

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	November 22, 2004
Plaintiff,	:	
	:	9:32 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 33
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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

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

2 THE COURT: Good morning everybody.

3 This is United States versus Philip Morris, CA 99-2496.

4 And we are ready, I believe.

5 MS. CENDALI: We are, Your Honor. Good morning.

6 Allison Cendali on behalf of the United States.

7 THE COURT: And your witness?

8 MS. CENDALI: Our witness is here. That would be

9 Dr. Paul Mele.

10 Dr. Mele, would you come up to the stand.

11 THE DEPUTY CLERK: Please remain standing and raise

12 your right hand.

13 PAUL MELE, Ph.D., Government's witness, SWORN

14 THE DEPUTY CLERK: You may be seated.

15 DIRECT EXAMINATION

16 BY MS. CENDALI:

17 Q. Good morning, Doctor. Can you please state your name for
18 the record?

19 A. Paul Mele.

20 MS. CENDALI: Your Honor, may I approach the witness?

21 THE COURT: Yes, you may.

22 BY MS. CENDALI:

23 Q. Dr. Mele, I'm handing you what has been filed on November 1,
24 2004, your direct testimony submitted pursuant to Order 471.

25 Do you recognize that document?

1 A. Yes, I do.

2 Q. Is that, in fact, the direct testimony that the United
3 States submitted pursuant to Order 471?

4 A. Yes, it is.

5 Q. And, Doctor, before adopting formally the written direct
6 testimony, do you have any changes or clarifications to the
7 testimony that you would like to make today?

8 A. There were two minor changes.

9 Q. Okay. Can you please tell the court what that first change
10 is?

11 A. Do I have to find it in here?

12 Q. Actually, I can direct your attention to page 14.

13 A. Page 14. They were both minor changes, but for the sake of
14 accuracy --

15 MS. CENDALI: Your Honor, may I approach?

16 THE COURT: Yes.

17 A. Is the change in here? Is this the original?

18 Q. No. That's correct. On line 6 through 8.

19 A. Right. There were some wording changes.

20 Q. Could you tell the court what the change would be?

21 A. Yes. The first sentence says 7 to 8 -- sentence, "Jim
22 Charles told me that the tolerance study could not be published
23 because the study showed tolerance and physical dependence to
24 nicotine."

25 My addition there was, "in accordance with the

1 Diagnostic and Statistical Manual, version 3."

2 Q. Okay. And were there any other changes that you would like
3 to make?

4 A. The second change was, if you can direct me to that page.

5 Q. That would be page 24.

6 A. 24.

7 Q. Line 16.

8 A. Yes. Line 16, there was an addition to the last sentence
9 where it now states, "We were all in different rooms at
10 different times. At the time I was speaking to Mr. Pollock,
11 most of us were present in one room."

12 Q. And can you -- basically, Your Honor, the changes that the
13 witness would like to make, if you can just read that sentence
14 one more time.

15 A. "They were all in different rooms at different times. But
16 when we were answering questions for Mr. Pollock, most of us
17 were in one room."

18 Q. And so, therefore, at the testimony on page 24, line 16, "We
19 were all" should read, "We were all in different rooms at
20 different times, but when Mr. Pollock asked the question, we
21 were all in the same room." Is that correct?

22 A. Most of us were in one single room.

23 Q. And, Your Honor, on page 14, the change should be made to
24 line 8, and the sentence should read, "Jim Charles told me that
25 the tolerance study could not be published because the study

1 showed tolerance and dependence to nicotine in accordance with
2 the Diagnostic Statistical Manual;" is that correct?

3 A. Yes, that's Version 3.

4 Q. Now, Dr. Mele, why are you making these changes today?

5 A. For accuracy.

6 Q. With these changes do you adopt your written direct
7 testimony under oath?

8 A. Yes.

9 MS. CENDALI: Your Honor, those are the only questions
10 I have of the witness.

11 THE COURT: All right.

12 MR. WELLS: Philip Morris has no cross-examination of
13 Dr. Mele, Your Honor.

14 MS. CENDALI: Your Honor, in light of the fact --

15 THE COURT: Well, let the record reflect everybody's
16 mouth is hanging open.

17 (Laughter)

18 THE COURT: That's fine. That's up to the defendants.

19 Let me just make sure. Do any other defendants have
20 any cross-examination of the witness?

21 MR. McDERMOTT: No, Your Honor.

22 MS. CENDALI: Your Honor, with respect to the
23 testimonial objections the defendants have made, the United
24 States assumes that those objections are hereby waived based on
25 the fact that the United States has not had an opportunity to

1 cure the objections.

2 THE COURT: I'm not sure about that. Can we let
3 Dr. Mele go?

4 MR. WELLS: Yes, Your Honor.

5 MS. CENDALI: Your Honor, if we need to cure the
6 objections or if there are some hearsay objections, we ask that
7 the witness not be excused so that we be able to do that if
8 that's necessary.

9 THE COURT: Well, the testimony is concluded at this
10 time. You put on your testimony. The defendants have done what
11 they want to do, and it's done and over with and therefore I
12 have to deal with the validity of the objections. So I think he
13 may be excused.

14 MS. CENDALI: Thank you, Your Honor.

15 THE COURT: Dr. Mele, I can't remember for a moment.
16 Where are you coming from?

17 THE WITNESS: Just locally.

18 THE COURT: Well, that's good.

19 THE WITNESS: Only in Frederick.

20 THE COURT: All right. You may step down.

21 THE WITNESS: Thank you very much.

22 THE COURT: Do counsel want to follow the usual
23 procedure we have been following, which is that after each
24 witness everybody takes just a day or so to see if there are
25 still outstanding objections, or do you feel you can go ahead

1 this morning?

2 Mr. Wells, I think would rather consider where he
3 stands, from his expression, or I'm not sure.

4 MR. WELLS: Yes.

5 MS. SCHWARZSCHILD: Your Honor, how are you?

6 We have resolved our objections on the exhibits because
7 the only one remaining was the Waxman --

8 THE COURT: Counsel, let's come forward, though.

9 MS. SCHWARZSCHILD: Your Honor, Pat Schwarzschild for
10 Philip Morris.

11 And the objection we had was to one exhibit, the Waxman
12 Report, and the government chose to withdraw that.

13 MS. CENDALI: We withdrew that objection, that's
14 correct. So there are no outstanding objections to exhibits.

15 THE COURT: What about on testimony?

16 MS. SCHWARZSCHILD: Those remain for Your Honor to
17 decide as you just mentioned a moment ago.

18 THE COURT: Now, for some strange reason, I didn't
19 bring that file with me this morning. I think that's the first
20 time I've missed a file.

21 I may be able to resolve your objections in any event
22 without the file. Why don't you just -- I cannot remember, you
23 had a few, I know, but not a huge number.

24 MS. SCHWARZSCHILD: There were several, Your Honor,
25 pertaining mainly to hearsay where the witness would talk about

1 testing. I can go through those specifically.

2 But information that was given to one person and then
3 relayed to him or references to information without any regard
4 to who provided that information to him, but it was not directly
5 to him, and so we objected to that.

6 THE COURT: Let me go through this for a moment.

7 I gather that you are not proceeding with the 701
8 objection that you first raised. Is that right?

9 MS. SCHWARZSCHILD: We did raise an objection, Your
10 Honor, on 701 on expert testimony, but our major objection is
11 the hearsay.

12 THE COURT: Let me ask you this.

13 The government has responded by arguing as to a number
14 of the objections that they fall within the hearsay objection of
15 constituting an admission by a party opponent. So that's one
16 major thing to answer.

17 It seems to me that that objection -- or that argument
18 applies to probably the bulk of your objections or the most
19 serious of your objections, so let's deal with that one first.

20 MS. SCHWARZSCHILD: If I may step back and pick that
21 up.

22 THE COURT: Sure.

23 For example, the government refers to statements made
24 with -- made to and from Dr. Charles as head of the biochemical
25 research division to other supervisors. I have to say that

1 seems fairly clear to me, that category of response to your
2 objection.

3 MS. SCHWARZSCHILD: Your Honor, our major objection is
4 not if the statement was made directly to Dr. Mele but, for
5 instance, on page 21, line 7 --

6 THE COURT: I'll ask you to read that.

7 MS. SCHWARZSCHILD: I'm sorry. I will.

8 There was a question that preceded it at line 4, "Was
9 the supplement -- study actually published?" The answer was,
10 "No". And then the question next was, "Why not?"

11 THE COURT: You're on page 20?

12 MS. SCHWARZSCHILD: 21.

13 THE COURT: All right. Line 7.

14 MS. SCHWARZSCHILD: That's correct, Your Honor. And
15 after the Why not question on line 6, the answer is, "Jim
16 Charles told Dr. DeNoble."

17 THE COURT: Right.

18 MS. SCHWARZSCHILD: So we feel that's hearsay because
19 Dr. Mele was not the one to whom any admission was made about
20 that.

21 THE COURT: But both Dr. Charles and -- I'm sure Jim
22 Charles is a Doctor or I think he is -- Dr. Charles and
23 Dr. DeNoble are both high-level employees of Philip Morris, or
24 were both high level employees of Philip Morris.

25 MS. SCHWARZSCHILD: To the extent that the government

1 is intending -- as they appear to be -- to call Dr. DeNoble
2 soon, we will be able to examine Dr. DeNoble about that, but
3 Dr. Mele was not party to that conversation.

4 THE COURT: I understand that, but I don't think that
5 changes the meaning of 801(d)(2)(d).

6 Now, Dr. DeNoble's direct testimony or cross may
7 contradict or undermine what's in Dr. Mele's statement, of
8 course I don't know that, and of course you're allowed to
9 explore that. But as to any hearsay objection regarding
10 statements made by Dr. Mele's supervisors or coworkers, for that
11 matter, those are allowed under 801(d)(2)(d). Now, you raised
12 some other issues and --

13 MS. SCHWARZSCHILD: On that same page, Your Honor,
14 lines 17 and 18, may fall into your same ruling. But our
15 objection was that, again, Dr. Mele had no knowledge of this.
16 He says that Mr. Charles spoke to Dr. DeNoble who related to him
17 and then on 19 and 20.

18 THE COURT: Wait. Just a minute. Your objection is --
19 again, we're on page 21 to -- what line?

20 MS. SCHWARZSCHILD: Page 22, Your Honor, line 18.

21 THE COURT: Page 22, line 18. All right.

22 MS. SCHWARZSCHILD: And that statement was not in his
23 presence or to him, it's a statement by Dr. DeNoble, evidently
24 that was relayed to him.

25 THE COURT: I understand that, but it's the same issue,

1 and that is that Jim Charles, a supervisor, discussed the issue
2 with Dr. DeNoble and another supervisor. Both of the statements
3 are being relayed as being offered as a statement by the
4 parties, agent or servant concerning a matter within the scope
5 of the agency or employment made during the existence of the
6 relationship under 801(d)(2)(d). So, that one, too, may come
7 in.

8 Now there is a particular one, on page 23, that you
9 mentioned, lines 1 through 3. Let me look at that.

10 MS. SCHWARZSCHILD: There's one similar to that on page
11 22, line 19 and 20, where the witness talks about being told,
12 without giving any reference to by whom the source of that
13 comment, and that's also on 23 that he was told.

14 THE COURT: And let me be very clear. Are you making
15 the same objection to those two pieces of testimony on pages 22
16 and 23?

17 MS. SCHWARZSCHILD: I am, Your Honor.

18 THE COURT: That objection is overruled for the same
19 reasons, but I thought -- this is what I want to be clear about.
20 This is why I just asked you that question.

21 You said in your legal memorandum, issue 2, likewise on
22 page 23, lines 1 through 3, Dr. Mele answers a question without
23 in any way identifying any person who might have told him this
24 information.

25 I took it from your response that your objection,

1 again, was that there hadn't been -- let me say it this way,
2 that Dr. Mele wasn't repeating what one person told him directly
3 but rather was repeating what Dr. Charles told Dr. DeNoble who
4 told Dr. Mele.

5 MS. SCHWARZSCHILD: As to the last two on pages 22 and
6 23, our objection is as stated in our legal memorandum, that he
7 is --

8 THE COURT: Which is that the person is not --

9 MS. SCHWARZSCHILD: Dr. Mele has failed to identify the
10 source of the comment on which he relies for his testimony.
11 That is the objection.

12 THE COURT: What's the government's response to that?

13 MS. CENDALI: Your Honor, if Dr. Mele were here, he
14 would be able to explain. When you see on page 22, lines 17 and
15 18 talking about the discussions regarding the move to
16 Switzerland, those discussions were all between Jim Charles and
17 Dr. DeNoble who relayed the information to Dr. Mele, and then
18 the questions that follow are actually follow-up questions
19 related to those discussions.

20 So, for each of those instances where the defendants
21 have objections, the answer is that Dr. Charles was having
22 discussions with Dr. DeNoble who was Dr. Mele's supervisor and
23 Dr. DeNoble would turn around and discuss those matters with
24 Dr. Mele. So that was all part and parcel of those discussions
25 surrounding moving Dr. Mele Dr. DeNoble off of Philip Morris

1 property.

2 THE COURT: Let me say this. Reading this after the
3 fact, I certainly think that in fairness to Dr. Mele those
4 questions on 19 and on -- on line 19 of 22 and line 1 of page 23
5 could have been asked more clearly. But again, in context we're
6 talking about three questions, lines 17, line 19, and line 1 of
7 page 23; it's clear that that -- that Dr. Mele is referring to
8 the discussions between Dr. Charles and Dr. DeNoble. It really
9 isn't any doubt as I read this material, and so, therefore, the
10 objections will be sustained for the reasons I gave earlier as
11 to the other pieces of testimony where it was crystal clear
12 that --

13 MS. CENDALI: Excuse me. Did you mean sustained or
14 overruled?

15 THE COURT: I meant overruled. Excuse me.

16 MS. CENDALI: I'm sorry.

17 THE COURT: And were there other objections?

18 MS. SCHWARZSCHILD: I think there were, but I think you
19 covered them, Your Honor, in terms of your rulings.

20 THE COURT: Okay. All right.

21 MS. SCHWARZSCHILD: I think they all fit within the
22 same context.

23 THE COURT: Well, we're obviously a little early. But
24 Mr. Redgrave wants to discuss issues. Is that right?

25 MS. CENDALI: Your Honor, before we leave this matter I

1 just want to move all the documents into evidence. I have not
2 yet done that, if they haven't been admitted into evidence, with
3 the exception of 77012.

4 THE COURT: That motion is granted.

5 However, again, given the procedure we've been
6 following, the government is to get a final clear list to
7 Ms. Hightower -- checked out with defendants first, of course --
8 so that she knows exactly what is to be admitted.

9 MS. CENDALI: Yes, Your Honor.

10 THE COURT: All right. Mr. Redgrave.

11 MR. REDGRAVE: Thank you, Your Honor. Good morning.

12 THE COURT: Good morning.

13 MR. REDGRAVE: I've got three discrete issues just to
14 raise with Your Honor. I think they are pretty much
15 housekeeping, although one is more substantive than that.

16 The first is an issue discussed in Mr. Juchatz's
17 testimony. There are objections raised to questions posed where
18 Your Honor sustained the objection on privilege grounds.

19 The government wanted an opportunity to consider
20 briefing a motion for reconsideration on that and you instructed
21 them to tell us promptly. This is going back to page 6626 and
22 27 of the trial transcript.

23 At about 9:00 o'clock last night I received an e-mail
24 from Mr. Brody indicating that they would be filing a motion for
25 reconsideration. They indicated they would do that by the end

1 of the day today. In subsequent exchanges I think that will
2 translate to about 7:00 o'clock tonight.

3 Under Your Honor's order last week we have 48 hours to
4 respond, so that will be about 7:00 o'clock on the Wednesday
5 before Thanksgiving.

6 The question that raises is how and when do you want us
7 to deliver courtesy copies to Your Honor of that? I don't know
8 if the court is open on Friday.

9 THE COURT: We are in recess, which is a very vague
10 term, and I have a feeling I'll be in and out over the weekend.
11 I would think your response is going to be pretty slim and,
12 therefore, you could slip it under the door, I would hope.

13 MR. REDGRAVE: As long as we can get in the courthouse,
14 Your Honor.

15 THE COURT: You can get in.

16 MR. REDGRAVE: Under which door?

17 THE COURT: I'm sorry. Under chambers' door, meaning
18 on the sixth floor.

19 Now, they may not let you do that. If they don't let
20 you do that, you can leave it with the marshals, but I don't
21 know that -- well, leave it downstairs with the CSOs.

22 You're going to be filing it electronically anyway, so
23 if worse comes to worse, we can print it out if I don't get it.

24 Is there any chance -- I realize that timing is very
25 tight -- of you're getting it in any earlier? Then for sure we

1 will get it and there will be someone in chambers.

2 MR. REDGRAVE: Well, Your Honor, we could try. I don't
3 want to make promises. A lot of people did have some travel
4 plans and we will work around that. We will get it in.

5 But I would think maybe, because of the fact that it
6 should be pretty short, if -- we could also separately e-mail it
7 if that would be of any assistance to your law clerk to have it
8 printed that way as opposed to ECF. It will be fairly short.

9 THE COURT: It would be of assistance to me because I'm
10 not sure -- I don't want to drag her in if it's not absolutely
11 necessary. Whereas I'm pretty sure I'm going to be in and out,
12 as I say.

13 So, you can certainly send it to my e-mail address and
14 then we have to deal with the government's response. And when
15 will that come in? Who is going to speak for the government?
16 Mr. Brody, right.

17 MR. BRODY: Your Honor, I think it's apparent that
18 obviously the briefing is going to extend beyond the testimony
19 of Mr. Juchatz, but as you observed last week, it's an issue
20 with implications for future witnesses.

21 I have not had a chance to check with our people in
22 terms of their availability to get a response in on Friday. It
23 might be safer to say first thing Monday morning --

24 THE COURT: All right.

25 MR. BRODY: -- for the response.

1 MR. REDGRAVE: The only irony I know is they are having
2 more time for the reply than we get for response, but it's the
3 holidays and I can understand the fact that people are not
4 working all the time.

5 THE COURT: Do you want to get it in on Friday?

6 MR. REDGRAVE: Your Honor, I guess this goes to the
7 fact of when Your Honor will be ruling upon this. We don't have
8 any adverse witnesses coming up for examination the week of
9 November 29th at this point.

10 It really depends, Your Honor, when you want to sit
11 down and consider the motion that the government is going to
12 file tonight, our response, and any reply.

13 If Your Honor is going to do that the middle of next
14 week, I would ask for leniency and do it on Sunday night and the
15 government can respond on Tuesday so they don't have to worry
16 about the holidays at all, if that would be acceptable.

17 THE COURT: I think that's fairer. I've looked at the
18 submissions for next week. It seems to me there's a fair amount
19 of reading for this weekend.

20 There is a substantial motion that has to be decided
21 before Dr. Chaloupka testifies. What I'm really saying is that
22 even if this case were the only case on my docket, I will have
23 more than enough to do in the next few days.

24 So in order to make life a little bit easier for
25 everybody, the opposition should come in Sunday night and the

1 response from the government, Mr. Brody, Tuesday. Can you get
2 that in then?

3 MR. BRODY: That's fine, Your Honor.

4 MR. REDGRAVE: Thank you, Your Honor.

5 The second issue also deals with Mr. Juchatz. We
6 received a letter from counsel for the government on Friday
7 evening offering a possible stipulation to the admission with
8 respect to 32 exhibits that they had listed for use with
9 Mr. Juchatz.

10 In the letter it indicated that perhaps if we entered
11 into some sort of agreement with those, any examination of the
12 witness with respect to those documents could be foregone,
13 keeping in mind there could be some inadvertence that he needs
14 to go into examination. But the idea would be to save some time
15 with the witness.

16 We have reviewed those, and we have indicated to
17 government counsel that as to 30 of the 32 documents, Your
18 Honor, we do not have evidentiary objections to those and that
19 they could be admitted, and on the witness order it could
20 reflect that the documents were submitted in conjunction with
21 the testimony of Mr. Juchatz, even though the government doesn't
22 actually put them in front of the witness.

23 And if that would be acceptable to Your Honor, I would
24 like to read into the record the 30 exhibit numbers.

25 THE COURT: Why do you want to read them?

1 MR. REDGRAVE: Because I don't have a typed list with
2 me.

3 THE COURT: But you can submit that.

4 MR. REDGRAVE: That's fine, Your Honor.

5 Mr. Schwartz is aware of the two exhibits that we did
6 not, and then it's up to him to decide whether or not he wants
7 to try and use those.

8 And again, I also understand that there may be an
9 instance, depending on what the answers are, where Mr. Schwartz
10 believes he has to examine the witness. We understand that.
11 We're not going to hold him to this agreement here that he can't
12 examine the witness. We just want to shortcut it.

13 And I understand from Mr. Schwartz, and not holding him
14 to exact minutes, but this may save as much as 30 minutes off
15 the examination of the witness. So we want to advise you of
16 that. So when the exhibit order comes in, there will be
17 exhibits you didn't hear.

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

19 MR. SCHWARTZ: It's understood, Your Honor.

20 THE COURT: And then I know everybody didn't expect us
21 to be moving so fast this morning. When is the witness
22 expected?

23 MR. SCHWARTZ: He's here.

24 MR. REDGRAVE: I believe he's just arrived, Your Honor.

25 And I do have one other housekeeping matter, that I

1 would just like to hand something up to Your Honor to have you
2 essentially rule upon. I'll make this quick.

3 Last Wednesday -- and, for the record, this is on pages
4 6359 through 6362 -- I raised an issue regarding an explanatory
5 footnote for orders accompanying the exhibit that come in by a
6 witness.

7 The government opposed that and Your Honor ruled
8 against them and actually gave us proposed language on pages
9 6362 and 6363. I took that language and quoted it verbatim to a
10 large degree and added something about the Federal Rules of
11 Evidence.

12 The government has proposed a counter footnote that
13 changes Your Honor's language and changes my language, too. And
14 quite frankly, Your Honor, rather than argue it, I would just
15 like to provide Your Honor with the two proposals that each side
16 had, and a proposed compromise I have that takes part of theirs
17 and then, Your Honor, you just tell us what the language is.
18 We're not going to discuss it any more. It is what it is.

19 THE COURT: Did you include in there what the language
20 was that I proposed to begin with?

21 MR. REDGRAVE: Your Honor, I did. That's the
22 transcript here. I'll explain the three things and I'll give
23 those also to Mr. Brody.

24 The first document I'm handing up is just the pages of
25 the transcript that I referred to.

1 The second one is excerpted from e-mails back and forth
2 with the government with my proposed language and the
3 government's proposed language.

4 And the third document, with absolutely no title
5 whatsoever, is what I would propose as a compromise.

6 And, believe it or not, I have nothing else to say.

7 THE COURT: All right. Mr. Brody, do you want to look
8 at the final document?

9 MR. BRODY: What has been drawn from the e-mails that
10 went back and forth over the weekend is something I am familiar
11 with.

12 I can say that the one major problem that we had with
13 what was added by Mr. Redgrave and what he proposed by e-mail
14 and what was added to what the court had indicated as being the
15 purpose of a footnote in the trial record last week was the
16 addition of a sentence that seems so obvious as to raise
17 suspicions in our minds, and all evidence is admitted subject to
18 the Federal Rules of Evidence. And the suspicion being that it
19 will lead to rearguing the scope of admissibility and a request
20 that the court re-decide issues of evidentiary significance
21 later on down the road as we go forward and go forward.

22 And it seemed that, for the reason that the addition
23 proposed by Mr. Redgrave is superfluous, it is unnecessary. And
24 removing it, and it was not something that was mentioned by the
25 court last week, will eliminate potential complications

1 regarding the scope of the significance of the footnote --
2 arguments about the significance of the footnote later on.

3 For that reason, it seemed to us to make sense to take
4 it out and streamline it, and I think that what we had proposed
5 and what Mr. Redgrave has given you is more in line with what
6 we're trying to accomplish here with the footnote.

7 I mean, obviously, as Ms. Eubanks indicated last week,
8 we don't think the footnote is necessary at all, given that the
9 court had decided that it might be useful to have it. We tried
10 to come up with something that would do it simply and
11 accurately.

12 THE COURT: Mr. Redgrave.

13 MR. REDGRAVE: Your Honor, actually we did discuss the
14 rules of evidence. You said we could include something.

15 If I didn't get it exactly as Your Honor intended I'm
16 sure you could change a word or two, but I think it fairly
17 reflects the discussion.

18 But, as I said, it is what it is and we just ask Your
19 Honor to rule upon it so we can then incorporate a language in
20 these proposed orders. And you don't have to rule on it from
21 the bench, obviously; just tell us today and then we'll make
22 sure that language is incorporated in the exhibit orders that
23 will be submitted to the court.

24 Thank you.

25 THE COURT: Mr. Bass, you can come in too on this or is

1 this something different?

2 MR. BASS: Different. I just wanted to inform Your
3 Honor that last night joint defendants filed a supplemental
4 praecipe with respect to contacts between Dr. Lancaster and
5 Dr. Krugman. I suspect --

6 THE COURT: I don't think I've seen that.

7 MR. BASS: It probably was delivered to your chambers
8 just this morning. And it has a declaration from Dr. Lancaster.

9 I would assume that the government needs a chance to
10 digest it and consider whether they have to talk to Dr. Krugman
11 further, because there are some significant issues in there. I
12 still am hopeful that we can keep this on track and not get
13 sidetracked by it. We would like to address it before we break
14 for the week, perhaps sometime tomorrow, because I think
15 Dr. Krugman is coming up pretty soon.

16 THE COURT: Okay.

17 MS. EUBANKS: Your Honor, we received this last evening
18 pretty late. We would like the opportunity to file a response
19 tomorrow to it, but certainly we can be prepared to discuss it
20 tomorrow as well.

21 But given that it's fairly lengthy and a number of
22 things are stated on the record, we would like the opportunity
23 to file a very short response to that and be prepared to discuss
24 it tomorrow. We can file the response by noon tomorrow if
25 that's all right with Your Honor.

1 THE COURT: Are we going to be trying -- are you all
2 going to be trying to finish up Dr. Henningfield tomorrow or is
3 that not going to happen?

4 MS. EUBANKS: The last we heard the estimate for the
5 cross-examination of Dr. Henningfield was 8 to 10 hours.

6 THE COURT: I'm not surprised.

7 MS. EUBANKS: So --

8 THE COURT: That is pretty long, but I mean there's a
9 great deal of substance in what he had to said.

10 MS. EUBANKS: I think it unlikely that Dr. Henningfield
11 will be concluded by tomorrow.

12 THE COURT: All right. You wanted until noon tomorrow.

13 MS. EUBANKS: If that's not suitable, Your Honor, just
14 tell us when it --

15 THE COURT: You will have to get it in by noon. I will
16 tell you that tomorrow I have a, hopefully, brief criminal
17 status during lunch because it's a lot of lawyers and it was the
18 only time I could get them together. And so I will need to do
19 that and look over your final memo. And we may just take a
20 little longer lunch than usual, but then we can discuss it right
21 after the lunch break.

22 MS. EUBANKS: Thank you.

23 MR. BASS: Thank you, Your Honor.

24 THE COURT: Okay. Now I think we are ready.

25 Mr. Schwartz, are you ready?

1 MR. SCHWARTZ: Yes, Your Honor.

2 THE COURT: Mr. Juchatz, would you come forward,
3 please.

4 THE DEPUTY CLERK: Please remain standing and raise
5 your right hand.

6 WAYNE JUCHATZ, Government's witness, SWORN

7 THE DEPUTY CLERK: You may be seated.

8 MR. SCHWARTZ: Good morning, Your Honor. Joel Schwartz
9 again for the United States.

10 DIRECT EXAMINATION (Cont'd.)

11 BY MR. SCHWARTZ:

12 Q. Good morning, Mr. Juchatz.

13 A. Good morning.

14 Q. Okay, sir?

15 A. Yes.

16 Q. All right. First of all, thank you for coming back this
17 morning.

18 Last week I asked you a question about Mr. Kitchen who
19 is representing you and what his hourly rate was, and I received
20 information that it's \$450 an hour.

21 Does that refresh your recollection as to what his rate
22 of compensation is?

23 A. I'm really -- I don't know what his rate of compensation
24 was.

25 MR. SCHWARTZ: Your Honor, Mr. Kitchen has been good

1 enough to give me a copy of the retainer agreement but has
2 expressed an understandable interest that it not be made part of
3 the record. I was wondering if I could mark it for
4 identification only and show it to the witness and ask if that
5 refreshes his recollection. Would that be permissible?

6 THE COURT: Yes.

7 MR. SCHWARTZ: I believe counsel has had a chance to
8 see it.

9 MR. McDERMOTT: Yes, I have.

10 MR. SCHWARTZ: May I approach, Your Honor?

11 THE COURT: Yes, you may.

12 BY MR. SCHWARTZ:

13 Q. Sir, I'm going to show you a document that's marked United
14 States Exhibit 92042, for identification only. Please take a
15 look at it.

16 A. Yes, sir.

17 Q. Now does that, sir, refresh your recollection as to what
18 Mr. Kitchen's hourly rate for his work is?

19 A. Yes, it does.

20 Q. Can you tell the court what that is?

21 A. 450.

22 Q. \$450 per hour?

23 A. That's correct.

24 Q. Thank you.

25 Mr. Juchatz, last Thursday when we spoke you mentioned

1 that you became aware that you were going to be a witness in
2 this case around August of this year?

3 A. That's my recollection.

4 Q. At any time since then, did you come to believe or think
5 that you were also going to be named as an individual defendant
6 in this case?

7 A. No, I did not.

8 Q. At any time since that date did you learn or come to believe
9 that you were going to be the target of a criminal investigation
10 about the matters discussed in this case?

11 A. No, I did not.

12 Q. And at any time since you learned you were going to be a
13 witness, did you come to believe that you would be subject to a
14 state bar association disciplinary inquiry?

15 A. No, I did not.

16 Q. Now, sir, we discussed about four memos or four documents
17 last week regarding Dr. DiMarco. Do you remember those?

18 A. I believe I do.

19 Q. Okay. I briefly want to just ask you a couple of more
20 questions about those. Document 23009 is the first one. It's
21 the December 1982 memo that you prepared.

22 A. It's not in here.

23 MR. SCHWARTZ: Your Honor, I have an extra copy. Some
24 were taken out of the notebook. If I may approach the witness.

25 Your Honor, I'm handing the witness 23009 and a couple

1 of others that might have come out of the notebook.

2 BY MR. SCHWARTZ:

3 Q. Just hold on to all four of those, sir.

4 Now, 23009, if you recall, was the memo you wrote in
5 December of 1982 with regard to your meeting with Dr. DiMarco in
6 which you provided Mr. Witt, your boss, insight into his
7 position on the smoking and health controversy as well as his
8 perception of lawyers and their involvement in the workings of
9 the Research and Development Department.

10 Now, it was not your decision to meet with Dr. DiMarco
11 from which this information came; is that right? Was that your
12 decision to have that meeting?

13 A. I don't believe so. I don't know who scheduled it.

14 Q. I'm not asking you about scheduling it. Who directed you to
15 have that meeting?

16 A. I don't recall.

17 Q. Was -- you don't recall if it was Mr. Witt?

18 A. I don't recall.

19 Q. Now, among another handful of documents I gave you is 20746,
20 if you would take a look at that, sir.

21 A. Yes, sir.

22 Q. And that is the April 1982 document that you -- memo that
23 you prepared; is that right?

24 A. That's correct.

25 Q. And it wasn't -- in that memo, you said on page 2, I

1 believe, that -- I'm sorry, if I can get a copy myself, I'll be
2 able to talk to you about it better. Thanks for your patience.

3 You said on page 2 that you presented Mr. Juchatz with
4 a position paper and a mission statement that you thought would
5 reasonably, accurately reflect the company's position and his
6 expressed position.

7 Now, do you remember that?

8 A. I presented Dr. DiMarco with it.

9 Q. Right. You did it orally, you were talking on the
10 telephone?

11 A. Yes, sir.

12 Q. Okay. You didn't decide on your own to try to resolve the
13 issues between Dr. DiMarco and outside counsel by presenting him
14 with that position statement, that was somebody else's idea?

15 A. I don't recall. I don't recall the sequence of that.

16 I was a little confused on Thursday in terms of the
17 mission statement part of it because I recall Dr. DiMarco
18 wanting a mission statement.

19 Q. But you remember that you presented -- you were having a
20 phone conversation with him and you raised the idea of going
21 back to the basics and attempting to draft a position paper and
22 a mission statement. That's what's reflected in that document;
23 is that correct?

24 A. Yes, sir.

25 Q. Now, you said you were the fuzzy on the mission statement.

1 What about the position paper? Do you recall whose idea it was
2 to present him with the position paper?

3 A. No, I don't.

4 Q. Your boss at that time was Mr. Sam Witt; is that right?

5 A. That's correct.

6 Q. And Ed Hourigan in 1982, 1983 around the time we're
7 speaking, what was his position, do you recall?

8 A. Well, I believe he was chairman and CEO of the tobacco
9 company, but I can't be certain.

10 Q. Gerald Long, he was the president of the company at that
11 time?

12 A. I believe he was president and COO.

13 Q. COO?

14 A. I believe.

15 Q. All right. At some point Mr. Hourigan left and Mr. Long was
16 elevated in his position?

17 A. Again, I'm not very clear on that any more.

18 Q. All right. Do you recall Mr. Hourigan and Mr. Long
19 communicating to Dr. DiMarco that approval of Dr. DiMarco's
20 scientific program would have to await resolution by the lawyers
21 of questions concerning Dr. DiMarco's underlying beliefs?

22 A. No, I don't recall having any firsthand knowledge of that.
23 No.

24 Q. Do you recall any conditions being sent down from
25 Mr. Hourigan or Mr. Long to Dr. DiMarco that Dr. DiMarco would

1 not have his scientific agenda approved until the lawyers in the
2 company were comfortable with his positions?

3 A. Again, I don't want to mince words. I'm aware of that from
4 a subsequent memo, which is one of these exhibits, but I didn't
5 have -- I don't recall having knowledge of it at the time.

6 Q. Well, turn back to 23009, if you will, the December 1982
7 document and look at the bottom of the first page and the top of
8 the second page just briefly, please.

9 And read that paragraph that starts at the bottom to
10 yourself if you don't mind.

11 A. The one that --

12 Q. We left this issue?

13 A. He said?

14 Q. We left this issue.

15 A. Oh, I'm sorry.

16 Q. I'm sorry. Bottom of one, top of two. My mistake, sir.

17 A. Well, we left this issue --

18 Q. Just read it to yourself.

19 A. I'm sorry.

20 Q. Tell me when you've read it.

21 A. (Pause) I've read it, sir.

22 Q. Good. Now, sir, that was telling Dr. DiMarco that his
23 scientific agenda was subject to the law department being
24 comfortable with questions regarding his underlying beliefs
25 about smoking and health?

1 A. I don't know that I would phrase it that way. It was
2 subject to the Legal Department understanding what he was doing
3 so we could advise our management as to the risks.

4 Q. When you say advise your management, you're talking about
5 Mr. Witt, Mr. Hourigan and Mr. Long?

6 A. And my direct contact would be with Mr. Witt, initially.

7 Q. And it was your understanding that Mr. Witt was direct
8 supervision at least or direct was Mr. Hourigan and Mr. Long?

9 A. Again, I don't know whether he reported to Mr. Hourigan or
10 Mr. Long or both.

11 Q. You can put down that document, sir.

12 I want to ask you, do you remember a man names Charles
13 Tucker?

14 A. Yes, sir, I remember him.

15 Q. Do you remember what his position was at that time?

16 A. I don't remember what his position was at that time.

17 Q. Do you recall if he was involved in the External Affairs
18 Department of the company?

19 A. I don't recall.

20 Q. All right. Please look at document -- 20748 which is also
21 among the handful of documents I just gave you.

22 A. Do you want me to read it?

23 Q. Well, have you had a chance to look at this and prepare for
24 your testimony?

25 A. I saw it when it came over in the stack of exhibits that you

1 sent.

2 Q. Do you want a second to look it over again?

3 A. I don't believe -- I believe I'm fairly familiar with it.

4 Q. You believe you're fairly familiar.

5 Now, I direct your attention, sir, to the second page,
6 second bullet and the second sentence that starts with, "I".

7 The "I" is crossed out and says "we also raised" and I'm
8 going -- do you have that?

9 A. Yes, I have it.

10 Q. It says, We also raised our concerns about GRD's beliefs.

11 GRD is Robert DiMarco, is that your understanding?

12 A. That's my understanding.

13 Q. And then it says in brackets, EAH slash GHF charged Charlie
14 Tucker and me with the responsibility for finding out what the
15 problem was and proposing a solution.

16 Sir, do you remember being charged by -- I'm sorry, EAH
17 is Edward A. Hourigan.

18 A. That's correct.

19 Q. And GHF is Gerald H. Long?

20 A. That's correct.

21 Q. And those are the gentlemen we just spoke of?

22 A. Yes --

23 Q. Did you learn of Mr. Tucker and another person being charged
24 with the responsibility of finding out what the problem was with
25 Dr. DiMarco and proposing a solution about the problem?

1 A. Apart from this memo, I don't recall that, no.

2 Q. The "me" in this sentence is not you then; is that what
3 you're saying?

4 A. I don't believe it is.

5 Q. Would it be Sam Witt?

6 A. Again, that would be speculation.

7 Q. Now, the second sentence is?

8 THE COURT: Mr. Schwartz, you have to slow down a bit,
9 please.

10 MR. SCHWARTZ: I beg Your Honor's pardon. I beg your
11 pardon, Mr. Hawkins.

12 BY MR. SCHWARTZ:

13 Q. The next sentence is, They also advised GRD that approval of
14 his program would have to await resolution by the lawyers of
15 questions concerning underlying belief questions.

16 Sir, are you familiar with EAH, Edward A. Hourigan, and
17 GHL, Gerald H. Long, advising Dr. DiMarco that approval of his
18 program would have to await resolution by the lawyers of
19 questions concerning underlying belief questions?

20 A. Not that I recall, apart from what I see in this memo.

21 Q. But you can't rule it out. Is that fair to say?

22 A. I can't say with absolute certainty that I didn't.

23 Q. Would you now look at the third page in the second bullet
24 that starts, "I then approached." And take a second to read it
25 and let me know when you're ready.

1 A. Yes, I read it, sir.

2 Q. It says, I then approached Bob and explained that we had no
3 basic objection to his program although it would require close
4 legal monitoring as well as some real sensitivity on R&D's part
5 to our concerns. I then explained that our real concern was
6 with regard to his underlying beliefs on the causation issue in
7 the context of smoking and health litigation.

8 Now, sir, this did happen. Bob was approached and he
9 was explained that there was no basic objection to the program
10 except it would require close legal monitoring and control and
11 some real sensitivity on R&D's part to certain concerns.

12 A. Is that a question?

13 Q. Yes, I'm asking.

14 A. Well, the answer is I don't know or I can't recall that that
15 was done.

16 Q. Go back to 23009 if you would and look at the bottom of the
17 first page and the top of the second page.

18 A. I'm sorry. I'm not following your question.

19 Q. All right. I'm going to put it up on the screen for you if
20 you don't mind.

21 THE COURT: This is the same document; right?

22 MR. SCHWARTZ: Yes. I'm showing him first 23009, which
23 is the December 1982 memo that Mr. Juchatz has testified as to
24 preparing, and I want to ask him to briefly look at that and
25 compare to it the language on page 3, bullet two of

1 document 20748 that we just talked about with regard to Mr. Long
2 and Mr. Hourigan, the two people in upper management.

3 A. But, I'm sorry. What I thought the question was with
4 respect to document 20748 was the last sentence which -- I'm
5 sorry. I'm confused.

6 Q. I apologize, and I'll try to clear it up for you. Let me
7 ask another question.

8 Bob DiMarco was approached and it was explained to him
9 that there was no basic objection to his program, although it
10 would require close legal monitoring and control as well as some
11 real sensitivity on R&D's part to our concerns.

12 That's exactly what you told him in or around December
13 of 1982. Is that fair to say, sir?

14 A. That's fair to say. I thought you were speaking about the
15 second sentence. That's where I was confused.

16 Q. It was not explained to Dr. DiMarco that the real concern
17 was with regard to his underlying beliefs on causation, on the
18 causation issue?

19 A. Not in my memo. I thought that was what your question was.

20 Q. I'm sorry. There are two questions and that was my second
21 question. I'm not asking about your memo, sir. I'm asking
22 about your recollection.

23 Was the real concern about his underlying beliefs with
24 regard to causation in the smoking and health litigation
25 context?

1 A. I am generally aware that there was a concern about his
2 beliefs, yes, if that's your question.

3 Q. If that's what was communicated to Dr. DiMarco, that's what
4 I'm asking, sir.

5 A. Yeah. I believe I, in fact, said that to him in one of my
6 memos as well. But alluding it to outside, that it was outside
7 counsel's concern.

8 Q. I'm sorry?

9 A. I believe that I used similar words to this in one of my
10 memos and said that it was outside counsel's concern as to his
11 beliefs. I never remember saying it was my concern as to his
12 beliefs.

13 MR. SCHWARTZ: If I may have a moment, Your Honor.

14 Q. It was the law department's concern as well as outside
15 counsel's wasn't it, sir?

16 A. Again, what is the law department, other than the lawyers?
17 I'm sorry, I'm not trying to be obtuse.

18 Q. Can you put it on the overhead projector, please?

19 I want to ask you to look back, because I put it on the
20 projector page 6586.

21 A. Of?

22 Q. Of the transcript, sir. It's not going to be in front of
23 you, sir. It's the transcript from your testimony.

24 MR. SCHWARTZ: Does counsel have that available to
25 them?

1 MR. McDERMOTT: Page reference again.

2 MR. SCHWARTZ: 6586 starting at line 19.

3 BY MR. SCHWARTZ:

4 Q. And --

5 A. May I read it, please?

6 Q. Yes. I'm going to try to make it bigger for you.

7 A. Darker would be great. That's good. Thank you.

8 Q. Starting --

9 A. Where do you wanted me to start?

10 Q. Start with line 16, please. And look it over for yourself
11 and I'm going to read it out loud. Or do you want to look at it
12 first?

13 A. I want to go back to 11 if that's okay. Can I read from 11
14 down to myself?

15 Q. Sure. Of course.

16 A. Yes, sir.

17 Q. All right. Now, there it says, starting at 16, Because an
18 admission that the other products that RJR were making at the
19 time were unsafe was contrary to public statements that the
20 company was making at that time -- or at the time?

21 And you answered, I wouldn't put it exactly in those
22 terms. I think what I was probably thinking here, and again,
23 it's 25 years old or 20 or more years or so, that there was an
24 implicit statement in when you said safer --

25 THE COURT: Mr. Schwartz, slow down.

1 BY MR. SCHWARTZ:

2 Q. When you say safer, that what the other products we had are
3 less safe or unsafe.

4 And then you were asked, Okay, and that was a legal
5 concern of yours? And you go on to say that, It could be taken
6 out of context and used by plaintiff's attorney in litigation,
7 yes.

8 And the next question is, You're concerned that in
9 litigation that would be an admission, or an implied admission,
10 that every other cigarette that R.J. Reynolds made and was
11 making at that time was not safe.

12 And you say, My concern was that that could be argued,
13 yes.

14 So it was your concern and outside counsel's concern?

15 A. What was said here was, yes. But again, I don't know how
16 this ties to what you're looking at in the other document. I'm
17 still struggling.

18 Q. We talked the other day about you as a representative of the
19 Legal Department being concerned that if he made statements
20 about a cigarette that R.J. Reynolds was making was less
21 mutagenic or safer, and that that came out in smoking and health
22 litigation, that would be a concern to the company?

23 A. As I said in the Q and A, the concern wasn't so much with
24 less mutagenic. It was with the concept that he seemed to use
25 those terms less mutagenic, which I'm not sure I fully

1 understood what it was at that time, interchangeably with safe
2 or unsafe, and that was my concern. It was with respect to the
3 word safe or safer.

4 Q. Okay. Now on document 2748 there were references to
5 Mr. Long and Mr. Hourigan, EAH and GHL. If you would please
6 take a look at document 20747.

7 A. Yes, sir.

8 Q. All right. Now, I'm going to direct your attention to some
9 parts in a second, but I want to ask you a couple of questions
10 first.

11 In addition to Mr. Long and Mr. Hourigan being aware of
12 this situation, you would testify that Jacob, Medinger and
13 Finnegan was also aware of this situation and involved?

14 A. Yes. I don't know if I testified to that but it's apparent
15 from the face of this.

16 Q. And it's also apparent from the face of the April document
17 you wrote that alluded to outside counsel?

18 A. I alluded to outside counsel, yes.

19 Q. The outside counsel to whom you were alluding was the law
20 firm of Jacob, Medinger and Finnegan?

21 A. That's fair, yes.

22 Q. Now. The rule was that he might testify --

23 A. I'm sorry. Where are you now?

24 Q. I'll direct your attention to the document in a moment.

25 The concern of Jacob, Medinger and Finnegan, the

1 outside lawyers, was that he might testify contrary to the
2 theory or the statement that causation had not been proven.

3 A. In some sense, yes, I think that was a concern.

4 Q. It got to the point where Mr. Finnegan of Jacob, Medinger
5 and Finnegan met with Dr. DiMarco and he also presented him with
6 a draft policy statement.

7 A. I don't know that.

8 Q. Now, look at --

9 A. May I ask a question? Are you assuming that I authored this
10 memo?

11 Q. Sir, I'll ask you a question in a second. All right?

12 A. I'm sorry.

13 Q. You testified yesterday -- or on Thursday that you did not
14 author that memo.

15 A. I don't believe that I did, no, and I can explain to you
16 why.

17 Q. I'm just asking, and you said you don't believe that --

18 A. That's correct.

19 Q. All right. Now, I'm going to ask you about some statements
20 made in that memo, understanding that you don't believe you made
21 it, to see if you are aware of the events that are described
22 there. All right?

23 I'm going to direct your attention first just to the
24 first paragraph on the first page where it says, SBW and CAT met
25 with TMF and EJJ for a full day during which we discussed Bob

1 DiMarco and his perceived position on the smoking and health
2 controversy. Okay?

3 A. Is that a question?

4 Q. Have you seen this, sir?

5 A. Yes, I followed with you.

6 Q. All right. Now, SPW, fair to say, Sam Witt?

7 A. That's correct.

8 Q. CAT, Charles A. Tucker?

9 A. I believe so.

10 Q. TMF, Timothy M. Finnegan?

11 A. Yes.

12 Q. And EJJ, Ed Jacob?

13 A. That's correct.

14 Q. Were you aware of such a meeting, sir?

15 A. Not that I recall.

16 Q. Now, looking down to the third bullet starts -- on that
17 page, starts with the, we identified.

18 A. We identified, third bullet?

19 Q. I'm sorry, fourth bullet. I apologize.

20 It says, we identified two major risks associated with
21 Bob's continuing to set policy and direct our R&D efforts. The
22 risk that if he is called upon to testify in litigation or
23 legislative hearings, as the company's chief scientist he could
24 not support the company's slash industry's position, i.e.,
25 smoking has not been scientifically established to be the cause

1 of any disease in man. And we agreed that this could be
2 devastating.

3 Were you aware of discussions between Mr. Witt and
4 Mr. Tucker on the one hand and Mr. Finnegan and Mr. Jacob about
5 them having that concern, the risk bullet that we just read?

6 A. I have a recollection of some general awareness, yes.

7 Q. All right. Now --

8 A. Of that concern.

9 Q. All right. That's what I'm asking.

10 The next bullet is -- I'm sorry, the next small bullet,
11 is the risk that as the person responsible for establishing
12 scientific policy and directing our R&D efforts he would
13 commission scientific work, i.e., establish a record that, if
14 subpoenaed, would jeopardize our legal defense or at a minimum
15 prove embarrassing or hard to handle.

16 Were you aware that Messrs. Finnegan, Witt, Tucker, and
17 Jacob discussed and shared those concerns or that concern?

18 A. I don't recall being aware of that.

19 Q. Now, please look at the bottom bullet at page 1 and the top
20 bullet of page 2. Look at those and tell me when you're ready.

21 A. Yes, I read the text. I've not tried to read any of the
22 interlineations.

23 Q. I'm just asks about the typed text. All right.

24 It says, having agreed that GRD's product modification
25 slash benefit program was doable, we then decided that the best

1 way to find out what GRD's opinions, parenthesis, scientific
2 slash personal, were on the smoking and health controversy was
3 to put GRD and TMF together to draft a statement of the
4 company's policy on smoking and health issues.

5 TMF prepared a policy statement, parenthesis,
6 consolidating already existing company and industry positions
7 and submitted it to GRD for his review. TMF and GRD met for a
8 full day following which TMF reported that GRD said, quote, I
9 have no problem with any of this, end quote, and that as a
10 scientist he could support the policy statement. He said,
11 however, that he wasn't an expert in these matters.

12 Now, were you aware of, or did you subsequently become
13 aware of a meeting between Mr. Finnegan and Mr. -- and
14 Dr. DiMarco putting together a draft statement of the company's
15 position on smoking and health issues?

16 A. I don't recall being aware of such a meeting.

17 Q. Did you subsequently become aware of it, not necessarily the
18 time it was happening, if it was happening in this -- 1983, but
19 sometime after that.

20 A. I don't recall.

21 Q. But you also can't rule out that it happened; fair to say?

22 A. I don't recall is what I can say.

23 Q. Now, look at -- please go back to page 1.

24 A. Of the same memo?

25 Q. Yes, 20747. And I'm just going to refer you to some terms

1 that are used there because I want to ask you -- do you
2 recognize that we must --

3 A. Where are you?

4 Q. Page 1, second to last bullet.

5 We recognize that we must isolate our legal concerns
6 associated with GRD's program, parenthesis, i.e., research re:
7 benefits of smoking and product modifications resulting in a
8 cigarette which he -- which is perceived as, quote/unquote,
9 safer.

10 All right. So it describes there GRD --

11 THE COURT: Safer.

12 MR. SCHWARTZ: GR --

13 THE COURT: Isn't that right?

14 MR. SCHWARTZ: I'm sorry?

15 THE COURT: I wish that you would zoom in and make that
16 a little easier to read.

17 Right. "Which is perceived as safer." Go ahead.

18 MR. SCHWARTZ: Thank you, Your Honor.

19 BY MR. SCHWARTZ:

20 Q. So there that links GRD's program with the idea of research
21 with regard to the benefits of smoking and product modification
22 resulting in a cigarette which is perceived as safer.

23 A. Sir, I don't understand the question.

24 Q. I'm just asking you -- I'm asking you to understand that
25 term. Do you understand that the terms --

1 A. I understand -- I have read what's written.

2 Q. All right. And, in fact, when you spoke to Dr. DiMarco, and
3 you wrote up your memo 23009, he talked to you about doing
4 research regarding the benefits of smoking and also making --
5 trying to make a less mutagenic cigarette?

6 A. That's correct.

7 Q. All right. Now, with that description in mind, please go to
8 page 3, the first large bullet.

9 A. The same memo?

10 Q. Yes, sir, 2747. I'll tell you when we are changing memos.
11 Starts with R&D.

12 A. What paragraph are we in now?

13 Q. It's on the screen now. It's the second -- first big
14 bullet, second --

15 A. Okay. Thanks.

16 Q. R&D should have responsibility and direction for product
17 research, i.e., benefits product modification.

18 He must clearly be made to understand, however, that
19 the law department will be an important part of the R&D team on
20 all projects of this nature. No work in these areas will be
21 commenced until a protocol setting forth the purpose, steps, and
22 procedures to be followed is drafted and approved by the law
23 department. Thereafter, all first drafts of written work will
24 also be reviewed by the law department.

25 Okay. Now, we know from the prior page that the term

1 product modification refers to product modifications resulting
2 in cigarette -- a cigarette which is perceived as safer? Yes?
3 A. I think you can draw that conclusion, yes.

4 Q. All right. Now, let me ask you.

5 According to this document, at least, the research and
6 development wanted to make product modifications that resulted
7 in a cigarette perceived as safer they could not start working
8 on it until protocols set forth the purpose, steps and
9 procedures to be follow as drafted and approved by the law
10 department?

11 A. Sir, the literal language would suggest that.

12 One of the things that confuses me and concerns me
13 about drawing too many conclusions from this piece of paper is
14 that it's something that's captioned a working draft. It's
15 covered with marginalia and edits. I wouldn't say that this
16 concluded anything.

17 Q. Let me just ask you.

18 Were you aware of or did you subsequently become aware
19 that Dr. DiMarco's unit could not do any work on making a
20 product that was perceived as safer unless, first, a protocol
21 setting forth the purpose, steps and procedures to be followed
22 was drafted and approved by the law department?

23 Was that a requirement imposed on Dr. DiMarco of which
24 you were aware?

25 A. I'm going to have to explain this a little. I'm sorry.

1 But you take Premier, for example. I never remember
2 reviewing or seeing a protocol for Premier, that product, and
3 that was a less mutagenic cigarette. It was the mother of all
4 less mutagenic cigarettes.

5 So the fact that somebody thought that that might be a
6 good idea at this time, I'm not aware that it was imposed, in
7 fact, or put in place as a restriction.

8 Q. Well, let me ask you a couple of questions about that.

9 I asked you a moment ago about product modifications
10 resulting in a cigarette which is perceived as safer, and when
11 you picked the example Premier, you went from safer to less
12 mutagenic.

13 I'm asking you, sir, was Premier supposed to be a
14 product which was perceived as safer?

15 A. I think in Dr. DiMarco's mind when we had those original
16 conversations there was no Premier. There was a concept of
17 developing a less mutagenic cigarette that became Premier. And
18 at that point in time I think in his mind he used those terms
19 interchangeably. In my mind they are very different.

20 Q. So when Premier ultimately was made in -- or put out in the
21 test market in 1988 and 1989, at that time Dr. DiMarco, your
22 chief scientist, was referring to Premier as a cigarette that he
23 believed was safer or should be perceived as safer?

24 A. I don't recall him saying that.

25 Q. Well, when was Dr. DiMarco talking about Premier being a

1 cigarette that was safer or perceived as safer?

2 A. I hope I haven't confused you.

3 What I'm saying is in one of these early memos -- I
4 forget the number. It's the first one, it's the December memo.
5 When he was talking about less mutagenic, which he used in
6 conjunction with, or safer, that was what -- eventually that
7 work, that idea, that concept led to Premier.

8 So he wasn't talking about Premier per se at that time,
9 he was talking about a product that eventually became Premier.

10 Q. I know, but I understand that.

11 But what strikes me as curious, sir, is I asked you a
12 question about whether there were protocols put in place such
13 that the law department had to review and approve the purpose
14 and steps and procedures to be followed if the R&D Department
15 wanted to make a cigarette perceived as safer and you
16 immediately leaped to Premier as your example and saying, no,
17 that's not what happened with Premier.

18 My question to you, sir, is was it in your mind or the
19 company's mind that Premier was a product that was to be
20 perceived as safer?

21 A. Again, in my mind what Premier was, was a product that was
22 perceived to be as it was advertised. Safer would have been a
23 problem for us if it was perceived or marketed as safer.

24 Q. So when Premier was marketed in 1988 and 1989 for about
25 six months -- is that your recollection?

1 A. I don't recall how long it was test marketed for.

2 Q. It was test marketed for less than a year, is that fair to
3 say?

4 A. Perhaps, I don't recall.

5 Q. You were the chief counsel of R.J. Reynolds Tobacco Company
6 and you were putting out a cigarette that you yourself has
7 testified was believed to be less mutagenic, if not less risky,
8 and you don't remember when or how long it was test marketed?

9 A. I can't tell you how many months it was out there, sir. I'm
10 sorry.

11 Q. It was out there in a test market?

12 A. Yes, it was.

13 Q. And there was advertising attached to it?

14 A. Yes, there was.

15 Q. And the advertising never said that Premier was a less
16 mutagenic cigarette?

17 A. No, it didn't use that term.

18 Q. They never said that Premier was a safer cigarette?

19 A. It did not use that term?

20 Q. In fact, it didn't put out any language to suggest that
21 Premier should be perceived to be a safer cigarette?

22 A. It had a lot of language in there that suggested that it
23 was -- had less controversial compounds, as I recall; that it
24 was better, cleaner for the smoker and for those around them;
25 that -- it talked about the chemical constituents of the aerosol

1 as being dramatically reduced. I think it may have even said --
2 put percentages in there.

3 Q. You didn't want it to be perceived as a safer cigarette.
4 You said that would be a problem for the company. Is that fair
5 to say?

6 A. If it was marketed as a safer cigarette, that's correct. It
7 would have been a problem from an FTC and FDA standpoint.

8 Q. That was your understanding?

9 A. That is my understanding as I recall.

10 Q. Just looking for one more moment at this document, 20747.

11 THE COURT: Let me ask you a question, though.

12 How could it be marketed on the basis of it having less
13 constituent elements that were possibly toxic to the consumer
14 without a consumer concluding that this had to be by definition
15 a safer cigarette?

16 THE WITNESS: It's a very good question, Your Honor,
17 and I believe that a consumer could have reach that conclusion.

18 But we can only advertise what we can substantiate. So
19 what we were advertising was -- were quantifiable, objective
20 measures.

21 I don't know if that helps at all.

22 THE COURT: A famous phrase of one of the lawyers here,
23 "It is what it is."

24 Go ahead, Mr. Schwartz.

25 MR. SCHWARTZ: Thank you, Your Honor.

1 BY MR. SCHWARTZ:

2 Q. All right. Just looking for one more second at that
3 document. Do you recognize the handwriting in the margins?

4 A. I think I recognize some of it. This is a -- yours is a
5 better copy.

6 Yes, it has a familiarity to me.

7 Q. What familiarity does it have?

8 A. If I had to guess, I would say it was Sam Witt's.

9 Q. Sam Witt, the chief counsel of R.J. Reynolds in 1982 and
10 1983?

11 A. That's my guess.

12 Q. Then look, please, if you don't mind, back at 20 -- I'm
13 sorry. Hang on to that document.

14 You say it's your guess because you've seen Dr. --
15 Mr. Witt's handwriting a number of times over the number -- over
16 the course of the years that you've worked with him.

17 A. But probably not for 20 years.

18 Q. Sir, how many years did you and Mr. Witt overlap? Six,
19 seven years?

20 A. No, it wasn't even that long. I came there in '81 and he
21 left in '84 or '85.

22 Q. You became the boss in '85; right?

23 A. That's my recollection.

24 Q. And you succeeded Mr. Witt?

25 A. That's correct.

1 Q. You got there in 81?

2 A. That's not seven or eight years.

3 Q. So we're talking about four years?

4 A. Yes.

5 Q. Over the course of four years you had seen, not just
6 handwritten things from Mr. Witt, but -- I'm sorry -- you had
7 seen not just typed things from Mr. Witt, but also handwritten
8 things as well?

9 A. Yes, sir.

10 Q. Based on the four years of experience seeing handwritten
11 things from Mr. Witt, that is the basis for your conclusion that
12 from --

13 A. Guess.

14 Q. -- handwriting on 20747 is Mr. Witt's?

15 A. That's correct.

16 Q. Then look just for a moment at 20748 and look at the
17 handwriting there. 20747 and 20748.

18 A. On page 1, sir?

19 Q. Whatever page allows you to make a judgment if you can,
20 about the marginalia, I guess it's mostly prevalent on page 1.

21 A. And the date, yes.

22 Q. So -- okay. And the date, you said.

23 First of all, the handwriting looks like Mr. Witt's
24 based on your experience?

25 A. Yes, it does.

1 Q. And the date -- if you can flash to the top of the page --
2 is five ten slash three instead of something like five ten slash
3 83. Was that kind of --

4 A. Peculiar.

5 Q. And a peculiar trademark of Mr. Witt's hand?

6 A. I believe so.

7 Q. And again -- and I promise you it's the last time I'll ask
8 you to look at this. We have 20747.

9 A. Yes, sir.

10 Q. And up at the top there, the date also has that kind of
11 peculiar notation three slash twenty-four slash three. That was
12 idiosyncratic to Mr. Witt?

13 A. I think it may have been.

14 Q. Do you remember anybody else in the company who used --

15 A. I don't -- no, I don't remember anybody else.

16 Q. Okay. I'm finished with those documents and thank you for
17 your patience with them.

18 MR. SCHWARTZ: Your Honor, I'm going to move to another
19 subject. I don't know what Your Honor's schedule is with regard
20 to breaking this morning. Whatever is convenient.

21 THE COURT: Let's go to another subject.

22 MR. SCHWARTZ: All right.

23 BY MR. SCHWARTZ:

24 Q. Sir, I'm going to ask you to look for a while now at
25 document 85886, which has already been admitted into evidence.

1 It's a big, thick document.

2 MR. SCHWARTZ: And if Your Honor permits, I put it in a
3 single notebook that's smaller and might be easier for the
4 witness to handle.

5 THE COURT: All right.

6 BY MR. SCHWARTZ:

7 Q. Mr. Juchatz, I'm going to bring you just a single copy.
8 You can put that aside.

9 Okay, sir. If you want to open that up and take a look
10 at it so you can familiarize yourself with it.

11 A. Yes. This was one -- is this on?

12 Q. I think it is. Go ahead.

13 A. Yes, this was one of the exhibits that you forwarded to us.

14 Q. Okay. And you've had a chance to look through it?

15 A. I skimmed it, yes, sir.

16 Q. Okay. Now, the cover of this document, number 85886, which
17 is in evidence, is R.J. Reynolds Tobacco Company Working Issues
18 and Legal Analysis of Projects CC. Jones, Day, Reavis & Pogue
19 of June 21, 19894.

20 Do you see that, sir?

21 A. Yes.

22 Q. All right. I direct your attention, if I may, to page 1.
23 If it's okay, we will use the numbers that are actually at the
24 bottom of the page. Is that all right with you?

25 Actually, page 1 doesn't have a page 1. It says

1 Introduction at the top?

2 A. Roman 1 introduction.

3 Q. Now, first of all, in 1994, you were -- I'm sorry -- late
4 December 1993 you were chief counsel for R.J. Reynolds?

5 A. That's correct.

6 Q. R.J. Reynolds Tobacco Company?

7 A. That's correct.

8 Q. And you remained in that position through 1994 into 1995.

9 A. Until, I believe, March of '95.

10 Q. March of '95. Okay.

11 And the first paragraph here says that in late
12 December 1992, Wayne W. Juchatz, senior vice president,
13 secretary and general counsel, R.J. Reynolds Tobacco Company,
14 requested the law firm of Jones, Day, Reavis & Pogue to provide
15 legal advice regarding Project CC, controversial compounds, a
16 new cigarette product that Reynolds may introduce.

17 Sir, do you remember requesting this memo?

18 A. I have a vague recollection of requesting it, yes.

19 Q. And then when you got this document in the package that we
20 sent to you a couple of weeks ago you looked over the document
21 and that also refreshed your recollection about it?

22 A. Yes, it did.

23 Q. And you remembers requesting a memo. Do you also remember
24 getting the memo back?

25 A. I remember receiving it.

1 Q. And I'm assuming at that time when you received it, you
2 looked it over then as well?

3 A. I'm not sure exactly what I did.

4 I have a suspicion that when I saw the heft of it I may
5 have done something a little more in-depth than what I did when
6 I got it from you. I don't believe I read every page word for
7 word.

8 Q. Did you work with another lawyer in your office who perhaps
9 may have read that more in-depth and given you summaries or
10 pointers or directed you somewhere about the memo that you might
11 have wanted to look at?

12 A. My recollection is that --

13 Q. I'm sorry. I apologize.

14 A. My recollection is that I either gave it to one or both of
15 Chuck Blixt or Dan Donahue.

16 Q. Okay. That's Chuck Blixt who is now general counsel of R.J.
17 Reynolds Tobacco Company?

18 A. That's correct.

19 Q. He was your successor?

20 A. Yes.

21 Q. Dan Donahue was another person who was an in-house counsel
22 at R.J. Reynolds Tobacco Company?

23 A. Yes, he was in charge of the litigation.

24 Q. I'm sorry, sir?

25 A. He was in charge of the litigation, managing the litigation.

1 Q. Managing the litigation for the company?

2 A. Yes.

3 Q. Back in '93 and '94?

4 A. Yes.

5 Q. And Mr. Donahue also still works for the company, is that
6 your understanding?

7 A. Well, I don't know. I had heard -- I don't know. I'm not
8 certain that he's still there. He's getting close to
9 retirement, I believe.

10 Q. Now, the references -- the project described there is CC,
11 but in footnote one it says it was -- there was another acronym
12 that was also being used.

13 Do you recall that that other acronym was EW,
14 Project EW as well.

15 A. I believe that's correct.

16 Q. And the discussion whether a cigarette that was either
17 called CC or EW was going to be sold that ultimately was put out
18 in test market in Oklahoma?

19 A. Would you repeat the question?

20 Q. This cigarette that's being discussed here.

21 A. Yes.

22 Q. That was a cigarette ultimately -- or that project produced
23 a cigarette that was ultimately put out and test market in
24 Oklahoma?

25 A. I don't know.

1 Q. You don't know whether it was sold.

2 But you do remember that the other acronym to which it
3 was referred was EW?

4 A. Yes, I do.

5 Q. Okay. Good.

6 A. I believe it was marketed. It was introduced after I left,
7 that's why I'm saying that.

8 Q. You left in?

9 A. In March.

10 Q. March of '95, so if it was marketed in April of '95, you may
11 or may not have been aware of whether it actually went out to
12 market?

13 A. That's right.

14 Q. Now, at the point in time that you requested this memo, R.J.
15 Reynolds was thinking about marketing CC, but it hadn't actually
16 done it or decided to do it?

17 A. No. We didn't even, as I read -- as I skimmed through the
18 memo, we didn't even have a product and we didn't have
19 advertising.

20 Q. All right. Now, when you asked the law firm of Jones --
21 first of all, Jones, Day was the outside counsel or an outside
22 counsel to R.J. Reynolds Tobacco Company at the time?

23 A. That's correct.

24 Q. Do you know if at that time Jones, Day also was counsel to
25 any other tobacco company?

1 A. I don't believe they were, but I can't say for certain.

2 Q. When you asked for this memo to be prepared you were making
3 the request on behalf of the company. Is that fair to say?

4 A. Yes.

5 Q. And that was part of your job as counsel?

6 A. Yes, to -- yes.

7 Q. To get advice and information --

8 A. Yes.

9 Q. -- from wherever you needed it. Okay.

10 Now, in addition to being counsel at that time you were
11 also in the Product Steering Committee of R.J. Reynolds?

12 A. I don't recall what that was.

13 Q. Take a look at page 106 of this document, sir, and I'll
14 direct your attention to footnote 370.

15 A. Okay.

16 Q. All right. Now, the bottom paragraph above the footnote --
17 I'm sorry. It says, in May 1993 the PRISM's 1 team presented
18 the results of its enduring wants research and product
19 assessment to Reynolds Product Steering Committee -- that's in
20 caps, Product Steering Committee.

21 And then in footnote 370 it identifies people who were
22 on the Product Steering Committee according to this memo and it
23 has your name.

24 Does that refresh your recollection, sir, as to whether
25 you were on the Product Steering Committee?

1 A. I'm still drawing a blank on that.

2 Q. Do you remember -- are you drawing a blank on what the
3 committee was or whether you were on it?

4 A. Both.

5 Q. Are you familiar with committees or groups that were at the
6 company when you were working there that were involved with the
7 development and assessment of product ideas and making product
8 marketing decisions?

9 A. We had lots of committees and working groups and so I'm
10 familiar with the concept of having groups --

11 Q. Okay.

12 A. -- like this seems to be.

13 Q. So it wouldn't be unreasonable to think that Product
14 Steering Committee might do that kind of work?

15 A. Again, I don't know. I don't recall.

16 Q. Whose idea was it to have this memo prepared? Was it yours
17 or did someone ask you to do this?

18 A. I believe it was mine.

19 Q. And so this decision was not suggested by somebody from the
20 outside?

21 A. I don't believe so.

22 Q. Now, why was it you asked for it to be done?

23 A. Again, I'm trying to reconstruct this in my own mind.

24 But as I recall, we were about to embark on another
25 advance technology product successor to Premier that offered

1 some of the same product characteristics that could create some
2 issues in the context of the litigation, and I wanted to give
3 our outside counsel an opportunity to get what I would refer
4 to -- get up on the learning curve of what the issues that might
5 be presented by this product were.

6 Q. And give you and the company some feedback about that?

7 A. Well, again, as I recall it, my recollection is that the
8 primary objective was for it to be used by the firm to start
9 thinking about these issues. And I also vaguely recall being
10 somewhat surprised when I got a memo like this back.

11 Q. Well, they are very thorough guys?

12 A. They certainly are.

13 Q. Now, do you recall who at Jones, Day you asked to perform
14 this task for you?

15 A. I can't say for certainty.

16 Q. Do you have any sense of recollection?

17 A. The people that I would have dealt with to request something
18 like this -- and this is again speculation -- would have been
19 somebody at the top of the relationship and that would have
20 probably been John Strauch, but I can't say that with certainty.

21 Q. Can we be certain it was not Mr. McDermott or
22 Mr. Biersteker?

23 A. I'm pretty confident that it wasn't them.

24 Q. Which is not a cut on them being not at the top of the heap
25 there. I just want to rule out their involvement.

1 A. He's smiling.

2 Q. To me, you guys are at the top.

3 A. And this was a while ago.

4 Q. And I just want to make sure that neither of these
5 gentlemen, Mr. McDermott or Mr. Biersteker, were involved in
6 this project, to your knowledge?

7 A. You've just broaden the scope of that question. Involved in
8 the project? I have no idea.

9 Q. Well, in looking over this memo, you know that a series of
10 interviews were conducted by Jones, Day attorneys of about a
11 dozen RJR employees, and lots of documents were also looked
12 through.

13 Do you know if either of these gentlemen was involved
14 with that?

15 A. Not to my knowledge.

16 Q. But you do agree that interviews were conducted. I don't
17 mean to --

18 A. Only based on what the memo says.

19 Q. Do you know who ultimately wrote or put together that memo,
20 besides Jones, Day itself?

21 A. I can't recall.

22 Q. Now, please --

23 A. I'm just checking to see if there's a signature.

24 No, it's just signed by the firm.

25 Q. Now, please go to page 7, if you will, of this memo.

1 A. I'm there.

2 Q. All right. And the heading is Historical Development, and
3 there's a sentence there near the top says the Reynolds' R&D
4 document regarding Project CC. I direct your attention to that
5 sentence check. It's the second --

6 A. I'm sorry?

7 Q. Page 7, the second sentence starts, the Reynolds R&D
8 documents regarding Project CC --

9 A. Right.

10 Q. -- together with information obtained during interviews of
11 Reynolds' R&D personnel, established that CC substantially
12 reduces certain compounds in cigarette smoke that have been
13 identified by the Surgeon General and others as being
14 potentially harmful to human health.

15 That's what Jones, Day told you based on their
16 interviews and reviews of documents. Is that fair to say?

17 A. I'm taking it on its face, yes.

18 Q. And you don't have any reason to think that you had contrary
19 information?

20 A. No, I don't.

21 Q. All right. Look at page 94 then, if you would.

22 The heading is Commercial Feasibility?

23 A. Yes.

24 Q. And turn to page 95 at the very bottom paragraph starts with
25 the sentence that says, in sum.

1 A. I'm with you.

2 Q. Okay. It says, in sum, it appears that in terms of both
3 taste and price, CC is now ready to be introduced on to the
4 market.

5 Okay. Got that?

6 A. Yes.

7 Q. That's what they told you as well when you received this
8 document sometime in 1994?

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

10 Q. When you received this document, you didn't keep it to
11 yourself; you shared the information with management and the
12 company?

13 A. No, I don't believe that I did.

14 My recollection is that I distributed it to one or both
15 of the gentlemen that I mentioned. I don't recall giving this
16 wide distribution.

17 Q. Turn to page 100, please. And there's a section entitled
18 Regulatory Feasibility. And I'm going to direct your attention
19 to the first sentence there.

20 A. Yes, sir.

21 Q. All right. You were told by Jones, Day while there are
22 currently no regulations or statutes that prohibit the marketing
23 of CC, the FDA, FTC and/or other antismoking forces will
24 probably try to hold up the marketing of this product.

25 That's what you were told by Jones, Day as well?

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

2 Q. Now, despite what might be potentially triggered, what they
3 told you is that at the time you received this memo there
4 currently were no regulations or statutes that prohibited the
5 marketing of CC. Is that right?

6 A. Yeah. But, excuse me, but they did not have advertising. I
7 mean, you can't market without advertising.

8 Q. We will get to the advertising in a second.

9 A. I'm sorry. But the term marketing means advertising.

10 Q. And when you read it, is that what you thought, advertising?

11 A. That's what marketing means.

12 Q. So in your mind when you read the statement, while there are
13 currently no regulations or statutes that prohibit the marketing
14 of CC, what they were telling you what was there were no
15 regulations or statutes to prohibit the advertising of CC?

16 A. We had not developed advertising.

17 Q. We will talk about that in a second.

18 THE COURT: Didn't the FDA at this time have
19 regulations prohibiting you from making health claims for
20 cigarettes?

21 THE WITNESS: And that would have been in the marketing
22 or advertising of it.

23 I think when they say -- they may have been using the
24 term more loosely here "introduction of a product" as opposed to
25 the advertising that it was wrapped in. I don't know what was

1 intended exactly.

2 BY MR. SCHWARTZ:

3 Q. I think briefly I'll be able to direct the court and you to
4 what they intended about marketing.

5 I'm sorry to make you keep flipping pages, but if you
6 would go back to page 7 again.

7 A. I have it.

8 Q. Okay. After that sentence I read, which said that CC
9 established that their findings established that CC
10 substantially reduces certain compounds in cigarette smoke that
11 have been identified by the Surgeon General and others as being
12 potentially harmful to human health, Jones, Day then told you,
13 if or when this fact becomes known to plaintiffs in smoking and
14 health litigation, through discovery or otherwise, Reynolds can
15 expect that plaintiffs will assert design defect claims alleging
16 that CC is a feasible alternative quote/unquote safer design and
17 that Reynolds could have and should have, 1, developed and
18 marketed CC early other, and/or 2, replaced all other unsafe
19 cigarette designs with the CC design.

20 That's what they told you?

21 A. That's what it says yes.

22 Q. They said that their review shows that CC substantially
23 reduces compounds identified as being harmful, potentially
24 harmful, but if you put it out there, you can anticipate
25 somebody pointing a finger at R.J. Reynolds saying you should

1 have replaced all your other products because they were unsafe?

2 A. This is a potential claim. This was the blue sky kind of
3 thing they were supposed to be doing.

4 Q. Right. That was a potential claim that you should be aware
5 of that that might happen if you market CC?

6 A. Yes. On the one hand, but on the other hand. I mean, this
7 document is rift with on the one hand, on the other hand, kind
8 of scenario.

9 Q. We will try to get to a number of them.

10 Now, you had all of this information that it
11 substantially reduced certain compounds, that there was no
12 regulatory bar, no statutory bar, and it was commercially
13 feasible or ready to go to market, but there were potential
14 litigation implications if you brought it to market.

15 A. No. If you would please repeat that question because I
16 think you're going much farther than what I said or understood.

17 Q. Well --

18 A. It's not ready to be marketed. You can't market it until
19 you have a product. You can't market until you have the
20 advertising and the promotional materials. So it was not ready
21 to be marketed.

22 Q. And you agree with me that the products, Project CC was also
23 known as Project EW?

24 A. I believe it was, yes.

25 Q. All right. And if I told that you there was testimony in

1 this case that EW did go to market in April of 1995, would that
2 complete your understanding or refresh your recollection of what
3 happened to Project CC?

4 A. It would suggest to me that it was farther along than I
5 recall it being.

6 But the memo itself, at the time that it's written,
7 says the advertising and the product have not been developed.

8 Q. All right. That's worth looking -- taking a look at page
9 105, if you will then.

10 A. Yes, sir.

11 Q. Now, there's a caption that's called PRISMs 1, PRISMs 1, and
12 it says, at the end of 1992 or beginning of 1993, Reynolds
13 decided to shift the focus of its product development efforts
14 from development of existing brands to developing -- to
15 development of new products that would satisfy enduring
16 consumer wants.

17 To this end, Reynolds implemented a new strategic
18 product development plan called PRISMs 1. The initial goal of
19 PRISMs 1 is to identify, understand and define in an actionable
20 manner the, quote/unquote, enduring consumer wants and
21 corresponding product claims that would form the direction and
22 basis of Reynolds' future product development efforts.

23 Do you remember PRISMs 1?

24 A. I remember having -- I remember just having seen it in the
25 stack of documents that you sent over with the exhibits. I

1 didn't recall it until I saw that.

2 Q. So even though this document says that you were on the
3 product, new Product Steering Committee of R.J. Reynolds, you
4 don't remember --

5 A. I don't recall that, no.

6 Q. All right. That's your testimony today?

7 A. That is my testimony.

8 Q. Now --

9 THE COURT: Are you turning to a new area,
10 Mr. Schwartz?

11 MR. SCHWARTZ: I -- certainly if Your Honor wants to
12 take a break this would be an okay time.

13 THE COURT: Let's take a 15-minute break at this time,
14 everybody.

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

16 (Recess ended at 11:25 a.m.)

17 THE COURT: Mr. Schwartz, please.

18 MR. SCHWARTZ: Thank you, Your Honor.

19 THE COURT: Mr. Schwartz, what do you anticipate for
20 the rest of your direct? How long do you think it will be?

21 MR. SCHWARTZ: I think I'll be finished by or before
22 the 3:00 o'clock break this afternoon, and I'm not trying to
23 tell Your Honor when to take the break.

24 THE COURT: 3:00 o'clock break. Did I say we were
25 breaking -- you mean just the middle of the afternoon break?

1 MR. SCHWARTZ: I'm sorry, Your Honor. Around that
2 time.

3 BY MR. SCHWARTZ:

4 Q. All right. Sir, staying on this document, and looking still
5 at pages 105 and 106. If you would look at the bottom paragraph
6 of 105 and read into the next page.

7 A. Yes, sir.

8 Q. Now, we have already looked at the page that said that
9 PRISMs project was to identify enduring consumer wants, and this
10 part of the page says that PRISMs, the PRISM 1 team conducted
11 extensive marketing research, screened over 40 different product
12 claims and identified the top five so-called enduring consumer
13 wants. And the number one consumer want, at least the first one
14 listed, was reduced controversial compounds.

15 A. That's as I read it.

16 Q. And turning the page, it says, the next thing that the PRISM
17 team did -- looking at the next paragraph -- was to review these
18 top five wants, get together -- they got together with Reynolds'
19 Research and Development Department and assessed the
20 technological feasibility of developing products that could
21 potentially satisfy each of these enduring consumer wants.

22 And what it came up with was what research and
23 development, in conjunction with the marketing people in
24 PRISM's 1, came up with was that Project CC, which was almost
25 fully developed by that time, was obviously matched with the

1 enduring want and reduced controversial compounds.

2 A. Again, that's what it said.

3 Q. So it's fair to say what they were telling you is that they
4 identified the market. The market was interested in a reduced
5 controversial compounds product. And R.J. Reynolds had what
6 they believed to be a reduced controversial compounds product in
7 hand, or almost in hand, it was almost developed?

8 A. I believe that's what this says, yes.

9 Q. And then it says that in May of 1993 the PRISM's team met
10 with this product steering committee group, that identifies you
11 as being on it, and the steering committee decided to pursue
12 development of products to satisfy all of the top five wants,
13 except for fresh breath. And they also decided that, this new
14 product steering committee, to proceed with marketing research
15 for Project CC. Right?

16 A. That's what it says.

17 Q. All right. And you mentioned before that there wasn't
18 advertising stuff looked into for CC. But I want you to take a
19 look at the next session that's called Project CC marketing
20 research.

21 A. If I could interrupt for a second. I'd like to go back and
22 find out what I based that on.

23 I remember reading somewhere in the introduction or
24 somewhere up there that they had not yesterday developed
25 advertising or they -- and they didn't have the product

1 developed. That's what I was basing it on.

2 Q. If that's your recollection, that's fine, but that's what
3 your sense is. Now I'm asking you to look at this and we will
4 go through the section and at the end I'm going to ask you does
5 that change your recollection about whether they had developed
6 advertising.

7 A. Fine.

8 Q. Okay?

9 So here it says, in fall of 1993 Reynolds conducted
10 and -- I'm at 107 -- conducted concept and product development
11 testing for CC.

12 And it has a title called Wave 1. And it said that --
13 at the bottom of the page -- CC prototypes were tested with the
14 CC concept which discussed 50 percent reductions in
15 controversial compounds. So they tested a concept.

16 Now a concept is like marketing ideas, advertising
17 ideas? What would you call a concept?

18 A. I'm sorry. Where is the 50 percent reduction referred to?

19 Q. I beg your pardon, sir.

20 If you look at the bottom of page 107, under the
21 paragraph Wave 1, the last sentence says, the CC prototypes were
22 tested.

23 A. I'm sorry. I'm with you. Go ahead.

24 Q. Okay. And it says, were tested with the CC concept which
25 discussed 50 percent reduction of controversial compounds.

1 And I'm going to direct your attention in a minute to
2 the footnote, but I want ask you, the idea of testing a concept,
3 what does that mean?

4 A. To me, it is you go out with an idea and you see how the
5 consumers react to it. I don't -- I don't know exactly what
6 that means in terms of what you put in front of them, but a
7 concept means something that's not a final product, it's an
8 idea.

9 Q. And the concept is something that would be converted into
10 advertising copy of some sort. If the idea hit big, they say
11 that's what we want to base our advertising on.

12 A. But again that would depend on things like substantiation
13 and other forms of legal review.

14 Q. But just in terms of what was popular with the smoking --

15 A. Again, I'm not a marketing guy. I've been away from this
16 for quite some time, but that seems to make sense what you're
17 suggesting, but I can't say with certainty that that's the way
18 it was done.

19 Q. When you were general counsel for R.J. Reynolds for a number
20 of years you worked with the marketing people, obviously.

21 A. From time to time, yes.

22 Q. And the reason you worked with them to see if something they
23 thought they wanted to do was something legally they could or
24 should do?

25 A. We would advise them on the legal and regulatory

1 implications of what they were doing, yes.

2 Q. All right. Now, in this footnote on page -- footnote number
3 377. If you could just fly that out. It says, the CC claim
4 used in Wave 1 mentioned introducing PRISM, a new cigarette with
5 50 percent less controversial compounds than leading Light --
6 than the Leading Lights brand.

7 And then the next paragraph, it mentions that the
8 Surgeon General and others have identified a number of compounds
9 in cigarette smoke, but have been unable to prove which, if any,
10 are responsible. And it says that PRISM is a new cigarette that
11 reduces the level of these controversial compounds by
12 50 percent.

13 All right. Now, there it's saying that they tested a
14 concept that tells the listener that PRISM is a product that
15 reduces the level of controversial compounds by 50 percent.

16 A. Again, yes, but it is not necessarily a product to back it
17 up. It's a concept. It's an idea. It's words.

18 Q. They see how that idea plays?

19 A. That's my understanding, yes.

20 Q. Okay. And they also, of course, had a comparison concept,
21 and it says -- at the top of page 108, it says, the Winston
22 select control product was tested with a traditional taste
23 claim. And it details that in footnote 378.

24 Have you had a chance to look at that, sir?

25 A. I just read it.

1 Q. And you agree with me that the traditional taste claim of
2 the control or comparison product does not mention anything
3 about the reduction of controversial compounds?

4 A. Yes, it does. If I'm reading the right one, it's the last
5 paragraph.

6 Q. Page --

7 A. The Winston select -- I'm sorry.

8 Q. It's footnote 378, sir.

9 A. It talks about taste impurities being removed by a
10 specially-designed filter.

11 Q. Okay. It talks about taste impurities but not controversial
12 compounds?

13 A. It doesn't use those words, no.

14 Q. So we have the CC Project, or product that they talk about,
15 50 percent reduction in controversial compounds, and they were
16 testing it against what they call a taste claim that does not
17 mention reduction in controversial compounds?

18 A. Except there may, there may be something implicit in the
19 word impurity. I don't know.

20 Q. All right. Fair enough.

21 Now, turn to page 110 where they talk about their
22 findings. And, I'm sorry, you will have to look at the last
23 sentence in page 109 and then go on to 110.

24 A. I read the bullets.

25 Q. Now, it says -- it says, even though the CC concept conveyed

1 substantial taste tradeoffs compared to the traditional taste
2 claim, as measured by product attribute expectations, it also
3 says that person's intent was significantly higher for the CC
4 claim than the traditional taste claim. Is that correct?

5 A. There were some believability issues.

6 Q. And it says the CC claim was significantly more important
7 and different than the taste claim. That's what they told you
8 as well?

9 A. That's what this says, yes.

10 Q. All right. And at page 111 -- the bottom paragraph where
11 it's text rather than bullets -- it says, based on these
12 results, the PRISM 1 team recommended to management that CC
13 claim be -- the CC claim be used because it is more important
14 and different than the traditional Winston select taste claim
15 and generates significantly greater purchase interest; and two,
16 the CC claim be improved to convey less taste tradeoff and
17 greater believability.

18 Do you see that, sir?

19 A. Yes.

20 Q. Let me ask you. From your experience as general counsel for
21 all those years at R.J. Reynolds, when they say the PRISM's 1
22 team recommended to management, who are they recommending it --
23 to whom are they recommending it?

24 A. Again, I can't speak with certainty, but I believe it would
25 have been marketing management first, and if it went beyond

1 that, it would have been the management committee.

2 Q. Who is the management committee?

3 A. Everybody that reported directly to the CEO.

4 Q. Can you tell me what those position are, not people?

5 A. General counsel, head of external relations, head of public
6 relations -- well, I'm not so sure about that -- marketing,
7 sales, manufacturing. And I'm sure I've left off three or four.

8 Q. Okay.

9 A. R&D.

10 Q. R&D. At least those folks were the management to whom it
11 would filter up?

12 A. In theory, yes.

13 Q. Okay, good.

14 Now, look at page 112 then if you don't mind, and they
15 talk about a wave 2 concept. And there looking at the first
16 paragraph where it says, the Wave 2 concept product testing
17 employed procedures similar to those used in Wave 1, except the
18 CC concept was changed, it was enhanced, they say; that it went
19 from using a 50 percent reduction in alleged -- I'm sorry -- it
20 introduced the concept of 50 percent reduction in alleged
21 cancer-causing compounds instead of saying a 50 percent
22 reduction in controversial compounds. So they stepped up the
23 claim. Is that fair to say?

24 A. They juiced it up.

25 Q. They juiced it up to suggest that it was safer, is that fair

1 to say? From going to --

2 A. Or less risk. Safer.

3 Q. So they tested an even stronger health claim. Is that --

4 A. Implicitly, yes.

5 Q. Okay. Good.

6 So on page 113 it talks about the results of the change
7 to a stronger, or an implicitly more stronger health claim, and
8 it said, the change to CC concept used in Wave 2 was recommended
9 over the CC concept used in Wave 1. Is that right?

10 A. Again, that's what it says.

11 Q. And again it would be recommended to management, and if they
12 made it past marketing management, it would go up to all those
13 folks you named?

14 A. In theory, yes.

15 Q. All right, in theory.

16 And the company had all of this information from Jones,
17 Day as sent to you.

18 A. Well, the company, if you want to consider me, Dan Donahue,
19 and Chuck Blixt as the company, or surrogates for the company,
20 perhaps, but the company didn't have this. Management didn't
21 have this.

22 Q. You had it?

23 A. I had it.

24 Q. Okay.

25 A. Actually, I might have given my copy to somebody else, but I

1 received it.

2 Q. That's understandable.

3 Turn to page 114, if you will, and there it's captioned
4 Marketing Strategies. And it says, Reynolds is currently
5 considering several different marketing strategies for
6 Project CC.

7 The goal in developing a marketing strategy is to
8 maintain the consumer appeal for the CC concept that was
9 demonstrated during product/concept testing, while at the same
10 time minimizing the risk of adverse regulatory and/or legal
11 action.

12 Okay. So -- is that correct, sir?

13 A. That's what it says.

14 Q. Okay. So there they are saying that they are actually
15 considering it. At that time they actually did have different
16 marketing strategies in hand for CC and they were batting them
17 around to see which one was --

18 A. Apparently.

19 Q. Okay. So earlier you expressed caution about whether there
20 were any advertising ideas put together.

21 Does that change your opinion about whether there were
22 any advertising ideas actually put together for CC?

23 A. Perhaps I misspoke. But what I intended to say they did not
24 have -- they had not decided on advertising. They had not
25 decided on product configuration.

1 Q. When you say they had not decided, they had not decided by
2 the time you got this memo; is that right?

3 A. Yes, by the time this memo was written.

4 Q. All right. Turn to page 115, please, and it's the bottom
5 paragraph. And it says, from a marketing standpoint the
6 advantage of using the clearer, more aggressive personal concern
7 claims, of course, is that consumers find them more appealing.

8 Concept testing has demonstrated that the more clear
9 and unequivocal the personal concern claim is made, the more it
10 appeals to consumers. And it picks out a particular example.

11 For example, a claim of 50 percent less claimed cancer-
12 causing compounds is more appealing to consumers than reduced
13 controversial compounds or reduced irritancy.

14 So there, they are saying from a marketing standpoint,
15 at least, the stronger implicit health claim you could make, the
16 better.

17 A. It appears they are.

18 Q. Okay. And it also says that consumer testing has
19 demonstrated that new test claims are less appealing than
20 personal concern claims.

21 And it mentions that there are legal ramifications,
22 legal issues of pursuing that stronger market route. Is that
23 fair to say?

24 A. Yes.

25 Q. All right. Now, in fact, at page 116 they start to identify

1 some of the disadvantages to you, and they say, one obvious
2 disadvantage -- in the middle paragraph -- of using the more
3 aggressive personal concern claim is that in today's antismoking
4 environment such claims will almost certainly draw fire from the
5 FTC, FDA and antismoking advocates.

6 So what they did -- well, one thing that was suggested
7 was that they use a watered-down concept. If you turn to page
8 117, and I ask you if you remember that. It says, in short.

9 A. In short?

10 Q. In short, Reynolds may be able to minimize the risk of
11 regulatory action and possibly minimize its liability in the
12 smoking and health litigation by using watered-down personal
13 concern claims and taste claims, but such claims are less
14 appealing to consumers, and as discussed in the legal defense
15 section, watered-down claims also have significant downside in
16 defending against alternative design and fraudulent concealment
17 claims.

18 So they were suggesting one possible alternative is
19 don't go with the super strong high market test 50 percent
20 reduction in cancer causing compounds, but maybe step it down
21 below that a little bit, water it down.

22 A. Again, on the one hand, on the other hand. This is what was
23 going on here.

24 Q. They are discussing options for you. And they are saying,
25 the higher the health claim, the less implicit and more explicit

1 the health claim, the more legal bells that may go off?

2 A. The more risk vis-a-vis FDA, FTC, and anti-smoking groups.

3 Q. And litigation as well?

4 A. And litigation, yes.

5 Q. All right. Now, ultimately, Reynolds didn't use either a
6 watered-down claim or the strong personal concern claims, did
7 it?

8 A. I don't know what the claim was. I don't know what the
9 advertising was for CC.

10 Q. Or EW?

11 A. Or EW.

12 Q. Turn to page 137, please.

13 A. Yes, sir.

14 Q. Now, there it talks about the legal issues and analysis that
15 was provided to you by Jones, Day of the potential litigation
16 implications of making a reduced risk claim.

17 And it says, the section of this memo -- this section
18 of the memorandum analyzes several legal issues that may arise
19 in pending and future smoking and health cases as a result of
20 the development and/or the introduction of CC. Right?

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

22 Q. Now, do you understand that to say, let's look at what the
23 marketing people said and see what would happen depending on
24 which marketing claim we use?

25 A. Well, it doesn't tie it necessarily to which marketing

1 claim, it ties it to the introduction.

2 Q. Look at page 138. And there the section is entitled, Impact
3 of Project CC on Design Defects Claim.

4 A. Yes, sir.

5 Q. And it says again, as stated earlier, the R&D documents
6 together with the interviews of Reynolds' R&D personnel
7 established that CC reduces certain compounds of cigarette smoke
8 that have been identified by the Surgeon General and others as
9 being potentially harmful to human health.

10 If or when this fact becomes known to plaintiffs in
11 future smoking, Reynolds should expect plaintiffs who smoked
12 other brands, that they will assert design defect claims
13 alleging that CC was a safer design and that by comparison, all
14 other cigarettes should be deemed defective and unreasonably
15 dangerous.

16 So there they are telling you that if you let it be
17 known in the market that there's a reduced controversial
18 compound, somebody is going to come back and say, Hey, reduced
19 compared to what? Compared to the other stuff RJR was selling,
20 meaning the other stuff RJR was selling is not safe.

21 A. It's saying -- no, it's saying somebody could make that
22 claim.

23 Q. All right. Somebody could make that claim, and that was a
24 matter of concern that should be brought to your attention?

25 A. Well, it's something that they are suggesting ought to be

1 taken into consideration as they do their legal analysis of the
2 possible alternatives and consequence.

3 Q. Let me just ask you briefly, without making you go back into
4 that big notebook of exhibits.

5 Back when you were talking to Dr. DiMarco or talking
6 about Dr. DiMarco, you had that same kind of fear when he was
7 talking about making a less mutagenic cigarette, didn't you?

8 A. There was a paragraph in there that talked about less
9 mutagenic and/or safer, yes. That was a concern expressed at
10 that time.

11 Q. Now, here in this document, document 85886, it expressed as
12 a condition, it says, if or when this fact becomes known to
13 plaintiffs. So, this fact is referring back to the idea of
14 reduction in controversial compounds.

15 So they are assuming that if it comes out in public or
16 becomes known somehow that CC reduces controversial compounds,
17 that would raise the risk of somebody bringing certain claims
18 against R.J. Reynolds?

19 A. Again, theoretically, yes.

20 Q. Now, do you agree with me that it almost definitely would be
21 known in the public and available for litigation if RJR went
22 ahead and advertised what the PRISM 1 team told you to do which
23 was say 50 percent reduction in cancer-causing compounds?

24 A. Your question is if it's in the advertising, does that
25 increase the likelihood that that the plaintiffs noticed it, the

1 answer is yes.

2 Q. So if you don't tell anybody about it publicly, it's less
3 likely that there's going to be a lawsuit claim about RJR's
4 other cigarettes being unsafe. Do you agree with me?

5 A. Yes. Yes, I agree.

6 Q. All right.

7 Now, it discusses a little further this design -- the
8 risk of design defect claims, and I want to call your attention
9 if you would to page 144 and 145. Pages. And just the last --
10 beginning of the last sentence on 144 and 145, and read that
11 paragraph, please.

12 A. Excuse me. The language that begins, CC is?

13 Q. Yes, sir. And just read into that paragraph -- read the
14 next paragraph on the next page.

15 A. I'm reading it, but I'm trying to follow it. Let me try it
16 one more time.

17 Q. Sure. Take your time.

18 All right, sir. There, it says, since CC is intended
19 to appeal to some low tar Marlboro Light smokers, it would be
20 difficult for Reynolds to establish that CC is not an
21 alternative design to other cigarettes.

22 A. That's what it seems to say, but I'm trying to understand
23 how it works. I'm still a little fuzzy.

24 Q. Okay. I don't want to rush you through this document or
25 point you to something that distorts anything. If you need to

1 page through this section to see that they are talking about
2 whether a design defect claim could be made out against RJR,
3 please go ahead and do that.

4 A. I'm just struggling with the last sentence. "Thus, it will
5 be difficult for Reynolds to establish that CC is not an
6 alternative design to other cigarettes."

7 Q. Is it fair to say that what it's telling you is that a
8 plaintiff at least will be able to overcome the hurdle to show
9 that CC is, in fact, an alternative design in the context of
10 design defect litigation?

11 A. I must be incredibly dense, but I can't answer that
12 question. I'm trying to figure it out.

13 Q. That's fine. Take your time. And if you can't, you can't.

14 A. The penultimate sentence suggests that there would be some
15 difficulty on defending an alternative design case, but I don't
16 understand exactly why.

17 Q. Okay. But they are communicating to you that there will be
18 some hurdles?

19 A. That's what this seems to be saying.

20 Q. At least one hurdle. It also tells you in the next
21 sentence -- the next paragraph, it says, second, unless CC is a
22 commercial failure or is forced off the market by regulatory
23 forces, plaintiffs will probably be able to establish that CC is
24 feasible.

25 So they are telling you that's another hurdle that

1 plaintiffs may be able to overcome in bringing in a design
2 defect claim.

3 A. It appears they are, yes.

4 Q. All right. And then on page 146 there's a big paragraph
5 there, and the last sentence in that paragraph starts with the
6 word finally, comma.

7 It says, finally, CC appears to be economically
8 feasible. While the manufacturing costs associated with the CS
9 filter will make CC one of the most expensive Reynolds brands
10 manufactured, Reynolds should still be able to market CC at a
11 price comparable to the other premium brand, so it makes a
12 conclusion about whether or not the Project CC is economically
13 feasible.

14 A. Yes, it does.

15 Q. Okay. And that's also another hurdle that a plaintiff would
16 have to overcome in showing that there's a design defect because
17 it was economically feasible to make a safer cigarette?

18 A. I believe that's correct.

19 Q. Okay. All right. And then it says, third, right below
20 that, in order to succeed on design defect claims based on the
21 existence of CC, plaintiffs will have to allege and prove that
22 CC is a safer cigarette.

23 And then if you turn to page 147, the last sentence
24 starting with, generally, however, and into the next page,
25 please take a look at that.

1 A. Yes, but you jumped over a bunch of tough stuff.

2 Q. I'm just trying to identify that Jones, Day is telling you
3 that there's some hurdles, and one of the hurdles it's telling
4 you is that a plaintiff generally can avoid dismissal by
5 presenting at least some evidence that the proposed alternative
6 design is safer.

7 And then it says, plaintiffs probably will be able to
8 present enough evidence to avoid summary judgment or a directed
9 verdict on the issue of whether CC is a safer cigarette.

10 So they could -- they are telling you that this issue
11 is going to get to a jury, if it's a jury trial, that the --

12 A. Yes, that's what they are suggesting.

13 Q. All right. Turn to page 190, please, sir.

14 A. Yes.

15 Q. Now, there, your attorneys are advising you about the
16 prospects of fraud and express warranty claims being brought.

17 Is that correct?

18 A. Well, that's what the caption is.

19 Q. It says, whether R.J. Reynolds might expose itself to fraud
20 and/or breach of express warranty claims, it claims that CC
21 reduces alleged 50 percent -- I'm sorry -- alleged carcinogenic
22 compounds by 50 percent weight.

23 A. Yes.

24 Q. All right. They are saying if they make a 50 percent
25 reduced risk claim -- or a 50 percent reduced carcinogenic

1 compounds claim, it says compared -- actually compared to
2 Marlboro Lights -- somebody might sue them, sue you guys for
3 fraud or breach of express warranty.

4 A. Again, it's a theoretical prospect.

5 Q. They are saying you should be aware that there's a
6 possibility and there's another litigation --

7 A. Another theoretical issue that we ought to take into
8 consideration.

9 Q. All right. Would you agree with me, sir, that again your
10 best chance of avoiding a fraud for breach of express warranty
11 claim is to steer clear entirely of mentioning reductions in
12 cancer-causing compounds in advertising about the EW product?

13 A. If you make no warranty, it's very difficult to find breach
14 of warranty.

15 Q. Then the lawyers told you, at page 193, it is impossible to
16 assess whether Reynolds --

17 A. I'm sorry. Top of page?

18 Q. Yes. It is impossible to assess whether Reynolds or
19 plaintiffs would have the better of the argument, because
20 whether a statement is false or misleading is decided by the
21 trier of fact on the particular facts of each case.

22 So they were telling you, you can't be sure it's a slam
23 dunk that you're going to win these claims?

24 A. Reading what you've read to me, that would be appear to be
25 the case. There are issues on the one -- but there's another

1 hand in here that we keep skipping over.

2 Q. Okay. We will get to it, I hope. All right. And then just
3 briefly, let's look at page 194 to 196. If you want to kind of
4 flip through that to familiarize yourself and I'll direct your
5 attention to certain things.

6 And, in particular, I'll ask you to start at the
7 admissibility of CS/CT research information.

8 A. How far do you want me to go?

9 Q. 194 to 196 I think will cover it, sir. And, of course, if
10 you want to go further, you're welcome to.

11 And actually, 197. If you want to flip through that
12 section and -- I'll ask you if you've had a chance to look at
13 that before.

14 Okay, sir.

15 A. I've read it, but again I'm not sure I understand all that's
16 going on.

17 Q. That's okay. I'll direct you to certain things and we can
18 talk about them --

19 A. I'm just a humble country lawyer.

20 Q. I understand that. And you were advised by a group of other
21 humble country lawyers.

22 A. I don't know about that. There's nothing humble about those
23 guys.

24 Q. All right. So the sophisticated guys at Jones, Day.

25 (Laughter)

1 All right. Our sophisticated friends at Jones, Day
2 also discussed whether -- looking at page 194, the caption --
3 whether and, if so, under what circumstances documents
4 concerning the --

5 A. I'm sorry. Can we find it?

6 Q. It's the header at 194, number D. It's the heading.

7 A. Yes.

8 Q. Okay. They are telling you -- or they are discussing with
9 you whether and, if so, under what circumstances documents
10 concerning the development of CC will be admissible in evidence,
11 notwithstanding Federal Rule of Evidence 407 and similar state
12 rules of evidence?

13 A. That's what it says.

14 Q. And I know that you know off the top of your head that
15 Federal Rule of Evidence 407 talks about subsequent remedial--

16 A. This is making my teeth hurt.

17 Q. Okay. All right. All right. Look at page 195, if you
18 will.

19 A. Yes, sir.

20 Q. There it says, evidence of a feasible alternative safer
21 design could be used as evidence either in support of a claim
22 that Reynolds was negligent in marketing non-CC products or a
23 claim that risks of -- the risks of non-CC products outweigh
24 their utility.

25 And it goes on to say, information concerning the

1 development of CC might also be offered as circumstantial
2 evidence that Reynolds had knowledge of the harmful effects of
3 its other products.

4 A. Yes, sir.

5 Q. So they were saying even if there's not a particular claim
6 that they can stamp a name on, evidence may come out suggesting
7 that Reynolds knew that its other products, its non-EW products,
8 were not safe?

9 A. That's what it appears to be saying.

10 Q. Okay. And there, for you and for me as well, it reprints,
11 beneath it on page 196, Federal Rule of Evidence 407. Okay.

12 It talks about subsequent remedial measures.

13 A. Do you want me to read the footnote?

14 Q. No. I just want you to familiarize yourself. I'm going to
15 ask you a couple of questions.

16 A. I better read it.

17 You're talking about footnote 512?

18 Q. No, I'm sorry, sir. Here, it reprints Federal Rule of
19 Evidence 407. Page 196. I apologize, sir. I beg your pardon.

20 A. (Pause) Yes, I've read it.

21 Q. All right. It talks about rule 407 and whether it has been
22 uniformly interpreted to preclude the admission of evidence and
23 subsequent remedial measures to prove negligence -- I'll start
24 over.

25 It says, while rule 407 has been uniformly interpreted

1 to preclude the admission of evidence of subsequent remedial
2 measures to prove negligence, it has not been uniformly applied
3 in strict liability cases. Is that right?

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

5 Q. Okay. And on the next page, 197, in the paragraph that
6 starts, in contrast, it says, in contrast, the majority of state
7 courts that have decided the issue and the eighth and tenth
8 federal circuit courts of appeals have held that evidence of
9 subsequent remedial measures is admissible in strict liability
10 cases to show that a product was unreasonably dangerous or
11 defective.

12 A. Yes, it says that.

13 Q. So it's telling you that there is a risk that,
14 notwithstanding rule 407 in a strict liability case, evidence
15 about CC being safer than the other products R.J. Reynolds makes
16 could come out?

17 A. I believe that's correct.

18 Q. Okay. Just briefly the last thing I'll ask you to look at
19 is at the bottom of 198 where it says, thus, in jurisdictions,
20 and on to 1999.

21 A. (Pause) I read it.

22 Q. So there your colleagues at Jones, Day were telling you that
23 thus in jurisdiction where rule 407 does not preclude evidence
24 of subsequent remedial measures in strict liability actions,
25 evidence regarding CC might be admissible, if otherwise

1 relevant, to prove that another brand of cigarettes was
2 unreasonably dangerous.

3 Here, they are telling you this, sir, not for any other
4 brand of cigarette but of another RJR brand of cigarette. Is
5 that what you think they were alerting you to?

6 A. I think that's a reasonable implication from it, yes.

7 Q. So, looking at this memo as a whole of what we've spoken
8 about collectively, Jones, Day has given you a number of
9 reasons -- given you a number of reasons not to market the EW
10 cigarette with reduced compounds or reduced carcinogenic-causing
11 compounds' tag on it?

12 A. All I would say is with your question we had not looked at
13 this memo as a whole. We've looked at the sections that you've
14 selected. There were -- as I recall the memo, there were other
15 counterbalances to each of these issues that were raised.

16 Q. But you've looked -- I mean, when you got this memo, you and
17 Mr. Blixt and Mr. Donahue read the whole memo?

18 A. I'm not saying I did.

19 Q. Okay. You got -- you can reasonably be assured that your
20 colleagues, Mr. Blixt and Mr. Donahue, gave you a full flavor of
21 this memo?

22 A. Again, I can't say that.

23 Q. All right. The last thing I want you to look at is page 117
24 and 118. I promise you this is the last reference in this
25 document. Just look at the paragraph that starts with the

1 public controversy and ends at the top of page 118.

2 A. Yes, I understand.

3 Q. So it was telling you that public controversy surrounding
4 the benefits of Project CC may not necessarily be entirely
5 negative. Such a controversy could chip away at anti-smoking
6 sentiment and perhaps ultimately shift sentiment from demand for
7 a smoke-free society to a demand for a safer cigarette.

8 Reynolds is currently considering whether the long-term
9 benefits of creating a controversy surrounding Project CC would
10 be worthwhile.

11 While Project CC may ultimately prove unsuccessful due
12 to pressures from the FTC, the FDA and the anti-smoking
13 community it may act as a stalking horse and create demand for
14 other certain personal concern products that Reynolds currently
15 has under development.

16 Many in Reynolds R&D Division, including Dr. David
17 Townsend, appear to favor strongly an aggressive approach that
18 would bring the controversy to the forefront.

19 Okay. I want to ask you a couple of questions about
20 that paragraph.

21 First of all, it told you that as of 1994 Reynolds
22 currently had personal concern products under development. Is
23 that right?

24 A. That suggests that, yes.

25 Q. All right. It also told you that what was going on is that

1 Reynolds was currently considering whether the long-term
2 benefits of creating a controversy surrounding Project CC would
3 be worthwhile.

4 So there was a -- is it your recollection that there
5 was a discussion back and forth about whether you should float
6 EW into the market to create a controversy about smoking safer
7 cigarettes versus not smoking at all?

8 A. I don't recall the conversation, but I understand the
9 concept.

10 Q. Okay. But you don't recall the conversation?

11 A. No, sir.

12 Q. And then the last thing it says in that paragraph that we've
13 read is that, many in Reynolds's R&D Division, including
14 Dr. David Townsend. Who is Dr. Townsend?

15 A. I'm not sure what title or what responsibility he had at
16 that time, but he was a fairly senior, but he was not the head
17 of R&D, I don't believe.

18 Q. And do you know or before you left did he become the head of
19 R&D?

20 A. I think I've heard that he has become the head or was the
21 head for some time.

22 Q. And he's arguing here in favor of letting it be known that
23 they believe Project CC, the EW cigarette is, in fact, safer?

24 A. Yeah, let's pick a fight and let's attract a little bit of
25 litigation and let's let the games begin.

1 Q. And Dr. Townsend was an advocate of that position?

2 A. This suggests that he might have been, yeah.

3 Q. Do you know that he's the safe cigarette expert for R.J.
4 Reynolds in this case?

5 A. I don't know that.

6 Q. I'm finished with that document. Thank you.

7 All right, sir, before you open the notebook again.
8 When you became general counsel to R.J. Reynolds -- you go
9 ahead.

10 A. No, I can listen and pour.

11 Q. Okay. When you became general counsel to R.J. Reynolds part
12 of your responsibilities as general counsel was to serve on the
13 Tobacco Institute Committee of Counsel. Is that fair to say?

14 A. That's correct.

15 Q. Okay. So we know you did serve, but that was part of your
16 job as general counsel.

17 A. Yes, it was.

18 Q. Okay. And you also have testified that you were chairman of
19 the Committee of Counsel during some part of the years 1980 to
20 1990?

21 A. For some period of time, two years or slightly more.

22 Q. Now, as the Committee of Counsel member, of course you
23 attended regular Committee of Counsel meetings?

24 A. That's correct.

25 Q. And you also attended Tobacco Institute Executive Committee

1 of Counsel -- I'm sorry, I'm going to withdraw that request. I
2 apologize.

3 Because you were on the Committee of Counsel, you also
4 attended executive committee meetings for the Tobacco Institute.

5 A. I did from time to time. When I was chairman of Committee
6 of Counsel I attended regularly. I'm not sure that I attended
7 all executive committee meetings, so I can't say that with
8 certainty.

9 Q. As chairman, you made reports to the executive committee
10 about the goings on of the Committee of Counsel?

11 A. That's correct.

12 Q. All right. Now, are you familiar with a gentleman named
13 Ernest Pepples?

14 A. Yes, I remember who he was. He was the general counsel of
15 B&W.

16 Q. You and Mr. Pepples overlapped on the Committee of Counsel.
17 Is that fair to say?

18 A. Yes, that's fair to say.

19 Q. I'm going to now ask you to look at Exhibit 20874.

20 A. I have it, sir.

21 Q. Okay. Sir, have you had a chance to look this over since
22 you received it?

23 A. I did when it came over from your office.

24 Q. All right. I'm going to ask you to please look at the third
25 page; it's not numbered per se, but it has point number 5.

1 A. I'm there.

2 Q. Okay. It says, the frightening mathematics of smoking and
3 health products' liability actions is that a verdict against one
4 company will soon result in verdicts against others.
5 Consequently, the primary function of this Committee of Counsel
6 has been to circle the wagons to coordinate not only the defense
7 of active cases, but also to coordinate the advice which the
8 general counsel gives to ongoing operations of their companies
9 pertaining to product liability cases.

10 Sir, was that your understanding of the primary
11 function of the Committee of Counsel?

12 A. No, it was not.

13 Q. Was it your understanding of one of the functions of the
14 Committee of Counsel?

15 A. I could agree with the language if it -- that paragraph that
16 says, consequently, the primary function of this Committee of
17 Counsel has been to circle the wagons to coordinate the defense
18 of active cases. But when it came to coordinating what was
19 going on inside the companies, I would say absolutely not.

20 Q. Well, let me ask you a question.

21 Was Mr. Jacob or Mr. Finnegan involved with the
22 Committee of Counsel while you were on it?

23 A. I don't believe they were involved while I was on it. I
24 can't say that with certainty. There may have been a little bit
25 of a bridge period, but if they were there, they were not

1 representing Reynolds.

2 Q. Okay. Were they representing Brown & Williamson?

3 A. I don't remember.

4 Q. All right. Now, let's look at this phrase just briefly.

5 Coordinate the advice which general counsel gives to
6 ongoing operations of their companies pertaining to product
7 liability risks.

8 And I want to call your attention back to our
9 discussion of Dr. DiMarco just for a second and what was going
10 on in late 1982 and early 1983. There, you've testified that
11 Mr. Finnegan and Mr. Jacob were involved in that discussion. Is
12 that right?

13 A. Yes. That's reflected on a number of the memos.

14 Q. Did you become aware then or at any subsequent time whether
15 the Committee of Counsel or Committee of Counsel members were
16 also involved in that discussion?

17 A. Again, not to my knowledge. But please recall that I was
18 not a member of the Committee of Counsel then. I was not
19 general counsel.

20 Q. But you're not saying that you never attended Committee of
21 Counsel meetings back then?

22 A. Infrequently.

23 Q. Well, look 36078, if you will.

24 A. 36078?

25 Q. Yes, sir.

1 A. I have it.

2 Q. Okay. I don't yet. Sorry.

3 That's minutes of a Committee of Counsel meeting from
4 May of '82 and it says you were there. Is that right?

5 A. Yes, it does.

6 Q. And look at 86104 just for a moment.

7 A. I have it.

8 Q. All right. That's a November 14, 1983 Committee of Counsel
9 meeting minutes, or notes. Yes?

10 A. Yes, sir.

11 Q. Okay. And I have a son with a funny -- an odd spelling of
12 your name, so you have my sympathies. But it says Ukatz,
13 U-k-a-t-z.

14 A. There's no mistaking who they intended.

15 Q. That's you.

16 So at least even in the first couple of years when you
17 were at R.J. Reynolds you occasionally, at least, attended
18 Committee of Counsel meetings.

19 A. Yes, I did. I believe I said that.

20 Q. And in the 1982-83 period when you were at least
21 occasionally attending these meetings do you recall if, for lack
22 of a better term, the DiMarco situation was discussed?

23 A. No, I don't recall that being discussed.

24 Q. Do you recall if at any of those meetings you attended in
25 that period, Mr. Jacob or Mr. Finnegan would ever attend those

1 meetings?

2 A. I have no specific recollection of them being there.

3 Q. All right.

4 A. And again it was fairly infrequent. It was if I had
5 something to say.

6 Q. Thank you sir. I'm finished with those documents. Okay.

7 Sir, in addition to the Tobacco Institute, are you also
8 familiar with the Counsel for Tobacco Research?

9 A. I know what it is.

10 Q. It was an industry supported organization, is that fair to
11 say?

12 A. Yes, it was.

13 Q. And like the Tobacco Institute, each member company paid
14 into its annual budget?

15 A. Again, I don't know the actual members, but I believe that
16 to be the case.

17 Q. I'm going to probably refer to this as you talk about it as
18 CTR.

19 A. CTR?

20 Q. CTR, is that okay, or would you rather use Council for
21 Tobacco Research?

22 A. I'm sorry. I thought you said CIAR.

23 Q. No. I'm sorry, sir. The Council for Tobacco Research.

24 A. I'm sorry. Please, can we go back to your first question?

25 Q. Sure. Let's erase everything we just talked about and I'm

1 going to ask you again.

2 The Council for Tobacco Research, are you familiar with
3 that?

4 A. Yes, I am.

5 Q. And you have a substantial familiarity with that?

6 A. Well, over 15 years with the tobacco company, I have some
7 substantial experience.

8 Q. Okay. And the Council for Tobacco Research, that, like the
9 Tobacco Institute, was an industry-supported organization.

10 A. It was funded by the industry, yes.

11 Q. Okay. And we're not talking about CIAR here, we're talking
12 about --

13 A. I think I've got it straight.

14 Q. Okay. So I'm going to refer to it as CTR. Is that okay?

15 A. Yes.

16 Q. All right. Good.

17 Now, one of the rules of CTR was to fund research; is
18 that right.

19 A. That's correct.

20 Q. And they funded it, at least one way, through a grant-in-aid
21 program where applications were reviewed by an independent
22 Scientific Advisory Board?

23 A. That's correct.

24 Q. And when I say independent, it was an independent board of
25 scientists who were not part of the CTR staff?

1 A. That's my understanding.

2 Q. They were disinterested in the cigarette industry.

3 A. That's my understanding.

4 Q. And these Scientific Advisory Board members, they were
5 scientists, not lawyers. Is that fair to say?

6 A. Yes, that's my understanding.

7 Q. And funding for the grant-in-aid program that was reviewed
8 by the Scientific Advisory Board to the CTR, that fit within the
9 annual CTR program budget?

10 A. I don't know how the budget was managed or constructed.

11 Q. Now, another method of funding research through CTR besides
12 the grant-in-aid program was the special projects program.

13 A. I have a general awareness of that.

14 Q. And you do have a general awareness?

15 A. Yes.

16 Q. So that was a research funding mechanism as well?

17 A. For a very different type of research.

18 Q. Okay. Now, you became aware of -- I'm sorry.

19 A. I didn't say anything.

20 Q. You became aware of the special projects as early as 1982,
21 right, when you first got there?

22 A. I really can't say when I became aware of the special
23 projects.

24 Q. Let's turn again briefly to U.S. 36078.

25 A. I'm sorry. 36078?

1 Q. Yes. It was the 1982 Committee of Counsel meeting minutes
2 that we just looked at that you attended. In particular, turn
3 to the third page when you get a chance.

4 A. Yes, sir.

5 Q. Look at the bottom of the third page, number 9.

6 A. Yes, I see a reference to special projects.

7 Q. And on to page 10.

8 A. Yes.

9 Q. Okay. There, it talks about special projects, as you said,
10 and it talks about a Sirridge request. Who was Sirridge?

11 A. Again, I can't be absolutely certain, but I think it was Pat
12 Sirridge and I think he was with Shook, Hardy & Bacon.

13 Q. An attorney, not a scientist; right?

14 A. That's correct.

15 Q. And --

16 A. Well, I don't know if he had -- whether or not he had a
17 scientific background, but he was also an attorney.

18 Q. On the next page, page 4 at the top, and it mentions a
19 Brooke and it also says approved; is that right?

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

21 Q. Then, sir, if you don't mind just going to the front page
22 and the top where it lists attendees who are attending. All the
23 people there were attorneys who are listed as attending; is that
24 right?

25 A. I don't know who Benjamin and Gill are, but everybody else

1 there I recognize as being an attorney.

2 Q. Now, eventually, sir, you also played the role of approving
3 special projects for R.J. Reynolds?

4 A. When I became -- after I became general counsel.

5 Q. Look at Exhibit 29923.

6 A. I'm sorry. I'm having some trouble finding this.

7 Q. Take your time.

8 MR. SCHWARTZ: Your Honor, I can tell you now, I
9 overestimated how much time. I think we should be able to be
10 done in an hour of questioning. I don't know if that adjusts
11 any of Your Honor's estimates.

12 THE COURT: We will break at about 12:30, everybody.

13 A. I have it.

14 Q. All right, sir, and just briefly, this is you in 1986 as
15 general counsel approving a CTR special project for a person
16 named Eysenck, E-y-s-e-n-c-k.

17 A. Eysenck, yes.

18 Q. And you're agreeing to pay for three years of funding
19 referencing RJR's share.

20 A. Well, let me read this.

21 Q. Sure.

22 A. I don't -- as I read this, unless I'm misreading it, I don't
23 know that that was our share or that was the total amount. Is
24 it clear? Have I missed something?

25 Q. It's your testimony, sir. You tell me.

1 A. It's a share in that funding. It doesn't say that that's
2 our share.

3 Q. Now, when you talk about share, that's a market share
4 determined portion?

5 A. As I recall.

6 Q. So if Reynolds had 28.1 percent of the market or something
7 like that back then, that was the percentage you paid?

8 A. I believe that's correct.

9 Q. And do you remember if that was 28.1 percent of the entire
10 market or 28.1 percent of the market of just the participating
11 members?

12 A. I really -- I don't recall.

13 Q. Please turn just for another second to U.S. Exhibit 29901.

14 A. Yes, sir.

15 Q. Okay. That's a 1987 document of you approving funding.

16 A. That's correct.

17 Q. And this is referencing a CTR special project of Dr. William
18 Gutstein?

19 A. I'm not sure.

20 Q. Now, let me ask you. Do you remember who the participating
21 members were in the CTR in terms of the industry?

22 A. Are you talking about special projects or CTR?

23 Q. Special projects.

24 A. I think it changed from time to time. For some time some
25 were in, some were out. It depended upon either -- well, some

1 were in and some were out at varying times. But there was some
2 constants, and Reynolds was a constant, Philip Morris was a
3 constant. I think -- I can't say about Brown. I can't tell you
4 who was in it every step of the way.

5 Q. All right. Now, the role of the approving projects you got
6 because you were general counsel; is that right?

7 A. That's correct.

8 Q. You inherited that role from Mr. Witt?

9 A. That's correct.

10 Q. And before you, Mr. Witt did it? Is that your
11 understanding?

12 A. Yes.

13 Q. Now, is it fair to say that you reviewed dozens, if not
14 hundreds, of requests for special project funding during the
15 years you were general counsel?

16 A. Clearly dozens. I don't know about hundreds.

17 Q. All those that you reviewed, is it fair to say that you were
18 never asked to review a special project that the CTR Scientific
19 Advisory Board also had reviewed and approved?

20 A. Well, I believe that we reviewed and approved some special
21 projects for researchers who had been approved for grant-in-aid
22 funding. But your question was the same project?

23 Q. Yes.

24 A. I don't recall that happening.

25 Q. Is it fair to say that every application that you reviewed,

1 every special project application that you reviewed, either had
2 not been reviewed by CTR Scientific Advisory Board or had been
3 reviewed by the Scientific Advisory Board or rejected by the
4 Scientific Advisory Board?

5 A. I think that's right. It would be one or the other.

6 Q. So the projects you were asked to review were different from
7 the projects that Scientific Advisory Board was asked to review?

8 A. One of the alternatives was that they had reviewed and
9 rejected.

10 Q. So if they rejected --

11 A. Yeah.

12 Q. All right. Now, you were never asked to approve any CTR
13 grant-in-aid application. Is that fair to say?

14 A. No, I was not, that I can recall.

15 Q. That was left strictly to the scientists on the Scientific
16 Advisory Board?

17 A. If you're talking about grant-in-aid SAB reviews, that's my
18 understanding.

19 Q. So you and the other company participating company lawyers
20 were the people who received the special project approval
21 request?

22 A. We were the ones that received the special project approval
23 requests, yes, if that's what you said. I couldn't hear you.

24 Q. When you received those requests, those were not -- you got
25 them without the approval -- I'm sorry. I withdraw the

1 question.

2 The ones you received were not approved by the entire
3 Scientific Advisory Board?

4 A. Again, I don't ever recall receiving a request for special
5 project funding that had the approval of anybody on the
6 Scientific Advisory Board.

7 Q. Okay.

8 A. These were outside of the Scientific Advisory Board process,
9 as I recall.

10 Q. All right. Now, special projects was not funded out of CTR
11 main budget?

12 A. I don't believe so.

13 Q. Shook, Hardy & Bacon, they were outside counsel to the
14 industry at the time that you were reviewing the projects?

15 A. It's somewhat murky for me exactly who they represented at
16 varying times, but they represented a number of member
17 companies. I don't believe they ever represented us.

18 Q. Look at Exhibit 20800, if you will.

19 A. Yes.

20 Q. Have you had a chance to look over this document?

21 A. Well, I reviewed it along with the other, a number of them.

22 Q. Well, this is a 1986 document from Shook, Hardy & Bacon
23 addressed to you and other general counsel. Is that fair to
24 say?

25 A. Yes, it is.

1 Q. All right. And there in the bottom paragraph on the first
2 page -- take a look at that, please. And it said --

3 A. I'm not quite done.

4 (Pause)

5 Yes, I've read it.

6 Q. All right. Now -- excuse me. It says, with regard to CTR
7 special project proposals, the Jacob Medinger firm understands
8 that such approvals must be circulated to you by our firm.

9 A. That's what it says.

10 Q. And that's how the process worked while you were general
11 counsel. Shook, Hardy & Bacon would send you the request?

12 A. As I recall.

13 Q. Now, these special project ideas, they were typically
14 initiated by outside counsel and then sent to general counsel to
15 approve them?

16 A. The way I would say it is they were recommended by outside
17 counsel.

18 Q. And then when general counsel evaluated them, you evaluated
19 the special project proposals by judging them on their
20 litigation related value. Is that fair to say?

21 A. Primarily, but it had to be credible. In order to have
22 value in the litigation, it had to be credible. Good
23 scientists, good work.

24 Q. You mentioned a few minutes ago Mr. Donahue.

25 A. Mr. Who?

1 Q. Donahue. Daniel Donahue.

2 A. Yes.

3 Q. Okay. Turn to page 87024 -- I'm sorry, Exhibit 87024.

4 A. Got it.

5 Q. Okay. Have you had a chance to look at this document before
6 you came here today?

7 A. Yes, I did look at it.

8 Q. And you're familiar with it?

9 A. I've reviewed it.

10 Q. It's a memo from Daniel Donahue to you regarding --

11 A. That's correct.

12 Q. In 1992, Mr. Donahue worked for you in the legal department
13 of R.J. Reynolds Tobacco Company?

14 A. That's correct.

15 Q. And it was prepared for you as part of his duties. Is that
16 fair to say?

17 A. I believe so.

18 Q. All right. Page 4, please, the last paragraph.

19 A. Well, I may need to clarify something here. Mr. Donahue was
20 outside counsel to us for a while. I don't know what his status
21 was in '92.

22 Q. All right.

23 A. I'm not certain. He came inside at some point. I forget
24 the date.

25 Q. But he provided -- he provided counsel to you either as an

1 outsider or insider?

2 A. That's correct.

3 Q. He told you -- at the bottom paragraph.

4 A. On page 4?

5 Q. Yes. It says, by November 1965, at the latest, industry
6 counsel, both general counsel and the ad hoc committee, had
7 become involved and remained significantly involved in CTR
8 special projects.

9 A. That's what he says.

10 Q. You agree with that?

11 A. I don't know. I was not there in 1965.

12 Q. Well, you asked him to put this information together for
13 you?

14 A. Well, yeah. I agreed that he said that. I can't agree that
15 it's factually true.

16 Q. But you don't have any reason to disagree with it?

17 A. I can't. I have no reason to disagree on the face of the
18 document, no.

19 Q. Now, it mentions an ad hoc committee there, and I'll ask you
20 to turn to page 3. And look at the paragraph that starts "from
21 the documents."

22 A. I see that paragraph and I've read it.

23 Q. It says, the role of the lawyers in special projects -- I'm
24 sorry -- it refers to the ad hoc committee. It mentions Janet
25 Brown, Ed Jacob, Alex Holtzman, William Shinn and Don Cohn?

1 A. Yes, it does.

2 Q. They were all industry attorneys; is that correct?

3 A. I don't recall Don Cohn's name.

4 Q. And just briefly, sir, if you would look at page 6 at the
5 bottom.

6 A. Yes, sir.

7 MR. SCHWARTZ: I'm sorry, Your Honor. If I can have
8 one second.

9 A. I've read it.

10 Q. All right. There it says, the role of the lawyers in CTR
11 special projects appears to have continued to grow as time
12 progressed.

13 And it says, according to RJR R&D memorandum --

14 A. I'm sorry.

15 Q. I'm sorry.

16 A. Yeah, I'm with you now.

17 Q. According to RJR R&D memorandum, the special projects
18 generally were initiated, discussed, and approved by industry
19 counsel and/or their litigating counsel.

20 Yes?

21 A. That's what it says.

22 Q. Do you agree with that?

23 A. That's my understanding of what occurred during my tenure as
24 general counsel.

25 Q. Up at the top of the page, it says, further, the documents

1 reflect that attorneys evaluated proposed special projects
2 research, judging it on litigation-related value.

3 A. I'm sorry. Is this the paragraph that begins, the firms of
4 Jacob, Medinger and Finnegan.

5 Q. I'm sorry. The top of page 6, sir.

6 A. Six. I'm with you.

7 Q. All right. And it says, attorneys evaluated proposed
8 special projects research, judging it on litigation related
9 value?

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

11 Q. When you talk about the idea of special projects being
12 different from the SAB projects, that's what you mean?

13 A. Well, what I mean -- a lot of things.

14 One they are recommended by the attorneys for their
15 litigation value for want of a better term. That they did not
16 go through the SAB process. They were separate and distinct
17 from that. That's what I meant when I said that.

18 MR. SCHWARTZ: Your Honor, you had mentioned stopping
19 at 12:30. This is a good stopping point for me if it's
20 convenient for the court.

21 THE COURT: Okay. We will take a lunch break now,
22 everybody.

23 And you're going to be done approximately
24 three-quarters of an hour when we get back?

25 MR. SCHWARTZ: At most, Your Honor.

1 THE COURT: Okay. And then who will be doing the cross
2 for defendants.

3 MR. McDERMOTT: I will, Your Honor. Right now, I
4 anticipate very brief, if at all.

5 THE COURT: Let's come back at a quarter of 2:00,
6 please, everyone.

7 (Lunch recess began at 12:30 p.m.)

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13 *****

14

15 *****

16

17 CERTIFICATE
I, EDWARD N. HAWKINS, Official Court Reporter, certify
18 that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

19

20 Edward N. Hawkins, RMR

21

22

23

24

25

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.
	.	NOVEMBER 22, 2004
	.	
Defendants.	.	
.	.	

VOLUME 33
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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

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1 AFTERNOON SESSION, NOVEMBER 22, 2004

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

3 (1:47 p.m.)

4 THE COURT: Good afternoon, everybody.

5 Mr. Schwartz, please.

6 CONTINUED DIRECT EXAMINATION OF WAYNE JUCHATZ

7 BY MR. SCHWARTZ:

8 Q. Okay. Good afternoon, Mr. Juchatz.

9 A. Good afternoon.

10 Q. We've been talking before the lunch break about your
11 receiving requests to approve CTR Special Projects research.

12 I apologize.

13 We've been talking prior to the lunch break about you
14 receiving requests to approve CTR Special Project funding.

15 A. That's correct.

16 Q. All right. And in addition to the requests describing
17 projects to be funded and talking about individual scientists,
18 you also received requests to replenish or pay into the Special
19 Projects Fund; is that fair to say?

20 A. That's correct.

21 Q. And please take a look at United States Exhibit 30887.

22 A. (Witness complied.) I have it.

23 Q. All right. Now, here's an example of when you received a
24 request directly to -- from the Council for Tobacco Research to
25 specifically pay in money to Special Projects funding; is that

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1 right?

2 A. It appears that way, yes.

3 Q. All right. Now, was it your understanding that this was
4 separate from or outside of the way the rest of the Council for
5 Tobacco Research was funded?

6 A. My understanding was that CTR Special Projects were
7 outside the scope and the procedures for the normal grant in aid
8 funding, SAB-reviewed process.

9 Q. Well, as a more general proposition, was it your
10 understanding that CTR had an annual budget and every year each
11 participating company was asked to pay in its share, but the
12 request for Special Project funding was completely separate from
13 that annual budget process?

14 A. Again, I don't know what the budget process was, but I
15 know the two were kept separate. That's my understanding, that
16 the two were kept separate.

17 Q. All right. Now, I want to ask you, sir, about some
18 individual scientists about whom you were asked to fund Special
19 Projects. And I'm going to at first call your attention to a
20 Dr. Alvan Feinstein -- and that's A-L-V-A-N -- and ask you to
21 look at Exhibit 21811.

22 A. (Witness complied.) I have it. I have it.

23 Q. All right, sir. And I'll just ask you to look at this
24 letter. It's a 1988 letter addressed to you and other general
25 counsel regarding Dr. Feinstein. And then in the first

1 paragraph, it references his CTR Special Project?

2 A. Yes, it does.

3 Q. And he asks for \$484,000 -- 484- -- I'm sorry -- he asked

4 for \$484,960 for two years' worth of research funding?

5 A. That's what it says.

6 Q. And looking at the next paragraph, please, just take a

7 look at that for a second.

8 A. (Witness complied.) I read the paragraph.

9 Q. All right, sir. They were looking for almost a half

10 million dollars to fund Dr. Feinstein's epidemiologic necropsy

11 work; is that correct?

12 A. Yes.

13 Q. And the purpose was to provide better estimates of the

14 true occurrence of rates of disease, because a large reservoir

15 of disease remains undetected until autopsy. Was that your

16 understanding of what was being requested?

17 A. Again, that's what it says, yes.

18 Q. All right. And if you would just take a look at

19 Exhibit 29871.

20 And we're finished with that document, sir.

21 A. (Witness complied.) I have it.

22 Q. All right. Sir, that was your letter of April 21st,

23 two days later, back to Mr. O'Neill of Shook, Hardy & Bacon,

24 saying that R.J. Reynolds will kick in its share of the

25 \$484,960?

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- 1 A. That's what it says.
- 2 Q. Okay. And that's your signature?
- 3 A. Yes, it is.
- 4 Q. Okay. Look at that 21812. Take your time doing this.
- 5 We're going to be moving around a little bit, like this.
- 6 A. (Witness complied.) Yes, sir, I have it.
- 7 Q. And here it is two years later, 1990, and again,
- 8 Dr. Feinstein is back and asking for more money for a Special
- 9 Project?
- 10 A. I'm reading. Yes.
- 11 Q. All right. And at the bottom of the first page, it says
- 12 he's requested continued research support in the amount of
- 13 approximately \$276,140 for the first year; is that correct?
- 14 A. Yes, sir, that's what it says.
- 15 Q. And then -- I'm sorry to keep on turning pages on you.
- 16 If you could look at 29870.
- 17 A. (Witness complied.) Yes, I have it.
- 18 Q. And that's you, sir, a week or so later agreeing to pay
- 19 that money or pay your share -- your company's share of that
- 20 money?
- 21 A. Yes.
- 22 Q. All right. Please now turn to Exhibit 29876. Now, this
- 23 is from back in 1970 and you were you weren't with the company
- 24 then, obviously?
- 25 A. No, I was not.

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1 Q. All right. H.H. Ramm was General Counsel; Henry Ramm, we
2 spoke of last week, briefly?

3 A. I believe so.

4 Q. And here you see that Mr. Ramm is writing committing
5 funding for a Special Project to CTR, again for Dr. Feinstein,
6 as early as 1970?

7 A. That's correct.

8 Q. All right.

9 THE COURT: And before you leave that, does that suggest
10 or say that Mr. Ramm was saying that he was in favor of the
11 project so long as the United States Public Health Service wasn't
12 underwriting it? Is that right?

13 THE WITNESS: Well, I don't know for a fact, but my
14 interpretation of that is it's susceptible to, I think, another
15 interpretation and that is: Provided he doesn't get additional
16 money.

17 THE COURT: Oh, I see.

18 THE WITNESS: Do I make myself --

19 THE COURT: I see. Okay.

20 BY MR. SCHWARTZ:

21 Q. But of course, sir --

22 A. But I don't know.

23 Q. Right. You weren't there so you don't know what Mr. Ramm
24 meant when he said: "With the understanding that this
25 product -- project is not underwritten by the Public Health

1 Service, we would be in favor of its being financed by our
2 industry as a Special Project of CTR."

3 A. That's what it says.

4 Q. All right. Now, if the Public Health Service funded it,
5 they would get access to his results, right?

6 MR. McDERMOTT: Objection, no foundation. This is 15
7 years or 12 years before.

8 THE COURT: I'm going to sustain it, just as the witness's
9 answer was speculative for obvious reasons, although his
10 interpretation of the letter made a lot more sense than mine did.

11 Go ahead.

12 BY MR. SCHWARTZ:

13 Q. All right. Sir, I'm going to ask you about another
14 scientist or another person. His name is Ted Sterling. Are you
15 familiar with that name?

16 A. I remember the name.

17 Q. All right. And he was another Special Projects
18 beneficiary?

19 A. I believe so, but I can't say with certainty.

20 Q. He was a researcher at Simon Fraser University in Canada?

21 A. That sounds right, but I can't say for certain.

22 Q. All right. If you would please turn to Exhibit 21809.

23 A. (Witness complied.) Yes, sir.

24 Q. You're quicker than I am, sir. Here, if you look at the
25 first paragraph, it's a letter from Shook, Hardy & Bacon law

1 offices to you, Mr. Juchatz, and the other General Counsel
2 regarding a Dr. Theodore Sterling. And they're asking -- Shook,
3 Hardy & Bacon is asking you to commit \$532,000 per year for a
4 two-year period.

5 A. That's what it says.

6 Q. All right. And at the beginning of the second paragraph,
7 it says: "Dr. Sterling continues to be active in a variety of
8 areas that are of importance to the industry."

9 A. Yes, it does.

10 Q. And it says that: "He and his colleagues have expended
11 considerable effort in reviewing studies which claim an
12 association between smoking and disease."

13 A. Yes, it says that.

14 Q. All right. Take a look at the rest of the paragraph, if
15 you will, on to the next page.

16 A. (Witness complied.) I've read the carryover paragraph.

17 Q. All right. Now, in requesting over a million dollars
18 from you and your colleagues in the Committee of Counsel, one of
19 the things that the Shook, Hardy & Bacon lawyer points out to
20 you is that what Dr. Sterling's recently done in the past, and
21 points out one of the things his group has done is "submitting a
22 paper to the Risk Analysis Journal dealing with errors generated
23 by the ACS study data, called 'Errors in Estimates of
24 Smoking-Related Deaths Derived From Nonsmoker Mortality.'"

25 Are you familiar with the reference "ACS" being the

- 1 American Cancer Society, sir?
- 2 A. Generally, yes.
- 3 Q. Okay. So Dr. Sterling and his group -- or Dr. Sterling's
4 group wrote a criticism of the American Cancer Society's study
5 and that was something that Shook, Hardy & Bacon was
6 highlighting in asking you for a million dollars worth of
7 funding?
- 8 A. If it's pointing out errors in estimates, in that sense
9 it's critical, I suppose, yes.
- 10 Q. Okay. And in asking for a million dollars worth of
11 funding, Dr. Sterling also wrote a paper that was critical of
12 the U.S. Veteran's Study, called "The Extent, Persistence and
13 Constancy of the Healthy Worker Or Healthy Person Effect By All
14 and Selected Causes of Death"?
- 15 A. I believe that's what it says.
- 16 Q. So when the Shook, Hardy & Bacon lawyer was asking you
17 and your colleagues to commit a million dollars worth of funds,
18 what he wanted you to know was what Dr. Sterling had been doing
19 in criticizing the research organizations like the American
20 Cancer Society and the United States Veteran's Administration?
- 21 A. I'm sure that was a part of it, but he also wanted to let
22 us know that it was published in a peer-reviewed journal.
- 23 Q. All right. If you could now take a look at United States
24 Exhibit 85747.
- 25 A. (Witness complied.) Yes, sir.

1 Q. Dr. Sterling is back in 1990, asking for another
2 million -- over a million dollars; is that right?

3 A. I'm trying to see where --

4 Q. I'm sorry. Look at the first paragraph, sir.

5 A. It says for two years, yes.

6 Q. So \$541,080 per year?

7 A. For two years.

8 Q. Yeah. So about 1.1 million bucks, yes?

9 A. About right.

10 Q. And in the next paragraph, this Shook, Hardy & Bacon
11 attorney, Mr. Sirridge, is explaining to you the breakdown of
12 that million dollars worth of money. And part of it is for a
13 computer analysis and then \$488,000 of the first year's money is
14 to Ted Sterling & Associates for salary and benefits; is that
15 right?

16 A. I'm sorry. Let me read it.

17 Q. I'm sorry. I'll withdraw the question.

18 It says: "The proposed budget would support two separate
19 grants, one to Simon Fraser University and the other to the
20 Theodore Sterling & Associates, Limited, called "Critical Review
21 of Major Factors in Statistical Studies of Smoking and Health";
22 is that correct?

23 A. That's what it says.

24 Q. Okay. And the larger bulk of the money, of the \$541,000
25 per year, was to the second grant, the "Critical Reviews of

- 1 Major Factors in Statistical Studies in Smoking and Health"?
- 2 A. Yes, it appears that way.
- 3 Q. 488- --
- 4 A. Yes. It's a lot more, yeah.
- 5 Q. Okay. All right. Now, please turn to page 2 of this
- 6 document and look at paragraph 2 and read through it, if you
- 7 will, to yourself.
- 8 A. (Witness complied.) Yes, sir, I read it.
- 9 Q. Again, in trying to get another million dollars out of
- 10 the tobacco industry, Mr. Sirridge is telling you about some
- 11 work that Dr. Sterling has been working on and he talks about:
- 12 "Investigating the confounding effects of occupational studies
- 13 on smoking and health"; is that correct?
- 14 A. That's correct.
- 15 Q. And they want another million bucks out of you by way of
- 16 showing you examples like the fact that Dr. Sterling showed how
- 17 the increased risk for bladder cancer commonly attributed to
- 18 smoking essentially disappears when occupational exposures are
- 19 considered in epidemiological studies?
- 20 A. I believe that's pretty close to what he said in the
- 21 letter, yes.
- 22 Q. All right. So what Dr. Sterling is offering you for that
- 23 million dollars is an alternative explanation for bladder cancer
- 24 rates in smokers; is that fair to say?
- 25 A. That's one element of it.

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1 Q. All right. And in the same paragraph, this Shook, Hardy
2 & Bacon lawyer says he needs another million dollars: "Because
3 in addition, Dr. Sterling's group is working on research which
4 suggests that the reported increase in lung cancer among black
5 males is not, contrary to current claims, due to an increase in
6 cigarette smoking, but to increased exposure to hazardous
7 chemicals in the workplace."

8 A. That's what it says.

9 Q. So again, Dr. Sterling's worth his million bucks because,
10 again, he's offering you an alternative explanation for higher
11 lung cancer rates in black male smokers?

12 A. Yes.

13 Q. All right. Now, please look at the next paragraph that
14 starts: "In a series of papers."

15 A. (Witness complied.) I've read it.

16 Q. All right. Two things. The first thing is this Shook,
17 Hardy & Bacon lawyer is saying that: "Dr. Sterling and his
18 group have done some work to challenge the claim that 390,000
19 deaths per year may be attributable to tobacco use"?

20 A. Yes.

21 Q. Okay. Was it your understanding that Dr. Sterling and
22 his group were doing that to show that the death rate was
23 greater than 390,000 dollars -- 390,000 people per year or fewer
24 than 390,000 people per year died from tobacco-related -- or may
25 be attributed to tobacco use?

- 1 A. It's not clear, but I think I would have assumed that it
2 would be less.
- 3 Q. Right. And you agree with me, since these studies were
4 done for their -- or funded for their litigation-related value,
5 it would be better for the companies to show that there were
6 fewer than 390,000?
- 7 A. If the data supported it and if they were accepted for
8 peer-reviewed publication.
- 9 Q. All right. Now, in addition, this paragraph talks about
10 how Dr. Sterling has been challenging yet another claim by the
11 American Cancer Society, this one stating that an increasing
12 number of women are starting to smoke at a younger age.
- 13 A. Is that a -- yes, that's what it says.
- 14 Q. And that's part of the reason that Shook, Hardy & Bacon
15 thought you should give them a million more dollars.
- 16 A. It appears to be a part of the support for the request,
17 yes.
- 18 Q. All right. Please turn to United States Exhibit 29892.
- 19 A. 29892?
- 20 (Witness complied.) Yes, sir.
- 21 Q. All right. Now, this is you responding and approving
22 your share of that \$541,000 per year --
- 23 A. Again, I can't connect the dots. I don't know that this
24 is the same one without flipping back to the other one.
- 25 Q. I'm sorry. The other one is 85747.

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1 Sir, if it would be easier, they're both up on the
2 screen.
3 A. I can't read that.
4 Q. Okay. Sorry.
5 A. I'm sorry. 85187, did you say?
6 Q. 85747.
7 And if it's more convenient, I'm happy to approach with
8 my copy, Your Honor.
9 Here you go, sir. I apologize.
10 A. And the one we were referring back to is tab number?
11 Q. 29892. Let me see if I can grab that for you.
12 A. I have it.
13 Q. Okay. So you were asked for \$541,000 or your share of it
14 in February and in March, you get back to him and say, "Yeah,
15 we'll give you our \$158,000 per year share"?
16 A. That's correct.
17 Q. All right. Sorry for all that page flipping for just
18 that question. I apologize for that.
19 I'm going to ask you now to look at Exhibit 20308.
20 A. (Witness complied.) Yes, sir.
21 Q. All right. This is a 1992 request for more money for
22 Dr. Sterling, if you look at the first paragraph. I'm sorry.
23 A. Yes.
24 Q. And this time he wants \$359,755 per year.
25 A. That's correct.

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- 1 Q. Now, please turn to United States Exhibit 22979.
- 2 A. (Witness complied.) Yes, sir.
- 3 Q. And if you want to just page through that and go to the
- 4 second page of the exhibit.
- 5 A. All right. Mine are reversed.
- 6 Q. I understand. Go to -- not -- that page (indicating).
- 7 Yeah.
- 8 It's another letter from Shook, Hardy & Bacon law firm
- 9 addressed to you and your colleagues on the Committee of Counsel
- 10 asking for another installment of \$359,755.
- 11 A. That's correct.
- 12 Q. And if you flip back to the cover page -- this one's
- 13 easier, less pages -- that's you approving it: "Okay. W.W.J.
- 14 3-17-93"?
- 15 A. That's correct.
- 16 Q. All right. Please turn to 29696, sir.
- 17 Now, this is a letter addressed to Mr. E.A. Horrigan.
- 18 Take a moment to take a look at it.
- 19 A. (Witness complied.) Yes, sir.
- 20 Q. Okay. Now, E.A. Horrigan, again, was the person you
- 21 thought was the Chairman and CEO?
- 22 A. Yes.
- 23 Q. Okay. And it's signed by Max H. Crohn?
- 24 A. Yes.
- 25 Q. That was Mr. Witt's predecessor as General Counsel?

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- 1 A. Yes.
- 2 Q. All right. And to R.J. Reynolds Tobacco Company?
- 3 A. Yes.
- 4 Q. Okay. And here, this is again regarding Dr. Sterling and
- 5 Mr. Crohn is recommending his share or the company's share of a
- 6 \$283,000 request.
- 7 MR. McDERMOTT: I'm not sure how far the question is going
- 8 to go, but I may have foundational objections. This is two years
- 9 before the witness started becoming involved in the tobacco
- 10 industry as such. A little amount of general questioning might
- 11 be all right, but this witness, unless he establishes a
- 12 foundation, does not know this document and I'm not sure he knows
- 13 these facts.
- 14 THE COURT: So far it's just a very general question.
- 15 THE WITNESS: Would you repeat it, please?
- 16 BY MR. SCHWARTZ:
- 17 Q. Mr. Crohn is recommending to Mr. Horrigan in March of
- 18 1980 that the company contribute its share of \$283,000?
- 19 A. Again, without knowing anything else, that's what the
- 20 document says.
- 21 Q. All right. The document also says at the top of the
- 22 second paragraph: "Dr. Sterling is one of our industry's most
- 23 valuable outside assets."
- 24 A. I'm sorry. Is that a question?
- 25 Q. Yeah.

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- 1 A. Yes, it says that.
- 2 Q. All right. Now, when you took over the job of approving
3 the Special Projects and learned about Dr. Sterling, was that
4 information communicated to you, that he was one of the
5 industry's most valuable outside assets?
- 6 A. I really don't recall.
- 7 Q. Okay. And do you recall whether it was communicated to
8 you, sir, that he has -- at the bottom of that paragraph, that:
9 "He has continued to be one of the primary scientists available
10 for consultation with Shook, Hardy & Bacon in Kansas City"?
- 11 A. Again, I don't recall that being specifically
12 communicated to me.
- 13 Q. All right. I'm going to ask about another gentleman.
14 His name is Carl Seltzer. Are you familiar with that name?
- 15 I'm sorry. I'm going to withdraw that question and I just
16 want to ask you one more thing.
- 17 You said not specifically; it wasn't specifically
18 communicated to you that he was one of the industry's most
19 valuable outside assets. Were you generally aware of that fact?
- 20 A. I don't know that I was even generally aware of it.
- 21 Q. All right. Let's turn to someone else and talk about
22 Carl Seltzer. Are you familiar with that name, sir?
- 23 A. I remember the name, yes.
- 24 Q. And he was another CTR Special Projects beneficiary?
- 25 A. I would have to see the paper.

- 1 Q. 30493 is the one I would like to ask you about.
- 2 A. (Witness complied.) Yes, I have it.
- 3 Q. All right. Please take a moment. This is a document
- 4 that you had the chance to review before you came here today?
- 5 A. I'm sorry. Is that a question?
- 6 Q. Yes.
- 7 A. Yes, I had a chance to see it.
- 8 Q. It's a letter from Shook, Hardy & Bacon law firm dated
- 9 February 1990 addressed to you and your colleagues on the
- 10 Committee of Counsel.
- 11 A. That's correct.
- 12 Q. And it's regarding Dr. Carl Seltzer and his CTR research
- 13 project and it talks about, in the first paragraph, a CTR
- 14 Special Project?
- 15 A. Yes, it does.
- 16 Q. And it references an Adolescent Morbidity Project and the
- 17 request for funding of 100,000 -- \$100,500.
- 18 A. Yes, it does.
- 19 Q. All right. Please take a look at the second paragraph
- 20 that starts with: "As indicated."
- 21 A. (Witness complied.) I've read it.
- 22 Q. Okay. So here the Shook, Hardy & Bacon lawyer is asking
- 23 you to commit your share of a hundred thousand dollars for a
- 24 study that: "Focuses on various characteristics of children
- 25 prior to making a decision of whether or not to smoke."

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- 1 A. It appears to be doing that, yes.
- 2 Q. So they were asking you for money to study
3 characteristics of minors?
- 4 A. One second.
- 5 Yes.
- 6 Q. So RJR was being asked to fund a study of minors that
7 would give RJR a picture of what, essentially, the future smoker
8 looked like?
- 9 A. I don't believe that that was the purpose.
- 10 Q. Well, whether it was the purpose or not, what you were
11 getting was a profile of kids who were going to become smokers
12 and a profile of kids who were not going to become smokers.
- 13 A. Let me also suggest something else, that --
- 14 Q. Sir, I'm asking you a question. Were you getting --
- 15 A. I'm not sure. I don't know.
- 16 Let me add: My concern is that this is not my copy. I
17 may not have approved this. Typically, when I receive these,
18 there are notes on them, whether or not I approved them, who I
19 sent them to for review and input. This is not my copy.
- 20 Q. So are you suggesting that you didn't receive --
- 21 A. I don't know, with what you put in front of me, whether
22 or not we approved it. Is this an RJR document, may I ask?
- 23 Q. Sir, I'm just asking: Do you remember receiving this
24 document?
- 25 A. I don't remember receiving that document.

1 Q. All right. Take a look at -- hold on -- if you want,
2 pull that out of the notebook.

3 A. Sure.

4 Q. And now go to Exhibit 30045.

5 A. (Witness complied.) I have it.

6 Q. All right. Now, Exhibit 30493 sends a letter to you,
7 Wayne Juchatz, asking for \$100,500 for the completion of the
8 Adolescent Morbidity Project, right?

9 A. Yes.

10 Q. Okay. Exhibit 30045 says: "Dear Pat: We agree to pay
11 our share of the Adolescent Morbidity Project."

12 A. It appears that we did pay it.

13 Q. So 30045 you know is an RJR document?

14 A. Now that I see this document, yes.

15 Q. Okay. So now, let me ask you: You were being asked to
16 approve a study of minors?

17 A. I suppose that's correct.

18 Q. You were being asked to approve a study that gave you --
19 gave the company a profile of what a minor -- what
20 characteristics of a minor most likely became a smoker and what
21 characteristics of minors most likely did not -- or did not
22 become smokers?

23 MR. McDERMOTT: Objection, misstates the document.

24 THE COURT: I think it -- I'm not even sure whether it
25 misstates the document or not, but it is certainly not clear that

1 it accurately states what that study is about. Unless the
2 witness has personal knowledge or recollection of it -- of the
3 project, I'm going to sustain the question (sic).

4 Mr. Juchatz, do you remember what that project
5 specifically focused on?

6 THE WITNESS: No, Your Honor, I don't.

7 MR. SCHWARTZ: If I may have a second, Your Honor, to look
8 for another document that might clarify this.

9 THE COURT: All right.

10 MR. SCHWARTZ: I beg Your Honor's pardon and I appreciate
11 your patience.

12 THE COURT: That's all right.

13 BY MR. SCHWARTZ:

14 Q. Sir, we'll come back to that in a minute. We're going to
15 pull some documents that, hopefully, will help us clarify this.

16 A. 30,493? Is that what it was.

17 Q. Yeah. If you want to just put that on hold. You don't
18 have to worry about putting it back because we'll get back to
19 it, I hope, in a minute.

20 Now, sir, while we're waiting, I want to ask you about a
21 gentleman named Rodger Bick, B-I-C-K. Are you familiar with
22 that name?

23 A. It's a name that I'm familiar with.

24 Q. Are you familiar with him as a person who was a CTR
25 Special Project beneficiary?

1 A. Vaguely.

2 Q. All right. I want to go through just a couple of

3 documents with you. U.S. Exhibit 29912.

4 A. (Witness complied.) Yes, sir.

5 Q. And this is a letter dated March 25th, 1986 from you to

6 Jacob Medinger approving funding for a Rodger Bick's CTR Special

7 Project; is that right?

8 A. Yes, it is.

9 Q. All right. Please look at 29900.

10 A. (Witness complied.) Yes, sir.

11 Q. And that's you in 1987 again approving funding for a CTR

12 Special Project to Dr. Rodger Bick.

13 A. That's correct.

14 Q. All right. Please look at 29899, the document right

15 before that.

16 A. (Witness complied.) Yes.

17 Q. That's 1988: Again, you approving more Special Project

18 funding for Dr. Bick?

19 A. That's correct.

20 Q. 76279, please.

21 A. I have 70- -- excuse me.

22 Q. 76279.

23 A. (Witness complied.) Yes.

24 Q. That's 1990. Again, you on behalf of R.J. Reynolds

25 telling the law firm of Shook, Hardy & Bacon that you again will

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1 fund Dr. Bick?

2 A. That's correct.

3 Q. All right. Last one is 20305.

4 A. (Witness complied.) Yes.

5 Q. That's a letter to you from Shook, Hardy & Bacon's

6 Patrick Sirridge referencing Rodger Bick. And it says: "I

7 wrote you in December 1991 regarding Dr. Bick's request for

8 research funding for a study of coronary artery disease."

9 And it says: "I received work back from your five

10 companies that you would participate in funding." So you

11 approved funding for that research for Dr. Bick as well?

12 A. That's what this says.

13 Q. All right. Now -- so you funded him from at least '86 to

14 '92. Do you recall that Dr. Bick also served as a witness for

15 R.J. Reynolds in the Galbraith versus R.J. Reynolds Tobacco

16 Company case.

17 A. No, I don't recall that.

18 MR. SCHWARTZ: All right. I would like to mark this, Your

19 Honor, as United States Exhibit 92044. I'm giving a copy to

20 counsel and ask if I can approach, Your Honor. And I have a copy

21 for the Court.

22 THE COURT: All right. You can pass it up.

23 (Government Exhibit 92044 marked for purposes of

24 identification.)

25 MR. SCHWARTZ: I beg your pardon. Your Honor, I'll tell

1 you, this is not the full copy of his testimony.
2 BY MR. SCHWARTZ:
3 Q. But I would like you to take a look at the cover page.
4 And it says "Elayne Galbraith versus R.J. Reynolds Tobacco
5 Company"; right, sir?
6 A. Yes, I see it.
7 Q. Okay. And the next page, it lists the witnesses --
8 defense witnesses who are being called and it identifies a
9 Rodger Lee Bick.
10 A. I see that.
11 Q. Okay. And please turn to page 2085.
12 A. Is that tabbed?
13 Q. Yes, it's the last tab.
14 A. Yes, sir.
15 Q. And there, do you see where it says: "Reynolds will call
16 Dr. Rodger Bick as a witness for and on behalf of the defense."
17 A. Yes, I see that.
18 Q. Does any of that refresh your recollection as to whether
19 Dr. Rodger Bick, the person you funded from at least 1986 to
20 1992, was a witness in the Galbraith versus R.J. Reynolds
21 Tobacco Company case in 1985?
22 A. I'm not suggesting that he wasn't.
23 Q. Well, I'm just asking you if that refreshes your
24 recollection.
25 A. I guess it does.

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1 MR. SCHWARTZ: Your Honor, I'm just waiting for these two
2 documents to come back that I apologize for not having copies in
3 the courtroom. But otherwise, subject to the Court's ruling on
4 the attorney-client privilege issue, that would be the end of my
5 examination, so I just need to get those couple of documents.

6 THE COURT: Are those documents being copied now?

7 MR. SCHWARTZ: I very much apologize. I just didn't have
8 them with me, Your Honor.

9 THE COURT: And there are two documents now?

10 What did you mention about the attorney-client privilege?

11 MR. SCHWARTZ: Well, Your Honor, I --

12 THE COURT: If this is going -- one of these documents is
13 going to be subject to the ruling I make after I get briefs from
14 counsel on the --

15 MR. SCHWARTZ: I beg Your Honor's pardon. What I'm saying
16 is I don't want to say that my direct examination is over once I
17 talk about these documents until Your Honor has ruled on the
18 briefs that are being presented because there may be more
19 questions if Your Honor grants our motion for reconsideration.

20 THE COURT: But that's the issue, am I correct, that is
21 being held in abeyance while everybody is getting it briefed? Or
22 is this a separate privilege issue?

23 MR. SCHWARTZ: No, that's it. The briefing one that's
24 being done over the week.

25 THE COURT: And so, therefore, the two documents that are

1 still not here -- one relates to that issue?

2 MR. SCHWARTZ: No. I'm sorry for the confusion. I
3 apologize, Your Honor. Those documents -- there was some
4 question by Mr. Juchatz about the money for the adolescent study
5 and what it meant.

6 THE COURT: Right.

7 MR. SCHWARTZ: And I'm hoping that the two documents for
8 which I'm asking will clarify that. And I apologize and ask for
9 the Court's indulgence.

10 THE COURT: If you think it will only be two or
11 three minutes, it's not worth a recess at this point because it's
12 a little early anyway. If you think it's going to be something
13 like ten minutes or so --

14 MR. SCHWARTZ: It's coming right up. We just have a slow
15 photocopier. I'm sorry.

16 THE COURT: We'll just wait a couple minutes then.

17 MR. SCHWARTZ: Thank you.

18 And thank you, Mr. Juchatz, for your patience.

19 THE COURT: I'm surprised Mr. Redgrave doesn't have an
20 issue to present to the Court in this recess.

21 MR. REDGRAVE: I'm working on it, Your Honor.

22 THE COURT: All right.

23 (Pause.)

24 MR. SCHWARTZ: Thank you, Your Honor, very much.

25 BY MR. SCHWARTZ:

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1 Q. All right. I'm going to hand you -- if I may approach,
2 Your Honor -- a copy of 86275 and ask you to take a look at it
3 for a minute. And I'm going to ask you about the first two
4 paragraphs.

5 A. (Witness complied.) I've read it.

6 Q. All right, sir. And this is a document from 1986 --

7 A. '88.

8 Q. I'm sorry. 1988, requesting Special Projects funding for
9 Dr. Seltzer?

10 A. Well --

11 Q. And Dr. -- a B. van den Berg?

12 A. That's correct.

13 Q. And it's a Special Project fund -- funded program that
14 they're asking about?

15 A. Well, I'd want to -- I was looking for that. I wanted to
16 see if it was a CTR -- go ahead.

17 Q. It says -- in the first paragraph: "We recommend that
18 the research proposal be approved. As the counsel for
19 tobacco" --

20 A. Yes, we received that.

21 Q. Okay.

22 A. Thank you.

23 Q. All right. Thank you.

24 Now, the second paragraph says that: "Drs. Seltzer,
25 van den Berg and Oeschli -- O-E-S-C-H-L-I -- have been working

1 with data from the Kaiser Foundation hospitals, especially with
2 data dealing with psychosocial variables and their relationship
3 to smoking habits. The goal of the new project is to compile,
4 abstract and code morbidity data from the Kaiser Foundation
5 records on approximately 2,000 adolescents who have been
6 followed as part of a prospective study. The researchers would
7 then be able to combine and analyze the morbidity data and the
8 previously gathered psychosocial data in an attempt to identify
9 a wide range of characteristics in people before they became
10 cigarette smokers."

11 Now, sir, does that clarify for you that what was being
12 asked to be funded in this adolescent morbidity study would
13 provide the recipient with -- whether that's what they were
14 looking for or not -- a psychosocial profile of minors before
15 they made the decision to smoke?

16 A. Perhaps it would. I can't -- I'm not sophisticated
17 enough to parse through this, but --

18 Well, I'll just leave it at that.

19 Q. All right. And if you would also --

20 A. But wouldn't the issue be what they did with it?

21 Q. I beg your pardon?

22 A. Wouldn't the issue be what they did with it?

23 Q. I'm just asking if that's what you were being asked to
24 fund.

25 A. It appears that it was. I apologize.

1 MR. SCHWARTZ: All right. And if I may approach, Your
2 Honor, with 29886.

3 THE WITNESS: It's not clear, again, that I authorized it.
4 It's at the top left --

5 BY MR. SCHWARTZ:

6 Q. Coming at ya.

7 If I may approach, Your Honor?

8 THE COURT: Yes.

9 BY MR. SCHWARTZ:

10 Q. 29886 is what I'm handing you. I think it's in your
11 book, but just in case.

12 A. Yes, sir.

13 Q. So now you're agreeing to pay for the one-and-a-half year
14 project of Drs. van den Berg and Seltzer and accept your share
15 of the project about which they're discussing in the entire
16 document?

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

18 Q. Okay. And 29886 is an RJR document?

19 A. Yes.

20 Q. Okay. So you funded for at least a four-year period this
21 study of minors; is that right?

22 A. This study that the funding was requested for, yes.

23 Q. Now, that was a study that was done outside of RJR rather
24 than RJR studying minors in-house with its own people?

25 A. This is an outside CTR study -- CTR Special Project, yes.

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1 Q. All right.

2 A. Did I misunderstand your question?

3 Q. No, that's it. That's it.

4 Your Honor, subject to Your Honor's ruling on the
5 attorney-client and joint defense privilege, I would pass the
6 witness at this time.

7 THE COURT: All right.

8 Mr. McDermott, have you decided yet what you want to do?

9 MR. McDERMOTT: Yes, Your Honor. We have no questions,
10 but I guess I have a question about whether or not we should
11 excuse this witness. I'm not sure that he ought to be kept under
12 the rule and kept in suspension because it's not at all clear to
13 me that he ought to be recalled even if the Court does
14 reconsider. I'm just not sure there's that much.

15 THE COURT: But it all depends on my ruling.

16 MR. McDERMOTT: Indeed it does, Your Honor. But subject
17 to your rulings, it seems to me he ought to be excused, subject
18 to recall rather than kept not being able to talk to his
19 attorney, kept as though he's on the witness stand indefinitely.

20 THE COURT: What's the government's view?

21 MR. SCHWARTZ: The rule should continue, Your Honor. Of
22 course, he can talk to Mr. Kitchen about: Do I need to come
23 back? What's the ruling? What time should I get there? When
24 does the Court want to hear from me?

25 But if Your Honor permits me to ask him questions about

1 those events, there should be no communications between any of
2 the parties about what happened. And I also will not speak to
3 the witness about substance.

4 MR. McDERMOTT: We have no intention of communicating with
5 the witness.

6 THE COURT: Well, just so it's very clear for the record
7 and for the witness, there should be no communications.

8 There is one unresolved issue that's being briefed by the
9 parties. Depending on my ruling on that issue, you may have to
10 come back for very brief questioning about, I believe, one
11 document.

12 But until that issue gets resolved one way or the other,
13 and it hasn't even been fully briefed yet -- until then, you
14 cannot have any substantive conversations with either your lawyer
15 or the RJR lawyers or the government or anybody else connected
16 with the case.

17 Do you understand that?

18 THE WITNESS: Understood, Your Honor.

19 MR. KITCHEN: Your Honor, may I be heard just for a
20 moment?

21 I just want to point out to the Court that Mr. Juchatz is
22 from South Carolina.

23 THE COURT: I know that.

24 MR. KITCHEN: He's not an RJR employee. He flew up two
25 weeks ago at the government's request to testify and did not

1 testify that week. He flew up last Tuesday and testified only
2 for a few hours on Thursday afternoon. He's flown back for a
3 third time today to testify. And at some point, it becomes
4 unreasonably burdensome for him to continue the trips.

5 THE COURT: Well, I certainly realize that. We've tried
6 to accommodate witnesses and sometimes, in accommodating what are
7 real personal emergencies for people, that other people have had
8 to be inconvenienced.

9 I think we just have to wait until I rule on the
10 outstanding issue and then if, for some reason, he has to come
11 back, we'll just have to see. There may be other ways to handle
12 it. If it's only one document and if it's brief questioning,
13 there's at least a possibility that counsel could do it with a
14 phone deposition to be submitted to me. After all, I've had an
15 opportunity to see him now. I can estimate and judge his
16 credibility.

17 The government may not like that, but we'll just see. I
18 think it's a little too early to know for sure. And you'll be in
19 touch with all counsel and know what the ruling is, certainly, on
20 that issue.

21 MR. KITCHEN: Thank you, Your Honor.

22 THE COURT: Thank you. You may step down at this time.
23 And now we are ready for the government's next witness.

24 MS. EUBANKS: Could we just have a moment to change the
25 chairs, Your Honor?

1 THE COURT: Yes.

2 (Pause.)

3 THE COURT: Are you ready?

4 MR. GOLDFARB: Good afternoon, Your Honor. Andrew

5 Goldfarb for the United States.

6 The United States calls as its next witness Dr. Jack

7 Henningfield.

8 THE COURT: All right.

9 (JACK HENNINGFIELD, GOVERNMENT'S WITNESS, SWORN)

10 DIRECT EXAMINATION OF JACK HENNINGFIELD, Ph.D.

11 BY MR. GOLDFARB:

12 Q. Good afternoon, Dr. Henningfield. Do you have water

13 there, sir?

14 A. Yes, thank you.

15 MR. GOLDFARB: Your Honor, may I approach the witness?

16 THE COURT: Yes, you may.

17 BY MR. GOLDFARB:

18 Q. Dr. Henningfield, I am handing you a document that is

19 entitled "Written Direct Examination of Jack E. Henningfield.

20 Ph.D." that was submitted by the United States pursuant to Order

21 471 on November 15th, 2004.

22 Sir, is this document familiar to you?

23 A. Yes, it is.

24 Q. Do you recognize this to be the written direct

25 examination you prepared and was filed on your behalf in this

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1 case?

2 A. Yes, I do.

3 Q. Sir, before formally adopting this, are there any changes
4 you need to make to your testimony?

5 A. No. I think there might have been a typo or two I saw
6 someplace -- I don't even recall where it was -- but nothing
7 substantive.

8 Q. With that, sir, do you adopt this document as your
9 written direct examination in this case?

10 A. Yes, I do.

11 MR. GOLDFARB: Your Honor, we are now prepared to begin
12 our live direct examination of Dr. Henningfield. At the outset,
13 we would ask that Dr. Henningfield be recognized as an expert in
14 the areas for which he was proffered by the United States, and
15 those are psychopharmacology, including in the areas of health
16 and medical issues related to the development of treatment for
17 medical disorders, including tobacco dependence and other drug
18 addictions, and including in the design and effect of drug
19 delivery systems for addictive drugs.

20 THE COURT: Any objection?

21 MR. WEBB: Your Honor, I -- probably not much, but I have
22 a few -- I just prefer to have it ruled upon at the end of his
23 questioning.

24 THE COURT: All right. At the end of all questioning?

25 MR. WEBB: All questioning.

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

2 BY MR. GOLDFARB:

3 Q. Dr. Henningfield, I'm going to ask you questions this
4 afternoon about two different areas. The first area relates to
5 certain cigarette design features and how those design features
6 bear on the tar and nicotine yields obtained by the FTC
7 standardized machine test, as opposed to dosages received
8 generally by human smokers.

9 And the second area will relate to the evolution of the
10 understanding of the scientific and medical communities about
11 smoking and nicotine addiction.

12 First, sir, by way of background, the Court has received
13 some testimony about the FTC machine test already in this case.
14 In your view, sir, does the FTC test accurately measure the tar
15 and nicotine yields obtained by human smokers?

16 A. No, it does not.

17 Q. Was the FTC test ever intended to accurately measure tar
18 and nicotine delivery to human smokers?

19 A. No, it wasn't.

20 Q. What was the original purpose of the FTC test?

21 A. To provide a guide so that human cigarette smokers could
22 have their choices as to which brands of cigarettes that they
23 smoked, guided by information that would be provided by the
24 test, and ideally so that it would enable them to select brands
25 of cigarettes that would give them lower tar and nicotine

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1 levels.

2 Q. In your view, sir, does the FTC test accomplish that
3 objective?

4 A. No, it doesn't.

5 Q. Why not?

6 A. Well, there are several problems. The first major
7 problem from my perspective is nicotine addiction. And when the
8 test was developed, it was not anticipated that nicotine
9 addiction would be a powerful biological driving force that
10 would drive people to smoke to obtain the level of nicotine and,
11 unfortunately, other substances that they needed to sustain
12 their addiction.

13 The second is that the test is static. It's a machine
14 test. It does the exact same thing over and over and over
15 exactly the same way, unlike cigarette smokers, who can vary how
16 they smoke.

17 The third thing is that it was not anticipated, in my
18 opinion, that cigarettes would be designed in such a way to
19 increase the potential difference, the potential discrepancy
20 between the test and what the cigarette smoker obtained from the
21 method.

22 Q. Okay. For the first part of your testimony, sir, I want
23 to focus on this last reason that you gave for the discrepancy
24 between the FTC tar yields and dosages obtained generally by
25 human smokers.

1 First, sir, have you ever worked on the design or
2 development of cigarettes yourself?

3 A. No, I have not.

4 Q. How are you familiar with cigarette design?

5 A. I first became familiar with cigarette design when I was
6 doing research at Johns Hopkins Medical School in the late
7 1970s. In 1978, we were doing research on patterns and use and
8 intake from cigarettes. We read, we studied, we met with other
9 people, we took cigarettes and examined them physically. There
10 was the National Cancer Institute monograph series that was
11 helpful at that time.

12 And then we tested human cigarette smokers with a variety
13 of kinds of cigarettes to see what a difference various features
14 seemed to make. It was very crude when I look back at it, but
15 that's what we were doing.

16 Q. And has your own professional research and work involved
17 examining and developing drug delivery systems for potentially
18 addicting drugs?

19 A. Yes, it has.

20 Q. And has that work included working on systems that
21 deliver nicotine?

22 A. Yes, it has. And that has included work on different
23 nicotine delivery systems, replacement systems used as
24 medications. It has included working on expert committees, such
25 as the Canadian expert committee, World Health Organization

1 expert committees, where we were interested in cigarette design
2 features and what features of those were responsible for the
3 control of nicotine, what features might be relevant to
4 developing medicines and, in fact, if you were trying to develop
5 medicines to help people quit smoking, what features might be
6 particularly important to try to incorporate. And that included
7 oral formulations, patches, nasal spray, a nicotine vapor
8 inhaler and experimental work in development on the potential
9 delivery of nicotine aerosols by a variety of systems.

10 Q. Okay. Are you prepared to demonstrate today to the Court
11 design features of defendants' commercial cigarettes that you
12 conclude contribute to the discrepancies between the advertised
13 FTC yields and the doses generally received by human smokers?

14 A. Yes, I am.

15 MR. GOLDFARB: Your Honor, with the Court's permission --
16 with the Court's permission, I'll ask Dr. Henningfield to step
17 down from the witness box and down to the ELMO to facilitate his
18 demonstration.

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

20 THE WITNESS: Is this microphone working?

21 THE COURT: It is.

22 THE WITNESS: Thank you.

23 Do you have another?

24 MR. GOLDFARB: Yes.

25 THE WITNESS: Thank you.

- 1 BY MR. GOLDFARB:
- 2 Q. Dr. Henningfield, for this part of your demonstration,
- 3 what brands of cigarettes are you going to use?
- 4 A. Marlboro Regular or often called Red Hard Pack, Marlboro
- 5 Light and Barclay.
- 6 Q. Okay. Where did you obtain these packs of cigarettes,
- 7 sir?
- 8 A. The Barclay I ordered by internet just a couple of weeks
- 9 ago because my local gas station didn't have it. The Marlboro
- 10 and Marlboro Light, because I was running late this morning, one
- 11 of my colleagues ran across the street, I think to the gas
- 12 station, and purchased them.
- 13 Q. Why have you chosen these brands to demonstrate this
- 14 afternoon for the Court?
- 15 A. Well, the Marlboro and Marlboro Light enable me to
- 16 demonstrate the main features that are most widely used in
- 17 cigarettes today. The Barclay enables me to use an
- 18 additional -- demonstrate an additional feature and thus
- 19 illustrate the range of ways that cigarettes can be designed
- 20 and --
- 21 Q. Okay. Which brand of cigarettes are you going to start
- 22 with?
- 23 A. The Marlboro Red or Regular.
- 24 Q. Open it up.
- 25 A. Is there a small wastebasket or box handy? Otherwise,

1 I'll make a terrible mess.

2 Thank you.

3 MR. GOLDFARB: Your Honor, I'm going to hand up a Marlboro
4 Red cigarette that's coming from the pack so the court can follow
5 along with Dr. Henningfield's demonstration.

6 BY MR. GOLDFARB:

7 Q. Now, Dr. Henningfield, just at the outset, using the
8 ELMO, please just orient the Court to the main features of the
9 basic Marlboro cigarette you have on the ELMO there.

10 A. Sure. And I know that there has been testimony on
11 aspects, so I'm just going to hit some of the main things that I
12 think are useful for me to help describe the dosing system and
13 the difference from the FTC method.

14 The first is the tobacco column underneath this white
15 paper. The filter is underneath this, in this case cork-colored
16 paper and --

17 THE COURT: Is that cork-colored paper called the
18 "overwrap"?

19 THE WITNESS: The overwrap, I'll show you in just a
20 moment, is the part of the tipping paper that bridges between the
21 filter and extends over the tobacco column itself. So this
22 includes the overwrap.

23 And in fact, since you asked, let me -- it's easier to
24 actually show it. In this case, the cigarette is labeled
25 "Marlboro." If I slice it open --

1 Let's see. If I have this centered right, you'll see that
2 the filter in this cigarette stops here, and this would be the
3 overwrap (indicating), which is -- can be a few millimeters.
4 It's often 30, 40, 50 millimeters. I've seen some longer, but
5 this is fairly typical.

6 The other thing you notice if you look at it, this white
7 paper is porous. It's very delicate. It burns easily. Air
8 breathes through it. So that is part of the air which helps fuel
9 the burning tobacco.

10 You see small lines. They're often referred to as "burn
11 rings." It helps the cigarette burn down neatly. The paper
12 itself has burn accelerants and other substances in it to keep
13 the cigarette burning and it can actually -- that can be a way
14 that you -- the manufacturer can alter the rate of burn of the
15 cigarette; in other words, not only keep it burning, but control
16 the rate at which it burns if you just let it sit there
17 statically.

18 BY MR. GOLDFARB:

19 Q. Dr. Henningfield, can you explain to the Court how the --
20 what the features are in the paper that do, in your view,
21 contribute to the discrepancy between FTC advertised machine
22 yields and the dosages generally received by human smokers?

23 A. Sure, a couple of them. I don't know what is in every
24 cigarette and I don't know which particular chemicals are in
25 this particular cigarette.

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1 But there are citrates and various citrates and other
2 compounds that are in the material that keep it burning and,
3 again, control the burn rate. The porosity itself is a factor.
4 The packing of the tobacco underneath it is a factor. So all of
5 these are factors in influencing that burn rate and that burn
6 rate, in turn, influences the FTC rating.

7 Q. Can you explain how that is so?

8 A. Sure. If I -- the FTC -- and I'm going refer to it as
9 the "FTC smoking machine" even though the FTC hasn't done it
10 themselves since the 1980s and doesn't release the results, but
11 I think by convention, I'll just refer to it as the "FTC method"
12 or "machines."

13 First, the cigarette is inserted into a port, a few
14 millimeters. I don't recall the exact depth, but let's say to
15 about here (indicating). And it's a dry, round port that has a
16 snug fit. Then the machine is started and it takes a puff every
17 minute. And on this cigarette, it might take eight or nine
18 puffs.

19 THE COURT: So just one puff -- just one puff per minute?

20 THE WITNESS: One puff per minute. And each puff is a
21 35-milliliter puff and that's about the size of a golf ball. It
22 takes it over two seconds, so it's a steady puff every minute for
23 two seconds. And on this cigarette, it's going to be in the FTC
24 machine about eight or nine puffs.

25 There are approximately -- gosh, the last list I looked

1 at, I think more than 40 Marlboro sub-brands, so I don't
2 represent that this is identical for all, but I think that this
3 is typical.

4 Now, the machine stops smoking three millimeters out from
5 the overwrap, so in this case, the overwrap is here (indicating)
6 and if we measured, I would submit this is pretty close to
7 three millimeters.

8 During -- in between puffs, the cigarette is just burning
9 statically and any burning that occurs in between puffs, that
10 smoke, that tar and nicotine is not collected in the filter pad,
11 the Cambridge filter that I think you've heard about.

12 So during these two second puffs, during that time, that
13 smoke from that two seconds, that 35-milliliter golf-ball size of
14 smoke passes through a filter pad and whatever is trapped on
15 there, minus the water and nicotine, is called "tar." The
16 nicotine is separated; you can collect the carbon monoxide gas.
17 Anything that happens in between goes out the building exhaust
18 system, for all practical purposes, depending on how they've done
19 it.

20 And what this means is that if you increase the burn rate
21 of the cigarette, you increase the amount of tobacco that is
22 burned between machine-collected puffs and it's never measured.

23 The smoker, of course, could get some of that, depending
24 on how fast they puff. And in the case of the cigarette smoker,
25 typically, they take anywhere from 50 to a hundred percent more

1 puffs. And again it depends on the study, but -- so they might
2 be taking puffs closer to 30 seconds. 25 to 35 seconds, I think,
3 is a range that encompasses most of the human studies in the last
4 20, 30 years. And what that means is that the human smoker takes
5 in tar and nicotine that, in the case of the FTC test, went out
6 the building exhaust.

7 BY MR. GOLDFARB:

8 Q. Dr. Henningfield, in response to the Court's question,
9 you identified the filter overwrap. Can you just clarify again
10 the importance of the filter overwrap in terms of how the FTC
11 test is conducted?

12 A. Sure. The filter overwrap connects the tobacco column to
13 the cigarette filter. I'm going to take a different -- so it
14 won't be quite as messy.

15 Okay. Here's the point about three millimeters out from
16 the overwrap. I'm going to cut this here. Now, the machine
17 stops puffing there (indicating). And every puff that the
18 machine is taking or that a human takes gets stronger and
19 stronger and stronger in terms of its tar and nicotine. That's
20 because with every single puff, some of the tar that is produced
21 passes through the system, some of it is left. And the same
22 thing happens with nicotine.

23 So it's the same effect as we see in our laboratory
24 studies of marijuana. The short end of the marijuana cigarette
25 is much more concentrated than the long end of the marijuana

1 cigarette.

2 Q. Dr. Henningfield, does the FTC have any say in or any
3 contribution to the design of the cigarettes?

4 A. No. And in fact, in the ten years after the FTC test
5 started, it was reported in the literature that the overall
6 length of the overwraps increased over ten years. And the
7 reason overwrap is significant for the discrepancy between the
8 machine test and humans is because this is the amount of
9 material that is not smoked by the machine; it's the amount of
10 material that can be smoked by human cigarette smokers.

11 In fact, if you look at -- go to ashtrays, you'll find
12 that there is wide variability. I think that most smokers don't
13 smoke most of this. And our studies where we essentially make
14 smokers very poor by making them work a lot for cigarettes or
15 restrict their cigarettes, they don't waste that.

16 And this is important because every single puff gets more
17 concentrated. One journal article in the 80's in the Journal of
18 the American Medical Association by Dr. Kozlowski and his
19 colleagues I think put it nicely. They said the title of the
20 article was "What a Difference a Puff Makes" and the point was
21 that even one extra puff dramatically boosts the tar and
22 nicotine that the smoker takes in.

23 Q. Dr. Henningfield, in this little pile of tobacco that you
24 have removed from under the filter overwrap, is there anything
25 about the tobacco filler itself that you want to bring to the

1 Court's attention?

2 A. Just that it's a mixture. And again, I don't have data
3 on what the exact blend is, what is in here, but you can see --
4 let me zoom in just a little.

5 What you can see is that there is material that looks
6 like bits and pieces of tobacco leaf and probably is; there is
7 material that looks like brown paper confetti. And from a
8 manufacturing perspective, it is. There are different ways of
9 making what is called "reconstituted tobacco" or "recon," but
10 most commonly it's made like paper and then it's shredded up.

11 The size of the cutting, the size of the pieces
12 influences the smoke chemistry. It influences the particle
13 size. That in turn influences the nicotine dosing capability.
14 It influences the lung absorption, where in the lung, how deep
15 in the lung.

16 So all of these physical things can make a difference.
17 And with the reconstituted material, when that is made, a lot of
18 the nicotine and other substances which are water soluble or
19 soluble to the solvents that are used come out; they're put back
20 in; they may be put back in with other things, with flavorings.
21 Some or all on the nicotine might be put back in. Whether it's
22 the same nicotine, I don't know, but it's one of the ways that
23 the nicotine dosing is calibrated and fine-tuned.

24 THE COURT: Is it true that the tobacco in that portion on
25 the cigarette may well come from different parts of the tobacco

1 leaf?

2 THE WITNESS: Yes. And in fact --

3 THE COURT: And then does it also follow that different
4 parts of the tobacco leaf have more nicotine than other parts of
5 the tobacco leaf?

6 THE WITNESS: Yes. For example, typically, a higher stalk
7 position on the plant would be more concentrated. And in the FDA
8 investigation, it was discovered that one of the primary ways
9 that the nicotine content -- and I'm not talking about FTC; I
10 mean the absolute milligrams of nicotine in the cigarette -- is
11 controlled is by blending the different types of tobacco leaf to
12 get the exact dose in the cigarette that is targeted.

13 THE COURT: Do you have any knowledge -- I don't think
14 I've read any expert testimony on this, but do you have any
15 knowledge as to whether there is a different blend of tobacco
16 leaves up at the end of the filter as opposed to in the rest of
17 the cigarette?

18 THE WITNESS: It's possible and in some of the designs
19 that I have looked at over the years, the blend was indicated as
20 something that could be changed. In the Eclipse cigarette
21 substitute, there is different reconstituted material that even
22 looks different visually. But in any given cigarette that's on
23 the market, I can't tell you if there is any difference.

24 THE COURT: Okay.

25 BY MR. GOLDFARB:

1 Q. Moving up more toward the filter end of the cigarette,
2 Dr. Henningfield, can you please identify the filter paper.

3 A. Sure. This is the paper that surrounds -- that holds the
4 filter in place (indicating).

5 Q. Please describe for the Court the important features of
6 the filter paper.

7 A. Okay. The first thing is that you can feel it. It's a
8 tougher paper, so it's more resistant to degradation in the
9 mouth and exposure to saliva. It has to hold the filtering
10 material itself tight and attached to the tobacco column.

11 And from a dosing perspective and from a perspective of
12 the discrepancy between the FTC machine test and what people
13 get, one of the most important features is the ventilation
14 holes. And I'm not sure that you can see them. Let me zoom in
15 a little bit more.

16 You still can't see them. Let me try backlighting and
17 fatten this out. And now I'm going to zoom in because I can now
18 see them with my eye.

19 There they are. See that little tiny ring of dots?

20 THE COURT: I do.

21 THE WITNESS: They look tiny and they are very tiny. They
22 are razor perforations in this cigarette. The size shouldn't
23 fool you. It's kind of like having a tiny hole in your
24 automobile tire. It makes a difference. In this case, it
25 provides approximately ten to 15 percent air mixed through --

1 with the smoke that goes to the machine.

2 THE COURT: You know where to look for them. Is it -- is
3 it accurate to say that those ventilation holes are not visible
4 to either the naked or the untrained eye?

5 THE WITNESS: On this cigarette, they're very difficult.
6 You've got better eyes than I if you can find them. If you take
7 the paper off, hold it to a bright light, you can find them.

8 When I show you the Barclay, you'll see that one of the
9 rings is easier to see with the naked eye. And in fact there are
10 some brands where you can't miss them. You may not know what they
11 are, but it's possible to make them, as one of the advertisements
12 in a trade journal advertised years ago, visible or invisible.
13 That's the choice.

14 BY MR. GOLDFARB:

15 Q. And, Dr. Henningfield, for purposes of your opinion
16 vis-a-vis the FTC advertised machine yields and the dosages
17 generally received by human smokers, why are the vent holes --
18 or the difficulty in finding the vent holes make a difference?

19 A. Well, it means that the smoker doesn't have a choice as
20 to whether to cover them with fingers or lips. So the smoking
21 machine comes out here; the human can grab it here (indicating).
22 Their lips can come up, if a person has larger lips, it might be
23 almost inevitable or, as I used to watch from my -- when my
24 office was adjacent to my smoking laboratory, I had a one-way
25 window so I could watch smokers and you could see them at times

1 in some studies kind of (indicating) suck it in and get their
2 fingers up and cover -- we didn't know there were vent holes at
3 that time. That was 1978-79.

4 And if you look at -- in an ashtray, a public ashtray,
5 where there are people that use lipstick, you will see that some
6 holes had been covered, some aren't; some cigarettes will have
7 none covered. But it's -- I'd submit it's not by choice because
8 it's not easy to see them or, if you did see them, know what
9 they're there for.

10 Q. Dr. Henningfield, is there anything about the filter
11 itself that's important to explain vis-a-vis the FTC test yield
12 versus human smokers' intake?

13 A. Not that I can easily show with this machine. Only that
14 this filter material, most commonly in American cigarettes
15 cellulose acetate -- there are a lot of different ways to make
16 it. You can add substances to scavenge and remove certain
17 products; you can add substances that can increase nicotine.
18 The density affects not only the draw, how hard it is to puff,
19 but also what it traps.

20 You can put different designs; you can crimp -- I mean,
21 you can do all kinds of different things that affect the
22 particle size, the amount of material that is trapped and even
23 what kind of material is trapped.

24 Q. And do the filters perform differently in the FTC test in
25 any way from how they perform when human smokers smoke a

1 cigarette?

2 A. Well, yes. They can perform differently as a function of
3 how hard you are drawing; they can perform differently as a
4 function of smoking on them. And I think I can illustrate this
5 very easily.

6 With the filter material -- with the filter, if you look
7 at the end of the filter, when you start out with a smoking
8 machine, when the smoking machine begins to smoke it, it's a
9 pristine white filter. After the machine or a human takes a few
10 puffs, there's a dot of tar and nicotine and it's brown colored,
11 yellowish brown in the center. And with each puff, it gets
12 bigger and bigger.

13 And so if you look at cigarettes that have been stopped
14 at different times, you can estimate roughly how many puffs or
15 how big the puffs were. This is the last filter before the
16 smoker's lungs. And if the person has blocked some of the vents
17 or if some of the vents were taped by a researcher like my
18 colleagues, then the stain will not only be bigger and darker,
19 but it will go up to the edges.

20 And you can tell if somebody was really inhaling a lot of
21 smoke and really working it, if you will, because it will be a
22 much larger, darker stain on the cigarette butt.

23 MR. GOLDFARB: Okay. Your Honor, I see it's close to the
24 usual break time. Dr. Henningfield does have a few other
25 cigarettes to show the Court much more quickly and then we can

1 move to the second part of the demonstration; he can finish the
2 cigarette dissection now. Whatever your preference?

3 THE COURT: I think the court reporter probably needs a
4 break. Let's take just ten minutes, everybody, though.

5 (Thereupon, a break was had from 3:14 p.m. until 3:28
6 p.m.)

7 THE COURT: All right, please proceed.

8 BY MR. GOLDFARB:

9 Q. Dr. Henningfield, moving to the second portion of this
10 physical demonstration, can you please now take Marlboro Light
11 cigarettes from the box.

12 A. Sure.

13 Q. Thank you.

14 A. You're welcome.

15 MR. GOLDFARB: And Your Honor, again I'm going to hand up
16 a Marlboro Light cigarette so you can follow with
17 Dr. Henningfield's demonstration.

18 BY MR. GOLDFARB:

19 Q. Sir, for the design features that you identified and
20 described for the Court with respect to the Marlboro Red, can
21 you please identify for the Court differences and similarities
22 for this Marlboro Light cigarette?

23 A. Sure. The Marlboro Light, this one is a little bit
24 longer. They're sold in somewhat different lengths. The
25 incomparable brands, you know, the Red versus the Light version

1 in the king-size, the total amount of tobacco filler, appears to
2 be about the same. I've never weighed it, so I don't know the
3 exact difference. The Massachusetts -- the state of
4 Massachusetts has data on cigarette brands sold in the state, I
5 believe cigarettes that have more than five percent of the
6 market, and so you can go to Massachusetts's website and see how
7 much tobacco the actual nicotine content -- I mention that just
8 in case I refer to the Massachusetts data because that's where I
9 get some of my factual information about the content.

10 The obvious difference is this has stripes, it's labeled
11 differently. If you look at cigarette brands, you see that the
12 companies have the ability to decorate the products, to put
13 words, to put letters.

14 Q. Why is that relevant to you, sir?

15 A. Because it shows me that they have the capability, if
16 they so chose, to illustrate the vent holes, and for that matter
17 could even put signs, symbols, you know, circles with a slash
18 through which you see on even medicines and small pills at
19 times.

20 This is the overwrap. I'm not sure how well you can see
21 it here because it's the same color. The overwrap is about the
22 same as for the Marlboro Red. It might be identical, but it is
23 at least about the same. The filter itself is somewhat longer.
24 In principle that may enable it to trap more material; in
25 practice, whether it does or not, I don't know for certain

1 because how much material it traps is a function of how the
2 filter is made.

3 It is the case that the Marlboro Red brand family is most
4 of them delivering about 1.1 milligram of nicotine in the last
5 FTC chart that I saw and I believe the Massachusetts data, but a
6 milligram, milligram and a tenth?

7 Q. And sir, what is the major difference in design between
8 the Marlboro and the Marlboro Light that accounts for the
9 differences in the advertised FTC tar and nicotine yields?

10 A. The biggest single difference that I'm aware of is the
11 ventilation holes system, and I'm not sure -- they're very
12 difficult to see on this cigarette as well. Let me change the
13 lighting and zoom in. There they are. And what you see on this
14 cigarette, the first ring is out about the same as it was on the
15 Marlboro Red, and then a little further out is an additional
16 ring.

17 Now, the importance of that is that the red, according to
18 the Massachusetts data -- and the Massachusetts data are data
19 that are provided by the tobacco industry through the state of
20 Massachusetts -- the Marlboro Red, the ventilation, the
21 percentage of ventilation or the percentage of fresh air is on
22 the order of 10 to 13 or 14 percent; the Light is not quite
23 double that. And again, depending on which cigarette, which
24 year, it varies a little bit, but in round numbers this extra row
25 of vent holes almost doubles the amount of fresh air that comes

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1 in to the smoking machine, and that means if the smoker occludes
2 any of it, they can get much more tobacco smoke than the machine
3 and the extra holes mean that the smoke is cooler, smoother in
4 ways that smokers can actually feel and they tend to take bigger
5 puffs.

6 So, even if they don't cover the holes, studies show that
7 they take larger puffs from the cigarette, and the point is there
8 are several different ways that the smoker can get more tar and
9 nicotine that are related to the design of the product.

10 Q. Now, are the design features that you've been explaining
11 unique to the Marlboro Red and Marlboro Light cigarettes?

12 A. No, these are widely used. The vast majority of
13 cigarettes on the market today are ventilated. The
14 Massachusetts data suggests that the ventilation ranges anywhere
15 from a little less than 10 percent to close to 80 percent for
16 the vast majority of cigarettes. The cigarettes that are at the
17 very high ventilation, some people describe them differently.
18 Some people say it's like sucking on a straw because you get so
19 much air; some people will say they're harder to smoke because
20 they have to work so hard to get the nicotine that they're
21 looking for. Those are a smaller fraction of the market.

22 Q. Okay. Finally, Dr. Henningfield, the Court has heard a
23 fair amount of testimony in this case about the Barclay
24 cigarette sold by Brown & Williamson. Are Barclay cigarettes
25 still sold in the United States?

1 A. Yes, they are.

2 Q. And are you aware of whether Barclay was the subject of
3 controversy in the early 1980s?

4 A. Yes, I was. And during that time I was at the National
5 Institute on Drug Abuse. I was called, I believe, on at least
6 one occasion by attorneys with the Federal Trade Commission. I
7 really don't recall anything beyond that because I wasn't
8 formally involved in the case, but --

9 Q. Are you aware of what the particular design feature of
10 the Barclay cigarette was that was the subject of controversy at
11 that time?

12 A. Yes. The main subject of controversy and the complaint
13 lodged by Philip Morris and RJR to the FTC concerned what was
14 called the channel vent system.

15 Q. And do the Barclay cigarettes that you purchased recently
16 continue to use the channel ventilated system?

17 A. Yes, they do.

18 Q. Can you please briefly describe for the Court and show
19 the Court that system.

20 MR. GOLDFARB: Again, Your Honor, I'm going to hand up one
21 of the Barclay cigarettes.

22 THE WITNESS: Yes. I'm going to show you two different
23 ways of looking at it that I think are useful to help understand
24 it. The first is that if you look and you can see this with the
25 naked eye, at the end, the filter end of the cigarette, you can

1 see that there are four holes, and these are what is referred to
2 as the channels. They're almost big enough to put a small
3 toothpick or end of a toothpick hole -- toothpick through if you
4 expand. And when this is put in a machine which has a round,
5 perfectly round dry orifice, they're maximumly (sic) expanded.

6 Now, what those do if I look -- let me switch my lighting.
7 If I slice one of these -- let's see if we can see this with this
8 top lighting the way this is. Maybe if I move out a little bit.
9 (Indicating).

10 Now, on this cigarette I'll show you, you'll be able to
11 see it more clearly in a moment, but there are a triple ring of
12 vent holes about here, (indicating), and here is a ring that you
13 can actually see with the naked eye if you look closely, and
14 these are much larger. These are slices. I don't know if these
15 are made mechanically, but these are much larger.

16 Now, those feed the channels. And in fact, if I grab this
17 tipping paper, you'll see why I didn't go to medical school to
18 try to become a surgeon.

19 BY MR. GOLDFARB:

20 Q. Sir, while you're grabbing the filter, do you know
21 whether or not the packaging for the Barclay cigarette provides
22 any information to the consumer about the vent holes that are
23 visible to the naked eye?

24 A. No. No, it does not. My package didn't.

25 Now, what's interesting is this actually tears quite

1 naturally along where those slices were. And each of these, you
2 can see the indentation, so it's a fairly large channel that is
3 compressed in there, there's a plastic material that goes around
4 that holds it in shape, and so this channel -- I don't know the
5 percentage of ventilation of these, it wasn't listed in the NAS
6 Table, but when they were initially advertised, they were
7 advertised as 99 percent tar free, and I believe it was more than
8 90 percent air that the machine got, except when the person
9 put -- when the smoker put them in their mouth, the channels
10 block up in part because of the squishing of the lip, and the
11 moisture helps swell the material. So then the person -- the
12 effect is that the person gets the ventilation of the triple
13 rings, and in this one it has three rings, plus the person gets
14 these large feeder slices feeding the channels, and so no matter
15 how you smoke this, you're almost sure to get more than the
16 machine unless you don't take many puffs, and that was part of
17 the basis for the complaint of the Federal Trade Commission.

18 Q. Thank you, Dr. Henningfield. You can retake the witness
19 stand now, sir.

20 Dr. Henningfield, I now want to direct your attention to
21 U.S. Exhibit 17381, which is a demonstrative exhibit titled:
22 Evidence That Nicotine is Addictive. First, sir, where did your
23 idea for this diagram come from?

24 A. Well, when I was sitting in one of your conference rooms
25 or one of the DOJ conference rooms, I guess it was a few weeks

1 ago, discussing this demonstrative portion of the testimony, I
2 saw this on the wall. And I asked what it had been used for,
3 and one of you told me that one of the witnesses had used it to
4 illustrate how it was that the 1964 Surgeon General's Advisory
5 Committee had determined that smoking caused lung cancer, and I
6 said this would be perfect for me because this was the type of
7 analysis that we used at NIDA in the early 1980s, and I asked if
8 I could use it. And in fact, I asked if I could use the same
9 one since I assume this way the Court would already understand
10 how it had been used.

11 Q. And for purposes of your testimony, sir, what generally
12 does the diagram illustrate?

13 A. Three areas of evidence that are useful to a drug
14 addiction researcher in understanding if a substance is
15 addicting, what the nature of the problems are and what's
16 happening. Clinical observations; population studies, which
17 frankly we generally refer to as epidemiology; and laboratory
18 investigations.

19 Q. Dr. Henningfield, where on this diagram would you place
20 the current state of scientific and medical understanding about
21 the question of whether nicotine is addictive?

22 A. Right in the center where all of the circles overlap and
23 there is a strong convergence of evidence.

24 Q. When in your view did the scientific and medical
25 communities reach this point where the three different lines of

1 scientific evidence overlap on this diagram?

2 A. In the early 1980s.

3 Q. And sir, where on that diagram would you place the state
4 of scientific understanding as to the question of smoking and
5 nicotine addiction in 1964?

6 A. I would put it in the area where clinical and laboratory
7 overlap, and frankly it would be hard to find because there
8 would be just a few data points as evidenced by the fact that
9 the 1964 Surgeon General's Report had a ten-page chapter with, I
10 believe, 36 references for their entire analysis of whether or
11 not smoking caused addiction.

12 Q. And sir, how did volume of information on this question
13 compare to the volume and quality of information on the question
14 in the 1964 Surgeon General's Report about whether smoking
15 causes disease?

16 A. There really is no comparison. By 19 -- by the 19 --
17 early 1980s there were many, many more studies in all areas. By
18 the 1988 Surgeon General's Report, there were --

19 THE COURT: I'm concerned that the questions have been
20 apples and oranges, and maybe I misunderstood. Your first
21 question a minute or two ago was: When was consensus reached as
22 to whether nicotine is addictive, and the answer was the early
23 1980s. Then you switched questions as to when there was a
24 consensus that smoking caused disease.

25 MR. GOLDFARB: Maybe I didn't speak clearly, Your Honor.

1 The question actually went to comparing -- asking
2 Dr. Henningfield to compare for purposes of the 1964 report the
3 volume and quality of evidence that existed at that time on the
4 issue of causation of disease as opposed to the volume and
5 quality of evidence as existed on the question of nicotine and
6 addiction.

7 THE COURT: I certainly didn't understand that question
8 that way.

9 THE WITNESS: I'm sorry, did and I misunderstood it, too?

10 THE COURT: Well, I'm not sure.

11 BY MR. GOLDFARB:

12 Q. It was likely poorly phrased. Do you understand that
13 question now?

14 A. Yes, yes. Gosh, there is no comparison there either,
15 because if you look at the Surgeon General's Report on cancer --
16 and I'm not going to put myself forth as a cancer expert, but I
17 can count -- there were about a hundred pages or more on
18 cancer -- there were several hundred references on cancer, and
19 it included extensive clinical observations. For example, the
20 pathology and histopathology of the lung and does that seem to
21 relate to smoking, population studies, there was strong
22 epidemiological evidence and there is laboratory investigations
23 with animals, the skin painting test.

24 THE COURT: So, are you saying that there was either
25 stronger or weaker evidence in the Surgeon General's Report of

1 1964 as to whether smoking causes disease as compared with the
2 early 1980s when you believed that a consensus was clearly
3 reached as to the addictive nature of nicotine?

4 THE WITNESS: Actually, I think what happened, what is
5 fair to say is what happened was by the 1980s, the addiction area
6 basically caught up to where the cancer area was in the 1960s.
7 So the 1988 Surgeon General's Report on addiction was more than
8 600 pages; more than 2,000 references depending on how you count
9 them, but it took that long -- I think to the late '70s, early
10 '80s to start catching up.

11 BY MR. GOLDFARB:

12 Q. And again, Your Honor, just so it's clear, my question
13 went to comparing the quantity and quality of evidence in 1964
14 on the two different questions.

15 And now, Dr. Henningfield, looking first at the yellow
16 circle labeled Clinical Observations --

17 THE COURT: I want to ask one other question based on your
18 direct testimony, your written testimony. Is it correct that in
19 your view the industry knew by the early 1960s that nicotine was
20 addictive?

21 THE WITNESS: Yes, the industry had clearly come to that
22 conclusion. They didn't have as much evidence at that time as we
23 did by the '80s, but they had clearly come to that conclusion.

24 THE COURT: I don't think, correct me if I'm wrong, that
25 in your written direct you indicated when you think the industry

1 came to the conclusion that smoking causes disease. Did you give
2 an answer to that question in your direct?

3 THE WITNESS: To disease other than cigarette -- other
4 than addiction?

5 THE COURT: Well, the question is: When did the industry
6 come to a conclusion that smoking causes disease, meaning
7 physical disease, if you will?

8 THE WITNESS: I think certainly by the 1950s, although I
9 have not attended as much to disease, other than addiction, as to
10 addiction.

11 BY MR. GOLDFARB:

12 Q. Dr. Henningfield, turning to the yellow circle on the
13 left labeled Clinical Observations, what were some of the
14 clinical observations relating to smoking cigarettes and
15 nicotine that were known at the time of the 1964 Surgeon
16 General's Report?

17 A. Well, clinical observations in the addiction area are the
18 kind of observations that lead you to conclude that there is a
19 clinical syndrome or disorder or disease, if you will, and that
20 would concern the dependence process, the withdrawal process.
21 The Surgeon General's Report Advisory Committee in 1964
22 described the evidence as a whole as antidotal in nature. It
23 primarily talked about two studies that are relevant to the
24 clinical observation of addiction: One is the Johnston Study,
25 which you could put in either the clinical or the lab

1 investigation area, and that was the Lenox Johnston Study where
2 he injected himself and others with intravenous nicotine and
3 concluded that nicotine must be the equivalent in tobacco as
4 morphine was for opium use. And that was an important
5 observation, but the Surgeon General's Advisory Committee said
6 he did it to himself and others, it wasn't properly controlled,
7 and I think they reasonably did not give it a lot of weight.

8 The second main clinical body of data in my opinion are
9 related to the withdrawal syndrome, and this went back to the
10 Finnegan, Larson and Haag Study that was published in 1945 in
11 science where cigarette smokers were given regular cigarettes,
12 cigarettes with comparable nicotine yield but different -- they
13 were experimental -- and most importantly cigarettes that had
14 been greatly reduced in nicotine, and they were allowed to smoke
15 them for a month.

16 And that study showed that some people made the
17 substitution without any apparent difficulty, a few people
18 smoked a lot more of the reduced nicotine cigarettes, though the
19 article didn't call this compensation, and a number of people
20 complained bitterly and became irritable, couldn't concentrate,
21 later admitted that they had cheated and had smoked regular
22 cigarettes, and a lot of the symptoms that we would now consider
23 withdrawal.

24 That was about it. So, they didn't have a lot to go on
25 to conclude that nicotine caused addiction or dependence from

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1 the clinical side.

2 Q. And at that same time period, Dr. Henningfield, at the
3 time of the 1964 Surgeon General's Report, how did the clinical
4 understanding of nicotine as an addictive substance compare to
5 the clinical understanding of other drugs of addiction?

6 MR. WEBB: Your Honor, I'm only going to object -- One,
7 this is nothing more than repeating what's in the direct, and
8 number 2, the hour's up at this point. So if we're going to have
9 this rule, I mean --

10 THE COURT: I think it is. First of all, it's repetitive,
11 it's in the direct. I will admit I probably took up 5 minutes of
12 the government's time, but if you've got a couple more questions
13 you may ask them.

14 MR. GOLDFARB: Okay.

15 BY MR. GOLDFARB:

16 Q. Dr. Henningfield, let me just ask you the quick question:
17 After 1964, 1965, what happened in the area of the clinical
18 understanding of nicotine as an addictive drug?

19 A. It exploded. A lot of research was done, lots of people
20 tried to quit as a result of the '64 Report, a lot of people
21 did; smoking cessation clinics sprung up, there were researchers
22 studying the process, and that enabled researchers to determine
23 that the relapse patterns following quitting smoking were
24 similar to people that were treated for heroin and alcoholism
25 following getting off those drugs, enabled them to conclude it

1 was as difficult to quit as it was for those other drugs, and it
2 enabled psychiatrists by 1980 to conclude that there were two
3 clinical syndromes, withdrawal and dependence. They were even
4 withdrawal scales developed. One of my colleagues,
5 Dr. Shiffman, worked on one of them.

6 Q. And turning now quickly, sir, to the blue circle labeled
7 "Population Studies," before 1964, what was the state of
8 epidemiological evidence on the question of whether nicotine is
9 addictive?

10 MR. WEBB: Your Honor, I'm just again going to object.
11 This is just a repeat of the direct that's already in the direct.

12 THE COURT: Sustained. Anything final that you want to
13 ask? This is all in the direct, Mr. Goldfarb.

14 MR. GOLDFARB: Your Honor, if I may, this diagram I think
15 gives an important pictorial representation, both in terms of the
16 evolution, and addresses directly the defendants' contention
17 about the state of the science in 1964 as opposed to later on.

18 THE COURT: You've got 5 minutes max.

19 MR. GOLDFARB: Okay.

20 BY MR. GOLDFARB:

21 Q. And then, sir, after 1964 -- well, excuse me. I'm not
22 sure we got an answer to the prior question which is, were there
23 epidemiological studies on the question of nicotine and
24 addiction prior to 1964?

25 A. In 1964 there basically was not an epidemiology. The

1 Surgeon General's Report said there wasn't even a good basis for
2 understanding the demographics; that is, who smokes beyond some
3 of the basics. It was basically Department of Agriculture data.

4 Q. Okay. And after 1964, sir, what was -- was there
5 additional epidemiological evidence, population studies that
6 addressed the relevant questions as to the addictiveness of
7 nicotine?

8 A. Yes. That research fairly exploded because of the
9 recognition that data were needed. So in the same year that the
10 report was released, population surveys in youth and adults were
11 developed, the National Household Survey was released, had data
12 in the 1970s, '80s. Together this enabled the director of the
13 National Institute on Drug Abuse to testify on behalf of NIDA
14 and conclude that smoking met criteria as a dependence-producing
15 drug showing loss of control, persistent use in the face of harm
16 on the basis that 99 percent of smokers at that time smoked
17 regularly; six out of ten had tried and failed to quit;
18 70 percent smoked 15 or more cigarettes per day; 80 to
19 85 percent found it difficult to go even three months without
20 smoking. So it was strong epidemiological evidence.

21 Q. And lastly, sir, just looking at the bottom circle, the
22 circle labeled "Laboratory Investigations," what was the state
23 of the science prior to 1964 in the area of lab investigations?

24 A. It was very weak with animals and humans and, in fact,
25 the Surgeon General's Report raised the possibility that it was

1 the mixture of nicotine and other substances that caused
2 respiratory stimulation, and whether or not nicotine was clearly
3 involved in smoking and driving smoking was uncertain.

4 Q. And then, sir, in the period after 1964, was there
5 additional scientific and medical evidence that developed in the
6 area of lab investigations that contributed to this question?

7 A. Yes. That area exploded. That's near and dear to my
8 heart. I was one of the people hired at NIDA to help resolve
9 the gaps in the lab area, and the gaps were filled with major
10 animal studies, human studies, and together this evidence
11 enabled the director of the National Institute on Drug Abuse,
12 Dr. Pollin, to testify that nicotine met all criteria as a
13 dependence-producing drug in the early 1980s by the same
14 criteria that we evaluated other drugs. My laboratory, by the
15 way, was charged with evaluating drugs in general for
16 addictiveness, not nicotine in particular.

17 Q. Thank you, Dr. Henningfield.

18 MR. GOLDFARB: Your Honor, this does conclude our initial
19 examination of Dr. Henningfield. And understanding your earlier
20 indication that you'll reserve on the question as to
21 Dr. Henningfield's expertise until the conclusion, I'll pass the
22 witness.

23 THE COURT: Before the defendants begin, would you please
24 remind me again, what were the -- what was the timeframe during
25 which the defendants were conducting their animal studies?

1 THE WITNESS: Animal studies?

2 THE COURT: Correct.

3 THE WITNESS: Well, there was some research contracted
4 through Battelle that was relevant -- that was intended to be
5 relevant, understanding the addictive process in the 1950s. I
6 don't know when all animal research was conducted. Certainly
7 there was animal research in the 1970s in the Philip Morris --
8 and contracted by Philip Morris. I'm not sure if Dr. Mele has
9 testified, but his laboratory was one of the laboratories that
10 continued in that tradition.

11 THE COURT: Okay. All right. Let me hear from the
12 defendants, please.

13 CROSS-EXAMINATION OF JACK HENNINGFIELD, Ph.D.

14 BY MR. WEBB:

15 Q. Dr. Henningfield, as you know, my name is Dan Webb. I
16 represent Philip Morris. We just got reacquainted here before
17 court and we've met before, have we not?

18 A. Yes.

19 Q. And Doctor, I'm going to ask you questions about various
20 areas that you talked about during your written direct
21 examination and during your demonstration here today, and then
22 there will be other lawyers from some of the other companies
23 that will cover other areas.

24 I'm going to -- As I start, let me begin with this: How
25 many different cases have you now participated in against the

1 tobacco companies as an expert witness?

2 A. I've testified in about ten, and I'm not sure if it's
3 nine or eleven, but about ten.

4 Q. How many cases have you been actually engaged in even if
5 you didn't testify? How many cases have you participated in in
6 any fashion as an expert witness involving these companies?

7 A. That's more difficult because I've been listed in cases
8 that didn't necessarily go anywhere, and during the Attorneys
9 Generals' lawsuits, I gave depositions, I think, in four or
10 five cases, but I know I was listed for more Attorneys Generals,
11 so I'm not certain. And there have been times when I found I
12 was listed in something that I hadn't agreed to.

13 Q. So, can you tell, do you know approximately how many
14 cases you agreed to participate in in one way or another as an
15 expert witness regardless of whether you testified or not
16 involving the tobacco companies?

17 A. I've given -- I believe I've given more than 20 and fewer
18 than 30 depositions, but again that's not exactly the answer
19 that you -- I mean, your question's a little different, but it's
20 the best way I can answer it.

21 Q. If you can't answer it, I'll move on, but I'm trying to
22 bring out for the Court whether you just filed an expert report,
23 whether you just agreed to testify, whether you actually gave a
24 deposition, whether you actually came to trial, as you are here
25 today, and testified before a judge or jury. Regardless of the

1 level of participation, I'm just trying to get a handle for the
2 Court on the number of different cases you participated in in
3 any fashion as an expert witness against these companies.

4 A. Yes, and I believe it's about 30. The reason I'm being
5 so careful is I was asked a number of years ago if I was
6 involved in Wiley Grinnell and I said no. I think I was under
7 oath. And then I found out that 15 years earlier when I was in
8 the government I had agreed, and the case came back to life, so
9 I'm trying to -- I'm just being careful, that's the only reason.

10 Q. So, is your answer you don't know?

11 A. I don't know exactly. I believe around 30.

12 Q. Now, in fact, I think the first case you testified
13 involving a tobacco company was in 1986 in a smokeless tobacco
14 case; is that correct?

15 A. Yes.

16 Q. And so your testimony against these tobacco companies
17 goes back now moving towards a decade; is that fair to say?

18 A. Well, yes, my first smoke -- I did a smokeless case then
19 and then nothing until 1996.

20 Q. Now, Doctor, let me tell you what I'm going to focus on.
21 I don't know whether you are aware of this or not, but this case
22 is a fraud case. The charges in this case against these tobacco
23 companies brought by the government is fraud. Are you generally
24 aware of that?

25 A. Yes.

1 Q. Because the case is focused on fraud, I'm going to focus
2 my cross-examination on statements that you have made during
3 that 170 pages of written testimony or today when Mr. Goldfarb
4 was asking you questions that suggest that the tobacco companies
5 either concealed material facts on the subject matter of
6 addiction, or made false representations on the subject matter
7 of addiction.

8 So, let me start with concealment to start with. Doctor,
9 am I correct, in several places during your direct examination
10 you clearly state that it's your opinion, as an addiction expert
11 called to testify in this proceeding, that beginning in the 1960s
12 the tobacco companies knew more about addiction and nicotine than
13 did the general scientific community and concealed that
14 information? Did I fairly state what you've set forth in your
15 written testimony?

16 A. Yes, you did.

17 Q. In fact, let me show you specifically one spot where you
18 say that. Could I have tab 1, please. Do you have your written
19 direct there? If you look at page 87 and go to line 19 to 20 --
20 or you can look on the screen if you want, I put it on the
21 screen for you, either way, whatever is easier for you.

22 A. Thank you.

23 Q. But on that page you're asked a question: "How does what
24 the industry knew about nicotine in the 1960s compare with what
25 the public health community knew at that time?"

1 And your answer was: "The truth is that compared to the
2 independent scientific community, the tobacco industry had
3 additional knowledge that led it to conclude at a far earlier
4 point in time that the primary reason that people kept smoking
5 cigarettes was to obtain nicotine and that smoking produced
6 addictive effects."

7 Now, the statement that you made there that the tobacco
8 companies knew at a far earlier point in time that the primary
9 reason that people kept smoking was to obtain nicotine, I want to
10 ask you some questions about what the difference in knowledge was
11 by going back and looking at things that you've written earlier
12 as well as what other scientists have written so we can get a
13 handle on that, if I might.

14 A. Sure.

15 Q. Let's start -- let me start with the -- we're going to
16 talk about, Doctor, what is it that the tobacco companies knew
17 and then compare it to what it is that the public health
18 community or general scientific community knew. I'm going to
19 start with what I call the basic smoking behavior and find out
20 what was known and not known at that time.

21 Am I correct, one of the fundamental elements that you've
22 written about in the past, I think sometimes referred to as the
23 smoking behavior, is that one of the fundamental parts of it is
24 that it can be very difficult for people to stop smoking once
25 they've been smoking for a period of time; is that fair to say?

1 A. Yes, it is.

2 Q. Let's focus on that part of the smoking behavior, the
3 difficulty of quitting. As far as that part of the behavior of
4 smoking is concerned, am I correct, the truth is that the fact
5 that it's difficult for people to stop smoking, that fact has
6 been known to the general scientific community for a long, long
7 time before the Surgeon General's Report in 1964; is that fair
8 to say?

9 A. At a general level, the difficulty I think is not
10 generally appreciated and seems to differ across the companies
11 and the Websites today.

12 Q. Well, when you say "generally," we're talking about the
13 issue of whether -- well, let me ask the question this way: Is
14 it true that that fact about the smoking behavior, that it can
15 be very, very difficult to quit, that fact has been known by the
16 general scientific community, according to you, for about 200
17 years?

18 A. Yes.

19 Q. And in fact, in a book that you authored in 1984 called:
20 "Nicotine: An Old Fashion Addiction," you essentially wrote
21 that Indians who inhabited America at the time of the English
22 colonies had come to learn that once you start to smoke, you
23 could not stop without severe withdrawal symptoms; is that fair
24 to say?

25 A. Yes.

- 1 Q. In fact, let me show you that article. Can I have tab 4,
2 which is JD 060585. I believe it's entitled -- I'll put it on
3 the screen, but I'll give you a hard copy if it helps you, too.
- 4 A. Thank you.
- 5 Q. By the way, I'll try to put things on the screen, but if
6 you ever want to look at the actual document, I'll always hand
7 it to you if you want to.
- 8 A. Great, I appreciate that. In some cases I would like to
9 look at it.
- 10 Q. I'm going to give them to you, and if you don't need them
11 you don't have to, it's up to you.
- 12 A. Great, thank you.
- 13 Q. Now, this is called "Nicotine. An Old Fashion Addiction,
14 and this is authored by you; is that correct?
- 15 A. Yes.
- 16 Q. And if we go to page 25, I'm going to cull out a quote
17 I've taken there from your publication: "Early tobacco users
18 quickly learned what the Indians had long known. Once you
19 started, you couldn't stop without severe discomfort and a
20 powerful urge to resume the habit." When you wrote that, I take
21 it it was a fair and accurate statement when you put that in
22 your publication; is that correct?
- 23 A. Yes.
- 24 Q. And certainly there is no doubt in your mind that in 1964
25 the Surgeon General was certainly aware of the fact that it was

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1 well known in the general scientific community that it was
2 difficult to quit smoking. Is that fair to say?

3 A. Yes.

4 Q. Now, let me continue with the smoking behavior. Am I
5 correct, it's also your viewpoint as an addiction expert that
6 the reason that people have trouble quitting smoking is because
7 tobacco smoking has pharmacologic or drug effect on the human
8 body which makes smoking difficult to quit; is that correct?

9 A. More specifically, that it has effects on the brain and
10 central nervous system, which I'll use interchangeably.

11 Q. That's fine. That effect -- I see in the literature the
12 word "pharmacologic." What does that word mean?

13 A. Well, pharmacologic doesn't restrict itself to the brain,
14 and nicotine has pharmacological effects in the throat
15 periphery, but it is the effects in the brain or CNS or central
16 nervous system -- and I'll use those terms interchangeably --
17 that are critical in defining the behavior as drug addiction.

18 Q. Okay. Now, the fact that tobacco consumption has had a
19 pharmacologic or drug effect on the human body, that also has
20 been known by scientists for a long time; is that fair to say?

21 A. Well, in the body, but the '64 report acknowledged that
22 it was not clear if the effects in the brain were critical, and
23 they discounted the study by, I think, Domino and Knapp, which
24 showed the EEG effects as not being clearly relevant to humans.
25 So again, it's -- when you say "body," the brain is part of the

1 body, but to me the CNS is a very special place.

2 Q. Well, we're going to get to what was known about the CNS
3 and the brain, so we're going to take it one step at a time to
4 show the Court what was and was not known so we can kind of
5 break this down into pieces that we can have in the record.

6 So, I'm going to start with just a concept that cigarette
7 smoking -- strike the question, that tobacco smoking has
8 pharmacologic or drug effects on the human body. That's been
9 known for a long time; is that correct?

10 A. Yes.

11 Q. In fact, that has been known probably for 200 years also;
12 is that correct?

13 A. Smoking. You didn't specify it to nicotine, right, that
14 smoking did?

15 Q. Yes.

16 A. Then my answer is yes.

17 Q. Okay. So, in fact, could I have JD 001042, tab 2, which
18 I think I handed to you. It's a publication entitled: Advances
19 in Behavior Pharmacology authored in 1984, and I believe you
20 wrote a chapter in this publication which I'll show you. Do you
21 see that chapter I put up on the screen --

22 A. Yes.

23 Q. -- called Behavioral Pharmacology of Cigarette Smoking.
24 Do you see that?

25 A. Yes.

1 Q. And sir, I'm going to call your attention to a quote I'm
2 taking out of that from I believe it's page 132, which says:
3 "That tobacco is endowed with pharmacologic activity has been
4 known for centuries" -- and you give a cite -- "that persons who
5 use tobacco may become compulsive users as may persons who use
6 alcohol and opiates has been recognized for at least 200 years."
7 Do you see that?

8 A. Yes.

9 Q. And so that the Court understands, the general scientific
10 community has known for 200 years that there is pharmacologic
11 activity caused by tobacco that causes people to engage in
12 compulsive uses of tobacco just as people compulsively use
13 alcohol and opiates; is that correct?

14 A. You went further than I did here and further than I would
15 go in that you used, said that the pharmacological activity
16 causes the behavior and 200 years ago, and what I'm saying is
17 that, A, there was pharmacological activity, B, the behavior
18 could be very strong, and I believe at the time of the '64
19 Report they were at the same point, that I concur with where
20 they were, both things happened, but we don't know, putting
21 myself in their shoes, that the pharmacological activity in the
22 brain is driving the behavior.

23 Q. Well, I guess what you said here is: "We've known for
24 200 years that tobacco has a pharmacologic activity" and we've
25 known that for centuries; is that correct?

1 A. Yes.

2 Q. And we've also known for centuries that people who use
3 tobacco become compulsive users as may persons who use alcohol
4 and opiates, that's been known for 200 years?

5 MR. GOLDFARB: Objection --

6 THE WITNESS: Yes.

7 MR. GOLDFARB: -- your Honor, asked and answered.

8 THE COURT: No, objection's overruled. Go ahead, please.

9 BY MR. WEBB:

10 Q. Now, by the way, I take it at the time you wrote this
11 publication, you had not yet started testifying against tobacco
12 companies, had you?

13 A. That's correct.

14 Q. Now, let's go one step further. As far as tobacco having
15 a drug-like or pharmacological effect on the human body, it's
16 your viewpoint as a scientist that the reason for that effect is
17 because tobacco contains a drug called nicotine; is that
18 correct?

19 A. That nicotine is the major factor, and I've always
20 written I believe it's not the only factor, but that nicotine is
21 the major factor and the factor that defines the behavior as
22 drug addiction.

23 Q. Okay. So, on that issue about that tobacco having --
24 it's your opinion that the primary reason why tobacco has a
25 pharmacologic effect on the body is because of the presence of

1 nicotine. Did I say that correctly?

2 A. That's the main effect that pertains to addiction, yes.

3 Q. Okay. And the fact that tobacco contains nicotine and
4 that nicotine has a pharmacologic effect on the human body, that
5 also has been known by scientists for over 200 years; is that
6 correct?

7 A. Yes.

8 Q. And in fact, in that same publication, Advances in
9 Behavior Pharmacology that I gave you which you authored in
10 1984, I'm going to show you a quote from page 197. I think
11 that's tab 7. The quote you had in your publication there is:
12 "Scholars of the 17th and 18th centuries wrote of the addictive
13 nature of smoking." Do you see that phrase "addictive nature of
14 smoking"?

15 A. Yes.

16 Q. "And drew comparisons between tobacco, opium and alcohol
17 use. The powerful pharmacologic properties were rediscovered by
18 the Europeans and great medicinal potential was frequently
19 attributed to the plant. That a specific drug was contained in
20 the tobacco leaf was proven in the early 19th century when
21 nicotine was extracted and scientific investigations of nicotine
22 pharmacology were initiated."

23 Now, when you wrote that in your publication, was that a
24 truthful statement?

25 A. Yes.

1 Q. Now -- so the fact that scholars of the 17th and 18th
2 century wrote of the addictive nature of smoking -- strike the
3 question. Let's go to the extraction of nicotine. When did
4 that actually occur?

5 A. I think it was Posselt and Reiman, 1850s. I don't recall
6 the exact year.

7 Q. Okay. And can you generally describe what they did in
8 that experiment, if you remember?

9 A. I don't recall --

10 Q. Okay.

11 A. -- the details. They extracted and demonstrated that it
12 had activity to serve as a poison.

13 Q. So, as far as what the scientific community generally
14 knew, we know that by that time that that's when nicotine --
15 "scientific investigations of nicotine pharmacology were
16 actually initiated that long ago," that's what you state here?

17 A. Yes, and it was really the turn of the last century that
18 I think was more the heyday of the beginning of nicotine
19 pharmacology.

20 Q. So that's the turn of the century in the early 1900s?

21 A. Yes. 1890s to 1910 a lot of work was done.

22 Q. Okay. So we're talking over a hundred years ago?

23 A. Yes.

24 Q. Now, could I have JD 00 -- strike that. Am I correct,
25 sir, if we go up to the -- let's go up to the early part of the

1 20th century. So, we're a hundred years ago or so?

2 A. Okay.

3 Q. By that time there were already hundreds of studies
4 already conducted that suggested that nicotine was the main
5 pharmacologic factor of significance in the maintenance of
6 tobacco use; is that correct?

7 A. There were hundreds of studies that showed that nicotine
8 was active in the peripheral nervous system and, in fact, were
9 used to help map the peripheral nervous system. Lewin in 1931
10 in English concluded that nicotine must be responsible for
11 smoking. This is a little different than you stated it, but I'm
12 more comfortable with the way I stated it.

13 Q. Well, I'm going to show you how you stated it. I'm going
14 to show you a publication in a moment, but let's stick with it
15 for just a moment, sir.

16 Do you agree that by the time of the early 20th century, a
17 hundred years ago, there were already hundreds of studies already
18 conducted that suggested that nicotine was the main pharmacologic
19 factor of significance in the maintenance of tobacco use?

20 A. I think clearly that research provided the foundation --
21 in fact, the foundation for the modern neuroscience of tobacco
22 and neuroscience in general.

23 Q. Do you also agree that by the early 20th century there
24 was virtually no scientific doubt that nicotine was the
25 pharmacologic reason why people smoked tobacco; is that correct?

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1 A. I've stated that and to a number of key people like
2 Dr. Lewin and others that was the case, but again, by the time
3 the Surgeon General's Report was worked on, it still wasn't
4 clear. So it's not that everyone agreed.

5 MR. WEBB: Your Honor, I'm going to ask to strike the
6 answer I asked a very simple question as to whether or not by the
7 early 20th century there was no scientific doubt. Those kinds of
8 questions, I think, can be simply answered yes or no instead of
9 giving me a speech about 1964.

10 THE COURT: Well, I'm not going to strike the answer. I
11 mean, the final conclusion was, so I'm quoting, so it's "not that
12 everyone agreed." So let's move forward from there.

13 BY MR. WEBB:

14 Q. All right. Well, let me show you what you said, okay?

15 A. Sure.

16 Q. Could I have JD 001049, I think it's tab 8. It's a book
17 entitled: Progress in Clinical and Biological Research, and
18 there's a chapter written by you entitled: The Pharmacologic
19 Basis for Nicotine Replacement. Do you recall that article?

20 A. Yes.

21 Q. I'm going to put that on the screen, and I've taken a
22 quote that I've taken out of your publication, your publication
23 being called the Pharmacologic Basis for Nicotine Replacement,
24 and the first quote I put up on the screen appears on page 42,
25 the top of page 43 that states, and I quote: "Furthermore,

1 hundreds of studies early in the 20th century suggested that
2 nicotine was the main pharmacologic factor of significance in
3 the maintenance of tobacco use," and you cite a Larson, Haag and
4 Silvette publication. Do you see that, sir?

5 A. Yes.

6 Q. When you made that statement in that article, was that a
7 truthful statement?

8 A. It is and the word "suggested" is part of the source of
9 my quibble. If everybody knew it, we wouldn't have needed a '64
10 Surgeon General's Report or '88 report on the question.

11 Q. Well, at least we know -- we know that a hundred years
12 before the Surgeon General's Report -- strike that. We knew a
13 half century before the Surgeon General's Report that there were
14 hundreds of studies suggesting that nicotine was the main
15 pharmacologic factor of significance in the maintenance of
16 tobacco use; is that correct?

17 A. I believe that was my conclusion and still is.

18 Q. That's fine. I'm going to go to page 35, call out 9, and
19 I'm going to read another quote from this article in which you
20 stated: "By the beginning of the 20th century, there was
21 little --" strike that. Let me read it. "For nearly a century
22 it has been suspected that the effects of nicotine are critical
23 to the physiological and behavioral underpinnings of the tobacco
24 addiction process. Nicotine was isolated from tobacco leaves in
25 1828 by those scientists, and pharmacologic studies of the

1 physiologic actions of nicotine were well under way by the 19th
2 century." What I want to focus on is the next statement: "By
3 the beginning of the 20th century, there was little scientific
4 question that nicotine was the pharmacologic mediator of many
5 effects of tobacco sought by its users."

6 When you made that statement, that there was little
7 scientific question, was that a truthful statement?

8 A. It was my conclusion and Dr. Jasinski's conclusion.

9 Q. Pardon me?

10 A. It was my conclusion and Dr. Jasinski's, my coauthor's
11 conclusion.

12 Q. All right. So by the early 20th century, there had been
13 so much scientific research done on nicotine, that there was
14 virtually no doubt in the scientific world that it was nicotine
15 that was causing the compulsive smoking of cigarettes; is that
16 correct?

17 A. Well, that's where you've gone beyond what I said and, in
18 fact, beyond what the literature would show and beyond where the
19 Surgeon General was in '64.

20 Q. Well, okay. I'll leave it the way it is. The statement
21 you made that "there's little scientific question that nicotine
22 was the pharmacologic mediator of many effects of tobacco sought
23 by its users," you at least agree that was a truthful statement
24 at the time that you made it?

25 A. Yes, I just don't speak for the world at that time or

1 now.

2 Q. Well, you don't speak for the world, but you are an
3 addiction expert, is that correct, and you do write prolifically
4 in this area; is that fair to say?

5 A. Yes.

6 Q. And you ultimately ended up being the editor of the 1988
7 Surgeon General's Report; is that correct, the scientific
8 editor?

9 A. One of four scientific editors.

10 Q. By the time we get -- I'm going to jump forward 60 years.
11 Let's go forward to 1961. By the time we get to 1961, there was
12 a major compilation of scientific studies produced by three
13 authors by the name of Larson, Haag and Silvette who published a
14 landmark book that compiled about 6,000 published studies that
15 related to nicotine, smoking and addiction; is that correct?

16 A. Yes.

17 THE COURT: Wasn't that one of the citations in one of Mr.
18 Webb's earlier quotations a few minutes ago?

19 THE WITNESS: Yes.

20 MR. WEBB: And I don't think to be confusing -- these
21 authors were from -- these authors wrote some earlier articles
22 back in the 1940s; is that correct?

23 THE WITNESS: Several of them. Finnegan, Larson & Haag,
24 not Silvette, but the group in various arrangements did a lot of
25 work in the area.

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1 BY MR. WEBB:

2 Q. Now, let me give you that book. Could I have -- it's JD
3 00500, I've given a copy to you. If you need to see the
4 original, I went and got one from the library so I have one
5 here, Doctor. This book, if we look, this is three years before
6 the Surgeon General came out with his 1964 report concluding
7 that cigarette smoking was not addictive but was an habituation;
8 is that correct?

9 A. Correct.

10 Q. Now, in that publication, the authors Larson, Haag and
11 Silvette, they pulled together, number one, their own research,
12 and the research of many other scientists that goes back as long
13 as a hundred years earlier involving tobacco smoking, nicotine
14 and addiction; is that correct?

15 A. Yes.

16 Q. Now -- and as far as what detailed knowledge the
17 scientific community had about nicotine and its role in the
18 smoking behavior by 1961, before the Surgeon General's Report,
19 I'm going to call your attention to some passages from this
20 compilation of scientific studies. Let me go first to -- as far
21 as how important the role of nicotine is and the smoking of
22 tobacco, could you go to page 532? And I'll put it up on the
23 screen. There's a call out I'm going to call to your attention
24 to, if you want to look at page 532, and I've put it on the
25 screen. This is what the author said in 1961: "The fact -- a

1 matter of almost universal knowledge and experience -- that
2 smokers will not, except under duress -- will not, except under
3 duress, accept completely denicotinized cigarettes or cigars or
4 tobacco substitutes, is, perhaps, the best answer to the role of
5 nicotine in tobacco smoking." Let me stop there. Do you agree
6 with that, as an addiction expert, do you agree with that
7 statement?

8 A. Yes. There -- it says that smokers -- we know that for
9 some smokers they can switch, and the Finnegan, Larson and Haag
10 study that is cited in this chapter, not right here, showed that
11 some smokers could switch, but a lot of smokers couldn't. I
12 mean, denicotinized is unacceptable, I think, for most smokers,
13 but it says "smokers" as though it's all of them, and they knew
14 that wasn't true.

15 Q. Well, do you want me -- I guess you agree with what they
16 said as long as it says: "Most smokers will not, except under
17 duress, accept completely denicotinized cigarettes or cigars or
18 tobacco substitutes, is, perhaps, the best answer to the role of
19 nicotine in tobacco smoking." If we change the statement, do
20 you agree with it then?

21 A. Yes.

22 Q. Okay. Now, so the next statement they make, which by the
23 way, there's no doubt in your mind that first statement that I
24 just read off was well known in the general scientific community
25 by 1961; is that correct?

- 1 A. At a general level.
- 2 Q. In fact, we know the Surgeon General cited the Larson
3 compilation in the 1964 Surgeon General's Report; is that
4 correct?
- 5 A. That's correct.
- 6 Q. I'll show that to you in a moment. So there's no doubt
7 that the Surgeon General in 1964 knows what the general
8 scientific community knows that I'm now showing you from this
9 book; is that fair to say?
- 10 A. They cited this reference, so they at least had access to
11 this material.
- 12 Q. Okay. Now, the next statement that's made that's being
13 known in the general scientific world in 1961: "That man smokes
14 not in spite of, but because of nicotine." Do you agree that
15 that's an accurate statement as of what the general scientific
16 community knew in 1961?
- 17 A. I think it was an insightful statement for these authors;
18 it wasn't held by everyone, and, indeed, the Surgeon General's
19 Report itself referred to psychoanalytic theories of -- I mean,
20 a variety of other reasons. Again, I just don't want to go
21 beyond -- What they said I agree with. I think they were right
22 on that, ahead of their time in some ways, but that doesn't mean
23 that everyone agreed or that the general scientific community --
24 that's a little different.
- 25 Q. At least two authors were well respected within their

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1 profession at the time they authored this book; is that fair to
2 say?

3 A. Yes.

4 Q. And you respected them, did you not?

5 A. I respected them.

6 Q. Yes. And the next statement: "The idea that tobacco
7 habituation is developed and continued despite the action of
8 nicotine, not because of it, is seldom expressed. Lewin (1931)
9 remarked that many proposals have been made for withdrawing the
10 venom from tobacco. The simplest idea of denicotinizing the
11 leaves has been realized in quite a number of processes.
12 Castrated tobacco has been prepared in this way as with other
13 similar substances. Some people smoke cigars without nicotine.
14 If they find pleasure in doing so, they are to be congratulated,
15 although the impression persists this is not the case. For in
16 filtering the nicotine from tobacco smoke, the tobacco loses its
17 virtue: 'It is like wine without alcohol'."

18 Now let me go to another passage in their book about the
19 pharmacological effects of nicotine on the human body. Could I
20 go to page 532, please, and I've taken a quote, if you want to
21 find the page or you can follow along, whatever is easier for
22 you, Doctor. In this book in 1961, these authors write: "The
23 pharmacological effects of nicotine. Preceding chapters have
24 cited evidence that on many isolated and in-situ issues and
25 organs, and on many functions of the organism as a whole, the

1 characteristic action of nicotine is stimulation followed by
2 depression. This same effect may obtain on the higher nervous
3 centers in smoking, and Dixon, among others, have attributed the
4 pleasure of smoking in part to the initial stimulating and later
5 narcotic properties of nicotine. And nicotine has an even more
6 interesting biphasic action, unique among 'pleasure-poisons'.
7 Almost two centuries ago, Alston quoted the pipe-smoking country
8 people saying -- and he goes on with a quote there -- but the
9 most important biphasic action has been stated concisely by
10 Johns. 'We use tobacco because, when the nervous system is
11 stimulated, nicotine sedates; and when it is depressed, nicotine
12 stimulates'."

13 So that at least that statement made by these researchers
14 in 1961 about the biphasic action that we use tobacco because
15 when the nervous system is stimulated, nicotine sedates, and when
16 it is depressed, nicotine stimulates, you agree that
17 pharmacologic action on the nervous system was known by the
18 general scientific community as set forth in this document?

19 A. Yes.

20 Q. And that it goes on to state: We use tobacco -- excuse
21 me -- "Wilder also referred to observations that the cigarette
22 obviously serves a dual purpose: It will mostly pick us up when
23 we are tired or depressed, and it will relax and sedate us when
24 we are tense or excited." Did I accurately read that?

25 A. Yes.

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1 Q. Now, as you look at the information communicated in what
2 I just read to you, you do agree that the pharmacological
3 effects of nicotine as set forth in what I just read to you were
4 generally known by the scientific community by the time the
5 Surgeon General authored the 1964 Surgeon General report; is
6 that correct, Doctor?

7 A. I think at least by specialists in this area.

8 Q. Now, let me go to page 533, please. Let me go to page
9 533 to another quote. On page 533, this is tab 11 C, I'm going
10 to put on the screen another quote from the textbook we're
11 reading from: "In modern terminology, tobacco might well be
12 termed a tranquilizing drug, and so Pomeranze apparently
13 considers it. This concept has been formally advanced by the
14 compilers," referring to the three authors. "Weschler (1958)
15 reported that encephalograms --" what is an encephalogram?

16 A. We also often call it EEG, but it's essentially measuring
17 the electrical activity from various points on the cranium.

18 Q. In the brain?

19 A. The electrical activity is emitted from the brain.

20 Q. Now, they reported that, following cigarette smoking,
21 "that encephalograms made on individuals following cigarette
22 smoking might be interpreted as an abnormal attention response.
23 He too stated that tobacco is smoked for its relaxing effects
24 and the agent most likely responsible has been thought to be
25 nicotine. Asher termed tobacco and alcohol 'social sedatives'

1 and added they give rise to much pleasure and also much
2 illness."

3 Now, as far as whether there were withdrawal symptoms, if
4 someone tries to stop smoking, was that something that was known
5 by the general scientific community before the Surgeon General
6 authored the 1964 Surgeon General report, sir?

7 A. Different individuals suspected it, worked on it. The
8 1964 Surgeon General's Report concluded there was not sufficient
9 evidence for withdrawal, and I would concur with -- I think
10 their conclusion was reasonable given the evidence. At the same
11 token, there were clearly signs that there may be withdrawal.

12 Q. Okay. Well, let's look at what these authors said in
13 1961. I want to go over to the page 534, tab 11 D.

14 Sir, this is what in 1961 these authors stated: "Several
15 writers have stated or implied that smokers continue to smoke
16 simply to prevent the occurrence of abstinence symptoms.
17 Popularly put, the average smoker smokes because he is uneasy,
18 uncomfortable, sometimes in real distress if he does not smoke.
19 The habitual smoker suffers all the time when not under the
20 influence of nicotine, when the damage -- from the damage that
21 smoking has done him. Medically phrased, there is little
22 euphoria in tobacco smoking except in the return of approximate
23 normality in the addict when he indulges." And also I'm going to
24 go to page 539, tab 11 E. And here are the symptoms that are
25 being reported in 1961 when people try to quit smoking. Are you

1 are you with me, Doctor?

2 THE COURT: What is the objection?

3 MR. GOLDFARB: The objection is Mr. Webb has read three
4 extensive passages from this compendium without asking a
5 question.

6 THE COURT: Is this the last passage and then there will
7 be a question?

8 MR. WEBB: Yes, I'm on withdrawal and I'll ask him --

9 MR. GOLDFARB: I just want to note, he read separate
10 sections that had nothing to do with withdrawal and he didn't ask
11 questions of the witness about those passages.

12 THE COURT: Go ahead.

13 BY MR. WEBB:

14 Q. On the subject of withdrawal, according to 1961, the
15 literature according to these authors reflected that: "Among
16 such symptoms are irritability or restlessness," citing certain
17 authors, "dullness, disturbance of sleep, either insomnia or
18 drowsiness, amnesia, impairment of concentration, judgment or
19 performance skills, anxiety, craving, an intolerance or a
20 distaste for tobacco smoke has been emphasized."

21 Now, do you agree, by the way, that by the time the
22 Surgeon General wrote the 1964 Surgeon General's Report, that
23 what I read off about withdrawal symptoms were generally known in
24 the scientific community at that time?

25 A. Well, you said "withdrawal symptoms," and it wasn't

1 generally known as evidenced by the Surgeon General's Report.
2 Dr. Sievers, who is the addiction expert, who said thereby no
3 means is a tobacco withdrawal syndrome, so their report
4 described this evidence, if you will, as antidotal. I think
5 that's a reasonable characterization, so I think the Surgeon
6 General's Report itself gives you the answer. Some people
7 thought there was withdrawal, others, including the Surgeon
8 General's Advisory Committee, did not believe it.

9 Q. Well, let me ask you this: The information set forth on
10 that paragraph before you, do you agree that information
11 regarding those symptoms of withdrawal, if you stop smoking,
12 those symptoms being the result of abstaining from smoking were
13 generally known in the scientific community at the time that the
14 authors wrote this document?

15 A. I really don't know how widely they were known. There is
16 no question that there were publications.

17 Q. I'm going to get to that.

18 A. I don't know how widely they were known.

19 Q. I'll get to the Surgeon General's Report in a few
20 minutes. The Surgeon General actually cites these symptoms in
21 the report; is that correct?

22 A. Yes, and then concluded there was no withdrawal syndrome.

23 Q. The Surgeon General acknowledged that these symptoms have
24 been reported in the literature; is that correct?

25 A. Yes, it is.

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1 MR. WEBB: Your Honor, I can go longer. Is this a good
2 time?

3 THE COURT: No, I think this is a good time, Mr. Webb.
4 All right, Doctor, you may step down. Thank you. We'll begin
5 tomorrow at 9:30. I just want to warn everybody, I have an 8:00
6 doctor's appointment. I expect to be here on time. If I'm a few
7 minutes late, there shouldn't be a revolution in the ranks.
8 That's all. I'll see you all tomorrow. Mr. Well.

9 MR. WELLS: Your Honor, with respect to the other end of
10 the day, that is 4:30, on behalf of those who have to get trains
11 and planes right after court tomorrow, could we -- I would ask
12 the Court if we could stop at 4:30. Is that okay?

13 THE COURT: 4:30, yes, that's when we're supposed to stop.

14 MR. WELLS: Okay.

15 THE COURT: All right. 4:30.

16 (Proceedings adjourned at 4:41 p.m.)

17

18 C E R T I F I C A T E

19

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

22

23 -----
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