

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.
	.	October 14, 2004
	.	
Defendants.	.	
.	

VOLUME 13
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
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 (9:29 a.m.)

3 THE COURT: Good morning, everybody.

4 ALL PARTIES PRESENT: Good morning, Your Honor.

5 THE COURT: This is, of course, United States of America
6 versus Philip Morris, CA 99-2496. Again, for the benefit of our
7 court reporter, would government counsel identify himself,
8 please.

9 MR. SCHWARTZ: Good morning, Your Honor, my name is Joel
10 Schwartz, S-C-H-W-A-R-T-Z, and I'm here for the United States
11 today.

12 THE COURT: All right. And would you call your next
13 witness, please.

14 MR. SCHWARTZ: I'll call Dr. Jeffery Gentry, please.

15 (JEFFERY GENTRY, GOVERNMENT'S WITNESS, SWORN)

16 DIRECT EXAMINATION OF JEFFERY SCOTT GENTRY

17 BY MR. SCHWARTZ:

18 Q. Good morning, Dr. Gentry, I'm Joel Schwartz. We met
19 yesterday.

20 A. Yes.

21 Q. Could you just state your full name, please.

22 A. Jeffery Scott Gentry.

23 Q. What's your business address, please?

24 A. My business address is Bowman Gray Technical Center, R.J.
25 Reynolds Tobacco Company, Winston-Salem, North Carolina.

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1 Q. Okay. And last week, did you receive a written direct
2 examination of Jeffrey Gentry that was written in question and
3 answer format?

4 A. Yes, I did.

5 Q. And during the course of that week, changes were made to
6 that document; is that correct?

7 A. Yes, after receiving that, I made some changes to that
8 document.

9 Q. And that was done by crossing out some things and adding
10 in italics other things?

11 A. I think that's generally the process that was used, yes.

12 Q. And that resulted in a modified version that was called
13 the written direct examination of Jeffrey S. Gentry as corrected
14 by Jeffery S. Gentry. That was called -- if we could see that
15 up on the screen on the first page.

16 That resulted in that version; is that correct, sir,
17 after you --

18 A. Yes.

19 Q. The --

20 MR. SCHWARTZ: Could I approach the witness, Your Honor,
21 and hand him a copy?

22 THE COURT: Yes.

23 MR. SCHWARTZ: Does Your Honor need a copy?

24 THE COURT: Of the testimony? No.

25 MR. SCHWARTZ: Of the modified.

1 THE COURT: No, thank you. I have it.

2 BY MR. SCHWARTZ:

3 Q. Dr. Gentry, I'm going to hand you this document and ask

4 you to take a look at it and ask you to tell me if that's the

5 modified copy that you prepared?

6 A. Quickly skimming it, it seems to be, yes.

7 MR. SCHWARTZ: Your Honor, I would offer that written

8 direct examination of Jeffrey S. Gentry, as corrected by Jeffery

9 S. Gentry, PhD, pursuant to Order 471A into evidence at this

10 time, as well as the evidence -- or the exhibits associated with

11 it.

12 THE COURT: That evidence may be accepted.

13 MR. SCHWARTZ: Thank you, Your Honor.

14 BY MR. SCHWARTZ:

15 Q. Dr. Gentry, in the course of making that document, the

16 modified direct testimony, first, you received an original

17 version that we just mentioned; is that right?

18 A. Yes, I believe it was last Monday I got a copy of that.

19 Q. October 4th?

20 A. Yes.

21 Q. Yeah. And that was provided to you by whom?

22 A. That was provided to me by Chris Kreiner.

23 Q. And he's an attorney with the Womble, Carlyle, Sandridge

24 & Rice law firm?

25 A. Yes.

- 1 Q. And that law firm represents the R.J. Reynolds Tobacco
2 Company?
- 3 A. Yes.
- 4 Q. And did they also give you some documents as well as the
5 original version of the testimony?
- 6 A. No, they simply e-mailed me that original version.
- 7 Q. When you were reading over the original version, did you
8 see that there were references to some exhibits in there?
- 9 A. Yes, I did.
- 10 Q. And did you ultimately get to look at those exhibits?
- 11 A. Ultimately I did look at those exhibits, yes, the ones
12 that were referenced in the direct.
- 13 Q. And those were also provided to you?
- 14 A. Not at that time.
- 15 Q. When were they provided to you?
- 16 A. They were provided as I had gone through and highlighted
17 areas that I wanted to talk about and make corrections to, and
18 then, as we went through the direct with my attorneys, then I
19 saw most of those documents.
- 20 Q. Okay. So there wasn't a time when you got to look at all
21 of the exhibits that are mentioned in the testimony before you
22 met with the attorneys?
- 23 A. I had seen some of them before, but not all of them, no.
- 24 Q. All right. Is it your belief or understanding that
25 through the course of this process you got to see every one of

1 the exhibits that is mentioned in the direct examination?

2 A. That's in the direct, yes, I did.

3 Q. Okay. All right. Now, were you also shown additional

4 documents besides the documents that are mentioned in the direct

5 examination?

6 A. Only ones that I had requested to look at, yes.

7 Q. So you asked the attorneys to bring you additional

8 documents?

9 A. Yes.

10 Q. Do you have those documents with you here today?

11 A. No, I don't.

12 Q. Will you produce those documents to us so we can look at

13 them as well?

14 A. Sure.

15 Q. Okay.

16 MR. SCHWARTZ: Your Honor, I would ask the Court to direct

17 the defense to produce those documents so we can look at them.

18 THE COURT: Mr. Biersteker?

19 MR. BIERSTEKER: I have no objection to producing them,

20 but, frankly, I don't know that any record was kept of the

21 documents, the extra documents that the Doctor requested.

22 THE COURT: I don't think there is any such requirement.

23 It may be that those documents will be used in cross-examination

24 of the witness. And to the extent that the witness is questioned

25 on direct by the government, if the witness wants to refer to

1 those additional documents that he looked at, that's certainly
2 appropriate, and if and when he refers to them, and he may not
3 need to, but if and when he does, then they will have to be
4 produced. But they certainly don't have to be produced at this
5 point.

6 MR. SCHWARTZ: Very well, Your Honor.

7 BY MR. SCHWARTZ:

8 Q. Now, Dr. Gentry, these documents that you asked for, were
9 they company documents?

10 A. I think all of them were company documents.

11 Q. Were any of them personal documents?

12 A. Personal to me?

13 Q. For instance, some notes you might have kept on something
14 that you didn't have, ah, kept at the company, or something like
15 that, any kind of personal notes about work?

16 A. No, these are documents from our library or records.

17 Q. Okay. And there were no legal documents, like briefs or
18 motions or anything like that shown to you?

19 A. No.

20 Q. All right. Now, you mention that you worked with
21 attorneys to make the changes in the document, in the direct
22 examination; is that correct?

23 A. Yes.

24 Q. All right.

25 A. Let me go back just a minute. You asked if briefs were

1 shown to me.

2 Q. Yeah, legal briefs, things that are filed in Court as
3 opposed to documents --

4 A. I don't know the definitions of all these things, but I
5 was shown the section on EW that was -- I don't know how to
6 describe this other than maybe out of the government's
7 complaint, if that's -- I don't know if that's the reference
8 you're making.

9 Q. It was a write-up describing what the government believed
10 EW was about and how it was used or not used. Is that what you
11 were shown?

12 A. Yes.

13 Q. Okay. And who showed you that?

14 A. That was shown to me by Chris Kreiner of Womble, Carlyle.

15 Q. Did you ask Mr. Kreiner for that document, or did he
16 suggest that you read that document over?

17 A. He suggested that I read that document over.

18 Q. He told you it was a good idea to understand where the
19 government was going by seeing the whole picture of the EW story
20 as we were talking about it in this case; is that fair to say?

21 A. No, I don't think that's fair. I think he just wanted to
22 make sure that I understood what was being said about EW and the
23 government's case.

24 Q. So, before you answered the questions that were proffered
25 to you, he wanted you to see a broader story, is that what your

- 1 sense of it was?
- 2 A. I think to understand the scope of what EW was being
3 talked about.
- 4 Q. Again, it was Mr. Kreiner's idea for you to look at the
5 document, you didn't ask him to look at some document about
6 that?
- 7 A. No, and I don't know the definitions of these things, it
8 would be hard for me to ask for them.
- 9 Q. Now, you also mentioned there were some additional
10 documents that you asked to look at that were not these legal
11 pleading kind of things, but they were company documents. I'm
12 presuming about EW?
- 13 A. They were about a variety of things. EW, tobacco types,
14 things like that.
- 15 Q. And just so we can clarify for the Court, and for
16 everyone else listening, EW is an experimental cigarette that
17 you worked on at R.J. Reynolds Tobacco Company in the 1990s; is
18 that fair to say?
- 19 A. EW was a cigarette that we worked on in the mid -- or
20 early to mid-1990s and test marketed, yes.
- 21 Q. And test marketed as a brand called Winston Select?
- 22 A. Winston Select in Oklahoma, yes.
- 23 Q. In Oklahoma from April 1995 to some time in 1997?
- 24 A. Yes, summer of 1997.
- 25 Q. All right. And then the company took it off the market;

1 is that right?

2 A. That's right.

3 Q. All right. Now, the documents that you looked at that
4 were company documents, do you know if those documents were
5 produced in this case, to the other side, to us, the United
6 States?

7 A. No, I do not.

8 Q. Do you know when you were looking at those documents, did
9 they have a little sticker or number on the bottom that said
10 "exhibit" or "JD exhibit" or something like that on it?

11 A. Yeah, I believe they did.

12 Q. Do you know if all of those documents had "JD X" or
13 "exhibit" type stickers on them, or most of them, or just a few
14 of them?

15 A. I don't recall. I mean, some of the ones that I
16 specifically asked to see I got copies that didn't have anything
17 on them. I mean, they were copies from our library, or from our
18 Minnesota Website, so, some of them, certainly, wouldn't have
19 had anything on them.

20 Q. Now, roughly how many of those documents did you look at,
21 the documents that were not legal pleadings but were company
22 documents?

23 A. Maybe 10, 12. I really don't know.

24 Q. All right. Now, were any of those documents that someone
25 else suggested that you look at, or were they all documents that

- 1 you initiated the search for, the acquisition of?
- 2 A. They were documents that I wanted to know more background
3 information about.
- 4 Q. All right. Now, you worked with attorneys to make the
5 modifications to the written direct examination that you have in
6 front of you?
- 7 A. Yes. When I received the direct by e-mail, I read it
8 over and noted areas that I wanted to make changes to, and then
9 met with my attorneys to discuss the way I wanted to talk
10 through this.
- 11 Q. All right. Now, when you met with the attorneys, who
12 were they that you met with?
- 13 A. I either met with Chris Kreiner alone, or with Chris
14 Kreiner and Mr. Biersteker.
- 15 Q. And that's Mr. Biersteker here, from the Jones-Day law
16 firm; is that correct?
- 17 A. Yes, it is.
- 18 Q. Now, you say you looked at the document and marked it up
19 a little bit by yourself; is that right?
- 20 A. Yes.
- 21 Q. Okay. And then you met with the attorneys?
- 22 A. Yes.
- 23 Q. Okay. And what was the process by which you made the
24 changes with the attorneys? Can you describe that?
- 25 A. Yes. As I said, I received the direct by e-mail, the

1 original version, and then that evening, I guess it was Monday
2 evening last, I started going through that, went through that
3 the next day, and then met with my attorneys, talked through
4 them virtually line by line the things that I wanted to talk
5 about or to change, and they wrote down the things that I wanted
6 to change. We had someone in the office make those changes. We
7 repeated that process a couple of times until I was happy that
8 it represented my testimony.

9 Q. All right. Now, on how many different occasions did you
10 meet with attorneys, just on that next day or over the course of
11 the week, a few different times?

12 A. Um, we met a couple of times last week, and then not
13 knowing when I was going to start this week, met with them a
14 couple of times, but not about the direct this time.

15 Q. Okay. We'll get to that in a moment. Let's just talk
16 about your meetings with the attorneys up to say last Friday at
17 noon, which is when we received a copy --

18 A. Okay.

19 Q. -- of the modified written direct examination. About how
20 many times would you say you met with the attorneys during that
21 period?

22 A. Um, three times.

23 Q. Okay. And there was a time -- if I'm understanding what
24 you said, you would go through the changes, they would send it
25 out to somebody to make the changes, and then they would come

1 back, the changes would come back to you?

2 A. Right. When we were talking through, they would write
3 down what I was asking them to put into the direct testimony.
4 They would have someone in the office type that in in the bolded
5 section and italicized sort of format, and then they would bring
6 that back and then go through that again.

7 Q. And it was during that process with the attorneys that
8 you also looked at the exhibits and went through the exhibits,
9 the documents?

10 A. Yes, yeah.

11 Q. I'm sorry, first of all, I'm sorry for talking over you,
12 and I'll try not to do that.

13 Secondly, when I mean exhibits, I mean the documents that
14 are mentioned in the modified written direct examination that you
15 have in front of you.

16 A. Yes, during that process we were going through those,
17 yes.

18 Q. Okay. And you also were going through the other
19 documents that you had asked for; is that right?

20 A. Yes.

21 Q. And there was a back and forth between you and the
22 attorneys about the documents that are the exhibits and the
23 documents you had asked about?

24 A. I'm not sure what you mean by that. We were going
25 through this, and any time there was a reference in the direct

1 testimony to an exhibit, we looked at that and I went through it
2 and read it to make sure I understood what was in that
3 particular exhibit. And then where I had questions about some
4 of the things that I wanted to, you know, completely
5 characterize for the direct testimony, I asked for some things
6 out of our library, or our Minnesota Website, to verify that my
7 recollections were right.

8 Q. Okay. Did you make any changes in the document that
9 reflects information that you got from those additional
10 documents you asked for?

11 A. Um --

12 Q. If you don't understand the question, you can just say
13 so.

14 A. Yeah, could you repeat that?

15 Q. Sure. You were making changes in the document --

16 A. Right.

17 Q. -- as you were going along. At some point you read a
18 question, you said, Boy, if I could see RDM 1564 on the, you
19 know, carbon prototype of 1992, that might help me answer that
20 question. That's what kind of went through your mind?

21 A. Right.

22 Q. And you said, Could somebody get me RDM 1864 and bring it
23 back over here, and that was brought to you?

24 A. That would be the general process, yeah.

25 Q. Okay. And then when you had the document, that RDM 1864,

- 1 which I'm just using as an example.
- 2 A. Right.
- 3 Q. Okay. When you had that document, did you get
- 4 information from that document that helped you write down your
- 5 answer to any of the questions?
- 6 A. Um, in most cases it simply clarified that my
- 7 recollections were right. There may have been an instance or
- 8 two where I reaffirmed that information or may have -- it may
- 9 have changed something that I was thinking, but I don't remember
- 10 it changing anything specifically.
- 11 Q. Now, during the course of you writing the changes in this
- 12 document, this modified written direct testimony, did you write
- 13 down or mention in the changes that you were making what
- 14 document you were referencing or looking at or thinking about?
- 15 A. I don't recall doing that, no.
- 16 Q. Is it fair to say that there are no documents that you
- 17 asked for in the course of preparing this testimony that you
- 18 mention in your changes in the written direct testimony?
- 19 A. I'd have to review specifically, but I don't remember
- 20 referring to any specifically in here.
- 21 Q. Is it fair to say that the documents that you asked for
- 22 and looked at influenced the answers that you wrote down, some
- 23 of them in that written direct testimony?
- 24 A. As I said, I think it was mostly reaffirming some of my
- 25 recollections of the information, but I don't think they

1 substantively changed any answers, no.

2 Q. Now, could you give me a general estimate of what -- of
3 all the time you spent working on this document, the modified
4 written direct testimony that's in front of you, between Monday
5 when you got it and Friday when it left your hands as the final
6 version? And I'm sure you were relieved about that.

7 A. Yes.

8 Q. What percentage of the time did you spend -- was spent
9 with lawyers and what percentage of the time was spent just
10 yourself working on it?

11 A. Um, I spent most of, unfortunately most of the week on
12 it, and there was only two days in which I had sporadic meetings
13 with the lawyers. So I would say, maybe, 30 percent of the time
14 with lawyers.

15 Q. Okay. All right. Now, were there times when you met
16 with the lawyers that they would make suggestions for language
17 you might use in making changes?

18 A. Um, no, I mean, we talked through that, made sure that
19 the testimony here was the words that I wanted to make sure
20 represented my testimony.

21 Q. All right. Now, when you were meeting with the lawyers,
22 were there any occasions when they would suggest you crossed out
23 or excised some of the answers that I proposed in the original
24 version?

25 A. Well, when we were going through the process there were

1 many areas that I highlighted and said I needed to change or to
2 understand more about, and I think my lawyers had many of the
3 same areas that they were concerned about. And so, when we were
4 talking through that process, I think that became evident.

5 Q. Okay. Now, you finished that on Friday morning, Thursday
6 night -- when did you finish that up?

7 A. Friday morning.

8 Q. And you read the --

9 A. Last Friday morning, yeah, sorry.

10 Q. And you read the final draft and you okayed it and signed
11 off on it?

12 A. Yeah, actually, I was in Winston-Salem, and when I got
13 the final draft from them I read it and said, yes, this is my
14 testimony.

15 Q. Okay.

16 A. And then I'm certain they filed it for me.

17 Q. Now, looking at that block of time between Monday, when
18 you got the original version, and Friday, when it kind of left
19 your hands, so to speak, and you were done with that part of it,
20 did you also speak with the lawyers about questions that we
21 might ask you in Court about the document or about the questions
22 that are there?

23 A. Yeah, we went through -- these are some thing that we've
24 made changes to, what sorts of things might you be expected to
25 be asked. Yeah, we went through those.

1 Q. All right. And did they pose questions that you might be
2 asked, specific questions that you might be asked about the
3 testimony?

4 A. In some cases they would ask questions, yes.

5 Q. And did they say, well, what would your answer be if you
6 were asked that question?

7 A. I talked through some of what I believed to be the
8 answers to the questions that would be asked, yes.

9 Q. And you and the lawyers talked about how that sounded, or
10 if that was complete, or the answer that you wanted to give?

11 A. They were asking the questions, I was replying what I
12 believed I would respond to.

13 Q. So they --

14 A. And I'm not very good at memorizing, so I'm not sure it
15 would have made any difference anyway.

16 Q. So they did sort of a practice Q and A at times; is that
17 fair to say?

18 A. I think that's fair to say.

19 Q. During that period from Monday, when you received the
20 document, to Friday, when it left your hands, did they show you
21 any documents or talk about any documents besides the ones that
22 are mentioned in there, that I or the government might show you
23 during the course of your appearance this week?

24 A. Yeah, as I was referring to a while ago, there were some
25 other documents. I don't know exactly what they were, exhibits

1 or whatever. I think they were exhibits that were referred to
2 with respect to EW.

3 Q. Okay.

4 A. In the government's case.

5 Q. You talked about those documents, the documents that are
6 mentioned in that --

7 A. In addition to those, my understanding was there was
8 additional documents identified by the government as exhibits
9 relative to EW, and I looked at some of those.

10 Q. All right. And so they gave those documents to you and
11 said take a look at these as well?

12 A. In some cases I asked to see some information, and in
13 some cases the attorneys did show me that, those documents.

14 Q. Just so we're clear -- and I never used this machine
15 before so please bear with me.

16 There are three sets of documents that you worked with
17 during the course of preparing this modified written direct
18 examination.

19 A. All right.

20 Q. The first set are the U.S. exhibits, I'm going to write
21 "USX", that are mentioned in that document; is that right?

22 A. In the direct, yes.

23 Q. Okay. The second set were documents that "JSG", that's
24 you, asked for; is that right?

25 A. That's correct.

1 Q. Okay. And then there's a third set of documents that the
2 lawyers -- sorry about that, for "RJR" gave you. So there are
3 three sets of documents; is that a fair description of --

4 A. Yeah, the third set of documents was the ones that I
5 believe were the government's exhibits relative to EW that
6 weren't specific to my testimony.

7 Q. So, in addition to the lawyers giving you what the
8 government wrote about EW, they also gave you all the documents
9 that the U.S. mentioned about EW; is that right?

10 A. Um, I don't know if all, but there were several that were
11 mentioned in that -- where the U.S. wrote about EW that I did
12 see, yes.

13 Q. Okay. So, in that separate legal pleading that they gave
14 you where the U.S. wrote about EW, did -- is it your
15 understanding that you got a look at every one of the documents
16 that are mentioned in that section?

17 MR. BIERSTEKER: Objection, it's been asked and answered.
18 He said it was some.

19 THE COURT: He may answer it. You may answer.

20 THE WITNESS: As I said, I don't remember if I saw them
21 all, I saw some or many. I mean, I don't remember if it was all.

22 BY MR. SCHWARTZ:

23 Q. In all of those documents that were shown to you at the
24 lawyer's suggestion, not ones you asked for, but that third set
25 of documents that we asked about, were you familiar with all of

1 them?

2 A. Well, the ones that were in -- the ones that were

3 referred to in the U.S. work -- or the U.S. --

4 Q. Brief?

5 A. Brief. Sorry.

6 Q. I know it was a brief but --

7 A. There were many that if a reference is cited, I'd like to

8 see it, so most of those I did, in fact, see. I'm not sure how

9 to answer your question any further.

10 Q. That's fine. You just answer the question the best you

11 know how, and if it's not clear, tell me and I'll try to make it

12 a clearer question, okay?

13 A. Okay.

14 Q. All right. Now, during that period of Monday through

15 Friday, you talked about questions that I might ask you and

16 documents that you might look at. Did you also talk about

17 questions that Mr. Biersteker might ask you this week and

18 prepare for that phase of your testimony?

19 A. Um, we talked about areas that we wanted to make sure we

20 cover, yes.

21 Q. So -- and that was from Monday through Friday during the

22 same period of time when you were working on that written direct

23 testimony that's in front of you today?

24 A. No, I would say most of that was -- there was some of

25 that last week, but most of that was yesterday.

1 Q. Okay. We'll get to after last Friday in a minute, I
2 promise. I just want to ask you about that period of time
3 between Monday, when you got the document, and Friday, when it
4 went out the door.

5 A. Okay.

6 Q. Did you have practice Q and A sessions about things that
7 Mr. Biersteker might ask you this week in Court?

8 A. I don't remember specific Q and A, you know, sections
9 about what Mr. -- what Peter might ask me. We talked about
10 areas that were potential areas you may ask about from this
11 direct testimony, and then the things that I would represent as
12 a result of the changes I made.

13 Q. Just to be clear, were there also areas that he or
14 Mr. Kreiner talked about saying, well, we'll ask you about this
15 as well, or if Mr. Schwartz doesn't ask you about it, we'll make
16 sure to ask about it?

17 A. Yeah, those general conversations, yeah, we had those.

18 Q. And that happened between Monday and Friday during that
19 same period of time when you were working on the changes to that
20 modified written direct examination?

21 A. Yeah.

22 Q. Did they also talk about documents that they might show
23 you in Court this week?

24 A. I don't recall any documents, other than the ones that
25 were the U.S. exhibits that we've already talked about.

- 1 Q. Okay.
- 2 A. Either in the brief or in my direct.
- 3 Q. Okay. Let's close the chapter on that time period, and I
4 want to go to the time period after Friday at noon when that
5 document then went out the door.
- 6 A. Okay.
- 7 Q. Okay. Now, after that time period, you again met with
8 your lawyers; is that fair to say?
- 9 A. Yes, since then I have met with them.
- 10 Q. And you met with Mr. Kreiner and Mr. Biersteker?
- 11 A. Yes.
- 12 Q. Did you meet with any other attorneys?
- 13 A. No.
- 14 Q. Okay. Now, during that period of time after last Friday
15 at noon, up to today, you talked about questions that I might
16 ask you in Court?
- 17 A. Um, I would say that those happened since Monday
18 afternoon until today, some, yes.
- 19 Q. Since Monday, October 11th, not Monday, October 4th?
- 20 A. Right.
- 21 Q. Just this past Monday?
- 22 A. Right.
- 23 Q. Okay. And you also talked about other documents that I
24 might show you in Court?
- 25 A. Only if they were the ones that were mentioned in that

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1 brief, that's the only ones I've seen.

2 Q. Now, with regard to -- you're talking with Mr. Biersteker
3 and Mr. Kreiner about the questions I'm going to ask. Did you
4 actually have kind of a mock examination, a practice Q and A at
5 that time?

6 A. On some specific things, it wasn't a, you know, very long
7 thing at all.

8 Q. Did Mr. Kreiner play me?

9 A. No.

10 Q. Okay. Good. After Friday afternoon, Monday, this week
11 during the course of this week when you met with the lawyers,
12 you also talked about questions that they might ask you during
13 your appearance in the courtroom; is that fair to say?

14 A. Yes.

15 Q. Okay. And they also talked about documents that they
16 might show you during your appearance in the courtroom?

17 A. As I said, I don't recall any documents, other than the
18 ones we've already talked about.

19 Q. All right. Now, when they talked about questions that
20 the defense attorneys, Mr. Biersteker and Mr. Kreiner, might ask
21 you in the courtroom this week, did you have a practice Q and A
22 then?

23 A. Can you repeat that?

24 Q. Okay. If I understand your testimony correctly, you met
25 with the lawyers up to last Friday and you filed that document

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1 in front of you, right?

2 A. Right.

3 Q. And after that -- and you said starting mostly with

4 Monday, October 11th you met with them again and started

5 preparing for your courtroom appearance?

6 A. Right.

7 Q. And during the course of that preparation you talked

8 about questions that I might ask you and answers that you might

9 give to those questions?

10 A. Yes.

11 Q. Okay. Did you also talk about questions that they might

12 ask you and answers that you would give to those questions?

13 A. We talked in general about those as well, yes.

14 Q. Okay. And did you have, with regard to that last set,

15 the questions that they might ask you, the defense attorneys,

16 and answers you would give, did you have kind of a practice Q

17 and A?

18 A. Yeah, very short one, yeah.

19 Q. Okay. All right. And that happened over the course of

20 this past week?

21 A. Yes.

22 Q. All right.

23 MR. SCHWARTZ: Your Honor, if we could see Order 471, page

24 11, please. At this time, I'm going to make two motions to the

25 Court, the first is to prohibit the defense from questioning --

1 conducting any cross-examination today live in Court, and the
2 second is to re file as the proper testimony the original version
3 of the Q and A, and if I can make my proffer as to why I would
4 like to at this time.

5 THE COURT: You certainly better make a proffer.

6 MR. SCHWARTZ: All right. If you can show -- all right.

7 Your Honor, this is Order 471 page 11, and part 7, this
8 application of the rule on witnesses, and towards the bottom,
9 there's a highlight section that says, "fact witnesses are
10 prohibited from discussing their testimony with such -- with
11 counsel until such testimony is concluded".

12 It is our position, Your Honor, that as of Friday at noon,
13 that testimony was filed. His direct testimony had been lodged
14 in evidence just as if we had done this all live and I had
15 examined him and the examination, the direct examination ended on
16 Friday. If we had done this live and I conducted a direct
17 examination of Dr. Gentry on Friday and they stopped at noon and
18 Your Honor said I'm busy all this week, come back next Thursday
19 morning at 9:30, and you can pick up at the cross-examination,
20 the defense would have been prohibited from talking to Dr. Gentry
21 about what happened during his direct examination, what questions
22 were asked and what's given to him, and how to respond to that by
23 talking about documents or doing a mock Q and A about questions
24 that they would ask him.

25 Essentially, it's the functional equivalent of violating

1 the rule against witnesses as if the witness were appearing
2 completely live. The testimony was filed, the direct testimony
3 was completed and made unchangeable as of Friday afternoon. And
4 so after Friday afternoon, it's our position, that the witness
5 cannot be prepared, because it would be the equivalent of him
6 being prepared during a break in a live trial, live testimony
7 situation between his direct testimony and his cross-examination.
8 So that's the basis of my motion to prohibit the defense from
9 questioning him on cross-examination. It violates the rule
10 against witnesses.

11 Your Honor, I have not appeared before Your Honor before,
12 so I don't know what remedy Your Honor imposes when you discover
13 that someone has so drastically violated the rules as to do a
14 mock cross-examination for a period of time. But in my
15 experience, that would be an appropriate remedy, and that's what
16 I'm going to ask the Court to do.

17 THE COURT: And did you have a second motion?

18 MR. SCHWARTZ: Yes, I did, Your Honor. The second motion
19 is to have the Court replace the modified, the as corrected
20 version that was filed on Friday with the original October 4th
21 version that the United States filed without the changes that
22 were made subsequently. And the reason that I'm offering that
23 request to the Court is that, again, this is a situation where a
24 witness -- this -- what's going on in the process that Your Honor
25 set up, is a witness is given questions and he's supposed to

1 answer them, and during the course of a direct examination, he
2 shouldn't be influenced by what he's going to say or what he's
3 going to be asked about after his direct examination is
4 concluded. And essentially, if I'm understanding the testimony
5 of Dr. Gentry correctly, and I tried to be as clear as possible,
6 between Monday last week and Friday when that document went out
7 the door, they were not just talking about the answers to the
8 questions that were proffered to Dr. Gentry, they were talking
9 about how things would be handled on direct and cross-examination
10 in light of or in the context of those answers. That's -- it
11 abuses the adversarial process, Your Honor.

12 A situation like that could not take place if Dr. Gentry
13 had appeared live on direct examination. There's no way -- it's
14 not like a grand jury situation where Dr. Gentry -- where I could
15 ask Dr. Gentry a question on direct examination and he could
16 say -- he could answer it and then give the next question and
17 say, wait a minute and go outside to his lawyer and say, you
18 know, I was asked this question and this is what I answered, what
19 should I say in the next question -- or what's going to happen
20 next.

21 We're not in the grand jury situation we're in a trial
22 situation, and I believe what's appropriate, Your Honor, is that
23 it as closely as possible mimic the trial situation, and in that
24 case, while the lawyers can work with him to give the direct
25 examination answers, they can't during that time start talking

1 about or thinking about or working with him on what's going to
2 happen in Court after the direct examination is concluded. It
3 certainly might not violate the explicit language of the rule,
4 but I think that sentence, "fact witnesses are prohibited from
5 discussing their testimony with counsel until such testimony is
6 concluded" certainly captures the essence of it if not explicitly
7 says that.

8 THE COURT: Mr. Biersteker?

9 MR. BIERSTEKER: Well, just briefly, Your Honor. You
10 know, the testimony isn't the witness's testimony until he adopts
11 it. We've had witnesses take the stand and make changes and
12 corrections to their testimony. I don't see any violation of
13 Order 471 here at all.

14 And as to replacing his testimony, I mean that's just --
15 the testimony that was submitted was wrong and the witness went
16 through it. He testified he went through it 70 percent of the
17 time on his own. He testified he made the notes. I see no basis
18 for either of these motions, Your Honor.

19 THE COURT: Dr. Gentry's testimony was very clear, and
20 certainly he was examined for a half an hour on the details of
21 what went on this week. There is no basis for my granting the
22 motions, and in particular for allowing such a draconian remedy
23 as prohibiting cross-examination by counsel.

24 First of all, Dr. Gentry was very clear. He got the
25 direct by e-mail. He went through it. He went through it on his

1 own. He highlighted and marked up all the areas of concern to
2 him to begin with. Then, of course, he consulted with his
3 counsel. He had a right to consult with his counsel at that
4 point, and he explained in some detail that the subsequent
5 versions of his direct testimony went through several iterations,
6 not unlike, but if anything more detailed than the manner in
7 which Mr. Orlowsky testified yesterday. And certainly there was
8 no violation of the rule against -- the rule on witnesses.

9 In terms of replacing his final corrected version with the
10 first version submitted initially by the government, and when I
11 say "submitted" that's not accurate, it was really sent to
12 defense counsel, and under 471 A not filed. That was not
13 Dr. Gentry's statement. That was proposed testimony, proposed in
14 good faith by the government. Dr. Gentry's statement is either
15 what was officially filed by the defendants, and, of course,
16 these comments would apply across the board, or what he adopted
17 in open Court today. Possibly there could be some argument as to
18 which it was, but basically it's what he has sworn to today in
19 open Court, although, again, he made it very clear that he had
20 signed off on and he was satisfied with the final testimony that
21 his counsel filed with the Court.

22 But both government motions are denied. This witness has
23 a lot of substantive testimony to give. Some of it not so easy
24 to follow, so let's try to focus on the substance now.

25 MR. SCHWARTZ: Very well, Your Honor.

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1 BY MR. SCHWARTZ:

2 Q. If you could look at the document now, Dr. Gentry, that's
3 the written direct examination as corrected by Jeffery S. Gentry
4 that you have in front of you.

5 MR. BERNICK: I'm sorry, I don't know if the court
6 reporter can keep up.

7 THE COURT: Mr. Schwartz is talking too fast, yes, I'm
8 sure our court reporter can keep up because he hasn't said
9 anything, but yes, you really have to slow down.

10 MR. SCHWARTZ: Yes, Your Honor, I will. Thank you.

11 BY MR. SCHWARTZ:

12 Q. If you turn to page 1, first mistake I made was your --
13 the spelling of your name, and I apologize about that.

14 A. Yes.

15 Q. Just quickly, I want to ask you a few questions about
16 your background. You have a Ph.D. in analytical chemistry; is
17 that right?

18 A. That's correct.

19 Q. And you came -- you received your degree in 1986?

20 A. Yes.

21 Q. And it was just a couple weeks later that you came to
22 start to work for R.J. Reynolds Tobacco Company?

23 A. That's correct.

24 Q. And that was the office in Winston-Salem and the
25 surrounding areas?

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- 1 A. Yes, and research and development, yes.
- 2 Q. All right. Now, you worked there ever since without any
3 interruption?
- 4 A. That's correct.
- 5 Q. All right. And currently your position is vice president
6 of product development?
- 7 A. Yes.
- 8 Q. All right. Now, you're vice president of product
9 development now, but it's fair to say that you spent your entire
10 RJR career on the topic or the matter of product development?
- 11 A. Yes, that's fair.
- 12 Q. All right. And product development means cigarette
13 design and performance?
- 14 A. Yes.
- 15 Q. All right. Now, among those products that you have
16 worked on developing, they include projects or products related
17 to risk reduction?
- 18 A. Yes.
- 19 Q. All right. And is it fair to say that much of your new
20 product development work that you've done during the course of
21 your career has been related to risk reduction?
- 22 A. Yes.
- 23 Q. All right. And by "risk reduction", I mean reducing the
24 risks of the adverse health consequences related to smoking. Is
25 that the way you understand it?

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- 1 A. Reducing risk is -- re -- seeking ways to reduce the risk
2 associated with the inherent risk of smoking.
- 3 Q. Well, if you can, take a look at page 12, line 15.
- 4 A. I'm sorry, page?
- 5 Q. Page 12, line 15. And that's -- I'm sorry. I'm sorry, I
6 withdraw the question I apologize. I'm sorry, Dr. Gentry, don't
7 worry about. That I'm referring to the wrong line and I
8 apologize. All right. Now.
- 9 Now, one of the risk reduction new products that you
10 worked on was EW cigarette; is that correct?
- 11 A. That's correct.
- 12 Q. All right. Now, you were one of the leaders of the
13 development phase of the EW cigarette?
- 14 A. Yes.
- 15 Q. Okay. And you were involved in that work leading up to
16 the test marketing of the product in April of 1995?
- 17 A. That's correct.
- 18 Q. All right. Now, there are two -- there were two main
19 technological features of the EW cigarette, the first one was a
20 carbon scrubber filter?
- 21 A. Yes.
- 22 Q. And the second one was a special low nitrogen blend
23 tobacco?
- 24 A. Yes.
- 25 Q. Okay. And the carbon scrubber filter frequently was

1 referred to as a CS filter?

2 A. That's right.

3 Q. And the special low nitrogen blend of tobacco frequently
4 was referred to as the CT blend?

5 A. Yes.

6 Q. Okay. And during the course of our discussions today,
7 that's how I'm going to refer to it, to them, if that's all
8 right with you?

9 A. CS and CT.

10 Q. Okay.

11 A. Yeah.

12 Q. All right. Now, let me look at the testimony before I
13 ask you to look at it, so I know I have the right page this
14 time.

15 On page 4 of your testimony, line 19, you mention the
16 terms project CC and EW.

17 A. Yes.

18 Q. You make a distinction?

19 A. Yes.

20 Q. CC and EW involve the same pairing of technological
21 features; is that right?

22 THE COURT: Mr. Schwartz, I'm going to emphasize again,
23 not just for our court reporter, but for me, that this is highly
24 technical and I don't want you to go too fast, please.

25 MR. SCHWARTZ: I won't, Your Honor, I promise. This is a

1 summary question and I'm going to go back into it and explore it
2 very slow and I hope careful pace. All right.

3 THE COURT: All right.

4 BY MR. SCHWARTZ:

5 Q. Now, there's a reference you have here to project CC and
6 project EW?

7 A. Yes.

8 Q. What's the difference between the two?

9 A. Project CC was a precursor to EW, and it was, in fact, a
10 project looking at the technologies of CS and the low nitrogen
11 blend CT. But CC did not always have those two technologies
12 combined, there were aspects of just looking at the filter, just
13 looking at the blend. And then once we formally adopted the
14 combined technologies of the CS and the low nitrogen blend, and
15 began to prepare to go to test market for it in '94, we began
16 referring to it as EW.

17 Q. Okay. Now, CC stood for controversial compounds?

18 A. That's correct.

19 Q. What did EW stand for?

20 A. EW really didn't stand for anything. It's just an
21 acronym out of random letter generation.

22 Q. All right. Now, the purpose of the EW cigarette was to
23 create a tobacco burning cigarette that reduced risks?

24 A. That had the potential to reduce risk, yes.

25 Q. All right. Now, when I say "tobacco burning", that's

1 different from another cigarette that RJR previously had
2 produced and sold called Premier; is that right?

3 A. Different from Premier and our current one, Eclipse.

4 Q. We'll get to that in a second.

5 A. Okay.

6 Q. Now, if you could just briefly describe for the Court how
7 EW is a tobacco burning cigarette and how Premier is a tobacco
8 heating cigarette, if that's a correct characterization?

9 A. Sure, that's correct. EW is much more like a traditional
10 product that's in the marketplace that most people are familiar
11 with today.

12 Premier was a tobacco heating cigarette in which there
13 was a carbon element on the tip end of the cigarette surrounded
14 by an insulator. That carbon tip was what was lit and heated,
15 rather than a tobacco rod in a traditional cigarette. That
16 heated carbon tip, then hot gases from that were carried across
17 a capsule containing tobacco extracts on a substrate, as well as
18 a tobacco jacket surrounding that, and that's where the flavors
19 nicotine and glycerine came from in Premier, which the smoke
20 from that was primarily glycerine, water and nicotine and
21 flavors.

22 Q. If I could interrupt you for one second.

23 A. Sure.

24 Q. You mention the phrase "substrate", is that something
25 that we need to know to understand the cigarette?

- 1 A. Substrate was an alumina that we had sprayed the tobacco
2 extract onto that was contained within the capsule of Premier.
- 3 Q. Okay. It looked like a cigarette from the outside, but
4 it's the inside, what was inside the paper that was the outer
5 wrapping that was different; is that fair to say?
- 6 A. Yes, the outward appearance looked like a cigarette, and
7 the inner part of it was still tobacco wrapped around this
8 capsule that contained another tobacco abstract, as well as the
9 heat source.
- 10 Q. Okay. Now the Premier cigarette was sold by EW briefly
11 in 1988 or '89; is that fair on to say?
- 12 A. It was sold by RJR.
- 13 Q. I'm sorry, sold by RJR in 1988 or 1989?
- 14 A. I think that's right.
- 15 Q. For about six months?
- 16 A. I don't recall the time frame. I think it was less than
17 a year.
- 18 Q. And you worked on the development of the Premier
19 cigarette as well?
- 20 A. Yes.
- 21 Q. And so you were familiar with the features surrounding
22 that product?
- 23 A. Yes.
- 24 Q. Okay. And at the time RJR sold that product it believed
25 that that was a product that had the potential to reduce risk?

1 A. It certainly had significant reductions in controversial
2 compounds and biological activity, and we believed had a
3 potential to reduce risk.

4 Q. Now, that was in '88 or '89. In the early '90s leading
5 up to 1995, you worked on and produced EW?

6 A. Yes.

7 Q. And that's a tobacco burning cigarette, you said?

8 A. Right.

9 Q. Now, that was another cigarette that reduced
10 controversial compounds?

11 A. Yeah, it was a tobacco burning targeted at reducing them,
12 yes.

13 Q. Okay. And reducing biological activity?

14 A. To the extent we could, yes.

15 Q. All right. Now, EW went to test market in the state of
16 Oklahoma in April of 1995?

17 A. That's correct.

18 Q. All right. And it sold for about a year, or year and a
19 half; is that right?

20 A. I think it was right around two years.

21 Q. All right. Now, while you were selling that version of
22 EW in Oklahoma as the Winston Select cigarette, the company also
23 sold the Winston Select cigarette throughout the rest of the
24 country, but that had nothing like EW in it; is that fair to
25 say?

- 1 A. That's correct. The product that was EW was in the state
2 of Oklahoma, and then the rest of the United States retained the
3 original Winston Select product.
- 4 Q. And during the first six months or so of when you were
5 selling the EW version of Winston Select in Oklahoma, the
6 company had a control or comparison market in Chattanooga,
7 Tennessee where you compared activity of the sales of the
8 traditional Winston Select in Chattanooga and the experimental
9 EW Winston Select in Oklahoma?
- 10 A. Yes.
- 11 Q. All right. Now, if you look at your testimony, please,
12 on page 10, and I'm going to direct your attention to lines 7 to
13 10. And just let know when you're there and have had a chance
14 to look at it.
- 15 A. Okay.
- 16 Q. Okay. Now, the question you were asked was: "So, there
17 was a conclusion inside the company, prior even to going to test
18 market, that these EW cigarettes were highly consumer
19 acceptable." That's the question?
- 20 A. That's the question.
- 21 Q. The original answer was "Yes", and you crossed that out
22 and replaced it with the answer: "There was a range of use
23 within the company. I would not say there was a conclusion
24 within the company that it was highly consumer acceptable."
- 25 A. That's right.

1 Q. All right. Let me first ask you, was there a conclusion
2 within the company that EW was consumer acceptable?

3 A. Even on that, I think there was a range of views. Our
4 marketing department was very skeptical in some of the testing
5 we had done. The product was not parity to one's usual brands,
6 it was usually inferior. I think us and R & D were much more
7 hopeful that it would be consumer acceptable, but there was a
8 range of views.

9 Q. The marketing folks, they were proved wrong though,
10 because when you actually sold EW there was a parity in sales;
11 is that right?

12 A. As we watched that particular test market versus the
13 control markets, EW seemed to hold its own with a significant
14 level of promotion, promotional activity.

15 Q. But it was your observation that even though the initial
16 test of consumer acceptance in a testing situation were not as
17 high as you'd like, it sold better than that when it was
18 actually out in the field being offered to consumers?

19 A. I don't -- I didn't understand your question.

20 Q. I'm going to ask you to just take a look at a document
21 instead.

22 If you could show the witness Exhibit 30358, it's in the
23 second red row.

24 MR. SCHWARTZ: Your Honor, I'm going to give a copy of
25 this to the defense counsel. It's a nonexhibit that was

1 mentioned in the direct examination.

2 If I may approach and hand it to the Court and your clerk?

3 THE COURT: All right. That's 30358.

4 BY MR. SCHWARTZ:

5 Q. Do you have a copy of that, sir?

6 A. No, I do not.

7 MR. SCHWARTZ: I beg Your Honor's pardon.

8 BY MR. SCHWARTZ:

9 Q. For the moment, I want you to please feel free to take a

10 look at the entire document. And take your time looking it

11 over, but I'm going to direct your attention to the first

12 paragraph in the number one and two bullets that you have at the

13 top of the page. And just let me know when you're ready.

14 A. Okay, I've scanned through it, yes.

15 Q. Okay. Now, that's a memo that you wrote in 1999 to

16 Dr. Townsend?

17 A. Yes, it is.

18 Q. And Dr. Townsend's your boss?

19 A. Yes.

20 Q. And he was in 1999?

21 A. Yes.

22 Q. And he was back in the 1994, 1995 period when you were

23 working on EW as well?

24 A. Yes, I reported to Dave for a little more than a decade.

25 Q. Okay. And did you get a chance -- when you were last

1 week preparing for this testimony, did you get a chance to see
2 this document as one of those that was given to you by your
3 attorneys?

4 A. Yes, this is one that I did see.

5 Q. So you had an opportunity, in the last week or two, to
6 look this over as well?

7 A. Yes.

8 Q. Okay. All right. In this document, you mention on your
9 bullet one, "The original EW lights were shown to be consumer
10 acceptable in a test marketed environment despite questionable
11 performance in consumer testing." Is that right?

12 A. That's what's said here, yes.

13 Q. Okay. And the context of this comment is that in 1999
14 you're talking about whether a new version of EW ought to be
15 sold by the company?

16 A. Yes. Dave had asked for me to put together what I
17 believed the consumer reaction to a newer version of EW would be
18 based on some past data on EW, and this is really a reflection
19 of my opinions evaluating data in somewhat of a unique way.

20 Q. Well, it's not just your opinion grabbed out of the sky,
21 you looked at a bunch of data and you detailed the basis of your
22 opinion in the following basis in that memo?

23 A. Oh, yeah, my opinion is based right here.

24 Q. Now, I just want to ask you about your comments, not
25 about the new EW, not about what the company ought to do or

1 should have done in 1999 and still hasn't done, but rather I
2 want to ask you about when you wrote that, you were thinking
3 about the original EW and how it sold in the 1995 to 1997
4 period.

5 A. That's what these refer to, yes.

6 Q. Okay. Now, there you're saying that even though before
7 it went on the market it had, as you call it "questionable
8 performance" in consumer testing --

9 A. Um-hum.

10 Q. -- despite what the marketing gurus figured out or
11 thought about it before it went on the market in 1995, they were
12 proven wrong because it actually was consumer acceptable in the
13 test market environment?

14 A. That's not a conclusion that I would necessary draw from
15 a company perspective. That may be my opinion, but there was
16 information from marketings watching that test market where the
17 test market product actually failed substantially compared to
18 the balance of the U.S. market.

19 Q. Okay. There may be an opportunity for us to talk about
20 it, but all I'm asking you is it was your opinion that EW did
21 better in reality, as it was sold, compared to the expectations
22 of EW as a result of the consumer testing that was conducted
23 before it was put on the market in 1995?

24 A. Yeah, I think my opinion here in '99 was that it held its
25 own despite those consumer test scores, yes.

1 Q. Now, you used the term "parity", P-A-R-I-T-Y, that kind
2 of parity?

3 A. That's correct, equivalent performance.

4 Q. Okay. Now, is parity to a usual brand a matter of
5 whether it's acceptable or rather a preference of the usual
6 brand? I'll withdraw the question.

7 A. Okay. I wasn't sure I followed it.

8 Q. That's fine. Let's go back to are your comment on your
9 testimony on page 10, lines 7 to 10.

10 A. Yes.

11 Q. All right. Now, your answer was "There was a range of
12 users within the company and you will not say there was a
13 conclusion within the company that it was highly consumer
14 acceptable"?

15 A. That's what I said, yes.

16 Q. All right. Now, that was the conclusion before the
17 cigarette went to test market, is that right? The question was,
18 so there was a conclusion inside the company prior even to going
19 to test market that the cigarettes were highly consumer
20 acceptable.

21 A. Well, the question was put in the context of a quote that
22 Dave Townsend had made in my performance evaluation, and I took
23 it to mean that you were referring to Dave's comment as being a
24 conclusion with inside the company. There was a range of views
25 within the company.

- 1 Q. Let's look at that Document 22090, please, in the first
2 page. And in the second paragraph -- I'm sorry, do you have
3 that document in front of you, sir?
- 4 A. Yes.
- 5 Q. Okay. We're going to give you a hard copy too, if that's
6 easier to work with.
- 7 All right, now, do you have that, sir?
- 8 A. Yes, I do.
- 9 Q. And you've looked at that document last week, and so
10 you're familiar with it?
- 11 A. Yes.
- 12 Q. And you're familiar with it in the context -- the
13 question that we're talking about, because you said that's what
14 you believed it was referring to?
- 15 A. Yes.
- 16 Q. All right. Now, that paragraph -- first of all, the
17 document is your job performance evaluation for the year 1994;
18 is that right?
- 19 A. That's correct.
- 20 Q. Okay. And it's dated March 10th, 1995?
- 21 A. Yes.
- 22 Q. And that is roughly one month before EW went out into
23 test market in Oklahoma?
- 24 A. Yes.
- 25 Q. All right. Now, it was prepared by David Townsend, who

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- 1 you said was your boss?
- 2 A. Yes.
- 3 Q. Okay. And he said that "Dr. Gentry's main objective was
- 4 to provide test market ready EW products which exhibit
- 5 substantial reductions in controversial compound yields, and
- 6 various biological assays. This represents the first tobacco
- 7 burning products which exhibit reductions of this magnitude and
- 8 are highly consumer acceptable". Is that correct?
- 9 A. That's what Dave says, yes.
- 10 Q. That was the evaluation that you got, and he said two
- 11 things about it, one that they were tobacco burning -- I'm
- 12 sorry, three things. They were tobacco burning, they exhibited
- 13 reductions of substantial -- substantial reductions in
- 14 controversial compounds, and they were highly consumer
- 15 acceptable?
- 16 A. That's what Dave said, yes.
- 17 Q. That's what Dave said, and "Dave" is Dr. Townsend?
- 18 A. Yes, sorry.
- 19 Q. Now, that's a pretty good review?
- 20 A. Yes.
- 21 Q. Okay. You had a chance to look at this review when it
- 22 was written?
- 23 A. Yes.
- 24 Q. And if you look at the last page, you signed the review?
- 25 A. That's correct.

- 1 Q. So you did not dispute the conclusion of Dr. Townsend if
2 he said, way to go Dr. Gentry, you achieved the first tobacco
3 burning product which exhibits reductions of this magnitude and
4 are highly consumer acceptable?
- 5 A. In an evaluation this glowing, I wouldn't dispute it.
- 6 Q. Right, that is good day for Jeff Gentry?
- 7 A. Yes, it was.
- 8 Q. Okay. And if you saw something wrong, you will you would
9 say that's not it, that's not right, I can't sign off on that?
- 10 A. I'm not sure I would do that in an evaluation unless it
11 was counter to that.
- 12 Q. But this one you actually agreed with it that it was the
13 first tobacco burning products which exhibit reductions of this
14 magnitude and are highly consumer acceptable?
- 15 A. I would not have couched it as "highly consumer
16 acceptable". I had been much closer to the consumer testing
17 than Dave had been, I had seen the results in consumer testing,
18 I certainly hoped it would be consumer acceptable. I don't
19 think I would call it "highly consumer acceptable".
- 20 Q. So you signed off on this document as accepting it as
21 your evaluation, but you don't agree with that conclusion?
- 22 A. As I said, this was a glowing performance evaluation and
23 I would not have taken issue with that.
- 24 Q. So if he said you could dunk behind your back with a
25 basketball, you would sign off on that, too?

- 1 A. I probably would not sign off on that.
- 2 Q. So there's a range of what you would sign off on and what
3 you wouldn't?
- 4 A. I think so, yes.
- 5 Q. And the dunking might not be true but the highly consumer
6 acceptable part is on the truer end of the continuum?
- 7 A. That's much more of a subjective opinion. That was his
8 opinion. You would have to ask him about that.
- 9 Q. Well, you're right. Now we're going to talk to you about
10 it.
- 11 A. Okay.
- 12 Q. Dr. Townsend, he wrote that conclusion one month before
13 EW went to test market?
- 14 A. That's correct.
- 15 Q. And so he believed the EW cigarette was highly consumer
16 acceptable?
- 17 A. That's what it says, yes.
- 18 Q. And you have no reason to doubt his conclusion?
- 19 A. I have no doubt to -- I have no reason to doubt that that
20 was his assessment of the product, no.
- 21 Q. He was your boss then?
- 22 A. Yes.
- 23 Q. Now he's the head of all of R & D at R.J. Reynolds; is
24 that right?
- 25 A. That's correct.

- 1 Q. And, as a matter of fact, he's so good at what he does,
2 the whole defense is calling him as an expert witness in this
3 case, is that your understanding?
- 4 A. My understanding is he will be called as one of our
5 expert witnesses, yes.
- 6 Q. Okay. Now, this expert witness for all of these lawyers'
7 companies, said a month before it went to test market that the
8 EW product that you, Jeff Gentry, were among others responsible
9 for, was highly consumer acceptable. He said that.
- 10 A. Yes, as an expert in cigarette design, he asserted his
11 belief in highly consumer acceptable.
- 12 Q. And you have worked for Dr. Townsend for what, 15 years
13 now?
- 14 A. Since 1991.
- 15 Q. And I met him, my opinion is he's a very sharp guy?
- 16 A. He's an incredibly sharp guy.
- 17 Q. And his insight about cigarette design and cigarette
18 products that are made is non paralleled, is that fair to say?
- 19 A. I think as far as design and performance, that's
20 absolutely correct. I don't know that he would assert that
21 expertise in marketing and rating consumer test results.
- 22 Q. But this is a guy who has kind of seen it all since 1976
23 or so when he came to the company?
- 24 A. He's been there a long time and seen a lot of things,
25 yes.

- 1 Q. So he knows what's a stinker, and he knows what's highly
2 consumer acceptable just by seeing the whole spectrum of
3 products that have gone through the door?
- 4 A. Certainly, and I'm not calling EW a stinker, I believe EW
5 was a pretty good product.
- 6 Q. Now, there's another guy who also signed your evaluation
7 on the last page, and that's Dr. Gary Burger; is that right?
- 8 A. That's correct.
- 9 Q. Now, he didn't cross out "highly consumer acceptable",
10 did he?
- 11 A. No, he didn't.
- 12 Q. And you have no reason to doubt that in March 1995, one
13 month before EW went on the market, that Dr. Burger did not
14 believe that they were highly acceptable consumer products?
- 15 A. I had not discussed it with Gary, and his signing this
16 would mean that he agreed, to some extent, with that assessment.
- 17 Q. All right. Now, at that time, Dr. Burger was
18 Dr. Townsend's boss?
- 19 A. Right.
- 20 Q. So your boss's boss?
- 21 A. That's right.
- 22 Q. And he said, way to go Jeff, highly consumer acceptable,
23 first tobacco burning product with reductions of this magnitude?
- 24 A. That's -- yes.
- 25 Q. And what's important about him saying -- or about they're

- 1 saying "first tobacco burning product" is that Premier had high
2 reductions, but that was a tobacco heating product, right?
- 3 A. That's correct.
- 4 Q. Is that what you understood the distinction to make --
5 that's being made there in the evaluation?
- 6 A. Yes.
- 7 Q. Okay. And Premier, not highly consumer acceptable; is
8 that fair to say?
- 9 A. That is unfortunately fair to say.
- 10 Q. Okay. Right. And it's your sense that Dr. Townsend
11 worked on Premier as well, right?
- 12 A. I think, yeah, he had certain aspects of Premier, yes.
- 13 Q. So he made the conclusion that EW was highly consumer
14 acceptable, he had the benefit of the knowledge of what had
15 happened in 1988 and '89 when Premier, the tobacco heating
16 cigarette, that also had substantial reductions, wasn't exactly
17 highly consumer acceptable?
- 18 A. I think we certainly all had the context of a "stinker",
19 I believe you called it.
- 20 Q. With that kind of a monkey on the back you knew how to do
21 it technologically, but you had to have people like it?
- 22 A. Right.
- 23 Q. And here people are saying great, we have the technology
24 and he with think it's highly consumer acceptable as well?
- 25 A. As I said, I think that was Dave's conclusion.

- 1 Q. And you had no doubt that Dr. Burger joined in that
2 conclusion?
- 3 A. I never discussed that with Gary, but he signed this
4 evaluation. That's just one small piece of this entire
5 evaluation.
- 6 Q. Dr. Burger is not a shy guy, if he didn't agree with
7 something, he would --
- 8 A. I believe that to be correct, yes.
- 9 Q. Okay. Now, Dr. Burger, he became -- at the time that he
10 signed that, he was the vice president of product assessment and
11 product development?
- 12 A. I think that's correct.
- 13 Q. That's the position that you have, or the functional
14 equivalent of the position you have now?
- 15 A. I don't have the product assessment piece of it, I just
16 have the product development piece.
- 17 Q. All right. Now, let's assume that he was the vice
18 president of product development and -- product assessment and
19 product development. At that time, was that the most senior
20 position in the company with regard to product development?
- 21 A. Yes.
- 22 Q. Okay. So, in March 1995, one month before the EW test
23 market, there was no one in the company more senior in the area
24 of product development than Gary Burger?
- 25 A. In the area of product development being cigarette

- 1 design, performance, et cetera, yes.
- 2 Q. Okay. And so no one more -- there was no one more senior
- 3 in the area of product development who disagreed with the
- 4 proposition that EW cigarettes were highly consumer acceptable?
- 5 A. From the area of product development where we pay
- 6 attention to performance and design.
- 7 Q. All right.
- 8 A. Technical performance and design.
- 9 Q. All right. I want to ask you some questions now, if you
- 10 don't mind, about changes you made in your answers regarding --
- 11 to questions regarding the carbon scrubber filter and reductions
- 12 that it achieved, is that okay?
- 13 A. Sure.
- 14 Q. Okay. All right. Do you want a glass of water or
- 15 something?
- 16 A. I've got some, thank you.
- 17 Q. All right. Now, if you could now turn to page 15 of your
- 18 testimony and look at -- let me make sure I get this right, line
- 19 16 to 19.
- 20 A. Okay.
- 21 Q. Okay. Here the question ask you is: "And you found that
- 22 a major benefit of this CS filter", and that's the carbon
- 23 scrubber filter that went into the EW cigarette, right?
- 24 A. That's correct.
- 25 Q. "And you found that a major benefit of this CS filter was

1 that it reduces volatile vapor faced compounds in cigarette
2 smoke, including carbonyls, while minimizing the carbon off
3 taste associated with other carbon filters"?

4 A. That's the question.

5 Q. Okay. Get to the answer in a second. But I just want to
6 make sure we understand that the CS filter was not the first
7 time that R.J. Reynolds, or other companies, had tried to make a
8 product with a carbon or charcoal filter; is that right?

9 A. No, the industry had had many attempts at those products,
10 yes.

11 Q. And R.J. Reynolds had a Tempo cigarette, T-E-M-P-O; is
12 that right?

13 A. Yes, in the '60s and '70s, yes.

14 Q. And that had some sort of carbon or charcoal filter as
15 well?

16 A. It had a very different carbon filter than this one, yes.

17 Q. All right. The problem that Tempo, and of those older
18 charcoal or filter cigarettes had, was that it had this "off
19 taste", that's referred to in this question, is that fair to
20 say?

21 A. I think that's fair to say, yes.

22 Q. And it was the conclusion of Reynolds, at least, that
23 that off taste was one of the reasons that those earlier
24 versions of a charcoal or carbon filter didn't do so well in the
25 market?

- 1 A. I think that's one of the reasons. I think it's fair to
2 characterize probably a major reason.
- 3 Q. Okay. It's a major reason, and so one of the good things
4 about this carbon scrubber filter that went into EW is that it
5 was able to do some of the things that the old carbon filters
6 did, plus, it minimized that off putting carbon off taste; is
7 that fair to say?
- 8 A. Yes, as long as we say "minimized" the off taste, it did
9 not get rid of them.
- 10 Q. There was the perception that there was less of that
11 there?
- 12 A. Less of the off taste, yes.
- 13 Q. And it was the hope of R.J. Reynolds that with less off
14 taste it would be a more consumer acceptable product?
- 15 A. That's certainly our hope, yes.
- 16 Q. And then you get hit with this question, "A major
17 benefits of the CS filter was that it reduces the compounds
18 while minimizing the off taste".
- 19 A. That's the question, yes.
- 20 Q. And the answer I put in there was "Yes", but the answer
21 with you put in there was "Yes under FTC conditions"?
- 22 A. That's correct.
- 23 Q. All right. So you added a qualifier "under FTC
24 conditions"?
- 25 A. That's correct.

- 1 Q. And that's about the FTC smoking machine testing method?
- 2 A. Right.
- 3 Q. Is that correct? Okay.
- 4 Now, it's not your testimony that the carbon off taste is
- 5 only minimized by the CS filter when it's smoked on an FTC
- 6 machine.
- 7 A. No, the off taste would be with humans, but the compound
- 8 reduction is a very important point, the compound reduction was
- 9 not seen in other smoking conditions.
- 10 Q. Well --
- 11 A. A very important point.
- 12 Q. And we're going to talk about that in one second. I just
- 13 want to make sure looking at your changed answer to this
- 14 question, that the FTC machine has nothing to do with how a
- 15 cigarette tastes?
- 16 A. No, the machine doesn't tell us how it tastes, but it
- 17 certainly has to do with the other part of the question.
- 18 Q. Okay.
- 19 MR. SCHWARTZ: I'm going to move to strike the tail part
- 20 of that answer, Your Honor.
- 21 THE COURT: No, that motion is denied.
- 22 MR. SCHWARTZ: All right.
- 23 BY MR. SCHWARTZ:
- 24 Q. So, it's humans that you ask about taste, not machines,
- 25 right?

1 A. Yes.

2 Q. All right. Now, please look at page 15 lines 20 to 21.

3 A. Correct.

4 Q. Now, "The CS filter also reduced hydrogen cyanide, or

5 HCN". That's the question.

6 A. Um-hmm.

7 Q. And the answer I gave was "Yes", and the answer you gave

8 was Yes, under FTC conditions".

9 A. Correct.

10 Q. All right. Now, the "FTC conditions", the FTC testing

11 method, is that what you are referring to by --

12 A. That's what I'm referring to.

13 Q. And that's a testing machine where a cigarette is smoked

14 by a machine and things are collected on a Cambridge filter pad,

15 is that --

16 A. Yeah, it's a 35 cc or 35-millimeter -- milliliter puff

17 taken every 60 seconds and the tar collected on a Cambridge

18 filter pad.

19 Q. Now, the FTC testing method that you that you are talking

20 about, that measures the amount of tar, right?

21 A. It -- that -- the way that I'm using it is that this

22 is -- these experiments were done under those conditions.

23 Q. Right, just please -- I promise I'll try to get to what

24 you're thinking about, but let's try to stick with my question.

25 The FTC machine measures the amount of tar, not the

1 composition of the tar.

2 A. No, the FTC method is a method for measuring tar. The
3 FTC conditions are ways to smoke cigarettes. But the FTC method
4 is a method for measuring tar and nicotine.

5 Q. And what you're saying when you add this phrase "under
6 FTC conditions" is that Reynolds collected the smoke, or the
7 tar, from the test cigarettes, the EW type cigarettes, and the
8 control cigarettes, the ones that you were comparing them to,
9 using an FTC testing machine that you just described?

10 A. No, we were using FTC smoking conditions of 35
11 milliliters every 60 seconds.

12 Q. Collected on an FTC machine, or an FTC model or type
13 machine?

14 A. No, I mean, it's just a smoking machine, and then once
15 you collect that pad that has the tar, or the gas phase in a
16 bag, then you can do as you want to with the analysis of it.
17 It's not that you stick the cigarette in a machine and it
18 automatically reports. You have to stick the cigarette into a
19 smoking machine, the smoking machine is used to collect the tar,
20 and then you analyze it. So that's the reason that I'm specific
21 about the FTC method is a method for measuring tar and nicotine,
22 but the FTC conditions simply refer to 35 milliliter puff taken
23 every 60 seconds with a two second duration.

24 Q. Okay. And the value of using conditions like that is
25 that you can smoke the EW prototype in the exact -- or you can

1 collect tar from an EW prototype in exactly the same way as you
2 would collect the tar from the comparison cigarettes?
3 A. Yes, it's a standardized laboratory condition.
4 Q. And that was one of the benefits of using these FTC
5 conditions that you're talking about?
6 A. I think that's an advantage of using any standardized
7 laboratory condition.
8 Q. All right. Including the FTC?
9 A. Including the FTC.
10 Q. Now, you do believe that the FTC conditions are a
11 reasonable way to collect tar in order to assess a potential
12 reduction in risk?
13 A. I think it's one of the ways. The FTC conditions weren't
14 meant to represent anything other than a standardized way to
15 collect, um, for tar and nicotine.
16 Q. Using the FTC conditions doesn't skew in any way your
17 ability to assess the potential for a cigarette to reduce risk?
18 A. I think assessing risk from a cigarette involves much
19 more than just a single analysis under FTC conditions. We have
20 become very sophisticated in trying to figure that out.
21 Q. That's fine. I'm just asking you, do you think using FTC
22 conditions skews in any way the ability to measure or assess
23 whether a cigarette has the potential to reduce risk?
24 A. I think it's one way, and if we're to use it as the only
25 way in this cigarette characterization we would have been badly

1 mistaken.

2 Q. I'm not in any way, shape or form suggesting that you
3 used just that one line.

4 A. But that would have been a skew of the way that that
5 information would be used. To me that is a skew. It's not a
6 complete, accurate characterization of that product.

7 Q. If you had used it alone?

8 A. If I had used it alone.

9 Q. But the method itself doesn't skew the results you get
10 from that part of the analysis?

11 A. Naw. I mean, that's still a standardized laboratory
12 method in which I could compare a reference cigarette to a test
13 cigarette.

14 Q. All right. Now, looking at -- first of all, you had this
15 qualifier "under FTC conditions" to a number of the conditions
16 questions that are asked about chemical reduction measures?

17 A. That's correct.

18 Q. And I'm just holding out for now this hydrogen cyanide
19 question as an example of one of the many times when you added
20 that tail.

21 A. Um-hmm.

22 Q. Okay. Now, if I could see that again. It's 20 to 21.

23 THE COURT: What page are you on?

24 MR. SCHWARTZ: 15, Your Honor.

25 THE COURT: Still?

1 MR. SCHWARTZ: Same thing, yes.

2 BY MR. SCHWARTZ:

3 Q. Now, it's not your testimony that hydrogen cyanide
4 reductions are only accomplished when the carbon scrubber filter
5 is smoked on a smoking machine, is that your conclusion?

6 A. My conclusion was that with -- with respect to HCN
7 reductions, the ones that we measured were under FTC conditions.
8 We have subsequently made measurements that would have shown
9 that those reductions were diminished in smoking conditions.

10 Q. Diminished in terms of human smoking conditions?

11 A. Diminished in terms of smoking conditions that are more
12 stressful on the cigarette, which may be typical of ways people
13 could smoke the cigarette, yes.

14 Q. Well --

15 THE COURT: What do you mean "more stressful on the
16 cigarette"?

17 THE WITNESS: I'm sorry. FTC conditions are a 35
18 milliliter puff taken every 60 seconds, but "more stressful"
19 would be a large puff volume, say 60 ccs, taken every 30 seconds
20 instead of every 60 seconds. So more stress put on the cigarette
21 by a higher puff volume and more frequent puffing.

22 BY MR. SCHWARTZ:

23 Q. So, one reason to use the FTC conditions is to kind of
24 build in the assumption that the cigarette, the EW cigarette is
25 smoked the same way as cigarettes that the smoker otherwise

1 might have been choosing?

2 A. I think it's -- if cigarettes are being used -- if a test
3 and a reference cigarette are being used similarly, then the FTC
4 method is one way to look at it. But if the products aren't
5 being used by a population, or by a number of people at that
6 35/60, then I think we owe it to ourselves to look at the
7 product under different smoking conditions.

8 THE COURT: Would it be accurate to say that if a smoker
9 was using a reduced nicotine cigarette and was compensating for
10 the use of that cigarette, that that smoker would be smoking
11 under more cigarette stressful conditions than the FTC
12 conditions?

13 THE WITNESS: Yes, I think that's a fair characterization.

14 BY MR. SCHWARTZ:

15 Q. Okay. So picking up on that, some of the cigarettes to
16 which the EW prototypes were compared, in fact, were light
17 cigarettes or low-tar cigarettes?

18 A. That's correct.

19 Q. In fact, in many of the tests, the Marlboro Light
20 85-millimeter version was one of the comparison cigarettes?

21 A. That was one of them, yes.

22 Q. Another one was R.J. Reynolds Camel Light cigarettes?

23 A. In some of the experiments, yes.

24 Q. And in some of the experiments the Lark Light or low-tar
25 cigarette was used?

- 1 A. Yes.
- 2 Q. Okay. And Philip Morris makes Marlboro Light 85's?
- 3 A. That's correct.
- 4 Q. And they did back then?
- 5 A. Yes.
- 6 Q. So you were actually comparing this test cigarette to
- 7 another company's commercial brand?
- 8 A. Yes, as well as our own, yes.
- 9 Q. Who made Lark?
- 10 A. I should know this.
- 11 Q. Not you guys?
- 12 A. No, we did not.
- 13 Q. Some other guys?
- 14 A. Yes.
- 15 Q. Made Lark. So that was another situation where R.J.
- 16 Reynolds was comparing, during the testing the EW cigarette, to
- 17 an actual commercial brand of another company?
- 18 A. That's correct.
- 19 Q. Was it one of these guys do you know, Brown & Williamson,
- 20 Liggett?
- 21 A. It was one of the large tobacco companies, yes.
- 22 Q. Now, one thing you get from the FTC conditions is you
- 23 take the Marlboro Light 85, you take the Lark low-tar, you take
- 24 the Camel low-tar, and you take the EW, and you get the exact
- 25 same smoking conditions, they're smoked the same way because you

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1 have this machine take the 35 millimeter puff every --
2 A. 60 seconds.
3 Q. Right. So that was one good way of standardizing the
4 analysis?
5 A. That's one way, yes.
6 Q. And your concern is, as you've said, in the real world
7 human beings smoked the EW cigarettes differently from the
8 cigarettes like the Marlboro Light 85s or the Lark low-tars,
9 then you might see these differences change?
10 A. I mean, you could, but we had human smoking behavior that
11 showed that the product was used similar to people's usual
12 brands, which means they took similar puff volumes and similar
13 frequencies, but they were not typical of the FTC conditions,
14 they were much more stressful. So while they were the same as
15 someone's usually brands they were more stressful than the FTC
16 conditions.
17 Q. What was more stressful?
18 A. The puff volumes and frequency that we with found in the
19 human smoking behavior study.
20 Q. Now, you did these human smoking behavior studies, as
21 well as a bunch of other studies when you were assessing EW?
22 A. Yes.
23 Q. And when you had all that information before you went to
24 the test market in April 1995, you presented -- "you" meaning
25 the company -- presented all of its scientific findings to an

- 1 independent scientific panel of experts?
- 2 A. That's correct, in Baltimore.
- 3 Q. In Baltimore. And the head of that independent panel was
- 4 a Dr. Rudolf Jaeger or Jaeger?
- 5 A. Jaeger.
- 6 Q. J-A-E-G-E-R?
- 7 A. Right.
- 8 Q. And he and a bunch of other independent experts, in the
- 9 opinion of R.J. Reynolds, looked at all of the data that you had
- 10 acquired, or summaries of the data that you acquired in these
- 11 different testing areas?
- 12 A. Yes, he and his panel.
- 13 Q. Please take a look at Exhibit 89102.
- 14 Now, you've had a chance to look at that document. It's
- 15 pretty big.
- 16 A. Yes.
- 17 Q. You looked at that last week, because that's one of the
- 18 documents that we mentioned in the testimony that we sent over
- 19 to you guys.
- 20 A. Yes, I skimmed through it, yes.
- 21 Q. But that's not the first time you've seen that document.
- 22 You saw that document back in 1995 when it was put together?
- 23 A. Yes.
- 24 Q. And that's indicated, among other ways, by the fact that
- 25 you were cc'd on it?

- 1 A. Correct.
- 2 Q. But since you were one of the guys who was a leader in
3 the EW product development, you actually knew what was going
4 into that document as it was being produced?
- 5 A. For the most part.
- 6 Q. Yeah, so is it fair to say you're very familiar with that
7 document?
- 8 A. Um, well, it's been many years since I looked at it, but
9 I do know in general what's in here, yes.
- 10 Q. And back when it was produced and put out, at that time
11 you definitely were very familiar with that document?
- 12 A. I was very familiar with many elements of it.
- 13 Q. Okay, good. Now I'm going to ask you to take a look at
14 page 5306.
- 15 Could you blow-up the red part? Thank you.
- 16 This is one of the areas that was presented to this
17 independent group of experts, something on human smoking
18 behavior by John Robinson?
- 19 A. That's correct.
- 20 Q. And it's Dr. John Robinson?
- 21 A. Yes. This is his summary.
- 22 Q. And Dr. John Robinson is the company's foremost expert in
23 human smoking behavior; is that fair to say?
- 24 A. I think that's fair to say. I would certainly go to him
25 for that information.

1 Q. And they sent their A-guy out to make this presentation
2 to this panel?

3 A. Yes.

4 Q. So if somebody had a question about it, if anybody could
5 answer it, it was Dr. John Robinson?

6 A. About the studies?

7 Q. Yeah.

8 A. Sure.

9 Q. And if anybody could understand -- if you needed the best
10 person who understood the result of the studies in the company,
11 it would be Dr. John Robinson?

12 A. From the point of view of the human smoking behavior,
13 yes.

14 Q. Absolutely. Now his conclusion was the test cigarette
15 smoked very similarly to the subject's usual brands?

16 A. Yes, and in there he's referring that puff volumes and
17 puff frequencies on EW, as well as the reference cigarette, were
18 very similar.

19 Q. And not just the puff volumes, but the tar yields as
20 well?

21 A. Yes.

22 Q. And if we could go to page 5375, please.

23 MR. SCHWARTZ: Your Honor, if I could just direct a
24 comment to you. There are some graphs in here that are very hard
25 to read. If it would be of assistance to the Court, I would be

1 happy to present a hard copy to the Court if it doesn't appear
2 well on the screen.

3 THE COURT: Are you going to be questioning about the
4 graphs?

5 MR. SCHWARTZ: If it's readable, I will. If not, after
6 the Court looks at it, if the Court would like to look at it on
7 paper --

8 THE COURT: Was this the questioning that was in the
9 direct examination as well?

10 MR. SCHWARTZ: Yes, Your Honor, and I don't know --

11 THE COURT: I certainly wondered about those graphs, so
12 yes.

13 MR. SCHWARTZ: There are copies, and I apologize. That's
14 what we've got. As luck would have it, Your Honor, not one of
15 the best graphs, but I'll put it up and see how it looks.

16 How is that? Good, everybody?

17 THE COURT: I don't think the focus machine is going to
18 help with that.

19 MR. SCHWARTZ: Okay.

20 BY MR. SCHWARTZ:

21 Q. You've looked at this document when it wasn't so gray,
22 let's just say?

23 A. True.

24 Q. Okay. And do you remember what this graph looked like to
25 the human eye as opposed to --

1 A. This graph shows the FTC tar yields for the various
2 cigarettes as measured in the laboratory for a blend with a
3 standard blend with a carbon filter, the experimental blend with
4 a carbon filter, that would have been the EW product, and then
5 the experimental blend without the carbon filter, and then three
6 full flavor full market products.

7 THE COURT: Now, what page of the direct are we on?

8 MR. SCHWARTZ: Your Honor, I'm asking questions with
9 regard to his conclusions about the impact of FTC conditions.

10 Your Honor asked about -- and there's a number of
11 questions here, when I asked a question about a reduction, and
12 Dr. Gentry would say yes "under FTC conditions". I'm actually
13 trying to, believe it or not, in the interest of time, address
14 these questions as a group rather than go through them one-by-one
15 for each compound, and --

16 THE COURT: All right.

17 MR. SCHWARTZ: What Your Honor asked was, well what about
18 how a person would smoke his usual cigarette or her usual
19 cigarette, and --

20 THE COURT: Or what I asked was what about when a person
21 is smoking a low nicotine cigarette and compensating and
22 therefore not smoking under the FTC conditions.

23 MR. SCHWARTZ: Thank you, Your Honor, for clarifying, and
24 what I'm trying to get to, Your Honor, or what I'm trying to
25 present to Your Honor is results of a study of human beings who

1 smoked real life low-tar cigarettes, and who also were asked to
2 and agreed to smoke these EW versions of low-tar cigarettes. And
3 if the same person compensated on his own cigarette, to look at
4 what he would do with the EW cigarette and what the results would
5 be chemically. And that's why I'm presenting this testimony to
6 Your Honor.

7 THE COURT: What you offered before, but I didn't get, was
8 the actual graphs in a readable form. Now you may not have extra
9 copies of those. I had thought you did.

10 MR. SCHWARTZ: I'm sorry, I do have an extra copy, and I'm
11 happy to hand it up to Your Honor. I mean, in a readable form --

12 THE COURT: Do your copies look like what's up on the
13 screen? In which case I don't need them.

14 MR. SCHWARTZ: Unfortunately, they do, Your Honor.

15 THE COURT: Oh, no, those aren't going to help.

16 MR. SCHWARTZ: And I'm not being critical of anyone, this
17 is just how we got them. I don't think it's our photocopier.

18 THE COURT: All right. Let's just go with the questions.

19 MR. SCHWARTZ: All right, this is Exhibit 89102 page
20 51535735.

21 BY MR. SCHWARTZ:

22 Q. All right. Now, Dr. Gentry, looking at this exhibit and
23 thinking back to when it was put together -- I'm sorry.

24 A. That's okay.

25 Q. There are six cigarettes that are looked at here, one,

- 1 two, three, four, five, six, right?
- 2 A. That's correct.
- 3 Q. STD-C, Standard C, which one is that?
- 4 A. That's a standard blend with a carbon filter.
- 5 Q. Okay. EXP-C, that's the low nitrogen blend and the
- 6 carbon scrubber filter?
- 7 A. Right, that's the EW.
- 8 Q. EXP is just the low nitrogen -- I'm sorry, just the
- 9 carbon filter?
- 10 A. No, that's just the low nitrogen blend.
- 11 Q. So you've got every permutation of EW?
- 12 A. That was the intent.
- 13 Q. And those are the three graphs on the left.
- 14 A. Right.
- 15 Q. Now you have FFLT-2, FFLT-1, and FFLT-CH?
- 16 A. Correct.
- 17 Q. What are those cigarettes?
- 18 A. Those are market products, and if my recollections are
- 19 right, one of them was a Marlboro Light, one of them was a
- 20 Winston Select Light, and one of them was Lark Light.
- 21 Q. So those are three actual commercially sold cigarettes?
- 22 A. Yes.
- 23 Q. All right.
- 24 MR. SCHWARTZ: Your Honor, I'm going to have to switch, if
- 25 you don't mind. We're out of gas here. All right.

1 BY MR. SCHWARTZ:

2 Q. Now, here these results look at human beings smoking

3 actual commercial cigarettes and smoking the different

4 permutations of EW?

5 A. No, this is FTC smoking.

6 Q. Oh, those are the actual --

7 A. Those are FTC smoking conditions and the deliveries from

8 the products, from the products under FTC conditions.

9 Q. All right. Now, when going back to 5306 and going back

10 to the comments of Dr. Robinson, there he was talking about

11 human behavior?

12 A. Yes, in his conclusions, yes.

13 Q. And test cigarettes smoked very similarly to subjects

14 usual brands. Now, there's another comment where he says, "Test

15 cigarette mainstream smoke yields, blood nicotine and percent

16 COHB", that's -- you have to do it.

17 A. Carboxyhemoglobin.

18 Q. "Were slightly reduced but not statistically different

19 from the usual brands".

20 A. That's correct.

21 THE COURT: Could we have that blown up? It's hard to

22 see.

23 All right, thank you.

24 BY MR. SCHWARTZ:

25 Q. All right. Now, when Dr. Robinson, the expert in smoking

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1 behavior, said "test cigarettes maintain -- mainstream smoke
2 yields" et cetera, "-- were slightly reduced but not
3 statistically different from usual brands", that's human smoking
4 behavior, right?

5 A. Yes, and the only ones that he can refer to there under
6 human smoking conditions are nicotine and CO, carbon monoxide,
7 because that's the only biomarkers that were measured.

8 Q. Those are -- so the company chose not to measure tar, tar
9 yields, or is that not possible?

10 A. The only way we could measure tar would have been to
11 measure tar in a human smoking -- human mimic smoking condition.
12 And when he's referring to mainstream smoke yields, tar, I would
13 have expected it to be very similar between the products. I'm
14 not contesting that.

15 Q. Okay, all right. And you're not contesting the fact that
16 when human beings smoked the test cigarette they smoked it very
17 similarly to the subject's usual brands?

18 A. That's correct.

19 Q. And the usual brands were those commercial brands like
20 Marlboro Light 85 and Lark, and what was the third one you said?

21 A. Winston Select Lights. I'm not sure of the usual brands
22 that were in this, but I would expect them to be very similar to
23 those market products, yes.

24 MR. SCHWARTZ: Your Honor, if the Court wishes to take a
25 break, this might be an opportune time.

1 THE COURT: All right. Thank you. You may step down and
2 we'll take a 15-minute break, everyone.

3 (Thereupon, a break was had from 10:59 a.m. until
4 11:15 a.m.)

5 THE COURT: All right, Mr. Schwartz, please.

6 MR. SCHWARTZ: Your Honor, I have a complete copy of that
7 large exhibit, if I'm permitted to hand it up.

8 THE COURT: All right. Good.

9 BY MR. SCHWARTZ:

10 Q. Okay, Dr. Gentry.

11 A. Okay.

12 Q. All right. I'm going to ask you to turn your attention
13 now to page 18 of your testimony, lines 12 to 15.

14 A. Page 18, line 12.

15 Q. 12 to 15.

16 A. Okay.

17 Q. All right. Now, the question is: "With regard to
18 acetone, you found that Camel lights with the CS filter reduced
19 the compound by 72.4 percent relative to that contained in the
20 Marlboro Light 85 millimeter."

21 And the non-italicized section in the answer that we
22 proposed was: "That is what we found." And you added two
23 tails. One is "under FTC conditions" and the second one was
24 "for one of those prototypes."

25 A. That's correct.

1 Q. "One of these prototypes." Correct?

2 A. That's correct.

3 Q. Okay. And a few lines down, I asked you, on line 17 to

4 19: "And you found 78.96 percent less acetone in the Marlboro

5 Light 85 when the CS filter was teamed with the CT blend."

6 And again, you add to the answer: "Under FTC conditions,

7 for one of these prototypes."

8 A. That's right.

9 Q. Okay. Now those two questions that I have just shown you

10 are similar to a number of other questions in the direct

11 examination testimony where we asked about actual percent level

12 of reductions of chemicals.

13 A. Right.

14 Q. And you added not just the tail of "under FTC conditions"

15 but the additional tail of "for one of these prototypes"?

16 A. That's correct.

17 Q. So I'm also going to ask you specific questions about

18 acetone and these numbers, but we agree that you added that

19 qualifier -- those qualifiers for the questions I asked about

20 reductions in chemical compounds?

21 A. For many of the compounds.

22 Q. Acetone, acetaldehyde -- that's A-C-E-T-A-L-D-E-H-Y-D-E

23 -- hydrogen cyanide, nitrogen oxide --

24 Help me out here.

25 A. Hydrogen cyanide ...

1 Q. -- acrolein, A-C-R-O-L-E-I-N. When I asked you questions
2 about the reductions in that, you added: "Under FTC conditions,
3 for one of these prototypes"?
4 A. That's correct.
5 Q. Okay. Let's just talk about the acetone questions for
6 now and see if we can flesh this out enough that we don't have
7 to go through every single one of these.
8 A. Okay.
9 Q. All right. Now, we've talked about the under FTC
10 condition qualifier that you've added.
11 A. Yes.
12 Q. I want to talk to you about the qualifier or the tail
13 that you added saying "for one of these prototypes."
14 A. Um-hmm.
15 Q. Now, with regard to acetone and these figures, you're not
16 saying here that the results with this prototype are unreliable?
17 A. No, I'm not saying that these are unreliable at all. We
18 just had many prototypes and this is probably one of them.
19 Q. Okay. And you're not saying that these results that are
20 presented about acetone are not valid?
21 A. No, I'm not saying they're not valid for one of the
22 prototypes.
23 Q. Okay. And you're also not saying that they're not --
24 that -- I withdraw the question.
25 You're also not saying that they're anomalous?

- 1 A. Anomalous? No.
- 2 Q. Okay. You are definitely not saying that substantial
3 reductions were not accomplished for acetone with the CS filter
4 and other prototypes?
- 5 A. Under FTC conditions, yes.
- 6 Q. Okay. I'll try to get that down. And you're not saying
7 that the cigarette that was sold, the EW cigarette that was sold
8 in Oklahoma, did not also have, when tested under FTC
9 conditions, substantial reductions in acetone?
- 10 A. That's correct.
- 11 Q. Okay. And if I asked you those questions for the remarks
12 you made about acetaldehyde, acrolein, hydrogen cyanide and
13 nitrogen oxide, that would be the explanation of your qualifier;
14 is that right?
- 15 A. Yes. If you asked me that relative to the marketed
16 product under FTC conditions, we had significant reductions in
17 those.
- 18 Q. Okay. And those significant reductions that you had you
19 presented to this independent panel?
- 20 A. Yes.
- 21 Q. And just for acetone, by way of example, let's turn to
22 Exhibit 89102, that big fat presentation you made to the
23 independent scientific panel. And if we can, go to page 5408.
- 24 A. 5408?
- 25 Q. Yeah. And we'll see if this graph is any better.

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- 1 All right. That graph stinks. Let's go to 5411, if we
2 can, three pages further.
- 3 Now, here, in fact, we have all the carbonyls that were
4 tested and this is the summary of evidence that you presented to
5 the independent panel a month before EW went on the market?
- 6 A. This is part of the chemistry summary, yes.
- 7 Q. The one about the carbonyls that you tested?
- 8 A. Yes.
- 9 Q. And for acetone -- I'm sorry, again, the comparison was
10 EXP-C -- that's the EW cigarette -- with both the carbon
11 scrubber filter and the low nitrogen blend?
- 12 A. That's correct.
- 13 Q. The carbon scrubber filter and the low nitrogen blend,
14 the combined technologies?
- 15 A. That's correct.
- 16 Q. Okay. And the other ones that start FFLT, those are
17 actually marketed low tar cigarettes made by other companies?
- 18 A. One of them was; one of them was made by R.J. Reynolds.
19 Two of them are made by competitors; one's made by R.J.
20 Reynolds.
- 21 Q. Okay. And the competitors were Philip Morris' Marlboro
22 Light?
- 23 A. Correct.
- 24 Q. And what was the other one made by --
- 25 A. Lark Lights.

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- 1 Q. Lark Light made by one of those other guys?
- 2 A. Yes. And I can't remember. I'm sorry.
- 3 Q. And for acetone, the range of reductions accomplished by
- 4 the combined technologies of the EW was between 55 and
- 5 66 percent?
- 6 A. Under FTC conditions across those various market
- 7 comparisons, yes, the range was from 55 percent less to
- 8 66 percent less, under those conditions.
- 9 Q. And acrolein, that was 54 to 58 percent?
- 10 A. Under FTC conditions, true.
- 11 Q. Okay. And for acetaldehyde, it was 31 percent to
- 12 46 percent?
- 13 A. That's correct.
- 14 Q. Okay. Under FTC conditions?
- 15 A. Correct.
- 16 Q. And so while you added to the answers to the questions I
- 17 asked about the specific numbers under those prototypes for
- 18 these three compounds, that's the overall figures that you came
- 19 to be comfortable with?
- 20 A. Yes.
- 21 Q. And those the ones that you presented to the outside
- 22 expert panel?
- 23 A. That's correct.
- 24 Q. All right. Now, acetaldehyde is a possible human
- 25 carcinogen?

- 1 A. I think it's a 2B, yes. Possible.
- 2 Q. And when you say "2B," that's the category --
- 3 A. Yes. IARC classification 2B, possible human carcinogen.
- 4 Q. And just for me or for anyone, IARC is the Independent --
- 5 A. International Agency For Research on Cancer.
- 6 Q. And they categorize the known possible -- probable and
- 7 known human carcinogens in cigarettes?
- 8 A. Yeah. That particular agency will compile a bunch of
- 9 information taken from scientific literature, various tests, and
- 10 then classify compounds as to whether they're possible human,
- 11 probable human and known human.
- 12 Q. Okay. And acetaldehyde was one of those possible human
- 13 carcinogens?
- 14 A. Yes.
- 15 Q. All right. So even though you add that tail of "for
- 16 these prototypes," this is a summary of information that
- 17 represents all of the prototypes that were tested or the last
- 18 version of the prototype?
- 19 A. It represents the last version, the one that we took to
- 20 market.
- 21 Q. Okay. So the EXP-C is the exact EW cigarette or a
- 22 prototype before it?
- 23 A. In this particular study, it was the prototype that we
- 24 took to market.
- 25 Q. Okay.

1 A. It was the way it was represented here. It may have --
2 in other representations in data prior to this, it may have been
3 some other versions, but I would certainly let you know if it
4 were different.

5 THE COURT: So this is -- these statistics are for the
6 prototype that was marketed in Oklahoma for about a year and a
7 half; is that right?

8 THE WITNESS: Yes. For about two years, the data under
9 FTC conditions.

10 THE COURT: Whereas the testimony in your written direct
11 on all these points you have limited to one of the varying -- or
12 various prototypes that you were developing at the time; is that
13 right?

14 THE WITNESS: Yes, ma'am.

15 THE COURT: Okay.

16 BY MR. SCHWARTZ:

17 Q. Okay. Now, of course, these were not the only three
18 chemical compounds found in smoke that you tested?

19 A. That's correct.

20 Q. And they're not the only three chemical compounds in
21 smoke for which you found substantial reductions?

22 A. That's correct.

23 Q. All right. Another compound that you tested was benzene;
24 is that right?

25 A. Yes.

- 1 Q. And this IARC group, they determined that to be a
2 Category 1 known human carcinogen; is that right?
- 3 A. That's correct.
- 4 Q. And R.J. Reynolds found substantial reductions in benzene
5 as well?
- 6 A. Under FTC conditions.
- 7 Q. Under FTC conditions; all right. And if we could look at
8 page 5420 of 89102. If it's easier, it's also up on the screen,
9 but whatever you're comfortable with.
- 10 A. Oh, yes.
- 11 Q. Now, benzene is known human carcinogen. The reductions
12 accomplished by the cigarette that was actually sold in Oklahoma
13 compared to Marlboro Light, made by Philip Morris, and Lark
14 Light, made by one of these other guys, ranged from 57 to
15 69 percent?
- 16 A. Under FTC conditions.
- 17 Q. All right. Another compound that you tested was cadmium;
18 is that right?
- 19 A. Yes.
- 20 Q. And cadmium is also, according to IARC, a Category 1
21 known human carcinogen?
- 22 A. That's correct.
- 23 Q. And R.J. Reynolds found that there were also substantial
24 reductions in cadmium?
- 25 A. Under FTC conditions.

1 Q. Under FTC conditions. One of these days.
2 And if we go to page 5420 of Exhibit 89102 --
3 THE COURT: This is 5420 that's up now?
4 MR. SCHWARTZ: I beg Your Honor's pardon.
5 BY MR. SCHWARTZ:
6 Q. Cadmium -- let me just ask you because I wrote it down.
7 It was in the area of 60 to 83 percent reductions; is that fair
8 to say?
9 A. It was significant. I don't remember the exact number.
10 Q. Let me see if I can quickly find it.
11 Thank you, Your Honor. It's 5439.
12 All right. Are you there?
13 A. I'm there.
14 Q. All right. So there you have cadmium, a known human
15 carcinogen, and there was -- the version that went to market as
16 EW in Oklahoma showed reductions compared to your market light
17 cigarette, the Lark Light cigarette and Philip Morris' Marlboro
18 Light 85 cigarette in the areas of 60 to 83 percent?
19 A. Under FTC conditions.
20 Q. So there were 60 to 83 percent fewer known human
21 carcinogens in cadmium found in the smoke of the EW that you
22 sold in Oklahoma?
23 A. Yes.
24 Q. Okay. All right. I asked you some summary questions
25 about the chemistry reductions and you made some changes there.

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1 If you could look at your testimony again, on page 7.

2 THE COURT: I'm sorry. Page?

3 MR. SCHWARTZ: Page 7, Your Honor, lines 1 through 6.

4 BY MR. SCHWARTZ:

5 Q. Okay, sir?

6 A. Yes.

7 Q. Now, the question there was: "By the time it went to

8 test market, did you believe that the EW product was a

9 tobacco-burning cigarette that substantially reduced

10 constituents that the greater scientific community had

11 associated with smoking and disease?"

12 And I wrote: "I think so generally, yes."

13 And you added: "Under FTC conditions." You also added:

14 "But some of those constituents were not reduced or were

15 increased." For example BAP, formaldehyde and phenols were

16 either not changed or were increased."

17 That change.

18 A. That's correct.

19 Q. Okay. Now, "BAP" is benzo(a)pyrene?

20 A. That's correct.

21 Q. B-e-n-z-o, parentheses, a, end parentheses, p-y-r-e-n-e.

22 A. Right.

23 Q. Okay. And then --

24 THE COURT: Let me interrupt you for a moment.

25 We've had many visitors come through this courtroom during

1 this trial, a lot of them students, and I have certainly not
2 stopped to recognize them all, but I particularly would like to
3 welcome the people who have just come in. They are visitors to
4 our country from China. A number of them, and maybe everyone --
5 I'm not sure, but certainly a number are Chinese judges.

6 And I do believe that one of them, if they would stand, is
7 the Chief Justice of China. I don't know if my information is
8 correct about that.

9 Well, welcome, sir.

10 (Applause)

11 THE COURT: We are very pleased to have you here. It was
12 just ten years ago that I visited China and I wished I had had
13 the time to get back there in these ten years. And we hope that
14 you will find this interesting and instructive. We're doing some
15 very technical scientific testimony right now that we're all
16 required to pay close attention to, so I hope you're able to
17 follow it, everyone.

18 All right. Go ahead, please, Mr. Schwartz.

19 MR. SCHWARTZ: Thank you, Your Honor.

20 BY MR. SCHWARTZ:

21 Q. If you look down just a couple lines, the next question,
22 on page 7, line 7 to 9, I ask you: "And what about the company?
23 Was it your understanding Reynolds believed that these goals had
24 been reached vis-a-vis EW by the time it went to test market?"

25 I wrote: "I think so, yes."

1 You got rid of that part and you said: "In 1995, many
2 within the company shared my belief, but there were concerns
3 over some constituents being increased."

4 A. That's correct.

5 Q. Okay. And your answer to those two questions are
6 addressing the same area: That while there was some tremendous
7 and substantial reductions in known, possible and probable human
8 carcinogens compared to cigarettes sold by RJR's competitors,
9 like Philip Morris, there were also a few that were either no
10 changes or increases?

11 A. Yes. There are instances of no reductions or increases
12 in known human carcinogens and tumor promoters.

13 Q. Now, let's talk about the concerns about the no changes
14 and the increases. Are you familiar with the Dietrich Hoffmann,
15 D-I-E-T-R-I-C-H, Hoffmann?

16 A. Yes, I am.

17 Q. Could you tell the Court briefly who he is.

18 A. He is a very renowned researcher -- or is a very renowned
19 researcher; has dealt with tobacco, smoking and health for many,
20 many years. He's with the American Health Foundation.

21 Q. Now, there have been times when Dr. Hoffmann and the
22 American Health Foundation have not always agreed with
23 everything R.J. Reynolds has had to say about cigarette smoking
24 and risks?

25 A. I think there's been many instances where we've learned a

1 lot from Dr. Hoffmann and vice versa. But yeah, there are
2 certainly times he didn't agree with us.

3 Q. Okay. So he's been a scientific expert in the field, but
4 also occasionally critical?

5 A. I think he's definitely a scientific expert. As far as
6 his -- the critical part of his -- I can't speak to that because
7 my experience with him is that he's been very open about sharing
8 and talking about the science and his critical, you know -- the
9 part of his criticalness has been with respect to the science.

10 Q. Okay. Now, you were familiar with him because in 1994,
11 you and Dr. Townsend actually went to see Dr. Hoffmann about EW?

12 A. That's correct.

13 Q. Okay. And you also met with a Dr. Klaus, K-L-A-U-S,
14 Brunnemann, right? Do you remember that?

15 A. I don't remember him being there, but I do remember going
16 to the American Health Foundation in 1994 to meet with
17 Dr. Hoffmann. I don't remember whether Klaus was there or not.

18 Q. Are you familiar with Dr. Brunnemann?

19 A. Yes.

20 Q. And he's also with the American Health Foundation?

21 A. Yes.

22 Q. Also a renowned expert in the field?

23 A. Particularly with respect to, I think, nitrosamines.

24 Q. And then do you remember also a Dr. Mirjana,
25 M-I-R-J-A-N-A, Djordjevic, D-J-O-R-D-J-E-V-I-C, was present?

1 A. I seem to recall her being there, but I can't be for
2 certain on that. But I do seem to recall her being there.

3 Q. Dr. Djordjevic was also with the American Health
4 Foundation?

5 A. That's correct.

6 Q. Okay. Also a very well known expert in the field?
7 Renowned?

8 A. Yes.

9 Q. Okay. Now, you met with Dr. Hoffmann and you talked
10 about these specific concerns about increases in BAP and not
11 decreases in some of these other conditions or some of these
12 other compounds; is that right?

13 A. We showed him much of the smoke chemistry that we had on
14 EW at the time that we went -- or we were on a version of EW.
15 Yes, we did.

16 Q. And when you showed him that data, he told you that he
17 was not overly concerned about the increase in phenols that
18 appeared in your tests of EW?

19 A. That's what he said; I think so.

20 Q. Now, when you met with Dr. Hoffmann and you talked about
21 the fact that there were no reduction in benzo(a)pyrene, he told
22 you he was not overly concerned about that as well?

23 A. I don't recall.

24 Q. I'm going to ask you to take a look now, then, at
25 Exhibit 85886 and turn to pages 66 and 67. We're going to hand

1 that to you and put it up on the screen.

2 A. What pages?

3 Q. 66 and 67, sir. And if you could just --

4 I'm sorry. When you get there, I'll talk to you.

5 A. 3566?

6 Q. No. I'm sorry. Pages 66 -- oh, I'm sorry. The internal

7 numbering. I apologize. I switched up on you. It's pages 66,

8 right at the bottom of the page in the middle, and 67.

9 Does Your Honor have a copy of document 85886?

10 THE COURT: No, but I suspect I don't need that. I did

11 know that I needed to look at the graphs, the other documents.

12 MR. SCHWARTZ: There are no graphs here. No more graphs

13 anymore, ever, as my son would say.

14 BY MR. SCHWARTZ:

15 Q. All right. Now, have you had a chance to read the

16 section: "C: Meeting with Dietrich Hoffmann"? Would you take

17 a look at that for a moment.

18 A. Okay.

19 Q. All right, sir. Have you had a chance to look that over?

20 A. Yes.

21 Q. Does that help refresh your recollection of the meeting

22 with Dr. Hoffmann at the American Health Foundation?

23 A. Not much more than I had.

24 Q. It says here in the document --

25 This is a document that you looked at last week as well;

1 is that correct?

2 A. That's correct. First time I had ever seen it.

3 Q. Okay. It says: On January 29th, 1994, Dr. David

4 Townsend and Dr. Gentry met with Dr. Dietrich Hoffmann,

5 Dr. Clause Brunnemann and Dr. Mirjana Djordjevic of the American

6 Health Foundation to assess Dr. Hoffmann's reaction to the

7 analytical chemistry for Project CC."

8 A. Correct.

9 Q. And you remember that meeting and that's what you went

10 there to talk about?

11 A. Correct.

12 Q. Okay. And Project CC, again, was the project where the

13 EW components were tested both together and separately?

14 A. That's correct.

15 Q. And ultimately, Project CC became Project EW?

16 A. That's right.

17 Q. All right. Now, it says -- if you read down, it says:

18 "Dr. Hoffmann stated that the test results were significant

19 because of the dramatic reductions in nitrosamines."

20 And in your written testimony, you've talked a lot about

21 the reduction in nitrosamines? You were asked questions about

22 them?

23 A. Uh-huh.

24 Q. Okay. We're not going to talk about them today.

25 Now: "He also stated that he was not overly concerned

1 about the increase in phenols or the failure to reduce
2 benzo(a)pyrene, which he believed is a much weaker carcinogen
3 than nitrosamines and is present in much smaller amounts."

4 Does that help you remember what he said about
5 benzo(a)pyrene?

6 A. I don't have any reason to doubt what's here, but I don't
7 remember specifically.

8 Q. Okay. Now, you had that meeting with Dr. Hoffmann. I
9 know we talked about this in your written testimony. Did you
10 tell the Jones-Day lawyers or lawyers of the Jones-Day law firm
11 about that meeting with Dr. Hoffmann? Do you remember that?

12 A. As I said in my testimony, I don't remember meeting with
13 the lawyers per se. I can't dispute that the meetings occurred.
14 They're documented here. I don't remember telling them anything
15 about that.

16 Q. Let me ask you just briefly: When you were preparing for
17 this testimony and you were trying to remember or you were
18 looking back and being told about these meetings, did you ask
19 for any documents that might refresh your memory of whether the
20 meetings occurred?

21 A. No. I mean, what I -- being shown this for the first
22 time and looking through it, the information, much of it is so
23 specific and probably could have only come from myself or Gary
24 Shelar or someone who was on the project.

25 I don't dispute that the meetings occurred. I don't

1 remember them.

2 Q. Okay. And you see -- when you look at it, you see a
3 reference, for instance, at footnote 236. And it says "See
4 Gentry 1 at 10-11."

5 A. I see that.

6 Q. And in some of the numbers that I asked you about -- some
7 of the chemical reduction amount numbers I asked you about that
8 were also cited in this document, you also saw references to
9 things like "see Gentry 1," "see Gentry 2 attachments" and
10 things like that?

11 A. That's correct.

12 Q. Okay. Now, it's my understanding that when you met with
13 Mr. Kreiner and Mr. Biersteker and you needed to see some
14 additional documentation of something that might have helped you
15 provide your testimony, you asked for it and they brought it to
16 you or they had somebody bring it to you?

17 A. In many cases, yes.

18 Q. Okay. Was it the situation that when you saw references
19 to Gentry 1, Gentry 2 attachments and things like that, that you
20 asked them to bring you those documents?

21 A. I don't remember asking them to bring me any of these
22 documents.

23 Q. All right. Did it give you the sense when you saw Gentry
24 1, that alerted you to the existence of another document that
25 might help corroborate the fact or remind you about these

1 interviews?

2 A. It may have, but I mean, like I said, I have -- believe
3 me, I have tried and tried to remember these meetings, but I'm
4 not disputing they occurred.

5 Q. Did you ask them to bring your calendars from those
6 years, 1994, January and April, to see --

7 A. My calendars?

8 Q. Yeah.

9 A. No. I don't know if they even exist.

10 Q. Well, is it your understanding that when you have to
11 preserve documents for all the litigation that R.J. Reynolds is
12 in, a lot of times you hand over virtually every document that's
13 in your office for copying and the like?

14 A. Yeah. There's a process where attorneys come into our
15 offices regularly and pick up documents to be photocopied,
16 numbered and put out onto the website.

17 Q. Has it been your experience that they have at times
18 copied your calendars or datebooks, things like that?

19 A. I don't recall.

20 MR. BIERSTEKER: Your Honor, I'm going to object to this
21 line of inquiry. I mean, I don't know exactly what it goes to.

22 THE COURT: Sustained. Sustained. We're going very far
23 afield.

24 I just want the record to be clear though. In terms of
25 the last document that was put up, what number was that document?

1 MR. SCHWARTZ: That's Exhibit 85886, Your Honor.

2 THE COURT: And I don't think we've ever had an
3 identification of the document by the witness.

4 MR. SCHWARTZ: I beg Your Honor's pardon. I'll do that.

5 BY MR. SCHWARTZ:

6 Q. If you go to the front page of 85886, here's -- this is a
7 document that was referenced in your testimony; is that correct?

8 A. It was in the original version, yes.

9 Q. Okay. And it's entitled "The R.J. Reynolds Tobacco
10 Company Working Issue and Legal Analysis of Project CC"?

11 A. That's correct.

12 Q. And it's dated June 21, 1994. And above that, it's
13 written "Jones, Day, Reavis & Pogue."

14 A. "Jones, Day, Reavis & Pogue, Draft of June 21st, 1994."

15 Q. Now Jones, Day, Reavis & Pogue is a private law firm that
16 represents R.J. Reynolds Tobacco Company?

17 A. I know them as Jones-Day; I'm assuming it's the same
18 people.

19 Q. Okay. And back in the 1990s, was it your understanding
20 that Jones-Day also represented the R.J. Reynolds Tobacco
21 Company?

22 A. Sure. I think so.

23 Q. Okay. Now, if you could turn to page -- using the
24 internal numbers again --

25 THE COURT: Excuse me. I just want to make sure this is

1 clear.

2 Is this the document that you're being questioned about
3 regarding the meeting with Dr. Hoffmann?

4 THE WITNESS: Yes, Your Honor.

5 THE COURT: All right.

6 MR. SCHWARTZ: The meeting with Dr. Hoffmann is pages 66
7 and 67.

8 THE COURT: Okay.

9 MR. SCHWARTZ: And it's our understanding from reading the
10 document that this is a memorialization of interviews, in part.

11 THE COURT: All right.

12 MR. SCHWARTZ: And I think Mr. Biersteker wants to say
13 something.

14 MR. BIERSTEKER: I do, Your Honor. We have an objection.

15 THE COURT: I know that. I thought it was a different
16 number.

17 MR. BIERSTEKER: And I don't mind if it's used to try to
18 refresh the witness's recollection, but Dr. Gentry is here as a
19 fact witness. He never saw this document until the government
20 included it in its direct for him. And I think if we're going to
21 get into the substance of this document, that's improper
22 examination of this witness --

23 THE COURT: Well, he certainly --

24 MR. BIERSTEKER: -- separate and apart from the objections
25 that have been lodged.

1 THE COURT: He certainly made it clear thus far and in his
2 direct that he doesn't have any direct knowledge of this document
3 and that he had never seen it before. So what are you planning
4 to do with it at this point?

5 MR. SCHWARTZ: At this point, Your Honor, I actually --
6 you asked to present some information about the document and I'm
7 trying to move through the foundational basis of information for
8 the document and follow up with a couple of questions.

9 I have no other questions about this document, the content
10 of this document. I'm just -- I hope I was responding to Your
11 Honor's inquiry.

12 THE COURT: I just want to make sure of something,
13 everybody. You may certainly clarify with him what the document
14 is, just so that's clear. And I now understand what the two
15 documents are that the defendants are objecting to. I think I
16 got them mixed up.

17 Go ahead, please.

18 MR. SCHWARTZ: I beg Your Honor's pardon for not making
19 that clear up front.

20 BY MR. SCHWARTZ:

21 Q. Now, if you would just look at page 2, sir, of the
22 document.

23 I'm sorry. Its Bates number is 3575. It's the internal
24 two. Just look at the top paragraph, if you would, for a
25 minute.

1 A. Okay.

2 Q. It makes a reference to a Wayne W. Juchat -- Juchatz.

3 Are you familiar with Mr. Juchatz?

4 A. I knew him by name.

5 Q. Okay. And he was the -- did you know that he was the

6 General Counsel for R.J. Reynolds --

7 A. Yes.

8 Q. -- in 1993?

9 A. Yes.

10 Q. Okay. And during a good bit on the '90s, he was General

11 Counsel; is that fair to say?

12 A. I don't know.

13 Q. Okay. He was there at the company?

14 A. Yes.

15 Q. Okay. All right. And certainly in 1994 and 1995, when

16 EW came out, as well?

17 A. Like I said, I don't remember exactly.

18 Q. All right. Now, there the document says that: "In late

19 December 1993, Wayne W. Juchatz, Senior Vice President,

20 Secretary and General Counsel, R.J. Reynolds Tobacco Company,

21 requested the law firm of Jones, Day, Reavis & Pogue to provide

22 legal advice regarding Project CC, controversial compounds, a

23 new cigarette product that Reynolds may introduce."

24 All right. Now I'm going to ask you to turn to page 4,

25 two pages later --

1 THE COURT: Let me deal with the objection to this
2 document now, because it may affect the direct examination as
3 well as the cross.

4 As I understood it from the papers submitted, this is one
5 of the Bliley documents that has already been posted on the
6 Congressional website and to which I overruled objections. And
7 so therefore, it may be admitted into evidence and the objections
8 raised by the defendants have already been ruled on by me at a
9 much, much earlier point.

10 MR. SCHWARTZ: Your Honor, first of all, thank you. And
11 secondly, it's my understanding that Reynolds has also moved to
12 enter a reply in response to my response to the objections. If
13 Your Honor's admitting this into evidence, does that moot out
14 their motion for time to enter a reply?

15 THE COURT: Well, let me hear from Mr. Biersteker.

16 MR. BIERSTEKER: Your Honor --

17 THE COURT: And by the way, we have already put on the air
18 conditioning, everybody, so that we will freeze this afternoon.

19 MR. BIERSTEKER: Thank you, Your Honor. It would be
20 preferable.

21 I understand that Your Honor has overruled the privilege
22 objections and that's not the basis for the objections being
23 asserted.

24 The document is chock full of hearsay and multiple layers
25 of hearsay and to the extent it's being offered to prove the

1 truth of those hearsay statements, we do have an objection to it.

2 And we also have an objection under 403.

3 The supplemental brief that Your Honor got related to a
4 somewhat --

5 THE COURT: When did that come in?

6 MR. BIERSTEKER: I believe it was filed this morning.

7 THE COURT: I haven't seen that.

8 MR. BIERSTEKER: I understand. But it raises a somewhat
9 different issue and that is that the government has used this
10 document to make certain allegations and they did so in response
11 to our simple evidentiary objections that went to the substance
12 of the document and argued the substance of the document.

13 We felt those were unfair and we wanted to have an
14 opportunity to respond to them, which we have done.

15 THE COURT: Well, actually, I did see it. And I took most
16 of what was in your reply as a substantive response.

17 MR. BIERSTEKER: It was a point of personal privilege,
18 Your Honor, rather than an evidentiary argument. We felt that
19 the document had been mischaracterized and we wanted to have an
20 opportunity to respond.

21 THE COURT: All right. Well, I did read it and I'm sure
22 there are different points of view about this document.

23 Let me just focus on the evidentiary issues for the moment
24 because, as I say, I realize it may well affect the scope of
25 everybody's examination. And I think I may take another look at

1 this over the lunch break. Let's do as much as we can now with
2 this witness unless you tell me you're finished with him, and I
3 wouldn't think so.

4 MR. SCHWARTZ: No, Your Honor. The only thing I was going
5 to do with this document is to show that on page 4, it reflects
6 that Dr. Gentry was interviewed by Jones-Day lawyers about EW on
7 three different occasions. And that would be the tie-in.

8 And Dr. Gentry will correct me if I'm wrong, but it's my
9 understanding in his testimony he says he doesn't remember the
10 interviews; he had not seen the document until last week, but he
11 does not dispute the fact that they happened. And in looking at
12 the substance that was reflected in it, he said the information
13 contained therein that's referred to in his testimony and I've
14 been asking about could only come from either he or a couple of
15 other people, Dr. Shelar, S-H-E-L-A-R, or a few of others of his
16 colleagues in the R & D Department, because those were the guys
17 who knew about it.

18 Those are -- all of my questions and the direct testimony
19 and today are only about, and only based on, places where I would
20 see in the footnote, "see Gentry 1" at blah, blah, blah, because
21 it was our good faith understanding in preparing this written
22 direct examination that that meant Dr. Gentry talked to these
23 folks and that was the information he provided.

24 And so far, he has not disputed a single piece of
25 information that we have represented in the direct testimony or

1 questioning him today with regard to it being accurate or him
2 doubting that he would have said that to the Jones-Day lawyers if
3 he recalled it.

4 THE COURT: Now, do you have further direct of him?

5 MR. SCHWARTZ: I do; not of this document.

6 THE COURT: Why don't you proceed with the rest of your
7 direct.

8 MR. SCHWARTZ: All right.

9 BY MR. SCHWARTZ:

10 Q. Now, what we were asking about or what we were talking
11 about a minute ago was the fact that you said some people had
12 concerns about increases or changes -- or increases or failures
13 to reduce some of the compounds, notwithstanding the fact that
14 there were substantial reductions of known human carcinogens,
15 known possible human carcinogens and known probable human
16 carcinogens; is that right?

17 A. Yes, there were people with concerns.

18 Q. And one of the ways you went to allay your concern was to
19 go to another outside expert, this world renown gentleman,
20 Dr. Hoffmann?

21 A. Yes. We had conversations with Dr. Hoffmann as well as
22 our review panel. I mean, we had many conversations with inside
23 and outside experts.

24 Q. All right. Now, that was one way you went to -- one of
25 the reasons you did that was to allay the concerns that some

1 people were voicing about the fact that not everything was
2 reduced and, in fact, in some situations, there were increases?

3 A. That's what's, I think, reflected in this memo here.
4 Certainly we wanted to see what Dr. Hoffmann's reaction to a
5 product with those sorts of reductions and chemistries were.

6 Q. And that's your memory of it, not just what is said in
7 the document? You remember that you --

8 A. Yeah, sure.

9 Q. Okay. So when you testify about it, you're telling me
10 it's not just because I saw these pages in the document; it's
11 that I remember meeting the famous Dr. Hoffmann, some of his
12 colleagues at the American Health Foundation and talking about
13 the EW product?

14 A. Yes, I remember talking to Dr. Hoffmann. And while he
15 may not have had concerns about things, he wasn't the only
16 person we talked to and not the only expert we rely on.

17 Q. Well, in addition to going to these outside experts and
18 the outside independent panel of seven or eight experts headed
19 by Dr. Jaeger, you also have an internal process to deal with
20 that called "Product Stewardship," don't you?

21 A. That's correct.

22 THE COURT: By the way, let me ask you a question: You've
23 indicated that you certainly spoke to more experts than just
24 Dr. Hoffmann and the independent panel. Did any of the
25 outside -- I'll use the term "reviewers" -- echo the concerns of

1 those within the company or did they all share Dr. Hoffmann's
2 views?

3 THE WITNESS: I can't say for sure on the specific
4 constituents. I do know that, for example, Dr. Jaeger was one
5 who questioned whether the reductions that we had seen would hold
6 up under more stressful or under more human-like smoking
7 conditions. So there were a number of concerns pointed out by,
8 you know, the outside, not just related to the increase in
9 constituents, but for other reasons as well.

10 BY MR. SCHWARTZ:

11 Q. Now, this is a good opportunity, then, to look at
12 Exhibit 30345. And you can tell me when you're shown it whether
13 that is the report of Dr. Jaeger's outside panel.

14 A. Yes.

15 Q. You have it? So I'm asking to you take a look at United
16 States Exhibit 30345. And after you and your colleagues
17 presented -- made a presentation guided by Exhibit 89102, that
18 big, thick exhibit we've been talking about, about the results,
19 Dr. Jaeger and his colleague of experts issued an evaluation of
20 a new cigarette filter technology combined with a low nitrogen
21 tobacco blend; is that right?

22 A. Yes.

23 Q. Okay. And is this the report that they issued pertaining
24 to the EW presentation?

25 A. As far as I know, yes.

Scott L. Wallace, RDR, CRR
Official Court Reporter

- 1 Q. And that's dated March 31st, 1995?
- 2 A. Yes.
- 3 Q. And you received that information -- so you received that
- 4 information prior to when EW went out to test market?
- 5 A. Yes.
- 6 Q. Okay. And just a couple weeks at most prior?
- 7 A. Probably, yes.
- 8 Q. Okay. All right. Now, if you could, turn to page 9727,
- 9 which is the first text page of this exhibit.
- 10 Have you taken a look at that, please?
- 11 A. Okay.
- 12 Q. All right. I'm going to direct your attention to the
- 13 Charge to the Committee section there. And as you were asked in
- 14 your testimony -- I don't mean to confuse things. I'm going
- 15 read it from there and you can confirm it with your testimony in
- 16 a minute.
- 17 At page 67, the outside panel was charged with
- 18 determining, among other things, if the -- "In the committee's
- 19 opinion, is this approach to cigarette design beneficial in
- 20 lowering smoking constituents that have been linked to disease
- 21 statistically associated with smoking?"
- 22 And that was one of their charges?
- 23 A. That's correct.
- 24 Q. And another one of their charges was at number 3:
- 25 "Although the committee may feel smokers should quit, if a

1 smoker will not quit, is this cigarette, in the committee's
2 opinion, valuable as an alternative to other cigarettes at the
3 same tar level?"

4 A. That's correct, that question.

5 Q. And the further charge is: "What is the committee's
6 opinion on the overall scientific approach to evaluating this
7 cigarette?"

8 A. Correct.

9 Q. Okay. And then they answered the questions. If you look
10 at the third page -- that's 9729, Bates 9729.

11 A. Let me see if I can find it here.

12 Q. Right in the third paragraph here. I'm sorry.

13 The review panel headed by Dr. Jaeger and these outside
14 experts said: "In the review panel's view, a tobacco-burning
15 cigarette with U.S. market taste and having reductions in many
16 of the smoke constituents purported to be potentially harmful
17 ought to be available to smokers."

18 That was one of their conclusions, right?

19 A. That was one of their conclusions, right below "while
20 additional research was suggested."

21 Q. We'll get to that, I promise you.

22 That was one of their conclusions?

23 A. Right.

24 Q. And they based that conclusion, knowing full well about
25 the fact that while there were these substantial, significant

1 increases (sic) in known human carcinogens, known possible human
2 carcinogens and known probable human carcinogens, there were
3 also some increases and some places that there were no increases
4 or decreases; is that right?

5 A. They were shown the FTC smoking data, yes.

6 Q. And in fact, a little while ago when we were looking at
7 89102 and we looked at the chart of acrolein, acetaldehyde,
8 acetone, there was formaldehyde. And that was listed as one of
9 the carcinogens that there was no measurable demonstrative
10 change or decrease?

11 A. Or increase.

12 Q. Right. So kind of, there was a no-effect factor on
13 formaldehyde?

14 A. Yes.

15 Q. And they were shown that?

16 A. Yes.

17 Q. And they were shown -- and we listed on that chart
18 isoprene, I-S-O-P-R-E-N-E, I believe. And that also showed that
19 there was no substantial, huge decrease in isoprene compared to
20 the cigarettes that your competitors sold?

21 A. I think it was small, yes. It was a reduction.

22 Q. Okay. Nothing that was something that you would want to
23 boast as a substantial, significant reduction?

24 A. I don't recall. I think it was something on the order of
25 30 or so percent.

- 1 Q. Okay. So they got the whole picture?
- 2 A. Under FTC smoking, we tried to represent all the data we
3 had at that time and they recommended additional research.
- 4 Q. Okay. But they also told you that "a tobacco-burning
5 cigarette with U.S. market taste and having reductions in many
6 of the smoke constituents reported to be potentially harmful
7 ought to be available to smokers"?
- 8 A. That's what they say in this summary.
- 9 Q. Okay. Now, when they were shown all this stuff, you also
10 told them that you were planning to put it on the market soon,
11 like next month?
- 12 A. I wasn't at the meeting so I'm not exactly sure how it
13 was presented to them, but I would imagine we told them
14 something to that effect.
- 15 Q. You don't have any reason to doubt that they were kept in
16 the dark about the fact that R.J. Reynolds was planning to put
17 this thing out in the market?
- 18 A. I don't have any reason -- I don't know -- I mean, we use
19 independent scientific reviews for review of science, not to
20 reveal any business strategies.
- 21 Q. All right. Okay.
- 22 A. I don't know what we told them.
- 23 Q. When you talk about the fact that the issue of whether
24 there's -- it's worth putting EW out, in light of the fact that
25 in addition to these fantastic reductions, there are also some

1 no change situations or some increases, you presented that to
2 Dr. Jaeger and his group, and they came back with that report?
3 A. Right.
4 Q. You presented it to Dr. Hoffman and his colleagues?
5 A. That's correct.
6 Q. And they told you that they weren't overly concerned with
7 phenols or benzo(a)pyrene?
8 A. That's Dr. Hoffman's opinion.
9 Q. The world renowned expert?
10 A. "A" world renowned expert, not "the".
11 Q. Okay. Along with his colleague, Dr. Klaus Brunnemann,
12 another world renowned expert?
13 A. Another, but not the only two.
14 Q. And, in fact, not the only two because also in the room
15 was Dr. Mirjana Djordjevic, yet another world renowned expert?
16 A. Yeah, another.
17 Q. So you went to three all stars, and they all told you
18 we're not overly concerned with phenols and benzo(a)pyrene?
19 A. We went to many all stars, not just those three. We went
20 to many all stars, and all said that it was a step in the right
21 direction. All believed that it was a good -- the product had
22 reductions under FTC conditions, and many suggested additional
23 research to make sure that those reductions held up.
24 Q. Okay. And they made the suggestions, and you went ahead
25 and put it on the market?

- 1 A. Yes.
- 2 Q. Okay. Now, in addition to the external experts that you
3 went to, you also have a product stewardship process to assess
4 situations to see if a cigarette is not more harmful than its
5 predecessor; is that right?
- 6 A. That's correct.
- 7 Q. And, in fact, in looking at your testimony, starting at
8 page 11 line 12 and running to page 12 line 10, take a chance --
9 take a second to find those pages, and then I'll direct you to
10 the lines again.
- 11 A. All right. I'm getting lost in all these.
- 12 Q. Sorry. Would you like me to move any of those documents
13 out of there?
- 14 A. If you're through with them.
- 15 Q. I'm definitely through with the 3345.
- 16 All right.
- 17 A. What page?
- 18 Q. 11, sir.
- 19 A. Okay.
- 20 Q. 11 and 12.
- 21 A. Yes.
- 22 Q. All right. If you start at page 11, line 12 and read to
23 just 12 line 10, and then I want to talk to you for a second.
- 24 A. Okay.
- 25 Q. All right in the stewardship process, there's a weighing

1 of the substantial reductions, as well as the things that don't
2 change and the things that increase; is that right?

3 A. Yes, in general, yes.

4 Q. And page 11 line 18 you're asked a question about product
5 stewardship. It said, "Product stewardship is a term of art at
6 Reynolds, it means something very particular?" And you say,
7 "Yes"?

8 A. Correct.

9 Q. And then the next question is: "What it means is that
10 any new or revised version of a particular brand of cigarette
11 Reynolds sells cannot be deemed to pose a greater health risk
12 than its predecessor version of that product?" And you said
13 "Yes" again. Correct?

14 A. Correct.

15 Q. All right. And then the way the product stewardship
16 process works at R.J. Reynolds is a weight of the evidence
17 process?

18 A. That's correct.

19 Q. Okay. And so that weighs the good, the bad, and the
20 in-between, and looks at it on a collective basis?

21 A. That's correct.

22 Q. And --

23 MR. BIERSTEKER: Your Honor, I'm just going to interpose
24 an objection. I don't know where this is going, but this is all
25 the direct testimony, and the answers weren't changed and the

1 answers were there. I mean, if this is a predicate to something
2 else, it's only going to take a little while fine, but if we're
3 just going to repeat it, I don't see the point.

4 THE COURT: Are you getting to another issue?

5 MR. SCHWARTZ: Your Honor, there was a question in the
6 testimony that we talked about a minute ago where he changed the
7 testimony from saying "there were some concerns". Your Honor
8 asked what were the concerns, and you said well there were
9 external people and there were internal people. We talked about
10 the external people that I know about, Dr. Jaeger and his group,
11 and --

12 THE COURT: Why don't you get to the question you need to
13 find an answer to.

14 MR. SCHWARTZ: All right.

15 BY MR. SCHWARTZ:

16 Q. You went through the product stewardship process, and
17 that addressed the same increases, decreases, and in-betweens
18 and at the end you came out saying the weight of the evidence
19 shows this is still a product we should still go forward with
20 and it does not increase greater than its predecessor.

21 A. At the end, this says this process that say this product
22 is no worse than its predecessor.

23 Q. You went through this stewardship process before you sold
24 EW, and you deemed it should go out the door?

25 A. We deem it did not present any risk over and beyond the

- 1 predecessor.
- 2 Q. All right. Just a couple last questions then. Turn to
- 3 page 28, lines 21 and 25.
- 4 A. 28, line 21 through 25?
- 5 Q. Yes, sir. Now, this morning we've been talking about the
- 6 smoke chemistry reductions; is that right?
- 7 A. True.
- 8 Q. Okay. And I asked you a question saying, "Now looking at
- 9 these smoke chemistry testing results" -- "Now, looking at these
- 10 smoke chemistry testing results, are they an indicator, however
- 11 incomplete, that the EW prototype potentially posed less risk
- 12 than did the Marlboro Light 85s?". The answer I proposed was a
- 13 cautious one and I said, "I would say they are unnecessary but
- 14 not in and of itself standing alone, sufficient indicator". You
- 15 crossed out that answer and you put in "yes"; is that right?
- 16 A. That's correct.
- 17 Q. So the chemistry reductions alone, you are saying, was an
- 18 indicator that the EW prototype potentially posed less risk than
- 19 did the Marlboro Lights 85s?
- 20 A. No, the reason I crossed out that answer and just said
- 21 "yes" was that your question was sufficiently qualified for me
- 22 to accept it as a yes. It says that those results are an
- 23 "indicator, however incomplete", and I think the answer to that
- 24 is just yes.
- 25 Q. Okay. And there were three other areas of tests that

- 1 were done on EW, there was the chemistry, smoke chemistry test?
- 2 A. Correct.
- 3 Q. There were in vitro biological tests?
- 4 A. Correct.
- 5 Q. There were in vivo smoke inhalation tests?
- 6 A. That's correct.
- 7 Q. And there was human smoking behavior tests?
- 8 A. Correct.
- 9 Q. And in each of those categories I asked you a similar
- 10 question. Do you remember that?
- 11 A. Yes, in general, yes.
- 12 Q. And I asked you whether the results of the in vitro
- 13 tests, which included Sister Chromatid Exchange, Neutral Red
- 14 Assay and the Ames Test, whether they are indicators that the EW
- 15 prototype potentially posed less risk than the comparison market
- 16 cigarettes, and in each case with regard to those three tests,
- 17 you said yes?
- 18 A. Correct.
- 19 Q. Okay. And then I asked you about the in vivo, the smoke
- 20 inhalation tests that were done. And I asked you, "Looking at
- 21 the results of the smoke inhalation tests, are they an indicator
- 22 that the EW prototype potentially posed less risk than did the
- 23 comparison commercial cigarettes?" And again you said "yes"?
- 24 A. Correct.
- 25 Q. And then I asked you to look at -- then I asked you for

1 each of those categories, whether not only looking back now in
2 2004, whether that would be your answer, but whether it would
3 also have been your answer in 1994 and you also said "yes" to
4 those questions?

5 A. For this specific question, yes.

6 Q. Okay. All right. So the four areas that you tested was
7 the smoke chemistry, the three areas -- the three parts of the
8 biological in vitro testing, and the biological in vivo testing
9 and the human smoking testing; is that right?

10 A. Right. I would look at chemistry, in vitro biology, in
11 vivo biology, human smoking behavior to make assessments with
12 respect to product stewardship, et cetera.

13 Q. And those --

14 A. Those are all indicators, "however incomplete", which is
15 what your question said, and that's the reason I'm simply saying
16 "yes". All of those are in indicators however incomplete.

17 Q. All right. Take all four of those together and get all
18 of those results?

19 A. Right. Right.

20 Q. Put them all on one piece of paper?

21 A. Okay.

22 Q. Are those not incomplete -- are those the complete
23 indicators that the EW prototype potentially posed less risk
24 than the marketed commercial cigarettes to which they were
25 compared?

1 A. No, today sitting here today, I would say absolutely not.
2 Q. Okay. 1994, what would the answer be?
3 A. For me?
4 Q. Yeah.
5 A. For me, I believe that EW did post less risk. There were
6 people in our company, and people outside, who suggested extra
7 research, and that was not their conclusion at that time. My
8 conclusion at that time was yes. I was wrong.
9 Q. All right. You said yes, Dr. Townsend said yes; is that
10 correct?
11 A. I believe that would -- that is what he said, yes.
12 Q. And Dr. Burger said yes?
13 A. I believe so.
14 Q. Okay. Thanks. Pass the witness, Your Honor.
15 THE COURT: That concludes your direct now, Mr. Schwartz?
16 MR. SCHWARTZ: Yes, Your Honor.
17 THE COURT: All right. Mr. Biersteker, what do you
18 anticipate time-wise?
19 MR. BIERSTEKER: 15 minutes, Your Honor, at most.
20 THE COURT: All right. And do any other defense counsel
21 anticipate questions?
22 ALL PARTIES PRESENT: No.
23 THE COURT: Okay. Let's try to do that then.
24 MR. BIERSTEKER: Yes.
25

1 CROSS-EXAMINATION OF JEFFERY SCOTT GENTRY

2 BY MR. BIERSTEKER:

3 Q. Hello Dr. Gentry. In the examination by the government,
4 you indicated that looking back on 1994 in your view, that EW
5 potentially posed less risk. You now think you were wrong. Why
6 do you now think you're wrong?

7 THE COURT: I'm glad somebody asked that question.

8 THE WITNESS: In 1994, and over the period of '94 to '95,
9 we had made measurements of smoke chemistry reductions under FTC
10 smoking conditions, but we also had human smoking behavior data
11 that indicated that people used the product in a way that took
12 larger puffs at more frequent intervals. And we had scientists
13 within our building, scientists within our review panel, who
14 suggested we do extra research to make sure that those reductions
15 held up under more human like smoking conditions. We did. We
16 found that those reductions were significantly diminished when we
17 went to more stressful smoking conditions.

18 For example, acetaldehyde, one on the constituents we
19 talked about, went from basically a 50 percent reduction to no
20 reduction under more typical of human smoking conditions. That,
21 to me, clearly says that FTC was not fully characterizing a
22 product in which there was selective reduction by the filter
23 going on.

24 BY MR. BIERSTEKER:

25 Q. And --

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1 THE COURT: Does that suggest that the FTC test was
2 totally inadequate at measuring what smokers really do inhale?

3 THE WITNESS: No, I don't think that's -- that's what that
4 says. The FTC method was set up to create a set of conditions to
5 collect particulate phase tar and nicotine. Many of their
6 reductions we're talking about here are not particulate phase but
7 gas phase, which are not things that the FTC method was intended
8 to reflect. The carbon filter was responsible for reducing many
9 vapor phase constituents, and that's the FTC method simply was
10 not set up to look at those. It's the smoking conditions we were
11 using, not the method, per se, we were using.

12 THE COURT: All right. Go ahead.

13 BY MR. BIERSTEKER:

14 Q. Did R.J. Reynolds Tobacco Company give up on the
15 technology that was in EW?

16 A. Absolutely not.

17 Q. Do you continue to work at it?

18 A. Yes, we do, very hard, and hopefully we've become much
19 more sophisticated, and in a post-IOM world, we'll learn more
20 about how to characterize and put these products in the
21 marketplace.

22 Q. And for the benefit of the Court, and those of us who
23 have spent less time with those issues, what do you mean by
24 "post-IOM world"?

25 A. The Institute of Medicine issued a report a few years

1 back saying that they believed that the development of reduced
2 risk products, or potentially reduced risk production, was a
3 good thing. They began to give us a vocabulary to use, such as
4 reduced exposure, potential reduced exposure, and gave us a way
5 to road map characterizations of these products. It's not an
6 adopted philosophy, but it's certainly a road map we didn't have
7 at the time.

8 Q. You were shown by counsel for the government a memo you
9 wrote in 1999 where you offered your own personal assessment of
10 the consumer acceptability of the EW product, do you remember
11 that?

12 A. Yes, I do.

13 Q. At the time that you prepared that memo, did you have all
14 of the data from the test market available to you?

15 A. Um, I think all of the data were available, but I had not
16 reviewed the final report.

17 Q. Have you since looked at the final report on the
18 marketing of EW?

19 A. Yes, I have.

20 Q. Okay. And you testified that, at least as of 1999, it
21 was your view that EW held its own. Do the additional data that
22 became available later, and that you looked at later, alter in
23 any way that conclusion that you reached in 1999?

24 A. Yes. The subsequent, after about a year, the market
25 was -- or a year or year and a half, the market, the test market

1 was reviewed again. It showed that the test market product had
2 fallen in market shares substantially compared to the control or
3 the balance of the U.S. market. So it tells me that there was
4 beginning to show some weakness in the performance, consumer
5 performance of the product. I still believe the product was not
6 a dog, it was a reasonably good product.

7 Q. During the time that you were having all these meetings
8 with the outside scientists and you were meeting inside to try
9 to talk about EW and its potential risk reduction, was there
10 ever a consensus that emerged within Reynolds research and
11 development that EW was a safer or potentially reduced risk
12 product?

13 A. No, there was not a consensus reached prior to the time
14 going into the test market, no.

15 Q. Were efforts made from time to time to reach a consensus?

16 A. We spent many hours over many years arguing, reviewing
17 data, looking at data, looking at new ways to characterize the
18 product, and we could not come to a consensus on it.

19 Q. Why was so much time devoted to trying to reach a
20 consensus?

21 A. We wanted to -- management wanted to make as strong a
22 claim as we could in the marketplace about that product, but
23 they were emphatic that if their own scientists could not come
24 to a consensus about the product, then they were not going to
25 say something in the public where it would be misinterpreted.

1 Q. What do you mean by "as strong a claim" with respect to
2 what attributes of the product?

3 A. With respect to making potentially reduced risk health
4 claims.

5 Q. And who in management in particular did you hear this
6 message from?

7 A. I heard that message very loud and clear from our CEO.

8 Q. Doctor, do you have any expectation one way or the other
9 as to whether the content of your testimony, the substance of
10 what you say here today, will have any affect on your future
11 compensation, your promotions, or otherwise, at R.J. Reynolds?

12 MR. SCHWARTZ: Objection, Your Honor, that's well beyond
13 the scope of the direct examination, either in writing or orally
14 made.

15 THE COURT: No, the objection is overruled. It certainly
16 goes to issues of credibility which can always be raised. This
17 is cross-examination. It can be explored on redirect.

18 MR. SCHWARTZ: Your Honor, I didn't impeach his
19 credibility.

20 MR. BIERSTEKER: Your Honor, maybe if I could just say
21 something Your Honor. As you know, the government filed a motion
22 in limine that Your Honor characterized as raising very serious
23 allegations about financial inducements being offered to folks
24 within R & D at Reynolds to provide testimony that affected the
25 content of their testimony. If the government does not intend to

1 pursue that, that's fine, I don't need to inquire into it,
2 however, if they are, Dr. Gentry is here and I think he should be
3 permitted to address it.

4 MR. SCHWARTZ: We didn't say anything about Dr. Gentry,
5 Your Honor.

6 THE COURT: I'm going to allow the question -- I assume
7 it's not going to be very lengthy.

8 MR. BIERSTEKER: No, it will not.

9 THE COURT: I'll allow it.

10 BY MR. BIERSTEKER:

11 Q. Do you have the question in mind, Dr. Gentry?

12 A. Could you repeat it?

13 Q. No, but I'll try to approximate it.

14 Do you have any expectation that you will be rewarded
15 financially, or otherwise, as a result of the content or
16 substance of your testimony here in Court today? One way or the
17 other, do you have an expectation?

18 A. No, I have no expectation for being compensated for the
19 content other than being expected to tell the truth.

20 Q. And why is it that you have no expectation that you will
21 be rewarded or otherwise remunerated based on the content of the
22 substance of your testimony here today?

23 MR. SCHWARTZ: Your Honor, objection again. Again, I did
24 not impeach this gentleman's credibility. I didn't try to. I
25 didn't ask him any questions about it. The rules of evidence say

1 when credibility is put in issue, that's when you can try to
2 rehabilitate it.

3 THE COURT: The objection's overruled. You may answer.

4 THE WITNESS: Can you repeat the question?

5 BY MR. BIERSTEKER:

6 Q. Sure. Why is it that you don't think that what you are
7 saying here today will have any affect on your future
8 compensation, or other benefits, from R.J. Reynolds Tobacco
9 Company?

10 A. Well, I have testified on a couple of occasions, been in
11 depositions, and I've simply seen no evidence of being
12 compensated in any fashion for the content of my testimony. I'm
13 expected to tell the truth in this responsibility that goes
14 above and beyond my day-to-day job responsibilities.

15 Q. Now you said this is a job responsibly in a goes above
16 and beyond your day-to-day job responsibility. Are your duties
17 cut back or otherwise modified because from time to time you
18 have to come and testify?

19 MR. SCHWARTZ: Your Honor, I'm going to object, it's
20 leading. I know they practiced these questions last week, but at
21 least they should have practiced them using the format.

22 MR. BIERSTEKER: They were not practiced.

23 THE COURT: I'll allow the question. You may answer.

24 BY MR. BIERSTEKER:

25 Q. Do you have the question in mind, Doctor?

1 A. No. These objections are getting in the way.

2 Q. All right. Has there been any modification of your job
3 duties as a chemist in the Reynolds Research and Development
4 Department because you are from time to time called upon to
5 testify, as you are doing here today?

6 A. No. My responsibilities as vice president of product
7 development continue, they have not been modified, and my work
8 is piling up as I sit here.

9 Q. Let me show you an exhibit.

10 MR. BIERSTEKER: May I approach the witness, Your Honor?

11 THE COURT: Yes.

12 BY MR. BIERSTEKER:

13 Q. Doctor, I've handed you what's been marked as U.S.
14 Exhibit 30025, and it was a document that the government filed
15 with its motion in limine dated September 2nd, 1994, and written
16 by you. Do you recognize this document?

17 MR. SCHWARTZ: Your Honor, I'm going to object. This is a
18 document about Dr. Gentry writing in support of David Townsend.
19 This is so far outside of the scope of Dr. Gentry's credibility,
20 or anything that was talked about in the direct examination
21 either in writing or in Court today. It's ridiculous.

22 THE COURT: What is this relevant to?

23 MR. BIERSTEKER: I'll explain, Your Honor.

24 THE COURT: Okay.

25 MR. BIERSTEKER: I will explain. As part of their motion,

1 they attached this document written by Dr. Gentry to suggest that
2 this was one instance that created this atmosphere of financial
3 inducement, and I'm just going to point the Doctor to the
4 language that he wrote and ask him what he meant.

5 MR. SCHWARTZ: On Dr. Townsend, Your Honor. Dr. Gentry
6 wrote that letter about Dr. Townsend. When Dr. Townsend is
7 here --

8 THE COURT: Slow down.

9 MR. SCHWARTZ: When Dr. Townsend is here, I promise you
10 we'll use this document. And if they want to call Dr. Gentry as
11 a rebuttal witness and the Court permits it, that's dandy. But
12 right now, Your Honor, this is questioning of Dr. Gentry, his
13 credibility, and what he knows about EW, nothing else.

14 THE COURT: Well, it certainly doesn't have anything to do
15 with this testimony.

16 MR. BIERSTEKER: No, it does not, Your Honor, but these
17 are very serious charges that have been made. Dr. Gentry is
18 here, we don't intend to call him back in our case, and I just
19 wanted to address the one document, what he wrote, what they took
20 out of that document and made allegations about and just ask him
21 as to those sentence or two what he meant. That's all I'm going
22 to do.

23 MR. SCHWARTZ: What they want, and what the rules of
24 evidence say, Judge, seem to be in two different universes. He
25 said no, it doesn't have anything to do with the testimony. That

1 should be it.

2 THE COURT: Well, as we all know, it's a bench trial. I
3 don't see why we're going have to drag this person back to
4 testify again. If it turns out that this testimony becomes
5 irrelevant we will have wasted 5 minutes or 10 minutes, that's
6 true, at the most, but that is contrasted with the witness
7 wasting, I don't know how many hours it took him to get here.
8 So, you've got about 5 minutes, Mr. Biersteker at the most.

9 MR. BIERSTEKER: I don't think I'll need the 5 minutes,
10 Your Honor.

11 BY MR. BIERSTEKER:

12 Q. First of all, Dr. Gentry, foundationally, what is this
13 document?

14 A. This is a support letter that I wrote for the nomination
15 of David Townsend to senior principle scientist in R & D.

16 Q. All right. And I've highlighted and placed on the screen
17 the language that the government extracted from this particular
18 document, and actually, I think it was the second sentence up
19 there, maybe it was the first two, but it says, "Dave maintains
20 the highest level of competence in his field of expertise to
21 ensure the company is provided with sound scientific basis for
22 strategy, policy, and defense, and thus not compromised in any
23 way relative to external pressures."

24 There is a second passage that the government used in its
25 motion. It says: "He has made significant contributions to the

1 science of cigarette design and performance, defense of
2 litigation relative to smoking and health issues and ignition
3 propensity, and the development of strategic policy and direction
4 for the company". Those are the words you wrote is that right,
5 Doctor?

6 MR. SCHWARTZ: Your Honor, I'm going to object one more
7 time. This motion is denied, it's not before the Court, just
8 like the ad hominem stuff they put in their reply brief to 8586.
9 It's sort of a point of personal indulgence that's not what the
10 Court here's for.

11 MR. BIERSTEKER: Your Honor --

12 MR. SCHWARTZ: -- waste anyone's time with that.

13 MR. BIERSTEKER: Your Honor, if the government isn't going
14 to pursue this line that's raised by their motion, I'm perfectly
15 happy to --

16 THE COURT: I did not understand that at all. Is the
17 government going to be pursuing this issue with other witnesses?

18 MR. SCHWARTZ: We'll be making a decision on a witness by
19 witness basis Your Honor, right now that motion is denied.

20 THE COURT: Ask your question, let's get it done.

21 MR. BIERSTEKER: Fine.

22 BY MR. BIERSTEKER:

23 Q. Dr. Gentry, what did you mean when you wrote those words
24 back in 1994?

25 A. This entire recommendation was written to our technical

1 review committee who looks at the promotion of our scientists
2 along the technical ladder. And this was simply written to
3 reflect Dave's expertise and knowledge in the area of cigarette
4 design and performance, how that is valuable to the company with
5 respect to strategy and policy we set on a number of external
6 issues, not just litigation. But this was my way of saying Dave
7 is one of the biggest and best experts I know in the area of
8 cigarette design and performance and he's incredibly valuable to
9 the company as such.

10 MR. BIERSTEKER: I have no further questions, Your Honor.

11 THE COURT: Redirect?

12 MR. SCHWARTZ: Thank you, Your Honor.

13 Keep that document up, please.

14 REDIRECT EXAMINATION OF JEFFERY SCOTT GENTRY

15 BY MR. SCHWARTZ:

16 Q. Let's go to the part that wasn't highlighted, Dr. Gentry.

17 A. Okay.

18 Q. That big yellow part there is another sentence. Tell me
19 if I'm reading this correctly would you? "The value of his
20 expertise to the company is immense given the threat of
21 litigation and the levels of damages sought in liability cases."
22 That's what you wrote?

23 A. That's correct.

24 Q. That's why it was so important that you have an expert
25 like Dave Townsend here, because he can fight against anybody

1 trying to get money out of the tobacco company after they've
2 killed one of their relatives. That's why you wrote about that,
3 didn't you?

4 MR. BIERSTEKER: Objection, Your Honor, that's
5 argumentative.

6 THE COURT: Oh, the objection's overruled, it's fair game.

7 THE WITNESS: The value for Dr. Townsend for our company
8 is his knowledge and his expertise in this area. The value that
9 that then superimposes in the area of litigation, regulation, et
10 cetera, is part of the value he is to the company. This letter
11 was written to our technical review committee, not to any
12 management figure.

13 BY MR. SCHWARTZ:

14 Q. Technical review committee that gives the promotions?

15 A. No, technical review committee that evaluates the science
16 that he has performed, the nomination letters that are written
17 in support of that promotion, and then makes a recommendation to
18 management whether Dave is warrant -- is warranted (sic) of that
19 promotion.

20 Q. So you told the technical committee that his performance
21 in lawsuits was worthy of them telling the people who make the
22 raises?

23 A. No, I didn't tell them that in and of itself. I told
24 them that his expertise and his knowledge was valuable to the
25 company; one component of that is litigation. This was written

1 in a time when Dave had only testified, I think, one time.

2 Q. All right.

3 A. It was a big deal for R & D for somebody to be involved
4 in something like that.

5 Q. All right. Now, you spoke on cross-examination about
6 finding that under higher stress conditions the results change
7 for some of the compounds; is that right?

8 A. For many of the constituents that are attributed to
9 reduction by the filter.

10 Q. And the one that you talked about was acetaldehyde; is
11 that right?

12 A. That's one of them.

13 Q. Is the fact that people smoke harder than a machine a big
14 surprise to R.J. Reynolds?

15 A. No.

16 Q. Was that news?

17 A. No, we've known for many years that the FTC smoking
18 conditions don't represent any specific individuals smoking.
19 It's a way to standardize laboratory method.

20 Q. So, even though it was -- you knew that people smoked
21 harder than the FTC machine, you decided it was still worth
22 while using the FTC testing method to asses whether a product
23 reduced risk?

24 A. That's one of the ways we looked at it, yes, coupled
25 where human smoking behavior and subsequent smoking conditions.

- 1 Q. Now, you testified on redirect examination that you folks
2 at RJR have tried and tried and tried to reach consensus on EW,
3 but just haven't been able to do it?
- 4 A. That's correct.
- 5 Q. All right. I'm going to ask you -- I'm going to give you
6 a document, United States Exhibit 22184.
- 7 MR. SCHWARTZ: If I can approach, Your Honor.
- 8 THE COURT: Yes.
- 9 BY MR. SCHWARTZ:
- 10 Q. Take a look at that document, would you?
- 11 A. Okay.
- 12 Q. Okay. Now, that document is dated 1997, August 19th,
13 right?
- 14 A. That's correct.
- 15 Q. It's written by Robert Suber, who is the head of
16 scientific and regulatory affairs?
- 17 A. That's correct.
- 18 Q. And looking at the second page, you see that you got a
19 copy of it?
- 20 A. That's correct.
- 21 Q. Okay. Seen this document before?
- 22 A. Yes.
- 23 Q. In fact, you probably looked at it last week, didn't you?
- 24 A. Yes.
- 25 Q. Okay. So even though you looked at this document last

1 week, you testified today that the folks at R & D just could not
2 reach a consensus about EW?

3 A. During the period of time it was in test market.

4 Q. Okay. And that was 1995 to 1997; is that right?

5 A. To the June/July time frame of 1997.

6 Q. Well, are you sure it ended before August of 1997?

7 A. I'm reasonably sure, yes.

8 Q. Well, take a look at that document and in the first
9 paragraph it says, "We have revised the claims around the
10 combined CS filter and low nitrogen tobaccos, commonly referred
11 to as the EW cigarette, based upon current scientific data and
12 interpretation by consumers. We have conducted a number of
13 chemical and biological assays on this product, which can be
14 used to expand the claims originally provided in the memo of
15 March 26th this 1996"?

16 A. That's correct.

17 Q. In March 22, 1996 you were definitely selling EW at that
18 time?

19 A. That's correct.

20 Q. Okay. Now turn to the third page in the document,
21 please. It's called Revised Consensus to Scientific Claims?

22 A. Correct.

23 Q. Okay. Now, as of this date, there was a consensus in the
24 Research and Development Department for commercial EW on the
25 following from a scientific perspective; is that correct? First

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- 1 of all, "there was a decrease in the irritants which may or
2 might potentially reduce the risk of smoking". That is a
3 consensus?
- 4 A. Yes.
- 5 Q. Okay. There was a consensus that "there was a decrease
6 in many or some vapor phase irritants, cytotoxins and
7 genotoxins, which may or might potentially reduce the risks of
8 smoking". That was a consensus; is that right?
- 9 A. That's correct.
- 10 Q. A consensus, as far as I know, means everybody agrees?
- 11 A. Everybody could live with that statement.
- 12 Q. Okay. All right. There was a consensus that "the
13 potential risks of smoking may or might be reduced due to the
14 decrease in free radicals in smoke"; is that right?
- 15 A. That's what it says.
- 16 Q. And there were substantial reductions in the free
17 radicals in the smoke of the EW cigarette?
- 18 A. Yes, under the FTC conditions, yes.
- 19 Q. I knew that was coming.
- 20 Now, number 4, "there was a decrease in many or most
21 controversial compounds in the vapor phase or whole smoke with
22 further information on pack or insert to define terms
23 'controversial' and 'many' may or might reduce the potential
24 risks of smoking". That was a consensus?
- 25 A. That's correct.

1 Q. And, in fact, that indicates that there was a consensus
2 about putting a pack -- information on a pack or in an insert
3 about it?

4 A. Potentially, yes.

5 Q. But you didn't do that?

6 A. No, this was after the test market.

7 Q. Like four weeks after, you think?

8 A. I don't remember.

9 Q. All right. There was a consensus that there was "a break
10 through in filter technology giving good taste, but significant
11 reduction in most or many vapor phase compounds or reductions in
12 unwanted vapor phased compounds, that might or may reduce the
13 potential risks associated with smoking".

14 A. That's correct.

15 Q. All right. Let's go to the next page. Everyone also
16 agreed that the decrease --

17 MR. BIERSTEKER: Under the rule of completeness, would you
18 please put it up so we can see the bottom part as well?

19 MR. SCHWARTZ: I will. I'll move right along and you
20 can --

21 BY MR. SCHWARTZ:

22 Q. There's also consensus on "the decrease in many
23 controversial compounds in whole smoke, with explanation in
24 insert, that may or might reduce potential risks of smoking".
25 There was a consensus; is that correct?

- 1 A. That's correct.
- 2 Q. There was a consensus that there was -- "that the
3 breakthrough filter giving good taste, but a significant
4 reduction of many controversial compounds or unwanted compounds
5 in smoke may or might reduce the potential risks of smoking".
- 6 A. That's right.
- 7 Q. And there was a consensus, "the potential risks of
8 smoking may be reduced due to the decrease in irritants,
9 cytotoxins and some carcinogens in vapor phase?
- 10 A. That's correct.
- 11 Q. And then there was one -- there's still not a consensus
12 on significant reductions in cancer causing compounds; is that
13 right?
- 14 A. That's correct.
- 15 Q. So there were eight consensus conclusions that were
16 reached, miraculously, within a few weeks of when EW was taken
17 off of the market?
- 18 A. I don't think it was "miraculously" at all. We worked
19 very hard to try to come to consensus. Previously we had been
20 at consensus on, yes, those yield reductions and this that or
21 the other, but Bill Eisner thought that those would be implied
22 in claims; our management was not willing to make those kinds of
23 claims if our scientists weren't willing to say what the value
24 of that might ultimately be.
- 25 And I would also point out in Bob's memo, he points out

1 that local laws and regulations must be adhered to. These were
2 scientific claims, not marketing claims.

3 Q. I'm not asking about the marketing claims. I'm just
4 asking you if all the folks in R & D who are cc'd on that memo
5 reached a consensus that scientifically those eight conclusions
6 could be stated?

7 A. I think these eight statements that are in here were a
8 consensus, yes.

9 Q. And let's be honest, that consensus didn't occur starting
10 the day after it was taken off the market, that information was
11 gathering while it was still on the market?

12 A. I think it's fair to say, since I've already said we were
13 arguing about this for a couple of years, that yeah, that -- we
14 were moving toward what we hoped would be consensus.

15 Q. And somehow the month after it came off the market, boom,
16 it all clicked on?

17 A. It happened that way, yes.

18 Q. Okay.

19 MR. SCHWARTZ: Thanks, no further questions.

20 THE COURT: Was there any thought given after the -- after
21 putting together this memo on revised consensus to putting it
22 back on the market?

23 THE WITNESS: It was about this timeframe that we began to
24 develop the work on the reductions going away under more
25 stringent smoking conditions, so we would not have put it back on

1 the marketplace with any claims around it knowing that
2 information.

3 MR. SCHWARTZ: Your Honor, if I may, there is substantial
4 evidence to the contrary about that that I can present to the
5 Court right now.

6 THE COURT: Well, we'll hear the evidence when it comes
7 in.

8 MR. SCHWARTZ: I'm happy to bring it to the Court right
9 now if the Court's willing to hear it.

10 THE COURT: Are you asking him questions about it?

11 MR. SCHWARTZ: Yeah, I can show him documents, ask him
12 questions, if Your Honor wants, things if that would inform the
13 Court. I'm happy to continue the examination because we don't
14 want to bring Dr. Gentry back for just a couple of questions.

15 (Discussion had off-the-record between Mr. Brody and Mr.
16 Schwartz.)

17 MR. SCHWARTZ: We can present it through another witness,
18 Your Honor.

19 THE COURT: All right. Dr. Gentry, thank you, you may
20 step down.

21 MR. BERNICK: Your Honor, I have a very short motion that
22 doesn't require the witness be on the stand.

23 THE COURT: Can he be excused?

24 MR. BERNICK: As far as I'm concerned, yeah.

25 THE COURT: All right. You may step down.

1 All right, Mr. Bernick.

2 MR. BERNICK: My motion relates to the comments that
3 were -- or the statement that was made by counsel in the course
4 of questioning the witness. There was a reference to "killing
5 relatives", and I believe that that's a highly improper
6 suggestion or statement to be made in this proceeding. We've
7 tried a lot of these cases -- I've tried a lot of tobacco cases,
8 nontobacco cases involving issues and controversies, and I don't
9 think I have ever heard that kind of statement made before a
10 Court. It's not a question of whether it's personally offensive
11 to my client or the other clients, it's a question of how it
12 reflects on this proceeding. It was unnecessary for the
13 questioning of this witness, who was by counsel's own account a
14 credible witness and was being responsive, and we'd ask for an
15 admonition that counsel not make such statements and innuendoes
16 and suggestions and inflammatory remarks in the future.

17 THE COURT: Well --

18 MR. SCHWARTZ: My dead Aunt Violet Mandell, who smoked
19 Kools for 25 --

20 The court reporter: I'm sorry.

21 MR. SCHWARTZ: My dead, dead Aunt Violet Mandell (sic),
22 lung cancer, who smoked Kools, his product, for 25 years might
23 take an issue with his comments.

24 MR. BERNICK: That's precisely the kind of unprofessional
25 conduct that ought not be allowed.

1 THE COURT: Mr. Schwartz, all lawyers occasionally get
2 carried away, but it's really a mistake professionally to let
3 personal issues start to predominate, or start to heavily
4 influence your handling of the case or your approach to
5 witnesses.

6 Before you replied to Mr. Bernick, I was simply going to
7 say that inflammatory comments are not useful, but everybody says
8 something sooner or later in their life that they probably
9 shouldn't have said. But with your personal comment, I really do
10 reiterate that you can't let those kinds of personal issues come
11 into the courtroom. I understand. Everybody has their views on
12 all sorts of social issues, but they can't take over now.

13 MS. EUBANKS: Thank you, Your Honor. Our response is that
14 we will take heed to your remarks just now, and we recognize
15 that. Thank you.

16 THE COURT: All right. Everybody, 2:00, please for lunch.
17 And hopefully the air conditioning will be on.

18 (Thereupon, a luncheon break was taken.)

19

20 C E R T I F I C A T E

21

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

24 -----
25 Scott L. Wallace, RDR, CRR
 Official court reporter

 Scott L. Wallace, RDR, CRR
 Official Court Reporter

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GSK)
	:	October 14, 2004
Plaintiff,	:	
	:	2:03 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 13
AFTERNOON SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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

2 THE COURT: Good afternoon, everybody. There are two
3 matters left over from the examination of Dr. Gentry. Does the
4 government have something you want to bring up first?

5 MR. SCHWARTZ: Yes, Your Honor. There were two
6 documents that were not on the exhibit list that were used in
7 the examination Dr. Gentry. It's United States Exhibit 30358
8 and United States Exhibit 22184. And I would like to move them
9 into evidence at this time.

10 MR. BIERSTEKER: No objection, Your Honor.

11 THE COURT: As to the two exhibits that were on the
12 exhibit list about which I have not yet ruled, but I'm about to,
13 I assume there is still an objection to U.S. Exhibit 85886 and
14 89090. Is that right.

15 MR. BIERSTEKER: That's correct, Your Honor.

16 THE COURT: As to 85886, which is the Jones, Day
17 document, the objection is overruled.

18 Number one, there is no privilege issue because I
19 decided that a long time ago. And the government is correct
20 that this particular lengthy document falls under 802(D)(2)(D)
21 of the Rules of Evidence, and therefore it may be admitted.

22 As to U.S. Exhibit 89090, the objection is sustained.
23 Dr. Gentry was shown that document numerous times throughout his
24 written direct, and he said repeatedly that he didn't know
25 anything about the document. He certainly had no personal

1 knowledge about it. He had no input into it and couldn't
2 testify about it.

3 The government argues well, nothing he testified to was
4 inconsistent with what's in the document, but that's not
5 sufficient connection to get a document in. Therefore, the
6 objection is sustained as to 89090. I believe that takes care
7 of all matters relating to Dr. Gentry, I'm pretty sure at this
8 point.

9 MR. SCHWARTZ: It does, Your Honor.

10 THE COURT: I'm sorry. It's still uncomfortable in
11 this courtroom. I think the air-conditioning is on and so, as I
12 say, within a short period of time we should all be freezing.
13 But that's the best I can do. Okay.

14 Let's have the next witness for the government, please.

15 MS. BROOKER: Good afternoon Your Honor, Renee Brooker
16 on behalf of the United States, and I call Dr. Jeffery Harris
17 to the stand.

18 THE COURT: Dr. Harris, please come up to the stand.

19 THE DEPUTY CLERK: Please raise your right hand.

20 JEFFERY HARRIS, Government's witness, SWORN

21 THE DEPUTY CLERK: You may be seated.

22 MS. BROOKER: Your Honor, before I make a proffer of
23 Dr. Harris's expertise, I would first colloquy him on the
24 adoption of his testimony, if that is okay.

25 THE COURT: That's fine.

1 MS. BROOKER: If I may approach him with a copy of his
2 testimony?

3 THE COURT: Yes.

4 MS. BROOKER: Does Your Honor also have a copy up
5 there? I have an extra copy.

6 THE COURT: No, I have it.

7 MS. BROOKER: Thank you.

8 DIRECT EXAMINATION

9 BY MS. BROOKER:

10 Q. Dr. Harris, you have before you a copy of your written
11 direct testimony. Are you okay up there?

12 A. Yes.

13 Q. Okay. And you see that copy; correct?

14 A. Yes, I do.

15 Q. And who wrote your answers, that is in the testimony before
16 you?

17 A. I wrote all the answers.

18 Q. And have you rereviewed your written testimony since it was
19 filed with the court?

20 A. Yes, I have.

21 Q. And are there any corrections to the testimony that you
22 would like to make at this time?

23 A. I have one substantive change to make at this time.

24 Q. Okay. If you would please inform the court of what that
25 substantive change is?

1 A. I call your attention to page 73.

2 Q. Judge Kessler is there. If you would go ahead and tell the
3 court what the change is?

4 A. I'm making reference to demonstrative number 3 in the upper
5 right-hand box in the column entitled Benefit. The text should
6 read, "because consumers hear fewer negative messages" and the
7 words "do not," I would like to erase or strike.

8 Q. Was that an inadvertent or typographical error, Dr. Harris?

9 A. Yes.

10 Q. Now, are there any other corrections to your testimony that
11 you would like to make at this time?

12 A. No.

13 Q. Do you formally adopt this testimony at this time?

14 A. If I'm permitted to do so, yes.

15 THE COURT: Yes, of course the witness is.

16 MS. BROOKER: At this time, Your Honor, shall the
17 United States make a proffer of Dr. Harris's particular
18 expertise?

19 THE COURT: Yes, you may proceed that way.

20 MS. BROOKER: The United States proffers Dr. Harris as
21 an expert in economics with a particular emphasis on defendants'
22 conduct on smoking and health.

23 And I will also say that although Dr. Harris has
24 extensive experience on many, many subject matters as a
25 physician and economist, the United States specifically is not

1 offering Dr. Harris for purposes of this case on any of the
2 following topics as shown by the direct examination.

3 The United States is not offering Dr. Harris on the
4 calculation of disgorgement or any calculation.

5 The United States is not offering Dr. Harris on the
6 defendants' ability to pay disgorgement.

7 The United States is not offering Dr. Harris on youth
8 marketing or youth smoking rates, on teenagers' sensitivity to
9 changes in cigarette prices, or on the effect of advertising
10 bans on cigarette smoking.

11 And at this time, we would ask that the court accept
12 Dr. Harris in the specific area of expertise that we have
13 proffered.

14 THE COURT: Of course, the defendants have an
15 objection, I'm well aware of that.

16 MR. BERNICK: I don't really think so, Your Honor.

17 As I understand the proffer, he is proffered as an
18 economist. As I looked at the direct examination he expresses
19 his conclusions based on an economic framework, and if that's
20 the proffer, I have no issue with the proffer.

21 I'm not sure what's meant by with the particular
22 expertise on defendants' conduct. I wasn't aware that that was
23 an academic discipline. He's obviously here to talk about that
24 and that's fine. We don't have an objection about that. But I
25 think the proper proffer is simply as an economist.

1 THE COURT: He may be accepted as an expert, certainly
2 in the area of economics.

3 MS. BROOKER: Thank you, Your Honor.

4 The United States, then, at this time will begin with
5 its one-hour live direct examination and we will be using two
6 demonstratives for that purpose.

7 BY MS. BROOKER:

8 Q. Dr. Harris, have you had a demonstrative prepared to chart
9 your expert conclusions?

10 A. Yes, I have.

11 Q. And have you also had another demonstrative prepared to
12 explain defendants' positions about collusion and your responses
13 to those positions?

14 A. Yes, I have.

15 Q. Okay. Now, I'm going to ask you a series of questions about
16 those two demonstratives, and if you would please refer in your
17 responses to my questions to the demonstrative, the first one
18 that is before you sitting up there on the easel.

19 MS. BROOKER: Can Your Honor see that demonstrative,
20 because we are also going to put it up here on the big screen?

21 THE COURT: I can, and I think I have it.

22 MS. BROOKER: Dr. Harris also has one of those laser
23 lights and he will be using it. I think, because I'm not sure
24 he can see the big screen, but I think he will be pointing to
25 the demonstrative on the board if that's convenient for the

1 court.

2 MR. BERNICK: Your Honor, just a brief comment so that
3 I don't interrupt the flow of the examination.

4 It is our view that this use of this kind of
5 demonstrative which simply walks through a chronology is not
6 really what we believe the court had contemplated in the
7 one-hour presentation of expert testimony through
8 demonstratives.

9 This is not a technical discussion, it's simply a
10 recitation of fact. We have no problem if they want to proceed
11 along those lines, but we are also mindful that we will also
12 have experts who testify about historical facts. We want to
13 make sure that if this is what they are doing, that we get to do
14 essentially the same kind of thing.

15 THE COURT: Basic juris prudential rule. What's sauce
16 for the goose is sauce for the gander.

17 MR. BERNICK: The sauce rule, Yes, Your Honor. Thank
18 you.

19 THE COURT: We can't rely on -- or we can't cite
20 Mr. Redgrave for that, but I'm sure we can cite somebody for
21 that.

22 Okay. Go ahead.

23 MS. BROOKER: In brief response, I think that is a
24 premature objection because this one-hour live will not repeat
25 the direct. Thank you.

1 BY MS. BROOKER:

2 Q. Dr. Harris, look if you will at the time line that is
3 presented before you for the record, it's United States
4 Exhibit 17351. And I'll wait a moment. It looks like you're
5 trying to get your -- are you okay there with your microphone?

6 A. I don't know if it works. Can you hear me?

7 Q. I think it's fine. Now, can you please explain to the court
8 what this demonstrative depicts?

9 A. May I stand?

10 Q. Yes.

11 MS. BROOKER: Your Honor, may he stand?

12 THE COURT: All right. Although, if you use the laser
13 thing, I think the laser light, it ought to be just as
14 effective.

15 THE WITNESS: Should I refer to that one?

16 THE COURT: Okay.

17 BY MS. BROOKER:

18 Q. Again, the question was can you please explain to the court
19 what this particular time-line demonstrative depicts?

20 A. I drew this time-line demonstrative to emphasize primarily
21 that my economic analysis is based on the underlying primary raw
22 data in this case rather than secondary data.

23 That is, the discussion of the health scare, for
24 example, in the early 1950s refers to the underlying
25 advertisements from defendant manufacturers during 1952 and

1 onward. It refers to memoranda that were actually contemporary
2 at the time in late '53 and '54 and it refers likewise to
3 articles written in the lay press concerning advertisements that
4 were contemporary.

5 Likewise, if I moved all the way over to April of 1994,
6 my analysis is based on the actual transcript of the testimony
7 of defendant CEOs in front of Congressman Waxman's Subcommittee.

8 On occasion I do reference secondary sources, that is
9 the opinions of other economists, let's say in peer review
10 journals, concerning the analysis. But fundamentally my
11 analysis is grounded in the underlying facts to the extent that
12 I can do it.

13 Q. Now, in order to just orient the court to your testimony,
14 will you just briefly restate what conclusions, what specific
15 economic conclusions you reached in this case?

16 A. I understand my assignment to apply economic analysis to
17 determine whether defendants' conduct with respect to smoking
18 and health is more consistent with the economists' model of
19 collusion or is better described by the economists' model of
20 competition.

21 And my conclusion is that throughout this time line,
22 taken as a whole for the industry, the defendants' conduct is
23 best described as collusion in economic terms.

24 Q. Now, does each flag on the time line represent a single
25 document?

1 A. No, it does not.

2 Q. What do the flags represent?

3 A. The flags are milestones, so to speak, along a road. In
4 some cases they represent a series of documents or an entire
5 incident. But the actual documentary record upon which I
6 relied and the record that I examined is very dense throughout
7 the time line.

8 Q. Now, can you describe for the court generally the nature of
9 the documents that are reflected in your time line, Dr. Harris?

10 A. The documents that I relied on are for the most part
11 communications between major decisionmakers or documents that
12 describe actions or views of major decision makers.

13 For example, the King Sano exchange reflects
14 correspondence between Mr. Coleman, a major decisionmaker at
15 Philip Morris in 1957 at the time, and Mr. Hartnett who was, I
16 believe, CEO of another company and Chairman of the Tobacco
17 Institute Research Committee.

18 If we go to, for example, the Holland Barclay incident
19 marked as tab R, the documents refer to telephone calls between
20 the CEO of BAT, Tony Garrett, another Mr. Coleman at Philip
21 Morris, and further referred to -- in this case it would be the
22 Holland Barclay incident between Mr. Bruell at BAT and
23 Mr. Coleman, and also the transcript of a telephone
24 conversation.

25 In other documents the decisionmakers or writers are

1 general counsel for the tobacco industry or outside counsel, or
2 in some cases senior scientists or marketing individuals.

3 Q. Now, did you look to other internal company documents to
4 confirm some of these events that are not described in your
5 direct testimony?

6 A. Yes, I did.

7 Wherever possible, and I think it's true in virtually
8 every case, I was able not simply to identify one document but
9 to confirm that the essential details in that document were
10 internally consistent with other documents.

11 For example, in September 1970 a scientist describes a
12 meeting with Dr. Wakeham who is a senior scientist at Philip
13 Morris. The meeting describes the closure of an in-house
14 biological research facility at RJ Reynolds sometime in the
15 summer of 1970.

16 I searched documents to find, in fact, that other
17 documents confirmed that such a facility was closed and that
18 ultimately the scientists in charge resigned.

19 Q. Now, do the events depicted on this time line capture all of
20 defendants' conduct in relation to smoking and health for the
21 last five decades?

22 A. No, they do not.

23 Q. Why didn't you depict all of defendants' smoking and related
24 health conduct on this time line?

25 A. It would be impossible.

1 Q. And why is that?

2 A. There are so many documents that the time line would just
3 be -- it would be a black glob more illegible than a document I
4 saw in one of the previous witness's testimony.

5 In formulating my analysis, I identified specific
6 events, such as in the 1962 research conference in England there
7 was a description of the promotion of a certain type of
8 cigarette by Lorillard Company, one of the defendants, which
9 claimed to reduce a toxic substance called phenol in cigarettes.

10 Having identified that issue, I searched for every
11 document that I could find, either those produced in this case
12 or documents that were on the defendant's Web site that looked
13 for the word phenol.

14 My methodology was to identify specific scientific
15 events and then search extensively within them rather than to
16 just pull every document that was ever produced, which is surely
17 in the hundreds of thousands.

18 Q. In that one example you've just provided on the incident
19 with phenol with Lorillard, did you identify every one of those
20 documents that you reviewed?

21 A. Not in my direct testimony.

22 Q. Now, Dr. Harris, why doesn't your time line identify the
23 actions or the conduct of the federal government?

24 A. It does not identify specific actions of the federal
25 government because I have drawn the conclusion that while the

1 federal government is a participant and player throughout this
2 time period, it was not -- its actions were not the primary
3 determinant of the defendants companies' decisions as to whether
4 to act cooperatively in a collusive arrangement or independently
5 in a competitive arraignment.

6 Q. Do you think you might be able to provide an example by
7 using the time line?

8 A. Well, let me take the Federal Trade Commission as a specific
9 government agency rather than give exhaustive description.

10 My analysis in my direct testimony referring to tab A
11 here, I conclude that the market diminution in explicit product
12 claims by defendant manufacturers sometime in the spring to
13 summer of 1954 was not the result of FTC guidelines which
14 weren't issued in, even in draft form until September of 1954.

15 Likewise, if we go over to tab R, which refers to
16 Barclay in 1983 and again a related event concerning a meeting
17 between BAT and Philip Morris in Europe in 1989, the Federal
18 Trade Commission had brought complaints against Brown &
19 Williamson in connection with the measurement of the machine tar
20 rating of one of its brands called Barclay.

21 Although the federal government took -- the FTC
22 specifically -- took actions against Brown & Williamson in 1983
23 and those actions were resolved in 1986, so far as the FTC was
24 concerned, the decisions made by the individuals in tab R or tab
25 S were not fundamentally affected by the FTC's actions.

1 Q. Now, let me draw your attention to the first flag on the
2 board which is letter A dated 1953, which says: Health care of
3 the early 1950s and the response of the manufacturers. Do you
4 see that one?

5 A. Yes, I do. That's right here.

6 Q. Now, did defendants' response to the health scare of the
7 1950s involve public joint denials of disease causation?

8 A. Yes. The Frank statement --

9 THE COURT: Excuse me. Let me interrupt for a minute.

10 At this point I believe your prior question was give us
11 some examples. Are you still on examples or are you now getting
12 into the heart of Dr. Harris's testimony?

13 MS. BROOKER: No, I have moved on from that one
14 example.

15 I believe the example Dr. Harris provided was in follow
16 up to my question about why the time line did not indicate
17 action of the federal government. He provided those few
18 examples and now I've moved on to another question.

19 THE COURT: Okay.

20 BY MS. BROOKER:

21 Q. Now, I believe you just testified that defendants' response
22 to the health scare in the 1950s involved public joint denials
23 of disease causation. Is that what you just said?

24 A. Yes. Specifically, in January of 1954 in the Frank
25 statement, all but one of the defendant manufacturers signed the

1 statement indicating that it had not been proved that cigarette
2 smoking caused any disease.

3 Q. And that's in your direct testimony; correct?

4 A. That is correct.

5 Q. Now, as you move along the time line, did defendants
6 continue to jointly deny disease causation?

7 A. Yes, from 1954 onward up until -- up until the time interval
8 from April 1999 to June 2000.

9 Q. And have you concluded that that conduct of denying disease
10 causation is consistent with collusion?

11 A. Yes. From the economic standpoint.

12 Q. Now, please look at the conduct you have reflected on the
13 time line in June of 2000. Briefly describe what is the conduct
14 that you have depicted on your time line there.

15 A. In June of 2000 there were five major cigarette
16 manufacturers rather than six as there were in 1953.

17 Four of the CEOs testified explicitly in June 2000 in
18 the punitive damages' phase of the Engle trial that indeed
19 cigarette smoking caused disease. Of them, three of them, based
20 on my analysis, made such an explicit admission for the first
21 time in connection with their testimony in the Engle damages'
22 phase trial.

23 Q. Have you concluded that that conduct, which is the admission
24 of disease causation, is consistent with collusion?

25 A. Let me be careful to say that it is not inconsistent with

1 collusion.

2 Q. And have you explained that in your direct testimony?

3 A. Yes, I have.

4 Q. Now, please tell the court how defendants' joint denial of
5 disease causation and defendants' admission of disease causation
6 are both consistent with collusion.

7 THE COURT: That's not the way the witness phrased his
8 last answer. He was very careful in terms of limiting his -- I
9 don't want to say limiting -- but defining his answer.

10 MS. BROOKER: Okay.

11 BY MS. BROOKER:

12 Q. In follow-up to the way you phrased it, please explain how
13 your position as you've just stated on defendants' current
14 conduct, or I should say conduct as you just described in June
15 of 2000 can be consistent with collusion when at the same time
16 defendants' prior joint denial of disease causation is also
17 consistent? Excuse me. Is consistent with collusion?

18 MR. BERNICK: I think that, if I'm not mistaken, the
19 witness testified it was not inconsistent with, so to the extent
20 that counsel's question is trying to pick up on the prior
21 testimony.

22 THE COURT: That's his testimony.

23 BY MS. BROOKER:

24 Q. How do you square those two conclusions that you've drawn,
25 Dr. Harris?

1 A. In the time line in tab A in late 1953 the defendants were
2 acting from the economic standpoint in their joint and common
3 interests to deny that cigarette smoking caused any disease, in
4 part to stave off a potential avalanche of legal judgments in
5 smokers' lawsuits against the cigarette industry.

6 In June 2000 defendants are again from the economic
7 standpoint faced with an incentives to make admissions that
8 smoking caused disease in their common interests, which is to
9 stave off a potential for a multibillion dollar damage award in
10 clearly an important lawsuit that they were faced with.

11 Q. And have you described those incentives in your direct
12 testimony, Dr. Harris?

13 A. Yes, I have. What is more, if I may continue, while
14 defendants may have -- could have had an incentive to make
15 admissions to exploit their own independent competitive
16 advantages, the record that I've examined does not support that.

17 Put differently, the defendants did not make admissions
18 so as to sell more cigarettes at their competitors' expense.

19 Q. Now, Dr. Harris, is there any conduct depicted on your time
20 line after the year 2000?

21 A. No, not on the time line.

22 Q. Did you review documentary evidence in defendants' conduct
23 up to the present time?

24 A. Yes, indeed, I did pass 2000. I can give examples.

25 Q. Please provide some examples.

1 A. In particular, I considered changes in ownership in the
2 cigarette industry, such as the acquisition or the merger or
3 acquisition of firms all the way through 2003, the entry of
4 smaller fringe firms. That's an economic technical term all the
5 way through 2003.

6 I also examined the extent to which potential harm
7 reducing or novel cigarette products have been marketed either
8 on a test market basis or a national basis.

9 And, finally, I looked at the statements of defendant
10 manufacturers on their Web sites as recently as September 30th
11 of this year.

12 Q. Did you indicate, Dr. Harris, whether you reviewed market
13 share data?

14 A. That would be -- I don't know if I said that explicitly, but
15 that would be part of changes in ownership as well as the number
16 of -- and significance of -- fringe firms that have entered the
17 market since 1996 or '97.

18 Q. Now, Dr. Harris, did you review defendants' opening
19 statement?

20 A. Yes, I did.

21 Q. And in their opening statement did defendants argue that
22 they now in 2004 publicly admit disease causation and addiction
23 and that some of defendants Web sites state that there is,
24 quote, no such thing as a safe cigarette, end of quote?

25 A. If the question is have I reviewed them, indeed I have.

1 Q. And did you -- did defendants make those arguments?

2 Do you recall whether defendants made those arguments
3 in their opening statement?

4 A. Yes, I did. I read both the opening statements and I looked
5 at the demonstratives.

6 Q. Now, if it is true, Dr. Harris, that defendants now make
7 these statements or admissions, does this lead you to the
8 conclusion that defendants are no longer colluding on smoking
9 and health matters?

10 A. No, it does not.

11 Q. And why not?

12 A. In order for me as an economist to evaluate the issue of
13 collusion versus competition I have to consider the defendants
14 statements, but in the context of their own incentives. Does it
15 represent their common interest or does it represent the
16 defendants acting in competition with each other at each other's
17 expense?

18 I also need further to analyze or understand the
19 overall performance of the industry, not necessarily any one
20 firm, with respect to the potential risk reducing products which
21 I understand are at issue in this case, and finally, I would
22 look to other questions about whether the defendants have common
23 or divergent interests. And I discuss this in my direct
24 testimony.

25 Q. Did you review whether defendants used these admissions for

1 competitive gain?

2 A. Yes, I did specifically.

3 Q. And what did you conclude?

4 A. I found that in April 1999 Brown & Williamson for the first
5 time, based on my research, made a direct and explicit admission
6 that cigarette cause -- smoking caused disease on its Web site,
7 and that at the time it issued press releases notifying the
8 general public of the event. So I also know that prior to that
9 one of the defendants, Liggett, had also made an explicit
10 admission.

11 With respect to Brown & Williamson's action, while it
12 is possible that it was made for public relations' purposes or
13 to advance its market share at the expense of others, the
14 evidence thus far does not clearly support that.

15 Q. How would defendants use admissions for competitive gain?

16 A. We could take the example of an unconventional cigarette
17 that heats rather than burns tobacco, and in the process
18 nonetheless provides nicotine, the central drug in cigarettes
19 and tobacco that supports the smoker's need for addiction.

20 An explicit statement by a manufacturer to support that
21 product as superior to others would first acknowledge that
22 conventional cigarettes include smoke which causes disease;
23 second, that those cigarettes provide nicotine which is the
24 central drug in addiction; but, third, our new cigarette doesn't
25 give you the toxic smoke but still gives you the nicotine that

1 you need and you should use our products if you're going to
2 continue to smoke rather than our competitors.

3 Q. Have you determined whether defendants have used such
4 admissions for competitive gain?

5 A. The record, even up until today, with rare exception, does
6 not consistently show the introduction of those products along
7 with clear scientific statements which would support the
8 conclusion that defendants are introducing those products for
9 competitive gain at each others expense.

10 Q. Now, in answering many questions you use the term collusion.
11 Is collusion a term of art in economics?

12 A. Yes, it is.

13 Q. And what specifically, and briefly, does collusion mean in
14 economic terms?

15 A. Collusion means when a group of firms in oligopoly market
16 where there are few firms or the few firms or dominant act
17 cooperatively in their joint interests, but only when everyone
18 else within the collusive arrangement goes along with the joint
19 plan.

20 The word collusion is used instead of cooperation in
21 order to highlight that the cooperative arrangement is not in
22 the interest of the consuming public.

23 Q. Now, Dr. Harris, in the defendants' documents that underly
24 their conduct that is depicted on your demonstrative, did
25 defendants use the word collusion?

1 A. I don't think I could find that word once in any document
2 that I reviewed. And certainly no document that I specifically
3 cited within my direct testimony.

4 Q. Was that a surprise to you as an economist?

5 A. No, it was not.

6 Q. And why not?

7 A. The word collusion -- first of all -- has legal
8 connotations, but more important it is from the economist's
9 standpoint a technical term.

10 Writers within the documents, however, would use
11 commonplace, ordinary layman's language, such as united front or
12 joint front, or they might argue against, quote, unilateral
13 action unquote, or quote, going it alone, unquote.

14 And I could point to specific documents at the time
15 line where those commonplace words are used instead of the word
16 "collusion" but which I interpret, based on the entire record,
17 are consistent with collusion.

18 Q. Now, in the period of time depicted on this time line, do
19 the executives of the tobacco companies use the word competition
20 or competitive in the documents you reviewed?

21 A. Yes, numerous times.

22 Q. Now, does the fact that these words appear contradict your
23 conclusion on -- that the defendants' conduct over the years has
24 been consistent with collusion?

25 A. Not by itself.

1 Q. Can you explain why that is?

2 A. It is important for me when I evaluated a document that the
3 word "competition" or "competitor" be viewed within the context
4 of the facts. So, for example -- if I may step down for a
5 second.

6 MS. BROOKER: Is that okay with the court?

7 THE COURT: Yes.

8 MS. BROOKER: Thank you.

9 A. In connection with the King Sano exchange in June 1957,
10 Mr. Coleman writes to the head of the tobacco industry research
11 committee, it is one thing for Readers Digest to make
12 negative -- and I am paraphrasing here -- negative statements
13 about other companies' brands, but it is another thing for one
14 of our competitors or one of the members of the industry to make
15 statements about, quote, competitive brands. That's my best
16 recollection of the quotation.

17 What's relevant here is, as I explained in my direct
18 testimony, the writer is voicing a joint interest that each firm
19 not make explicit negative statements about each other's
20 products.

21 What is not relevant or as important is whether they
22 use the phrase, our rivals, our participants or our competitors.

23 Q. Now, in their businesses, do defendants in fact compete on
24 dimensions unrelated to smoking and health?

25 A. Yes.

1 MR. BERNICK: At this point, objection. That is
2 leading. I was going to suggest that maybe Dr. Harris would be
3 more comfortable sitting down. He just sat down.

4 Q. What are some of the dimensions that defendants compete on
5 in their businesses?

6 THE WITNESS: May I answer?

7 THE COURT: Yes.

8 A. Defendants compete -- they do compete on a number of
9 dimensions and I can give examples.

10 Q. What are they, Dr. Harris?

11 A. To some extent, defendants compete on price.

12 Defendants, some of them have introduced discount
13 cigarettes. Others have matched with price cutting.

14 In other caseS, some defendants have introduced generic
15 or black and white cigarettes as they are called, and others
16 have matched that.

17 In another area there is competition for retail space.
18 One defendant will pay a retailer or possibly a wholesale
19 distributor an extra bonus or incentive payment to ensure that a
20 particular brand is behind the counter, an issue that's
21 important in a product that cannot be legally just placed
22 anywhere on the supermarket shelf.

23 Third, the defendants have competed, at least since
24 approximately 1957, on tar and nicotine ratings of cigarettes as
25 measured by machines.

1 Q. Now, Dr. Harris, does the existence of such competition
2 among defendants on these dimensions undermine your conclusion
3 that defendants have acted collusively with regard to smoking
4 and health?

5 A. No, it does not.

6 Q. Can you explain why that is?

7 A. In virtually every industry, including the cigarette
8 industry, there are multiple dimensions of the product, but more
9 important, there are multiple dimensions of business strategy.
10 Pricing, promotion, retail incentive payments, aspects of the
11 product such as the government tar and nicotine rating or even
12 ratings published before the government got started.

13 It is very difficult, if not impossible, as indicated
14 in the economic literature, for firms to collude on every
15 dimension or aspect of their business. And when collusive
16 arrangements are successful, the historical record shows that
17 the colluding firms narrow the scope of their collusive
18 relationships so that some aspects of rivalry are within the
19 collusive arrangement and others are off the table, so to speak.

20 Q. In explaining defendants' conduct on smoking and health
21 throughout this time line, are you offering opinions about what
22 defendants should have done in the marketing of reduced-risk
23 cigarettes?

24 A. No, I am not.

25 Q. What kind of conclusions are you offering?

1 A. In almost page 1 or page 2 -- certainly chapter 1 of every
2 introductory textbook, the writer, that is the economist, talks
3 about the difference between descriptive and normative
4 economics.

5 Descriptive economics, which is what I have tried to do
6 exclusively here, is to tell what happened and why based on
7 economic models of oligopoly or firm interaction and based
8 critically on the analysis of incentives, which is a central
9 issue in economics.

10 By contrast, normative analysis is when the economist
11 steps past the role of a descriptive agent and says what should
12 be.

13 Q. So that the court understands, you're not offering normative
14 conclusions here. Is that your testimony?

15 A. It is not my testimony as to whether -- what the companies
16 did is good or bad, or whether I like it or don't like it. I
17 view my role solely as to assist the court in trying to
18 understand what happened and to provide whatever help I can in
19 the court's determining, not me, what is likely to happen.

20 Q. Now, one final question before we move to the other
21 demonstrative.

22 What do the documents show is defendant's ultimate goal
23 in engaging in the conduct depicted on your time line?

24 A. The economic theory of the for-profit firm is grounded on
25 the principle that firms fundamentally operate to make profits,

1 and the economic evidence within the documents in this case
2 supports that.

3 And that making profits in this case involves, among
4 other things, sustaining the demand for cigarettes on the one
5 hand, and staving off adverse legal judgments which indirectly,
6 but nonetheless could significantly impinge on profits.

7 MS. BOOKER: Ed, would you mind changing the
8 demonstratives? Thank you.

9 Q. While the demonstrative is being moved, Dr. Harris, let me
10 ask you. Have you evaluated defendants' positions that run
11 counter to your own conclusions that defendants colluded on
12 smoking and health?

13 A. Yes, I have.

14 Q. Now, for the record, the United States has put on the board
15 demonstrative number 17352. Can you please tell the court what
16 sources you reviewed to determine what defendants' positions
17 were?

18 A. I examined the deposition testimony and expert reports of
19 experts offered by the defendants, including economics experts.

20 I read the proposed and final findings of facts from
21 the defendants, and as I testified before, I read their opening
22 statements and reviewed their demonstratives.

23 Q. Now, is there a particular expert that defendants have
24 proffered in this case who offers specific opinions on collusion
25 that run counter to your own?

1 A. Yes, there is.

2 Q. And who is that?

3 A. That's Dr. David Teece, who was also -- who is an economist
4 and who was offered as an economic expert by defendants in this
5 case.

6 Q. Now, just briefly please tell the court the nature of the
7 various statements that you have put up here on this
8 demonstrative. What are the first two?

9 A. The first two statements -- can you hear me?

10 Q. Yes.

11 A. -- are quotations that I have extracted from the
12 introductory or early summary paragraphs of Dr. Teece's expert
13 report filed in 2002. Those are the first two.

14 Q. Okay. Now, before we start with those first two, let me
15 just ask you. Some of the defendants' statements up here on the
16 board use the term "conspiracy" in the findings of fact and in
17 Dr. Teece's expert report; is that correct?

18 A. Yes. I'm pointing to one under Dr. Teece in the first
19 quote, one under Dr. Teece in the second, and then the third
20 also here is the word conspiracy that I'm pointing to.

21 Q. Just to be absolutely clear for the court, are you here to
22 render a legal opinion about conspiracy?

23 A. No, I am not.

24 Q. Now, please turn first to Dr. Teece's conclusions which you
25 noted are quoted from the introductory paragraphs of his expert

1 report.

2 Could you -- let me ask you, did you read all of
3 Dr. Teece's four days of deposition testimony in this case as
4 well as his expert report?

5 A. Yes. His expert report was, I think, nearly 200 pages and I
6 read it all and I did read his deposition testimony as well.

7 Q. And could you just please read the two conclusions that you
8 are about to offer testimony on of Dr. Teece's?

9 MR. BERNICK: Your Honor, I don't believe that this is
10 appropriate subject for direct examination at this point in the
11 government's case.

12 Dr. Teece is a defense witness. He's yet to testify,
13 and I would think that if this witness has done work to respond
14 to Dr. Teece, that that ought to be rebuttal if the government
15 is going to have a rebuttal case.

16 This is their affirmative case. Dr. Teece hasn't
17 testified. This matter is not before the court. It's not in
18 the record. It's nothing. Right now at this point it's just
19 hearsay. So I don't know why it is that we are taking up time
20 at this point in the case with this witness's opinions regarding
21 Dr. Teece.

22 MS. BROOKER: Your Honor, if I may respond?

23 Your Honor, I think it would do the court a great
24 injustice if the government was to put forth an entire case and
25 make no mention at the end -- by the end of its case of what our

1 experts' opinions are in relation to the opinions of the counter
2 experts.

3 THE COURT: Ms. Brooker, there's nothing to preclude a
4 plaintiff or, for that matter, the government in a criminal case
5 from attempting to rebut an argument that they are virtually
6 positive is going to be made and if it isn't made, so be it.

7 MR. BERNICK: Would that, then, mean we are not going
8 to then have to hear about this on rebuttal as well?

9 My concern is we're going to call Dr. Teece and then,
10 based upon my long and interesting experience with Dr. Harris,
11 we're going to see Dr. Harris in rebuttal.

12 THE COURT: That may be, but I'm not going to give an
13 advisory opinion on that.

14 Go ahead, please.

15 MS. BROOKER: All right. Obviously, the United States
16 reserves all its rights for rebuttal.

17 We also took seriously the court's admonition in one of
18 the scheduling orders that rebuttal would be very limited as
19 rebuttal is. So obviously Your Honor, even in the opening
20 statement, I know many times mentioned to both counsel on both
21 sides an interest in hearing what the counter experts were
22 saying.

23 THE COURT: Go ahead.

24 MS. BROOKER: Thank you.

25 BY MS. BROOKER:

1 Q. Now, Dr. Harris, if you would -- well, please read the first
2 statement, and I'll ask you a particular question about a part
3 in that, from the expert report of Dr. Teece.

4 A. Okay. I'm reading from the first statement.

5 "The alleged conspiracies did not succeed and could not
6 have succeeded. The economic evidence regarding the outcomes
7 and behavior in the United States cigarette industry is
8 generally inconsistent with the conspiracy allegations."

9 Q. Now, Dr. Harris, focusing particularly on Dr. Teece's
10 conclusion that defendants could not have succeeded in the
11 alleged conspiracy, what is your understanding from reading his
12 deposition transcripts and his expert report of what the basis
13 of his conclusion is?

14 A. With respect to Dr. Teece's conclusion that the alleged
15 conspiracy could not have succeeded, Dr. Teece refers
16 specifically to his characterization of the relevant market for
17 the analysis as the market for cigarette health information.

18 A statement that follows shortly thereafter in the
19 introductory section he states or concludes, as best I can
20 determine, that within the market for cigarette health
21 information, rather than the market for cigarettes, the
22 defendant manufacturers have a relatively small market share and
23 little market power because the market for cigarette health
24 information contains other participants including Readers
25 Digest, Consumer Reports, the Surgeon General and family

1 doctors.

2 Q. Now, is Dr. Teece's analysis that looks at a market for
3 information instead of focusing on the cigarette market in order
4 to determine whether defendants have colluded on smoking and
5 health, is that generally consistent with the economic
6 literature?

7 A. It has been difficult for me to find a clear, unequivocal
8 reference to such a market for cigarette health information in
9 the formal sense of a market in the economic literature on the
10 cigarette industry.

11 The literature I reviewed indicates that economists
12 have been studying for many years the cigarette market; it has
13 been characterized as an oligopoly as one that is concentrated.
14 Market shares are computed with respect to the numbers of
15 cigarettes sold.

16 It is the case that one could talk about by a
17 hypothetical market for cigarette health information even if no
18 such formal market exists, but even within that construct I
19 don't think Dr. Teece's approach is terribly helpful in deciding
20 or determining either whether defendants have an incentive to
21 cooperate or whether such cooperation in fact succeeded.

22 Q. Now, are you saying, Dr. Harris, that information is
23 irrelevant to your economic analysis of the cigarette market?

24 A. No, quite the contrary. Information is as important to the
25 cigarette market as it is to any market for goods in the United

1 States. My conclusion is whether the notion of a formal market
2 for cigarette health information is terribly helpful.

3 For example, when Gerald Long in 2001 talks about the
4 incentives of R.J. Reynolds not to market Premier as a safer
5 cigarette, he stated -- and I am paraphrasing -- that to do such
6 would to engender not only his own company's business in
7 conventional cigarettes but also the business of other firms in
8 the industry.

9 Here, he is referring to the sellers of cigarettes and
10 not to the Surgeon General or the scientific literature or the
11 press in general.

12 Q. Now, is there any other -- before I move on to Dr. Teece's
13 second point in that first clip that we have up there, are there
14 any other reasons that you disagree with Dr. Teece's focus on a
15 so-called information market instead of the tobacco cigarette
16 markets?

17 A. Yes, there are.

18 Q. What are those other reasons?

19 A. In Dr. Teece's first conclusion from his introduction, he
20 states not only that the conspiracies or alleged conspiracies
21 could not have succeeded but that they did not succeed.

22 Q. What is the basis for Dr. Teece's conclusion -- what is your
23 understanding of the basis for Dr. Teece's conclusion that
24 defendants did not succeed in the alleged conspiracies?

25 A. My understanding is that Dr. Teece ultimately made reference

1 to the underlying performance of the industry to determine the
2 success of the alleged conspiracy, as he put it, and that
3 performance refers to two things.

4 First, the introduction of cigarettes with lower tar
5 and nicotine ratings -- at least as measured by the FTC method
6 -- throughout the entire period. That refers, in particular,
7 but not exclusively, to a chart I've seen numerous times in
8 which the market sales weighted average tar declined at least
9 from the early 1950s to the early 1980s.

10 Dr. Teece in evaluating the performance of the industry
11 also makes reference to a number of potential harm reducing
12 products, either conventional or unconventional, that -- or were
13 either proposed or introduced at various times to support his
14 contention that the industry has performed in a way inconsistent
15 with collusion.

16 Q. Why do you disagree with Dr. Teece's -- with that particular
17 bases?

18 A. With respect to the tar and nicotine, if 1 milligram of tar
19 from any one cigarette was the same substance as a milligram of
20 tar from any other cigarette, and if the consumers of cigarettes
21 were machines, then in fact the decline in the average tar and
22 nicotine over this period as measured by the machines would
23 indeed be an accurate indicator of the success or failure of the
24 industry in that aspect.

25 However, the evidence is that a milligram of tar from a

1 high tar cigarette or a conventional filter cigarette is
2 different than a milligram of tar from a low tar cigarette.

3 Second of all, individuals do not -- humans, the
4 consumers, do not smoke the cigarettes in the same way as the
5 machines.

6 And while I'm not here to give extensive testimony, it
7 is my understanding from the testimony of Dr. Farone and other
8 expert reports I have read, that these facts contradict the
9 conclusion that the market average tar level or its decline is
10 an accurate indicator of the industry's innovative success.

11 With respect to the potential risk reducing products,
12 as an economist I looked at the bottom line. I said: In
13 October of 2004 among all the products considered, temporarily
14 or permanently introduced, test marketed, which one of those is
15 now entirely on a national market and has obtained more than a
16 de minimis market share on a sustained basis?

17 With the possible exception that quite recently the
18 Eclipse product is now available nationwide in certain retail
19 chains, the answer is that none of the other products are now --
20 satisfied that criterion.

21 And from the economic standpoint that is, at least thus
22 far, today insufficient evidence to conclude that the industry
23 has had a level of performance that would be competitive rather
24 than collusive.

25 Q. Dr. Harris, will you please take a look at the board and

1 state what is Dr. Teece's second clip up there?

2 A. It reads, "It appears unlikely that the individual defendant
3 companies could have reached consensus on the objectives and
4 means of the alleged conspiracies."

5 Q. Now, what is your understanding of the basis for that
6 conclusion, that it was unlikely that defendants could have
7 reached consensus?

8 A. I think Dr. Teece's analysis is primarily theoretical on
9 this point rather than factual.

10 As a theoretical matter, when firms in an oligopoly
11 have very divergent interests it becomes difficult for them to
12 act cooperatively to -- in their common interests to obtain
13 higher profits.

14 In principle, that is absolutely correct, but in my
15 examination of the actual factual record I found that the
16 defendant manufacturers in fact had numerous overriding common
17 interests.

18 The common interests to stave off an avalanche of
19 smokers' lawsuits, or the common interests to prevent large
20 punitive damage judgments, or a common interest in ensuring that
21 a fringe of competitive firms not get too large a market share
22 are relevant facts, but they are not theories.

23 Q. Now, turning to the two quotations from the defendants'
24 findings of fact. Could you please identify or just read for
25 the court what those two quotations are that you will respond

1 to?

2 A. The first is, "The evidence fails to support any claim that
3 a RICO conspiracy or enterprise existed."

4 Q. What is the second?

5 A. "Relying almost entirely on a handful of ancient documents,
6 which it alleges prove the existence of a 'gentlemen's
7 agreement', the government's evidence falters because those
8 documents demonstrate -- and the government's own expert has
9 conceded -- that, by the early 1980s at the latest, any
10 agreement among the defendants, if one ever existed, had ended."

11 Q. Now, Dr. Harris, is what the defendants describe here as a
12 gentlemen's agreement the sole scope of defendants' collusive
13 arrangement?

14 A. No, it is not.

15 Q. Why not?

16 A. The gentlemen's agreement, as it was narrowly framed and
17 described in several documents, included an agreement not to
18 perform in-house biological research. That is, not to have
19 smoke with rats and mice on the premises.

20 And second, some of the documents refer to an agreement
21 that if any one manufacturer comes up with an innovation in
22 connection with smoking and health that it be shared among all
23 of the participants in the agreement.

24 That, by itself, is not the sole basis nor the sole
25 dimension in my analysis of the defendants' cooperative or

1 collusive conduct.

2 Q. Do you disagree that there are only a handful of ancient
3 documents to show the existence of a gentlemen's agreement?

4 A. Well, I believe that there may be less than 10 documents
5 that use the words gentlemen's agreement. There are numerous
6 references to an agreement other than those handful of documents
7 which are consistent with the gentlemen's agreement.

8 For example, Lawrence Meyer, in his testimony in one of
9 the Attorney General's cases -- I can't remember what tab it is
10 on my time line -- testified concerning his understanding as to
11 why Liggett did not introduce the XA prototype cigarette in the
12 late '70s or early '80s. And there he referred likewise to an
13 agreement which has many of the features of what other documents
14 call the gentlemen's agreement.

15 Q. Dr. Harris, I am told I have 10 minutes left and I have
16 three more questions for you.

17 Before I ask you to address the last quotation on this
18 board, in describing defendants' conduct and in responding to
19 defendants' claims, you've used some technical terms of art such
20 as collusion and cheating; is that correct?

21 A. That's correct.

22 Q. Now, did you use, are these terms or can these terms be
23 found in economic textbooks?

24 A. They are in all of the microeconomics and industrial
25 organization text books that I've ever taught from.

1 Q. Okay. And are those textbooks sitting up there next to you?

2 Are they sitting there?

3 A. Some of them.

4 Q. Some of the textbooks. Okay.

5 Now, are all of the terms that you used in your written
6 testimony taken verbatim from these textbooks?

7 A. No, not verbatim.

8 Q. And why is that?

9 A. If you take a word like oligopoly, or collusion, or
10 cheating, or other words like tit for tat, or even technical
11 terms like repeated gain, you will find that, for example, in
12 Hal Varian's book on microeconomics that I've taught from.

13 When it comes to the concept that firms have to narrow
14 the scope of their coordination or collusion in order to
15 maintain a collusive arrangement, I couldn't find a common term
16 that was always used. And, therefore, I tried to use a term
17 "carve out the scope of collusive arrangement" that would
18 capture the idea but still be enlightening to the court.

19 Q. Now, that first text -- for all of these texts, have you
20 flagged some of the pages where some of the technical or
21 economic terms you've used here today are in those textbooks?

22 A. Yes. These are copies of some books that I had at home. In
23 some cases it turns out not the latest edition. And I've gone
24 through the books -- for example, Varian's book here -- and just
25 flagged where I saw the word oligopoly, Corono, which was one of

1 the models referred to in my testimony, collusion, cheating,
2 punishment strategy, tit for tat, and tacit collusion.

3 Q. Now, finally, Dr. Harris, if you would please read the
4 quotation from defendants' opening statement that is up there on
5 the board?

6 A. I'm reading from the last one. "My point is that, Your
7 Honor, we're not in lock step. Supposedly if the government is
8 correct, we're in some massive enterprise today where we're all
9 in lock step in a conspiracy. If we were, we would probably all
10 be doing the same thing and we're not."

11 Q. Now, Dr. Harris, how do you interpret defendant's statement?

12 A. I interpret defendant's statement to mean that an economist
13 would expect firms engaging in collusion to act uniformly
14 with -- in this case with respect to smoking and health rather
15 than to take divergent paths.

16 Q. Now, what was the main evidence that defendant's counsel
17 pointed to as support for this argument?

18 A. Within the context of the transcript of the opening
19 statement, the primary reference was, as I understand it, was
20 with respect to defendant manufacturers' positions on pending
21 legislation to regulate the cigarette industry through the Food
22 and Drug Administration.

23 Secondarily, there are in other places in the
24 transcript references to the manufacturers being different,
25 specifically with respect to the content of their Web sites.

1 Q. Now, are the statements on defendants' Web sites different
2 from each other?

3 A. My review of the defendants' statements with respect to
4 smoking as a cause of disease on September 30th indicates that
5 all of the statements do represent an explicit admission of
6 causation rather than an implied admission, rather than an
7 acknowledgement that other scientists think there's causation.
8 And although the wording is different, from my standpoint as
9 someone who has contributed to Surgeon General's reports and
10 various committee reports of the Institute of Medicine, the
11 language is essentially identical or is virtually equivalent.
12 They are not divergent.

13 Q. Do you agree that defendants are not in lock step today,
14 based upon your description of that term?

15 A. Not -- to follow up your last question, not with respect to
16 their explicit admissions concerning smoking as a cause of
17 disease.

18 Q. Now --

19 THE COURT: I'm sorry, let me be clear. Are you saying
20 that the defendants are not in lock step as to their admissions
21 that smoking is a cause of disease?

22 THE WITNESS: I am saying that they are in lock step.

23 THE COURT: Okay.

24 BY MS. BROOKER:

25 Q. Is the conduct that defendants' counsel pointed to, as you

1 just testified regarding specifically the position of the
2 tobacco companies on FDA regulation, is that in your view acting
3 or not acting in lock step?

4 A. I understand that Philip Morris has recently taken a
5 position in favor of pending FDA regulation, whereas the other
6 defendants are on record as being against it.

7 However, at this point I regard such a divergence as
8 too speculative to draw a firm conclusion. No legislation has
9 been passed.

10 Economists understand that regulatory legislation often
11 turns out to benefit the incumbent firms at the expense of
12 potential entrants or smaller firms.

13 It may turn out in the long run if those economic
14 criticisms of regulation are correct, that the current incumbent
15 firms may all turn out to favor such regulation. And it's just
16 too early to tell whether that divergence on pending legislation
17 constitutes genuine evidence of not moving in lock step.

18 THE COURT: Are you aware of where the legislation is
19 at this moment?

20 THE WITNESS: My understanding is that it was to be
21 appended to a budget bill, but that it did not go through and
22 it's unlikely to go through in this session.

23 Nonetheless, in the academic literature, including my
24 own professional work, I still receive evaluations of that
25 legislation, and economists and scientists are still debating it

1 under the assumption that it will come up in the next Congress
2 or certainly could.

3 THE COURT: Anything can, especially in Congress.
4 Anyway, go ahead.

5 MS. BROOKER: That was my last question.

6 THE COURT: Okay. Thank you.

7 MS. BROOKER: Thank you, Your Honor.

8 THE COURT: Mr. Bernick, we will take a break. But
9 what are your estimates in terms of cross of this witness?

10 MR. BERNICK: Well, I certainly will not finish today,
11 I expect I'll go probably until noon tomorrow and maybe a little
12 bit.

13 THE COURT: Tomorrow --

14 MR. BERNICK: After that.

15 THE COURT: Tomorrow I have 18 matters on my calendar.

16 MR. BERNICK: I misspoke, and I was actually looking
17 forward to being home tonight myself and working on other
18 matters myself tomorrow.

19 So I expect it will continue on Monday, at least until
20 noon, probably a little bit into the afternoon. I have
21 substantial cross-examination of Dr. Harris whose testimony is,
22 I know you will appreciate already, covers a lot of different
23 areas and a lot of history.

24 THE COURT: And will other defendants have cross of
25 this witness?

1 MR. WEBB: Yes, Your Honor.

2 THE COURT: Rough idea of how long?

3 MR. WEBB: It depends on what Mr. Bernick covers. I
4 would estimate roughly an hour.

5 MR. BIERSTEEKER: I think I'll have some as well Your
6 Honor.

7 MR. MINTON: As will I.

8 MR. MARKS: As well I do.

9 MR. SHEFFLER: In fact I will, too.

10 THE COURT: I guess Dr. Harris's testimony covers a
11 lot. It sounds to me like, counting redirect, we're not going
12 to finish before Tuesday with this witness --

13 MR. BERNICK: I hope that we -- we cannot obviously
14 assure that we won't spill over until Tuesday, but I'll make an
15 effort to get through my material promptly and --

16 THE COURT: But that's including redirect from the
17 government?

18 MR. BERNICK: I don't know what they have by way of
19 redirect.

20 MS. BROOKER: It's hard to say, Your Honor.

21 THE COURT: All right. Well, that gives me an idea.
22 We will take 15 minutes, everybody.

23 (Recess began at 3:10 p.m.)

24 (Recess ended at 3:28 p.m.)

25 THE COURT: Mr. Bernick, cross, please.

1 CROSS-EXAMINATION

2 BY MR. BERNICK:

3 Q. Good afternoon, Dr. Harris. I want to take up a little bit,
4 if we could, with some of the testimony that you just gave in
5 response to questions by the government and talk about some of
6 the specific areas which you indicate are not covered or are not
7 encompassed by your opinions. That's where I'm going to go
8 first and then I'm going to go through some of the things that
9 you actually do say that you're going to cover.

10 As I understand it, one of the very important things
11 that you've said is that you're not offering judgments about
12 what we should have done.

13 MS. BROOKER: Your Honor, I would just object to the
14 mischaracterization. This was the United States' proffer of
15 Dr. Harris and I believe Mr. Bernick just characterized it as
16 his testimony. It was not Dr. Harris's testimony. It's our
17 proffer.

18 THE COURT: Well, the Doctor can correct him.

19 BY MR. BERNICK:

20 Q. As I understood it, what you were saying is that your
21 testimony was descriptive, not normative; that you were not
22 making judgments about what we, the defendants, should have
23 done.

24 A. That is correct.

25 Q. Now, it's true, is it not, that you have been an economist

1 for approximately 30 years?

2 A. That is correct.

3 Q. And not quite as long, but for a long time, you've also been
4 an expert who has testified in smoking and health matters;
5 correct?

6 A. I testified in the Cipollone case in 1988.

7 Q. That was a trial, and you probably were involved in the
8 Cipollone case at some prior point in time?

9 A. I think I gave a deposition in 1985. There was a period in
10 the '90s when I didn't do anything and then it started up again
11 with the Attorney General's cases in '96 or '97. Indeed, I have
12 been asked to testify in one form or another pretty much every
13 year since then.

14 Q. Okay. And just to be a little bit more specific. So we're
15 talking about almost 20 years. You were retained in a wide
16 variety of lawsuits during the 1990s cost recovery lawsuits and
17 the like; correct?

18 A. Correct.

19 Q. You testified in different states around the country;
20 correct?

21 A. Yes. Different Attorney General's cases. New York I
22 remember specifically. New Jersey, Akron, Ohio.

23 Q. And in connection with all that work, is it fair to say that
24 you've submitted literally hundreds of pages of expert reports?

25 A. Correct.

1 Q. Is it also true that in those expert reports you've
2 described literally hundreds of different documents that have
3 been obtained during discovery from tobacco company files?

4 A. Correct.

5 Q. And is it also true that literally and probably more than a
6 score of reports you go over in detail the history of industry
7 conduct -- tobacco industry conduct; correct?

8 A. Correct.

9 Q. And in that regard you've come into contact with discussion
10 and historical -- historical events relating to safer
11 cigarettes; correct?

12 A. I'm not sure I understand your question. I've come into
13 contact with discussions?

14 Q. Yes. You've looked at documents and reviewed the history of
15 research into safer cigarettes?

16 A. Oh, yes, some of the documents indeed in great part refer to
17 the history of cigarettes designed or intended to reduce health
18 risks.

19 Q. In the course of your work you've also had contact with, not
20 just in litigation but in other areas as well, in the smoking
21 and health field, you've had contact with many experts from many
22 scientific disciplines, have you not?

23 A. Correct.

24 Q. And you've reviewed many learned treatises. In fact, your
25 testimony, your direct examination talks about learned treatises

1 that have related to smoking and health; correct?

2 A. Correct, I have, and in addition, my testimony does talk
3 about that.

4 Q. As we sit here today with the benefit of 20 years of
5 experience, the government has not asked you to tell us as an
6 expert what the defendants should have done to make cigarettes
7 safer; true?

8 You've made no normative judgment about what this
9 industry could have done to make cigarettes safer; correct?

10 MS. BROOKER: Objection. Extremely argumentative as to
11 the scope of what the government asked this particular expert to
12 opine about.

13 MR. BERNICK: Fine. I'll rephrase the question. Take
14 the government completely out of the picture.

15 BY MR. BERNICK:

16 Q. Because you are not here to offer judgments, you are not
17 prepared to offer the opinion -- you have not offered the
18 opinion here in your testimony about what this industry could
19 have done over all these years to make cigarettes safer.

20 That's not your expert opinion in this case; correct?

21 A. No, I'm not going to pass judgment on any -- whether any
22 particular cigarette is safe or could be safe unless I'm asked,
23 and I am not here to instruct scientists in any of the defendant
24 companies as to what research they should undertake. I
25 understand Dr. Farone has opinions about this, but he will speak

1 for himself.

2 Q. Let's talk about advertising. You've had a lot of contact
3 with advertising documents, have you not?

4 A. Yes, I have.

5 Q. And after all that experience and all that expertise you're
6 not here to tell us what the defendants should have done or
7 should do in the future with regard to advertising practices,
8 true?

9 MS. BROOKER: Objection. Extremely broad with respect
10 to advertising practices. Obviously, the government's proffer
11 talked specifically about certain types of advertising. And
12 again it's just very argumentative as to the scope of his --

13 THE COURT: The objection is overruled. It's
14 cross-examination. I know Mr. Bernick is making a point. He's
15 allowed to make the point.

16 Go ahead. But don't be overly simplistic about it,
17 Mr. Bernick.

18 MR. BERNICK: I'll try not to be, Your Honor. I didn't
19 intend to be.

20 BY MR. BERNICK:

21 Q. You're not here to make judgments or offer opinions on what
22 it is that the defendants have done in the past, should have
23 done in the past, should have done in the past or should do in
24 the future with regard to advertising; correct?

25 A. You are correct. I can only describe what the firms'

1 incentives were to say one thing or another in some forms of
2 advertising, and whether the advertising content or actions were
3 consistent with one economic model or another.

4 Q. And with regard to what the court should do in this case,
5 you're familiar, are you not, Dr. Harris, that the court in this
6 case is being asked to take steps injunctive steps with respect
7 to this industry?

8 Do you have that understanding?

9 A. I am familiar with that, yes.

10 Q. In connection with your work, you are not offering opinions
11 as an expert on what the court should tell the defendants that
12 they should do in the future. You've not offered any such
13 opinions, have you?

14 A. Not with respect to advertising. Not with respect to
15 research of potential cigarettes. In fact, in general, I am not
16 here to advise the court as to what to order.

17 Q. Let's go to a different topic. Another "not."

18 You said you have not done calculations regarding
19 disgorgement. I think that that's what you indicated, correct,
20 or what counsel indicated in the proffer?

21 A. That is correct with respect to what I indicated and what I
22 understand counsel indicated as well.

23 Q. Now, again, the cases that you were involved with back in
24 the mid-to-late 1990s and up until -- I remember one case where
25 we spent a lifetime together in Brooklyn in the year 2000.

1 Those were, many of them cases that involved calculations of how
2 the defendants' alleged wrongful conduct caused smokers to smoke
3 more than they otherwise would have leading to, you know,
4 damages or leading to lost profits and the like. That's one of
5 the issues in those cases; correct?

6 A. Without agreeing to everything in your question, let me say
7 yes. I made damage calculations in which private parties or the
8 states' Attorneys Generals sought cost recovery, although not
9 necessarily profit disgorgement.

10 Q. Not necessarily. But the common element was you supplied
11 statistical calculations -- statistical models that then created
12 the foundation for calculations regarding the impact of the
13 defendants' conduct on smoking behavior; correct?

14 A. One of the elements indeed was the impact of defendants'
15 conduct on smoking behavior as part of an overall damage
16 analysis.

17 In some cases I was permitted to actually give damage
18 numbers; in other cases I was asked simply to provide the
19 elements by which the finder of fact would in turn make such a
20 calculation if they chose to.

21 Q. Now, in this particular case you specifically discussed with
22 counsel for the government the possibility of your doing such
23 calculations and analysis in this case; correct?

24 MS. BROOKER: Objection, complete mischaracterization.

25 MR. BERNICK: Tell me whether it's true or not? He was

1 deposed on this very subject.

2 THE COURT: Well, but it's not relevant to anything.

3 MR. BERNICK: It's relevant because the government in
4 this case has had -- it has known that this was an issue. They
5 talked to a guy that had expertise in this issue, and they
6 basically took a guy who had been working 15 years said We don't
7 want you to do that calculation.

8 THE COURT: That's the government's business. Either
9 they present the evidence that's necessary or they don't on the
10 subject through whomever they choose. Maybe they think
11 Dr. Harris isn't the best presenter on that issue. But we don't
12 have to get into that on cross.

13 MR. BERNICK: Fair enough.

14 BY MR. BERNICK:

15 Q. Another subject. You talked about the fact that in your
16 direct testimony you generally have not dealt with the
17 government's role; correct?

18 A. No, I don't think that's correct.

19 Q. I thought you said that you considered what the government
20 had done, but you came to the conclusion that it wasn't the
21 primary driver, I think as you've put it?

22 A. I think that would be a better characterization. I
23 considered carefully the government's role. The government does
24 indeed have a role in the sense that it's a participant, but my
25 conclusion is that the government was not the primary key

1 factor, its actions in defendants' decisions as to whether to
2 act collusively or competitively.

3 Q. I think we are probably on the same wave length. Let me
4 follow up a little bit.

5 It's true, is it not, that really for the last -- for
6 the entire period of time that you've reviewed going back into
7 the '50s, all the way up through the present, the government has
8 had a significant and substantial involvement in the smoking and
9 health field?

10 A. I'm not sure about that. You would have to better define
11 significant and substantial.

12 I think it probably would depend on which agency of,
13 obviously, a non-monolithic entity the government is.

14 Q. Well, I'm talking about all the agencies. But for purposes
15 of my questions, I'll focus on the Federal Trade Commission, the
16 Surgeon General's Office, the National Cancer Institute, the
17 National Institutes of Health. We could go on.

18 I think you know that there have been agencies that
19 have been quite active, actually, in the smoking and health
20 field; correct?

21 A. I would be reluctant to say quite active without going
22 through each agency one by one.

23 Q. Well, I'd like to spare both us and the court of the litany.

24 Can you agree -- could you agree with me that different
25 government agencies over time have been involved, let's be

1 specific, in the issue of whether smoking causes disease?

2 A. Oh, government agencies, including the National Cancer
3 Institute, have issued reports on whether smoking causes disease
4 and have also sponsored research on that question, and with
5 respect to those agencies and that issue, their involvement has
6 been very significant.

7 Q. With the same qualifications, would you agree that the same
8 thing is true with respect to smoking behaviors, such as
9 addiction?

10 A. It's my understanding that the National Institute on Drug
11 Abuse has sponsored a significant amount of research, and that
12 the Surgeon General's reports, including the 1988 report, do
13 involve significant involvement in evaluating literature on
14 addiction.

15 Q. Different government agencies have been substantially
16 involved in the conduct of research regarding reducing the risks
17 of cigarettes; correct?

18 A. No, I don't think that the involvement is significant.

19 There has been some role of the Department of
20 Agriculture and the National Cancer Institute, especially during
21 the '70s, but over the broad time line we're discussing the
22 design of less hazardous cigarettes has not been a major area of
23 involvement to the government to my knowledge.

24 Q. Fair enough. Advertising and marketing. Would you agree
25 with me that different government agencies, most particularly

1 the Federal Trade Commission, has been on an ongoing basis
2 significantly involved in advertising and marketing issues
3 concerning smoking and health?

4 A. With due deference to my colleagues at the Federal Trade
5 Commission, they have had involvement with what I would describe
6 as toothless involvement.

7 Q. That's your judgment, Dr. Harris. I simply asked you
8 whether they were significantly involved.

9 MS. BROOKER: Objection to the commentary which is
10 basically testimony from counsel.

11 THE COURT: Objection is overruled.

12 Is there a question pending?

13 BY MR. BERNICK:

14 Q. Yes. The question was whether the Federal Trade Commission
15 has had significant involvement in marketing and advertising
16 issues in the smoking and health field.

17 A. By statute and by statutory authority, they are supposed to
18 have significant involvement, but in fact in terms of the
19 economic record, their actual influence has been quite minimal.

20 Q. Well, we will get into your opinions on that in detail in a
21 little bit here. I'm just trying to get the fact of their being
22 involved.

23 With all of the -- with what you just testified to,
24 would you agree with me that government action, government
25 action, is certainly part of the context in which these

1 companies have acted over the last 50 years in the field of
2 smoking and health?

3 A. Yes, in that broadest sense, without reference to specific
4 government actions, yes.

5 Q. And I think your own testimony acknowledges that context is
6 critical to the analysis that you've done; correct?

7 A. Correct.

8 Q. Okay. If I'm not mistaken, I don't believe that in your
9 direct testimony you ever say that the government was in the
10 dark about the essential features of the relationship of smoking
11 and health, do you?

12 A. I'm not sure what you mean by essential features.

13 If you mean that the government understood that smoking
14 caused diseases such as cancer and understood the publicly-
15 available evidence, then yes.

16 Q. Indeed, there were people within the government who were
17 expert in that area; correct?

18 A. Over the 50-year period, indeed there were.

19 Q. Same thing applies to addiction; correct?

20 A. There were and are people within the government who are
21 experts in addiction.

22 Q. Same thing with regard to cigarette design; correct?

23 A. I'm not sure about that. You would have to -- you have to
24 point to individuals.

25 Q. My question that led to that though, Dr. Harris, was I think

1 a simple and somewhat narrower one.

2 In your direct testimony you never offer up the opinion
3 that the government was kept in the dark about the essential
4 properties of smoking and its relationship to disease; do you?
5 In your direct testimony.

6 MS. BROOKER: Objection. That's been asked and
7 answered. Dr. Harris already testified that he wasn't sure what
8 that question meant.

9 THE COURT: I think that's correct. I'm going to
10 sustain the objection.

11 BY MR. BERNICK:

12 Q. Is it true in your direct testimony you never once say that
13 the government, with all the knowledge that it had about the
14 tobacco industry, disagreed with anything that the industry was
15 doing?

16 You never offer that opinion in your direct testimony,
17 do you?

18 A. I didn't discuss in my direct testimony -- no, I think the
19 answer is the government did disagree with what the tobacco
20 industry was doing, and so the answer to your question is
21 indeed -- I don't know whether it was a yes or a no type
22 question -- but the answer is the government did disagree.

23 Q. Where in your direct testimony do you specifically say that
24 the government disagreed, explicitly disagreed, with something
25 that the tobacco industry was doing?

1 MS. BROOKER: I would just object to the term,
2 continuing use of the term "government" when Dr. Harris has
3 already testified that the government is not a monolith and he
4 would need to know specifically what government agencies are
5 referred to.

6 THE COURT: Well, Dr. Harris can either refer to places
7 in his testimony, if they exist, that refer to government or
8 that refer to components of the government in terms of the
9 question that was asked by Mr. Bernick.

10 BY MR. BERNICK:

11 Q. Tell me specifically where the government said: We disagree
12 with what the tobacco industry is doing. Where is that in your
13 direct testimony?

14 A. You mean if I interpret your question to mean the quote, we
15 disagree, unquote --

16 Q. Yes.

17 A. -- without any reference to anything that is equivalent to
18 disagreement or -- then the answer is no, the words, we
19 disagree, literally I don't remember that in my direct
20 testimony.

21 Q. In fact, isn't it true that over time, over this history,
22 the government has repeatedly endorsed various aspects of what
23 the tobacco industry has done in the smoking and health field?

24 A. I think that's an overstatement.

25 Q. There have been endorsements, have there not, Dr. Harris?

1 A. No. I still think that's an overstatement. You would have
2 to point me to a specific example for me to respond more
3 completely or concretely.

4 Q. The Public Health Service in 1966 endorsed the idea of there
5 being lower delivery cigarettes sold and available for people to
6 smoke; correct?

7 A. In 1967 --

8 Q. '66, as recited in the preface to the '81 Surgeon General's
9 report.

10 A. Either in '66 or '67 a meeting of the Public Health Service
11 reached the conclusion that the lower the dosage or delivery of
12 tar and nicotine to the smoker, other things being equal, the
13 lower we would expect to be the risk of disease.

14 Since I participated in the 1981 Surgeon General's
15 Report, including writing a draft of the preface to which you're
16 talking about, I can say that that did not mean that the
17 government specifically endorsed any particular product.

18 Q. Well, the government endorsed what the industry was doing in
19 making lower delivery cigarettes so that people who couldn't
20 quit would smoke lower-delivery rather than higher-delivery
21 cigarettes; correct?

22 MS. BROOKER: Objection to the vagueness of the
23 question and the continuing use of the term "the government."

24 THE COURT: Overruled.

25 Go ahead.

1 A. The government endorsed a well-known principle, which is the
2 lower the dose of bad stuff the better. The government was at
3 the time in the dark that the cigarettes purportedly to have a
4 low dose for the machine, in fact, did not give a low dose to
5 real people.

6 Q. Your testimony under oath is that the government did not
7 understand that machine deliveries did not necessarily match the
8 actual delivery to the smoker in 1966? That's your testimony?

9 A. Yes, that's correct.

10 Q. Okay. We will come back to that on Monday when we get the
11 transcript and we can put it up there and zero in on it.

12 In fact, there's nowhere in your direct testimony where
13 you anywhere acknowledge that the government actually agreed
14 with the approach that was being taken by the tobacco industry
15 with respect to tar and nicotine; correct?

16 MS. BROOKER: Objection. What time period are we
17 talking about?

18 We're talking about the government, Dr. Harris has
19 already testified the government is not a monolith.

20 MR. BERNICK: 1966 to 2001.

21 THE COURT: You may answer.

22 A. I don't know what more than to repeat my previous answer.

23 The government, particular agencies, including the
24 Public Health Service and the Surgeon General, specifically,
25 definitely endorsed the concept that the lower the dosage of

1 toxic substances in principle, then, everything else being
2 equal, the lower the risks should be of disease.

3 Q. And the Surgeon General stood by that position all the way
4 until this year when the 2004 Surgeon General's Report came out;
5 correct?

6 A. No. I think even in my draft of the '81 Surgeon General's
7 Report and in the ultimate preface that was written, the Surgeon
8 General's Report at that time made clear that smokers could
9 compensate for nicotine and that, therefore, a cigarette which
10 had a machine rating of a low tar may not, in fact, deliver the
11 actual low tar to the smoker.

12 Q. What the preface that you now acknowledge that you wrote
13 said was that in 1966 the Public Health Service endorsed the
14 idea of low delivery cigarettes. It was repeated again in 1975.
15 And in the 1981 report, in the preface that you wrote, what the
16 Surgeon General said was that the recommendation remains,
17 although it now has some caveats; correct?

18 A. Your question had so many different parts, some of which I
19 would have to answer no, some of which I would have to answer
20 yes, and some of which I'd have to answer I don't know.

21 Q. Dr. Harris, I think we agreed a minute ago that
22 understanding the context for the industry's conduct is
23 critical; right?

24 A. That's correct.

25 Q. In this case the context for industry conduct is not only

1 critical, it's very complex. Would you agree with me on that?

2 A. Yes. There is a long and complicated factual record that
3 spans 50 years.

4 Q. During that period of time -- I want to make sure that we
5 have complete agreement on this -- it is your view that over
6 those 50 years the context for the industry's conduct has
7 experienced the -- the context has experienced considerable and
8 continuous change; true?

9 A. Yes, indeed. The context has changed considerably, both
10 respect to the science on smoking and health and the business
11 environment in which the defendant companies have operated.

12 Q. That context includes developing science; correct?

13 A. Correct. I just said so.

14 Q. Developing science and multiple disciplines?

15 A. Correct.

16 Q. It includes that context evolving in changing political
17 environments; correct?

18 A. I'm not an expert on that.

19 Q. I asked you, you judged our conduct. Our conduct took place
20 in the political context, didn't it?

21 A. To the accident that I have lay knowledge rather than being
22 a political scientist, indeed administrations changed, members
23 of Congress changed. Perhaps the political influence of the
24 tobacco industry changed.

25 Q. Let's talk --

1 A. Beyond that, I'd be speculative.

2 Q. I don't want you to be speculative and that's why we will
3 flesh this out right now. I'm talking about context.

4 What you're talking about is the real world context in
5 which people and companies act; correct?

6 MS. BROOKER: Objection, Your Honor. I don't even know
7 what Mr. Bernick is talking about. It's incredibly vague with
8 respect to time, context with respect to what, that we are
9 referring to.

10 MR. BERNICK: Well, I am just talking about what it is
11 that the witness himself talks about in his report.

12 THE COURT: These questions come out of the direct
13 testimony and, therefore, I'm going to overrule the objection.

14 BY MR. BERNICK:

15 Q. When we talk about context in which our conduct should be
16 evaluated, we're talking about the real world in which companies
17 and the people that work for those companies acted. True or
18 not?

19 A. Yes. That's definitely true.

20 Q. And that real world as we know from what you just talked
21 about, it does include politics; right?

22 A. Yes, it does.

23 Q. How many different congressional hearings have been held
24 with regard to smoking and health over the last 50 years? Can
25 you even count them up?

1 A. Numerous. That's all I can say.

2 Q. And you're telling us that this is an area in which you do
3 not have expertise?

4 A. No, I'm not a political scientist.

5 Q. Let's talk about science. That's another area where there's
6 been important -- there's important contextual facts in that
7 area. I think you just testified to that; right?

8 A. Correct.

9 Q. Let's talk about another one. Public opinion.

10 Fair to say that the tobacco industry is a highly
11 controversial industry; it has been a highly controversial
12 industry for the better part of more than 50 years?

13 A. Yes.

14 Q. Public opinion is part of the context in which the industry
15 and the people who work for those companies has acted; correct?

16 A. That is correct.

17 Q. Would it be fair to say that you're not an expert with
18 respect to public opinion?

19 A. That is correct.

20 Q. Let's talk about one other -- in order to move things
21 along -- which is the law. You've said that you've done an
22 analysis from the point of view of an economist, an economic
23 analysis; correct?

24 A. Correct.

25 Q. And you have said such and such conduct is consistent with

1 either competition or collusion from an economic point of view;
2 correct?

3 A. Correct.

4 Q. And, in point of fact, there are laws that bear upon
5 questions of competition and collusion; correct?

6 A. Antitrust laws, for example.

7 Q. Antitrust laws, for example.

8 Let me show you a chart, and I want to take you through
9 a couple of these areas and we won't spend too much time on it
10 because I think we will have a lot of agreement here, but I do
11 want to go through it.

12 I'm showing you a demonstrative called J-DEM 010075,
13 and I don't know how that one fell off, but it did, so I've
14 already revealed one part of it. I meant to reveal it. There
15 we go.

16 I put "conduct" up at the top because, as I understand
17 it, your analysis focuses on the conduct of the industry;
18 correct?

19 A. Is that why you put it up? I don't know why you put it up.

20 Q. True to your report, all of your conclusions are expressed
21 in terms of conduct of the industry?

22 A. Conduct is a central word, yes.

23 Q. And you talk about whether the conduct is consistent with
24 competition, or whether it's consistent with not cooperation,
25 which I put here, but collusion; correct?

1 A. Correct.

2 Q. Now, when it comes to competition, it's true, is it not,
3 that there are areas of the law what's defined what it is that
4 you can do and what it is that you can't do when it comes to
5 competition?

6 MS. BROOKER: Objection. I object to the extent these
7 call for a legal conclusion.

8 THE COURT: I don't think really, given the Professor's
9 involvement and what I've read about his CV. I'll overrule the
10 objection, certainly as to this question.

11 Q. There's a whole area of competition that's illegal because
12 it's unfair competition; correct?

13 A. Without professing any expertise in that, I think I can
14 agree.

15 Q. Let's talk about another one. And this is under the
16 jurisdiction, at least in the federal government of the FTC
17 where you've already expressed some of your opinions; correct?

18 A. To my knowledge, indeed it is under the purview in part of
19 the FTC. I don't know about any other agency. And indeed I
20 have expressed opinions about the FTC.

21 Q. Now, not only they, but the states have the right to also
22 protect against competition which involves the deception of
23 consumers; correct?

24 A. Yes, in Massachusetts there's a consumer fraud statute.

25 Q. Okay.

1 A. In a case I testified in Illinois, I believe that the case
2 involved also a consumer fraud statute, but beyond that, I think
3 you're going to have to send me to law school.

4 Q. That changes your mind forever, Dr. Harris. We never wish
5 that.

6 MS. BROOKER: Can I just ask if there are hard copies
7 of these demonstratives that the government could be provided a
8 copy of?

9 MR. BERNICK: Afterwards we will provide hard copies to
10 the government.

11 MS. BROOKER: I'd like have a hard copy.

12 THE COURT: Do you have any hard copies now? Although
13 it's pretty clear in terms of looking at them, but --

14 MR. BERNICK: We just didn't want to do it in advance
15 of cross-examination, but certainly right after -- as anything
16 is shown, we will provide right afterwards a copy to the
17 government.

18 THE COURT: All right.

19 BY MR. BERNICK:

20 Q. The states not only have the ability to control competition
21 to protect consumers from deception, but there are also product
22 liability laws that preclude or that create liability where a
23 manufacturer or competitor, vigorous competitor, tough
24 competitor -- competition, competition, competition -- make
25 money, makes unsupported warranties. There's liability under

1 state law for unsupported warranties; correct?

2 A. Your question has a number of subparts with the repetition
3 of taking away competition. I'm not sure which to answer.

4 Q. State law limits what competitors can do by way of making
5 unsupported warranties through the product liability laws;
6 correct?

7 A. Well, I know about implied and expressed warranties. I know
8 that there is strict liability and there's negligence. Perhaps
9 I should be embarrassed, but I did not go to law school. I
10 can't answer your question.

11 Q. Would it be fair to say -- this is what I really wanted to
12 get to -- that the tobacco companies, the individuals that
13 worked with them, when they were operating in the real world
14 maybe they should have thought like economists, but you would
15 agree that in their context they also had to worry about
16 complying with the law; correct?

17 A. Your question had a number of parts. One part is whether
18 they should have thought like economists. I don't think -- I
19 can only answer how economists would analyze their conduct. I'm
20 sure there are many economists or economic thinkers within the
21 industry.

22 In terms of the law, it's my understanding as an
23 economist that companies have general counsel and that in
24 principle one of their functions is to advise the company as to
25 whether its business conduct is legal or illegal.

1 Q. Right. And you don't have any quarrel with the idea that
2 when a company is operating in the real world, whatever its
3 competitive desires might be, its principle obligation is to
4 follow the law; fair?

5 MS. BROOKER: Objection to asking Dr. Harris whether he
6 quarrels with this.

7 THE COURT: Sustained. It's pretty obvious.

8 BY MS. BROOKER:

9 Q. Dr. Harris, I think you've already acknowledged this but
10 when it comes to drawing these lines -- that is, what kind of
11 competition crosses over the line in this unfair competition,
12 what kind of competition crosses the line and involves consumer
13 deception, what kind of competition crosses the line and would
14 expose a company to unsupported warranties -- that all of those
15 lines that I've just referred to are lines that you cannot draw
16 as an expert; correct?

17 A. If I were a legal expert, perhaps, but as an economist I
18 make no judgment as to whether someone is -- in this case has
19 violated a consumer deception statute. I make no judgment
20 whatsoever with respect to unsupported warranties.

21 I'm not an expert on whether, for example, people have
22 to be on notice about intent, reliance. I've only heard the
23 words.

24 Q. Maybe you're getting to what I'm asking you. But it's not
25 just a question of whether you've made a judgment or not. You,

1 in analyzing whether people are being truly competitive, cannot
2 as an expert tell us about areas in which people cannot compete
3 because to do so would be illegal. You're not qualified to draw
4 that line; correct?

5 MS. BROOKER: Objection. Besides the length of the
6 question, it's incredibly argumentative, and it's Mr. Bernick
7 testifying arguing with Dr. Harris at the very beginning of that
8 question. And I really haven't made all of these objections,
9 but he continues to make commentary before asking a question. I
10 would just ask that Mr. Bernick be directed to ask questions of
11 Dr. Harris.

12 THE COURT: The objection is overruled. Mr. Bernick
13 may proceed.

14 BY MR. BERNICK:

15 Q. You can't tell us what is the line between pure competition
16 and competition that is illegal; correct?

17 A. That's a question -- this question, forget the other
18 questions.

19 Q. Yes.

20 A. No, I don't want to make any legal judgments as to whether
21 certain forms of competition are legal -- or collusion are legal
22 or illegal. It's not my business.

23 Q. In fact, Dr. Harris, not have you not done a legal analysis
24 here, you yourself are not an expert in antitrust analysis, are
25 you?

1 A. I teach antitrust. I've testified in antitrust cases,
2 including a hospital merger case.

3 Q. In 1984 once.

4 A. I have participated in other antitrust cases that did not go
5 to court. All I can ask -- all I can say is that the record
6 would speak for itself.

7 Q. I'm asking you to assess the record.

8 You've never published in your life a single article
9 setting forth an antitrust analysis, have you?

10 A. No, I can't recall any article that was focused on
11 antitrust.

12 Q. In fairness, Dr. Harris, you would not stand up in front of
13 a conference of people who were experts in antitrust analysis
14 and say -- and hold yourself out to be their peers, would you?

15 A. No, I wouldn't hold myself out to be an antitrust expert.
16 Certainly not in the broad field.

17 Q. Let's talk about cooperation and collusion.

18 It's true, is it not, that there are forms of
19 cooperation, such as joint research, that under the law are not
20 anticompetitive or collusive; correct?

21 MS. BROOKER: Objection, that is a legal question.

22 MR. BERNICK: I'll rephrase it.

23 BY MR. BERNICK:

24 Q. Isn't it true you can't tell us one way or another whether
25 certain forms of joint research are under the law noncollusive?

1 A. When a -- conclusions about what is legal or illegal, I
2 cannot.

3 Q. Isn't it a fact that in this particular case the tobacco
4 industry, in the context of the TIRC, actually disclosed to the
5 Department of Justice that the industry was acting together to
6 conduct joint research?

7 A. I know that there was a memo or meeting in '54 with some
8 communication to the Justice Department about what was supposed
9 to be the purpose of the TIRC.

10 Q. Have you actually looked?

11 A. Not in a couple of months.

12 Q. Well, isn't it a fact that the industry disclosed to the
13 Department of Justice that it was going to conduct research into
14 smoking and health on a joint basis?

15 A. Yes, that that's what its intent was. It was in 1954.

16 Q. Did you see any evidence in the record anywhere where the
17 Department of Justice, that particular department of the
18 government, said no, that would be collusive and
19 anticompetitive?

20 A. The Department of Justice had some reservations, but I
21 cannot recall off the bat what they were.

22 Q. Let's talk about something else.

23 Isn't it true that joint defense of litigation takes
24 place every day of the week in every state of the union and is
25 entirely legal and noncollusive?

1 MS. BROOKER: Objection, calls for a legal conclusion,
2 and how would Dr. Harris know what takes place every day in
3 every state?

4 THE COURT: Much too broad and vague.

5 MR. BERNICK: I'll make it specific.

6 BY MR. BERNICK:

7 Q. Isn't it a fact that joint defense is not necessarily
8 collusive, it can also simply be a cooperative way of defending
9 a common interest?

10 A. My knowledge of the law is that joint defense is ordinarily
11 a right of parties in multiparty defendant lawsuits, and that by
12 itself it is not only not illegal, but is an opportunity that
13 multiple defendants can take advantage of.

14 Q. You certainly don't quarrel with the idea that the tobacco
15 industry was entitled to defend itself in litigation, do you?

16 MS. BROOKER: Objection. Dr. Harris already testified
17 on direct that he's not offering normative opinions, and I think
18 that is an area where he's being asked to render legal opinions.
19 He's continued to say he's not an attorney.

20 MR. BERNICK: I'll rephrase the question. I think
21 these points are so simple and I think we can move through it
22 very, very quickly.

23 BY MR. BERNICK:

24 Q. You don't quarrel with the idea that the tobacco industry
25 was entitled to defend itself on the joint basis in the

1 litigation that it faced; correct?

2 MS. BROOKER: Same objection.

3 THE COURT: Sustained. His personal knowledge is
4 irrelevant at this point.

5 BY MR. BERNICK:

6 Q. Can we agree, Dr. Harris, that when it comes to what kind of
7 conduct is collusive or noncollusive in the sense of collusive
8 or noncollusive under the law, that that again is a line that
9 you can't draw for us here today as an expert?

10 MS. BROOKER: Objection. I think this has been asked
11 and answered.

12 THE COURT: No, not as to cooperation, I do not
13 believe.

14 A. I would much appreciate, unless you want to rephrase, the
15 question being repeated. I missed one word.

16 Q. I'll be happy to rephrase it.

17 Are we comfortable, Dr. Harris, that you are not
18 capable as an expert in defining what forms of joint research or
19 what forms of joint defense are collusive under the law or not
20 collusive under the law?

21 You can't do that for us as an expert; correct?

22 A. With respect to the law, rather than with respect to
23 economists definitions, I cannot. I do not propose to.

24 Q. Would the same thing be true when it comes not to joint
25 research or joint defense, but joint political action, that's

1 also an area where you just don't have any expertise?

2 A. I'm not a political scientist, and what is more I do not
3 have expertise in the degree to which individuals can jointly
4 petition the government.

5 Q. What about when it comes to state action? That it is joint
6 action by competitors in order to comply with state law. That's
7 not an area where you have any expertise, is it?

8 A. I can only say that the economics books, including those to
9 my right, are filled with examples in which firms acted
10 collusively under an economist's definition in violation of the
11 law and sometimes they were caught and sometimes they weren't.

12 With respect to which laws I don't know. I have
13 information about it, but I am not here to express an opinion
14 about specific state laws.

15 Q. The whole notion that state action doctrine as articulated
16 by the Supreme Court that says there's an immunity for joint
17 action in order to respond to state law, that again is outside
18 of your expertise; correct?

19 A. You have told me as much about state action now in the
20 preamble to your question as I know. The answer is no, I do not
21 profess expertise in that area.

22 THE COURT: Counsel, please be careful not to cut off
23 the witness. The witness should not be speaking either while
24 counsel is. One at a time, everybody.

25 BY MR. BERNICK:

1 Q. What about advertising codes? It's true, is it not, there's
2 an advertising code that was adopted for this industry; correct?

3 A. There was indeed an advertising code adopted in 1964.

4 Q. That was a joint activity, was it not?

5 A. Yes, it was a joint voluntary activity.

6 Q. Is it true that that activity also was explicitly disclosed
7 to the Department of Justice?

8 A. I don't know.

9 Q. You haven't looked through that in all the doc -- you
10 express opinions about the advertising code; correct?

11 A. If your asking me two questions. The first is have I looked
12 through it? I don't recall seeing it. But yes, indeed I have
13 expressed -- I've drawn conclusions about the economic function
14 of the advertising code.

15 Q. Did you do a word search on advertising code to see what
16 other documents would come up?

17 A. Yes, I did. That would be part of my normal procedure.

18 Q. And you never saw the correspondence where the industry
19 contacted the Department of Justice specifically about putting
20 together an advertising code?

21 MS. BROOKER: Objection. I believe Mr. Bernick is
22 offering testimony about facts that are not in evidence.

23 MR. BERNICK: Your Honor, I'm not sure what -- I've
24 never been before Your Honor at trial, but all the questions
25 that I'm asking, A, are argumentative because cross-examination

1 is inherently argumentative; B, assume facts that we believe
2 will establish -- and these are frivolous objections, this is
3 straight cross.

4 THE COURT: Many have been, Ms. Brooker. Many. I
5 don't want to have to keep on overruling every single objection.

6 Go ahead, please.

7 MR. BERNICK: Now I've forgotten what I was going to
8 ask.

9 BY MR. BERNICK:

10 Q. Let me switch to a different topic, Dr. Harris. The
11 left-hand side of the chart here.

12 We've been talking a little bit about competition and
13 cooperation. Would you agree with me that not all -- not all
14 instances in which competitors fail to compete are necessarily
15 collusive and anticompetitive? Would you agree with me about
16 that?

17 A. There are economic models in which, for example, one firm is
18 the dominant firm and the other simply follow along, which do
19 not fit either into the model of competition or collusion but
20 which would not, strictly speaking, be considered competition.
21 And that's just one example.

22 Q. Another example would be in regulated industries. The
23 telephone industry used to be an intensely regulated industry,
24 still is; correct?

25 A. I don't know. I'd have to check that out.

1 Q. It used to be. Airlines used to be regulated.

2 A. Oh, that goes way back to the Carter administration, but
3 they used to be regulated.

4 Q. When it comes to regulated activity, that's a situation in
5 which the failure of companies to compete is not necessarily
6 evidence of collusion or anticompetitive conduct; correct?

7 A. Yes. Companies that act in compliance with certain kinds of
8 government regulation may not be acting competitively but
9 nonetheless are not colluding.

10 It is, of course, true that government regulation can
11 form the basis upon which a collusive structure can be erected.
12 That's well known in economics. But nonetheless there are cases
13 where companies are simply complying with regulation.

14 Q. And you would also agree with me that cooperation between
15 competitors doesn't necessarily mean anticompetitive collusion;
16 correct?

17 A. There are forms of cooperation in which companies engage in
18 joint conduct to the public's benefit which would definitely be
19 cooperative in the sense that they all have to do it together to
20 work and in which they have a common interest but in which the
21 consuming public is not injured, and those would be considered
22 cooperation, but not collusion.

23 Q. Let's talk a little bit about intent.

24 You say that you've reviewed all of these pages of
25 documents during the course of your work, and it's true, is it

1 not, that those documents that you've reviewed include internal
2 documents not meant for public consumption, internal company
3 documents not meant for public consumption?

4 A. Yes. Many of the documents were not to my knowledge
5 intended for public consumption.

6 Q. In fact, you've even seen documents that were once held to
7 be privilege documents involving consultations with counsel;
8 correct?

9 A. Correct.

10 Q. I take it that after having reviewed -- strike that.

11 After you've reviewed all those documents when you
12 submitted your expert testimony in this case, I don't see any
13 conclusion that you've reached that says that any given
14 individual or company had an actual historical intent to deceive
15 anybody. I can't find that in your testimony. Am I correct?

16 MS. BROOKER: Your Honor, I would object to the extent
17 that that calls for a legal conclusion of legal intent which
18 Your Honor will ultimately render in this case.

19 MR. BERNICK: I didn't ask about legal intent, I said
20 historical intent.

21 THE COURT: The question is whether this witness made
22 such a statement in his testimony.

23 You may answer.

24 THE WITNESS: May I have the question read back?

25 BY MR. BERNICK:

1 Q. Yes. Isn't it a fact, Dr. Harris, that if we go through
2 your expert testimony we nowhere will find a conclusion that
3 you've expressed that any individual or company acted with the
4 actual intent to deceive anybody?

5 A. You are correct that I draw no conclusions about what was a
6 specific intent to deceive.

7 I talk about the incentives to take certain actions and
8 whether the observed conduct is consistent or inconsistent with
9 incentives, but as to whether any one individual intended to
10 deceive, that's not within the scope of my opinion.

11 Q. You also say that you looked through all of those pages of
12 documents -- and I tried to get this down right -- looking for
13 the word collusion. Right?

14 A. Correct.

15 Q. And you couldn't find the word collusion, I think your
16 testimony was.

17 A. I don't think that word is there at all.

18 Q. In fact, what you said is that you find words like united
19 front or common action, or staying together, words to that
20 effect, that you said were, quote, consistent with collusion;
21 correct?

22 A. Yes. They were words like joint front, words about
23 decisionmakers talking about unilateral action or going --
24 talking against going it alone, which are consistent with
25 collusion.

1 Q. Consistent with. You were very clear and specific on direct
2 examination in saying "consistent with." Right?

3 A. Correct.

4 Q. Did you ever look for the words "all agree"? That is,
5 everybody agrees to do something or everybody agrees not to do
6 something? Did you look for the word "agree"?

7 A. Oh, yes.

8 Q. Can you give any instances in which all of the defendants
9 sitting here, you saw a document saying they all agree to do
10 something?

11 A. Yes. Many documents they all agreed to do something.

12 Q. The Frank statement and the associated documents of the TIRC
13 would be an example of that; correct?

14 A. Well, in the case of the Frank statement, one of the
15 defendants at the time, Liggett, was not a signer. And so a
16 direct answer to that question, of all the defendants currently
17 on the table, as I understand it, they all did not in that
18 instance agree.

19 Q. Can you give us -- setting the Frank statement to one side,
20 and let's set the folks at Liggett & Myer, I'm sure they will be
21 happy to be set to one side. Let's set them to one side.

22 Are there any other examples that you can give where
23 you find actual documentation where everybody is sitting around
24 and the other defendants all agree to a common course of action?

25 A. Numerous examples.

1 Q. Give me two more.

2 A. When the administrator of the voluntary advertising code in
3 1964 tentatively ruled that Lorillard's use of the word
4 Micronite filter along with its associated claims was
5 impermissible under the code. The administrator called counsel,
6 all of the counsel of the major tobacco companies, including
7 counsel for Lorillard and the other companies, together and got
8 on the speaker phone and they all agreed on what would be the
9 sanction to Lorillard. That's one.

10 Q. Okay. Give me another. That was part of the advertising
11 code; right?

12 A. It pertains to the actual economic function of the
13 advertising code as a collusive device, but it does not pertain
14 to whether it's legal or illegal.

15 Q. And we are going to talk about that one specifically. Any
16 other document --

17 A. Without saying that this is the only example, all of the
18 counsel to my knowledge met at Davis, Polk & Wardell. I don't
19 know if Wardell was part of the firm at that time, the name.

20 Q. Wardwell?

21 A. Wardwell. I apologize.

22 May I just consult my demonstrative to make sure I have
23 the detail right? I don't want to ask a question.

24 Q. December of 1963 pertains to the same meeting that you're
25 talking about.

1 A. I thought it was August '63. But nonetheless they all
2 agreed to respond to the Surgeon General's report together
3 rather than to act individually in their own interests with
4 respect to advertising.

5 Now, there are many other examples, but you only asked
6 me for two.

7 Q. Give me another one. All agree. All agree. Give me your
8 next best one and I'll work with those three.

9 A. The best in what sense?

10 Q. The best -- you think is most probative of collusion where
11 they all sat around and said, we agree.

12 A. The major companies met in England in the Shockerwick House
13 in 1977.

14 I'm sorry, you're shaking your head. I don't know
15 whether that means that's a pending question or whether --

16 Q. How about the domestic manufacturers?

17 A. Those were the domestic manufacturers. Even though the
18 meeting was called by Tony Garrett who was the CEO of BAT and
19 even though there were other manufacturers, such as
20 representatives from Germany, nonetheless all of the U.S.
21 domestic manufacturers as part of the group jointly agreed to
22 hold the line on admissions concerning what they would admit to
23 their individual governments concerning smoking and health,
24 among other things.

25 Q. We will work with those. Let me ask you in order to get to

1 the conclusion --

2 MR. BERNICK: Your Honor, can I ask -- are we going the
3 break soon or do I have another half-hour?

4 THE COURT: Not another half an hour. I'd like to
5 break around 4:30, meaning a little bit past, and then I gather
6 there's a procedural matter that the government wants to raise.
7 But we do need to break by a quarter of or ten of at the latest.

8 MR. BERNICK: I will wind it up in this way with this
9 document.

10 BY MR. BERNICK:

11 Q. This was your demonstrative here that worked with time.
12 And, if I'm not mistaken, the last entry you have the meeting --
13 the meeting with, the Shockerwick meeting, is that on here?

14 A. You're asking yes or no. The answer is it is on there.

15 Q. 1977, is that it?

16 A. Operation Berkshire. It's out of focus for me, but my
17 recollection is it's called Operation Berkshire, although the
18 participants did meet in the Shockerwick House in England.

19 Q. Yeah, well, it's out of focus for me, too.

20 THE COURT: That might be the only two things that the
21 two of you could agree on. Sorry, everybody. It's late in the
22 day.

23 MR. BERNICK: We will try to keep it that way.

24 BY MR. BERNICK:

25 Q. Now, if I take a look at this chart, the only thing that I

1 see after 1990 is the testimony of the CEOs in 1994 and then in
2 1999 the testimony in the Engle case; right? Those are the only
3 items you have after 1990.

4 A. You know, the direct answer to your question is that in this
5 chart, which I now realize is a draft chart which was later
6 corrected, the direct answer to your question is yes.

7 Q. Okay. And in 1994 the CEOs got together. The reason that
8 they were all there testifying together, all as one, that they
9 were all there at the same time, is they were all asked to be
10 there at the same time by Congressman Waxman; correct?

11 A. Yes, or someone else on the staff.

12 Q. Not exactly a private meeting, was it?

13 A. No. It was a public meeting.

14 Q. And the same thing with the testimony in the Engel case.
15 That was not some secret meeting, it was a participation in open
16 public proceeding; correct?

17 A. It was watched by all the stock analysts.

18 Q. You were very careful -- and this is the area that I wanted
19 to conclude with and then we can come back to some of this in a
20 little bit more detail on Monday.

21 You were very careful in answering the government's
22 questions to say that -- I think you're referring to the
23 testimony in 1990s -- that the conduct of the industry there
24 was, quote, not inconsistent with, close quote, collusion;
25 correct?

1 A. Your question had a reference to the testimony in the 1990s.

2 Let me say with respect to the entire record of the
3 industry's performance, that includes its overall incentives,
4 the rate of introduction or lack of introduction, the potential
5 harm reducing products, and the actual record on executive
6 testimony. Indeed, yes, the record is not inconsistent with
7 collusion.

8 Q. Okay. In your repor, and -- or your testimony I'm focused
9 on page 232, and --

10 THE COURT: I'm going to interrupt you for a minute,
11 Mr. Bernick.

12 In your answer, you said, Let me say with respect to
13 the entire record of the industry, are you talking about only
14 the 1990s or the 50 years we're talking about?

15 THE WITNESS: With respect to the 1990s I am talking
16 about not only the testimony in public of the executives, but
17 also what were the incentives of the companies coming into 2000
18 and beyond.

19 THE COURT: But your conclusion applied to the 1990s?

20 THE WITNESS: That's correct.

21 THE COURT: Mr. Bernick, your next question.

22 BY MR. BERNICK:

23 Q. When we get to the back end of your direct examination, and
24 you're talking about some fairly recent developments like work
25 on devices such as Omni or Advance, Accord, Advance is not a

1 device, but Accord, Eclipse and the like, those are more recent
2 developments; right?

3 A. I listened very carefully to your question.

4 Okay. Advance is not a device, I agree on that part of
5 it. Accord and Eclipse were in development, to my knowledge, at
6 least from the 1990s, and if you regard Eclipse as a successor
7 to Premier, then it was in development since the early '80s.

8 Q. But when you get into this period of time in the 1990s in
9 your testimony, you are very careful again in your words, you
10 say, The record to date on the entire industry's long-term
11 performance is, quote, insufficient to conclude that defendants'
12 long-standing collusive arrangement has been permanently
13 replaced by competition.

14 Do you recall saying that?

15 A. Yes, I do.

16 Q. And as I just read it, just reading the words on the page,
17 it's a statement that says, "There is not yet enough record
18 evidence to conclude kind of affirmatively that the collusion
19 has now been replaced with competition;" correct?

20 A. In view of the long-standing well-documented record, based
21 on my analysis, in view of that long-standing record
22 establishing up until recently affirmatively the presence of
23 collusion or at least conduct consistent with collusion, I
24 cannot now draw the conclusion that that previously confirmed
25 collusion has now been terminated permanently.

1 Q. Now, just in your last answer, you said that based upon the
2 record where there was affirmatively the presence of collusion
3 or at least conduct consistent with collusion, let me ask you
4 about that.

5 When is the most recent event where you are able to say
6 that there affirmatively was the presence of collusion?

7 You said this record goes all the way back and there's
8 been affirmative evidence of the presence of collusion. Not
9 consistent with collusion, but the presence of collusion.

10 When is the most recent event where you can say I can
11 establish the record of evidence that says affirmatively that
12 there was the presence of actual collusion?

13 A. I think there's a continuum of evidence that is difficult to
14 answer yes or no on a date certain, but, if you want, I will
15 elaborate.

16 Q. I just really want an answer to the question. You've been
17 very careful. You offered opinions that evidence was not, or
18 conduct was not inconsistent with. You have offered evidence
19 that conduct was consistent with. We've already got a spectrum
20 there.

21 Not inconsistent with is weaker than consistent with
22 which is, in turn, weaker than actual presence of collusion;
23 right?

24 A. You've asked me so many questions I don't know what to
25 answer.

1 Q. Let's focus on the last one. Those three are different in
2 the way that I've indicated.

3 Not inconsistent with is weaker than consistent with,
4 consistent with is weaker than the actual presence of collusion;
5 right?

6 A. I indeed have been careful to qualify my statements so as to
7 not overreach.

8 If you go back far enough, the record is filled with
9 documents that involve explicit communication between major
10 decisionmakers in which they propose to act cooperatively or
11 collusively whether the word collusion is used or not.

12 As you go forward in time, the number of documents that
13 actually reflect explicit joint communication becomes more --
14 becomes sparser.

15 So that by April of 1994, an economist -- certainly I
16 as an economist, would conclude that there was collusion, though
17 I cannot identify a document in which the CEOs communicated with
18 each other about their joint testimony.

19 Q. Wait. In 1994, all you could say was not inconsistent with.
20 Not inconsistent with. That's not consistent with and it's not
21 the actual presence.

22 I want to know when in time is the last point where you
23 can say affirmatively I can actually establish the presence of
24 collusion? When was the most recent point in time?

25 A. You made a number of statements before your question that I

1 cannot agree with.

2 Q. Let's focus on the question. When is the most recent time
3 when you can say affirmatively there was actual collusion?

4 A. While there are no explicit communications between counsel
5 or CEOs planning what they will say in front of the Waxman
6 Subcommittee, the evidence is strongly consistent, whether we
7 use the affirmative or not with the presence of collusion.

8 As we move toward the period after that Master
9 Settlement Agreement and into the year 2000, without trying to
10 overreach and to be careful so as not to make final decisions
11 that I understand the court should make, I can say that I have
12 not found documents that talk about explicit communications
13 between CEOs or counsel to collude.

14 However, I have concluded, nonetheless, that the
15 defendants have not persistently and in the long term asked --
16 acted independently in a rivalry to outdo each other
17 competitively, nor are their underlying common interests
18 fundamentally changed. As to when exactly there is a cutoff,
19 that is harder for me to say.

20 Q. Doctor, this is now completely unresponsive. I think we
21 established earlier that you had a spectrum. Maybe we can't get
22 any further. We have a spectrum. And the stronger case was
23 where you could say there was actual collusion. The weaker case
24 is where all you could say was the conduct is not inconsistent
25 with collusion.

1 You then informed the court, on the court's question,
2 that the latter, that it's not inconsistent with pertained to
3 the '90s; right?

4 MS. BROOKER: Your Honor, I would just object.

5 Q. And so my question to you is --

6 THE COURT: No. I want to hear the question so we can
7 get an answer to this.

8 Q. My question is, to what period of time does the stronger
9 statement apply? Not the weaker statement that says not
10 inconsistent with; not the statement that says, consistent with;
11 but the statement that says there actually was collusion and I
12 can prove it. During what period of time does that apply?
13 That's my question.

14 A. I would say that even though there are not documents
15 reflecting explicit communication up through April of 1994 in
16 front of the Waxman Committee, the events as I testified in my
17 direct testimony are strongly consistent with continuing
18 collusion.

19 As we move past April 1994, then the documentary record
20 becomes itself much more sparse and I can only rely on evidence
21 about the structure of the industry, the conduct of the
22 manufacturers, and whether it is consistent with collusion.

23 Thus, for example, in the testimony of the CEOs in the
24 Engle case --

25 Q. You said that before, and I still don't think I'm getting an

1 answer to the question, but I'll go on to something else in
2 order to finish up here because we're running out of time.

3 In 1994 one of my clients actually went out of
4 business. That was American Tobacco Company. Correct?

5 A. They were bought up by BAT or by Brown & Williamson, I can't
6 remember which, what was the transaction.

7 Q. And that transaction --

8 A. It was in '95. I'm sorry.

9 Q. That transaction was specifically scrutinized by the
10 government for its anticompetitive implications; correct?

11 A. Correct.

12 Q. It's an oligopoly at that time, the industry was, and
13 ultimately that transaction went forward; correct?

14 A. That transaction what? I'm sorry.

15 Q. Went forward and was consummated.

16 A. I'm sure it was reviewed by either the Justice Department or
17 the FTC and it certainly did go forward.

18 Q. And most recently -- one of the reasons it went forward is
19 at that point American Tobacco was a failing company, was it
20 not?

21 A. I'm not sure -- I'm not so sure I'd go that far.

22 Q. After 50 years of what you called collusion, American
23 Tobacco went from being number one to being really
24 inconsequential in the industry; correct?

25 A. In terms of profits, no. In terms of market share, its

1 market share had declined.

2 Q. And more recently, another company was bought up, another
3 client of mine, Brown & Williamson; correct?

4 THE COURT: Wait. I just have to insert one question.

5 Are you saying that its market share declined and its
6 profits increased?

7 THE WITNESS: I'm saying that although its market share
8 declined, it was still a profitable company at the time.

9 BY MR. BERNICK:

10 Q. And with respect to Brown & Williamson, Brown & Williamson
11 recently was bought up as well; correct?

12 A. You mean RJR bought Brown & Williamson. I think that is an
13 accurate description.

14 Q. And that also was reviewed by the Federal Trade Commission
15 was it not?

16 A. I don't know that for a fact, but I suspect so.

17 Q. And again by the time that Brown & Williamson was bought it,
18 too, had become inconsequential in the industry; correct?

19 A. No, I would disagree with that.

20 Q. Isn't it true that FTC itself approved that acquisition as
21 not doing any violence to the laws against anticompetitive
22 mergers?

23 A. The FTC did -- or the Justice Department did review that
24 acquisition with respect to its jurisdiction on competition, but
25 I'm not familiar with its review.

1 Q. So, two of the original conspirators, members of the
2 collusive agreement back in 1954, it is your testimony two of
3 those members acted on a continually collusive basis even though
4 they were going down the tubes; correct?

5 A. No, that would not be my testimony.

6 MR. BERNICK: Your Honor, I think we can break for the
7 day and resume Monday morning.

8 THE COURT: Dr. Harris, you may step down.

9 We really do have time constraints because staff has
10 time constraints. What's the issue the government wants to
11 raise?

12 MS. EUBANKS: It's very important one to us, Your
13 Honor. It's dealing with the adverse witnesses. And the reason
14 I wanted to raise it today is that tomorrow at noon the
15 corrected testimony of three adverse witnesses is due. Hoel,
16 Robertson, and Schwartz have been filed and lined up for next
17 week. So, I want to make the motion as follows.

18 We would like to move to preclude these witnesses from
19 engaging in discussions with counsel after the United States has
20 written and served its direct.

21 Alternatively, certainly, after preparing and filing
22 the corrected version there should be no consultation with
23 counsel.

24 Now with respect to prior orders in this case, there
25 was an order dealing --

1 THE COURT: Let me say flat out, I'm not going to
2 preclude it, preclude contact with counsel after service of the
3 proposed testimony.

4 I may not have articulated my views well this morning,
5 but they were certainly very strong, and the witness has a right
6 to confer with counsel.

7 I do think, having thought about it during the day and
8 not yet ruling, that the issue is more problematic in terms of
9 consultation and communication with counsel once the final
10 corrected testimony is filed.

11 So I'll hear from you on that and then I'll hear from
12 Mr. Webb.

13 MS. EUBANKS: Well, Your Honor, with respect to the
14 questions that are served, if the witness were on the stand and
15 the United States was asking those questions, just for purposes
16 of the record, I do want to be clear, that it's our position
17 that the witness wouldn't have an opportunity to consult with
18 counsel before providing an answer. Based upon the testimony
19 that we've had thus far, that's clearly what has happened.

20 Now, getting testimony from an adverse witness is
21 difficult at best, and these -- what is being provided here
22 through the process, actually, is coached responses of
23 attorneys.

24 Now, it's more troubling here, given that we are not
25 just talking about the attorneys of the witnesses, but we are

1 talking about attorney intervention from the very defendants in
2 this case. Those types of consultations are proceeding.

3 Your Honor will recall that at the time that the
4 opening statement was to take place, defendants objected to fact
5 witnesses even being present while their lawyers were laying out
6 the case.

7 The concerns that they addressed on that are amplified
8 here when we're talking about testimony. Conferences with
9 counsel for nontestimonial matters are expected.

10 However, the record here indicates that defendants'
11 counsel has been playing a role, indeed a substantial role,
12 vis-a-vis the final corrected written direct.

13 We believe that this is -- this prejudicially impedes
14 the government's case and the search for true function that the
15 court is engaged in here. And we have to remember that while
16 this is a bench trial we are making a record here.

17 If we are unable to question these witnesses and get
18 these witnesses' testimony, as we found out with Mr. Orlowsky
19 what the situation was, without an intervention of a privilege
20 objection, then we are in a lot of trouble here in terms of
21 getting that witness's testimony and being able to argue later
22 what the witness testified to.

23 What's occurring here is we are getting counsel's
24 remarks. And I would remind the court that 471 does address
25 this issue in paragraph 7, which states that fact witnesses are

1 prohibited from discussing their testimony with counsel until
2 such testimony is concluded.

3 It's our position that under the provisions of 471,
4 even the testimony that the government proposed is something
5 that's important. And if it was important enough to protect
6 those witnesses from providing that by making that a
7 nondisclosable function, it's even more important here to
8 protect the truth finding function so that these witnesses give
9 their testimony.

10 These are all adverse witnesses by agreement between
11 the parties. The parties agree. There's no disagreement on
12 that. And yet they are consulting with them once they have the
13 benefit of what it is that the government intends to ask and
14 they are advising them in positions where it's not as though
15 that witness is being tried.

16 It is not a Sixth Amendment right to counsel. Really,
17 the situation should be -- and perhaps we will have to exercise
18 our options under the order -- that we just call the adverse
19 witnesses and state the reasons why written direct isn't to be
20 obtained.

21 MR. WEBB: Can I respond?

22 I might respond by saying I think every word she just
23 spoke is false, and the implication -- I'm irritated -- the
24 implication that defense counsel are interfering with the truth
25 finding process -- first of all, a lot of the testimony the

1 government is filing as adverse testimony is false on its face.

2 If the defense lawyers are doing anything, they are
3 trying to avoid the government putting false, misleading, and,
4 if not, fraudulent testimony into the record, and so we are
5 trying to correct it. There's two categories we're dealing
6 with.

7 People that are actually our witnesses that work for
8 our companies that we're lawyers for, we have had interaction as
9 Mr. Newbold did with his CEO.

10 There are other adverse witnesses, for example, some
11 coming up next week, Mr. Sorell Schwartz, for example, I happen
12 to be cross-examining him. I don't even know his lawyer. He's
13 got a lawyer and one my of lawyers has talked to him to send
14 him -- we are having no interaction with him, none whatsoever.

15 And that's the same thing, Mr. Northrip, he didn't --
16 these other lawyers that have independent lawyers, they are
17 doing all the corrections themselves because they have lawyers
18 and they don't need to consult with us to correct the testimony.

19 It is actually after that corrected testimony is
20 filed -- for example, when Mr. Schwartz, his lawyer does the
21 corrections, which as far as I know we will have no interaction
22 on. When he files those corrections tomorrow I would like an
23 opportunity to meet with his lawyer. I've tried to set up a
24 meeting for Sunday so I could try to find out areas to explore
25 on cross-examination. I have a right to prepare for

1 cross-examination.

2 I happen to know for a fact, for example, when they
3 file -- by the way, if what she's saying is correct, when they
4 file their testimony for their witnesses on Monday for the
5 following week, if the rule is that once its filed, that is the
6 final testimony under 471 and, therefore, nobody can talk to the
7 witness, then they have been breaching that rule as far as I can
8 tell because they have been meeting with witnesses after the
9 Monday, but before the next Monday before the witness goes on
10 the stand.

11 The reason they've been doing that is because both
12 sides have been operating on the common sense assumption, which
13 I thought Your Honor reiterated this morning, that witness
14 testimony under 471 does not become the rule of exclusion and
15 the lawyers can't interact takes place when the witness goes on
16 the stand and swears under oath that his or her testimony.

17 Prior to that time, rule 471 does not apply. If it did
18 apply, they should have no right to have met with Dr. Farone at
19 all last week, at all, because once they filed his testimony
20 under -- they should not have interacted with Dr. Farone because
21 their -- the lawyers can't interact with the witness if that's
22 his final testimony.

23 In fact, there's witnesses that have gone on the stand,
24 Your Honor, that on -- on the following Monday they've actually
25 been asked and they said no, that's not my final testimony, such

1 as this witness right here who made one correction, other
2 witnesses have made other corrections.

3 Until that testimony is sworn to in front of Your
4 Honor, that rule should not take place. And as a practical
5 example, if I were told right now that I've got three witnesses
6 coming up next week that they call adverse witnesses that I've
7 not had a chance to do any preparation for cross-examination,
8 I'm going to scramble over the weekend, try to meet with these
9 people's lawyers, talk through with them areas of
10 cross-examination so that I can do my job as a lawyer, just like
11 they do their job in the week before these witnesses go on the
12 stand.

13 And to shut us off from that and to say that we can't
14 interact with the lawyers -- or, by the way, if one of these
15 witnesses wanted to meet with me I ought to have a right to meet
16 with the witnesses just as much as the government does.

17 I don't know whether these adverse witnesses will even
18 meet with me and that's their call. But the government does not
19 have a monopoly on honesty in this case. And we have a right to
20 interact with our witnesses just like they do, and to shut us
21 off from that opportunity and say that week before they go on
22 the stand that we can't interact with them is wrong.

23 And the implication that we are doing anything to cause
24 incorrect testimony be presented to this court because of the
25 adverse testimony proceeding, that is simply untrue and it has

1 not happened, and it's unfair to make that suggestion.

2 MS. EUBANKS: Your Honor, I want to be clear, and I
3 know I spoke clearly and perhaps Mr. Webb wasn't listening, my
4 motion went to adverse witnesses.

5 Adverse witnesses that the parties have actually agreed
6 are adverse witnesses. I stand by the representations I made
7 and take the court back to the testimony of Mr. Northrip. He's
8 not paying his lawyer. The companies are paying his lawyer.

9 In terms of an adverse witness under 611C the rule
10 states a witness associated with an adverse party. That means
11 that we certainly cannot contact these witnesses.

12 Insofar as Dr. Schwartz is concerned, we sent by e-mail
13 a copy of the testimony to Dr. Schwartz's attorney ourself.
14 That notwithstanding I can see that the defendants have already
15 made contact to be able to prepare him.

16 It's just unfair to the process to be able to get that
17 kind of involvement from counsel on the other side to prepare
18 the witnesses, then we file their testimony. It's just
19 completely inconsistent with the truth-finding function.

20 We can certainly call the witnesses live and probably
21 get at more substantive testimony than examining them on the
22 changes that they made to the written directs, why they made
23 them and what their lawyers' involvements are.

24 THE COURT: If you had provided a witness list of live
25 witnesses with no written direct testimony in advance, opposing

1 counsel could still try to contact those people and/or their
2 lawyers, not of course knowing what their direct would be, but
3 try and contact them and find out what in the world they were
4 going to testify about.

5 MS. EUBANKS: That's absolutely correct. But the
6 difference is, Your Honor, if the witness were on the stand and
7 the witness were offering testimony, the witness would get a
8 question which that witness would answer, perhaps an objection
9 would be raised by the other side, the court would then decide
10 it, but what wouldn't happen is a discussion between counsel and
11 that witness before the answer was provided and that is the
12 system that we have in place now. That is what witnesses have
13 testified to.

14 So then when the witness does take the stand, we are
15 placed in the position of asking a large number of questions
16 about what that process was and then we engaged -- we had
17 objections from Mr. Orlowsky's counsel, which Your Honor ruled
18 were waived at that point, but we still can't even get at the
19 substance of --

20 THE COURT: Is it your position at this point that from
21 the moment you serve on the witness the proposed testimony, that
22 they should not be allowed to have any contact with, quote,
23 their counsel, whether it's their private counsel or corporate
24 counsel?

25 MS. EUBANKS: Not any contact, Your Honor, but contact

1 substantively vis-a-vis the nature of the testimony.

2 THE COURT: That's the same thing. I'm not talking
3 about having a drink.

4 MS. EUBANKS: Obviously, Your Honor, though 471(a) does
5 address something for defense counsel to proceed with, and that
6 is preparing the italicized version and the shaded version.

7 Now that's nonsubstantive contact in terms of actually
8 preparing it once the witness has provided it. So it's not
9 just --

10 THE COURT: This is my ruling, everybody, and it
11 obviously follows up on what I think I ruled this morning.

12 And that is that until the witness adopts their
13 testimony in open court, that witness may consult with their
14 counsel, whether it's private retained counsel or whether it's
15 corporate counsel.

16 However, once the corrected testimony is filed -- I
17 understand that they haven't adopted it yet in open court -- but
18 for the reasons that the government is raising, there should be
19 no further contact and there need be no further contact between
20 the filing of that corrected testimony and that's filed
21 officially on ECF and the witness's actual testimony in court.

22 I want to say one other thing and that is of the
23 witnesses I've heard so far -- and I realize there are only a
24 few -- as to those people it's been very clear to me that those
25 people got the testimony -- in several instances those people

1 weren't even in the same city with their lawyers -- went over
2 the testimony themselves first, focused in on what they thought
3 needed to be corrected or added to, and then did unquestionably
4 confer with their counsel.

5 But at this point I don't have any reason to conclude
6 that their counsel are writing their testimony. I just -- I
7 don't conclude that at this point.

8 MR. WEBB: Your Honor, I want to clarify. All of us
9 are going to follow your rule. I just want to make sure I
10 understand what you're saying.

11 There's a witness named Schwartz who has a lawyer
12 who -- I don't know his name -- but one of my lawyers was
13 contacting him. He tomorrow by noon, that lawyer will have to
14 file with Your Honor the final testimony with his corrections,
15 which presumably I'll get it at that time, too.

16 THE COURT: At that point all contact has to cease.

17 MR. WEBB: I can't talk to his lawyer about anything to
18 prepare for cross-examination?

19 THE COURT: It does mean that. That's the -- what
20 should I say -- the balance that I am reaching in order to --
21 certainly not fully meet anybody's concerns, I know both sides
22 would be really unhappy with this -- but in order to make sure
23 that once a witness has committed themselves to the final
24 testimony and filed it with the court, even though they may
25 discover typos and slight errors as Dr. Harris did, but once

1 that is done, their testimony is filed, and then there cannot be
2 consultation or preparation of that witness. That's what we are
3 really talking about, everybody, is preparation of the witness.

4 Mr. Wells --

5 MR. WELLS: Your Honor --

6 THE COURT: Let me talk to Ms. Hightower a minute.

7 (Discussion off the record between Court and Courtroom
8 Deputy.)

9 THE COURT: Ms. Hightower has to leave everybody. Not
10 everybody works all hours of night and day.

11 MR. WELLS: Your Honor, I'll be very brief.

12 I want to ask Your Honor, if that is going to be the
13 rule, that you not implement it for one week, and I want to give
14 you a concrete example.

15 One of the witnesses next week is a Don Hoel, H-o-e-l.
16 He is represented by Mr. Sundermeyer. Mr. Sundermeyer has told
17 me, in response to my request to talk to his client, that he
18 would not let me talk to his client until after the testimony is
19 filed because he doesn't want any argument that I had anything
20 to do with the testimony.

21 THE COURT: Well, Mr. Sundermeyer probably knows my
22 thinking. Go ahead.

23 MR. WELLS: Right. But he has told me once it's filed
24 this Friday, that I could meet with him after it's filed.

25 In other words, if you were to put that procedure into

1 place today, I would be in the position where I could never talk
2 to Mr. Hoel. I've never met him in my life.

3 THE COURT: That might be and then you would just have
4 to do regular old-fashioned cross-examination that you have done
5 all of your professional life and that you know how to do very
6 well.

7 MR. WELLS: But he's an adverse --

8 THE COURT: No. He's adverse to the government.

9 MR. WELLS: Well, he's adverse to the government, but
10 in a normal world I would be able to talk to a witness who is
11 aligned with me.

12 Now, I haven't been permitted to talk to him ever
13 because Mr. Sundermeyer thought what you would want is for me
14 not to talk to him before the testimony was filed. So he has
15 told me, "Mr. Wells, I will not let you talk to him before this
16 Friday, but after it's filed, because then it's in the can,
17 nobody can say Mr. Wells or Mr. Webb had anything to do with it,
18 I'll let you talk to him."

19 So, in other words, if I knew what the rules were I
20 could have told Mr. Sundermeyer, "Look. The only time I can
21 ever talk to him is before it's filed because that's what the
22 court has ruled."

23 So because we have not been put on notice as to what
24 the rules of the game are, and I'm willing to abide by whatever
25 Your Honor says, both myself and Mr. Webb with his witnesses, we

1 are in the spot where people who are aligned with us, that's
2 what makes them adverse, we are not even permitted ever to talk
3 to these witnesses. We've got three witnesses coming up who we
4 have never met, never talked to.

5 THE COURT: Next week three of them?

6 MR. WELLS: Yes.

7 MR. WEBB: Three.

8 MR. WELLS: And I would think the government -- we've
9 not had anything to do with the testimony because both Mr. Webb
10 and I decided in talking to the lawyers, okay, we will talk to
11 them after the testimony is filed, which is something I thought
12 the government might be happy about.

13 But now because we went down a road that we thought was
14 appropriate, now we're in a spot. I can never talk to the
15 witness.

16 MS. EUBANKS: Your Honor, in terms of the balance of
17 fairness here and --

18 THE COURT: Which is what I am trying to achieve. Go
19 ahead.

20 MS. EUBANKS: -- and the truth-finding function, 471
21 placed --

22 THE COURT: 471 is not what you can really rely on for
23 this reason.

24 Again, one can never foresee all of the difficulties
25 that are going to arise in a trial, as we have well seen. 471,

1 I will admit as the writer of it, that it was written in the
2 context of traditional procedures.

3 I was stating the general rule on witnesses, that
4 nobody talks to anybody once the person has started testifying.
5 It was, quite frankly, not written with this issue and this
6 problem in mind. I don't have any other way to explain it other
7 than that.

8 MS. EUBANKS: Well, the Federal Rules of Evidence
9 certainly support this in terms of 611C and the advisory
10 committee notes to that rule.

11 In terms of being on notice, certainly these
12 practitioners should have been on notice about this. Now let me
13 tell you --

14 THE COURT: No, not necessarily. Not necessarily.
15 This is the first day that we have really focused on this
16 problem.

17 And I am aware that some of the rules have changed and
18 are going to change slightly as we go along in response to
19 problems that do arise in the course of the trial.

20 I try to discuss any changes with all of you in advance
21 and get everybody's views so that you will have an idea of
22 what's coming. But let's just focus on this issue for now.
23 What else did you want to say?

24 MS. EUBANKS: With respect to Mr. Hoel, he is -- has
25 been or was an industry lawyer with Shook, Hardy & Bacon for his

1 entire legal career.

2 Now in terms of -- Shook, Hardy & Bacon lawyers have
3 entered appearances in this case. I really don't think it's
4 fair to assume or suggest, as I'm sure Mr. Wells isn't exactly
5 saying, but he's certainly suggesting it, he may have come into
6 this case as of late, but that law firm has been involved and
7 access to Mr. Hoel is something that they have long had.

8 His deposition was taken, I think in January of this
9 year. That deposition is out there. He's on numerous
10 documents. Insofar --

11 THE COURT: And he was on your original witness list;
12 is that right?

13 MS. EUBANKS: That's correct.

14 THE COURT: What about the other two people who testify
15 next week?

16 MS. EUBANKS: They as well.

17 MR. WELLS: Yes. The question is Mr. Webb and myself,
18 we are the lawyers in this courtroom who are assigned to examine
19 those witnesses. We never talked to them in our lives.

20 THE COURT: Am I right that at least one of them was
21 deposed?

22 MR. WELLS: They were deposed in 2002 by -- two were
23 deposed I think in 2002, but --

24 THE COURT: You have depositions to work with. That's
25 more than most people have on cross-examination in a traditional

1 trial without millions of documents.

2 MR. WELLS: But if we had known what the rules were, I
3 would have talked to Mr. Hoel last week or this week. In other
4 words, you've just changed --

5 THE COURT: I do --

6 MR. WELLS: -- the procedure, because I want to talk
7 to -- I would have told Mr. Sundermeyer the only time I can talk
8 to him now under the procedure is this week.

9 Mr. Sundermeyer thought he was doing what Your Honor
10 would have preferred by not letting me talk to him. He
11 expressly said, "I will not let you talk to him until I file the
12 testimony on Friday because" --

13 THE COURT: I understand this issue. I will hear
14 briefly from Mr. Webb and then Ms. Eubanks.

15 MR. WEBB: Mine is just very brief. I'm in the same
16 position. If I -- look. I'm going to follow any rule you put
17 down and I'm not going to argue with you about it.

18 The fact is if we could have a few days. If after this
19 week we impose this rule we understand it, but the two witnesses
20 I have coming up next week -- and, by the way, just to put it
21 down in the real world.

22 Mr. Schwartz, he hasn't done any work for the tobacco
23 industry for 10 years. He actually swears that he's not adverse
24 to the government. He doesn't understand why he's being called
25 adverse. And if you look at his testimony in depositions, he

1 seemed to have had a falling out with the Tobacco Institute
2 10 years ago.

3 THE COURT: Well, they probably didn't pay his bills.
4 Ms. Eubanks.

5 MS. EUBANKS: Your Honor, in terms of a solution to
6 address these issues and to address the United States' issues as
7 well, which I think are all of our issues here in terms of the
8 function of the court, we would not object to the defendants'
9 placing those witnesses on their witness list even belatedly,
10 calling them as their own and dealing with it that way.

11 But we do object to their having that kind of contact
12 to do a prepared cross-examination of the witnesses and to
13 prepare them in the way that we have seen through other
14 testimony as been happening now that that written direct is
15 filed.

16 So we certainly wouldn't -- to address the concerns of
17 these gentlemen about their working with their witnesses --
18 wouldn't oppose them adding them to their witness list and
19 affirmatively putting forward any testimony that they deem
20 appropriate in that setting.

21 THE COURT: I don't know that that's the solution
22 they'll want, but here's the solution, everybody.

23 You all have depositions. I think the defense counsel
24 can deal with this issue. If for some reason you want to put
25 them on your witness list, you will be allowed to do so,

1 everybody.

2 We are in recess until Monday morning at 9:30.

3 (Recess began at 5:02 p.m.)

4

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11 CERTIFICATE

12 I, EDWARD N. HAWKINS, Official Court Reporter, certify
13 that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

14 Edward N. Hawkins, RMR

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