

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GK)
	:	January 11, 2005
Plaintiff,	:	
	:	9:34 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 47
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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23 Proceedings reported by machine shorthand, transcript produced
24 by computer-aided transcription
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1 P R O C E E D I N G S

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

4 Mr. Bernick, please.

5 MR. BERNICK: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. BERNICK: I want to inform the court that I have
8 both equipped myself with more technology here.

9 THE COURT: Now, Mr. Bernick, I would not have brought
10 it up, but I certainly appreciate your bringing it up. This is
11 good.

12 MR. BERNICK: I've done that and I've practiced, as you
13 can see, and counsel pointed out that there used to be some
14 lines there and it works, and I'm now told that the real problem
15 is an even more profound one, which is I used the wrong markers,
16 so today I have the right markers.

17 And I'll further observe in going back through the
18 transcript it appears from Your Honor's remarks that perhaps I
19 was guilty of a more serious infraction than technological
20 insufficiency, and if I displayed to the court any relationship
21 with Kathleen Cawley over here that's anything less than totally
22 coequal, I can assure Your Honor that our relationship is
23 totally coequal.

24 THE COURT: I see how good she is. Believe me, I
25 observe it.

1 ANTHONY BIGLAN, Ph.D., Government's witness, RESUMES

2 CROSS-EXAMINATION (Cont'd.)

3 BY MR. BERNICK:

4 Q. Dr. Biglan, good morning.

5 A. Good morning.

6 Q. I would like to go to our chart here and kind of pick up
7 where we left off and maybe give the court a flavor of the
8 multifactorial nature of smoking initiation.

9 Is smoking initiation a multifactorial process in your
10 view?

11 A. Yes, I would say that the process of adolescents starting to
12 smoke involves a series of changes in the adolescent and that
13 it's influenced by a variety of variables.

14 Q. I appreciate your answer, it's a very full answer. We are
15 really going to try to expedite my examination at least, and I
16 think others as well. If a simple "yes" or "no" would suffice,
17 I would urge you to do that. This is cross-examination. And I
18 take it from the answer that you just gave that we are in
19 agreement that it's a multifactorial process, fair?

20 A. Yes.

21 MS. BROOKER: Objection. I would just say asked and
22 answered. He's already answered the question.

23 MR. BERNICK: He has. And I am really more interested
24 in trying to get this, get it done in an efficient fashion. It
25 is cross-examination. I don't have to pursue that further.

1 Q. I want to talk about some of the factors that have been
2 identified and considered in the process of people doing
3 research on smoking initiation --

4 And if I've turned my back to you, it's not out of
5 discourtesy. I'm going to use some of my materials here. I'm
6 just going to put a bunch of others on the board. Some of those
7 potential factors.

8 Peer favorability to smoking, is that a factor that's
9 been examined for its impact on initiation.

10 A. Well, yes. Certainly peers actual smoking has been
11 examined.

12 Q. Well, peer favorability to smoking, I took this right off
13 your own demonstrative. So, real simple question, is this a
14 factor that's been identified in research for its contribution
15 to initiation?

16 A. Yes.

17 Q. Parental smoking is that another one?

18 A. Yes, it is, though the results are less consistent with that
19 than with peer smoking.

20 Q. I didn't ask you for the results. I'm just going to get a
21 whole bunch of them out here and then we will get to the
22 results, okay, bear with me?

23 MS. BROOKER: Objection.

24 THE COURT: No, objection is overruled. Mr. Bernick
25 did explain to begin with. I know it's hard for experts to get

1 used to court procedures and there is a certain artificiality
2 about them. But I can assure you, Dr. Biglan, that whether
3 through cross or through redirect, and it may be through
4 redirect, the essence of your views and the substance of your
5 views will all get on the record. So if possible, you should
6 answer "yes" or "no". If possible.

7 All right. Mr. Bernick.

8 THE WITNESS: Thank you, Your Honor.

9 BY MR. BERNICK:

10 Q. Let's just continue on. Parental smoking, is that another
11 potential factor that's been identified?

12 A. Yes, it is.

13 Q. Parental limit setting is that another factor, potential
14 factor that's been Identified?

15 A. Yes, it is.

16 Q. Actually, I'm going to get a bunch of them here so I'm going
17 to put this one kind of next to that.

18 Susceptibility to smoking, is this one of the elements
19 of the initiation process that's been identified and researched?

20 A. Yes.

21 Q. I'm going to put it down here as being somewhere in between
22 psychological needs and smoking. Is that appropriate?

23 A. Yes, susceptibility has been shown to be a predictor of
24 adolescent smoking.

25 Q. In fact in your own demonstrative that's exactly where you

1 placed it, correct?

2 A. That's right.

3 Q. Favorable attitudes to smoking -- to smokers and smoking, is
4 that again a factor that's been studied in the course of the
5 literature?

6 A. Yes.

7 Q. Positive images of brands and their smokers. Is that
8 another factor that's been studied in the literature?

9 A. Yes.

10 Q. Okay. Now I've got some others here.

11 Is it true that in 1994 the Surgeon General issued a
12 report regarding adolescents in smoking?

13 A. That's correct.

14 Q. Is it true that in that report the Surgeon General
15 identified a series of potential risk factors for smoking
16 initiation?

17 A. Yes.

18 Q. Okay. I'm go to put some of those up here and you tell me
19 whether they are risk factors, potential risk factors that were
20 identified or not.

21 Developmental stage. Was that on the SG-94 report?

22 A. I don't recall specifically.

23 Q. Well, okay. We can -- let's come back to that one. Any one
24 that you don't recall specifically we will put over here and
25 then we will come back to it.

1 Low socioeconomic status, was that a potential risk
2 factor that was identified?

3 A. Yes.

4 Q. Normative expectations, was that another one identified in
5 the '94 report?

6 A. I don't recall specifically that it was in the '94 report.
7 Certainly there are normative factors that are associated with
8 smoking.

9 Q. Fair enough. Intentions, was that another one in the '94
10 report?

11 A. Yes. The current research would make intentions roughly
12 equivalent to susceptibility.

13 Q. I'll put it right down there.

14 Social support, another factor?

15 A. I don't recall that.

16 THE COURT: Does that mean that you simply don't
17 remember or does that mean you're saying you don't recall it
18 being in the report?

19 THE WITNESS: I don't -- I don't recall it being in the
20 report, and I'm not -- I'm hesitant as to what precisely is
21 meant by social support in this context.

22 MS. BROOKER: Your Honor, if maybe it would be more
23 helpful to the court if Dr. Biglan could be provided a copy of
24 the 1994 Surgeon General report because otherwise it just may
25 not be helpful if he's unclear about some of these.

1 MR. BERNICK: We will get to that if it's necessary.

2 THE COURT: Correct.

3 MR. BERNICK: I don't know that its really going to be
4 necessary.

5 BY MR. BERNICK:

6 Q. Self-efficacy, is that another potential risk factor that's
7 been identified either in the Surgeon General's Report or
8 elsewhere?

9 A. That's actually helpful. Yes, it has.

10 Q. Subjective expected utility, another one?

11 A. Yes, there are some studies that have looked at that.

12 Q. Self-esteem and self-image?

13 A. Yes.

14 Q. Psychological well-being?

15 A. I don't recall that specifically.

16 MS. BROOKER: Your Honor, if Mr. Bernick could be
17 specific, I'm not clear whether Mr. Bernick is asking about any
18 studies or studies in the 1994 Surgeon General report or the
19 1994 Surgeon General report itself.

20 MR. BERNICK: If necessary, I'll keep on reiterating
21 it. The question now to the witness is whether they are
22 potential factors identified either by the Surgeon General in
23 '94 report or elsewhere in the literature that he has referred
24 to.

25 THE COURT: That broad question is to apply to each of

1 the factors you're asking Dr. Biglan about.

2 MR. BERNICK: I just want to get a map, that's all.

3 THE WITNESS: If I can say, if psychological well-being
4 refers to issues like depression and anxiety, you can put it
5 over there.

6 BY MR. BERNICK:

7 Q. We will do that.

8 Advertising. Another one, Surgeon General '94 report,
9 potential factor?

10 A. Yes.

11 Q. And we've already got advertising here, but we will kind of
12 put it over there just to keep track.

13 Sibling use, is that another one?

14 A. Yes.

15 Q. Behavioral skills?

16 A. Yes.

17 Q. Personality factors?

18 A. Yes.

19 Q. Constructive behaviors?

20 A. I don't recall about that one, and I'm not sure what that
21 refers to.

22 Q. Academic achievement?

23 A. Yes.

24 Q. Functional meanings?

25 A. If, by functional meanings, that refers to the meanings that

1 adolescents attach to cigarette smoking, then I would say that,
2 yes, there is evidence of that.

3 Q. We will do it that way. Other problem behaviors?

4 A. Yes. Those have been shown to be associated with smoking.

5 Q. Accessibility?

6 A. Yes. There is some evidence that accessibility is
7 associated with smoking.

8 Q. I'll put it here so we don't get into problems with the ones
9 that are on the margins.

10 Okay. And then obviously, advertising. We've got a
11 bunch of different advertising campaigns.

12 We've got Marlboro. We've got Camel. We've got
13 Newport that you've talked about. We've got KOOL, B KOOL.
14 We've got some others like Carlton, which you haven't mentioned
15 and we're looking to get into in just a little bit.

16 Is it also true that beyond these factors you,
17 yourself, have identified other factors that are kind of out
18 there in society that are probably at work, including factors
19 pro smoking, like the tobacco industry and lobbying and the
20 like, and factors that are antismoking, like prevention programs
21 and the like?

22 A. Well, I would give a guarded yes to that because I think
23 what you've just described, for example, the -- it is
24 encompassed in, for example, the tobacco company activities.
25 Marketing is one of the things that they do and you've already

1 got that up there.

2 But what I've written is that the companies engage in a
3 variety of public relations and lobbying activities that to some
4 extent are designed to make it safe to -- for them to be able to
5 market.

6 Q. I guess what I was getting at is your own direct examination
7 at page 30 quotes from one of your articles where you talk about
8 influences on the tobacco use of individuals, including
9 nicotine, aversiveness of smoking attributable to morbidity.
10 Social influences for and against tobacco use by friends, we've
11 got that; family, we've got that. Health care providers, we
12 didn't get that one; right?

13 A. Off the top of my head, I can't think of a study that shows
14 that health care providers have -- are influencing adolescents
15 smoking, but --

16 Q. I'm sorry. Go ahead.

17 A. Well, there are some efforts to get, for example,
18 pediatricians to advise adolescents, and we did some research on
19 smoking cessation using health providers.

20 Q. But in your own direct testimony you have listed all these
21 things under the heading --

22 A. Yes.

23 Q. -- Influences on the Tobacco Use of Individuals; correct?

24 A. That's right.

25 Q. So at least the opinion that you expressed there is that all

1 of these things are influences, including health care providers;
2 advertising we picked up; other media we didn't really pick up;
3 the tobacco industry and what it does to encourage use as well
4 as the organized activities of anti tobacco forces. All those
5 are influences; correct?

6 A. What I should clarify is that we summarized the influences
7 on the tobacco use of individuals.

8 The health care providers, there's been substantial
9 amount of work on affecting adult smoking by getting physicians
10 to give advice on quitting smoking.

11 Q. Now, the next step. Let's talk about some of the research
12 that's been done to kind of untangle this web.

13 Would it be fair to say that different people doing
14 research have done different research on different kinds of
15 relationships within these different factors?

16 A. Yes.

17 Q. For example, people have done research on peer -- the impact
18 of peer smoking; correct?

19 A. Yes.

20 Q. Parental smoking; correct?

21 A. Yes.

22 Q. People have also looked to see about relationships -- and I
23 think this is the right pen now, Your Honor -- between
24 advertising and favorable attitudes to smokers and smoking?

25 A. Yes. I cited a number of studies yesterday.

1 Q. So different folks who have done research have picked out
2 different kinds of relationships to focus on in connection with
3 their research, fair?

4 A. That's correct.

5 Q. And is it also true that different methods have been applied
6 in those research efforts? For example, some people have done
7 cross-sectional studies; correct?

8 A. That's correct.

9 Q. And a cross-sectional study, tell me if I'm wrong, but in
10 the simplest terms, kind of takes a snapshot at a given point in
11 time and tries to find whether there are relationships between
12 two factors or two things that might be at play?

13 For example, advertising at a given point in time and
14 peoples' attitudes towards advertising. That would be an
15 example of a cross-sectional study; correct?

16 A. That's correct.

17 Q. Now, very importantly, isn't it true that when it comes to
18 the cross-sectional studies, they kind of have embedded in them
19 a certain amount of the chicken and egg problem?

20 That is, which came first: the advertising or the
21 disposition of the individual to find the advertising favorable
22 because the person was already thinking about smoking or
23 smoking.

24 A. That's correct. They are not as strong evidence for the
25 influence of one variable on another as our longitudinal

1 studies.

2 Q. That's really what I get to. To use this as an example. If
3 we have a cross-sectional study, we don't know which one
4 happened first.

5 Whereas, if we have a longitudinal study, which
6 measures attitudes at different points in time; correct? That
7 would be an example of a longitudinal study, is over time.
8 Right?

9 A. I'm sorry. I didn't think you were finished.

10 Q. I'll put the question more simply.

11 Longitudinal studies, instead of taking a snapshot at
12 one point in time, look for data over a period of time; correct?

13 A. Yes, they look at a -- they assess a hypothesized predictor
14 of behavior at time one, and then at a later time they assess
15 the behavior and look at whether or not the, for example,
16 exposure or liking for advertising at one time predicts the
17 later onset of smoking.

18 Q. And longitudinal studies help unpack whether, which
19 direction, whether there is directionality; correct?

20 A. That's right.

21 But I would like to point out that a cross-sectional
22 study nonetheless does -- when they find a correlation in a
23 cross-sectional study it is consistent with the hypothesis that
24 one variable affects another, particularly when that's done in
25 the context of a theory and existing evidence about the

1 relationships between those variables.

2 Q. I'm not asking for anything about that.

3 I said with respect to respect to longitudinal studies,
4 the longitudinal study is designed to help out, find out whether
5 there is directionality; correct?

6 MS. BROOKER: Objection. Dr. Biglan answered that
7 question very directly.

8 THE COURT: The objection is sustained.

9 BY MR. BERNICK:

10 Q. Dr. Biglan, from your point of view, longitudinal studies
11 are in fact better in determining whether a given predictor
12 contributes to the onset of smoking; correct?

13 A. That's correct.

14 Q. Now, I want to go from this general roadmap to talking about
15 your own work.

16 Your own work is focused specifically on a circle that
17 we will broadly describe as intervention; correct?

18 A. As I said yesterday, much of -- certainly the core of the
19 work I've done on adolescent smoking has been to try to develop
20 and evaluate smoking prevention programs.

21 Q. And in order to find out whether intervention programs in
22 your research are good or not, you cut right to the chase and
23 look for this relationship, that is whether an intervention
24 affects smoking initiation; correct?

25 A. That's correct. Since at least about 1980 that's been the

1 standard in the field, to look at specifically at whether or not
2 it affects smoking.

3 Q. So you're particularly focused on intervention on the one
4 hand and actual smoking behavior in terms of whether it's
5 effective; fair?

6 A. Yes, but that's not to say that one isn't interested in such
7 variables as susceptibility since --

8 Q. You did it again, that's not to say. I understand it's not
9 to say, but the question is whether that's been the focus of
10 your work.

11 MS. BROOKER: Objection. Dr. Biglan --

12 THE COURT: The objection is overruled. The objection
13 is overruled. I think the Doctor answered your question.

14 MR. BERNICK: I think that he did answer the question.

15 Q. Again, once again, Doctor, if you can just focus on the
16 answers, we will get to the other comments and constellation of
17 other opinions at some point in time as the court has indicated.

18 Different approaches have been used by people who want
19 to develop intervention programs over the years; correct?

20 A. There have been a variety of interventions, yes.

21 Q. And they've been researched by people, such as yourself,
22 looking to see whether the intervention programs can be
23 validated; correct?

24 A. That's correct.

25 Q. And validation is a process that involves, as you talked

1 about yesterday, applying established scientific or accepted
2 scientific methodologies; correct?

3 A. I -- I don't like that way of characterizing it, because
4 specifically it's a matter of experimentally evaluating the
5 impact of the intervention on the outcome.

6 Q. Well, is it true that validation involves a process, from
7 your point of view, of applying accepted scientific methods?

8 MS. BROOKER: Objection. That question has been asked
9 and he just answered the question.

10 MR. BERNICK: He did not.

11 THE COURT: The objection is overruled.

12 THE WITNESS: I'm pointing to the specific scientific
13 methods relevant to that. I would not say that all --

14 BY MR. BERNICK:

15 Q. My next questions get to the specifics. But major
16 questioning is, again, you begin with the general sometimes and
17 then you get to the specifics. You'll have a chance. Okay.
18 The general question -- answer the general question before we
19 get to the specifics -- is that in looking to validate a
20 particular intervention program you apply accepted scientific
21 methods; correct?

22 A. Yes.

23 Q. Okay. And those, the characteristics of the methods or the
24 elements of the methods, include gathering empirical data. True
25 or not?

1 A. That's what it means to say you've applied a scientific
2 method.

3 Q. So that's true?

4 A. That's true.

5 Q. That's true. And in a particular, again, even more
6 particularly, the way to gather empirical scientific data is to
7 conduct randomized trials in your field; correct?

8 A. That is the method of evaluating the effects -- yes, that is
9 the method of evaluating the effects of an intervention.

10 Q. We're getting closer.

11 Now, if we go through some of the methods that have
12 been -- or some of the interventions that have actually been
13 studied, is it true that there are certain approaches that have
14 been used in intervention work over the years?

15 And I've got a little chart here where I've tried to
16 put them on. J-DEM 010202 talks about, for example, the
17 information deficit model for intervention.

18 Is that one of the models --

19 A. Yes.

20 Q. -- that's been used for intervention?

21 A. Yes, sir.

22 Q. Another one that came a little bit later is the affective
23 education model; correct?

24 A. Yes.

25 Q. Another one that came still later on was the social

1 influence model; correct?

2 A. Yes. There have been a variety of social influence
3 interventions.

4 Q. And life skills training is a model or an approach that is
5 the most recent kind of an evolution and it's in use today;
6 correct?

7 A. Yes. That's correct.

8 Q. And there's been an effort made -- again talking about
9 validation -- to apply the accepted scientific methods that
10 you've talked about in order to determine whether each one of
11 these is valid; that is, whether it works; correct?

12 A. That's true. But the methodology and the application of
13 experimental methodology has always developed as the work on
14 this has developed.

15 So, for example, I don't believe -- there might be one
16 or two experimental evaluations of information deficit models.

17 Q. Would it also be fair to say that over time the scientific
18 community and the Surgeon General in particular, came to, or
19 expressed assessments about the effectiveness of these different
20 types of interventions?

21 A. Yes.

22 Q. And I've tried to record a couple of them.

23 Would you agree that the Surgeon General found that the
24 information deficit model had basically had not been found to be
25 effective?

1 A. That's correct.

2 Q. Same thing with respect to the affective education model?

3 A. That's correct.

4 Q. And the same thing with respect to the social influences
5 model, at least over the long term. That is, over the long term
6 it had not been established that the social influences model
7 gave good results?

8 A. No, I wouldn't agree with that completely. You've correctly
9 quoted me there in terms of --

10 Q. We're going to get to you in a minute. I'm talking about
11 the Surgeon General.

12 A. Right. And what I'm saying is that the evidence is mixed
13 with respect to the effects of social influence --

14 Q. Fair enough.

15 A. -- interventions. And you get into some complicated issues
16 regarding what exactly -- is this a social influence
17 intervention? Is that? And so on. So it's more complicated.

18 Q. So we've got mixed on social influences; fair?

19 A. Yes.

20 Q. And with respect to life skills training, I've got a quote
21 here, but to be totally fair, the life skills training
22 approach -- program and approach has been validated in certain
23 studies; correct?

24 A. Yes.

25 Q. That is, a particular implementation of the life skills

1 training program has been validated scientifically in certain
2 studies; fair?

3 A. Yes. There are a number of studies that have shown its
4 effect.

5 Q. But you're not willing to say that all life skill training
6 programs work; correct?

7 A. That's correct.

8 Q. And, in particular, there are some limitations that have
9 been noted in connection with the validation of life skills
10 training programs, including that they may not work over the
11 long term unless there are boosters or kind of renewed activity
12 in the program; correct?

13 A. That's one concern that's been identified, yes.

14 Q. Okay. So the jury in a sense is still out on exactly how
15 efficacious and -- how efficacious the programs are and there's
16 variability. Some are effective, some have been proven to be
17 effective, some not; correct?

18 MS. BROOKER: Objection to the way the question is
19 framed with respect to --

20 MR. BERNICK: I'll withdraw the question.

21 BY MR. BERNICK:

22 Q. Dr. Biglan, is it fair to say that the area of the
23 validation of life skills training programs is an area where the
24 research is still evolving?

25 A. I would say that there's considerable confidence in the

1 field about the efficacy of life skills training when it is
2 implemented with fidelity. The research has moved on to the
3 question of how you can ensure that fidelity of implementation.

4 Q. So basically the approach can work and it's been validated,
5 but the question is, getting now down to the details of
6 implementation, and that's where the research is now focused;
7 fair?

8 A. I think that's correct.

9 Q. Now, you've reviewed in this case the defendants'
10 intervention programs, their YSSP programs; correct?

11 A. The Youth Smoking Prevention Programs, yes, I have.

12 Q. YSPP. And when you evaluated the defendants' programs in
13 this case, isn't it a fact that when you evaluated the
14 defendants' programs, you basically applied the same
15 requirements to the defendants' program that have been applied
16 in doing the research on programs in the literature; correct?

17 A. That's correct.

18 Q. Okay. So, for example, showing you....

19 If we go through your direct testimony in this case,
20 and I've got displayed here J-DEM 010197.

21 THE COURT: Do you have a handout of that, just because
22 it's hard to read?

23 MR. BERNICK: I'm sure we do.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Please. Thank you.

1 That's all right, I have it.

2 BY MR. BERNICK:

3 Q. We see in your own direct testimony that repeatedly you are
4 making reference to whether or not these different interventions
5 are supported by empirical validation, empirical evidence, or
6 the empirical literature; correct?

7 A. That's correct.

8 Q. So very simple in a way, very clear methodology that you've
9 used when it comes to the intervention programs that you've
10 scrutinized which is to apply exactly the same accepted
11 scientific methodologies that you do in your own research, to
12 the defendants' programs; fair?

13 A. Yes. I have applied the same standards with respect to
14 experimental evaluation of interventions.

15 Q. And the essence of your criticism -- let me just go back.

16 We had the life skills training program as being one of
17 the most recent approaches and one that has been validated. At
18 least two of the defendants in this case, Brown & Williamson and
19 Philip Morris, have in fact adopted that type of approach in the
20 YSPP programs that they are sponsoring; correct?

21 A. They've supported the implementation of life skills training
22 in several places, yes.

23 Q. And that is the one approach that has seen some validation;
24 correct?

25 A. That's correct.

1 Q. And your criticism -- let me be clear about this. You don't
2 say that they've done it right.

3 You've criticized -- you criticized the defendants'
4 sponsored programs specifically not because they followed that
5 approach but because of how they implement that approach;
6 correct?

7 A. What I said in my testimony was that there was a concern
8 about whether or not that program was being, and would be,
9 effective -- implemented with fidelity, since that's a concern
10 in the field. And it's known that when an intervention, which
11 has been validated and well-controlled research studies is put
12 in the field, its implementation is often inadequate.

13 Q. Okay.

14 A. And that has been shown with respect to life skills
15 training.

16 Q. So your criticism of the defendants' program is not for the
17 approach that they adopt but for the failure to be able to
18 demonstrate that their particular implementation of that
19 approach has been validated; correct?

20 A. Yes, that's correct, with respect to life skills training.

21 Q. That's what I'm asking you about now.

22 A. And that's my answer.

23 Q. Can you respond orally?

24 A. Yes.

25 Q. Is that your criticism is not the approach to life skills

1 training, your criticism is the absence of validation of the
2 particular implementation of that approach by the two companies
3 that have used that approach; fair?

4 A. That's correct.

5 Q. Now, isn't it true that if we applied the same standards
6 that you applied to the defendants, all of the programs that
7 have been used historically -- I should say all the way up to
8 social influences -- all of these prior ones, information
9 deficit, affective education model, they would have flunked;
10 right?

11 A. That's correct.

12 Q. And that with respect to social influences, because that's
13 not really been demonstrated to be valid in the same fashion as
14 life skills training, that would have flunked, too; correct?

15 A. Well, I wouldn't use the term flunk. Evaluation --

16 Q. They wouldn't -- it would have failed your test of
17 validation?

18 MS. BROOKER: Objection, Your Honor. We have to have a
19 clear record here and Mr. Bernick continues to talk over
20 Dr. Biglan.

21 THE COURT: The objection is sustained on this question
22 and answer. The Doctor may finish his answer.

23 A. The other thing I wanted to say is that with respect to the
24 social influence programs, here you have to stop and say -- I
25 think it would be a mistake to make a general statement about a

1 type of program because there may be specific social influence
2 programs that have been shown to be effective and others that
3 haven't. This gets back to what I said about the variability in
4 these types of programs. So I would say something more guarded
5 as to what works.

6 Q. Fair enough.

7 A. To be specific about the program.

8 Q. Fair enough. Fairer, also, that there are many social
9 influence programs that have been adopted over the years which
10 would also fail the test that you've applied to the defendants'
11 sponsored programs; correct?

12 A. With respect to the concern about implementation, yes.

13 Q. And with respect to life skills training, isn't it a fact
14 that today there are many life skills training programs that are
15 actually in use without the defendants' sponsorship at all that
16 have not been validated?

17 A. They have... they have not been shown to be implemented with
18 fidelity, and there's some evidence that the -- that they aren't
19 implemented with fidelity when they are widely disseminated.

20 Q. I asked you about validation.

21 Is it true that there are many life skills training
22 programs that are in use today without the sponsorship of these
23 tobacco companies that have not been validated?

24 A. I'm sorry, but I wouldn't talk about it in those terms.

25 The validation is something that -- we label a program

1 as validated when it's been shown in randomized trials to affect
2 the outcome and then it -- a program is often widely
3 implemented.

4 What we've been talking about is the way in which life
5 skills training has been implemented and the concern about its
6 implementation, and so there is a concern that when it has been
7 widely implemented it isn't -- it often isn't implemented with
8 fidelity.

9 THE COURT: But aren't there two aspects to validation?

10 Isn't there validation of a program, meaning its
11 concepts, and isn't there also validation of programs as
12 implemented, or is that incorrect in your view?

13 THE WITNESS: No. I think that that's roughly correct.

14 What I said earlier is that the -- where the field has
15 gone is that it's gotten to the point where some of these
16 programs have been shown repeatedly to have an impact when the
17 researcher implements it with their staff and the research is
18 now turning to the question of: Okay, when you train teachers
19 to do this and it's widely disseminated, does it get implemented
20 with fidelity? And that's the area that's of greatest concern
21 currently to the prevention science field.

22 BY MR. BERNICK:

23 Q. I think I understand what you're saying now. Let me focus
24 on it.

25 Is there a distinction between programs being

1 demonstrated to be efficacious versus programs being
2 demonstrated to be effective?

3 A. Yes, as a matter of fact, there is. I wasn't sure we would
4 ever get into that fine a point. Do you want me to --

5 Q. I don't want to spend a lot of time on it because I don't
6 have a lot of time. But does that --

7 THE COURT: I need to understand that difference, I
8 have to say. I thought the words were synonymous.

9 MR. BERNICK: Well, I'll try for about 120 seconds
10 because I didn't find it self-evident, either, but when you read
11 it, it does make a certain amount of sense.

12 A program that is implemented under optimal
13 circumstances and found through randomized controlled trials to
14 produce a change or a benefit in terms of smoking, that program
15 is said to be efficacious.

16 THE WITNESS: That's correct.

17 MR. BERNICK: See, that's 35 seconds. I got one
18 question.

19 BY MR. BERNICK:

20 Q. Second question. Whereas, a program that's not only have
21 been shown to be efficacious when implemented under optimal
22 circumstances, but further has been demonstrated through
23 randomized controlled trials to be effective under real world
24 circumstances, the right word to use then is effective?

25 A. I think you have the core of it, and as you could well

1 imagine I could do 20 minutes on the fine points of it.

2 Q. I'm a thousand percent sure that you could.

3 Now, when it comes to life skills training, we first of
4 all have to ask the question of what exactly is the protocol
5 pursuant to which a life skills training program is implemented?

6 You have to understand what the program is; right?

7 A. Yes.

8 Q. You then have to get to the question of whether it's
9 efficacious, and then you finally have to get to the question of
10 whether it's effective?

11 A. Yes.

12 Q. Okay.

13 A. I guardedly agree with that.

14 Q. You don't have to be guarded. If you agree you can say,
15 "Mr. Bernick, I agree with that."

16 A. Well, it gets into the fine points of effectiveness. So
17 what's become clear -- and Brian Flay who originally developed
18 these, this distinction -- and I've written about this -- is
19 that it may require ongoing monitoring.

20 So the day doesn't come when we say it's effective and
21 now we don't have to be concerned about its fidelity of
22 implementation.

23 Q. With respect to life skills training, A, the protocols, the
24 programs that are out there have protocols, and what you're
25 saying is that certain life skill training programs have been

1 shown to be efficacious.

2 A. That's correct.

3 Q. Are there any life skill programs that have been validated
4 through randomized controlled trials as being effective as well?

5 A. Well, here is where we get into the fine points.

6 Yes, I would say that there are studies of the life
7 skills program that have involved less involvement of research
8 personnel and more involvement of just people in the field. So
9 we are sort of moving toward that.

10 Q. Okay. Fine. Now, going back to the question that led to
11 all of this.

12 Is it true that there are many life skill programs
13 currently in place through people other than the tobacco
14 industry which have not been shown to be efficacious?

15 A. I -- I can only think of two program -- I guess my answer
16 would be no. I can only think of two programs that would be
17 labeled as life skill programs.

18 One is life skills training that was developed by Gil
19 Botvin, and the other is Towards No Tobacco that was developed
20 by Steve Sussman.

21 Both of those have strong efficacy -- evidence of their
22 efficacy and reasonable evidence of their effectiveness when --
23 still evaluated by researchers.

24 Q. Now, the particular programs that have been sponsored by the
25 defendants in this case, Brown & Williamson and Philip Morris,

1 is it true that those programs follow the same approach -- that
2 is, the same basic protocol as the programs that have been shown
3 to be efficacious?

4 A. Yes. It is my understanding that the life skills training
5 Program of Botvin is the program that's being implemented --
6 or whose implementation is being supported by Brown & Williamson
7 and Philip Morris.

8 Q. And what you're then saying as your criticism in this case
9 is that you've got questions about the -- in a sense the field
10 implementation, how exactly is it being done in the sense of
11 whether there is what you say fidelity to the program that has
12 been validated by Botvin and others?

13 A. Yes, there's considerable concern in the field about this
14 issue of implementation.

15 Q. Now, at this point you don't know, based upon science, that
16 the programs that are being sponsored by these companies are not
17 effective? You don't know.

18 A. I -- well, you've said the programs that are being sponsored
19 by the companies. I --

20 Q. The ones that you looked at.

21 A. There's no efficacy evidence for any of the programs being
22 sponsored by the companies other than the life skills training
23 Program.

24 Q. Life skills training. Let's just talk about life skills
25 training as sponsored by the two companies.

1 At this point you don't know, based upon any research,
2 that those programs, in fact, will not be effective?

3 A. I believe that the evidence that I'm aware of suggests that
4 they will not be.

5 Q. I didn't ask you that. I said you don't know, based upon
6 research, that those programs will not be effective; true?

7 A. The research that I'm... no. The research that I'm aware of
8 indicates that when life skills training is not implemented with
9 fidelity, it is less effective. And research that we -- data
10 we've collected in the state of Oregon has shown that it is not
11 being implemented with fidelity.

12 Q. Well, first of all, that research, you've not really
13 disclosed that research in your direct testimony; correct?

14 A. No, we haven't published -- actually, I did refer to it in
15 my testimony, but we haven't published it.

16 Q. You haven't published it and you haven't made it available
17 to us; correct?

18 A. That's correct.

19 Q. Let's talk about what's published or available to us.

20 Isn't it true that there are not randomized controlled
21 trials that have been done with respect to the programs that you
22 -- that the defendants have sponsored, these life skills
23 training Programs, the randomized control trials haven't been
24 done; correct?

25 A. No. I must not understand your question.

1 Q. These particular programs as sponsored by these defendants
2 in the field have not been tested in the sense of the empirical
3 data has not been gathered with respect to them. That's one of
4 your criticisms; correct?

5 A. That's correct.

6 Q. Therefore, at this time, based upon empirical data relating
7 specifically to these programs, you don't know whether or not
8 they are going to be effective based on empirical data?

9 A. I -- based on empirical data, I can make a judgment about
10 the efficacy of the other programs of the defendants, and yes,
11 you are correct that there's not efficacy data on any of those
12 programs under the life skills training.

13 Q. Fair enough. In matters of judgment, Dr. Biglan, people
14 made judgments that the Information Deficit Model would work.
15 That's why they used it, right? People made judgments.

16 A. Yes.

17 Q. And it turns out that those judgments were not right;
18 correct?

19 A. That's correct.

20 Q. They made judgments about using the Affective Education
21 Model and those judgments proved not to be right; correct?

22 A. That's correct.

23 Q. And people made judgments at the time social influences
24 first were adopted and it's been mixed with respect to them;
25 correct?

1 A. That's correct.

2 Q. And at the time that life skills training first was put in
3 place, that was a matter of judgment and there were not
4 validated data at that time to say that it would actually work;
5 correct?

6 A. When it was originally tested, that's correct.

7 Q. In all of these cases the first implementation of these
8 approaches was not supported by, were not supported by, did not
9 have validated empirical data to say, "Yes, they will work;"
10 correct?

11 A. That's true in most cases.

12 In most cases they were based on existing evidence,
13 typically correlational evidence, that suggested that if they
14 intervened on the factors that these -- these kind of factors
15 that it would affect adolescent smoking.

16 Q. Fair enough. Let's go back -- let's talk about some of
17 these other variables.

18 We've talked about this one here, intervention.

19 Is it true that in the course of your work and the work
20 of others, that some of these other variables have been studied
21 as well?

22 A. In my own work, yes, that's correct.

23 Q. And, in particular, you've studied the effect of peer
24 smoking and you've also looked at parental smoking and parental
25 limits; correct?

1 A. That's correct.

2 Q. Okay. And again the focus is you want to cut right to the
3 chase. You want to look for this relationship here which is
4 whether changing the parental limits, whether parental smoking,
5 and whether peer smoking, actually have an effect on smoking
6 initiation; correct?

7 A. That's not completely correct.

8 We've certainly looked at the relationship between peer
9 smoking and adolescent smoking and parental smoking and
10 adolescent smoking.

11 With respect to parental limits setting, we've
12 looked -- typically, what we found is that parental limit
13 setting affects the degree to which young people associate with
14 others who smoke. So, you've drawn a line between parental
15 limit setting and peer favorability.

16 Q. Where should the line go?

17 A. Between parental limit setting and peer smoking.

18 Q. Peer smoking.

19 A. Well, that's taking....

20 Q. We can put that in there. We can say peer smoking. This is
21 what you've looked at; right?

22 A. That's correct.

23 Q. Now, I want to go to -- I don't want to spend a lot of time
24 on it because I think it's -- it's relevant but not completely
25 relevant to your testimony. I want to focus just on peers, the

1 effect of peer smoking or peer favorability to smoking.

2 Isn't it true that your own research supports the
3 conclusion that the single most important factor, single most
4 important factor, in determining when and how cigarettes are
5 first tried are peers?

6 A. Yes. I made that statement, and I believe it was in the
7 context of the variables that we included in the analysis.

8 Q. Well, variables.

9 Your own research supports the conclusion that the
10 single most important factor in determining when and how
11 cigarettes are first tried are peers, your own research?

12 A. Yes. It's true that when we've studied the variables we've
13 studied in relation to adolescent smoking we found that the
14 single most important factor was peer smoking.

15 Q. Isn't it further true, Dr. Biglan, that you have reported
16 that your results confirm the often replicated finding that
17 smoking -- adolescent smoking behavior is strongly associated
18 with friends smoking; correct?

19 A. That's correct.

20 Q. How often has that been replicated?

21 A. I don't know. Quite frequently.

22 THE COURT: And I'm sure Mr. Bernick is going to get to
23 this, but let me ask you now.

24 Does that conclusion inevitably lead to a further
25 conclusion that marketing practices of the defendants are not,

1 in your view, the single most important indicator of youth
2 smoking?

3 THE WITNESS: It does not lead to that conclusion.

4 What I've said, and I tried to make clear in my direct
5 testimony, is that it's precisely because peers are so important
6 to adolescents that the marketing practices of the tobacco
7 companies are effective. Because what they do is they
8 communicate that adolescents can achieve peer acceptance,
9 popularity, through adopting the smoking of one of the brands
10 that's advertised. So the two, in a sense, interact in their
11 influence on smoking.

12 The concern about, you know, being accepted by your
13 peers and looking for ways to do that and the marketing provides
14 adolescents with information as to one way that they can do
15 that.

16 THE COURT: So in your view peer smoking and marketing
17 practices of the defendants are in a certain sense heavily
18 intertwined. That's not the most scientific way to say that I
19 am sure.

20 THE WITNESS: No. Actually, I think that's a pretty
21 good way to put it.

22 And if you look at the studies in which the peer
23 smoking and exposure to advertising are included in the same
24 longitudinal prediction of smoking, what you find is that both
25 of them account for variance in subsequent smoking.

1 And often exposure, measures of exposure to advertising
2 account for more of the variance in subsequent smoking than does
3 the exposure -- than does friends smoking.

4 In addition, one of the things I said in my direct
5 testimony is that the advertising also has to be evaluated in
6 terms of its impact on the peers.

7 So if I'm an adolescent and I see these ads and they
8 tell me that, Oh, my friends will like me or admire me if I
9 smoke Camel, my friends have also seen that advertising and so
10 it increases the likelihood that they will, in fact, see me in
11 that way.

12 THE COURT: Mr. Bernick.

13 MR. BERNICK: You did get a little bit ahead.

14 THE COURT: I knew that.

15 MR. BERNICK: No, no. That's fine. My mountain is now
16 kind of slightly differently contoured here, but I'll deal with
17 it.

18 BY MR. BERNICK:

19 Q. Let me focus on a couple of things you just said and then I
20 think I want to proceed in a way that will get to the same point
21 and in a somewhat different fashion.

22 First of all, when it comes to your own research, your
23 own research demonstrates that peer smoking is the single most
24 important factor. It's what you just said; correct?

25 A. I said that we said that in at least one paper, and I

1 believe that we said it in the context of the variables that
2 were in that analysis.

3 Q. Well, I understand that there are always going to be in the
4 context, but I asked you about your own research.

5 And again, your testimony, you've just endorsed it
6 four minutes ago, was that your own research supports exactly
7 what we wrote on the board which is the single most important
8 factor; correct?

9 MS. BROOKER: Objection, asked and answered two times
10 now.

11 MR. BERNICK: But he -- then Your Honor asked questions
12 and these are follow-up to Your Honor's question.

13 MS. BROOKER: Just a moment ago.

14 THE COURT: The objection is overruled. The question
15 has been asked and answered, but sometimes and much of the time
16 context is very significant. So go ahead, Mr. Bernick.

17 BY MR. BERNICK:

18 Q. Your own research supports the proposition that the single
19 most important factor in determining when and how cigarettes are
20 first tried are peers; correct?

21 A. To be honest, I don't remember which paper we said that in.
22 And I would want to go back and check whether that was said in
23 the context of the variables that were in the analysis or
24 whether we asserted that it was simply the single most important
25 factor per se.

1 Q. I'm not focused on, you know, what you may have said in the
2 paper. I'm focused on the answer that you gave.

3 Isn't it a fact that your own research supports the
4 conclusion, which is the question, the single most important
5 factor has been peer smoking; correct?

6 MS. BROOKER: Your Honor, I believe Dr. Biglan is
7 trying to answer this question as accurately as possible, and
8 he's --

9 THE COURT: Let's get the answer. Dr. Biglan.

10 THE WITNESS: Pardon?

11 THE COURT: Let's just get the answer, please.

12 A. Well, I did say that I believed that I said that, and --

13 Q. Isn't it true, Dr. Biglan, that there is no published paper
14 that you've ever written at any point in time that says that
15 peer smoking is not the single most important factor?

16 A. No, I don't believe I've ever said that peer smoking is not
17 the single most important factor.

18 Q. Now, in point of fact there are studies -- we're going to
19 talk about them now in a minute -- where people have looked to
20 the marketing -- what we will call the marketing variable, which
21 is what we talked about a little bit yesterday, to see the
22 impact of the marketing variable; correct?

23 A. Yes, sir.

24 Q. You are not one of those people who did that research. You
25 told us that yesterday as well; correct?

1 A. That's correct.

2 Q. You told us yesterday that -- really, when I asked you
3 whether you would hold yourself out as an expert in that area,
4 you said, "Well, gee, no. I would defer to those other people."
5 Correct?

6 A. Yes.

7 Q. Okay. Now, those people published papers -- for example,
8 Pierce published his paper in 1998 looking at marketing by the
9 cigarette companies and susceptibility to smoking; correct?

10 A. That's correct.

11 Q. He's one of those longitudinal studies that you referred to;
12 correct?

13 A. Yes.

14 Q. The only thing was that Dr. Pierce never actually analyzed
15 the impact of cigarette marketing as a variable on smoking per
16 se, he looked at the relationship between attitudes towards
17 marketing, receptivity and susceptibility to smoking; correct?

18 A. I think to adequately answer that question I'd have to go
19 back to the paper.

20 Q. Well, if you can't answer it, that's fine. But just so we
21 are -- Your Honor was kind of raising a question because what
22 does that really mean.

23 Receptivity to advertising is a word that's been used
24 to capture whether adolescents have a favorable attitude or an
25 unfavorable attitude towards marketing, correct? Receptivity.

1 A. Receptivity has been defined as -- has been measured in
2 terms of the degree to which adolescents own tobacco promotional
3 items, the degree to which they have a favored ad or some of the
4 items that Pierce and others have used to measure receptivity.

5 Q. Receptivity really is kind of an attitude or a measurement
6 of attitude by the adolescent towards the vehicles for
7 marketing; correct?

8 A. No. I wouldn't equate it with favorable attitudes.

9 Q. I didn't say favorable. I said it's a measure of the
10 attitude that they have towards the tools of marketing, ads and
11 promotional items.

12 A. Well, it's a measure of their liking, or having a favorite
13 ad and whether or not they own promotional materials.

14 Q. Susceptibility to smoking is a measurement of whether people
15 say that they are not -- they are determined that they are not
16 going to smoke or whether they say, No, we may -- I may smoke in
17 the future, or I think I will smoke in the future; correct?

18 A. That's correct.

19 Q. That's another attitude; correct?

20 A. It's not typically called an attitude. It's sometimes been
21 referred to as an intention.

22 Q. An intention. Fine.

23 And there are people who have done studies, including
24 longitudinal studies, that look to say -- and I want to make
25 sure I draw the line the right way -- to look to see if there's

1 a longitudinal tie between high receptivity and changes or
2 increases in susceptibility; correct?

3 A. Yes. That should be a single headed -- single-headed arrow.

4 Q. Is that right?

5 A. That's right.

6 Q. And you don't know whether that includes Pierce or not?

7 A. I would have to go back and look at the -- at that paper.

8 Q. Now in those papers, papers that look for this relationship,
9 the marketing itself is not a variable; correct?

10 A. Well, I suppose that's how -- it would depend on how you
11 characterized it. It certainly -- their certainly obtaining
12 measures of adolescents' exposure to the marketing.

13 Q. Oh, really. Do any of those studies actually measure
14 exposure -- document and measure the exposure as opposed to how
15 the adolescent responds to a question about what they have done
16 or their attitude towards the marketing?

17 A. Yes. It would be difficult for an adolescent to own a
18 promotional item if they hadn't been exposed to marketing, and
19 it would be difficult for them to have a favorite ad if they
20 hadn't been exposed to ads.

21 Q. But if their receptivity is low -- if their receptivity is
22 low, you don't know whether they've been exposed or not. You're
23 not measuring exposure, you're measuring what they say about the
24 advertising, not their actual exposure to the advertising;
25 correct?

1 A. That's possible, but I believe there are other studies
2 that -- well, there are other studies that show that exposure to
3 the advertising increases --

4 Q. I didn't --

5 A. -- favorability to those ads.

6 Q. I didn't ask you that. I asked you for the studies that
7 we're talking about here that tried to tie receptivity to
8 susceptibility. Those studies do not include the actual
9 marketing as a variable; correct?

10 A. No, I don't think I agree with that.

11 I think of the randomized trials that have been done on
12 exposure to cigarette marketing that show effects on the
13 favorability towards smokers.

14 Q. I'm not asking about those studies. I'm asking about the
15 studies that are looking for a relationship between receptivity
16 and --

17 MS. BROOKER: Objection. That's been asked and
18 answered.

19 THE COURT: Wait a minute. The objection is sustained.
20 BY MR. BERNICK:

21 Q. Can you tell me a single study -- can you identify a single
22 study which -- a longitudinal study -- which seeks to measure
23 whether changes in receptivity affects susceptibility which
24 includes marketing as a variable? Just name one.

25 A. Well, as I said, I think we disagree as to whether or not

1 you've measured exposure to marketing with the receptivity
2 variable itself.

3 Q. Well, can we agree that in those studies what you're really
4 saying is there may be an effective marketing, or exposure to
5 marketing, that is embedded in receptivity?

6 A. That's correct.

7 Q. No, I'm not really -- it may be my fault for not being
8 clear.

9 There are no studies that are looking for whether
10 receptivity affects susceptibility where the marketing is an
11 independently measured variable; correct?

12 A. I think I'd have to go back and look at the studies. I know
13 that Pierce has measured adolescents reports of their exposure
14 to advertising, other than receptivity.

15 Q. In the same study that he looked for the relationship
16 between receptivity and susceptibility?

17 A. I don't recall.

18 Q. So at least today you can't give us by name or identity any
19 such study; correct? At least today.

20 A. That's correct.

21 Q. Okay. Now, let's talk about smoking.

22 Can you identify a single study where receptivity is
23 measured longitudinally for its relationship to actual smoking?

24 A. I don't recall. I would have to look back at the papers
25 that are listed in demonstrative 7, which looked at various

1 measures of exposure to cigarette advertising and subsequent
2 smoking.

3 Q. Fair enough.

4 Let's finally talk about advertising and smoking. Can
5 you identify a single longitudinal study that measures the
6 relationship between the actual marketing practices on the one
7 hand -- not receptivity or susceptibility or attitudes or
8 needs -- but independently measures cigarette -- defendants'
9 cigarette marketing as a variable in its relationship to actual
10 smoking behavior? Can you identify any such study?

11 A. No. The studies that have evaluated -- it would be
12 unethical to do such a study.

13 The studies that have been done have focused on whether
14 or not exposure to cigarette advertising changes the favorable
15 attitudes towards smokers.

16 Q. You keep on saying exposure. Exposure is not an
17 independently-measured variable in the studies that deal with
18 smoking; correct?

19 A. It is independently measured in a randomized trial in which
20 adolescents are exposed or not exposed to cigarette advertising
21 and the effect of that exposure is measured on variables such as
22 attitudes towards smoking.

23 Q. We're not on the same page. I'm talking about studies that
24 actually measure exposure to defendants' cigarette marketing as
25 an independent -- as a variable. Get data on that variable and

1 see whether in a longitudinal study it is related to not
2 receptivity, not susceptibility, but actual smoking behavior.
3 Is there any such study?

4 A. And I'm saying that, if I understand what you're saying
5 correctly, it would be unethical to do such a study. But what
6 can be done, has been done, and shows that cigarette advertising
7 is an influence on the variables that will -- in the process of
8 becoming a smoker.

9 Q. Again, you may have answered the question indirectly, but
10 it's not clear. You said it would be unethical.

11 I'm just asking you, isn't it a fact there is no study
12 that measures advertising as a variable, exposure to
13 advertising, and determines whether it has an effect on actual
14 smoking behavior? No such study.

15 MS. BROOKER: Objection, Your Honor, I would just --

16 MR. BERNICK: Could we at least get his answer before -

17 THE COURT: The objection is overruled.

18 Let's hear your answer.

19 THE WITNESS: I just said, no, for the reasons I've
20 stated.

21 MR. BERNICK: Fair enough --

22 THE COURT: But your testimony is, correct me if I am
23 wrong, that there are studies that measure the effect of
24 defendants' cigarette marketing as an independent variable on
25 receptivity and/or susceptibility as steps on the way to

1 smoking. Is that an accurate statement?

2 THE WITNESS: Yes, it is. And also, that measure the
3 effect on favorable attitudes towards smokers and intentions to
4 smoke, intentions to smoke is essentially the susceptibility
5 variable.

6 BY MR. BERNICK:

7 Q. Let's probe that. So we're in agreement that we don't have
8 a study that actually ties to smoking behavior, but you believe
9 there are studies that independently measure advertising
10 exposure on the one hand and ties them to susceptibility?

11 A. Yes. And if we're going to put all the arrows in that
12 belong, there should be one between susceptibility and smoking.

13 Q. Well, that's fine. And it's not a surprise, really, that
14 people who start out as being susceptible to smoking end up
15 being smokers, is it?

16 A. Well, the evidence that I've seen is that the process of
17 becoming susceptible to smoking is one that is nurtured by
18 exposure to cigarette advertising.

19 Q. I didn't ask you that. I asked -- not a surprise that
20 people start out being susceptible turn out to be smokers?

21 MS. BROOKER: Objection. That was asked and that was
22 answered.

23 THE COURT: Sustained. Sustained. Next question.

24 BY MR. BERNICK:

25 Q. Dr. Biglan, isn't it true that when it comes to receptivity

1 and susceptibility and smoking, that the studies that have been
2 done in this area -- that is tying -- let's just begin with
3 tying receptivity, which you indicate is an indirect measure of
4 exposure to susceptibility -- isn't it true that the only
5 longitudinal studies that have been done along those lines were
6 in 1999 -- 1998 by Dr. Pierce and in the year 2000 by
7 Dr. Gardener -- Dr. Sargent?

8 A. I would have to go back and look at the papers to answer
9 that with accuracy.

10 Q. Are you really an expert when it comes to those papers,
11 fairly?

12 A. It's my understanding that Dr. Eriksen was expected to be
13 the expert on those.

14 What I concentrated on in my testimony was the
15 influence of cigarette marketing on the images and so on.

16 Q. Fair enough. But just to answer my question. Are you
17 really an expert when it comes to these relationships between
18 advertising and smoking?

19 A. Well, I certainly read those papers carefully and came to
20 the conclusion that I expect Dr. Eriksen will come to, which is
21 that cigarette marketing does influence susceptibility to
22 smoking and ultimately smoking.

23 Q. We can show you what Dr. Eriksen actually has concluded, but
24 would you agree with me in answer to my question that you are
25 not an expert when it comes to this area?

1 That is, you do not hold yourself out to be an expert
2 when it comes to actual research regarding defendants' cigarette
3 marketing practices and their impact on smoking behavior?

4 MS. BROOKER: Objection. Dr. Biglan has answered that
5 question in his words.

6 THE COURT: The objection is overruled.

7 A. I think the best I can say, Your Honor, is that I have read
8 those studies carefully. I did not concentrate on them in my
9 written direct, and that my conclusion from them is, as I said,
10 that the exposure to cigarette advertising influences
11 susceptibility in smoking, and that I'm confident in that
12 conclusion.

13 Q. Wasn't your answer to exactly the same question yesterday
14 no, that you would defer to these other people?

15 A. I don't recall.

16 Q. Question at page 9579. "And you have never held yourself
17 out to the scientific community as an expert in the contribution
18 that defendants' cigarette marketing makes as a variable in the
19 smoking initiation equation; correct?

20 "Answer: No. I would certainly defer to others in the
21 smoking prevention field on that issue."

22 Isn't that what your testimony was yesterday?

23 A. That's correct. And in my answer just now I did not say I
24 was an expert. I said I've reviewed the evidence and I've told
25 you what my conclusions are.

1 Q. Let me do one more question on susceptibility and then I
2 want to get to the next step.

3 Isn't it true -- you say, Well, gee, there have been
4 studies that tie susceptibility to smoking.

5 Isn't it true that the very studies that look for the
6 impact of indirect measures, such receptivity on susceptibility
7 -- longitudinal studies -- actually document how as much as half
8 of the people that start out being susceptible have their
9 susceptibility reduced over time rather than increased over time
10 and do not end up smoking?

11 A. That's correct.

12 Q. Next topic. In your -- I would like to talk a little bit
13 about opinions and methods. By methods, I mean accepted
14 scientific methods.

15 Isn't it true that in your expert report in this case
16 when you discussed the relationship between defendants'
17 cigarette marketing on the one hand and smoking on the other,
18 that you described the marketing as a substantial contributing
19 factor? True or not?

20 MS. BROOKER: Just to be clear, Your Honor, I do
21 believe Mr. Bernick is talking about the expert report and not
22 the direct testimony. And yesterday you were slipping into it
23 interchangeably, so I wanted to be sure.

24 MR. BERNICK: Did I misspeak?

25 MS. BROOKER: No. I just wanted to be sure you did

1 mean that.

2 MR. BERNICK: I meant what I said.

3 THE COURT: Which is the expert report?

4 MR. BERNICK: The expert report.

5 BY MR. BERNICK:

6 Q. Isn't that true?

7 A. That's correct.

8 Q. And when you filed your report in your direct testimony --
9 strike that. Let me ask another question.

10 Isn't it true that prior to the time that you submitted
11 your expert report, in your writings you had never referred to
12 smoking as a substantial -- marketing as a substantial
13 contributing factor; correct?

14 A. I believe it's true I've never used that phrase.

15 Q. Never used that phrase.

16 In fact, isn't it also true that this statement here
17 that peer smoking is a single most important factor, even after
18 Pierce's study came out in '98, Gardener's study came out in '99
19 -- in 2000, and Biener's study came out in 2000, all of which
20 dealt with longitudinal data; even after all those studies came
21 out, you never wrote to change the opinion that you had
22 expressed in your earlier research; correct?

23 A. I don't recall -- certainly the things I published -- I
24 certainly published quite a number of things in the 1990s
25 indicating that I thought that cigarette marketing was an

1 important influence on adolescent smoking.

2 Q. I didn't ask you about cigarette marketing.

3 You testified that in your research, your research
4 supports the conclusion that the single most important factor
5 was peers. That's what you testified to; correct?

6 A. I don't know if I stated -- if I said that in anything I
7 published after 1998. I'd have to go back and look.

8 Q. But the point is in '98 and 2000, these longitudinal studies
9 came out that dealt with receptivity and susceptibility.
10 Studies like Pierce, Biener and Sargent; correct?

11 A. Yes.

12 Q. And after those studies came out you never wrote anything to
13 change what you had said in your earlier papers regarding peers;
14 correct?

15 A. Even before some of those studies came out, I published in
16 1995 a book in which I discussed the marketing as being an
17 important factor. So in that sense I've certainly -- wasn't
18 saying that peer influences were the single most important
19 factor, but...

20 Q. You never actually came out with a paper that says, "My
21 earlier work was wrong. As a result of these new studies
22 dealing with receptivity, I now believe that the single most
23 important factor is advertising." You never said that?

24 A. No.

25 Q. And in any of your research; correct?

1 A. No. If you look at the studies we did on peer influence you
2 will see that they account for maybe 20 percent of the variance
3 in subsequent smoking.

4 So, we understood that there were other variables that
5 hadn't been identified that account for adolescent smoking, and
6 the research that you've described is some of the research
7 that's pointed to other variables, specifically advertising.

8 Q. After that research came out, you never wrote that what you
9 had said in your research earlier has now been shown to be wrong
10 and the single most important factor is advertising. You've
11 never written those words; correct?

12 MS. BROOKER: Objection. This question has been asked
13 and Dr. Biglan has answered it.

14 THE COURT: Half of it has been asked and answered.
15 Not the other half. So, therefore, just repeat your question
16 and let's get an answer.

17 BY MR. BERNICK:

18 Q. You have never come out after these other studies came out
19 and said that these other studies have now changed your view and
20 the single most important factor is not peers, it's advertising.
21 You've never said that since; correct?

22 A. No, and I wouldn't have said that because, as the court
23 described it, what we find is that these variables are
24 intertwined.

25 Essentially, what we've learned is that one of the

1 reasons that the social influences are so strong to smoking is
2 because of the influence of advertising, not only in the
3 individual adolescent but on the peer group.

4 Q. And since those papers came out you've never even written
5 that in a peer-reviewed paper, have you?

6 A. Well, I've certainly written papers stating that I believed
7 that the cigarette marketing was an important influence on
8 adolescent smoking.

9 Q. I didn't ask you that.

10 Since the papers came out that talked about this other
11 data, you have never written down that We now know that
12 advertising is a very important factor because it's intertwined
13 with the peer influence that we used to believe was the single
14 most important factor. You've never written that down in a
15 peer-reviewed paper since these studies came out in 1998 and
16 2000; correct?

17 MS. BROOKER: Objection, asked and answered.

18 THE COURT: Overruled.

19 A. I have -- I published in 1995 a discussion of the issue in
20 which I said that tobacco marketing was an important influence.

21 Q. That's 1995. I'm asking whether after 2000 when these other
22 papers came out you wrote in sum and in substance that your
23 prior work has now -- now -- your views have been changed
24 because of the work that's been done by people like Biener,
25 Pierce and Sargent. You've never said that in any peer review

1 paper; correct?

2 MS. BROOKER: Objection. The question is misleading.

3 THE COURT: No. Overruled.

4 A. When I have written about the influences on adolescent
5 smoking I have tried to make clear what we knew about the
6 variables that influenced it. And when, as the research came
7 out on the influence of advertising, I certainly discussed that
8 as a factor.

9 Q. I don't want to waste any more time.

10 THE COURT: I think that's as clear an answer or as
11 complete an answer as you're going to get.

12 MR. BERNICK: I think that that's probably right, Your
13 Honor, so let's push on.

14 BY MR. BERNICK:

15 Q. In your expert report you used "substantial contributing
16 factor." I think you told us that you never had used those
17 words in any of your own research; correct?

18 A. That's correct.

19 Q. In your testimony here that you've offered, you no longer
20 use the words "substantial contributing factor," do you?

21 A. I don't believe I do.

22 Q. You now use the word "influence"; right?

23 A. Yes.

24 Q. Now, I want to then talk about a different word, which is
25 the word "cause".

1 I believe your testimony has been that when it comes to
2 the word "cause," that's not a word you use; correct?

3 A. That word is not used much in the behavioral sciences any
4 more.

5 The term "influences" come to be used largely because
6 it better connotes the fact that behavior is multiply determined
7 and so no single variable cause is -- of behavior. Behavior is
8 influenced by a set of variables.

9 Q. Is this correct? This word is not used much any more?

10 A. Yes.

11 Q. Now, it's true, is it not, that when it comes to
12 interventions you look to see whether interventions are
13 effective and efficacious; right?

14 A. That's correct.

15 Q. That's not talking about interventions; right?

16 A. Yes.

17 Q. Those are opinions that you looked to and that you expressed
18 here in court today; right?

19 A. Could you repeat the question?

20 Q. Yes. You looked to determine whether interventions are
21 effective and efficacious when it comes to smoking initiation;
22 right?

23 A. That's correct.

24 Q. And the accepted scientific methods that are used to
25 determine whether interventions in fact do, are effective and

1 efficacious with respect to smoking initiation, the methods that
2 you used you've described are that you look for empirical data
3 using randomized trials; right?

4 A. That's the ideal method, yes.

5 Q. Okay. Well, it's not only the ideal method, it's actually
6 the method that is called out as being the required method by
7 people in your field; correct?

8 A. The standards are -- have become that we experimentally
9 evaluate interventions, their effect on behavior.

10 Q. You've been involved in writing an organization called the
11 Society for Prevention Research; correct?

12 A. That's correct.

13 Q. And they issued something called Standards of Evidence, did
14 they not?

15 A. That's correct.

16 Q. And the Society for Prevention Research actually did so and
17 set out criteria for determining effectiveness and efficacy;
18 correct?

19 A. That's correct.

20 Q. And the criteria are spelled out in black and white; true?

21 A. That's correct.

22 Q. And the criteria include gathering empirical data through
23 randomized controlled trials; correct?

24 A. That's correct.

25 Q. In fact, these criteria required that the data, the studies

1 be replicated; true?

2 A. Replication is very valuable because you can have greater
3 confidence in the effects of the variable.

4 Q. We are almost there. Almost there.

5 A. I'm done.

6 Q. Can I get an answer to the question that says, "Yes, one of
7 the criteria was to have replication of the studies?"

8 A. Yes. One of the criteria was to have replication of the
9 studies.

10 Q. Okay. Great.

11 Now, isn't it true that when this standard came out --
12 this is JD 013134 -- are you familiar, is that the standards
13 document?

14 A. Yes.

15 Q. And we can see that it's got the Society of Prevention
16 Research, and we can also see that from page, little I, that a
17 committee was appointed of prevention scientists to determine
18 the requisite criteria and the standards have been -- the
19 standards that were developed by this committee were unanimously
20 approved; correct?

21 A. That's correct.

22 Q. And in recognition of your prominence in this particular
23 field, you were on the committee, were you not?

24 A. That's correct.

25 Q. And you approved these standards, did you not?

1 A. That's correct.

2 Q. And isn't it true that these standards specifically go
3 through the criteria that we've just now talked about. That is
4 to say, when it comes to smoking initiation, smoking initiation,
5 the gold standard, the required standard for saying that a
6 particular intervention actually is effective with respect to
7 smoking initiation, is as we've indicated, randomized controlled
8 trials that have been replicated; correct?

9 A. That's correct.

10 Q. Now, I'm curious about one thing in this process.

11 There is a set of criteria for efficacy and then
12 there's a separate and probably a little bit more rigorous set
13 of criteria for effectiveness; correct?

14 A. I wouldn't call them more rigorous, but there are separate
15 criteria for efficacy and effectiveness.

16 Q. In fact, to be able to say that an intervention affects --
17 is effective with regards to smoking behavior, not only do all
18 the criteria for efficacy have to be satisfied, but there are
19 additional criteria that have to be satisfied for effectiveness
20 as well?

21 A. Yes, you're correct.

22 Q. And if we go through the criteria for efficacy we can, in
23 fact, see some of the things we've talked about.

24 There has to be statistically significant positive
25 results, and then there has to be replication consistent

1 findings are required from at least two different high quality
2 studies, et cetera, et cetera.

3 A. That's correct.

4 Q. You've applied those same criteria in this case in
5 scrutinizing what the defendants are sponsoring as being
6 something that they believe will affect smoking initiation;
7 correct?

8 A. That's correct.

9 Q. Now, this word "cause," isn't it true that these very
10 standards specifically talk about the ability to make causal
11 statements?

12 A. That's correct.

13 Q. In fact, not only do they talk about the ability to say
14 cause, these standards go so far as to say that the research
15 itself must be defined -- must be designed so that causal
16 statements can be made; correct?

17 MS. BROOKER: Objection.

18 Your Honor, I would just ask if Mr. Bernick clarify
19 whether we're talking about prevention research or smoking
20 initiation and behavior, because I think the record is getting
21 confused. Even some of his questions are using both terms.

22 MR. BERNICK: I object. I think that is an improper
23 objection of the context here.

24 In any event, it's very clear we are talking about
25 prevention, and then the very next step is going to be we're

1 going to talk about advertising and smoking initiation. So
2 we're going to do both.

3 THE COURT: The issue right now is prevention only.

4 MR. BERNICK: Is prevention. But to be clear, we're
5 talking about intervention programs and whether, in fact, they
6 affect smoking initiation.

7 Q. Smoking initiation is the end point for these studies;
8 correct?

9 A. In many of them, yes.

10 Q. Okay. So when it comes to smoking initiation, not only do
11 these guidelines say -- talk about causal statements, but they
12 require studies designs that must allow for unambiguous causal
13 statements; correct?

14 A. That's correct.

15 Q. In fact, it is the requirement of being able to make a
16 causal statement that as a result drives these criteria;
17 correct?

18 A. Yes. You want to be confident that, in fact, the
19 intervention produced the result and it wasn't due to some other
20 variable.

21 Q. Now, let's take the next step, which is to talk about
22 initiation and advertising. Same end point, different variable.
23 This relationship here.

24 Isn't it true that there are authors, indeed authors
25 that you say you would defer to, who specifically talk about not

1 just substantial contributing factor, not just influence, but
2 specifically talk about cause in connection with advertising and
3 initiation? Isn't that a fact?

4 A. I'm sorry. I would have to look at the papers to see
5 whether they use the term.

6 I recognize that the fact that we are trying to make
7 causal statements seems inconsistent with the notion of
8 influences, but I will stand by my approach to the terminology.

9 Q. Well, one of the papers you, in fact, have cited in your
10 testimony is by Dr. Sargent; correct?

11 A. Yes.

12 Q. And that's JD 065832.

13 If we could make sure that the witness has that,
14 please, Kathleen. I want to ask a couple of questions about it.

15 This is one of those papers that deals with receptivity
16 and actually it deals with susceptibility to smoking; correct?

17 A. Yes.

18 Q. And it deals with advertising; correct?

19 A. Yes.

20 Q. Cigarette promotions. And the relationship -- put that
21 paper to one side for a second. I want to get there in half a
22 moment. No, let's just deal with it now.

23 This paper is by one of the people in this field that
24 you would defer to, like Dr. Erikson; correct?

25 A. I have respect for his work. I think he's someone we would

1 have included in my answer to that question yesterday.

2 Q. Isn't it true that what he says is this?

3 "Evidence of a causal relationship between exposure to
4 cigarette marketing" -- this one over here -- "exposure and
5 smoking uptake" -- this one here -- make sure that there's a
6 parenthetical -- "cigarette marketing (the epidemiological
7 equivalent to exposure), and smoking uptake (the epidemiological
8 equivalent to disease) exists if a significant association can
9 be established between marketing and smoking; the results are
10 not explained by chance, bias, or confounding; the findings are
11 consistent with adolescent behavior theory; and the findings can
12 be replicated. Causality is strengthened if it can be
13 established that the exposure precedes the onset of the
14 behavior, that there is a dose response, and that elimination of
15 the exposure decreases smoking."

16 Did I read that right?

17 A. That's correct.

18 Q. And we see -- let's take a look at footnote 7 which is
19 appended to this very clearly-worded statement about what it
20 requires to establish causal relationship; correct?

21 A. I'm not sure what your question.

22 Q. Footnote 7 appears immediately after this very carefully-
23 worded statement about what's required for --

24 A. Yes it does.

25 Q. -- causation; correct?

1 A. Yes.

2 Q. And footnote 7, it turns out, is to Dr. Hennekens' book
3 called Epidemiology in Medicine; right?

4 A. That's correct.

5 Q. And Dr. Hennekens is one of this country's foremost
6 epidemiologists; correct?

7 A. I don't know that.

8 Q. Do you know who he is?

9 A. I don't know.

10 Q. Have you ever read the textbook Epidemiology in Medicine?

11 A. No.

12 Q. Do you know what the standards for proof are in the field of
13 epidemiology, proof of causation?

14 A. Yes. I think that the statement that Dr. Sargent made is an
15 accurate one with respect to the principles of epidemiology and
16 trying to identify influences on disease and behavior.

17 Q. And isn't it true that as he defines -- as Dr. Sargent
18 defines the requirements for causal relationship citing
19 Dr. Hennekens' book, that those requirements are very similar to
20 the requirements that, in fact, were incorporated into the
21 Standards of Evidence pamphlet that you helped prepare at the
22 society for preventive -- what -- for preventive research?

23 A. Prevention research.

24 Q. Prevention research.

25 Very similar requirements; correct?

1 A. Yes, with one exception, and that is that over here we're
2 talking about ways of trying to validate or determine the
3 effects of interventions and so the emphasis is on experimental
4 evaluations of those interventions; whereas, in epidemiological
5 research, it's often impossible to assign some people to smoke
6 and others not to smoke, and so there is that difference.

7 Q. Well, okay. You would agree with me, would you not, that
8 the standards that you've articulated for being able to say
9 cause when it comes to initiation and intervention as to end
10 points, that those standards still have not been met in the
11 scientific literature today? Do you agree?

12 A. Have not been met with respect to?

13 Q. Advertising and smoking.

14 A. No, I don't agree with that.

15 Q. So you think that the standards requiring randomized
16 controlled trials establishing a connection -- randomized
17 controlled trials establishing a connection between defendants'
18 cigarette marketing and smoking, that multiple trials have been
19 done and the results have been replicated. Is that your
20 testimony?

21 MS. BROOKER: Objection. Your Honor, I would just ask
22 that Mr. Bernick be clear. He's stated as if it's the same
23 question. He said advertising, now he's saying marketing.

24 MR. BERNICK: I'll rephrase the question.

25 THE COURT: Mr. Bernick, are you going to be completing

1 this particular subject in a couple of minutes? I think not.

2 MR. BERNICK: Let me just take a look. I think it's
3 going to take me about 10 minutes to finish this.

4 I have another subject that will -- I then have two
5 clean-up points that I think will only take me about
6 five minutes. I can break now if Your Honor would think that's
7 appropriate.

8 THE COURT: Let's take a break now for our court
9 reporter. Fifteen minutes, everybody.

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

11 (Recess ended at 11:31 a.m.)

12 THE COURT: All right. Mr. Bernick.

13 MR. BERNICK: Thank you.

14 BY MR. BERNICK:

15 Q. Dr. Biglan, we've seen that the term "cause" is used by the
16 SPR in connection with the effectiveness of intervention
17 programs on smoking initiation; correct?

18 A. No. We've seen the term "causal relationship."

19 Q. Causal relationship?

20 A. And "causal statement" used.

21 Q. Causal statement.

22 We've seen the term cause and causal relationship also
23 used in connection with advertising and smoking initiation by
24 Sargent; correct?

25 A. That's correct.

1 Q. I want to talk about that same cause and actual studies.

2 First, when it comes to the advertising campaigns
3 themselves, you would agree with me that not all campaigns are
4 the same; correct?

5 A. Yes.

6 Q. We have Carlton. That's got a very different ad campaign
7 focus than the KOOL; correct?

8 A. That's correct.

9 Q. And B KOOL as a campaign had a -- had different imagery from
10 the KOOL waterfalls of the prior many, many years of
11 advertising; correct?

12 A. Yes, different imagery.

13 Q. Now, Dr. Doland told us -- and again you've told us that
14 you've read, this testimony. He told us at page 7888 that he
15 was not aware of any single study which demonstrates that any
16 RJR ads actually have caused smoking initiation. He wasn't
17 aware of such a study. And the same answers with respect to
18 Marlboro, Newport, and KOOL.

19 Do you recall reading that testimony?

20 MS. BROOKER: Objection. Mr. Bernick misread that. He
21 said he was not aware of any studies framed that way.

22 I just wanted the record to be clear what the testimony
23 of Dr. Dolan was.

24 THE COURT: Wait just a minute.

25 All right.

1 BY MR. BERNICK:

2 Q. I'm talking about what's on screen. He told us what's on
3 the screen demonstrates that any RJR ads actually have caused
4 smoking initiation. He says, "I don't know of any study that's
5 been framed that way." Do you see that?

6 A. Yes.

7 Q. And he said the same thing with respect to Marlboro, Newport
8 and KOOL; correct?

9 A. Yes.

10 Q. Isn't it a fact that you can't point to a single study which
11 relates on the one hand any particular ad campaign with smoke
12 initiation on the other; correct?

13 A. Well, his answer was he hadn't seen them framed that way.

14 Q. I didn't ask you that. Would you just focus on my question
15 so that we can progress here?

16 I said, Isn't it a fact that you can't point to a
17 single study which -- it's not completed here -- a single study
18 which looks for a relationship between a particular ad campaign
19 on the one hand and smoking initiation on the other? True or
20 not?

21 A. I am not aware of a study that has looked at a -- at one
22 single advertising campaign and its effect on adolescent
23 initiation of smoking.

24 I am certainly aware of studies that show that exposure
25 to cigarette advertising of a variety of ads affects all the

1 variables that we've shown.

2 Q. Again, with due respect, Dr. Biglan, I didn't ask you about
3 the other variables.

4 We have had a lot of discussion about the importance of
5 focusing on the end points of studies; correct?

6 MS. BROOKER: Objection. Dr. Biglan I believe had his
7 mouth open and I don't think he was finished with his answer,
8 but I'm not sure.

9 THE COURT: Had you finished your answer?

10 THE WITNESS: No.

11 A. There is one more thing I would say. The Sargent paper,
12 which you gave me, does look at exposure to cigarette
13 advertising, but not of a single campaign, and does show that
14 that exposure as measured predicts the uptake of smoking.

15 Q. Not a single -- first of all, did you read the Sargent
16 article on the break?

17 A. I read some of it.

18 MR. BERNICK: Again, this is not consistent with the
19 instruction. I would ask again for the witness to be instructed
20 that in connection with his testimony he's not to do further
21 work on the breaks.

22 THE COURT: Well, this is a close question in terms of
23 what happened.

24 You had presented him the article. He had either not
25 read it at all -- I can't remember -- or hadn't read it in a

1 long while and anticipated probably further questioning about
2 it.

3 So I'm not surprised if he took advantage of the break,
4 which was actually a little longer than usual, to look at the
5 article.

6 Are you going to be asking any follow-up questions
7 about this --

8 MR. BERNICK: That's the problem. I'm on a tight
9 timetable and I could ask him a gagillion questions about any
10 particular study.

11 THE COURT: I don't see any reason to depart from your
12 logical timetable.

13 BY MR. BERNICK:

14 Q. Can we then focus, Dr. Biglan, on the answer to my question?
15 I was talking about individual campaigns.

16 Are you familiar with that fact, that I was talking
17 about individual campaigns?

18 A. Yes.

19 Q. I'm simply asking you, isn't it a fact that you're not aware
20 of any study that measures the effect of an individual ad
21 campaign with smoking initiation?

22 MS. BROOKER: Objection, asked and answered.

23 A. No, and I can't imagine how --

24 THE COURT: I'll let the witness answer. Go ahead.

25 A. No, and I can't imagine how such a study could be done.

1 Q. Such a study, in fact, is feasible, is it not?

2 A. Well, if we wanted to experimentally evaluate the impact of
3 a particular campaign on adolescent smoking, we would have to
4 isolate the exposure to that campaign, and we would have to
5 measure adolescent subsequent smoking, and I don't think that
6 that would be considered ethical because of all the other
7 evidence that exposure to such campaigns would influence
8 adolescents to smoke.

9 Q. You say that. But isn't it a fact that there's all kinds of
10 research that's been done where the researchers very
11 specifically and deliberately exposed adolescents to cigarette
12 advertising campaigns in order to gauge their reactions?

13 A. There are experimental studies which I cited that show that
14 exposure to cigarette advertising does increase the perception
15 that adolescents smoke and those things, yes.

16 MR. BERNICK: Again, Your Honor, I would ask that the
17 witness be instructed. Obviously, my question was, he says it's
18 unethical because you're doing an experiment that exposes
19 adolescents to advertising.

20 I then asked him the question of whether, in fact, for
21 purposes of these other studies, researchers had, in fact,
22 exposed adolescents to advertising, and he gave me an answer
23 that says, while it's true that studies have been done which
24 demonstrate that ads affect....

25 I didn't ask for the results of the study. I simply

1 asked, weren't those people exposed to the advertising?

2 THE COURT: And what's the answer to that question?

3 A. Yes, they were exposed to the advertising.

4 Q. In fact, because they were exposed to the advertising and
5 because their attitudes you say were affected, isn't it true
6 that some of those people might have been at increased risk of
7 going on to smoke?

8 A. Yes.

9 Q. So really in prior studies people for experimental purposes
10 have taken the step of exposing adolescents to advertising even
11 knowing there might be an increased risk of smoking; correct?

12 A. Yes, with respect to studies on the attitudes and other
13 precursors of smoking, but I can't imagine a human subjects
14 committee approving a study in which the dependent variable was
15 adolescent smoking.

16 Q. It's not a question of what you decide to measure. The fact
17 is that all these people are being exposed to the ads and are
18 being put at risk; correct?

19 MS. BROOKER: Objection. That question has been asked
20 and answered.

21 THE COURT: No. The objection is overruled.

22 A. I believe -- and I have been on human subjects committees --
23 that if such a study were proposed to our human subjects
24 committee, they would insist that some post study interaction
25 occur with the adolescents that what was designed to make sure

1 that their brief exposure to advertising didn't in fact
2 influence their favorability towards smoking.

3 Q. I didn't ask you what you would have done if you were on a
4 committee. I asked you what in fact happened at the time that
5 these research studies were done.

6 These people exposed adolescents to ads and put them at
7 risk of subsequent smoking initiation even though they didn't
8 actually measure the occurrence of that initiation; correct?

9 A. I believe that that's correct. I don't know what procedures
10 they used to guard against that harmful effect.

11 Q. Okay. Now, with respect to -- we've now seen that the word
12 causal -- just to review -- has been done -- used in connection
13 with both interventions and initiations.

14 You acknowledged to us that you're not aware of a study
15 that specifically looked for the linkage between specific ad
16 campaigns and smoking; correct?

17 A. That's correct.

18 Q. And I now want to take the next step.

19 Isn't it true that Dr. Krugman has said that when it
20 comes to the relationship between advertising and promotion,
21 generally, and smoking initiation as the other element of the
22 study, that there are simply too many intervening variables that
23 take place between the advertising and promotion and smoking
24 behavior to disentangle specific causes?

25 MS. BROOKER: Objection. I would object and ask that

1 Dr. Biglan be provided a copy and that he have a moment to look
2 through whatever statement we're talking about.

3 THE COURT: Page 158, I gather of that --

4 MR. BERNICK: Yes, that is, Your Honor.

5 THE COURT: -- direct testimony.

6 BY MR. BERNICK:

7 Q. Dr. Krugman has said that the relationship is not an
8 empirically verifiable phenomenon. There are simply too many
9 intervening variables to disentangle specific causes as
10 reflected on that page; correct?

11 A. Yes, that's what he says.

12 Q. Isn't it a fact that when it comes to that word "cause," you
13 haven't seen the word "cause" used in internal tobacco company
14 documents to describe a relationship between cigarette smoking
15 and smoking initiation; correct?

16 A. I don't recall seeing that word used.

17 Q. Isn't it true that the same thing applies to the scientific
18 literature? That you haven't seen the word "cause" used in the
19 scientific literature to describe a relationship between
20 cigarette marketing and smoking initiation; correct?

21 A. I have not seen the word "cause" used. I have seen "causal
22 inference" used. And, in fact, I believe there was a paper that
23 was entitled "Support for a Causal Inference."

24 Q. So, first, let's get it accurately. You haven't seen the
25 word "cause" used to describe a relationship between cigarette

1 marketing and smoking initiation in the scientific literature.

2 True or not?

3 A. That's correct.

4 Q. And isn't it true that the Surgeon General's office has not
5 expressed the view that causation of cigarette smoking by
6 advertising has been demonstrated scientifically? Isn't that a
7 fact?

8 A. Well, I believe the -- no. The 1994 Surgeon General's
9 Report said that the use of the word "cause" was misguided.

10 Q. I didn't ask you that. I asked you this question.

11 Has the Surgeon General expressed a view that causation
12 of demonstrate -- the causation of cigarette smoking by
13 advertising has been demonstrated scientifically?

14 Has that statement by made by the Surgeon General or
15 not?

16 MS. BROOKER: Objection. Dr. Biglan very directly
17 answered Mr. Bernick's question with respect to what the Surgeon
18 General says in 1994 about cause.

19 THE COURT: The answer was "no."

20 MR. BERNICK: Now I'm completely confused, Your Honor.
21 I'm sorry.

22 THE COURT: Well, I'm simply looking back at the
23 transcript, and while Dr. Biglan gave additional information,
24 which defendants probably didn't want to hear, I do believe that
25 he started out saying "no."

1 MR. BERNICK: I thought he said "no" with a view of
2 disagreeing with me.

3 BY MR. BERNICK:

4 Q. Am I correct -- am I correct the Surgeon General has not
5 expressed the view in a report that causation of cigarette
6 smoking by advertising has been demonstrated scientifically?

7 MS. BROOKER: Objection, asked and answered.

8 THE COURT: Overruled. Let's get it clear for the
9 record.

10 A. Yes, for the reasons I stated.

11 Q. Now, that statement, actually back in 1994, then went on to
12 describe the importance of longitudinal studies; correct?

13 A. Yes.

14 Q. Isn't it true that after that statement that you've now
15 referred to in 1994, that's exactly when these longitudinal
16 studies came out by people like Sargent, by people like Pierce,
17 by people like Biener; correct?

18 A. That's correct.

19 Q. Isn't it true that even after those longitudinal studies
20 were done, even after those longitudinal studies were done, the
21 Surgeon General still has not issued a report stating that
22 causation of initiation by advertising or marketing has been
23 demonstrated scientifically?

24 A. I don't know the answer to that.

25 Q. Isn't it true to -- to wind up this area and then I've just

1 got a couple of other questions to clean up -- that when it
2 comes to Dr. Krugman, Dr. Krugman specifically uses the word
3 "influence" in talking about the relationship and says that
4 that's different from talking about causation which he says
5 cannot be empirically verified?

6 MS. BROOKER: Objection. I would ask that Dr. Biglan
7 be provided with Dr. Krugman's exact statement of where it's
8 located.

9 MR. BERNICK: In the interest of time, the witness read
10 all the testimony. I'm simply asking for the essence of the
11 testimony when it comes to using the word "influence" versus
12 "causation." Isn't it a fact that Dr. Krugman uses the word
13 influence rather than the word causation?

14 THE COURT: I'm going to overrule the objection.

15 You may answer.

16 A. My recollection is that he had concerns about the use of the
17 word "cause" as well, but that's the best of my -- I can't
18 recall precisely.

19 Q. Have you read the deposition testimony of Dr. Eriksen to
20 whom you've referred?

21 A. I don't recall whether I've read his deposition testimony or
22 not. I don't think I have.

23 Q. Have you been told that Dr. Eriksen, too, declines to use
24 the word "cause" and uses "substantial contributing factor"
25 because the epidemiological proof is not there for cause?

1 MS. BROOKER: Objection. Mischaracterization. Now I
2 would like Mr. Bernick to show whatever it is he's referring to
3 to Dr. Biglan.

4 MR. BERNICK: I asked whether he's been told of what
5 Dr. Eriksen's views are. Let's start with that.

6 THE WITNESS: I haven't.

7 BY MR. BERNICK:

8 Q. Before you came in and submitted a record saying
9 "influence," you knew that Dr. Eriksen was out there, but you
10 never bothered to review his deposition testimony?

11 A. That's correct.

12 Q. Okay. I said that there were two other very short issues.
13 One was -- where is adolescence? Here it is.

14 Does the name Lawrence Steinberg, is that a name that's
15 familiar to you, Dr. Biglan?

16 A. Yes, it is.

17 Q. In fact, isn't he the author of a textbook on adolescence?

18 A. Yes, he is.

19 Q. And he's a leading authority in the field of adolescence?

20 A. He's certainly an expert on adolescents, yes.

21 Q. In fact, he's probably more an expert in adolescence than
22 you are; correct?

23 A. Yes.

24 Q. Are you familiar with Dr. Lawrence Steinberg's view of the
25 period of time covered by adolescence? How far it goes in age?

1 A. My recollection is that he has said that it's roughly the
2 second decade of life.

3 Q. To refresh your recollection to say -- to hear that in his
4 textbook, which is JD 013138, Adolescence by Dr. Lawrence
5 Steinberg. This is one of the texts, actually, that you
6 referred to and relied upon in connection with your direct
7 testimony; correct?

8 A. That's correct.

9 Q. If we look at page 3 under Adolescent Development and
10 Context, do you see where he says, "Because of these changes,"
11 that he has referred to, "it makes more sense to think of
12 adolescence as beginning around age 10 and ending in the early
13 twenties."

14 Are you familiar with that view?

15 A. I don't recall seeing that statement before, but I accept
16 it.

17 Q. Okay. So that's what I'm saying.

18 And if we took what Dr. Steinberg was saying seriously,
19 he would have us looking, when we talk about adolescence, for a
20 period of time that actually extended into the early twenties;
21 fair?

22 A. Yes. I think that's consistent with our conversation
23 yesterday.

24 Q. That was quick. Last questions relate to some timing.

25 You issued your report -- your only report that

1 describes your expert opinions with respect to historical
2 marketing practices -- you issued that report in this case on
3 November -- in November of the year 2001; correct?

4 A. Yes.

5 Q. You then gave a deposition for two days, in March of 2002,
6 on the 12th and 13th of March; correct?

7 A. That's correct.

8 Q. And it was at that deposition that, at page 38, you gave the
9 testimony that we covered yesterday about whether you published
10 any peer-reviewed research on the impact of cigarette marketing
11 with respect to underaged persons and adults. You gave that
12 testimony on that date, at page 38; correct?

13 A. Yes.

14 Q. And at page 39 -- again, you gave the testimony on that
15 date, very next page. You've never personally conducted a study
16 published in the peer-reviewed paper in which you concluded that
17 cigarette promotions caused initiation. You gave that
18 testimony?

19 A. Would you leave that up for a second?

20 Q. Sure. That's the one we talked about yesterday.

21 A. And your question?

22 Q. Whether that's the one you gave that testimony. It's on the
23 next page, so you must have given it the same day; right?

24 A. Yes.

25 Q. On the same day, at page 312, you gave the testimony that we

1 talked about yesterday where you hadn't identified any company
2 documents which state that the purpose of any of those ads,
3 which are the ones that you brought, was to influence youth in
4 any way.

5 You gave that testimony on the same day, correct?

6 A. I can't see it.

7 MS. BROOKER: Can Dr. Biglan refer to the transcript so
8 he can just look at the page before and after?

9 MR. BERNICK: It's not necessary.

10 THE COURT: This is yesterday's testimony.

11 MR. BERNICK: It's yesterday's testimony. I'm
12 clarifying a point of sequence here.

13 THE COURT: Correct. I'm going to overrule the
14 objection.

15 BY MR. BERNICK:

16 Q. You gave that testimony on the same day on page 312;
17 correct?

18 A. Yes, I did.

19 Q. And then finally you were asked yesterday and you
20 acknowledged that you gave testimony at page 426, this is the
21 same day, that you don't recall a document that says that a
22 specific ad or campaign was designed to fulfill adolescent
23 identity needs.

24 All that testimony was given on the same day, March 12,
25 2002; correct?

1 A. Yes.

2 Q. Now, it's been pointed out that subsequent to this you
3 issued an expert report on another subject, which was the
4 defendants' intervention programs; correct?

5 A. Yes.

6 Q. And then you gave a third expert report, and refresh me on
7 what subject. I guess it was a response to some the defendants'
8 experts on the intervention studies; correct?

9 A. That's correct.

10 Q. After you issued all three reports, you also supplemented
11 the materials that you had looked at with about 21,000
12 documents; correct?

13 A. I -- there were additional documents that I identified as
14 considered subsequent to those reports, yes.

15 Q. And isn't it true that the Justice Department wrote to us
16 after this production and represented that with respect to you,
17 Dr. Biglan, that none of the supplemental materials would change
18 your, as well as others', expert report, opinions, or deposition
19 testimony?

20 Were you familiar with that letter?

21 A. Yes.

22 Q. Okay. And in point of fact, when you were then deposed for
23 the third and last day, isn't it true that when you were deposed
24 at that time that you were specifically asked to verify the
25 accuracy of that statement?

1 A. I don't recall.

2 Q. Showing you page 15 of your deposition in December -- on
3 December 5th of 2003. That's when you gave the deposition;
4 correct?

5 A. Yes.

6 Q. And isn't it true that you were shown by good Mr. Beach, who
7 you acknowledged took your deposition, you were shown the letter
8 from Renee Brooker to Jonathan Redgrave. He then read that same
9 letter and he asked you specifically.

10 He reads the sentence, "Answering your question with
11 respect to Doctors Eriksen, Chaloupka, Biglan and Dolan, the
12 supplemental materials they have considered have not affected
13 their reports or deposition testimony and have not altered or --
14 changed or altered the opinions they expressed in either.

15 "As that statement pertains to you, Dr. Biglan, is that
16 a true statement?"

17 And you acknowledged that that statement was a true
18 statement; that none of the materials, supplemental materials,
19 affected your deposition testimony.

20 MS. BROOKER: Two objections.

21 I would just note that I believe this was not Mr.
22 Beach's deposition of Dr. Biglan. To be clear for the record, I
23 believe Karen Horrigan took the deposition.

24 My second objection is to relevance because this sounds
25 like the issue that Your Honor already addressed in Order 622

1 with regard to the supplemental depositions and the supplemental
2 materials.

3 MR. BERNICK: It has nothing to do with the orders of
4 the court. This witness suggested in testimony yesterday --

5 THE COURT: The objection is overruled. Go ahead.

6 BY MR. BERNICK:

7 Q. Was that your sworn testimony, that none of the supplemental
8 materials altered your deposition testimony that you had
9 previously given?

10 A. Yes.

11 MR. BERNICK: I have nothing further, Your Honor.

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

13 MR. WEBB: Yes, Your Honor. Just a minute or so to get
14 set up.

15 MR. BERNICK: Your Honor, we are trying to make an
16 effort to see whether it may be possible to get Dr. Biglan even
17 done today. And I don't know whether the others have made up
18 their minds, but I don't know that there's going to be anyone
19 else besides Mr. Webb.

20 THE COURT: All right. I know Mr. Webb has
21 approximately an hour. Am I right?

22 MR. WEBB: That's right.

23 THE COURT: What about everyone else?

24 MR. McDERMOTT: I think Reynolds will pass, Your Honor.

25 MR. MINTON: I think Lorillard will as well.

1 THE COURT: And I think there were two other people.

2 MR. WALLACE: BATCo will pass as well, Your Honor.

3 MR. MARKS: No questions, Your Honor.

4 THE COURT: I think we've covered everybody; therefore,
5 there will be redirect. Do you have a sense, Ms. Brooker, how
6 long?

7 MS. BROOKER: I should be able to finish in two hours.

8 THE WITNESS: Your Honor, if we're going to go another
9 hour, I could use a break.

10 THE COURT: All right. Let's see. Are you comfortable
11 going until 12:30 or do you need a break now?

12 Let's just take a two or 3-minute break or
13 five minutes. And I have plenty of work to do at the bench and
14 everybody can have five minutes, but then come back and we may
15 or we may not be able to get it all done before lunch. We will
16 see how it goes. But everyone may take a 5-minute break.

17 (Recess began at 11:58 a.m.)

18 (Recess ended at 12:01 p.m.)

19 THE COURT: All right. Mr. Webb.

20 MR. WEBB: Thank you, Your Honor.

21 MR. BRODY: May we have one second to grab Ms. Brooker?
22 We sent someone to grab her.

23 (Discussion off the record.)

24 THE COURT: All right. We are ready, Mr. Webb.

25 CROSS-EXAMINATION

1 BY MR. WEBB:

2 Q. Doctor, my name is Dan Webb. I represent Philip Morris in
3 connection with the trial that you're testifying in, and so I'm
4 not going to repeat things that Mr. Bernick covered and I'm only
5 going to ask you questions that are very specific to Philip
6 Morris.

7 So what I want to start with, I want to start with
8 Philip Morris's Youth Smoking Prevention Program, because I
9 think you will recall, Doctor, am I correct you spent a fair
10 amount of time in your written direct examination offering
11 testimony that was critical of Philip Morris's Youth Smoking
12 Prevention Program?

13 Do you recall that testimony, Doctor?

14 A. Yes, I do.

15 Q. And so, Doctor, I take it before you came before this court
16 and offered your opinions that were critical of Philip Morris's
17 Youth Smoking Prevention Program, I take it before you reached
18 those critical opinions, that you carefully had studied the
19 scope and nature and extent of Philip Morris's Youth Smoking
20 Prevention Program. Is that fair to say?

21 A. Yes, I did.

22 Q. And in connection with that, Doctor, what I'd like to do is
23 I'd like to kind of -- in order to put your criticisms into
24 perspective, I'd like to walk through an overview and have you
25 explain to the court your understanding of Philip Morris's, the

1 scope and nature of that Youth Smoking Prevention Program that
2 you're critical of.

3 Could I show the witness J-DEM 040032?

4 This is a demonstrative exhibit, Doctor, that I'm going
5 to put up on the screen.

6 Jamie, that's tab 19.

7 Doctor, to start out I used this demonstrative exhibit
8 during my opening statement to walk through the major components
9 of Philip Morris's Youth Smoking Prevention Program.

10 Do you agree with me, Doctor, based on your extensive
11 review of Philip Morris's program, do you agree that Philip
12 Morris has engaged in youth smoking prevention activities that
13 fall into each of the four areas that I've listed on this chart?

14 A. I certainly agree with the first three. I'm less clear
15 about the last one, Research.

16 Q. Did you see any evidence that Philip Morris was doing what
17 was known as TAB's research in the area of youth smoking
18 prevention?

19 A. Yes, I am familiar with the TAB's research.

20 Q. Where Philip Morris was doing research on youth smoking,
21 behavior of youth, and then making that available, not only
22 inside Philip Morris, but to other researchers; is that
23 correct?

24 A. I don't know that for a fact. I haven't seen peer-reviewed
25 published papers coming out of that research.

1 Q. Did you look at some of the TAB's research?

2 A. Yes.

3 Q. So I take it you do agree with me, then, that Philip Morris
4 has engaged in youth smoking prevention activities that fall
5 into each of the four categories on the chart you're looking at;
6 is that correct?

7 A. Yes.

8 Q. Now, Doctor, as far as the program is concerned, tell the
9 court, am I correct in reviewing the nature and extent of Philip
10 Morris's program, you learned that six years ago, in 1998, that
11 Philip Morris implemented a major new comprehensive Youth
12 Smoking Prevention Program? Is that correct?

13 A. I am aware of the Youth Smoking Prevention Media Program
14 that they implemented. I'm not precise about what year it began
15 at the moment.

16 Q. Did you learn in doing your review that six years ago, in
17 1998, Philip Morris actually set up within the company itself,
18 within the structure of Philip Morris, Philip Morris set up an
19 entire department, there was a standalone department called the
20 Youth Smoking Prevention Department?

21 Did you discover that in looking at the evidence in
22 this case?

23 A. Yes, I was aware of that.

24 Q. And did you discover that that Youth Smoking Prevention
25 Department has now existed and operated for six years, up to

1 where we are today; is that correct?

2 A. That's my understanding.

3 Q. And you've looked at what we've done during the past
4 six years at Philip Morris; is that correct?

5 A. Yes, I have.

6 Q. And you found out, for example, that Philip Morris
7 prioritized this to a high enough level that the person running
8 that department is the senior vice president that reports
9 directly to the CEO of Philip Morris; is that correct?

10 A. Yes, I did understand that.

11 Q. And did you understand that they staffed that department
12 with over 20 people to work full time on youth smoking
13 prevention activities during the past six years?

14 A. I did not know the precise number of people employed, but I
15 knew that there were a number of people employed.

16 Q. You learned there was a substantial number of people
17 employed in this activity; is that correct?

18 A. I'm not sure I'd call it substantial, but yes, there -- I
19 don't have a reason to argue with 20.

20 Q. That's fine. I don't want to argue with you, either.

21 In fact, am I correct that as far as the Youth Smoking
22 Prevention Department was concerned, that as someone who I take
23 it -- I'm sorry.

24 You are an expert in -- you're a smoking prevention
25 science expert; is that correct?

1 A. I do research on smoking prevention, yes.

2 Q. Okay. As a smoking prevention expert, do you believe that
3 it's a good thing for a tobacco company to elevate youth smoking
4 prevention to a high level within a company's business
5 priorities? Do you think that's a good idea?

6 A. As a behavioral scientist in this case I'm simply looking at
7 whether or not -- the effects of those programs, I haven't
8 reached a judgment about whether it's a good thing or a bad
9 thing.

10 Q. So as someone interested in preventing youth smoking, you
11 haven't been able to reach an opinion or to analyze whether you
12 believe as an expert that it's a good thing for a tobacco
13 company to rank its business priorities in such a way as to move
14 youth smoking prevention up to a high level. You have not been
15 able to form any opinion on that topic?

16 A. No. What I've done is looked at the influence -- the
17 evidence about the effects of programs in preventing smoking and
18 evaluated the Philip Morris' Youth Smoking Prevention Programs
19 in light of that evidence.

20 Q. Well, based on your expertise as a youth smoking prevention
21 expert, do you think it's good idea to elevate it to a high
22 level within a company?

23 MS. BROOKER: Objection. He's already answered the
24 question as to whether he addresses whether something is a good
25 or a bad thing.

1 THE COURT: The objection is sustained.

2 BY MR. WEBB:

3 Q. Now, Doctor, based on the work that you've done as an expert
4 witness in this case, as you found reason to criticize Philip
5 Morris's program, did you discover that since 1998 Philip Morris
6 has expended approximately \$100 million annually each year on
7 youth smoking prevention activities?

8 A. No. I am aware that in some of those years they spent a
9 hundred million dollars. My reading of deposition testimony led
10 me to conclude that it was substantially less in the recent
11 year, though I may not have seen the entire budget.

12 Q. I think you're correct about the last year, so let me show
13 it to you.

14 Could I show the witness J-DEM 04016 -- I'm sorry,
15 040160. Jamie, that's tab 20A.

16 Doctor, I've given you -- I've put on the screen, I've
17 handed you a demonstrative exhibit that I believe accurately
18 summarizes from documents the amount of money Philip Morris has
19 spent during the past six years on its youth smoking prevention
20 activities.

21 If you look at this chart, is this essentially
22 consistent with your understanding as you did your expert
23 opinion work in this case?

24 A. Yes, it is, though the 85 million in 2004 is more than the
25 sum of the items that I saw testified about in Mr. Willard's

1 deposition.

2 Q. Do you have any reason to doubt the accuracy of these
3 numbers?

4 A. No, I don't.

5 Q. In fact, so when you look the at Philip Morris during the
6 past six years has spent \$657 million on its youth smoking
7 prevention activities, at least on an average for the past six
8 years, that's over a hundred million a year during the past six
9 years; is that correct, Doctor?

10 A. Yes.

11 Q. Now, Doctor, can you tell me any other public or private
12 entity in the United States beyond Philip Morris that has spent
13 over \$650 million on youth smoking prevention activities during
14 the past six years?

15 MS. BROOKER: Objection, relevance.

16 THE COURT: The objection is overruled.

17 A. I would have to go back and look at the budgets of the
18 states, the Centers for Disease Control, SAMHSA, the National
19 Institutes of Health, and the American Legacy Foundation. Did I
20 mention the states?

21 Q. You mentioned the states. Go on.

22 But in doing all your expert opinion work to evaluate
23 Philip Morris's program, did you look at that to see whether it
24 might be that Philip Morris as an entity is spending more money
25 on youth smoking prevention than any other entity in the United

1 States?

2 A. That may be.

3 Q. Did you look at that issue?

4 A. I did not. I'm sorry.

5 Q. For example, let's talk about the states just as an example.

6 Did you learn, in trying to analyze youth smoking
7 prevention, for example, that last year, on average, the 50
8 states spent less than \$10 million each on youth smoking
9 prevention?

10 A. I have not seen those figures.

11 Q. And you mentioned the American Legacy Foundation; is that
12 correct?

13 A. Yes.

14 Q. The American Legacy Foundation to the extent they used --
15 that they do youth smoking prevention activities, they are using
16 tobacco money to do that; is that correct?

17 A. They are using money that came from the Master Settlement
18 Agreement is my understanding.

19 Q. And that's tobacco money; is that correct?

20 A. That's correct.

21 Q. Now, sir, between -- by the way, as far as putting Philip
22 Morris's spending on youth smoking prevention in perspective.
23 As you looked at the evidence as you reach your opinions
24 regarding Philip Morris's program, did you discover that Philip
25 Morris during the past several years is spending more money in

1 media advertising for its Youth Smoking Prevention Program than
2 it spends in media advertising for Marlboro cigarettes, its
3 leading brand?

4 A. If -- if you're asking me to put the spending on youth
5 smoking prevention in perspective, then the perspective would
6 include the total budget --

7 Q. Did you understand my question?

8 I simply asked you did you determine whether Philip
9 Morris spends more media money promoting youth smoking
10 prevention than it spends media money in promoting Marlboro?

11 MS. BROOKER: Objection, Your Honor. I believe
12 Dr. Biglan was trying to as accurately as possible answer the
13 question.

14 THE COURT: The objection is overruled.

15 A. And the question is? I'm sorry.

16 Q. Let me show you this chart.

17 Could I show the witness Demonstrative Exhibit 40161
18 which is tab 20B.

19 Sir, what I've handed you is a Demonstrative
20 Exhibit 40161 which summarizes Philip Morris's advertising for
21 youth smoking prevention and its advertising for its leading
22 brand of cigarettes, Marlboros, from 1999 to 2004.

23 And as you see on this chart, Philip Morris spends far
24 more money on youth smoking prevention advertising than it does
25 on Marlboro advertising. Do you see that, sir?

1 A. I see this chart, but this does not include all of the
2 things that Philip Morris does to advertise the Marlboro brand.

3 Q. See, I'm trying to compare apples to apples. I'm trying to
4 see how much money they spend in the media on youth smoking
5 prevention and how much money Philip Morris spends in the media
6 on Marlboros.

7 Do you understand the comparison?

8 A. Yes, and I agree that that's apples to apples.

9 THE COURT: Mr. Webb, I'm not sure you heard the full
10 answer to the last question. You might want to just take a
11 look.

12 MR. WEBB: Well, I will. Thank you, Your Honor.

13 THE COURT: The answer was, "and apples to apples
14 comparison," I do believe.

15 MR. WEBB: Let me explore that.

16 BY MR. WEBB:

17 Q. Let's just start with these numbers here.

18 First of all, based on the work you've done, do you
19 agree that this appears consistent with your understanding of
20 your expert opinion work, that as far as media money spent on
21 Marlboro and media money spent on youth smoking prevention, that
22 this chart is consistent with your understanding?

23 A. Yes, but it doesn't put YSP of Philip Morris in perspective
24 in my view.

25 Q. I'm going to take -- I'll take it the next step.

1 But at least this is consistent, the numbers on this
2 chart are consistent with your understanding?

3 A. That's correct.

4 Q. Okay. Now, you want to include in the Marlboro number, for
5 example, Philip Morris price discount money; is that correct?

6 A. I would include all of the things that Philip Morris does to
7 market the Marlboro brand, right.

8 Q. You want to include, for example, when Philip Morris gives a
9 price discount for Marlboro, like a 2-for-1 program, you believe
10 that should be put into the number to compare the amount of
11 money being spent on promotion; is that correct?

12 A. I believe that that's one of the variables that influences
13 the consumption of the brand by adolescents, yes.

14 Q. As opposed to comparing simply the monies spent on both
15 programs in the media; is that correct?

16 A. That's correct.

17 Q. Now, let me go -- let's go through some of the activities
18 that Philip Morris spends the money on. Let me start with
19 communications, sir.

20 Did you learn in doing your expert opinion work in this
21 case that over the past several years Philip Morris has expended
22 a large sum of money in order to produce and air television
23 commercials that are directed at both young people and the
24 parents of young people to communicate the message that kids
25 should not smoke?

1 Did you learn that, sir?

2 A. Yes.

3 Q. Sir, let me show you. I'm going to show you another
4 demonstrative exhibit.

5 Could I show the witness tab 21? J-DEM 40033.

6 THE COURT: Before you leave this tab I just want to
7 establish one thing, and of course I need to hear it from the
8 witness.

9 Doctor, do you understand that in 2004 there was no
10 media advertising by Philip Morris for Marlboro? Is that
11 correct to your knowledge?

12 THE WITNESS: Well, I think it would depend on what we
13 called advertising.

14 I showed an ad in the Unlimited magazine, and my
15 understanding is that that's still being distributed to 800,000
16 homes on a quarterly basis.

17 There are other direct mail things going into homes and
18 then there are point of sale. And all of those have the brand
19 image that reminds people of all of the things that I talked
20 about.

21 THE COURT: I'm not referring to point of sale, though.
22 I'm referring only to magazines and publications.

23 THE WITNESS: Yes, other than Unlimited, that's my
24 understanding.

25 THE COURT: I see. All right.

1 BY MR. WEBB:

2 Q. The Unlimited magazine is a magazine Philip Morris sends to
3 its adult smokers on its database; is that correct?

4 A. It's my understanding that they send it to people on their
5 database.

6 Q. And you understand the database is limited to people who
7 have certified they are adults; is that correct?

8 A. I am unclear about that.

9 Q. Other witnesses have talked about it and I'm going to move
10 on, sir.

11 As far as Philip Morris spending money, do you have in
12 front of you now the exhibit I've given you regarding Philip
13 Morris's teen TV advertisements? Do you see that, sir?

14 A. Yes, I do.

15 Q. Now, sir, as part of your work as a marketing expert in this
16 case, did you confirm that between 1998 and 2002, that Philip
17 Morris produced and aired 14 different nationwide TV
18 advertisements directed at young people to communicate the
19 message not to smoke, for a total of cost of \$155 million? Did
20 you confirm that, sir?

21 A. I haven't confirmed precisely these figures, but I believe
22 that each of these is a YSP advertisement directed at teens.
23 And I'm not a marketing expert --

24 Q. I'm not going to go there, either.

25 A. Well, you referred to me as a marketing expert.

1 Q. Actually, I apologize. I did not intend to do that. As an
2 expert in the area --

3 A. I wasn't offended. I just wanted the record --

4 Q. I didn't intend to offend you. I'll strike that from the
5 record.

6 Just as an expert in the areas that you have described
7 in your testimony.

8 Now, for example, have you actually looked at those 14
9 commercials, all 14?

10 A. I'm not sure I've seen every one of them, but I've certainly
11 soon most of them. I may well have seen all of them.

12 Q. I'm going to play one for you right now.

13 Jamie, could I use tab 22? This is JD 41561. This
14 will be from the Super Bowl of 2000 called My Reasons. If you
15 remember looking at that one. But I'll play it for you now.

16 A. Yes, I've seen it.

17 (Video playing.)

18 Q. Now, Doctor, that particular one I think ran on the 2000
19 Super Bowl. I take it you at least generally know that it cost
20 quite a lot of money to run an advertisement at the Super Bowl.
21 Is that fair to say?

22 A. I have heard that.

23 Q. Now, let me go on to beyond ads like that, that Philip
24 Morris sponsored to go directly to kids, you've learned, have
25 you not, that between 1999 and 2004 Philip Morris then aired 16

1 TV commercials directed at parents to communicate with parents
2 that they should talk to their kids about not smoking; is that
3 correct?

4 A. That's correct.

5 Q. Could I show the witness JD 41561? It's tab 23 E, Jamie.
6 No, take that back. It's tab -- Jamie, could I just -- I want
7 to show the Demonstrative Exhibit 40034 which is the parent TV
8 advertisements. And Jamie, that's tab 23.

9 Doctor, I've handed you another demonstrative exhibit.
10 This time it's the parents ads. Did you -- I take it, did you
11 learn from your expert opinion work in this case that Philip
12 Morris during this time period of 1999 to 2004 produced 16
13 commercials addressed to parents for a total cost of
14 \$208 million? Did you learn that, sir?

15 A. I could not answer precisely that that was the amount of
16 money or that that was the number of ads, but I have no reason
17 to doubt it.

18 Q. Okay. And you did learn that Philip Morris expended a
19 substantial sum of money in producing and airing what are called
20 parent ads; is that correct?

21 A. That's correct.

22 Q. And did you look at all 16 of these -- or watch all 16 of
23 these parent ads?

24 A. I don't believe I've seen all 16.

25 Q. Let me just run one. I'm going to run one, it's called Ten

1 o'clock.

2 Jamie, that's JD 41561, tab 23E.

3 And you can tell me if you saw this one.

4 (Video shown.)

5 Now, Doctor, in addition to looking at some of our
6 commercials, did you come to be aware that Philip Morris did
7 extensive testing of its Youth Smoking Prevention commercials
8 before they actually aired the commercials in order to see if
9 the message was being communicated; is that correct?

10 A. I'm aware that they did testing. I'm not aware of copy
11 testing, which would experimentally evaluate the impact of those
12 ads on intentions to smoke.

13 Q. Now, I understand -- well, here, let's go through and
14 establish what testing Philip Morris did do based on your
15 research, okay, or your review of the evidence.

16 Did you learn that Philip Morris before it tests its
17 commercials -- I mean, before it actually airs commercials, that
18 Philip Morris does what is known as qualitative testing and
19 quantitative testing of the commercials? Is that correct?

20 A. Yes.

21 Q. Okay. And I'm not going to get into much detail about it
22 now; other witnesses will get into more detail about it. But
23 just...

24 Qualitative testing that Philip Morris did normally
25 took the form of focus group research in which groups of kids or

1 parents were brought in to view commercials and then asked
2 questions in a free-flowing discussion to test things such as
3 the clarity of the message, et cetera; is that correct?

4 A. That's correct.

5 Q. And in addition to that, if the commercial did well on
6 qualitative testing, Philip Morris then did quantitative
7 testing, is that correct, of the commercial?

8 A. They did some forms of quantitative testing. I'm not aware
9 of their doing experimental evaluations, as I said.

10 Q. Well, do you know whether on every one of the commercials
11 Philip Morris aired, before they aired the commercial they did
12 quantitative testing in the form of mall intercepts with each
13 commercial where hundreds of kids or hundreds of parents were
14 shown the commercial and interviewed extensively about what the
15 commercial established? Did you see that?

16 MS. BROOKER: Objection. It's just a compound question
17 because we're talking about parent-directed ads and children-
18 directed ads, and I just think if Mr. Webb could be clear it
19 would be helpful for the record.

20 THE COURT: Rephrase.

21 MR. WEBB: I'll rephrase it.

22 BY MR. WEBB:

23 Q. Let's take the ads for the youth, the kids themselves.

24 Did you discover that Philip Morris did quantitative
25 testing in mall intercepts with those type of ads?

1 A. I am aware of mall intercept assessments of some the ads. I
2 can't say that I'm aware that they did them for every ad.

3 Q. You just don't know?

4 A. I don't know.

5 Q. Did you also find out that for the parent commercials, that
6 Philip Morris did quantitative testing in mall intercepts? Did
7 you find that out?

8 A. Yes. Essentially the same answer.

9 Q. Now, did you find out that if Philip Morris actually decided
10 to air a commercial and decided to run it, such as the two
11 you've seen in the courtroom, that after it was aired, Philip
12 Morris then went back out and did additional testing after it
13 was aired; is that correct?

14 A. Yes.

15 Q. And you found out that Philip Morris after the commercials
16 were aired, they actually did qualitative and quantitative
17 testing of the commercials to see how they were actually playing
18 in the marketplace; is that correct?

19 A. I'm aware of qualitataive and quantitative testing, but I'm
20 not aware of any studies that evaluate the impact on
21 adolescents' intentions to smoke.

22 Q. Let me take it one step further. Have you looked at some
23 of -- did you look at some of --

24 When Philip Morris would test these commercials with
25 qualitative and quantitative testing to try to make sure the

1 right message was getting across, did you look at some of the
2 documents in Philip Morris's files or that the government gave
3 you that shows the results of the testing?

4 A. Yes.

5 Q. Now, for example, let me just show you one that is a test
6 that was done after ads were ran.

7 Could I show the witness JD 51028? It's tab 23B,
8 Jamie.

9 Sir, I've handed you what I'll put up on the screen
10 now. It's tab 23B, it's JD 51028 which I think you will see --
11 it's what's called a tracking study, is that correct, sir, from
12 the front part of the document?

13 A. That's correct.

14 Q. Did you review this document, if you know?

15 A. I don't recall. It certainly looks similar to others that
16 I've reviewed.

17 Q. Okay. And I'm just going to use this as an example. If we
18 go to the first page it looks like Philip Morris did what's
19 called a random digit dial of a total of 1,795 parents and 519
20 children during a certain time period in November and December
21 of 2003. Is that correct?

22 I put up on the screen the portion I'm calling your
23 attention, Doctor.

24 A. Yeah, I'm looking at it.

25 Yeah, that appears to be correct.

1 Q. If you want to -- if you would go into the page that's Bates
2 stamped, ends with 4083 -- I'll put it up on the screen -- we
3 see some of the things that Philip Morris is testing with this
4 tracking study of their ads that are in the market. Is that
5 correct?

6 A. Yes. On this page they appear to be assessing ad awareness,
7 correct recall of the main message.

8 Q. Let's break it down.

9 A. And self-reported attitudes of those who were interviewed is
10 what it look like.

11 Q. Okay. It says, "Ad influence on attitude," and the first
12 one there says, "Made me more aware of importance of talking to
13 my kids about not smoking." And I think the black there
14 indicates those are people that report -- they answered that
15 question either very much or somewhat.

16 Do you see that in the footnote?

17 A. My difficulty is I'm not clear what these numbers refer to.
18 55 OMN. I haven't figured out what that refers to.

19 Q. Then I won't bother it with you then. Okay?

20 Do you see down there at the bottom? For example, one
21 of the things that Philip Morris tried to find out is whether
22 the parent actually had a conversation with the child as a
23 result of any youth smoking prevention ad. Do you see that?

24 Do you see the question, sir?

25 A. Yes.

1 Q. Okay. And do you see -- you don't accept those as
2 percentage answers: 56 percent, 47 percent, 50 percent,
3 48 percent, and 41 percent?

4 A. Well, I'm looking for where it says that those are percents.
5 Can you help me with that?

6 Q. Actually, if you can't... did you look at this document, and
7 were you able to interpret it when you did your expert opinion
8 work in this case?

9 A. I don't recall having seen this document. As I said, I may
10 very well have seen it.

11 Q. If you look at the footnotes, Doctor -- and if it doesn't,
12 does that help you understand that this is the percent of people
13 that answered the question either very much or somewhat?

14 A. That helps me quite a bit. Thank you.

15 Q. Now, let me ask you this question, Doctor.

16 Beyond communicating with these -- you can take that
17 down, Jamie.

18 Beyond communicating with parents in the form of these
19 television commercials, did you discover in doing your expert
20 opinion work in this case that Philip Morris also then produced
21 certain specialized brochures to make available to parents to
22 give them more detail on how to communicate with their kids
23 about smoking?

24 Did you find that out in your expert opinion work?

25 A. Yes, I did.

1 Q. Let me hand you two of those.

2 Could I hand the witness JD 50791 and JD 50792. Jamie,
3 that's tab -- put the first up -- tab 25.

4 What I've handed you, Doctor -- and I don't intend to
5 go through these entire books -- but what I've handed you are
6 two brochures that Philip Morris has published to teach parents
7 how to communicate with their kids about not smoking.

8 One of them is entitled, "Raising kids who don't
9 smoke." That's the one I have up on the screen. Do you see
10 that, sir?

11 A. Yes, I do.

12 Q. The other one is called, "Raising kids who don't smoke, peer
13 pressure." Do you see that the second one?

14 A. Yes.

15 Q. Did you discover -- look at the first one I gave you, which
16 is JD 350791 and go to page 3 of the document.

17 And if you go to page 3, Jamie, call out the advisory
18 board.

19 Did you learn that Philip Morris hired an advisory
20 board to actually use their background and expertise to help
21 Philip Morris draft these brochures so they would effectively
22 communicate with parents? Did you learn that?

23 A. Yes, I was aware of that.

24 Q. Are you familiar with some of the people that are listed on
25 this advisory board?

1 A. The only one of these people that I know is Alan Marlatt
2 from the University of Washington.

3 Q. But do you have any reason to doubt the knowledge or ability
4 of these people to consult in the area of effective
5 communications with kids?

6 A. I don't know any of them as people who have published
7 research on parental intervention, certainly on smoking. But my
8 own research has been much more broadly looking at parental
9 interventions and ways to influence, you know, prevent smoking
10 and other adolescent problems from -- through interventions
11 directed at parents.

12 And I don't recall publications by any of these people,
13 including Alan Marlatt whose work is generally not with
14 adolescents, but with college students and older.

15 Q. Do you fault Philip Morris for actually retaining an
16 advisory board to help figure out how to effectively communicate
17 with parents?

18 MS. BROOKER: Objection. That's not a question for a
19 behavioral scientist.

20 THE COURT: The objection is overruled.

21 A. Well, I don't -- I'm not trying to make judgments about
22 whether I fault them or not.

23 I'm just saying that these are people who, I'm not
24 familiar with research that they may have done on the kinds of
25 interventions that are represented in these brochures.

1 Q. In doing your expert opinion work in this case, did you look
2 at these brochures?

3 A. Yes, I did.

4 Q. When you looked at it, did you say to yourself, it was a
5 good idea for Philip Morris to go out and retain experts to try
6 to formulate an effective way to communicate with kids?

7 A. I didn't make a judgment about that.

8 Q. Now, Doctor, did you learn that Philip Morris then went out
9 and tested these brochures in quantitative testing and mall
10 intercepts with over a thousand parents in order to determine if
11 these brochures effectively communicated to parents about how to
12 communicate with kids? Did you find that out?

13 A. Yes. I'm aware of a mall intercept study that evaluated
14 brochures. I don't know if the one I'm thinking of is the one
15 you're referring to.

16 It had -- it sampled opinion leaders who made, over 34,
17 who made over a hundred thousand dollars a year.

18 Q. How many mall intercepts did you see Philip Morris doing in
19 connection with the brochures?

20 A. Well, I've read a number of them, but this is the ones that
21 come to mind.

22 Q. There were several; is that correct?

23 A. Yes.

24 Q. Let me move beyond communications and go to the another part
25 of Philip Morris's program.

1 Did you find out that Philip Morris, besides -- besides
2 the communications' phase of Youth Smoking Prevention Program,
3 another substantial part of Philip Morris's Youth Smoking
4 Prevention Program was giving educational grants in the area of
5 youth smoking prevention? Is that correct?

6 A. I'm aware of some grant making that Philip Morris did, yes.

7 Q. Let me show you -- could I give the witness JDEM 40035A.
8 It's tab 27, Jamie.

9 This is a demonstrative exhibit, Doctor, that I used
10 during my opening statement. But in doing your expert opinion
11 work, sir, did you come across evidence that Philip Morris over
12 the last several years has given out approximately \$110 million
13 to 139 community-based organizations in the year of youth
14 smoking prevention?

15 A. I haven't seen that precise figure.

16 I'm aware of their grants to some of the organizations
17 that are listed here, and I have no reason to doubt what you're
18 saying.

19 Q. Okay. Now, for example, Mr. Bernick asked you a lot of
20 questions about life skills training, so I don't intend to
21 repeat that. But one of the groups that Philip Morris -- strike
22 the question.

23 Did you learn that life skills training is actually the
24 largest benefactor, in the form of \$26 million, over the last
25 several years.

1 A. I did not know that the largest sum went to support the life
2 skills training program.

3 Q. And do you have any reason to doubt it?

4 A. No.

5 Q. Life skills training -- in fact, I think you referred to
6 life skills training in your direct examination, and I think you
7 told Mr. Bernick today, as a program that you believe to be
8 empirically validated; is that correct?

9 A. Yes. I think we established that it's efficacious and that
10 there's some evidence of its effectiveness and that there are
11 concerns about the fidelity of implementation of the program
12 when it's put in the field.

13 Q. As far as Philip Morris's reasonableness in selecting that
14 as its primary recipient, you're aware that several federal
15 government agencies have certified life skills training as being
16 a model program that works; is that correct?

17 A. I'm aware of two federal agencies that have done that, yes.

18 Q. Let me see if I can refresh your memory.

19 Could I show the witness JD 54525, tab 30, please.

20 I'll go through this -- tab 30, which is 54525. This is
21 actually the website of an organization that is called the
22 Substance Abuse and Mental Health Administration, it's part of
23 HHS.

24 Are you familiar with that organization?

25 A. Yes, I am.

1 Q. And have you visited their website in the past?

2 A. I don't recall. I probably have.

3 Q. I want to go down to the bottom where this HHS section sets
4 forth certain federal agencies that have recognized life skills
5 training as a model program. Do you see that?

6 A. Yes.

7 Q. And it looks to me like we have a model program by the
8 Substance Abuse and Mental Health Administration, that's under
9 the U.S. Department of Health and Human Services; Centers for
10 Disease Control; Office of Juvenile Justice; the White House
11 Office of National Drug Control Policy, it was then designated
12 an exemplary program by the U.S. Department of Education, and a
13 program that works by the National Institute on Drug Abuse. Do
14 you see that?

15 A. I do.

16 Q. Do you have any reason to doubt that?

17 A. No, not at all.

18 Q. In fact, let me show you -- could I have tab 28? Could I
19 show the witness JD 54527?

20 This is Philip Morris's website, sir which I'll call up
21 on the screen. That's JD 54527, tab 28.

22 This is from Philip Morris's website describing life
23 skills training. I think you described it somewhat this
24 morning. I don't want to take up a lot of time on it, sir, but
25 does this page set forth what you understand to basically be the

1 life skills training program?

2 A. Yes.

3 Q. And, for example, if we go down to --

4 Jamie, the next paragraph down under, where you have
5 there --

6 We see here that the program -- they talk here about a
7 Journal of the American Medical Association finding that
8 students who receive life skills training program in junior high
9 school were 25 percent less likely to be pack-a-day smokers at
10 the end of high school. Do you see that?

11 A. Yes, I do.

12 Q. Have you read that study?

13 A. That would be the study by Botvin, Baker, Dusenbury.

14 Q. Yes, that's what the footnote says.

15 A. Yes, I'm fairly sure I read that.

16 Q. Now, did you learn as part of your expert opinion work that
17 Philip Morris, by contributing \$26 million to this program, it
18 helped school districts in 19 states provide the program to
19 550,000 middle school students? Did you understand it was that
20 expansive?

21 A. I read this website before.

22 Q. Thank you. Now, sir, do you agree that during the exact
23 time period that Philip Morris has been expending approximately
24 \$100 million a year on youth smoking prevention activities, that
25 during that same time period youth smoking prevalence rates have

1 come down; is that correct?

2 A. I'm aware of a decline in youth smoking prevalence rates.

3 Q. And you're aware Philip Morris has not attempted to take
4 credit of that, but you've read Carolyn Levy's testimony and you
5 know that Philip Morris at least hopes that it is maybe part of
6 it; is that correct?

7 A. Yes, and they should not attempt to take credit for it, my
8 conclusion.

9 Q. Let me ask you this. In fact, let me show you -- first of
10 all, let's establish for the record.

11 During the time period that Philip Morris has had its
12 Youth Smoking Prevention Program in place, youth smoking rates
13 have gone down from about 35 percent down to 22 percent; is that
14 correct.

15 A. I would have to review the data from a specific study to
16 answer your question.

17 Q. All right. Can I show the witness JD 54530, please? That's
18 tab 35.

19 Are you familiar with the Centers for Disease Control's
20 Youth Risk Behavior Surveillance Survey?

21 A. Yes, I am.

22 Q. I've handed you what I believe to be from CDC website, and I
23 simply highlighted on the screen what I thought were the
24 appropriate numbers to try to pick the time period -- during the
25 time period that Philip Morris had its Youth Smoking Prevention

1 Program. Do you see that?

2 A. I do.

3 Q. It looks like from 1991 the CDC says smoking prevalence rate
4 for youth was 34.8 percent and in 2003 down to 21.9 percent.

5 A. I see that.

6 Q. And -- I'm sorry. What did I say? I think I made a
7 mistake.

8 Do you see that, sir.

9 A. Well, perhaps I didn't listen carefully enough to your
10 question.

11 Q. I'm sorry. I was trying to show you the figures from 1999,
12 which I believe --

13 A. Is 34.8 percent.

14 Q. Did I have that right? And 2003, it's 21.9 percent?

15 A. That's correct.

16 Q. That looks to me like about a 13 percent drop.

17 A. It is. I would like to have more information about the ages
18 and grades of students and the sampling and so on.

19 Q. Actually, rather than debate it with you, why don't you tell
20 me what you viewed the percentage rate to be, approximately?

21 A. Well, it depends on the survey procedure used.

22 There are some sampling problems with youth risk
23 behavior survey. I think the Monitoring the Future would
24 probably be a better one. And my awareness of the Monitoring
25 the Future is that it does show a decline in the prevalence of

1 adolescent smoking. I don't think it's as substantial as this,
2 however.

3 Q. It's about the same, isn't it?

4 A. I don't think so, but I could be wrong.

5 Q. In any event, during this time period you agree youth
6 smoking prevalence rates are coming down; is that correct?

7 A. They have come down in the last several years, yes.

8 MR. WEBB: Your Honor, I'm going to have probably --
9 I'm going to say 15 minutes to finish, which I'll finish now if
10 you want or I can come back and do it.

11 THE COURT: If you think you can do it in 15 minutes,
12 let's get through it now.

13 MR. WEBB: I think I can, Your Honor. I'm going to try
14 to buzz through it and see if I can.

15 BY MR. WEBB:

16 Q. Let me move to a little different topic. Let me talk about
17 Marlboro just for a couple of minutes.

18 As far as whether Philip Morris developed the Marlboro
19 Man and Marlboro Country advertising campaigns for the purpose
20 of targeting underaged people, have you read my
21 cross-examination of Dr. Krugman about the history of how Philip
22 Morris and the advertising agency of Leo Burnett came to develop
23 and implement the Marlboro Man and Marlboro Country advertising
24 campaign in the late 1950s and early 1960s?

25 A. No, I haven't read the testimony, but I was here when he

1 gave it.

2 Q. So you were here when I cross-examined Dr. Krugman?

3 A. That's correct.

4 Q. So you generally recall --

5 MS. BROOKER: I'm sorry. I don't think we got an
6 answer.

7 THE WITNESS: I said that's correct.

8 MS. BROOKER: Sorry. I didn't hear it.

9 MR. WEBB: That's okay.

10 BY MR. WEBB:

11 Q. Have you actually read the transcript over then after you
12 observed his testimony?

13 A. I may have read some of the transcript. I'm pretty sure I
14 didn't reread that part of the transcript.

15 Q. Okay. Well, I don't intend to repeat that cross-examination
16 here, for time reasons, and go through the same facts again with
17 you, but I'm going to show you a couple of key portions of
18 Dr. Krugman's testimony, and all I want to do is find out
19 whether you agree or disagree with his testimony on this issue.

20 Could I have -- Jamie, it's tab 10. And could I hand
21 to the witness Dr. Krugman's trial testimony, if I could,
22 please.

23 Do you have that? We don't have it. Kevin, do you
24 have it?

25 I'm going to show it to you. If you need to see the

1 transcript, we will get it for you.

2 Could I have Jamie, tab 10?

3 The portion I want to call to your attention, and I'll
4 read it off and you can read it with me.

5 My question to Dr. Krugman was:

6 "Question: And this man, Leo Burnett, the advertising
7 fellow, was contacted by Philip Morris in the mid-1950s to
8 reposition the Marlboro brand differently in the market; is that
9 correct?"

10 Dr. Krugman said, "Yes."

11 Next question. "And what you discovered after
12 reviewing the literature is that at that time Leo Burnett was
13 asked to find an advertising campaign that could reposition
14 Marlboro, number one, as a filtered cigarette, and number two,
15 that would appeal to adult men; is that correct?"

16 And his answer was, "Yes, sir."

17 Next question. "And Philip Morris then proceeded to
18 develop -- strike the question. And you've seen from the
19 literature that Leo Burnett himself came up with the idea that a
20 cowboy was the best way to communicate to men this masculine
21 image; is that correct?"

22 "Answer: Well, I think there were --" and he goes on
23 to give an answer which you can read.

24 But then I came back and said, "And the cowboy?"

25 And he said, "Yes, sir."

1 Do you see that?

2 A. Yes.

3 Q. Now, sir, my question is, do you agree with Dr. Krugman that
4 the Marlboro Man and Marlboro Country campaigns were designed to
5 appeal to adult men?

6 A. No, I don't.

7 Q. Is your answer no? I accept it. You're disagreeing with
8 Dr. Krugman?

9 A. I do disagree.

10 Q. Thank you.

11 Now, let me show you another part of Dr. Krugman's
12 trial testimony during my cross-examination. It's tab 6, Jamie.
13 This is from page 8828 and 8829.

14 Dr. Krugman was asked this question. "Well, maybe I
15 should ask the question this way, and I'm going to go through
16 the specifics. So we're going to educate the court and go
17 through what actually happened, but maybe I can start with the
18 general again.

19 "As a marketing expert, are you telling the court that
20 Philip Morris originally developed the Marlboro Man and Marlboro
21 Country advertising campaign in the late 1950s and early 1960s
22 for the purpose of marketing cigarettes to underaged people?"

23 And he says, no, he was not doing that.

24 Do you agree with his testimony on that point?

25 A. No, I don't.

1 Q. Thank you.

2 Now, Doctor, as I listened to your oral direct
3 examination yesterday by Ms. Brooker during your one hour of
4 testimony it appears to me that virtually all types of cigarette
5 imagery you believe appeals to kids. Is that correct, underaged
6 people?

7 A. No.

8 Q. Well, let me ask you this.

9 For example, do you recall your testimony yesterday
10 when I listened to it, you told the court, for example, that
11 images of young people on the one hand and images of older
12 people on the other hand, they both appealed strongly to
13 underaged people. Is that correct.

14 A. I don't recall saying precisely that, no.

15 Q. Could I have tab 36, Jamie? This is J-DEM 40163, which I'll
16 hand you, sir.

17 And what I've done is I've simply put up on the same
18 screen two exhibits that I believe you told the court yesterday
19 during your testimony you believe both have strong appeal.

20 The one on the left is Marlboro, which is U.S.
21 Exhibit 17592, and the one on the right is U.S. Exhibit 17635.
22 Do you see that?

23 A. I see these ads.

24 Q. Okay. Did you tell the court yesterday both of them have
25 strong appeal to underaged people?

1 A. Well, I said that both of them have appeal to adolescents.

2 I think I said, with respect to the Marlboro one on the
3 left, that the evidence is clear from both studies done by
4 public health researchers and studies done by Philip Morris,
5 that it strongly conveys images of masculinity, independence,
6 freedom and autonomy, and that these images are appealing to
7 adolescents.

8 Q. Doctor, did you tell the court yesterday that both of these
9 appeal?

10 I can move along. Did you tell both of these appeal,
11 tell the court yesterday both of these appeal to youth?

12 MS. BROOKER: Objection, asked and answered.

13 THE COURT: It hasn't been answered fully.

14 A. With respect to the one on the right, I said that that also
15 contains images that -- and themes that are important to
16 adolescents having to do with girls having a loving relationship
17 with a young man.

18 Q. Is the answer to my question yes?

19 A. I don't know.

20 Q. Did you tell the court yesterday both of these ads have
21 strong appeal to adolescents?

22 A. I don't -- I don't believe that I said strong appeal with
23 respect to the Virginia Slims ad, but I may have.

24 Q. Did you also yesterday -- if we can try to compare -- for
25 example, you told the court yesterday on the one hand that ads

1 that contain images of excitement have great appeal to underaged
2 people, but on the other hand ads that have images of total
3 relaxation also appeal to young people?

4 Did you tell the court that yesterday?

5 A. Yes, I did. I said that there were ads that convey that a
6 smoker can, by smoking, can relax and deal with stress, and I
7 said that there were ads that conveyed that smokers lead a life
8 of excitement.

9 Q. Could I have tab 37, Jamie? J-DEM 40168, please. If I can
10 show that to the witness?

11 And I put up on the screen, and I'll move along, that
12 yesterday you told the court that both of these ads -- one
13 showing a lot of action, the other then showing total
14 relaxing -- both of those ads have great appeal to underaged
15 people. Is that correct, sir?

16 A. Yes. I don't recall saying relaxation with respect to the
17 first one -- or the second one, but I may have.

18 Q. Let me go on to -- also, as far as images, as far as social
19 scenes, did you tell the court in your testimony yesterday --
20 and, Jamie, why don't you call up tab 38, which is J-DEM 40165.

21 Did you tell the court yesterday that social scenes in
22 which -- social scenes in which people are being very sociable
23 with each other are very appealing to underaged people and on
24 the other extreme pictures of solitary people also have great
25 appeal to underaged people?

1 A. I believe that what I said was that the -- part of the
2 success of the Marlboro campaign was that it communicated to
3 adolescents that by smoking Marlboro they would be independent
4 and self-sufficient.

5 And that research done in the '90s when there was
6 concern about the Joe Camel campaign that indicated that
7 introducing a more sociable dimension to the Marlboro Man was
8 also of value. Those are -- the multidimensional character of
9 the Marlboro Man has been an important part of why it's been
10 successful.

11 Q. Is the answer to my question yes?

12 A. Yes.

13 Q. Thank you.

14 Did you also tell the court yesterday, for example,
15 that ads that have action scenes have great appeal to underaged
16 people and, on the other extreme, ads that show total calm,
17 tranquil scenes also appeal to underaged kids? Do you recall
18 that?

19 A. I believe that what I said was that there is a subgroup of
20 adolescents for whom excitement and action is particularly
21 appealing, and that ads that communicate that a smoker of those
22 brands will having action and excitement made the brand more
23 appealing.

24 And I also indicated that there are ads that
25 communicate that smoking will help to achieve relaxation and

1 stress management.

2 Q. Let me show a comparison. Could I have tab 39, Jamie, which
3 is J-DEM 40164, which I put on the --

4 My only question is, sir, are these two ads that I've
5 now put on the screen, ads -- one showing total action, the
6 other showing total tranquility, that you told the court
7 yesterday both have great appeal to underaged people?

8 A. I said that both of those have appeal to adolescents. May
9 not necessarily be the same adolescent or it may not be -- it
10 may appeal to an adolescent at different times, depending on
11 their needs.

12 Q. Here is my question, sir. As far as that testimony about
13 all of these images and that they appeal to -- all the different
14 types of images that appeal to adolescents, did you limit your
15 search to only those brands that you perceived to be popular
16 among underaged people?

17 A. No. I looked at brands that were not popular with youth as
18 well.

19 Q. Ah. And by doing that, let's talk to the court about that
20 just for a couple of minutes and I'm done.

21 When you go look at ads for brands of cigarettes that
22 are not popular with kids, you see the same type of images; is
23 that correct, Doctor?

24 A. That's certainly not what I concluded in looking at the --
25 if you look in my direct testimony at the ads that I presented,

1 and as the court pointed out yesterday, that these types of
2 images are much less likely to be seen among brands that are not
3 popular with youth.

4 Q. Let me show you some examples I pulled out last night and
5 let's look at them for a second.

6 Could I have tab 45, Jamie, which will be J-DEM 40172?

7 Now, Doctor, I'll hand you the hard copy which we are
8 getting for you here. But on the left is an exhibit you
9 identified yesterday as being a Virginia Slim ad which I believe
10 you told the court communicates independence and appeals to
11 young girls; is that correct?

12 A. There was evidence that it appeals to young -- to adolescent
13 females, yes.

14 Q. Do you see the one on the right? I've actually
15 intentionally taken off the brand for a moment. I'm going to
16 show you the brand.

17 But do you recall seeing ads like this on the right
18 with the same type of communication of female independence on
19 brands of cigarettes that you told the court have no youth
20 smoking?

21 A. I don't recall having seen this ad.

22 Q. Okay. Jamie, can I call up and showing the full ad? That's
23 a Merit ad. JD 54543.

24 Did you tell the court in your written direct
25 examination that Merit has no appeal to underaged people?

1 A. I said that the research that had been done, which as I
2 indicated in my testimony yesterday, showed a Merit ad of a
3 young woman. It did not perform as well as two Marlboro ads,
4 two Newport ads, two KOOL ads, two Winston ads and two Camel
5 ads.

6 That all of those ads were rated as -- well, not every
7 one, but most of them were rated as being more appealing than
8 the Merit ad that they were compared with and most of them were
9 rated as making smoking --

10 Q. That wasn't my question. My question is, did you tell the
11 court in your written direct examination that Merit is a brand
12 of cigarette that is not popular among youth?

13 A. Yes, I did.

14 Q. Okay. Could I have tab 46 called up? And for the record,
15 this is JD 40170.

16 On the left is a Marlboro Lights ad that you told the
17 court yesterday shows puppies and dogs and sociability and that
18 appeals to underaged people; is that correct? Do you recall
19 that testimony yesterday?

20 A. I don't recall specifically -- yes, I recall.

21 Q. Thank you.

22 Now, on the right I have also included an ad for
23 another brand of cigarettes that also looks like it's got
24 puppies and dogs and sociability. Do you see that?

25 A. Yes.

1 Q. That's JD 54544.

2 Do you recall seeing an ad like that during the course
3 of preparing to be an expert witness in this case?

4 A. I don't recall seeing this ad.

5 Q. Both of those ads are communicating the same sociability
6 with dogs; is that correct?

7 A. I'm not willing to agree that they are the same. I would
8 have to see research on what actual impact it has. There are
9 many ways in which these ads differ.

10 Q. Jamie, can I show the brand of cigarette this is?

11 This is Benson & Hedges. Do you see that, sir?

12 A. I do.

13 Q. Which is also a brand of cigarettes that you know from your
14 research is not popular among young people; is that correct?

15 MS. BROOKER: Objection. If we could just get a date.
16 There's no date on this Benson & Hedges ad, and it's unclear.
17 If Mr. Webb could tell us from approximately what time period.

18 MR. WEBB: I'll find out on the break. I don't
19 remember right now. That's not my point anyway, Your Honor.
20 They can ask if they want.

21 THE COURT: I understand. It's not terribly relevant
22 to the point you're trying to make.

23 Go ahead.

24 BY MR. WEBB:

25 Q. Am I correct, Benson & Hedges is not one of the brands that

1 you identified as being popular you among young people; is that
2 correct?

3 A. That's correct.

4 Q. Let me go to a couple of more quickly. Could I have tab 47,
5 please?

6 What I have put -- this is J-DEM 40173. On the left
7 I've included a Marlboro commercial that you told the court
8 yesterday has as an action scene that has great appeal to
9 underaged people. Do you recall that testimony yesterday?

10 A. I recall testifying that ads that are high in sensation
11 value are particularly appealing to adolescents who are high in
12 sensation-seeking trait.

13 Q. Do you see the ad I have on the right, sir, where I've taken
14 off the brand of cigarettes where it shows another action scene?
15 This time it looks like it's a boat in water, a race boat. Do
16 you see that?

17 A. I do.

18 Q. Do you recall seeing an ad like that in connection with the
19 Vantage brand of cigarettes?

20 A. I don't.

21 Q. Jamie, this is a Vantage ad. Are you familiar with the
22 Vantage brand of cigarettes?

23 A. I have some familiarity with it, yes.

24 Q. It's made by RJ Reynolds; is that correct?

25 A. I believe that's the case.

1 Q. Are you aware that Vantage has no popularity among underage
2 people?

3 A. I'm aware that it's not one of the youth popular brands in
4 the sense of having more than 2 percent market share among those
5 under 18.

6 Q. Tab 48, please. This is J-DEM 40175.

7 At the top is U.S. Exhibit 17632, which you showed the
8 court yesterday. That's one of Philip Morris's brands,
9 Parliament, showing this relaxation scene that you said is
10 popular with kids. Do you recall that testimony?

11 A. Again, I don't recall saying that relaxation was
12 specifically conveyed in this ad, but I certainly did say it
13 about the Parliament campaign.

14 Q. Do you see the ad at the bottom?

15 A. I do.

16 Q. Do you see that same type of tranquil scene at the bottom?
17 Do you know what brand of cigarettes that is?

18 A. I don't know what brand of cigarettes that is.

19 Q. Could I have it called up, please?

20 That's also Vantage. Do you see that, sir?

21 A. Yes, I do.

22 Q. Could I have tab 43, please?

23 Sir, yesterday, this is J-DEM 40169. On the left is a
24 Marlboro Lights' commercial that you told the court yesterday
25 you described how you have to look in the background to see that

1 little horse and a man, but it's very tranquil outdoor scene
2 that you said has great appeal to kids.

3 Do you recall that testimony yesterday?

4 A. Yes, but I'd like to remind you that one of the things I
5 said about this advertising is that given an exposure to the
6 entire campaign, an ad affects the entire set of things that a
7 person has learned to associate with the brand.

8 And so to show someone a Marlboro ad, such as the one
9 on the left, evokes all of the images of freedom and
10 independence that have been conditioned by exposure to all the
11 other ads.

12 You may be showing me ads that are similar for these
13 brands, but I've looked at many of the ads for these nine youth
14 popular brands, and they don't have that extensive conditioning
15 of these images that I talked about with respect to the youth
16 population.

17 MR. WEBB: Respectfully, I would like to ask that that
18 answer be struck. I asked him whether or not he told you
19 yesterday that was one of the adds that appeal to kids. That's
20 all I asked him.

21 MS. BROOKER: Objection. That was a very responsive
22 and helpful answer to the court.

23 THE COURT: Technically, you are entitled to have it
24 struck, but, first of all, it's relevant to the witness's basic
25 testimony. It's certainly consistent with his direct

1 examination, and I'm not going to strike it.

2 MR. WEBB: I'll just try to get an answer to my
3 question and I'll move on.

4 BY MR. WEBB:

5 Q. Is the answer to my question yes?

6 A. Could you remind me of the question?

7 Q. I just asked you whether yesterday under oath you told the
8 court that that Marlboro Light ad on the left you explained was
9 an ad that appeals to kids.

10 A. Yes.

11 Q. And do you see the ad I have on the right? Do you see that,
12 sir?

13 A. Yes.

14 Q. Do you see the same type of tranquil water mountain outdoor
15 scene?

16 A. Yes, I do.

17 Q. Do you know what brand of cigarettes that is?

18 A. No, I don't.

19 Q. Can we show him, Jamie?

20 It's Alpine. Alpine is another brand of cigarettes
21 manufactured by Philip Morris that has no underaged smoking
22 behavior; is that correct?

23 A. I don't know its youth share, but I'm sure it's very small.

24 Q. One last question, sir.

25 Could we show the witness U.S. Exhibit 72747? This is

1 a -- I just have one quick -- Doctor, this is a document that
2 was referenced in your expert report.

3 Do you recall referencing this in your expert report,
4 sir?

5 A. Yes, I do.

6 Q. And you have referenced this as part of your reliance
7 material; is that correct?

8 A. I believe so.

9 Q. Can you tell the court, just generally describe what this
10 document is.

11 A. It's a long time since I've looked at this, so --

12 Q. If you don't remember, then tell me you don't.

13 A. I don't remember.

14 Q. Fine. But you relied upon it and referenced it in your
15 expert report; is that correct?

16 A. Yes.

17 MR. WEBB: I have no more questions.

18 THE COURT: You may step, Dr. Biglan, for now.

19 2:15, everyone, and we will certainly finish this
20 witness by the end of the day.

21 I think, in all fairness to the next witness, that she
22 doesn't have to come to court this afternoon, given what you've
23 told me, approximately two hours for redirect; is that right?

24 MS. BROOKER: Yes. I would certainly hope to finish up
25 in two hours. It's hard to say if I have a lot less, but I

1 probably have two hours.

2 THE COURT: Maybe you should put her on 15-minute call,
3 if for some reason you end up with only an hour.

4 MS. BROOKER: That would be possible. I have to go
5 over --

6 THE COURT: Mr. Brody.

7 MR. BRODY: Your Honor, based on the statements that we
8 heard from counsel for defendants at the end of the day
9 yesterday, and the indication that we would also have an hour
10 from R.J. Reynolds, a little less than an hour from Lorillard,
11 15 minutes from BATCo, I think, and five minutes from Liggett, I
12 don't know that Mr. Wise, who will be examining Ms. Dawson, is
13 going to be able to be prepared to start that this afternoon,
14 given what we heard last night and given the preparations that
15 he's undertaking with our technical people as well as getting
16 the exhibits copied and processed for this.

17 So with that change, I don't know if it's going to be
18 realistic from our perspective to have Ms. Dawson on a 15-minute
19 notice, given our situation.

20 THE COURT: You will be ready at 9:30 tomorrow morning
21 with her?

22 MR. BRODY: We will, Your Honor.

23 THE COURT: 2:15, everybody.

24 (Recess began at 1:07 p.m.)

25

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CERTIFICATE

11 I, EDWARD N. HAWKINS, Official Court Reporter, certify
12 that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

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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.
	.	January 11, 2005
	.	
Defendants.	.	
.	

VOLUME 47
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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

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1 AFTERNOON SESSION, JANUARY 11, 2005

2 THE COURT: Good afternoon, everybody.

3 MS. BROOKER: Good afternoon.

4 THE COURT: All right, Ms. Brooker, we're, of course,
5 going to finish this witness, and I'm sure that no one will be
6 unhappy if you make it before the 4:30 cutoff. So why don't you
7 go ahead.

8 MS. BROOKER: Thank you, Your Honor.

9 REDIRECT EXAMINATION OF ANTHONY BIGLAN, Ph.D.

10 BY MS. BROOKER:

11 Q. Good afternoon, Dr. Biglan.

12 A. Good afternoon.

13 Q. I'm going to ask you some follow-up questions in response
14 to the cross-examination. If you -- if I can put up here, I
15 have the transcript, the final transcript from yesterday, which
16 I just think I'll put up here.

17 Now, do you recall being asked as -- I should put on my
18 speaker.

19 Now, Dr. Biglan, I've put up here the transcript from
20 yesterday where you were asked, "Isn't it true that
21 notwithstanding the length of your report, you've identified a
22 very, very small percentage of documents that, for whatever
23 reason, were important to you in connection with giving your
24 testimony in this case, correct?"

25 And you answered, "Correct."

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1 And then you were asked, "And isn't it true that you
2 nowhere described a scientific method for how you made that
3 selection?"

4 And you answered, "I believe that's correct."

5 Do you recall that testimony?

6 A. Yes.

7 Q. You recall being asked those questions and giving those
8 answers?

9 A. Yes.

10 Q. Okay. Now, how many documents that were relevant to your
11 testimony do you think you reviewed for purposes of this case?

12 A. I have never kept a count, but I'm sure there were
13 thousands.

14 Q. And how many depositions -- well, how did you select your
15 documents for review?

16 A. I began with a summary of documents that had been
17 developed by Cheryl Perry in the Minnesota case, and read those
18 documents, and that was supplemented by a huge amount of
19 documents that I received from the Justice Department, and I
20 generally read documents until I felt I had a clear
21 understanding of a particular aspect of the case.

22 THE COURT: Who is the person who you just named in the
23 Minnesota case?

24 THE WITNESS: Cheryl Perry was an expert witness in the
25 Minnesota case who reviewed and organized summaries of documents

1 in that case.

2 BY MS. BROOKER:

3 Q. And were those documents, the documents you're referring
4 to as the Cheryl Perry documents, documents that you disclosed
5 at the time of your expert report in November 2001?

6 A. Yes.

7 Q. Now, if you look at the testimony that I have added up
8 here -- I think I have to do one at a time, you were asked, "And
9 is it also true that in connection with your analysis of Philip
10 Morris's history you cite a couple, three, four depositions,
11 correct?"

12 "Answer: I do cite depositions from Philip Morris."

13 "Question: In connection with Reynolds -- and in
14 connection with Reynolds I would be -- I think you only cite the
15 testimony -- one piece of testimony from one marketing
16 individual in the entirety of your report, correct -- not
17 report, your testimony?"

18 And you answer: "I don't know."

19 And then you were asked the question, "Isn't it true that
20 with respect to Lorillard and Brown & Williamson, you cite
21 absolutely no deposition testimony whatsoever?"

22 And you answered, "I don't believe that's correct."

23 Do you see that?

24 A. Yes.

25 Q. And those were questions you were asked yesterday; is

1 that right?

2 A. Yes.

3 Q. Now, for the record I'm going to pass up to the Court and

4 Dr. Biglan -- and I have copies for defendants -- the following

5 U.S. exhibits: 17667, 17672, 17673, and 17669.

6 MS. BROOKER: If I may approach Dr. Biglan?

7 THE COURT: Yes, you may.

8 MS. BROOKER: Thank you.

9 BY MS. BROOKER:

10 Q. Now, Chris, I don't know if you can call up 17667.

11 Now, Dr. Biglan, the top you have -- have you seen this

12 demonstrative previously?

13 A. I don't recall seeing it.

14 Q. Okay. And at the top of the demonstrative it indicates

15 U.S. versus Philip Morris, et al. Depositions Reviewed by

16 Dr. Biglan, Page 1 of 3. Do you see that?

17 A. Yes.

18 Q. And will you please look at the columns, or the column in

19 which it indicates Depositions Reviewed, and under each bullet

20 is the name of a deponent, the date of the deposition, and the

21 date of the disclosure letter disclosing when you disclosed that

22 you reviewed a deposition. If you would please take a look at

23 that first column for all three pages, 17667, U.S.

24 Exhibit 17672, and U.S. Exhibit 17673, and I'll give you a

25 moment to do that. And my question is whether or not you recall

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1 reviewing these depositions taken in this case and disclosing
2 that to defendants?

3 A. There are a few for which I don't have a precise
4 recognition, the rest of them very definitely.

5 Q. I'm sorry, the rest of them?

6 A. I very definitely recall reading.

7 Q. Okay. And for the record, do you recall which ones you
8 just don't recall whether or not you reviewed?

9 A. The one of Norma Suter Drew, I'm not sure about.

10 THE COURT: Which one, I'm sorry?

11 MS. BROOKER: Is that on U.S. exhibit --

12 BY MS. BROOKER:

13 Q. Dr. Biglan, let me ask the question to clarify. Is the
14 deposition of Norma Suter Drew on U.S. Exhibit 17667?

15 A. Yes, it is.

16 Q. And if you look at the second column of pages 1 through
17 3, which reads deponent's job titles, what is listed down that
18 column, if you will, on those three pages?

19 A. Well, it appears to be job titles.

20 Q. Okay. Of the deponents, of the deponents of whose
21 deposition you reviewed?

22 A. Yes.

23 Q. And did you disclose to defendants that you reviewed all
24 of these depositions?

25 A. To the best of my knowledge I did.

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1 MR. BERNICK: Well --

2 BY MS. BROOKER:

3 Q. Now, Doctor --

4 MR. BERNICK: Excuse me. Your Honor, I'm not sure -- I'm
5 not sure where we're going with this. Obviously we've dealt with
6 the problem of demonstratives where you have a witness on the
7 stand who is your own witness, and the demonstrative displays
8 your own analysis, you're not supposed to display that
9 demonstrative until you have elicited first the testimony of the
10 witness himself or herself, otherwise it's dramatically leading.
11 Now, this is such a -- whatever he disclosed he disclosed, but we
12 really don't have the witness's independent recollection of that.
13 So I don't really think there's a basis for these demonstratives
14 at all.

15 THE COURT: Number one, I don't know that they're
16 demonstratives, are they, or are they going to be offered as U.S.
17 exhibits?

18 MS. BROOKER: Well, these are U.S. exhibits. Your Honor,
19 another document that I could admit are the underlying letters in
20 which Dr. Biglan disclosed, or I should say the United States
21 disclosed on behalf of Dr. Biglan that he reviewed these
22 depositions. I don't hear defendants saying there's any dispute,
23 and there certainly should not be any dispute that he reviewed
24 these, and I am very happy to now take Dr. Biglan through and ask
25 him to identify each deposition that is listed here and which

1 ones he recalls reviewing.

2 THE COURT: No, we're going to do it differently. First
3 of all, I didn't get an answer to my question. Are the three
4 documents, I think it's three, labeled U.S. Exhibit 667, 672 and
5 673, are they going to be offered as exhibits or are they just
6 demonstratives?

7 MS. BROOKER: They are demonstratives, Your Honor.

8 THE COURT: All right. So that takes care of that issue.

9 Second of all, the doctor already testified that -- maybe
10 he hadn't finished his testimony, but I thought he had, that on
11 these three demonstrative exhibits, the only deposition he didn't
12 remember was the deposition of Norma Suter Drew, listed on U.S.
13 Exhibit 17667. You may wish to clarify the record, or supplement
14 the record, with direct testimony from him as to how these
15 exhibits or demonstratives were put together, just so it's very
16 clear. And ordinarily that should be done first. But again,
17 everybody, I think we need to be much more practical about how
18 we're going about things. The issue was raised on
19 cross-examination, perfectly properly, this is redirect to
20 clarify for the record what depositions the doctor reviewed and
21 which ones, if any, he used in his direct testimony. So let's go
22 about it in the most efficient way. Just ask him how he put this
23 together.

24 MR. BERNICK: He didn't --

25 MS. BROOKER: Your Honor.

1 MR. BERNICK: I completely, obviously, agree with Your
2 Honor's guidance on that, but he didn't put these together. The
3 point is he testified the way he did yesterday, counsel then put
4 these demonstratives, or whatever they are, together at some
5 point, and now instead of eliciting what the witness really knows
6 or recalls, their work product is being tendered to him so he can
7 sign on to it. That's not the way that we've dealt with
8 demonstratives before.

9 THE COURT: If he didn't put this together.

10 MR. BERNICK: That's what he said.

11 THE COURT: Well, I guess I missed that for some reason.
12 If he didn't put this together, then you do have to ensure by
13 questioning him that -- or I should say, whether he specifically
14 remembers reviewing each and every one of these depositions, if
15 that's his testimony, and whether he cited to depositions in his
16 written direct testimony, although having said that, I don't see
17 why we have to even go through that exercise. It's in the direct
18 testimony. This is a demonstrative. If it's accurate, and I'll
19 assume for the moment that it is, then it simply summarizes, as
20 it's supposed to, the answers, or the answer to the questions
21 raised in cross-examination as to what testimony -- what
22 depositions he cited to in his direct testimony.

23 MR. BERNICK: That's what he's going to get to. On the
24 second one it's a matter of record anyhow.

25 THE COURT: It is, but demonstratives are based on what's

1 in the record much of the time. So let's proceed with the first
2 three demonstratives, and get clear what, if at all, the doctor
3 did in preparing this, and if he didn't prepare it, then what his
4 testimony is about it.

5 BY MS. BROOKER:

6 Q. Yes, Your Honor. Dr. Biglan, let me ask you again to
7 clarify for the record, have you seen this demonstrative before?

8 A. No, I have not.

9 Q. Okay. Now, if you would please look down the list of
10 depositions reviewed, and if you could indicate for the record
11 by stating the name of each deponent, each deposition you recall
12 reviewing in this case for purposes of your expert conclusions,
13 then we could clarify for the record. So if you would just
14 start at the top and just indicate for the Court each name of
15 the deponent whose deposition you reviewed in this case.

16 A. Well, I have reviewed -- I'm sure I have reviewed all but
17 two, and those two I'm less certain about.

18 THE COURT: And those who are?

19 THE WITNESS: Carolyn Brinkley and Norma Suter Drew.

20 THE COURT: All right.

21 BY MS. BROOKER:

22 Q. And just to be perfectly clear for the record, the
23 remaining depositions that are listed here on these three
24 demonstratives, you recall that you reviewed those depositions
25 for this case?

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1 A. That's correct.

2 MS. BROOKER: Your Honor, can I just have Dr. Biglan go
3 down and read each name off, if we're not going to seek to admit
4 this demonstrative into evidence, just so it's perfectly clear
5 for the record which depositions he reviewed for this case? And
6 he could just quickly go down and list them, either that or I can
7 offer this as a demonstrative that can be part of the record.

8 MR. BERNICK: No problem, just simply offering it as a
9 list. If it saves time. I think it's kind of a waste of time.

10 THE COURT: It does.

11 MR. BERNICK: If we just offer it as a list he can say
12 I reviewed them all and it is what it is.

13 THE COURT: And he's already testified to that, so
14 everybody, U.S. Exhibit 17667, 672 and 673 is being offered not
15 as a demonstrative but as a standard exhibit. The witness has
16 already given his testimony that he specifically remembers all of
17 the individuals listed except for the two people he identified.

18 The exhibits may be accepted into evidence. Let's move
19 on.

20 MS. BROOKER: Yes, Your Honor, I would like to pass up
21 just to finalize this one more demonstrative, which is U.S.
22 Exhibit 17669.

23 (Government's Exhibits 17667, 17672 and 17673 admitted
24 into the record.)

25 BY MS. BROOKER:

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1 Q. Okay. I think it's already passed up, I just didn't ask
2 about it yet. If you would look at that demonstrative, Dr.
3 Biglan, which at the top is headed Depositions Quoted or Cited
4 to in Written Direct Testimony of Dr. Biglan. Have you seen
5 this demonstrative before?

6 A. I have not.

7 Q. Okay. And can you look at the names of the individuals
8 or deponents who appear on this demonstrative and indicate to
9 the Court whether or not these are depositions taken in this
10 case which you cited in your direct testimony?

11 A. I haven't gone back to my direct testimony to check it,
12 but I believe that this is accurate.

13 Q. Now, I just held up there yesterday's transcript where
14 you were asked, "Isn't it true, with respect to Lorillard and
15 Brown & Williamson, you cite absolutely no deposition testimony
16 whatsoever." Can you please identify whether there is any
17 deposition testimony from Brown & Williamson employees or
18 Lorillard employees on this list?

19 A. Well, I have cited Dr. Sharon Blackie, who is a Brown &
20 Williamson employee, and I cited the deposition of Lynn Beasley,
21 who's an RJR employee, and also Carolyn Brinkley, who is an RJR
22 employee.

23 Q. And specifically Brown & Williamson and Lorillard?

24 MR. BERNICK: Your Honor, if this is designed -- if it's
25 supposed to be responsive to the examination that I conducted, my

1 examination related to the historical practices of Brown &
2 Williamson, the marketing practices, and some of these
3 depositions don't relate to that at all. If he can address that,
4 that's fine, but I think it's misleading right now. Some of the
5 depositions were taken with respect to the intervention programs,
6 the YSS -- the YSPP programs, and those are still included on
7 here, but my questions related to depositions that he cited
8 related to historical marketing practices.

9 THE COURT: It's up to Ms. Brooker whether she wants to
10 direct her question to directly counter your cross or to not
11 counter.

12 MR. BERNICK: Fine.

13 MS. BROOKER: Your Honor, I was just using these to
14 clarify in response to Mr. Bernick's questions that indeed
15 Dr. Biglan has reviewed many of the various company employees'
16 depositions. The first three demonstratives show that many of
17 them are marketing employees, and the last demonstrative simply
18 shows that there are also various company employees in the
19 various departments. I can, I think, move on, I think if Your
20 Honor is going to accept these demonstratives for that purpose
21 it's a point that I've made and that I can move on.

22 THE COURT: All right. Go ahead.

23 MS. BROOKER: Thank you.

24 BY MS. BROOKER:

25 Q. Now, with respect to the testimony that you just looked

1 at for Mr. Bernick, one final question before we move on.

2 Is there anything that was unscientific about your review
3 of tobacco company documents that you testified you looked at in
4 this case, or the depositions, the numerous depositions that you
5 looked at in this case?

6 A. I don't believe so. As I said yesterday, one of the
7 things that I did was read the research that the companies had
8 conducted, and that's something that I do all the time, and a
9 scientist reads research and summarizes it. The other thing I
10 didn't get an opportunity to say yesterday is that there is a
11 paper by Cummings, et al. that did a systematic sampling using
12 the kind of method that Mr. Bernick, I think, was referring to
13 in which they actually sampled from all of the -- from a
14 database that contained all of the documents that were at least
15 available on the various company Websites, and that
16 systematically sampling led to pretty much the same documents
17 that I and other experts have identified and have certainly led
18 to the same conclusions.

19 Q. Which brings me to another line of cross-examination from
20 yesterday. If you would look at this testimony in which you
21 were asked, "Tell me what fraction of the marketing documents
22 that you wrote actually constituted marketing research, that is
23 gathering, analyzing data, what fraction?"

24 And you answered, "I can't give you a specific fraction."

25 "Question: Maybe like 4 or 5 percent?"

1 "Answer: Could you clarify the question?"

2 "Yes, actual marketing research where you got a report
3 that recites data from focus groups, analyzes the data, reaches a
4 conclusion, that kind of research constitutes only a very small
5 fraction of the documents that you reviewed, correct?"

6 And you answered, "No, I don't agree."

7 Do you recall that testimony?

8 A. I do.

9 Q. And why is it that you do not agree with that?

10 A. Well, just because a large volume of the documents that I
11 read were, in fact, research documents, either qualitative
12 research or quantitative research on the impact of various
13 campaigns of the various companies.

14 Q. Now, you're using very specifically the term "research
15 documents" was your focus on reviewing the company's marketing
16 plans or marketing research documents?

17 A. I reviewed -- it was not -- my focus was not on marketing
18 plans, it was much more on marketing research, though I
19 certainly reviewed other documents, particularly regarding the
20 defendants' understanding of the needs of adolescents and their
21 understanding on the need to market to adolescents.

22 Q. Do you recall -- let me take this down. Do you recall
23 being asked, I believe, several times, but specifically you were
24 asked yesterday morning whether you have ever held yourself out
25 prior to your appearing in this case as an expert in tobacco

1 marketing practices, and I believe that you testified a few
2 times that you would not call yourself a tobacco marketing
3 expert. Is that your testimony?

4 A. Yes.

5 Q. Now, how did you bring your expertise you do have to bear
6 upon your review of the tobacco marketing -- the tobacco
7 companies' marketing practices for your purposes in this case?

8 A. Well, as a scientist I read research, reports all the
9 time, and my understanding of, for example the effect of a
10 particular variable on a behavior and my understanding of how
11 behavior develops and so on, is based on a reading of the
12 literature relevant to that. It's often different, quite a
13 variety of methods, and I try to draw from that the best
14 understanding I can of the variables that influence the behavior
15 that I'm interested in.

16 Q. Now, as a behavioral scientist, is it accepted in your
17 field to rely upon the research, the empirical or other types of
18 research of other experts?

19 A. Oh, certainly.

20 Q. And to what extent, if at all, did you do that for
21 purposes of this case?

22 A. Well, extensively there's, as we talked about yesterday
23 and some today, there's extensive literature on the influence of
24 tobacco company marketing on adolescent smoking and all of the
25 psychological variables that lead up to adolescent smoking, so

1 there's that literature. There's the research of the tobacco
2 companies, and there are other sets of research literatures on
3 other aspects of the development of adolescent smoking.

4 Q. And from time to time you were asked questions on
5 cross-examination on whether you would defer to other experts
6 with respect to particular papers that were, you know, presented
7 to you and that you were asked about. Do you recall giving some
8 of that testimony?

9 A. Well, I believe that the -- if I recall correctly, the
10 question was asked of me was whether I myself felt I was an
11 expert on some of those marketing issues, and I think I said
12 there are others in the field that I would defer to in terms of
13 their -- having actually done much of the research.

14 Q. Now, when you were referring to those other individuals
15 or scientists in the field, were you testifying that you
16 yourself were not qualified to review those research papers,
17 either written by other scientists or relied upon by other
18 scientists, in reaching your conclusions?

19 MR. BERNICK: Excuse me, Doctor, before you answer, I have
20 an objection. Number one, if this really is the question, we
21 ought to see his testimony, because he testified that he wasn't
22 that expert twice. Number two, the question is patently leading.
23 Tells him what the answer should be.

24 MS. BROOKER: Your Honor, I'll wait.

25 THE COURT: Well, certainly there was testimony at least

1 twice, I can't remember if it was yesterday or today, on this
2 issue in which the doctor made certain statements. Let me just
3 look at the question again.

4 I do think that the question is very leading. Do you have
5 the exact testimony given by Dr. Biglan either yesterday or
6 today?

7 MS. BROOKER: I'm sure I do. I was trying to be efficient
8 and while we were on this area just ask that, but as I flip
9 through his testimony I'm sure I'll come across it again and I
10 can just bring you up the subject matter a second time.

11 THE COURT: Mr. Bernick probably has it right available.

12 MR. BERNICK: Thank you, Your Honor. It's at page 9579,
13 line 8. And then he testified to this again this morning when I
14 asked him and we clarified my statement was correct that he did
15 not hold himself out as an expert.

16 MS. BROOKER: Just a moment, Your Honor, if I may look.
17 I'm not sure if I'm following up on what Mr. Bernick has raised
18 here, but if you can tell me, 9579, what line, Mr. Bernick?

19 MR. BERNICK: 8.

20 MS. BROOKER: Thank you.

21 BY MS. BROOKER:

22 Q. You testified, Dr. Biglan -- this is one place which we
23 can point out to Dr. Biglan that, "You have never held yourself
24 out to the scientific community as an expert in the contribution
25 that defendants' cigarette marketing makes as a variable in the

1 smoking initiation equation, correct?"

2 And you answered, "No, I would certainly defer to others
3 in the smoking prevention field on that issue."

4 Do you recall that question and answer?

5 A. I do.

6 Q. Now, my response to you is, as a behavioral scientist,
7 how, if at all, do you rely upon the research -- rely upon
8 and/or cite to the research of others who have contributed to
9 that field or to that body of literature, I should say, as
10 you've testified?

11 A. Well, I think that the exchange that Mr. Bernick and I
12 had today was perhaps more informative with respect to how I use
13 that literature and what my competence is to judge that
14 literature, and I certainly have read that literature carefully
15 and feel confident and comfortable in my conclusions about that
16 literature.

17 So, I don't know if that answers your questions or helps
18 the Court but I'm --

19 Q. My question really is, you know, just to be perfectly
20 clear, is do you rely upon that literature in addressing your
21 conclusions for this case?

22 A. Oh, yes, definitely.

23 MS. BROOKER: I think that would clarify, Your Honor.

24 BY MS. BROOKER:

25 Q. Now, how, if at all, is your expertise in psychology --

1 specifically in follow-up to the last question before
2 Mr. Bernick and I got into the exchange -- how, if at all, is
3 your expertise in psychology relevant to looking at marketing
4 methods?

5 A. Well, I think it's relevant in a number of ways. Picking
6 up on what we were just talking about, it's certainly relevant
7 in terms of my understanding of the methodologies that are used
8 to identify variables that are used in behavior and to identify
9 methods for evaluating the effects of an intervention on
10 behavior, or any other variable on behavior. More
11 substantively, as a psychologist, my understanding of the
12 specific psychological processes that are involved in, for
13 example, adolescents, and the factors that influence that
14 development and the implications of that development for the
15 development of not only smoking behavior but a variety of other
16 problem behaviors, they're all, I think -- you know, I draw on
17 my knowledge and training as a psychologist in all of that.

18 Q. You were asked a question, in fact, this was a subject of
19 much of your cross-examination, but I will point to a specific
20 question, and if you need me to put it up there I will. The
21 question is, "Isn't it true that when it comes to the
22 relationship between cigarette marketing and smoking, you've
23 never personally conducted a study published in a peer reviewed
24 journal in which you concluded that cigarette promotions caused
25 smoking initiation?"

1 And you answered, "I hesitate to answer that because I
2 don't typically use the term "cause", so no, I haven't published
3 articles about any variables causing another one."

4 Do you recall that line of questions?

5 A. Yes, I do.

6 Q. Okay. Now, let me ask you, as a behavioral scientist,
7 would research on human subjects involve the question as it was
8 posed in that question?

9 A. Well, as I said, that isn't typically the way it's talked
10 about. I think the concern that behavioral scientists have
11 about talking in that way is that it leaves impression that if
12 this causes that, then it couldn't be caused by something else.
13 So, for example, if we say, well, it's peer influences that
14 cause smoking, there's an implication that it must not be
15 something else, but I think as we -- what we got to in the
16 discussion today is that the -- in particular the peer
17 influences and the marketing influences are intertwined, and the
18 one, in a sense, feeds on the other.

19 Q. Now, why is it that you do not use the word "cause"? Be
20 very specific. Why is it that you do not use the word "cause"
21 in looking at the question or the relationship between whether
22 cigarette marketing causes, or the relationship between
23 cigarette marketing and youth smoking initiation?

24 A. Well, again, I think it's because of this concern that it
25 connotes a sort of billiard ball causation of this billiard ball

1 hits that one and we know this caused that, but in the
2 behavioral sciences, the development of behavior is something of
3 the function of the developing physiology of the adolescent, the
4 changing environment, the things that they're learning, their
5 interactions with peers and family and so on, so it's much more
6 complex, and so the language of influences come to be used --
7 there's a paper that I published with Steven Hayes that
8 discusses some of these issues.

9 Q. Now, you also testified on this issue a few times today,
10 that research on -- well, let me just ask it this way so it's
11 not a leading question.

12 Is research on the question of whether marketing causes
13 youth smoking initiation an ethical study to perform?

14 MR. BERNICK: Objection, lack of foundation, plus beyond
15 the scope of his expertise, nowhere disclosed in any of his
16 expert reports in the case.

17 THE COURT: The objection as to its going beyond his
18 expertise is overruled. First of all, the doctor already
19 testified earlier that any research protocol has to be approved
20 by somebody -- some particular body, and it has different names
21 in different institutions, and some institutions it's just called
22 the IRB, but I don't think that's true with Dr. Biglan's
23 institution. But in any event, somebody has to pass upon the
24 ethical propriety of that particular research protocol.

25 He testified that he has already sat on such bodies and,

1 indeed, that his own research has been subjected to that kind of
2 scrutiny for certain particular either grant applications or
3 studies that he was working on. So I think he's certainly
4 qualified to testify about it.

5 Now, you had a second objection.

6 MR. BERNICK: Yeah, this whole issue got raised, it's
7 nowhere in any of his expert reports and this whole issue got
8 raised because he volunteered --

9 THE COURT: He did?

10 MR. BERNICK: -- this as a reason why studies have not
11 been done, and we've really never had a fair opportunity to
12 examine him on any of those matters, that is to say --

13 THE COURT: You certainly did this morning.

14 MS. BROOKER: And in his first deposition.

15 MR. BERNICK: Excuse me, counsel.

16 Well, all right, the difficulty really is if we knew he
17 was going to be expressing that opinion as an expert, that is
18 within his qualifications, we could have examined him at his
19 deposition thereby being prepared for trial on what procedures
20 were used in these studies, if any, that have been done on
21 adolescents in advertising, whether his testimony is accurate or
22 not as to whether there is an ethical issue with those. He just
23 offered the opinion for the first time, to my knowledge, in this
24 record period by way of explaining why it is that he thinks that
25 the research hasn't been done. Now, we disagree with that, but I

1 certainly was in no position to cross-examine him because we
2 never had an opportunity to investigate these matters with him.

3 THE COURT: What about this first deposition that you
4 mentioned?

5 MS. BROOKER: Your Honor, defendants have made this a
6 significant part of the cross-examination of not just Dr. Biglan,
7 but of every expert in this case. It's something that
8 Mr. Bernick repeatedly elicited from Dr. Biglan on
9 cross-examination because he asked him many questions about
10 whether or not cause, and Mr. Bernick put "cause" up on the board
11 and was very specific about using the word cause, and so
12 Dr. Biglan was simply answering Mr. Bernick's question, and part
13 of his answer was that it is unethical and not feasible to study
14 it in that manner, and I wanted to ask him two follow-up
15 questions to that. I also recognize that three times Dr. Biglan,
16 because of the questions, testified about the unethical, you
17 know, that it would be unethical, and I noticed that it seemed
18 like Your Honor might have even had a question in follow up, so I
19 wanted to follow up just to be helpful to the Court.

20 THE COURT: The objection's overruled. I just want to
21 make it clear, though, that that ruling isn't based on something
22 the government just eluded to, namely that defendants have raised
23 this issue about ethical implications with other witnesses. If
24 they have, I haven't heard about it, and I'm certainly not basing
25 my ruling on that.

1 You may answer the question if you remember what it was.

2 Why don't you ask your question again, please?

3 BY MS. BROOKER:

4 Q. Dr. Biglan, you testified at various points in your
5 cross-examination that the specific research to this specific
6 question would be unethical and not feasible, and I'm going to
7 tell you the specific question and ask you if you could just
8 elaborate on your answer. The question being, "Is
9 advertising -- does advertising cause youth smoking initiation?"

10 MR. BERNICK: I don't understand. I'm sorry, I don't
11 understand the question. Is the question now whether conducting
12 research into that issue would be unethical?

13 MS. BROOKER: I'm just asking Dr. Biglan to follow up on
14 his explanation that conducting such research on the question of
15 whether advertising causes youth smoking initiation, to elaborate
16 on his responses earlier as to why it would be not feasible and
17 why it would be not ethical, and then we can move on.

18 MR. BERNICK: If you want to break those apart. He
19 specifically testified in his deposition that it was feasible, so
20 I never raised -- I raised the issue of feasibility, I don't
21 think he gave any contrary testimony. If he's now going to say
22 it wasn't feasible, that most clearly changes the scope of the
23 examination and I want an opportunity to recross on that subject.

24 THE COURT: There are two separate issues to ask him
25 about. Number one, would it be ethical, and he clearly addressed

1 that issue this morning. Number two, if you wish, you may
2 address the issue of whether it would be feasible. I don't
3 remember him specifically referring to feasibility this morning.
4 Now, if both counsel do, I'll accept your representations. I
5 thought he only said that it would be unethical.

6 MS. BROOKER: I do believe that Mr. Bernick asked about
7 both in follow up to what Dr. Biglan's repeated answers were, so
8 I want to make clear for the record, if Dr. Biglan has
9 conclusions about more specifically about why -- I don't think
10 Dr. Biglan had the opportunity, because Mr. Bernick continued to
11 object to that as an answer, why it would be unethical and why it
12 would not be feasible, and if Dr. Biglan thinks it would be
13 feasible, he can explain his answer.

14 THE COURT: If he -- if you ask him about feasibility, and
15 if that answer is contrary to what Mr. Bernick thinks was given
16 in the deposition, I will allow recross on that very minor
17 specific issue. It's up to you whether you want to ask him about
18 both questions, whether it's ethical or not and whether it's
19 feasible or not.

20 MS. BROOKER: If I could first ask if he has opinions on
21 both of those then I can follow up.

22 THE COURT: All right.

23 BY MS. BROOKER:

24 Q. Dr. Biglan, with respect to those two issues, whether or
25 not advertising causes youth smoking initiation, whether that's

1 a feasible study to perform and whether it's an ethical study to
2 perform, do you have conclusions with respect to each, or just
3 one of those points?

4 A. I have conclusions with respect to both of those.

5 Q. Now, do you recall being asked here, either today or at
6 any of your four depositions in this case, that line of
7 questions from Mr. Biersteker or Mr. Beach, or anyone else who
8 deposed you during those four days?

9 A. Are you asking me about the depositions only?

10 Q. I'm asking you first about the depositions.

11 A. I don't recall.

12 Q. You don't recall one way or the other, or you don't
13 recall being asked?

14 A. I don't recall being asked -- I do not know whether I was
15 asked about feasibility of such a study in my depositions.

16 Q. Okay. Now, do you recall testifying about that earlier
17 today or being asked about that?

18 A. My recollection is like the Court's, that the issue of
19 feasibility didn't come up in our discussion today.

20 MS. BROOKER: Then, Your Honor, I will just follow up on
21 cross-examination and ask Dr. Biglan whether or not what his
22 point was that he was making about it being unethical.

23 THE WITNESS: Well, given the research that's been done
24 showing that even very brief exposure to cigarette advertising or
25 other points, types of marketing such as the amount of the --

1 degree to which there is advertising in a convenience store,
2 given the experimental studies that have shown that when you
3 systematically increase adolescents exposure, even briefly, to
4 those things, that it changes their beliefs about smokers, that
5 it changes, in some cases, their intentions to smoke, that it
6 changes their beliefs about what proportion of young people
7 smoke. Given those findings, you -- and all of the other
8 research on the influence of exposure to cigarette marketing to
9 the development of adolescent smoking, to do a study in which you
10 tried to reach the sort of causal statement that was discussed
11 that the society of prevention research is talking about, to do
12 that study, what a study like that would require would be
13 randomly assigning adolescents to be exposed on a frequent, heavy
14 basis to cigarette marketing or not. And I don't believe that
15 any IRB would agree that that was ethical unless you had some --
16 you were fairly confident that you then had something that you
17 could do with the young people exposed to the marketing to get
18 rid of the effect that have marketing. So I think it would be
19 considered unethical to systematically manipulate extensive
20 exposure to cigarette marketing on the part of adolescents.

21 THE COURT: For the record, we better have a definition of
22 that term IRB.

23 THE WITNESS: Institutional Review Board.

24 BY MS. BROOKER:

25 Q. Now, in order to perform that type of controlled trial,

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1 who would you need the cooperation of?

2 A. Well, in order to do it, you would in some way need to
3 have -- be able to randomly assign either individual adolescents
4 or schools or communities in some way, randomly assign
5 adolescents so that they did or didn't get that advertising, and
6 so probably the difficulty would be in ensuring that there was a
7 set of adolescents that didn't get any advertising --

8 Q. Is there any --

9 A. -- or other marketing.

10 Q. Is there any advertising, is there any communities or
11 any -- strike that. Are there any communities that you're aware
12 of that are not subjected to the defendants' cigarette marketing
13 and advertising?

14 A. I'm not aware of any in the United States.

15 Q. What, if any, cooperation would be required from the
16 tobacco companies to perform a controlled trial such as the one
17 that would answer the question of whether advertising causes
18 youth smoking initiation?

19 MR. BERNICK: At this point, Your Honor, what's happened
20 is that she's gone into the issue of feasibility. There was
21 testimony in his deposition on September the 5th of 2002 by
22 Mr. Biersteker asking the questions that pursued exactly this
23 same line of examination. The testimony that was being offered
24 by the witness that time was that it wasn't possible, it wasn't
25 feasible to do the experiment. In fact, he --

1 THE COURT: That's his testimony now.

2 MR. BERNICK: I know, but he's now got into the issue of
3 feasibility all over again, which is exactly the issue that I did
4 not raise as the witness has now acknowledged, but that I am now
5 foreclosed from cross-examining about, this very line -- Your
6 Honor, there were two opinions that --

7 THE COURT: Everybody's going off on -- I don't want to
8 say tangents, that would not be accurate, but issues that I don't
9 think with we need to go off on.

10 Number one, I think I said about seven or eight minutes
11 ago that if the government opened the door on feasibility, and if
12 you believed, Mr. Bernick, that there was a conflict between his
13 testimony today and his deposition, I would allow you very brief
14 recross on that subject, if you think there's a conflict.

15 MR. BERNICK: Fine.

16 THE COURT: That's number one. Number two, as you just
17 represented to me briefly, what is in the deposition, it didn't
18 sound to me, as if there was a conflict, it sounds to me as if
19 the testimony was consistent.

20 And number three, if I were Ms. Brooker, I might withdraw
21 my question on feasibility and just leave the testimony on the
22 subject of the ethical issues, but that's up to the government.

23 MS. BROOKER: Your Honor, I will be happy to do that,
24 although I would just like to note for the record that a few
25 moments ago Mr. Bernick stood up here and he did argue that there

1 was -- that Dr. Biglan never was asked about feasibility in his
2 deposition, and then he came up here with the transcript, which I
3 had somebody else reviewing sitting here at counsel table,
4 because I wasn't going to make the representation that I was
5 quite sure about which is that this was covered at his
6 deposition. So I'll be happy to withdraw the question so that we
7 don't have any recross on this point.

8 THE COURT: All right. And that means it doesn't exist in
9 the record. I want to be clear for everybody, and that means
10 also that nobody can quote it in their Proposed Findings of Fact
11 and Conclusions of Law. All right, Ms. Brooker.

12 BY MS. BROOKER:

13 Q. Okay. Let me direct your attention, Dr. Biglan, to the
14 line of questions that you were asked about your first
15 deposition, and you may recall the line when I referenced you to
16 pages 38 and 39 of your first deposition which several times you
17 were asked about, and I will state that in response to the
18 question -- let me just get to the question. The question was
19 pointing you to pages 38 and 39 of your deposition transcript,
20 and you testified that you were given -- "I was given homework
21 between the first and second days, but this is on the first
22 day," -- meaning pages 38 and 39 -- "I was asked if I had
23 published anything on cigarette marketing on the previous page
24 and I said I didn't know, and on the subsequent day I provided
25 Mr. Beach with information about papers I had published

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1 regarding cigarette marketing and its influence on" -- and then
2 you were cutoff, and you were asked, "So these two statements
3 here are both false?" And you responded, "I guess they are."

4 Now, do you recall that testimony?

5 A. I do.

6 Q. Now, is it your testimony that you were being misleading
7 at your first deposition?

8 A. No.

9 Q. What is your testimony when you say that you guess that
10 the statements that you gave were false?

11 A. I don't know why I said that. I think we would probably
12 need to look back at the line of questioning that occurred prior
13 to that, which I have not done.

14 Q. Okay. Would you please take a moment to do that?

15 A. You started on page 38?

16 Q. Yes. Let me turn to there. Please start on page 37.
17 I'll put it up on the monitor. It's too light. I turned it
18 upside down.

19 Okay. If you could take a look at that testimony,
20 Dr. Biglan.

21 Did you have a moment to look at it?

22 A. Yes.

23 Q. Okay. "So, you recall that you were being asked about a
24 number of articles expressing the opinion whether cigarette
25 marketing is a substantial contributing cause of smoking

1 initiation?" That was the question that's up there. Is that
2 what you recall?

3 A. Yes.

4 Q. Okay. And you testified there, you cited to a series of
5 articles on that page; is that right?

6 A. That's correct.

7 Q. Okay. And then, if you would turn to page 38, and you
8 testified -- well, the question was, "Now, sir, am I correct
9 that you have not published peer reviewed research on the impact
10 of cigarette marketing on continued smoking among underage
11 persons?"

12 And you answered, "I believe that's correct."

13 And then the question was, "And you have not published
14 peer reviewed research on the impact, if any, of cigarette
15 marketing on smoking among adult smokers; is that correct?"

16 And you answered, "I believe that's correct."

17 Now, do you recall that that's the testimony that you were
18 being directed to --

19 A. I see here.

20 Q. -- yesterday in cross-examination?

21 A. Yes.

22 MR. BERNICK: Your Honor --

23 BY MS. BROOKER:

24 Q. Okay. Now, do you recall giving that testimony at your
25 deposition?

1 MR. BERNICK: I'm sorry, I won't dispute that he gave that
2 testimony. We see it in the transcript, but this is really, I
3 think, not fair to the Court and misleading, because if you
4 really go back and grab the pages preceded, the pages that she's
5 now shown, it's very, very clear from the deposition exactly what
6 happened. And I'm happy to address that with the Court now, but
7 those pages that are really relevant to the opinion that the
8 witness just again recited, the testimony just recited on page
9 38, you have to go back, literally, to page 25 to see what
10 happened in the questions. I'm prepared to address that but I
11 didn't want to interrupt the examination.

12 THE COURT: Well, you are interrupting the examination.

13 MR. BERNICK: Well, I understand.

14 MS. BROOKER: Mr. Bernick continued --

15 MR. BERNICK: Well --

16 MS. BROOKER: If I may respond, Mr. Bernick.

17 MR. BERNICK: Sure, go ahead.

18 MS. BROOKER: Mr. Bernick continues to interrupt and it
19 will take a very long time to get through this redirect. I do
20 not believe that's a proper objection, number one.

21 THE COURT: It is not a proper objection, that's number
22 one.

23 Number two, Mr. Bernick had ample opportunity to address
24 the context of this statement in his cross-examination of the
25 witness. At this point, Ms. Brooker has an opportunity to make

1 whatever efforts she can to quote, unquote, rehabilitate the
2 witness. That's what she's trying to do. Go ahead, please.

3 BY MS. BROOKER:

4 Q. Dr. Biglan, when you were asked to focus your attention
5 yesterday on page 38 and those two questions, do you recall
6 whether you were also asked to look back at page 25, or any
7 other earlier page, yesterday?

8 A. No, I wasn't.

9 Q. And you -- do you recall whether you looked up at the,
10 what was up on the board on those two questions, or whether or
11 not you had the opportunity to go back and look at your entire
12 testimony or other portions of it?

13 A. I didn't go back to the previous pages.

14 Q. Now, you did, in explaining your answers on
15 cross-examination yesterday, explain in follow up that you --
16 and again it's right here in the testimony that we saw -- that
17 you were given homework between the first and the second day.
18 Do you recall?

19 A. That's correct.

20 Q. Now, was part of your homework something that was
21 responsive to those two questions that you were asked that I
22 just showed you on page 38?

23 A. Well, having -- as this discussion has been going on, I
24 looked back at page 25, and the question was whether or not I
25 had ever written anything that I had the opinion that cigarette

1 marketing was an influence on adolescent smoking, and my
2 homework was to identify papers that I published that did
3 express that opinion and I did that, and there were such papers.

4 Q. I'm sorry "I did that" and?

5 A. There were such papers.

6 Q. And did you respond to Mr. Beach's question on that day
7 by going home that evening and doing homework?

8 A. Yes.

9 Q. And when you returned to the deposition the next day,
10 what did you -- information did you provide Mr. Beach to shed
11 light on the questions that he asked you as you indicated on
12 page 25 in here on page 38?

13 A. Well, I think what I indicated was that there were a
14 number of papers, and I began to give him specific citations,
15 but then we went on to other things.

16 Q. So, just in wrapping this up, please respond to what it
17 is, when you testified yesterday that those two statements which
18 we just showed up there again are false, what you meant when you
19 gave that testimony?

20 A. Well, I believe that -- I don't know if this is the way
21 to go about this, but I believe that the issue was whether or
22 not I had done empirical research in which we actually measured
23 adolescents' exposure to marketing and evaluated its association
24 with subsequent smoking, and whether I published in peer
25 reviewed papers on that, and I've been trying to make it clear

1 that no, we hadn't done that. But as to the question of whether
2 or not I believed and, in fact, relied on the empirical evidence
3 of others with respect to the question of whether or not
4 adolescent smoking -- or adolescent marketing does influence
5 adolescents to smoke, I did believe that, I do believe it now,
6 and I have published things on that topic. I hope I'm just sort
7 of clarifying the categories here.

8 Q. Now, were you asked a series of follow-up questions here
9 in Court on that very topic about whether or not you had
10 previously published papers relating to those topics? Do you
11 recall also being asked that line of questions here in this
12 trial?

13 A. Yes.

14 MS. BROOKER: Your Honor, I would like to pass up three
15 exhibits, please.

16 If may approach the witness?

17 THE COURT: Certainly. And defendants have this?

18 MS. BROOKER: Yes, defendants have a copy too.

19 MR. BERNICK: We do.

20 MS. BROOKER: I believe you do. Sorry.

21 BY MS. BROOKER:

22 Q. Now, Dr. Biglan, if you would take a look at U.S.
23 Exhibit 17655, and please indicate whether or not --

24 THE COURT: 176 --

25 MS. BROOKER: 17665, thank you.

1 BY MS. BROOKER:

2 Q. And would you please indicate to the Court whether or not
3 you have seen this demonstrative before?

4 A. I don't believe that I have. It is, I believe, based on
5 a table that I created of these papers and quotations from them.

6 Q. Could you please just describe briefly to the Court what
7 is contained here on U.S. Exhibit 17665?

8 MR. BERNICK: Your Honor, at this point, again, I'm going
9 to object. The practice that the Court has adopted with respect
10 to demonstratives when they're used in the examination of your
11 own witness is they do not get shown to the witness with the
12 content before there is predicate testimony from the witness who
13 prepared them, or predicate testimony from the witness that's not
14 being elicited by looking at the document, otherwise it's
15 leading. Remember when we used to draw things on the board and
16 Your Honor sustained those objections. That's number one.

17 Number two, and we'll make a proffer if that's what's
18 appropriate. I believe the substance of what's being said here
19 opens up substantive testimony that goes beyond the scope of my
20 examination. He testified on direct examination, on direct
21 examination in this case that he previously had opined and
22 expressed the view that advertising caused smoking initiation.
23 On my examination, I showed him those deposition pages which
24 really focused on research and conducted the cross-examination.
25 What this does is to bolster his prior testimony on direct

1 examination that he had published that opinion. Because it's
2 bolstering testimony, it's not really relevant to my
3 cross-examination, it opens up new matters and I want the
4 opportunity to examine him on those things.

5 MS. BROOKER: Your Honor, this is rehabilitation, it's
6 very directly tied to the cross-examination by Mr. Bernick where
7 he asked extensive questions of Dr. Biglan to the extent related
8 to, I should say, the types of research that Dr. Biglan -- I mean
9 he's asked him a series of different kinds of questions about the
10 types of research he performed previously and whether or not he
11 studied marketing as a factor along with all those other factors
12 and all those circles that Mr. Bernick put up there, he asked
13 Dr. Biglan repeated questions about whether or not Dr. Biglan had
14 involved -- been involved in other kinds of research relating to
15 marketing. And this demonstrative, which I believe I can lay a
16 foundation for, the content of the demonstrative through
17 Dr. Biglan, and again, then the testimony will be on the record
18 and --

19 THE COURT: Let me ask Mr. Bernick a question. Assuming
20 that an adequate foundation can be made or established, and we
21 haven't done that yet, I don't really understand your statements
22 or arguments that this goes way beyond the scope of your
23 cross-examination.

24 MR. BERNICK: There's obviously a lot of focus on the
25 testimony that he gave that he said was false yesterday, and I

1 can certainly understand that. Counsel is now, by talking about
2 other parts of the deposition and by talking about these
3 documents sought to rehabilitate the witness on that subject. I
4 can understand why she would go down that path. But the
5 testimony the witness just gave was that he acknowledged that he
6 hadn't done research, he hadn't published research papers --

7 THE COURT: Which is exactly what he said yesterday
8 afternoon.

9 MR. BERNICK: That's correct, and therefore, therefore
10 what I would suggest to the Court is therefore the testimony that
11 he gave under oath that acknowledged that and said it's correct
12 was absolutely correct. What is now being addressed is the
13 separate question of whether he's ever published a paper that
14 offered the opinion based on his own research or not, really not
15 his own research, ever offered the opinion. We've never disputed
16 that. It's never been an issue of controversy at all. He
17 clearly has testified that he has written papers where he has
18 offered the opinion. It's just that he has never done the
19 research to support it. That's what he admitted the first day of
20 his deposition, and if you went back to page 25 for 12 pages, he
21 discussed in that deposition all of the papers that he wrote that
22 expressed the --

23 THE COURT: I don't think he has ever denied that he
24 didn't do the research. He may have misunderstood a question at
25 the deposition, I'll just assume that for a moment, but I

1 don't -- certainly not in this proceeding has he ever denied that
2 he hasn't done the underlying research.

3 MR. BERNICK: Well, that's the whole -- that's really the
4 whole point. That's why I showed him the deposition testimony
5 which was focused on research papers where he expressed the
6 conclusion, and where he has said previously, correct, I haven't
7 done that. Then he said that that testimony was false, and that
8 sent us down this whole road of, well, then I went off and did
9 homework and all the rest of that. The homework that he was
10 asked didn't have anything to do with it, and I can show Your
11 Honor that the homework didn't have anything to do with it, so we
12 now have a very messy record about not what really so much as he
13 actually did, but about his testimony under oath which bears upon
14 his credibility.

15 THE COURT: And I think you all are making a mountain out
16 of a mole hill. I think, possibly, the witness misunderstood a
17 question asked in the deposition. That misunderstanding has now
18 spawned this extensive cross-examination as if we're in a murder
19 trial, and the defendant is denying a crucial fact when, in fact,
20 the witness has basically always taken the same position. He
21 didn't do the empirical research, but he has written extensively,
22 I gather, on the broader subject and he has relied completely and
23 totally on the empirical research done by others in their many
24 relevant articles. I think that's where we are.

25 MR. BERNICK: I think that's part of where we are, Your

1 Honor. Unfortunately it is what it is. I mean, I have no choice
2 but to point this out. In these papers where he's expressing
3 these opinions, he's not necessarily relying upon the extensive
4 research that was done by others, because it hadn't even been
5 done yet. What he's now saying in this case is that he's relying
6 on the research of others, that is, research that bears upon
7 whether, in fact, cigarette advertising causes youth initiation.
8 The papers that he's written that have made that commentary, they
9 don't constitute reviews of empirical data, they constitute
10 really one of the, you know, factors that's out there in the
11 environment that he's aware of during the course of his research
12 with regard to adolescents. That's why yesterday I pursued this
13 whole thing to clarify, based on his prior testimony, that he
14 hadn't done the research himself and he didn't know that research
15 because that's what he testified to before, where as he comes
16 here now and says I know it's an influence, I can express these
17 views as an expert. The fact that he hadn't done the research
18 obviously bare upon his credibility. He then said that testimony
19 was false, that then, led to lots of explanations about why it's
20 false. The explanations are no better than his first testimony.
21 The explanations that he's offering are false, and we can
22 demonstrate it by reference to his prior deposition, and that
23 most certainly does bare upon his credibility.

24 Now, I don't want to belabor this further, because I know
25 that I've spent up a lot of time speaking and we want to get the

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1 witness done, but in fairness I do have to talk about what I
2 believe the record has shown, and we're prepared to proffer the
3 deposition pages that bare out exactly what I'm saying.

4 THE COURT: One thing I want to make very clear, the
5 witness has testified repeatedly that he didn't do the empirical
6 research. I did not hear any testimony from the witness, which
7 Mr. Bernick just sort of alighted in in his last paragraph or
8 two, I heard no testimony from him that he wasn't familiar with
9 the research and didn't know anything about it.

10 What did you have to say, and then I'm going to tell what
11 you to do and then we'll move on.

12 MS. BROOKER: I was going to say that Mr. Bernick has made
13 the case far better than I myself could for why it is that I need
14 to rehabilitate Dr. Biglan on this point based on the very
15 lengthy commentary he made, and for practical purposes, Your
16 Honor, I am trying to expedite this, instead of bringing here all
17 of these publications and putting each one before Dr. Biglan, I
18 simply wanted to summarize them and ask him, really, a few
19 questions to elicit that he had held the opinions prior to his
20 being involved in this case and had done research, and either
21 commented upon others' research or had himself performed research
22 that looked at the question of whether marketing was a factor in
23 youth smoking behavior, and that's simply what this demonstrative
24 is doing.

25 THE COURT: You're going to have to establish the

1 foundation for this demonstrative. Are you going to go through
2 each and every article that's mentioned in this demonstrative?

3 MS. BROOKER: I really don't think I need to do that to
4 establish a foundation. I really think I can do this in a few
5 questions.

6 THE COURT: You may move forward with your foundation and
7 then we'll see where we are when I hear answers to those
8 questions.

9 MS. BROOKER: Thank you, Your Honor.

10 BY MS. BROOKER:

11 Q. Dr. Biglan, let me just ask the questions again, because
12 I'm not sure what you recall having already answered. But do
13 you recall seeing this demonstrative, or a table similar to this
14 demonstrative, before?

15 A. Yes, I created a table of this sort.

16 Q. Which contains the studies on this table?

17 A. Yes.

18 Q. Okay. And what was the purpose of your creation of this
19 table, which has now been entitled U.S. Demonstrative 17665?

20 A. Well, I think the main thing that prompted it was a
21 statement that was made in the opening statement that when I was
22 asked to be an expert in this case, the scales had fallen from
23 my eyes and I had come up with the opinion that cigarette
24 marketing influenced adolescents to smoke, and so I thought it
25 was important to identify papers that I had published prior to

1 my being involved in this case that showed that I, in fact, did
2 believe cigarette marketing was an influence on adolescent
3 smoking.

4 Q. And did you publish all of the papers that are listed
5 here on this demonstrative?

6 A. Yes, I did.

7 Q. Okay. And are -- how would you just characterize or
8 summarize the nature of what is depicted here by the summary of
9 these studies that you performed?

10 A. Well, a number of them describe smoking prevention
11 interventions that we evaluated and described how one of the
12 components of those interventions was an activity different --
13 different interventions had different activities, that were
14 designed to sensitize adolescents to marketing influences and
15 designed to undermine the influence of those marketing stimuli
16 on adolescents.

17 Q. Are all of the -- excuse me, are all of the publications
18 on U.S. Exhibit 17 -- or Demonstrative 17665, publications --
19 your publications that are before the date of your expert report
20 on November 4, 2001?

21 A. Yes, there are two of these publications that are dated
22 2000, but they were written -- they were written and published
23 before I got involved in this case. If I could --

24 MS. BROOKER: Your Honor, I don't feel the need -- I don't
25 think I need to -- I don't think it's necessary for me to go

1 through each one of these publications and ask questions, and I
2 would just simply offer this as a demonstrative for the purposes
3 for which Dr. Biglan testified.

4 THE COURT: I'm going to ask one or two questions just to
5 make sure our record is clear. U.S. Exhibit 17665 is being
6 offered as a demonstrative only, which means that it doesn't come
7 into the record.

8 Dr. Biglan, I want to know from you, are you prepared to,
9 of course under oath, adopt as your testimony the fact that you
10 wrote every one of the articles listed in this demonstrative?
11 That's number one.

12 Number two, that the quotes from those articles listed in
13 the demonstrative are accurate.

14 And number three, that you actually wrote the article.
15 I'm not talking about published, but wrote the article listed in
16 the demonstrative prior to your starting work as an expert
17 witness on this case?

18 THE WITNESS: Yes.

19 THE COURT: Do you need me to go over that question with
20 you again?

21 THE WITNESS: Well, I think the question is, did I write
22 them? Obviously they're co-authored, but I was an author on each
23 of these papers. They were all published before I was involved
24 in this case.

25 THE COURT: Actually, my question was, were they written

1 before --

2 THE WITNESS: Yes.

3 THE COURT: Before you became involved?

4 THE WITNESS: Yes, they were both written and published

5 before I was involved.

6 THE COURT: And my third question, which was actually my

7 second question, is --

8 THE WITNESS: Yes.

9 THE COURT: -- are you prepared to state that every quote

10 listed in this demonstrative is an accurate quote from the

11 article in question?

12 THE WITNESS: To the best of my knowledge these are all

13 accurate quotes from the articles.

14 THE COURT: All right. Go ahead, please.

15 MS. BROOKER: Thank you, Your Honor. I have one more

16 exhibit that I will pass up.

17 BY MS. BROOKER:

18 Q. Did I pass up a copy of this to you, Dr. Biglan? No.

19 I'm sorry, I have them up here.

20 MS. BROOKER: If I could approach. For the record, I am

21 showing Dr. Biglan what has been marked as U.S. Exhibit 17671.

22 BY MS. BROOKER:

23 Q. Dr. Biglan, could you just briefly describe what is this

24 book and what is the year of its publication?

25 A. This is a book entitled Changing Cultural Practices, A

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1 Contextualist Framework For Intervention Research.

2 Q. And what was the date you published this book?

3 A. 1995.

4 Q. Okay. And is there anything that you prepared to point
5 out to the Court about your statements made in this book?

6 MR. BERNICK: Your Honor, I have the same objections that
7 I made before.

8 THE COURT: Well, I'm going to sustain your objection for
9 different reasons. That question is just too open-ended.

10 MS. BROOKER: Okay, Your Honor, I can be more specific.

11 BY MS. BROOKER:

12 Q. In writing this book, and you said in 1995 it was
13 published; is that correct?

14 A. Yes.

15 Q. Okay. Did you identify the tobacco companies' cigarette
16 marketing practices?

17 A. Yes.

18 Q. Okay. And did you have a discussion in your book in
19 1995, before you testified in this case, about the tobacco
20 companies' marketing practices?

21 A. Yes, I did.

22 Q. And what, if you could briefly point out to the Court,
23 what on page 217 or 216 of this book of yours -- which I've
24 provided a couple pages of -- what statements you have made that
25 relate to the tobacco companies' marketing practices?

1 A. Well, I -- the -- one of the -- the book is about the
2 evolution of the practices of groups and organizations, and it
3 was motivated by a desire to better understand and develop
4 research on the larger social systems that affect individuals.
5 Most of the research that's been done on adolescent smoking, for
6 example, up to that point was on individual adolescents and how
7 you affect them, and what I was trying to do in this work was
8 get at what are the larger social system variables that affect a
9 practice like smoking. And so the first six chapters of this
10 book are sort of a theoretical framework that could be applied
11 to any cultural practice, and then there are four chapters on
12 specific cultural practices and analysis of those and how they
13 could be affected in the interest of public health. And this is
14 a chapter on reducing the prevalence of tobacco use in which I
15 tried to systematically analyze, not only the individual and
16 close proximal influences on the behavior of smoking, but also
17 the cultural practice -- the prevalence of smoking, and then you
18 get out into the practices of both the tobacco control community
19 and the marketing -- and the tobacco industry, and I analyzed
20 the practices of both organizations, or systems, in terms of
21 their material consequences. So this is -- the excerpt here is
22 on an analysis on the way in which the marketing practices
23 influence adolescence smoking.

24 Q. Dr. Biglan, did you provide this copy of this book to the
25 Department of Justice?

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1 A. Yes.

2 Q. Okay. And who highlighted these portions of your book
3 which are copied here in part?

4 A. I don't know if I highlighted -- I don't recall if I
5 highlighted them or not.

6 Q. Do you recall highlighting any portion of your book that
7 you provided to the Department of Justice?

8 A. I believe at some point I marked a section, this section
9 of the book, to bring it to your attention, yes.

10 Q. And what was the purpose of bringing this to our
11 attention?

12 A. Well, one was that it, again, speaks to the issue of
13 whether I believe that tobacco marketing was an influence. And
14 I think another was to get at the issue of the evolution of the
15 practices of the tobacco companies over the last 40 years going
16 from a time when they were explicit about their need to and
17 intention to market to adolescents, and then subsequently their
18 need to be more discreet about what they were doing and what the
19 effects of it were, all of which I argue in here and not just
20 about tobacco, but I apply that general analysis to the tobacco
21 industry and argue that the practices were selected by the
22 material consequences of those practices, that when a group or
23 an organization engages in practices that are successful in
24 getting the material consequences, and if they develop practices
25 that are not successful or harmful, that practice will either

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1 dwindle or the organization itself will dwindle.

2 Q. Okay. Thank you, Dr. Biglan. I'm going to show you some
3 testimony that you gave yesterday where you were asked, "Isn't
4 it true that you do not have any evidence with respect to any of
5 the brand marketing ads in your work that any of them was
6 test-marketed among anybody less than 18?"

7 And you answered, "Yes, I am not aware of any research by
8 any of the companies on the impact of a particular campaign on
9 anyone under the age of 18."

10 And then on the next page you were asked another follow up
11 question where you gave an answer, "Certainly the defendants have
12 tracked the impact of their campaigns, at times, on those under
13 18 through survey research."

14 Do you see that testimony?

15 A. Yes.

16 Q. Okay. And do you recall that testimony yesterday?

17 A. I do.

18 Q. Okay. Now, were you making a distinction between survey
19 research and other types of research in giving those answers?

20 MR. BERNICK: Objection, leading.

21 THE COURT: The objection's overruled.

22 THE WITNESS: Well, my concern in saying that was that,
23 well, it may be true that the -- that one can develop a campaign
24 by doing focus groups and quantitative research with those who
25 are, let's say 18 to 24. As we discussed yesterday and today,

1 because of the lack of a bright line between 17 and 18, one can
2 be confident that research that showed that a cigarette -- an
3 advertising campaign was effective with 18-to-24-year-olds would
4 be effective with those under 18. What I was thinking about here
5 are documents such as Myron Johnston's 1975 document where he
6 referred to his own data showing that among 15-to-17-year-olds
7 Marlboro was doing even better than it was among those over 18.
8 And so tracking your market share is, in my view, part of the
9 research that one does to see how one's doing with a group, even
10 if one isn't doing other kinds of research, such as the focus
11 groups and qualitative research to develop the advertising
12 campaign.

13 BY MS. BROOKER:

14 Q. And are you applying --

15 MR. BERNICK: I'm sorry, Your Honor. I move -- I don't
16 understand the question that was posed; I certainly don't
17 understand the answer as being responsive. There were two
18 questions posed. One asked him whether he was aware of test
19 marketing, and he said the answer to that was no. She then
20 linked that to tracking through surveys where he did say there
21 was tracking through surveys. Is he now saying that his prior
22 answer was -- is he now explaining the prior answer on test
23 marketing, or is he explaining this answer? I don't know whether
24 he's standing by the answer to the first question, the second
25 question or both of them.

1 MS. BROOKER: Your Honor, if I could just point out, and I
2 will follow up on that.

3 THE COURT: All right.

4 MS. BROOKER: Because I want the record to be clear.

5 BY MS. BROOKER:

6 Q. The first question you were asked was with respect to
7 test marketing. Do you recall that?

8 A. Yes.

9 Q. Okay. And the answer that you gave, is that still your
10 answer?

11 A. I said yes, I am not aware of any research by any of the
12 companies on the impact of a particular campaign on anyone under
13 the age of 18. And I was thinking about these exact issues that
14 I just spoke about in giving that answer.

15 MR. BERNICK: Well --

16 MS. BROOKER: If I could follow up.

17 MR. BERNICK: Well --

18 THE COURT: What is the objection?

19 MR. BERNICK: The objection is that the question asked
20 whether he stands by his answer as being correct. And if we
21 could have a response to that question, I think that that's fair.

22 THE COURT: What is your response, do you still stand by
23 the answer that you gave to that question?

24 THE WITNESS: Yes.

25 BY MS. BROOKER:

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1 Q. And could you please elaborate, as I think you were going
2 to do, on what specific limitation you were giving in your
3 answer when you said: "I am not aware of any research by any of
4 the companies on the impact of a particular campaign on anyone
5 under the age of 18."

6 A. Well, I -- the example of the document of Myron Johnston
7 is -- that's an example of what I was thinking about, that that
8 is evidence that Philip Morris --

9 THE COURT: Let me ask you this: Is it your answer to the
10 question that was just asked by counsel the answer you gave
11 two minutes ago?

12 THE WITNESS: Yes.

13 THE COURT: That's what I thought.

14 THE WITNESS: Yes, it is.

15 THE COURT: Okay. Let's move on.

16 BY MS. BROOKER:

17 Q. Now, you just identified in your response the last time,
18 I believe, one of your recent responses to tracking data of the
19 tobacco companies, which you were asked extensively about by
20 Mr. Bernick; is that correct?

21 A. Yes.

22 Q. Okay, now can you just describe how it is that you took
23 into consideration the tracking data of the tobacco companies
24 when you performed your analysis?

25 A. Well, I thought it was relevant to -- in my view, it's

1 the ultimate evaluation of their marketing practices. Their
2 market share among a particular age group, whether it's those
3 under 18 or those over 18, is the ultimate test of whether a
4 campaign that they've developed and implemented, or other
5 marketing practices that they've developed or implemented is, in
6 fact, successful.

7 Q. Have you come to that conclusion in part from a review
8 that you have done of the tobacco company documents which you've
9 cited in your testimony?

10 MR. BERNICK: Objection, leading.

11 THE WITNESS: Yes.

12 THE COURT: Excuse me.

13 THE WITNESS: I'm sorry.

14 THE COURT: Let me hear the question again.

15 BY MS. BROOKER:

16 Q. What is -- I can just ask it more openly. What is the
17 basis for your conclusion, as you just stated it, with respect
18 to the tobacco companies' use of tracking data?

19 A. Well, I -- that the tobacco companies used that tracking
20 data to evaluate, I think as I just said, to evaluate the impact
21 of their marketing practices on their market share.

22 Q. Have you seen statements in any of the tobacco company
23 documents which you discussed in your direct testimony which
24 states that tracking data was not being used by the tobacco
25 companies for the purpose for which you've just testified?

1 A. I'm sorry, could you repeat the question?

2 Q. Have you seen statements in the tobacco companies'

3 documents that you've reviewed which state that the tracking

4 data was not being used by the tobacco companies for the

5 purposes that you've just described?

6 A. No.

7 MS. BROOKER: When would be a good time for an afternoon

8 break, or do you want to keep going?

9 THE COURT: Well, that's a good question. I actually

10 wasn't thinking of an afternoon break. How much longer do you

11 have?

12 MS. BROOKER: I'm just probably -- I guess the answer to

13 that, in part, depends on objections, but I don't expect to go

14 any more than 15 minutes if there were no more objections. I

15 think I can wrap up in 20 minutes.

16 THE COURT: Let's see how the court reporter is doing.

17 THE COURT REPORTER: Your Honor, I'm fine.

18 THE COURT: You're okay.

19 MS. BROOKER: Would you like to keep going?

20 THE COURT: Let's just try, unless are people falling

21 apart?

22 MR. BERNICK: For unrelated reasons, yes.

23 THE COURT: Well, I can't deal with unrelated reasons,

24 Mr. Bernick. Is our witness all right, or do you need a

25 five-minute break?

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1 THE WITNESS: No, I think I can tough it out for
2 15 minutes.

3 THE COURT: We'll all try, everybody. Go ahead.

4 BY MS. BROOKER:

5 Q. Now, Dr. Biglan, you were asked a lot of questions and
6 particularly today, if you recall, on the topic of whether or
7 not you believe, or have ever believed, that peer influence is
8 the single most important factor in determining when and how
9 cigarettes are first tried by adolescents. Do you recall that
10 line of questions?

11 A. I do.

12 Q. Okay. And you testified numerous times in response to
13 that line of questions that that was not a variable, I believe,
14 and let me ask you: When you were testifying that that was not
15 a variable that you used in some of the studies where you
16 reached the conclusions about the influence of peers, could you
17 please elaborate on specifically what you meant by that?

18 MR. BERNICK: I object to the form of the question, and I
19 really think that counsel has cited his prior testimony in error
20 as the predicate to the question.

21 THE COURT: Sustained.

22 BY MS. BROOKER:

23 Q. Let me ask -- here's the question that you were asked,
24 and here's the answer that you gave --

25 THE COURT: Is this coming from --

1 MS. BROOKER: The testimony today.

2 THE COURT: All right. From the transcript?

3 MS. BROOKER: Yes.

4 BY MS. BROOKER:

5 Q. "Isn't it true that your own research supports the
6 conclusion that the single most important factor in determining
7 with when and how cigarettes are first tried are peers?"

8 MS. BROOKER: And it's a rough transcript, Your Honor,
9 because that's what we have access to.

10 BY MS. BROOKER:

11 Q. And you answered, "Yes, I made that statement, and I
12 believe it was in the context of the variables that we included
13 in the analysis."

14 Do you recall that question and the answer?

15 A. I do.

16 Q. Okay. Please elaborate on what you mean when you
17 indicate that it was in the context of the variables that you
18 included in the studies.

19 A. Well, I can't be sure. I regret that I didn't memorize
20 that statement and which paper it came from, but we published a
21 couple of papers in which we used some measure of adolescents'
22 exposure to peers, or how many of their friends smoked, looking
23 at that as a predictor of subsequent smoking, and I know for a
24 fact that in at least one of those studies we did say that among
25 the variables that we looked at, the social influence variable

1 was the single most important factor. And I think that -- and
2 so it's correct in the context of the other variables we
3 studied. I think I also pointed out that we accounted for
4 probably less than 25 percent of the variance in smoking in any
5 of those studies, and so there was a lot of other variants to be
6 accounted for, and I think subsequent research has shown that
7 exposure to cigarette advertising is one of the factors that
8 accounts for -- additional variance in adolescents smoking.

9 Q. In the study or the studies that you're referring to, was
10 advertising one of the variables that you included in those
11 particular studies?

12 MR. BERNICK: I'm sorry. A, which study? B, the
13 suggestion, then, is the study that he did, because the question
14 was "variables you included", and we haven't identified the study
15 that he did subsequently where he included additional variables.

16 MS. BROOKER: I'm just following up to Dr. Biglan.
17 Dr. Biglan just said specifically that he couldn't remember -- he
18 couldn't cite specifically as he's sitting here, name those
19 studies, and I'm asking him -- I think he can answer the question
20 whether or not when he reached that conclusion, whether or not
21 those, or that single study, or those few studies that he's been
22 testifying about included advertising as a variable. He can
23 answer the question and clarify it if he needs to.

24 MR. BERNICK: I don't know -- we've now get even more
25 complication. He did studies prior to the time he made the

1 statement that he reported in the deposition and he reiterated at
2 trial. Counsel then asked, Well, have you learned something new?
3 He said, Yeah, there are new studies. Are we asking about the
4 old studies --

5 MS. BROOKER: I think this is --

6 MR. BERNICK: -- or are we asking about the new studies?

7 THE COURT: You should simply clarify which studies your
8 question relates to.

9 MS. BROOKER: Well, I would like Dr. Biglan to clarify
10 when Mr. Bernick asked that question, which is not clear, whether
11 or not Dr. Biglan can elaborate on what he meant by his answer.
12 So Dr. Biglan is the one who just needs to clarify.

13 THE COURT: All right. Go ahead, please.

14 THE WITNESS: I'm afraid you have to ask the question
15 again. I'm lost.

16 BY MS. BROOKER:

17 Q. Certainly. You were asked today:

18 "Question: Isn't it true that your own research supports
19 the conclusion that the single most important factor in
20 determining with when and how cigarettes are first tried are
21 peers?"

22 "Answer: Yes. I made that statement and I believe it
23 was in the context of the variables that we included in the
24 analysis."

25 So I am asking, and the reason I am asking is because it

1 is unclear on the record, the question that was asked of you, and
2 I just want you to elaborate what specifically you were referring
3 to in giving that response.

4 A. Well, I -- there -- variables -- we did not measure
5 adolescents' exposure or liking for advertising in that study,
6 and so that simply wasn't studied in those papers. I don't know
7 if that answers the question.

8 Q. And so my question, again -- this is how we all started
9 this -- was, is it your testimony that you cannot recall which
10 study where you made a statement that -- of the importance of
11 peers?

12 A. I can't recall which paper that statement was made in.

13 Q. Okay. Is it one paper or more than one paper?

14 A. I don't know. Certainly there were a number of papers
15 where we said that we thought that peer influences were very
16 important as an influence in adolescent smoking.

17 Q. And so my specific question is, in those papers that you
18 can't recall the names of, was advertising a variable that you
19 used in those studies or that study?

20 A. It was not measured in any of those studies.

21 Q. Okay. Thank you.

22 Now, Dr. Biglan, do you recall that you were asked a
23 couple of questions about the 1994 Surgeon General Report and
24 you, in fact, in giving some of your responses pointed, I believe
25 it was Mr. Bernick, but it was someone asking you a question

1 today, to a quote or a statement in the 1994 Surgeon General
2 Report. Do you recall?

3 A. Yes.

4 Q. Okay. Do you recall what the statement in the 1994
5 report was that you referred counsel to in the
6 cross-examination?

7 A. I believe the question was asked, a question was asked
8 regarding the position that the Surgeon General's Report took on
9 whether or not cigarette advertising or marketing causes
10 adolescents to smoke, and I stated that the -- my recollection
11 was that the Surgeon General had stated that the -- that the --
12 it was misguided to talk about it in terms of causes.

13 Q. Okay. Now, just to clarify for the record, so that the
14 Court can be clear where you were citing or quoting from,
15 because I don't believe you were handed a copy of the '94
16 Report, do you see the quotation that you were discussing
17 earlier today?

18 A. Yes. The second paragraph that's visible here says: "A
19 misguided debate has arisen about whether tobacco promotion,
20 quote/unquote, causes young people to smoke; misguided because
21 single source causation is probably too simple an explanation
22 for any social phenomenon. The more important issue is what
23 effect tobacco promotion might have."

24 "Current research suggests that pervasive tobacco
25 promotion has two major effects. It creates the perception that

1 more people smoke than actually do and provides a conduit
2 between actual self-image and ideal self-image; in other words,
3 smoking is made to look cool. Whether causal or not, these
4 effects foster the uptake of smoking, initiating for many a
5 dismal and relentless chain of events."

6 THE COURT: Do you have any disagreement with what is
7 stated in that paragraph from the Surgeon General's Report?

8 THE WITNESS: I wouldn't disagree with it, but I would say
9 that since 1994, there's been quite a bit of elaboration of our
10 understanding of the role that cigarette marketing plays in the
11 development of adolescent smoking. The -- I think it's the third
12 sentence focuses on the self-image issues because of the work of
13 Chasen and others, had by then been published, showing that
14 adolescents are particularly likely to smoke if they believe that
15 their image is like that of a smoker; that the images that people
16 have -- young people -- adolescents have of smokers are
17 distinctly different from the images they have of nonsmoking
18 adolescents.

19 BY MS. BROOKER:

20 Q. The first sentence that you actually quoted earlier in
21 your testimony and that you now just read again here on
22 redirect -- do you agree today with that statement, that first
23 sentence?

24 A. Yes. I think it's fundamentally what I've been saying
25 about the use of the word "cause."

1 Q. Thank you.

2 Now, if you would take a look at JDEM 010200, which is
3 the large board that's sitting up here -- and I know you can't
4 see that, Dr. Biglan. I would wonder if -- do you have a copy
5 of it up there, because I do believe you were presented with a
6 copy?

7 And, Ed, I'm really not going to --

8 A. I may have it, but it's probably better for me --

9 MS. BROOKER: Ed, would you mind seeing if you could help
10 him find it up there? Let me just see. It's just a one-page.

11 It's right here (indicating). Okay. I didn't want to
12 make you go to the trouble.

13 Does Your Honor still have a copy of this? All right. I
14 guess we're going to put the big board up. Thank you, Renee.

15 BY MS. BROOKER:

16 Q. Now, do you recall being asked a few questions about this
17 demonstrative, I believe it was yesterday?

18 A. Yes.

19 Q. Okay. And do you believe what representations were made
20 in the questions about this demonstrative? What was your
21 understanding of the representations that were made?

22 MR. BERNICK: Your Honor, if we're going to go through
23 that, then we really ought to have the testimony up before the
24 witness so we can see exactly what questions were posed and what
25 answer he gave.

1 MS. BROOKER: I'm really asking if he recalls what his
2 understanding of what he was being asked and I'm trying to
3 expedite.

4 THE COURT: It's overruled.

5 MR. BERNICK: I'm sorry. I don't --

6 THE COURT: At this moment, I don't know where she's going
7 with her testimony. The first question is very simple and that
8 is whether the witness remembers what he was asked about this
9 particular board. So let's just proceed that way for now.

10 THE WITNESS: Well, I recall being asked a question to the
11 effect of whether any of the -- any of these documents obtained
12 data from those under the age of 18. But more precise than that
13 I can't be.

14 BY MS. BROOKER:

15 Q. Do you recall what was represented to you in the
16 questions about what the letter "T" meant on the demonstrative
17 up there?

18 A. Yes. I believe it was stated that the "T" stood for
19 tracking.

20 Q. Okay. All right. And was it your understanding from the
21 questions that if there was a "T" for tracking on this
22 demonstrative, that that represented that these were the ages
23 contained in the document for tracking purposes?

24 A. That was my understanding.

25 Q. Okay. I'm going to show you a few documents which are

1 listed here on this board. But let me first ask you:
2 Dr. Biglan, have you ever had an opportunity to review this
3 demonstrative at all, other than seeing it in court here
4 yesterday?

5 A. No.

6 MR. BERNICK: Your Honor, I'm going to object. To the
7 extent that she wants to go after the question of whether the
8 numbers that on there or the designations are accurate or not,
9 that really was an area that was foreclosed during the course of
10 my examination.

11 I described that chart, and this is at pages 7587 and 7588
12 and 7589, and there were then objections to the use of the
13 demonstrative; it was complicated, unfair. There was then a
14 colloquy. I then asked him -- I said I'm not asking him to
15 specify the accuracy; I'm asking him to verify that in fact
16 overwhelmingly, the documents that he himself cited in his direct
17 testimony, when they specify an age range, specify an age range
18 18 and over unless they're tracking documents.

19 That's the question. Your Honor overruled the objection:
20 "You may answer."

21 Then the witness said: "Is the question whether I can
22 verify that this is accurate?"

23 And I then said: "Do you want me to ask the question
24 again, Dr. Biglan?"

25 "That would be helpful."

1 And here's the question. It's the only question he
2 answered: "The question is whether it is in fact true that
3 overwhelmingly -- in fact, I'll say with rare exceptions, the
4 documents that you yourself discuss in the body of your direct
5 testimony when it comes to specifying age range, those very
6 documents specify an age range of 18 and above, with the
7 exception of certain on the tracking documents which include
8 lesser ages. Is that statement correct or not?"

9 In other words, he never had to opine as to the accuracy.
10 I never got into the accuracy of the chart. I then posed that
11 independent question --

12 THE COURT: What's your objection at this point?

13 MR. BERNICK: My objection is that we're now apparently
14 going to go down the road, in going through the chart and talking
15 about whether it's accurate or not, which is precisely the area
16 that I was not allowed to ask questions in.

17 THE COURT: Is that where you're going?

18 MS. BROOKER: Your Honor, where I'm going with this is
19 that Mr. Bernick, I believe, has misrepresented Dr. Biglan's
20 testimony on this demonstrative and then asked him the question
21 whether or not -- and you know, I don't have those pages; I could
22 flip through them, but whether or not the documents up there --
23 and I'm just focusing on a few of them -- the documents --

24 If Mr. Bernick wants to stipulate, I will accept this; if
25 he wants to stipulate that where he has -- first of all, if he

1 agrees not to move this into evidence, but second, where he has
2 indicated that some of these --

3 THE COURT: It's a demonstrative.

4 MR. BERNICK: It's a demonstrative. I didn't move it into
5 evidence. I'm not going -- I was not even permitted -- I was
6 permitted to use it only in the sense of showing it to him; it
7 was then shut down and I asked him just a general question.

8 THE COURT: It's not being moved into evidence. That's
9 number one. Number two, the doctor did not testify as to the
10 accuracy of the document. Therefore, there is no
11 cross-examination for you to rehabilitate on the accuracy of the
12 document.

13 MS. BROOKER: Well, if I could --

14 Mr. Bernick, if I could see your transcript very quickly;
15 I won't read your notes.

16 MR. BERNICK: I read to the Court from here (indicating)
17 to the top of the next page.

18 MS. BROOKER: Thank you.

19 Well, this is exactly what I'm following up on. The
20 question is: "I'm asking the witness to verify that in fact
21 overwhelmingly, the documents" -- and the documents here in the
22 demonstrative -- "that he himself has cited in his direct
23 testimony, when they specify an age range, specify an age range
24 18 and over unless they're tracking documents."

25 The documents that are up there --

1 THE COURT: That was a general question that went to the
2 entirety of the demonstrative; isn't that correct?

3 MS. BROOKER: Yes. And then if I could just point out
4 Mr. Bernick's follow-up question, which -- and again, referring
5 Dr. Biglan to this demonstrative as if it were fact, he then
6 asks: "Isn't it true that the documents you yourself discuss in
7 the body of your direct testimony, when it comes to specifying an
8 age range, those very documents specify an age range of 18 and
9 above, with the exception of certain of the tracking documents
10 which include lesser ages? Is that statement correct or not?"

11 And Dr. Biglan, having this demonstrative in front of him
12 and presumably assuming its accurate, says: "I think that's
13 correct."

14 So if Your Honor is saying that -- or if Mr. Bernick wants
15 to withdraw his line of questions using this demonstrative and
16 allow Dr. Biglan's testimony with the -- I just don't want the
17 Court to be misled, that where he says "tracking some of those
18 documents" (sic) -- and I've only been able to check a few --
19 those documents are not tracking documents. And I don't want the
20 record to be unclear that because this demonstrative was created
21 and Dr. Biglan had an understanding that Mr. Bernick was
22 presenting him with an accurate demonstrative, went along and
23 answered the question that, okay, looking at that demonstrative,
24 that is true, when in fact, again, those documents marked "T" up
25 there I can show from a spot checking that they are not tracking

1 documents.

2 THE COURT: As far as I'm concerned, this is where we
3 stand at this point. The board itself is a demonstrative and is
4 not being admitted into evidence. There was one very important
5 question and answer that Mr. Bernick asked and received an answer
6 to, and that was essentially -- this isn't a quote -- but
7 essentially: Isn't it true that, to an overwhelming extent, the
8 age ranges referred to in your direct examination were 18 to 24
9 and above? And the doctor answered that question.

10 That question stands in the record. As far as I am
11 concerned, any other questions that turn on the accuracy of the
12 demonstrative are not going to be given any weight by me. If
13 Mr. Bernick wants me to give weight to any questions relating to
14 the accuracy of the demonstrative, then I'm going to have to
15 allow you to go into, in detail, the inaccuracy, as you perceive
16 it, of the demonstrative.

17 That's where we are, Mr. Bernick.

18 MR. BERNICK: I will represent to the Court that the only
19 testimony that I got on this, and that we do intend to rely upon,
20 is the question that Your Honor has picked up, which appears at
21 the bottom of page 2589 (sic). That question was not specified
22 to the document precisely because there had been an objection to
23 using the document.

24 We're not proffering the document. We're not proffering
25 any testimony that was based on the document. The only testimony

1 that we're referring to and relying upon is the question that
2 appears at line 23 of 2589 and the carryover page, with respect
3 to the objection that's now been raised.

4 THE COURT: Therefore, I don't think you need to redirect
5 him at all on that demonstrative, which is not coming into
6 evidence.

7 MS. BROOKER: Okay, Your Honor. Could I just ask one
8 follow-up question in response to that question that Mr. Bernick
9 asked that's not about the demonstrative?

10 THE COURT: If it's in response to that question.

11 MS. BROOKER: It is. Could I see your testimony again?

12 MR. BERNICK: It's not -- this is -- the question that I
13 quoted was at line 23 of 7589.

14 MS. BROOKER: I'll look at that. That's what I'm looking
15 at. Thank you.

16 BY MS. BROOKER:

17 Q. When it comes to specifying age range in the tobacco
18 company documents, have you included in your written direct
19 testimony documents in addition to documents identifying
20 tracking information, documents that specify an age under the
21 age of 18?

22 A. Yes.

23 Q. Thank you.

24 A couple questions on youth smoking prevention,
25 Dr. Biglan. You were asked a question this afternoon --

1 THE COURT: We'll find out whether everybody's holding up
2 without a break.

3 MS. BROOKER: I have, I think, ten more minutes.

4 THE COURT: All right.

5 BY MS. BROOKER:

6 Q. Can we finish up, Dr. Biglan? Is that okay?

7 Thank you, Your Honor.

8 You were asked questions about JD 054530, and I'll just
9 show that to you. Do you recall being asked questions about
10 this exhibit?

11 A. Yes.

12 Q. Okay. And I believe your testimony was that Philip
13 Morris should not attempt to take credit for a decline in youth
14 smoking prevalence, which I believe Mr. Webb put up here to
15 demonstrate. And I know that you didn't verify your familiarity
16 with this information, but my question to you is: Why is it
17 that you -- if you could elaborate on why it is that you
18 concluded that Philip Morris should not attempt to take credit
19 for any decline in youth smoking prevalence.

20 A. Well, there are a number of reasons. One is that there
21 has been a whole host of other smoking prevention activities
22 occurring both in individual states and around the nation.
23 There's empirical evidence indicating that the American Legacy
24 Foundation's Truth Campaign has had distinct benefit in reducing
25 the prevalence of adolescent smoking. There have been increases

1 in the tax of cigarettes in many places, which, it's my
2 understanding, is a variable that reduces the prevalence of
3 adolescent smoking.

4 And in addition, except for life skills training program,
5 which we discussed in detail, none of the other Philip Morris
6 smoking prevention activities have been evaluated with the kinds
7 of standards that we were talking about this morning. And
8 there's, in fact, some evidence with respect to the media
9 campaign targeting adolescents that it in fact increases
10 adolescents' intentions to smoke.

11 So there's certainly no empirical evidence that would be
12 consistent with the notion that it's Philip Morris's smoking
13 prevention efforts that have -- or that of other companies that
14 have contributed to the reduction in adolescent smoking and
15 there's some evidence to suggest that they might actually be
16 harmful.

17 Q. Now, in the response that you just gave where you said
18 there's in fact some evidence with respect to the media campaign
19 targeting adolescents, that it is in fact -- that it in fact
20 increases adolescents' intention to smoke, just to be clear for
21 the record, which campaign were you referring to?

22 MR. WEBB: Your Honor, I'm going to object that this is a
23 direct repeat. This is all in his direct examination.

24 THE COURT: Well, I knew I was going hear an objection,
25 Mr. Webb, because we were turning to your issue.

1 But no, the objection's overruled. You may clarify that
2 question: Which campaign are you referring to?

3 THE WITNESS: The American Legacy Foundation's Truth
4 Campaign is a campaign that has involved a variety of ads
5 directed at teens and there's evidence that exposure to that
6 campaign is associated with decreases in the intention to smoke.
7 And there's a study by Farley et al. that was a published,
8 peer-reviewed paper that showed that.

9 That paper also showed evidence that adolescents who were
10 exposed to the Truth Campaign -- that that exposure was
11 associated with, actually, an increase in intentions to smoke.
12 Both of those effects were fairly small, but they were
13 statistically significant.

14 BY MS. BROOKER:

15 Q. I'm just -- what is the name of the campaign you were
16 referring to, the Philip Morris campaign?

17 A. The Philip Morris campaign is -- I'm sorry -- "Think,
18 Don't Smoke."

19 Q. Okay. I just wanted to clarify that. Now, if you would
20 just take a look at the document that Ms. --

21 Excuse me just a moment, Your Honor.

22 That's what I think I just tried to clarify. When you
23 said the paper showed evidence that adolescents who were exposed
24 to the Truth Campaign -- that that exposure was associated with
25 actually an increase in intentions to smoke, did you mean to say

1 the Legacy Truth Campaign or did you mean to say something else?

2 A. I'm glad you pointed that out. No, I meant to say that
3 the evidence was that the exposure to Philip Morris's "Think,
4 Don't Smoke" campaign was associated with significant increase
5 in intention to smoke and exposure to the American Legacy
6 Foundation's Truth Campaign was associated with a significant
7 decrease in the intention to smoke.

8 Q. Thank you. Now, if you would take a look at the exhibit
9 that Mr. Webb showed you -- and it looks like this, so I'll cite
10 it for the record, but if you can just see if you can find it up
11 there; it's JD 051028.

12 A. Yes.

13 Q. Okay. Let me just hold it up here.

14 Okay. I'm on page -- the last four numbers are 164081 of
15 the Bates range, if you would just take a look at that.

16 Now, what is the precise question that Philip Morris is
17 researching in this document?

18 And again, for the record, this is "Philip Morris YSP
19 Parent TV Advertising Tracking Research, November 2003; Draft
20 For Discussion Purposes, January 30th, 2004."

21 And if you could please describe what is the question
22 that's being asked.

23 A. Well, this is apparently data on who sponsored
24 commercials telling parents to talk to children about not
25 smoking.

1 Q. And is Philip Morris USA's commercial listed there?

2 A. Yes. Yes, it is.

3 Q. Okay. And so what is the question, then, with respect to
4 Philip Morris USA's parent-directed advertising in relation to
5 some of the other ones, specifically researching?

6 What's the question? I'm sorry. Just repeat what is the
7 question.

8 A. I'm unclear. The subheading of this is: "Among parents
9 of children age 10 to 17 who saw a commercial telling parents to
10 talk to children about not smoking."

11 And so they apparently have a subcategory of all of the
12 respondents who are those parents of children ages 10 to 17 who
13 saw a commercial telling parents to talk to children about not
14 smoking. And they apparently are giving the percent of those
15 parents who said that they saw each of these types of ads. So
16 for example, the American Cancer Society would be 3 percent;
17 Philip Morris would be 5 percent.

18 I think that's what this says, but I'm not certain.

19 Q. Okay. Do you have any understanding as to why Philip
20 Morris is researching the question of who sponsored -- of asking
21 people whether they know who sponsored commercials telling
22 parents to talk to children about not smoking?

23 MR. WEBB: Objection, lack of personal knowledge, lack of
24 foundation for him to know that. There is no foundation for him
25 to know that.

1 THE COURT: Well, you're going to have to establish
2 whether he has a -- whether he has any knowledge and then, if he
3 thinks he does, whether there's any foundation for it.

4 BY MS. BROOKER:

5 Q. I think I just asked you: Do you have an understanding?

6 A. Well, based on the research that Philip Morris has done
7 on the degree to which their smoking prevention efforts are
8 reaching opinion leaders and are affecting the public image of
9 the company, all of that would be consistent with the notion
10 that they're interested in whether or not people are attributing
11 their ads -- or seeing their ads and are attributing to Philip
12 Morris an effort to try to reduce youth smoking.

13 Q. With respect to Philip Morris's parent-directed
14 advertising or any of its other previous or current youth
15 smoking prevention activities, so I'm including all of the
16 activities of the Youth Smoking Prevention Department and
17 Corporate Responsibility Department at Philip Morris, is any --
18 is Philip Morris evaluating any of those activities to determine
19 whether those activities reduce youth smoking prevalence?

20 A. I could not find any evidence that the -- that Philip
21 Morris or any of the other companies are evaluating the actual
22 impact of their youth smoking prevention programs on the
23 prevalence of adolescent smoking. And in the case of the
24 materials directed at parents, I have not seen any evidence that
25 they're evaluating whether or not those interventions actually

1 influence parents to talk to their adolescents, in at least any
2 well-controlled study.

3 Q. And did you arrive at that -- those conclusions after
4 reviewing the deposition testimony of the various employees in
5 charge of youth smoking prevention at the tobacco companies in
6 this case?

7 A. Yes, I did.

8 Q. Okay. I'm going to show you a few of the ads that you
9 were shown this afternoon. Okay. Now, do you recall not too
10 long ago taking a look at these advertisements?

11 A. Yes.

12 Q. Okay. Now, is it your testimony, Dr. Biglan, that the
13 advertisements for Marlboro, and particularly the ones you've
14 included in your direct testimony, in your one-hour live and the
15 ones that you were asked about again -- is it your testimony
16 that these appeal exclusively to adolescents?

17 A. No.

18 Q. Then how is it that you were led to this conclusion that
19 the advertisements appeal to adolescents and arrived at your
20 conclusions in this case?

21 MR. WEBB: Your Honor --

22 MR. BERNICK: Objec --

23 MR. BERNICK: I'm going to object. This is a repeat of
24 the direct examination.

25 THE COURT: Sustained.

1 BY MS. BROOKER:

2 Q. Could you just briefly --

3 THE COURT: Mr. Bernick, these are not your objections.

4 MR. BERNICK: I felt obliged --

5 MR. WEBB: I'll take all the help I can get, Your Honor.

6 BY MS. BROOKER:

7 Q. Could you list the research or just the broad types of
8 research that led you to the conclusion that these -- that you
9 gave in your testimony, that these advertisements are
10 particularly appealing to adolescents. Just what are the types
11 of research?

12 MR. WEBB: Your Honor, I do -- this is exactly a repeat of
13 the direct. That's where we're going.

14 THE COURT: Sustained.

15 And we're not going to do this again, everybody, with no
16 afternoon break because it's very, very hard for the court
17 reporter. I'm sure the witness is exhausted. I had been led to
18 believe that we were going to break a lot earlier.

19 MS. BROOKER: I apologize, Your Honor.

20 THE COURT: Go ahead.

21 BY MS. BROOKER:

22 Q. I'll just ask one more question about an advertisement.
23 If you would take a look at this advertisement that you were
24 shown, you were shown this demonstrative JDEM 040172, which has
25 the Virginia Slims voice campaign advertisement and the Merit

- 1 advertisement. Do you recall seeing those two?
- 2 A. Yes.
- 3 Q. Okay. Now, is there a difference in your opinion between
4 the images, and anything else other than images, between these
5 two advertisements that led you to your -- that led you to give
6 your testimony on cross-examination?
- 7 A. I don't know. I -- it may very well be that there's
8 research that they did on the Merit campaign that showed that it
9 had some of the same image effect as the Virginia Slims
10 campaign. And I suppose that if they ran a campaign of that
11 sort and heavily reached adolescents, it might even be
12 effective, but I just can't say. I haven't seen any evidence --
- 13 Q. Is there any --
- 14 A. Well, the only evidence I've seen, as I said in my
15 earlier testimony, is that in fact the Merit ad that the Arnett
16 Study used that compared that ad with ads from Marlboro, Kool,
17 Newport, Winston and Camel, consistently found that the Merit ad
18 didn't have the same impact on adolescents as those more
19 youth-popular brands.
- 20 Q. Okay. And are there words on this second advertisement,
21 the Merit advertisement, that are different than what appear in
22 the voice campaign? Can you read that?
- 23 A. Well, I mean, for a start, there are huge words: "Of
24 course you can." And I guess that --
- 25 Q. And what's in the right-hand corner?

1 A. "You can switch down to lower tar and still get
2 satisfying taste."

3 Q. Is that a similar message to the one that appears in the
4 Virginia Slims advertising campaign that's up there?

5 A. No, that's -- it's a message about risk reduction. It's
6 saying that -- I mean, it would be particularly relevant to
7 people who are concerned about the health effects of cigarettes.
8 And adolescents as risk-takers, I think there's been a lot of
9 evidence, are not concerned about that. In fact, knowing -- for
10 many adolescents, knowing that cigarette smoking is risky is
11 actually enticing to them.

12 MS. BROOKER: Your Honor, that was my last question. And
13 just so that I don't forget, yesterday your staff reminded me
14 that when I proffered Dr. Biglan as an expert in psychology and
15 prevention science, Mr. Bernick made a couple of objections,
16 although -- and I clarified with Mr. Bernick at the end of the
17 day; he did not object to Dr. Biglan being proffered on that
18 basis, but we never got around to asking Your Honor to so qualify
19 Dr. Biglan. And I would just ask at this time if he could be so
20 qualified.

21 MR. BERNICK: I've got two housekeeping matters. That's
22 actually one of them, but I don't believe that it requires that
23 the witness be here for them.

24 THE COURT: Is there any objection?

25 MR. BERNICK: No. There never was an objection to his

1 expertise.

2 THE COURT: Fine. He may be accepted as an expert then.

3 MS. BROOKER: Thank you, Your Honor.

4 THE COURT: The other housekeeping matter doesn't involve
5 him?

6 MR. BERNICK: It does involve him, but I don't think it
7 requires his presence. But I would like just to make a matter of
8 record before he's -- I would like to make it a matter of record
9 after a short break or whenever Your Honor would find it
10 appropriate.

11 THE COURT: We're not going to take a break, everybody.
12 We're going to get this done and at 4:30, we're all walking out
13 of this courtroom.

14 MR. BERNICK: Okay.

15 THE COURT: Doctor, I have a final question for you. Does
16 your conclusion that adolescent smoking is substantially affected
17 by peer influence -- does that conclusion exclude the conclusion
18 that adolescent smoking is also -- does it also exclude your
19 conclusion that adolescent smoking is also substantially affected
20 by tobacco company marketing and advertising?

21 THE WITNESS: No, Your Honor. And in fact, what I tried
22 to make clear in my direct testimony is that it is precisely
23 because adolescents are so concerned about peer acceptance and
24 popularity, and that cigarette advertising communicates to them
25 that they can achieve it by becoming smokers, that they're

1 motivated to smoke. It's not the only factor that motivates
2 them, although it's probably the most important factor. So as
3 you said earlier, really, the two factors are intertwined.

4 THE COURT: All right. Thank you. You may step down at
5 this time.

6 THE WITNESS: Thank you.

7 THE COURT: Before we get to counsel's housekeeping
8 matters, regarding exhibits, counsel will certainly have to work
9 together on that. I would hope you could be ready to deal with
10 the issue by Thursday afternoon or Thursday morning, after we
11 conclude --

12 MS. BROOKER: Would you like to do that after the next
13 witness, Your Honor -- conclude all of -- because we still have
14 all the outstanding issues on the various witnesses?

15 THE COURT: I'm very aware of that and we're going to do
16 that on Thursday.

17 MS. BROOKER: Okay.

18 THE COURT: All right. Mr. Bernick.

19 MR. BERNICK: Three things as a matter of record. And I
20 know it's late in the day and I probably have irritated the Court
21 too much with my diligence to preserve what I think is important
22 for the record, but I do want to preserve three things.

23 Number one is that with respect to Your Honor's last
24 question, it got to the question of substantial; that is, one
25 cause being substantial; another cause being substantial.

1 THE COURT: I didn't use the word "cause."

2 MR. BERNICK: Well, substantial influence or whatever --
3 substantial effect. Whatever it was, there was a quantitative
4 dimension to it, Your Honor.

5 And with due respect, we would have elicited testimony
6 relating to that specifically, that this witness has admitted in
7 his deposition that he did nothing to quantify the impact of
8 advertising in marketing. That was not within the purview of his
9 work and I don't believe he has any opinion with respect to
10 substantial or not that has been in his expert reports -- or I
11 should say that was in the expert report and was removed from his
12 direct examination.

13 In his deposition, he admitted that he did not have a
14 quantitative aspect to his opinion. I believe that's correct,
15 but we certainly would have pursued that in our examination.
16 That's number one.

17 Number two is that we would make a proffer -- we believe
18 that the testimony that he gave in his deposition, never to be
19 forgotten, to be page 38 of the first day, where he said that he
20 had not done -- he had not published a peer-reviewed research
21 paper regarding the impact of advertising on adolescents and he
22 said that was correct -- that testimony was in fact correct, and
23 that when he said yesterday it was false, that that also was now
24 false testimony, bearing upon his credibility, and that further,
25 his further deposition pages that we would have proffered to the

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1 Court would have established that the two excuses that he gave
2 also were false.

3 The homework assignment that he was given is set out at
4 page 487, 488 and 489 of his testimony on the following day,
5 which is March the 13th. The homework that he was given was to
6 gather any prior articles that use the terms "substantial
7 contributing factor." That was his homework assignment.

8 And as I elicited in my examination of the witness this
9 morning, because I used that page from his deposition, he didn't
10 come up with any articles where the words "substantial
11 contributing factor" had been used overnight. So his homework
12 assignment did not relate to the question at page 38 and page 39
13 and his testimony that it did was false.

14 And we would have demonstrated that by bringing out the
15 lead-in text to the examination the following day where they
16 talked about what the homework assignment was. That's the
17 question that Mr. Beach talked with him yesterday about and there
18 was a specific reference to the homework at line 12 on page 488.

19 The further excuse that he gave for his false testimony
20 was: "Gee, I didn't have the opportunity," or words to that
21 effect, "to gather up and point out at this point in the
22 deposition all of the articles that I had published where I
23 stated the opinion that advertising had an effect on smoking
24 initiation."

25 That explanation, too, was false. If you go back to page

1 25 of the deposition, and pages 25 leading up to 38, it's very
2 clear that he initially was asked whether he had ever stated the
3 opinion before the cigarette advertising, you know, caused or
4 affected smoking initiation and there's page after page where he
5 recites all those articles, including, I believe, the articles
6 that he talked about in the demonstrative this afternoon.

7 The questioning then shifts at page 38 because Mr. Beach
8 gets into "What about empirical research that you've done?" And
9 the question that's posed at page 38 is: "Have you ever
10 published peer review research on that question?"

11 And the answer to that was -- "No, you haven't?"

12 And the answer to that was: "That's correct." And that
13 was the correct answer at the time.

14 So we can see that this witness, for whatever reason,
15 inaccurately testified that his testimony at page 38 was false;
16 he then inaccurately testified as to the reasons it was false.
17 And this whole kind of debacle may not make a tremendous
18 difference, as it appears it does not, to the Court's substantive
19 view of the evidence, but we think it goes very much to the
20 witness's credibility.

21 So we would proffer in support of that position the
22 testimony on March the 12th of 2002 from page 25 to 38 and the
23 testimony on page 488 and 489 of March 13th of 2002. And that's
24 our proffer.

25 And I apologize to the court reporter for the late hour

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1 and to Your Honor as well for the late hour.

2 THE COURT: I do not need to hear a response at this point
3 to that.

4 I just want to be clear on what's ahead of us. Are we
5 going to finish the witness tomorrow in one day?

6 MS. EUBANKS: Your Honor, two things. To answer your
7 question directly, I believe that we will finish the witness or
8 we may finish the witness tomorrow. I know we have probably
9 three, three and a half hours and we received an estimate from
10 the defendants of a couple of hours. That's one thing.

11 But the point I wanted to make is I'm very troubled by
12 this proffer notion because of Order 471 and the precise
13 procedure that the Court has put in place for evidentiary
14 proffers when a witness is on the stand and what's to take place.
15 It's supposed to be in writing. We're supposed to have the
16 opportunity to respond to it --

17 THE COURT: Well, first of all, let me interrupt you.

18 What Mr. Bernick did is not really an evidentiary proffer.
19 It's straight argument. It is his argument that this witness was
20 lying. I think Mr. Bernick may have accurately forecast how
21 heavily that might or might not weigh with me.

22 Now, there are other arguments to be made about the
23 substance of this witness's testimony and they may weigh very
24 heavily with me, but that particular one will probably not be the
25 beginning and the end of my view of Dr. Biglan's testimony.

1 But in any case, it's not an evidentiary proffer; it's a
2 straight legal argument.

3 MS. BROOKER: That's fine, Your Honor. But in terms of
4 how we proceed going forward, given that we have been complying
5 with the letter of 471 with respect to any time that we wanted to
6 make an evidentiary proffer -- and I understand and quite agree
7 that it was merely argument, but if we're going to take up our
8 trial time with that --

9 THE COURT: No, we're not.

10 MS. BROOKER: Fine. Thank you, Your Honor.

11 MR. BRODY: And, Your Honor, if we are still planning to
12 break at 3:30 tomorrow, then I think it's quite possible that
13 Ms. Dawson's testimony, given the estimate we received from
14 defendants, will spill over into Thursday morning. Given the
15 estimates and given what we anticipate, I think it's likely it
16 will spill over into Thursday morning.

17 THE COURT: I'm glad you reminded me of that, Mr. Brody.
18 I was so absorbed in today that I had forgotten about tomorrow.

19 Yes, Mr. Bernick.

20 MR. BERNICK: I forgot the last housekeeping matter. We
21 made an objection at the beginning, remember, to page 452, the
22 second part of the page, where it appeared that the witness's
23 direct testimony got into the issue of relief.

24 Do you remember when the --

25 THE COURT: I do.

1 MR. BERNICK: -- direct testimony was proffered, I made
2 that objection. I said there's no point in asking the Court to
3 resolve it in advance because I didn't intend to pursue that
4 subject matter and, in fact, it never was pursued. But we still
5 would stand on the objection. I don't know at what point or in
6 what way Your Honor would prefer that we deal with that.

7 THE COURT: I'm going to rule now.

8 What's the basis of your objection? Why shouldn't he be
9 allowed to testify on that subject, given the scope of the
10 plaintiff's contentions? It would be on that subject and it
11 would be on the subject I'm going to assume for the moment of
12 likelihood of defendants not complying with the MSA and
13 additional relief being necessary.

14 By "additional relief," I mean relief in addition to that
15 provided in the MSA.

16 MR. BERNICK: It's not a question of whether the testimony
17 would be relevant, Your Honor. It's that it is nowhere set forth
18 as an opinion in his expert reports. As I brought out -- I'm
19 sorry.

20 I think I brought out to the Court, when he gets into the
21 MSA period of time, there's no commentary on the substance of
22 what the MSA requires in terms of things that are missing from
23 it. All that is said is that after the MSA came into being, he
24 believes that many of the practices continued.

25 We have no objection to that coming in; we have no

1 objection to the fact of the MSA coming in. But to the extent
2 that he's offering opinions on defects in the MSA, that was not
3 in his expert report and it's not in his expert examination and
4 it's improper, in our view, now to have that matter come out for
5 the first time in his direct testimony.

6 We've all been very careful -- I think we've tried to be
7 careful with respect to making sure that opinions have a
8 predicate in the discovery process. That opinion did not. And I
9 can take Your Honor through the pages.

10 THE COURT: No, no. I know what you're talking about.

11 MS. BROOKER: Your Honor --

12 THE COURT: You have about one and a half minutes to
13 respond and if you can't do it in that time, we'll finish it up
14 tomorrow morning.

15 MS. BROOKER: Okay, Your Honor. The first point I would
16 make is that Mr. Bernick raised this issue. It's improper under
17 Order 471 because this should have been part of the issues
18 motions and if we're going to start going down this path with
19 defendants raising issues outside of the practices under Order
20 471, which is the proper way of raising issues, then we're going
21 to open the floodgate to this happening on a rolling basis.

22 Mr. Bernick said he didn't have the opportunity to read
23 the testimony. Well, I submit that that is Mr. Bernick's fault
24 and that should fall to the defendants if they didn't get a
25 chance to raise an objection timely.

1 The second point that I would raise is that I would ask
2 Your Honor, before ruling, to look again at Dr. Biglan's
3 testimony because Mr. Bernick mischaracterizes his testimony.

4 And I will say as to disclosure issues, Dr. Biglan clearly
5 disclosed squarely that he would be testifying about this subject
6 because the part of the MSA that he has cited is the only portion
7 of the MSA that relates in any way even remotely to youth smoking
8 prevention activities. And his entire second report in this case
9 was based upon the youth smoking prevention activities of the
10 companies and the deposition testimony that was taken of their
11 youth smoking prevention activities and deposition testimony
12 taken specifically on those corporate practices -- policies that
13 are in the MSA. And it just relates to youth smoking prevention.

14 So it squarely falls within his testimony; it was
15 disclosed as such and it's not accurate to characterize his
16 testimony in the way that it is. If we're going to talk about
17 that, I think we should go and look at exactly what he says.
18 It's only a few questions, actually.

19 THE COURT: We'll come back to this tomorrow and finish up
20 the discussion.

21 Everybody owes Mr. Wallace an apology.

22 All right, everybody. We are in recess until 9:30
23 tomorrow.

24 (Proceedings adjourned at 4:30 p.m.)

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C E R T I F I C A T E

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

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I N D E X

Examinations

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E X H I B I T S

Description

Government's Exhibits 17667, 17672 and 17673 admitted	9773
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