

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 27, 2005
	.	
Defendants.	.	
.	

VOLUME 55
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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

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

2 (9:33 a.m.)

3 THE COURT: Good morning, everybody.

4 MR. WEBB: Good morning, Your Honor.

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

7 MR. WEBB: Your Honor, I told you at the end of the day
8 that I was done with my cross-examination.

9 THE COURT: That's what I thought.

10 MR. WEBB: I saw the puzzlement on your face. I'm going
11 to ask if I can ask a few more questions, and it relates to the
12 issue -- I'm going to say this carefully, because I don't want to
13 say it in front of the witness. There was a black binder shown
14 to the witness.

15 MR. SCHWIND: Your Honor, we would ask that the witness be
16 excused.

17 THE COURT: All right. Mr. Parrish, please.

18 MR. WEBB: Your Honor, there was a black binder that was
19 marked by the government as U.S. Exhibit 92064, which contained a
20 series of letters to the EPA regarding the EPA's ETS risk
21 assessment, and Mr. Schwind showed it to Mr. Parrish, along with
22 another document, to make the point that these -- I believe it's
23 one of them -- 16 letters were submitted by consultants of Philip
24 Morris to the EPA with no attribution. That was his point that
25 he made, and I was a little bit taken aback by it and I told Your

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1 Honor that I had lawyers in a conference room because they
2 thought that some of these letters had been submitted but under a
3 cover letter from Philip Morris, or TI, clearly showing the
4 tobacco company relationship, which would defeat the point that
5 he was making. I couldn't find that, okay. This is a document
6 that they did not put in his written direct examination. I've
7 never seen these before, so between last night and this morning,
8 literally right now, lawyers have found what -- what they thought
9 existed. I just got it, okay, and so all I'm asking for is five
10 minutes to make that point, okay, because I just discovered it.
11 I haven't actually stopped -- I said I was done, but it's not
12 even a reopening, I just want to extend my cross for a very
13 limited point in time to make this point with Mr. Parrish, which
14 of course, he knows nothing about.

15 THE COURT: Mr. Schwind, you're standing, but I can't
16 imagine you're objecting though.

17 MR. SCHWIND: I'm sorry, Your Honor?

18 THE COURT: You're standing, but I can't imagine you're
19 objecting.

20 MR. SCHWIND: We do object, Your Honor, to the timing of
21 this, number one, and number two, the relevance. The documents
22 that I submitted in U.S. Exhibit 92064 show that they were
23 received at EPA all on different dates. Whatever Mr. Webb has
24 was submitted under some other cover letter is not relevant to
25 what it is in the binder.

1 THE COURT: Mr. Schwind, A, it's clearly relevant, and B,
2 in terms of timeliness, I don't remember exactly what time it
3 was, but it was either 4:30 or 4:31 or '2 for once we were
4 breaking close to on time, and Mr. Webb said he was done, and it
5 was the appropriate time to break. The government hadn't begun
6 its redirect. There's nothing untimely about it, let's bring
7 Mr. Parrish in, please.

8 CONTINUED CROSS EXAMINATION OF STEVEN C. PARRISH
9 BY MR. WEBB

10 Q. Good morning, Mr. Parrish. Mr. Parrish, I have one more
11 line of questions I want to ask you. I don't know, do you have
12 up there at the witness stand -- yesterday the government gave
13 you a black binder of documents. It's marked as U.S.
14 Exhibit 92064. Do you have that in front of you now?

15 A. Yes, I do.

16 Q. Okay. Now, do you remember yesterday Mr. Schwind showed
17 you this binder, which -- and then I think there was a break
18 taken and you had a chance to look at the documents in this
19 binder; is that correct, Mr. Parrish?

20 A. That's correct.

21 Q. And after the break, you came back in, Mr. Schwind asked
22 you some more questions about this binder, and I believe you
23 told him that you had had a chance to quickly review it on the
24 break; is that correct?

25 A. That's right.

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- 1 Q. Now, this binder contains -- I counted them up -- it
2 appears to be 16 letters that are submitted to the EPA by people
3 that Mr. Schwind asked you if they were consultants for Philip
4 Morris; is that correct?
- 5 A. Right.
- 6 Q. And I believe -- I believe you told him that based on
7 another list he had shown you, another exhibit, that they
8 appeared to either be consultants or experts at one time or
9 another connected to Philip Morris; is that correct?
- 10 A. Right, and I think I also mentioned that the first one
11 was from Dr. Adlkofer, and that he was not a consultant or an
12 employee of the industry association in Germany.
- 13 Q. The German Verband?
- 14 A. Correct.
- 15 Q. And you explained that yesterday?
- 16 A. Yes.
- 17 Q. The other 15 letters in here, I think you indicated, on
18 the face of them it did not appear there was any attribution to
19 Philip Morris; is that correct?
- 20 A. Right. During the break I skimmed through them real
21 quickly focusing, as Mr. Schwind suggested, on the first part of
22 the letter, and then in the latter part of the letter, and
23 didn't see anything.
- 24 Q. At least you didn't see anything quickly going through
25 the letters; is that fair to say?

1 A. That's fair.

2 Q. And am I correct, had you ever seen -- to your knowledge,
3 had you ever seen these documents before?

4 A. I don't think so.

5 Q. And they weren't submitted by the government to you as
6 part of your written direct examination; is that correct?

7 A. That's correct.

8 Q. Now, Mr. Parrish -- so with that in mind, I'm going to --
9 MR. WEBB: Your Honor, a little short on copies because I
10 just discovered this, so I'm going to have to walk up and stand
11 next to the witness. May I have permission to do that?

12 THE COURT: Yes.

13 BY MR. WEBB:

14 Q. Mr. Parrish, I'm going to hand you a document that I have
15 come across since you've been on the stand which is called --
16 it's a document marked JD 013174, and I'm going to show it to
17 you, and because I don't have an extra copy, nor is it loaded
18 into our machine, I'll just put it -- I don't have a copy to
19 hand to -- Jamey, can you call this up?

20 THE COURT: The government now has a copy.

21 MR. SCHWIND: We don't, the first page of that document, I
22 think it's a cover letter, right, Mr. Webb?

23 MR. WEBB: Yes.

24 MR. SCHWIND: And I don't believe we have any kind of
25 cover letter. Our first page ends with 5553.

1 MR. WEBB: They don't have 5552. It fell off in the other
2 room. I'll show it to you right now so you can read it.

3 MR. SCHWIND: Okay.

4 BY MR. WEBB:

5 Q. Mr. Parrish, maybe for the Court's benefit, this is a
6 document that is dated September 28th, 1990; is that correct?

7 A. Yes.

8 Q. And this is the time that Philip Morris and other people
9 were making public comments to the EPA about ETS issues?

10 A. That's correct.

11 Q. And the cover letter, why don't you read the cover letter
12 into the record, because I don't of a copy to give to the Court
13 at this moment. I'm trying to get other copies made.

14 A. It's addressed to the project officer for environmental
15 tobacco smoke technical information staff, Office of Health and
16 Environmental Assessment, the EPA and it gives a street address.
17 "Regarding external review draft, health effects of passive
18 smoking, assessment of lung cancer in adults, and respiratory
19 disorders in children."

20 And then it has the "EPA" and then numbers which I'm not
21 sure what those mean. And then in the body of the letter it just
22 says, "The attached review comments are submitted on behalf of
23 Philip Morris, Inc., yours sincerely, Robert A. Pages, Ph.D.,
24 manager science and technology" and it's on Philip Morris USA
25 stationery.

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1 Q. So it's on Philip Morris USA stationery, signed by
2 Dr. Pages who is manager of science and technology at Philip
3 Morris?

4 A. Correct.

5 Q. And he makes it extremely clear on the face of the letter
6 that the attached comments are submitted on behalf of Philip
7 Morris; is that correct?

8 A. That's right.

9 Q. Now, what I've done, Mr. Parrish, quickly this morning --
10 where's that black binder? Do you still have that? I'm going
11 to ask you to, if you would, so we have a record of this, the
12 black binder, which is marked U.S. Exhibit 92064, what I
13 think -- what I did is in that black binder, I simply have taken
14 the Government's Exhibit, but I have marked on certain tabs -- I
15 need to actually give you -- Mr. Parrish, I need to give you
16 another copy of the Government's Exhibit, and I'll explain to
17 you what I've done, so that you can quickly find this
18 information. In the government's binder, I have put numbers on
19 some of the tabs, do you understand?

20 A. Yes.

21 Q. And then I put numbers on some of the submissions that
22 are under the Philip Morris cover letter that is marked as JD
23 013174 so we can determine if some of the letters in the
24 government's binder that the government said had no attribution
25 from Philip Morris, whether they, in fact, are part of the

1 submission that is JD 13174. Do you understand the comparison I
2 was trying to make?

3 A. I understand.

4 Q. And so to save time in Court this morning -- obviously,
5 you and I have not talked about this; is that correct?

6 A. That's correct.

7 Q. But to save time, what I did is, in the submission from
8 Philip Morris on September 28th, 1990, marked as JD 13174, if I
9 found in that submission from Philip Morris the same letter in
10 the government's binder, the black binder, I've also tabbed it
11 with a 1, so if this has a 1 and there's a 1 in here, at least
12 it appeared to me it was the --

13 MR. SCHWIND: Your Honor, we do object.

14 THE COURT: Wait, just a minute. Let Mr. Webb finish his
15 sentence or his explanation and then I'll hear from the
16 government. Finish your paragraph, as it were.

17 MR. WEBB: I will.

18 BY MR. WEBB:

19 Q. So, if I put a 1 on a letter from Philip Morris under the
20 Philip Morris submission, and I put a 1 in this black binder, at
21 least it appeared to me to be the same letter, and all I'm going
22 to ask you to do, though, is making that comparison so we can
23 make a record as to whether -- I can't testify, it's up to you
24 to determine yes or no. The only thing I'll tell you is they
25 are all in chronological order pretty much, except number 6 is

1 at the back, so I put that in blue just so it's easier.

2 A. I understand.

3 Q. And also number 9, on number 9, the one I marked as 9,
4 when you get to 9 there's a -- the cover letter is not in this
5 submission from Philip Morris, but the actual submission from
6 that doctor is here, it looks like the cover letter. So -- it's
7 going to take just one second. It's going to take you,
8 probably, a couple minutes to do this, and I'm asking you to do
9 it in Court.

10 MR. SCHWIND: I have reason to believe this document is
11 not what Mr. Webb purports it to be.

12 THE COURT: Would you use the mic please? You're a little
13 low today.

14 MR. SCHWIND: According to the table of contents, this
15 document ends with appendix 2. Appendix 2 ends with the Bates
16 number last four is 5689. All of these letters that show that
17 they were received by the EPA on different dates, begin -- they
18 skip one Bates number, 5690, and then these letters begin at
19 5691. There's no indication in the table of contents submitted
20 with this document that these letters were attached to it at all,
21 number one, and number two, given that there's a break in the
22 Bates range between Mr. Pages' submission on behalf of Philip
23 Morris and the letters that Mr. Webb is attempting to get to
24 right now, there's reason to believe this document -- these
25 letters were not attached in any way to Dr. Pages' submission.

1 THE COURT: Mr. Schwind, you're going to get a chance for
2 redirect in about hopefully 10 or 15 minutes.

3 MR. SCHWIND: I understand this, Your Honor, however, this
4 witness has no idea whether these documents were attached to
5 Philip Morris's submission.

6 THE COURT: Well, Mr. Webb can ask him certain questions
7 to which he has to give an answer, if he can, and then depending
8 on his answer, you certainly can probe on redirect whether he has
9 any basis for giving an answer unless he said "I don't know". So
10 I don't see the basis for an objection now. Mr. Webb hasn't even
11 posed the questions yet to the witness.

12 MR. SCHWIND: Well, Mr. Webb was asking him to review a
13 document. I guess our objection is foundation, whether Mr. Webb
14 has any foundation -- or this witness has any basis to comment on
15 this submission at all.

16 THE COURT: Well --

17 MR. WEBB: Can I have one second, Your Honor, please?

18 Your Honor, let me make this request: You can tell this
19 is something that happened on the spur of the moment. I'm not
20 about to elicit anything that is inaccurate, okay. I did not
21 realize until this second that there's a break in the Bates range
22 which counsel just pointed out to me, okay. I was in the middle
23 of examining this witness. What I would like to do is to simply
24 allow lawyers to check this out, because I'm not about to make a
25 mistake in front of Your Honor, but this is happening on the

1 spot, and I want to double-check to make sure that I'm not wrong,
2 because if I'm wrong I'm not going to present this to the Court.
3 If I'm right, I do want to present it to the Court and Your Honor
4 can tell the witness -- obviously the witness does not know -- I
5 have not talked to the witness about this topic. It's going to
6 be a very short line of examination. If I'm correct, I just
7 discovered it this morning.

8 My suggestion is that we go ahead and go forward -- I'm
9 asking the Court to reserve my right to complete this brief line
10 of examination, but to do so, maybe, after the break this
11 morning, or else take a brief recess now, either way is fine with
12 me, because I want to double confirm and make sure I'm not about
13 to make a mistake, and when counsel told me there's a break in
14 the Bates range, I want to double-check it.

15 THE COURT: Mr. Schwind, it would seem to me that you
16 covered -- well, not you, but Mr. Webb covered so many other
17 topics on his cross, that you could do redirect on all -- not
18 all, perhaps, about you on other matters, and then, as everybody
19 knows we take our break at approximately 11, and then we'll see
20 where we are after the break.

21 In no event will the government lose any opportunity to
22 cross this witness if Mr. Webb decides to, excuse me -- to
23 redirect this witness if Mr. Webb decides to cross him on only
24 this issue, which will be reserved for now.

25 MR. WEBB: That's all I'm asking.

1 MR. SCHWIND: That's fine, Your Honor.

2 THE COURT: Fine. Thank you.

3 MR. WEBB: Thank you, Your Honor.

4 THE COURT: Go ahead, Mr. Schwind.

5 REDIRECT EXAMINATION OF STEVEN C. PARRISH

6 BY MR. SCHWIND:

7 Q. Thank you, Your Honor. Good morning, Mr. Parrish.

8 A. Good morning.

9 Q. Mr. Webb started off his cross-examination yesterday by

10 putting up a demonstrative exhibit that I would like to look at

11 today. Do you recognize this as JDEM 040183?

12 A. Yes.

13 Q. And this is what we looked at yesterday, or you looked at

14 yesterday, with your counsel when talking about the corporate

15 structure of the Philip Morris, as he used the term, family of

16 companies, right?

17 A. Right.

18 Q. You mentioned that certain companies had independent and

19 separate boards of directors, correct?

20 A. That's correct.

21 Q. Let's talk about Altria Corporate Services Incorporated,

22 formerly PMMC, your former employer, right?

23 A. Correct.

24 Q. Who sits on its Board of Directors?

25 A. I don't know.

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- 1 Q. But isn't it true, Mr. Parrish, that the Board of
2 Directors of Altria Corporate Services, formerly PMMC, consists
3 of directors or executives from the other Philip Morris family
4 of companies?
- 5 A. That was not my impression, but as I said, I don't know
6 exactly who is on the Board. I assumed it was employees of
7 Altria Corporate Services, but maybe I'm wrong.
- 8 Q. So you don't know if there's any overlap among its Board
9 of Directors with other companies, including Altria itself?
- 10 A. I don't.
- 11 Q. Now, again, you indicated yesterday that the officers and
12 Board of Directors of Altria Group have been separate from the
13 officers and directors of Philip Morris USA, correct?
- 14 A. I said the directors, I'm not sure I said the officers.
- 15 Q. Would that statement hold true with respect to the
16 officers?
- 17 A. I think there have been times -- well, in my case, for
18 example, there was a period of time when I was both an officer
19 of Philip Morris Companies and Philip Morris USA. It was a
20 relatively brief, but there was that period of time. There may
21 have been other instances like that, I'm not sure.
- 22 Q. Other instances and other employees who would be officers
23 of Altria and Philip Morris USA simultaneously?
- 24 A. There may have been. I don't recall other instances than
25 the one I mentioned about myself, but there certainly could have

1 been. I just --

2 Q. Well, isn't it true, Mr. Parrish, that the officers and

3 Board of Directors of Altria have not been separate from the

4 activities of Philip Morris USA?

5 A. Well, certain -- yes, you're right, to the extent that I

6 indicated earlier about the role of Altria vis-a-vis all the

7 operating companies, including Philip Morris USA.

8 Q. Well, in fact, members of the Board of Altria and

9 officers of Altria have been involved in the activities of the

10 Council for Tobacco Research and the Tobacco Institute, right?

11 A. Um, yes.

12 Q. You testified yesterday, you mentioned the name

13 Mr. William Murray, right?

14 A. Correct.

15 Q. And who is he again?

16 A. At the time I joined the company he was one of the two

17 vice chairmen of the Board.

18 Q. And vice chairman of the Board for which entity?

19 A. Philip Morris Companies, which is now known as Altria.

20 Q. I'm going to hand you a document that's been marked U.S.

21 Exhibit 32606.

22 THE COURT: Philip Morris Companies is Philip Morris USA?

23 THE WITNESS: No, Philip Morris Companies is what is now

24 known as Altria.

25 THE COURT: Oh, that's right, okay.

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- 1 BY MR. SCHWIND:
- 2 Q. And I put the first page of the document, this is on the
3 screen, this is a Council for Tobacco Research, CTR, Board of
4 Director meeting minutes from June 7th, 1990, correct?
- 5 A. That's right.
- 6 Q. And you recognize that Murray Bring and Mr. William
7 Murray, both of Philip Morris Companies, were members of the
8 Board of Directors of CTR at that time?
- 9 A. That's what this says, yes.
- 10 Q. And you also see that Alexander Holtzman, from Philip
11 Morris Companies, attended this meeting on the CTR?
- 12 A. Yes, according to this document.
- 13 Q. And Mr. Holtzman, of course, was the general counsel at
14 the time for Philip Morris Companies, right?
- 15 A. I don't believe he was general -- no, he was not general
16 counsel of Philip Morris Companies in 1990.
- 17 Q. What was his position?
- 18 A. He was in the legal department, but Mr. Bring was general
19 counsel.
- 20 Q. But he worked for Mr. Bring then?
- 21 A. I believe so. At some point around this time he retired,
22 but certainly when he was in the legal department he worked for
23 Mr. Bring.
- 24 Q. Mr. Parrish, now I'm going to hand you a document that's
25 been marked U.S. Exhibit 32608. This is the CTR meeting minutes

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- 1 from June 6th, 1991. Do you see that?
- 2 A. Yes.
- 3 Q. And, again, we see that in attendance, and one of the
4 members of the Board of Directors for CTR was Murray Bring,
5 right?
- 6 A. That's correct.
- 7 Q. And I'm going to show you just a few more of these. This
8 is U.S. Exhibit 32610, can you review that document, please?
- 9 A. Okay.
- 10 Q. It's another meeting minutes from CTR, this one dated
11 one year later, June 11th, 1992, correct?
- 12 A. Correct.
- 13 Q. And Mr. Bring is still a member of the Board of
14 Directors, still from Philip Morris Companies, correct?
- 15 A. That's right.
- 16 Q. Now, isn't it true that Philip Morris Companies had
17 approval authority for tobacco industry special projects in the
18 late 1980s and early 1990s?
- 19 A. I'm sorry, could you repeat that?
- 20 Q. Sure. Isn't it true that Philip Morris Companies had
21 approval authority for industry special projects in the late
22 1980s and early 1990s?
- 23 A. Could you tell me what you mean by "industry special
24 projects"? Are you referring to CTR special projects or some
25 other --

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- 1 Q. Yes, CTR special projects.
- 2 A. I believe that's right, I believe that's right.
- 3 Q. And, in fact, let's look quickly at a document that's
- 4 marked U.S. Exhibit 87508. The first page of this document is a
- 5 cover letter from Helen, how does she pronounce her last name?
- 6 A. Frustace.
- 7 Q. Frustace, to Robert Gergenbach at CTR enclosing a check
- 8 for \$744,000 for a fourth installment of dues, as well as
- 9 payment of over a 100,000 for the Special Projects Fund. Do you
- 10 see that?
- 11 A. Right.
- 12 Q. And if we turn to the second page --
- 13 A. Just so it's clear, it's a Philip Morris USA check, but
- 14 her letter is on Philip Morris Companies letterhead.
- 15 Q. Right. If we turn to the third page of this document, we
- 16 see the Philip Morris voucher, right?
- 17 A. Yes.
- 18 Q. And who is the approval authority for this particular
- 19 payment to CTR?
- 20 A. It looks to be the signature of Alex Holtzman.
- 21 Q. And, again, he was with Philip Morris Companies at the
- 22 time, right?
- 23 A. I believe so.
- 24 Q. And if we look at Exhibit 62461, which I'm going to get
- 25 you in just a moment, we see in the paragraph under the list of

1 names that, in fact, you, yourself attended this meeting in
2 June 1996 of the Tobacco Institute, correct?

3 A. Correct.

4 Q. Can you tell us please, approximately, what years you
5 attended meetings of the Tobacco Institute on behalf of Philip
6 Morris Companies?

7 A. Um, well -- yes, I attended, when I was general counsel
8 of Philip Morris USA, I attended meetings of the Committee of
9 Counsel, and then periodically during the time I was general
10 counsel of Philip Morris USA, depending on the agenda, I
11 attended Executive Committee meetings, although I was not a
12 member of the Executive Committee meeting.

13 After I was no longer general counsel of Philip Morris
14 USA, I think I attended one or two, maybe more, meetings of the
15 TI Executive Committee because of something on the agenda about a
16 particular legislative initiative which would have fallen under
17 my -- in my department's responsibilities.

18 Q. And again, that department was the Corporate Affairs
19 Department for Philip Morris Companies, correct?

20 A. Right. As I described yesterday, providing services to
21 the operating companies, including Philip Morris USA.

22 Q. But you were employed by Philip Morris Companies, right,
23 in 1996?

24 A. Yes, yes.

25 Q. I'll hand you a document that's been marked 88252, U.S.

1 Exhibit. And on this document we see that as of -- I'll slide
2 the document up, September 22nd, 1994, a representative of
3 Philip Morris Companies was a listed Class A -- was a Class A
4 director of the Tobacco Institute, correct?

5 A. Correct.

6 Q. Are you familiar with Ms. Leneghan?

7 A. Leneghan, yes, Kathleen Leneghan.

8 Q. What was her position within Philip Morris Companies?

9 A. At that time she was vice president of Government
10 Affairs.

11 Q. I'm going to hand you another exhibit, Mr. Parrish. This
12 one is marked U.S. Exhibit 88308. This is the minutes of the
13 Tobacco Institute Executive Committee meeting held on
14 September 1993.

15 A. Correct. Correct.

16 Q. And we see this is Leneghan was a member of the Executive
17 Committee at that time, correct?

18 A. That's correct.

19 Q. And that was, again, on behalf of Philip Morris
20 Companies, right?

21 A. No, I disagree with that. She was an employee of Philip
22 Morris Companies, but she was providing services pursuant to the
23 service agreement to Philip Morris USA because of her
24 legislative relations job, and that's why the head of Government
25 Affairs always sat on the TI Executive Committee.

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1 Q. And back to one of the -- related to the first area --
2 one of the first areas, as far as writing checks, I'll show you
3 another document. We're almost to the end of these, I promise.

4 Handing you what's been marked U.S. Exhibit 20384, and
5 this is a letter from Chuck Wall, of Philip Morris Companies,
6 dated may 18th, 1992, correct?

7 A. That's right.

8 Q. And it's addressed to Bernard O'Neill, an attorney at
9 Shook, Hardy & Bacon, correct?

10 A. Yes.

11 Q. And Mr. Wall is enclosing Philip Morris's check in the
12 amount of almost \$162,000, payable to Theodore Sterling and
13 Associates, correct?

14 A. That's right.

15 Q. Do you recognize the name Theodore Sterling?

16 A. I recognize the name, I don't know if I've ever met him,
17 but yes.

18 Q. And you aware that he received, or he and his associates,
19 received millions of dollars of tobacco industry funding over
20 the years, correct?

21 A. I don't know exactly how much, I know it was a
22 considerable amount.

23 THE COURT: When employees of Philip Morris Companies were
24 performing duties on behalf of one of the other corporate
25 entities, pursuant to one of the service agreements you've

1 mentioned, was it -- how, if at all, was it made clear whether
2 that employee was acting on behalf of Philip Morris Companies or
3 on behalf of the entity with which it had a service agreement?

4 THE WITNESS: I think it sort of depended on the
5 situation, Your Honor. For example, at the Tobacco Institute
6 meetings, it was clear that people from our Government Affairs
7 office were there on behalf of Philip Morris USA.

8 THE COURT: Who is this cover letter, for example -- I
9 shouldn't say who, but in terms of Mr. Wall sending this check to
10 Shook Hardy to pay Theodore Sterling and Associates, is he acting
11 for Philip Morris USA or is he acting for Philip Morris
12 Companies?

13 THE WITNESS: Um, I can't tell from this letter, because I
14 don't know who the check is from. If the check were from Philip
15 Morris Companies, I would guess it would be Philip Morris
16 Companies. But if he's transmitting a Philip Morris USA check,
17 then I would assume it would be Philip Morris USA.

18 THE COURT: And so in this instance you're saying it all
19 turns on where the check comes from?

20 THE WITNESS: Well, Philip Morris USA was the member of
21 CTR, but I just don't know in this instance who Mr. Wall was
22 acting on behalf of.

23 THE COURT: Okay. Mr. Schwind.

24 BY MR. SCHWIND:

25 Q. But at this time, Mr. Parrish, Mr. Wall was Vice

1 President and Associate General Counsel of Philip Morris
2 Companies, correct?
3 A. That's right.
4 Q. And he currently is Senior Vice President and General
5 Counsel of Altria Group, right?
6 A. That's right.
7 Q. Formerly Philip Morris Companies?
8 A. Correct.
9 Q. I'm going to hand you a document marked U.S.
10 Exhibit 92008. I believe you were provided this with your
11 written testimony, but if I'm mistaken you can let me know.
12 A. No, this was provided.
13 Q. If we could fly out the first page of that, please. A
14 little farther down.
15 We see that this is a -- well, the first page is a cover
16 memorandum from Claire Purcell to Ingrid Haveland dated July 2nd,
17 1992, right?
18 A. I think it's from Ms. Haveland to Ms. Purcell.
19 Q. Correct. And you're copied on this memorandum, right?
20 A. Yes.
21 Q. And the subject of the document is "intercompany expenses
22 billed to us by Covington & Burling," right?
23 A. Right.
24 Q. And you'll confirm that Covington & Burling was billing
25 not only Philip Morris USA but also Philip Morris International

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- 1 and Philip Morris Companies for its services, depending on what
2 the service was it was performing, right?
- 3 A. I know Covington was billing Philip Morris USA and Philip
4 Morris International and Philip Morris Management Corporation.
5 They may have been billing Philip Morris Companies. I don't
6 know if this document says that, that would be the case, let me
7 just, if I can look.
- 8 Q. Let's turn to the third page, I'll orient you to what I
9 think.
- 10 A. I see that Charles Wall, that there is yes, \$9,311 for
11 consultant services to Charles Wall.
- 12 Q. Correct, and that was just for the month of February,
13 1992, right?
- 14 A. That's what it appears to be, yes.
- 15 Q. And we see that Tom Borelli at CSA -- that's Corporate
16 Scientific Affairs, correct?
- 17 A. That's right.
- 18 Q. Was billed for a certain amount, and then if we --
- 19 A. Right, but that's not Philip Morris Companies.
- 20 Q. Correct.
- 21 A. Right. Okay, just so we're clear.
- 22 Q. That's Philip Morris International, right?
- 23 A. That, I think, if I can look at it again -- yes, Philip
24 Morris International.
- 25 Q. If we turn to the next page, you see your portion of the

1 billing for several months in 1992, correct?

2 A. Yes.

3 Q. And the bottom section of that, the SCP monthly
4 international legal fees related to consultants, you're the SCP,
5 right?

6 A. That's right.

7 Q. Mr. Parrish, we can put those documents to the side now,
8 hopefully, and move on to the next aspect of what Mr. Webb
9 covered yesterday with you, and I'm putting on the projector the
10 document marked JD 046719.

11 Do you remember yesterday when Mr. Webb handed you this
12 document, Mr. Parrish?

13 A. Yes.

14 Q. Now, this was the Philip Morris Companies Website in
15 October 1999, right?

16 A. That's right.

17 Q. Because at that time that's whose Website it was, right?

18 A. Right.

19 Q. This is not a Philip Morris USA Website, right?

20 A. No, I think, as I recall, there were ways you could get
21 to Philip Morris USA information, but this was the Philip Morris
22 Companies Website.

23 Q. Right, and this is the Website that had the initial
24 corporate positions on smoking and health that we talked about
25 yesterday, correct?

- 1 A. That's right.
- 2 Q. And it also had the initial corporate position on
3 environmental tobacco smoke, right?
- 4 A. Well, it had the positions of Philip Morris USA and
5 Philip Morris International on it, yes, on both the smoking and
6 health and the environmental tobacco smoke.
- 7 Q. Again, these were stated on the Philip Morris Companies
8 Website?
- 9 A. That's right.
- 10 Q. In fact, let's turn to -- I'm just going to turn to a
11 page here and put it on the projector for you. The page of this
12 exhibit, it doesn't have page numbers -- oh, it does, it says "2
13 of 6" at the bottom left-hand corner. And we see "ETS lung
14 cancer and heart disease", right?
- 15 A. Yes.
- 16 Q. And this is where Philip Morris Companies included the
17 statement, "Many scientists and regulators have concluded that
18 ETS poses a health risk to nonsmokers. Even though we do not
19 agree with many of their conclusions, below we have provided
20 some links so you can access some of their views", right?
- 21 A. That was on the website, yes.
- 22 Q. Next, Mr. Parrish, I would like to talk to you about
23 another exhibit that your counsel used yesterday with you, and
24 this was a Philip Morris -- I'm sorry, an Altria Group press
25 release dated October 11th, 2004, right?

- 1 A. Yes.
- 2 Q. And what was your statement as to what this press release
3 was?
- 4 A. This was the -- our press release -- this was our press
5 release giving our reaction to the failure of the FDA
6 legislation to pass.
- 7 Q. All right. And just for the record, this is marked JD
8 054571 and if I didn't say it before, the prior exhibit of the
9 Website was marked JD 046719. According to this press release,
10 I want to focus in on what I've highlighted here. Altria said
11 that "the senate legislation, which was supported by leading
12 public health groups, contained a wide array of important
13 provisions, including," and then there's the list of seven
14 bullet points below that, right?
- 15 A. Right.
- 16 Q. Now, the first provision that Altria has summarized here
17 is "larger, more emphatic health warnings on all cigarette packs
18 and advertisements," right?
- 19 A. Right.
- 20 Q. Now, there's nothing keeping Philip Morris from doing
21 that today, correct, imploring those larger, more emphatic
22 health warnings, right?
- 23 A. I guess that's a legal question about whether you can do
24 that in addition to the Congressionally mandated warning. I
25 guess there's -- as long -- let me put it this way: I guess as

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1 long as it didn't interfere with the Congressionally mandated
2 warning, I suppose you could.

3 Q. Correct. For example, if the Labeling Act warning was on
4 one side of the pack, Philip Morris could easily do whatever it
5 wanted on any of the other sides of the pack, correct?

6 A. Right, as long as whatever agency is responsible, I think
7 it may be BATF, or whoever, FTC, I'm not sure, weren't concerned
8 that what was on the other panel wasn't somehow distracting from
9 the Congressionally mandated warning.

10 Q. And do you think that Philip Morris could on its own
11 enlarge the Congressionally mandated warning?

12 A. I don't think it could enlarge -- I don't know. I mean,
13 I haven't asked counsel about that. But my impression or
14 understanding has always been you can't change the substance or
15 the size of the Congressionally mandated warning, couldn't make
16 it smaller, and I don't think you could make it larger.

17 Q. You certainly can't make it smaller, right?

18 A. Obviously, right.

19 Q. So let's talk about -- in other countries, Mr. Parrish,
20 Philip Morris does already have enlarged more emphatic health
21 warnings on its products, correct?

22 A. Absolutely right.

23 Q. So, for example, if I show you this, it's not in too good
24 a shape, a pack from the United Kingdom, if you're there you
25 might see a warning covering half of the pack, "smoking can

- 1 cause a slow and painful death", right?
- 2 A. Correct.
- 3 Q. That's not a warning that Philip Morris is willing to
- 4 agree to in the FDA legislation, was it?
- 5 A. Um, well, let me --
- 6 Q. Yes or no, Mr. Parrish.
- 7 A. That was not in the FDA legislation drafted by Senator
- 8 Kennedy and DeWine, and we supported their bill.
- 9 Q. On the other side we see, covering approximately
- 10 one-third of the package, the warning "smoking kills", right?
- 11 A. Right.
- 12 Q. And again, this was not a warning that Philip Morris was
- 13 supporting in its FDA legislation, right?
- 14 A. I thought either in the '97 proposal or possibly in the
- 15 Kennedy-DeWine Bill, that there might have been one of those
- 16 specific ones, "smoking kills", but maybe not.
- 17 THE COURT: Do you happen to know whether the two warnings
- 18 on that particular exhibit, on the two sides of that exhibit, are
- 19 specifically mandated by English legislation?
- 20 THE WITNESS: I believe they are, Your Honor.
- 21 THE COURT: So those weren't put on voluntarily, were
- 22 they?
- 23 THE WITNESS: I don't believe so.
- 24 BY MR. SCHWIND:
- 25 Q. In fact, did the tobacco industry fight these warnings,

1 Mr. Parrish?

2 A. I don't know.

3 Q. You have no idea whether the industry fought the warnings
4 that were mandated by the EU or the United Kingdom?

5 A. I certainly didn't have any responsibility for Government
6 Affairs for Philip Morris International, so I don't know what
7 their position was.

8 Q. Let's go across the channel to Germany, for example.
9 German pack of cigarettes, the warning on almost half of this
10 package, I'll read it out -- I'll help the court reporter after
11 we're finished, "Rauchen kann die spermatozoen schadigen und
12 schrankt die Fruchtbarkeit ein." Do you see that?

13 A. I see that.

14 Q. Do you know what that means, Mr. Parrish?

15 A. "Smoking can damage the sperm and reduce fertility."

16 Q. That's not a warning that Philip Morris supported in the
17 FDA bill either, is it?

18 A. I don't believe so.

19 Q. I'll leave this up there.

20 A. Except, can I qualify that a little bit? Except to the
21 extent the bill we did support, the DeWine-Kennedy Bill did give
22 FDA the authority to change at any time the warnings that were
23 in the bill, so FDA had determined that that was the right
24 warning, the bill would have given them the authority to do
25 that.

- 1 Q. But it also would have given -- there was a mechanism
2 there for Philip Morris to resist that, correct?
- 3 A. We could give our input, just like anybody else.
- 4 Q. Now, if we also look at this package in another aspect of
5 the -- of what was in the Altria press release, we see the third
6 highlighted bullet "Authority for the FDA to regulate or ban
7 terms such as 'light' and 'low tar'," right?
- 8 A. Yes.
- 9 Q. Now, in fact, that's exactly what's been done in Europe,
10 right?
- 11 A. I believe that's right.
- 12 Q. In fact, this is a Marlboro -- here would be a Marlboro
13 Lights pack of cigarettes, right?
- 14 A. Right.
- 15 Q. And isn't it true, then, Mr. Parrish, that Philip Morris,
16 if it wanted to, on its own, could remove those brand
17 descriptors at any time in this country as well?
- 18 A. I think that's right.
- 19 Q. Another item, "full disclosure of all ingredients added
20 to tobacco products"?
- 21 A. Yes.
- 22 Q. Philip Morris could do that now if it would like?
- 23 A. It does.
- 24 Q. It does?
- 25 A. It's on its Website.

- 1 Q. "Disclosure by brand and by quantity," Mr. Parrish?
- 2 A. I know it's by brand, I'm not sure by quantity.
- 3 Q. But Philip Morris could disclose that information by
- 4 quantity if it wanted to, right?
- 5 A. Yes, it may, I just, I don't know if it does or not.
- 6 Q. We also see that some other aspects of the bill, that
- 7 again, is there any -- without reading each of them, is there
- 8 anything that's listed here that Philip Morris could not do at
- 9 this time acting on its own?
- 10 A. Um, well, certainly Philip Morris cannot establish
- 11 standards for potentially reduced harm products. It can do what
- 12 it can to develop and market those, but it can't establish
- 13 standards for the industry. And then there are other things
- 14 that Philip Morris already does not do that would have been
- 15 prohibited by this statute, so, you know, the fact that Philip
- 16 Morris doesn't sell candy or fruit flavored cigarettes, that
- 17 needed to be in the bill, according to Senator DeWine and
- 18 Senator Kennedy.
- 19 Q. So that aspect would not have impacted Philip Morris at
- 20 all?
- 21 A. Correct.
- 22 Q. And you're aware, Mr. Parrish, aren't you, that some have
- 23 referred to this -- or some refer to this legislation as the
- 24 Marlboro Monopoly Act, right?
- 25 A. I've heard some people say that, yes. I don't think

1 Senator Kennedy or Senator DeWine would refer to it that way.

2 MR. SCHWIND: I ask that non answer be stricken.

3 THE COURT: I'm not going to strike that from the record.

4 BY MR. SCHWIND:

5 Q. Now, you stated yesterday, in response to counsel's
6 question, that the reason -- one of the reasons Philip Morris
7 does not employ the warning "smoking is addictive on its
8 products" is that you're concerned, or the company is concerned
9 that the label "addictive" may discourage smokers from quitting;
10 is that right?

11 A. If -- I didn't mean to say it that way, if that's what I
12 said. What I said was that I thought that a government agency,
13 such as the FDA, needed to have that authority for reasons such
14 as that and look at factors such as that.

15 I'm not sure why Philip Morris USA decided not -- or has
16 decided or chosen not to put an addiction warning on the pack.

17 Q. Do you know that that position that you recited for
18 counsel yesterday is not consistent with any public health
19 authority?

20 A. What position is that?

21 Q. That the warning "smoking is addictive" should not be
22 added to a cigarette pack out of concern that it may discourage
23 smokers who want to quit from trying to quit.

24 A. Right, and I don't think that's what I said. That's not
25 what I meant to say. What I meant to say was, and what I think

- 1 I did say was that FDA should consider all kinds of issues,
2 including that one, and if FDA thinks no, that's not a concern,
3 then that's fine.
- 4 Q. Counsel also showed you several articles on nicotine and
5 addiction, correct?
- 6 A. Yes.
- 7 Q. I'm going put up here on the screen, the first of them is
8 marked JD 040359, right?
- 9 A. Yes.
- 10 Q. And according to the abstract of this paper titled
11 "Airway Sensory Replacement as a Treatment for Smoking
12 Cessation." The first sentence is: "Although nicotine may be a
13 necessary component of the smoking addiction," and then it goes
14 on from there, "it is obvious even to the nonexpert that there
15 is far more to smoking than the delivery of nicotine alone." Do
16 you see that?
- 17 A. Yes, I do.
- 18 Q. And again, yesterday, when you were going through this
19 article, and you were being shown this article, does Philip
20 Morris dispute the overwhelming medical and scientific consensus
21 that smoking is addictive?
- 22 A. No.
- 23 Q. That wasn't the point of your answers yesterday, then?
- 24 A. No.
- 25 Q. In fact, Mr. Parrish, I'm going to show you what your --

1 or what Philip Morris Incorporated and Philip Morris Companies
2 submitted in January 2003 to update its response to a government
3 interrogatory on this issue. And do you see where I've
4 highlighted, sir?

5 A. Yes.

6 Q. "Philip Morris states that nicotine and cigarette smoke
7 is addictive and that cigarette smoking is addictive," correct?

8 A. Yes, that's what this says.

9 Q. And your testimony yesterday wasn't backing away from
10 that?

11 A. Oh, no, not at all.

12 Q. Counsel also showed you a second nicotine article. This
13 one's marked JD 010819. Do you see that?

14 A. Yes.

15 Q. This is an article, a paper entitled "Nicotine or Tar
16 Titration in Cigarette Smoking Behavior?" And it's dated
17 January 11th, 1993. Do you see that?

18 A. Yes.

19 Q. Now, the authors are Hausenfratz, Baldinger and Battig,
20 right?

21 A. Yes.

22 Q. Do you recognize the name Battig?

23 A. I do.

24 Q. He's an industry-funded consultant or researcher,
25 correct?

- 1 A. I think that's right.
- 2 Q. And, in fact, if we look at the very last page of this
3 document, of this 1993 paper, we see the document was supported
4 by the Swiss Association of Cigarette Manufacturers, right?
- 5 A. Correct.
- 6 Q. Philip Morris is a member of that association, right?
- 7 A. Yes.
- 8 Q. Mr. Parrish, you testified yesterday that after the date
9 of the Hatch Statement, which again was October 2nd, 1997, the
10 public health community has for the past seven and a half years
11 been able to communicate to the American public a single
12 consistent message, right?
- 13 A. I believe so.
- 14 Q. Philip Morris has taken itself out of the debate?
- 15 A. Yes.
- 16 Q. But that's not really true, is it, Mr. Parrish?
- 17 A. I'm not sure what you're referring to.
- 18 Q. Isn't it true that after the date of the Hatch Statement,
19 Philip Morris continued to be a member of CTR, TI, and CIAR, the
20 Center for Indoor Air Research?
- 21 A. Until those were dissolved.
- 22 Q. In 1999, right?
- 23 A. Yes. The decision to dissolve them was reached as part
24 of the Master Settlement Agreement in 1998, and it took some
25 time to unwind those organizations, I assume.

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1 Q. But are you aware that the funding from those
2 organizations, for example, CIAR, related to projects that
3 continued on beyond 1999, as far as when they were finished and
4 published?

5 A. I was not aware of that.

6 Q. Well, isn't it true that after 1997, after the Hatch
7 Statement, Philip Morris continued to fund scientists through
8 CIAR's applied projects program?

9 A. I don't know, I didn't have any responsibility for CIAR
10 after May of 1995.

11 Q. And it included -- I'll just ask you if you're familiar
12 with this, for example, funding a study by James Enstrom that
13 was published fairly recently in 2003 in the British Medical
14 Journal, correct?

15 A. I didn't know that.

16 Q. You're not familiar with the British Medical Journal
17 article?

18 A. I'm familiar with the British Medical Journal, I didn't
19 know about that study or that article.

20 Q. And isn't it true, Mr. Parrish, that study received
21 significant media attention here in the United States?

22 A. I've never heard of the study.

23 Q. You were not aware, for example, just going back to the
24 funding date of this, that CIAR paid approximately \$600,000 for
25 the work that Enstrom published?

1 A. I did not know that.

2 THE COURT: What's the name of that article that you're
3 referring to?

4 MR. SCHWIND: I'm not sure of the name, Your Honor, it's
5 the Enstrom Kabat paper that we discussed during Dr. Max
6 Eisenberg's testimony, and it was also discussed during
7 Dr. Samet's testimony as well. We can find that out for the
8 Court during the break.

9 BY MR. SCHWIND:

10 Q. Now, it's also true, as we saw earlier on the Philip
11 Morris Companies' Website, that Philip Morris stated its
12 disagreement with the Surgeon General, and other public health
13 authorities, when it first addressed the passive smoking
14 exposure on its own Website?

15 A. Could I see that again?

16 Q. Sure. I'm going to put it up on the projector again, JD
17 046719. Where Philip Morris Companies included the sentence
18 "even though we do not agree with many of their conclusions,
19 below we have provided some links". Do you see that,
20 Mr. Parrish?

21 A. I see that.

22 Q. So it's true that even in 1999, Philip Morris was part of
23 a debate on the health aspects of passive smoking?

24 A. Well, I'm not sure I would consider that to be a debate.
25 In any way, they changed the Website. That's not what it says

1 anymore.

2 Q. And I think your testimony was you're not sure when the
3 Website was changed, correct?

4 A. Correct.

5 Q. Mr. Parrish, yesterday you spoke for some time on what
6 you did when you -- after you were asked by, I think,
7 Mr. Murray, to take control or find some strategic coherence, I
8 think is the phrase you used, for the Philip Morris ETS or
9 passive smoking program, right?

10 A. Right.

11 Q. And one of the things you said you did was you went out
12 and met with Dr. Wynder, W-Y-N-D-E-R, right?

13 A. That's right.

14 Q. Can you tell me, first, when that meeting with Dr. Wynder
15 was?

16 A. Oh, it would have been in, maybe, April or May, it's a
17 guess, of 1990.

18 THE COURT: Of 19 --

19 THE WITNESS: '90.

20 BY MR. SCHWIND:

21 Q. And you stated yesterday --

22 A. Maybe a little before or a little later, but I think it
23 was in about that time.

24 Q. And you stated yesterday that you met with him anywhere
25 from 8 to 12 times, I believe?

- 1 A. During that initial period I continued to get together
2 with him, really, for the rest of his life.
- 3 Q. And was Dr. Wynder paid for those consultations,
4 Mr. Parrish?
- 5 A. No, he was not.
- 6 Q. At the time he was president of an organization called
7 the American Health Foundation, right?
- 8 A. Correct.
- 9 Q. Now, that was not a government organization, right?
- 10 A. No, it's a private organization.
- 11 Q. And it's sometimes referred to as AHF in various
12 documents?
- 13 A. Right.
- 14 Q. Isn't it true, Mr. Parrish, that at the time you met with
15 Dr. Wynder you were aware that he was receiving, and had
16 received, large sums of money from Philip Morris?
- 17 A. I don't know if I knew he was at the time, because I'm
18 not sure he was, but certainly he had -- the American Health
19 Foundation had done work for Philip Morris -- I think they did
20 some mouse skin painting work for Philip Morris.
- 21 Q. Were you aware of the long association that Dr. Wynder
22 had at the time with the tobacco industry?
- 23 A. I knew that Dr. Wynder had done work for Philip Morris,
24 and maybe some other companies, I'm not sure, but I wasn't aware
25 of the details of it.

1 Q. I'm going to hand you a document marked U.S.
2 Exhibit 85666.
3 Looking at the top of the document, it's a memorandum.
4 We see the names Dr. Helmut Wakeham and R. Fagan, do you see
5 that?
6 A. Yes.
7 Q. Are you familiar with the names of those individuals?
8 A. I'm familiar with the name of Dr. Wakeham, not Mr. Fagan
9 or Ms., whoever that is. I don't know who that is.
10 Q. And who is Dr. Wakeham?
11 A. Dr. Wakeham, at one point in time, was, I believe, the
12 head of R & D for Philip Morris USA.
13 Q. And this document is dated August 1st, 1969, right?
14 A. Right.
15 Q. And it concerns a request for funding from Dr. Wynder,
16 right?
17 A. I haven't read the whole thing, but it looks like that's
18 what it is.
19 Q. And in paragraph 4 we see, "as you might suspect, Wynder
20 would like some unrestricted financial support from the tobacco
21 industry in general, and from each cigarette company in
22 particular." And then we see the last sentence -- well, I'll
23 just read on from there instead of omitting it. "Wynder feels
24 that he has an ally in Roger Saleeby, who will push Wynder's
25 request for funding in the Philip Morris office. Naturally,

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1 Wynder would like to be able to present his ideas to Mr. J.
2 Cullman. Wynder characterizes himself as one of the, quote,
3 'best friends the cigarette industry has'." Do you see that?
4 A. I see that.
5 Q. Now, I'm handing you, Mr. Parrish, a document marked U.S.
6 Exhibit 92067. We see on the first page that this is a personal
7 and confidential -- I'm sorry, fax, from Dr. Tom Osdene to
8 Mr. William Murray, dated November 23rd, 1987, correct?
9 A. Right.
10 Q. If we turn to the next page of the document, we see a
11 list of payments to the American Health Foundation from 1976 to
12 1987, correct?
13 A. That's right.
14 Q. And we see the payments ranging from a low in 1976 of
15 \$125,000 to a high, apparently, in 1986 of 320 -- almost
16 \$325,000, right?
17 A. That's what it says, yes.
18 Q. Were you aware of, maybe not the amounts, but the fact of
19 those payments at the time that you were talking to Dr. Wynder?
20 A. Well, as I said earlier, I was aware that Dr. Wynder had
21 done work and the American Health Foundation, had received
22 monies from the company.
23 Q. All right. Let me show you a document that's been marked
24 U.S. Exhibit 89162. Now, this is a memorandum from FTR Research
25 and Development dated December 1st, 1983, right?

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- 1 A. That's what it says. I've never seen this before, but
2 that's what it says.
- 3 Q. FTR R & D is the Philip Morris subsidiary in Neuchatel,
4 correct?
- 5 A. FTR is, yes.
- 6 Q. And this document is written by W. Fink. You know -- are
7 you familiar with that name?
- 8 A. Yes.
- 9 Q. Who is that?
- 10 A. He was -- I don't know if he is still there, in the
11 Research and Development Department of FTR.
- 12 Q. All right. The subject of the document is VDC Scientific
13 Committee Meeting held in Hamburg on November 9th, 1983, right?
- 14 A. Yes.
- 15 Q. And the VDC is the German Verband, of which Philip Morris
16 was a member, correct?
- 17 A. Philip Morris Germany was -- is a member, yes.
- 18 Q. Is and still is a member, right?
- 19 A. Yes.
- 20 Q. Now, if we can go to the last page of this document I've
21 highlighted some language. "Board decisions. The grant" -- and
22 the second decision "the grant given by the VDC to Professor
23 Wynder was reduced from 100,000 to 60,000 for 1984", correct?
- 24 A. That's what it says.
- 25 Q. Did you know, Mr. Parrish, at the time that you were

1 meeting with Dr. Wynder that he had received funding, not only
2 from Philip Morris but also through the German Verband?
3 A. I don't think I was aware of that.
4 Q. Let me show you another document. This is marked U.S.
5 Exhibit 36899. And this one has your name on it, so I'm hoping
6 you're familiar with it. Now, this is what in your written
7 testimony is referred to as a "PROFS Message", right?
8 A. That's right.
9 Q. And that was the precursor to e-mail in Philip Morris,
10 right?
11 A. That's right.
12 Q. And this particular message is to you from Bob Pages,
13 right?
14 A. That's right.
15 Q. And it's dated January 4th, 1991?
16 A. Right.
17 Q. And according to -- well, first of all, who is
18 Dr. Pages -- who was Dr. Pages at the time of this message?
19 A. He worked, at the time of this message, in Corporate
20 Scientific Affairs.
21 Q. For which entity?
22 A. Philip Morris Management Corporation.
23 Q. Now, Philip Morris Management Corporation -- but do you
24 recall that he served Philip Morris USA and Philip Morris
25 Companies?

1 A. His work was done primarily on behalf of Philip Morris
2 USA. I don't think he did anything for Philip Morris Companies.
3 Q. Now, he says the subject of this message of this PROFS
4 Message is AHF. And I'm going to go down to where you see the
5 highlighted language. "Tom says there is no low-yield cigarette
6 grant. For some years we have given them 50,000 per year
7 unrestricted to support their efforts in epidemiology." And
8 then we see a little farther down, "a personal observation: The
9 epidemiology that has been supported by this money could also
10 easily have been used in their ongoing efforts to study
11 nonsmoker lung cancer and/or diet and cancer." Do you see that?
12 A. Yes.
13 Q. And, again, the date of this is January 4th, 1991?
14 A. That's right.
15 Q. Let's move forward to the document marked U.S.
16 Exhibit 85674.
17 Now, this document, this document, Mr. Parrish, was
18 included with your written testimony. Do you recall it?
19 A. Yes.
20 MR. WEBB: Your Honor, that's actually -- the only
21 objection I have, is that this was in his written direct, so this
22 is just repeating what was already in the written direct. This
23 is not -- anyway, I object to repeating the written direct.
24 MR. SCHWIND: We're not going to repeat the written
25 direct, Your Honor. It's going to connect up to the last message

1 that we saw, the PROFS Message to Mr. Parrish.

2 THE COURT: The objection's overruled.

3 BY MR. SCHWIND:

4 Q. This is the May 3rd 1991 letter from Kraft General Foods

5 to Dr. Wynder; is that right?

6 A. That's right.

7 Q. And your name appears on this document, right?

8 A. That's right.

9 Q. We see a CC up in the upper right-hand corner, and we see

10 a received stamp with your name on it in the lower right-hand

11 corner, right?

12 A. Correct.

13 Q. Now, this, according to this document, Kraft agreed to

14 fund nearly \$2 million over five years to Dr. Wynder, right?

15 A. That's right.

16 Q. And to his American Health Foundation?

17 A. That's right.

18 Q. And the bulk of those funds were to be used to study the

19 role of diet in cancers, which was also referred to in

20 Mr. Pages' personal observation in the last document, right?

21 A. Yes.

22 Q. And you testified yesterday on cross-examination that you

23 considered diet as an ETS confounder, right?

24 A. Potentially.

25 Q. And you were asked questions, obviously many questions,

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1 about Altria Group and Philip Morris Companies, correct,
2 yesterday?

3 A. I'm sorry, could you say that again?

4 Q. You were asked general questions at the beginning of
5 yesterday's cross-examination, questions about the role of
6 Philip Morris Companies?

7 A. Correct.

8 Q. Now, you said yesterday you talked about Kraft, and you
9 mentioned that it was -- it was a package food company, or how
10 did you describe Kraft?

11 A. Package foods company.

12 Q. The second largest package food company in the world,
13 right?

14 A. Right.

15 Q. And you testified that Kraft, as we know, is an operating
16 company of Altria, right?

17 A. Correct.

18 Q. Now, assuming that the work funded here in this letter,
19 and conducted by AHF with the funding from Kraft, resulted in a
20 publication of those results, would it be correct that any
21 attribution would be to Kraft General Foods?

22 A. If there were a publication, it would be because that's
23 where the money was coming from. I'm not sure the work
24 Dr. Wynder was doing for them was that kind of work.

25 THE COURT: Meaning what, that it was -- that it would not

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1 produce a publication?

2 THE WITNESS: Right, that's right, Your Honor. Well, I'm
3 not that familiar with what -- I can explain what I know about
4 Dr. Wynder's work with Kraft General Foods if you like.

5 BY MR. SCHWIND:

6 Q. Well, let me just ask a question, because again, as we
7 saw in the prior document, if we go back to the screen here,
8 again the message from Dr. Pages to you, a personal observation:
9 "The epidemiology that has been supported by this money," and
10 he's talking about support from Philip Morris, right?

11 A. That's right.

12 Q. "Could also easily have been used in their ongoing
13 efforts to study nonsmoker lung cancer and/or diet and cancer,"
14 right?

15 A. Right, that's what it says.

16 Q. And we see "diet", the confounder that you talked about
17 yesterday?

18 A. For lung cancer.

19 Q. For lung cancer?

20 A. Right.

21 Q. And am I correct, that instead of Philip Morris funding
22 this work in its own name, or Altria funding this in its own
23 name, if we go back to the Exhibit 85674, instead Kraft funded
24 this?

25 A. No.

1 Q. Kraft did not fund this?

2 A. Kraft funded it, but not for the reasons you said. I
3 would be happy to explain.

4 Q. Well, in fact, you were in this funding decision,
5 correct?

6 A. No, I was not.

7 Q. Yet your name is listed as a CC on this letter from
8 Kraft?

9 A. Yes, it was, and I'll be happy to explain why.

10 Q. Now, just one moment --

11 THE COURT: Well, why in the world would Kraft Food fund
12 this particular project with a very substantial commitment of
13 almost \$2 million over five years?

14 THE WITNESS: I believe the reason, Your Honor, is this:
15 Dr. Wynder was interested -- the American Health Foundation and
16 Dr. Wynder did work way beyond smoking issues. Dr. Wynder had
17 different ideas about the role of diet, and in particular
18 different types of fat, monounsaturated fat, polyunsaturated fat
19 and the development of different cancers. For example, one of
20 the things he talked about with me from time to time was the role
21 of diet and fat in diet and prostate cancer. One of the things
22 that Dr. Wynder wanted to explore with Kraft was doing some
23 research for them, since it's a food company and its products --
24 a lot of its products have fats in them, what issues there might
25 be and what he might be able to do to contribute to Kraft in

1 terms of formulating products that had healthier types of fats or
2 reduced types of fats. He asked me if I would facilitate a
3 meeting with him and the appropriate person at Kraft, so I
4 arranged for Dr. McVicker to meet with Dr. Wynder, and that
5 happened. Kraft, without any input from me, made a decision to
6 fund the research and I -- that is why I'm sure Dr. McVicker
7 copied me on his letter to Dr. Wynder.

8 THE COURT: Mr. Schwind.

9 BY MR. SCHWIND:

10 Q. And he also copied Dr. Lilly in Philip Morris in
11 Richmond, right, Mr. Parrish?

12 A. Correct.

13 Q. Now, you testified that in addition to Dr. Wynder you
14 discussed passive smoking with a number of scientists within the
15 company, within Philip Morris, right?

16 A. That's right.

17 Q. Did you talk to anyone else about the issue, anyone from
18 outside the company?

19 A. Um, about the issue of environmental tobacco smoke in
20 general?

21 Q. Yes, at the time that you're referring to when you were
22 meeting with Dr. Wynder and internal scientists.

23 A. Yes.

24 Q. Who was that?

25 A. I talked to outside counsel about threatened impending

1 litigation on environmental tobacco smoke. I also talked to
2 outside counsel about the pending, or expected, EPA risk
3 assessment and also potential issues with respect to OSHA.

4 Q. And you're aware of the conclusions of the 1986 Surgeon
5 General's Report, right?

6 A. Yes.

7 Q. Did you talk to any of the contributors, any of the
8 authors of that document?

9 A. I don't, I don't think so, but -- I'm confident I didn't.
10 I can't tell you exactly who the contributors were, but I'm sure
11 I didn't.

12 Q. All right. And just if we could go to page 76 of your
13 written direct testimony, please.

14 A. Okay.

15 Q. All right. We do have page 76. If we could fly out
16 lines 11 to 14, please. You were asked, do you recall and see
17 that the bulk of Kraft's payments to Wynder was to fund a study
18 looking into the role of diet and lung cancer, oral cancer and
19 bladder cancer, right?

20 A. That's what it says.

21 Q. The last part of the answer that you added was "I had no
22 involvement in this work," right?

23 A. Right.

24 Q. Yet you just testified that you did have some involvement
25 in this project, right?

- 1 A. I don't consider introducing him to Dr. McVicker to be
2 involvement in the work. I obviously introduced him, yes.
- 3 Q. Well, you also knew the subject of the study at that
4 point, right, from Dr. Pages?
- 5 A. No, not from Dr. Pages, from Dr. Wynder.
- 6 Q. Well, Dr. Pages --
- 7 A. I don't believe that what Dr. Pages referred to is what
8 Dr. Wynder ended up doing for Kraft General Foods.
- 9 Q. Let's look at that. Dr. Pages told you this money could
10 easily have been used in their ongoing efforts to study
11 nonsmoker lung cancer and/or diet and cancer?
- 12 A. Right.
- 13 Q. Isn't it true that the work that Kraft funded related to
14 the impact of the idea of confounding from diet and cancer?
- 15 A. As it related to Kraft's business.
- 16 Q. Also as it related to lung cancer, right?
- 17 A. I don't know, I was not involved in the research or the
18 project.
- 19 Q. What packaged good or what product does Kraft make that
20 has been proven to cause lung cancer?
- 21 A. I'm not aware of any.
- 22 MR. SCHWIND: My next line of questions, Your Honor, have
23 to do with the binder of exhibits that we're going to put off
24 until later. I would just like to, if I could, reserve that
25 until after, as we spoke, after Mr. Webb has a chance to look at

1 that?

2 THE COURT: Yes, absolutely.

3 BY MR. SCHWIND:

4 Q. Now, Mr. Parrish, yesterday you were asked, and you can
5 correct me if I mischaracterize your testimony, whether -- or
6 the impact of funding on scientific independence, something like
7 that, do you recall that?

8 A. Yes.

9 Q. And what was your statement in response to that line of
10 questioning?

11 A. Well, I think it was to the effect that just because a
12 researcher or a scientist is supported by an entity doesn't in
13 and of itself mean that that research is not independent.

14 Q. Right. If all of it is something like an unrestricted
15 grant, right?

16 A. Unrestricted grant, that's one way of funding research.

17 Q. If I give you \$5 and I say, Mr. Parrish, go off and use
18 my \$5 and conduct a study that you're thinking about conducting,
19 and you go out and conduct your study, write it up and give it
20 to me, it seems like that's fairly independent, right?

21 A. It seems so.

22 Q. That wasn't what was going on with regard to the ETS
23 Consultancy Program, correct?

24 A. I don't think that's exactly what was going on, no.

25 Q. In fact, the money went to the consultants for projects

1 that were reviewed and edited, and changed by lawyers for the
2 tobacco industry, right?

3 A. I think I said yesterday I was not aware of that
4 happening. It may have, I just am not aware of it.

5 Q. All right. I would like to hand you a document that's
6 marked 92065. Your Honor, we talked about this document
7 yesterday, but given the cross-examination of this witness, we
8 believe it's now relevant. The Court brought up yesterday --
9 it's a Shook, Hardy & Bacon bill. The Court indicated yesterday
10 there may be a privilege issue. This document, and you'll see
11 the -- I'll put it on the screen, was produced by Brown &
12 Williamson to the United States in this litigation. And I don't
13 think we're going to hear a privilege objection to this
14 document, and we haven't heard one today.

15 Mr. Parrish, do you recognize what I've handed you?

16 A. Yes.

17 Q. It's a Shook, Hardy & Bacon bill dated October 26th,
18 1990, right?

19 A. Yes.

20 Q. And it's for, we see a subject under the IRS I.D. number
21 of "ETS witness development", right?

22 A. That's right.

23 Q. And we see a number of tasks that Shook Hardy was billing
24 for in this document, right?

25 A. Right.

- 1 Q. And one of them is to review Dr. Clayton's draft
2 submission to the EPA, right?
- 3 A. Yes.
- 4 Q. We have a telephone conference with Dr. Clayton, just
5 under that, not highlighted?
- 6 A. I see that, yes.
- 7 Q. Do you recall that Dr. Clayton's EPA submission is one of
8 the documents that was in the binder that I showed you
9 yesterday?
- 10 A. I think it was, but I'm not positive, but I think so.
- 11 Q. Before I go forward, in October 1990, where were you?
- 12 A. I was working for Philip Morris Management Corporation.
13 I may have -- either had just become or was about to become
14 general counsel of Philip Morris USA.
- 15 Q. We see also in the next highlighted point, "prepare for
16 and attend a meeting with Dr. Bucci," right?
- 17 A. Yes.
- 18 Q. Dr. Bucci's EPA submission was in the binder I handed you
19 yesterday as well, right?
- 20 A. Right.
- 21 Q. The next highlighted document, or the next highlighted
22 volume, "telephone conference of Mr. Teal to discuss EPA
23 comments from Mr. Lee, Dr. Sullivan and Dr. Skrabanek." Do you
24 see that?
- 25 A. Yes.

1 Q. EPA comments from those three individuals, Dr. Lee,
2 Dr. Sullivan and Dr. Skrabanek were always in the binder I
3 provided you yesterday, right?

4 A. I think that's right.

5 Q. And the conference with Mr. Teel, to whom does that
6 refer?

7 A. Keith Teel is a lawyer at Covington & Burling.

8 THE COURT: Let me just interrupt with one question. Does
9 this bill indicate to you, Mr. Parrish, whether it's for time
10 spent by a particular lawyer at Shook Hardy or is this just a
11 monthly or periodic total bill sent out by the law firm, if you
12 know?

13 THE WITNESS: As I recall the way we did it in those days,
14 Your Honor, I would get a detailed summary like this of
15 activities, and then a separate statement of which lawyer spent
16 how much time, but there was no connection between the amount of
17 hours an individual lawyer spent and specific -- well, you can
18 see at the bottom of the page.

19 THE COURT: I think Mr. Schwind is getting to what will
20 answer my question.

21 BY MR. SCHWIND:

22 Q. If we go further down we see the name -- "telephone
23 conference with Dr. Springall," right, regarding his EPA
24 comments?

25 A. Right.

1 Q. Another of the submissions that's in the binder we saw
2 yesterday, right?

3 A. Right.

4 Q. If we go down to the -- past the area that's not
5 highlighted -- "review and revise Dr. Daniel's EPA comments."
6 Do you see that?

7 A. Yes.

8 Q. "Prepare for and attend meeting with Dr. Daniel to revise
9 and finalize his EPA ETS submission." Do you see that?

10 A. Yes.

11 Q. Skipping down to the next highlighted section, "review
12 final drafts of Dr. Springall and Dr. Skrabanek's EPA
13 submissions and prepare memorandum regarding same, review
14 Dr. Bridges' EPA ETS comments." Do you recall that Dr. Bridges,
15 his submission was also included in the binder we saw yesterday?

16 A. Right.

17 Q. "And prepare for and attend meeting with Dr. Bridges to
18 revise his comments," and we see a telephone conference with
19 Dr. Butler regarding Bibra, B-I-B-R-A, draft comments to the
20 EPA." Do you recall also that Dr. Butler's submission was
21 included in the binder?

22 A. I think that's right.

23 Q. And according to this bill, Mr. Andrade, we found out
24 yesterday he's one of the partners at Shook Hardy, right?

25 A. Right.

- 1 Q. Mr. Dryer, I don't think you identified who he was
2 yesterday?
- 3 A. He's also a partner at Shook Hardy.
- 4 Q. These two attorneys for the work that's summarized above,
5 spent what, almost 90 hours of their time?
- 6 A. Right.
- 7 Q. To do the work that they described, right?
- 8 A. That's right.
- 9 Q. Moving to the second page, I just want to point out
10 several of the items that are specifically billed under
11 "expenses". On September 6th, 1990, that was within three weeks
12 of the EPA submissions that we saw yesterday, Bernard O'Neill
13 rented a conference room for a meeting with Dr. Bucci in
14 Atlanta, RE his statement, do you see that?
- 15 A. Yes, I do.
- 16 Q. And who is Bernard V. O'Neil?
- 17 A. He's a partner at Shook, Hardy & Bacon, or he was at that
18 time. I don't know if he still is.
- 19 Q. Now, Mr. Parrish, you testified yesterday that funding
20 alone, in your opinion, did not affect the scientific
21 independence of the consultants; is that right?
- 22 A. Yes.
- 23 Q. It's clear from this bill that what was going on from the
24 tobacco industry was far more than just providing funding for
25 consultants and researchers to write positions, right?

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1 A. That's right.

2 Q. Now, yesterday, Mr. Parrish, your counsel --

3 THE COURT: You know, are you changing topics?

4 MR. SCHWIND: Yes, Your Honor.

5 THE COURT: Okay. Let's take a recess. Everybody has

6 some work to do over the recess, I believe, and we'll take

7 15 minutes, please.

8 (Thereupon, a break was had from 11:01 a.m. until

9 11:18 a.m.)

10 THE COURT: Mr. Schwind, please.

11 MR. SCHWIND: Thank you, Your Honor.

12 BY MR. SCHWIND:

13 Q. Mr. Parrish, I would like to move now to another exhibit

14 that your counsel used with you yesterday. This is a document

15 that was marked JD 080154. It's titled: "Choices in Risk

16 Assessment: The Role of Science Policy in the Environmental

17 Risk Management Process." Do you see that?

18 A. Yes, I do.

19 Q. And I think this, according to your counsel's questioning

20 yesterday, this document contains some material that was

21 favorable to the industry's position on secondhand smoke, right?

22 MR. WEBB: Your Honor, I'm going to object. Yesterday I

23 did try to get into certain paragraphs in this document dealing

24 with relative risk and how you consider relative risk and what's

25 considered causative. You then stopped me and said that you

1 thought it was too far afield. The witness had not seen the
2 document before, so I did not get to publish any part of this
3 document because you sustained counsel's objection to it. My
4 objection is to them going into the document now.

5 MR. SCHWIND: Your Honor, we're not going to talk about
6 the specific section of the document that Mr. Webb wanted to
7 read. We're going to talk about another aspect of this.

8 MR. WEBB: Right.

9 THE COURT: Of the document, though?

10 MR. SCHWIND: Of the document, yes.

11 THE COURT: But he wasn't allowed to get into the document
12 at all.

13 MR. WEBB: Right.

14 MR. SCHWIND: Your Honor, without telling him where I'm
15 going, it relates to Mr. Parrish's cross-examination testimony as
16 far as independence of consultants.

17 MR. WEBB: Your Honor, counsel didn't -- if they wanted
18 this document to be used, they did not have to object to the use
19 of this document. When they blocked me from using this document
20 in any way, they should not be now allowed to use this document.
21 They objected to it.

22 MR. SCHWIND: Your Honor, again, I'll make it clear very
23 quickly that I'm not going into the substance of this document in
24 any way.

25 THE COURT: I understand that. I will hear a question or

1 two and judge things as we go along. Let me hear. But for now,
2 the objection's overruled.

3 Go ahead. Let me hear the questions.

4 BY MR. SCHWIND:

5 Q. Do you recall this document, Mr. Parrish?

6 A. Yes. I saw it yesterday.

7 Q. I would like to go to the page marked roman numeral
8 number 4. And this is within the "Forward" from the persons who
9 put this together. The names of the persons who put this study
10 together or this publication together are Steven Milloy, Pamela
11 Aycock and Jason Johnston. Do you see that?

12 A. Yes, I do.

13 MR. WEBB: Your Honor, I don't know where counsel is
14 going, but clearly, he's using the document now to make some
15 point and I thought he was just going to -- anyway, I object to
16 using this document. He's now publishing sections of a document
17 that I was not allowed to publish anything from.

18 MR. SCHWIND: Your Honor --

19 THE COURT: Overruled for now. I may be striking all this
20 testimony, but I may not be.

21 So just get to the point, Mr. Schwind, please.

22 MR. SCHWIND: Yes, Your Honor.

23 BY MR. SCHWIND:

24 Q. Mr. Parrish, who is Steven Milloy?

25 A. At this point in time, I'm not sure what his job was. At

1 one point in time, I believe he had consulted with Dr. Borelli
2 on some matters -- Dr. Borelli, who worked for me.

3 Q. Dr. Tom Borelli at Philip Morris?

4 A. That's right.

5 Q. You're also aware that he was the Executive Director of
6 an organization called the Advancement of Sound Science
7 Coalition or TASSC here in Washington, right?

8 A. I remember that he was involved in that organization; I'm
9 not sure what his title was, but sure.

10 Q. TASSC was set up by the tobacco industry, right?

11 A. I'm not sure what company supported it. Certainly Philip
12 Morris did.

13 MR. WEBB: Your Honor, I am going to -- it's clear
14 counsel -- counsel is now suggesting that I used this document to
15 support a pro-industry position and that the authors of it had a
16 bias -- that's what he's doing, okay -- when in fact I didn't get
17 to use the document to support the industry position. So how is
18 it relevant to prove that an author had a bias?

19 MR. SCHWIND: What I'm trying to do, Your Honor, is show
20 what the industry was able to do as far as their funding to
21 generate publications that supported what was the industry's
22 position on ETS without any attribution, without any idea. And
23 it goes to the idea of independence that Mr. Parrish testified to
24 yesterday on cross-examination.

25 MR. WEBB: And, Your Honor, I object. This is a project

1 that was funded and published by the United States Government
2 Laboratory and then I did not get allowed to go into it so they
3 should not be allowed to show bias of an author of a document
4 that I was not allowed to go into.

5 THE COURT: I have to sustain the objection. I do. Go
6 ahead, please.

7 BY MR. SCHWIND:

8 Q. Just to clarify one thing, this is not a United States
9 government document, right, Mr. Parrish?

10 A. I've never seen the thing until yesterday and I haven't
11 read any of it.

12 Q. In fact, the laboratory that prepared it was Sandia
13 National Laboratories, right?

14 A. That's what that says.

15 Q. That's not a government laboratory, right?

16 A. I've never heard of Sandia Laboratories.

17 Q. It's contractor-operated; isn't that right?

18 A. I don't know.

19 MR. SCHWIND: Your Honor, if I can go back to something
20 that you asked about during the last session, the Enstrom and
21 Kabat 2003 study that was funded through CIAR that was marked as
22 U.S. Exhibit 65086 and it's already been admitted with the
23 testimony of Dr. Eisenberg --

24 THE COURT: All right.

25 MR. SCHWIND: -- some time ago, I believe back in

1 November.

2 BY MR. SCHWIND:

3 Q. Mr. Parrish, yesterday you also talked about the OSHA

4 proposed rulemaking procedure, right?

5 A. Right.

6 Q. And where OSHA was proposing to publish or pass some

7 regulations relating to indoor air quality, including

8 environmental tobacco smoke, right?

9 A. That's right.

10 Q. And in fact the industry, of course, responded to that in

11 a public hearing type setting, correct?

12 A. Correct.

13 Q. And the rule was -- or the proposed rule was eventually

14 withdrawn, correct?

15 A. Right.

16 Q. I'm going to hand you a document that's marked U.S.

17 Exhibit 92068. This is the OSHA news release dated December

18 14th, 2001. Do you see that?

19 A. Yes.

20 Q. Have you seen this document before?

21 A. I may have. I don't have a specific recollection, but --

22 MR. WEBB: Your Honor, I guess I'm going to object to the

23 use of this document. If it's being offered to prove up a

24 statement by this government official as to why they did not

25 proceed with their rulemaking authority, it's being offered for

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1 the truth of the matter asserted; in other words, the reasons why
2 the government chose to abandon OSHA's rulemaking authority. And
3 therefore, I object because it's hearsay.

4 I mean, if they want to bring in someone from OSHA and
5 explain why they dropped this rulemaking authority, I would
6 certainly like to cross-examine that witness as to why they
7 withdrew their rulemaking authority.

8 And if they're going to offer this into evidence and
9 substitute for live testimony from an assistant secretary for
10 OSHA, then it's being offered for the truth of the matter
11 asserted and I object it's hearsay.

12 THE COURT: Mr. Schwind?

13 MR. SCHWIND: Your Honor, yesterday Mr. Webb offered or
14 showed this witness this document, which is another --

15 MR. WEBB: This document?

16 MR. SCHWIND: Yes. This document I have on the screen
17 right now, JD 003074. This was an OSHA public document dated
18 December 17th, 2001, three days after the press release that I'm
19 attempting to show the witness. They opened up this testimony.

20 We're not offering it for the truth. We're offering it
21 just to get Mr. Parrish's confirmation as to certain thing that
22 OSHA did and his understanding of why they did it.

23 MR. WEBB: And my objection goes to --

24 THE COURT: Objection sustained.

25 MR. WEBB: Thank you.

1 THE COURT: What is more, my quite firm recollection of
2 yesterday's testimony was that there was simply one question
3 asked of Mr. Parrish -- Didn't OSHA withdraw the rulemaking
4 ultimately? -- even though certainly there was discussion prior
5 to that about the rulemaking itself.

6 But in terms of the cessation of the rulemaking, there was
7 one question: Didn't OSHA ultimately withdraw it? The answer
8 was "Yes" and that was the end of it.

9 So the objection is sustained.

10 MR. SCHWIND: All right. I'll ask the question this way,
11 without the document, Your Honor.

12 BY MR. SCHWIND:

13 Q. Isn't it true, Mr. Parrish, that the proposed
14 regulation -- the proposed rule was withdrawn with the support
15 of even antismoking groups?

16 A. I don't know. And the reason I say that is because by
17 the time it was -- this decision was made by OSHA, I had been in
18 my current job for about six years and was not involved in the
19 ETS issues at all.

20 Q. Can you at least confirm that OSHA withdrew the rule
21 without any causal conclusion or comment on the health aspects
22 of ETS in the workplace?

23 MR. WEBB: Your Honor, I object. The witness has now just
24 said he has no personal knowledge about why they withdrew the
25 rule and now counsel is trying to ask him the same question all

1 over again.

2 MR. SCHWIND: I'm not asking why, Your Honor. I'm asking
3 just -- I'm not asking the why. I'm just asking for the fact
4 that OSHA did not reach any causal conclusion as to the substance
5 of the proposed rule.

6 THE COURT: He may answer that question, if he can.

7 THE WITNESS: Not that I know of, they didn't -- or it
8 didn't.

9 BY MR. SCHWIND:

10 Q. Another document that you were shown yesterday,
11 Mr. Parrish, was marked JD 003080. And this was the
12 Congressional Research Service testimony before a Congressional
13 subcommittee on May 11th, 1994. Do you see that?

14 A. Yes.

15 Q. Do you recall the questioning on that document yesterday?

16 A. In general, yes.

17 Q. And you described for us what CRS was, right?

18 A. Correct.

19 Q. Now, isn't it true that the two individuals who
20 testified, one was a Dr. Gravelle, who was a Senior Specialist
21 in Economic Policy; the other was a Dr. Zimmerman, who was a
22 Public Finance Specialist?

23 A. Right.

24 MR. WEBB: Your Honor, I'm going to object to this line of
25 questioning. I was trying to remember what happened yesterday

1 and I just remembered.

2 The government objected when I used this document. You
3 then sustained the objection, not on the grounds of -- you said
4 the document's in evidence, because it is in evidence; this
5 document's in evidence and, therefore, I then stopped inquiring.
6 I just said since it's in evidence, I won't go into the document
7 with this witness and I abandoned it.

8 MR. SCHWIND: But he was allowed, Your Honor -- the
9 witness was allowed to describe his opinion of what the CRS was
10 and its level of authority and independence. I can't remember
11 Mr. Parrish's exact words, but before you did sustain the
12 objection, this witness did talk about CRS.

13 The only testimony I'm going to elicit is exactly what I've
14 asked, which is the positions of the persons who gave the
15 testimony to Congress.

16 THE COURT: You may ask about that subject only, not about
17 the substance of the report or the testimony they presented.

18 MR. SCHWIND: Thank you, Your Honor.

19 BY MR. SCHWIND:

20 Q. Isn't it true, Mr. Parrish, that neither person who
21 prepared or who gave this testimony was within the public health
22 authority -- within any public health authority?

23 A. No. My assumption was they were employed by CRS, but
24 maybe that's not right.

25 Q. Right. Not a public health authority, right?

1 A. Right.

2 THE COURT: I think that question is very unclear,
3 Mr. Schwind. I think what you're trying to ask is whether either
4 of those people was employed by any government agency with public
5 health responsibilities. Is that your question?

6 MR. SCHWIND: Or any recognized authority on issues of
7 smoking and health.

8 BY MR. SCHWIND:

9 Q. Or I can ask it that way: Governmental or
10 nongovernmental, for that matter?

11 A. Well, as I said, they were, I thought, employees of CRS.

12 Q. Correct. So to your knowledge the answer is "No," right?

13 A. Right. I mean, that's all I know, is that I think they
14 were employed by CRS.

15 Q. Now, Mr. Parrish, yesterday you were also asked several
16 questions about the EPA Risk Assessment and you indicated during
17 that testimony that the EPA obtained a risk estimate of 1.19 for
18 the increased risk of lung cancer for passive exposure, correct?

19 A. That's my recollection.

20 Q. And at that point in the testimony, the Court asked you
21 what the risk estimate was using the 95 percent confidence
22 interval, right?

23 A. Right.

24 Q. And that was after you talked about your understanding
25 that EPA had reduced the confidence interval to 90 percent?

- 1 A. That was my understanding, yes.
- 2 Q. And at that point in the testimony, you answered that you
3 thought that the risk estimate, if we went to a 95 percent
4 confidence interval, went down to something awfully close to 1,
5 didn't you?
- 6 A. That's my recollection.
- 7 Q. Now, again, I'm not going to get too far into the
8 epidemiology of this, but I think I'm going to go into it as far
9 as you know. Isn't it true that you were answering a question
10 about the confidence interval, not what the risk estimate is,
11 right?
- 12 A. Well, I guess when I heard the question, I thought it was
13 a bit of both.
- 14 Q. Well, the fact is, Mr. Parrish, and you can confirm this,
15 the risk estimate does not change based on a confidence
16 interval, right -- a change in the confidence interval?
- 17 A. I guess I thought it was. Maybe I'm wrong.
- 18 Q. Well, bear with me here. For example, you've seen the
19 meta-analyses type documents on various epidemiology studies,
20 right?
- 21 A. Some.
- 22 Q. And you've seen where they have a graph with a confidence
23 interval and then a point estimate in the middle of that?
- 24 A. I'm not -- I may have seen something like that. I don't
25 recall it as I sit here today.

1 Q. Well, isn't it true, Mr. Parrish, that when we reduce the
2 confidence interval, it expands that line, but the risk
3 estimate --

4 A. I see what your point is, yeah. I think that's right.

5 Q. So the risk estimate that's the center point there in
6 that line does not change at all, right?

7 A. I think that -- I think you're right.

8 Q. So when the EPA moved from a 95 percent confidence
9 interval to a 90 percent confidence interval, the relative risk
10 of 1.19 stayed the same, right?

11 A. I think that's right. And the range expanded so that one
12 end of the range would have been close to zero. I guess that's
13 the way I should have said it. I think that's right.

14 Q. The bottom end of that range?

15 A. Yes, the bottom end.

16 Q. Now, Mr. Webb also asked you --

17 THE COURT: I have to emphasize something. Mr. Parrish is
18 not an expert in statistics and I'm sure he recognizes that. And
19 he's not an expert in epidemiology, although this isn't just an
20 issue of epidemiology.

21 I don't think any government expert has directly addressed
22 this issue. I could be wrong about that, certainly. But I would
23 hope that if nobody has, that somebody will. I would imagine
24 somebody will on the defense side, but I don't know. And if my
25 memory is wrong about testimony directly addressing how

1 confidence levels impact the risk assessments, then it would be
2 useful to me if the government simply filed a praecipe so that
3 the defense knows what they're doing, pointing out that testimony
4 to me.

5 MR. SCHWIND: Yes, Your Honor. Dr. Samet did cover that
6 material months ago and we can point that out to the Court.

7 THE COURT: All right. Go ahead.

8 BY MR. SCHWIND:

9 Q. Mr. Parrish, Mr. Webb asked you yesterday whether, if you
10 go slightly over unity, unity being 1 -- a relative risk of 1,
11 right?

12 A. Correct.

13 Q. If you go slightly over unity and you have that weak of
14 an association, there's a point considered statistically
15 insignificant. Do you recall that?

16 A. Yes, I think so.

17 Q. The question of statistical significance, Mr. Parrish,
18 turns only on the confidence interval, not the relative risk,
19 right?

20 MR. WEBB: Your Honor, I do actually think he's now --
21 unless you're expert in epidemiology and confidence levels, this
22 keeps -- I clearly did not offer him as that. I did not --

23 THE COURT: I'm going to sustain the objection, with all
24 due respect to Mr. Parrish. I just -- he's not the proper person
25 to testify about it.

1 MR. SCHWIND: Well --

2 THE COURT: And obviously, that judgment weighs in on how
3 much weight I'm going to give to the underlying testimony he
4 gave, which is what the government's trying to attack in its
5 redirect.

6 MR. SCHWIND: Thank you, Your Honor.

7 BY MR. SCHWIND:

8 Q. In cross-examination, you were also asked about risk
9 estimates in the context of what Philip Morris called GEPs or
10 Good Epidemiological Practices, right?

11 A. Right.

12 Q. And you recall that yesterday?

13 A. Yes.

14 Q. And you testified that if there had been uniform
15 guidelines referring to a cutoff of 2.0, a relative risk of 2.0,
16 then EPA, for example, wouldn't have been allowed to declare
17 environmental tobacco smoke a Group A carcinogen, correct?

18 A. I think it would have been much more difficult for them
19 to do that.

20 Q. So you're changing it today to just "much more
21 difficult"; is that right?

22 A. Well --

23 MR. WEBB: Your Honor, if he's going to impeach him, show
24 him his testimony from yesterday because I don't think that's
25 exactly what he said yesterday, but I don't have -- if he's got

1 something that he said yesterday that he wants to call to his
2 attention and then see if he's changing his testimony, he ought
3 to use the testimony and not some vague recollection of it,
4 because I'm not going to swear to it, but that's not what I think
5 he said yesterday.

6 MR. SCHWIND: Your Honor, the witness, I think, can
7 confirm, if he can recall what he said yesterday.

8 THE COURT: Why don't you ask him if he can recall. I
9 have a pretty clear recollection.

10 BY MR. SCHWIND:

11 Q. Do you recall stating yesterday that the EPA, for
12 example, wouldn't have been allowed to declare environmental
13 tobacco smoke a Group A carcinogen?

14 A. I may be thinking of a different question, but I thought
15 what I said was that if the association were less than 2, that
16 that would be a very important consideration for the EPA or
17 anybody else and make it even more important that things like
18 confounders and misclassification and other types of bias be
19 considered; and that would, in my opinion, have made it much
20 more likely that EPA could not have declared ETS a Group A
21 carcinogen and it would have been something more appropriately
22 for a Group B or something else.

23 Q. Well, you also said that if the EPA classified ETS as a
24 Group A carcinogen, Philip Morris was concerned that the
25 classification would lead to more workplace smoking

1 restrictions, right?

2 A. Right.

3 Q. And you identified that in your examination yesterday by

4 Mr. Webb as the reason for Philip Morris's concern, right?

5 A. That was part of the reason for our concern. The other

6 thing we were concerned about is we thought that the science had

7 not been properly evaluated.

8 Q. Well, the concern was, though, for Philip Morris,

9 workplace smoking restrictions, right?

10 A. Because of what we thought was the faulty science, yes.

11 Q. Well, because of the classification of ETS as a Group A

12 carcinogen?

13 A. Yes, correct.

14 Q. Because isn't it true that an increase in workplace

15 smoking restrictions would lead to an overall decrease in

16 smoking and would hurt the profits of Philip Morris USA and

17 Altria Group?

18 A. I think there was a concern about that. I'm not sure

19 anybody knew. I think that was the concern, though.

20 Q. Profits were the concern, right?

21 A. No. Here's what I was trying to say is sure, profits are

22 a concern, but I don't think anybody knew that increases in

23 workplace smoking restrictions was necessarily going to lead to

24 a decline in consumption, but there was a concern about that and

25 what impact that would have on the business.

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1 Q. Do you remember from two days ago we talked about
2 Mr. Camilleri's speech back in November, right? Three
3 objectives: Growing earnings --
4 A. Right.
5 Q. -- resolving litigation --
6 A. Right.
7 Q. -- rewarding shareholders?
8 A. Right.
9 Q. Increased workplace restrictions would hurt each of those
10 three objectives, right?
11 A. Not necessarily.
12 Q. But most likely, right?
13 A. I don't think -- no, I won't agree with that. I'll be
14 happy to explain, as I was the other day.
15 Q. No, that's fine, Mr. Parrish. Let's talk next about the
16 McGill Symposium. You were asked on cross-examination some
17 questions about the disclosure of the tobacco industry's
18 involvement in that conference, correct?
19 A. Correct.
20 Q. I would like to refer you to the document that they
21 showed you marked U.S. Exhibit 65706 and -- just one moment.
22 I'd like to go to the page that Mr. Webb showed you of
23 that exhibit and this is the page marked -- the last four of the
24 Bates number are 0007. And again, we're within the document
25 marked U.S. Exhibit 65706.

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1 And it talks about, in the first paragraph: "The
2 International Symposium on Environmental Tobacco Smoke" held on
3 November 3rd and 4th, 1989 at McGill University, Montreal,
4 Canada was made possible by a tobacco industry grant and by
5 grants and other support from the following co-sponsors."

6 Do you see that?

7 A. Yes, I do.

8 Q. And just to assist you, Mr. Parrish, I'm going to hand
9 you back what you were given yesterday, the U.S. Exhibit, again,
10 65706, the Proceedings of the McGill Conference that this page
11 is drawn from.

12 Can you turn to that page, please.

13 A. Okay.

14 Q. Now, is it your testimony, Mr. Parrish, that the
15 involvement by the tobacco industry is fully and fairly
16 disclosed within these proceedings?

17 A. Well, I'm not exactly sure what you mean, but I think
18 what this discloses is that there was a tobacco industry grant.
19 And that's really all it says.

20 Q. Let's look at that a little bit. I would like to first
21 hand you a document that's been marked U.S. Exhibit 22932. And
22 this is a memorandum, a Philip Morris International memorandum
23 marked "Strictly Confidential" to Mr. William Murray from, I
24 believe his name is Andrew Whist, right?

25 A. Correct.

1 MR. WEBB: Your Honor, I'm going to object to this
2 document and I'll tell you why. Yesterday, the reason I asked
3 Mr. Parrish one question about whether that symposium disclosed
4 that there was tobacco industry funding is because the government
5 in its written direct had a question that said that this was a
6 covert project, so I showed him one question to bring out that it
7 clearly wasn't covert because it was listed on the face of the
8 symposium that it was sponsored by the -- it was funded by the
9 tobacco industry in part.

10 Counsel can go through all kinds of documents that this
11 witness has no -- this document is not -- this witness is not
12 copied on this document; he has nothing to do -- he wasn't even
13 working at the company at the time that this symposium was
14 conducted. And so to cross-examine him on underlying documents
15 is outside the scope of my cross-examination.

16 MR. SCHWIND: Your Honor, it's -- well, it's not beyond --

17 THE COURT: Go ahead.

18 BY MR. SCHWIND:

19 Q. Mr. Parrish, you're familiar --

20 THE COURT: Let me be clear. I thought you were going to
21 say something different.

22 The objection is overruled. When this came up yesterday
23 and that question and answer were given, I had some notion of
24 what I might hear from the government on redirect.

25 BY MR. SCHWIND:

1 Q. You worked for Mr. Murray when you were originally hired
2 by Philip Morris, correct?

3 A. Correct.

4 Q. And in fact, he was the one who told you -- gave you the,
5 for lack of a better word, the mandate to go forward and
6 coordinate the Philip Morris ETS effort, right?

7 A. That's right.

8 Q. And you indicated during my examination earlier that, I
9 believe yesterday, that you were familiar with the McGill
10 Symposium, correct?

11 A. After I came with the company, I became familiar with it.

12 Q. I would like to talk to you about what's in the
13 highlighted paragraph. Well, let me ask you first, did you know
14 Mr. Whist?

15 A. Yes.

16 Q. What was his position?

17 A. At the time, I think he was in Corporate Affairs for
18 Philip Morris International.

19 Q. And he wrote: "What we have been planning over the past
20 several days is a major international symposium which would be
21 both closed and private until the release, shortly after the
22 symposium, of a monograph summarizing the proceedings."

23 Let me just stop there. Were you aware, Mr. Parrish,
24 after you came on board or after -- even when you were at Shook
25 Hardy, that this symposium was planned to be both closed and

1 private until after it was over?

2 A. No.

3 Q. Mr. Whist then wrote that: "Our goal, of course, is to
4 produce an impressive document that would have the potential of
5 neutralizing two reports that are scheduled to be released near
6 the end of this year." And the two reports are the ETS Risk
7 Assessment and then a Canadian assessment at Rockefeller
8 University. Do you see that?

9 A. I see that, yes.

10 Q. Now, did you know when you came on board at Philip Morris
11 that the purpose of this symposium was to generate a document, a
12 book, a statement of proceedings that could be used to
13 neutralize the two assessments in this paragraph?

14 A. No, I didn't.

15 Q. Now, these facts in this paragraph are not disclosed
16 anywhere within the actual published proceedings of the McGill
17 Symposium, right?

18 A. Not that I know of.

19 Q. I want to go back to that same page within the McGill
20 Proceedings, U.S. Exhibit 65706, and talk to you about the
21 other -- your familiarity with the other entities that are
22 listed here as being grantors or co-sponsors, the following
23 co-sponsors listed there.

24 First of all, we see McGill University itself, right?

25 A. Yes.

- 1 Q. This was Professor Ecobichon's university, right?
- 2 A. I don't know.
- 3 Q. You don't know that name?
- 4 A. I don't.
- 5 Q. The second list there is -- or the second on the list
- 6 there is Healthy Buildings International. You're familiar with
- 7 that name, right?
- 8 A. Yes.
- 9 Q. That's a long-time tobacco industry-funded group,
- 10 correct?
- 11 A. Yes. Company.
- 12 Q. And they're called here a co-sponsor, right?
- 13 A. That's right.
- 14 Q. In your experience, Mr. Parrish, did the money go from
- 15 the tobacco industry to HBI or from HBI to the tobacco industry?
- 16 A. I don't understand the question.
- 17 Q. Who was paying whom, Mr. Parrish, between the tobacco
- 18 industry and Healthy Buildings International?
- 19 A. I think that tobacco industry paid HBI.
- 20 Q. With -- the next entity up there is the Institut
- 21 Fresenius in Neuhof, Germany. Do you see that?
- 22 A. Yes.
- 23 Q. Are you aware that Philip Morris Europe had a research
- 24 contract with this institute?
- 25 A. I seem to recall the name Fresenius, so I'll assume

1 that's the same -- I thought there was an individual named
2 Dr. Fresenius, but maybe I'm wrong about that.

3 Q. Are you -- we'll go to another one on the list, the
4 Hanyang University in Seoul, Korea. Are you aware that that was
5 the university where at least one of the industry's consultants
6 who attended this conference worked?

7 A. No, I was not.

8 Q. The Institute of Environmental and Industrial Medicine --
9 I'm sorry -- the Institute For International Health and
10 Development in Geneva -- are you familiar with that
11 organization?

12 A. I don't think so.

13 Q. Mr. Parrish, isn't it true that this is the organization
14 who worked with Philip Morris to influence the World Health
15 Organization?

16 A. I'm not aware of that.

17 Q. The National -- the next one, the National Energy
18 Management Institute here in nearby Alexandria -- are you aware
19 that that's the organization of another Tobacco Institute
20 consultant, Frank Powell?

21 A. No.

22 Q. And we see the last name on the -- the last name on the
23 list, the School of Pharmacology at Sunderland Polytechnic in
24 Sunderland -- are you aware that that was also the school where
25 one of the ETS consultants worked?

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- 1 A. No.
- 2 Q. And in fact, if we -- are you familiar with any of the
3 names on this list?
- 4 A. The only name that is familiar to me is HBI.
- 5 Q. I just want to talk about one other document related to
6 McGill. I'm going to hand you what's been marked U.S.
7 Exhibit 22731.
- 8 The first page of this exhibit is a cover letter from
9 Covington & Burling, a person named Michael Buckley. Do you
10 know Mr. Buckley?
- 11 A. I believe I've met him.
- 12 Q. And was he one of the attorneys at Covington & Burling?
- 13 A. Yes.
- 14 Q. And this is a letter to Kay Thomas at the Tobacco
15 Institute. Do you or did you know her as well?
- 16 A. Yes.
- 17 Q. It's dated January 19th, 1990. And the subject is
18 "McGill Symposium." And Mr. Buckley wrote that he was attaching
19 a list of expenses associated with the McGill Symposium. Do you
20 see that?
- 21 A. Yes, I do.
- 22 Q. If we turn to the next page of this document, we see the
23 beginning of the list of those expenses. And we see a number of
24 names you probably recognize as industry ETS consultants, right?
- 25 A. I recognize some of these names as industry consultants,

- 1 yes, not all of them.
- 2 Q. That Covington & Burling was billing to the Tobacco
3 Institute for these persons' expenses, right?
- 4 A. That's what this appears to say, yes.
- 5 Q. And I have one -- there's some other items. One is
6 Healthy Buildings International again, right?
- 7 A. Right.
- 8 Q. And we see a fee of a thousand dollars for Healthy
9 Buildings International and expenses of just over \$1,100. Do
10 you see that?
- 11 A. I see that.
- 12 Q. So what we saw before is that HBI is being listed as a
13 sponsor of the McGill Symposium and yet they're being paid --
14 they were paid, according to what Mr. Buckley was billing the
15 Tobacco Institute for, right?
- 16 A. I can't tell what this is for from this document.
- 17 Q. If we go to the -- oh, if I can go down a little farther,
18 we see Associates for Research on Indoor Air, ARIA, right?
- 19 A. Right.
- 20 Q. If you go to page -- the next page of the document,
21 continuation of the list, you may see some more names you're
22 familiar with. Dr. George Leslie, right? Do you know him?
- 23 A. I don't know him, but I know the name.
- 24 Q. Dr. Francis Roe?
- 25 A. The same.

- 1 Q. Tobacco industry consultants, right?
- 2 A. Yes.
- 3 Q. I've highlighted several items where McGill -- or where
- 4 Covington & Burling is billing the Tobacco Institute for
- 5 payments made to McGill. Do you see that?
- 6 A. Yes, it looks like that's what that says.
- 7 Q. Now, according to the sheet we just looked at, McGill and
- 8 specifically the Department of Pharmacology and Therapeutics was
- 9 listed as a co-sponsor of the event, right?
- 10 A. Right.
- 11 Q. Now, in your just familiarity with the ways of the world,
- 12 Mr. Parrish, if you're a sponsor -- if you're sponsoring
- 13 something, would you expect to be paying or being paid for that
- 14 sponsorship?
- 15 A. Paying.
- 16 Q. And yet we see, according to Mr. Buckley's list, that the
- 17 industry paid through Covington & Burling over a hundred
- 18 thousand dollars?
- 19 A. I don't know what Mr. Buckley's statement means and I
- 20 don't know what McGill did. I mean, I just don't know.
- 21 Q. If we turn to the next page, the last page of the list,
- 22 I've highlighted another name, the Institute For International
- 23 Health and Development, which, again, was also one of the listed
- 24 co-sponsors. Do you see that?
- 25 A. Yes, I do.

1 Q. And now we see that Covington & Burling is billing the
2 Tobacco Institute for a \$120,000 payment to an organization that
3 was advertised in the proceedings as a co-sponsor. Do you see
4 that?

5 A. Yes.

6 Q. And then just under that, we see that Covington & Burling
7 billed the industry -- or billed the Tobacco Institute \$262,000
8 for its services in conjunction with that conference, right?

9 A. That's right.

10 THE COURT: Of course, we don't know whether that was the
11 total bill, do we, Mr. Parrish?

12 THE WITNESS: I certainly don't, Your Honor.

13 THE COURT: It's indicated as the fourth quarter bill,
14 right.

15 THE WITNESS: Right.

16 BY MR. SCHWIND:

17 Q. Mr. Parrish, that's all I have on the McGill Symposium.
18 I would like to discuss one more aspect of your testimony
19 yesterday.

20 You were asked a series of questions about -- with
21 respect to the -- I think it was with respect to the OSHA
22 rule-making. You stated that -- or Mr. Webb characterized that
23 as a trial, right?

24 A. Right.

25 MR. WEBB: I called it an "administrative trial," is what

1 I called it, if you look at the record, okay.

2 THE COURT: All right.

3 BY MR. SCHWIND:

4 Q. And you agree with that characterization, right?

5 A. Yeah, I referred to it, I think, as a hearing but --

6 Q. And you stated words to the effect of up until that date

7 that was the only time that ETS signs actually was put into the

8 process of a trial to find out what the truth was, right?

9 A. I said -- and then I think a bit later I said that I

10 didn't know if there had been any individual environmental

11 tobacco smoke lawsuits that had preceded that, I didn't know.

12 Q. You didn't know?

13 A. No. I think -- I thought that was the first time, but

14 there may have been individual lawsuits.

15 Q. Well, I'm going to hand you a document that's marked U.S.

16 Exhibit 65089 and see if you're familiar with this one.

17 A. Yes, I am.

18 Q. And what have I handed you, Mr. Parrish?

19 A. This is the decision in the AFCO case that we talked

20 about yesterday.

21 Q. And the AFCO decision followed a trial in Australia,

22 correct?

23 A. That's correct.

24 Q. A trial that was precipitated by a statement from the

25 Australian Tobacco Institute that, "there is little evidence and

1 nothing which proves scientifically that cigarette smoke causes
2 disease in nonsmokers," correct?

3 A. That's correct.

4 Q. If we turn to the -- and you were involved in that trial
5 in some way, right?

6 A. I served in a supervisory role for Philip Morris
7 International, yes.

8 Q. And you know that a number of experts testified from both
9 sides in that case, correct?

10 A. Absolutely, absolutely.

11 Q. If we turn to the second page of that exhibit, number 6,
12 "these are within the Court's findings, in relation to the
13 disease of cancer, the statement, this is referring to the
14 Tobacco Institute of Australia's statement, was erroneous and
15 was misleading and deceptive both in 1986 and to date because A,
16 far from there being little evidence that cigarette smoke caused
17 disease in nonsmokers, there was much evidence to that effect,
18 irrespective of whether the primary articles alone were regarded
19 as evidence for the purposes of the advertisement, or regard was
20 also had to the major reviews; and B, a review of the totality
21 of the available data leads to the conclusion that there was
22 scientific proof in the sense that there was compelling
23 scientific evidence that cigarette smoke caused lung cancer in
24 nonsmokers." Correct?

25 A. Correct.

1 Q. And so, in contrast to your testimony yesterday,
2 Mr. Parrish, there was -- there had been a trial on the health
3 effects of ETS, correct?

4 A. Right, I was thinking of the United States, I apologize
5 for that. You're right.

6 Q. And Mr. Parrish, I just want to confirm the date of that
7 opinion was what, approximately?

8 A. Um, I'm not sure. You know, this went up and down on
9 appeal, I think, and I can never remember which. This says
10 1991, I think. Well, wait a minute, one page said 19 -- I don't
11 know. Let me look before I say.

12 Q. Well, according to the reporter, we see on the second
13 page the book itself, the upper right-hand corner we see 1991,
14 right?

15 A. Right, but the reason I paused was because on the page
16 before over at the left it says 1990, so I guess the 1991 refers
17 to the AFCO decision.

18 Q. Mr. Parrish, I need to go back to something I was asking
19 you about earlier because I apparently overlooked several
20 questions about the GEPs, the good epidemiological practices, if
21 we could go back to that.

22 Are you familiar with a class of cardiovascular disease
23 medications known as statins, drugs such as Lipitor, which is
24 advertised frequently on television?

25 A. I've seen those ads.

1 Q. Are you aware that statins, like Lipitor, can reduce the
2 risk of a heart attack by as much as 30 percent?

3 A. I wasn't --

4 MR. WEBB: Your Honor, I'm going to object. I don't know
5 what the relevancy is of statins.

6 MR. SCHWIND: I'll make it clear in four questions, Your
7 Honor.

8 THE COURT: Four.

9 MR. SCHWIND: Four. I've got them right here.

10 THE COURT: You've got four.

11 BY MR. SCHWIND:

12 Q. Mr. Parrish, a 30 percent reduction in the risk of heart
13 attack is the equivalent of eliminating exposure to an agent
14 that carries a risk estimate of 1.3 in epidemiological
15 investigation; isn't that correct?

16 A. I don't know.

17 Q. Isn't it true that epidemiology is, in fact, used to
18 calculate drug efficacy in clinical trials with the FDA?

19 MR. WEBB: Your Honor, I'm going to object, he's obviously
20 cross-examining him as an expert in epidemiology, which he
21 clearly is not.

22 THE COURT: Sustained.

23 MR. WEBB: And I would like to have the last group of
24 questions struck.

25 THE COURT: Sustained.

1 MR. SCHWIND: Your Honor, Mr. Webb opened this whole thing
2 up, Your Honor, and we objected on his cross-examination to these
3 types of questions. Obviously the Court allowed that line of
4 questions, but I'm willing to stop, but we think they were
5 warranted.

6 THE COURT: The objection's sustained.

7 MR. SCHWIND: Your Honor, I will just, again, get away
8 from the science and just --

9 BY MR. SCHWIND:

10 Q. Mr. Parrish, talk to you from your personal experience
11 right now. If a doctor told you that you had a 30 percent
12 elevated risk of developing a fatal disease, but there was a
13 medication you could take that, would eliminate that elevated
14 risk without any side effects, would you take that medication?

15 MR. WEBB: Your Honor, I object to the form of the
16 question. It's --

17 THE COURT: Sustained.

18 MR. SCHWIND: Your Honor, we do have a line of questions
19 related to the binder of information. I have not heard from
20 defendants.

21 THE COURT: Because they haven't had their chance yet.

22 MR. WEBB: Your Honor, over the break I -- I confirmed,
23 counsel had raised a concern that there's a break in the --

24 MR. SCHWIND: Actually, if we could have the witness
25 perhaps leave.

1 MR. WEBB: That's fine.

2 THE COURT: Mr. Parrish.

3 MR. WEBB: What I was about to examine Mr. Parrish on the
4 binder, and the attribution issue, counsel had raised an
5 objection about break in the Bates stamp range, which I had not
6 noticed and caused me to pause and hesitate because I did not
7 want to present any incorrect information to the Court on a
8 document that was shown the witness yesterday. I have confirmed
9 over the break that there's not a problem with the Bates stamp
10 range. There is one page missing, which was a blank page, so
11 that's not an issue.

12 Counsel also raised an issue about whether the table of
13 contents created any doubt as to whether -- there's a group of
14 documents that were consecutively Bates stamp numbered that
15 appear to be the same document because they're all consecutively
16 numbered, but the table of contents shows appendix 2 as ending
17 the submission, and therefore I have decided that I'm not going
18 to run the risk of using Mr. Parrish to present any incorrect
19 information to Your Honor. I've got to find out once and for all
20 from other people, and I'll present it through another witness,
21 so I am not going to present my rebuttal -- if I'm going to
22 present a rebuttal to that binder I'm going to do with another
23 witness with the certainty that I need and I'm not going to do it
24 with Mr. Parrish.

25 THE COURT: And therefore, Mr. Schwind, you have

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1 concluded; is that right?

2 MR. SCHWIND: Well, Your Honor, I would like to ask
3 Mr. Parrish some questions about the binder.

4 MR. WEBB: Your Honor, I did not use the binder at all, I
5 started to use it this morning and then I've, obviously, realized
6 that I'm not going to use it and Your Honor has accepted that and
7 there's nothing that could -- I didn't use the binder at all. He
8 used the binder extensively during his direct examination, I made
9 a choice not to use the binder until I thought I found out this
10 morning which I've now decided not to use, so clearly using the
11 binder is retire -- is outside of the scope of my cross.

12 MR. SCHWIND: Your Honor, yesterday Mr. Webb introduced
13 two documents, one was Dr. Pages' September 28th 1990 submission
14 on behalf of Philip Morris. It's marked JD 023793. And then he
15 also went to the EPA hearing that was held on December 4th, 1990
16 and asked Mr. Parrish whether disclosure was made at that time of
17 the affiliations or the attribution of the experts who testified
18 there, the attribution to the tobacco industry. So he did open
19 the door to attribution of the persons who testified or
20 participated in this conference. Again, it's marketed JD 002884
21 in December 1990.

22 THE COURT: But that doesn't mean he opened the door to
23 the use of everything in that binder. No. It does not. If you
24 need to ask Mr. Parrish about those two minor issues about which
25 he was questioned, namely Dr. Pages' -- not testimony, but the

1 information relating to Dr. Page and how everybody was
2 introduced, you can do that, Mr. Schwind, if you think it will be
3 really useful and produce important information, but you'd only
4 be limited to those two things because Mr. Webb did indeed ask
5 questions about those two things.

6 MR. SCHWIND: Yes, Your Honor.

7 THE COURT: But not using the binder or the documents in
8 the binder.

9 MR. SCHWIND: Well, I wanted to just -- I'll tell you what
10 I wanted to ask, I'm not trying to hide anything, just to confirm
11 that at that December 1990 hearing, where Mr. Parrish gave his
12 statement in front of the Scientific Advisory Board, at no time
13 did Philip Morris disclose that the documents that are in the
14 binder were submitted on behalf of Philip Morris. For example,
15 Philip Morris potentially could have righted the wrong at that
16 point in December and said, hey, those -- the following
17 submissions that you received back in September and October, they
18 were ours, they were submitted on our behalf, but the fact is at
19 the hearing he did not do that and that's what I wanted to
20 confirm with him.

21 MR. WEBB: Your Honor, this witness already testified on
22 his examination and mine that the documents in the binder he
23 didn't even know about, so you've got a record you don't know
24 about.

25 THE COURT: It's not useful, it's just not useful. The

1 record indicates he doesn't -- he did not know, and so I'm going
2 to sustain the objection to that. Some lawyer on the defense
3 side should tell Mr. Parrish that he's excused at this point,
4 please, and we're already -- I'm not sure, does the government
5 have Dr. Eriksen?

6 MR. SCHWIND: Yes, Your Honor.

7 THE COURT: We can begin his testimony. I know he has an
8 hour of direct.

9 MR. SCHWIND: If we could have a few minutes to change
10 seats. Thank you, Your Honor.

11 MS. CROCKER: Okay, Your Honor, we're ready to begin with
12 the testimony of Dr. Michael Eriksen. For the record, I'm
13 Elizabeth Crocker.

14 (MICHAEL ERIKSEN, Ph.D., GOVERNMENT'S WITNESS, SWORN)

15 DIRECT EXAMINATION OF MICHAEL ERIKSEN, Ph.D.

16 BY MS. CROCKER:

17 Q. Dr. Eriksen, do you have a copy of your direct testimony
18 in front of you there?

19 A. Yes, I do.

20 Q. And did you draft the answers in that testimony?

21 A. Yes.

22 Q. And at this time, do you formally adopt that as your
23 testimony?

24 A. Yes, I do.

25 MS. CROCKER: Your Honor, at this time the United States

1 formally offers Dr. Eriksen as an expert in public health. I
2 don't know if defendants have an objection to that.

3 MR. BERNICK: No objection, to that.

4 THE COURT: All right. He may be accepted as an expert in
5 that area.

6 MS. CROCKER: Okay, Your Honor, we'll get started on our
7 live testimony. And we're proffering Dr. Eriksen's written
8 direct into the record, Your Honor.

9 THE COURT: That may be accepted.

10 BY MS. CROCKER:

11 Q. Dr. Eriksen, did you create some demonstratives to show
12 the Court this morning?

13 A. Yes, I did.

14 Q. And first, we're going to pull up United States
15 demonstrative Exhibit 17,684.

16 THE COURT: Are these demonstratives that have been given
17 to me already?

18 MS. CROCKER: Yes, Your Honor, there are only a few and
19 they were provided to Your Honor.

20 THE COURT: All right.

21 MS. CROCKER: Do you need an additional copy or --

22 THE COURT: I don't think so.

23 BY MS. CROCKER:

24 Q. First, Dr. Eriksen, what is the source of the data that
25 is depicted here?

1 A. The data in this demonstrative is from the United States
2 Department of Agriculture representing the per capita
3 consumption of cigarettes for adults from 1900 to the present.
4 Each part that have red line is an annual estimate of per capita
5 consumption. The black text is from the Centers for Disease
6 Control and Prevention Website and was reproduced in the 1989
7 Surgeon General's Report. I added the previous demonstrative
8 was from 1900 to 1999. For these proceedings, I added the data
9 points from 2000 through 2003.

10 Q. When you say you "added the data points," you just added
11 the additional red line and none of the words on the page?

12 A. Yes, that's the case.

13 Q. Okay. Please explain what is depicted in this
14 demonstrative.

15 A. This demonstrative shows the increase in tobacco use --
16 cigarette smoke specifically, over the 20th century showing that
17 cigarette smoking, really, is a 20th century phenomenon. Back
18 at the turn of the century very few cigarettes were smoked at
19 all. Following the great depression, and during the beginning
20 and the second world war, the increase in smoking was rapid and
21 unprecedented, peaking at the time of the first Surgeon
22 General's Report in 1964, and since that time there's been some
23 ups and downs, but a fairly regular decrease in smoking --
24 cigarette consumption until the present. I would note that the
25 rate of decline since the first Surgeon General's Report is not

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1 as steep as the rate of increase, but nonetheless, substantial
2 progress has been made in reducing cigarette consumption in the
3 United States.

4 Q. Dr. Eriksen, why is the rate of decline more gradual than
5 the rate of increase?

6 A. The rate of increase, really, is attributable to the
7 introduction of mass production capabilities of cigarettes and,
8 really, an unprecedented marketing and distribution effort of
9 cigarettes throughout the United States. The rate of decline is
10 more gradual, and I'd like to note that even at this last tail
11 here, the rate of decline is not as great as was projected from
12 analysis associated with the Master Settlement Agreement where
13 we expected a larger, more steep, decline in per capita
14 consumption, but evidence suggests from recently published study
15 that that decline was blunted somewhat by the large increase in
16 marketing expenditures that occurred since the Master Settlement
17 Agreement.

18 Q. And what is this study that you're referring to?

19 A. The study I was referring to is a recently published
20 study by two economists, one from Berkley and one from Stanford,
21 that was published in Applied Economics by Keeler, et al.

22 Q. Please pull up United States demonstrative Exhibit 17704.
23 Dr. Eriksen, what is depicted on this demonstrative?

24 A. This demonstrative illustrates what we call the
25 cumulative age of initiation of cigarette smoking, and I wanted

1 to use this demonstrative to show the Court that the first
2 trying the cigarette, as well as becoming -- the first trying is
3 represented by the red line, but also becoming a daily smoker
4 represented by the blue line occurs primarily during
5 adolescence. If you were to -- a good way to interpret this
6 slide, if you look at the horizontal axis, which is age, and the
7 vertical axis, which is percent, if you go to the age 18 and
8 draw a line upwards, you'd see -- I'm not doing that very
9 well -- you'd see that most of the -- and then go across
10 horizontally, you'd see that about 80 percent of daily --
11 80 percent of the trying the first cigarette occurs before the
12 age of 18, and more than half of daily smoking occurs before the
13 age of 18 as well. So the point of this slide is just to
14 reinforce what everyone knows, I think, but that smoking begins
15 primarily among the young.

16 Q. Dr. Eriksen, why are these two measures both included,
17 first trial as well as daily smoking?

18 A. As a public health scientist, we like to look at both of
19 these measures knowing that the initiation of smoking occurs
20 when young. We want to look at both when cigarettes are first
21 tried, the first cigarette is smoked, and then to see how
22 quickly that smoking progresses to daily smoking, which is more
23 an indication of dependence, and is more typical of what adult
24 smokers do. And as you can see, the difference between first
25 trying and daily typically is two to three years.

1 Q. Do all those who try --

2 MR. BERNICK: Excuse me, I'm sorry. I don't think the
3 record reflects, Your Honor, that as the witness was speaking,
4 that some of the graphics people put in this yellow bar on the
5 chart, and it's not simply a highlight, it's actually kind of a
6 new line on the demonstrative. I would object to that unless the
7 witness actually describes where the bar is drawn, in this case,
8 I think, at least the suggestion was that at 18. I don't think
9 it was, and I think that's actually where it is now, it's
10 inconsistent with what the witness just testified to, so I just
11 want to make a record of that and object to the placement of the
12 bar unless the witness specifically --

13 THE COURT: Is your point that you think that the bar is
14 placed too close to 20?

15 MR. BERNICK: Yeah, because his own testimony is daily
16 smoking, about half the people become daily smokers before
17 they're 18. If you see where that line is drawn, it intercepts
18 with daily smoking at around 70 or 75 percent, which will be
19 wrong, and I just want to be sure that the record is clear and I
20 think the witness would acknowledge that that bar is not really
21 in the right place.

22 THE COURT: The record's clear. Go ahead, Ms. Crocker.

23 MS. CROCKER: Thank you, Your Honor, that's not a
24 permanent bar, our demonstrative will be as it was produced to
25 Your Honor without a bar.

1 BY MS. CROCKER:

2 Q. I just had one final question about that demonstrative,
3 Dr. Eriksen. Do all those who try smoking go on to become
4 regular smokers?

5 A. No. That's not the case. In fact, it's very
6 interesting, I would like to just take a second to describe. If
7 you look at all young people, you can divide them into thirds.
8 About a third of high school students never smoke, never try,
9 not even a puff. About a third of high school students try
10 smoking, will take a puff, they're smoke a couple cigarettes but
11 they'll give it up. And about a third of high school students
12 will try a cigarette, become a daily smoker and continue
13 smoking. And I think it's useful to kind of understand the
14 problem here, that we have a third that never experiment, never
15 try, a third who experiment and try and don't go on, and a third
16 who experiment and try and become, often, lifetime smokers.

17 Q. Let's pull up United States demonstrative Exhibit 17688.
18 Dr. Eriksen, what is the source of the data shown in this
19 demonstrative?

20 A. The source of the data for this demonstrative is the
21 monitoring in the future study which is conducted by the
22 University of Michigan funded by the National Institute of Drug
23 Abuse, part of the National Institutes of Health. And with this
24 demonstrative I wanted to convey the point that for high school
25 seniors, which is the red line at the top, we have data going

1 back on smoking rates to 1975, and for a full 30 years we're
2 very fortunate to be able to monitor rates for that age group.
3 For 10th graders, which is the green line, and 8th graders, the
4 blue line, we only have data going back to 1991, at which time
5 they -- the University of Michigan received funding to expand
6 the study to include 8th, 10th and 12th graders.

7 The other important thing to note on this slide is that
8 teenage smoking is quite variable. You can see, particularly,
9 for high school seniors that there was a slight uptick the first
10 year the survey was conducted, a fairly rapid decline in the late
11 '70s, remarkable stability during the '80s and then at the
12 beginning of the '90s, again, a very rapid increase in smoking
13 only to begin to decline again in the late '90s, '97 probably
14 would be the best estimate, and you see a similar pattern with
15 8th graders and 10th graders. I would note that the rate of
16 decline appears to be plateauing. The change between 2003 and
17 2004 is not significantly significant, as is there is actually a
18 slight increase in 12th grade smoking between 2003 and 2004, but
19 that isn't statistically significant either.

20 THE COURT: And this demonstrative, though, covers any
21 kind of smoking, including young people who have, perhaps, smoked
22 perhaps one cigarette in the past 30 days; is that right?

23 THE WITNESS: Yes, that's right, Your Honor. Current
24 smoking is defined by the monitoring in the future is having
25 smoked at least one cigarette in the past 30 days.

1 BY MS. CROCKER:

2 Q. Dr. Eriksen, how up-to-date is this data?

3 A. This data, actually, the last data point from 2004 was

4 released last month by the University of Michigan, so this is

5 the most recent picture of teen smoking in the United States.

6 Q. Let's pull up United States demonstrative Exhibit 17696.

7 Dr. Eriksen, what is depicted in this demonstrative?

8 A. This demonstrative illustrates, the pie chart illustrates

9 that adolescents predominantly smoke three brands of cigarettes,

10 Marlboro, Newport and Camel, that these three brands are the

11 most advertised brands of cigarettes, that teenagers

12 disproportionately smoke these brands compared to adults, and

13 also that research that I've been involved in, we've seen that

14 teenagers are more sensitive to advertising expenditures than

15 are adults, approximately three times more sensitive.

16 Q. Is the research you just referred to research that was

17 published in a peer-reviewed journal?

18 A. Yes. The research I was referring to was the Polay, et

19 al. article that was published in the Journal of Marketing.

20 Q. Please pull up United States demonstrative Exhibit 17702.

21 Dr. Eriksen, what is depicted on this demonstrative?

22 A. This demonstrative is simply a simple schematic

23 illustrating the stages that a young person goes through in

24 beginning to become a smoker.

25 THE COURT: Excuse me, everybody. What did you say, 17702

1 or 3?

2 MS. CROCKER: I said 17702, Your Honor.

3 THE COURT: All right sorry, go ahead.

4 THE WITNESS: These stages were described in the 1994
5 Surgeon General's Report that go from -- should be -- there's a
6 typo on the stages; should be "preparatory" rather than
7 "prepatory", but goes from the time when young people begin to
8 think about smoking, thinking about its utility, what it means in
9 their life, what functional value it may have before they even
10 try it, which is the next stage where they will have their first
11 puff, smoke their first cigarette, have a physiologic reaction to
12 it, and then from there go on to experimentation which is more
13 frequent trying, beginning to incorporate smoking somewhat more
14 into their life-style, going to regular use, which the Court
15 basically described, as typically smoking at least once a week or
16 once a month, in some instances, and then ultimately going to
17 regular -- to nicotine dependence and addiction.

18 And you could imagine that there's a much larger group at
19 the bottom of this slide of young people that kind of narrows
20 down corresponding to what I said earlier about a third, a third
21 and a third.

22 BY MS. CROCKER:

23 Q. Dr. Eriksen, does any evidence support the hypothesis
24 that adolescents make a decision to become a smoker and then
25 make a brand choice later in time?

- 1 A. No, not that I'm aware of. The process of beginning to
2 smoke, I think, is best articulated in this schematic that shows
3 that it's a very gradual process of thinking about smoking,
4 fitting in with the adolescent, development issues, that I know
5 you've discussed before in the Court, and trying out smoking and
6 seeing how it provides a utility or function for an adolescent
7 in their own development.
- 8 Q. Please pull up United States demonstrative Exhibit 17729.
9 Dr. Eriksen, would you please read the title on this
10 demonstrative?
- 11 A. The title of this demonstrative is "The Study That Would
12 Determine if Marketing Causes Youth Smoking Initiation".
- 13 Q. What type of study is referred to in that title?
- 14 A. What I would be illustrating as this slide becomes more
15 visible, is that a randomized control trial is the only type of
16 study that would definitively prove the effect of cigarette
17 marketing causing young people to start to smoke.
- 18 Q. Where did you derive the model from that you're going to
19 show us on this set of slides?
- 20 A. I will be showing the Court a classic design for
21 randomized control trial, which is common in any textbook for
22 research methods or experimental design.
- 23 Q. And in what disciplines would this model be used?
- 24 A. This will be used in any type of experimental research
25 ranging from medicine, biology to psychology or any group that

1 does experimental studies.

2 Q. Please go to the next image. Dr. Eriksen, what is meant
3 by "subject accrual"?

4 A. Subject accrual is the first step in the process which
5 simply means identifying the individuals that will compose the
6 study population. In most cases the subjects are individuals,
7 but as I'll describe, they could be communities or cities as
8 well. In this instance for this study, we'll be proposing, we
9 would like to accrue a number of subjects, we'll say
10 adolescents, who have never been exposed to cigarette marketing.

11 Q. Let's pull up the second image. What is meant by
12 "randomization" in this model?

13 A. Once the subjects are accrued, they would then be put
14 together into a pool and randomized into one of two conditions.
15 Typically a random number generator would be used, subjects
16 would be assigned numbers, and in some instances, in all
17 instances, the subject doesn't know to what condition they're
18 randomized to, but the investigator himself is not aware himself
19 and that would be a double blinded study, but we would then
20 randomize the subjects to conditions.

21 Q. Please pull up the next image. What is meant there by
22 "experimental group" and please explain the O1, X1 and O2.

23 A. The first condition in this schematic is the experimental
24 condition where subjects would be -- half the subjects would go
25 to this red box. O1 represents the pretest or the first

1 observation. X1 is the intervention, what we're experimentally
2 manipulating, and O2 is the post test or the follow up
3 assessment of -- I would like to point out that in this
4 experiment, X1, the intervention, would be a representation of
5 what children are exposed to in cigarette marketing in the real
6 world, so we would actually like to see what affect real life
7 cigarette marketing would have on children previously unexposed.

8 Q. Could you please explain when you said O1 is the pretest,
9 what is happening at that stage?

10 A. O1 pretest or "O" stand for observation 1, would be
11 assessing students, or young people's, knowledge, awareness,
12 attitudes, intentions and their actual smoking behavior. You'd
13 want to see at baseline, so to speak, before anything is done
14 how you could characterize them.

15 Q. And then what, exactly, happens at O2?

16 A. At O2 the same battery of tests or assessments are made
17 and you calculate what type of change has occurred between the
18 baseline O1 and O2.

19 Q. And would that be change in awareness and --

20 A. Yes, I'm sorry, it would be change in the same variables
21 of awareness, attitudes, intention, but most important,
22 behavior.

23 Q. Dr. Eriksen, please explain the control group. The other
24 half of the subjects who weren't randomized to the experimental
25 condition would be randomized to the control.

1 A. The control condition would be identical to the
2 experimental condition except for not being exposed to the
3 intervention, which is the marketing campaign. The same
4 baseline assessments would be made, a time O1, the same baseline
5 assessments would be made at O2. By following this design,
6 you're able to determine whether there's baseline equivalence
7 that with randomization, O1 for experimental group and O1 for
8 the control group should be identical, and at O2, the difference
9 between O2 in the experimental group and O2 in the control group
10 can be attributed to X1.

11 Q. Thank you. Pull up the next. Dr. Eriksen, why do you
12 indicate here under "subject accrual" that subject accrual would
13 be infeasible?

14 A. I don't know how we will be able to identify adolescents
15 in the United States who have been unexposed to cigarette
16 marketing. This study proposes to get unexposed young people
17 and randomize them and the data that I've seen and the evidence
18 suggests that exposure to marketing among young people is
19 ubiquitous and exists even in young children. So it would be
20 very difficult to accrue an unexposed group of subjects to
21 subsequently randomized.

22 Q. To properly perform such a study, how many subjects would
23 you recommend accruing?

24 A. What we would do is conduct a power analysis where you
25 would actually calculate the sample size based on the estimated

1 change you expected to see, but I would think a study like this
2 you would want to have hundreds, if not thousands, of students
3 to be randomized, young people to be randomized.

4 Q. You indicated that it would be possible to also randomize
5 communities; is that correct?

6 A. Yes.

7 Q. And if you were using communities as your subject, how
8 many communities would be required?

9 A. You would need -- when you -- you have certain different
10 methods with a higher unit of analysis. A community would be a
11 larger unit of analysis and you would want to make sure that the
12 communities that you randomized were similar, but you would need
13 at least dozens of communities to have a respectable, reliable
14 study.

15 Q. Please pull up the next. Dr. Eriksen, why do you
16 indicate under randomization that that would be unethical?

17 A. I cannot imagine that any institutional review board that
18 cares about the protection of human subjects, particularly
19 children, would allow for children to be randomized to a
20 condition where there was potential harm. Universities are very
21 careful about protecting the health of children and making sure
22 that there is a benefit to the children that exceeds the harm
23 that may be caused, and I cannot imagine, nor can others, that
24 this type of randomization to a condition in which they would be
25 purposely exposed to cigarette marketing would be allowed or

1 approved.

2 Q. Can I have the next image please. Dr. Eriksen, why do
3 you indicate you understand the experimental and control groups
4 that those would be both infeasible and unethical?

5 A. There are a number of reasons. Primarily due to the fact
6 that experimentally it would be virtually impossible to
7 replicate X1. As I'll testify later, the experimental research
8 that's been done looks at very small 5-minute exposures. To
9 really meaningfully represent the type of cigarette marketing
10 that children are exposed to would require years of exposure and
11 untold resources to replicate it. The -- an 18-year-old today
12 in the United States has grown up during a period in which a
13 hundred billion dollars has been spent marketing cigarettes.
14 And to realistically replicate what a young person is exposed to
15 in their lifetime is, to me, not feasible to do. There are
16 other issues of feasibility regarding keeping these groups
17 intact for a number of years, avoiding contamination from one
18 group to the other. We would need the cooperation of
19 communities to participate, and we would also need the
20 cooperation of the tobacco companies to agree not to -- to limit
21 their advertising in a way that would allow this study to be
22 completed.

23 Q. If such a study as you have just explained is both
24 unethical and infeasible, how can any research be conducted that
25 examines the relationship between cigarette marketing and

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1 adolescent smoking?

2 A. You need to rely on the research that you can do. And
3 the research you can do is small scale experimental studies
4 which we'll discuss, I'm sure, but also observational study
5 which the best of which are the longitudinal observational
6 studies where you look at what happens over time.

7 Q. Why are observational studies not subject to the same
8 problems of infeasibility and the ethical issues that you just
9 mentioned?

10 A. This is an important issue in that in observational
11 studies you just observe what's going on, you do not intervene,
12 you're not subjecting individuals to an exposure, you're simply
13 looking at what happens and making inference based on changes
14 over time.

15 Q. And you mentioned small scale experimental studies. Why
16 are those not subject to the same problems you've just
17 discussed?

18 A. One may ask why are -- why is any experimentation
19 approved by an institutional review board. I believe the case
20 is that the research that's been done that's experimental has
21 involved 5-minute exposures, or reviewing one magazine, or
22 looking at a video for a short period of time, and I believe
23 these institutional review boards may have approved these with
24 the belief that there's not really any harm associated with a
25 brief 5-minute type of exposure.

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1 Q. Is there any other difference in those types of
2 experimental studies with the brief exposure in terms of what is
3 measured at O2?

4 A. No, the format would be the same in terms of the
5 experimental design, whether it's a long intervention or a short
6 intervention, you would still do the same type of assessment.
7 The major difference is in the experimental differences that
8 have actually been done they do not look at smoking behavior
9 they typically just look at attitudes, they typically see after
10 a brief exposure, are -- have your attitudes changed towards
11 smoking or towards smokers rather than have you become a smoker.

12 Q. Has any researcher conducted the type of randomized
13 control trial that you have depicted on this slide?

14 A. No, and I'm not the only one who feels it's not possible.
15 I think witnesses on both sides also agree that this type of
16 study would not be feasible or ethical.

17 MS. CROCKER: Your Honor, we just have one more
18 demonstrative, should we go through that before we take our lunch
19 break?

20 THE COURT: Yes.

21 BY MS. CROCKER:

22 Q. Please pull up 17703. Dr. Eriksen, please read the title
23 on this slide.

24 A. The title of this slide is the "Evidence Supporting the
25 Effect of Marketing on Youth Smoking."

1 Q. And what do you mean by "scientific evidence" at the top
2 of the slide?

3 A. By the scientific evidence bar, horizontal bar, and the
4 arrows going down, what I mean is that there is evidence,
5 despite the fact of not having the definitive study represented
6 by the experimental design we just discussed, there is peer
7 reviewed published scientific evidence that looks at awareness
8 and recognition, favorable attitudes towards smoking, the
9 intention to smoke, and actual smoking behavior. This is the
10 model that I have suggested in my written testimony that
11 represents, somewhat, the continuum of how the smoking process
12 begins and is consistent with other types of health behavior
13 theory where it begins with an awareness, moving to attitude
14 change to intention to behave in a certain way, to the ultimate
15 performing the behavior. And for each of those categories,
16 there is strong scientific empirical evidence.

17 Q. Please briefly explain the evidence related to awareness
18 and recognition.

19 A. Just briefly to say that there's both -- we have evidence
20 that young people recognize brands of cigarettes, match logos
21 with smoking, are familiar with slogans, it's described in the
22 testimony but there's good data, typically cross-sectional, that
23 shows that very young children are aware of and recognize the
24 attributes of cigarette marketing.

25 Q. And please briefly explain the evidence related to

1 favorable attitudes.

2 A. As I mentioned earlier, this is where there is some
3 experimental evidence where young people are actually exposed to
4 videos, magazines or ads, briefly, there's a control group
5 that's not exposed and typically the results are those that are
6 exposed have more favorable attitudes towards smoking or
7 smokers.

8 Q. Please briefly explain the evidence related to specific
9 intentions.

10 A. There is some longitudinal data and studies that have
11 looked at exposure to advertising and its affect on subsequent
12 intention to become a smoker, and in the psychological
13 literature, intentions are most predictive of actual behavior,
14 so there's studies that show that -- exposure to advertising
15 affects intentions to smoke.

16 Q. Are those longitudinal experiments experimental or
17 observational?

18 A. No, longitudinal studies tend to be observational in all
19 cases.

20 Q. And please explain the scientific evidence related to
21 actual behaviors.

22 A. Just in closing, there is strong peer reviewed scientific
23 literature that indicates that exposure to cigarette marketing
24 actually not only influences progression towards smoking, but
25 also affects actual smoking behavior, that the studies, as we'll

1 discuss, that the more exposure, and this exposure is often
2 measured by a proxy measure of whether they're aware of having
3 promotional items, willingness to possess the items, using the
4 items, having favorite ads, these types of measures of exposure
5 are significantly associated with actually becoming a smoker.

6 Q. Thank you, Dr. Eriksen.

7 MS. CROCKER: That's the end of our questions, Your Honor.

8 THE COURT: All right. Thank you, Doctor, we'll take our
9 lunch break now. Mr. Bernick will start with cross after lunch,
10 and I think you told me three hours; is that right?

11 MR. BERNICK: Yeah, I did. Maybe we can try to get the
12 good doctor off the stand today. I'll do my best.

13 THE COURT: We'll see, because even after your cross the
14 government gets redirect, but --

15 MR. BERNICK: I do.

16 THE COURT: I would like to break -- I say this almost
17 every day. That I would like to break at what is supposed to be
18 our breaking time, 4:30. Obviously, if it's 5 or 10 minutes to
19 finish the witness we'll do it, but otherwise I'd like to do it
20 at 4:30 if we can. Did you want to raise something else?

21 MR. BERNICK: I just had a procedural matter and it
22 doesn't require the doctor to be here.

23 THE COURT: Doctor, you can step down.

24 MR. BERNICK: We served on the government this morning a
25 brief that relates to the next witness, who is Dr. Wigand, and I

1 wanted to alert the Court that there are very, very substantial
2 issues that go not --

3 THE COURT: Why did you wait until today to do it?

4 MR. BERNICK: What?

5 THE COURT: Why did you wait until today to do it?

6 MR. BERNICK: We were doing it yesterday afternoon and
7 frankly, I'll take responsibility I didn't focus on it as much as
8 I should have, but the issues are not -- part of it is in my
9 experience with Dr. Wigand, he has been a fact witness. We
10 didn't even depose him in this case because he's been a fact
11 witness before. He's being tendered as a fact witness in this
12 case as well, but his testimony goes way beyond --

13 MS. EUBANKS: Your Honor, excuse me, but the United
14 States -- we didn't meet and confer on any motion with respect to
15 this, we have no idea what it is that Mr. Bernick is about to
16 mention, we have not seen the motion, so if we could just reserve
17 on this. I'm happy to take a look at it over lunch, but I don't
18 think it's appropriate to have this discussion when we're in the
19 complete dark about whatever it is that he's about to say about
20 something that was filed last night of which we never met and --
21 filed this morning which we never even met and conferred.

22 THE COURT: I have one relevant question, how long is your
23 brief?

24 MR. BERNICK: The brief is a very short brief, it lays it
25 on you very succinctly I wasn't intending on arguing now, I want

1 to --

2 THE COURT: How many pages is the brief?

3 MR. BERNICK: What is it brief, five pages.

4 THE COURT: Well, we'll try and pull it up at lunch, I
5 don't know if we can, we will.

6 MS. EUBANKS: Thank you.

7 THE COURT: We'll have to address it before this witness
8 takes the stand again this afternoon, only in terms of setting a
9 schedule.

10 MR. BRODY: Your Honor --

11 THE COURT: And is there some reason that Dr. Wigand, if
12 need be, can't come on Tuesday or Wednesday next week?

13 MS. EUBANKS: Yes, there is a reason insofar as Wednesday
14 is concerned. The estimate that we received -- Dr. Wigand has an
15 appointment to be in another place right now on Wednesday, I
16 believe it is, on noon and to get there on Wednesday around noon
17 it's probably important to start his testimony on Monday so that
18 if there is need to role over until the next day that there's
19 sufficient time to do that without crunching things up, and it
20 has been planned long in advance to try to get him in at that
21 time and it would be greatly inconvenient -- a great
22 inconvenience to try to move it. He's not someone that the
23 United States is compensating, so we can't control the witness in
24 that sense, Your Honor.

25 MR. BRODY: Your Honor, if I may, what -- and this may

1 eliminate some confusion on the issue. What Mr. Bernick is
2 referring to as a brief, are merely the objections to
3 Dr. Wigand's testimony. They submitted the legal issues
4 memoranda with those in accordance with Order 471. There are
5 three issues that they raised. I don't think that -- well, I
6 just glanced at the brief that was just handed to me by counsel
7 for defendants at the 11:00 break, but obviously we need a chance
8 to look at it, respond to it. It was late, it wasn't filed until
9 9:50 this morning, obviously it was due yesterday at 5. That's
10 one issue. That raises the issue of when we're supposed to
11 respond to it given that normally we would have until 5:00 today.
12 We did not even get it until 11:00 this morning. So that raises
13 another issue, but it's certainly premature to address the issues
14 at this point in time.

15 MR. BERNICK: I think if counsel would let me finish, to
16 begin with, I'm not suggesting that we should. The only reason I
17 wanted to alert the Court to it is that it really does pertain to
18 how broad his testimony is going to be. Therefore it's not just
19 a question of what exhibits are going to come in. I'm not
20 suggesting that we need more time for Dr. Wigand on Monday, in
21 fact, I'm suggesting we need less, I think we can finish with him
22 promptly. I just wanted to flag it for the Court so Your Honor
23 would understand the significance of the objections that we filed
24 with respect to this witness in particular.

25 THE COURT: I always read the objections before I read the

1 testimony, everybody, if I've got them so I, obviously, know what
2 to look for.

3 2:00, everyone, please.

4 (Thereupon, a luncheon recess was had.)

5

6 C E R T I F I C A T E

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

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10 Scott L. Wallace, RDR, CRR
Official Court Reporter

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GK)
	:	January 27, 2005
Plaintiff,	:	
	:	2:00 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 55
AFTERNOON SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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23 Proceedings reported by machine shorthand, transcript produced
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1 P R O C E E D I N G S

2 THE COURT: Mr. Bernick, let's begin the cross.

3 MR. BERNICK: Thank you, Your Honor.

4 THE WITNESS: Good afternoon.

5 MR. BERNICK: Good afternoon.

6 MICHAEL ERIKSEN, Ph.D., Government's witness, RESUMES

7 CROSS-EXAMINATION

8 BY MR. BERNICK:

9 Q. Dr. Eriksen, as you know because I just introduced myself to
10 you, I'm David Bernick and I represent Brown & Williamson, and
11 I'm going to be conducting what I hope is the principal part of
12 our examination, maybe the only examination that we'll do for
13 the defendants here.

14 You, I believe, showed this demonstrative during the
15 course of your examination here this afternoon, and I want to
16 get to this in a moment, but I want to ask you a couple of
17 questions about your background leading up to it. And I
18 apologize if I have my back to you periodically while I move
19 things around here.

20 It's true, is it not, that you've been a part of the
21 public health community for virtually your entire career?

22 A. Yes, sir.

23 Q. And is it also true that within that community there is a
24 subset of people whom you sometimes described or referred to as
25 the advocacy community; correct?

1 A. Yes, I believe I described different components of the
2 public health community in such a way.

3 Q. Okay. And I don't think that it's very hard to ascertain
4 what that means, but just to be clear.

5 The advocacy community are those people within the
6 public health community who tend to be activists; correct?

7 A. I wouldn't equate the two terms necessarily. I believe
8 there is a continuum of type of activity that ranges from
9 scientific to grass roots activism and advocacy can span some of
10 those areas, but generally that's correct.

11 Q. But these are groups or individuals that are activists or
12 advocates as opposed necessarily to being scientists?

13 A. I believe there are scientists who are advocates and
14 advocates who are scientists and that it's not mutually
15 exclusive.

16 Q. I understand that. But would you agree with me that this
17 group is comprised -- the reason they are a subset is that they
18 tend to be activists or advocates; correct?

19 A. No. As I said, I think there are individuals who are both
20 and do both well, and some do both badly, but I wouldn't make
21 them mutually exclusive if that's what you're suggesting.

22 Q. That's fine. I'm not suggesting that at all.

23 Now, you yourself have been an activist when it comes
24 to tobacco control issues, have you not?

25 A. No. I would not consider myself to have been an activist.

1 Q. Are you -- have you considered yourself to be part of this
2 advocacy community?

3 A. I would think that most people in public health at different
4 times would consider themselves to be both advocates and
5 scientists.

6 Q. Okay. I'm not -- again we're going to get to the science,
7 trust me in a little bit. I'm just saying you defined a subset
8 of people who are advocates or activists and I just want to know
9 throughout your career at different points, have you been part
10 of that subset of the community?

11 A. I wouldn't self-describe myself in that way.

12 Q. Well, it's true, is it not, that you've been, from 1986 to
13 1992 you were a committee member of what's called The Cancer
14 Education in the Workplace International Union Against Cancer,
15 correct?

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

17 Q. Was that an advocacy group?

18 A. No, sir.

19 Q. You were the Chair of the American Public Health Association
20 Anti-tobacco Initiative. Was that an activist group?

21 A. No, sir.

22 Q. Not an advocacy group?

23 A. It was a committee of the American Public Health Association
24 of trying to identify members who were interested in the issue
25 of tobacco control; some of whom were scientists and some of

1 whom may be advocates.

2 Q. When I say advocate, I recognize that there are advocates
3 who are also scientists. And I'm not disputing the fact that
4 you're a scientist. I just want to know whether you were also
5 an advocate when you served as Chair of the Anti-tobacco
6 Initiative Public Health Section which was in the ATHA?

7 Were you acting in an advocacy role there as well as
8 being a scientist?

9 A. I would not consider myself to be acting in an advocacy role
10 in that capacity, no.

11 Q. What about the award you got for contributing to a
12 smoke-free society, an award from -- award of recognition from
13 the American Cancer Society. The American Cancer Society awards
14 you that certificate of recognition solely because you were a
15 scientist?

16 A. My understanding is they awarded me the certificate because
17 of my work at the time I was employed by Pacific Bell, the
18 private employer, the phone company in California, to the work I
19 did in the company to establish a smoking policy.

20 Q. The American Cancer Society clearly is an advocacy
21 organization, is it not?

22 A. I believe the American Cancer Society does advocacy, but
23 they are also a scientific organization and a fund raising
24 organization.

25 Q. Let me ask you this. It's true, is it not, that you were

1 heavily involved in Surgeon General's report of the year 2000?

2 A. Yes, sir.

3 Q. And is it true that in connection with that work that you
4 were involved in, or participated in selecting the reviewers and
5 authors that made contributions to the 2000 Surgeon General's
6 Report?

7 A. Yes.

8 Q. And is it true that in that capacity you participated in
9 appointing people who were advocates and activists to be part of
10 the Surgeon General's process for the year 2000 report?

11 A. Everyone who was asked to contribute to the Surgeon
12 General's report was first a scientist and I didn't go beyond
13 that in determining whether they were an advocate or activist or
14 anything else.

15 Q. So the fact that they were, some of them were activists and
16 advocates; correct?

17 A. They may have been. That was not a criteria that we looked
18 at in determining the authors. Our approach was always to find
19 the best available scientist to contribute the section of the
20 report.

21 Q. So, if somebody were -- let me just get it at this way.

22 I want show you some of the contributing authors and
23 some of the reviewers for the year 2000 report. This is J-DEM
24 020210, and it's up on the screen and I'll get it a little bit
25 better displayed.

1 You know that Frank Chaloupka has been an expert in the
2 litigation against the tobacco industry; correct?

3 A. I know that Dr. Chaloupka has been an expert witness in this
4 case.

5 Q. Right. Richard Daynard is actually a lawyer, is he not?

6 A. Yes. I believe he's an attorney and also has a Ph.D.

7 Q. And you certainly would consider him to be both an activist
8 and an advocate as well as being a lawyer and a Ph.D.; correct?

9 A. Yes, I would consider him to be an example of an activist
10 and a scientist, also.

11 Q. Now, you are comfortable with Mr. Daynard being one of the
12 contributing authors to the year 2000 report?

13 A. Yes, sir.

14 Q. And the fact that he also acted as an expert witness against
15 the industry didn't affect your view. You were just focused on
16 whether he can make a contribution as a scientist?

17 A. The -- I was comfortable that we could eliminate any bias
18 that may be, appear in a report through the peer review process.
19 So I had no qualms about asking Richard Daynard or others to
20 prepare a section of the report that would then be reviewed
21 multiple times.

22 Q. Let me see if I got that right. You recognized that he was
23 an activist; right?

24 A. Yes.

25 Q. You recognized as a result he might well have some bias;

1 right?

2 A. The possibility would exist.

3 Q. Well, certainly because he is an activist you would expect
4 that there would be some bias; correct?

5 A. Whatever bias there might be would not necessarily be
6 reflected in his professional writing.

7 Q. Okay. So he might be biased, but it may not be expressed in
8 the work he was doing?

9 A. Exactly.

10 Q. Okay. You're aware at the time that you asked Dr. Burns to
11 be a selected reviewer, that he had been testifying against the
12 tobacco industry as an expert witness for years; correct?

13 A. I did not know that, no.

14 Q. Did you recognize that Mr. Califano -- Mr. Califano was a
15 lawyer and is a lawyer; correct?

16 A. I don't know that, but I can explain that the tradition
17 would be that we would circulate the Surgeon General's Report to
18 previous government officials who have experience in the topic.
19 It's kind of a protocol that we would follow.

20 Q. I didn't really ask you that. I just asked you whether he
21 was and is a lawyer.

22 A. I'm sorry. I do not know his professional credentials. He
23 was Secretary of HEW.

24 Q. And is it true when he was Secretary of HEW that he declared
25 war on the tobacco industry? In those words.

1 A. I do not know that he did that in those words.

2 Q. K. Michael Cummings, expert witness against the tobacco
3 industry; correct?

4 A. I do not know that, sir.

5 Q. Ronald Davis, expert witness against the tobacco industry as
6 of the year 2000?

7 A. I do not know that now or did not know that then.

8 Q. Jeffrey Harris, expert witness against the tobacco industry
9 going back to the Cipollone case in the 1980s; correct?

10 A. I'm not aware of that. I know he's a witness in this
11 litigation.

12 Q. Dr. Henningfield, expert witness against the tobacco
13 industry; correct?

14 A. Only -- my knowledge is only that he's a witness in this
15 litigation.

16 Q. Cheryl Perry was an expert witness against the tobacco
17 industry dating back to 1996 and 1997; correct?

18 A. I do not know that, sir.

19 Q. Richard Pollay, expert witness against the tobacco industry;
20 correct?

21 A. Sir, I have no knowledge that he was or was not.

22 Q. When you decided to have these people participate, was it
23 important to you that they make disclosures of whether they had
24 acted as expert witnesses against the tobacco industry?

25 A. Please let me clarify. These names you're calling are

1 reviewers.

2 Q. I understand.

3 A. I just want to make sure. These are not individuals who are
4 writing sections of the report; they are getting the report to
5 review as part of a peer review process.

6 We do not -- we did not require any type of disclosure
7 of conflicts of interest or involvement in litigation for
8 someone who was a reviewer, but we did so for authors.

9 Q. Oh, what about Richard Daynard? Did he disclose his
10 activities as an activist against the tobacco industry and as a
11 lawyer who had supported litigation against the tobacco
12 industry?

13 A. We were aware of those relationships and we asked him to
14 write the section because he was the outstanding scholar in that
15 area.

16 Q. Did you ask -- did you make a disclosure in the Surgeon
17 General's Report Year 2000 of his background and his activities?

18 A. Not that I'm aware of, no.

19 Q. Let me move from that a little bit to a related question.
20 Certainly you would consider anybody who was actually acting as
21 an expert witness in litigation against the tobacco industry to
22 be involved in an advocacy activity, would you not?

23 A. No, not at all. I would assume that if they were testifying
24 as to be an expert they were testifying as an expert.

25 Q. In that respect they are not advocates?

1 A. They may or may not be. I don't see the correlation between
2 them testifying as an expert in litigation and that
3 reflection -- necessary reflection of any other aspect of their
4 professional activities.

5 Q. Isn't it true, Dr. Eriksen, that it is a given, a given in
6 the advocacy community, that advertising encourages smoking?
7 It's a given.

8 A. I would agree that it's a commonly-held belief that
9 advertising encourages smoking.

10 Q. The word given. Is it a given? Your word. Would you agree
11 that it is a given in the advocacy community that advertising
12 encourages smoking?

13 A. I may have said that. I'd like to -- could I see where
14 you're getting that from?

15 Q. I'm just asking whether that rings a bell.

16 A. It may or may not. Not necessarily in those precise words,
17 I'm not denying I said it, but I am not sure if I could say when
18 I said it.

19 Q. Would you agree with the comment that it is a given in the
20 advocacy community that advertising encourages smoking and is
21 not necessarily based on a thorough understanding of the
22 published literature?

23 A. That statement would be consistent with something I would
24 say, but, as I said, I don't know if or when I said that.

25 Q. Now, you're here today in this case testifying, as I think

1 you've been at pains to point out, as a scientist; correct?

2 A. Yes, sir.

3 Q. And in fact, your chart here -- and I've displayed J-DEM
4 020213, which is really just a blown-up copy of U.S.
5 Exhibit 17703 -- that's one of the charts that you showed the
6 court before the lunch hour; correct?

7 A. Yes.

8 Q. So you're here as a scientist testifying about science;
9 right?

10 A. Yes.

11 Q. Not about public policy; correct?

12 A. Yes. I'm here to speak about the scientific evidence.

13 Q. And you're not here to talk about advocacy either, are you?

14 A. That's right, sir.

15 Q. So the true test of your opinions are the rules and methods
16 that are accepted within the scientific community; correct?

17 A. Yes, sir.

18 Q. Now, you're the fifth expert, I will tell you -- and I don't
19 say that to minimize your contribution, maybe your last and
20 best -- but you're the fifth expert to appear before this court
21 to talk about advertising and youth smoking.

22 And the fourth expert was a Dr. Biglan and I asked him
23 whether his work in this case should follow the same rules that
24 apply in his scientific work and he agreed with that.

25 Would you also agree with that?

1 A. I would -- I would agree with it. I don't see any reason
2 there should be any different standards.

3 Q. I also asked him whether that meant following established
4 scientific methods, and he agreed with that. Would you agree
5 with it?

6 A. As long as they were relevant for the type of research that
7 was being discussed.

8 Q. The answer would be yes?

9 A. Yes, as long as they were relevant for the type of --

10 Q. I got the caveat. Let's just keep on going here. Let's
11 make up a little board here that I'm going to follow along with,
12 and I'm going to use the right pens, although -- this is a
13 write-on board.

14 Let's talk about what some of the established methods
15 are. One that you talked about was randomized controlled
16 trials. Do you recall that?

17 A. Yes, sir.

18 Q. And another method was longitudinal -- actually, let me more
19 broadly -- observational studies; right?

20 A. Yes. These are types of studies as opposed to methods.

21 Q. Fine. That's fair. But they all involve their own set of
22 methods; correct?

23 A. Yes.

24 Q. And I think that we had a distinction between the
25 longitudinal studies, which were -- I think your words were "the

1 best," right?

2 That's what you told us late this morning; correct?

3 A. I'm not sure of the exact words I used, but within
4 observational studies you would prefer to have a longitudinal
5 study as opposed to a cross-sectional study.

6 Q. You don't remember saying "best"?

7 A. No.

8 Q. The transcript will reflect whatever it is that you said.
9 We can count on that.

10 And then there were the cross-sectional studies; right?

11 A. Yes, sir.

12 Q. And let me ask you whether it's true -- we've been through
13 this with other witnesses and I just want to make sure that
14 you're on the same page as what I think we've discussed with
15 others -- that with respect to the cross-sectional studies
16 you're kind of taking a snapshot at a given point in time, and
17 because of that you kind of have a little bit of a chicken and
18 egg problem. You may see an association, but you don't know
19 which direction it takes. Fair?

20 A. Yes. I actually was going to use the word "snapshot"
21 myself.

22 Q. Whereas, with the longitudinal studies you're able to
23 determine -- you're able to at least look for directionality;
24 correct?

25 A. Yes.

1 Q. And that is much better if you want to be able to ascertain
2 cause and effect; correct?

3 A. Yes, it certainly helps.

4 Q. Now, is it also true that in addition to doing randomized
5 controlled trials and observational studies -- I won't say it's
6 a method, so I'll put it in brackets -- there is also evidence
7 that's often referred to as anecdotal evidence; right?

8 A. Yes.

9 Q. So, for example, if event A takes place and is followed by
10 event B, the mere fact that event B follows event A is only
11 anecdotal evidence that there's a relationship between the two;
12 correct?

13 A. Yes. I wouldn't use anecdotal to describe A and B. To me,
14 anecdotal is someone's belief or observation or accounting of
15 something, an incident that occurred as opposed to somehow
16 trying to infer causality or cause and effect relationship.

17 Q. But if you have two events and you haven't done any testing
18 or analysis of the relationship between the two, using a
19 scientific method, all that you have by way of evidence that
20 there's a relationship is anecdotal evidence; correct?

21 A. I think scientifically you would use the word "descriptive"
22 as opposed to "anecdotal."

23 Q. Descriptive. That's fine. We will put that down here, too.

24 In fact, you've displayed evidence in this case, indeed
25 in this court, which is only descriptive; correct?

1 A. I'm not aware of what that would be. I'm sure you can point
2 it out to me.

3 What I think I've displayed were different types of
4 experimental and observational data, either cross-sectional or
5 longitudinal.

6 Q. Well, the consumption chart that you showed, for example.
7 That consumption chart contains entries on it that are purely
8 descriptive. They are untested; correct?

9 A. I would describe it as being descriptive. It paints a
10 picture of the distribution of data points over time.

11 Q. And many of those data points are untested data points;
12 correct?

13 A. That's not a relevant parameter on which to refer to a data
14 point.

15 Q. Okay. Well, fine, we will come back to that chart here in a
16 minute. I think we've got a rubric that we can at least work
17 with.

18 MS. CROCKER: Your Honor, Dr. Eriksen was in the middle
19 of an answer. If he could be permitted to finish his answer.

20 THE COURT: Yes, he may finish his answer.

21 A. I was just trying to convey the point that the per capita
22 consumption graphic was a very valuable depiction of what's
23 happened over the 20th Century. It would be, it's relied upon
24 heavily. To characterize it as anecdotal or untested is not a
25 relevant metric to do that. There is value in just looking at

1 data for its own face validity.

2 Q. Well, now that we've gone down that road a little bit, let's
3 go down the road a little ways more.

4 You showed the court what was marked as U.S.
5 Exhibit 17684. Do you recall?

6 A. Yes, sir.

7 Q. And you said that it was derived from the Surgeon General's
8 Report of 1989. Do you recall that?

9 A. Yes, sir.

10 Q. And you made the statement -- you had some of the little
11 arrows there and you talked about those, but you also made some
12 statements.

13 Do you recall making a comment about the impact of
14 marketing on the slope of this curve here?

15 A. Yes, sir. I believe I said that there was an effect -- the
16 slope of that line was a function of the mass production of
17 cigarettes and marketing and distribution factors.

18 Q. Now, in point of fact, the Surgeon General's Report of 1989
19 obviously, as you pointed out, doesn't contain in this chart any
20 mention of the Master Settlement Agreement, does it?

21 A. No, sir.

22 Q. You pointed that out.

23 A. No, sir.

24 Q. It also doesn't contain any mention of nicotine medication
25 available over the counter because that also is a date that post

1 dates 1989; correct?

2 A. That's correct.

3 Q. But you also put on there the Surgeon General's Report on
4 Environmental Tobacco Smoke, that was in 1986 and in 1989 when
5 the Surgeon General came out with the Surgeon General's Report
6 and produced this chart, that entry was not on the chart, was
7 it?

8 A. I do not know for a fact, sir.

9 Q. Well, did you check that out before you came here?

10 A. No, I did not.

11 Q. The same thing is true of The First Great American Smoke
12 Out. That was not on the Surgeon General's Chart in 1989, was
13 it?

14 A. I do not know, sir.

15 May I clarify what I believe I said during the live
16 presentation?

17 Q. You said whatever it is that you said. We can go back over
18 it. I was pretty careful to take notes and I believe you said
19 that these entries were derived from the '89 report. And as to
20 entries that postdated the 1989 report, you put those in. And
21 the entries that we now see, Surgeon General's Report On
22 Environmental Tobacco Smoke predated the '89 report, did it not?
23 You just told us that it did.

24 MS. CROCKER: Your Honor, if Dr. Eriksen could explain,
25 but I think that Mr. Bernick might be misrecollecting what the

1 testimony was this morning, because that is not what the
2 testimony was this morning.

3 MR. BERNICK: I think it's quite plain that it was.

4 MS. CROCKER: If we could let the witness explain and
5 not cut off his answer I think we can clear this up.

6 THE COURT: Excuse me. The objection is overruled.

7 Go ahead, Mr. Bernick.

8 BY MR. BERNICK:

9 Q. The reference to The First World Conference on Smoking and
10 Health, that also doesn't appear in the '89 report, does it?

11 A. I do not know, sir.

12 Q. Now, when it comes to descriptive as opposed to going beyond
13 descriptive and actually doing a scientifically,
14 methodologically driven analysis, there's a tremendous amount of
15 work that's been done to determine what factors actually
16 affected that consumption curve; correct?

17 A. Yes. There's been a substantial amount of research that --
18 that's looked at the change in tobacco consumption over time.

19 Q. In fact, the 1989 report reviews in detail extensive
20 articles in research papers that have been done to determine
21 what factors according to econometrics were actually -- are
22 actually associated with the changes in that curve; correct?

23 A. It included some analysis like that, yes, sir.

24 Q. Okay. Now, that analysis includes people who have looked
25 for the impact of the Surgeon General's Report; correct?

1 A. Yes, sir.

2 Q. And there are people, including Dr. Ippolito, who has
3 published studies saying the '64 Report was of tremendous
4 importance and is provable; correct?

5 A. I'm not aware of his work.

6 Q. Well, are you aware of any of the people that have actually
7 done the analysis of whether the events that are described here
8 do, in fact, have statistical -- statistically significant
9 impact on that curve? Are you an expert in that area?

10 A. I'm sorry. I think there were two questions.

11 Q. Are you an expert -- do you hold yourself out as an expert
12 in the literature, the econometric literature, of whether the
13 factors that you have identified in this chart actually did
14 affect the consumption curve? Are you an expert in that area?

15 A. No, sir. I do not consider myself to be an expert in that
16 area and that was not the intent of these events on this chart
17 to explain.

18 Q. I didn't want to interrupt you.

19 A. No, that was it.

20 Q. You said, "marketing accounts for the slope of this curve."

21 Is there an econometric study that you can point to
22 that demonstrates that marketing accounts for the slope of that
23 curve?

24 A. I didn't say that marketing alone accounted for the slope of
25 that curve. I said that it was -- the slope of that curve was

1 associated with increases in the distribution of cigarettes, the
2 mass production of cigarettes, and unprecedented marketing
3 activities during that period.

4 Q. Associated with. Associated in the sense that it's been
5 methodolog -- scientifically tested and a statistical
6 association has been found, or is that associated in a looser
7 sense, a common sense saying, that happened at about the same
8 time and it looks plausible that there's a relationship? Which
9 way?

10 A. I would say associated in the context I described three
11 factors.

12 You picked one out to try to attribute -- have me
13 attribute to that increase in the slope, and I just wanted to
14 make sure that that wasn't a conception -- the perception of the
15 Judge.

16 Q. Can you identify a single econometric study which
17 establishes that the slope of that curve for consumption was, in
18 fact, statistically associated with increased marketing
19 activities during that period of time?

20 A. No, sir. That was not the intent of the presentation.

21 Q. Likewise, on the back end, can you identify for us a single
22 econometric or scientific study which demonstrates that the
23 Nonsmokers Rights Movement actually is statistically associated
24 with the diminution of consumption in the 1970s?

25 A. Not an econometric study, sir. There's literature that

1 speaks to that, but that was not the point of my presenting this
2 data.

3 Q. Isn't it a fact that, for example, the fairness doctrine and
4 the broadcast ad ban, some econometricians say that these have
5 been statistically associated with consumption, other
6 econometricians say that they are not; correct? Or do you not
7 know?

8 A. No, I do. There's been research, both econometric and
9 others, looking at the effect of the fairness doctrine and the
10 broadcast advertising ban that's been published.

11 Q. Is there anybody who actually proved that the First Great
12 American Smokeout had a significant impact on consumption, from
13 a scientific point of view?

14 A. Not that I'm aware of, sir, but that wasn't the point of
15 being on here.

16 Q. Dr. Eriksen, I understand that you may have a perspective,
17 but we will make much more progress if we can get answers to the
18 questions, and I'll do my best to make sure I don't cut you off.

19 I got a little bit off track because I was going down
20 the road of these different categories here, and I want to get
21 back to that exercise if I could.

22 You've described the word, or talked about the word
23 "cause" or "causation" in the course of your direct
24 examination -- actually, more particularly in the course of your
25 live testimony here this afternoon; correct?

1 A. I'm not sure exactly how I used that word during my live
2 testimony. It may have been in the context of talking about the
3 type of study that would be required to prove causation. It was
4 probably the only time it was mentioned.

5 Q. It was this chart, and this is 17729, and I just put my box
6 around the word "cause." That's a word that you specifically
7 address; correct?

8 A. Yes, as I said, as part of this demonstrative.

9 Q. Now, Dr. Eriksen, you discussed the word cause in the course
10 of talking about randomized controlled trials and whether such
11 trials can be done with respect to advertising and youth smoking
12 behavior; correct?

13 A. Yes, sir.

14 Q. But, in fact, isn't it true that if we talk about the
15 concept of cause, there is a tremendous amount of scientific
16 literature that deals with how it is that you determine cause
17 scientifically; correct?

18 A. Yes, sir. It's very much written about and an important
19 topic.

20 Q. In fact, cause is probably the most core concept in the
21 field of science is it not, science is an inquiry into causes?

22 A. I would agree with that, yes, sir.

23 Q. If we go back for 40 years, we're not going to talk about
24 the whole history of cause going back to probably Aristotle and
25 before, but let's just take the last 40 years. Since the year

1 1964, let's talk about the meaning of the word cause in 1964.

2 Hasn't it been recognized since 1964 that causation can
3 be proven -- can be demonstrated on the basis of longitudinal
4 epidemiological studies that are observational rather than
5 controlled trials?

6 A. I believe -- it depends if you consider epidemiologic
7 studies and case controlled studies to be observational or
8 clinical studies.

9 Q. Could you please focus on my question?

10 Go back to 1964. Hasn't it been recognized since 1964
11 that longitudinal observational trials, or longitudinal
12 observational studies can in fact establish cause?

13 A. I'm not person -- no, I'm not personally aware that that was
14 a conclusion in 1964.

15 Q. Well, in 1964, are you familiar with the fact that the
16 Surgeon General's Report came out about smoking?

17 A. Yes, sir.

18 Q. That was the first Surgeon General's Report, was it not?

19 A. Yes.

20 Q. And as we -- as the court is only too well familiar, after
21 all these months and weeks, the 1964 report said, "Significantly
22 and signally that smoking caused disease, caused lung cancer."
23 Correct?

24 A. I believe the language was that smoking causes -- was
25 causally related to lung cancer in men.

1 Q. Okay. Causally related. You don't think the Surgeon
2 General said that smoking causes lung cancer?

3 A. All I'm reciting to you is the conclusion of the 1964
4 Surgeon General's Report.

5 Q. So you would say causally related. Is that good enough?

6 A. Yes, sir.

7 Q. Good.

8 Isn't it true at that time, in order to reach that
9 conclusion there had been no randomized controlled trials which
10 established that relationship? True or not.

11 A. Yes, sir. They note that in the report. They said it would
12 have been unethical.

13 Q. In fact, isn't it true that the backbone of the conclusion
14 that smoking was related to disease, as expressed by the Surgeon
15 General's Advisory Committee in 1964, the backbones were
16 longitudinal observational studies?

17 A. I would not agree with that.

18 I would agree that the backbone of their conclusion was
19 clinical epidemiologic studies and case controlled studies done
20 in hospitals.

21 Q. You're not familiar with the studies that were done over
22 time of how people became sick within certain cohorts?

23 There were cross-sectional studies done of hospital
24 populations; correct?

25 A. I would imagine so. That's not what -- that's not what I'm

1 referring to by case controlled studies, but...

2 Q. Even with case control studies, you're talking about
3 observational studies, are you not?

4 A. As opposed to experimental, yes, I would agree with that.

5 Q. Yes. So in '64 you didn't have randomized controlled
6 trials, but observational studies were sufficient to lead to a
7 conclusion of causal relatedness; correct?

8 A. As long as we agree that observational includes case control
9 studies and clinical studies as well as traditional
10 observational studies.

11 Q. Fine. So in order to reach a conclusion of cause,
12 randomized controlled trials were not necessary in the 1964
13 report; correct?

14 A. For the 1964 Surgeon General's Report to reach the
15 conclusion of smoking is causally related to lung cancer, they
16 did not rely on randomized controlled trials.

17 Q. Now, isn't it also true that the Surgeon General, again very
18 notably and very famously, not only recited in the report that
19 there was a tremendous amount of discussion about the word
20 cause, but the Surgeon General also spelled out criteria for
21 determining cause?

22 A. Yes, sir.

23 Q. And those included, with respect to the causal significance
24 of an association: A, consistency; B, strength; C, specificity;
25 D, temporal relationship; and E, coherence; correct?

1 A. Yes, sir.

2 Q. And these were criteria that were applied to the
3 observational studies by the Surgeon General in the course of
4 concluding that causation had been demonstrated; correct?

5 A. Yes, sir.

6 Q. Isn't it true that today substantially the same criteria,
7 same criteria, substantially the same, are used to test data
8 about the relationship between advertising and smoking?

9 A. Yes, sir. These criteria have been used to improve causal
10 inference in a variety of types of public health sciences.

11 Q. So the criteria that we're talking about here are not simply
12 confined or tailored to causation of disease, they have also
13 been applied -- it's been accepted that they are applicable to
14 talking about human behavior, including smoking behavior;
15 correct?

16 A. Yes, sir.

17 Q. And, in fact, if we take a look at the Cochrane
18 Collaboration Review that you cite in your direct examination --
19 and I've got JD 013159, the Cochrane Collaboration -- we see
20 that at pages 2 and 3, the reviewers -- this is a document that
21 you very heavily cite and rely upon, is it not?

22 A. Yes, it is, sir.

23 Q. We see at page 2 and 3, it says, "Since experimental studies
24 addressing this question -- which is talking about the impact on
25 marketing -- cannot be conducted, we will have to rely upon

1 observational studies." Just as we have on our chart; correct?

2 A. Yes, sir.

3 Q. It goes on to say, "Susser identifies criteria for
4 evaluating causality of a suspected agent from epidemiological
5 studies: One, it must clearly precede the hypothesized effect;
6 two, the association is strong; three, consistent; four,
7 specific; five, it should be expected from theory."

8 It goes on to say, "Properly conducted longitudinal
9 studies that examine the relationship between exposure to
10 marketing approaches and subsequent changes in smoking
11 behaviors, while controlling for possible confounding factors
12 can provide evidence supporting the causal links between tobacco
13 marketing and smoking behavior."

14 Do you see that?

15 A. Yes, sir.

16 Q. And those are very similar to the same criteria that were
17 used in 1964; correct?

18 A. Yes, they are. I believe they are derived from Bradford
19 Hill's work that was used in '64 originally.

20 Q. If we go to the work of the good Dr. Susser himself -- and
21 this is JD 013160, it's the cited study. "What is a Cause and
22 How Do We Know One? A Grammar For Pragmatic Epidemiology, by
23 Mervyn Susser." I guess he's at Columbia; is that right?

24 A. I do not know.

25 Q. You see that he talks all about cause, and one of the things

1 he says is that cause is a type of causation, includes the type
2 of causation where you have many different causes; correct?

3 A. I'm sorry. Could you point to me where you're referring?

4 Q. Yes, it's number 4, the fourth type of cause. "X is neither
5 necessary nor sufficient to cause Y." And he then explains, it's
6 a contributory cause.

7 So cause is still a term that's appropriate where you
8 have many factors, no one of which is either necessary or
9 sufficient. He still talks about cause; correct?

10 A. It's difficult for me to agree with what you're saying. I'm
11 only seeing number 4 of 4. I'm not sure what the other
12 preceding points are that he's trying to make here.

13 Q. Okay.

14 MS. CROCKER: Could Dr. Eriksen be given that document?

15 MR. BERNICK: I think he was.

16 BY MR. BERNICK:

17 Q. Maybe it's a point that I can ask you generally because I
18 don't know that we're really going to be different on this.

19 Would you agree with me that even where you have
20 multiple factors, no one of which is either necessary or
21 sufficient to produce a result, it's still appropriate to refer
22 to those factors as being causal, if the tests for causation are
23 met? Would you agree with that?

24 A. Yes.

25 Q. Now, he then talks about the property of causes, including

1 features like -- these are the three attributes of a cause,
2 association, time order, and direction, are here taken as sine
3 qua non. It means in his view, according to this article cited
4 in the Cochrane Review, according to his view you can't have
5 cause unless you have association, time order, and direction.
6 Do you see that?

7 A. Yes, I see that, sir.

8 Q. And at the end, he gives definitions of the criteria that
9 seem most useful and least tautologic, and he talks again about
10 strength, specificity, consistency, predictive performance, and
11 coherence.

12 Again, very similar to the same criteria we saw in
13 1964; correct?

14 A. Yes. I consider these to be an outgrowth from the '64 ones
15 we discussed earlier.

16 Q. Okay. Is it also true that even people who do actual
17 research, not just the reviewers like the Cochrane reviewers,
18 but actual researchers on the very issue that you have spoken
19 to, talk themselves about the proper definition of cause;
20 correct? Do you know whether any of them do?

21 A. Most research articles will discuss these -- the
22 implications and findings of the studies and the limitations of
23 the studies about what they found and what needs to be done
24 additionally.

25 Q. In order to determine cause; correct?

1 A. Or the relationship or association between the independent
2 variable and the dependent variable.

3 Q. But Dr. Sargent, in particular in the article, one of the
4 articles that you've cited, actually recites what it takes to
5 establish a causal relationship; correct?

6 A. I'm not sure I know what's on the screen right now.

7 Q. Have you read the Sargent article that's cited in your
8 testimony?

9 A. Yes, sir.

10 Q. Do you recall that Dr. Sargent -- I shouldn't have asked you
11 that question. That wasn't fair. It was snide. I apologize.

12 You recall that Dr. Sargent talks about evidence of a
13 causal relationship and really kind of gives a definition. Do
14 you remember that?

15 A. I'm sorry. I missed the first part.

16 Q. Do you recall that Dr. Sargent, who is one of the
17 researchers, did a longitudinal study, gave a definition of what
18 constitutes a causal relationship?

19 A. If you mean the highlighted paragraph where he's describing
20 that as a definition, yes, I would agree.

21 Q. He cites Dr. Hennekens. Do you know who Dr. Hennekens is?

22 A. Yes.

23 Q. Who is he?

24 A. He's a professor of epidemiology. He was at Harvard and
25 Brigham Young Hospital.

1 Q. One of the foremost epidemiologists in the country; correct?

2 A. Certainly.

3 Q. Now, Dr. Sargent didn't say -- as you did during your
4 examination this morning -- he didn't say you can't determine
5 cause unless you do a randomized controlled trial, did he?

6 A. I don't know if he said that in his report or not. I would
7 doubt it. It wouldn't be relevant to the study he was
8 presenting.

9 Q. In fact, there's no study that you've cited to the court in
10 your direct examination or here in court live, there's no study
11 that says you cannot determine cause unless you have a
12 randomized controlled trial?

13 A. I'm not aware if any of the studies directly address that
14 point. What I was trying to do was just to show the gold
15 standard for establishing causality is the randomized controlled
16 trial.

17 Q. No. What you said this morning was the only way to
18 determine causal relationship is through a randomized controlled
19 trial. That's what you said; correct?

20 A. I'd have to look at my transcript of my testimony to see if
21 they were my words or not, sir.

22 Q. That certainly would be a statement that's not a correct
23 statement; correct?

24 It is not true to say that you cannot establish cause
25 unless you have a randomized controlled trial. That's not

1 right.

2 A. If you're requiring a single definitive study you would want
3 a randomized controlled study to establish that causality.

4 Q. If you want any study to be able to establish causality, any
5 study, does it have -- do you have to have any studies that are
6 randomized controlled trials in order to get causality?

7 A. No single observational study will establish causality.

8 Q. I didn't talk about a single one. You said that the only
9 way to get to causation was through a randomized controlled
10 trial. That's not true; correct?

11 A. I'm getting a little confused because I thought the question
12 you had asked me previously was about a single study.

13 My point is that whether you have a longitudinal or an
14 observational study, one study by itself will not establish
15 causality.

16 Q. So when it comes to observational studies, you have to have
17 consistency, coherency, you have to whole a bunch studies, all
18 of which come out basically the same way; right?

19 A. Exactly, the whole bunch of studies.

20 Q. In fact, what's happened is that a lot of people have done
21 an awful lot of studies, observational studies, to determine
22 whether cigarette advertising causes initiation of smoking;
23 correct?

24 A. There's been an increasing number of them over the recent
25 years, yes sir.

1 Q. And it's both feasible and it's ethical to do those studies;
2 correct?

3 A. Yes, sir.

4 Q. Now, let's talk about -- I want to lead up to what some of
5 those studies actually say, but I want to do it a little bit
6 step wise, and I got myself confused when I took that excursion
7 down the road of consumption, so I've got to collect my thoughts
8 here.

9 Let's talk about the different kinds of scientific
10 evidence that we have. In your own report, with respect to
11 these relationships between advertising and youth smoking, you
12 use a wide variety of words to refer to that relationship;
13 correct?

14 A. I'm sorry, sir, to refer to the dotted line in between the
15 two?

16 Q. Yes. You talk in your report about the relationship between
17 advertising and smoking behavior; correct?

18 A. In my report, yes, sir.

19 Q. And one word that you don't use in your report to describe
20 that relationship is cause, correct? You don't say that
21 advertising causes youth smoking behavior, do you?

22 A. I'm not sure if I say that or not in my report.

23 Q. Based upon what you said this morning you couldn't say that
24 in your report, could you?

25 A. It's certainly the question that's been asked of me many

1 times. I could have said it in the report. I proceeded to use
2 other terminology.

3 Q. One of the phrases that you use is substantial contributing
4 factor. Do you recall using that in the course of your report?

5 A. Yes, sir.

6 Q. Let's put that one down.

7 MS. CROCKER: Your Honor, I'm just not sure if
8 Mr. Bernick means to refer to the report repeatedly or the
9 direct testimony. I think it might clear things up if he did.

10 MR. BERNICK: I apologize. Counsel is absolutely
11 right. I'm referring to your direct testimony.

12 THE WITNESS: Thank you.

13 BY MR. BERNICK:

14 Q. Now, those words are your words; correct?

15 A. They are the words I used in my written testimony, yes, sir.

16 Q. And, in fact, if we go to beyond that, you can't tell
17 whether anyone else uses those words, can you?

18 A. Well, I know that the words are used other than by myself.

19 Q. Well, do you recall being deposed on this very subject and
20 giving this testimony and this is page 84 of your deposition, in
21 August 22, 2002. The question at line 18 by Mr. Williams.

22 "Question: So we can agree that when you use the term
23 substantial contributing factor, that is your terminology, your
24 words?

25 "Answer: I can say that they are my words. Whether

1 they are other people's words as well, I cannot tell you now."

2 That was your testimony at that time; correct.

3 A. Yes, sir.

4 Q. Isn't it true that if you go -- well --

5 A. But I can tell you now.

6 Q. I'm sure you will be able to. I'll give you a chance.

7 I then asked Dr. Biglan -- Dr. Biglan used those same
8 words in his direct testimony, substantial contributing factor,
9 and I asked him whether it was true that prior to the time that
10 he submitted his direct examination, whether he had ever
11 actually used those words in any of his research work.

12 And he said -- and this is at page 9676 of the trial
13 transcript, "I said, isn't it true that prior to the time that
14 you submitted your expert report in your writings, you had never
15 referred to smoking as a substantial -- marketing as a
16 substantial contributing factor."

17 "Answer: I believe that's true I've never used the
18 phrase."

19 Do you see that?

20 A. Yes, sir.

21 Q. Is there now something that you can identify after your
22 deposition and after Dr. Biglan has testified where there's
23 actually scientific research where a researcher says, smoking is
24 a substantial contributing factor -- advertising is a
25 substantial contributing factor with respect to smoking

1 behavior?

2 A. I believe I used that phrase in the -- my testimony in the
3 Federal Trade Commission case against R.J. Reynolds.

4 Q. Fair enough.

5 A. And since my deposition I did a little searching and I
6 believe that's the same phrase that was used in the FDA rule
7 making process.

8 Q. So that's a legal proceeding, is it not?

9 A. It was a proceeding reviewing the evidence and coming to a
10 conclusion of why the FDA should exert authority on regulating
11 cigarette advertising.

12 Q. And this is a legal proceeding, is it not?

13 A. Yes, sir.

14 Q. So the two areas where you believe that this word -- and we
15 will take your word for it as these phrase have been used are
16 both legal proceedings -- you haven't identified for us a single
17 piece of scientific literature that uses those words, have you?

18 A. I haven't sought -- it may -- there may or may not. I have
19 not looked. I'm just saying that I did find those words in the
20 FDA proceedings and also in my testimony in 1998 with the
21 Federal Trade Commission.

22 Q. And there is no established scientific methodology that
23 gives us a test that's accepted in the literature for what
24 constitutes a substantial contributing factor, is there?

25 We can't go to the textbooks of epidemiology. We can't

1 go to the textbooks of science and see an authoritative
2 methodology for defining when it is that you have a substantial
3 contributing factor, can we?

4 A. Not statistically, and that's purposely it was used
5 substantially -- it was used to not imply statistical
6 significance.

7 Q. The answer to my question is we can't go to the literature
8 and find that established methodology that tells us when that
9 test is met; correct?

10 A. I would agree with that, yes.

11 Q. You also say that advertising and promotion affects smoking
12 behavior. That's another word you used; correct?

13 A. I'm just looking at my testimony to see where it might
14 appear.

15 Q. I think it's at page 55 if I got that right.

16 A. The -- it appears on page 55 in the sentence, "Many reports
17 of the Surgeon General have concluded that advertising and
18 promotion affects smoking behavior."

19 Q. We can't go to the scientific literature and find an
20 established methodology that gives us a test for affects, can
21 we?

22 A. Affects is a term to describe the relationship between two
23 variables.

24 Q. But there's no scientific methodology or text that tells us,
25 here is the test for when something affects, with an A,

1 something else; correct?

2 A. No, there's no scientific test, nor is there for any of the
3 terms that you're using. There's no scientific test to
4 establish causality.

5 Q. Oh, really. What about the criteria set forth in the
6 Surgeon General's Report in 1964? Those aren't criteria?

7 A. They are criteria. They are not a scientific test.

8 Q. Can you tell me the established criteria where it sets out
9 in the words of one syllable what the established scientific
10 criteria are for when something affects something else?

11 A. You would apply the same criteria that we're discussing
12 around causality: the strength of the association, the temporal
13 nature of the association, the consistency of the association.

14 And, I'm sorry, I wasn't finished.

15 Q. Go ahead.

16 A. I was just saying this is the same process that did occur
17 40 years ago at the first Surgeon General's Report, and they
18 defined causality or causal as a significant, effectual
19 relationship. And there's no test that you can test that term,
20 but that's what the basis of the foundation of these principles
21 are and the criteria are.

22 Q. The words "cause" are words that you don't use in describing
23 the relationship between advertising and youth smoking behavior;
24 correct?

25 A. I try to be more precise about the words, yes, sir.

1 Q. You don't use those words -- the words cause, though, have
2 criteria; right?

3 A. Causal inference has criteria, yes, sir.

4 Q. Causal inference has criteria. We can't find in the Surgeon
5 General's Report or anywhere else criteria that the Surgeon
6 General says apply to the word affect, can we?

7 A. No, sir.

8 Q. Same thing applies to influence, which is another word you
9 use, correct? Page 58 and page 56.

10 A. I'm just trying to find the quote.

11 (Pause)

12 Yes, sir, I use the word "influences."

13 Q. You also talk about clear and compelling evidence. Is there
14 a scientific test for clear and compelling evidence or is that
15 another legal term?

16 A. It may not be either, but....

17 Q. What about preponderance of the evidence?

18 Is there a scientific definition or a set of criteria
19 for preponderance of the evidence or is that another legal term?

20 A. It may be a legal term, sir. I'm not a lawyer.

21 Q. Let's go back to then your chart and apply some of this
22 learning to some of the categories of scientific studies that
23 you've now looked into and testified about.

24 You say that there is scientific evidence regarding
25 awareness and recognition, favorable attitudes, specific

1 intentions and actual behaviors; correct?

2 A. Yes, sir.

3 Q. Would it be fair to look at these studies, look at the
4 studies that you've talked about and ask whether that scientific
5 evidence shows directionality?

6 Would that be an important thing to look for?

7 A. That's not one of the specific criteria, but it would be
8 important to look at, yes, sir.

9 Q. It would be important.

10 Would it also be important to look to see if there are
11 tests of statistical significance?

12 A. If that's relevant for the type of study that's done. Not
13 all studies measure statistical significance. Many studies look
14 at odd ratios and confidence intervals.

15 Q. In order to have odds ratios and confidence, those are tests
16 of significance, aren't they?

17 A. They are not considered to be P values, if you're referring
18 to statistical significance.

19 Q. The result is statistically significant if it falls within a
20 95 percent confidence limit and it excludes one; correct?

21 A. That's not the only way of determining significance.

22 Q. It's one of the ways; correct?

23 A. Yes.

24 Q. Consistency, is that another criteria that you should look
25 for in reviewing the scientific evidence in these different

1 areas?

2 A. Yes, consistency applies to cross studies.

3 Q. And specificity, is that also something you should look for?

4 A. Yes. I'm not sure that's one of the criterias, but it may
5 be.

6 Q. Let's talk about awareness and recognition. You said that
7 typically these are cross-sectional; right?

8 A. Yes, sir.

9 Q. I think you've got eight or nine studies, do you not, in
10 this area of your direct testimony?

11 A. I think there were seven or so.

12 Q. Isn't it true that all of them are cross-sectional studies?

13 A. Yes, I believe they are.

14 Q. Because they are all cross-sectional studies, isn't it true
15 that you can't determine directionality from these studies?
16 They all say that.

17 A. Yes, but some of them are among 3 and 6-year-olds.

18 Q. I didn't really ask. All I'm saying is, none of those
19 studies tell you about directionality; correct?

20 A. No, none of the studies speak to directionality in terms of
21 a cross-sectional, but you can look at the population you're
22 looking at to help conclude whether -- to help inform the issue
23 of their awareness which causes which.

24 Q. Okay. Is there any way to account for the fact that in
25 every single one of those studies the authors point out that

1 they can't determine causality because they are not
2 longitudinal?

3 A. No, sir. That would be a common limitation of the study.

4 Q. Let's talk about the studies regarding favorable attitudes.
5 I think you've had four studies, two of them are
6 cross-sectional; right? That would be Turco and Feighery.

7 A. No, sir. Turco is an experimental study.

8 Q. Oh, it is?

9 A. Yes, sir.

10 Q. Feighery is a cross-sectional study; is it not?

11 THE COURT: What page are we on in the direct?

12 MR. BERNICK: I can tell Your Honor exactly because I
13 put that in my folder. The cross -- this area is in pages --
14 beginning on page 60, and the studies are cited at 62 and 63,
15 and Feighery is in the middle of 62. It's U.S. Exhibit 17684.

16 THE COURT: Okay.

17 BY MR. BERNICK:

18 Q. And the Feighery study is a cross-sectional study, is it
19 not? If I can get this in front of me.

20 A. Yes, sir, I believe it is.

21 Q. Okay. And the Turco study is actually a study -- that's
22 right. It's an experimental study. So Turco is experimental,
23 Pechman is experimental, and Arnett is experimental; correct?

24 A. Yes. There are two Pechman studies. Both of them are
25 experimental.

1 Q. So the rest of them are experimental.

2 And in these experiments, isn't it true that none of
3 these experiments extends to any smoking behavior? It doesn't
4 include that as an end point; correct?

5 A. That's correct, sir.

6 Q. Isn't it also true?

7 THE COURT: Is that for the ethical reasons that you
8 discussed this morning and that you discussed in your direct
9 testimony?

10 THE WITNESS: Exactly, Your Honor.

11 MR. BERNICK: Well, in fairness, these are studies in
12 which advertising -- let's just be clear about it.

13 BY MR. BERNICK:

14 Q. Advertising is shown to the kids in the Pechman studies;
15 correct?

16 A. Yes, sir.

17 Q. And in the Arnett studies; correct?

18 A. There's a 5-minute video shown to the children in the
19 Pechman studies and in the Turco study they view a magazine.
20 One group views a magazine with ads, the other group views the
21 magazine without ads and they look at attitudes at the outcome.

22 And responding to Your Honor's question, it's my
23 opinion those studies would not have been allowed if they had
24 been a longer exposure or if the outcome, the dependent variable
25 was of smoking behavior.

1 Q. Let's be clear about that. These kids were deliberately
2 exposed to advertising; correct?

3 A. They were deliberately -- yes, sir, they were deliberately
4 exposed to a brief 5-minute exposure to advertising.

5 Q. And in no case was there a follow-up to look at their
6 smoking behavior; correct?

7 A. Not that the investigators reported or that I'm aware of.

8 Q. Now, the Turco study, they were looking at ads as well;
9 correct?

10 A. Yes, I believe it was ads in magazines.

11 Q. Ads in magazines. In those cases, some of the kids were
12 already smoking; correct?

13 A. I'd have to look at the study to see if the study population
14 included smokers or nonsmokers.

15 Q. You just don't remember?

16 A. I don't remember, sir. I'd have to look at the study to
17 confirm that.

18 Q. And all that Pechman and Arnett were doing, really, is that
19 they were getting kids reactions to the ads; right?

20 They were not long term thing to see how their
21 long-term attitudes were framed or their long-term intentions
22 were framed. They were just a quick exposure. How do you react
23 to the ad; right?

24 A. It was a quick change in attitude, but also you said it
25 didn't affect their intentions, but they did measure the

1 intentions and it did affect their intentions.

2 Q. Really, in these studies here they did?

3 A. Yes.

4 Q. Or is that in the next category?

5 A. In the Pechman study, it did.

6 Q. Which Pechman are you talking about? The Pechman that
7 talked about intentions or the Pechman over here on attitudes?

8 A. I'm talking about the Pechman study that was done in 2002
9 and published in the Journal of Consumer Research.

10 Q. Let's go over here to the category that deals with -- it
11 would be fair, though, Dr. Eriksen, that the short exposures
12 that you have here in the studies that deal with attitudes can't
13 really replicate how attitudes are framed over the long term
14 because they didn't extend over the long term; fair?

15 A. Yes, the attitudes nor the exposure.

16 Q. Let's then go to the next one which is the specific
17 intentions work. You got three studies. Braverman is
18 cross-sectional.

19 Would it be fair to say that over here -- I'm sorry --
20 on favorable attitudes, that these experiments are short term?

21 A. They are short -- the exposure is short term, yes, and the
22 measurement of the effect on the outcome.

23 Q. The specific intentions you got, Braverman, that's
24 cross-sectional, right?

25 A. No, it's longitudinal.

1 Q. It is. I could be mistaken.

2 Braverman takes a snapshot at a given point in time.
3 They take a look at people. They are given advertising ban in
4 Norway and you then do an assessment by questionnaire to look at
5 current smoking or expectations of smoking in the future.

6 THE COURT: What are you reading from, Mr. Bernick?

7 MR. BERNICK: These are all -- and I'm sorry, Your
8 Honor. I'm trying to get through this without getting bogged
9 down in each one, but...

10 THE COURT: Are these your notes?

11 MR. BERNICK: These begin at page 63, and Braverman is
12 cited at page 64, it's 17684.

13 THE COURT: Yes, I know all of that, but I want to
14 know -- I don't believe you were reading -- maybe you were --
15 but I don't think you were reading from the direct testimony,
16 were you?

17 MR. BERNICK: I'm reading from the article itself.

18 THE COURT: That's what I was trying to find out.

19 MR. BERNICK: Yes.

20 BY MR. BERNICK:

21 Q. The Braverman study took a snapshot of adolescents in Norway
22 who had been exposed to tobacco marketing despite an existing
23 ban; correct?

24 A. Sir, I'd like to see the study because I think it's a
25 longitudinal study. They followed a cohort over time.

1 Q. I don't think so, but you can -- this is JD 013154.

2 THE COURT: And the witness now has it. Why don't you
3 just check on this point so we can get it clear for the record?

4 MR. BERNICK: I may stand corrected on that.

5 THE COURT: Twice, Mr. Bernick, this afternoon --

6 MR. BERNICK: I'm sorry?

7 THE COURT: Twice or maybe three times this afternoon.

8 MR. BERNICK: What?

9 THE COURT: That you've had to stand corrected on what
10 kind of study it was. That's a record.

11 We are going to take a 10-minute recess everybody.

12 MR. BERNICK: I'll try to improve.

13 (Recess began at 3:12 p.m.)

14 (Recess ended at 3:23 p.m.)

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

16 MR. BERNICK: I've been busily reading the stats, Your
17 Honor, and in the hopes that I won't make any mistakes, but no
18 guarantees.

19 BY MR. BERNICK:

20 Q. I'm not a statistician by background. That's why you're
21 going to help me out; right?

22 A. Whatever I can do.

23 Q. I was going to say -- I was going to concede that there were
24 three longitudinal studies here by specific intentions, but my
25 able partner, Ms. Honigberg, says, "Well, let's take another

1 look."

2 So I want to take another look at the Braverman study,
3 and it's true that there were two different interviewing
4 sessions: one in 1990 and one in 1995; correct?

5 A. Yes, sir.

6 Q. And it's true that there were cohorts that were given I
7 think the same questionnaires both times; right?

8 A. I believe that's the case.

9 Q. But is it true that they were different cohorts?

10 A. Could I take a minute to see?

11 Q. Absolutely. I'm not to go off on a limo, though. I think
12 they may have been different cohorts.

13 A. Well, let me say before I look at it, just because if they
14 are different cohorts, that does not nullify them being a
15 longitudinal study.

16 Q. I didn't say that it did. I just want to know if they are
17 two cohorts or not.

18 A. It appears that there are two different cohorts of the same
19 age children five years apart.

20 Q. So you have a study that we will call -- should we put
21 "longitudinal" in question marks -- quotes, or would you be --
22 we are better off probably saying two cross-sectional studies.
23 You tell me which.

24 A. May I just have a moment, please?

25 Q. I'm sorry?

1 A. I would just like to have a moment.

2 Q. Sure.

3 MR. BERNICK: Can you see this?

4 THE COURT: No. I was just thinking of the question I
5 want to ask as soon as the doctor is ready.

6 MR. BERNICK: Okay.

7 (Pause)

8 THE COURT: Doesn't a longitudinal study require
9 examination of the same cohort?

10 THE WITNESS: Usually, Your Honor, but not necessarily.
11 They usually will refer to it as a longitudinal cohort study,
12 but there are -- this may be an example of a type of
13 longitudinal study that has a large enough sample that they
14 interview two similar cohorts at two different points of time.
15 But it does get confusing in the terminology.

16 BY MR. BERNICK:

17 Q. Tell me one thing, following up on the court's question.

18 The reason that we talked about longitudinal and
19 cross-sectional being an important distinction is that
20 longitudinal can tell you about directionality; right?

21 A. Yes, sir.

22 Q. And the way that longitudinal tells you about directionality
23 is it looks for one condition to precede the other in time;
24 right?

25 A. Yes. That speaks to the temporal nature of the

1 relationship.

2 Q. And if you don't have the same cohort, isn't it true that
3 you can't tell whether within a certain group of people there
4 has been a progression -- that is, a change over time -- in the
5 variable that you're looking at?

6 A. I think that's the point that Your Honor was addressing.
7 And I think if you have in this type of study a large enough
8 sample that's representative of the initial sample at a
9 subsequent time, that's also considered to be a longitudinal
10 study.

11 Q. Done?

12 A. Yes.

13 Q. But in this one, did the authors make any kind of conclusion
14 about progression within the cohort?

15 A. Not that I'm aware of, no, sir.

16 Q. In fact, in this particular study -- maybe we should just be
17 simpler about it and say -- now that we spent this time on it,
18 this is the Braverman study -- the authors are careful to note
19 that the study -- the data do not demonstrate that a causal
20 relationship exists between marketing exposure in either current
21 smoking status or future expectations?

22 "In addition to differences in actual exposure to
23 marketing, respondents reports on these variables might reflect
24 differences in selective attention, perception, interpretation,
25 and memory for tobacco marketing, and smoking susceptibility

1 might precede differences in these underlying cognitive
2 processes."

3 So the authors are not prepared to make a statement
4 regarding progression and they are not prepared to make a
5 statement regarding causation; true?

6 A. I believe they are noting these limitations of the study and
7 pointing out some of these things can only be done through more
8 experimental research.

9 Q. With that qualification is the answer to my question yes?

10 A. Yes.

11 Q. If we then go to the next of three studies, which is the
12 Wakefield study --

13 MR. BERNICK: And that is, Your Honor, in the same page
14 range, that is at page 65, and it's U.S. 17684.

15 Q. Do you recall that in the Wakefield study that is not a
16 study that deals with advertising at all?

17 A. Yes, sir. As I note in my testimony, it was about intention
18 not to smoke as being important predictors of actual smoking
19 behavior.

20 Q. And then we have the Aitken's study, and the Aitken's study
21 is a longitudinal study; correct?

22 A. Yes, sir.

23 Q. And isn't it true that in that study they look at
24 advertising; right?

25 THE COURT: And where is that?

1 MR. BERNICK: That's the same page range, Your Honor.

2 That's at the bottom of page 64. It's U.S. Exhibit 17684.

3 BY MR. BERNICK:

4 Q. That's a study that does look at advertising exposure over
5 time; correct?

6 A. Yes, sir.

7 Q. And looks at intentions to smoke over time; correct?

8 A. Yes, sir.

9 Q. Isn't it true that what they find is that intentions to
10 smoke affect awareness of ads? That is, the people who have an
11 intention to smoke are more likely to be more aware of ads over
12 time.

13 A. That's not my interpretation of it, but I -- perhaps we can
14 look at the study if you would like to discuss it more. But was
15 that --

16 Q. Isn't it true that basically what they have found is that
17 even at baseline, at the beginning, the people who were
18 smokers -- or who had intentions to smoke when older were
19 already paying attention, more attention, to the ads as the
20 longitudinal study commenced?

21 A. I find their discussion is, you know, first children whose
22 intention to smoke when older became more positive between the
23 two interviews tended to be more aware of cigarette advertising
24 at the time of the first interview.

25 Q. Right. But from that you can't tell whether the advertising

1 is prompting people to become more positive or whether in fact
2 they start out by being more positive focusing on the ads and
3 then progressing as being more positive. That is to say, people
4 who start out with an intention to smoke are already more
5 focused on the ads and become more positive in their intentions
6 over time.

7 A. I'm sorry. I really can't follow that.

8 All I can say, you know, I'm looking at their
9 conclusion in the paper where there was a relationship between
10 baseline, awareness of ads, and subsequent intention to smoke.

11 Q. Okay. Is that about what you can tell us this afternoon on
12 this?

13 A. Well, that's to me my interpretation of the bottom line of
14 the study and that's why I used it.

15 And just to add, these studies were illustrative
16 studies. I didn't intend to do a comprehensive literature
17 review of all the studies, but to put in some studies that
18 illustrated this model that there was evidence to illustrate
19 each of these points.

20 Q. Would it be fair to say that of the three studies that you
21 chose to show us this afternoon, the only study that draws a
22 conclusion about directionality -- which we're not going to be
23 able to unpack completely today, I suspect -- is the Aitken's
24 study? In this area that is on intentions.

25 A. In terms of my testimony, yes, sir. I wouldn't want that to

1 represent the literature out there as a whole, but what I
2 included in my testimony.

3 Q. It's what I've got to work with here this afternoon, so it's
4 going to have to be sufficient for today's purposes.

5 I'd like to take in the time that we have remaining the
6 last step. None of the studies that we've been talking about so
7 far -- correct me if I am wrong, Dr. Eriksen -- but none of
8 these studies actually develop a linkage between marketing on
9 the one hand -- market exposure on the one hand and actual
10 smoking behavior on the other. Correct?

11 A. Yes, sir, that's generally correct.

12 Q. So we're now going to take this last step and we're going to
13 talk about studies that do deal with actual smoking behavior and
14 I'm going to go through a couple of them.

15 And if we can -- I think that this is the -- yeah, this
16 is the magnet deal. Let's put it over there. It's a little bit
17 easier.

18 MR. BERNICK: Now, for Your Honor's reference, this is
19 part of the direct examination and it's all under the next
20 subsection in the examination. And maybe we can give you --

21 THE COURT: I think it's page 65.

22 MR. BERNICK: Page 65. Okay.

23 BY MR. BERNICK:

24 Q. Beginning at page 65 you start to cover what I understand to
25 be three categories of research that pertain to this last step,

1 and I've kind of created a new little icon that's borrowed from
2 yours and I'm going to stick it over here to keep track of the
3 end point variable that we're looking for, which is what is it
4 that affects or has been shown to be associated with actual
5 smoking behavior.

6 Are we on the same page, roughly?

7 A. So far, sir.

8 Q. Now, I've got at the other end defendants' marketing
9 practices, and I want to go through some of the studies, and the
10 studies in particular that I want to focus on are the two
11 studies that you told us about in your deposition.

12 Do you recall telling us in the deposition that you
13 gave that the two studies that you were prepared to talk about
14 were the Pierce study in 1998 and the Biener and Siegel study in
15 the year 2000?

16 A. Yes, sir, I recall that from the deposition. There are
17 other studies included in the written testimony, but....

18 Q. Okay. And these studies are all studies that are -- those
19 studies are both longitudinal studies, but you have also got
20 studies that deal with two different other areas: one is brand
21 preference and the other is consumption.

22 MR. BERNICK: I think for the court's benefit, I may
23 have been confused in terms of the order.

24 Q. The first studies that are taken up are the brand preference
25 studies and the second studies, if I'm right, Dr. Eriksen, are

1 the consumption studies and the third -- is it the other way
2 around?

3 A. Yes.

4 Q. Let's just march through them. I'm going to begin with
5 brand preference.

6 When we talk about brand preference, brand preference
7 is not the same thing as initiation of smoking, is it? Correct?

8 A. That's right, sir. It's a type of smoking behavior, but
9 it's not initiation.

10 Q. The data that you present on brand preference, first of all,
11 focuses on the top three brands, and you make the statement that
12 Newport, Marlboro and Camel are the three most advertised
13 brands.

14 Do you recall making that statement at page 49 of 91?

15 MR. BERNICK: Maybe the page span, Your Honor, of the
16 brand preference studies begins -- yeah, teenage brand
17 preference begins at 49.

18 Q. "When adolescents begin to smoke, they generally smoke one
19 of three brands, Marlboro, Newport, and Camel, and they remain
20 loyal to those brands." Do you see that?

21 A. Yes. What am I looking at?

22 Q. Page 49 of your direct examination.

23 A. Thank you.

24 Yes, sir, as of 1994.

25 Q. As of 1994. And you say as of that time, that these are the

1 same brands that are also the most advertised brands; correct?

2 A. Yes, sir.

3 Q. And the inference I think that you want us to draw is the
4 fact that they are so popular probably has something to do with
5 the fact that so much money is spent in advertising; correct?

6 A. Yes, and that the teens smoke them more than adults do.

7 Q. But in point of fact, those are not the three brands that
8 significantly have been -- that consistently have been the most
9 advertised, are they?

10 A. I only know that for 1994.

11 Q. You only know that for 1994.

12 I want to show you J-DEM 010141, and ask you whether
13 you have any reason to doubt that Newport as an example was one
14 of the top three in '89, '91, '92, and '93, but never made it to
15 the top three in terms of expenditures for any year thereafter.

16 A. I'm sorry. I would like to correct what I said.

17 The study was published in '94, but the data was from
18 '93. That's the confusion that corresponds with what you have
19 here. That in 1993, Marlboro, Camel and Newport were the three
20 most advertised brands, and we published that study in 1994.

21 Q. And isn't it a fact -- or do you have any reason to doubt
22 that Newport after 1993 was no longer one of the top three
23 brands in terms of the level of advertising?

24 A. I have no reason to doubt it or believe it, sir. I haven't
25 seen this data.

1 Q. Is there any reason you decided to pick out 1993 instead of
2 looking for all the years since 1993 to see which are the top
3 three in expenditures?

4 A. The reason we picked out 1993 is that we did the study in
5 1993 and we had to purchase the data. So we purchased the most
6 recent data that was '93. This data is not available to the
7 public, so it had to be acquired.

8 Q. So when you say that the top three brands in terms of youth
9 consumption are Marlboro, Camel and Newport, and that
10 corresponds with the levels of advertising expenditure, you're
11 only prepared to make that representation as being true today
12 for 1993; correct?

13 A. That's the only study that was done that I'm aware of that
14 we published.

15 Q. If you take at face value what I've now shown you in J-DEM
16 010141, we can see that that correspondence doesn't occur in any
17 other year; correct?

18 A. Those three -- according to this demonstrative, those three
19 brands do not appear in the top three in any other year.

20 Q. And, therefore, the correspondence doesn't occur in any
21 other year if this data is correct?

22 A. Just so everyone understands. These were just the outdoor,
23 the advertising expenditures that we -- I'm not sure what this
24 is.

25 Q. These are the advertising expenditures, as I understand it.

1 The top advertising, top three spenders.

2 A. I can tell you what was included in the analysis that we did
3 in terms of type of advertising. I'm not -- what I'm saying,
4 I'm not sure that this is the same category is represented since
5 I don't know --

6 Q. It may not be. But all I'm saying is that today you don't
7 really know what you said in your testimony pertains to any
8 other year than 1993; fair?

9 A. Yes, sir, that's what I said in the testimony.

10 Q. Now, you also say, it also turns out -- and this is at page
11 53 of your testimony that the top three brands that you've
12 identified -- Marlboro, Newport and Camel -- not only are the
13 top three for adolescents, but there's a greater share -- they
14 have a greater adolescent share than they have an adult share.
15 That is, that adolescents are more likely to pick those brands
16 than are adults. Fair?

17 A. Fair.

18 Q. That's the inference that you would want the court to draw;
19 correct?

20 A. No. It's the data, sir.

21 Q. Well, it's the data that would then support that inference.
22 Fair, Dr. Eriksen?

23 Okay. To make that point --

24 THE REPORTER: He didn't answer.

25 MR. BERNICK: I think he said "fair."

1 Q. Fair?

2 A. Fair.

3 Q. Got it now.

4 Now, in order to say that, you compare percentages
5 based upon a National Survey of Drug Use and Health, a SAMHSA
6 survey, you compare the youth market share -- that is ages 12 to
7 17 -- for Marlboro, Newport and Camel with the market share that
8 they have for adults age 26 and up. And we can see that in fact
9 the adolescents' share is higher than adults.

10 And you illustrate the same point, I believe, in, on
11 the next page, page 54, where you actually draw a bar graph that
12 compares for each, the adolescent share and the adult share in
13 the year 2003. We can see that again the adolescents' share is
14 higher than the adult share. Fair?

15 A. Yes, sir.

16 Q. That's at page 54. It's your own chart.

17 A. I recognize the chart. I was trying to find the page.

18 Q. It's page 54.

19 Now, if we go back, is page 54 and that graph based
20 upon the data that we have at page 53?

21 A. It's from the same data source.

22 Q. Is it the same data? In other words, to create the bar
23 chart, did you use the data that was on page 53?

24 A. I believe so, yes.

25 Q. Are you sure?

1 A. May I have a moment?

2 Q. Well, I think they are the same, but do you recall one way
3 or another?

4 A. No, I took it from the national health survey -- National
5 Survey of Drug Use and Health, and I believe they should be the
6 same.

7 Q. Did you, though, make sure that the comparison was a fair
8 comparison before you presented it to the court?

9 A. Obviously. It was my intent for it to be a fair comparison.
10 I don't know how it's not.

11 Q. Well, I don't know. Maybe it is.

12 But this works with the adolescents are defined as
13 people between the age of 12 and 17, and adult smokers are
14 defined as being the age of 26 and up; correct?

15 A. Yes, sir.

16 Q. What happened to the people who are 18 to 25?

17 A. I just took the data from the report, sir. I just provided
18 the contrast. I'm not even sure the data for 18 to 25 are in
19 the report. They may or may not be.

20 Q. When you wanted to make sure that the comparison was a fair
21 comparison, wouldn't that be a logical question to ask, is
22 whether the data for adults really is all the data for the
23 adults?

24 A. I think this table could have been prepared with three
25 columns instead of two, but I think this provides a contrast

1 between adolescents and adults that's fair and honest.

2 Q. Well, with certain adults. The older adult population;
3 correct?

4 A. 26 and up.

5 Q. Yeah.

6 A. I think that's pretty representative of adults.

7 Q. No difference between 26 and 50, is there? I'm being
8 facetious here.

9 Let me ask. It's true, is it not, that there are
10 adults who, because of brand loyalty, are still smoking brands
11 that my client used to make its business off of, like
12 Chesterfields and Viceroy? Those are old, old brands, are they
13 not?

14 A. Yes, they are. I just don't know how their brand -- their
15 market share has changed.

16 Q. I can assure you that they have dropped like -- well, they
17 are at rock bottom. But they would still be picked up with
18 people who are older; right?

19 A. I don't know that data. If you say so.

20 Q. Well, wouldn't it stand to reason that if there are older
21 brands, then the older the population of adults that you use for
22 comparison purposes, the more that these three brands, which are
23 newer brands, are going to have been diluted by the presence of
24 other brands in the marketplace?

25 Do you understand what I'm saying?

1 A. Yeah. I just don't know if I agree that that's a factor
2 that would -- that would change the nature of this comparison at
3 all.

4 Q. Well, Lucky Strike was the biggest brand in America in the
5 1950s and Marlboro was not even an also-ran, it was a tiny
6 market share; correct?

7 A. Yes, sir, that's right.

8 Q. And yet we still have people who are smoking Lucky's today
9 because they've always smoked Lucky's, right, maybe in that
10 adult population?

11 Wouldn't you be curious, Dr. Eriksen, to know how the
12 data turns out for people who are 18 to 25?

13 A. I'm always interested in seeing data, sir.

14 Q. Okay, let's try to satisfy that curiosity.

15 I show you J-DEM 010215 where, based upon exactly the
16 same National Survey of Drug Abuse and Health, same source, I've
17 marked in red the data for people who are 18 to 25, and again
18 assuming that data is accurate, we would see that the numbers
19 are significantly different, are they not?

20 A. Yes, the data is very interesting. I would have -- I have
21 not seen this data. I would have to say it's not presented in
22 the report that you probably did some type of analysis, but in
23 any case --

24 Q. Which report?

25 A. The National Household Survey of Drug Use.

1 Q. Oh, from the 2003 report. It doesn't have that data?

2 A. I don't recall, sir.

3 Q. Well, I've actually got that. That is JD 067884, table
4 7488, and what it reflects, as I sit here and look at it, is
5 three columns: 12 to 17, 18 to 25, and 26 and older.

6 Are you sure that it wasn't in the report when you
7 looked at it?

8 A. I didn't say it wasn't in the report. I'm saying I don't
9 recall it. I said that I could have presented all three columns
10 just as well.

11 Q. Yeah.

12 A. What page is that at?

13 Q. This is page 40715, and if you go to the next page, which is
14 407 -- table 7.48B, it actually spells out the percentages. I
15 think that's why Rene came to point this out to me.

16 We see 53.2 for Marlboro, 17.9 for Newport, and 13.7
17 and 14.2, et cetera, et cetera, going down the line. And all
18 that we've done is take the numbers there for 2003 of 14.2,
19 50.9, and 17.5, and put them on the same chart to show that, lo
20 and behold, with Marlboro the adolescent share 12 to 17, is
21 very, very close, is it not, to the 18 to 25s; the Newport is a
22 little bit higher than the 18 to 25; and Camel actually is less
23 popular proportionately among adolescents than it is among
24 people 18 to 25, if those numbers are correct. Right?

25 A. I think this data is very valuable and it tells little

1 stories. It wasn't excluded for any purpose except that I was
2 trying to compare adolescents to adults.

3 It shows the, you know, kind of the residual effect of
4 the Camel campaign in my interpretation.

5 Q. Oh, I see. So you think it was more popular as a result of
6 the Camel campaign. That's actually an area where you've
7 testified, is it not?

8 A. Yes, sir.

9 Q. Isn't it true that you're not aware of a single statistical
10 study which shows an impact of the Joe Camel Campaign on
11 consumption among youth; correct?

12 A. I've been asked that question before, sir, and I said it's
13 not been a published study, but I would say that the FTC
14 proceedings document the case that Camel played in increasing
15 initiation and affecting brand preference of young people.

16 Q. You're not only aware of a single public study, you haven't
17 shown this court in your direct testimony, either in writing or
18 orally, the data that supports your conclusion; correct?

19 A. The data were all presented in the FTC proceedings.

20 Q. Well, but in your expert report in this case and in your
21 direct testimony in this case, you nowhere share with this court
22 data to support that conclusion, do you?

23 A. I don't agree with that.

24 The data to support that conclusion is cited in the
25 publications on my CV and in this report about brand preference,

1 showing the increase in brand preference of Camel during this
2 period, and I'd be pleased to discuss that data. I was not --
3 Q. You don't have a statistical study that demonstrates a
4 connection between advertising of the Joe Camel Campaign on the
5 one hand and youth initiation on the other, do you?

6 MS. CROCKER: Objection, Your Honor. If Dr. Eriksen
7 could be allowed to finish his answers. I think it's probably
8 very difficult for the court reporter when Mr. Bernick is
9 interrupting and speaking over the witness.

10 MR. BERNICK: I've tried very hard not to. If I have,
11 Your Honor, I apologize.

12 THE COURT: No, there's a specific question out there.
13 It is a very narrow and focused question. And it's answerable,
14 I do believe, by a yes or no.

15 That question is: You don't have a statistical study
16 that demonstrates the connection between advertising of the Joe
17 Camel Campaign on the one hand and youth initiation on the
18 other, do you?

19 THE WITNESS: There is not a published study, no.

20 BY MR. BERNICK:

21 Q. Well, in fact, you're not aware of one study, not one study,
22 that provides a statistically significant linkage between Joe
23 Camel and any increase in youth smoking at all, are you?

24 A. I believe I said that in my deposition, and, yes, sir.

25 Q. And you would stand by that today; correct?

1 A. Not a published study, yes.

2 Q. Well, you've even made that qualification in your testimony
3 in this case. This is deposition at page 66, August 22, 2002,
4 "As of today" -- question at line 20 -- "Are you aware of any
5 statistically significant study linking the Joe Camel Campaign
6 with any increase in youth smoking?"

7 "Answer: There's not one study since that time, that
8 is since your prior testimony, that would change my response to
9 that."

10 Correct?

11 A. I answered that -- when I was asked that question, I
12 answered in terms of being a published study.

13 And what I was trying to convey now, to make the case
14 complete, was that I believe that data are contained and
15 represented in the FTC proceedings in 1998.

16 Q. Well, in point of fact your response is, at line 12, the
17 original question is: "Would you agree that there was not in
18 1998 one statistically significant study linking the Joe Camel
19 Campaign with any increase in youth smoking?"

20 No qualification about whether it's published or not.
21 You answer. "As stated, I would agree with that statement as I
22 had in prior testimony."

23 And then you were asked the question about whether
24 there was any study since that time, and you said no, you're not
25 aware of any study since that time; correct?

1 A. Yes, sir. When I was asked the question, I was interpreting
2 it to mean a statistically significant published study.

3 Q. Going back to where we were before we had that exchange. We
4 can see that, in fact, the comparison that you sought to draw
5 between the share of adolescent smokers on the one hand and the
6 share of adult smokers on the other shows a very different
7 result when we focus on people who are 18 to 25 than it does for
8 what you originally presented, which is adults 26 and over;
9 correct?

10 A. The data are different for different age groups, but I don't
11 see it changes my inference or conclusion at all.

12 Q. So you have with Marlboro, you said that there's 49 percent
13 for 12 to 17 as compared to 38 percent, and it now turns out to
14 be 49 percent as compared to 50 percent. You don't think that's
15 a significant difference?

16 A. I'm sorry. What are you comparing?

17 Q. When you compare the probably market share of Marlboro among
18 underaged smokers 12 to 17 with those of adults who are 18 to
19 25, you don't see that the adult market share is any different
20 from the adolescent market share and vice versa; correct?

21 A. I see that the young adult market share is the same as the
22 adolescent market share for Marlboro. It's less for Newport and
23 it's more for Camel.

24 Q. And that is different from the graph that you presented to
25 this court which only focused on 26 and over; correct?

1 A. Yes, it is because it's another column.

2 Q. And isn't it true that if the industry advertises to people
3 who are 18 to 25, it is inevitable that there is going to be
4 spillover to people who are 12 to 17; correct?

5 A. That's my opinion, yes, sir.

6 Q. And, in fact, you have said that it would be excruciatingly
7 difficult -- you're smiling because those are your words -- it
8 would be excruciatingly difficult to be advertising to people
9 who are 18 and above and not have spillover to people who are
10 under 18; correct?

11 A. Yes, sir. I made that comment during the deposition.

12 Q. And you stand by that; correct?

13 A. Yes, sir.

14 Q. Let's talk about another area of evidence when it comes to
15 the potential linkage of marketing and actual behavior, which is
16 the area of -- if I can get this down right -- the studies that
17 you have referred to.

18 You referred to three studies. They are the Last Straw
19 Article by Pollay and others, including yourself. They are the
20 King study and then the Pucci study. Right?

21 A. Yes, sir. What page are you on?

22 Q. This is pages 73 and 74 of the testimony.

23 A. Yes. I would just add we also included the MMWR report
24 around brand preference.

25 Q. Okay. First of all, let's talk about the Pollay article,

1 which is U.S. Exhibit 73037. That's the one that was done by
2 Pollay, and you were a co-author in 1996; correct?

3 A. Yes, sir.

4 Q. That study actually doesn't even talk about brand
5 preference, it talks about brand market share; right?

6 A. No, sir.

7 Q. I thought it talked about the relationship between share of
8 voice -- that is -- and this is difficult to state precisely --
9 but the proportion of advertising expenditures devoted to a
10 certain brand as against the total that's being devoted to
11 advertising all brands, and the relationship of that to
12 adolescent consumption and whether it's different between share
13 voice as related to adult consumption.

14 Did I get that right?

15 A. Close.

16 Q. Put it in your own words.

17 A. First of all, the independent variable, share of voice, is
18 as you described it only it includes a lag effect over time.

19 In other words, we didn't just look at advertising
20 expenditures in one year, but we tried to take into account
21 previous advertising expenditures and how that might affect
22 one year in question.

23 And then on the dependent variable side, on the outcome
24 side, for youth we looked at brand preference, and for adults we
25 looked at brand market share.

1 Q. Okay. So it's both of these then, for adults?

2 A. Yes, sir.

3 Q. And youth?

4 A. For adults it's market share, and for youth it's preference,
5 brand preference.

6 Q. Am I correct that this study does not examine a linkage
7 between actual exposure to marketing on the one hand and actual
8 smoking behaviors on the other? Correct?

9 A. Yes, sir, it does not. It doesn't look at smoking behavior.
10 It doesn't look at smoking initiation or consumption.

11 Q. Now, let me ask you a couple of other questions.

12 This study does not focus specifically on any
13 particular brand, does it?

14 A. It looks at the top -- I believe the top 10 brands.

15 Q. In the aggregate, it doesn't break out brands in particular;
16 correct?

17 A. In terms of the share of voice, it does, yes.

18 Q. Well, right, but the correlation that you're looking for
19 doesn't enable you to say that a particular brand is causing a
20 brand preference or a brand share. You're looking to the
21 relationships, relative relationships, with adults and
22 adolescents; correct?

23 A. In relation to investment in a particular brand. I mean,
24 the whole -- the whole analysis is based on brand specific
25 expenditures and brand specific brand preference or market

1 share.

2 So, in that way it was essential to look at the brand,
3 but the overall conclusion was in terms of expenditures,
4 differential affect on youth versus affect on adults.

5 Q. And, therefore, it doesn't tell you that any particular
6 brand is more or less effective in relationship to youth smoking
7 than any other brand; correct?

8 A. This study only looked at the expenditures associated with
9 that brand as opposed to any other items associated with the
10 brand.

11 Q. Now, in point of fact, Dr. Sardar who was one of the
12 coauthors here went ahead and actually took a look at particular
13 brands, such as Camel and Marlboro and Newport, in subsequent
14 work; correct?

15 A. I'm not aware if he did, sir. Dr. Siddhartha you mean.

16 Q. You don't know the work he did on particular brands?

17 A. No, I do not.

18 Q. Do you know -- this actually is a study also that in dealing
19 with share of voice includes both promotion and advertising,
20 both; correct?

21 A. I'm not familiar with the study. I can't comment.

22 Q. This study in particular.

23 A. No. It just looked at advertising.

24 Q. Just looked at advertising. Okay.

25 Do you know whether in fact any data exists that tells

1 you whether either advertising or promotion themselves actually
2 have been shown to be effective with respect to brand preference
3 and brand share?

4 A. If I --

5 Q. In other words, we went through the fact that exposure to
6 marketing and actual behavior is not the subject of this study.

7 I then took you with to whether the share of voice
8 analysis had been applied to see whether particular brands are
9 effective.

10 And I'm now asking you whether the share of voice
11 analysis has ever been applied to promotions to find out whether
12 promotions, in terms of share of voice, are effective.

13 A. Okay. It just sounds like a different question than before.
14 But just to clarify.

15 I'm not aware of any study that looks at promotions in
16 relation to brand preference because promotional data are
17 typically not available to researchers. The advertising data
18 that we use, we purchased from a third party and allowed us to
19 do that.

20 Q. Okay. The next study is the King study. This is U.S.
21 Exhibit 64274. Does the King study draw a connection between
22 actual exposure to cigarette marketing on the one hand and
23 actual smoking behavior on the other?

24 A. I'm just concerned about how you've -- what I said and what
25 you've depicted up there regarding Pollay, marketing, and

1 behavior as a no, because that's not what I --

2 Q. You told me that -- I think -- that the study does not
3 actually measure exposure to cigarette marketing and then link
4 it to actual smoking behavior.

5 There's no measurement of exposure to marketing there,
6 is there?

7 A. Well, I have an objection to both characterizations. We
8 measured advertising expenditures, which I think is a very
9 direct measure of marketing, and we linked it to brand
10 preference about adolescents, which is an aspect of actual
11 smoking behavior.

12 So, I would just say that I would not agree with the
13 characterization that the Pollay study didn't look at marketing
14 and behavior. It did. It looked at advertising, share of
15 voice, and brand preference of adolescents.

16 Q. But advertising share of voice is not the same thing as
17 actual exposure of kids to advertising, is it?

18 A. Well, it's pretty close.

19 Q. I didn't ask whether it was close. You could actually take
20 data and find out whether kids are exposed to advertising. In
21 fact, the Pucci study did that; right?

22 A. We are getting to the Pucci study, but the Pucci study
23 looked at magazines alone.

24 The whole concern with this type of research is that
25 it's extraordinarily difficult to operationalize exposure to

1 cigarette marketing. We looked at advertising expenditures as
2 close as we could get to that.

3 Q. Well, that's my whole point. It may have been as close as
4 you think you could get, but in point of fact it does not
5 directly measure exposure, it simply measures how much money is
6 being spent; correct?

7 A. Yes. It measures how much money is being spent in the media
8 and we use that as a measure of exposure to marketing.

9 Q. It's a proxy, is it not?

10 A. Yes.

11 Q. I'm going to always make sure, when we talk about proxy, to
12 use that word to refer to exactly what you're talking about, and
13 I mean to make it distinguished from actually directly measuring
14 exposure.

15 Can we have that same vocabulary?

16 A. I was going to suggest the use of the word proxy as well.

17 Q. And, likewise, when it comes to brand share, that's not the
18 same thing as smoking initiation, is it?

19 A. No, it's not, but it is a part of smoking behavior.

20 Q. Fair enough. But I'm going to make this very clear.

21 Why don't we talk about smoking initiation. And the
22 Pollay study does not seek to connect directly cigarette,
23 actually exposure to cigarette marketing on the one hand and
24 smoking initiation as the behavior on the other; correct?

25 A. That's correct.

1 Q. Is the same thing true of the King study?

2 A. The King study is a totally different type of study that
3 looked at patterns of advertising and magazines read by
4 children, so....

5 Q. It's not even -- it's almost not even on the same map;
6 correct?

7 A. You can't really put it into this metric.

8 Q. In fact, all that the King study is doing is finding out how
9 ads for certain brands are placed in magazines that kids might
10 read; right?

11 A. Yes. And they concluded that the ads that -- the ads for
12 cigarettes that kids smoked -- most likely smoked are placed in
13 ads -- in magazines that kids most likely read.

14 Q. So the King study is really kind of over here as a placement
15 study; right? Right?

16 A. Yes. It doesn't look at the outcome of smoking behavior.

17 Q. I don't -- now the Pucci study. Pucci actually takes a look
18 at exposure to marketing; correct?

19 A. Yes, sir.

20 Q. So Pucci starts out with this one as exposure, but it
21 doesn't link exposure to smoking initiation; correct?

22 A. Do you have the page number handy?

23 Q. That is at page 74 of 91.

24 A. Okay, I'm sorry. Could you repeat the question now?

25 Q. Pucci starts out with exposure to marketing, but he doesn't

1 link it -- she doesn't link it to smoking initiation. She links
2 it to a proxy brand preference. Correct?

3 A. She links it to, as we've been discussing, a smoking-related
4 behavior; not initiation, but brand preference, yes.

5 And just to say, we were talking earlier, this was an
6 effort to operationalize exposure by looking at magazines and
7 calculating a child's exposure to magazines and their subsequent
8 brand preference.

9 Q. Now, I want to try to move through the next category
10 quickly, which are the consumption studies.

11 There are studies that deal --

12 MR. BERNICK: And this, Your Honor, begins at -- if I
13 can get this right -- I know it ends at page 92. 66 to 92.

14 A. 65.

15 Q. You have a different category that deals with what has been
16 shown to have a relationship with consumption; correct?

17 A. Yes.

18 Q. And there are a whole bunch of studies in this area, are
19 there not?

20 A. Yes, sir.

21 Q. Okay. And isn't it true that with respect to this area --
22 let's talk about the linkage again. Here with the consumption
23 studies you're worried about advertising or marketing
24 expenditures on the one hand and on the other you're worried
25 about consumption. Right?

1 A. Yes. The only thing I would add is that some of the studies
2 not only look at expenditures, but they also look at bans.

3 Q. You look at bans. Fair enough.

4 Now, am I correct that none of these consumption
5 studies seek to link up exposure to cigarette marketing on the
6 one hand and smoking initiation on the other?

7 A. They look at expenditures as a proxy for exposure, I think
8 is that the language we agreed to?

9 Q. Right. And they look at consumption as a proxy for smoking
10 generally; right?

11 A. No. Well, just to be precise. When they look at
12 consumption, they look at it in terms of either smoking yes, no,
13 or amount smoked. It's defined as participation or consumption.

14 Q. But the consumption studies -- and I'll put them up here
15 generically -- the consumption studies again don't directly look
16 for a linkage between exposure to market and youth initiation.

17 Fair or not?

18 A. Just so everyone -- because this does get complex.

19 A ban does -- is a direct measure of cigarette
20 marketing.

21 Q. But it's not necessarily a direct measure of what is left of
22 the exposure. It just says that there's a ban or a partial ban.
23 It doesn't measure exposure; correct?

24 A. It does measure exposure. It may not be a complete ban
25 immediately, but -- I mean, how can you measure exposure if you

1 don't accept the fact that a ban would be a restriction or an
2 elimination of exposure if the ban was implemented?

3 Q. If it's a partial ban, then you have to get there and
4 measure what the exposure is; correct?

5 A. I know, but that's the whole -- I mean in my opinion it's
6 the whole premise here.

7 If you were to ban marketing and did it well, that
8 would be a direct measure of cigarette marketing exposure.

9 Q. Okay. Let's assume that that's true.

10 My question remains: Isn't it true that under these
11 consumption studies they don't link that up with actual smoking
12 initiation?

13 A. They look at, as you say -- no, you're right. They look at
14 consumption because that's the variable they can best measure.

15 Q. And in these studies, if we wanted to draw a circle around
16 consumption, it would include not only smoking initiation among
17 adolescents, it would include adult smoking, adult initiation,
18 adult continuation, adolescent continuation, as well as changes
19 in the number of cigarettes consumed; right?

20 A. Yes, sir. As I said, it's participation and consumption
21 starting or how much you smoke, and it's represented there.

22 Q. And, therefore, if you're looking for specificity to youth
23 initiation, you don't find that specificity in these consumption
24 studies; correct?

25 A. That's one of the criticisms, yes, sir. That's one of the

1 criticisms of econometric analysis for youth because most of the
2 smoking is done by adults.

3 Q. Now, let me ask you something else.

4 Isn't it true that even with those limitations the
5 results of these different consumption studies are mixed? Your
6 own words.

7 A. I agree.

8 Q. And not only are they mixed but, as you say at page of 69,
9 most of the econometric studies do not find a statistically
10 significant relationship between marketing and cigarette
11 consumption?

12 A. Yes, sir. Most do not find a statistically significant
13 relationship.

14 Q. So if we have statistical significance and we have -- if we
15 have statistical significance as being an issue, we've got
16 problems there; right?

17 A. There are more statistically significant positive studies
18 than there are negative.

19 Q. That just means that there are more studies that turn out to
20 be statistically significant that showed a positive relationship
21 than there are studies that turned out to be statistically
22 significant that showed a negative relationship, but it doesn't
23 change the fact that most of the studies find no statistical
24 significance; right?

25 A. Most of them find no statistical significant, but most of

1 them find a positive direction of their results but not
2 statistically significant.

3 THE COURT: But if they are not statistically
4 significant, it doesn't matter what direction they are in, does
5 it?

6 THE WITNESS: That's basically how it's interpreted in
7 the studies, yes, Your Honor.

8 THE COURT: All right. So then, therefore, maybe we
9 can move on.

10 MR. BERNICK: Okay.

11 BY MR. BERNICK:

12 Q. Specificity. That's another problem with these studies,
13 correct, in terms of the goal of this analysis which is to look
14 at youth smoking? That's another problem of specificity?

15 A. You're speaking about the econometric?

16 Q. Yes.

17 A. In terms of youth smoking, yes. Econometric studies are not
18 very specific to youth.

19 Q. That's another problem, consistency, right? Because you get
20 all these different results.

21 A. I agree.

22 Q. In fact, based upon scientific method, when you say that you
23 now want to weigh -- that's one of your words -- weigh these
24 studies in with the balance of the evidence, there's no
25 scientific established method that tells you whether that weight

1 is one way or another? Those studies are just there. Correct?

2 A. I'm sorry. Are you referring to the econometric studies?

3 Q. Yes.

4 A. There's a lot of discussion and debate about the direction
5 and you can find studies on both sides and you have to put it --
6 when I use the term "weight of the evidence," I'm using
7 econometric with experimental, with observational studies,
8 looking at all the evidence, not just the econometric study.

9 Q. But before you put the econometric studies in and you're
10 trying to figure out whether they weigh for or against the
11 relationship, that's basically a subjective judgment that you're
12 making; fair?

13 A. Yes, and people try to objectify it and they argue about it
14 in terms of different techniques.

15 Q. But in fairness, as you've said, it really is a subjective
16 judgment; right? You just said that.

17 A. Let me just clarify.

18 There are people who perform meta-analyses on the
19 results. They do other types of procedures of counting up, as
20 we've just done here, the types of results.

21 There are procedures, quantitative procedures, to try
22 to come to a conclusion, but even then there's disagreement.

23 Q. And there's no objective standard that you can talk to us
24 about today that says that one side is right and the other side
25 is wrong, is there? Don't give us that standard in your

1 testimony.

2 A. Yeah. I don't think -- I don't think econometricians would
3 agree amongst themselves.

4 Q. Let's now finally get to the longitudinal studies. And I'm
5 going to focus now on two longitudinal studies.

6 MR. BERNICK: And in order, Your Honor, to avoid having
7 this become a total mess, I'm going to erase the board a little
8 bit.

9 Did I use the wrong one? I may not be able to erase
10 the board?

11 THE COURT: Excellent, Mr. Bernick.

12 MR. BERNICK: I'm better at this than I am at the
13 studies. Is that right, Your Honor?

14 BY MR. BERNICK:

15 Q. Okay. I want to go to the longitudinal studies, and you've
16 pointed out two longitudinal studies. One is by the good
17 Dr. Pierce and the other is by Dr. Siegel and Biener; correct?

18 A. I included more than that. You selected those two, sir.

19 Q. Those are the ones. We're going to get to all of them here
20 in just a minute. And -- but without slogging you through all
21 of them because we've got a handy way to do it. The ones that
22 you focused on in your deposition were Pierce and Siegel; right?

23 A. They were the two, they were discussed in the deposition.
24 Other ones have come out since.

25 Q. Okay. Fair enough. That's in 2002.

1 Actually, a lot of the studies that you cite in your
2 report predate 2002; correct?

3 A. Some do, some don't.

4 Q. There are a total of about -- what is it? About seven
5 longitudinal studies that you cite in your report?

6 A. I haven't counted the number.

7 Q. But the Aitken's study predated your deposition; correct?

8 A. Yes.

9 Q. The Armstrong study predated your deposition?

10 A. Yes, sir.

11 Q. And the Weil study predated your deposition, that was 1996?

12 A. Yes, sir.

13 Q. And the Diaz study predated your deposition?

14 A. Yes, sir.

15 Q. And do you know when the time came for your deposition in
16 2002, the only two studies that you could rely upon at that
17 point in 2002 were Pierce and Biener and Siegel; correct?

18 A. They were the two that were discussed in the deposition,
19 yes, sir.

20 Q. Well, you were asked to say -- there's been a number of
21 studies recently published that have -- I'll get your fairness,
22 you say a number of studies in the last five years that have
23 been prospective longitudinal studies. That's fair. Let's talk
24 about these and we will get to the others.

25 When it comes to the Diaz study, you didn't even

1 include that in your reliance materials; correct?

2 A. Yes, I was not aware of it until I read the Cochrane review.

3 Q. Now, Pierce does not study actual initiation of smoking as
4 an end point, does he?

5 A. His end point includes initiation of smoking. It's a
6 smoking continuum. It's not limited to the initiation of
7 smoking, but it includes it.

8 Q. The relationships that he draws are between on the one hand
9 receptivity to advertising and on the other hand changes in
10 susceptibility; right?

11 A. I would define it as progression towards --

12 THE COURT: Excuse me a minute.

13 Where are these studies discussed in the direct,
14 please?

15 MR. BERNICK: Okay. Pierce is 64696, and it's cited at
16 bottom of page 76 and carry over to 77, and then Siegel and
17 Biener. 77, Your Honor.

18 BY MR. BERNICK:

19 Q. The Pierce study, I'll take your correction, deals with a
20 progression in susceptibility; right?

21 A. I would use the term progression towards smoking.

22 Q. Progression. Well, his measure -- susceptibility is to
23 smoking. The actual measure is susceptibility. That's the
24 variable that he includes in his analysis; correct?

25 A. Yes.

1 Q. And he rates susceptibility from minimal to high; right?

2 A. Yes.

3 Q. And, therefore, in his study he doesn't conclude that there
4 is a change in people actually initiating smoking. He concludes
5 that, depending upon their receptivity to advertising, they
6 progress to greater susceptibility to smoking; correct?

7 A. Basically, yes, sir.

8 Q. And, therefore, actual smoking behavior is not an end point
9 for his statistical analysis, is it?

10 A. Not for his analysis. It was included as part of the
11 continuum of smoking.

12 Q. He gathers smoking behavior data, but when he analyzed that
13 data he does not analyze that data to look for an actual change
14 in smoking initiation; correct?

15 A. Yes, sir.

16 Q. And, therefore, if we want to know whether Pierce tells us
17 about a connection between exposure to cigarette marketing on
18 the one hand and initiation on the other, the answer is that
19 Pierce does not do that; correct?

20 A. Right. He does -- the dotted line would go to
21 susceptibility to smoking.

22 Q. So he's over here, right? P for Pierce.

23 A. P for Pierce would draw the line from your box to
24 susceptibility.

25 Q. He doesn't measure exposure to cigarette marketing?

1 A. He does through his receptivity, that's the proxy.

2 Q. Okay. That's fair enough.

3 He takes a proxy for exposure, which is to ask people
4 whether they have a favorite ad or they would want -- a favorite
5 ad or whether they would want -- favorite promotional item.

6 A. Or whether they possess one or were willing to use one.

7 Q. It's a proxy. He doesn't actually measure what their real
8 exposure to cigarette marketing is; correct?

9 A. Yes. That proxy is commonly used as, to measure the
10 independent variable, because we cannot measure actual exposure.

11 Q. You say that. But Pucci did measure actual exposure to
12 advertising?

13 A. In magazines, period.

14 Q. But the actual measurement was made.

15 A. But that's the whole point, is that you can only do it in
16 like a magazine. You can show people -- find out what magazines
17 they read, calculate the amount of ads in it, but you can't
18 measure the type of exposure that's done of retail in billboards
19 at the time and other venues.

20 Q. Of course you can. The advertising agencies do reach
21 studies all the time. Reach studies are exposure studies, are
22 they not?

23 A. I'm not an advertising expert.

24 Q. Now, the Siegel study starts at receptivity. So we're going
25 to do Siegel starts at receptivity and sees whether there's a

1 change in terms of people becoming established smokers; right?

2 A. It's the -- it should be referred to as the Biener study.

3 Q. So Biener takes you from receptivity to established smoking;
4 correct.

5 A. Yes, sir.

6 Q. But Biener doesn't take you from exposure to the marketing
7 to established smoking either, does she?

8 A. I feel that they do.

9 Q. They only use a proxy; correct?

10 A. And I feel a proxy is a valid measure of exposure to
11 cigarette marketing.

12 THE COURT: And her proxy is what, expenditures?

13 THE WITNESS: No. The proxy is they ask the subjects
14 whether they have a favorite advertisement, whether they own a
15 promotional items, whether they would like to have a promotional
16 item, whether they would be willing to use promotional items.
17 And the reason they use these proxies is because they feel it's
18 an indication of exposure and beyond that actually shows that
19 they were attracted to this exposure, and that's basically the
20 state of the art of how people operationalize the issue of
21 exposure to marketing.

22 Q. It may be operationalized and it may be state of the art,
23 but what they are measuring is the people's reaction to
24 advertising, not their actual exposure to advertising; correct?

25 A. Yes, and some would say that's even a better measure.

1 Q. Now, I have only got a chance for a few more questions, but
2 I want to ask you one very specific question --

3 THE COURT: We are about to break. Now either we can
4 break now or in about two minutes.

5 MR. BERNICK: Okay. Well, then I'll -- I've got
6 two minutes.

7 BY MR. BERNICK:

8 Q. Isn't it a fact that you don't have a single longitudinal
9 study -- not one longitudinal study -- that actually takes you
10 from exposure to cigarette marketing on the one hand to
11 initiation of smoking among adolescents on the other? Not one.

12 A. I would disagree, sir.

13 I would say that the Biener and Siegel article brings
14 you from the exposure to marketing as measured by their
15 receptivity variable to the initiation of smoking.

16 Q. And you would agree with me that they are working with a
17 proxy. You think it's a good proxy, but you would agree they
18 are working with a proxy?

19 A. Yes, sir.

20 Q. Isn't it true that one of the problems with Biener, that the
21 Pierce study worked with a population of people who were never
22 smokers; right?

23 A. Yes, sir.

24 Q. And the reason that was so important is he wanted to make
25 sure he was starting out with a clean slate in order to see

1 whether people then, upon becoming exposed to advertising,
2 changed in their susceptibility; correct?

3 A. Yes, sir.

4 Q. And isn't it true that if we go to the Biener study, that
5 study is not quite so clean?

6 A. No, I don't agree.

7 Q. Isn't it a fact if you read the Biener study, that she
8 includes in her baseline population people who have smoked a
9 cigarette?

10 A. They would not be considered to be a smoker. They could be
11 included, yes.

12 Q. But they are not never smokers?

13 A. They are never smokers.

14 Q. They are people who have had a cigarette?

15 A. That's -- a smoker is classified scientifically as someone
16 who has smoked at least a hundred cigarettes.

17 Q. That's an established smoker. In fact, under the -- you
18 remember that little curve that you drew that talked about
19 what's happening over time?

20 A person who smoked a cigarette in the last 30 days
21 under that curve is a current smoker; right?

22 A. A current one, yes.

23 Q. And yet a current smoker, that's a person who had smoked
24 within the -- a cigarette within the last 30 days would still
25 qualify to be part of the baseline group in the Biener study;

1 correct?

2 A. If it was their first cigarette.

3 MR. BERNICK: That's all I have for today, Your Honor,
4 so it would be a good time to --

5 THE COURT: All right. We need to work out scheduling
6 to begin with.

7 How much more cross are you going to have?

8 MR. BERNICK: I think I estimated three hours, and I
9 think I probably have about a half an hour or 45 minutes left.
10 I'm sorry I couldn't finish today, but it wasn't to be,
11 Dr. Eriksen.

12 THE COURT: And Ms. Crocker, what do you think you're
13 going to have on redirect?

14 MS. CROCKER: I don't think it will be more than an
15 hour, Your Honor, and that's probably longer than I'll need.

16 THE COURT: It's up to the government as to whether you
17 want Dr. Eriksen to come back on Monday or whether, for your own
18 reasons and the convenience of the witness, you need to call
19 Dr. Wigand on Monday.

20 MS. EUBANKS: What I would like to do, Your Honor, is
21 to double-check with Dr. Wigand exactly what time it is that he
22 has to leave. I know it's Tuesday afternoon because he has to
23 be in Jackson, Mississippi by noon on Wednesday.

24 He has a speaking engagement with 1200 students, I
25 think it's at a high school, and he's made -- that engagement

1 has been long-standing. I think the Attorney General of the
2 state is going to be present. And so that commitment is
3 something that we can't move.

4 I'm concerned about the estimate being another
5 two hours and then things seem to take a long time. If
6 Mr. Bernick is saying between half an hour and 45 minutes and if
7 it really turns out to be that, that's fine.

8 If we're talking about an actual hour, and depending on
9 how many objections we get, that can stretch things out, then I
10 am concerned that beginning with Dr. Wigand in the middle of the
11 day on Monday, I just want to -- I want everyone to be aware
12 that he is going to have to be finished to leave Tuesday
13 afternoon.

14 THE COURT: Who is going to do the cross of Dr. Wigand?

15 MR. BERNICK: I will.

16 THE COURT: Isn't that going to be fairly extensive? I
17 haven't read his direct.

18 MR. BERNICK: It depends in part on what Your Honor --
19 really, not being coy about it. It really depends on his scope
20 of testimony. I originally estimated with respect to Dr. Wigand
21 that I would have two hours max. And his testimony is now
22 expanded, I would probably say more like three and a half.

23 I will alert the court that I, in contrast to
24 Dr. Eriksen, I have examined Dr. Wigand before. It is a
25 difficult -- speaking as the examining lawyer only -- it is a

1 difficult process to examine Dr. Wigand. So I think, if he has
2 a very broad testimony, I would be conservative and say four
3 hours.

4 MS. EUBANKS: Well, Your Honor, also I suppose we
5 should ask Dr. Eriksen about his other commitments next week
6 because I don't know whether -- I believe he teaches a class on
7 Tuesdays. If I could ask Your Honor what Dr. Eriksen's schedule
8 look like for next week.

9 THE COURT: What's your situation? Can you come back
10 either Tuesday afternoon or Wednesday?

11 THE WITNESS: Any other day -- Tuesday or Thursday are
12 the worst days. I don't want to miss class if I could.

13 THE COURT: So Wednesday morning you could be here?

14 THE WITNESS: Monday or Wednesday would be best for me.
15 It's the pleasure of the court.

16 MR. BERNICK: I don't really think it's going to be a
17 problem getting Dr. Wigand out by noon on -- was it Tuesday or
18 Wednesday?

19 MS. EUBANKS: Well, he needs to leave Tuesday, by the
20 end of the day I believe.

21 MR. BERNICK: I don't know why that -- let's assume the
22 worst and that Dr. Eriksen takes until noon on Monday, I then
23 have two hours Monday afternoon, and we have all day on Tuesday
24 to finish up, and the government can take two, three hours,
25 whatever. We can be done with Dr. Wigand I think pretty

1 certainly.

2 I'm just concerned, A, about trying to get continuity
3 with respect to Dr. Eriksen, and that's something we talked
4 about specifically yesterday afternoon. And I know also the
5 witnesses who are coming up include people who have been -- you
6 know, in fact, they are people for my client again. So I would
7 kind of like to stick to the schedule if we possibly can.

8 MS. EUBANKS: Your Honor, there is another issue.

9 There's the motion that we talked a bit about before we
10 started, and if defense counsel wants that resolved in advance,
11 which we think it should take its normal course as those
12 submissions have in the past taken, you had told us that you
13 wanted to resolve certain objections with respect to evidence
14 coming in through certain witnesses on Monday and we are
15 prepared to do that as well.

16 THE COURT: That, I can put off. When are you going to
17 get in your opposition to the motion? I read it at lunch.

18 MS. EUBANKS: It's just the usual submission. We will
19 get ours in tomorrow since theirs was late. It would have been
20 due today, but obviously getting it today, we will get ours in
21 tomorrow.

22 THE COURT: When are you going to get it in tomorrow?

23 MS. EUBANKS: If we could have by 5:00 o'clock, Your
24 Honor.

25 THE COURT: 5:00 o'clock in chambers.

1 MS. EUBANKS: Yes.

2 THE COURT: Tomorrow. And then the reply will be when?

3 MS. EUBANKS: It's no reply under the rules, Your
4 Honor.

5 THE COURT: I'm sorry. We haven't been doing replies.
6 Excuse me. No replies. 5:00 o'clock tomorrow in chambers.

7 MS. EUBANKS: If Mr. Bernick can commit to work with us
8 to get Dr. Wigand done by Tuesday afternoon and to get
9 Dr. Eriksen done, then we could begin the day on Monday with
10 Dr. Eriksen, get him out of here, and then start immediately
11 with Dr. Wigand and keep to the schedule.

12 David could have his way if he's going to work with us
13 to finish up the witnesses on time, since he's going to be doing
14 those examinations.

15 MR. BERNICK: I'm more than happy to do that. I just
16 think it's smoother and easier, and I see Dr. Eriksen nodding
17 his head a little bit. I think it will have an incentive to get
18 him off the stand and do Dr. Wigand.

19 THE COURT: Dr. Eriksen we will see you on Monday
20 morning, 9:30, please. And, of course, the usual rules apply.
21 You can't do any homework. You can't check up on any sites or
22 anything like that. And of course, you can't talk with the
23 lawyers about your testimony. You may step down at this time.

24 I need to talk at the bench, please, with one lawyer
25 from the government. I guess it can be Ms. Eubanks, and either

1 Mr. Webb or Mr. Redgrave for the defendants.

2 And everyone else can be dismissed certainly.

3 (Bench conference not reported.)

4 (Proceedings concluded at 4:35 p.m.)

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CERTIFICATE

14 I, EDWARD N. HAWKINS, Official Court Reporter, certify
15 that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

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Edward N. Hawkins, RMR

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