

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 2, 2004
	.	
Defendants.	.	
.	

VOLUME 38
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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

2 (9:32 a.m.)

3 THE COURT: Good morning, everybody.

4 ALL PARTIES PRESENT: Good morning, Your Honor.

5 THE COURT: This is United States versus Philip Morris, CA
6 99-2496. All counsel are present, and you have requested, which
7 is fine with me, that we deal with the Wyant motion first. Now,
8 I haven't reread this for the third or fourth time, everybody,
9 but I have to tell you, the first two or three times I read it I
10 just couldn't keep things straight and plow through this. Now,
11 we will go, as we have been, let me get all my papers straight,
12 issue by issue.

13 All right. Mr. Biersteker, you're going to respond on
14 this?

15 MR. BIERSTEKER: Yes, Your Honor.

16 THE COURT: And who for the government, please?
17 Mr. Brody. It might be helpful if you both came forward, because
18 a number of my questions are just plain factual.

19 In terms of the back cast cap and the back cast cap
20 correction analyses, and I'm sure this is Greek to our court
21 reporter, it was Greek to me, when did the defendants first know
22 about Dr. Wyant's use of these calculations?

23 MR. BIERSTEKER: Your Honor, we saw that he had done
24 this -- let me just give you a little background. There were
25 some e-mails.

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1 THE COURT: I think you all better fill me in, because
2 even though I read the papers, it just wouldn't hurt. Don't go
3 on and on, needless to say, but it wouldn't hurt for you to give
4 me some context.

5 MR. BIERSTEKER: All right. The context is that earlier
6 on in the case Dr. Wyant was exchanging e-mails with Dr. Gruber,
7 and it turned out there was a motion to compel production of
8 those, and then this limited deposition was allowed to go forward
9 for two purposes, one was the e-mails, one was additional work
10 that Dr. Wyant had done.

11 In the e-mails there was an indication that this analysis
12 had been done in connection with the July -- excuse me, the
13 July 2002 analyses that Dr. Wyant had done. In the deposition I
14 asked whether or not he had done those with respect to the 2003
15 analyses, and he wasn't sure, but he said yes, I did do them with
16 respect to the 2002. And I said, well, would you produce them,
17 and that's what this request is for.

18 THE COURT: I just want to be clear, though, we're talking
19 about the 2003 analysis or the 2002?

20 MR. BIERSTEKER: Well, for sure the 2002, but if you look
21 at the transcript of the deposition, you will see he was
22 uncertain whether he had done it in connection with the 2003, but
23 in either event it wasn't given to us and we would like to have
24 it.

25 THE COURT: All right. Now, is there any factual question

1 as to whether the 2002 analyses were given to the defendants?

2 MR. BRODY: No, Your Honor. I think Your Honor, if I may,
3 just by way of background, I think it would be helpful to the
4 Court to understand what defendants are asking for here, and --

5 THE COURT: Well, that's always helpful, Mr. Brody.

6 MR. BRODY: As we tried to point out in our opposition to
7 the motion, what you have here is a situation where experts --
8 Dr. Wyant is a bio statistician -- have done extensive
9 calculations to determine the healthcare -- smoking attributable
10 healthcare costs associated with the youth addicted population.

11 THE COURT: All of which bares on your calculations
12 regarding the disgorgement amounts, right?

13 MR. BRODY: No, it does not bare on the disgorgement
14 calculation, it bares on the calculation of the healthcare costs
15 that were incurred by the youth addicted population as a measure
16 of the effect of the materiality, if you will, of defendants'
17 fraudulent conduct with respect to the youth addicted population.
18 This was all addressed in the motions that led --

19 THE COURT: Isn't that ultimately -- I mean, this isn't
20 relative to the disposition of this motion, but doesn't that
21 ultimately bare on your disgorgement request?

22 MR. BRODY: Dr. Gruber's calculations bare on the
23 disgorgement requests. The materiality of defendants' conduct in
24 terms of the harms that it has caused bares on the disgorgement
25 request. It also bares on other equitable relief that the Court

1 may consider in this case outside of the disgorgement amount.

2 But by way of background, in terms of what we're talking
3 about here, all of the programs that were utilized to create the
4 model that Dr. Wyant used to arrive at his expert opinions were
5 turned over to defendants, and what we're talking about here in
6 terms of this motion, I think, is largely best summed up by
7 something that Dr. Wyant said in his deposition, and this is in
8 Exhibit 7 to defendant's --

9 THE COURT: I think this is a long way of telling me that
10 the 2002 and 2003 analyses were not turned over.

11 MR. BRODY: It's not. It's a way of trying to tell you
12 that, in essence, defendants have the 2002 and 2003 analyses.
13 You can do anything with that data, and let's say you have an --
14 and I'll just try and simplify it. You've used the calculating
15 function on the computer, it comes on every computer, you can
16 pull up a calculator, run some numbers, look at the results on
17 the screen. You -- let's say you had a program, 7 times 2 times
18 3, okay, and you changed the 2 to a 3, you said okay, it's a
19 different number. You change the 2 to a 4.

20 THE COURT: Mr. Brody, I don't think I agree with your
21 basic premise. They're entitled to the calculations, and indeed
22 one of the many reasons they're entitled to them, one being of
23 course the Federal Rules, but a second reason is that I believe
24 there have already been a number of corrections made by different
25 experts for each of you in these very calculations. Am I right

1 about that, Mr. Biersteker?

2 MR. BIERSTEKER: You are, Your Honor.

3 MR. BRODY: What I'm trying to say, Your Honor --

4 THE COURT: So therefore, it is the calculations
5 themselves that the defendants need to see to check whether there
6 were obvious straightforward calculation errors.

7 MR. BRODY: Your Honor, the point is they have done that
8 and we've given them everything to do that, and so what you're
9 talking about here is a situation where an expert does all of his
10 work and says this is my model, these are the inputs I'm using,
11 this is how I'm calculating what I'm doing, and I'm going to turn
12 all of this stuff over to you. And then --

13 THE COURT: Except the final calculations?

14 MR. BRODY: No, including the final calculations,
15 everything.

16 THE COURT: So what in your view hasn't been turned over?

17 MR. BRODY: After that, what happens is, using the
18 programs, the models, the variables, everything that has been
19 turned over to them, the expert in the process of preparing to
20 testify for deposition, moving forward, says, you know, shoot,
21 maybe they're going to ask me in my deposition what would happen
22 if I took into account some of the criticisms that their expert
23 has levied against me in his report and so I'm going to take what
24 they have and I'm going to do -- I'm just going to play with it,
25 and see what it looks like on the screen. You're not creating

1 anything, you're not, and that's why Dr. Wyant said it over and
2 over again in his deposition, it was in the materials that were
3 produced to you, and it's just a matter of him doing what their
4 experts are doing. It's just, they have everything. They can
5 say, Dr. Wyant, what do you think would happen to your analysis,
6 your calculations, if we were to change this particular aspect or
7 that particular aspect? And to say that an expert, in preparing
8 to sit in the witness stand and endure a lengthy
9 cross-examination or to go into a deposition like Dr. Wyant did,
10 can't pull up the programs and the various data that was turned
11 over and say, you know, this isn't part of my opinions, these are
12 not calculations that I am relying on, these are not things that
13 form a part of my model or my calculation.

14 THE COURT: Is it accurate to say that in his direct
15 examination he would not be testifying about these particular
16 calculations?

17 MR. BRODY: Yes, that is accurate, Your Honor. The only
18 way that it might come up would be if he were asked on
19 cross-examination, you know, do you think that what Dr. Wecker
20 did in his expert report where he took your data and manipulated
21 it is a valid criticism and invalidates your results? That's the
22 only way it would come up. So it kind of makes the motion odd
23 because they're saying, well, he shouldn't be allowed to rely on
24 this stuff, but he's not relying on the stuff, and that's the
25 point.

1 THE COURT: Let me frame it this way, and then I'll want
2 both of you to respond whether you agree or disagree with this
3 analysis. Under the rules, as we all know, anything that is
4 considered or relied upon or part of his expert opinion must be
5 disclosed. Once that is disclosed and opposing experts have
6 criticisms of Dr. Wyant's opinions, the question is when he
7 addresses those criticisms himself, in order to prepare for the
8 cross-examination of a deposition or in court testimony, do the
9 rules require that his preparation for the cross-examination and
10 the attack on his work require disclosure of the calculations?
11 Is that an accurate way to pose the issue, everybody?

12 MR. BIERSTEKER: I think so, Your Honor, and I think the
13 answer should be yes.

14 THE COURT: Why, Mr. Biersteker?

15 MR. BIERSTEKER: Because the whole purpose of the rules --
16 I mean, this work was done in this case; it wasn't done for any
17 other purpose. What happened, what occurred in this deposition
18 is, Dr. Wyant, did you check this? Yes. Well, wait a minute,
19 that wasn't provided to me. Okay.

20 THE COURT: I don't know that that -- Rule 26 requires
21 that.

22 MR. BIERSTEKER: Well, I believe it does, Your Honor. I
23 believe if an expert does work in connection with a case in order
24 to reinforce his opinions and to give him confidence that his
25 opinions previously expressed are accurate, despite the

1 criticisms that have been leveled against him, that has to be
2 produced, otherwise the witness can't talk about it, either on
3 direct or cross, because otherwise they're setting us up for an
4 ambush. They come in, you haven't produced the analyses, you
5 said, did you check that? Oh, yeah, I did that last week. That
6 was the answer in the deposition. He had done analyses the week
7 before the deposition that weren't turned over.

8 THE COURT: And then the validity of his opinion stands or
9 falls on what is presented in direct and what your people have to
10 say on cross -- I don't mean on cross, what your experts have to
11 say on direct and I have to evaluate the two.

12 MR. BIERSTEKER: No, but, let me put it this --

13 THE COURT: Tell me what you think in the rules supports
14 your position? I mean, the rules again, as we all know, are
15 very, very liberal in giving you everything that the expert used
16 in preparing his opinions. I don't know that they give you
17 anything in terms of what the expert may do to meet your
18 criticisms of his opinion.

19 MR. BIERSTEKER: Because he's going to testify about it at
20 trial, and the whole purpose of the rules is to provide
21 disclosure for that which is going to be the subject of testimony
22 at trial.

23 THE COURT: So that you are prepared, as the
24 cross-examiner, to meet his opinions?

25 MR. BIERSTEKER: Well, yes, but he's going to say no, my

1 opinion remains valid because I checked out the criticisms and I
2 don't find the criticisms persuasive, and he's perfectly entitled
3 to say that, provided that he gives me the basis for that
4 testimony so I can pursue it with him. If he doesn't, if he
5 holds it close to his chest and he hides it and he gives that
6 opinion, what am I supposed to do on cross? You can't do
7 anything.

8 THE COURT: I think you're getting a citation to the rules
9 from counsel.

10 MR. BIERSTEKER: Pardon me?

11 THE COURT: I think you're getting a citation to the rules
12 from counsel.

13 MR. BIERSTEKER: I'm just saying it's something that he
14 has considered, not necessarily in the initial formulation of his
15 opinions, but to defend those opinions, and that seems to me
16 we're cutting this thing awfully --

17 THE COURT: I'm sorry to interrupt you all, because I know
18 this is going to take a long time, but this has to be a dialogue
19 because this is an interesting issue.

20 That would mean that that expert, in preparing for his or
21 her trial or deposition, having read the criticisms of your
22 people, would literally have to disclose his work until the night
23 before he came to trial.

24 MR. BIERSTEKER: Well, if --

25 THE COURT: That doesn't make sense. I don't think that's

1 what the rules require.

2 MR. BIERSTEKER: I think it's been called to my attention,
3 if you look at 26, Rule 26(2)(c), it requires that disclosures be
4 made and that they include materials that are generated solely to
5 contradict or rebut evidence on the same subject matter
6 identified by another party under paragraph 2(b) dealing with
7 experts. And that's precisely what this is.

8 THE COURT: Mr. Brody, let me hear your response. For
9 some reason there is so much stuff up here I can't find my rules.
10 But go ahead, Mr. Brody.

11 MR. BRODY: Your Honor, I think that's a mis -- I think
12 that's a misinterpretation of the rule. I don't think that
13 Rule 26 requires never ending discovery of experts. I mean, it
14 requires that the expert provide all the materials that the
15 expert relies on or considers in forming his or her opinions
16 prior to trial. It does not require that if the expert says I
17 really want to be up on my stuff, I want to rerun some stuff, I
18 want to refresh my recollection of this process, I want to think
19 about ways that I might be attacked on cross-examination, that
20 then all of a sudden there's another round of discovery and
21 another deposition, and it would be never ending. And that is
22 not what the rule requires, it's not what the cases that have
23 interpreted the rule require, and there's no chance of ambush
24 here at trial, because Dr. Wyant is not going to be offering
25 opinions in his direct testimony based on anything that's being

1 sought in this motion.

2 We have --

3 THE COURT: Give me your citation again, please, which
4 subsection?

5 MR. BIERSTEKER: Rule 26(2)(c).

6 THE COURT: C. All right. All right. Mr. Brody, any
7 further response?

8 MR. BRODY: Yes, Your Honor. I should say, as you are
9 aware, there was a process set up in this case for rebuttal
10 reports where if our expert was going to come out and say, you
11 know what, based on what I saw of defendants' expert's
12 criticisms, I think -- I am going to offer the opinion that those
13 criticisms are valid for this or that reason, that we had to file
14 a report. We did that. Dr. Wyant did that. And we turned that
15 information over to defendants. But what you're talking about
16 here, and the ELMO is on, we can use it, I think is best summed
17 up in the deposition that was attached where Dr. Wyant said, and
18 this was attached to defendants' motion, "There were no new
19 analyses, but there were rerunning of some things to refresh my
20 memory in preparation of this deposition."

21 "Now, that's what we're talking about here, and that's
22 what we're talking about in terms of each of the categories of
23 data, and, in essence, flashes on the screen. And the key factor
24 is, based on programs and data and models that were turned over
25 to defendants and defendants' experts."

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1 THE COURT: All right, final comment and then I'll rule.

2 MR. BIERSTEKER: I couldn't disagree more with that
3 characterization. That snippet of the transcript is taken out of
4 context, it's limited to five items. It's additional work this
5 expert did in order to buttress his opinions and to say to the
6 Court and to me on cross-examination, No, I checked that,
7 everything's fine. And that stuff needs to be produced.

8 I think they're obligated to produce it. We're entitled
9 to it. Otherwise, I ask him, Did you check this, and he says
10 yeah, yesterday, and that's basically what happened in the
11 deposition. He had -- For example, he had produced some analyses
12 responsive to the defense experts' criticisms. That's what we
13 were permitted to ask him about in this deposition. There was
14 one analysis -- I just didn't see how it met the criticism, and,
15 frankly, it didn't, and I started to ask him about it, and he
16 said, Oh, no, I did some more work. Well, when did you do that?
17 Last week, the week before the deposition, Your Honor, in July of
18 2004.

19 THE COURT: Which is what a well prepared expert, it seems
20 to me, would do, just like a lawyer.

21 MR. BIERSTEKER: But it seems to me they've got to produce
22 it when they do it, because otherwise how am I supposed to
23 cross-examine him? I can't, and to pretend that's not considered
24 in connection with his opinions, I think, is silly, because it
25 clearly reinforces and affirms the validity of those opinions for

1 that expert. It needs to be produced.

2 THE COURT: No, it doesn't change -- it should not -- let
3 me put it this way -- change any of the original opinions. If it
4 changed any of his original opinions, no question you'd be
5 entitled to that. I don't think that Rule 26 requires that kind
6 of never ending, ongoing disclosure. That's number one.

7 And number two, I don't think, even though we all throw
8 around the word "ambush" in our discussions, that the defense or
9 the government, if it was in this position, is being ambushed.

10 The witness has already had to disclose everything going
11 into the preparation of his opinion and the reaching of his
12 opinion. He has reached it, he has prepared, he's given you the
13 report, the supplemental report, all the reliance materials. His
14 triple checking, because he might be up at 3 a.m. in the morning
15 worrying about his testimony the next day, I don't think that's
16 the kind of preparation, and that's all it is, that the rules
17 cover.

18 So, in terms of issue number one, just so we can move
19 along here everybody, the defendants are denied their request for
20 those calculations. I think there's some issue as to whether
21 they even exist, but I don't need to reach that issue.

22 MR. BRODY: Your Honor, that analysis applies to the first
23 four issues, and we can move forward to the fifth one and there's
24 an easy answer --

25 THE COURT: So it applies to the back casting analyses,

1 which I think I understand what they are, the smoothing splines,
2 which I absolutely do not understand substantively, but I do not
3 need to at the moment, but you all better do a good job on
4 direct. It also applies to Dr. Wyant's analysis, I think, given
5 what Mr. Brody just said, of NMAS statistics regarding people who
6 quit before they get ill and after they get ill, and Dr. Wyant's
7 work on a defense criticism regarding separate calculations for
8 those -- for the healthcare expenditures of those who quit before
9 the age 35; is that right everybody?

10 MR. BRODY: That's correct, Your Honor.

11 MR. BIERSTEKER: I believe it does, Your Honor.

12 THE COURT: All right. And now we're on -- let me make
13 sure I have everybody's papers in front of me -- the defendants'
14 request for publications, certain publications, and let me look
15 at questions that I had, if any. I believe the government claims
16 that it turned over these publications. Is that right,
17 Mr. Brody?

18 MR. BRODY: That's correct, Your Honor. Dr. Wyant has not
19 considered any additional publications that he's relying on in
20 support of his opinions. And in the course of his professional
21 work it's quite possible that he has read -- he's a bio
22 statistician -- articles continue to come out, he's not relying
23 on them and he's not considering them in support of his opinions.
24 Clearly it's possible that -- and I think this was his difficulty
25 in answering these questions in the deposition, he was basically

1 asked a somewhat open-ended question, you know, published
2 literature dealing with cancer prevention study 2 comes out all
3 the time, and it falls into that category. We turned over
4 everything that he considered in support of his opinions. That
5 was the point of that section of our brief. There's nothing new
6 that he has considered in support of his work on this case that
7 we're aware of, and he was not intending to refer to anything
8 additional in the deposition.

9 MR. BIERSTEKER: Well, if there's nothing further, I'll
10 take that representation and we're done. The testimony was
11 ambiguous. He said that he thought that he had examined
12 additional materials after his reliance list was turned over, and
13 there had been no supplementation of those materials. So, all I
14 was asking in the deposition, in the repeated letters and in this
15 motion, is if there's something more, tell me what it is. If
16 counsel is now representing to the Court there is nothing more,
17 that's fine, and we're done, although I wish I had known that
18 earlier.

19 THE COURT: All right. And this is an actual motion, and
20 given our computer system, in a day or so I will have to sign an
21 order denying the motion, but everybody knows what I've decided
22 at this point.

23 MR. BRODY: Thank you, Your Honor.

24 MR. BIERSTEKER: Thank you, Your Honor.

25 THE COURT: All right. Dr. Dolan, please. I actually

1 thought we were going to be longer than that, so we're a little
2 bit ahead of schedule.

3 Doctor, you are still under oath this morning.

4 CROSS-EXAMINATION OF ROBERT J. DOLAN, Ph.D.

5 BY MR. BERNICK:

6 Q. Good morning, Dr. Dolan.

7 A. Good morning, Mr. Bernick.

8 Q. I want to begin talking a little bit about science in the
9 area in which you teach. Is it true, in the field of business
10 administration, there's significant reliance upon certain social
11 science in the literature of those sciences?

12 A. That would be generally true, yes, uh-huh.

13 Q. And as examples, there's reliance on economics, correct?

14 A. That would be true.

15 Q. In your particular area, there's also reliance upon,
16 probably, psychology to a certain extent, correct?

17 A. That would be correct, yes, um-hmm.

18 Q. And is it also true that in your field of business
19 administration, there are well established methodologies --

20 A. Are you referring to marketing now, or are you trying to
21 keep it at the general level of business administration?

22 Q. Business administration, and we'll pick up marketing in
23 particular.

24 A. There are a wide variety of methodologies that are used
25 in the field.

1 Q. And there are a wide variety of established
2 methodologies, correct?

3 A. I don't get the distinction that --

4 Q. Well, there are methods that are well accepted and
5 conventional methods that are conventionally used within the
6 field of business administration, correct?

7 A. That would be correct, yes.

8 Q. Statistics is such a method, is it not?

9 A. Statistical methodologies, an array of them, those would
10 be commonly used.

11 Q. Accounting methodologies, there are well established
12 accounting conventions, are there not?

13 A. Yes, there are.

14 Q. Okay. Within your field, there are survey methodologies,
15 are there not?

16 A. There are survey methodologies, yes.

17 Q. Within your field of advertising, there's also work with
18 focus groups, correct?

19 A. Well, I would not define my field as advertising.

20 Q. Marketing?

21 A. Marketing, yes.

22 Q. Would you agree with me --

23 THE COURT: Is that a point of honor?

24 THE WITNESS: Well, it's just a little narrow for me.

25 Thank you.

- 1 BY MR. BERNICK:
- 2 Q. Well, I'll accept that, and I think I know what you're
- 3 getting at, is that advertising is kind of a subset of the
- 4 broader area of marketing, is that fair?
- 5 A. That's fair. That's a fair statement.
- 6 Q. Okay. And within your field of marketing, and in
- 7 particular the sub field of advertising, would you agree with me
- 8 that focus group work is one of the established methodologies?
- 9 A. Well, focus group methodologies are widely used in the
- 10 marketing field in advertising new product development. A
- 11 number of other marketing issues are informed by the use of
- 12 focus groups.
- 13 Q. So, science is relied upon, and established methods are
- 14 relied upon, within the field of marketing, correct?
- 15 A. Well, yes, I would agree that. The field of marketing
- 16 draws upon underlying disciplines and there are a number of
- 17 methodologies that support research in the marketing field.
- 18 Q. Okay. Is it also true that in the area of tobacco
- 19 marketing in particular, there is significant science regarding
- 20 tobacco marketing?
- 21 A. Um, I'm not sure what you mean by that.
- 22 Q. Well, there are analyses that have been done,
- 23 psychological analyses that have been done of tobacco marketing,
- 24 correct?
- 25 A. Um, there have been analyses -- I'm not -- psychological

- 1 analyses of consumer behavior within the tobacco area, yes.
- 2 Q. Okay. Is it also true that there are -- that statistics
- 3 have been applied within the field of tobacco marketing in doing
- 4 research?
- 5 A. Yes, for example there have been a number of econometric
- 6 studies that have been done.
- 7 Q. Econometric studies have been done, other statistical
- 8 studies have been done, correct? I'm sorry, go ahead.
- 9 A. Yes, there have been a number of different kinds of
- 10 statistical analyses done within the field of tobacco marketing.
- 11 Q. Okay. Now, let's talk their -- let me just finish that
- 12 up. Is it true that with respect to the initiation of smoking,
- 13 that is, the beginning of smoking behavior, that at this point
- 14 there is literally a vast literature that exists of research
- 15 following established methodologies to understand the initiation
- 16 of smoking behavior?
- 17 A. Well, I guess we could debate about what "vast" means,
- 18 but certainly there is a significant literature developed on
- 19 that topic.
- 20 Q. That literature goes back over 30, 40 years, does it not?
- 21 A. If that's what you stipulate to me, I would have no
- 22 occasion to disagree with that.
- 23 Q. Is it true, Dr. Dolan, that you are familiar with the
- 24 research literature relating to the initiation of smoking?
- 25 A. I am somewhat familiar with it, but I haven't drawn upon

1 it in my expert opinion expressed to this Court.

2 Q. Well, I didn't ask you that. I asked you whether you
3 were familiar with the published research literature on the
4 initiation of smoking?

5 MS. BROOKER: Objection, he's answered the question and
6 already we're going beyond the scope of his direct testimony.

7 THE COURT: Objection's overruled, you may proceed.

8 THE WITNESS: I'm -- I -- "familiar" is a somewhat vague
9 word. I'm familiar with the existence of the literature. If you
10 ask me what would be the leading paper that I would cite in the
11 field, I would not -- I would know that I would have one off the
12 top of my head.

13 BY MR. BERNICK:

14 Q. Were you asked this question and did you give this answer
15 in the deposition of this case at page 247.

16 "Question: Now, you are aware that there is an extensive
17 body of literature in the social sciences going back decades,
18 examining what factors lead to smoking initiation. Are you
19 familiar with that literature?" And there is an objection. And
20 your answer was: "I am familiar with that literature."

21 Was that your testimony in this case under oath Dr. Dolan?

22 A. It was my testimony, but it's also a different question
23 than the one you just asked me.

24 Q. Well, I asked you whether it was your testimony?

25 A. Right, but -- I answered the question.

1 Q. It is your testimony. And at that time you testified
2 that you were familiar, no qualifications, you were familiar
3 with the literature in the social sciences examining what
4 factors lead to smoking initiation?

5 MS. BROOKER: Your Honor, if Dr. Dolan could be provided a
6 copy of the transcript, and all future transcripts if he's going
7 to be shown transcripts, we would be asked that he be given the
8 same courtesy as other witnesses.

9 THE COURT: All right, I think the defendants have that,
10 although this is a pretty straightforward question, but am I
11 correct that your parallel is going to get that.

12 MR. BERNICK: Yes, she probably is.

13 I think, actually, the pending question simply asks
14 whether that's true. I may not be right about that. I guess it
15 is testimony.

16 THE WITNESS: Could I have a page number, Mr. Bernick?

17 BY MR. BERNICK:

18 Q. Yes, it's page 247.

19 A. You gave me the wrong volume, then. It is 5-10-02.
20 Okay, is there a question still pending to me? I'm sorry.

21 Q. The question -- I'll have a difficult time retrieving it
22 now. At that time you testified that you were familiar, no
23 qualifications, you were familiar with literature in the social
24 sciences going back decades examining what factors lead to
25 smoking initiation. Was that your testimony?

1 A. That is, and then my answer is elaborated upon following
2 this question.

3 Q. Well, no you were asked a different question, the
4 question was what literature you reviewed. I just simply asked
5 you whether you're familiar. Is that your testimony or not,
6 Dr. Dolan?

7 A. My testimony is as represented on the chart there, yes.

8 Q. Thank you.

9 A. You're welcome.

10 Q. Now, let's talk a little bit about the method that you
11 followed in this case, your method.

12 THE COURT: Mr. Bernick, would you move that around a
13 little bit? I can't see it at all. It's blocked by the witness.

14 MR. BERNICK: Sure. That better? I can move this out.
15 We're going to have to move it back in a minute, but I can just
16 pull it out here for now.

17 THE COURT: That's fine.

18 BY MR. BERNICK:

19 Q. I'm sorry. Let's talk about your method, Dr. Dolan. Is
20 it true that the focus of your method that you applied in this
21 case, the focus of that method is to read documents?

22 A. I would not define that as the focus of my method, no.

23 Q. Is it true that you've described your methodology as
24 basically examining company documents?

25 A. Right, that would be the process of -- that would be my

- 1 process.
- 2 Q. Your process, your method -- the process of your method
- 3 is to read company documents, right?
- 4 A. Read and analyze, I guess, is how I would think about it.
- 5 Q. Fine. Isn't it true, that in your testimony we cannot
- 6 find a single cite to any actual research publication in the
- 7 general literature?
- 8 A. I believe that is correct, that in my direct testimony
- 9 filed with this Court there are no citations to the published
- 10 literature.
- 11 Q. Isn't it true, in your testimony we cannot find any cite
- 12 to any textbook or principle -- any textbook or authoritative
- 13 source about any established methods for analyzing marketing?
- 14 A. Um, my report does not cite to any textbooks.
- 15 Q. Is it true that your methodology, I believe, you've been
- 16 using for approximately 15 years in connection with your
- 17 testimony in various cases?
- 18 A. I would say that the methodology that I've used, as I
- 19 described it in my expert report, has been pretty similar in the
- 20 expert witness work I've done since 1988, '89, that timeframe,
- 21 since 1988, '89.
- 22 Q. Maybe about 15 years, correct?
- 23 A. Yep, um-hmm.
- 24 Q. And is it true that that methodology that you have used
- 25 has never been peer reviewed?

- 1 A. Excuse me?
- 2 Q. Has never been -- the methodology that you have used in
3 this case, and have been using for 15 years, has never been peer
4 reviewed?
- 5 A. Well, I'm not sure how you peer review a methodology. I
6 mean, none of the results of my -- I have not published any of
7 the results of my methodology in peer reviewed journals.
- 8 Q. And you've never explained your method in any peer
9 reviewed journals, correct?
- 10 A. I have not explained my methodology in a peer review
11 journal, no.
- 12 Q. And I think you probably just said it, but you never
13 explained your methodology in any publication, correct?
- 14 A. Um --
- 15 Q. At least, I don't see any citation to it in your
16 testimony?
- 17 A. Right, I was just thinking for a second.
- 18 Q. Okay. Sure.
- 19 A. I don't believe I've described my methodology in any work
20 that I've published, no.
- 21 Q. In fact, isn't it true that your methodology that you're
22 coming here in Court to testify in your case has never even been
23 written down, except in your direct testimony?
- 24 A. Um, I'm trying to think of whether it's been described
25 before. I think it's been described in other cases that I've

1 been involved in.

2 Q. You've never written it?

3 A. Excuse me?

4 Q. You've never written it, have you? Have you actually put

5 pen to paper in connection with any of your cases and written

6 down the specific methodology that you've applied in this case?

7 A. In the context of the litigations, I believe I have, yes.

8 Q. So you have other writings that you have issued where you

9 actually write down the method, the specific methodology that

10 you've used here?

11 A. Could I have the question --

12 Q. Yes. You have other writings, other places where you

13 have written down --

14 A. Right.

15 Q. -- the specific methodology that you used here, other

16 than in your direct testimony?

17 A. The answer would be yes.

18 Q. You don't cite any of those, do you?

19 A. No, I do not cite them in my expert report -- in my

20 direct testimony, no.

21 Q. Isn't it also true that even with what we've just now

22 described, in your view your method in this case is scientific?

23 A. Um, that would not be the first word I would use to

24 describe it. I think it meets the, obviously, I believe it

25 meets the -- it's rigorous and I stand behind it, but it's

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1 basically a descriptive -- I would describe it as a descriptive
2 methodology. I think it is scientific within the descriptive
3 realm, but that's different than science in a normative realm.

4 Q. So is -- so you agree with me you describe it as being
5 scientific?

6 A. Right. I would say that it's a scientific approach, yes.

7 Q. Let me talk a little bit about some of the -- well, let
8 me just ask the question this way: The Court has heard
9 testimony from other experts in this case who have testified for
10 the government regarding historical documents, I'll tell you
11 that. The Court has heard from a historian named Brandt. Do
12 you know a Professor Brandt at Harvard?

13 A. I don't.

14 Q. The Court has heard testimony that he's a historian. The
15 Court also heard testimony from Dr. Harris, Jeffrey Harris, who
16 reviewed company documents and also testified about economics.
17 I'll just tell you that. The question is -- I'll just tell you
18 that both of those witnesses testified here that it was critical
19 in assessing company documents to look for the context in which
20 those documents were written. Do you understand what I mean?

21 A. Yes, I understand that.

22 Q. Now, as I understand it, if you take a look at the direct
23 testimony that you've offered here, you say, in describing your
24 methodology at page 21, that you use 4 Cs. "I usually use the
25 4 C's framework to organize my thinking in data collections. I

- 1 have to understand" -- and you list company, competitors
2 customers and channels, right?
- 3 A. That's correct.
- 4 Q. We're going to make a list of Cs here, so I'm not writing
5 this down for the sake of writing it down, but you have company,
6 competitors, customers, and channels. Did I get those right?
- 7 A. Yes, you did.
- 8 Q. I don't see anywhere in your methodology where you list
9 as one of the Cs context. Am I right about that?
- 10 A. You're right, I had four Cs, and you've added a fifth.
- 11 Q. And yet, when it comes to the publications that you have
12 done about marketing management, isn't it true that in your
13 publications, for example, your book called Marketing Management
14 Cases, JD 013070, this is a book that you edited on marketing,
15 correct?
- 16 A. Yes, it's a book of -- I mean it's -- a lot of material
17 in it is stuff I've written, so it's --
- 18 Q. Well, were you the editor of this book?
- 19 A. Um, well --
- 20 Q. It says Robert Dolan right on the cover, right?
- 21 A. Yeah, the only reason I'm hesitating -- I mean,
22 certainly, it's a book of mine, it's just a question of whether
23 one would call me the editor or the author.
- 24 Q. Well --
- 25 A. Because so much of the material in it is mine.

- 1 Q. Fair enough.
- 2 A. That's the only question.
- 3 Q. That's fine. I think we'll have no problem with that.
- 4 I'm only going to direct you to page 2 of part 1, which is
- 5 called "Note on Marketing Strategy", and ask whether you wrote
- 6 that?
- 7 A. That's me.
- 8 Q. That's you. And we see here that in describing the
- 9 analysis, you talk about the analysis of five Cs, correct?
- 10 A. Correct.
- 11 Q. And we go through, and they kind of read out the same
- 12 way. We've got customers, we've got competitors, we've got
- 13 competition, we've got collaborators, and collaborators would
- 14 include people who were involved in the channel, right?
- 15 A. Right, we sometimes -- yeah, the channel -- that's
- 16 exactly right.
- 17 Q. But then you have a fifth C and that's the C called
- 18 context, right?
- 19 A. Correct.
- 20 Q. And when you wrote your book you thought it was pretty
- 21 important to look at context, correct?
- 22 A. I did.
- 23 Q. Now, let me just understand, can we agree here today that
- 24 context is critical to analyzing company documents, even though
- 25 you haven't described it in your direct testimony?

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1 A. Right. Context is important, right.

2 Q. I said "critical".

3 A. Critical? Oh --

4 Q. I would say -- well, that's my question for you. Would

5 you agree with me in this case that context is critical in

6 analyzing company documents?

7 A. I would say that an understanding of the context is

8 critical, yes.

9 Q. Okay. Let's see if we can get out a fifth -- sixth C.

10 Would you agree with me that when your focus is company

11 documents, essentially the data that you're working with is the

12 company documents, that's your data?

13 A. That would be your primary data, right.

14 Q. Okay. And would you agree with me that in following any

15 sound method, it is critical to gather data carefully?

16 A. I would say that it's appropriate to gather the data

17 carefully, yes.

18 Q. Would you then agree with me also that when it comes to

19 gathering and reviewing documents in this case, it is critical

20 to do so carefully?

21 A. I would agree with that.

22 Q. We'll make that our sixth C, which is careful document

23 reading. Critical to your opinions here?

24 A. The fact that I was careful in my work, was that

25 critical?

- 1 Q. No, that that was something that ought to be part of your
2 methodology, which is to carefully read the documents that
3 you've gathered up?
- 4 A. Um, yeah, that's fine.
- 5 Q. That sounds fine. Okay. Let's talk about just an
6 example here before we get on to some structure of your
7 analysis. At page 95 of your direct examination, you say the
8 following: "Finally R.J. Reynolds' Camel Y and R orientation
9 from 1988 stated" -- and then you go on and have a quote here;
10 it's stated -- "each year a million new adult smokers enter the
11 cigarette market." There's then an ellipses, "YAS are the only
12 source of replacement workers less than one-third of smokers
13 start after the age of 18." And then the value of -- I call it
14 FUBYAS, I don't know if you kind of think of it differently --
15 "F-U-B-Y-A-S compounds over time due to extreme brand loyalty
16 and rate per day increases." Do you see that?
- 17 A. I do.
- 18 Q. And that's a quotation that you chose to make based upon
19 this document, correct?
- 20 A. That's a quotation that I chose to cite, yes.
- 21 Q. Did you review that quotation carefully to make sure that
22 it accurately captured the essence of what the document was
23 saying?
- 24 A. I would try to, yes.
- 25 Q. Did you do that?

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1 A. I believe so.

2 Q. This is significant because it shows that R.J. Reynolds
3 knew that the majority of starters were teenagers, it coined the
4 term FUBYAS, first usual brand young adult smokers, as a
5 substitute for saying new smokers. What you're suggesting there
6 is that somehow Reynolds didn't really want to say in its
7 document "new smoker", so it kind of made up a new term. Is
8 that what you are saying?

9 A. Yes, that's basically correct.

10 Q. And it said: "But the key to success R.J. Reynolds is
11 setting out is clear, get the young entrants at brand loyalty in
12 your favor and have them smoke more as they grow old. That is
13 the way to build a successful brand."

14 In essence what you're saying to the Court, is that
15 Reynolds was actually going after entrants, many, if not most of
16 whom, were under the age of 18 --

17 A. Right.

18 Q. -- and in their document they were kind of covering that
19 over a little bit by referring to them as FUBYAS, and YASs,
20 correct?

21 A. This would be based on my analysis of an entire set of
22 documents, rather than saying it's this particular one that
23 shows all that.

24 Q. But you're setting this particular one as an illustration
25 of the point, are you not?

- 1 A. It is, but if you go back to the previous page, you will
2 see that on line 20 of page 95 I say, "finally", so this is the
3 last in a long string of citations.
- 4 Q. That's fine. But would you agree with me that this ought
5 to support the proposition that you're advancing?
- 6 A. This would be -- that the quote, that that document --
- 7 Q. That this document is cited and is said to be
8 significant, this is significant, this document is significant
9 because it shows, and you go on to say what it shows.
- 10 A. Right, that it knew the majority of starters were
11 teenagers.
- 12 Q. And what you're suggesting is that this document shows
13 that Reynolds is actually going after people who are new
14 entrants, most of whom are under the age of 18, and they're
15 covering their tracks by using words like YAS and FUBYAS,
16 correct?
- 17 A. Again, this is the -- when I say "this" on line 3, "this
18 is significant because it shows that R.J. Reynolds knew the
19 majority of starters were teenagers." That comes directly out
20 of the -- out of the quote where it says: "Less than one-third
21 of smokers start after age 18."
- 22 Q. Which means that most starters start before 18, correct?
- 23 A. Well, could I finish my answer first?
- 24 Q. Sure.
- 25 A. And then sort of summing up a series of documents which

1 have led up to this in an understanding of the general
2 principles of brand loyalty operating, I do go on to say that
3 they coined this term FOBYAS, and I believe it to be a
4 substitute, basically, for a way of saying "new smoker" without
5 so saying.

6 Q. Fine. Are you done?

7 A. I am.

8 Q. Okay. Would you agree with me that the essence of what
9 you're telling the Court is that this, and other documents, if
10 you would like to put that in, that's fine, this and other
11 documents show that Reynolds intended to target and go after new
12 smokers under the age of 18 and that it intended to cover its
13 tracks by using these words?

14 A. I would say that they desired to attract new starting
15 smokers, they knew that the majority of those smokers were
16 teenagers, and that they came up with this term FUBYAS. I have
17 no document that I can cite to you that says, okay, let's stop
18 saying "new smokers" and say "FUBYAS" instead. But that's my
19 sense from reading an array of documents.

20 Q. So apart from your sense, you don't have a document that
21 actually gives you evidence, direct evidence that FUBYAS was a
22 coined term, correct?

23 A. Well, I think it -- I think -- I don't have evidence that
24 it was a -- direct evidence, as I just said, I don't have a
25 document in which R.J. Reynolds says let's stop saying new

1 smokers and use FUBYAS to refer to them.

2 Q. Are you telling the Court that FUBYAS are people who are
3 over 18, under 18, over and under 18? What are you telling the
4 Court that FUBYAS are or YASs are, what age?

5 A. They could be a number of different -- first usual brand
6 young adult smoker what this is saying -- if you go back, you
7 talk about someone who's not -- does not have a first brand.
8 That means they -- they're going to be new smokers, so -- and
9 then the document goes back and says the majority of these
10 people are under the age of 18.

11 Q. I understand what the quote is, Dr. Dolan, that's not my
12 question. Are you telling the Court that FUBYAS includes people
13 who are under 18 or not?

14 A. Some FUBYAS would be under the age of 18.

15 Q. And that's your opinion as an expert based upon your
16 careful review of these documents, including this document,
17 correct?

18 A. That would be correct.

19 Q. Okay. Let's take a look at some of the other -- some of
20 the pages of this document in order to see what this document
21 says about this subject. This is Exhibit 20774, and we'll go to
22 page 1, and I'm going to put on the screen the parts of this
23 document that you quoted, which appear on page number ending
24 1617, and this again is the same document that we've been
25 dealing with on page 95 and 96 of your testimony. Do you see

1 where it says, "each year a million new adult smokers enter the
2 cigarette market"?

3 A. I do see that.

4 Q. And you quoted that, did you not?

5 A. I believe I did.

6 Q. And it says, "YAS are the only source of replacement
7 smokers." Do you see that?

8 A. I do see that.

9 Q. And that's another thing that you quoted, correct?

10 A. I believe I did.

11 Q. You say, "less than one-third of smokers start after age
12 18." You quoted that?

13 A. I did.

14 Q. And it says, "the value of FUBYAS compound" -- these are
15 three basic quotes that you decided in carefully reviewing this
16 document that you were going to extract and put into your direct
17 examination, correct?

18 A. That is correct.

19 Q. Now, if we go further down the page, just this page, we
20 see, "RJR is substantially under developed and declining in its
21 share of 18 to 20-year old smokers." And the data provided is
22 for 18 to 20-year old smokers, correct?

23 A. The data is provided for 18 to 20-year olds, uh-huh.

24 Q. You don't quote any of that data, correct?

25 A. Not in this particular point I don't believe, no.

- 1 Q. Well, you never quote this portion of the document
2 anywhere in your testimony, correct?
- 3 A. I don't believe so.
- 4 Q. Let's go further on to the page ending in 1620. It says,
5 "Young adult smokers strategic importance to stabilize RJR's
6 share of total smokers it must raise share among 18 to 20-year
7 olds, ASAP." That's what it says, correct?
- 8 A. That's what it says there.
- 9 Q. You don't quote that either, do you?
- 10 A. No, I don't.
- 11 Q. Let's take a look at a couple pages on, the page ending
12 in 1650. This is an interesting page. It says,
13 "Differentiating within" --
- 14 A. Just hold on one second so I can catch up with.
- 15 Q. It ends in 1650, I'm sorry. Do you have that?
- 16 A. That's okay, I'm just looking upside down at these
17 things. Okay.
- 18 Q. "Throughout this next section we will be talking about 18
19 to 20-year old smokers and they equal FUBYAS," right?
- 20 A. I understand what it says there, yes.
- 21 Q. FUBYAS are defined in this document, one, to be smokers,
22 and secondly, to be 18 to 20-year olds, correct?
- 23 A. They are right here, yes.
- 24 Q. They are -- well, they are right here, they are in the
25 document that you cited to the Court, correct?

1 A. Right. Yeah, that's right. I mean, this is how they're
2 explicitly defining it.

3 Q. In an internal document, correct?

4 A. In an internal document, correct.

5 Q. And you don't cite that to the Court, do you?

6 A. I did not.

7 Q. If we moved on -- let's just advance this cause here a
8 little bit -- we now get "importance of younger adult
9 smokers" -- those are the YASs -- "to RJR," correct? This is at
10 1693.

11 THE COURT: Now, is -- let me be clear. Is this a
12 different document or another --

13 MR. BIERSTEKER: It's the same -- I'm sorry, Your Honor,
14 I'll be careful. Every time I switch I'll be sure to let
15 everybody know.

16 BY MR. BERNICK:

17 Q. Same document, now talking about number one, "the
18 importance of young adult smokers to RJR." Do you see that?

19 A. Younger adult smokers, right.

20 Q. And young adult smokers, if we take a look at 1695,
21 what's their age group?

22 A. In this document they're defined as 18 to 24 years old.

23 Q. Until we switch the document, Dr. Dolan, all my questions
24 are going to be this document. We'll get to a bunch of other
25 ones.

- 1 Would you agree with me that in this document FUBYAS are
2 18 and over and YASs are 18 to 24?
- 3 A. Um, well, let's see. Younger -- here it's defining
4 younger adult smokers as age 18 to 24.
- 5 Q. Okay. And if we went further, if you go to a page that
6 ends in 18 -- 1698, that's another section on today's young
7 adult -- younger adult smoker, correct?
- 8 A. Yes.
- 9 Q. And within that section on the very next -- I guess it's
10 1701, the demographic profile is described as being one-third
11 from 18 to 20, and two-thirds from 21 to 24, correct?
- 12 A. That's correct.
- 13 Q. Didn't quote any of that to the Court, did you?
- 14 A. I did not.
- 15 Q. Let's get to the T word, target. Does this document talk
16 about who it is that is being targeted?
- 17 A. Um --
- 18 Q. Do you know?
- 19 A. I don't know whether this specific word "targeted" is
20 used in this document or not.
- 21 Q. Well, there had been tremendous discussion in this case
22 about targeting, targeting, targeting effect. That's the
23 essence of what your report looks at, targeting, correct?
- 24 A. That would be one topic.
- 25 Q. It's the most important topic in your report, is it not,

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- 1 is targeting teenagers, targeting youth?
- 2 A. I would not say that that was necessarily the most
- 3 important, it's one of a number of important topics.
- 4 Q. Certainly you would want to look at the documents that
- 5 you're citing to the Court real real careful to see when they
- 6 talk about who the target is, would you not?
- 7 A. It would be useful to understand in a document who the
- 8 target --
- 9 Q. It would be critical, wouldn't it?
- 10 A. It would be important to understand that.
- 11 Q. Take a look at 1780. "Improved worsening opinion of
- 12 Camel target smokers." What is the age group -- what's the
- 13 lowest age range that is referred to in this target page?
- 14 A. The lowest age range would be 18 years old.
- 15 Q. Nothing in this document says, does it, that young adult
- 16 smokers are less than 18 as used in Reynolds strategy, correct?
- 17 A. Well, if you go back to page 617, where we were a while
- 18 ago.
- 19 Q. Sure.
- 20 A. You can see there. Can we have that one up? Bullet
- 21 point 2 is the young adult smokers, YAS, is the only source of
- 22 replacement smokers. So, the only way you can be a replacement
- 23 smoker is if you weren't a smoker in the first place.
- 24 Q. That's correct.
- 25 A. Okay. So it's saying that some of these YASs, young

1 adult smokers, are, in fact, nonsmokers, and less than one-third
2 of these people are over the age of 18.

3 Q. Well, that's the way you read it, but the other way to
4 read it is in talking about replacement smokers, the target,
5 which is young adult smokers, is a third, that is, the people
6 who are 18 or over, that that's what we're going after, and in
7 fact, the entirety of the document focuses on people who are 18
8 and above, does it not?

9 A. When it explicitly talks about target markets at this
10 time --

11 Q. And it provides data?

12 THE WITNESS: Well, well --

13 MS. BROOKER: Objection.

14 THE COURT: Objection is sustained.

15 BY MR. BERNICK:

16 Q. Go ahead.

17 A. By the time of this -- by the time of document -- by the
18 time of these documents, we're talking about a 19 -- I think
19 we're up to 1990, you know, it's references to teenagers,
20 specifically, are pretty much gone out of the documents.

21 Q. I didn't really ask you that.

22 A. Right.

23 Q. Okay. With respect, Dr. Dolan, could you try to stay
24 with the question?

25 A. Sure, I'll do that.

- 1 Q. The question is, that the entirety of this document when
2 it talks about young adult smokers, YAS, and defines them in
3 FUBYAS and defines them, what Reynolds is saying is that they're
4 aiming at the one-third of smokers who start at 18 and over,
5 correct?
- 6 A. That would not be my interpretation, no.
- 7 Q. Is there anywhere you can see in this document where
8 young adult smokers in the profile, in FUBYAS in the profile,
9 are less than 18 years old?
- 10 A. Well, I would say on point 2 here, it says "young adult
11 smokers are the only source of replacement smokers," and then it
12 goes on to articulate that less than one third of these people
13 start after the age of 18.
- 14 Q. Yeah --
- 15 A. And I would agree with you that when it specifically
16 shows an age, it is 18 and above.
- 17 Q. 18 and above. Now, isn't it true, Dr. Dolan, that --
18 first of all, this is a 1988 document, correct?
- 19 A. Um, I don't --
- 20 Q. You cite it as Y and R orientation in 1988, do you not?
- 21 A. I would accept that, I don't have my -- I guess that's
22 '88.
- 23 Q. You say, 1988, from 1988?
- 24 A. Right, fine.
- 25 Q. And would you agree with me -- when you made that

1 quotation that nowhere referred to the age ranges of this
2 document, why did you not actually tell the Court that there are
3 age ranges that were provided in the document and the age ranges
4 were all 18 and above? Why didn't you tell the Court that?

5 A. Um, I guess I didn't really see it as necessary at that
6 point in time.

7 Q. Okay. Now, age ranges were pretty important when it came
8 to Reynolds telling Congress who it was that they were marketing
9 to, correct?

10 A. I don't know what you would be referring to there.

11 Q. Well, are you familiar with the fact that Reynolds --
12 R.J. Reynolds actually told Congressman Luken, who is chairman
13 of the Subcommittee on Transportation, Tourism and Hazardous
14 Materials, and the Committee on Energy and Commerce in the House
15 of Representatives, that Reynolds actually told Congressman
16 Luken who it was they were targeting. Do you know about that?

17 A. I don't specifically recall it at the moment.

18 Q. Well, this is JD 065994. It's a letter dated April 4,
19 1990, it's written by Wayne Juchatz who the Court already knows
20 was the general counsel of R.J. Reynolds, is written to the
21 honorable Thomas A. Luken, and it says, it's responding on
22 behalf of Reynolds to a letter written by Congressman Luken on
23 March 15th of 1990. Do you see that on the first page?

24 A. I do.

25 Q. And do you see that in paragraph three, which begins on

1 the second page where it reads: "RJR T denies the assertion
2 contained in the third paragraph of your letter that our
3 marketing of cigarettes to smokers 18 years of age and older
4 violates the cigarette advertising code."

5 And it goes on to explain his interpretation of the code
6 and says that -- it basically further provisions. And it goes on
7 to then say unequivocally "RJR T markets to adult smokers, and
8 only to adult smokers, and that group consists of those smokers
9 18 years of age and older." Do you see that?

10 A. I do see that.

11 Q. And is it true, as set forth in this document, that the
12 target, the age target that is being described to Congress is
13 exactly the same as the age range described internally in the
14 document that you highlighted in your testimony and we just got
15 done talking about it?

16 A. They would be the same.

17 Q. Is it further true, that the same representations were
18 made to the FTC in 1990? Are you familiar with the letter that
19 was sent to the FTC in 1990 by RJR T?

20 A. I don't know if I've seen this particular letter or not,
21 but certainly representations of this type are made quite
22 regularly.

23 Q. Well, is it a fact that what RJR Reynolds told the
24 government when asked, consistently, and has continued to tell
25 the government consistently, all the way up to today, is that

1 they market to people who are 18 years of age and older. That
2 is, legal purchasers of cigarettes?

3 MS. BROOKER: Your Honor, I don't know why we're not
4 passing up Dr. Dolan copies of the documents as soon as they're
5 shown up there.

6 MR. BERNICK: I asked a general question. We'll get to
7 the document.

8 BY MR. BERNICK:

9 Q. Isn't it true that that's what Reynolds' position has
10 always been to the government, that they market to people who
11 are 18 years of age and older, that is, legal purchasers of
12 cigarettes?

13 A. I believe that would be correct. I cited some examples
14 of those kinds of statements yesterday myself.

15 Q. You cited that. You cited to the Court -- let me get
16 this down. You cited to the Court examples of Reynolds saying
17 18 plus; is that right?

18 A. I don't know that I had one that specifically said the
19 age 18, but the general idea, as I gave in my one hour live --
20 or somewhat less, testimony yesterday, was that I don't have any
21 argument with your saying that Reynolds and other people
22 regularly said that their target market was adults and only to
23 impact brand switching, nothing else.

24 Q. That is totally -- respectfully, it's nonresponsive
25 Dr. Dolan. You just said you cited to the Court yesterday

1 examples of RJR T saying 18 and over. Is that true or not?

2 A. I don't believe I said that. I said something to the
3 effect of similar type documents.

4 Q. For the record, JD 002696, an October 31, 1990 letter
5 from R.J. Reynolds, a Guy Blynn to Janice Evans of the FTC says
6 in answers to interrogatories, "Camel advertising and promotion
7 is designed to appeal to adult smokers primarily 18 to 34-year
8 old males that smoke Philip Morris Marlboro cigarettes." Had
9 you ever seen that document?

10 A. I'm not sure whether I've seen this particular one or not
11 before.

12 Q. It says, "Since 1988 Camel advertising has been designed
13 at appeal primarily to the 18 to 20 and 21 to 24-year old male
14 smoker segments, because Marlboro is by far is the leading
15 cigarette." Are you familiar with that statement?

16 A. I mean, I would certainly be -- whether I've seen -- as I
17 said a moment ago, whether I've seen this particular document or
18 not, I'm not sure, but certainly, that kind of statement is no
19 surprise to me.

20 Q. Same thing that Reynolds was telling Congress has been
21 Reynolds' consistent position, 18 and over, correct?

22 A. That's been their consistent externally expressed
23 position, yes.

24 Q. Let's go on and talk about the structure of your opinions
25 here, and this is going to be a little bit difficult.

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1 MR. BERNICK: If we could just -- I've asked already for
2 Mr. Sheffler's indulgence in case he gets concealed here. He's
3 assured me that that's all right, he'll listen very carefully.

4 THE COURT: Or read the realtime.

5 MR. BERNICK: Is this all right? I've also offered him
6 the chair in front here so we'll see if he accepts that.

7 BY MR. BERNICK:

8 Q. Can you see that, Dr. Dolan?

9 A. With a little bit of a squint, yeah.

10 Q. I'll try to put it up big. I'll write big on it. But
11 what I've got here is what I think is a good structure for
12 asking you questions about your opinions.

13 Do you have opinions on what the tobacco companies, who
14 are present here, said about their marketing practices?

15 A. Yes, I do have a view on that.

16 Q. And then you also have views that you talk about which is
17 what the companies actually did, correct?

18 A. Yes, correct.

19 Q. And then, yesterday, in case after case or time period
20 after time period, counsel for the government was very diligent
21 in asking you a whole series of questions, was she not,
22 regarding the impact of what the defendants here did, right?

23 A. Right.

24 Q. And you've expressed expert opinions to a reasonable
25 degree of certainty in your field in all three of these areas?

- 1 A. Yes.
- 2 Q. And so that's the structure that I'm going to use, and
3 let me begin with what was actually said. I've gone through
4 your report, and this is now why we have a thing over there.
5 Can we try to haul this thing over?
- 6 I've gone through your report pretty carefully and tried
7 to analyze what it is that you said -- that you say we said. And
8 you understand that this is a case that's based upon wire fraud,
9 do you not?
- 10 A. I sorry?
- 11 Q. You understand this is a case based upon wire fraud?
- 12 A. If you had asked me the question without giving me the
13 answer, I wouldn't have said "wire fraud".
- 14 Q. Fair enough. I will tell you it's a case based upon wire
15 fraud, and I'll further tell you, or suggest to you, and I think
16 you probably know this just as a result of your background, when
17 someone's accused of making a fraudulent statement, it becomes
18 pretty important to make sure that everybody understands exactly
19 what the statement was, right?
- 20 A. That would seem right.
- 21 Q. It wouldn't be appropriate, in your view, to, in a sense,
22 use words that were not the person's words in saying you said
23 something wrong, right?
- 24 A. Right, it would be better to use the person's words.
- 25 Q. Better to use the person's words. Now, I went through

1 your direct examination and I have captured your words in terms
2 of what you say we said. For example, at page 56, you say we
3 said: "The tobacco companies also regularly stated that they
4 did not wish to impact teenagers." Those were your words,
5 correct?

6 A. Those are my words, yes.

7 Q. And that's why I put the first one up over here at page
8 56. "We do not wish" -- I've put up there and then it goes on
9 to say at page 56: "The tobacco companies expressly stated they
10 had no interest in either, one, increasing the likelihood of
11 anyone's beginning to smoke, or decreasing the likelihood that a
12 current smoker would quit." Do you see that?

13 A. I see those two.

14 Q. Then so on and so forth. We can go through. It says:
15 "The tobacco companies claim absolutely no interest in or effort
16 to gain new smokers." That's page 59, correct?

17 A. Well, I would have to catch up with you on that one.

18 Q. I've got it on the screen here for you.

19 A. Right.

20 Q. Next one: "Brand choice impact is the one and only
21 impact of our marketing. No one who is in any way not already
22 smoking is supposed to be impacted in any way."

23 And then the next one: "No teenager is to be impacted by
24 any of our marketing." All of those appear at page 74 as being
25 public statements that you say were clear, right?

- 1 A. I've got to catch up with you, again, on this.
- 2 Q. Page 74, lines 14 through 17.
- 3 A. Well, you have -- I mean, there's no -- I mean, you're
- 4 taking sort of what I say and then you're changing -- like I
- 5 have the phrase in my expert report is "no one who is not
- 6 already smoking is supposed to be impacted in any way."
- 7 Q. Right.
- 8 A. And then you've taken "no teenager is to be impacted" --
- 9 Q. No, that's the next line, next sentence.
- 10 A. Okay, I'm just -- "no teenager is to be impacted by any
- 11 of the" -- I say "their" marketing and you changed to "our".
- 12 Q. Right, because you're saying we said these things?
- 13 A. Right.
- 14 Q. Their public statements are clear. So you're correct, I
- 15 took "their" and made it into "our" because this is something
- 16 that you said we said, right?
- 17 A. Right, but I didn't put it in quotes and you're now
- 18 putting it in quotes.
- 19 Q. Absolutely. We're going to get to that in just a minute.
- 20 A. Right.
- 21 Q. Do you see where it says on page 75 that you say, "We
- 22 claimed publicly to have no interest in new smokers"?
- 23 THE COURT: Wait a minute, are we on 75?
- 24 MR. BERNICK: 75 line 23.
- 25 MS. BROOKER: Your Honor, if I may object to the use of

1 this demonstrative. It's extremely misleading and Dr. Dolan is
2 trying to explain that because Mr. Bernick has quotes up there,
3 and obviously the testimony he's selecting from Dr. Dolan's
4 testimony is Dr. Dolan's own words about what the public -- the
5 impact of the public statements are. So, I really object to the,
6 you know, putting things in "we" and putting the quotes up there,
7 particularly on the last one that Dr. Dolan has just explained.

8 THE COURT: Beside the last one, which I have to find on
9 my --

10 MR. BERNICK: That's --

11 THE COURT: I don't even understand the objection to
12 quotes. They are quotes from his direct testimony.

13 MS. BROOKER: That's correct, they're quotes of
14 Dr. Dolan's, but I'm saying Mr. Bernick is describing these as
15 quotes that Dr. Dolan is ascribing to the defendant, so if we're
16 clear that these are Dr. Dolan's words, particularly --

17 THE COURT: I'm perfectly clear on this.

18 MS. BROOKER: Okay.

19 THE COURT: But I want to come back to 75, because --

20 MR. BERNICK: 75 is the -- "we have no interest in new
21 smokers."

22 THE COURT: What line is that?

23 MR. BERNICK: That's line 23, the very last one. This
24 while claiming publicly to have "no interest in new smokers."

25 THE COURT: Okay.

1 BY MR. BERNICK:
2 Q. If you go to the next one, "we do not care if someone
3 stops smoking or not" that appears at page 103, correct?
4 Defendants maintain, line 18, that they "never cared if someone
5 stopped smoking or not," right?
6 A. Well, again, subject to what we were saying a moment ago,
7 instead of putting things in quotes that aren't --
8 Q. We're going to get to exactly that point. Page 10 --
9 A. I can see where we're going.
10 Q. Well, I think we all can see. Page 137, lines 3 and 4,
11 "we have no concern about the overall size of the market".
12 That's what you said -- that's what you said we professed;
13 profess is another way to say "say", correct?
14 A. Could I have the page number please?
15 Q. Yes, page 137, I wrote it down -- I'm sorry -- lines 4
16 and 5. I'm sorry. That's the language that appears there,
17 correct?
18 A. Right. It goes on to say "merely their share of it"
19 which you don't have over here.
20 Q. That's right, I highlighted it though.
21 A. Right, but you don't have it over here.
22 Q. That's correct.
23 A. Okay.
24 Q. And page 65, it's a little bit out of order, you say,
25 "the tobacco companies publicly say that they are not concerned

1 with -- they're not concerned with the number of current smokers
2 who quit or the consumption rate of people who smoke."
3 I think that's back at 65 lines 3 through 9, right?
4 A. Fine.
5 Q. Now, it's true, is it not, that I have said -- I have
6 taken the language right out of your report where you say what
7 we said. And now the question I said is, who made that
8 statement? I don't see anywhere in any document that you cite
9 in your direct examination where those words were actually used
10 by somebody at the tobacco companies, correct?
11 A. No.
12 Q. Tell me, tell me where we say in a document, use the
13 words "we do not wish to impact teenagers". Are those your
14 words or the document's words?
15 A. You know, Mr. Bernick, I didn't -- as I, you know, as --
16 you're doing all this, you know from reading my expert report
17 that this was my summary statement of a number of documents, and
18 to then say to put it in quotes and say, okay well who said
19 that, I go back to what I said yesterday. A number of times the
20 tobacco companies have said the only thing we're interested in,
21 the only impact of our marketing is brand switching.
22 Q. I asked you, tell me where we say in a document, use the
23 words "we do not wish to impact teenagers". Are those your
24 words or the document's words?
25 A. You know --

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- 1 Q. I think it's pretty simple, Dr. Dolan. Why don't we just
2 make clear that these are words that you chose to characterize
3 your views of what we said; they are not the words that actually
4 appear in a document, true or false?
- 5 A. Well, my direct testimony didn't present them as words
6 that I was quoting from a document on.
- 7 Q. When you say "the tobacco companies publicly say they are
8 not concerned with the number of current smokers", that doesn't
9 purport to say what the tobacco companies said?
- 10 A. It's not quoting a document.
- 11 Q. In fact, all of these statements you can't find in any
12 document, correct, in those words?
- 13 A. In those exact words, no. Those words are my words which
14 I use to summarize a number of documents and I wasn't attempting
15 to draw from the defendants' documents quotations. And -- there
16 was nothing in my expert -- in my direct testimony that would
17 give that impression.
- 18 Q. And to find -- well, let me just pursue it this way: I
19 think that's fine. Let's talk about some of the other graphics
20 that you've used here. For example, when you talk about brand
21 switching, you say, "those are false statements". That's what
22 you say in that graphic, correct? That is exhibit, Your Honor,
23 17436 that was presented on examination yesterday.
- 24 A. Yes, the title includes "false statements", yes.
- 25 Q. And is it true that you're now actually quoting the

- 1 document?
- 2 A. Right, those are -- that's what the quotation marks and
3 the reference to a specific exhibit is meant to convey.
- 4 Q. And this document also is wrong, is it not?
- 5 A. I'm sorry?
- 6 Q. I said, this document also is wrong, is it not, where
7 you're purporting to quote?
- 8 A. If there is an error in it I'm not aware of it as I sit
9 here.
- 10 Q. There are multiple errors in this document, are there
11 not?
- 12 A. I couldn't -- I --
- 13 Q. Did you double-check it to make sure it was right before
14 you decided to present it here in Court?
- 15 A. I did not double-check it back against the original
16 documents just before this -- after the chart was made.
- 17 Q. Did you even prepare this document, you yourself prepare
18 this, Dr. Dolan? Did you prepare the document?
- 19 A. I did not prepare this particular document. It was based
20 on some materials that I had gathered.
- 21 Q. Did counsel for the government prepare the document or
22 did somebody else prepare the document?
- 23 A. I imagine it was counsel for the government.
- 24 Q. Did you ask that this document be prepared or was it
25 somebody else's idea?

1 A. Well, I had a list of the false statements, and as we
2 were developing what I was going to say for my presentation
3 yesterday, this was one of the exhibits that the government had
4 made up for possible use.

5 Q. Was that the first time you saw it, was yesterday?

6 A. Oh, no.

7 Q. Was this -- first time you saw this document was not
8 yesterday? You saw it before?

9 A. Correct, I saw it before.

10 Q. Okay. And again, whose idea was it to prepare this
11 document, yours or somebody else's?

12 A. This was developed by the government for potential use in
13 my testimony -- my one hour testimony yesterday.

14 Q. Is that true of the other documents that are like this,
15 that is, the ones talking about false statement teenagers, false
16 statement people over 21, all the ones that look like this?

17 A. I think there's one other slide of this type, and that
18 would be true of that one as well.

19 Q. What about the chart that showed expenditures over time,
20 did you -- advertising or marketing expenditures over time, was
21 it your idea to prepare that document?

22 A. I don't think I said, well, this is one of the
23 demonstratives that we should have available to possibly
24 present. I mean, we had discussed it in terms of, you know, a
25 very similar chart was prepared for defendants' opening

1 statement.

2 Q. Oh. And who said that?

3 A. Who said that?

4 Q. Yeah.

5 A. I said that.

6 Q. With respect to any of the graphics that you showed

7 yesterday, was the idea of presenting any of those graphics your

8 idea?

9 A. Well, certainly the, you know, the in motion thing about

10 the five purposes of marketing, I mean, that's basically a --

11 just another representation of a graphic which is already in my

12 expert -- in my direct examination.

13 Q. Any others that you developed the idea of?

14 A. I'm trying to think of what we had yesterday. I think --

15 let's see. I think we had the in motion five purposes one,

16 which was right out of my direct testimony. Then the two on

17 brand switching and focus on adults.

18 Q. There were three actually.

19 A. Were there three?

20 Q. Yeah.

21 A. And then the expenditure chart, right.

22 Q. Let's go through this one just briefly. If we take a

23 look --

24 THE COURT: I think, Mr. Bernick, this is a good time to

25 take a break, and let me inform counsel, first I was told I

1 didn't have a conference call at 12:00 and now I am told I do, so
2 we're going to have to take a lunch break early, although not
3 unduly long, but just keep that in mind, and let's take only
4 10 minutes at this time.

5 (Thereupon, a break was had from 11:00 a.m. until
6 11:12 a.m.)

7 THE COURT: All right. Mr. Bernick, please.

8 MR. BERNICK: Thank you, Your Honor.

9 BY MR. BERNICK:

10 Q. First, let's straighten out a couple of factual matters
11 if we can, Dr. Dolan. If we focus on the entry for April 1994
12 on Exhibit 17436, the cite here is to U.S. Exhibit Number 2644,
13 correct?

14 A. I see that, yes.

15 Q. And this is said to be an R.J. Reynolds statement in
16 April 1994, correct?

17 A. That's what it says there, yes.

18 Q. Did you actually ever read the Reynolds statement itself?

19 A. I couldn't be sure if I've read this particular one.
20 Certainly, I've read a number that would be similar in spirit
21 and meaning to this.

22 Q. Well, I'll show you 20644 that says we don't advertise to
23 children. It's R.J. Reynolds Tobacco Company. And there's a
24 handwritten note up at the upper right-hand corner. I can't
25 represent who actually made it. It says "U.S. News and World

- 1 Report, April 1984." Do you see that?
- 2 A. That appears to be what it says.
- 3 Q. And can you squint, way down at the bottom; do you see,
4 it's not totally clear, but it actually says "1984, R.J.
5 Reynolds Tobacco Company"?
- 6 A. It appears to say '84, yes, uh-huh.
- 7 Now that you've handed me the document, I do remember
8 that I read this one.
- 9 Q. Who picked the April 1994 date for the chart?
- 10 A. Not me.
- 11 Q. If we go further down, did you -- were you responsible,
12 though, if not for the dates, at least for the company icons
13 that tell us who made the statement? Was that your
14 responsibility?
- 15 A. No.
- 16 Q. Going down further, do you see where it says "1994" and
17 it's a statement that is attributed, by virtue of the little
18 logo here, to Philip Morris?
- 19 A. I see that.
- 20 Q. Now, the cite is to Exhibit 85141, correct?
- 21 A. That's what it says there, yes.
- 22 Q. I have got 85141. And it's actually -- first of all, do
23 you know where this statement came from?
- 24 A. Just by -- you mean, do I know what 85141 is?
- 25 Q. Right.

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1 A. No, I wouldn't know offhand what that would be.

2 Q. Do you know whether you looked at the document that has
3 this quote?

4 A. I'd have a similar answer to the previous one: That, you
5 know, certainly, I've read a number of statements of this type.
6 Whether I recall this particular document -- if you showed it to
7 me, I could probably give you an answer.

8 Q. But was it a public document?

9 A. I couldn't tell you for sure from looking at what's in
10 front of me.

11 Q. Well, in fact, 85141 is the transcript of a television
12 interview on CBS This Morning. Do you see where the date is not
13 1994; it's 1989?

14 A. I do.

15 Q. Again, you didn't pick that date, I'm assuming, on the
16 exhibit?

17 A. No, I did not.

18 Q. Do you see where the person being interviewed is
19 Ms. Dawson?

20 THE COURT: Is who?

21 MR. BERNICK: Ms. Dawson.

22 THE COURT: Oh, right.

23 MR. BERNICK: And, Your Honor, you'll hear from her. It's
24 Brennan Dawson.

25 THE COURT: I remember seeing the clips.

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1 THE WITNESS: Yes, I --
2 BY MR. BERNICK:
3 Q. Do you know who she is?
4 A. She's with the Tobacco Institute.
5 Q. Well, if she's at the Tobacco Institute, why is it that
6 the statement is attributed to Philip Morris?
7 A. I don't know what to say other than it's likely because
8 it's an error.
9 Q. Are there any other errors on this Exhibit 17436?
10 A. I wouldn't be able to say.
11 Q. Let me just ask you a question about brand switching
12 generally. If I take a look at this document, would I be
13 correct in saying that the citations are to statements that
14 appeared in letters, sometimes, as we saw, a television ad or
15 television interview, sometimes in a kind of an "advertorial,"
16 but I don't see any statements on this exhibit that actually
17 appeared as part of product advertising; would that be correct?
18 Product advertising.
19 A. I heard you. I just didn't know what -- I was having
20 trouble with what the term meant.
21 Q. "Product advertising"?
22 A. Yeah.
23 Q. Is that an ambiguous term in your field?
24 A. Well, I mean, I guess -- I guess, you know, if you look
25 at 2644, that seems to be an advertisement, if it's in U.S. News

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1 and World Report.

2 Q. That's a product ad?

3 A. That's why I'm -- a product ad is -- that's why I'm

4 trying to understand, is what you mean by a "product ad."

5 Q. An advertisement for RJR -- Reynolds brand cigarettes.

6 A. For a particular brand? This would not fit that

7 characterization.

8 Q. In fact, none of the statements that appear in 17436 are

9 actually part of any product advertisement, correct?

10 A. I couldn't say for sure, but if you stipulated that, it

11 would not surprise me at all that it wasn't part of a product

12 ad.

13 Q. And in fact, to come out with an advertising or marketing

14 announcement that says: "We advertise for brand switching"

15 wouldn't exactly be the hottest message to have for your

16 consumers buying your products, would it? It's not something

17 they really want to know about the cigarettes themselves?

18 A. A consumer?

19 Q. A consumer.

20 A. Yeah, I suspect a consumer would not -- you know, if that

21 came up on the Super Bowl, that that would win the prize for the

22 most engaging advertisement of the day.

23 Q. Right. In fact, the real audience, would it be fair to

24 say -- the real target for the kind of statements that appear

25 here are opinion leaders, correct? That is, people who have the

1 ability to make decisions that might ultimately affect the
2 industry, correct?

3 A. Well, I would not call those "opinion leaders." You
4 know, within the marketing field, an opinion leader can be
5 somebody who is a consumer who will then -- they will help form
6 the opinion of other people. But certainly -- so to --

7 Q. What word would you use to refer to the kind of person
8 that I'm talking about, which is someone who has the ability to
9 affect the industry from a public policy point of view?

10 A. That's a good description.

11 Q. Okay. And is it true that the opinion leaders literally
12 for the last 50 years -- the opinion leaders who have had the
13 ability to affect this industry have never taken at face
14 value -- at face value anything that the industry says about its
15 advertising, correct? They've scrutinized it?

16 A. Well, I was just about to say no to the -- you know,
17 "Isn't it true that they never take anything at face value?" I
18 wouldn't have the data to be able to tell you that, one way or
19 the other.

20 Q. Is it true that for the last 50 years, the industry's
21 advertising, and particularly advertising with respect to youth,
22 has been an incredibly controversial and highly scrutinized area
23 by people who are looking over the industry's shoulder?

24 A. Well, certainly, the marketing practices of the industry
25 have been the subject of the attention of a number of regulatory

1 authorities, yes.

2 Q. Who are, all of whom, very skeptical of the industry's
3 practices, correct?

4 A. I couldn't -- I couldn't say that.

5 Q. If we took the statement we just now have been referring
6 to, which is that the industry's purpose was brand switching,
7 isn't it true that counsel yesterday didn't ask you for any
8 opinion on whether that statement had impact on anybody?

9 A. I don't believe counsel asked me if that -- what was the
10 impact of that statement on anyone.

11 Q. And in fact, isn't it true that your expert -- neither
12 your expert report nor your direct testimony actually opined
13 that this particular statement had impact on anybody? Neither
14 of those documents do that, do they?

15 A. I don't believe I tried to say that there was an impact
16 on consumers of that statement.

17 Q. Not only consumers. You don't purport to say that the
18 statement actually had an impact on anybody, correct? There's
19 no opinion in your report that says that?

20 A. I think that's a fair statement, that I did not try to do
21 that.

22 Q. Let's go on to the next statement. And I've taken the
23 liberty during the break of just writing these down and you tell
24 me if I'm right or wrong.

25 Isn't the second thing -- the second statement that the

1 industry made about its advertising practices that you focus on
2 is that the defendants here do not market to teens? And I have
3 in mind your 17435.

4 Isn't that the second statement that you say that the
5 industry made that was false?

6 A. Yes, that would be the second one.

7 Q. And if we take a look at 17435, is that document correct?

8 A. I could not say.

9 Q. If we go back on this document and just take a look at
10 the document on its face, is it true -- you say at the top that
11 the title is: "False statement; i.e., 'We do not market to
12 teens.'" But the word "teens" doesn't appear in the first
13 quote, does it?

14 A. No, the word is "youth."

15 Q. It doesn't appear in the second quote, does it?

16 A. No, it's "young person."

17 Q. It does appear in the third quote, right?

18 A. Yes.

19 Q. It does not appear in the fourth quote. It does not
20 appear in the fifth quote, which is "kids." The sixth quote, it
21 says -- it does not appear. It's "children" and it's "kids,"
22 correct?

23 A. Right.

24 Q. With respect to the next quote, the specific word used is
25 "minors" and then "children." There's no reference -- and

- 1 "youth." There's no reference to "teens" there, is there?
- 2 A. No, not specifically.
- 3 Q. And then the next quote is "youth," not "teens." And the
- 4 next quote is "children" and "youth," right?
- 5 A. Yes.
- 6 Q. So would it be actually a more accurate statement,
- 7 Dr. Dolan, that what the industry represented consistently --
- 8 well, let me take a step back and put this in context.
- 9 Isn't it true that virtually every single one of these
- 10 quotes came from a statement that the industry was making in
- 11 response to a claim that the industry targeted kids or minors?
- 12 A. I couldn't say whether it was proactive or reactive.
- 13 Q. Well, did you read the documents that are the basis of
- 14 this chart?
- 15 A. I'm sure I read a number of them without -- just by
- 16 looking at the exhibit numbers, I couldn't tell you.
- 17 Q. And as you were careful to say when I showed you that RJR
- 18 marketing plan, that you had read other documents that were like
- 19 it, and in fact you were careful to say when we went through the
- 20 last chart -- which is that you had read other documents like
- 21 it --
- 22 A. Right.
- 23 Q. -- did you be sure to read all of these particular
- 24 documents that are on this chart?
- 25 A. I read quite a number of documents that dealt with the

1 substantive matter that is discussed on this chart. Whether
2 these specific ones are ones that I could stipulate to you that
3 I recall reading at this time, I'm not sure. If you wanted to
4 show me the documents, I could probably do that.

5 Q. When did you first receive the chart?

6 A. A couple days ago, three days ago.

7 Q. But you told me that was not the first time you had seen
8 it?

9 A. Yeah. I said yesterday was not the first time I had seen
10 it.

11 Q. So a couple days ago is the first time you had seen it?

12 A. Right. Yes, so earlier in the week.

13 Q. Earlier in the week?

14 A. Right.

15 Q. So again, is it true that while maybe some of the
16 individual statements were not made in response, that by and
17 large, when the company -- when the industry says: "We don't
18 target kids," that it was doing so in response to a statement or
19 an accusation that, in fact, that's exactly what the industry
20 was doing?

21 A. I couldn't say that.

22 Q. Well, if we take a look at the very first one, 2121 --
23 excuse me -- 21270, this is a statement -- this is a statement
24 of George Allen, President of the Tobacco Institute, and he says
25 he's issuing a statement, "because there has been some

1 misunderstanding and criticism of the industry on this point";
2 do you see that?
3 A. I see that.
4 Q. And therefore, this is a document -- this is a responsive
5 document, is it not?
6 A. Well, to a very general kind of --
7 Q. That's what I'm saying. This is not a proactive
8 statement; this is a reactive statement, is it not?
9 A. Well, I don't know. It's a press release and, you know,
10 it's -- I think of a press release as a proactive kind of
11 general statement.
12 Q. What about 21242? It says --
13 A. Well, could I get the document?
14 Q. Sure.
15 A. Never mind. I'm familiar with this one.
16 Q. This is a response, is it not, by RJR to a letter from
17 Mr. Califano?
18 A. Yes, this is a response to --
19 Q. A response?
20 A. That's correct.
21 Q. Is it true that when Brennan Dawson showed up on CBS News
22 Night Watch in 87735, the quotation that's out of here is in
23 response to questions that are being posed regarding targeting
24 children, correct?
25 A. I'm going to have to catch up with you on that. I just

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1 got the document.

2 Q. It's page 7 of the transcript. She's making a responsive
3 statement, is she not?

4 A. Well, she's chosen to appear on CBS News, so that I think
5 of as a proactive step. And Representative Waxman was there,
6 so --

7 Q. Wouldn't you suppose that it was Mr. Waxman that wanted
8 to be there and somebody from the Tobacco Institute was asked to
9 show up?

10 THE COURT: Now, now, Mr. Bernick.

11 MR. BERNICK: I say that as coming from a Chicago
12 perspective, so here in Washington I should behave myself better.
13 I'll take that back.

14 BY MR. BERNICK:

15 Q. In any event, is it true that she's basically answering
16 accusations that are being made with respect to targeting
17 children?

18 A. Well, she's engaging in a discussion with Representative
19 Waxman in which she's representing a different point of view
20 from him.

21 Q. Okay. Coming back to this statement where you say "do
22 not market to teens," in fact, isn't it true that every single
23 one of the documents that appears or is the basis for your
24 summary exhibit regarding teenagers -- every single one is
25 focused on the charge being made against the industry that the

1 industry was targeting minors?

2 A. Is responsive to the charge? I'm not --

3 Q. Yeah. The statement that was being made, the accusation

4 that was being leveled against the industry was that the

5 industry was targeting people who were under age. And what the

6 industry was saying was no, we don't target people who are under

7 age; is that fair?

8 A. I could not say that each one of these statements was

9 made in response to an accusation.

10 Q. Is it true that -- we went through; there was only one

11 that referred to teenagers, correct?

12 A. Well --

13 THE COURT: Isn't it correct that the only reason you

14 can't answer that question is because you haven't read all the

15 documents?

16 THE WITNESS: Well, I believe I have likely read all the

17 documents, Your Honor. It's just that sitting here at the

18 moment, I can't tell from looking at an exhibit number -- I don't

19 have the recall of what that particular document was.

20 THE COURT: All right.

21 BY MR. BERNICK:

22 Q. Well, let's just take R.J. Reynolds. Did R.J. Reynolds

23 ever represent in these public statements that it didn't go

24 after people who were 19 years old or 18 years old?

25 A. Um --

- 1 Q. Let me take the question back.
- 2 A. Okay.
- 3 Q. To be clear, Dr. Dolan, because I don't think that this
- 4 should be very controversial --
- 5 A. Right.
- 6 Q. -- "teens" includes people who are 18 and 19, fair?
- 7 A. Yes.
- 8 Q. And those people legally can buy and smoke cigarettes in
- 9 most states, correct?
- 10 A. That's correct.
- 11 Q. Okay. And the issue that was being raised and that the
- 12 industry was answering was not whether it was selling to people
- 13 who were 18 or 19, but whether it was selling to people who were
- 14 17 or 16 or 15, correct? That's the charge that was being
- 15 answered?
- 16 A. Well, it -- I don't accept the premise that all of these
- 17 are reactions to particular charges.
- 18 Q. Whether they are or not, the essence of these statements
- 19 that the industry was making was not "we don't target or market
- 20 teens," but "we don't market to minors, youth, kids"?
- 21 A. Well, in some cases it says -- some of their documents
- 22 say "teenagers"; some of them say, as you've pointed out here,
- 23 "youth," "kids."
- 24 Q. One document says "teenagers"?
- 25 A. One, on Exhibit 17435.

1 Q. But these are the ones that we have to deal with. What
2 are there, ten of them? And one of them says "teenagers" and
3 you say that they all really mean "teenagers"?

4 A. I never said that, Mr. Bernick.

5 Q. Well, the title of the document says that. It says
6 "teenagers."

7 MS. BROOKER: The objection is that Dr. Dolan was not
8 finished with his answer. Mr. Bernick continues to just talk
9 over Dr. Dolan. He's not rushing to answer the question. If he
10 would just pause for a moment before asking another question --

11 THE COURT: He occasionally cuts him off.

12 Dr. Dolan, had you had an opportunity to finish your
13 answer?

14 THE WITNESS: I have, Your Honor.

15 THE COURT: Okay.

16 BY MR. BERNICK:

17 Q. The document says "teenagers," right?

18 A. That's the -- up in the heading, yes, uh-huh.

19 Q. And would the essence of these quotes that we see here
20 essentially be not teenagers generally, but minors more
21 specifically?

22 A. I think that --

23 Q. "We do not market to minors"?

24 A. Well, I didn't get to start that one.

25 I would say that these particular eight or nine that we

1 have referenced here, as you pointed out, only one of them
2 specifically says "teenagers."

3 More generally, I think it is the case that the companies
4 in some cases say we don't market to people under the age of 21,
5 but make a number of statements that say we don't market to
6 people under the legal age, and so, in fact, do not market to
7 minors.

8 Q. Minors. Let's talk about the last one, which is
9 marketing to people who are under 21. That really is the third
10 graphic. You have a graphic, 17437: "False Statements,
11 Marketing to Persons Under 21," right?

12 MS. BROOKER: Your Honor, I'm going to object to the use
13 of this because we did not use this in our one-hour live and I do
14 not believe that we have shown this to Dr. Dolan.

15 MR. BERNICK: Well, that may be correct, that this was not
16 shown. The entire expert -- a huge focus of the expert report is
17 precisely this claim that we falsely represented that we did not
18 market to people who were under 21.

19 THE COURT: Were these exhibits cited in the direct
20 testimony?

21 MS. BROOKER: Your Honor, if I may respond to that by
22 saying that these demonstratives here were used by the United
23 States in the opening statement. Dr. Dolan himself put together
24 a demonstrative that is attached to his direct testimony. It's
25 Demonstrative Number 9. If you look at that demonstrative, you

1 will see that the quotes in that demonstrative, unlike the errors
2 that were inadvertently made here on the opening statement
3 demonstrative, were corrected by Dr. Dolan in Demonstrative
4 Number 9.

5 So that's really the demonstrative that, if Mr. Bernick
6 wanted to use what was accurately put together and that Dr. Dolan
7 has reviewed, would be that one.

8 MR. BERNICK: I'll take it off for now and let me just ask
9 some questions.

10 BY MR. BERNICK:

11 Q. First of all, is counsel correct, that as we went through
12 some of these prior documents and showed that there were
13 mistakes in them -- do you remember that?

14 A. I do recall that.

15 Q. Did you seem to correct those mistakes in your own
16 compilation, Demonstrative Exhibit Number 9?

17 A. I was not aware of those mistakes until just an hour ago.

18 Q. Okay. Let's talk about marketing to people under 21.
19 And I think that this will be relatively simple and we probably
20 don't even need this document so we don't have to be
21 controversial about it.

22 This was used in opening and, therefore, we -- I think it
23 was also furnished to us in connection with his testimony, so we
24 thought --

25 THE COURT: No question it was furnished with the

1 testimony.

2 MR. BERNICK: Yes. Okay.

3 BY MR. BERNICK:

4 Q. Dr. Dolan, isn't it true that what you claim is that all
5 of the defendants here have declared that they do not market to
6 anyone under the age of 21?

7 A. I don't recall making that declaration.

8 Q. Well, let me see if we can refresh your recollection.
9 Turn to page 57 of your testimony, which I think is in front of
10 you.

11 A. Right.

12 Q. You say -- the question is: "What did the defendants'
13 statements you have just cited communicate to the public?
14 "Answer: They state two important things that the
15 tobacco companies claim not to do. First, they declare that
16 they do not market to anyone under the age of 21."

17 A. Can you give me a page, Mr. Bernick?

18 Q. Yes. Page 57.

19 A. Is there a question pending to me?

20 Q. Yeah. The question is whether you represent to the Court
21 in your direct testimony that the defendants in this case, the
22 U.S. marketing defendants in this case, declare that they do not
23 market to anyone under the age of 21. That's what you testified
24 to in your direct examination?

25 A. Well, you have to go back to the previous page to pick up

1 the correct representation of what I said. If you go to page
2 56, you can see the question is: "Can you give any examples
3 from the 1970s where defendants made such public statements?"

4 And I cite one from the Tobacco Institute, one from, I
5 think it's -- may well have been a letter, so we see letters
6 from the President of Liggett and the Chairman of Brown &
7 Williamson. And those are the three particular things that I am
8 referring to when the next question is: "What did the
9 defendants' statements you have just cited communicate to the
10 public?"

11 And it's -- so what's elaborated there on lines -- the
12 lines you've underlined is exactly what those three documents
13 that I have cited specifically right before it, what they say.

14 Q. Okay. That's fair. So it's your testimony in this case
15 that Philip Morris has never represented that it markets to
16 people that it does not -- let me strike that.

17 Is your testimony in this case that Philip Morris has not
18 stated that it doesn't market to people under 21 and that
19 Reynolds has not stated that it markets to -- it doesn't market
20 to people under 21 and that Lorillard has not so represented
21 either?

22 A. I have not testified to that.

23 Q. Well, then, which way is it? Is it your contention in
24 this case that the defendants here have represented that they
25 don't market to people under 21 or that not all of them have so

1 represented?

2 A. I have not gone through an exercise of trying to say:
3 Let me see if at every point in time, every one of the
4 defendants is saying they don't market to under 21. They --
5 from time to time, some of the companies have made that
6 representation.

7 I would not say that it's a representation that all
8 companies have made as applying to the all periods in time.

9 Q. You nowhere say that in your report, do you? You never
10 come out and tell the Court and tell the litigants that your
11 only contention is that some statements have been made by some
12 companies at some points in time?

13 A. But I never -- I never affirmatively state that all of
14 them said they were marketing to people under 21.

15 Q. Okay. Fair enough. When did Brown & Williamson first
16 represent publicly that it did not market to people under 21?

17 A. I couldn't say what the first time would be.

18 Q. Did Philip Morris ever make the representation that it
19 didn't market to people under the age of 21?

20 What are you looking at there, Doctor?

21 A. I'm looking at the U.S. Exhibit 17437.

22 Q. But you can't even represent that that's accurate. Why
23 would you look at it? You didn't make it; you don't know
24 whether it's accurate. Why would you rely upon that for your
25 testimony?

1 A. Well, I'm looking at it. I haven't made any
2 representation based on it at the moment, have I?

3 Q. Well, if it helps you. I want to know: Did Philip
4 Morris ever represent that it didn't market to people under the
5 age of 21?

6 A. I couldn't cite to you a specific case in which they did
7 that.

8 Q. Well, that's very careful. My question is a more general
9 one: Did Philip Morris ever represent that it didn't market to
10 people under 21 or not, do you know?

11 A. I'm not sure if they did or not.

12 Q. Did Lorillard ever represent that it didn't market to
13 people under the age of 21?

14 A. I'm not sure that they did.

15 Q. Did Reynolds ever represent that it didn't market to
16 people under the age of 21?

17 A. No, I'm not sure that they have.

18 Q. The only one you're sure about is my poor client, Brown &
19 Williamson?

20 A. Well, we have --

21 THE COURT: Let's not bring out the violin at this point,
22 Mr. Bernick, really.

23 But please answer the question.

24 THE WITNESS: Well, we have the specific statement that I
25 quoted on lines 4 through 6 on page 57 on Brown & Williamson.

1 BY MR. BERNICK:

2 Q. Okay. So I was all set to fill out this chart about

3 which companies made this representation and when, that they

4 market only to 21 and over, but basically as an expert, you

5 can't help me fill out that chart, can you -- as an expert?

6 A. I'm sorry. You want to fill out the chart with what?

7 Q. I was going fill out the chart with you about what

8 companies, if any -- what the companies actually represented

9 about who they sold to. That's what we were going to do.

10 A. Okay.

11 Q. And what -- for example, what Philip Morris said in terms

12 of whether it marketed to 21, over, under and when. But as an

13 expert, the fact is I could show you all kinds of things, but as

14 an expert, you could not actually tell me what companies made

15 the representation that they didn't market to people under 21

16 and which ones did?

17 A. Not as I sit here at the moment. I mean, certainly

18 I've -- you know, I've looked at that at points in time; I've

19 looked at all the representations that the companies made with

20 respect to who they marketed to and who they didn't.

21 Q. Let me just ask you about this date of 18 -- or this age

22 of 18 to 21. Is it true, Dr. Dolan, that it is legal for people

23 in most all states of the country who are 18 and above, it's

24 legal for them to buy cigarettes?

25 MS. BROOKER: Objection, calls for a legal conclusion.

1 THE COURT: Well, not a conclusion.

2 If you know, you may answer the question; if you don't
3 know, then just say so.

4 THE WITNESS: My understanding is that in the vast
5 majority of states, that 18 years old is the legal age for
6 purchasing cigarettes. There may be two states that it's 19, but
7 certainly in the vast majority of cases, it's 18 and above.

8 BY MR. BERNICK:

9 Q. Isn't it true that in many states it was legal to buy
10 cigarettes if you were 16, all the way up into the early 1980s?

11 MS. BROOKER: Objection. That's a legal question. He
12 hasn't testified in his direct examination as to what the laws
13 were at different times.

14 THE COURT: Overruled. As an expert, he may know the
15 answer and if he doesn't, he'll tell us.

16 THE WITNESS: I couldn't specify the time period.

17 BY MR. BERNICK:

18 Q. What about in the District of Columbia?

19 A. I wouldn't be able to tell you what the rules are in the
20 District of Columbia particularly.

21 Q. Isn't it a fact that in the early 1990s, it took an Act
22 of Congress to establish uniformly that the age did have to be
23 18 or more among the states?

24 A. That sounds right to me.

25 Q. Is it true, then, in most states of the union today and

1 historically, it is therefore perfectly legal for vendors of
2 cigarettes to sell those cigarettes to people who are 18 and
3 above?

4 A. I believe that to be true, yes.

5 Q. Is it true that today it is totally and completely legal
6 for the defendants in this case to manufacture and market
7 cigarettes to people who are 18 years of age and above?

8 A. I believe that's correct.

9 Q. Okay. And isn't it a fact, Dr. Dolan, that absent some
10 commitment to the contrary publicly, it is perfectly appropriate
11 from a marketing point of view for these companies here in this
12 court today to market to people who are 18 and over?

13 A. I'm sorry. Could I have that one read back?

14 Q. I'll say it again.

15 A. Okay.

16 Q. And stop me and tell me if you don't understand
17 something.

18 Isn't it true from a marketing point of view, it is
19 appropriate today for the manufacturers in this courtroom to
20 market to people who are 18 and above unless they have made a
21 public commitment not to do so?

22 MS. BROOKER: Your Honor, I would object because this
23 calls for a legal conclusion and obviously, the crux of this case
24 is a RICO action, based upon their false public statements that
25 they do not market to people of certain ages.

1 THE COURT: It does not call for a legal conclusion at
2 all. The question was as a marketing matter. And I may not have
3 quoted it exactly right, but that was basically the question.

4 MR. BERNICK: That's correct.

5 THE COURT: Overruled. You may answer.

6 THE WITNESS: The question as I understood it was: Is it
7 appropriate? Is that the --

8 BY MR. BERNICK:

9 Q. From a marketing point of view. Is it appropriate from a
10 marketing point of view, unless a contrary commitment has been
11 made -- is it appropriate from a marketing point of view for
12 these defendants today to market to people who are 18 years and
13 older?

14 A. I guess "appropriate" is a difficult word for me.
15 Certainly, there is nothing illegal about them doing so. "Is it
16 appropriate" is -- you know, it calls for a value judgment.

17 Q. Well, if you're in an advertising or marketing
18 organization or you're providing marketing advice to the tobacco
19 companies with respect to marketing cigarettes -- you want to
20 market our cigarettes to people who will buy them -- is there
21 anything -- unless a commitment has been made publicly where the
22 where the company says "No, we're only going sell to people
23 who -- or market to people who are 21 and above" -- is there
24 anything from the point of view of marketing principles that
25 says that they shouldn't market to people who are of legal age

- 1 and can legally buy cigarettes?
- 2 A. Nothing from a marketing -- you know, strictly a
3 marketing principle. The question about "appropriate," though,
4 still remains.
- 5 Q. That's fine. Isn't it also true that the market -- the
6 market of people who are 18 and above is a vast marketplace?
- 7 A. The number of people in the United States who are above
8 the age of 18?
- 9 Q. Above the age of 18. Well, 18 and above. The legal age
10 is 18.
- 11 A. Right, right, right. So the question to me is --
- 12 Q. Let me put it this way: You have said -- I believe you
13 testified yesterday that the median age where people start to
14 smoke is 16.5. Do you recall saying that?
- 15 A. I was using 16.5 as an approximation, yes.
- 16 Q. Well, do you really know as an expert what the median age
17 is?
- 18 A. I believe in 1984 it was 16.7 and in 2001 it was 16.1.
- 19 Q. Isn't it true that if we just take people who are turning
20 18, who just turned 18 and are now buying cigarettes regularly
21 for the first time -- so we're talking about people who are just
22 18; they're not over 18; they're not under 18; they're just 18
23 and they're buying cigarettes for the first time -- that those
24 people constitute almost 20 percent of starters?
- 25 A. 20 percent of the people who start smoking --

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1 Q. Starting to smoke.
2 A. -- are precisely 18 years of age.
3 Q. 20 percent of the people who are starting to smoke in the
4 sense of becoming daily consumers of cigarettes --
5 A. Right.
6 Q. -- do so, become daily consumers of cigarettes, going
7 into the store and buying, going wherever and getting them --
8 A. Right.
9 Q. -- when they turn 18?
10 A. That's a statistic that I haven't seen.
11 MR. BERNICK: Your Honor, I'm anxious about proceeding
12 promptly and I have the 12:00 our in mind. I think I can cover
13 at least a couple more subjects before 12, if that's appropriate.
14 Thank you.
15 BY MR. BERNICK:
16 Q. Let's talk a little bit about the second column here,
17 which is people who -- I'm sorry.
18 What We Did -- the What We Did column. And I know that
19 your testimony covers a lot of different things of what we did
20 and I want to make kind of a list. Let me see if we can move
21 through them fairly quickly.
22 You say, for example, that we spent a lot on marketing,
23 right?
24 A. Yeah, I would say that.
25 Q. In fact, you showed us that nice chart that showed the

1 mountain of money that was spent on advertising. Let me see if
2 I can get this. This was shown. This was Exhibit 17362.
3 Now, I think you told us that this data came from the
4 FTC, did it not?
5 A. Yes.
6 Q. And is it true that on an ongoing basis, the tobacco
7 companies are obliged to report to the FTC how much money
8 they're spending on marketing?
9 A. On advertising and promotion, yes, uh-huh.
10 Q. And is it also true that those reports are broken down
11 into subcategories; that is, what the money actually went for?
12 A. Yes, that's correct.
13 Q. Now, you didn't show a --
14 THE COURT: Are we on -- I just want to make sure.
15 MR. BERNICK: 17362.
16 THE COURT: Right. Okay.
17 MR. BERNICK: That's --
18 THE COURT: Which is labeled "Marketing Expenditures," not
19 "Advertising."
20 MR. BERNICK: Right. That's what I -- yeah, yeah. That's
21 actually an important -- we're going to get to that in a minute.
22 BY MR. BERNICK:
23 Q. First of all, did you prepare 17362?
24 A. No. I did not prepare it myself, no.
25 Q. Was it your idea to prepare 17362?

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1 A. I think we discussed this a little bit earlier. I mean,
2 I did at one time discuss this kind of -- this -- these data and
3 this representation of it that defendants used in their opening
4 statement with the Justice Department and it was something that
5 I knew I was going want to talk about in my statement yesterday.
6 Q. Was this the first time -- when did you first see 17362?
7 A. This specific exhibit?
8 Q. Yeah.
9 A. A few days ago.
10 Q. Okay. Now, you testified in response to counsel's
11 questions that these numbers were not discounted or deflated
12 numbers. Do you recall that?
13 A. I do recall that.
14 Q. Was that something that you really know or is that
15 something that you kind of said, "Well, she's asking me that.
16 I'll say -- I'll agree with it"?
17 A. No, that I knew.
18 Q. Okay. I want to show you 17428, which is another graphic
19 that was given to us in anticipation of your testimony. And I
20 want to ask you whether you've ever seen this before.
21 MS. BROOKER: Your Honor, I would object to the use of
22 this demonstrative. This was -- as with all witnesses, you --
23 the government produces a series of demonstratives that the
24 government may or may not use with a particular witness and this
25 was one that we did not use with Dr. Dolan, so he did not cover

1 it in his one-hour live and we did not ask him questions about it
2 and it's not covered in his direct testimony.

3 So it's not defendants' exhibit; it's the United States'
4 exhibit and the United States has not used it, just in the same
5 way that the government is not using, unless used by the defense,
6 their exhibits.

7 MR. BERNICK: Your Honor, whether or not it's a United
8 States Exhibit or a defense exhibit, I believe that we have the
9 right under prior orders of the Court to use exhibits that are
10 marked by the United States if there's a proper basis for using
11 them otherwise in the trial.

12 Number two, I just asked him whether he's seen it before.
13 If he's not seen it before and had no contact with it and it
14 doesn't bear on his testimony, he can tell me that. If it
15 does --

16 THE COURT: Isn't it correct, this exhibit was filed? Not
17 admitted, but filed?

18 MR. BERNICK: It certainly was furnished to us in
19 connection with his testimony.

20 THE COURT: And that's why I have it as well.

21 MR. BERNICK: Yes.

22 THE COURT: So you may question about it. I understand
23 full well that it wasn't used by the government.

24 I certainly note that the dollar figures are the same in
25 both 17362 and 17428.

1 MR. BERNICK: It's my impression that its only difference
2 from the other one is the pictures that appear.

3 THE COURT: All right. Well, go ahead with your question.

4 THE WITNESS: Your question was: Have I seen this before?

5 BY MR. BERNICK:

6 Q. Yes.

7 A. The answer is yes.

8 Q. Okay. Now, this kind of suggests -- it's consistent with
9 the testimony that you offered yesterday; I believe you said
10 that during the decade of the '60s, the focal point for
11 advertising was on TV?

12 A. Well, the focal point for advertising and promotion in
13 general was television.

14 Q. By "general," you mean non-tobacco?

15 A. No, no. What I meant was what we're looking at here is
16 expenditures on advertising and promotion.

17 Q. Right.

18 A. So if you look at those two together, television
19 advertising represented over half of the total of advertising
20 and promotion. So if you restrict it to just advertising --

21 Q. Fine.

22 A. Yeah, television.

23 Q. We see that in the -- I'm sorry.

24 We see that in the '70s, there's been a focal point shift
25 to the outside advertising and you talk about that.

- 1 A. I talked about the shift into magazines, newspapers and
2 outdoor, yes, uh-huh.
- 3 Q. And then you have a further shift in the 1980s to include
4 heavy magazine advertisement?
- 5 A. No. The -- what I said yesterday, you know, in terms of
6 talking about the most significant thing in advertising and
7 promotion in the 1980s was the beginning of the shift from
8 advertising and promote -- the total advertising and promotion
9 dollars, greater proportion of it started to be used for
10 promotion rather than advertising.
- 11 Q. And we know that after 1998, billboards are out, TV is
12 out, magazine advertising is significantly constrained and
13 voluntarily, some of the companies have constrained their
14 magazine advertising even further.
- 15 Isn't it a fact that today, the most readily accessible
16 mass advertising is at point of sale?
- 17 A. I haven't seen the data for 2004. The data that I've
18 seen goes up through 2002.
- 19 Q. Okay. And is it true that the most accessible form of
20 mass advertising today for cigarettes -- the most accessible
21 form is point of sale?
- 22 A. No, I would say in 2002, which is -- again, you jumped to
23 "today" again and --
- 24 Q. Use 2002.
- 25 A. -- I -- 2002? The way I looked at it was in 2002, you

1 had a billion dollars of spending roughly on direct connection
2 with the customer. About \$300 million in magazines, about 300
3 million in point of sale and roughly --

4 Q. Well, also what I wanted --

5 A. Wait. And then the third piece is public events. So
6 those three represent about a billion dollars of spending in
7 2002.

8 Q. Okay. So point of sale -- first of all, is it true that
9 point of sale -- if we've got "Point of Sale" down here, we're
10 talking about something that would be about here on the chart
11 (indicating), probably even less?

12 A. Well, no. I think it would be --

13 Q. That's at 300 million.

14 A. I said 300 million. It's just a question of whether you
15 want to show 300 million --

16 Q. This would be a billion right here (indicating), so I
17 just kind of came down to about 300 million, right?

18 A. No.

19 Q. No?

20 A. You --

21 Q. You have to get up to 12.

22 A. I understand what we have to get up to.

23 Q. So zero 1, 2 -- I tried to come across and do 1, which is
24 right there and 300 million would be right there (indicating).

25 A. Okay.

1 Q. Okay. And the magazines were another 300, right,
2 roughly?

3 A. Yep.

4 Q. And the last would be the public events, right?

5 A. Yeah. That gets you up to a billion, right.

6 Q. That gets you up to about a billion. And in point of
7 fact, isn't it true that overwhelmingly -- overwhelmingly, the
8 huge volume of money that's being spent -- the lots of money is
9 not being spent on advertising; it's being spent on price
10 promotion, correct?

11 A. Well, promotion generally. And that's what I said
12 yesterday.

13 THE COURT: All right, everybody. We're going to have to
14 break now.

15 MR. BERNICK: Okay.

16 THE COURT: 1:15, please.

17 (Thereupon, a luncheon recess was had.)

18

19 C E R T I F I C A T E

20

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

23

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

25

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 I N D E X

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3 Examinations

Page

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5 CROSS-EXAMINATION OF ROBERT J. DOLAN, Ph.D.
6 BY MR. BERNICK

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9 E X H I B I T S

10 Description

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GK)
	:	December 2, 2004
Plaintiff,	:	
	:	1:15 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 38
AFTERNOON SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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by computer-aided transcription

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

2 THE COURT: Mr. Bernick, are you going to finish this
3 afternoon?

4 MR. BERNICK: Our goal is we hope to maybe even finish
5 with the witness if we can move smartly, and that's the hope.

6 THE COURT: That's you, though?

7 MR. BERNICK: No.

8 THE COURT: Everybody?

9 MR. BERNICK: That's everybody that -- we hope, even
10 the government and the witness. Now, that's very aspirational,
11 but --

12 THE COURT: We'll do well if we're done with you,
13 although that's not to discourage anybody else to be done as
14 well. Go ahead.

15 MR. BERNICK: Actually, before I do that I wanted to
16 raise with Your Honor a question that maybe we can address at
17 the end of the day very briefly, although I know the end of the
18 days are always very difficult, and that is what the schedule is
19 coming up for the government's witnesses between now and
20 Christmas. In part, because we have a bunch of kind of dark
21 days, and when we have the advance submission of the
22 examination, particularly with respect to adverse witnesses or
23 company witnesses, we don't want to get caught in a situation
24 where somebody finishes their direct examination and then has a
25 long time before they actually testify, perhaps even spanning

1 the holidays. Nobody wants that.

2 So, if the government could tell us -- give us an
3 indication later on this afternoon of who they really think they
4 are going to call between now and the 17th, that would be very
5 advantageous.

6 THE COURT: There's only two solid weeks after today.
7 Mr. Brody probably knows already. He usually reports on these
8 matters, I believe.

9 You're going to call Dr. Chaloupka.

10 MR. BRODY: Yes, Your Honor.

11 We have actually communicated this to defendants
12 previously, and we expect to, hope to, before the -- by the 16th
13 of December get through Dr. Chaloupka, Dr. Krugman, Dr. DeNoble,
14 and Ms. Smith. And I think that that is a reasonable
15 expectation for what we can do before we break for the holidays.

16 We are going to be filing -- I guess it will be a fifth
17 amended witness order. That will either be this evening or
18 tomorrow morning.

19 MR. BERNICK: The only question that I would raise with
20 respect to that, Your Honor, we are concerned particularly about
21 Ms. Smith. She's a company witness. It sounds like it's
22 somewhat at least uncertain as to whether she's actually going
23 to appear.

24 And if we were to get her testimony on the 6th, that is
25 not a court day. The 7th is not a court day. We have to

1 scramble to get her to review it, be able to finalize it by the
2 10th, also not a court day. And if she doesn't appear, we can't
3 speak with her until after the holidays, because if she doesn't
4 appear on the 16th she's not going to appear until after the
5 first of the year.

6 So the net effect would be that she does her direct
7 examination and then comes in to testify on the 6th of January
8 which is, it's almost a month after that, and --

9 THE COURT: Are you suggesting that she appear before
10 Dr. DeNoble?

11 MR. BERNICK: No. We really suggest that if it's
12 really uncertain about whether they are going to get to
13 Ms. Smith, that maybe they switch whoever was going to be after
14 Dr. DeNoble, go after Dr. DeNoble, and then we will have
15 Ms. Smith basically switch with whoever it is that's after
16 Dr. DeNoble.

17 THE COURT: Do you want to talk about that?

18 MR. BRODY: I don't think that would resolve any
19 potential issue that we have, because we presently anticipate
20 calling Brennan Dawson who is an adverse witness after
21 Ms. Smith.

22 THE COURT: But she doesn't work for TI.

23 MR. BERNICK: She works for the new Reynolds American.
24 So what we really need is an expert after Dr. DeNoble. And
25 there's been a lot of -- they're closing me off here.

1 THE COURT: That will never happen, Mr. Bernick. We
2 all know that.

3 MR. REDGRAVE: Your Honor, actually, on this we've
4 asked the government --

5 (Laughter)

6 Isn't that pretty good? We've asked the government for
7 that week after because we're starting up on the 6th, I believe,
8 of January. If they do an adverse witness --

9 THE COURT: Why does that not sound right to me? But
10 let me check.

11 No, that is right.

12 MR. REDGRAVE: Your Honor, if they use an adverse
13 witness that week, that means we're going to be the week between
14 Christmas and New Years' trying to track down all of the people
15 to do the corrections of the testimony with them, and that's
16 what we want to avoid. That's really what Mr. Bernick is
17 getting to on the witness for the 6th and 7th, at that period of
18 time.

19 The government has a lot of experts. They should just
20 use those. We will do our objections and everything else during
21 that week that we will have to do the week before the witness
22 comes, which is the 27th, 29th, and 30th, on that schedule.

23 But we would really appreciate it if the government
24 would schedule their witnesses that wouldn't be adverse for that
25 first week into the New Year so we're not dealing with the

1 holiday problem and coming to you for extensions, et cetera, et
2 cetera.

3 THE COURT: I think -- well, if you have a response
4 already.

5 MR. BRODY: First of all, I think the concerns about
6 Ms. Smith are a little premature. I would hope that we are able
7 to get to her.

8 We're going to have five full court days and we are
9 anticipating three witnesses. Actually, I think it's four
10 witnesses.

11 THE COURT: I haven't looked at Dr. Chaloupka's
12 testimony, but based on what I've read in motions and all,
13 that's going to be complicated testimony, isn't it?

14 MR. BRODY: It is complicated testimony, but I still
15 think it's -- you know, it's premature to say, well, we're not
16 going to get to Ms. Smith, first of all.

17 Second, we have been putting a lot of thought into the
18 presentation that -- two things, really.

19 It's not a simple matter to just say, okay, we're going
20 to throw another expert in after Dr. DeNoble and plan to call
21 that expert, you know, a week and a half from now. As you know,
22 it is complex, complicated testimony, and it's not the kind of
23 thing that you can put together overnight just switching up.

24 Second, we think it would be beneficial to the court
25 and we think it important to our presentation in order to

1 present testimony from fact witnesses on these issues, and not
2 simply add another expert after the three experts that the court
3 is going to be hearing from: Dr. Dolan, Dr. Chaloupka and
4 Dr. Krugman, And for that reason we are doing it this way.

5 As you know, Dr. Denoble's testimony relates to
6 addiction. We're doing that a little bit out of order just in
7 order to -- he is a nonparty witness. We're trying to
8 accommodate his schedule and I believe he's going to be coming
9 from the West Coast. So, that is why we put him in where we
10 did, in order to accommodate his schedule, but --

11 THE COURT: One thing I would consider in January is
12 trying to sit either all or part of the 7th. You're here for
13 the 6th. I have some matters scheduled, but I find that -- I
14 don't know why -- a lot of my Friday calendar seems to dissolve,
15 and I'm sure at a minimum I could push everything to the
16 afternoon and we might get in all of a day.

17 So unless that's a problem, you all had better let me
18 know if it is a problem, I would think not because we are not
19 sitting until Thursday, and I'm trying to make up for some of
20 that time.

21 MR. BRODY: We had already anticipated that that might
22 be a possibility, Your Honor.

23 In terms of the schedule of objections, submission of
24 testimony for that week, since we're not actually appearing in
25 court until January 6th, we're happy to talk to counsel for

1 defendants about a schedule that might involve the submission of
2 written testimony for that week, a week in advance of the
3 Thursday, and a subsequent staggering if it is going to make
4 things easier.

5 Quite frankly, I think the whole issue that they've
6 raised is a little premature. We've had discussions about, you
7 know, who we expect. And as I told you, we've told them who we
8 hope to call before the holiday break. We have not had concrete
9 discussions with them at this point in time about the best way
10 to accomplish that. It's quite possible we could come to an
11 agreement. But I think it's premature at this point to be
12 arguing over proposals for the presentation of testimony before
13 Your Honor.

14 MS. EUBANKS: Your Honor, I guess the main thing that I
15 want to make sure that you're aware of is the amount of time
16 that goes into the preparation of the written direct examination
17 and planning far in advance to make a change.

18 They've been aware of this part of the order on the
19 schedule for quite some time. Assignments have been made. A
20 lot of the testimony, particularly with respect to adverse
21 witnesses, there can be six, eight, 12 transcripts that have to
22 be reviewed. And to try to switch the order -- it's not just or
23 simply a question of presentation, it's a bench trial.

24 I'm sure the court can take matters out of order and
25 catch up with things without any huge problem in terms of our

1 presentation. That is one thing. But case management, if you
2 will back at the farm, is another.

3 And it is the holidays for people on the government's
4 team as well and people have had these assignments for some time
5 and been working diligently toward them.

6 I'm also concerned about a down day. I mean, we had
7 that happen once early on in the case and we vowed to the court,
8 and we kept to this promise, that we would make sure that we had
9 sufficient witnesses with respect to the written directs that
10 would be filed the Monday preceding.

11 We don't want to lose that schedule. We want to get
12 those materials before the court so that we can be prepared if
13 those witnesses, if we do get to that point in testimony. We
14 don't want to find a time where simply because the estimated
15 time for the cross-examination wasn't as long as we thought,
16 that you know we've run out of witnesses. And that's a serious
17 concern for us because we are about getting this case completed.

18 THE COURT: Well, I don't know if any witness for whom
19 the cross was shorter than anticipated. We're not going to
20 resolve this right now.

21 MR. BERNICK: It just raises a question.

22 THE COURT: But certainly over the weekend counsel
23 ought to talk.

24 We will have to -- by the close of testimony next
25 Thursday we're going to have to get it resolved for sure because

1 everybody needs to know exactly where they are going.

2 All right. Mr. Bernick, please.

3 MR. BERNICK: Thank you, Your Honor.

4 ROBERT J. DOLAN, Ph.D., Government's witness, RESUMES

5 CROSS-EXAMINATION (Cont'd.)

6 BY MR. BERNICK:

7 Q. Good afternoon, Dr. Dolan.

8 I think where we left off we were talking about this
9 mountain of money marketing expenditures and what drove it over
10 time, and I would like to take a pause and step back for a
11 second and become a little bit more precise.

12 I want to show you a graph that's been taken, that we
13 took from the written direct examination of Dr. Chaloupka, who
14 is going to be the next witness in the case, where he goes
15 basically through and shows a similar curve, may even be
16 identical dollars, looks like it is, leading up to \$12 billion
17 in 2002. And you can see that he distinguishes between
18 image-related marketing expenditures and price-related marketing
19 expenditures.

20 Is that a distinction that is meaningful to you in the
21 field of marketing, that is image versus price?

22 A. Yes, that is.

23 Q. I don't know -- if you can lean forward a little bit.

24 A. Yes, it is.

25 Q. We can actually see that the image advertising over time as

1 we go forward has remained relatively steady and it's the
2 pricing expenditures that have so dramatically risen over time;
3 correct?

4 A. Right, the promotional expenditures, as I tried to explain
5 yesterday.

6 Q. And in point of fact, there are kind of some bumps in the
7 road, and I think you may have even mentioned this.

8 Marlboro Friday was somewhere in the '92-93 time frame.

9 A. '93, yes.

10 Q. And what we can see is that after it was a promotion, the
11 prices -- the formal, I guess the list prices were dropped, at
12 which point you didn't have to -- if you wanted to compete on
13 price, you didn't have to give a promotional allowance, it was
14 just a lower price.

15 A. It was less need. That's correct.

16 Q. And it was steady for a while. And then it starts to go up
17 again. Let me just ask you a question.

18 Isn't it true that during the latter part of the 1980s
19 there grew to be incredibly intense price competition where
20 discount brands were seeking to undercut the market share of the
21 premium brands that were made by the defendants here?

22 A. Well, the discount brands did start to -- you know, that's
23 what led up to Marlboro Friday in April of '93.

24 The discounted brands came along and Philip Morris felt
25 that the price differential between its premium brands and the

1 discount brands became too great and it was cutting into
2 Marlboro's market share, so then they reduced their premium
3 price.

4 Q. In fact, if we wanted to draw a line reflecting at this same
5 time what was happening to the market share of discount brands,
6 what was happening is the market share of discount brands was
7 going like this, and finally it got so bad Marlboro had lost so
8 much market share that they decided to cut their prices for
9 Marlboro in order to compete with the discounters; correct?

10 A. Right. My understanding is that initially in, I believe it
11 was April of 1993, they gave a price promotion and then in, I
12 think it was in August, those price promotions were made -- were
13 built into the list price.

14 Q. Now, over time that kind of steadied off for a while, but
15 then over time we can see in the late 1990s, once again the
16 prices, the price discounting, the price competition is perking
17 up again.

18 Is it true that in the late 1990s, there was a new
19 source of market share erosion for the defendants here, which is
20 that the defendants here agreed to the MSA through which they
21 settled very substantial costs; correct?

22 A. Just -- there was a big preface into the question.

23 Q. 1998 the companies signed the MSA; correct?

24 A. Correct.

25 Q. And thereafter, the companies assumed, the companies that

1 signed the MSA, assumed a very substantial obligation to pay
2 money out in that year and in future years; correct?

3 A. That's correct.

4 Q. As a result, they started to have to raise their prices to
5 be able to cover the incremental costs that they were
6 experiencing; correct?

7 A. No.

8 Q. But that's what they did.

9 Is that beginning in 1998 the companies substantially
10 started to raise the prices of cigarettes; correct?

11 A. They were regularly raising, you know, the up -- there's an
12 upward trend of prices. But if you were setting your prices to
13 be profit maximizing in the first place, the fact that you had
14 to pay something out to somebody else would have no bearing.

15 Q. That's fair enough. It created a lot of pressure, but what
16 happened at the same time is that new companies came into the
17 business of manufacturing cigarettes who didn't have that same
18 cost structure and were able to undercut the prices of the
19 people who were signatories to the MSA; correct?

20 A. I haven't analyzed the cost structure of the competitors. I
21 don't know that they would be able to have a lower cost
22 position.

23 Q. Would it be fair to say that this huge sum of money, which
24 is overwhelmingly the marketing expenditures that you've
25 documented, are reflective of basic price competition; correct?

1 A. No, I wouldn't say it that way.

2 Q. You're saying a company profit maximizing company --

3 A. Right.

4 Q. -- is going to offer pricing discounts when they don't have
5 to?

6 A. Well, they don't have to. I mean, it can be part of a
7 profit maximizing strategy --

8 Q. Sure.

9 A. -- to use price promotions, sure.

10 Q. Sure. If you want -- absolutely. But it's only part of
11 that profit maximizing strategy if your failure to do it means
12 that you're going to lose the business. If you can raise your
13 prices and not lose the business and maintain your profits,
14 isn't that ideal?

15 A. Again, I'm trying to -- you're giving me a long preface into
16 a question.

17 Is it the ideal thing for a manufacturer of a good to
18 be able to raise their prices and not lose any volume? I would
19 say that's -- that would be a situation many firms would like to
20 find themselves.

21 Q. Everybody would like to find themselves in that situation.

22 In fact, what turns out is that the companies here,
23 ever since the late 1980s, have been unable to do that because
24 they have faced fairly constant threats to their market share
25 from people who want to come in and price cigarettes lower;

1 correct?

2 A. Right. I have no problem with the fact that the -- you
3 know, the presence of discount brands, of people with lower
4 price points, constrained the pricing flexibility of the premium
5 brand manufacturers, no problem at all with that.

6 Q. Price competition. I don't even see any reference to price
7 competition in your direct examination. Is there any reference
8 to price competition in your direct examination?

9 A. I have mentioned price, but I don't -- I can't recollect a
10 time when I noted price competition.

11 Q. And, therefore -- I guess what I'm struggling with is you
12 presented a chart here -- I've marked it up as, you've presented
13 this chart with all of this money?

14 A. Right.

15 Q. Isn't it a fact that the only -- you have the ability when
16 you made this chart to segment the portion that was pure
17 advertising; correct?

18 A. Correct.

19 Q. And isn't it true that it's only the pure advertising
20 portion of the expenditures that's really relevant to your
21 testimony about whether we've marketed to people who are under
22 age?

23 A. Oh, no. No, that's absolutely not true.

24 Q. Absolutely untrue?

25 A. Untrue.

1 Q. I don't see any reference in any of your direct examination
2 to the fact of price promotions being used to target people who
3 are less than 18.

4 A. Well, price promotions are used to garner the support of
5 retailers and to providing you shelf space and displays.

6 Q. Yeah. But you're saying -- your testimony is that we
7 targeted people who were less than 18, and I don't see a word in
8 your direct examination that says that price promotions were
9 designed to target people who were less than 18. True or not?

10 MS. BROOKER: Your Honor, I'm just going to make an
11 objection for the record that, as Mr. Bernick well knows and as
12 I let him go on using Dr. Chaloupka's chart, Dr. Chaloupka
13 hasn't testified or added context to that chart.

14 But pretty clearly, Dr. Chaloupka is the person that we
15 have called and he will be here to testify very specifically
16 about price and youth-price sensitivity, and that is primarily
17 his area of testimony.

18 So if we're going to go down this path, we're going far
19 afield from Dr. Dolan's expert opinions, although obviously he
20 has some opinions and he's willing to testify about them. But I
21 just don't want us to go too far beyond the direct testimony.

22 THE COURT: Well, we are not going down the path, but
23 we are raising the question that's on the table, and it's
24 appropriate to have that one answered because certainly
25 particular expenditures were presented to the court through this

1 witness's testimony. So the objection is overruled.

2 BY MR. BERNICK:

3 Q. There's not a word, there's no opinion in your direct
4 examination, is there, Dr. Dolan, that says the price promotion
5 was used to target people who were under age; correct?

6 A. I don't believe you could find -- I couldn't cite you to
7 that particular sentence. But the use of price promotions, one
8 of the -- you know, as a way of gaining retail support for your
9 product is mentioned in my report.

10 Q. I didn't ask you about retail support.

11 A. That's what a price promotion does.

12 Q. We know --

13 A. That's what it gains.

14 Q. We know what it means to target people who are minors, do we
15 not?

16 A. Yes.

17 Q. Okay. Target is a big word. It's got a lot of meaning in
18 your trade; correct?

19 A. Correct, it does.

20 Q. And I think -- would you agree with me, Dr. Dolan, so that
21 we can move on --

22 A. Uh-huh.

23 Q. -- that there is no opinion expressed in your report where
24 you say, "We targeted minors with price promotions," is there?

25 A. I don't believe that that particular sentence is stated in

1 my direct examination, but again the use of promotion in two
2 ways, to achieve retailer support so you get good display space
3 in an environment that teenagers are coming into, and secondly,
4 you're price promoting so that you're getting lower prices when
5 it's well known, as Dr. Chaloupka will go through in detail when
6 he arrives here,

7 Q. I didn't ask you about Dr. Chaloupka.

8 THE COURT: The witness should finish his response.

9 Go ahead.

10 A. That price promotions are a particular way of getting your
11 prices low to a particularly price-sensitive group, that is
12 teenagers.

13 Q. I don't believe that's responsive, but now that you've said
14 it, you've known about Dr. Chaloupka, is that correct? You've
15 known about his opinions?

16 A. Yes, I have known about his opinions.

17 Q. You are an expert when it comes to marketing and advertising
18 targets; true?

19 A. I'm an expert in general marketing management issues.

20 Q. I didn't ask you that. I said, are you an expert when it
21 comes to targeting using marketing practices?

22 A. You know, if you walked up to me on the street somewhere and
23 said, "What are you an expert in?" I would not have said, "I'm
24 an expert on targeting."

25 Q. If I were to walk up to a street with you -- excuse me --

1 walked up to you on the street somewhere, Dr. Dolan and say,
2 "Dr. Dolan, the former Harvard Professor, Dean of the Business
3 School at Michigan, are you an expert in targeting?", what would
4 you say?

5 A. I'd say, "What do you mean?" I would say -- I would say,
6 "I'm an expert in marketing."

7 Q. Okay. I'll accept that.

8 Now, let's go on and talk about some of the other
9 things that you say that we did.

10 You say that we knew that consumers were brand loyal;
11 right?

12 A. Well, yeah, but that's under what did.

13 Q. Well, I understand that. But you gave us a whole long list
14 of things, and I just want to establish what you say that we
15 came to understand or believe. One of them was the consumers
16 were brand loyal; correct?

17 A. That's correct. I'm just questioning where you're placing
18 it on the chart because it's not --

19 Q. Fair enough. That's a fair point. And we will see where
20 I'm going here in just a moment.

21 A. Okay.

22 Q. You also say that we believed that youth or teenagers, or
23 however you want to put it, was the basis for the business;
24 right?

25 A. I wouldn't say that.

1 Q. Foundation for the business?

2 A. No, I wouldn't use that terminology.

3 Q. What relationship did the fact of people who were young,
4 starting to smoke, have to our business in your view?

5 A. Well, that the people who were starters were predominantly
6 teenagers.

7 Q. Fair enough. Starters, mostly teens.

8 And you also say that we actually tracked teens; right?

9 A. Yes.

10 Q. Now, would you agree with me, Dr. Dolan, do you accept that
11 all of these being true, we spent a lot on advertising that we
12 believed customers were brand loyal, that we tracked people who
13 were teenagers and that we -- and that teens are in fact
14 starters.

15 Even if all those things were true, that's not the same
16 thing as saying that we actually went off and targeted people or
17 targeted teens in our advertising and marketing? It's not the
18 same thing; right?

19 A. You would need more information than the first four.

20 Q. That's what I now want to focus on is targeting, what
21 further activities actually said and constituted targeting.
22 Now, I think there that I'm going to be on pretty good ground
23 when I go to your report because your report at page 31 actually
24 talks about targeting; correct?

25 A. Yeah. It has a target customer right in the middle of the

1 marketing mix up.

2 Q. That's a word that you didn't have any trouble with when you
3 put it in there, was it?

4 A. I had no difficulty at all.

5 Q. No difficulty at all.

6 Okay. So the question that is asked, "Can you explain
7 demonstrative one which shows the marketing mix?" And basically
8 the essence of the answer that you give is that the marketing
9 mix is all of the marketing activities that create value for the
10 customer.

11 In the sense that I have from what then follows is that
12 once you have the target customer, that kind of drives what you
13 then go ahead and do to create value.

14 You look at the product and how to make the product
15 attractive or tailored to the target customers, you look to an
16 integrated communications practice, how to make it tailored.
17 You look at distribution, you look at price, and you develop a
18 full package or mix of activities that are all tailored to that
19 target. Fair?

20 A. Well, it's fair to say that all of those activities are
21 directed to that target. Sometimes it may not be tailored in
22 the sense that there might be multiple purposes that you're
23 driving from -- from a particular communications campaign.

24 Q. I'll do this. I'll say that all these different activities
25 were directed, directed, to your chosen customer. That's how

1 marketing is supposed to work; right?

2 A. That's correct. You start by trying to understand what the
3 customer wants and then you derive a marketing program, as I've
4 tried to explain, to meet the ones wants of that customer.

5 Q. And when you do that, if you want to be very systematic, you
6 create a plan; right?

7 A. That's generally right.

8 Q. In fact, in this particular case it's your belief and your
9 opinion that the defendants approached marketing very
10 systematically, this was at page 53, and they did it by creating
11 marketing plans; correct?

12 A. That would be one element, right.

13 Q. So when you're looking for this industry and how this
14 industry approached marketing, would it be fair to say that one
15 of the most important places to look for targeting is in the
16 actual marketing plans; fair?

17 A. That would be fair.

18 Q. Now, you have a whole series of plans that you have cited in
19 your expert testimony, and by no means am I going to go through
20 all of them, but I'm going to go through Reynolds and ask you
21 some questions about the -- just the plans that you focused on
22 in your direct examination.

23 And I want to begin -- and again would you be fair --
24 would it be fair to -- again when we look at those plans, and
25 we're looking at the target, the customer as the target, you've

1 got to be very careful to be precise on who that target is.

2 That's very important, isn't it?

3 A. The target or targets, there could be multiple.

4 Q. Especially when you're making the claim that we targeted
5 teens, are you not?

6 A. I make the claim that they marketed -- targeted and marketed
7 to teens.

8 Q. Further, are you meaning to tell us that we in fact targeted
9 minors? Is that your contention in this case, that we targeted
10 minors?

11 A. I don't think I used that word in my --

12 Q. Apart from whether you used the word, Is it your testimony
13 and your opinion in this case that these defendants targeted
14 people who were under the age of 18? Yes or no.

15 A. Yes.

16 Q. What?

17 A. Yes.

18 Q. So if that's true, when we look through these plans, we've
19 got to be pretty careful -- going to your 6C -- we've got to be
20 pretty careful to see whether those plans actually define a
21 target that includes people who are under the age of 18. We
22 have to be careful in doing that, don't we?

23 A. They are not going to say that.

24 Q. They are not going to say that:

25 A. No, they are not.

1 Q. Is it your testimony that none of the plans say that?

2 A. No, not none.

3 Q. Oh, not none. Isn't it true --

4 A. Wait, wait. Can I answer?

5 Q. Sure.

6 A. Certainly some of the plans specifically say 14 to
7 17-year-olds. As we move later in the time period, you see --
8 you don't see references to specific age groups.

9 Q. I think, and I want to go back to the question I asked you,
10 which is all I asked you is, Isn't it true that in light of the
11 claim that you've made, which is not just that we targeted
12 teens, but we targeted people who were under the age of 18.

13 Isn't it true that in order to formulate an accurate
14 and appropriate opinion in this case, that you had to be careful
15 to take a look and see whether or not the plan calls out for a
16 target that includes people who are less than 18?

17 You may say that it doesn't or does not for some
18 particular reason, but it's certainly important to look for that
19 in the plans; correct?

20 A. It would be important to look to see what the specifications
21 of the target market was.

22 Q. Okay, that's exactly what I thought we would ultimately
23 agree on. If we take a look at Exhibit 48445, this is at page
24 70 of your testimony. And you again quote here.

25 Again, is it true that as we go through all of these

1 plans, that you are the one who decided among these plans, or
2 within these plans, what parts to quote?

3 A. Yes, that would be true.

4 Q. That was your work product?

5 A. Part of my work product.

6 Q. But nobody else is responsible for these quotes other than
7 you?

8 A. No, just me.

9 Q. It says, and this is for the court's reference. This is a
10 1970 plan for Salem, 1970 Salem brand marketing plan. And you
11 quote, I believe, the language that says, "The brand's marketing
12 efforts will be directed at," and you pick out four: "Appealing
13 to new adult smokers entering the market for the first time."
14 Did I get that right?

15 A. Yes, you did. And more of my direct -- what my testimony
16 says is, you know, that I noted that this was one of the five
17 purposes to which the marketing effort was directed.

18 Q. That's fair. And I don't -- we're not questioning that at
19 all.

20 Then you go on to say, there's a little ellipsis, you
21 jump over some things and go on to pick out and say, "This may
22 be Salem's best potential source of new users to replace those
23 who leave the brand by giving up smoking altogether."

24 And what you're picking out is the sentence that
25 appears on the following page which says, "This may be Salem's

1 best potential source of new users to replace those who leave
2 the brand by giving up smoking altogether."

3 That's what you quote; right?

4 A. Yes.

5 Q. What you don't quote is what appears above. It says,
6 "Appealing to new adult smokers entering the market for the
7 first time, Salem must continue to recruit new young adult
8 smokers entering the cigarette market for the first time.
9 Salem's slight skew to adults, 21 to 34, similar to that of the
10 menthol category, indicates this" "this" refers to 21 to 34,
11 does it not?

12 A. No, that's not my interpretation.

13 Q. Oh, really.

14 THE COURT: What page are we on?

15 MR. BERNICK: This is the page that ends in 2019. It's
16 the next page of the document.

17 THE COURT: No, I mean in the direct testimony.

18 MR. BERNICK: I'm sorry. It's page 70. It's at page
19 70, Your Honor, and it's at lines 7 through 11.

20 THE COURT: Okay. Thank you.

21 MR. BERNICK: And I think Your Honor will see.

22 Q. Is this correct, Dr. Dolan, that in the ellipsis which
23 you've eliminated in your quote in your testimony is what I have
24 bracketed here in red?

25 "Salem's slight skew to adults 21 to 34 indicates that

1 this may be Salem's best potential source of new users." You've
2 eliminated the reference to 21 to 34, have you not?

3 A. Let me catch up with you here.

4 What I did was -- okay, if you go to page 70 of my
5 testimony. So I quote from page 2017, "Salem must continue to
6 recruit new young-adult smokers entering the cigarette markets
7 for the first time dot, dot, dot."

8 And then I come over and I pick up at, "This may be
9 Salem's best potential source of new users to replace those who
10 leave the brand by giving up smoking altogether."

11 So I didn't eliminate anything. I may have, you know,
12 picked up at a different spot than you.

13 Q. I'm sorry. You didn't eliminate anything?

14 A. Well, the dot, dot, dot, you know, it signals that I left
15 some things out in getting to the next work.

16 Q. Let's just be real clear and --

17 THE COURT: But the dot, dot, dot refers to 21 to
18 34-year-old smokers, doesn't it?

19 THE WITNESS: No, Your Honor. It refers to the -- it
20 refers to that -- you know, I started this quote over on page
21 2017.

22 BY MR. BERNICK:

23 Q. No, that's your error. I think you see that's the quote
24 that you picked up right here. "Indicated the brand's marketing
25 efforts will be directed at -- dot, dot, dot -- one of the five

1 listed." Then goes on, "appealing to new adult smokers entering
2 the market for the first time.

3 " That completes the reference to this first page.
4 You then flipped the page and you started with a new sentence.
5 A. Okay.

6 Q. Saying, "Salem must continue to recruit new young adult
7 smokers entering the cigarette market for the first time."
8 That's the first part of this paragraph.

9 You then put an ellipsis, and you pick up with this,
10 and what you've left out is quote, "Salem's slight skew to
11 adults 21 to 34 similar to that of the menthol category close
12 paren, indicates that," and then you pick up, "this may be
13 Salem's best potential source."

14 So if you read what you have quoted here reasonably,
15 "Salem must continue to recruit new adult -- young adult
16 smokers. This may be Salem's best potential source. The reader
17 believes that what this is saying is simply recruiting new young
18 adult smokers," and the reader has no idea that what precedes
19 this is Salem's slight skew to adults 21 to 34, indicating that
20 this may be Salem best potential source of users. You've
21 completely taken that out; correct?

22 A. Right. I have omitted that, but I think the meaning is that
23 I -- that I portray here is correct.

24 Q. But --

25 A. Can I continue with my answer?

1 Q. No. If you answer -- sure. Go ahead and continue and then
2 I'll put another question to you.

3 A. Okay. So we are -- the second part of the thing that's
4 quoted here, what's quoted on lines 8 through 11, is under this
5 heading of number 4, "Appealing to new adult smokers entering
6 the market for the first time."

7 So that's what -- the first sentence is, "Salem must
8 continue to recruit new young adult smokers entering the
9 cigarette market for the first time. Salem's slight skew to
10 adults 21/34," meaning Salem -- we are already doing pretty good
11 with 21 to 34-year-olds. The place where we really have an
12 opportunity to do better is with the new people who are coming
13 into the market. So that's my interpretation of what's being
14 said there.

15 Q. Fair.

16 A. A slight skew says the opportunity for us, the best
17 potential for us, is for new users.

18 Q. Yeah, but the fact -- we will get to that. That's fine. We
19 will pick right up on that.

20 Can you tell us, it was your decision to omit the
21 reference to 21 to 34; correct?

22 A. I'm responsible for what's written in my --

23 Q. It was your decision to make that specific omission, was it
24 not?

25 A. Well, I'm responsible for what's in my testimony, and I was

1 the one who decided to quote the first part of that and then
2 skip over the next part because I didn't believe it was
3 material.

4 Q. Do you take a look at the switching study and who the
5 switching study focused on, whether it focused on people who
6 were young, who were new adult smokers?

7 A. Did I -- I'm not sure whether I looked at that switching
8 study or not.

9 Q. Did you take a look -- did you take a look in the other
10 documents that were written at this pure point in time to see
11 whether new adult smokers included people who were under 18?

12 A. Well, around this period in time, 1970, there was -- it was
13 understood that the starters were still many teenagers.

14 Q. But this document doesn't tell you that the target is people
15 under 18, does it?

16 A. No. What this document says --

17 Q. Can you answer the question, please?

18 This document does not --

19 MS. BROOKER: Your Honor, he continues to interrupt the
20 witness.

21 THE COURT: The witness may answer yes or no and may
22 explain his answer.

23 MS. BROOKER: Thank you, Your Honor.

24 A. I don't see that this document says that it does not specify
25 an age group of being under the age of 18 that they are

1 pursuing. What it says is they are going after new adult
2 smokers, and the new smokers are known to be predominantly
3 teenagers.

4 Q. Let's take a look at the next document that you cite
5 literally. I believe it's on -- it's the 1971 Annual Marketing
6 Plan, which -- of Salem. Same brand. Same year, correct? Or a
7 different brand, same year, right?

8 This is on page 71. If you would turn to page 71. Let
9 me ask you questions about Exhibit 787 -- 48724.

10 You say -- you quote, "Appealing to young adult smokers
11 who were new to the market. And then one of four promotion plan
12 strategies listed was maintaining competitive pressure in the
13 marketplace to capture new smokers."

14 We see that what you have reference to is, "Marketing
15 efforts will be directed to" -- this is on page 6 of the
16 exhibit, and one of the bullets there is "appealing to young
17 adult smokers who are new to the market." Correct?

18 A. Yes.

19 Q. And then you further, I believe -- let's see. You had
20 reference, "Maintaining competitive pressure in the marketplace
21 to capture new smokers."

22 More promotional plans strategies. I think that that
23 is on a different page.

24 Let me take you to page 7. Appealing to young adult
25 smokers who are new to the market also appears at the top here;

1 correct?

2 A. Correct.

3 Q. It says, "New smokers comprise a larger share of Salem's
4 franchise than that of the total industry. This valuable source
5 of business must be protected and extended in order to counter
6 losses. Other considerations which dictate strong efforts are
7 the absolute size of the 21 to 34-year-old segment of the
8 population. The importance of the young adult smoker as a
9 possible long-term user and competition not generated by the new
10 -- among females 21 to 34."

11 A. Right.

12 Q. Once again, the reference is the age reference of the
13 segment that's being referred to is 21 to 34; correct?

14 A. Well, it says, "other considerations which dictate strong
15 efforts against," you know, meaning against those who are new to
16 the market are the size of the 21 to 34-year-old segment of the
17 population. And the importance of the young adult smoker as a
18 possible long-term user.

19 Q. There's no reference to anybody under the age of 18, is
20 there?

21 A. Not explicitly in this document, no.

22 Q. If we go to -- it says there's a reference to "new". Did
23 you see that?

24 A. I did.

25 Q. New smokers and the new smokers, I believe, are new in

1 quotes; correct?

2 A. Yes.

3 Q. Have you ever looked to see if the documents defined who a
4 new smoker is?

5 A. Well, you know, they say they appeal to young adult smokers
6 who are new to the market, meaning new people coming into the
7 marketplace.

8 Q. That's not my question.

9 My question is whether you ever looked to see if
10 Reynolds defined what it meant in its plans by saying new
11 smokers?

12 A. Certainly I read the plans to get a general sense of what
13 they were talking about.

14 Did I seek out a definition, I'm not --

15 Q. Let's talk about one of the plans that you've cited. This
16 is the Salem 1985 Marketing Plan, Exhibit 50529. Do you see on
17 page 2 where it says, 1985 Strategic Thrust? Do you see that?

18 A. I do.

19 Q. And do you see, "In support of the brand's 1985 corporate
20 role as a core volume brand with targeted growth opportunities,
21 Salem's strategic thrust will be to optimize franchise growth
22 leading to volume by, number one, building gains among 18 to 34
23 target smokers." Do you see that?

24 A. I do.

25 Q. And again, that's not a portion of this document that you

1 quoted, is it?

2 A. I don't believe I quoted that portion, no.

3 Q. In fact, this is squarely on point, because it says that the
4 market that Reynolds is looking for as of this point in time is
5 a market that does not include minors; correct? It's an
6 18-to-34 market.

7 A. Well, this would be -- this would be one of their target
8 growth opportunities.

9 Q. I understand that that may be so. But in this document with
10 respect to the Salem brand, the target smokers that are defined
11 are 18 to 34; correct?

12 A. Well, one, as I say, one of the particular targets which is
13 identified here is building -- they want to try to build --
14 building gains among these 18-year-old to 34-year-old target
15 smokers.

16 Q. Right. Take a look at the next page. I'm sorry, page 14.

17 A. I'm sorry, page?

18 Q. 14 at the bottom.

19 A. The document that I was given has only -- only has four
20 pages.

21 Q. It was apparently split into two exhibits, which is 50530,
22 and I'll just give it to you.

23 Do you see where it says on the gain side, "Salem
24 significantly increased first usual brand selectors, helping
25 fuel Salem's gains among younger adults"?

1 You actually quoted that in your testimony, did you
2 not?

3 A. I'm not sure. It could well be.

4 Q. And we then get a definition of new. "New smokers are
5 defined as younger adult smokers who have selected their first
6 usual brand."

7 Do you see that?

8 A. I do see that.

9 Q. And what that means is these are not nonsmokers who are on
10 the verge of becoming smokers or are at risk of smoking, these
11 are people who have already decided to smoke; true?

12 A. Well, if you're a smoker, you've decided to smoke.

13 Q. That's correct. That's the whole point.

14 So when they say "new smokers," they are not talking
15 about targeting people who haven't decided to smoke, they are
16 targeting people who have decided to smoke in order to get their
17 business; correct? If this definition is correct.

18 A. Well, when -- if this definition -- right, smokers are
19 defined as young adult smokers who have selected their first
20 usual brand. So, right, they -- to fit their definition of new
21 smokers, they have to be smoking.

22 Q. Let's go to another document. This is at page 97 of 149,
23 and this is Exhibit 48355.

24 This refers, does it not, to Winston's media objectives
25 and spending for 1972; correct?

1 A. Yes, it does.

2 Q. And this is again one of the documents that you quote in
3 your testimony; correct? At page 97.

4 A. I believe that's correct, yes.

5 Q. And you pick up a particular quote where there's a reference
6 to younger smokers, ages 14 to 20.

7 A. That's correct.

8 Q. And you say, "How is this document important? There's a
9 reference to a specific age group, 14 to 20."

10 It says, "This shows that Reynolds was directing its
11 advertising dollars to teenagers, including those as young as
12 14 years old." Do you see that?

13 A. I do.

14 Q. If you go to the document itself, it says -- indeed, what is
15 quoted here, "The major markets must also contain greater
16 numbers of younger smokers 14 to 20. New received data
17 indicates Marlboro's exceptional strength against this age
18 group."

19 It goes on to say, "The October 1970 NFO study showed
20 12 percent of Winston's smokers 21 to 24 versus 18.5 for
21 Marlboro." So the comparison point is 21 to 4, not 14 to 20;
22 correct?

23 A. In the October NFO study that they are referring to?

24 Q. Yes.

25 A. Yes.

1 Q. You then get to other principles, spending.

2 A, sampling -- "spending will be directed to all adult
3 smokers 21 years and over." Isn't that what the spending is
4 directed at pursuant to this document?

5 A. Well, I'll go back to a page earlier where -- there's a lot
6 of different things going on, but on the page number 4 of this
7 document -- if we can go up to the top -- it's saying, "Winston
8 will allocate 10 percent of all working media to major marketing
9 areas which contain the highest concentration of quote/unquote
10 new smokers."

11 And then they are talking what's the rationale, and
12 point C is, "The major market must also contain greater numbers
13 of younger smokers, 14 to 20."

14 Now it goes on to make point number 4, which is that,
15 "Winston will allocate approximately 3 percent of working media
16 to separate advertising and campaigns and ethnic markets."
17 Point number 5, there's another point made, and then point
18 number 6 is other principles.

19 Q. That's fine. C describes where the markets are. The major
20 markets must also contain greater numbers of younger smokers.
21 They go on to describe that. But when it comes to what will be
22 directed, direction of the spend is specified as being smokers
23 21 years and over. True or not?

24 A. That is a principle. What it's saying -- what it's
25 saying -- but back on page.

1 Q. It's not a principle. It's a fact. That's what they say
2 they are going to do?

3 A. No, no, no. It's a principle. Mr. -- if you look at what
4 point 6 says, it is other principles.

5 Q. Right.

6 A. Right. And if we go back to point 3 which says what they
7 will do, it says, "Winston will allocate 10 percent of the total
8 working media to major market areas which contain the highest
9 concentration of new smokers."

10 Then if you follow up on this principle --

11 Q. Excuse me.

12 MR. BERNICK: Your Honor, this is getting to be fairly
13 constant where I ask a very specific question. The question
14 was, Where was the spend directed? And I then get an answer
15 that goes over to other pages that we've already gone over and
16 don't pertain to -- don't even specify an age group.

17 I would like to get the witness to at least be
18 responsive to the question and he will be able to explain when
19 counsel stands up.

20 MS. BROOKER: Your Honor, if I may just respond.

21 Mr. Bernick is just trying to get a sound bite here,
22 and the witness is trying to be very helpful and explain in the
23 context of the document what his answer is, and I think that he
24 should be able to answer this question or else we're going to
25 spend a lot of time on redirect having me go back and have him

1 answer all the questions.

2 THE COURT: The witness may explain his answer.

3 A. Okay. My answer is that what -- point 6 is other
4 principles, but if you go back on 3, it says exactly where they
5 will allocate the total working media to major markets. And
6 then under 3, 3 C is the rationale, "The major markets must also
7 contain greater numbers of younger smokers, 14 to 20."

8 And then if you go back -- go to page 6 of the
9 document, which is the spending summary after the principle, you
10 see that 30 percent of the spending -- on page 6, item number
11 2 -- attract new users, is going to be 30 percent of the
12 total -- of the total budget.

13 Q. Have you finished with your explanation?

14 A. That's the direction on spending.

15 Q. Have you finished your explanation?

16 A. I am.

17 Q. Isn't it true that when it comes to the so-called new
18 smokers or starters, there is no age group that is specified in
19 this document; correct?

20 A. I don't see a specification of the age, but again, it's well
21 known what the age of a typical starter is.

22 Q. You've said it's well known, and I'll accept that your
23 testimony is, "It's well known that people start when they are
24 less than 18."

25 It's also well known that people start when they are

1 18. It's also well known that they start when they are 19.

2 Correct?

3 A. Some do, yes.

4 Q. Okay. So when we talk about new starters, it's very -- new
5 people who are starters, it's very important to focus in terms
6 of targeting on exactly what age we're talking about; correct?

7 A. To the extent that you can.

8 Q. To the extent that you can.

9 And if we looked through the documents we see that the
10 documents themselves say what a new smoker is; correct?

11 A. Well, there's a definition that we've looked at a moment
12 ago.

13 Q. That's correct. And every time you then look at a document,
14 if you see new smokers or starters, that's something to focus
15 on, but then you have to focus on the age identification, true
16 or not?

17 A. You have to think about the whole -- the whole process, yes.

18 Q. You have to focus on the age identification. True or not?

19 A. Well, if there is an age identification.

20 Q. If there is one. And in this case this document which you
21 cited doesn't say anything about people who are less than 18;
22 correct?

23 A. Not explicitly it does not.

24 Q. When it does specify where the money is going to be spent,
25 it does use the age limitation and that age limitation is 21 or

1 over.

2 If this principle is to be abided by -- if this
3 principle is to be abided by, spending will be directed to all
4 adult smokers 21 years or over, the spend is going to be for
5 people who are 21 and over, true or false.

6 A. I think the principle there does not square with what they
7 are saying they will do two pages earlier.

8 Q. So you think that this is a mistake and the part of the
9 document that you quoted is accurate?

10 A. I don't think it's a mistake that they state that as a
11 principle, but then they state what it is they are going to do
12 in terms of where they are directing their spending.

13 Q. In any event, you never even pointed out this principle to
14 the court in your direct testimony, did you?

15 A. I did not quote this part of the document in my direct
16 testimony.

17 Q. I want to direct your attention to U.S. Exhibit 48902 which
18 is at page 98 of your testimony.

19 This testimony -- this document is actually a
20 relatively long document called Marketing Plan. And you, in
21 your testimony, have identified "young male market" which is at
22 page 52, correct? You've talked about the --

23 A. Right, right.

24 Q. And we see that there are actually a whole bunch of
25 references to ages on this page. Sometimes it is 18 to 34,

1 sometimes it is under 18, again 18 to 34.

2 Do you see that?

3 A. I do.

4 Q. If you flip again to page 53, Importance to the
5 85-millimeter category, we see "Over the last 5 years NFO data
6 shows" and we get more numbers that are used: 18 to 34, 14 to
7 20, 14 to 34, 18 to 34, 14 to 20; correct?

8 A. Correct.

9 Q. So there's lots of information that's coming in.

10 If we take a look at page 54. Major growth trend in
11 category, Marlboro, has successfully appealed to young adults,
12 and we see that young adults as used here, the data referred to
13 for young adults is 18 and 20; right?

14 A. I wouldn't say that you --

15 Q. 18 to 20.

16 A. No. I don't --

17 Q. I see. Okay. That's fair enough.

18 You see the major growth is 32, 30 and 13. In any
19 event, it's people who are 18 and over; correct?

20 A. That are shown explicitly on this chart.

21 Q. I'm sorry.

22 A. That are shown explicitly on this chart.

23 Q. That's what they are talking about. All we know is the
24 chart begins at 18; fair?

25 A. Right, because, you know, probably because that's what the

1 NFO data goes down to.

2 Q. That's the point that I want to make.

3 When we see a lot of these numbers on these plans,
4 Dr. Dolan, isn't it true that the numbers that -- the ages that
5 appear in these plans when the plans are talking about what's
6 happening in the market, the ages are reflecting how the
7 information about the market comes into the companies; correct?

8 A. At times, yes.

9 Q. So if information comes from different sources at different
10 times, it can pick out different age spans; right?

11 A. Right, and some of those age spans would be specified by the
12 companies. Other ones would be ones that they have to accept if
13 they are buying that service.

14 Q. Right. So that just because we see information being
15 reported by the marketplace by these age spans doesn't mean that
16 either, A, the company has asked for it that way, or B, that the
17 company has actually decided to go out and target that group;
18 correct?

19 A. Right. You could not infer just from the fact that there is
20 data on 14-year-olds cited here that the company is going,
21 targeting 14-year-olds, I would agree with that.

22 Q. So that's why it's again very important to distinguish
23 tracking from who it is that you're targeting; correct?

24 A. Yes, that's fair. Tracking is not targeting.

25 Q. Tracking is not targeting.

1 If we go to page 55, do we see that Camel filters in
2 the young adult male, at number one, "Camel filters marketing
3 efforts are currently targeted to this group."

4 That's your targeting word again; right?

5 A. I'm sorry. What page are we on now?

6 Q. This is page 55.

7 A. Oh, okay, at the top. Okay, I see it.

8 Q. And, in fact, if we then go down to the bottom of the page
9 we see that all of the information here about young adults, it
10 says, young adult males particularly, those 18 to 24; correct?

11 A. Particularly --

12 Q. I'm sorry. 18 to 20?

13 A. Right.

14 Q. And we then see the table there again is 18 to 20; true?

15 A. 18 to 20 is a specific age break out shown, that's fair.

16 Q. There's no language that says we're going to target people
17 who are under the age of 18, is there?

18 A. Not on this page, no.

19 Q. Again, more data later on. 18 to 24, talking about young
20 smokers; correct?

21 A. Correct.

22 Q. Nothing in this document says that RJR is targeting people
23 less than 18; correct?

24 A. That's correct. It's just saying that it's going after
25 young people.

1 Q. Page 98 of your testimony. Here you talk about Exhibit --
2 98, 99, Exhibit 21609; right?

3 A. I'm waiting for the document.

4 Okay.

5 Q. This is the Hilton Head conference that you say -- Some had
6 presentation that you say kind of what formalized the -- the
7 goals were formalized after the Hilton Head conference; right?

8 A. Yes.

9 Q. Page 98 and over to 99. And you make references. The only
10 numbers, the only age span that you make a reference to is 14 to
11 24; right?

12 A. That's the one I make reference to, yeah.

13 Q. In point of fact if we go through this document, isn't it
14 true that this is a presentation where there are all kinds of
15 ages reflecting all kinds of information?

16 This has a 1950, this young adult market, the 14 to 24
17 age group represented 21 percent. Then again you see on the
18 same page, 14 to 24 in talking about 1975; right?

19 A. I see that.

20 Q. If we go to page ending in 6954 we see that the numbers are
21 different here. This talks about Salem Box advertising, chart
22 10.

23 "Further young adult emphasis is being placed through
24 the successful Salem Box denim campaign. Research has shown,
25 Salem Box profile is younger with 50 percent of the users in the

1 18 to 34 age group versus 41 percent to Salem King."

2 You didn't quote that in your direct examination, did
3 you?

4 A. No, but I've never said that they were completely ignoring
5 anybody over the age of 21.

6 Q. But this document basically says that when they are looking
7 at how Salem's advertising is doing. They are not looking at
8 people who are 14, 15, 16 or 17, they are looking at people who
9 are 18 to 34; correct?

10 A. Well, it's specifically citing a particular research among
11 18-year-olds, 18 and up. So again, I'm not saying that they
12 aren't looking at those people.

13 Q. But there's nothing here that says that they are actually
14 targeting people who are you under 18, is there?

15 A. Not in those three lines there.

16 Q. Not anywhere. You don't see anywhere in this document where
17 it says we are targeting people less than 18, do you?

18 A. Oh, I believe you do.

19 Q. Where? You tell me. It's not quoted in your testimony.

20 A. Well, let's go -- let's take this document from the top
21 then.

22 Q. The document is a long document. If there's something that
23 you specifically recall, or is it in your testimony where you
24 say, here is where they say we are targeting people less than
25 18, that would certainly expedite things.

1 MS. BROOKER: Your Honor, I'm going to object to this.

2 Again, Mr. Bernick is trying to rush through all of
3 these documents to get sound bites. Dr. Dolan has already
4 testified that the context is important and he would like to go
5 through it.

6 If Mr. Bernick is going to ask him questions about
7 documents he should be permitted to go through them. Otherwise,
8 again, we're going to waste a lot of time on redirect having
9 Dr. Dolan go back over these same documents.

10 THE COURT: He can take a minute or two to look through
11 the document.

12 THE WITNESS: Thank you, Your Honor.

13 (Pause)

14 A. Okay, if you just go to page 1 of the document, which would
15 be I guess 0748, you can see that the opportunity area that they
16 specify is that they are to increase our young adult franchise.

17 And then when they go down a few lines under the
18 four points, they say, first, let's look at the growing
19 importance of the young adult in the cigarette market. In 1960,
20 this young adult market, the 14 to 24 age group. Okay, 1950.
21 Okay. This young adult market, 14 to 20 age group, represented
22 21 percent of the population. So they are saying young adult
23 market is 14 to 24 years old.

24 And then as they go forward, they say that on chart 9,
25 which would be on the bottom of page 0750 -- for Salem,

1 significant improvements have been made in the advertising
2 design for more young adults appeal.

3 And then it goes on to say that -- page -- page 0752
4 starting in July '74 a new marketing program was put into test
5 market. Targeted young adults who earlier had been defined as
6 14 to 24-year-olds.

7 And then over on the next page, ad spending has been in
8 increased in 1957 with more targeted efforts against young
9 adults to fully exploit this potential.

10 And then there are several other references to specific
11 targeting later on. So I think this is a document where there
12 is a very explicit specification of an age group and that they
13 are going to target people in that age group.

14 Q. What you just said is you took the very information that we
15 went through when I first started to ask you questions, which
16 was information about -- information obtained somehow in 1950
17 about the 14-to-24 age group and you now believe that that
18 defines throughout the rest of the document what their target
19 market is?

20 A. Well, they used the term the young adult market and then
21 they put right after it the 14-to-24 age group.

22 Q. The data they have from 1950.

23 A. Well, that is to get whether it represents 21 percent of the
24 population or not, but it says how they are using the term young
25 adult market.

1 Q. How do you explain the fact that when they are look -- when
2 they are looking at their own advertising, right now at the time
3 of the document, they are not looking 14 to 24 or 14 to 34.
4 They are looking the 18 to 34?

5 A. That's one example of they've collected data among 18 to
6 34-year-olds and they are citing that particular data.

7 Q. Take a look at the next page. They go on to say with
8 respect to Camel filter advertising, the brand has increased its
9 share penetration among the key 18 to 24 male age group. Right?
10 A. Right.

11 Q. No 14 -- if they wanted to attract 14, they could track 14.
12 All they are looking for here is the key 18 to 24; correct?

13 A. That's the terminology that they are using there, but in
14 other cases they are saying 14 to 20-- 14-year-olds and up is
15 what they are defining as the young adult market.

16 Q. And they say, "Let's talk about the Meet the TURK
17 Advertising Campaign." Did you ever take a look at Meet the
18 TURK?

19 A. I have.

20 Q. And here is a Meet the TURK ad, JD 013069, and that -- your
21 testimony is that that's how they decided to target
22 14-year-olds?

23 A. No. I don't have -- I have not made a statement about who
24 this particular ad is targeted to.

25 Q. The Meet the TURK campaign was not targeted to 14-year-olds,

1 was it?

2 A. I couldn't say that it was.

3 Q. Did you take a look -- when you're saying that this document
4 which recites 1950 data at 14 to 24, and then goes on to talk
5 about the key profile being 18 to 24 in the Meet the TURK
6 program, it's your testimony that this document supports the
7 proposition that this company is specifically targeting people
8 who are under 18? Is that your testimony?

9 A. I find this document is supportive of that fact, yes.

10 Q. Very well. Let's take a look at a couple of more and then
11 we will push on.

12 Exhibit 48188.

13 THE COURT: Discussed where in the direct, please?

14 MR. BERNICK: I don't know that this was -- was it
15 discussed in direct?

16 At page 72. I think this one ought to go fairly
17 quickly.

18 BY MR. BERNICK:

19 Q. We are now in 1977, total Winston marketing -- I'm sorry,
20 Total Winston 1977 Marketing Plan Summary. Do you see that?

21 A. I do.

22 Q. And I believe that you quote language that appears at page 3
23 under Marketing Strategy, which is to utilize advertising, et
24 cetera, et cetera, for strengthening the loyalty of current
25 smokers and for persuading new competitive smokers to switch to

1 Winston; right?

2 A. New slash competitor smokers, right.

3 Q. But what you don't tell us about is the next page, page 4.

4 At page 4, it says as number 4 under Marketing Strategy, it uses
5 the target word.

6 A. Right. Uh-huh.

7 Q. It says, "Target advertising/promotional support for each
8 brand style against high potential demographic and geographic
9 segments in the market." And it gives a whole long list of
10 brands; right?

11 A. It does.

12 Q. And the age -- the age span for the target advertising and
13 promotional support, the age span, the segment is 18 to 34 for
14 Winston 85; 18 to 34, especially 18 to 24, for Winston Box; 18
15 to 49 for Winston Longs; age 21 and over for Winton Lights; and
16 age 21 and over for Winston Menthol; correct?

17 A. I see, that yes.

18 Q. Would you agree with me, Dr. Dolan, that specific target
19 called out by age in this document is -- are targets that are
20 people at least 18 years of age?

21 A. That's being specified here.

22 You're taking a document from a section of my report
23 which didn't have anything to do with age; it was to do with
24 whether people were new to the market or not.

25 Q. Was it your decision to put it in that part of the report?

1 A. It was indeed, yes.

2 Q. So you decided to put it in that part of the report rather
3 than to put it in the part of the report that addressed the
4 question of targeting, correct?

5 A. Oh, no. This is a targeting --

6 Q. This is a targeting document. It couldn't be clearer that
7 in 1977 with respect to -- with respect to Winston, which was
8 also the subject of the earlier plans, that the called out
9 target is at least 18 years of age; correct?

10 A. On this particular plan, yes.

11 And the reason I was quoting this plan was not to make
12 a point about 18-year olds. What I was making the point about
13 is that this was to show that the companies were in fact
14 targeting people who would be new to the market.

15 So this document is -- it's supportive of the spot it's
16 in my report. It's not meant to say anything about age.

17 Q. It's actually in the section, it's a subsection under the
18 general section. The general section says, that page 67,
19 "Defendants market to starters who are primarily teenagers,"
20 right?

21 A. Right.

22 Q. And interestingly that's that use of the word "teenagers."

23 There's nothing wrong from a marketing point of view,
24 you told me, to marketing to teenagers who are 18 and over;
25 correct?

1 A. There's nothing illegal about that.

2 Q. Nothing illegal or inappropriate from a marketing point of
3 view; correct?

4 A. I did not get to the point of saying it was appropriate.

5 Q. I said inappropriate. There's nothing inappropriate.

6 A. I would not get to the point of saying there's nothing
7 inappropriate about it.

8 Q. You got to that point this morning?

9 A. I did not.

10 Q. You did not.

11 MS. BROOKER: Well --

12 THE COURT: Excuse me, everybody. What's the
13 objection?

14 MS. BROOKER: That clearly mischaracterizes Dr. Dolan's
15 answer to Mr. Bernick's question earlier this morning. And if
16 he would be permitted to explain again, he did not say whether
17 or not it was appropriate or inappropriate.

18 MR. BERNICK: I'll withdraw it because I want to move
19 on.

20 THE COURT: The record will reflect what he said. It
21 is my recollection that that is what he said, but it will -- we
22 can go back and check the transcript. In the meantime you can
23 move on, Mr. Bernick.

24 BY MR. BERNICK:

25 Q. Isn't it true, Dr. Dolan, that you nowhere point out in your

1 report that marketing plans, such as this plan, specifically
2 call for targeting people who are not minors? That is, they
3 call out for targets that do not include minors?

4 A. Could you give me that again?

5 Q. I'll rephrase this question.

6 You've testified, and I asked you to reaffirm your
7 testimony before we went down this road.

8 A. Okay.

9 Q. You reaffirmed your testimony that you believed that these
10 defendants targeted people who were under the age of 18;
11 correct?

12 A. Correct.

13 Q. And yet you nowhere point out in your testimony that in the
14 very documents that you're citing, the target is specified and
15 it's specified in a way that does not include people who are
16 under the age of 18; correct?

17 A. No. There are -- you know, the Hilton Head document we
18 looked at a moment ago, in my judgment, very clearly says they
19 are targeting people 14 to 21 years old.

20 Q. We saw that in that document that you only picked out the
21 one page that dealt with the data in 1950 and that one set of
22 age spans that begins at 14; correct?

23 A. It didn't deal with data in 1950. It dealt with their plans
24 going forward.

25 Q. It is what it is and the court has seen it.

1 If you don't disclose to the court that in this
2 document the target is defined in a way that excludes
3 minorities; correct?

4 A. In which document?

5 Q. The one we just went through.

6 A. I'm just trying to make sure. We were talking -- we were
7 just talking about Hilton Head. Are we back talking about the
8 total Winston 1977 marketing plan?

9 Q. That's correct.

10 A. I was using this document in a portion of my report to talk
11 about whether they were targeting new users or not. And I used
12 it for that purpose and I quoted the germane part of the
13 document to that particular topic. I did not point anything out
14 about age.

15 Q. Isn't it a fact that if we go to every single one of the
16 plan documents cited in your testimony with respect to R.J.
17 Reynolds, that where they call out a target and they specify an
18 age span for that target as opposed to saying, you know, young
19 adults, et cetera, et cetera, where they call out a target, the
20 target always is at least 18 years of age?

21 A. When there is specification of the target by an age -- using
22 an age designation, it is above 18 and above.

23 Q. Thank you. Is the same thing true, we could go through --

24 THE COURT: Mr. Bernick, let me ask. How much more do
25 you think you have?

1 MR. BERNICK: I was going to try to finish up in
2 45 minutes.

3 THE COURT: Let's take a recess at this time.
4 15 minutes, everybody.

5 (Recess began at 2:36 p.m.)

6 (Recess ended at 2:54 p.m.)

7 BY MR. BERNICK:

8 Q. Dr. Dolan, as we just finished off we were talking about
9 marketing plans and where were they specified in age range for
10 target, if the age range was ever below 18. I want to ask you
11 some related questions with respect to Reynolds.

12 Isn't it true that you know of no evidence that
13 Reynolds conducted any taste tests on teenagers from 14 to 17?

14 A. I know of no taste tests that Reynolds conducted.

15 Q. Isn't it true that you have no knowledge of Reynolds testing
16 any advertising campaigns with teenagers from 14 to 17?

17 A. I would have no knowledge of that.

18 Q. If I were to ask you those same questions; that is, do you
19 have any knowledge of either taste tests on people under 18 or
20 advertising tests on people under 18, do you have any evidence
21 that that ever occurred with respect to any of the other
22 defendants, that is Lorillard, Liggett -- we have to call them
23 out by name, they are always kind of hiding back there --
24 Lorillard, Liggett, Philip Morris or Brown & Williamson, do you
25 have any evidence with respect to any of those companies?

1 A. No, I would have no evidence on any of those companies.

2 Q. With respect to the marketing plans, that is where the
3 marketing plans do specify an age range for the target, are you
4 aware -- go ahead -- are you aware -- is it also true that you
5 know of no plan for any of the other companies, that is
6 Lorillard, Liggett, Philip Morris or Brown & Williamson, where
7 the age range goes below 18?

8 A. The specification of an age range below 18, no.

9 Q. I'm going to show you just a document before we push on to
10 present time and then go on to a different subject.

11 This is J-DEM 010076 and it shows the market share
12 within the industry over time, and I want to go back for a
13 moment to brand switching.

14 We talked a little bit about whether there was an
15 effort to target people below the age of 18, and I want to talk
16 about competition to get people who have already started to
17 smoke to switch.

18 Isn't it a fact that literally the fortunes of
19 companies in this business have been won and lost on the basis
20 of brand switching?

21 A. I would say that they've been won and lost on the flip side
22 of brand switching. That is their ability to keep people loyal.

23 Q. It is kind of the flip side of the same coin.

24 A. Right, it is.

25 Q. If you're real successful in keeping your current customers,

1 are you really unsuccessful in keeping your current customers
2 against pressures of brand competition?

3 A. Right.

4 Q. Industry history has shown it can kill you; right?

5 A. One person's loyalty is the other person switching away,
6 right.

7 Q. And we can actually see that illustrated; that, for example,
8 when it came to KOOL cigarettes, the Brown & Williamson brand,
9 isn't it true that Brown & Williamson was not able to keep KOOL
10 customers -- no pun intended -- keep KOOL customers and they
11 switched to Newport?

12 A. I do believe that some Brown -- some KOOL customers would
13 switch to Newport.

14 Q. In point of fact we see that Brown & Williamson kind of came
15 up in the mid-1970s and then came down, essentially apart from
16 the fact that it bought American and it got its market share,
17 Brown & Williamson's market share has steadily declined as it
18 has suffered significant losses to its customer base; correct?

19 A. Well, significant losses either in terms of their ability to
20 attract new people as they come into the market or in terms of
21 losing people that they had to other -- to other firms. You
22 can't sort out those two from looking at market share data
23 alone.

24 Q. Right. Now, if you take a look at the precipitous move in
25 Philip Morris, you can see it comes in, it's flat and then it

1 all of a sudden takes off and it's a straight line, slope line.

2 Isn't it true that a huge portion of Philip Morris's
3 growth was driven by brand switching?

4 A. Some significant portion of it was, and another piece was
5 their ability to attract young people as they came into the
6 market. Both of those.

7 Q. Do you have any idea how much value accrues to a single
8 percentage point of market share in this market?

9 A. I used to have the number in my head at one point, but I
10 forget what it is now.

11 Q. Huge sums of money, isn't it?

12 A. Oh, one market share point is a big deal in this market.

13 Q. Let's talk a little bit about where we are today on these
14 questions of marketing and people who are under age.

15 You testified, I believe it was yesterday -- I guess
16 yesterday afternoon, towards the end of the day -- that you
17 believe there still was activity of these companies that was
18 designed to market to youth; correct?

19 A. Yes, that's true.

20 Q. And is it to your testimony that even today that these
21 companies are still actually targeting people who are under the
22 age of 18?

23 A. I believe they are targeting new people to come into the
24 marketplace and they still understand that the majority of those
25 people are under the age of 18.

1 Q. You said that a couple of times here very carefully. I saw
2 as you said it this time you were very careful in saying it.

3 You said they are still focused on targeting new people
4 or people who are newly coming into the market knowing that many
5 of them -- that people coming into the market are, many of them,
6 under the age of 18; right?

7 A. Correct.

8 Q. That's what you just said. My question, I think, is a
9 little bit different.

10 A. Okay.

11 Q. Isn't it a fact -- are you able to say that these companies
12 are specifically intending to reach out and communicate, target
13 people who are under 18; not simply that they know that new
14 smokers are often under 18, but they are specifically targeting
15 those particular new smokers who are under the age of 18? Is
16 that your testimony?

17 A. My testimony is this. That the targeting I think is not so
18 much defined in my mind by an age grouping, it's defined by user
19 status. And I do believe that they are targeting people who are
20 currently nonusers, and the large majority of those nonusers who
21 are likely to start are teenagers.

22 Q. That's why I asked the question as precisely as I did.

23 There's no question that the industry could target new
24 entrants who are 18 years of age and over, and that would be
25 perfectly legal, and again we believe that you testified this

1 morning that it would not be inappropriate from a marketing
2 point of view. I want to differentiate those people from people
3 who are new smokers who are not 18 years of age. So even though
4 you say, well, we're targeting new smokers --

5 A. Right.

6 Q. -- my question is more refined.

7 Do you have actual evidence that you can state as an
8 expert demonstrates that the companies are actually targeting
9 that particular group of people who are new smokers who are less
10 than 18 years of age? Can you say that as an expert?

11 A. It's my judgment that they are.

12 In terms of looking at a document, one document to tell
13 you that where they say that, "Let's go after 16 and 17-year-old
14 nonusers at the moment," I don't have a document to cite to you
15 on that.

16 Q. That's really kind of what I was getting at.

17 Isn't it true if you really go through the documents
18 very systematically and you look for direct evidence that the
19 industry wants to get the business, wants to get the business,
20 but has decided to go after the business of people who are under
21 18, that is not something that is said in the documents. Fair?

22 A. Well, this is sort of covering old ground, I think. You
23 know, where I said if you look at the target market, is there --
24 is the age variable used as the variable to segment the market,
25 and having segmented that way, is there a segment that is

1 targeted that is described as being 16 and 17-year-olds? There
2 is not a document that says that.

3 If you segment the market on the basis of user status,
4 there is in my judgment a focus on pursuing the segment of
5 customers who are currently nonusers and they know that the end
6 result of their work with respect to that is that the --
7 typically a person who becomes a starter is under the age of 18.
8 Q. Again, I think I won't pursue it. I'll just ask you a
9 couple of more questions and we will move on.

10 But let's assume that a company wants to target people
11 who are 18 years of age who are just beginning to smoke. So
12 they are saying we're going after the young adults, we're going
13 after new smokers. That's what they want to do.

14 But then they say we know that we really can't target
15 people who are under 18, so if we specify an age, it's going to
16 be 18 and above.

17 Would you say that that company is targeting people who
18 are less than 18? They want to get new smokers --

19 A. Right.

20 Q. -- let's assume that. They want to get them 18 and older
21 and, therefore, they specify 18 and older.

22 A. Uh-huh.

23 Q. Do you know of any documents that say, "No, these companies
24 are going further. They are specifically targeting that portion
25 of new smokers who are less than 18"? Any document that says

1 that?

2 A. Well, as I've -- I think I've already answered this
3 question, that I know of no document that says that there are
4 16, 17-year-olds that they are specifically targeting within
5 that new user population.

6 Q. Under the age of 18?

7 A. I said 16, 17.

8 Q. Let's go and make this a little bit more concrete with
9 respect to what's happening today.

10 I believe in your testimony you specified four respects
11 in which youth continue to be exposed to marketing efforts of
12 defendants through communications.

13 A little bit focused on this question because the
14 question to you really was: Please explain the ways that
15 defendants continue to market to youth.

16 That's a question that asks for what the defendants are
17 doing. Your answer, though, talks about youth exposure.

18 So my question to you is not youth exposure, my
19 question to you is defendants doing what they did. Okay.

20 A. Right, but it's the defendants doing that results in the
21 exposure.

22 Q. Fine. Your answer was a little bit different, so I thought
23 I would put it to you.

24 With respect to point of sale materials, point of
25 purchase is your first one; isn't it true that you've not seen

1 any document since 1990 which says that the objective of the
2 company is people under 18 when it comes to point of purchase?

3 You have seen no document where an objective --

4 A. I understood the question.

5 Q. -- in connection with point of sale to market to people who
6 are less than 18.

7 A. Again, I've not seen a document that says we are targeting
8 people under 18 with our point of purchase materials.

9 Q. Let's talk a little bit about the magazine placement -- I
10 shouldn't have taken that off -- magazine placement. Media
11 advertising for some brands, let's include magazine placement.

12 Isn't it true that you've not seen any documents from
13 any companies that discuss as an objective targeting youth with
14 magazine placement since 1990?

15 A. That would be correct; that I have not seen a document which
16 says we are targeting youth with these particular ads.

17 Q. Since 1990 have you seen any document that discusses as an
18 objective reaching youth with direct mailing practices?

19 A. Not specifying an objective of that.

20 Q. Is it true that when it comes to the buzz -- I never heard
21 of that before this case, buzz -- that you've not seen any
22 documents showing that the objective was to create buzz among
23 people less than 18?

24 A. It does not specify among whom the buzz is being created,
25 but one of the things about buzz is that it's -- it's well known

1 that it's not controllable and not targetable.

2 Q. That was my point. It's not targetable and it's not
3 targeted.

4 You've not seen any documents that says that it's
5 targeted to people under 18; correct?

6 A. Correct. You would not see that for a program which is
7 creating buzz because it has broad diverse, diffuse impact which
8 the company doesn't control after it's created.

9 Q. Isn't it true that you've seen no document since 1990 from
10 any of the companies that says, "We intend through our marketing
11 to reach people who are under 18 years of age"?

12 A. In terms of -- I think this is -- we've already covered this
13 ground. But in terms of a specification of a target market
14 described by an age variable under the age of 18, I've not seen
15 that document.

16 Q. Let's go to the next segment -- which my folder is smaller
17 and my time is shorter, so that means I guess it's got to be
18 shorter -- which is low tar ads -- by that, I mean ads for
19 low-tar cigarettes -- and statements regarding health effects of
20 smoking, statements about diseases caused by smoking.

21 You've offered opinions to the effect that the
22 companies placed ads which, relating to low tar products, which
23 were designed to dissuade people from quitting; correct?

24 A. Well, I didn't break out ads in particular.

25 What I did say was that there was a strategy around low

1 tar/low nicotine products. So, first of all, there were product
2 introductions and, secondly, there were messages which
3 accompanied those product introductions.

4 Q. So I'll put ads and product.

5 A. Fine.

6 Q. Is that better? Is that better, ads and product?

7 A. In my opinion, yeah.

8 Q. That's fine.

9 And again your next theory is that the company, in
10 making statements about evidence relating to the health effects
11 of cigarettes, were doing so in an effort to dissuade people
12 again from quitting; correct?

13 A. That would be one of the purposes, yes.

14 Q. Let's talk a little bit about the history of quitting or the
15 history of consumption here in the United States, or maybe
16 better yet, this whole little area here for just a moment.

17 If we begin in -- focusing on low tar in particular.
18 It's true, is it not, that low-tar cigarettes or the filtered
19 cigarettes were introduced back in the late 1940s, early 1950s,
20 filtered cigarettes?

21 A. That sounds right to me.

22 Q. And I believe you pointed out that there were certain ads
23 that were used in connection with filter cigarettes back in the
24 late '40s, early 1950s, that made pretty explicit health claims;
25 correct?

1 A. Yes.

2 Q. The ones that said, you know, More doctors smoke Camel or
3 whatever.

4 A. Right. I didn't specifically cite that one, but in that
5 neighborhood.

6 Q. And isn't it true that in 1954 -- by 1954 most of those
7 doctor ads were pulled?

8 A. I believe that's correct.

9 Q. And that was a good thing from your point of view, wasn't
10 it?

11 A. I don't make a judgment about -- I haven't tried to make a
12 judgment about whether it's good or bad.

13 Q. Is it also true that by 1955 the Federal Trade Commission
14 had issued a regulation that basically said that the tobacco
15 companies could no longer make health claims with respect to
16 cigarettes?

17 A. I think it's -- explicit health claims?

18 Q. Yes.

19 A. Yes.

20 Q. And as you understand that remains true today; that is, you
21 can't make an explicit health claim in connection with
22 cigarettes?

23 A. Correct.

24 Q. Now, isn't it also true that by 1966 or thereabouts, 1966
25 the Public Health Service came out and said that we want to

1 encourage people who can't quit or who do not want to quit
2 smoking, we want to encourage them to switch down to
3 lower-delivery cigarettes; correct?

4 A. Yeah. You know, my -- the way I have the terminology in my
5 head is basically well, saying that, as you were intimating,
6 quitting is a good idea, but if you can't quit, the
7 preponderance of the evidence seems to suggest that it's a good
8 idea to switch to low tar/low nicotine.

9 Q. And, in fact, the government came out shortly thereafter --
10 organizations like the American Cancer Society came out with
11 actual brochures and advertising and -- pamphlets, but they are
12 marketing pamphlets carrying that message out; correct?

13 A. I couldn't -- I know there were some. Now, whether they,
14 you know, particularly the American Cancer Society or who it
15 was, I couldn't cite to you. But there were other people who
16 sort of picked up on that theme.

17 Q. And the idea was if you want to -- let me take a step back.

18 If you want to have people have the option of using low
19 tar if they don't want to quit, and if the government is going
20 to say, "Really, if you can't quit or don't want to, switch
21 down," for that to work, those folks have got to have a product
22 to buy; correct?

23 A. Just make sure I understand your question.

24 Q. The government wants people to switch down if they can't
25 quit; right?

1 A. Yes.

2 Q. And let's say the people say, "Hey, that's a good idea. I
3 want to switch down. I would rather not quit." None of that
4 works unless there's a product for them to buy.

5 A. It's got to be a possible switch tour.

6 Q. Got to be a possible switch.

7 You've got to have a product -- excuse me -- you've got
8 to have a product, and you just indicated beyond the product, if
9 you want to have people know about the product and choose to use
10 that product, you've got to have advertising, too.

11 A. That's a little bit strong. I mean, you usually would have
12 advertising.

13 Q. You surely would. In the United States you want your
14 product -- you want the manufacturers to have an incentive to
15 sell the product. They got to sell the product in a sufficient
16 volume to make a profit; right?

17 A. Okay.

18 Q. And if they don't want to sell in significant volume enough
19 to make a profit, they got to broadcast their brand?

20 A. Not necessarily. I mean, you know, the scenario you're
21 building is that the government is saying, and other people are
22 saying, this is a good thing to do, so -- I mean, it could be
23 that the customer will go in search of the product.

24 But, I mean I will agree with you that the reality of
25 the situation is that the -- that there was heavy advertising

1 support put behind these products.

2 Q. The reality, the economic reality of the situation -- and
3 Dr. Harris testified to this as well -- the economic reality of
4 the situation is if this idea was going to work, manufacturers
5 had to have a commercial incentive to make the product and
6 customers had to know where to go and they had to want to buy
7 it; right?

8 You had to have both a supply and a demand.

9 A. You had to have -- right, both of those have to happen.

10 Q. The University of Chicago, right, the University of Chicago
11 is high in demand?

12 A. Among other places.

13 MR. BERNICK: I went to the University of Chicago, Your
14 Honor.

15 THE COURT: I never would have guessed that.

16 (Laughter)

17 Q. So, the advertising -- I'll just leave that one alone. The
18 advertising is there for low-tar cigarettes. And is it true
19 that at the same time the government was coming out -- I think
20 we've established the government was coming out with its own
21 little pamphlets, and lo and behold what happened -- and your
22 chart demonstrated it, maybe I'll just put it up -- your chart
23 demonstrated -- it's from your report, page 126 -- that from the
24 late '60s up through the early 1980s there's a very significant
25 increase in low-delivery cigarettes; correct?

1 A. Yeah. Well, yeah, you can -- I would guess I would have
2 said like early '70s, but --

3 Q. So if we go from the late '60s to -- you're right -- from
4 the late '60s on into the mid-'70s, you get a trend that kind of
5 looks like that; right?

6 A. Yeah, you do.

7 Q. Okay. And that trend reflects the fact that people caught
8 on to that low-delivery product pretty fast. Fair enough?

9 A. Right. Right. They did.

10 Q. And isn't it true that in that process people who were
11 public health authorities actually praised the industry's
12 efforts to make available -- to design and make available these
13 low delivery products? It's just during this period of time.

14 A. I'm not sure that they were praised or not. They could well
15 be. I'm just not familiar with it.

16 Q. Isn't it true that all the way up until the late 1990s the
17 government stood by its encouragement of people to switch down
18 if they couldn't or didn't want to quit?

19 MS. BROOKER: Objection. This is going beyond the
20 scope of Dr. Dolan's direct examination.

21 THE COURT: And I think also beyond his area of
22 expertise.

23 MR. BERNICK: Well, I'll define the question --
24 rephrase the question differently.

25 BY MR. BERNICK:

1 Q. As you understood the market in which this advertising was
2 done, isn't it true that the marketplace in which this
3 advertising was done was a marketplace in part affected, or in
4 part influenced, by the government's continuing endorsement of
5 low-delivery cigarettes?

6 A. I would just say -- I would just take exception -- I'm not
7 sure that's quite the right word, but continuing endorsement. I
8 can't verify. I wouldn't stipulate that there was a continuing
9 endorsement by the government.

10 What I would say is that the Public Health Service
11 statements about low tar/low nicotine certainly impacted the
12 information context in which the marketing of the manufacturers
13 took place.

14 Q. Fair enough. I want to show you JD 047664 called Five Ways
15 to Reduce the Risk of Smoking put out by the Public Health
16 Service in 1970. And if you direct your attention to the second
17 page, or after the cover, it says, What can you do to lower your
18 intake of all cigarette smoke? Here are five positive steps.
19 Number one, choose a cigarette with less tar and nicotine.

20 Learn the tar and nicotine content of your cigarette.
21 The Federal Trade Commission gives the latest numbers.

22 Find out how much you can reduce your tar and nicotine
23 intake by switching to another brand or to another version of
24 the brand you are presently smoking.

25 Will such a switch result in your smoking more?

1 Probably not. Most smokers who make such a change either
2 continue to smoke at their previous rate or even smoke less.

3 So, basically, the government has got a pretty simple
4 message, which is the government says: Switch. Right?

5 MS. BROOKER: Your Honor, I'm going to object. This
6 again, he's just using this document. This line of questions is
7 going beyond the direct testimony of Dr. Dolan's. It's
8 unnecessary to go in this direction.

9 He's already testified that these -- that this existed
10 in the environment. There's no reason now to go down this
11 entire path. Completely beyond his direct examination.

12 MR. BERNICK: Very short. And I just want to pick up
13 on the fact of he's now acknowledged that the government was
14 there, how the government was conveying the message, and then we
15 will go on to how the defendants were conveying the message.

16 THE COURT: You may proceed.

17 BY MR. BERNICK:

18 Q. You see where it says, basically, one of the messages is
19 switch.

20 A. Well, yeah. I guess it's -- I guess we could -- five ways
21 to reduce -- yeah, I guess it would be switched. So the
22 assumption would be that somebody is already smoking, I guess,
23 would go into this story.

24 Q. And certainly the suggestion is that if you do that, it
25 might lower your risk; right?

1 A. Well, let's see.

2 The question is, What can you do to lower your intake
3 of all cigarette smoke? The title is Five Ways to Reduce the
4 Risk of Smoking. So, yeah, I would presume a person would
5 interpret that as a health risk.

6 Q. We will put down lower. The arrow for risk is lowered?

7 A. I'm sorry. What did you say?

8 Q. This may be a way of reducing your risk.

9 The government's messages were twofold: Switch, and
10 this may be a way of reducing your risk. Right?

11 MS. BROOKER: Your Honor, I'm going to object to this
12 line of questioning. It does not call upon the expertise of
13 Dr. Dolan to interpret this document and what the government
14 meant.

15 THE COURT: Sustained.

16 BY MR. BERNICK:

17 Q. Was that your understanding of the message that the
18 government was delivering to the marketplace?

19 THE COURT: I just sustained that.

20 MR. BERNICK: I'm saying without reference to the
21 document.

22 The government was conveying the message to the
23 marketplace to switch and if you do switch, it may reduce your
24 risk.

25 THE COURT: No. The objection is sustained.

1 BY MR. BERNICK:

2 Q. Are you familiar with what the American Cancer Society had
3 to say about this?

4 MS. BROOKER: Same objection, Your Honor.

5 THE COURT: Mr. Bernick, I don't think going through
6 all the messages of the public health community, including the
7 government, was within the scope of his direct examination.

8 MR. BERNICK: Well, I won't pursue it, Your Honor.
9 What we -- what I want to establish and what we will go on and
10 do is how the messages that he is saying that we made that were
11 wrong compare to the messages that were already out there
12 through an organization which he acknowledges was influential in
13 the marketplace.

14 MS. BROOKER: I would object to the characterization.

15 MR. BERNICK: The government is saying it's a
16 fraudulent representation. I'm sorry.

17 How can it be a fraudulent representation in what we
18 are doing is exactly what the government was suggesting that we
19 do?

20 MS. BROOKER: I would object to the characterization.
21 The way that Mr. Bernick just characterized Dr. Dolan's
22 testimony, it's improper.

23 And if he wants to ask a question of Dr. Dolan and what
24 his testimony was on that point, he should do that, but not
25 stand up here and make that kind of a misrepresentation.

1 MR. BERNICK: Misrepresentation.

2 THE COURT: Mr. Bernick, ask your questions in terms of
3 what his direct testimony was. Don't call upon him to interpret
4 what the government's messages were.

5 BY MR. BERNICK:

6 Q. Okay. When the tobacco industry used its ads they had
7 messages; correct?

8 A. Yeah. And an ad would typically have a message, yes.

9 Q. What you said in your testimony is that those messages were
10 false messages; correct?

11 A. I said that what -- those ads were -- created the -- helped
12 create the perception among -- among consumers, some consumers,
13 that low tar/low nicotine cigarettes had a differential health
14 impact, a better health impact for them -- or less bad health
15 impact, I should say.

16 Q. I know that's what your testimony said. I'm asking you a
17 different question.

18 I'm asking you whether your testimony was and is that
19 the ads that were used by the tobacco companies were false?

20 MS. BROOKER: Objection. That question has just been
21 asked and answered.

22 THE COURT: No. The objection is overruled.

23 A. I said what -- I characterized it as a deception in the
24 sense that the end result was that a number of smokers came to
25 believe that switching to low tar/low nicotine cigarettes meant

1 they had less health risk.

2 Q. Well, when you say it's deceptive, that suggests that it was
3 false; right? You can't deceive somebody if you're telling them
4 the truth.

5 A. Well, I mean, if -- I mean, let's take, for example, a True
6 ad. Now, if you -- we see a True advertisement of a person who
7 is just there in their tennis gear and says, "Gee, with all I've
8 heard, I think I'll either quit or smoke True."

9 Q. Let's take that one.

10 A. Can I finish?

11 Q. Sure.

12 A. Now, if you put that in front of me and said, "Is that
13 false?" I would say, No, it's not false. I mean, we have a
14 made-up character who is saying something. Does it help create
15 a false impression, you know, an incorrect impression among
16 consumers? I would say it does.

17 Q. What's the false impression?

18 A. That this is a viable alternative to quitting.

19 Q. Well, how is that false if that's exactly what the
20 government is saying that should have been done?

21 MS. BROOKER: Objection, mischaracterization. That's a
22 mischaracterization of the government's position.

23 THE COURT: The objection is overruled.

24 You may try to answer.

25 A. So how is the ad?

1 Q. If an ad says, Either quit or smoke True. I decided to
2 smoke True. It says, If you don't want to quit or decided not
3 to quit, you've got two alternatives. You quit or smoke True.

4 A. Right.

5 Q. And you said -- I said, why is that -- why is that false if
6 the government has said exactly the same thing, either you quit
7 or you smoke a lower delivery cigarette?

8 A. But I started by saying if you take that True ad and say, Is
9 this false?

10 I would say no, it's a person in a tennis suit who
11 says, with all I looked at, I decided to either quit or smoke
12 True. So is the ad in and of itself false? No, but the net
13 result was that while the cigarette manufacturers knew that
14 there were no -- you know, as testified to by Mr. Schindler was
15 that he didn't have any data that showed that there was a --
16 such a thing as a safer cigarette.

17 This advertising messages had the impact of creating --
18 contributing to creating the impression among users that
19 shifting to a low tar/low nicotine cigarette yielded them a
20 differential health benefit.

21 Q. Well, is that -- is it false that switching to a lower-tar
22 cigarette or a low-delivery cigarette had a differential health
23 benefit? Is that false?

24 A. Well, now you're really getting beyond my expertise, and --
25 but -- and, you know, into a whole area of compensation and so

1 forth in which there are other experts to testify.

2 Q. Isn't it correct that the advice to switch or quit, that
3 those two alternatives in the ads -- switch down was exactly
4 what the government was saying that should be said to consumers?

5 MS. BROOKER: Objection. We've already gone over some
6 of this area and again it's just a mischaracterization of what
7 the government's position, and he says government in general,
8 but it's just a mischaracterization of what the government has
9 ever said.

10 MR. BERNICK: Your Honor, I want to keep this very
11 brief because I don't want to keep on repeating this.

12 The essence of what we're saying is the government has
13 said that our ads were deceptive. Our ads followed exactly what
14 the government wanted us to do.

15 The witness can't say it was false to advise people to
16 switch down, and I further want to establish that all our ads
17 did was to deliver exactly the same message that had been
18 blessed by the government. That obviously is relevant to his
19 testimony.

20 THE COURT: The witness may answer.

21 A. The question was?

22 Q. The question is: Isn't it true that when our ads say either
23 if you decide not to quit, switch down, that that message was
24 exactly the same message that the government was delivering at
25 the same time?

1 A. As I stated about 10 minutes ago, as I understand the
2 message from the government -- at least, as I've seen it
3 expressed in the Surgeon General's Reports -- was basically, you
4 know, the main element of the message was: Quit. This is the
5 thing that is really more beneficial for your health.

6 And then part 2 was if you can't quit, the
7 preponderance of the evidence seems to suggest that trading
8 down -- switching to a low tar/low nicotine cigarette. That's
9 my understanding of the two major points.

10 Q. Right. If we take that second point -- that is, if you
11 can't quit or you don't want to quit, switch down -- that was
12 the government's message; correct?

13 A. It was the government's message, as I understand it, at one
14 point in time that the preponderance of the evidence was that
15 that was a good idea.

16 Q. And the ads that the industry produced had that same
17 message: Switch down; correct?

18 A. Well, it presented the availability for those brands. I
19 mean, sometimes -- you know, typically when Marlboro Lights came
20 out, it was offered as an option for somebody to switch. You
21 could stick with Marlboro or you could switch to Marlboro
22 Lights.

23 Q. Take an example, Merit. Exhibit 25510, which is one of the
24 ads that you feature in your testimony.

25 "Merit taste eases low tar decision. Enriched flavor

1 tobaccos proving real alternative to high tar smoking."

2 That's the same message that the government was
3 delivering; correct?

4 A. Just let me look at it for one second, please.

5 (Pause)

6 Well, it's a -- I mean, this is saying that it's --
7 it's a real alternative, although an alternative with real taste
8 if you switch into the low tar segment.

9 Q. It's no different from what the government was saying;
10 correct? It was a real alternative?

11 A. I would not say it's exactly the same -- same message.

12 Q. It certainly doesn't go further than what the government
13 said, does it, except to say about taste?

14 A. Right. I mean, here, it's -- it's saying that this is a
15 real alternative and, you know, it's being marketed as a, you
16 know, a health reassurance segment.

17 Q. Let's talk about the health side of the equation.

18 A. Okay, to the extent I can.

19 Q. The ads -- the ads themselves make no representation
20 regarding health; correct?

21 The ads don't say smoking low-tar cigarettes will
22 reduce your risk, do they?

23 A. This one doesn't.

24 Q. There's no ad in any of your direct testimony that makes an
25 explicit health claim regarding reduction of risk, is there?

1 A. Not to my knowledge is there an ad that makes explicit
2 health claim, that's correct.

3 Q. And, really, the essence of what you're saying about health
4 is you say there is positioning.

5 These ads position low-delivery cigarettes as being
6 health reassurance or potentially healthier; correct? It's a
7 positioning point.

8 A. That's what they were trying to do, yes.

9 Q. Another way of saying it may be, in more simple terms, is --
10 aren't you saying the essence of what these ads do is to suggest
11 or imply reduced risk?

12 A. You mean suggest an opposed to explicitly state?

13 Q. Yes. Another word for position is that they were designed
14 by the circumstances to suggest a potential health reassurance.

15 A. Well, I'm just hesitating on the use of the word
16 positioning. I mean --

17 Q. It was your word in your testimony, wasn't it?

18 A. That's a word that I used, but not in the way -- I'm quite
19 comfortable with the way I used it. I wasn't comfortable with
20 the way you used it.

21 Q. What you're saying to the consumer these cigarettes would be
22 construed as being potentially lowered in risk; correct?

23 A. That was the idea of the health reassurance brands, and the
24 segments in the research shows that the consumers, some of them
25 came to see it that way.

1 Q. There's been testimony in this case that the implication of
2 lowered risk for lowered delivery cigarettes was not only
3 permitted by the FTC, it was mandated by Congress. Are you
4 familiar with that fact?

5 MS. BROOKER: Objection, beyond the scope of the direct
6 examination.

7 MR. BERNICK: I asked him whether he was familiar with
8 the fact.

9 THE COURT: Sustained.

10 BY MR. BERNICK:

11 Q. Well, have you looked at the context, the context in which
12 these ads were framed?

13 A. Yes. I tried to understand the context in which the
14 marketing was taking place, yes.

15 Q. In trying to understand the context for the market, did you
16 look back to the circumstances that were present in 1966 when
17 the Public Health Service decided to endorse lower-delivery
18 cigarettes and the FTC decided to permit -- permit -- low tar
19 and nicotine rating advertising, did you look into that to see
20 what it was that was anticipated by the Public Health Service
21 and by the FTC?

22 A. I understood those two events. To say did I look into it to
23 see what was anticipated?

24 Q. Yes.

25 A. I don't recall ever sitting down to say -- I mean, I may be

1 missing something here.

2 Q. In 1972 are you familiar with the fact that it became
3 mandatory, Congress passed a law requiring an advertising, the
4 disclosure of tar and nicotine deliveries? Are you familiar
5 with that?

6 MS. BROOKER: Objection, beyond the scope of the direct
7 examination and beyond the scope of Dr. Dolan's expertise in
8 marketing.

9 MR. BERNICK: Your Honor, they can't have it both ways.
10 They cannot attack our ads for what they did; put a witness on
11 the stand who recognizes the context is critical and then
12 foreclose cross-examination of what the context is. This is
13 Dr. Harris's own testimony.

14 THE COURT: I think that's correct. He has to be
15 allowed to be crossed on this issue. The objection is
16 overruled.

17 BY MR. BERNICK:

18 Q. Did you look into what Congress intended and what the law
19 required when Congress passed legislation mandating the
20 disclosure of tar and nicotine deliveries in the early 1970s?

21 A. Let me break -- you had a question pending to me and then
22 there was an objection and then you went on to another question.
23 The first question was, was I aware --

24 Q. Yes?

25 A. -- of the FTC in 1972 requiring the placement of tar and

1 nicotine ratings in advertising? And the answer is yes.

2 The second question is?

3 Q. My second question asks you for the reason of what they
4 anticipated when they did that and your answer was that you
5 didn't know.

6 A. No.

7 Q. I was trying to get you back. Forget about it. I'll
8 withdraw the statements and questions. I want to move on.

9 In 1972 Congress acted, and Congress passed legislation
10 requiring that all ads disclose tar and nicotine deliveries;
11 correct?

12 A. I believe so, yes.

13 Q. Did you take a look at what was anticipated in connection
14 with that piece of legislation, what the intent of the
15 legislation was?

16 MS. BROOKER: Objection. Now this is going beyond the
17 scope of direct examination.

18 To ask Dr. Dolan what he understood the context is one
19 thing. To ask if he knew what the intent behind the legislation
20 or the intent behind what the FTC was doing is clearly beyond
21 the scope of his expertise or his direct examination.

22 THE COURT: Sustained. And I think what is being asked
23 is the intent of Congress, and if anybody can define that, they
24 would be billionaires.

25 Go ahead, please. Next question.

1 BY MR. BERNICK:

2 Q. You say that at the time that these representations --
3 these ad were taken out, that you believed that the industry
4 didn't have any basis for suggesting that there might be a
5 reduction of risk. Do you recall that?

6 A. I didn't say it quite that way.

7 Q. You said that Mr. Schindler and Mr. Morgan testified in the
8 Minnesota case that they understood that there was no health
9 differential in lower-delivery cigarettes; correct?

10 A. Right.

11 Q. And you then, in order to support that, presumably you
12 looked back at their testimony?

13 A. I did, yes.

14 Q. Did you look to anything else?

15 A. No. I would say their testimony was -- I don't understand
16 when I'm looking to see what they said in their testimony, what
17 else I should look at.

18 Q. Isn't it a fact that both individuals said that while their
19 companies didn't have the data to prove that these cigarettes
20 were less risky, that they were prompted to go down this road by
21 the government's public health authorities recommending that
22 they do so?

23 MS. BROOKER: Objection. This is beyond the scope.

24 MR. BERNICK: Your Honor, this is exactly what they
25 testified to in Minnesota.

1 THE COURT: The objection is overruled.

2 A. I mean, I do -- I know the first part of it. In terms of
3 whether they went on to say we were led down the road by the
4 government or whatever your characterization of it was, I didn't
5 follow that part of their testimony.

6 Q. Did you read their testimony to see why it was what they
7 said that they knew about the potential health benefits when
8 they were marketing these cigarettes?

9 A. Well, let's see. When I read their testimony it was
10 basically to see what they were saying about a lot of things.
11 So I don't -- I didn't go to their testimony and read their
12 testimony with the specific question you just asked me in mind.

13 Q. Did you personally read the testimony of the individuals
14 that have cited in your direct examination?

15 A. Oh, yes, I did.

16 Q. I want to show you testimony of Mr. Schindler at page 6703
17 which is March 6, 1998, Minnesota trial.

18 MS. BROOKER: Does Dr. Dolan have a copy of his
19 transcript?

20 MR. BERNICK: I'm getting it.

21 MS. BROOKER: Can we wait for the question until we get
22 the copies, please?

23 BY MR. BERNICK:

24 Q. Take a look at page 6702 carried to 03 and 04.

25 Do you see where it says on 6702, line 11, "Are you

1 aware that in this courtroom RJR is suggesting that low-tar
2 cigarettes are safer? Are you aware of that?"

3 "No."

4 And he then goes on later on. "I want you to assume
5 that that's what's being urged in this courtroom. If that is
6 being urged, you know of no data to confirm that, do you?"

7 And the answer is, "I'm not going to assume that was
8 said in this courtroom. I find it hard to believe that it was.
9 In fact, I don't believe it was."

10 It then goes on and the question is put to him again.
11 "You know of no data to confirm it, do you?"

12 "Answer: I don't know of any Reynolds data that says
13 that low-tar cigarettes are safer and I do not assume that
14 happened in this courtroom.

15 "In fact, you would find it hard to believe that
16 because you don't believe it; correct?"

17 "Answer: Believe what?"

18 "Questions: That low-tar nicotine cigarettes are
19 safer.

20 "Answer: In the absolute that you're defining that I
21 believe that, you know, basically what medical science has said
22 over the years, that it's a good idea to address the risk in
23 smoking -- cigarette smoking by reducing the tar levels. And
24 we've pursued that over the years, and we have cigarettes today
25 that are substantially less in tar and nicotine. I believe that

1 in principle they may have or have the potential to reduce the
2 risk. That certainly reduces the compounds associates with
3 risks of second-hand smoking. In an absolute sense of safer
4 cigarette, I couldn't say that. But it reduces tar, reduces
5 compounds that people associate with the risk of smoking."

6 Did you read the full testimony before you crafted your
7 direct examination?

8 A. As I said a moment ago I read the full testimony of
9 Mr. Schindler.

10 Q. And Mr. Schindler isn't saying here that there is no data to
11 say that the risk may be lower, is he?

12 He's saying, I don't have any Reynolds data, but
13 medical science says if you reduce the dose, you should reduce
14 the risk and that's what we're doing.

15 A. He says, "I don't know of any Reynolds data that says that
16 low-tar cigarettes are safer."

17 Q. Go on. That's Reynolds' data.

18 If Reynolds knew that the government and the scientific
19 community believed that reducing smoke reduced risk, why
20 couldn't -- why couldn't Mr. Schindler rely upon the government
21 data in putting out these cigarettes.

22 MS. BROOKER: Objection. That calls for speculation of
23 Mr. Schindler.

24 THE COURT: Sustained.

25 BY MR. BERNICK:

1 Q. Isn't it a fact, Dr. Dolan, that in both cases -- that is,
2 both Philip Morris and RJR and every other tobacco company in
3 the industry had -- did not have the ability to prove safety,
4 made no claim that safety had been proven, but in all cases had
5 the government's recommendation to use when they came out with
6 lower-delivery cigarettes?

7 MS. BROOKER: Objection, clearly beyond the scope of
8 direct examination and this witness's expertise. Nowhere does
9 he testify as to safety in his direct testimony.

10 MR. BERNICK: It's the same artificiality, Your Honor.
11 He may not know any of this.

12 THE COURT: The objection is overruled.
13 You may answer.

14 A. Could I have the question, please?

15 Q. Yes. Isn't it a fact that with respect to this industry,
16 all the way until the year 2000, that the medical community was
17 saying consistently, and the government was saying consistently,
18 that reducing deliveries should lower risk, and what the tobacco
19 companies were doing in coming out with these cigarettes and
20 these ads is following that lead even though they didn't have
21 internal data to prove that the cigarettes were safer?

22 Isn't that a fact of what happened?

23 A. That's beyond my expertise. I don't know whether that's
24 true or not.

25 Q. I'll accept -- that's fine. That's fair.

1 Now, if you take a look at the next prong here, the
2 last thing that was -- you say we said. Statements regarding
3 the health effects of tobacco. Are you an expert in whether
4 those statements were true or false when made?

5 A. No, I wouldn't consider myself an expert in tracking the
6 health -- what was known about the health effects of cigarettes.

7 Q. So when the tobacco companies made claims about the health
8 effects of smoking, would it be up to somebody else to say
9 whether they were true or not as an expert?

10 A. That draws on an expertise that I do not have.

11 Q. Let's take a look at the question of whether people were
12 already aware of the health effects of smoking. That is, the
13 tobacco companies are making a statement regarding health
14 effects, perhaps saying not proven.

15 A. Right.

16 Q. Their audience is getting information from many sources
17 about the health effects of smoking and they have their own
18 opinions.

19 Are you an expert in what the actual views were of the
20 consuming population, the customer base, at the time that these
21 different statements were made?

22 A. I tried to be able to assess the frame of mind of customers,
23 what they were looking for at different points in time. Am I an
24 expert on how they would be interpreting the medical evidence
25 that's been presented? I'm not, no.

1 Q. That's my point. There's a lot of polling data, survey data
2 and research that's been done with respect to people's knowledge
3 and attitudes about smoking over time; correct?

4 A. There is a lot of that, yes.

5 Q. And there's been a lot of research, in fact, done about
6 where people looked to get information about the health effects
7 of cigarettes; correct?

8 A. That's beyond my expertise. As I understand, there will be
9 other people in -- a few witnesses down the road talking about
10 issues of risk perception.

11 Q. And, therefore -- just to cut to the chase -- when the
12 tobacco industry said something about the health effects of
13 cigarettes, you cannot speak as an expert based upon data about
14 whether those statements were regarded as authoritative,
15 reliable, deceptive, or anything. You haven't studied that
16 particular issue; correct?

17 A. Well, reliability, no. As I just said, that's beyond my
18 expertise.

19 What I did perceive was that in this continuing
20 controversy strategy the tobacco companies did try to seize the
21 mantle of authority by saying, you know, we -- we are moral
22 people, we see this as an important issue, the health effects,
23 and we know lots about this and we are conducting research on
24 it.

25 So there was certainly an attempt in my judgment by the

1 tobacco companies to be seen as authoritative.

2 Q. And for purposes of my questioning, I'll accept that.

3 A. Okay.

4 Q. My question is really a different one. My question takes
5 that a little step beyond and says: Well, the tobacco companies
6 may have been saying things and trying to convey authority, but
7 when it comes to their audience and how their audience, what
8 their attitudes were and their -- how they looked or didn't look
9 to the tobacco industry, that's an area outside of the work that
10 you've done on this case; correct?

11 A. Yeah, I would not say I specifically -- you know, I've seen
12 some of the data that you referred to earlier on kind of whether
13 the tobacco companies are a trusted source and that sort of
14 thing, but I don't consider it a particular area that I focused
15 on.

16 Q. So when it comes to whether consumers in 1970 regarded
17 statements being made by the tobacco industry as authoritative
18 or as not authoritative, that's an area that somebody else is
19 going to have to cover; correct?

20 A. At that level. But I mean, what I --

21 Q. Stay with that, please. Just that little piece first and
22 then you can go on and cover what else you want.

23 But when it comes to how the tobacco industries'
24 statements were regarded by people who were in the audience,
25 that is a subject that you have not studied as an expert;

1 correct?

2 A. Not -- not in the same detail as some other people would
3 have.

4 Q. I'd like to take the next step, then, and go from what we
5 said, what we did, and talk about the impact and I'd like to
6 talk about impact in two different ways. One is impact on
7 initiation and the other is on quitting.

8 Are you with me?

9 A. I am.

10 Q. And you have testified that what the industry said and did,
11 at least on what it did, did have an impact on consumption
12 because it affected both initiation and quitting; correct?

13 A. Yes, I said contributed to that.

14 Q. I'd like to put up a board and see if we can't walk through
15 it and have me live up to my promise that I would finish.

16 If you take a look at your testimony, Dr. Dolan, at
17 page 43. You lay out a little schema or diagram dealing with
18 how -- I think you call it a hierarchy of effects which describe
19 a customer's relationship with the product.

20 A. A hierarchy of effects, right.

21 Q. And if I'm pointing to it properly at page 43, where you
22 start with customers who are unaware and then ultimately end up
23 being loyal.

24 A. Uh-huh.

25 Q. And what I have done on this exhibit, which is going to

1 become JD 010108, have I faithfully reproduced the hierarchy of
2 effects in your report?

3 A. I believe you have.

4 Q. Let's talk about -- use this hierarchy of effects and talk
5 about the effect of tobacco marketing on initiation and
6 quitting. Okay? Can we do that?

7 A. Well, all right. Yeah, yeah. I guess we can try that. A
8 little stretch, but we can do it.

9 Q. And we will change some of the words as we go along here in
10 order to make it -- tell me if it's right or wrong -- to make it
11 work.

12 If we just begin with your hierarchy of effects, would
13 it be fair to say that one of the purposes of marketing, if you
14 follow the hierarchy of effects, is to try to take your customer
15 along this line from being unaware of the product, to being
16 aware of it, being knowledgeable about it, to being interested
17 in it, to trying it, to repeat purchase, and to become loyal?

18 A. Yes.

19 Q. Those are all functions of marketing, in a sense a way of
20 measuring how effective your marketing is, is to see whether in
21 fact it produces the hierarchy of effects; correct?

22 A. See whether it moves people through it, right.

23 Q. These are all very distinct steps. That is, to go from
24 being unaware to aware, aware to knowledgeable, knowledgeable to
25 interested in, and so on and so forth; those are all distinct

1 steps that a person has to go through before they become a loyal
2 customer according to this scheme.

3 A. No. You know, even though I've mapped them out as distinct
4 stages here, there are some product categories in which those
5 first five steps can happen all at once.

6 Q. Sure.

7 A. So they will be collapsed.

8 Q. But one way or another, the customer has to go through each
9 one of them. You can't become knowledgeable about a product if
10 you're not aware of it. You can't become interested in it if
11 you know nothing about it. And you can't try it if you're not
12 interested in it; correct?

13 A. No. People would -- people would argue that, you know, this
14 is one possible hierarchy.

15 Next week I think you will see a different hierarchy
16 presented for low involvement products from Dr. Chaloupka.

17 But each one of these steps -- I mean, there are
18 certain products in which you don't really go through all of
19 those steps of really getting a lot of information about the
20 product.

21 For example, if you are at a checkout counter at a
22 convenience store and you see a new candy bar, and if you're
23 kind of hungry because you didn't have lunch that day, you grab
24 this new candy bar. Well, you've jumped to trial before -- I
25 mean, you got aware of it when you saw it, but you don't know

1 anything about it.

2 Q. You're aware of a candy bar, you don't know anything about
3 it, you're not interested in it, but you try it anyhow?

4 A. Yeah, basically, right. I mean, this is what's saying --
5 you know, there are certain product categories, and you can
6 check it out in the marketing literature in your spare time some
7 day.

8 Q. According to this hierarchy of effects, these are all
9 stages. They may be cleared quickly or slowly, but they are all
10 stages in a process; correct?

11 A. Right.

12 Q. Now, if we just focus on -- this is why we are going to be
13 able to just buzz through this. If you just focus on young
14 adult ads, the ads that you say were designed to target young
15 adults.

16 And we were, in particular, focused on the idea that
17 marketing made young adults who are unaware, aware of a product,
18 knowledgeable about it, interested in it, and then starting to
19 smoke. I want to focus on people who haven't, are nonsmokers
20 and whether there's a sequence that makes them into smokers.
21 That's why I said smoking initiation.

22 A. Okay.

23 Q. Repeat purchase and loyal customer.

24 The idea was that the young adult ads prompt people to
25 become aware of, knowledgeable about, interested in, starting to

1 smoke, and in fact smoking to the point that they are loyal
2 customers, those would be all be stages that that nonsmoker
3 would have to go through before they became a successful
4 customer of the ad; correct.

5 A. Successful what?

6 Q. If they became customer, loyal customers for the product
7 being advertised. They would have to go through all those
8 different steps; correct?

9 A. Well, again, yes, subject to what I said earlier; that, you
10 know, those steps can be collapsed in time.

11 Q. Now, if we were to take the first brand that we talked
12 about, the RJR brands, are you aware of any study, any study,
13 which proves that the Reynolds' ads, in particular, took
14 nonsmokers through this sequence where they became aware,
15 knowledgeable, interested in, and they started smoking Camel or
16 Winston brands?

17 Is there any study that you know of which demonstrates
18 that sequence?

19 A. Well, not each -- not each step has to be accomplished by
20 the ad.

21 Q. But that's my question to you. My question to you is: Are
22 you aware of any study which demonstrates that RJR ads have had
23 the effect of prompting nonsmokers to smoke?

24 MS. BROOKER: Your Honor, if I can just object a
25 moment. Clearly again Dr. Dolan was not finished with his

1 answer.

2 Mr. Bernick just rushes through to the next question.
3 And obviously Dr. Dolan is thoughtful and takes a few moments to
4 answer, and once again he was cut off.

5 THE COURT: Had you finished your answer?

6 THE WITNESS: No, I had not, Your Honor.

7 THE COURT: You may finish your answer.

8 A. It's not the requirement that an ad has to get somebody
9 through all of those steps. It's all of marketing. And, you
10 know, sometimes the awareness will occur from another source.

11 So in my judgment, you know, there are what -- and
12 certainly subsequent witnesses will discuss this in more detail
13 than I do, about the image which is created by an advertising.
14 So advertising has a role in creating the image and portraying
15 the benefits that a customer would see in the product and
16 generate that interest as a step toward initiation.

17 Q. That's really not -- first of all, we are here with you on
18 the stand today, with due respect.

19 A. Right.

20 Q. We're not here to cross-examine somebody in the future.

21 A. Right.

22 Q. And I heard you testify, and you repeated it. When I asked
23 you, I heard you testify in response to the government's
24 questions that in your view the ads that you found, that you
25 were -- the ad campaigns that were the subject of your

1 examination caused kids to smoke.

2 A. What I said was --

3 MS. BROOKER: Objection. That was a
4 mischaracterization.

5 THE COURT: Then the witness will answer. He's about
6 to. Go ahead, please.

7 A. What I said was the marketing activities of the companies
8 contributed to the initiation.

9 Q. Contributed to. Are you able to tell me of a single study
10 that says that ads by Reynolds contributed to in the sense of
11 caused smoking initiation?

12 A. I don't think you can sort out causation in the sense of
13 saying there's a lot of things that, which are going on
14 together.

15 As I've said a number of times, whatever company you
16 want to look at, the marketing programs of those companies, the
17 way in which they brought out products, communicated about those
18 products, got distribution and priced those products, were such
19 that they had the impact of contributing to the initiation of
20 smoking.

21 Q. I know you said that.

22 A. And I haven't stripped out an individual element to say,
23 okay, this particular advertising campaign was a cause of an
24 individual smoking. I've not tried to do that.

25 Q. Let's pursue a little bit because you used the word

1 contribute.

2 A. Uh-huh.

3 Q. And we are here in court and we want to talk about the word
4 cause, that something causes something else.

5 A. Right.

6 Q. So I'd like to ask you questions about cause.

7 Are you telling me that there are any studies which
8 demonstrate that ads to the young adult, the YAS, actually have
9 caused smoking --

10 A. Are there studies that show that?

11 Q. Yes.

12 A. Within the company documents?

13 Q. Yes. RJR ads causing smoking initiation.

14 A. Are there studies which I've cited?

15 Q. I don't think you -- you've not cited any studies. You've
16 cited surveys. You've cited -- all you basically have cited is
17 surveys that appear in the company documents.

18 A. Right. I've been focused on the company documents as we
19 said at the outset.

20 Q. I'm now asking a very specific question. We have to worry
21 about the word "cause."

22 Can you tell me of a single study which demonstrates
23 that any RJR ads actually have caused smoking initiation?

24 A. I don't know any study that's been framed that way.

25 Q. The same question with respect to Marlboro.

1 Any study that you can cite which shows that Marlboro
2 ads have caused smoking initiation?

3 MS. BROOKER: Objection. That's basically been asked
4 and answered by the last question. Dr. Dolan just said he
5 doesn't know of any study that's been framed that way.

6 THE COURT: Well, it wasn't clear whether that applied
7 only to that particular company.

8 You can ask this question. It's a yes or no.

9 A. The same answer.

10 Q. Same answer with respect to Newport?

11 A. Same answer.

12 Q. Same answer with respect to KOOL?

13 A. That's correct.

14 Q. Now, let's talk about the question of studies which address
15 the question of whether advertising generally -- that is, not
16 broken down by a particular campaign or particular brand -- but
17 advertising generally whether it causes smoking initiation.

18 MS. BROOKER: Objection. This whole issue of causation
19 and outside studies outside of the tobacco company documents is
20 really beyond the scope of the direct testimony of Dr. Dolan.

21 THE COURT: How can you say that?

22 MS. BROOKER: As I indicated, this is an area that
23 Dr. Eriksen will be expressly covering all the studies.

24 THE COURT: It doesn't matter whether you have other
25 experts to testify on this issue. This expert is testifying now

1 and he has clearly directly addressed that issue in his direct
2 testimony. No question about it. So the objection is
3 overruled.

4 Go ahead.

5 MS. BROOKER: Your Honor, if I just may briefly respond
6 by saying my point is that this expert has clearly indicated
7 that he has not studied the literature, which this question
8 calls for an answer responsive to what is the range of
9 literature, and obviously this expert has specifically studied
10 the practices of the tobacco companies by looking at their
11 marketing documents.

12 THE COURT: Cross-examination is for the purpose, one
13 purpose amongst others, to test the depth and the scope of
14 anyone's knowledge, in particular an expert's. Overruled.

15 Go ahead, please.

16 BY MR. BERNICK:

17 Q. In the tobacco company documents, have you seen and cited to
18 us any study where a tobacco company did research on whether
19 advertising caused smoking initiation?

20 A. They would not frame it as a cause.

21 Q. Are you aware of any published literature that addresses
22 this particular question?

23 A. Not around causation, no.

24 Q. You're not aware of it -- have you read the Surgeon
25 General's Reports that addressed the question of whether

1 advertising causes smoking initiation?

2 A. Right. I've read the Surgeon General's report, yes.

3 Q. Isn't it true that in 1989 the Surgeon General's Reports
4 specifically addressed the question of whether advertising
5 caused smoking initiation and said, "We have not seen the proof
6 of that and we don't expect it any time soon"?

7 A. Right. Yes, and that's because when you strip out
8 advertising from the rest of what's going on in the marketing
9 program, it's very hard to make such a judgment.

10 Q. So you're saying that the Surgeon General just kind of
11 missed the boat; that if they had looked at this properly, they
12 could have reached a different answer?

13 MS. BROOKER: Objection, argumentative.

14 THE COURT: Sustained.

15 BY MR. BERNICK:

16 Q. What the Surgeon General said in 1989 is that there's no
17 scientifically rigorous study available to the public that
18 provides a definitive answer to the basic question of whether
19 advertising and promotion increased the level of tobacco
20 consumption. Given the complexity of the issue, none is likely
21 to be forthcoming in the foreseeable future.

22 Were you familiar with that conclusion before you came
23 in to testify?

24 A. Could I have the rest of this document?

25 Q. That's the whole Surgeon General's report.

1 A. Well, I just -- I mean, I don't even have the pages you're
2 referring to.

3 Q. Page 516. Summary.

4 A. Right. I've got that, but don't you go on to 517?

5 Q. You don't have 517?

6 A. I don't.

7 Thanks.

8 MS. BROOKER: Your Honor, I would just ask Dr. Dolan
9 once more with this document, he should be provided a copy of
10 it.

11 THE COURT: Well, I think he's going to be provided
12 that.

13 THE WITNESS: Yeah, I've read -- I've read the Surgeon
14 General's Report of 1989 prior to my testimony, yes.

15 BY MR. BERNICK:

16 Q. And what they say is that we don't see the definitive answer
17 to the question of whether advertising and promotion caused
18 consumption; correct?

19 A. Right. Through the approaches that they reviewed here,
20 right.

21 Q. Well, the approaches included econometric analysis, did they
22 not?

23 A. It did.

24 Q. They included surveys, did they not?

25 A. They did.

1 Q. They reviewed the entire scientific literature and came up
2 with that statement in 1989, did they not?

3 A. Well, that there is -- there is not a definitive answer at
4 this point in time, right, and they say it's a complex issue.

5 Q. I want to show you page 153 of the current Surgeon General's
6 deposition in this case, Surgeon General Carmona.

7 I'm sorry, Your Honor, for the delay here.

8 Let me just ask the witness a question. Are you aware
9 of whether the Surgeon General's office, even as of today, has
10 expressed a consensus view that cigarette advertising actually
11 causes youth initiation?

12 A. I don't know that anybody who has stripped out advertising
13 and said that it is the cause of initiation.

14 Q. In point of fact, haven't there literally been scores of
15 studies analyzing that exact issue?

16 A. There have been many studies on the issue of advertising
17 and -- advertising and sales and advertising and initiation, and
18 some of them seem to support it and others don't.

19 Q. And that's the view of the literature today?

20 A. That would be -- I'm not up-to-date on that particular
21 literature.

22 Q. You've said before that you were specifically familiar with
23 the literature on initiation of smoking. That's the very first
24 question that I asked you.

25 A. Right. There's familiarity with and then there's, you know,

1 are you an expert in it? Have you really studied it? And I
2 have not.

3 Q. Certainly as you came here today you were aware of any
4 consensus on that issue. Would that be fair?

5 A. I would say that I would be aware that there was not a
6 consensus on that issue.

7 Q. Is it true that the decision to smoke is a multifactorial
8 decision?

9 A. Could you tell me what you mean by multifactorial?

10 Q. We're not going to finish today if we pursue that line.
11 Let's talk about the low-delivery cigarettes, and the question
12 is again using your hierarchy of effects, were people unaware
13 and became aware, knowledgeable about, interested in, and rather
14 than quit, switched, thereby remaining smokers, repeated
15 purchase, loyal customers?

16 I'm focused on whether low-delivery ads caused people
17 to switch as opposed to quit, and we can start out on that with
18 Carlton, which you single out in your testimony.

19 You single out Carlton, do you not?

20 A. I cite a Carlton ad.

21 Q. Are you aware of any study which demonstrates the Carlton
22 ads have the effect of causing people to switch down to Carlton
23 as opposed to quitting?

24 A. I know of no study that's addressed that question.

25 Q. The same thing be true of Merit which you also single out?

1 A. The same would be true.

2 Q. Would the same thing be true of True which you single out?

3 A. That would be true.

4 Q. In general, are you aware of any study which demonstrates
5 that lower-delivery ads and promotion cause -- have caused
6 people to switch rather than quit?

7 A. Other than my own analysis, you mean?

8 Q. Or anybody else's analysis. Are you aware of a single study
9 which demonstrates that?

10 A. I don't know of anything in the published literature, no.

11 Q. Let's talk about public health statements, or statements --
12 let's talk about statements regarding the health effects of
13 smoking. That is what the industry said over time with respect
14 to that issue.

15 And now we've got a hierarchy of effects that goes from
16 unaware to aware, to knowledgeable about, interested in, the
17 same thing, causes people to switch, or I should say keeps
18 smoking versus quitting would be more accurate; right?

19 A. Well, it depends on --

20 Q. I'll put that in. Keep smoking.

21 Are you aware of any studies -- first of all, let me
22 just go back. Are you aware of any studies that actually define
23 who was even aware of the industries' statements regarding
24 disease causation before 1964?

25 MS. BROOKER: Objection, beyond the scope.

1 MR. BERNICK: The statements go all the way back to
2 1954, and I just want to know, does he know of studies that say
3 well, before 1964, who was even aware of what the industry was
4 saying?

5 THE COURT: The objection is overruled.

6 A. I'm sorry. Your question to me was?

7 Q. The industry makes statements regarding the health effects
8 of smoking before 1964; correct?

9 A. Yes.

10 Q. Are you aware of any studies that document who became aware
11 of those statements?

12 A. I wouldn't look at anything back that early.

13 Q. Well, let's talk about after 1964.

14 In all of the statements that the industry made after
15 1964 that are included in your direct examination regarding the
16 health effects of smoking, have you looked to even see who was
17 aware of what the industry was saying about disease causation
18 after 1964?

19 A. I wasn't looking at awareness. I did look at what their
20 beliefs, consumers' beliefs were.

21 Q. Okay. But the beliefs can come in any number of places;
22 correct?

23 A. The beliefs could be the result of a number of things,
24 right.

25 Q. I've got a whole chart here that we won't have time to go

1 through, but there's a whole array of different sources of
2 information about smoking and health; correct?

3 A. That's correct.

4 Q. So the question that I have for you is: Are you aware of
5 any study or any survey or any data that tells you who was even
6 paying attention to what the tobacco industry was saying after
7 1964?

8 A. Oh, so the question would be how aware are you of the
9 statements --

10 Q. The tobacco industry makes a statement that says -- they say
11 we don't believe that causation is proven.

12 A. Right.

13 Q. Okay. And the statement's made by somebody from the Tobacco
14 Institute in 1980.

15 A. Right.

16 Q. Have you gone through to see whether there's any evidence
17 anywhere of who it was that became aware of the fact of what the
18 industry is saying?

19 A. No. I've looked it up, further down the road outcomes
20 rather than preliminary stage.

21 Q. Are you aware of any study, any evidence that tells us who
22 was even interested in what the tobacco industry was saying
23 about smoking and health after 1964?

24 A. Well, you know, we -- the hierarchy of effects refers to
25 products.

1 Q. I'm sorry.

2 A. Right? So I just want to be sure that we're not getting
3 mixed up, because now you're asking me about awareness of
4 statements --

5 Q. It doesn't make a difference to my examination.

6 A. Right.

7 Q. I would ask you probably exactly the same questions even if
8 they weren't in your hierarchy of effects.

9 A. Right.

10 Q. And the reason -- let's just take a step back.

11 I make a statement to you about the health effects of
12 smoking, and somebody says, "The statement that I made caused
13 you to keep smoking." If I want to analyze that statement or
14 that assertion, I first of all have to find out did you hear me;
15 right?

16 A. That would be a good first step.

17 Q. The next question I would have to find out from you is did
18 you understand what I had to say?

19 A. Right.

20 Q. Then I would have to find out did you really care about what
21 I had to say? Were you interested in it? Right?

22 A. Well, okay.

23 Q. And then I would have to find out did you act on the basis
24 of it?

25 A. Right. If you're asking the question, did what you say

1 caused me to do something? You would go through those kind of
2 steps.

3 Q. That's why I'm asking you. The hierarchy of effects is
4 really no different from asking, correct, the basic steps of
5 causation; true?

6 A. Nobody would ever -- up until now, nobody would make that
7 connection.

8 Q. I did. Maybe I was right or I was wrong, but it doesn't
9 make a difference.

10 A. No. I just want --

11 Q. My question is with respect to any and all statements that
12 the tobacco industry made about disease causation after 1964,
13 have you determined who was actually interested in what the
14 tobacco industry had to say, if anybody?

15 A. I guess the way -- I have not examined who, you know, what
16 the impact was on -- looked at any studies to say okay, who was
17 interested in this.

18 The way I thought about it was to say, well, the
19 tobacco industry is saying that it's not proven. The question I
20 asked myself was, well, what would be the difference between
21 that scenario and one which the tobacco industry said, you know,
22 Our products really are harmful to your health. Would that have
23 made a difference on consumer behavior? And my judgment is that
24 it would have made a difference in consumer behavior.

25 Q. Your judgment?

1 A. Yes.

2 Q. But we're here not just to find out about your judgment,
3 we're here to find whether you have a basis to offer an opinion,
4 and that's why I'm asking all these questions, not simply about
5 your judgment, but whether there is data and research to support
6 the opinion. So I'll now come back to it.

7 Is there research that you can identify that says that
8 anybody after 1964 actually was interested in what we had to say
9 about causation?

10 A. I know of no study to that point.

11 Q. You say, "Well, if the industry had made a statement, a
12 different statement about causation, maybe things would be
13 different." That's what you said; correct?

14 A. I would think -- yes, the two scenarios that I described
15 would be very different from one another.

16 Q. That's kind of what if the world were different, what would
17 it look like? If the industry had said something different, how
18 would things have changed?

19 Isn't it true that it's almost impossible to craft a
20 study that says, "Well, what if the world were different on this
21 issue, what would have happened?" Correct?

22 A. Well, it's not a simple little question where you kind of
23 throw some numbers in and crank the crank and out pops the
24 answer, but that's why you have to really try to understand what
25 consumer behavior is in this marketplace and then make a

1 judgment about we have a -- we have a consumer who would really,
2 as we know from the data that shows that the majority of them
3 really would like to quit, and that person is sort of looking
4 for a rationale to not quit.

5 And the company is providing a rationale in terms of,
6 well, it's not proven versus would it be different if the
7 company were saying, you know, our products really are hazardous
8 to your health. There's much more of a justification and
9 impetus to keep smoking in the first condition than in the
10 second.

11 Q. And that's the analysis that you've done in this case?

12 A. Yes, an analysis I've done.

13 Q. Isn't it true that that analysis requires the determination
14 about whether what the industry said in fact did provide the
15 justification that the consumer relied upon in keeping smoking;
16 correct?

17 A. Well --

18 Q. Just bear with me for a moment.

19 A. I thought you were done with your question.

20 Q. Your analysis, you assumed that the consumer would have
21 been -- what was interested in the justification that the
22 industry offered; correct?

23 A. No. What I was saying is that let's suppose the scenario
24 was one in which the company said in 1954, "Well, we're going to
25 investigate this question and we'll let you know whether, when

1 we find out any negative health implications."

2 If, in fact, at some later point in time the industry
3 did come to the consumers and say, you know, "We've looked.
4 We've done research. And we've concluded our products are
5 hazardous to your health." That would have had -- in my
6 judgment, that would have had a differential impact on consumer
7 behavior.

8 Q. But you've not done any analysis of data or any -- there's
9 not even a research paper that you have cited which says that;
10 correct?

11 A. There's no research paper that I've cited. I based that
12 based on my understanding of consumer behavior in this market.

13 Q. When it comes to your saying that any of these activities --
14 that is, advertising, young adult advertising -- let me take the
15 word back and put the right word in?

16 When it comes to any of these areas, young adult
17 marketing, low delivery marketing, and statements regarding
18 disease causation, would it be fair to say that the testimony
19 that you offered yesterday which said that those activities
20 actually affected smoking behavior, that all of those are
21 judgments that you've made but that you don't have actual
22 research that supports those particular conclusions?

23 A. Well, I've done research in this particular case and the
24 research has been by looking at internal company documents.
25 That's my research.

1 Based on my research, I make the statement that the
2 marketing activities of defendants in this case contributed to
3 the initiation and continuation of smoking.

4 Q. But beyond referring to company documents to support your
5 judgment, you have not followed any of the conventional research
6 methodologies of gathering data, analyzing it statistically and
7 reaching conclusions based upon statistical analysis, have you?

8 A. I did not set out to do a statistical analysis at any point
9 in my work.

10 Q. Is it true that there is no actual research that you can
11 even point to which establishes a statistically significant link
12 between any of our marketing activities that you've talked about
13 and either the initiation of smoking or quitting smoking?

14 A. I've not attempted to examine that literature based on
15 statistical significance, no.

16 Q. And is it true that if you go to the tobacco companies' own
17 documents, the tobacco companies' own documents nowhere actually
18 say that our ads are causing -- causing -- nonsmokers to start
19 to smoke; correct?

20 A. I don't -- I don't recall seeing that statement anywhere in
21 the documents I looked at.

22 Q. Isn't it true that in the documents that you looked at
23 there's nowhere -- or even in the documents, our documents say
24 that low-delivery marketing actually has caused people to stay
25 smoking rather than quitting?

1 None of them say that; correct?

2 A. What they say is that advertising, for example, has been
3 effective in promoting the image of the brand, creating the
4 image of the brands in the minds of the consumers. Advertising
5 has offered reassurances to the consumer.

6 Does it say, Our advertising caused initiation, our
7 advertising kept somebody from quitting? No, but does it say,
8 We had these effects on consumers? Then an outcome of that
9 is -- an outcome of that is that that contributes to their
10 initiation or not quitting.

11 Q. Oh, no. You slipped in something just at the end there.

12 A. Maybe you jumped around.

13 Q. I got nervous when you did that.

14 MS. BROOKER: Objection, just getting argumentative.

15 THE COURT: Sustained.

16 MR. BERNICK: I'll withdraw the question.

17 Q. Forget about my anxiety, Dr. Dolan.

18 That very last statement, isn't it, you've said, well,
19 gee, our ads have been effective with respect to the image, our
20 ads have been effective with respect to health assurance, our
21 ads have been effective in terms of our market share.

22 But isn't it true that not a single one of our
23 documents actually says or provides data that demonstrates that
24 our low delivery in marketing actually has caused people to stay
25 smoking rather than quitting?

1 MS. BROOKER: Objection. That question has basically
2 just been asked and answered.

3 MR. BERNICK: No, it was not answered.

4 THE COURT: I'm not clear if it's been -- if it's been
5 answered directly, so you may answer it at this point.

6 A. There are internal company documents that say that the
7 impact of our health reinsurance brands has been to offer
8 consumers an alternative.

9 Q. Got that. Go on.

10 A. Excuse me.

11 Q. I got that. Go on.

12 A. So there's research data that shows, that the companies
13 cite, that the impact of their activities was to create in the
14 mind of the customer that they perceived that these brands were
15 safer for you.

16 And therefore -- now, then the next step is to say,
17 okay, if these are safer for you, consequently the benefit that
18 you derive is greater than these -- than you would have if these
19 products didn't exist. Therefore, the value that you have from
20 smoking is higher than it otherwise would be, and consequently
21 the probability of you stay using the product is higher.

22 Q. The probability of you starting to -- staying to use the
23 product is higher.

24 A. Yeah.

25 Q. I heard all of that.

1 A. Good.

2 Q. But nowhere do we see in the documents data that's been
3 gathered by these companies that say that we actually have moved
4 the needle in terms of people staying smokers versus quitting.

5 Where do you ever see a measurement in any of these
6 documents about groups that got -- or got exposed to our ads and
7 then some of them quit and some of them did not and the ads
8 actually affected their quitting?

9 MS. BROOKER: Objection. Mr. Bernick has tried to ask
10 that question a third time. Dr. Dolan has given a full
11 explanation.

12 THE COURT: Sustained.

13 BY MR. BERNICK:

14 Q. Same question. Where do you ever see in our documents
15 actual research that shows that anybody kept smoking because of
16 what we told folks about whether causation had been proven?

17 A. I don't see an explicit statement of that.

18 MR. BERNICK: I think I may be at the end of my
19 questions, Your Honor.

20 THE COURT: I do see an audience reaction in favor of
21 that, Mr. Bernick.

22 MR. BERNICK: Oh, is that right? I won't ask if they
23 are this side of the courtroom or this side of the courtroom.

24 That's fine, Your Honor. I'm done.

25 THE COURT: Let me ask you a closing question, Doctor.

1 THE WITNESS: Yes, Your Honor.

2 THE COURT: You've answered a lot of Mr. Bernick's
3 questions. And looking at U.S. Exhibit 17362, can you give an
4 answer as to why you do think in your expert opinion the
5 defendants, at least in 2002, were spending \$12.47 billion on
6 marketing expenditures?

7 THE WITNESS: Yes, I can, Your Honor. Basically, it's
8 to do a number of things? But, you know, one component of -- it
9 is advertising. As I mentioned earlier, advertising point of
10 sale displays and public events really to create the image or
11 brand image for their products, but the large majority of the
12 \$12 billion is on price promotions, and there are promotions
13 generally. There are two basic reasons for that.

14 One is to induce the retailers to really give them good
15 display space. So the better deal I give the retailer, the more
16 prominently I'm going to be featured at retail.

17 So a lot of the marketing has moved out of the home of
18 the customer to the point of purchase so they want to be sure
19 that they've got the right display space and the amount of shelf
20 space. So that's number one reason why the promotion
21 expenditures are so high.

22 And then the second one is that they have chosen to
23 engage in a great deal of product promotions. For example, buy
24 two packages of cigarettes, get one free kind of deal.

25 And the reason you do that is basically twofold.

1 Number one is to be able to give a discount to people who are
2 most price sensitive, and then number two is to kind of create
3 some excitement at retail.

4 So rather than having the same everyday price so that
5 the retail environment wasn't changing, this is a way to get
6 some excitement in marketing of their products at the retail --
7 at retail outlets.

8 So those are basically the reasons.

9 THE COURT: All right. Thank you. You may step down
10 for now.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: We will get back on Wednesday at 9:30.

13 I would like now to talk with Ms. Eubanks and Mr. Brody
14 and -- is Mr. Redgrave here? No. Well, that leaves Mr. Webb --
15 I know, over some procedural matters or logistical matters
16 really at the bench for just a moment or two, please.

17 MR. BERNICK: Your Honor, before the witness is excused
18 could we be sure that he understands that --

19 THE COURT: Did someone put in all call to Mr. Redgrave
20 on all of your machines and everything? That was --

21 MR. REDGRAVE: I can hear your voice.

22 THE COURT: I hope not outside.

23 MR. BERNICK: Could the witness be advised that no
24 work, no communication with regard to his testimony between now
25 and his next appearance?

1 THE COURT: Dr. Dolan, between now and when you come
2 back, it would be just as if you were to testify tomorrow
3 morning, and that means that you can't do any further
4 substantive work on your testimony. You can't do any other
5 research. You certainly can't talk with counsel or anybody else
6 connected with the case about the substance of your testimony.

7 THE WITNESS: Could I ask, Your Honor, can I read my
8 own testimony again, say next Tuesday?

9 THE COURT: No. It would be as if you hadn't been
10 interrupted at all.

11 THE WITNESS: Thank you, Your Honor.

12 MS. BROOKER: May I just inquire as to the amount of
13 time for further cross-examination?

14 MR. FREDERICK: Your Honor, Tom Frederick for Philip
15 Morris. My best estimate right now is two hours. I'll look at
16 it over the weekend and see what happens. That's where I'm at
17 right now.

18 MR. McDERMOTT: Your Honor, we will look at it over the
19 weekend, but I think it will be very brief; perhaps nothing at
20 all.

21 MR. MINTON: Mike Minton for Lorillard, Your Honor, and
22 we are in the same ballpark.

23 MR. MARKS: Your Honor, Howard Marks for Liggett, a few
24 minutes perhaps.

25 THE COURT: If counsel would approach.

1 (Proceedings concluded at 4:32 p.m.)

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10 I, EDWARD N. HAWKINS, Official Court Reporter, certify
that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

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12 Edward N. Hawkins, RMR

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