

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.
	.	December 1, 2004
	.	
Defendants.	.	
.	.	

VOLUME 37
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	U.S. DEPARTMENT OF JUSTICE Civil Division Sharon Y. Eubanks, Director 1331 Pennsylvania Avenue, N.W. Suite 1150 Washington, D.C. 20004 202.616.8280
	U.S. DEPARTMENT OF JUSTICE Civil Division Stephen D. Brody, Deputy Director 1331 Pennsylvania Avenue, N.W. Suite 1150 Washington, D.C. 20004 202.616.1438
	U.S. DEPARTMENT OF JUSTICE Criminal Division Frank Marine, Sr. Litigation Counsel, Organized Crime and Racketeering Section 1301 New York Avenue, N.W. Suite 700, P.O. Box 27598 Washington, D.C. 20530 202.514.0908

Scott L. Wallace, RDR, CRR
Official Court Reporter

APPEARANCES: Cont.

U.S. DEPARTMENT OF JUSTICE
Civil Division
Renee Brooker, Assistant Director
Tobacco Litigation Team
1331 Pennsylvania Avenue, N.W.
Suite 1150
Washington, D.C. 20004
202.616.3797

U.S. DEPARTMENT OF JUSTICE
Criminal Division
Andrew N. Goldfarb, Trial Attorney,
Michele Gluck, Senior Trial
Attorney,
Tobacco Litigation Team
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
202.616.4875

For Defendant:
Philip Morris USA,
Inc.

WINSTON & STRAWN
Dan K. Webb, Esq.
Thomas J. Frederick, Esq.
35 West Wacker Drive
Chicago, IL 60601-9703
312.558.5700

HUNTON & WILLIAMS
Patricia M. Schwarzschild, Esq.
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
804.788.8728

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON
James Brochin, Esq.
Theodore Wells, Esq.
1285 Avenue of the Americas
New York, NY 10019
212.373.3000

For Defendant:
Lorillard Tobacco
Company

THOMPSON COBURN
J. William Newbold, Esq.
William B. Minton, Esq.
Richard P. Casetta, Esq.
One U.S. Bank Plaza
St. Louis, MO 63101
314.552.6000

Scott L. Wallace, RDR, CRR
Official Court Reporter

For Defendant:
Brown & Williamson
Tobacco Corporation

KIRKLAND & ELLIS, LLP
David M. Bernick, Esq.
Kenneth N. Bass, Esq.
200 East Randolph Drive
Chicago, IL 60601
312.861.2248

For Defendant:
R.J. Reynolds Tobacco
Company

JONES DAY
Jonathan M. Redgrave, Esq.
Peter J. Biersteker, Esq.
Robert Francis McDermott, Esq.
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
202.879.3939

For Defendant:
British American
Tobacco
(Investments), Ltd.

CHADBOURNE & PARKE, LLP
David Wallace, Esq.
30 Rockefeller Plaza
New York, NY 10112
212.408.5498

For Defendant:
Liggett Group, Inc.

KASOWITZ, BENSON, TORRES & FRIEDMAN
Aaron H. Marks, Esq.
Nancy Straub, Esq.
1633 Broadway
New York, NY 10019
212.506.1700

For Defendant:
Tobacco Institute

COVINGTON & Burling
Phillip Dube, Esq.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20009

For Defendant:
The Council for
Tobacco Research USA,
Inc.

THOMPSON COBURN
J. William Newbold, Esq.
William B. Minton, Esq.
Richard P. Casetta, Esq.
One U.S. Bank Plaza
St. Louis, MO 63101
314.552.6000

For Defendant:
British American
Tobacco Australian
Services, Ltd.

SHAW PITTMAN, LLP
Jack McKay, Esq.
Alvin Dunn, Esq.
2300 N Street, N.W.
Washington, D.C. 20037
202.663.8355

Scott L. Wallace, RDR, CRR
Official Court Reporter

Court Reporter: Scott L. Wallace, RDR, CRR
Official Court Reporter
333 Constitution Avenue, N.W.
Room 6814, U.S. Courthouse
Washington, D.C. 20001
202.326.0566

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

2 (9:33 a.m.)

3 THE COURT: Good morning, everybody. Well, this is United
4 States versus Philip Morris, CA 99-2496, day 37. I don't know
5 whether the days are getting longer for everybody, it feels that
6 way to me. But that's because I'm going to deal with some of
7 your discovery issues, and you can always tell what a good mood
8 that puts me in everybody. Okay. Let us finish. You are still
9 under oath, Doctor. Did you have a question?

10 THE WITNESS: Yes. I made -- I answered a question of
11 yours yesterday that when I went home I was thinking it could
12 have been misleading. If I could take 20 or 30 seconds, I would
13 love to correct it for the record.

14 THE COURT: Any objection, anybody? I think we need a
15 correction, especially since I asked the question.

16 MR. WEBB: I have no objection.

17 THE COURT: All right, go ahead, please.

18 THE WITNESS: In dealing with the withdrawal intoxication
19 tolerance, the Dr. Ellis criteria, I used the example of
20 antihistamines, and some antihistamines can produce intoxication,
21 even hallucinations. I use that as an example. We learned in
22 pharmacology that's not enough to make a drug addictive, but what
23 I did not want to do is leave any impression that antihistamines
24 or cold medicines meet criteria for dependence or withdrawal by
25 DEA or APA criteria. And probably the best example of the

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1 disconnect are probably the millions of Americans that use pain
2 medications. Schedule II medications become physically
3 dependent, may experience withdrawal, but don't realize they're
4 being detoxed by their doctors when it's time to stop. And on a
5 percentage basis it's rare for them to develop what we call
6 dependence or addiction in the sense of compulsive drug seeking.

7 THE COURT: Schedule II includes what? Is that Morphine?

8 THE WITNESS: Schedule II is Morphine, Demerol, oxycodone
9 drugs.

10 THE COURT: And you include Oxycontin?

11 THE WITNESS: Oxycodone. Oxycontin is a Schedule II drug.
12 That's a brand name of a particular oxycodone drug. And all of
13 these are Schedule II. People that use them as they're supposed
14 to develop physical dependence, if they stop using them too
15 quickly they'll experience withdrawal, so their doctors, when
16 it's time, gradually discontinue and on a percentage basis very
17 few ever seek the drugs or meet criteria for what we call
18 dependence or addiction, but --

19 THE COURT: I understand, thank you very much.

20 MR. GOLDFARB: Your Honor, I apologize. I didn't know
21 that you were going to start -- we were going to start on
22 substance with Dr. Henningfield. Mr. Newbold indicated he just
23 had a brief comment he wanted to put on the record.

24 MR. NEWBOLD: Thank you. Bill Newbold for Lorillard.
25 Your Honor, out of an abundance of caution, Ron Milstein, the

1 general counsel of Lorillard, will be testifying in this case
2 some time after Christmas, but in the furtherance of his duties,
3 I wanted to make sure that it was appropriate for him to help
4 prepare Martin Orlowsky for a deposition in an ALF lawsuit, and
5 also to attend a deposition of Cheryl Heaton, who is the
6 president of ALF, who will also be a fact witness in this
7 lawsuit. I discussed it with the government and they said that
8 they had no objection to that.

9 THE COURT: It's a totally unconnected separate lawsuit,
10 right?

11 MR. NEWBOLD: Yes, ma'am.

12 THE COURT: Thank you for letting me know, but that's
13 fine.

14 MR. NEWBOLD: Thank you, Your Honor.

15 CONTINUED REDIRECT EXAMINATION OF JACK HENNINGFIELD, Ph.D.

16 BY MR. GOLDFARB:

17 Q. Good morning, Dr. Henningfield.

18 A. Good morning.

19 Q. Again, for the record, Andrew Goldfarb for the United
20 States. Dr. Henningfield, I'm going to try to move quickly
21 through some different areas that were covered on
22 cross-examination and hopefully finish with dispatch.

23 First, I want to talk to you a little bit -- you were
24 questioned extensively on cross-examination about the 1988
25 Surgeon General's Report. Do you recall that?

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1 A. Yes.

2 Q. And your involvement and the process by which that report
3 was created?

4 A. Yes.

5 Q. Many of Mr. Webb's questions rested on the premise that
6 the purpose of the '88 Surgeon General's Report was to determine
7 whether smoking or nicotine was addictive, is that a correct
8 characterization of the purpose of the '88 report?

9 A. No.

10 Q. How would you characterize the purpose of the 88's
11 record?

12 MR. WEBB: Your Honor, I just object. This is right in
13 the face of his direct examination he sets forth his view of the
14 purpose so this is truly just repeating the direct examination,
15 and -- time is time. I object to the form of the question and
16 repeating the direct.

17 MR. GOLDFARB: Your Honor, Mr. Webb spent three hours
18 talking about the --

19 THE COURT: The objection's overruled.

20 MR. GOLDFARB: Thank you.

21 BY MR. GOLDFARB:

22 Q. It was to resolve the issue, if you will, once and for
23 all by thoroughly exploring every line of evidence that we could
24 conceive and that reviewers raised on the addiction issue from
25 the pharmacology, to biochemistry, to the social issues to the

1 fact that a lot of people quit on their own, every single issue
2 that was conceivable was explored.

3 And Mr. Webb repeatedly suggested that the criterion in
4 the '88 report were essentially made up for the specific purpose
5 of evaluating nicotine. Do you recall questions to that effect?

6 A. Yes.

7 Q. Is that a true characterization of how the report was and
8 how the criteria were developed for the report?

9 A. No, it isn't.

10 Q. Can you describe for the Court what -- how those criteria
11 are articulated?

12 A. Sure. The report followed the APA for the clinical
13 phenomena, their criteria of dependence and withdrawal and
14 listed the criteria, and frankly, went beyond APA in updating
15 the knowledge base for APA, which subsequent APA DSMs relied
16 upon in their updates of DSM.

17 For what we call technically abuse liability, or
18 dependence potential assessment, there were extensive sections
19 using the same kinds of methodologies relying on the same kinds
20 of comparisons with other drugs as we do at NIDA when we
21 evaluate any drug for abuse potential or dependence potential or
22 addiction potential, and the general criteria were then
23 summarized in the front of the report.

24 Q. And just to be clear, the Court had asked you a question
25 at one point about whether the term "addiction" was used to

1 communicate the -- to communicate clearly with the public or
2 because it met criteria for addiction. Do you recall the Court
3 asking questions to that effect?

4 A. Yes.

5 Q. And your response was one of the purposes was to
6 communicate clearly the scientific results and the conclusions
7 of the report?

8 A. It's to communicate, and again, we discuss right in the
9 beginning of the report the interchange ability -- what you do
10 in any paper, you say this is how I'm going to use the term, and
11 that's what we did at the beginning of the report.

12 Q. And just so the record is clear -- excuse me did you
13 finish your answer in?

14 A. Yes, I'm sorry.

15 Q. And just so the record is clear, as to the other part of
16 the Court's question that you wanted to also indicate that
17 nicotine met the criteria for addiction, did it also satisfy
18 that part of the Court's question?

19 A. Yes, it did, and part of the reason for the summary, by
20 the way, was that it was pointed out by nonaddiction experts,
21 like Dr. Burns, who is mentioned, that this is a technical
22 field, if you're not an addiction expert, this is a technical
23 field, and they said it would be very helpful to have it laid
24 out, the road map in the front to help people follow it. I'm
25 boiling it down, but I think that's the essence of why we

1 articulated right at the beginning a summary of the criteria.

2 Q. And I may ask you another question about that in a
3 moment. You referred to Dr. Burns' comments and do you recall
4 Mr. Webb also showed you the comments of Don Shopland and
5 Dr. Cullen?

6 A. Yes.

7 Q. And he showed you comments all to that same effect?

8 A. Yes.

9 Q. Did those reviewers have any disagreement with the
10 scientific conclusions in the report?

11 A. I don't recall any major disagreement with scientific
12 conclusions, or the conclusions that nicotine met criteria for
13 dependence and addiction. They all provided very extensive
14 comments that were helpful.

15 Q. And the comments that Mr. Webb showed you, how would you
16 characterize the comments that those reviewers made to the draft
17 they had about the absence of a clear articulation of the
18 criteria?

19 A. They're the kind of comments that you want to get when
20 you're early -- when you haven't completed the process, it's
21 like getting manuscript reviews back, you cringe a little bit,
22 you'd like to think you got it perfect, and thoughtful people
23 say you've got more work to do to make it clear and well
24 presented.

25 Q. Okay. And you took those to heart?

1 A. Yes. The process is that you have to address every
2 single comment that comes in. It doesn't mean that you change
3 it in the way that everybody says or you would really have the
4 classic camel which is horse designed by committee.

5 Q. And just again, you made reference to the terminology,
6 let me just direct your attention to page 7 of the Surgeon
7 General's Report, and for the record, this is U.S. Exhibit
8 Number 64591.

9 Dr. Henningfield, this is the page of the report that
10 Mr. Webb showed you and he focused on the bottom part of the
11 report, which is the articulation of the primary criteria.

12 A. Yes.

13 Q. I want to focus on just a part of that page that Mr. Webb
14 didn't show you, because the Court had also asked the question
15 about terminology and the -- whether there was confusion or --
16 in terms of how the terms were used in the report. If you can
17 go up a little bit, please, in the page. I want to go up in the
18 page to the text, the paragraph beginning "the terms".

19 Dr. Henningfield, can you please read that paragraph for
20 the record, please?

21 A. "The terms drug "addiction" and drug "dependence" are
22 scientifically equivalent. Both terms refer to the behavior of
23 repetitively ingesting mood altering substances by individuals.
24 The term drug "dependence" has been increasingly adopted in the
25 scientific and medical literature as a more technical term,

1 whereas the term drug "addiction" continues to be used by NIDA
2 and other organizations when it is important to provide
3 information at a more general level. Throughout this report,
4 both terms are used and they are used synonymously."

5 Q. And so you did refer generally to the first chapter of
6 the report and this is one of the portions that you were
7 referring to when you referred the Court generally to your
8 discussion of the terminology?

9 A. Yes.

10 Q. Okay. Just so the record is clear, in response to some
11 of Mr. Webb's questions, and the discussions of intoxication,
12 you made a few comments about intoxication, you said that was
13 found in the '88 report. Did the '88 report assess whether, in
14 light of subsequent scientific information, nicotine was
15 addictive even by the 1957 WHO criteria?

16 A. It would be addictive by those criteria with the
17 exception of the personality disorder, and I think we understand
18 that virtually anyone with a healthy functioning nervous system
19 can principally become addicted to these classes of drugs,
20 whether they're nicotine, cocaine or what have you.

21 THE COURT: I didn't -- I'm sorry, finish your sentence,
22 please.

23 THE WITNESS: Nicotine can produce intoxication. That's
24 an effect of nicotine overdose. Intoxication is not listed by
25 APA as a clinical syndrome because in practice the actual

1 frequency is relatively rare, except sometimes in first time
2 using kids.

3 THE COURT: But are you saying that nicotine could have
4 satisfied the WHO standard, or criteria, rather, which included
5 the requirement of intoxication?

6 THE WITNESS: Yes, because nicotine can pharmacologically
7 intoxicate and that is an effect of nicotine overdose, but it is
8 not a syndrome recognized by APA because in practice it's
9 relatively rare that it occurs, and I agree with APA, just
10 because a drug can do something, doesn't mean that's how you
11 categorize the drug in the same way that just because certain
12 antihistamines can cause hallucinations, I think it would be
13 inappropriate to call them hallucinogens.

14 BY MR. GOLDFARB:

15 Q. And I want to turn now to just a brief discussion of some
16 more information -- some more questions that Mr. Webb covered
17 with you about the development of the 1988 report. Let me call
18 up JD 054316.

19 Dr. Henningfield, do you recognize this as the April 29th
20 1987 cover memorandum to the outline that Mr. Webb spent a fair
21 amount of time talking about, which was a preliminary outline
22 for what turned out to be the 1988 Surgeon General's Report?

23 A. Yes.

24 Q. And the cover memo is a note to yourself, Dr. Benowitz,
25 Dr. Grunberg, and Harry Landow, Dr. Landow?

1 A. Yes.

2 Q. Now, Mr. Webb suggested by his questioning that the --
3 between the April 13th outline that Mr. Webb also showed you,
4 which was JD 066099, that April -- that initial April 13th
5 outline and this April 27th or April 29th memorandum, that
6 the -- essentially the terminology in the outline switched
7 entirely from "dependence" to "addiction". Do you recall
8 questions to that effect?

9 A. Yes.

10 Q. Okay. And if I could turn to bullet point 7, which is, I
11 think, on the last page. Just pull out the section Roman VII,
12 please. The whole Roman section.

13 Now, Mr. Webb, read the title of the section -- of the
14 outline, preliminary outline which is titled: Tobacco Use
15 Compared to Other Addictions. And then he read the first two
16 letters, the sub letters, of this section called General Concepts
17 of Drug Addiction and Relationship Among the Use of Tobacco and
18 Other Addicting Substances.

19 A. Yes.

20 Q. And he was suggesting by that that the terminology
21 changed from "addicting" -- from "dependence" and "dependency"
22 terminology to "addiction"?

23 A. Yes.

24 Q. And he didn't read C which is right below that. Can you
25 read what bullet point C says?

1 A. Sure. That's "characteristics of dependence-producing
2 chemicals, bioassays and clinical characteristics."

3 Q. Is this outline consistent with your recollection that at
4 this point in time before the report, or the development of the
5 report, the terms "dependence" and "addiction" were continuing
6 to be used interchangeably?

7 A. Yes, we were using both terms at that time and throughout
8 the report and in our discussions.

9 Q. Okay. Now, let's look at the report itself to see what
10 these corresponding sections of the report itself were titled.
11 If we could call back up and put them parallel please, U.S.
12 Exhibit 64591.

13 Now, if you look, that bullet point 7 from the outline
14 that Mr. Webb showed you, that April 27th 1989 outline was
15 called: Treatment of Tobacco Addiction. I'm sorry, it was
16 called -- can you call up chapter 4, please. It was titled:
17 Tobacco Use as an Addiction.

18 THE COURT: No, it doesn't say that. Wait a minute.
19 You're confusing me, Mr. Goldfarb.

20 MR. GOLDFARB: Okay, if I could just have a second, maybe
21 we could straighten it out so we could have them parallel so the
22 record will reflect.

23 BY MR. GOLDFARB:

24 Q. Now, --

25 THE COURT: Well, I think I see your point from what

1 flashed on earlier.

2 BY MR. GOLDFARB:

3 Q. Well, if we look, Dr. Henningfield, if we look back at
4 the table of contents of the 1988 Surgeon General's Report, and
5 we look at the title of chapter 5, can you read what the title
6 of chapter 5 is?

7 A. Tobacco Use Compared to Other Drug Dependencies.

8 Q. Okay. And in the 19 -- April 1987 report, again, the
9 title -- the section, the corresponding title that Mr. Webb read
10 to you is Tobacco Use Compared to Other Addictions?

11 A. Yes.

12 Q. Okay. So, Dr. Henningfield, was Mr. Webb, in fact,
13 correct that in April of 1987, before the report was ever
14 drafted, you and the other scientific editors had determined to
15 use the term "addiction" to the exclusion of "dependency" in the
16 report?

17 A. If that was implied, it wasn't true.

18 Q. Now, you referred earlier, and we just discussed a little
19 bit earlier, some of the peer reviews that you received from
20 Dr. Burns and others. I just want to show you Dr. Burns
21 quickly, one of his comments on this report, and it's JD 02117,
22 and I won't go back over, of course, what you have testified to
23 about his comments as to the criteria, but I do want to just
24 highlight something on page 2 of Dr. Burns' report, and that's
25 this -- can you read, this is on page 2 of Dr. Burns' peer

1 review on the Surgeon General's Report. Can you read the
2 paragraph that I just bracketed?

3 A. Yes. "Having concluded that smoking is addicting, it is
4 then appropriate to change the title of the volume to the health
5 consequences of smoking: Addiction."

6 Q. Okay. And just from the front of this document,
7 Dr. Henningfield, what's the date of Dr. Burns' review?

8 A. March 3, 1988.

9 Q. And the report was released when?

10 A. Mid May, '88.

11 Q. Okay. So what does this tell you about Mr. Webb's
12 suggestion that in April of 1987, before the report was ever
13 developed, the scientific editors and the Surgeon General had
14 decided to put the word "addiction" in the title of the '88
15 Surgeon General's Report?

16 A. That implication wasn't true.

17 Q. Now, following on the discussion of the peer review, do
18 you also recall Mr. Webb asking you questions about whether your
19 approved consulting work with Pharmacia influenced the content
20 of the 1988 Surgeon General's Report?

21 A. Yes.

22 Q. Did it?

23 A. No.

24 Q. Why not?

25 A. Well, for several reasons. First, the section that dealt

1 with treatment was not under my primary purview, although I have
2 joint responsibility for all sections. Mainly, however, is the
3 process, and it was the process that Dr. Davis and others at the
4 Office on Smoking and Health raised when I initially raised my
5 concern that my consulting and testimony in a Court case might
6 reduce my credibility as an editor, and I suggested they find
7 someone else. And he and the office stated that the process
8 made sure that there isn't anyone that is -- including the
9 Surgeon General himself -- in the position to bias the outcome
10 of the report, and it was for that reason that we used a couple
11 of people that we knew had worked with tobacco industry, because
12 we felt in certain domains they were the most knowledgeable
13 people in the area, and we relied on the review process to make
14 sure the report was tight, scientifically solid and not biased.

15 Q. Do you have any recollection about how many people
16 prepared draft chapters or portions of the report?

17 A. In the ballpark of 50 to 100, and that was because the
18 report involved so many different areas. The treatment section,
19 for example, included different kind of treatment, behavioral
20 treatment, pharmacological treatment. I don't recall how many
21 people contributed. The comparison to other drug dependency
22 involved many authors. So there are many different authors who
23 would sometimes overlap, and the role of editors was to bring it
24 together.

25 Q. And do you recall how many people acted as peer reviewers

1 for different portions of the report?

2 A. I haven't counted for quite a while. In the front of the
3 report, I believe, the peer reviewers and the senior reviewers
4 are in the ballpark of 100. Maybe it's 80, maybe it's 110. It
5 was a lot by any standard I was accustomed to.

6 Q. And how does the review process for a Surgeon General's
7 Report, and in particular the 1988 report, compare to the review
8 process for an article that appears in a peer-reviewed
9 scientific or medical journal?

10 A. It's -- there's no comparison. It's a glider compared to
11 a rocket ship, and it's an open process. You've got a committee
12 of people sitting around going over every single comment that's
13 come in to make sure that people concur that it's been
14 appropriately dealt with, and that includes people that are more
15 or less disinterested as to the -- what the report says, but who
16 are very concerned about the process.

17 Q. And just so the record is clear in your testimony, which
18 are you comparing to a glider and which to a rocket ship?

19 A. The article including my own article are the glider, the
20 Surgeon General's Report is the rocket ship.

21 Q. Moving to a different area, Dr. Henningfield, do you
22 recall being asked by various counsel about the role of pH and
23 ammonia in nicotine delivery?

24 A. Yes.

25 Q. Sir, what's the importance to your conclusions of the

1 documents that you cite in your direct testimony about
2 defendants' research on the issue of pH, ammonia and nicotine
3 delivery?

4 MR. WEBB: I'm just going to object, this is in his direct
5 examination what he thinks this is, so I object to the form of
6 the question, it's in the direct.

7 MR. GOLDFARB: Your Honor, this is just a -- I'm just
8 trying to orient the witness so --

9 THE COURT: I think he's very oriented. You can move on.
10 The objection's sustained. You can certainly go into this
11 subject.

12 MR. GOLDFARB: Okay.

13 BY MR. GOLDFARB:

14 Q. Dr. Henningfield, does the defendants' manipulation and
15 research on pH, does that constitute, in your view, a major
16 factor in how they control nicotine delivery to smokers?

17 A. I do not know the degree to which it actually affects
18 nicotine delivery to people in commercially marketed cigarettes,
19 and that was not my main point in my discussion of the topic.

20 Q. Okay. And Mr. Webb asked you a question to -- where he
21 said that it's important to distinguish between facts and
22 scientific hypotheses. Do you recall that?

23 A. Yes.

24 Q. Dr. Henningfield, is it a scientific fact that if you
25 raise the pH the amount of free nicotine in the smoke goes up?

- 1 A. That's a fact.
- 2 Q. And is it a scientific fact that unprotonated nicotine,
3 so called free nicotine, is absorbed faster across biological
4 membranes?
- 5 A. Across membranes of the mouth and oral mucosa.
- 6 Q. Did the defendants know these scientific facts?
- 7 A. Their documents indicate that they did, that they
8 accepted them as facts.
- 9 Q. Okay. And Dr. Henningfield, do you conclude that
10 defendants incorporated ammonia technologies, at least in part,
11 with the intent of taking advantage of these scientific facts?
- 12 MR. WEBB: Your Honor, I'm going to object. This witness
13 is testifying to someone else's intent.
- 14 THE COURT: Sustained, and also totally leading. This is
15 your witness, not an adverse witness.
- 16 BY MR. GOLDFARB:
- 17 Q. Dr. Henningfield, do you recall being asked about the
18 Tobacco Working Group?
- 19 A. Yes.
- 20 Q. And do you recall, I think both Mr. Webb and Mr. Minton
21 made reference to the point that in the mid 70s the Tobacco
22 Working Group discussed with some of the representatives of the
23 tobacco companies the idea of ammoniation and pH?
- 24 A. Yes.
- 25 Q. As part -- okay. And were defendants, Dr. Henningfield,

1 to your knowledge, were they researching the idea of pH and free
2 nicotine before the Tobacco Working Group suggested it in 1976?
3 A. Yes.
4 Q. And do you cite documents in your testimony to that
5 effect?
6 A. Yes, I do.
7 Q. I just want to show you.
8 Dr. Henningfield, I handed you U.S. Exhibit 92045.
9 A. Yes.
10 Q. And you see it's titled: The Release During Smoking of
11 Nicotine Added to Tobacco?
12 A. Yes.
13 Q. And it's on the letterhead of British American Tobacco
14 Company?
15 A. Yes.
16 Q. And it's dated September 1963?
17 A. Yes.
18 Q. By the British convention of dating -- I just want to
19 turn to page -- Bates number --
20 MR. WEBB: Could we have one second, because we have
21 different lawyers involved.
22 MR. BERNICK: Your Honor, I would object to any use of
23 this document. Again, I did not pursue any questions at all, and
24 this document is a document that does come from British
25 American --

1 THE COURT: Counsel, would everybody come forward who's
2 going to speak on this, just to make it easier?

3 MR. BERNICK: This was authored by British American
4 Tobacco, but the document itself was produced by Brown &
5 Williamson. In fact, it bears the stamp that it's from Brown &
6 Williamson files and, therefore, it's obviously going to be used
7 against Brown & Williamson. Again, I'm happy if he wants to get
8 into it, that's fine, but I'm going to want to do
9 cross-examination with respect to this document.

10 MR. SHEFFLER: Further, Your Honor, I did not ask
11 questions about this document or what this subject matter was.

12 THE COURT: Could I have the name of it again, please?

13 MR. SHEFFLER: The Release During Smoking of Nicotine
14 Added to Tobacco. There were no questions in my
15 cross-examination about BATCo agencies research or development on
16 this document whatsoever. I could have done so, I would have
17 done so, if I had known he was going to use it on redirect and I
18 would reserve the right to ask questions with respect to the
19 subject matter of this document and this line of research if
20 Mr. Goldfarb is entitled to go into it now on redirect, although
21 I didn't do it on cross.

22 THE COURT: Mr. Goldfarb?

23 MR. GOLDFARB: Well, first of all, Your Honor, this is
24 clearly within the scope of the cross-examination. I'm not going
25 to go into the substance of the document. I'm simply

1 establishing that well before the Tobacco Working Group suggested
2 it in 1976, defendants were studying this issue with respect to
3 pH and nicotine, and I'm not going to go into the substance, I
4 just --

5 THE COURT: Well, you're certainly using the document to
6 support the witness's conclusions on that subject. So, in that
7 sense you're using the document substantively for what it's --
8 perhaps not for the scientific information contained in it, but
9 to show that defendants were conducting research on this issue,
10 right?

11 MR. GOLDFARB: Yes, that's why I'm doing it. If
12 defendants -- if you believe that defendants are entitled to
13 recross to disprove the fact that they were conducting this
14 research, obviously we'll abide by it. We believe it's clearly
15 within the scope of what was asked on cross-examination, and --

16 THE COURT: Are you using it to show that Brown &
17 Williamson was conducting such research or are you willing to
18 stipulate that you're using that exhibit only against BATCo to
19 show that it was conducting such research?

20 MR. GOLDFARB: No, Your Honor, we would not so stipulate.
21 The document was circulated to both, and what this establishes is
22 that the tobacco industry, the defendants in this case, which
23 obviously there are conspiracy and RICO enterprise allegations in
24 the case, were conducting this research at least 13 years before
25 Mr. Minton suggested the issue was ever arose.

1 THE COURT: As to BATCo, -- all right, did you want to say
2 one thing?

3 MR. SHEFFLER: Just one thing, Your Honor. The problem is
4 we talk about "the research". How he's characterizing the
5 research may not be the way the document and the research was
6 truly conducted and I should have the right to demonstrate that,
7 and demonstrate what this research was, why it was conducted, and
8 how it was conducted and what it really did address. And I think
9 that I would have the right to do that if this had been done on
10 direct on cross-examination. If it's being done for the first
11 time in redirect and I didn't have a time to go into this
12 document which was never cited in the testimony before, I should
13 have the opportunity to do it on redirect. It may be a
14 mischaracterization, I don't know how he's really going to
15 characterize "the research", but I should be able to develop what
16 the research actually was in the research at BATCo.

17 THE COURT: As to BATCo, the objection is overruled. This
18 is legitimate redirect to counter the -- I don't know if I want
19 to say significant, but certainly to counter the cross on the
20 subject matter. The mere fact that BATCo and the government
21 didn't use this particular document in their examination doesn't
22 preclude the government from using it now on redirect, and
23 certainly doesn't necessarily -- doesn't entitle BATCo to further
24 cross on the document. This doesn't raise a new issue. It
25 doesn't raise a new subject matter. The subject matter was

1 certainly covered by BATCo in its cross.

2 Now, as to Brown & Williamson, we're in a different
3 situation and a different posture, and I realize that. And
4 because of the way in which cross was waived by Brown &
5 Williamson -- or not waived, that's not really the right way to
6 categorize it, but because Brown & Williamson determined, based
7 upon the direct, that it need not do any cross, I have already
8 ruled that Brown & Williamson documents that are used on redirect
9 will give Brown & Williamson an opportunity to do limited cross
10 on that document.

11 Mr. Goldfarb, what now? I've ruled.

12 MR. GOLDFARB: Okay. I will say that one of the documents
13 cited in Dr. Henningfield's direct, directly on this point is a
14 BATCo B & W document that also -- that is also -- it also
15 predates the 1976 time, so it's in his direct, and certainly
16 Mr. Bernick or Mr. Sheffler, had they wanted to cross Dr.
17 Henningfield on this very issue about pH and its effect on
18 nicotine, had the opportunity to do so, and so we don't see it as
19 proper just because -- it was in the direct; they opted not to
20 cross on it.

21 THE COURT: Mr. Bernick, quickly.

22 MR. BERNICK: Yes. If it were completely cumulative it
23 shouldn't be offered anyhow. I suspect it's not completely
24 cumulative. In fact, this gets into nicotine transfer
25 efficiency, which is a separate subject, and I think why it's

1 actually being offered. In any event, it could be used for that
2 purpose. So, if it were --

3 THE COURT: It's being only used -- I want to emphasize
4 this because it will confine the limits of your cross. As I
5 understand it from Mr. Goldfarb, it is only being used to
6 establish that defendants were conducting research in this area,
7 not for any detailed substantive evidence about what the research
8 was.

9 MR. GOLDFARB: That's correct, Your Honor.

10 MR. BERNICK: I understand that. In my -- my
11 cross-examination would be confined to that. I have to be candid
12 with the Court, I'm not quite sure how that distinction actually
13 works. I mean, the fact of the research being done is
14 inextricably intertwined with what was the research, otherwise
15 that fact has no significance to the case or relevance to the
16 case. In fact, research being done on nicotine that's got
17 nothing to do with its pharmacological properties, or whatever,
18 would have extremely little relevance to the case. So, I believe
19 that they're offering it for this purpose, to show what we knew
20 about nicotine and its properties and using it in the design of
21 cigarettes. That was the subject.

22 THE COURT: That's not my understanding from the
23 government.

24 MR. BERNICK: Then there's no way to read this document,
25 Your Honor, or any of the other documents that have been used

1 with this witness that are being proffered, and somehow believe
2 that they don't have to do with the theory of the case, which is
3 that we specifically knew about the properties of nicotine and
4 their pharmacological significance and we incorporated our
5 knowledge into research regarding design. That's the whole
6 essence of the witness's testimony. So what it was that was
7 being researched is the tie to this witness's testimony and is
8 highly relevant, and when he says it's not really being offered
9 for that purpose, I think that's disingenuous, that's exactly the
10 purpose for which it's being offered.

11 MR. WEBB: Can I make a suggestion, Your Honor, a
12 possibility to avoid the -- counsel just said the only reason
13 they're offering it is to prove that prior to the TWG meetings in
14 the '70s the tobacco companies actually had done research in the
15 area of pH. That's what he said. The witness just three minutes
16 ago said that he cited other documents that proved that in his
17 written direct examination. So assuming that's the case, this is
18 a classic example of we're building a mountain out of a mole hill
19 when it's redundant. The point they want to make is that the
20 tobacco companies did research in the area of pH prior to the TWG
21 meeting in the 1970s. This witness just told Your Honor he's
22 already cited other documents in his written direct that prove
23 that fact. So they've already -- this is clearly cumulative and
24 redundant, so why are we opening this up for something that is
25 actually -- on principles of relevancy, I just suggest they don't

1 need it and it's in the record, according to the witness.

2 THE COURT: Is it in the record? Did he cite it in his
3 direct?

4 MR. GOLDFARB: He did not cite this document, Your Honor,
5 and --

6 MR. WEBB: He --

7 MR. GOLDFARB: He did not cite this document in his
8 direct, however, this document -- the -- I mean the document is
9 clearly admissible into evidence and the -- I was -- it is
10 clearly relevant that there are documents that even go further
11 back in time before the document cited in Dr. Henningfield's
12 direct that go to the fact that the companies were well aware
13 of -- and were studying pH and basic acidic, you know, adding
14 those things to tobacco and measuring how it affected nicotine
15 delivery. I'm not going into the --

16 THE COURT: The --

17 MR. GOLDFARB: I didn't mean to cut you off. I'm not
18 going into the substance of this document with this witness.

19 THE COURT: My ruling stands as to Brown & Williamson.
20 And that is that the government is offering the document for a
21 limited purpose. When we get to Mr. Bernick's cross, we'll see
22 how much, if at all, he needs to be limited, and we'll just have
23 to deal with it, perhaps, question by question at this point --
24 at that point, I should say.

25 BY MR. GOLDFARB:

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 Q. Dr. Henningfield, have you had a chance to look at this
2 document at all?

3 A. In the past?

4 Q. No, no, no, just since I've handed it to you?

5 A. Just when I opened the page. I wasn't sure if I was
6 allowed to at this point.

7 Q. Okay. If I could just direct your attention to page 2 of
8 the document.

9 Again, Dr. Henningfield, the second paragraph is talking
10 about that BATCo was measuring the addition of freebase nicotine
11 and that it increased the pH of the tobacco in the smoke and
12 that added nicotine citrate reduced the pH of the tobacco but
13 had little effect on the pH of the smoke. Do you see that?

14 A. Yes.

15 Q. Okay. So, this is another document showing well before
16 the TWG the tobacco companies were aware of the measuring pH and
17 it's effect on nicotine delivery?

18 MR. WEBB: Your Honor, I'm going to object, that's
19 leading. I haven't been objecting, but --

20 THE COURT: I know you haven't been, Mr. Webb, and I
21 appreciate that, but that objection is sustained.

22 MR. GOLDFARB: Okay.

23 BY MR. GOLDFARB:

24 Q. Dr. Henningfield, do you also recall Mr. Webb asking you
25 whether you were aware of any brand of cigarettes sold by the

1 tobacco companies on trial in this case over the last 20 years
2 that has ever had a pH over 6.5?

3 A. Yes.

4 Q. And you said in your response that's correct, and I think
5 this is what you said: That's correct, the way its measured and
6 the data presented to the state of Massachusetts?

7 A. Yes.

8 Q. Do you recall also that Mr. Webb showed you the article
9 that you wrote with Dr. Pankow in 2004?

10 A. Yes.

11 Q. Okay. Are you also aware of Dr. Pankow's earlier
12 publications on the topic of pH and free nicotine?

13 A. Yes, I haven't reviewed them for a while, but I'm
14 familiar with them.

15 Q. Okay. Can I call up --

16 MR. WEBB: I will have an objection to this. Dr. Pankow,
17 I intentionally did not cross-examine this witness on the subject
18 matter of ammonia and Dr. Pankow's method of measuring pH. I
19 clearly did not do that. There's a whole series of articles that
20 Dr. Pankow authored, I chose not to go into that topic. This is
21 clearly a brand-new topic that I did not open the door on my
22 cross-examination to, as to how Dr. Pankow's method of measuring
23 pH. I did not do that. I intentionally stayed away from it, so
24 I object to going into this area.

25 MR. GOLDFARB: Your Honor, he asked Dr. Henningfield

1 whether the cigarettes manufactured by these defendants has a pH
2 of over 6.5 and Dr. Henningfield said, well, as it's been
3 measured and reported by these defendants to the state of
4 Massachusetts, that's correct. However, if there's other
5 information that shows by other measurements that, in fact, the
6 pH of cigarettes manufactured by these defendants over the last
7 20 years is above that, on cross-examination -- or excuse me on
8 redirect that's clearly a proper subject for review -- or for
9 examination.

10 MR. WEBB: Your Honor, I disagree with that. I mean, this
11 whole area of Dr. Pankow is a brand-new area that I -- there's
12 probably 45 minutes of examination on Dr. Pankow -- which we did
13 earlier in the case which I chose not to do with this witness, on
14 what Dr. Pankow's method of measuring pH was, and I chose not to
15 go into that topic. This is a brand-new topic that I chose not
16 to go into and it's outside of the scope of my cross-examination.

17 MR. GOLDFARB: First of all, that's incorrect, because he
18 showed him Dr. Pankow's 2004 article with Dr. Henningfield that
19 discussed this very topic. I'm sure that that document -- that
20 that article cited to this one, and I just -- I don't see how, if
21 he's talking about pH values of cigarettes in his
22 cross-examination, that it's incorrect to show that maybe other
23 people have gotten that -- that other people maybe more correctly
24 and properly have submitted other information which contradicts
25 the information presented to the state of Massachusetts by his

1 client.

2 MR. WEBB: That's a mischaracterization. I showed the
3 article that this witness wrote in 2004 for the very limited
4 purpose of establishing that he wrote that there were four types
5 of research that needed to be done before you could reach any
6 conclusions on this theory. I did that to show that today it has
7 not been proven. The fact that three other -- there were two
8 other authors on the article, one of whom was Dr. Pankow, that
9 does not open the door to going into the whole Dr. Pankow theory
10 of how you measure pH. I used that article for a very limited
11 purpose of securing an admission from this witness that this year
12 he wrote an article in which he stated the theory hadn't been
13 proven. I did not get into at all Dr. Pankow's method of
14 measuring ammonia -- or measuring pH at all.

15 THE COURT: Mr. Bernick, did you have something to add?

16 MR. BERNICK: Yeah, I didn't want to anticipate, but I
17 suspect that counsel is now going to use Dr. Pankow's article
18 that has measurements. That article breaks out measurements by
19 particular brands of cigarettes in contrast -- breaks out by
20 brands of cigarettes in contrast to the review article that
21 Mr. Webb was referring to that was the subject of
22 cross-examination. One of the brands specifically identified is
23 a Brown & Williamson brand, and that's actually different from
24 the state of Massachusetts report which didn't get into the Brown
25 & Williamson brands, and specifically different from the review

1 article. So, again, to the extent that there's going to be
2 questioning regarding Dr. Pankow's article with regard to pH
3 number of brands, I'm going to want to pursue the Brown &
4 Williamson numbers that they mean.

5 THE COURT: A final comment from the government and then
6 I'll rule.

7 MR. GOLDFARB: I think I've made the point. If Mr. Webb
8 is talking about manufactured cigarettes by these defendants and
9 the level of pH that they submitted to the state of Massachusetts
10 in his cross-examination of Dr. Henningfield, I don't understand
11 why I should be precluded on redirect from introducing clearly
12 relevant evidence that directly contradicts the suggestions and
13 including statements made in earlier Surgeon General's reports
14 that Mr. Webb highlighted with this witness.

15 THE COURT: Objection is sustained. It raises a -- not a
16 new area, that wouldn't be the right way to characterize the
17 testimony, but it certainly raises a new theory and opens the
18 door to a lot of testimony that should have come in on direct if
19 it was going to come in. The objection's sustained. Next issue,
20 please.

21 BY MR. GOLDFARB:

22 Q. Now, Dr. Henningfield, yesterday Liggett counsel showed
23 you U.S. Exhibit 86908, which is the 1991 Brown & Williamson
24 Root Technology Handbook for Leaf Blenders and Product
25 Developers. Do you recall being shown that document by Liggett

1 counsel?

2 A. Yes.

3 Q. I'm just going to focus on the pages that Liggett counsel
4 identified for you, and just again for the record, Liggett
5 counsel referred to the RT in her questioning. What is RT
6 referred to?

7 A. Root technology or --

8 Q. -- excuse me --

9 A. Ammonia technologies.

10 Q. Okay. And if I could just direct you first to page 9 of
11 this document.

12 And this is just the section that Liggett counsel focused
13 on. Under the heading: Other Root Technology in the U.S.
14 Market. Do you see that?

15 A. Yes.

16 Q. Brown & Williamson -- this Brown & Williamson report
17 first states, "there are two consistent trends apparent in the
18 U.S. market, first, recon is the preferred means for applying
19 RT. Second, everyone is working hard to match PM smoking
20 quality."

21 And then it goes on to say: "The situation at B & W is
22 use of RT in almost all domestic and export nonmenthol brands.
23 B & W is also doing major development work on variance of
24 existing RT."

25 MR. BERNICK: I'm sorry, Your Honor, it's the exact same

1 problem. We now have a document that was used only for Liggett,
2 and as predicted yesterday, he's going to get into this, he's now
3 gotten into Brown & Williamson's use of RT. And I'm happy to
4 pursue it, I'm prepared to pursue it briefly on
5 recross-examination, but we clearly should have that opportunity.
6 This was never raised in direct examination, and when counsel for
7 Liggett put this document up, I was poised to raise the issue,
8 but she used it solely for purposes of demonstrating that Liggett
9 didn't use RT. The government's now taken another step saying
10 Brown & Williamson did use RT. I want to cross-examine about
11 this document.

12 THE COURT: Mr. Goldfarb?

13 MR. GOLDFARB: Your Honor, he -- with respect to this
14 document, I think Mr. Bernick may have expressly waived his right
15 to cross-examination. These are obviously defendants --

16 THE COURT: Isn't it correct that Liggett's counsel was
17 only asking questions about what was in the document pertaining
18 to Liggett? I think her examination was less than 10 minutes and
19 maybe only 5.

20 MR. GOLDFARB: It was, but it also referred to -- as I
21 said, I'm restricting my questioning to the two pages that she
22 referred to in her examination, and she did make reference to
23 this -- to the heading which is Other Root Technology in the U.S.
24 Market.

25 THE COURT: But the questions she asked were directed to

1 Liggett's role or nonrole. Isn't that correct? Not just the
2 heading on the document.

3 MR. GOLDFARB: Your Honor, yes, she was using it,
4 obviously, for purposes of her client, but --

5 THE COURT: But you can't expand on that. She was the
6 only one to question about this document. That's number one.

7 And number two, her questions were limited to only issues
8 pertaining to her client. And now you're seeking on redirect to
9 open that door to include all of the defendants, and that was not
10 the scope of the cross-examination.

11 MR. GOLDFARB: Well, there were other counsel that also
12 questioned Dr. Henningfield about whether he knew whether ammonia
13 technology had been used in marketed cigarettes by these
14 defendants.

15 THE COURT: That may be, I'm not disputing that, but again
16 those counsel did not question Dr. Henningfield about B & W's
17 role in that particular -- on that particular topic.

18 MR. BERNICK: Your Honor, I would only add, very briefly,
19 this specific matter was raised yesterday.

20 THE COURT: It was.

21 MR. BERNICK: And the government not only was sensitized
22 to this issue yesterday, as a result of the dialogue with the
23 Court, they've now come in and they have specifically knowing
24 about this issue directly walked through the door. You know,
25 they want this, so if they want this to come out, they now know

1 that when they're doing this I'm going to stand up and ask for
2 recross.

3 THE COURT: The simple fact is that on cross-examination
4 there was no examination -- no cross by any counsel of this
5 witness on B & W's activities or work with regard to root
6 technology. Therefore, you cannot use this witness and redirect
7 this witness on that particular issue. It's pretty
8 straightforward, Mr. Goldfarb, and I feel compelled to sustain
9 the objection.

10 Now, of course -- well, let me leave it at that.

11 BY MR. GOLDFARB:

12 Q. Dr. Henningfield, moving to a different area, a few quick
13 questions about the issue of compensation, which was discussed
14 with you by various counsel.

15 First, do you recall that Mr. Sheffler asked you about
16 the U.K. recommendation, I believe it was in the 1988 document,
17 that machine measured tar yields should continue to be reduced
18 by the tobacco manufacturers?

19 A. Yes.

20 Q. And you indicated in your answer to his question that the
21 situation, I believe you used the word more complex than
22 Mr. Sheffler alluded to or to Mr. Sheffler's characterization.
23 Do you recall that?

24 A. Yes.

25 Q. Can you explain what you meant by your response?

1 A. Well, there was and has remained to this day controversy
2 within the health community itself over that approach, and most
3 recently with the European Union directive to continue the
4 approach, and the controversy is that on one hand it makes sense
5 to reduce toxins. Everybody agrees with that. On the other
6 hand, the FTC ISO -- and ISO is what it's called in most
7 countries outside the U.S -- method has enabled the light
8 cigarette, light cigarette debacle health problem and that is of
9 great concern. And so, in the most recent E.U. directive, it
10 includes the importance of research on the topic.

11 Also, back in the '80s that was at a time that in the
12 health community, despite the increasing awareness of
13 compensation, we still believed that there must be benefit if
14 you reduce toxins, and just did not understand the full extent
15 of compensation and the fact that the relatively small numerical
16 decrease, the difference of a few milligrams of tar per
17 cigarette by a machine method was biologically meaningless.

18 Q. And you just referred to, I think you said the "light
19 cigarette tobacco". What do you mean by that?

20 A. As discussed in Monograph 13 that's been raised a number
21 of times, that's the National Cancer Institute Monograph 13
22 which concludes there is not a benefit, a health benefit of
23 light cigarettes, per se.

24 Q. Dr. Henningfield, do you recall that defense counsel
25 showed you documents that indicated that smokers, not the

1 tobacco companies, have ultimate control over how much tar and
2 nicotine smokers take in?

3 A. Yes.

4 Q. And documents that talked about the -- that cigarettes
5 are designed to have, I think the term is elasticity of yields?

6 A. Yes.

7 Q. In your view, could companies limit smokers' ability to
8 compensate for nicotine in cigarette design and manufacture?

9 A. It's possible to cap the ceiling by the amount of
10 nicotine that's in the product, and that's been done in research
11 cigarettes that I've used, and even in a commercial line.

12 Q. And are there any other design features that could be
13 used to limit --

14 A. Well, filtration. There are different ways of
15 reducing -- of trapping, in principle, the amount of nicotine or
16 other substances. You could build the particles so large that
17 there would be delayed and poor pulmonary absorption. There are
18 a lot of ways you could approach it to reduce it.

19 Q. Did you say "build the particles"? What do you mean by
20 that?

21 A. Well, the particles start out as bouncing around little
22 molecules, if you will, coagulating like snow flakes, getting
23 bigger and bigger. The size that they are when they reach the
24 mouth, when they start going down the throat, is a function of
25 the time, the speed, the moisture, the glycerin, other things

1 that are in the product.

2 Q. Are you aware of any -- whether any of the defendants

3 ever researched, and, in fact, developed a filter that had the

4 ability to limit compensation?

5 A. There is at least one filter that I've seen.

6 Q. What filter are you referring to?

7 A. It might have been called the -- gosh, I haven't seen --

8 I might be confusing it with the name of a person, a Gill Rig

9 (sic) Filter, something like that, and I don't recall the

10 spelling.

11 Q. Let me call up --

12 MR. BIERSTEKER: Your Honor, I object. This is straight

13 out of direct. I didn't ask any questions about this filter.

14 THE COURT: Well, the answer has been given already.

15 MR. BIERSTEKER: He's going on to show the document.

16 THE COURT: You may go ahead.

17 BY MR. GOLDFARB:

18 Q. Let me call up U.S. Exhibit 29749, please. Did you get

19 one, Dr. Henningfield?

20 A. Let me look for just a moment.

21 Q. Sure.

22 A. I'm sorry, I was confusing the filter with a name, it's

23 the Multijet.

24 Q. And this is a memorandum dated November 17, 1969?

25 A. Yes.

- 1 Q. And that's to Dr. Murray Senkus?
- 2 A. Yes.
- 3 Q. Do you know who Dr. Senkus was?
- 4 A. He was a researcher within the company. I don't know his
5 position.
- 6 Q. Which company?
- 7 A. I'll have to look for a second again. When you've looked
8 at so many documents from so many companies, I --
- 9 Q. If you look at the last page, sir, you can see that it
10 was written by a John D. Woods. Do you see that?
- 11 A. Yes.
- 12 Q. And it was cc'd to C.E. Teague and A.H. Laurene.
13 Does the -- do any of those names help you locate which
14 company Dr. Senkus --
- 15 A. I think it's R.J. Reynolds, but frankly, no, it -- I'm
16 not sure if it's them or BAT -- or I'm sorry, not BATCo, but
17 Brown & Williamson.
- 18 Q. Okay.
- 19 A. It might be Brown & Williamson. I think it probably is,
20 but, again, I don't want to state that for a fact when --
- 21 Q. Okay. And it indicates in the first line of the memo
22 that "smoking tests have been made to determine the amount of
23 wet TPM delivered to human smokers from five different
24 cigarettes"?
- 25 A. Yes.

1 Q. And if you look down at the chart at table 1, it
2 identifies what the five cigarettes were there. And one of
3 them, as Multijet filter on a Winston Rod, and then there's a
4 Winston, a Doral, a True and a Carlton?

5 A. Yes.

6 Q. And just to cut to it, if you turn to page 2, please, and
7 if you call out sub point 4 there. Just read that first
8 sentence under sub point 4.

9 A. "The Multijet filter is unique since it delivers
10 approximately the same amount of wet tar to the human smoker as
11 the machine measured FTC wet tar value".

12 Q. Okay. And so, what do you interpret that to mean?

13 A. Well, it's consistent with a table that they present that
14 with this filter, on average, the person -- smokers would
15 actually get what the FTC rating suggests, or at least closer
16 than what you see with the other cigarettes.

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

18 Turning now to a different issue, Dr. Henningfield,
19 Mr. Sheffler showed you many published documents that were
20 sponsored in whole or in part by his client, BATCo. Do you
21 recall that part of your testimony?

22 A. Yes.

23 Q. In cross-examination. And a lot of them were sponsored
24 by the -- or conducted by the TRC, Tobacco Research Council?

25 A. Yes.

1 Q. The documents that Mr. Sheffler showed you about nicotine
2 research and pharmacology and so forth, were those internal
3 BATCo research documents?

4 A. Yes.

5 Q. And some of the published studies, were those also
6 internal documents to BATCo?

7 A. Well, it was a mixture of research, and I might be
8 confusing it now, but I believe you showed me a mixture of
9 research that was published, supported by BATCo and internal.

10 Q. Okay. Were the -- the statement where the publications
11 that Mr. Sheffler showed you statements of BATCo's public views
12 on the role of nicotine and smoking addiction?

13 A. They -- first, I don't know what all they said in England
14 and in other countries, but they are not the statements that
15 were being made -- in other words, in documents they used the
16 word "addiction", for example. Those conclusions or statements
17 were not being offered by any major tobacco company in the
18 United States to the public in the '70, '80s, forward that I'm
19 aware of, and certainly not in formal hearings.

20 Q. And do the published documents and research sponsored by
21 BATCo shown to you by Mr. Sheffler change your conclusions about
22 BATCo's understanding and knowledge of nicotine's role in
23 smoking?

24 A. No, they reinforce it, and, in my opinion, similar to the
25 way FDA came to its conclusions, is based in part on the facts

1 of the record which demonstrate that BATCo had internal research
2 and it supported external research that came to some similar
3 conclusions, and therefore, it's -- it just wasn't credible for
4 them to oppose the concept that nicotine was addictive, frankly,
5 when you've demonstrated it in supported research that helped
6 come to that conclusion.

7 Q. Do you recall -- and I'll just put this up quickly -- do
8 you recall that Mr. Sheffler showed you the third report of
9 the -- the third report of the independent scientific committee
10 on smoking and health? That's JD 00657.

11 A. Yes.

12 Q. And just for the record, that was published in 1983?

13 A. Yes.

14 Q. Can we call up U.S. Exhibit 21733?

15 Dr. Henningfield, do you see that these are notes of the
16 tobacco company research directors at Imperial -- at Imperial's
17 head office dated February 16th, 1983.

18 A. Yes.

19 Q. And do you see that the members present include a
20 representative of Philip Morris and a representative of BAT?

21 A. Yes.

22 Q. And if you would just turn to the back page for a moment.
23 Who is the author of this document, these notes?

24 A. It appears that the author was L.C.F. Blackman.

25 Q. If we turn back to the first page, just to establish the

1 purpose of this meeting, can you just read the first sentence of
2 the notes?

3 A. "We met to discuss the 11" -- I'm not sure of that
4 word -- "the 11" -- whatever word -- "research proposals
5 contained in the impending ISC third report."

6 Q. And if I could now -- okay. If I could turn your
7 attention to page 2, the bottom of page 2 of the documents, of
8 this document. Under sub heading three it reads: "The effects
9 of nicotine at the levels achieved through smoking." It states,
10 "While animal experiments could probably be designed to study
11 the effect of nicotine, either by itself or as spiked editions,
12 our response to the ISC should be that we have nothing to offer.
13 The little information we have is already in the public domain
14 and we have no idea as to a worthwhile research program." Do
15 you see that?

16 A. Yes.

17 Q. Okay. And then further down on that page 3, under sub
18 heading five, the meeting participants discussed the role of
19 nicotine at the relevant lower range of nicotine dosage in
20 perpetuating the smoking habit. And Dr. Blackman wrote: "While
21 such information already exists in the literature, Russell,
22 Ashton and Stepney, et cetera, this is a particularly sensitive
23 area for the industry. If any future study showed that nicotine
24 either was or was not associated with perpetuating a smoking
25 habit, industry could well be called upon to reduce or eliminate

1 nicotine from the product. A heads we lose, tails we cannot win
2 situation. We must not become involved in any collaborative
3 study with the ISC."

4 Dr. Henningfield, is this document consistent with the
5 conclusions about the tobacco industry's approach about
6 cooperating with the public health community?

7 A. No, not in my opinion.

8 MR. WEBB: Your Honor, as this line of questioning began,
9 counsel asked this witness whether a representative from Philip
10 Morris was at this meeting. The record should be clear, that
11 that's a different Philip Morris company that's on trial in this
12 case.

13 THE COURT: Is that Philip Morris International?

14 MR. WEBB: International.

15 MR. GOLDFARB: Your Honor, at the time this document was
16 written Philip Morris International was a part of Philip Morris
17 Incorporated, which is a defendant in this case.

18 MR. WEBB: Actually --

19 MR. GOLDFARB: 1983.

20 MR. WEBB: We'll deal with that in our case, then, Your
21 Honor.

22 THE COURT: All right.

23 BY MR. GOLDFARB:

24 Q. Dr. Henningfield, I just want to clarify the record. My
25 last question was, whether the decision or the expression in

1 this document that the tobacco industry must not become involved
2 in any collaborative study with the ISC, I asked you whether you
3 thought that was consistent with the way the tobacco industry
4 had approached its -- had approached dealing and disclosing its
5 work with the independent scientific and public health
6 community. And I just want to clarify your record. I think --

7 A. My interpretation is that this suggests that the
8 industry -- and I don't know what the best words are, is
9 disingenuous in their appearance of helping ISC. That is not to
10 say that they did not offer anything to ISC.

11 Q. Okay. And in light of all the documents that
12 Mr. Sheffler showed you about BATCo sponsored published
13 research, let me show you U.S. Exhibit 23036.

14 MR. SHEFFLER: Your Honor, I object to this document, it's
15 far beyond the time period in any of any cross-examination and
16 part of the summary judgment of my cross-examination. Of course,
17 I didn't talk about the author of this document or anything that
18 she's talking about in the document in June of 1994. It's simply
19 beyond the scope of the cross-examination.

20 MR. BERNICK: The second paragraph deals specifically and
21 it's entirety with a Brown & Williamson issue.

22 THE COURT: Mr. Goldfarb?

23 MR. GOLDFARB: Your Honor, this is in direct response to
24 Mr. Sheffler talking and showing Dr. Henningfield published
25 article after published article that BATCo sponsored, not

1 necessarily that they conducted internally, but that they
2 sponsored, and it's certainly proper on redirect to indicate what
3 BATCo was actually telling the public on the subject of nicotine
4 addiction when they were aiming communications at the general
5 public.

6 MR. SHEFFLER: One last point, Your Honor, and I don't
7 want to beat a dead horse here, but my examination on that issue
8 was very carefully crafted to his representation that before 1982
9 in a Benowitz article compensation -- That's the scope of my
10 examination was, the period before 1982, it was on compensation
11 with respect to what was known and what BATCo contributed to that
12 knowledge before 1982. This document is well after anything that
13 I asked about.

14 THE COURT: I don't think there was any cross on any
15 documents, even in the early 1990s.

16 MR. GOLDFARB: No, but, Your Honor, Mr. Sheffler showed --
17 I mean, showed what he purported to be a confidential press
18 release that talked -- that used the word "addiction" and
19 discussed nicotine addiction. He raised several documents that
20 talked about --

21 THE COURT: When was that press release?

22 MR. GOLDFARB: Excuse me?

23 THE COURT: When was that press release?

24 MR. GOLDFARB: I think it was dated --

25 THE COURT: It was 1971. The opinion of this witness was

1 that before a certain timeframe, BATCo and other companies were
2 doing certain things. We're well beyond that timeframe, though.
3 And so in that sense, I think this exhibit is way beyond the
4 scope of the cross-examination, and I'm going to sustain the
5 objection.

6 MR. GOLDFARB: I'll move on.

7 BY MR. GOLDFARB:

8 Q. Dr. Henningfield, just a few brief clean up points. You
9 referred to several points during your cross-examination to the
10 triangular report to Congress that was put out by NIDA?

11 A. Yes.

12 Q. And you never explained to the Court what that was. Can
13 you please do so?

14 A. Congress requested that the National Institute on Drug
15 Abuse produce a report every three years. The first one,
16 beginning in 1984, on the state of knowledge on major categories
17 of drugs, including nicotine, and so each one of these reports
18 would include a chapter, for example, on marijuana, on nicotine,
19 on heroin and other opioids. 1984 was the first formal report,
20 and these were expected to be the agencies' opinion as to the
21 current state of understanding and research needs for each of
22 these drugs.

23 Q. Okay. And let me just call up JD 004485. I apologize.
24 I don't know if we have a copy for the witness.

25 MR. WEBB: I don't know that -- I don't have a copy, but I

1 don't think this document -- I don't think anyone cross-examined
2 on this document.

3 MR. GOLDFARB: I was going to identify it for the record
4 what it was and ask a few questions about it.

5 THE COURT: Well, the requirement isn't that he be
6 cross-examined on the document, the requirement is that
7 cross-examination cover a particular subject matter. I don't
8 know what follow-up questions Mr. Goldfarb is going to ask at
9 this point.

10 MR. WEBB: My objection goes to, I don't know of anything
11 in this document that is a summary judgment matter that was
12 covered on cross-examination.

13 THE COURT: Well, let's at least start and let me hear a
14 question, please.

15 MR. GOLDFARB: Okay. I may have a copy to give the
16 witness, Your Honor, and I do, I apologize to defense counsel.
17 I'll get you a copy.

18 MR. WEBB: You said you do or don't have one?

19 MR. GOLDFARB: I do have one for the witness and we will
20 get you one with dispatch.

21 THE COURT: And if need be, we can take our morning recess
22 now and defense counsel can get a chance to look at this
23 document. Would that be --

24 MR. WEBB: That's fine.

25 THE COURT: Is that agreeable? All right. Let's take

1 15 minutes. And one thing I want to raise. I got a motion this
2 morning that I suspect there's no opposition to, and I don't even
3 know if the government has gotten it. It's Philip Morris' motion
4 requesting redaction of certain personal information. You all
5 may not have gotten it yet.

6 MS. EUBANKS: We haven't reviewed it yet, haven't seen it
7 at all. If it's short, we can take a look at it.

8 THE COURT: It's very short.

9 MS. EUBANKS: We'll take a look during the break.

10 THE COURT: All right. Fine. Thank you.

11 (Thereupon, a break was had from 10:55 a.m. until
12 11:13 a.m.)

13 THE COURT: Mr. Goldfarb, please.

14 BY MR. GOLDFARB:

15 Q. Now, Dr. Henningfield, before the break, we were just
16 clarifying for the Court what the Triennial Report is. Do you
17 have that before you now?

18 A. Yes, I do.

19 Q. Okay. And does this document use the term "addiction"
20 and "dependence" interchangeably?

21 A. Yes.

22 Q. And does it refer to -- and did you indicate that the
23 document does address tobacco use and nicotine?

24 A. Yes, it does.

25 Q. And does it refer to -- well, what substances does it

1 refer to as addictive or dependence-producing in the report?

2 A. I'd have to look. I believe cocaine would have, almost
3 for certain; probably heroin. But I haven't systematically gone
4 through it, looking.

5 I don't recall that there was a statement here as there
6 was in the Surgeon General's Report saying that they were going
7 to be used interchangeably; just that terms "addiction,"
8 "dependence," "abuse" were all used pretty much interchangeably
9 by NIDA in the report.

10 Q. Okay. And the last subject, sir: You were asked some
11 questions during cross-examination by both Mr. Webb and
12 Mr. Minton about the issue of vent holes?

13 A. Yes.

14 Q. Now, in response to Mr. Webb's and Mr. Minton's
15 questioning about the optimum -- do you recall being asked about
16 the defendants' research and consideration as to where the
17 optimum placement of the vent holes was?

18 A. Yes.

19 Q. You indicated in your response that the optimum placement
20 in their research was not your concern?

21 A. Correct.

22 Q. What is your concern about the issue of vent holes?

23 A. My concern is that they're hidden on most cigarettes,
24 that they're not explained on any cigarettes for the consumer,
25 and that the potential dire impact in terms of increased tar and

1 nicotine is not communicated to smokers at the point of sale.

2 And I mention the point of sale because that is
3 important. There are some allusions to these issues now on some
4 of the websites, but even those do not give clear direction.

5 Q. And so do you recall that Mr. Webb showed you some
6 testimony from Dr. Farone?

7 A. Yes.

8 Q. And it was on the subject of the placement of vent holes?

9 A. Yes.

10 Q. Does the testimony of Dr. Farone shown you by Mr. Webb
11 alter your conclusions as to your conclusions on the issue of
12 vent holes?

13 A. No, not at all, because it doesn't alter the fact that
14 they're hidden and there isn't guidance. Making a choice
15 assumes that you have information. There's no information to
16 people to make a choice to cover them or not.

17 Q. Dr. Henningfield, on cross-examination by Mr. Minton, he
18 suggested in his questioning or he asked you whether you knew
19 whether Lorillard brands of cigarettes were ventilated --
20 included ventilation holes. Do you recall him asking about
21 that?

22 A. Yes.

23 Q. And do you recall by his questioning he left open the
24 question as to whether or not Lorillard cigarettes used
25 ventilation?

1 A. Yes.

2 MR. GOLDFARB: Okay. Your Honor, can I give the witness a
3 pack of cigarettes? I'm happy to do this. I can --

4 MR. MINTON: Your Honor, I would object. I mean, it's a
5 little late now to try to generate factual basis for some opinion
6 with a demonstration on the stand during recross.

7 THE COURT: Well, counsel, first of all, come forward.

8 MR. MINTON: I apologize.

9 THE COURT: I'm unclear as to one thing. You asked the
10 witness whether Mr. Minton on cross left the question open --
11 left the issue open. Isn't that the way you asked the question
12 of this witness?

13 MR. GOLDFARB: I don't -- I'm told yes.

14 THE COURT: Pardon me?

15 MR. GOLDFARB: I'm told yes, that is the way I --

16 THE COURT: I don't know what that means. And I'm not
17 about to supply the answer and I don't want you to supply the
18 answer. Perhaps I can clarify it this way.

19 Doctor, do you remember whether you were asked directly on
20 cross-examination yesterday whether, in fact, there is
21 ventilation in those cigarettes?

22 THE WITNESS: Yes, I was.

23 THE COURT: And what was your response yesterday?

24 THE WITNESS: My response was that I believe that
25 Lorillard employed ventilation, but I was unable or unwilling,

1 frankly, to name a specific brand because I wasn't certain which
2 brands were Lorillard. So I wasn't going to state for a fact
3 Brand X when it might have been another company's brand.

4 THE COURT: And your objection is?

5 MR. MINTON: That he stated the factual basis for his
6 opinions, what facts he was aware of, what facts he wasn't. And
7 I think it's too late in the day now to provide him with a
8 specific Lorillard product and ask him to confirm whether or not
9 there are ventilation holes in that product when he said he
10 didn't know.

11 MR. GOLDFARB: Your Honor, in -- both in his direct
12 examination and in his live hour, Dr. Henningfield expressly
13 indicated that the technologies that he was demonstrating to the
14 Court were not limited to the Marlboro and the Marlboro Light
15 cigarettes and the Barclay cigarettes that he dissected for the
16 Court.

17 Now, if counsel is willing to stipulate that brands of
18 Lorillard cigarettes are in fact ventilated, I'll take that
19 stipulation and we can move on. This was a trivial matter that
20 was left open because Mr. Minton was suggesting that Lorillard
21 cigarettes are not ventilated.

22 THE COURT: All right. Just a yes or no: Are you
23 prepared to stipulate?

24 MR. MINTON: That there are Lorillard brand that are
25 ventilated? Yes.

1 THE COURT: Does that take care of it?

2 MR. GOLDFARB: Yes.

3 THE COURT: That's the easiest thing we've addressed all

4 day.

5 All right. Go ahead, please.

6 BY MR. GOLDFARB:

7 Q. And, Dr. Henningfield, you were asked questions by

8 Mr. Biersteker about Dr. Kozlowski's work on the effect of vent

9 holes. Do you recall that?

10 A. Yes.

11 Q. And Mr. Biersteker showed you select portions of

12 Dr. Kozlowski's chapter in Monograph 13?

13 A. Yes.

14 MR. GOLDFARB: Can I call up Exhibit 58700, please.

15 BY MR. GOLDFARB:

16 Q. Do you see on the screen that this is, in fact, Monograph

17 13, Dr. Henningfield?

18 A. Yes.

19 Q. Do you have your copy? Do you need your copy close?

20 Actually, if we can go to page -- if we can go to page

21 34, please, of the report.

22 A. I meant to bring one, but I don't know if I got it up

23 here.

24 Q. We'll call it up on the screen. Here it is.

25 Call up the conclusion, please.

1 You referred, in response to one of Mr. Biersteker's
2 questions, that you thought he was mischaracterizing the full
3 scope of Dr. Kozlowski's research?

4 A. Yes.

5 Q. And including the data presented in this chapter in
6 Monograph 13?

7 A. Yes. I thought it was very misleading.

8 Q. Okay. Why was it misleading?

9 A. Dr. Kozlowski had a section where he discussed the
10 complex interplay between ventilation, covering holes, size of
11 puffs and the differences across studies. And he did studies
12 where he looked at carbon monoxide boosts under certain
13 conditions for, I believe it was a Marlboro and/or Marlboro
14 Light cigarette.

15 What Dr. Kozlowski never backed away from in that
16 article, and no one has, is what he stated clearly in his
17 conclusions to the report. Yet what was taken was out of a
18 section where, if you wanted to -- if you wanted to take the
19 time, you'd have to go through the whole section and say, look,
20 he's talking about frequency, the nature of the problem, the
21 extent of the problem, the conditions under which it occurs, the
22 condition under which machine tests and evaluations come up with
23 different results. That's what that section was all about.
24 That was, I think, a good scientific evaluation of the process
25 and the mechanisms. The conclusions come back to the bottom

1 line.

2 Q. And can you read the conclusions, Dr. Henningfield,
3 please.

4 A. All or the ones pertaining to --

5 Q. Read the first -- you can read the first three.

6 A. "Number 1: Several design changes in the way that
7 cigarettes are manufactured have led to a substantial reduction
8 in the machine-measured tar and nicotine yields of U.S.
9 cigarettes over the last several decades."

10 I think we're all in agreement there.

11 "Number 2: Many of the same design changes that have
12 reduced machine-measured tar yields, particularly placing
13 ventilation holes in the cigarette filters, also create an
14 elasticity of delivery for the cigarette, allowing a wide range
15 of tar and nicotine deliveries from the same cigarette when a
16 smoker alters his or her smoking behavior.

17 "Number 3: Increasing puff volume and frequency,
18 covering the ventilation holes with fingers or lips and other
19 changes in smoking behavior known to occur with use of low
20 machine-measured-tar cigarettes can dramatically increase the
21 tar and nicotine delivery of low- and ultralow-yield brands."

22 Q. And for completeness, just read the last one as well.

23 A. "Number 4: Variations in the tar and nicotine delivery
24 that result from the known compensatory alterations in smoking
25 behaviors make the current U.S. cigarette tar and nicotine

1 yields as measured by the FTC method not useful to the smoker,
2 either for understanding how much tar and nicotine he or she is
3 likely to inhale from smoking a given cigarette or for comparing
4 the tar and nicotine intake that is likely to result from
5 smoking different brands of cigarettes."

6 Q. Dr. Henningfield, do you share the conclusions expressed
7 by Dr. Kozlowski in this chapter of Monograph 13?

8 A. Yes. And I believe this is consistent with all of my
9 testimony.

10 MR. GOLDFARB: We have no further questions at this point
11 for Dr. Henningfield.

12 THE COURT: All right.

13 Mr. Bernick, please.

14 CROSS-EXAMINATION OF JACK HENNINGFIELD, Ph.D.

15 BY MR. BERNICK:

16 Q. Good morning, Dr. Henningfield.

17 A. Good morning.

18 Q. I think we've met briefly, but I don't believe I've ever
19 questioned you before; is that correct?

20 A. Not to my recollection.

21 Q. Okay. I want to focus on a couple of the documents, as
22 you have heard in the dialogue with the Court, that pertain to
23 my client, Brown & Williamson, and ask you some questions that
24 are specific to these documents and specific to Brown &
25 Williamson.

1 First, with regard to U.S. Exhibit 56986, the 1963 --
2 July 1963 memo, do you recall giving testimony concerning this
3 document? And maybe to refresh you, this is the one where you
4 could hardly read the initials that appear at the end, "A.Y.";
5 do you recall that?
6 A. Yes. This was the Rorschach Test.
7 Q. Do you know --
8 THE COURT: I think doctor -- excuse me.
9 I think the doctor has that. Do you have that document?
10 THE WITNESS: I'm certain that I do, but --
11 MR. BASS: I can facilitate it by --
12 THE COURT: Okay. Fine.
13 BY MR. BERNICK:
14 Q. Do you know who A.Y. was?
15 A. I presume Addison Yeaman, but I don't know that for a
16 fact.
17 Q. Who was Addison Yeaman; do you know that?
18 A. I believe that he was a senior attorney advising or
19 working with the company, but I do not know his specific
20 position or relationship, only that I've seen him on a number of
21 key documents.
22 Q. Okay.
23 A. Oh, I'm sorry. I didn't see right at the top of this
24 memo, it says "Addison Yeaman."
25 Q. "Addison Yeaman." Addison Yeaman -- it's square with

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 your recollection that he was actually the general counsel of
2 Brown & Williamson at the time?

3 A. Yes.

4 Q. Okay. Now, Addison Yeaman, it turns out -- we heard
5 yesterday in your testimony and we saw reference to documents
6 indicating that Sir Charles Ellis, the advisor to BATCo, was
7 pretty enthusiastic about the properties of nicotine, correct?

8 A. Yes.

9 Q. And he was pretty enthusiastic about the research that
10 was being done at Battelle, correct?

11 A. Yes.

12 Q. And is it also true that Addison Yeaman himself, here in
13 the United States, the number one lawyer for Brown & Williamson,
14 when it came to Battelle's work, Addison Yeaman man was pretty
15 enthusiastic too, was he not?

16 A. That's my recollection.

17 Q. And in fact on the page that you had reference to and
18 that was pointed out, there's a fairly extensive quotation by
19 Mr. Yeaman concerning what it is that Battelle has found about
20 the properties of nicotine, correct?

21 A. Yes.

22 Q. And if we focus further down on the page, we see Addison
23 Yeaman kind of waxes a little bit eloquent. He says:
24 "Moreover, nicotine is addictive. We are, then, if the business
25 of selling nicotine, an addictive drug effective in the release

1 of stress mechanisms."

2 You quoted that yesterday in your testimony, correct?

3 A. Yes.

4 Q. He then goes on to talk about the beneficent effect of
5 nicotine, in opposition to what might be the bad effects of the
6 other constituents of smoke, correct?

7 A. Yes.

8 Q. So we see the language of Sir Charles Ellis talking about
9 the stress release mechanisms and the beneficent qualities of
10 nicotine. We see that even in Addison Yeaman's own writing,
11 correct?

12 A. Yes.

13 Q. The Court has already seen in evidence JD 53468, which is
14 the Southampton Research Conference minutes that were the
15 subject of examination. This was in 1962, correct?

16 A. Yes.

17 Q. And Addison --

18 MR. GOLDFARB: Your Honor, this document was not used, I
19 don't believe, on cross-examination -- excuse me -- on redirect
20 examination of Dr. Henningfield and the Court's express
21 instruction was that Mr. Bernick would be limited to the
22 documents that were used on redirect examination that concerned
23 his client, Brown & Williamson.

24 MR. BERNICK: Your Honor, this document directly
25 demonstrates the language in Addison Yeaman's memo, where he

1 talks about the properties and benefits of nicotine, come
2 straight out of the language of Sir Charles Ellis. What he's
3 doing is he's saying, "Here are all these great properties."
4 He's getting it directly from Sir Charles.

5 And all I'm doing is establishing that because Sir Charles
6 authored the portion of the Southampton Research Conference that
7 contains the language that's identical. And that's the purpose
8 of the proffer.

9 MR. GOLDFARB: And, Your Honor, Mr. Sheffler
10 cross-examined extensively on Sir Charles Ellis's discussions of
11 what he called the "beneficent effects of nicotine."

12 THE COURT: I must agree with that. I certainly heard a
13 lot yesterday about Sir Charles Ellis and his view.

14 Very briefly, please, you may establish --

15 MR. BERNICK: That's all --

16 THE COURT: -- that one fact.

17 MR. BERNICK: That's all that it's there for.

18 BY MR. BERNICK:

19 Q. You see exactly the same kind of -- indeed, you can track
20 the language from the Yeaman memo in '63, where he talks about
21 it being an addictive drug and then talking about the beneficial
22 effects and stress release mechanisms. It almost tracks the
23 sequence of the Southampton Research Conference statement that
24 Sir Charles made, correct?

25 A. It appears very consistent, I would agree.

1 Q. Okay. Now, beyond being a believer in the Battelle
2 research and the beneficial effects of nicotine, is it true that
3 Addison Yeaman's perspective on the significance of this work,
4 as reflected in this document, was somewhat different than Sir
5 Charles's perspective?

6 MR. GOLDFARB: Your Honor, if he's going to start asking
7 general questions about Addison Yeaman's understanding and views
8 on nicotine, that's well beyond the scope of the redirect.

9 MR. BERNICK: Absolutely to the contrary. The only
10 evidence in the record regarding what Addison Yeaman thought
11 about nicotine is in the document that they put before the Court.
12 And what I'm going to do is walk through the document.

13 Again, they opened this door flat out. This is a highly
14 significant document to this case. It is the tie between the
15 work that was done in Europe for BATCo and my client, Brown &
16 Williamson. They've got a document that comes from the General
17 Counsel, espouses his views, and yet objections are being made
18 that somehow constrain my ability to elicit from the witness what
19 those views were. I really don't think that that's right.

20 THE COURT: The objection is overruled. You may ask a few
21 questions.

22 BY MR. BERNICK:

23 Q. We see that both Addison Yeaman and Sir Charles shared a
24 view -- Addison Yeaman and Sir Charles Ellis shared a view about
25 the beneficial effects, correct?

1 A. Yes.

2 Q. Isn't it true that the Battelle work in particular was
3 oriented towards exploring those effects by use of a device that
4 would deliver nicotine, the aerial device?

5 A. Yes.

6 Q. Is it also true that, somewhat by contrast, Sir
7 Charles -- or excuse me -- Addison Yeaman, also a believer in
8 the beneficent effects of nicotine, was focused on a slightly
9 different proposition, which was called the Griffith Filter,
10 which is in the title of this document?

11 MR. GOLDFARB: Objection, Your Honor. The redirect had
12 nothing to do with the Griffith Filter. It only concerned the
13 Hippo research in both Mr. Sheffler's questioning and in the
14 redirect. So this is beyond the scope of both the redirect and
15 the Court's instruction as to the scope of recross by
16 Mr. Bernick.

17 MR. BERNICK: Your Honor, they specifically raised this
18 document. They quote just one portion and say these are the
19 views of Brown & Williamson.

20 This document is all about a proposal that they didn't
21 even have this witness describe to the Court. The entire
22 document is about a very specific proposal and the Battelle
23 portion plays into that proposal and it's vital to understand why
24 it is that Addison Yeaman is writing this memo.

25 He's not writing this memo to talk about whether the

1 information should go to the Surgeon General of the United States
2 or to the SGAC; he's writing this memo to make a very specific
3 proposal about what to do going forward with the Battelle work
4 and it's centrally focused on the Griffith Filter.

5 My questions are brief on this, but that's absolutely what
6 this document is about. Otherwise, what they're really saying
7 is: Well, we want to put this before the Court without
8 limitation. They didn't simply say we only want a certain
9 portion to come in that will support the witness's testimony.
10 They proffered it to the Court. And then they don't let me put
11 into context through this witness, who knows exactly what's in
12 this document.

13 Again, you can't cut it that fine. You open the door, you
14 open the door. And the objections are taking, frankly, longer
15 than my examination of the witness will.

16 MR. GOLDFARB: Your Honor, the -- Mr. Bernick's
17 reference -- we didn't use this document and the context of the
18 redirect had nothing to do with submission to the Surgeon
19 General's Report. It had to do with BATCo and B & W's
20 understanding of nicotine addiction in 1963.

21 Furthermore, if Mr. Bernick wants to call a witness to
22 explain this whole area of questioning, he can call a witness in
23 his case. This is beyond the scope. Again, this is --

24 THE COURT: I'll allow a few questions. Let's just move
25 on with it.

1 MR. BERNICK: Fine.

2 BY MR. BERNICK:

3 Q. The Griffith Filter was a proposal that Addison Yeaman
4 felt was a very important proposal to make and very broadly,
5 correct?

6 A. Yes. And if we're going to talk about this in detail,
7 I'll have to spend a couple of minutes looking at it, but
8 I'll --

9 Q. You let me know if there is some portion you don't follow
10 or if it's important for you to read more carefully. I'm happy
11 to do that. I think my questions will be pretty simple.

12 What Addison Yeaman actually proposes is that in response
13 to the upcoming expected report of the Surgeon General, that
14 Brown & Williamson seize the initiative and come out with a
15 Griffith Filter cigarette and tout both the Griffith Filter
16 cigarette as highly filtered on the one hand, and also the
17 benefits of nicotine on the other, per Battelle.

18 That's exactly what's being proposed by Addison Yeaman,
19 correct?

20 A. That's a substantial portion of this. There's a lot of
21 discussion, but I wouldn't disagree that that's substantial.

22 Q. I'll just read very briefly: "We challenge these
23 charges" -- that is, the charges that the Surgeon General's
24 Committee is expected to make -- "and we have assumed our
25 obligation to determine their truth or falsity by creating our

1 new Tobacco Research Foundation. In the meantime we say, here
2 is our triple or quadruple or quintuple filter capable of
3 removing whatever constituent of smoke is currently suspect
4 while delivering full flavor and, incidentally, a nice jolt of
5 nicotine. And if we are the first to be able to make and
6 sustain that claim, at what price, Kent?"

7 And he then finishes off: "The point is on this new
8 terrain, permitting strong offensive action, we get there
9 fastest with the mostest." That's what he said, correct?

10 A. Yes.

11 Q. And there is nowhere in this document even a suggestion
12 that somehow the Battelle research has got to be kept secret, is
13 there?

14 A. I would have to go back and look, but that was not my
15 primary use of this document.

16 Q. So you have a top -- the top lawyer in the United States;
17 he's not uncomfortable with the idea of going public with the
18 Battelle work, fair?

19 A. I'm not sure that that is fair. What he discusses is
20 what their counter to their expected public health campaign by
21 the American Cancer Society and other health organizations. So
22 he's talking about how they're going to counter health issues
23 with the filter and the nicotine beneficent claim.

24 Q. That's not my question. My question is: When it comes
25 to Battelle's work on nicotine, he wants to trumpet that work,

1 correct?

2 A. He wants to trumpet findings that are in their interest.

3 That's clear.

4 Q. Can you answer the question. He wants to --

5 MR. GOLDFARB: Objection, your Honor. Please let the
6 witness finish.

7 THE COURT: The objection is sustained.

8 You may finish your sentence.

9 THE WITNESS: I don't know the extent to which he wants to
10 trumpet. He clearly states that the counter to the health
11 concerns will be a filter and beneficial claims about nicotine.

12 As to the Battelle program per se, the premise is what
13 they were doing, in the context of everything that I've looked
14 at, it doesn't appear to me that that's the case, and they didn't
15 share it.

16 BY MR. BERNICK:

17 Q. Well, wait.

18 THE COURT: Wait. It doesn't appear to you that what is
19 the case? I just want it to be clear for the record.

20 THE WITNESS: Oh, that they were going to provide it to
21 the Surgeon General. They, in fact, in either this document or
22 another document, said that we will -- we won't, unless we are
23 directly and specifically asked for it.

24 MR. BERNICK: I'm happy to go back into that area and
25 establish, as Mr. Sheffler did, that the reason for that was the

1 advice that had been received concerning the merits of the
2 scientific research. The witness has now gotten into that. I'm
3 happy to do it. That was not the thrust of my question. I
4 believe that's already been established, why it didn't go
5 forward.

6 BY MR. BERNICK:

7 Q. My question is whether this -- whether Sir Charles
8 Ellis -- excuse me -- whether Addison Yeaman was advocating in
9 this memo anything other than the affirmative use of the
10 information that had been provided by Battelle. That's what
11 he's saying in this memo.

12 Indeed, he says they had to be able to give a jolt of
13 nicotine and to be able to substantiate the claim with the
14 Battelle research, correct?

15 MR. GOLDFARB: Objection. Asked and answered, Your Honor.

16 THE COURT: No. Objection's overruled.

17 You may answer.

18 THE WITNESS: I agree that a major thrust was countering
19 the health concerns with claims that nicotine is beneficial and
20 that a filter will take care of the problem.

21 BY MR. BERNICK:

22 Q. That's fine. Now, do you know whether or not the work on
23 the Griffith Filter continued?

24 A. I don't know how far it went. I thought I saw it
25 referred to in more than one document, but I'm really not

1 certain.

2 Q. And we know that the work on nicotine continued, as you
3 indicated yesterday in response to Mr. Sheffler's questions, at
4 the TRC, correct?

5 A. Yes.

6 Q. Okay. Now, I want to turn to the potential impact of
7 this information with respect to the 1964 report. I want to
8 show you some of the testimony that's been offered in this case
9 by Dr. Benowitz.

10 MR. GOLDFARB: Objection, Your Honor. This is all beyond
11 the scope of proper recross-examination by Mr. Bernick.

12 MR. BERNICK: To the contrary, the specific opinion was
13 offered by this witness about the significance of the Battelle --
14 the Hippo documents and how the Hippo documents, over my
15 objection, would have affected the result in the 1964 report.
16 Specifically, that was his testimony.

17 I said it was speculative. They proffered it. I move to
18 strike. Your Honor decided not to grant that motion, which is
19 fine. But now to make this claim -- you know, Battelle research,
20 Addison Yeaman -- you know, it's addictive and it's not being
21 shared and it would have changed the result -- of course, I'm
22 going to pursue what impact, if any, it would have had on the '64
23 report.

24 If they want to stipulate -- if they want to stipulate to
25 what Dr. Benowitz said as being binding in this case, which is

1 that it would not have -- it would not have had -- he can't say
2 it would have an effect on the '64 report -- that's fine. I
3 won't have to ask this witness this question.

4 But they've been very careful. Dr. Benowitz has testified
5 over the last seven years that the Battelle work would not have
6 affected the '64 report. That's what he has said repeatedly.
7 And he confirmed in this case that if all of the matters set
8 forth if the Battelle report were actually known to -- or all the
9 matters that are critical to the witness's testimony about the
10 Surgeon General's Report were actually known in the scientific
11 literature.

12 I want to establish as a result of that that
13 Dr. Benowitz's testimony in other cases is the correct testimony.
14 They didn't ask him that question here. Instead, they called
15 this witness to now offer the opinion for the first time against
16 my client that says that the Battelle research would have made a
17 difference. They can't have it both ways.

18 THE COURT: Mr. Goldfarb, what is your response?

19 MR. GOLDFARB: This is in his direct testimony. And if
20 you give me a minute, I'll tell you exactly where he says I can't
21 tell you for certain, but it's my opinion that had the
22 information been disclosed, it would have been reasonable to
23 conclude -- for the Surgeon General -- that the Surgeon General
24 would have considered the information --

25 THE COURT: It's in Dr. Benowitz's testimony or this one?

1 MR. GOLDFARB: Dr. Henningfield's direct testimony.

2 THE COURT: I do remember that. That's the testimony of
3 this witness, which Mr. Bernick is attempting to impeach with the
4 testimony of Dr. Benowitz in other proceedings.

5 MR. GOLDFARB: He could have done that on
6 cross-examination, Your Honor. I don't understand.

7 MR. BERNICK: I had no motive to.

8 MR. GOLDFARB: He had the opportunity. The defendants
9 took 14 hours with this witness. If he wanted to impeach him on
10 testimony that was in his written direct, he could have done so.
11 This was not to be the proper scope of recross-examination of
12 this witness.

13 THE COURT: Go ahead.

14 MR. BERNICK: They are the ones, again, who decided -- I
15 was content with where things were. I declined to proceed. They
16 were the ones who decided that they wanted, as part of their
17 examination, to rope Addison Yeaman and Brown & Williamson into
18 this process and to suggest that somehow we've concealed matters
19 and it had the effect --

20 THE COURT: Objection is overruled. You may proceed on
21 this point.

22 BY MR. BERNICK:

23 Q. Dr. Benowitz has testified specifically that it was
24 known -- and this is at page 4644 -- that it was known in 1964
25 that smoking was a reinforcing behavior. He then goes on to

1 talk about --

2 MR. GOLDFARB: Your Honor, if Mr. Bernick's going to
3 question this witness about Dr. Benowitz's testimony, the witness
4 should have Dr. Benowitz's testimony so he can see it in context.

5 MR. BERNICK: It's right here.

6 Do we have the trial transcript, Ken?

7 THE COURT: I think it will probably be pretty
8 straightforward. And here it comes. What I'm not clear on: Is
9 this Dr. Benowitz's testimony in this case?

10 MR. BERNICK: In this case.

11 THE COURT: All right.

12 BY MR. BERNICK:

13 Q. Line 21: "It was known in 1964 that nicotine in smoke
14 was a reinforcing behavior, correct?"

15 His answer is: "Yes." Is that answer correct,
16 Dr. Henningfield?

17 A. I think in the context he was being asked, it is
18 consistent with the wording of the Surgeon General's Report and
19 similar to testimony I've given. And I've specifically
20 testified that they said nicotine was a pharmacological
21 reinforcer for the social, et cetera. It's in --

22 Q. I didn't ask you whether it was similar to your
23 testimony. I simply asked whether it was a correct answer.

24 A. Well, "correct" is a funny question for -- I agree with
25 it. That's the way I would put it.

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1 Q. That's fine. It says: "It was known in 1964 that
2 nicotine had mood-altering or psychoactive effects, correct?"
3 His answer is one word: "Yes." Is that a correct
4 answer?
5 A. Yes.
6 Q. It then says: "In fact, the Surgeon General's Advisory
7 Committee made that very clear in the 1964 report, correct?"
8 He says: "Yes." Is that correct?
9 A. Yes.
10 Q. He then says: "And it was also known in 1964 that
11 nicotine use could be highly controlled or compulsive, correct?"
12 And he again admits: "Yes." Is that a correct answer?
13 A. Yes.
14 Q. And then it says: "And again, the Surgeon General's
15 Advisory Committee made that clear in the report, correct?"
16 The answer, again, is: "Yes." Is that a correct answer?
17 A. Yes.
18 Q. He then goes on to say: "And so the scientific evidence
19 regarding nicotine in smoke that was known as of 1964 was, in
20 fact, sufficient to satisfy the new criteria for addiction set
21 forth in 1988 Surgeon General's Report, correct?"
22 And the answer again is: "That is correct." Is that
23 also correct?
24 MR. GOLDFARB: Objection, your Honor. I don't want to
25 prolong this either, but this is -- this does not respond to the

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1 question that was offered on redirect, which is: Would the
2 information provided by a tobacco company on the issue of
3 nicotine's pharmacology in their understanding that was done by
4 these defendants in 1964 have made a difference or been
5 considered important by the Surgeon General's committee?

6 Dr. Henningfield answered that question on redirect. And
7 so this is a separate -- this is a separate question about the
8 substance of the knowledge of nicotine prior to 1964. It does
9 not go to whether or not information potentially submitted by
10 these defendants would have an influence or affected or been
11 considered important by the Surgeon General's Advisory Committee.

12 THE COURT: Mr. Bernick?

13 MR. BERNICK: It's very simple. And again, the objection
14 is longer than the question and the answer.

15 We will show that in 1988, the criteria would have been
16 met. That's what Dr. Benowitz's testimony was. I hope the
17 witness will admit the same thing. We then go back to 1964 and
18 establish --

19 THE COURT: The objection is sustained.

20 This particular piece of Dr. Benowitz's testimony does not
21 go to the question that you raised with this witness, which is
22 whether, if the Surgeon General's people had known in preparing
23 the report -- had known this information, whether it would have
24 made any difference.

25 MR. BERNICK: That's fine.

1 BY MR. BERNICK:

2 Q. Dr. Benowitz (sic), is it true that in 1964, there were
3 specific criteria that were in place as the Surgeon General
4 Advisory Committee decided to go ahead and analyze the
5 properties of smoking in determining whether it was a habit or
6 an addiction?

7 MR. GOLDFARB: Objection. Exhaustively asked and
8 answered.

9 MR. BERNICK: It's a foundational question because I now
10 want to get into whether it would have changed the report.

11 THE COURT: You may answer.

12 THE WITNESS: I'm sorry. Could you repeat that?

13 BY MR. BERNICK:

14 Q. Yes. The question is whether there were -- there's a
15 certain classification or criteria system that the Surgeon
16 General's Advisory Committee used in 1964 in determining whether
17 smoking was a habit or an addiction?

18 A. Yes, there was.

19 Q. Okay.

20 THE COURT: And we've heard extensive testimony on that
21 and we're not redoing that.

22 MR. BERNICK: We're not going to redo it.

23 BY MR. BERNICK:

24 Q. Is it true that Dr. Benowitz, for the last seven years in
25 litigation, has testified repeatedly that the pre-1964 research

1 would not have made a difference, would not have made a
2 difference to the SGAC in 1964 because of the classification
3 system that the SGAC used in connection with that report?

4 MR. GOLDFARB: Objection, this is beyond the scope of both
5 what was discussed on redirect with this witness and what was --
6 what the Court considered to be proper recross by Mr. Bernick.

7 THE COURT: No, the witness may answer the question if he
8 knows the answer.

9 THE WITNESS: First, with the qualification that I haven't
10 followed all of his testimony, to the best of my knowledge, I
11 believe that both Dr. Benowitz and I would concur that the
12 conclusion could have been drawn in 1964 depending on the
13 criteria, that it was not. I don't think either one of us has
14 disputed the conclusions that the 1964 Surgeon General's Advisory
15 Committee came to.

16 BY MR. BERNICK:

17 Q. I'm sorry, I think there's a disconnect. I asked you
18 whether, in fact, it's the case that Dr. Benowitz has repeatedly
19 testified that the pre-1964 research, including the Battelle
20 research, if known to the SGAC, would have made no difference to
21 the outcome of the '64 report because of the criteria or the
22 classification scheme that the SGAC used in connection with
23 that?

24 MR. GOLDFARB: Objection, objection, Your Honor. It calls
25 for speculation. The witness has already said he doesn't know

1 the last --

2 THE COURT: No, I allowed the question yesterday when it
3 was asked and the doctor may answer again.

4 THE WITNESS: I believe that both he and I have testified
5 that the specific research findings in the narrow sense would not
6 have changed the opinion because these research findings did not,
7 for example, demonstrate intoxication, abnormal personality
8 disorder.

9 My opinion has gone beyond that and said -- and I may
10 differ with Dr. Benowitz here -- is that had the companies been
11 fully forthcoming with their conclusions and assumptions, that
12 that may have tipped the balance, but we do not know, we'll never
13 know.

14 BY MR. BERNICK:

15 Q. Fair enough. You've made a distinction, I just want to
16 make sure it's clear. Are we clear that if the SGAC had known
17 about the specifics of the Battelle research, that is what they
18 were doing and the data experiments, whatever, that you can't
19 say that that would have made a difference to the '64 report
20 because of the criteria that were supplied in that report? Can
21 we agree on that?

22 MR. GOLDFARB: Objection, Your Honor, asked and answered.
23 It's in his direct. The witness already answered the question.

24 THE COURT: The objection's overruled.

25 THE WITNESS: I come to that conclusion for two reasons.

1 THE COURT: No, that wasn't the question.

2 THE WITNESS: Okay.

3 BY MR. BERNICK:

4 Q. I just asked you whether you would agree with that. I'm
5 trying to make life simple for you here.

6 A. Well, yes and no.

7 Q. Well, let me get to the second part of your question, or
8 your answer, Dr. Henningfield. You say well, gee, maybe it
9 would have made a difference, we don't know, maybe it would have
10 made a difference if the SGAC had known about the assumptions
11 that the companies were making in going ahead and doing that
12 research, right?

13 A. And being fully forthcoming.

14 Q. Well, I'm not talking about fully forthcoming, I'm
15 talking about the substance of what would be conveyed to the
16 SGAC. Let me put it this way: Yesterday you actually
17 testified, I believe, that, well, gee, maybe it didn't really
18 matter if the Hippo documents, or the Battelle researchers were
19 wrong on their hypotheses, whether their tests were right or
20 wrong. What was important to you was that they had already made
21 the assumption, the assumption that nicotine is critical, that
22 nicotine's drug effects were critical and the Battelle research
23 for them, called Hippo, was he intended to explore the
24 mechanisms, is that what you were getting to in the second part
25 of your answer?

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1 A. Yes.

2 Q. So we got the question of would the data and experiments
3 have made a difference, answer to that is can't say that it
4 would. Would the fact that the companies were making an
5 assumption about the criticality of nicotine, that might have
6 made a difference, fair?

7 A. Yes.

8 Q. Thank you.

9 A. You've summarized better than I could.

10 Q. Now, in point of fact, isn't it true that when it comes
11 to that assumption, the assumption that was being made in doing
12 that research, I want to put into perspective that assumption
13 that nicotine is real important, you call it critical, and put
14 that in the context with the Addison Yeaman memo which talks
15 about addiction. Do you recall that?

16 A. Yes.

17 Q. And I think you were candid in explaining to the Court
18 yesterday that you got to put these labels into perspective,
19 habit, dependence, addiction, you've got to put those into
20 perspective and come to grips with the core concept. Do you
21 recall that?

22 A. Yes.

23 Q. And isn't it true you that the core concept that you
24 articulated to the Court is this core concept that's real
25 simple. Four words: ".... loss of control." That's what you

1 said first, right?

2 A. Yes.

3 Q. And then it turns out that you can't say absolute loss of
4 control because there's no such thing as "absolute loss of
5 control", correct?

6 MR. GOLDFARB: Objection, Your Honor. We're getting into
7 the substance of testimony that was covered exhaustively on
8 original cross-examination, and this is starting to go -- this
9 is -- the discussion, generally, of the addiction field and
10 nicotine pharmacology is getting well -- and definitions of
11 addictions has been exhaustively covered --

12 THE COURT: Mr. Bernick where are you going?

13 MR. BERNICK: I'm going right back to the Addison Yeaman
14 memo and the Battelle research, that's exactly where I'm going.
15 The point is, if this is the core concept, if this is the key
16 concept, whether it is called addiction, habit, dependence, if
17 this is the core concept, again, what is the difference that the
18 Battelle research and the Addison Yeaman memo, what difference do
19 they point out with reference to this core concept?

20 THE COURT: All right, you may proceed.

21 BY MR. BERNICK:

22 Q. Isn't it true that later on in your testimony you
23 acknowledge that, really, the key or core concept is not simply
24 loss of control, but you said relative loss of control, correct?
25 Those were your words?

- 1 A. That seems reasonable, but --
- 2 Q. I just asked you whether those were the words that you
3 volunteered yourself in talking about this concept, this core
4 concept?
- 5 A. Yes, it seems like words I might have used.
- 6 Q. Well, is there any doubt about that in your mind? I can
7 show you.
- 8 A. No.
- 9 Q. This is at page 7490, "relative loss of control".
10 "Difficulty to stop in the face of harm or sometimes expressed
11 as relative loss of control. Control is never absolute." Do
12 you recall using those words?
- 13 A. Yes.
- 14 Q. Okay. Now, let's get back to the Addison Yeaman memo
15 now, in the broader context of this core concept. Isn't it true
16 that you've nowhere pointed out anywhere in any of the Battelle
17 research or documents that you've tendered to the Court, you
18 nowhere point out anywhere where Battelle says, jeez, you know,
19 with nicotine there's a relative loss of control?
- 20 A. Did I -- excuse me, the question is, did I point --
- 21 Q. Yeah, is there anything that you pointed the Court to in
22 all of those Battelle documents and research where Battelle is
23 saying, you know, with nicotine, there's a relative loss of
24 control?
- 25 A. I don't recall Battelle using those words.

1 Q. Well, in fact, Battelle didn't even address in anything
2 that you have shown the Court whether in behavioral terms the
3 use of or exposure to nicotine and the use of cigarettes was
4 compulsive, correct? They didn't address the issue?

5 MR. GOLDFARB: Objection, Your Honor.

6 THE WITNESS: They used the word "addiction".

7 MR. GOLDFARB: Again, Dr. Henningfield's testimony about
8 the Hippo documents was not with respect to behavioral issues and
9 loss of control. He expressly said, both in response to a
10 question by counsel and myself on cross and redirect that it was
11 the exploration of the mechanism and the pharmacological role of
12 nicotine in smoking that was important to him and this is going
13 well --

14 THE COURT: You're correct about that. I'm going to
15 sustain the objection. Mr. Bernick, try to get to the point that
16 you're --

17 MR. BERNICK: Well, maybe I'll try it this way and pursue
18 another question.

19 BY MR. BERNICK:

20 Q. Is there anywhere in Addison Yeaman's document, in
21 Addison Yeaman's memo where he says, gee, you know, with
22 nicotine there's really a relative loss of control or use of
23 nicotine is compulsive? Did he even address the issue?

24 MR. GOLDFARB: Same objection, Your Honor.

25 THE COURT: Yes. The objection is overruled.

1 BY MR. BERNICK:

2 Q. He addressed that in the document?

3 A. My answer is yes. He used the word "addiction", which is
4 the word that we generally use for that core concept, and you
5 can go back through the Oxford English dictionary hundreds of
6 years, that's the way the word is generally used. I
7 operationally defined it.

8 Q. So what you are saying is you construed his use of the
9 word "addictive" to mean in light of kind of common language,
10 loss of control, that's how you construe that word?

11 A. That and more.

12 Q. That and more. Well, that's what you just said, correct?

13 A. Yes.

14 Q. That's what you just said. And, in fact, addiction has
15 been used, it's been common knowledge for hundreds of years
16 that, in fact, tobacco, the use of tobacco is addictive in
17 precisely that way?

18 MR. GOLDFARB: Objection.

19 BY MR. BERNICK:

20 Q. Relative loss of control; is that true?

21 MR. GOLDFARB: Objection. I'm sorry, Mr. Bernick.

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

23 MR. BERNICK: That's fine, Your Honor, I don't want to
24 quarrel with the Court.

25 THE COURT: We went in at great great length yesterday

1 into the definitions of these terms, and I don't think we need to
2 go over that again today.

3 MR. BERNICK: My only point, Your Honor, is that there's
4 nothing in Addison Yeaman and the Battelle research --

5 THE COURT: I have overruled the objections to questions
6 that focused on Addison Yeaman's memo.

7 BY MR. BERNICK:

8 Q. Addison Yeaman in his memo never actually addresses the
9 behavioral aspects of nicotine in smoking other than to say that
10 nicotine has beneficial tranquilizing effects, correct?

11 A. He did two things.

12 Q. Can you answer the question, please? Again, two things
13 if you would like, but I would like to you answer the question.

14 A. Well, then please restate the question, because I can't
15 answer that yes or no.

16 Q. I'll restate the question. Isn't it a fact that in the
17 Addison Yeaman memo, Addison Yeaman never addresses the
18 behavioral aspects of smoking other than to observe that, per
19 Battelle, that nicotine has this tranquilizing stress release
20 effect?

21 A. That is a complicated question, so you're conceding that
22 he's talking about addiction and nicotine but not using my
23 words? If that's the case, I concur, he didn't use my words.

24 Q. No, I'm talking about -- I'm not conceding anything, I'm
25 asking you, I think, a simple question. You talk about relative

1 loss of control. That's a behavioral concept, correct?

2 A. Yes.

3 Q. Okay. And all I'm saying is that when it comes to
4 Addison Yeaman's memo and talking about behavior of smokers and
5 behavior of smoking, is there anywhere where Addison Yeaman says
6 that people he believes, at least from a relative sense, lose
7 control?

8 A. He didn't use those words. He used the word "addiction".

9 Q. He used the label, right?

10 A. Yes.

11 Q. Let me just ask you a further question about that label.
12 Isn't it true that at exactly the same time as that label was
13 being used by Addison Yeaman that the tobacco industry in
14 America was sponsoring research that said in published words the
15 same thing?

16 MR. GOLDFARB: Objection, Your Honor, this is --

17 THE COURT: Sustained.

18 BY MR. BERNICK:

19 Q. I want to move forward here to the document, the last
20 document that I want to ask about. I guess it's the second
21 document I'm going to ask about, which is this R & D report, and
22 then get into the last questions that I have.

23 You were asked questions about this document, which is
24 U.S. Exhibit 92045. Do you recall that? Let me get out the
25 right page here in a moment. I regularly tear those things in

1 handling them. Do you recall this document? This was the BATCo
2 R & D report.

3 A. Yes.

4 Q. And it was proffered for the purpose, I believe, of
5 demonstrating that there was research being conducted regarding
6 pH prior to the 1976 Tobacco Working Group meeting, correct?

7 A. Yes.

8 Q. And the purpose of that proffer was to establish that in
9 the sense the tobacco companies were on to this issue before the
10 Tobacco Working Group, correct?

11 A. Yes.

12 Q. Let me go back to exactly that same point in time. Isn't
13 it true that actually the Tobacco Working Group was not the
14 first organization to publish the idea of looking at pH?

15 A. I would be surprised if they were. The concept has been
16 around so long that I don't know who was the first. So I --

17 Q. Well, maybe we can zero in on that for a second. If we
18 take a look at the actual body of the research, do we see -- and
19 this is at page 11 -- that really the research that was done was
20 not research that focused on the addition of ammonia. That is
21 what the Tobacco Working Group focused on was the addition of
22 ammonia?

23 A. That was one of the things.

24 Q. And that was one of the things that the National Cancer
25 Institutes publication by Elson and Butts in 1972 also focused

1 on potentially changing pH with ammonia, correct?

2 MR. GOLDFARB: Objection, Your Honor. Again, this is
3 outside of the scope of the use of the document, and the
4 testimony that this witness gave on redirect examination about
5 this document.

6 MR. BERNICK: It is not -- we're going to establish
7 exactly what this document referred to and a very misleading
8 comparison that was made by the government here.

9 MR. GOLDFARB: Your Honor, I did not ask any questions of
10 this witness with respect to this document about the issue of
11 ammonia. I asked him about whether the companies were studying
12 pH and the addition of bases in this document, it's nicotine
13 bases to tobacco, and it's affect on nicotine delivery. I didn't
14 go into -- first of all, other publications, and my question was
15 focused in response to counsel's questioning on cross-examination
16 about Mr. Minton's testimony that the tobacco industry started
17 looking at this in 1976 and was doing it solely in response to
18 the Tobacco Working Group.

19 MR. BERNICK: Counsel suggested by the question that my
20 client in particular was not affected by the Tobacco Working
21 Group, that they, in a sense, did this on their own. This is
22 again the secret internal research. Nothing could be further
23 they are from the truth.

24 THE COURT: The objection's overruled. Go ahead, please.
25 BY MR. BERNICK:

Scott L. Wallace, RDR, CRR
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- 1 Q. Do we see that on page 11, the actual experiments that
2 were conducted didn't involve ammonia at all?
- 3 A. I'm not aware that this research involved ammonia.
- 4 Q. Okay. All they were doing is they were adding free --
5 nicotine base that is free nicotine to see what the effect would
6 have -- would be on the pH of the tobacco in the smoke, correct?
- 7 A. That and nicotine citrate.
- 8 Q. And nicotine citrate, which would be more acidic,
9 correct? Now it turns out that this idea actually -- let me
10 just ask you, did you take a look at the references that appear
11 in this document towards the back end -- these references -- to
12 see what it was that BATCo actually was researching here?
- 13 A. I didn't look up each of these references, but as I
14 stated a few minutes ago, the general concept was known for some
15 time. I don't know when it was first --
- 16 Q. I didn't really ask -- did you look up any of these?
- 17 A. Did I look up any of these references?
- 18 Q. Right.
- 19 A. No, I didn't.
- 20 Q. And these are references that go back to 1960, correct?
- 21 A. Yes.
- 22 Q. In the published literature, correct?
- 23 A. Yes.
- 24 Q. Isn't it true that what happened was a researcher by the
25 name of -- by the name of Shmuk, who worked for the U.S.

1 Department of Agriculture, published a study in 1953 suggesting
2 that pH differences could affect taste, and that all of this
3 research was being done to follow up on the idea that by
4 changing pH you could change the strength, the strength in the
5 mouth of cigarette smoke?

6 MR. GOLDFARB: Again, Your Honor, I object, this is beyond
7 the --

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

9 BY MR. BERNICK:

10 Q. Is it true that from Brown & Williamson's perspective
11 there are actually documents that document that the source of
12 this idea had nothing to do with pharmacology and everything to
13 do with the taste of smoke?

14 A. I don't believe that they were solely focused on the
15 taste of smoke. I do not dispute that taste was important and
16 relevant, and even impact trigeminally was relevant, but my
17 opinion is not that they were only concerned with taste.

18 Q. Well, your opinion, is that an expert opinion? You've
19 actually looked into the foundation of that opinion to determine
20 what all of these different research reports that led up to this
21 one focused on?

22 MR. GOLDFARB: Objection, this is not a document that's in
23 Dr. Henningfield's direct. I don't know if it's on his reliance
24 list. It was offered in redirect by cross-examination by
25 counsel.

1 THE COURT: But it's clearly being offered in terms of
2 supporting his expert opinion. The objection's overruled.

3 BY MR. BERNICK:

4 Q. Have you actually looked at all these different research
5 reports that are cited, not the publications but the research
6 reports that are cited?

7 A. I have seen --

8 Q. Excuse me. To see whether any of them focused on
9 anything other than the sensory properties of smoke?

10 A. Those I have not. My opinion is based on the total of
11 all of the documents that I have reviewed, which are much more
12 extensive than just these couple of documents that we have
13 looked at.

14 Q. It may be. I can't ask you questions about all those
15 other documents. I can only ask you questions about this
16 particular document which was proffered with a view to
17 establishing that Brown & Williamson was interested in smoke pH,
18 and you testified extensively about the pharmacological effects
19 of pH. My only question to you is, isn't it true that you can't
20 state as an expert, based upon an expert investigation, that
21 either this document or the documents that led up to it focused
22 on anything other than taste?

23 A. This specific document, if all we did was just look at
24 this in isolation, I can't.

25 Q. Okay.

Scott L. Wallace, RDR, CRR
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1 A. But that is not --

2 Q. But --

3 A. -- my opinion.

4 MR. GOLDFARB: Objection. Can the witness finish his

5 answer?

6 MR. BERNICK: I'm sorry, I didn't mean to interrupt.

7 THE COURT: The witness can finish his answer, although, I

8 can practically finish it for him, but that would not count for

9 the record, everybody, so let's have the doctor finish his

10 answer.

11 THE WITNESS: If all I had was this document and no other

12 information, my opinion would be more limited, but I have much

13 more information that I have acquired over the years reviewing

14 documents, many more than we have before us, and that is the

15 basis for my opinion which I stand by.

16 BY MR. BERNICK:

17 Q. Have you actually reviewed, as an expert, can you testify

18 under oath, Dr. Henningfield, that you've actually reviewed any

19 of the other research reports that are cited in this one?

20 MR. GOLDFARB: Objection, asked and answered.

21 THE COURT: Sustained, it was asked and answered about

22 two minutes ago.

23 MR. BERNICK: I apologize, then, Your Honor, and I am done

24 except for one last couple questions.

25 THE COURT: Can we get it done in five minutes?

1 MR. BERNICK: We can get it done in five minutes and I
2 know we're in the lunch hour here.

3 BY MR. BERNICK:

4 Q. You focused in your examination concerning Brown &
5 Williamson, both in talking about the Addison Yeaman memo and in
6 talking about this memo, on the fact that Brown & Williamson was
7 pretty focused on the properties of nicotine. It was an
8 important area for Brown & Williamson, correct?

9 A. Yes.

10 Q. And it was important to you as you've now confirmed on my
11 examination, it was important to you that Brown & Williamson
12 thought that nicotine was so important, correct?

13 A. Yes.

14 Q. And in fact, this research, other research demonstrates
15 that that importance translated into a lot of research, correct?

16 A. Yes.

17 Q. Isn't it true, have you been told at the end of the day,
18 the testimony in this case by Dr. Kessler himself has been that
19 his confidential sources within Brown & Williamson said Brown &
20 Williamson designs for tar? Were you ever told that?

21 MR. GOLDFARB: Objection, this is beyond the scope of the
22 examination.

23 THE COURT: Mr. Bernick, what does this have to do with
24 the scope of your cross?

25 MR. BERNICK: Because his testimony really underscored it.

1 While Battelle research itself didn't make the difference or
2 maybe this document didn't make a difference, but it was really
3 important to him that Brown & Williamson thought that nicotine
4 was key.

5 THE COURT: Right.

6 MR. BERNICK: And in point of fact, I want to establish
7 that he is not familiar with the fact that as things evolved over
8 time, when it came to actually designing cigarettes, Brown &
9 Williamson did not design cigarettes for nicotine, it designed
10 them for tar, and Dr. Kessler, who was running the FDA at the
11 time that he was working with the FDA, so concluded. Now, again,
12 if they would stipulate to that there wouldn't be a problem.

13 THE COURT: Not relevant. Not relevant not within the
14 scope. Sustained. Objection sustained.

15 MR. BERNICK: Nothing further, Your Honor.

16 THE COURT: All right. Are we done with this witness,
17 everyone? Dr. Henningfield, you may step down, although we'll be
18 talking about your testimony after you leave, but in any event,
19 you may step down.

20 THE WITNESS: Thank you very much.

21 MR. GOLDFARB: I assume -- we of course are going to
22 reoffer our --

23 THE COURT: We're going to go over all of those things,
24 but I don't think we need the Doctor.

25 MR. GOLDFARB: Only if there is any question as to the --

1 THE COURT: There's one issue that I would think we could
2 dispose of very quickly, Mr. Webb, but if it will take argument,
3 we'll do it after lunch.

4 MR. WEBB: We don't need argument on that.

5 THE COURT: The issue of expertise?

6 MR. WEBB: You can rule.

7 THE COURT: Clearly the Doctor may be accepted as an
8 expert in the areas for which the government offered him.

9 We will -- in terms of exhibits, my understanding is that
10 everybody's going to confer and get back to me on where we stand
11 on those.

12 MR. WEBB: On that point, what I did is I have all -- for
13 all the defendants, I have put on one list so you have it. I'll
14 tender it to the Court and give it to the government, and we'll
15 talk about it among ourselves as we've done with the other
16 witnesses, and come back and address -- we'll try to work out all
17 that we can among ourselves.

18 THE COURT: Right.

19 MR. WEBB: And those that are in dispute, we'll T it up
20 before Your Honor at some time convenient to Your Honor, if
21 that's acceptable.

22 MR. GOLDFARB: And, Your Honor, do you also want to deal
23 with all the exhibits at one time, and also with respect to the
24 exhibits that were objected to in their objections that were
25 filed?

1 THE COURT: Yes.

2 MR. GOLDFARB: We'll handle them all at once.

3 THE COURT: We're following the same procedure with each
4 witness. All right. Thank you, Doctor. Everybody, 2:15,
5 please.

6 (Luncheon recess had beginning at 12:14 p.m.)

7

8

9 C E R T I F I C A T E

10

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

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

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Scott L. Wallace, RDR, CRR
Official Court Reporter

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I N D E X

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	December 1, 2004
Plaintiff,	:	
	:	2:16 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 37
AFTERNOON SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

SHARON Y. EUBANKS, DIRECTOR
U.S. DEPARTMENT OF JUSTICE
Civil Division
1331 Pennsylvania Avenue, NW
Suite 1150
Washington, DC 20004
(202) 616-8280

STEPHEN P. BRODY, DEPUTY DIRECTOR
U.S. DEPARTMENT OF JUSTICE
Civil Division
1331 Pennsylvania Avenue, NW
Suite 1150
Washington, DC 20004
(202) 616-1438

RENEE BROOKER, ASSISTANT DIRECTOR
U.S. DEPARTMENT OF JUSTICE
Civil Division
Tobacco Litigation Team
1331 Pennsylvania Avenue, NW
Suite 1150
Washington, DC 20004
(202) 616-3797

1 APPEARANCES: (Cont'd.)

2 For the Plaintiff:

ELIZABETH CROCKER, ESQ.
MEREDITH L. BURRELL, ESQ.
PATRICK M. KLEIN, II, ESQ.
U.S. DEPARTMENT OF JUSTICE
Civil Division
1331 Pennsylvania Avenue, NW
Suite 1150-N
Washington, DC 20004
(202) 616-4119

7 LINDA McMAHON, ESQ.
U.S. DEPARTMENT OF JUSTICE
Civil Division
1331 Pennsylvania Avenue, NW
Suite 1150
Washington, DC 20004
(202) 307-0448

11 FRANK J. MARINE, SR., ESQ.
U.S. DEPARTMENT OF JUSTICE
Criminal Division
Organized Crime and
Racketeering Section
1301 New York Avenue, NW
Suite 700
Washington, DC 20530
(202) 514-0908

16 ANDREW N. GOLDFARB, ESQ.
U.S. DEPARTMENT OF JUSTICE
Civil Division
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 616-4358

19 BRIAN J. McCABE, ESQ.
U.S. DEPARTMENT OF JUSTICE
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 514-6875

22 For the Defendant:
23 Philip Morris USA, Inc.

THOMAS J. FREDERICK, ESQ.
WINSTON & STRAWN
35 West Wacker Drive
Chicago, IL 60601-9703
(312) 558-5700

24
25

1 APPEARANCES: (Cont'd.)

2 For the Defendant:
Philip Morris USA, Inc.

THEODORE V. WELLS, JR., ESQ.
JAMES L. BROCHIN, ESQ.
PAUL WEISS RIFKIND WHARTON &
GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3089

6 For the Defendant:
Lorillard Tobacco Company

J. WILLIAM NEWBOLD, ESQ.
MICHAEL B. MINTON, ESQ.
RICHARD P. CASSETTA, ESQ.
THOMPSON COBURN LLP
One US Bank Plaza
Suite 3500
St. Louis, MO 63101-1693
(314) 552-6000

10

11 For the Defendant:
Brown & Williamson
12 Tobacco Company

DAVID M. BERNICK, ESQ.
STEPHEN R. PATTON, ESQ.
RENE HONIGBERG, ESQ.
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2248

15

16

17

KENNETH N. BASS, ESQ.
KIRKLAND & ELLIS
655 15th Street, NW,
Suite 1200
Washington, DC 20005
(202) 879-5000

18

19 For the Defendant:
R.J. Reynolds Tobacco Company

ROBERT F. McDERMOTT, JR., ESQ.
PETER J. BIERSTEKER, ESQ.
JONATHAN M. REDGRAVE, ESQ.
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939

20

21

22

23 For the Defendant:
Liggett Group, Inc.

AARON H. MARKS, ESQ.
NANCY ELIZABETH STRAUB, ESQ.
KASOWITZ, BENSON, TORRES & FRIEDMAN
1633 Broadway
New York, NY 10019
(212) 506-1700

24

25

1 APPEARANCES: (Cont'd.)

2 For the Defendant: PHILLIP DUBE, ESQ.
Tobacco Institute JAMES A. GOOLD, ESQ.
3 COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
4 Washington, DC 20009
(202) 662-6000

5 For the Defendant: J. WILLIAM NEWBOLD, ESQ.
6 Council for MICHAEL B. MINTON, ESQ.
Tobacco Research USA, Inc. RICHARD P. CASSETTA, ESQ.
7 One US Bank Plaza
Suite 3500
8 St. Louis, MO 63101-1693
(314) 552-6000

9 For the Defendant: PHILIP A. PFEFFER, ESQ.
10 British American Tobacco CHADBOURNE & PARKE
30 Rockefeller Plaza
11 New York, NY 10112
(212) 408-5100

12
13
14 Court Reporter: EDWARD N. HAWKINS, RMR
15 Official Court Reporter
Room 6806, U.S. Courthouse
16 Washington, D.C. 20001
(202) 682-2555

17
18 Proceedings reported by machine shorthand, transcript produced
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1 P R O C E E D I N G S

2 THE COURT: Good afternoon, everybody. I gather
3 there's a problem over on that side of the room. Who doesn't
4 have power over there?

5 All right. Well, we will work on it. I think we can
6 deal with some other matters while people who know a lot more
7 are dealing with the power issue.

8 Am I correct that the government has no objection to
9 Philip Morris's motion for an order requiring redaction of
10 certain personal information; is that right?

11 MS. EUBANKS: That's correct. That's the motion that
12 is filed on the 29th.

13 THE COURT: Right. I wonder why it took me two days to
14 get it?

15 MS. EUBANKS: Your Honor, our LiveNote is stuck.

16 THE COURT: Pardon.

17 MS. EUBANKS: Our LiveNote is gone, not just the
18 screen.

19 THE COURT: Well, do we need to call Mr. Cramer?

20 We're not ready for a witness yet. Can everybody at
21 least survive in terms of dealing with the objections related to
22 Dr. Dolan's testimony?

23 MS. BROOKER: Your Honor, we can handle that now. When
24 we are ready for the one hour live, we will need the technology,
25 but we can certainly handle the objections right now.

1 THE COURT: All right. Who is going to proceed for the
2 defendants?

3 MR. BERNICK: I am, Your Honor.

4 MS. BROOKER: Your Honor, depending upon which issue
5 you're raising -- on behalf of the United States will be
6 addressing the issue.

7 THE COURT: Well, I'm going to go through the three
8 issues raised in the defendants' notice of objections and the
9 United States' response, and then of course somewhere I have the
10 defendants' reply. Just those two documents.

11 By the way, is it correct that the government is
12 planning to offer 400 exhibits with Dr. Dolan? Is that right?
13 If my math is right.

14 MS. BROOKER: Your Honor, there are a lot of exhibits,
15 I don't know if I counted the exact number of them. Is that
16 correct? Yes. That's approximately correct.

17 THE COURT: That's what I thought.

18 MS. BROOKER: There are a lot of exhibits discussed in
19 the direct testimony.

20 THE COURT: Let me start out with some real basics on
21 admissibility, everyone, because reading your papers I think
22 there are some misunderstandings about the law.

23 In 471(b), as you all know, I established a procedure
24 setting forth a rebuttable presumption of admissibility for
25 exhibits which are cited, referred to, or discussed in the

1 proposed findings of fact or in the direct written testimony of
2 live witnesses or in the designated and counter designated
3 testimony of prior witnesses.

4 Those are the only presumptions. There seems to be, on
5 the part of a particular party, an assumption that because an
6 exhibit was disclosed at some point, that it's presumptively
7 admissible. That's just not correct, and I will be addressing
8 the issue directly as it comes up in ruling on the defendants'
9 legal issues. But first I want to make sure the fact -- that I
10 have all the facts straight.

11 The issue one that the defendants raise concerns the
12 fact that, according to the defendants, 92 exhibits are neither
13 cited in Dr. Dolan's direct examination nor including in -- nor
14 included, rather, in the findings of fact.

15 I believe that the government's response is that these
16 documents were disclosed as reliance materials and therefore
17 they should be admitted.

18 Ms. Brooker, who is going to handle this, please?

19 MS. CROCKER: Good afternoon, Your Honor. Elizabeth
20 Crocker for the United States.

21 It is correct that we submitted with Dr. Dolan's
22 testimony a three-tier exhibit list. And the third category of
23 exhibits that we hoped to submit with Dr. Dolan's testimony were
24 exhibits that he cited in his expert report as reliance
25 materials that he did not actually directly cite in his direct

1 testimony. Those materials were disclosed to defendants in
2 November of 2001.

3 What is not correct is I don't quite understand the
4 defendants' math, how they've come up with 92, because if you
5 look at the appendices to the United States' submission --

6 THE COURT: Let me interrupt you, for this reason.

7 The one thing I'm not going to get bogged down in is
8 everybody's math. I'm going to establish general principles or
9 re-establish general principles. I'm going to deal with the
10 substance of arguments and then when you all go home you can
11 figure out the numbers.

12 I'm just going to operate for the moment on the numbers
13 that defendants are citing. Obviously, the substance of any
14 objection doesn't turn on the numbers, so don't worry about
15 that.

16 MS. CROCKER: Your Honor, if you notice in the United
17 States' response we have some attachments at the back of our
18 response, and if you look at attachment B, you will see that
19 there are only 10 documents that are actually reliance documents
20 that we were planning to submit through Dr. Dolan that are not
21 cited either in the findings of fact or in the direct testimony.
22 So it is actually a smaller number and, of course, we would be
23 guided by Your Honor's ruling.

24 If the ruling is that we should not submit materials
25 that were relied upon by the expert in their original report in

1 reliance sets, but are not directly cited in their testimony, we
2 would be guided by your rulings.

3 But our understanding was that Your Honor, through the
4 procedures in 471 and 471(b), anticipated that the United States
5 and both parties would be able to submit exhibits with
6 witnesses, either fact or expert, that were either -- your words
7 were either submitted or referred to as part of the direct
8 testimony.

9 So it was our understanding that we would be able to,
10 and we have been doing this with witnesses, that we would be
11 able to provide and admit through a witness materials that are
12 related to their direct testimony, exhibits that are related to
13 their direct testimony but are not -- that are not cited
14 directly in that testimony.

15 THE COURT: Let me hear if that's defendants'
16 understanding.

17 MR. BERNICK: There's actually a long story here that I
18 will not recount because the court understands I know very well
19 that it goes back.

20 It's the whole issue of the kind of en mass or volume
21 submission of exhibits that took us down this long road. Your
22 Honor, I think at least two different times, said no, we are not
23 going to have that. There is going to be a predicate for
24 admission.

25 In order not to have the proceedings become so slowed

1 down by proceeding document by document, I think Your Honor
2 toyed around with the idea of establishing an overall limit
3 numerically, didn't quite like that for understandable reasons.

4 THE COURT: Couldn't come up with any rationale basis
5 for it.

6 MR. BERNICK: As a substitute came up with the idea,
7 well, if it's in the proposed findings, A, there's a numerical
8 limitation that's implicit in that and, B, the proposed findings
9 lay out in a sense the theory of relevance that drives the
10 admission of the document.

11 And I think that that really is what is behind Order
12 471, which is if it's in the proposed findings of fact, at least
13 everybody can go there and understand why the document is being
14 proffered. If it's not in the proposed findings, then we are
15 back to where we began.

16 THE COURT: Or the direct testimony.

17 MR. BERNICK: Or in the direct testimony.

18 THE COURT: But my question is a simple one. Do you,
19 meaning all of you, share the government's interpretation of
20 471(b) that the word "referred to" --

21 MR. BERNICK: No.

22 THE COURT: -- includes reliance materials?

23 MR. BERNICK: No, no. As I said, so we are now in the
24 situation where none of that's been done, and they are now going
25 back to the discovery process simply saying we had some notice

1 of the fact that it might be relevant or it might be used --

2 THE COURT: Let me just say this, because if all sides
3 had a totally different reading, it might conceivably persuade
4 me. I don't know that it would. But that was not my intention.

5 Let me be very clear. I did use the word "referred to"
6 meaning that if in the direct testimony a witness talked about
7 an article, then certainly that article, within the normal rules
8 of evidence, could come in. But it was never my intention to
9 say that there is a presumption of admissibility for all
10 reliance materials. That would have been completely contrary to
11 the whole purpose of 471(b).

12 Now, also I want to say one other thing. As you all
13 know, I established a rebuttable presumption not to encourage
14 you all to go outside the presumption but to always leave room
15 for meritorious arguments.

16 But certainly the presumption is that if exhibits
17 aren't listed in the direct or included, referred to in findings
18 of fact, that you have to make an awfully strong argument to me
19 as to why they should come in.

20 And so, therefore, on issue number 1, whether we are
21 talking about five or 92 the principle is the same, that unless
22 you can make an exhibit by exhibit argument, those documents
23 will not be admitted.

24 MS. CROCKER: Your Honor, if I may, I didn't mean to
25 say that we were assuming that there was a rebuttable

1 presumption for all reliance documents. Certainly not.

2 What we did, though, is we elected the small number of
3 reliance documents that we thought were important, that were
4 relevant, that were not hearsay. And I will note defendants
5 have not objected on those bases to these documents and we
6 submitted those with this testimony. In our -- and it was just
7 an oversight that we did not make that document by document
8 showing for that small number of documents in our papers on the
9 Monday when we filed them. We did make that showing on
10 Wednesday when we filed our response.

11 And if you see our response to issue one, we go
12 document by document through those documents and we explain the
13 relevance and the importance of each of those documents. So, I
14 would just --

15 THE COURT: Where are you? Pages 2 through --

16 MS. CROCKER: Pages 2, 3, 4, and that is where we are
17 hoping that we can overcome the presumption of inadmissibility
18 for those documents.

19 The remainder of the documents that defendants
20 discussed are either cited in the United States' findings of
21 fact or -- and/or cited in Dr. Dolan's direct testimony.

22 MR. BERNICK: Your Honor, I don't mean -- we are not
23 meaning to take the government to task for what's now been
24 acknowledged as an oversight. That's fine.

25 But I think the problem still doesn't really go away

1 and it's still fairly fundamental. The presumption is against
2 admission. As Your Honor has now indicated, there has to be a
3 pretty strong showing.

4 If the government had come to us and said, "Look. We
5 really only have a handful of documents," we would not be
6 talking with Your Honor about this general principle. We would
7 talk about a particular document and maybe we would be able to
8 resolve everything. But we don't believe it's a small number of
9 documents, number one.

10 And number two, if you go through the brief and take a
11 look at what they've done, all they've basically said is, "Well,
12 the witness is testifying about this area, these are relevant to
13 the testimony," without any indication about why they are so
14 particularly important that they warrant overcoming the
15 presumption.

16 Presumption in the findings of fact creates a break in
17 this process that is critical, which is to keep the process
18 even, you know, somewhat focused so that we can keep track of
19 documents and actually respond to them.

20 If all that they need to do in order to satisfy, or to
21 rebut the presumption is to come in with these general
22 statements that says, well, this kind of goes to promotions or
23 this goes to advertising, then the presumption doesn't really
24 mean anything at all and we are back to the world of huge
25 volumes of documents coming in through witnesses. And I think

1 that that really undercuts rule 471.

2 If they came to us again with particular documents and
3 said, "These are different from what's already there, they are
4 not cumulative, they are different and here is why we are
5 tendering them," we would be totally open to that. They haven't
6 done it. They didn't do it in the beginning and they still
7 haven't done it in their brief.

8 THE COURT: Let me rule as follows and say this for the
9 future. I've looked at the government's justification -- well,
10 first, you all are going to have to figure out the numbers here.
11 That's just a fact matter, whether we are talking five or 92.

12 Now, two, as to those the government did identify and
13 did give justifications for on pages 2 through 4 of its
14 response, I didn't find any of those justifications compelling,
15 and I didn't find them sufficient to overcome the presumption.

16 It would be easier in the future, I think, for
17 everybody, if, when the government is offering documents and
18 trying to rebut the presumption, if you provided a separate tab,
19 if you will, that -- in just two or three lines at the most
20 gives your justification for each of those documents.

21 On issue number 2, the government says -- let me look
22 at the defendants' --

23 MR. BERNICK: Your Honor, maybe I can help streamline
24 that a little bit.

25 We listed the documents and there are quite a number of

1 them that we did not believe were in the reliance set. And the
2 government in part has come back to say, Well, yes, they were.
3 And if we are mistaken, sometimes these reliance materials are
4 difficult to keep track of because they come in CDs and
5 different kinds --

6 THE COURT: So both sides can make a mistake.

7 MR. BERNICK: Both sides can absolutely make a mistake
8 in this area. And if, in fact, there was a disclosure, well,
9 then the predicate for our objection is removed. We don't
10 believe that that applies to all of them.

11 I think that the issue of law that's before Your Honor
12 is whether the failure to disclose as reliance materials now can
13 be remedied by saying that they are, in fact, relevant or they
14 are in the proposed findings. And we don't believe that that's
15 right as a matter of law.

16 As a matter of law, we have a discovery process. We
17 have to be afforded notice in the discovery process, timely
18 notice, so that we can take discovery with respect to the expert
19 on reliance materials, and if they weren't in the reliance
20 materials, then they shouldn't be used.

21 Again, everybody makes mistakes. If they want to come
22 to us with a small number of documents, I think it's going to
23 happen on both sides.

24 THE COURT: There were exceptions, though, that the
25 government certainly gets to. Let me be clear about the

1 government's position, though. Putting aside for the moment
2 issues related to the review of the Philip Morris database,
3 that's a separate topic, but putting that issue aside, is the
4 government arguing that issues -- I don't mean issues -- that
5 exhibits that were not provided in the reliance materials are
6 admissible? I don't think so. I didn't read that in your
7 argument.

8 MS. CROCKER: Your Honor, it's again a little
9 confusing, because what we tried to do with our exhibit list is
10 provide -- and we provided three categories of documents so that
11 defendants could easily understand exactly what the categories
12 of documents were.

13 The first category were documents cited in Dr. Dolan's
14 direct testimony.

15 THE COURT: No problem with those --

16 MS. CROCKER: All those were disclosed as reliance
17 materials.

18 THE COURT: Fine.

19 MS. CROCKER: The problem, Your Honor, is that in
20 defendants' objections they then in this issue two discussed
21 many of those documents from that first category as well as
22 including documents from the second category.

23 The second category we clearly stated, these are
24 documents that Dr. Dolan did not disclose as reliance materials
25 and these are documents that are in the United States' findings

1 of fact that are relevant to Dr. Dolan's testimony that are not
2 cited in his testimony, but the United States is submitting them
3 with his testimony because they are findings of fact documents
4 that are relevant to his testimony.

5 THE COURT: Did he rely on them?

6 MS. CROCKER: No. These were not cited as reliance
7 documents.

8 THE COURT: I'm not saying they were cited. I
9 understood you about that. The factual question is: Did he
10 rely on them in reaching his opinion?

11 MS. CROCKER: Your Honor, I'm not here prepared to
12 specify for you how many were or were not.

13 What we did is we looked through our findings of fact
14 and we selected the number of documents which were the
15 defendants' marketing plans and 5-year plans.

16 As you know from Dr. Dolan's written testimony, he has
17 reviewed the whole set of marketing plans and 5-year plans. Now
18 in his direct testimony he goes through and carefully discusses
19 those plans one by one and quotes from them. He didn't list
20 anywhere in his testimony these are all of the marketing plans
21 and 5-year plans I have reviewed.

22 What we submitted with Dr. Dolan's direct testimony in
23 that second list of documents are all the marketing plans and
24 5-year plans that the United States has cited in its findings of
25 fact. So I'm not prepared to tell you -- I could go back to the

1 office and figure out which ones were in his reliance set, many
2 of them probably were in his reliance set.

3 Does that answer Your Honor's question?

4 THE COURT: It does. I'm just thinking a bit about the
5 overlaps among these categories.

6 The defendants' position is that even if they were
7 mentioned in the findings of fact, if they weren't disclosed as
8 reliance materials and they relied on them, they don't come in.
9 Is that right?

10 MR. BERNICK: Well, there are really -- there are two
11 principles that are -- that's the first one.

12 Your Honor -- that's what I raised to begin with -- and
13 Your Honor then asked Is the government saying that, and
14 apparently they are. And from our point of view -- again, if
15 it's not disclosed in the reliance materials, then it shouldn't
16 come in through the witness since that's the whole purpose of
17 discovery.

18 We wouldn't be arguing it if we were talking about
19 three or four documents that were simply omitted but as a
20 principle, they shouldn't come in.

21 Now, the second problem we now hear is that even when
22 they were not in the reliance materials and they are not in the
23 direct examination, therefore they have no nexus to the
24 witness --

25 THE COURT: That's a separate -- that's another

1 category. I haven't even gotten to that yet, Mr. Bernick.

2 MR. BERNICK: I think that that's what's in this second
3 category. That is, what she says -- what the government I
4 believe is saying is that there may be materials that are not
5 reliance materials, not in the direct testimony, and are in the
6 proposed findings that relate to the subject matter of the
7 testimony and, therefore, they come in.

8 And if that's so -- and I think that's what counsel
9 just said -- then they are saying effectively is that because
10 they are in the proposed findings, that in and of itself
11 provides an actual predicate for their admission regardless of
12 who is on the stand. And I don't think that there's any rule of
13 evidence that says that. That's just not in the rules of
14 evidence. That's not --

15 THE COURT: Ms. Crocker, did you want to add something?

16 MS. CROCKER: Really, Your Honor, we've done our best
17 to understand and follow your orders. If we haven't properly
18 understood them, then, you know, more instruction will be
19 helpful. But this is not a new process. This is the same
20 process that the United States used when submitting with other
21 witnesses.

22 For example, I understand that with Dr. Henningfield
23 the United States also submitted a small list of documents that
24 are documents cited in its findings of fact that were not
25 discussed in Dr. Henningfield's direct testimony, and it was --

1 it was the United States' understanding that the court wished to
2 avoid having document days where documents would simply be
3 presented to Your Honor. We didn't want to have some type of
4 procedure. We wanted to link them to the witnesses.

5 So what we have tried to do is, to a limited extent
6 where there are documents, such as marketing plans or 5-year
7 plans that Dr. Dolan clearly explains the relevance and
8 importance and what those types of documents are, we selected
9 those few documents, we put them into our list and we clearly
10 labeled them as findings of fact documents submitted as related
11 to the testimony of Dr. Dolan.

12 THE COURT: Let me say this. You may have followed the
13 procedure. If there was no objection from the other side, then,
14 quite frankly, I didn't focus on it one way or the other, since
15 there's more than enough to focus on when there are objections.

16 If there are overlapping categories, everyone, if --
17 even if documents are mentioned in the direct testimony and/or
18 in the findings of fact, if they are also legitimately reliance
19 documents that were not disclosed as reliance documents, then
20 they cannot be admitted under rule 26. So that's a slightly
21 different issue.

22 If they are documents that are in the proposed findings
23 of fact, they are not reliance documents in that the witness
24 didn't consider them or rely on them in any way or they are
25 mentioned in his direct, and it sounds like they wouldn't be,

1 then you make a separate justification exhibit by exhibit as we
2 talked about for the very first category of exhibits as to why
3 there is a nexus of any kind between this witness and the
4 document you're seeking to admit.

5 MS. CROCKER: That would be for finding of fact
6 documents?

7 THE COURT: It would be for finding of fact or -- as I
8 say, I don't think this will happen very often -- or if it is
9 mentioned in the witness's direct testimony. I don't think
10 that's going to be the case, though.

11 MS. CROCKER: It was our understanding that your ruling
12 was that the findings of fact themselves had explained the
13 relevance and the importance of these documents so that the
14 showing, that's not accurate?

15 THE COURT: I don't think I ever put it that way. I
16 tried to identify significant categories, i.e., direct testimony
17 and findings of fact, that would contain documents that were
18 presumptively admissible because they were presumptively tied to
19 the case, but that doesn't mean that there's any nexus between
20 those documents and this witness's testimony.

21 Am I not being clear with you?

22 MS. CROCKER: It's just that we are a little unclear
23 about the rebuttable presumption of admissibility for finding of
24 fact documents if then we have to do the same type of document
25 by document showing that we would have to do for documents that

1 don't have that rebuttable presumption. But I understand what
2 Your Honor is saying.

3 THE COURT: Well, certainly one thing should be clear
4 on this. If they are reliance documents and they haven't been
5 produced, then they don't come in at all. If they are in the
6 findings of fact, there still -- it may be -- I'm sorry. Let me
7 begin again.

8 If they are in the findings of fact, if there's any
9 objection to their coming in with this witness, there has to be
10 some showing of a nexus to this witness.

11 MR. BERNICK: Your Honor, maybe the best thing to do is
12 if the government wants to proceed along those lines, they
13 should make some kind of proffer along those lines so that we
14 can kind of have a more concrete discussion of it.

15 But I would be fundamentally -- I don't believe that
16 there is any place in the Federal Rules of Evidence or in the
17 federal rules of procedure whereby a proposed finding of fact,
18 which is, after all, simply a pleading that's supplied to the
19 court for the court's benefit, constitutes an evidentiary or any
20 kind of predicate for admissibility.

21 The Federal Rules of Evidence are quite clear. There
22 has to be a predicate for the admission of a document. That
23 predicate has to be supplied from a witness or in some other
24 fashion that makes it -- satisfies the requirements of Rule 104,
25 which is preliminary determinations with respect to documents.

1 The proposed findings of fact are simply their pleading.

2 To say that because it's in the proposed findings it
3 comes in regardless of whether a witness sponsors it, I think
4 is -- there's just no place for it in the rules. I'd be happy
5 to be -- I am completely unacquainted with that process.

6 Now, if the witness supplies -- excuse me. Okay. If
7 the witness supplies a predicate, if there's a nexus to the
8 witness, well that's fine, but if there's not, it doesn't
9 satisfy the rules.

10 Moreover, it then creates the same problem we've been
11 dealing with, which is documents coming in that don't get tested
12 in the trial process.

13 We have to keep track of them. If they've got hundreds
14 of documents or 50 documents or 45 documents that there's just
15 going to put in because a witness is on the stand, even though
16 the witness doesn't testify about them, then we really don't
17 have the ability to control the flow of evidence in this case so
18 that we can even respond to it.

19 So two problems. One is the rules, and the other is a
20 fundamental question of our ability to handle this flow of
21 documents in connection with our defense of the case.

22 THE COURT: Ms. Crocker, did you want to say something?

23 MS. CROCKER: The United States is happy to make
24 another showing or make another submission of this exhibit list
25 to the court and to explain whatever the court would like.

1 You said that you would like the nexus explained to
2 this witness. I think that that's something that I could right
3 now. But I'm happy to explain --

4 THE COURT: I think it's easier in writing and it's
5 faster for me.

6 MS. CROCKER: -- the connection between the marketing
7 plan submitted and the -- his testimony about those marketing
8 plans.

9 THE COURT: All right. Issue 3.

10 MS. CROCKER: Your Honor, did you wish to address the
11 direct mail databases in issue two?

12 THE COURT: The direct what?

13 MS. CROCKER: The direct mail databases covered by
14 issue 2.

15 THE COURT: I'm sorry, I did. Thank you. That's a
16 very different issue.

17 MR. BERNICK: Your Honor, Mr. Frederick will be
18 addressing that issue.

19 THE COURT: Here, of course, the government didn't get
20 access to the database until -- when was the date again? Very,
21 very recently.

22 MS. CROCKER: Yes, Your Honor, a few weeks ago. It
23 depends which database you're speaking of.

24 But we received the findings from the Lorillard
25 database within the last few weeks and the Brown & Williamson

1 database even more recently. As of course Your Honor knows, we
2 received the materials from the Philip Morris' database many
3 months ago, and Dr. Dolan was then -- we disclosed that he had
4 relied upon those. In fact, defendants knew that he had come to
5 the database in New York City and had reviewed it. And then
6 defendants took a deposition of Dr. Dolan and asked him
7 questions about his review of those materials. And then, of
8 course, there was motions practice, and Your Honor ruled that in
9 order 622 that Dr. Dolan could discuss in his direct testimony
10 the Philip Morris' direct database.

11 THE COURT: So, Mr. Frederick, what exactly is your
12 position on this?

13 MR. FREDERICK: Your Honor, our position is simply that
14 the opinions weren't disclosed. If you think you've resolved
15 that issue in 622, then I have nothing further to say as to that
16 particular issue. But clearly didn't disclose what he says in
17 his direct testimony at the time he was deposed in December of
18 2003.

19 MS. CROCKER: Your Honor, if I could? In the briefing
20 that led up to order 622 --

21 THE COURT: Wait. I want to just go back for a minute.
22 Mr. Frederick, let me hear you again on that.

23 MR. FREDERICK: Your Honor, what Dr. Dolan says about
24 the Philip Morris' direct marketing -- mail database in his
25 testimony was not disclosed when he was deposed in December of

1 2003.

2 THE COURT: It couldn't have been disclosed because he
3 didn't have the relevant materials.

4 MR. FREDERICK: Your Honor, that's not correct with
5 respect to the Philip Morris' database. Those materials were
6 forwarded months before his December 2003 deposition.

7 THE COURT: All right. Ms. Crocker.

8 MS. CROCKER: Let me try again, Your Honor.

9 The opinions that Dr. Dolan has have not changed. His
10 fundamental opinions are as we set forth in the briefs that led
11 up to Order 622 and as we set forth again in this briefing, that
12 defendants have marketed to young people, including teenagers.
13 Those are his fundamental opinions.

14 He has disclosed in 2001, again before we had another
15 deposition in 2003, he disclosed various different materials
16 upon which he relied and came to those opinions. And in the
17 deposition in 2003, in December of 2003, Dr. Dolan was deposed
18 about the Philip Morris' direct mail database results and he
19 explained that his fundamental opinions that defendants had
20 marketed to youth had not changed in any fundamental way but
21 simply that the direct mail databases were another marketing
22 tool that defendants used and that was basically it.

23 In the motions practice that led up to Order 622 we
24 just set forth exactly those arguments, and in the ruling in
25 Order 622 it was our understanding that Your Honor said, as the

1 United States argued, his fundamental opinions have not changed.
2 He has disclosed these reliance materials. They did not change
3 his mind.

4 He hasn't now concluded that defendants don't market to
5 youth anymore. He hasn't concluded they market to youth
6 anymore. It's just another basis for his fundamental opinion
7 which he has disclosed and therefore he can discuss that opinion
8 in his direct testimony. And we would make the same assertion
9 for the database results that we just received a few weeks ago
10 from Brown & Williamson and Lorillard.

11 THE COURT: Namely, that they did not change his
12 opinion?

13 MS. CROCKER: His fundamental opinions, his underlying
14 opinions are not changed. As you know from his direct
15 testimony, he covers 50 years of conduct. He covers lots of
16 different types of marketing tools, and this is simply one other
17 marketing tool.

18 There's only one paragraph in his direct testimony that
19 actually just presents some of the factual information about the
20 mailings that are sent out to consumers and, you know, the lack
21 of age verification. And simply it's just another piece of
22 evidence that he's looked at in reaching his fundamental
23 underlying opinions which are unchanged from November when he
24 filed his -- November 2001 when he filed his original report.

25 THE COURT: Mr. Frederick, anything further?

1 MR. FREDERICK: Your Honor, I'm certainly not here to
2 speak to others' databases, so I'm not going to address those.
3 I have nothing further on Philip Morris. I don't think it was
4 clearly decided in 622, but if the court disagrees, we will
5 abide by that ruling.

6 THE COURT: I think 622, which I've read a -- reread a
7 couple of times -- covers the issue. Mr. Bernick?

8 MR. BERNICK: There was reference made to the Brown &
9 Williamson data.

10 THE COURT: There was and to Lorillard, I believe.

11 MR. BERNICK: And to Lorillard.

12 At least with respect to Brown & Williamson, we have
13 not received any supplementation indicating that he, in fact,
14 intends to rely upon materials relating to the Brown &
15 Williamson database, and therefore that matter falls within the
16 scope of the broader principle that we just finished discussing,
17 which is the ability of the government to use through a witness
18 documents that were not disclosed as reliance materials. There
19 was no supplemental production saying he is now going to be
20 relying upon these items, at least as I am informed.

21 THE COURT: The situation with these databases is very
22 different than the situations we had been discussing earlier
23 this afternoon.

24 Ms. Crocker what's your response on this?

25 MS. CROCKER: Just briefly, Your Honor. The materials

1 are produced very, very recently. And defendants knew as they
2 asked Dr. Dolan in his last deposition had he reviewed any other
3 companies databases. Of course he had not. They were not then
4 available.

5 We had motions practice, and defendants were well aware
6 that Dr. Dolan was our only expert who was going to take a look
7 at the results of those database inquiries.

8 We then included this single paragraph in his testimony
9 which defendants had on the 19th of November. They've had it
10 for about two weeks now. I don't see there's any prejudice from
11 this disclosure of reliance material very late produced.

12 MR. BERNICK: What was just said by counsel was not
13 accurate.

14 We were not told that Dr. Dolan would be speaking to
15 our database -- our databases on direct mail at any time in
16 connection with the discovery process whatsoever. The first
17 notice that we received --

18 THE COURT: Well, again, I think you weren't told it
19 because he didn't have the databases.

20 MR. BERNICK: Well, it -- I don't know that that is
21 correct, but in any event --

22 THE COURT: He just got it. I don't mean just a couple
23 of weeks ago.

24 MR. BERNICK: He may have just gotten it, but that's
25 the problem. If he just got it, how in the world are we

1 supposed to deal with his formulation of opinions now based upon
2 materials that were not available to us in discovery?

3 THE COURT: It seems to me, Mr. Bernick, you're putting
4 several carts before horses. He didn't get the database because
5 you didn't turn it over.

6 MS. CROCKER: Your Honor, it simply was not produced.
7 We had to go through two series of motion practice.

8 THE COURT: I remember.

9 MS. CROCKER: As you know, so --

10 THE COURT: I remember.

11 Mr. Minton.

12 MR. MINTON: At least with respect to Lorillard, Your
13 Honor, Dr. Dolan's testimony was he wasn't even aware if
14 Lorillard had a direct mail database. I don't think that tells
15 us -- well, if he was intending to --

16 THE COURT: If you don't turn over materials, how is he
17 supposed to know? He doesn't work for all of you.

18 MR. MINTON: Well, I think he would at least know
19 whether or not if there was a database, A, and B -- well,
20 certainly the government was aware at the time Dr. Dolan's
21 deposition was taken.

22 THE COURT: Where does this all get you in terms of
23 trying to preclude his testimony on discovery materials that he
24 didn't get from you all until approximately four to six weeks
25 ago? I think that's conservatively accurate.

1 MR. MINTON: It impacts on our ability to know how it
2 is that he's going to rely on that and what opinions he's going
3 to express.

4 THE COURT: Didn't you depose him? Quite recently.

5 MR. MINTON: In December 2003.

6 THE COURT: I'm sorry. That's right. 2003.

7 And did he take the position that his recent access to
8 the databases that were just turned over to him did or did not
9 change his substantive opinions? That's for Ms. Crocker.

10 MS. CROCKER: Your Honor, there was -- he did not take
11 a position that it changed his opinions. In fact, he was very
12 clear that it had simply reinforced his opinions. As I said,
13 it's one more marketing tool that the defendants had used.

14 THE COURT: I see no justification for precluding his
15 testimony on this subject and I see no prejudice to the
16 defendants on it.

17 Have we completed or have I left out anything on issue
18 number two?

19 MS. CROCKER: I think that's completed, Your Honor.

20 THE COURT: Now, issue number 3 is the question of
21 witness immunity. Let me get some notes out, everybody.

22 MS. BROOKER: We have Mr. Klein from our office to
23 handle this issue.

24 THE COURT: All right. Would you identify yourself for
25 the record, please?

1 MR. KLEIN: Patrick Klein for the United States.

2 THE COURT: And who is going to speak for defendants on
3 this issue?

4 MR. BERNICK: I will, Your Honor.

5 THE COURT: All right. Let me just get to everything.
6 I don't really have questions on this.

7 Do counsel have anything to add to what's in their
8 papers?

9 MR. BERNICK: The only thing that I would add pertains
10 to the case law dealing with the question of whether the rule
11 that we cited is limited to damages cases. And it's kind of an
12 interesting question, but the only case that actually --

13 THE COURT: You did put your finger on a problem,
14 Mr. Bernick.

15 MR. BERNICK: Okay. Well, maybe I'll be able to solve
16 the problem, maybe I won't.

17 But the case -- we've looked at the cases, and as I
18 understand it, there are cases that talk -- that are damages
19 cases, but the only case that really comes right out and says
20 the rule should be different for equitable cases is this
21 Combustion Systems Services vs Schuykill. I think it's
22 pronounced SKU-gul, having spent some time in Philadelphia
23 Energy Resources, where the court goes through that --

24 THE COURT: No, SKY-kill. Schuykill Energy Resources.

25 MR. BERNICK: My Philadelphia friends always say

1 SKU-kul, but maybe it's SKY-GIL.

2 In any event, what's clear from this case is two
3 things. One is that the analysis is squarely the analysis of a
4 court that's looking for the policy of considerations that drive
5 the immunity. It's not simply a Black letter kind of test. The
6 question is what actually makes sense. And that's very evident
7 in the discussion in subsection B that precedes the discussion
8 that deals with the rescission of the contract.

9 And the rescission of the contract section actually
10 articulates a much narrower rule than what is articulated by the
11 government here.

12 This is a situation where the false testimony is the
13 core of two different claims. One is a breach of contract claim
14 and the other is an equitable claim. If you don't have the
15 false testimony evidence come in, then there is no case.

16 And, in fact, that is proven out by the posture in
17 which the matter appears before the court. That posture is on a
18 motion to dismiss.

19 The effect of applying the immunity in this case would
20 mean that there is no claim for equitable relief whatsoever.
21 That is fundamentally a completely different posture from the
22 one that we have here.

23 Here, we have an equitable claim. There's all kinds of
24 evidence that the government is seeking to proffer with respect
25 to that claim.

1 There is no motion to dismiss at this stage. Maybe
2 there should have been a motion to dismiss before, but with
3 respect to witness immunity, I don't believe that there was
4 because it would not have been appropriate.

5 This, in short, is not a question of claim preclusion.
6 This is a question of whether the evidence comes in. And,
7 therefore, the effect of keeping the evidence out is far less
8 Draconian than what you see in this case.

9 Now the court announces, says, I don't see any cases
10 out there. It may well be that there are no other cases out
11 there that are directly on point, that is, that address this
12 issue in the context of evidentiary preclusion.

13 There is only one that I'm aware of that comes close to
14 this is, which actually what Judge Weinstein did in connection
15 with testimony before Congress, which is the Norr-Pennington
16 issue, but it took place in the context of evidentiary
17 preclusion as opposed to claim preclusion.

18 Judge Weinstein, I tried the case in front of him and
19 it couldn't have been more clear. If you quote Weinstein on
20 Evidence against him, he will always say, "Well, that's a
21 different Weinstein."

22 In this case what he decided was, Look, there is
23 immunity. The testimony that was offered before Congress in
24 1994 -- which was the issue there -- squarely picked up by
25 Norr-Pennington in his words, "You can lie to Congress under

1 Norr-Pennington" -- there wasn't any problem keeping it out of
2 the case because it didn't have the effect of precluding
3 the case or the entire claim.

4 That's the situation that we have here. We don't need
5 this evidence to come in. Allowing it to come in creates
6 exactly the kinds of problems that the witness immunity policy
7 was designed to foreclose.

8 THE COURT: Are you talking -- the case you're talking
9 about is Falise, though; right?

10 MR. BERNICK: That was the Falise case.

11 THE COURT: And that was a jury trial, wasn't it?

12 MR. BERNICK: That was a jury trial, sure, but whether
13 it's a jury trial or a bench trial --

14 THE COURT: I understand.

15 MR. BERNICK: -- Doesn't really bear upon the policy
16 consideration.

17 So this case is instructive but it is not on point. It
18 is -- it's most certainly factually not on point. The issue is
19 evidentiary preclusion, not claim preclusion.

20 THE COURT: Does the government need to add anything?

21 MR. KLEIN: Just a few points, Your Honor.

22 Counsel is correct that there -- that there is no case
23 out there that says that this can apply to equitable cases such
24 as this one.

25 It is clear from all the case law, and especially the

1 case law cited by the defendants, that this immunity doctrine
2 has no basis in equity type cases. The language itself is
3 strictly limited to damage-seeking cases which, as you correctly
4 identified, isn't what we are here for.

5 Now, the other thing that counsel said that bears
6 mention is that because there is other evidence of fraud that we
7 are introducing in this case, even if Your Honor would accept
8 that this doctrine applies to equitable type cases, it falls
9 smack into the middle of the exception that we pointed out in
10 our papers that this type of evidence of fraudulent conduct
11 still gets in because of the fact that there is other evidence
12 of fraud. So, they can't have it both way. Either we get it in
13 that way or it comes in through the exception.

14 Finally, there is no case cited by defendants, no case
15 that we could find, that applies to this type of immunity in a
16 case where -- as defendants are now trying to do -- not claim
17 preclusion, not cause of action preclusion, but simply an
18 evidentiary test. None of the cases deal with it in that
19 context. This is a -- they are trying to apply it in a brand
20 new way in which the cases don't intend to be applied.

21 MR. BERNICK: Just a very small footnote with respect
22 to the broad fraudulent scheme point. Again, all the cases that
23 deal with that are in the context of claim preclusion.

24 That is, the mere fact that the false testimony was
25 simply one element of a broader fraudulent scheme has not served

1 as a basis under witness immunity prevents the entire claim from
2 going forward. That's the language that appears in the middle
3 part of subsection B where it talks about one exception to the
4 witness immunity doctrine and then goes on to talk about these
5 cases.

6 It says, "One court has stated that the exception
7 exists because it would not be appropriate to preclude recovery
8 for fraud, merely because one element of the fraud involved
9 giving false testimony during the civil suit."

10 So you basically have a situation where that is the
11 broad fraud claim. The question is whether one element that
12 might be subject to witness immunity prevents the entire claim
13 from going forward. The answer to that is no.

14 We don't have that situation here. We're not seeking
15 to preclude the entire claim from going forward.

16 MR. KLEIN: Your Honor, just one point on that last --
17 specifically to that last point.

18 The cases that we are referring to dealing with that
19 exception all involve cases where it's not seeking to preclude
20 the cause of action but just other evidence of the same fraud.
21 So you have the fraudulent testimony, plus other evidence
22 relating to that fraud. So it's not a cause of action
23 preclusion. It deals with the very same fraud and dealing with
24 the evidence.

25 THE COURT: Well, I'm prepared to rule at this point.

1 This is a very interesting issue if we all had time to
2 write law review articles. And even though I spent a lot of
3 time on it last evening and even at some unearthly hour this
4 morning -- and I, as I say, I'm certainly prepared to rule at
5 this time -- it is an issue that I may be willing to revisit as
6 a matter of law when all the evidence is in.

7 I read all of the cases that you gave me. Quite
8 honestly, I did not have time to do independent research. There
9 may not be any other cases out there. I know you all usually
10 cover the ground pretty fully, but perhaps my discomfort is
11 simply because none of the cases that you all cite really
12 directly address the issue presented before me.

13 I do think it's interesting that neither one of you
14 cited either the Supreme Court case or the Court of Appeals'
15 case from our own circuit on this issue, and those are the cases
16 I'm going to rely on, everybody, and they are, for the record,
17 Brisco vs Lahue, L-a-h-u-e, which is 460 U.S. 325 and that was
18 decided in 1983, and Gray vs Poole, 275 Fed 3rd 1113, decided in
19 2002. And that's from our own circuit.

20 MR. KLEIN: Your Honor, if I may, I believe both of us
21 cite those two cases.

22 THE COURT: I didn't say you didn't cite them in your
23 papers. I certainly meant to say that you didn't discuss them
24 this afternoon. If I said "cited in your papers," I didn't mean
25 that. I know you both cited them, I definitely know that.

1 The language of both of those cases covers immunity and
2 judicial proceedings for civil liability for damages. Both of
3 those cases use that language.

4 It's also interesting that most of the cases on this
5 issue are section 1983 cases, which of course raise very
6 different both policy and legal issues in terms of the interplay
7 of absolute immunity and qualified immunity.

8 So there are a lot of complicated issues involved,
9 which is why, as I started out saying, I'm not at all convinced
10 that we've all examined all the niceties of this issue. But I'm
11 satisfied that the most relevant cases from my own circuit and
12 from the Court of Appeals -- I'm sorry, my own circuit and the
13 Supreme Court, a Freudian slip, does support the government's
14 position on this.

15 Moreover, even if the defendants were correct about the
16 applicability of immunity here, there is the exception that the
17 government relies upon, namely, that the court in a case of this
18 sort where there is widespread fraud alleged, that the court may
19 consider this evidence as pertaining to other elements of the
20 fraudulent scheme that's presented in evidence.

21 And, finally, even if the evidence comes in, and as a
22 practical matter, I determine at the end that it should not have
23 been admitted or that it certainly cannot be relied upon, if I
24 reach those conclusions, that either it shouldn't have been
25 admitted or that it cannot be relied upon for establishing

1 liability, since this is a bench trial there won't be any
2 prejudice to defendants. That's a legal conclusion that I'm
3 going to have to reach if I am convinced to the contrary.

4 There may not be other law out there. I don't think
5 this issue in the context presented in this case has been, as I
6 say, fully presented in any of the cases that have been cited in
7 your papers or that we've discussed this afternoon.

8 But, as I think I've already indicated, the language
9 from the Supreme Court case and from Poole limits the immunity
10 to immunity in a damages' action. That's why I'm ruling the way
11 I am.

12 Now, issue number 4 regards the applicability of the
13 Norr-Pennington Doctrine. Let me get to that in a minute.

14 MR. BERNICK: I might be able to narrow that issue.

15 (Pause)

16 THE COURT: Sorry, everybody.

17 MR. BERNICK: I might be able to shorten it a little
18 bit in any event.

19 I think this really comes down beyond the testimony,
20 the direct testimony itself, which gets into this whole area of
21 lobbying.

22 When it comes to the exhibits themselves we are
23 prepared to confine our position to asserting Norr-Pennington as
24 to those particular exhibits that relate to communications with
25 Congress or people who represent, counsel for congressional

1 committees, as opposed to other communications that go to other
2 people in the government.

3 So, what that would mean is -- and I can just list for
4 the record, it's U.S. Exhibit 22345, which is the testimony of
5 Joseph Coleman to the executive committee -- I'm sorry -- to the
6 Consumer Subcommittee of the Senate Committee on Commerce;
7 Exhibit 87307, which is the testimony of Horace Kornegay before
8 the House of Representatives Subcommittee on Health and the
9 Environment, and Exhibit 20026, which is a letter from Arthur C.
10 Stevens to the General Counsel of the Senate Commerce Committee.

11 And then finally, I think that there is -- there's one
12 more I thought I had. Yes, there's testimony of Nick Brooks in
13 1998 before -- before I think one of the subcommittees. I'll
14 have to get the specific reference to that. But these would all
15 be testimony or communications with committees of Congress or
16 their staff. And the remaining documents that pertain to
17 communications with organs of government. We would not be
18 asserting the Norr-Pennington issue at this time.

19 THE COURT: With that contraction, if you will, of the
20 scope of things, does the government have any position?

21 MS. BURRELL: Meredith Burrell on behalf of the United
22 States.

23 With respect to the specific exhibits that counsel
24 referenced, I think there is a little bit of confusion. For
25 example, Exhibit 22345 is not listed as one of the objections in

1 defendants -- one of the exhibits, excuse me, in defendants'
2 objections to which the Norr-Pennington issue applies which are
3 listed at page 9, footnote 13 --

4 THE COURT: That, you're going to have to hash out with
5 the defendants.

6 But given the documents that Mr. Bernick is claiming
7 application of Norr-Pennington to, do you have any disagreement
8 with him? I think he listed five documents. Mr. Bernick?

9 MR. BERNICK: I think there are, altogether, four. The
10 last one, for the record, was 35023, which, I'm sorry, the
11 testimony of Nick Brooks to the Senate Commerce Committee.

12 THE COURT: All right. Four documents, all
13 congressional documents.

14 MS. BURRELL: The only question I have is with respect
15 to 87307, which I believe was identified by Mr. Bernick, I have
16 that as a statement from the Brown & Williamson website, not any
17 statement to Congress. So we would disagree with the
18 applicability of the Norr-Pennington as to that document.

19 THE COURT: Let me tell you, I think you all have to
20 get together on these exhibits.

21 MR. BERNICK: But the principle that we've articulated
22 we are prepared to stand by.

23 THE COURT: I understand that, and that's what I really
24 want the government to respond to.

25 Are you in agreement or disagreement with the

1 defendants that at least as to those four documents which were
2 specifically directed to either Congress persons or staff on
3 their committees or personal staffs, although I think they are
4 all committee staff, that they are entitled to application of
5 the Norr-Pennington Doctrine?

6 MS. BURRELL: I think that it's still necessary to
7 examine the context of those communications because not all
8 communications with the government are automatically subject to
9 Norr-Pennington immunity.

10 THE COURT: That's not what they are claiming. They
11 are claiming that communications with Congress people or their
12 committee staff are entitled to protection.

13 MS. BURRELL: To the extent that those communications
14 were made for the purpose of influencing Congress or a
15 legislature to take an action or not to take an action, those
16 kinds of communications arguably do follow from the definition
17 of petitioning activities.

18 Even entities can have communications with Congress
19 that are not necessarily made for the purpose of persuading
20 Congress to take an action or not take an action; for example,
21 in the context of a congressional investigation.

22 THE COURT: But do you dispute as to these four
23 documents whether they were made for that purpose or not?
24 That's what I'm trying to find out, is to just get your
25 positions straight.

1 MS. BURRELL: We do disagree that these four documents
2 are covered by the Norr-Pennington.

3 THE COURT: That they are covered?

4 MS. BURRELL: Yeah, we dispute that.

5 THE COURT: So we don't have a dispute as to these four
6 documents.

7 MS. BURRELL: I'm sorry, we do dispute.

8 The government disputes that these documents are
9 covered by the Norr-Pennington Doctrine.

10 THE COURT: On the grounds that the communications were
11 not made, that these four communications were not made for the
12 purpose of influencing the legislature in its legislative
13 activities?

14 MS. BURRELL: That's right.

15 MR. BERNICK: The whole proffer of this witness's
16 testimony in direct examination is precisely that we were
17 lobbying Congress to either act or to not act with respect to
18 regulations pertaining to cigarettes.

19 If these were communications with Congress that had
20 nothing to do with lobbying, they would be completely irrelevant
21 to this witness's testimony.

22 His direct examination says, we use lobbying in order
23 to, you know, hold off bans and other activities that would
24 affect the ability of smokers to smoke. So the proffered
25 testimony is contrary to the government's position with respect

1 to these documents.

2 THE COURT: Not entirely. I know there's another
3 argument to be made. I don't seem to be getting it made, but --

4 MS. EUBANKS: Just briefly, Your Honor, in terms of the
5 types of information that we're looking at here and some of the
6 documents that Mr. Bernick identified, I want to remind the
7 court that the defendants used with the testimony of the last
8 witness we had, Dr. Henningfield, Kathy Ellis's letter to
9 Congress to disprove, in their words, fraud liability.

10 Now, they can't use it as a sword and then use it as a
11 shield when the United States attempts to introduce similar
12 evidence in this case.

13 So we do have a disagreement with them on the
14 applicability of this particular doctrine in this case in terms
15 of of uniformity in the first place, and in terms of with
16 respect to these particular documents.

17 Now, we are happy, because Mr. Bernick has narrowed the
18 area, to be more specific and we can submit something to the
19 court that tells you precisely with respect to the exhibits that
20 he has now narrowed it down to exactly what our position is on
21 those, especially in light of the testimony that was elicited
22 through Dr. Henningfield regarding Kathy Ellis's letter, which
23 we spent a great deal of time on.

24 But these are the same kinds of documents, at least in
25 part based on my brief review of the evidence, and it's really

1 unfair to suggest that those documents may not come in in the
2 government's case in chief, but when defendants examined the
3 government's witnesses they may use Norr-Pennington type, if you
4 will, documents.

5 THE COURT: I'm going to rely on the opinion I issued
6 accompanying Order 588, which I do believe the government cited
7 in its response, and that -- and it's still applicable.

8 At that point it was clear to me that there was a
9 dispute as to whether the conduct in question was petitioning,
10 i.e., petitioning covered by the Norr-Pennington Doctrine. That
11 issue is still in dispute.

12 I'm going to allow the testimony to come in. After
13 hearing it in context, it may be clear to me that the defendants
14 are correct, and obviously if I conclude that they are, then
15 such testimony cannot be used as the basis for finding any kind
16 of liability. But at this point there is still some factual
17 disputes about it, and I'd rather have the record complete on
18 this issue and make the appropriate findings -- conclusions of
19 law when all the evidence is in.

20 So that the defendants' objection is going to be
21 overruled on that issue. I think that covers the three issues
22 that the defendants raised.

23 MS. CROCKER: Your Honor, if I could just raise one
24 procedural matter related to the rulings that you've just made.

25 We filed, as you know, of course, on Monday the

1 testimony of Dr. Krugman and we also filed an exhibit list with
2 that testimony, and we followed the same type of procedure with
3 Dr. Krugman's exhibit list that we did with prior witnesses. So
4 some of the rulings that Your Honor has made today will affect
5 both the United States' exhibit list and also defendants'
6 objections to Dr. Krugman's exhibits.

7 THE COURT: Rulings on procedure or rulings on some of
8 the substantive objections?

9 MS. CROCKER: On the substantive. Well, I would
10 characterize them as both, Your Honor.

11 But, for example, I'm just thinking that Dr. Krugman's
12 list includes finding of fact documents which Your Honor has now
13 said we should make a showing of nexus document by document.

14 So what I was going to ask Your Honor is that we be
15 allowed to resubmit Dr. Krugman's exhibit list and that we put
16 off for a few days defendants' objections so that they can then
17 object to the exhibit list which will be properly filed
18 according to the rulings that you've made today.

19 THE COURT: You're not going to get to him until late
20 next week; right?

21 MS. CROCKER: Exactly, Your Honor.

22 So it wouldn't be a problem in terms of the timing, and
23 the timing that I would suggest, just for the same documents --
24 of course, not any additional documents, just simply the same
25 documents -- the timing I would suggest is the timing that we

1 just used when we had the Thanksgiving break, which is that we
2 could endeavor to file our exhibit list for Dr. Krugman this
3 Friday; I think at 5:00 o'clock is what we had done.

4 Defendants, if they could file their objections to
5 Dr. Krugman by Sunday, we could then respond by Tuesday and that
6 would take care of those issues well before Dr. Krugman was
7 taking the stand.

8 MR. BASS: Your Honor, first I think it does make sense
9 for them to resubmit it, but I would like to have until 5:00
10 o'clock on Monday to file our response and then have them file
11 theirs on Tuesday. So there are about, I think, three or 400
12 Krugman exhibits as well. And obviously we would -- our
13 understanding is that there would be no addition of any exhibits
14 to the list.

15 THE COURT: No, there won't be.

16 MR. BASS: Some may go off.

17 THE COURT: Of course, you say there are three or 400
18 exhibits, but that doesn't mean that the government is going to
19 have to provide individual justifications. I have no idea what
20 the numbers are.

21 MS. CROCKER: No, Your Honor, there are not that many
22 documents that are finding of fact documents, and most of the
23 documents on the exhibit list are cited in Dr. Krugman's
24 extensive direct testimony.

25 THE COURT: Do you have any idea how many there are?

1 MS. CROCKER: I just don't have the numbers in my head.
2 I could get them for Your Honor after our afternoon break if you
3 wanted.

4 THE COURT: Let's do it that way.

5 MS. CROCKER: We would not be happy with a schedule
6 that would give defendants additional time beyond the time that
7 the usual schedule provides and then keep the United States
8 constrained to a 24-hour period to respond.

9 We would -- we would propose that we use the same
10 schedule that the parties both agreed to and used during the
11 Thanksgiving break.

12 THE COURT: The same schedule should apply. I want to
13 hear the numbers. If they are minor, there's no reason in the
14 world we can't have a regular schedule apply.

15 MR. BASS: Your Honor, I just have one modification on
16 that, which is we are prepared to file -- there are some other
17 issues with respect to Dr. Krugman's testimony. We are prepared
18 to file those today. And then there's the issue as to whether
19 there were certain things that were not in his reliance that
20 relate to the procedural issue really that we discussed today.

21 We would just as soon go ahead and file the other issue
22 memos and have the government respond to those and then we
23 will -- I'm fine with responding Sunday to the one -- to the
24 limited issue that's left.

25 THE COURT: That's fine. It's a little more time.

1 MR. BASS: I believe there's about 40 documents that
2 are in issue --

3 THE COURT: I see.

4 MR. BASS: -- from our count and it sometimes --

5 MR. BERNICK: Documents on this.

6 MR. BASS: That have this issue.

7 MR. BERNICK: What I was going to say, Your Honor,
8 again if we can get this discussion down to a small number of
9 documents -- you know, five, ten -- these -- all these issues
10 I'm sure could be worked out. It's when you get up into the
11 volume and then we get something that says, basically kind of
12 repeats little generalities, we're not kind of really joining
13 issue and we are dealing with volumes of documents. That's
14 where the problem arises.

15 THE COURT: Counsel, you've got to get together and
16 talk about the numbers. Not just the numbers, but which
17 documents are which.

18 MR. BERNICK: What they really want and need, I mean --

19 MS. CROCKER: What we are doing, Your Honor, is we are
20 submitting with the experts, documents which are in the United
21 States' findings of fact which are highly relevant, which the
22 findings of fact set out the relevance and which the testimony
23 of the experts explains the relevance. Defendants have not
24 challenged the admissibility of these documents. They simply
25 talk about numbers.

1 I would notice -- I would just note for Your Honor this
2 is a big case, as of course you know. It's 50 years of fraud
3 we're talking about, a lot of different defendants. The
4 findings of fact is a finite number of documents and that's all
5 we're talking about here. So, that's what we're talking about.

6 MR. BASS: Your Honor, I can send them over because we
7 are prepared -- it's 3:00 o'clock and we are due to file at 5:00
8 o'clock. I can send them over, because one of our issue memos
9 was going to be this exact issue in the same format it was
10 raised with Dr. Dolan. So I can send you the list of documents
11 that we think are in issue, you know, sometime this afternoon,
12 and then you can take a look at it and you can let us know if
13 there's a difference of opinion as to whether they fall in this
14 procedural category and then we can go.

15 And I would suggest we go ahead and file our other
16 issue memos and you respond in the normal course and then we
17 will follow the other schedule as to this one issue.

18 MS. CROCKER: Maybe we can talk about that at the
19 break, Your Honor.

20 THE COURT: All right. Mr. Redgrave?

21 MR. REDGRAVE: Your Honor, two issues. One of them I
22 think you were going to address but we just want to make sure.

23 Mr. Biersteker is still here in the court to address
24 Dr. Wyant. I believe you were going to address that motion.

25 And then I have just a separate issue with respect to

1 the Juchatz motion papers that have been coming into Your Honor
2 that I want to raise.

3 THE COURT: I don't think that's fully briefed, is it?

4 MR. REDGRAVE: Well, the issue is the government filed
5 their response last night. I want to raise an issue with
6 respect to a request that we would have for a sur-reply. I just
7 want to explain it briefly so you can just deal with it.

8 THE COURT: Let's do that right now before we take a
9 break.

10 MR. REDGRAVE: Your Honor, as you know, this deals, for
11 the record, with the ruling that you made sustaining privilege
12 objections to further inquiries into the substance of discussion
13 between Mr. Juchatz, who is general counsel at R.J. Reynolds,
14 his lawyer and lawyers for Reynolds.

15 The government filed a motion for reconsideration that
16 was four pages. We filed our response which is about 10. And
17 the government last night filed a 10-page reply brief.

18 Now, length in and of itself is not a reason to ask for
19 a sur-reply and that's not the reason I'm asking for a sur-reply
20 right here.

21 The reason I want it is because the government, in
22 their 10-page filing last night, made a number of new arguments
23 and cited to cases that I hadn't cited to before.

24 And one of the arguments, Your Honor, is a privilege
25 waiver argument. And I'm hearing the government argue waiver

1 left, right, and center in this case.

2 And I think, as you have recognized and the Court of
3 Appeals has recognized, waiver arguments are not to be lightly
4 undertaken. We want the opportunity to respond to the privilege
5 waiver argument. We think they are completely wrong, but we
6 think we should have a right to briefly respond to that.

7 They cite four or five cases that we think that they
8 have omitted significant facts about those cases that bear on
9 the issue that's before, Your Honor. We want to be able to
10 respond to that, at last one of the cases they make a
11 miss-citation to.

12 And then finally, Your Honor, in their brief from last
13 night they make a number of statements that are both highly
14 speculative and highly charged with respect to the concept of
15 witness coaching.

16 I think that the number of the allegations are
17 completely misplaced. I think they are highly inappropriate.
18 And thinking back to Justice Sutherland in the United States vs
19 Berger case, that prosecutors, the government attorneys should
20 strike hard blows but fair ones. I think there are foul ones
21 here and we believe that we should have a right to respond.

22 I ask for only five pages, Your Honor. I would get
23 this in by Friday so Your Honor would have it for a full ruling
24 on the motion. But we feel very strongly about this.

25 We think that what they filed was inappropriate in many

1 ways, and we just want to be able to respond, particularly to
2 the legal issues so that you have a full record to make that
3 ruling on.

4 THE COURT: I don't think I have seen the government's
5 response.

6 MR. BRODY: Your Honor, briefly, in response.

7 I don't think the defendants can meet the standard for
8 a sur-reply in this instance. We were very surprised to get
9 from them a 10-page memorandum in opposition to a four-page
10 motion for reconsideration.

11 And their response, the only thing that our reply does
12 is respond to, appropriately, the matters that are raised by the
13 defendants in their memorandum in opposition to the motion for
14 reconsideration.

15 You know, as to the waiver issue, the waiver issue was
16 raised because they raised a new basis in their memorandum in
17 opposition asserting work product protection for the first time,
18 and that was not an issue that was briefed in our initial
19 motion. I think it was appropriate for us to respond. We
20 didn't do it in any extensive fashion. I think the only
21 discussion of it is probably in a footnote.

22 In terms of the cases, if a sur-reply were appropriate
23 every time one side thought the other side had relied on cases
24 that didn't support the proposition that it was citing them for
25 we would have sur-replies in every instance. Under *Lewes vs*

1 Rumsfeld in this circuit, that's not an appropriate instance for
2 a sur-reply. It doesn't mean the standard. I think one of the
3 Alexander vs FBI cases also sets out that standard as well.

4 And, finally, as to the allegation of speculative and
5 charged presumption appearing in the United States' brief, I
6 think there is some discussion in the United States' reply brief
7 of the reasons why we think it is important that the United
8 States be able to discover the information for which the
9 privilege assertion was raised in trial. I think that to
10 characterize them as speculative and charged or in any way
11 unfair is not an accurate characterization of the United States'
12 brief.

13 And it's certainly the fact that we have laid out in
14 response to arguments made by defendants against
15 reconsideration, the reasons why we think that the policies
16 underlying the attorney-client privilege and the standards for
17 the assertion of the attorney-client privilege are not met here
18 does not again under the case law, and on under circumstances
19 that have been set out in this circuit, give rise to a right for
20 a sur-reply. And we don't think that it's appropriate.

21 Certainly, I don't think that -- if Your Honor were
22 inclined at this point in time to tell defendants yes, they
23 could go ahead and file a sur-reply on this issue, we would ask
24 that you would reply the view the papers filed by the parties
25 because I think a review of the papers would show it to be

1 inappropriate to allow in these circumstances.

2 THE COURT: You've got one minute, Mr. Redgrave.

3 MR. REDGRAVE: Thank you, Your Honor.

4 I've appeared before Your Honor for the last
5 five years. A lot of times I've taken issue with the
6 government's briefs. A lot of times I would have loved to file
7 sur-replies. I haven't.

8 As a party as representing defendants here, on a couple
9 of occasions we've asked for sur-replies. We have only done it
10 where we thought it was very important. In this particular case
11 on this motion it's very important.

12 Mr. Brody just stood up here and said we didn't raise
13 the work product argument we did. Under Rockwell International
14 it's clear in this circuit discussions we are having in raising
15 the privilege objections includes all privileges recognized in
16 this circuit, including the work product protection.

17 And so the reason I raise it, Your Honor -- and I'm
18 down to 30 seconds. The reason I raised it here is to just not
19 have to file a motion for leave for the sur-reply just to bring
20 it to Your Honor's attention. We do believe it's important. It
21 will be five pages. It will address the issues. I think it
22 will frame it better for court.

23 We will explain the cases what's wrong with the way the
24 government has cited and used it, and then the issue will be
25 fully ripe by the end of this week for Your Honor to rule.

1 Thank you.

2 THE COURT: I'll read the papers everyone -- probably
3 not tonight, though -- and then I'll decide on whether a
4 sur-reply is needed or not. I am very much opposed to
5 sur-replies. As a general matter, I never say never.

6 MR. BRODY: Your Honor, may I suggest we discuss the
7 Wyant issue tomorrow morning?

8 THE COURT: So you can get started with this witness.

9 MR. BRODY: So that we can do our hour this afternoon;
10 otherwise, we are going to be running up against your 4:45 plea.

11 MR. REDGRAVE: That is fine with us, Your Honor.

12 THE COURT: All right. Also, I'm not sure my demeanor
13 could get through another discovery motion this afternoon,
14 everybody. I'd rather hear substantive testimony.

15 We're going to take -- we will take a 15-minute break.
16 We will certainly go to 4:30 or a little bit after. The
17 government wants its hour to get that done.

18 When we break I'm going to have to ask you all to leave
19 quickly because I have two criminal matters. I thought I only
20 had one, but we have two now. But we will take a short recess
21 at this point.

22 (Recess began at 3:31 p.m.)

23 (Recess ended at 3:46 p.m.)

24 THE COURT: Good afternoon. Excuse me one minute.

25 Go ahead, please.

1 MS. BROOKER: Your Honor, we are now for the first time
2 starting to move along in this case to the youth or the youth
3 marketing group of experts and there are six of them, as you
4 know.

5 Now, I wondered if -- I was prepared, if you were
6 interested, to name the six experts and the very brief area of
7 expertise each of them has, if that helps you at all to know
8 where each of them fall into place.

9 THE COURT: It my be useful.

10 MS. BROOKER: Okay. The first expert we will be
11 calling in a moment is Dr. Dolan. Obviously, he is an expert on
12 marketing and his testimony covers the very broad picture of
13 defendants' marketing practices, including Light cigarette
14 marketing.

15 Dr. Chaloupka will be the next witness who is called.
16 He is an economist and his expertise is economics and applied
17 econometrics. Specifically, he will testify about a very narrow
18 area, even teenagers' price sensitivity and the defendants'
19 price-related marketing.

20 And we have gone to -- we have really tried to not have
21 people overlap and have as little duplication, even though it's
22 impossible to completely not overlap.

23 Then the third in our series of experts will be
24 Dr. Krugman who will give a very detailed, rather than a
25 general, discussion of defendants' advertising and promotion,

1 including expenditures and reach of their advertising.

2 He will also testify about their advertising code and
3 communication analysis of the Frank statement and the cigarette
4 warnings that appear on cigarette packages. And he is an expert
5 in marketing communication and mass communication.

6 Then after that the next three witnesses are as
7 follows. We will have Dr. Biglan whose expertise is in
8 psychology rather than in specifically marketing, and he will
9 talk very specifically about adolescent psychology and imagery
10 in cigarette advertising and promotion campaign. So he will be
11 focused on the imagery in the advertising. And also an area
12 that only Dr. Biglan will cover is youth smoking prevention and
13 the defendants' activities in that regard.

14 The fifth expert in this line will be called is
15 Dr. Slovic who is an expert in psychology and risk perception in
16 particular, and obviously he will be very narrowly focused on
17 risk perception and defendants' understanding of consumer
18 behavior and risk perception in terms of their marketing
19 practices.

20 And the last expert in that line -- did you need me to
21 slow down?

22 THE COURT: No.

23 MS. BROOKER: The last expert in that line will be
24 Dr. Eriksen who will very precisely talk about data on smoking
25 behavior and smoking prevalence. Dr. Eriksen is the person who

1 will go into depth regarding the Surgeon General's conclusions
2 regarding smoking behavior and smoking prevalence particularly
3 with regard to teenagers, and he is the person who will talk
4 about the studies and the literature on the effects of
5 advertising and marketing and promotion on youth behavior. And
6 also he will be talking about remedies.

7 So that is I guess, as you would say, our line up. And
8 we will now call to the stand Dr. Robert Dolan.

9 THE DEPUTY CLERK: Please raise your right hand.

10 ROBERT DOLAN, Ph.D., Government's witness, SWORN

11 THE DEPUTY CLERK: You may be seated.

12 DIRECT EXAMINATION

13 BY MS. BROOKER:

14 Q. Dr. Dolan, you have some water up there --

15 A. Thank you.

16 Q. -- and your testimony.

17 Before I ask that Dr. Dolan be qualified, I would ask
18 if you -- do you see your testimony up there?

19 A. I do.

20 Q. Okay. Is that a copy of the testimony that you have
21 drafted?

22 A. Yes, it is.

23 Q. So let's repeat that. Is that a copy of the testimony that
24 you have drafted?

25 A. It is.

1 Q. Okay, that's better.

2 And are there any -- before I ask you to formally adopt
3 your testimony, are there any corrections that you would like to
4 make to your testimony?

5 A. Yes, I'd like to note some corrections at this point.

6 Q. Do you recall how many corrections it is you want to note?

7 A. I believe there will be six.

8 MS. BROOKER: Okay. Now, Your Honor, I would like to
9 just walk Dr. Dolan through those for the record so we get those
10 corrections noted, and also if Your Honor wanted to follow along
11 and make any corrections.

12 THE COURT: All right.

13 BY MS. BROOKER:

14 Q. Let's turn, first, to page 72 of your testimony. And please
15 tell the court if there's any correction on page 72 you would
16 like to make.

17 A. Yes. If you look on line 16 where I give the answer, I say,
18 "Yes. An R.J. Reynolds' document entitled KOOL Family Utopian
19 Objectives," I shouldn't have attributed that to R.J. Reynolds.
20 That's a Brown & Williamson document.

21 In another point in my testimony I correctly referred
22 to what is a Brown & Williamson document, but here I'd like to
23 change R.J. Reynolds to Brown & Williamson.

24 Q. Okay. And let's go to page 79 and please note any
25 corrections you would like to make to that page.

1 A. Yes. This is a similar -- similar correction in terms of
2 having referred to a -- attributing a document to an incorrect
3 company.

4 Q. And that is on page 12? I mean, on line 12. Excuse me.

5 A. Line -- yes, line 12. Brown & Williamson should be
6 Lorillard.

7 Q. Okay. And if you would please turn to page 124.

8 And, for the record, this is an objection to an
9 incorrect or imprecise quote that defendants raised that we
10 responded to.

11 And if you would please tell the court on page 124 if
12 you can recall at line 10 what correction, if any, you would
13 like to make.

14 A. On line 10 where I said, "offered demonstrations" and then I
15 made the quote, "You could see the proof of Kent's health
16 protection." Defendants have appropriately noted a correction
17 to that particular terminology.

18 Q. Okay. For the record, is the correct quote, quote, visual
19 proof of the greatest health protection ever, end of quote?

20 A. Yes, it is. That's correct.

21 Q. All right. We have three more.

22 If you would turn to -- turn to page 141 of your
23 testimony, on the last line, which is line 24. Is there any
24 correction you would like to note there?

25 A. Oh, yes. On the exhibit number, it's the -- the quote is

1 correct, it's just the incorrect exhibit number.

2 Q. Okay. Is this an objection that the defendants raised in
3 their filing?

4 A. Yes, it is.

5 MS. BROOKER: Okay. For the record, Your Honor, U.S.
6 Exhibit 58935 should be noted as Exhibit 33165.

7 Q. And if you would turn to page 147, and is this a correction
8 that you identified that you yourself wanted to make?

9 A. I believe -- yes, on line 20 there.

10 Q. If you could tell the court the change in wording?

11 A. Okay. The change in wording, just in the first sentence
12 where it says, "As of 2003, 24.4 percent of teenagers smoked," I
13 should change the word "teenagers" to "12th graders." And then
14 following the period after "smoked," put in parenthesis,
15 "defined as having used cigarettes within the past 30 days."
16 This is just to clarify.

17 Q. Okay. And the last, if you would turn to page 148, line 16.

18 A. Yes.

19 Q. Is that an objection that was noted by defendants?

20 A. Yes. On line 16 where the quote that I said is "to create
21 face value and buzz on the streets," the word "face" should be
22 "talk."

23 Q. Okay. Was that an inadvertent word that you had placed in
24 there?

25 A. Yes.

1 Q. Okay. Now that you have made those corrections, will you
2 formally adopt your testimony here as your own?

3 A. Yes, I would.

4 MS. BROOKER: Now, at this time the United States would
5 proffer Dr. Dolan as an expert in marketing.

6 THE COURT: Any objections or voir dire at this point?

7 MR. BERNICK: No.

8 THE COURT: All right. He may be accepted as an expert
9 in the field of marketing.

10 MS. BROOKER: Thank you, Your Honor.

11 BY MS. BROOKER:

12 Q. Now, Dr. Dolan, briefly, can you tell the court what are the
13 purposes of defendants' marketing, cigarette marketing?

14 A. Yes, I could. There are a number of purposes. There would
15 be five, five major purposes, three of which are common in many
16 product categories and then a couple of more which are more
17 particular to cigarette marketing.

18 So the first purpose would be to influence brand
19 choice, and there are really two different parts to that.

20 One is if you have a customer who is consuming your
21 brand, you would like that customer to stay loyal to your brand.
22 And the flip side of that is, of course, if they are using a
23 competitive brand, what you would like to do is induce them to
24 switch to your brand. So brand choice is purpose number one.

25 The second purpose is to induce people to contribute to

1 the number of people who come in and enter the product category.
2 In other words, change from being a nonuser of the product to
3 becoming a user of the product.

4 And then the third purpose is to increase the
5 consumption rate of those who are in the market using your
6 product. So, for example, to move a light user of your product
7 up to being a moderate user or a moderate user up to being a
8 heavy user.

9 And, as I said, those three purposes are fairly common
10 to marketing situations. The cigarette industry is -- because
11 of some special characteristics it has, there's two other
12 important purposes that defendants had.

13 One of them -- number four on my list is that -- and it
14 really stems out of the fact that many people who smoked at some
15 point in time desire to quit.

16 So the defendants undertook marketing practices to
17 induce those, to decrease the likelihood that was somebody who
18 was using the product would decide to quit.

19 And then a related fifth purpose would be at some point
20 if somebody had quit, somebody who was a user became a nonuser,
21 marketing was used to induce those people back to their former
22 state of being a user of the product being back in the product
23 category.

24 Q. Okay. Now, Charles, if you could show Exhibit 17434.

25 Now, Dr. Dolan, looking at this first slide, please

1 explain as it shows up on the board how brand switching is a
2 purpose of defendants' cigarette marketing.

3 A. Well, this is the first one that I mentioned a moment ago.

4 And let's just assume for a second, let's take a
5 consumer who Philip Morris has as a consumer of Marlboro, and
6 you can see that there are basically two things going on.

7 One is if you are R.J. Reynolds and you had your Camel
8 brand, what you would be doing is trying to induce that Marlboro
9 smoker to switch to your Camel brand. For their part, Philip
10 Morris wants to make sure that that brand switching does not
11 occur and, in fact, is trying to induce brand loyalty to the
12 Marlboro brand.

13 So there's two -- as I mentioned a moment ago, there
14 are two different ideas here. One is promoting brand loyalty
15 and the other one is promoting brand switching under this first
16 general purpose of marketing.

17 Q. Can you please show the next slide?

18 Now looking up at the next slide, Dr. Dolan, please
19 explain how getting people to start smoking is another purpose
20 of defendants' cigarette marketing.

21 A. Well, this is the second one I mentioned a moment ago.

22 If you think of the -- on these slides, if you think of
23 the gray area in the middle, you know, as those are people who
24 are quote in the market and the outer blue area is people who
25 are not. So what we're talking about here is that cigarette

1 marketing was used to contribute to the inflow of people into
2 the market. That is, to impact positively impact a number of
3 people who started smoking, bringing them in to the marketplace.

4 Q. Charles, the next slide, please.

5 Now, the next slide, please explain how smoking or
6 getting people to smoke more is another purpose of defendants'
7 cigarette marketing.

8 A. Well, the third purpose is that when somebody enters the
9 product category, typically they would start out as not a
10 tremendously heavy user.

11 A minute ago I think there were probably 10 cigarettes
12 up on the left-hand side of the gray-shaped egg there, gray-
13 colored egg shaped.

14 And so a third purpose of marketing is to induce those
15 who are light users to increase their consumption rate up to a
16 higher levels.

17 Q. Okay. If we could go to the next slide. Please explain
18 what this slide shows with respect to defendants' purpose of
19 keeping people in the market.

20 A. What this slide represents is that the three consumers
21 there, as I mentioned a moment ago, one of the characteristics
22 of the cigarette marketer is that many people decide that at
23 some point that they would like to stop using cigarettes. In
24 other words, they would like to stop being part of the gray area
25 there and move to the outer blue area.

1 And so what the cigarette manufacturers use marketing
2 to do was to keep people from moving outside the market and keep
3 them in the market as consumers.

4 So here we show them as, you know, perhaps being a
5 Marlboro customer, but staying into the market because there's
6 the opportunity to switch to a Marlboro Lights, for example.

7 Q. Charles, can we go to the next slide?

8 Dr. Dolan, please explain how restarting quitters is
9 another purpose of defendants' cigarette marketing.

10 A. Well, this is the fifth purpose that I mentioned, where as
11 the consumer, as they are in the sort of the dark purple there
12 in the gray area, they are a user of the product category.

13 Some people, as I mentioned a moment ago, will act on
14 their desire to quit and will leave the market, so they will go
15 from being a user of the product to a nonuser of the product.

16 Marketing is used to induce some of those people to
17 come back into the market, to switch back from being a nonuser
18 back to once again being a user of the product.

19 Q. Okay. Now, have you concluded in this case whether
20 defendants' market for all five purposes that are shown on the
21 demonstrative? And can you turn to the next? Thank you.

22 A. Yes, I have. It's my judgment that defendants' marketing
23 had the purposes of impacting all five of those forces that I've
24 shown on this summary slide here that we've talked about.

25 Q. Now, please tell the court what are the major marketing

1 devices that defendants used to achieve these five purposes.

2 A. Well, there's quite a set of them, actually. There are what
3 we call in marketing the marketing mix, and they would really be
4 comprised of three major categories.

5 Number one would be the product, the product that the
6 defendants marketed themselves, the way those products were
7 designed, how new products were introduced, how product lines
8 extensions were made; that is, bringing out Marlboro Lights as a
9 complement to Marlboros, for example.

10 So the first category or set of marketing actions would
11 be what was done with the product.

12 A second category or set of actions would be the
13 integrated marketing communications that the defendants
14 undertook. So this would include things like advertising,
15 promotions, what retail displays they are getting, that sort of
16 thing. So that's a second major category.

17 Then the third category is the distribution strategies
18 that the defendants are providing value to customers by making
19 it very easy for those customers to find their products at
20 retail.

21 So the products were extensively distributed, and also
22 they were able to induce the retailers to give them good display
23 space so that the product wasn't hard to find and it was good
24 retail visibility.

25 Q. And do defendants also manage the price of cigarettes?

1 A. Yes, right. That's the fourth element of the marketing mix.

2 So you generally think of those first three as the way
3 that marketers create value, the perception of value in the mind
4 of the customer. And then the price -- so that creates a
5 value -- and then the price is the way that the company takes
6 some of that value which is created for the customers and
7 captures some of it for themselves. So bring that -- bring
8 those dollars back into the firm so they can support new product
9 development, the cost of manufacturing, the cost of marketing.

10 Q. Now, what is -- what have defendants publicly stated is the
11 only purpose of their marketing?

12 A. Well, they've regularly stated there's one and only one
13 purpose of their marketing, and that's the one that we've shown
14 on the upper right-hand side there: the brand switching
15 purpose.

16 Q. Now, can we please, Charles, put up demonstrative 17435?

17 Okay. Now, does this provide some examples of
18 defendants' public statements about their marketing?

19 A. Yes, it does. It covers their statements about the
20 purposes -- I should say purpose, singular, to which they say
21 they use -- for which they say they use marketing.

22 Q. Okay. Now, could you --

23 MR. BERNICK: Excuse me. Just for the record, I think
24 that there was a -- counsel misspoke. This is 17436. I think
25 that counsel said 17435.

1 MS. BROOKER: Thank you. If I misspoke, I meant 17436.

2 That's just a demonstrative number, Dr. Dolan.

3 BY MS. BROOKER:

4 Q. Now, can you choose an example up here on the board of one
5 of the defendant's statements about the single purpose of their
6 marketing and explain it to the court, briefly.

7 A. The second one would be a good representative one, where it
8 says -- very similar to what I've said a second ago -- that all
9 of our cigarette ads are what we call brand advertising.

10 And the key sentence there is the next one where it
11 says, "The purpose is to get smokers of competitive products --
12 of competitive products to switch to one of our brands," meaning
13 as I said a moment ago, to get the Marlboro smoker to switch to
14 Camel, "and to build the loyalty of those who already smoke one
15 of our brands."

16 So meaning if you already have -- if R.J. Reynolds
17 already has that person as a Camel smoker they want to build the
18 loyalty of that smoker to that brand.

19 Q. Now, if you could also put up there 17435.

20 Now, what do defendants publicly state about their
21 marketing as it relates to teenagers or young people?

22 A. Well, basically, it says that these are a set of statements
23 that -- that basically go along the theme of, that smoking is an
24 adult custom, and that marketing is directed only to adults, and
25 that the manufacturers don't want to influence in any way

1 teenagers in their decisions to smoke.

2 Q. Now, why do defendants publicly make these public statements
3 that they have a single purpose to effect brand switching in
4 their marketing and make these statements about not marketing to
5 adults only? What is the purpose of those statements?

6 A. Well, I think the purpose is that if you say it is only one
7 purpose to your marketing, and that's brand switching, that
8 means your marketing activities have absolutely no impact on the
9 overall number of cigarettes which are smoked in the country in
10 a given year.

11 All of the other four purposes we talked about --
12 influencing the number of people who came in the market, the
13 number of cigarettes that they smoke while they are in it, the
14 likelihood that anybody who is in it stays in it, and the
15 ability to get somebody who has left, become a nonuser, to come
16 back as a user -- all four of those purposes would have an
17 impact of increasing the number of cigarettes which were smoked
18 in the country in a given year in a given time period.

19 So if you say that the only purpose and only impact is
20 brand switching, then you're saying we have no impact on the
21 total number of cigarettes smoked and consequently should bear
22 no responsibility if there's anything harmful about the
23 cigarette smoking because nothing we did impacted the number of
24 cigarettes which were smoked anyway.

25 Q. And what is the purpose of defendants' statements as shown

1 up on the board as examples that they only market to adults?

2 A. Well, I think it's related to the first purpose, because
3 teenagers -- it's well known that the starter population, that
4 is those people who are going -- who go from being nonusers to
5 first becoming users, those are predominantly teenagers. So
6 it's related to the statement that the only thing they do is
7 brand switching.

8 Q. Now, could you point to one example of defendants' public
9 statements about marketing or not marketing to teenagers and
10 just briefly explain it to the court.

11 A. Sure.

12 I guess the second one from the bottom is fine. Again,
13 they are all very similar, where it says "Lorillard does not and
14 will not design or implement any marketing or promotional
15 program intended to encourage youth to smoke cigarettes and will
16 continue to utilize only those advertising, promotional and
17 marketing materials that do not, directly or indirectly, target
18 youth."

19 So it's saying, you know, "We don't want to have even
20 an indirect impact on youth. We really just want to be
21 influencing adults."

22 Q. Now, did the defendants consider the ability to induce brand
23 switching as the key to their success in business?

24 A. It was one of the -- one of the important aspects of things,
25 but it was really well known in this product category that this

1 is one of the most brand loyal product categories in the United
2 States.

3 So in terms of the key success factors in this market,
4 it was really recognized by the defendants that the most
5 important thing to do was to be able to attract somebody to your
6 brand as a starter, and then the brand loyalty phenomenon which
7 was well understood would basically mean that you could keep
8 that starter with you smoking your brand well into the future.

9 Q. And do defendants know at what age people start smoking?

10 A. Yes. The internal documents of the company show that they
11 are well aware of the typical age distribution of the starting
12 population.

13 Q. Which is what?

14 A. Predominantly teenagers.

15 Q. At what ages?

16 A. At what ages?

17 Well, several documents show that the median age of
18 starting smoker was about 16 and a half years old.

19 Q. Now, has the key for success to defendants been the same for
20 the last five decades?

21 A. Yes, I would say it has been remarkably consistent. While a
22 number of aspects of their marketing change, the basic key
23 success factor that you want to get people with your brand as
24 they start and then the brand loyalty phenomenon will keep them
25 with you over the years, and typically that their average

1 consumption rate also goes up as they stay in the product
2 category, that consistently was used as the key to success in
3 this product category.

4 Q. Okay. Now before I show you the next demonstrative, let me
5 just ask in a very broad or general way.

6 Over the last five decades did the marketing practices
7 of the companies change over time or were they consistent?

8 A. There were some important elements which were consistent,
9 such as the basic model I've talked about, but there were other
10 elements of the marketing mix which changed dramatically over
11 the last 50 years. The marketers were regularly adapting their
12 marketing programs to what was going on in the environment.

13 Q. Okay. Now, Charles, if we could put up demonstrative 17362.

14 Now, Dr. Dolan, what does it mean at the top of the
15 board where it says "Defendants Marketing Expenditures"?

16 A. Right. What I've shown here is the defendants' expenditures
17 on advertising and promotion as they reported them to the
18 Federal Trade Commission.

19 Q. Okay. Now, what marketing expenditures do the defendants
20 make that are not included in the data that they report to the
21 FTC and, therefore, are not included in this demonstrative?

22 A. Right. As I said a moment ago, the things which are
23 included are basically their spending on advertising and then
24 promotion. So it would be anything like "buy one, get one free"
25 kind of offer.

1 But what wouldn't be included in these numbers would be
2 the -- like the expenditure that they make on their sales force,
3 which would be another substantial -- a substantial expenditure.

4 Q. Now, are the figures up here, just for clarity, are they
5 adjusted or unadjusted figures?

6 A. Those figures are not adjusted for inflation, so they are in
7 nominal terms.

8 Q. Okay.

9 MR. BERNICK: Again, just for purposes of clarifying
10 the record, maybe the witness has identified this by saying,
11 "FTC reported." But I don't believe that there's a source
12 that's been identified for the data that's in the document. If
13 it's what was reported to the FTC, we will understand that, if
14 that could be made clear.

15 MS. BROOKER: I think the witness has already indicated
16 that this is FTC data that's up on the board.

17 THE COURT: Let's just --

18 THE WITNESS: I believe I did say that a moment ago,
19 but I will say it now. This is the data that the defendants
20 report to the Federal Trade Commission.

21 BY MS. BROOKER:

22 Q. Now, if you would, in order to follow up on your discussion
23 of the advertising and the promotion practices of the defendants
24 changing over time; I want you to focus your response to my
25 questions on what you referred to as the three major elements of

1 marketing: product, integrated communications and distribution.

2 Can you explain what the major advertising and
3 promotion practices were that the companies used from 1963 to
4 1970 in that first time period on the demonstrative?

5 A. Right. In the first time period you see that in 1970 the
6 expenditures on advertising and promotion were almost
7 \$400 million there, and during that time period the predominant
8 expenditure was on television advertising. So, over half of, in
9 any given year over half of the spending was on television
10 advertising to create the image of the brands.

11 Q. Now, did the marketing practices of the companies in this
12 time period attract teenagers to begin smoking?

13 A. I believe they contributed to that, yes.

14 Q. Now, let's just move to the next decade that is up on the
15 board. Were there major changes in the 1970s?

16 A. Yeah, there were some major changes in a couple of important
17 respects. Sticking with the advertising piece for a moment.

18 As we know, the broadcast ban came into effect on -- in
19 January of 1971, so what was the predominant median for
20 advertising was now no longer available to the manufacturers.
21 And so what you see is that once that -- once that median is
22 taken away as a way to communicate with customers, the
23 advertising expenditure, the advertising and promotion
24 expenditures do not go down, however.

25 You see that they stay pretty much constant for the

1 next few years, and then by 1980 they are up to well over a
2 billion dollars.

3 So, what we saw is that the money that was being
4 allocated to television is now reallocated to other media, and
5 so during this time period magazines, newspapers and outdoor
6 advertising became very important.

7 In fact, a Philip Morris executive has said that the
8 story of the broadcast ban is not so much the story of the
9 broadcast ban as much as the impetus for Philip Morris to create
10 great outdoor advertising.

11 So as a restriction was put on one form of marketing,
12 the defendants moved to another form of marketing to communicate
13 with consumers.

14 The other thing which is important that happens in the
15 1970s. As I mentioned a moment ago, the first element of the
16 marketing mix is the product, and there was a fundamental change
17 in the kinds of products which were being offered that around
18 the early mid-70s was the time that low tar/low nicotine brands
19 really started to take off and become a major force in the
20 marketplace.

21 So there was a change in the advertising and promotion
22 approach and also the basic products which were being advertised
23 and promoted.

24 Q. Now, you referred to outdoor advertising being a big
25 increase during that time period. Will you just specify what

1 you mean by outdoor?

2 A. That would be would be primarily billboards.

3 Q. Did the marketing practices of the companies during this
4 decade attract teenagers to start smoking?

5 A. I believe it contributed to that, yes.

6 Q. Now, let's move to the next decade. Were there major
7 changes in the defendants' marketing practices in the 1980s?

8 A. Yes. Yes, there were. I mean, the big trend, which starts
9 in the '80s and really has continued on up until today, was a
10 shift in the spending. If you looked at the overall advertising
11 and promotion spending, there was a shift from being
12 predominantly advertising to now being predominantly promotion.

13 So you can see that in this decade of the '80s, the
14 expenditures go up quite dramatically on the total of
15 advertising plus promotion. All that growth, though, is coming
16 from more spending and promotion.

17 So you will see that the spending goes up now to about
18 four -- \$4 billion over that decade. And so it's a substantial
19 increase and also a fundamental reallocation, so the spending is
20 moving more and more to the point of purchase to the retailer
21 and promoting of products.

22 Q. Now, when you say the defendants reallocated some large sums
23 of money to promotion, specifically what are you referring to
24 when you say promotions?

25 A. Well, promotions is a very broad category of things.

1 One, a coupon, for example, would be counted as a
2 promotion. So if a 50-cent off coupon were distributed to --
3 either through the mail or newspapers or given to someone, that
4 would count as a promotional expense and would call that a
5 consumer promotion.

6 Another kind of promotion is a trade promotion where
7 the manufacturer might say to a retailer, Okay, if you give me
8 an end of aisle display, I will reduce the price on the next
9 case that you get or you get a free case with every 12 cases
10 that's you buy. So those are a couple of examples of
11 promotional expenditures.

12 Q. Now have you concluded that the marketing practices of the
13 companies during this time period attracted teenagers to begin
14 smoking?

15 A. I believe it contributed to that, yes.

16 Q. Now, were there major changes in the way the defendants
17 marketed or their marketing practices in the 1990s?

18 A. There were. There were a couple of important things.

19 One is -- one is, as I said, the -- there's a continued
20 transition of dollars from the percentage of the advertising and
21 promotion expenditure which was on promotion continues to go up.
22 Whereas, in 1990 it was probably around 50 percent, it's up
23 around 80 percent later on. So that's one.

24 The second thing which is -- when you see the kind of,
25 the dip in the curve of -- the spending curve going up there --

1 and I think that's '93 or so -- that was the event of what's
2 popularly known as Marlboro Friday when Marlboro -- when Philip
3 Morris reduced the -- reduced the price of their premium brand
4 Marlboro initially via promotion and then later by a change in
5 the standard list price. So, that's why you see a little bit of
6 a dip in spending at that time.

7 And then at -- and then it really goes off quite
8 substantially. It sort of really -- after a couple of years,
9 there's a low level. It really takes off in '98 with the
10 passage of -- with the signing of the Master Settlement
11 Agreement in '98 or so you can really see the spending taking
12 off on advertising and promotion.

13 Q. Okay. Now, if we could have, Charles, pull up JDEM 040030.

14 Now, Dr. Dolan, have you seen this demonstrative
15 before?

16 A. I have, yes.

17 Q. Okay. Is this a demonstrative defendants used in their
18 opening statement?

19 A. That's my understanding, yes.

20 Q. Okay. Now, when defendants agreed to the Master Settlement
21 Agreement in 1998, did they agree to stop using cartoons?

22 A. It's my understanding, yes.

23 Q. Okay. And when they agreed to the Master Settlement
24 Agreement, did they agree to stop using billboards?

25 A. They did agree to that, yes.

1 Q. Did they agree to stop advertising in stadiums?

2 A. Yes.

3 Q. And did the defendants agree to stop transit advertising?

4 A. They did.

5 Q. Did the defendants agree to have no more paid product
6 placement?

7 A. They did agree to that, yes.

8 Q. And did the defendants agree that they would have no brand
9 named sponsored concerts?

10 A. Yes.

11 Q. Okay. And did the defendants agree that they would have no
12 brand name merchandise after the Master Settlement Agreement?

13 A. Yes, they did.

14 Q. Did the defendants agree to limit brand name sponsorship to
15 one non-team?

16 A. They did.

17 Q. And it's not up there on the board, but did the defendants
18 also agree to limit the size of signage at retail?

19 A. They did.

20 Q. Now, if all of this is true, Dr. Dolan, and defendants
21 cannot use these different media after the Master Settlement
22 Agreement, then how is it that you've reached the conclusion
23 that defendants are still targeting youth?

24 A. Well, I mean these are restrictions on the kinds of
25 marketing activities that defendants can engage in and in some

1 ways it has given them fewer vehicles or taken away some degrees
2 of freedom which they previously had.

3 But there's analogy back to 1970 when -- '71 when the
4 broadcast ban went in, that they were able to find other
5 vehicles. So as these vehicles were taken away, we still saw
6 that the spending went up dramatically and they basically have
7 found other ways to communicate with customers.

8 Q. And what are those other ways?

9 A. Well, very heavily through, as I was mentioning, promotions,
10 and there are -- there are still ways of communicating through
11 advertising. But heavily it's moved into promoting at retail
12 and really building up their visibility at the point of
13 purchase.

14 Q. And when you say "at retail," are you speaking of
15 convenience stores?

16 A. That would be one example, convenience stores, grocery
17 stores, gas stations, the places where cigarettes are sold.

18 Q. Does the Master Settlement Agreement limit the defendants
19 from presenting their images or communicating to people at
20 retail?

21 A. No, other than what you mentioned a moment ago in terms of
22 the size of the -- the size of the sign, for example.

23 Q. And in terms of the five purposes for marketing that you had
24 up on the board a few moments ago, have the defendants changed
25 at all any of those purposes as a result of entering the Master

1 Settlement Agreement?

2 A. Not in my judgment, no.

3 Q. Now, with the restrictions that you've identified over time
4 for the last five decades, have you concluded whether defendants
5 have been successful in continuing to market behind those five
6 purposes on a consistent basis over that period of time?

7 A. It's my judgment that they have, yes.

8 Q. Now, you said you've read the opening -- excuse me.

9 Have you read the opening statement in this case?

10 A. Portions of it.

11 Q. Have you read portions of the defendants' opening statement?

12 A. I have.

13 Q. Okay. If we could -- Charles, if we could go to the
14 defendants' opening statement of September 22nd at page 410.
15 There are portions that I've highlighted up there.

16 Can you please read to the court what defense counsel
17 said at the opening statement where those lines are highlighted?

18 A. It says, "There have been enormous changes in the business
19 practices of these companies. These changes have been profound,
20 they've been permanent and they're irreversible."

21 Q. Would you agree, Dr. Dolan, that defendants have
22 made profound, permanent and irreversible change in their
23 marketing practices since the Master Settlement Agreement?

24 A. Well, they've made changes to be in accord with the Master
25 Settlement Agreement, but I would not judge them to be profound.

1 Q. How would you judge those in terms of their continuing to
2 market to teenagers?

3 A. Well, as I said a moment ago, these are restrictions.
4 There's certain ways of communicating with customers that are
5 taken away that you can no longer use, but there's no limitation
6 on the amount of spending that you undertake, nor any penalty
7 for inducing somebody to start smoking.

8 Q. Okay. If we could please pull up page 389 of the
9 defendants' opening statement. And I've also yellow highlighted
10 a couple short passages.

11 If you could please read what defense counsel said at
12 page 389 of the opening statement?

13 A. Let's see. It says "We each devised ways, and I'll describe
14 in a little detail, to basically drastically reduce the public
15 visibility in mass media of Philip Morris cigarette and
16 marketing and retailing activities."

17 And then the second portion, "Philip Morris made the
18 decision some time ago that we are simply going to try to get
19 our advertising out of the mass media. And so today what's
20 basically left with Philip Morris cigarette advertising and
21 marketing is that we communicate in private communications with
22 our smokers and we basically have withdrawn from all public
23 visibility."

24 Q. Now, is that an accurate portrayal of defendants' current
25 marketing practices?

1 A. Not in my opinion, no.

2 Q. And why is that?

3 A. Well, I mean, if you -- I mean, it's my understanding that
4 Philip Morris has withdrawn from advertising in magazines, but
5 if you just take the last -- the last sentence or so, pick up on
6 line 16, where it says, "we basically have withdrawn from all
7 public visibility," I don't know how they could be saying that
8 when if somebody walks into a convenience store or a grocery
9 store or a gas station outlet, you will see -- you will be very
10 likely to see public visibility for the Marlboro brand, in
11 particular.

12 Q. Now, do defendants mass market today?

13 A. In my judgment, they do.

14 Q. Can you just explain what you mean by that?

15 A. Well, as we talked about a moment ago, a lot of the
16 marketing in terms of the communications, the integrated market
17 communications part of things has moved into retail outlets. So
18 anybody who walks into the store is exposed to the displays and
19 the "buy one, get one free" offers, and the end of aisle
20 displays, the counter displays and so forth, so that would be
21 one way.

22 And then, secondly, just the distribution of the
23 products is so extensive throughout -- throughout all these
24 outlets. So it really is marketed on a mass basis still.

25 Q. Do you know of any evidence the defendants have attempted to

1 increase their visibility at retail?

2 A. Yes. Manufacturers have really studied the issue of how
3 they deemed retail visibility and impression on the consumer as
4 that consumer comes into a retail outlet.

5 Q. Now, can you think of a recent example of an internal
6 document that would show a defendant's concern with retail
7 visibility?

8 A. Yes. There's a Philip Morris study from 1998 that was
9 documented in February of 1999 on this issue.

10 Q. Okay.

11 MS. BROOKER: Your Honor, if I may approach Dr. Dolan,
12 I just have one exhibit.

13 THE COURT: All right.

14 BY MS. BROOKER:

15 Q. Now, is this a copy of the document?

16 A. Yes, it is.

17 Q. Okay. Now, what is the date of this document?

18 A. Well, as shown on the bottom of the first page of the
19 document, it's February 1999.

20 Q. Is this a Philip Morris' document?

21 A. It is.

22 Q. Okay. What is the methodology of the study that is reported
23 in this document?

24 A. Well, it's basically a survey of customers. So the
25 methodology is actually described on -- let's see, what would be

1 the third page of the document, it has three long sets of
2 numbers on it, so I don't know which ones I should be using
3 here.

4 Q. Let me just say, I did forget to say for the record it's
5 U.S. Exhibit 43390. And you should just cite to the last three
6 numbers of the page or the last two numbers in this case, 62 or
7 63.

8 Do you have the number at the bottom? The bottom
9 right-hand corner.

10 A. Bottom right-hand corner? That's about the only place I
11 don't have a number.

12 Q. Just holding it straight up like this.

13 A. Oh, that way. Okay.

14 Q. So if you would -- are you still answering my question what
15 is the methodology of the study?

16 A. I am.

17 Q. Okay, go ahead.

18 A. I'm oriented. So if we go over to the page --

19 THE COURT: Wait a minute. I think I'm not. What is
20 the title on your page?

21 THE WITNESS: The title page is Retail Prominence.

22 THE COURT: No. I meant what's the title on the page
23 you're looking at?

24 THE WITNESS: Oh! It's Methodology. It's the third
25 page of the document.

1 MS. BROOKER: For the record, it's page 0060.

2 THE COURT: Okay.

3 BY MS. BROOKER:

4 Q. Go ahead, Dr. Dolan.

5 A. So this describes the methodology of this study where they
6 basically did interviews with adult smokers, legal age or older,
7 who made a cigarette purchase, and you can see it was -- it was
8 in the field in late September, early October of 1998.

9 Q. And what is meant by legal age?

10 A. Well, I would -- legal age would be 18 years old in most
11 states. I guess a couple it's 19, but by and large 18 years
12 old.

13 Q. Could you direct the court to the page or pages that
14 illustrate your point which you indicated was that defendants
15 still attempt to increase visibility at retail stores?

16 A. Right. If you just go over to -- two pages, to the one, the
17 last three numbers, 062, you can see that they've summarized
18 their findings from this -- in this study, which says that,
19 bullet point number one there is that "Marlboro is clearly the
20 leading brand in terms of perceived retail visibility, not only
21 compared to other brands of cigarettes, but across categories as
22 well."

23 So this basically means that even against a brand like
24 Coca-Cola, that Marlboro has more of a perception -- more retail
25 visibility than a brand like Coke or Budweiser or something like

1 that.

2 Second is they are evaluating there their program that
3 they have with retailers, the Philip Morris' retail master's
4 program, where they say that this is an effective vehicle for
5 enhancing Marlboro's perceived retail prominence, and provides
6 an even more important boost for Basics' visibility, which is
7 another -- another Philip Morris' brand.

8 Then if you go down two more bullet points, you can see
9 that there's a judgment of what is the most effective particular
10 type of display, where it says that based on this study that
11 they've undertaken, they have come to the finding that on-
12 counter product displays a more effective and driving visibility
13 than signage. So an on-counter product display would be is, as
14 you're going to the checkout counter and going to be paying for
15 your purchases, that you would see -- that you would see a
16 display for a Philip Morris' product at that point.

17 Q. Is there any other page that you would like to point out?

18 A. Just over on the next page, I guess, would be Philip
19 Morris's summary of the major point that, as I was saying a
20 minute ago, here is the specific reference that they have made
21 where they are comparing their retail visibility to the retail
22 visibility of Coca-Cola, Budweiser and Pepsi, and their top line
23 conclusion on that is even brands as big as Coke and Budweiser
24 lag significantly behind Marlboro retail visibility as perceived
25 by adult smokers.

1 Q. How is that relevant to your conclusions you've reached in
2 this case?

3 A. Well, it's showing that even when you compare it to the
4 other most well-known brand names in the country, the retail
5 visibility that Philip Morris -- Philip Morris has for its
6 Marlboro brand in late 1998 is the highest of any of these
7 brands.

8 Q. Now, keeping in mind all of defendants' marketing activities
9 and particularly their retail activities, have you concluded
10 that they contribute even today to the number of teenagers who
11 begin smoking?

12 A. Yes, I have.

13 Q. And to what extent do you believe that marketing contributes
14 to teenage smoking?

15 A. I believe it's a significant amount.

16 Q. And do defendants' current activities contribute to the
17 average rate of consumption of smokers?

18 A. Yes, I believe it does.

19 Q. And even today do those same activities, including those at
20 retail, contribute to the likelihood that a smoker who started
21 smoking would remain a smoker?

22 A. Yes, it does.

23 MS. BROOKER: Thank you, Dr. Dolan.

24 Your Honor, that would conclude the one-hour live.

25 THE COURT: Okay. I think you took less than an hour

1 which I appreciate.

2 Well, I don't think we will start cross at this point.

3 Mr. Bernick, do you have any idea how long yours is
4 going to be?

5 MR. BERNICK: I think it will go probably certainly
6 after lunch tomorrow. My estimate is about four hours. I'll
7 try to be shorter. May end up being longer. As you know, I'm
8 not a particularly good estimator.

9 THE COURT: And that means that there's a good chance
10 we will finish this witness by the end of tomorrow. No?

11 MR. FREDERICK: Your Honor, Tom Frederick for Philip
12 Morris. I probably have two hours for this witness and others
13 may have additional time.

14 MR. MINTON: For Lorillard, Your Honor, I will have
15 some, but it will be considerably less than two hours.

16 MR. McDERMOTT: For Reynolds, the same, considerably
17 less than two hours.

18 MS. BROOKER: Is there anyone else, if we could
19 inquire?

20 MR. PFEFFER: Nothing from BatCo.

21 MR. MARKS: I don't think Liggett is going to ask
22 questions, Your Honor.

23 THE COURT: Okay. 9:30 tomorrow morning, everybody.

24 (Proceedings concluded at 4:37 p.m.)

25

1 INDEX

2 WITNESS: PAGE:

3 ROBERT DOLAN, Ph.D.
4 DIRECT EXAMINATION 7656

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8 CERTIFICATE

9 I, EDWARD N. HAWKINS, Official Court Reporter, certify
10 that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

11 Edward N. Hawkins, RMR

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