

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	May 19, 2005
Plaintiff,	:	
	:	9:31 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 107
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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

2 THE COURT: Good morning, everybody. This is United
3 States of America versus Philip Morris, CA 99-2496.

4 We are ready for cross -- or the continuation of cross.

5 MR. BERNICK: Thank you, Your Honor.

6 MATTHEW MYERS, Government's witness, RESUMES

7 CROSS-EXAMINATION (Cont'd.)

8 BY MR. BERNICK:

9 Q. Good morning, Mr. Myers.

10 A. Good morning.

11 Q. I've just got a couple of things left by way of comparing
12 the '97 agreement and the MSA; one is on the board, one is not
13 on the board, and then I'm done.

14 The one that's left on the board relates to youth
15 tobacco use reduction targets. And as you recall, as set forth
16 on this chart, the 1997 Resolution requires youth tobacco use
17 reduction targets with industry-wide penalties if targets are
18 not met.

19 Is that what your campaign's comparison reflected as to
20 the 1997 Resolution?

21 A. It did.

22 Q. Is it also true, if we go to the MSA, your chart reflects
23 that that is not addressed, and I suppose that is a fair and
24 accurate point to the extent that the MSA does not incorporate
25 use reduction targets; correct?

1 A. Nor any penalties if use --

2 THE COURT: Mr. Myers, I'm going ask you, even though I
3 know you're looking at that board, if you would make sure you
4 look into --

5 THE WITNESS: Sure. Let me -- maybe if I look at the
6 chart that's on this piece of paper. I'm happy to do that.

7 I think what I started to say -- I apologize. I lost
8 my train of thought. That would be helpful.

9 It doesn't include any penalties if measurements of
10 actual youth use don't go down in a degree-upon level.

11 BY MR. BERNICK:

12 Q. So, just real briefly here, I think this is a pretty
13 straightforward point. In the '97 Resolution there were youth
14 use targets. That was the look-back provision; right?

15 A. I think that's what it was called, that's right.

16 Q. And these targets applied, and there was a penalty if they
17 were not met. These targets basically referred to levels of
18 youth smoking that were to be attained in the future?

19 A. That's correct.

20 Q. And it was then left up to the companies to see if they
21 could meet those targets; correct?

22 A. Well, it was purposely just an objective standards. Either
23 those targets were met or they weren't met and, therefore, there
24 wouldn't be debate about who was at fault.

25 Q. Right. But by the same token, if the company -- I don't

1 want to really get into an analysis, because we're trying to
2 focus just on the facts of what occurred.

3 Would it be fair to say this was kind of an outcomes-
4 oriented target?

5 A. Right. It was specifically chosen as outcome-oriented
6 target.

7 Q. That's the word I wanted to get to.

8 Now, in the MSA, we don't have that. We do have a
9 provision that reads out, as this chart that is J-DEM 010430
10 does read, we have a prohibition in the MSA against any action,
11 directly or indirectly, to target youth -- or the primary
12 purpose of which is to initiate, maintain or increase the
13 incidence of the youth smoking, close quote. Is that fair?

14 A. That's correct. That was a standard that was specifically
15 rejected in '97 because of its ineffectiveness.

16 Q. Well, I didn't really ask you that. You've now provided
17 that as a background.

18 But my question is, In the MSA that's the approach that
19 was used, which is to define a kind of conduct which is
20 prohibited; correct?

21 A. I wouldn't describe it as a kind of conduct because it
22 focuses on intent rather than actual conduct, but it is the
23 standard that is in the MSA, that's correct.

24 Q. Well, let's just say -- let's be more specific about it.

25 The prohibition is against a kind of conduct; that is,

1 conduct that is associated with an intent to target; correct?

2 A. It was the intent to target that is its fundamental
3 weakness.

4 Q. Well, again you say that --

5 A. But it is an intent to target standards, that's correct. I
6 don't mean to argue with you.

7 Q. Okay. Last question I want to ask you relates -- the last
8 questions I want to ask you relate to another aspect of the MSA
9 that you feature in your examination.

10 A. Sure. Could you just point me to the page?

11 Q. Yes. Page 23.

12 You point out in your direct examination that there are
13 no requirements in the MSA that the states spend any of their
14 settlement funds for these purposes; that is, purposes that are
15 spelled out in the MSA. And again you actually point out that
16 repeatedly. That is, that the MSA did not specifically earmark
17 funds and did not specifically impose requirements that funds be
18 spent on particular purposes in contrast to the 1997 agreement;
19 correct?

20 A. By and large, that's correct.

21 You know, I point out the money that was earmarked for
22 the public education campaign for a minimum of 5 years.

23 Q. Fair enough. Be fair to say, though, that there was a huge
24 amount of money that was called to be paid to the states under
25 the MSA where the MSA did not impose a specific and explicit

1 agreement or requirement that the money be spent for any
2 particular purpose?

3 A. There was about an equal amount of money that was earmarked
4 for the states in both agreements. The difference was that in
5 the '97 agreement, on top of that there was approximately two
6 and a half billion dollars a year earmarked for a variety of
7 specific prevention and cessation activities, and then whether
8 or not the states spent additional funds on top of that would
9 have been handled in the same way.

10 Q. That's a more accurate statement and I certainly would
11 accept that.

12 It would be true that in the period of time -- again
13 now moving off the MSA as it was agreed and into the period of
14 time of its implementation -- it would be fair to say that your
15 own observation was that the money that was going to the states,
16 instead of being used predominantly for tobacco control
17 purposes, went for every political plum you can imagine?

18 A. I think.

19 THE COURT: Wait a minute. Is that in the testimony?

20 THE WITNESS: No.

21 MR. BERNICK: That's what he has said, not in the
22 testimony, but elsewhere.

23 THE COURT: All right. I didn't think I --

24 MR. BERNICK: It was not in the testimony, but
25 Mr. Myers is smiling because he recognizes his prose that way.

1 BY MR. BERNICK:

2 Q. That was your own description, really kind of somewhat
3 provocative, description of the fact that there was a great deal
4 of money that was given to the states or paid to the states -- I
5 should more accurately say -- pursuant to the MSA that was not
6 used for tobacco control purposes but was used for a variety of
7 purposes including political purposes; correct?

8 A. We have commented routinely on our belief that the states
9 haven't spent an adequate amount of that money on tobacco
10 prevention and cessation?

11 Give me one second, Mr. Bernick.

12 Q. Sure. All set.

13 I want to show you J-DEM 010416, which is a
14 demonstrative -- although we will be offering it, Your Honor, as
15 a summary at a certain point in time.

16 And what I want to elicit is the amount of money, or
17 kind of proportionately the amount of money that was going to
18 the states and going to the federal government on the one hand
19 and the amount that was actually being spent by the states and
20 federal government in connection with tobacco control. And I've
21 provided the sources and I'm going to walk through them just
22 very briefly.

23 But are you familiar with the CRS report for Congress
24 that deals with federal excise taxes and is made on a fairly
25 regularly basis?

1 A. I'm generally familiar with the report. I can't say --

2 MS. EUBANKS: Your Honor, I'm going to object. This is
3 beyond the scope in terms of the testimony that is given and
4 we're talking now about excise taxes. This is certainly beyond
5 the scope of this witness's testimony, particularly in light of
6 the court's rulings on the limitations.

7 MR. BERNICK: No. Actually, what I'm doing, Your
8 Honor, is to elicit purely facts. There's no opinions that are
9 involved at all. And the facts relate directly to the witness's
10 testimony that one of the major differences between the MSA and
11 the 1997 Resolution was that there was no requirement in the MSA
12 that funds be paid. He points this out as a deficiency --

13 THE COURT: That funds be paid?

14 MR. BERNICK: Be used for tobacco control purposes.

15 And this is basically testified to by the witness as a
16 significant difference and deficiency vis-a-vis the 1997
17 Resolution.

18 It is our position, and it will be our proof, that
19 while it is true that the requirement is not made, what we're
20 really illustrating is the impact of that, both at the state and
21 federal level, which is that the funds were made available and
22 in fact they were used for other purposes.

23 The government opened the door by eliciting this
24 testimony and we are entitled to show the full factual
25 difference that it made.

1 MS. EUBANKS: Your Honor, our position on this is
2 simple.

3 If defendants want to call forward a witness to talk
4 about excise taxes at the CRS report to Congress as set forth on
5 this demonstrative, then they are free to do that.

6 But given the positions that they have taken with
7 respect to Mr. Myers' testimony and the rulings of the court,
8 this is still beyond the scope of the testimony that he's
9 offered.

10 He does not discuss in any detail -- in fact, it was
11 disallowed -- the effect of excise taxes and what would happen.
12 The mere fact that they are out there is something that is fine,
13 besides which they are not a part of the MSA.

14 It's certainly beyond the scope of his testimony that's
15 allowed and it's not proper cross-examination. If they want to
16 call Mr. Parrish to talk about it, that's fine.

17 MR. BERNICK: No. There's absolutely no ruling by this
18 court, and we certainly never made the suggestion that where the
19 government opened up a subject matter factually, that we weren't
20 entitled to pursue it.

21 They chose to open up the subject matter of the
22 difference between federal legislation on the one hand and the
23 state agreement on the other and to point out that the federal
24 legislation would have had the effect of requiring and
25 earmarking funds to be used for a particular purpose. And that

1 opens up the subject matter of what actually happened pursuant
2 to this agreement, which is also within the scope of his
3 testimony. He talks about the implementation of this agreement.

4 And the question -- I mean, what actually happened, as
5 we know was, that the funds were not in fact used for the
6 purposes that the witness would have preferred and not, in fact,
7 used more germanely for the purposes described in 1997
8 Resolution. They were used for nontobacco control purposes.
9 And all that we're doing is putting in the record the precise
10 magnitude of those funds.

11 THE COURT: There may be limited cross on this subject
12 to get the basic facts in the record. Those basic facts may
13 well be in the record from other witnesses. At this second I
14 couldn't identify from whom. I certainly know this information,
15 and I could only know it from this case, everybody. But get it
16 in the record.

17 MS. EUBANKS: Your Honor, I will say that when the
18 court gave its ruling one of the things that the court
19 emphasized was the political nature of the testimony being
20 something that's excluded.

21 To the extent that this gets into those areas, we will
22 have a right to re-examine the witness on those areas as well.

23 THE COURT: You will if Mr. Bernick goes beyond getting
24 into the record the facts regarding how these funds either were
25 or were not used.

1 BY MR. BERNICK:

2 Q. Going back to J-DEM 010416, Mr. Myers, all I want to do is,
3 as expeditiously as possible, get before the court the sources
4 of the bars.

5 And I'm going to give you JD 013284, JD 012969, and JD
6 013285. And in order to expedite the process here, I will --
7 you have the full documents there before you -- and I'm going to
8 give the tab excerpts that flagged the relevant portions of
9 these documents in order to save some time.

10 MS. EUBANKS: May counsel have a flagged copy as well?

11 MR. BERNICK: Good grief. I'll tell you exactly the
12 pages.

13 With respect to JD 013284, it's CRS-5. With respect to
14 JD 0 --

15 MS. EUBANKS: If you could slow down for just a second,
16 please.

17 MR. BERNICK: Page 5 of CRS.

18 MS. EUBANKS: Thank you, next.

19 MR. BERNICK: With respect to JD 012969, it is Page 4,
20 and with respect to JD 013285, it is pages 6 and 8.

21 Those, for the record, are also the documents that are
22 indicated as to the sources for J-DEM 010416.

23 MS. EUBANKS: Your Honor, before we proceed, I would
24 like some foundation with respect to the witness's familiarity
25 with the documents.

1 THE COURT: Yes.

2 MR. BERNICK: I didn't ask the question. I'm going to
3 do that.

4 THE COURT: Go ahead, please.

5 BY MR. BERNICK:

6 Q. Mr. Myers --

7 A. Could you give me a second to look at these?

8 Q. I'm sorry?

9 A. Could you give me a second to look at these?

10 Q. Sure.

11 A. (Pause) Go ahead.

12 Q. Are you familiar with the CRS report to Congress indicating
13 the approximate, or actually, the federal excise taxes in the
14 year 2001?

15 A. I can't say that I have a specific recollection of seeing
16 this specific one. I routinely read these sorts of documents
17 when they come out on that.

18 Q. And is that a document that is issued by the government -- I
19 think my original question was by the Congressional Research
20 Service on a periodic basis?

21 A. It purports to be on the surface. Since I don't remember
22 this specific one as opposed to others, I'm not the person who
23 could validate whether there is a true and accurate copy. I
24 assume it is.

25 Q. Okay. With respect to the tax burden on tobacco, is that

1 another document that you're familiar with that is issued from
2 time to time reflecting the amount of money that's collected in
3 excise taxes both at the state and federal level?

4 A. It's a document produced by the representatives of the
5 tobacco industry on that issue, yes.

6 Q. Well, it used to. Actually, I think it was produced by the
7 Tobacco Institute at one point in time and I think it's now
8 produced by somebody else.

9 Is that something that you're familiar with?

10 A. I'm familiar with, you know, the tax burden on tobacco, yes.

11 Q. That's a document that compiles how much money is being paid
12 in excise taxes both at the state and federal level; correct?

13 A. That's what it purports to do, yes.

14 Q. And the last document, which is Tobacco Control State
15 Highlights 2002, is that another document that you're familiar
16 with that deals with expenditures -- receipts and expenditures
17 of tobacco-related funds?

18 A. I am.

19 Q. In fact, that document itself makes reference to and relies
20 upon the tax burden document -- the tax burden report that has
21 been issued by the tobacco industry over time; correct?

22 A. If it says it does, it does; if it doesn't -- I mean --
23 whatever it purports to say there.

24 The difficulty, as you know, is my organization puts
25 out a chart on each of these categories. If you would provided

1 us with that chart I could have answered these questions very
2 quickly for you.

3 Q. Well, all that I know is what we were able to cobble
4 together. In fairness, just to be clear --

5 A. It's on the website.

6 Q. -- isn't it true that there were no documents that were
7 produced by your organization in this case?

8 A. No, but this chart is on our website, so it was available to
9 you. But that's okay. I'm happy to answer your questions.

10 Q. Are these all documents, then, that you're basically
11 familiar with -- let me be precise.

12 Are these all documents that are documents that you
13 have been familiar with factually during the years that past
14 since the MSA was put into place and, more particularly, in 2001
15 and 2002?

16 A. The answer to that is in general. I mean, I assume you're
17 not asking me about the very specific ones you've put in front
18 of me.

19 Q. That's correct. Generally, were these documents that --

20 A. In general, that's right.

21 Q. -- that you reviewed in the ordinary course; fair?

22 A. Yes.

23 Q. And have I picked out -- I think the highlighting would have
24 reflected this -- the numbers that are reflected in J-DEM 01416
25 as the numbers that reflect -- or the numbers that relate to the

1 federal excise tax, the state excise tax and the MSA payments in
2 2001 and the state and federal funding of tobacco control
3 activities in 2002?

4 A. You know, it looks like you've highlighted the same numbers
5 you transposed. That's a different question, whether or not I
6 think each one of them accurately reflects the situation.

7 Q. Okay. Well, let's begin with they're accurately transposed.

8 Do you have any reason to doubt the accuracy of the
9 numbers that are set forth in J-DEM 010416?

10 A. I'm sorry. Why don't you refer to them by name? I'd like
11 to be responsive. I don't want to be confused.

12 Q. I think if you take a look at the federal excise tax --

13 A. The CRS numbers on taxes are numbers that we rely upon.

14 Q. Okay. And then with respect to the expenditures -- I think
15 the expenditure data comes out of this document here, which is--

16 A. I think there's some questions about the expenditure data.

17 Q. Well, the expenditure data come from --

18 A. I understand that.

19 Q. -- JD 012969; correct?

20 A. That's correct. I think there's certain categories that
21 have been counted in there that we would disagree with.

22 Q. Why don't you just tell us what they are?

23 A. Much of the -- a good amount of the federal spending that
24 relates to general research on diseases and topics that are
25 tangentially related to tobacco, that are diseases caused by

1 tobacco, but that don't relate to tobacco spending in terms of
2 either tobacco prevention or cessation. So that we have never
3 used those numbers in categorizing what's actually spent.

4 Q. I've got down federal funding as only \$89 million. Is that
5 number high or low?

6 A. I think that number is quite high, actually, but it depends
7 again on categorization. That's why I say the important thing
8 to you here is if you want me to spend the time to go through
9 for you what's included and what's not included, I could do
10 that, but I hadn't seen this document recently for that purpose.
11 So, I don't think it's a reliable number. I can't give you the
12 precise number off the top of my head.

13 Q. So if we can capture your testimony. The \$89 million number
14 does come from the document that's before you, but you think
15 that it may be tied to the extent it includes categories of
16 research that you've identified?

17 A. I assume you're not misleading me. I haven't gone back and
18 checked to make sure it does.

19 It is high from our perspective if you're looking at
20 funds that are directly related to tobacco prevention and
21 cessation activities.

22 Q. Okay. Are there any other numbers that you have any reason
23 to doubt on JD 010416?

24 A. No. I believe the state funding numbers -- and again,
25 without double-checking it against the numbers that we've

1 categorized -- it looks approximately correct.

2 Q. Anything else?

3 A. No.

4 Q. Okay.

5 MR. BERNICK: Your Honor, that is all that I have.

6 We would offer as a summary, a fact summary under Rule
7 1006, both J-DEM 010430, 010416, and 010429, those being the two
8 boards that make the comparison between the '97 Resolution and
9 the MSA, and then the demonstrative that we just walked through
10 with the witness relating to tobacco control expenditures.

11 MS. EUBANKS: Your Honor, we would ask that we reserve
12 the ruling on these as we have with the other witnesses and we
13 will then state what our position is.

14 MR. BERNICK: I don't -- reserve until?

15 THE COURT: Certainly until redirect.

16 MR. BERNICK: That's fine. That's all I have. I think
17 Mr. Frederick has some.

18 CROSS-EXAMINATION

19 BY MR. FREDERICK:

20 Q. Good morning, Mr. Myers.

21 A. Good morning.

22 Q. We met at your deposition, but for the record my name is Tom
23 Frederick and I represent Altria and Philip Morris USA, Inc.

24 I want to ask you some questions about your testimony
25 concerning international brand sponsorships, generally, and

1 Philip Morris International sponsorship of Formula 1 racing
2 specifically. Okay?

3 A. Certainly.

4 Q. Let me have tab 2, Jamey. And, Pat, can you give
5 Mr. Myers -- do you have your written direct examination in
6 front of you, sir?

7 A. I do if you point me --

8 Q. Yes. If you turn to Page 35 and it's on the screen. I want
9 to direct your attention to starting at line 7, and let me know
10 when you get there.

11 Page 35, line 7. Do you have that in front of you,
12 sir?

13 A. Yes.

14 Q. And you discussed development since the MSA with respect to
15 sponsorships; correct?

16 A. Correct.

17 Q. And if -- tab 7, Jamey.

18 If you go down to line 20 on Page 35, you specifically
19 discuss international brand name sponsorships; correct?

20 A. Correct.

21 Q. And there you state --

22 THE COURT: Excuse me a minute, Mr. Frederick.

23 THE DEPUTY CLERK: Mr. Cramer suggests that we try to
24 ask counsel to use the podium mike, and turn off your mike and
25 see if that will help.

1 MR. FREDERICK: I'll give it a shot.

2 MR. BERNICK: Should I turn mine off, too?

3 THE COURT: Probably so because I know that our court
4 reporter was having trouble while you were speaking.

5 MR. FREDERICK: Actually, I have to get the right
6 records for you. Hang on one second. We've got the wrong
7 reference on the screen. Try tab 4, Jamey.

8 BY MR. FREDERICK:

9 Q. Okay. In referencing -- at Page 35, starting at line 20,
10 you were asked the question in your direct, "How do
11 international brand name sponsorships make the situation more
12 difficult?"

13 And your answer is, "International brand name
14 sponsorships impact the United States via a number of routes,
15 including the media and the Internet. Philip Morris, in
16 particular, is the largest presence at the international
17 Formula 1 car racing circuit. Formula 1 is one of the most
18 popular sports series in the entire world and is broadcast back
19 here in the United States."

20 Do you see that, sir?

21 A. I do.

22 Q. And, sir, just so the court understands what we are talking
23 about here, what is Formula 1 racing? What's your
24 understanding?

25 A. Formula 1 racing is an international racing series, involves

1 I think 19 races this year literally on -- throughout the entire
2 world that involves -- it's circuit racing rather than oval
3 racing. It involves a specific kind of very sleek, low slung
4 car.

5 Do you want me to describe it more?

6 Q. No, that's fine. That's fine. I just want to give the
7 court a general understanding.

8 Now, sir, in your answer here that appears at, on the
9 screen, the Philip Morris' entity to which you're referring that
10 sponsors the Formula 1 race team is Philip Morris International;
11 correct?

12 A. That's correct.

13 Q. And you're aware that Philip Morris International is not a
14 defendant in this case; correct?

15 A. Philip Morris International is not specifically a defendant
16 in this case, that's correct.

17 Q. Could I have tab 5, Jamey. And let's go to Page 36 of your
18 testimony.

19 And there you state -- you were asked the question,
20 "Yes, but Philip Morris claims that sponsorship of its Formula 1
21 team is technically paid by Philip Morris International, an
22 affiliate who is not a signatory to the MSA."

23 And then you answer, "As a technical matter, this is
24 true, and illustrates one of the loopholes in the MSA that
25 Philip Morris has been able to exploit."

1 Do you see that, sir?

2 A. I do.

3 Q. And now is it your contention before this court that the
4 fact that the MSA does not address Philip Morris International
5 sponsorship of overseas' conduct relating to Formula 1 racing
6 constitutes racketeering activity by its parent company Altria
7 or its sister company Philip Morris USA?

8 MS. EUBANKS: I would have to object, Your Honor,
9 because with respect to the testimony given early in the written
10 direct, Mr. Myers indicates that he's not an expert in RICO. I
11 think the question --

12 THE COURT: The objection is sustained.

13 MS. EUBANKS: It could probably be rephrased.

14 BY MR. FREDERICK:

15 Q. Well, Mr. Myers, do you have an understanding that this is a
16 racketeering lawsuit and the court's limited jurisdiction is
17 limited to preventing and restraining future racketeering
18 violations by the defendants in this case and in this country,
19 the United States?

20 A. Do you want me to give a legal opinion on that?

21 Q. I'm just asking --

22 A. I'm not sure if I understand your question. If you're
23 asking me a factual question, I'm happy to answer it. I'm not
24 sure --

25 Q. I'm just asking for your understanding, sir. Is that your

1 understanding or not?

2 A. My understanding is that Philip Morris USA and Altria, the
3 parent company, both Philip Morris USA and Philip Morris
4 International are participants in this lawsuit.

5 I haven't been asked to judge what specific acts are
6 racketeering acts and which acts are not racketeering acts. I
7 was asked to just factually describe for the court certain
8 activities and relationships and impacts.

9 Q. Okay. So you're not here to testify today that Philip
10 Morris International sponsorship of Formula 1 racing is
11 racketeering activity by either Altria or Philip Morris USA?

12 That's not the purpose of your testimony here today; is
13 that correct?

14 A. I'm not here to testify one way or the other about that in
15 terms of a legal conclusion.

16 Q. Give me tab 7, Jamey. Actually, I want to go to the top of
17 Page 36 of your -- that's the wrong tab again.

18 Tab 4, again. I'm sorry, Jamey. And, sir, if you
19 go -- again, we are back to this question that we looked at
20 earlier.

21 If you look at the last line of your answer, it states,
22 "Formula 1 is one of the most popular sports series in the
23 entire world and it's broadcast back here in the United States."
24 Are you with me?

25 A. Yes.

1 Q. And just so the record is clear, when you say that Formula 1
2 is one of the most popular sports series in the entire world,
3 you don't mean to suggest to this court that Formula 1 racing
4 enjoys great popularity in this country, the United States, do
5 you?

6 A. It enjoys popularity in this country; otherwise, it wouldn't
7 be broadcast back in, magazines wouldn't cover it, it wouldn't
8 be on the Internet here. I'm not sure what the word great
9 popularity means in your --

10 Q. All right. Well, who is the most famous Formula 1 racer in
11 the entire world, do you know?

12 A. Today?

13 Q. Yes.

14 A. Michael Schumacher.

15 Q. And he races for Team Ferrari, one of the sponsors --

16 THE COURT: Everybody, you're speaking over each other.

17 And, Mr. Frederick, you know you speak very fast, even
18 faster, I think, than Mr. Bernick and who else.

19 MR. FREDERICK: And I'm very proud of that, Your Honor,
20 but I'll slow down anyway.

21 (Laughter)

22 THE COURT: Go ahead.

23 A. Michael Schumacher is the lead driver for the Marlboro
24 Ferrari Race Team, that's correct.

25 Q. And do you know who the other racers on Team Ferrari are?

1 A. I do, but I have to admit the second racer is a Brazilian
2 whose name I sometimes mangle when I pronounce it. I apologize
3 to you.

4 Q. Do you know who the other sponsors are, besides Philip
5 Morris International, of Team Ferrari?

6 A. I know some of them, but I hadn't focused on them.

7 Q. Do you know that one of them is Vodaphone?

8 A. I believe that's correct. I have seen that on the car.

9 Q. Do you know what Vodaphone is?

10 A. Only what I read in the newspapers.

11 Q. Sir, you assert in your testimony that Philip Morris in
12 particular is the larger presence at the international Formula 1
13 racing circuit; correct?

14 A. I do. The Marlboro Race Team is world renown. You can't go
15 anywhere in the world without people knowing it.

16 Q. Just so the record is clear. It is called, though -- it's
17 not called the Marlboro Race Team, it's called Team Ferrari;
18 correct.

19 A. It is called Team Ferrari.

20 Q. All right. Give me tab 9, Jamey.

21 Let's talk about Michael Schumacher a moment,
22 Mr. Myers. I'm going to ask Pat to hand you U.S. Exhibit 93250,
23 which is one of the exhibits identified in your testimony.

24 Do you have that, sir?

25 A. Sure. Just give me one second.

1 MR. BRODY: Could we pause for a second? It seems we
2 have lost the transcription. We are getting -- it's as if it
3 were sealed and not being broadcast to the table.

4 THE COURT: That's true. I don't see it on mine. It
5 stopped also.

6 MR. BRODY: It just came back, Your Honor.

7 THE COURT: Okay.

8 BY MR. FREDERICK:

9 Q. Do you have U.S. Exhibit 93250, sir?

10 A. I do.

11 Q. And if you look at the front, this appears to be an excerpt
12 from the April 20, 2003 issue of Sports Illustrated; correct?

13 A. Correct.

14 Q. And if you turn to the third page -- and give me tab 10,
15 Jamey.

16 If you turn to the third page of this exhibit, there's
17 an article about Michael Schumacher entitled -- our tabs are
18 not -- there we go -- entitled International Man of Mystery. Do
19 you see that?

20 A. I do.

21 Q. And, by the way, is that title International Man of Mystery,
22 is a that apparently a jocular reference to the Austin Powers'
23 movies starring Mike Myers?

24 A. You know, that one, I'll have to leave to you.

25 Q. All right.

1 Sir, have you ever actually read the article included
2 in U.S. Exhibit 93250 from front to back?

3 A. I actually did when it came out.

4 Q. Now, let's look at the highlighted portion on the title page
5 that's on the screen, and it's on the page in front of you,
6 where it talks about Michael Schumacher.

7 And there it states, "He is one of the most famous
8 athletes in the world. He is certainly one of the two most
9 highly paid. In his field he's likely the best there's ever
10 been. But Michael Schumacher, like NATO or the metric system,
11 remains a dark and distant mystery to most Americans. For this
12 he thanks you. You wouldn't recognize him if he showed up at
13 your door tonight with a hot platter of Leberknodel and a free
14 bottle of Gewurztraminer, would you?"

15 Do you see that, sir?

16 A. I do.

17 Q. There's a paragraph that starts about halfway down the page
18 in the left-hand column that begins, "Schumacher still
19 cranking." Do you see that?

20 Go up a little, Jamey. Just give us the whole page a
21 second.

22 Do you see that, halfway down the left-hand column,
23 "Schumacher still cranking."

24 A. It's hard to read on my copy.

25 Q. It's hard to read on the one I got, too.

1 I'll represent to you if you take a moment -- I don't
2 know if you can read it at all -- but it talks about -- it's
3 discussing how Mr. Schumacher and his wife enjoy vacation in the
4 United States because nobody knows him here. Do you see that?

5 A. It's hard to read that on my copy, but if you say that's
6 what it says.

7 Q. It's on the screen. You can read it up there.

8 Is it on the screen this front of you, too?

9 A. Okay. It says what it says.

10 Q. (Pause) Are you done, sir?

11 A. Sure. I mean, it's word stands for itself.

12 Q. Okay. Let's look at the highlighted portion where it
13 says -- he's talking about a visit he made out west in the
14 United States.

15 He's asked, according to the writer, asked: "Anybody
16 recognize him?

17 "Answer: No.

18 "How'd that make him feel?

19 "Great. It's one of the things we like about the
20 States.

21 "He pedals on.

22 "Americans don't know him because we don't much cotton
23 to Formula 1. For a variety of reasons we ignore it and shun
24 its mighty stars when they amble into Stuckey's; our casual
25 xenophobia; the current absence of competitive 'Murcan

1 drivers" -- I guess that means American drivers -- "our
2 big-block V-8 distaste for those fragile effete cars; and our
3 general dislike for bad hats and pop gun scooters."

4 Do you see that, sir, in the article?

5 A. I see it in the article, yes.

6 Q. Now, sir, the point you don't have any basis whatsoever on
7 which to dispute this article's assertion that the single-most
8 popular Formula 1 driver in the world, Michael Schumacher, is
9 virtually unknown in this country, do you?

10 A. I think the answer to that is that's a distortion of the
11 overall image that's projected both in the article and in
12 reality.

13 This was -- for example, this was a very prominent
14 article in which throughout the article there's pictures
15 displayed of the Marlboro race car, whether or not an individual
16 recognizes the face of Michael Schumacher in Texas.

17 In addition, it ignores the fact that since this
18 article Formula 1 racing has signed a contract with CBS to be
19 broadcast in this country. It's broadcast on multiple major
20 cable networks, magazines feature it prominently, and on the
21 Internet websites for racing, and America does love racing.
22 It's featured prominently on a regular basis.

23 They wouldn't be spending all this time and this money
24 if people weren't reading this stuff and seeing this stuff. You
25 know, if the -- I think it was the 2003 Formula 1 race in the

1 Indianapolis, there were like 140,000 people there and that's
2 just, you know, snapshot of the number of people who witnessed
3 this.

4 Q. Sir, give me tab 52, Jamey. And it's JD 055403. If you can
5 give Mr. Myers a copy, Pat.

6 A. Do you want me to keep the Sports Illustrated here?

7 Q. You can put it off to the side. Thank you.

8 Do you have what's been marked as JD 055403 in front of
9 you?

10 A. I do.

11 Q. And take whatever time you want to look at it, but I'll
12 represent that this article reports on the 2004 Formula 1 U.S.
13 Grand Prix in Indianapolis about which I believe you just
14 mentioned.

15 You understand there's only one Formula 1 race that
16 takes place in the United States; correct?

17 A. I believe that's right.

18 Q. Now, if we look at the title of the article, and it's dated
19 June 23rd of 2004, it says, "F1 heads back to Europe, still
20 puzzled over lucrative U.S. market."

21 Do you see that?

22 A. I do.

23 Q. And in the first sentence of the article it reads:

24 "Formula 1 is still pondering how to conquer America as
25 it heads back to its European heartland."

1 Do you see that?

2 A. I do.

3 Q. And if you go on a little bit, the article describes how
4 Mr. Schumacher won the U.S. Grand Prix, and then at the top --
5 if we go to tab 54, Jamey, at the top of Page 2.

6 THE COURT: For the court's edification. Was that
7 picture Mr. Schumacher?

8 MR. FREDERICK: That was not Mr. Schumacher, no. That
9 is a racing driver well past his prime, Your Honor.

10 THE WITNESS: We should all be able to hold the
11 race car as sleek and as beautiful as the model race car at that
12 age, or any age probably for some of us.

13 BY MR. FREDERICK:

14 Q. Are you -- at the top of Page 2 you see it states:
15 "Formula 1 popular in almost every corner of the world again
16 failed to make much of a dent in the idiosyncratic sporting U.S.
17 sporting consciousness." Correct?

18 A. That's what it says.

19 Q. And if we go to the last page of this exhibit -- tab 55,
20 Jamey -- do you see the heading "not popular" there?

21 A. You cut off the part where it talks about the 120,000 people
22 who were at the race.

23 Q. It's right there, at the top of the screen. Do you see
24 that?

25 A. That's right.

1 Q. Then it says "not popular"; right?

2 A. Not as popular as NASCAR racing, which is probably the most
3 popular sport in the United States.

4 Q. Sir, can you answer my question?

5 A. Sure. It's not as popular as NASCAR racing. That's
6 absolutely right.

7 Q. That wasn't my question.

8 It says "not popular" on the screen in front of you;
9 correct?

10 A. Not by their standards.

11 Q. Is the answer yes?

12 A. That's what it says.

13 Q. All right. Thanks.

14 And then it reads, "But a move to boost Formula 1 in
15 America may not please the world's most famous racing driver who
16 loves the United States largely because no one knows him."

17 Do you see that?

18 A. I see that on the article.

19 Q. Okay. Now, sir, again you don't have any data that you
20 brought to this court regarding the popularity of Formula 1
21 racing in the United States, do you, sir?

22 A. I don't have any specific data about the number of people
23 who watch it on television, although there is data out there
24 about the ubiquity of its availability throughout market and its
25 growing availability in the market throughout the United States.

1 I saw Formula 1 racing sitting home about two weeks ago
2 on a Saturday afternoon, or Sunday afternoon. I've forgotten
3 which.

4 Q. Sir, you recall being deposed in this case recently;
5 correct?

6 A. I do.

7 Q. Do you recall Mr. Bernick specifically asked you if you had
8 any data on the extent to which U.S. consumers track Formula 1
9 racing?

10 A. No. And I said then, and I'll say now, I do not have
11 specific viewership data on Formula 1 in the United States.

12 Q. Let's go back to tab 4, Jamey.

13 And there in the last line 2, I think it's Page 36, you
14 talk about how the Formula 1 racing is broadcast back here in
15 the United States; correct?

16 A. I'm sorry. Are we back to that same question again?

17 Q. I'm just -- this is on Page 35, line 20, I think going over
18 to Page 36, line 2.

19 A. Okay.

20 Q. In line 2 on Page 36, you mention the fact, as you just said
21 in your testimony, that Formula 1 racing is broadcast back here
22 in the United States; correct?

23 A. Yes.

24 Q. And I believe you talk about CBS, and we will talk about
25 that in a moment.

1 But before this year, anyway, wasn't the venue for the
2 broadcast Formula 1 racing in the United States primarily
3 something called the Speed Channel?

4 A. The Speed Channel was a prominent place where it was shown.

5 When I started looking at it I went to a number of the
6 cable networks on line to see if they showed it -- people like
7 Comcast and others -- but I did that within the last year.

8 Q. All right. Do you know -- now, you mentioned CBS is
9 broadcasting racing. That's for the first time this year;
10 correct?

11 A. It's a new contract within the last year, I believe.

12 Q. And it involves four of the 19 Formula 1 races; correct?

13 A. It does.

14 Q. Give me tab 12, Jamey, and that's JD 055390. Thanks, Pat.

15 Mr. Myers, you've been handed what I'll represent is
16 USA Today's weekend TV ratings review for April 25, 2005. Do
17 you have that in front of you, sir?

18 A. I do.

19 Q. And if you looked at the first page, this has various
20 weekend TV ratings for various programs.

21 And the first page shows that NASCAR's Subway Fresh 500
22 on the Fox Network drew a 4.6 Nielsen rating; correct?

23 A. I means, it says what it says, that's correct.

24 Q. And the NBA Playoff game on ABC drew a 3.6 Nielsen rating;
25 correct?

1 A. Correct.

2 Q. And a golf tournament on CBS drew a 3.3 Neilsen rating;
3 correct?

4 A. It does.

5 THE COURT: Mr. Frederick.

6 MR. FREDERICK: I'll keep looking.

7 BY MR. FREDERICK:

8 Q. If you turn the page, you see at the top it references the
9 Formula 1 race, the Grand Prix of San Marino, broadcast on CBS
10 drew a 1.4 Neilsen rating. Do you see that?

11 A. I do.

12 Q. And the note in the right-hand column states, "This
13 Formula 1 race also did about as well as CBS's Cheer and Dance
14 Collegiate Competition which aired Saturday and drew a 1.2
15 overnight." Do you see that?

16 A. It does say that.

17 Q. So at least it's fair to say if you look at this and compare
18 to the other programs against which it's ranked here, it's not
19 exactly cleaning up in the TV ratings.

20 Wouldn't that be fair to say?

21 A. No. But 1.4 percent of 77 million households is still a
22 fairly substantial number. You could do the math yourself.

23 Q. It drew less than one-half of the NBA Playoffs; right?

24 A. I mean, if we want to get into a discussion about popularity
25 in sports, NBA Playoffs I think are more popular in the United

1 States today, yes.

2 Q. And it drew one-third of what NASCAR drew; right?

3 A. It did on that day.

4 Q. Now, you told us there are 19 Formula 1 races; correct?

5 A. Correct.

6 Q. Give me tab 14, Jamey, that's JD 055387.

7 Do you have that in front of you, sir?

8 A. I do.

9 Q. Do you see that -- this list, I'll represent, list the 19
10 Formula 1 racing for 2005. Do you see that?

11 A. Yes.

12 Q. And if you look -- the first column on the left has the name
13 of the race and then you go over and it shows the location of
14 the race; correct?

15 A. It does.

16 Q. And these races take place in Melbourne, Australia;
17 Istanbul, Turkey; Sao Paulo, Brazil. There's Shanghai, China
18 there; correct?

19 A. Correct. It says what it says.

20 Q. And just so we are clear. Are you proposing to this court
21 that it somehow order Philip Morris International to cancel
22 contracts that it has to sponsor Team Ferrari in Formula 1 races
23 in every country throughout the world outside the United States?
24 Is that what you're asking the court to do here, sir?

25 A. I'm not proposing anything to the court.

1 What I'm saying factually is that the Formula 1 race
2 with the Marlboro logo prominently displayed comes back to the
3 United States in a variety of forms and manners and complements
4 and supplements the Formula 1 sponsorship of Philip Morris USA.
5 So it builds on it.

6 Whether it's considered one or two sponsorships, I'll
7 leave that for the lawyers, but it expands the viewership and it
8 expands the exposure of that sponsorship back in the United
9 States.

10 Q. Now, sir, back in the United States -- let's just talk about
11 that Indianapolis race that drew 120,000 fans, and that's the
12 U.S. Grand Prix; right?

13 A. It is.

14 Q. And now you're aware that at the U.S. Grand Prix Team
15 Ferrari races without the Marlboro logo; correct?

16 A. I'm aware that they are required to do that and they did,
17 yes.

18 Q. That's because Philip Morris USA owns the logo, loans the
19 trademark from Marlboro in the United States; correct?

20 A. Well, Altria and Philip Morris own and license the trademark
21 for Marlboro around the world, I think except in Japan, and they
22 are taking it back in Japan.

23 Q. By the way, you say Altria owns it. What's your basis for
24 saying that?

25 A. Altria -- both Philip Morris USA and Philip Morris

1 International are a hundred percent subsidiaries of Altria the
2 parent corporation, so Altria has both control and
3 responsibility for both. Money flows back and forth, decisions
4 flow back and forth. That's why -- I mean you see that in a
5 myriad of ways on a regular basis.

6 Q. Sir, you know Philip Morris USA owns the Marlboro trademark
7 in the United States?

8 A. Correct, it does.

9 Q. Are aware of that?

10 A. Yes, it always has.

11 Q. And just so we are clear. You're aware that the Marlboro
12 logo appears nowhere at the U.S. Grand Prix when it takes place
13 in this country; correct?

14 A. I'm aware that they were required to remove it because of
15 their sponsorship of the Indy racing series, that's right, when
16 it raced in the United States.

17 The issue that was raised is when it's broadcast back
18 into the United States from outside the United States, whether
19 the Marlboro logo appears.

20 MR. FREDERICK: Your Honor, I move to strike that last
21 answer. Can he just answer my question?

22 THE COURT: No, the motion is denied.

23 BY MR. FREDERICK:

24 Q. Sir, you're aware that Philip Morris International is not
25 the only cigarette manufacturer that sponsors a Formula 1 Race

1 Team; correct?

2 A. I am.

3 Q. And, for example, the German cigarette manufacturer,

4 Remmetsma, R-e-m-m-t-s-m-a, sponsors Formula 1 racing; correct?

5 A. Correct. As does British American racing, which is related

6 to formerly Brown & Williamson.

7 Q. Let me focus you on Remmetsma a minute. Its brand name

8 cigarette is West that sponsors the race; correct?

9 A. I have to double-check. I believe you're right, but I

10 haven't focused on West, but I think you're right.

11 Q. Look at tab 22, Jamey. JD 055400.

12 JD 055400, sir?

13 A. I do.

14 Q. And it's a photograph of a car sponsored -- I'll represent

15 it's a photograph of a car sponsored by Remmetsma racing at the

16 U.S. Grand Prix.

17 A. It appears to be.

18 Q. Do you see the West brand name displayed on the side and

19 tail fins of this car?

20 A. I do see the West brand.

21 Q. And there's nothing that this court can do about that, is

22 there, sir, since Remmetsma is not a defendant in this case;

23 correct?

24 A. You know, I'm going to let you -- I'm not going to make a

25 legal opinion on what the court can and cannot do in that

1 respect.

2 Q. All right, sir. Let's -- you gave testimony here today
3 about the 1997 proposed Resolution; correct?

4 A. Correct.

5 Q. Now, isn't it a fact that under the 1997 proposed Resolution
6 there was nothing in that Resolution that would have barred
7 Philip Morris International from sponsoring Formula 1 races
8 internationally?

9 A. I'll have to go back and take a look.

10 We were assured by the Philip Morris Companies that we
11 would not see Marlboro one racing brought back into the United
12 States.

13 Representatives of executives who were part of -- what
14 was then Philip Morris Companies, that's now known as Altria,
15 were part of those discussions.

16 I'd have to go back and look and to see specifically.
17 If you would like me to do that, I'll be happy to do it.

18 Q. Let's give Mr. Myers U.S. Exhibit 42978, which is the
19 proposed Resolution. And tab 19, Jamey. And put up tab 20
20 specifically, Jamey.

21 And, sir, you can look through that if you would like.
22 Let me know when you're ready, but I'm going to draw your
23 attention to some particular language.

24 A. Sure. Just give me a minute.

25 (Pause) Okay.

1 Q. If you look at the very front page under the preamble, the
2 first sentence reads, quote, "This legislation would mandate a
3 total reformation and restructuring of how tobacco products are
4 manufactured, marketed and distributed in this country."

5 Do you see that, sir?

6 A. Yes.

7 Q. And "this country" means the United States; correct, sir?

8 A. It does.

9 Q. And we have already established that the Marlboro logo
10 doesn't appear at the U.S. Grand Prix, correct?

11 A. It does not appear on the race car in the Grand Prix, that's
12 correct.

13 Q. And you understand, sir, that Altria/Philip Morris USA -- if
14 Altria and Philip Morris USA are not responsible for the
15 broadcast of Formula 1 races in the United States; correct?

16 A. I'm sorry. Ask that question again.

17 Q. Yeah. The contract to broadcast Formula 1 races in the
18 United States, Altria and Philip Morris USA are not parties to
19 that contract; correct?

20 A. I do not believe they are parties to that contract.

21 Q. If you go to tab 21, Jamey, to the memorandum of
22 understanding that appears at the back of U.S. Exhibit 42978,
23 which is the proposed Resolution.

24 It's signed by Philip Morris Incorporated; correct?

25 A. Correct.

1 Q. And that's -- you understand that's the entity now called
2 Philip Morris USA, Inc.; correct?

3 A. I do.

4 Q. Now, sir, let me go through some of the exhibits you
5 identify in your testimony. Give me tab 8, Jamey. And it's
6 Page 36, line 15.

7 A. Can I just -- because I think it's important as you focused
8 on this.

9 We were assured during those discussions that Philip
10 Morris as a series of companies would not violate the spirit of
11 it by broadcasting back. That's why there was actually language
12 in here as well, that they would take all reasonable steps to
13 prohibit Internet advertising that violated the agreement from
14 coming into the United States.

15 MR. FREDERICK: Your Honor, I would move to strike that
16 last answer as precluded by your ruling in this case.

17 THE COURT: That motion is granted.

18 MR. FREDERICK: Thank you.

19 BY MR. FREDERICK:

20 Q. Now, if we go to tab -- if we go to Page 36, line 15. Are
21 you there, sir?

22 A. No, but I'll get there.

23 Q. Are you with me?

24 A. Yes.

25 Q. It reads, "Question: I want to show you a series of

1 documents related to the Formula 1 racing and the Philip Morris
2 sponsorship."

3 Then there are a series of documents listed there. And
4 you were asked, "What do these exhibits show?"

5 And your answer is, "These exhibits demonstrate how the
6 international Philip Morris Formula 1 sponsorship impacts
7 audiences and viewers in the United States, particularly when
8 the races are broadcast in the United States and when
9 photographs of the Marlboro vehicles are printed in American
10 magazines and newspapers."

11 Do you see that, sir?

12 A. I do.

13 MR. FREDERICK: And now, Your Honor, just before I
14 proceed, I want to be absolutely clear. Is this still in, based
15 on your prior ruling, this particular passage, before I cross on
16 it and open the door?

17 THE COURT: I thought you all worked this out. Is it
18 in or out?

19 MS. EUBANKS: It's in.

20 MR. BERNICK: It's in.

21 MR. FREDERICK: Fair enough.

22 BY MR. FREDERICK:

23 Q. Well, first of all, sir, the exhibit, do you recall the
24 exhibits that are listed there, generally?

25 A. In general, I do for sure.

1 MS. EUBANKS: Your Honor, I think that the witness --
2 these are numbers on the screen. I think if he's going to ask
3 him questions about those exhibits, then fairly he should put
4 the exhibits before Mr. Myers.

5 MR. FREDERICK: And I'm going to do that, Your Honor.
6 Let me get back to this question after I've shown you all the
7 exhibits. Fair enough.

8 BY MR. FREDERICK:

9 Q. Let's start with Exhibit 93250, the Sports Illustrated
10 article we were looking at a moment ago.

11 Let me know when you have that, sir.

12 A. I do.

13 Q. Now, you told me at your deposition that this article was
14 brought to you by some sports aficionado in your office around
15 the time it came out.

16 A. I said it was brought to me by somebody in my office.

17 Q. Okay. And I believe you said you thought it was a sports
18 aficionado.

19 A. You know, I said because it's Sports Illustrated, it could
20 have been the person who normally looks at these things or it
21 could have been just somebody who had been reading Sports
22 Illustrated. I didn't remember.

23 Q. Fair enough. Let's go to tab 26, Jamey.

24 Pat, can you give Mr. Myers U.S. Exhibit 93263?

25 Do you have that document, sir?

1 A. I do.

2 Q. And I believe you told me at your deposition that the
3 government had provided this document to you in connection with
4 your testimony, but that you believed you had previously seen
5 both images separately; is that correct?

6 A. I believe what I said -- and I haven't double-checked it --
7 that the government did provide this document to me and that I
8 couldn't be sure I had seen this specific image, but that I had
9 seen similar images.

10 Q. And you believed these images come from outside the United
11 States; correct, sir?

12 A. I believe what I said was that I didn't know for certain
13 where this photo was taken. It appeared to have come from
14 outside the United States.

15 Q. And that's because presumably the Marlboro logo wouldn't be
16 appearing at the U.S. Grand Prix; correct?

17 A. It was because I -- you know, as I looked at the specific
18 logos on there and the background, it didn't appear to be from
19 within the United States, but I also said I didn't know where it
20 was taken.

21 Q. Let's give Mr. Myers U.S. Exhibits -- let's start with U.S.
22 Exhibit 89461, Pat.

23 That's tab 27, Jamey.

24 Sir, do you have U.S. Exhibit 89461?

25 A. I do.

1 Q. And it appears to be an excerpt from an April 27, 2005 issue
2 of something called AutoSport Magazine. Do you see that?

3 A. It does.

4 Q. Did the government provide a copy of this to you in
5 connection with your testimony here today?

6 A. This specific issue they did.

7 Q. And have you ever seen this specific issue of AutoSport
8 Magazine at any time before the government provided you with a
9 copy?

10 A. I've seen AutoSport Magazine, but I didn't have a
11 recollection of seeing this specific issue before the government
12 showed it to me.

13 THE COURT: Is that an American magazine?

14 THE WITNESS: It's a -- it's not an American magazine
15 but it's sold in the United States. I could buy it two blocks
16 from my office.

17 BY MR. FREDERICK:

18 Q. Pat, could we give Mr. Myers 89462?

19 And Jamey, that's tab 28.

20 And, sir, do you have U.S. Exhibit 89462 in front of
21 you?

22 A. I do.

23 Q. And did the government provide U.S. Exhibit 89462 to you to
24 review in connection with your testimony here today?

25 A. The first time I saw this, they did.

1 Q. All right. So you had not seen this issue or this magazine
2 before?

3 A. I have not seen this specific issue before the government
4 showed me this specific issue, no.

5 Q. And please give Mr. Myers U.S. Exhibit 92110. That's tab
6 29, Jamey.

7 Sir, do you have U.S. Exhibit 92110 in front of you?

8 A. I do.

9 Q. And, sir, you never saw this document before the government
10 provided it to you in connection with your testimony here today;
11 correct?

12 A. What I said was I didn't have any specific recollection of
13 seeing this specific issue of USA today. I've seen issues of
14 USA Today that have listed Formula 1 racing before, which is why
15 I think the government showed it to me.

16 Q. But not this issue; correct?

17 A. I said I don't have a specific recollection one way or the
18 other. USA Today doesn't stick out in my mind in that way.

19 Q. Sir, let's -- I'm going to give you a group of exhibits
20 which are related. 93339, 93340, 41 and 42, Pat, if you have
21 those four.

22 Okay, sir, I'll give you whatever time you want to look
23 at those, but just for the record do you have before you U.S.
24 Exhibit 93339, 93340, 93341, and 93342.

25 A. 93339 through 93342?

1 Q. Yes, sir.

2 A. Three of them appear to be issues of AutoWeek, the other one
3 on the copy you've given me I can't tell. Yes.

4 Q. I'll represent to you I believe it's also AutoWeek as well.
5 They get worse the more copies you make of them.

6 Can you put tab 30 on the screen, Jamey, which is U.S.
7 Exhibit 93339?

8 And just for the record, sir, each of these appears to
9 be an excerpt from various issues of something called AutoWeek
10 Magazine with an article on Formula 1 racing; is that correct?

11 A. Correct.

12 Q. And until the government provided them to you in connection
13 with your testimony in this case, you had not seen any of these
14 articles; correct, sir?

15 A. I have not seen these specific issues, I've seen AutoWeek
16 before.

17 Q. But you've not seen these articles?

18 A. I didn't have a specific recollection of seeing these
19 specific issues.

20 Q. Do you recall telling me at your deposition that you didn't,
21 had not seen these issues?

22 A. Yeah, as I said, I do not have any specific recollection of
23 seeing these specific issues before.

24 Q. All right. Thank you, sir.

25 If we go down to -- let's go -- give Mr. Myers finally

1 U.S. Exhibits 93256, 93274, 93276, and 93290. Do you have
2 those, Pat?

3 For the record, Mr. Myers, do you have U.S. Exhibit
4 93256, 93274, 93276, and 93290 in front of you, sir?

5 A. I have to answer I think I do, but the numbers are blurry on
6 some of them, so they are hard to read.

7 Q. Well, let me give you good copies so we make sure you have
8 the right thing.

9 A. I have no reason to disbelieve you.

10 Q. I'll just give them to you.

11 MR. FREDERICK: May I approach, Your Honor?

12 THE COURT: Yes, you may.

13 BY MR. FREDERICK:

14 Q. I'm not certain this is going to represent a substantial
15 improvement. They are in reverse order.

16 Do you have those four exhibits in front of you, sir?

17 A. I do.

18 Q. And, sir, it's correct, is it not?

19 A. What numbers are they supposed to be?

20 Q. Sure.

21 A. I'm having trouble reading them, but we shouldn't spend time
22 on them. I'm sure they are what you say they are.

23 Q. Let me just -- but I want the record to be very clear.

24 Do you have in front of you the following U.S. Exhibit
25 Numbers? 93256, do you have that, sir?

1 A. Yes.

2 Q. Do you have 93274?

3 A. That's the one that's hard to read, but I think so.

4 Q. Do you have 9376?

5 A. Yes.

6 Q. And do you have 93290?

7 A. Yes.

8 Q. And it's true, sir, that until I showed you these exhibits
9 at your deposition you had not seen them; correct?

10 A. I don't recollect whether I had seen them or whether I had
11 said that I hadn't seen them until the government showed me
12 these specific articles.

13 Q. Well, either way you had not seen them until the government
14 provided them to you in connection with your testimony; correct?

15 A. Not these specific articles, no.

16 MR. FREDERICK: Thank you, Your Honor. I have no
17 further questions.

18 THE COURT: Redirect, please.

19 MS. EUBANKS: Your Honor, it might be more efficient if
20 we could take a short break to take the morning break early to
21 set up and also to get in touch with the next witness so that we
22 stay on schedule.

23 THE COURT: All right. How long do you think your
24 redirect will be?

25 MS. EUBANKS: Certainly less than an hour.

1 THE COURT: I do note that Mr. Payton is here. Does
2 that mean that Dr. Heaton is here as well? No?

3 MS. EUBANKS: I don't believe she's here yet.

4 THE COURT: And you're going be less than an hour?

5 MS. EUBANKS: I think so, Your Honor.

6 THE COURT: Let's take a 15-minute recess.

7 (Recess began at 10:36 a.m.)

8 (Recess ended at 10:52 a.m.)

9 THE COURT: All right. Ms. Eubanks, please.

10 MS. EUBANKS: Thank you, Your Honor.

11 REDIRECT EXAMINATION

12 BY MS. EUBANKS:

13 Q. Mr. Myers, one of the documents Mr. Frederick handed you, JD
14 055390, would you put that before you?

15 A. Yes.

16 Q. I would like to direct your attention to the second page of
17 that document. You were asked some questions about the ratings.
18 Do you remember that?

19 A. I do.

20 Q. Now, you see in the column, the next-to-the-last column, the
21 taped delayed race where you got a better rating than a live ABC
22 Indy Racing League race in March and a live NBC champ car race
23 this month.

24 Do you see that?

25 A. I do.

1 Q. Now, the other column was read to you, but you, of course,
2 know that Philip Morris has races in the Indy Racing League, has
3 a car in the Indy Racing League; correct?

4 A. Correct.

5 Q. And so in terms of the popularity of the Formula 1 racing,
6 what does this demonstrate in comparison with the Indy Racing
7 League racing?

8 A. Well, it shows, in fact, that viewers on the same weekend
9 are seeing both, so they compound or multiply each other in
10 terms of the number of viewers and the impact.

11 Q. In terms of the number of viewers, does it demonstrate that
12 the Formula 1 racing was more popular in terms of viewership
13 than the Indy Racing League?

14 A. That's what it says that particular weekend.

15 Q. And Philip Morris does sponsor -- has the sponsorship in
16 this country in the Indy Racing League.

17 A. That's right. The Marlboro Race Team, it's the Penske Race
18 Team with the Marlboro logo is indistinguishable from the one on
19 the Formula 1 race car.

20 Q. Mr. Frederick asked you a number of questions about your
21 personal knowledge of Formula 1 racing and a number of exhibits
22 that were cited in your -- about -- he asked you questions about
23 a number of exhibits that were cited in your written direct
24 testimony. I'm sure you recall those questions; right?

25 A. I do.

1 Q. Now, does your organization, the Campaign for Tobacco-Free
2 Kids, take an interest in tobacco sponsorship in car racing?

3 A. We have for a very long time.

4 Q. Why?

5 A. There's a strong correlation with auto racing sponsorship
6 and youth impressions, youth perceptions, and youth usage. It
7 compounds the imagery from advertising in terms of the imagery
8 in terms of the perceptions of young people about where a
9 product fits. And the Marlboro theme, particularly because of
10 its nature of risk taking, rebelliousness, independence,
11 strength, it's the perfect complement.

12 Q. Now, how does your organization monitor tobacco sponsorship
13 of auto racing?

14 A. We do it a number of different ways. We do it by looking to
15 see where it's being broadcast.

16 We look to see attendance figures, although not on a
17 rigid level.

18 We look through magazines that are sold popularly in
19 the United States for it. And we look at websites and other
20 areas like that.

21 Q. Now, besides auto racing, what other type of advertising
22 does your organization track or monitor?

23 A. We try to keep particular track of a variety of forms of
24 advertising. It falls into several different categories.

25 The most significant are those that we've identified

1 and others have identified as having the greatest impact on
2 youth. So it's the kind of image ads, ads with glossy pictures
3 that don't have any substance to them, other than themes and
4 imagery, particularly those that appeals to kids, and look for
5 where they are as we try to measure the impact of the industry's
6 behavior on youth tobacco use and perceptions.

7 We do it in magazines. We do it in the retail outlets,
8 although we don't have the resources to do it on a nationwide
9 survey in that respect.

10 We do it -- I'm sorry. I've lost my own train of
11 thought. Outdoor signage, particularly with regard to outdoor
12 signage where we reason to believe it's been reported to us that
13 a large number of kids pass on their way to school or
14 playgrounds or things like that.

15 We do it with regard to price promotions and things
16 like that, that have been shown to heavily impact kids and a
17 number of other areas.

18 MR. FREDERICK: Your Honor, I'm going to move to strike
19 the last answer. The question asked him, now besides auto
20 racing, what other types of advertising does your organization
21 track or monitor? And we've got, it seems to me way away from
22 that question. Advertising. We've got into price, we've got
23 all sorts of things.

24 THE COURT: Was the objection to the answer or to the
25 question?

1 MR. FREDERICK: To the answer, Your Honor, as
2 nonresponsive.

3 THE COURT: No. Overruled. It may stand. Go ahead,
4 please.

5 BY MS. EUBANKS:

6 Q. Have you personally -- let's return to Formula 1. Have you
7 personally ever watched Formula 1 car races in this country?

8 A. Not in attendance in the race, but on TV, yes.

9 Q. About how many?

10 A. Dozens of times over the years.

11 Q. Then do you know if Formula 1 races, both here in the United
12 States and races abroad, are televised in the United States?

13 A. They are televised in the United States.

14 Q. Do you know if the race times and channels are advertised
15 and listed in newspapers?

16 A. They are. I routinely see them in newspapers that I read.

17 Q. Such as?

18 A. USA Today, the Washington Post. I travel more than I would
19 like, so I see it in other newspapers around the country.

20 Q. Now, you discussed a number of exhibits that were a website
21 edition of articles from AutoWeek Magazine, and let me give you
22 the numbers because I believe you have them before you.

23 U.S. Exhibit 93256, U.S. Exhibit 93274, U.S.
24 Exhibit 93276, and finally U.S. Exhibit 93290. I'll make sure
25 you have those in front of you.

1 A. I do.

2 Q. On the screen is U.S. Exhibit 93274. Can you identify that?

3 A. Yes.

4 Q. Please do.

5 A. It's an article from the website for AutoWeek that focuses
6 on Michael Schumacher because of his recent victory that
7 prominently displays the Marlboro logo, although it doesn't have
8 a picture of Michael Schumacher.

9 Q. Now, what have you done to verify personally these articles
10 and photographs of the Marlboro Ferrari that are actually on the
11 AutoWeek Magazine website as shown in, for example, U.S.
12 Exhibit 93274?

13 A. I've gone to the AutoWeek website itself and seen in this
14 article and each of the other articles and many others on that
15 website.

16 Q. I know we saw only four website editions of articles from
17 AutoWeek website.

18 Do you have any sense as to how prevalent Marlboro
19 articles featuring Marlboro or its Formula 1 team are on that
20 particular site that you've viewed?

21 A. The last time I went to the website I typed the word
22 "Marlboro" into the search engine and came up with more than
23 1300 different citations.

24 Q. Do you have any sense of the prevalence of Philip Morris's
25 Formula 1 sponsorship on the Internet more broadly?

1 A. I do. It's based upon my own review of different websites.
2 I've gone to multiple websites that cover sports and auto
3 racing, and the Marlboro race -- the Ferrari Race Team with the
4 Marlboro logo is prominently displayed on probably a dozen
5 websites that I've looked at.

6 Q. Now, we saw some examples of the magazines themselves.

7 Have you personally gone out recently and seen the
8 Formula 1 -- seen the Philip Morris Formula 1 sponsorship in any
9 local bookstore?

10 A. I have, and I've seen it before as well.

11 MR. FREDERICK: Your Honor, I'm just -- just so we have
12 a clear record. We have no record as to when Mr. Myers has done
13 this stuff.

14 For example, I don't know if he went to the website
15 last week in preparation of his testimony. I don't know if he
16 went to the website three years ago. And I do think it makes a
17 difference, and I think we are entitled to a clear record on
18 that.

19 THE COURT: Let's have time frames.

20 BY MS. EUBANKS:

21 Q. Go ahead.

22 A. I'm happy to do that. I've actually done both.

23 I did go to the website after the Department of Justice
24 first showed me the articles so that I could verify it on my own
25 to be certain it was correct.

1 THE COURT: Is that within the past three months?

2 THE WITNESS: Yes. And it was during that visit --
3 actually, it was multiple visits -- but it was during one of
4 those visits that I typed in "Marlboro" into the search engine,
5 so that my citation of the 1300 is within the last probably
6 two months, even.

7 I had previously gone periodically to these various
8 websites specifically to look at the issue of the extent to
9 which tobacco-sponsored race cars were easily accessible and
10 visible within the United States.

11 I didn't keep an accurate record of where that is.
12 It's something I would could every six, seven months and look at
13 that issue.

14 BY MS. EUBANKS:

15 Q. Before the objection I don't believe I got an answer to the
16 question that I had asked you, and that is have you recently
17 gone out to -- or recently seen in any local bookstore any
18 magazines that focus on the Philip Morris Formula 1 sponsorship?

19 A. I have.

20 Q. All right.

21 MS. EUBANKS: May I approach, Your Honor?

22 THE COURT: Yes.

23 BY MS. EUBANKS:

24 Q. I've just handed you an exhibit that's marked as U.S.
25 Exhibit 92137. Do you know where this comes from?

1 A. I do.

2 Q. Tell me.

3 A. This comes from a bookstore about two blocks from my office.
4 I purchased it. It's a bookstore that I visit regularly. I've
5 seen these kinds of magazines over a long period of time.

6 I think one of the down sides of my job is that you
7 look at things that others don't necessarily always do.

8 And after the government had shown me the copy of
9 AutoSport that was referenced earlier, I wanted to verify for
10 myself that it was easily available and around, and went into a
11 local bookstore and picked up this particular issue.

12 MR. FREDERICK: Your Honor, I'm sorry to interrupt, but
13 just so the record is clear. The U.S. Exhibit 92137 is dated
14 May --

15 MS. EUBANKS: Your Honor, this is my examination and
16 I'm about to ask the witness some more questions, and I'd
17 appreciate the ability to do that instead of having
18 interruptions.

19 There isn't even a question pending and I'm about to
20 ask the witness further questions. I think that's appropriate.
21 I think this is inappropriate.

22 MR. FREDERICK: Let me state an objection. Foundation.
23 We need timeframes.

24 MS. EUBANKS: I'm getting there.

25 THE COURT: Objection is overruled at this point.

1 BY MS. EUBANKS:

2 Q. Mr. Myers, can you tell us the date of U.S. Exhibit 92137?

3 A. Certainly. It's dated May 5, 2005.

4 Q. And when did you purchase U.S. Exhibit 92137?

5 A. Within the last two weeks.

6 Q. All right. Now, can you describe the cover of U.S. Exhibit,
7 the first page of U.S. Exhibit 92137?

8 A. Sure. The cover prominently features the Marlboro logo
9 along with Vodaphone in small letters, but the Marlboro logo is
10 the visible thing that catches your eye.

11 Q. Is that the helmet of the driver?

12 A. It is the helmet of the driver. You actually don't get to
13 see the driver because you don't when they are racing.

14 Q. It says, "Team chief on Schuey's future." F.I.'s future,
15 his future, what do you understand that to mean?

16 A. It's an article that talks about the future of this
17 particular person. I don't have any specific knowledge about
18 that.

19 Q. Have you looked at the article that is attached to U.S.
20 Exhibit 92137? And with respect to the copy that you have there
21 is a flag on it because you have the full magazine.

22 A. Yes. There's an article beginning on Page 34 that has a
23 fairly lengthy discussion of the Ferrari Race Team with
24 virtually every page prominent features of the Marlboro logo and
25 the Marlboro Race Team logo.

1 Q. I don't know if you've stated this, and forgive me if you
2 have, but where exactly, what bookstore did you purchase U.S.
3 Exhibit 92137 in?

4 A. It's two blocks from my office. I think it's a Barnes &
5 Noble. I don't think it's a Borders. It's a Barnes & Noble
6 two blocks from my office. But if you go two blocks in the
7 other direction there is a magazine bookstore that also carries
8 this as well.

9 Q. I noticed that on the cover of U.S. Exhibit 92137 it says
10 AutoSport, 6-99 printed in the UK.

11 A. Correct.

12 Q. Do you see that?

13 But you bought it in a bookstore. Would that be on
14 14th Street?

15 A. Yes, the one I bought it at was at 14th Street, but I also
16 saw it at -- the same issue, the corner of Connecticut and K and
17 a couple of other places once I had purchased this one.

18 Q. Now, you were talking before about advertisements.

19 How do you view the cover of U.S. Exhibit 92137 insofar
20 as an advertisement is concerned?

21 MR. FREDERICK: Objection.

22 THE COURT: Sustained.

23 BY MS. EUBANKS:

24 Q. With respect to the Marlboro logo, what is your
25 understanding of what is being conveyed by the cover of U.S.

1 Exhibit 92137?

2 MR. FREDERICK: Objection, Your Honor. His
3 understanding of what's being conveyed?

4 MS. EUBANKS: Yes, Your Honor.

5 MR. FREDERICK: Foundation.

6 THE COURT: Well, I think the question can be asked a
7 little differently in terms of his describing what's on the
8 cover.

9 It may be the distance that I am from the screen, but
10 it's not exactly clear to me. So you may describe the cover,
11 please.

12 THE WITNESS: Certainly. Let me try to do it exactly
13 as you said.

14 The viewer's eyes here are directed to the Marlboro
15 name and logo in the very center in the helmet which features --
16 the cover itself features a portion of the Ferrari Marlboro
17 Vodaphone race car from Formula 1. And so it is the feature
18 vision, visual, for this particular magazine.

19 What it also means, as happened with me, is all you
20 have to do is walk by the newsstand and the Marlboro logo is
21 what jumps out at you.

22 MR. BERNICK: Your Honor, he testified he bought this
23 at Barnes & Noble. Now he's saying it's a newsstand.

24 THE COURT: Well, that is not a proper objection, and
25 so therefore it's overruled.

1 Go ahead, please.

2 BY MS. EUBANKS:

3 Q. As Judge Kessler said, it's not really clear what we're
4 looking at.

5 Are you looking at the car, the driver, the helmet in
6 terms of what you're describing? Could you be more specific for
7 the record, please?

8 A. I can try. What you're looking at is both the car and the
9 helmet. They blur into each other on a Formula 1 race. You
10 don't see the individual face of the driver. I mean, these cars
11 are going very fast when they are doing it. They wear a helmet
12 that's more protective than a football helmet because it covers
13 their face as well.

14 So, the key is the placement of logos, which is why
15 these cars are plastered with them in such a place so that it is
16 what stands out, and it becomes associated literally with a
17 integral part of the car. It's why promotion is so effective.

18 MR. BERNICK: Your Honor, I move to strike.

19 This whole answer, and I think it was invited by the
20 question, is directly if violation of Your Honor's order. It
21 states his impression and his opinions. It's just the same as
22 we heard from their experts as part of their liability case.

23 THE COURT: The last two sentences may be struck.

24 MS. EUBANKS: Your Honor --

25 THE COURT: Not the initial ones.

1 MS. EUBANKS: Your Honor, may I be heard on this
2 because the court's ruling was not as Mr. Bernick set forth.

3 In fact, the court separated its ruling with respect to
4 areas that Mr. Myers was not permitted to testify about and
5 expressly stated -- I know defendants don't like this -- but he
6 is going to be able to testify about the racing, and that was
7 something that was left in in total.

8 In terms of his views of the racing, you said that
9 defendants would be able to cross-examine him on that and that
10 was an entirely different category.

11 So, I think that Mr. Bernick has misstated the court's
12 record on what was in and what was out, but we were not excluded
13 from questioning about racing, which was why Mr. Frederick
14 raised the issue and himself questioned Mr. Myers on this.

15 THE COURT: You are not precluded from questioning him
16 about facts relating to the racing.

17 The two sentences I struck, after leaving in the
18 beginning of that answer -- after leaving in the beginning of
19 that answer, those two questions related -- were clearly opinion
20 testimony and fact testimony.

21 MS. EUBANKS: Well, Your Honor, with respect to Rule --

22 THE COURT: He was asked to describe what was on the
23 cover, and I believe that was my question in order to follow up
24 on a question to which an objection had been sustained, and the
25 witness gave a description as best he could. It's not entirely

1 clear and that was his testimony.

2 I must say as one who is not familiar with sports
3 racing, that cover is not entirely clear to me, either. But in
4 any event, he answered the question. But then added some
5 material contained in the last two sentences. Those two
6 sentences were struck.

7 MS. EUBANKS: Well, Your Honor, with respect to Rule
8 701 and the lay opinion, this witness's testimony goes -- it
9 falls squarely within that rule in terms of the foundation that
10 we've laid of his knowledge, and it's not based on scientific or
11 specialized knowledge. These are his observations and what he
12 observes clearly comes within the lay opinion, Rule 701.

13 THE COURT: The last two sentences and then this will
14 be the end of this discussion.

15 (Reading real time) So comma the key is the placement
16 of logos, which is why these cars are plastered with them in
17 such a place so that it is what stands out, and it becomes
18 associated literally with an integral part of the car. It's why
19 promotion is so effective.

20 That's not facts. All right. Next question, please.

21 BY MS. EUBANKS:

22 Q. Is brand name sponsorship a form of advertising?

23 A. It's certainly a form of communication and marketing, yes.

24 Q. Why do you say that?

25 MR. BERNICK: Objection, the why again gets into his

1 opinions on now a promotion and advertising.

2 Frankly, Your Honor, Your Honor has spent a lot of time
3 pouring through this and ruling very clearly, and I think the
4 government is just rearguing their position and it's
5 inappropriate.

6 MS. EUBANKS: Your Honor, it's not a reargument of the
7 position.

8 And with respect to the permissibility under the
9 Federal Rules for a witness to, assuming his answer is opinion
10 and we don't know that yet, the question is not improper to ask
11 why as a follow up.

12 But the second point insofar as his opinion, the
13 Federal Rules do permit lay opinion, because simply because it
14 may be Mr. Myers' opinion is not something that the Federal
15 Rules rule out, particularly in light of this court's ruling on
16 March 29th at the insistence of defendants that their very
17 experts should be allowed to give opinions. This isn't even on
18 a technical matter --

19 THE COURT: I'll allow this question. Let's move on,
20 everybody.

21 THE WITNESS: I have to apologize. With the give and
22 take, I need you to repeat what the question was.

23 BY MS. EUBANKS:

24 Q. I asked you if brand name sponsorship was a form of
25 advertising. You answered that question. Do you remember your

1 answer?

2 A. Yes.

3 Q. And I asked you why?

4 A. Because it complements the imagery and the themes that you
5 see in advertising and, therefore, simply another mechanism of
6 communicating the same themes, the same imagery to the same
7 audience.

8 Q. Now, I know during the questioning this morning that, I
9 think it's fair to say that Mr. Frederick took issue with your
10 statement that Altria, the parent of both Philip Morris USA and
11 Philip Morris International, can control the use of the Marlboro
12 trademark by its overseas affiliate.

13 Can you share with the court the basis for your making
14 that statement?

15 MR. BERNICK: Objection again. Now he's going to be an
16 expert in corporate governance in relationship between parent
17 and subsidiary.

18 THE COURT: He's not testifying as an expert, but
19 certainly he was questioned on this subject on cross, and he has
20 a -- the government has a right to elicit his reasons. It's not
21 an expert opinion, everybody, but he so testified. He was
22 crossed on it effectively as to whether there was any basis for
23 it, and that's the purpose of redirect, is to rehabilitate him.

24 You may answer the question if you can remember it.

25 THE WITNESS: This time I can.

1 It's twofold. Altria itself in its own documents and
2 on frequent occasion represented its authority over how the
3 Marlboro logo is used.

4 But equally as importantly, several years ago I had --
5 I came into possession of a toddler outfit that was emblazoned
6 with the Marlboro logo, and at the request of the United States
7 Senator, I provided it to him to illustrate a point.

8 I was contacted after that by an Altria executive who
9 complained to me that the particular toddler outfit was a
10 counterfeit and had I brought it to his attention, that they
11 would have -- and it had been a real Marlboro logo from
12 overseas, this was from Asia -- that he would have taken steps
13 immediately to correct it.

14 MR. FREDERICK: Your Honor, we're going to move to
15 strike that as lack of foundation, therefore hearsay, and
16 just -- it's not even responsive to the question. Control.
17 Control what?

18 MS. EUBANKS: Your Honor.

19 MR. FREDERICK: Let me finish.

20 My question to him was who owns the Marlboro trademark?
21 He told me Philip Morris USA.

22 Now we're talking -- I don't know what we're talking
23 about now, but we're not talking about who owns the Marlboro
24 trademark. We're talking about something else.

25 We've got U.S. Senators. We've got testimony that was

1 nowhere disclosed previously. And I just -- I move to object as
2 irrelevant.

3 THE COURT: It's a very straightforward example of what
4 Mr. Myers thinks demonstrates Altria's control over Philip
5 Morris USA. Whether it is a convincing example or analogous
6 will be for me to figure out later on.

7 It was responsive to the question insofar as Mr. Myers
8 could answer that question. And, again, it's certainly related
9 to the cross-examination which Mr. Frederick just referred to.

10 Next question, please.

11 MS. EUBANKS: Thank you, Your Honor.

12 THE COURT: I guess my final point is it's not hearsay
13 because it is --

14 MS. EUBANKS: -- an admission under --

15 THE COURT: -- an admission by a party opponent. Go
16 ahead.

17 BY MS. EUBANKS:

18 Q. You were asked some questions about excise taxes. Do you
19 recall those?

20 A. Vaguely.

21 Q. What, if anything, do excise taxes have to do with the MSA?

22 A. What do excise taxes have to do with the MSA? Nothing to
23 the best of my knowledge.

24 Q. I'm going to show you J-DEM 010416. It's a 1-page exhibit,
25 Mr. Myers. I don't know if you can see it clearly on the

1 screen. It was given to you this morning.

2 A. I can see it fine.

3 Q. So, in terms of the bar that -- in terms of the bar
4 discussing federal and state excise taxes, what, if anything,
5 does that information have to do with the MSA?

6 A. Nothing to the best of my knowledge.

7 Q. Now, yesterday you were asked, with respect to some charts
8 that Mr. Bernick showed you, to compare provisions of the 1997
9 proposed Resolution with provisions of the Master Settlement
10 Agreement.

11 A. Correct.

12 Q. And you will see one of those exhibits is to your left. The
13 board is still up.

14 A. Right.

15 Q. I want to make sure that I show you the correct exhibit, or
16 at least that I'm referring to the correct exhibit, so if I
17 could have a moment. It's the one behind this one, actually.
18 Mr. Schwind is going to switch them for me, and maybe I'll help
19 him so it doesn't fall on him.

20 All right. You have before you -- and I guess I should
21 identify the number on that -- it's J-DEM 010429. You probably
22 have a paper copy there as well.

23 A. Actually, I have a paper copy of the second, of the one you
24 just took down. I apologize.

25 Q. It was in the documents that were handed up yesterday, so --

1 A. I don't think I was given the first page.

2 Q. Mr. Bernick will hand you a duplicate. Thank you.

3 Now, the first item on the chart is the comparison of
4 the print advertisement provisions of both documents. Do you
5 see that?

6 A. I do.

7 Q. Now, what were the print advertisement restrictions in the
8 1997 proposed Resolution?

9 A. They are accurately recorded under the blue section, which
10 was limited ad in newspapers and magazines with large youth
11 readership, and that was defined as either 15 percent or 2
12 million youth readers. So it was both a percentage and a
13 quantifiable number, to black and white text only
14 advertisements.

15 Q. Can you explain more precisely that definition of the
16 15 percent or 2 million with the large youth readership?

17 A. Certainly. It was a number derived by the Food and Drug
18 Administration, as I'm sure everybody knows, to get at both
19 small circulation journals with a large percentage youth
20 readership and large circulation journals with maybe a smaller
21 percentage youth readership but a very large number.

22 Q. And I believe Mr. Bernick asked you if certain cigarette
23 manufacturers had voluntarily adopted a 15 percent rule.

24 Do you recall that discussion yesterday?

25 A. I do recall that discussion.

1 Q. Now, what does the 2 million component of the definition of
2 the 1997 proposed Resolution provide that the 15 percent
3 component standing alone does not?

4 A. There's a significant number of magazines that are very,
5 very popular in terms of numbers of the actual readers with
6 adolescents; that, because of the size of their overall
7 readership, the percentage of youth readers falls below
8 15 percent or sometimes comes slightly above and sometimes
9 slightly below, but it, in fact, reaches more youth readers than
10 some of the magazines that have more than 15 percent youth
11 readership.

12 You know, as I said yesterday, on any given day you
13 have to look at the specific numbers, so I can't give you a
14 specific example today, but, you know, whether or not Sports
15 Illustrated, for example, falls above or below the 15 percent
16 youth readership, the number of actual youth readers that are
17 recorded by MRI and Simmons and other organizations like that
18 substantially exceeds 2 million. So the actual youth exposure
19 is very large.

20 Q. Let's go back to the 15 percent figure and the questioning
21 on cross by Mr. Bernick.

22 Before we talk about how -- you've already discussed
23 MRI and Simmons and like data in order to calculate the
24 15 percent.

25 Are you aware of any cigarette company that has agreed

1 to a 15 percent limitation as part of the MSA?

2 MR. BERNICK: I object to the form of the question.

3 There's no issue in the case that I think says it's not in the
4 MSA. So when the question is as part of the MSA, it's
5 ambiguous. We know it's not in the MSA. We know that the
6 issue.

7 THE COURT: Objection sustained. It's an unclear
8 question.

9 MS. EUBANKS: Well, Your Honor, during the examination
10 yesterday Mr. Bernick talked about this living agreement, and I
11 think it's fair examination to establish with this witness that
12 was Mr. Bernick's term, the witness gave an answer, and then
13 Mr. Bernick summed that up by saying, Well, the MSA is a living
14 agreement.

15 If he's prepared to say that what he meant by "living
16 agreement" meant that it didn't have any meaning at all with
17 respect to the actual MSA that was signed, then I'm happy to
18 move on.

19 THE COURT: My concern is with your use of the phrase
20 "as part of the MSA agreement."

21 You can certainly ask him whether to his knowledge
22 there is any kind of an agreement by the companies that they
23 will not advertise in this fashion, but that term "as part of
24 the MSA agreement" is misleading. For the record, we know what
25 the MSA agreement is.

1 MS. EUBANKS: Thank you, Your Honor, with that
2 clarification.

3 BY MS. EUBANKS:

4 Q. Is there any formal agreement between, to your knowledge,
5 between any cigarette company and the National Association of
6 Attorneys General or states to comply with the 15 percent
7 limitation?

8 MR. BERNICK: Objection, lack of foundation.

9 THE COURT: Oh, objection is overruled.

10 A. To be precise, you have to differentiate among the
11 companies, fairness says.

12 Because the companies vary among them. You know, for
13 example, Philip Morris has adopted a policy on a voluntary basis
14 after --

15 THE COURT: But I think the question was a formal
16 agreement. Am I correct?

17 THE WITNESS: The only company --

18 THE COURT: Wait just a minute, please.

19 Ms. Eubanks; is that correct?

20 MS. EUBANKS: Yes.

21 THE COURT: So we're not talking policies now. The
22 question was an agreement, a formal agreement.

23 A. To the best of my knowledge, the only company that there is
24 a formal agreement was with R.J. Reynolds as a result of an
25 enforcement lawsuit that was brought in California and as part

1 of the Resolution after a Court of Appeals' decision in
2 California. On that one, R.J. Reynolds did enter into an
3 agreement, I understand, to limit magazine advertising to those
4 with 15 percent youth readership but not with regard to total
5 numbers. I don't believe it applies to any of the other
6 companies.

7 Q. Now, in terms of that agreement with the 15 percent, did it
8 include any reference to 2 million?

9 A. It did not.

10 Q. And just to be clear, so that -- I think it's clear. It
11 only had the 15 percent then?

12 A. Correct.

13 Q. Excluding your testimony about -- or excluding the example
14 that you give about R.J. Reynolds and the state action, the
15 enforcement lawsuit in California; with respect to any voluntary
16 agreement to comply with the 15 percent rule, to your knowledge,
17 is that something that is enforceable by the states?

18 MR. BERNICK: Objection, calls for a legal conclusion,
19 also lack of foundation.

20 THE COURT: Sustained, besides which it's perfectly
21 obvious.

22 Go ahead, please.

23 BY MS. EUBANKS:

24 Q. What changes did you observe following the MSA?

25 A. In terms of what?

1 Q. In terms of magazine advertising. I'm sorry.

2 MR. BERNICK: Your Honor, I really think that this
3 is -- this is reiteration of a portion of the direct examination
4 that was specifically excluded by the court.

5 There's a part of the examination that got into how the
6 companies reacted to the MSA in kind of general terms talking
7 about --

8 THE COURT: If you can narrow your question
9 substantially and focus it on a particular factual area, you may
10 do it that way. Otherwise, that kind of a broad question, the
11 objection will be sustained to.

12 MS. EUBANKS: Well, Your Honor, I did note that on
13 cross-examination Mr. Myers was asked questions about actions of
14 the companies with respect to advertising in magazines today and
15 that door was opened.

16 In terms of following up with him about that, I think
17 it's important to have in the record as well his testimony, not
18 his opinions, but facts that he has observed with respect to his
19 monitoring activities insofar as magazine advertising after the
20 MSA.

21 THE COURT: You're going to have to narrow it that way
22 then. I don't want just an open-ended discussion.

23 MS. EUBANKS: I will do that, Your Honor.

24 MR. BERNICK: I just -- Your Honor, this is like the
25 third time where Your Honor has ruled based upon the prior

1 rulings of the court and we get reargument again. And the last
2 two times that this has happened the witness clearly has picked
3 up on exactly where he has been directed and we do get opinion
4 testimony.

5 This part of the examination was black and white, and
6 it was stricken, and all that I asked him was about particular
7 advertising campaigns.

8 MS. EUBANKS: Your Honor, in asking about particular
9 advertising campaigns, that certainly does bring it past the
10 time.

11 THE COURT: Everybody, we are taking a lot of time.
12 You may narrow your question.

13 MS. EUBANKS: I will do that, Your Honor.

14 BY MS. EUBANKS:

15 Q. Mr. Myers, with respect to your observations of magazine
16 advertising -- not your opinions, but your observations -- what
17 changes, if any, have you observed following the MSA?

18 MR. BERNICK: Same objection.

19 THE COURT: I will listen carefully to the answer. The
20 question is all right as posed.

21 A. And I'll try to -- if I understand exactly the limitations I
22 will do my very best to stick within it, Your Honor.

23 In the first two to three years after the MSA we saw
24 actually a rise in what we call image advertising, colorful
25 image advertising, in magazines that were rated by MRI and

1 Simmons as having more than 15 percent or 2 million youth
2 readers. After the Attorney Generals' open investigation, there
3 was a change to some degree in the patterns. After that period
4 of time Philip Morris stopped advertising in those magazines.

5 But through to today we continue to see, again, what
6 I'm calling image advertisements -- which I simply mean the sort
7 of colorful ads with people and images in them -- in magazines
8 that to the best of my knowledge have been rated by MRI and
9 Simmons as having either more than 15 percent or more than 2
10 million youth readers on a very regular basis.

11 MR. BERNICK: I object. I move to strike on the
12 grounds of lack of foundation, number one.

13 Number two, it directly contravenes Your Honor's ruling
14 with respect to very specific parts of the direct examination
15 which were stricken.

16 And number three, we were specifically precluded from
17 conducting any discovery of this organization with respect to
18 any of those campaigns.

19 The only area that's been pursued on cross-examination
20 related to that portion of the direct examination, which was
21 comprised at the bottom of Page 30 and the top of Page 31, which
22 I specifically referenced, and all that they are doing now is to
23 have the witness give exactly the same analysis and opinions
24 without our opportunity for discovery and in contravention of
25 the court's orders.

1 And I hate to keep on standing up because I think we
2 ought to get the examination done, but what the government is
3 doing systematically is to erode the force of Your Honor's
4 ruling on redirect when I have absolutely no opportunity to
5 conduct a cross-examination.

6 MS. EUBANKS: Well, Your Honor, I have --

7 THE COURT: The motion to strike is denied.

8 Move on, please.

9 BY MS. EUBANKS:

10 Q. Mr. Myers, how do you and your organization monitor or track
11 cigarette print advertising information? How do you do that?

12 A. As I said yesterday, we subscribe to a significant number of
13 magazines, by no means the full panoply of magazines out there.

14 We also ask people who see magazines to send us copies
15 so that we can monitor those.

16 And then sporadically on a very irregular basis we will
17 contract with MRI or Simmons or otherwise get copies of their
18 data to take a look at a comparison.

19 Q. All right. During your cross-examination I know you
20 mentioned several magazines and I want to show you at least one
21 of them.

22 MS. EUBANKS: May I approach, Your Honor?

23 THE COURT: You may.

24 BY MS. EUBANKS:

25 Q. Mr. Myers, I have just handed you U.S. Exhibit 92142. Can

1 you identify that, please?

2 A. Yes. It's a Sports Illustrated dated April 11, 2005.

3 Q. What does the address tab indicate on the magazine?

4 A. National Center For Tobacco-Free Kids.

5 Q. And that's your organization?

6 A. Yes. We've technically changed our name to Campaign for
7 Tobacco-Free kids, but it is.

8 MR. BERNICK: Your Honor, we would object to any
9 questions with regard to this. Once more, we asked for the
10 documentation, exactly this kind of documentation from the
11 files. This witness deliberately did not review --

12 THE COURT: What kind of documentation?

13 MR. BERNICK: Your Honor, we specifically asked for
14 documentation from his files relating to the campaigns that he
15 monitored.

16 THE COURT: Wait a minute. Wasn't -- was this
17 particular issue shown to the witness in your questioning?

18 MR. BERNICK: Absolutely not.

19 MS. EUBANKS: No.

20 MR. BERNICK: I'm sorry.

21 Absolutely not. And part of the reason why I never
22 pursued it was that, Your Honor, we specifically asked for
23 discovery from his files --

24 THE COURT: Yes, I know all of that, Mr. Bernick.

25 Here is my other question and I'm going to word it

1 carefully, since I don't wish to put words in anybody's mouth.

2 Does this exhibit and question relate to certain
3 testimony that was offered during the cross-examination?

4 And if counsel don't understand, then I'll have you two
5 approach the bench -- we are not sealing a record or anything --
6 but you two may approach the bench unless you can answer that
7 question.

8 MS. EUBANKS: The answer is yes.

9 MR. BERNICK: I'd like to approach.

10 THE COURT: Counsel may approach.

11 (Bench conference on the record.)

12 THE COURT: On cross the witness testified that he had
13 seen a Camel ad very recently. Is this the ad?

14 MS. EUBANKS: It's on the back of a magazine, yes, and
15 I just want to make sure --

16 THE COURT: So what's the objection? I figured that's
17 what it was.

18 MR. BERNICK: The objection was -- at least, it's
19 fairly simple, which is that my question to him elicited the
20 answer where he made reference to it.

21 My question to him simply pertains to the 15 percent
22 rule. He went then beyond the question I asked and he
23 volunteered his own personal experiences and the fact that he
24 had reviewed this magazine.

25 That's not something my question elicited. The scope

1 of my questioning, as Your Honor remembers, we had problems with
2 keeping him to the scope of my questions.

3 So the fact that he volunteered information that was
4 not responsive to my question does not mean that I opened the
5 door. All of my questions were oriented towards the rules that
6 were being done, not his personal experience to determine
7 whether he had complied with those rules.

8 And, Your Honor, I know that you've heard this before.
9 This witness specifically declined to review his own files in
10 order to avoid discovery, and now we are seeing exactly the
11 information that we know is in his own files that we haven't
12 been able to obtain.

13 THE COURT: It's not exactly difficult to obtain. This
14 is what? Sports -- no, not Sports Illustrated -- yes, I'm
15 sorry, Sports Illustrated.

16 MS. EUBANKS: It was illustrated in yesterday's --

17 MR. BERNICK: (Overtalking) -- was sent to his -- this
18 is the kind of thing that we have been --

19 THE COURT: So what? Anybody can purchase it anywhere.
20 What's your response?

21 MS. EUBANKS: Very briefly, Your Honor. Yesterday
22 during the questioning -- and there was no motion to strike
23 it -- he was asked about particularly magazine ads, or at least
24 he stated that Sports Illustrated like the one he talked about,
25 and he actually referenced it.

1 It's proper redirect examination following up with the
2 testimony that was elicited on cross, that was not -- there was
3 no motion to strike, and we moved on from that.

4 In terms of rearguing and --

5 THE COURT: It's not worth all this time.

6 He testified that he had seen a very recent ad, despite
7 the 15 percent, 2 million -- not \$2 million -- 2 million
8 readership --

9 MR. BERNICK: With respect, that was not the question.
10 The question was purely the 15 percent. And he used this to say
11 that, yes, the 15 percent, but not 2 mill. I didn't see
12 anything about that.

13 MS. EUBANKS: Your Honor, I want the record to be
14 clear. I want to show the witness this exhibit, ask him if with
15 respect to the testimony that he gave in describing the ad --

16 THE COURT: You may proceed.

17 MS. EUBANKS: Thank you.

18 (End of bench conference.)

19 BY MS. EUBANKS:

20 Q. Mr. Myers, you have before you U.S. Exhibit 92142. I
21 believe you've -- there's a Camel ad that appears in that
22 exhibit. Do you see it?

23 A. On the back cover, yes.

24 Q. On the back cover. And what is that ad of?

25 A. You know, it's --

1 THE WITNESS: I'm not very good at factual descriptions
2 of these things, Your Honor. I'll do the best I can.

3 THE COURT: Why don't you simply read the title of it?

4 A. It says, "Camel, Pleasure to Burn." That's the only really
5 visible text on the ad.

6 It then shows an image of a male with his cigarette and
7 sunglasses, appearing to be going at high speed, given how his
8 hair is being blown, wearing what looks like to be a leather
9 jacket.

10 Q. Now, just to be clear for the record. You referenced a
11 Sports Illustrated issue yesterday. Can you tell us what's on
12 the cover of U.S. Exhibit 92142?

13 A. I believe this is the Sports Illustrated that I referenced
14 yesterday in response to a question from Mr. Bernick. It's a
15 cover about the NCAA basketball tournament and North Carolina's
16 victory in it.

17 Q. And again what -- the date of the magazine is what?

18 A. April 11, 2005.

19 Q. What has your organization found with respect to cigarette
20 advertising in Sports Illustrated since the MSA?

21 MR. BERNICK: Same objection as before, Your Honor.

22 THE COURT: Sustained. It may be the same objection --
23 well --

24 MR. BERNICK: To be clear --

25 THE COURT: -- we won't get into that. It's sustained.

1 BY MS. EUBANKS:

2 Q. But your organization has studied, or made observations with
3 respect to cigarette advertising in Sports Illustrated, has it
4 not?

5 A. Yes.

6 Q. And you have made observations or studied it since the MSA;
7 correct?

8 A. Yes.

9 Q. With respect to your observations -- strike that.

10 THE COURT: There's nothing wrong with concluding
11 redirect at some point, Ms. Eubanks.

12 MS. EUBANKS: I'm very close, Your Honor.

13 BY MS. EUBANKS:

14 Q. Now, you spoke before about an enforcement suit brought
15 against R.J. Reynolds, and I just want to quickly show you a
16 document and confirm that we're talking about the same thing.

17 I'm handing the witness what's been marked as U.S.
18 Exhibit 92141. Would you identify that, please?

19 MR. BERNICK: Before it's shown, I object to the use of
20 this exhibit -- I would like -- if he wants to identify it,
21 that's fine, but it shouldn't be displayed in court until the --

22 THE COURT: Is this a court document?

23 MS. EUBANKS: Your Honor, this is the -- it is a court
24 document. As you can see, this is the source of the 15 percent
25 rule.

1 MR. BERNICK: I really object to the technicians for
2 the government, in the face of my objection, now zeroing in on
3 this document. This is an opinion by a different court. It
4 does not belong in this proceeding. And it's certainly not
5 appropriate to bring this out in connection with this witness.

6 MS. EUBANKS: It most certainly is, and I'm prepared to
7 discuss this at the bench because I want there to be no
8 suggestion that I'm signaling to Mr. Myers about his testimony.

9 THE COURT: First of all, if it's a court opinion as
10 I've ruled on many -- on many occasions, I can take judicial
11 notice of it. And its interpretation in terms of what's
12 significance it has is not for this witness to comment on
13 anyway. So I'm not at all clear why you're presenting this to
14 him.

15 And I'm not looking at it, Mr. Bernick. I just could
16 tell a court document when I see one.

17 MS. EUBANKS: Well, as I prefaced my question, the
18 witness had testified about an R.J. Reynolds' enforcement suit
19 and the 15 percent rule.

20 I merely wanted him to identify this document so that
21 we could have a record of that. And as you said, I'm very close
22 to concluding the redirect examination, but I think it's proper
23 follow up.

24 When I asked him the question --

25 THE COURT: You may ask him whether this -- you may ask

1 him to identify it only and whether this is the document to
2 which he was referring in his earlier testimony, period.

3 MS. EUBANKS: Thank you, Your Honor. That's fine.

4 MR. BERNICK: That's fine. I would say, though, Your
5 Honor, I will have one question in recross based upon this. I
6 believe this goes completely beyond the scope of any examination
7 that I've conducted, introduces the whole question of the
8 settlement of the lawsuit, and I have one question in follow up
9 recross as a result because it completely exceeds the scope of
10 my cross-examination.

11 MS. EUBANKS: It does not, Your Honor. Mr. Bernick
12 suggested that the R.J. Reynolds' agreement was voluntary in
13 nature. This document indicates --

14 MR. BERNICK: Absolutely.

15 MS. EUBANKS: I'm not done.

16 THE COURT: Everybody, one at a time.

17 MS. EUBANKS: This document certainly indicates
18 otherwise and, as the court said, the court can take judicial
19 notice of it. We don't believe that it's necessary to ask
20 Mr. Myers a lot of questions about it.

21 But to clarify the record which, when I read over the
22 transcript last night, is a little bit muddled on this point. I
23 think it's appropriate to put the document before him, but it's
24 not appropriate, given the cross-examination already on the
25 topic, to have him ask Mr. Myers one more question. That's not

1 appropriate. There's no record for that. It's not beyond the
2 scope.

3 THE COURT: I won't rule for the moment, although
4 obviously in a couple of minutes I will, on whether Mr. Bernick
5 gets his one more question or not.

6 You may have him identify the document, as I said. And
7 you may have him indicate that this is the document to which he
8 was referring in his earlier testimony.

9 And then I guess I'll hear from everybody after that as
10 to whether there will be any further questions.

11 Go ahead, please.

12 BY MS. EUBANKS:

13 Q. Can you answer those questions, please?

14 THE COURT: He has to see the document.

15 A. I have a copy here.

16 This is the court of -- the state Court of Appeals'
17 decision which I referenced earlier in my discussion. But just
18 to be precise, it's -- this decision, that was followed by an
19 agreement to resolve the matter.

20 THE COURT: And that may take care of Mr. Bernick's
21 follow-up question, hopefully.

22 MS. EUBANKS: Well --

23 THE COURT: Let's not -- I shouldn't even said that. I
24 should know better.

25 Next question.

1 MS. EUBANKS: Well, Your Honor, you know, I'm nearing
2 the end of the examination and certainly before I conclude I
3 would like to know where we're going to go on that, because I am
4 going to ask the witness at this point to put the document
5 aside, given the court's ruling, and move on.

6 THE COURT: All right. Go ahead.

7 BY MS. EUBANKS:

8 Q. Now, I want to show you -- there was some suggestions made
9 during the cross-examination that the Department of Justice had
10 shown you a number of documents that you had not brought to our
11 attention, but the Department of Justice had brought to your
12 attention certain documents.

13 Do you recall that testimony?

14 A. I do.

15 Q. I want to show you, U.S. Exhibit 92132. It's on the screen.
16 Can you identify this, please?

17 A. Yes. It's a -- the front page of the sports section of the
18 Indianapolis Star May 27, 2003.

19 Q. Where did this document come from, if you know?

20 A. I gave you this document.

21 Q. You gave this document to me. When?

22 A. I'm not sure.

23 Q. Was it in the past month or so?

24 A. Yes.

25 Q. Now what is the caption underneath the photo?

1 MR. BERNICK: I object.

2 A, it goes beyond the direct examination and my cross
3 and Mr. Fredericks' cross.

4 And B, this is exactly the kind of document that we
5 called for and that was not furnished.

6 MS. EUBANKS: Your Honor, this is a public document.

7 The suggestion was made during cross-examination that
8 somehow the Department of Justice went to Mr. Myers and showed
9 him a bunch of documents about car racing.

10 What we've just established is that this is a document
11 that he had, but if you look at it, it's from a newspaper and it
12 has a caption on it, and it has a child in a Marlboro race car.

13 I mean, the fact is that this is certainly within the
14 scope of the examination that was conducted by Mr. Frederick,
15 and it certainly is rehabilitation for the suggestion that
16 something improper went on with respect to showing the witness
17 documents.

18 MR. FREDERICK: Your Honor, a couple of responses to
19 that.

20 First of all, this doesn't rehabilitate the fact that
21 he was shown documents after he was designated as a witness, as
22 a fact witness here.

23 Second, this isn't Formula 1. My cross is about
24 Formula 1 racing. This is apparently Indy car racing, but it
25 has nothing to do with my cross-examination. It's beyond the

1 scope.

2 MS. EUBANKS: Well, Your Honor, the witness can
3 certainly be asked questions --

4 THE COURT: You may show him a couple of documents if
5 you think it will establish that he presented them to you rather
6 than you, the Department of Justice, to him. That is the only
7 purpose of the redirect.

8 And that way we can short-circuit whether we're talking
9 about Formula 1 or Indy, because I have to tell you when I look
10 at these I'm not going to know the difference.

11 And second of all, it focuses on the only proper
12 purpose of the questioning and the presentation of these
13 particular documents. A couple, please.

14 BY MS. EUBANKS:

15 Q. Mr. Myers, is this an example -- which racing league is
16 involved in U.S. Exhibit 92132?

17 A. It is the U.S. Indy Racing League and this was the
18 Indianapolis 500.

19 Q. Mr. Myers, have you been offered anything in return for your
20 appearing as a witness in this case?

21 MR. BERNICK: Objection. This goes to his bias or the
22 lack of bias. It was not a subject that I pursued whatsoever.
23 I deliberately stayed away from it in order to keep this
24 testimony on track, and they are now opening the door.

25 If they open that door I will definitely want recross

1 on this witness's bias.

2 MS. EUBANKS: Your Honor, if you're going to -- bias is
3 always relevant. There are suggestions in the papers of
4 defendants that this witness, in the briefing, the large amount
5 of briefing --

6 THE COURT: That was in the briefing, though. And I
7 certainly took that into consideration, as I do everything
8 that's said in briefing. It certainly had some place in my
9 reasoning in terms of the opinion I made.

10 It was not gone into, that I remember, at all in the
11 cross-examination, and since it was not gone into, if I allow
12 this question, it will indeed open the door, and I don't want
13 that door opened.

14 MS. EUBANKS: I'll withdraw the question, Your Honor.
15 Nothing further.

16 THE COURT: All right. Counsel, approach the bench,
17 please.

18 (Bench conference on the record.)

19 THE COURT: What's your one question?

20 MR. BERNICK: The one question is in connection with
21 the settlement that he's now testified to by RJR, whether RJR
22 and the Attorney Generals both agreed that 15 -- the 15 percent
23 rule was sufficient to settle a claim brought forth targeting
24 without any requirement regarding 2 million.

25 Excuse me.

1 We have now seen this examination that the 15 percent
2 rule is not enough, it's got to be 15 percent plus 2 million,
3 that RJR is not doing the 2 million, they are only doing the
4 15 percent.

5 At the same time, she now brings out through the
6 settlement, which I never pursued, that RJR is only doing that
7 reluctantly or, in a sense, under threat of litigation.

8 I want to bring out that that settlement was a
9 settlement between both sides that focused solely on 15 percent.
10 There was no 2 million requirement. And obviously the inference
11 that we will later argue is RJR is totally within its rights to
12 go with 2 million because a targeting claim is settled on the
13 basis of going forward with 15 percent alone.

14 MS. EUBANKS: Your Honor --

15 MR. BERNICK: They can't have it both ways. They can't
16 say RJR was brought to the table and, by the way, they are still
17 not there because they don't have 2 million, when what was
18 decided at the table about targeting was the 15 percent was
19 enough.

20 MS. EUBANKS: My suggestion on this is very simple.

21 That's not the type of question that was opened up with
22 respect to this witness in terms of his foundation, his
23 knowledge of the negotiations that ensued after, and if we're
24 going to go down that road I'm certainly going to be entitled to
25 more direct examination --

1 THE COURT: -- the document that will show this?

2 MR. BERNICK: No, because that's the whole point is
3 because the settlement agreement -- the settlement agreement is
4 not before the court. She brought it out on her redirect
5 examination.

6 MS. EUBANKS: Yes, she did.

7 THE COURT: Would the settlement agreement make your
8 point for the record?

9 MR. BERNICK: You know, I don't know -- nor do I not
10 know, but in a settlement agreement, 408 -- there's lots of 408
11 problems. I don't know what the recitals are in that. I don't
12 think that the settlement should ever come before this court for
13 any purpose whatsoever.

14 MS. EUBANKS: Well --

15 MR. BERNICK: So I think that the answer to the
16 question is very simple and it cures the problem that's been
17 introduced.

18 I don't know if that problem -- assuming that the
19 problem itself would be solved by the settlement agreement. The
20 settlement agreement contains a lot of other things.

21 If we can have a stipulation from the government that
22 that case was settled solely for the 15 percent restriction --

23 THE COURT: That's a fact issue.

24 MS. EUBANKS: Your Honor, all of these are fact issues,
25 and the defendants have --

1 I'm not done.

2 Defendants will have an opportunity to bring in anybody
3 in their case. R.J. Reynolds is a party to this agreement that
4 we're talking about. They can bring in their own witnesses if
5 they believe this is material. This is a document --

6 THE COURT: I don't understand why we can't get a
7 stipulation if it's correct.

8 MS. EUBANKS: I don't know that it is. We are not a
9 party to it. And I seriously doubt in terms of that document
10 and to be prepared to go through this today.

11 When the witness stated on cross-examination -- or
12 sometime during his examination -- I don't remember who was
13 questioning -- when he raised this issue -- I think it came up
14 yesterday in the testimony -- I wanted to just establish what
15 this record was about insofar as their affirmative position on
16 what that document accomplished. Either the document speaks for
17 itself or not.

18 If they want to turn Mr. Myers into a witness to give
19 his opinions about what occurred at a settlement table where he
20 was not there, which is what it is that Mr. Bernick is
21 suggesting, he wants to say what this document indicates --

22 THE COURT: No. I think he wants to say or elicit from
23 the witness what the settlement agreement, which is not before
24 me, says.

25 I'd rather have a document -- I'll tell you that -- no

1 matter how blacked out it might be in terms of -- just
2 information I shouldn't know, let us say, than have the witness
3 testify. First of all, it opens doors.

4 I certainly am not interested in any of the
5 negotiations -- well, any of the background that goes into that,
6 that agreement. I'm interested in the facts, which is if the
7 agreement only covered half of this issue, i.e., 15 percent
8 rather than 2 million -- but I don't understand why we can't
9 ultimately get a document in the record no matter how
10 redacted -- is the word I was looking for -- to give me the
11 facts. So that's what you two are going to have to agree on.

12 MR. BERNICK: I'd be happy to do that if we can get
13 cooperation from the government --

14 THE COURT: Of course, I don't know how that document
15 reads. So he's done.

16 MR. BERNICK: He's done.

17 (End of bench conference.)

18 THE COURT: Mr. Myers, you may step down at this time.

19 THE WITNESS: Thank you.

20 THE COURT: All right. Counsel, you forced me to
21 forget something that I know I told you about -- of course, I
22 didn't triple-check my calendar -- namely, that I have a 12:00
23 o'clock conference call, and therefore we are obviously going to
24 take a lunch break at this time.

25 And I know Dr. Heaton lawyers were down here early and

1 she probably was as well. I don't think it was anticipated that
2 the redirect would take so long.

3 I just have to do this conference call. I Chair the
4 subcommittee, everybody.

5 MR. BERNICK: When would Your Honor convene? Can I
6 make a request, which is that -- I thought we were going to
7 finish now, and I have a conference call at 1:30 that I can't
8 miss. Could we --

9 THE COURT: We're certainly not going to finish
10 Dr. Healton.

11 MR. BERNICK: No. I'm saying I have to cover a couple
12 of matters of record with respect to Mr. Myers. Your Honor's
13 rulings, I want to make of record what's in and what's out with
14 respect to Mr. Myers' testimony.

15 THE COURT: But we don't need him.

16 MR. BERNICK: I just want to read it into the record so
17 that we have established what was in and out of his direct. And
18 I did proffer these two summary exhibits and I'd like to come
19 back to that now that his testimony has been complete, and all
20 that I would ask if the court is going to start up at 1:30, if I
21 can take this issue up perhaps at the end of the afternoon or
22 break.

23 THE COURT: We can take it up later.

24 I'm trying to decide between 1:15 and 1:30. I think
25 will do 1:30, everybody. I know it's a long lunch hour. But

1 1:30, please.

2 We will finish Dr. Heulton's testimony this afternoon.

3 I assure everybody of that.

4 (Lunch recess began at 12:00 p.m.)

5 INDEX

6 WITNESS: PAGE:

7 MATTHEW MYERS

8 CROSS-EXAMINATION BY MR. BERNICK 21655

9 CROSS-EXAMINATION BY MR. FREDERICK 21670

10 REDIRECT EXAMINATION BY MS. EUBANKS 21703

11 *****

12

13 *****

14

15 CERTIFICATE

16 I, EDWARD N. HAWKINS, Official Court Reporter, certify

17 that the foregoing pages are a correct transcript from the

18 record of proceedings in the above-entitled matter.

19

20

21 Edward N. Hawkins, RMR

22

23

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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 19, 2005
	.	
Defendants.	.	
.	

VOLUME 107
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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Official Court Reporter

1 AFTERNOON SESSION, MAY 19, 2005

2 (1:32 p.m.)

3 THE COURT: Good afternoon, everybody. The government is
4 ready to recall its witness; is that right?

5 MS. EUBANKS: That's correct, Your Honor, but I think as a
6 preliminary matter Mr. Payton has an issue to address with the
7 Court.

8 THE COURT: All right.

9 MR. WEBB: Well, Your Honor, I'll raise the issue first
10 and then Mr. Payton can chime in or respond to my comments. The
11 preliminary -- and I don't know that we need to exclude anyone
12 from the courtroom, but what the issue relates to is the
13 following: During my cross-examination of Dr. Healton, toward
14 the end of the day last Thursday, I put a document up on the
15 screen that Mr. Payton objected to saying it came from the
16 Lorillard litigation, which is a litigation in Delaware between
17 ALF and Lorillard.

18 THE COURT: I remember.

19 MR. WEBB: I represented that that was correct, although
20 it was not confidential because it was part of a public filing in
21 that courtroom as part of a summary judgment brief which I took
22 off of the Website. Okay, so it's public.

23 Mr. Payton wanted to check that out, I said that was fine,
24 although we were supposed to be very careful so that no one
25 talked to the witness, nor to the government, to front off my

1 examination. I sent Mr. Payton an e-mail the next morning
2 listing five documents, just so he could satisfy himself that
3 they were part of the public record in the Lorillard case, and he
4 promptly responded that he was able to verify that.

5 Last night I discovered I made a mistake. I had left
6 three documents -- I went through my outline and I put down five
7 documents; there were three documents that I just didn't realize
8 they had come from the Lorillard case. I just thought they came
9 from some part of the case, but I discovered through my
10 trustee -- if I did not have Kevin Narko I wouldn't survive in
11 this case. So last night Kevin tells me I left these three off.
12 So, at 11:00 last night, which I know is late, but I sent
13 Mr. Payton an immediate e-mail telling him the exhibit numbers,
14 that I made a mistake and telling him that I had double-checked
15 and that they were part of the public record in Delaware.

16 I met with Mr. Payton this morning on the first break when
17 I saw Mr. Payton in Court. He advised me that because of his
18 schedule, he was not able to verify what I put in my e-mail, and
19 I told him that was of some concern to me. So, I went and got,
20 for Mr. Payton's benefit I went and had my office send me -- I
21 actually have the docket sheet from the Delaware lawsuit part of
22 the public record in Delaware to show Mr. Payton that the three
23 new exhibits were also part of that summary judgment filing,
24 which I thought, hopefully, would end this matter so we wouldn't
25 have any delays today.

1 Now, that's where we are and I don't want to speak for
2 Mr. Payton, who may have things to add to it. I don't want to
3 front off these documents, I don't want to talk about them. If
4 we need to talk to them we should go to a sidebar because of the
5 presence of the government and Dr. Healton, and I think I should
6 let Mr. Payton address the Court.

7 MR. PAYTON: I believe Dr. Healton is not in the
8 courtroom. We asked her to stay out while we had this
9 discussion.

10 THE COURT: I don't see her.

11 MR. PAYTON: Mr. Webb's description of what happened is
12 exactly accurate. On Thursday, I believe the Court instructed us
13 that we would proceed the way he said. He should send me an
14 e-mail on Friday. He did. I responded to it, I believe, in like
15 two hours. I said those documents were fine. It's not just
16 documents, it was documents that were stamped "highly
17 confidential". There are a lot of those documents in the
18 Lorillard case.

19 The Lorillard case, as the Court knows, is a very
20 significant case to the Foundation where Lorillard is seeking to
21 de fund the Foundation and seeking a return of all the money it
22 has received under the MSA to return to an escrow agent. A lot
23 of the documents are very confidential. The way you know whether
24 something is confidential is you see it's stamped, and the way
25 you know it's been made public is I want to actually physically

1 look at what was attached to a motion where I know those
2 documents had the designation lifted. That's why I wanted them
3 to be sent to me by e-mail so I could do that. That's what we
4 did on Friday. I got an e-mail back saying we have resolved this
5 issue, thank you very much, and then last night at 11:00, 10:55,
6 I got an e-mail that said I made an inadvertent mistake, just
7 what Mr. Webb just said, and I then learned this morning that, in
8 fact, Court was proceeding more quickly than was anticipated and
9 that Dr. Healton may come on this morning. That's why I came
10 down here this morning. Okay. So that's why I came straight
11 down here.

12 THE COURT: It was a little later than I had hoped, but
13 that's all right.

14 MR. PAYTON: I agree with that, too, but we were where we
15 were, and it looked like it may be that she could come on this
16 morning. It actually did look like that when I got down here, so
17 I came down here.

18 In the Lorillard case, this very threatening litigation,
19 the final brief on the motions for summary judgment, cross
20 briefing, is due tomorrow, and my team is off working on that
21 brief. I did not want to simply yank them off to look at these
22 additional documents. Mr. Webb has shown me the docket sheet, I
23 do not have reason to believe what he is showing me is incorrect,
24 but I thought the procedure we set up was one which would have
25 allowed me to actually personally verify it because mistakes have

1 been made in connection with documents that were designated
2 confidential in the Delaware case, not in this case.

3 THE COURT: Can we handle it this way? When it gets to
4 these three documents, and as I understand there's only three in
5 question.

6 MR. WEBB: That's correct.

7 THE COURT: That at that point the record is temporarily
8 sealed, the courtroom is emptied, everybody's subject to that
9 sealing order, of course, and the confidentiality they've signed
10 on to, we do the testimony. You, in the next either 24 or
11 48 hours, verify one way or the other. If the documents are
12 fine, then the seal comes off and if the documents are not fine,
13 then that particular questioning, I'm not sure whether it gets
14 struck from the record. I would have to hear more about that,
15 but in any event, we take the appropriate action.

16 MR. PAYTON: That's fine.

17 MR. WEBB: That's fine with me, and I actually -- because
18 of the concern, I actually now I've been told I now have the hard
19 copy of the summary judgment brief with the actual documents. It
20 would probably take three minutes to verify it. I mean, I got
21 it. I went and got the actual summary judgment brief with these
22 three documents to show Mr. Payton that they're actually part of
23 the summary judgment brief, so if that's easier to take
24 five minutes, I can -- I have it here; is that right?

25 THE COURT: Will that satisfy you in terms of ascertaining

1 accurately whether the "highly confidential" label is no longer
2 valid?

3 MR. PAYTON: (Nodded head affirmatively.)

4 THE COURT: Let's do it now then, instead of sealing,
5 unsealing, all the rest of that.

6 MR. PAYTON: That's fine.

7 THE COURT: Why don't you do it now.

8 MR. PAYTON: I thought the procedure was so that I could
9 do exactly something like that, and --

10 MR. WEBB: I think we got -- I've just been told -- I
11 tried to get it over the lunch hour, I wasn't quite certain I had
12 it, and now I've been told it's been delivered here. Do you want
13 to take five minutes?

14 THE COURT: I always have reading material, Mr. Webb, so
15 you all can look over the document and hopefully it won't take
16 very long.

17 MR. WEBB: I'm going to take Mr. Payton in this room right
18 now with Mr. Narko and get this resolved and be back quickly.

19 (Brief pause in proceedings.)

20 MR. PAYTON: Just to complete the record, Your Honor, I've
21 reviewed them and they are what they purport to be.

22 THE COURT: Good. All right.

23 MR. WEBB: Thank you, Mr. Payton, for your cooperation,
24 and thank you, Your Honor, for the brief delay and I think we're
25 ready to call Dr. Healton.

1 THE COURT: All right. And Dr. Healton, you're still
2 under oath this afternoon.

3 THE WITNESS: Before we begin, I wanted to ask a question.

4 THE COURT: What's the question?

5 THE WITNESS: Over the weekend I recalled something and
6 it --

7 THE COURT: Have you discussed this with Mr. Payton?

8 THE WITNESS: No.

9 THE COURT: No, you aren't supposed to talk to him, so of
10 course you didn't.

11 Mr. Webb, did you hear that?

12 MR. WEBB: I heard -- I think I heard part of it, that she
13 had a question or that she wanted to say something because she
14 thought of something over the weekend.

15 THE COURT: And I believe she was about to say that she
16 had recalled something when I interrupted her, because I didn't
17 want her volunteering information. You can proceed as you wish
18 at this point.

19 MR. WEBB: Well, I'll give her -- let me --

20 THE COURT: And I'm going to instruct Dr. Healton again,
21 to try to talk directly into the mic and to keep your voice up,
22 please.

23 CONTINUED CROSS-EXAMINATION OF CHERYL G. HEALTON, Ph.D.

24 BY MR. WEBB:

25 Q. I think in fairness, if there's something that you

1 thought of that you want to correct, an answer that you thought
2 was wrong, is that what you are thinking of?

3 A. Yes.

4 Q. I think you're entitled to do that and I have no
5 objection. Why don't you tell us what you did that you think
6 you got wrong and tell us how you would like to correct it.

7 A. It isn't that I got something wrong, it's that I don't
8 know if I was right. I do not recall the incident.

9 Q. I didn't mean to interrupt you. I don't have any problem
10 if a witness thinks they made a mistake and said something
11 wrong, because I think you have a right to correct it. If you
12 think you're trying to modify or just add to something --

13 A. No, I'm not. I'm just trying to -- the statement I made
14 could, in fact, be wrong because of circumstances I remembered
15 over the weekend when I was away.

16 Q. Go ahead, I'll let you, that's fine.

17 A. So at one point in my testimony you asked whether I had
18 deleted the sponsorship of the article, which I have no
19 recollection of doing whatsoever, but over the weekend I
20 remembered all the circumstances surrounding that and I do not
21 feel that I can definitively say I didn't do it or someone else
22 didn't do it. So that's all I wanted to say, and if you want to
23 question me about the circumstances, I'll --

24 Q. That's fine, I accept what you say and we can move
25 forward. In fact, what I would like to do, Dr. Healton, I want

1 to pick up right where we left off with my cross-examination
2 last Thursday and just to kind of re acclimate you to where we
3 were, I was examining you about what is known as the
4 anti-vilification clause that appears in the MSA. And let me
5 just to reacquaint you with that. Could I have tab 86. It's JD
6 045158 given to -- do you have it there? Do we have that?

7 And this is the Master Settlement Agreement. Go to the
8 next page, Jamey. That's the language that you and I were
9 talking about on Thursday, if you remember.

10 A. Yes, I do.

11 Q. And I put it on the screen for you. So, this is the
12 language where it says "the National Public Education Fund shall
13 be used only for public education and advertising regarding the
14 addictiveness, health effects and social costs related to the
15 use of tobacco products and not be used for any personal attack
16 on, or vilification of" et cetera. That's the language and
17 you're familiar with that language; is that correct?

18 A. Yes, I am.

19 Q. Now, in fact, you told me, I believe, at the end of our
20 session last Thursday that the American Legacy Foundation took
21 that identical language and included it in its operating bylaws;
22 is that correct?

23 A. Yes, it is.

24 Q. And where we actually left off, at a point where -- let
25 me re -- I started to ask you some questions about whether or

1 not you were familiar with the actual reasons why the tobacco
2 companies had wanted that type of language included in the MSA,
3 and I showed you a document, Mr. Payton had an objection, we
4 took the document down. So I'm going to return to that document
5 now. So, could I hand the witness JD 055263, it's tab 93 A,
6 Jamey.

7 Do you now have a copy of the exhibit with you, Doctor?

8 A. Yes, I do.

9 Q. And what I put on the screen, I think we can explain to
10 the Court, this is a memo from the law firm of Wilmer, Cutler &
11 Pickering dated December 15th 1999; is that correct?

12 A. Yes, it is.

13 Q. And the subject says it's guidelines for interpreting
14 bylaw restrictions on Foundation advertising. And if we look at
15 the first paragraph it says that "this memorandum offers
16 guidance for interpreting the language in the American Legacy
17 Foundation's bylaws which prohibits" and then it goes on to,
18 basically, refer to the vilification clause. Do you see that?

19 A. You are talking about what's highlighted there?

20 Q. Just on the first page, that's all I'm talking about.
21 The memo deals with guidelines and how to interpret this
22 vilification clause; is that correct?

23 MS. EUBANKS: Your Honor --

24 THE WITNESS: Yes.

25 MS. EUBANKS: -- I'm going to object in terms of

1 asking this witness questions about this particular document
2 prepared by the witness's counsel's firm without a little more
3 foundation. I don't think it's appropriate to go into the terms
4 of what it says without establishing this witness's knowledge of
5 the circumstances surrounding the information that's contained
6 about the vilification clause and so forth.

7 MR. WEBB: Well, I don't think there needs to be speaking
8 objections. If there's a foundation objection, it can be made.

9 THE COURT: The objection's overruled. This is her
10 attorney giving her and her organization advice. If there's an
11 attorney-client privilege objection, and there is not, then of
12 course I'd examine it. The government, of course, doesn't have
13 standing to raise that kind of objection, so you may proceed.

14 BY MR. WEBB:

15 Q. Now, this -- let me just make sure I got an answer. I
16 think you answered, but we got interrupted.

17 This is a memo provided by the Wilmer, Cutler law firm
18 that provides guidance to ALF regarding interpreting the language
19 of the vilification clause of the MSA; is that correct, Doctor?

20 A. As it relates to Public Education Fund, yes.

21 Q. Okay. Now, this -- were these guidelines presented to
22 the Board of Directors of ALF?

23 A. Was this particular memo -- I don't know. It was written
24 before I, you know, came there, so I don't know if this physical
25 document was provided to them or not.

1 Q. Okay. Let's look at -- as far as why the tobacco
2 companies wanted this provision, the vilification provision, if
3 you would turn in the document to page 4 of the document. If I
4 could go to page 4, Jamey it's tab 93. What Wilmer, Cutler
5 advised ALF is about the legislative history of this clause. It
6 says, "the legislative history of the personal
7 attack/vilification restrictions offer some additional insights
8 into the intent underlying Section 12.2." 12.2 is actually the
9 bylaw of ALF that actually adopted or incorporated the
10 vilification clause; is that correct?

11 A. Um-hmm.

12 Q. You just have to answer for the record.

13 A. Can you repeat the question?

14 Q. I'm sorry.

15 A. I'm sorry, I was trying to familiarize myself. I hadn't
16 read what's up here yet.

17 Q. You don't have to, I'll take you through it together.

18 A. I'm sorry.

19 Q. You can look at anything you want to, but it says, "the
20 legislative history of the personal attack/vilification
21 restrictions offer some additional insight into the intent
22 underlying Section 12.2." And simply, for the Court's benefit,
23 Section 12.2 is ALF's bylaw that incorporated the vilification
24 language that was in the MSA; is that correct?

25 A. My recollection is that the MSA vilification clause, and

1 a few other items, were incorporated into the bylaws subsequent
2 to the first meeting of the full Board which did not occur until
3 February of 2000. It was incorporated, but it was some time
4 later, so I don't know about the Section 12.2. I may be
5 misremembering it, but --

6 Q. Well, we'll go to the ALF bylaws then, I'll quickly go
7 there. You do recall -- are you familiar with the section of
8 the ALF bylaws called Section 12.2?

9 A. Not by the section number, no.

10 Q. Fine. Jamey, could I call up tab 88, which will be JD
11 055220, which I believe are the ALF bylaws. And I think I
12 showed these to you last week. Do you have the ALF bylaws in
13 front of you, Doctor?

14 A. Yes, I do.

15 Q. And if you go to page 16 of the ALF bylaws, do you see
16 section -- I'm sorry, I'll wait for you to get there. Are you
17 on page 16 now?

18 A. Yes.

19 Q. Do you see Section 12.2?

20 A. Yes, I do.

21 Q. Do you see it says National Public Education Fund, and do
22 you see that ALF adopted the vilification language verbatim into
23 its bylaws?

24 A. Yes, I do, and I now understand. I think I was confusing
25 this with our papers of incorporation. I think it's

1 incorporated in more than one place, so I stand corrected.

2 Q. That's fine, no problem. Jamey, could I come back to
3 where I was with that previous exhibit.

4 So, now, are you back with me, Doctor? We're back on this
5 Wilmer, Cutler document now. It's talking about the vilification
6 restriction into the intent underlying Section 12.2. That's
7 referring to the ALF bylaw we just looked at; is that correct?

8 A. Yes.

9 Q. And your law firm went on to tell you "the initial
10 version of what is now section 6H of the MSA restricted only
11 political activity such as lobbying. The tobacco industry later
12 proposed language prohibiting any personal attack or
13 vilification of a person, company or government agency or any
14 group of persons, companies or government agencies. Industry
15 executives apparently did not want their own money used to
16 demonize them or their companies. The state representatives --
17 the state representatives countered with a proposal to strike
18 the phrase "any group of persons, companies, or governmental
19 agencies". But the industry insisted on retaining some
20 prohibition on collective attacks and succeeded in inserting the
21 substitute phrase "individually or collectively".

22 And then this is the key language I want to call your
23 attention to: "We understand from Attorney General Gregoire --"
24 You're familiar with Attorney General Gregoire, are you not?

25 A. Yes.

1 Q. Was on your Board, or went on your Board at some point;
2 is that correct?

3 A. She was on the Board from the beginning.

4 Q. From the beginning, and she was one of the leaders behind
5 the MSA; is that your understanding?

6 A. Yes.

7 Q. And she has -- anyway, at that time she was the Attorney
8 General of the state of Washington; is that correct?

9 A. Yes.

10 Q. "We understand from Attorney General Gregoire that the
11 industry's primary concern was personal tax on or vilification
12 of individuals working for the tobacco industry as epitomized by
13 the demon awards ad that ran in Florida during the negotiations
14 which placed tobacco executives on the same stage as Adolf
15 Hitler and which, by some accounts, nearly torpedoed the entire
16 settlement. But as evidenced by their insistence on including
17 the" -- and going to the top of the next page -- "the word
18 "collectively" in section 6H, the tobacco executives also
19 appeared to have been concerned about attacks on and
20 vilification of groups of companies and the tobacco industry."

21 I take it, as the President of ALF, you became aware that
22 the tobacco companies had inserted the vilification language
23 because of what had happened in Florida; is that correct?

24 A. I was told that.

25 Q. You were told that. And in spite of knowing that,

1 Dr. Heulton, as I understand it, after you became the President
2 of ALF, you went right out and you hired the former head of the
3 Florida Tobacco Advertising Campaign, Mr. Chuck Wolfe, to come
4 to work for you and you tasked him with developing ALF's
5 advertising campaign; is that correct?

6 A. No.

7 Q. Well, let me break that down. Did you hire Chuck Wolfe
8 to work on your advertising?

9 A. No. You're talking about me personally?

10 Q. Did ALF --

11 A. I'm sorry, we're just having --

12 Q. I'm sorry.

13 A. He was there when I came there and had been for a number
14 of months, I apologize.

15 Q. I'll clarify. You became the President of ALF; is that
16 correct?

17 A. Yes.

18 Q. And at the time you became the President of ALF you
19 learned that ALF had already hired Mr. Wolfe; is that correct?

20 A. Yes.

21 Q. And Mr. Wolfe had been the person in Florida responsible
22 for the advertising that the tobacco companies had become
23 concerned about; is that correct?

24 A. You're referring now to this Demon Award ad?

25 Q. No, I'm just referring -- listen to my question.

1 A. Okay.

2 Q. Did you generally understand that Mr. Wolfe had been in
3 Florida responsible for the state of Florida's advertising
4 campaign?

5 A. Yes.

6 Q. Okay. And he then, when he came to work for ALF, ALF
7 tasked him with the assignment of developing and working on
8 ALF's advertising campaign; is that correct?

9 A. Yes.

10 Q. And when you came on as President, you endorsed the
11 concept of ALF cloning the type of advertising that was done in
12 the state of Florida; is that correct, Doctor?

13 A. Not exactly.

14 Q. Well, let me show you tab 90, JD 055232, and --

15 A. I saw this, yeah.

16 Q. The document I've handed you is a memo to the Board of
17 Directors from you; is that correct?

18 A. Let me look at the date. Yes, it is.

19 Q. And it's dated March 8, 2000. Do you see that?

20 A. Yes.

21 Q. How long had you been working for ALF at this time?

22 A. I'd been on the payroll for one week.

23 Q. One week?

24 A. But I had been working for them for about three months.

25 Q. Three months you had been working on ALF issues; is that

1 correct?

2 A. Yes.

3 Q. Now, you basically tell the Board of Directors that
4 "enclosed is the full report presenting the steep decline in
5 Florida youth smoking." Do you see that?

6 A. Yes.

7 Q. And you go on to describe the data; is that correct?

8 A. Yes.

9 Q. And then you say to your Board of Directors "to state the
10 obvious, we are on the right track cloning Florida." Do you see
11 that?

12 A. Yes.

13 Q. Those were the words that you communicated to the Board
14 of Directors on or about March 8th, 2000; is that correct?

15 A. Yes.

16 Q. Now, as far as cloning what happened in Florida, when
17 we -- the last thing we did last Thursday is that I was
18 beginning to show you some of ALF's commercials, TV commercials,
19 and was asking you questions as to whether or not these appeared
20 to you to vilify or attack the tobacco industry. Do you recall
21 that?

22 A. I do.

23 Q. And just to re acclimate you, I'm not going to show it to
24 you again, I had shown you one commercial which is called
25 Shredder, which you and the Court observed and I won't go back

1 through. It showed this big machine in front of Philip Morris's
2 corporate headquarters in New York at 120 Park Avenue and we see
3 on the commercial documents and file cabinets and brief cases
4 being thrown into a big machine; is that correct?

5 MS. EUBANKS: Objection, Your Honor, that assumes facts
6 not in evidence. We do have a transcript of the Shredder ad, but
7 perhaps Mr. Webb misspoke, but he expressly said it involved
8 Philip Morris on 120 Park Avenue and there's nothing in the
9 record. And as I said, we have a transcript of that ad that
10 would project that, but that's assuming facts not in evidence.

11 MR. WEBB: Interesting this witness had no problem
12 answering that question with a yes, but counsel didn't like that
13 answer, so she decides to get up and coach the witness.

14 THE COURT: Objection's overruled. Go ahead, please.

15 BY MR. WEBB:

16 Q. I'll clarify that point because I'm not trying -- you and
17 I talked about this last week, the ad, and you told the Court
18 last week the ad was intentionally structured to be placed in
19 front of 120 Park Avenue, but you do not say in the ad the words
20 "Philip Morris" and you told the Court that last week; is that
21 correct?

22 A. Right, and just to be clear, for that particular ad and
23 all the ads in that series -- I think there were three -- there
24 was filming in front of other buildings. So I actually think
25 the shredder machine, just to be technical about it, was not in

1 front of Philip Morris, for what it's worth. It was around the
2 corner. I don't think it was possible to get the permit to put
3 it there because it's a big machine.

4 Q. But the point is you wanted to use Philip Morris's actual
5 corporate headquarters in the commercials; is that correct?

6 A. Well, it wasn't disclosed that it was Philip Morris when
7 it was broadcast, but that's where it was shot.

8 Q. And you made the decision to shoot it there?

9 A. Actually that decision was already -- had already been
10 made before I got there, but I didn't unmake it.

11 Q. Did you object to it?

12 A. No, I only unmade one part of that.

13 Q. Okay. Now, let me show you a couple of other ALF
14 commercials, another one that was shot at Philip Morris.
15 Actually, before I do that, I'm going to show you a couple other
16 commercials, but let me make sure it's clear. In fact, let me
17 have the vilification clause back up on the screen, tab 86, it's
18 JD 045158.

19 And just go to, Jamey, the page that -- there it is. I
20 just want to look at what -- what ALF had agreed to do was the
21 funds that it received from the tobacco companies for the
22 National Public Education Fund were to be used only for "public
23 education advertising regarding the addictiveness, health
24 effects and social costs related to the use of tobacco
25 products". So let me just stop there for a minute. When you,

1 as the President of ALF, designed these commercials, did you
2 take it upon yourself to be certain that the advertising did
3 only that, that it only communicated about the addictiveness and
4 health effects related to the use of tobacco products?

5 A. That's what our ads do, yes.

6 Q. And I take it you believed it was important for ALF to
7 live up to the letter and the spirit of the vilification letter;
8 is that fair to say?

9 A. We took that language very seriously, yes.

10 Q. And you're a charitable foundation, that's correct?

11 A. Yes.

12 Q. I take it you believe it's very important for charitable
13 foundations to act with honor and integrity; is that fair to
14 say?

15 A. Yes, indeed.

16 Q. Now, in order to just do that, to only communicate about
17 the addictiveness, health effects and social costs related to
18 the use of tobacco products, did you believe there was any need
19 to design commercials that focused on the conduct of the tobacco
20 companies?

21 A. As -- yes, I did think there was a need and I think the
22 science proves that there's a need. If you're going to have --
23 the NSA calls upon us to reduce youths' tobacco usage.

24 Q. Right, I understand you want to reduce --

25 A. We have to. That's what it tells us to do.

1 Q. Let's make sure we understand. You have to, but if for
2 some reason you could design very effective commercials that
3 violate that clause, you were not supposed to do that; is that
4 correct?

5 A. That's right.

6 Q. And so all I'm asking you is, if the only thing that
7 you're supposed to do is to communicate about the addictiveness,
8 health effects and social costs of tobacco products, if that's
9 all you're doing, why would there be a need to focus commercials
10 on alleged misconduct by tobacco company executives?

11 A. Well, first of all, only a portion of our commercials
12 focus on the documents of the tobacco industry. But the -- can
13 you restate your question because I want to be careful I answer
14 your question.

15 Q. I'll restate it.

16 A. And don't veer off.

17 Q. I'll give you the same question again. If you took
18 seriously that language that all you're supposed to do is
19 communicate about the use of tobacco products and you're not
20 trying to find a way to get around that, why would you need to
21 structure commercials that focus on something different, which
22 is alleged misconduct by the tobacco company executives?

23 A. Well, as we were talking last time, all three of those
24 concepts, addictiveness, health effects and social costs are
25 broad concepts, number one, and number two, the target of the

1 campaign, Open to Smoking Young People, is an unusually
2 difficult target to reach. I think everyone who knows the
3 science would agree on that. And so we had to find the most
4 creative way within the letter of the agreement to do that, and
5 that is what we set out to do. We've spent, literally, millions
6 complying with this. We've spent tens of -- I won't say the
7 figure, but millions having it adjudicated right now, and as you
8 know, soon there will be a decision from Delaware about whether
9 we have or have not violated this clause. And I've been told
10 from the beginning that the intent of the parties -- the
11 agreement specifically says that the intent of the parties
12 cannot be drawn in. Now, John may have drawn it in in a memo to
13 the former, you know, President, but my understanding is the
14 agreement explicitly says the intent of the parties can't be
15 drawn in, that it's the letter, it's the letter and a Judge is
16 now deciding on that.

17 Q. And I'm not trying to litigate that case.

18 A. Okay, well, I'm just saying it is being litigated and
19 there was enough of an issue, you know, that it's -- you know,
20 it's been going on for a long time and there'll be an answer
21 shortly.

22 Q. I didn't get an answer. I'm going to ask it --

23 A. I think I did.

24 Q. I'm just trying to find out if you, as the President of
25 this organization, you're trying real hard to live up to the

1 letter and spirit of this agreement as a charitable corporation
2 and all you're supposed to do is communicate about the use of
3 tobacco products, that's all you're supposed to communicate, why
4 do you need to use commercials that focus on alleged misconduct
5 of tobacco company executives?

6 A. I need to communicate -- I, we, the Foundation, need to
7 communicate to young people how it is they end up addicted, how
8 they end up suffering the health effects and how their families
9 suffer the health effects and what the social costs are. And
10 frankly, to divorce those three concepts entirely from the
11 machinery and the people and the effort that creates a
12 \$13 billion marketing machine that does, in fact, successfully
13 addict very large proportions of adolescents in this country,
14 you know, would mean that basically I'm supposed to do a public
15 education fund without disclosing where it came from.

16 Q. Well, actually, the question is, I thought you just said
17 you could -- there's no question you could design the best
18 commercials in the world, but if the best commercials in the
19 world do exactly what you just said, violate that clause, you're
20 not supposed to do it; is that right?

21 A. If they do, and that is being adjudicated, as we all knew
22 it would be when the language was put in there. Eventually you
23 would sue us, someone would sue us.

24 Q. Actually, let's look at a couple more of your ads. And I
25 think you -- one of your ads is called Lie Detector, which the

1 Court saw, and I'm going to show again during cross-examination.

2 Do you recall that ad?

3 A. Yes, I do.

4 Q. That ad, I'll play it in a moment, was also shot inside

5 Philip Morris's corporate headquarters in New York; is that

6 correct?

7 A. Yes.

8 Q. You had people go into the lobby of Philip Morris's

9 corporate headquarters with a box that purported to be a lie

10 detector; is that correct?

11 A. Yes.

12 Q. And the purpose of that was to communicate to the public

13 that Philip Morris executives lie; is that correct?

14 A. No, because, of course, the company's identity was not

15 divulged, number one, so, no.

16 Q. You're in the lobby of a tobacco company?

17 A. Right, that's what it says.

18 Q. That's what it says. Whatever the company is, you want

19 to communicate that whatever company that is lies; is that

20 correct?

21 A. I think the principle goal of that ad was to counteract

22 the very recent testimony by multiple tobacco executives that

23 they do not believe tobacco was addictive, number one. Number

24 two, while that ad was airing, I think you know this, Philip

25 Morris had actually filed papers in, I believe, the Weinberg

1 case continuing to purport that it was not addictive, that were
2 publicly available documents. So a lot of young people saw that
3 and we are trying to be certain that just because they see, you
4 know, five or six grown-ups swear they don't believe it's
5 addictive, that it, in fact, is addictive.

6 Q. Is the answer to my question yes and I'll move on?

7 A. But yes, we went into your headquarters with a lie
8 detector and we raised the issue that there was confusion. You
9 may want to show ad again.

10 Q. I'm going to show it right now to you, because I want to
11 get an answer to my question.

12 A. The question is it or is it not, and we're not trying to
13 send a message that you lie, we're trying to send a message that
14 confusion has been created very much so in the public domain
15 about whether or not nicotine is or is not addictive.

16 Q. I think I heard an answer there, but I've got to make it
17 clear. I asked you whether or not ALF was intending to
18 communicate with the commercial that people at that tobacco
19 company lie?

20 A. I think they were -- no, I do not think that was what was
21 being communicated.

22 MR. WEBB: Could I play the commercial? It's JD tab 95 JD
23 55247.

24 (Videotape played.)

25 BY MR. WEBB:

1 Q. Actually, let's show the transcript so we could parse out
2 what was said, could I have tab 95 A, which is JD 055296, which
3 is a transcript of what we just saw.

4 Would it be fair to say, Doctor, as you just saw that
5 commercial and as you look at the transcript, the only message,
6 the only message -- well, I'll take that back. Clearly, the
7 primary message that that commercial was trying to communicate
8 is about people at that tobacco company lying about smoking and
9 health issues; is that correct?

10 A. No.

11 Q. Okay. You -- in fact, when you actually look at what you
12 said in that commercial -- well, let me ask you: Is it your
13 position that the only thing that that commercial was designed
14 to communicate is a message about the addictiveness of tobacco
15 products?

16 A. No, it communicates many things.

17 Q. Okay. Well, we establish that the only thing that you're
18 allowed to communicate about is about the health effects,
19 addictiveness and social costs of tobacco products; is that
20 correct?

21 A. Yes. Broadly interpreted in the public interest.

22 Q. I'm sorry?

23 A. As we discussed, those are very broad concepts, so you
24 may tend to narrow them and I would tend to broaden them, being
25 a public health person.

1 Q. I thought you said long ago that you wanted to live by
2 the spirit and the letter of this agreement?

3 A. I said the three concepts are broad by definition, that's
4 all I said. I don't mean to start a debate about that.

5 Q. Do you sense that when you just saw that ad that there's
6 a focus on the conduct of that tobacco company?

7 A. I think the primary message of that commercial is that
8 there's a focus on the conduct of young people. It is a
9 commercial not for you, not for me, frankly, not for anyone in
10 this courtroom. It's a commercial to make young people think
11 critically about the whole issue of addictiveness and there's
12 nothing that appeals to an edgy young teen like taking control
13 of a situation and confronting grown-ups. I mean, that's what
14 that ad is about.

15 Q. So this ad, you don't think this ad in any -- does this
16 ad in any way communicate that people at this tobacco company
17 lie about tobacco-related issues?

18 A. I think it communicates very strongly that there's a
19 great deal of confusion, and in fact, there is and was,
20 particularly around the time of the congressional hearings.

21 Q. I'm going to ask the question again. Do you believe this
22 commercial in any way communicates to the American public that
23 the people at this tobacco company lie about tobacco-related
24 issues?

25 A. It sends the message that there's been a lack of

1 disclosure about health issues and about the addictiveness, and
2 I think that's a just fact. It's simply a fact in the record.

3 Q. What's the answer to my question?

4 MS. EUBANKS: Objection, Your Honor, the witness has
5 answered the question.

6 THE COURT: Sustained.

7 BY MR. WEBB:

8 Q. Let's look at another commercial. This one -- do you
9 recall the commercial that you entitled: Tobacco Suburbia?
10 Sometimes I have seen it called Hypnosis. Do you know that
11 commercial?

12 A. Yes, I do.

13 Q. And that commercial begins by a setting where it says:
14 Somewhere in tobacco suburbia and we see three male teenagers
15 driving around in a van in a nice suburban neighborhood where
16 wealthy tobacco executives live?

17 A. Well, they're asking are there tobacco executives that
18 live around here, yeah.

19 Q. Okay. Well, let's look at the commercial. Could I have
20 tab 96, JD 55248.

21 (Videotape played.)

22 BY MR. WEBB:

23 Q. Now, Doctor, having looked at that commercial, as the
24 President of ALF, did ALF carefully design that TV commercial so
25 all it did was to communicate the negative health effects of

1 tobacco products and nothing more?

2 A. No, because we're not required to only do that.

3 Q. Well, let me ask you this: When you just saw the
4 commercial, do you agree the entire commercial is not focused on
5 tobacco products, it's focused on tobacco company executives
6 making a lot of money and living in a wealthy neighborhood; is
7 that correct?

8 A. It's focused on young people taking control of the
9 situation and appearing to be activists, trying to help people
10 do the right thing.

11 Q. Doctor, as you just saw the commercial, do you believe
12 there is a focus in that commercial on tobacco company
13 executives making a lot of money and living in a wealthy
14 neighborhood? Do you believe it communicates that message,
15 Doctor?

16 A. It definitely communicates that tobacco is very
17 profitable and that when you buy it, this is what you're
18 contributing to, yes, it does.

19 Q. Now, the fact -- was that one of the things you were
20 supposed to be able to do in your ads is to communicate how
21 wealthy tobacco company executives become?

22 A. I don't think we're precluded from doing that, provided
23 we are reaching our target with the key messages and
24 substantially contribute to reducing youth smoking, which the
25 MSA requires us to do. It's a public document, and the funds

1 are coming to us from the states, not from the tobacco
2 companies.

3 Q. Well, let's -- I'm sorry, the money's coming to you from
4 the states --

5 A. The funds are paid to the Foundation on behalf of the
6 states.

7 Q. Right, the great states out there. That money -- does
8 that money come from tobacco companies, Doctor?

9 A. It does, as part of a legal agreement to avoid the
10 continuance of 46 litigations, yes.

11 Q. Now, Doctor, if we -- let's look quickly at a transcript
12 of that commercial, it's tab 96 A, JD 055296 now, and I'll get a
13 chance to have you look at it.

14 A. I don't have a copy here.

15 Q. We're going to get you one right now.

16 A. Thank you.

17 MS. EUBANKS: Your Honor, I don't know if it's an error or
18 not, but I'm informed that that was not the entire ad that was
19 shown.

20 THE WITNESS: The first half was left out, that's why I
21 mentioned, did you mean to leave the first half out.

22 MR. WEBB: I didn't try to leave anything out.

23 THE WITNESS: It's the last half of the ad.

24 MS. EUBANKS: As long as the record is clear, that's fine,
25 but I just want the record to reflect what we saw was not the

1 entirety of that ad.

2 THE COURT: I understand.

3 MR. WEBB: Actually, I'm now told that that ad ran in
4 different versions on TV, sometimes in longer form. I'll ask the
5 witness. Did that ad always run exactly in the longer form?

6 THE WITNESS: Most of our ads, I don't know if this one
7 had a 60 and 30 second version, but I don't recall that being the
8 30 second version. It may be, I can't confirm it.

9 MR. WEBB: Well, Your Honor, I'll check over a break.

10 BY MR. WEBB:

11 Q. As far as the transcript is concerned, if we look at
12 this, at the transcript of what you're actually communicating,
13 do you think that there's a personal attack on tobacco company
14 executives in this commercial?

15 A. No, because I think personal is personal.

16 Q. Well, in this particular one, you went into the --
17 supposedly the setting is the personal neighborhood of where
18 these people personally live; is that correct?

19 A. Well, obviously it's not. I mean, it's a suburb, and if
20 you see the first half, then you'll know that they don't know
21 where they're going. The part that's missing is it opens up
22 with them pulling up to a fast food store saying, you know, do
23 any tobacco executives live around here, we want to try to help
24 them.

25 Q. Are you talking about the 60-second version?

1 A. Well, I don't believe that what's in front of me that has
2 ten sentences is the 30-second version.

3 Q. I'm going to find out.

4 A. All I'm saying is, I've seen this ad frequently over the
5 last, you know, few months because of the other litigation, and
6 you know, it does not begin there.

7 Q. And we'll check on a break.

8 A. So let's assume this is --

9 Q. I just want to make sure -- as far as what you're
10 communicating, the setting that you set forth here deals with
11 talking about -- I guess looking for an industry that kills over
12 a thousand people a day pays pretty well, huh. Do you see that?

13 A. Yes, I do.

14 Q. Is that a commentary on the income of the tobacco company
15 executives?

16 A. Well, it's a commentary -- I think the main point here is
17 you can take control, young people, that most Open to Smoking
18 Young People are the ones who tend to be very edgy and risk
19 takers. They, in this, you're making the point, we're
20 communicating the social costs, a thousand people a day, and
21 we're communicating the addictiveness, looks like money is
22 addictive, too and the point here is, of course, in addition to
23 nicotine.

24 Q. Just so I know, there is a commentary in here about the
25 amount of money made by tobacco company executives; is that

1 correct?

2 A. There is and a lot of that money is coming from youth
3 purchase.

4 Q. Now, Doctor, am I correct that ALF wasn't satisfied with
5 the TV commercials vilifying the tobacco companies enough, ALF
6 found a second way to use your Website to vilify tobacco company
7 executives; is that correct?

8 MS. EUBANKS: Objection, argumentative.

9 THE COURT: Say that again.

10 MS. EUBANKS: Argumentative.

11 THE COURT: Sustained.

12 BY MR. WEBB:

13 Q. Doctor, did ALF develop -- did ALF develop a way to use
14 its Website to vilify tobacco company executives?

15 A. No.

16 Q. Well, did ALF develop a feature on its own Website which
17 supposedly encouraged young people of the ages between 12 and
18 17, your target group, to send e-mails directly to tobacco
19 company executives when ALF provided their name?

20 A. There -- yes, there was a way to send a personal e-mail,
21 meaning something you wrote, and there was also something called
22 madlibs, both of which were taken down.

23 Q. They're not used now, are they?

24 A. They haven't been used for almost three years, maybe
25 more.

1 Q. Well, we're not going to miss -- they were used for two
2 years; is that correct?

3 A. It sounds about right.

4 Q. Let's show the Court what ALF designed here. Could I
5 show tab 101. It's JD 55267. And this is -- this is what
6 you're referring to, this is ALF's Website, this is from --
7 you've seen this, have you not, Doctor?

8 A. I haven't seen it in this exact form, but --

9 Q. Have you seen ALF's Website?

10 A. I don't go to the Website very often personally, I mean,
11 I see the content that's being loaded up on it.

12 MS. EUBANKS: Your Honor, I'm going to object to this
13 line. This is beyond the scope of the written direct
14 examination. It's far beyond the scope. I mean, I've allowed
15 without objection some questions dealing with vilification, but
16 we've gone down that road now and now we're moving to the
17 Website. It's beyond the scope.

18 MR. WEBB: Your Honor, it's clearly not beyond the scope.
19 I started this exam showing her her testimony where she's blaming
20 tobacco company executives for doing things against ALF, and I
21 have a right to show that tobacco company executives had some
22 reason to be concerned about what ALF is doing, and clearly that
23 this is relevant to her direct examination. This also violates
24 the vilification clause of the agreement that this foundation
25 entered into. It's highly relevant, Your Honor, it's just as

1 relevant as the ads I went through.

2 MS. EUBANKS: Your Honor, with respect to the issue of
3 violating the MSA, by putting on evidence of the intent of the
4 MSA, that itself is a violation of the MSA, the parole evidence
5 that was displayed with respect to that. But regarding the
6 Website, at page 15 of the written direct, is the information
7 that the United States proffered through the written direct
8 examination about this witness, but going down this path is far
9 beyond the scope.

10 THE COURT: The objection's overruled.

11 MR. WEBB: Thank you, Your Honor.

12 BY MR. WEBB:

13 Q. What ALF did is that ALF -- what we're looking at is on
14 ALF's Website, ALF provided a way for young people, 12 to 17
15 years of age, to send what turned out to be vile and profane
16 e-mail to tobacco company executives; is that correct?

17 A. Certainly that was not our intent and --

18 Q. Is that what happened, Doctor?

19 A. Well, you're giving me a document from my Website that
20 does not include the statement to the young people in a very
21 cool way, a youth type way, telling them that they should not --
22 that it is bad for them to communicate with the use of
23 profanity. That does not appear on here.

24 Q. Well, we'll go through that, the whole story.

25 A. Well, let's have the whole story.

1 Q. We are, Doctor, don't get upset, we're going to tell the
2 whole story. We're going to start with, show the Court what ALF
3 designed and then we'll move on to what happened. What this is,
4 so the Court understands, is what you tell these kids is --
5 "they" -- referring to tobacco companies -- "spend billions on
6 the advertising, they put into the magazines you read and the
7 stores you shop and still most of it sucks. Let them know what
8 you think. Here's how you do it. To create a customized" --
9 I'm not going to -- the Court can see the language. "Fill in
10 the spaces on the following page with any word you can think of.
11 The only rule is that the word must match the part of speech
12 asked for in each space", and what as you fill in the words that
13 go into this form e-mail, you then get -- the person gets to
14 choose what tobacco company they want this delivered to; is that
15 correct?

16 A. I'm afraid that probably, is the best I can say. I
17 haven't gone through this, personally, in all of its dimensions.

18 Q. I gave it to you. You have it in front of you. If you
19 go to the third page, if someone clicks on Brown & Williamson --
20 can I go to the third page of this document, Jamey. That's the
21 second page, I have to go to the second page, Jamey.

22 Well, we can do this first.

23 A. Was there an -- I just want to clarify so I know what I'm
24 looking at. No ad was made based on this, right, this was not
25 broadcast in any way.

1 Q. I'm going to go through it.

2 A. I just want to make sure.

3 Q. You can say anything you want.

4 A. Okay, you're going to tell me. Okay. Good.

5 Q. If you click on Brown & Williamson, what ALF was kind
6 enough to do with these kids is to provide them with the name
7 and office -- and the title of people that they could send these
8 form e-mails to; is that correct?

9 A. That's my understanding, yes.

10 Q. Okay. Let's go back and look at the way ALF designed the
11 form e-mail that was going to go to these executives, so I can
12 go to the second -- Jamey, there we go.

13 The kids are supposed to fill in the blanks. "Dear
14 Mr. Tobacco company executive, I just wanted to say that I think
15 your -- I think the way your -- blank -- cigarette companies
16 deceive the world really -- fill in the blank -- and I don't
17 understand how you can -- fill in the blank -- with yourself
18 selling a -- fill in the blank -- product like cigarettes." And
19 it goes on. Do you see that?

20 A. Yes, I do.

21 Q. ALF designed the phraseology and put the blanks where
22 they wanted to put the blanks for the kids to fill in; is that
23 correct?

24 A. That's my understanding. Our ad agency, yes.

25 Q. And this is being done to educate kids; is that correct?

1 A. It's being done to empower them to speak out. I think
2 most of them just sent regular e-mails, many about losing their
3 father or mother or aunt or uncle or grandparents.

4 Q. Well, actually, ALF kept -- let's show the Court what
5 happened. ALF kept very close track of these tobacco company
6 executive e-mails that got sent; is that correct?

7 A. I -- I can't answer that. I don't -- I don't know what
8 you mean by "close track". I literally do not.

9 Q. Did you, as the President of ALF, sometimes make
10 inquiries because you wanted to be certain that enough e-mails
11 were going to tobacco company executives to slam them?

12 A. Never.

13 Q. Okay. Well, let's see what happened.

14 A. I made an inquiry when we got a call complaining about
15 them and I asked to see them and I reviewed them with our
16 counsel.

17 Q. Well, we'll go through that. Let's first of all show the
18 Court what the result of this function was. Could I show the
19 witness, it's tab 102, Jamey, it's JD 055268, tab 102. I'm not
20 going to put this -- I made a mistake, don't put that. Your
21 Honor, there's bad language, I can give you a copy. We don't
22 need to put this on the screen, I'm just going to give you a
23 copy.

24 I don't mean to put this on the screen.

25 What we see here, Doctor, is this is actually dated

1 February 6, 2002, do you see that? There's an e-mail -- actually
2 it's February -- there's an e-mail from someone named Wayne
3 Griffith to Ellen Vargyas; is that correct?

4 A. Yes. I'm seeing it for the first time. I've never seen
5 it before.

6 Q. Ms. Vargyas is the General Counsel of ALF?

7 A. Yes, and I suspect she requested it.

8 Q. And who is Wayne Griffith?

9 A. He's our web master. He's not really technically a web
10 master, but in charge of the web.

11 Q. And Mr. Griffith writes to Ms. Vargyas, "Dear Ellen" --
12 or "Hello Ellen. To answer your question about the quantity and
13 tone of the e-mails our users are sending to the tobacco company
14 executives, from January '02 to February 1, users have sent
15 1,434 e-mails to tobacco company executives via thetruth.com.
16 Below are all the e-mails that were sent in January of '02."

17 So what we're looking at now is just e-mails for one
18 month; is that correct?

19 A. No, I can't answer that because this only includes the
20 madlibs, and the e-mails that I looked at carefully were the
21 e-mails that were actually written by the young people, which
22 the Board had unanimously voted they had a right to do. So I
23 think I'm only seeing here how many filled out this form thing,
24 and I have not personally seen what's in front of me right now.
25 I have seen their -- other sets of e-mails, which I actually

1 think are more voluminous, but I can't be certain.

2 Q. Do you believe Mr. Griffith is a competent employee?

3 A. Are you asking me only about madlibs, because we have two
4 types?

5 Q. I'm asking what the e-mail says and I'm trying not to
6 argue with you. Do you see where Mr. Griffith says "below are
7 all of the e-mails that were sent in January of '02"?

8 A. That's quite possible.

9 Q. Okay.

10 A. I mean the -- you know, hundreds of thousands of young
11 people have come to the "truth" Website, so this wouldn't
12 surprise me at all, that that many people wrote one.

13 Q. And at this point in time the Website had already been
14 using these executive e-mails for about two years; is that
15 correct?

16 A. Um.

17 Q. It started in March of 2000, did it not?

18 A. I don't know when it started. It could be -- I would say
19 some time in the spring of 2000. It would make sense, because
20 of the discussion of the First Amendment rights of the young
21 people took place at the February Board meeting, and that was
22 when the Board said there had to be this admonition not to use
23 profanity, or encouragement not to use it.

24 Q. It starts in the spring of 2000 and this happens to be in
25 January of 2002; is that correct?

1 A. Yes.

2 Q. So there's no question that this was not some short-lived
3 project, ALF kept this e-mail project going on for about two
4 years; is that correct?

5 A. That's right. You know, I believe we took it down when
6 we received a complaint about it and I think, you know, that the
7 companies were able to block them.

8 Q. Well, we're going to come to that.

9 A. Okay.

10 Q. We're going to come to the companies trying to block
11 them. We're going to tell the story. I'm not going to read --
12 in fact, maybe we can just agree, if you just read the first
13 three or four e-mails here and my question is, as you read them,
14 would you agree with me that they're filled with profanity,
15 vileness and attacking these company executives personally?

16 A. I'm afraid I wouldn't go that far, but obviously, they're
17 a subject of the adjudication that's occurring right now.

18 Q. Well, I'm going to try to avoid reading the e-mails.

19 A. Yes, they used profanity, they used the "F" word, they
20 violated what the Foundation asked them not to do. Again, we
21 are trying to appeal to very edgy kids.

22 Am I proud of this particular feature of the Legacy's
23 work? No, I am not. But I'm not going to sit here today and say
24 that we violated the law while it's being adjudicated elsewhere.
25 I don't feel competent to make that determination.

1 Q. Fine. Well, let's just -- I'll tell you what.

2 A. At this juncture.

3 Q. I'm not going to read off any of the profanity. But as
4 far as whether, let's break it down. Do you agree that these
5 e-mails are filled with profanity?

6 A. Yes. Some of them have profanity, and assuming these are
7 all of them, many of them do.

8 Q. And it's not just -- it's not just mild profanity, some
9 of these would clearly be called vile?

10 A. I haven't had a chance to read it. I saw the "F" word on
11 the first page.

12 Q. Read the first one. Just read the first one and I won't
13 make you read them all. Tell me if that doesn't appear to be
14 vile?

15 MS. EUBANKS: Your Honor, in terms of -- I want to renew
16 the objection on scope here. I think we have the document
17 itself. I think we need to move on if we're going to finish with
18 this witness.

19 THE COURT: And I'm flipping through it.

20 MR. WEBB: I'm not going to --

21 THE COURT: I thought young people had a better command of
22 the English language than that. Go ahead, Mr. Webb.

23 BY MR. WEBB:

24 Q. I'm not going spend a lot of time. I'm going to make a
25 couple points and move on. Just take the first one, fairly

1 vile, would that be fair to say?

2 MS. EUBANKS: Your Honor, I don't understand what asking
3 this witness questions about whether e-mails that kids sent, that
4 we've already established were vile or not, has any relevance to
5 these proceedings. And furthermore, with respect to
6 vilification, that's not an issue that the defendants have raised
7 in this litigation.

8 THE COURT: This is an exhibit now, it's in the record. I
9 don't think we have to question the witness on her personal views
10 as to the e-mails.

11 BY MR. WEBB:

12 Q. Now, I'm going to show you just one more, just to show
13 that this conduct went on for two years. Could I have tab
14 101 -- don't put this on the screen, tab 101 A, it's JD 55411.
15 I'll hand one up to the Court.

16 This is one that was sent in the early stages, this is
17 dated, you see, in November of 2000. Do you see that?

18 A. Yes.

19 Q. This is sent to a female executive at Lorillard whose
20 name is Judith Young. Do you see that, at the top where it
21 says --

22 A. Yes.

23 Q. Do you see that? That name was provided to somebody,
24 apparently, whose name is Shelly, by ALF?

25 A. Yes.

1 Q. And again, I don't have to read this, either, into the
2 record, but do you agree it's filled with profanity? Do you see
3 that?

4 MS. EUBANKS: Objection, Your Honor, the document will
5 speak for itself. It's the same objection. We don't need to go
6 through these e-mails. They say what they say.

7 THE COURT: I've read it.

8 MR. WEBB: Thank you.

9 BY MR. WEBB:

10 Q. Is it true, Doctor, that ALF wanted these profane e-mails
11 after -- strike the question. After ALF discovered, back as
12 early as 2000, the way -- the type of e-mails that were going to
13 these executives, ALF found out that some of the tobacco
14 companies decided to protect their executives from this and
15 tried to block the e-mails; is that correct?

16 A. I only know that from testimony in the other -- that
17 occurred in the other case. I have no firsthand knowledge of
18 that. The first, to my knowledge the first I ever saw these is
19 when we received a complaint about them.

20 Q. And my question, are you generally aware that after ALF
21 discovered that, particularly my client, actually, found a way
22 to protect their executives from receiving these vile e-mails,
23 ALF tried to find a way to get around the block so it could
24 still get the e-mails, the profane e-mails to Philip Morris; is
25 that correct?

1 A. I'm not aware of that. That's the first I'm hearing
2 that.

3 Q. Well, let me show you, if I could show the witness --

4 A. And are we talking about madlibs or are we talking about
5 a simple e-mail about losing a loved one? I just want to
6 understand so I know what we're talking.

7 Q. I'll show you.

8 A. I believe most of the e-mails that were sent were just
9 young people expressing their personal views and concerns.
10 These are the -- these read very irresponsibly, we have many
11 that read very responsibly, that's all.

12 Q. Do you have anything else you want to say?

13 A. I'm sorry.

14 Q. I'm going to show you, as far as this issue of blocking,
15 could I show the witness tab 103, which is JD 055270.

16 If we see this there, do you see an e-mail at the top of
17 the screen from a person named Sharon, and I don't want to
18 mispronounce her last name.

19 A. It's Natanblut.

20 Q. And do you know her?

21 A. I do know her.

22 Q. Okay. And it's from Beverly Kastens. Do you know her?

23 A. Yes, I do.

24 Q. Okay. And it says here, this is dated December 18th,
25 2000, "I would like to discuss this with you and Phil when you

1 have a chance." It says "re letters to big tobacco.
2 Specifically I'm wondering two things, were these madlibs a good
3 thing to do? If so, what can we do to get it going again? What
4 if a banner ad were designed that allowed kids to click on it
5 and send a message to big tobacco? I think kids might love
6 that. Also, please explain how Philip Morris is blocking our
7 messages from going through. Can we get around that? I hate
8 taking them off the list this way." Have you seen this e-mail
9 before?

10 A. I don't remember ever seeing this e-mail, and I can --
11 I'm fairly certain I never asked for these two questions to be
12 answered, so --

13 Q. I haven't gotten to your e-mail yet.

14 A. Whatever, I'm kind of astounded looking at it. I do get
15 thousands upon thousands of e-mails, and someone may have
16 described to me a desire to have this information, but I believe
17 it would be a false attribution.

18 Q. Let's go through --

19 A. I know when I asked about them was when we got a
20 complaint and it wasn't then.

21 Q. And as far as you being the President of ALF, this is
22 December of 2000, the program's been going on for seven, eight,
23 months at that time; is that correct?

24 A. Yeah, I mean -- it's December of the first year, yes, so
25 it's been going on about a year. I have no recollection of this

1 communication.

2 Q. But as far as -- I take it people in ALF decided this was
3 a good idea because you kept it going for another 18 months; is
4 that correct?

5 A. I know that it stopped soon after we explored what the
6 material was in response to a complaint. I cannot remember when
7 I sat down with our EVP and looked at that material, but I do
8 remember that meeting and it wasn't that early. I don't think I
9 even -- even think Ellen Vargyas was there at the time.

10 Q. The timeframe -- let me ask the question, Doctor. The
11 timeframe -- you told me a moment ago you believed the program
12 started -- I told you I believed it started in March.

13 A. Right.

14 Q. You said you thought it was spring of 2000; is that
15 correct?

16 A. Yeah.

17 Q. Is that right?

18 A. That was my recollection.

19 Q. And I just showed you an e-mail a moment ago of a
20 collage, they're still going on in 2002; is that correct?

21 A. That's possible, um-hmm.

22 Q. During that two-year time period, as the President of
23 ALF, you were never aware that these profane and vile e-mails
24 were being sent to these tobacco company executives?

25 A. All I knew is what I knew from our Board meeting when it

1 was approved. And to my knowledge, I had never seen any of
2 their e-mails until there was a complaint and I said to my
3 counsel, get it all and let me look at it.

4 And when I looked through it all -- and I was not given
5 at that time, I don't believe, the madlibs, I was given the
6 other e-mails, some of which were not appropriate language. By
7 the same token, the site did say do not use that language, it's
8 not a good way to communicate. Most of them were simply heart
9 felt young people's stories about losing their loved ones, and
10 frankly, I think that is very important to provide them that
11 opportunity. I do not -- and we don't provide it now. I think
12 there's nothing wrong with providing that opportunity. I don't
13 particularly care for the madlibs because of the way they were
14 executed.

15 So you're asking me, did I look into it to see whether
16 these things were happening, I thought I would have heard if
17 these were happening. This was a couple years before any
18 complaint was registered with ALF. It may have been registered
19 with NAAG, but when I was aware of it was some time --

20 Q. Well, let's look, because we're now in the first year of
21 this going on and this is December of 2000. Who is Beverly
22 Kastens?

23 A. Beverly Kastens is the Vice President for Marketing.

24 Q. Okay, she's the Vice President for Marketing. Go back
25 up -- I'm sorry, Jamey, just go back up and she's writing --

1 she's writing this e-mail --

2 A. At the time she was, do you want to know what she was at
3 the time?

4 Q. Yes, what was she then?

5 A. I believe she was the Director of Marketing

6 Q. We have the Director of Marketing, she wants to make sure
7 we can try to keep this thing going; is that correct?

8 A. Yes.

9 Q. And that Director of Marketing at the same time wrote an
10 e-mail to you responding to some of your requests about this; is
11 that correct?

12 A. I never made those requests, and I do not understand this
13 e-mail.

14 Q. Well, let's go through it and see what it says. This is
15 from Beverly Kastens --

16 A. Let me back up, because I want to be clear. I know at
17 one point I said how many letters are being sent, but I was
18 referring not to madlibs, I was referring to the young people
19 writing their own e-mails. I did ask that once, and I don't
20 know what prompted it, but other than that, I certainly would
21 never ask question two.

22 Q. Well, we're going to go through it and then we'll talk.
23 Let's make sure it's clear. On December 15th of 2000 your
24 Director of Marketing, Beverly Kastens, sends an e-mail to you.
25 Do you see that?

1 A. Yes.

2 Q. And she says "Dear Cheryl"?

3 A. Yes.

4 Q. "Below is the information you requested on the number of
5 letters to big tobacco from thetruth.com. As you saw, we do
6 have a warning about profanity and harassment on the page where
7 people send letters. You also asked about: How many letters
8 are being sent out? And are the tobacco executives being
9 slammed by "truth" e-mails?" Do you recall asking those two
10 questions?

11 A. I don't, but in looking at it, the only thing I could
12 reconstruct is that I may have had, as you know, the tobacco
13 industry meets periodically with NAAG, Chris was the liaison to
14 Philip Morris and she, on and off, would call me. She may have
15 called me and said somebody mentioned these to me and I may have
16 said what's going on with these. And incidentally, if I said
17 are tobacco executives being slammed, it was so I could see
18 whether that was, in fact, a problem. Now, what kind of answer
19 did I get, you'll have to refresh my memory. This was five
20 years ago.

21 Q. We'll show you. This is what you asked. So let's -- can
22 we go on down, Jamey.

23 I'm sorry, we've got to go back up, Jamey, I'm sorry.

24 She says, "you ask about how many letters are being sent
25 and are tobacco company executives being slammed by "truth"

1 e-mails?" And she starts --

2 A. I get it now. "Slammed" is a technical term. I
3 understand what it was about now.

4 Q. Okay. I'm going to go through the e-mail.

5 A. I apologize, go ahead.

6 Q. "How many letters are being sent", and you find out that
7 there's 7,363 madlibs, is that what it says?

8 A. Yes.

9 Q. And "are tobacco executives being slammed by "truth"
10 e-mails" the answer given is "circle.com meters the delivery of
11 e-mail messages, it's about 10 messages every 10 minutes. So if
12 someone goes in and submits a hundred messages, they aren't able
13 to flood an in box all at once." Then they go on to the good
14 news, "however, all the messages do go out over time. Also,
15 please note that Philip Morris' personnel have been taken off
16 the list since they are blocking our messages at the mail
17 server. Cheryl, I hope you find this information reassuring.
18 If it gives you pause for any reason, please let us know and
19 we'll address your concerns."

20 Now that you've seen this, did anything from being advised
21 about that, why is it you did nothing for another 18 months to
22 stop this from going on?

23 A. Well, let me back up. Now, I have a -- a very vague,
24 believe me, very vague, memory of this. Someone, and I don't
25 know who, told it to me. It could have been someone at NAAG or

1 Chris Gregoire said we were causing something to happen to the
2 computer system at the tobacco companies. She didn't say a word
3 in that conversation -- she said you're jamming up their system,
4 which it turns out is called slamming a system. So I simply
5 made an inquiry are we slamming their system, so they're
6 reassuring me that it's coming out at a pace that will not stop
7 their regular e-mail from coming in.

8 The other thing I would say is no one gave me any
9 information in there about the content. I wasn't asking about
10 the content, I was asking about something else entirely. And I
11 frankly don't even think the content had been raised to me at
12 that point. It later was raised to me, as I said.

13 Q. Well, we just looked at some of the e-mails in this
14 courtroom; is that correct?

15 A. E-mails that I have never seen before, yes, they're here.

16 Q. It's your testimony, as the President of this
17 organization, this program to educate young people went on for
18 two years in what we now know the profane and vile e-mails were
19 going to tobacco company executives and you as the President
20 knew nothing about it?

21 A. Because no one raised it with me, including the tobacco
22 industry.

23 Q. Now --

24 A. It's a \$140 million budget, a lot goes on. As President
25 I cannot be involved in every single detail and read every

1 communication that goes out of the Foundation.

2 Q. Let's go to a new subject, Doctor. Doctor, in your
3 written direct examination, you talk about certain meetings you
4 had with Mr. Szymanczyk on the subject matter of Philip Morris
5 providing additional funding to your organization; is that
6 correct?

7 A. Philip Morris agreeing to an amendment of the MSA, right,
8 or --

9 Q. Could I have the written direct. It's tab 54, it's page
10 36 of your written direct examination, line 16 to 21.

11 THE COURT: During the break, everybody, we'll help you
12 get more water, I gather people are running out this afternoon.

13 MR. WEBB: Fine, thank you.

14 THE WITNESS: Page 36?

15 BY MR. WEBB:

16 Q. Yes, I put it on the screen, are you on page 36?

17 A. Yes.

18 Q. You talk in here about meetings you had with
19 Mr. Szymanczyk; is that correct?

20 A. Let me just -- I haven't seen this in some time.

21 THE COURT: That's at line 16?

22 THE WITNESS: Pardon?

23 THE COURT: Line 16 on page 36.

24 THE WITNESS: So just the question and answer you want me
25 to read?

1 BY MR. WEBB:

2 Q. Yes, I'm just trying to refresh your memory that you put
3 in your written direct examination about this subject matter of
4 meeting with Mr. Szymanczyk, asking him about funding; is that
5 correct?

6 A. Yes.

7 Q. So the Court's clear, what you wanted Philip Morris to do
8 was for Philip Morris to fund ALF beyond what Philip Morris was
9 obligated to do under the MSA; is that correct?

10 A. I suggested to Mr. Szymanczyk that given the results that
11 were about to be published that there was a 20 plus -- actually
12 a 20 to 50 percent impact of the campaign on youth smoking,
13 that -- and I gave him a heads-up on that that it wasn't coming
14 out yet, that I thought it was the time, if there was ever a
15 time, to allow the Attorneys General to reopen the Agreement one
16 way or the other. And again --

17 Q. I asked you a simple -- did you want Mr. Szymanczyk to
18 have Philip Morris put in additional money beyond what Philip
19 Morris was obligated to do under the MSA?

20 A. Provided it was in a legally binding agreement, yes.

21 Q. And you had several meetings with Mr. Szymanczyk over the
22 last 18 months on that subject; is that correct?

23 A. I had three meetings.

24 Q. Okay. And --

25 A. I recollect three meetings.

1 Q. And Mr. Szymanczyk made it very clear to you that in
2 spite of the e-mails and the ads, he still was willing to go
3 forward and fund you with additional money; is that correct?

4 A. He said it was something that could be discussed with
5 very strict parameters, and it's no longer my discussion,
6 obviously, it's now left in the hands of the committee of the
7 Board.

8 Q. Oh. Let's show -- could I show the witness JD 052837.
9 It's tab 55. This is in April of 2004. Mr. Szymanczyk writes
10 you a letter regarding these discussions; is that correct?

11 A. Yes, I haven't read this in a while, but yes, this is a
12 letter that he sent me.

13 Q. And for time reasons I'm not going to spend -- but he
14 goes on to talk about the fact that he's willing to have Philip
15 Morris consider giving you extra money, but he raises -- do you
16 see where he says "at present, it seems to us opportunities
17 exist for Philip Morris USA to provide funding for new Legacy
18 programs, like the youth cessation work you've been discussing
19 with Howard Willard. Assuming our collaboration results in a
20 plan we're both pleased with, we're willing to fund this
21 development process". Do you see that?

22 A. Yes.

23 Q. And then if you go to the next page, he goes on to tell
24 you, "however, direct and indirect conflicts currently exist
25 when it comes to funding exist -- however, direct and indirect

1 conflicts currently exist when it comes to funding existing
2 Legacy programs, there are three major conflicts or concerns."
3 Do you see that?

4 A. Yes, I do.

5 Q. The first one he raises, he tells you that "our mission
6 calls for us to identify, support and develop programs to
7 discourage youth smoking while promoting positive youth
8 development", et cetera. He goes on to explain "Legacy's
9 conflict of industry rules severely impede our ability to fund
10 programs conducted by third party experts, despite our
11 commitments to defer to their expertise and to make no attempt
12 to influence the programs. The Legacy funding restrictions
13 impact governmental, public health, academic and other entities
14 and prevent these entities from accepting funding from Philip
15 Morris in circumstances where no conflict exists."

16 Now, as far as that issue, you told us last week that
17 Legacy has still not changed or amended its policy that it will
18 not provide grants to any organization that receives money from a
19 tobacco company; is that correct?

20 A. Um, the Board has considered that a number of times and
21 they have not yet decided what to do about it. I would not be
22 surprised if there was some modification of it, but I don't
23 think it will be a wholesale modification.

24 Q. So it wasn't unreasonable for Mr. Szymanczyk, as he's
25 talking to you about you wanting more money from Philip Morris,

1 for him to raise the issue, please get rid of that clause
2 because we can't give money toward the organizations. It's a
3 fair thing for him to raise, wasn't it?

4 A. He raised it verbally many times, and as we saw earlier,
5 a letter -- a letter was written to our Board about it and
6 unanimously was rejected.

7 Q. All I'm asking --

8 A. It's perfectly reasonable to raise it.

9 Q. And it hasn't changed yet, has it?

10 A. No, it hasn't changed yet.

11 Q. And Mr. Szymanczyk goes on to point out about Legacy
12 advertisements that vilify Philip Morris by misrepresenting the
13 truth and he explains his position to you; is that correct?

14 A. That was the first time I had actually heard that, so I
15 was kind of surprised by that one.

16 Q. Let me ask, do you agree that you can understand why, if
17 you want Mr. Szymanczyk and Philip Morris to give more money to
18 ALF, that it would be fair for Mr. Szymanczyk to raise with you
19 whether or not the additional money that would be given would
20 then be used to vilify Philip Morris?

21 A. I think he was very clear in our meeting that none of any
22 money that would come from Philip Morris could be used for the
23 "truth" Campaign at all.

24 Q. So this support --

25 A. And I said I understood that. He said for employee

1 morale and stockholder reasons Philip Morris could not fund the
2 "truth" Campaign period, so I found that one somewhat perplexing
3 because he wouldn't be funding it.

4 Q. Well, it's a -- you agree it's a fair issue for
5 Mr. Szymanczyk to raise that if you want me to give even more
6 money to your causes, don't use the money to vilify me. Is that
7 a fair thing for Mr. Szymanczyk to say?

8 A. He can certainly say it and it's being adjudicated.

9 Q. And we don't need to belabor it, these discussions are
10 still going on today; is that correct?

11 A. Not to my knowledge. I mean, the last discussion was
12 with General Sorell and to my knowledge there's been no further
13 discussion -- Attorney General Sorell.

14 Q. Dr. Healton, last Thursday I asked you some questions
15 about a statement that had appeared in your 2002 article that
16 compared ALF's youth smoking prevention ads with Philip Morris's
17 youth smoking prevention ads. Let me remind you what I showed
18 you. It's tab 127 A, Jamey, it's JD 065578. This is the 2002
19 article that I asked you questions about last Thursday. If you
20 go to page 902 of your article, you will probably remember that
21 I asked you some questions about what I think you and I both
22 agreed was a key part of your survey, where you state in your
23 survey in the article that in the survey you included all
24 advertisements from both campaigns aired within six weeks of the
25 survey start. Do you see that?

1 A. Yes, I do.

2 Q. And we talked about that, and do you recall that you told
3 the Court last week that you were aware that Philip Morris had
4 sent you a letter in February of 2002 from Dr. Levy pointing out
5 that you had excluded over 60 percent of Philip Morris's ads
6 from your survey, and you told the Court you had concluded that
7 that was a false assertion by Philip Morris. Do you recall
8 that?

9 A. I don't, and I need to see the letter that Carolyn Levy
10 sent. I had only one letter from her. I had many, many more
11 letters with Mr. Willard. My recollection of Carolyn Levy's
12 assertion was one ad, Boy On a Bus, began airing after the
13 survey started, and therefore, it wasn't picked up. That's what
14 I recalled from our meeting, which I think was a very fruitful
15 meeting. So is --

16 Q. Let me just show you the letter so we can look at it.

17 A. Okay.

18 Q. Could I have --

19 A. I haven't seen it in a long time.

20 Q. JD 55028, tab 128, please. Can we show the whole letter,
21 Jamey, for a minute. I actually asked you about this letter
22 last Thursday. Do you recall this --

23 A. I'm sorry, you said my letter, so I was trying to think
24 of a letter.

25 Q. That's fair, I meant ALF, and this is to Dr. Haviland

1 from Dr. Levy. Do you see that?

2 A. Yes.

3 Q. If you go down to the bottom of the letter, Dr. Levy
4 points out, she wants you all to know at ALF that you appear to
5 have missed 62 percent of Philip Morris ads. Do you see that?

6 A. Let me be clear. Yes, it's 62 percent of the ads, but
7 not 62 percent of the GOP or 62 percent of the people. As I
8 think you know -- can I give you --

9 Q. Let me interrupt you, because I don't want to go through
10 this whole thing again.

11 A. It's important.

12 Q. Well, let me ask you this: I want to get to one point.
13 Do you recall telling the Court just last Thursday that that
14 assertion by Philip Morris was a false assertion that you had
15 come to that conclusion?

16 A. What I --

17 Q. If you don't remember saying it tell me and I'll show you
18 your testimony.

19 A. I believe what I said is I've seen no proof of that
20 assertion.

21 Q. Let me show you your testimony.

22 A. I would be happy to look at it. I know I was getting a
23 little frustrated.

24 Q. I'll show you your trial testimony. Could I have tab 141
25 page 20879 of the trial testimony last week, and I'll put that

1 up on the screen so you can see it, Doctor. My question to you
2 was I said, "I asked you a very simple question: Why didn't you
3 put that footnote into the article" was my question.

4 "To be honest with you, I don't remember, and I don't -- I
5 do not believe at the time, absent the provision of proof to the
6 contrary, that there were other ads running on a national buy
7 because if there were, I assume they would have been provided.
8 So I didn't include it, I guess, to be honest, because I thought
9 it was a false assertion given the unwillingness to prove it."

10 Do you see that?

11 A. Right, and the operative --

12 Q. Do you see that?

13 A. I see that and it was -- just note that I said "national"
14 and this does not say "national".

15 Q. We're going there, Doctor.

16 A. Okay. I have to be clear about the language because --

17 Q. Doctor, we're talking about your survey that chose to
18 compare your ads to Philip Morris ads; is that correct?

19 A. That was one aspect of it, yes.

20 Q. And you, at least, were aware that Dr. Levy had gone
21 through the trouble to tell you that you had excluded over
22 60 percent of Philip Morris's ads, we just saw it in the letter.
23 At least you found out that's what she thought; is that correct?

24 A. Does this say "running six weeks prior"? Does it say
25 "national"? This is very important.

1 Q. Doctor, do you remember you told me last week that you
2 actually took this seriously, and you said that you had your
3 people contact Video Monitoring Service to find out whether or
4 not these -- what ads were actually running. Do you recall
5 that?

6 A. No, I went to Video Monitoring Service before we went out
7 to the field and they told us what was running, not after the
8 fact. I mean, they may have made additional inquiries, but the
9 Video Monitoring Service was gone to because it's the go to
10 place to find out what's actually running nationally versus, you
11 know, by four little cities with seven or eight ads saying I
12 missed 62 percent of the ads. I just want to be clear.

13 Q. We're going to be very clear. In fact, let me just
14 pursue what you told the Court so it's clear to the Court.

15 Video Monitoring Service is a company that you just called
16 the go to company, when you want to find out the truth about what
17 ads are actually running at what time; is that correct?

18 A. That is my understanding, yes.

19 Q. And your documents reflect that it's your position that
20 when you decided to structure the survey back in the year 2000,
21 that your company went to Video Monitoring Service to find out
22 which Philip Morris ads were actually on the air during that
23 six-week time period; is that correct?

24 A. I don't think it was a six-week time period. It was ads
25 that were airing prior to six weeks before the survey start.

1 You have to pick a cutoff point, so that's what they picked as
2 the cutoff point. And my understanding from Carolyn, because we
3 did discuss this, was Boy On the Bus did start airing nationally
4 while we were out doing the survey.

5 Q. Explain to the Court -- I want to make sure we have a
6 clear record. The six-week time period that's set forth in your
7 article requires what?

8 A. It says that we would ask questions about ads that were
9 airing six weeks before the survey went out in the field. You
10 have five or six different survey research call centers, so you
11 have to get all the materials to them, they have to know what
12 the materials are, you can't keep changing it, so you pick a
13 cutoff time, and that's what we did. It was a cutoff time for
14 "truth" ads and it was the same cutoff time for Think. Don't
15 Smoke ads. But of course, people could mention another ad if
16 they saw it and, you know, from looking at the data that only
17 two to three percent mentioned any other ads.

18 Q. But did -- have you actually gone to Video Monitoring
19 Service since then to find out if Philip Morris told you the
20 truth about what ads were running?

21 A. I believe we have made inquiries and they are unable to
22 give data that far back. By the time we were making -- this is
23 what I remember, I may be wrong, and I think we went to more
24 than VMS, but they must purge the system at some point or what
25 they have in the system when it's archived is just the buyer,

1 and we don't know if it's your cessation ads or, you know, the
2 ads about, you know, bringing food to people at home and the
3 North Carolina flood relief, that kind of thing. I think when
4 it's archived what the exact ad is no longer retrievable, it's
5 the purchaser. But there are people that know much more about
6 this than I do. I'm not an expert on this.

7 MR. WEBB: And, Your Honor, I'm almost done, I have one
8 point I want to check on. Could we actually take our recess now
9 and come back and then I'll be done in just a very, very few
10 minutes.

11 THE COURT: Does the government think it will be able to
12 complete its redirect today?

13 MS. EUBANKS: I doubt it, Your Honor. I think I have
14 about two hours, and I know that it's not productive to stay very
15 late. I certainly will get through as much as I can.

16 THE COURT: And we have Dr. Rubin on Tuesday; is that
17 right, everybody?

18 MS. EUBANKS: That's right.

19 THE COURT: And that's a full day of testimony. All
20 right.

21 MR. WEBB: Thank you, Your Honor.

22 (Thereupon, a break was had from 3:03 p.m. until 3:26
23 p.m.)

24 BY MR. WEBB:

25 Q. Doctor, as we took the recess, I actually became a little

1 uncertain of what six-week time period you were talking about,
2 so I want to make sure I have the record very clear on this, so
3 I went back and looked at your article, so I put it back on the
4 screen.

5 This is -- you have the full article there, but I put
6 back on the screen the same statement I did a moment ago, this
7 key statement, where it says that "to control for order effects
8 and included all advertisements from both campaigns aired within
9 six weeks of the survey's start." Do you see that?

10 A. Yes.

11 Q. And that's an accurate statement; is that correct?

12 A. Yes.

13 Q. Okay. And if we want to know --

14 A. So it's up to when it started. Okay.

15 Q. That's fine. I just want to make sure -- to be fair to
16 you. So if we want to know what time period is, we can tell
17 from the article when the survey started. If you go look at --

18 Jamey, could I go to the left-hand column on the same
19 page; if you just go up toward the top, Jamey; if you come down
20 to the end -- yeah, that's it.

21 If you look at the end of the first paragraph, you tell
22 the readers in your article that the next telephone survey,
23 which is LMTS-II -- that's the survey that used both the ALF ads
24 and the Philip Morris ads; is that correct?

25 A. Yes.

1 Q. So we know it started on September 8th, 2000, according
2 to what the article says?

3 A. Yes.

4 Q. And so it's the six weeks before September 8th that is
5 the six weeks in which you were measuring all advertisements; is
6 that correct?

7 A. It's the six weeks before that the ads were drawn from.

8 Q. Yes.

9 A. Okay. Yes.

10 Q. Okay. So now, you mention that what you believe your
11 company did is they went to this go-to company called Video
12 Monitoring Service to try to find out what Philip Morris ads
13 were being -- ran during that six-week time period; is that
14 correct?

15 A. Yes.

16 Q. Okay. And in fact, if we go to -- that's set forth --
17 Could I have tab 145, which is JD 064819, Jamey. It's
18 tab 145.

19 This is a publication of your organization called the
20 "First Look Report." This one happens to be the ninth report in
21 the series. Do you see that on the cover?

22 A. Yes.

23 Q. And if you go to page 31, you'll see where you clearly
24 set forth what you did, okay, which is that: "The 'truth'
25 ads -- The 'truth' ads included in the LMTS-II were chosen based

1 on schedules provided to us by Arnold Communications, LegacyEs
2 advertising firm. The TDS ads" --

3 "TDS" means "Think. Don't smoke"; is that correct?

4 A. Yes.

5 Q. That's Philip Morris ads, right?

6 A. Yes.

7 Q. "The "Think. Don't smoke" ads were chosen based on ad
8 tracking information from Video Monitoring Service. We included
9 ads in the survey that were airing on TV in the weeks preceding
10 the survey or were currently running during the survey period."

11 Do you see that?

12 A. That's the first time I have seen that, but --

13 Q. That's fine. I'm not debating that with you. Okay?

14 A. Right.

15 Q. But Video Monitoring Service is this company. And so
16 when Carolyn Levy told you that you missed 60 percent of Philip
17 Morris's ads, did you send somebody back to Video Monitoring
18 Services to see if maybe Dr. Levy was correct?

19 A. I believe --

20 MS. EUBANKS: Objection; this has been asked and answered.

21 MR. WEBB: I didn't get an answer to that. I did not get
22 an answer.

23 MS. EUBANKS: It was gone into last Thursday as well, what
24 happened with respect to this. We've been over this.

25 MR. WEBB: I did not ask --

1 THE COURT: I don't think so, everyone. We'll try to do
2 it quickly. My recollection could be wrong.

3 Would you please answer the question.

4 THE WITNESS: It's my understanding that we not only went
5 to Video Monitoring Service, we went to other monitoring
6 services.

7 BY MR. WEBB:

8 Q. Doctor, I'm going to hand you an exhibit.

9 Could I hand the witness JD 55410, which is tab 150,
10 which is a report from Video Monitoring Services showing the TV
11 commercials for Philip Morris's Youth Smoking Prevention
12 commercials for the time period July 1st, 2000 through
13 September 31st, 2000.

14 Do you see that?

15 A. I do.

16 Q. And if you -- did you ever get any type of report like
17 this from Video Monitoring Service to show you what the true
18 story was as far as the number of Philip Morris Youth Smoking
19 Prevention ads that were running during this six-week time
20 period?

21 A. I didn't personally get it, but it is my understanding
22 that it was obtained by RTI. I don't know if they went directly
23 to VMS or whether Arnold Communications obtained it, because
24 Arnold would know better how to get it. So I personally have
25 not seen it. This is the first I've seen the report from VMS --

1 Q. Have you --

2 A. -- personally.

3 Q. All right. Did you -- but when Carolyn Levy at least
4 wrote you a letter and said, "look, folks, you missed 60 percent
5 of our ads," did you ask your people to go back and get a report
6 from VMS so we can tell the truth once and for all as to whether
7 Dr. Levy was correct or incorrect?

8 A. I did --

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

10 THE WITNESS: And I did answer this question. I did --

11 THE COURT: Excuse me.

12 MS. EUBANKS: Asked and answered.

13 THE COURT: Asked and answered when, today or last week?

14 MS. EUBANKS: Certainly just now as well as last week.

15 It's in the transcript. He's asked this question repeatedly.

16 MR. WEBB: I just handed her the Document.

17 MS. EUBANKS: That's not the question. The question
18 that's pending is not based on the documents. He said: Did you
19 go and ask your people to get this information?

20 THE COURT: Objection's overruled. Let's go ahead.

21 BY MR. WEBB:

22 Q. Doctor, when Dr. Levy wrote you the letter and told you
23 you missed 60 percent of the ads and you knew that Video
24 Monitoring Service was the company that your company used, did
25 you tell your people to go back to this specific company and get

1 your report so you would know once and for all the truth as far
2 as whether Dr. Levy was giving you accurate or inaccurate
3 information?

4 A. I did in fact ask them to go back, not only to VMS but to
5 any other service like it. And it is my understanding that they
6 don't keep the information. And of course you folks didn't
7 provide it yourselves, as you well know, so --

8 Q. But can I just ask --

9 A. I did ask them to do it.

10 Q. Can you tell me the name of the person in your
11 organization -- just bear with me for a minute. I don't care
12 about other services. I want to know as far as the specific
13 service, Video Monitoring Services, which is the company you
14 were relying on in the first place -- just bear with me and let
15 me finish my question.

16 Can you tell me the name of the person on your staff that
17 went to Video Monitoring Service to see if they had records that
18 would show the truth as far as what ads were running during that
19 time period?

20 A. I did, not just my staff, but I think RTI as well.

21 Q. Tell me the name of the people -- the name of the people
22 that went to Video Monitoring Service.

23 A. I would have to consult my records, but I would assume
24 that the people I communicated with would have been Bev in our
25 Marketing Department and Matthew at RTI. Those would have been

1 the logical people.

2 Q. Did somebody report back to you specifically and tell you
3 that as far as Video Monitoring Services was concerned, that
4 they did not have any records as to what Philip Morris -- as to
5 which Philip Morris Youth Smoking Prevention ads ran during the
6 six-week time period?

7 A. It's my understanding that two years later, when we were
8 asking what happened -- well, you're not letting me answer the
9 question.

10 Q. I'm asking you a very specific question. All I'm
11 asking --

12 A. You are.

13 Q. Doctor, listen to my question. I'm asking, can you give
14 me the name of the person that reported back to you and told you
15 that they had contacted Video Monitoring Services and Video
16 Monitoring Services did not have the records of what Philip
17 Morris ads actually ran during the six-week time period.

18 What is the name of the person?

19 A. I don't remember, but it was either someone at RTI or in
20 the Marketing Department. And they said they don't keep two
21 years back.

22 Q. Okay. Fine. If you just look at what I gave you, you'll
23 see the exact records from Video Monitoring Service showing what
24 Philip Morris ads ran during this time period; is that correct?

25 Let me make it easier. Can I show --

1 Show the witness JDEM -- tab 151, JDEM, 04- --

2 A. I need a second. I need a second --

3 Q. Fine.

4 A. -- to know what period of time this report is for.

5 Q. Just go to the front page.

6 A. It's three months.

7 THE COURT: There's no question --

8 MS. EUBANKS: Objection, Your Honor --

9 THE COURT: Just a moment, please.

10 There's no question pending.

11 MS. EUBANKS: There's no foundation to address this
12 document with this witness, who has said that she has not seen
13 it. And now to go into the document and to ask her to verify
14 this information and whether it was something that was provided
15 is improper without foundation.

16 MR. WEBB: I have a right to show what they would have
17 gotten if they went to get it.

18 THE COURT: Oh, no, no, no, if that's what you're trying
19 to do.

20 MR. WEBB: Your Honor -- Your Honor, I will use it with
21 another witness. I'm calling an expert, okay, to deal with this
22 issue.

23 But I have a right to find out whether or not this witness
24 has knowledge as to whether all of these ads in fact ran during
25 the exact --

1 THE COURT: That's a different question.

2 MR. WEBB: Well, that's where I'm going.

3 THE COURT: But you certainly don't have the right to try
4 to find out from her what she might have known --

5 MR. WEBB: I agree with that.

6 THE COURT: -- is she had done it.

7 MR. WEBB: I'm not going to ask that question.

8 THE COURT: Okay.

9 BY MR. WEBB:

10 Q. Doctor, look at -- what I put up on the screen is simply
11 a demonstrative that's prepared from the underlying document,
12 which is JD 55410, which you can see, what we did is we --

13 MS. EUBANKS: Objection, Your Honor. If we're going to
14 take a demonstrative that's prepared from the underlying document
15 that the witness has never seen, JD 055410, then that's not
16 proper either. It's just a back door method, given this
17 witness's testimony.

18 There's no foundation that the document JD 055410 that the
19 demonstrative is based upon -- that that information was
20 available to Legacy. We don't have the proper foundation to do
21 this.

22 THE COURT: Well, right now, Mr. Webb is attempting to ask
23 foundational questions, so I don't know yet whether there's a
24 foundation or not.

25 Why don't you go ahead, please.

1 BY MR. WEBB:

2 Q. Doctor, looking -- do you recognize -- if you look at the
3 demonstrative exhibit that I've shown you, which shows the
4 number of times that Philip Morris ads aired within six weeks
5 prior to September 8th, 2000 --

6 We've established that's the proper time period; is that
7 correct?

8 A. Yes.

9 Q. Okay. And what is listed there are ten different Philip
10 Morris ads that, according to the underlying document, ran both
11 nationally and locally during the six-week time period. Do you
12 at least see that?

13 A. I see what you're saying occurred, yes.

14 Q. And my question to you is that -- did anybody from your
15 organization ever tell you that in fact Video Monitoring
16 Services had records that established that ten Philip Morris ads
17 ran during this time period?

18 A. All they said was they had records that were presently
19 unavailable because it was two years after the time period.

20 Q. Well, this is now --

21 A. We had the original run that we used to select the ads,
22 which I'm going to guess are the top three, the big heavyweight
23 ads there, but I'd have to look back because the rest are de
24 minimis on a national level.

25 But definitely, we had a VMS report; that is what was

1 used to pick the ads to ask about. I specifically remember
2 Carolyn Levy mentioning either "Boy on the Bus" or maybe it was
3 "Black Belt," but it was one ad that she felt was left out. And
4 then I got a letter saying 62 percent of ads were left out.

5 And if we look at all of this, you know, it's really the
6 top three ads that have the weight, but --

7 Q. Well, the ones in red are the ones you actually tested in
8 your survey. The other seven you did not test in your survey.
9 That's what Dr. Levy was trying to communicate to you.

10 A. No, we tested all of your adds because they were given
11 open-ended questions about your ads.

12 Q. Well, we might have to go back through all that again.

13 Doctor, let me ask --

14 A. Let me ask you: Are these ads -- these are not the ads
15 where they're smoking in it, right? These are -- these were --
16 these are not test market ads? These are --

17 Q. These are national ads, as you can see. Look in the
18 column. They ran nationally.

19 A. Okay.

20 Q. You told us last week --

21 MS. EUBANKS: Your Honor, I'm going to have to object to
22 this. I mean, the witness is asking Mr. Webb questions and he's
23 answering her about the content. That's improper.

24 THE COURT: Sustained.

25 BY MR. WEBB:

1 Q. Now --

2 You can take that down.

3 Just one last -- just a few questions on one other last
4 area.

5 You told us last Thursday in your written direct and in
6 my cross-examination that it's your belief that for the last
7 several years --

8 A. Could I see that again?

9 Q. Yes. What do you want to see?

10 A. What you just had up.

11 Q. Yes.

12 Put the demonstrative exhibit back up.

13 A. And then I'll be very quick. I'll just look at it very
14 quickly.

15 Q. You have a hard copy right in front of you, too, if you
16 want to look at it.

17 A. I have a hard copy that covers a lot of other ads.

18 Oh, okay. I'm sorry.

19 Q. I got you that.

20 A. Okay. Go ahead. I'm sorry.

21 Q. I'm moving to a new area.

22 A. Okay.

23 Q. You told us last week in your written direct and in my
24 cross that you believe for the last several years, ALF has been
25 in financial crisis; is that correct?

1 A. I've said that we cannot keep the "truth" campaign on
2 without invading the reserve fund, so that's a crisis; in other
3 words, our most successful program will have to end or the
4 Foundation will have to end doing it, so --

5 MR. WEBB: Could I have tab 1. It's the written direct,
6 page 34, line 13 to 16.

7 THE WITNESS: I'm sorry. You're asking me to --

8 BY MR. WEBB:

9 Q. No, you don't have to. I'll put it on the screen for
10 you.

11 Do you recall telling the Court this last week in your
12 written direct: "Does the Foundation have sufficient financial
13 resources to continue this effective campaign?"

14 "No, at least not for very much longer. The Foundation
15 is facing what can only be called a financial crisis."

16 Do you see that?

17 A. Yes, given what it costs to do a national ad campaign,
18 which we're required to do.

19 Q. Doctor, are you responsible for ALF's -- strike the
20 question.

21 As the president of ALF, are you responsible for ALF's
22 investment policies?

23 A. No, the Investment Committee is.

24 Q. Do you have anything to say about ALF's investment
25 policies?

1 A. Only that we not invest in tobacco.

2 Q. Have you -- as the President of ALF, have you been aware
3 that ALF does not appear to be investing its money as if it was
4 in any type of financial crisis?

5 A. Well, the investment decisions are being made by the top
6 people in the field, brought to the table by Mike Levitt, and
7 we're investing in order to have a growth -- it's about, I
8 think, 80/20 between stocks and bonds, if that's what you're
9 asking.

10 Q. That's correct. Your financial statements show that your
11 split of investments is about 80 percent stock and 20 percent
12 more conservative bonds or government securities; is that
13 correct?

14 A. Yes, because the Board wants growth because without
15 growth, there will be no "truth" campaign or its equivalent.

16 Q. That's fine. But the point is ALF is gambling heavy in
17 the stock market and in some years, you've lost more money in
18 the stock market than you've given toward the organizations for
19 Youth Smoking Prevention activities; is that correct?

20 A. That's a pretty outrageous statement, given the market,
21 sir. The Foundation has outperformed almost every
22 not-for-profit --

23 Q. Well, let me --

24 A. -- for earnings.

25 Q. Before you caught it "outrageous" --

1 A. I guess it's the tone. I apologize.

2 Q. I didn't mean anything by the tone. Let's look at your
3 financial documents.

4 Can I have ALF's financial statement, tab 153, JD 055210.

5 And if I could go to page 10, if we just look at the year

6 200- -- go to the year 2003. Jamey, I'm going to have to have

7 the column off to the left. That's fine. Actually, go down,

8 Jamey. Just drop -- go back up. I want to go down -- look at

9 these -- do you see where there's a section called "Unreal --

10 Realized Gain Or Loss on Investments."

11 Do you see that?

12 A. Um-hmm.

13 Q. If you look at the year 2003, you can see for 2003, ALF

14 was gambling enough in the stock market that it lost almost

15 \$36 million that year in the stock market. Do you see that?

16 A. I don't believe so. I think the figure is the bottom

17 figure. We gained 33 million.

18 Q. Well, actually, you're talking about --

19 A. I mean, that was in one category, but we're heavily

20 diverse- -- extremely diversified.

21 Q. Doctor?

22 A. Okay.

23 Q. A "realized gain or loss" means a loss that's actually

24 been already realized?

25 A. I'm not an accountant.

1 Q. So you don't know what the word "realized" means?

2 A. I really don't. I just see the bottom line: "Total
3 investment return, 33 million."

4 Q. If you'd look at the line that says "Realized" -- do you
5 see where -- do you understand that that 35 million 934 is a
6 realized loss because it's in parentheses?

7 Do you understand that?

8 A. You're talking about the second line?

9 Q. Yes, that says "Realized Gain/Loss." Do you see that?

10 A. Yes.

11 Q. Do you understand that by putting it in parentheses --

12 A. Yes, that that's a negative; that much I get.

13 Q. Fine. You see that number? Do you see it to be almost
14 \$36 million?

15 A. I do.

16 Q. Okay. Let's look and see how much ALF actually gave that
17 year to worthy organizations.

18 Could I go to page 20, please.

19 MS. EUBANKS: Your Honor, I'm going to object. I mean,
20 this witness has been on the stand a long time, but I don't
21 understand what the relevance is here of its policies in this
22 regard. I could see the first set of questions about the
23 finances. Now we're moving to questions about what they gave to
24 worthy organizations.

25 THE COURT: It's pretty far from what is relevant to me.

1 Counsel will remember that there was the statement about
2 financial crisis was included in the original direct. I struck
3 it. You all decided to withdraw your objections, I guess so you
4 could engage in this line of cross-examination. I struck it
5 because I didn't think it was relevant to any determinations that
6 I have to make in this lawsuit; namely, whether particular
7 remedies -- and certainly the direct talked about very particular
8 remedies -- but whether they were appropriate and in accordance
9 with the legal standards.

10 I still have that view and, therefore, I don't think that
11 ALF's financial status is -- is certainly not directly related to
12 anything I have to decide.

13 MR. WEBB: It's my last question, Your Honor. I think I
14 have a right in light of her testimony as far as what ALF has
15 been doing --

16 THE COURT: Do that with your last question.

17 BY MR. WEBB:

18 Q. If you look at the page I put up on the screen, if you
19 look, do you see -- if you go to "Grants" -- do you see "Grants"
20 down towards the bottom of the page?

21 A. What year are we talking about?

22 Q. This is for the year 2003. Do you see at the top?

23 A. Okay. So that's the one that's --

24 Q. The same year that we just looked at the loss for. Do
25 you see that?

1 A. Right.

2 Q. Do you see at the top, "Consolidated Statement of
3 Functional" --

4 A. So that's the year that began in 2002, correct, and ended
5 in 2003?

6 Q. It says "Year ended June 30, 2003."

7 A. Okay. I just want to understand.

8 Q. Fine. Do you see "Grants"?

9 A. Yes, I do.

10 Q. And do you see the total grants over in the far left to
11 be 27 million 905?

12 A. That was actually spent in the year, not committed. It
13 was three or four times that for commitments, but yes.

14 Q. That's the amount you spent that year; is that correct?

15 A. That's the amount that the grantees drew down. That's
16 different than what was committed to them. It was probably
17 twice that, what was committed to them, even in that year.

18 Q. That's the amount of --

19 A. I can't give people money that haven't spent it yet.

20 Q. I'm just going to get an answer and then I'm done.

21 Is that amount of cash ALF spent out for that fiscal year
22 for grants?

23 A. For that category of grants. The "truth" campaign,
24 obviously, goes out the door as well.

25 MR. WEBB: I have no more questions.

1 THE COURT: Let me ask Mr. Bernick one question. I know
2 he wants to put certain things on the record. Everybody has a
3 tendency to go over their time.

4 How long is it going to take you, Mr. Bernick? I would
5 start the redirect of this witness, of course, but I want some
6 idea. Is it going to take five minutes? Ten minutes?

7 MR. BERNICK: It'll take two minutes.

8 MS. EUBANKS: I don't know about that. I haven't had a
9 chance to --

10 MR. BERNICK: Could we talk about it --

11 MS. EUBANKS: Your Honor, I would really like to try, if
12 we could possibly do so, to get Dr. Healton completed. And I've
13 cut my estimate in half, from two hours --

14 THE COURT: Let's go with the redirect, then. We'll get
15 back to your point, Mr. Bernick, although it might be Tuesday
16 morning. It might be.

17 MS. EUBANKS: Thank you, Judge Kessler.

18 REDIRECT EXAMINATION OF DR. CHERYL G. HEALTON, Ph.D.

19 BY MS. EUBANKS:

20 Q. Dr. Healton, you were shown a document, JD 055410. It's
21 in the binder there.

22 A. Yes.

23 Q. Now, I know you said you've never seen this before. I
24 want to focus your attention on the bottom of the document --
25 bottom left-hand corner.

1 A. Yes.

2 Q. What does it indicate with respect to the copyright?

3 A. "Copyright 2005, Video Monitoring Services of America."

4 Q. Is this a document that was in Legacy's files, to your
5 knowledge?

6 A. No.

7 Q. Besides looking at the document itself, do you have any
8 other information about how the document was put together?

9 A. No, I don't, other than, you know, the observation that
10 most pages talk about cities as opposed to national. But it
11 would take me all day to evaluate it.

12 Q. And what's the significance of most pages talking about
13 cities other than national?

14 A. Well, when you're doing a media tracking survey,
15 obviously, if a very high proportion of ad buy is in cities and
16 not nationally, you're going to get a very low response rate
17 when you call 10,000 households of adolescents across -- I don't
18 know how many households; a lot of households.

19 Q. Dr. Healton, there was a lot of discussion today and a
20 little bit last week about your understanding of the
21 vilification clause. So can you share with the Court your
22 understanding of the genesis of the vilification cause.

23 A. I only know the genesis from conversations I had with
24 Chris Gregoire and her understanding was that the "Demon Award"
25 is one of the reasons, but I do believe that the vilification

1 clause was in the Florida agreement before the "Demon Award"
2 ever ran, but I may be wrong about that, but I thought it was.

3 I think that the vilification clause, of course, no
4 longer exists in Florida and it doesn't exist in any of the
5 state programs, so the only entity in the United States that has
6 a vilification clause is the American Legacy Foundation.

7 Q. And in terms of the "Demon Award," was it just that
8 one ad that it's your understanding was the genesis of the
9 vilification clause?

10 A. It was the only ad ever mentioned to me.

11 Q. Can you describe for the Court the "Demon Awards" ad.

12 A. It basically takes place in hell and the tobacco industry
13 and multiple other entities that cause disease and cause death
14 are depicted, among them Hitler and Genghis Khan, suicide, all
15 of these other causes of death. And I think for the fourth or
16 fifth year in a row, the tobacco industry wins the award and it
17 appears it's the devil that's giving the award out. And I think
18 it ends with the person getting the award saying, "This is for
19 all you smokers out there."

20 Q. Now, has Legacy ever run an ad like the "Demon Awards"
21 ad?

22 A. No.

23 Q. Now, explain why it's important to communicate with young
24 people about the conduct of tobacco companies in your ads.

25 A. Well, young people are surprisingly and sadly pretty

1 unsophisticated about the marketing efforts that are made toward
2 them for a whole variety of products and, obviously, one of
3 those products is tobacco.

4 It is extremely important for young people to understand
5 when they purchase the product that they didn't just
6 spontaneously desire the product or, if they take cigarettes
7 from their parents, they didn't spontaneously want it; that it
8 is the result of, at last count, \$13 billion in advertising and
9 promotion, which is everywhere -- including, for example, the
10 ads from the defendant companies are sent to libraries in all
11 the magazines that libraries subscribe to. The A.G.'s are
12 currently trying to end that, for example.

13 Very provocative, sexually provocative ads, ads that
14 portray tobacco as associated with "alive with pleasure, not
15 dead as a doornail." It is a very expensive operation. Our
16 efforts absolutely pale in comparison. I think there's \$200
17 spent by the tobacco industry for every dollar the Foundation
18 spent in advertising in its highest spending year.

19 And if young people do not get a sense that they are
20 being affected by all of the tobacco imagery they see,
21 potentially even including the imagery they see in movies and
22 TV, that they cannot protect themselves as wary consumers.

23 So the overarching philosophy of the "truth" campaign is
24 to depict edgy young people taking back the right to protect
25 themselves. And it was philosophically developed at Columbia

1 University many years ago; I think 1996 was the report that went
2 to the CDC. The CDC has since made that information available
3 to states. They made it clearly available to Florida to start
4 their campaign.

5 And that group of advertising executives that were
6 brought together at Columbia said that the way to fight back
7 against this -- then it was 6 billion, now it's 13 -- is to
8 create a brand that can go up against a brand like Marlboro, a
9 brand like Winston, a brand like Newport, Camel. The three most
10 popular are Marlboro, with the highest youth share, Newport and
11 Camel. You need to come at it with a brand that young people
12 will say, "I'd rather buy that brand than that brand."

13 Q. Now, do you believe that Legacy complies with the MSA?

14 A. Yes, I do.

15 Q. And do you believe, in reducing youth smoking, that the
16 ends justify the means insofar as the requirements of the MSA
17 are concerned?

18 A. No, but I do believe that whether or not one reduces
19 youth smoking will be a factor when someone considers how
20 broadly to interpret the clause.

21 Q. Now, Mr. Webb has shown you, I think, three Legacy
22 commercials. How many ads has Legacy aired?

23 A. A few hundred.

24 Q. Now, did Legacy clone the Florida "truth" ads?

25 A. No, we did not. As a matter of fact, we chose a

1 different lead agency and we have, I think, about seven or eight
2 ad agencies in the first group that were responsible, a
3 different ad agency for every major ethnic market. And Crispin
4 Porter, which had been the lead in the Florida campaign, was
5 involved, but they were not the lead agency.

6 Q. Now, Mr. Webb spent a lot of time on e-mails. How big a
7 part of Legacy's program are these e-mails that we saw earlier
8 today?

9 A. Well, they're no longer a part, but when they were,
10 they're -- judging from the schedule I just had my memory
11 refreshed on, they were down to 97 e-mails per month in the last
12 month that was depicted in the piece of paper I was given.

13 Q. Now, on last Thursday and today, you were shown Legacy's
14 "Consolidated Financial Statements and Report of Independent
15 Certified Accountants." It's the -- I believe the last document
16 that you were just shown by Mr. Webb. I'll just put it up for
17 you. It's JD 055210.

18 A. Yes.

19 Q. You can see -- now, with respect to this document, you
20 were asked some questions last week -- you were asked some
21 questions last week regarding -- strike that. I'm going to move
22 on.

23 Let's look at U.S. Exhibit 92125. And what I'm going to
24 do is hand you a document that I have redacted certain personal
25 information from for the copy for defendants. And I want to

1 make sure that, Dr. Healton, you have a copy with the redacted
2 provisions.

3 Now, you were asked some questions last week about a
4 secured loan -- a secured mortgage note.

5 A. Yes.

6 Q. Do you recall those questions?

7 A. Yes.

8 Q. I want to -- the document that I've just handed you, what
9 is this?

10 A. It's the note that fully secures the loan with my home on
11 Cape Cod and the property itself.

12 Q. And what is the date of the document, please, on the
13 first page?

14 A. September 5th, 2002.

15 Q. And it's a promissory note for what amount?

16 A. For \$967,500.

17 Q. I want to direct your attention to page 3 of that
18 document, the fourth paragraph down in particular --

19 A. Yes.

20 Q. -- because you did testify that the loan was secured.
21 Would you take a moment and review that paragraph.

22 A. Yes.

23 Q. Now, last week when you testified that the loan amount
24 was secured, is this the document that you were thinking of?

25 A. Yes.

1 Q. Now, has the fact of the loan that's set forth in the
2 promissory note that is U.S. Exhibit 92125 been publicly
3 disclosed?

4 A. Yes.

5 Q. Dr. Healton, in general terms, what is a public 990
6 filing?

7 A. It's your -- you know, audited financial statements that
8 you make; you know, you give the financial situation of the
9 Foundation and make any legally required disclosures.

10 Q. Was this loan disclosed in that 990 filing?

11 A. Yes, it was.

12 THE COURT: And for the record, that's filed with IRS; is
13 that right?

14 THE WITNESS: Yes.

15 BY MS. EUBANKS:

16 Q. Dr. Healton, there were questions by defense counsel last
17 week that suggested that Legacy desired to edge its way into
18 litigation and into this case in particular. Do you recall that
19 line of questions?

20 A. Yes, I do.

21 Q. Well, let's get it out. Who initiated the idea of your
22 testifying here?

23 A. You did.

24 Q. When?

25 A. When -- at the end of a meeting when we first met.

1 Q. Well, in terms of the meeting when we first met, do you
2 recall how long ago that was?

3 A. A long time. I'm going to say two years. I could be
4 wrong.

5 Q. Well, in terms of the request that was made for you to
6 give testimony in this case, can you tell the Court how long it
7 took you to decide whether to voluntarily appear?

8 A. It took me a number of months.

9 Q. Why did it take so long?

10 MR. WEBB: I'm going to object. I really don't think this
11 is relevant to anything. Why would it take her so long to decide
12 to testify? I don't know what it's relevant to.

13 MS. EUBANKS: It certainly is relevant to the line of
14 questions that were asked --

15 THE COURT: Objection's overruled.

16 THE WITNESS: Well, first, as I think you know from the
17 meeting, my lawyers with the Foundation, both my general counsel
18 and my external counsel, John Payton, were concerned that any
19 testimony that I provided here could adversely affect the very
20 important litigation in Delaware which will determine whether we
21 have or have not vilified and personally attacked the tobacco
22 industry. And obviously, I had to take that very much into
23 account.

24 And despite the fact that I felt testifying was the right
25 thing to do because I believe in the case that the federal

1 government is trying to make here, I did not want to do something
2 that would damage the Foundation.

3 BY MS. EUBANKS:

4 Q. Now, let's talk about what you mean by "the right thing
5 to do." Does the right thing to do, to your mind, have anything
6 to do with securing financing for Legacy?

7 A. No. Would I be upset if that were to happen? Not at
8 all. But that is absolutely not the purpose for me being here.

9 Q. In your written direct and here today when you say it is
10 the "right thing to do," what do you mean?

11 A. Well --

12 MR. WEBB: I'm going to object. For a witness to talk
13 about what the right thing to do is to come into the courtroom
14 and testify -- I don't see what the relevancy is. To get an
15 opinion from this witness in her mind as to what the right thing
16 to do is regarding testifying, I -- I object. Objection,
17 relevancy.

18 MS. EUBANKS: Well, Your Honor, they didn't object when
19 the question was posed and answered in the written direct. I'm
20 merely asking the witness to define the term that she used.
21 Given the --

22 THE COURT: She may answer. Certainly in the
23 cross-examination, whether raised overtly or implicitly, the
24 issue of the integrity of her testimony and whether it was
25 influenced by financial considerations -- certainly that issue

1 was in the atmosphere, as I say. Whether it was laid out openly
2 or not one could argue about.

3 You may an the question.

4 THE WITNESS: I thought it was important for the
5 Foundation to testify and for me to testify because, over the
6 period of five years since I've been the President and CEO of the
7 Foundation, I have acquired a great deal of information about the
8 efficacy of our work, the efficacy of the efforts that are
9 undertaken by the tobacco industry, and I have found -- and this
10 is not a personal opinion; it's a scientific opinion -- that the
11 efforts of the industry not only are not neutral, they are less
12 than neutral and they are in fact associated with increased
13 intentions to smoke.

14 And this is why we called upon them to take "Think. Don't
15 smoke" off the air. I learned around the time of the initial
16 launch of our campaign, when so many efforts were undertaken to
17 try to get our campaign off the air and did actually get it off
18 the air for a period of time, that around then, Philip Morris was
19 presenting a series of ads to all of the networks depicting young
20 people smoking.

21 They were rejected by Fox; they were rejected by NBC. NBC
22 actually wrote a letter saying that they would never air this ad
23 in this form, that it was a violation of the FCC ban on
24 advertising.

25 These were very tough letters and I've seen them because

1 we've had ads rejected for a variety of reasons, but I was just
2 amazed to learn that the ads themselves -- I think virtually all
3 of them in the first round depicted young people smoking.

4 You know, we're up against a company and companies that,
5 if they cannot continue to draw young people into their market in
6 the United States, their market in the United States will end.
7 And that is why I use a strong term like the fox watching the
8 chicken coop because we cannot hand over the mantle of public
9 education to the company that benefits most from it not working.

10 BY MS. EUBANKS:

11 Q. Dr. Healton --

12 MR. WEBB: Your Honor, I would just like to make a motion.
13 Because she asked that question, obviously because of
14 preparation, she just gave a speech that had nothing to do with
15 the question at all, nothing to do with what her motivations
16 were. She just went on a rant about the tobacco companies. And
17 I'm going to make a motion to strike. One, it was unresponsive
18 to the question and it's irrelevant. And it's improper redirect
19 examination.

20 MR. BERNICK: I have a further request in support of that
21 motion, which is that she purported to reflected state of science
22 and she made a political statement. This is exactly the same
23 kind of testimony that they sought to elicit from Mr. Myers and
24 it is improper in this Court. And I join the motion to strike.

25 MS. EUBANKS: Your Honor, there's no basis for a motion to

1 strike. This is fair redirect examination, given the grilling
2 that this witness had to undergo last Thursday. And I kept my
3 seat while that took place.

4 She needs to have an opportunity to be heard. I can do it
5 by Q's and A's and we can come back here on Monday. But there
6 is -- and I object to the characterization that there is some
7 type of rehearsal. As counsel is well aware, we have not been in
8 contact with this witness; we could not be in contact with this
9 witness. This is not a rehearsed examination. These are
10 questions and answers and they are entirely proper.

11 MR. WEBB: If you read the actual question asking her to
12 testify as to what she believed was right about testifying, that
13 answer was simply a diatribe against the tobacco industry and it
14 wasn't responsive.

15 THE COURT: The motion to strike is denied. Number one,
16 as I indicated in the last ruling, the integrity of the witness
17 and her testimony was certainly put in issue and there was
18 nothing inappropriate about that cross, but by the same token,
19 the government is allowed to address it on its redirect. That's
20 number one.

21 Number two, the answer certainly was responsive. The
22 question was: Why did you think it was, quote, "the right thing
23 to do"? Defendants may not have liked the answer or the content
24 of the answer, but that was her reasoning.

25 Number three, in terms of her addressing some scientific

1 issues, the Court's well aware that we've had many, many, many
2 experts addressing those issues. I will, I think it's fair to
3 say, rely on the scientific testimony in making final judgments
4 here.

5 And I think those constitutes my reasons.

6 BY MS. EUBANKS:

7 Q. Dr. Healton, has anyone offered the Foundation anything
8 of value in return for your testimony?

9 A. Absolutely not.

10 THE COURT: I guess there was one other reason. I knew
11 there was one other point I wanted to make and that was I have
12 heard reams of testimony in this case about the final point that
13 Dr. Healton made as to targeting of youth.

14 Again, I don't mean this disrespectfully to the witness,
15 but she didn't say anything that I haven't heard over and over
16 ask over again in this case.

17 Next question, please.

18 BY MS. EUBANKS:

19 Q. Dr. Healton, there was a great deal of discussion during
20 cross-examination about Joe Califano's organization, Citizens'
21 Commission to Protect the Truth, filing an amicus brief in this
22 case. Do you recall that?

23 A. Yes.

24 Q. Did you ask Mr. Califano to do that for Legacy?

25 A. No, I did not.

1 Q. Now, I want to show you JD 055209. I believe it's one of
2 the documents that's before you, but I'll display it up on the
3 screen if you're comfortable following it there.

4 Now, last week when you talked about this, you indicated
5 that there were certain -- I believe you called them signatories
6 to the brief. I want to invite your attention to page 2, the
7 second paragraph of JD 055209.

8 A. And this is -- what is this document?

9 Q. This is -- the cover page is the Motion to Appear As
10 Amicus Curiae.

11 A. Okay.

12 Q. You may have a version of it there. I don't want to give
13 you mine because it's marked, but I'm just going to take you to
14 a paragraph, if you're comfortable following on the screen.

15 A. That's fine.

16 Q. Do you see that it states, in the second paragraph, that:
17 "The Commission was created to end youth smoking by supporting
18 the American Legacy Foundation's life-saving 'truth' campaign.
19 Its members include all of the former United States Secretaries
20 of Health and Human Services, former United States Surgeons
21 General and former Directors for the Centers for Disease Control
22 and Prevention from every administration since that of Lyndon
23 Johnson. They have united for this cause because smoking
24 prevention is the single most important way to protect death and
25 disease in this country."

1 Do you see that paragraph?

2 A. Yes, I do.

3 Q. All right.

4 MS. EUBANKS: It's the second page, Charles. I'm on 9 now

5 so -- I saw it, but it's moved beyond it. It says "03" at the

6 top. That's it right there. If you would call that out.

7 BY MS. EUBANKS:

8 Q. Now, last week when you said that the signatories to the

9 brief were -- I believe you said "health advocates," is this

10 what you were referencing in terms of the members of the

11 Citizens' Commission?

12 A. I'm surprised I used the words "advocate," but they are

13 the leading health directors and Surgeons General throughout all

14 of the history of these agencies who remain alive.

15 Q. Now, I want to quickly refer you to the last page, page

16 15 of the document. And I want to call out the signature, the

17 "respectfully submitted."

18 Now, you had testified that Dewey Ballantine had prepared

19 the brief. Do you know anything about the -- did Legacy finance

20 in any way Dewey Ballantine's production of this document?

21 A. No.

22 Q. I see that it says that it is "attorneys for amicus

23 curiae, the Citizens' Commission to Protect the Truth." Do you

24 see that, the very last line on the page?

25 A. Yes, I do.

1 Q. And did you see this brief before it was filed?

2 A. No. I didn't know it was even being filed until it was
3 filed.

4 Q. I want to direct your attention to your 2005 article,
5 which is U.S. Exhibit 89452. I want you to refer, Dr. Healton,
6 to the last page of this exhibit, please.

7 Actually, if you could, the next to the last page, if you
8 would take a look there first on that same exhibit. Let me know
9 when you have it in front of you.

10 A. I have it.

11 Q. Do you see the section about the authors?

12 A. Yes, I do.

13 Q. Who does it -- what does it -- can you read into the
14 record what it says in the small print regarding authors who are
15 associated with Legacy?

16 A. It says, "Matthew C." -- is it the last sentence?

17 Q. Why don't you just read that, please.

18 A. Okay. "Matthew C. Farrelly and Kevin C. Davis are with
19 RTI, International Research Triangle, North Carolina; M. Lyndon
20 Haviland and Cheryl G. Healton are with the American Legacy
21 Foundation, Washington, D.C.; Cheryl G. Healton is also with the
22 Mailman School of Public Health, Columbia University, New York,
23 New York; Peter Messeri is with the Mailman School of Public
24 Health, Columbia University."

25 Q. Now turn the page, please, to "Acknowledgements."

1 A. Yes.

2 Q. What does the first sentence under "Acknowledgements"
3 state?

4 A. "This study was supported by the American Legacy
5 Foundation."

6 Q. Now, you can set that aside for now.

7 Now, I want to refer to JD 065578. And this is your 2002
8 article. Do you have that before you?

9 A. Yes, I do.

10 Q. All right. Now, you recall a discussion of the
11 acknowledgements issue regarding JD 065578, the 2002 article?

12 A. Yes, I do.

13 Q. Now, I believe you indicated that you were, I think you
14 said, about to fall off your chair with surprise when you
15 noticed that the document did not acknowledge Legacy's support.
16 Do you recall that testimony?

17 A. Yes.

18 Q. Now, I want to focus your attention on a couple of
19 sections that Mr. Webb did not show you. Let's look at page
20 906, please.

21 A. Yes.

22 Q. All right. Do you see the section about the authors?

23 A. Yes.

24 Q. Do you see where it states: "Cheryl G. Heaton, Peter --

25 A. Wassary.

1 Q. Wassary. Thank you. "And Lyndon Haviland with the
2 American Legacy Foundation."

3 Do you see that?

4 A. Yes.

5 Q. Now, I want you to look on that same page to the far
6 right column under contributors. Do you see the sentence "C.G.
7 Heaton participated in preparation of the final draft"?

8 A. Yes.

9 Q. Now, I also want you to look, with respect to this
10 article because, as you said, you were about to fall off your
11 chair when you learned that it didn't make certain
12 acknowledgements.

13 I want you to look at page 901 of the article, please,
14 under "Methods" at the bottom right-hand corner of the
15 document --

16 A. Yes.

17 Q. -- where it states, beginning on the last line: "Legacy
18 begins sponsoring the Legacy Media Tracking Surveys, LMTSs,
19 which were designed to yield nationally representative samples
20 of youths aged 12 to 17 and of young adults aged 18 to 24. We
21 limited our analysis to 12- to 17-year-olds, the target audience
22 for "truth". The two-stage stratified design surveys measured
23 exposure to environmental tobacco smoke, access to tobacco
24 products, knowledge and attitudes about tobacco, awareness of
25 pro and anti-tobacco advertising and self-reported tobacco use

1 and identifications (sic)".

2 A. "And intentions."

3 Q. I'm sorry, thank you. And do you see in the next
4 paragraph again the pronoun "we" is used, where it states "We
5 enhance representations of African-Americans and..." so forth?

6 A. Yes.

7 Q. Now, in terms of the disclosure of Legacy's involvement
8 in the article, is there -- do you believe that a reader of the
9 article would understand what position -- what information
10 Legacy was supplying with respect to the findings of the
11 article?

12 MR. WEBB: Your Honor, I'm going to object to what a
13 reader would believe. I object to the form of the question.

14 MS. EUBANKS: I'll rephrase. I think it speaks for
15 itself. Let's move on.

16 BY MS. EUBANKS:

17 Q. Now, you were asked questions about -- a lot of questions
18 about Philip Morris' "Think. Don't smoke" Campaign. I have a
19 simple question for you. To your knowledge has Philip Morris
20 ever evaluated the efficacy of its own "truth" (sic) Don't Smoke
21 campaign?

22 A. Not that it's released, but it does have a survey that
23 asks, I think, no questions about their ad campaign called TABS.
24 It appears to be a marketing survey. Normally it would be
25 called a KABS Survey, Knowledge, Attitude and Behavior, but it's

1 TABS.

2 Q. To your knowledge has Philip Morris ever requested a
3 third party to the evaluate the efficacy of its "truth" (sic)
4 Don't Smoke Campaign?

5 A. No.

6 Q. To your knowledge has Philip Morris ever published in any
7 format, peer-reviewed or otherwise, an evaluation of its "Think.
8 Don't Smoke" Campaign besides the TABS information you
9 mentioned?

10 A. No, and they never published TABS either.

11 Q. Why did Legacy -- why didn't Legacy include ten and
12 11-year olds in the LMTS survey?

13 A. Well, first of all -- first of all, that is not the
14 target of the "truth" Campaign. The target of the "truth"
15 Campaign is 12- to 17-year-olds, because those are the model
16 ages for beginning to smoke, so that's number one.

17 Number 2, if we were going to have 10 and 11-year olds
18 included, we would have to have a second campaign, because that
19 age range 9, 10, 11, watches entirely different media. The
20 amount of overlap is very minimal, so we would have had to have
21 a separate campaign that probably would not have been a "truth"
22 Campaign. It would have been something quite different.

23 Q. Now, with respect to your conclusions in the article
24 about "Think. Don't Smoke", what effect, if any, did the fact
25 that you did not include 10 and 11-year olds in your survey have

1 upon your conclusions about "Think. Don't Smoke"?

2 A. No effect, because the conclusions were about the impact
3 of the campaign on 12- to 17-year-olds.

4 Q. There's been a lot of discussion about national campaigns
5 and ads run nationally, and I just want to make sure we have a
6 clear record. Does the fact that a "Think. Don't Smoke" --
7 that "Think. Don't Smoke" is a national campaign mean that all
8 of the "Think. Don't Smoke" ads run nationally?

9 A. Apparently not. But I think I now understand that,
10 because a few weeks ago I read some documents that related to
11 the problem with the smoking -- the ads with the smoking, and
12 this is all on the publicly available document cite, and it was
13 a strategy memo on how to circumvent the standards and practices
14 by -- nationally. Because the clearance system is much easier
15 on a local basis when the locals are making the decision rather
16 than the national, and they were anticipating that they wouldn't
17 get over the hurdles with many of the major networks.

18 Q. Now, I want to leave aside a question that you addressed
19 at length in your cross-examination regarding the issue of
20 whether the ads ran locally or nationally for "Think. Don't
21 Smoke", and ask you this question: Would including more ads
22 have made a difference in your analysis in the article?

23 A. No, nor would it make a difference in the results.

24 Q. Why not?

25 A. Well, in terms of the analysis, as you can see -- I would

1 have to go back to get the exact number -- but about 65 to
2 75 percent of young people could name Philip Morris ad and about
3 the same amount, a little bit higher, for the "truth" Campaign.
4 In subsequent waves, and this is now being written up, every
5 single ad that we had been informed was airing anywhere was
6 asked about, and there was absolutely no change in awareness
7 levels for the "Think. Don't Smoke" Campaign so for it to have
8 changed the results, we would have to, one, missed huge numbers
9 of people; two, they would have had to have answers that were in
10 the exact opposite direction of the trend line, and so much so
11 that it could reverse a substantial negative association with
12 intentions to smoke in relation to being exposed to "Think.
13 Don't Smoke".

14 MR. WEBB: Your Honor, I'm going to make an objection.
15 The answer she gave before this question, it was one answer ago.
16 The question did not call for any violation of the best evidence
17 rule. It simply asked her to explain whether -- do all national
18 ads, if they're national, do they always run nationally?

19 She then, in the middle of the answer, starts to testify
20 about the content of an unidentified document that she just said
21 she read. We don't know what the document is. It clearly
22 violates the best evidence rule. You can't offer the
23 content. She can't give oral testimony about the content of an
24 unidentified document to establish that something exists.

25 In other words, she just testified there's some

1 unidentified document that she read that says something about why
2 Philip Morris ran campaigns in certain cities and not nationally.

3 That clearly violates the best evidence rule, and I move
4 to strike that part of the answer as being in violation of the
5 best evidence rule because you're proving up the content of an
6 unidentified document with oral testimony.

7 MS. EUBANKS: Well, Your Honor, if anything, that goes to
8 the weight, not the admissibility of the evidence, and that's
9 clear under the precedent that talks about the best evidence rule
10 that addresses it. I think the witness's answer is clear and I
11 think that argument of counsel, after giving an answer, is what's
12 improper here.

13 The question was proper. The witness's answer should
14 stand. And insofar as bringing in whatever is the best evidence
15 of the content, that's certainly up to defense counsel if they
16 want to do that and to present those arguments, but that's no
17 basis for striking the testimony of the witnesses. It goes to
18 the weight.

19 MR. WEBB: Your Honor, under the rules of the evidence,
20 that's actually incorrect. Under the rules of evidence --

21 THE COURT: Objection sustained.

22 MR. WEBB: Thank you.

23 BY MS. EUBANKS:

24 Q. Now, did you know whether the methodology used in the
25 2002 study was designed only for that study or had the

1 methodology been applied previously, to your knowledge?

2 A. You mean the methodology of -- in other settings for
3 other subjects?

4 Q. Correct.

5 A. Yes, it's a standard approach survey methodology that's
6 been used in hundreds of studies.

7 Q. Now, the "Think. Don't Smoke" ads were taken off the air.
8 Do you know why?

9 A. I was told.

10 MR. WEBB: Your Honor, I'm going to object on hearsay. If
11 there's a foundation, time, place, who was present, we'll find
12 out if it's being offered for the truth of the matter asserted.
13 I object at this point on the grounds of hearsay.

14 THE COURT: Sustained.

15 BY MS. EUBANKS:

16 Q. Do you have an understanding as to why it is the ads were
17 taken off the air, yes or no?

18 A. I learned --

19 MR. WEBB: Your Honor, yes or no -- I don't object to the
20 form of the question. Ms. Eubanks asked a proper question as
21 long as the witness answers it with a yes or no.

22 THE COURT: Doctor, that is a yes or a no.

23 THE WITNESS: Yes.

24 BY MS. EUBANKS:

25 Q. And where does that understanding generate from?

1 A. I have two understandings. I have my understanding that
2 soon after we asked them to take it off because it was
3 deleterious to young people, they did.

4 MR. WEBB: Your Honor, I'm -- the question
5 "understanding," we have to find out whether it's coming from
6 someone else, whether it's -- you can't just change the form of
7 the question and get disguised hearsay into the record.

8 MS. EUBANKS: That's --

9 MR. WEBB: Let me finish my objection. Under the rules of
10 evidence, we've got to have a foundation. If her understanding
11 is based on a conversation with somebody, if it's based on a
12 document, if it's pulled out of the air, I object, lack of
13 foundation. And what she's about to testify to appears to be
14 hearsay.

15 MS. EUBANKS: Your Honor, that wasn't a question that
16 called for hearsay. I asked about the witness's understanding.

17 THE COURT: The witness sometimes goes beyond. You may
18 lead your witness, if you know what the answer is, in a direction
19 so that she directly answers your question.

20 BY MS. EUBANKS:

21 Q. Well, quite apart from that, Your Honor, in terms of the
22 information, if it was told to her, then I don't understand why
23 the content or the question regarding whether -- I don't want to
24 say too much here to signal the witness, but --

25 THE COURT: Let me ask a couple of questions. Did you

1 have any conversations with employees of the defendant tobacco
2 companies about why the campaign was pulled off the air?

3 THE WITNESS: Yes. At the meeting that we had at Columbia
4 University where there were a number of people present, Howard
5 Willard told us that they decided that they wanted to speak to
6 adults instead and they were going to do "Talk. They'll Listen."

7 THE COURT: All right. That sentence may stand.

8 BY MS. EUBANKS:

9 Q. What was the timing for the "Think. Don't Smoke" ads
10 coming off the air relative to any findings set forth in any
11 articles that you may have authored?

12 A. It was about two months at the most.

13 Q. Two months from what time, Dr. Healton?

14 A. From the press conference where the request was made.

15 Q. What year was that?

16 A. That would have been when this article -- the day this
17 article came out. It says June 2002, so it would be sometime in
18 June. I can't remember the actual date. Maybe the very end of
19 May.

20 Q. Now, you were shown a document, JD 052837, and I want to
21 put it up on the screen because that's probably easier, but I
22 have a U.S. Exhibit number, and we can sort this out later.
23 It's U.S. Exhibit 93642. I have a copy for counsel. It's
24 identical to JD 052837.

25 You were asked questions about this not too long ago by

1 Mr. Webb. This is the April 2nd, 2004 letter from Mike

2 Szymanczyk.

3 Do you have it?

4 A. Yes.

5 Q. Now, I want to refer you to a couple of places in this

6 document. If you could look at the very first paragraph,

7 please, of this April 2nd, 2004 letter. And it states: "I

8 thought I'd share our current thinking with you regarding your

9 funding request in advance of meeting so you would have the

10 opportunity to reflect on it prior to our conversation."

11 Did I read that correctly?

12 A. Yes.

13 Q. Now, I want you to refer to the last page of the

14 document, on page 3, and share with the Court Mr. Szymanczyk's

15 statement in the paragraph at the top of the page there.

16 A. Yes.

17 Q. Where he closes, "We continue to believe that much of

18 Legacy's work has been significant in contributing to reductions

19 in underage smoking."

20 Do you see that?

21 A. Yes, I do.

22 Q. Now, you testified that you had a number of conversations

23 with Mr. Szymanczyk at Philip Morris about the matters that are

24 described in JD 052837, which is a duplicate of U.S.

25 Exhibit 93642, the April 2nd letter.

1 Do you recall that testimony?

2 A. Yes.

3 Q. And throughout the testimony at any time, did
4 Mr. Szymanczyk suggest to you that Legacy's work had been
5 anything but effective in reducing underage smoking?

6 A. No.

7 Q. In all of the interactions or in the many interactions
8 that you've had with the defendants, what, if anything, prior to
9 your agreeing to testify in this case, was ever discussed with
10 you about the lack of effectiveness of Legacy's work?

11 A. Nothing with regard to effectiveness.

12 Q. Dr. Heaton, why is it important to evaluate the efficacy
13 of youth smoking prevention campaigns?

14 MR. WEBB: Your Honor, I'm only going to object because
15 this is directly out of the direct examination, it's a complete
16 repeat.

17 THE COURT: Sustained.

18 BY MS. EUBANKS:

19 Q. Do you know if any of the defendants have attempted to
20 evaluate the efficacy of any of their youth smoking prevention
21 programs?

22 A. To my knowledge they have not.

23 Q. Are you aware of any peer-reviewed studies demonstrating
24 the efficacy of any of defendants' youth smoking prevention
25 programs?

1 A. No, I am not. Prevention.

2 Q. Now, in terms of the information contained in the "truth"
3 ads, I know you were shown three ads by Mr. Webb, and in your
4 direct examination you displayed, I believe, a half dozen ads
5 for the Court last week.

6 Do you recall that?

7 A. Yes, I do.

8 Q. Now, there's been a great deal of discussion about the
9 content of the "truth" ads in terms of how the content of the
10 "truth" ads is put together. What type of material is it that
11 Legacy relies upon in putting together its "truth" ads?

12 A. A great deal of material. The process, of course, begins
13 with developing alternative message points in consultation with
14 focus groups and then larger focus groups. They then get to a
15 conceptual stage where they pick two or three campaigns that
16 look like they would be very effective with young people,
17 particularly open to smoking young people.

18 That process then goes through a rigorous legal and
19 policy evaluation by the ad approval process of the Board of
20 Directors, as well as our outside counsel and our internal
21 counsel.

22 Q. Does Legacy rely upon internal documents of the companies
23 from time to time in preparing its ads?

24 A. Yes, we do.

25 Q. Does Legacy ever make up any facts in terms of putting

1 forth materials in its "truth" Campaign?

2 A. No.

3 Q. Now, I want to take you back to one of the ads that we
4 saw during the direct examination. And just to refresh you, I
5 certainly don't want to show all of the ads, but I do want to
6 show the Court the ad that was called Project Scum and then show
7 you a document and ask you a question about that.

8 Charles, can you put that up, please?

9 MR. McDERMOTT: Your Honor, I object. There was no
10 cross-examination on this ad.

11 MS. EUBANKS: Your Honor, while there may have been no
12 cross-examination on this ad, there was a great deal of
13 cross-examination about the content of the Legacy ads, what
14 Legacy was doing, and questions of vilification.

15 What I would like to do is take the Court back to and to
16 take the witness back to this ad that was shown and then to
17 follow up with a line of questions that I just asked her about
18 the type of materials that Legacy uses in putting its ads
19 together. It will take about 30 seconds.

20 McDERMOTT: Your Honor, the examination that Mr. Web
21 conducted was solely about vilification. This was not --

22 THE COURT: This cross is on -- I'm sorry, redirect is on
23 the vilification issue.

24 MS. EUBANKS: Yes, it is.

25 THE COURT: I'll allow it. Is there any chance you're

1 going to finish today?

2 MS. EUBANKS: I think there is, Your Honor, if I could
3 probably have another 10 minutes.

4 THE COURT: All right.

5 MS. EUBANKS: At most.

6 (Videotape played.)

7 BY MS. EUBANKS:

8 Q. Dr. Healton, I would like to show you a document, U.S.
9 Exhibit 90,127.

10 McDERMOTT: Again, Your Honor, I object. Beyond the
11 scope.

12 THE COURT: Is this a different ad?

13 MS. EUBANKS: No, Your Honor. I'm handing the witness the
14 document that was just -- I want to ask the question of her. I
15 don't want to -- if I may, Your Honor. Thank you.

16 THE COURT: Go ahead.

17 BY MS. EUBANKS:

18 Q. Now, Dr. Healton, I've handed you U.S. Exhibit 90,127.
19 Have you seen this before?

20 A. Yes, I have.

21 Q. Is this a copy of the document that was featured in the
22 Scum ad we just saw?

23 A. Yes, it is.

24 Q. Now, why did Legacy develop a "truth" advertisement based
25 on this document?

1 MR. WEBB: Your Honor, I'm going to -- we're now asking
2 about why did Legacy develop an ad that I didn't talk about
3 during redirect. During my cross I didn't once talk about the ad
4 or where they developed the ad. This has nothing to do with my
5 vilification ad. This is designed to establish that she had a
6 good foundation to design an ad based on a Reynolds document, and
7 I did not cross-examine on it, nor does it have anything to do
8 with my vilification cross. This is clearly beyond the scope of
9 the cross-examination.

10 MS. EUBANKS: Your Honor, there was a great deal of
11 examination of the witness about her intention with respect to
12 the "truth" Campaign, what type of information was used, what was
13 the reach for it, and a great deal of discussion about what was
14 the intent with respect to the ads that were placed.

15 I think it is entirely, it entirely meets those types of
16 questions that were asked about vilification to ask the witness
17 why Legacy developed a campaign based upon this. It's not
18 leading. It certainly, I believe, addresses the question of
19 vilification.

20 THE COURT: I'll allow a very broad (sic) cross on the
21 vilification issue, but I have some doubts about it. And
22 certainly there were vigorous objections. I'm certainly going to
23 allow the government on redirect to address the issue, and I will
24 allow this question.

25 Go ahead, please.

1 BY MS. EUBANKS:

2 Q. Do you remember the question, Dr. Healton?

3 A. I think you'll have to restate it.

4 Q. Why did Legacy develop a "truth" advertisement on Project
5 Scum?

6 A. Well, because we wanted individuals, young people
7 whose -- an ad for the adolescent market to understand the kind
8 of marketing approaches that are being utilized. And this
9 particular effort was focused in San Francisco to try to boost
10 smoking among people who are low income with one particular
11 brand, I believe, and those who are gay, alternative life-style
12 individuals.

13 Q. Did you ever learn where within Reynolds this document
14 U.S. Exhibit 90,127 was created?

15 A. It was very much in the documents, and it was a very
16 alive program that actually was executed. You can tell that
17 from the documents, and the details of the program actually had
18 the most senior executives copied on the communications prior to
19 its public disclosure.

20 Once it was publicly disclosed, there was a public
21 apology from R.J. Reynolds. And I think just prior to that,
22 they renamed it Project Sourdough.

23 McDERMOTT: Your Honor, I object and move to strike that
24 testimony. It's way beyond the scope of the defenses'
25 cross-examination. It's a whole area that this witness is --

1 this is not proper redirect, Your Honor.

2 THE COURT: Objection's been overruled. You've got about
3 seven more minutes.

4 MS. EUBANKS: I'll finish up, Your Honor.

5 BY MS. EUBANKS:

6 Q. Dr. Heaton, do you recall being -- the "truth" Campaign,
7 has it been recognized for its efficacy?

8 MR. WEBB: Your Honor, that is in her written direct
9 examination.

10 MS. EUBANKS: Not the -- then if it's in her written
11 direct, it will stand, but it's --

12 THE COURT: It is, it is. The objection's sustained.

13 BY MS. EUBANKS:

14 Q. Have you made a record of the individual's support, a
15 particular individual's support for the efficacy of the "truth"
16 Campaign?

17 MR. WEBB: Your Honor --

18 THE WITNESS: Yes, we have.

19 MR. WEBB: That's what's in the written direct.

20 THE WITNESS: Actually --

21 MS. EUBANKS: This is not in the written direct. I can
22 assure the Court what I'm about to ask the witness about is not
23 in the written direct.

24 THE COURT: If you can point me to it, Mr. Webb.

25 MR. WEBB: Well, see, I can't read her -- there's a

1 section in the written direct that talks about the efficacy and
2 people who praise the efficacy of this campaign, which appears to
3 be what this question goes to.

4 MS. EUBANKS: Well, Your Honor, on cross-examination Mr.
5 Webb asked the witness whether very prominent members of the
6 public health community had criticized the conclusion that
7 "truth" contributed to a decline in youth smoking. I think on
8 redirect it's entirely appropriate to point out that others,
9 perhaps prominent members of the community, may have done
10 something different, and that's all I want to do.

11 THE COURT: Objection's overruled. Go ahead, please.

12 THE WITNESS: Yes. In addition to the Citizens Commission
13 and all of the advertising and public health awards that are
14 mentioned in the direct, Julie Gerberding, Governor Gregoire, and
15 also at our press conference, although he was unable to be there
16 because he was with then President Clinton in the tsunami --
17 First George Bush, our former president, also taped a very moving
18 ad about the importance of the "truth" Campaign, and particularly
19 its edgy approach to advertising and the effectiveness of the
20 campaign and the importance for adults to understand that the
21 campaign is for our children and our grandchildren, not for us.

22 BY MS. EUBANKS:

23 Q. I'd like to show U.S. Exhibit 93771.

24 (Videotape played.)

25 BY MS. EUBANKS:

1 Q. Is this a tape that Legacy made of the former president?

2 A. Actually, he made it at his home in Kennebunk, Florida
3 with his own team.

4 Q. And he provided this to Legacy?

5 A. Yes, he did, for our press conference.

6 Q. I have nothing further, Your Honor.

7 THE COURT: Thank you, Dr. Healton. You may step down.

8 I'll ask a question or two about Tuesday, everybody. Dr. Rubin
9 will be testifying. Who's going to be doing his direct?

10 MR. BERNICK: Peter Biersteker, I believe will be doing
11 the direct.

12 THE COURT: Do you think that defendants will have an hour
13 of his direct?

14 MR. BERNICK: About a half hour.

15 THE COURT: And who will be doing the cross for the
16 government?

17 MR. BRODY: Patrick Klein will be handling the
18 cross-examination for the United States, and we estimate three to
19 four hours. Although, we do have an objection that we filed
20 yesterday that defendants will be responding to today, that goes
21 to about 50 or so pages of that written direct.

22 THE COURT: I hope the defendants are going to get that in
23 on time today. I said, I hope the defendants are going to get
24 that in on time today. I hope.

25 MR. BRODY: We also, Your Honor, have an objection that

1 goes to -- and this is on Mr. Fischel, who is slated to testify
2 on Friday, that goes to the entirety of the written direct that
3 was filed by -- filed as the written direct of Mr. Fischel.

4 THE COURT: I've received the objections, of course, and
5 obviously it's not yet time for the responses.

6 MR. BERNICK: I would add, Your Honor, that I know that
7 statements have been made about the timeliness of our response
8 and I have not responded to them, but in light of Your Honor's
9 comments, we consistently get the proposed testimony late, and --
10 that was before. The objection is late. For example, with
11 respect to Mr. Fischel, I personally waited around to get the
12 objections and they didn't come into our office until, I think,
13 7:30, quarter of 8 last night. So, fair is fair. We need to
14 take the time that's necessary to respond and we're certainly not
15 delaying it unduly.

16 MR. BRODY: Your Honor, with respect to Mr. Fischel, the
17 reason that the objections were filed late is because
18 defendants --

19 THE COURT: Everybody, everybody. You know I don't want
20 to hear this. That is an arbitrary statement. I don't want to
21 hear this.

22 I know everybody's working very, very hard. I had a
23 purely selfish reason for asking, or for emphasizing that I would
24 like it on time. And that is because I'd like to start reading
25 it early. In any event, when it comes in, it will be read. I

1 don't think -- well, it will be very close whether we can finish
2 Dr. Rubin on Tuesday. Is it -- is everybody hoping to? I don't
3 know. Well, we'll do our best.

4 MR. BERNICK: My understanding is that I believe that
5 Professor Rubin really needs to be done on Tuesday. I don't know
6 if there's any flexibility that's opened up with respect to that.
7 He has flexibility on Wednesday morning.

8 MR. REDGRAVE: He could, if necessary, Your Honor, appear
9 on Wednesday, although I think Mr. Biersteker was hoping, with
10 the estimate that we got, we will be able to conclude him that
11 day.

12 MR. BRODY: Your Honor, I would hope there is not going to
13 be a lot of, for defendants' sake, redirect examination of
14 Dr. Rubin. We haven't received the time for this week, but I
15 expect they will only have seven or eight hours left of their
16 265, as we go through the final phase of trial.

17 THE COURT: I was wondering about that. I haven't seen
18 the calculations myself, but obviously I will at the end of
19 today.

20 MR. BERNICK: Yeah. Obviously we're coming close to the
21 limits of our time. I think that --

22 THE COURT: That's quite an accomplishment, Mr. Bernick.

23 MR. BERNICK: Well, that's true. I won't comment on what
24 it is that's prompted it either, because that's probably not a
25 worthwhile discussion, particularly at this point in time of the

1 day. But in response to Your Honor's query, we obviously have
2 cut back very significantly on our rebuttal case.

3 But we will not be calling Dr. House. We will not be
4 calling, I believe, Mr. -- Dr. Burnstein, Mr. Bernstein. And
5 therefore our case likely is to be comprised simply of the five
6 witnesses. I think we are likely to run out of time before the
7 last two, maybe before the last three, but we're actually coming
8 very, very close in; that is, we're talking about two witnesses
9 next week and then three witnesses the following week.

10 But in any event, we will obviously, if we do run out of
11 time, be making an application to the Court for limited time to
12 permit us to present the remaining testimony in our case.

13 MR. BRODY: And we will likely oppose that.

14 MR. BERNICK: I was highly confident of that, so. If I
15 could make a record of this --

16 THE COURT: No, not now. Not now. I wanted to get that
17 witness done so that she could be excused. Mr. Payton may
18 certainly be excused.

19 MR. WEBB: Your Honor, may I just raise just one --

20 THE COURT: Mr. Payton, you must understand that at the
21 end of every day we have to have these sessions.

22 MR. WEBB: I apologize. I'll be very brief. But there is
23 one kind of critical -- we are getting down to the end of our
24 case. We're going to end our case. I had suggested to Your
25 Honor last week --

1 THE COURT: I know that, I have raised that issue with the
2 government, Mr. Webb, on a couple of occasions because I know
3 that you want to get scheduled for those days. And quite
4 frankly, so do I. The government has made a reasonable response,
5 at least at the times I raised it, that they hadn't yet even
6 gotten all the direct testimony. Is that the issue that you're
7 dealing with?

8 MR. WEBB: Yes. The closing argument on the 7th, 8th and
9 9th, and I guess based on what now our remedy case is going to
10 be, which is limited to these experts, under the D.C. Circuit law
11 as to when you can call a rebuttal witness -- the standard in the
12 D.C. Circuit is extremely difficult to meet to call rebuttal
13 witnesses. I don't see how there's any chance right now there
14 could be live rebuttal witnesses.

15 THE COURT: Let me find out before you have a long
16 discussion about it. They certainly have this -- not this
17 week's -- next week's directs and they don't yet have the directs
18 for the week of the 30th, right? Or did you file those?

19 MR. BRODY: (Shook head negatively.)

20 MR. WEBB: When do they have?

21 THE COURT: Let me ask the government: Based on what you
22 know now, can you make any statement or statement of probability
23 so that we can all tie down the 7th and 8th and 9th for closing
24 argument?

25 MS. EUBANKS: Well, Your Honor, it depends in no small

1 part with the ruling with respect to the scope of some of the
2 testimony and what is going to happen with respect to both
3 Dr. Rubin and Mr. Fischel.

4 A lot of the testimony that was submitted by Dr. Rubin, we
5 maintain in our objections, is material that should have been
6 covered in the liability phase of the case, not the remedies
7 phase.

8 Obviously, if the Court disagrees and that information
9 comes in, that places us in a position of making a determination
10 about whether a rebuttal case would be appropriate. We don't
11 know yet, obviously, what the Court's ruling is going to be, what
12 determination is going to be made on that.

13 Similarly with respect to Mr. Fischel, there are numerous
14 objections to that testimony. And depending on how the Court
15 handles Mr. Fischel's testimony, that may necessitate a small
16 rebuttal case. But I can assure the Court that we will make --
17 it's been a large record and a long trial. We'll make every
18 effort to refer to the documents, the evidence that's already in
19 the record, and if the record has been made, we have no desire to
20 bring forward a rebuttal case. It's not our intent.

21 MR. WEBB: And, Your Honor, based on the D.C. -- because
22 we've cut it down to these experts, which are basically
23 responding to their experts, under the D.C. Circuit case law, the
24 only rebuttal case you can put in is where there is some topic
25 that came up that could not possibly be anticipated in advance

1 when the party -- when the burden went forward. I suppose
2 anything could happen, but the likelihood of that happening now
3 in light of us cutting back so substantially, maybe I could just
4 respectfully ask, can we agree -- right now, it does not appear
5 to me likely there's going to be a rebuttal case. So we can at
6 least schedule the closing arguments for those dates. If
7 something credibly unusual happens, we'll debate and it argue it.
8 But at least for all of us -- I'm sorry.

9 THE COURT: Well, this information is not overly relevant
10 to me, but I gather it's relevant to all of you, and that is that
11 the ceremonial courtroom is unavailable on the 7th and the 9th.
12 I want to get my dates right.

13 MR. WEBB: Your Honor, someone asked me about that
14 earlier. I know there was high interest in this case for opening
15 statements, but I'll speak at least on behalf of my client and I
16 don't know about the others. We certainly don't need the
17 ceremonial courtroom for client representatives or family and
18 friends to come for this closing argument, Your Honor.

19 I just -- this courtroom, actually -- this is a pretty big
20 courtroom and I don't --

21 THE COURT: I thought so for ten years, Mr. Webb.

22 MR. WEBB: And I think you're correct. I don't see any
23 reason to delay because of the availability of the ceremonial
24 courtroom.

25 THE COURT: I certainly don't either. I don't know about

1 the government.

2 MR. BRODY: Well, Your Honor, two points in response to
3 that. Ms. Eubanks can speak to the need for representatives of
4 the department to have space to attend closing arguments and
5 addressing that issue.

6 The other issue, irrespective of the availability of the
7 ceremonial courtroom, we are coming to the close of a case that
8 will take, at the time we get to the June 2nd or June 3rd
9 concluding date of the trial sessions, have taken eight and a
10 half months. And I think that in order to provide something --
11 it's our position that in order to provide something that is
12 going to be most helpful to the Court and provide the most
13 efficient presentation of the issues that are important in a case
14 that has changed in midstream and presents an extraordinary
15 number of issues and has involved an incredible number of
16 witnesses, that to push that back to a date that -- or series of
17 dates that you had identified in a prior session, which was June
18 20th to the 22nd, will serve not just the parties but also the
19 Court, in terms of the presentation that can be made, and the
20 ability to effectively simulate everything that's gone on for the
21 last eight and a half months, to determine which issues are going
22 to be the issues that we feel we should address in order to be
23 most helpful to Your Honor, that everyone would benefit from
24 doing it at that time.

25 It would also allow us to submit what we plan to submit,

1 which is prior testimony designations, a very limited number. At
2 last count, I think there were three that we had identified as
3 rebuttal to liability, and we could submit those on --

4 THE COURT: Mr. Webb, do you have problems with the 20,
5 21, 22? If you do, I need to know that.

6 MR. WEBB: Do I have a problem with that?

7 THE COURT: Yes.

8 MR. WEBB: There was a problem with --

9 MR. FREDERICK: Mr. Biersteker had made family vacation
10 plans many, many months ago, and following the 27th was
11 preferable between the two weeks the Court mentioned.

12 THE COURT: Well, I have a few things set, but those can
13 be moved around. I don't really terribly desire to push it off
14 that far. What's your availability, Mr. Webb?

15 MR. WEBB: For the?

16 THE COURT: 27th 28th, 29th.

17 MR. WEBB: I'll be available.

18 THE COURT: So is everybody -- I don't know if I want to
19 use the word preference, but at least can everybody live with the
20 27th, 28th and 29th? Is that what I'm hearing?

21 MR. WEBB: We'll definitely live with it. Our preference
22 is strongly for the 7th, 8th and 9th. You've been very gracious
23 to the out-of-town lawyers in this case, but we've been out here
24 for months and months, and quite frankly both sides understand
25 this case. We know it backwards and forwards. We have a lot of

1 down days between now and that time. We're on a fairly leisurely
2 schedule. We're on for what, two days next week? We all have
3 time to prepare for -- plus your schedule -- you're leaving
4 town -- you've got a judicial conference starting the following
5 week. I was just trying to get this all out of the way before.

6 THE COURT: I have a strong preference for the 7th, and my
7 preference is that I have a lot of thinking and organization to
8 do. I want to do that after having the benefit of closing
9 arguments.

10 They'll certainly affect my thinking, how I structure
11 things. And at some point, as early as possible, I want to know
12 that our in-court work is done. Then you can all go home and
13 have a good time, I guess, and I have a great deal to do after
14 that. So I want the government to keep that in mind.

15 MR. BRODY: Your Honor, what would be helpful for planning
16 purposes is to get an idea of how much time you are going to
17 allot to each side, and of course we would make the request that
18 we be permitted to reserve time for rebuttal at closing,
19 following whatever defendants' presentation is.

20 THE COURT: Well, let me hear your proposal first.

21 MR. WEBB: Well, Your Honor, when I addressed you last
22 week, I proposed a day and a half for each side. That would be
23 three days. I haven't counted up the hours. Whatever that
24 number of hours is, we can do that calculation.

25 THE COURT: What's the government requesting then?

1 MR. BRODY: Well, it sounds as if what defendants are
2 requesting is about seven and a half hours per side if they're
3 looking at a day and a half. And I think it could be done in
4 less than that, given the interim summations that we have had
5 throughout, one very recently. So I'm hearing Mr. Bernick
6 whispering six to Mr. Webb and I think that's something we could
7 live with.

8 MR. WEBB: And I was -- that's fine. Six hours is fine.

9 THE COURT: Well, what are you requesting on a final
10 rebuttal?

11 MR. BRODY: We're requesting the ability to reserve an
12 hour for rebuttal.

13 THE COURT: Oh, an hour is probably more than fair. I
14 don't have a problem with that. Let me just think it through and
15 work it through.

16 MR. BERNICK: The idea, Your Honor, would be that the
17 government takes their time first and can fit it in in a day.
18 That sounds like it would probably fit in a day. We though,
19 believe that we would take a day and rather than have Your Honor
20 sit through six hours straight, probably have some part of it
21 carry over until the third day, which would then also pick up the
22 government's time for their rebuttal, so that way you're not
23 sitting through a full six-hour day.

24 THE COURT: So five hours the first day for the
25 government, five hours the second day.

1 MR. BERNICK: Or four.

2 MR. WEBB: Maybe four and a half. If we come back the
3 next day and do two hours of ours and then an hour of theirs, and
4 we can split it up between the two days.

5 MS. EUBANKS: Your Honor, if I may. I think we would
6 prefer that as much of defendants' case gets done the second day
7 so that the one hour rebuttal -- so that we can go home and work
8 on getting that together.

9 THE COURT: That certainly makes sense, that does. Well,
10 we'll certainly get it done in three days. I'm probably going to
11 think about the allocation a little bit, but it won't be very far
12 from what you all suggested. And it does make sense to have the
13 government have its five hours on that first day.

14 I, as I say, my strong preference is for the 7th --
15 obviously the 7th, 8th and 9th. And so I'm going to leave it now
16 that unless something truly unusual comes up, everybody's
17 calendar should be cleared for the 7th, 8th and 9th, and that
18 will be it.

19 MR. WEBB: Your Honor, there's a related issue which I'll
20 just touch upon, but is pretty important, which is that after the
21 closing arguments are finished, as far as Findings of Facts and
22 Conclusions of Law, let me just quickly share with you what we at
23 least discussed among ourselves, which is that --

24 THE COURT: Go ahead.

25 MR. WEBB: Half this case is probably in the form of prior

1 testimony which has been filed with the Court. Obviously, Your
2 Honor couldn't possibly have had time to read it and make
3 rulings, and we understand that. And that's your schedule.
4 Whatever you want that to be, we respect it and it is. It's our
5 view that at -- I don't think it's possible for the parties to
6 file or even prepare their Findings of Fact and Conclusions of
7 Law until they get rulings and we know what's actually in
8 evidence. So my suggestion was going to be or is that whatever
9 date you decide -- you've ruled on all the priors. From some
10 date forward, the government would then have 60 days to file
11 their Findings of Facts and Conclusions of Law from that date.

12 They're the party with the burden of proof, so they would
13 file theirs first. We will then have 60 days to respond to their
14 Findings of Facts and Conclusions of Law, and then that would
15 conclude that process.

16 THE COURT: Has the government given any thought of this?

17 MR. BRODY: We had not thought of it in that way, Your
18 Honor. We'll be happy to caucus and give some thought to the
19 issue of how we think it's best to proceed with the preparation
20 of final Proposed Findings, Post-trial Findings and briefing.
21 And we'd be happy to come back and tell you what our thoughts are
22 on that on Tuesday.

23 MS. EUBANKS: If that's acceptable to the Court. I do
24 think, and if I could say at least preliminarily, that the
25 schedule that Mr. Webb suggests is, I think, too far extended for

1 purposes --

2 THE COURT: To what?

3 MS. EUBANKS: Far extended. 60 days and 60 days and
4 comments and the desire to move on. If we're going to accelerate
5 the time for closing arguments, it seems to me that the Court
6 might have something different in mind and we'll come forward
7 with a proposal next week.

8 THE COURT: I do, Mr. Webb.

9 MR. WEBB: You know, we can talk about this, but for a
10 nine-month trial, this is a densely packed record with all the
11 prior testimony. If parties try to sit down now and start
12 putting together meaningful Findings of Fact and Conclusions of
13 Law that are going to be useful for the Court, saying you can do
14 that in less than 60 days, I think that's going to be a
15 challenge.

16 If the government started today on Findings of Facts and
17 Conclusions of Law and knew whatever the ruling was on all the
18 prior testimony, if they can -- it strikes me as very difficult
19 to compact all that and come up with meaningful findings. It's
20 not like I'm asking for 120 days or something.

21 MS. EUBANKS: Well, Your Honor, you sent through your law
22 clerk, just before we started the trial, an e-mail to the parties
23 about what type of planning to do for purposes of this moment,
24 when we would get to the -- our proposed Findings of Fact and
25 Conclusions of Law. I would remind the defendants of that and

1 assert to the Court that when we present what it is that we
2 intend to do, we're going to take that into consideration what
3 the court, through the law clerk, advised us to do as we went
4 forward. And I don't think that the task before us, if we follow
5 those instructions, knowing going in what it was that the Court
6 expected of us should be particularly difficult, but we'll come
7 forward with a proposal for the Court on Tuesday.

8 MR. WEBB: Very well. Thank you, Your Honor.

9 MR. FREDERICK: I'll have a motion to make with respect to
10 Mr. Myers' testimony, but I can save that.

11 MS. EUBANKS: May I ask what the motion is, Your Honor, so
12 I --

13 THE COURT: Why don't you confer now out of my presence.
14 (Proceedings adjourned at 5:01 p.m.)

15

16

17 C E R T I F I C A T E

18

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

21 -----
22 Scott L. Wallace, RDR, CRR
 Official Court Reporter

23

24

25

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 I N D E X

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3 Examinations

Page

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5 CONTINUED CROSS-EXAMINATION OF CHERYL G. HEALTON, Ph.D. 21761
6 BY MR. WEBB7 REDIRECT EXAMINATION OF CHERYL G. HEALTON, Ph.D. 21838
8 BY MS. EUBANKS

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10 E X H I B I T S

11 Description

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