

1 UNITED STATES DISTRICT COURT  
 2 FOR THE DISTRICT OF COLUMBIA

3 UNITED STATES OF AMERICA, : CA No. 99-2496(GSK)  
 4 Plaintiff, : September 28, 2004  
 5 : 9:30 a.m.  
 6 v. : Washington, D.C.  
 7 PHILIP MORRIS USA, et al., :  
 8 Defendants. :  
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9 MORNING SESSION  
 10 VOLUME 5  
 11 TRANSCRIPT OF TRIAL RECORD  
 BEFORE THE HONORABLE GLADYS KESSLER  
 UNITED STATES DISTRICT JUDGE

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

2 THE COURT: Good morning, everybody.

3 This is United States of America versus Philip Morris,  
4 CA 99-2496. All counsel are present. As the court scans the 50  
5 people or so in the courtroom, probably 99 percent of whom are  
6 lawyers.

7 Dr. Brandt, you are still under oath this morning and  
8 we are still on cross-examination.

9 MR. BERNICK: Thank you, Your Honor.  
10 ALLAN BRANDT, Government's witness, PREVIOUSLY SWORN

11 CROSS-EXAMINATION (Cont'd.)

12 BY MR. BERNICK:

13 Q. Good morning, Dr. Brandt.

14 A. Good morning.

15 Q. I believe when we broke yesterday we had been talking about  
16 the latitude that had been given to the SAB in approving grants  
17 in terms of subject matter. That is, they were allowed or they  
18 were -- said they were told their mission was very broad in  
19 terms of what they could approve for funding; correct?

20 A. That's correct.

21 Q. Okay. And we also discussed that literally thousands of  
22 proposals came into the SAB for review over the years; correct?

23 A. Yes, thousands of proposals came in.

24 Q. And thousands of proposals were approved and thousands of  
25 peer review articles resulted from all of that; correct?

1 A. Yes, that's correct.

2 Q. Let me ask you a very specific question, Dr. Brandt.

3 Based upon your review, apart from certain of the  
4 proposals for nicotine-related research in the late 1970s, isn't  
5 it a fact that there were no grants that were approved for  
6 funding by the SAB but not allowed to be funded by somebody in  
7 the industry?

8 A. I'm just not sure.

9 Q. Is that an area where you've done any expert -- is that an  
10 area where you're prepared to express opinions as an expert?

11 A. I just don't know whether there were grants like that.

12 Q. Okay. I'd like to turn to some of the documents that were  
13 written.

14 When we focused on the formation of the TIRC and the  
15 formation of the SAB group in the program, we spent a lot of  
16 time looking at the documents that were written at the time;  
17 correct?

18 A. Correct.

19 Q. I want to spend a little bit of time this morning talking  
20 about some of the documents that were written after the fact  
21 because there are some documents written after the fact that are  
22 said in your direct examination, and I want to begin with U.S.  
23 Exhibit 56986.

24 Do you recall in your direct examination referring to  
25 this document, which is dated July 17, 1963, and it was written

1 by Addison Yeaman, then general counsel for Brown & Williamson  
2 regarding the implications of Patel HIPPO I and II in the  
3 Griffith filter. Do you recall referring that?

4 A. Yes, I recall referring to it. Could I get the copy?

5 Q. Sure. We've got that there for you. In particular, I think  
6 in connection --

7 A. I don't have the correct document. I'm sorry.

8 Q. Do you have the right document now Dr. Brandt?

9 A. I don't have it.

10 Q. Do you recall, you know, the Addison Yeaman memo, do you  
11 not?

12 A. I do know this memo. I cited it in my direct testimony.

13 Q. Let's see if we can do without a copy for now. If you  
14 really want one I'll just give you mine that's marked up.

15 A. We can start.

16 Q. Okay. You see on the see page I think is the part that --  
17 one of the quotations that you made from this, it says: The  
18 TIRC cannot, in my opinion, provide the vehicle for such  
19 research. It was conceived as a public relations gesture and  
20 however undefiled the Scientific Advisory Board and its grants  
21 may be in its function as a public relations operation.

22 That's a part of the document that you focused on;  
23 correct?

24 A. I do recall citing that in my direct testimony, yes.

25 Q. Okay. Now, in point of fact the actual title of the

1 document deals with the implications of certain research that  
2 was underway at the time, this Patel research and the Griffith  
3 filter; correct?

4 A. Yes.

5 Q. Do you know what the Griffith filter was?

6 A. I think it was a filter under development at Brown &  
7 Williamson.

8 Q. And so really this memo is designed to deal with the  
9 implications of internal research into the properties of  
10 nicotine and internal research on a new design of cigarette;  
11 correct?

12 A. That's one of the things that it covers, certainly.

13 MR. BRODY: Your Honor, if Mr. Bernick is going to be  
14 asking questions of Dr. Brandt about the entirety of the  
15 document, perhaps we could get Dr. Brandt the document.

16 MR. BERNICK: Well, I apologize, but we don't have an  
17 extra copy of this here.

18 Does anybody else have the exhibits that back up the  
19 direct examination?

20 THE COURT: All of these lawyers in this room and  
21 nobody has got the document?

22 MR. BERNICK: I'll tell you what. I'll tell you what.  
23 Here's what we will do. We will solve this problem.

24 I will push on to another document. Somebody will  
25 immediately make a copy of this one for the witness and we will

1 go ahead.

2 THE COURT: All right.

3 MR. BERNICK: I'm sorry, Your Honor.

4 BY MR. BERNICK:

5 Q. Addison Yeaman wrote that memo in 1963; correct?

6 A. Yes.

7 Q. And he was at that time the general counsel of Brown &  
8 Williamson. I think we already covered that; right?

9 A. That's correct.

10 Q. Another one of the documents that you refer to -- I hope  
11 we've got this one -- is U.S. Exhibit 63527, which is a  
12 January 19, 1968 memo, again from Addison Yeaman to various  
13 people within the industry. Right?

14 A. That's correct.

15 Q. And do you have a copy of that here?

16 A. Yes. Now I have a copy.

17 Q. Okay. And Addison Yeaman at this time is still the vice  
18 president and general counsel of Brown & Williamson; correct?

19 A. That's correct.

20 Q. And what he actually is talking about is the need to  
21 reorganize CTR; right?

22 A. Yes, that's covered in this memo.

23 Q. Do you see the second paragraph, it says, The discussion was  
24 highly useful. I got the impression that Lorillard liked Brown  
25 & Williamson certainly and others of us possibly has



1 considerable concern as to whether we are spending our dollars  
2 in the most useful way and specifically whether we might derive  
3 greater value, both short and long term, from CTR work  
4 reoriented and perhaps in the sense reorganized.

5 He then goes on to recite the views of Janet Brown who  
6 basically is advocating in favor of the status quo; that is,  
7 that things should be left the way they are. Right?

8 A. Yes.

9 Q. And she was outside counsel for American Tobacco at the  
10 time; correct?

11 A. That's correct.

12 Q. American Tobacco at that time again was a prominent player  
13 in the industry?

14 A. Yes.

15 Q. American Tobacco really was the largest company, cigarette  
16 company back in the 50s and its fortune has declined over time;  
17 right?

18 A. That's my understanding.

19 Q. Okay. So she then talks about -- or it's recited that she  
20 made a well-reasoned argument in defense of the long-established  
21 policy of CTR, carried out through the SAB, to research the  
22 disease as opposed to researching questions more directly  
23 related to tobacco.

24 Do you know what it meant to say, questions more  
25 directly related to tobacco?

1     A. Well, according to my direct testimony, I would suggest that  
2     it was well recognized, both in this document and the earlier  
3     one you put up from Mr. Yeaman, that -- in fact, it was  
4     recognized within the industry that CTR wasn't explicitly  
5     studying tobacco's implication for human health.

6             And so there were discussions like this and that's why  
7     I cite these, that indicate that it was widely recognized that  
8     the theory was research the disease -- in other words, cancer --  
9     as a way of avoiding researching basic issues of human health  
10    related to the behavior of smoking.

11    Q. Is there any document that actually says that the purpose of  
12    researching the disease was to avoid researching whether tobacco  
13    caused that disease?

14            Is there any document that actually says that?

15    A. Yes. I cite documents in my direct testimony that make it  
16    clear that rather than focusing on human health related to the  
17    problems of smoking, research the disease.

18            And I'd have to look back through --

19    Q. That's why I asked you.

20            MR. BRODY: Please allow Dr. Brandt to finish his  
21    answer.

22            THE COURT: You may finish your answer.

23    A. I'd have to look back through, but there is another  
24    document, I think it's cited in my written testimony, where it  
25    actually says, So long as we can focus on the disease, we can,

1     you know, say we are not ready to focus on the issues of tobacco  
2     itself.

3             And so I think this is part of a major issue in my  
4     direct testimony; that it was well recognized in the industry  
5     that CTR had moved the focus away from the product to basic  
6     processes, mechanisms, genetics of cancer, and that's how I read  
7     this document here.

8     Q.   Actually the document goes on -- I think this may be the  
9     document that you had in mind -- but it goes on actually to say  
10    what Janet said, was that the argument seems to be that by  
11    operating primarily in the field of research of the disease we  
12    do at least two useful things.

13            First, we maintain the position that the existing  
14    evidence of relationship between the use of tobacco and health  
15    is inadequate to justify research more closely related to  
16    tobacco.

17            Secondly, that the argument -- that the study of the  
18    disease keeps constantly alive the argument that until basic  
19    knowledge of the disease itself is further advanced, it is  
20    scientifically inappropriate to devote the major effort to  
21    tobacco.

22            Is she really saying here, is it your interpretation  
23    she's saying that CTR isn't looking into the relationship  
24    between the use of tobacco and health, that they are not doing  
25    that?

1     A. Well, you know, the way I read it is first we maintain the  
2     position that the existing evidence of a relationship between  
3     the use of tobacco and health is inadequate to justify research  
4     more closely related to tobacco.

5             So I do read that as saying: This approach of CTR  
6     directs attention away from more research on tobacco. That's  
7     how I read it.

8     Q. Let me create kind of a three-part scheme here and see how  
9     that dovetails with your reading of the document and some  
10    others.

11            Let's, first of all, talk about research into the  
12    disease, let's say lung cancer, and under this category put  
13    epidemiology, because you can't research the disease lung  
14    cancer, as you've said, without doing population studies that  
15    relate to the people who get it. Right?

16    A. That's right.

17    Q. Okay. Let's then create another category at the other  
18    extreme which is research that's specifically related to product  
19    design.

20            Let's create a third category which is research that  
21    takes place in the laboratory -- in the lab, that was one of  
22    your other circles, right -- that focuses on disease, but it  
23    deals specifically with tobacco smoke in the laboratory. These  
24    would be lab studies. These would be toxicology studies, right?

25            Now, are you saying that CTR didn't do any -- or didn't

1 fund any research relating to the epidemiology of lung cancer  
2 including the relationship between lung cancer and tobacco use?

3 Is that your testimony?

4 A. No, it's not that they didn't do any research in that area.

5 Q. Well, then I don't understand.

6 Is it true -- are you saying that CTR was deliberately  
7 oriented in order to avoid dealing with the relationship between  
8 the use of tobacco and health or not?

9 A. I'm saying it was deliberately structured and organized and  
10 their processes of investigation was to move the focus away from  
11 the connection between tobacco use and health to more basic  
12 problems of the cancers and disease. That's my testimony.

13 Q. And, as a result, we shouldn't see any research grants that  
14 relate to the epidemiology of lung cancer and its relationship  
15 to tobacco; right?

16 A. No, I wouldn't say you wouldn't see any.

17 I'm saying that it was well recognized as this memo,  
18 which I think is very important, makes clear that the focus of  
19 CTR research, and Little says this is my focus, the basic  
20 mechanisms of cancer.

21 And here, you know, quoting Janet Brown in this Yeaman  
22 memo is saying, We maintain the position that there's not enough  
23 evidence about the relationship between the use of tobacco and  
24 health. It's inadequate. This is 1968 four years after the  
25 Surgeon General has issued his report to justify research more

1       closely related to tobacco.

2       Q.   Can we agree, Dr. Brandt, can we agree that, in fact, the  
3       SAB and CTR did, in fact, fund research that focused on the  
4       relationship of tobacco to lung cancer?

5               MR. BRODY:  Objection, Your Honor.  The question was  
6       asked twice already.

7               MR. BERNICK:  No.  I didn't get an answer.

8               THE COURT:  The objection is overruled.

9               But I want to hear exactly how you phrased that.  You  
10       were interrupted.  I want to hear particular words.

11               MR. BERNICK:  I won't be able to remember it, but I'll  
12       try again, Your Honor.

13       BY MR. BERNICK:

14       Q.   Isn't it a fact that the SAB approved and that CTR, in fact,  
15       funded research directly looking at the relationship between  
16       cigarette smoking and lung cancer?

17       A.   They did fund some research in that area.

18       Q.   Isn't it a fact that what research they funded in that area,  
19       the direction that they took was defined by the SAB in its  
20       approval process?

21       A.   Well, that question raises a lot of questions about how the  
22       SAB was structured, who was on it, what their orientation to an  
23       entire research program is.

24       Q.   We've already been through who the members were.

25       A.   No.

1 Q. Well, we've already been through who the members were. And  
2 my question is: With whatever that membership was -- you're  
3 saying, well, they were too conservative or -- whatever that  
4 membership was, isn't it a fact that it was the SAB who decided  
5 the direction that the funding would take in connection with the  
6 SAB program?

7 A. Yes. The SAB was in charge of the SAB program.

8 Q. And they weren't told you have to orient your grants, grant  
9 approvals one way or the other; isn't that a fact? They were  
10 not told, Dr. Brandt.

11 A. Well, they were monitored by a variety of staff in the CTR.

12 MR. BERNICK: I'm sorry. I move to strike as not  
13 responsive. The question is not --

14 THE COURT: No. Motion is denied. Next question.

15 BY MR. BERNICK:

16 Q. They were not told the direction that their grant approvals  
17 should take; correct?

18 A. I don't know that.

19 Q. Now, we are going through this memo where their views of an  
20 outside lawyer for American are being recited, and she goes on  
21 to then say: Moreover, further research more closely oriented  
22 to tobacco is already being carried on first by our opponents  
23 and secondly by the AMA.

24 Isn't it a fact that the industry by this point in time  
25 had decided to fund, give a major grant to the AMA for purposes

1 of looking at the relationship of smoking and disease?

2 A. It gave a grant to the AMA to explore aspects of tobacco and  
3 health, that's true.

4 Q. \$15 million; correct?

5 A. Correct.

6 Q. After at the end of which the AMA ultimately concluded in  
7 their report that there was in fact a relationship between  
8 tobacco and disease, and they spent a lot of research focused on  
9 precisely that issue; correct?

10 A. Some.

11 Q. Well, tobacco industry then is not only through CTR, it is  
12 also through the AMA now focused on the relationship between  
13 tobacco and disease; correct?

14 A. Well, most assessments of the AMA-ERF program were that it  
15 was not a particularly significant scientific program.

16 Q. I didn't ask you whether -- what the assessments were. I  
17 didn't ask you the quality. I asked you the focus.

18 The focus of the grant work that was done by the AMA  
19 with tobacco industry funding was specifically on the  
20 relationship of smoking to disease; correct?

21 A. It was a complicated program. It had many elements. There  
22 were elements related to smoking and disease.

23 Q. And nobody told the AMA what -- it was a no strings attached  
24 grant, was it not?

25 A. Again, it's hard for me to characterize it as a no strings



1 attached grant.

2 Q. Did you read the final report that was done by the AMA as a  
3 result of all that research?

4 A. Yes, I've read it.

5 Q. Doesn't that specifically say that they were not -- they  
6 were given complete latitude to do the research that they wanted  
7 to do and to reach the conclusions that they wanted to reach?

8 A. It does say that.

9 Q. And it expresses gratitude for the grant that was issued by  
10 the tobacco industry, does it not?

11 A. Yes, it expresses gratitude.

12 Q. Okay. Now, the memo goes on then to talk about another  
13 development, which is that on a number of counts among, which is  
14 Henry Rams very helpful suggestion to Dr. Little that in his  
15 report to the annual meeting he, Little, delineate clearly and  
16 in some detail the extent to which the CTR was processed -- was  
17 progressing in the direction of planned research as opposed to  
18 the pure grant-in-aid approach.

19 Are you familiar with the evolution that was taking  
20 place, even as this memo was written, where the SAB program was  
21 expanding to include contract research; that is, planned  
22 research funded by the SAB in addition to grants?

23 A. Yes, I'm familiar with that.

24 Q. Let's go on to the next memo which I think your direct  
25 examination cites. Incidentally, let's go back.

1                   MR. BERNICK: Do we now have a copy for the witness of  
2 the Patel report?

3 Q. I apologize for not having this earlier.

4 A. No problem.

5 Q. Addison Yeaman five years earlier, that is in 1968, actually  
6 end up suggesting --

7                   THE COURT: Just to be clear. This is 56986. Is that  
8 right?

9                   MR. BERNICK: That's correct.

10                  THE COURT: And it's a July 17, '63 memo?

11                  MR. BERNICK: That's right, Your Honor. By the same  
12 individual, Addison Yeaman the same position, five years  
13 earlier.

14 BY MR. BERNICK:

15 Q. What he suggests there after talking about the undefiled  
16 SAB, the public relations operation that he feels was involved  
17 with the TIRC, he kind of wants to up the ante. He suggests  
18 that the research now be done with outside organization like the  
19 Surgeon General, the Public Health Service and the American  
20 Cancer Society; correct?

21 A. That's correct.

22 Q. One of his motives is that thus to accept its  
23 responsibility, what I suggest, free the industry to take a much  
24 more aggressive posture to meet attack. It would particularly  
25 free the industry to attack the Surgeon General's report itself

1 by pointing out its gaps and omissions, et cetera, et cetera.

2 He then has a long discussion about the warning, et  
3 cetera, but finally he says: Now at long last I come back -- he  
4 has a long discussion of things like or issues like warnings,  
5 but he finally comes back at the end -- this is the bottom of  
6 page 3 and onto page 4 -- to talk about the Patel report and the  
7 Griffith filter.

8 That was -- the original title of the paper was dealing  
9 with those issues; correct?

10 A. Yes, that's correct.

11 Q. And he recites what Patel has learned, which are the  
12 properties of nicotine. This is the often-cited language that's  
13 appeared all over the place in the 1990s. Moreover, nicotine is  
14 addictive. We are then in the business of selling nicotine, an  
15 addictive drug, effective in the release of stress mechanisms.

16 Correct?

17 A. Yes, it does say that.

18 Q. It then says, But cigarettes, as we assumed the Surgeon  
19 General's committee to say, despite the beneficent effects of  
20 nicotine, have certain unattractive side effects. It talks  
21 about cause or predisposed to lung cancer, et cetera.

22 We challenge those charges and we have assumed our  
23 obligation to determine the truth or falsity by creating a new  
24 Tobacco Research Foundation. In the meantime, we say, here is  
25 our triple or quadruple or quintuple filter capable of removing

1       whatever constituent of smoke is currently suspect in the  
2       delivery while delivering full flavor, and incidentally, a nice  
3       jolt of nicotine. And if we are the first to be able to make  
4       and maintain that claim, what price Kent.

5               Ultimately, at the end of the day, Addison Yeaman's  
6       vision was to focus on developing a new product that would  
7       deliver nicotine but would then have the ability to selectively  
8       filter out whatever it was that was the constituent that was the  
9       problem. That was his vision; correct?

10      A. Yes. This was a vision expressed by many tobacco executives  
11      and scientists from the earliest time.

12      Q. Yes. And in fact, it was not only expressed by them, it was  
13      expressed by outside public health authorities who wanted to  
14      figure out a way to filter out the harmful constituents of smoke  
15      and produce a safer cigarette; correct?

16      A. Yes. People wanted to get carcinogens out of cigarettes.

17      Q. Now, this project, what Addison Yeaman was actually talking  
18      about, that was an issue of product design; correct?

19      A. Well, as we've already seen from this memo, it's talking  
20      about many things, so one of the things in this memo is product  
21      design.

22               But, you know, a historian looking at a document like  
23      this would say, What are the range of issues covered in this?  
24      And even if it's titled the Griffith filter, you know, that's  
25      why I read this memo carefully in my research, was to suggest

1       that certainly he's talking about the Griffith filter, but he's  
2       talking about CTR, its policies --

3       Q.   Sure, and I understand that.  I'm not suggesting that  
4       somehow the discussion of CTR is irrelevant at all.  But at the  
5       end of the day, he does talk about property design; correct?

6       A.   Correct.

7       Q.   And would you agree with me, that to do research on product  
8       design would fall outside of the original scope and limitation  
9       on what CTR could do as set forth in the statement of origin and  
10      purpose?

11      A.   Yes.  I don't think that CTR was organized towards devising  
12      product design.

13      Q.   In fact, there would be antitrust issues if the companies  
14      were to agree with one another on how to design a cigarette;  
15      correct?

16               MR. BRODY:  Objection, Your Honor.  Dr. Brandt is here  
17      as a historian.  He's not here as an expert in antitrust issues.  
18      BY MR. BERNICK:

19      Q.   Well, based on the review that you had --

20               MR. BERNICK:  I'll take that, Your Honor.

21      BY MR. BERNICK:

22      Q.   I'm not asking for your expert opinion.

23               Based upon the review that you performed of industry  
24      documents to do joint research through CTR on product design  
25      would be -- would raise the same antitrust -- the very same

1 antitrust issue that was reflected in the historical documents  
2 at the time that TIRC was formed; correct?

3 MR. BRODY: Your Honor, I don't think this gets us out  
4 of the area where my objection was raised.

5 THE COURT: The objection is overruled because my  
6 recollection is that there was a very specific reference to this  
7 particular issue in the direct testimony. I think we are taking  
8 a long time on a very straightforward issue.

9 Can you answer the question, please?

10 THE WITNESS: Yes, I can.

11 A. I don't know that that was a concern at this time, but there  
12 had been concerns in the industry in the creation of CTR about  
13 antitrust issues.

14 Q. Okay. Let's go now to the next document which is December  
15 8, 1970. We are moving forward in time, and this is now 63525.  
16 U.S. 63525.

17 And this is a document by Dr. Wakeham where he's  
18 talking about the best program for the industry, correct, in the  
19 1970?

20 A. Yes, I know this document.

21 Q. And in this document, basically the question that  
22 Dr. Wakeham asked is, Well, what approach with CTR would be best  
23 for us; correct?

24 A. That's correct.

25 Q. And he list what ends up being a series of different

1 options.

2 One is to aim the program at contributing to the search  
3 for the cause of diseases, especially those alleged to be caused  
4 by smoking.

5 Another is to use CTR programs as a means of  
6 establishing expert scientific witnesses.

7 And a third is aim CTR research at the discovery of  
8 information of use and value to the cigarette industry,  
9 including changing our products.

10 Correct?

11 A. Yes, I see that here.

12 Q. So we have kind of a couple of different issues.

13 We've got one approach, option A is kind like focusing  
14 on this disease angle. What are the diseases associated with  
15 cigarette smoking?

16 Option C is more focused on product modification. And  
17 in the middle is not tobacco smoke toxicology, it's just doing  
18 expert work; right?

19 MR. BRODY: Your Honor, I have to object to that as  
20 compound. He's asked him to confirm --

21 THE COURT: Sustained.

22 BY MR. BERNICK:

23 Q. We'll take it one at a time. Option A focuses on disease;  
24 correct?

25 A. Yes.

1 Q. Option C focuses on product design; correct?

2 A. Yes.

3 Q. Option B focuses on expert work; correct?

4 A. Yes, the development of using CTR for developing expert  
5 witnesses it says who testify on behalf of the industries and  
6 legislative halls, in litigation, at scientific meetings before  
7 the press.

8 Q. Now, none of those options actually were adopted; correct?

9 That is that CTR did not get reorganized after 1970; true

10 A. Well, CTR pursued some of these options irrespective of  
11 Wakeham's, you know, suggestions.

12 Q. Well, in point of fact, CTR already was contributing to the  
13 search for causes of diseases, option A; correct?

14 A. Yes, it was doing some of that.

15 Q. And, CFR through the special projects not approved by the  
16 SAB, was also -- was also doing -- not established --  
17 establishing scientific expert witnesses, but was already doing  
18 special projects at the request of counsel through outside  
19 researchers; correct?

20 A. Correct.

21 Q. And option C, CTR at discovery of information and use of  
22 value to the cigarette industry, that involved product  
23 modification and as a consequence, we're back over here to the  
24 issue of product design; correct?

25 A. That's correct.



1 Q. But in point of fact there was no reorganization of CTR  
2 following this document in 1970; correct?

3 A. Yes, there was no reorganization.

4 Q. Now, the often-quoted portion -- I think that you cite this  
5 in your direct examination. It says, It has been stated that  
6 CTR is a program to find out the truth about smoking and health.  
7 What is truth to one is false to another.

8 CTR and the industry have publicly and frequently  
9 denied what others find as true. Let's face it. We -- that is  
10 the industry, correct, what's best for the industry -- we are  
11 interested in evidence which we believe denies the allegation  
12 that cigarette smoking causes disease. Right?

13 If the CTR program is aimed at this direction, which is  
14 to deny that cigarette smoking causes disease, it is in fact  
15 trying to prove the negative, that cigarette smoking does not  
16 cause disease. Both lawyers and scientists will agree that this  
17 task is extremely difficult, if not impossible.

18 What he's saying is if we're thinking about what's best  
19 for us, and if what's best for us is to deny the allegation and  
20 CTR were aimed at that direction, it would be an impossible  
21 task; correct?

22 A. Yes. I think he's acknowledging that it's well understood  
23 that proving at this point that cigarette smoking is not harmful  
24 is -- would be impossible.

25 Q. In which case, CTR -- if that were to be CTR's real

1       objective is to prove the negative, that would be an  
2       impossibility; correct?

3       A.   That was the dilemma that CTR was in.

4       Q.   That would be an impossibility according to what he says;  
5       correct?

6       A.   Well, he says it would be extremely difficult, if not  
7       impossible, you know. I'll let him speak for himself.

8       Q.   Let's talk about what actually took place. And I want to  
9       turn now to another document that you recite in your direct  
10      examination, which is 55955. We are now at 1974. This is a  
11      Lorillard memo from Spears to Judge.

12               By 1974 we know from this memo itself, that if we turn  
13      to page 3 -- I'm going to try to keep my little notes so you  
14      can't see them here.

15               THE COURT: We do occasionally see them though,  
16      Mr. Bernick. I better warn you.

17               MR. BERNICK: Yes, I know.

18      BY MR. BERNICK:

19      Q.   Okay. Here it is goes.

20               Following the Harvard funding, B&W -- actually, it's on  
21      prior page that we get a specific date -- sometime ago, in 1970,  
22      the CTR program was evaluated by the research directors.

23               So we're talking 1970. That's kind of the date of the  
24      Wakeham memo; right?

25      A.   That's correct.

1 Q. Okay. And, I'm going to come back to these three items, but  
2 I want to get in this.

3 Following the Harvard funding, B&W suggested that CTR  
4 be reorganized and redirected. That's talking about what  
5 Addison Yeaman was proposing; correct?

6 A. Yes, I assume so.

7 Q. Their suggestion was basically to expand the efforts on the  
8 motivational aspects of smoking and to become supportive of  
9 Harvard in other areas of research.

10 They also proposed that the scientific director of CTR  
11 be supported by an advisory board and specialized staff members.

12 They proposed a working group for overall coordination  
13 consisting of Harvard scientific directors, CTR scientific  
14 directors and industry representatives.

15 That proposal, the reorganization never actually took  
16 place; right?

17 A. Yes. I don't think it took place.

18 Q. So we are now here in 1974 where the Addison Yeaman idea of  
19 reorganizing CTR has been run up the flagpole and it has not met  
20 with approval by the others, and Spears in 1974 is now looking  
21 again at the purposes of CTR; correct?

22 A. Yes.

23 Q. Now, by this time we not only have CTR being funded by the  
24 tobacco industry, we have a laundry list of other funding  
25 mechanisms that the tobacco industry is funding for purposes of

1       conducting research into a variety of areas; correct?

2       A.   Yes.

3               THE COURT:  You don't really mean mechanisms.  Don't  
4       you mean grantees?

5               MR. BERNICK:  Your Honor, I think that they are a  
6       little bit -- they are all a little bit different.  Most of them  
7       I think are grants.  Most of them I think are -- some of them  
8       are just -- let me rephrase it.

9               Let me get it through the witness.  I think we can get  
10      it through the witness.

11      BY MR. BERNICK:

12      Q.  The Harvard project was basically money given to Harvard for  
13      Harvard to spend doing research on the subjects that are listed;  
14      correct?

15      A.  Yes.

16      Q.  They didn't solicit grants and approve it.  They just said  
17      to Harvard, Here's some money.  Spend it.  And they ended up  
18      spending it on the subjects that are listed; correct?

19      A.  Well, I wouldn't phrase it quite that way because I don't  
20      think they went to the head of the university and said, Here's  
21      some money.  You're Harvard university.  Spend it.

22              I think that identified specific researchers who then  
23      they either developed the grants or contracts with.

24      Q.  Okay.  But these are direct funding approaches.  They didn't  
25      go through the SAB or CTR; correct?

1 A. I think that's correct.

2 Q. The same thing is true with Washington university; correct?

3 A. Yes.

4 Q. Same thing is true of UCLA?

5 A. Yes.

6 Q. Then you've got chemical companies that are kind of working  
7 on their own to develop tobacco substitutes; correct?

8 A. That's what it says here.

9 Q. Then you got the German Tobacco Institute which is doing its  
10 own work and that work is highly-property orientated.

11 Do you know whether Germany had at this time the same  
12 antitrust issues that the United States had?

13 A. I don't know.

14 Q. You then had the TIRC. The TIRC was kind of the functional  
15 equivalent of -- CTR in the United States was the functional  
16 equivalent in the UK; correct?

17 A. Functionally, yes.

18 Q. And again, they were highly-product oriented; correct?

19 A. I see that it says that.

20 Q. The list goes on. University of Kentucky, the USDA which  
21 obviously is not funded by the industry. They're also -- the  
22 state agriculture research, tobacco sheet manufacturers, the  
23 National Cancer Institute, and then the ad hoc committee and  
24 then CTR itself.

25 So you've got a whole bunch of different research

1 organizations, some funded by the tobacco industry, some not  
2 funded by the tobacco industry; correct?

3 A. That's correct.

4 Q. And it would be fair to say that they go all around your  
5 three circles. That is, you got populational studies like  
6 epidemiology, you got laboratory studies, you've got clinical  
7 studies, you've got microbiologicals. You've got a variety of  
8 different studies; correct?

9 A. Well, studies with different functions, purposes and goals,  
10 so --

11 Q. That's the whole point. When it comes to CTR, it says,  
12 epidemiology, bioassay, genetics, primarily aimed at  
13 tumorigenesis and chronic pulmonary disease, and some activity  
14 in cardiovascular disease and smoking motivation; correct?

15 A. That's what it says, yes.

16 Q. And he reviews that in order to be able to say, Today CTR is  
17 conducting research in a highly competitive area and the program  
18 must be well conceived and targeted to avoid unwanted  
19 duplication to produce significant results; correct?

20 A. Yes.

21 Q. He then recites that after the review in 1970, CTR program  
22 was evaluated by the research directors at that time. It was  
23 felt that the desired aims of the CTR program could be stated  
24 as, number one, to define the effects of cigarette smoke on the  
25 human system.

1                   Do you see that?

2       A.   I see it.

3       Q.   That's not a statement that says we want to avoid the  
4       subject.   That's a statement saying that the purpose of CTR, the  
5       desired aims, were to define the effects of cigarette smoke on  
6       the human system; correct?

7       A.   Yes.   And it's my contention that --

8       Q.   I just --

9       A.   That's what it says.

10      Q.   That's what it says.   That when they met internally and they  
11      talked about CTR, and when they wrote among themselves, they  
12      didn't say we want to avoid the human effects of smoking, they  
13      say, that's one of the aims of the CTR program; correct?

14      A.   Yes, that's what it says.

15      Q.   Okay.   Number two, to conceptualize and explore other  
16      hypothesis relative to the smoking and health question by  
17      epidemiological and other appropriate methods.

18                   That's looking for alternative causes; correct?

19      A.   That's correct.

20      Q.   Certainly if there are alternative causes for lung cancer,  
21      that would be very relevant to the role that smoking played as  
22      well; correct?

23      A.   Yes.

24      Q.   Any populational study has got to be focused or any  
25      populational research effort has to consider the intervention of

1 other factors; correct?

2 A. It should.

3 Q. Should.

4 And then number 3, to define motivational mechanisms of  
5 smoking using laboratory animal models as well as human  
6 populations, every single one of those topics is relevant to  
7 smoking and health, is it not, as they have put it?

8 A. Sure. They are relevant.

9 Q. There's nothing in this memo that says that CTR's aims were  
10 designed to avoid the question at issue, is there?

11 A. No, it doesn't say that here.

12 Q. Now, in point of fact where Mr. Spears is going --  
13 Dr. Spears is going with this memo is that his concern is that  
14 from what has been said to this point, it seems obvious that a  
15 multitude of research organizations are involved in the area of  
16 smoking and health.

17 In addition, U.S. sponsored research in disease areas  
18 associated with smoking are too orders of magnitude above  
19 industry spending. In point of fact, by this time the National  
20 Cancer Institute is involved in a 10-year effort through the  
21 tobacco working group to do research on all kinds of aspects of  
22 cigarette smoking and disease; correct?

23 A. They were working on the issues of smoking and health.

24 Q. And one of the things that the NCI was doing, was doing  
25 extensive research looking specifically in the laboratory to the



1       impact of some tobacco smoke on animals using various  
2       techniques; correct?

3       A.   That's correct.

4       Q.   This bears upon the statement in the prior page, Look at all  
5       this research that's underway.  There's a lot of competition.  
6       There's a lot of dollars chasing the same issues, fair?

7       A.   Fair enough.

8       Q.   Okay.  He also ends up focusing on product modification.

9               Now, he then says -- and this is the -- the part is  
10       quoted in your direct examination.  Historically, the joint  
11       industry funded smoking and health research programs have not  
12       been selected against specific scientific goals but rather for  
13       various purposes, such as public relations, political relations,  
14       positions for litigation, et cetera.

15              Now, he's not saying -- he's not picking out CTR for  
16       that comment.  That's a comment that he's making about joint  
17       industry-funded smoking and health research programs; correct?

18       A.   Well, I'm not sure I would read it that way, because the  
19       joint industry funded smoking and health research programs, you  
20       know, would certainly include CTR.

21       Q.   It includes CTR, they include Harvard, UCLA, Washington  
22       University; correct?

23              MR. BRODY:  I'm going to raise a foundation objection  
24       here, Your Honor.

25              There were no questions about a joint funding effort

1 with UCLA. I think we had a question about a joint funding  
2 effort with Harvard and some testimony about that, but we did  
3 not --

4 THE COURT: We certainly had a question about  
5 Washington University. Objection is overruled. Go ahead,  
6 please.

7 BY MR. BERNICK:

8 Q. It seems obvious that reviews of such program for scientific  
9 relevance and merit in the smoking and health field are not  
10 likely to produce high ratings.

11 High ratings by whom and for what purpose? Is that  
12 spelled out?

13 A. I think he means from a scientific perspective.

14 Q. But you don't really know exactly what he means there;  
15 correct?

16 A. I just want to reread -- it seems obvious that reviews of  
17 such programs for scientific relevance and merit in the smoking  
18 and health field are not likely to produce high ratings.

19 Q. By whom and for what purpose? By outside authorities? By  
20 the companies when it comes to what will help them in their  
21 business? What purpose? It's not said, is it?

22 A. I think he means in terms of making progress.

23 Q. I'm sorry. It's not said what he means; correct?

24 A. Well, you know, I just read -- that's what it says.

25 I mean, all these documents are subject to

1 interpretation and evaluation.

2 Q. Right.

3 A. They don't tell you what they mean.

4 Q. He ends up making a proposal, really. Look what he ends up  
5 saying. In general, however the public and political attitude  
6 towards smoking has seriously decayed.

7 A. You skipped a sentence there.

8 Q. Sure.

9 A. It says, In general --

10 Q. That's fine.

11 A. -- these programs have provided some buffer to public and  
12 political attack of the industry as well as background for  
13 litigious strategy.

14 Q. Absolutely. However, the public and political attitude  
15 towards smoking has seriously decayed with respect to tobacco  
16 industry and scientific and political attack has become intense  
17 with efforts at forced product modification underway.

18 Isn't it true at this time that there are proposals for  
19 mandating tar and nicotine levels in cigarettes?

20 A. There were proposals.

21 Q. Thus, we see the litigation threat of much lesser importance  
22 than that of legislative and public acceptance of cigarette  
23 smoking.

24 This suggests that goals should be defined more on the  
25 basis of scientific aspects, public relations and the programs

1       leading to such goals coordinated more by business and  
2       scientific management.

3               What Dr. Spears is saying is, Let's seize a coordinated  
4       control over these different efforts at the company level.  
5       Correct?

6       A. Yes, that's what he's saying. I couldn't agree more.

7       Q. Couldn't agree more.

8               Now, in point of fact this proposal also was not  
9       adopted. That is, that the companies did not in fact seize  
10      control over CTR. Correct?

11      A. You know, my view is that companies had considerable control  
12      over CTR.

13      Q. What he's proposing in this memo did not take place, true or  
14      not?

15      A. I don't know specifically what you're saying he's proposing  
16      here.

17      Q. That management would take over.

18               He says, management -- this suggests that goals should  
19      be defined more on the basis of scientific aspects, public  
20      relations, and the programs leading to such goals coordinated  
21      more by business and scientific management. Business  
22      management.

23               Did business management take control over CTR?

24      A. My sense is that, you know, industry and business management  
25      had a good deal of control over CTR from its inception. So, you

1 know, I think he's saying we need to be even in more control  
2 now.

3 Q. My question is: Was there a reorganization or a  
4 reorientation of CTR after this memo was written?

5 A. In 1974 -- it's hard for me to say, but I think it continued  
6 much as it had been largely controlled by industry interests.

7 Q. Isn't it true that Dr. Spears never said that grants awarded  
8 by CTR were irrelevant to smoking and health?

9 A. I don't know exactly what you're referring to.

10 Q. I just asked. In the whole document Dr. Spears never said  
11 that grant work awarded by the SAB and CTR was irrelevant to  
12 smoking and health.

13 A. You know, I think he has raised here the issue of its  
14 relevance to smoking and health.

15 Q. He never says it's irrelevant. In fact, he talks about  
16 three different prongs that you admit are relevant.

17 A. I don't -- I don't see -- it doesn't say here that it's to  
18 be relevant to health.

19 Q. Dr. Spears never said that quality of research funded by CTR  
20 was poor, did he?

21 A. Not in this memo, no.

22 Q. He never said that the SAB wasn't qualified to serve as the  
23 SAB -- the members weren't qualified, did he?

24 A. No, he was not questioning the qualifications of the members  
25 of the SAB.

1 Q. He never said that the SAB was controlled by industry, did  
2 he?

3 A. Well, he talks a lot about the CTR, of which SAB was a part,  
4 under industry management.

5 Q. Well, CTR did a lot of different things, but when it came to  
6 the SAB grant program, he said -- he never says that was  
7 controlled by industry, does he?

8 A. No, he doesn't say it.

9 Q. Is it true that he also never said that the grant program  
10 wasn't doing exactly what had been promised in the Frank  
11 statement? He never says that they are not doing their job?

12 A. He doesn't say that, no.

13 Q. One last document in this area.

14 Next year, isn't it true that from 1970 -- in 1974,  
15 early 1970s, Addison Yeaman resigned as general counsel for  
16 Brown & Williamson and became president of CTR?

17 A. Yes, that's correct.

18 Q. So the same individual who was writing in '63 that the TIRC  
19 was really just designed for public relations' purposes, however  
20 undefined the SAB might be, and was saying in 1968, Let's  
21 reorganize CTR, that individual is now in charge of CTR.

22 A. Yes, that's correct.

23 Q. Okay. And then he writes, does he not, extensively about  
24 the value of CTR?

25 A. Yes, I think he felt CTR had been quite valuable.

1 Q. Well, none of those documents -- this particular document --  
2 in fact, there's no document by Addison Yeaman, once he is now  
3 head of CTR, you can see how it really works, there's no such  
4 document in your direct testimony, is there?

5 A. I just don't recall if I cited a Yeaman document after he  
6 became head of CTR.

7 Q. I'm going to show you U.S. 86005.

8 MR. BERNICK: It's hard to read on the screen, Your  
9 Honor. It's December 11, 1975, memo to Earl Clements, who was a  
10 consultant to the tobacco industry, from Addison Yeaman. Can't  
11 really read it but it says chairman and president now of CTR.

12 Q. And he says, he's basically reporting on what he has now  
13 learned since coming on board. And he says at page 3: Is the  
14 CTR perfect?

15 Of course, it isn't and it never will be, being a human  
16 organization.

17 But where does it fall short?

18 He says the frame of reference from which one looks at  
19 a problem makes a tremendous difference.

20 That's a general principle of truth in the field of  
21 history, is it not? What you see depends in part on where you  
22 sit?

23 A. Sure.

24 Q. It says, When I looked at CTR from the standpoint of a  
25 member, I was a very glib critic, so says Addison Yeaman in

1 1975. Correct?

2 A. Yes, that's what he says.

3 Q. As a functioning part of CTR I am not so glib. That's what  
4 he's now saying?

5 A. That's it.

6 Q. That's it. He then goes on to talk about specifically the  
7 relationship of public relations in science, which you talk  
8 about in your direct examination where you say: CTR, with  
9 respect to the TIRC, science was subservient to public  
10 relations.

11 Do you remember your testimony?

12 A. I do.

13 Q. And what he says on that topic is he says, Now for a general  
14 observation. While it is true --

15 A. I'm there.

16 Q. This is page 3. I'm sorry. At the bottom.

17 While it is true that TIRC was formed to meet a public  
18 relations' need, the CTR has become, in your wisdom, the  
19 instrumentality for the discharge of your responsibility to know  
20 all that you can know about the part tobacco may play in human  
21 disease.

22 It is my sober judgment that CTR, as it now operates,  
23 is the greatest public relations' asset you have in the problem  
24 of tobacco and health, but the moment CTR becomes or the attempt  
25 is made to use it as a public relations' instrumentality



1       subservient to public relations, your asset will lose its value  
2       because it will have lost its posture in the scientific  
3       community. End of sermon.

4               Those were Addison Yeaman's views once he came on board  
5       in 1975; correct?

6       A. Yes. This confirms a lot of things that I am -- a lot of my  
7       opinions in my direct testimony.

8       Q. I asked you whether those were his words.

9       A. Those were his words, yes.

10       Q. Nowhere does he say that public relations, that science is  
11       subservient to public relations; correct?

12       A. Well, what he says here is, While it is true the TIRC was  
13       formed to meet a public relations' need, the CTR has become, in  
14       your wisdom -- I guess he's referring to Mr. Clements -- the  
15       instrumentality for the discharge of your responsibility to  
16       all -- to know all you can -- to know all you can about the part  
17       tobacco may play in human disease.

18               I'm not sure who he is referring to as your.

19       Q. My question -- I don't know that that really responds to my  
20       question.

21               My question nowhere says that science is to be  
22       subservient to public relations. In fact, he says precisely the  
23       opposite.

24       A. Well, he nowhere says that science should be subservient to  
25       public relations.

1 Q. Now, CTR itself in its funding evolved during the 1970s;  
2 correct?

3 A. Yes, it did.

4 Q. And isn't it true that CTR in the 1970s embarked upon  
5 funding, through the SAB, a vast program to look at the impact  
6 of tobacco smoke on animals in the laboratory?

7 A. Well, I don't know if I would call it a vast program, but  
8 they had studies --

9 Q. What was the -- I'm sorry. I didn't mean to interrupt you.

10 A. They had studies that were studying tobacco smoke in  
11 animals.

12 Q. Well, do you know the name of the contractor that did all of  
13 that work?

14 A. I'm not sure. It was Microbiologic Associates.

15 Q. That's exactly right. Microbiological Associates got a  
16 multiyear, multimillion dollar contract to do extensive research  
17 specifically on tobacco smoke and specifically in the laboratory  
18 for its effect on animals; correct?

19 A. They did research like that.

20 Q. And, in fact, that was directly tobacco-oriented research,  
21 was it not?

22 A. Yes, it was.

23 Q. At the end of the day, isn't it true that that study, the  
24 inhalation of smoke by mice ultimately as all the other  
25 inhalation studies were, it was unsuccessful in showing that the

1 inhalation of smoke by animals caused lung cancer; correct?

2 A. Yes, I believe that's what their studies showed. But your  
3 question suggested that all inhalation studies had shown no  
4 impact on animals. That, I don't agree with.

5 Q. I'll take it one at a time. That's certainly what that  
6 study showed; correct?

7 A. I don't know all of their studies.

8 Q. The MAI study, the long-term inhalation study was  
9 unsuccessful in producing lung cancer in the animals; correct?

10 A. I just don't know that study that well.

11 Q. It was certainly consistent with what the Surgeon General  
12 then concluded in 1982, which is that the effort to demonstrate  
13 through an inhalation model that smoking caused lung cancer in  
14 animals had been unsuccessful?

15 A. It was quite difficult to develop an animal model to  
16 evaluate tobacco smoke.

17 Q. In fact, this whole area of tobacco oriented -- that is,  
18 tobacco smoke-oriented research, even today has failed to even  
19 get to the baseline of producing lung cancers in animals;  
20 correct?

21 A. There's debate about it. But I agree that it's been  
22 difficult to produce lung cancers in animals through inhalation  
23 studies for a number of reasons.

24 Q. And, therefore, the very tobacco-oriented research that was  
25 being advocated by some in the industry, and it's a subject

1       which you say that CTR avoided, this research actually bore out  
2       one of the principal bases of the tobacco company's position on  
3       causation, which is that cause had not been demonstrated in the  
4       laboratory; correct?

5       A. Causal elements had been demonstrated in the laboratory.  
6       The question was, you know, were you going to wait to produce --

7       Q. I didn't ask you --

8       A. Ask me the question again, please.

9       Q. I'm sorry. What happened in that study, as in many other  
10      studies, is that they bore out one of the principal bases for  
11      the tobacco companies' position on causation in the '60s, '70s,  
12      '80s, and early '90s, which is that causation had not been  
13      demonstrated using smoke in the laboratories; correct?

14      A. Yes, the tobacco companies contended that one would need to  
15      demonstrate smoking in the laboratory in order to assume cause.

16      Q. Do you have that little chart? In your three-circled  
17      chart -- I'll do it right here. I noticed that all three of  
18      your circles -- I know I'm going to mess this up.

19               All three of your circles, including the lab, the  
20      populational studies and the clinical studies, they all overlap  
21      there; right?

22      A. Yes.

23      Q. What that means is that at the end of the day with respect  
24      to all of the different diseases that you've talked about, in  
25      fact, you do have laboratory demonstration of the causal link;

1 correct?

2 A. Yes, in some instances 200, 300 years later.

3 Q. I just asked, in all those cases you have laboratory  
4 confirmation of cause; correct?

5 A. No, you don't.

6 MR. BRODY: Your Honor, Dr. Brandt has answered the  
7 question.

8 A. I can just give you a quick example going back to my chart.

9 Q. You can say no. I'll accept that answer.

10 A. No, you don't.

11 Q. I'll just take your chart at face value.

12 In this case if we are to take tobacco, we couldn't  
13 draw this chart based upon whole smoke in the laboratory, we  
14 have to draw a chart that kind of excluded this.

15 It would be a chart that has this one (indicating) and  
16 this one (indicating), but lab wouldn't overlap because it  
17 hasn't been demonstrated in the laboratory. Right?

18 A. Some things had been demonstrated in the laboratory. That  
19 was my direct live testimony yesterday.

20 Q. But the replication of lung cancer in the laboratory has  
21 never taken place; correct?

22 A. As I say, there have been some contested studies, but I  
23 don't -- I would agree, there's never been a single explicit  
24 animal model in which you could say: Here's cigarettes. We got  
25 the animals to smoke it in some way and developed lung cancers.

1 Q. Is it accurate, then, to say that given your own three  
2 circles, today it's accurate to say there are significant  
3 questions that remain to be demonstrated through research when  
4 it comes to the relationship between smoking and disease?

5 That's true today that there are questions like that;  
6 correct?

7 A. There are questions about every disease that we know much  
8 about. So there are questions, of course, about lung cancer,  
9 although I would say from a mechanistic point of view -- and  
10 there will be contemporary medical experts, you know, who I'm  
11 sure you could ask about this -- we actually know quite a lot  
12 about the processes of carcinogenesis from a mechanistic point  
13 of view today.

14 Q. None of those experts will be able to tell us what the  
15 constituent of smoke is that causes lung cancer; correct?

16 A. Well, I think you should ask them.

17 Q. You certainly can't tell us what that is today, can you?

18 A. Now I think we've gone beyond my area of expertise.

19 Q. Well, in all of the work that you've done, hundreds of hours  
20 pouring over this history, you have not found anybody prepared  
21 to say after all of these years what is the constituent of smoke  
22 that actually causes lung cancer, have you?

23 MR. BRODY: Objection, Your Honor. I think the  
24 question goes well beyond the scope of Dr. Brandt's direct  
25 examination.

1 THE COURT: The objection is sustained.

2 MR. BERNICK: Okay.

3 BY MR. BERNICK:

4 Q. At the end of the day -- coming back to why we went down  
5 this road, Dr. Brandt -- the SAB remained intact all the way  
6 until the time that CTR was disbanded in 1998; correct?

7 A. Correct.

8 Q. And throughout those years it was the SAB that always made  
9 the judgment about what to fund and what not to fund; correct?

10 A. For SAB-sponsored programs.

11 Q. For SAB-sponsored programs; correct?

12 A. Correct.

13 Q. It's true, is it not, that the Surgeon General thought that  
14 SAB-funded work was relevant enough to cite it at last count  
15 over 500 times; correct?

16 A. Yes.

17 Q. Surgeon General reports; correct?

18 A. They cite SAB-related work.

19 Q. And it's also true that the work of CTR ultimately evolved,  
20 such that if we go to this three-part scheme, between CTR, both  
21 in its grant program and its contract program, and the companies  
22 in their work on product design, that all areas of research  
23 regarding the relationship of smoking and disease were being  
24 covered; correct?

25 A. Well, with different emphases, yes.

1 Q. Let's pursue another topic and I'm going to try to get you  
2 off the stand fairly soon here, but your report -- or your  
3 testimony covered a variety of different things.

4 Let's talk about what the companies said about  
5 causation. We've about been talking about everybody else and  
6 what they said, also about the companies and what they said  
7 about causation.

8 Now I will move this out of the way.

9 I'm going to entitle this one: What the industry said.

10 Let's do a little timeline here, too. Go from 1954 --  
11 that's not looking very healthy. We will put in the '64, and we  
12 will put in '98, 2000.

13 First, you've pointed out in your report that there  
14 were -- and in your direct testimony -- that there were  
15 scientists inside the companies that expressed views internally  
16 on the relationship -- the potential relationship between smoke  
17 and disease; correct?

18 A. Correct.

19 Q. You've talked about Rodgman's paper in 1962, the trip report  
20 in 1958, and a series of other documents, about five or six  
21 documents in your direct examination; correct?

22 A. Correct.

23 Q. Now, there certainly were some scientists, as reflected in  
24 those documents, that were concerned that, in fact, there might  
25 well be a relationship between smoking and disease; fair?



1 A. Fair.

2 Q. Okay. When it came to those documents, did you follow what  
3 you told us at the very beginning, which was to look for the  
4 context of those documents scrupulously?

5 A. I attempted to be as thorough and scrupulous as I could.

6 Q. So you have exhaustively looked to see when it comes, for  
7 example, to the '58 trip report, why those folks came to the  
8 United States, who they spoke with, and then any other documents  
9 that might relate to their meeting. You've done that search?

10 A. I did attempt to do that.

11 Q. I'm sorry?

12 A. Yes, I did attempt to do that. I'm familiar with their  
13 trip, and I pursued other documents around their trip.

14 Q. Pursued other documents. Well, I'm only going to ask you  
15 about documents that relate to my client and their affiliates.  
16 I represent Brown & Williamson. So I'll ask you about the '58  
17 trip report here pretty specifically.

18 This is U.S. Exhibit 76169. It's a report on a visit  
19 to USA and Canada April 17th to May 12, 1958, and there are  
20 three individuals, there; right?

21 A. Yes.

22 Q. That's the '58 trip report that you talk about in your  
23 direct examination; correct?

24 A. I never referred to it as the trip report, so that's why I  
25 was confused about what you were talking about, but I usually

1       referred to it as the Bentley, Felton, Reid report.

2       Q.   Now, who are these three individuals, do you know?

3       A.   Yeah. They were researchers for various companies. Bentley  
4       worked for Imperial Tobacco, Felton for BAT, and Reid for a  
5       company called Carreras.

6       Q.   Carreras. Isn't it a fact -- do you know why they came to  
7       the United States in 1958?

8               I mean, specifically. I know they came and did a bunch  
9       of interviews, but do you know what their motivation was?

10      A.   I'm not sure. I think they wanted to know what was going on  
11      in the research front, especially around smoking and health in  
12      the U.S That led to most of their visits and discussions.

13      Q.   So the three companies said: Gee, we're kind of curious  
14      what's happening there in the United States. 1958, gosh, let's  
15      just go find out.

16      A.   No. I think officially they came from the research  
17      committee, the Tobacco Manufacturers Standing Committee in Great  
18      Britain.

19      Q.   TMSC; right?

20      A.   Yes.

21      Q.   What was TMSC's focus? Do you know what the specific  
22      purpose of the trip was? Have you actually looked to see what  
23      the specific purpose of this trip was?

24      A.   Well, I think I answered, you know, I think TMSC sent them  
25      to explore what was the scientific issues in --

1 Q. Well, you already told us in your direct examination that  
2 the MRC in Britain had already issued a report linking smoking  
3 to disease in 1957.

4 A. Yes, I'm aware of that report.

5 Q. Well, if they issued a report in 1957 from the UK saying,  
6 Hey, it's there. You know, the association has been  
7 demonstrated. Why do these people have to come to the United  
8 States to find out about what the United States people think?  
9 What's the purpose? Do you really know?

10 A. Well, I mean I don't think that tobacco researchers ever,  
11 you know, just said, Oh, well, MRC's decided, so now we don't  
12 need to visit the United States. I don't understand that.

13 Q. Well, they came over and the report recites their views of  
14 what they saw, and I think you told me that you were careful to  
15 look for other documents that reflect on the same events;  
16 correct?

17 A. I was.

18 Q. I want to show you JD 000524, which is a document that was  
19 generated by American Tobacco called Report on Meeting of  
20 Scientific Advisory Board, New York, New York, May 10th to 11,  
21 1958.

22 Now, the trip report that you cite basically says that  
23 the SAB thought that causation had been established; right?

24 A. Yes, the trip report does say that.

25 Q. If we take a look at this contemporaneous documentation, has

1       this document ever come to your attention?

2       A.   Yes, I know this document.

3               MR. BERNICK:  Okay.  We offer it, Your Honor.

4               THE COURT:  Any objection, Mr. Brody?

5               MR. BRODY:  My only question is this is a redacted  
6       version.  Is there an unredacted version of this document?

7               MR. BERNICK:  I frankly don't know what the purpose of  
8       the redaction was.  To the extent that it's ever been produced  
9       in an unredacted form, we will do it.

10              MR. BRODY:  Your Honor, we would have no objection to  
11      the production of the unredacted version of the document, but we  
12      do have an objection to the admission of the incomplete.

13              MR. BERNICK:  I'm only seeking to proffer it for the  
14      purpose of the unredacted portion which appears -- I'm sorry.

15              THE COURT:  Go ahead.

16              MR. BERNICK:  I'm only seeking to introduce it for the  
17      purposes of the unredacted portion which appears at the end of  
18      the document.

19              MR. BRODY:  Regardless of the purpose, Your Honor, we  
20      would like to see the unredacted document and, therefore, we  
21      object to the admission of the document in its current form.

22              THE COURT:  Well, you may question the witness about  
23      the document and focus on the last paragraph that you're  
24      concerned with.

25              During one of our recesses you will find the unredacted

1 version and see if you can give it in its entirety to the  
2 government. If you can, then of course the government will  
3 figure out whether it has an objection or not. If you can't get  
4 an unredacted version for some reason, then we will deal with it  
5 at that point.

6 BY MR. BERNICK:

7 Q. It says, Bentley, Felton and Reid joined the board at  
8 luncheon. It's the same people; right?

9 A. Yes, those are the same researchers.

10 Q. It says Jacobsen. He's a member of the SAB; correct?

11 A. Yes.

12 Q. Very distinguished scientists; correct?

13 A. Distinguished.

14 Q. Very distinguished.

15 MR. BRODY: Objection.

16 A. Distinguished.

17 THE COURT: Objection sustained.

18 BY MR. BERNICK:

19 Q. Jacobsen asked Bentley pointblank if he accepted the  
20 conclusion of the MRC, the Medical Research Council.

21 So basically, according to this set of minutes,  
22 Jacobsen -- it's Jacobsen from the SAB who is asking Bentley if  
23 he accepts the conclusions of the MRC.

24 After long hesitation, he said no. Jacobsen said he  
25 was glad to hear that. He, personally, did not think there was

1       any relation between smoking and lung cancer, but if this  
2       hypothesis were generally accepted, it was felt that a case had  
3       been proved against tobacco, then he had things to do other than  
4       to serve on the SAB.

5               Is that what it says?

6       A.   Yes, that's what it says.

7       Q.   Are you aware of any other document or piece of evidence  
8       that resolves the question of who got the content of the meeting  
9       right?

10      A.   Well, this doesn't resolve that for me as a historian, these  
11      two documents.

12      Q.   I'm sorry. You say as a historian. All the questions I'm  
13      asking you are as a historian. I asked you a very specific  
14      factual question. Should I repeat it?

15             Are you aware of any other evidence that actually  
16      resolves the question of who got it right, the trip report that  
17      was done by the British scientists or the document that was  
18      written by the ATCO employee who attended the meeting?

19             Is there any evidence that resolves the question of who  
20      got it right?

21             MR. BRODY: Your Honor, I'm going to raise a  
22      foundational objection. We've had no testimony nothing to  
23      establish that there is any difference.

24             MR. BERNICK: Well, if you will stipulate --

25             MR. BRODY: Who got it right.

1           MR. BERNICK: If the government will accept the  
2 rendition that's set forth in this document, I have no further  
3 questions on this document. Will you accept it?

4           MR. BRODY: We will accept the fact that the documents  
5 speak for themselves.

6           THE COURT: There's a difference between the two  
7 documents though, Mr. Brody, isn't there?

8           MR. BRODY: I didn't understand that to be the  
9 question.

10          The question was of these two documents, who got it  
11 right? And there hasn't been any questions about the first  
12 document.

13          THE COURT: But there was testimony on direct about the  
14 first document.

15          MR. BRODY: There is testimony in the direct.

16          THE COURT: And now the effort is being made on cross  
17 to confront the witness with a document that reaches a different  
18 conclusion than the document about which he testified.

19          MR. BRODY: The objection was put, quite frankly, is  
20 the foundation has not been laid, even in the direct for the  
21 question that Mr. Bernick asked.

22          THE COURT: The foundation exists in that questions  
23 were asked on direct. The witness answered them. And a  
24 different document is being presented to him on cross, a  
25 document that reaches a different conclusion, and he certainly

1 can be questioned about that document.

2 MR. BRODY: Your Honor, if we could just then also  
3 raise an objection based on the facts that it's a question about  
4 a document that's incomplete as a redaction.

5 THE COURT: Well, that's a more serious issue.

6 I am going to let Mr. Bernick finish his cross on this  
7 document. Ultimately, we are going to have to come back to this  
8 document to find out whether this entire few minutes is even  
9 going to remain in the record.

10 But let's get this piece of it done and then we will  
11 return to the issue when Mr. Bernick gets the unredacted  
12 document.

13 MR. BRODY: Thank you, Your Honor.

14 BY MR. BERNICK:

15 Q. The question is: Are you aware of any evidence that  
16 actually resolves the question of which version of this meeting  
17 was correct?

18 The version that's set forth in the government's  
19 exhibit and in your direct testimony or in the version that's  
20 set forth in this document, which is JD 000524.

21 A. I'm not aware of any other document that could resolve the  
22 issue of which is correct.

23 Q. Are you aware of any testimony that resolves the issue of  
24 which version is correct?

25 A. No, I'm not aware of any testimony.



1 Q. In fact, you didn't look at any of the testimony from any of  
2 the people who were employed by the tobacco industry on any of  
3 the matters that are set forth in your direct examination;  
4 correct?

5 A. I need the question again.

6 Q. You specifically looked at a lot of documents, but you did  
7 not review the sworn testimony from the people who wrote the  
8 documents, did you?

9 A. Felton, Bentley --

10 Q. Any sworn testimony.

11 A. I've seen sworn testimony from tobacco industry officials  
12 and employees.

13 Q. Oh. Have you read the depositions of the people who wrote  
14 the documents that are the subject of your direct testimony?

15 A. I don't -- I can't say that I've comprehensively examined  
16 their depositions.

17 Q. Would it be fair to say that that's an area where your  
18 review has been less than scrupulous?

19 A. I focused my research on the primary source documents that  
20 were produced in the time. So, you know, it's something I'd  
21 like to see more of that material. There's a lot more material  
22 that one could see around a lot of issues.

23 Q. But, specifically, what somebody who was there at the time  
24 says is primarily source material, is it not?

25 A. Well, it can be, although a lot of depositions and so on are

1 post hoc taken at another period of time.

2 Depositions as a historical document are structured  
3 around very specific questions in judicial proceedings, so they  
4 are just one kind of document.

5 Q. But they are a primary source.

6 A. They are a primary source, usually with a retrospect.

7 Q. Okay. So those are primary source materials that you did  
8 not scrupulously examine; fair?

9 A. There are some primary materials I have not seen.

10 Q. When it's comes to the most important documents that are in  
11 your direct testimony, on those specific documents you did not  
12 go back to systematically review the testimony, did you?

13 A. I haven't seen testimony related to these documents.

14 Q. Would you go back and review what Mr. Panzer said about the  
15 memo he wrote in 1972?

16 A. I haven't seen Panzer's testimony.

17 Q. That's one of the most important documents in your direct  
18 testimony. That's the one that talks about creation of doubt;  
19 right?

20 MR. BRODY: Objection. There are two questions there:  
21 One on the importance and one on the substance.

22 THE COURT: Sustained. Ask them one at a time.

23 BY MR. BERNICK:

24 Q. The Panzer memo is one of the most important memos in your  
25 direct testimony; correct?

1 A. I don't know that I would characterize it that way.

2 Q. It's not one of the most important?

3 A. You know, I haven't rated the memos in my direct testimony  
4 as this one is the most important, this one is somewhat less  
5 important and so on. I just haven't thought about it that way.

6 Q. Sure you did. You read thousands, hundreds and thousands of  
7 documents, correct? You read them?

8 A. I've read thousands of documents.

9 Q. And of all those documents you pick out about a couple of  
10 hundred documents to refer to in your testimony; correct?

11 A. I haven't counted up, but that would probably be right.

12 Q. So it's a very small fraction of what you've read, and they  
13 are the ones that you felt were the most important documents in  
14 order to set forth your testimony; correct?

15 A. I chose important documents.

16 Q. Okay. And Panzer's memo in '72 is certainly one of those  
17 documents, is it not?

18 A. It's one of the documents cited in my direct testimony.

19 Q. You never even made an effort to review what Mr. Panzer  
20 himself testified went into that memo?

21 A. I haven't reviewed Panzer's testimony.

22 Q. Well, let's talk about -- let's go beyond the '58 trip  
23 report and the memo that was done at the same time. I want to  
24 ask you a different question which is you've identified some  
25 memos -- let me back up.

1                   You cite in your direct testimony the '58 trip report;  
2     correct?

3     A.   Yes, I do.

4     Q.   You don't even mention this other document that you were  
5     aware of relating to exactly the same event, do you?

6     A.   No, I haven't mentioned it in my testimony.

7     Q.   When it comes to the documents that you cite where they  
8     refer to the views expressed internally by company scientists,  
9     your direct testimony talks about documents, or the scientists  
10    are saying, Maybe there's something there about this  
11    relationship; correct?

12    A.   Yes.

13    Q.   But you don't talk about the documents that were internal  
14    documents where scientists say: We don't think that there is a  
15    relationship, do you?

16    A.   There are a lot of documents that say that.

17    Q.   Well, a lot of documents that say what?

18    A.   That say that we don't think there's a relationship.

19    Q.   There are a lot of documents by company scientists over the  
20    same years, people who are qualified in the area who say that  
21    they don't believe that there's a relationship; correct?

22    A.   There's some documents like that.

23    Q.   So it would be fair to say that at the companies during this  
24    period of time some people internally were raising questions  
25    about whether there was a relationship and expressing the view

1       that maybe there was, and other scientists, qualified scientists  
2       were saying that they don't think that there's a relationship;  
3       correct?

4       A.   Correct.

5       Q.   Some of the scientists who said they didn't think there was  
6       a relationship were people who were scientists of significant  
7       stature; correct?

8       A.   I just -- I don't know specifically what you're referring  
9       to, but I'm sure.

10      Q.   Sir Charles Ellis, who was a consultant to BATCo, was an  
11      eminent scientist, was he not?

12      A.   Yes.

13      Q.   Isn't it true that in internal documents in 1962, even after  
14      the Royal College of Physicians report, Sir Charles Ellis said,  
15      Not proven internally; correct?

16      A.   Yes, that's correct.

17      Q.   Now, what the industry decided to do during this early  
18      period of time or from '54 to '64, is that they cited -- it's  
19      the wrong one again -- they cited independent scientists; right?  
20      Correct?

21      A.   I'm not sure I have your whole question.

22      Q.   In this period of time from '54 to '64 the industry, in  
23      talking about the causation issue, said causation has not been  
24      proven, and in support of that they cited independent scientists  
25      who said the same thing; correct?

1 A. Yes, three did.

2 Q. And those are independent scientists who had on their own  
3 already spoken out to their views that causation had not been  
4 demonstrated; correct?

5 A. Some had.

6 Q. Well, all the people that I talked about yesterday, Hueper,  
7 Rosenblatt, Robins 1, Robins 2, all of those people had spoken  
8 out on their own to say causation had not been established;  
9 correct?

10 A. Yes.

11 Q. And the industry cited those people who had already been  
12 outspoken; correct?

13 A. They did.

14 Q. Is it also true that the SAB itself looked at the science  
15 and developed an assessment about whether causation had been  
16 established?

17 A. Well, my position would be that the SAB was selected on a  
18 criteria of skepticism, so --

19 Q. I didn't ask you -- with all due respect, Dr. Brandt. I'm  
20 trying to get done, and I'm already going later than what I had  
21 thought.

22 I didn't ask you how they were selected. I asked  
23 you -- because we've already been through that -- I asked you  
24 whether they assessed the science on the causation issue.

25 A. Well, the SAB didn't do any research itself.

1 Q. I'll ask the question another time.

2 A. I'm sorry.

3 Q. I asked, did they develop an assessment about whether  
4 causation had been established?

5 A. They took a position, yes.

6 Q. Well, did they do an assessment?

7 A. I'm not sure that the SAB did a formal assessment of  
8 causation. They took positions on it, usually voiced by Little,  
9 but, you know, there's a lot of discussion about whether the SAB  
10 actually has a position on proof and causality.

11 Q. Did you actually take a look to see what the SAB had done,  
12 Dr. Brandt? Did you really do that yourself?

13 A. I've looked at a lot of things from the SAB.

14 Q. The SAB, in fact, specifically reviewed the evidence, did an  
15 assessment and concluded that causation had not been established  
16 as late as 1960; correct?

17 A. I just -- I don't know if -- I don't know what the nature of  
18 that assessment was.

19 Q. 1964 comes about, after 1964 -- the Surgeon General's report  
20 comes out in 1964, but as of 1964 --

21 THE COURT: Mr. Bernick, I assume that at some point  
22 you're going to get back to the document you were waving at the  
23 witness.

24 MR. BERNICK: Yes, I'll be happy to. I was not -- I  
25 didn't think it would be appropriate if he hadn't looked at it

1 to simply show it to him and put into evidence.

2 THE COURT: My only question, not to repeat the way you  
3 questioned, but my only question was I assume at some point  
4 you're going to get back to that. Is that right?

5 MR. BERNICK: Yes. In fact, I'd be happy to put it in  
6 the record right now. It's no -- I've got it right here in my  
7 hand.

8 THE COURT: You can put it in when and where you want.  
9 I just want to know I'm going to see it at some point.

10 MR. BERNICK: I'll put it in right now before I forget.

11 It is JD 010308, Scientific Advisory Board meeting  
12 confidential report, Charleston, South Carolina, March 10th to  
13 11, 1960. We offer it.

14 MR. BRODY: Your Honor, I, quite frankly, would like to  
15 have our folks check this against our list of what's on  
16 Defendant's Exhibit list.

17 According to our records, there were three documents  
18 with joint defendant exhibit numbers used yesterday that were  
19 not on the list, so if Mr. Bernick wants -- I don't know if you  
20 have additional questions about the document, but if we could  
21 hold off, I could check at the break and make certain.

22 MR. BERNICK: This is cross-examination. We weren't  
23 required to list cross-examination exhibits as part of our  
24 exhibit list under the orders. It's cross.

25 MR. BRODY: He's offering it into evidence, Your Honor.



1           MR. BERNICK: A lot of things will be on  
2 cross-examination going into evidence.

3           THE COURT: No. The objection is overruled.

4           But you haven't shown it to this witness yet, so go  
5 ahead.

6 BY MR. BERNICK:

7 Q. Does this refresh your recollection of having seen this  
8 document, Dr. Brandt?

9 A. I may have seen this document. I'm not sure I had seen it  
10 with the appended report.

11           I've seen many of these Scientific Advisory Board  
12 meeting minutes such as this one, and I would just have to check  
13 my notes to see if this was specifically one I've reviewed. But  
14 I'm familiar with the reports like this.

15           MR. BERNICK: Then we would offer it, Your Honor.

16           THE COURT: I'm going to defer. Let the government  
17 sort of get itself organized about this exhibit. We will come  
18 back to it either after the recess or after lunch. I think  
19 there are two outstanding issues at this point.

20           How much longer do you have?

21           MR. BERNICK: I've got one more area after this that I  
22 think will take about 25 minutes, and I've got one more  
23 question -- I've got one more question that will complete where  
24 we are here that I'd like to put to the witness.

25           THE COURT: You get one more question to finish this

1 area and then we will take a break.

2 MR. BERNICK: That's fine.

3 BY MR. BERNICK:

4 Q. I want to show you Dr. Richmond's testimony on two related  
5 points and ask -- I'm just doing to ask you whether this is  
6 reasonable testimony. This is in the Falise trial, page 523,  
7 and the Falise trial, page 522.

8 I asked at line 8: Isn't it true that, in your own  
9 view, you have no criticism of the people who before 1964 said  
10 not proven?

11 And he said: That's true.

12 I then went on to ask him specifically about  
13 Dr. Little. Isn't it true, Dr. Clarence Cook Little, when he  
14 spoke to the issue for the tobacco industry, said not proven?

15 Answer: Yes, he said that very vehemently.

16 Question: Isn't it true that again you're not critical  
17 of Dr. Little for having said, prior to '64, not proven; right?

18 Answer: No. He was at liberty to the that.

19 Question: It was proper and reasonable for the tobacco  
20 companies in good faith to rely upon Dr. Little to make those  
21 statements on behalf of industry; correct?

22 His answer is: Well, I think it was poor judgment to  
23 use him and his analyses.

24 I then asked him, question: Haven't you testified that  
25 you have no criticism of the tobacco industry for relying upon

1 Dr. Little?

2 Answer: Well I think they could have exercised better  
3 judgment, but that's a matter of opinion.

4 Question: It's a matter of opinion?

5 Answer: Yes, but I wasn't saying they couldn't  
6 properly rely on him.

7 Is Dr. Richmond's testimony about the propriety of what  
8 the industry did unreasonable testimony, Dr. Brandt?

9 A. No, I don't think his testimony is unreasonable.

10 MR. BERNICK: That's all I have on this line and then  
11 we can come back and finish up.

12 THE COURT: All right. We will take a 15-minute recess  
13 now, everybody.

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

15 (Recess ended at 11:09 a.m.)

16 THE COURT: Counsel, before we begin, I need some  
17 definite time estimations from people because I want to know  
18 roughly when we are going to be done with this witness.

19 How long do you think you're going to be, Mr. Bernick?

20 MR. BERNICK: Half-hour.

21 THE COURT: Now, I know Mr. Wells has cross. Will you  
22 give me an estimate?

23 MR. WELLS: Hour, hour and 15 minutes.

24 THE COURT: Are there other defense counsel who also --  
25 I assume there's not going to be any overlap or duplication

1       whatever.

2               MR. BIERSTEKER: No, Your Honor. We are trying to  
3 address documents that are specific to each of our respective  
4 clients that Mr. Bernick --

5               THE COURT: Give me a rough idea.

6               MR. BIERSTEKER: Maybe a half-hour.

7               MR. MINTON: Fifteen to 20 minutes Your Honor.

8               THE COURT: So he's going to go well into this  
9 afternoon.

10              MR. WELLS: Your Honor, just in terms of the overlap  
11 question, Mr. Bernick --

12              THE COURT: Mr. Wells, come forward for the court  
13 reporter.

14              MR. WELLS: Mr. Bernick and I are quite sensitive to  
15 the order that questioning not be cumulative pursuant to order  
16 471. We have coordinated, and I will have some questions  
17 dealing with certain positions taken before the United States  
18 Congress that Mr. Bernick purposefully did not include because  
19 we decided I would cover it.

20              THE COURT: All right. The reason -- by the way, we  
21 are going to have a lot of international visitors coming into  
22 the courtroom, ladies and gentlemen. They happened to be in the  
23 courthouse and this is good trial for them to observe.

24              There are some important logistical issues that counsel  
25 have raised with my law clerk and that we all need to address.

1 I was going to do them right after the lunch recess.

2 I think we need to get this witness concluded, then I  
3 will raise those issues with everyone, and given what you're  
4 telling me, I think it's probably going to be probably  
5 midafternoon or so, but certainly before we leave at 4:30 or  
6 5:00 I want to turn to a number of different practical  
7 questions.

8 So, Mr. Bernick, go ahead, please.

9 MS. EUBANKS: Your Honor, if I might, just for purposes  
10 of planning for the afternoon. Because we wanted to make sure  
11 that we didn't have any unnecessary gaps in terms of timing, our  
12 next witness is here, so would it be the court's preference to  
13 be able to address these procedural issues?

14 And if that's the case, then I can let our witness know  
15 for planning purposes about tomorrow because defendants  
16 anticipate, I think, spending the entire day with Dr. Samet.

17 MR. BERNICK: It would certainly be useful to get  
18 Dr. Samet -- if you're going to do, as I assume the government  
19 is going to, their initial presentation with demonstratives, to  
20 get that done, so that we can then proceed promptly with the  
21 cross-examination tomorrow morning.

22 THE COURT: Well, I hope we can do that. I don't plan  
23 to take forever on these procedural and logistical issues. Now,  
24 sometimes you all take forever, but I'm not planning to. So  
25 I'll leave it at that. We will do our best get him on for an

1 hour.

2 Mr. Bernick, please.

3 MR. BERNICK: Yes, Your Honor. I will inform the court  
4 that we have since located an unredacted version --

5 THE COURT: Good.

6 MR. BERNICK: -- of the exhibit, JD 000524.

7 I'll note -- and I furnished a copy of this to the  
8 government. The part that was redacted, for the court's  
9 information, was redacted and listed on the privilege log and it  
10 was never challenged. So that's the form the document as exists  
11 today.

12 At the same time, having read it, while I understand  
13 the assertion of privilege and believe it to be correct, it's  
14 just not worth pursuing a debate at this point. It's an old  
15 document 1958.

16 So, we would tender the document. We would offer the  
17 document in its unredacted form at this time.

18 MR. BRODY: Well, frankly, Your Honor, we are not  
19 particularly happy with the idea that we are going to be going  
20 through trial here. Every time the defendants want to use a  
21 document, we are going to be -- in order to make a document  
22 complete for purposes of questioning the witnesses, we're going  
23 to be seeing something's for the first time. Frankly, there's  
24 no Bates number on this page.

25 THE COURT: Mr. Brody, this is cross. They are

1       entitled to confront a witness with a document they haven't  
2       listed on cross. So unless there's some other objection to the  
3       document, it comes in.

4               MR. BRODY: Well, our position, Your Honor, quite  
5       frankly, is that we don't believe they should allowed to  
6       withhold the document as privilege, for portions of the document  
7       as privileged, and then offer the document at trial when it  
8       suits them to use it defensively. And that's the objection to  
9       the admission of this document with his testimony. So at this  
10      time we would also make a motion to strike the testimony about  
11      the document.

12             MR. BERNICK: Your Honor, this is particularly  
13      inappropriate.

14             We had an exhaustive process for logging privileged  
15      documents. We followed that process. This is a document  
16      produced in redacted form specifically listed on the log and  
17      they never even challenged it.

18             The only reason today that we are producing an  
19      unredacted portion --

20             THE COURT: It's to move things along.

21             MR. BERNICK: To move things along.

22             THE COURT: 000524 is admitted. Let's move on now.

23             (Defendants' Exhibit No. 000524 was received into evidence.)

24             BY MR. BERNICK:

25      Q. Dr. Brandt, I want to turn to the period of time after 1964.

1       You've told us about the consensus that was articulated by the  
2       Surgeon General in 1964. I know that in your direct examination  
3       you expressed different views about when it arose, but certainly  
4       we all agree about consensus in '64.

5               After 1964, isn't it true that there were still  
6       independent scientists with no ties to the tobacco industry who  
7       were of the view that causation had not been proven?

8       A. Yes.

9       Q. In fact, some of them testified under oath to Congress in  
10      1965 and again in 1969; correct?

11      A. Yes, there was congressional testimony.

12      Q. And some of those people who spoke as experts had  
13      relationships with the tobacco industry and some of them did  
14      not; correct?

15      A. I think that's true.

16      Q. Okay. Now, as time went on, I think we would all agree that  
17      the number of outside experts who were still of the view that  
18      causation had not been demonstrated diminished over time;  
19      correct?

20      A. I agree with that.

21      Q. And at a certain point most of the experts, the ones with  
22      authority, in any event, who had announced their views also  
23      served as witnesses for the tobacco industry either in a  
24      regulatory context or a litigation context; correct?

25      A. Many did.



1 Q. Okay. And their views -- that is, the testimony and views  
2 of these experts was what the industry cited as part of its  
3 effort to take its position on causation to the court of public  
4 opinion; correct?

5 A. It was one of the things they did, yes.

6 Q. Okay. In fact, didn't the time come when the Tobacco  
7 Institute itself recognized that the position that -- that the  
8 public effort to get the position out no longer, if ever, had  
9 credibility, no longer had credibility?

10 A. I think the Tobacco Institute understood that in the face of  
11 the overwhelming scientific research and acceptance of that  
12 research, that their public relations' posture, given the  
13 industry's claims of open question ongoing controversy was more  
14 and more difficult.

15 Q. In fact, in 1979, 1980, didn't they specifically conclude  
16 that the people who were articulating public opinion in the  
17 press simply just didn't buy it at all?

18 A. There were certainly concerns within the tobacco industry  
19 that the industry's position was difficult to sustain from a  
20 public relations' point of view.

21 Q. And that's documented as of 1979. And, in fact, it was  
22 specifically articulated by your colleague, Dr. Richmond, in  
23 1980; correct?

24 He's the Surgeon General in 1980, right?

25 A. He was the Surgeon General in 1980.

1           MR. BRODY: A foundational objection. There was  
2 nothing in the prior testimony about the documentation of a  
3 Tobacco Institute position.

4           THE COURT: Sustained.

5 BY MR. BERNICK:

6 Q. If we take a look at your direct examination, what is the  
7 last point at which the Tobacco Institute on its own initiative,  
8 apart from responding to a question, on its own initiative  
9 articulates publicly the position that causation has not been  
10 proven?

11           What's the last time when the Tobacco Institute went to  
12 the court of public opinion on its own initiative on that issue?

13 A. I just don't know when the last time was. I couldn't say.

14 Q. If we took your direct testimony, when would be the last  
15 time that you cite where the Tobacco Institute on its own  
16 initiative took the matter to the court of public opinion?

17 A. They just didn't systematically look at the Tobacco  
18 Institute on that question. I've looked at industry spokes  
19 people. You know, I mean I --

20 Q. That's fine. I'll expand the question.

21           Tell me -- I know that 1994 the executives were brought  
22 before Congress to answer questions. I know that in 1998  
23 Mr. Jeffrey Bible was put under questions in the Minnesota  
24 tobacco trial and you quote the testimony that was offered in  
25 both those context.

1 A. Yes.

2 Q. But that's where the industry is being responsive to  
3 questions asked.

4 My question is: From all sources in your direct  
5 testimony, when was the last time that the tobacco industry on  
6 its own came out with a public statement of its position on  
7 causation?

8 A. I don't -- I don't know the answer to the question. I can  
9 go back -- the last time that I think I know that I can document  
10 at this time -- you know, it's an interesting question, I'd like  
11 to be able to document it -- is that, for example, I read in the  
12 New York Times 1985 where an industry spokesperson from the  
13 Tobacco Institute is asked about the possibility of producing a  
14 safer cigarette.

15 And the tobacco industry spokesperson says, We don't  
16 know anything that makes a cigarette unsafe, so how could we be  
17 working towards a safer cigarette?

18 That gets at the issue of, you know, assumptions about  
19 causality.

20 Q. I'm not sure that that's really directly responsive, but  
21 I'll take it.

22 Is there anything that you're aware of as you sit here  
23 today after 1985 where the tobacco industry is on its own taken  
24 to the court of public opinion its position with regard to  
25 causation.

1 A. As I said, I just don't know after '85.

2 Q. Let's get to the last questions that I want to ask you,  
3 which is: What about consumers? I put them on the same  
4 timeline.

5 In your testimony on direct examination you offered the  
6 view that, I think your words were, consumers misperceived the  
7 state of knowledge with regard to --

8 A. Could you tell me where you are?

9 Q. Yes. It's at page 100 of your testimony.

10 A. Page 100?

11 Q. It says, As a result of this campaign, your testimony was,  
12 there remains substantial public misperceptions about the state  
13 of scientific knowledge of the harms of smoking.

14 Is that your testimony?

15 A. I'm sorry?

16 Q. It's the last line.

17 A. As a result of this campaign.... yes, that's my testimony.

18 Q. Let's talk a little bit about consumer perception. I'll try  
19 to move through this relatively promptly in the interest of  
20 letting others ask you questions.

21 This period of time, actually even before 1954, when  
22 the scientific studies were coming out, it's true, is it not,  
23 that there was very significant publicity in the media about  
24 these studies?

25 A. Yes, there was significant attention.

1 Q. Time Magazine, Life Magazine, Newsweek, national television,  
2 national radio, all of them broadcast headline news when these  
3 studies came out; correct?

4 A. Yes, there was a good deal of coverage of these studies.

5 Q. And is it also true that the Readers Digest, in particular,  
6 did a whole series of articles kind of tracking these  
7 developments and talking about the hazards of cigarettes?

8 A. Yes, it's true.

9 Q. You're familiar, are you not, with the fact that a poll was  
10 taken from Gallup in 1954 showing that 90 percent of those  
11 polled had heard or read that smoking might have health effects?

12 A. Yes, I'm familiar with that poll. And there was additional  
13 information in that poll that 90 percent had heard, but they  
14 also identified the percentage that actually believed that was  
15 the case.

16 Q. We're going to talk about that. The point is that  
17 90 percent had heard. That's all the question that I asked you.

18 A. Yes, that's correct.

19 Q. Is it true that in relationship to other information or  
20 other levels of knowledge, that is a very, very high number?

21 A. Yes, I think that's a high number.

22 Q. And after 1954, or in the 1950s with this information, isn't  
23 it a fact that people actually began to modify their behavior as  
24 a result of information that had appeared in the press? Smoking  
25 behavior.

1 A. Yes, there was some modification of smoking behaviors.

2 Q. So even before under your analysis there was any scientific  
3 consensus, smokers were voting with their feet on whether they  
4 were concerned; fair?

5 A. Well, I think in the period that you're talking about, from  
6 1954 to the early 1960s, overall there's actually an increase in  
7 smoking during that period.

8 Q. Well, let's talk about that.

9 First of all, would you agree with me that in this  
10 period of time before 1964 consumers are concerned enough that  
11 they switched to filtered cigarettes?

12 A. Yes, I testified to that in my direct testimony.

13 Q. And the recommendation that filtered cigarettes or low tar  
14 cigarettes be made and consumed actually came from the public  
15 health authorities; correct?

16 A. Not exclusively.

17 Q. The public health authorities, Dr. Wynder himself  
18 recommended and testified before Congress that there should be a  
19 40 percent reduction in tars; correct?

20 A. Dr. Wynder wasn't really a public health official.

21 Q. He's certainly one of the researchers that you cite for  
22 saying categorically that smoking causes disease; correct?

23 A. Yes, but he's a researcher.

24 Public health officials are generally people who work  
25 for public health institutions, so that's the distinction that I

1 do draw in my work.

2 Q. I see. The recommendation to reduce tar deliveries was made  
3 by people who are researchers; correct?

4 A. Yes.

5 Q. Independent of the tobacco industry; correct?

6 A. Yes.

7 Q. And their views were important enough that they were asked  
8 to testify before Congress on that very same matter; correct?

9 A. That's correct.

10 Q. Okay. And news got out and the filters were available,  
11 people began to switch to filtered cigarettes in the 1950s even  
12 before there was a consensus; fair?

13 A. I haven't agreed about when the consensus is. But, yes,  
14 people began to change their behaviors.

15 Q. Now, you said the consumption increased, but let's talk  
16 about something else. Let's talk about prevalence. Prevalence.

17 A. I think you misspelled it.

18 Q. I did. Which is it? "A" here?

19 A. Yes.

20 Q. "A" there, too?

21 A. You got it right.

22 Q. Prevalence. Have you looked to see whether the prevalence  
23 of smoking among certain groups of people was actually declining  
24 in the 1950s?

25 A. Among certain groups of people?

1 Q. Have you looked to see whether the rate of smoking  
2 initiation by males was staying the same, increasing or  
3 declining even in the 1950s?

4 A. No. I've only looked at the general data for the  
5 population.

6 Q. 1964 report comes out, and we know that in 1964 the Surgeon  
7 General says: Cause. And the industry says, not proven. Very  
8 publicly; right?

9 A. Yes.

10 Q. And people, in making their smoking decisions, could choose  
11 to believe the Surgeon General or they could choose to rely upon  
12 what the tobacco industry said very publicly; correct?

13 A. Yes.

14 Q. And isn't it true that after 1964 -- in 1964 and thereafter  
15 there certainly was very broad awareness that smoking was a  
16 problem; correct?

17 A. Yes. It depends on how you define awareness. But there was  
18 a lot of public media and discussion about the issues associated  
19 with smoking and health.

20 Q. And you said, well, people had heard early on but maybe they  
21 didn't believe. That had shifted by 1964; correct?

22 A. To some extent. You see, the way I would analyze an issue  
23 like that --

24 Q. I'm sorry. I just asked you whether it had shifted.

25 A. Could you repeat the question?



1 Q. Yes. Whether people simply had heard that cigarettes might  
2 be harmful and whether they believed that cigarettes in fact  
3 were harmful, that had changed as we move forward in time. More  
4 people believed that cigarettes were harmful by 1964; correct?

5 A. I don't have the Gallup numbers in front of me, but there's  
6 actually some motion through that period of the late 50s up and  
7 down. So, there's not a consistent trend towards acceptance of  
8 the belief that smoking causes lung cancer.

9 Q. Certainly the American Medical Association in an article  
10 that was published in 1954, a letter that was sent in 1954 from  
11 the executive vice president of the AMA, Dr. Blasingame, says  
12 With respect to cigarettes, cautionary labeling cannot be  
13 anticipated to serve the public interest with any particular  
14 degree of success.

15 The health hazards of excessive smoking have been well  
16 publicized for more than 10 years and are common knowledge.  
17 Labeling will not alert even the young cigarette smoker to any  
18 risks of which he is not already aware.

19 You're familiar with Dr. Blasingame's letter to the  
20 FTC, aren't you?

21 A. Yes, I am.

22 MR. BERNICK: We offer that. The document itself is JD  
23 080031.

24 THE WITNESS: It's hard to see the whole document on  
25 this kind of a slide.

1           MR. BERNICK: If you take a look at the -- I think, if  
2       you would just give him the joint defense exhibit number.

3           That's what we're offering. We are not offering the  
4       demonstrative, Your Honor. We are offering the underlying joint  
5       Defendants' Exhibit.

6           MR. BRODY: We have no objection Your Honor.

7           THE COURT: All right. Admitted.

8           (Defendants' Exhibit No. JD 080031 was received into  
9       evidence.)

10          BY MR. BERNICK:

11         Q. That's certainly what the American Medical Association was  
12       saying in 1964, was it not?

13         A. Yes, that's what they were saying.

14         Q. If you go back 10 years, they are really saying that there's  
15       been broad awareness of the hazards -- not just well maybe --  
16       the hazards, really since 1954; correct?

17         A. This is exactly the same time, for example, that the AMA  
18       took the \$15 million grant from the tobacco.

19         Q. So you think that the AMA went down for the tobacco industry  
20       because they got a lot of money?

21         A. I'm just saying that AMA politics were quite complex during  
22       that period.

23         Q. You made a statement, Dr. Brandt. You've made a suggestion.

24                 Do you believe, do you have evidence that this letter  
25       was written by the executive vice president because he was

1       prevailed upon to do so because he received money from the  
2       tobacco industry?

3               MR. BRODY: Your Honor --

4       BY MR. BERNICK:

5       Q. Are you testifying to that?

6       A. No, I'm not testifying to that.

7               THE COURT: Excuse me a minute.

8       A. I'm not testifying to that.

9               MR. BRODY: I have no objection if the question is do  
10       you believe, but there was a characterization of testimony that  
11       I want to object to.

12              THE COURT: The witness I believe has answered the  
13       question.

14              MR. BERNICK: Thank you.

15       BY MR. BERNICK:

16       Q. And polls, in fact, were taken during this period of time,  
17       were they not?

18       A. The polls were taken.

19       Q. Well, before we get to polls, are you familiar with a  
20       Dr. Daniel Horn?

21       A. Yes, I know of Dr. Horn.

22       Q. And he was one of the early researchers into smoking and  
23       health?

24       A. Yes.

25       Q. And what he said in 1968 was that you could stand on a

1 rooftop and shout "smoking is dangerous" at the top of your  
2 lungs and you would not be telling anyone anything that they did  
3 not already know. It's a very famous quotation from Dr. Horn;  
4 correct?

5 A. I don't know if it's a very famous quotation, but I'm  
6 familiar with it.

7 Q. Beyond these people who were making the observation, their  
8 actual polling data continuing on with where Gallup left off in  
9 the 1950s, was there not?

10 A. Yes, I think there was additional polling data.

11 Q. And the polling data showed, for example, even among  
12 teenagers in 1968, over 90 percent of teenagers polled in 1968  
13 would say that smoking is harmful to health; correct?

14 A. I just wasn't sure you had a document.

15 Q. Sure. Are you familiar with the poll that was done by the  
16 U.S. Department of Health, Education and Welfare on teenagers,  
17 4,406 boys and girls ages 12 to 8?

18 A. I'm not sure whether I was seen that specific poll or not.

19 Q. Would you agree with me that by the late 1960s, 90-plus  
20 percent not only had heard but believed that smoke was harmful?

21 A. The polls are just -- the polls are more complicated in  
22 terms of the questions that they ask.

23 Q. Would you say that smoking is harmful to health? That's a  
24 pretty simple question; correct?

25 A. Yes.

1 Q. And it was in response to questions like that, that over  
2 90 percent of those polled consistently, from the late '60s all  
3 the way forward, said they -- said yes, that they would say  
4 smoking is harmful to health?

5 MR. BRODY: Objection, Your Honor. This question is  
6 going to the document that --

7 THE COURT: Sustained. Sustained.

8 A. I'm sure that's what the document --

9 THE COURT: You don't have to answer that question.

10 BY MR. BERNICK:

11 Q. Are you familiar with those polls? There's a whole series  
12 of polls that were taken; correct?

13 A. Well, I've taken a good look at a number of polls and that's  
14 why -- you know, you can pick out one element of these polls,  
15 but they often -- they often had subsequent questions like, Do  
16 you think smoking is also caused by other factors?

17 So I'm just -- I'm very cautious about my use of poll  
18 data in my work because I think that it's easy to come to very  
19 broad claims about what they said and what they mean that, you  
20 know, I've tried to be very careful about.

21 Q. Fair enough. And I'm asking about the question that simply  
22 asks categorically: Would you say that smoking is harmful,  
23 okay, to your health?

24 I'm just saying a lot of the polls asked that question  
25 over time, and isn't it true that consistently the yes responses

1       were in the 90-plus percent range, over time?

2               MR. BRODY: Your Honor, I would have to raise the same  
3       foundational objection. There's been no reference to what polls  
4       we're talking about here.

5               THE COURT: I'm going to sustain the objection.

6               MR. BERNICK: I will try to rephrase it, Your Honor.  
7       I'm not asking for him to testify to any particular poll.

8               He has testified in his direct examination that there's  
9       this -- without any citation, that there was this misconception  
10      among the public.

11              And all I'm asking for is a fact, which is the level of  
12      response to a certain kind of question was A, high, and B,  
13      consistent. We can go through all the surveys, but I'm just  
14      asking for his testimony about what he understands during this  
15      period of time.

16              THE COURT: You can ask him whether he knows of any  
17      such polling that contains that simple and straightforward a  
18      question.

19              MR. BERNICK: I'll adopt that.

20      BY MR. BERNICK:

21      Q. Do you know of any polling that contains that simple  
22      question, which is: Would you say smoking is harmful to your  
23      health?

24      A. Yes, I know there were polls that asked that question.

25      Q. Okay. And then based upon that knowledge, would you agree

1 with me that from the late '60s all the way forward the  
2 affirmative or yes responses to that question were in the 90-  
3 plus percent range.

4 A. I just wouldn't -- again, like I -- I know that question was  
5 asked. I know there were responses in the 90-plus range on some  
6 of those polls, but I can't characterize a group of polls that I  
7 haven't had a chance to review.

8 And you keep saying that I say there was a public  
9 misconception, but what my testimony says is that there were  
10 substantial public misconceptions, and I think there's a  
11 distinction that's quite important.

12 There were a number of misconceptions about the risks  
13 of smoking. That's my testimony.

14 Q. Then I appreciate your saying that.

15 Are you saying -- let me just be clear. You're not  
16 saying -- you're not saying in your direct testimony that people  
17 misconceived that smoking was in fact harmful to their health,  
18 are you?

19 A. Some people did.

20 Q. That's not the subject of your testimony.

21 In your testimony you have this broad statement, There  
22 remains substantial public misperceptions about the state of  
23 scientific knowledge.

24 That's not to say you're not saying that in the 1960s,  
25 '70s, '80s, and '90s, that somehow people didn't believe that

1 smoking was harmful, are you?

2 A. No, I think there was great public awareness about the idea  
3 that smoking was harmful.

4 But if you read my testimony, it says, As a result of  
5 this campaign there remains substantial public misconceptions  
6 about the stated of scientific knowledge of the harms of  
7 smoking.

8 Q. Fair enough. The state of scientific knowledge is a  
9 complicated thing as we -- as you, I know, have explored very  
10 diligently in your work.

11 But when people make decisions about whether to start  
12 and stop smoking, do you think that they scrutinize the details  
13 of the science?

14 A. I think there are levels, educational levels, you know, in  
15 which the science can be more or less important and significant  
16 in different ways.

17 Q. By and large, the person on the street doesn't make  
18 decisions based upon parsing whether there was a consensus and  
19 whether there was mouse skin painting. The person on the street  
20 doesn't do that kind of thing; correct?

21 A. No. I think the person on the street is influenced by  
22 advertising, promotion, public media, many things.

23 Q. Well, that's fair enough. But on the particular question of  
24 whether smoking is harmful to your health, would you agree with  
25 me that over 90 percent of the people who were thinking about



1       that issue from the 1960s forward, they believed that smoking  
2       was harmful?

3               MS. EUBANKS:  Objection.

4       Q.  Whether they understood the particular state of science or  
5       not, they believed that smoking was harmful?

6               MR. BERNICK:  Objection.

7               THE COURT:  What's the objection?

8               MR. BRODY:  This question has been asked and answered  
9       as to the entire period about which the question was just asked  
10      again.

11              THE COURT:  The prior question went to the issue of  
12      polling, so the objection is overruled as to this question.  
13      BY MR. BERNICK:

14      Q.  I think you were about to say --

15      A.  Yeah, I know right where I was.

16              I was about to say that the term harmful is such a  
17      general word that I'm not surprised at polling data and other  
18      perceptions were that 90 percent believed that smoking was  
19      harmful in some way, yes.

20      Q.  After all, not only the Surgeon General's report come out,  
21      there were warnings on the packets of cigarettes, the first  
22      saying, Smoking may be hazardous to your health; correct?

23      A.  Yes, starting in 1966.

24      Q.  And then '69 --

25      A.  May be hazardous.

1 Q. '69, it was made more affirmative and then there were  
2 rotated warnings. For somebody to say as of 1970, "Gee, I don't  
3 know whether smoking is harmful to health," that would have been  
4 a pretty rare individual; fair?

5 A. What's the date?

6 Q. 1970.

7 A. Yeah. People in the tobacco industry are saying that, but  
8 most people had a wider perception, I think.

9 Q. It would be a very rare person who, as of 1970, in the  
10 public would say, "Gee, I don't know whether smoking is harmful  
11 or not"; correct?

12 A. Yes. I think in this general way people had begun to  
13 understand that smoking was harmful.

14 Q. I didn't ask you whether they had begun to understand. I  
15 asked you a much more specific and clear question.

16 It would have been a very rare person who, as of 1970,  
17 would say, "Gee, I don't know whether smoking is harmful to  
18 health."

19 MR. BRODY: Objection, Your Honor. Dr. Brandt answered  
20 the question yes.

21 MR. BERNICK: He said yes, but he then went on to say,  
22 "I think that in a general way people had begun to understand."

23 THE COURT: The answer was yes, and then there was a  
24 qualification. Let's move on, please.

25 BY MR. BERNICK:

1 Q. Now, during the same period of time there was a major  
2 campaign that was mounted, correct, to get people to quit  
3 smoking?

4 A. Yes, there were public health efforts to reduce levels of  
5 smoking.

6 Q. Massive public health efforts; correct?

7 A. Well, it would depend on how we define massive, so --

8 Q. Well, I'll just respond in the way the Surgeon General did.

9 The Surgeon General in 1989 issued a report, did he  
10 not, there was a 19 --

11 A. Yes, there was a report in '89.

12 Q. And the Surgeon General's report of 1989 was a retrospective  
13 view in 1989 about this campaign and whether it had been  
14 successful or not; right?

15 A. Yes.

16 Q. And with that -- you were a reviewer of that report, were  
17 you not?

18 A. Yes, I was.

19 Q. And what the Surgeon General said in 1989 --

20 MR. BERNICK: I don't think this is in evidence. We  
21 would offer the Surgeon General's report in 1989. It's JE  
22 063621.

23 MR. BRODY: I believe the '89 report came in with  
24 Dr. Kessler.

25 MR. BERNICK: Okay. I'm sorry.

1           THE COURT: If it hasn't come in, it will be admitted  
2 now.

3           (Defendants' Exhibit No. JE 063621 was received into  
4 evidence.)

5 BY MR. BERNICK:

6 Q. The 1989 report spells out, quote, Dramatic progress that's  
7 been achieved in the past quarter century against one of our  
8 deadliest risks; correct?

9 A. Yes.

10 Q. It talks about during the last quarter century, individual  
11 citizens, private organizations, public agencies, and elected  
12 officials have tirelessly pursued the advisory committee's call  
13 for appropriate remedial action; right?

14 A. Yes, that's what it says.

15 Q. That's the campaign that we're talking about; correct?

16 A. Yes. I didn't see "massive" anywhere there, but.... that's  
17 what you had asked me.

18 Q. It was massive, wasn't it?

19 A. I don't know how we would characterize it. Was there enough  
20 money for it? Was it well funded?

21 Q. It was well funded and there was enough money, wasn't there?

22 A. You know, I think that that's an important socio-political  
23 question.

24 Q. The Surgeon General in '89 didn't say, Gee, we don't have  
25 enough money to continue this?

1       A. Oh, I think the Surgeon General was always saying it would  
2       be great to have more money for these kinds of preventive and  
3       health-related programs.

4               And I happen to know that many Surgeon Generals felt  
5       that anti-tobacco campaigns and other public health campaigns to  
6       change behaviors were significantly underfunded.

7       Q. Well, the federal government in any given year gets 6 to  
8       \$8 billion worth of money in excise taxes from cigarettes;  
9       correct?

10      A. I don't know the exact figure.

11      Q. It's in that range, is it not?

12      A. I assume that's right.

13      Q. And of that money, it's the federal government that decides  
14      how much money to spend on smoking cessation, is it not?

15      A. Yes. The federal government, through its processes of  
16      advise and consent, congressional mandate, debate, lobbying  
17      makes determinations about these things.

18      Q. And the Surgeon General also makes determinations about how  
19      much money should be spent; correct?

20      A. Within --

21               MR. BRODY: Objection.

22      A. -- recommendations and within the Surgeon General --

23               THE COURT: Just a moment, please.

24               MR. BRODY: Your Honor, I object to this line of  
25      questioning as being outside the scope of the direct

1 examination.

2 THE COURT: I'm going to sustain the objection.

3 Dr. Brandt, let me be clear. When anybody makes an  
4 objection, you should stop talking, please.

5 THE WITNESS: I'm sorry.

6 THE COURT: And sometimes it's in your interest to stop  
7 talking.

8 Go ahead.

9 If it is the government counsel objecting.

10 BY MR. BERNICK:

11 Q. Throughout this period the Surgeon General said tremendous  
12 changes have occurred. You agreed with that, did you not?

13 A. Yes, I agree with it.

14 Q. It goes on to say, The antismoking campaign has been a major  
15 public health success. It didn't say, massive but it said  
16 major.

17 A. Right. I think those are -- I use those words differently.  
18 I don't know if you do.

19 Q. Well, the question is whether or not that's what the Surgeon  
20 General said.

21 A. Yes. The Surgeon General said the antismoking campaign has  
22 been a major public health success, yes.

23 Q. In your process as a reviewer, did you talk to folks at the  
24 loss of smoking and health and say that those words were wrong?

25 A. No, I think that's an appropriate characterization.

1 Q. I want to draw one more line -- actually, it's two lines  
2 that connect these two things.

3 What consumers did and who they looked to, and what the  
4 tobacco industry said.

5 Did consumers -- consumers -- look to what the tobacco  
6 industry said about smoking and health? That's what I'm going  
7 to ask you about.

8 And I asked Dr. Richmond, Are you aware of any study  
9 that says that consumers look to the industry to learn about the  
10 health effects of smoking?

11 And his answer was: No.

12 Do you see that?

13 A. Yes, I see that.

14 Q. Are you aware -- I don't see it anywhere in your direct  
15 testimony. There's nothing in your direct testimony that cites  
16 a study showing that consumers looked to the industry to learn  
17 about the health effects of smoking, is there?

18 A. Well, actually, I reviewed some documents, you know,  
19 specially in the, I would say probably late 1950s, where people  
20 at the TIRC are saying, People are really now looking to us we  
21 are succeeding in our campaign. People now rely on us for their  
22 assessments. Media is coming to us for information.

23 So, I guess I would say that there are some indications  
24 that consumers did at certain times -- now, we are covering a  
25 very long span of time. And the question a historian would ask

1 is, you know, at what time would this question be relevant?

2 Q. I'll make it very clear. At any point in time, are you  
3 aware of any study -- not somebody who says, Gee, I think it's  
4 working -- are you aware of any study that says, Consumers look  
5 to the industry to learn about the health effects of smoking?

6 In all of your historical review, have you identified  
7 such a study?

8 A. I think there are studies in the internal industry  
9 documents.

10 For example, about the success of filters, the fact  
11 that consumers are coming that way because of the way filters  
12 have been identified and promoted as protective.

13 So there were internal studies that, you know, showed  
14 that the industry did affect the way consumers learned about  
15 health effects.

16 Q. Could we focus on the question? Do you see that?

17 Are you aware of any study that says consumers look to  
18 the industry to learn about the health effects of smoking? I  
19 asked you to identify any such study.

20 MR. BRODY: Objection, Your Honor, asked and answered.  
21 And I object to the characterization of the prior answer.

22 MR. BERNICK: He's not -- I've asked him this question  
23 three times.

24 THE COURT: The objection is overruled.

25 A. Am I aware of any studies that consumers look to the



1 industry, and I thought what I said is yes, there are studies in  
2 the internal industry documents that suggests that consumers are  
3 looking to the industry to learn about the health effects of  
4 smoking.

5 Q. Do you see the word "says"? I didn't say suggests, I said  
6 says.

7 The focus of the study is do consumers look to the  
8 industry to learn about the health effects of smoking?

9 It's the fourth time now, Dr. Brandt.

10 THE COURT: No. Objection sustained. You got an  
11 answer. You may not like it, Mr. Bernick, but you got an  
12 answer.

13 MR. BERNICK: At this point, Your Honor, I have got  
14 some documents to offer into evidence. I think we took care of  
15 the -- that SAB meeting -- the report about the SAB meeting.

16 I think counsel said that he was concerned about  
17 something being on the exhibit list, and I'm not sure whether  
18 that related to some other document that we had proffered.

19 And then I have a list of additional exhibits to admit.  
20 And I'll furnish a copy to your folks here.

21 I gave a copy of this list to counsel for the  
22 government this morning together with extra copies of the  
23 exhibits. But these are all exhibits that were the subject of  
24 examination yesterday.

25 It's a bunch of articles that appeared in the

1 literature during the 1950s and 1960s. It's the forwarding  
2 memorandum from Hill and Knowlton. It's the January '55 SAB  
3 meeting, and the TIRC meeting of June -- every single one of  
4 them was identified to the court during the course of my  
5 questioning.

6 THE COURT: Has the government looked over this list?

7 MR. BRODY: Your Honor, I've looked over the list.

8 The only issue I really have is I know that the  
9 question of the documents that the United States submitted or  
10 referred to in Dr. Brandt's testimony being admitted is still  
11 outstanding. I believe that two of these are on the list.

12 THE COURT: On your list?

13 MR. BRODY: Are on our list. And the question is still  
14 pending.

15 Obviously, we want them admitted, but there is an issue  
16 of there being unresolved objections out there.

17 THE COURT: I'm going to deal with all exhibits for  
18 Dr. Brandt at the very end, including yours, obviously, and  
19 those being offered by different defendants. That way, we can  
20 do it in a more comprehensive effort and I think it would be  
21 easier that way.

22 MR. BERNICK: That's fine. Can this list then serve as  
23 our proffer of these documents?

24 THE COURT: Yes.

25 MR. BERNICK: Thank you. I have no further questions

1 Your Honor.

2 THE COURT: Mr. Wells.

3 MR. BERNICK: Your Honor, the one that we have  
4 proffered, JD 010308 where there was no redaction issue, counsel  
5 said that he wanted to go back and see whether it was on the  
6 exhibit list.

7 Your Honor since has said that materials used on  
8 cross-examination need not be on the exhibit list, so we don't  
9 know that there is any remaining objection to this document.  
10 I'm not sure --

11 THE COURT: Is that on your proffer list?

12 MR. BERNICK: No. This is in addition to the proffer  
13 list. We covered it yesterday.

14 MR. BRODY: That was the exhibit we wanted to check and  
15 make sure that was on the list. We have checked. It is on the  
16 list. We have no objection to the admission of that particular  
17 document.

18 THE COURT: All right. That one may come in.

19 (Defendant's Exhibit No. JD 010308 was received into  
20 evidence.)

21 THE COURT: The list that you just referred to I'm not  
22 ruling on at this time. We will do that at the end of this  
23 witness's testimony.

24 MR. WELLS: May I commence?

25 THE COURT: Mr. Wells, go ahead, please.

1 CROSS-EXAMINATION

2 BY MR. WELLS:

3 Q. Dr. Brandt, my name is Ted Wells and I am co-counsel for  
4 Philip Morris.

5 Several pages of your direct testimony addressed  
6 documents that were authored by a Dr. Helmut Wakeham; correct?

7 A. Correct.

8 Q. And Dr. Wakeham in 1960 became the head of research and  
9 development for Philip Morris?

10 A. Correct.

11 Q. And he held that position from 1960 until the early 1980s;  
12 correct?

13 A. I think that's right.

14 Q. So he was in that job for over 20 years.

15 A. Yes.

16 Q. And is it correct that during the time that Dr. Wakeham was  
17 in that job, that Dr. Wakeham focused on the issue of developing  
18 less hazardous cigarettes?

19 A. Yes, that was one of the things that he did.

20 Q. In fact, Dr. Wakeham would become active at Philip Morris in  
21 promoting the development of a medically-acceptable cigarette;  
22 correct?

23 A. Yes.

24 Q. And what his documents show when you review them is a person  
25 who, for over 20 years, was focused and dedicated to trying

1 to -- to try to use research and development efforts to develop  
2 less hazardous products; right?

3 A. Yes, that's one of the things he did.

4 Q. Now, did you review any of the deposition or trial testimony  
5 given by Dr. Wakeham in various tobacco-related litigations for  
6 purposes of preparing your direct testimony?

7 A. I have not reviewed Wakeham's legal testimony.

8 Q. And are you aware that the legal testimony of Dr. Wakeham in  
9 various tobacco litigations covers and addresses some of the  
10 very documents that you comment upon in your direct testimony?

11 A. No, I didn't review his testimony.

12 Q. Did the government ask you to review it?

13 A. No, they didn't ask me to.

14 Q. Did they tell you not to review it?

15 A. They didn't tell me not to.

16 Q. Did they tell you that they were going to designate portions  
17 of Dr. Wakeham's testimony to be entered in this trial?

18 A. No, they didn't tell me.

19 Q. Now, did you review the tobacco-related testimony of any  
20 Philip Morris' executives?

21 A. I'm trying to recall, but I -- I don't think I have.

22 Q. In connection with preparing your direct testimony, did you  
23 review the deposition testimony and tobacco-related litigation  
24 of Sheldon Sommers who was the former chair of CTR's Scientific  
25 Advisory Board?

1 A. No, I haven't reviewed Sommers' testimony.

2 Q. Did you review the deposition testimony of James Glenn who  
3 was the former president and CEO of CTR?

4 A. No, I haven't reviewed his deposition testimony.

5 Q. Did you review the deposition testimony of Harmon McAllister  
6 who was the last head of CTR at the time of its dissolution?

7 A. No, I didn't review it.

8 Q. Did you review the testimony of Dr. Clarence Cook Little in  
9 the case of Green vs American Tobacco Company that was given in  
10 1959?

11 A. I have looked at Little's testimony in the Green trial.

12 Q. Did you read the entire transcript?

13 A. I don't know if I read the entire transcript, but I'm  
14 familiar with it.

15 Q. I want to -- tell me what you read.

16 A. I read, you know, passages and sections of his testimony in  
17 Green and Lartigue.

18 Q. How did you pick what passages you read?

19 A. I -- I reviewed the material. You know, I didn't pick  
20 selected passages. I just -- I wanted to be cautious to not say  
21 I've read it all because I can't be certain that I read  
22 everything, but it's something that I reviewed.

23 Q. Now, you prepared an expert report in this case; correct?

24 A. Yes, I did.

25 Q. And following that expert report, you were deposed; is that

1 correct?

2 A. I was deposed.

3 Q. And during your deposition, which took place after you  
4 prepared the expert report, you were asked questions as to  
5 whether or not you read any deposition testimony of any tobacco  
6 executives or CTR executives; correct?

7 A. Yes, I think that's correct.

8 Q. And during that testimony you stated that prior to preparing  
9 your expert report you had not read the deposition or trial  
10 testimony of any tobacco executives or CTR executives; correct?

11 A. Yes, that was correct.

12 Q. So after you did the expert report, then you went back and  
13 you at least read some of the portions of Dr. Little's testimony  
14 in Green and Lartigue; is that correct?

15 A. That's correct.

16 Q. Did you review Dr. Little's testimony in Zagurski?

17 A. No, I didn't.

18 Q. In terms of things you looked at, did you review the  
19 racketeering acts that are part of the appendix to the  
20 complaint?

21 A. I haven't reviewed the racketeering acts.

22 Q. So you didn't take the time to look at the racketeering acts  
23 that are part of the complaint in this case, correct?

24 MS. EUBANKS: Objection, asked and answered.

25 THE COURT: Sustained.

1 BY MR. WELLS:

2 Q. And since you didn't review the racketeering acts, it's fair  
3 to say at no time did you make any type of systematic analysis  
4 of the racketeering acts for purposes of putting them in their  
5 historical context; correct?

6 A. Yes. I mean, my view of reviewing the racketeering acts was  
7 that, you know, the specific questions that I was going to  
8 pursue as a historian was historical analysis of certain things  
9 and I wasn't relating that to what the racketeering acts were or  
10 not or what the provisions of those acts were. I just did my  
11 historical analysis.

12 Q. But whether that was a good judgment or a bad judgment, to  
13 some extent it depended on reviewing the racketeering acts in  
14 the first place and making a decision.

15 A. I just -- you know, to be perfectly honest, the status of  
16 the racketeering acts is independent of the historical work that  
17 I -- that I do and did. And I wasn't making any assessments as  
18 I did my historical work, you know, how specifically is this  
19 relevant to this statute. I was just studying the history of  
20 these peoples and events and developing a historical analysis.

21 Q. But if you had looked at the racketeering acts and you saw  
22 that the racketeering acts just didn't relate to a statute but  
23 related to statements that live people made and that are part of  
24 the historical fabric, you might have come to a different  
25 conclusion; right?



1 A. I don't think -- I can't understand how the racketeering  
2 acts could have changed my conclusions about the historical  
3 materials I reviewed. You know, they just -- I'm sorry, I'm  
4 just not really understanding what you're -- what the question  
5 is.

6 Q. Well, I'll move on, because you would agree, since you never  
7 took the time to read them in the first place, it's hard for you  
8 to sit there and give a reasoned, an educated opinion about what  
9 impact they would have had on you; correct?

10 A. On a historical analysis? I just -- I'm sorry.

11 Q. Okay. I want to direct your attention to your direct  
12 testimony -- just give me a second and see if I know how to work  
13 this. I'll have to take this down.

14 At page 85 of your direct testimony --

15 A. Let me get that for a second. Yes.

16 Q. Now, you were asked a question: I would like you to take a  
17 look at U.S. exhibits. And then there's a whole host of  
18 exhibits listed; right?

19 A. Yes, there are.

20 Q. And then you answer: Yes, I can. These are additional  
21 issues of tobacco and health that were used by the TIRC to  
22 target health officials.

23 Did I read that correctly?

24 A. Health professionals, yes.

25 Q. And one of the exhibits I have circled is 26,174; correct?

1 A. Yes.

2 Q. And I want to put that exhibit up on the screen and see if  
3 that is an exhibit that relates to targeting health  
4 professionals.

5 Now, that is an exhibit that is dated April 19, 1961,  
6 and it's from a Carl Thompson to Timothy V. Hartnett; correct?

7 A. Correct.

8 Q. And the exhibit states that this is in response to your  
9 inquiry about materials going to U.S. Senators and  
10 Representatives. The entire congressional list receives  
11 regularly the following.

12 1. All issues of tobacco news.

13 2. All issues of tobacco and health.

14 3. The Annual Report of the scientific director of the  
15 Tobacco Industry Research Committee.

16 4. Other special publications and mailings, such as,

17 A. Tobacco, source of pleasure, source of wealth.

18 B. Tobacco and the health of the nation.

19 C. Tobacco and Americans by Robert Heimann.

20 A. He was eventually president of American Tobacco.

21 Q. And it concludes by saying: In addition, there is specific  
22 material frequently delivered to individual offices of  
23 Congressmen and Senators including such items as state booklets  
24 to the various delegations concerned.

25 A. Yes, I see that.

1 Q. Now, that exhibit, which is part of your direct testimony,  
2 does not relate to targeting health officials; correct?

3 A. Well, tobacco and health was predominantly sent to health  
4 officials. That was its primary goal, but it wasn't exclusively  
5 sent to health officials. And, you know, I think that this memo  
6 just indicates in addition to -- it had a wide circulation with  
7 doctors and dentists, but apparently they also sent it to  
8 Congress.

9 Q. And they sent it to Congress because not only did the  
10 tobacco companies target health officials, they also targeted  
11 Congress in terms of trying to influence how Congress might vote  
12 on tobacco-related legislation; correct?

13 A. It's hard for me to say in this instance that's why they  
14 sent these, but I would accept that.

15 Q. I mean, you have held yourself out as an expert on how the  
16 tobacco companies have attempted to lobby the United States  
17 Congress with respect to legislation; correct?

18 MR. BRODY: Objection, Your Honor. I don't know that  
19 is within the scope.

20 THE COURT: Why don't you rephrase it a little  
21 differently as to whether it is part of his expertise as a  
22 scientific historian, or as a historian of science, I should  
23 say.

24 BY MR. WELLS:

25 Q. Do you recall testifying during your deposition that you

1 considered yourself an expert in this particular area?

2 A. Well, I think my -- I have -- I have been interested in the  
3 political influence of the tobacco industry, but I would say  
4 that my -- it was not something that I have focused on in the  
5 development of my -- of my direct testimony, so....

6 Q. So you don't recall testifying in the deposition that you  
7 considered yourself an expert in this area? Is that your  
8 testimony?

9 A. I just -- you know, I may well have said in my deposition  
10 that among my areas of expertise was attempts by the tobacco  
11 industry to influence legislation.

12 Q. In fact, in April of 1996 you wrote an article that's  
13 titled: Tobacco industry strategies to oppose federal  
14 regulation. Do you recall writing the article?

15 A. Of course I do.

16 Q. And that article sets forth from a historical perspective  
17 the attempts of the tobacco companies to lobby Congress in both  
18 a direct and indirect fashion with respect to influencing  
19 Congress's actions with respect to federal legislation; right?

20 A. Yes, that's correct.

21 MR. BRODY: Your Honor, I would like to object to this  
22 line of questioning.

23 The mere fact that Dr. Brandt has expertise in various  
24 areas does not open up a line of cross-examining questions,  
25 substantive questioning as to everything that Dr. Brandt has

1       ever written or any subject area in which he may have expertise.

2               We're going to have all sorts of experts coming in here  
3       in this case, many of whom are accomplished in many, many  
4       fields, but under the Federal Rules and under rule 611,  
5       cross-examination has to fall within the scope of direct.

6               The mere fact that Dr. Brandt may have, in response to  
7       a deposition question, an entirely different setting than the  
8       setting at trial, said that he believes he does have expertise  
9       in this area does not mean that it is within the scope of his  
10       direct examination.

11              He has specifically testified here on questioning from  
12       Mr. Wells that it is not an issue that he looked at in preparing  
13       his direct testimony.

14              MR. WELLS: May I respond?

15              First, Dr. Brandt entered or attempted to offer into  
16       evidence through his direct testimony a document that he states  
17       in his direct relates to the targeting of health professionals.

18              When we look at the document, the document has nothing  
19       to do with the targeting of health professionals; it is about  
20       what actions the tobacco companies are engaged in with respect  
21       to communicating with the United States Congress.

22              THE COURT: But that's not what Mr. Brody objected to.

23              MR. WELLS: No. He objected I believe to the entire  
24       area.

25              Secondly, I will -- if you give me a chance, I'll go

1 back --

2 BY MR. WELLS:

3 Q. I want to focus you on your direct, page 25.

4 A. Twenty-five.

5 Q. At page 25 of your direct, you say: How have you framed  
6 questions in your own work on the history of cigarette smoking  
7 in the United States?

8 And you go on to set forth four questions in your  
9 direct that you were going to focus on.

10 And the fourth question is fourth, What was the  
11 relationship of scientific knowledge to public policy and  
12 regulatory initiatives? Is that correct?

13 A. Yes. This was in the context of describing work that I have  
14 done.

15 Q. Right. And this is in your direct testimony; right?

16 A. Right.

17 Q. Now, I want to ask you questions concerning the role that  
18 Congress played with respect to smoking and health issues during  
19 the period 1953 through 1965. Okay?

20 MR. BRODY: Your Honor --

21 A. I don't know if it's okay.

22 MR. BRODY: Your Honor, if the question is merely, you  
23 know, what was Congress doing during this period, put it in  
24 historical context, that's a little different than asking for  
25 questions about, you know, in saying, Well, tobacco industry's

1 efforts to influence Congress.

2 It's an entirely different question when you are  
3 talking about trying to contextualize the entire historical  
4 period, that is okay.

5 I would have to note for the record that the quoted  
6 portion of page 25 is in a background section of the testimony  
7 that comes six pages before page 31 when the question is: Now,  
8 let's turn to the substance of your opinions in this case. But  
9 if it's merely questions about what was Congress doing during  
10 this time period, I think that would be okay.

11 THE COURT: I don't think that the direct testimony,  
12 unless you point out specific places to me, Mr. Wells, focused  
13 substantively on what, if anything, the tobacco industry was  
14 doing vis-a-vis Congress. Certainly that was not my reading of  
15 the thrust of his testimony.

16 You may indeed elicit factual questions as to what was  
17 going on with Congress at that point, but I don't think that --  
18 again, unless you want to focus me on specific pages, I don't  
19 think that the direct testimony directly addressed what the  
20 tobacco industry was doing, if anything, vis-a-vis attempting to  
21 influence congressional action.

22 BY MR. WELLS:

23 Q. Congress was aware during the 1950s that there was a debate  
24 within the scientific community as to whether or not smoking  
25 causes cancer; right?

1 A. Yes, Congress was aware.

2 Q. And because of that awareness of that controversy, Congress,  
3 during the 1950s and the 1960s started asking questions;  
4 correct?

5 A. Yes, people asked questions.

6 Q. And Congress asked questions of the public health community;  
7 right?

8 A. Yes.

9 Q. And Congress asked questions of the tobacco companies;  
10 correct?

11 A. Yes, they did.

12 Q. And sometimes the tobacco companies answered directly in  
13 their individual capacity and at other times they answered  
14 through the TIRC; correct?

15 A. Yes, I think that's correct.

16 Q. And the reason Congress was asking the questions and the  
17 reason the public health community is responding and the tobacco  
18 companies were responding was because Congress was trying to  
19 figure out what, if anything, to do about federal regulation in  
20 the area of smoking and health; correct?

21 A. Yes, that's correct.

22 Q. And the public health community was trying to influence how  
23 Congress might react with respect to the issue of federal  
24 regulation; correct?

25 A. I'm not sure they were trying to influence. You know, I



1 mean, I think that, as you put it, Congress was asking people  
2 what's your perspective on this controversy which might have  
3 implications for regulation.

4 Q. And the tobacco companies, in turn, were giving their  
5 perspective in an effort to influence what Congress might do;  
6 right?

7 A. I just don't know if that's exactly how I would characterize  
8 it. But roughly, yes.

9 Q. And part of the information that the tobacco companies were  
10 providing to Congress during the 1950s and during the 1960s was  
11 information concerning scientific research with respect to the  
12 issue of smoking and causation; correct?

13 A. Yes.

14 Q. Now, I've developed a chart just to try to give a picture as  
15 to what was going on in front of Congress during the period of  
16 '53 through '65, and the chart is captioned: Legislative  
17 Overview 1953 through 1965.

18 And the first box refers to March 24, 1953, hearings  
19 before the House Subcommittee of the Committee on Appropriations  
20 regarding appropriation requests for the Public Health Services.  
21 Okay. And I want to direct your attention at this point to what  
22 occurred on that day before the House Subcommittee.

23 Do you have a copy?

24 A. No, I don't.

25 Q. Then I apologize. This has been marked as Joint Defendant's

1 Exhibit 002548.

2 What is stated there is that Congressman Fogarty, he  
3 says: Doctor, what about lung cancer in men? Is that on the  
4 increase?

5 And the respondent is a Dr. Heller. You know who  
6 Dr. Heller is; correct?

7 A. Yes, I know Dr. Heller.

8 Q. Dr. Heller in March of 1953 was the head of the National  
9 Cancer Institute; correct?

10 A. Correct.

11 Q. And Dr. Heller is appearing on behalf of the National Cancer  
12 Institute before Congress as part of getting his budget  
13 approved; right?

14 A. I haven't seen this before, or at least in some time, so  
15 I -- I just can't answer the question. I don't know what the  
16 purpose of these hearings was.

17 Q. And Dr. Heller responds: It is reported to be on the  
18 increase. Our data would support that, Mr. Fogarty.

19 In the last 25 or 30 years it has jumped up seven fold  
20 in men --

21 A. I think it says "several fold."

22 Q. Several fold in men. There has not been a similar increase  
23 in the occurrence of lung cancer in women. Why this should be  
24 is not completely known.

25 As you are well aware, the correlation of heavy

1 cigarette smoking has been mentioned in connection with the  
2 occurrence of lung cancer, but this has not, to our  
3 satisfaction, definitely been established despite the fact that  
4 there is a very high correlation between heavy cigarette smoking  
5 and the occurrence of lung cancer.

6 Our epidemiologists and scientists seem to feel that  
7 there are some additional factors which we have not yet  
8 discovered or studied sufficiently, which may have a bearing on  
9 this particular problem.

10 So at least as of March 1953, Dr. Heller on behalf of  
11 the National Cancer Institute is saying that there has not been  
12 any conclusive proof that smoking causes cancer; correct?

13 A. Yes. You know...

14 Q. Now, the next slide I want to show you relates to a hearing  
15 in 1956. Again, it is an appropriations hearing, and it is  
16 three years later, and that document is identified as Joint  
17 Defendants' Exhibit 004227. It's two pages.

18 Again it's Congressman Fogarty, and he says: Doctor,  
19 what conclusions have you come to as far as the linking of lung  
20 cancer with excessive smoking?

21 And Dr. Heller again from the NCIA states: Well, sir,  
22 we still hold to the belief which was stated by the Surgeon  
23 General and, in turn, by the Cancer Institute as of a year ago  
24 that there is unmistakably a correlation between the occurrence  
25 of lung cancer and smoking, particularly cigarette smoking. But

1       so far it is not believed that a causation has been  
2       demonstrated; that is, a cause and effect relationship.

3               So, three years later, in 1956, Dr. Heller is still  
4       communicating in public to the United States Congress that as  
5       far as the National Cancer Institute is concerned, that it has  
6       not been demonstrated that there is a cause and effect  
7       relationship between smoking and lung cancer; correct?

8               MR. BRODY: Your Honor, I would --

9       A. Yes, correct.

10              MR. BRODY: I would like to raise an objection to this  
11      line of questioning.

12              It stems from -- you know, given what's in the  
13      testimony and given the fact that Dr. Brandt has not offered  
14      opinions on attempts to influence Congress, what this makes this  
15      into is merely a recitation of who said what during the 1950 to  
16      1964 time period.

17              We went through that at length in Mr. Bernick's  
18      examination yesterday. He drew a chart. He put some things on  
19      it. And I don't think it's fair to say that Order 471 says  
20      that, well, Mr. Bernick can ask questions about statements that  
21      were being made in the '50 to '64 time period and then counsel  
22      for another defendant can get up and say, well, you know what,  
23      I'm going to cover that issue again.

24              And given the limitations that we've discussed in the  
25      written direct and what's in the written direct, all that this

1 is, is a repetition of the same line of questions that we heard  
2 from Mr. Bernick yesterday, and it's a violation of Order 471.

3 MR. WELLS: There is absolutely no duplication.

4 Mr. Bernick did not cover any statements made before  
5 Congress except the statement by Surgeon General Birney which I  
6 am not going to cover.

7 This court and this record has every right, I submit,  
8 to have in the record what statements were made both by the  
9 public health community and the tobacco companies in public  
10 forums before the United States Congress.

11 What Mr. Bernick did was lay out what was going on in  
12 the academic community, what articles were being written. He  
13 did not cover this. This is not in the record. And I submit we  
14 have every right to put it in the record.

15 THE COURT: Is this all on the issue of when a  
16 consensus was reached.

17 MR. WELLS: Absolutely, Your Honor, and we have every  
18 right to put this on the --

19 THE COURT: I'll allow a short amount of questioning on  
20 this. It is not directly -- it is not repetitive in that the  
21 same events are not being asked about, but it is certainly  
22 cumulative, so I won't let it go on too long.

23 MR. WELLS: I only have, I believe, three other  
24 readings and then I'll go to another area.

25 THE COURT: All right.

1                   MR. WELLS: Thank you.

2           BY MR. WELLS:

3           Q. Now I want to move forward in time to 1957.

4                   Now, what happens in 1957 in front of Congress is that  
5           there were hearings with respect to the issue of false and  
6           misleading advertising concerning filter tip cigarettes;  
7           correct?

8           A. Yes, that's correct.

9           Q. Is it fair that, based on your knowledge of history in this  
10          area, that between 1953 and the commencement of the hearings in  
11          1957, a number of bills were introduced in Congress with respect  
12          to regulating the tobacco industry?

13          A. I'm sure that's true, but it's not something that I have  
14          recently investigated.

15          Q. Okay. But you understand there is not Congressional silence  
16          between '53 and '57. All sorts of bills are being introduced  
17          during that time period.

18                   MR. BRODY: Objection, Your Honor.

19                   THE COURT: Sustained.

20          BY MR. WELLS:

21          Q. Now, with respect to the '57 hearings --

22                   MR. WELLS: And that document, Your Honor, for  
23          identification, is marked Joint Defendants' Exhibit 043087. The  
24          first statement is by Dr. Little. Once I read these three  
25          statements, Your Honor, I'm not going to read any more.

1 BY MR. WELLS:

2 Q. And Congressman Hardy states: Then you would disagree with  
3 Dr. Hammond's conclusion that there is a causative relationship  
4 between smoking and lung cancer.

5 Dr. Little: I would say that no evidence has yet been  
6 produced that has convinced me of that. I admit that he has an  
7 entire right to his own opinion and he has worked with these  
8 data and collected them. But from the point of view of somebody  
9 who has worked experimentally with the disease in animals, I am  
10 not convinced that this relationship is a real one yet; or, if  
11 real, is anything like as important as it is now being made to  
12 appear.

13 Now, Dr. Little, during that hearing, is then followed  
14 by Dr. Heller. I need to read the top first.

15 And Congressman Mendor says: As the chairman  
16 mentioned, we had Dr. Little before the committee last week. I  
17 don't know whether you are familiar with his testimony  
18 originally given before the committee.

19 And then Dr. Heller responds: Certainly, Mr. Meader.  
20 Dr. Little is a distinguished and beloved scientist of the  
21 nation. I think, perhaps, you may be aware of his  
22 accomplishments in the field of genetics. Dr. Little is indeed  
23 a very fine gentleman, both as a man and as a scientist. But  
24 there are differences in interpretation among scientists as  
25 perhaps you are well aware.

1           Dr. Little is sincerely of the opinion that these data  
2       do not warrant the inference which we have indicated.

3           We do believe, however, Mr. Meader, that while  
4       Dr. Little is entitled to his interpretation and we respect him,  
5       still we feel on the basis of our background, our knowledge, our  
6       experience, and our information, that our stand is a proper one  
7       for us to take.

8           And then during that same hearing -- and this will be  
9       my last reading from that hearing.

10          MR. BRODY: Your Honor, are there any questions for the  
11       witness?

12          THE COURT: I don't think yet.

13          MR. BRODY: Reading documents into the record.

14          MR. WELLS: It's all one segment and then I'll ask a  
15       question.

16          Same document.

17          THE WITNESS: I don't have it.

18          MR. WELLS: We will get it to you, sir.

19       BY MR. WELLS:

20       Q. And this is from a Dr. Green --

21          MR. WELLS: One second.

22       Q. This is from Dr. Green of Yale University, and what he says,  
23       and then I'll ask you a question.

24          He says: The statistical studies purporting to  
25       establish a causal relationship between smoking and lung cancer



1       have been the subject of a barrage of propaganda both in the  
2       press and over the radio, and the controversy has provided a  
3       great deal of free entertainment for the populace.

4               The arguments, of course, go on endlessly for, like the  
5       question of how many angels can sit comfortably on the head of a  
6       pin, there are no pertinent data on which to base a definitive  
7       answer.

8               So, it is clear that the United States Congress in 1957  
9       is being told not that there is a categorical consensus, but  
10      rather that there is a difference of opinion by respected  
11      members of the scientific community; correct?

12              MR. BRODY: Your Honor, I have to object.

13              Dr. Brandt specifically testified that he has not  
14      looked at documents surrounding the issue recently of exactly  
15      what was being said to Congress during this time period, so the  
16      question about --

17              THE COURT: Well, I think Dr. Brandt can just tell us  
18      whether he has an answer or not to the question.

19      A. Yes, I think both positions were presented. Little on  
20      behalf of the industry, some people independently, and these  
21      positions were presented to Congress.

22      Q. When you say, "perhaps independently," you mean Dr. Green of  
23      the Yale medical school was an independent spokesperson;  
24      correct?

25      A. Yes.

1 Q. Now, ultimately what took place in '64, there were other  
2 hearings dealing with cigarette labeling and advertising; is  
3 that correct?

4 A. Yes, there were hearings in '64.

5 Q. And then the Surgeon General came out with his report in  
6 1964; right?

7 A. Yes, we've cleared that up.

8 Q. And the Surgeon General's report was to be a two-part  
9 report. Part 1 was supposed to deal with the question of what  
10 is the answer, and part 2 was supposed to be a focus on what  
11 should happen next in terms of federal warning legislation;  
12 right?

13 A. The way it was put is that there would be two phases. And  
14 the first phase was an investigation of the scientific questions  
15 associated with tobacco as a cause of disease.

16 And then Surgeon General Terry said that should be held  
17 separate from a second phase in which Congress and others would  
18 evaluate the policy implications.

19 Q. And the second phase took place following the issuance of  
20 the report in January of '64 and ultimately resulting in June of  
21 '65 in the passage of the Federal Cigarette Labeling and  
22 Advertising Act; correct?

23 A. I wouldn't characterize it exactly as the second phase.

24 I think at first Terry actually had the idea that this  
25 would be a study group that would attend to these two phases and

1       make recommendations, but after the first phase was accomplished  
2       by January 64, then there was debate and perspectives about how  
3       to proceed from a regulatory point of view.

4               Terry had actually had the idea that maybe there would  
5       actually be two phases of a Surgeon General -- of a Surgeon  
6       General's commission, and the second phase was really displaced  
7       by Congressional debate.

8       Q.   And the participants in that debate where Congress was the  
9       final arbiter were the tobacco companies and the public health  
10       community; correct?

11      A.   Well, I just don't think about it quite that way because  
12       that counterposes the tobacco industry on one side and public  
13       health officials on the other.

14              And, you know, I think the debate is more complicated  
15       than a sort of bimodal notion of these two forces going at each  
16       other.

17      Q.   But the ultimate decision maker who was receiving all of the  
18       information from the multimodal situation was Congress; right?

19      A.   I don't think it was any disagreement that Congress makes  
20       laws, if that's the question, of course.

21      Q.   Now, I'm going to put this down and I want to ask you some  
22       questions about specific Philip Morris documents.

23              THE COURT:   Well, I think this is probably a good time  
24       if you're changing topics.   We will take a lunch break now.

25              Dr. Brandt, you may step down.

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CERTIFICATE

I, EDWARD N. HAWKINS, Official Court Reporter, certify  
that the foregoing pages are a correct transcript from the  
record of proceedings in the above-entitled matter.

Edward N. Hawkins, RMR

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.         |
|                            | . | September 28, 2004       |
|                            | . |                          |
| Defendants.                | . |                          |
| . . . . .                  | . |                          |

VOLUME 5  
AFTERNOON SESSION  
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS  
BEFORE THE HONORABLE GLADYS KESSLER,  
UNITED STATES DISTRICT JUDGE

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Official Court Reporter



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

2 AFTERNOON SESSION, SEPTEMBER 28, 2004

3 (1:59 p.m.)

4 THE COURT: All right, Mr. Wells, are you being suited up  
5 or something?

6 MR. WELLS: Yes, Your Honor. I'm missing a piece of  
7 testimony, one second, Your Honor.

8 May I commence, Your Honor?

9 THE COURT: Yes, please.

10 MR. WELLS: Thank you.

11 CROSS-EXAMINATION OF ALLAN BRANDT, Ph.D.

12 BY MR. WELLS:

13 Q. Dr. Brandt, at page 134 of your testimony, specifically  
14 line 2, you were asked the following question and you give the  
15 following answer -- and I'll just put it up on the screen.

16 A. 134?

17 Q. Yes, sir.

18 A. Yes.

19 Q. "Question: Why do you believe that Wakeham was a  
20 significant figure for your historical analyses of the smoking  
21 and health controversy?"

22 "Answer: Wakeham recognized in numerous internal  
23 memoranda, the cancer causing effect of cigarette smoke."

24 Now, I would like you to clarify what you mean by that  
25 answer. Are you testifying that based on your review of

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1 Wakeham's documents, that it was Wakeham's personal belief that  
2 smoking causes cancer or that Wakeham merely recognized the  
3 existence of scientific studies that reached the conclusion that  
4 smoking causes cancer?

5 THE COURT: What page are you on, Mr. Wells?

6 MR. WELLS: I'm on page 134, that's lines 2 through 5,  
7 Your Honor.

8 THE COURT: Okay.

9 THE WITNESS: I think they're really both in his  
10 memoranda. There certainly is the recognition that many people  
11 have identified cancer causing substances and compounds in  
12 cigarette smoke, and then he identifies those carcinogens, which  
13 he -- and co-carcinogens which he calls tumor promoters in  
14 cigarette smoke in his -- in his memos. So, I think it's both  
15 recognizing that externally this had been demonstrated, but also  
16 internally.

17 BY MR. WELLS:

18 Q. Okay. So it is your testimony that the three documents  
19 that you cite following your statement that Wakeham had  
20 recognized the cancer causing effect of cigarette smoke in his  
21 documents, that those documents support the proposition that it  
22 was Wakeham's personal belief that smoking causes cancer?

23 A. I believe that Wakeham knew that there were known human  
24 carcinogens in tobacco smoke, yes.

25 Q. Well, the mere fact that there's a carcinogen in tobacco

1 smoke does not mean that smoke causes cancer, correct?

2 A. It doesn't theoretically mean that, yes.

3 Q. Okay. So the mere fact that he identified in one of his  
4 memos that smoke contained certain carcinogens does not, in and  
5 of itself, mean that he believed that smoking causes cancer,  
6 correct?

7 A. It doesn't necessarily mean that, yes.

8 Q. Okay. Now, let's look at the three documents you rely on  
9 to support your testimony that it was Wakeham's personal belief  
10 that smoking causes cancer, and I want to do it in reverse  
11 order.

12 The third document you rely on is on the next page, page  
13 135, lines 9 through 13. And you state: "Later on, April 20,  
14 1962, Wakeham recommended diverse identification of Philip  
15 Morris's USA business at a greater rate due to the reporting of  
16 evidence that smoking leads to disease."

17 And then you refer to Exhibit 20120. Now, when you  
18 commenced your direct examination, you actually changed that  
19 answer in part, correct?

20 A. I changed the line at line 9, that's correct.

21 Q. Right. Because when it says "Wakeham recommended it",  
22 you changed it to say "Mace recommended it", correct?

23 A. That's correct.

24 Q. Because actually when you look at the document in  
25 question, it is a document from Mace to Wakeham, not the other

1 way around, correct?

2 A. That's correct.

3 Q. Now, that document, let's make it clear, it's dated April  
4 20, 1962, C.V. Mace to H. Wakeham, and the first two paragraphs  
5 read: "Here are my thoughts -- "  
6 A. Can I have the documents? I'm sorry.

7 Q. I'm sorry. Are you ready?

8 A. Yep.

9 Q. "Here are my thoughts on a policy the company might  
10 follow as a result of the reopening of the smoking and health  
11 question in Great Britain."  
12 "First, since there is a chance, slight though it may be,  
13 that excessive cigarette smoking may lead to a greater incidence  
14 of degenerative diseases in humans, and this in turn to a  
15 lessening in the use of cigarettes, I think we should diversify  
16 our business at a more rapid rate than we are doing."  
17 So, at least in the second paragraph, Mr. Mace, the  
18 author of the memo, is stating that from his personal  
19 perspective, there is only a slight chance that smoking may  
20 cause disease, correct?

21 A. Yes. I mean, the language is clear. Since there is a  
22 chance, slight though it may be that excessive smoking may lead  
23 to more incidence I think is Mace taking into account the  
24 possibility that, in fact, smoking may lead to degenerative  
25 diseases in humans.

1 Q. But he is clearly stating by saying that there is just a  
2 "slight chance", he is not of the camp that has concluded that  
3 smoking causes cancer, correct?

4 A. I just find this kind of language, you know,  
5 characteristic of correspondence internally in the industry at  
6 this time. Could I have your question again, I'm sorry?

7 Q. My question: Is it correct that when Mr. Mace writes the  
8 sentence in the second paragraph --

9 A. Yes.

10 Q. -- that there's only a "slight chance" that smoking may  
11 cause disease, by writing that, he is not putting himself, in  
12 your opinion, in the camp of people who have concluded that  
13 smoking causes cancer?

14 A. No, I don't think he's putting himself in that camp.

15 Q. Okay. Now, you have no document where Dr. Wakeham  
16 responds to Mr. Mace's April 20, 1962 memo, correct?

17 A. I don't have a response to this, that I know about.

18 Q. Okay. So that document, on its face, tells us absolutely  
19 nothing about Dr. Wakeham's position in terms of how he viewed  
20 the question of whether or not smoking causes cancer, correct?

21 A. Yes, that's correct, that's why I corrected the original  
22 testimony.

23 Q. Well, the right way to correct it, don't you agree,  
24 should have been to have struck the entire passage instead of  
25 just correcting who sent it and who received it?

1 A. I don't know if that was the right way. I corrected it  
2 by making clear that Wakeham had received this recommendation.

3 Q. Right. But you didn't clarify that the document does not  
4 support your present position, that the documents support the  
5 proposition that it was Wakeham's personal belief that smoking  
6 causes cancer?

7 MR. BRODY: Objection. That's a mischaracterization of  
8 Dr. Brandt's testimony about the importance of these particular  
9 documents.

10 THE COURT: Objection is overruled.

11 BY MR. WELLS:

12 Q. You can answer?

13 A. Could I have the question again? I'm sorry.

14 MR. WELLS: You can read it back.

15 THE COURT REPORTER: "But you didn't clarify that the  
16 document does not support your present position, that the  
17 documents support the proposition that it was Wakeham's personal  
18 belief that smoking causes cancer?"

19 THE WITNESS: No, I don't think this tells you what  
20 Wakeham thought about the causes of cancer, this document, but  
21 what it does tell you is the correspondence among executives, and  
22 how they would regard the problem of smoking and health and their  
23 business decisions. That's what the document is about.

24 BY MR. WELLS:

25 Q. Right. And to the extent Dr. Wakeham and Mr. Mace are

1 both involved in the research and development area, it would be  
2 totally natural for them to have discussions about scientific  
3 publications taking positions on the question of causation,  
4 right?

5 A. Sure.

6 Q. Now, let's go to the second document and let's work  
7 backwards -- but that one's in the middle, so let's go to page  
8 134.

9 A. Back to 134 in my testimony?

10 Q. Yes, sir. And I want to start, just to focus everybody,  
11 on line 11. This is the second document you refer to.

12 A. I still don't have it.

13 Q. Okay.

14 A. Okay.

15 Q. Okay. Now that document is U.S. Exhibit 20381, correct?

16 A. Yes, 20381.

17 Q. Okay. Now what I'm going to do, with permission of the  
18 government, I'm going to substitute what the government  
19 identified as 20381 with an exact copy, but which is more  
20 legible, which is also a government exhibit, U.S. 20088, okay?

21 A. Okay. I mean, I don't know, it's --

22 Q. I'll give you a copy.

23 MR. BRODY: We have no objection.

24 BY MR. WELLS:

25 Q. They just used the copy that was somewhat illegible on

1 certain pages, I'm just giving you a cleaner copy.

2 A. Okay. Thank you.

3 Q. Now, your testimony states, with respect to that  
4 particular Document 1 sentence is, line 14, "The proposal listed  
5 15 carcinogens and 24 co-carcinogens, or tumor promoters, in  
6 cigarette smoke."

7 And you've already testified the mere fact that  
8 carcinogens are contained in smoking does not say anything about  
9 whether smoking causes cancer, correct?

10 A. I don't think -- it doesn't say anything, that's not my  
11 testimony.

12 Q. Okay. It doesn't tell --

13 A. What I say --

14 Q. I doesn't establish that -- just so the record is  
15 clear -- the mere fact that smoke contains carcinogens, does not  
16 establish?

17 A. Human carcinogens.

18 Q. I'm sorry?

19 A. Human carcinogens.

20 Q. Does not establish in and of itself that smoking causes  
21 cancer, right?

22 A. Not in and of itself.

23 Q. Okay. And there's nothing on the page in the document  
24 where those carcinogens are listed that states that it is the  
25 personal opinion of Dr. Wakeham that smoking causes cancer,



- 1 correct?
- 2 A. Yes, not there. It doesn't say it.
- 3 Q. Okay. Now let's look at the second sentence. The second
- 4 sentence quotes from another part of the document and says,
- 5 "Wakeham also cited the belief that cardiovascular ailments that
- 6 may arise from smoking are due to the physiological effects of
- 7 nicotine, noting in particular nicotine's specific effects on
- 8 the adrenal -- "
- 9 A. Adrenal, yes.
- 10 Q. "Adrenomedullin causing it to discharge --" you can
- 11 pronounce it for me?
- 12 A. Epinephrin.
- 13 Q. -- "epinephrin, a hormone that accelerates the heart
- 14 beats, blood vessels and raises the blood pressure."
- 15 Now, that sentence does not give you any window into
- 16 whether or not it was the personal belief of Dr. Wakeham that
- 17 smoking causes cancer, correct?
- 18 A. Yeah, that sentence isn't about cancer, it's about
- 19 cardiovascular disease.
- 20 Q. Right, because I want to ask you about that opening
- 21 sentence up on lines 3 and 4 of your testimony, where you said
- 22 Wakeham recognized numerous internal memorandum the cancer
- 23 causing effect of cigarette smoke, that's what I'm focusing on,
- 24 and that sentence does not support that proposition, correct?
- 25 A. Yes, that's a different sentence.

1 Q. Okay. Now, the third sentence that refers in your direct  
2 testimony to the document, is at line 19, and that states:  
3 "Wakeham identified 84 percent of the more than 400 gas and  
4 particulate compounds in cigarette smoke, including those that  
5 he specifically recognized as carcinogens inside stream or  
6 second hand smoke."  
7 Now, will you turn to the page where he refers to the  
8 84 percent?  
9 A. I'm -- do you have it marked there?  
10 Q. It's about the third page in.  
11 A. Okay.  
12 Q. Are you there?  
13 A. Is it this one with the illustration?  
14 Q. Yes. In connection with preparing your testimony, that  
15 you swore to in this courtroom, you took the time to look at  
16 this document, right?  
17 A. I have looked at this document, yes.  
18 Q. Okay. Now, in fact, the document does not support the  
19 proposition that Wakeham identified 84 percent of the more than  
20 400 gas and particulate compounds in cigarette smoke; is that  
21 correct?  
22 A. I'm just looking at this chart.  
23 THE COURT: And for the record, we're talking about  
24 U.S. -- well, are we talking about U.S. Exhibit 20381?  
25 MR. WELLS: No, we're now in the middle document which is

1 20088, which I have substituted, that is correct, Your Honor.  
2 The substituted copy is 20088, and the reference is to the one  
3 that's illegible.

4 THE COURT: Right.

5 THE WITNESS: Yes, I mean --

6 BY MR. WELLS:

7 Q. Yes, what, sir?

8 A. The chart you're asking me to look at is about the  
9 chemistry of cigarette smoke, so I need your question again.  
10 I'm sorry.

11 Q. Well I have a real simple question: On this one, isn't  
12 it a fact that you just got it plain wrong, that the chart does  
13 not even support the proposition that you state in your direct  
14 that Wakeham identified 84 percent of the more than 400 gas and  
15 particulate compounds in cigarette smoke?

16 MR. BRODY: Objection. I don't think that's what that  
17 sentence says.

18 MR. WELLS: Well, this is my cross. I object.

19 THE COURT: Objection is overruled, Mr. Brody, Mr. Wells  
20 was reading it.

21 THE WITNESS: I just, it says Wakeham identified  
22 84 percent of the more than 400 -- here it says "total of more  
23 than 400 compounds of which about 50 have been identified for the  
24 first time by Philip Morris research center". And then this says  
25 "84 percent inside stream smoke". So, you know, the way I read

1 this is the way I understood it when I looked at the document,  
2 that there are 400 compounds and 84 percent of those 400 gas and  
3 particulate compounds here on the chart are inside stream smoke.  
4 BY MR. WELLS:  
5 Q. Well, let's look at the chart.  
6 A. I'm sorry.  
7 Q. Okay. The chart says "chemistry of cigarette smoke",  
8 correct?  
9 A. Yes.  
10 Q. And it says, "side stream smoke" -- and it has a big,  
11 nice little picture of what's "side stream" and what's "main  
12 stream".  
13 A. Right.  
14 Q. And it says 84 percent is in the side stream side and  
15 that 16 percent is in main is stream, that's what the chart  
16 shows?  
17 A. Right.  
18 Q. Because if you add 16 percent and 84 percent you get a  
19 100 percent, right?  
20 A. Yes.  
21 Q. And that chart says nothing about 84 percent of the more  
22 than 400 gas in particulate compounds, you just read your chart  
23 wrong?  
24 A. I'm not sure I did. I just want to go back over it  
25 because --

1 Q. Take your time.

2 A. These are the gases -- I don't know, I just find that --  
3 it says Wakeham identified 84 percent of the more than 400 -- it  
4 says total of 400. I just can't completely make sense of the  
5 chart right now, I'm sorry.

6 Q. So at least at this moment you're willing to say that you  
7 can't make sense of the chart, right?

8 A. Yeah, I just need to go back over it.

9 Q. But one thing is crystal clear, that that chart under any  
10 interp -- under any interpretation does not tell you anything  
11 about Dr. Wakeham's personal view on whether or not smoking  
12 causes cancer, correct?

13 A. No, I didn't think it told me about his personal view.

14 Q. Okay. Now, the last reference to that particular  
15 document begins at line 23 and reads: "Low irritation and low  
16 nicotine cigarettes for commercial exploitation will be  
17 developed in the course of our present R & D program during the  
18 next two to five years with an expenditure of not more than  
19 25 percent of the R & D budget during this period. A medically  
20 acceptable low carcinogen cigarette may be possible. It's  
21 development would require time, money, unfaltering  
22 determination."

23 Now, is it fair that there's nothing in the language of  
24 that document that I just read to you that establishes that it's  
25 Dr. Wakeham's personal view that smoking causes cancer?

1 A. It's hard to say from this what his personal view was. I  
2 use this document because it indicated a clear recognition on  
3 the part of Wakeham that there were known carcinogens in tobacco  
4 that the industry was working to remove, but it hadn't been made  
5 clear to the public that these carcinogens were in tobacco by  
6 the companies. That's how I use the document.

7 Q. Well, in your research of the documents, did you come  
8 across a document where Philip Morris gives to the Surgeon  
9 General of the United States in connection with the 1964 Surgeon  
10 General's report its list of carcinogens that Philip Morris has  
11 identified? Did you come across that document?

12 A. I don't think so.

13 Q. Are you -- so you have no knowledge that such a document  
14 and production was made by Philip Morris to the Surgeon General  
15 of the United States in connection with the 1964 Surgeon  
16 General's report?

17 A. I don't know of that document.

18 Q. And do you have any knowledge that the carcinogens that  
19 Dr. Wakeham identifies in that document before you are, in fact,  
20 contained in various standard scientific books?

21 A. Oh, I think it was well known by then that there were  
22 carcinogens in tobacco among scientists.

23 Q. So all Dr. Wakeham is doing is picking up a scientific  
24 textbook that would be available to anybody in the public, and  
25 certainly anybody in the scientific community, and discussing

- 1 the issue of carcinogens, right?
- 2 A. I don't know if that's exactly -- I read his memo a  
3 little bit differently about what Wakeham is doing here about  
4 the industry's activities to produce a medically acceptable  
5 cigarette.
- 6 Q. The industry's activities to produce a medically  
7 acceptable cigarette are appropriate and natural given that  
8 surrounding the industry there's this huge controversy about  
9 whether or not smoking causes cancer, correct?
- 10 A. There was a lot of attention to that.
- 11 Q. And if you are over in the R & D section and you're  
12 reading about the controversy, one of the things you would want  
13 to do, and it would be natural and appropriate, would be to try  
14 to develop a cigarette that is acceptable to all segments of the  
15 community, correct?
- 16 A. Yes, I agree with that.
- 17 Q. Because, even if you disagree with the segment of the  
18 medical community that said smoking causes cancer, the mere fact  
19 that there is such a camp would create marketing issues and  
20 product issues, correct?
- 21 A. Yes, of course.
- 22 Q. Now, you told us earlier you did not review Dr. Wakeham's  
23 depositions in various tobacco related litigation, correct?
- 24 A. Yes, I did.
- 25 Q. Now, I just want to show you that in one of those cases,

1 Dr. Wakeham was questioned under oath specifically about that  
2 particular document. And I'm putting up on the screen the  
3 deposition testimony of Dr. Wakeham from -- in the matter of New  
4 York Tobacco litigation -- the Zeto case, Zeto versus the  
5 American Tobacco Company, and if we can just go to the page  
6 where he was questioned about the specific document before you,  
7 it says: "Okay, doctor, could you turn back a few pages to the  
8 page with the Bates number 1000277430. It has a heading on it,  
9 The Cancer Controversy. Now, do you remember that there is such  
10 a heading in that document in front of you? If you look at the  
11 copy, and I'm trying to save time, you can go right to that  
12 Bates number on it, do you see it?"

13 A. Yes, yep.

14 Q. Okay, so you know given the Bates number that the  
15 questioner now has the very document you have in front of you  
16 before him and he's asking Dr. Wakeham about that document,  
17 right?

18 MR. BRODY: Your Honor, I'm going to object to the use of  
19 this deposition transcript in this way. It's clearly hearsay  
20 when used in this fashion and it's not --

21 THE COURT: Well, let me ask this: Are you going to be  
22 getting to a question based on this transcript?

23 MR. WELLS: Yes, Your Honor.

24 THE COURT: All right, overruled for now, just for now.

25 MR. WELLS: All right.



1 BY MR. WELLS:

2 Q. And it goes on to read: "Question: Doctor, this is  
3 again written in 1961. At that time, what was the cancer  
4 controversy?"

5 "Answer: Well, as I recall it, in those days, we had  
6 people who were saying cigarette smoking causes cancer. And we  
7 had other people saying that the evidence is not sufficient to  
8 convince people that it did cause cancer. So there would be, in  
9 effect, a controversy. Some people would say it does and others  
10 that it doesn't."

11 "Question: And in 1961, where did you find yourself in  
12 that controversy?"

13 "Answer: As I recall it, at that time, I was very  
14 open-minded. I didn't know whether there was or was not a  
15 convincing body of evidence to say that cigarette smoking caused  
16 cancer."

17 Now, my question to you, Dr. Brandt, as an expert witness  
18 who is giving direct testimony based on his review of documents  
19 where you have sworn that Dr. Wakeham's personal view was that  
20 he believed smoking causes cancer, would you have found that  
21 particular deposition passage instructive?

22 MR. BRODY: Your Honor, this --

23 THE WITNESS: I don't.

24 MR. BRODY: Excuse me. Your Honor, the question clearly  
25 contemplates -- I mean it's clearly premised upon an offer of the

1 testimony for the truth of the matter asserted in the testimony,  
2 and in that way, I think the hearsay objection here is proper.  
3 The use of Dr. Wakeham's testimony for cross-examination in this  
4 matter, and I also think that under rule 403 it is confusing  
5 prejudicial and a waste of time.

6 THE COURT: It's being proffered to contest the accuracy  
7 of the testimony that was offered on direct. The objection's  
8 overruled. Go ahead, please.

9 MR. WELLS: You can answer.

10 THE WITNESS: Thank you. You see, the question doesn't  
11 reflect what my testimony says, which is that I -- I don't know  
12 that I expressed Wakeham's personal view. What I said in quoting  
13 my testimony, is Wakeham recognized in numerous internal  
14 memoranda the cancer causing effect of cigarette smoke, and you  
15 know, if he said in his deposition that there was a controversy  
16 and he wasn't convinced, you know, I'm sure that's what he said.

17 BY MR. WELLS:

18 Q. But Dr. Brandt, the very reason I asked you at the very  
19 beginning of my questions this afternoon, if it was your  
20 personal view that what Dr. Wakeham -- withdrawn.

21 At the beginning of my questioning this afternoon, I asked  
22 you a question where I said I want you to clarify what you mean  
23 by that answer. Do you recall that?

24 A. Yes.

25 Q. And I wrote it out because I didn't want later on for you

1 and I to have any confusion about what I had asked you at the  
2 outset. And the question I read to you was: Quote, "Are you  
3 testifying that based on your review of Wakeham's documents,  
4 that it was Wakeham's personal belief that smoking causes cancer  
5 or that Wakeham merely recognized the existence of scientific  
6 studies that reached the conclusion that smoking causes cancer?"

7 And you answered on the record within the last 30 minutes  
8 that the answer was, "Both". Do you recall that?

9 A. Yes, I do.

10 Q. Okay. Now, let's talk about the third document, and last  
11 document, that you referred to with respect to Dr. Wakeham.

12 And -- one second. Put that up on the ELMO.

13 And that document reads at line 5: "In a September 22,  
14 1959 memorandum that is marked as U.S. Exhibit 21657, for  
15 instance, he wrote: One of the main reasons people smoke is to  
16 experience the physiological effects of nicotine on the human  
17 system. Nicotine, to the best of present knowledge, does not  
18 produce cancer. Hence, in theory, won could achieve the major  
19 advantage of smoking without the hazard of cancer, but nicotine  
20 in tobacco smoke is present in the tar phase."

21 Now, I want to show you the specific document, and the  
22 specific document that you referred to, Government's  
23 Exhibit 21657, is from Dr. Wakeham to a Robert P. Roper and it's  
24 dated September 22, 1959, correct?

25 A. Yes, correct.

1 Q. And Dr. Wakeham writes in the opening paragraph of the  
2 memo, he says: "The following commentary is based on the rather  
3 extensive reading I have done in connection with the impending  
4 legal action of Ross versus Philip Morris, and on conversations  
5 with scientists and physicians at the 1959 Gordon Research  
6 Conference on cancer which I attended August 31st, to September  
7 4th, as an observer".

8 And then he goes on to write in -- I think paragraph 5,  
9 "The complexities of the problems -- the complexity of the  
10 problem is such that even if further evidence for a relation  
11 between cigarette smoking and lung cancer is uncovered, the  
12 answer will be either conclusive nor simple".

13 So it is a fair statement that this document does not  
14 support the proposition that it was the personal belief of  
15 Dr. Wakeham that smoking causes cancer.

16 A. No, this document doesn't support that belief.

17 Q. Okay. Now, I'm going to go to one -- to a different  
18 area, no more questions about Dr. Wakeham, and then I'll sit  
19 down and turn it over to one of my colleagues.

20 And on your direct testimony, you refer at page 125,  
21 lines 8 through 12, to a so-called "psychological crutch"  
22 statement. Do you recall that?

23 A. Yes.

24 Q. And in your direct you swore in 1964, Philip Morris  
25 executive vice president George Weissman wrote to Philip Morris

1 president, Joseph F. Cullman the Third, marked as U.S. Exhibit  
2 20189, quote, "However, at some point, reflecting the same  
3 seriousness with which we met the report, we must in the near  
4 future provide some answers which will give smokers a  
5 psychological crutch and a self rationale to continue smoking."

6 Now, I want to show you the psychological crutch document.  
7 Do you have a copy, sir?

8 A. Yeah I have a copy now.

9 Q. Now, the document is dated January 29, 1964, and it's  
10 written to George F. Cullman and it comes from George Weissman,  
11 correct?

12 A. Yes.

13 Q. And the re: is Surgeon General's report, correct?

14 A. Yes.

15 Q. And the first paragraph opens up, "Inasmuch as I am  
16 leaving soon and I am involved in preparations for my trip, I  
17 thought I would pass on to you some of my thoughts regarding the  
18 recent release of the Surgeon General's report."

19 Now in your review of documents in this case, did you come  
20 across any document in which Mr. Weissman -- I'm sorry,  
21 withdrawn -- in which Mr. Cullman requested Mr. Weissman to write  
22 a memo to him giving his thoughts about the Surgeon General's  
23 report?

24 A. No, I don't think Cullman necessarily requested this  
25 report. I have no reason to believe that that was true.

1 Q. And you would agree that a fair interpretation of the  
2 first sentence is that Weissman, who is about to go on this  
3 trip, is giving Mr. Cullman his unsolicited thoughts on the  
4 Surgeon General's report, correct?

5 A. Weissman and Cullman, Cullman was the head, Weissman was  
6 a senior vice president, and I assume they exchanged, you know,  
7 correspondence like this.

8 Q. Okay. And the memo is dated January 29, 1964, and the  
9 Surgeon General's report was released January 11, 1964, correct?

10 A. That's correct.

11 Q. Okay. Now, the language that refers to the  
12 "psychological crutch" is under the heading Public Relations  
13 Program, and letter A says, "The restraint and unity of the  
14 industry has been very effective in this period. The opponents  
15 have had their inning. The industry has demonstrated it's  
16 seriousness and responsibility in saying we would study the  
17 report."

18 B, "However, at some point reflecting the same seriousness  
19 with which we met the report, we must in the near future provide  
20 some answers which will give smokers a psychological crutch and a  
21 self rationale to continue smoking. These answers must also  
22 point out the weaknesses in the report and the path for future  
23 research. However, it cannot be done under the flag of saying  
24 the unanimous opinion of the Surgeon General's committee is  
25 wrong."

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1           Now, my first question is, do you know where Mr. Weissman  
2 got the phrase "psychological crutch" from?

3     A.     It's a common phrase. I don't -- I'm not sure -- I'm not  
4 sure of its origin in this instance.

5     Q.     Isn't it a fact that the phrase "psychological crutch" is  
6 used by the Surgeon General at page 355 of the Surgeon General's  
7 1964 report?

8     A.     It's perfectly conceivable to me that the Surgeon  
9 General's report used that term as well.

10    Q.     Well, let's look at what the Surgeon General wrote on  
11 January 11th, only a couple of weeks before Mr. Weissman wrote  
12 his memo.

13           So, under the heading, Beneficial Effects of Tobacco, the  
14 Surgeon General of the United States wrote, "Evaluation of the  
15 effects of smoking on health would lack perspective if no  
16 consideration was given to the possible benefits to be derived  
17 from the occasional or habitual use of tobacco. A large list of  
18 possible physical benefits can be compiled from a fairly large  
19 literature, much of which is based upon anecdote or clinical  
20 impression."

21           And then the third paragraph goes on to state: "But it is  
22 not an easy matter to reach a simple and reasonable conclusion  
23 concerning the mental health aspects of smoking. The purported  
24 benefits on mental health are so intangible and so elusive, so  
25 intricately woven into the whole fabric of human behavior, so

1 subject to moral interpretation and censure, so difficult a  
2 medical evaluation and so controversial in nature, that few  
3 scientific groups have attempted to study the subject. The drive  
4 to use tobacco being fundamentally psychogenic in origin has the  
5 same basis as other drug habits, and in a large fraction of the  
6 American population appears to satisfy the need of the individual  
7 for a psychological crutch."

8           And then could we go up to the next page, 356, and then  
9 the summary on the next page is, "Medical perspectives requires  
10 recognition of significant beneficial effects of smoking  
11 primarily in the area of mental health. These benefits originate  
12 in a psychogenic search for contentment and are measurable only  
13 in terms of individual behavior. Since no means of quantitating  
14 these benefits is apparent, the committee finds no basis for a  
15 judgment which would weigh benefits versus hazards of smoking as  
16 it may apply to the general population."

17           So, is it fair to say that what the Surgeon General is  
18 saying in the passages that I have read to you, in fact, there  
19 may be mental benefits to smoking that some people, in effect,  
20 need a psychological crutch, but there's a problem in terms of  
21 doing a cost benefit analysis to determine if for certain  
22 individuals it may be worth the hazard or not? Is that a fair  
23 interpretation?

24           THE WITNESS: It's so complex.

25           MR. BRODY: Objection, Your Honor. I think maybe

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1 Dr. Brandt -- well, I'll tell you what, I withdraw the objection.

2 THE COURT: All right. I think Dr. Brandt was going to  
3 answer the question.

4 THE WITNESS: Yeah. Well the question was so complex that  
5 it's difficult for me to answer, but I do have a perspective  
6 about what the Surgeon General was trying to do when the  
7 committee included this in their summary. Which was that the  
8 Surgeon General and his committee understood that it would be a  
9 complex issue to tell people that smoking, in fact, caused series  
10 disease and that individuals would need to assess, in the face of  
11 that evidence, how they would respond to it depending on how  
12 tobacco functioned for them.

13 So, that's how I've always read this passage in the  
14 Surgeon General's report. I would say I don't associate it  
15 exactly with the document you gave me because I think that  
16 Weissman is talking about something else.

17 BY MR. WELLS:

18 Q. Well, let's see, let's see if on the next page Weissman  
19 specifically refers to page 356 of the Surgeon General's report.

20 So, if we go back to the document, and I ended my reading  
21 last time about where I said the Surgeon General's committee is  
22 wrong. Now I'm going to pick up, so Weissman is now saying,  
23 "Therefore, I propose that when the white paper analyzing the  
24 report is completed, a press conference be called, if possible,  
25 on an equal time basis with the Surgeon General in the state

1 department auditorium in perhaps Clarence Cook Little and the  
2 various industry research directors and scientists and  
3 Dr. Hockett and Dr. Fransen, et cetera would get up and take the  
4 following approach, and then he puts quotation marks, and he  
5 says, "We have studied the Surgeon General's report which is an  
6 excellent comprehensive analysis of previous statistical  
7 studies. When it was released the Surgeon General noted that  
8 more research was necessary and after analysis of the report, we  
9 find there are some -- these are some of the areas in which the  
10 research is necessary. Number one: Page 356 of the Surgeon  
11 General's report recognizes significant beneficial results of  
12 smoking primarily in the area of mental health, but goes on to  
13 say there are no means of quantifying these benefits and that  
14 the committee had no means of weighing the benefits versus the  
15 hazards. In these times when blank percentage of our population  
16 may be affected by matters of mental health, we think the  
17 imperative factor is that further research be done in these  
18 areas."

19 So no question that Mr. Weissman is now referring to page  
20 356 of the Surgeon General's report, which incorporates that part  
21 of the report dealing with mental health benefits in the  
22 so-called "psychological crutch" language, correct?

23 A. Now he is, yes.

24 Q. And he goes on to conclude his memo and states: "In  
25 closing, the main essence of the report in the publicity to me

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1 is that it has still left smoking on an individual basis, the  
2 individual's own choice of the psychological benefit versus the  
3 alleged hazard. Anything that impinges on the right of the  
4 individual to make this choice is contrary to our most basic  
5 traditions."

6 And what Mr. Weissman is saying in that last paragraph  
7 is, in substance, what you just said in terms of your  
8 interpretation of that particular passage, correct?

9 A. Yes, I think that's right. I think that that's  
10 Weissman's perspective.

11 Q. And you know of no document where Mr. Cullman responds to  
12 Mr. Weissman's memo concerning the reference to psychological  
13 crutch; is that correct?

14 A. Yes, Mr. Cullman -- I don't know whether he responded to  
15 this or not.

16 MR. WELLS: No further questions.

17 THE COURT: All right. Mr. Biersteker, are you going to  
18 be next?

19 MR. BIERSTEKER: Yes, Your Honor.

20 THE COURT: You may proceed.

21 MR. BIERSTEKER: Thank you, Your Honor.

22 CROSS-EXAMINATION OF ALLAN BRANDT, Ph.D.

23 BY MR. BIERSTEKER:

24 Q. Dr. Brandt, I'm Peter Biersteker. I represent R.J.  
25 Reynolds. I only want to ask you a few questions about some

1 very specific Reynolds documents. But first to put in context  
2 you cite a number of documents from my client from the 1950s and  
3 the very early 1960s.

4 Isn't it true, doctor, that beginning in about 1953 or  
5 1954, the Reynolds research and development department expanded  
6 significantly?

7 A. Yes, it did.

8 Q. And one of the first things that the Reynolds R & D  
9 department did after that expansion was to survey the literature  
10 about smoking and health, correct?

11 A. Yes, that's among the things it did.

12 Q. And one of the documents you cited in your direct  
13 examination was a survey of cancer research by Dr. Teague, U.S.  
14 Exhibit Number 21407, correct?

15 A. Yes, I did cite that document.

16 Q. And at page 59 to 60 of your testimony, doctor, you said  
17 that the sentiments expressed by Dr. Teague in this exhibit,  
18 stood in sharp contrast to the industry's public statements,  
19 correct?

20 A. Yes.

21 Q. All right. Dr. Teague nowhere in this document, doctor,  
22 expresses categorically that smoking causes cancer, does he?

23 A. No, he does not.

24 Q. And in fact, if I could have page 4 of the document on  
25 the screen --

1 A. Could I have the document, please?

2 Q. I only want to ask you about this one thing. If it's  
3 necessary we can do that.

4 MR. BRODY: Your Honor, the witness has asked for a copy  
5 of the document.

6 MR. BIERSTEKER: Fine, may I approach, Your Honor?

7 THE COURT: Please.

8 MR. BIERSTEKER: Thank you.

9 THE WITNESS: Thank you.

10 BY MR. BIERSTEKER:

11 Q. In fact, doctor, at the top of page 4, Dr. Teague writes  
12 "In spite of observation, research and theorizing for the past  
13 2,000 years, the cause of spontaneous human cancer is still  
14 unknown", doesn't he?

15 A. Yes, it does say that.

16 Q. And that does not stand in sharp contrast to the  
17 statements that the industry was making in public, does it?

18 A. Well, there's more to this document than that single  
19 statement, so, you know, --

20 Q. Can you point me -- you just told me there's no  
21 categorical statement in this document that smoking causes  
22 cancer, correct?

23 A. Right.

24 Q. All right. Let's move on to the next Reynolds document.  
25 The next exhibit was U.S. Exhibit 20667. Do you remember citing

1    this document?

2    A.     Yes, I do.

3    Q.     And you remember saying that it had similar statements

4    with respect to those that Dr. Teague had made?

5    A.     Um, yes, I would characterize them as similar.

6    Q.     And likewise, there is no categorical statement in this

7    statement, is there doctor, that smoking causes lung cancer?

8    A.     You know, I certainly didn't say in my statement -- in my

9    written testimony that there was a categorical statement in

10   either one of these documents.

11   Q.     Fine. Let's move on to the next Reynolds document. Now,

12   for a little context before we get there, one of the things that

13   the Reynolds R & D department did after there was the survey of

14   the literature was to set about trying to identify the chemical

15   compounds that are found in cigarette smoke, correct?

16   A.     Correct.

17   Q.     And do you know whether or not over half of the chemical

18   compounds identified in cigarette smoke today were first

19   identified in publications from my client?

20   A.     I don't know that.

21   Q.     You talked a little bit with Mr. Wells about constituent

22   and cigarette smoke. Do you know whether or not the identity of

23   carcinogens in cigarette smoke appeared in Reader's Digest and

24   Consumer Reports back in the '50s and early '60s?

25   A.     Of course there were discussions of carcinogens in

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1 tobacco smoke in those publications.

2 Q. So that information was readily available to the public

3 and the lay press, as well as in the scientific text books that

4 Mr. Wells referred to, correct?

5 A. Well, as you just pointed out, there was an extensive

6 identification of carcinogens by RJR scientists and I don't

7 believe all that have information was in the lay press.

8 Q. Now, you cite the U.S. Exhibit 22893, a memorandum by

9 Dr. Rodgman entitled the Optimum Composition of Tobacco and Its

10 Smoke?

11 A. Right, mine -- I don't want to be a stickler, but I

12 prefer to have the documents in front of me.

13 Q. I was just trying to move along, but I understand.

14 MR. BIERSTEKER: May I, Your Honor?

15 THE COURT: Yes.

16 THE WITNESS: Thank you, I'm sorry.

17 MR. BIERSTEKER: That's all right.

18 BY MR. BIERSTEKER:

19 Q. Are you with me, doctor?

20 A. I'm with you.

21 Q. Okay. And you cited the proposition that Reynolds had

22 identified a potent carcinogen, cholanthrene, in cigarette smoke

23 that had not been published, correct?

24 A. Yes. I don't have the page on my testimony that you are

25 referring to, but that would be my recollection, yes.

1 Q. Do you know whether or not cholanthrene has ever been  
2 identified in cigarette smoke since Dr. Rodgman wrote this  
3 memorandum in 1959?

4 A. I'm just not sure.

5 Q. Do you know whether or not Dr. Rodgman himself noted two  
6 years later that he was unsure whether, in fact, he had found  
7 cholanthrene in cigarette smoke?

8 A. I'm not aware of that.

9 Q. Did you review, during the course of your work in this  
10 case, Dr. Rodgman's 1964 report entitled the Analysis of  
11 Cigarette Smoke Condensate Roman Numeral 35, a Summary of An  
12 8-year Study?

13 A. I don't think that's a document that I have seen.

14 Q. Do you know whether or not Dr. Rodgman published a  
15 subsequent article in which he says he wasn't sure he really had  
16 identified cholanthrene in cigarette smoke?

17 A. I was aware that Dr. Rodgman was publishing, but I don't  
18 know that particular article.

19 Q. Let's move to the last Reynolds document -- actually it's  
20 two, U.S. Exhibit 63583, and also 50668.

21 During your direct examination you cited this document,  
22 U.S. Exhibit 63583, did you not?

23 A. Yes, I did cite this document.

24 Q. And you attached particular importance to it, did you  
25 not?



- 1 A. I think it's a significant document.
- 2 Q. First -- I'll hand you both of them. The document you
- 3 cited ends on the last page in mid-sentence, doesn't it?
- 4 A. The one I cited?
- 5 Q. Yes. Exhibit 63583?
- 6 A. I have both of these documents in my file. I have the
- 7 longer version, too, I think.
- 8 Q. Why did you choose to cite the shorter one in your report
- 9 and not the longer?
- 10 A. I don't know, I -- the management of documents has been
- 11 complicated and I, you know, I was aware that this was only a
- 12 portion of the whole document.
- 13 Q. In fact, the longer document is about 20 pages longer
- 14 than the other, correct?
- 15 A. That's correct.
- 16 Q. All right. Now, you testified based upon this 1962
- 17 memorandum that Dr. Rodgman considered the evidence of smoking's
- 18 harm convincing, correct?
- 19 A. Um, again, I'd rather have right directly the reference
- 20 to my --
- 21 Q. Sir, if you look at page 97 of your direct at lines 13 to
- 22 14.
- 23 A. Okay.
- 24 Q. Can we pull that up?
- 25 A. Yes. Rodgman made it explicit that reports within the

1 industry considered the evidence of smoking's harm convincing.

2 Q. All right. And those are your words, not his?

3 A. No, those are my words on lines 13 and 14.

4 Q. That's correct. In fact, you know that Dr. Rodgman in  
5 the -- even in the longer version of the document that you did  
6 not use, says at pages 13 and 14, -- can we get that up, page  
7 13, Jaime?

8 He says, and I quote, "It is not my intent to suggest  
9 that this company accept the smoking health data at face value."  
10 Do you see that?

11 A. Of course.

12 Q. Do you think that Dr. Rodgman thought that the evidence  
13 of the harms of smoking were convincing based on that statement?

14 A. I think what he's saying there -- it doesn't really  
15 reflect what his own position is, he's saying that the -- that  
16 it is not his intent to suggest that the company accept the data  
17 at face value, but I don't think it's, you know, I don't think  
18 it reflects that -- that sentence doesn't reflect his personal  
19 view of the evidence.

20 Q. I see. Would it surprise you to learn that Dr. Rodgman  
21 had been deposed about this document?

22 A. It wouldn't surprise me, no.

23 Q. And you testified in response, I believe, to Mr. Bernick  
24 earlier, that you would like to see more of what the industry  
25 people who actually wrote these documents had to say about them,

1 correct?

2 A. I think their depositions are of interest.

3 Q. All right. Well why don't we look at what Dr. Rodgman  
4 had to say when he was deposed about the very excerpt from this  
5 deposition that you quoted in your report -- I mean your direct,  
6 excuse me.

7 MR. BIERSTEKER: Can we get the Minnesota testimony for  
8 Rodgman, do we have that? You do not have it? Okay, fine.

9 I'm sorry, Your Honor.

10 It's on the screen, but if the witness would like a hard  
11 copy, I'll provide it.

12 MR. BRODY: Your Honor, I would like to just raise an  
13 objection to the extent that Mr. Biersteker is offering this for  
14 the truth of the matter asserted. I don't think it's improper  
15 impeachment because it is hearsay, and not admissible in this  
16 way.

17 THE COURT: Well, Mr. Biersteker, what do you plan to do  
18 now?

19 MR. BIERSTEKER: I plan to do exactly what Mr. Wells did,  
20 which is to read the excerpt from the deposition and suggest to  
21 the witness that this should be material to the views he  
22 expresses in this case.

23 THE COURT: The objection's overruled.

24 BY MR. BIERSTEKER:

25 Q. Let's start at the very top, and this is page 112

1 starting on line 2, and Dr. Rodgman's being examined and he  
2 says: "You then look at the data and on page 4 under the  
3 Evidence to Date, you state, quote, obviously the amount of  
4 evidence accumulated to indict cigarette smoking as a health  
5 hazard is overwhelming and the evidence challenging this  
6 indictment is scant. Correct?"

7 And, indeed, that's the very passage that you quote in  
8 your direct, yes.

9 A. Yes, that's what I quoted.

10 Q. And Dr. Rodgman answers: "That's what I said."

11 And then the lawyer for the plaintiff in that case, the  
12 state of Minnesota asks: "As of 1962, was it your opinion that  
13 it was more likely than not that cigarette smoking caused health  
14 problems?"

15 And Dr. Rodgman answers: "No." Doesn't he?

16 A. Yes, that's his answer.

17 Q. And then he goes on to provide an explanation. He says:  
18 If I may offer an answer and there is some lawyer colloquy, but  
19 he continues, he says: "If you look at what was in the  
20 literature, the evidence would appear to be overwhelming, but  
21 what we knew at Reynolds from our work, and from other people's  
22 work, was that some of the evidence -- and here I dealt  
23 primarily with chemistry -- was wrong, and since has been proven  
24 wrong not by laboratories of the tobacco companies, but NCI. In  
25 fact, some of the things that were being claimed by the

1 anti-tobacco people, like Wynder and Hoffman, they proved  
2 themselves it was wrong, so if all you were hearing was one  
3 side, that's why I said it was overwhelming."

4 Doctor, would the testimony of Dr. Rodgman shed a  
5 different and better light on what he believed in 1962 than what  
6 you were able to glean solely from the incomplete document that  
7 you examined?

8 A. Well, I think it sheds Rodgman's reflections from 1997 on  
9 that period when he worked at Reynolds, and it doesn't really  
10 change my opinion of how I evaluated the Rodgman document.

11 Q. So you know better what Dr. Rodgman believed in 1962 than  
12 Dr. Rodgman himself; is that right?

13 A. I'm just saying I read the document and put it in its  
14 context. This adds additional information about how Rodgman  
15 perceived it himself, but I stand by my reading of the document  
16 in my direct testimony.

17 Q. Fine. Let's turn to the second issue for which you used  
18 this document. You indicated on direct examination on page 98  
19 lines 3 to 4 that Dr. Rodgman was expressing frustration --  
20 excuse me, concern and frustration that most aspects of the  
21 smoking and health questions had been left to the TIRC. Do you  
22 see that?

23 A. Yes, I do.

24 Q. And to be clear, in this document, Dr. Rodgman does not  
25 criticize the quality of the research done by the TIRC grantees,

- 1 right?
- 2 A. That's not what I said in my direct testimony. I said he
- 3 expressed concern and frustration.
- 4 Q. And the concern and frustration that he was expressing
- 5 was that he was basically preparing a polemic arguing that he
- 6 and the Reynolds R & D department should do that research, he
- 7 didn't want to be paying for TIRC to do it, correct?
- 8 A. Yes, I think it should be done in-house.
- 9 Q. Yes. And, in fact, what he said, if you'll turn to page
- 10 5 of even the abbreviated memorandum that you used, that's U.S.
- 11 Exhibit 63583, --
- 12 A. I'm sorry, I'm on the wrong document here. Page 5?
- 13 Q. Right.
- 14 A. Okay.
- 15 Q. And what Reynolds -- what Dr. Rodgman said in the last
- 16 sentence of the penultimate paragraph on the page, the members
- 17 of this company -- the paragraph above it, last sentence.
- 18 A. Great, thank you.
- 19 Q. "The members of this company research department are as
- 20 qualified, as objective, and as interested in learning about
- 21 these complex problems as scientists not employed by a tobacco
- 22 manufacturer."
- 23 In other words, he was arguing, do not fund independent
- 24 research, let us do it; is that right?
- 25 A. Yes, he wanted to do it.

1           MR. BIERSTEKER: All right. No further questions, Your  
2 Honor.

3           THE COURT: Is that statement of Dr. Rodgman in any way  
4 inconsistent with your direct testimony?

5           THE WITNESS: I don't believe it's in any way inconsistent  
6 with my direct testimony.

7           THE COURT: All right. Who is next?

8           MR. MINTON: Michael Minton, is the microphone on?

9           THE COURT: Please proceed.

10          MR. MINTON: Thank you, Your Honor.

11          CROSS-EXAMINATION OF ALLAN BRANDT, Ph.D.

12 BY MR. MINTON:

13 Q.       Good afternoon, Dr. Brandt.

14 A.       Good afternoon.

15 Q.       I would like to discuss for a moment your opinion about  
16 how information about technical innovations in filter tip  
17 technologies is of central importance in understanding the  
18 information environment in the '50s and '60s. You have such an  
19 opinion, correct?

20 A.       Well, I have to say, I'm -- I don't hold myself out as an  
21 expert on technical aspects of the development of filters.

22 Q.       And nor are you an expert in advertising, your focus is  
23 the information environment with respect to filter tip  
24 technologies in the '50s and '60s, correct?

25 A.       Yes, sir, I would say I know something about that

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- 1 information environment.
- 2 Q. That's the point you're making in your expert report,
- 3 correct?
- 4 A. It's one of them, yes.
- 5 Q. All right. And specifically, then, you go on at page 137
- 6 of your expert report to point to specific advertisements
- 7 regarding filter tip cigarettes, correct?
- 8 A. Yes, in this passage, I do.
- 9 Q. Right. And on page 137, do you specifically point to
- 10 language from an ad that was run from my client Lorillard for
- 11 Kent cigarettes, correct?
- 12 A. Yes, I do.
- 13 Q. All right. And you testified that that ad said that,
- 14 "The new micronite filter provided the greatest protection in
- 15 cigarette history," and that the ad also said, "For the greatest
- 16 protection of any filter cigarette, Kent, with the exclusive
- 17 micronite filter." Do you see that?
- 18 A. I see the quotation here, but I just haven't caught up
- 19 with where you are.
- 20 Q. I believe it's lines 11 through 13.
- 21 A. Yes.
- 22 Q. All right. Now, let's discuss the contribution of that
- 23 language, or that ad, to the overall information environment
- 24 about filter tip technologies, which you've said is the
- 25 substance of your opinion.



1           At that point in your written examination on and, in fact,  
2   at no point in your written examination, do you direct the Court  
3   to any specific ad or exhibit regarding Kent or even a date which  
4   you say contains that language, correct?

5   A.       Yes, in this passage I have not.

6   Q.       All right and in other areas of your direct exam where  
7   you defer to advertisements you actually cite a source, correct?

8   A.       Yes.

9   Q.       Right. And you did cite a source to a Lorillard ad in  
10   your expert report at page 45, footnote 75?

11   A.       At page 45 of my report?

12   Q.       Correct.

13           MR. MINTON: Can you bring that up?

14           MR. BRODY: Just for clarification, you're referring to  
15   the expert report and not the expert testimony?

16           THE WITNESS: I'm sorry, I'm on my direct --

17   BY MR. MINTON:

18   Q.       All I want to do is establish the advertisement here.

19   A.       Okay. I -- the only thing I have in front of me is my  
20   direct written testimony. I don't have my expert report in  
21   front of me.

22   Q.       All right.

23   A.       So I just don't have this document. I --

24   Q.       Well, just to refresh your recollection, Dr. Brandt, on  
25   page 45, you cited the exact same language, and then in footnote

1 75 -- actually go down to the next footnote, footnote 76, you  
2 cite an advertisement from Life magazine April 19th, 1954, at  
3 page 75, correct?

4 A. Yes, I -- that comes from my expert statement, I think.

5 Q. Okay. And as part of the critical and careful evaluation  
6 of evidence that historians must make, evidence that appears to  
7 contradict any interpretation is crucial and needs to be  
8 explained fully, correct, Dr. Brandt?

9 A. Yes.

10 Q. And what is also crucial in terms of understanding the  
11 information environment on filter tip innovation is to look to  
12 the variety of sources about the important contributors to that  
13 information in the environment at that time, correct?

14 A. Yes, that's fair.

15 Q. All right. And the historian should evaluate source  
16 materials in the specific context in which they were produced,  
17 right?

18 A. Yes, generally that's true.

19 Q. And have you done that for the Court here in connection  
20 with your reference on page 137? You don't provide the Court a  
21 citation to the specific advertisement, correct?

22 A. Yes, in my direct testimony, you know, from a  
23 professional historian's perspective, I would have preferred to  
24 have footnotes, but it came to my attention that footnotes in  
25 direct testimony wouldn't be possible, so --

1 Q. Okay.

2 A. -- I did cite it clearly in the expert statement and I  
3 think some of the footnotes where there were similar materials  
4 came out in the direct testimony because of the rules of  
5 submission for the testimony. That was my understanding.

6 Q. Indeed you did, and if we could bring up U.S.  
7 Exhibit 67623. And just to begin here, that is a -- the bottom  
8 part of that says: April 19th, 1954, Life magazine, which is  
9 exactly the date that you have cited in your expert report for  
10 that advertisement, correct?

11 A. As I just said, I don't have the expert report in front  
12 of me, but I'm sure if that's what you say, that's correct.

13 Q. All right.

14 MR. MINTON: And let's put up the part of the  
15 advertisement that appears in that ad on that day in life  
16 magazine that you quoted in your report. Now the ad itself.

17 MR. BRODY: I'm sorry, if I could get a copy of the  
18 exhibit --

19 MR. MINTON: Right here.

20 THE WITNESS: Can I have a copy of that, too? Thank you.

21 BY MR. MINTON:

22 Q. All right, the ad in its specific context actually  
23 contains quite a bit more information than what you have quoted  
24 in your testimony, correct, Dr. Brandt?

25 A. Yes, I didn't quote the entire ad, that's correct.

1 Q. But someone reviewing your testimony wouldn't know that  
2 because you haven't given the reader the reference to the  
3 specific ad, have you?

4 A. Well, as I say, I certainly don't think there's any  
5 reason to believe I was trying not to give a specific reference  
6 to this. I prefer to have specific references in my testimony.

7 Q. All right. Let's look at some of the rest on the ad and  
8 see if it gives us any important clues to other important  
9 contributors in the information environment about filter tip  
10 technologies.

11 MR. MINTON: Jaime, if you could bring down the first part  
12 of the ad.

13 BY MR. MINTON:

14 Q. The top of the ad says, "The American Medical Association  
15 voluntarily conducted in their own laboratory a series of  
16 independent tests of filter and filter cigarettes." Do you see  
17 that?

18 A. Yes, I see that.

19 Q. You can't point us to anywhere in your direct testimony  
20 where you report the results of what, if anything, the American  
21 Medical Association said about the Kent filter, correct?

22 A. No, I didn't include that in my testimony.

23 Q. The American Medical Association is clearly an important  
24 contributor to the information environment about filter tip  
25 technology, isn't it, Dr. Brandt?

1 A. I just don't know. I don't think that the American  
2 Medical Association is a specifically, you know, elite  
3 institution for evaluating filter tip technologies.

4 Q. You don't know because you didn't investigate what, if  
5 anything, the American Medical Association had said about the  
6 Kent micronite filter, or about any other cigarette filter,  
7 correct?

8 A. I have not investigated the American Medical  
9 Association's evaluation of filters in the 1950s.

10 Q. Okay.

11 MR. MINTON: Jaime, if you could bring down some more of  
12 the ad, please.

13 BY MR. MINTON:

14 Q. Okay. The ad itself goes on to refer specifically to the  
15 American Medical Association testing, correct?

16 A. Yes.

17 Q. And the American Medical Association has a journal,  
18 doesn't it, it's called the Journal of the American Medical  
19 Association?

20 A. Yes, they do.

21 Q. Did you ever look in JAMA to see if they had reported the  
22 results of those tests there?

23 A. I didn't look in JAMA for that.

24 MR. MINTON: If you could bring up JDEM 200011 and, and  
25 this is a table from joint defendants' table 012590.

1           MR. BRODY: Do we have the entire document?

2           THE WITNESS: This is very hard to read.

3   BY MR. MINTON:

4   Q.     If you look, Dr. Brandt, do you see where it says "Brand

5   B 1 and B2"?

6   A.     Brand B1 and B2?

7   Q.     Yes in table 2.

8   A.     B1 and B2, yes I see that.

9   Q.     And over on the right side, the far column, it says

10   "Reduction of tars in main stream smoke as a percentage." Do

11   you see that?

12   A.     Yes, I do.

13   Q.     And B1 and B2 are the highest rated in those tests in

14   terms of tar reduction, are they not?

15           THE COURT: Which column is that? Is that the fifth

16   column.

17           MR. MINTON: It's the far right column, Your Honor. It

18   appears to be column 10.

19           THE COURT: Okay. Thank you.

20           THE WITNESS: Yes, I see it.

21   BY MR. MINTON:

22   Q.     And those two are the highest rated in that test in terms

23   of tar reduction, are they not?

24   A.     Yes.

25   Q.     And what was the magazine in the mid 1950s that had by

1 far the greatest general circulation in the United States of  
2 America?

3 A. Um, I don't know.

4 Q. Okay. It was Reader's Digest, Dr. Brandt, and you cited  
5 in your --

6 MR. BRODY: Objection, Your Honor. The witness said he  
7 didn't know.

8 THE COURT: The objection is sustained. No testimony from  
9 counsel, please.

10 MR. MINTON: All right.

11 BY MR. MINTON:

12 Q. You cite Reader's Digest in your own expert report, don't  
13 you?

14 A. Yes, that's correct.

15 Q. And they were obviously an important contributor to the  
16 information environment with respect to both the hazards of  
17 cigarettes and filter tip technology, were they not?

18 A. Yes, they had a number of articles which I cite in my  
19 testimony about tobacco and health.

20 Q. But you don't cite any in your testimony about filter tip  
21 innovations, or the results of filter tip testing, do you,  
22 Dr. Brandt?

23 A. No, I don't think I do.

24 Q. All right.

25 MR. MINTON: If we could bring up demonstrative number 3,

1 please.

2 BY MR. MINTON:

3 Q. This is JD 00074 an and it's Reader's Digest, 1957 and I  
4 would like you to turn to page 37. And do you recall Brand B1  
5 from the JAMA testing, Dr. Brandt?

6 A. Yes, I do.

7 Q. Reader's Digest confirms for us right here that cigarette  
8 B1 was Kent, correct?

9 A. I'm just finding my place. I'm sorry. Yes, I see that.

10 Q. And actually Reader's Digest tells a bit of the story of  
11 the filter innovation with respect to Kent in this article. If  
12 you look down at the next highlighted passage, they explain that  
13 there was a change to the Kent filter. In the way that the  
14 Reader's Digest puts it, they say that the filter tip was too  
15 good, don't they?

16 A. Yes, I see they say that.

17 Q. Okay. And further on down in the article, Reader's  
18 Digest then itself reports the AMA's test results for the  
19 reduction in tar for both the original Kent cigarette and the  
20 modified Kent cigarettes, and they report them as reductions of  
21 55 and 44 percent in tar reduction, correct?

22 A. Yes, I see that.

23 Q. So, at this point, not only has JAMA put those data out  
24 in the information environment with respect to filter tip  
25 innovation, but so too has Reader's Digest, correct?

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- 1 A. Yes, right.
- 2 Q. And you note in your testimony that Kent ads use the term
- 3 "protection", correct?
- 4 A. Yes, protection.
- 5 Q. All right. Let's look at how Reader's Digest interpreted
- 6 the term "protection".
- 7 If you look on page 34 --
- 8 A. 34?
- 9 Q. -- Reader's Digest says, "The test results raise some
- 10 important questions, how much, quote, health protection do
- 11 filter tips provide." And then they go on to say, "Specifically
- 12 how much less tar and nicotine does the smoker get"?
- 13 So at least in terms of how Reader's Digest is
- 14 characterizing filter tips and their effectiveness in reducing
- 15 tar, they specifically relate protection and health protection
- 16 to how much less tar the smoker is getting, correct?
- 17 A. Yes.
- 18 Q. That's not a manufacturer talking, that's Reader's Digest
- 19 talking, correct?
- 20 A. Yeah, it says this raises some important questions on how
- 21 much "health protection" do filter tips provide.
- 22 Q. And then they say specifically how much less tar than
- 23 nicotine does the smoker get good, correct?
- 24 A. Yes.
- 25 Q. And actually in the footnote they even expand further,

- 1 they quote Dr. Earnest Wynder, whose quote is "The greater the  
2 tar reduction in the smoke, the greater will be the reduction in  
3 the risk of lung cancer." Do you see that?
- 4 A. Yes, I see that.
- 5 Q. So that was what Reader's Digest was telling its  
6 readership with respect to health protection or protection in  
7 terms of tar reduction, correct?
- 8 A. Yes.
- 9 Q. Dr. Wynder testified before Congress in 1957 on that very  
10 same issue, did he not, Dr. Brandt?
- 11 A. Yes, he did.
- 12 Q. Okay. And neither that testimony, nor this Reader's  
13 Digest article, is mentioned in your testimony with respect to  
14 the information environment as it relates to filter tip  
15 technology, correct?
- 16 A. Yes, I didn't utilize those in my direct testimony.
- 17 Q. In getting back to this article on page 35, Reader's  
18 Digest reports their own independent test results, correct?
- 19 A. Yes.
- 20 Q. And this is in the article that equates protection with  
21 reduction in tar, correct?
- 22 A. Yes.
- 23 Q. And at the bottom you'll see Kent has a tar milligram  
24 rating of 25.6, correct?
- 25 A. Yes, I see that.

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1 Q. Again, the best of all the cigarettes tested, right --  
2 excuse me, the lowest in tar delivery of all the cigarettes  
3 tested?

4 A. Yes, according to these tests conducted by Reader's  
5 Digest, Kent was the lowest.

6 Q. All right. And going back for a moment to 1953, the AMA  
7 said in their 1953 article, that the 53 report was,  
8 "Contemplated to be the first of several planned reports on  
9 cigarettes, cigarette smoke and filters." Do you see that at  
10 the top?

11 A. Yes.

12 Q. Do you know how many of these tests the AMA released?

13 A. I don't know.

14 Q. All right. You don't cite any -- this test or any  
15 follow-up tests by the AMA in your testimony, correct?

16 A. No, I don't cite the AMA tests in my testimony.

17 Q. And so if there were any further tests, you don't know  
18 what the results of those tests were, correct?

19 A. I do not know.

20 Q. All right.

21 MR. MINTON: Let's bring up demonstrative 11 which is JD  
22 025003.

23 BY MR. MINTON:

24 Q. Okay, here we have another issue of the American Medical  
25 Association, April 9th, 1955. Do you see that?

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- 1 A. Yes.
- 2 Q. It says it's the fourth report -- on page 1309 it goes on  
3 to describe that it's the fourth report on cigarette smoke and  
4 filters by the AMA?
- 5 A. Yes.
- 6 Q. All right. And again, they examined a number of brands  
7 in connection with this test and analysis, correct?
- 8 A. Yes. Of course, from these analyses, which is part of  
9 the information environment, you wouldn't know which brands were  
10 which, do you? Is there a code for identifying which brand is  
11 which?
- 12 Q. Well if you go to the third full paragraph down --
- 13 A. Yes.
- 14 Q. -- in the 1955 article, it says: "Letters assigned to  
15 the brands have been retained as the first letter of the same  
16 brands in this report."
- 17 A. Yes.
- 18 Q. Okay. Which would mean Brand B is Kent, correct?
- 19 A. Well, I guess that a reader would have to figure that  
20 out.
- 21 Q. Well, Reader's Digest told us that Brand B was Kent,  
22 correct?
- 23 A. So in other words, to really map this with the Reader's  
24 Digest, you would need to have had the code broken by Reader's  
25 Digest to understand the JAMA evaluation.

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1 Q. At least in terms of the three articles that we're  
2 discussing here, that's a fair point. Let's look at the table 2  
3 results in 1955.

4 And again, Brand B, which has been highlighted on the  
5 screen, shows the greatest overall reduction in tars for main  
6 stream smoke, correct?

7 A. It's very hard for me to read, but I assume that you  
8 must --

9 Q. Well, it's --

10 A. -- be correct about it. I mean, I have a very -- it's  
11 hard to read on that.

12 Q. It is a little blurry?

13 A. But if you say so.

14 Q. It's 41 percent, and the way you can check that, and we  
15 can do the math if you would like, but you can divide the two  
16 numbers that appear in columns 8 and 9 to derive column 10?

17 MR. BRODY: Your Honor.

18 THE WITNESS: I'm relying on you and I believe that what  
19 you are telling me is true.

20 MR. BRODY: I mean I'm going to raise an objection here  
21 under Rule 403. I don't know what this is going to. We're happy  
22 to stipulate that the article says what it says.

23 THE COURT: And that gets us pretty far, I think.

24 MR. BRODY: Yes.

25 THE COURT: What more do you need to bring out?

1           MR. MINTON: I can go on to the next article, Your Honor.

2     Thank you.

3     BY MR. MINTON:

4     Q.       Were you aware, Dr. Brandt, that Reader's Digest  
5     conducted more tests of filter tips in August of 1957?

6     A.       Yes, I know that they were evaluating filter tips.

7           MR. MINTON: And if we could go to pages 45 and 46, and  
8     this is JD 000826.

9           MR. BRODY: Your Honor, on a broader level, I think we're  
10    going to a degree outside the scope here. I don't think that  
11    Dr. Brandt has expressed any opinions about whether certain  
12    brands of cigarettes had filters that tested more effectively  
13    than others or not. And quite frankly, you know, I would like to  
14    have time for everyone to take a short afternoon break and then  
15    for us to complete the redirect and let this witness get off the  
16    stand.

17           THE COURT: Are you almost done?

18           MR. MINTON: Yes.

19           THE COURT: I'm going to sustain the objection to this  
20    question. Why don't you move on. Do you think you can be done  
21    in about 5 minutes.

22           MR. MINTON: I can, Your Honor.

23           THE COURT: All right.

24     BY MR. MINTON:

25     Q.       You agree, Dr. Brandt, don't you, that there was intense

1 competition for technical innovation in connection with filter  
2 tip technology in the '50s and '60s, don't you?

3 A. Yes, I believe there was competition.

4 Q. And you agree that there was an abundant source of  
5 information that was provided to consumers about filter tip  
6 technology that came not from the manufacturers, but from  
7 magazines like Reader's Digest and Consumer Report, correct?

8 A. I don't think I would characterize it as "abundant".  
9 These were some of the studies that were available, probably  
10 some conducted in one way and others conducted in another, so  
11 that there was an abundance of information about the  
12 effectiveness of filters in the '50s is questionable.

13 Q. And you don't report your results of any attempt to make  
14 that determination in your expert testimony, correct?

15 A. Yes, I think we're beyond the scope of my expert  
16 testimony.

17 Q. And you provide no data in your testimony which tends to  
18 make any perceptions consumers may have had about filter  
19 cigarettes to any particular source of information, correct?

20 A. I'm sorry, I lost you in the middle of that question.

21 Q. You don't provide any data in your testimony in which you  
22 attempt to link any perceptions consumers may have had about  
23 filter tip cigarettes to any particular source of information,  
24 do you?

25 A. No, I don't.

1 Q. Thank you.

2 MR. MINTON: That's all I have, Your Honor.

3 THE COURT: All right. We better take a break now, but  
4 let me find out how many more on the defense side are going to be  
5 doing any questioning.

6 MR. MARKS: No questions from anybody, Your Honor.

7 THE COURT: Wise decision. Now Mr. Brody, what do you  
8 anticipate on redirect?

9 MR. BRODY: I hope, Your Honor, that we can move through  
10 it quickly and that we can get through it in 40 minutes or so.  
11 Obviously, it depends on the answers the witnesses gives, the  
12 number of objections, but I'm hopeful that we can keep it focused  
13 and get through it in about 40 minutes.

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

15 (Thereupon, a break was had from 3:28 p.m. to 3:47  
16 p.m.)

17 THE COURT: All right, Mr. Brody, redirect. And you are  
18 going to keep everybody awake and alert, right.

19 MR. BRODY: I'm going to do my best. And I'm going to do  
20 my best to keep it at about 40 minutes, if I can.

21 REDIRECT EXAMINATION OF ALLAN BRANDT, Ph.D.

22 BY MR. BRODY:

23 Q. Dr. Brandt, I want to start with something that  
24 Mr. Bernick touched on this morning. He asked you about a 1954  
25 Gallup Poll that asked whether persons were aware of smoking's



1 harms. And I believe you indicated that there were other  
2 questions and other aspects to that survey.

3 Can you tell us about the other aspects and questions of  
4 that 1954 Gallup Survey.

5 A. Yes. And I don't have it right in front of me, but the  
6 way I understand that Gallup asked these questions through the  
7 1950s and perhaps somewhat forward from that was they would ask:  
8 Is there a general awareness of the idea of this smoking and  
9 health controversy?

10 Very high numbers identified an awareness of it, but then  
11 when you asked people: Do you believe that smoking causes lung  
12 cancer, less. And then they would also ask other questions: Do  
13 you believe that it's one of the causes of lung cancer or among  
14 many causes or some people have a higher tendency towards lung  
15 cancer?

16 So Gallup asked a lot of -- they asked a lot of  
17 questions. And actually, the Gallup organization doesn't like  
18 that 90 percent figure being used without the additional  
19 information.

20 Q. Thank you. I want to go back to one of the other issues  
21 Mr. Bernick touched upon today and that's the issue of research  
22 conducted by Microbiological Associates.

23 Do you know whether the -- whether anyone at any of CTR's  
24 member companies expressed concern about the direction of that  
25 research?

1 A. I'm just not sure whether they -- how they expressed  
2 concern about it.

3 Q. Do you know whether the Microbiological Associates'  
4 research was completed?

5 A. I don't know.

6 Q. Dr. Brandt, when Mr. Wells was questioning you, he asked  
7 you questions about Racketeering Acts. Do you know what a  
8 Racketeering Act is?

9 A. Roughly, I do know that Congress has passed Racketeering  
10 Acts against fraud and so on.

11 MR. BRODY: Could we pull up the Frank statement.

12 BY MR. BRODY:

13 Q. Now, Dr. Brandt, did you rely on the Frank statement in  
14 your written direct testimony?

15 A. I did rely on it.

16 Q. And in addition to the documents that you specifically  
17 discussed in your written direct testimony, as well as the  
18 documents that I think Mr. Minton brought out, there are some  
19 documents that are cited in your expert report.

20 Are there additional -- did you review as part of your  
21 work in this case additional documents that were identified and  
22 provided to counsel for defendants?

23 A. Yes, I did.

24 Q. Okay.

25 MR. BERNICK: Does it have a date?

1           MR. BRODY: I believe there is a date grafted on the side.  
2 It says "Reprinted from the Washington Post" and other  
3 newspapers, "Tuesday, December 1, 1970."

4           MR. BERNICK: Okay.

5 BY MR. BRODY:

6 Q.       Dr. Brandt, I've handed you what's been marked as United  
7 States Exhibit 63572. Have you seen this document before?

8 A.       Yes, I have.

9 Q.       Did you consider this document in forming the opinions  
10 expressed in your expert report as it was filed in this case?

11 A.       Yes, I did.

12 Q.       And does this document also support the opinions in  
13 your -- in your opinion, does this document support the  
14 conclusions that are expressed in your written direct testimony?

15 A.       Yes, it does. This document is consistent with one of  
16 the opinions in my testimony that suggests that the Tobacco  
17 Institute was very committed to this idea of keeping the smoking  
18 and health question open and maintaining it as question long  
19 after, in my assessment, the issues relating smoking to health  
20 had been scientifically resolved.

21 Q.       Thank you.

22           MR. BERNICK: Your Honor, I'm sorry. I don't object to  
23 the question and the answer, but I guess I'm wondering is:  
24 What's the use of the document? I don't believe the document was  
25 part of the direct testimony and if it's not, then it's beyond

1 the scope of --

2 THE COURT: Are you moving it in?

3 MR. BRODY: I'm not moving it in at this point in time,

4 Your Honor. I'm happy to proffer it if there's no objection.

5 THE COURT: Oh, I think there will be an objection.

6 MR. BRODY: And quite frankly, Your Honor, I don't know --

7 I mean, certainly I would not ascribe to the position that it is

8 somehow improper to show a witness a document on redirect that

9 has not necessarily been used in the direct examination.

10 THE COURT: I don't think that was the objection.

11 Mr. Bernick wanted to know what you were going to do with it.

12 And you're not moving it in at this time, so why don't we just

13 move ahead then.

14 MR. BRODY: Fair enough. If I may approach the witness.

15 THE COURT: Yes.

16 BY MR. BRODY:

17 Q. Dr. Brandt, I've handed you a document marked as U.S.

18 Exhibit 63571. And let me ask you: Have you seen this document

19 before?

20 A. I believe I have.

21 Q. And in fact, is this one of the documents that you

22 reviewed and considered in forming your -- the opinions that

23 you've expressed in this case?

24 A. Yes, I did.

25 Q. Dr. Brandt, I believe -- what I want to do next is go

1 to --

2 Let me ask you this question: Do you believe that this  
3 document supports the opinions that you have expressed in this  
4 case?

5 A. Yes, I do, because this was an interview with Joseph  
6 Cullman, the chairman of the board of Philip Morris, continuing  
7 to express this idea of open question controversy about the  
8 scientific findings.

9 Q. Thank you. Dr. Brandt, if you could look at the -- what  
10 I've placed on the screen here is a copy of the appendix to the  
11 United States complaint in this case. And if you could look at  
12 what's listed there as "Racketeering Act Number 1," is what's  
13 described there, the Frank Statement to Cigarette Smokers, a  
14 document that you relied on in forming your opinions in this  
15 case?

16 A. Yes, I relied on it.

17 Q. And, Dr. Brandt, if you'll look at what's on the screen,  
18 which is also part of the appendix to the United States'  
19 complaint, what's there is Racketeering Act Number 23 -- is the  
20 description there. Does that describe a document that you've  
21 relied on in support of your opinions in this case?

22 A. Yes.

23 Q. And is the description of that document consistent with  
24 the document exhibit that I handed you -- the question about  
25 cigarette smoking is still a question?

1 A. Yes, it is.

2 Q. And, Dr. Brandt, if you'll take a look at what's another  
3 page of the appendix to the United States' complaint there,  
4 where it says "Racketeering Act Number 105," is that a document  
5 that you considered in the process of forming your opinions in  
6 this case?

7 A. Yes, it was.

8 Q. And in fact, is that Racketeering Act describing one of  
9 the documents that we have looked at here this afternoon?

10 A. Yes.

11 Q. Dr. Brandt, yesterday Mr. Bernick drew the diagram that's  
12 on the board there. First of all, for clarification's sake,  
13 what is -- do you recall what's circled there and what is  
14 described there as a Study Group? Do you know what comprised  
15 that Study Group or what Mr. Bernick wrote as a Study Group?

16 A. Yes. That was a group put together by -- with  
17 representatives from the National Cancer Institute, the American  
18 Cancer Society, I believe the American Heart Association and  
19 other respected groups; a group of scientists who at that time  
20 comprehensively assessed the emerging scientific information  
21 about smoking and health.

22 Q. And, Dr. Brandt, of the various studies, names of  
23 researchers, various things on the chart there, which of those,  
24 if you know, were consensus statements?

25 MR. BERNICK: I object, Your Honor. All the questions

1     that he's asked so far about that chart are simply direct  
2     reiterations of precisely what is in the direct testimony. And  
3     the last question that he asked -- that is, what's a consensus  
4     statement and what's not -- again is right out of the direct  
5     testimony, so I think that this is simply replotting old ground.

6             THE COURT: He's allowed to follow up on the chart that  
7     you created during your cross.

8             Objection's overruled. You may answer, Doctor.

9             THE WITNESS: A number of these were groups that were put  
10    together to evaluate, in the face of dissension and debate, what  
11    was the evidence, how would you evaluate it, what perspective  
12    would you bring to it?

13            So the so-called Study Group there -- Burney's paper was  
14    supplied as a consensus statement. Certainly the WHO, the Royal  
15    College of Physicians and ultimately, the Surgeon General's  
16    Report.

17            So there were quite a few efforts during this period to  
18    ask for comprehensive independent evaluations of the emerging  
19    science and reach a determination. And I think that was  
20    principally because this was such a momentous public health issue  
21    for Americans.

22    BY MR. BRODY:

23    Q.     Did any of the statements below the line -- I better walk  
24    over so this is clear and let you know what I'm referring to --

25    A.     Yes. Those are --

1 Q. Actually, let me finish the question.

2 Did any of the statements below that line purport to be  
3 consensus statements, like the Study Group of the American  
4 Cancer Society, the American Heart Association, the National  
5 Cancer Institute and the National Heart Institute?

6 A. I'm just looking --

7 MR. BERNICK: Excuse me. I object to the form of that  
8 question. If he's asking about the particular studies that are  
9 referenced there, that's fine. But for example, there was no  
10 consensus statement from the National Cancer Institute. That was  
11 the whole problem that surfaced below the line.

12 Excuse me, counsel. I don't think that that's proper.

13 MR. BRODY: I was going respond to your objection if  
14 you're through. But if you're not, I'll wait. That's fine.

15 MR. BERNICK: So if you clarify and say that he focus in  
16 particular on the individuals who were part of those different,  
17 as he says, consensus reports, I do not have a problem. But that  
18 was not the form of the question that he asked.

19 MR. BRODY: Your Honor, I thought the question was clear,  
20 but I'm happy to rephrase it if it will satisfy Mr. Bernick and  
21 we can move on.

22 THE COURT: Okay.

23 BY MR. BRODY:

24 Q. Dr. Brandt, were any of the statements -- did any of the  
25 statements made by the persons who Mr. Bernick listed below that



1 line -- did any of those statements purport to be consensus  
2 statements?

3 A. I'm just looking to be careful. I don't believe so.  
4 Generally, the people below the line, starting with Hueper,  
5 Rosenblatt, Robbins and Robins -- and each one is different, but  
6 they're expressing individual skepticism about the character of  
7 the findings and they weren't participating in a comprehensive  
8 assessment of the available evidence in the way that the  
9 consensus statements were.

10 Q. Dr. Brandt, do you believe that the existence of  
11 individual skepticism is inconsistent with your opinions about  
12 the formation of scientific consensus concerning smoking as a  
13 cause of lung cancer?

14 A. No, I don't. I would anticipate in the development of  
15 new scientific and medical knowledge for there to be skeptics,  
16 sometimes important skeptics. So I don't see that as in any way  
17 limiting the notion that consensus can be achieved in the face  
18 of skeptics, some of whom are articulate and express important  
19 opinions.

20 Q. As a medical historian, is it possible for you, just to  
21 orient this in a broader context: The history, if possible --  
22 is it possible for you to give an example of such a skeptic  
23 outside the context of smoking and lung cancer?

24 A. Yes.

25 MR. BERNICK: Your Honor, again, at this point, I didn't

1 ask any questions about anything but smoking and health.

2 MR. BRODY: Your Honor, I'm just trying to be sure that  
3 the testimony is illustrative of the historical support for  
4 Dr. Brandt's position.

5 THE COURT: Objection's overruled. Go ahead.

6 THE WITNESS: Yes. I think there are some historical  
7 examples. The one that comes to mind first would be that, for  
8 example, in the early years of the HIV epidemic, there were a  
9 number of people who were skeptical about the idea that the human  
10 immunodeficiency virus was the cause of HIV.

11 And in fact, getting back to things that we discussed in  
12 the live direct yesterday, it was difficult in the first decade  
13 of the HIV epidemic, to demonstrate Koch's postulates. But in  
14 spite of that skepticism and in spite of the inability to produce  
15 the postulates, there was considerable and vigorous consensus  
16 that in fact AIDS was caused by a virus, the virus was  
17 potentially contaminating the blood supply. And one would take  
18 public health action in the face of both that consensus and  
19 knowledge to try to reduce those harms.

20 BY MR. BRODY:

21 Q. Moving to a slightly different topic, yesterday,  
22 Dr. Brandt, do you recall testifying that you used the term  
23 "categorical" in your written testimony, and specifically  
24 referring to a categorical understanding of the link between  
25 smoking and lung cancer as of 1953, as a descriptive term of the

1 fundamental character of understanding causality?

2 A. Yes, that's how I used it.

3 Q. Do you also recall viewing a statement that was marked as  
4 Joint Defense Exhibit 662 of Ernst Wynder in the April 1954  
5 Connecticut State Medical Journal?

6 A. Yes, I remember getting that.

7 Q. I want to bring up on the screen the last page, a passage  
8 from the last page of Dr. Wynder's statement.

9 And do you see there that Dr. Wynder wrote: "While  
10 realizing the importance of other factors in the development of  
11 lung cancer, we must also admit that we do not comprehend many  
12 of those factors. Therefore, it seems, we must concentrate on  
13 those factors that we understand today. The tobacco factor is  
14 such a factor."

15 Do you see that?

16 A. Yes.

17 Q. Do you believe that Wynder's statement, as contained in  
18 the defendants' exhibit, is consistent with your description of  
19 a categorical understanding of the link between smoking and lung  
20 cancer?

21 MR. BERNICK: Objection. This is obviously a leading  
22 question, Your Honor.

23 MR. BRODY: I don't think a question of whether a  
24 statement is consistent with his opinions is necessarily leading.

25 MR. BERNICK: Very old --

1 THE COURT: You can certainly --

2 MR. BRODY: Okay. I'll remove the "necessarily" from that  
3 characterization.

4 I, quite frankly, do not think that asking Dr. Brandt if a  
5 certain statement in a document that was showed to him by counsel  
6 for defendants to try to suggest that there was no support for  
7 his opinion in order to draw that out and ask him, is it  
8 consistent, is entirely appropriate.

9 THE COURT: All right. Go ahead.

10 THE WITNESS: Yes. I think this point is consistent with  
11 my opinions, which said that the researchers believed there was a  
12 categorical link.

13 BY MR. BRODY:

14 Q. Dr. Brandt, I want to ask you if you recall a discussion  
15 of the document marked and introduced by counsel for the  
16 defendants yesterday as 88364, if we could bring that up.

17 If I have an extra copy to hand you, it's probably in the  
18 stack there.

19 A. Yes, I remember seeing this document yesterday. It may  
20 also be cited in my direct testimony.

21 Q. And do you see there -- we're on page 3 of the  
22 document -- that under the heading "Selection of" -- if we can  
23 go back to that -- "Selection of Scientific Advisors," it  
24 indicates: "On a number of occasions from the start of the  
25 Tobacco Industry Research Committee early in the year, when his

1 name was put forward by Mr. Hill, Dr. Clarence Cook Little was  
2 proposed to the committee as excellent possibility for  
3 scientific director."

4 Stopping right there, who is Mr. Hill?

5 A. Mr. Hill was John Hill, who was the President of Hill &  
6 Knowlton.

7 Q. And then continuing on: "When Dr. Little accepted a  
8 place of the advisory board, these recommendation were renewed  
9 to O. Parker McComas, who had become Chairman of the TIRC,  
10 Tobacco Industry Research Committee, and various members of the  
11 board."

12 Do you know who O. Parker McComas was?

13 A. Yes. He was the President of Philip Morris.

14 Q. Dr. Brandt, do you believe that the decision to hire CC  
15 Little as scientific director of TIRC is at all inconsistent  
16 with your conclusions about the public relations focus of the  
17 TIRC?

18 A. No, I do not believe it's inconsistent.

19 Q. Can you explain the basis for your answer.

20 A. Yes.

21 MR. BERNICK: I'm sorry. If that is going to be  
22 displayed, for the sake of it being a presentation of a full  
23 paragraph, could we include the last two sentences that are  
24 omitted there?

25 MR. BRODY: Your Honor, I believe the entire exhibit is in

1 evidence. It was offered by defendants with no objection from  
2 the United States. And so we are just looking at a particular  
3 part of the document. The fact that Mr. Bernick may not have  
4 focused on it -- I think at this point in time we should just  
5 move on.

6 THE COURT: You may question on what you want to focus on  
7 at this point.

8 MR. BRODY: Thank you.

9 BY MR. BRODY:

10 Q. Dr. Brandt, I'll -- I guess the last question was: Can  
11 you explain the basis for your belief?

12 A. Yes. I think Hill was consistent with the public  
13 relations approach because --

14 Q. I'm sorry.

15 A. Not Hill. I'm sorry. Little.

16 Because he was so clearly an individual who would be  
17 highly skeptical of any evidence coming from any of the domains  
18 of investigation that I mentioned in my live direct testimony  
19 except for the laboratory.

20 And so it became a very constricted view of exploring the  
21 question and causality, but it was also a view of saying we're  
22 doing science and this is valuable from a public relations point  
23 of view to the industry.

24 Q. Dr. Brandt, you also, and I'm skipping around a little  
25 bit here, indicated today in response to questioning from

1 Mr. Wells that you felt that George Weissman, in the document  
2 marked as Exhibit 20189, was using the words "psychological  
3 crutch" on the first page of that document in a different way  
4 than the Surgeon General used "psychological crutch" in the 1964  
5 Surgeon General's Report.

6 Can you explain what you mean by that statement.

7 A. Yes. Because the Surgeon General, when he and his  
8 Advisory Committee used the term "psychological crutch," were  
9 saying that for some smokers, cigarette smoking is a  
10 psychological crutch; it may have certain psychological  
11 advantages for them.

12 But when I read Weissman's memo and it said: "We are  
13 going to need to provide smokers with a psychological crutch,"  
14 it's not saying we need to give them cigarettes; it's saying  
15 we're going to need to find a way of reassuring them in the face  
16 of the definitive report that the Surgeon General has produced.

17 Q. Dr. Brandt, in your opinion, did the tobacco industry act  
18 consistently with Weissman's -- with what you've described as  
19 your interpretation of Weissman's "psychological crutch" comment  
20 after publication of the '64 report?

21 MR. BERNICK: Again, I hate to interrupt. These are  
22 really leading questions under the circumstances.

23 THE COURT: Not this one. Certainly the witness can  
24 choose his answer.

25 THE WITNESS: Yes. I think that the industry worked to do

1    what Weissman was suggesting, really in two ways. The first was  
2    by maintaining the position that they had taken since the Frank  
3    statement about open question and controversy. And even though  
4    there is some documentation to say there was a debate within the  
5    industry about what to do at that time, the consistency of the  
6    perspective of open question was an important psychological  
7    crutch to smokers.

8           And then the other thing was the promise of modification  
9    of the product. And these two things, I think, formed an  
10   important psychological crutch to those who already were smoking  
11   or those who might become smokers.

12   BY MR. BRODY:

13   Q.     Dr. Brandt, I'd like to conclude just by going through a  
14   series of questions and asking you about some of the facts that  
15   were elicited during your cross-examination. And then I'll -- I  
16   may have a follow-up question about them.

17           Dr. Brandt, do you believe that the fact that the TIRC  
18   funded independent scientists is inconsistent with your opinion  
19   that the scientific program of TIRC was subservient to the goals  
20   of public relations?

21   A.     No, I don't think it's inconsistent. In fact, the idea  
22   of funding some research that was in some instances of a high  
23   quality was a crucial element of the public relations program in  
24   which the industry needed to indicate to the American public:  
25   We're doing research.



1 Q. Dr. Brandt, do you believe that the fact that some of the  
2 SAB members were distinguished scientists is inconsistent with  
3 your opinion that the TIRC exploited scientific research for  
4 public relations?

5 A. No, I don't think it's inconsistent. There were, you  
6 know, eminent and distinguished scientists who became part of  
7 the process, sometimes expressing concerns about it, but who  
8 participated in the SAB segment of the much larger TIRC-CTR  
9 activity.

10 Q. Mr. Bernick started to ask you a question about -- in  
11 fact, I think he indicated that you -- he -- in the course of  
12 his cross-examination, that the composition of the Scientific  
13 Advisory Board had been established through the process of  
14 elimination. At the time you disagreed with him.

15 Can you explain the basis for your disagreement.

16 A. Yes.

17 MR. BERNICK: I'm sorry. I didn't even hear that. Could  
18 I have the question reread.

19 (Court reporter read back last question.)

20 THE WITNESS: Yes, I can.

21 MR. BERNICK: I don't understand the question.

22 BY MR. BRODY:

23 Q. Please do so.

24 MR. BERNICK: But that's okay.

25 BY MR. BRODY:

1 Q. Please explain.

2 A. Well, my memory of yesterday's cross-examination was that  
3 Mr. Bernick emphasized the independence of the SAB as an  
4 independent evaluative research program sponsored by TIRC. But  
5 my notion is that the members of the SAB were chosen in part  
6 because they would have a potentially skeptical view, so the SAB  
7 never represented the kinds of consensus positions where you try  
8 to get a group of independent, uncommitted scientists together,  
9 but rather people who were chosen on the grounds of having  
10 already identified skepticism in one way or another.

11 Q. Dr. Brandt, do you believe that the fact that the TIRC  
12 and CTR, through the SAB, funded many accomplished scientists,  
13 including Nobel laureates, is at all inconsistent with your  
14 opinion that the industry's commitment to research was dominated  
15 by public relations considerations?

16 A. No. In fact, I think the idea that they had Nobel  
17 laureates who had grants and other distinguished scientists was  
18 actually part of the public relations orientation and,  
19 obviously, it's striking. These people weren't working  
20 explicitly on smoking and health issues, as I explained  
21 yesterday. But encompassing them within the TIRC-CTR added  
22 public relations value to their program.

23 Q. Somewhat similarly, Dr. Brandt, do you believe that the  
24 fact that some of the TIRC and CTR-funded research was published  
25 in peer review journals is inconsistent with your opinion that

1 the tobacco industry's commitment to research was dominated by  
2 public relations considerations?

3 A. No, it's not inconsistent with my opinion.

4 Q. Can you explain the basis for your answer.

5 A. For similar reason. If the TIRC was to survive and  
6 develop public relations influence, it had to have investigators  
7 doing peer reviewed published research.

8 Q. Do you believe that the fact that the TIRC funded  
9 thousands of grants is at all inconsistent with your opinion  
10 that the industry worked through TIRC to distort and discredit  
11 medical and scientific findings?

12 A. No, it's not inconsistent with my view.

13 Q. Can you explain the basis for your answer.

14 A. Well, there were two things -- maybe more than two things  
15 going on simultaneously at TIRC-CTR. One was a sponsorship of  
16 research that was often marginal to any fundamental questions of  
17 the impact of smoking and health. And at the same time, there  
18 was a public relations engine, largely dominated by Hill &  
19 Knowlton, in which Little participated vigorously to denigrate  
20 and question and attack emerging new science in this area. And  
21 the TIRC-CTR program accomplished both of those simultaneously.

22 Q. Dr. Brandt, yesterday you testified on cross-examination  
23 that you would describe the tobacco industry as "deviant and a  
24 rogue industry." Why do you describe the tobacco industry that  
25 way?

1 A. I describe them that way, and I realize those are strong  
2 terms, because I think when an industry comes to have a product  
3 that is identified as a major cause of human health -- human  
4 disease and sickness, and yet takes the position to denigrate  
5 and try to attack that evidence without really taking it  
6 seriously in terms of their commitment to the public, then I  
7 don't think that that industry's acting the way I anticipate  
8 most businesses operate.

9 So that, I think, makes the industry deviant and/or rogue  
10 and, in other words, outside the boundary of what my expectation  
11 would be about an industry whose product -- principal product is  
12 implicated with such serious disease.

13 MR. BRODY: Thank you, Dr. Brandt.

14 Your Honor, we would like to move the admission of the  
15 documents that were contained in the Notice of Exhibits submitted  
16 or referred to in the testimony of Dr. Brandt at this time.

17 THE COURT: Well, let me raise a question.

18 MR. BRODY: Certainly.

19 THE COURT: Is it correct that 197 of your exhibits were  
20 not disclosed in the expert report that the doctor submitted for  
21 his reliance materials.

22 MR. BRODY: I don't think that's correct and I don't think  
23 the number is 197. I will tell you that there are two places in  
24 the expert testimony where we -- in the testimony where we chose  
25 to show documents to Dr. Brandt. He merely identified those

1 documents, in one case being related to the Tobacco and Health  
2 Newsletter, and he had cited a couple of Tobacco and Health  
3 Newsletters in his expert report, as well as provided them with  
4 the reliance materials.

5 And the other section, we showed him a number of documents  
6 from the Hill collection merely for identification purposes.  
7 Those are not documents that we even contend were specifically  
8 relied on by Dr. Brandt. They were merely shown for  
9 identification.

10 And I think that the other Hill documents, a number of  
11 which were identified, discussed specifically in the expert  
12 report, discussed -- provided in the additional materials that  
13 were provided with Dr. Brandt's expert report at the time that it  
14 was filed on May 10th, 2002 -- that those documents -- his  
15 testimony about those documents as well as the defendants' use of  
16 a number of those documents in cross-examination here clearly  
17 establishes that the documents are very relevant to the  
18 opinions -- the area that we have discussed, an area that, as you  
19 know from the amount of time that defendants have taken to  
20 cross-examine Dr. Brandt, due to the number of issues that you  
21 saw both in the -- both sides' opening statements that are  
22 encompassed in the report -- that those documents -- that Hill &  
23 Knowlton's role in the formation of TIRC and in the development  
24 of tobacco industry strategies in the 1950s and '60s, as well as  
25 the importance of the Tobacco and Health Newsletter, is, as part

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1 of the implementation of a public relations campaign -- those  
2 documents are clearly relevant to the issues in this case.

3 The documents are not only relevant, I think every single  
4 one of them is over 20 years old. We've submitted a certificate  
5 of authenticity for the Hill documents from the archivist.

6 THE COURT: Are you moving the Hill documents into  
7 evidence?

8 MR. BRODY: Yes, we are, Your Honor.

9 THE COURT: All right. That's what I want to be clear on.

10 MR. BRODY: And quite frankly, given the relevance of the  
11 documents, the fact that the documents are not hearsay, the fact  
12 that the documents are authentic -- we would not even have had to  
13 ask Dr. Brandt the question, you know: Do you recognize these  
14 documents?

15 So those two sets of documents, the ones where quite  
16 frankly we, the United States, in asking the questions, chose to  
17 put those before him merely for identification -- not for  
18 specific reliance, but merely for identification -- were not  
19 cited in the expert report.

20 But there is -- I mean they -- quite frankly, we didn't  
21 even have to ask him about them. I think, based on the testimony  
22 we have heard, the testimony that has come in from Dr. Brandt, as  
23 well as the cross-examination and the focus of that  
24 cross-examination on a number of these documents -- that the  
25 documents are extremely relevant and should be considered by the

1 Court.

2 MR. BERNICK: Your Honor, if I could just very briefly, to  
3 make clear what our objection is.

4 We're not arguing relevance, although there may be some  
5 relevance arguments.

6 THE COURT: You're talking about the Hill & Knowlton  
7 documents?

8 MR. BERNICK: The Hill & Knowlton document and the other  
9 objections that we made to the documents that were not listed in  
10 the expert report.

11 Some of them may be relevant. Some of them may come into  
12 evidence through another witness. In light of the fact that Your  
13 Honor had taken all of the objections under advisement, of  
14 course, I inquired into some of those documents because I had my  
15 one and only opportunity for cross-examination.

16 The problem is not an issue of relevance and it's not all  
17 the things that Mr. Brody has now recited to you. It's the  
18 answer to your first question, which is: Were they listed in the  
19 expert report?

20 We had a very extensive process for listing everything as  
21 reliance materials in this case and the importance of that was to  
22 give us the fair opportunity to conduct discovery with respect to  
23 the witness. We took the reliance lists at face value; we  
24 conducted depositions with respect to the reliance lists and we  
25 prepared for trial on the basis of those reliance lists.

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1           If at the time of trial they now have the latitude to go  
2 beyond what was disclosed in their expert reports and tender them  
3 as part of the direct testimony, effectively, we've been led down  
4 the garden path in discovery and we have not had fair discovery.

5           It's not a question of whether he covered the subject;  
6 it's not a question of whether it might be relevant. It's a  
7 question of whether they complied with Your Honor's instructions.  
8 And this is significant not only for that, but as we go forward  
9 in this case.

10          As Your Honor can see, this case is swamped with  
11 documents. And the more that happens that lets out the string of  
12 what can be put into evidence through a witness, the more serious  
13 this problem is going to become. We should have witness who  
14 testify to what's in their expert report so everybody has a fair  
15 shot and we can work with the documents.

16          And we didn't hear a direct answer to the question of  
17 whether all the documents that were part of this notice in fact  
18 were in the expert report because they were not.

19          THE COURT: Mr. Brody.

20          MR. BRODY: Your Honor, with all due respect to  
21 Mr. Bernick, I think I did provide a clear answer to your  
22 statement. I specifically -- to your question, I specifically  
23 said not every document that is listed. And I drew your  
24 attention to those two, in essence, places where we chose to show  
25 a group of documents to Dr. Brandt for identification purposes.

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1 Those were not cited in the expert report or provided with the  
2 additional materials.

3 THE COURT: You aren't showing them just for  
4 identification. You're moving -- that's why I asked you, just to  
5 be clear, whether you are also moving them into evidence.

6 MR. BRODY: We're moving them into evidence because  
7 Dr. Brandt's testimony clearly establishes the relevance of the  
8 documents. Dr. Brandt discussed a number of Hill & Knowlton  
9 documents in his expert report from the Hill collection. A  
10 number of them, and additional ones, were introduced --  
11 identified as exhibits during his deposition by defendants. And  
12 that's really the point.

13 THE COURT: During the deposition or during  
14 cross-examination?

15 MR. BRODY: During the deposition and in  
16 cross-examination. And so what I'm saying here is as to those --  
17 now, first of all, it's not 197. As you know from the papers  
18 that were submitted on the objections, there was one document  
19 that was cited -- objected to as being previously undisclosed  
20 that is even block quoted in Dr. Brown's expert report. There  
21 are additional examples.

22 The argument we're making here is not that we're putting  
23 forth these documents -- these additional document as reliance  
24 materials. And again, we're talking about documents that are  
25 cited in two questions in the expert statement.

1           But we're -- what we're saying is Dr. Brandt's  
2     testimony -- and he didn't rely in -- on his testimony on those  
3     additional documents; he wasn't saying that, you know -- and in  
4     fact, I think the answers to the questions merely say these are  
5     tobacco and health documents; these are Hill & Knowlton papers.

6           But what the testimony establishes is the critical role  
7     that Hill & Knowlton played in the development of these  
8     strategies. And so documents from the Hill collection detailing  
9     the efforts of the industry, I mean, that can be identified,  
10    based on their place at the archives and work that has been done  
11    with them, are extremely relevant to the issues in this case.

12           THE COURT: Relevancy is not the issue, though. You were  
13    required to disclose them early on.

14           MR. BRODY: Well, I think relevancy is the issue because,  
15    quite frankly, our position is that Dr. Brandt's testimony -- if  
16    you take out those two questions, let's say, that -- where -- the  
17    one question which lists various Hill & Knowlton documents -- "Do  
18    you recognize these?" "Yeah, I recognize them; they're Hill &  
19    Knowlton documents?" "And do you recognize these?" "Yeah, these  
20    are Tobacco and Health Newsletter documents."

21           Take out those questions -- take out those questions and  
22    the Tobacco and Health Newsletter documents that are specifically  
23    relied on in the expert report that were provided to defendants  
24    that were specifically discussed in the testimony -- those  
25    documents which were also in the expert report as well as the

1 Hill & Knowlton documents that were specifically discussed and  
2 the role of Hill & Knowlton in the formation of these strategies  
3 covers seven, eight pages of Dr. Brandt's expert report. That  
4 establishes the relevance.

5 And so irrespective of that -- I mean, quite frankly, we  
6 didn't even have to ask him that question because the testimony  
7 so clearly establishes the relevance.

8 The other bases for admissibility are met that, given the  
9 testimony that has come in, we have -- we have established the  
10 relevancy and could move those documents in right now,  
11 irrespective of whether they were even specifically identified in  
12 the testimony because all three requirements for admissibility,  
13 relevance, nonhearsay and authenticity, are met as to those  
14 documents.

15 And that's our position: That relevancy is the issue and,  
16 you know, we're happy to say, and, in fact, I believe I did say  
17 when we initially moved the documents in that those documents are  
18 not specifically relied on by Dr. Brandt, but his testimony  
19 establishes the relevancy.

20 MR. BERNICK: I think I've -- I think I said what our  
21 position is and I still don't think we have an answer to it.

22 There was a misstatement that I'm sure that Mr. Brody did  
23 not intend when he says that some of the Hill & Knowlton  
24 documents were actually the subject of examination at the  
25 deposition and had not been previously described. We took that

1 deposition and I don't believe that that is so. There were no  
2 new Hill & Knowlton documents that were the subject of testimony  
3 at that deposition.

4 This is a very plain situation where, with some other  
5 witness at some other time, it may be that those documents can  
6 come in, but, you know, it's the basic here. We went through  
7 hundreds of hours of depositions; we piled through all their  
8 reliance materials, which were voluminous.

9 To say now it doesn't make a difference and we can have a  
10 witness on the stand whose opinions are bolstered by items that  
11 were not disclosed and not identified, in contravention of the  
12 Court order, really undercuts the entire fabric of this case.

13 There are certain Hill & Knowlton documents that he did  
14 include. Those can come in; his testimony as to those can come  
15 in. But now to shovel in scores, however many it might be, of  
16 documents --

17 THE COURT: So where are you even requesting to draw the  
18 line?

19 MR. BERNICK: I'm requesting to draw the line where the  
20 Court originally drew the line, which is the government should  
21 not be permitted to proffer through this witness documents that  
22 the witness did not identify in the expert report.

23 Now, if I had introduced those documents on  
24 cross-examination, I've explained why, I'm prepared to live with  
25 that. If I have examined the witness with respect to those

1 documents, that's now a question of my cross-examination. And if  
2 I have done that, well, then, they can come in.

3 But for the government to rely upon the documents that the  
4 witness reviewed but never identified, and we didn't have fair  
5 notice at the deposition that he was actually going to use them  
6 because they were not disclosed in accordance with the Court  
7 orders, is another way of saying that the reliance lists that we  
8 originally worked with under Your Honor's very meticulous orders  
9 just don't make a difference.

10 And that's not right and I don't think it creates a good  
11 precedent for this case. We're going to see this expand.

12 THE COURT: Well, just remember this, everybody, on all of  
13 these rulings that I'm making. The bell rings both ways. We  
14 will at some point get to the defendants' case.

15 I do think it's very important, whether we're talking  
16 about a massive case like this or whether we're talking about a  
17 garden variety case, if there's such a thing, that counsel be  
18 able to rely in discovery and in the trial that occurs subsequent  
19 to discovery on following the rules. In particular in this  
20 trial, where we're dealing with such massive amounts of documents  
21 and massive numbers of documents, counsel have enough trouble  
22 wading through what is listed and what is proffered without  
23 suddenly having -- I don't know the number at this point, but for  
24 the sake of argument, 197 extra documents sprung on them.

25 My ruling is -- and you all are going to have to sit down

1 and figure out what documents actually fall into these  
2 categories -- but my ruling is that no document that was not  
3 cited -- I'm sorry to do this in negatives, everybody -- but no  
4 document that was not cited either in the witness's -- this  
5 applies to any expert witness -- to the expert witness's report  
6 or their reliance materials may come into evidence unless the  
7 opposing party used the document in cross-examination of the  
8 witness. And then, of course, the opposing party has opened the  
9 door and they're stuck with the consequences.

10 That's number one. And you all are going to have to  
11 figure out which documents fall into that.

12 The defendants made some other objections, which I don't  
13 need to ask any questions about, nor discuss with everybody,  
14 because I'm about to overrule them.

15 One of the objections was that Dr. -- much of Dr. Brandt's  
16 direct testimony was beyond the scope of his expertise. Well,  
17 number one, that's questionable; and number two, even if it's  
18 true, there's no question that defendants in lengthy  
19 cross-examination had a full opportunity to very effectively  
20 explore that, both as to issues that were within his expertise  
21 and those issues that were not within his area of expertise.

22 The defendants made a third objection which I think is  
23 really moot at this point. And that is, there was an objection  
24 to the Hill & Knowlton documents on the grounds that no  
25 foundation had been laid for them.

1           On that ground alone, the objection would have been  
2    overruled because there was a foundation and the witness  
3    testified as to how he used the documents and how he -- not  
4    obtained them, but how he got to use them.

5           But that's not the basis on which the defendants'  
6    objection is being sustained. I think I've made very clear what  
7    the basis is.

8           Can we let this witness go at this point?

9           MR. BRODY: With that, Your Honor, I believe we can.

10          MR. BERNICK: I think so. Remember, Your Honor -- I'm  
11    sure you do -- that there is that short list of documents that we  
12    actually used during his examination -- cross-examination that  
13    we --

14          THE COURT: Correct.

15          MR. BERNICK: -- that we proffered. And I'm assuming that  
16    however Your Honor is going to rule on that, we hope that they  
17    are admitted, but we don't need the witness in any event to  
18    resolve that remaining issue.

19          But before we discharge him, I just wanted to make sure  
20    that that is still a live matter before the Court. I don't waive  
21    my right to get those in because he's leaving.

22          THE COURT: Have you had a chance to look at that list?

23          MR. BRODY: We've had a chance to look at that list and we  
24    have no objection to the admission of those documents, Your  
25    Honor.

1 THE COURT: All right. Those documents may come in.

2 MR. BERNICK: I appreciate that. And there's one that I  
3 omitted, which was the last Yeaman document, 1975, the  
4 Government's Exhibit 86005.

5 MR. BRODY: And we have no objection to that, Your Honor.

6 THE COURT: All right. That will be admitted.

7 (Government's Exhibit 86005 admitted into the record.)

8 THE COURT: Dr. Brandt, you may be excused at this time.  
9 Thank you.

10 Counsel may not be excused because now we're going to do  
11 some other hard work, not the most interesting for observers, but  
12 it's going to make a difference.

13 I want to talk about some procedural and logistical issues  
14 and paper and things like that. And let me get my notes to make  
15 sure that I cover everything that I need to cover.

16 All right. In terms of copies of things, the government  
17 has been submitting to me, as it was directed to do, two copies  
18 of exhibits for all the witnesses --

19 Two or three? Which is it, Mr. Brody, that you were  
20 doing?

21 MR. BRODY: We were providing two copies of exhibits, one  
22 for Your Honor and one for Ms. Soneji.

23 THE COURT: Right. Well, after only a few days of trial,  
24 we've both reconsidered and decided the courthouse isn't going to  
25 be big enough to hold all of that. One copy of exhibits will be



1 fine. That will save a whole lot of trees as well as a whole lot  
2 of room here.

3 On direct testimony -- and of course this applies across  
4 the board, everybody, when we get to the defendants' case -- we  
5 still do need the two copies of direct, but that is a much, much  
6 smaller universe of paper.

7 I want to talk about the submission of prior testimony.  
8 As I understand it, what's coming in now is -- the government  
9 submits two copies with their designations in one color, the  
10 defendants submit two copies with their designation in another  
11 color and then I think the government's coming back with their  
12 final designations in yet another color.

13 This is nonsensical, even though I may have crafted it.  
14 But, hopefully, one learns from once mistakes. One copy,  
15 everybody. Let's talk about how to do it.

16 You know better than I do what's the easiest way to do it,  
17 but I want to end up with two copies, I should say, of one piece  
18 of direct testimony with all the designations, two from the party  
19 offering the testimony and one from the party objecting to the  
20 testimony or counter-designating.

21 MR. BRODY: Your Honor, I would suggest that the easiest  
22 way to accomplish that would be when we file, just to file on  
23 Monday a notice of -- notice of submission, it would really be --  
24 notice of submission, notice of production to defendants, of our  
25 designations, setting out the pages designated, without really

1 filing or submitting the testimony to Your Honor, of course, at  
2 that point. Provide them by Monday at 5 with their -- with pink  
3 highlighted copies. They can then take those pink highlighted  
4 copies and make their counter-designations on those, give them  
5 back to us, file at that time a notice similar to what we had  
6 filed on the Monday, give them back to us for any rebuttal  
7 designations.

8 And quite frankly, I don't know that there have been  
9 rebuttal designations yet. I don't think there were any last  
10 week.

11 THE COURT: I don't know.

12 MR. BRODY: And to do it that way.

13 One thing I would not like to see happen -- we noticed in  
14 some of the submissions that we got -- some of the copies that we  
15 got from defendants last week, they had taken what we did, which  
16 was, you know, a full page of testimony, converted it somehow  
17 into an altered computer format that contained five pages per  
18 page, wasn't highlighted, just had a red line that went down by  
19 what purported to be our designations and a blue line along the  
20 side of the page by what purported to be their designations.

21 As Your Honor recalls, we went through -- the United  
22 States actually requested permission to use brackets and Your  
23 Honor, after considering it, initially saying okay, considered it  
24 and said no, let's go with the highlighted versions. And I think  
25 that's something that you actually used successfully in a prior

1 case earlier this year.

2 THE COURT: It's much easier, much easier.

3 MR. BRODY: So we don't want to see that. And we've  
4 actually found in some instances that what defendants did with it  
5 was incorrect. There were entire pages of our designations  
6 missing from these computer-combined altered formats. It would  
7 go from page 118 to page 121 or 123. You know, quite frankly, in  
8 addition to everything else we're doing, to have to deal with  
9 alterations due to a converting of testimony to a computer format  
10 is not something that we want to be dealing with here.

11 So I would suggest that in order to get to the point where  
12 there be only one copy coming to chambers, that we use a system  
13 where we highlight, they counter designate in blue, we do any  
14 counter rebuttal designations and we file a notice of filing in  
15 submission with a courtesy copy to them on Thursday, that might  
16 work.

17 THE COURT: Mr. Redgrave.

18 MR. REDGRAVE: Thank you, Your Honor. I think a procedure  
19 like that probably would make some sense. I think we need to  
20 elongate the time frames for that, though. I'll give you an  
21 example why. The government in their submissions this week have  
22 line and page designations, plus the color copies. We're finding  
23 that they're not matching up, that the color copy is not matching  
24 up with what the line and page is. Okay, it's a big case,  
25 there's going to be a little of bit of problems. Mr. Brody says

1 they have problems with what we do; we have problems with what  
2 they do. I suggest that we work together to have that  
3 submission. They give us maybe the highlighted copy on the  
4 Monday, we go back and give them a highlighted copy on the  
5 Wednesday, if that's the time frame that works, or we could  
6 exchange designations, but at some point we have to work together  
7 to -- we color our stuff, they color their stuff, and of course  
8 there's overlap, so we figure out how to color that, and we get  
9 the copies to Your Honor. I think we're going to have to spread  
10 it out so it's not coming in maybe the same day as maybe the  
11 objections are because just to do that manual highlighting to get  
12 together and make sure everything is right just takes some time,  
13 and that's our experience this week. And so I'm happy to work  
14 with them giving us those, but I just want a little bit of leeway  
15 on that timing.

16 THE COURT: Well, we don't have a lot of leeway, and any  
17 leeway that I give you comes out of my reading time.

18 MR. REDGRAVE: One day.

19 THE COURT: One day.

20 MR. REDGRAVE: And Mr. Brody is correct, that I don't  
21 think we usually have many rebuttal designations, but -- so  
22 one day -- If we looked at Friday, Friday would be the day,  
23 maybe by noon that the parties have agreed, and by Friday at noon  
24 you're getting the colored copies for chambers of the designated  
25 testimony for that week.

1           THE COURT: So, Monday would be the direct, Wednesday  
2 would be the counter designation that you all would be working on  
3 together, and then the final would come in --

4           MR. REDGRAVE: By Thursday they would have to tell us or  
5 put in any response to our objections, and maybe the line and  
6 page of what the rebuttal was, but then on Friday we'd work with  
7 them to make sure the colorization was done correctly, and then  
8 one of us would make sure that Your Honor got the copies that you  
9 requested.

10          THE COURT: By Friday at noon?

11          MR. REDGRAVE: Right. So that's really just a day -- or  
12 even less than a day delay from Thursday when the government  
13 would have been given you if they had anymore colorization for  
14 rebuttal.

15          THE COURT: Mr. Brody.

16          MR. BRODY: If I may, Your Honor, just all of this talk of  
17 working together, I just want to be sure that working together  
18 does not include something that was suggested in the praecipe  
19 that defendants filed over the weekend, which was that they would  
20 tell us which pages and lines they wanted designated and we would  
21 have people do the highlighting from our side. We, quite  
22 frankly, we cannot do that.

23          THE COURT: I think I saw that.

24          MR. BRODY: We don't, quite frankly, have the time to  
25 undertake that exercise in addition to everything else that's

1 going on on our end.

2 THE COURT: I made some notes about more work, much more  
3 work. Sometimes reading at home I'm a little more informal in my  
4 notes.

5 MR. REDGRAVE: It's certainly true that somebody has to do  
6 work, and in that scenario it would have been flipped on us in  
7 our case. So, we're totally flexible as far as some way, but if  
8 it just don't work -- and I don't know whether you would want me  
9 to address this. The system does, whether it's a Monday,  
10 Wednesday, Thursday or Friday system, falls apart when you get 40  
11 transcripts in one --

12 THE COURT: That's the next thing I'm going to get to, but  
13 I thought we'd work out a system first before we get to the  
14 fireworks.

15 Well, Mr. Brody, this is my question for now: Do you feel  
16 that you can work out a system -- this is for your case now --  
17 where you get your designations over to defendants -- I'm not  
18 talking about ECF now, I'm talking about physically over to them  
19 by Wednesday? They -- and it seems to me they have to be marking  
20 up your designated copies. They do their counter designations,  
21 get them back to you, and then you mark up that same copy with  
22 your final rebuttal designations, if you have any, and then you  
23 get together and make sure that they're right.

24 MR. BRODY: Your Honor, I think we can do that. It would  
25 actually be Monday at 5, which is when the designations were

1 delivered to --

2 THE COURT: What did I say?

3 MR. BRODY: You said Wednesday, but they come back on  
4 Wednesday.

5 THE COURT: I meant Monday at 5.

6 MR. BRODY: I think that's a system that would work, and  
7 quite frankly I don't know that there is going to be a lot of  
8 rebuttal designations, so that's going to make the back end easy.  
9 I think building in a little extra time until Friday at noon is  
10 something that will be helpful given that court sessions are not  
11 scheduled on Fridays and just everybody is going to have a little  
12 more time to talk about things, if there are any issues. I hope  
13 there are not any, but that will make sense.

14 We can give them our designations Monday at 5, they can do  
15 their -- highlight their counter designations; if we have any  
16 rebuttals, we can then file something indicating or just notify  
17 that there were rebuttals, and certainly by Friday at noon we can  
18 have delivered to the Court, you know, one copy for you, a second  
19 copy that will have everyone's designations in the same  
20 transcript.

21 THE COURT: All right. Now, I gather that -- well, I  
22 won't comment for the moment. I gather that 40 individuals have  
23 been designated for next week by virtue of prior testimony; is  
24 that right?

25 MR. BRODY: That's correct, Your Honor, and that is, to a

1 degree, a function of not knowing exactly how we're going to be  
2 handling the admission of the prior designations and the  
3 documents associated with them.

4 THE COURT: You're not going to have those people here to  
5 testify, right?

6 MS. EUBANKS: That's correct, Your Honor, and that's why  
7 we're proffering it this way. And one of the things that we had  
8 thought would be helpful to the Court, given the large number of  
9 designations and how we planned the case from the trial outline,  
10 would be for us to take about -- take a few minutes with respect  
11 to each of those witnesses and summarize the testimony for you on  
12 those witnesses in groups.

13 For instance, with respect to I think some of the first  
14 group, we're looking at four witnesses who are similarly  
15 situated, and with respect to that situation, describing to the  
16 Court the proffer of testimony that we've set forth, we thought  
17 that that might save us some time in the long run.

18 In addition to that, one of the really troubling issues  
19 that we've seen today with the documents is, as Your Honor is  
20 well aware with these designations in the prior testimony, there  
21 are very few, comparatively few live witnesses who can offer  
22 testimony. We need to know that we're getting in the right  
23 witnesses with the documents to be able to at the end of the case  
24 know that the government has before the Court the exhibits that  
25 it needs or has said that it needs to prove its case for purposes



1 of establishing all of the claims that we laid out last week in  
2 the opening statement.

3 Now, one of the things that we saw today was there were  
4 certain foundational requirements, as Mr. Brody pointed out, that  
5 had been established through an expert witness but we were denied  
6 the ability to get in the Hill & Knowlton documents because of  
7 reliance material issues. That means, in accordance with our  
8 witness list, we may be required to call document custodians to  
9 come forward and to get certain documents in.

10 One of the reasons that we thought it would be helpful to  
11 the Court to see -- to have an explanation of how these witnesses  
12 fit within the outline that we gave you, just a few moments from  
13 counsel saying that's what these witnesses have done, both sides  
14 could get up and say, here's what this testimony is or what it's  
15 meant to establish or what it is that we're proffering it for,  
16 would help the Court as we moved forward in the proceedings. And  
17 also, when we had issues with respect to some of the documents  
18 that go alongside of those submissions, would place the Court in  
19 a better position to decide those issues.

20 So, in terms of the trial outline, if you look at the  
21 first part of the case and the enterprise issues, what you see is  
22 a lot of those witnesses are from a longer period ago in terms of  
23 testimony that they've given and so forth. And bringing that  
24 up-to-date is what we hope to do, and also to deal with some of  
25 these document issues in a way that we see at the early end of

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1 the case what the Court will deem is admissible so that we know  
2 as we plan forward what witnesses we might need to ask the Court  
3 to hear from live in order to meet the foundational requirements  
4 that the defendants are insisting upon.

5 MR. BERNICK: Your Honor, can I make a practical  
6 suggestion?

7 I just have this image of Your Honor and your limited  
8 staff sitting back there and getting these buckets of material,  
9 and of course we're busy in our respective trial sites preparing  
10 all of it with swarms of people.

11 Ordinarily when you try a case, bench trial, jury trial,  
12 in the sense that the limiting -- the limiting valve is what  
13 actually happens every day in court. Things get read, witnesses  
14 get called to the stand, and inevitably that creates a principle  
15 of limitation on what people burden the trier of fact with.  
16 Here, because of the direct examination, which I think already  
17 clearly has saved tremendous amounts of time with respect to live  
18 witnesses, and the idea of proffering all of these designations,  
19 in the sense that that limitation principle that you ordinarily  
20 have doesn't seem to apply, it seems to me that the simplest way  
21 to work through this problem is we ought to focus on the people  
22 who are going to appear live, and they ought to put their live  
23 witnesses in and we ought to go through that promptly.

24 If at the end or any point during the process they feel  
25 like there are additional documents that they need to bring to

1 the Court's attention that cannot and have not come in through a  
2 live witness, we can certainly talk about that in the  
3 designations that would be necessary to get them before the  
4 Court. But to anticipate that there are going to be huge numbers  
5 of documents that the Court's really going to want to see after  
6 all of that live testimony, and in order to get them in put in  
7 these huge amounts of paper, I just think puts the cart before  
8 the horse. Why don't we focus on getting the live testimony in,  
9 the documents that are associated with the live testimony, and if  
10 then counsel wants to make a proffer with respect to additional  
11 deposition testimony and can explain what the purpose of it is,  
12 Your Honor can determine whether this is something that's really  
13 cumulative, whether it's necessary, and whether we have to go  
14 through it. And if so, and this cuts both ways, and if so, what  
15 are the documents that really have -- we can become much more  
16 focused on it. But at this point in time while we're still very  
17 early in the live witnesses to have the paperwork side of the  
18 case overwhelm the Court and really impair the ability of the  
19 parties to get the live witnesses on and off, I just never  
20 experienced that before in all the trials I've ever had, and it  
21 seems to me creates an unnecessary burden for everybody.

22 MS. EUBANKS: Well, Your Honor, I have a bit of trial  
23 experience myself, and you asked for a trial outline in the case  
24 where the parties were to put before the Court our plan of  
25 intention of moving forward with the case, the order of

1 presentation of the evidence that we believed necessary to make a  
2 compelling case to the Court.

3 I don't think I heard the Court say that the Court was  
4 overwhelmed. The Court has had five years of experience in  
5 dealing with the issues in the case, has decided a number of  
6 summary judgment motions to points, and has kept up with the case  
7 with a number, hundreds, literally, of orders.

8 My proposal of bringing forth counsel to put the  
9 testimony -- the designated testimony in context and also at that  
10 time to know, Your Honor, and this is critical for our  
11 presentation, what evidence has been admitted so that as we go  
12 forward we know whether, if at first you don't succeed, try try  
13 again. There will be rulings on the admissibility of exhibits  
14 that will give rise to a need for a party to try a proffer  
15 through a different witness. We never had a plan in this case,  
16 and the Court has our list of anticipated testimony in this case  
17 to just put the live witnesses on and then move. We will end up  
18 in the remedies portion of the case where a large number of live  
19 witnesses will appear on disgorgement issues, and I know that's  
20 not the intent of the Court.

21 So, the orderly presentation that we have put forward,  
22 which the Court asks us to do in the form of a trial outline, has  
23 long anticipated that this was our plan, to put in the evidence.  
24 We had a hearing before Your Honor on which evidence would be --

25 THE COURT: Who would you have next week, just this one

1 witness? I certainly didn't read the testimony yet, but I looked  
2 at it and I think it's about 60 or 65 pages.

3 MR. BRODY: Well, Your Honor, if I can actually address  
4 that issue. One of the things that we -- one of the things --  
5 let me tell you about one of the things that we did and one of  
6 the things that we anticipate doing. What we did, at the request  
7 of counsel for Lorrillard, was move the anticipated time to call  
8 Lorrillard's CEO, Martin Orlowsky, back a week. They informed us  
9 last week, I think, that Mr. Orlowsky would not be available at  
10 all next week, which was a time when we originally had  
11 anticipated calling him as a witness, and as an accommodation to  
12 Mr. Orlowsky and at the request of counsel for Lorrillard, we  
13 decided that we would agree to shift that to the following week,  
14 and it's either Monday or Tuesday, I don't know what the Court's  
15 plans are for the federal holiday Columbus Day, which is the  
16 11th, but either the 11th or the 12th will be the date that  
17 Mr. Orlowsky is called to testify.

18 THE COURT: What about next week where you've got 40  
19 nonlive witnesses listed to which defendants can't possibly get  
20 their -- that many counter designations in and you've got only  
21 one live witness. Dr. Samet is going to be a very substantive  
22 witness. However, he may be sufficiently substantive that there  
23 won't be all that much cross-examination of him and we may get  
24 him done this week.

25 MR. BRODY: Well, I would assume, based on defendants'

1 estimates, that we will get Dr. Samet done this week,  
2 hopefully -- if not during the day tomorrow, early on Thursday.  
3 And then after that Arthur Stevens, who is a former general  
4 counsel of Lorrillard, is slated to testify live. After that  
5 Robert Northrip is slated to testify live, a former industry  
6 lawyer -- maybe a current industry lawyer.

7         So, it's my expectation that Mr. Northrip's testimony will  
8 extend until next week, and then we have Ms. Pollice, the shifts  
9 of Orlowsky have caused us to look at, and I talked about one  
10 thing that we're going to do, we expected to do it this evening,  
11 is file what would be a first amended anticipated order of  
12 witnesses based upon that change, and that will reflect how we  
13 anticipate going forward. You know, given moving Mr. Orlowsky  
14 and a reevaluation of, therefore, the time to call Mr. Tisch as a  
15 live witness, that has sort of shaken up the schedule. It's  
16 been -- and quite frankly, from our view, the schedule has been  
17 shaken up as a result of our accommodation.

18         If it would assist the process, what we can do is, I  
19 think, move up a fact and an expert witness who we anticipate  
20 will be submitting significantly lengthy testimony, William  
21 Farone, and we will be happy to file, to go ahead and file  
22 Dr. Farone's testimony on Thursday of this week with the  
23 anticipation that we would call him to testify next week.

24         If defendants wish to take time to respond to the  
25 objections or -- I'm sorry, to file objections to his testimony,

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1 that's fine, but given the shift and what is in our view an  
2 accommodation to Lorrillard in moving Mr. Orlowsky's testimony, it  
3 has kind of shaken things up, but I do expect that with the  
4 testimony of Dr. Samet, Mr. Stevens, Mr. Northrip, Ms. Pollice --

5 THE COURT: That that will take all next week.

6 MR. BRODY: That would probably take us and I would hope  
7 at least through Tuesday. And as I said, we'd be happy to file  
8 Dr. Farone's testimony as part of that switch, because as you  
9 know, we held off on Mr. Orlowsky as a result -- and reevaluated  
10 Mr. Tisch, who is also formerly with Lorillard, a former  
11 Lorrillard CEO, as a potential accommodation.

12 THE COURT: Let me hear from the defendants.

13 Mr. Webb, move to the middle, please.

14 MR. WEBB: I was just asking a question going through  
15 their order of proof.

16 MR. BRODY: That will be encompassed in the revised  
17 filing. We -- quite frankly, Dr. Richmond is 88 years old. We  
18 went ahead and looked at it and decided that it's -- it may not  
19 be necessary to call him. If it's necessary to call him in  
20 rebuttal, we will do that. Otherwise, we are going to do without  
21 Dr. Richmond as a witness in our case in chief.

22 MR. WEBB: As far as Dr. Farone is concerned, if they give  
23 us the designations tonight to the testimony -- it's two days  
24 late or one day late, but we'll live with that. But the idea  
25 that next week we're going to interrupt this trial and start

1 doing what I call interim summations where they're going to, as I  
2 understand it, they're going to try to put witnesses of these  
3 prior witnesses into groups, and then they want to argue to you  
4 what they're trying to say, and then they want to argue about the  
5 exhibits, and then we're going to get up and argue about our  
6 counter designations, Your Honor, your whole ruling was that the  
7 prior testimony would be something that you would review when you  
8 wanted to review it and we weren't going to take up court time  
9 doing that. And so, interrupting the live presentation of  
10 testimony with this hybrid procedure next week makes no sense  
11 whatsoever.

12 And quite frankly, Your Honor, we were here today to try  
13 to convince you, with all due respect -- we can't possibly get  
14 our responses in, the objections done, to these 40 witnesses by  
15 tomorrow night. We can't -- we need some break on the schedule  
16 to be able to respond to 40 of these prior testimony designations  
17 with hundreds and hundreds of exhibits. Plus you're going to  
18 need time to review it. And so there's no way that we're going  
19 to be able to do that next week and break that into groups of  
20 four and have all these arguments about it which totally disrupts  
21 the flow of the trial, but I will accept Farone late because we  
22 can do him next week.

23 MR. BERNICK: Can we focus then -- the current order would  
24 then be Mr. Stevens, Mr. Northrip; you're withdrawing Richmond as  
25 a witness?



1           MR. BRODY: We have decided that we are not going to call  
2 Dr. Richmond as a witness in our case in chief unless the need to  
3 do so arises later in the proceedings.

4           MR. BERNICK: Fine. Then, as you know, Your Honor, we  
5 sought to designate his trial testimony. We're obviously, in  
6 light of their withdrawing it, we'll probably have an application  
7 for the Court, but that's their prerogative. After that, Tisch  
8 is listed. Are you going to withdraw Tisch or --

9           MR. BRODY: I believe what we're going to do is try to  
10 work with counsel for Lorrillard to reschedule Tisch to come after  
11 Mr. Orlowsky.

12          MR. BERNICK: Okay. So it's Stevens, Northrip, Pollice,  
13 and then Farone.

14          MR. BRODY: That will be the order that we would go in.  
15 And I think that given the way things have gone and some of the  
16 estimates that we have received, that that should take us through  
17 next week with Dr. Farone.

18          Your Honor, at this point in time, it's 5:00, I don't know  
19 how realistic it would be to file Dr. Farone's testimony tonight,  
20 but we can certainly do that by 5 tomorrow.

21          MR. BERNICK: Just in terms of -- who would be after  
22 Farone, just so we can get a sense of what -- we may finish him  
23 next week, too.

24          MR. BRODY: Well, I don't -- quite frankly, I don't think  
25 that you will. Our anticipation was that Mr. Farone's

1 testimony -- Dr. Farone's testimony would probably be followed by  
2 an interim summation, and that the interim summation -- and I  
3 think this is on our trial outline, quite frankly, would then  
4 take us through the week. We would start the next week with  
5 Mr. Orlowsky, and based on the schedule with Mr. Tisch -- but as  
6 I said, we're going to file an updated -- first amended  
7 anticipated order. It's just some --

8 MR. BERNICK: So, we then come back to the question that I  
9 think Mr. Webb poses, which is that if the order of the live  
10 witnesses is nailed down and it's like what you say --

11 THE COURT: This is what has to be clear, everybody, and I  
12 understand what the government's worried about and is focused on,  
13 but I think the government's losing sight of something, and that  
14 is that there are a lot of people here, a lot of lawyers away  
15 from the other things they have to do. We've got to focus on our  
16 live witnesses during our trial time. I understand the concern  
17 about my reading and getting to the deposition testimony of  
18 nonlive witnesses, meaning, of course, people who are still alive  
19 but people who aren't going to testify live. But we're just  
20 going to have to work that in as we can, and it may be that I am  
21 more liberal about -- however you want to interpret that word  
22 liberal these days -- about letting in exhibits from  
23 nontestifying witnesses than I might be ordinarily given the  
24 intensity with which this trial is moving forward. It may be  
25 that I can only keep up with the reading for the live witnesses.

1 And that, of course, is absolutely essential, but we can't have  
2 chunks of time that are left open with everybody sort of -- I  
3 don't know what you all would be doing while I caught up with the  
4 deposition testimony of people, especially when you're talking  
5 about designating 40 witnesses. That just wouldn't work. I  
6 don't know how long it would take me to get through that.

7 MS. EUBANKS: Your Honor, one of the things that you  
8 suggested that would be helpful to us, because we viewed the  
9 provision in Order 471 that does expressly state that the Court  
10 will then take the testimony from the designations and then at a  
11 later date let the parties know certain rulings, but one of the  
12 things that would be helpful for us to know, as I said before in  
13 going forward, is document issues and how to handle them because  
14 with upcoming live witnesses, then it becomes critical to know  
15 whether the documentary evidence that we've submitted alongside  
16 that testimony -- and quite frankly whether that testimony has  
17 been accepted into evidence so that we know what we need to do to  
18 go forward without the passage of time.

19 Now, we can work with Your Honor on whatever schedule it  
20 is that you deem appropriate, but just in an orderly fashion for  
21 us to know how to present our case for you to decide, we have to  
22 know about rulings on that evidence so that when we have a live  
23 witness we know how to handle the documents with that witness,  
24 whether to attempt to proffer them through that witness because,  
25 you know, they may not come in through one of the other

1 witnesses.

2           So, I'm afraid that it is a huge amount of designations  
3 and so forth, and that's why pretrial we tried on at least three  
4 occasions to work out these issues in advance. Unfortunately,  
5 unsuccessfully because we didn't come with a proposal that the  
6 Court thought would be workable. But given a little time,  
7 perhaps by Monday, I could consider, given your comments here  
8 today and your concerns about the presentation, something that  
9 wouldn't be harmful to our presentation of our evidence -- that  
10 would address that issue -- and similarly would address the  
11 Court's concerns about being able to have time in trial with  
12 witnesses testifying, yet at the same time not do harm to the  
13 rules of evidence in terms of the admissibility of documents.

14           So that's something that I'm certainly willing to give  
15 another try to, but it's something that, as Your Honor will  
16 certainly remember -- I've spoken about this point many times  
17 because where we are today and what we're looking at is exactly  
18 the fear that I have had with respect to the evidence. If we  
19 don't get the evidence in, then we won't be in a position to  
20 prove our case, and we are constantly bombarded with objections  
21 and we have to deal with those because obviously the Court has to  
22 make rulings based upon those.

23           So it is a problem, and with your permission I would be  
24 happy to submit a short three-page document on Monday that  
25 proposes a way to handle some of these issues.

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1           THE COURT: Do the defendants want to respond at all at  
2 this time or does everybody want to take a break -- it's 5 after  
3 5 -- and try and think about this for a day or two. Certainly  
4 the issue has been raised before. I did rule against the  
5 government consistently because I felt that the government was  
6 talking about a world of documents that was just too huge. Now,  
7 I don't know whether that remains the case or not, I don't know.

8           MR. REDGRAVE: Your Honor, if you could permit me just a  
9 few moments. On the issue of the designations, if we just take a  
10 look at what happened to us this week, there were 40 witnesses  
11 but it's over a hundred transcripts. There are 1600 exhibits  
12 that suddenly flood our office on Monday. And I'll give you one  
13 example. We heard testimony about Dr. Wakeham today, okay; 115  
14 exhibits they through in with Dr. Wakeham's prior testimony.  
15 Now, you would think, perhaps, maybe all those exhibits were  
16 discussed in that testimony; only 45 were, which then leaves us  
17 to try to scurry around to try to find out what the connection is  
18 of those to Dr. Wakeham, which quite frankly, if you look at  
19 Order 471 you start thinking about the language that is supposed  
20 to be in connection with prior testimony or deposition testimony.  
21 So we adjust to say, first we have to scurry around and figure  
22 out which ones were actually in there because there's no  
23 identification whatsoever, so that takes us a long amount of time  
24 to do that. But then the bottom line is we still have this huge  
25 volume we have to go through and, whether it's limits in the way

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1 Mr. Bernick talked about, maybe let's go through the live case,  
2 or it's limits with respect to -- there should be actual limits  
3 on how many pages should be designated, something that stops us  
4 from just having everything come in without some governor, as  
5 Mr. Bernick said, somebody that has to act as governor for  
6 counsel, on both sides, not to just throw things in on the off  
7 chance that maybe that's the one. We need to narrow the focus  
8 down on these priors, because right now like being here in court  
9 there is nothing to limit either side from just designating and  
10 designating and trying to get exhibits in.

11 MR. BERNICK: Your Honor, I think we should take a break,  
12 it is late. I know that people on all sides have to go. If they  
13 have a proposal to make, let's hear the proposal. I think Your  
14 Honor knows what our concerns are. There are people in the back  
15 wondering very desperately do we have to file our responses  
16 tomorrow to the 48 or whatever it is.

17 MR. REDGRAVE: We couldn't.

18 THE COURT: That's just unreasonable. I won't require  
19 that. I do think there's a basic rule of reason that I've got to  
20 follow.

21 MR. BERNICK: And it may be that after the live witnesses  
22 are done and we are at a point in their case where they would  
23 otherwise want to sum up, if we could -- if they could describe  
24 to the Court what additional documents they want to come in, Your  
25 Honor can react about that and see how much you want to see so

1 that there's some guidance and we're not simply putting lots of  
2 documents in. The problem remains that there are still too many  
3 documents in this case.

4 MR. REDGRAVE: Your Honor, with respect to the due date  
5 issue, which all people back in the trial site are desperately  
6 waiting for an answer, I would suggest, if it's acceptable with  
7 Your Honor, that we will start on a rolling basis responding as  
8 we can. And it may take some time to get through witness number  
9 40 on this prior list, but if we can be allowed that latitude,  
10 maybe we can put it back in at the end of it, it but we certainly  
11 need a lot more time than was contemplated when we thought it  
12 would be five or six for most priors on any given week.

13 MR. BRODY: Your Honor, I, given the characterizations  
14 that have been made about those designations, I think I do need  
15 to point out that for some of the witnesses there are as few as,  
16 I believe -- I don't know if I have this exactly right, 12 pages  
17 or so that were submitted. And Mr. Redgrave talks about 1600  
18 exhibits, but when you break it down, that's 40 exhibits per  
19 witness, and so --

20 THE COURT: Times 40 witnesses.

21 MR. BRODY: Times 40 witnesses. I know, but I didn't want  
22 you to leave here with the impression that it's 115 exhibits per  
23 witness. It's not anywhere near that. And in addition, you  
24 know, he referred to the hundred transcripts. There are a number  
25 of witnesses for which there are minimal designations. So I

1 just -- it almost sounded like we were starting to get an oral  
2 argument on an objection to admission of the Wakeham exhibits  
3 from Mr. Redgrave, and --

4 THE COURT: Well, I'll tell you this, everybody. If you  
5 all amongst yourselves can't figure out a way to resolve this,  
6 and you may not be able to, I'm trying to think by either Friday  
7 or Monday, then I will just -- and I'll be thinking about it, of  
8 course, I'll just impose some limits on the number of witnesses  
9 who can be designated by prior testimony only in a given week,  
10 and the number of -- this is -- I hate to say it this way, but  
11 it's the only way I know to say it, the number of lines of  
12 testimony that can be designated per witness per week who is not  
13 going to testify. That is a very arbitrary, heavy handed way to  
14 do things, words that I'm sure will come back to haunt me, but it  
15 may be the only way that it can be done.

16 MR. WEBB: Your Honor, that suggestion is the one that I  
17 said at the trial site last night, that based on my trial  
18 experience -- the problem in the case -- Not the problem, just  
19 the nature of the case, is that we've got so many hours to  
20 present our case, but the prior testimony, you're handling it in  
21 a much more -- I think in a very effective way than in other  
22 cases where we sit and watch it being played on a screen for  
23 hours.

24 THE COURT: I'm not doing that.

25 MR. WEBB: I've seen it happen. So you're doing it the



1 right way. But because of that, there is no governor or check on  
2 all of us, including us. So, if you decide to impose a line and  
3 page limitation, I have told my co-counsel that's what should  
4 happen, because -- it will hurt us, too, but otherwise we are in  
5 this world where both sides are going to have huge over  
6 designations. I, as a trial lawyer, do not even know what is  
7 before you now in testimony with this prior testimony. I cannot  
8 keep up with this volume of information coming in, and I just  
9 doubt if you can, at least at this point. You will eventually,  
10 but unless you put a limitation on the parties, including us,  
11 because we're going to respond in like kind, undoubtedly when we  
12 get to our case, that's what's going to happen. We're going to  
13 have this out of control situation. So if you're thinking about  
14 it, I will tell you I suggested to my co-counsel that's probably  
15 what should happen in spite of the fact that we may already have  
16 suffered a bit because we are already in the case, but we'd all  
17 be better off for it. So, for what it's worth, I think it's a  
18 concept that -- you were able to figure out how many hours of  
19 testimony to limit us to. One could argue that was an arbitrary  
20 decision on your part based on information that was provided to  
21 you, but you had to make a decision. The same thing can be done  
22 with prior testimony. Some limitation with page and line numbers  
23 so we don't have the situation, I think is a good solution.

24 MS. EUBANKS: Your Honor, there is something that is not  
25 said here in the room, but it's certainly in Order 471, and I

1 think sometimes, you know, when we put together procedures, they  
2 lead to other things that happen. I don't think that Mr. Webb  
3 has in mind the provision in 471 that this obviously would lead  
4 to if there were arbitrary cutoffs. There's a provision that  
5 Your Honor included expressly for offers of proof. As we said  
6 before, it's our desire to prove our case here, not in the  
7 appellate court, but if we are denied the right to include  
8 evidence that we deem appropriate, then we'll have to file that  
9 procedure in every instance, because the order so states, when it  
10 comes time, to demonstrate what it was that we were denied  
11 because we didn't have enough time or enough leeway from the  
12 Court to be able to put it in. So, I don't think --

13 THE COURT: I have a feeling, Ms. Eubanks, that the Court  
14 of Appeals, who has already heard of this case on a number of  
15 occasions, and where one of its members has already indicated on  
16 the record that he doesn't think it should have been up there on  
17 those earlier occasions, that the Court of Appeals will  
18 understand the immense nature of the case and will be at least,  
19 how should I put it, reasonable in its consideration of any rules  
20 and cutoffs that I impose.

21 I'll leave it at that without saying more.

22 MS. EUBANKS: But, Your Honor, my point was not about the  
23 Court of Appeals, it's about those offers of proof taking place  
24 here before Your Honor and clogging the schedule as well as a  
25 necessity to preserve the record. So what I'm cautioning here is

1     that while there may be limits that are imposed, they may have  
2     other consequences under the current order. It really wasn't  
3     about what the Court of Appeals may or may not do because the  
4     purpose of the offer of proof is to put the evidence in so the  
5     Appeals Court can have that in the record should it be necessary,  
6     but we would still have to put it in the record, is my point.

7             THE COURT: You can do that in writing.

8             MR. WEBB: I know this is late, but one issue that  
9     Mr. Brody -- the issue of live witnesses next week, which this is  
10    all happening very quickly, but we were a little bit -- I  
11    understand what Your Honor has said. You want the week filled up  
12    next week with live testimony.

13            THE COURT: I do. I would think that's what all counsel  
14    want as well.

15            MR. WEBB: We wanted that. Last night we were scurrying  
16    about at our trial site figuring that maybe somehow we hadn't  
17    gotten the transmission, because I kept saying there is no way  
18    they would have designated one live witness for next week. So  
19    there's no question that -- I still as I stand here do not  
20    understand that. However, having said it, I do want to feel next  
21    week with live testimony.

22            The idea of having a lot of downtime just is not appealing  
23    to us at all. And quite frankly, the witness they said they will  
24    now call, Mr. Farone, is a major witness, a former Philip Morris  
25    employee that is a major witness. They should have given it to

1 us late night. If I can get it tonight, we can start getting  
2 ready for next week, but if they say they can't get it ready  
3 until tomorrow night, which means I'm losing two full days of  
4 preparation, I just don't think that's fair. And if they were  
5 ready to do it last night, they ought to be able to do it  
6 tonight. I'm willing to waive one day, but it seems to me that's  
7 not an unfair request on my part to get the direct exam tonight.  
8 I'll waive the one day that I lost and we'll cross Farone next  
9 week.

10 THE COURT: But he wouldn't come on until --

11 MR. BRODY: Probably the Wednesday, Your Honor, so there  
12 would be seven days from filing that tomorrow, which is as much  
13 time as counsel is going to get, you know, for any particular  
14 witness. Obviously, we had seven days for Dr. Brandt's  
15 testimony.

16 THE COURT: I think that's right.

17 MR. WEBB: That's true of all the witnesses. We're  
18 supposed to get all the witnesses for the following week on  
19 Monday night.

20 THE COURT: That's correct.

21 MR. WEBB: I'm just saying that they're asking for a  
22 two-day extension as opposed to one, and it just doesn't seem  
23 fair to me to do that with the major witness against Philip  
24 Morris. I'm willing to give up the day, but just trying to give  
25 up two days of preparation.

1           THE COURT: I don't think they can get it done tonight.  
2 Obviously, they will be after the deadline right now, it's 5:20  
3 and the deadline is 5:00.

4           MR. WEBB: I'll accept 9:00.

5           THE COURT: I'm sorry?

6           MR. WEBB: I'd accept 9:00 tonight; it doesn't matter what  
7 time they get it to us.

8           MR. BRODY: Your Honor, I think 5:00 tomorrow should be  
9 reasonable, and, Your Honor, I do have to say again that from our  
10 view this arises and this filing Dr. Farone's testimony arises as  
11 a result of our effort to try to accommodate counsel for  
12 Lorrillard to move Mr. Orlowsky.

13          THE COURT: I understand that. We're going to do it this  
14 way, everybody. You will get Dr. Farone's direct in by 5:00  
15 tomorrow. You, meaning Philip Morris, will do your best to be  
16 ready for his testimony on Wednesday. If you really need to  
17 begin on Thursday, I might be convinced to give you a half a day  
18 off.

19          MR. WEBB: That's fair.

20          THE COURT: In terms of the Columbus Day holiday, that  
21 Monday is a federal holiday. The Court is closed, so we'll take  
22 that Monday off, but that's all, and it will be Tuesday,  
23 Wednesday, Thursday of that week.

24          I've already scheduled all my civil matters for that  
25 following Friday, and I can't re -- you know, I can't reschedule

1 all of those. Those people are unhappy enough as it is.

2 Now, there's one final thing, and that is somehow  
3 Mr. Redgrave's 40 counter designations. I'm assuming they're not  
4 his alone. At this point, because things are still up in the air  
5 and I'm well aware of that, at this point you are to get in at a  
6 minimum five counter designations by tomorrow, which I believe --  
7 let me see, they were due tomorrow in any event.

8 MR. REDGRAVE: That's correct, Your Honor.

9 THE COURT: And five tomorrow, five by the end of the  
10 week. And as I've said, on Monday either people are going to  
11 come back with some workable solutions or I will announce a  
12 decision as to how we're going to do this so we're not in this  
13 position again.

14 MR. REDGRAVE: Thank you, Your Honor.

15 MS. EUBANKS: Your Honor, I know it's late, and with your  
16 permission, I would like to make a motion either now or first  
17 thing tomorrow morning dealing with one of the documents I'd like  
18 to ask for reconsideration on. We can either do it now or I can  
19 do it in the morning.

20 THE COURT: With this witness, with Dr. Brandt, you mean?

21 MS. EUBANKS: It was a document that was admitted through  
22 Dr. Brandt, but I think that it was an error, and I wanted to lay  
23 out to the Court the reason for that. I can do that now in about  
24 five minutes or --

25 THE COURT: It's admitted because Mr. Bernick used it on

1 cross? I don't want to hear the substantive argument; I just  
2 want to be clear what the universe is.

3 MS. EUBANKS: All right, Your Honor. It was Joint  
4 Defense, JD 00524. It was admitted earlier today, and that is  
5 the document that had the redaction in it and then we asked for a  
6 complete document, and counsel told us that that document had --  
7 the redaction was included because the redacted material had  
8 appeared on a privilege log that we had been given and that the  
9 United States had not challenged that privilege beforehand.

10 I want to emphasize something that I actually agree with  
11 that Mr. Bernick said. We prepared for trial on the basis of the  
12 information that we had, and this was information that was  
13 withheld before we came into trial and that we don't need to be  
14 led down the prim rose path and to have our witnesses crossed  
15 with privileged information. This kind of hide and seek  
16 manipulation by defendants is a problem, and there are at least  
17 two D.C. Circuit cases that are directly on point that both you  
18 and the Special Master have asserted.

19 THE COURT: I'm not going to hear a substantive argument  
20 now. You get your written motion in tomorrow. There is a  
21 procedure in the order that governs these proceedings, and I want  
22 you to follow that procedure. I am sure that what you have to  
23 say is going to be very much contradicted or opposed by the joint  
24 defendants, and then I'll hear from them --

25 MS. EUBANKS: Thank you, Your Honor.

1           THE COURT:  -- in the ordinary fashion, everybody.  9:30  
2 tomorrow, everyone.

3           (Proceedings adjourned at 5:22 p.m.)  
4

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

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.

9                   -----  
10                  Scott L. Wallace, RDR, CRR  
Official Court Reporter  
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