

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	Docket No. CA CA99-02496
	.	
v.	.	
	.	
PHILIP MORRIS USA, et al.,	.	Washington, D.C.
	.	January 13, 2005
	.	
Defendants.	.	
. . . . .	.	

VOLUME 49  
MORNING SESSION  
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS  
BEFORE THE HONORABLE GLADYS KESSLER,  
UNITED STATES DISTRICT JUDGE

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1 THURSDAY MORNING SESSION, JANUARY 13, 2005

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

3 (9:32 a.m.)

4 THE COURT: Good morning, everybody. This is United  
5 States of America versus Philip Morris, CA 99-2496. Mr. Bernick,  
6 please.

7 MR. BERNICK: I'm told it's going to be warm enough today,  
8 Your Honor, to have a picnic this afternoon here in Washington.

9 THE COURT: I couldn't hear you.

10 MR. BERNICK: I've been told it's going to be warm enough  
11 to have a picnic later on today, so I would like to get out,  
12 although I'm, unfortunately, going to San Francisco where I  
13 understand it's wet.

14 THE COURT: Well, San Francisco is not unfortunate.

15 MR. BERNICK: No, that's true, that's true.

16 CONTINUED CROSS-EXAMINATION OF BRENNAN DAWSON

17 BY MR. BERNICK:

18 Q. Good morning, Ms. Dawson. I want to go back over, to  
19 provide a little bit more context, to the time line that we  
20 started to draw yesterday, and basically go through a larger  
21 version of that time line.

22 MR. BERNICK: And then, Your Honor, I've got a -- a bunch  
23 of documents that relate to the attribution issue, and my hope is  
24 to be able to provide, simply, the foundation with the witness.  
25 I've already identified these documents very, very briefly to

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1 counsel for the Justice Department, for the government, and I  
2 think we're going to have to go through them a little bit, but my  
3 hope is that we'll move through it very quickly. One of  
4 housekeeping matters we undertook yesterday to try to find out  
5 what the expectation was with respect to Ms. Dawson's bonus for  
6 the year 2004.

7 THE COURT: Correct.

8 MR. BERNICK: And I wanted to report to the Court, as I  
9 already reported to the government, that first of all  
10 Ms. Dawson's salary for 2004, precisely, was \$311,000. The board  
11 will meet, as I understand it, on February 2nd to formally or  
12 finally approve a bonus. My understanding is that the target is  
13 50 percent of salary, 50 percent, I'm sure that can't be a  
14 disappointment, but I hope it's also the witness's expectation so  
15 that this is not sharing information that would not otherwise  
16 come to her later. These are simply my report to the Court. I  
17 do not have documentation of this. We would be prepared to  
18 stipulate, that is the circumstance as it exists today, our  
19 expectation is that it will also be the fact as of February 2nd,  
20 and I understand that counsel may want to inquire on those  
21 matters, but we did want to report to the Court that's the  
22 current status.

23 THE COURT: All right, well Mr. Wise, you certainly, if  
24 you need to, you can address that issue on your redirect.

25 MR. WISE: That's fine, Your Honor.

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1 BY MR. BERNICK:

2 Q. Let me ask you, Ms. Dawson, going back to the point in  
3 time when you first joined the Tobacco Institute, my  
4 understanding from your direct examination is that you actually  
5 had some prior experience at the Department of Health and Human  
6 Services with regard to media relations; is that correct?

7 A. Yes, it is.

8 Q. Okay. And in -- again, by way of foundation, you were  
9 there for roughly six years?

10 A. That's correct.

11 Q. So that would take you back to around 1980; is that fair?

12 A. That's correct.

13 Q. In your experience at the Tobacco Institute, and with  
14 whatever experience you had from the perspective of Health and  
15 Human Services, has there or has there always -- has there or  
16 has there not always been a political and media dimension to  
17 smoking matters here in the United States?

18 A. There is very much a political dimension.

19 Q. I want to show you a newspaper headline for January 11,  
20 1978. It's the document -- the document is JD 013149, and ask  
21 you whether or not you recall that at that time the newspapers  
22 widely reported that the then secretary of HHS, Joseph Califano,  
23 declared war on smoking in early 1978. Are you familiar with  
24 that report?

25 A. I'm generally familiar with it, yes.

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1 Q. Okay. Do you -- were you familiar with the fact that in  
2 1979 the Surgeon General's Report -- there's a Surgeon General's  
3 Report that issued recognizing 15 years since the 1964 report,  
4 were you familiar with that?

5 A. I don't know about the 1979 report specifically.

6 Q. Okay. Do you remember whether or not at that time, that  
7 is in 1979, based upon the information that you acquired when  
8 you were at the Tobacco Institute, whether there was an  
9 affirmative effort by the Tobacco Institute at that time to, in  
10 a sense, preempt the '79 report by holding a press conference  
11 the prior day? Is that something that you learned during the  
12 course of your work?

13 A. Generally, yes.

14 Q. Okay. Do you remember whether the Tobacco Institute,  
15 after that effort, did an editorial analysis to find out whether  
16 their message, their message and their strategy had met with any  
17 success?

18 A. The Tobacco Institute routinely did that.

19 Q. Okay. I'm going to show you JD 011663, which is a  
20 February 9, 1979 memo from Mr. Kloepper to Mr. Kornegay giving  
21 an editorial analysis for the '79 Surgeon General's Report. If  
22 you would just flip through that a little bit, I'm only going to  
23 ask you some foundational issues for it and then read from a  
24 portion of it, because this predates your tenure at the Tobacco  
25 Institute.



1           Ms. Dawson, does this document reflect the kind of  
2 editorial analysis that was done on a fairly regular basis at  
3 the Tobacco Institute?

4       A.     Yes, the TI would have reviewed news reports to see how  
5 their message was coming across.

6       Q.     And is this document the type of document that would have  
7 been generated and maintained in the ordinary course of business  
8 by the Tobacco Institute?

9       A.     I think so.

10      Q.     If we take a look at the first page of the editorial  
11 analysis itself, it says: "Most of us are aware that news  
12 coverage of the 1979 Surgeon General's Report achieved a  
13 balance, of sorts, with attention given to the Tobacco  
14 Institute's views both before and after the actual event.  
15 Editorial" -- and that's underlined -- "reaction, however, which  
16 is the subject of this analysis, has been overwhelmingly pro  
17 government, antismoking, and, particularly, anti Institute."

18           Do you see that?

19      A.     Yes, I do.

20      Q.     Now, after this memo is written in 1979, I want to go to  
21 a little bit forward to 1984 and show you another document,  
22 which is dated May 29, 1984. It is JD 080669.

23           I'll represent to you, Ms. Dawson, and to the Court, that  
24 this was produced from the Tobacco Institute's files, and it's  
25 called Report to the Communications Committee. You testified

1 yesterday, as I recall, about the Communications Committee, do  
2 you recall that?

3 A. Yes.

4 Q. And was the Communications Committee a committee within  
5 the structure and organization of the Tobacco Institute?

6 A. It was.

7 Q. Okay. Is this kind of report, again, the kind of report  
8 that would have been done on a fairly regular basis during the  
9 course of Tobacco Institute activities?

10 A. It would have been.

11 Q. I want to direct your attention to the pages -- page 9,  
12 and this is page 9 of the communications plan -- this is 1984, a  
13 couple years before you arrived. It says: "With respect to the  
14 primary health issue." What was the primary health issue?

15 MR. WISE: Your --

16 THE WITNESS: Smoking and health issue.

17 THE COURT: What's the objection?

18 MR. WISE: Your Honor, I'm going to object to these  
19 documents. That predate Ms. Dawson's tenure at the Tobacco  
20 Institute. I was very careful in choosing documents that were,  
21 in fact, from the period of time that he was employed at the  
22 Tobacco Institute, and when she was shown documents, questions  
23 like are these consistent with positions you took were the limit  
24 of the questions I asked.

25 Now, Ms. Dawson has said she was generally aware of the

1 '79 report and the Tobacco Institute's response. We've now seen  
2 specific documents, internal documents, that go to that issue. I  
3 don't think there was a foundation laid for that, a proper  
4 foundation, for questions to that document, and now this document  
5 that -- I don't think the question's even been asked if she saw  
6 it when she was at the Tobacco Institute years later, and to now  
7 question her about it I just don't think it's appropriate.

8 MR. BERNICK: Your Honor, the -- my examination is in  
9 response not only to Mr. Wise's oral examinations, it's also in  
10 response to the direct testimony that was proffered in writing.  
11 That testimony, many many portions of it consists of confronting  
12 the witness with a whole series of documents that never came from  
13 Tobacco Institute files with a question of whether she saw them,  
14 whether she agrees with them or whatever. So, the government  
15 obviously has expanded their examination way beyond documents  
16 that she saw, so there's no scope issue.

17 With respect to having her comment on the content of the  
18 documents, in terms of whether the documents can come into  
19 evidence, I believe we'll be able to offer this document into  
20 evidence because it's an ordinary course of business record, it's  
21 not hearsay, and she is in a position, because she was an  
22 employee, to be able to verify those facts. So we think --

23 THE COURT: All right, Mr. Bernick the objection's  
24 overruled, you may proceed.

25 BY MR. BERNICK:

1 Q. I want to direct your attention -- I think I asked you  
2 about the primary health issue and I think that you identified  
3 for the Court what that was, but just -- I was distracted a  
4 little bit, so I'm not sure you had an opportunity to give your  
5 answer.

6 A. The primary health issue is what we called smoking and  
7 health and whether smoking caused cancer and other diseases for  
8 smokers.

9 THE COURT: Ms. Dawson, I think you need to keep your  
10 voice up, please.

11 THE WITNESS: Thank you, I will.

12 BY MR. BERNICK:

13 Q. This says: "Decrease" -- the bullet says, "decrease  
14 Institute visibility on and reaction to the unwinnable primary  
15 health issue" and then under that, "never raise the issue. In  
16 situations where we must respond, keep statements short and free  
17 of rhetoric. Wherever possible contain coverage to one day by  
18 issuing statements for same day use and by refraining from  
19 making comments which might extend the debate and encourage  
20 questions." And then finally, "remove from general circulation  
21 all Institute publications and literature with reference to the  
22 primary smoke issue".

23 That approach -- is that -- what relationship, in your own  
24 experience, if any, is there between the approach that's  
25 described in the document in 1984 and the approach that was taken

1 while you were at the Tobacco Institute with respect to the  
2 primary health issue?

3 A. This is very, very consistent with the approach that was  
4 taken at the Tobacco Institute while I was there, except that I  
5 don't recall issuing any statements. It was, in the sense of  
6 issuing a press release on the smoking and health issue. So  
7 here it talks about containing that to one day. I'm not aware  
8 that we even did that. We responded to questions during media  
9 interviews and that was it.

10 Q. Okay. I now want to take you up to the period of time  
11 when you were at the Tobacco Institute, and I want to move  
12 forward, and I want to do this relatively quickly so that we can  
13 all keep our picnic and other plans here.

14 If we were to go back during the period of time when you  
15 were there, that began in 1986?

16 A. Yes.

17 Q. So, we'll mark off '86 and we'll mark off '94 when the  
18 Waxman hearings took place, and in-between we'll put 1990.

19 I want to take a snapshot of where we were in '86 in  
20 terms of going forward, the basic issues that the Tobacco  
21 Institute was dealing with, and I want to begin with, I think  
22 what you testified to, both in the written testimony and orally,  
23 which is the issue of smoking in public places. Was that an  
24 issue when you joined?

25 A. Yes, it was.

1 Q. Did it remain an issue through '94?

2 A. Yes, it did.

3 Q. What about youth smoking, was that an issue that you were

4 focused on when you joined in '86?

5 A. Or shortly thereafter, so, yes, that was an issue for the

6 entire period.

7 Q. Was there any particular prompt that occurred during this

8 period of time that intensified the focus on that issue?

9 A. The congressional hearings in the 1990s -- or actually

10 they began in the late 1980s.

11 Q. Okay. So we have youth smoking. If I said 1990 was the

12 date that the Waxman Bill was introduced, would that refresh

13 your recollection?

14 A. That might be.

15 Q. Now, with respect to both of these issues, or take them

16 one at a time, you've talked about with respect to causation or

17 the primary health issue that in a sense you weren't going to

18 speak unless asked to speak. Was that true of public smoking?

19 A. Yes, it was.

20 Q. Okay. Did a time come with respect to public smoking

21 where there were also more proactive activities?

22 A. Yes, there were proactive activities.

23 Q. So public smoking, you would say, is both, in a sense,

24 "R" for reactive, answer questions when asked, but it's also "P"

25 for proactive, fair?

1 A. Very fair.

2 Q. What about youth smoking, how old that stack up?

3 A. Along the same lines. It would be reactive if a bill

4 were introduced to ban tobacco advertising, for example, it

5 would be proactive in the sense that we were trying to promote

6 the industry's initiatives.

7 Q. Okay. Let's take another issue, which is causation, and

8 put this one down here. I know that that was an issue that was

9 out there when you joined and remains, so we can put that in.

10 But with respect to causation, I take it from what you've said

11 before, that that, during your period, was reactive and not a

12 proactive issue?

13 A. That's right, answer a question if asked.

14 Q. Okay. And with respect, now, to addiction, when did

15 addiction really come on the screen of the Tobacco Institute?

16 A. With the Surgeon General's Report.

17 Q. So that would have been in 1988?

18 A. That's right.

19 Q. I'll put it halfway and it remained true through '94?

20 A. That's right.

21 Q. On addiction, was that a proactive issue, a reactive

22 issue, or both?

23 A. Reactive.

24 Q. Okay. Now, you've said that the Tobacco Institute was

25 operating in a political environment, and we know from your job,

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1 and the job of the Tobacco Institute, that in that environment  
2 the tobacco industry was media and politically sensitive. It's  
3 part of your job, would that be fair?

4 A. That is very fair.

5 Q. Okay. What about voluntary health organizations? Did  
6 you deal with voluntary health organizations in the context of  
7 your own work?

8 A. If they were involved in, say, the legislative process,  
9 they had taken a position, then there would have been some  
10 dealings.

11 Q. Okay. Were there particular voluntary health  
12 organizations that were, in a sense, media active or politically  
13 active?

14 A. Yes, there were.

15 Q. Could you name a couple for us?

16 A. The American Lung Association, the American Heart  
17 Association, the Cancer Society.

18 Q. Okay. Did you have dealings with the American Cancer  
19 Society during the course of your work?

20 A. Yes, I did.

21 Q. I take it that we all know the American Cancer Society  
22 was an anti-tobacco force?

23 A. Yes.

24 Q. Okay. I want to show you JD 013145, which is a  
25 publication from the American Cancer Society called Smoke



1 Signals, and it's dated September 1985. That would have been  
2 shortly before you came on board, correct?

3 A. Correct.

4 Q. And it's called: Smoking Control Media Handbook. Did  
5 you, during the course of your own work, come into contact with  
6 this publication?

7 A. Yes, I've seen it.

8 Q. I want to direct your attention to the table of contents.  
9 Does it talk about, part 1, gaining media attention and then  
10 various ways of doing that, part 2, capturing the symbols of the  
11 debate?

12 A. Yes.

13 Q. This says that much of this book was drawn from an  
14 extraordinary workshop sponsored by the American Cancer Society  
15 and held in Washington in September of 1985. So if we went to  
16 '85, this would be the ACS workshop that basically was  
17 extraordinary -- may have been the most creative and successful  
18 smoking control leaders. I want to direct your attention just  
19 to a couple parts.

20 You were asked a lot of questions about ETS and public  
21 smoking. This discusses capital B, spoiling their fun, and as  
22 an example of spoiling their fun, it says, "in Washington, D.C.  
23 a Continuing Medical Education conference at Georgetown  
24 University devoted to a discussion of the evidence on  
25 involuntary smoking was exposed as funded by tobacco interests

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1 and disproportionately loaded with researchers supported by the  
2 industry. Amidst effective publicity the outcry by smoking  
3 control leaders shamed Georgetown into canceling the  
4 conference." There's been testimony by Dr. Schwartz. Do you  
5 know who Dr. Schwartz was and is?

6 A. I do. He's at Georgetown University, he was when I knew  
7 him.

8 Q. Was he or was he not involved in the activities that are  
9 referenced here in this document?

10 A. He was.

11 Q. Now, he says that he cancelled the conference. This is  
12 at page 4454 of the transcript of this trial. "Mainly because I  
13 wanted to have a scientific conference and not a press  
14 conference, and the Washington Post got into it, and I didn't  
15 want more reporters there than doctors. The question is, that's  
16 fine. That flap, as you described it, you found out that the  
17 Office of Smoking and Health had put pressure on the speakers  
18 not to show up; is that correct? " Answer "to withdraw" and he  
19 then talks about Dr. Hoffman.

20 He then says: "Question: Did you believe, sir, that  
21 what was going on at that time you, at least, believe was  
22 chilling as far as academic freedom, is that fair to say?"

23 "Answer: Truthfully I didn't think it was chilling, I  
24 just thought it was stupid."

25 He then goes on to say: "Your university -- question,

1 your university thought it was a problem of academic freedom?"

2 "Answer: Oh, yes the university did. I was not outraged  
3 by the imposition on my personal academic freedom, I was more  
4 outraged by their getting people to withdraw."

5 Are we talking about the same incident here, that is, the  
6 incident that's referred to in the American Cancer Society  
7 publication as "spoiling their fun" and the incident that  
8 Dr. Schwartz is referring to when he said that the conference was  
9 cancelled?

10 MR. WISE: Your Honor, I'm going to object. This witness  
11 has no personal knowledge of this conference. It predated her  
12 time at the Tobacco Institute. To ask her if this document, in  
13 reference to a conference at Georgetown, is the same one that we  
14 now heard from Dr. Schwartz's testimony about, it's just not  
15 proper with this witness.

16 THE COURT: Mr. Bernick, she don't know anything about  
17 this personally.

18 MR. BERNICK: Well, fair enough. I'm not really offering  
19 it for the purpose of verifying -- I'll rephrase the question  
20 because what I'm --

21 BY MR. BERNICK:

22 Q. Let me just ask it this way, Ms. Dawson: As of 1986,  
23 were you -- I think you already said you had contact with the  
24 American Cancer Society during the course of your work?

25 A. Yes, I did.

- 1 Q. Your own dealings with public health organizations that  
2 were involved in anti-tobacco control, were your dealings framed  
3 by your understanding of the history of context between those  
4 organizations and the Tobacco Institute?
- 5 A. They were.
- 6 Q. And I'm just going to ask you whether this particular  
7 incident was one of those matters that, from your point of view,  
8 framed your attitudes?
- 9 A. It was part of it, yes.
- 10 Q. Did you -- did you have any involvement in any of these  
11 issues?
- 12 A. In this specific Georgetown conference?
- 13 Q. Yes.
- 14 A. No, I did not.
- 15 Q. Okay. Let's move forward, in the interest of time. I  
16 want to get to the portion of the document that ties into your  
17 period of time. This says: "General recommendations: Don't  
18 let journalists treat paid tobacco industry spokespersons as the  
19 moral equivalent of public health advocates. Challenge their  
20 credibility." Do you see that?
- 21 A. I do.
- 22 Q. Is there, then, discussion about the issues that should  
23 be used to challenge the credibility of the industry as we see  
24 in the third bullet point?
- 25 A. There are.

1 Q. In your own experience, I think you've already said that  
2 the issue of whether smoking has health hazards, was an issue  
3 that was put to the industry during your period of time, fair?

4 A. That's fair.

5 Q. Okay. Do we see that the recommendation to use that  
6 issue to challenge the credibility of the industry is also part  
7 of the American Cancer Society agenda?

8 A. It is.

9 Q. Was that your own experience?

10 A. It is my -- it was my experience.

11 Q. So the ACS was speaking to causation as a matter of  
12 credibility. Let's talk about addiction a little bit. I think  
13 you said your real involvement with addiction was  
14 contemporaneous with the '88 report?

15 A. That's right.

16 Q. Let's take a look a little bit at this document at page  
17 21, this 1985 document. It says: "Cigarettes are more  
18 addictive than heroin or cocaine, and by far the leading  
19 preventable cause of death and disease in our society. Smoking  
20 is fatal under normal or moderate conditions of use. The habit  
21 has no redeemable social value other than to relieve its own  
22 addiction." And there's then here later on, "freedom of choice  
23 has no meaning to heroin addicts or those who are similar  
24 addicted to smoking." Do you see that?

25 A. I do.

1 Q. Later on -- well, let's again, sort of record where we  
2 come on that. The ACS is talking here about addiction and hard  
3 drugs before this even became an issue for the Tobacco  
4 Institute?

5 A. That's right.

6 Q. Let's follow that through. In 1987, the Justice  
7 Department yesterday pointed out, through Exhibit 62752, that in  
8 1987 the industry learned, in late '87, that the Surgeon General  
9 was likely to describe smoking as addictive. Do you remember  
10 your testimony on that?

11 A. I do.

12 Q. So the issue is now starting to percolate at the Surgeon  
13 General in '87. Following up on the American Cancer Society  
14 recommendation -- following up on the American Cancer Society's  
15 brochure here, did you become familiar at this time, that is,  
16 when word first surfaced that the Surgeon General might say  
17 "addictive", did you become familiar with whether or not the  
18 scientists who were working on this matter for the Surgeon  
19 General were specifically studying the media effects of using  
20 the word "addiction"? Did you ever become familiar with that?

21 A. There were rumors of what discussions were taking place,  
22 but nothing further at that point.

23 Q. Well, it's been brought to the attention of this Court  
24 and in this trial, and this is JD 064656, which are notes of a  
25 meeting on tobacco use as an addictive process, and I'll tell

1 you that the Court heard about this document through the  
2 testimony of Dr. Henningfield who is one of the government's  
3 experts. And the document says, and Dr. Henningfield confirmed,  
4 that as far as public communication was concerned, "In  
5 communicating information about the addictive nature of tobacco  
6 use to the public we must use simple direct language,  
7 furthermore, any pronouncement must be well covered by the media  
8 in order to have impact."

9 It goes on to say: "We should use, we should use the word  
10 "addiction" for its visceral effect on the public and the  
11 pressure on lawmakers that will result." This is  
12 Dr. Henningfield speaking.

13 Let me just ask you, Ms. Dawson, assuming that this is in  
14 the trial record here, would you agree with the folks who wrote  
15 this document, the scientists, that using the word "addiction"  
16 would have a visceral effect on the public and result in pressure  
17 on lawmakers?

18 A. It did, in fact.

19 Q. Now, when the announcement was actually made by the  
20 government of the '88 report, -- and who made that announcement  
21 on behalf of the government?

22 A. Surgeon General Koop at a press conference.

23 Q. Okay. Showing you JD 080643 --

24 MR. WISE: Your Honor, before we proceed, I just want to  
25 address the last document we saw in the instant after it was

1 shown, we briefly checked to see if it had, in fact, been used  
2 with Dr. Henningfield, and by our records it wasn't, so the  
3 assertion that it was, I just don't know if that's the case.

4 MR. BERNICK: I apologize.

5 THE COURT: I didn't remember seeing it, and given its  
6 content, I thought I would have remembered, but go ahead,  
7 Mr. Bernick.

8 MR. BERNICK: I'm sorry, Your Honor, the correct  
9 designation, and I apologize for the confusion, it's ours, it's  
10 JD 012675, you may want to check the records on that, and it was  
11 used with Dr. Henningfield, and we specifically looked for that  
12 yesterday and he confirmed that these were minutes of a meeting  
13 that he attended.

14 MR. WISE: Well, but that's a different issue than whether  
15 this document was used, whether he attended this meeting. I  
16 don't know that that's precisely the same issue.

17 MR. BERNICK: Well, the document was used with him, in any  
18 event, and we can get the particular language. Here we go. This  
19 is the testimony -- thank you very much very timely -- at page  
20 7010. It says: "The question is: Let me have this one I'm  
21 referring to and then you can tell me if there were others.  
22 Could I have JD 12675" -- which I think is the number that we  
23 just gave, that's tab 194 -- "this appears to be a Harvard  
24 University working meeting that took place on July 24, 1985  
25 before you agreed to serve on the '88 Surgeon General's Report as



1 an editor. Do you recall attending this particular workshop,  
2 sir?"

3 "Answer: Yes, I definitely would not have characterized  
4 it the way that you characterized it. But he attended this  
5 workshop. Let's look at what it says, did you attend the  
6 workshop?"

7 "Yes."

8 "Actually give a presentation?"

9 THE COURT: My question is, and I have a feeling people  
10 are going to have to check the transcript --

11 MR. BERNICK: I'm sorry --

12 THE COURT: -- during this trial, was Dr. Henningfield  
13 presented with this document, and did he acknowledge that he had  
14 either made the presentation in question or that the language you  
15 asked Ms. Dawson about accurately conveyed whatever it was he had  
16 to say during that meeting?

17 MR. BERNICK: Yeah, well, Your Honor, it would be our  
18 position, this document was produced by the government, he said  
19 he attended the session, so we've got that far.

20 Your Honor's now saying, well, did he sign off on the  
21 accuracy. We think that whether or not he did, we would still be  
22 able to use the document because it's a government document and a  
23 record of what happened, but to save the day at page 7011, he  
24 says the answer, at line 19 there's discussion about the issue of  
25 addiction, it's connotations, he says: "Is that correct?"

1           "Answer: Yes, I believe this is a summary of the workshop  
2 done after, and I'm not sure I had involvement in this, that is  
3 the document, but these are the -- the workshop was run more like  
4 a scientific meeting. I gave a presentation, other people would  
5 give a presentation, there would be a discussion, so if this  
6 doesn't look like it was actually -- this doesn't look like it  
7 was actually run, it looks like a summary of it."

8           "Question: I'm not saying this is verbatim, this appears  
9 to be a summary of what you all discussed and did that day, is  
10 that fair?"

11          "Answer: Yes. And, in fact, there is a Monograph, a red  
12 Harvard Monograph that has my chapter and the other chapters in  
13 the workshop."

14          And, in fact, there was no objection during this  
15 cross-examination to any of this or the use of the document. I  
16 think, in fact, I don't know if there's even an objection to the  
17 document being introduced as evidence, but I think that the  
18 exhibits on Henningfield may still be in process. So it's not  
19 been formally admitted. Those are the page references, Your  
20 Honor.

21          MR. WISE: Your Honor, again, the issue of whether  
22 Dr. Henningfield attended the workshop and whether he thought the  
23 minutes -- well, first of all, will counsel represent that JD  
24 just so we're clear, because you made a comment first that this  
25 may clear up the confusion. Is JD 02012675 the same document as

1 JD 012675? Because we've got two documents.

2 THE COURT: I believe the answer's yes.

3 MR. BERNICK: No, I -- the one I used before was -- I  
4 don't even have it in front of me, 012675 is the same as the  
5 document that I showed the witness. Is that what you got down?  
6 12675. 012675.

7 MR. WISE: Right and my question is, I believe the  
8 document was used with Dr. Henningfield was 012675. Is that the  
9 same?

10 MR. BERNICK: Yeah, see, those are identical numbers.  
11 012675.

12 THE COURT: All right. Could we establish for the record  
13 it's the same document? I think it is. The government's  
14 objection is overruled. Let's proceed.

15 MR. BERNICK: So, what did I just do with my copy. You  
16 objected to the last document. I was done with it, so it's over  
17 here someplace.

18 BY MR. BERNICK:

19 Q. Picking up on the last document where it talks about the  
20 impact of the word "addiction", you've already talked about the  
21 fact that it did have the impact. Was there or was there not a  
22 media event associated with the release of the Surgeon General's  
23 Report in 1988?

24 A. Yes. The Surgeon General released the report at a press  
25 conference.

1 Q. Okay. And again, showing you JD 080643, is this a  
2 statement that was made by Surgeon General Koop in connection  
3 with the conference that was held at 10:00 on May 16, 1988?

4 A. It is.

5 Q. Okay. Now, we see that Surgeon General Koop, at page 2,  
6 it says, "first, cigarettes and other forms of tobacco are  
7 addicting. Nicotine is the drug in tobacco that causes  
8 addiction."

9 It then says, "third, pharmacologic and behavioral process  
10 that determine tobacco addiction are similar to those that  
11 determine addiction to drugs such as heroin and cocaine."

12 But my question to you is, as a person in the media  
13 business, what would you expect to be the impact of this  
14 scientific language? How would it -- what would the take away be  
15 from the press?

16 A. The press would, naturally, gravitate to the heroin and  
17 cocaine because it was a better -- it just -- it had more  
18 impact.

19 Q. Okay. Did you deal with the immediate consequences of  
20 the press conferences -- press conference?

21 A. Yes, it would actually have begun before the press  
22 conference because press materials would have been distributed  
23 in advance.

24 Q. Okay. Now, just describe for us, very briefly, what that  
25 day was like, and I want to begin, first of all, with television

1 coverage. Was there television coverage of Mr. Koop's  
2 statement? Did he appear on TV?

3 A. Yes, he would have appeared -- videotape of his press  
4 conference or interviews with him would have been on every major  
5 newscast.

6 Q. Did he appear live on channel 4 here in Washington? Do  
7 you remember?

8 A. He may have.

9 Q. The McNeil Lehrer News Hour later on in the day?

10 A. He would have been on just about everything.

11 Q. Okay. Showing you JD 080690, is this a collection of the  
12 transcripts of news broadcasts on that day, May 16, 1988,  
13 relating to the release of the report?

14 A. I have a transcript of the McNeil Lehrer News Hour.

15 Q. And if you page through, do you see there are a whole  
16 bunch of other transcripts from earlier points in time during  
17 that day?

18 A. I only have one transcript.

19 Q. Oh, there's only one. Okay. Well, then, that's my  
20 mistake and we'll deal with it.

21 Let me just ask you this question, which is what I wanted  
22 to get to. Knowing that the media would focus on the equivalency  
23 that was being -- or the similarity that was being expressed  
24 between nicotine and smoking on the one hand and heroin and  
25 cocaine on the other, what, if anything, was the essence of what

1 the Tobacco Institute developed as a message in response?

2 A. We talked about the differences between nicotine and  
3 smoking and heroin and cocaine, and used data from the Surgeon  
4 General's office on the number of people who had quit and how  
5 they had gone about quitting.

6 Q. Now, counsel showed you two press releases relating to  
7 addiction, one dated May 16, 1988 that was Exhibit 21239, and  
8 the other being July 29, 1988, that being U.S. Exhibit 77065.  
9 Recognizing your testimony that the approach that was taken by  
10 the Tobacco Institute with respect to addiction was reactive,  
11 rather than reactive and proactive, were there any other press  
12 releases issued by the Tobacco Institute, other than these two  
13 press releases in the summer of 1988, relating to addiction?

14 A. No. One was in response to the Surgeon General's Report,  
15 because we had to have something to give reporters, and the  
16 other was on top of a packet of testimony at a congressional  
17 hearing where the issue -- we were asked to address the issue.

18 Q. Okay. Going to the point -- the American Cancer Society  
19 saying "addiction, hard drugs," this ought to be part of the  
20 equation, did the addiction issue continue to follow the  
21 industry into the mid-1990s, and in particular in connection  
22 with the proposals to regulate, have the industry regulated by  
23 the FDA?

24 A. Addiction did follow that issue, yes.

25 Q. Showing you U.S. Exhibit 87155, which is the Crossfire --

1 the transcript of the Crossfire interview that, I believe, was  
2 played yesterday by clip, and Your Honor may remember I didn't  
3 have the transcript there at the time, I now have the  
4 transcript.

5 Do you see where this is a Crossfire interview and the  
6 intro talks about in "the Food and Drug Administration has said  
7 it may start regulating tobacco just like any other drug." Do  
8 you recall that proposal being made in 1994 by the FDA through  
9 then commissioner, David Kessler.

10 A. Yes, and the sponsor of that measure was the other guest  
11 on Crossfire on this transcript.

12 Q. Who was that?

13 A. Congressman Mike Synar.

14 Q. So it's called the Synar Amendment?

15 A. It was the Synar Bill.

16 Q. Okay. And do we see that the very question that was  
17 played back yesterday, did we raise, or did the Tobacco  
18 Institute raise the question or come out with the statement in  
19 connection with this saying we're going to issue a press release  
20 or we're going to make a public statement, nicotine is not  
21 addictive, is that how this issue got discussed on this clip?

22 A. No, we were asked a question about it.

23 Q. And then the question is -- is the question: You make a  
24 statement here which was not played, Your Honor, on the clip.  
25 The clip began with the yellow portion where Mr. Kinsley is

1 asking the question about addiction. Prior to that, you made  
2 the comment, "so what we have is an overwhelmingly informed  
3 public, you can't find an American adult who hasn't heard that  
4 message" -- that is, smoking may increase your risk of -- may  
5 increase your risk -- "in fact, according to the Surgeon  
6 General's office, people not only have heard that message, they  
7 believe that message. So if people have the information they  
8 need to make a decision, 50 million American adult say that they  
9 want to smoke, every day they go out and they purchase a pack of  
10 cigarettes, that's something that they want to do. Let's let  
11 them make up their own minds, let's not leave it up to Mr. Synar  
12 to decide what people should and should not do."

13 Now that comment doesn't talk about addiction, does it?

14 A. It does not.

15 Q. So, I take it, then, that the part that was played  
16 yesterday was a question that Mr. Kinsley raised on his own?

17 A. It was.

18 Q. And you went ahead and answered it. I looked at the  
19 answer and the answer, again, that was played to the question of  
20 whether nicotine is addictive, you said, "Absolutely not.  
21 Nicotine is first of all -- I mean, nicotine occurs naturally in  
22 cigarettes. Nicotine is also found in things as scary as  
23 potatoes." Did you say potatoes or is that --

24 A. I think I said tomatoes.

25 Q. Yes, not that it makes an enormous difference, what's



1 more significant is you say, "I mean nicotine", and then the  
2 clip skipped over the next part. But Kinsley says, "Not in the  
3 quantity that are in cigarettes, come on."

4 But you say, "But it's not in the quantity in tomatoes  
5 that it is when it's in the tobacco products."

6 Were you or were you not cut off by Mr. Kinsley at that  
7 point, that is, that after saying "I mean nicotine" -- you were  
8 in the middle of your answer. Is that right or do you remember  
9 or --

10 A. It was Crossfire, and they like to cut you off.

11 Q. Right.

12 A. It was also in response to a proposition by Congressman  
13 Synar that the cigarette companies spiked their cigarettes with  
14 nicotine, and he had said that earlier on page 2. So, I mean,  
15 Kinsley and Congressman Synar were both picking up this charge.

16 Q. Ultimately, did the position of the industry on nicotine  
17 and addiction become as predicted by the American Cancer Society  
18 an issue of credibility?

19 A. Yes, I think it did.

20 Q. Let's talk a little bit about causation, then I think I  
21 can finish up after we go through some of these attribution  
22 documents. Let's pick up the causation scheme.

23 Yesterday you testified concerning the guidelines that  
24 were issued as media strategy by the U.S. Department of Health  
25 and Human Services Public Health Service and the National

1 Institute of Health. Do you recall that?

2 A. I do.

3 Q. Okay. Now, that event took place -- this is a workshop  
4 that took place January 14th or 15th. I think that the document  
5 itself was later -- in 1988, we have then the HHS, Public Health  
6 Service, and the NIH talking about media, and I don't want to go  
7 back over the details of this, I really want to follow up on it.  
8 You discussed -- or we discussed the fact that this makes  
9 reference to using, again, as an especially effective technique  
10 in any debate or public appearance with a representative of the  
11 tobacco industry, challenge that representative to respond to  
12 the question, do you believe that smoking causes any lung cancer  
13 or any other -- question -- and then it goes on to say when the  
14 answer is "no, not proven", that will be a credibility issue.

15 My question is, after this document was issued in January  
16 of 1988, did you or did you not have experience exactly along  
17 those lines?

18 A. Exactly along those lines.

19 Q. I want to show you U.S. Exhibit 85150, which is another  
20 one of your sessions with Mr. Kinsley on Crossfire.

21 And this deals with the question of ads that are being  
22 run by the State of California, TV cigarette -- TV commercials  
23 run by the State of California that basically have an  
24 antismoking message. Do you recall that interview with  
25 Mr. Kinsley?

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1 A. I do.

2 Q. Now, I want to direct your attention to this discussion  
3 here at page 3. It says: "Okay, Doctor Kaiser, let's bring the  
4 Tobacco Institute in on this. Ms. Dawson, first of all, is the  
5 ad accurate in its assertion that cigarettes cause cancer, heart  
6 disease, emphysema and strokes?" Now, when that's being raised,  
7 is that the primary health issue again?

8 A. That would be the primary health issue, yes.

9 Q. Was that what you came to talk to Mr. Kinsley about when  
10 you showed up on Crossfire?

11 A. No, we were supposed to talk about the California ad  
12 campaign.

13 Q. Was it a shocking surprise to you that he raised this  
14 question?

15 A. Wasn't a shocking surprise no, it wasn't what we were  
16 there to talk about.

17 Q. It says, "Is the ad accurate in its assertion?"  
18 You say, "I'd like to jump back to what Mr. Kaiser --"  
19 Kinsley says, "Well, answer my question first, and then  
20 honestly, I'll let you answer Mr. Kaiser, we'll go in point  
21 then."

22 Answer -- question --

23 Your answer is, "I think that smokers and non-smokers that  
24 adults across the United States are smart enough, they've heard  
25 messages before, they see it on every pack, for goodness sake, to

1 know about --"

2 He then interrupts you and says, "Is it true, is it true?"

3 And then you say, "The dangers that have been alleged

4 about tobacco smoking, the 99 percent awareness rate, for one

5 thing" -- and you then go in then to talk about it.

6 He didn't let you off the hook. On the next page he said,

7 "I just want to find out if you're on the is same planet here.

8 Does smoking cause lung cancer?"

9 THE COURT: No, "Does smoking cause cancer."

10 MR. BERNICK: I'm sorry, "Does smoking cause cancer."

11 BY MR. BERNICK:

12 Q. Is this or is this not the experience that you had with

13 the causation issue which was it's being used as a litmus test

14 for credibility?

15 A. It's the experience.

16 Q. Did a time come in the late 1990s -- let me just ask you,

17 by the mid-1990s, in your own view, how is the Tobacco Institute

18 fairing in the court of public opinion with regard to its

19 credibility on the issues of addiction and causation?

20 A. I think we were at the bottom of the heap.

21 Q. Ultimately, as the Court, I know, has heard from other

22 people, have those positions been abandoned or are they still

23 being maintained?

24 A. No, we've changed our positions.

25 Q. I want to go to an important question that the Court

1 asked you and deal with it, and spend a few minutes because of  
2 its importance. Before I do that, actually, I want to pull in  
3 one other thing. Before I forget, which I didn't do.

4 This form, and the media strategy guidelines, has at the  
5 back end, has at the back end Appendix C, and it's called  
6 Creative Epidemiology. Do you see where it makes reference --  
7 where this government report makes reference to a whole series  
8 of kind of, you know, bullet points or factoids, I guess it's  
9 now called, about various statistics?

10 A. I do.

11 Q. Number one is a thousand people quit smoking every day by  
12 dying. That is equivalent to two fully loaded jumbo jets  
13 crashing every day with no survivors. Memorable?

14 A. Yes.

15 Q. Now, this is dated 1988. Have you heard that same  
16 comparison made during the course of these years since the  
17 government put out the publication about that use of  
18 epidemiology?

19 A. Yes.

20 Q. In fact, I want to show you a book, or a piece of a book.  
21 This was referenced in the government's demonstrative 17671 used  
22 with Dr. Biglan. It's dated 1995, and as he testified, he had a  
23 chapter on reducing the prevalence of tobacco use. And the  
24 whole introduction talks about, basically, the smoking and  
25 health problem. Do you see where at the bottom Dr. Biglan in

1 his publication in 1995 says, "To illustrate the size of the  
2 tobacco problem, imagine two Boeing 747s crashed today killing  
3 everyone on board, unless the planes clearly were not defective,  
4 these crashes would probably produce an immediate grounding of  
5 all 747s", and then he spends the next two full paragraphs  
6 talking about this particular comparison.

7 Was Dr. Biglan alone in seizing upon the creative  
8 epidemiology?

9 A. He was not. This was commonly used.

10 Q. Let's talk about your own answers to this Court,  
11 Ms. Dawson. When you were acting as a spokesperson for the  
12 Tobacco Institute, did you or did you not believe in the truth  
13 of what you were saying?

14 A. I did believe it.

15 Q. Did you expect that some of those listening to you,  
16 listening to your statements on behalf of the Tobacco Institute,  
17 would agree, for example, with the industry's views on  
18 environmental tobacco smoke? Some of them would?

19 A. Some would agree.

20 Q. Did you believe that some of them would agree with the --  
21 that the industry was, in fact, taking appropriate steps on  
22 youth smoking?

23 A. I think so, yes.

24 Q. Did you expect that some would agree with the view that  
25 you expressed on behalf of the Tobacco Institute that

1 nicotine -- or smoking, I should say, was not addictive like  
2 hard drugs?

3 A. I think some people would agree with that, yes.

4 Q. Let's talk about the primary health issue. When you were  
5 in a position where, as Mr. Kinsley was doing, (indicating),  
6 he's putting the issue to you, the primary health issue to you,  
7 and you are responding as the industry has responded  
8 historically that causation's not been demonstrated, albeit as  
9 the press -- as your interview reflected yesterday, there is a  
10 potential risk factor. Was that language part of the language  
11 that you used, "potential risk factor"?

12 A. It was.

13 Q. Did you believe at the time when you would make those  
14 statements, did you expect that any significant number of people  
15 who were listening to that statement would actually believe that  
16 the statement was accurate scientifically or factually?

17 A. I think some would believe it.

18 Q. Any (sic)?

19 A. No.

20 Q. Was persuading people about the merit, that is the  
21 scientific merit of the industry's position on primary --

22 THE COURT: Excuse me, I have to go back for a minute,  
23 everybody, and I want you to look at the realtime transcript.

24 MR. BERNICK: Okay.

25 THE COURT: Did you ask the question "any" or "many"?

1 MR. BERNICK: I think I --

2 THE COURT: Because as you will see, that one letter makes  
3 a very big difference in the answer.

4 MR. BERNICK: You mean the one I just asked?

5 THE COURT: Yes.

6 MR. BERNICK: I said -- it wouldn't make sense if it  
7 were -- if it were "many," it would have to be "any significant  
8 number." Is that the question that you are focused on?

9 THE COURT: Yes. Well, if you think the transcript is  
10 right, that's fine.

11 MR. BERNICK: It says did you --

12 THE COURT: Maybe I'm misreading it.

13 MR. BERNICK: "Did you believe at the time that you made  
14 those statements, did you expect any significant number of people  
15 who were listening to that statement would actually believe that  
16 the statement was accurate scientifically or factually?"

17 She said, "I think some would believe it" -- oh, I see,  
18 it's the next one. Sorry, I said "many" with an "M".

19 THE COURT: That's what I thought.

20 MR. BERNICK: I saw "any" in the prior question, I thought  
21 that's what you were asking about.

22 THE COURT: That's what I thought.

23 BY MR. BERNICK:

24 Q. Now, here's what I want to get to. Beyond the prospect  
25 of persuading some people, whatever the number was, about the



1 merits, the scientific merits of the Tobacco Institute's  
2 position on these issues, was that the only purpose of your  
3 being a spokesperson of the Tobacco Institute doing what they  
4 were doing?

5 A. No. I was on these television programs talking about  
6 other topics when I was asked this question, and they were  
7 political, regulatory, legislative issues that were going on  
8 generally.

9 Q. Okay. I want to be more precise in order to get to  
10 what's going to be the Court's questions to you.

11 In those television programs where you were then asked the  
12 primary health question, pick that one out, you said that gee, I  
13 didn't expect that many people were going to be persuaded by it,  
14 and you could take the other positions as well, was there any  
15 purpose to your articulating the industry's position on these  
16 issues other than the prospect of actually persuading many  
17 people, some people, to agree that those positions were factually  
18 or scientifically correct? Do you understand where I'm asking  
19 you now? I'm asking you if there was any other purpose to the  
20 communication?

21 A. I mean, the purpose was to respond to the question so  
22 that you could, you know, then talk about the other issues. The  
23 purpose wasn't to try to persuade people, the purpose was to try  
24 to respond and move on.

25 Q. Okay. Let me then put this, now, in the context of the

1 question that the Court asked you. It says, you originally were  
2 asked, "You and the Tobacco Institute intended the public to  
3 rely upon the public statements you made on those television  
4 shows?"

5 And the answer that was proposed by the government was:  
6 "That's correct." And when the Court asked you those questions,  
7 you ultimately said "yes".

8 And I want to ask you, first of all, whether, kind of now  
9 looking back at that question and the way that you answered it  
10 originally in your dialogue with the Court, with the benefit of  
11 hindsight, should that have been your answer to begin with?

12 A. That's correct is fine, yes.

13 Q. Okay. What were you getting at by saying "our intent was  
14 to communicate the views of the Tobacco Institute on industry  
15 issues to the public"? Why is that anything different from  
16 "rely"?

17 A. Because I did not want to answer in the affirmative that  
18 I was trying to persuade people, that I was -- I mean that to me  
19 was what the "rely" implied, that we were trying to persuade  
20 people that smoking wasn't dangerous that we were affirmatively  
21 selling that message, that I was affirmatively selling that  
22 message, because I don't believe I was.

23 I was there to discuss, you know, in many cases, in most  
24 cases, a legislative matter. The question came up, I answered  
25 it, and then went back to the issue that we were discussing for

1 the, you know, for the rest of the 13 page transcript, for  
2 example.

3 Q. And when you now recognize that the answer should have  
4 been "yes", what relationship does that, if any, have to the  
5 questions I was asking, which is when you did speak to the  
6 issue, did you or did you not recognize that some people were  
7 going to take it seriously on the facts and might believe it,  
8 that that might be true for some people?

9 A. But for some people it might be true.

10 Q. I want to turn, finally, to this stack of documents here,  
11 and I don't know, Your Honor, of a better way in which to do it  
12 other than to just go through them.

13 There were questions that were asked of you concerning --  
14 what happened to those -- Exhibit 855587, which was a press  
15 release that made reference to Doctors LeVois, Lee, and Fleiss.  
16 Do you recall that?

17 A. I do.

18 Q. And there were questions was anything disclosed on the  
19 press release that LeVois had a relationship with the Tobacco  
20 Institute, do you recall that?

21 A. I do.

22 Q. I want to show you JD 013143. Do you see that that's an  
23 article in the Tulsa Tribune, Tulsa, Oklahoma, dated a little  
24 while later, that is, the next year, 1991.

25 A. I do.

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- 1 Q. It says, The Effect of Smoke On Nonsmokers Challenged.  
2 It says, "Last year, at the request of the Tobacco Institute, I  
3 submitted written comments to the Environmental Protection  
4 Agency on portions of an EPA draft compendium of technical  
5 information on ETS."  
6 And it's signed by the same individual, do you see that?  
7 A. I see that.  
8 Q. I want to show you JD 013142, which is a June 26, 1991  
9 letter to the editor by Maurice LeVois, and all the different  
10 people that he's writing are there, and it says, actually, let  
11 me just check out, includes the Tulsa Tribune. "Dear Editor,  
12 Again last year at the request of the Tobacco Institute" -- was  
13 that letter written by Maurice LeVois preceding the article in  
14 the Tulsa Tribune?  
15 A. It is.  
16 Q. And we see the same letterhead of fairly broad  
17 distribution?  
18 A. Yes, it would have.  
19 Q. You then have Exhibit 85588, which was shown to you by  
20 the government, dated January 20, 1992, again relating to the  
21 EPA draft document. It has no attachments, and it makes  
22 reference to a Dr. Flamm and a Dr. LeVois, again relating to  
23 ETS, right?  
24 A. Right.  
25 Q. At that time, that is, July of 1992, showing you JD

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1 013147, Flamm is writing now to the Scientific Advisory Board  
2 staff office of the EPA, and says: "I've been asked by the  
3 Tobacco Institute to comment on the draft EPA document." Do you  
4 see that?

5 A. I see that.

6 Q. Here's another one, JD 013148, now, by Dr. LeVois meta  
7 analysis, again, July 1st -- both of these are just prior to the  
8 press release, is that fair?

9 A. That would be fair.

10 Q. Again, he said here, "I've been asked by the Tobacco  
11 Institute to prepare comments."

12 Was there any doubt in your mind that the affiliations of  
13 Doctors LeVois and Flamm to the Tobacco Institute was a matter of  
14 public record?

15 A. It was a matter of public record.

16 Q. The criticisms that were made by those individuals, did  
17 they or did they not -- did those types of criticisms ultimately  
18 get aired in Court, that is, the EPA's risk assessment, were the  
19 criticisms of the assessments aired in Court?

20 A. Yes they did.

21 Q. And what was the result if you know?

22 A. The EPA risk assessment was overturned.

23 Q. I'm going to show you Exhibit 22367, which is the Public  
24 Affairs Management Plan Progress Report dated July 1990 that was  
25 shown to you by the government. Do you recall that?

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- 1 A. I do.
- 2 Q. And there was reference made to the Detroit News  
3 publication of an editorial -- there is reference made to the  
4 Detroit News publishing an editorial submitted by Joe Pedelty,  
5 and there's no indication that he has an affiliation with the  
6 Tobacco Institute; is that correct?
- 7 A. That's correct.
- 8 Q. Showing you JD 013141, which is the Detroit News July 26,  
9 1990, Smokers Dangers Overplayed is the headline, it says by  
10 Joseph Pedelty, do we see the description of the author includes  
11 an attribution, or a disclosure, that he's done work for the  
12 tobacco companies?
- 13 A. It's disclosed.
- 14 Q. Showing you 85588, which is -- I'm sorry, 85379 and -- I  
15 guess it's just that one, 85379. This was the 1990 press  
16 release that the government showed you dealing with the youth  
17 smoking issue. It says "Experts would violate the first" -- the  
18 Bill -- "Experts say Bill would violate First Amendment."  
19 There's a reference here to Mr. Floyd Abrams to Professor  
20 Mizersky, to -- I think it was one other, to Dr. Flamm, do you  
21 see that again?
- 22 A. I do.
- 23 Q. And there were hearings that were being held at that  
24 time, correct?
- 25 A. That's correct.

1 Q. Showing you JD 013144, do we see the same press release  
2 as produced by the Tobacco Institute in Minnesota with  
3 sequential pages 26755 up to 26888, and attached to the press  
4 release are the actual statements that were being submitted to  
5 Congress; is that accurate?

6 A. Yes, and as -- this is the package that would have been  
7 at the congressional hearing on the press table. It would have  
8 included all of the testimony.

9 Q. Okay. Taking a look at Floyd Abrams, does the statement  
10 indicate on its face that he's appearing on behalf of the  
11 Tobacco Institute? This is at the page ending 8 -- 082, excuse  
12 me. It's the page that ends at the bottom, 26802. Is that the  
13 same thing? It should be the first page of the statement?

14 A. On behalf of the -- it says statement of Floyd Abrams on  
15 behalf of the Tobacco Institute.

16 Q. Same thing with respect to Mizersky at page ending 836,  
17 the indication he's appearing on behalf of the Tobacco  
18 Institute?

19 A. Statement of Richard Mizersky on behalf of the Tobacco  
20 Institute.

21 Q. And then Dr. Flamm, this is the page ending 873 where it  
22 says, "I've been asked by the Tobacco Institute to present my  
23 views". Was there any doubt in your mind that with respect to  
24 all three individuals it was a matter of public record that they  
25 were appearing and had ties and were -- they were appearing on

1    behalf of the Tobacco Institute?

2    A.       There was no doubt in my mind.

3           MR. BERNICK: Thank you, Your Honor, that's all the

4    questions I have of the witness.

5           THE COURT: Any other defense counsel with questions for

6    this witness? Mr. Wise, how long do you think you'll be?

7           MR. WISE: Not very long, Your Honor. I think maybe a

8    half an hour at the longest.

9           THE COURT: All right, well, let's at least start, please.

10          REDIRECT EXAMINATION OF BRENNAN DAWSON

11   BY MR. WISE:

12   Q.       Good morning, Ms. Dawson.

13   A.       Good morning.

14   Q.       Why don't we pick up where counsel left off and address

15   some of the other issues, some of the issues that were raised

16   yesterday. Let's start with talking about these letters to the

17   editor. Now, why don't we start with -- yesterday counsel

18   discussed with you, briefly, the Dallas ETS survey press release

19   and the events that surrounded that. Do you recall that?

20   A.       Yes, I do.

21   Q.       And you were shown that press release. Why don't I just

22   do it this way. Counsel showed you that, it's JD 013136. Do

23   you recognize this? Is this the Tobacco Institute June 30th

24   1987 press release that we discussed in your direct?

25   A.       Yes, it is.

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1 Q. And it's titled New Study of Actual Air Quality In  
2 Restaurants, Offices Shows Tobacco Smoke is Insignificant  
3 Factor"; is that correct?

4 A. That's correct.

5 Q. And it's referring to the Dallas survey we were  
6 discussing, right?

7 A. It is.

8 Q. And counsel flipped past the press release to the second  
9 attachment, I guess, statement of John Carson, and pointed you  
10 to the fact that in that statement there was the sentence:  
11 "Because of the company's" -- referring in this case to  
12 Mr. Carson's company International Technological --  
13 International Technology Corporation -- "Because of the  
14 company's extensive experience in air quality areas, IT was  
15 selected by the Tobacco Institute to collect and analyze samples  
16 of indoor air in the metropolitan Dallas area". Did I read that  
17 correctly?

18 A. Yes.

19 Q. And it was your testimony that any reporter would have  
20 known, after having read this press release and then read the  
21 subsequent attachments, that what that meant was that the  
22 Tobacco Institute had hired IT Corporation to conduct this  
23 survey; isn't that right?

24 A. Yes.

25 Q. And that they would know that Mr. Carson, therefore, was

- 1 a paid contractor of the Tobacco Institute; isn't that correct?
- 2 A. Yes.
- 3 Q. Ms. Dawson, in your, I guess, 20 years of public affairs  
4 work, are you familiar with the -- with an organization called  
5 the United Press International?
- 6 A. Yes.
- 7 Q. And that's a national news organization? Is that a fair  
8 way to characterize it?
- 9 A. Yes, it is.
- 10 Q. And reporters write stories and place it on this service  
11 and then newspapers can pick them up and run them in their  
12 newspapers with attribution to UPI; isn't that correct?
- 13 A. Right.
- 14 Q. Ms. Dawson I'm showing you an exhibit -- actually, can we  
15 get this? It's 90103. It's U.S. Exhibit 90103. And I'll hand  
16 you this copy, Ms. Dawson.
- 17 A. Thank you.
- 18 Q. And you'll see at the top it's listed UPI, you understand  
19 that's the acronym for United Press International?
- 20 A. Yes.
- 21 Q. 6-30-87, June 30th, '87, the same day as the press  
22 release, and the first paragraph reads: "Dallas" -- that's the  
23 location of the ETS survey and where the press conference was  
24 held; is that right?
- 25 A. Yes, it is.

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1 Q. And it says, "A report released Tuesday" -- and there is  
2 "release", in fact, that's the word used in the press  
3 conference, right, the report was released by the Tobacco  
4 Institute?

5 A. Yes.

6 Q. "Said secondhand smoke is not as dangerous to nonsmokers  
7 as previously estimated."

8 And then if we could scroll down to the paragraph that  
9 starts "John Carson". "John Carson, air quality project manager  
10 for International Technology", that's the contractor that  
11 conducted the study, right?

12 A. Yes, it is.

13 Q. That was referred to in the press release as an  
14 independent scientific team; isn't that correct?

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

16 Q. International Technology was referred to in the Tobacco  
17 Institute press release as an independent scientific team; isn't  
18 that correct?

19 A. That's right.

20 Q. Now, this paragraph reads: "John Carson, air quality  
21 project manager for International Technology, said each office  
22 or restaurant in the study was equipped with a briefcase  
23 containing air quality measuring devices, the case was placed on  
24 a desk or chair near the center of the area away from doors and  
25 air vents." Did I read that correctly?

- 1 A. Yes, you did.
- 2 Q. So the information that you testified, any journalist  
3 would have known from reading the attachments to the press  
4 release, is not, in fact, in this press report written based on  
5 the press release, is it?
- 6 A. No, it says the Tobacco Institute released the report.
- 7 Q. Well, I didn't ask you about that first paragraph yet,  
8 I'm asking about this paragraph. It says, "John Carson, air  
9 quality project manager for International Technology." Nowhere  
10 in this statement is the information that you said any reporter  
11 would have known by reading the attachments to the press  
12 release, nowhere is that information, in fact, in this  
13 statement?
- 14 A. It's not in this paragraph, that's correct.
- 15 Q. Well, why don't we look -- you said it's not in this  
16 paragraph. Why don't we take a moment to look at the press  
17 release -- not at the press release, but the article in its  
18 entirety, and, in fact, that information isn't contained  
19 anywhere else in this article, is it?
- 20 A. The article refers to it as a Tobacco Institute study.
- 21 Q. Ms. Dawson, my question is, the fact that the  
22 International Technology Corporation and John Carson were paid  
23 by the Tobacco Institute, is that disclosed anywhere -- or is  
24 that discussed anywhere else in this article?
- 25 A. The fact that it was a Tobacco Institute study, would

1 that not indicate that IT Corporation was paid by the Tobacco  
2 Institute, if it was our study?

3 Q. Well, Ms. Dawson, if you could just answer my question.  
4 I asked you if the fact that the information you said any  
5 reporter would have known that John Carson was paid by the  
6 Tobacco Institute, is that information in the paragraph that  
7 discusses him, is that information contained there?

8 MR. BERNICK: Objection, Your Honor, asked and answered.

9 THE COURT: The objection's overruled, the witness may  
10 answer.

11 THE WITNESS: I believe that the fact that, for example,  
12 it says that it was a Tobacco Institute study, indicates that  
13 people understood that IT was part of the Tobacco Institute study  
14 and therefore, they would have been compensated.

15 BY MR. WISE:

16 Q. But if we could just focus on -- I think the testimony  
17 you gave yesterday, and that is that the statement of John  
18 Carson that was attached to the press release, would have  
19 alerted any reporter, and I think you even said anyone with the  
20 exception of the man on the street, that Mr. Carson, in fact,  
21 was being paid by the Tobacco Institute, is that addressed in  
22 the paragraph that talks about Mr. Carson?

23 A. Not in that paragraph.

24 THE COURT: But, Ms. Dawson, once you issue a press  
25 release with whatever attachments are attached to it, do you

1 control what the press chooses to select out to put in its  
2 stories?

3 THE WITNESS: No, Your Honor, you wouldn't.

4 BY MR. WISE:

5 Q. Well, Ms. -- may I, Your Honor?

6 Ms. Dawson, you testified yesterday that you ran media  
7 tours to localities that were considering, I think you said,  
8 public smoking bans, like Dallas; is that correct?

9 A. That's right.

10 Q. And you brought scientists and other people to, I think  
11 you said, make media appearances, or some words to that effect?

12 A. That's right.

13 Q. But you issued national press releases; isn't that  
14 correct?

15 A. I'm not sure that this would have been issued nationally.

16 Q. Well, it was picked up by UPI, which is a national wire  
17 service, as you've testified to just a few moments ago; isn't  
18 that right?

19 A. It was -- it does look like it was picked up by UPI, yes.

20 Q. And this would have then been broadcast nationally; isn't  
21 that right?

22 A. Newspapers could have chosen to run it, yes, sir.

23 Q. And I'd ask you the same question about the press release  
24 that discussed the New York City survey. Again, New York City  
25 was considering a local smoking ban and you conducted media

1 tours in New York City; isn't that right?

2 A. Yes, we did.

3 Q. But you issued a national press release; isn't that

4 right?

5 A. The press release could have been picked up by the

6 Associated Press so that UPI -- for national distribution.

7 Q. It, in fact, would have been disseminated by you to AP

8 and the UPI, as you testified, in the ordinary course of

9 business at the Tobacco Institute; isn't that right?

10 A. Yes, for New York City, yes, it would have gone to AP in

11 New York City.

12 Q. Well, Ms. Dawson, is it your understanding that there was

13 a separate AP for New York City?

14 A. There's an office in New York City, yes.

15 Q. I didn't ask if there was an office, I asked if the

16 Associated Press is, in fact, a national news organization?

17 A. They are.

18 Q. So you sent this news article to a national news

19 organization?

20 A. Yes.

21 Q. Now, while we're on the subject of the local media tours,

22 I think you testified yesterday that these tours were limited to

23 areas, or that you undertook them and sent them to places where

24 state or government was considering public smoking bans; isn't

25 that right?

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1 A. I don't believe that I testified that they were limited  
2 to that. Working with our state and local lobbyists we would  
3 select the places we would send them.

4 Q. You also did media tours, for instance, at meetings of  
5 the American Medical Association; isn't that right?

6 A. We would have -- I remember a couple of times when we had  
7 media availabilities, that is, people there ready to respond if  
8 necessary.

9 Q. Just so we're clear, the only place, and I think just so  
10 the record is clear, the Tobacco Institute media tours were not  
11 limited to locals where government action was being considered?

12 A. The action didn't have to be contemporaneous to the media  
13 tour, it could be something where a lobbyist said I anticipate a  
14 problem next month, put me on the schedule.

15 Q. It could have also been at a location where you  
16 anticipated a problem with a Tobacco Institute program; isn't  
17 that correct?

18 A. I don't recall that occasion, but it -- that may be.

19 Q. Well, let's look at U.S. Exhibit 62252. This is the  
20 public affairs management plan progress report from January '89.  
21 You were shown this yesterday. I don't know if -- with the  
22 stack up there it's probably a lot to ask to find it.  
23 We're going to go to TI 09911601. We discussed this page  
24 yesterday. This is the page that identifies media relations  
25 primary responsibility, Brennan M. Dawson. Did I read that



1 correctly?

2 A. Yes, you did.

3 Q. And this public affairs management plan progress report  
4 talks about the Tobacco Institute's Enough Is Enough campaign;  
5 is that correct?

6 A. Yes, it does.

7 Q. And on the following page, a page we didn't discuss  
8 yesterday in Court, at the very top it reads: "The Institute,  
9 as part of aggressive promotion to respond to charges and  
10 proposals and news coverage of the AMA's antismoking conference,  
11 re ran the Enough Is Enough advertisement in the Houston Post on  
12 the opening day of the conference and set up a media operation  
13 in Houston that included an economic and scientific witness."  
14 Did I read that correctly?

15 A. Yes, you did.

16 Q. And the next bullet point read: "Covering the conference  
17 were about 20 media outlets, most from Houston television and  
18 radio stations. From larger organizations, only CNN, Newsweek,  
19 UPI and the Los Angeles Times were in attendance. Prior to  
20 coverage of the antismoking agenda, TI had briefed these  
21 national reporters." Did I read that correctly?

22 A. Yes, you did.

23 Q. And the next paragraph reads: "As a result of these  
24 activities, the industry's views were featured in the media  
25 coverage of the conference. In addition, the briefings provided

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1 press representatives with ammunition for some tough and  
2 specific questions of antismoking proposals." Did I read that  
3 correctly?

4 A. Yes, you did.

5 Q. Just so the record is clear, the media tours also  
6 included events like American Medical Association meetings;  
7 isn't that right?

8 A. This wasn't a media tour. There was a scientific witness  
9 and an economist that were made available to reporters covering  
10 it. It's not a big distinction, but it explains my answer  
11 previously.

12 Q. And you testified that a media tour consisted of a  
13 scientific witness, or more, being sent to a location to answer  
14 questions or interact in some other way with the press; isn't  
15 that right?

16 A. Right, the mechanics of the two are just different.

17 Q. But the substance is the same?

18 A. Um, no, not necessarily, because one, you would be going  
19 out if there were a smoking proposal, you know, a smoking in  
20 public place proposal, and the other you've got experts  
21 available as things come out to be on the spot to make it easier  
22 for reporters to get the views.

23 Q. I guess that's the last part of your answer I just want  
24 to make clear. In any event, the Tobacco Institute took this  
25 approach of setting up -- sending people to locations to address

1 media issues, whether it was a government -- in locations that  
2 were considering government action or in private meetings, like  
3 the American Medical Association; isn't that right?

4 A. Yes.

5 Q. Now, Ms. Dawson, yesterday, in response to a question  
6 from counsel, or a series of questions from counsel, you said  
7 that when you joined the TI, it was your understanding that if  
8 the issue of smoking and disease was raised, you should get away  
9 from it as quickly as possible; isn't that right?

10 A. Yes.

11 Q. And you said the reason that you were -- your  
12 understanding of why that was the Tobacco Institute's guidance  
13 to you was that because, and you used the phrase "our position"  
14 you said "our position" was not credible; isn't that right?

15 A. That's right.

16 Q. And by "our" you mean the Tobacco Institute's position?

17 A. That's right.

18 Q. And yet, as you testified yesterday, Ms. Dawson, after  
19 you joined the Tobacco Institute in 1986, you went on  
20 television, various television programs, and made statements to  
21 the effect that the relationship, the causal relationship  
22 between smoking and disease had not been proven; isn't that  
23 correct?

24 A. That is correct.

25 Q. And we saw a clip of an appearance you made in 1986 on

1 CNN in which you stated that directly, that the causal  
2 relationship had not been established; isn't that correct?

3 A. That's correct.

4 Q. And you also made that statement in 1999 on Good Morning  
5 America, and we saw that clip yesterday, where you made the  
6 statement the causal relationship has not been established;  
7 isn't that correct?

8 A. Correct.

9 Q. And Mr. Bernick has put up a couple of time lines, and  
10 just so we're clear, why don't we talk about some of the  
11 statements you made and locate when in time they were?

12 THE COURT: Well, we're not going to make any 15 minutes,  
13 but then I didn't think we would. So, let's take our morning  
14 recess for 15 minutes, but I do hope that by approximately 11:30  
15 you will have completed your redirect.

16 MR. WISE: Okay.

17 THE COURT: Approximately. 15 minutes.

18 (Thereupon, a break was had from 11:01 a.m. until  
19 11:18 a.m.)

20 THE COURT: Mr. Wise.

21 BY MR. WISE:

22 Q. Ms. Dawson, before the break, we were talking about some  
23 of the statements you made from the period of 1986 when you  
24 joined the Tobacco Institute up through 1994. Do you recall  
25 that?

1 A. Yes.

2 Q. And before we address some of those statements, and  
3 perhaps we won't need to in specifics, but just so the record is  
4 clear, you were asked a series of questions about a conference.  
5 We saw some sort of report from the conference. I believe it  
6 was a conference sponsored by -- I've got one up here.

7 The conference was entitled "Media Strategies For Smoking  
8 Control From a Consensus Workshop Conducted By the Advocacy  
9 Institute For the National Cancer Institute" and it was JD  
10 004595. Do you recall that?

11 A. I do recall it.

12 Q. And you gave testimony after being read some sections of  
13 this document that, in fact, after this conference, after 1988,  
14 you were asked questions about whether smoking caused disease on  
15 your many television appearances. Do you recall that testimony?

16 A. I do.

17 Q. Now, isn't it true, Ms. Dawson, that a year later, in  
18 1989, the Surgeon General issued another major report on smoking  
19 and disease?

20 A. Do you mean the 25th anniversary report from the Surgeon  
21 General?

22 Q. That's exactly what I mean. Isn't that correct?

23 A. That's correct.

24 Q. And for instance, when you appeared on "Good Morning  
25 America," you were asked to appear or -- well, strike that.

1           You appeared on "Good Morning America" on the same day as  
2   the release of the 25th anniversary of the 1964 Surgeon  
3   General's Report, isn't that correct?

4   A.       I don't recall if it was the same day, but yes, I do  
5   recall that appearance.

6   Q.       And so is it fair to say, for instance, in 1989 when you  
7   appeared on "Good Morning America," you appeared on "Good  
8   Morning America" to address the Surgeon General's Report, not  
9   this conference that had occurred a year earlier; is that  
10   correct?

11   A.       That's correct.

12   Q.       Now, Ms. Dawson, we've looked at a couple video clips of  
13   statements you made on television to -- well, I'm going to limit  
14   it to two of the issues up on the time line here. And I just  
15   want to, just so we're clear, so the record is clear, just  
16   review briefly some of those statements and when they occurred.

17           Now, we saw a clip from CNN's "Newsmaker Sunday" in  
18   1986 -- I'll just abbreviate "Newsmaker Sunday" -- where you  
19   addressed the issue of causation; isn't that correct?

20   A.       That's correct.

21   Q.       And we also saw a clip where you appeared on "Good  
22   Morning America" in 1989. And I don't know where is a good  
23   point to put that, but -- well, why don't we put it right about  
24   here.

25           Appeared on "Good Morning America" and addressed the

1 issue of causation; isn't that correct?

2 A. That's correct.

3 Q. And you appeared on CNN's "Crossfire" in 1990 and you

4 again addressed issues of smoking and disease; isn't that

5 correct?

6 A. Yes. In all of those instances I was asked a question

7 about it, right.

8 Q. And you made statements in response to those questions?

9 A. Yes.

10 Q. And then you also appeared in 1990 on a program called

11 "Newswatch" -- "Nightwatch"; I'm sorry -- that was a CBS

12 program, I think?

13 A. Right. That was the one with Mr. Waxman -- Congressman

14 Waxman.

15 Q. And that was in 1990 and you made statements regarding

16 smoking and disease on that program; isn't that correct?

17 A. That's correct.

18 MR. BERNICK: Your Honor, I'm not sure where this is

19 going, but I would object. This is a reiteration of the

20 chronology that counsel for the government specifically went

21 through in his first cross-examination (sic).

22 THE COURT: Where are we going, Mr. Wise?

23 MR. WISE: In a moment, Your Honor, I'm going to add the

24 same chronology for some of the addiction statements, just to

25 complete -- now that we have this time line of Ms. Dawson's

1 activities, just to complete that.

2 Or I can move on, Your Honor. I mean, if --

3 THE COURT: I think you can move on, Mr. Wise.

4 BY MR. WISE:

5 Q. Let's talk just for a minute about a couple of the  
6 statements you made concerning addiction. When you appeared on  
7 "Good Morning America" in 1989 -- why don't we just look at the  
8 transcript from that. We saw a clip from this show yesterday.  
9 You appeared with -- you appeared with Dr. Timothy Johnson, who  
10 was the "Good Morning America" Medical Editor; isn't that  
11 correct?

12 A. That's correct.

13 Q. And here, I guess Dr. Johnson makes a statement: "Well,  
14 I just can't help but smile when they talk about 50 million  
15 smokers making an informed choice to smoke, as though they all  
16 sat down as adults, sat down, listened to the evidence, reasoned  
17 back and forth and then made a rational choice to start smoking.  
18 In fact, what we know happens is that the vast majority of  
19 smokers start as kids and teenagers. They are not making  
20 rational, informed choices. They are making choices under the  
21 pressure of peer pressure and led by seductive, sexy  
22 advertising. And then when they do become adults, they spend  
23 the rest of their life trying to kick this addictive habit. So  
24 they're not making free choices to begin with and they don't  
25 have a very free choice to quit even when they want to."

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1           And just so the record's clear, this is U.S. Exhibit  
2   21286 and I was reading from page TI- -- well page 2, TIMN  
3   389475.

4           The next page, the host, Joan Lunden, I guess, interrupts  
5   and it carries over from the last part of what Dr. Johnson said.  
6   And Ms. Lunden is attributed as saying: "Most of the surveys,  
7   you must admit, Ms. Dawson, do show that the majority of the  
8   smokers are the poorer people, the less educated people, the  
9   younger people, so many would say: 'Aren't you directing your  
10   ads to this group of people who are much more likely to  
11   succumb?'"

12           And then you're quoted as saying: "I can't allow the  
13   claim that smoking is addictive to go unchallenged." And then  
14   this is where the clip we showed yesterday picks up; isn't that  
15   correct?

16   A.     That's correct.

17   Q.     So it's fair to say in this example, Ms. Dawson, you were  
18   asked a question about, I think, directing ads at people who  
19   were likely to succumb and you made the statement: "I can't  
20   allow the claim that smoking is addictive to go unchallenged,"  
21   referring to the statement Dr. Johnson had made; isn't that  
22   right?

23           MR. BERNICK: I'm sorry, Your Honor. I really think that  
24   if that's the question being asked, and I do not have an  
25   opportunity for recross, you have to go back to the top of page

1 2, which preceded the thing that you were showing before.

2 Do you see where it says -- well, at the top of page 2,  
3 you'll see that there's a statement regarding "addictive" there.

4 THE COURT: It's up to you, Mr. Wise, what you want to put  
5 in or not.

6 BY MR. WISE:

7 Q. I'm just -- here again, this is another statement by  
8 Dr. Johnson, if I'm reading correctly, that "smoking is a  
9 terribly addictive problem." So if that clarifies the record  
10 that Dr. Johnson made two statements that smoking was addictive  
11 and then you responded with: "I can't allow the claim that  
12 smoking is addictive to go unchallenged"; isn't that correct?

13 A. Yes, that's correct.

14 Q. And in fact, you weren't asked a question at that moment,  
15 whether or not smoking was addictive, were you?

16 A. No, although it had come up repeatedly previously.

17 Q. Now, Ms. Dawson, you made statements on these television  
18 programs both in response to questions or, as we just saw, in  
19 response to things other participants on the program said; isn't  
20 that correct?

21 A. That's correct.

22 Q. And you testified yesterday that you intended the public  
23 to rely on statements you made on television; isn't that  
24 correct?

25 A. That's correct.

1 Q. And is it fair to say that you intended -- and it's fair  
2 to say, isn't it, that you intended the public to rely on  
3 statements you made on television whether they were in response  
4 to questions or spontaneous statements you made in reference to  
5 statements made by others; is that fair to say?

6 A. That's fair.

7 MR. WISE: I have nothing further, Your Honor.

8 THE COURT: All right. Ms. Dawson, thank you. You may  
9 step down.

10 THE WITNESS: Thank you.

11 MR. WISE: Your Honor, could we have one moment? I think  
12 we have one additional question.

13 THE COURT: All right, Ms. Dawson. Just a moment.

14 MR. WISE: If we could, Your Honor, just one, just to  
15 clarify -- well, two things, I think, just to clarify for the  
16 record.

17 BY MR. WISE:

18 Q. We did reference this document "Media Strategies For  
19 Smoking Control" and I think you made the statement that you had  
20 seen it before. When did you see this document, Ms. Dawson?

21 A. After it was published in the 1980s.

22 Q. Did you review this document with your counsel when you  
23 were preparing for your testimony today?

24 MR. BERNICK: No. "Your testimony to-" -- I'm not sure --

25 THE COURT: You have to ask it more clearly.

1 BY MR. WISE:

2 Q. When you were preparing your corrected written direct for  
3 this case.

4 A. I'm trying to remember if I've seen it in the last week.  
5 I may have.

6 Q. Well, Ms. Dawson, when I asked you if you had seen any  
7 other documents in addition to the documents referenced in your  
8 written direct, is it now your answer that you -- I think you  
9 said may have seen this; is that correct?

10 A. That's correct.

11 Q. Are there any other documents that you may have seen?

12 A. Again, when you asked me the question yesterday, I said  
13 "I don't think so" because I was trying to recall if there was  
14 anything specifically that wasn't an exhibit and I didn't.

15 Q. I just want to make sure there is nothing else that falls  
16 into that category.

17 A. Not that I can recall.

18 MR. WISE: And just one other minor point -- well, I won't  
19 say minor point. One other point to clarify on the record.

20 Counsel has stipulated that Ms. Dawson's salary for last  
21 year was 311,000. The uncorrected written direct now has it at  
22 300,000. I would move to, I guess, strike that and have it  
23 replaced with 311,000.

24 THE COURT: That's granted.

25 MR. WISE: And just so it's clear, counsel also stipulated

1     that an anticipated bonus of approximately 50 percent of that  
2     base salary is expected. And just so that's in the record, that  
3     would bring Ms. Dawson's compensation for last year, I think,  
4     very approximately, to about \$460,000.

5             THE COURT: 466,000

6             MR. WISE: \$466,000. Thank you, Your Honor. Now I have  
7     nothing further.

8             THE COURT: All right. You may step down, Ms. Dawson.

9             THE WITNESS: Thank you.

10            THE COURT: All right, everybody. We have a lot of  
11     exhibit work to do. Let me take the two most recent witnesses  
12     first. Are counsel working on the exhibits relating to  
13     Dr. Biglan?

14            MS. BROOKER: Excuse me. What was your question, Your  
15     Honor.

16            THE COURT: My question is: Are counsel working on the  
17     exhibits relating to Dr. Biglan or have you actually completed  
18     that work? You were going to look at them and try to resolve any  
19     differences.

20            MS. BROOKER: I think we have tried to do that. And maybe  
21     if I get my papers and whoever is going to represent defendants,  
22     we can try to work through some of those. I think we may --  
23     there may be -- we have resolved some and others, we have, I  
24     think, agreed that we have not resolved.

25            THE COURT: All right. That's fine.

1           MR. BERNICK: We do have that one issue outstanding with  
2   respect to Dr. Biglan, which is the --

3           THE COURT: Right. You'll have to do that as well. First  
4   of all, I have to get the right folders.

5           MR. BERNICK: Do you want to hear that matter now?

6           THE COURT: Let's do the exhibits first and then I'll hear  
7   that other matter.

8           MS. BROOKER: You want to do Dr. Biglan's exhibits first.

9           THE COURT: Yes.

10          MS. BROOKER: Who's going to be handling them? Are you,  
11   Renee?

12          MS. HONIGBERG: Your Honor, Renee Honigberg on behalf of  
13   Brown & Williamson Holdings, Inc.

14          And, Your Honor, the only outstanding issue memo issue for  
15   Dr. Biglan -- I think we've resolved all the other issue memo  
16   issues -- is what documents were or were not on Dr. Biglan's  
17   reliance list. And I understand the government is still working  
18   to get us information as to what is or is not on Dr. Biglan's  
19   reliance list and we will go from there.

20          I believe there may be some individual defendants who have  
21   issues with specific Dr. Biglan exhibits.

22          THE COURT: All right. But let's leave things clearly.  
23   Do you believe that your client and the government can resolve  
24   the reliance exhibit issues?

25          MS. HONIGBERG: I believe -- we have always been able to

1 work out what is really on or not on the exhibit list amicably.  
2 And I don't know the government's position. Our position is, of  
3 course, to the extent we agree that something is not on the  
4 reliance list, that it does not come in. Dr. Biglan testified  
5 about all of these documents in his direct or his demonstrative.  
6 There can be no claim that he didn't rely or consider them.

7 THE COURT: Correct. Also, my understanding from his  
8 testimony is that there were a huge number of documents on his  
9 reliance list. So as to Brown & Williamson and the government,  
10 you ought to be able, in a day or two or three, to submit to me  
11 the kind of order that everybody's been submitting all along,  
12 getting those exhibits in?

13 MS. BROOKER: Your Honor, I can address that and maybe  
14 move this along, even. I'm prepared today -- I'll hand here to  
15 Ms. Honigberg -- what we had agreed to do was for the  
16 approximately 85 exhibits that Dr. Biglan included in his direct  
17 testimony which defendants could not locate in one of his  
18 disclosure letters or the, you know, numerous CD-ROMs, we have  
19 created a list of each exhibit and where that was disclosed  
20 specifically. And we have been able to locate for every exhibit  
21 that was questioned by defendants where Dr. Biglan disclosed  
22 that.

23 So I think that, you know, of course defendants will  
24 follow up on this, but we're going to hand right now a copy of  
25 that to Ms. Honigberg and then we can just work this out. And

1 hopefully, this will resolve the matter.

2 THE COURT: All right. Fine.

3 Mr. Redgrave, do you want to proceed?

4 MR. REDGRAVE: Thank you, Your Honor. By way of general  
5 background, I want to alert the Court, there are a lot of exhibit  
6 objections that were raised by the various defendants and they're  
7 in our omnibus submission for each of these witnesses.

8 We're prepared to go through those. I will say that when  
9 we looked over this last night, we wanted to highlight a couple  
10 of those and argue those before Your Honor where we think  
11 additional information is necessary. Otherwise, the objections  
12 have been made for Your Honor with respect to hearsay and other  
13 matters like that and just can be ruled upon. And I don't know  
14 how you want to proceed that way.

15 I do have one argument with respect to a document of  
16 Reynolds that the government has asked to be admitted with  
17 Dr. Biglan and that is U.S. Exhibit 20848. And, Your Honor, it's  
18 up on the screen as well.

19 We objected to this document, Your Honor under 401, 402  
20 and 802. The document you see up here on the screen -- this is  
21 the cover page of it -- you can actually see that it's not  
22 prepared for Reynolds, but it's prepared for another company,  
23 RJR-MacDonald, Inc., and that was the Reynolds' international  
24 subsidiary or sister corporation in Canada. And you will also  
25 see that it's prepared for them by a company down here at the

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1 bottom, Creative Research Group, Limited. And the date of this  
2 is 1987.

3 The government, in responding to our objection, stated  
4 that the document was in the Reynolds' possession since 1996 and  
5 it's not being offered for the truth of the matter asserted, but  
6 being offered to show that it was in Reynolds' possession and  
7 that Reynolds thus possessed research relating to teenagers.

8 Your Honor, a little bit of background here that I think  
9 proves up our objection to the document and why it should not be  
10 admitted with Dr. Biglan.

11 THE COURT: Was it referred to in his direct testimony?

12 MR. REDGRAVE: Yes.

13 THE COURT: Was it referred to in any of the Findings of  
14 Fact -- Proposed Findings of Fact?

15 MR. REDGRAVE: Yes, Your Honor. It's in the government's  
16 Proposed Findings of Fact.

17 THE COURT: You have an uphill battle.

18 MR. REDGRAVE: I know that, Your Honor, and I'm prepared  
19 to go up that hill.

20 THE COURT: Go ahead.

21 MR. REDGRAVE: Your Honor, the document itself in 1987 --  
22 the Creative Research Group is a group up in Canada that was  
23 doing just general research. And if you look through this  
24 document, which itself is several pages long -- and I could hand  
25 it up to Your Honor.

1           You'll see it has a general section and a specific section  
2   at the end. Creative Research Group went around with this  
3   syndicated research, trying to sell it to many different  
4   individuals, corporations, governments, and it just collected a  
5   lot of data. They also offered specific tailoring to any  
6   individual that wanted to purchase --

7           THE COURT: I did open, totally randomly, to a page that  
8   begins: "Females are more avid readers than males." Let the  
9   record reflect that.

10          Go ahead, Mr. Redgrave.

11          MR. REDGRAVE: Your Honor, two other exhibits that have  
12   been identified by defendants really weigh in on this issue.

13          And, Jamey, if you could show up, first, document JD  
14   60382, please.

15          This document, Your Honor, goes before the date of this  
16   document in your hands being prepared and it shows really how  
17   this came to be. This person at Creative Research had contacted  
18   a person at RJR-MacDonald, the Canadian company, and asked, would  
19   you be interested in purchasing a subscription? And  
20   RJR-MacDonald had decided to. But importantly, you'll note, in  
21   that second -- I'm sorry -- the third paragraph down, I'll read  
22   this out: "As I've explained to you, our industry does not  
23   market its products to those aged under 18. Could you,  
24   therefore, please ensure that in your analysis and reporting, you  
25   focus your attention on the 18 to 24 age group."

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1           Now, Your Honor, in response to that, the Creative  
2 Research Group wrote on February 20th.

3           And, Jamey, could you show 60029.

4           Now, in this document, Creative Research writes back. And  
5 you'll see in the second paragraph that: "Not only will they be  
6 receiving a full analysis of the values and lifestyles; we have  
7 noted your request that we focus attention on the 18 to 24 age  
8 group." So even with respect to the Canadian corporation, that's  
9 what they wanted; that's what they were talking about.

10          Now, this document has been proffered by the government  
11 because it has ages under 18 in the document. And it does. But  
12 that is not probative whatsoever to the issue of what even the  
13 Canadian corporation might have been doing.

14          But more importantly, Your Honor, the government in the  
15 Findings of Fact have tried to use this document to say that R.J.  
16 Reynolds Tobacco Company in Winston-Salem, North Carolina had  
17 this information in 1987 and they tried to tie it together with  
18 the Camel campaign, the Joe Camel campaign.

19          This document, Your Honor, did not come into R.J. Reynolds  
20 Tobacco Company's possession until 1996. The reason for that was  
21 that --

22          THE COURT: This was after the Joe Camel campaign had  
23 terminated or not?

24          MR. REDGRAVE: That's around the same time, Your Honor.  
25 That was with the FTC inquiry with respect to Joe Camel and I

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1 think in '96, it was either over or pretty close -- '96 to '98,  
2 but certainly not anywhere near the genesis of that campaign.

3 And importantly, Your Honor, it came to Reynolds through  
4 the Legal Department because there was in Canada the ad ban  
5 litigation in the mid 1990s, so Reynolds in the United States  
6 became aware of different documents being produced by  
7 RJR-MacDonald in Canada and this is one that certain individuals  
8 had highlighted because it had age.

9 And in fact, Jamey, if you'll just pull up a screen from  
10 the Reynolds tobacco document website, it shows the information  
11 that the government has.

12 This is the index information. If you remember, in the  
13 early case management orders, you required us to produce our  
14 website; you required us to produce our index.

15 And if you look down, this is the 1987 document we were  
16 just looking at. The author is Creative Research Group. You see  
17 it went to RJR International, not R.J. Reynolds Tobacco Company.  
18 And if you go down to the source -- that is, where did we pick it  
19 up in the files of Reynolds -- the Law Department.

20 Okay. This is not something that the Marketing Research  
21 Group was using at R.J. Reynolds Tobacco Company to look at any  
22 campaigns for any brands in the United States by R.J. Reynolds  
23 Tobacco Company. It's not probative of anything in this case  
24 under rule 401; it's prejudicial under Rule 403; it's been  
25 misused by the government in the Findings of Fact. That document

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1     should be excluded.

2             I will add also, Your Honor, that the document also was  
3     submitted with Dr. Dolan, so this objection is the same as it  
4     would be there. Your Honor, it shouldn't come in. And that's my  
5     uphill climb.

6             THE COURT: All right. Ms. Brooker.

7             MS. BROOKER: Your Honor, I think I'll just be very brief  
8     in response. And I'm not sure, standing here now, I could  
9     respond to all the factual assertions and arguments about the  
10    entire context, as Mr. Redgrave just argued and portrayed it, but  
11    I would say it's not a basis for an evidentiary objection.

12            All of the arguments made by Mr. Redgrave, I would -- I  
13    believe, go to the weight of the evidence and not the  
14    admissibility of the document.

15            And also, defendants had an opportunity and chose not to,  
16    for whatever reason they so chose, to not ask Dr. Biglan about  
17    his understanding of the context of the document that he cited  
18    and they had that opportunity.

19            I would say that the document is something that Dr. Biglan  
20    cited as something -- in a huge volume of materials that he  
21    relied upon. And there, specific in their objection, defendants  
22    admit that they were in -- that R.J. Reynolds tobacco was in the  
23    possession of this document and that it was contained in the  
24    files of R.J. Reynolds Tobacco Company.

25            THE COURT: But six years after it was created, right?

1 MR. REDGRAVE: Nine, Your Honor.

2 THE COURT: Pardon?

3 MR. REDGRAVE: Nine years later.

4 MS. BROOKER: Correct. And they said after it was  
5 written.

6 So I would just ask that Your Honor admit the document and  
7 you can obviously hear argument on it at an appropriate time.

8 THE COURT: I'm going to sustain the objection, but I want  
9 to be very clear with everybody why.

10 Because certainly, as I suggested in my initial questions  
11 to Mr. Redgrave, it is presumptively admissible. It was cited in  
12 the direct testimony and it was cited in the Proposed Findings of  
13 Fact. And so, therefore, obviously the defendants have to  
14 overcome that presumption.

15 The reason I think that they have overcome it in this  
16 instance -- I don't want anybody to draw the wrong conclusions  
17 from this ruling, which is limited to this particular exhibit --  
18 is that Dr. Biglan's testimony used this document as part of a  
19 great deal of other support to buttress his analysis regarding  
20 the use of data and tracking information and all sorts of  
21 statistical information about individuals under the age of 18.  
22 And obviously, that was very significant.

23 In fact, RJR International made it clear to the producer  
24 of this document that it didn't want information on individuals  
25 under the age of 18 and it would appear that the creator of the

1 information agreed to that limitation, although in fact did not.

2 Second, RJR, meaning RJR in the United States, didn't  
3 obtain the document in its files until nine years after it was  
4 created. And obviously, that would greatly affect the  
5 meaningfulness of its use in terms of the creation of any  
6 advertising and media campaigns by RJR in the United States.

7 For those reasons, I find that the admission of this  
8 document, again, in this very specific factual context, that  
9 under Rule 403, its admission would be more prejudicial than  
10 probative.

11 We all know that the issue of youth smoking is a very  
12 important one in this case. There's been an enormous amount of  
13 testimony about it. Dr. Biglan, of course, focused all of his  
14 testimony on it.

15 No, not all, but virtually all of his testimony on it.  
16 And any evidence that would support the view that defendants were  
17 targeting through their marketing individuals under the age of 18  
18 is clearly prejudicial. And given the reasons I've just laid  
19 out, I do not think that that conclusion can be appropriately  
20 drawn from this particular document.

21 I spent a long time on that explanation. I'm not going to  
22 spend that kind of time most of the time, as you all know.

23 All right. Let's move on, please. Now, as to other  
24 objections --

25 MS. BROOKER: Your Honor, if I may --

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1           THE COURT: No, I'm not going to take further argument on  
2 it. I gave everybody an opportunity to argue. We'll never get  
3 done. I cut off Mr. Bernick at times; sometimes I have to cut  
4 off the government.

5           As to RJR's other objections, do you want me to just rule  
6 on the basis of the papers that I have in front of me? I don't  
7 even know which ones are RJR's.

8           MR. REDGRAVE: Your Honor, with respect to a number of  
9 objections on Rule 403 grounds and Rule 901 grounds, we sent a  
10 communication to the government last night, and I'll admit that  
11 it was late, with respect to some of those we asked them to look  
12 at further. And what I'm hoping through that process is, as the  
13 agreed upon orders have come in before, that the government will  
14 substitute the pages to make those the right exhibits or break up  
15 the documents to make them the right exhibits.

16          With respect to some of the duplication of exhibits, I  
17 think maybe the water has just gone too far over the damn at this  
18 point. We had objections, for instance, Your Honor, where they  
19 have two documents that are virtually the same; the only  
20 difference might be a fax line at the top, but they're not being  
21 offered for the importance of that fax line, and we had asserted  
22 the objection. We're going to see if we can get the government  
23 to agree to have just one of those document in the massive pile.  
24 But given that they are referenced by different experts with  
25 different exhibit numbers, it may be just too late for that and

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1 that's just a problem that we have to all live with.

2 But we'll confer with the government on that. I don't  
3 think there's a need to go through those document by document  
4 with Your Honor unless you see otherwise. We can do that; I'm  
5 happy to do that, but I don't think so. So that's where we'd  
6 like to leave those other documents.

7 THE COURT: At this point, I certainly don't choose to go  
8 through them one by one while you and the government are still  
9 trying to work it out.

10 MR. REDGRAVE: And I think we'll quickly come to a  
11 conclusion on those, Your Honor.

12 I think Mr. Narko does have some documents for Philip  
13 Morris.

14 THE COURT: All right.

15 MS. MOLTZEN: Your Honor, if I could just address that  
16 briefly, the United States already, in its response to the  
17 objections, made a lot of the changes or alterations that  
18 Mr. Redgrave is referring to, so the issue of duplication  
19 shouldn't be an issue that the water is too far over the damn, as  
20 Mr. Redgrave is saying.

21 But I wanted to, just quickly, so don't get past this and  
22 have confusion in the record, raise an issue which came up.  
23 Ms. Honigberg said that there was only one remaining issue  
24 related to Dr. Biglan's testimony and I just wanted to make sure  
25 with Your Honor that what defendants were saying is that they are

1 withdrawing the other two issues that they raised in their issue  
2 motion, because there are three issues raised in their issue  
3 motion.

4 MS. HONIGBERG: Your Honor, as to issue two, which I  
5 believe was the learned treatise issue, actually the government  
6 withdrew exhibits that we agreed were subject to that hearsay  
7 issue. And then there were others that they pointed out to us  
8 may have been erroneously included in that, so we came to a  
9 resolution on that issue.

10 The third issue, the cumulative issue, we pointed out to  
11 the Court that we thought portions of Dr. Biglan's testimony were  
12 cumulative in the sense of other experts' testimony. We point  
13 that out to the Court; there were not, you know, a whole line of  
14 specific exhibits or specific page and lines. We just note that  
15 for the record that that -- that we had an objection to that  
16 basis.

17 THE COURT: All right. Let me hear from Philip Morris,  
18 please.

19 MR. NARKO: Good morning, Your Honor. Kevin Narko for  
20 Philip Morris.

21 The exhibits I would like to address are some of the  
22 documents that Mr. Webb used with Dr. Biglan. If this is the  
23 right time, I would like to address those now.

24 THE COURT: You may do so.

25 MR. NARKO: And there are two sets of exhibits that I

1 would like to address and the first relates to Websites. And  
2 there are three Websites that Mr. Webb used. The first one is JD  
3 054530.

4 THE COURT: Now, is this -- or I should say, are these on  
5 the list of objections that defendants submitted on January 6th?

6 MR. NARKO: No. These are documents that Mr. Webb used  
7 during his cross-examination of Dr. Biglan.

8 THE COURT: That you're moving in now?

9 MR. NARKO: Right. Yes, Your Honor.

10 THE COURT: Well, first of all, let me find out: Does the  
11 government know the list and do you have objections?

12 MS. BROOKER: Yes. Mr. Narko and I -- and granted, we  
13 have all been working very late doing this, so there have been  
14 e-mails back and forth through the evening on this. And I think  
15 he and I both have a list and I believe we have agreed where  
16 we're going to disagree and we don't have to bring before the  
17 Court all of the agreements that we do have. We can work that --  
18 we can work that out.

19 THE COURT: I don't need to hear agreements at all.

20 MS. BROOKER: But we do have some document issues.

21 THE COURT: We should proceed in this fashion. The  
22 government should go first in terms of raising what objections it  
23 does have and then, of course, I'll hear the answer from  
24 defendants.

25 MS. BROOKER: Okay, Your Honor. Let me see if I can go

1 about that efficiently. I would say --

2 THE COURT: Did you all plan to do it the other way?

3 MS. BROOKER: You can stay here, Kevin.

4 MR. NARKO: I can move over.

5 MS. BROOKER: No, this is perfectly fine. However Your  
6 Honor wants to proceed, we're happy to proceed.

7 Now, with respect to JD 054530, I only bring it up because  
8 Mr. Narko just brought it up and I hadn't had an opportunity to  
9 tell him we won't object to the admission of that exhibit.

10 THE COURT: All right.

11 MS. BROOKER: There are -- let's see. There are five  
12 advertisements; I would refer to them as "advertisement  
13 demonstratives" that Mr. Webb used, which we have the same  
14 objection to all of them, so if -- how about if I read the  
15 exhibit numbers into the record and then I can state my basis for  
16 the objections?

17 The exhibit numbers are JD 054543, JD 054544, JD  
18 Exhibit 054541, JD Exhibit 054546 and JD Exhibit 054545. And the  
19 objections are that these are advertising images; these were the  
20 images that were not the ones used in Dr. Biglan's examination,  
21 the Vantage advertisements.

22 THE COURT: Were these the exhibits -- and if they are, I  
23 remember them very well -- that Mr. Webb used to attempt to show  
24 that there was essentially no difference in terms of certain  
25 attributes of the advertisements that Dr. Biglan referred to and

1 the advertisements by products that had virtually no appeal to  
2 youth?

3 MR. NARKO: These were the cigarette ads where one ad was  
4 masked -- the brand name was masked and then it appeared, but  
5 they were all cigarette brands.

6 MS. BROOKER: The exhibits --

7 THE COURT: They were cigarette brands that had  
8 virtually -- well, let me put it this way: That had an extremely  
9 low percentage of youth smokers.

10 MS. BROOKER: Your Honor, I don't mean to interrupt this,  
11 but I have been passed a note that our live feed is not working  
12 and I guess I should be asking the Court if that is a problem.

13 The live feed at our table is not working. Is that true  
14 over on defendants' table?

15 THE COURT: So it's not working for anybody?

16 (Discussion had off the record between the court and the  
17 court reporter.)

18 THE COURT: I think it's on, everybody. I think.

19 Okay. Now, here are your instructions, everyone. They  
20 come from Mr. Wallace. Everybody has to slow down. Ms. Brooker,  
21 you talk really fast, almost as fast as Mr. Redgrave. That's  
22 number one.

23 Number two, everybody has to clearly identify themselves  
24 for the record so that our court reporter knows who's talking.  
25 All right.

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1           There are five advertisements to which the government has  
2 an objection. What's the objection, please.

3           MS. BROOKER: The objection -- there's two objections to  
4 those five demonstratives or advertisements. The first one is  
5 that there was no kind of a foundation laid for the  
6 advertisements. And when I say "no foundation," I mean there was  
7 no indication as Dr. Biglan had seen those previously or that we  
8 knew where those advertisements were placed, if they ever were  
9 placed, what the date of the advertisement was. They may not  
10 have been advertisements that were ever placed in any media.  
11 There was just absolutely no foundation at all for the  
12 advertisements.

13           And the second objection that I would have is that, if  
14 Your Honor will recall -- and I don't know if Mr. Narko has an  
15 example, but there would be an advertisement on two different  
16 demonstratives, one with the words and one without the words and  
17 they are marked as the same number. So I think the record, if  
18 Your Honor -- that objection would go to if Your Honor was going  
19 to admit them, then I would say that it is not clear -- it will  
20 not be clear to the record since it is two separate documents  
21 with the same number.

22           THE COURT: I have a question for defense counsel. Are  
23 you prepared to make a representation that each of those  
24 advertisements were in fact run in some media outlet?

25           MR. NARKO: Yes, Your Honor.

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1           THE COURT: All right. There is certainly an adequate  
2 foundation. That objection is overruled.

3           As to the technical problem that Ms. Brooker raises, the  
4 advertisement as first shown, which was without words, should  
5 keep the number it has; the advertisement with words should get  
6 the same number and it will be "A." I think that takes care of  
7 that issue.

8           MR. NARKO: Yes, Your Honor. We'll do that.

9           THE COURT: All right. Next government objection.

10          MS. BROOKER: The next government objection is -- there is  
11 a Philip Morris website. Now, I don't know if Mr. Narko has a  
12 document here. It might have been -- I think it was the Life  
13 Skills Training website. And our objection is that that website  
14 is hearsay because it is offered for the truth of the matter  
15 asserted.

16          THE COURT: Wait a minute. Which website?

17          MR. NARKO: Kevin Narko. I have the document, it's JD  
18 054527. It's from the Philip Morris USA Website.

19          THE COURT: I think you'll have to pass that up, please.

20          MR. NARKO: It's a portion of the Website that describes  
21 the life skills training. We're offering it not for the truth of  
22 the matter asserted here, but to what Philip Morris believes the  
23 program to be, and it is a business record, and the Website, it's  
24 part of the Website that is coming in through a number of  
25 witnesses referenced a number of times during the Findings of

1 Fact.

2 THE COURT: It may be admitted.

3 (Defendant's Exhibit JD 054527 admitted into the record.)

4 MR. NARKO: Thank you, Your Honor.

5 THE COURT: You can give this back. Next.

6 MS. BROOKER: I'm not sure if we have a disagreement on  
7 any other exhibits, Your Honor, because I think I've checked off  
8 my list.

9 The only other question I have is that I spoke with Ms.  
10 Honigberg last night about two documents that the United States  
11 seeks to admit, which wasn't I believe ruled upon or that I  
12 wasn't clear whether or not it had been admitted through the  
13 redirect of Dr. Biglan, and I believe Ms. Honigberg said they  
14 wouldn't have an objection to those two documents, but I will let  
15 Ms. Honigberg -- I'm sorry, there you are. I'll let you speak  
16 for yourself.

17 MS. Honigberg: Renee Honigberg. That is correct, we  
18 didn't have objections. One was a summary exhibit, which I'm  
19 sure you recall. It was an issue with Dr. Biglan, and he adopted  
20 certain things. And so consistent with Your Honor's ruling with  
21 how that exhibit was coming in, we have no objection.

22 MS. BROOKER: So I think we're finished then with  
23 Dr. Biglan in terms of what we have to argue with you -- what we  
24 have to argue before you today.

25 THE COURT: Right. And again, in two or three days I'm



1 going to get a final order to sign from everyone. All right.

2 Now, let's return to the substantive issue which was raised at  
3 the close of Dr. Biglan's testimony.

4 Mr. Bernick, in two to three minutes max, restate it for  
5 me, please, and then I'll hear from the government.

6 MR. BERNICK: I guess I should speak -- maybe I'll speak  
7 as quickly as Mr. Redgrave.

8 THE COURT: No.

9 MR. BERNICK: I'm kidding. The objection is this: At  
10 page 452 of the direct examination of Dr. Biglan, and this was an  
11 objection that I think the record will reflect that we actually  
12 made when the testimony first was proffered and we then  
13 reiterated at the conclusion of Dr. Biglan's testimony.

14 THE COURT: And this was redirect now that you're talking  
15 about?

16 MR. BERNICK: At the end of his redirect. We raised it at  
17 the beginning when the written testimony first was proffered, and  
18 then we raised it just at the end just to make sure we hadn't  
19 waived it.

20 At the bottom of page 452, there appears a paragraph that  
21 basically is critical of the Master Settlement Agreement for what  
22 it does not include. It doesn't require that youth smoking  
23 prevention activities be research-based. It says: "Nor are  
24 there other financial or other incentives for reducing adolescent  
25 smoking prevalence or penalties for failure to do so." This

1 paragraph goes beyond, in subject matter, the substance of what  
2 appeared in the first expert report for Dr. Biglan, which was the  
3 expert report that focused on historical marketing practices.  
4 That expert report does talk about the MSA, but only as an event  
5 that, after which, the practices that he criticizes continued.

6       There does not appear in the opinion on why the Master  
7 Settlement Agreement or that the Master Settlement Agreement  
8 permitted this to take place and in effect what could be done  
9 maybe to give it more teeth. And the concern that I have -- and  
10 I'll be candid with the Court, this was not raised formally in  
11 written objection at the time, I think because it's very long and  
12 people weren't looking at this in terms of potential evidence  
13 regarding relief, that's my concern. To the extent that this  
14 paragraph is proffered as expert opinion regarding what kind of  
15 relief might be appropriate, it clearly goes beyond the scope of  
16 the expert reports which don't get into that, and we have not had  
17 an opportunity to conduct discovery with Dr. Biglan with respect  
18 to those matters. So that's our objection as to that second half  
19 of page 452.

20       THE COURT: Ms. Brooker.

21       MS. BROOKER: Briefly, Your Honor. My first response to  
22 that is that it is inappropriate for defendants to raise the  
23 issue after the opportunity they had to file such an objection in  
24 their issue motion. Obviously Order 471 set forth a procedure  
25 where a defendant should have raised it at that time, and I would

1 submit to Your Honor that you not open the floodgates to either  
2 side, because I think we could see it happening, either side  
3 continuing now to bring up objections that they had the  
4 opportunity to raise under the Order 471 procedures, and it's  
5 prejudicial to the United States that we not have an opportunity  
6 to brief that issue if Your Honor is going to rule in that  
7 direction.

8           The second substantive response I would have to this is  
9 that perhaps the confusion is that Mr. Bernick is not aware of  
10 the second expert report Dr. Biglan filed in this case. He filed  
11 three expert reports on, you know, interrelated topics, but  
12 really on different topics. They weren't supplemental to what  
13 had come before; they were on different topics. And the second  
14 expert report in May of 2002 addressed youth smoking prevention  
15 and the very brief question and answer -- in fact, there is one  
16 question and answer that Mr. Bernick is objecting to in his  
17 direct testimony, which comes almost verbatim out of his May 2002  
18 expert report where he very clearly outlined that one provision  
19 of the Master Settlement Agreement which addresses arguably youth  
20 smoking prevention activities and he identified what is not  
21 included in the Master Settlement Agreement with respect to youth  
22 smoking prevention activities. So there was clearly disclosure  
23 and more than an opportunity to take discovery on that.

24           MR. BERNICK: I don't find that reference in the -- I'm  
25 totally aware of the second report. I don't find that reference,

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1 and it's conceivable that I missed it, but if there is a part of  
2 the second report that specifically identifies this and offers an  
3 opinion, I would stand corrected. I'm not aware of it and I  
4 don't think it's never been pointed out.

5 THE COURT: At this point can you please give a page cite  
6 for the record.

7 MS. BROOKER: Sure, and I will say I was being very  
8 narrow, but I will say both reports address repeatedly the Master  
9 Settlement Agreement provisions and what is and is not contained  
10 in the Master Settlement Agreement. But more specifically, and I  
11 can point to many pages, but I can point to pages 25 through 28  
12 where Dr. -- excuse me, where Dr. Biglan more specifically  
13 focused what he was going to address about the Master Settlement  
14 Agreement in his direct testimony and, frankly, Dr. Biglan could  
15 have said 10 or 20 pages about the Master Settlement Agreement  
16 based on his disclosure, but we kept it to a question and answer  
17 that covers two pages.

18 And as Ms. Crocker is pointing out to me, he was asked  
19 extensively about this very topic at his second deposition which  
20 lasted for seven hours on this report alone.

21 THE COURT: The objection's overruled on both procedural  
22 and substantive grounds. Number one, it's untimely. Number 2,  
23 it would appear that the issue was raised in at least one expert  
24 report, possibly two, and was addressed in a deposition.

25 Now, I think that takes care of everything about

1 Dr. Biglan; is that right?

2 MR. BERNICK: Yes.

3 THE COURT: I want to take care of one other short matter,  
4 and that relates to the testimony of our most recent witness,  
5 Ms. Dawson. Are counsel conferring about any issues they may  
6 have regarding exhibits related to her testimony?

7 MOLTZEN: Mary Jo Moltzen.

8 THE COURT: How do you spell it, please.

9 THE WITNESS: M-O-L-T-Z-E-N.

10 THE COURT: Say it again.

11 MS. MOLTZEN: Mary Jo Moltzen for the government.

12 THE COURT: All right.

13 MS. MOLTZEN: We are ready to discuss the U.S. exhibits,  
14 but we would like a little bit of time to look over the exhibits  
15 that were discussed during cross, and I believe Mr. Bass has  
16 something to say first. We have narrowed -- of the sixteen  
17 objections, it's now down to ten.

18 THE COURT: All right, Mr. Bass.

19 MR. BASS: Your Honor, I do not believe there is an issue  
20 as to any of the exhibits that were actually used in the  
21 examination of Ms. Dawson.

22 There were, I believe, 11, and maybe now it's down to 10,  
23 but there were a number of exhibits that were not cited in the  
24 Findings of Fact and not mentioned in her testimony. We objected  
25 to those. Now, I really have a procedural issue on this, and

1    this should guide the parties, I think going forward on this, but  
2    clearly under Order 471B, you indicated that if a document -- if  
3    an exhibit that is submitted is not cited in the Findings, and  
4    not mentioned in the testimony, it's presumptively not  
5    admissible. It's a rebuttable presumption. But when the  
6    government submitted their list of exhibits, they didn't submit  
7    anything to overcome the presumption, and then they waited for us  
8    to object, and then in their response, which of course we have no  
9    opportunity to respond to, they came in with several pages of  
10   saying, Well, here now is what we're going to tell you as to why  
11   we think they're related. That's improper reply, Your Honor, and  
12   I think it should be clear, and I think it was clear that under  
13   Order 471B, that you intended that when a party submits their  
14   exhibits, they know they're presumptively inadmissible, they need  
15   to overcome that presumption. So I think that's improper.  
16   Otherwise, you then don't have in the papers before you a full  
17   record because you don't have their saying why they think they  
18   overcome the presumption and then our opportunity to respond to  
19   that.

20           So, other than our asking for an opportunity to file a  
21   sur-reply and go through all of that, which seems to me to be  
22   certainly an unnecessary imposition on the Court and everybody  
23   else, that's not the way it should go.

24           So, we object procedurally that the government didn't make  
25   the showing when they should have made the showing as to the

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1 documents that were not cited in her testimony and not in the  
2 Findings of Fact.

3 Now, I could go through those as to why the showing they  
4 tried to make is insufficient. I think that's -- again, that's  
5 the problem if we don't have the written record for you on it.

6 THE COURT: Well, I've gone through all of this. I have a  
7 couple questions to ask people, but I'm prepared to rule on a  
8 number of them and then, of course, as soon as I get answers I'll  
9 rule on the rest.

10 As to U.S. Exhibit 76778 and 76780, those are newspaper  
11 articles in which Ms. Dawson is quoted. There's absolutely no  
12 prejudice in admitting those. They're her own statements.

13 (Government's Exhibits 76778 and 76780 admitted into the  
14 record.)

15 THE COURT: As to four other exhibits, and they are --  
16 actually, I'll go through them individually. But I did this a  
17 couple of nights ago, everybody, so let me look at my notes  
18 again.

19 Isn't it true, Mr. Bass, that as to the next four listed  
20 exhibits, which are for the record 62282, 87418, 65673, and  
21 65674, that all of those four exhibits relate to topics that were  
22 extensively discussed in Ms. Dawson's testimony, in particular  
23 The Great American Welcome, and various media tours? Isn't that  
24 correct?

25 MR. BASS: Your Honor, I do believe that they, in a very

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1 general sense, relate to topics that were covered in her  
2 testimony, but of course the problem for us is that when the  
3 government submits documents that they don't discuss in her  
4 testimony and that they aren't in the Findings of Fact, we don't  
5 really know what part of the document they're trying to -- what  
6 they're going to try to use it for, so it makes it very difficult  
7 then when the witness is here to try to figure out, well, what  
8 should we then deal with in the exhibit as opposed to if it's  
9 discussed in the testimony and they say, Do you see this quote or  
10 that quote and they ask questions about it or if it's in the  
11 Findings of Fact. That's the problem with these documents that  
12 fall in that category. Some time down the road they'll cite them  
13 in their Finding of Fact and say, Well, these were -- you know,  
14 nobody said anything about them. Well, we don't know what  
15 they're going to say about them.

16 THE COURT: As to the four exhibits I just mentioned,  
17 again, 62282, 87418, 65673, and 65674, even though they have  
18 certainly some relationship to the subject matter of Ms. Dawson's  
19 testimony, the case has not been sufficiently made to overcome  
20 the presumption of admissibility since they weren't cited in the  
21 Findings of Fact or proposed -- I'm sorry, they were not cited in  
22 the direct testimony or the proposed Findings of Fact.

23 As to JD 80672, that exhibit was, it is my understanding,  
24 written by Ms. Dawson herself to various members of the media.  
25 It concerned the EPA ETS risk assessment. It clearly concerns a



1 subject of great centrality to this lawsuit. It was not a  
2 particularly long document, so there won't be any confusion as to  
3 how it's to be used.

4 MR. BASS: Your Honor, we don't have a problem with that  
5 one, sorry.

6 THE COURT: All right, Mr. Bass, I guess you knew how I  
7 was going to come out on that. So that's admitted.

8 (Exhibit JD 80672 admitted into the record.)

9 THE COURT: Now, there are --

10 MR. BASS: I also don't have a problem with U.S. 22957.

11 THE COURT: All right, admitted.

12 (Government's Exhibit 22957 admitted into the record.)

13 MR. BASS: The U.S. 29853, however, it's totally  
14 cumulative and it's just a discussion of generic activities, and  
15 again I couldn't figure out what they would be trying to do with  
16 that.

17 THE COURT: The objection is sustained as to 29853, and as  
18 to 37322, this is a memorandum from K. Thomas. What's your  
19 position about this?

20 MR. BASS: Well, there again, it was very difficult to  
21 determine what the government thinks is significant about that  
22 document, and so we do object to that.

23 THE COURT: The objection is sustained. And as to  
24 Exhibit 61698, the government is agreeing to withdraw that?

25 MR. BASS: That's right, Your Honor.

1           THE COURT: All right. I believe that completely takes  
2 care of Ms. Dawson's exhibits -- No, the government is still  
3 considering -- all right. And therefore I'm going to get an  
4 order from everybody in a couple of days.

5           And therefore we will probably go more slowly, everybody.  
6 I want to start with Ms. Ivey's. I hope I have the right people.  
7 If I don't have the right people, we'll take that one right after  
8 lunch. Do I have everybody?

9           MS. EUBANKS: Sharon Eubanks for the United States, Your  
10 Honor.

11          MS. HONIGBERG: Yes, Your Honor, Renee Honigberg for Brown  
12 & Williamson Holdings, Inc.

13          THE COURT: All right, let me just get my papers out.  
14 Given the fact that you all have had some time to confer, let me  
15 hear at this point from the defendant as to what objections  
16 remain.

17          MS. HONIGBERG: Your Honor, we have conferred and we've  
18 resolved a lot of objections. Ms. Eubanks, Ms. Hahn and I have  
19 worked diligently to do that. We still have some remaining. The  
20 first thing that would probably be good to address would be the  
21 issue memorandum objections themselves, and then we have some  
22 additional exhibits that the defendants would like to proffer  
23 that were used during Ms. Ivey 's live cross, and the government  
24 has some additional exhibits they would like to proffer that were  
25 used during Ms. Ivey's live direct that we have not been able to

1 resolve our objections to, if that would be okay.

2 THE COURT: That's fine.

3 MS. HONIGBERG: And the first issue that's discussed in  
4 our issue memorandum is regarding the Morrison affidavit.

5 THE COURT: Let me see that. Yes.

6 MS. HONIGBERG: And will you be able to hear me if I go  
7 over here or do I need --

8 THE COURT: I think so.

9 MS. HONIGBERG: I'm pretty loud. And this is an affidavit  
10 that was submitted by the government with Ms. Ivey's testimony.  
11 You might recall it. It's an affidavit and it attaches quite a  
12 bit of MRI data or what purports to be MRI data attached, and we  
13 objected to this on a few -- on the grounds that it is blatant  
14 hearsay.

15 First of all, it's a declaration that is hearsay in and of  
16 itself, and it attaches a summary chart that is also hearsay.  
17 The government contends that this is not hearsay for a couple of  
18 reasons. First of all, they say that the chart attached is a  
19 summary exhibit under Rule 1006.

20 This chart that's attached -- and Mr. Bass can jump in if  
21 I'm misstating what's on this chart -- this chart is not just  
22 data that was pulled from an MRI data. This chart was compiled  
23 based on calculations that Ms. Morrison, who is neither a witness  
24 in this case nor has there been any testimony from any expert, I  
25 don't believe, about this affidavit, compiled this. This was not

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1 taking straight data from MRI data and placing it on the chart;  
2 there were calculations made.

3 They also tried to get it in under the exception for  
4 certain market reports, I think it's 803.17 hearsay exception.

5 Again, this is not straight data from MRI. Even if it  
6 would have otherwise fit in that exception, it's not straight  
7 data. And certainly the chart in and of itself should not be  
8 admitted, but certainly the declaration should not be admitted.  
9 This is not a summary exhibit. This declaration includes  
10 statements by Ms. Morrison that, for example, some of the  
11 magazines discussed have substantial youth readership. This is  
12 not just some objective summary of data, this is an affidavit,  
13 it's an out-of-court statement. Both the chart and the  
14 declaration itself should not come in.

15 THE COURT: All right, Ms. Eubanks.

16 MS. EUBANKS: Your Honor, it's my understanding that this  
17 very document with the passage of time has been agreed upon with  
18 joint defendants through -- to be admitted through another  
19 witness with no objection. It appeared on a list, no issues  
20 memorandum or anything, and it's coming in through Dr. Krugman.  
21 So, insofar as this particular issue is concerned versus  
22 Ms. Ivey's testimony, as long as the document itself has been  
23 agreed to and there's no objection with Dr. Krugman, I see no  
24 reason to address this here because it's been agreed upon and  
25 will come in with Dr. Krugman pursuant to that agreement.

1 MS. BROOKER: Your Honor, could I just have a moment?

2 MS. EUBANKS: Well, Your Honor, just to be clear about it,  
3 then, perhaps what I should do is present the United States'  
4 arguments on this because I understand that --

5 THE COURT: Excuse me, just a minute. I don't need to  
6 hear the argument if you're correct on your first point. Who on  
7 the defense side is handling Dr. Krugman's exhibits? Mr. Bass,  
8 has this been agreed to?

9 MR. BASS: My understanding, Your Honor, is that the --  
10 that Dr. Krugman repackaged the data that he got from  
11 Dr. Morrison, and he's got exhibits, and those will be fine. And  
12 I believe that the chart that's attached to the Morrison  
13 declaration is in Dr. Krugman's, but the declaration itself I  
14 don't believe actually is.

15 THE COURT: All right, so the charts been agreed to. Is  
16 that right?

17 MS. BROOKER: Your Honor, I think I can clarify. I think  
18 I have the correct story. Here's the situation. The declaration  
19 itself is not a part of Dr. Krugman's testimony. Dr. Krugman  
20 has -- excuse me, Dr. Morrison has attached to the declaration  
21 two types of data, MRI data and CMR data, which are different  
22 types of data. One is expenditure data and the other is what we  
23 talked about in this courtroom quite a bit with Dr. Krugman, the  
24 MRI data on measuring magazine readership.

25 What Dr. Krugman covered in his direct examination was the

1 MRI data charts which are in sum and substance -- and actually, I  
2 believe the exact same charts were moved in or -- well, I guess  
3 we haven't talked about all of his testimony, but are in through  
4 Dr. Krugman. So, part of the charts that are in the Dr. Morrison  
5 declaration were not discussed expressly in Dr. Krugman's  
6 testimony, and that's the CMR data. Does that clarify it?

7 MS. EUBANKS: Well, Your Honor, for purposes of  
8 completeness, then, it would seem entirely appropriate to include  
9 the Morrison affidavit with the information that's included.  
10 Unless I --

11 THE COURT: That affidavit is pure hearsay.

12 MS. EUBANKS: This is an affidavit that's already been  
13 before the Court in a summary judgment motion that was submitted,  
14 and under the ruling --

15 THE COURT: It may have been before the Court in summary  
16 judgment; that doesn't mean it comes in as an exhibit at trial.

17 MS. EUBANKS: Your Honor, under the Rules of Evidence  
18 under Rule 804, it could come in as a statement in the case where  
19 the defendant -- where both parties are present, and they  
20 certainly had an opportunity to proffer similar evidence or to  
21 proffer evidence that rebutted or would tend to rebut the  
22 testimony that was given there.

23 THE COURT: Summary judgment is a totally different  
24 context than trial.

25 MS. EUBANKS: I understand that, Your Honor, but in terms

1 of exceptions for affidavits and for prior testimony, the rules  
2 do provide an exception in 804 which we could rely upon here.

3 In any event, it gives clarity to the testimony of Dr. --  
4 of Susan Ivey given that she offered testimony on the materials  
5 themselves, and when the Court refers to it, would certainly have  
6 that affidavit knowing how the information was compiled. So,  
7 also for purposes of 807, it has substantial guarantees of  
8 reliability and could come in under the residual exception  
9 assuming that it is considered by the Court to be hearsay. But  
10 it certainly has reliability in that it's been utilized in these  
11 proceedings before, relied upon by the Court. Defendants had an  
12 adequate opportunity to provide any rebuttal in terms of both  
13 evidence that was submitted through Susan Ivey, as well as  
14 evidence that would have been submitted during the course of the  
15 summary judgment briefing.

16 So, given this is a bench trial and the Court could look  
17 at the evidence all together in a package and given that Susan  
18 Ivey has offered testimony on the basis of it, I think there is a  
19 substantial guarantee of reliability under 807 that the Court  
20 could receive into evidence, this document.

21 THE COURT: Ms. Honigberg and then Mr. Bass.

22 MS. HONIGBERG: Your Honor, Ms. Ivey didn't offer  
23 testimony about this document, she was shown parts of it in her  
24 written direct and said (sic), "Does it say this?" And she said,  
25 "Yes."

1           And, in fact, Ms. Ivey had never seen the summary chart,  
2   the affidavit, and she's not an expert who is required to go then  
3   and do analysis to come and rebut it; she was a fact witness. So  
4   that absolutely should not get this in.

5           THE COURT: Mr. Bass.

6           MR. BASS: I have nothing to add to that. I don't see how  
7   Ms. Ivey could respond to the declaration from Ms. Morrison, but  
8   the data, the MRI data, as you know, Your Honor, Dr. Krugman  
9   testified about that extensively and that data will be in the  
10   record.

11          THE COURT: The Morrison affidavit does not come in. That  
12   objection is sustained. The CMR data, which essentially comes  
13   from the Morrison affidavit and the work that Dr. Morrison did,  
14   as to that the objection is sustained. The MRI data is  
15   essentially in, or will be coming in very shortly when we reach  
16   Dr. Krugman.

17          All right. Next objection, please.

18          MS. HONIGBERG: The next issue we have not resolved refer  
19   to a Website, the National African/American Tobacco Prevention  
20   Network, I believe, and I'll put it up there.

21          THE COURT: Now, wait a minute. Where --

22          MS. HONIGBERG: This would be --

23          THE COURT: -- is that? This should be under tab B; is  
24   that right?

25          MS. HONIGBERG: Yes. I apologize I believe this is under



1 tab B. I think it's the very last exhibit objection. It's  
2 Exhibit 89170.

3 THE COURT: All right. Go ahead.

4 MS. HONIGBERG: And this exhibit relates to the Kool Mixx  
5 Campaign, which Your Honor may or may not recall. Ms. Ivey was  
6 asked a lot about that campaign.

7 THE COURT: First of all, was this an exhibit -- obviously  
8 it was used in her direct examination, right?

9 MS. HONIGBERG: I believe it was used in her direct.

10 THE COURT: Was it also cited in proposed Findings, do you  
11 know?

12 MS. HONIGBERG: I'm not sure if it was cited.

13 MS. EUBANKS: It was not, Your Honor, cited in the  
14 proposed Findings.

15 THE COURT: Okay.

16 MS. HONIGBERG: And again, this is a document that  
17 Ms. Ivey was asked about. She was not asked whether she had ever  
18 seen it before. It is a Website on the great World Wide Web, and  
19 it's clear hearsay for what it's saying about the Kool Mixx  
20 Campaign.

21 The government contends that they seek to admit it for  
22 notice to Brown & Williamson, but as you did with Sharon Smith,  
23 simply because something is in the millions and millions and  
24 millions of documents on the Internet, that Ms. Ivey certainly  
25 was never asked about or testified that she saw, that that does

1 not provide notice of anything. That someone could find it out  
2 on the Internet does not provide notice of anything.

3 THE COURT: All right, Ms. Eubanks.

4 MS. EUBANKS: Yes, Your Honor. We've been clear that  
5 we're not offering this for the truth of the matter asserted. As  
6 Your Honor may recall, there was a great deal of discussion about  
7 a settlement that occurred, and this was one of the parties that  
8 was involved in terms of moving that settlement along. The  
9 notice issue is something that's important and that we questioned  
10 the witness on rather extensively about her knowledge of the  
11 events that were surrounding it.

12 THE COURT: Let me just interrupt you. U.S. 89170 may be  
13 admitted.

14 (Government's Exhibit 89170 admitted into the record.)

15 MS. EUBANKS: Thank you, Your Honor.

16 THE COURT: Does that cover all matters for Ms. Ivey?

17 MS. HONIGBERG: There is one more issue memo matter and  
18 then we'll have some individual issues to address.

19 Issue 2, I believe, dealt with a series of documents  
20 relating to Imperial Limited, which is a Canadian tobacco  
21 company. And there are a few documents that they've attempted to  
22 admit through Ms. Ivey, again without eliciting testimony from  
23 her about it at all. It's not cited in her direct. These were  
24 just added at the end. They're from a Canadian tobacco company  
25 which referred to people at times 16 years old -- They do some

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1 studies on people 16 years old.

2 As the affidavit from Mr. Wells that we attached to the  
3 issue memo shows, these documents are not Brown & Williamson  
4 documents or the documents of other defendants in the case. The  
5 only reason Brown & Williamson has the documents in its  
6 possession is that its legal department got them when they were  
7 produced in a Canadian ad ban trial.

8 There is no evidence these documents were used, reviewed,  
9 held by anybody in Brown & Williamson's Marketing Department or  
10 used for any purpose, and therefore they have no relevance, and  
11 any potential relevance is outweighed by undue prejudice. These  
12 are documents that are not Brown & Williamson or any other  
13 defendants' marketing documents.

14 MS. EUBANKS: I should be very clear about this, Your  
15 Honor, because counsel is relying upon an affidavit of J.  
16 Kendrick Wells to make these assertions about the use of these  
17 documents, an affidavit that was filed in 2000 in another  
18 proceeding.

19 The information upon which counsel is relying to support  
20 the assertion that the documents are not Brown & Williamson's --  
21 used in Brown & Williamson's Marketing Department itself is  
22 hearsay. It comes from a witness, someone who's on the witness  
23 list and is expected to come and testify in these proceedings.  
24 But insofar as reliance upon an affidavit that hasn't even been  
25 filed, no original filing in this proceeding has indicated that.

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1           We have these documents, we have them legitimately,  
2   they're Brown & Williamson documents. How they found themselves  
3   into their file, we nearly have a statement of counsel that's  
4   supportive of that, but we don't have any evidence that suggests  
5   that these documents should not be received into evidence in  
6   these proceedings.

7           MR. BERNICK: Your Honor, I hesitate to stand up because  
8   Ms. Honigberg has covered everything, but that last point I have  
9   personal knowledge of, and I would note under Rule 104A,  
10   questions of admissibility generally can be addressed by the  
11   Court subject to the provisions of subsection B in making its  
12   determination. It is not bound by the rules of evidence except  
13   those with respect to privileges.

14          So when it comes to these preliminary determinations of  
15   admissibility, the Court has the latitude to consider matters  
16   that would not necessarily come into evidence during the course  
17   of trial, including an affidavit. Mr. Wells' affidavit was  
18   submitted in connection, I believe, with the Florida case. The  
19   issue -- exactly the same issue arose in the Florida case. These  
20   documents tend to get proffered by the plaintiffs in all the  
21   cases, and we did get Mr. Wells' affidavit. That is his  
22   affidavit. We submitted it to the Court there. It is a -- it's  
23   never been questioned as being the affidavit of J. Kendrick  
24   Wells, so it's exactly the kind of thing that we believe the  
25   Court can consider under Rule 104A.

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1           MS. EUBANKS: Your Honor, it's no different than the  
2 Morrison affidavit. Indeed, if anything, the Morrison affidavit  
3 had more guarantee of reliability in that it was an affidavit  
4 submitted in proceedings in US v. Philip Morris before this  
5 Court.

6           There was even litigation surrounding the question of  
7 whether Ms. Morrison should have to testify in the case in order  
8 to proffer certain information, but for counsel to make  
9 representations, there's positively nothing in Rule 104 that  
10 suggests that the representations of counsel regarding the use of  
11 an affidavit give support or lend any credence to any allegations  
12 about the use of the document or what it is. The document on its  
13 face speaks for itself. How it came into being with Brown &  
14 Williamson Tobacco Company is something that they're entitled to  
15 put on evidence of themselves, but that does not guard against  
16 admissibility here.

17          THE COURT: Is it correct that these documents -- I don't  
18 even have their numbers right in front of me -- were cited in the  
19 direct testimony?

20          MS. HONIGBERG: No, there was not one question elicited  
21 from Ms. Ivey in the direct testimony about these documents. She  
22 has never seen them before, as far as I know.

23          MS. EUBANKS: I can check on this, Your Honor. I don't  
24 want to make the representation without checking, but I believe  
25 these documents are cited in the United States' proposed

1 Findings.

2 THE COURT: And does the defense disagree with that? Or  
3 is everybody unsure?

4 MR. BERNICK: I think that they probably were. The  
5 proposed Findings, though, I think would reveal the in-Canada  
6 smoking age at the time was 16 years of age. It may even be in  
7 Mr. Wells' --

8 THE COURT: And all of that would go to the weight to be  
9 given to the document. Acting on the assumption, now, that these  
10 documents were used in the proposed Findings of Fact, the  
11 presumption of admissibility attaches and I see no reason to rule  
12 that it has been overcome. Additional evidence about the --  
13 about why the document shouldn't be considered may of course be  
14 proffered and will be weighed by me, but there's no reason to  
15 exclude the documents given the presumption of admissibility  
16 since they were cited -- since I'm going to assume they were  
17 cited in the proposed Findings of Fact. So they may be admitted.

18 Now I think that covers it for Ms. Ivey.

19 MS. HONIGBERG: That covers it for the issue memos, and  
20 then we have some of the individual issues used live.

21 THE COURT: All right. Let's deal with all of those  
22 before lunch break.

23 MS. HONIGBERG: I'll start with the one the government  
24 wants to admit, if that's okay, Sharon.

25 MS. EUBANKS: That's fine.

1           THE WITNESS: Okay. There were a few document that the  
2 government wants to admit that we weren't able to reach agreement  
3 on. The first, for the record, are Exhibits 20989.

4           THE COURT: Are they included in the written objections?

5           MS. HONIGBERG: They would not have been because we  
6 wouldn't have known about them at the time.

7           THE COURT: Okay. Go ahead, please.

8           MS. HONIGBERG: And the second is Exhibit 21431, and both  
9 of these exhibits are exhibits regarding Kool marketing in the  
10 1970s. And you may or may not recall, since it was a long time  
11 ago, but when the government attempted to use these documents,  
12 Mr. Bernick jumped up and objected and said that Ms. Ivey wasn't  
13 even at the company in the '70s. Your Honor let her go on to see  
14 if she had seen the documents or had any familiarity with the  
15 documents.

16           When Ms. Ivey made clear she did not have familiarity with  
17 the documents, Your Honor sustained Mr. Bernick's objections to  
18 questioning on both of these documents. And if you would like  
19 the trial page cite for 20989 -- there actually may be a typo or  
20 a misstatement in the transcript where it's 20999. It is at  
21 pages 6332 through 6337. And for U.S. Exhibit 21431, it is pages  
22 6337 through 6338.

23           THE COURT: All right. Does the government have anything  
24 to respond?

25           MS. EUBANKS: Yes, Your Honor, and I think I can be brief

1 on this. For purposes of the testimony here, these are documents  
2 that are cited in the United States' proposed Findings of Fact.  
3 And you may recall that the line of questioning that led to the  
4 examination was one that had risen during the cross-examination  
5 of the witness in particular.

6 Just to put this in context, what these documents are,  
7 21431 is one that expressly refers to a direct targeting group  
8 being 6.3 million, 16-to-25-year-old smokers of king-size and  
9 long-size plain filter cigarettes who consumed 35 billion  
10 cigarettes in 1967.

11 The question that was raised during cross-examination of  
12 the witness was whether, in all of the work that you've done on  
13 these cases and all of the documents that you've looked at as the  
14 company's CEO, have you ever seen any documents that address  
15 targeting. In that this document is cited in the United States'  
16 proposed Findings of Fact, and in that we don't have any  
17 questions as to any authenticity under 470 that's been raised,  
18 and that we've established clearly that the documents are  
19 relevant to these proceedings, and we've established a nonhearsay  
20 purpose, that the document isn't hearsay, it's a business record,  
21 we believe there's sufficient evidentiary support for the  
22 documents to be admitted.

23 THE COURT: Anything further?

24 MS. HONIGBERG: Your Honor, just to clarify, Mr. Bernick  
25 elicited from Ms. Ivey whether she had seen such documents either



1 what the government had shown her or in her work.

2 THE COURT: There's a presumption of admissibility because  
3 the documents were cited in the proposed Findings of Fact, and  
4 there's no question that the government has established their  
5 connection nexus in relationship to this case. I certainly  
6 understand that the basis of the objection is that the witness  
7 wasn't allowed to be questioned on the documents, but especially  
8 given what the documents are, there is no basis for excluding  
9 them and they will be admitted.

10 (Government's Exhibits 20989 and 21431 admitted into  
11 the record.)

12 THE COURT: Anything further?

13 MS. HONIGBERG: Not on those documents.

14 MS. EUBANKS: Thank you, Your Honor.

15 THE COURT: All right. That's Ms. Ivey.

16 MS. HONIGBERG: I'm sorry, I thought you meant on that  
17 document, I apologize. We're getting there. The next document  
18 is Exhibit 92040, and that is discussed in a transcript at page  
19 6314 through probably 6318. And this document is a marketing --  
20 not a marketing document, it's a compilation of some readership  
21 data, maybe from MRI or Simmons, but when Ms. Ivey was asked  
22 about this particular document, which is not in the Findings of  
23 Fact, the first thing out of Ms. Ivey's mouth was she had not  
24 seen this document before. There is no foundation laid with this  
25 witness regarding this document. She did not know what it was.

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1 THE COURT: And was it cited in her direct testimony?

2 MS. HONIGBERG: I don't believe -- no, it was not. The  
3 first time it was brought up was in the live cross -- or the live  
4 direct.

5 MS. EUBANKS: Your Honor, we covered this many times, that  
6 with respect to a particular witness, that that is not the  
7 governing force in terms of the admissibility of documents with  
8 respect to whether a witness has ever seen it or not seen the  
9 document.

10 Here, just to put this in context, what the witness was  
11 asked about was whether the company utilized Simmons and MRI data  
12 in its ordinary course of business. And in establishing that, we  
13 utilized U.S. Exhibit 92040 and asked the witness a number of  
14 questions about it. The only objection that we have here is one  
15 of lack of foundation. So we have the fact that the document  
16 itself is -- it's not challenged on grounds of authenticity; it's  
17 a document that's clearly relevant to the proceedings, and it's  
18 nonhearsay.

19 MS. HONIGBERG: Could I just make one final comment? I  
20 would also question the relevancy. There is no evidence that  
21 this document was used in the course of Brown & Williamson's  
22 marketing business, as opposed to dealing with legislation or  
23 litigation looking at what certain regulations -- proposed  
24 regulations from the FDA or other entities would do on their  
25 magazines they could advertise in.

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1           This is not -- there is no evidence that this document was  
2   used in determining what magazines to advertise in at the time  
3   that this document was in Brown & Williamson's possession. And  
4   because Ms. Ivey has never seen this document, she was unable to  
5   comment on what it was or was not used for, so we don't know what  
6   this document is based on Ms. Ivey's testimony, and we don't know  
7   what it was used for.

8           MS. EUBANKS: That all goes to the weight of the evidence,  
9   Your Honor, not it's admissibility.

10          THE COURT: There is no presumption of admissibility,  
11   given that it wasn't cited in the direct or proposed Findings of  
12   Fact. There is certainly a lack of foundation. I'm going to  
13   sustain the objection as to 92040.

14          MS. HONIGBERG: And the next few documents deal with some  
15   of the affidavits, you may recall, regarding the Kool Mixx  
16   lawsuit, and Ms. Ivey was shown a few affidavits. They were  
17   90057, which is the affidavit of Sarah Brooks Gansheimer,  
18   G-A-N-S-H-E-I-M-E-R; and 90056, which is the affidavit of a  
19   Christopher Waltz; and 90059, which is the affidavit of a Milton  
20   Branch.

21          And Ms. Ivey was questioned about these affidavits at  
22   pages 6154 through 6159 and again has repeatedly said she has  
23   never seen the affidavits. These were affidavits filed in a  
24   lawsuit in New York. They are hearsay, and Ms. Ivey was not  
25   familiar with them. There's no issue. Of course Ms. Ivey had

1 notice of the lawsuit, but we don't need these affidavits to  
2 establish that she had notice of the lawsuit.

3 MS. EUBANKS: As Your Honor may recall -- First, I'll say  
4 that these are not documents that were cited in the proposed  
5 Findings; these were fairly recently created documents, but the  
6 objections that have been raised go to hearsay.

7 What the witness testified to with regard to these three  
8 particular affidavits had to do with the question that was  
9 proposed in her written direct, and it was -- I am aware of only  
10 one instance where someone was able to go around the protections  
11 we set up with respect to accessing data that we set forth on the  
12 Web and so that underage people then could get it. These  
13 particular affidavits that are offered, if you look at the first  
14 paragraph of each one, indicate that they are exceptions under  
15 803.8 because they are records that are used or created in the  
16 course of -- in this sense a law enforcement action.

17 And the individuals who were proffering the information  
18 were investigators with either the state or reported to  
19 investigators of interns who were sent out to go out and see if  
20 they could access this information from the Web with certain  
21 information.

22 Now, these affidavits similarly were submitted in a  
23 proceeding where Brown & Williamson was a party involving  
24 questions of whether, under the MSA, whether it had been violated  
25 because of issues surrounding the Kool Mixx Campaign.

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1           So, insofar as an exception to the hearsay rule arises,  
2 here under 804(b)(1), this testimony was offered in a proceeding  
3 where Brown & Williamson was a party and had every opportunity to  
4 provide responsive information.

5           So, our argument is really twofold: First, that it comes  
6 with an exception under 803, 803.8 to be precise, and it also  
7 comes within the exception of 804(b)(1). And it's really  
8 appropriate and necessary to the Court because, with respect to  
9 these affidavits, they invited Ms. Ivey to look at what had  
10 happened, given her direct testimony which stated, No, I'm only  
11 aware of an instance where this occurred. And here we put  
12 forward three instances. It's entirely probative.

13           THE COURT: Anything further, from the defense?

14           MS. HONIGBERG: Yes, Your Honor. As you will recall,  
15 Ms. Ivey said she was only aware of one instance. There's no  
16 evidence -- these cannot be used to impeach her. There is no  
17 evidence she had seen these affidavits and thereof was aware of  
18 these other incidences. I'll also submit that by the time these  
19 affidavits were filed and Ms. Ivey could have seen them, the  
20 lawsuits had already started and the actions about which they  
21 complained; namely, getting into the Website underage had been  
22 completely shut down voluntarily by Brown & Williamson.

23           MS. EUBANKS: But I'll remind Your Honor that Ms. Ivey  
24 testified to familiarity with the proceedings that ended in the  
25 settlement.

1 THE COURT: These two documents -- it's two, am I right or  
2 three?

3 MS. HONIGBERG: I believe it's three.

4 THE COURT: These three affidavits may be admitted under  
5 804(b)(1) because Brown & Williamson was a party to the  
6 litigation in which they were utilized and therefore had an  
7 opportunity to respond to them, and very secondarily, as --  
8 falling within 803.8. Next, please.

9 (Government's Exhibit 90056, 90057 and 90059 admitted into  
10 the record.)

11 MS. HONIGBERG: Your Honor, there's another affidavit  
12 which you may rule the same way, and I'll just put it on the  
13 record and say we have a couple of affidavits from that same  
14 proceeding then that we would seek to admit. Again, if we are  
15 able to present rebuttal evidence, we had a chance to rebut in a  
16 proceeding, we would like those affidavits to be admitted as  
17 well, and I can pull those out for you in a moment.

18 THE COURT: Did you use those with Ms. Ivey?

19 MS. HONIGBERG: We used at least one of them.

20 THE COURT: Let's do it in an orderly fashion. You were  
21 going to get to that issue second, I thought you --

22 MS. HONIGBERG: Right. There was one more affidavit,  
23 90061, the affidavit of Michael Kamins. Again, we would -- this  
24 was done by an expert, I believe, hired by the State of New York.  
25 Again, we would make the same objections subject to Your Honor's

1 rulings.

2 THE COURT: All right. 90061 may be admitted.

3 (Government's Exhibit 90061 admitted into the record.)

4 THE COURT: Now, the next category are affidavits that you

5 wish to move in; is that right?

6 MS. HONIGBERG: Correct.

7 THE COURT: And did you ever ask Ms. Ivey about them in

8 your cross.

9 MS. HONIGBERG: There is one, Your Honor, and I apologize,

10 I thought it was an affidavit, but it's actually the brief Brown

11 & Williamson submitted in connection with the New York case, and

12 that is Exhibit JD 013066.

13 THE COURT: A brief of lawyers?

14 MS. EUBANKS: Yes, and one of the lawyers has entered an

15 appearance in this case.

16 THE COURT: No. Absolutely not admitted.

17 MS. HONIGBERG: And then, Your Honor, this second exhibit

18 is an exhibit that we -- I do not believe did use with Ms. Ivey,

19 which is JD 013067. It's the affidavit of Michael Russell. It

20 is absolute rebuttal to the affidavit of Mr. Kamins, I believe,

21 to present a complete record of the issue.

22 MS. EUBANKS: Ms. Ivey --

23 THE COURT: You showed it to her. I just want to be clear

24 on the facts. You showed it to her?

25 MR. BERNICK: Let us check that.

1 MS. EUBANKS: I checked.

2 MR. BERNICK: I'm sorry. Let us check that because there  
3 was testimony from Ms. Ivey on -- As Your Honor will recall, she  
4 testified that hip-hop was not simply a teenage cultural  
5 phenomenon. It's been around for a very long time. I think that  
6 either the brief or the affidavit was used as the basis for her  
7 belief about that, and that's how the discussions took place, but  
8 I don't want to misspeak on this. Why don't we just use the  
9 lunch hour. If neither one -- if this was not used, then we  
10 won't proffer it. And with respect to the brief, Your Honor has  
11 already ruled, but I think we should just find out what the story  
12 is.

13 THE COURT: What's the government's understanding?

14 MS. EUBANKS: Well, I checked. JD 013067 was never even  
15 shown to Ms. Ivey during her testimony. Certainly, if defendants  
16 want to --

17 THE COURT: Let's leave it this way, everybody.  
18 Defendants will check. I'm going to operate on the assumption  
19 for the moment that the document wasn't used. If the defendants  
20 disagree with that, then, of course, you should raise that issue  
21 right after lunch, please.

22 MS. HONIGBERG: And I believe -- Now we're getting to the  
23 exhibits (sic) the government wants to admit, and I believe we  
24 just have three left and I'll let --

25 MS. EUBANKS: You mean the objections, and I want to make



1 sure because I know that you may have had communications with Ms.  
2 Hahn last night, and the ones that I have are JD 01775, and that  
3 was a document that was a 1998 creative plan, and it was a  
4 document that Ms. Ivey never received because she was not even at  
5 Brown & Williamson at the time, so our objection goes to the  
6 foundation, Your Honor, she had never seen it before.

7 THE COURT: And these are documents that the defendants  
8 are seeking to introduce. All right. Go ahead, Ms. Honigberg.

9 MS. HONIGBERG: Yes, Your Honor. First of all, this was  
10 used in Ms. Ivey's cross-examination with Mr. Bernick. I believe  
11 he established a foundation. She was familiar with Kool  
12 targeting and the Kool campaign during that time. She was asked  
13 about whether this document was consistent with her  
14 understanding. This is a -- may be in the Findings of Fact,  
15 although I'm, quite frankly, not sure, and she certainly had a  
16 familiarity with the Kool campaigns -- Be Kool campaigns and the  
17 Kool campaigns in the late '90s, certainly more than she would  
18 have in the 1970s Kool documents that we talked about earlier.  
19 She kind of went between Brown & Williamson and BATCo for a  
20 while. So we believe there is certainly an adequate foundation  
21 for the admission of this document.

22 THE COURT: The document may be admitted.

23 (Defendants' Exhibit JD 01775 admitted into the record.)

24 MS. EUBANKS: JD 013066. Again, there was no foundation  
25 laid for that document, no indication that Ms. Ivey had ever seen

1 that document before, being asked about it on the stand, and  
2 that -- is that --

3 MS. HONIGBERG: I apologize. I believe Ms. Eubanks may be  
4 addressing the brief we already discussed.

5 MS. EUBANKS: I'm sorry, sorry for taking the time. Thank  
6 you, Renee. The next one I have, JD 012971, that is an April  
7 30th, 1999 e-mail from David Harris to Burt -- at BATES -- to  
8 someone named Burt Kremer and others at B & W. There's no  
9 foundation here. Ms. Ivey was not identified as a recipient on  
10 the e-mail, and she wasn't even at Brown & Williamson in April of  
11 1999 when that e-mail was transmitted. She didn't return to  
12 B & W until July of 1999. There's no indication in the record  
13 that she ever saw the document; she's not --

14 THE COURT: Ms. Eubanks, shows show down.

15 MS. EUBANKS: Thank you, Your Honor. There's no  
16 indication in the record that she ever saw the document prior to  
17 being asked about it during her testimony here.

18 MS. HONIGBERG: And, Your Honor, this document -- again,  
19 Mr. Bernick laid a foundation with Ms. Ivey asking if this was  
20 the type of document normally kept in the course of Brown &  
21 Williamson's business. And just for the record, it's discussed  
22 at pages 6200 through 6202 of Ms. Ivey's testimony.

23 Again, she certainly testified she was familiar with the  
24 campaigns going on at the time, and this document relates  
25 directly to the Kool Mixx Campaign and what type of target

1 audience they were targeting to, which the government questioned  
2 Ms. Ivey extensively about, and we think it's admissible.

3 MS. EUBANKS: Your Honor, I'll note that Ms. Ivey is on  
4 defendants' witness list, and if they want to make those  
5 foundational proffers during her testimony, they can do that, but  
6 it hasn't been made so far in these proceedings. This is an  
7 e-mail between two people that we've never even heard the names  
8 of before who are not witnesses in this case.

9 THE COURT: But did you question her a lot about that?

10 MS. EUBANKS: No.

11 MS. HONIGBERG: Your Honor, we used the document in  
12 response to them questioning Ms. Ivey about the target for the  
13 Kool Mixx Campaign, and certainly this would fit within -- if  
14 foundation is no longer an issue -- First of all, Mr. Bernick did  
15 lay the foundation. Second of all, saying it was a business  
16 record. It was established it was a business record and --

17 THE COURT REPORTER: Slow down, please.

18 MS. HONIGBERG: I'm sorry. It was established that it was  
19 a business record, and it more importantly was established that  
20 what this document showed was consistent with Ms. Ivey's  
21 understanding of how they determined the target for Kool Mixx  
22 Campaign. It's highly irrelevant to her testimony.

23 THE COURT: The document may be admitted.

24 (Defendants' Exhibit JD 012971 admitted into the record.)

25 MS. EUBANKS: JD 13067 on your list of proffers.

1 MS. HONIGBERG: That's one --

2 MS. EUBANKS: All right. The last one I have, and please  
3 correct me if this is wrong, is demonstrative, JDEM 010095. This  
4 was a -- is this still being proffered?

5 MS. HONIGBERG: One moment.

6 MR. BERNICK: Well, Your Honor, I take responsibility for  
7 this. This is -- remember, we had that big chart about the terms  
8 of the settlement? And it was proffered or originally it was  
9 used as a demonstrative. Your Honor asked for a copy of it, and  
10 after that and kind of looking at it, it really looked to us like  
11 it was a pretty useful summary of what is otherwise a fairly  
12 extensive settlement. It's totally up to Your Honor in terms of  
13 whether it would be useful. We would proffer it if Your Honor  
14 would accept it as a summary. We don't need it. The underlying  
15 document is in evidence, but it's kind of a handydandy way of  
16 capturing the elements of the campaign and what was done to  
17 resolve it. So it is what it is.

18 MS. EUBANKS: We object on substantive grounds here, and  
19 I'm sure it was unintentional. But the information that was  
20 contained on the demonstrative, which I'm sure was hurriedly put  
21 together, is inaccurate. It does not reflect the that are set  
22 forth in the settlement agreement, which itself was I think a  
23 40-something page document, so it doesn't meet the 1006  
24 requirement of being a voluminous document.

25 THE COURT: If it's not accurate, I'm not going to admit

1 it. That's not helpful to me.

2 MR. BERNICK: If it's not, we wouldn't proffer it, but  
3 there was no examination of the witness after we used it to say  
4 that it was inaccurate. There was no --

5 MS. EUBANKS: I'm sorry.

6 MR. BERNICK: There was no impeachment, so maybe after the  
7 lunch hour.

8 THE COURT: That's the way I'm going to leave it.  
9 Certainly, if it's accurate, it was helpful. I did look at it.  
10 If it's inaccurate, I don't want it anywhere around me, so you  
11 all figure it out --

12 MR. BERNICK: That's fine.

13 THE COURT: -- and let me know after lunch.

14 MS. EUBANKS: We will, Your Honor.

15 MS. HONIGBERG: Your Honor, with those exceptions, I  
16 believe that -- Oh, I apologize. I forgot.

17 MR. WALLACE: David Wallace for BATCo. Your Honor, I just  
18 wanted to raise one issue. I guess I'm following or trying to  
19 follow in the long shadow cast by Jonathan Redgrave in the  
20 presumptive -- climb up the hill of presumptive admissibility.

21 THE COURT: Except he happen, I think, to get to the top.

22 MR. WALLACE: He did, he did. We've been chatting over  
23 there and he's been giving me some pointers.

24 In any event, my objection on behalf of BATCo relates to  
25 approximately 15 documents that the government included on the

1 exhibit list with Ms. Ivey. She was asked only about one or two  
2 of those documents and she was not asked any substantive  
3 questions. She was simply, as many witnesses have been in this  
4 case, asked if counsel for the government had read a passage  
5 correctly. And the issue is really one of relevance. These are  
6 brand plans, foreign brand plans, foreign market plans that the  
7 government obtained discovery of in this case from companies  
8 affiliated with BATCo. They pertain to the perceptions of  
9 consumers of cigarettes in the likes of Taiwan, Hungary, Poland,  
10 Warsaw, Russia, and so on. There is nothing in any of the  
11 documents and there was no attempt to question Ms. Ivey to in any  
12 way tie these documents to the U.S. market at all.

13         The only argument that the government made in opposition  
14 to BATCo's written objection to this is that, well, this case is  
15 about marketing and these documents relate to marketing. And so  
16 what we would submit is that, you know, without any effort -- and  
17 there has been none to tie them to the us market or to establish  
18 that these foreign brand plans were used by BATCo or B & W in  
19 order to market cigarettes in the United States -- they simply  
20 have no relevance.

21         And notwithstanding the presumption of admissibility  
22 because they were cited in the government's Findings of Fact,  
23 BATCo respectfully submits that this is a case after all still  
24 about the United States' cigarette market, and that at the end of  
25 the day the presumption of admissibility should not necessarily

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1 be used.

2 For the most part, I think the way Your Honor has  
3 structured it, it has worked quite well, but it certainly should  
4 not be used to pack an already amply packed record with documents  
5 that simply have no relevance. And I submit at the end of the  
6 day the Court will not be wanting for marketing documents to read  
7 and rely upon in its Findings of Fact, and that's our submission  
8 on that.

9 MS. EUBANKS: Your Honor, all of that goes to the weight,  
10 but if I may ask Mr. Wallace a question. I don't have that in  
11 the collection of the timely filed objections. Was it filed in  
12 accordance with 471?

13 MR. WALLACE: I believe it was, yes.

14 MS. EUBANKS: I would like, Your Honor, over the lunch  
15 hour to be able to check that, if I could, because I do remember  
16 one of the filings from BATCo coming in late. And given the  
17 ruling that we had earlier today with respect to the timeliness  
18 issue, it's something that I would like the opportunity to check  
19 because that may resolve it on procedural grounds in terms of the  
20 objections, but I would note that these were documents that were  
21 cited in the United States' proposed Findings of Fact, as Mr.  
22 Wallace has acknowledged.

23 They'll have every opportunity during their case in chief  
24 to be able to put on any contrary evidence, but a decision was  
25 made early on in this case not to call every single witness live.

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1 If we're going to exclude testimony on the bases that he's  
2 asserted here, we don't think it would be consistent with some of  
3 the prior rulings, but I would like the opportunity to look at  
4 the document over the lunch hour if I could, Your Honor.

5 MR. WALLACE: Your Honor, if I might, I just handed Ms.  
6 Eubanks the submission of joint defendants dated November 12th  
7 incorporating BATCo's objections, indicating that they were  
8 timely made and enabling us to actually have lunch at lunch.

9 MS. EUBANKS: I'd like the opportunity to take a look,  
10 nonetheless, Your Honor.

11 THE COURT: You may take a look at it.

12 MS. EUBANKS: Thank you.

13 THE COURT: I believe that will be the only remaining  
14 issue about Ms. Ivey's testimony.

15 Then we have to deal, and we're going to finish this,  
16 exciting as it may be to everybody, we're going to finish  
17 Dr. Henningfield, Dr. Krugman, Dr. Chaloupka and Dr. Dolan. So  
18 everybody needs to be prepared. Hopefully, we can be as brief as  
19 possible. Those were a while ago, so I may have to go through  
20 them slowly.

21 MR. BRODY: Your Honor, I've received a request from the  
22 back that after we finish this remaining issue with Ms. Ivey that  
23 we go directly to Dr. Henningfield. It sounds like you were  
24 planning to do that anyway. I'm told that we should be able to  
25 resolve those issues in less than five minutes, and so I've had a



1 request from Mr. Goldfarb that we take those up next, if  
2 possible.

3 THE COURT: Less than five minutes, and then Mr. Goldfarb  
4 doesn't have to come back this afternoon, right?

5 MR. BRODY: Exactly.

6 THE COURT: Okay, we'll do it now, Dr. Henningfield's.

7 MR. GOLDFARB: Your Honor, just one moment.

8 THE COURT: All right, everyone. Again, be sure to  
9 identify yourself for the record, please.

10 MR. GOLDFARB: Good afternoon, Your Honor. Andrew  
11 Goldfarb for the United States. The United States in the  
12 five weeks since Dr. Henningfield appeared has not heard from  
13 joint defendants as to whether or not they are going to continue  
14 to assert any objections.

15 Our objections -- our responses to their objections are  
16 stated in our responses. We've had no responses to whether any  
17 of those are being withdrawn despite repeated requests.

18 As to the United States' objections to documents used on  
19 cross-examination with Dr. Henningfield, there are five very  
20 brief objections that I think can be done in two or  
21 three minutes.

22 THE COURT: Where do you stand on your objections?

23 MR. NARKO: On our objections we have one issue relating  
24 to the reliance documents, which is an issue that's coming up  
25 with several of the experts. When that issue gets resolved, it

1 will apply equally to Dr. Henningfield.

2 THE COURT: All right. I think we probably better put  
3 that aside. It applies, I believe, to Drs. Dolan, and Chaloupka,  
4 and Dr. Krugman. I'm not sure, everybody. I think it does,  
5 though. What are your five issues?

6 MR. GOLDFARB: Just briefly, Your Honor. One of them is  
7 just housekeeping. And again, I had previously identified these.  
8 One is a document that was on their -- that was identified to us  
9 was the Philip Morris Website dealing with health effects of  
10 smoking. They didn't use that document with Dr. Henningfield or  
11 that Website page, they used a diction page. We have no  
12 objection. Those can just be substituted, and that should take  
13 care of that one, but --

14 THE COURT: I assume there's agreement.

15 MR. NARKO: We agree.

16 THE COURT: All right, the second one.

17 MR. GOLDFARB: There were three documents that were raised  
18 during the cross-examination, two, during Mr. Sheffler's  
19 cross-examination that were articles that were asked about, sort  
20 of just as a foundational matter whether Dr. Henningfield heard  
21 of those documents or knew about them -- they were not shown to  
22 the witness -- and it's our view that if a document is not shown  
23 to a witness on cross-examination, the defendants should not for  
24 these articles be able to -- or with respect to these articles,  
25 and they are JD 011671.

1 THE COURT: Are the defendants moving those articles in?

2 MR. GOLDFARB: Yes, Your Honor, they're on the list that  
3 was provided to us.

4 THE COURT: Let's be clear. That doesn't make sense to me  
5 at all.

6 MR. NARKO: No, Your Honor, we're not moving those in.  
7 That must be an error on the list we provided to the government.

8 THE COURT: All right. It didn't sound right to me.

9 MR. GOLDFARB: That takes care of, just so the record is  
10 clear, JD 011671 and JD 061518.

11 The third document in this category was a document that  
12 was again just referenced obliquely by Mr. Minton regarding a  
13 1976 meeting of the Tobacco Working Group. And Mr. Minton  
14 identified the exhibit number for the Court, did not show the  
15 document to the witness. In fact, the document, which I think  
16 Mr. Minton was using to locate just the timing of a meeting, is  
17 four or five documents for which no foundation was laid with the  
18 witness, contains notice of meeting, meeting minutes, handwritten  
19 notes of attendees, and again I don't think it should come in  
20 through Dr. Henningfield.

21 THE COURT: Well, Mr. Minton's not here.

22 MR. CASETTA: Your Honor, I'm counsel for Lorillard.

23 MR. GOLDFARB: Your Honor, I do have a copy of the  
24 document if you want to flip through it.

25 THE COURT: I don't need it.

1 MR. GOLDFARB: And again, so the record is clear as we're  
2 talking about it, this is JD 041339.

3 THE COURT: I think counsel's going to tell me he's not  
4 moving it in.

5 MR. CASSETTA: Your Honor, we'll lay the foundation with  
6 another witness.

7 THE COURT REPORTER: Your name, sir.

8 MR. CASSETTA: Yes, Richard Cassetta on behalf of Lorillard  
9 Tobacco Company.

10 THE COURT: And so technically you're withdrawing your  
11 effort to move this document in with this particular witness?

12 The witness: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. GOLDFARB: And just the last one, Your Honor, is JD  
15 054454. That is the NIDA statute that Mr. Webb began to question  
16 Dr. Henningfield about. You sustained an objection to the use of  
17 that document or questioning Dr. Henningfield about that  
18 document.

19 THE COURT: This is the statute itself?

20 MR. GOLDFARB: Yes.

21 THE COURT: Mr. Webb's not moving that. The Court will  
22 take judicial notice of the shaking of the head.

23 Does that cover everything with Dr. Henningfield?

24 MR. GOLDFARB: I'm not exactly clear on what the reliance  
25 issue is with respect to Dr. Henningfield. In our objections we

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1 identified where in his reliance materials all of the documents  
2 to which defendants objected had been identified in November of  
3 2001, and so I'm not really sure what issue remains.

4 MR. NARKO: There was no issue. I was informed that there  
5 was still an issue for some of the documents. If there's not,  
6 we'll clear it up over the break. Your Honor's ruling, as it  
7 comes up with the other experts, won't apply then to  
8 Dr. Henningfield's reliance materials, but we'll just  
9 double-check our facts over the lunch break.

10 THE COURT: All right. Counsel, did you have anything  
11 further?

12 Okay.

13 MR. GOLDFARB: Thank you, Your Honor.

14 THE COURT: All right. 2:15, everybody, please.

15 (Thereupon, a luncheon recess was had.)

16

17

18 C E R T I F I C A T E

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 -----  
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## I N D E X

## Examinations

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Defendant's Exhibit JD 054527 admitted	10131
Government's Exhibits 76778 and 76780 admitted	10138
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Government's Exhibits 20989 and 21431 admitted	10156
Government's Exhibit 90056, 90057 and 90059 admitted	10161
Government's Exhibit 90061 admitted	10162
Defendants' Exhibit JD 01775 admitted	10164
Defendants' Exhibit JD 012971 admitted	10166

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GK)
	:	January 13, 2005
Plaintiff,	:	
	:	2:15 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
. . . . .	:	

VOLUME 49  
AFTERNOON SESSION  
TRANSCRIPT OF TRIAL RECORD  
BEFORE THE HONORABLE GLADYS KESSLER  
UNITED STATES DISTRICT JUDGE

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

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

2 THE COURT: We have Dr. Henningfield, Krugman,  
3 Chaloupka and Doland. If there are issues as to one of those  
4 witnesses that will resolve issues as to the other witnesses,  
5 then obviously it makes sense to start with that person. I  
6 don't know who that would be, though. So let me hear from  
7 counsel.

8 And let me warn everybody, because it's getting warmer  
9 outside, it will probably get less comfortable in this courtroom  
10 this afternoon, although are going to try and get  
11 air-conditioning. I don't know if that's evenly humanly  
12 possible.

13 Mr. Wallace?

14 MR. WALLACE: Yes, Your Honor.

15 Ms. Eubanks and I were just talking about the last  
16 remaining Ms. Ivey issue, and she has indicated, having reviewed  
17 the papers, that the timeliness objection is withdrawn and it  
18 remains as she otherwise stated it in addition to their  
19 written -- they did make a written response to our objections.

20 And in further response to the point that she made  
21 before we adjourned or moved on to the Henningfield,  
22 Dr. Henningfield issue, I would just say that it's not clear to  
23 me at all how an opportunity to address irrelevant documents in  
24 BATCo's own case necessarily makes them relevant or somehow  
25 constitutes an efficient and economic procedure.

1           So I mean, I think with that, unless Ms. Eubanks has  
2 anything else to add, that issue is ripe.

3           MS. EUBANKS: Your Honor, I do have something to add,  
4 and I think it might be helpful if I just summarized for the  
5 court in this proceeding what our arguments are with respect to  
6 the documents.

7           First, this collection of documents that Mr. Wallace is  
8 discussing are all cited both in Ms. Ivey's written direct  
9 examination as well as in the United States' proposed findings  
10 of fact.

11           They are all documents that are dealing with questions  
12 of light low tar research, issues that the witness indicated a  
13 familiarity with on the stand as well as in her written direct  
14 testimony in discussing these documents.

15           With the exception of one of the documents, they all  
16 came from BATCo's files and, in fact, that is the ultimate  
17 parent Brown & Williamson, and the witness herself worked for  
18 BAT for a period of time.

19           But the documents are all relevant consuming consumer  
20 research which was shared between and among the BAT entities,  
21 one of which Brown & Williamson was, so they certainly are  
22 relevant to the proceedings here.

23           MR. WALLACE: Just one more point, Your Honor.

24           It may well be that within the BAT group of families  
25 that documents of this sort are shared with one another

1       periodically.

2               There certainly hasn't been any attempt through  
3       Ms. Ivey to establish that any of the 15 brand plans and  
4       marketing plans at issue here that clearly pertain to other  
5       countries were used by either BATCo or B&W to develop any  
6       marketing plans or brand plans for the sale of cigarettes in the  
7       United States' cigarette market. That's our submission.

8               THE COURT: I'm going to allow the documents in.

9               All right. Now we are done with Ms. Ivey.

10              Do counsel have a view on what witness it would be most  
11      efficient to address first?

12              MS. HONIGBERG: Rene Honigberg for the record.

13              Really briefly on Ms. Ivey. We provided over the lunch  
14      hour a revised copy of the summary exhibit regarding the KOOL  
15      Mixx settlement. I don't know if Ms. Eubanks has had a chance  
16      to review it yet, but there was one issue that they had a  
17      concern over accuracy.

18              We believe that issue is now taken care of. We tried  
19      to put in almost the exact quote from the document, which made  
20      it a little longer.

21              And as Your Honor said, this would be a helpful exhibit  
22      to Your Honor. I could hand up a revised copy if you would  
23      like.

24              MS. EUBANKS: Your Honor, we oppose this exhibit for  
25      the reasons, in addition to the error that was set forth. The

1 error was rather significant because it actually suggested that  
2 you could put the logo on certain materials.

3 THE COURT: Since it's been corrected, I don't really  
4 have to get off into that issue.

5 MS. EUBANKS: It's not a proper summary because it  
6 doesn't adequately summarize the document. It has a few key  
7 points that counsel wish to point out with the court.

8 If we're going to revise the document, the United  
9 States would like an opportunity to create, with respect to the  
10 elements that are important to the settlement, elements that it  
11 believes are important.

12 The settlement agreement itself, Your Honor, is only --  
13 when I said it was 43 pages, I was wrong, it's 17 pages counting  
14 the signatures. It's just not a 1006 summary because it's not  
15 even a lengthy document. It's the best evidence.

16 THE COURT: The document is not going to be admitted.  
17 And, obviously, the settlement itself is the best evidence. And  
18 let me hand this back to Ms. Honigberg, please.

19 MS. CROCKER: For the record, Elizabeth Crocker on  
20 behalf of the United States.

21 Your Honor, I think that Ms. Honigberg and I have  
22 agreement that there are global issues with regards to Dr. Dolan  
23 and Dr. Krugman which we can address first which may clear up a  
24 number of issues.

25 I understand that some of those issues may also relate

1 to only a few, I think nine exhibits for Dr. Henningfield, and  
2 so then Andrew Goldfarb is still here, we can also get to those.

3 THE COURT: Dr. Dolan.

4 MS. CROCKER: Dr. Dolan and Dr. Krugman.

5 We want to cover the global issues first, Your Honor.

6 THE COURT: Just a minute now, everybody.

7 MS. CROCKER: Your Honor, I can point you to the dates  
8 of filings if that would be helpful because I know there have  
9 been a number of filings for these experts.

10 THE COURT: Just a minute.

11 All right. Let me hear first about the global issues.

12 MS. HONIGBERG: Your Honor, before we begin on the  
13 global issues, how would you like us to proceed? Would you like  
14 us to do the global issue for Dr. Dolan and then just stay with  
15 Dr. Dolan?

16 THE COURT: I think that makes sense and then -- and  
17 you're going to start with Dr. Dolan?

18 MS. HONIGBERG: Correct.

19 And the first issue, the main issue with Dr. Dolan is  
20 going to be the reliance issue, which I think you are well  
21 familiar with.

22 Since the beginning of this case and since we had our  
23 very first expert on the stand, Dr. Brandt, the court has made  
24 very, very clear: If documents were not properly and timely  
25 disclosed in an expert's reliance materials, those documents do

1 not come in through that expert. And that's under rule 26, and  
2 of course the court's own disclosures requirements.

3 And again even when we argued this issue with  
4 Dr. Dolan, Your Honor said -- and I'm quoting from the  
5 December 1, 2004, transcript at page 7616 -- "Even if documents  
6 are mentioned in the direct testimony and/or in the findings of  
7 fact, if they are also legitimately reliance documents that were  
8 not disclosed as reliance documents, then they cannot be  
9 admitted under Rule 26."

10 And you had a similar statement with Dr. Brandt. This  
11 is page 983 and 984 of the transcript.

12 THE COURT: And the policy, the reason for that is very  
13 clear; that if the other side, whoever it is, doesn't have those  
14 reliance documents, then they are obviously limited in terms of  
15 the adequacy and completeness of their cross-examination on  
16 depositions.

17 MS. HONIGBERG: And, Your Honor, the government has now  
18 raised an issue.

19 If the document was cited in either parties' proposed  
20 findings of fact, does Rule 471(b)'s presumption of  
21 admissibility mean that somehow these documents, that even  
22 though they weren't disclosed, can now come in if they are  
23 submitted with the expert's witness testimony?

24 And our position, and we believe the clear rulings of  
25 the court are, that they don't come in through that expert

1 unless they were properly disclosed.

2 THE COURT: Let me hear from the government.

3 MS. CROCKER: Your Honor, I think we can really resolve  
4 this easily, and that is because the United States has been very  
5 clear from the first exhibit list that was filed with Dr. Dolan  
6 and Dr. Krugman and in the amended exhibit lists that were filed  
7 with Dr. Dolan and Dr. Krugman, that this category of exhibits  
8 are not reliance materials. They are not materials considered  
9 by the expert. And the expert --

10 THE COURT: Why are they not reliance materials?

11 MS. CROCKER: They are materials which are not  
12 discussed in the expert's testimony. They are materials that  
13 the United States is submitting with that expert testimony  
14 because they are materials relevant to the expert's testimony.

15 So the United States clearly made two categories of  
16 exhibits that would be submitted with Dr. Doland and Dr. Krugman  
17 and this may apply also to Dr. Henningfield, although I'll let  
18 Mr. Goldfarb address that.

19 The first category of materials were materials cited in  
20 or discussed in that expert's written direct testimony. Those  
21 materials, of course, were materials that were considered and  
22 disclosed to defendants.

23 The second category of materials were those which were  
24 not cited in the expert's direct testimony, which were not on  
25 the expert's list, but which were in the United States' opinion,



1 relevant to that expert, and so therefore we submitted them with  
2 that expert so that the court would be able to consider those  
3 materials -- for example, marketing plans -- at the same time  
4 that it considered those exhibits and the testimony of Dr. Dolan  
5 that gave context and relevance to marketing plans.

6 And I would just briefly --

7 THE COURT: Are you saying, for example, that Dr. Dolan  
8 didn't consider marketing plans?

9 MS. CROCKER: No, Your Honor.

10 I would briefly remind Your Honor, and it's set out in  
11 our filing of December 8th, that we had a ruling from the bench,  
12 from Your Honor on specifically this point, and you very clearly  
13 gave us guidance and you said that -- I'm just quoting here --  
14 "If they are documents that are in the proposed findings of fact  
15 and they are not reliance documents in that the witness didn't  
16 consider them or rely upon them in any way or they are mentioned  
17 in his direct, and it sounds like they wouldn't be, then you  
18 make a separate justification exhibit by exhibit as we talked  
19 about for this category of exhibits as to why there is a nexus  
20 of any kind between this witness and the document you're seeking  
21 to admit."

22 THE COURT: It sounds to me as if the issue at this  
23 point is: Are these documents or are they not reliance  
24 materials?

25 MS. CROCKER: And the United States has never asserted

1       that they were materials considered. That is why this issue  
2       that is before Your Honor is very different from the issue that  
3       was before Your Honor when you heard argument about Dr. Brandt,  
4       because the documents in Dr. Brandt's testimony were actually in  
5       his testimony.

6               And so Your Honor's ruling was an expert witness  
7       cannot, of course, in their own testimony, include discussion of  
8       documents which they had never before disclosed.

9               The United States has been very careful, of course, not  
10      to do that with Doctors Dolan and Krugman, and so what we did is  
11      we provided -- we provided two clear categories of exhibits on  
12      the exhibit lists: those which were cited in the testimony and  
13      were materials considered and disclosed, and there been no  
14      dispute that those were properly disclosed materials, and then  
15      we also provided a separate list of finding of fact documents  
16      presumptively admissible.

17              And then after Your Honor's ruling from the bench we  
18      provided yet another list in which we provided a nexus for each  
19      document, document by document, which was over 20 pages long for  
20      Dr. Dolan and about 10 pages or so for Dr. Krugman's exhibits.

21              MS. HONIGBERG: Two responses, Your Honor.

22              First of all, even if an expert is not testifying about  
23      a document, why it is submitted with an expert who is not going  
24      to opine about it, testify about it, or to be part of or related  
25      to that expert testimony when Your Honor's clearly said reliance

1 materials don't come in with that expert, that is inconsistent  
2 with, we believe, the spirit and statement of your -- that Your  
3 Honor has made.

4 THE COURT: I didn't say reliance materials don't come  
5 in with the expert.

6 MS. HONIGBERG: No, no. I'm sorry. Undisclosed  
7 materials. If they weren't disclosed.

8 So by appending to Dr. Dolan's list, for example, a  
9 hundred -- and I'm just pulling that out -- a hundred documents  
10 that were not in his reliance materials; by appending that to  
11 his testimony so the court can consider it with his testimony  
12 when Dr. Dolan is not prepared to say a word about these  
13 documents, presumably, then it seems like we are just inflating  
14 the record for no reason.

15 And I want to raise -- excuse me -- I just want to get  
16 over here for a second. I want to raise an important issue with  
17 Dr. Dolan. Forty-four of the documents that are supposedly not  
18 reliance materials -- meaning not considered by Dr. Dolan in any  
19 way, shape or form -- are on Demonstrative 9, which you may or  
20 may not recall from Dr. Dolan is a 40-some-odd page document  
21 that Ms. Brooker and Mr. Dolan repeatedly stated Dr. Dolan  
22 personally created.

23 How he personally created a demonstrative with exhibits  
24 he's never considered or doesn't rely on, that reads as a bigger  
25 issue of -- just because you're not calling it reliance

1 materials, does that mean he can get up there and testify about  
2 it or have a demonstrative that he made? It seems that that  
3 certainly is improper.

4 THE COURT: Does the government have anything further?  
5 And then I want to look over again my papers that you all  
6 submitted way back in December on this issue.

7 MS. CROCKER: Your Honor, if I could just make  
8 two points briefly. And then I do think the papers are really  
9 very full and we do have two rounds of briefing on this, so the  
10 United States would be happy for you to talk -- to rule upon the  
11 papers.

12 First of all, we are -- if we go down the path that  
13 defendants are suggesting here, we would be making a completely  
14 different rule for expert witnesses than for fact witnesses.

15 With fact witnesses, Your Honor has clearly ruled --  
16 and I'm quoting again from the transcript -- "There's no  
17 requirement that every exhibit must be referred to or must be  
18 essentially introduced by a particular witness." And of course,  
19 you said, "The exhibit must be relevant. It must be authentic  
20 and not be hearsay."

21 So with fact witnesses, Your Honor, the United States  
22 has been following your order, 471, and submitting along with  
23 the fact witness testimony findings of fact documents.

24 And so with the expert witnesses, again, we have been  
25 perfectly clear. These are not reliance materials or considered

1 materials. They are materials that are in the United States'  
2 findings of fact so there should not be a concern about an  
3 inflated record. It's a limited number of documents, only 30 so  
4 for Dr. Krugman, about a hundred for Dr. Dolan. These are  
5 relevant documents that there should be no dispute about.

6 And defendants have not objected on the grounds of  
7 relevance, authenticity or hearsay to those documents, but are  
8 simply raising this issue of reliance.

9 And with the issue that Ms. Honigberg raised related to  
10 Dr. Dolan's testimony, I do not think that that's an accurate  
11 characterization of his testimony, and our papers do clearly set  
12 out that he in his -- in one of his demonstratives, documents  
13 were included.

14 As Ms. Honigberg notes and as noted in our papers as  
15 well, finding of fact documents were listed in that  
16 demonstrative, a long list of documents, along with other  
17 considered documents.

18 And what the United States did to try to be very clear  
19 is we put on our list of exhibits the ones that were the finding  
20 of fact documents not considered by Dr. Dolan. Those were in  
21 that second set of exhibits which the United States said these  
22 are finding of fact documents, not considered by the expert.  
23 And so we are, you know, asking for those to be moved in under  
24 the presumption of admissibility and 471.

25 MS. BROOKER: Your Honor, if I may just address

1 Ms. Honigberg's discussion of Dr. Dolan's testimony just for the  
2 record.

3 THE COURT: All right.

4 MS. BROOKER: And my recollection of Dr. Dolan's  
5 testimony is that when he was asked about -- just for the  
6 record, it's Demonstrative 9, which contained all the false  
7 public statements, but again the record will -- you know, the  
8 record will reflect what the testimony was -- but all of the  
9 documents in Demonstrative 9 are false public statements in the  
10 youth section of the government's final findings of fact, except  
11 for website statements, public website statements and those were  
12 removed as a result of Your Honor's -- I believe it's Order 622  
13 expressly prohibiting Dr. Dolan from referring to website  
14 statements.

15 So when Dr. Dolan was asked on cross-examination if he  
16 had seen these documents, some of the documents in here, while  
17 all of them are in the findings of fact, some of the documents  
18 in here are also in his original expert report and other  
19 disclosures, some are not.

20 But Dr. Dolan, along with the other youth experts,  
21 also reviewed at different points in time the government's  
22 findings of fact, and many of the documents underlying the  
23 findings of fact, and disclosed to the defendants that, prior to  
24 their depositions, that they had reviewed those findings of  
25 fact.

1           So now while we did not, therefore, assume that  
2     anything in the finding of fact was a disclosure, and we didn't  
3     treat it that way, the point is that when Dr. Dolan was on the  
4     stand and asked if he had reviewed all of the documents on here,  
5     his testimony was -- he was -- I would, you know, submit to the  
6     court he was thinking that he has seen a lot of these because  
7     they are in the United States 'finding of fact long before --  
8     long before he wrote his trial testimony.

9           So defendants never really made that clear. It was one  
10    question and one uncertain answer by Dr. Dolan. And I just, you  
11    know, don't want the record to be completely confused as to what  
12    Dr. Dolan represented because I do believe it was a bit of an  
13    overstatement as Ms. Honigberg had put it, and I just want that  
14    to be clear.

15           MS. HONIGBERG: May I briefly respond?

16           Your Honor, in Dr. Dolan's written direct, at page 59  
17    and 56, Dr. Dolan asked, "Did you have a chart created that  
18    shows many of the defendants' public statements?" And he  
19    answers "Yes" on the next page.

20           In the transcript of the trial -- and I will give you  
21    the page cite so the record is completely accurate --  
22    Ms. Brooker represented -- as you might recall, Mr. Dolan was  
23    asked about a series of demonstratives that were used in opening  
24    statements that he wasn't familiar with and so -- and there were  
25    some errors in there. And Ms. Brooker didn't want Dr. Dolan to

1 get the blame for any errors for something he didn't look at.

2 Ms. Brooker made clear on the record that the one we  
3 should really be looking at is Demonstrative 9 because, quote,  
4 Dr. Dolan himself put together Demonstrative 9 that is attached  
5 to his direct testimony. And that's at page 7765.

6 At page 7766 Ms. Brooker says that the errors in the  
7 opening statement demonstratives were corrected by Dr. Dolan in  
8 Demonstrative 9.

9 To somehow say now that the documents on Demonstrative  
10 9, that Dr. Dolan, it was represented, put together himself, it  
11 just cannot be the case.

12 You may not call them reliance materials, but they are  
13 reliance materials. They are documents he considered and relied  
14 if it was correct that he put together this chart, and that was  
15 what was stated.

16 And I believe there was further testimony from  
17 Dr. Dolan that any quote -- he selected -- the quotes from all  
18 these documents he selected, and if that's all true, these were  
19 documents he reviewed.

20 And if an expert can simply say that they've looked at  
21 the findings of fact and then any of the thousands and thousands  
22 of documents in the findings of fact are now considered reliance  
23 materials, then anything is going to come in.

24 MS. BROOKER: Your Honor, just in response to that last  
25 point. When the government -- as a result of the prior lists



1       that had been provided by some of the experts where the  
2       government did not necessarily, as maybe this is the case with  
3       Dr. Brandt -- and I don't know if this was a case with another  
4       United States' expert -- since there started to be confusion  
5       about this distinction between documents admitted through the  
6       expert versus documents that were clearly documents that were  
7       considered and disclosed by the expert for the first time,  
8       realizing this confusion, the United States decided, Let's be  
9       clear in our filing and make the category so it doesn't appear  
10      that we're making misrepresentations or confusing the record  
11      about what is considered and what is not.

12               So the documents on Demonstrative 9, those that, as I  
13      said, were in his expert report or other disclosures were put  
14      under the list clearly headed Documents Considered and Disclosed  
15      by Dr. Dolan.

16               The remainder of the documents on Demonstrative 9 that  
17      were in the findings of fact but that were not considered, you  
18      know, individually by Dr. Dolan, were put on a separate list  
19      sent out along with the original direct testimony filing that  
20      expressly informed the defendants and the court that these were  
21      not documents the government was putting forth as documents  
22      considered and disclosed by Dr. Dolan.

23               So we tried to be very clear with that in our initial  
24      filing to be honest so that we wouldn't get to this point where  
25      there was confusion about which document was considered and

1       which was a finding of fact document.

2               THE COURT: I want to look at a couple of things,  
3       everybody.

4               (Pause)

5               I thought the government indicated that it filed some  
6       lengthy justifications to each of the separate documents. What  
7       date was that filed?

8               MS. CROCKER: I'll just pull that up for you, Your  
9       Honor. It looks as if Ms. Honigberg hopefully has a copy for  
10      the court. And I can tell you the date of it as well.

11              THE COURT: And I don't think that it was your  
12      November 24th filing, I don't think.

13              MS. CROCKER: No, Your Honor. That was our response to  
14      the first round of objections, and after that we had Your  
15      Honor's ruling from the bench that we should put together the  
16      nexus.

17              So we then put together an amended list of exhibits for  
18      both Dr. Krugman and Dr. Dolan, and we filed that on December  
19      3rd. And there's one for Dr. Krugman and one for Dr. Dolan.  
20      Dr. Dolan's is 32 pages long, and Dr. Krugman's is 16 pages  
21      long, Your Honor, and goes document by document explaining the  
22      nexus, as you had asked.

23              THE COURT: Counsel, I think that I am just going to  
24      have to pull together these documents. I usually have  
25      everything organized well, but I don't see those documents. I

1       may have them for Dr. Krugman, but I certainly don't seem to  
2       have them for Dr. Dolan. And, in any event, I would want to  
3       look through them.

4               MS. CROCKER: Your Honor, if you looked at those you  
5       might also want to consider that defendants then filed  
6       objections, separate objections, to those amended lists both for  
7       Dr. Krugman and for Dr. Dolan on December 6th, and then the  
8       United States filed a consolidated reply -- a consolidated  
9       response on December 8th to those two different set of  
10      objections.

11             MS. HONIGBERG: Your Honor, we have a set here of all  
12      the Doland ones kind of in order, if that would be helpful. We  
13      can provide that to Ms. Hightower.

14             THE COURT: I think we will probably pull it  
15      altogether.

16             I say this with great hesitation, but I'm going to make  
17      a commitment that this issue gets ruled upon by the close of  
18      business tomorrow. I've got matters in court, but I also have a  
19      little bit more time, and I do want to look at all the documents  
20      together. I have a final question for the government, however.

21             How can you say that Dr. Dolan put together  
22      Demonstrative Exhibit, I think it's Number 9, that he chose the  
23      false statements for that exhibit, that he obviously made  
24      intentional decisions as to what was to be used and what not to  
25      be used, and that he didn't consider those documents?

1       Otherwise, how could he have done what he did?

2               MS. BROOKER:  If I understand your question, Your  
3       Honor, you are asking about the demonstrative and the testimony  
4       that Dr. Dolan gave in his written direct examination.

5               THE COURT:  Yes.

6               MS. BROOKER:  Okay.  The testimony that -- could we  
7       take a look at that testimony again?  Did you want to put it  
8       back up there.

9               The testimony -- I believe Dr. Dolan was asked the  
10       question, "Did you have Demonstrative 9 prepared?"  And he did  
11       have Demonstrative 9 prepared, based in part on the set of  
12       public statements that were in his expert report and/or the set  
13       of statements that were in.... excuse me.

14               "Did you have a chart created that shows many of  
15       defendants' public statements?"

16               And he did have a demonstrative that was created that  
17       included, again, the statements that were in his expert report  
18       as well as the findings of fact statements, which again we then  
19       set out as a separate list notifying the defendants and the  
20       court which ones are the specific ones that he considered and  
21       disclosed and which ones that he had not disclosed prior to his  
22       written direct.  So we were entirely forthcoming with that.  And  
23       again, it was very similar to Dr. Brandt who considered --

24               THE COURT:  That's not the issue, Ms. Brooker.

25               The issue is did he disclose all of his reliance

1 materials? How do you define reliance materials?

2 And how can you conclude that exhibits, which he used  
3 or which he considered in putting together Demonstrative Number  
4 9 do not constitute reliance materials which should have been  
5 disclosed?

6 MS. CROCKER: Your Honor, when Dr. Dolan in his written  
7 direct testimony said he had a chart prepared for him, he was  
8 being completely accurate.

9 He indicated which public statements that he had  
10 considered he wanted to include, and the United States also  
11 included public statements from the findings of fact which it  
12 considered relevant and then put on its second list.

13 Dr. Dolan didn't impermissibly consider documents that  
14 were outside of his set of materials considered. He didn't go  
15 through documents that he had not considered before and put that  
16 chart together. He did not testify he put the chart together.  
17 He had the chart prepared.

18 MS. BROOKER: And again, Dr. Dolan had, pursuant to his  
19 review, as did many of the experts, review all of the findings  
20 of fact and consider or look at many of the documents that  
21 underlie that.

22 But to the extent the documents were and were not  
23 disclosed, the government was careful to only include in that  
24 testimony, particularly of Dr. Dolan, those public statements  
25 that he disclosed and either defendants deposed him about or had

1 the opportunity to depose him about.

2 I don't know if that is answering Your Honor's  
3 question.

4 MS. HONIGBERG: Your Honor, very briefly.

5 Again, Ms. Brooker represented to this court Dr. Dolan  
6 himself put together Demonstrative 9. She also said errors were  
7 corrected by Dr. Dolan and, quote, It was accurately put  
8 together and Dr. Dolan had reviewed it.

9 How could he not have reviewed the documents in this  
10 demonstrative that he put together. Even if he selected them  
11 and had the government type them up, he stands by the quotes  
12 from these documents since he selected these things.

13 MS. BROOKER: Your Honor, I would say in response to  
14 that, that Dr. Dolan did look at, and I believe he testified  
15 that he could not recall -- I can't -- we have his testimony  
16 there and we should look at it, but I believe that Dr. Dolan  
17 said he was not sure all of the documents that he looked at.

18 But Dr. Dolan did, at the time of reviewing the  
19 findings of fact, look at a lot of these documents and have  
20 these demonstratives prepared and did look at the underlying  
21 documents.

22 But again, since they were not disclosed as reliance  
23 documents, we clearly set them out so that we would not create  
24 an impression that all of those were on his disclosure set  
25 because all of them were not; only some of them from his

1 original expert report and some supplemental disclosures were  
2 actually included.

3 THE COURT: But the concern and the question is not  
4 whether the government clearly and honestly delineated these  
5 different kinds of documents, the real question is: Did the  
6 government disclose those documents which actually constitute  
7 reliance documents?

8 That was the government's obligation, and that, of  
9 course, was an obligation that kicked in at a very early point  
10 or a fairly early point in the litigation.

11 And then the question is: How could Dr. Dolan have put  
12 together at least one exhibit with documents that don't  
13 constitute, in the government's view, reliance documents?

14 Now, the government isn't clear as to whether Dr. Dolan  
15 did or did not put together this particular demonstrative. It  
16 seems to me that you've both presented somewhat conflicting  
17 statements from the transcripts.

18 My sense in listening to Dr. Dolan -- and this doesn't  
19 apply to Demonstrative Number 9 -- but my overall sense in  
20 listening to him is that he had a lot of people do a lot of work  
21 on his presentation and he didn't do it all.

22 MS. BROOKER: Well, Your Honor, if I could just say in  
23 response. What is accurate is what Dr. Dolan stated in his  
24 testimony, which is, "Dr. Dolan, you know, did you have a chart  
25 created that shows many of defendants' public statements?"

1           If I may have misspoke, let me clarify, that that is in  
2 fact what occurred. That Dr. Dolan asked and had a  
3 demonstrative put together that included all of the public  
4 statements from the findings of fact except for the website  
5 statements.

6           THE COURT: But you're using the passive sense. Does  
7 that mean that some graduate student put it together?

8           MS. BROOKER: No, I understand that is your question,  
9 Your Honor.

10          No, Dr. Dolan, as he testified, he worked alone. He  
11 had no consultant or anyone work. So to the extent that any of  
12 the demonstratives were put together, as I elicited on redirect  
13 examination either the United States, because Dr. Dolan did not  
14 have any consultants, we either used the opening statement  
15 demonstratives, some of which he testified about were -- and  
16 they were all false public statements from the findings of fact,  
17 some of which were in his expert disclosures, and others of the  
18 documents were the findings of fact document which the  
19 government had a paralegal put together, which Dr. Dolan  
20 reviewed several times and Dr. Dolan looked at several times,  
21 and, you know, that's where the demonstrative comes from.

22          THE COURT: That supports the defendants' argument.  
23 Namely, that he had to exercise his expert judgment in deciding  
24 what belonged and what didn't belong in that exhibit.

25          How else could he have done it? I come back to the



1 question that's been posed by Ms. Honigberg.

2 MS. BROOKER: You mean the admissibility of some of the  
3 documents on the demonstrative?

4 THE COURT: The question is: How could he have  
5 composed that exhibit and made the decisions as to what should  
6 be included or not included in that exhibit without having  
7 considered all the documents? And if he considered them, then  
8 they constituted reliance materials which should have been  
9 disclosed at a much earlier point.

10 Am I misstating defense counsel's argument?

11 MS. HONIGBERG: No, Your Honor, that's correct. That's  
12 our position.

13 MS. BROOKER: I guess -- I'm not trying to be unclear  
14 or to not understand the court. I guess my response is just,  
15 again, is that Dr. Dolan, having looked at all the findings of  
16 fact included in the demonstrative, all the findings of fact  
17 public statements, except the public website statements, and  
18 then we set forth so that we were clear which of those documents  
19 were documents we would readily be able to get admitted into  
20 evidence through him because they are consideration documents  
21 and they are in his testimony.

22 So those were documents we could get in versus  
23 documents we knew we had to make a separate argument for, so we  
24 set them out separately because they were findings of fact  
25 documents which then Your Honor ruled for those we would create

1 a nexus for.

2 So... I guess what I'm just saying is that the United  
3 States was just trying to be clear for the first time through  
4 Dr. Dolan's filing which of the documents were findings of fact  
5 documents that were not disclosed and which ones were disclosed  
6 by Dr. Dolan.

7 THE COURT: I'm certainly not raising any ethical  
8 issues about how the government presented the material.

9 I think, unless there's something final to be added,  
10 that we will just have to put this issue aside for now.

11 MS. CROCKER: Your Honor, could I say one last thing?

12 THE COURT: Yes.

13 MS. CROCKER: Very briefly, Your Honor.

14 I just want to note that the issue that Ms. Honigberg  
15 has raise and we spent about 15 minutes discussing really only  
16 applies to a subset of materials in Dr. Dolan's -- in the  
17 objection to Dr. Dolan's exhibits.

18 It doesn't apply at all to Dr. Krugman and it doesn't  
19 apply to I think 55 of the documents or exhibits that were  
20 submitted with Dr. Dolan. Those, there is no dispute they were  
21 finding of fact documents. There's no dispute they are reliance  
22 documents. So I just wanted to make that clear for the record,  
23 Your Honor.

24 THE COURT: Okay. All right. Second issue, and is  
25 this as to Dr. Dolan now? We are staying on him?

1 MS. HONIGBERG: This is as to Dr. Dolan. And for  
2 Dr. Dolan I believe the only remaining issues are individual  
3 defendants' exhibit issues, I believe.

4 And I know we had used -- the defendants had used three  
5 exhibits in their cross -- well, I should say Brown & Williamson  
6 used three exhibits in its cross of Dr. Dolan. Philip Morris  
7 had some additional documents they would like to get in.

8 There are three exhibits the government objects to the  
9 admission of, and we could do those; I'm not sure who is arguing  
10 those.

11 THE COURT: Let's deal with those three exhibits now,  
12 please, and then we will come back to the other defendants.

13 MS. BROOKER: If you have the list, why don't you -- I  
14 mean, I have the list, too.

15 MS. HONIGBERG: The three documents that B&W used, the  
16 first is JD 2696. The next one is JD 65994.

17 THE COURT: Are you sure you used the proper numbers on  
18 the first one? 2696?

19 MS. HONIGBERG: Oh, I probably -- yes, I apologize. I  
20 left out some zeroes. It should be JD 002696.

21 THE COURT: The next one is 65994?

22 MS. HONIGBERG: Correct.

23 And the next one is JD 047664.

24 MS. BROOKER: Now, let me just state for the record  
25 that yesterday I thought that -- have you withdrawn some other

1 exhibits, because we didn't have agreement on more than three?

2 MS. HONIGBERG: Some of them Philip Morris we'll be  
3 addressing.

4 MS. BROOKER: I see.

5 THE COURT: I thought these are the three you disagree  
6 on.

7 MS. BROOKER: Yes.

8 THE COURT: Then let's just focus on these three.

9 MS. BROOKER: If I could just try to pull the exhibits.  
10 I don't remember them.

11 The first one is JD 002696, and the United States  
12 objects for two reasons. One, it's hearsay.

13 THE COURT: Tell me what the document is, please,  
14 because I don't have any of these listed.

15 MS. BROOKER: Specifically -- I can put this up here.  
16 The document is an interrogatory response, and Ms. Honigberg can  
17 correct me if I'm wrong. This an interrogatory response by R.J.  
18 Reynolds in the FTC proceeding in 1990. It's hearsay. And, in  
19 addition, Dr. Dolan had not seen it before. I believe when he  
20 was asked about it on cross-examination he was not familiar with  
21 the document. So, in addition to it being hearsay, it is not --  
22 a foundation was not laid for the document.

23 MS. HONIGBERG: Your Honor, this document, we are not  
24 seeking to admit it for the truth of the matter. This document  
25 came in the context of questioning Dr. Dolan regarding our

1       representations to the government. It is not for the truth of  
2       the matter of what was said, it is that it was said. It is not  
3       for hearsay purpose.

4               The question was what representations were we making  
5       to -- and I believe in this case it was the FTC. What  
6       representations were we making to the FTC about our marketing  
7       practices to say whether or not that was consistent with what we  
8       were doing. This was not used to establish what our marketing  
9       practices were, merely what our representations to the  
10      government were. And I will also add it's in the proposed  
11      findings.

12             THE COURT: This document may be admitted.

13             (Exhibit No. JD 002696 was received into evidence.)

14             THE COURT: 65994, what is this?

15             MS. BROOKER: JD 065994 is a 1990 letter from RJR to  
16      Thomas Luken, then Chairman of the Subcommittee on  
17      Transportation.

18             Again, Dr. Dolan testified that he was not sure he had  
19      ever seen this document, he wasn't sure whether or not he had  
20      seen this particular document, and there was no -- there was no  
21      foundation as a result laid. And it's also hearsay.

22             MS. HONIGBERG: Your Honor, the same issue with this  
23      document.

24             This is a document to the Honorable Thomas A. Luken in  
25      the Congress, and it was specifically to show what were we

1 saying to the government. Not to say it was true, but what were  
2 our representations.

3 Dr. Dolan had opined that our representations were  
4 false. This was to say what was our representations. If he  
5 hadn't considered this document, we were able to say "You didn't  
6 consider this document." But we believe it should be admitted.  
7 It's not for hearsay purpose.

8 MS. BROOKER: I don't see --

9 THE COURT: This document may be admitted.

10 (Exhibit No. JD 065994 was received into evidence.)

11 THE COURT: And now 047664.

12 MS. BROOKER: Okay. This was another document, JD  
13 047664 was another document which I believe I objected and the  
14 court sustained the objection to Dr. Dolan being asked questions  
15 about this because it's entitled, Five Ways to Reduce the Risk  
16 of Smoking, and it clearly fell outside his area of expertise.

17 It's hearsay. It is a partial document and there was  
18 no foundation laid for asking this witness to lay a foundation  
19 for the admissibility of the document.

20 MS. HONIGBERG: Your Honor, briefly, if I may respond.

21 First of all, this document is in the proposed findings  
22 and it's presumptively admissible.

23 Secondly, the issue was whether this related to  
24 Dr. Dolan's testimony. And Dr. Dolan -- question at Dr. Dolan's  
25 direct, page 118 was, "Could you explain why this was one of

1       the, quote, great deceptions, end quote, in the marketing of  
2       cigarettes?"

3               Answer by Dr. Dolan, "Yes. In reality, low tar and  
4       nicotine cigarettes offered smokers no differential health  
5       impact as compared to regular cigarettes" and goes on to talk  
6       about the low tar deception.

7               This is not for the truth of the matter asserted. This  
8       is for what was the government saying about it. And even if  
9       Dr. Dolan may not have -- even if we may not have been permitted  
10      to ask Dr. Dolan further about it, certainly it related to his  
11      opinions and his testimony and it is in the findings of fact.

12              THE COURT: It does have a presumption of  
13      admissibility. There's certainly a clear nexus between the  
14      testimony of Dr. Dolan and this document.

15              And there was a third reason I was going to allow it  
16      in, but the third reason escapes me for the minute. So I've  
17      stated two, and that's sufficient. It may be admitted.

18              (Exhibit No. JD 047664 was received into evidence.)

19              THE COURT: All right. Does that take care of Brown &  
20      Williamson's documents?

21              MS. HONIGBERG: That is correct, Your Honor.

22              THE COURT: Now we will go to individual defendants.

23              Mr. Redgrave.

24              MR. REDGRAVE: For the record, this is Jonathan  
25      Redgrave.

1           I only have one document I wanted to raise. It's  
2 Exhibit 22121.

3           Jamie, if I could have the next yellow.

4           Your Honor, this document we objected on hearsay  
5 grounds. And in response to our objection, the government  
6 argued, quote, This exhibit is not hearsay, it's both the e-mail  
7 and the attached survey were made in the course of RJ Reynolds'  
8 business and kept as a business record under Federal Rule of  
9 Evidence 803(6).

10          I'll note also, Your Honor, this document was not in  
11 the reliance materials, so subject to that objection as well and  
12 it was not in Dr. Dolan's written direct.

13          The government, in their response, went on to say that  
14 this exhibit is cited in the United States' findings of fact and  
15 is therefore presumptively admissible under the orders of the  
16 court.

17          Now, of course, that means I've got a hill to climb,  
18 Your Honor, and I did the stairs in between our breaks, so I  
19 think I'm prepared on this document.

20          If you look at the document, you will see there's an  
21 e-mail at the top within Reynolds, and there's a very short note  
22 from one employee to another about the attached Gallup survey,  
23 and then you will see this line, right here, which marks a  
24 break, and then you will see that on this page it looks like the  
25 author of this e-mail is just cut and pasted from something and



1       that something looks like a press release or news release.

2               You can see, here, it comes from a PR Newswire and we  
3       can read down through it, it talks about -- kind of a release  
4       about this survey, attitudes and behaviors related to smoking  
5       cessation. A survey of current and former smokers. And that  
6       was sponsored by SmithKlein Beacham, Consumer Health Care. And  
7       then you will see there's a media briefing in New York.

8               If we go to the next page -- Jamie -- you will see it  
9       goes through with a number of quotes from different people. In  
10      fact, one of our experts in this case is quoted in the middle,  
11      Jack Henningfield, and so it's got a double hearsay problem in  
12      there.

13              You will also remember Dr. Henningfield was a  
14      consultant with SmithKlein Beacham, although you wouldn't be  
15      able to tell from this document.

16              Jamie, if you can go to the last page, please.

17              You will see on the bottom here it talks about  
18      SmithKlein Beacham, like this. And those types of documents, it  
19      looks like this is really a press release kind of put out on the  
20      PR Newswire by SmithKlein Beacham itself.

21              So with respect to the government's argument that this  
22      document, all this text here was somehow created by Reynolds in  
23      the regular course of business, that's just wrong.

24              Just because you have an e-mail within a company  
25      doesn't make an e-mail a business record. It has to be

1 something under 803(6) that is created in the regular course of  
2 business that has the indicia of reliability.

3 There's some business process. There's something  
4 within the company that says this is a reliable record. And to  
5 the extent we are looking at all the content here, the quotes  
6 within a press release from some other organization, this can't  
7 come in for the truth of the matter asserted.

8 Now, I suppose if the government wants to change its  
9 argument and just say notice that Reynolds saw this and attached  
10 to an e-mail, that's a different thing. But the representation  
11 to the court was -- and I think perhaps the use in the findings  
12 of fact -- is going to the actual substance of this, and that's  
13 just not right.

14 The response they provided, 803(6) exception, is not  
15 applicable. This document can only come in for a limited  
16 purpose, if the government even wants it to come in for that  
17 purpose, and even as to that, I question the relevance of it.

18 THE COURT: Ms. Brooker.

19 MS. BROOKER: Your Honor, I guess I would say a few  
20 things in response.

21 One, I would just note to the court that I and Rene  
22 Honigberg and Kevin Narko have been working for a couple of days  
23 now trying to know in advance what issues we were going to argue  
24 so we could work this out.

25 And I have to say I didn't know that we were going to

1     argue this issue, I would have been more prepared on it, so I  
2     can only look at what our brief response is here in our papers.

3             And I will say that Mr. Brody just noted to me that RJR  
4     asserted Order Number 7 confidentiality over this document,  
5     which is a relevant piece of evidence that I think contradicts  
6     what Mr. Redgrave is saying about the document.

7             And the second thing is the document is no doubt -- and  
8     I don't think they dispute that it is kept in the regular course  
9     of Reynolds' business. So as for its creation, that is not a  
10    relevant point.

11            Other than that, I would -- you know, as Ms. Eubanks is  
12    passing up to me Rule 803(6), memorandum, as Your Honor knows,  
13    from information transmitted by a person with knowledge if kept  
14    in the course of a regular-conducted business activity, and if  
15    it was a regular practice of that business activity to make the  
16    memorandum, the document can be admitted into evidence.

17            So I would say that it has indicia over liability and  
18    should be admitted. And, also, as with some other objections  
19    that we've heard here today, I think that the document should be  
20    admitted and it should go -- arguments by counsel should not be  
21    considered facts for purposes of admissibility of a document.  
22    And to the extent that they want to make admissibility or weight  
23    of the admissibility arguments at a later time it would be more  
24    appropriate. So we would just stand on our --

25            THE COURT: I want to see that brief sentence or so at

1 the very beginning of the e-mail.

2 The issue of e-mails is a very complicated one and  
3 there's a great -- a growing body of judicial opinions on that  
4 subject, some of which I've contributed to I think in this  
5 case -- no, some other case. Sorry, everybody.

6 But the essence of the government's argument is that  
7 this e-mail should be accepted into evidence for the truth of  
8 what's contained in it because it is a business record.

9 The reason that we consider business records admissible  
10 is because there are certain requirements for establishing them,  
11 as you all know, and that is they have to be made  
12 contemporaneously, they have to be made in the ordinary course  
13 of business, et cetera.

14 Those requirements probably are satisfied for the first  
15 sentence of that e-mail, namely the e-mail to everybody on the  
16 list saying, "Thought the attached Gallup survey had an  
17 interesting omission," et cetera.

18 But certainly those requirements do not apply to the  
19 attachment to the e-mail, and I think we have to differentiate  
20 between the substance of an e-mail, i.e., "We had a meeting on  
21 such and such a date, why weren't you there," and any attachment  
22 to the e-mail, such as "This is a document that was distributed  
23 at that meeting."

24 There are very different reliability and policy issues  
25 attached to -- or I should say applicable to the actual e-mail

1 as opposed to the attachment.

2 And so after that long introduction, my ruling on this  
3 one is that, that first sentence, "thought the attached had an  
4 interesting omission" and what comes after the semicolon, which  
5 is also part of the first sentence, that certainly is admissible  
6 as a regular business record and, therefore, can be admitted for  
7 the truth of it, for whatever that significance is.

8 But the attachment of that Gallup survey is not made in  
9 the ordinary course of business. It is not a business record.  
10 It does not have indicia of reliability. Certainly not to  
11 criticize the Gallup surveys, but that's a whole separate issue  
12 and therefore it doesn't come in.

13 MS. BROOKER: May I make another basis for  
14 admissibility?

15 THE COURT: Go ahead.

16 MS. BROOKER: All right. Your Honor, the document  
17 is -- the United States offers the document to show that the  
18 company had access to this information, the attached Gallup  
19 survey, and that it was circulating that information internally.

20 So the actual underlying facts of the Gallup survey,  
21 it's not -- you know, that survey is not offered for the truth  
22 of the matter asserted, it's offered to show the practices of  
23 the company and that the company had access to this kind of  
24 information, circulated internally this kind of information, and  
25 used this kind of information.

1           THE COURT: I think Mr. Redgrave suggested that the  
2 government might make that argument. That's a very different  
3 argument.

4           What's your response again, Mr. Redgrave?

5           MR. REDGRAVE: Your Honor, I said with respect to that  
6 if they chose so to say -- I mean, just notice purposes that  
7 Reynolds had this, it is what it is. The e-mail is there. They  
8 circulated that.

9           Again, I'm not sure what that's going to mean at the  
10 end of this trial, so I'm not going to argue against that. It's  
11 just not a business record as they tried to make it out to be.

12          And I will point out one of the reasons I raised this  
13 particular objection, Your Honor, is in that mountain of priors  
14 you have back there, there are a number of arguments that the  
15 government raised with respect to e-mails, attachments, other  
16 documents which really just say outright that this is a business  
17 record because it was -- it's got their Bates number. It's a  
18 business record because it's in their files. And that's just  
19 not right.

20          As I think Your Honor is completely correct in the way  
21 in which you stated the law, there's got to be a little bit more  
22 analysis on that. And so with respect to this, for the notice  
23 part and the others, not for the truth of matter asserted, I  
24 agree, it should come in in the split way in which Your Honor  
25 has stated it.

1 MS. EUBANKS: Your Honor, there is a significant  
2 difference that hasn't been addressed by Mr. Redgrave here with  
3 respect to this document.

4 Although I can't disagree with what the court has said  
5 about the business records' exception, its intent and the case  
6 law that interprets it. But here we have special proceedings in  
7 place including Order Number 7, wherein in a party could make  
8 confidentiality claims. Before making those confidentiality  
9 claims --

10 THE COURT: I don't think the claim is one of  
11 confidentiality.

12 MS. EUBANKS: Yes, it is, Your Honor, on the side of  
13 the document.

14 My point goes to the question of whether this is  
15 hearsay and a business record. If defendants took the position  
16 early on in this litigation that this came within Order Number 7  
17 and they were entitled to assert confidentiality, not over part  
18 of it but the document in its entirety, it seems to me that they  
19 indeed were treating it as an 803(6) business record.

20 And despite the arguments of counsel that only that  
21 first part is something that was in the ordinary course of  
22 business and the rest of it was simply circulated, they stamped  
23 this as confidential, used it as such.

24 And the prerequisites to Order Number 7 have certain  
25 requirements that would indicate that they have adopted this as

1       their own practice, their own documents, as something that the  
2       company itself needed to protect, not Gallup survey research  
3       itself, but something that became a part of the company, and  
4       they utilized that process under Order Number 7 to do that.

5               So with respect, Your Honor, this particular indication  
6       that they were claiming Order 7 confidentiality with respect to  
7       this document indicates the use that the defendants made of it  
8       in the ordinary course of business.

9               MR. REDGRAVE: Your Honor, first of all, from a  
10       substantive standpoint, the rules of evidence are the rules of  
11       evidence, and Order Number 7 wouldn't change that in the  
12       reliability of any of the information in there with respect to  
13       Your Honor's reliance upon them and any fact finding in this  
14       case.

15              Secondly, with respect to confidentiality. Obviously,  
16       we didn't claim that at trial with respect to this document in  
17       terms of any of the procedures set up for handling of the trial  
18       exhibits.

19              With respect to the original confidentiality claim, I  
20       haven't gone back to look at that. There were a number of  
21       documents produced in the case, as you know. With respect to  
22       this, I imagine that it was done on the document basis for that  
23       first part, but that really shouldn't change the analysis.

24              I mean, that was the e-mail from our files and the  
25       people reviewing it probably looked at it, and it was dated 1998



1       when we were producing it a while ago in this case in discovery,  
2       they would have attached a confidentiality claim to the document  
3       as a whole. It wasn't one of those that was challenged in the  
4       Order 7 process. But that really doesn't change the evidentiary  
5       analysis, Your Honor, with respect to it.

6               THE COURT: Here's my ruling, everybody. We've spent  
7       too much time on this issue.

8               The entire document comes in. The first complete  
9       sentence comes in for the truth of it. The remainder of it  
10       comes in on the notice issue, period.

11              MR. REDGRAVE: Thank you, Your Honor.

12              (Exhibit No. JD 22121 was received into evidence.)

13              THE COURT: Now, are we done with R.J. Reynolds, at  
14       least for the moment?

15              MR. REDGRAVE: Your Honor, you're done with me for the  
16       entirety of the day.

17              THE COURT: Good. All right, counsel.

18              MR. NARKO: Good afternoon, Kevin Narko for Philip  
19       Morris.

20              I have on my list of exhibits that the government is  
21       objecting to five. These are exhibits that Mr. Frederick used  
22       during the cross-examination of Dr. Dolan. JD 052969.

23              THE COURT: 052969.

24              MR. NARKO: JD 041096. JD 050791.

25              THE COURT: I'm sorry. 050 --

1 MR. NARKO: -- 791.

2 MS. BROOKER: Excuse me, Mr. Narko. That last one, I  
3 think we had an e-mail exchange about it. The United States is  
4 not objecting to JD 050791.

5 THE COURT: All right.

6 MS. BROOKER: I think that's also one that you're  
7 seeking to admit through Dr. Biglan. So I would just indicate  
8 if you would just try not to duplicate for the record. But  
9 we're not objecting to it.

10 THE COURT: So I have two so far.

11 MR. NARKO: JD 054423.

12 THE COURT: 054 --

13 MR. NARKO: -- 423. And the last one is JD 051645.

14 THE COURT: And these -- I just want to be clear at  
15 this point, these are exhibits that defendants are objecting to.  
16 Is that correct?

17 MS. BROOKER: That the United States is objecting to  
18 and defendants are seeking to admit.

19 And the only thing that I have to say, Mr. Narko and I  
20 did not discuss because Your Honor has just put a big focus on  
21 it, today as we were going through these is -- and maybe  
22 Mr. Narko ought to say whether any of these are findings of fact  
23 documents.

24 MR. NARKO: Yes, three are in the findings of fact.

25 THE COURT: Which ones?

1           MR. NARKO: JD 052969. I'm sorry, one of those  
2       withdrawn, so there are two. The first one I just read and the  
3       last one. JD 051645.

4           THE COURT: What are the government's objections?

5           MS. BROOKER: Okay. So JD 051 --

6           THE COURT: No.

7           MS. BROOKER: -- 645.

8           THE COURT: Let's start with the beginning. 052969 is  
9       the first one.

10          MS. BROOKER: Is that not one you just said you were  
11       withdrawing?

12          THE COURT: No.

13          MS. BROOKER: Sorry.

14          THE COURT: Wait a minute. I shouldn't answer for  
15       counsel.

16          MS. BROOKER: That last one.

17          MR. NARKO: No, we are not withdrawing them. They are  
18       within the findings of fact. We are moving to admit them at  
19       this time.

20          THE COURT: That's what I understood.

21          Ms. Brooker, don't confuse me further. Go ahead.

22          MS. BROOKER: JD 052969, the United States' objection  
23       is lack of foundation because Dr. Dolan did not really give a  
24       response. He was not really asked whether he was familiar with  
25       the document. And it is hearsay.

1                   And if you want to state for the record what the  
2                   document is.

3                   MR. NARKO: JD 052969 is what's called the freestanding  
4                   insert. Your Honor has heard some testimony about and some  
5                   argument about this. It's a brochure that was placed inside  
6                   newspapers.

7                   THE COURT: And it's in the findings of fact.

8                   MR. NARKO: It's in the findings of fact, Your Honor.

9                   THE COURT: That may be admitted.

10                  (Exhibit No. JD 052969 was received into evidence.)

11                  THE COURT: 041096, not in the findings of fact.  
12                  What's the government's objection?

13                  MS. BROOKER: The same objections, Your Honor. Hearsay  
14                  and no foundation was laid through Dr. Dolan.

15                  MR. NARKO: Your Honor, JD 041096 is the insert that  
16                  related to low tar and light cigarettes. Again, Your Honor has  
17                  heard an awful lot about this thus far in the trial.

18                  It is not being offered for the truth of the matter  
19                  asserted, but for the fact that this is something that Philip  
20                  Morris communicated. Further it's a business record.

21                  THE COURT: And you certainly questioned him about it;  
22                  is that correct?

23                  MR. NARKO: Yes, Your Honor.

24                  THE COURT: That may be admitted.

25                  (Exhibit No. JD 041096 was received into evidence.)

1 THE COURT: 054423.

2 MS. BROOKER: That is, I do believe, a Philip Morris'  
3 website statement, which has not been previously admitted and  
4 which the United States objects to because Dr. Dolan, you know,  
5 obviously was not permitted to testify about the website  
6 statements, and we objected to questioning Dr. Dolan on any of  
7 the website statements, and also because it is hearsay.

8 MR. NARKO: Your Honor, JD 054423 is that portion of  
9 the Philip Morris USA website that relates to quitting smoking.

10 Again, Your Honor has heard some testimony about this,  
11 some argument about this. He was questioned about it. Again,  
12 it's a business record. It's not being offered for the truth of  
13 the matter asserted, but for the fact that this is information  
14 that Philip Morris communicated.

15 THE COURT: Well, this is a close issue, but it wasn't  
16 in the findings of fact, he wasn't allowed to be questioned  
17 about it because of a prior ruling of mine, and, therefore, at  
18 least through Dr. Dolan, it's not going to be admitted. I would  
19 not be at all surprised that it comes in through somebody else.

20 And now finally 051645, which was contained in the  
21 findings of fact.

22 MS. BROOKER: And the objection to that would be that  
23 was the document that the government objected to, which was the  
24 retail leaders 2003 document that was voluntarily produced late  
25 in this case, which clearly Dr. Dolan had not seen previously.

1 THE COURT: What was it again?

2 MS. BROOKER: It was the retail leaders 2003 Philip  
3 Morris' document, which I don't know if Your Honor recalls it,  
4 but there was a lot of objection and discussion about that  
5 document because it was voluntarily produced and not something  
6 that Dr. Dolan had seen or had considered by virtue of the fact  
7 that it was voluntarily produced, and the cross-examination  
8 suggested that it was just something he hadn't taken the time to  
9 look at when, in fact, it was a late produced document.

10 And again it is -- our basis is that it is hearsay and  
11 there was no foundation laid through this witness.

12 THE COURT: Counsel.

13 MR. NARKO: Your Honor, JD 051645 is the retail  
14 agreement Philip Morris has with many of the customers for its  
15 cigarettes.

16 It was produced in accordance with the court's orders,  
17 at least on the final exhibit list, and then cited in the  
18 findings of fact, and it is clearly a business record.

19 THE COURT: As being included in the findings of fact,  
20 it has a presumption of admissibility. Certainly there's a  
21 nexus established in terms of its relevance, number one, to the  
22 case, number two to Dr. Dolan's testimony. There was nothing  
23 improper about the voluntary submission of it, and it will be  
24 admitted.

25 (Exhibit No. JD 051645 was received into evidence.)

1 THE COURT: Anything else for Philip Morris?

2 MR. NARKO: No, Your Honor.

3 THE COURT: Who else do I need to hear from, if  
4 anybody, on Dr. Dolan? Last person, is that correct, I hope.

5 MR. CASSETTA: I believe, Your Honor. Richard Cassetta  
6 on behalf of Lorillard Tobacco Company.

7 Your Honor, there were six Lorillard documents that  
8 fall within what's under consideration by you now, namely they  
9 were not disclosed on the reliance list. And then there were  
10 two --

11 THE COURT: But those six are going to be decided in  
12 terms of the decision that you all get by the close of business  
13 tomorrow which will be probably a two- or three-sentence ruling.

14 MR. CASSETTA: Yes, Your Honor.

15 MS. BROOKER: If I may, are these separately objected  
16 to in your issues motion as part of the separate objections?

17 MR. CASSETTA: As part of the issues motion.

18 MS. BROOKER: As part the global issue. I'm sorry,  
19 okay.

20 MR. CASSETTA: And then there are two objections that  
21 we made to documents that were -- one was duplicative of another  
22 exhibit that had been admitted, and the other a joint exhibit  
23 should have been used, and I can work that out with Ms. Brooker.  
24 I don't think that will be an issue.

25 THE COURT: All right.

1           MR. CASSETTA: And I can read for the record, it's  
2   Exhibit U.S. 21523 is duplicative, and then U.S. 46454, there  
3   was a joint exhibit that, the procedures the parties should use  
4   that, and I'm sure we can work that out.

5           MS. CROCKER: Your Honor, our response to both of those  
6   already has, I think, worked that out. For the first, 21523,  
7   the defendants' claim is duplicative of 21524 --

8           THE COURT: Counsel, move that mic a little bit.

9           MS. CROCKER: 21524 had not been admitted into evidence  
10   and so the duplication issue didn't seem applicable to us.

11          For the second one, in its response the United States  
12   already agreed that it would use the joint exhibit.

13          THE COURT: All right. So as to the first one, that  
14   exhibit will be admitted because it's not duplicative.

15          And as to the second one, that exhibit will not be  
16   admitted because the government is going to use something else.  
17   Is that correct?

18          MS. CROCKER: That's correct.

19          MR. CASSETTA: That's correct, Your Honor.

20          (Exhibit No. U.S. 21523 was received into evidence.)

21          THE COURT: Anything else for Dr. Dolan? Seeing nobody  
22   rise.

23          MS. CROCKER: Your Honor, I'm the bearer of bad news, I  
24   think, today. Your Honor, there are 22 documents to which  
25   defendants made individual objections at the back of this set of



1 objections, and I understand from Ms. Honigberg -- I just want  
2 to get it on the record so that we can.

3 MS. HONIGBERG: I believe Mr. Redgrave may have pointed  
4 this out earlier this morning, but we didn't want to take Your  
5 Honor through each and every authenticity and duplicate  
6 objection.

7 We've worked out or are working out what we can. To  
8 the extent we can't, our objections are on the record, and if  
9 they are included, they are not -- there will be hundreds of  
10 documents you will be sitting here listening to if we do this.  
11 So we will work out what we can. The rest of our objections are  
12 preserved for the record and they will come in without argument.

13 MS. CROCKER: I just wanted to have that on the record,  
14 Your Honor.

15 THE COURT: Now, we're going to turn to Dr. Krugman,  
16 and with him there's also, I think, a global issue regarding  
17 reliance questions; is that right?

18 MS. CROCKER: Yes, Your Honor.

19 THE COURT: If so, it's a different one.

20 MS. CROCKER: No, it's exactly the same one. The only  
21 difference, which I don't think we need further discussion of,  
22 is that with Dr. Krugman, there is no debate that Dr. Krugman  
23 did not anywhere in his direct testimony or in any demonstrative  
24 include any of the findings of fact documents which defendants  
25 object to. He simply had on his exhibit list a set of finding

1 of fact documents which were not considered documents and which  
2 are not discussed anywhere in his testimony or in any  
3 demonstrative. And then there are several other issue motions  
4 and, of course, objections to individual exhibits.

5 MR. BASS: Your Honor, just for the record, Ken Bass.

6 That's right, counsel's statement. We do object to  
7 those, but they are covered by the same argument that was made  
8 with respect to Dr. Dolan.

9 THE COURT: All right. I have defendants' legal issues  
10 memoranda.

11 MR. BASS: Let me -- I'm sorry.

12 THE COURT: Is that what we are ready to work on?

13 MR. BASS: Yes. And, Your Honor, on that -- actually,  
14 I think some of this kind of got taken care of as we went  
15 through Dr. Krugman's testimony.

16 THE COURT: Issue number one is the reliance issue; is  
17 that right?

18 MR. BASS: Right. Issue number one was the reliance  
19 issue, and I think that that -- no, that actually came up later.

20 But the first issue I have is -- well, it was an  
21 opinion that was not previously disclosed, and that one I think  
22 that we're -- we dealt with him on that in terms of  
23 cross-examination to the extent it was even relevant, and so --

24 THE COURT: So that issue is no longer alive?

25 MR. BASS: Right. You can accept that for whatever

1 weight there is.

2 But the second one, Dr. Krugman's unsupported opinions  
3 as to the youth appeal of particular marketing campaigns is a  
4 not insignificant issue.

5 However -- and just to step back for a second -- that  
6 is the issue where Dr. Krugman gave opinions about certain  
7 advertising and he said, "In my opinion, this ad appeals to  
8 youth."

9 In cross-examination we established further that he had  
10 done nothing to establish that, other than essentially give his  
11 raw opinion.

12 But I think that the court -- if this was a jury trial,  
13 obviously, this would be a significant issue as to whether it  
14 goes to the jury -- but I think the court has got everything  
15 both before Your Honor with respect to what he did and didn't do  
16 on that and you will assign it the appropriate weight as to  
17 whether his opinion is entitled to anything at all.

18 So I don't think there's anything else on that. I  
19 don't think that it requires the court to make a ruling of  
20 exclusion or not in a bench trial.

21 THE COURT: It will be basically a subject of argument.

22 MR. BASS: That's right, Your Honor.

23 THE COURT: All right.

24 MR. BASS: The third one, we will withdraw that. It's  
25 a very -- I think it turns out to be a very minor issue. That's

1       whether he disclosed his method for calculating inflation.

2               And then the fourth one had to do with the relevance of  
3       opinions as to warning labels.

4               Now, certainly for the record, Your Honor, we don't  
5       believe that it's relevant. However, I did cross him on that,  
6       and to the extent that we had points to make about it in terms  
7       of whether there was the quality of his research and whether it  
8       establishes anything, even if it is relevant, that's also all in  
9       the record and can be argued. So, I actually don't think that  
10      we need to do anything further on those four issues.

11              The last issue is the documents that we talked about  
12      first. So I think that takes care of all the issue memos.

13              THE COURT: All right. Now what about specific  
14      objections? What remains?

15              MR. BASS: On specific objections, defendants have a  
16      number of objections, Your Honor, to the documents that were  
17      used by the government. They were set forward. But I don't  
18      know whether there's any defendant who has one that they  
19      specifically want to argue as opposed to they are just there.  
20      The objections are in there.

21              Oh, Ms. Honigberg reminds me of one other thing. There  
22      were a number of exhibits, a handful, that were cited in  
23      Dr. Krugman's testimony, his written testimony, that were then  
24      withdrawn by the government.

25              Now, ordinarily, I would -- we would request that that

1 testimony be stricken since it relates to withdrawing an  
2 exhibit.

3           However, we think that the appropriate thing is Your  
4 Honor simply indicates that parties cannot rely on -- where  
5 they've withdrawn exhibits, they can't rely on something that  
6 was in the written direct later on to circumvent their  
7 withdrawal of the exhibit.

8           And I think that that takes care of that issue. I  
9 think this may come up in a couple of other instances with  
10 witnesses, but I don't see a need to go back and amend the  
11 record.

12           But I think the parties must understand that if they've  
13 withdrawn an exhibit they can't then go to testimony where  
14 somebody quoted that exhibit and get around the withdrawal.

15           THE COURT: Well, certainly if the testimony quoted an  
16 exhibit, no, that testimony can't be used.

17           If the testimony is simply a statement of, "I believe  
18 such and such," and then there's an exhibit cited and the  
19 exhibit is withdrawn, the testimony remains in the record, the  
20 support for the testimony is gone.

21           MR. BASS: Right.

22           THE COURT: And, therefore, there's not going to be  
23 very much weight given to the testimony.

24           MR. BASS: That's what I would expect, Your Honor. I  
25 don't see a need to go back and start amending what's in there.

1       So, that would be our understanding of how it would be treated.

2               THE COURT:  Correct.

3               MR. BASS:  Now, as to the individual exhibits, I don't  
4       have any Brown & Williamson ones.

5               There are actually, I think, three that we objected to  
6       that related to Brown & Williamson, and I don't -- actually, I  
7       don't have a problem with any of those coming in at this point,  
8       having looked at them again.

9               And those for the record are U.S. Exhibit 20999, U.S.  
10       78732, which is I think the same thing as 20999, and  
11       Exhibit 87735.

12              And there was an objection that we had made to a, I  
13       think a summary chart, which was U.S. 89175, but it was sort of  
14       a contingent objection depending on the use of it, and based on  
15       how it was used by Dr. Krugman and the statements that were made  
16       in the record at the time, we don't have any further issue with  
17       respect to that exhibit.

18              I don't know if any of the other defendants have in  
19       particular Dr. Krugman exhibit that they wanted to argue.

20              THE COURT:  Does anyone else have issues regarding  
21       Dr. Krugman's exhibits?

22              MR. NARKO:  Yes.  Philip Morris again.  We have some  
23       documents that were used during the cross-examination of  
24       Dr. Krugman to which the government is objecting.

25              THE COURT:  All right.

1 MR. BASS: Well, I --

2 MS. BROOKER: That's different. We are still talking  
3 about the U.S.'s admission of exhibits; correct, Ken?

4 THE COURT: Any other defendant have anything on  
5 objections to government exhibits as to Dr. Krugman?

6 MS. BROOKER: The only other thing I will add is that  
7 we do have, and maybe you don't want to jump ahead to redirect.  
8 Do you want to wait on that?

9 MR. BASS: Let's do it one --

10 MS. BROOKER: Okay.

11 MR. CASSETTA: Your Honor, just for the record, there  
12 are two --

13 THE COURT: Counsel, identify yourself.

14 MR. CASSETTA: I'm sorry, Your Honor. Richard Cassetta  
15 on behalf of Lorillard Tobacco Company.

16 There are two exhibits, U.S. Exhibits, that we feel  
17 should have been joint exhibits. Again, I'm sure we can, if  
18 they are not taken care of already, we can resolve those.

19 I'll identify those so the court doesn't have to  
20 concern itself with this, and they are U.S. Exhibit 21604, and  
21 U.S. Exhibit 67506.

22 THE COURT: Are we ready for government objections to  
23 defense exhibits used during their cross?

24 MR. BASS: I believe we are, Your Honor.

25 MS. CROCKER: Could I respond to what Mr. Cassetta has

1       said?

2               THE COURT: All right.

3               MS. CROCKER: The United States has already agreed in  
4       its response that rather than 21604, it will replace with the  
5       joint exhibit suggested.

6               However, with 67506 the United States is not agreeing  
7       to use that exhibit, the joint exhibit, that defendants suggest,  
8       is missing a page, and so it's incomplete.

9               MR. CASSETTA: Your Honor, we will withdraw our  
10      objection, so there's no objection to that, 67506.

11              THE COURT: All right. Now, we are on exhibits that  
12      defendants want admitted that were used during their cross.

13              Government's objections, please.

14              MS. BROOKER: Okay. The first is, I believe, the ones  
15      that -- I think these are the ones -- well, here is the thing.  
16      Mr. Narko has sent me some, which he and I have tried to work  
17      out, and then I guess could go through Mr. Bass's first.

18              The first one is JD 013094, and I don't know if you  
19      have all of these documents to tell the court, but I have a note  
20      here that it's the MRI 2004 Teenage Survey. Is that a  
21      demonstrative?

22              MR. BASS: No. Your Honor will probably remember that  
23      one. That's the one I handed up to you that was the 65-page  
24      questionnaire that teenagers get in the mail from MRI.

25              THE COURT: And you're seeking to get that admitted?



1           MR. BASS: That's right, Your Honor, but I don't know  
2 what the government's objection is to it.

3           THE COURT: What is the government's objection?

4           MS. BROOKER: The government's objection is lack of  
5 foundation because I believe that Dr. Krugman had testified that  
6 he had not studied that document and that would be our  
7 objection.

8           I don't believe a proper foundation was laid for his  
9 testimony about that document, and I think that defendants could  
10 lay a foundation with one of their own experts about that.

11          THE COURT: Mr. Bass.

12          MR. BASS: Your Honor, Dr. Krugman, of course,  
13 testified at length about the MRI survey and what teens had  
14 read, and we submitted the document which is -- and it's not  
15 being submitted for the truth of the matter, it's being  
16 submitted for the obvious purpose it was submitted at the time,  
17 which was the difficulty of getting teens, a significant number  
18 of teens, to send back such an extensive lengthy survey.

19          And Dr. Krugman, having testified about that, I believe  
20 he did say that he was aware of the teen survey and of course  
21 what is done with it. And he certainly should be if he's going  
22 to offer evidence with respect to the percentage of teens it's  
23 reached.

24          THE COURT: That document may be admitted.

25          (Exhibit No. JD 013094 was received into evidence.)

1 THE COURT: Next.

2 MS. BROOKER: The next one is JD 013105, Brand Week  
3 from June 21, 2004. And we would object to the document as  
4 being hearsay, and there was no foundation laid through  
5 Dr. Krugman for the admissibility of that document.

6 THE COURT: What was it again?

7 MS. BROOKER: It is Brand Week.

8 We should show the court. I don't know if you recall,  
9 but it was a document, A special report, Brand Week, Super  
10 Brands Americans, Top 2000 Brands. And Dr. Krugman, there was  
11 no foundation laid for his knowledge or understanding or he was  
12 not able to testify, he was cross-examined about the document.  
13 But primarily lack of foundation and its hearsay.

14 THE COURT: And your response?

15 MR. BASS: Your Honor, it would come in under Rule  
16 803(17), which is exception for hearsay for market compilation  
17 that are relied upon by people in their field.

18 And I did ask Dr. Krugman if this is the type of thing  
19 that he's seen rankings of brands, and he said yes, he had seen  
20 them.

21 And, in fact, the government submitted a number of  
22 these with Dr. Krugman's testimony showing where these brands  
23 ranked at earlier periods of time, including the 50s and 60s,  
24 there were from very similar times of publications. So it comes  
25 in really on the same basis as they submitted.

1 MS. BROOKER: Also --

2 THE COURT: Do you really want this long document in  
3 the record, Mr. Bass?

4 MS. BROOKER: Mr. Brody is also pointing out that the  
5 document, it appears -- and Mr. Bass can verify this for us --  
6 it appears that it is not complete and does not include the  
7 chapter or category as they call it on tobacco.

8 MR. BASS: I believe it actually does, on page 65. But  
9 it's not being submitted for that, it's submitted for the  
10 ranking.

11 And Your Honor, it's submitted because Dr. Krugman has  
12 similar rankings of these brands going back to the 50s and 60s,  
13 so it's bringing it up to the present to show because he says  
14 these are ubiquitous and we say, Where are they today.

15 THE COURT: It may be admitted.

16 (Exhibit No. JD 013105 was received into evidence.)

17 MS. BROOKER: The next one is a Time Magazine -- I'm  
18 sorry, JD 013112. It's a Time Magazine article regarding  
19 Emerson Foote, who is a person, if you recall, was someone who  
20 Dr. Krugman referred to in his direct testimony.

21 The document is clearly hearsay, and there was no  
22 foundation laid for the admission of this. But our primary  
23 argument is that it is hearsay and is not admissible through  
24 Dr. Krugman.

25 MR. BASS: Your Honor, that one was -- that was the

1 Time Magazine article that referred to Mr. Foote when he left  
2 his advertising agency, and he said he was going to become an  
3 antitobacco propagandist, and it was submitted for the purpose  
4 of showing the declarant's state of mind when he made his  
5 declaration with, that was quoted by Dr. Krugman.

6 THE COURT: No, not admitted.

7 MS. BROOKER: The next one is JDEM 0 -- I'm sorry, let  
8 me just say for the record, J-DEM 0101 --

9 THE COURT: Wait.

10 MS. BROOKER: -- 35.

11 THE COURT: Too fast. 01?

12 MS. BROOKER: 010135. There is no objection to that  
13 document.

14 The next one is J-DEM 010144. The United States  
15 objects to this document because it is a demonstrative created  
16 by defendants that compares Simmons and MRI data.

17 Dr. Krugman was not provided the Simmons' data, which  
18 is a similar service to MRI, their competitors, if you will.  
19 They basically provide commercial data of the same nature to  
20 companies, and again they are just competitors of the same  
21 variety.

22 And Dr. Krugman did not review the underlying data in  
23 that demonstrative. There was no foundation laid. He was not  
24 showed the underlying data, and he did not review Simmons' data,  
25 although he's generally familiar with Simmons' data because he's

1 an expert who would be knowledgeable about it.

2 It's clearly no foundation was laid to admit that  
3 demonstrative for demonstrative purposes or any other purpose  
4 through Dr. Krugman. That would be something defendants would  
5 have to have one of their experts testify about.

6 THE COURT: Mr. Bass.

7 MR. BASS: Your Honor, I believe there's a number of  
8 demonstrative exhibits that I think the government may have  
9 objections to, but of course, as you've indicated a number of  
10 times, they are not coming into evidence other than for  
11 demonstrative purposes, which is a pretty limited purpose.

12 Of course, if we want to cite to any of the data in  
13 them, there's going to have to be underlying evidence and we  
14 indicated that at the time. So, unless there's some --

15 THE COURT: Mr. Bass, wait a minute. There's an  
16 assumption that I want to be clear about.

17 Demonstrative exhibits are used during the course of  
18 trial. They don't automatically come in. Now, one of you may  
19 move a particular demonstrative exhibit in, and if you do, then  
20 it has to meet all of the standard requirements, but they don't  
21 ordinarily come in.

22 Now, on this one the government is arguing that it  
23 shouldn't come in under the applicable evidentiary standards  
24 because it's a comparison, and Dr. Krugman didn't have access to  
25 one of the comparators. So I think you have to address that

1 argument, if you can. And it may be that you're going to get it  
2 in, in a completely different way.

3 MR. BASS: That's fine, Your Honor. We won't offer it  
4 here.

5 THE COURT: All right.

6 MS. BROOKER: The next one is J-DEM 010145 and if I'm  
7 not mistaken, Mr. Bass, this is one I think either you've  
8 withdrawn or I asked you for a copy of because we did not have  
9 one. So I'm not sure what this is.

10 MR. BASS: We have not withdrawn it, but this is what  
11 it was.

12 MS. BROOKER: And, Your Honor, the objection I just  
13 made to the last exhibit would be the same objection that I  
14 would have to this exhibit.

15 It is a demonstrative which is entitled Children's  
16 Youth and Teen Magazines appearing in SRDS 1992 to 2000, and it  
17 is based on commercial data referred to as SDRS data, consumer  
18 magazine advertising source.

19 Again, it's exactly the same bases I just stated.  
20 Dr. Krugman did not have this data for purposes of this case,  
21 could not testify about this underlying data.

22 THE COURT: Let me hear Mr. Bass.

23 MR. BASS: We will seek to offer that one, Your Honor,  
24 at a later time.

25 THE COURT: That's five. Actually, that's six. I

1 thought you had five objections.

2 MS. BROOKER: I don't believe I said five objections.

3 THE COURT: All right. Maybe I misunderstood.

4 MS. BROOKER: J-DEM 010149 and J-DEM 010150, and I'm  
5 happy to be more specific, but those are also demonstratives  
6 that I would have the same objection.

7 One is based upon household cleaning products data  
8 according to the demonstrative, and the other is TNS, or I  
9 believe it's CMRTNS data, both data that again for the same  
10 reasons Dr. Krugman didn't have access to it, didn't testify  
11 about it, and I'm happy to take a look at them again.

12 MR. BASS: One of those is, we will offer at a later  
13 time, that's J-DEM 010149. The other one --

14 THE COURT: So that's withdrawn at this time?

15 MR. BASS: Right.

16 The other one we will also offer at another time.  
17 That's not from the data that you have.

18 MS. BROOKER: Just for the record, withdrawing J-DEM  
19 010150.

20 I would have the same objections to J-DEM 010188, which  
21 is another demonstrative. I won't repeat my objections.

22 THE COURT: Did you all go over these together?

23 MS. BROOKER: Yes, we did, Your Honor. We had an  
24 exchange about this, and I informed Mr. Bass we would have  
25 objections.

1 THE COURT: All right.

2 MR. BASS: That one is a demonstrative that is based on  
3 the Brand Week survey that was just admitted and I think should  
4 come in, because again he was familiar with that type of  
5 information and he had a chance to take a look at that. He had  
6 the material in front of him, unlike with some of these others  
7 where he couldn't have verified what was in there.

8 MS. BROOKER: Your Honor --

9 MR. BASS: So I do think that's in a different  
10 category.

11 MS. BROOKER: Dr. Krugman was not given the opportunity  
12 at a break or any other time or asked to -- this is complicated  
13 data that you have to pull out of this in order to create this  
14 chart, and Dr. Krugman was not given the opportunity to do that.  
15 It's just another demonstrative, that before taking that stand,  
16 he had not reviewed and had not been able to verify the  
17 demonstrative.

18 THE COURT: 010188 is not admitted. Next one.

19 MS. BROOKER: The same objections to J-DEM 010192.

20 Now, while that demonstrative is based on MRI data, I  
21 redirected Dr. Krugman to ask him if he had had the information  
22 available to look at the standard deviation, which I believe was  
23 in some of the MRI data, but he testified he did not. So again,  
24 it just contains information that he could not verify on the  
25 stand and did not.



1           MR. BASS: Your Honor, with respect to this one, which  
2 was -- this was a demonstrative on the standard deviations.

3           While certainly it's surprising that Dr. Krugman didn't  
4 submit with his MRI data the standard deviations and never  
5 disclosed them to defendants, but nonetheless, we'll have  
6 someone put that in. So we will withdraw that for now.

7           MS. BROOKER: Now, I believe the last note I have here  
8 for documents Mr. Bass is seeking to admit is J-DEM 010190, and  
9 I believe I have a note that I didn't have that document either.

10          Here it is, 190. I'm sorry. I apologize.

11          MR. BASS: That one we will withdraw and submit that  
12 through another witness.

13          MS. BROOKER: Then that resolves all of the -- and,  
14 Your Honor, Mr. Bass and I did work out a goodly number of other  
15 ones. It was just that there a lot more through Dr. Krugman  
16 that Mr. Bass used.

17          And then I believe that there are some that we have not  
18 worked out with Philip Morris, if I'm not mistaken.

19          Mr. Narko.

20          MR. CASSETTA: Your Honor, if we could ask your  
21 indulgence, we would also -- Mr. Redgrave and I would like to --  
22 I don't know if we're going to take a break to consult with  
23 Mr. Bass to make sure that some the nonlead lawyers' exhibits  
24 used on cross were, you know, considered in what he said.

25          MS. BROOKER: I will say that I have not been notified

1 of any, so I'm happy to address them here. But I worked out  
2 with everyone who e-mailed me -- you know, I worked out issues  
3 with everyone who sent me an e-mail or gave me a phone call  
4 about them.

5 THE COURT: So you two need to consult.

6 MR. CASSETTA: Yes, Your Honor.

7 THE COURT: Does that conclude the objections to  
8 Dr. Chaloupka?

9 MS. BROOKER: We have the ones that Mr. Narko and I  
10 consulted on.

11 MR. NARKO: For Dr. Krugman.

12 THE COURT: I'm sorry. I meant Dr. Krugman, you're  
13 right. How many do you have?

14 MS. BROOKER: Let me just count them here.

15 I think there's six of them. One I have a note that I  
16 asked Mr. Narko for an exhibit that I don't recall receiving a  
17 copy of. So, I believe that there are one, two, three, four,  
18 five, six, and possibly a seventh one. And some of these can be  
19 categorized which may make it go quickly.

20 THE COURT: This is what I want to do, everybody. I  
21 want to conclude these with Dr. Krugman. And then, quite  
22 frankly, given the hour, even though we still have two  
23 remaining, I think I'm going to break for the day. But the ones  
24 remaining will be Dr. Chaloupka and Dr. Henningfield.

25 MR. BROCHIN: May I speak to Dr. Henningfield briefly,

1 Your Honor?

2 Jim Brochin for Philip Morris.

3 There's no additional issue to deal with with respect  
4 to Dr. Henningfield beyond one of the issues that Your Honor has  
5 said you will resolve tomorrow with respect to Dr. Dolan.  
6 Mr. Goldfarb and I have spoken. There are nine documents at  
7 issue. They are covered by that same issue, so there's no  
8 additional work.

9 THE COURT: So then there's only Dr. Chaloupka left.

10 MS. CROCKER: Yes, Your Honor, and I have some good  
11 news as respect Dr. Chaloupka.

12 Although defendants did raise a number of issue motions  
13 in their objections, most of those have already been resolved.  
14 As far as I can tell, there is one limited half of an issue  
15 motion left that has not been either resolved by Your Honor or  
16 withdrawn, and there are only nine specific document exhibit  
17 objections, which defendants for the most part have not been  
18 going through those one by one and perhaps it would not be  
19 necessary to do that either. So I think we could really resolve  
20 Dr. Chaloupka in just two to three minutes if we just look at  
21 the one --

22 THE COURT: No, that doesn't sound right. That doesn't  
23 sound right. And I see other counsel shaking their head.

24 What I'm trying to avoid is wasting, if you will, a  
25 15-minute recess. At the same time, for our court reporter we

1       can't go forever.

2               So I want to come back, and unless someone can give me  
3       a very good reason, I want to finish up what we were doing and  
4       that will leave, not Dr. Henningfield, because he's going to be  
5       included in the group I consider, but it will leave  
6       Dr. Chaloupka for Monday and I definitely will do that on Monday  
7       morning. Monday -- Tuesday.

8               MR. REDGRAVE: Your Honor, Jonathan Redgrave for the  
9       record.

10              In conferring with Mr. Bass and Mr. Cassetta, we appear  
11      to have had a miscommunication on our side. And I also need to  
12      apologize because I said I've wasn't going to be up here again,  
13      so a double apology.

14              For Reynolds, there were seven documents that Mr. Beach  
15      used in his examination of Dr. Krugman that we were going to  
16      seek to admit. They were not in the list that was provided to  
17      the government before this hearing.

18              So I think in fairness, rather than have the government  
19      have to respond on the spot to it, I'll give them the  
20      identification of these right now, and I think they would either  
21      agree or we will have very short arguments on those.

22              But given the hour and what Your Honor wants to do,  
23      let's get through the things that we are prepared to talk about.  
24      I apologize for that, Your Honor, but it is what it is.

25              MS. BROOKER: Your Honor I'm happy if Mr. Redgrave

1 wants to appear after a short break --

2 THE COURT: No, I don't want to take a break.

3 MS. BROOKER: Oh, I'm sorry.

4 THE COURT: I want to finish as soon as we can, and  
5 then everybody can go and then some of us can get back to some  
6 other work.

7 All right. Let's proceed, please. I think it's only  
8 with Philip Morris.

9 MR. CASSETTA: Your Honor, Richard Cassetta for  
10 Lorillard.

11 Similar to Mr. Redgrave, for Dr. Krugman, perhaps  
12 Dr. Biglan and Dr. Dolan, I just need to confirm that exhibits  
13 that Mr. Minton may have used in the cross-examination were  
14 included in the list that the lead cross-examiner sent over, and  
15 I will confirm that.

16 If there are some that Mr. Minton used that were not in  
17 that list, I will confer with Ms. Brooker and, you know, we can  
18 be prepared to deal with it Tuesday morning when court resumes.

19 MR. REDGRAVE: Thank you, Your Honor.

20 THE COURT: Now, we will come back to I think seven is  
21 the number I heard.

22 MS. BROOKER: I believe that's correct.

23 MR. NARKO: It should actually be shorter. For the  
24 record, Kevin Narko. It should actually be shorter. Some of  
25 those are ads again, the ads for the other products, so those

1 can all be addressed at the same time.

2 THE COURT: Now, these are government objections to  
3 Philip Morris' exhibits; is that right?

4 MR. NARKO: Yes.

5 THE COURT: Ms. Brooker.

6 MS. BROOKER: The first one is JD 012276, it is a New  
7 Yorker article. It is hearsay, Your Honor. It's just pure and  
8 simple hearsay.

9 THE COURT: What's the article again?

10 MS. BROOKER: It is a magazine, a New Yorker and it's  
11 an article.

12 THE COURT: Wait. I know it's a New Yorker, everybody.  
13 What's the article?

14 MS. BROOKER: Oh, the title of the article?

15 MR. NARKO: Your Honor, it's the article written by Leo  
16 Burnett, a 1958 article.

17 THE COURT: And why are the defendants seeking to get  
18 this in?

19 MR. NARKO: We are seeking to get it in because  
20 Mr. Webb did ask Dr. Krugman a number of questions about it.  
21 Dr. Krugman was familiar with the article, was familiar with the  
22 story. It's an ancient document. And we would seek its  
23 admission, Your Honor.

24 THE COURT: I will admit it. I wish I had an  
25 evidentiary category of just totally unnecessary because I can

1 just see the Court of Appeals' response when it takes a look at  
2 this record. But I'll follow the rules of evidence, everybody.

3 (Exhibit No. JD 012276 was received into evidence.)

4 MS. BROOKER: JD 054508. Excuse me, I apologize.  
5 Correction. JD 040553, which is a 1979 internal document which  
6 the testimony of Dr. Krugman -- I don't know if this is in the  
7 defendants' findings of fact, so maybe that's an issue and I'll  
8 just briefly state that.

9 It is a document of their own from their own files that  
10 they are seeking to admit, and they did not lay a foundation  
11 through Dr. Krugman, and it is hearsay.

12 MR. NARKO: Your Honor, JD 040553 is not in the  
13 findings of fact. It is a cigarette tracking study from 1979.

14 Mr. Webb asked Dr. Krugman a number of questions about  
15 it. It relates to the age range that Philip Morris tracks. So  
16 it was directly relevant to Dr. Krugman's testimony.

17 It's not being offered for a hearsay purpose, not for  
18 the truth of the matter asserted, not for the statistics that  
19 are in it, but for what Philip Morris was doing and it is a  
20 business record as Ms. Brooker knows.

21 THE COURT: That will be admitted.

22 (Exhibit No. JD 040553 was received into evidence.)

23 MS. BROOKER: The next set of documents, I will read  
24 off the numbers as a group, and I will just identify what type  
25 of advertisement it is because they are all advertisements.

1 JD 054509 is an Alamo advertisement, that's right.

2 JD 054510 is an advertisement that had the picture of  
3 Ralph Lauren on it.

4 JD 054511 is a Chevy truck advertisement.

5 MR. NARKO: You skipped 054508.

6 MS. BROOKER: I do not have any objection to JD 054508.  
7 No objection to that.

8 THE COURT: So far you listed three to which you do  
9 have objections; is that right?

10 MS. BROOKER: That's correct, Your Honor.

11 And then there is another Chevy truck's advertisement  
12 which is JD 054517.

13 MR. NARKO: We will withdraw that, Your Honor. We did  
14 not display that.

15 MS. BROOKER: So my objection is to those three.

16 THE COURT: What's the basis of it?

17 MS. BROOKER: If we would look at those again, I do --  
18 I haven't looked at these in a couple of days, but there was no  
19 foundation laid for Dr. Krugman having seen the advertisements,  
20 the same objections I stated early with respect to other  
21 advertisements.

22 There was no testimony underlying these advertisements  
23 for when or where they were placed, and there was no testimony  
24 from Dr. Krugman about his familiarity to lay a proper  
25 foundation for those exhibits.



1 THE COURT: And your response?

2 MR. NARKO: Your Honor, as with the ads we discussed  
3 this morning, these were ads used to compare Marlboro ads.

4 509 is the Alamo Rental car, 3510 is the Ralph Lauren  
5 ad, and 511 was a Chevy -- Chevrolet Blazer, I guess it is, ad.

6 They are not being offered for hearsay purposes. They  
7 are strictly for comparison purposes. It's very relevant to the  
8 witness's testimony.

9 THE COURT: 054509, 510, and 511 may be admitted.

10 (Exhibit No. JD 054509 was received into evidence.)

11 (Exhibit No. JD 054510 was received into evidence.)

12 (Exhibit No. JD 054511 was received into evidence.)

13 MS. BROOKER: If I am correct, that is -- oh, the  
14 remainder of the exhibits with Dr. Krugman, I do believe I had a  
15 few exhibits that I would like to admit from redirect.

16 THE COURT: All right.

17 MS. BROOKER: That's right, they are advertisements.

18 Mr. Bass and I have agreed on, there were eight  
19 exhibits the United States sought to admit through redirect and  
20 we have agreed to five of them. I don't need to repeat that  
21 here.

22 Here are the three to which Mr. Bass has an objection:  
23 U.S. Exhibit 13585, U.S. Exhibit 14473, U.S. Exhibit 14474. And  
24 Your Honor may recall that all three of those were Lorillard  
25 advertisements placed in ESPN magazine which were disclosed to

1 the defendants, and there should be no objection to their -- no  
2 evidentiary objection to their admissibility.

3 MR. BASS: Your Honor, I believe these were -- I don't  
4 believe that these were in Dr. Krugman's reliance materials and  
5 I don't believe that they are in the findings of fact. I'm not  
6 positive about that.

7 THE COURT: This was on redirect, though.

8 MR. BASS: This was on redirect. But the issue for  
9 which they were being presented was Dr. Krugman was trying to  
10 claim -- or the government was really trying to claim that these  
11 were ads that were put into ESPN magazine at a time that MRI  
12 reflected that ESPN had 20 percent, quote, youth readership, end  
13 quote, the way they define it, but there was no foundation that  
14 the MRI numbers had come out at the time that these ads were  
15 placed.

16 The fact of of the matter is, and there's  
17 correspondence with the Attorneys General, those numbers from  
18 MRI came out during the year in 2002.

19 THE COURT: That's your testimony.

20 MR. BASS: That is -- well, there is no -- there was no  
21 testimony from Dr. Krugman that -- as to when the MRI numbers  
22 came out.

23 THE COURT: Did you object on the grounds of lack of  
24 foundation?

25 MR. BASS: Yes, Your Honor.

1 MS. BROOKER: Your Honor, that was not the purpose for  
2 which the United States used those documents in redirect. And I  
3 will just say as an evidentiary matter, that's not an  
4 evidentiary objection. That goes to the weight -- goes to the  
5 weight of the document, not its admissibility.

6 And on cross-examination, if I recall, it was -- I  
7 believe it was Mr. Minton who asked a question about -- of  
8 Dr. Krugman, I don't believe it was related to the MRI data, but  
9 it was a question related to Do you know whether Lorillard  
10 placed advertisements in a particular year. It might have been  
11 1996. I'm kind of forgetting right now what the year was.

12 And the response from Dr. Krugman was he wasn't sure, I  
13 believe. And we used this to show that in fact in that year --  
14 in that year -- and Mr. Minton was not specific with respect to  
15 a month in that year, he just said that that year and it was  
16 rehabilitation.

17 I'm sorry. We used it for rehabilitation purposes, but  
18 there's -- and I will also just respond and say again it doesn't  
19 go to the evidentiary -- an evidentiary objection. But all of  
20 these magazine advertisements were, in ESPN, were disclosed by  
21 Dr. Krugman, not used in his direct testimony because all --  
22 because all of them weren't put in in that manner, but they were  
23 disclosed.

24 THE COURT: Anything final, Mr. Bass?

25 MR. BASS: No, Your Honor, other than when the

1 government says it wasn't being offered for the purpose of  
2 showing the defendants had advertised in a magazine with youth  
3 readership as measured by one of these, I don't know what it was  
4 put in for, and I think they ought to proffer what the purpose  
5 is that it's being used for so that we can determine later what  
6 argument needs to be made with respect to it.

7 THE COURT: What was the purpose?

8 MS. BROOKER: Well, if -- Ms. Crocker, she will recall.

9 MS. CROCKER: Your Honor, the question specifically to  
10 Dr. Krugman was: Did Lorillard place advertisements in ESPN  
11 magazine in 2002?

12 And Dr. Krugman simply said, "Sitting here, I can't  
13 remember one way or the other."

14 On redirect, we provided him with three advertisements  
15 that were placed in 2002. I think they were something like  
16 June, July, or in the spring of 2002.

17 I remember there being some objection from Lorillard  
18 counsel, and simply they were asserting, as Mr. Bass has now  
19 asserted again, that MRI data wasn't available to Lorillard  
20 until September of 2002, and they wanted to dispute the months.  
21 But that's what I recall, Your Honor.

22 MR. BASS: If it's simply being offered, Your Honor,  
23 for purposes of showing that there were ads placed by Lorillard  
24 in ESPN in those months in 2002 in which these ads appeared, so  
25 be it. They can come in for that purpose. I mean, we could

1 stipulate to when they came in, but --

2 MS. BROOKER: I think that's reserved for argument,  
3 Your Honor. It's just a question of what the evidentiary  
4 objection is.

5 THE COURT: The -- I'm sorry. The exhibits: 13585,  
6 14473, 14474 may be admitted.

7 (Exhibit No. U.S. 13585 was received into evidence.)

8 (Exhibit No. U.S. 14473 was received into evidence.)

9 (Exhibit No. U.S. 14474 was received into evidence.)

10 THE COURT: Counsel, we're about to break.

11 Mr. Brody, did you have something?

12 MR. BRODY: Just because we are about to break, Your  
13 Honor, I wanted to let you know for planning purposes that we  
14 anticipate submitting a slightly revised order of live  
15 witnesses. We will probably do that tomorrow. It just switches  
16 a couple around here and there, and in particular moves David  
17 Schechter up to testify after Dr. Eriksen.

18 So that on Monday we will be filing, or submitting to  
19 defendants, because three of the witnesses are adverse -- or,  
20 actually, Mr. Schechter is a nonparty, so we will be submitting  
21 it to his counsel -- but testimony of Mr. Schindler,  
22 Mr. Parrish, Dr. Eriksen, and Mr. Schechter to come up in the  
23 week of the 24th.

24 THE COURT: Schindler. Who else?

25 MR. BRODY: Schindler, Parrish, Eriksen, who is an

1 expert, and Mr. Schechter. And then obviously next week we have  
2 Dr. Slovic, followed by Ms. Keane in the 2-day week.

3 As to Dr. Eriksen, there are really two aspects to his  
4 testimony. One goes to the youth marketing, the advertising  
5 literature, the other aspect goes to remedies.

6 What we're going to do with Dr. Eriksen is he will be  
7 submitting the advertising, youth marketing prong of the case,  
8 testimony on Monday, and then his remedies testimony, which is  
9 distinct and separate, we expect to submit in the remedies  
10 portion of our case.

11 MR. BASS: Your Honor, I certainly don't want to be the  
12 one to prolong things here, but there are two things.

13 Number one, we think it's inappropriate to break up  
14 Dr. Eriksen into two pieces. And that's certainly the first we  
15 heard about it. So I think the government should have at least  
16 told us.

17 But there was an issue that got left hanging back  
18 there. The procedural issue as to the timing of when a party  
19 who is submitting documents that are not cited in the findings  
20 or in the testimony should make the proffer under 471(b) to  
21 establish why they are related to the testimony.

22 Our view -- and, of course, the shoe will be on the  
23 other foot when it gets to our case -- but our view is that when  
24 the exhibits are submitted with the testimony is when that  
25 proffer should be made, not in response to the objections.



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CERTIFICATE

I, EDWARD N. HAWKINS, Official Court Reporter, certify  
that the foregoing pages are a correct transcript from the  
record of proceedings in the above-entitled matter.

Edward N. Hawkins, RMR