

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	December 16, 2004
Plaintiff,	:	
	:	9:32 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 43
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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

2 THE COURT: Good morning everybody. This is United
3 States versus Philip Morris. CA 99-2496.

4 I am not, unfortunately -- Mr. Newbold or Mr. Minton
5 may have asked, I'm not sure -- I simply have not been able to
6 get to the papers regarding Mr. Milstein. I'm sorry, everybody,
7 but I've just had an awful lot of other things relating to other
8 cases to take care of.

9 Now, he's due to testify Friday, is that right, the
10 Friday after we all come back?

11 MR. NEWBOLD: Your Honor, part of our papers said that
12 we really don't think that the government is going to reach
13 Mr. Milstein on Friday because Smith and DeNoble have been
14 scheduled for Thursday and Friday. And we were asking the court
15 to order the government to list Mr. Milstein, not for the 6th or
16 7th because he won't be reached, but to list him for the week of
17 January the 10th. And the big difference in that is that --

18 THE COURT: Wait. Mr. Brody may have an easy solution,
19 like he may not oppose this.

20 MR. BRODY: No. Your Honor, I think that if we do not
21 call Mr. Milstein to testify on the 7th we're not going to have
22 witnesses past about 11 AM on the 7th.

23 Defendants have estimated 2 to 3 hours of
24 cross-examination for Dr. DeNoble. We will not have any initial
25 examination of Dr. DeNoble because he's a nonadverse witness and

1 we'll simply be adopting his testimony when he takes the stand.

2 We're going to get to Ms. Smith on that Thursday
3 afternoon. We haven't seen her corrections, but it's quite
4 possible, given the scope of Ms. Smith's testimony, that we will
5 complete her testimony late Thursday afternoon or certainly
6 Friday morning, leaving us without any witnesses. That's why we
7 scheduled and anticipated calling Mr. Milstein on the 7th.

8 THE COURT: Well, let me just say this in terms of a
9 decision. I have to say my Fridays are just jammed full in
10 terms of things to do and things to prepare for.

11 I am fairly sure that by the end of -- well, that by
12 the end of Tuesday at the latest I would have a decision on that
13 issue and I think that will give everybody enough time. Am I
14 right about that?

15 MR. NEWBOLD: Yes, Your Honor, if you would have a
16 decision on Tuesday, I'm trying to do my --

17 THE COURT: Tuesday, December 21st for January 7th.

18 MR. NEWBOLD: Right. I would -- if the government --
19 if the court rules in Lorillard's favor and requires a written Q
20 and A, then that written Q and A would be that if you hold him
21 for to testify on January 7th, that means that the written Q and
22 A would be due on December 27th, a Monday.

23 And as I said in my papers, Mr. Milstein, the general
24 counsel, has already scheduled a vacation to New York, which is
25 his hometown, during the week of the 27th, and that's why we

1 were asking the court if he could be put over a week so that he
2 wouldn't have to change his vacation plans. Because obviously
3 if the government is going to call Mr. Milstein on the 7th --
4 and I think that's highly unlikely he's going to be reached --
5 that means that we will have to meet with --

6 THE COURT: Why do you think it's unlikely, though,
7 given the government's representations about Dr. DeNoble and
8 Ms. Smith and how long they are going to be or really how short
9 they are going to be?

10 MR. NEWBOLD: Well, simply based upon experience, we've
11 never gone through two witnesses in two days yet, I don't
12 believe.

13 THE COURT: These aren't experts and I believe, based
14 on other testimony I've heard -- I could be wrong, of course --
15 but that Dr. DeNoble is going to testify about one incident or
16 maybe two. Is that about right?

17 MR. BRODY: He will be testifying about the terms of
18 his employment and the termination of his employment at Philip
19 Morris.

20 THE COURT: And certainly there could be extensive
21 cross about that, I suspect. And there's -- in the government's
22 view, there's no other -- I don't have your list in front of me
23 of witnesses. There's no other -- not even short, but there's
24 no other witness you could put on on the 7th?

25 MR. BRODY: There is not, Your Honor, given the

1 schedule of witnesses and the schedules of counsel.

2 The witness following Mr. Milstein will be Dr. Biglan.
3 We anticipate filing his written direct on January 3rd, so he
4 would be testifying during the week of the 10th, and so there is
5 really not a way we can move that up if we get him started
6 earlier. And that's why we have scheduled it the way that we
7 did.

8 We also did it for presentation purposes in terms of
9 our case, but when it ultimately came down to making decisions
10 about whether we could move things around, that was the key
11 factor in that decision making.

12 As we pointed out in our motion, there will be no
13 scheduling issue or problem if the motion is granted.

14 THE COURT: Well, I don't see any way around the
15 problem, Mr. Newbold. I've tried to always position people so
16 they were accommodated, but I guess we can't do it all the time.

17 I do want to make use of that Friday because, again, I
18 moved some things around. We won't actually begin that Friday,
19 because I do have some criminal statuses set, but I think --

20 Ms. Hightower, if you would bring up our calendar. Did
21 we set those for 9:30 and 9:45 so that we can begin trial at
22 10:00?

23 THE DEPUTY CLERK: I'm going to have to get the
24 calendar up.

25 THE COURT: My recollection is that that's what we're

1 going to do. So we will only be starting a half an hour late.
2 And then I have a sentencing which I moved until late in the
3 afternoon. I think probably 4:30 so that we could get in most
4 of the day. As it stands now, I just have to leave it.

5 MR. NEWBOLD: May I raise one other issue, Your Honor,
6 since if you're going to rule on Tuesday, I won't have another
7 opportunity to speak to the court?

8 If the court rules in favor of the government and
9 follows the same procedure that was used with Wayne Juchatz,
10 which is that once Mr. Milstein receives the exhibits, that he's
11 no longer allowed to speak to counsel, we think that that's
12 inappropriate since Mr. Milstein is the acting and current
13 general counsel of Lorillard and needs to be speaking with his
14 lawyers.

15 But, in any event, if that's the court's ruling that
16 we're not to speak with Mr. Milstein after he receives the
17 exhibits, then we would ask that we not be given the exhibits
18 until the Friday before the week that he's going to testify so
19 that I can continue to counsel with my client up until right
20 before he takes the witness stand.

21 So we don't want to see those exhibits if it's going to
22 preclude us from talking to our client until the Friday before
23 he testifies.

24 THE COURT: Are you representing him? He's not going
25 to have separate counsel?

1 MR. NEWBOLD: He is not. I am representing him.

2 MR. BRODY: Your Honor, that would not conflict with
3 the proposed order that we submitted with our motion.

4 We had suggested that we provide them a list of
5 exhibits on Monday, January 3rd for testimony on Friday, January
6 7th so as to allow them time to consult prior to receiving the
7 list.

8 THE COURT: You don't mean the testimony on January
9 7th, do you? You're going to call him on January 7th.

10 MR. BRODY: We're going to call him on January 7th,
11 meaning that if we're calling him without a written direct and
12 we're providing Lorillard a list of the exhibits that we're
13 going to use in the live examination, that we would not provide
14 that until January 3rd so as to provide counsel for Lorillard
15 the opportunity to consult with Mr. Milstein for a longer period
16 of time.

17 We were able to agree with counsel for Reynolds and
18 counsel for Mr. Juchatz as to the date when they wanted to
19 receive the list of exhibits prior to Mr. Juchatz's testimony.
20 I don't see that being a problem with counsel for Lorillard in
21 terms of the timing of their receipt of the list of exhibits.

22 MR. NEWBOLD: Let me say this, Your Honor.

23 If the government is saying that for sure he's going to
24 testify on Friday the 7th, then I don't want them to give those
25 exhibits to Mr. Milstein until Wednesday because we want the

1 opportunity to be speaking to my client.

2 THE COURT: I thought you just asked for Monday, didn't
3 you?

4 MR. NEWBOLD: I said Monday, but I forgot the fact that
5 we were actually going to be called on Friday.

6 Quite frankly, I just want those exhibits about two
7 days before he actually takes the witness stand because I want
8 the ability to counsel with my client up until that time.

9 So if the government -- if you rule in favor of the
10 government and say it has to be a live direct, then we don't
11 want those exhibits until Wednesday.

12 MR. BRODY: We have no objection to that schedule, Your
13 Honor.

14 THE COURT: All right. All right. Of course,
15 everybody, as you know -- well, I may have skimmed the original
16 motion, I have certainly -- I haven't read the papers carefully.
17 I haven't read the opposition. So we're all operating on
18 speculation at this point. But I understand everybody's
19 position now.

20 MR. NEWBOLD: Thank you, Your Honor.

21 THE COURT: Thank you. And we are ready for cross.
22 Doctor, you're still under oath this morning.

23 Go ahead, Mr. Minton.

24 DEAN M. KRUGMAN, Ph.D., Government's witness, RESUMES

25 CROSS-EXAMINATION

1 BY MR. MINTON:

2 Q. Dr. Krugman, when we left off yesterday we were discussing
3 the concept of peers and you had pointed to a particular
4 Lorillard document and we had seen that the age range of the
5 brand positioning or the targeting that was referred to in the
6 document that you relied on was 21 to 40-year-olds. And we next
7 discussed the language that you pointed to in that document
8 about reinforcing the perception that Newport delivers smoking
9 pleasure in social settings relative to their life-styles.

10 Do you recall that that's where we were in your
11 testimony?

12 A. Yes, sir.

13 Q. All right. And you testified that your understanding was
14 that the reference in the documents to quote, "their lifestyles"
15 in terms of social settings relative to their lifestyles, was a
16 reference to lifestyles of some peer group of younger adult
17 smokers. Do you recall that?

18 A. Yes.

19 Q. All right. And your testimony about Newports Alive With
20 Pleasure Campaign is that it has remained essentially the same
21 for 30 years; correct?

22 A. Yes.

23 Q. All right. And part of staying the same means that it has
24 relied on basically the same types of imagery for those
25 30 years; correct?

1 A. Similar imagery, yes, sir.

2 Q. All right. And with those thoughts in mind, let's look at a
3 few Newport ads.

4 Jamie, if you could please bring up JD 025061. And
5 actually, if you could go -- yeah, that's it.

6 Now, on page 6, Jamie, there's one of a dog house.
7 Yep, that's it.

8 That's the ad that you pointed to on Tuesday that ran
9 in Rolling Stone in 1981; correct?

10 A. Yes.

11 Q. All right. And it shows a couple holding up a dog house and
12 there's a puppy inside the dog house; correct?

13 A. Yes.

14 Q. And you selected that because you thought that that was a
15 particularly good example to illustrate your testimony; correct?

16 A. I selected that ad to show that it goes with the Newport
17 idea of Alive With Pleasure and how long the campaign is
18 running. There are any number of Newport ads that have
19 different caricature than this.

20 Q. Have you evaluated this image of the couple holding up the
21 dog house with the puppy inside in terms of empirical data to
22 determine -- well, let me start over.

23 What empirical research have you pointed to that
24 evaluated whether this image of the couple holding up the dog
25 house with the puppy inside was a social setting that an

1 underage smoker would consider highly relevant to their
2 lifestyle?

3 A. As I've said -- as I've said earlier, it's not necessarily
4 any one ad but rather the whole series of ads that portrays the
5 image of the product.

6 Q. Now, would you answer my question?

7 Dr. Krugman, what empirical data have you pointed to
8 that evaluated whether this image was a social setting that an
9 underaged smoker would consider highly relevant to his or her
10 lifestyle?

11 A. Well, I've certainly referred to the Institute of Medicine
12 report on the lifestyles of individuals growing up and their
13 need for peer association, and I certainly referred to the
14 Surgeon General's Report in that regard.

15 And I also referred to the most recent study from the
16 American -- American Psychological Association that talks about
17 cigarette advertising, normalizing youth behavior.

18 Q. Dr. Krugman, I'd like to go through these questions as
19 expeditiously as possible. If you could listen to what I'm
20 asking.

21 That image was not contained in any of the three
22 documents you just mentioned; correct? This image that's
23 displayed on the screen right now. Correct?

24 MS. BROOKER: I just object to the argumentative
25 comment because I do think Dr. Krugman is carefully answering

1 the question.

2 THE COURT: The objection is sustained.

3 BY MR. MINTON:

4 Q. Dr. Krugman, was the image that we're looking at right now,
5 which is the image of the couple holding up the dog house with
6 the puppy inside, was that in any of the three documents that
7 you just mentioned?

8 A. No.

9 Q. All right. And my question is what empirical data have you
10 pointed to that demonstrates that this image that we're looking
11 at depicts a social setting that an underage smoker would
12 consider highly relevant to his or her lifestyle?

13 MS. BROOKER: Objection, asked and answered.

14 THE COURT: Overruled.

15 A. It's unlikely that we are going to have any particular study
16 that's going to look at this image.

17 Q. And so your answer?

18 A. No.

19 Q. The answer is no. You have not pointed to any; correct?

20 A. That's correct.

21 Q. All right. And you haven't pointed to any empirical
22 evidence that an underaged smoker would find that image that
23 we're looking at appealing; correct?

24 MS. BROOKER: Objection, asked and answered.

25 THE COURT: Sustained.

1 BY MR. MINTON:

2 Q. Let's go to another image, Dr. Krugman, which is JD 025061
3 at page 8. This is an ad that, according to the information we
4 have, ran in Ebony Magazine in February 1979. It appears those
5 people are celebrating a birthday in that ad; correct?

6 A. Yes.

7 Q. And there are six candles on the cake, and if you give
8 credit for one to grow on, the birthday is apparently for a
9 5-year-old.

10 MS. BROOKER: Objection.

11 THE COURT: It is?

12 MS. BROOKER: Confusing question.

13 THE COURT: What's your objection?

14 MS. BROOKER: It's a confusing question. I just don't
15 even understand the question.

16 THE COURT: Why don't you rephrase it?

17 BY MR. MINTON:

18 Q. Okay. Are there six candles on the cake, Dr. Krugman?

19 A. Yes.

20 Q. And a birthday is being celebrated? Is that your impression
21 of what this ad is?

22 You don't know?

23 A. I think the question, the way you ask it, and the way people
24 would tend to look at ads of this nature in general are -- would
25 simply not work.

1 As I pointed out earlier, sir, the advertising of this
2 nature tends to be image based, not, bypasses logical analysis,
3 and people aren't going to be looking at the number of candles
4 on the cake.

5 MS. BROOKER: I'm sorry. You just might want to move
6 your microphone up a little bit. Thank you.

7 BY MR. MINTON:

8 Q. And with respect to this image, Dr. Krugman, you don't point
9 to any empirical data on whether it depicts a social setting
10 that underaged smokers consider highly relevant to their
11 lifestyle; correct?

12 A. No.

13 Q. Let's go forward in time about 20 years, Dr. Krugman.

14 Jamie, if you could bring up JD 025061 at page 4.

15 This is an ad that ran in 1998. And there's a couple
16 depicted in this ad and there's a heartshaped hole that's been
17 cut in the newspaper.

18 And can you tell, is that the financial section of the
19 newspaper that's depicted there, Dr. Krugman?

20 A. Could be, yes.

21 Q. All right. And the same question. You don't point to any
22 empirical research whether this ad depicted in image that
23 underaged smokers would consider highly relevant to their
24 lifestyle; correct?

25 MS. BROOKER: Objection. This is really the same

1 question that Dr. Krugman has already answered with respect to
2 other ads.

3 THE COURT: He may have the same answer, but it's not
4 the same question because obviously the question refers to
5 different advertisements. And so you may answer.

6 A. It would be the same answer that I gave earlier.

7 Q. No matter what Newport ad I put up there, your answer would
8 be the same?

9 You don't point to any empirical data with respect to a
10 specific ad on whether or not it depicted a social setting that
11 underaged smokers considered highly relevant to their lifestyle;
12 correct?

13 A. Any of the specific Newport ads that you're putting up, sir?

14 Q. Yes.

15 A. Yes, sir.

16 MR. MINTON: Thank you Dr. Krugman.

17 THE COURT: Mr. Minton, you were very true to your
18 estimates, I have to say. I think you told me about
19 five minutes yesterday, and given the normal -- I don't want to
20 use the word exaggeration, but exaggeration, for lack of a
21 better word, you were pretty close to it. Thank you. Let's
22 hope everybody else can keep to their estimates.

23 And counsel, you better identify yourself for the
24 record, please.

25 MR. BEACH: I will. Your Honor, Jeff Beach from Jones,

1 Day for Reynolds.

2 CROSS-EXAMINATION

3 BY MR. BEACH:

4 Q. Good morning, Dr. Krugman.

5 A. Good morning, Mr. Beach.

6 Q. Dr. Krugman I wanted to start just by following up on a
7 question posed to you yesterday by Mr. Minton and the day before
8 from Mr. Bass, but first Mr. Minton's question.

9 This is from yesterday's transcript at page 8738 and
10 your answer is on 8739. I'll put it on the screen here, but you
11 can certainly find it on the page yourself if you need to.

12 You may recall, sir, that you were asked by Mr. Minton,
13 "You don't point to any empirical data on what number or
14 percentage of persons in any age range paid attention to any
15 Newport ad or campaign, correct?"

16 Your answer was, "Correct."

17 And then he asks you, "Same is true for any defendants'
18 ad, correct?"

19 And your response was, "No, sir."

20 And then to clarify your answer. He said, "No, sir,
21 that's correct, you don't, correct?"

22 And you responded, "No, I do report some -- I do report
23 recognition data and some recall data for the Camel campaign."

24 Do you recall generally being asked that question and
25 giving that answer?

1 A. I do.

2 Q. And the Camel campaign, sir, that you're referring to
3 there -- I believe the only Camel campaign that you're referring
4 to there, sir, was the Joe Camel campaign; is that correct?

5 A. Yes.

6 Q. Thank you. And now my follow up to a question that was
7 posed by Mr. Bass on Tuesday. And you may recall, sir, he asked
8 you some questions about the research techniques that you
9 discuss in your textbook, the research techniques that you
10 reviewed with him?

11 A. Yes.

12 Q. And, in particular, you were asked, "Would it be fair to say
13 with respect to Alive With Pleasure, Be KOOL, and the Camel
14 Mighty Tasty Lifestyles and Viewer Discretion campaigns, that
15 you have not actually used any of these eight research
16 techniques with respect to judging what impact they may have on
17 adolescents?"

18 And your answer was, "That's correct."

19 Do you generally recall that, sir?

20 MS. BROOKER: Objection. This is repetitive testimony
21 that's prohibited under this court's orders and it's been asked
22 and answered as well.

23 THE COURT: Let me hear the next question.

24 MR. BEACH: Thank you, Your Honor.

25 THE COURT: But we didn't get an answer to the last

1 one.

2 MR. BEACH: That's right.

3 BY MR. BEACH:

4 Q. Do you recall being asked that question and giving that
5 answer, Dr. Krugman?

6 A. Yes, sir.

7 Q. And would your answer, sir, be the same with respect to the
8 Camel Pleasure to Burn campaign?

9 A. Yes.

10 Q. And would your answer --

11 THE COURT: Just to be clear. The prior objection is
12 overruled. It's a different question than was asked yesterday.

13 BY MR. BEACH:

14 Q. And, sir, would your answer be the same with respect to the
15 Winston No Bull -- N-O, two separate words, B-U-L-L -- campaign?

16 A. Yes.

17 Q. Now, Dr. Krugman, in your direct testimony you cited
18 Reynolds' documents -- I'm going to focus my questions now to a
19 few of the Reynolds' documents that you discussed in your
20 direct.

21 You cited Reynolds' documents related to marketing
22 research used to test advertisements, reports on focus groups or
23 larger so-called quantitative tests.

24 Do you generally recall that, sir?

25 A. Yes.

1 Q. And, for example, with respect to the Reynolds' ads
2 referenced in your direct testimony, you generally understand
3 that Reynolds tests those ads with targeted -- with target adult
4 smokers; correct?

5 A. Where are you referring to, sir?

6 Q. No. This is a -- I'm not referring specifically to a
7 statement in your testimony, sir. I'm now asking you a
8 different question.

9 And my question is simply: With respect to the
10 Reynolds' ads that you refer to in your direct, the various ads,
11 you showed some ads in the large books to the court.

12 A. Yes.

13 Q. And you have other ads that are actually shown in the
14 content of your direct testimony. If you would like to look at
15 it we can get that for you.

16 But my question is simply a general one, which is that
17 you understand that Reynolds tests such ads with targeted adult
18 smokers.

19 A. What age is the target that you're referring to, sir?

20 Q. With respect to adults aged 18 and older. The targets of
21 the campaigns.

22 A. I do report some surveys and tracking data in my direct
23 testimony that refers to people under the age of 21 in
24 advertising.

25 Q. Well, for example, sir, do you recall that you discuss --

1 U.S. Exhibit 21440 entitled, Heroic Camel Advertising Test,
2 March 1988?

3 A. I'm sorry, Mr. Beach. I didn't hear you. I was distracted
4 for a moment. Can you please repeat?

5 MS. BROOKER: Can you just refer to his direct
6 testimony? That would be helpful.

7 BY MR. BEACH:

8 Q. Sir, if you turn to your direct testimony, for example at
9 page 88, lines 6 through 10, I believe that you will see that
10 you refer to a document entitled Heroic Camel Ad Test. Do you
11 see that, sir?

12 A. I do.

13 Q. All right. And we can give you a copy of that document.
14 Here it is on the screen. And there's the Exhibit Number 21440.

15 And my question -- and you recall, sir, for example,
16 that this is a report on testing for a particular Camel ad, and
17 it involves samples of adult smokers aged 18 and older.

18 A. Yes.

19 Q. And my question more generally, sir, was: Isn't it correct
20 that with respect to the Reynolds' ads that you reference in
21 your direct testimony, this kind of testing that we're looking
22 at, for example, in U.S. Exhibit 21440, is not atypical?

23 Reynolds generally tests ads which target adult
24 smokers; correct?

25 You've seen that in the documents that you've reviewed.

1 A. Mr. Beach, I'm trying to answer -- I'm trying to answer your
2 question as to what -- on general testing. And I've pointed to
3 tracking data which would be a kind of -- which would be a
4 general testing and regular testing in which 18 -- people below
5 the age of 21 were examined on their awareness for advertising
6 campaigns. And I'm now looking at another document. So I'm not
7 sure, if I'm understanding the question correctly, that I
8 could -- I would agree with you.

9 Q. Certainly though, sir, in conjunction with the documents
10 that you've reviewed from the files of Reynolds -- put the
11 tracking documents aside -- do you recall going through in your
12 testimony with Mr. Bass a discussion of marketing research done
13 by the defendant manufacturers? And I'll keep my question
14 focused on Reynolds.

15 Do you recall seeing a great many documents like this
16 one that you pointed to in your direct testimony involving
17 actual testing of advertising with targeted adult smokers aged
18 18 and older? Correct?

19 A. Well, I've certainly pointed to these documents as documents
20 where people under 21 are being examined. And I'm trying to
21 figure out the other side of the question, which is saying that
22 there is testing for people over 21 for the ad campaigns, and
23 yes, that would be the case.

24 Q. And I think my question more specifically was over the age
25 of 18 and older, and that would also be the case, would it not,

1 sir?

2 A. Yes.

3 Q. And in fact, sir, with respect to the tracking documents
4 that you reference in your direct testimony, isn't it correct,
5 sir, that you do not cite in your direct testimony a tracking
6 document that involved the testing of a specific Reynolds'
7 advertising campaign?

8 A. I only -- yes. I cite the references to those tracking
9 documents and the discussion of those tracking documents.

10 Q. But with respect to your direct testimony, sir, I don't
11 recall anywhere in your direct testimony where you cited a
12 tracking document as reflecting testing on a specific Reynolds'
13 advertising campaign. Isn't that correct?

14 A. That is a prob -- yeah. I think that's correct, Mr. Beach.

15 I would have to go back and check it out very
16 specifically, because I know I looked at the references to those
17 tracking documents and the important -- and what those
18 references involved.

19 But did I actually see that particular tracking study?
20 I think the answer is, no.

21 Q. Now, the court, Dr. Krugman, has already seen and heard from
22 Dr. Dolan about Reynolds' marketing plans, so I'm going to focus
23 instead on a few questions about other non-brand planned
24 documents.

25 First of all, do you recall that you cite a memorandum

1 from 1973 written by Dr. Claude Teague?

2 I apologize, Your Honor.

3 THE COURT: That's all right.

4 MS. BROOKER: Could I ask that Mr. Beach just direct us
5 to the page of the testimony so we can follow along?

6 MR. BEACH: Sure.

7 BY MR. BEACH:

8 Q. Do you recall, Dr. Krugman, that at page 72, lines 12
9 through 17, you were asked about a memorandum by Dr. Claude
10 Teague written in 1973?

11 A. Yes, sir.

12 Q. And this is a document, sir, that you cite as an indication
13 of Reynolds need to focus on and target young people. Those are
14 your words; correct?

15 A. Yes.

16 Q. And you would not have cited, sir, this document if you did
17 not believe that it fairly illustrated that point in your expert
18 opinion; correct?

19 A. Yes.

20 MR. BEACH: And, Your Honor, for the record, I would
21 note that a duplicate version of this document was previously
22 admitted as U.S. Exhibit 20708 in conjunction with Dr. Kessler's
23 testimony.

24 If we could pull up a copy of that. It's U.S. 21475.

25 Q. Now, Dr. Krugman, it's correct that this memorandum is not

1 addressed to anyone, is it not?

2 A. Correct.

3 Q. And you've never seen a memorandum indicating that it was
4 circulated. Out of the thousands of tobacco company documents
5 that you reviewed, you've never seen any memos suggesting that
6 this was circulated internally at Reynolds; is that correct?

7 A. Correct.

8 Q. And you don't have any evidence that it was circulated;
9 correct, sir?

10 A. Correct.

11 Q. And whether a document is circulated internally in a company
12 could be important to know; right?

13 A. Could be important to know.

14 Q. You've also never seen a memo or other evidence referring to
15 it, something like following up on Dr. Teague's memo and so on,
16 something like that. You've never seen a document like that in
17 Reynolds' files; correct?

18 A. Correct.

19 Q. And if we could display the second page. At the top it's
20 marked Draft; correct, sir?

21 A. Yes.

22 Q. And you've never seen a version that was finalized; correct?

23 A. Correct.

24 Q. And, sir, when it comes to your own writings you have been
25 reluctant to provide drafts of your work precisely because

1 drafts certainly change, among other reasons; correct?

2 A. Drafts are what they are, they are drafts.

3 Q. Sir, the question, though, that I asked you was: When it
4 comes to your own writings, you have been reluctant to provide
5 drafts of your work precisely because drafts certainly change,
6 among other reasons; isn't that correct?

7 A. I often share drafts of my work for people to see and
8 comment on. That's a thing I regularly do.

9 Q. Dr. Krugman, do you recall being deposed in the Thomas' case
10 in July of 2000?

11 A. Yes.

12 MR. BEACH: Can we provide Dr. Krugman with a copy of
13 his transcript, please?

14 Q. Dr. Krugman, let me direct your attention to page 56, lines
15 2 through 19, and I would like to ask you whether or not you
16 were asked the following question and gave the following answer.

17 Do you have that, Jamie?

18 MS. BROOKER: Your Honor, just while we have a brief
19 pause, I didn't want to interrupt Mr. Beach, but I'm not sure
20 what Mr. Beach said, but it came up here on the screen that he
21 introduced this as a document that was introduced with
22 Dr. Chaloupka and not Dr. Kessler. And I'm not sure what
23 Mr. Beach said or whether the reporter heard it correctly, but
24 if Mr. Beach could just clarify what he was representing about
25 this document for the record.

1 MR. BEACH: Sure, I'd be happy to.

2 Ma'am, I believe that the document was offered and
3 admitted with Dr. Kessler. I don't believe I mentioned
4 Dr. Chaloupka. If I'm in error about that, I apologize.

5 THE COURT: Now, is this the deposition you're
6 referring to?

7 MR. BEACH: Yes, ma'am. The Thomas' deposition at page
8 56, lines 2 through 19.

9 BY MR. BEACH:

10 Q. Dr. Krugman, do you recall that you were asked the following
11 question and gave the following answer.

12 "Question: Well, that is something that we are going
13 to request because we believe it would be relevant to your
14 expert opinions and we can deal with counsel on any issues
15 regarding protecting your propriety interest in that during the
16 course of litigation, but I do want to request for the record
17 that that draft article be produced.

18 "Answer: That article is in draft form and drafts
19 certainly change. I have not gotten anything by way of proofs
20 back from the journals so I am always reluctant to let things
21 out in forums other than which they will appear in a public
22 forum. Additionally, as you may know, many journals will not
23 publish work that has been distributed prior to their official
24 release because that is why they are in journals. That's what
25 they do."

1 Do you recall being asked, sir, that question and
2 giving that answer about one of your own drafts?

3 A. I do.

4 Q. Now, if we could return to the government's exhibit that you
5 rely on.

6 A. I would like to continue with my answer if I may.

7 THE COURT: Go ahead.

8 THE WITNESS: Thank you, sir.

9 THE COURT: Would you speak up, please, Doctor?

10 THE WITNESS: Yes. I'm sorry, Your Honor.

11 Two things. One is when I noted that I often share my
12 drafts, I do. I often share my drafts with my colleagues at the
13 university.

14 In this particular instance, you were asking me for a
15 draft of an article that was soon to be published and in proof
16 form, and it's a standard that articles are embargoed before
17 they are released and we don't give the drafts out when they are
18 that close simply because the journal wants to have the splash
19 of making the article come out. So these are really two very
20 different kind of scenarios that you're posing, sir.

21 BY MR. BEACH:

22 Q. But the words that you -- in your answer that you chose,
23 sir, was, "This article is in draft form and drafts certainly
24 change."

25 Drafts do change; isn't that correct, sir? Your own

1 drafts can change.

2 MS. BROOKER: Objection. I object because Dr. Krugman
3 has answered that question very directly and thoroughly.

4 THE COURT: Sustained.

5 BY MR. BEACH:

6 Q. If we could go back to U.S. Exhibit 21475, the second page.

7 Now, you recall in this memo, do you not, Dr. Krugman,
8 that, among other things, Dr. Teague writes, "At the outset it
9 should be said that we are presently, and I believe unfairly,
10 constrained from directly promoting cigarettes to the youth
11 market."

12 Sir, how do you interpret the word constrained?

13 A. Not allowed.

14 Q. The one sentence from the memo that you quote in your direct
15 testimony is the first sentence of the second paragraph in which
16 Dr. Teague wrote, "Realistically, if our company is to survive
17 and prosper over the long term, we must get our share of the
18 youth market."

19 Do you recall that that is the sentence that you quoted
20 in your direct?

21 A. Yes, sir.

22 Q. All right. And with respect to the very next sentence, you
23 didn't quote that, which says, "In my opinion, this will require
24 new brands tailored to the youth market."

25 You didn't cite that sentence to the court; correct?

1 A. Yes.

2 Q. Now, in your direct you only noted that he was an Assistant
3 Director of Research, that was with Research and Development
4 Department; is that right?

5 A. I don't remember at this time, Mr. Beach.

6 Q. Do you know, sir, whether he was in the Marketing Department
7 or the Research and Development Department?

8 A. Research and Development.

9 Q. All right. And do you know whether or not Dr. Teague was a
10 chemist by training?

11 A. I do not remember.

12 Q. But you do know that Dr. Teague characterizes his own
13 statements in this memo, sir, as "incomplete, subjective, and
14 simplistic." You recall that, don't you, sir?

15 A. Where are you referring to, sir?

16 Q. If we could go to page 2 -- or it's the Bates' page ending
17 7359, first paragraph, second sentence. "If this incomplete,
18 subjective, and simplistic analysis is even approximately
19 correct."

20 Do you recall that that was his own characterization of
21 his work, sir?

22 A. Yes.

23 Q. Now, if we could go to the last page of this document, the
24 first full paragraph?

25 Do you recall, Dr. Krugman, that Dr. Teague notes, "The

1 thoughts expressed here may provide a preliminary agenda for
2 discussions." Do you recall that language?

3 A. Yes.

4 Q. And by the way, Dr. Krugman, this is a document that you've
5 had among your reliance materials for years, several years that
6 you've been testifying against tobacco companies; is that
7 correct?

8 A. Yes.

9 Q. Now, with respect to his specific statement here, "The
10 thoughts expressed here may provide a preliminary agenda for
11 discussions in the future." What he's saying is we -- there
12 maybe should be some follow up to the ideas expressed in his
13 memo; correct?

14 A. What he's -- what he's advocating is integrating the
15 thoughts with the different units in the company, which would --
16 which would show how the information would flow between the
17 different organizations and back over to marketing.

18 Q. Right. But specifically here what he's saying is the
19 thoughts expressed here may provide a preliminary agenda for
20 discussions and between the various departments that you note.

21 Do you have any evidence whatsoever that those
22 discussions occurred, because I don't recall it being cited in
23 your direct?

24 A. Not with respect to this document.

25 Q. I'd like to move forward in time to another document you

1 cite in your direct, sir, entitled Planning Assumptions and
2 Forecasts For the Period 1977 Through 1986.

3 Jamie, if you could pull that up. It's U.S. 48377,
4 please.

5 A. What page are you on, sir?

6 Q. You referred to it, sir, in your written direct testimony at
7 page 76, lines 17 through 23, I believe.

8 First, let me ask you. Is it correct that this is a
9 document that you referred to in your direct?

10 A. Yes.

11 Q. And if you could -- Jamie, just pull out so we could see the
12 whole page, please? And blow up the date.

13 This is another document coming from the Research
14 Department. Do you understand that to be the Research and
15 Development Department, sir?

16 A. Yes.

17 Q. And you can see that the document that you have cited is
18 dated April 15, 1976; correct?

19 A. Yes.

20 Q. Now, on Tuesday, I believe, sir, you mentioned that you had
21 read at some point Dr. Dolan's direct testimony, written direct
22 testimony. Is my memory correct on that, sir?

23 A. Yes.

24 Q. And do you recall, sir, when you were reading Dr. Dolan's
25 direct testimony that he cites a document bearing the exact same

1 title but a different date?

2 A. I don't remember that.

3 MR. BEACH: Can we provide Dr. Krugman with a copy of
4 Dr. Dolan's direct? If you could pull up, Jamie, Dr. Dolan's
5 direct at page 93, lines 8 through 14. I think it was 8 through
6 14 may help us.

7 Q. But you see, sir, that in Dr. Dolan's direct he cites a
8 document bearing the exact same title, Planning Assumptions and
9 Forecast For the Period 1977 through 86, and his document is
10 dated March 15, 1976. Do you see that, sir?

11 A. Yes.

12 Q. Did you notice that difference, sir, when you read his
13 direct?

14 A. I did not.

15 Q. And again, for clarity, your version of this document, U.S.
16 Exhibit 48377, is dated April 15, 1976, one month later;
17 correct?

18 A. Yes.

19 Q. And, sir, do you recall that you and he both cite
20 essentially the same passage from this document? I'll put it up
21 on the Elmo here to show you. This is from your written direct
22 testimony at page 76.

23 You see, the passage, sir, that you quoted was
24 "Evidence is now available to indicate that the 14 to
25 18-year-old group is an increasing segment of the smoking

1 population. RJR-T must soon establish a successful new brand in
2 this market if our position in the industry is to be maintained
3 over the long-term."

4 Do you see that passage, sir?

5 A. Yes.

6 Q. And now I'll show you from Dr. Dolan's testimony which I
7 know you have in front of you.

8 Do you see that he's citing the same passage there, "14
9 to 18-year-old group is an increasing segment of the smoking
10 population. Reynolds must establish a successful..."

11 You see, sir, that he cites the same passage, referring
12 to, "14 to 18-year-old group is an increasing segment of the
13 smoking population. RJRT must soon establish a successful new
14 brand in this market if our position in the industry is to be
15 maintained over the long-term"?

16 A. Yes.

17 Q. And in fact you've seen that, this March 15th version of
18 that document, before, haven't you, sir?

19 A. I've seen the documents. As to the specific date on the
20 document, March or April 15th, I'm not a hundred -- I couldn't
21 say which date I remember seeing.

22 Q. And if we could just return to your testimony about the
23 significance of this document.

24 MR. BEACH: Your Honor, this is Dr. Krugman's direct at
25 page 77, lines 1 through 6.

1 If you would pull that up, please.

2 BY MR. BEACH:

3 Q. And, sir, what you told the court was that this document
4 shows RJ Reynolds' focus on young people, in this case 14 to
5 18-year-olds, as key portions of the market. "There is a stated
6 urgency to reach this teenage market if R.J. Reynolds is to
7 maintain its position."

8 Those were the words that you used, sir, to describe
9 the significance of this document to the court; correct?

10 A. Yes.

11 Q. Now, you recall, sir, that this memorandum is one that you
12 and I have actually discussed before and it is a deposition I
13 took of you in a case called Seaborn in June of 2000. Do you
14 recall that?

15 A. I certainly remember our -- some of our previous
16 discussions, Mr. Beach. I don't remember this specific issue.

17 Q. Let's pull it up to remind you, sir. If you could go to
18 page 215, lines 11, beginning line 11, you will see, sir, that
19 here is where we start. If you look at line 14. "April Planning
20 Assumptions Document."

21 A. Yes.

22 Q. And you can continue to read through that, sir, if you want
23 and then we can return to my question which was that we
24 discussed these.

25 I think if you continue to read, you will see that --

1 it continues on to talk about a version of the document with
2 again the same exact title, now dated May -- I misspoke. I said
3 May of 1996 and you corrected me May of 1976.

4 Do you see that, sir?

5 A. Yes.

6 Q. So now we really have three versions of this document, don't
7 we? We have a March version, an April version, and a May
8 version; correct?

9 A. If I follow you, that's correct, yes.

10 Q. Well, now let's look at the May version. This is JD 060037.

11 And if you could just focus on the top part of the
12 page, Jamie. It's dated May 17, 1976.

13 Do you see that, Dr. Krugman?

14 A. Yes.

15 Q. And the title is shown up in the left-hand corner, Planning
16 Assumptions and Forecast for the Period 1977 through 1986 for
17 R.J. Reynolds Tobacco Company. Do you see that?

18 A. Yes.

19 Q. And it says, "Attached, please find." And it's being
20 distributed by Dr. Alan Rodgman; correct?

21 A. Yes.

22 Q. And you have seen, sir, this very document before because I
23 showed it to you in your Seaborn deposition. Do you recall
24 that, don't you?

25 A. I think so.

1 Q. You're not sure?

2 A. My answer is, I think so.

3 Q. Would you like to verify?

4 A. No, that's okay.

5 Q. Now, let's compare, sir, the version of the document that
6 you cited to the court with the version of the document that I
7 showed you in your deposition in the Seaborn case.

8 If we could pull up J-DEM 060455, please.

9 Sir, I'll give you both of the documents. But don't
10 you recall that the precise language that you cite to the court
11 is in fact omitted from the May version that was distributed by
12 Dr. Rodgman?

13 A. Yes.

14 Q. And you knew that, obviously, sir, in your direct testimony
15 you only referred to the April version of this document;
16 correct?

17 A. I certainly referred to the April version of the document,
18 but my -- my testimony is that whether it's cleaned up or not,
19 that thinking was still existing within the company. And I
20 point to a host of other documents from that time period.

21 Q. Sir, I'm asking you about this document right now. I
22 believe that the question that I asked you was: When you
23 told -- made the representation that you did in court about the
24 significance of this particular document, U.S. 48377, you in
25 fact knew that there was a version that was, in fact, circulated

1 and had a cover memo circulating it, dated one month later, that
2 omitted the language that you cited to the court and you did not
3 at least indicate in your direct testimony that that was the
4 case.

5 A. No, I did not -- I did not specifically omit it to make the
6 point that I am trying to make through the string of documents,
7 if that's your inference.

8 Q. Sir --

9 THE COURT: Did you even indicate in your testimony and
10 your direct that the April version was only a draft?

11 THE WITNESS: I did not, Your Honor.

12 BY MR. BEACH:

13 Q. And if we could return to the cover page of the JD version
14 of that document.

15 Again, you recall, sir, don't you that in Seaborn
16 deposition you and I went through -- I'll just tell you --
17 literally nine pages of transcript where you and I reviewed
18 Dr. Rodgman's testimony about the sequence of events that led to
19 this final version. Do you generally recall that?

20 A. No, sir.

21 THE COURT: When was that deposition, please?

22 MR. BEACH: The deposition in the Seaborn case, ma'am?
23 It was June 1, 2000.

24 BY MR. BEACH:

25 Q. Dr. Krugman, you're perfectly free to review your Seaborn

1 transcript. I believe it's already been provided to you.

2 If you look at pages 217, lines 21 through page 226,
3 line 6, you will see that we discussed Dr. Rodgman's testimony
4 in your deposition. And you feel free to look at that if you
5 want, but I think I can cut to the chase here by showing you a
6 particular exchange that may clarify this.

7 If you could pull up Dr. Krugman's Seaborn deposition
8 at page 225 lines 11 through 17.

9 At the end of this series of questions, Dr. Krugman, I
10 asked you "And you're also now aware, aren't you, sir, that the
11 gentleman responsible for distributing this document in May
12 specifically testified that the language, the reference to 14 to
13 18-year-olds, was struck because he thought it was
14 inappropriate; correct?"

15 And your answer was, "That's what he said."

16 Do you recall being asked that question and giving that
17 answer after having reviewed Dr. Rodgman's testimony about these
18 documents?

19 A. In looking at it now, sir, yes.

20 Q. And that, sir -- let me ask it this way.

21 You possessed information, sir, that's flatly
22 inconsistent with the conclusions that you drew about the
23 significance of the April draft.

24 You knew, number one, that the operative language that
25 you cite to the court -- and, by the way, Dr. Dolan also cites

1 to the court -- was stricken from the final version of the
2 document, and you knew that it was stricken because the
3 author -- excuse me -- the person responsible for the
4 distribution of this document concluded it was inappropriate.

5 You knew those two facts, sir, and nonetheless, you
6 decided not to share that information with the court in your
7 testimony; correct?

8 MS. BROOKER: Objection to the extent that Mr. Beach is
9 offering that fact from the testimony of the witness as hearsay.
10 He can ask Dr. Krugman if he considered that testimony, but he
11 cannot offer it as an established fact because it is hearsay.

12 THE COURT: I think you have to rephrase your question.
13 The objection is sustained.

14 BY MR. BEACH:

15 Q. Sir, in your testimony about the significance of this
16 document, quite simply, you had seen Dr. Rodgman's testimony
17 about why the language that you cite was stricken, and you knew
18 that there was a final version, a circulated version of the
19 document that didn't contain that language and neither of those
20 two things did you decide were worth including in your
21 discussion of that document; correct?

22 A. Well, they certainly are not included in my direct
23 testimony.

24 Q. I'd like to move forward now from 1976, the date of the
25 document that we were just looking at, to 1987 and ask you about

1 an internal 1987 Camel memo that you cite which is U.S. 50876.

2 And for your reference, sir, it was discussed in your
3 direct testimony on page 83, lines 6 through 11. Let me just
4 first ask you if you want to confirm or whatever you prefer.
5 You can look at the screen.

6 Do you recall citing this document, sir?

7 A. I'm trying to find the page number again. Can you give that
8 to me again?

9 Q. Sure. It's page 83, lines 6 through 11, I believe, sir.

10 A. Thank you, Mr. Beach.

11 Yes.

12 Q. Now, as you can see, this of course is a memo written, you
13 may have to pull back on, or go to the second page. I want to
14 show who it's written by.

15 At the bottom of the first page. A J. H. Miller. Do
16 you see that, sir?

17 A. I do.

18 Q. And it's dated October 15, 1987. And the RE line is Project
19 LF Potential Year 1 Marketing Strategy. And this particular
20 memo you cite refers to a target audience, and blow up the first
21 sentence of the second paragraph, please.

22 "The targeted audience is younger adult male smokers,
23 paren, primarily 13 to 24-year-old male Marlboro smokers." And
24 that's in fact language that you point out in your direct
25 testimony; correct?

1 A. Yes.

2 Q. And in fact, sir, based on this document, we can display
3 your direct, sir, at pages 83, lines 12 through 18.

4 What you told the court was "This R.J. Reynolds'
5 memorandum shows a strategy that has a clear focus on young male
6 smokers, including teenagers. The company is primarily
7 targeting those young smokers who are, or will be smoking
8 Marlboro. Many of these teenagers will be new to the market and
9 not already existing smokers." And your answer goes on from
10 there.

11 Do you recall, sir?

12 A. Yes.

13 Q. The point is that you've told the court in no uncertain
14 terms, sir, that this memo reflects quote, "A strategy that has
15 a clear focus on young male smokers, including teenagers;"
16 correct?

17 A. Yes.

18 Q. And early in your direct testimony, I believe you indicate
19 that when you say teenagers, you mean 12 to 17-year-olds?

20 A. Yes.

21 Q. Now, this is the only document regarding project LF that you
22 cite in your direct testimony; correct?

23 A. Yes.

24 Q. And as someone who has taught the importance of careful
25 research, you didn't assume, did you, sir, that this is the only

1 document in Reynolds' files concerning project LF?

2 A. I was focusing -- pardon me. I was focusing on the specific
3 target note, not the project per se.

4 Q. That may be the case, sir, but I don't believe that's
5 responsive to my question.

6 As a person who has taught the importance of careful
7 research in the context of careful marketing research, you
8 didn't assume that this was the only document in Reynolds files
9 concerning project LF; correct?

10 A. No. What I took this document was in context with the many
11 other Reynolds' documents that I had seen in previous years
12 which continually noted audiences -- or markets starting at
13 14 years old and moving up.

14 So when you see this, it was extraordinarily consistent
15 with many of the other documents that I refer to in my direct
16 testimony.

17 Q. The answer to my question which was, You didn't assume that
18 this was the only document in Reynolds' files concerning project
19 LF, was no, you didn't have that assumption. Let me ask you
20 another question.

21 Did you look, sir, for a single other document relating
22 to project LF in the research that you conducted in this case
23 when you decided to cite this particular document for the
24 proposition that you cite it for?

25 A. No, I did not, because the way I was looking at the

1 documents was focusing not on any specific project but rather
2 the specific markets that were identified as being important to
3 RJR products.

4 Q. Is it fair to say, sir, that you did not undertake any
5 investigation whatsoever into the background of this document
6 before deciding it was worthy of presenting to court?

7 A. I decided it was worthy, sir, based on the context of all
8 the other documents that I had seen.

9 Q. Sir, the question that I asked you I believe was more
10 precise than that.

11 Is it fair to say that you did not undertake any
12 investigation whatsoever into the background of this document
13 before deciding it was worthy of presenting to the court?

14 MS. BROOKER: Objection, asked and answered.

15 THE COURT: Overruled. You may answer.

16 A. Again, sir, I didn't look into the background of the
17 document, but I took the document in the context of all the
18 other documents that I had been reading with respect to this --
19 these age groups.

20 Q. Is the answer to any question, sir, no, you did not
21 undertake any investigation into the background of this document
22 before deciding it was worthy of presenting to the court? Any
23 investigation specific to this document. That's my question.

24 MS. BROOKER: Objection. He did just answer that
25 question.

1 THE COURT: The objection is overruled.

2 Is the answer no?

3 THE WITNESS: Yes.

4 BY MR. BEACH:

5 Q. Thank you. I believe, Dr. Krugman, that you actually got
6 this document from the government. It was among the
7 supplemental materials produced for you.

8 Do you recall that, sir?

9 A. I don't remember. I've obtained any number of documents
10 over the years. I don't remember where this particular document
11 came from.

12 Q. Well, if we could pull up U.S. 50876, the document that
13 we're talking about. Look at the Bates number in the lower
14 left-hand corner.

15 THE COURT: 50876. Is that what we're looking at?

16 MR. BEACH: Let me double-check, Your Honor.

17 THE COURT: I think that's right.

18 MR. BEACH: Yes, ma'am, 50876.

19 BY MR. BEACH:

20 Q. Do you see the Bates number in the bottom left-hand corner,
21 sir?

22 A. Yes.

23 Q. Sir, let me just show you, for example -- do you recall
24 among.... The documents that you -- oops, the documents that
25 you received, this is a shipping -- this is what we got from the

1 government with a box of documents, references to VXA numbers.

2 Do you recall that? Were those Bates numbers on the
3 documents that you received from the government, sir?

4 A. Would you ask your question again, Mr. Beach?

5 Q. Do you recall on the company documents that you received
6 from the government them having separate Bates numbers beginning
7 with the prefix VXA or other prefixes?

8 A. Yes.

9 Q. Other prefixes including -- if we could go back to the U.S.
10 exhibit. MTP003, do you recall that as well?

11 A. I remember letters in front of the Bates numbers, yes.

12 Q. Is this one of the documents in your conversations with the
13 government, sir, that they specifically pointed you to from the
14 findings that they wanted you to talk about in your written
15 direct? Do you recall?

16 A. I don't believe so.

17 Q. Let me ask you a different question.

18 We know from your direct testimony, sir, that you read
19 defendants' proposed final findings of fact. You cite the
20 chapter that addressed marketing issues. Do you recall that?

21 A. Yes, sir.

22 Q. And, sir, in the interest of being thorough and careful in
23 your work, did you read the entire chapter from the defendants'
24 proposed final findings of fact on marketing issues?

25 A. I did.

1 Q. In the interest of being thorough and careful in your work,
2 sir, did you ask for copies of the documents cited by defendants
3 in that chapter?

4 A. I may have occasionally asked for a document, but that
5 wasn't normally the way I would work at all.

6 Q. If we could display, please, paragraph 453 from defendants'
7 final findings of fact. We just saw it flashed up quickly
8 there, the table of contents for the chapter.

9 This is the chapter that you received; correct,
10 Dr. Krugman?

11 A. Yes.

12 Q. And -- thank you, Jamie, paragraph 453 -- you will see, in
13 fact, sir, that there is discussion references to that precise
14 language that you cited in your direct testimony, the 13 to
15 24-year-old reference, the Miller memo?

16 A. Yes.

17 Q. And so when you read this chapter of defendants' findings,
18 you read this paragraph, didn't you, sir?

19 You saw that there were references to a great number of
20 other documents involving so-called project LF?

21 Do you recall reading this, sir?

22 A. I remember reading the document, and what would happen in
23 that situation is I wouldn't take it from -- I wouldn't take it
24 from that.

25 I would call and talk to counsel and indicate that

1 there would be -- if there were documents in there that I hadn't
2 already seen, I would like to see them.

3 Q. I'm sorry. I was a bit distracted, Dr. Krugman, from your
4 answer, but did you just say you would want to see those
5 documents?

6 A. If I saw a document like this, the way I would work would be
7 to have called counsel on occasion, as I said yesterday, and
8 say, "I'd like to see that whole document."

9 Q. Did you do that?

10 A. I don't remember if it was for this specific one.

11 Q. Let's pull up -- I'm going to show you the actual document,
12 sir, so you don't have to take our for it from the findings of
13 fact.

14 But you do recall reading this paragraph and you think
15 you may have asked the government for copies of these documents?

16 A. What I said, sir, is I recall reading over the document. I
17 can't tell you whether I recall this specific passage correctly.
18 I'm trying to phrase how it could have worked, if it worked that
19 way.

20 Q. All right. In any event, let's look at the JD 60574,
21 please. I'm going to go through and show you each one of these
22 documents now, Doctor.

23 This is a document entitled Project LF and it's dated
24 September 11, 1987. Do you see that, sir?

25 A. Yes.

1 Q. So in fact, sir, this is dated approximately one month
2 before the memorandum that you cite. Do you see that?

3 A. Yes.

4 Q. And if you look at the third -- well, the third heading on
5 the page under Background to Target. You see, sir, that in fact
6 the defined target for project LF in this document written
7 one month before the version that you cite as disclosed in
8 defendants' proposed final findings of fact that you read,
9 states that "The target audience was 18 to 34-year-old males."
10 I won't read the whole thing.

11 You can also see the reference to "primary emphasis on
12 the 18 to 24." Do you see that, sir?

13 A. Yes.

14 Q. Have you seen this document before, Dr. Krugman?

15 A. I don't remember seeing this document.

16 THE COURT: Counsel, I need you to go back to the
17 finding of fact for a minute, please.

18 MR. BEACH: Yes, ma'am.

19 THE COURT: The document you showed I think one
20 document before. I can't read it. You will have to bring it
21 forward a little bit.

22 MR. BEACH: I'm happy to --

23 THE COURT: All right. I see it. I see it. Okay.

24 Thank you.

25 MR. BEACH: I'm happy to read it into the record if you

1 like.

2 THE COURT: No. I think you did already. But in any
3 event, I see what I needed to see.

4 MR. BEACH: Okay.

5 BY MR. BEACH:

6 Q. If we could actually return --

7 THE COURT: Let me clarify something.

8 The document that refers -- and, of course, this is a
9 question for the witness -- that refers to targeting "the young
10 male adult smoker primarily 13 to 24 years old" was written a
11 month after the document that refers to targeting 18 to
12 34-year-olds; is that correct?

13 THE WITNESS: Yes.

14 MR. BEACH: This document, ma'am?

15 THE WITNESS: May I?

16 THE COURT: Had you finished your answer?

17 THE WITNESS: No, I was going to continue a little bit
18 if I may, Your Honor.

19 THE COURT: All right. Go ahead.

20 THE WITNESS: There's -- there's often strings of
21 documents, and in this particular -- in this particular case we
22 see one taking place after the -- after the first document. And
23 it's hard to exactly say which is the prepotent or most
24 operational document, but I think like in the last string of
25 documents that we -- that we've seen, there is a -- there is a

1 focus within the company -- and people are writing memos
2 discussing age groups that are clearly under the age of 18.
3 Now, sometimes they are before and sometimes they are after, but
4 yet they are existent.

5 BY MR. BEACH:

6 Q. Following up on that point, Dr. Krugman. From your
7 perspective -- you are now referring to that planning and
8 assumptions document that we just looked at -- from your
9 perspective, sir, the fact that that language that you
10 specifically point to was stricken from the final and it was
11 stricken because it was inappropriate is irrelevant; is that
12 correct?

13 MS. BROOKER: Objection. That is hearsay. That is
14 only a statement of counsel in the findings of fact.

15 THE COURT: No. No. A question was asked earlier.
16 You raised an objection. I sustained the objection. The
17 question was rephrased and the witness answered it
18 appropriately, giving his personal opinion about the existence
19 of that fact. And so, therefore, it's not simply hearsay at
20 this point. This witness has testified to it. So the objection
21 is overruled.

22 MS. BROOKER: Your Honor, if I may, that was on a
23 different document and a different issue.

24 I'm referring now to the statement that we just had a
25 moment ago in the findings of fact, and that was a different --

1 that was a few minutes back when I objected to Mr. Beach.

2 THE COURT: Ms. Brooker, I think you are confusing
3 things. We've already established that.

4 The statement in -- and I believe I asked this witness
5 this question -- that the statement in the -- that is quoted in
6 the findings of fact was made after the memorandum that included
7 a reference to 18 to 34-year-olds.

8 Are we all on the same page or not, everybody? This
9 record is going to look like a mess.

10 MR. BEACH: I could illustrate this on the chart.
11 Actually, it's a fairly simple time line.

12 I believe, Your Honor, that Ms. Brooker's objection
13 referred to my question about the prior document that we were
14 discussing.

15 To keep things simple, I'll go ahead and ask my next
16 question. I think I can clarify the record --

17 THE COURT: All right.

18 MR. BEACH: -- ma'am, with respect to this document,
19 right now.

20 THE COURT: Okay.

21 BY MR. BEACH:

22 Q. Let's display, if we could, quickly, JD 67931. Now,
23 Dr. Krugman, this is another document concerning project LF.

24 You see that it is dated October 23, 1987; correct?

25 A. Yes, sir.

1 Q. All right. So, in fact, this now is written approximately
2 one week after the memo that you rely on in your direct
3 testimony; correct?

4 A. Yes.

5 Q. And by the way, if we look at the next page -- oh, before we
6 do that. Of course, the specified target is 18 to 34-year-olds
7 with an emphasis on 18 to 24, and this of course is all about --
8 in the context of smokers. Do you see that, sir?

9 A. Yes.

10 Q. If we look at the next page just real quickly, Jamie.

11 You see under the -- the top left-hand corner the
12 reference to research timetable. Do you see that, sir, in the
13 top left-hand corner?

14 A. Yes.

15 Q. And then this is a page listing out, is it not, various
16 research projects that were intended with respect to the
17 development of project LF. Do you see that, sir?

18 A. Yes.

19 Q. The research that I was asking you about at the outset of my
20 examination, and so for example you see -- look down that column
21 under Design Description in the middle. There's no reference to
22 anyone under the age of 18 on this page, and if you want, you
23 can turn to the next page, because this list continues there.

24 THE COURT: And that's the column labeled Design
25 Description.

1 MR. BEACH: Yes, Your Honor.

2 BY MR. BEACH:

3 Q. Is that correct, sir?

4 A. That's correct. And by 1987 that doesn't surprise me.

5 Q. Now, in fact, Dr. Krugman, do you recall that both of the
6 documents that we were looking at have been provided to you by
7 the government?

8 Not just the findings, but both of these two documents,
9 the document written a month before and the document written the
10 week after. Those were both provided to you, were they not,
11 sir?

12 A. It's possible.

13 Q. Let me show you U.S. Exhibit 66459. The copy isn't as good.
14 Here is the -- what you see project LF, October 23, 1987?

15 A. Yes.

16 Q. We were just looking at that. It's the same target
17 reference. And then if you flip, you will actually see that
18 this U.S. exhibit is two documents, because if you flip to Bates
19 page VXA 1204298 you will see the reference to the other -- the
20 earlier version, September 11th.

21 A. Yes.

22 Q. And again the VXA is a Bates range that you saw in the
23 documents the government gave you; correct?

24 A. Yes.

25 Q. So you had three documents in your possession relating to

1 project LF, at least.

2 You had the memo written a month before, you had the
3 memo written a week after, and the one memo that you chose to
4 refer to in your direct testimony, sir, was the one that
5 contained the reference to 13 to 24-year-olds; correct?

6 A. Yes. And by my looking at this string of memos they keep
7 putting it in and taking it out.

8 Q. Putting it in and taking it out sir?

9 A. The younger age group. The age group that I refer to of 13
10 to 24.

11 THE COURT: Isn't it just the reverse? Didn't they put
12 it in, take it out?

13 No. I'm sorry. Isn't it just the reverse, that they
14 had 18 to 34, then 13 to 24, and then back to 18 to 34?

15 THE WITNESS: Yes, that's what I was -- if I didn't say
16 it like that, Your Honor, that's how I meant to say it.

17 At one point in time this is clearly part of the
18 thinking that was going into it, similar to the other documents
19 where they were cleaned up and they took out that age -- that
20 age group.

21 BY MR. BEACH:

22 Q. Cleaned up. Are you suggesting, sir, that someone
23 instructed or otherwise saw the reference to 13 to 24 in
24 Ms. Miller's document?

25 Are you specifically representing to the court, sir,

1 that there was an instruction to clean up that language?

2 A. I'm saying that those age groups are removed.

3 Q. Sir, my question to you is: Are you specifically
4 representing to the court that there was an instruction with
5 respect to Ms. Miller's memo to remove the reference to 13 to
6 24-year-olds? And if your answer to that question is "yes," I
7 will tell you that I'd like to know what that evidence is, sir.

8 MS. BROOKER: Objection, argumentative.

9 THE COURT: Let me hear first the answer to the
10 question.

11 A. I think that within the company -- and now I'm looking at --
12 speaking a little bit more broadly now, if I may -- that there
13 was a focus on people under the age of 18, and there was an
14 overall view that they wouldn't be called people over the age of
15 18, but rather referred to as different kinds of individuals,
16 sometimes FUBYAS: First Usual Brand Young Adult Smokers, or
17 other, or another kind of phraseology. So, this terminology,
18 Mr. Beach, in using the language of 18 to 34 doesn't
19 particularly surprise me.

20 MR. BEACH: Your Honor, I would move to strike the
21 response as nonresponsive.

22 The question that I posed to Dr. Krugman was did he
23 have evidence with respect to a specific instruction that the
24 reference in Ms. Miller's document be stricken. That was the
25 question that I posed to him.

1 THE COURT: I'm not going to strike the answer, but I
2 will direct the witness to specifically respond to the question
3 that was just asked.

4 THE WITNESS: No.

5 BY MR. BEACH:

6 Q. And, Dr. Krugman, let me show you one additional document.
7 It's JD 060380. This is a memo written by J. H. Miller, the
8 same author that you referred to; correct?

9 A. Yes.

10 Q. And it's about the same subject, Project LF Positioning?

11 A. Yes, sir.

12 Q. And it's dated one day before the document that you cite,
13 sir. Have you seen this document before?

14 A. I don't remember seeing this document.

15 Q. If we could go to the second page.

16 The day before the document that you cite, sir,
17 Ms. Miller, the same person references the prime prospect for
18 this project or this -- yes, Project LF as being 18 to 34 with a
19 18 to 24 emphasis.

20 Do you see that, sir?

21 A. Yes. So if I understand this, this particular document is
22 talking about an advertising strategy primarily -- primarily
23 directed to 18 to 34-year-olds.

24 Q. Sir, did you consider the possibility when you looked at
25 these documents -- you have one dated a month before, you have

1 one dated a week after, and you have a memo from the exact
2 person that you rely on dated the day before.

3 Would you consider the possibility that the document,
4 sir, that you refer to has a mere typographical error in it?

5 Would that be within the of realm of possibility for you, sir?

6 A. Anything is possible.

7 Q. In this case, do you know?

8 A. My answer, sir, is anything is possible.

9 Q. No. But now I'm asking you, do you know?

10 A. Do I know if it's a typographical error?

11 Q. Yes.

12 MS. BROOKER: Objection, calls for speculation.

13 THE COURT: He may answer. The answer is pretty --
14 well, he may answer.

15 A. I don't know if it's -- my answer is -- I guess anything is
16 possible.

17 Q. You don't know, sir; correct?

18 MS. BROOKER: Objection, asked and answered.

19 THE COURT: It was not answered. The question is
20 simply you do not know, sir; is that correct?

21 THE WITNESS: I do not know whether it was a
22 typographical error.

23 BY MR. BEACH:

24 Q. Let's move forward from 1987 now to January 1990, sir, and
25 another document that you cite U.S. 51170. If we can bring that

1 up?

2 THE COURT: Where is that in the direct?

3 MR. BEACH: I will right now, Your Honor.

4 BY MR. BEACH:

5 Q. It's cited in your direct testimony, Dr. Krugman, I believe
6 at page 83, lines 12 through 18. If you could just confirm that
7 for us, please.

8 A. Yes, sir.

9 Q. Now, this is a memorandum from a Mr. McMahon, and you can
10 see in the top left-hand corner he's the Division Manager with
11 the Sales. Do you see that, sir?

12 A. I do.

13 Q. And in your direct testimony you identify this document as
14 an example that quotes, "contradicts Reynolds' statements that
15 they are only interested in adult smokers."

16 Do you recall that?

17 A. Yes.

18 Q. And, in fact, you go beyond that statement in your direct
19 testimony, and if we could display. This is at page 84, lines 4
20 through 7.

21 You told the court in response to the question, How is
22 this memorandum significant to your conclusion?

23 You told the court, sir, that this memorandum
24 illustrates that at the tactical level R.J. Reynolds was
25 targeting teenagers via in-store selling programs.

1 Do you recall that, sir?

2 A. Yes.

3 Q. In fact, Dr. Krugman, you know that Mr. McMahon was
4 reprimanded by Reynolds, don't you, sir?

5 A. I have heard that he was reprimanded by Reynolds.

6 Q. You don't know?

7 A. No. I have been told in other forums that he had been
8 reprimanded for this.

9 Q. I'm sorry?

10 A. I have been told in other forums that he has -- he had been
11 reprimanded for this.

12 Q. So it's your understanding that Mr. McMahon was reprimanded
13 for this memo, but you did not yourself investigate whether or
14 not that was correct? You just don't know?

15 A. I don't know. I do know, though, what the memo says.

16 Q. Now, Dr. Krugman, as a person who has carefully studied the
17 documents, in terms of understanding the significance of what
18 was said, would it be important to know whether or not those
19 statements resulted in an employee being reprimanded?

20 A. The more important thing for me is --

21 Q. Excuse me, Dr. Krugman. I'd like a yes or no and then you
22 can expand upon it.

23 A. No.

24 Q. It's not important to you to know that he's reprimanded.
25 That's your testimony to this court; correct?

1 MS. BROOKER: Objection. He answered "no" and he would
2 like to finish explaining.

3 THE COURT: You may finish your answer.

4 A. The most important part that I'm focusing on here is an
5 individual at the tactical level telling the sales reps to place
6 products where teenagers frequent.

7 Q. Are you finished, sir?

8 In fact, I am happy to show this to you if you like,
9 Dr. Krugman.

10 But going all the way back to 1997, six years ago, in a
11 case in the Texas Attorney General case you were asked about
12 this document and you were asked the following question, "But
13 it's your understanding that this gentleman was reprimand for
14 sending out the memo, is that correct?"

15 Your answer was, "Yes, oh yeah. Yes, yes."

16 And then the next question, "An apology was made?"

17 "Answer: Yes."

18 Do you recall, generally, that you've known about the
19 fact that Mr. McMahon was reprimanded for years, sir?

20 A. I said that earlier in my answer to you that I knew that he
21 had been reprimanded.

22 Q. Of course, that's information that you decided not to
23 provide the court in your direct testimony; correct?

24 A. It's not in the direct testimony.

25 Q. You said you didn't know, so let's actually look and see

1 what happened, sir.

2 At JD 60266. You can see this a memorandum dated
3 April 11, 1990 to Mr. McMahon from Mr. Turner, the Regional
4 Sales Manager. Do you see that, sir?

5 A. Yes.

6 Q. And if you look at the first paragraph you see the reference
7 to his January 10th memo. That's the memo that you rely on;
8 correct?

9 A. Yes.

10 Q. If we look at the second paragraph --

11 If you could blow that up, Jamie, please.

12 What Mr. Turner told Mr. McMahon was the implication of
13 your letter is that the company will now start targeting high
14 school students for promotion of our products. This implication
15 is in direct conflict with the company's long-standing policy of
16 not marketing or promoting our products to minors. Company
17 policy explicitly states that there must be no exceptions to
18 this policy at any time, for any reason, under any
19 circumstances.

20 Do you see that, sir?

21 A. I do.

22 Q. And do you recall whether or not your understanding, sir,
23 included the fact that Mr. McMahon was then ordered to send a
24 corrective memo to the sales representatives in his division?

25 MS. BROOKER: Objection. This is now being offered for

1 the truth of the matter asserted. He should be able to ask
2 Dr. Krugman if he considered this letter in his conclusions but
3 not offering this as a fact.

4 THE COURT: No. Objection is overruled.

5 Go ahead, please.

6 BY MR. BEACH:

7 Q. Do you have an understanding of whether or not Mr. McMahon
8 was, in fact, instructed to specifically essentially countermand
9 the memo that you rely on?

10 Was that part of your understanding, though you may not
11 have seen the document?

12 A. I don't -- I don't remember the specifics of it. I remember
13 the reprimand.

14 Q. I believe you can go to the next page, Jamie.

15 I'm instructing you to take the following corrective
16 action, immediately clarifying writing to all division
17 personnel.

18 A. Yes.

19 Q. So, in fact, Mr. McMahon was instructed in his reprimand to
20 countermand, rescind any implication from the memo that he
21 wrote; correct?

22 A. Yes.

23 Q. Now --

24 THE COURT: Excuse me. Are you still on this
25 particular document or are you changing topics now?

1 MR. BEACH: I have a few more questions on this
2 document, Your Honor, and then I will actually be concluded.

3 THE COURT: All right.

4 BY MR. BEACH:

5 Q. Now, let me quickly show you, sir --

6 MR. BEACH: I apologize, Your Honor. Let me see if I
7 have a copy of it.

8 BY MR. BEACH:

9 Q. U.S. -- if you could display U.S. 21031. You see this is --
10 this is the correction memo that Mr. McMahon sent. Did the
11 government give this to you, Dr. Krugman, when you were
12 preparing your direct testimony?

13 A. I don't think so. I don't remember.

14 Q. You do see there's a reference to his -- he's telling the
15 sales reps, May 1990, referring to his prior January 10th memo.
16 You see that? So he was doing what he was instructed to do in
17 his reprimand. Do you see that, sir?

18 A. Yes.

19 Q. And in fact, Dr. Krugman, the government in their opening
20 statements -- I'll show you -- actually explicitly refers to
21 that memo. And this was --

22 MR. BEACH: Your Honor, there's no number that was
23 assigned, I believe, to demonstratives in the openings, but this
24 is a demonstrative from the government's opening and they
25 specifically referred to Mr. McMahon's countermand of the memo

1 that Dr. Krugman relies on.

2 Q. Do you see that, Dr. Krugman, the date?

3 A. Yes.

4 Q. Now, Dr. Krugman, aren't you aware, sir, that after
5 Reynolds' sales executives became aware of Mr. McMahon's memo,
6 they conducted an investigation, and the Executive Vice
7 President for Sales sent out a memo to every sales rep in the
8 United States for R.J. Reynolds to -- with respect to any
9 implication from the McMahon memo.

10 Do you have a general recollection of that?

11 A. I do not.

12 Q. Let me show you what's been marked in the case as Joint
13 Exhibit 22534.

14 And by the way, Dr. Krugman, the JE reference, it means
15 that this is a document that appears both on the government's
16 list as well as the joint defendants' list. Okay?

17 I take it the government didn't give you this
18 particular memo either, sir, did they?

19 A. I don't remember, Mr. Beach.

20 Q. But you can see, this is a memo from Mr. Yancey Ford,
21 Executive Vice President for Sales at Reynolds, it's dated April
22 10, 1990, a few months after the McMahon memo. Do you see that?

23 A. Yes.

24 Q. And of course, it's addressed to all field sales employees.
25 Do you see that, sir?

1 A. Yes.

2 Q. And in this memorandum to the entire Reynolds' sales force,
3 Mr. Ford states, "It is our long-standing and firmly held view
4 at R.J. Reynolds Tobacco Company that smoking is an adult
5 custom. Our policy is to promote and market our products only
6 to adult smokers, primarily those who smoke competitive brands."

7 Do you see that, sir?

8 A. I see those words, yes.

9 Q. And then he goes on to state. "It has come to our attention
10 that our current strategy against Marlboro was misinterpreted in
11 one of our 166 sales divisions. As a result, our sales
12 representatives in that division were apparently asked to
13 identify retail calls near high schools for the purpose of
14 maintaining ongoing promotions in these stores."

15 Do you see that, sir?

16 A. I do.

17 Q. "Actions of this nature," he continues, "are a clear
18 violation of our policy and will not be tolerated. Corrective
19 action has been taken in the involved division. Once again, I
20 want to reinforce our policy that we promote our products only
21 to adult smokers."

22 Do you see that, sir?

23 A. I see the written policy.

24 Q. "Retail stores near high schools should be given no special
25 emphasis, and should be worked with the normal course of

1 frequency and with the same programs you would give any other
2 similar outlet, regardless of location. Please give this matter
3 your immediate attention and high priority."

4 Do you see that, sir?

5 A. I see that retail stores near high schools will be given no
6 special attention, which means that it will be given some
7 attention.

8 Q. Dr. Krugman, when you were drafting -- you talked about the
9 process of drafting your written direct.

10 A. Yes.

11 Q. You were aware -- you had said you had an understanding that
12 there is a reprimand. But you did not, in fact, conduct an
13 investigation and determine what came of the memo that you rely
14 on at any point in time; isn't that correct?

15 A. That's correct.

16 Q. And when you were writing your response and describing the
17 significance of the McMahon memo from January 1990 as reflecting
18 tactical level marketing to teenagers, you meant 12 to
19 17-year-olds as you previously testified, sir.

20 The government never said to you, "By the way, sir, we
21 have an exhibit on our exhibit list dated three months later
22 countermanding that." Is that correct?

23 A. Well, it is tactical, yes -- and it is tactical.

24 Q. Sir, could you answer -- let's have a clear answer to my
25 question, please.

1 A. Yes.

2 MR. BEACH: Nothing further, Your Honor.

3 THE COURT: All right. Let's take a break.

4 But before we take our break, I believe there is one
5 more person to do cross. Is that right?

6 MR. WEBB: I think there's two, Your Honor.

7 THE COURT: Two?

8 MR. WEBB: I have -- I'm going to try to keep mine
9 under an hour. I think Mr. Wallace has some questions.

10 MR. WALLACE: Five to 10 minutes.

11 THE COURT: 15 minutes, everybody.

12 (Recess began at 11:08 a.m.)

13 (Recess ended at 11:23 a.m.)

14 THE COURT: All right, Mr. Webb, please.

15 And we need our witness.

16 Ms. Brooker, how long do you think you're going to be
17 on your redirect, do you know?

18 MS. BROOKER: Oh, I'm sorry, Your Honor, you asked me
19 how long my redirect? I would expect, it's certainly not going
20 to be any more than 2 hours. I would say 2 hours.

21 THE WITNESS: My apologies.

22 THE COURT: That's all right.

23 CROSS-EXAMINATION

24 BY MR. WEBB:

25 Q. Doctor, my name is Dan Webb. I represent Philip Morris in

1 this case and so I'm not going to repeat things that other
2 people have covered with you. I'm going to try to focus on
3 Philip Morris' specific issues, and I'm primarily going to be
4 focused on the concept of fraud.

5 And I think you told us earlier, in response to one of
6 Mr. Bass's questions, that you at least generally understand
7 that this case involves allegations of fraud by the government
8 against the tobacco companies. Is that correct, sir, as to your
9 general understanding?

10 A. I understand there's allegations of fraud, but I really
11 don't know in a legal sense what constitutes fraud.

12 Q. I'm not going to ask you any legal questions at all.

13 A. Okay, sir.

14 Q. I just want to get focused, because it is a fraud case, I
15 want to get focused and ask you some very specific questions as
16 to what you as a marketing expert have found to be a factual
17 basis as to whether Philip Morris actually developed and
18 implemented marketing strategies with the purpose of marketing
19 cigarettes to underaged people. So, let me start with the
20 general and get more specific.

21 As you reviewed the evidence in this case, Doctor, as a
22 marketing expert, do you have any problem with Philip Morris
23 developing marketing strategies that have as their specific
24 purpose the marketing of cigarette products to people of legal
25 smoking age?

1 MS. BROOKER: Objection. First, could we get it
2 correct what Dr. Krugman specifically is being offered as an
3 expert for. To say he's a marketing expert is not incredibly
4 accurate. Maybe Dr. Krugman could just first clear that up.

5 THE COURT: No. The government certainly presented him
6 as an expert in that field, so I think that's clear.

7 However, the use of the term, "do you have a problem
8 with" is fairly unclear.

9 MR. WEBB: I'll rephrase it.

10 THE COURT: Please rephrase it.

11 BY MR. WEBB:

12 Q. I take it, based on the work you've done in this case, you
13 recognize that cigarettes are a legal product; is that correct?

14 A. I do, sir.

15 Q. And as a marketing expert, do you agree that Philip Morris
16 has the right to develop marketing plans and strategy for the
17 purpose of marketing products to people of legal smoking age?

18 A. As an expert in marketing communications, the statements
19 that have been made with respect to communicating to people
20 under the age of 21 would be contrary to communicating with
21 people over the age of 18.

22 Q. I'm sorry. Let me try to rephrase my question again. If
23 you can't answer, please tell me.

24 I'm asking you as a marketing expert knowing that
25 cigarettes are legal products, do you agree that Philip Morris

1 has a right to develop marketing plans and strategies for the
2 purpose of marketing cigarettes to people who are of legal
3 smoking age?

4 MS. BROOKER: Your Honor, to the extent that the
5 question is whether or not there is a right, that sounds like a
6 legal question to me.

7 THE COURT: The objection is overruled.

8 You may answer the question.

9 A. I study marketing communications and I've been asked -- I've
10 been asked to study --

11 Q. Sir, I don't mean to interrupt. Did you understand my
12 question? If you can't answer it, tell me, but I --

13 A. I'm not -- I'm not -- floundering with my words, if you will
14 forgive me -- but I wasn't charged by the government in any way
15 to make decisions about the kind of question that you're asking.

16 Q. Let me ask it this way then. I'll approach it this way,
17 because -- and the reason I'm asking this is because we are
18 dealing with fraud and we're trying to find out what Philip
19 Morris's purpose is in doing things.

20 As you looked at the evidence with your expertise to
21 reach the opinions that you reached that you've articulated to
22 the court, did you come across evidence that indicated to you
23 that Philip Morris, in fact, has developed marketing strategies
24 that appear to you to have the purpose of marketing its
25 cigarette products to people of legal smoking age?

1 A. Could you ask the question again? It's my fault. I'm
2 really trying to pay attention to it. I'm a little bit confused
3 by the background going back and forth, sir. Okay?

4 Q. Clear your mind for a moment and I'll ask this question
5 again.

6 Sir, am I correct in reviewing the evidence you've
7 reviewed in order to reach the opinions you've articulated to
8 the court, am I correct that as you did your work you came
9 across evidence that indicated to you that Philip Morris has
10 developed marketing strategies for the purpose of marketing its
11 cigarette products to people of legal smoking age? Is that
12 correct?

13 A. Yes.

14 Q. Now, in fact, let's focus on specifically -- strike the
15 question.

16 As I read over your 200 pages of written direct
17 examination you do spend a fair amount of time talking about the
18 Marlboro product which is made by Philip Morris; is that
19 correct?

20 A. Yes, sir.

21 Q. And in talking about the Marlboro cigarette product, you
22 talk about what was known as the Marlboro Man or Marlboro Cowboy
23 or Marlboro Country kind of western theme advertising; is that
24 correct?

25 A. Yes.

1 Q. And in focusing on what I'm going to call the Marlboro
2 Country theme -- can I call it that? And you know what I'm
3 talking about?

4 A. Yes, sir.

5 Q. In focusing your testimony and your written direct on the
6 Marlboro Country theme, I take it you spent quite a bit of time
7 looking at Philip Morris's advertising and its policies
8 regarding using that theme; is that correct?

9 A. Yes.

10 Q. Now, in connection with that particular theme, the Marlboro
11 Country theme, the Marlboro Cowboy theme, am I correct that you
12 actually agree that that Philip Morris Marlboro Man and Marlboro
13 Country advertising campaign, you actually agree it has great
14 appeal to people 18 years and older of legal smoking age; is
15 that correct?

16 A. Yes.

17 Q. And you've testified to that in the past, have you not?

18 A. Yes.

19 Q. Now, in connection with -- let's show the court.

20 Can I show the court what you say about this product
21 about the Marlboro Country? Could I have tab 70, Jamie, which
22 is page 98 of the written direct.

23 If you have your written direct, this is page 3 to 11
24 on page 98. You can look at your actual testimony. This was
25 the portion I was going to cull up.

1 What you say, "Do themes in Philip Morris's
2 advertisements appeal to youth?

3 "Answer: Yes. The advertisements for Philip Morris
4 Marlboro Country appeal to youth because they develop and
5 perpetuate the imagery that resonates with and is influential
6 among young people. The imagery in the Marlboro Country
7 Campaign transforms the smoking experience into situations
8 appealing to youth.

9 "The Marlboro Man has become an icon in American life
10 symbolizing and communicating freedom, independence,
11 authenticity, ruggedness and adventure.

12 "Philip Morris's Marlboro racing advertisements also
13 appeal to youth because they personify many of the above
14 attributes associated with the Marlboro Man." And then you cite
15 the Surgeon General's Report.

16 Is that correct, sir?

17 A. Yes.

18 Q. Now, because you agree with me that the Marlboro -- you can
19 take that down, Jamie -- that the Marlboro Country
20 advertisements have great appeal to legal age smokers, I take it
21 as a marketing expert you don't quarrel with Philip Morris
22 having developed that advertising campaign, do you?

23 A. Not the campaign per se, no.

24 Q. Okay. Because as a marketing expert you are well aware that
25 98 percent of the United States' cigarette market is composed of

1 sales of cigarettes to people of legal smoking age; is that
2 correct?

3 A. Yes.

4 Q. And so you have discovered as a marketing expert in this
5 case that only 2 percent of the United States' cigarette market
6 is composed of sales of cigarettes to people under the legal
7 smoking age; is that correct?

8 A. Correct.

9 Q. Now, as a marketing expert in providing your opinions to
10 this court you are testifying, are you not, that Philip Morris
11 can develop an advertising campaign for the purpose of marketing
12 cigarettes to 98 percent of the legal market even though that
13 same campaign may have some themes that will appeal to the
14 2 percent under age population; is that correct?

15 A. I would -- I would take the -- take the word "may" away from
16 that.

17 It absolutely does have themes that resonate very
18 strongly among young people who, as they grow into the market,
19 become heavier users of the market and become a part of that
20 98 percent that you're referring to, sir.

21 Q. Let me rephrase the question. Maybe I can -- if I can't,
22 I'll get the answer and I'll move on.

23 If I understand your testimony from reading your direct
24 and what you just told me now here today, as a marketing expert,
25 you are telling the court that Philip Morris can develop an

1 advertising campaign for the purpose of marketing cigarettes to
2 the 98 percent legal market even though that same advertising
3 campaign in your judgment does contain themes that will appeal
4 to people under 18. Is that correct?

5 A. I think your -- I think your question, sir, mischaracterizes
6 my testimony, and what I would wish to say about it.

7 Q. Can you answer my question?

8 MS. BROOKER: Objection.

9 Q. If you're not testifying to that, just tell me.

10 MS. BROOKER: Dr. Krugman wasn't finished with his
11 answer.

12 THE COURT: He may answer the question and then if he
13 has something he needs to add to that answer, he may.

14 A. Yes, I think Philip Morris can develop campaigns reaching
15 people over the ages of 21 as they've indicated, but my larger
16 point is the one that I was making.

17 To characterize it, the under -- the 17 and under
18 market as only 2 percent I think mischaracterizes the way that
19 nature of that market works. And that young people begin
20 smoking and, as a consequence, they don't smoke as much when
21 they are younger and they tie into a brand, and then they become
22 part of that 98 percent consumption experience that you're now
23 talking.

24 Q. Doctor, I'm talking about -- let me ask it this way. I want
25 to make sure I know what you're telling the court.

1 I take it that in order to reach the opinions you've
2 reached in this case, that you went back to the mid-1950s and
3 early 1960s to study the evidence about how Philip Morris came
4 to develop the Marlboro Man advertising campaign; is that
5 correct?

6 A. I did.

7 Q. And as you go back and look at that evidence, you are well
8 aware, are you not, that Philip Morris did not develop that
9 advertising campaign for the purpose of marketing cigarettes to
10 underage children, did they?

11 A. I don't know, sir, what was in their mind and the genesis of
12 who the exact target was of the campaign when they moved to a
13 virile man's cigarette and to an image and finally settled on
14 the Marlboro Man, but I do know that that image worked
15 extraordinarily well with young people.

16 Q. By the way, when you say -- that's what I just asked you.

17 There's public literature available that you as an
18 advertising expert had available to you that does tell you
19 exactly how and why the campaign was started. Is that correct?

20 MS. BROOKER: My objection is simply that I don't think
21 Dr. Krugman was finished with his answer.

22 THE COURT: Had you finished?

23 THE WITNESS: Can I have the risk of sounding like I'm
24 not paying attention? You know, I'm trying very hard. Where
25 exactly did I leave off?

1 THE COURT: Your answer was, "But I do know that that
2 image worked extraordinarily well with young people," and
3 certainly I had thought you were finished. But were you or not?

4 THE WITNESS: I was finished.

5 THE COURT: Good.

6 Mr. Webb.

7 BY MR. WEBB:

8 Q. Do you remember my next question or should I repeat it?

9 I'll repeat it just so we're sure you're on the same
10 page. That's fair to you.

11 When you tell the court that you don't know what was in
12 the minds of people at Philip Morris when the original Marlboro
13 Man advertising campaign was originated and developed in the
14 mid-1950s and early 1960s, you told me a moment ago you went
15 back and looked at that issue, didn't you?

16 A. Yes, sir. I was answering your question with respect to
17 underage smoking. I didn't know if that was in their mind.

18 I know the genesis of the campaign and the movement
19 from making the -- having an image of the product of a feminine
20 cigarette and moving that over to a male brand.

21 Q. Well, maybe I should ask the question this way, and I'm
22 going to go through the specifics. So we're going to educate
23 the court and go through what actually happened, but maybe I can
24 start with the general again.

25 As a marketing expert, are you telling the court that

1 Philip Morris originally developed the Marlboro Man and Marlboro
2 Country advertising campaign in the late 1950s and early 1960s
3 for the purpose of marketing cigarettes to underaged people?

4 A. No.

5 Q. Thank you.

6 Now, now that we've got that cleared up, let's go
7 through what actually happened. When you went back and studied
8 the campaign -- let's go through it. Tell me if I'm right and,
9 if I'm not, you correct me.

10 What you discovered as a marketing expert when you went
11 back and looked at the origins of the Marlboro Man and Marlboro
12 Country campaigns, you discovered from the literature that in
13 the mid-1950s the Philip Morris' Marlboro cigarette had a very,
14 very small market share and was positioned in the market as a
15 cigarette to appeal to women; is that correct?

16 A. Correct.

17 Q. And what you learned as a marketing expert is that at that
18 time Marlboro had an advertising campaign to appeal to women in
19 which the advertising campaign for Marlboro was, "It is mild as
20 May." Do you recall that?

21 A. Yes.

22 Q. Okay. However, you learned by looking at the literature
23 that that was not a very successful advertising campaign and
24 Marlboro had an extremely small percent of the cigarette market.
25 Is that correct, sir?

1 A. Correct.

2 Q. Then what you discovered is that in the mid-1950s as filters
3 were becoming a major new product design issue, you discovered
4 from looking at the literature that Philip Morris in the
5 mid-1950s hired an advertising agency by the name of Leo Burnett
6 to reposition this product in the market; is that correct?

7 A. Yes.

8 Q. And Leo Burnett at that time was just a small advertising
9 agency; actually, in my hometown, Chicago. Is that correct?

10 A. I don't know what their size was at that point in time.

11 Q. Leo Burnett today is a large advertising agency
12 headquartered in Chicago; is that correct?

13 A. Correct.

14 Q. And there really was a Leo Burnett, wasn't there?

15 A. Yes. Oh, yes.

16 Q. And he started the company, didn't he? If you know.

17 A. Oh, yes. And he was an extraordinarily hard worker.

18 Q. And this man, Leo Burnett, the advertising fellow, was
19 contacted by Philip Morris in the mid-1950s to reposition the
20 Marlboro brand differently in the market; is that correct?

21 A. Yes.

22 Q. And what you discovered from reviewing the literature is
23 that at that time Leo Burnett was asked to find an advertising
24 campaign that could reposition Marlboro, number one, as a filter
25 cigarette, and number two, that would appeal to adult men; is

1 that correct?

2 A. Yes, sir.

3 Q. And Philip Morris then proceeded to develop -- strike the
4 question.

5 And you've seen from the literature that Leo Burnett
6 himself came up with the idea that a cowboy was the best way to
7 communicate to men this masculine image; is that correct?

8 A. Well, I think there were -- that the conceptualization was
9 originally not just the cowboy, sir, but rather the
10 conceptualization was that they wanted a kind of macho,
11 independent image, and went through a couple of different
12 creative iterations; used different characters, for example, an
13 individual sitting and having his sleeves rolled up and having a
14 tattoo. So the conceptualization, of course, was the macho,
15 independent image, and then the creative execution that they hit
16 on and elected was the Marlboro -- the Marlboro Man.

17 Q. And the cowboy?

18 A. Yes, sir. Yes, sir.

19 Q. Let's talk about that. Could I show the witness JD 012276.
20 And I'll hand it to you. Right now, Doctor, I'll give you a
21 chance to look at it.

22 Jamie, that is tab 1K to call up on the screen.

23 This is going to be hard to read, Doctor. Bear with
24 me. If you look at the front cover, just so we can date the
25 article before I ask you any questions. Just go to the front

1 cover. Way up at the top. Jamie.

2 You can barely make it out at the top. It looks like
3 it's November of 1958. Can you see it up there, Doctor?

4 A. You're not going to get to show me any New Yorker cartoons
5 in here?

6 Q. I don't think so. If I get the original magazine I will.

7 A. Okay, sir.

8 Q. Actually, I suspect you've seen this before or something
9 like it.

10 A. Portions of it.

11 Q. Okay. And so this is 1958, and there was a New Yorker
12 article, if we go to the next page, called: The Marlboro Story.
13 How one of America's most popular filter cigarettes got that
14 way. And it's actually authored by the gentleman who created
15 the Marlboro campaign, Leo Burnett; is that correct?

16 A. Yes, sir.

17 THE COURT: Was that an advertisement or was that
18 supposedly a story?

19 MR. WEBB: I'm sorry. I didn't hear you. I apologize.

20 THE COURT: I said, was that a paid advertisement or
21 was that supposedly an independent story? I'm not sure the
22 witness knows the answer to that question.

23 MR. WEBB: I see. I do understand your question.

24 THE COURT: Thank you.

25 MR. WEBB: I misunderstood, and I apologize.

1 THE COURT: Let's move on, everybody. I should know
2 better than to ever ask a rhetorical question.

3 Go ahead, Mr. Webb.

4 BY MR. WEBB:

5 Q. Now, this at least sets forth the Marlboro story; is that
6 correct?

7 A. Yes, sir.

8 Q. And you've read this. Is that correct?

9 A. I don't know if I've read this exact piece. Well, I may
10 have read this exact piece.

11 Q. That's fine. I want -- what I want to call your attention
12 is, if you go over to the second page of the article. The next
13 page.

14 A. Yes.

15 Q. I've culled out some portions here that Mr. Leo Burnett
16 discusses way back -- this is now almost, what? 40-some years
17 ago.

18 A. Okay.

19 Q. Mr. Burnett in this article -- Jamie -- do you see where it
20 says "What the research told us," do you see that? In the
21 left-hand column.

22 A. I'm looking -- oh, yes, sir.

23 Q. I'll cull it out. Is that easier now to see?

24 A. Yes.

25 Q. "What the research told us," and he goes on -- Mr. Burnett

1 goes on to say, "people regarded the old ivory-tipped Marlboro
2 as a sissy." And he goes on to say, "That's the way it has been
3 advertised as America's luxury cigarette in a very plush
4 atmosphere."

5 He goes on to say, "Many regular smokers at that time
6 tended to regard all filter cigarettes as slightly effeminate."
7 That's what he says. Do you see that?

8 A. Yes.

9 Q. Let's go over to the next column and cull out what I've
10 highlighted in the second column. He goes on to state, "It did
11 not take any motivational research or psychological seance to
12 decide that the best way to sell the new Marlboro was to present
13 it for what it really was, a filter cigarette with a full,
14 honest flavor that could satisfy a man who was a regular smoker.
15 In other words, a man's filter. The Marlboro Cowboy. We asked
16 ourselves what was the most generally accepted symbol of
17 masculinity in America and this led, quite naturally, to a
18 cowboy."

19 So, I take it, you were at least generally aware that
20 good or bad, right or wrong, Mr. Burnett thought that using a
21 cowboy with western imagery would be a way to communicate with
22 adult male smokers; is that correct?

23 A. With males.

24 Q. Okay. Well, let's talk about that. That theme -- in fact,
25 I think you told the court this yesterday. Once Philip

1 Morris -- strike the question. I think you mentioned this.

2 There was a bit of an evolution for a period of time
3 when Marlboro was using different types of strong masculine male
4 figures; is that correct?

5 A. Yes.

6 Q. And eventually by the early 1960s Philip Morris designed
7 what you called the Marlboro Country backdrop for the Marlboro
8 Cowboy; is that correct?

9 A. Yes.

10 Q. And what happened in the early 1960s is Philip Morris and
11 Leo Burnett decided the best way to communicate this masculinity
12 was to use a cowboy as a masculine figure and some type of
13 country setting that became known as Marlboro Country; is that
14 correct?

15 A. Yes, with -- yes.

16 Q. And you told the court, and it's in your written direct
17 examination, that that simple theme of a cowboy in western
18 scenery called Marlboro Country became the consistent
19 advertising imagery that Philip Morris then used from the early
20 1960s up until at least the early 2000; is that correct?

21 A. Yes.

22 Q. And it's that consistency that lasted all those years --
23 let's just look at one so we can focus in on what it really is.
24 This is one you referred to from Rolling Stone.

25 Jamie, it's tab 1 L. It will be U.S. Exhibit 17372.

1 This is actually from the Rolling Stone exhibit.

2 You recall the Rolling Stone exhibit that you showed
3 the court two days ago?

4 A. I do, sir.

5 Q. And I just pulled this out. This is one of those that you
6 showed the court which is -- this one is actually from page, for
7 the record, 1994-01 from that exhibit.

8 And what I've shown here on the screen, would you
9 agree, that's a typical Marlboro Country advertisement with a
10 person on a horse with western garb going through rugged
11 countryside; is that correct?

12 A. Yes.

13 Q. And that -- so the court -- we could show any number of
14 these, but this is typical of what you called this consistent
15 communication that lasted for 40 years or so; is that correct?

16 A. It's an example of it, yes.

17 Q. Okay. And let's try to find out what this is communicating.
18 In fact -- by the way, if we look at this, just so it's clear as
19 far as whether Philip Morris designed this with the purpose of
20 trying to market to underaged people.

21 First of all, if we look at this scenery do you see any
22 young-looking models that might attract underaged smokers in
23 this advertisement?

24 A. No, but the age of the model would not be what captures the
25 imagination of a young person.

1 Q. We're going on from there. I can only take it one step at a
2 time.

3 Do you see any young-looking models that Philip Morris
4 has put into these Marlboro Country ads to attract underaged
5 smokers?

6 MS. BROOKER: Objection, asked and answered.

7 MR. WEBB: I don't think he answered it.

8 THE COURT: Actually, he did.

9 BY MR. WEBB:

10 Q. So we have no underaged models in here.

11 The other thing you talked about was the concept of
12 peerness. Do you recall that?

13 A. Yes.

14 Q. You told the court that you look at some ads and you try to
15 decide whether they are trying to communicate that there's --
16 that underaged peers are smoking cigarettes. Do you recall that
17 testimony?

18 A. I believe the testimony was advertising using appeal for the
19 peer group.

20 Q. Well, for example, this advertisement is communicating
21 exactly the opposite of peerness. You say in your direct
22 examination this is communicating independence and freedom; is
23 that correct?

24 A. That's correct, but -- that's correct.

25 Q. All right. And you have testified, I think specifically,

1 that it's your view as an advertising expert what this
2 communicates are the themes of independence, ruggedness and
3 freedom; is that correct?

4 A. Yes.

5 Q. Now, I take it as an advertising expert either in the work
6 you did in this case or even generally in your career in
7 advertising -- in marketing, have you discovered that those
8 themes of independence, ruggedness and freedom have frequently
9 been used to appeal generally beyond tobacco products and
10 specifically marketing products to adults and not young people?

11 A. Those themes have been used, sure.

12 Q. So you're aware that other companies that manufacture
13 consumer products that want to reach an adult audience and not a
14 younger audience, they specifically design their products, their
15 advertisements -- design their advertisements to appeal to
16 adults by using this same type of rugged sense of freedom; is
17 that correct?

18 A. I would not say same type.

19 This is a -- this is a campaign that has billions of
20 dollars of brand equity behind it, and in the artful manner in
21 which it's been represented and the mystique that the campaign
22 brings up regarding independence and ruggedness has not been
23 matched by other products.

24 Q. I'm sorry. I'm not asking you about the volume. I'm
25 talking about people's intent and purpose.

1 Are you aware that other consumer manufacturers in at
2 least trying to reach an adult audience have made the decision
3 that that theme you see on the screen is the right way to market
4 adult products?

5 A. But --

6 Q. Have you seen that? Can you start with that?

7 MS. BROOKER: Objection. Please let Dr. Krugman answer
8 the question.

9 MR. WEBB: He didn't.

10 THE COURT: The objection is overruled. He has to --
11 he's required to answer this question.

12 A. There is a -- you raise the issue of kind of the concept of
13 using independence. Yes, other people use independence, but you
14 then --

15 Q. I asked you to market to adult. Bear with me so we don't
16 get off on a tangent.

17 I'm specifically talking about, when people decide how
18 to develop an advertising campaign and when they have a product
19 that clearly they only want to reach adults with, like cars.
20 Okay?

21 A. Yes.

22 Q. They make choices, just as Philip Morris did, to use that
23 type of outdoor rugged scenery in order to communicate with
24 adults. That's my question. Is that correct?

25 A. Yes.

1 Q. Now, let's go through some examples. Could I -- I'm going
2 to hand you a group of advertisements for other products and
3 I'll just hand them to you as a group and I'm going to call one
4 up at a time for the court to see.

5 The first one is JD -- make sure we go through them in
6 order. Jamie, can I call up JD 54508? This is tab 1N, Jamie.

7 The first one I've got called up on the screen for the
8 record is JD 54508. Do you have a hard copy in front of you,
9 sir?

10 A. I do, sir.

11 Q. And this actually -- Digital, this is actually computer
12 hardware for businesses; is that correct?

13 A. Yes.

14 Q. And I take it you would agree that underage -- people under
15 the age of 18 are not interested in buying hardware for
16 businesses, are they?

17 A. That part is correct.

18 Q. And you also see that this company decided to use the same
19 type of western theme ruggedness that's depicted in this exhibit
20 in order to market this product to adults; is that correct?

21 A. No.

22 Q. And let me just say. As you look at this ad that we now
23 have in the record, do you believe that this is communicating
24 something very similar to Marlboro, which is kind of a country
25 scene with a rugged type cowboy person depicted in the scene?

1 Do you see that?

2 A. My answer is no.

3 Q. You don't see that. Okay, that's fine.

4 Now, let's go to --

5 A. The reason it's no --

6 MR. WEBB: Your Honor, he's answered my question. If
7 he doesn't see a cowboy and horses in that scene, I accept it.

8 THE COURT: He may explain his answer.

9 A. I didn't say I didn't see a cowboy and horses in that theme,
10 sir.

11 What I said was that's not a parallel in terms of the
12 same appeal that the Marlboro ad has, for any number of reasons.
13 The first reason, sir, is that --

14 MR. WEBB: Your Honor, I did not ask this question.

15 THE COURT: Sustained. The witness has explained --
16 has sufficiently explained his answer.

17 BY MR. WEBB:

18 Q. Just so it's clear for the record. You do see a cowboy and
19 horses in this scene?

20 A. I do see a cowboy and horses, sir, yes.

21 Q. Thank you. Could I have JD 54509 called up, please?

22 This is the second one I gave you, Doctor. And I'll
23 wait until it gets called up on the screen.

24 This is an ad -- Exhibit JD 54509 is also an ad for a
25 product for adults which is rental cars; is that correct?

1 A. Yes.

2 Q. Because I think actually in our country you can't even rent
3 a car if you're under 21. Is that your understanding?

4 A. I think that's correct.

5 Q. Okay. So does it look to you like Alamo, in deciding to
6 market its rental cars to adults, decided to use a scene
7 depicting a cowboy and horse in an action-type country setting?
8 Do you see that?

9 A. In part, that ad has cowboys and horse in it, in part.

10 Q. Okay. And do you believe that the owners of Alamo made a
11 decision that they decided one way to reach adults would be to
12 use the same type of scenery that Marlboro uses to reach adults?

13 A. I would not agree with you, sir, that it's the same type of
14 scenery. There's a difference in the way Marlboro was
15 communicated and the way this brand is communicated, even though
16 they both have horses and cowboys in them.

17 Q. I'll bite on that one. Let's talk about that.

18 Would you please just tell me as you look at this ad
19 for Alamo as it uses horses and the cowboys in a country
20 setting -- I just want you to describe how is that visually
21 different than the ad I just showed you for Marlboro Country?
22 How is it visually different when it communicates to people?

23 A. Well, the first reason is the whole bottom half of the ad
24 has long descriptive copy, shows a product, a car on the bottom
25 left, and I believe that's a price listing -- I can't quite see

1 that box on the right-hand side that has a lot of highly
2 descriptive information in it, and also contains a headline that
3 says Alamo and then has horses and people who are partially,
4 partially shown as cowboys.

5 My point, sir, is there's a gestalt in the ad. That
6 is, one can't necessarily pick apart an ad and understand its
7 underlying image by only focusing on one part of it. But rather
8 when I see this, I don't see a Marlboro image at all.

9 Q. So you think the visual image of the cowboy and the horses
10 that is depicted in this ad by the people that own Alamo, you
11 think it's totally different than that Marlboro Country
12 depiction of cowboy and horses. Is that your testimony?

13 A. Yes, sir. And I want to be clear on this, because the ad
14 has lots of other kinds of different information in it. It's
15 differently constructed.

16 Q. So because it has a picture of a car and not a cigarette
17 box, that makes it different. I strike the question. Strike
18 it.

19 Let's go to another one. Could I go to the next one,
20 Jamie? This is JD 54510. And this one is a picture of -- looks
21 like a cowboy advertising men's fragrance by Ralph Lauren. Do
22 you see that?

23 A. Yes.

24 Q. Does it appear to you that the folks that own Ralph Lauren
25 decided that one way to market men's fragrances is to use this

1 type of cowboy image?

2 A. In a very general -- in a very general sense, but that's not
3 the Marlboro Man.

4 Q. It's a different cowboy, a different model.

5 A. It's a different image. It's a different image.

6 THE COURT: Well, just for the record in case the Court
7 of Appeals ever looks at this, isn't that Ralph Lauren himself
8 or do you not know?

9 THE WITNESS: I do not know.

10 MR. WEBB: I didn't know, either, Your Honor, but it
11 could be.

12 THE COURT: I'm not testifying, everybody.

13 THE WITNESS: I'm showing my age, but that almost looks
14 like a Steve McQueen look alike.

15 THE COURT: All right. Moving on.

16 THE WITNESS: My apologies.

17 BY MR. WEBB:

18 Q. Let me go to -- actually, let me go to the last one in the
19 group I gave you, Doctor. Let me go to JD 54517. I think it's
20 the last one that you will see there.

21 I put this up because apparently this is an
22 advertisement for a truck with a western saddle sitting in this
23 kind of western setting. Do you see that?

24 A. Yes.

25 Q. And I'm going to show you another one because this is --

1 this is a Chevrolet truck; is that correct?

2 A. Yes.

3 Q. And as far as this type of scenery, let's go to JD 54511.

4 That will be the one for the Trail Blazer in the group you have.

5 I picked this one simply because it shows -- there's no cowboy

6 here -- but it shows this rugged scenery as a means of

7 communicating to people that might be interested in purchasing

8 cars; is that correct?

9 A. Yes.

10 Q. Have you discovered as an advertising expert that the type

11 of scenery used in the Marlboro Country ads that communicate

12 like the one I showed you, outdoor ruggedness, that that type of

13 outdoor scenery is used by many consumer manufacturers in trying

14 to reach adults in communicating in advertisements; is that

15 correct?

16 A. Outdoor scenery is often used to communicate to adults.

17 Q. Now, let me go to another topic, Doctor.

18 As far as whether Philip Morris over the years was

19 trying to position Marlboro or Marlboro Country in a way and

20 with the purpose of marketing cigarettes to underaged people, I

21 believe you told Mr. Bass, and I think it's in your textbook,

22 that basic advertising planning requires that strategic research

23 be conducted in order to plan out a successful marketing

24 campaign. Is that correct?

25 A. Often that's the case, surely.

1 Q. All right. So that -- and if, for the past 40 years, Philip
2 Morris has been implementing and developing marketing plans for
3 the purpose of marketing Marlboro cigarettes to underaged
4 people, then as a marketing expert would you expect to find in
5 Philip Morris' files a substantial amount of Philip Morris'
6 market research and surveys conducted on underaged smoking
7 behavior so they would know how to design their advertisements?

8 A. Not necessarily, no.

9 Q. Okay. So you think -- by the way, you do agree Philip
10 Morris is a very sophisticated organization, do you not?

11 A. Correct.

12 Q. And do you believe that Philip Morris is probably no
13 different than other companies in trying to -- if they are going
14 to market to a certain audience, they are going to do strategic
15 research and find out how to market to that audience. Is that
16 fair to say?

17 A. Yes.

18 Q. And you've looked at Philip Morris's market research that
19 they've actually conducted over the years, have you not?

20 A. I've looked at some, yes.

21 Q. Okay. Well --

22 A. Yes.

23 Q. Okay. And you have found out by looking at it, Philip
24 Morris does a lot of market research; is that correct?

25 A. Yes.

1 Q. And am I correct, Doctor, that in looking at all of the
2 market research, the strategic market research that Philip
3 Morris has conducted in the past 50 years, you only cite one
4 Philip Morris' document as reflecting market research regarding
5 underaged people; is that correct?

6 A. There's a 1989 document that is cited in my report.

7 Q. Well, let's start with the -- the document I actually was
8 talking about, Doctor. You cite a July 25, 1974, Roper study.
9 Do you recall that?

10 A. Yes. What page are you on?

11 Q. You do generally recall?

12 A. Yes, sir.

13 Q. Let me show you specifically. Could I have page -- it's tab
14 47, Jamie. It will be page 61 of the written direct
15 examination, if you want to go to that.

16 A. Thank you.

17 Q. And you cite here a Roper study, is that correct, and give
18 some testimony about it that runs from page -- from line 1 to
19 line 13; is that correct?

20 A. Yes.

21 Q. And this is actually a Market Research Department study in
22 which you actually -- you took certain quotes from the document;
23 is that correct?

24 A. Yes.

25 Q. And you point out here that the Roper organization was

1 commissioned to undertake the studies summarized here with the
2 intention of probing the dynamics of the market among smokers
3 below the age of 24 -- dot, dot, dot. I take it you left
4 something out there, did you not?

5 A. Yes.

6 Q. We're going to come back and talk about what you chose to
7 leave out.

8 A. Okay.

9 Q. But you left something out there. And you went on to say no
10 lower age limit was set. Do you see that?

11 A. Yes.

12 Q. And that young smokers were sought out. Popular hangouts,
13 drive-ins, bowling alleys, at beaches, et cetera. Do you see
14 that, sir?

15 A. Yes.

16 Q. Now, my question is; when I read over your 200 pages of
17 written direct I did not see you cite any other Philip Morris'
18 strategic market research, other than this document, that refers
19 to Philip Morris doing any market research on people under the
20 age of 18. But if there's another one, I just want you to tell
21 me where it is.

22 A. I will, sir.

23 Q. And I'll wait until you find it.

24 A. Thank you, sir.

25 Q. Whenever you find it, if you will give me the page number

1 and I'll direct you there, so just let me know when you find it.

2 A. Thank you, sir. I'm a little bit slow. If you will just
3 give me a little time.

4 Q. That's all right.

5 A. Would you turn to page 197, please?

6 Q. I will. Maybe I have a different draft.

7 Jamie, call up page 197, please.

8 A. I'm sorry, sir. Page 68. My apologies.

9 Q. Page 68?

10 A. Yes. My apologies, Mr. Webb.

11 Q. That's no problem.

12 Page 68. Jamie, would you please call up page 68?

13 What lines are you talking about, sir?

14 A. Five through 13.

15 Q. Okay.

16 A. This is a document written for -- by Leo Burnett discussing
17 our U.S. target market. So Leo Burnett is now doing planning.

18 And it says, "Our U.S." -- it says, "Our U.S. target as a moving
19 target, is in transition from adolescence to young adulthood."

20 Later in the document there's a specific section that says

21 Feelings About Advertising. And it says --

22 Q. Where are you now?

23 A. I'm sorry, sir. That would be on line 9, Feelings About
24 Advertising.

25 So they are figuring out how people feel about

1 advertising, and it says, "For additional insights we reviewed
2 previous research on a similar market."

3 Now, when they talk about that previous research --

4 Q. Where are you reading now?

5 A. I'm just on line 10, sir. My apologies. I'm just reading
6 straight through at this point.

7 Q. That's fine. Go ahead.

8 A. Thank you, sir. Sorry. "We reviewed previous research on a
9 similar market. As part of the review on these similar targets,
10 two studies are cited: One from 1992 entitled, They are US, An
11 Exploration of Teens in the '80s, and one is from 1987 entitled,
12 Tweens and Teens Talk About Advertising."

13 So in this respect we see a document about the target
14 written by the advertising agency which is charged with creating
15 and disseminating that image.

16 And in their secondary research they are looking at two
17 documents on teenagers and saying that's a similar market.

18 Excuse me. One on teens and one on Tweens and Teens.

19 Q. Do you remember the question I asked you, Doctor?

20 A. Yes, I do, sir.

21 Q. Okay. I asked you to show the court where you cite any
22 document where Philip Morris conducted market research on
23 underaged people, and you're showing the court a document in
24 which the advertising agency is talking -- is there any
25 reference in here to any market research being conducted by

1 Philip Morris on underaged people?

2 A. Mr. Webb, you're asking me as an expert how I interpret this
3 document and I'm doing the best I can, sir.

4 Q. I just asked you a question.

5 A. One starts in this situation by looking at the available
6 literature. And they are clearly looking, when defining a
7 similar market, they are looking at two other studies on the
8 similar target.

9 Q. Were those studies conducted by Philip Morris, sir?

10 A. You know, sir, I really don't know who those studies are
11 conducted by, but I do know that Leo Burnett is the agent in
12 charge of disseminating -- creating and disseminating the image.

13 So when they are constructing this plan on our US
14 target they are clearly using a lot of information in 1989 that
15 on these target markets.

16 Q. But my question is -- all I'm asking you, sir -- we've been
17 through -- we're going to come back to the Roper study.

18 The Roper study was clearly Philip Morris did market
19 research and asked questions of people under the age of 18. Is
20 that correct?

21 A. I understand, sir.

22 Q. That's what you say they did?

23 A. Yes, sir.

24 Q. All right. So you say they did that on that occasion?

25 A. Yes.

1 Q. Is that correct?

2 A. Yes.

3 Q. I just want to know what evidence you have that at any time
4 in 50 years after that Philip Morris ever actually conducted its
5 own market research on underaged people.

6 A. Sir --

7 Q. Just tell me the document number.

8 A. We are -- we are looking at a document.

9 Q. No. I understand you -- this document you just pointed out
10 to me, and I asked you whether or not there's any study in here
11 conducted by Philip Morris and you said you don't know.

12 A. I don't know, and I'm not -- I am not at all trying to be
13 argumentative here, sir. I'm just trying to make -- I'm just
14 trying to make my point.

15 Q. So we've --

16 A. And my point is that this is a strategic type plan.

17 Q. Doctor, I just accepted. You pointed this -- I'm trying to
18 find out if there's any -- set this aside.

19 A. Okay.

20 Q. Is there any other document or record you've cited in your
21 direct examination where you believe Philip Morris did consumer
22 surveys of underaged people other than the Roper study conducted
23 in 1974?

24 A. They may not have done the surveys per se.

25 In other words, if you're asking did they go out, other

1 than the one -- the very troubling one in 1974? But they
2 certainly were looking at this market in their other documents.

3 Q. Sir, actually, did you testify in your DOJ deposition that
4 you did not remember seeing any Philip Morris' market research
5 surveys conducted after 1974 -- let me finish the question -- on
6 underaged people? Did you testify to that in your deposition?

7 A. Yes.

8 Q. Was that a truthful statement?

9 A. It was a statement where my memory was not hitting on all
10 the cylinders at that time. After I was done I thought it
11 through and said, "I missed it."

12 Q. So now just tell me -- just show me in your written direct
13 where you actually identify another document, other than the
14 Roper document, where it's clear to you that Philip Morris
15 actually conducted market research on people under the age of
16 18?

17 MS. BROOKER: That I think has been asked and answered.

18 THE COURT: Not clearly yet.

19 You may answer.

20 A. There are a number of documents that refer to research
21 regarding individuals under the age of 18.

22 Q. Doctor, if you answer my question, I'm going to move on.

23 Can you cite me any other document that's set forth in
24 your written direct which makes it clear to you as an
25 advertising expert that Philip Morris was conducting actual

1 market research on people under the age of 18 after 1974? Just
2 tell me what page it's on if it's there.

3 A. The answer would be no, but I would like a chance to
4 elaborate.

5 MR. WEBB: Your Honor, I'll accept a "no" and he can do
6 it on redirect then, because otherwise I'm never going to get
7 done here.

8 THE COURT: Yes. Next question, please.

9 BY MR. WEBB:

10 Q. Let's go back and -- remember the questions Mr. Beach was
11 asking you about this morning on some of the Reynolds' documents
12 as to whether you may have played some games occasionally in how
13 you took information and cited it in your direct examination?
14 Do you remember Mr. Beach's questions?

15 MS. BROOKER: Objection, that's an argumentative
16 comment.

17 THE COURT: Well, it's an inappropriate way to refer to
18 it, so just rephrase.

19 MR. WEBB: I'll strike it. Let me just deal with
20 Philip Morris then.

21 BY MR. WEBB:

22 Q. Sir, I take it you considered this Roper study to be a
23 really important study that you wanted to accurately and
24 honestly communicate to the court about; is that correct?

25 A. Certainly an important study.

1 Q. And let's go back and let's go to the actual Roper study so
2 we see what the real document said and we will come back and see
3 how you chose to refer to it with the court.

4 Can I have tab 49, which will be the actual Roper study
5 which would be U.S. Exhibit 20104?

6 Do you have the document in front of you, sir?

7 A. I do.

8 Q. This is the Roper study that you were referring the court to
9 dated July 25, 1974. Do you see that?

10 A. Yes.

11 Q. Okay. Now, if we were to just go --

12 THE COURT: Do you have the direct page cite?

13 MR. WEBB: Yes. It is on page 61. I'm sorry. It's
14 page 61 of his written direct. Line 1 to 13 is where he
15 discusses the Roper document.

16 BY MR. WEBB:

17 Q. Now, the quote that you chose to give the court -- if you go
18 into the document three pages, you see where down at the bottom,
19 it's really the second page of the document, it says, "What was
20 done?" Do you see that? If you find that page, sir.

21 A. Yes.

22 Q. Have you found that page?

23 A. Yes.

24 Q. Do you see What was done. And then there's a statement
25 there made by the author of this document.

1 "The Roper organization was commissioned to undertake
2 the study summarized here, with the intention of probing the
3 dynamics of the market among smokers below the age of 24."

4 And then the author put into parenthesis a very
5 straightforward sentence. "This was not the usual sample of age
6 18 to 24; in this study, no lower age limit was set."

7 Do you see that?

8 A. Yes.

9 Q. Now, when Philip Morris -- when you read the document over
10 and you learned that this is not the way Philip Morris normally
11 does their samples, and they normally do their samples at age 18
12 to 24, I take it you considered that to be important
13 information; is that correct?

14 A. What I took to be important information here --

15 Q. Did you consider that to be to important information?

16 A. I didn't look at it quite that way.

17 Q. Did you consider it unimportant?

18 A. No. I considered it, but what I found interesting is that
19 they went and commissioned a special study and gave very
20 specific directions to look at people younger than that.

21 Q. I understand that's important. You put that in your written
22 direct; is that correct?

23 A. Yes.

24 Q. Did you think it might be important for the court to
25 understand that this was a one off, unusual, as you said -- a

1 special occasion -- for whatever reason Philip Morris did
2 something they don't ordinarily do. Did you consider that
3 important?

4 A. I saw this as an important study that focused on people
5 under the age of 18.

6 Q. Well, let me just -- let's just see what you actually did
7 and how you came to do it this way.

8 Let me call back up your testimony from page 61.

9 Jamie, use tab 76.

10 I'm going to create a chart here so we can make sure we
11 have a record here of exactly what you did. What I have here
12 is -- have I accurately taken the quote right from your written
13 direct where you talk about the highlights memorandum. That's
14 the Roper study; is that correct?

15 A. Yes.

16 Q. And you go on to explain -- and you put in quotes, "The
17 Roper organization was commissioned to undertake the study
18 summarized here, with the intention of probing the dynamics of
19 the market among smokers below the age of 24," and then you made
20 a judgment call to omit what was then stated and you put dot,
21 dot, dot, which I have put in red. Do you see that?

22 A. Yes.

23 Q. You were the one that made that choice; is that correct?

24 A. Yes.

25 Q. Let's see what you excluded.

1 Could I call up from Exhibit 20104, so we have very
2 clear what you chose to exclude? You made the judgment call to
3 exclude from the court the explanation that this was not the
4 usual sample of age 18 to 24, and you left off the word "in this
5 study."

6 Do you see the red words you left off and substituted
7 dot, dot, dot. Do you see that, sir?

8 A. Certainly.

9 Q. Now when you made -- and you are the one that made that
10 choice; is that correct?

11 A. Yes.

12 Q. And you decided that you did not want to tell the court that
13 this was not the usual sample of age 18 to 24; is that correct?

14 A. Yes, because my interpretation was they were doing a special
15 study, not a usual -- not the usual study. I was focusing on
16 the fact that this was a special study.

17 Q. Okay. And so -- and, by the way, as a marketing expert, if
18 you're trying to find out whether Philip Morris is doing
19 strategic research to develop marketing plans to market to
20 underaged people, there would be a difference on whether Philip
21 Morris did it once in 50 years versus did it on a regular basis.
22 Is that fair to say?

23 A. Not necessarily.

24 Q. Okay. By the way, did you talk to the government about your
25 decision to exclude that information from the court?

1 A. When I was -- when I was constructing the doc -- when I was
2 constructing what I was going to put in I gave it to the
3 government as to what I wanted.

4 Q. I'm sorry. Well, who made the decision to exclude this
5 information? You or the government? The dot, dot, dot.

6 A. It would have been me.

7 Q. Okay. Did you discuss with the government your choice of
8 omitting that information?

9 A. No, I did not.

10 Q. Okay. Now, let's talk about what Philip Morris actually has
11 done as far as actual consumer market research over the last
12 50 years because you do know what they've done, don't you?

13 A. Done a lot of research.

14 Q. Okay. Let's talk about that with the court.

15 You've examined a large volume of consumer research
16 done by Philip Morris over the past 50 years; is that correct?

17 A. Yes.

18 Q. And you've come to the conclusion that what Philip Morris
19 has done is that Philip Morris is a company that does a lot of
20 consumer research and trying to figure out how to advertise
21 their products, don't they?

22 A. Yes.

23 Q. In fact, what you've reviewed is that Philip Morris for at
24 least the last 35 years has done a substantial amount of almost
25 daily consumer research in the form of what are known in

1 marketing as tracking studies. Is that correct?

2 A. Yes.

3 Q. And you've reviewed the Philip Morris' tracking studies that
4 have been conducted over the past 35 years or so; is that
5 correct?

6 A. Not a voluminous amount, but I've seen tracking studies.

7 Q. Well, you've seen Philip Morris did -- have you seen that
8 Philip Morris over the last 35 years has done an enormous amount
9 of tracking studies?

10 A. Yes.

11 Q. And did you think that if you want to find out whether this
12 company is actually doing strategic planning on underaged people
13 to decide how to develop marketing and advertising strategies,
14 did you think it's important to see what they are actually
15 researching on a day-to-day basis?

16 A. Not necessarily.

17 Q. Okay. So because let's -- tell the court -- you know -- you
18 do know what's in the tracking studies, don't you?

19 A. I don't have exact -- I'm not arguing the point that Philip
20 Morris does a lot of tracking studies, sir.

21 Q. Let me try to define tracking and I'll bow to your expert
22 here, but let me take a stab at it.

23 A tracking study refers to regularly conducted consumer
24 research carried out by a manufacturer of a consumer product so
25 that the manufacturer has comprehensive data that can be used in

1 making marketing decisions. Is that correct?

2 A. Yes.

3 Q. Now, what Philip Morris has done, you've learned from
4 looking at their tracking studies, is that they hire outside
5 companies that do tracking studies in the form of telephone
6 surveys of consumers; is that correct?

7 A. I think that's correct.

8 Q. Okay. And you're aware that Philip Morris does these
9 telephone surveys in the form of tracking studies so they can
10 develop information they can use in developing marketing plans;
11 is that correct?

12 A. Likely to be correct, yes.

13 Q. Now, you've become aware that when Philip Morris -- and have
14 you become aware that, at least in recent years, Philip Morris
15 does so much of it they literally do it almost on a daily basis?

16 A. I don't know that to be the case, but it certainly doesn't
17 surprise me.

18 Q. Okay. Now in your written direct examination you do not
19 identify any of the Philip Morris' tracking studies done during
20 the last 35 years that involved any consumer research on people
21 under the age of 18; is that correct?

22 A. Correct.

23 Q. Now, in connection with -- let's just quickly go through
24 some examples to show what Philip Morris actually does do during
25 these tracking studies.

1 And could I have JD 04 -- I'm sorry, JD 040553. This
2 is tab 54, Jamie.

3 I'm going to hand the document to you, sir, which I
4 think you will see is the cigarette tracking study summary for
5 1979. Do you have that in front of you, sir?

6 A. Yes.

7 Q. Now as part of your expert opinion work in this case, did
8 you review that study, if you remember?

9 A. I don't remember reviewing the study.

10 Q. Okay. Now, if we want to see what Philip Morris is
11 actually -- what they are doing on the tracking study -- in
12 fact, maybe I can simplify this.

13 Did you observe, in looking at Philip Morris' tracking
14 studies, that from the mid-1970s all the way up to the current
15 date when Philip Morris does its tracking studies it always
16 limits its market research to people 18 years and over? Is that
17 what you discovered?

18 A. That doesn't surprise me.

19 Q. Is that what you discovered as an expert trying to reach
20 your opinions in this case?

21 A. I don't remember discovering it like that.

22 Q. Well, let me go through this one then.

23 THE COURT: Didn't you ask that question about
24 two minutes ago, Mr. Webb?

25 MR. WEBB: To go through this one? I got -- I got --

1 he did not cite any. He cites none. He cites no -- he cites no
2 tracking studies that show a study of people under the age of
3 18. So he cites none in his direct exam.

4 I tried to take it one step further to establish that
5 he's looked at them and he can verify that we don't do it.
6 Okay? That's all I'm trying to...

7 BY MR. WEBB:

8 Q. Sir, if we -- I'm going to direct your attention to certain
9 pages in the document.

10 If you go to the page that's Bates stamped -- Jamie,
11 it's 4178.

12 Doctor, you know what Bates stamp numbers are; is that
13 correct?

14 A. Yes.

15 Q. If you go inside, you will see a page that's Bates stamped,
16 the last four numbers are 4178.

17 A. Yes.

18 Q. And you will see there that there's categories of who's
19 being questioned and what the age groups are. Do you see that?

20 A. Yes.

21 Q. Does it appear to you --

22 We will call out, Jamie if you make the top larger
23 where you've got the yellow highlighting.

24 Does it appear to you that Philip Morris appears to be
25 asking questions about age groups that are of the legal smoking

1 age?

2 A. In this tracking study, yes.

3 Q. Okay. Well, let's go on to another page where I see ages.

4 Go to the page that's Bates stamped 4213.

5 Have you found 4213 yet?

6 A. I have, sir.

7 Q. Let me see if I can get it called up on the screen.

8 And do you see -- I've highlighted certain portions I
9 want to cull out, which appears that Philip Morris is conducting
10 tracking studies using the age group of 18 to 24. Do you see
11 that?

12 A. Yes.

13 Q. And do you see that reference twice on that page; is that
14 correct?

15 A. Yes.

16 Q. If you then go to the page that's Bates stamped further in,
17 4263. I've called it on the screen if you want to look at it.

18 A. Thank you.

19 Q. Again, I'm just trying to show that they are tracking people
20 of legal smoking age; is that correct?

21 A. Yes.

22 Q. Okay. And, by the way, let's go to the first page. Go to
23 page 4161, which is the first page of the document.

24 The next page, Jamie, actually. It's Bates stamped --
25 that's it.

1 The preface tells us what Philip Morris is doing for
2 this tracking study. Is that correct?

3 A. Yes.

4 Q. It says, "This study represents the results of daily
5 telephone interviews of a national random sampling of U.S.
6 adults age 18 and over." Do you see that?

7 A. Yes.

8 Q. And it gives the dates it's conducted and the company that
9 does it; is that correct?

10 A. Yes.

11 Q. And it goes on to state -- it goes on to talk about similar
12 studies going back to 1970 are on a basis essentially comparable
13 to this study. Do you see that?

14 A. Yes, sir.

15 Q. How many of these tracking studies did you actually
16 physically look at and review in reaching your expert opinions
17 in this case?

18 A. Very few.

19 Q. You did not think -- if you're trying to find out whether
20 Philip Morris is trying to purposely design their advertising
21 campaigns to appeal to underaged people, you didn't think
22 looking at their daily tracking studies would give you some
23 indication of whether they are trying to target underaged people
24 with their advertising activities?

25 A. I didn't think their daily tracking studies would not --

1 would be part -- would be part of the issue in terms of looking
2 at older -- or adults -- smokers over the age of 18.

3 But I wouldn't anticipate that they would necessarily
4 include people under the age of 18 even though they could be
5 knowingly reaching those markets.

6 Q. But I take it as a marketing expert with the opinion that
7 you've reached in this case, the fact that Philip Morris for
8 35 years did not do tracking studies on underaged behavior, did
9 you find that to be a good thing for Philip Morris to do, to not
10 do that?

11 A. In terms of the tracking studies, I would -- I would think
12 they would look at only people over the age of 18.

13 MR. WEBB: Okay. Now, Your Honor I'm going to go to
14 another topic, which is not -- my last topic, it's not long.

15 THE COURT: I think I want to take up one other matter
16 with counsel, but the Doctor may step down and may be excused
17 until 2:00 o'clock. I have a feeling we will be a few minutes
18 on other things.

19 I gather that the government wanted to raise some
20 additional scheduling issues. Ms. Eubanks.

21 MS. EUBANKS: Thank you, Your Honor.

22 The issues really go not so much directly to scheduling
23 of the coming witnesses, but rather to the time that we are
24 spending in the trial with respect to planning and going
25 forward.

1 At your direction, your law clerk sends us a report
2 every week at the end of trial about how much time counsel have
3 used, each side has used in presentation of its case.

4 The report that we received last Thursday indicated
5 that defendants have now used 103 hours and 18 minutes, and as
6 of last Thursday the United States had used 65 hours and
7 20 minutes. As you're well aware your Order Number 596
8 permitted each party 265 hours or 12 weeks to present its case.

9 Pertinent to this issue is the footnote that was
10 included in 596, which states, "Defendants have assured the
11 court that they can complete their case in 225 hours. While
12 they will not be held to that figure, in the interest of
13 equality, their compliance with it will be greatly appreciated."

14 My purpose in addressing the court on this issue is to
15 make the record very clear with respect to our intentions, and
16 we really appreciate the time that the court has devoted to the
17 matter and the allowance of our being able to present the case
18 as many days per week as we have.

19 But based upon a review of where we are right now in
20 terms of the hours that have been expended, looking at
21 defendants' witness lists that were submitted May 4, 2004, it
22 seems problematic with respect to the remaining number of hours,
23 including the remaining number of witnesses that the government
24 has to present in this case, whether the defendants will be able
25 to keep within their hours.

1 Now that's --

2 THE COURT: You mean within their 265?

3 MS. EUBANKS: Within their 265.

4 THE COURT: That's their problem, though.

5 MS. EUBANKS: That's exactly what I want to establish
6 here, Your Honor.

7 THE COURT: I don't mean to be flip, everybody, but I
8 meant what I said.

9 MS. EUBANKS: The reason I raise it is that since the
10 inception, since the trial began there have been some changes in
11 orders, 471(b) and (c) and so forth, and that there have been
12 some slight changes.

13 I just wanted to reconfirm, because the United States
14 has indeed presented its case in accordance with the time frame
15 set forth in 596, our planning of our redirect examinations,
16 whether we will use an entire hour when we present an expert,
17 and exactly how we go about presenting our evidence is mindful
18 to the time limits set forth in 596.

19 But I wanted to ensure in terms of going forward that
20 looking at the schedule and looking at the number of hours that
21 have been spent so far, that we wouldn't find ourselves in
22 situation where defendants would argue that those changes in
23 some of the orders since the trial started would require this
24 court to provide additional hours, and that we are operating
25 under the assumption that the hours in 596 are all of the hours

1 that we have to present this case.

2 THE COURT: Ms. Eubanks, you are raising a problem that
3 doesn't even exist at this point. That's number one.

4 Number two, I cannot believe for a moment that the
5 defendants who are smart and sophisticated would have the
6 terrible bad judgment to make such a request of the court.

7 I'm hoping that they will keep to their original
8 estimate, but I understand full well what my footnote says and
9 that they are not required to.

10 And number three, I don't know if this is their
11 strategy, but it has been apparent to me that their strategy is
12 that they will use up their hours primarily on cross-examination
13 rather than the direct examination of their own witnesses, many
14 of whom are experts, just as the government will probably do
15 something somewhat similar -- not identical because you probably
16 have more adverse witnesses, I'm not sure they have any adverse
17 witnesses, I'm not sure about that -- but you will do something
18 very similar.

19 So while I look at those hourly statements every week,
20 wincing as I see them, I have no reason to think that any of the
21 ground rules are going to change on that subject.

22 MS. EUBANKS: Thank you, Your Honor. That's
23 appreciated.

24 THE COURT: Is there anything else? Please don't
25 create problems, everybody.

1 Now, I just want to --

2 MR. BEACH: Excuse me, Your Honor. I'm sorry to
3 interrupt. Could I just briefly mention one --

4 THE COURT: Yes, but you better come forward, please.

5 MR. BEACH: I'm sorry.

6 Your Honor, it was pointed out to me that one of the
7 exhibits that I used during Dr. Krugman's examination relates to
8 Mr. McMahon's reprimand, that that document contains his social
9 security number. So the version that I will provide to the
10 clerk, I've asked somebody to have that redacted with a notation
11 that it's being redacted. I just wanted that to be clear for
12 the record.

13 THE COURT: Yes, that has to be done, everybody, under
14 the new FTC rules and the privacy rules that the courts are
15 following.

16 MR. BEACH: And I apologize for not noticing that
17 before, Your Honor, but I wanted to bring it to your attention.

18 THE COURT: I know that, of course, we have to deal --
19 not now, but depending on how much time we have at the end of
20 the day -- with exhibits relating to Dr. Chaloupka and
21 Dr. Krugman.

22 I want to check. Are there any outstanding issues with
23 Dr. Dolan's exhibits? I thought we had resolved all of those.

24 MR. BRODY: We have issues that we're prepared to
25 address with Dr. Dolan.

1 There was a subsequent round of briefing, objections,
2 an amended exhibit list, objections and a response to those
3 objections, that we can be prepared to address. I think the
4 issue that comes up is an issue that also comes up with
5 Dr. Chaloupka.

6 I also wanted to note, while you're raising the issue
7 of outstanding objections, that there are still issues remaining
8 with respect to Dr. Henningfield and with Ms. Ivey.

9 THE COURT: All right. That's what I wanted to
10 double-check with everybody then. All those issues are still
11 outstanding.

12 I don't know -- given what the government said about
13 redirect -- I'm very anxious to finish this witness today. How
14 much longer are you going to be?

15 MR. WEBB: I'll try. I'll be 15 minutes or so. I'm
16 getting there.

17 THE COURT: And Mr. Wallace, 15?

18 MR. WALLACE: Less than that, Your Honor.

19 THE COURT: Pardon?

20 MR. WALLACE: Less than that.

21 MS. BROOKER: Your Honor, I will definitely finish up
22 so that Dr. Krugman can be finished today.

23 THE COURT: We may not have time to reach the issues,
24 however, with the five witnesses. I'm not so worried about
25 Dr. Chaloupka and Krugman because they are recent, and I think

1 Dr. Dolan does relate to them, too.

2 I would certainly like to get the first two issues out
3 of the way, meaning those relating to Ms. Ivey and
4 Dr. Henningfield. The question is are those substantial issues?
5 Do I have to go back in my files and bring all of those up?
6 Just give me a heads-up on that.

7 MR. BERNICK: Excuse me. I can only speak with respect
8 to Ms. Ivey. I think that there are a number of exhibits that
9 are at issue.

10 I've got a pocket folder in my box, and maybe after
11 lunch I can inform the court as to how long, at least from our
12 point of view, it would take and whether it really is necessary
13 for Your Honor to go back. So maybe that's just the best way to
14 leave that.

15 And also with respect to Dr. Dolan, I think I've got
16 those here as well. Maybe you can do the same thing.

17 THE COURT: I think there was an objection to a lot of
18 exhibits, but I think it was the same objection.

19 MR. BERNICK: Well, with respect to Dr. Dolan, there is
20 that reliance issue that we argued previously, but I think
21 there's some other issues as well, and rather than trying to
22 speculate about that, maybe the best thing to do is just have me
23 take a look at the folders and I will tell Your Honor when we
24 return.

25 THE COURT: Mr. Brody.

1 MR. BRODY: As to Dr. Henningfield, Your Honor, there
2 are not very many issues as to documents.

3 I believe we are still waiting for an answer from
4 defendants as to a request that we put to them for information
5 about their position as to certain exhibits in an attempt to
6 narrow it as much as possible.

7 I do not know whether -- I know that one of the
8 inquiries was put to Mr. Frederick. I know he is not here
9 today. We can have Mr. Goldfarb here this afternoon to address
10 it and to go through it if it's appropriate to do that.

11 THE COURT: I don't know that it's realistic given what
12 I've heard about everything.

13 I will tell you, because you all indicated you would be
14 happy to break early, I have a 4:45 meeting in chambers. I
15 don't have to go anywhere, Mr. Minton. Where is Mr. Minton?
16 But I also need to keep that meeting, so I wouldn't want to go
17 past then.

18 MR. BERNICK: Speaking for myself, neither would we.

19 THE COURT: Well, I understand that. We will certainly
20 finish this witness.

21 I'm not sure realistically how much we're going to get
22 to on the objections. That puts a lot over until two and a half
23 weeks away, which makes me very uncomfortable, but I don't see
24 any way around it.

25 MR. BRODY: There is one other issue, Your Honor,

1 that's an uncontested issue.

2 The parties have spoken about the schedule for the
3 submission of objections and counter-designations and responses
4 to objections and rebuttal designations for prior testimony and
5 would like to jointly request a revision to the schedule that
6 currently exists, which is the Monday-Wednesday-Thursday
7 schedule given the way that those are being submitted.

8 And what we would suggest is that we go Monday by
9 midnight for the submission of the list of exhibits and
10 identification of testimony. That would be starting on
11 January 3rd.

12 That objections and counter-designations would then be
13 identified the following Monday by midnight.

14 And that responses to objections and rebuttal
15 designations would come in by the end of the day on Friday after
16 the counter-designations come in.

17 It would pull the schedule out. And then subsequently
18 the court would get the submission from the designating party of
19 all the designations and counter-designations on the -- I guess
20 it would be Monday two weeks after the initial designations
21 process started. We would be happy to submit a proposed order
22 that sets all of this out.

23 THE COURT: It would be the 3rd for the designations,
24 the 10th for the oppositions, objections and
25 counter-designations, and then the responses would come in on

1 the 13th. Is that right?

2 MR. BRODY: If the 13th is Friday -- the 14th.

3 THE COURT: The 14th.

4 MR. BRODY: And then we would just proceed on that
5 schedule as the case goes forward. In order to make it
6 completely clear, we would be happy to submit a joint proposed
7 order that memorializes this and sets out the schedule for
8 priors.

9 MR. WEBB: We have agreed to this and I think we should
10 submit a draft order to Your Honor and you can see if you are in
11 agreement with us or what we think -- we think this is a more --
12 we think this is a better way to proceed.

13 THE COURT: The dates sound fine with me or the
14 scheduling sounds fine with me, so you can give me a proposed
15 order on that.

16 MR. BRODY: Thank you, Your Honor.

17 THE COURT: All right. 2:00 o'clock, please.

18 (Lunch recess began at 12:47 p.m.)

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7 *****

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10 *****

11 CERTIFICATE

12 I, EDWARD N. HAWKINS, Official Court Reporter, certify
13 that the foregoing pages are a correct transcript from the
14 record of proceedings in the above-entitled matter.

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16 Edward N. Hawkins, RMR

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	Docket No. CA CA99-02496
	.	
v.	.	
	.	
PHILIP MORRIS USA, et al.,	.	Washington, D.C.
	.	December 16, 2004
	.	
Defendants.	.	
.	.	

VOLUME 43
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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Proceedings reported by machine shorthand, transcript produced
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1 AFTERNOON SESSION, THURSDAY DECEMBER 16, 2004

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

3 (2:02 p.m.)

4 THE COURT: All right, Mr. Webb, please.

5 MR. WEBB: Yes, Your Honor.

6 CONTINUED CROSS-EXAMINATION OF DEAN M. KRUGMAN, Ph.D.

7 BY MR. WEBB:

8 Q. Doctor, I want to pick up -- actually I have kind of one
9 more area I'm going to go into, but let me come back to one
10 issue if I might.

11 This morning I was asking you a line of questions about
12 whether there was any other Philip Morris market research other
13 than the 1974 Roper Study that indicated that Philip Morris was
14 doing consumer research on people under the age of 18, and you
15 pointed me to page 68 in your written direct; is that correct, to
16 a Leo Burnett document?

17 A. I did, sir.

18 Q. Over the lunch break I went and got the Leo Burnett
19 document, so I'm going to actually use that document, the
20 document itself.

21 A. Okay.

22 Q. If I could hand that to him, please. I'm giving you the
23 Leo Burnett document that's marked as U.S. Exhibit 22336, I'll
24 call it the front page of the document shows that this is -- the
25 heading on the study it's on Leo Burnett stationery, and you

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1 understand Leo Burnett is an advertising agency that did work
2 for Philip Morris; is that correct?

3 A. Yes, sir.

4 Q. And it says it's a young adult smoker target and in-depth
5 look prepared for Philip Morris, do you see that?

6 A. Yes.

7 Q. Now, if we go into the document, just go to the first
8 page of the document, right to the next page, it gives
9 background. What it says here is that Philip Morris and Leo
10 Burnett Company, see that Philip Morris, LBC?

11 A. Yes.

12 Q. "Philip Morris and Leo Burnett recognize the need to
13 better understand young adult smokers." Do you see that?

14 A. I do, sir.

15 Q. And do you understand "young adult smokers" to be
16 referencing people of legal smoking age 18 to 21?

17 A. When they say it in the chart that it's 18 to 21.

18 Q. Right there on the face of it; is that correct?

19 A. Yes.

20 Q. Okay. And so you understood, when you told me this
21 morning that Philip Morris was doing -- that you thought this
22 document showed Philip Morris doing market research, consumer
23 research on people under the age of 18, this document shows
24 Philip Morris was interested, and Leo Burnett, in young adult
25 smokers; is that correct?

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1 A. What I said this morning, sir, was in response to
2 strategic -- you asked about strategic research, and I pointed
3 to this document to indicate, and I see where it says 18 to 21
4 up front, but from a strategic research standpoint, later on in
5 the document, it clearly shows the use of younger individuals
6 tween and teen study when they say on similar markets. It says
7 "research on similar markets" so I point to that to be under the
8 age of 18, sir.

9 Q. I understand. We're going to go -- we're going to show
10 the Court exactly what research Philip Morris actually did,
11 okay. So let's go to, if you would -- if you want to know
12 whether Philip Morris and Leo Burnett were doing any consumer
13 research on people under the age of 18, sir, if you go into what
14 actually is the fourth page of the document, it's Bates stamped
15 7986, we see what the research objectives are. Do you see that?

16 A. Yes.

17 Q. Are you on that page with me, sir? Do you have the same
18 page in front of you?

19 A. Yes.

20 Q. It says here: "This study -- the research objectives:
21 This study initiated as part of worldwide pilot to obtain
22 insights into young adult smokers", do you see that term used
23 again?

24 A. Yes.

25 Q. And then it goes on to describe that to understand this,

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1 who the target is and what they are, that there's going to be
2 certain markets chosen to represent trend of markets, do you see
3 that?

4 A. Yes.

5 Q. In Manhattan and Los Angeles, do you see that?

6 A. Yes.

7 Q. And then, sir, if you go into -- go to the next page of
8 the document, please. And you see a heading saying "what we
9 did", do you see that?

10 A. Yes.

11 Q. Do you understand "what we did" to refer to Philip Morris
12 and/or Leo Burnett?

13 A. Yes.

14 Q. And then it describes some primary research -- first of
15 all, they described they're going to, basically, do a two-phase
16 program. Do you see that at the top?

17 A. Yes.

18 Q. And they described the first phase as primary research
19 conducted by personal depth interviews in May 1989; is that
20 correct?

21 A. Yes.

22 Q. And if we read that, we'll see exactly the research that
23 was done by Philip Morris and Burnett, and it's described there
24 as a total of 20 interviews among 18- to 25-year-old smokers in
25 those two areas, Manhattan and Los Angeles. Do you see that?

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1 A. Yes.

2 Q. And so, does it appear to you that the consumer research
3 that was actually carried out that's reflected in this document
4 by Philip Morris and Leo Burnett, whatever consumer research was
5 done by Philip Morris and Leo Burnett, was done on 18- to
6 25-year-olds. Do you see that, sir?

7 A. Yes.

8 Q. Now, if we go to the next page, we can see what the
9 second objective was. Do you see that? The second objective
10 was a comprehensive literature review in order to provide a
11 broader context for interpreting, understanding primary research
12 findings. Do you see that?

13 A. I do.

14 Q. Okay. And I asked you this morning in the studies that
15 Leo Burnett referred to were studies that were carried out by
16 people other than Philip Morris. Do you remember that? And you
17 told me you couldn't tell?

18 A. That's correct.

19 Q. Okay. Let's go into the page that you cite in your
20 written direct where that's a study of teenagers that's
21 described. Go to the page that's Bates stamped 8023, if I could
22 call that page up, Jamey.

23 And you cite this in your written direct; is that
24 correct, as a study of people that are referred to by Leo
25 Burnett of people who were referred to as under 18, do you see

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1 that?

2 A. I'm trying to catch up with you, sir.

3 Q. That's fine, I'm wait until you do.

4 A. Thank you, sir.

5 Q. You actually refer to this, the Bates stamps in your

6 written direct, do you not?

7 A. I want to make sure I'm on the same -- I'm on the right

8 page, sir.

9 Q. Are you trying to find out whether you cite this Bates

10 stamp? If you look at page 6 of your direct.

11 A. I'm trying to find out if the Bates stamp number is

12 correct in the page that is --

13 Q. If you want to know if you cited this in your direct, I

14 can show you -- look at page 68 of your written direct.

15 A. Okay.

16 Q. Do you have your written direct in front of you, sir?

17 A. I do.

18 Q. Do you see in your written report where you cite Bates

19 stamp 8023?

20 A. Yes.

21 Q. So let's go back and look at 8023. I'm now back on page

22 8023, is that where you are, sir?

23 A. Yes.

24 Q. Do you see where the study that you reference there

25 actually says it's an independent study, obviously not conducted

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1 by Philip Morris or by Leo Burnett; is that fair to say?

2 A. Yes.

3 Q. Thank you. Now, let me go to another topic, sir. I want
4 to talk about some direct examination you gave -- in fact, let
5 me call it up on the screen so the Court and you can know where
6 I am. Can I have tab 69, Jamey, this will be page 46 line 19 to
7 23 called up on the screen, if I could, please?

8 I'll give you a chance to find it there, Doctor. Do you
9 see where you talk about your fourth conclusion?

10 A. I'm just trying to catch up. One moment, please, okay.
11 I'm really back on the last document, because I don't think we
12 captured the two studies I was talking about in the last --

13 Q. Doctor, you have a lawyer here that may decide. I've
14 tried to --

15 A. Fine.

16 Q. -- I'm trying to finish if I can.

17 A. Of course.

18 Q. I'm going into another area.

19 A. I understand sir.

20 Q. That's fine.

21 A. Yes.

22 Q. I'll wait until you catch up. This is page 46 of your
23 written direct.

24 A. Yes.

25 Q. And you say this is your fourth conclusion; is that

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1 right?

2 A. Yes.

3 Q. And what you tell the Court here, which I want to ask you
4 some questions about, you say: "My fourth conclusion is that
5 the ubiquitous nature of cigarette advertising" -- ubiquitous I
6 assume that's advertising that appears everywhere?

7 A. Yes.

8 Q. "The ubiquitous nature of cigarette advertising and
9 promotion normalizes and socially sanctions smoking among
10 teenagers."

11 What I want to do is, I want to take that fourth opinion,
12 and when you gave that opinion, did you consider looking at what
13 Philip Morris does today in its marketing and advertising
14 regarding the Marlboro product?

15 A. Yes.

16 Q. Okay. And so, I want to focus on where Phillip -- maybe
17 I should start with the basics. Are you telling the Court that
18 it is your opinion, as a marketing expert, that today Philip
19 Morris uses Marlboro Man and Marlboro Country advertising in an
20 ubiquitous and visible way in order to attract underage smokers?
21 Is that your testimony?

22 A. I think the ubiquity attracts under-age smokers.

23 Q. Okay. Well, I'd like to focus today on exactly where in
24 America an underage person can see the Marlboro Country or
25 Marlboro Man imagery. Are you with me?

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1 A. Yes.

2 Q. Did you look at that issue, that issue being, as an
3 advertising expert, did you try to go out and say to yourself
4 where in America today can an underage person actually see this
5 imagery of the Marlboro Country or the Marlboro Man advertising
6 theme? Did you look at that issue in reaching your opinions?

7 A. Yes.

8 Q. Okay. Could I have JDEM 40151 handed to the witness?

9 It's tab 71, Jamey, to call up on the screen.

10 Sir, I'm going to hand you JDEM 04015, which is an
11 exhibit I prepared to try to ask you some questions about the
12 visibility of the Marlboro Man and western theme today in
13 America that underage people might see somewhere in America.
14 So, I just want to go through this and see if you agree or
15 disagree with what I placed on the chart.

16 Do you agree with me that the left-hand column I've shown
17 where in the past underage people might see the Marlboro Man or
18 western theme imagery, do you see that?

19 A. Yes.

20 Q. And I placed there that -- you see the different
21 categories I have from TV and radio, product placement, all the
22 way down to retail, do you see that?

23 A. Yes.

24 Q. And do you agree with me that the left-hand column does
25 reflect the visibility of the Marlboro Man imagery at some point

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1 in time in the past; is that correct?

2 A. I do, yes.

3 Q. Now, let's see where it is today.

4 THE COURT: I want to be clear about one thing in terms of
5 your chart, Mr. Webb. Is it fair to say that the column labeled
6 "visibility in the past" covers any period up to but excluding
7 January 1, 2004?

8 MR. WEBB: That's fair, yes, it is. And we can probably
9 go through different things entered at different times, and I may
10 go into some of that, but that is exactly correct, Your Honor.

11 BY MR. WEBB:

12 Q. So, as far as where today, in 2004, some underage person
13 might see the western theme, Marlboro cowboy imagery, have I
14 accurately reflected in the right-hand column that you cannot
15 see the Marlboro Man or western theme imagery in TV and radio,
16 product placement in movies, sampling, print media, including
17 magazines and newspapers, outdoor, including billboards, transit
18 and stadium, on branded non tobacco items like hats, duffel
19 bags, et cetera, and on sponsorship events? Do I accurately set
20 forth that you cannot see the Marlboro Man and western theme
21 imagery today in those categories?

22 A. Well, there are certainly product placement in movies
23 that are still existing that people can rent and see where
24 there's -- where Marlboro is available. So --

25 Q. Are you talking about older movies, sir?

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1 A. Yes, sir.

2 Q. Okay. But as far as Philip Morris doing anything to
3 place product placement in movies, do you believe Philip Morris
4 is doing that in the year 2004?

5 A. No.

6 Q. Okay. Anything else that you disagree with this chart
7 on?

8 A. The point of sale retail you have as limited.

9 Q. You disagree with that?

10 A. Yes.

11 Q. That's fair, I'm going to go through that in a little
12 detail since you disagree with it. Do you disagree with
13 anything else?

14 A. No.

15 Q. Okay. So, let's talk about where an underage person
16 might see the Marlboro Man or western theme imagery today, and I
17 start -- let me go through direct mail first, and then I'll come
18 to your issue about retail, is that okay? I'll do it.

19 A. You get to ask the questions.

20 Q. That's fair, I'll do it. Let's talk about direct mail.
21 As far as where you could -- where the Marlboro western theme
22 imagery theme still appears today -- could we call that back up,
23 keep that up on the screen, Jamey -- as far as where you could
24 see it today, I wrote down the word "yes" and let's go through
25 what I'm referring to there. You are generally aware that

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1 Philip Morris has a direct mail program; is that correct?

2 A. Yes.

3 Q. And you do not mention it anywhere in your direct
4 examination, do you?

5 A. That's correct, I do not.

6 Q. And I take it the reason you don't mention it in your
7 direct is that you do not believe that Philip Morris uses direct
8 mail as a means to provide imagery or try to market to underage
9 people; is that fair to say?

10 MS. BROOKER: Objection, that's a mischaracterization, and
11 Mr. Webb knows it.

12 THE COURT: Objection's overruled. I don't know what
13 Mr. Webb knows or not, but the question itself was not a
14 mischaracterization. You may answer.

15 THE WITNESS: I did not make a study of that topic.

16 BY MR. WEBB:

17 Q. Well, let's talk about what the program -- maybe we can
18 try to get you to at least give me your thoughts on it based on
19 your expertise.

20 You're generally aware that Philip Morris's direct mail
21 program is restricted to people 21 years and over who are
22 smokers; is that correct?

23 MS. BROOKER: Objection, beyond the scope of direct
24 testimony.

25 MR. WEBB: Your Honor, this is an advertising expert

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1 that's rendered opinions --

2 THE COURT: Overruled.

3 MR. WEBB: -- on the target.

4 THE COURT: Overruled.

5 THE WITNESS: I didn't make a study of direct mail.

6 BY MR. WEBB:

7 Q. I'm just asking you, I didn't ask you if you made a
8 study. Based on all the work you've done in this case, do you,
9 at least, generally understand that Philip Morris's direct mail
10 database has people on it that have certified that they're 21
11 years or over and are a smoker? Do you at least understand that
12 much about the program?

13 MS. BROOKER: Objection, beyond the scope of direct
14 examination and lack of foundation to ask Dr. Krugman who has not
15 disclosed that he reviewed other experts' direct mail databases.
16 That's not a part of his direct testimony.

17 MR. WEBB: Your Honor, he says we targeted people, I'm
18 trying to bring out where today we could possibly target underage
19 people.

20 MS. BROOKER: This is just not the right --

21 THE COURT: Just a moment please, everybody. He did
22 indicate that he did not make a study of that program.

23 MR. WEBB: I know he said that.

24 THE COURT: I don't think there's a foundation for this
25 series of questions. If he hasn't studied it, then it seems to

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1 me he can't respond. So the objection's sustained.

2 MR. WEBB: That's fine.

3 BY MR. WEBB:

4 Q. Let me just ask: In doing all of the work that you've
5 done in this case, you have not reached any opinion, have you,
6 that Philip Morris is using its direct mail activities for the
7 purpose of marketing to underage people? You have not reached
8 that opinion, have you?

9 A. I have not reached any opinion on direct mail.

10 Q. So you haven't reached that opinion, have you?

11 A. Yeah.

12 MS. BROOKER: Objection, that was asked and answered.

13 THE COURT: Objection's overruled. The witness's response
14 is very clear that he hasn't studied it and he hasn't reached any
15 opinion whatsoever.

16 BY MR. WEBB:

17 Q. Let me go on to the last place that you could possibly
18 see the Marlboro western theme imagery in America today if you
19 were underage, and you -- when I wrote down the word "limited at
20 point of sale", you take issue with that; is that correct?

21 A. I do, sir.

22 Q. I take it you've studied the issue pretty carefully?

23 A. I have.

24 Q. Okay. So, let's talk about what Philip Morris does today
25 at point of sale. First of all, as a marketing expert, do you

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1 agree that because cigarettes are a legal product, as a
2 marketing expert you agree that Philip Morris has the right to
3 have its cigarettes sold at retail; is that correct?

4 A. I'm not a legal expert.

5 Q. I didn't ask you if you were a legal -- just as you sit
6 here -- the fact that we actually sell cigarettes at retail, you
7 actually take issue with that?

8 A. No, I'm not taking issue.

9 Q. That's all I'm -- that's fine, I'll put that behind us
10 then. And so -- but as an advertising expert, do you at least
11 agree this much with me, that since Philip Morris is legally
12 entitled to sell its products at retail, Philip Morris, at
13 least, has the right to tell smokers with some type of signage
14 where the products are located?

15 MS. BROOKER: Objection, it calls for a legal question at
16 the very least. It's beyond the scope of his --

17 THE COURT: Not necessarily, the objection's overruled.
18 If you can answer it, please do.

19 THE WITNESS: I'm not sure what the rights are.

20 BY MR. WEBB:

21 Q. Set aside legal rights. Just as an advertising expert,
22 based on your advertising expertise, do you believe that if
23 somebody is selling a product at retail, it's reasonable for
24 that party, that company to, at least, put up some signage to
25 tell customers that the product is available there?

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1 A. Yes.

2 Q. Okay. Now, let's go in and see what you would accept as
3 being proper signage and promotion to tell consumers, for
4 example, that Marlboro's available at a retail outlet. First of
5 all, have you actually studied Philip Morris's current efforts
6 to reduce the visibility of the Marlboro imagery at retail so
7 that it can be reduced as much as possible so that young people
8 won't see it? Have you studied that issue?

9 A. I have read -- I have read the -- I've read some of the
10 programs that you have, yes.

11 Q. All right, then. And I take it you've read over
12 information about the marketing program called "retail leaders";
13 is that correct?

14 A. I have, I've looked through it.

15 Q. Okay. And if you can't answer some of my questions, you
16 can just tell me.

17 A. Okay, sir.

18 Q. Are you generally aware that that was a -- that's the
19 current retail marketing program that Philip Morris uses with
20 retailers?

21 A. Generally speaking.

22 Q. And are you aware that that program is not new, it's been
23 in existence and implemented five years ago in 1999?

24 A. I'm not aware of when it was implemented, sir.

25 Q. Did you try to find out how long Philip Morris had been

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1 using that program?

2 A. No.

3 Q. Okay. Now, are you generally aware that under -- have
4 you actually read over the retail leaders agreement that Philip
5 Morris has with retailers that spells out what the parties can
6 and can't do at retail?

7 A. I've read through it, sir.

8 Q. So, I take it -- I'm not going to get into a lot of
9 detail, but are you generally aware that Philip Morris, under
10 the Philip Morris retail leaders agreement, that retailers are
11 provided actual financial incentives if they will agree to
12 reduce the number and location of cigarette signs and displays
13 at retail?

14 A. Yes.

15 Q. Okay. And are you aware that these financial incentives
16 are provided if they will actually agree to centralize the
17 signage in one central location where the cigarettes are sold?

18 A. Yes.

19 Q. And are you also generally aware that under the retail
20 leaders agreement, that Philip Morris provides other financial
21 incentives if the retailer will agree to convert from self
22 service displays of cigarettes to nonself service display of
23 cigarettes that are behind the counter where young people cannot
24 get access to them? Are you generally aware of that?

25 A. Yes.

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1 Q. Now, do you agree with me that as far as Philip Morris --
2 strike the question. Do you agree with me that providing
3 financial incentives to retailers in order to reduce the
4 visibility of cigarette advertising and to reduce young people's
5 access to cigarettes at retail, do you believe that's a good
6 thing for Philip Morris to strive to do?

7 A. There are two questions. One is visibility and one is
8 product access, I believe.

9 Q. I'll break it down. That's fair. Let me start with the
10 visibility. Do you believe it is a good thing for Philip Morris
11 to provide financial incentives to retailers in order to reduce
12 the visibility of cigarette advertising at retail?

13 A. It would depend on what the floor of visibility was.

14 Q. If Philip Morris as a company, at least, decides to try
15 to do something about the issue, and gives people money to
16 reduce signage of cigarette ads in stores, do you basically view
17 that to be a good thing for a tobacco company to do?

18 A. I understand the question, and I'm trying to answer it
19 and not be evasive at all, sir, I'm just simply saying it would
20 depend what the floor on the visibility was. In other words, if
21 you were to walk into the store for the signs that I've shown
22 and you have those very large signs over the counter with the
23 Marlboro Country theme, then, if that's your floor, your lowest
24 part of visibility, then I'm not sure that's going to help much.

25 Q. Well, we'll get specific.

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1 A. Okay.

2 Q. The concept of trying to reduce signage from different
3 locations, strike the question. You've looked at this issue in
4 the past. You've seen retail stores in the past where you have
5 signage in multiple places in a store; is that fair to say?

6 A. Correct.

7 Q. And the idea that Philip Morris is, at least, trying to
8 get it centralized in one location, is that a good thing?

9 A. It can be.

10 Q. Okay. And do you know whether under that retail leaders
11 agreement Philip Morris actually has limits on how big signs can
12 be at the centralized location?

13 A. Are these for people who sign up for the program?

14 Q. If you sign on to the program, yes.

15 A. Yes.

16 Q. Okay. For example, you're familiar -- you're familiar
17 with the type of sign that's known in the advertising business
18 as a header; is that correct?

19 A. Yes.

20 Q. And you showed some photographs of a Marlboro header in a
21 store; is that correct, during your direct oral direct?

22 A. It is, sir, yes.

23 Q. Okay. In fact, I'm going to -- what's this exhibit
24 number? I'm going to show you now what I have marked as JD
25 54514, which is, I believe, if we go back and look at your

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1 photographs, it was -- you could see --

2 THE COURT: Wait, wait, I think that's inside out.

3 THE WITNESS: Upside down.

4 MR. WEBB: It is, thank you.

5 THE COURT: You've still got it wrong, Mr. Webb, now it's

6 backwards.

7 MR. WEBB: Is this better?

8 THE COURT: Yes.

9 BY MR. WEBB:

10 Q. Can you see this, Doctor?

11 A. I can, Mr. Webb.

12 Q. Okay. Do you recognize this as what is known as a header

13 that can be put overhead?

14 A. I do, sir.

15 Q. Okay. And look at the size of that. You can see the

16 size of the cowboy on a horse there?

17 A. Yes.

18 Q. Now, that's one type of sign that you know Philip Morris

19 does allow the retailers to use to tell consumers where the

20 product is; is that correct?

21 A. Yes.

22 Q. Okay. Now, by the way, is it your testimony to the Court

23 that that cowboy on that horse, as I have on this sign, is

24 somehow going to be some type of promotional activity that is

25 going to cause underage people who don't want to smoke to start

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1 smoking and buy cigarettes at retail?

2 A. I would never phrase the question in a causal manner, and
3 I have a lot of direct testimony regarding influence versus
4 cause.

5 Q. I'm just asking you about this cowboy on a horse. You're
6 looking at the sign that is called a header that Philip Morris
7 allows to be used at retail today, and I'm just asking you
8 whether that small horse with that small cowboy, do you believe
9 as an advertising expert, that's going cause underage people to
10 come into the store, see that cowboy and go out and buy
11 cigarettes when they didn't want to smoke?

12 MS. BROOKER: Objection, asked and answered, that specific
13 question.

14 MR. WEBB: I don't think I got an answer.

15 THE COURT: Well, you may have gotten an answer that you
16 didn't like or didn't serve your purpose, but I think you did get
17 an answer, Mr. Webb, and it was: "I would never phrase the
18 question in a causal manner, and I have a lot of direct testimony
19 regarding influence versus cause."

20 BY MR. WEBB:

21 Q. Well, let me ask you this -- by the way, you showed some
22 pictures with this type of header in stores; is that correct?

23 A. Yes.

24 Q. Okay. Now, are you also aware that under the retail
25 leaders program, that the retailer can actually use what is

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1 known as a shelf sign?

2 A. Yes.

3 Q. Okay. And I'm now going to show you what is marked as JD
4 054516. I have it in my hand, if you can see it. I'm told
5 these are called "shelf talkers", have you terms used to
6 describe signs like this?

7 A. Similar terms.

8 Q. Okay. And this is a sign that actually gets inserted
9 back behind the counter to show the consumer where Marlboro is;
10 is that correct?

11 A. Yes.

12 Q. And you actually -- and there's a little -- do you see
13 there's a little cowboy and a horse on that shelf talker? Do
14 you see that?

15 A. Yes.

16 Q. Okay. Jamey, could I have tab 71 called back up again?
17 Sir, I have a general question, this is my last question. As an
18 advertising expert, do you believe it's a good thing that Philip
19 Morris has substantially reduced the visibility of Marlboro Man
20 and western theme imagery advertising as set forth on this
21 chart?

22 MS. BROOKER: Objection, beyond the scope of -- it's not a
23 question for an expert whether or not something is a good or a
24 bad thing.

25 THE COURT: Sustained. You'll have to rephrase it.

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1 BY MR. WEBB:

2 Q. As a marketing expert, as a marketing expert studying
3 what Philip Morris is doing today, as far as having advertising
4 everywhere and being ubiquitous, do you believe that that type
5 of reduction in visibility, as reflected on this chart, is
6 something that by reducing it helps solve the ubiquity problem?

7 A. Would work towards solving the ubiquity problem.

8 Q. Thank you. I have no more questions.

9 THE COURT: All right, Mr. Wallace?

10 CROSS-EXAMINATION OF DEAN M. KRUGMAN, Ph.D.

11 BY MR. WALLACE:

12 Q. Dr. Krugman, my name is David Wallace and we have not met
13 before, have we?

14 A. No, we have not.

15 THE COURT: Are you all right?

16 THE WITNESS: I'm fine, but I left out a -- I left out
17 part of an answer to Mr. Webb's last question.

18 THE COURT: Well, we'll leave it to the government counsel
19 to bring it out.

20 THE WITNESS: I'm sorry, I don't know the proceedings. My
21 apologies, Your Honor.

22 BY MR. WALLACE:

23 Q. I have just a few questions, sir. In both your written
24 and your live direct testimony, you made a series of fairly
25 broad generalizations about the tobacco company defendants, the

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1 marketing practices of the tobacco company defendants in
2 general, correct?

3 A. Yes, sir.

4 Q. In describing, for instance, your characterizing the
5 marketing practices that are at issue in this case, you've used
6 the terms "tobacco companies", correct?

7 A. I have, sir.

8 Q. "The tobacco industry"?

9 A. I have, sir.

10 Q. Or "defendants" in a largely indiscriminate fashion at
11 times, correct?

12 A. I have, sir.

13 Q. In your written testimony, for instance, at page 122,
14 lines 8 through 11, you were asked: "Have all the tobacco
15 companies placed cigarette advertisements in the magazines shown
16 on demonstrative 17,507 to 17,509 during the 10-year period --
17 during the 10-year from period 1993 to 2002?" And you answered,
18 "yes", correct?

19 A. I'm just trying -- these are all -- okay.

20 Q. I'm just focusing here, "all tobacco companies", right?

21 A. Yes.

22 Q. And then in your live direct at page 8466, this is
23 referring to your 30-year Rolling Stone census of cigarette ads
24 that have appeared in Rolling Stone, and Ms. Brooker asked you,
25 "Have all of the defendant tobacco companies advertised in

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1 Rolling Stone during the time period that's identified in that
2 book, in those two books", and you answered "I believe so,"
3 correct?

4 A. Yes.

5 Q. When you refer to what all of the defendant tobacco
6 companies in this case supposedly were doing at different times
7 in terms of their marketing -- their advertising policies and
8 practices, sir, who are you referring to?

9 A. Tobacco companies.

10 Q. Okay. Can you name the defendant tobacco companies in
11 this case who you are including in your phraseology when you
12 talk about the defendant -- "all the defendant tobacco
13 companies", their actions in this case, which ones are you
14 referring to, sir?

15 A. R.J. Reynolds, Philip Morris, Brown & Williamson,
16 Lorillard, are the major ones that I'm focusing.

17 Q. Are you aware of the identity of any other tobacco
18 company defendants in this case?

19 A. Not that I would be able to name, sir.

20 Q. All right, so, Reynolds, R.J. Reynolds, Philip Morris,
21 Brown & Williamson, and Lorillard are the only entities for
22 which you have actually reviewed documents and advertising
23 materials in this case in forming your opinions, correct?

24 A. I viewed -- I have read documents from, earlier documents
25 from American Tobacco.

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1 Q. Any others?

2 A. Boy, Liggett Myers. I'm not presently sure who makes

3 Omni.

4 Q. Omni?

5 A. Yes.

6 Q. Now, if there are any other tobacco company defendants in

7 this case, Dr. Krugman, apparently you have not taken into

8 account their marketing and advertising practices in forming the

9 opinions that you have come here to provide the Court, correct?

10 A. I'm trying to think more broadly, if that's the case.

11 I'm working from memory.

12 Q. I understand, sir.

13 A. As I sit here, I can't think of the others.

14 Q. All right. I will tell you that I represent an English

15 tobacco company called British American Tobacco investments

16 limited, which we can call BATCo for short, okay?

17 A. Yes.

18 Q. Are you familiar with that company at all, sir?

19 A. To the extent of -- did I mention Brown & Williamson in

20 my list?

21 Q. Yes, you did.

22 A. Okay. I'm familiar with BATCo, yes.

23 Q. What -- I have sat here patiently and listened quite

24 carefully, sir, since you took the stand on Tuesday morning, and

25 I have not heard you utter so much as a word about BATCo,

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1 period.

2 A. That would be correct, sir.

3 Q. So, to the extent you have not mentioned BATCo, or any

4 BATCo brands or advertising in your testimony, would it be

5 correct to say that you did not consider BATCo at all in forming

6 your opinions?

7 A. I would have to know the BATCo brands in the U.S. to make

8 that judgment.

9 Q. Right. And the truth is, the fact is that you don't, you

10 don't know a single BATCo brand, if any, that might be available

11 for sale in the United States, correct?

12 A. May I ask a question just so I --

13 Q. Can you answer my question first, sir?

14 A. Well, I'm trying to.

15 Q. Okay.

16 A. Are there BATCo brands separate from Brown & Williamson?

17 Q. Do you know, sir, one way or another?

18 A. That's what I'm trying to determine.

19 Q. I'll represent to you that there are.

20 A. I'm not familiar with those brands.

21 Q. Okay. So you -- if, for instance, the Court wanted to,

22 as you suggested, travel through your 30-year census, your two

23 volume 30-year census of Rolling Stone cigarette ads, and the

24 Court asked you, as an expert, to provide it with some guidance

25 as to what BATCo trademarks and brands and imagery it might want

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1 to have in mind and be looking for as it traveled through that
2 magazine, you wouldn't be able to assist the Court, would you,
3 Dr. Krugman?

4 A. No.

5 Q. The bottom line, Dr. Krugman, is that you've brought this
6 Court no evidence that would enable to able it to find, as a
7 matter of fact, that BATCo has ever designed or placed its
8 advertising in any media to knowingly target adolescents under
9 18 years of age, correct?

10 A. I would have to travel back in time to understand if
11 there were specific BATCo brands that were advertised in the
12 U.S. and make a judgment on that.

13 Q. Well, with all due respect, sir, the time to have done
14 that has pretty much come and gone at this point, correct?

15 A. Yes.

16 Q. And you haven't done it to this point?

17 A. To the extent that I don't know the specific brands,
18 can't name the specific brands to you, that's correct.

19 Q. All right. So, in your written direct, and in your live
20 direct in response to Ms. Brooker's questions, when you told
21 this Court what "all the defendant tobacco companies" in this
22 case had done in terms of their marketing practices, you meant
23 all but BATCo, correct?

24 A. I'm not precise on that matter, I'm just not. I'd have
25 to look at the BATCo brands to know how to answer that question.

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1 Q. All right. And what you've already said at the outset
2 was that you have not actually incorporated or accounted for
3 BATCo in any of the research and work that you did in
4 formulating your opinions in this case to get to the point where
5 you sit at this moment, correct?

6 A. Correct, with the understanding that there aren't BATCo
7 brands that I'm confusing being under another company.

8 Q. And as we've established, I've represented to you that
9 there are, in fact, BATCo brands that are separate from B & W,
10 and you can't tell the Court which ones, if any, might be
11 available for sale in the United States?

12 A. That's correct.

13 Q. No further questions.

14 THE COURT: All right. I believe that there were no other
15 defendants scheduled for cross-examination. Ms. Brooker, let's
16 start, please.

17 MS. BROOKER: Thank you, Your Honor.

18 REDIRECT EXAMINATION OF DEAN M. KRUGMAN, Ph.D.

19 BY MS. BROOKER:

20 Q. Good afternoon, Dr. Krugman.

21 A. Good afternoon, Ms. Brooker.

22 Q. Dr. Krugman, you were just asked questions by Mr. Webb of
23 this demonstrative which is JDEM 040151, correct?

24 A. Yes.

25 Q. Now, you were asked questions about visibility currently,

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1 in 2004, regarding television and radio; is that correct?

2 A. Yes.

3 Q. Now, you have cited in Joyce Julius data in your
4 testimony which relates to television audiences; is that
5 correct?

6 A. Correct.

7 Q. Now, does Philip Morris still sponsor race car teams?

8 A. Yes.

9 Q. All right. And can you cite -- do you know what the name
10 of the Marlboro team is?

11 A. I can't recall.

12 Q. If I were to ask you if you remember Marlboro Team
13 Penske, does that ring a bell?

14 A. Yes.

15 MR. WEBB: I object to leading.

16 THE COURT: Absolutely sustained.

17 BY MS. BROOKER:

18 Q. Well, does Marlboro have a racing team?

19 A. Yes.

20 Q. You recall -- do you recall that much?

21 A. Yes.

22 Q. Okay. Now, does this sponsorship make Marlboro brand
23 name and logo visible?

24 A. Certainly.

25 Q. And is it visible on television?

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1 A. Yes.

2 Q. And what data do you have that supports that conclusion?

3 A. Joyce Julius data.

4 Q. Now, you were also asked about point of sale retail

5 looking at that demonstrative, and you said -- I believe you did

6 not agree, or you had a qualifier as to whether or not you

7 agreed whether retail visibility as of 2004 was limited as its

8 written up there in the demonstrative. Do you just recall

9 testifying about that?

10 A. Yes.

11 Q. Okay. Would you explain further -- well, before you do,

12 let me ask you: When you talk about point of sale in retail,

13 are you talking about signage inside retail stores or outside

14 retail stores or both?

15 A. Both.

16 Q. Okay. So, would you please explain, briefly, what your

17 qualification was when you answered Mr. Webb's question?

18 A. First, there are -- there's visibility outside, and

19 second, as I looked at retail, as I traveled to some stores to

20 look at retail, I didn't see a great reduction in visibility,

21 and additionally, if you take your dollars out of the other

22 places, one of the questions that quickly comes to mind is, are

23 you putting dollars back in other places? So limiting

24 visibility, or coming out of the vehicles that are out now

25 doesn't take away from the fact that -- in other words, things

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1 all have to be equal. If you're reducing it in one area and it
2 goes up in another area, you really may not have reduced as
3 much. So, my answer to one of the questions is, do I agree that
4 it's a good thing that the other vehicles are limited? Yes,
5 everything else being equal.

6 Q. Okay. And is everything else equal?

7 A. No.

8 Q. Can you just briefly describe further, what do you mean
9 everything else is not equal?

10 A. Because dollars are going much more into the retail
11 level, and as a result of programs toward the retailer,
12 promotional programs and retail value added programs, you see
13 the retailer having more -- having -- in other words, the
14 retailer is paid more to sell the product, and when I looked at
15 retail visibility I didn't see a great deal of difference.

16 Additionally, I'm wondering, and only wondering, we
17 talked about the signage in the stores, and Mr. Webb held up a
18 sign that was about this big (indicating), and I think there was
19 the notion, if I understood it correctly, that retailers are
20 paid to reduce signage, or to have more limited visibility or
21 things behind the counter, and I wonder about retailers that
22 don't go along with those programs, and if they're provided with
23 the signs. In other words, he held up a particular size, and
24 the ones I saw seemed bigger than that.

25 Q. Now, just for the record, you were saying about this big,

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1 and how many feet are you referring to, just to get it on the
2 record, the sign that Mr. Webb showed you?

3 A. I'm not particularly good at this, but the sign was about
4 this (indicating).

5 THE COURT: Would it be fair to say approximately 3 feet?
6 Would you feel comfortable with that?

7 THE WITNESS: Yes, Your Honor, thank you, Your Honor.

8 BY MS. BROOKER:

9 Q. Now, just to briefly follow up on that, do you have
10 conclusions, as you sit there today, related to whether the
11 current retail environment is ubiquitous and impacts teenagers
12 under the age of 18?

13 A. Yes, I do.

14 Q. And briefly, what are --

15 THE COURT: Ms. Brooker, I have to interrupt you. Let me
16 repeat that question for you. "Do you have conclusions, as you
17 sit there today, related to whether the current retail
18 environment is ubiquitous", well, an environment can't be, but --

19 MS. BROOKER: I apologize, Your Honor.

20 BY MS. BROOKER:

21 Q. Why don't you describe in your own words, Dr. Krugman,
22 what is your, as you sit here today, what are your conclusions
23 regarding ubiquity and the current retail environment and
24 defendants' marketing practices in the retail environment as it
25 relates to teenagers under the age of 18?

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1 MR. BASS: Your Honor, I object, because this is just
2 directly what he said in his direct examination, in his written
3 direct examination. He gave a conclusion about ubiquity and he
4 gave a conclusion about the retail environment.

5 MS. BROOKER: Just a brief follow up to Mr. Webb's last
6 question.

7 THE COURT: I'll allow a brief answer. Go ahead.

8 THE WITNESS: The retail environment has a great deal of
9 cigarette signage, and that signage, and the images portrayed in
10 that signage, and the location in the store would all point to a
11 high visibility and having the ability to portray image which
12 would be part of the influence process.

13 THE COURT: First of all, the objection should have been
14 sustained. Second of all, I really want to emphasize this
15 afternoon that the purpose of redirect is to provide testimony
16 that directly meets questions that were raised on
17 cross-examination, not to just give the witness a second bite at
18 the apple. I've read the direct, that testimony stands in the
19 record, so please, Ms. Brooker, remember that principle. I've
20 been, perhaps, a little too lax about that, but I'm not going to
21 be this afternoon.

22 MS. BROOKER: Okay.

23 BY MS. BROOKER:

24 Q. Dr. Krugman, now, you were just asked, and I just have
25 pulled up the transcript here, a few moments ago by Mr. Webb,

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1 and I'll just state the question and your answer and I'm just
2 going to ask you to explain it.

3 "Is it your testimony to the Court that the cowboy on that
4 horse as I have on the sign is somehow going to be some type of
5 promotional activity that is going to cause underage people who
6 don't want to smoke to start smoking and buy cigarettes at
7 retail?" That was the question and your answer was: "I would
8 never phrase the question in a causal manner, and I have a lot of
9 direct testimony regarding influence versus cause".

10 So, my specific question in follow up is what you meant
11 when you said you would "never phrase the question in a causal
12 manner"?

13 A. You cannot look at advertising and promotion and get a
14 direct causal link to behavior. That has been well cited in the
15 literature, it's been well cited in the 1994 Surgeon General's
16 Report, that the whole notion of positing a causal question is
17 really not germane to understanding if there is influence
18 between advertising and sales promotion and youth behavior.

19 Q. And one final question on this last area, Mr. Webb kept
20 referring to retail marketing in his questioning of you, that it
21 was only to show product -- that the product was available. Do
22 you agree with that or is that accurate?

23 A. That's not at all accurate.

24 Q. And why is that?

25 A. Because there's a great deal of imagery taking place at

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1 the store level.

2 Q. Now, I'm going to refer you back to -- I believe it was
3 two days ago when we started out here in this Court with your
4 cross-examination, Dr. Krugman, and you were asked -- and the
5 question put to you was: "Is it your contention that you can
6 determine, simply by looking at an advertisement yourself,
7 whether it targets minors"? Do you recall that question?

8 A. I do.

9 Q. And you responded, "I wouldn't simply look at an ad
10 itself and make that determination". Can you just follow up and
11 explain why you gave that response?

12 A. Yes. Well constructed advertising campaigns have a great
13 deal of financial weight behind them, they work at both retail
14 or -- in many different -- they work in many different vehicles.
15 As importantly, one ad doesn't tell the story. One looks at a
16 campaign, including any number, any number of ads. Some ads
17 might -- some images might fit neatly into an appeal here,
18 there, but you have to take kind of the whole campaign. You
19 just can't look at one particular ad or it wouldn't make sense.

20 Q. And is that what you did in this case?

21 A. Yes.

22 Q. Now, you were also asked on cross-examination, and the
23 question put to you was: "Apart from the studies that are
24 contained in your articles on warning research that you did,
25 have there been any other recognition and recall tests that you

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1 have done with respect to adolescents concerning cigarette ads?"

2 And you responded "no". Do you recall that?

3 A. Yes.

4 Q. Okay. Well, Dr. Krugman, if this is true, please
5 explain, specifically, your bases for your conclusion that
6 defendants targeted 12- to 17-year-olds through their imagery
7 which you testified has appeared on billboards and in magazines
8 and at retail?

9 MR. BASS: Your Honor, I object. That just calls for him
10 to repeat his direct testimony, and that question does not meet
11 the question I asked because it doesn't -- he said no, he didn't
12 do any recall recognition and she hasn't asked him if that's an
13 incorrect answer or if there's something different about it. So
14 to respond to it by just repeating his direct testimony is just
15 repeating his direct.

16 THE COURT: Sustained. There's a different way to ask
17 that question, but that's up to counsel.

18 BY MS. BROOKER:

19 Q. Dr. Krugman, are there other ways that you have made the
20 determination that cigarette advertisements appeal to teenagers
21 in the absence of yourself conducting additional research?

22 A. Yes.

23 Q. Okay. Could you explain what that is?

24 A. Sure. The first thing I looked at was the expenditures.
25 The second thing I looked at was what industry professionals had

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1 to say about the way advertising works in the development of
2 primary demand and having starters use the product.

3 Additionally, I looked at the leading brands and the
4 imagery contained thereof -- therein.

5 Additionally, I looked at a lot of secondary literature
6 that went into depth regarding youth initiation and advertising
7 and promotion, such as the Surgeon General reports, the Institute
8 of Medicine report, the American Psychological Association's most
9 recent report on advertising and teenagers. I looked at other
10 research that had been done in the academic literature, and I
11 looked at documents.

12 Q. Thank you.

13 THE COURT: How significant do you consider the use or the
14 failure to use recognition and recall tests in determining the
15 influence that advertisements or advertising has on young people?

16 THE WITNESS: Recognition and recall tests, Your Honor,
17 can be valuable in determining the specifics of understanding a
18 particular campaign. They would not, necessarily, get at the
19 normalization process and the ubiquity process in the way
20 advertising and sales, promotion work.

21 BY MS. BROOKER:

22 Q. Okay. Now, you were also asked on cross-examination,
23 "Would you agree that any time a consumer picks up a pack of
24 cigarettes, they encounter the warning on the pack of
25 cigarettes?" And you answered, "I would agree that the

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1 information's available." And then you were asked, "Well, the
2 information's available at any time there's a cigarette
3 advertisement in any mass media it contains the warning; is that
4 correct?" And you answered, "The warning is available".

5 Now, what distinction are you making between impact and
6 availability?

7 A. Available does not at all mean that one is going to have
8 impact. In other words, in my estimation and our research, I've
9 concluded that people simply learn not to look at the warnings.

10 Q. Okay. I'll move on. Let's see if we can call up U.S.
11 Exhibit 64272, and specifically, let's see, use the Bates range
12 with the last four numbers 4947.

13 A. Do you know what page of the book that is?

14 Q. It's page 118, that's probably a more helpful number, if
15 we look at page 118, the last four numbers of the Bates range is
16 4947. Do we have that?

17 THE COURT: I think the witness may have the document.

18 BY MS. BROOKER:

19 Q. Dr. Krugman, you should look, it's in your advertising
20 book, you should turn to that. It may be up there on your
21 right, I'm not sure, but I know you were passed up a copy. Do
22 you need help in locating it?

23 A. I do not see it, Ms. Brooker, but --

24 Q. Okay, let's just call this up here, then. Let's see if I
25 can -- can you zoom in a little bit? I forgot it was not up

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1 here. Can you zoom in a little bit so that you can read it?

2 Okay. Let me take up a copy.

3 A. Thank you.

4 Q. The pages are probably missing from there because I

5 probably pulled them out.

6 Now, do you recall questions being focused on the portion

7 of the second paragraph. I believe it was the first sentence:

8 "Most of the evidence would seem to indicate that advertising is

9 the result rather than the cause of consumption."

10 A. Yes.

11 Q. Okay. Now, do you recall that you stated that that was

12 not an accurate statement in the book?

13 A. Yes.

14 MR. BASS: Objection.

15 BY MS. BROOKER:

16 Q. Now, can you explain --

17 THE COURT: What's the objection?

18 MR. BASS: Your Honor, that mischaracterizes what he said

19 about it. He said he disagreed with it.

20 THE COURT: That's correct, he didn't use the word

21 "inaccurate", but he made it clear that he disagreed with it.

22 MS. BROOKER: Okay. Your Honor, I was just quoting from

23 the transcript, but that's fine, because Dr. Krugman can

24 actually --

25 THE COURT: Was the word "inaccurate" used?

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1 MS. BROOKER: It was so that that's not an inaccurate
2 statement in the book at all, did I misstate -- quote that?

3 THE COURT: I'm not sure, let's move on.

4 MS. BROOKER: Okay. Let's move on, I apologize.

5 BY MS. BROOKER:

6 Q. I would like to you explain what you meant when you were
7 explaining this to the Court on cross-examination.

8 A. Looking at sales and advertising, looking at aggregate
9 sales -- looking at advertising going up or down, and aggregate
10 sales is not a good measure. Simply because it's just not
11 sensitive enough to pick up at those marginal ends when you're
12 spending more or less money in advertising and sales promotion,
13 seeing that whole market go up or that whole market go down,
14 it's generally not a good technique, and there's pretty good
15 dispute in the literature as to why it's not a good technique.

16 Q. Now --

17 THE COURT: So, are you saying that you don't think it's
18 possible to answer the question of whether advertising is the
19 result or the cause of consumption?

20 THE WITNESS: I think I have an answer. I think I have an
21 answer to that question, that advertising influences the
22 consumption process. What this --

23 THE COURT: Is that your answer, that it influences it?

24 THE WITNESS: Yes.

25 THE COURT: Okay.

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1 BY MS. BROOKER:

2 Q. And do you consider that distinct from causing?

3 A. I do.

4 Q. Now, you had -- the Court had asked you, aren't the two
5 statements from your book that were quoted by Mr. Bass
6 inconsistent with the position that you quoted approvingly from
7 Emerson Foote, do you recall that?

8 A. Yes.

9 Q. Okay. And you answered "My coauthor, who wrote the
10 section, would give the impression that that's the opposite".
11 Do you recall your testimony?

12 A. Yes.

13 Q. Now, is it, in fact, the opposite or, please explain what
14 you were trying to indicate there.

15 A. Could you restate that for me, please?

16 Q. Sure. I just want you to follow up on that. Is it or is
17 it not the opposite. You indicated "My coauthor, who wrote it,
18 would give the impression that that's the opposite." I simply
19 wanted you to clarify what you were indicating, just elaborate
20 on your answer.

21 A. First, that aggregate consumption in advertising is
22 really not the most specific way to do it at all, and that the
23 better way to do it would be looking at influence on specific
24 markets.

25 Q. How would you have rewritten -- is there a way you have

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1 rewritten the sentence in your book to make it more clear?

2 A. I wouldn't have written the sentence. I mean, I would
3 have written the sentence to say something like advertising has
4 influence on basic and primary demand in certain situations, and
5 advertising has influence on specific demand on certain
6 situations.

7 Q. Is there empirical support for your conclusion?

8 A. Yes.

9 THE COURT: But you've indicated that you have to look at
10 how advertising influences a specific market. The specific
11 market we're talking about here is the market for cigarettes, or
12 perhaps you would want to define it even more narrowly, namely,
13 the market for cigarette sales amongst people under the age of
14 18. What is your answer as to how advertising influences either
15 the general market for consumption of cigarettes and the specific
16 market for consumption of cigarettes by people under the age of
17 18?

18 THE WITNESS: I think that advertising and sales promotion
19 as a group influence the basic initiator for market, that is,
20 people under 18 in most cases are the individuals who -- people
21 begin smoking before the age of 18, and that advertising and
22 sales promotion have an influence on that process by normalizing
23 the behavior, making the behavior seem more acceptable, and there
24 is pretty good literature on that, including the Surgeon
25 General's Report. Additionally, setting up a scenario where the

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1 advertising and sales promotion provide images to young people,
2 those images kind of bypass a logical analysis and that the
3 images are pleasing and acceptable and likable and that not
4 only -- it not only makes the brand okay, it makes smoking okay.

5 So, a person comes into the marketplace not saying I'm
6 going to be a smoker and then I'm going to smoke Marlboro, or I'm
7 going to be a smoker, and then I'm going to smoke Newport, but
8 I'm going to be a Newport smoker.

9 So there's an influence -- there's an influence that takes
10 place in that particular way, and I point out the literature,
11 Your Honor, regarding that there's nothing below a person's
12 perception or radar in seeing it. That is, it's not subliminal,
13 it is surely supra-liminal, above our cognitive threshold, but
14 rather, it works at that level just to make it okay and make the
15 imaging okay.

16 If we dealt with every product in a high involvement way,
17 that is a way where we would have the chance to evaluate every
18 aspect of the product and compare it against its competition,
19 going to the grocery store would be an ordeal, but rather,
20 advertising and sales promotion provides a presence and a
21 lubricant for that process that just makes it easier.

22 MS. BROOKER: Did you have any follow-up? Okay. Thank
23 you, Your Honor.

24 BY MS. BROOKER:

25 Q. Do you recall, Dr. Krugman, being asked a series of

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1 questions on cross-examination regarding your process for
2 reviewing documents and selecting documents and quotations to
3 put into your direct testimony?

4 A. I do.

5 Q. Okay. Now, did you receive supplemental documents
6 produced by defendants in this case after you filed your expert
7 report and after your second deposition?

8 A. Yes.

9 Q. Now, by the way, do you recall on how many days you were
10 deposed in this case?

11 A. Two or three.

12 Q. Would you be surprised if I told you you were deposed for
13 four days in this case?

14 A. No.

15 Q. Okay. Now, let me point you to testimony that you gave
16 on cross-examination. You specifically said that you had a
17 series of documents in front of you, and actually, let me put
18 this up on the board.

19 A. What is it you're putting up?

20 Q. I'm going to put up some testimony from, I believe it was
21 yesterday, and we can zoom up there on the first answer. And
22 looking up there at your testimony, you said: "I had a series
23 of documents in front of me, and whether they were newer or more
24 recent documents, on almost a weekly basis I would call counsel
25 and go over my documents with them on the phone and dictate

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1 portions of what I thought the relevant material was, and we did
2 this time and time again or time and time and time again, where
3 I was pointing out what I thought the relevant passages were."

4 Now, you said "on a weekly basis". Now, for how many
5 weeks or months after your second deposition in this case did you
6 call the government on a weekly basis and cite documents?

7 A. I can't give you the number of weeks, but for a long
8 period of time, a couple months -- I don't know what, exactly,
9 that period of time was -- but the process went, I'd read them,
10 I'd get done with a group, and then I'd just want to call up and
11 kind of get the information over so I didn't have to do it in
12 one large chunk. So it happened over a long period -- over a
13 long period of time, and I'm sorry for not being able to
14 remember just how long a period of time that was or on how many
15 occasions it was, but I know it was a regular part of my work
16 process because I set up a regular schedule, almost, to do it.

17 Q. Now, when you reported documents to the government, were
18 you reporting documents as well as quotes, or what exactly were
19 you reporting to the government?

20 A. The specifics of a document. If I had a document that
21 was worthy of consideration, I would call up and -- I don't know
22 what counsel was doing on the other end of the phone, but I was
23 clearly going over these documents kind of line by line or page
24 by page as to what I thought was germane within the contents of
25 it, and then sometimes would give an overall description of the

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1 document.

2 Q. And what was your purpose in doing that?

3 A. So that I was in command of the documents.

4 Q. Now, do you recall whether that process -- you said you
5 could not recall -- you said you knew it was over a period of
6 time, but you could not recall exactly the length of time or how
7 long it was, but do you recall continuing with that whole
8 process, going through your documents, up until your last
9 deposition in this case?

10 A. Sure.

11 Q. Now, do you know when the government's final Findings of
12 Fact were filed in this case?

13 A. I do not, I'm sorry.

14 Q. Well, would you be surprised to know that they were filed
15 in July, on July 1st of 2004?

16 A. No.

17 Q. Now, did you ever discuss with the government whether the
18 documents, the defendants' documents and the quotes that you
19 were selecting from the documents would be used in the
20 government's final Findings of Fact?

21 A. I have no idea.

22 Q. Okay.

23 THE COURT: Your answer was that you have no idea?

24 THE WITNESS: I have no idea. If the question is, were
25 the things I was saying, would they go into the final Findings of

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1 Fact?

2 BY MS. BROOKER:

3 Q. Yes, do you know whether or not that was the case?

4 A. My instincts were, when I was talking -- when I was asked
5 about it the other day, because the implication was that the
6 government was giving the information to me, my response to
7 myself at that time was the arrow is really going the other way,
8 that I was the one who was driving what the government should be
9 looking at.

10 Q. Now, do you recall, and I put the quote up here, counsel
11 representing to you, and I'm at the last question there on the
12 second line, which says: "I looked at your expert report in
13 this case, which was prepared and submitted in November 2001, I
14 believe, to see if you had quoted any of these documents that
15 I've had up on the screen or that are in these series of
16 exhibits, if you had quoted any of them in your report, and I'll
17 represent to you that I didn't find a quote from any of those
18 documents in your report." Do you recall that representation
19 made to you in cross-examination a day ago?

20 A. Yes.

21 MS. BROOKER: Your Honor, I would like to hand up a copy
22 to you and the witness and the defendants of an exhibit, if I may
23 approach the witness.

24 THE COURT: All right.

25 BY MS. BROOKER:

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1 Q. I don't know how clear this is going to be. It may not
2 be too clear, it's very small print, but everyone has a copy.

3 Now, Dr. Krugman, this is a demonstrative, and if you
4 would count on there, how many documents, how many rows appear on
5 this demonstrative, which is U.S. Exhibit 17532?

6 A. Twelve.

7 Q. Okay. Now, do you recall that you were asked in this
8 line of questions about 15 documents which appeared on
9 demonstratives that were provided to you here in Court by the
10 defendants in which there were columns marked Dr. Krugman's
11 direct testimony, Dr. Dolan's direct testimony?

12 A. Yes.

13 Q. Okay. Now, let me represent to you and the Court that
14 these are 12 of the 15 documents, and the first column
15 represents joint defendants' demonstrative, which was used in
16 Court the other day. The second column is the U.S. Exhibit
17 cited in the direct testimony, and the next column is the Bates
18 ranges of the document, and as you can see the document title
19 and document date.

20 Now, take a look at the first row. The documents that
21 appeared in joint defendants' demonstrative JDEM 0101154, where
22 does it represent that that document was disclosed by you,
23 Dr. Krugman, on this chart? If you can look at the Dr. Krugman
24 disclosure column?

25 A. 11-15-2001.

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1 Q. And did you have an appendix to your expert report?

2 A. Yes.

3 Q. Okay. Now, that same document, which has a Bates range
4 listed in the Bates range column, what does this chart indicate
5 where it was disclosed by Dr. Dolan in this case, in the Dolan
6 disclosure column?

7 MR. BASS: Your Honor, I object because there were no
8 questions about where in Dr. Dolan's reports any of these
9 exhibits were disclosed, and furthermore, it's not rehabilitation
10 of the questions I asked him because what I asked him was whether
11 he had quoted them in his report. He testified that he thought
12 that many of them were included in the appendix, which was the
13 hundreds of -- a list of hundreds of reliance materials that he
14 had, and so there's no rehabilitation here.

15 THE COURT: No, that objection is overruled. It may or it
16 may not be complete rehabilitation, but at a minimum, depending
17 on the questions and answers, it may be at least partial
18 rehabilitation. Certainly the clear inference from the cross was
19 that there had been some inappropriate, either consultation with
20 Dr. Dolan or a copying of his materials or use of his materials
21 or Dr. Dolan's use of this witness's materials. And certainly,
22 this demonstrative, depending on the answers, bears on that
23 issue, so you may continue.

24 BY MS. BROOKER:

25 Q. Now, Dr. Krugman, if you go down the list of the 12

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1 documents that are listed here, and I understand that we just
2 created this and you're just seeing this for the first time, but
3 if you go down the list of the 12 documents, and the 12 rows
4 here, what is reflected, with respect to these 12 documents with
5 regard to whether each document was cited in your expert report
6 back in 2001, and whether that same document was also cited by
7 Dr. Dolan in his expert report back in November 2001?

8 A. Yes.

9 Q. What is reflected? Can you just explain what your
10 understanding of what is reflected about these 12 documents
11 listed here?

12 A. They're similarly reflected in both reports.

13 Q. Now --

14 THE COURT: Let me ask a leading question to try to get
15 the answer a little bit faster. Is it accurate or not accurate
16 to say that the last two columns reflect that the document titles
17 on each line were disclosed in your expert report of November
18 15th, 2001 and were disclosed in Dr. Dolan's expert report of
19 November 15th, 2001?

20 THE WITNESS: Yes.

21 BY MS. BROOKER:

22 Q. Now, did you consult with, meet with, know Dr. Dolan back
23 in November 2001 when you included these documents in your
24 expert report that was filed on November 15th, 2001?

25 A. No.

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1 Q. Did anybody, other than you select these documents to be
2 cited along with your expert report back in November 2001?

3 A. No.

4 Q. Now, in terms of the specific passages that were
5 pulled -- excuse me, that were pulled from these documents that
6 you cited in your expert report in November 2001, that then made
7 its way into your direct testimony, who selected those documents
8 from among the ones in your expert report and who selected the
9 quotes from those documents to put into your direct testimony?

10 A. I did.

11 MR. BASS: I just object, Your Honor, because counsel's
12 statement that they were cited in his expert report, what this
13 chart indicates is that most of them were cited in the appendix
14 of reliance materials to his expert report, not in his expert
15 report itself.

16 MS. BROOKER: It's accurately reflected here in this
17 demonstrative, Your Honor.

18 MR. BASS: But not in your question.

19 THE COURT: Well, that's a fair statement. Certainly, the
20 demonstrative differentiates between inclusion of -- I don't mean
21 inclusion, disclosure of the document in either Appendix 1 or in
22 something other than Appendix 1, and so to that extent you should
23 be sure to ask your question in a way that reflects those
24 differences.

25 MS. BROOKER: Thank you, Your Honor.

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1 BY MS. BROOKER:

2 Q. Now, Dr. Krugman, were the appendixes, or appendices, or
3 Appendix 1 from which your documents appear, was that attached
4 to your expert report that you filed November 15th, 2001?

5 A. Yes.

6 Q. Does the fact that it was an appendix and not, you know,
7 actual documents put into the text of the report, change any of
8 your answers that you've just given?

9 A. No.

10 MS. BROOKER: Your Honor, I have a few more demonstratives
11 that I would like to pass up. I'll pull out the copies.

12 THE WITNESS: Your Honor.

13 THE COURT: You can't give any testimony. Did you need a
14 break or something?

15 THE WITNESS: I do, Your Honor.

16 THE COURT: Okay. Fair enough, I'm sure our Court
17 reporter does too. How much more do you have, you think?

18 MS. BROOKER: I think I have an hour. I will finish up
19 today. I will finish up today.

20 THE COURT: Okay. Ten-minute break, everybody.

21 (Thereupon, a break was had from 3:24 p.m. until 3:37
22 p.m.)

23 THE COURT: All right, Ms. Brooker.

24 MS. BROOKER: Thank you, Your Honor. I would like to hand
25 up another set of demonstratives.

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1 Okay, Your Honor. Not to belabor this point, I have just
2 a few demonstratives. I don't think we need to go through in
3 great deal every one of them, but for the record, I have passed
4 up to Dr. Krugman what is marked as U.S. Exhibit 17529.

5 BY MS. BROOKER:

6 Q. Do you have that in front of you?

7 A. Yes.

8 Q. Okay. Now, let me represent to you that this
9 demonstrative is -- added to it is a demonstrative that
10 defendants cited yesterday which, at the top -- or maybe it was
11 the day before; I can't recall which day of cross-examination,
12 but it's identified as JDEM 01068. And the columns, which
13 indicate at the top "Defendants' Demonstrative" with that
14 number, are the columns from Defendants' Demonstrative and we
15 have just added the citation and the page from Dr. Krugman's
16 expert report in 2001 and Dr. Dolan's expert report in 2001.

17 And, Dr. Krugman, if you could just follow through with
18 me for a moment --

19 A. Yes.

20 Q. -- and if you would -- and again, recall that defendants
21 represented that their key at the bottom in red meant words
22 identical, and their blue meant what they called "concept
23 identical" and black meant "not identical."

24 Do you recall that key?

25 A. Yes.

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1 Q. Okay. Now, if you look at the first column, which is
2 indicated: "Dean Krugman, Expert Report, November 15, 2001" --

3 A. Yes.

4 Q. -- you see a title of a document and a Bates number. Is
5 that what's in that column?

6 A. Yes.

7 Q. Now, if you look at your direct testimony, you also see
8 that there is a document that is dated March 13, 1981; is that
9 correct?

10 A. Yes.

11 Q. And what is cited in red as identical there?

12 A. Yes.

13 Q. I'm asking you: What is cited there as identical in the
14 column marked "Dean Krugman Direct Testimony"?

15 A. What day are you on, again, please?

16 Q. Oh, it's 5-28. And here I'm looking at the wrong one. I
17 apologize.

18 I'm sorry. If you're looking -- I was looking at the
19 wrong one. If you're looking at the first column, what is
20 indicated in red is the Bates number and the title of the
21 document; is that correct?

22 A. Yes. Are we on November 29th, now?

23 Q. And we are in your column, "Dean Krugman Expert
24 Report" --

25 A. Yes.

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1 Q. -- "November 15, 2001."

2 A. Yes.

3 Q. Okay. What is indicated in red in that column?

4 A. "Summary of Decisions Made in Marketing Research

5 Department-Esty Meeting Concerning Spring 1971 NFO Tobacco

6 Products Survey."

7 Q. Is that the title --

8 THE COURT: Excuse me a minute. What number do you have

9 up on the screen?

10 MS. BROOKER: Is that 17528? That's what we should all be

11 working off of, if I misspoke. Okay. That's the first

12 demonstrative in the series.

13 BY MS. BROOKER:

14 Q. So that is the title of the document quoted from your

15 expert report at appendix 1, page 1; is that what's indicated in

16 the first column?

17 A. Yes.

18 Q. Okay. And what else in that first column is indicated in

19 red as identical, besides the title of the document?

20 A. The Bates number.

21 Q. Okay. The Bates number. Now, when you go to the second

22 column, which is "Dean Krugman Direct Testimony, Filed November

23 29th," from defendants' -- pulled right from Defendants'

24 Demonstrative -- do you see that, Dr. Krugman?

25 A. Yes.

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1 Q. Okay. Now, what is identical, which is indicated in red,
2 that is in that column?

3 A. The same title.

4 Q. All right. The same title. Is it also the date of the
5 document in red?

6 A. Yes.

7 Q. And what else is indicated in red?

8 A. Bates number.

9 Q. Okay. And a U.S. Exhibit number, correct?

10 A. Yes.

11 Q. So what is identical about those first two columns is the
12 Bates number and the title of the document. Now, let's move to
13 the third column, which is indicated "Robert Dolan Expert
14 Report." Do you see that?

15 A. Yes.

16 Q. Okay. What is identical from Dr. Dolan's expert report
17 that is identical in your direct testimony and your expert
18 report, indicated there in red?

19 A. The title, the date, and the Bates numbers.

20 Q. Now, the date is in red and the Bates number is in red.

21 A. Yes.

22 Q. Is there a title indicated there? In the "Dr. Dolan"
23 column, is there a title that's indicated in red --

24 A. Yes.

25 Q. -- in the third column, under "Robert Dolan Expert

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1 Report"?

2 A. I was looking at the wrong column. No.

3 Q. Okay. Now, under "Dr. Dolan Expert Report," what is
4 identical as compared to your direct testimony from his expert
5 report?

6 A. The date and the Bates number.

7 Q. Okay. Is there anything else that's identical?

8 A. No.

9 Q. Now, let's move to the next column, "Robert Dolan Direct
10 Testimony," which was filed November 19th. And again, we're
11 pulling this, as indicated at the top of that column, right from
12 Defendants' Demonstrative that they used in court the other day.

13 And let me ask you, Dr. Krugman: What in that column is
14 identified by defendants in red as words identical?

15 A. The dates and the title and the Bates numbers.

16 Q. And is there anything else?

17 A. And the exhibit number.

18 Q. Okay. Now, is there anything else that is identical in
19 Dr. Dolan's direct testimony and your direct testimony, other
20 than the date, the title of the document and the Bates range?

21 A. U.S. Exhibit number.

22 Q. Now, let's move to the last column on this demonstrative,
23 "U.S. Findings of Fact, Filed July 1, 2004," and again, pulled
24 right from Defendants 'Demonstrative, JDEM 010154.

25 Are you following me, Dr. Krugman?

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1 A. I am.

2 Q. Okay. Now, again, from Defendants' Demonstrative, what
3 have they highlighted in red as identical?

4 A. The dates -- the date and the Bates ranges and the
5 exhibit number.

6 Q. Now, does this demonstrative show for this particular one
7 of the 15 documents that the defendants showed you in court that
8 there is anything identical in your testimony, in your -- in
9 Dr. Dolan's testimony and the United States' Findings of Fact,
10 other than the date of the document and the Bates range of the
11 document and the title of the document?

12 A. No.

13 Q. Now, if you would just take a look at 17529.

14 A. Yes.

15 Q. And briefly, 17530 and I also have 17531. Are you
16 looking at all of those? There's four demonstratives.

17 A. Yes.

18 Q. Okay. Now, if you would just take a quick look at them
19 and just indicate for the record whether they contain the same
20 columns --

21 A. Yes.

22 Q. -- as in the first demonstrative that I showed you?

23 A. Yes.

24 MS. BROOKER: Okay. Your Honor, rather than go through
25 all of those, I'll just move on at this time.

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1 THE COURT: Good.

2 BY MS. BROOKER:

3 Q. Now, you testified, and I put it up here on the board the
4 other day, in response to a question on cross-examination, that,
5 quote: "I've never spoken to Dr. Dolan, never met Dr. Dolan.
6 As I look through this, there are a number of compelling
7 documents that are noted, so it doesn't surprise me at all that
8 we would come to the same document. Nor does it surprise me
9 terribly that when we find the documents, we would pick out
10 similar language; not always the exact language, but certainly
11 similar language."

12 Do you recall your testimony?

13 A. Yes.

14 Q. Okay. Now, why, if you can explain to the Court, did it
15 not surprise you, as you've indicated here?

16 A. Because we have similar training, although we're doing
17 some different things, that that similar training, in looking at
18 various aspects of marketing communication or various documents,
19 would stand out.

20 Q. Now, can you explain to the Court the concepts -- the two
21 concepts of "reliability" and "replicability" in science.

22 MR. BASS: Objection, Your Honor. I don't know what this
23 is related to in terms of my cross-examination of him, but I
24 don't remember asking him about those two concepts in science.

25 MS. BROOKER: There is just a wrap-up to this question

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1 right here, Your Honor. I have two questions on this very point.

2 THE COURT: To the demonstrative exhibit, questions?

3 MS. BROOKER: To the testimony.

4 THE COURT: About Dr. Dolan?

5 MS. BROOKER: Yes.

6 THE COURT: All right. Go ahead.

7 BY MS. BROOKER:

8 Q. Dr. Krugman, can you explain just briefly to the Court
9 the two concepts of "reliability" and "replicability" in
10 science.

11 A. Yes. "Reliability" means that if you're looking at a --
12 whatever you're observing, whatever the phenomena in question,
13 that when you look at it, you look at it the same way; that you
14 get -- what you get -- that it's just -- it's just -- when
15 you're going to get something, if it's there and you're looking
16 at it in the right way, you should get it again and again and
17 again, because if the data aren't reliable, then you have a
18 problem in terms of getting to validity if you can't get
19 consistency and reliability.

20 Being able to replicate simply means just that: You have
21 one study or another study and they kind of replicate each
22 other. You -- in other words, you do it again and get similar
23 findings or you do it again and get dissimilar findings.

24 Q. Now, do these two concepts of replicability and
25 reliability in science apply to the fact that you and Dr. Dolan

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1 looked at a similar set of materials and found similar documents
2 to be relevant to your conclusions?

3 A. I might use those terms, Ms. Brooker, but I might also
4 introduce the term of "convergent validity"; that is, you have
5 two looks at the same object and those looks converge.

6 Q. Now, would it surprise you to know that there were more
7 than 1,030 documents cited in the United States Final Findings
8 of Fact in the Youth section alone?

9 A. No.

10 Q. Do you know how many documents you cited, approximately,
11 in your direct testimony?

12 A. I'm glad my students aren't here to see my lack of memory
13 today. In my direct testimony, hundreds, I suspect. I don't of
14 that figure, I just don't.

15 Q. All right. I'm going to move on to another topic.

16 I don't know if you want to take a look at this. I know
17 you have all these demonstratives up there. I'll put this up on
18 the board and you may or may not need to pull either one that
19 you have, but do you recall this demonstrative, which is JDEM
20 010120 --

21 A. Yes.

22 Q. -- that you were shown on cross-examination?

23 A. Yes.

24 Q. And do you recall being asked questions about whether
25 these cigarette brands appeared in -- advertisements -- excuse

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1 me -- for these cigarettes brands appeared in Sports
2 Illustrated?
3 A. Sports Illustrated?
4 Q. Yes.
5 A. Rolling Stone.
6 Q. Rolling Stone. Excuse me. I'm not looking up at the
7 board. In Rolling Stone. Do you recall being asked that
8 question?
9 A. Yes.
10 Q. Okay. And you were asked a series of questions about the
11 advertisements for these cigarette brands appearing in Rolling
12 Stone, correct?
13 A. Yes.
14 Q. Okay. Now, when you looked back at your own research and
15 other research, as well as looking through the magazines, and
16 particularly the Rolling Stone books that you testified about,
17 do you recall -- or do you have any research on whether there
18 are more cigarette advertisements for Marlboro, Newport and
19 Camel in Rolling Stone than advertisements for other cigarette
20 brands?
21 A. Yes, there would tend to be -- there would be more
22 advertisements for the larger youth brands, Marlboro, Camel and
23 Newport, in a magazine -- in a Rolling Stone that trends younger
24 than there would be those same kinds of advertisements in older
25 magazines.

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1 Q. Are you basing that on published research or something
2 else or a combination of things?

3 A. I'm basing that on published research.

4 Q. Now, are there any other brands that are identified here
5 on this demonstrative that defendants showed you that you would
6 characterize as having a -- as being a -- having a higher share
7 of youth smokers?

8 MR. BASS: Objection, Your Honor. The question is vague
9 as to what she means by "higher share of youth smokers."

10 THE COURT: Sustained as to form.

11 BY MS. BROOKER:

12 Q. Would you consider any of these other than -- you were
13 clear in your testimony that Marlboro and Newport and Camel were
14 brands most smoked by youth; is that correct?

15 A. Yes.

16 Q. Okay. Are there any other brands that you would consider
17 to be more smoked by youth than other brands that are listed
18 specifically here in this demonstrative?

19 MR. BASS: Same objection, Your Honor. We don't have a
20 definition of what is meant here by "youth brand." Without a
21 definition -- he's actually testified as to which three he thinks
22 are youth brands, so if he's going to start changing his
23 testimony and saying that there are other ones, then I want to
24 have recross.

25 THE COURT: The question was not in terms of quote "youth

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1 brands" unquote, but rather brands that you would consider to be
2 more smoked by youth than other brands.

3 I think that question was perfectly clear and doesn't
4 require any further definitions and so the objection is
5 overruled.

6 You may answer.

7 MR. BASS: I'm sorry, Your Honor, but the question "more
8 smoked than other brands" is vague because it doesn't -- more
9 smoked by -- smoked more by youth than adults within that brand
10 or smoked more by youth than other brands? What other brands?
11 Than Marlboro, Newport and Camel or Chesterfield? I mean, it's
12 still vague. We don't have a standard here and if we're going to
13 have him testify to it, we should have at least the definition
14 that he's using.

15 THE COURT: Why don't you clarify exactly what you were
16 getting at.

17 MS. BROOKER: Yeah. I did refer -- and I did specifically
18 say and I was referring to the brands here identified that are
19 advertised in Rolling Stone. I wasn't talking about any brand at
20 all, but the brands here.

21 BY MS. BROOKER:

22 Q. Are there brands that are identified here other than
23 Marlboro, Camel or Newport that are brand that are more smoked
24 by teenagers than other brands listed here on the Rolling Stone
25 demonstrative?

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1 A. Not the way I --

2 MR. BASS: Same objection, Your Honor. It's still --

3 THE COURT: Objection is sustained. Let me ask the
4 question.

5 Doctor, you have already testified that the three brands
6 most smoked by youth, meaning people under the age of 18, are
7 Camels, Newports and Marlboros; is that correct?

8 THE WITNESS: That is correct.

9 THE COURT: What, in your view, are the brands smoked by
10 people under the age of 18 of the group listed on the board that
11 would be number four, number five and number six, if you can
12 answer that question?

13 THE WITNESS: I'm only estimating, Your Honor.

14 THE COURT: Okay. If any?

15 THE WITNESS: Winston and Kool would probably be in some
16 of the cited literature, but two and a half -- around two or two
17 and a half percent. Those are the ones that -- those are the
18 ones that really come to mind.

19 THE COURT: Is it accurate to say that those two brands
20 that you just mentioned constitute only a very small percentage,
21 somewhere around two percent, of those brands smoked by people
22 under the age of 18?

23 THE WITNESS: Yes. I would put it in another way: That
24 the three leading brands have about 87-point-something percentage
25 of the market.

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1 THE COURT: The three leading brands being?

2 THE WITNESS: Marlboro, Newport and Camel.

3 THE COURT: Okay.

4 MS. BROOKER: Thank you, Your Honor.

5 Your Honor, I have another exhibit to pass up.

6 BY MS. BROOKER:

7 Q. Now, do you recall, Dr. Krugman, being asked questions on
8 cross-examination about the types or nature of advertisements
9 for other products other than cigarettes in Rolling Stone and
10 Sports Illustrated?

11 A. Yes.

12 Q. Okay. Now, if you would look on the front cover of what
13 I've marked as U.S. Exhibit 17536, what -- well, first, what is
14 this exhibit?

15 A. It's a December 30th, 2004, January 13th, 2005, Rolling
16 Stone.

17 Q. Okay. And let me represent to you --

18 MR. BASS: Your Honor, I object. I was asking him -- they
19 showed about 30 years worth of Rolling Stones in those enormous
20 volumes. This is the current issue that was not in there. I was
21 asking him about the stuff that they had already showed him. Now
22 they're bringing in a new Rolling Stone. I would think they
23 could at least use one that's out of the dozens of Rolling Stones
24 that are shown in their volume. I clearly wouldn't have been
25 asking him about one that wasn't even in there. This is the

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1 December 2004, January 13th, 2005 issue of Rolling Stone.

2 THE COURT: What's the subject of your question?

3 MS. BROOKER: The subject of the questions is: I'm going
4 to ask Dr. Krugman -- now, on cross-examination, Mr. Bass asked
5 him questions about whether or not products other than cigarette
6 products, such as car advertisements that appeared in Rolling
7 Stone -- and he made the point that a lot of the advertisements
8 in Rolling Stone were aimed at an older audience.

9 And this is a very current issue of Rolling Stone
10 Magazine. I intend to ask Dr. Krugman to point out the four
11 cigarette advertisements that are currently in Rolling Stone,
12 which is also very relevant to the cross-examination, and ask him
13 to identify some of the other products that are advertised in
14 Rolling Stone and whether he can point out some of them that are
15 clearly youth advertisements or advertisements for youth
16 products.

17 THE COURT: Objection is sustained as to the use of the
18 December 2004 through January 2005 edition of Rolling Stone and
19 the Court doesn't need this up on the bench. Now I know why I
20 don't read that magazine.

21 Go ahead.

22 BY MS. BROOKER:

23 Q. Well, in follow-up to that line of questions,
24 Dr. Krugman, and specifically the line of questions where you
25 were asked about the nature of the advertisements for other

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1 products in magazines such as Rolling Stone and Sports
2 Illustrated, can you just briefly respond or describe for the
3 Court what other types of products are advertised in Rolling
4 Stone or Sports Illustrated by way of example that are youth
5 products or products purchased by people under the age of 18, if
6 you know?

7 A. Clothing, music. I would have to peruse one to get a
8 much better feel. Sporting goods.

9 MS. BROOKER: Is Your Honor precluding Dr. Krugman from
10 doing that? We're not going to use the Rolling Stone Magazine
11 for that follow-up.

12 THE COURT: I'm going preclude his use of the brand-new
13 one that the defendants have had no time to look at. There were
14 so many that were referred to in his direct testimony and that
15 were the subject of cross-examination. You can ask this question
16 relating to any one of those, but not to a brand-new one that he
17 hasn't seen before and, most significantly, that the defendants
18 haven't seen and that is not a follow-up to their cross.

19 In other words, your direct has to be about one of the --
20 about an edition or a particular month that was covered in the
21 group that cross-examination covered.

22 MS. BROOKER: Your Honor, the cross-examination was not
23 limited to the demonstratives -- the book demonstratives.
24 Rather, the questions were more broadly posed about the content
25 of those magazines. And currently today, these companies --

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1 certainly Brown & Williamson is still advertising and RJR is
2 still advertising in these magazines.

3 THE COURT: Then you should have used that in your direct
4 if you wanted to make that point. But the objection is
5 sustained. Please move on.

6 BY MS. BROOKER:

7 Q. Now, Dr. Krugman, do you recall being asked questions
8 about Lorillard's Marketing Regulation Manual?

9 A. Yes.

10 Q. Now, did Mr. Minton on cross-examination show you a copy
11 of Lorillard's Marketing Regulation Manual?

12 A. No.

13 Q. Okay. Is Newport a Lorillard brand?

14 A. Yes.

15 Q. And is that what you described in your testimony earlier
16 as the second leading brand most smoked by adolescents?

17 A. Yes.

18 THE COURT: By adolescents or by people under the age of
19 18?

20 THE WITNESS: Depending on the measure, Your Honor, 12- to
21 17-year-olds.

22 THE COURT: All right.

23 THE WITNESS: Sometimes the measure will go from 12- to
24 18-year-olds.

25 THE COURT: Okay.

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1 BY MS. BROOKER:

2 Q. And has Newport's imagery been consistent over the years?

3 A. Very much so.

4 Q. And for what time period is that?

5 A. Well, in the Rolling Stones we presented, from at least

6 the '70s on.

7 Q. And you were also asked about reviewing Lorillard

8 depositions in this case. Do you recall that?

9 A. I was.

10 Q. Okay. Now, did you review depositions of people in the

11 Marketing or Marketing Research Department or the advertising

12 agencies in this case before you wrote your direct testimony?

13 A. Yes.

14 Q. Okay. Can you give the Court an approximate number of

15 how many depositions you reviewed of those types of employees of

16 the companies, in whole or in part?

17 A. 15.

18 Q. Now -- I'm sorry; did you --

19 Is the fact that you did not review a copy of or did not

20 recall reviewing a copy of; I don't recall precisely which you

21 said -- the Lorillard marketing policy document, does that

22 affect your conclusions in any way about Newport's marketing or

23 Lorillard's marketing practices?

24 A. No.

25 Q. Why not?

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1 A. Because I was able to use the same kind of analysis that
2 we had discussed earlier to look at the documents, the documents
3 and their ads and the other literature connected to explaining
4 the documents and the ads.

5 Q. Now, do you recall being asked on cross-examination if,
6 during the years 2002, 2003 and 2004, Lorillard has ever
7 advertised Newport in any magazine that had an MRI number above
8 15 percent?

9 A. I remember the question.

10 Q. And do you recall giving an answer that you simply don't
11 know?

12 A. Yes.

13 Q. Now, if you would please open up to the back of your
14 testimony, one of your demonstratives that's attached --

15 Your testimony. It's underneath that big binder, I
16 think.

17 And if you would look at what is the demonstrative that
18 is numbered 17- -- U.S. Exhibit 17509 and page 1 of 5.

19 When you get there, just let me know.

20 A. Yes.

21 Q. Okay. Now you're on 17509, page 1 of 5; is that correct?

22 A. Yes.

23 Q. Okay. Now, if you would look down for the magazine --
24 and again, what does this demonstrative reflect at the top?

25 What is reflected by this demonstrative, if you could --

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1 A. "The Percent of Readers Ages 12 to 17 of Magazines in
2 Which Defendants Placed Cigarette Brand Advertisements."

3 Q. For what periods of time?

4 A. 1993 to 2002.

5 Q. Okay. Now, for 2002, what -- if you would identify for
6 ESPN, what is the percentage listed there?

7 A. 20.25 percent.

8 Q. Okay. So that 20.25 specifically represents what?

9 A. The percentage of readers that are 12 to 17 of that
10 magazine.

11 MS. BROOKER: Your Honor, I would like to pass up a couple
12 demonstratives.

13 BY MS. BROOKER:

14 Q. Now, Dr. Krugman, if you could look at the three
15 demonstratives, which I will read for the record, the first one
16 is 13585 --

17 Well, I guess, before we move through them, what does the
18 U.S. Exhibit 13585, the first page, indicate? What magazine is
19 this, in other words?

20 A. ESPN.

21 Q. And if you could look down at the bottom left-hand corner
22 where it gives a date, can you read the date?

23 A. March 18th, 2002.

24 Q. Okay. And if you would just flip through the couple of
25 pages and please identify for the record what appears behind

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1 that magazine cover?

2 MR. BASS: Your Honor, I'm going to object because before
3 he's going to establish that there was something essentially to
4 impeach the statement with respect to Lorillard, there's going to
5 have to be a foundation as to when in 2002 MRI started providing
6 the information on ESPN, because I believe it was not until the
7 fall 2002 survey, in which case, these are magazines -- an ESPN
8 from the spring. The question that was asked by Lorillard's
9 counsel was: Did Lorillard place ads in any magazines that had
10 an MRI-rated 12 to 17 readership of over 18 percent.

11 THE COURT: Well, how firm is your knowledge?

12 MR. BASS: Pardon?

13 THE COURT: How firm is your belief or how well based is
14 your belief that they didn't start measuring ESPN until the fall?

15 MR. BASS: Your Honor, there was correspondence with the
16 state Attorneys General from Brown & Williamson on the same topic
17 and I think you were shown it earlier in Ms. Ivey's testimony.
18 Literally, they crossed in the mail. The Attorneys General
19 complained also about Brown & Williamson advertising in ESPN and
20 Brown & Williamson had sent a letter in the middle, I believe --
21 that's my recollection -- of 2002 saying we now have new
22 measurements from MRI and we're pulling our ads from ESPN. So I
23 believe that was the middle of 2002.

24 MS. BROOKER: Well, Your Honor, if that is the case, I
25 would say that the question was very misleading, because the

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1 question that I just read from the transcript -- and I think we
2 can get the testimony; if there is some evidence that they want
3 to put in through another witness about this issue, they should
4 be permitted to do that.

5 But I am simply establishing here, based on the question,
6 which was: "Do you know if, during the years 2002, 2003 and
7 2004, Lorillard has advertised Newport in any magazine had an MRI
8 number above 15 percent? Give me those dates, sir. 2002, 2003
9 and 2004.

10 "Answer: I don't know."

11 So we could clarify this --

12 THE COURT: Let me just hear from counsel.

13 MR. CORNFELD: Your Honor, my name is Rick Cornfeld. I'm
14 Mr. Minton's partner. He had to leave to attend the trial where
15 Dr. Wecker is testifying tomorrow.

16 But I can tell you that what Mr. Bass told you is correct;
17 the survey did not include ESPN until later in the year in 2002.
18 And in fact, Mr. Minton asked Dr. Krugman if he knew why
19 Lorillard had gotten out of ESPN and Dr. Krugman said he didn't
20 know.

21 MS. BROOKER: Well, again, Your Honor, I think we could
22 sort this all out when we actually have facts to support what
23 counsel is --

24 THE COURT: You may elicit the question and the answer.
25 The defendants, I am positive, will remember this issue. If

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1 there is testimony on the defense side that substantiates what's
2 being told to me in court -- and I certainly am not questioning
3 the integrity of counsel -- but so long as there is testimony
4 that substantiates it, then later on, that will all affect me in
5 judging the accuracy and believability of the particular
6 testimony.

7 But let's just get it on the record for now. Everyone
8 will be paying attention to the issue later on.

9 MS. BROOKER: I think I can do this in a broad sweep, Your
10 Honor. I would just note for the record we've already identified
11 the date for 13- -- U.S. Exhibit 13585.

12 BY MS. BROOKER:

13 Q. Dr. Krugman, just briefly state what advertisements
14 appear in this ESPN Magazine dated March 18, 2002.

15 A. Newport Pleasure and Newport Pleasure goods.

16 Q. And if you look at U.S. Exhibit 14473, would you please
17 tell the Court what magazine that is and what is the date.

18 A. ESPN, I believe it says February 18th.

19 Q. February 18, 2002?

20 A. Yes. I'm having trouble reading it.

21 Q. And for the record, the last U.S. Exhibit is 14474. Is
22 that a copy of ESPN as well?

23 A. Yes.

24 Q. And can you read the date at the bottom?

25 I can help you out here. Does it say April 15, 2002?

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1 A. It does.

2 Q. And what advertisements -- cigarette advertisements
3 appear in that magazine?

4 A. Newport Pleasure goods.

5 Q. Now, are you aware of anything that prevents either
6 Philip Morris or Lorillard from advertising in magazines again
7 once this case is over?

8 A. No.

9 Q. Okay. I'll move on to the next topic.

10 Dr. Krugman, you were asked a lot of questions about MRI
11 data on your cross-examination; is that correct?

12 A. Yes.

13 Q. Okay. Now, is MRI data used in the advertising industry
14 as a common way to measure magazine audiences?

15 A. Yes.

16 Q. And do the larger advertising agencies tend to rely upon
17 both the services of MRI and Simmons?

18 MR. BASS: Objection, leading.

19 THE WITNESS: Yes.

20 THE COURT: Just rephrase it, please.

21 BY MS. BROOKER:

22 Q. Who relies on MRI and Simmons, Dr. Krugman?

23 A. Both advertising agencies and their clients.

24 THE COURT: Not a useful objection, Mr. Bass.

25 Go ahead, please. Next question.

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1 BY MS. BROOKER:

2 Q. Are you familiar with Starcom, Leo Burnett's media buying
3 arm?

4 A. Yes.

5 Q. Okay. And again, just for the record, who is Leo Burnett
6 in relation to any of the tobacco --

7 THE COURT: Oh, we all know. There's enough testimony on
8 that.

9 MS. BROOKER: All right.

10 BY MS. BROOKER:

11 Q. Are you aware of whether Starcom purchases MRI or Simmons
12 data for Leo Burnett for the Philip Morris account?

13 A. Yes.

14 Q. Is that yes, you are aware or yes, they do?

15 A. Yes, they do.

16 Q. Now, you were also asked a series of questions, I
17 believe, about advertisers or data that was or was not available
18 prior to MRI or Simmons data being available for advertising
19 decisions. And just let me ask you: Prior to MRI or Simmons
20 data being available in either the 12- to 19-year-old age or
21 older, how did advertisers make placement decisions prior to
22 having that commercial data available to them?

23 THE COURT: 12 to 19?

24 MS. BROOKER: In either category that MRI or Simmons
25 measures, Dr. Krugman, how did advertisers make placement

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1 decisions prior to having that data available?

2 THE WITNESS: They would rely on other -- perhaps other
3 surveys, other internal data that they had, or they may have run
4 their own -- done some of their own work. They would have
5 consulted the magazine circulations and descriptions, they could
6 use any number of sources.

7 MS. BROOKER: I'm trying to speed up here, Your Honor.

8 BY MS. BROOKER:

9 Q. Do you recall being asked questions -- let me show you a
10 demonstrative first. Do you recall being shown this
11 demonstrative identified as JDEM 010125?

12 A. Yes.

13 Q. And this is identified as the index of smokers ages 18 to
14 34; is that correct?

15 A. Correct.

16 Q. Now, are you aware of whether Dr. Morrison purchased data
17 for you which included information about people who smoked
18 included in the MRI data?

19 A. No.

20 Q. You're not aware or you did not purchase that data for
21 this case?

22 A. I don't believe we purchased the data for this case.

23 Q. Now, without that data is there any way to verify these
24 numbers?

25 A. No.

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1 Q. Now, if I could pass up a demonstrative. For the record,
2 it's U.S. Exhibit 17533.

3 THE COURT: Let me just check. Is everybody's realtime
4 working?

5 ALL PARTIES PRESENT: Yes, Your Honor.

6 THE COURT: Mine isn't, but we don't have that much longer
7 to go, everybody.

8 BY MS. BROOKER:

9 Q. Now, I realize this is a very small print. Can you see
10 it okay, Dr. Krugman?

11 A. Yes.

12 Q. Okay. Now, we can always focus in. If you would just
13 take a look at this table, and if you could just -- I know, you
14 know, you just need to take a moment to look it over, but this
15 is in follow-up to the line of questions that you were asked
16 about, the demonstrative with the index of age 18 to 34 readers,
17 and in comparison, can you tell the Court what this index is?

18 THE WITNESS: This index would be a readership index
19 setting the number of individuals who are age 12 to 17 in the
20 U.S. population, you see it says 10.20 or 10.2 percent.

21 BY MS. BROOKER:

22 Q. Okay. I want to make a comparison, so did we just take
23 down -- which one --

24 THE COURT: Who provided this material, though? Is this
25 MRI material, Doctor, or do you not know?

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1 THE WITNESS: This is based on MRI data.

2 BY MS. BROOKER:

3 Q. I'll ask a couple follow-up questions about that.

4 MR. BASS: Your Honor, I'm sorry, and I know we want to
5 get out of here, but it's not clear to me whether this is
6 something that was prepared by Dr. Krugman, but if it's something
7 that he prepared after he took the stand working with counsel, I
8 think that's not the way the rules are supposed to work here.

9 MS. BROOKER: Your Honor, that --

10 THE COURT: Who prepared the document?

11 MS. BROOKER: That is not the case. I'm going to elicit
12 some questions. I had no contact with Mr. Krugman about this
13 demonstrative at all. I am going to ask him some questions.
14 This is a demonstrative that he prepared, but certainly not
15 during his testimony. So if I could ask a couple follow-up
16 questions.

17 THE COURT: Well, you can get the record clear. Go ahead.
18 We'll see if --

19 BY MS. BROOKER:

20 Q. Dr. Krugman, in reviewing and analyzing the MRI data that
21 you purchased in this case and disclosed to defendants, did you
22 have occasion with Dr. Morrison to prepare this chart?

23 A. Yes.

24 Q. Okay. Now, is this a demonstrative that you ended up
25 using in your direct testimony?

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1 A. It is not.

2 MR. BASS: Your Honor, I object because this was not
3 disclosed to us. It's not like this is something that was in
4 some reliance materials --

5 THE COURT: Was it provided in any way?

6 MS. BROOKER: Your Honor, what Dr. Krugman provided was
7 about this large of a book (indicating) which contained all of
8 the data, all of the MRI data. And again, what we saw here with
9 this demonstrative that I have up here, the index of smokers,
10 some of the data that defendants used in this demonstrative they
11 purchased elsewhere. They did not provide that to the
12 government. I did not include in this demonstrative, again which
13 Dr. Krugman in fact prepared long ago -- I mean, Dr. Krugman
14 may --

15 THE COURT: He may have prepared it long ago, but it
16 wasn't disclosed long ago and it certainly wasn't disclosed in
17 this form. It's your statement that he disclosed all of the
18 underlying -- not calculations, but data in an aggregate form to
19 the defendants; is that right?

20 MS. BROOKER: Yes, Your Honor. All of the data is
21 produced, at which time you can put all of the data into an Excel
22 spreadsheet and sort it however you so choose. But yes, all of
23 the underlining data was produced to the defendants more than a
24 year ago.

25 THE COURT: If the underlying data was produced, you may

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1 ask him individual questions, but you can't use this particular
2 demonstrative exhibit which obviously organizes the data in a
3 particular fashion and has not been disclosed.

4 MS. BROOKER: Well --

5 THE COURT: So you may ask questions. What is it,
6 Mr. Bass?

7 MR. BASS: I wanted to also note for the record that I
8 think I was clear when I put that exhibit that's up on the board,
9 that clearly we will have to have a witness come in and put that
10 in at some point. I asked him to assume those were the numbers.
11 So at some point we will have to -- we're not submitting that as
12 evidence at this point.

13 THE COURT: Right, but you still asked a lot of questions
14 about it.

15 MR. BASS: Yes, we did.

16 THE COURT: Go ahead.

17 MS. BROOKER: Your Honor, again what I was following up to
18 was --

19 THE COURT: I know what you were following up to. If you
20 can pose individual questions, you are free to do so, but you
21 can't use the exhibit in this -- you can't use the exhibit
22 because it presents all of this data in a, probably an effective
23 form that defendants have never seen.

24 MS. BROOKER: Okay.

25 BY MS. BROOKER:

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1 Q. Dr. Krugman, without using the demonstrative, let me ask
2 you now just as a foundational question, do you recall that
3 you -- because I'm not sure if this is clear -- do you recall
4 whether you and Dr. Morrison at some point in time used the data
5 that you disclosed to put together this spreadsheet?

6 A. Yes.

7 Q. Okay. Now, what was the purpose or what was the -- what
8 does the spreadsheet, without using your demonstrative, what was
9 the purpose and what were you intending to show by putting
10 together such a spreadsheet that is relative to your opinions in
11 this case?

12 A. To set -- to show an index of readership for 12- to
13 17-year-olds in those particular magazines to see if 12- to
14 17-year-olds were overrepresented or overrepresented relative to
15 an average value.

16 THE COURT: Why didn't you put it in your direct
17 testimony?

18 THE WITNESS: There was so much to do, there was so many
19 different ways to approach it, we discussed cutting the data in
20 any number of different ways, Your Honor. It was just an
21 enormous amount of data.

22 BY MS. BROOKER:

23 Q. Did you include a substantial amount of CMR data and
24 tables in your direct testimony, just to clarify?

25 A. No.

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1 Q. Excuse me, MRI, I meant to say.

2 A. Yes.

3 Q. Yes. Okay. Now, you said that it was to reflect whether
4 or not it was overrepresented or underrepresented. What were
5 your findings as a result?

6 A. That as a rule the younger magazines had --

7 THE COURT: The younger magazines?

8 THE WITNESS: Pardon me, Your Honor. Those magazines with
9 more 12- to 17-year-old readers had high -- had a higher
10 readership index, had a high readership index.

11 BY MS. BROOKER:

12 Q. And what was the -- if you can generally explain to the
13 Court how that fared with respect to the general United States'
14 population of people under the age of 18.

15 MR. BASS: I object to that part, Your Honor.

16 THE COURT: You're unclear.

17 MR. BASS: Way beyond.

18 THE COURT: And it does go -- it certainly goes beyond the
19 scope of the questioning during cross which did not pertain to
20 the general population at large.

21 MS. BROOKER: I was just asking -- maybe if I ask it in a
22 broader way. What was the index that -- what were the
23 comparisons that you were using for purposes on the index?
24 That's just what I'm trying to get at.

25 THE WITNESS: In creating the index, you look at the

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1 number of people who are -- a percentage of people who are
2 between the ages of 12 and 17 and then compare that with the
3 percentage of readers who are actually between the ages of 12 and
4 17.

5 BY MS. BROOKER:

6 Q. And your findings in general were -- That's the gist of
7 what I was asking you to ultimately expand on.

8 MR. BASS: Your Honor, I object. I mean, if that's what
9 he did, then that's completely different than what we did,
10 because the index here is not a comparison to the general
11 population, it's a comparison to magazine readership, so it's a
12 comparison to the average readership of a magazine.

13 MS. BROOKER: Well, Dr. Krugman could answer that
14 question, I bet.

15 THE COURT: What did you just say?

16 MS. BROOKER: I bet Dr. Krugman could answer that question
17 whether or not this was a fair comparison between the data in
18 this demonstrative and the other demonstrative and the data that
19 I initially passed up in the demonstrative.

20 THE COURT: How do the parameters that you used in your
21 readership index, a demonstrative that's not being admitted into
22 evidence, but how do the parameters that you use differ from the
23 parameters that were used in what is up on the screen, which is
24 "1998 Spring Mediamark Research, Inc. Weighted Population Index
25 of Smokers Ages 18 to 34"?

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1 THE WITNESS: I believe I can answer that, Your Honor, if
2 I understand correctly how the demonstrative we have in front of
3 us on the screen was collected. And that is you would take the
4 number of people between the ages of 18 and 34 and get that as a
5 percent of the U.S. population. You would then take the
6 percentage of readers between the ages of 18 and 34 who actually
7 would read a magazine. So the actual number of the population
8 would be what's equal to a hundred, and then any number above
9 that reading a particular magazine would make the index higher.
10 So it just equalizes everything.

11 In the question that Ms. Brooker just asked me, it was
12 basically the same parameter only different numbers. In other
13 words, roughly 10.2 percent of the U.S. population is between the
14 ages of 12 and 17. Therefore, if a magazine, for example, like
15 Sports Illustrated has 17 percent youth readership, then the
16 index would be 170. So they're basically doing the same kind of
17 things.

18 MR. BASS: Your Honor, I'm going to request about
19 two minutes of recross on that issue, because I don't think
20 that's right.

21 THE COURT: I think the issue is significant enough that
22 I'm probably going to have to allow it. Go ahead, please.

23 BY MS. BROOKER:

24 Q. Now, you were asked specifically whether you were aware
25 of any instance in which any of the members of the industry, the

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1 tobacco industry, placed advertisements in media where the
2 audience of that media was more than 50 percent under the age of
3 21 since 1964, the date of the advertising code. Do you recall
4 that question?

5 A. Yes.

6 Q. Okay. Now, anywhere in the advertising code does it
7 identify the figure of 50 percent?

8 A. No.

9 MS. BROOKER: Your Honor, let me just see. I may be
10 finished. If I can just take a quick look through my stuff.

11 BY MS. BROOKER:

12 Q. Now, you were asked a few questions this morning by
13 Mr. Beach, I believe, about some of the draft, drafts of tobacco
14 company documents that you reviewed.

15 A. Yes.

16 Q. Now, how many tobacco company documents did you review in
17 connection with this case?

18 A. Thousands.

19 Q. Excuse me?

20 A. Many, thousands.

21 Q. Thousands. Okay. And how are drafts -- and when I say
22 "drafts" I mean internal tobacco company documents that indicate
23 that they are drafts or versions of a document -- useful, if at
24 all, to your conclusions that you reach in this case?

25 A. Reflect the underlying tenor of what's going on.

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1 Q. Do you need evidence that a document is in its final
2 state or final version in order to rely upon it to understand
3 the tobacco companies' marketing strategies?

4 A. No.

5 Q. Why not?

6 A. Because they reflect the underlying tenor of what's going
7 on.

8 Q. Now, you were asked some questions about research and
9 tracking studies today, do you recall?

10 A. Yes.

11 Q. And you said -- you were asked questions about whether or
12 not there's reference to anyone under the age of 18, in
13 particular documents, and you said -- your response was by 1987
14 that doesn't surprise you. Do you recall?

15 A. Yes.

16 Q. Now, why were you not surprised?

17 A. Because I think at that point in time, whether they're
18 searching for a market and going after a market, it's just not
19 going to be reflected in their documents, in their public
20 documents.

21 Q. If it's not expressly stated in a document, how can you
22 then conclude that the tobacco companies market to people under
23 the age of 21 and under the age of 18?

24 A. Well, because I think, as Dr. Joe Cohon put it in his
25 General Public Policy and Marketing article, that some of this

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1 naming of individuals is a fiction. He called it the FUBYAS
2 Fiction. In other words, while the naming of the population
3 might be between 18 and 21 or in some cases between 20 and 22 or
4 21 and 24, that the actual -- the actual market or part of the
5 actual market was people below those ages under the age of 18.

6 Q. Did you also draw upon your own expertise in looking at
7 the tobacco company documents?

8 A. Yes.

9 Q. And in what way?

10 A. To do just that, and then noted for many years there were
11 explicit references to people under the age of 18, and all of a
12 sudden those explicit references just stopped.

13 MS. BROOKER: Okay, Your Honor, I'm finished.

14 THE COURT: Mr. Bass.

15 RECROSS-EXAMINATION OF DEAN M. KRUGMAN, Ph.D.

16 BY MR. BASS:

17 Q. Dr. Krugman, the data that you supplied to us that was
18 gathered by Dr. Morrison from MRI did not itself disclose any
19 indices of readership; is that right?

20 A. Correct.

21 Q. And you had not at any point disclosed to us any, other
22 than what you just said today in court, any description of a
23 methodology by which either you or Dr. Morrison calculated the
24 indices of 12- to 17-year-old youth readership of any magazine;
25 is that right?

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1 A. Yes, Mr. Bass.

2 Q. All right.

3 MR. BASS: Your Honor, the way I would like to proceed is,
4 we will reserve having an expert witness, probably could find
5 someone within the experts we have, although if we can't, we may
6 have to ask the Court for permission to add someone on the topic,
7 but to have someone describe the methodology, because I don't
8 think I can, standing here for the first time with this without
9 having gone through the MRI Tech Guides and other material,
10 really cross-examine Dr. Krugman on this issue.

11 THE COURT: And so you're proposing to essentially get
12 your recross done by virtue of the testimony of an expert; is
13 that fair to say?

14 MR. BASS: That's right, Your Honor, and it can be done in
15 connection with putting in the evidence with respect to the
16 indices that we did do.

17 THE COURT: I don't see how the government can object. Is
18 there any objection?

19 MS. BROOKER: Your Honor, I would just respond simply by
20 saying the government was surprised here today by showing
21 Dr. Krugman data that was purchased by defendants that defendants
22 through their experts never disclosed or otherwise never ever
23 disclosed to the United States that was used in that one smokers
24 demonstrative. The index that Dr. Krugman arrived at was simply
25 arrived at by using the MRI data that was already purchased and

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1 disclosed to defendants. So my point is simply that we were the
2 ones that were surprised, and Dr. Krugman himself is unable, as
3 well as we, are unable to respond to the demonstrative, the
4 particular demonstrative that I showed up here that included
5 smokers because we do not have that data and we have never had an
6 expert evaluate that data because defendants never disclosed that
7 they were going to have an expert that talked about MRI data at
8 all, let alone use the MRI data beyond that which we produced
9 through Dr. Krugman. So, it's a bigger surprise to us than it is
10 defendants.

11 THE COURT: I'm not sure how that cuts, Ms. Brooker, but
12 in any event, the defendants are certainly allowed to have one of
13 their existing experts address this issue of the calculation of
14 these indexes or indices. If you need an additional expert,
15 that's a whole lot tougher road to hoe, Mr. Bass.

16 MR. BASS: I understand and I will try not to have to
17 cross that bridge at all.

18 MS. BROOKER: Your Honor, will there be a disclosure and a
19 time -- a period for deposition-taking if we have another expert?
20 That's really what it would entail.

21 THE COURT: Well, first of all, I don't know if we're
22 going to have another expert. Mr. Bass is going to do his best
23 not to have another expert. That's number one. Number two, I
24 think Mr. Bass needs to do his investigation and his thinking
25 about this issue to see who he's going to use, how he's going to

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1 use that person, and then we'll get to the issue of whether there
2 are disclosures or not.

3 In terms of depositions, you know I'm pretty negative
4 about depositions mid-trial, but that's not a conclusive answer
5 on that subject.

6 MS. BROOKER: I just don't know if Your Honor would permit
7 me to make one more comment in response.

8 THE COURT: Not really. You may step down. Thank you. I
9 know everybody's trying to get out of here and to make planes and
10 trains. Have a good holiday. I hope everybody gets some sleep,
11 some rest, some family time.

12 Mr. Brody, good luck. Congratulations whenever they're
13 due. I'm not sure.

14 MR. BRODY: Thank you, Your Honor.

15 THE COURT: It hasn't happened yet, has it?

16 MR. BRODY: It has not happened yet.

17 (Made confirmation.)

18 MR. BRODY: No, it hasn't.

19 THE COURT: Go home, Mr. Brody. Okay. Have a Happy New
20 Year and a good holiday, everybody.

21 (Proceedings adjourned at 4:38 p.m.)

22 C E R T I F I C A T E

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

25 -----
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