

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GSK)
	:	October 20, 2004
Plaintiff,	:	
	:	9:32 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 16
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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

2 THE COURT: Good morning everybody. I'm sorry we are
3 late today. This is United States versus Philip Morris. CA
4 99-2496.

5 Would the government please call its next witness?

6 MR. SCHWIND: Good morning, Your Honor. Gregg Schwind
7 for the United States.

8 THE COURT: Good morning.

9 MR. SCHWIND: We call Mr. Donald K. Hoel.

10 THE DEPUTY CLERK: Please remain standing and raise
11 your right hand.

12 DONALD K. HOEL, Government's witness, SWORN

13 THE DEPUTY CLERK: You may be seated.

14 D I R E C T E X A M I N A T I O N

15 B Y M R . S C H W I N D :

16 Q. Good morning, Mr. Hoel. My name is Gregg Schwind. I
17 represent the United States. I don't believe we've met before.
18 I see you've brought something with you, sir. What do you have?

19 A. This is the -- a corrected copy of a deposition.

20 THE COURT: I'm not sure the witness is either wired
21 appropriately, or do you all wire the witnesses or do they just
22 speak into the mic, everybody?

23 MR. SCHWIND: Ordinarily the microphone, Your Honor.

24 THE COURT: All right. Mr. Hoel.

25 THE WITNESS: I'll speak into the mic then.

1 THE COURT: That's good. Thank you.

2 BY MR. SCHWIND:

3 Q. Mr. Hoel, you indicated you had brought a copy of your
4 corrected testimony; correct?

5 A. That's correct.

6 Q. And this was based on some, a proposed written testimony
7 that you received sometime last week; correct?

8 A. I believe that's correct.

9 Q. And, sir, are you certain that the document you brought with
10 you is complete? That is, it has all the pages in your
11 corrected testimony?

12 A. I believe so.

13 Q. Are you ready to adopt that testimony as your testimony in
14 this case?

15 A. Yes, sir.

16 Q. Mr. Hoel, I want to go back to last week after you received
17 a copy of the proposed testimony.

18 First of all, you're represented by Mr. Sundermeyer;
19 correct?

20 A. Correct.

21 Q. And he is the same attorney that represents your former
22 partner at Shook, Hardy & Bacon, Mr. Bob Northrip; correct?

23 A. I believe that's correct.

24 Q. And Mr. Sundermeyer represented you at your June 2002
25 deposition; correct?

1 A. That's correct.

2 Q. Sir, who paid the legal fees associated with your
3 representation at that deposition?

4 A. I believe my firm did, my former law firm.

5 Q. Shook, Hardy & Bacon?

6 A. Correct.

7 Q. Did you receive a bill for Mr. Sundermeyer's services from
8 the June --

9 A. I did not personally receive a bill.

10 Q. And, sir, who do you expect will pay the legal fees
11 associated with today's testimony and preparing your corrected
12 testimony?

13 A. I hope it's somebody other than myself.

14 Q. Do you expect to receive a bill for that, sir?

15 A. No, sir.

16 Q. And if you were to receive a bill, what would you do with
17 it, Mr. Hoel?

18 A. I believe I would send it to my former law firm.

19 Q. Mr. Hoel, how long did you spend reviewing and correcting
20 your proposed testimony?

21 A. Gosh. Several days.

22 Q. A number of documents were cited in that testimony; correct?

23 A. Yes, a number of documents.

24 Q. Now, did your attorney or your former firm provide you
25 access to those documents?

1 A. Yes.

2 Q. And did you review those documents in conjunction with
3 correcting your testimony?

4 A. I reviewed some of them.

5 Q. Were there some that you did not --

6 A. Well, there was a box as big as this filled with documents.
7 I did not review each and every page, no.

8 Q. Did you discuss your testimony or the documents while you
9 were reviewing your testimony?

10 Did you discuss the testimony or those documents with
11 anyone other than Mr. Sundermeyer?

12 A. No.

13 Q. Now, at some point you completed your corrected testimony;
14 correct, sir?

15 A. Yes, sir.

16 Q. Since that time have you discussed your testimony or the
17 documents with anyone other than Mr. Sundermeyer?

18 A. No, sir.

19 Q. And have you, for example, contacted anyone from your former
20 firm or still at your former firm to ask them any questions
21 about any of the matters in your testimony?

22 A. No.

23 Q. Sir, are you taking any medication today that might
24 interfere with your ability to accurately recall events?

25 A. The only medications I have taken is an antihistamine.

1 Q. Sir, I ask that, I saw you smile when I asked that.

2 In your corrected testimony there are over a 150 times
3 where you state that you do not recall --

4 A. That's true.

5 Q. -- the answer to a particular question.

6 A. Right. It has nothing to do with any medications I'm
7 taking.

8 Q. But it made some of us wonder, sir, whether we had the right
9 man. I just want to --

10 MR. WELLS: Objection, Your Honor. That was
11 unnecessary.

12 THE COURT: I think it was a little bit. Certainly
13 you're entitled to cross about the failure to remember, but I
14 think I will sustain that objection.

15 BY MR. SCHWIND:

16 Q. Mr. Hoel, I assure you I meant no insult by that at all.

17 A. I understand. You understand, of course, that many of the
18 inquiries were of documents or events that took place over
19 30 years ago.

20 Q. Yes, sir.

21 A. And so I -- I have to be honest and say I don't remember
22 some of those.

23 Q. Sir, do you remember Dr. Sorrel Schwartz?

24 A. I remember the name.

25 Q. Do you remember the man?

1 A. No.

2 Q. Do you recall that he sometimes worked in conjunction with
3 the Tobacco Institute and the law firm of Covington & Burling?

4 A. I don't recall that.

5 Q. I want to show you, sir, something that Mr. Schwartz said
6 about you in his testimony that's been filed in this case.

7 MR. WELLS: I'm going to object, Your Honor. There's
8 no question put to the witness in his direct about Mr. Sorrel
9 Schwartz. They had the opportunity to put that in the testimony
10 if they wanted to. And this is not the appropriate time to be
11 raising a totally new matter.

12 MR. SCHWIND: Your Honor, it's not a totally new
13 matter. We did ask him about an organization called IAPAG,
14 which does have to do with Mr. Schwartz. But the reason I'm
15 using this, as Mr. Wells will see, is not to talk about, if
16 anything, Mr. Schwartz did --

17 THE COURT: Is it on the issue of recollection?

18 MR. SCHWIND: Yes, Your Honor.

19 THE COURT: The objection is overruled. You may
20 proceed.

21 MR. WELLS: Your Honor --

22 THE COURT: Mr. Wells, the objection is overruled.

23 BY MR. SCHWIND:

24 Q. Mr. Hoel, Dr. Schwartz was asked if he was familiar with you
25 and he said: "Yes, he was." He was asked -- do you see that,

1 sir, on the screen?

2 A. Yes.

3 Q. The third question was what was his impression of you.

4 He said, "I saw him as a major player in the ETS issue.
5 My impression was that he was the most powerful person in the
6 whole group."

7 Do you see that, sir?

8 A. I see that.

9 Q. And then he was asked, "Why did you have that impression?"

10 And he answered, "Everyone seemed to defer to Hoel. He
11 seemed to be in charge of the entire industry, not just the
12 Tobacco Institute."

13 I know you're -- you've laughed when I read the answer
14 to the third question, but would you agree with at least
15 Dr. Schwartz's characterizations of the importance that you
16 played while --

17 A. I've never seen this before nor have I ever heard this
18 before.

19 Q. I understand, sir. But Dr. Schwartz --

20 A. I take it as a compliment, but I don't think I was, you
21 know, that super powerful.

22 Q. Sir, on the issue of ETS, environmental tobacco smoke, how
23 would you respond to Dr. Schwartz's assessment that you were a
24 major player in that issue?

25 A. I think I was a major player.

1 Q. Mr. Hoel, with respect to your former firm, Shook, Hardy &
2 Bacon, was there anyone at the firm that was more knowledgeable
3 than you on the issue of ETS?

4 A. Whether -- I don't think more knowledgeable. I think many
5 were as knowledgeable.

6 Q. All right, sir. I want to show you one other document.
7 This has been marked Trial Exhibit 21505, and this, sir, is a
8 1978 Philip Morris document.

9 MR. SCHWIND: May I approach the witness, Your Honor?

10 THE COURT: Yes, you may.

11 BY MR. SCHWIND:

12 Q. I'm going to hand you a copy of the complete document, sir.

13 MR. WELLS: Your Honor, I would like to object.

14 I don't understand how this relates to the changes in
15 his direct. If Mr. Schwind could perhaps lay a predicate so at
16 least I could understand how it relates to what I understand the
17 function of today is, which is to deal with changes in the
18 testimony.

19 MR. SCHWIND: Your Honor, I'm going to show the witness
20 several documents to try to establish his importance to the
21 industry and to the defendants on the issue of ETS; to put his
22 over 150 responses, if I do not recall, in perspective.

23 MR. WELLS: In all due respect. First, he has conceded
24 that he did play an important role, so that's on the record.

25 THE COURT: Let me just cut you short. I'm going to

1 sustain the objection for this reason. Obviously, I've read the
2 material. I think I even made a comment yesterday about the
3 many responses of not recalling. So, I certainly understand
4 that.

5 The witness just testified that he agreed that he
6 played a major role, although he has said that others might have
7 been as knowledgeable.

8 What is more, I don't think this is useful because
9 based on all the other testimony I have heard, it is perfectly
10 clear to me that he played an extremely important role. And I
11 don't think you have to establish that for the record.

12 So, for that reason, I'm going to sustain the
13 objection.

14 MR. SCHWIND: Thank you, Your Honor.

15 THE WITNESS: Do you want this document back?

16 MR. SCHWIND: Yes, sir.

17 BY MR. SCHWIND:

18 Q. Now, sir, this morning we're going to be talking about
19 environmental tobacco smoke, as you perhaps gathered from your
20 proposed testimony. I may use other terms for ETS. I may call
21 it passive smoking, depending on the document, I may call it
22 second-hand smoking. I believe the Surgeon General at one point
23 referred to it as involuntary smoking. When I use those terms,
24 sir, I'm using them interchangeably. I'm not trying to trick
25 you.

1 A. All right.

2 Q. You appreciate that?

3 I want to first, sir, talk about the one -- perhaps the
4 one document that does not relate to environmental tobacco smoke
5 in what was presented to you with your proposed testimony. If
6 we go to Exhibit 30935.

7 A. I can't read that.

8 Q. Mr. Hoel, this is the July 1970 letter from Mr. Hardy, your
9 former senior partner, to Mr. DeBaun Bryant, the General Counsel
10 of Brown & Williamson. Do you recall reviewing that letter,
11 sir?

12 A. I reviewed it, yes.

13 Q. Now you are --

14 MR. WELLS: Your Honor, I have an objection. The
15 procedure that we've followed with all the other adverse
16 witnesses has been that the government's questioning focuses on
17 the changed answers, and they direct the witness to that portion
18 of the transcript where they changed an answer and, as I
19 understand it, they are then permitted to question about why the
20 change was made.

21 Now, where Mr. Schwind is going, I have no idea. I
22 have no idea. I don't know where this particular document is
23 cited in the 75 pages of the transcript. I could take time to
24 try and find it out, but I would ask that Mr. Schwind conduct
25 his examination consistent with how we have proceeded with every

1 adverse witness up to now.

2 THE COURT: Counsel? Government?

3 MR. SCHWIND: We are at page 6-1, Mr. Wells.

4 THE COURT: And this is 30935; right?

5 MR. SCHWIND: Yes, Your Honor.

6 THE COURT: Okay.

7 BY MR. SCHWIND:

8 Q. Mr. Hoel, you indicated in your answers that you had no
9 recollection of this document; correct?

10 A. That's correct.

11 Q. Do you recall that Brown & Williamson and British American
12 Tobacco were clients of Shook, Hardy in 1970 at the time of this
13 letter?

14 A. I know Brown & Williamson was at that time. I'm not sure
15 about British American Tobacco at that time.

16 Q. Sir, do you recall the subject matter of this letter, and
17 that is, namely, the June 1969 British American Tobacco Research
18 Conference in Kronberg, Germany?

19 A. No, I do not recall that.

20 Q. Mr. Hardy states on page 1 of this document that he has seen
21 the minutes of that conference. Do you see that, sir?

22 A. It's in the second paragraph. Yes.

23 MR. SCHWIND: May I approach the witness, Your Honor?

24 THE COURT: Yes, you may.

25 BY MR. SCHWIND:

1 Q. Sir, I'm handing you a -- or I've handed you a document that
2 is marked U.S. Exhibit 47773.

3 MR. WELLS: May I have a copy?

4 MR. SCHWIND: I just handed you one, Mr. Wells.

5 BY MR. SCHWIND:

6 Q. Sir, what is the title of this document?

7 A. Research conference held at Kronberg, 2nd through 6th June,
8 1969.

9 Q. Do you recall seeing this document, sir, while you were an
10 attorney at Shook, Hardy & Bacon?

11 A. No, sir.

12 Q. Are you familiar with any of the names listed at the top of
13 that document, sir?

14 A. Possibly I.W. Hughes.

15 Q. That's Wally Hughes; right?

16 A. That's who I think it is, yes.

17 Q. And he was a scientist at Brown & Williamson; correct?

18 A. That's correct, as I recall.

19 MR. WELLS: Your Honor, could I ask Mr. Schwind to tell
20 me where we are now in the direct testimony because I'm not
21 sure --

22 THE COURT: This is a follow up to page 6-1. Is that
23 right?

24 MR. SCHWIND: Yes, Your Honor. I'm trying to refresh
25 the witness's recollection of the subject matter of the document

1 where he claims -- or he stated he did not recall.

2 THE COURT: You may go forward.

3 BY MR. SCHWIND:

4 Q. Let's look back, Mr. Hoel, at the exhibit marked 30935, the
5 one that's... does looking at the -- at the other -- the second
6 exhibit I gave you, the 4773, does that help refresh your
7 recollection at all?

8 A. No, it does not.

9 Q. I asked you, sir, with respect to this document in your
10 testimony at page 7-2 whether Mr. Hardy shared the same goals
11 that you stated in another document to Mr. Todd Sollis, namely
12 protecting the companies in products liability actions and
13 insuring the continued viability of the companies.

14 Do you recall that -- I'll let you find that page, it's
15 on page 7-2, sir.

16 A. I'm getting to it here. All right.

17 Q. And your answer, which is on the page that follows 8-1, is,
18 "I don't know. I don't recall discussing with Mr. Hardy."

19 A. That's correct.

20 Q. But certainly, sir, you knew that these were Shook, Hardy's
21 goals even back in 1970, did you not?

22 A. What?

23 Q. Sir, you understood back in 1970 that Shook, Hardy's goals
24 with respect to its representation of the tobacco companies was
25 to protect those companies in products liability actions and

1 ensure their continued viability?

2 A. Correct.

3 Q. So those goals did not change between the time of
4 Mr. Hardy's letter in 1970 and 1988 when you wrote the
5 memorandum to Mr. Sollis; correct?

6 A. The goals were the same, to protect our clients' interests.

7 Q. So in fact, sir, when you answered on page 8-1 that you
8 never --

9 THE COURT: Page what? I'm sorry.

10 MR. SCHWIND: 8-1, Your Honor.

11 BY MR. SCHWIND:

12 Q. That I don't recall discussing with Mr. Hardy, you didn't
13 need to ask Mr. Hardy what the goals were, did you?

14 A. No, sir. That wasn't the point. I just don't remember ever
15 discussing this matter with him.

16 Q. All right. Mr. Hoel, we will put that -- this document
17 aside for now.

18 Let's talk about that June 1988 memorandum to
19 Mr. Sollis and we're going to go to page 3-1 of your testimony
20 where I asked you several questions about that.

21 A. All right.

22 Q. The first question I asked you was, "What is this document?"
23 And you changed the answer to take out assistant general counsel
24 at Philip Morris Management Corporation.

25 Do you see that, sir?

1 A. I took that out, yes, sir, and I took out the month because
2 it was incorrect.

3 Q. Right, the month was incorrect.

4 Why did you take out the assistant general counsel at
5 Philip Morris Management Corporation?

6 A. I don't recall if that was his title, or not.

7 MR. SCHWIND: May I approach the witness, Your Honor?

8 THE COURT: Yes.

9 BY MR. SCHWIND:

10 Q. Mr. Hoel, I've handed you a document that's marked U.S.
11 Exhibit 90013. Would you take a moment to look at that, please?

12 A. All right.

13 Q. It's a letter you wrote to Mr. Sollis on June 27, 1988,
14 correct; sir?

15 A. Correct.

16 Q. And the address that you used was Philip Morris Management
17 Corporation; correct, sir?

18 A. That's correct.

19 Q. Does this refresh your recollection that Mr. Sollis was in
20 fact employed by the Philip Morris Management Corporation at the
21 time you wrote the memo that's marked U.S. Exhibit 20311?

22 A. Yes, but I didn't know his title. I still don't. It's not
23 on here.

24 Q. At least he is marked Esquire; correct?

25 A. Correct.

1 Q. Would that lead you to believe he is an attorney there?

2 A. Yes, it would.

3 Q. Sir, what was the occasion -- let's go back to
4 Exhibit 203011 -- what was the occasion that caused you to write
5 that lengthy memo to Mr. Sollis?

6 MR. WELLS: I want to object, Your Honor. We are away
7 from the direct now.

8 MR. SCHWIND: Your Honor, he's indicated he doesn't
9 recall several aspects later on.

10 THE COURT: You may proceed.

11 A. I'm sorry, what document are we talking about?

12 Q. We are on U.S. Exhibit 20311. Have you been provided that,
13 sir?

14 A. No, I don't believe so.

15 Q. It will be in just a minute.

16 A. Thank you. I have it now.

17 Q. Sir, you recall reviewing this document in conjunction with
18 your corrected testimony; correct?

19 A. Yes, sir. I believe --

20 Q. I'll ask the question again.

21 A. I mean, let me be very honest with you. There were so many
22 documents in that great, big, huge box. I have no specific
23 recollection of any individual document.

24 Q. Sir, does this document look familiar to you?

25 A. I would say it looks familiar.

1 Q. Do you recall the occasion that led to your writing this
2 document to Mr. Sollis?

3 A. No, sir, I don't.

4 Q. At the time you wrote this document, sir, Shook, Hardy was
5 the lead law firm for Philip Morris on the passive smoking ETS
6 issue; correct?

7 A. I believe that's correct.

8 Q. And, in fact, Shook, Hardy had been the lead law firm on the
9 issue since it became an issue. Let me back up, sir.

10 When do you recall ETS becoming an issue for the
11 industry in Shook, Hardy & Bacon?

12 A. Probably the late '60s, early '70s.

13 Q. And from that time on, sir, is it fair to say that Shook,
14 Hardy was the lead law firm for Philip Morris on the issue of
15 ETS?

16 A. I believe that's correct.

17 Q. All right, sir. I want to direct your attention to page 4-1
18 of your testimony. It relates to the same exhibit. We're going
19 to look at a different page of your testimony.

20 Now on this page I asked you to look at page 4 of this
21 document and, in particular, a paragraph that begins under
22 intercompany liaison, and it begins on the bottom of page 4 and
23 ends on the top of page 5.

24 Do you see it on the screen, sir?

25 A. I do now.

1 Q. And I asked you to read that and -- or asked if I had read
2 it correctly. You said, yes.

3 And then I asked you if it was fair to say that
4 according to your memorandum Shook, Hardy played an important
5 role in ensuring that the individual cigarette companies
6 cooperated and acted in concert on smoking and health issues.

7 Can you read your answer, sir, please?

8 A. The answer you had put in, or somebody had put in was,
9 "yes."

10 Q. You're corrected answer?

11 A. My corrected answer is "no." SH and B, or Shook, Hardy &
12 Bacon, had played an important role in some of the company's
13 joint defense of litigation and in advocacy of their legal
14 interests, including in regulatory and legislative matters.

15 Q. Sir, let's look at the terms you used in the letter. First
16 of all, you said intercompany liaison. What did you mean by
17 that term, sir?

18 It's on the screen, sir.

19 A. Which letter are we talking about?

20 Q. We are still on the same document to Mr. Sollis, 20311?

21 A. Right. All right.

22 Q. The question was, sir, what did you mean by intercompany
23 liaison?

24 A. Working together.

25 Q. With all the cigarette manufacturers; correct, sir?

1 A. Yes, sir.

2 Q. And you say that -- you refer in this paragraph to -- let me
3 get the right -- eliminating potential difficulties within the
4 tobacco industry. Can you highlight that, please?

5 I want to talk about that phrase, sir. First of all,
6 the tobacco industry there -- again, we always talk about the
7 tobacco industry and the tobacco industry. What were you
8 referring to, sir, when you used the words "tobacco industry" in
9 that sentence?

10 A. I don't know how otherwise to answer your question other
11 than the tobacco industry in this country.

12 Q. Sir, what did that include?

13 A. The cigarette manufacturers.

14 Q. Anyone else?

15 A. Not that I would be referring to.

16 Q. And you said, eliminate potential difficulties. What were
17 the potential difficulties that you were referring to in this
18 sentence, sir?

19 A. Anything that might indicate that there was a going down
20 different roads in response.

21 Q. Right. One company was going one way, another company was
22 going another way; right, sir?

23 A. That could be.

24 Q. A disagreement among the companies?

25 A. That could be.

1 Q. And so in your sentence you said, Shook, Hardy helps
2 eliminate those types of divergences or disagreements. Correct,
3 sir?

4 A. Yes, we did.

5 Q. To make sure all the companies acted the same way; correct,
6 sir?

7 A. Either acted the same way or didn't act in different ways or
8 go down different paths.

9 Q. In fact, sir, one of the roles of Shook, Hardy was to keep
10 all the companies essentially in lock step, wasn't it?

11 A. I wouldn't say lock step, no.

12 We represented many of the cigarette manufacturers, and
13 at this time I don't believe we represented all of them, but we
14 worked closely with all of them.

15 Q. At this time, sir, which companies did you represent?

16 A. I can't be specific on the timing of it, but certainly
17 always we have represented Philip Morris and, subsequently,
18 Brown & Williamson.

19 Q. Lorillard?

20 A. Lorillard. In later times on some matters, R.J. Reynolds.

21 Q. British American Tobacco?

22 A. And later times, British American Tobacco.

23 Q. Sir, you said you didn't represent all the companies, how
24 about Liggett. Did you represent Liggett?

25 A. I don't believe so.

1 Q. Let me ask you, you talked about potential difficulties
2 within the industry. You said all the companies.

3 What would happen when one of the companies, such as
4 Liggett that you didn't represent, tried to go a different way?

5 A. I don't recall that ever occurring, so I can't tell you what
6 would happen.

7 Q. And the American Tobacco Company, sir, did you also
8 represent them as well?

9 A. I don't believe we ever represented American Tobacco.

10 Q. Do you recall any instance where American went off and
11 diverged or went down its own path?

12 A. No.

13 Q. And when you said Philip Morris, sir, before, that would
14 include Philip Morris Companies; correct?

15 A. I'm not sure I know what you mean by Philip Morris
16 Companies.

17 I represented the Philip Morris Company in the United
18 States. Subsequently, we represented Philip Morris Europe.

19 Q. Did you -- you're aware, sir, that -- I don't want to get
20 too down into the weeds here, but there are a number of Philip
21 Morris entities. There were a number of Philip Morris entities
22 at the time you wrote this memorandum; correct?

23 A. I believe that's correct.

24 Q. One of them was Philip Morris Companies, Incorporated;
25 correct?

1 A. I'm not -- I just don't recall the specific titles.

2 Q. And we saw earlier Philip Morris Management Corporation;
3 correct?

4 A. I saw that.

5 Q. And you're aware of Philip Morris USA?

6 A. I am.

7 Q. And Philip Morris International; correct, sir?

8 A. Yes.

9 Q. To your knowledge, were all those entities clients?

10 Let's put it this way. Did Shook, Hardy represent the
11 interests of all those entities?

12 A. To my best recollection, yes, we did.

13 Q. Sir, essentially, I used the words lock step before and you
14 disagreed with me. Let me ask the question this way.

15 Representation through Shook, Hardy & Bacon assisted
16 the companies in remaining united on certain important issues;
17 correct?

18 A. I believe that's correct.

19 Q. And those issues included smoking and health, generally?

20 A. Yes.

21 Q. Environmental tobacco smoke, passive smoking?

22 A. Yes.

23 Q. And how would you describe your role, sir, personally, in
24 keeping the companies united on the issue of environmental
25 tobacco smoke?

1 A. Well, just common sense. There was no big divergence of
2 opinion or responses.

3 Q. So, essentially, you didn't have to do too much work to keep
4 them united?

5 A. No, not that I recall.

6 Q. Let's move forward to your testimony at page 5-1. The same
7 document, same memorandum to Mr. Sollis but a different question
8 that you changed. Your testimony at page 5-1.

9 A. All right.

10 Q. I asked you about the scientific consensus in the 1986
11 Surgeon General's report. Do you see that, sir? At the bottom
12 of page 5-1.

13 A. All right.

14 Q. And I asked you, "At the time -- now, at the time the
15 position of Philip Morris and the other cigarette manufacturers
16 was that the consensus in the 1986 Surgeon General's report was
17 wrong, and that cigarette smoking caused no adverse health
18 effects in nonsmokers; correct?"

19 And you changed the answer to, or your answer was, "I
20 do not understand the question. I do not recall a consensus
21 outside the companies about a 1986 SG report. Generally, I
22 recall there was not proved scientifically that ETS caused
23 disease."

24 So that last sentence there, I'm going to take off the
25 generally -- or the "generally" and the "I recall." It was not

1 proved scientifically that ETS caused disease.

2 That was the united position of all the companies while
3 you represented them at Shook, Hardy & Bacon; correct?

4 A. I believe that's correct.

5 Q. And none of companies -- let me ask you. Do you recall any
6 instance where any of the companies diverged or departed from
7 that position, sir?

8 A. No, I do not.

9 Q. And that was their position up until the time you retired
10 from Shook, Hardy in 1993; correct?

11 A. Correct.

12 Q. Let's move forward to page 6-1 of your testimony. This is
13 where I asked you, "Because the only scientific witnesses you
14 were interested in finding were those who would provide
15 favorable testimony or findings for Philip Morris and the other
16 company clients; right?"

17 And your answer was, "No. We were interested in
18 finding evidence to support our clients' legal interests. We
19 were interested in scientists who would tell the truth and who
20 would be effective witnesses. We wanted to present testimony
21 based on high quality science."

22 Is that what you wrote, sir?

23 A. That's correct.

24 Q. I want to go to page 7 and 8 of this Exhibit 20311. Go back
25 to the memorandum, your memorandum, sir, to Mr. Sollis, and I

1 want to talk about the paragraph that starts at the bottom of
2 page 7 and finishes up, and includes the top of page 8. You
3 should see it on your screen, sir.

4 In this paragraph you say, "Shook, Hardy & Bacon is
5 instrumental in developing scientific research in the area of
6 ETS. The firm also monitors ETS advisory group projects."

7 A. I'm not keeping up with you.

8 Q. All right, sir. I'll slow down.

9 A. Where are you starting from?

10 Q. From the top. Go to the first sentence -- you're right,
11 sir. I skipped some of that.

12 A. Yes, you did.

13 Q. "Shook, Hardy & Bacon, SHB, is instrumental in developing
14 scientific research in the area of ETS." Do you see that?

15 A. Correct.

16 Q. And the next sentence I read was, "The firm also monitors
17 ETS advisory group projects, which are now being folded into
18 CIAR." Do you see that, sir?

19 A. Yes.

20 Q. "And" -- I will finish off the sentence -- "the research
21 projects and papers of ETS consultants in the U.S. and abroad."

22 Now, with respect to those types of matters -- the
23 matters that have been highlighted, sir -- isn't it true that
24 all of these matters were intended or expected -- and expected
25 to provide your clients with data and results supportive of the

1 tobacco industry's position on environmental tobacco smoke?

2 A. If you mean by the supportive of that, it had not been
3 scientifically established that environmental tobacco smoke was
4 a danger, the answer would be, yes.

5 Q. Because that was the industry position; correct, sir?

6 A. That is correct.

7 Q. So let's talk about the first sentence there.

8 Shook, Hardy's instrumental in developing scientific
9 research. Sir, do you recall what type of scientific research
10 Shook, Hardy developed in the area of ETS?

11 A. It would vary, depending upon the scientist involved,
12 whether it would be epidemiological studies, twin studies,
13 measurements, and the like.

14 Q. Again, sir, with respect to your prior answer, the
15 scientific research that Shook, Hardy was developing was
16 intended to provide evidence supportive of the industry's
17 position on ETS; correct?

18 A. I would say that would be correct, yes.

19 Q. Let's go to the next highlighted sentence, refers to ETS
20 advisory group research projects. I'll ask the same question,
21 sir, with respect to that matter.

22 Isn't it also true that Shook, Hardy was interested in
23 generating or obtaining evidence consistent with the industry's
24 position on ETS?

25 A. That's correct.

1 Q. And then you -- that sentence, next part which is, now being
2 folded into CIAR. With respect to that, sir, isn't it also true
3 that CIAR was also intended to provide evidence consistent with
4 the industry's position on ETS?

5 A. CIAR, no. It didn't provide evidence. CIAR was a funding
6 organization.

7 Q. Sir, you've referred to research projects being folded into
8 CIAR; correct?

9 A. That's correct.

10 Q. With respect to those projects that were moving into CIAR,
11 it's true that those projects were intended to generate evidence
12 consistent or to support the industry's position on ETS;
13 correct?

14 A. That is correct.

15 Q. The last type of evidence here, sir, in your paragraph
16 refers to research projects and papers of ETS consultants in the
17 U.S. and abroad. Same question with respect to them.

18 With respect to the research projects and papers of ETS
19 consultants, those types of projects and papers were also
20 intended to generate evidence supportive of the industry's
21 position; correct?

22 A. I believe that's correct.

23 Q. Sir, we looked a lot of -- we talked about scientific
24 research and you indicated what the industry intended.

25 Was there ever a time that the scientific research

1 developed by Shook, Hardy generated adverse results; that is,
2 results that did not support the industry's position on ETS?

3 A. I don't recall of that ever occurring, no.

4 Q. So you don't recall any research, sir, that contradicted the
5 position of the industry?

6 A. No.

7 Q. Are you sure of that, sir?

8 A. I'm not sure of it, no, but I don't recall of any instance
9 where that occurred.

10 Q. And sir, with respect to the correspondence with those
11 researchers, would you, yourself and other attorneys at Shook,
12 Hardy correspond with those researchers?

13 A. On occasion.

14 Q. And has that correspondence, to your knowledge, sir, ever
15 been produced in discovery?

16 A. Not to my knowledge.

17 Q. So essentially, sir, if there were scientific research
18 results adverse to the industry's position that were generated
19 by the scientific research that Shook, Hardy was monitoring and
20 developing, that hasn't been produced in discovery; correct?

21 A. Not that I know of.

22 Q. Let's move forward to page 8-1 of your testimony and a new
23 exhibit. The exhibit is 22818.

24 Sir, this is a document that's titled Philip Morris ETS
25 Billing Categories, Summary. Correct?

1 A. Yes, that's what it's titled.

2 Q. And you were shown this document -- or at least you had
3 access to the document when you were preparing your corrected
4 testimony; right?

5 A. That's correct.

6 Q. I want to go to -- well, your answer was -- I asked you what
7 it was, and you said, "I don't know." At the bottom -- at the
8 bottom of page 8-1.

9 MR. WELLS: I asked the government if it had an extra
10 copy of the document because if they don't have an extra copy,
11 we've got four volumes of documents here. It's going to take us
12 a while to catch up.

13 MR. SCHWIND: Your Honor, there is no requirement for
14 us to provide copies of documents. They are in the testimony.
15 But we don't have a problem waiting several seconds after we
16 refer to an exhibit.

17 MR. WELLS: That's all I'm saying. If you want to
18 speed it up, it would be quicker if you gave me a copy.
19 Otherwise, I've got four big books and I've got to find the
20 number.

21 MR. SCHWIND: We don't have extra copies.

22 MR. WELLS: I do have copies. It's just going to take
23 a minute.

24 MR. SCHWIND: Perhaps defendant can assign a person to
25 sit here with the binders and provide the exhibits to Mr. Wells.

1 MR. WELLS: I have such a person here, but you ask a
2 question, you got to get into the book.

3 THE COURT: I think it's fair to say the defendants
4 have many, many, many, many persons. I heard a number the other
5 day that just was higher than even I had anticipated. So just
6 try to keep current, but we will stop when necessary.

7 Go ahead, please, Mr. Schwind.

8 Mr. Schwind, how do you spell your name?

9 MR. SCHWIND: S-c-h-w-i-n-d.

10 THE COURT: Okay. I just wanted to get it right.

11 MR. WELLS: Your Honor, I just want to say, yesterday
12 they were given -- we were given documents. These were
13 documents everybody had and we had a big to-do about Where is my
14 document. These are all documents --

15 THE COURT: You have these documents.

16 MR. WELLS: But it's going to take me -- all I'm
17 saying, they are acting like I'm asking for something special.
18 Yesterday, they were demanding, "Where is my copy of the
19 document?" And we gave them the copies, and I thought that was
20 fair what they were asking for yesterday. But it's just going
21 to take a minute.

22 MS. EUBANKS: Your Honor, with respect to yesterday,
23 what I should point out is that the questions that were
24 occurring were on examination by defense counsel. Under the
25 order that we are operating under, they don't have to give us

1 copies in advance.

2 Under the order that we're operating under with this
3 adverse witness statement, they were provided copies of all of
4 the documents mentioned in the testimony.

5 THE COURT: I understand that, Ms. Eubanks.

6 Let's try and move on. If necessary, we will certainly
7 hold up for a minute before you either switch topics or, it
8 certainly takes a minute or two to orient the witness, to ask
9 introductory questions, and by that time defendants will
10 probably have found the document.

11 Go ahead, please.

12 MR. SCHWIND: Thank you, Your Honor.

13 BY MR. SCHWIND:

14 Q. Mr. Hoel, back to the document that's marked U.S.
15 Exhibit 22818. You have that before you; correct?

16 A. Yes.

17 Q. Do you recognize the document?

18 A. No, sir.

19 Q. Have you ever seen such a document?

20 A. I may have seen it in connection with preparing the answer
21 to the question. Did I ever see it before? I don't ever recall
22 ever seeing it before.

23 THE COURT: Mr. Hoel, this is a billing document from
24 your old law firm where you worked for I think close to
25 35 years.

1 THE WITNESS: 35 years.

2 THE COURT: Pardon?

3 THE WITNESS: 35 years.

4 THE COURT: 35 years. And it's a billing document.

5 And you don't remember seeing a billing document?

6 THE WITNESS: No, ma'am.

7 THE COURT: All right. Go ahead.

8 BY MR. SCHWIND:

9 Q. Sir, what role did you play in the billing of Philip Morris
10 when you were an attorney in 1990 with Shook, Hardy & Bacon?

11 I assume you prepared some type of document that would
12 be sent to generate this exhibit; correct?

13 A. My -- I would bill for my time spent on work done for Philip
14 Morris.

15 Q. But you would have certain categories of work you would do
16 for Philip Morris; correct, sir?

17 A. I'm sure you're right, but I don't recall ever seeing this
18 document separately prior to this litigation.

19 Q. Yes, sir. But have you seen documents like it? Not
20 necessarily this one, but billing documents like it?

21 A. No.

22 Q. Let's turn to page 3 if we could, sir, please.

23 A. Of what?

24 Q. Of the document itself. And this page has in it an index of
25 what appear to be categories. Do you see that, sir?

1 A. Yes.

2 Q. I just want to go through these and see if you recognize the
3 categories.

4 The first tab number there is Three Company ETS Witness
5 Development. Do you see that, sir?

6 A. I see that.

7 Q. What did that refer to?

8 A. I do not know.

9 Q. Who were the three companies that that referred to?

10 A. I do not know.

11 Q. Can you take a guess, sir?

12 THE COURT: If there's an objection, and I think
13 Mr. Wells may not have been listening, sustained. No guesses,
14 please.

15 THE WITNESS: Thank you.

16 BY MR. SCHWIND:

17 Q. Mr. Hoel, you were an attorney at the company back in 1990;
18 correct?

19 A. I was an attorney with the law firm.

20 Q. With the law firm back in 1990; correct?

21 A. Correct.

22 Q. And based on your experience and your position at the firm
23 in 1990, can you say who these three companies were?

24 A. No, because in 1990, for example, the date you mentioned, I
25 was in London.

1 Q. Were the three companies cigarette manufacturers, sir?

2 A. I have no idea who they are.

3 Q. Were you doing ETS work for anyone else other than cigarette
4 manufacturers?

5 A. No.

6 Q. Was your firm performing ETS work for anyone other than
7 cigarette manufacturers?

8 A. Not that I know of.

9 Q. Let's talk about witness development. What did that refer
10 to, sir, in 1990?

11 A. Under the general topic, Witness Development, I don't know
12 what it refers to in this document. But I would say if we go
13 out and look for witnesses to be of assistance to us in
14 defending our clients' position.

15 Q. Let's go down to tab number 4. It says Philip Morris ETS
16 Special Projects. Do you see that, sir?

17 A. Yes.

18 Q. What does that refer to?

19 A. I would have to guess. I just have no recollection of this
20 at all.

21 Q. Sir, I don't want you to guess. But do you recall the term
22 ETS Special Projects?

23 A. I do recall that. I don't recall Philip Morris ETS Special
24 Projects, no.

25 Q. Let's take just ETS Special Projects, what do you understand

1 that to mean?

2 MR. WELLS: We're talking about in general, not in the
3 document as shown on the screen; correct?

4 THE COURT: Yes.

5 THE WITNESS: In general.

6 THE COURT: Is that correct, Mr. Schwind, that's your
7 question?

8 MR. SCHWIND: Yes, Your Honor, right now that's my
9 question.

10 A. In general, we would from time to time try to develop an
11 area -- information in an area of interest, and we have it
12 funded by a special project. If it was ETS, then it would be
13 called an ETS Special Project. That would be funded by CIAR.

14 Q. Could that have been scientific research, sir?

15 A. I'm sorry?

16 Q. Could that have --

17 A. Oh, yes.

18 Q. It could have included scientific research?

19 A. I think it would primarily be scientific.

20 Q. And do you recall, sir, that those special projects were
21 undertaken on behalf of the cigarette manufacturers?

22 A. Yes, sir.

23 Q. And one of them being your client Philip Morris; correct?

24 A. That's correct.

25 Q. The next category is Philip Morris ETS International. Do

1 you recall, sir, what that referred to?

2 A. No, sir.

3 Q. Next category Philip Morris ETS Clearance. Do you recall
4 what that category refers to?

5 A. No, sir, I don't.

6 Q. And then Category 7 is Three Company ETS Special Projects.
7 Can we assume, sir, that this special projects in tab 7 you
8 would define the same way as you defined special projects in tab
9 4?

10 A. I would assume so, yes.

11 Q. And what role did you play, sir, personally? We're talking
12 about 1990. What role did you play in those special projects?

13 A. In 1990?

14 Q. Yes, sir.

15 A. Probably none.

16 Q. What role did the attorneys who worked for you play in those
17 special projects?

18 A. It would be searching out research projects in various areas
19 of interest to the companies involving ETS.

20 Q. And so your attorney, sir, would go out and identify
21 researchers. Is that what --

22 A. That would be correct.

23 Q. Would they make a proposal, your attorneys?

24 A. No. They don't make a proposal. They would ask the
25 researcher if they would be interested in doing research in a

1 specific area and, if so, would that researcher draw up a
2 proposal for consideration for funding.

3 Q. And that research proposal would then be turned back into
4 Shook, Hardy & Bacon; correct?

5 A. Initially, yes.

6 Q. Where would it go from there, sir?

7 A. For funding?

8 Q. Yes, sir.

9 A. It would go to -- for a special project, it would go to CTR.

10 Q. And there's a distinction here, though, between -- well, let
11 me back up.

12 CTR included all of the cigarette manufacturers in
13 1990; correct, sir?

14 A. That's correct.

15 Q. Your two categories here refer to Philip Morris Special
16 Projects and Three Company Special Projects?

17 MR. WELLS: I object, Your Honor. That's my very
18 point. He started out asking him about the general. Now he's
19 looped back and now he's asking, not about the general, but
20 about the specific where it refers to Philip Morris ETS Special
21 Projects. And now he's -- the record is going to be very
22 confusing, because the witness said he did not know about the
23 particular descriptions in that document.

24 Mr. Schwind said, "Well, can you define ETS witness
25 development? Can you define ETS Special Projects?" And that's

1 why I made the objection earlier, to make clear that we were
2 talking about the general.

3 Now he's starting to confuse it, and the record is
4 going to appear like he was always talking about what's
5 identified in that document.

6 THE COURT: Mr. Schwind, you have to be clear on your
7 questioning as to what you're referring to.

8 MR. SCHWIND: I do think Mr. Hoel is doing a pretty
9 good job of telling me when I'm unclear. I don't think he needs
10 help from Mr. Wells.

11 THE COURT: I think the record also needs to be clear.

12 BY MR. SCHWIND:

13 Q. Mr. Hoel, you said that special projects were eventually
14 sent to CTR?

15 A. They were taken -- they were taken to the head of CTR for
16 his review and approval.

17 Q. Now, is that consistent -- I mean, would those special
18 projects that you defined right there, would they be called
19 Philip Morris Special Projects?

20 A. Not that I know of, no. It would be industry -- I don't
21 know what a Philip Morris Special Project is.

22 Q. Sir, do you conclude, then, that tab 4, Philip Morris ETS
23 Special Projects are something different from in addition to?

24 A. It's something I'm not familiar with.

25 Q. Let's move forward to page 10-1 of your testimony.

1 A. All right.

2 Q. At the top of page 10-1 you were asked, "You were one of the
3 lawyers involved in the selection and management of CTR special
4 project work; correct?"

5 And your answer was changed to, or modified to, "I was
6 involved in proposing and managing some CTR special projects."

7 By proposing, sir, I assume you're referring to the --
8 part of what you just testified to; correct?

9 A. Yes.

10 Q. And how would you go about -- let me ask you the difference
11 between selection and proposal.

12 Selecting a CTR special project versus proposing it,
13 what's the difference between those?

14 A. Well, you have a number of things to choose from. You
15 select, and then after you select, you propose it.

16 Q. And who would make the selection, sir, with respect to the
17 CTR special project work?

18 A. I would, in some instances.

19 Q. All right. Let's go to page 14-1.

20 A. All right.

21 Q. At the top of page 14-1, sir, you were asked to take a look
22 at several documents and to identify them and your answer was,
23 "I don't recall these documents. They look like company
24 approvals of special projects."

25 I'd like to show you, sir, three of those documents,

1 quickly, just to confirm your recollection of what these
2 documents are.

3 The first is Exhibit 22758. Sir, do you have that
4 document in front of you?

5 A. I do.

6 Q. Now, this is -- well, let me ask you. What is this
7 document?

8 A. It appears to be a letter dated February 3, 1976, from
9 someone at Brown & Williamson, looks likes EP at the bottom, so
10 that would indicate to me it would be Ernie Pepples who was a
11 general counsel.

12 Q. And this is Mr. Pepples' approval on behalf of Brown &
13 Williamson of the Hickey special project; correct?

14 A. That's what it appears to be, yes.

15 Q. Let's go forward to Exhibit 20326. Sir, have you had a
16 chance to look at that document?

17 A. I have it in my hands now.

18 Q. And just to speed things along, I'll ask, do you agree that
19 this is another approval, in this case by on behalf of Philip
20 Morris Companies dated March 13, 1986, of a special project
21 relating to Theodor Sterling?

22 MR. WELLS: I'm going to object, Your Honor. He's
23 already testified that they looked like company approvals of
24 special projects. That's his testimony.

25 THE WITNESS: That is my testimony.

1 THE COURT: Well, he's getting the three documents
2 identified and then I don't know where Mr. Schwind is going.

3 MR. SCHWIND: Correct, Your Honor. It's only three
4 documents.

5 THE COURT: Go ahead.

6 BY MR. SCHWIND:

7 Q. Did you agree with my characterization of the document,
8 Mr. Hoel?

9 A. I don't recall what your characterization was.

10 Q. This Exhibit 20326 is an approval on behalf of Philip Morris
11 Companies of a special project relating to Theodor Sterling.

12 A. That's what it appears to be. I don't recall the author of
13 the letter.

14 Q. Do you recall who the general counsel was at the time of the
15 Philip Morris Companies?

16 A. Well, Mr. Holtzman is mentioned, so I know about him.

17 Q. You're very familiar with him; right, sir?

18 A. Yes.

19 Q. And you're familiar also with the name Theodor Sterling;
20 correct?

21 A. Yes.

22 Q. Who was he?

23 A. He was a scientist at one time at Washington University in
24 St. Louis, Missouri, and then subsequently at Simon Fraser
25 University in Victoria, Vancouver Canada.

1 Q. For approximately how many years did -- well, let me back
2 you up.

3 Dr. Sterling, in fact, carried out a number of special
4 projects on behalf of the industry; correct?

5 A. I believe that is correct.

6 Q. And these were projects proposed by you to the industry?

7 A. Very likely.

8 Q. We will go to one more document, sir. Let's go to
9 Exhibit 23047. I'll give you a moment to review that.

10 A. All right.

11 Q. Just to speed thing along, sir. Do you agree that this is
12 another approval on behalf of Philip Morris Companies of another
13 special project at this time relating to Dr. Carl Seltzer?

14 A. It appears to be, yes.

15 Q. Do you recall the name Dr. Carl Seltzer, sir?

16 A. Yes, I do.

17 Q. This document is dated May 1988; correct?

18 A. Yes.

19 Q. Who was Dr. Carl Seltzer?

20 A. He was a scientist in New England area.

21 Q. What type of work did he do?

22 A. I'm not -- I can't specifically say.

23 Q. Let me back up, sir. We talked just a moment ago about
24 Dr. Sterling. What type of work did Dr. Sterling do?

25 A. He was statistical.

1 Q. Statistics in what way? What types of statistics did he
2 look at?

3 A. I can't recall the specifics of it, but different -- he was
4 a statistician.

5 Q. In fact, he did ETS statistical work; correct, sir?

6 A. I believe that's correct.

7 Q. And you recall that today?

8 A. Yes, sir.

9 Q. Sir, it's fair to say that while you don't recall the
10 specific documents, you do recall the subject matter and the
11 persons mentioned in the documents; correct?

12 A. Yes.

13 Q. Is there any reason, sir, to doubt that these documents are
14 something other than what they purport to be?

15 A. No.

16 Q. Let's move forward to several other documents. Let's go --
17 in the next question I asked you again to identify certain
18 documents, and your answer was, "I do not recall any of the
19 documents."

20 And again I just want to go through a small number of
21 them. 57123.

22 THE COURT: Let me ask you this, Mr. Schwind. Are you
23 doing this in order to be very sure that you've got your
24 foundation for admission of the documents or are you then going
25 to ask specific questions about the documents?

1 MR. SCHWIND: Your Honor, this is going to build toward
2 documents that we're going to see later in the testimony. For
3 example, Dr. Sterling.

4 I'm not going to hide anything. We're going to see
5 some other documents mentioning Dr. Sterling's name because we
6 think the evidence will show he did perform ETS work on behalf
7 of the industry as Mr. Hoel testified to.

8 So you will see that the documents that I'm going to
9 show the court, Your Honor, relate to ETS work that we're going
10 to see in other documents down the road in the testimony.

11 THE COURT: My only question is efficient use of time.

12 MR. SCHWIND: Yes, Your Honor. We are only going to
13 look at three documents again right now.

14 THE COURT: The witness did say, Mr. Wells, that he
15 didn't recall these documents and so I think certain questions
16 have to be asked. You may proceed.

17 MR. WELLS: Your Honor, he's not asking the -- showing
18 him the documents to refresh his recollection. The witness said
19 he doesn't recall them. He's not trying to get him to --

20 THE COURT: He has also asked him whether he has any
21 reason to doubt -- I don't think he used the word validity, but
22 accuracy of the document.

23 So you may proceed, Mr. Schwind.

24 BY MR. SCHWIND:

25 Q. Mr. Hoel, do you have Exhibit 57123 in front of you?

1 THE COURT: Mr. Hoel, are you all right?

2 Would you call the nurse right now?

3 (Discussion off the record.)

4 THE COURT: Why doesn't everyone else leave the
5 courtroom so we can have some privacy?

6 (Recess began at 10:33 a.m.)

7 (Recess ended at 11:13 a.m.)

8 THE COURT: Well, ladies and gentlemen, let me report.
9 I'm sure people are concerned.

10 Mr. Hoel has been taken to Washington Hospital Center,
11 in an ambulance, of course, and the paramedics got here first.
12 I believe that it was something serious. There's no two ways
13 about that. And I certainly don't want to opine, at least not
14 on the record, as to what it was. But he will be evaluated, of
15 course.

16 And Mr. Sundermeyer tells me that he has a son and a
17 daughter in this area, because as you all know, he doesn't live
18 in the area, and I'm sure that they will take over.

19 He was feeling better by the time that he was taken to
20 the hospital, but there was no question, of course, that he was
21 going to go to the hospital.

22 And I'm sure it was a very upsetting incident for
23 everyone. I did want to clear the courtroom, as you all could
24 tell, as quickly as possible and clear the corridor for when
25 Mr. Hoel was taken out because it's just not good to have a lot

1 of people surrounding somebody when they are not doing very
2 well.

3 So that was, of course, a very upsetting incident and
4 we will have to come back to that whole issue when we can. I'm
5 sure Mr. Sundermeyer will report in, and if he doesn't, I'll
6 contact him and find out where things stand.

7 Now, the government certainly didn't expect to go
8 forward with another witness this morning. If that person
9 happens to be here, we can do that; otherwise, we can address
10 some other issues.

11 MS. EUBANKS: Your Honor, the witness is present and we
12 are prepared to proceed.

13 THE COURT: All right. Let's do that then.

14 MS. EUBANKS: We call Reginald Simmons.

15 THE DEPUTY CLERK: Please remain standing and raise
16 your right hand.

17 REGINALD B. SIMMONS, Government's witness, SWORN

18 THE DEPUTY CLERK: You may be seated.

19 DIRECT EXAMINATION

20 BY MS. EUBANKS:

21 Q. Good morning, Mr. Simmons. Just for the record, would you
22 state your name, please?

23 A. Reginald B. Simmons.

24 MS. EUBANKS: Your Honor, may I approach the witness,
25 please?

1 THE COURT: Yes.

2 BY MS. EUBANKS:

3 Q. Mr. Simmons, I've handed you a document. Can you tell the
4 court what that is that I've handed you?

5 A. This would be my direct written testimony for this case.

6 Q. All right. Can you tell me if there are any changes that
7 you need to make before you adopt this testimony?

8 A. Line 7, page 1, there should be an "E" at the end of Brook
9 in my address.

10 And regarding question number 18 -- that's line 18,
11 page 1, regarding certifications, I'm also a member of the
12 Indoor Air Quality Association.

13 Other than that, I think everything else in there is
14 accurate.

15 MS. EUBANKS: Your Honor, at this time we would ask
16 that the testimony that was filed by Reginald B. Simmons be
17 formally adopted.

18 THE COURT: It may.

19 MS. EUBANKS: Given those are the only changes, we have
20 no more questions at this time and pass the witness.

21 THE COURT: All right.

22 MR. WEBB: Your Honor.

23 THE COURT: Mr. Webb. Give me a time estimate,
24 Mr. Webb, if you know.

25 MR. WEBB: Hour, maybe an hour and a half, roughly.

1 I'll say -- it may go along reasonably quickly.

2 CROSS-EXAMINATION

3 BY MR. WEBB:

4 Q. Mr. Simmons, my name is Dan Webb. We've never met before,
5 have we?

6 A. No.

7 Q. And I represent Philip Morris and I'm going to ask you some
8 questions about the testimony that you've just said that is your
9 testimony in this case?

10 Let me just set the stage for the court and go through
11 some very basics just for a moment.

12 As I understand your direct examination, you began
13 working for a company that was called ACVA Atlanta -- Atlantic
14 in January of 1986; is that correct?

15 A. That's correct.

16 Q. And that company ACVA Atlantic changed its name to become
17 Healthy Buildings, International at some point in time; is that
18 right?

19 A. That's correct.

20 Q. And did that occur while you were working for this company?

21 A. To the best of my recollection, it occurred afterwards, but
22 I'm not sure of the exact date.

23 Q. There's going to be a number of witnesses that are going to
24 talk about this HBI company and you're the first one, and so if
25 I refer to that the company as HBI, is that -- you and I will

1 know we are talking about the same company?

2 A. That's fine.

3 Q. And Healthy Buildings, International became known by the
4 letters HBI. Is that your understanding?

5 A. Yes, it is.

6 Q. Now, when your employment began at HBI in January of 1986,
7 what was your job title or position when you were hired to work
8 at HBI?

9 A. I was hired as a field technician and was later promoted to
10 senior technician or project supervisor, whatever you want to
11 call it.

12 Q. And when you were a field technician, can you just explain
13 to the court what your general job duties were?

14 A. Originally, the job consisted primarily of duct cleaning
15 assignments and conducting indoor air quality assessments in
16 buildings.

17 Q. And how long did you remain as a field technician while you
18 were working at HBI?

19 A. I would assume that you would say through my entire tenure
20 with the company.

21 Q. But you also did, you indicate you received your job
22 title -- excuse me -- your job title changed at some point while
23 you were employed at HBI?

24 A. Yes, it did. I was a project supervisor or a team leader,
25 if you want to call it that, responsible for leading a team, and

1 as well as training or individuals that were knew to the
2 company.

3 Q. Now, when you became a team leader, though, did your basic
4 duties as a field technician remain the same?

5 A. Basically, other than additional contact with folks with the
6 building that we had to arrange -- make arrangements to do
7 actually the building surveys.

8 Q. Now, can you tell the court, because you're the first
9 witness to talk about HBI, just give the court what was this
10 company HBI, what was its business? What did it do?

11 A. The company, when I joined them, was very small, and the
12 business primarily, in my opinion, was a duct cleaning business,
13 duct cleaning business that was being sold under the auspices of
14 an indoor air quality company.

15 Q. How long did you remain at HBI as an employee, up until
16 when?

17 A. That would have been up until about -- I don't remember the
18 exact date, but I think it was about April of 1989, roughly.

19 Q. So you were at the company for a little less than three and
20 a half years; is that correct?

21 A. That's correct.

22 Q. Now, when you worked for the company did you know a person
23 by name of Gray Robertson?

24 A. Yes.

25 Q. Tell the court who was Gray Robertson.

1 A. Gray Robertson was the president of the company.

2 Q. And how frequently as a field technician did you interact
3 with Mr. Robertson?

4 A. On occasion. It wasn't every day, but we did speak almost
5 daily when I was in the office areas. Our offices were in close
6 proximity and we did speak. He was also present at various
7 staff meetings that were held over the course of the years.

8 Q. And when you worked at the company, did you know a person by
9 the name of Peter Binnie? B-i-n-n-i-e. Did I pronounce that
10 correctly?

11 A. Pete Binnie. Yes, I knew him.

12 Q. What was his job title or position when you worked at
13 company?

14 A. It's my understanding he was known as the vice president.
15 He was basically in charge of technical operations, if I
16 remember correctly.

17 Q. Was he -- did he report directly to Mr. Robertson as far as
18 you could tell?

19 A. That would be my assumption.

20 Q. And did you have frequent interaction with Mr. Binnie?

21 A. Mr. Bennie, yes. More frequent than with Mr. Robertson.

22 Q. Now, who was your direct supervisor?

23 A. When I started there, it would probably have been John
24 Maderis.

25 Q. And tell us who John Maderis was?

1 A. John Maderis was, I guess, a field technician and as time
2 went on I think he was promoted into the position of operations
3 manager.

4 Q. Now, this company that you worked for HBI, as you set forth
5 in your direct examination, sir, it had a business consulting
6 relationship with the Tobacco Institute; is that correct?

7 A. That's correct.

8 Q. I want to ask you some questions for the court about how
9 that relationship got started which you testified to in your
10 direct examination.

11 MR. WEBB: Could I actually have Mr. Simmons' --

12 Q. I'm going to direct your attention to your direct
13 examination to the bottom of page 2 and the top of page 3, a
14 question you were asked on direct exam, which I want to ask you
15 a few questions about if we can get that up on the screen.

16 Now, at the bottom -- the question at the bottom of
17 page 2 was, "To your knowledge, when did HBI first become
18 involved with the tobacco industry?"

19 And you gave the answer, "In the spring of 1986, while
20 I was working in an Oliver Carr building in Washington, DC, an
21 HBI employee name John Maderis and I were approached by a vice
22 president of the Tobacco Institute. It is my understanding that
23 the Tobacco Institute's offices were located in the building,
24 and he asked us a lot of questions about HBI. He asked us to
25 refer him to someone at HBI, and we told him to contact Gray

1 Robertson."

2 Now, that event that you are talking about in that
3 paragraph, you say in the spring of 1986, this would have been
4 two or three months after you started with the company,
5 approximately?

6 A. Approximately, yeah.

7 Q. Okay. And when you say you're working in an Oliver Carr
8 building, what is -- who or what is Oliver Carr?

9 A. If I remember right, Oliver Carr was the property management
10 company that had multiple properties under their management
11 within the city of Washington.

12 Q. That's my understanding.

13 Oliver Carr, as I understand it, was some type of
14 building manager, so it was like a company; is that correct?

15 A. Correct.

16 Q. And so you were in one of their buildings in Washington, DC
17 doing your field testing for the Oliver Carr Company?

18 A. As far as I know.

19 Q. Okay. And at least that's what you believed at the time?

20 A. Correct.

21 Q. And John Maderis is with you, and this -- it turned out, I
22 guess, by happenstance or coincidence that the Tobacco Institute
23 happened to have offices in that building. Do I understand that
24 correctly?

25 A. That would be a reasonable assumption.

1 Q. Okay. And now where were you -- what time of day was it
2 when you were in the building when Mr. -- when the vice
3 president from the Tobacco Institute walked up to you?
4 Approximately.

5 A. It would have probably been sometime between 9:00 o'clock
6 and 3:00 o'clock. 9:00 o'clock in the morning and 3:00 o'clock
7 in the afternoon.

8 Q. Just so I know. Do you visually remember? I mean, were you
9 standing somewhere with Mr. Madaris when the vice president
10 walked up to you?

11 A. If I remember the situation correctly, Mr. Maderis and I
12 were in the hallway doing what we did, which was conducting,
13 conducting our study, and we were approached by a gentleman in a
14 suit and tie, started asking us a lot of questions regarding
15 what it was we were doing, and from that point we were presented
16 with a business card and asked to have someone contact --
17 contact him.

18 Q. And do you recall that gentleman's name, by the way?

19 A. No, I do not.

20 Q. But that gentleman handed you a business card and said could
21 you have someone from your company contact him?

22 A. He handed it to John Maderis.

23 Q. Handed it to Maderis.

24 Okay. And let's go on down. If I could scroll down to
25 the next question was -- well, actually I guess what it says in

1 your testimony is, He asked us to refer him to someone and we
2 told him to contact Gray Robertson. So apparently you gave to
3 him Mr. Robertson's name; is that correct.

4 A. If I remember correctly, yes.

5 Q. Okay. And the next question, "To your knowledge, did he
6 contact Mr. Robertson?" And you answered, "Yes."

7 "And how do you know that?"

8 And you answered, "Shortly after our conversation with
9 that official from the Tobacco Institute, there was a series of
10 meetings between Gray Robertson and people I believed to be
11 officials of the Tobacco Institute."

12 Now, as far as that answer is concerned, were you
13 present for some of those meetings with Mr. Robertson and the
14 officials from the Tobacco Institute?

15 A. No.

16 Q. And so when you tell the court that you know that happened,
17 that there was a series of meetings, how did you find that out?

18 A. Mr. Robertson made it well known that he was meeting with
19 folks from the tobacco companies.

20 Q. So Mr. Robertson told you?

21 A. Amongst others.

22 Q. Okay. That's what -- he told you -- this would have been in
23 the days following the occasion that this gentleman from the
24 Tobacco Institute walked up to you?

25 A. That's correct. Days, weeks, whatever.

1 Q. Do you remember? Was it a long time or a short time?

2 A. Don't recall.

3 Q. Okay. But that's something you remember pretty well, I take
4 it. Was that a big deal in the company at that time, that
5 Mr. Robertson was developing a relationship with the Tobacco
6 Institute?

7 A. It seemed to be.

8 Q. Okay. And then you say, "To your knowledge, what was the
9 result of those meetings?

10 And you say "From that point, which to my recollection
11 was the end of 1986."

12 So we've gone from the spring of 1986 -- was it the end
13 of 1986 when HBI became busy with projects for the Tobacco
14 Institute? Is that your best recollection?

15 A. The volume of work grew steadily over the course of that
16 year, and as a matter of fact, it grew steadily over the course
17 of all the years I was there.

18 Q. Then just based on your recollection, how long after the
19 meeting in the spring of 1986 did HBI first start actually doing
20 consulting work with the Tobacco Institute based on your
21 recollection?

22 A. I can't give you an exact date. I've said the end of 1986.
23 I'm working from memory.

24 It was known within the company because of meetings
25 that were held, staff meetings and whatnot, that we were getting

1 an increasingly larger percentage of our work from tobacco
2 interests.

3 Q. I'm not trying to pressure you.

4 Are you saying that at the end of 1986 is when the work
5 picked up or your best recollection is that's when it began?

6 A. What I'm saying is that the work picked up steadily from the
7 time that the initial meetings were being held with tobacco
8 interests. From that point forward, the work started to
9 accumulate.

10 Q. So to the best of your recollection, how long -- I'm not
11 asking you for a date or a time. Was it a few weeks? A few
12 months? Your best recollection.

13 How long after the spring meeting, if you can recall,
14 did HBI first start doing some work for the Tobacco Institute as
15 best you can remember?

16 A. I can't give you an exact time frame and the reason for that
17 is because the tobacco projects were not always specifically
18 identified when we were handed a worksheet and said, "Go do this
19 building."

20 Q. It was sometime after the spring meeting?

21 A. That's -- yeah, that's --

22 Q. Okay, just so I'm clear.

23 Sometime after the spring meeting you know
24 Mr. Robertson had a series of meetings with the Tobacco
25 Institute.

1 A. I know that Mr. Robertson had routine meetings with Tobacco
2 Institute folks.

3 Q. I'm just talking about -- you said shortly after our
4 conversation with that official from the -- there was a series
5 of meetings between Gray Robertson and people I believe to be
6 officials of the Tobacco Institute.

7 I take it as a result of those meetings at some point
8 HBI did begin to do work for TI; is that correct?

9 MS. EUBANKS: Objection, Your Honor. This has been
10 asked and answered.

11 THE WITNESS: And I believe I answered it.

12 THE COURT: Excuse me. Just a minute.

13 Overruled. You may proceed.

14 A. Yes.

15 Q. So, as I understand your testimony, you were kind of the
16 person -- you were involved in the original event that led to TI
17 and HBI having a relationship?

18 A. No. I haven't said that. It's very possible that there was
19 a relationship prior to that meeting.

20 What I'm saying is that I was present in a building in
21 Washington in the spring of 1986 when I was approached by a vice
22 president from -- who identified himself as a vice president
23 with the Tobacco Institute.

24 Whether or not there was an existing relationship, I
25 don't know. Whether or not work started immediately after that,

1 I don't know.

2 But I'm telling you that I was approached -- John
3 Maderis and I were approached. The conversation was held. And
4 we referred that individual to Gray Robertson. That's what I'm
5 telling you.

6 Q. At least as far as you knew at that point the individual
7 approached you, he didn't know who you were or what your company
8 was?

9 A. As far as I could tell, he didn't.

10 Q. Sir, let me ask you this question. Is it not true that --

11 Can I go back up? Scroll back up to the question.

12 This event that you told the court under oath occurred
13 in the spring of 1986 while you were working at this Oliver Carr
14 building where a member of the Tobacco Institute walked up, had
15 a conversation. Isn't it a fact that event actually did occur
16 exactly as you stated there, except it occurred 14 months before
17 you ever started working at this company? Isn't that a fact?

18 A. No, that's not a fact.

19 Q. Isn't it a fact you fabricated this in order to try to make
20 yourself appear to be involved in the event when, in fact, you
21 weren't even working at the company when the event occurred?

22 A. No, that's untrue.

23 MR. WEBB: Could I show the witness JD 023500? If I
24 could call that up on the screen.

25 Can I show the full document just for a minute?

1 Q. This document is dated in December of 1984; is that correct?

2 A. That's what the document says.

3 Q. And that's -- is that 14 months before you started working
4 at the company?

5 A. Yeah, that would be.

6 Q. And do you see there, there's a business card there that,
7 you're right, it was John Maderis. His business card is Xeroxed
8 onto this page; is that correct?

9 A. I see his card there, yes.

10 Q. And the name Gray Robertson is actually written on that
11 card; is that correct?

12 A. I see that as well.

13 Q. If we read this document over, here's what we will find out.
14 It says to Marvin Kastenbaum from a Daniel Melway. Subject:
15 ACVA Atlantic, Inc.

16 That's the company that you eventually worked for; is
17 that correct?

18 A. That's correct.

19 Q. Did you later learn when you worked at HBI that
20 Mr. Kastenbaum and Mr. Melway, they are with the Tobacco
21 Institute?

22 A. As I previously stated, I was with John Maderis in the
23 Oliver Carr building at the time that I testified to. We were
24 approached by an individual from the Tobacco Institute and we
25 were given -- we referred him to Gray Robertson. I was there

1 when that took place.

2 Q. My question is -- all I'm asking you, sir, is do you at
3 least know that the names Marvin Kastenbaum and Daniel Milway,
4 those are officials -- did you later learn those are people
5 connected to the Tobacco Institute?

6 A. I have no idea who either one of those individuals are.

7 Q. Well, let's read what these folks say here.

8 They say: "This outfit," apparently referring to ACVA,
9 "was in on 12/21" -- December 21 -- "to test the air quality on
10 our floor as well as all other floors in the building. They are
11 under contract to Oliver T. Carr Company to sample twice per
12 year and to provide Carr with a written report addressing a
13 snapshot of particulate as well as a cumulative since the last
14 report. The man who was here said he was sure that the company
15 would be glad to show us a sample report. He suggested we call
16 Gray Robertson."

17 "I mentioned the subject to John Rupp who suggested you
18 might want to see what could be obtained."

19 Now, that clearly is referring to the same event you've
20 testified about, the event occurring in the Oliver Carr building
21 when someone came up to you, took a business card away, but it's
22 the same event, isn't it?

23 MS. EUBANKS: Objection, Your Honor. That's not what
24 the witness's testimony was in terms of how that question was
25 phrased because the witness has already testified --

1 THE COURT: The objection is overruled. The witness
2 may answer the question.

3 BY MR. WEBB:

4 Q. I'll rephrase the question, sir.

5 The event you've sworn under oath to this court you
6 personally participated in, in the Oliver Carr building, is
7 clearly the same -- the event you put in your testimony is the
8 same event that is in this memo here, is it not?

9 A. No, it's not. This appears to be an event that took place
10 in December of 1984. The event that I have testified to took
11 place in the spring of 1980 -- whatever.

12 Q. Six?

13 A. Six.

14 Q. Let's go back to your testimony, then.

15 Could we put his testimony back up on the screen.
16 Let's go back to the question that you were asked. Can I put
17 the question back up? It's the bottom of page 2.

18 "To your knowledge, when did HBI first become involved
19 with the tobacco industry?" Do you see that question?

20 A. Yes, I see it.

21 Q. You answered the question on the next page.

22 The answer was, you told this court "In the spring of
23 1986," and you go on to explain this whole incident in an Oliver
24 Carr building in DC where the Tobacco Institute walked up, gave
25 him a business card, and told him to contact Gray Robertson.

1 That's what you're saying; right?

2 A. That's exactly what I've testified to, that's correct.

3 Now, a -- and I think I also testified earlier today
4 that I don't know if HBI had a previous -- had a previous
5 engagements with Tobacco Institute prior to that time or not.
6 They may have.

7 Q. I'm sorry. The question was, to your knowledge, when did
8 HBI first become involved? At least as far as you know they
9 became involved because of this event at --

10 A. As far as I knew.

11 Q. Okay. Are you suggesting to the court that the same
12 identical event in an Oliver Carr building in Washington, DC
13 actually took place 14 months earlier?

14 A. No, I'm not suggesting the same identical event. I'm
15 suggesting a different event. I'm not suggesting it. I'm
16 telling you a different event took place. I stand by my
17 testimony. It took place as I said it did.

18 Q. Have you ever had any memory problems?

19 A. No.

20 Q. Sir, to show that there's no -- strike the question.

21 Can I have -- are you aware -- did you come to learn or
22 believe that the first project that was actually carried out by
23 HBI for the Tobacco Institute after the incident in the Oliver
24 Carr building in December of 1984 was for HBI to review their
25 existing building inspection reports that they had done over the

1 years to give a report to the Tobacco Institute as to the
2 general role that ETS played in these earlier buildings that
3 they had inspected?

4 Do you recall that?

5 A. No, not at this point. No, I don't recall.

6 THE COURT: By the way, I just want to make sure that
7 you meant to say December 1984 in your question.

8 Excuse me. I'm not speaking to you.

9 Mr. Webb, did you mean to say December 1984 in your
10 question?

11 MR. WEBB: I did.

12 THE COURT: Okay.

13 BY MR. WEBB:

14 Q. Sir, did you learn after you came to the company that after
15 the Oliver Carr event that occurred in December of 1984, that
16 after that, the first consulting project was actually carried
17 out long before you came to the company by HBI for TI, and that
18 it dealt with giving them a report on buildings that the company
19 had previously inspected before the relationship started?

20 A. My answer is no. I have no knowledge of what HBI business
21 was conducted with Tobacco Institute prior to my employ. I can
22 only testify to what events took place post employment date.

23 MR. WEBB: Can I have -- could I show the witness JD
24 080236?

25 Q. Now, have you seen this document before, sir?

1 A. No.

2 Q. Okay. And at any point in time did you become aware that
3 HBI in April of 1985, eight or nine months before you came to
4 the company, did their first consulting work for TI and gave
5 them a report on 102 building inspections that had been
6 requested by TI? Did you become aware of that?

7 A. No, I was not aware of that.

8 Q. And, although this is eight months before you came to the
9 company.

10 A. I said I was not aware of that.

11 Q. No, I'm sorry. Strike it.

12 This report is dated before you started working at the
13 company; is that correct?

14 A. That's correct.

15 Q. Now, Mr. Simmons, you stopped working for HBI in May of
16 1989 -- strike it -- sometime in 1989, approximately May. Does
17 that seem about right to you?

18 A. It was about April of '89, thereabouts.

19 Q. And I believe you testified in your direct examination that
20 you resigned because you had burned out, because you had a
21 family and you were frequently out of town on business travel
22 and it wasn't worth it.

23 Is that the testimony you've given to this court?

24 A. It is.

25 Q. And am I correct, sir, there were some incidents that had

1 occurred between you and the company that occurred that led to
2 your departure from the company? Is that fair to say?

3 A. It's fair to say that I resigned from the company, yes.

4 Q. Let's talk about it. Before you resigned from the company,
5 in the last part of 1988 were you working on a building clean-up
6 project in Florida?

7 A. Yes, I was.

8 Q. Did an incident or incidents occur where several members of
9 your team reported back to HBI that you had been intoxicated
10 while working and had overslept during the job?

11 Did you recall people at least making that allegation?

12 A. I'm not going to testify as to what some other people may or
13 may not have said. I have no idea as to what may have been
14 said.

15 Q. Maybe I should ask it this way.

16 After these employees made that report, did you have a
17 meeting with Mr. Robertson and Mr. Maderis in which they
18 discussed the incident with you?

19 A. If I remember correctly, there was a termination meeting. I
20 resigned from the company. I walked off the job in Florida and
21 that was the end of my employment,thereafter.

22 Q. Well, the job in Florida was at the end of 1988; is that
23 correct?

24 A. Let me -- you're correct, yes. It was in 1988, and I did
25 not resign until some months after that, that's correct.

1 Q. That's all right. If you make a mistake, you can correct
2 your testimony, sir.

3 But the incident that occurred in October of 1988 in
4 Florida led to a meeting between you and Mr. Robertson and
5 Mr. Maderis where they talked to you about this incident that
6 had occurred in Florida at work; at least there were people
7 saying that you had been drinking too much and were sleeping on
8 the job. Did you have a discussion with them about that topic?

9 A. I had a discussion about the entire project.

10 Q. No --

11 A. I don't recall a discussion regarding sleeping on the job,
12 which did not take place, as a matter of fact, or drinking on
13 the job.

14 Q. Okay. I just want to make sure I'm clear.

15 You don't recall any meeting in late 1988 where
16 Mr. Robertson and Mr. Maderis sat down with you in an office,
17 talked to you about the drinking issue and the sleeping issue,
18 and Mr. Maderis told you at that time he thought you should be
19 terminated? You don't recall any meeting like that?

20 A. I think I just said I recall having a meeting with them
21 regarding -- regarding that entire project.

22 Q. Did it include at least a discussion of this drinking issue
23 and their dissatisfaction with your performance?

24 A. I don't remember the exact content of the conversation. It
25 was project related.

1 Q. Well, did Mr. Robertson and Mr. Maderis tell you that they
2 wanted to give you a chance and allow you to continue to work at
3 the company and you said you wanted to continue to work at the
4 company? Is that what happened?

5 A. That's correct, and I did.

6 Q. And you worked the next several months; is that correct?

7 A. That's correct.

8 Q. And then one night in May of 1989 in the middle of the
9 night, you called up Mr. Robertson in the middle of the night
10 and told him he could stick his job. Is that correct?

11 A. That's fairly precise.

12 Q. And he told you the next day that he would like to meet with
13 you, and before you could meet with him, you resigned; is that
14 correct?

15 A. Actually, I resigned in the course of the conversation on
16 the telephone.

17 Q. Would it be fair to say that when you left the company there
18 were hard feelings on your part?

19 A. No, there weren't. I was just tired of the work and was
20 ready to move on to something else. I had no hard feelings.

21 Q. Well, I'm not going to go into this at all to any extent,
22 but I will -- can I ask a question and then I'll move on?

23 A. Sure.

24 Q. There at least were -- you had some drinking issues in your
25 life during this time period. Is that fair to say?

1 A. That's a fair characterization.

2 Q. I'm going to drop it.

3 Now, could I have the direct examination on page 5
4 called up on the screen?

5 I'm on page 5, sir. While I'm calling it up, what I
6 want to direct your attention to is that -- it's on line -- no,
7 could you just go back up? I want to go from line 3 to -- cull
8 out the first part.

9 You're telling the court here that at some point in
10 time a Mr. Benney, that we've identified, had a number of
11 instructions and ground rules for us to follow that applied to
12 all -- you underlined the word all -- of the buildings we
13 inspected, private and public.

14 Do you see that testimony?

15 A. Yes, I do.

16 Q. And I want to go through each of these instructions and try
17 to find out some details about them for the court's benefit if I
18 may, sir. Let's start with the first one.

19 It says, "When taking air samples for nicotine tests,
20 we were instructed to take air samples in lobbies and other
21 easily accessible areas where the circulation was best, thus
22 reducing the readings." Do you see that?

23 A. Yes.

24 Q. Now, let me focus on that just for a moment.

25 Now, as I understand testimony that you've given, you

1 gave a deposition in a case called Seckler versus HBI. Do you
2 recall that, sir?

3 A. Yes, I do.

4 Q. And if I understand it correctly, your testimony on this is
5 that not only were you supposed to take air samples in lobbies
6 where circulation was best, but you also were supposed to do it
7 where no smoking was going on; is that correct?

8 A. I don't have the testimony in front of me, but that's
9 reasonable to --

10 Q. Is that your recollection of what Mr. Benney told you?

11 A. We were instructed to take samples in areas such as lobbies
12 or small office spaces where it was -- ventilation was good and
13 smoking was probably less of an issue.

14 MR. WEBB: Could I have his deposition? Hand him his
15 deposition testimony in the Seckler case. Can I have -- it's
16 tab 12. Can I have his testimony from page 118 of his
17 deposition in the Seckler versus HBI case?

18 Q. And line 16, what I'm going to call to your attention, sir,
19 is that this is testimony you gave in a case called the Seckler
20 case; is that correct? If you look at the front of it.

21 A. Yes, it is.

22 Q. And you were asked this question. "Were there no cigarettes
23 being smoked? Is that correct?"

24 And your answer, "Sometimes they were in areas where no
25 cigarettes were being smoked. Other times they were --

1 cigarettes were being smoked. The instructions that we received
2 were to try and take them in areas where there's not smoking
3 going on that are well ventilated and easily accessible as
4 stated."

5 So if I understand your testimony there, the
6 instructions that you received from Mr. Binnie were to go to
7 areas where there's not smoking going on and where there's well
8 ventilated and easily accessible. Is that the instruction you
9 received?

10 A. That's basically what I've testified to, yes.

11 Q. Okay. Now, first of all, why don't we start with basics?
12 Would you explain to the court, what is a nicotine test?

13 A. At the time the test that was being performed was -- it was
14 an air sampling pump, a small portable air sampling pump that
15 was fitted with Tygon tubing and, if I remember right, an
16 XAD2 -- it was either XAD2 or XAD4 sorbent tube.

17 A known volume of air was drawn through the sample pump
18 for a known amount of time and then the samples were submitted
19 for laboratory analysis.

20 Q. I want to focus -- I didn't mean to cut you off. I
21 apologize.

22 A. That's fine.

23 Q. Did you have more to say to your answer?

24 A. No.

25 Q. The testimony you gave in the Seckler case is that you say,

1 "Sometimes they were in areas where no cigarettes were being
2 smoked. Other times they were in areas where cigarettes were
3 being smoked."

4 Do I -- if I understand the nicotine tests, when you
5 did nicotine tests, the idea was, is that you normally would try
6 to measure an area of the building where smoking was actually
7 occurring, like offices or smoking area, and then you would take
8 an air sample of an area of the building where smoking was not
9 allowed, like a lobby or a public accessible area, so you could
10 compare the two with each other.

11 Is that generally what you did?

12 A. That would -- that was the general protocol, and in some
13 cases you were able to follow protocol and some cases you
14 weren't.

15 Q. That's fine. The idea was if you're going to check nicotine
16 in the air and you want to have some way to compare it, the idea
17 at least, or the normal protocol, as you say, was you go -- you
18 try to go to one area where smoking is going on and you take
19 your test of the nicotine level, then you go to an area where no
20 smoking is going on, well ventilated, and you do a test there
21 and then you have something to compare to each other.

22 Was that the normal way you approached it?

23 A. We approached it the way we were instructed, which was to
24 place the samples in areas that were well ventilated, generally
25 easily accessible, and for the most part where there was no

1 smoking taking place.

2 Q. In your answer you said sometimes they were in areas where
3 no cigarettes were being smoked, other times they were in areas
4 where cigarettes were being smoked.

5 So I take it -- I thought what you were saying there is
6 that you did in both types of places.

7 A. At times, yes.

8 MR. WEBB: Could I come back to page 5 of his
9 testimony?

10 Q. So, when you tell the court that Mr. Binnie told you that
11 when taking air samples -- strike the question.

12 So, are you telling the court that you went ahead, just
13 so we know what you're telling the court, as a field technician,
14 are you telling the court that you followed Mr. Binnie's
15 instructions and that when you went out and did field testing,
16 that you would take air samples only in lobbies or easily
17 accessible areas or areas where no smoking was going on? Is
18 that your testimony?

19 A. That's what it says.

20 Q. And did you -- I take it you followed his instructions?

21 A. We followed the instructions we were given, yes.

22 Q. Okay. By the way, those instructions that you received, did
23 you ever get those instructions in writing from Mr. Benney?

24 A. Not that I recall.

25 Q. Did you ever take any notes --

1 THE COURT: Mr. Webb, I think it's Mr. Binnie.

2 MR. WEBB: Binnie. I apologize.

3 THE WITNESS: It's Binnie. That's the way we used to
4 pronounce it.

5 BY MR. WEBB:

6 Q. I'll pronounce it that way. Mr. Binnie.

7 As far as when Mr. Binnie gave you those instructions,
8 am I correct, your recollection is that that instruction was
9 given to you about how to sample for the air test for nicotine,
10 that occurred just about the time of or during the time of that
11 HBI took on a project to sample some 500 buildings for nicotine;
12 is that correct.

13 A. That's correct.

14 Q. And that would have been in 1989; is that correct?

15 A. I don't remember the exact date when that project started,
16 but it was close to the end of my time period with HBI, so that
17 puts it in that general time frame.

18 Q. You were involved in a major project that HBI undertook for
19 the Tobacco Institute to do some testing at approximately 500
20 office buildings; is that correct?

21 A. That's correct.

22 Q. And you did participate in that 500-building study; is that
23 correct?

24 A. I conducted some of the testing, yes.

25 Q. Now, isn't it a fact, sir, that what Mr. Binnie actually

1 told you at that time was that as you did your air samples, that
2 you should try to take nicotine air samples in easily accessible
3 areas and he said nothing about making sure it was nonsmoking or
4 low smoking areas? Isn't that true?

5 A. No, that's not true. That's not what I testified to.

6 MR. WEBB: Could I have his -- if I'm -- could.

7 Q. I'm going to call your attention to your deposition in the
8 Seckler case, page 113. If you can go to that. Could I have
9 page 113 called up on the screen from his Seckler deposition.

10 At line 2 to 12. Sir, were you asked this question and
11 did you give this answer.

12 "With respect to instruction number one -- which I
13 think is referring to the nicotine test -- you might want to
14 take a look at it, is this all that Mr. Binnie said about where
15 you should, what locations you should take the nicotine tests
16 in?

17 "Answer: The way I remember it is just like it's
18 stated. We were pretty much told to collect samples in easily
19 accessible areas. That's pretty much it. The collection of the
20 nicotine samples in these studies were looked upon by the staff
21 as just an additional test to be done added to an already heavy
22 workload on the projects that were being performed."

23 Do you recall giving that testimony?

24 A. I gave that testimony, yes.

25 Q. Thank you.

1 Now, sir, if we actually were to look at some of the
2 building inspection test forms that you actually filled out
3 during the 500-building work, it becomes clear that you did
4 nicotine tests all the time in office areas where people smoked
5 and in areas where the circulation was not like a lobby area.
6 Is that correct?

7 A. I haven't reviewed those documents in years. I don't know
8 if that's correct or not.

9 Q. But if we want to find out if you're telling the truth we
10 could find it out by looking at your test results, can't we?

11 A. If you can -- if you can -- if you can depend upon the
12 validity of the paperwork that you have, I assume that you might
13 be able to do that.

14 Q. Okay. Let's look at some of them and let's see.

15 Could you hand to the witness JD 054238? If I could
16 have that called up on the screen.

17 This is called an ETS test form. Do you see that?

18 A. Yes.

19 Q. This one is dated January 16, 1989. Do you see that?

20 A. Yes.

21 Q. Do you see who the inspector is, RS?

22 A. Yes, sir.

23 Q. Do you know who RS is?

24 A. Yes, this is my handwriting. I filled this out.

25 Q. You filled this out, and this is for, it looks like the

1 address is in Fairfax, Virginia. Do you see that up in the
2 left?

3 A. Actually, that's the address of ACVA Atlantic.

4 Q. I'm sorry. That's my mistake. Can we tell where the
5 building is here?

6 A. I can't. Can you?

7 Q. I'm just asking. Is there some place on here where you
8 write down the building that you're at?

9 A. There does not seem to be a building location or a name on
10 this form.

11 Q. Okay. Then I'll go to the next one.

12 Well, when you're filling this -- just so I understand.
13 You wrote down the name client here. Are you doing testing at
14 your own facilities here?

15 A. I'm not sure exactly what you're referring to. Do you want
16 to --

17 Q. It says at the top -- do you see where it says "client"?

18 A. Client, ACVA Atlantic.

19 I don't know. This was January of 1989. I have no
20 idea what this form was -- what building it was collected at, I
21 have no idea.

22 Q. But you did the inspection; is that correct?

23 A. Apparently.

24 THE COURT: Well, on the right-hand side at the top
25 there's a line saying "job number." Would this refer -- does

1 that refer to the particular job in question?

2 THE WITNESS: If I remember right, every job that we
3 were given was assigned a job number and so there would be some
4 record of the location. It's possible that this was a test that
5 was conducted right in HBI's office. I don't remember.

6 BY MR. WEBB:

7 Q. As part of doing a testing of 500 buildings, is one of the
8 buildings out of the 500 that actually was tested was ACVA's
9 actual headquarters, if you remember?

10 A. I don't know. I don't remember.

11 Q. That's fine. As far as the test you performed that day, if
12 I'm reading this correctly, if we look at the first column
13 there, it says, "type of business" and it says -- I can't read
14 your handwriting. It talks about some kind of office you're
15 testing; is that correct?

16 A. It says consulting office.

17 Q. That's a consulting office. Okay.

18 And in that office, if we go down to -- can we cull
19 back out so the court can see the question? There's a question
20 about the total number of cigarettes smoked. Do you see that on
21 the form?

22 A. Let's see here.

23 Q. If you look at --

24 A. Yes, I do.

25 Q. Okay. Just so I understand and the court understands. When

1 you're doing a test, are you trying to report your observations
2 so that it will mean something when someone examines and looks
3 at the test results?

4 A. Yes. We recorded observations during the testing period.

5 Q. You were instructed by Mr. Binnie and other superiors at
6 your company that when you're testing a smoking area, to try to
7 count the number of cigarettes you believe you observed smoking
8 during the test; is that correct?

9 A. That's correct.

10 Q. And so in this particular one -- how long would it have
11 taken you to do that consulting office test, approximately?

12 A. Well, from the data, it looks like it started at 11:00
13 o'clock and stopped at 12:00 o'clock, so it would have been an
14 hour which was pretty standard.

15 Q. Is that standard?

16 A. If I remember correctly, yes.

17 Q. So, in that office, then, you observed five cigarettes being
18 smoked?

19 A. That's what it says.

20 Q. And then in the right-hand column, the other type of
21 business is some other -- it says consulting office, also; is
22 that correct?

23 A. That's correct.

24 Q. And it apparently had the same dimensions; is that correct?

25 A. It was the same space.

1 Q. And in that particular office you observed four cigarettes
2 being smoked?

3 A. Correct.

4 Q. So at least on this particular building in 1989 you were not
5 following Mr. Binnie's directions, are you?

6 A. This was the -- apparently, this was the consulting office
7 of ACVA Atlantic. There were no separate lobby areas or
8 nonsmoking areas. It was a smoking office.

9 It would have been impossible to follow Mr. Binnie's
10 directions for this particular building because of the physical
11 layout of the property.

12 Q. So you went ahead and tested offices where smoking was going
13 on?

14 A. In this particular case, the test was run where there was
15 smoking taking place, yes.

16 Q. And you couldn't find an office where someone didn't smoke
17 in it?

18 A. It was an open office plan that you didn't -- the answer to
19 your question, no.

20 Q. Do you think that's the only time you ever did a field test
21 where you measured smoke -- measured nicotine in areas where
22 people were smoking?

23 A. There may have been others. I don't recall.

24 Q. Well, if you were following Mr. Binnie's instructions there
25 wouldn't be any others, would there?

1 A. Technically, no, there wouldn't.

2 Q. Let's -- could I show the witness JD 054243, if I could, and
3 call that up on the screen. The exhibit I have on the screen,
4 sir, I've given you a hard copy of it and I've given one to the
5 government. This appears to be -- the client is listed as Chevy
6 Chase Land Management. Do you see that?

7 A. I see it.

8 Q. And it's got an address there. Do you recall this
9 particular inspection?

10 A. No.

11 Q. This was done on January 26, 1989; is that correct? That's
12 the date that's on there?

13 A. That's the date that's on the form.

14 Q. And the inspectors are someone named, initials GW and I
15 believe URS; is that correct?

16 A. What I see here is GW as the inspector. It appears that my
17 initial have been added after the fact.

18 THE COURT: Wait a minute. Where is that? I see.

19 BY MR. WEBB:

20 Q. You think someone tampered with this form?

21 A. I have no idea. I don't recall doing the inspection, and I
22 obviously -- I don't recall filling out this form. I don't know
23 who put my initials on the form.

24 THE COURT: Does that look like your handwriting?

25 THE WITNESS: No, ma'am, it's not. It does not look

1 like my handwriting.

2 BY MR. WEBB:

3 Q. At least whoever did this -- my understanding is that your
4 instructions were to go in two-person teams when you did your
5 inspections?

6 A. We generally had two-person teams, but if you -- if I can
7 refer you back to the first test form that you presented me, you
8 will notice that there's only one set of initials on that form
9 and it's mine.

10 Q. I just want to make sure I understand.

11 Are you telling the court that when you have two
12 inspectors that go to the job you only write down the initials
13 of one.

14 A. No. I'm telling you that there -- there were times when
15 single inspectors were sent out to project sites. It was not
16 that uncommon.

17 Q. Well, at least this -- whoever went out did not follow
18 Mr. Binnie's instructions here; is that correct?

19 A. I'm not going to testify as to what GW may or may not have
20 done.

21 Q. Why don't we look at the form and we will see?

22 Do you see the type of business? It says here it's an
23 insurance business. Do you see that on the left-hand column?
24 Type business. Do you see that? Number one.

25 A. Yes, I see that.

1 Q. And does it appear to you that they are testing in an area
2 where cigarettes are being smoked?

3 A. It would appear that way.

4 Q. And then the second location, the second place at that
5 building is also another -- looks like an insurance-type office
6 and cigarettes are being smoked there. Is that correct?

7 A. According to the form.

8 Q. Let's go to another one. Can I have JD 054237 called up,
9 please?

10 Sir, do you have that exhibit in front of you?

11 A. Yes.

12 Q. And the name of the client is Crestar. Do you see that?

13 A. Yes.

14 Q. In Richmond, Virginia?

15 A. Yes.

16 Q. Do you remember this inspection?

17 A. No, I do not.

18 Q. Do you see your initials there as the inspector?

19 A. Yes, I do.

20 Q. Do you recognize the handwriting?

21 A. Yes. It looks like I filled this form out.

22 Q. So on this particular inspection, does it look to you like
23 you did not follow Mr. Binnie's instructions?

24 You did not -- you did not test in an area that was
25 like a lobby with great circulation, the best circulation, and

1 you also test -- did not avoid smoking areas, did you?

2 A. I'll answer your question this way.

3 In many instances there were only specific parts of the
4 building that we had access to in which we could test, so tests
5 were conducted in the areas to which we had access.

6 Q. Well, in this case if you look at the left-hand column, you
7 were inspecting an office; is that correct?

8 A. That's correct.

9 Q. I can't read your writing. Does that say 12?

10 A. It looks like it says 12th floor south.

11 Q. And at least in that office you observed one cigarette being
12 smoked during the test time; is that correct?

13 A. That's what the form says.

14 Q. And then in the second column, the type of business, it's
15 also an office, and you observed two cigarettes being smoked in
16 that particular office; is that correct?

17 A. That's correct.

18 Q. So at least on this particular occasion you did not follow
19 Mr. Binnie's instructions and avoid testing where smoking was
20 going on?

21 A. In this particular occasion, we conducted -- I conducted the
22 test in the area that was accessible to us.

23 Q. I'm sorry. Do you actually remember the occasion? Is that
24 what you're telling me?

25 A. No. I'm telling you based upon what this form says. I

1 conducted the test in the area that was made available to us
2 obviously at the time.

3 Q. First of all, you told me a moment -- you don't remember the
4 test?

5 A. No, I do not.

6 Q. So you don't remember what the building looked like?

7 A. The Crestar Building in Richmond? Yes, I remember what the
8 building looks like.

9 Q. You tested it before this occasion?

10 A. I've been in the Crestar Building many times over the course
11 of the years.

12 Q. Are you telling me there's nowhere in that building that you
13 could find an area that did not have smoking in it? Is that
14 what you're telling the court?

15 A. No. I'm telling you that it appears that these tests were
16 conducted in specific areas of the building, and it is my best
17 guess that those were the areas that were made available to us.

18 Q. Did you call up Mr. Binnie and tell him you had to violate
19 his instructions on this inspection?

20 A. No.

21 Q. Let me go to another one. If I could call up JD 054235.
22 I'll get you a copy here, sir.

23 This appears to be the Wisconsin AFL-CIO Building in
24 Milwaukee, Wisconsin; is that correct?

25 A. That's what it appears to be.

1 Q. And do you recognize the handwriting on this form?

2 A. Some of it.

3 Q. Is some of it your handwriting, sir?

4 A. Yes.

5 Q. Do you see this inspection as occurring on April 18, 1989?

6 A. Yes.

7 Q. And do you see that you put your initials down as RS, did
8 you not?

9 A. That's correct.

10 Q. And you also wrote down someone else's initials called KS;
11 is that correct?

12 A. That's correct.

13 Q. So you chose, as you filled out this form, to put down the
14 initials of both inspectors?

15 A. That's correct.

16 Q. And so there's nothing unusual about that, is there?

17 A. Not in this particular case.

18 Q. Well, was there something unusual about it on the earlier
19 form when you said someone else must have added your initials to
20 it?

21 A. It appears to me that my initials have been added after fact
22 on the form you're referring to, if you're referring to the GW
23 form.

24 Q. Tell the court, why do you think someone added your initials
25 to that form?

1 A. Well, I'm not a handwriting expert, but it looks to me like
2 whoever wrote that has different penmanship than the person that
3 filled this form out.

4 GW is Greg Walchin. I know what those initials stand
5 for. It doesn't appear to me that Greg Walchin wrote RS on this
6 form.

7 Q. You're telling the court that GW did not write RS on this
8 form?

9 A. I'm not a handwriting expert. I'm telling you it looks to
10 me like someone else besides GW wrote those initial there.

11 Q. In any event, we now know from the exhibit you're looking
12 at, JD 054235, when you filled out reports you often wrote down
13 the name of both inspectors; is that correct?

14 A. I would write down the initials of the inspectors. I don't
15 recall ever writing down full names. It may have taken place.
16 But the initials were generally used.

17 Q. So generally you would write down the initials of both
18 inspectors?

19 A. If there were two.

20 Q. So here there were two; is that correct?

21 A. Apparently.

22 Q. And if we look at the type of testing you did at this
23 facility on April 18, 1989 -- I'm trying to read your writing
24 again. On the left-hand column on Type of Business, does that
25 say "Nurses Office"?

1 A. I don't know. That's not my writing.

2 Q. Can you read the writing? Does it say?

3 A. It looks like nurses something-or-other office. I don't
4 know what the middle word is, but it says "nurses office" of
5 some type. "Nurses union office," maybe.

6 Q. I think that's right.

7 And at least on this occasion the test occurred in an
8 area where smoking was going on and the observation was that
9 three cigarettes were smoked during the test; is that correct?

10 A. That's what the form would indicate.

11 Q. And then in the right-hand column, the other location tested
12 here, was called "union office." Do you see that?

13 A. Yeah. I think it says "union employee office."

14 Q. Union employee office. Is that your handwriting?

15 A. No, it's not.

16 Q. Okay. And at least during the test one cigarette was smoked
17 in that office according to the observation on this form. Is
18 that correct?

19 A. According to the form, yes.

20 Q. Which part of this form has your handwriting on it?

21 A. Let's see. I filled out the client information at the top
22 before you get into that first boxed area. And it looks like I
23 put in the notation down at the bottom relating to the
24 temperature at the time that we conducted the test.

25 Q. Okay. At least on this occasion, you and -- I'm sorry. Who

1 is KS?

2 A. I don't recall who that was.

3 Q. You and whoever your partner was on this inspection did not
4 follow Mr. Binnie's instructions on this occasion, did you?

5 A. On this occasion we were in a union building in Milwaukee,
6 Wisconsin, that was a smoking building. There were no
7 nonsmoking areas in the building.

8 Q. So you actually remember this inspection?

9 A. I remember going to Milwaukee.

10 Q. Do you remember the inspection?

11 A. I remember going to Milwaukee and performing the inspection
12 at the union building, yes.

13 Q. Just so I know. You remember as you sit here now precisely
14 that there was no area in that building that you could have
15 tested where there was nonsmoking?

16 A. If memory serves me correctly, there weren't nonsmoking
17 areas.

18 I can't swear that there may not have been a room or a
19 closet somewhere in the building where you couldn't smoke. But
20 it was a union building and smoking was allowed in the union
21 building.

22 Q. You're supposed to test only in lobby areas where there's
23 the best circulation. Did you test in a lobby area here where
24 there's the best circulation?

25 A. If I remember this building correctly, there wasn't any

1 circulation. It was a decrepit, old union building.

2 THE COURT: Well, if that's the case, why under "air
3 circulation ventilation" do you have written down for one room
4 that the air circulation ventilation was fair and for the second
5 room that it was good?

6 THE WITNESS: I didn't make those notations, ma'am.

7 MR. WEBB: Now, could I have JD 054236 called up and a
8 copy handed to the witness, please?

9 Q. I'm going to show you another form, which I think is a
10 companion form for that one, for the same AFL-CIO building
11 inspected on 4-18-89; is that correct?

12 A. That appears to be correct.

13 Q. And you're listed as one of the inspectors; is that correct?

14 A. That's correct.

15 Q. And you were one of the inspectors; is that correct?

16 A. Apparently.

17 Q. You don't actually recall it, but that's what the form says?

18 A. If this is the same building, and it seems to be, yes, I
19 recall doing an inspection at this building.

20 Q. And in this particular one in the left-hand column you're
21 doing a test in a secretary-reception area; is that correct?

22 A. That's what the note says.

23 Q. And that showed four cigarettes were being smoked at the
24 time of this test; is that correct?

25 A. According to the form.

1 Q. I take it the reason there's like one -- there's four lines
2 there is, are your instructions to kind of write down the number
3 of cigarettes as you watch them being smoked so you can keep
4 track of it?

5 A. We were told to record the number of cigarettes that were
6 smoked if we saw any, yes.

7 Q. The next place you tested on this occasion is in the lunch
8 room; is that correct?

9 A. I would assume so. It's written there.

10 I want to point out on this form once again, I filled
11 in pertinent client information, but other than doing the
12 averages at the bottom of the readings chart I did not fill out
13 the rest of this form.

14 The only lines I filled out were general area size, the
15 compass direction of the test area, and the local area size, and
16 that's in the first column. Everything else apparently was
17 filled out by someone else.

18 Q. Sir, is it your testimony that Mr. Binnie only instructed
19 you and no one else to test in the way of only testing the
20 lobbies where there's the best circulation and areas where
21 there's no smoking? Were you the only one that received those
22 instructions from Mr. Binnie?

23 A. No. The instructions were given at staff meetings to
24 whichever members of staff were present.

25 Q. So, whoever did this KS -- whoever KS is -- they did not

1 appear to follow Mr. Binnie's instructions on this occasion?

2 A. Can't speak for KS.

3 Q. Could I have JD 054241?

4 A. Thank you.

5 Q. This is an inspection report, ETS test form March 29, 1989.

6 And by the way, let me ask you.

7 These buildings were all being inspected in the time
8 frame in 1989, that's part of this 500-building inspection
9 project; is that correct.

10 A. If I remember correctly, yes.

11 Q. And you're listed here as one of the inspectors; is that
12 correct?

13 A. RS. I assume that's me.

14 Q. And do you know who MAP is?

15 A. I don't recall.

16 Q. Do you have any of your handwriting on this page?

17 A. Actually, yes. It appears that I filled out most of the
18 data recordings down in the lower portion of the page.

19 Q. Now, do you actually recall this building as to where this
20 building was located?

21 A. No.

22 Q. Does it appear in Washington, DC?

23 A. According to the address, it was 1225 I Street.

24 Q. As you sit here now in front of the judge, you don't
25 remember the inspection?

1 A. No.

2 Q. On that occasion it looks like there's two offices
3 inspected. One office on the ninth floor. Do you see that?

4 A. Yes.

5 Q. And in that office there was no cigarettes, but can you read
6 the writing? There's something about some sidestream smoke.

7 A. It seems to say sidestream smoke from peripheral office.

8 Q. And then it appears that an elevator lobby was tested and
9 one cigarette was smoked; is that correct?

10 A. According to the form, yes.

11 Q. Now, do you recall ever calling up Mr. Binnie after you did
12 inspections and tell him that you were not able to follow his
13 instructions?

14 A. No.

15 Q. Did Mr. Binnie ever look at all these reports you filled out
16 and ever tell you that he had discovered you were not following
17 his instructions?

18 A. No, not that I recall.

19 Q. You can take that down. Let me go to a different topic for
20 a minute.

21 In your direct examination to the court you have
22 some -- you answered some questions about a study that was
23 conducted in New York involving measurements in restaurants and
24 offices over a 10-day period; is that correct?

25 A. That's correct.

1 Q. And I want to ask you a few questions about that particular
2 study. In fact, why don't you in your own words describe that
3 study to the court?

4 A. You've done a pretty good job so far.

5 The study consisted of -- it was a study of office
6 buildings, if I remember correctly. It was somewhere in the
7 neighborhood of 240 locations of office spaces and restaurants.
8 It was conducted with members of the tobacco companies present
9 utilizing their equipment and supplies. And the object of the
10 study was to take readings of secondhand smoke in various areas.

11 Q. And this was being done for who?

12 A. It was being done under the direction of, if I remember
13 correctly, that would have been R.J. Reynolds' scientists that
14 were present at that particular study.

15 Q. Okay. Now -- so as I understand it, you and the people
16 working on the project, you would walk into a restaurant or an
17 office with this specially-designed briefcase that contained
18 some air quality testing equipment; is that correct?

19 A. That's correct.

20 Q. And you would then go into the location. You would turn on
21 the equipment in the briefcase. You would let it run for an
22 hour and then you would unload the data at a computer center in
23 New York City. Is that correct?

24 A. Yeah. The guys from R.J. Reynolds actually had computer
25 terminals set up at their hotel room at the Regency, and after

1 each test we would go back and they would download the data and
2 take out any sample materials from the briefcases, reload them
3 and send us back out.

4 Q. And you told the court that this took place in 1988; is that
5 correct?

6 Could I have -- go to page 10, line 22 and 23 so you
7 can make sure you're comfortable with that?

8 A. Yeah. I don't remember the exact date, but it would have
9 been somewhere in that time frame.

10 Q. Somewhere in 1988?

11 A. I think so, yeah.

12 Q. Okay. It was at a time, you say, when New York State
13 officials were considering antismoking legislation in 1988.
14 That's what you say there?

15 A. That actually would have been New York City officials rather
16 than state.

17 Q. That's fine. Do you want to correct that? You can correct
18 it now.

19 That should read: "In 1988, when the New York City
20 officials were considering antismoking legislation," that would
21 make it a truthful statement?

22 A. Yes, I believe it was.

23 Q. Okay. And go to the next page, on page 11, line 1 to 4.
24 You tell the court that it involved 240 restaurants; is that
25 correct?

1 A. That's -- if memory serves me correctly, it was roughly that
2 number.

3 Q. That's an odd number. Is there -- that's -- did you
4 actually remember when you prepared your testimony, do you
5 actually remember the number as being 240 studies of restaurants
6 and offices?

7 A. I don't remember the exact number. That's the reason I said
8 approximately.

9 There were six or seven technicians at times going to
10 two to three to four to five locations per day every day for
11 10 days. Do the math. However many it comes to.

12 Q. Let's go to page -- go to page 12, please, line 2 to 6.

13 If you look at page 12 of your testimony, sir, I'm
14 going to look at line 2 to 6 where you tell the court -- you
15 say -- "Question: Did you advise the owners of the restaurants
16 and office buildings that you worked for the Tobacco Institute
17 and its members?

18 "Answer: At no time did we tell anybody that we were
19 working with or for the Tobacco Institute and its members. We
20 were told to tell anyone that asked that we were doing a time
21 study within the space."

22 That's your testimony. That's correct?

23 A. That's correct.

24 Q. Now, have you testified in the past that the reason you
25 didn't tell anybody that you were working for TI is because no

1 one ever asked you who you were working for when you did these
2 tests?

3 Do you recall giving that testimony at any time?

4 A. I don't recall those exact words, no. I may have.

5 Q. Could I have the Seckler deposition and it will be page 161.
6 So if you want to look in your deposition on page 161, I'm going
7 to talk about line 12 to 18 where -- I'm going to ask you were
8 you asked this question and did you give this answer.

9 "Now, you say in the last sentence of this paragraph,
10 at no time did we tell anybody that we were working with or the
11 Tobacco Institute or its members R.J. Reynolds or HBI Lorillard?
12 Do you see that?

13 "Yes, I see that.

14 "Question: Were you ever asked who you were working
15 for?

16 "Answer: No. No one ever asked me."

17 Was that a truthful answer on your part?

18 A. Yes, it would have been truthful.

19 Q. Now --

20 THE COURT: Excuse me. I don't really quite understand
21 this restaurant study.

22 You all walked in with these little black boxes that
23 could have had a bomb in them, I guess, but in any event these
24 little black briefcases and you did your tests. And what did
25 the restaurant -- what were the restaurant owners or managers

1 told as to why you were there?

2 THE WITNESS: I don't know what they were told, ma'am.
3 We -- we were given instructions to go to the restaurants that
4 we were assigned to, whether it was breakfast, lunch or dinner,
5 and sit -- be seated, place the testing briefcase on a seat next
6 to us, turn it on, order a meal, stay the hour, make our
7 observations, turn it off and leave.

8 THE COURT: So you stayed the hour, and did you eat the
9 meal?

10 THE WITNESS: At times if it was lunchtime or dinner,
11 yes, we would eat the meal.

12 THE COURT: So would it be reasonable to say that you
13 acted like just a regular customer except you had this briefcase
14 with you?

15 THE WITNESS: That's exactly what we did.

16 THE COURT: Were you trying to hide the fact that you
17 were testing?

18 THE WITNESS: I wasn't personally, but it would appear
19 that way to me.

20 The testing equipment was enclosed in a leather
21 briefcase that had two or three very small openings to it. And
22 the way that you activated the test is when you would set the
23 briefcase down, and there was a brass switch at the top, you
24 would flip a switch and the briefcase would start operating,
25 basically taking in air samples and recording data.

1 No one knew -- no one could possibly know what was in
2 the briefcase. So it would appear to me that there was some
3 attempt being made to take measurements unbeknownst to the
4 people around us.

5 THE COURT: Did you identify yourself to either the
6 manager or the host or hostess?

7 THE WITNESS: I don't recall ever identifying
8 ourselves, no.

9 THE COURT: Did you pay for the meals?

10 THE WITNESS: The meals would have been covered under
11 our expense accounts, yes.

12 THE COURT: But while you were at the restaurant, did
13 you get the check and did you appear to pay for it?

14 THE WITNESS: Yes, ma'am.

15 BY MR. WEBB:

16 Q. There's actually a very specific protocol that was developed
17 by the people that designed the study that set forth exactly
18 what you're supposed to do; is that correct?

19 A. I would assume that there was a specific protocol, yes.

20 Q. You received instruction as to how to do this, did you not?

21 A. Yes, we were instructed.

22 MR. WEBB: Can I have JD 054244 called up, please?

23 Your Honor, it's actually 12:30. Apparently I
24 misplaced this exhibit, which I'll find immediately, but is it
25 all right to take a lunch break at 12:30?

1 THE COURT: All right. You may step down, sir. Thank
2 you.

3 We need to have a, actually, an air temperature
4 discussion which is appropriate. The air-conditioning, for some
5 unknown reason, has just gone on. We can leave it on over lunch
6 and maybe we will get some fresher air in here and then if
7 people get uncomfortable or freezing, I assume they will
8 indicate it. Are there any strong objections to that?

9 MR. WEBB: No.

10 THE COURT: Okay. Quarter of 2:00, please, everybody.

11 (Lunch recess began at 12:29 p.m.)

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1 INDEX

2 WITNESS: PAGE:

3 DONALD K. HOEL
4 DIRECT EXAMINATION 3058

5 REGINALD B. SIMMONS
6 DIRECT EXAMINATION 3103
7 CROSS-EXAMINATION 3105

8 *****

9 *****

10 CERTIFICATE

11 I, EDWARD N. HAWKINS, Official Court Reporter, certify
12 that the foregoing pages are a correct transcript from the
13 record of proceedings in the above-entitled matter.

14 Edward N. Hawkins, RMR

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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 20, 2004
	.	
Defendants.	.	
.	

VOLUME 16
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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1 AFTERNOON SESSION, OCTOBER 20, 2004

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

3 (1:49 p.m.)

4 THE COURT: All right, would the witness please take the
5 stand.

6 Mr. Webb, please.

7 MR. WEBB: Thank you, Your Honor.

8 CONTINUED CROSS-EXAMINATION OF REGINALD B. SIMMONS

9 BY MR. WEBB:

10 Q. Mr. Simmons, I'm going to pick up where we left off right
11 at the time of the lunch break and I was asking you about this
12 New York study that had been done and you had explained to the
13 Court how you did it. And I've handed you -- and I think I've
14 handed you Exhibit JD 054244. I'm going to put that up on the
15 screen.

16 And I take it -- were you generally aware that the people
17 who designed the testing program developed a protocol or
18 procedures to follow. Were you generally aware of that?

19 A. Yes.

20 Q. And if we just look at the first page of this exhibit, it
21 basically, on the first page, describes what was being done.
22 The test was being done in both restaurants and offices located
23 in New York City; is that correct?

24 A. Correct.

25 Q. And the -- it talks about this briefcase and the sampling

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1 system in the briefcase, and if you go to the page that -- and
2 this is actually Bates stamp 9074 -- you'll see some stamps on
3 the side. To help you find the page, do you see some stamps on
4 the page starting with 9074?

5 A. I've got it.

6 Q. Okay. So, this sets forth the criteria for selecting
7 restaurants. And just looking at that paragraph -- I don't
8 intend to ask you a lot -- did you participate in designing or
9 working on the criteria to develop restaurants that would be a
10 representative cross-section? Did you participate in
11 discussions about that?

12 A. No.

13 Q. Okay. The -- as I understand it, when you walked into a
14 restaurant, you would be seated wherever they decided to seat
15 you and you would put your testing equipment in the briefcase,
16 as you said, I think, on a table or chair near you; is that
17 correct?

18 A. That's correct.

19 Q. And am I correct, the one thing that you did not want to
20 do is that you did not want -- strike the question.

21 So the Court understands, what the study was designed to
22 measure was what would someone who does not smoke but was in a
23 restaurant exposed to the normal behavior in the restaurant might
24 experience in the way of ETS. Is that essentially what you are
25 trying to study?

1 A. You need to address that question to Mr. Oldaker, the
2 designer of the study. I was there to conduct testing.

3 Q. Okay. So you did not -- well, did you have any general
4 understanding that you were trying to test what someone who
5 didn't smoke would experience in a restaurant?

6 A. I had the understanding that we were to go into the
7 restaurant, place the sample cassettes, collect the samples,
8 report our observations. Other than that, no.

9 Q. Okay. Let me ask you this: Were you given certain
10 instructions on where to put the equipment so that you would get
11 accurate measurements?

12 A. We were told to, preferably, place the equipment on the
13 table top, if possible, secondary location would be an empty
14 chair at the table.

15 Q. Do you recall if you were told, for example, that when
16 you're in the restaurant as the tester, for you not to smoke
17 near the equipment because you wanted the equipment to measure
18 what someone who didn't smoke would receive? Do you recall
19 receiving those instructions?

20 A. I don't recall those instructions.

21 Q. Well, could I go to the next page.

22 Look at the next page in the document, and this page, I
23 think, sets forth -- it's one thing to walk into a restaurant and
24 sit down, but if you're going to walk into an office building,
25 you were aware that there was clearly prior contact with the

1 office building to let people know you were coming; is that
2 correct?

3 A. I have no idea what kind of prior contact may have taken
4 place. I was there to collect samples. I was not in charge of
5 running the test -- the program.

6 Q. I'm sorry, I didn't mean to interrupt. Just using your
7 commonsense, if you're going to go into somebody's office
8 building and sit down in their reception area or office area,
9 wouldn't you at least let them know in advance that someone's
10 going to be there doing some type of indoor air testing so they
11 don't start sending police up to arrest you or something?

12 MS. EUBANKS: Objection, your Honor. He's asking the
13 witness to use his commonsense, and we're here to gather the
14 facts. The witness is to --

15 THE COURT: I'll sustain the objection.

16 BY MR. WEBB:

17 Q. Well, looking at this page, do you see in this protocol
18 that prior to a visit, I think to an office visit, there's
19 provisions that were set forth to contact people 24 hours ahead,
20 if possible. Do you know anything about these procedures?

21 A. I wasn't in charge of any of the contacts that were
22 made --

23 Q. Okay.

24 A. -- if any.

25 Q. Were you usually with someone else when you were on these

- 1 inspections?
- 2 A. If I recall, there was usually one or two people,
3 usually. It was a long 10 days.
- 4 Q. Okay. And -- so the procedure set forth here that says
5 at the time of the visit you identify yourself as part of the
6 Tobacco Institute Air Sampling Study. You did not do that?
- 7 A. I never did, no.
- 8 Q. Do you know whether somebody else did?
- 9 A. I can't speak for someone else, I never did.
- 10 Q. Okay. Now, were you told, though, as far as how to do
11 these studies, that you were trying not to let people know you
12 were testing for smoking as opposed to some other kind of indoor
13 air sample because you didn't want people to modify their
14 behavior and skew the test results? Were you at least told
15 that?
- 16 A. The only pertinent instructions that we were given
17 regarding office space testing was that if we were questioned as
18 to what our activities were, we were to respond that we were
19 conducting a time study in the space.
- 20 Q. And did you understand that when you didn't tell people
21 that you were studying for smoke, that was because you didn't
22 want people to modify their behavior and skew the test results?
- 23 A. I don't know what the reason was for us to have a cover
24 story. I can't answer that question.
- 25 Q. If you -- could I go to the page -- the next page,

1 please.

2 If you look here at this page, there's some specific
3 directions about the -- by the way, the briefcase, was it called
4 Pass, P-A-S-S were you aware of that.

5 A. It was called the Pass Study, yes.

6 Q. Okay. And there were certain details, if you look at
7 this page about guidelines where to position the Pass such as if
8 you just follow like, for example, to make sure that it's at
9 least two feet away from walls, et cetera. As you read down
10 those guidelines, were you generally aware that there was a
11 desire to put this Pass machine where it would accurately record
12 what it's supposed to record?

13 A. There was some limited instructions to that effect,
14 however, generally what happened was you were in either an
15 office or a restaurant environment, placed at the will of
16 someone else, and you ran the sample in the location in which
17 you were placed, over which you did not have much control.

18 Q. But you at least were given some instructions about what
19 will be the ideal place to place the equipment?

20 A. If I recall, there was some limited discussion of it.

21 Q. Okay. And also -- you can take that down. I'm done with
22 that document, sir.

23 Am I correct, just so the Court doesn't have any
24 misimpression, the tobacco industry was not trying to hide the
25 study? After the study was done, it was publicly announced to

1 the media; is that correct? Are you generally aware of that?

2 A. I seem to recall that there was a media release just
3 prior to the City of New York coming out with their antismoking
4 legislation.

5 Q. So you do recall that the Tobacco Institute publicly
6 disclosed the results of its study? Do you recall that?

7 A. I can personally say that I believe that they disclosed
8 the study after the fact, yes.

9 Q. Okay. Now, let me direct your attention to another
10 subject matter that you talked about in your direct examination.
11 Could I call up tab 31? It will be page 5 of your written
12 testimony, if you want to locate that, sir.

13 What I want to talk about is the next instruction that
14 Mr. Binnie gave you to follow is number 2, and you have it in
15 your testimony: "If asked, always recommend to clients that any
16 air pollution problems could be solved by better ventilation."
17 Do you see that?

18 A. Yes, I see it.

19 Q. And that was one of his other instructions, according to
20 your testimony; is that correct?

21 A. That was a general company instruction, yes.

22 Q. Okay. Well, let's talk about that. I'll come back to
23 that in a minute. Let me complete this.

24 Had you heard the phrase: "Sick building syndrome".

25 A. Yes.

1 Q. Would you please tell the Court what is the "sick
2 building syndrome" which I think will become an issue as other
3 witnesses testify?

4 MS. EUBANKS: Your Honor, the sick building syndrome is
5 beyond the scope of the direct examination and they haven't
6 called Mr. Simmons as their own witness here. It's completely
7 outside of the scope.

8 MR. WEBB: Your Honor --

9 THE COURT: I thought he mentioned it in the direct.

10 MR. WEBB: I thought he did too.

11 THE COURT: Unless I'm confusing it with Mr. Robertson's
12 testimony.

13 MS. EUBANKS: Well, Your Honor, for purposes of expediting
14 the matter, I'll withdraw the objection.

15 THE COURT: All right. Go ahead please.

16 BY MR. WEBB:

17 Q. You don't need to go into elaborate detail, just explain
18 to the Court what is the sick building syndrome?

19 A. To my knowledge, I never have mentioned it in any of my
20 testimony in this particular case, but the sick building
21 syndrome would be the accumulation of indoor pollutants in a
22 building that could adversely affect the health of the
23 occupants, in a nutshell note.

24 Q. And sir, am I correct, based on prior deposition
25 testimony that you've given, you do agree, do you not, that

1 faulty ventilation, faulty filtration, and faulty HVAC systems
2 can be a major cause of the sick building syndrome; is that
3 correct?

4 MS. EUBANKS: Objection, Your Honor. If he's going to be
5 asked about prior deposition testimony that he's given the way
6 the question is phrased, I request that a copy be shown to him.

7 MR. WEBB: I'll strike the question.

8 BY MR. WEBB:

9 Q. Sir, just tell the Court, am I correct that based on your
10 experience, it's your view that faulty ventilation, faulty
11 filtration and faulty HVAC systems can be a cause of the sick
12 building syndrome; is that correct?

13 A. In my opinion it can be one of many causes, yes.

14 Q. Okay. And by the way, you also agree -- so we can follow
15 this along -- that as far as ETS is concerned, environmental
16 tobacco smoke, that's not one of the major pollutants in the
17 sick building syndrome analysis; is that correct?

18 MS. EUBANKS: Objection, Your Honor, he's not being called
19 as an expert.

20 THE COURT: Sustained.

21 BY MR. WEBB:

22 Q. Well, when you say here that you were told to recommend
23 to clients that any air pollution problems could be solved by
24 better ventilation, let's take -- is nicotine one of the
25 components in ETS?

1 A. Yes.

2 Q. And is nicotine one of the components of ETS that you're
3 trying to measure when you do indoor air measurements?

4 A. I would assume so, yes.

5 Q. And am I correct --

6 A. When you're doing specific testing for nicotine levels.

7 Q. Right. And so -- and do you agree, do you not, based on
8 your experience, that good ventilation and filtration can help
9 reduce nicotine levels in indoor air; is that correct?

10 MS. EUBANKS: Objection, Your Honor. Again, these go to
11 opinion issues and he hasn't been qualified as an expert in the
12 field he's here as a fact --

13 THE COURT: He didn't give his opinions on any of these
14 issues in his direct.

15 MR. WEBB: Your Honor, if he's trying to imply there was
16 something wrongful about what he instructed, I'm trying to bring
17 out there is nothing wrong with receiving this instruction.

18 THE COURT: Well, his testimony is factual, one can infer
19 whatever one wants from it, but he's not giving an opinion, and
20 it would seem to me that this is an opinion that requires being
21 certified as an expert or being deemed an expert, so I'm going to
22 sustain the objection.

23 MR. WEBB: Very well.

24 BY MR. WEBB:

25 Q. Sir, is it a fair statement that as far as the statement

1 here, and I think you just mentioned this a moment ago, that it
2 was your understanding your employer, HBI, had a basic theory
3 that it operated under which was that proper ventilation and
4 filtration and clean HVAC systems were the preferred solution to
5 curing indoor air problems; is that correct?

6 A. In general, there was an expression that was used.

7 Q. Okay.

8 A. "Dilution is the solution to pollution."

9 Q. It was actually printed in the company's promotional
10 materials; is that correct?

11 A. I don't recall.

12 Q. When you joined the company and worked at the company,
13 you were generally aware that that was a theme that the company
14 operated with; is that correct?

15 A. It was a general theme.

16 Q. Now -- and as far as your statement there, "if asked,
17 always recommend to clients that any air pollution problem could
18 be solved by better ventilation," just so I understand, am I
19 correct, sir, because of the nature of your job, when you were
20 in the field, am I correct, it was not part of your job duties
21 to make ultimate recommendations to the client about what they
22 should do with respect to indoor air problems; is that correct?

23 A. Let's see if I understand your question correctly. You
24 said, when I was in the field to make recommendations. Field
25 recommendations were made to building operations personnel on a

1 regular basis. In some cases that involved industrial hygiene
2 issues, such as cleanliness of the building or the air
3 conditioning systems, and in some cases it involved what we had
4 noted in the ventilation systems. But it was routine for us to
5 speak with the building operations people about what we found
6 during the course of our operations.

7 Q. You're talking about the building operation -- let me ask
8 the question and then I'll move on. Was a part -- was it part
9 of your -- was it part of your job when you were employed at HBI
10 to make ultimate recommendations to the client about what the
11 client should do with respect to indoor air problems?

12 A. I wrote reports that did have recommendations in them. I
13 was not responsible for the final editions of those reports.

14 Q. Let me show you, if you look in your deposition
15 testimony, could I have page 120, line 19 to 23, it's tab 40,
16 sir. I'm going to ask you, in the Seckler case were you asked
17 this question and did you give this answer. Question, "Was it
18 your job when you were in the field, Mr. Simmons, to make the
19 ultimate recommendation to the client about what they should do
20 with respect to indoor air problems they have?" You answered,
21 "No". Was that question asked and did you give that answer?

22 A. Apparently it was asked, and yes, I gave that answer.

23 Q. And was that a truthful answer?

24 A. For my understanding of the question at the time, yes.

25 Q. Okay. Now, you did write reports to your superiors on

1 what you observed when you did your field test; is that correct?

2 A. That's correct.

3 Q. And your superiors had the responsibility of preparing

4 reports to clients and making ultimate recommendations on how to

5 deal with indoor air problems; is that correct?

6 A. Pete Binnie and Gray Robertson, among others, edited and

7 issued final reports.

8 Q. Okay. You mentioned Mr. Binnie and Mr. Robertson as

9 editing final reports. They were part of senior management; is

10 that correct?

11 A. They were.

12 Q. They had the right on behalf of the company to maintain

13 control over what reports went to their clients; is that a fair

14 statement?

15 A. Apparently they did. That's the power that they

16 exercised routinely.

17 Q. And you also were aware that Mr. Simon Turner also

18 participated in editing final reports; is that correct?

19 A. Yes, he did.

20 Q. And did -- do you recall whether someone named Michael

21 Price also participated in that process of issuing -- of

22 drafting and issuing final reports to clients?

23 A. The name doesn't really ring a bell.

24 Q. Okay. Now, am I correct, you were not part of the

25 process of actually preparing the final reports to the client;

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1 is that correct?

2 A. I prepared the initial reports, in many cases, for the
3 buildings that I studied. And when I say "initial", I would say
4 that they were complete reports that were turned in for editing.
5 What went out after that is anybody's best guess.

6 Q. Well, let's just -- "anyone's best guess". You don't
7 know what actually went out because you did not participate in
8 preparing the final reports; is that correct?

9 A. The final reports were not prepared by myself, no.

10 Q. Okay. And it was your belief that Mr. Binnie and
11 Mr. Robertson had the right to edit it and review reports,
12 because they were corporate officers that had an interest in the
13 final work product that the company gave to clients; is that
14 correct?

15 MS. EUBANKS: Objection, relevance, Your Honor, to what
16 rights he believed that these individuals or corporate officials
17 had.

18 THE COURT: Overruled, he may answer the question.

19 THE WITNESS: Whether or not I believe they had a right to
20 edit the reports in a corporate sense, yes, as corporate
21 officers, it was their obligation to edit reports. It was not
22 within their rights to alter data in the reports.

23 BY MR. WEBB:

24 Q. I'm going to come to that. Just so I understand, you
25 agree, because they are corporate officers, they do have the

1 right to edit final reports to a client; is that correct?

2 A. From an editorial standpoint, yes.

3 Q. And as I understand the testimony in this case before
4 this Court, you never actually reviewed the final inspection
5 report before it was sent to a client; is that correct?

6 A. I don't recall reviewing any final reports before they
7 went out the door.

8 Q. Now, let me show you the testimony. It's on page 5 of
9 your testimony, sir.

10 Could I have tab 55, which is page 5. Starting on line 23
11 and going over to page 26. I just want to show you the testimony
12 and then ask you some questions, sir.

13 A. Sure.

14 Q. On page 5 you're asked the question: "How do you know
15 your reports were changed after you submitted them to Mr. Binnie
16 or Mr. Robertson?" Answer: "On many occasions involving
17 inspections of public and private buildings, I would later see
18 the inspection reports in the main files, and note that
19 Mr. Binnie or Mr. Robertson had changed the data in the
20 conclusions. For example, when I had recommended a restriction
21 or banning of smoking, Mr. Binnie would edit it out of the final
22 inspection report. It was also a standard practice for
23 Mr. Binnie to reduce the actual results of two significant tests
24 that were done on buildings. The tests for airborne particle
25 count, APC, and the test for weighing airborne particles, WAP."

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1 Now, that testing, what I want to do, I want to talk
2 about your two examples that you gave the Court. So let's start
3 with the first one. Your first example is that when you would
4 recommend a restriction on banning and smoking, Mr. Binnie would
5 edit it out of the final inspection report. Do you see that,
6 sir?

7 A. Yes.

8 Q. Can you tell me, first of all, can you provide to the
9 Court, so we can find out if that's an accurate statement, can
10 you tell me the client name of the first report where you
11 recommended this to occur and Mr. Binnie took it out?

12 MS. EUBANKS: Objection to the form of the question.

13 THE COURT: I don't know what the objection is. It seems
14 perfectly clear to me. Do you understand the question?

15 THE WITNESS: I think I understand it, Your Honor.

16 THE COURT: All right, you may answer it.

17 THE WITNESS: If memory serves me correctly, there was a
18 particular project that would have been the MCI telephone center
19 in Sergeant Bluffs, Iowa, in which there was some recommendations
20 made on my part regarding either restricting or creating specific
21 smoking areas within the building. And once again, if memory
22 serves me correctly, those recommendations were either edited out
23 or altered to such a point that they were not my original
24 recommendations.

25 BY MR. WEBB:

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- 1 Q. When was the date on that report, approximately?
- 2 A. I gave you a name and location, HBI should be able to
3 supply you with the date.
- 4 Q. Do you remember?
- 5 A. I don't recall the date.
- 6 Q. Okay. And do you recall who was with you on the
7 inspection?
- 8 A. No, I do not.
- 9 Q. And can you, just so I understand, can you -- what was
10 the actual recommendation you recall making?
- 11 A. If I recall, it was either -- I believe the
12 recommendation was the establishment of a specific smoking area,
13 because at the time, the building had an open smoking policy. I
14 don't -- and I know that somehow or another it was altered
15 before it went out of the door.
- 16 Q. And -- now this recollection that you have about that
17 building, when did you have this recollection?
- 18 A. Well, I guess I've had it ever since I took place in the
19 study.
- 20 Q. Okay. Have you -- did you testify in your deposition in
21 the Seckler case that you could not remember any building or
22 projects where you made -- where you could actually recall
23 making such recommendation?
- 24 A. I may have made that statement, and I'm sure you're about
25 to point it out to me.

1 Q. Well, let's see if I'm correct. Can I have page 130 of
2 Mr. Seckler's deposition. I don't have a tab for this, but it's
3 page 130, sir, Mr. Simons?

4 A. Simmons.

5 Q. Mr. Simmons. If you look at page 130. And I'll cull out
6 line 18 to 21. Question: "Three and a half years, okay.
7 During the three and a half years that you were at HBI, did you
8 ever recommend a restriction or ban on smoking?"

9 Answer: "Well, as it states here at the second or third
10 line at page 5 of my statement, there were times that I recall,
11 but I don't remember which buildings or which projects, but I
12 recall having made some recommendations that perhaps smoking
13 areas be established or whatever."

14 Do you remember giving that testimony in that case? Was
15 that question asked and that answer given?

16 A. I remember giving the testimony, about six hours worth of
17 it, if I remember correctly.

18 Q. Do you remember this question being asked and that answer
19 being given?

20 A. I do not remember specific questions and answer from a
21 six-hour session that took place ten years ago.

22 Q. Sir, as you look at this, whether you gave that answer to
23 that question, was it truthful testimony?

24 A. It was truthful to the best of my ability to remember
25 what took place at that time, yes.

1 Q. Now, sir, as far as the issue about whether someone's
2 going to recommend a smoking ban or not recommend a smoking ban
3 based on a field inspection, your next employer was a company
4 called EPS; is that correct?

5 A. Environmental Protection Systems, that's correct.

6 Q. I didn't -- what's the name of it? I'm sorry, sir.

7 A. Environmental Protection Systems, Incorporated.

8 Q. And would you please tell the Court what was the general
9 nature of that company's business?

10 A. They were a broad spectrum environmental consulting firm.

11 Q. They did some work similar to what HBI did; is that
12 correct?

13 A. Some.

14 Q. And am I correct, you -- it's your understanding and
15 recollection that that employer never issued any reports to a
16 client that recommended banning smoking; is that correct?

17 A. "Never" is an awful broad word. I don't recall, to be
18 honest with you.

19 Q. Let me show you your testimony again. Could I have page
20 35 of his Seckler deposition, tab 45? So if you look on page
21 35, sir, I'm going to call your attention to line 11 to 14. And
22 if I could, I'm going to look at line 11 to 14.

23 "Did you ever see any report issued by EPS that banned
24 smoking that suggested recommended?" Answer, "I don't recall any
25 that went out banning smoking, no."

1 Was that a truthful answer at the time that you gave it to
2 the best of your recollection?

3 A. To the best of my recollection it would have been, and
4 the statement that was made down in line 17 through 20, as well,
5 would have been truthful, which references the project that I
6 just talked about in Iowa.

7 Q. Okay. Well, let's talk about that. That was a project
8 that was done in Iowa somewhere, that's the project you just
9 told us about; is that correct?

10 A. I believe so, yes.

11 Q. Just so I understand, that project you're referring to is
12 the same project you just told the Court about?

13 A. I believe so, yes.

14 Q. Okay. Now, as far as -- could I come back to the
15 witness' testimony at page 5? I'll come back to your testimony
16 again at page 5, sir, which would be tab 55, line 23, same one
17 we had up there before. And over on the next page, I want to go
18 to the second example that you testify about here, which is
19 that -- your second example talked about a standard practice for
20 Mr. Binnie to reduce the actual test results. Do you see that
21 example that you give?

22 A. Yes, I do.

23 Q. Would you please identify, so we can check this out, by
24 client name the first time Mr. Binnie changed the tests you
25 described there?

- 1 A. I can't give you a specific client or project.
- 2 Q. Well, can you give me the time period it occurred in?
- 3 A. I was employed from 1986 to 1989. It occurred regularly
- 4 during that timeframe.
- 5 Q. But there is no -- as you sit here now, you can't
- 6 remember a single -- you can't identify a client that it
- 7 occurred with?
- 8 A. I cannot identify a specific client with which that
- 9 occurred. I recall having conversations with Mr. Binnie
- 10 regarding this action, or this having taken place.
- 11 Q. But if we want to find out if it's correct, you can't
- 12 give us the name of any client to go check the file?
- 13 A. Unless I'm mistaken, you have all of HBI's files and
- 14 there are examples therein that show alternation of data.
- 15 Q. Sir, can you give me an example of a name of a client?
- 16 A. No.
- 17 Q. Thank you. Now --
- 18 THE COURT: Are you saying that the files themselves would
- 19 show that the data was altered, or simply that the files contain
- 20 altered data? Do you understand my question?
- 21 THE WITNESS: I understand your question, and I believe
- 22 that there are examples within their files that actually show
- 23 alteration of data.
- 24 BY MR. WEBB:
- 25 Q. You do understand Mr. Robertson is going to be a witness

1 in this case?

2 A. Yes.

3 Q. Now, by the way, let me ask you a question: Am I
4 correct, as far as the particle counts that you're talking about
5 in that statement about changing test results, am I correct,
6 particle counts obtained in field tests are actually supposed to
7 be adjusted either up or down after the testing equipment is
8 recalibrated; is that correct?

9 A. That's a good question.

10 Q. If you know.

11 A. I don't have an answer for you.

12 Q. Okay.

13 THE COURT: Is it -- well, never mind. Go ahead.

14 BY MR. WEBB:

15 Q. Am I correct, you did not participate in recalibrating
16 particle count equipment when you worked at HBI; is that
17 correct?

18 A. The only calibrations that field technicians would have
19 performed would have been cleaning, and then the automatic
20 calibration which the unit performed upon itself. I was not
21 involved with submitting the equipment back to the manufacturers
22 for annual recalibration.

23 Q. Okay. Now, as far as this statement that you made to the
24 Court about false reports being prepared, the first time you
25 made that allegation was in a case involving a Mr. Jeffrey

1 Seckler, S-E-C-K-L-E-R; is that correct?

2 A. That's correct.

3 Q. And you are aware that because of the allegations that
4 you made, and Mr. Seckler made, you are, at least, generally
5 aware that the Department of Justice conducted an investigation
6 to see if allegations of false reports being prepared by HBI
7 was, in fact, true? You're generally aware of that, are you
8 not?

9 A. I'm not aware of what the Department of Justice has done
10 up until the point that I was contacted for this case.

11 Q. Well, let me ask you this, and I don't intend to go into
12 anything of substance, but was there any point in time when the
13 Department of Justice, not on this case, but back in 1996, did
14 anyone from the Department of Justice talk to you about the
15 allegations you were making?

16 A. If I remember correctly, I was visited by an FBI agent,
17 and possibly one or two Department of Justice people, for about
18 a two-hour conversation, but in all honesty, I don't remember
19 what the exact context of the conversation was.

20 Q. You don't have to tell me. I don't intend -- I don't
21 intend to get into it. All I'm trying to bring out is you, at
22 least, were generally aware back in 1996 that some folks at the
23 Department of Justice were at least asking questions about these
24 allegations; is that correct?

25 A. People have been asking me questions about this since

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1 1994 with the Seckler case, followed by congressional testimony,
2 and then ongoing since.

3 Q. And after -- and that included the -- well, let me ask
4 you this: Are you generally aware that after the Department of
5 Justice looked at the allegations you and Mr. Seckler were
6 making, that they sent a letter to Mr. Robertson and HBI
7 indicating that they were declining to proceed on the case
8 because they concluded the allegations could not be proven? Are
9 you generally aware of that?

10 A. No.

11 Q. Can I have JD 080190?

12 Sir, I'm now showing you a letter from the Department of
13 Justice Criminal Admonition dated November 26, 1996, sent to a
14 lawyer, Crowell & Moring in D.C. regarding Healthy Buildings
15 International, which says to the lawyer, "With respect to the
16 above referenced investigation, based on the evidence presently
17 available to us, and the standards of proof applicable in a
18 criminal case, we have closed the file without prosecution."

19 Were you generally aware that after the FBI and the
20 Department of Justice investigated your allegations, they
21 reached that conclusion?

22 A. No.

23 Q. Let me ask, were you aware in the Seckler case they
24 reached a point in that lawsuit where Mr. Seckler admitted that
25 he did not have evidence that HBI had falsely prepared building

1 inspection reports?

2 MS. EUBANKS: Objection, Your Honor, this is far beyond
3 the scope. He doesn't talk about the Seckler case, he talks
4 about specific facts.

5 THE COURT: Why is this relevant, even, to his direct
6 testimony?

7 MS. EUBANKS: It's not.

8 MR. WEBB: Well -- I'll move on.

9 BY MR. WEBB:

10 Q. Sir, let me direct your attention to one last issue and
11 then I'm done.

12 A. Thank you.

13 Q. Is that okay?

14 A. That's fine.

15 Q. Okay. I want to talk about Switzerland, and let me show
16 you -- as I understand in your direct examination, you talk
17 about some work that you did in Switzerland; is that correct?

18 A. That's correct, it's mentioned in my testimony.

19 Q. It's mentioned in your testimony; is that correct?

20 A. Correct.

21 Q. Now, in fact, if we go to your report, can I have tab 65
22 which will be your testimony at page 8 line 15 and 16 where I'm
23 just -- as I understand, you advise the Court -- the question
24 was, "Who edited the final reports for the building inspections
25 in Switzerland?" And your answer was, "The final reports for

1 the Switzerland study were edited by Mr. Binnie and
2 Mr. Robertson."

3 Now, my question is, did you actually -- while you were
4 working at HBI, did you actually see the final reports for the
5 Switzerland building inspections so that you could be clear that
6 it was actually edited by Mr. Binnie and Mr. Robertson?

7 A. I actually witnessed Mr. Binnie editing the report.

8 Q. Okay. Now, were you actually working at the company at
9 the time that report became final and was sent out to the
10 client?

11 A. I don't know what date that would have been, so it's hard
12 to answer the question.

13 Q. When did you leave the company in relation to the
14 Switzerland study?

15 A. Switzerland was February in '89, and I think I left in
16 March or early April, so it was shortly thereafter.

17 Q. Okay. Well, let's look at the -- the allegation that you
18 make -- can I have on page 8, then, let's go to the next
19 question and answer, which is what I want to ask you some
20 questions about.

21 Did you ever learn what was made -- I'm sorry, "Did you
22 ever learn what use was made of the building inspections in
23 Switzerland?" Answer, "Yes, in 1990, after I had left HBI, I
24 heard Mr. Simon Turner, of HBI, give a presentation on the
25 results of the Swiss study at the International Conference on

1 Indoor Air Quality held in Toronto, Canada. In his presentation
2 he asserted that environment tobacco smoke was only a minor
3 problem in the buildings we surveyed. In my opinion, this was
4 not an accurate characterization of what we observed. Contrary
5 to his presentation, some buildings we observed in the study had
6 high levels of environmental tobacco smoke."

7 I take it, as you said there, that's your opinion; is
8 that correct?

9 A. That's correct.

10 Q. Now, when you were at the conference, did you receive the
11 paper that Mr. Simon Turner submitted to everybody at the
12 conference?

13 A. I was a participant in the conference, I wasn't a
14 presenter, and I do not recall ever having gotten a copy of the
15 entire paper.

16 Q. Have you actually, though, since that time, in connection
17 with any of these cases you've been involved in, have you read
18 over the actual report that was submitted in that Toronto
19 Conference by Simon Turner?

20 MS. EUBANKS: Objection, Your Honor, in terms of whether
21 he's read the report or not. He's testified about his
22 recollection, and that he didn't get a copy of it, so its
23 irrelevant.

24 THE COURT: The objection's overruled.

25 THE WITNESS: I don't recall if I ever read the entire

1 report or not.

2 BY MR. WEBB:

3 Q. Okay. Let me show it to you. Can I have JD 54234?

4 A. Thank you.

5 Q. Do you recall if you've seen this report before?

6 A. Well, I would have seen it while he was making his
7 presentation, I'm fairly certain of that.

8 Q. Okay. So your best recollection is you reviewed it.
9 Were you reviewing it at the time that he spoke?

10 A. No, I was actually listening to him speak.

11 Q. Okay. Now, let's go to the next page, I think it's
12 called page 27. Let's cull out the first paragraph.

13 This is Simon Turner. If you look at the first paragraph,
14 do you recall that he communicated to the audience basically that
15 what the project was all about, and he makes the statement, "The
16 most significant cause of air quality problems was found to be
17 poor ventilation, followed by inadequate filtration and poor
18 hygiene." Do you see that statement?

19 A. I see the statement.

20 Q. Do you think that was a correct statement made by him
21 about what was the most significant cause of the air quality
22 problems based on what you knew from your participation in this
23 project?

24 MS. EUBANKS: Objection, Your Honor, again, it calls for
25 an expert opinion.

1 MR. WEBB: Your Honor, he was at the conference and he
2 gave testimony that something misleading happened.

3 THE COURT: Objection's overruled.

4 THE WITNESS: I'll read from the testimony. "In my
5 opinion this was not an accurate characterization of what we
6 observed."

7 BY MR. WEBB:

8 Q. All I'm asking you, sir, is do you recall that
9 Mr. Turner, when he made this presentation, when he told the
10 audience that that was the most significant cause of the air
11 quality problems, is that consistent with your recollection of
12 working on the project?

13 A. As I stated in my opinion, this was not an accurate
14 characterization of what we observed. The presentation that
15 Mr. Simon Turner made fell in lockstep with the standard HBI
16 presentation, which was to present ventilation problems as the
17 major contributor to air quality problems.

18 Q. So I can try to find out what was wrong with what he
19 said, can I go to the -- I want to show you -- in the report,
20 did you notice that he actually reports on the specific nicotine
21 test results that were reached in each of the buildings? Did
22 you notice that?

23 A. I think I already mentioned that. I haven't really read
24 this report in any length.

25 Q. Let's look at it. Do you see the page I have up on the

1 screen now? Have you found that page in the report?

2 A. Yes, I see it.

3 Q. And Mr. Simon Turner sets forth exactly what the nicotine

4 tests were. Do you see that?

5 A. I see a column of test results.

6 Q. Okay. And my question is, do you have any -- is there

7 anything that you know about that you want to tell the Court

8 where you believe that any of those test results are not the

9 correct test results based on the measurements obtained?

10 A. I can tell the Court that some of the tests that were

11 conducted in Switzerland were not necessarily conducted in

12 office spaces associated with buildings where they were

13 collected. I know that there were samples collected outside of

14 hotel windows, for instance.

15 Q. Can you answer my question? All I'm asking you is, when

16 Mr. -- when Simon Turner reported to this audience those

17 nicotine readings, can you tell me whether you have any evidence

18 that any of those readings are wrong?

19 A. I don't have any personal evidence, no.

20 MR. WEBB: I have no more questions.

21 THE COURT: All right. Redirect, please. Excuse me, any

22 other questions from the defense side? All right, redirect.

23 REDIRECT EXAMINATION OF REGINALD B. SIMMONS

24 BY MS. EUBANKS:

25 Q. You were just shown a document, Mr. Simmons, JD 054234.

1 Would you put that before yourself again? I would like to you
2 refer to the final page of the document, please. And would you
3 read into the record the acknowledgements, please?

4 THE COURT: And please read it slowly, because we don't
5 seem to have it up on the --

6 MS. EUBANKS: It's Joint Defense Exhibit, perhaps we
7 could --

8 THE COURT: I won't ask them to do that, just read it
9 slowly, please.

10 THE WITNESS: It starts out "Acknowledgements. Thanks for
11 guidance during the preparation of this paper all due to Gray
12 Robertson of HBI USA and Howard Goodfellow, HBI Canada.

13 BY MS. EUBANKS:

14 Q. And I'm sorry. Under "references", there's also a
15 reference to "Robertson G." What do you know that to be?

16 A. I would assume that would be Gray Robertson.

17 Q. And what else does it say, please, just for the record?

18 A. That's references line 1 it says, "Robertson G, 1998" and
19 apostrophes --

20 Q. It says 1988.

21 A. I'm sorry, 1988. It's a copy and the print is kind of
22 small. "Source, nature, and symptomology of indoor air
23 pollutants with indoor and ambient air quality, sulf er London,
24 page 311 through 319". I assume that is.

25 Q. And Gray Robertson was your boss while you were at HBI?

1 A. He was the president of the company.

2 Q. I want to show you U.S. Exhibit 65093, please. You're
3 going to be handed a copy.

4 MR. WEBB: Could I get a copy?

5 MS. EUBANKS: A copy was provided on Tuesday to you. I
6 don't know that I have an extra one with me. I'll wait while you
7 get it.

8 MR. WEBB: We'll find it. While we're waiting, maybe we
9 should just check out protocol. Yesterday when the witness was
10 on the stand, my understanding was any time we handed the witness
11 an exhibit, even if it was the other side's exhibit, knowing they
12 wouldn't have it at their fingertips, we were being asked for it
13 and we handed it over and I thought that was the general
14 procedure that we could follow so is that -- there's no way --
15 there is no way Ms. Eubanks can know in advance exactly what
16 exhibit she's going to pull out, nor do I know which once she's
17 going to pull out.

18 MS. EUBANKS: That's correct, Your Honor, we went through
19 this in Court in one of the pretrial conferences, and perhaps
20 Mr. Webb was there. We went through a long detailed discussion
21 under 471 of how we would provide documents that were referenced
22 in the written direct to the defendants on the Tuesday following
23 the Monday submission. There's no provision in 471 that gives us
24 any notice of what defendants will use in a cross-examination of
25 one of those witnesses, so they have to give us copies of

1 documents because we have no notice. But the reason that we
2 serve them copies of documents on Tuesday is so they can have
3 them prepared for Court and bring them with them. We do this --
4 that's going to be our process going forward, because we talked
5 at great length about this in terms of just giving them copies.
6 Now, if they don't want us to give them copies on that Tuesday,
7 then that's a different matter. We can bring the copies to Court
8 and hand them off here.

9 MR. WEBB: Your Honor, my only point is, yesterday, even
10 when I showed Dr. Harris a U.S. exhibit, not my exhibit, it was
11 one of their exhibits, they were asking me for it because -- and
12 I gave it to them, and I thought that's what we were supposed to
13 do. I'll follow whatever procedure people want.

14 THE COURT: I think that was probably because you were
15 super prepared. This is what seems to me be the fair way to go
16 about it. The offerer of the witness, again, we're talking both
17 sides, has to provide the direct testimony and the exhibits in
18 advance. It seems to me that that one provision of exhibits is
19 sufficient. It may be, as it has happened today, that the person
20 on the other side needs a couple of seconds to catch up as
21 exhibits are used, if a huge number of exhibits are used. But it
22 seems to me, really environmentally immoral to require that a
23 second production of all of those exhibits. On the other hand --
24 or I shouldn't say on the other hand -- in addition, when it
25 comes to cross-examination of the witness offered, obviously the

1 offerer of the witness does not know what exhibits are going to
2 be used or proffered on cross-examination and then copies do have
3 to be supplied. The rule, of course, applies across the board.
4 I think that is a fair way to go about it. It may not be the
5 fastest, but I just can't see providing two copies of everything
6 to everybody.

7 MR. WEBB: We'll do it exactly that way.

8 THE COURT: Okay.

9 BY MS. EUBANKS:

10 Q. Mr. Simmons, you have before you U.S. exhibit?

11 THE COURT: 65093, I think.

12 MR. SCHWIN: Correct. Thank you, Your Honor.

13 BY MS. EUBANKS:

14 Q. I'd like to invite your attention to the second page of
15 that exhibit, paragraph Roman VI, Peter Binnie lays the ground
16 rules.

17 Now, first, can you tell us, what is this exhibit? What
18 is this document?

19 A. Um, this would be, if my memory serves me correct, a
20 statement that I made, the original statement I made in the
21 Seckler case, I believe.

22 Q. Well, then, why don't we do it this way: You were shown
23 a number of one page exhibits during your cross-examination.
24 They were called ETS test forms.

25 A. Right.

- 1 Q. Do you have any of those in front of you right now?
- 2 A. Yes.
- 3 Q. Why don't you tell us which exhibit you have in front of
- 4 you right now with the number provided preceded by JD?
- 5 A. JD 054241.
- 6 Q. All right. There is a statement at the bottom of that
- 7 page. Where you read it where it says "the information"?
- 8 A. Yes, "The information is confidential and is being
- 9 produced for the official purposes for the House subcommittee
- 10 and health and the environment and reliance on the promises and
- 11 protection by Chairman Waxman in his September 30th, 1994
- 12 letter, to help the Buildings International Incorporated in
- 13 accompanying procedures."
- 14 Q. Now, the document that we have on the screen and which
- 15 I've asked you to look at, is this a document that you gave in
- 16 connection with the Waxman proceedings?
- 17 A. Here again, the statements that I've made over the years
- 18 are relatively the same statements.
- 19 Q. Is this a statement by you?
- 20 A. Yes, it is.
- 21 Q. All right.
- 22 A. And it may very well be the Waxman statement.
- 23 Q. Did you give a statement to the Waxman committee?
- 24 A. Yes, I did.
- 25 Q. And what was the statement about that you gave to the

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1 Waxman committee?

2 A. It was about my personal experiences as an employee of
3 HBI.

4 Q. All right. In terms of this exhibit, I was directing
5 your attention to Peter Binnie Lays the Ground Rules and you
6 were asked some questions on cross-examination about the rules
7 by Mr. Binnie, would you read that statement, please?

8 A. Yes.

9 MR. WEBB: Your Honor, I'm going to object. I guess this
10 is rehabilitation with a prior consistent statement which it's
11 not proper rehabilitation unless it's something that predates any
12 motive to fabricate. So I object on the grounds of relevancy.
13 If there's any motive to fabricate here that I tried to lay, it
14 would be his issues with his employment, which then he left, this
15 is not a statement that predates the motive to fabricate, so
16 rehabilitating a witness with a prior consistent statement, the
17 prior consistent statement must predate the motive to fabricate.
18 This post dates the motive to fabricate and it's not proper
19 rehabilitation under the rules of evidence.

20 MS. EUBANKS: This is not rehabilitation, Your Honor, they
21 were statements that were culled out from a deposition which we
22 intend to turn to as well, where select portions were pulled out
23 with respect to the law laid down by Peter Binnie. What I intend
24 to do is point the Court to one place with the statement is made
25 all together, and then to turn to that deposition and point out

1 parts that my opponent here failed to direct the witness to and
2 to ask some questions about what was it that he was doing while
3 he was there. That's not rehabilitating the record, that's
4 clarifying it with all the evidence that we have from this
5 particular witness about a subject.

6 THE COURT: I'll allow it for now. We will see what it
7 really turns out to be, everybody.

8 THE WITNESS: Would you like me to read this paragraph?

9 BY MS. EUBANKS:

10 Q. Please.

11 A. "Throughout the period 1986 through 1989 when the company
12 was going through massive expansion, Mr. Peter Binnie was
13 intimately involved with all operations. The work we were
14 receiving from the Tobacco Institute covered, as I said,
15 virtually the entire United States and various foreign
16 countries, and included public, federal and state and private
17 buildings. As a result of public relations work done by
18 Fleishman Hilliard we also began to receive calls from
19 nontobacco institute potential clients. Mr. Binnie had a number
20 of instructions and ground rules for us to follow that applied
21 to all of the buildings that we inspected, public and private."

22 "Number one, when taking air samples for nicotine tests,
23 we were instructed to take air samples in lobbies and other
24 easily accessible areas where the circulation was best, thus
25 reducing the readings."

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1 "Number two, if asked, always recommend to clients that
2 any air pollution problem could be solved by better ventilation."

3 "Number 3, banning or restricting tobacco use or smoking
4 was never to be recommended."

5 And "number 4, every inspection report was to be reviewed
6 and undergo final editing by either Mr. Binnie or Mr. Robertson
7 before it was sent out."

8 Q. Now, you were asked some questions on cross-examination
9 and focused on a deposition that you gave in the Seckler case.
10 I want to take you to some portions there and ask you some
11 questions about what instructions were given by Mr. Binnie. But
12 before I do that, let me ask you, the statement that you've just
13 read into the record, is that consistent with, or inconsistent,
14 in any way with the instructions that you were provided by HBI
15 with respect to your inspections?

16 A. That's consistent with instructions we were given.

17 Q. All right.

18 Now, we looked at some inspection reports, or I should
19 say ETS test forms, and you gave some testimony about those
20 particular test forms, and you were asked a series of questions
21 about whether because those test forms indicated that cigarettes
22 were smoked, whether that was inconsistent with the instructions
23 that you were given by Mr. Binnie. Do you remember that line of
24 questioning?

25 A. Very well.

1 Q. All right. I'm going to show you some pages from the
2 transcript from your deposition given in the Seckler case, and
3 I'm going to begin with page 118. And I apologize for the
4 marking on the copy that I have. It was how I received the
5 information.

6 Now, I want to invite your attention on page 118 to
7 question number 16 where it states: "Where there were no
8 cigarettes being smoked" -- let me back up a little bit -- let
9 me back up to line 10 to put it in context, do you see line 10?

10 A. Yes.

11 Q. All right. The question there that's posed is: "So,
12 it's not as though you were taking tests in areas where there
13 was no cigarettes being smoked; is that correct?"

14 And you answer, "Not always."

15 The question says: "Sometimes you took them in areas?"

16 Answer, "Sometimes."

17 Question, "Where there were no cigarettes being smoked; is
18 that correct."

19 Can you read your answer then that follows that question?

20 A. Yes, that's line 18. The answer is: "Sometimes there
21 were in areas" -- wait a minute. "Sometimes they were in areas
22 where no cigarettes were being smoked; other times they were in
23 areas where cigarettes were being smoked. The instructions that
24 we received were to try and take them in areas where there's not
25 smoking going on and that are well ventilated and easily

1 accessible as stated."

2 Q. All right. I'm going to show you the following page to
3 keep this in context from that same transcript.

4 MR. WEBB: Which page is that?

5 MS. EUBANKS: It's following page 119.

6 BY MS. EUBANKS:

7 Q. And the question you were asked is: "But as a matter of
8 fact, you took them in office areas and other areas where there
9 was smoking going on, correct?"

10 And what was the answer that you gave?

11 A. The answer was, "We took them in areas that were
12 available to us based upon physical constraints of project
13 locations. We had to. The bottom line was we had to collect
14 the samples somewhere."

15 Q. And then the question was asked: "So you did not follow
16 Mr. Binnie's instructions?"

17 And what was the answer that you gave?

18 A. The answer was: "As best as we could."

19 Q. What did you mean and what -- what did you mean by "as
20 best as you could"?

21 A. We took the samples -- we tried to follow the protocols
22 as laid out to us as best as we could, and in many cases we were
23 restricted by the physical layout of the building, we only had
24 certain areas which we could run tests.

25 Q. Now, you were asked some questions on cross-examination

- 1 about access to records or access to buildings. Do you recall
2 that line of questions?
- 3 A. Yes.
- 4 Q. Now, the tests were made, I believe you testified, in the
5 areas where you had access; is that correct?
- 6 A. Yes.
- 7 Q. And who arranged for access?
- 8 A. I would assume that HBI senior management made those
9 arrangements.
- 10 Q. Did you arrange for any access to particular locations to
11 be consistent with what Mr. Binnie said?
- 12 A. No.
- 13 Q. Do you know who determined what areas were available to
14 you to do these inspections?
- 15 A. No.
- 16 Q. Are you here under subpoena, Mr. Simmons?
- 17 A. Yes.
- 18 Q. Now, you mentioned a John Madaris during your
19 examination, and he's also referenced in your written direct
20 examination. Will you remind us of who he is?
- 21 A. John Madaris was on HBI staff when I was hired, and
22 served as my initial trainer when I started with the company,
23 later became the operations manager towards the end of my
24 tenure.
- 25 Q. All right. Now at the time that you left, you have -- I

1 believe you stated on cross-examination that you've been
2 questioned a number of times about some of the same events that
3 you're brought here to testify about regarding your work at HBI,
4 correct?

5 A. Correct.

6 Q. Can you just outline for the Court what those are,
7 besides this particular case?

8 A. Um, I was deposed in the Seckler case, I was questioned
9 by the Congressional subcommittee, I think I mentioned that I
10 answered some questions by the Justice Department and the FBI at
11 some point in 1996, and then, obviously, I've been subpoenaed
12 for this case as well.

13 Q. Did Mr. Madaris give you any advice regarding statements
14 that you would make about your work at HBI?

15 A. Prior to my deposition for the Seckler case, I received a
16 phone call from Mr. Madaris. It was the first time I had heard
17 from him since my employment, and --

18 MR. WEBB: Your Honor, I'm going to interrupt, I'm going
19 to object to hearsay. Mr. Madaris did not work for any of these
20 defendants, and I don't know what the statement is going to be,
21 but I object to the statement coming in, its clearly hearsay.

22 MS. EUBANKS: It's not hearsay, Your Honor, it's been
23 stated that the witness had some motive for -- or suggested
24 during the examination that he had some improper motive for
25 coming forward. I think it's proper to show that someone from

1 the company counseled him about remarks that he would make when
2 he was being contacted. I think it's directly relevant to these
3 proceedings for the Court to weigh the truthfulness of the
4 testimony of this witness, which certainly has been placed at
5 issue.

6 THE COURT: It may be relevant, but it's clearly being
7 offered for the truth on the statement.

8 MS. EUBANKS: Actually, it's been offered to show that he
9 was contacted by someone about these actions who worked at HBI
10 who at the time was a representative of the company.

11 THE COURT: And that person cannot be cross-examined as to
12 whether this telephone call was made or as to anything that was
13 said in the phone call. The objection's sustained.

14 MS. EUBANKS: No further questions.

15 THE COURT: All right. Thank you, sir, you may step down.

16 THE WITNESS: Thank you.

17 MS. EUBANKS: Your Honor, on the witness front, I should
18 advise you that we contacted our next witness who's adverse to
19 us, we contacted his counsel. He informed us that until we knew
20 that it was time --

21 THE COURT: That would be Mr. --

22 MS. EUBANKS: Effram, I believe his name is, is the lawyer
23 that we contacted; Mr. Robertson is the witness. And he's not
24 too far from us on Pennsylvania Avenue, and so, depending on how
25 you want to proceed, we can make a phone call to him right now

1 and have him come, or if there's some other proceeding that you
2 wanted to address now.

3 THE COURT: Mr. Webb?

4 MR. WEBB: The only -- I have no objection to -- we've
5 been taking these witnesses out of order, which is fine, I agreed
6 to this because they had scheduling problems on the other side.
7 They told us yesterday Mr. Robertson would testify tomorrow
8 morning. Obviously they did not anticipate the events of this
9 morning, so I don't -- calling the witness now, can I assume that
10 you have a fairly long direct?

11 MS. EUBANKS: Well, he certainly made more changes than
12 any other witnesses so far, so I would anticipate it could at
13 least be a couple of hours.

14 MR. WEBB: Then that's fine, because I wouldn't have to
15 start cross. I was going to work on cross tonight, which I think
16 in fairness I shouldn't have to start today, but with two hours
17 of direct it shouldn't be a problem.

18 THE COURT: This is what we're going to do everybody,
19 first of all, I want to conclude some technical matters with this
20 witness, I'll get my own papers straightened out, and make some
21 rulings.

22 MS. EUBANKS: Yes, Your Honor.

23 MR. WEBB: Just on housekeeping, I don't mean to
24 interrupt.

25 MS. EUBANKS: You go ahead.

1 MR. WEBB: We both forgot to offer exhibits. I would like
2 -- you go first.

3 MS. EUBANKS: I would like to offer the two exhibits that
4 were cited in the testimony of the witness here, both exhibits
5 were referenced and there were only two.

6 MR. WEBB: My objection to those two, those both were
7 the -- they're prior affidavits that the witness filed in the
8 Seckler case and in the Congressman Waxman proceeding, so those
9 are being offered as prior consistent statements which do not
10 predate the motive to fabricate, and therefore, I object on their
11 introduction.

12 MS. EUBANKS: That objection was not raised in the written
13 opposition that we filed and briefed before Your Honor, so this
14 is new.

15 MR. WEBB: Well --

16 MS. EUBANKS: And waived.

17 THE COURT: It wasn't raised, and therefore it shouldn't
18 be raised now. At the same time, it is certainly a very valid
19 objection. I don't want this to stand as any precedent for
20 anybody that they can come in and make last minute objections
21 that they haven't made earlier. It's so clear on this one that
22 the affidavits don't come in.

23 MS. EUBANKS: Your Honor, it's not an affidavit.

24 THE COURT: Pardon?

25 MS. EUBANKS: One of the documents is not an affidavit,

1 Mr. Webb misspoke. The one that we had on the screen was a
2 statement that was made, it's not an affidavit.

3 THE COURT: You mean the statement to the Congressional
4 committee?

5 MS. EUBANKS: Correct, Your Honor, just so it's clear --

6 MR. WEBB: Whether it's a statement or affidavit, the
7 witness gave a prepared statement that is -- that doesn't come
8 into evidence.

9 THE COURT: That's correct. The objection's sustained as
10 to those documents.

11 Now let me see for a moment, are you still moving exhibits
12 in or have you concluded? Let's do this in an orderly fashion,
13 everybody, we'll start with plaintiff and then hear from defense
14 counsel. Ms. Eubanks?

15 MS. EUBANKS: Those were the only two we had. We didn't
16 have any others besides those two.

17 THE COURT: And Mr. Webb?

18 MR. WEBB: I'm offering into evidence each of the exhibits
19 that I used during my cross-examination. I didn't stop and offer
20 it at the time, because I thought it was quicker this way, so I'm
21 offering each of those exhibits into evidence.

22 THE COURT: Let me just make sure that Ms. Hightower got
23 them as we went through.

24 THE DEPUTY CLERK: My concern is that there are a couple
25 that I do not have as being marked.

1 THE COURT: Let's leave it this way. When we break today,
2 you'll go over it with counsel after I rule.

3 MS. EUBANKS: We have no objection to any of those that
4 were proffered during the examination.

5 THE COURT: But I just want to make sure we're not letting
6 in more than were directly addressed in the examination.

7 MR. WEBB: I'll follow the procedure that I did with
8 Dr. Farone. I'll file a written list that I marked, make sure
9 I've checked it out with everybody, and then we'll follow that
10 procedure.

11 MS. EUBANKS: Your Honor, I do want to note, however, that
12 none of the exhibits that were proffered today were on joint
13 defendants' exhibit list, so I presume that when we get to our
14 portion of the case and -- their portion of the case and we're
15 crossing witnesses, that we will be permitted to do similar.

16 MR. WEBB: I agree with that.

17 THE COURT: Nobody was required to put on their witness
18 list what they were going to use for impeachment purposes.

19 MR. WEBB: Right.

20 MR. BRODY: And just for the record, it's 8 that were new
21 and 3 that were on of the 11.

22 THE COURT: All right. Now let me see one other document
23 that I have, and I think we've addressed all the issues. All
24 right. I think we've addressed all the objections that were
25 raised to Mr. Simmons' testimony. Am I right everybody?

1 MR. WEBB: I believe that's correct.

2 THE COURT: All right. I know that the government has
3 wanted to have a discussion of 471B and its implications. That's
4 fine. I'm willing to do that now. It seems to me that that
5 doesn't necessarily preclude starting with the next witness,
6 since we can go until 4:30. Why don't we have that discussion
7 now. When we are finished with that, we'll take our afternoon
8 break, the government can put in a call to the next witness, and
9 then he can be here within a reasonable period of time and we can
10 at least get in a good hour depending, maybe an hour and a half
11 of the direct of that witness.

12 MS. EUBANKS: That's certainly fine, Your Honor. If I
13 could have about 60 seconds to find my copy of the order and
14 reorganize my files here?

15 THE COURT: That's fine.

16 MS. EUBANKS: Your Honor, we appreciate your taking some
17 time to go over some of the provisions with us, and this is Linda
18 McMahon who has appeared before you as well, and she's been quite
19 involved on these issues.

20 As I stated before, there are a couple of things that -- I
21 think I have a solution to what some of the problems are for the
22 United States insofar as these changes coming at this stage of
23 proceedings. And perhaps it can be resolved by some
24 clarification so that the parties are all on the same page about
25 what it is that the order means so that we know exactly how to

1 proceed forward.

2 Our gravest concern had to do with the limitation on the
3 number of designations, prior witness designations as set forth
4 in the order because we had a lot of litigation on that even
5 going before the Special Master on the witness list and the
6 numbers and everything and much of this went back to 2002 back in
7 January -- well, back in 2001, in fact, when the Court ordered
8 the parties, with order number 65, to file a witness list to file
9 amended witness lists then on June 1, 2002. So we've been
10 working roughly with the same general witnesses for a period of
11 years now.

12 Subsequently, the Court made sure that we would vary the
13 June 2002 list by only 10 percent from our 2001 list, so again,
14 as we worked through this, we were working from lists that had
15 been prepared quite some time ago.

16 Now, if order number 470 limited whose witnesses could
17 come in in terms of the parties sought an additional 25 witnesses
18 who had not been disclosed, I know there were proceedings before
19 the Special Master. Long story short, we ended up with a witness
20 list that the Court approved, both sides did. The United States,
21 on that witness list, had identified witnesses as live, had
22 identified witnesses as prior, and had identified a number of
23 witnesses as live/prior. We sent a letter to joint defendants
24 explaining what we meant. They brought the issue to the Court's
25 attention. The Court issued an order that required us to make a

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1 choice, either we were proceeding with witnesses who were live or
2 we were proceeding with witnesses who were by prior testimony.

3 So we did that, meaning that as we prepared to proceed
4 some months ago to begin the trial, we had a list of witnesses,
5 we got subpoenas out, we worked with the Court, we had
6 proceedings, as you will recall, on the issuance not just of RICO
7 subpoenas but Rule 45 subpoenas as well, and we had numerous
8 proceedings that led up to this moment.

9 So, it is a little bit unsettling when we now have a
10 limitation, because we originally had 131 witnesses who were
11 designated -- who were appearing by prior testimony and witness
12 designations.

13 Now, I understand that the Court has already taken care of
14 one of those witnesses and said -- so that means that there are
15 30 that are out there. I want to assure the Court of something
16 that's really important as the case has gone forward, of course
17 each side, certainly the United States is evaluating the evidence
18 as it comes in. Since we're the party who begins with the burden
19 of proof, we're the plaintiff here, and I can tell Your Honor
20 that there's no question that we don't need 30 more live
21 witnesses, so that's not what I'm talking about, it's not these
22 live witnesses were taken with 471B and now we must replace them,
23 that's not our position. Our position is this, Your Honor, we'd
24 like some time, next week, we could do this as early as next
25 week, to come forward with a list of individuals that we believe

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1 that we will need to call live, since we're limited to 100 prior
2 designations. And if we're able to do that, I think it can be
3 done -- I know it won't be 30 more live witnesses, that much I'm
4 sure of. I can think right off the top of my head of three
5 witnesses that won't be on the list, so I know it's not 30, but
6 I'm not prepared to give you a number or range today that's
7 reasonable or reliable.

8 The other thing is, that the way the order works together
9 in looking at it, and Ms. McMahon and I have spent some time
10 doing this, it seems that the benefits of the presumptions
11 certainly will give rise to an ability to ease the flow of
12 evidence that's coming in. But still one of the questions we
13 have, and it was how our case was prepared, because I'm sure you
14 remember all of the discussions we had on how to handle the
15 exhibits and what we might do and what different options the
16 Court might have and there was a lot of disagreement. This order
17 has taken us a long way in terms of at least our position, it
18 seems, in resolving some of these issues in certainly an orderly
19 fashion and one that we're prepared to work within the confines
20 of.

21 Now, under the exhibit section, and this is why it's tied
22 to the witnesses, you may recall our discussions about the reason
23 we need so many witnesses is to be able to connect them with the
24 exhibits that we need. But with the presumption that we're given
25 under exhibits, paragraph 8, it suggests that -- it does state

1 that there's a rebuttable presumption of admissibility for
2 documents that are referenced in a party's proposed Findings of
3 Fact. The issue, or the question that I have here is that a
4 rebuttable presumption is not quite the same as deemed admitted,
5 which means that --

6 THE COURT: That's right, it isn't quite the same.

7 MS. EUBANKS: Which means that we still will need
8 witnesses to tie to the documents, in either to reference the
9 exhibits with the designated portions of the testimony with he
10 forward or either with live witnesses even for the documents that
11 are in the Findings of Fact so it's still a tie with the
12 witnesses. I'm not making sense, am I?

13 THE COURT: No, I understand, I just don't think you're
14 right. So long as an exhibit has been cited, referred to or
15 discussed in the proposed Findings of Fact or in the direct
16 written testimony of a live witness, or in the prior testimony of
17 a witness, unless there is some credible argument made on the
18 other side, there's a presumption that the exhibit's going to
19 come in.

20 Now, having made clear the criteria for the rebuttable
21 presumption, I am hopeful that many of the objections that are
22 made, that the party offering those objections will realize that
23 they are not viable objections. I don't know that in advance, I
24 can't speak to that in advance, but it lets everybody know pretty
25 clearly -- I mean, that's the purpose of a presumption -- what my

1 strong leaning is. But that's never to preclude a good argument
2 being made since one never knows quite how creative lawyers can
3 be.

4 MS. EUBANKS: Well, Your Honor, perhaps Ms. McMahon can
5 address this more forcefully.

6 MS. McMAHON: I think one of ours questions is we just
7 weren't quite certain of the procedure. Would we still be
8 submitting the exhibits on a witness-by-witness basis?

9 THE COURT: Yes.

10 MS. McMAHON: And defendants on the Wednesday that they
11 would make their objection would make their objection --

12 THE COURT: Correct.

13 MS. McMAHON: -- with the rebuttable presumption.

14 THE COURT: And I would proceed in the manner that I've
15 been attempting -- well, I've certainly been able to do it with
16 all the live witnesses with the priors. I read all of the
17 objections and the counter objections, and in my own mind I make
18 decisions. If there are questions as to some of the objections,
19 I will raise them in open court and hear argument briefly from
20 counsel. Quite -- well, quite frankly, I can often tell just
21 from reading as to what I'm planning to do, and sometimes when
22 there are objections made, the other party responds in such a way
23 that they directly counter the objection, i.e., there have been
24 many objections made that something was illegible and the
25 government responds by saying we'll be providing a substitute

1 document and the issue is taken care of.

2 MS. EUBANKS: Then I guess, then, my concern is certainly
3 very real, then, in terms of still needing to have witnesses,
4 whether by prior testimony or by live, to move in the exhibits
5 that are related to the testimony that they're giving. So,
6 notwithstanding the rebuttable presumption which certainly should
7 cut down on the types of objections that the Court gets --

8 THE COURT: It certainly should. Now again, I'm not
9 prepared to have irrebuttable presumptions, I think that's a
10 dangerous business for a trial judge, invites very careful
11 scrutiny from on high, and I'm not going to do that.

12 MS. EUBANKS: I'm not suggesting or requesting that
13 because I think that would -- that that would lead to error, so
14 I'm not suggesting that the Court should apply a rebuttable
15 presumption to that.

16 THE COURT: Irrebuttable.

17 MS. EUBANKS: Irrebuttable. But what I am saying, Your
18 Honor, is that the way this order was formulated here in the
19 fourth week of trial effectively, without giving us back the
20 opportunity to call witnesses live, then we are precluded from
21 being able to put forward the evidence that we had been planning
22 since early in the case when the first order was entered with
23 respect to the witnesses and the lists that we've provided.

24 THE COURT: And so then is your proposal that some time
25 next week on a day we agree to that you come forward with a

1 request to add witnesses to your witness list? Is that what your
2 proposal is?

3 MS. EUBANKS: Not new witnesses, Your Honor, so I want to
4 be clear about that, witnesses who are on the current witness
5 list and moving them from, since we had 131 prior designations,
6 now this order gives us 100, to be able to evaluate the
7 evidentiary landscape to see how many witnesses we now need
8 subpoenas for to come live, and in so doing to have the Court
9 understand that the burden here in terms of the arguments that we
10 had before about the RICO subpoena, that that burden has been met
11 by this order of the Court so that we don't have to then argue
12 about whether a witness who was on the witness list in the fourth
13 week of trial who now needs to come live because of procedural
14 matters, can't come live, that we've at least cleared that hurdle
15 that there was quite a bit of briefing over and we can ask the
16 Court -- bring forward to the Court a list of witnesses for whom
17 subpoenas can be issued and they can come to court live and we
18 can meet all of the obligations.

19 THE COURT: And one final question before the impatient
20 Mr. Redgrave is heard from: And to fit within your hourly limit
21 that I have already set, correct?

22 MS. EUBANKS: It is to fit within our hourly limit already
23 set, and to be more precise about what I was saying about the
24 RICO subpoenas, the literal legal phase is that good cause would
25 have been shown for the issuance of those.

1 And the only other question that I have to the Court is
2 one that's also important to us as we go along: 471 certainly
3 states that it's the Court's prerogative to give us decisions on
4 the evidence that we've submitted with the designations as the
5 Court prepares that and comes forward. This Order 471B does
6 state that at some point there will be limited exhibits that
7 would be allowed at the end of the proceedings under certain
8 circumstances. I just want to assert our position so that the
9 Court understands why we've taken certain positions here. If we
10 know what evidence is in as we move forward, then it may
11 alleviate the need to call a particular witness that is dependent
12 upon, if we don't get it in on this witness, as we saw for
13 instance with Mr. Simmons, the information that he was unable to
14 give, is because that person that he was speaking of -- it was a
15 hearsay objection -- can't come to court. Well, they're not
16 here, they're not on the witness list, and rulings along the way
17 certainly will affect how we go forward.

18 So, what my inquiry is is whether the parties can expect,
19 and certainly I'm not suggesting that the Court should be on any
20 kind of schedule for doing this, but whether the parties can
21 anticipate that as we move forward that we will receive
22 evidentiary rulings on the designated materials.

23 THE COURT: All right. Mr. Redgrave.

24 MR. REDGRAVE: Thank you, Your Honor. You correctly note
25 that I was a little impatient. I wanted to address this issue.

1 I do want to alert the Court that we have some other issues under
2 Order 471B that we would like to address with the Court as well,
3 but let me start with the prior testimony issue. And Your Honor
4 ruled in 471B that limits were appropriate and necessary, limits
5 that went first and foremost to the scope of the designations
6 that were made no matter whether it's 10 or 100 or 150 witnesses,
7 that the parties had to go back, particularly the government had
8 to go back and narrow that down, and we hope that they will, and
9 we're concerned that they we won't, but that's for another day.

10 However, when we get to the issue of the 100 versus the
11 131, I'm afraid the government has lost sight entirely of what
12 was the concern of the Court. And what they're suggesting now,
13 Your Honor, is they want to bring in, instead of saying we're
14 going to limit the number of witnesses we have because we really
15 don't need 131 for this case from prior, they're saying, Well, we
16 now want to pick some of them and bring them live.

17 Live witnesses in this matter is really a veiled way to
18 seek reconsideration of the limits. But worse than that, it's
19 going to cause more work for the Court, more work for the
20 parties, and we're going to be inconveniencing witnesses that the
21 government had previously said they were just going to allow to
22 come in through priors, and quite frankly, Your Honor, if there
23 was anything to be considered, perhaps it would be if they showed
24 need at the end of their case that there was one or two or three
25 of these prior designations that they've already picked out that

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1 they really need to fill in their case, then that's what we
2 should be talking about at the end of their case.

3 They say, Your Honor, we really needed that prior
4 testimony from these three or four or five, and so instead of a
5 hundred, can you please give us 105 of these priors. That's what
6 we should be talking about, and we should only be talking about
7 that at the end. You have issued a limit, the government should
8 abide by that limit, and if there's good cause shown at the end
9 of their case in chief, that is when we should be talking about
10 exceeding it. We should not be talking about RICO subpoenas, we
11 should not be dragging more people in here to sit in that witness
12 chair. That's not what an order on limits was supposed to do,
13 because that's going to greatly expand all the work that we're
14 doing and everything coming in to Your Honor with more written
15 direct statements, more objections on that written direct process
16 under 471.

17 And by the way, Your Honor, with respect to the live prior
18 argument we had before, there are only eight witnesses on their
19 list of priors that were in that category to start with, so if we
20 get to the end of the case in chief, we should only be talking
21 about maybe going up to maybe 108 priors, adding another eight
22 priors. So, with all due respect to the government, that should
23 be the relief valve. It shouldn't come at the end. And I'm
24 quite serious, Your Honor, if we're going to go down this road
25 that they need more -- it is completely undermining your order if

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1 we allow now live testimony for these witnesses where the
2 government was just going to use prior designations.

3 I do have a number of procedures or mechanical issues
4 related to the priors that deals with the number, if you allow me
5 to go into those. Your order talks about the 51, and that was in
6 the briefing. Right now there are 66 priors that were submitted
7 either fully or in part to Your Honor, because while this was
8 pending the government was still making designations. One of
9 those --

10 THE COURT: But I thought that we had started on the eight
11 per week.

12 MR. REDGRAVE: We had, Your Honor, and here's why I need
13 to get clarification from our standpoint. We started on the
14 eight per week, but we were working off that backlog as to which
15 now the designations have been withdrawn. So what I would like
16 to do is, if we could, reset this --

17 THE COURT: You mean withdrawn, not voluntarily.

18 MR. REDGRAVE: They were deemed withdrawn, that's correct,
19 Your Honor. So, we've got 66, one of those is Clarence Cook
20 Little, which leaves us with 65; 51 are deemed withdrawn, and if
21 my math is correct, that leaves us with 14.

22 As to those 14, if the government is limited to a hundred,
23 I imagine they may want the opportunity to determine whether or
24 not they really wanted that 14 in, and I think the best course of
25 action would be to have those deemed withdrawn as well, we start

1 over again next week, and we go with the rule of eight. Your
2 Honor had asked when I last stood up on this, I believe --

3 THE COURT: And then, of course, they would lose the -- I
4 don't want to say the advantage, it's not much of an advantage,
5 but from their perspective they would lose the opportunity they
6 had to submit the eight per week which I guess constitutes the
7 14.

8 MR. REDGRAVE: They wouldn't --

9 THE COURT: I'm sure nobody reading this record from an
10 appellate point of view will understand my math, but I think the
11 parties do.

12 MR. REDGRAVE: Your Honor, they're not losing that, it's
13 just pushing it back, and it will go eight per week until they
14 get it in, which gets to the point that Your Honor said, "well,
15 what happens at the end of their case?" because presumably their
16 case in chief with the written directs and the live witnesses
17 will conclude before we can get to the end of 100 at eight per
18 week.

19 I've got a couple of solutions: First, as Your Honor
20 recognized, the priors coming in doesn't necessarily control
21 what's happening in the courtroom, and if Your Honor wanted to,
22 those could continue to be submitted while we're going to the
23 next part of the case.

24 A second option would be in December when we're getting
25 closer to the end, we again convene and we come up with a

1 schedule where we increase the rate of eight per week. We could,
2 you know, adjust eight per week right now and go to maybe ten per
3 week, something like that. There are a couple of different
4 solutions here, but the important point I think is to not lose
5 fact -- lose sight of the fact that the live witnesses and the
6 process of getting those men and women on and off the stand
7 should take precedence in terms of what this case is about, the
8 preparation and the work of the lawyers involved.

9 So, I would submit, Your Honor, that we should stay with
10 the eight per week, we should reset this all; the government in
11 fairness should be allowed to go through whatever their listing
12 is to come up with the 100 -- I suppose it's 99, Your Honor --
13 and then of course as we go through that process we would need to
14 abide by the restrictions or the narrowing admonition you gave us
15 for our counter designations. One last thing is very procedural.

16 THE COURT: By the way, I don't want to see, and now I do
17 have to name names, another objection from the defendants
18 preserving their objections about ETS. It's there, it's in the
19 record. Your objection is preserved forever and ever. No more
20 paper on that subject. Go ahead.

21 MR. REDGRAVE: Thank you, Your Honor, and I assume the
22 same would be true for any documents that were compelled released
23 under the orders of the Court. Thank you, Your Honor.

24 THE COURT: The famous goose and gander rules.

25 MR. REDGRAVE: I believe that was "Redgrave On Sauce",

1 Your Honor.

2 THE COURT: That's pretty good, Mr. Redgrave.

3 MR. REDGRAVE: Thank you. So there's 99 really that the
4 government would have left that we would go through on this
5 weekly basis. I think that is orderly, I think we can get it
6 done, and I think it keeps the focus on the right things.

7 So, to go back to where we were on the lives and the
8 priors, we should not now be converting priors to lives, and if
9 we're going to go down that road, let's just increase the number
10 of priors the government actually needs. And I mean this
11 seriously, what do they really need? And again, Your Honor, when
12 we talked about exhibits, the government raised the exhibits, you
13 do have a safety valve there as well for the issue that Ms.
14 Eubanks raised, the concern that while maybe we won't have a
15 witness be able to deal with this and how do we deal with this
16 rebuttable presumption. Your Honor recognized the orphan concept
17 and said, quite frankly, we're going to have an ability to
18 address those.

19 The numbers of exhibits, even with the limitations for
20 presumption, you're talking about 14,000. There's no way 14,000
21 documents are necessary to try this case and give Your Honor a
22 record to rule upon, and I certainly hope the government will
23 exercise discretion in what they actually try to put in front of
24 Your Honor.

25 And again, let's get to the end of the case, and if there

1 are things that need to be filled in where they don't think they
2 had the witness that they needed, let's talk about that. Maybe
3 there's stipulations. Maybe there's some other way to address it
4 with respect to documents that are illegible. We tried to work
5 with the government, and we'll continue to do that, but we
6 shouldn't let that change what you now laid forth in Order 471B.
7 And so those are the issues on the priors. I have a couple
8 others, but I'll stop there in case the government wanted to
9 respond or you have any questions of me.

10 THE COURT: No, I don't have any questions.

11 Ms. Eubanks.

12 MS. EUBANKS: Yes, Your Honor. First, I point out there
13 never was a proposal put before the Court in the praecipes that
14 the parties filed that the United States should cut its witness
15 list. I want to make it very clear that the fact of 471B is that
16 the United States' witness list is cut and the defendants' is
17 not. Now, we often here --

18 THE COURT: Well, I don't know what defendants' witness
19 list --

20 MS. EUBANKS: I can tell you -- I can represent to you
21 that the number -- that if this order was applied to them, they
22 won't have to make any changes in their presentation because of
23 the number of priors that they plan to use and to rely upon.
24 I'll also represent to the Court --

25 THE COURT: That means they have less than a hundred.

1 MS. EUBANKS: That means they have less than a hundred
2 going into this process, which means that the government is the
3 one feeling the pain in terms of an order that occurs in the
4 beginning once the trial has begun.

5 Now, the fact is that we have proposed a solution, and we
6 would ask the Court to allow us to give Your Honor a list of
7 witnesses that we would like to apply the ruling of 471B to, a
8 number of people that we believe we need to call as live
9 witnesses. I would also note that the defendants have on their
10 witness list right now more live witnesses than the United States
11 does. See, we haven't been looking at this process from what it
12 is that the joint defendants have and what they plan to present,
13 and if we are going to make radical changes, and I want to make
14 it clear, Your Honor, these are radical changes in terms of the
15 case that this Court kept on schedule with orders about witnesses
16 since 2002 and our planned proceeding here now, is disrupted by
17 now not being able to call witnesses, and witnesses still under
18 471B are the way that you get your evidence in.

19 Now, as we said in a number of recent filings, we
20 certainly take to heart the remarks of the Court and you've seen
21 this before. When the Court lashes out, if you will, with an
22 order that says this is too much and there has to be a change,
23 that the parties have been responsive. At least the United
24 States has been responsive. We don't recycle objections that
25 have been ruled on and we will not recycle material that it's

1 clear that the Court has stated a preference for less in order to
2 make this, but we cannot make our case, Your Honor, if we are not
3 able to call the witnesses that we now for years have planned on
4 in terms of presenting the evidence.

5 So, if we -- unless we have a vehicle to get the exhibits
6 in, and under 471B that vehicle is still through the witnesses,
7 then cutting us off of a number of witnesses is a huge problem.
8 We don't have any intention of calling any witnesses live if we
9 don't need them. We don't have any intention of prolonging the
10 trial. You may remember, and it's in a footnote in one of your
11 orders, that defendants said that they didn't think that we
12 needed as much time as the United States was requesting to put
13 its case on. If you review the numbers, defendants have spent
14 more time of trial than the United States had and we're in the
15 United States' case in chief. So by their count they've
16 introduced documents into evidence --

17 THE COURT: But that's not surprising at all given how
18 we've structured it with direct testimony. I have no doubt that
19 when it comes to the defendants' case you're going to be using up
20 a lot more hours -- again, perhaps I shouldn't say I have not
21 doubt, but it wouldn't surprise me if you end up using up a lot
22 more hours when we're in defendants' case than they do. I'll let
23 you finish and then I'll hear briefly from Mr. Redgrave. I want
24 to say a couple of things.

25 MS. EUBANKS: Well, Your Honor, respectfully, I would

1 request the opportunity to provide something in the way of a plan
2 to meet the requirements of the order, a solution to it, not 30
3 witnesses, I don't think that that's a viable solution or a
4 necessary solution given the -- given some of the provisions in
5 471B, which I do think take us a long way in getting there.

6 And as Your Honor is concerned about the Court of Appeals,
7 we're concerned about prevailing here and having sufficient
8 evidence before Your Honor to be able to prevail on our claims,
9 and I can represent to you here and now that under this order we
10 won't be able to do that if we don't have some type of relief,
11 because it is a huge change and it does preclude the ability to
12 get in certain evidence. So, with respect, I would request that,
13 Your Honor.

14 THE COURT: All right.

15 Mr. Redgrave.

16 MR. REDGRAVE: Thank you, Your Honor. Briefly on this one
17 issue we've been dealing with, the government tries to justify
18 this move to live by saying they've been planning and this upsets
19 their plan. Their planning was to have these witnesses by prior,
20 so the solution is that they need to add those priors, not
21 summary changes and --

22 THE COURT: Why does the suggestion that they are making
23 in any way work to the detriment of the defendants? Because they
24 have agreed that they would live within their hour limit that was
25 set at the beginning of this trial.

1 MR. REDGRAVE: Well, Your Honor, there's a great
2 difference in terms of the prior designations that were made
3 under the orders of the Court as far as the scope of that
4 testimony was. The government elected and said they were going
5 to bring the witnesses by prior testimony. The amount of work
6 that is required is not minimal, but to go and do designations
7 and counter designations and get that in, to bring the witness
8 now live would be adverse lives, I assume for most of them. To
9 go through that entire process of working with those witnesses to
10 get the written direct corrected, to then go through the
11 examination live here in court is going to be a lot more work for
12 everyone, including Your Honor. And quite frankly, that really
13 flips on its head where we started with this. We didn't come in
14 and ask for the limit on the numbers, we wanted page and line
15 because of the problem with the vast breadth of this. To now
16 have the government say, "Well, we were planning on them being
17 priors, we've limited that, so now we still want them; we're not
18 going to limit our case at all really, we're just going to bring
19 them on the stand," it doesn't help reduce anything and it
20 actually complicates and overburdens us with respect to witnesses
21 where, quite frankly, if they really needed that prior, which is
22 what they identified, let them have that prior testimony, rather
23 than now expanding the scope of the work for everyone. That's
24 where I'm coming from, Your Honor. It's going to create a lot of
25 additional work now for these witnesses where the government was

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1 intent to have them come by prior testimony.

2 THE COURT: Right, because the government -- it is my
3 view -- was planning -- I know the government will be very
4 unhappy to hear me say this, but was planning to simply designate
5 huge amounts of deposition testimony from priors and then let me
6 figure it out in chambers after the trial had concluded.

7 MR. REDGRAVE: And Your Honor, what they should do after
8 witness 100 -- and actually 1 through 100 -- is pick out those
9 nuggets where they say, "Judge, this is what proves it." And to
10 the extent they need any of these people that they are now
11 threatening they need to bring in live, they have that prior
12 testimony, they know the nuggets that they think are going to
13 convince you of the findings they want you to find for that, that
14 is where we should go. We shouldn't now be dragged down this
15 process of 1964 subpoenas and the rest which will, I guarantee
16 you, be a lot more work for everyone and a lot more time spent in
17 court on that.

18 THE COURT: I just don't understand that argument,
19 Mr. Redgrave, why it's more work. Now, of course, the government
20 can also consider a different solution. I certainly rejected the
21 defendants' suggestion that people should be limited to a number
22 of lines. That certainly seemed to me the most arbitrary
23 solution. It may be that -- and I'm going to be obviously
24 mulling all this over in the next day or two. It may be that the
25 priors, if limited in lines, need not be limited as

1 draconiously (sic)-- there is no such word -- as I know I did.
2 And if I'm not being clear, what I'm trying to focus on is that
3 the government argues very strongly that it needs these
4 witnesses, and I certainly understand that argument. I am
5 convinced it doesn't need all that's being designated for these
6 witnesses, and it may be with serious consideration and
7 evaluation the government can get their priors into evidence and
8 into the record but drastically reduced in terms of length, and
9 that's something for everybody to think about in the next day or
10 so.

11 I'll let you finish up and then Mr. Bernick has to add
12 something.

13 MR. BERNICK: I don't have to add something, I was going
14 to try to make a proposal. The difficult part of this --

15 THE COURT: I think Mr. Bernick cut you off, Mr. Redgrave.

16 MR. REDGRAVE: That's okay, I'll let him this time.

17 MR. BERNICK: The difficulty is that this is all very
18 abstract.

19 THE COURT: Yes, it is.

20 MR. BERNICK: Their proposed findings have 10,000
21 documents, ours have 4,000. Ten thousand documents is an
22 enormous number of documents. As I took Ms. Eubanks' comments, a
23 lot of the concern with the number of witnesses is being able to
24 get in the documents, so it sounds like the documents in a way
25 are the dog, and they're kind of wagging the tail of how many

1 witnesses are necessary to be called. It would be very, very
2 helpful to know why it is that we really need 10,000 documents to
3 say nothing of more than 10,000 documents. But if we put that
4 aside because it's too abstract and we can't deal with it in
5 anymore detail than that right now, at least from my client, to
6 go from working with prior designations to dealing with live
7 testimony makes me want to say we'll live with the priors.

8 I mean, you cut back or you set a limit on the number of
9 priors only to then have them say they want to make up for the
10 cutback with live people, which is another way of saying you
11 really shouldn't cut us back on the total number of priors or
12 witnesses that could be presented under that umbrella. All we're
13 saying is if you're going to make it a hundred, then we have to
14 make it 110 or 120 by adding more live witnesses. So the
15 pressure point is still the number. We would be much more, at
16 least from my point of view in dealing with the burden that's
17 associated with this and the time of the Court, we would rather
18 have more priors because at least we know the paperwork we're
19 dealing with, we don't have this very time consuming and
20 difficult process that has to take place in court through live
21 witnesses.

22 So, I feel a little uncomfortable listening to this
23 discussion, because all that's happened is we've gone from a
24 discussion about prior designations, which can be handled in
25 sense in the back room, to the discussion of in-court proceedings

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1 now with more people than we ever had before. It seems like
2 that's the wrong direction to go in. So, my own observation to
3 the Court would be I think hundreds is plenty. I agree with
4 everything Mr. Redgrave has said about kind of a show cause
5 process beyond that. But if the government really believes that
6 they need all of these people in order to get all of these
7 documents and we're not really in a position to second-guess that
8 at this point because it's very abstract, I would rather give
9 them some leeway on the priors on the 100 than to go back to a
10 process of dragging people in from across the country to wait and
11 to be prepared and to show up here and testify live. I think
12 that that's just -- it's even more inconvenient. Obviously, it
13 means that -- and I think that if Your Honor has said, as you
14 have, that there ought to be more judgment in how much to include
15 in those designations, what really ought to happen is folks ought
16 to go back and revisit the designations that they've made
17 previously so that they get reread and focused. Maybe that's the
18 best solution.

19 THE COURT: I thought that's what I indicated.

20 MR. BERNICK: I think that's right.

21 THE COURT: Very clearly.

22 MR. BERNICK: But from our point of view, the volume of
23 witnesses shouldn't be made up with people coming in live. I
24 just think that that's --

25 THE COURT: Let me say two things for counsel to keep in

1 mind, and then I'll hear briefly from Ms. Eubanks and we'll take
2 a recess. I agree with one thing that was said, agree strongly,
3 that the live testimony in open court has to take precedence in
4 terms of everybody's schedules, lives and moving forward. That's
5 number one. And number 2, I think I have to reluctantly conclude
6 that I set up a scheme that I thought that I could keep up with,
7 and it's simply, because of the huge volume of everything,
8 turning out not to be possible. I can with a lot of work,
9 because don't forget everybody, I do have some other things to
10 do, I can I think thoroughly keep up with the direct that's being
11 submitted, be fully prepared to understand the nuances of your
12 cross and to rule after each person. And that is a firm
13 commitment that you have from me. You do not at this point have
14 any commitment from me, I am sorry to say, about the schedule I
15 will keep up with priors. My intent had been that I would read
16 all the priors week-by-week to keep up with all of you, and it
17 just can't -- I don't know, maybe if you work 28 hours a day, but
18 I can't do it.

19 And so what that means is that the priors will undoubtedly
20 not be read before the government closes, and that's a logistical
21 problem that I've struggled with and obviously it applies as well
22 on the defendants' side whenever you all close.

23 In bench trials -- First of all, it doesn't trouble me at
24 all that the government will make its interim summations and its
25 final summation without some of those decisions on exhibits

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1 having been made because the record is open and I'll make
2 decisions as I go along. What's more, in bench trials it's often
3 understood that the Court won't get a chance to look at some of
4 the documentary evidence, nothing like this trial but in other
5 bench trials, until after everybody goes home and you start to
6 write the opinion and really figure out whether the documents
7 support some of the evidence that's been made.

8 In this trial, one of the unknowns on both sides is that
9 after you finish your live testimony, and it's not until you
10 finish or come very close to finishing your live testimony that
11 you will know where the crucial holes are in your evidence, and I
12 don't think we're near that point yet, and I have really
13 considered whether we need a week -- I'm just throwing out a
14 period, I have not by any means decided this -- in which each
15 side evaluates after the close of its case where it really
16 stands.

17 Now, again, that's something else that I've thought about
18 in terms of making sure that the record everybody gets in is a
19 complete but not bloated record.

20 I was going to give you time to say something final. I
21 want to make sure that before we close I let people know where
22 they stand only on the eight-a-week issue so you know how you
23 have to proceed on that.

24 MR. REDGRAVE: Your Honor, Mr. Bernick did interrupt me,
25 so I'll ask your indulgence for a second, and I don't know when

1 you want to address this. I do have an issue under 471B on
2 interim summation I want to raise, and I don't believe I need to
3 address that aspect of fairness that Ms. Eubanks raised a -- I
4 don't believe that's a proper consideration, and I did have one
5 other issue I need to raise on scheduling. I don't know whether
6 you want to do that after the break or you want to do it now.

7 THE COURT: No, we might as well -- I guess I should check
8 with our court reporter and see how he's doing.

9 THE COURT REPORTER: I'm fine, Your Honor.

10 THE COURT: Ms. Eubanks.

11 MS. EUBANKS: I want to emphasize that it's our duty to
12 assist and not inundate the Court. We will provide -- we've read
13 clearly your orders, and it's very clear to us that the Court is
14 certainly keeping up with proceedings. There was something that
15 we proposed that comes out of English law, and obviously it's not
16 something that, given your work schedule which is fairly intense,
17 that you are willing to do, but reading days was something that
18 along the way would certainly keep us from having to have a week
19 down as we would have a day to --

20 THE COURT: I don't think that's fair to all of you. I
21 saw it. Yes, it would be nice, but I don't think it's fair to
22 everybody else involved.

23 MS. EUBANKS: Well, as you know, Your Honor, we've
24 listened carefully to the discussion that the defendants have
25 raised here, and I know you've listened carefully to what it is

1 that the government has to say. We will provide, with your
2 permission, another document very early next week that takes all
3 of this into consideration and proposes --

4 THE COURT: You can provide it.

5 MS. EUBANKS: -- a proposal.

6 THE COURT: I don't want anybody to jump to any
7 conclusions about what I'll do. It has to be in Monday by
8 noontime so that I can work on it Monday afternoon.

9 MS. EUBANKS: Thank you, Your Honor, we'll do that.

10 THE COURT: Mr. Redgrave, you wanted to raise some other
11 issues, summations.

12 MR. REDGRAVE: Yes, Your Honor. With respect to interim
13 summations, we understood, and I think we understand from the
14 order but I want to make clear, in the Manual for Complex
15 Litigation when it talks about interim summations, it's presumed
16 both sides are allowed to speak during the summation to the trier
17 of fact, and the order could be read to say, and maybe this is
18 what Your Honor intended, in which case I think I would ask you
19 to reconsider it, that only -- For instance, the government in
20 its case in chief could pick a time, they'd stand up for up to
21 90 minutes, and then we wouldn't say anything. I don't know if
22 that was the Court's intention, but we -- if it was, we humbly
23 submit it would be better for Your Honor in trying to understand
24 the evidence that has been presented to that point to hear both
25 sides --

1 THE COURT: That wasn't my intention.

2 MR. REDGRAVE: Okay. So both sides would then have -- so
3 I understand it, the government would have two opportunities in
4 its case in chief, they might pick, and they'd say like next
5 Thursday they're going to do it, they would have 90 minutes, and
6 then we'd have 90 minutes that same day to respond, and we'd have
7 to split it up however we arm wrestle in the back room, correct?

8 THE COURT: That's correct.

9 MR. REDGRAVE: Okay. Thank you, Your Honor, on that.

10 THE COURT: And, of course, everybody would know in
11 advance approximately when it was going to be depending on when a
12 particular witness finished.

13 MR. REDGRAVE: Right. Your Honor, with respect to the 65
14 deemed or -- 51 deemed withdrawn, maybe 65, I wanted to alert
15 Your Honor that because of the 51 withdrawn, we weren't filing
16 any today because we originally planned to file from that
17 backlog, so we weren't filing any objections today. So we do
18 need clarification on where the 14 stand so we know if we need to
19 file objections to those, we figure out a time to do that. If
20 they are going to be deemed withdrawn so the government can
21 figure out which 99 it's going to pick, that's fine, we'll go
22 forward with that. There's just a matter that I need to clarify
23 so I do what I need to do under the Court's orders.

24 And then the last issue I was going to raise, Your Honor,
25 is with respect to a witness next week that will be noticed for

1 testimony the following week. His name is Wayne Ukatz. This is
2 a former general counsel of R.J. Reynolds. He's being called as
3 an adverse witness. The government has told us they intend to
4 invoke a provision under Order 471 with no letter attached,
5 paragraph on page 73B.

6 And the reason I want to raise this quickly, Your Honor,
7 is that we believe that we could head off motion practice on this
8 with an instruction from the Court. The paragraph in question
9 says, "if a party proposes to present a witness who has given no
10 prior trial or deposition testimony, written or videotaped --"
11 which is the case with Mr. Ukatz; then it goes on to say "-- for
12 whom the party is unable to obtain a written direct examination,
13 that party shall notify the Court and other parties in its notice
14 of witnesses and exhibits to be filed by 5 p.m. the Monday
15 preceding."

16 Your Honor, based on information provided to me that we
17 have obtained from counsel for Mr. Ukatz, the government has
18 simply told them that they intend to invoke this provision
19 without trying to obtain a written direct. In other words,
20 without looking at the documents they intend to question
21 Mr. Ukatz about and putting together a written direct
22 examination. With all due respect, Your Honor, I believe that's
23 contrary to this order. I believe that if you would instruct the
24 government to do that, counsel for Mr. Ukatz would attempt to
25 work with Mr. Ukatz through that written direct examination based

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1 on documents and submit corrected testimony which would be fully
2 consistent with the procedure we've followed with every other
3 witness. Just because he does not have prior deposition or trial
4 testimony does not allow the operation of this paragraph to
5 eliminate the effort to try.

6 THE COURT: Who is his counsel, by the way?

7 MR. REDGRAVE: I believe Eric Kitchen at Steptoe &
8 Johnson.

9 THE COURT: Mr. Brody.

10 MR. BRODY: Your Honor, two things. I guess in response
11 to the issue with Mr. Ukatz, he's an adverse witness. He's
12 former general counsel of R.J. Reynolds. He has never been
13 deposed, never spoken in a health case before. We have no
14 testimony that he has given. I believe that a notice and
15 accompanying motion has already been filed, it's a three-pager.
16 It was probably filed this afternoon because we met and conferred
17 on it with defendants earlier today, and I gave our approval to
18 our folks back at our office to go ahead and file it. So I would
19 be surprised if it has not already been filed. We think this is
20 precisely the circumstance that should allow us to proceed
21 without a written direct examination.

22 Given the way things have gone, I think ultimately it will
23 probably take less time for the examination of Mr. Ukatz in total
24 than if we try to come up with a written direct examination in
25 the absence of any other testimony. Defendants certainly can

1 respond to what we filed today. It was only three pages, as is
2 required under Order 471, and, you know, based on our discussions
3 during the meet and confer that we had on it earlier today, I
4 expect they will. So that's the status of that.

5 The other thing that I just wanted to raise, it's 3:45
6 right now, we do have the conclusion of Dr. Harris's redirect in
7 the morning, and I'm wondering if it might make sense just to
8 start with Mr. Robertson after Dr. Harris's testimony is
9 completed rather than getting in 30 minutes and then having that
10 big break.

11 THE COURT: The redirect is going to be approximately
12 1 hour.

13 MR. BRODY: 60 to 90 minutes, I suspect.

14 THE COURT: Closer to 60 than 90, it seems to me.

15 MR. BRODY: I will convey your sentiments.

16 THE COURT: Your motion was filed today. Mr. Redgrave, if
17 it's only three pages, I don't think there is any law on it, can
18 you get in an opposition tomorrow, tomorrow at 5.

19 MR. REDGRAVE: Unfortunately, Your Honor, I'm not sure --
20 I'm not going to be able to be in court. I've got -- I would
21 prefer if I could do it by Friday morning. If I can by tomorrow
22 night, I will do it. It won't personally be me, so I'm going to
23 impose upon someone else, Your Honor. I hate to do that, but I
24 will try to do that by 5:00 tomorrow night, but if I could have
25 your indulgence until the next day -- and clearly, Your Honor, if

1 we're correct in our reading of this order and you didn't hear
2 Mr. Brody say that he tried, we certainly would ask that the
3 Court direct them to try.

4 THE COURT: Friday at noon and then the government has to
5 file a response. It's going to be due Saturday at noon.

6 MR. BRODY: I hope that we won't have to. We'll take a
7 look at what they file, and if we're not going to file a reply,
8 we'll submit a notice advising the Court of that.

9 THE COURT: Now, let me get back to the famous 14. I did
10 not deem them withdrawn because the government had heard my
11 admonitions before they were filed, and therefore I did not wish
12 to operate on a presumption that they were ignoring them.
13 However, it may be the government's choice at this point to
14 reevaluate those 14. I understand that Mr. Redgrave needs a
15 decision because it triggers his obligations. If the government
16 wants to withdraw them for reevaluation at this point, it may.
17 If you want to stand on those 14, then we'll be following the
18 regular schedule.

19 MR. BRODY: What we would like to do, Your Honor, is when
20 we submit the pleading that Ms. Eubanks spoke about on Monday at
21 noon, is at that time advise if there are any that we wish to
22 withdraw. We have to take a look at it in the context of the
23 whole. It may be, in order to --

24 THE COURT: And that means the defendants have no
25 obligations to counter designate.

1 MR. BRODY: That would be correct, although I think they
2 have already counter designated as to a few of them. I don't
3 think they're necessarily going in order, so there may be, and I
4 think there are, a couple of those that they have already counter
5 designated to.

6 MR. REDGRAVE: There may have been one or two for all I
7 know, Your Honor, with the defense group. I can't keep track of
8 everything entirely. But if that's the case, I would just as
9 soon have Your Honor's blessing that we could just hold down
10 until we know where this is actually going and not have to file
11 counter designations or objections, especially if they are going
12 to be moot.

13 THE COURT: No such counter designations need to be filed
14 on any of the 14 where they haven't already been filed.

15 MR. REDGRAVE: Thank you, Your Honor.

16 THE COURT: I think that takes care of the immediate
17 problems, certainly not the long term problems.

18 Yes.

19 MR. REDGRAVE: One more issue, if I could raise it, is
20 completely mechanical, but I don't know if we're going to stop.
21 I think we are. Your Honor, as you know, we've had a number of
22 lists that have been coming in with respect to exhibits on
23 testimony. We would like your guidance and permission to just be
24 able to agree between the parties, give the list to Ms.
25 Hightower, and if they are consistent with the Court's records,

1 have minute orders entered with the exhibit numbers so we can
2 have in the record knowing which documents have been admitted as
3 exhibits as we go forward.

4 THE COURT: And the way to do that, again, to keep a
5 record as clear as possible, is that the order should come in in
6 terms of subject to any objections which the parties may have
7 made on the record, the parties agree that the following exhibits
8 should be admitted. That preserves substantive objections but it
9 gets everything into the record and it demonstrates that -- or
10 reflects that the parties are in agreement on what the exhibit
11 numbers are.

12 MR. REDGRAVE: Thank you, Your Honor.

13 THE COURT: Any problem with that from the government's
14 point of view?

15 MS. EUBANKS: None, Your Honor.

16 THE COURT: All right. Well, everybody's getting off
17 early today, but from the look on everyone's faces maybe that's
18 all right. 9:30 tomorrow morning, everybody.

19 MR. WELLS: Judge, off the record.

20 (Discussion had off the record between Mr. Wells and the
21 Court.

22 (Proceedings adjourned at 3:46 p.m.)

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1 C E R T I F I C A T E.

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

5 -----
6 Scott L. Wallace, RDR, CRR
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