

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	April 11, 2005
Plaintiff,	:	
	:	9:30 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 90
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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

2 THE COURT: Good morning, everybody. This is so bright
3 in here this morning. Well, I have to say for years I've been
4 complaining that the lights don't work correctly in here and now
5 I know it wasn't me who was crazy. Everybody finally figured
6 out how to work them correctly.

7 Anyway, United States of America versus Philip Morris.
8 99-2496.

9 Did counsel have preliminary matters or something?

10 MS. EUBANKS: I don't, Your Honor.

11 I did want to let you know that in terms of completing
12 the preparation for completing the examination of
13 Mr. Szymanczyk, there is positively no chance that the United
14 States will need to call him back. We've reviewed the
15 additional documents that were allowed in and are prepared to do
16 a complete his examination. That's the good news.

17 The bad news is that the two-hour estimate was off.
18 I'm not sure how long it will take, but I hope to be through by
19 our lunch break.

20 THE COURT: All right. And certainly you will have
21 enough time for redirect this afternoon.

22 MR. WEBB: Hopefully, we will finish today, I hope. I
23 think we will.

24 THE COURT: Counsel, at one of our breaks -- I have
25 noticed for a couple of days that more and more exhibits are

1 piling up at the witness stand, I have no idea whose they are,
2 but it's just a problem and people ought to clean them out at
3 some point.

4 Mr. Szymanczyk, you're still under oath this morning.

5 MICHAEL E. SZYMANCZYK, Defendant's witness, RESUMES

6 CROSS-EXAMINATION (Cont'd.)

7 BY MS. EUBANKS:

8 Q. Good morning, Mr. Szymanczyk.

9 A. Good morning.

10 Q. I want to take you back to a couple of statements that you
11 made on Friday during your testimony, and I'm sure you remember
12 testifying about the mission statement and core values in your
13 written correct as well as live on Thursday, not Friday.

14 A. Yes.

15 Q. In fact, isn't it true that as early as 1988 Philip Morris
16 claimed to be a company of good character and a company that
17 treated controversial issues responsibly?

18 A. I don't know. That's prior to the time I joined the
19 company.

20 Q. Well, let me show you a document that is 93307, U.S.
21 Exhibit 93307. And you see that that is a draft outline dated
22 July 30, 1988. Do you see that at the top of the document?

23 A. Yes.

24 Q. And do you note to that it includes goals of a speech. Do
25 you see that?

1 A. Just let me look it over.

2 Q. Sure.

3 A. (Pause) Okay.

4 Q. Now, I believe you testify in your written direct that there
5 had been some work done on the core values and mission statement
6 of Philip Morris before you became CEO. Is that true?

7 A. Yes.

8 Q. Okay. Now, if you look at this. As early as 1988 you will
9 see that Philip Morris was claiming to -- if you look in the
10 first paragraph on the goal of speech -- use a PMK study to
11 exemplify responsible corporate action. Do you see that?

12 A. Yes.

13 Q. And it also talks about shaping corporations that have good
14 character, doesn't it?

15 A. Yes.

16 Q. And both of these are things that you emphasize right now,
17 today in 2005, with respect to Philip Morris's core values and
18 mission statements; correct?

19 A. Well, no, this isn't what we say, but -- I don't know
20 exactly what you mean. I haven't used the word "good character"
21 as a part of the mission statement or the core values, but...

22 Q. Mr. Szymanczyk, would you disagree if I said that in terms
23 of the core values of Philip Morris, as you have set them forth,
24 that corporate -- good character is not something that you would
25 consider to be a core value whether or not it's written on your

1 little card or not?

2 A. Well, I think character would come about from practicing the
3 behaviors that we describe in our core values and that people
4 would judge your character based on that behavior. That's the
5 way I would look at it.

6 Q. Well, look at the core under item number 3 of this exhibit
7 where it says "responsible corporate action." Do you see that?

8 A. I do.

9 Q. Now, you testified at length here on Thursday and in your
10 written direct about responsible corporate action, do you not?

11 A. Well, I say that we want to be a responsible, effective and
12 respected corporation. Those are the words that I use.

13 Q. I understand that those are some of the words that you use.
14 But would you agree here in 2005 that it is a goal of Philip
15 Morris to have responsible corporate action in its undertakings?
16 Yes or no, please.

17 A. Well, I suppose you could say it that way, sure.

18 Q. So that's a yes?

19 A. Well, these are capitalized letters. Okay? I don't know
20 what they refer to specifically. But I have said -- and our
21 mission states clearly -- that we -- our goal is to be
22 responsible. Now we describe a list of stakeholder goals that
23 describe what we need to do in our view, based on those
24 stakeholders, in order to be responsible.

25 Q. Now -- but I'm taking you back to a document that's dated

1 1988. Who is Hamish Maxwell?

2 A. Hamish Maxwell was the chairman and CEO of Philip Morris
3 Companies, Inc., the predecessor to Altria Group, Inc.

4 Q. Okay. You can set that document aside.

5 Now, I'd like you to return to a discussion to follow
6 up with a couple of questions about Marlboro brand spending.
7 I'm not interested in going into any matters that -- or
8 repeating your testimony that we had during the closed session,
9 so I'm not asking you any questions that would elicit remarks
10 with respect to repeating those figures because we are in a open
11 courtroom. So I'm sure your counsel and you will be mindful of
12 that, but I do want to tell you that my questions should not
13 encompass those matters. All right?

14 Now, with respect to Marlboro brand spending, let's
15 just talk about Marlboro marketing expenditures. I want to show
16 you a document that is marked U.S. Exhibit 25253.

17 All right. Now, the Marlboro marketing expenditures
18 that are listed here include advertising, events, price,
19 product, incentive, continuity, couponing, direct mail, point of
20 sale material slash other, and then there's a column for --
21 there are totals following those brand spending items. Do you
22 see that?

23 A. Yes.

24 Q. Now, the Marlboro marking expenditures listed here on this
25 exhibit do not include expenditures to develop and maintain your

1 sales force, do they?

2 A. No, I don't believe they do.

3 Q. All right. And the same would be true for the advertising
4 and promotional expenditures reported to the FTC. That
5 expenditures on sale force are not included in those reports --
6 in those amounts reported?

7 A. No. Expenditures through retailers would, in fact, be
8 reported. I think I discussed that Thursday. Those would be
9 reported in the form of off revenue. They would call that
10 promotion, price reduction. Merchandising payments would be
11 reported to the FTC. Those would all be encompassed into the
12 FTC numbers.

13 Q. Just to be clear, then, the FTC numbers would include
14 figures for advertising and promotional expenditures. Is that
15 your testimony?

16 A. I believe that's correct, yes.

17 Q. Okay.

18 A. And others. But, yes, certainly those.

19 Q. All right. Now, when you were testifying on Thursday about
20 expenditures, I just want to make clear that in your definition
21 of what constituted marketing expenditures you were not
22 including all of these elements that are set forth on U.S.
23 Exhibit 25253, were you?

24 A. Yeah. I think I -- I think I covered all of these.

25 Q. You think. Are you certain?

1 A. Yeah, I'm pretty sure I covered all of these and beyond
2 these in the things I talked about, if I remember correctly.

3 Q. Now, but let's talk about -- let's turn to what is reported
4 to the FTC.

5 Philip Morris doesn't report to the FTC the salaries
6 and benefits paid to the sales force, including performance
7 bonuses, base salary, incentive payments, and gifts and the like
8 now, does it?

9 A. No.

10 Q. Okay. And that's also not included on the Marlboro budget
11 that we see at U.S. Exhibit 25253; correct?

12 A. No, I do not think that's included in these numbers. No.

13 Q. So how much, approximately, is spent annually for Marlboro
14 sales force, including performance bonuses, salaries, incentive
15 payments, gifts and the like, do you know?

16 A. We don't have a Marlboro sales force. We have one sales
17 force for the company, if that's what you're referring to. I
18 don't know the exact number for that --

19 Q. Okay.

20 A. -- off the top of my head.

21 Q. Do you know on an annual basis if it's -- can you give me an
22 estimate?

23 A. For the sales force?

24 Q. Yes, including performance bonuses, salaries, incentive
25 payments, gifts.

1 A. Well, just give me a minute and I'll see if I can give you a
2 calculation because I don't know the number off the top of my
3 head. I'm going to give you a rough estimate.

4 I would say it's probably in the range of \$300 million,
5 something like that. 250 to \$300 million, I would guess.

6 Q. Now, in addition, the Marlboro budget that is set forth in
7 the exhibit that I've handed you, with respect to what's
8 reported to the FTC, now that would not include, would it,
9 reimbursements for sales force for direct expenses, such as
10 travel, meals, entertaining clients and things like that, would
11 it?

12 A. I don't know. I don't think it does, but I don't know that
13 off the top of my head.

14 Q. Do you know what that figure would be?

15 A. I do not, no.

16 Q. Similarly, the Marlboro budget exhibits, the Marlboro budget
17 and the reports to the FTC do not include expenses in providing
18 the, say, physical infrastructure, such as offices, overhead, do
19 they?

20 A. No, I don't think that is included. No.

21 Q. You would agree that overhead for your sales force is a
22 substantial figure annually, isn't it?

23 A. Not relative to these expenses, no. I wouldn't agree with
24 that.

25 Q. Well, how much is it?

1 A. I don't know off the top of my head, but it isn't anywhere
2 close to these expenses.

3 Q. What would you estimate it to be?

4 A. I can't do that.

5 Q. Now, the Marlboro budget exhibit that you're looking at,
6 U.S. Exhibit 25253, and the reports to the FTC also do not
7 include managerial time and efforts spent in overseeing and
8 leading the sales force. Isn't that true?

9 A. I think that's correct.

10 Q. Now, Leo Burnett is Philip Morris's largest ad agency, isn't
11 it?

12 A. Yeah, I think that's right.

13 Q. And the Marlboro budget that I've handed you and the reports
14 to the FTC do not include expenditures for the work Leo Burnett
15 does in performing research on ad campaigns or developing ad
16 campaigns for Marlboro, does it?

17 A. I think it does.

18 Q. Where?

19 A. I think it's in these numbers.

20 Q. Where?

21 A. I can't tell you for sure. I think it's in like the
22 advertising numbers the cost of the production and all that. I
23 think it's included in these numbers.

24 Q. You think it's included in that number?

25 A. I believe it is.

1 Q. Upon what do you base that belief?

2 A. I just think it is. I think that that's the way you
3 calculate these numbers.

4 Q. Do you know how much is annually spent on Leo Burnett by
5 Philip Morris?

6 A. No, not off the top of my head.

7 Q. Can you estimate how much is spent annually on Leo Burnett?

8 A. No.

9 Q. Now, you don't report to the FTC Philip Morris's efforts on
10 its brand planning that would include hiring services of brand
11 consultants, test marketing and focus group expenditures, do
12 you?

13 A. That, I don't know.

14 Q. You can set that exhibit aside.

15 Now, on Thursday when I asked you questions about
16 whether Marlboro was the number one youth brand, you seemed to
17 have some difficulty with that.

18 MR. WEBB: Your Honor, I would like to object and
19 strike the last comment from -- he didn't say -- I don't recall
20 him having any difficulty with it.

21 THE COURT: Sustained.

22 MS. EUBANKS: I'll rephrase, Your Honor.

23 THE COURT: All right.

24 BY MS. EUBANKS:

25 Q. When I spoke with you on Thursday about whether Marlboro was

1 the number one youth brand, is it fair to say that you were
2 uncertain as to their placement in that regard?

3 A. No. I believe what I said was that I just didn't have any
4 data to support it. I was aware that that was what is often
5 said. I just don't have data. And I'm not suggesting that I
6 don't believe that that's the case, either. I just don't have
7 data to support it.

8 Q. Did you know its on your website?

9 A. No, but it could very well be. That's what -- a lot of
10 public health community information is on our website. So if
11 that's what is said, then it would definitely be up there, I
12 would suppose. I don't know why it wouldn't.

13 Q. But you've testified extensively about the website and what
14 information is on the website in your written direct, haven't
15 you?

16 A. I did cover the website in my written direct.

17 Q. I want to show you two exhibits: U.S. Exhibit 92120 and
18 U.S. Exhibit 92121.

19 Mr. Szymanczyk, I want to invite your attention on
20 92120 to the last line on that exhibit, but before I do that,
21 you see that this is from PM-USA's website, don't you?

22 A. Yes, that's what it looks like.

23 Q. And you see it's from About Us press room? At the very top
24 of the exhibit.

25 A. Yes.

1 Q. Now, I want you to focus on -- it's not a very good focus,
2 is it?

3 You will note that the last line says -- that I've
4 highlighted on the copy that's on the Elmo -- "Just three
5 cigarette brands account for nearly all teen smoking," and then
6 the document continues -- "and one of those brands alone
7 accounts for the majority of the underage tobacco market,
8 according to results from the Monitoring the Future study at the
9 University of Michigan. Marlboro is the choice of nearly
10 two-thirds of youth smokers by the time they reach the end of
11 high school. The second most widely-used brand by teens is
12 Newport, and the third is Camel. None of the other brands
13 accounts for even 2 percent of the market among teens."

14 Do you see that?

15 A. I do.

16 Q. And that's on your website, PM-USA website, isn't it?

17 A. It is.

18 Q. And that's not a public health link that you give; right?

19 A. No.

20 Q. Now, I want you to look at the next exhibit that I've given
21 you because that's also on your website. That's U.S.
22 Exhibit 92121.

23 Now, for the record, this exhibit is the actual press
24 release that's referenced in the previous exhibit, isn't it?

25 A. I think so. That's what it appears to be.

1 Q. So if you clicked on to the press release, this is the
2 exhibit that you would find; correct?

3 A. I don't know that, but I'm going to assume that's true.

4 Q. Well, it speaks to the Monitoring the Future study, does it
5 not?

6 A. It does.

7 Q. All right. And we just looked at the language from the
8 website in 92120 that referenced the Monitoring the Future study
9 and the fact that Marlboro was the number one youth brand;
10 correct?

11 A. Yes.

12 Q. Now, take a moment, if you will, and review this exhibit and
13 verify for me that this exhibit indicates that Marlboro is the
14 number one youth brand.

15 A. (Pause) That's what it says.

16 Q. And it's true, isn't it?

17 A. I'm sorry?

18 Q. It's true, isn't it?

19 A. Well, that is certainly what this study says, yes.

20 Q. And it's a fact, isn't it?

21 A. Well, what's a fact is that this study says that, and I'm
22 not denying that it isn't true. I'm just telling you the only
23 information I have is what you're giving me, and I'm not denying
24 that it's certainly the case. So, I don't know what you're
25 asking me beyond what my thoughts are. I'm not denying that.

1 Q. Okay, we will move on.

2 Now, in your -- you can set that aside, Mr. Szymanczyk.

3 Now, in your written direct, particularly at page 137,
4 and you can feel free to -- do you have it up there -- look at
5 that, you talk about the Retail Leaders Program for Philip
6 Morris.

7 You begin, I think, the discussion on 136, but on 137,
8 lines 8 and 9, you actually describe Philip Morris's Retail
9 Leaders Program. Right?

10 A. Yes.

11 Q. Now, you also see on page 137, at lines 17 and 18, that you
12 state that the program punishes retailers who are found to have
13 sold cigarettes to minors. Correct?

14 A. Correct.

15 Q. Now, if you look at page -- I want you to refer to page 143
16 of your written direct, line 16, and you see that the question
17 posed was.

18 "Mr. Szymanczyk, how does Philip Morris USA ensure that
19 its retailers are complying with their obligations under Retail
20 Leaders?"

21 And you answer, "Our sales force calls on all our
22 contracted retailers regularly to support them and monitor their
23 compliance as well as sell them our promotion programs. We
24 penalize retailers for repeated noncompliance. If Philip Morris
25 USA is informed that a retailer has been fined or convicted of

1 selling cigarettes to minors, then their Retail Leaders'
2 benefits will be suspended or terminated on and we will deny
3 them access to our promotions."

4 Do you see that?

5 A. Yes.

6 Q. Now, let's look at Joint Defense Exhibit 045044. You see
7 that this is a letter dated January 21, 2000, from Paula Desel.
8 Did I pronounce her name correctly?

9 A. Desel, yes.

10 Q. Desel. And it's to David Nocenti, counsel to the Attorney
11 General for the State of New York; correct?

12 A. Yes.

13 Q. And you're copied on this correspondence, are you not?

14 A. Yes.

15 Q. Now, if you look at this January 21st, letter -- Paula Desel
16 was a house attorney for PM Management Corp; right?

17 A. Yeah. She was an in-house lawyer, that's right.

18 Q. Now if you look at the second full paragraph of this letter,
19 you see that Ms. Desel is outlining Philip Morris's policy with
20 respect to withholding merchandising benefits from retailers who
21 violate New York's minimum age laws; right?

22 A. Yes.

23 Q. And just to be clear. By January of 2000 the Philip Morris
24 Retail Leaders Program was already in place; right?

25 A. Yes.

1 Q. And this is the same Retail Leaders Program that you
2 describe in your written direct; right?

3 A. Yes. Well, I mean it -- the name has been the same since it
4 was introduced, but the program itself has had modifications
5 during each year.

6 Q. Now, let's return back to JD 045044, Ms. Desel's letter.

7 You see that under Philip Morris's policy, the first
8 time a store is fined or receives a conviction for selling to
9 minors, a store receives no suspension if it agrees to
10 participate in the We Card or similar program; correct?

11 A. Correct. If it -- if it was willing to at this point in
12 time, if it was willing to participate in the program, train its
13 clerks and so on to take actions that would preclude a future
14 violation, then that was the first objective, because I think
15 that was the best way to get stores on board in -- in becoming
16 more cognizant of their responsibilities here.

17 Q. And the letter also states, doesn't it, that the same
18 penalty of a month's suspension is imposed upon the store who
19 receives a third fine or conviction?

20 A. Well, what it means is it's an additional month.

21 Q. Let's back up. The first offense and you find out about
22 that, if they agree to participate in We Card or comparable
23 program, then that's fine. That takes care of the violation
24 insofar as PM was concerned in 2000; correct?

25 A. Right. The first time they have a choice. They can either

1 go into the -- and this program is different than this now, but
2 at this point in time I believe, because we were trying to get
3 more and more stores to participate, the store had a choice.

4 They could either go through the We Card program and
5 submit to the training and so on or they were fined. They lost
6 their benefits for a month.

7 If they got a second violation, even if they had gone
8 into We Card, then their benefits were automatically suspended
9 for a month.

10 Q. Now you said they were fined. You didn't mean that, did
11 you?

12 A. Well, what I mean is we suspended their benefits.

13 They would had to have been fined or convicted of
14 selling cigarettes to a minor and we would have had to have been
15 notified by the state before we could take this action, but --
16 so presumably they were fined, but that would have been by the
17 state.

18 Q. And a second conviction, if it's the second offense, then
19 you simply would suspend them their merchandising benefits from
20 the We Card program; correct?

21 A. Well, from their merchandising. From the Retail Leaders
22 Program. They would had all of their benefits for that month
23 suspended. They wouldn't have gotten paid.

24 Q. Correct. I'm sorry. I misspoke. I meant from the Retail
25 Leaders Program.

1 A. Right.

2 Q. Now, upon notification of a third fine or conviction, then
3 PM-USA would suspend the merchandising benefits for another
4 month; right?

5 A. That's correct. What I believe this is means is they would
6 have a 2-month suspension.

7 Q. And then if you follow on the next page of this exhibit, you
8 see that for a fourth conviction, fine or conviction within
9 12 months of the first one that resulted in a suspension of
10 benefits, then PM-USA would suspend the merchandising benefits
11 for four consecutive months.

12 Do you see that?

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

14 Q. To your knowledge, that never happened, did it?

15 A. Pardon me?

16 Q. To your knowledge, that never happened, did it?

17 A. I don't know whether or not that happened.

18 Q. Okay. So, you state in your written direct, as we looked at
19 page 143, that retailers merchandising benefits could be
20 terminated for selling to minors, but, in fact, that wasn't the
21 policy at the time that this letter from Ms. Desel, that you're
22 copied on, was sent to the counsel for the Attorney General for
23 the State of New York; isn't that correct?

24 A. In 2000, that wasn't the case. It is now, but it wasn't in
25 2000.

1 Q. Well, it is the policy now, but you have never, to this day,
2 have you, if it is the policy now, you have never terminated any
3 retailer for selling to minors, have you? Terminated any
4 retailers benefits under the Retail Leaders Program for -- if it
5 sold to minors.

6 A. We have terminated benefits. In other words, we have
7 suspended payment to retailers for notification for sales to
8 minors.

9 We have penalized a number of retailers over the years
10 where they've lost payment for 1 month or 2 months. Generally,
11 after a retailer gets their payments suspended for a month or --
12 or longer, they take appropriate actions to try to see that that
13 never occurs again.

14 Q. But, what we're talking about is a permanent termination.
15 That never has happened now, has it? A termination --

16 A. (Interrupting) Permanently forever.

17 Q. May I finish, please?

18 A. Okay.

19 Q. You state in your written direct that one of the options is
20 to terminate a retailer.

21 Isn't it true that Philip Morris has never permanently
22 terminated any retailer from participating in its Retail Leaders
23 Program for violating the policy of selling to minors?

24 A. I don't know that. I don't know whether we have or haven't.
25 I think the policy today, if you get terminated --

1 Q. (Interrupting) We will get to that.

2 MR. WEBB: Your Honor, I respectfully ask that she not
3 interrupt the witness in the middle of an answer.

4 THE COURT: Well, the question is whether the witness
5 really believes he knows the answer to the question or whether
6 you're just speculating about what the current policy is now.

7 Do you know for sure?

8 THE WITNESS: Well, I do know what the policy is. I
9 just don't know if anybody has ever gone to the full extreme of
10 the policy.

11 THE COURT: Then that's the answer to the question.

12 MS. EUBANKS: Thank you, Your Honor.

13 BY MS. EUBANKS:

14 Q. Retail Leaders is a contractual obligation between Philip
15 Morris USA and the retailer organization; correct?

16 A. Yes. It's a contract.

17 Q. You've never terminated one of those contractors -- one of
18 those contracts when an establishment sold to minors now, have
19 you?

20 A. I don't know.

21 Q. In terms of providing the information about fines and
22 convictions, you rely upon the states to do that, don't you?

23 A. Yes.

24 Q. So you don't go to retailers and ask them to produce a
25 report for you. You wait for the states to tell Philip Morris

1 that there has been a violation. Right?

2 A. Yeah. We communicate with the states on this subject and we
3 wait for them to provide us with the information, and they do,
4 some don't.

5 Q. Let's look at another exhibit. Let's look at JD 045045.

6 Do you see that this is a February 22, 2000, letter
7 from David Nocenti, counsel for the Attorney General of New
8 York, to Paula Desel, assistant general counsel at PM Management
9 Corporation.

10 A. I do.

11 Q. And this is a February 22, 2000, letter that's responding to
12 the previous exhibit that we looked at, which was a January 21,
13 2000 letter from Ms. Desel. Is that correct?

14 A. I'm sorry. What was your question? I was reading the
15 letter.

16 Q. Okay. The previous exhibit that we looked at, JD 045044, is
17 the letter to which JD 045045 responds; correct?

18 A. That would appear to be the case, yes.

19 Q. Why don't you take a look at it? And I'll ask you a couple
20 of questions about it.

21 Do you see in the second paragraph of JD 045045, that
22 Mr. Nocenti writes, "We assume that the purpose is to deter
23 retailers fromFRER selling tobacco products to minors, but in
24 most circumstances the policy would not appear to impose any
25 penalty for such illegal conduct."

1 Do you see that?

2 A. I see it.

3 Q. Do you also see that in the third paragraph of this letter,
4 he states, "Moreover, you indicate that there is a one month
5 suspension of merchandising benefits if the store refuses to
6 participate in the program, but do not state what steps Philip
7 Morris takes if, after that one month period, the store still
8 refuses to participate in the program."

9 I read that correctly, didn't I?

10 A. Yes.

11 Q. Now, in the fourth paragraph of this same letter the counsel
12 to the Attorney General for the state of New York writes, "You
13 indicate that merchandising benefits are suspended for only
14 one month upon notification of a second or third fine or
15 conviction. However, in New York City a second violation within
16 a 2-year period results in a one year revocation of the
17 retailer's cigarette license, and elsewhere in New York State,
18 dealer registrations are suspended for one year following a
19 third violation within two years." Citing to a statute.

20 Then it continues, "Thus, because the retailer is
21 statutorily prohibited from selling cigarettes during that time
22 period, it is not clear what purpose is served by Philip
23 Morris's policy of suspending merchandising benefits."

24 Do you see that?

25 A. I do.

1 Q. Now, if you turn the page on that exhibit you will see where
2 Mr. Nocenti writes that, "I think it would be helpful to explore
3 ways in which Philip Morris can update its present policy so
4 that it imposes meaningful penalties that will help us deter
5 retailers from selling tobacco products to minors."

6 Do you see that?

7 A. I do.

8 Q. Having looked at this letter, wouldn't you agree that
9 Mr. Nocenti is expressing a real skepticism about the
10 effectiveness of the Philip Morris' penalties that were imposed
11 to deter retailers from selling cigarettes to minors?

12 A. Yeah. I think he's giving us some feedback on how we could
13 improve the program.

14 Q. And he's expressing skepticism about what it is that Philip
15 Morris has put in place insofar as it being effective is
16 concerned, isn't he?

17 A. I don't know that, but he certainly is saying you could make
18 it better and here's some suggestions.

19 Q. So he made some suggestions to Philip Morris about making it
20 better, and that was February 22, 2000; right?

21 A. Yes.

22 Q. Let's look at JD 045046. You see that this is a May 9,
23 2000, letter, again from David Nocenti, counsel for the Attorney
24 General for the State of New York, to Philip Morris Corporation,
25 Martin Barrington, an attorney. Do you see that?

1 A. I do.

2 Q. And it notes in this May 9th letter that -- it references
3 the February 22nd letter, correct, in the third paragraph?

4 A. Yes.

5 Q. And it notes that, "I am still awaiting a response to my
6 February 22, 2000, letter to Paula Desel regarding Philip
7 Morris's retailer suspension program." Correct?

8 A. Yes.

9 Q. So according to JD 045046, as of May 9, 2000, Philip Morris
10 had not responded to the, as you say, suggestions that were made
11 as to how it could improve its program; is that correct?

12 A. Well, we hadn't responded to the letter. That's what this
13 says. So you're right. I don't know whether the program had
14 been modified. We modified it a number of times, but we didn't
15 respond to the letter by this date.

16 Q. Now, you state in your written direct testimony in a number
17 of places how responsive Philip Morris USA is to State Attorneys
18 General, don't you?

19 A. We try to be, yes.

20 Q. Then yet from February 22nd by May 9, 2000, you hadn't
21 responded to a concern about retailers suspension insofar as
22 sales to underage people is concerned, correct?

23 A. Well, it appears not from this.

24 Q. Well you don't have any independent recollection otherwise,
25 do you?

1 A. I do not, no.

2 Q. And you were copied in the first letter in this series;
3 correct?

4 A. I believe that's right, yes.

5 Q. Now, I believe you've testified -- let me just ask you the
6 question. The Retail Leaders Program, in terms of its
7 provisions and requirements, has evolved over time a little bit?

8 A. Yes.

9 Q. Now, I want to show you a document that is U.S.
10 Exhibit 93329. Now, can see that this is dated August 21, 2003.
11 Do you see that at the top?

12 A. I do.

13 Q. And the subject is: Underage cigarette sales prevention
14 policy; correct?

15 A. Yes.

16 Q. And it's addressed to the field sales force; correct?

17 A. Correct.

18 Q. And this was part of the Retail Leaders Program; correct?

19 A. Well, not exactly. It's a policy that is outside of Retail
20 Leaders because it applies to any account whether they are
21 Retail Leaders' account or not.

22 Q. Mr. Szymanczyk, look at the second page of us Exhibit 93329,
23 please. Do you see this is on Philip Morris USA letterhead
24 dated September 2003?

25 A. Yes.

1 Q. And do you see that it's to the valued retailer?

2 A. I'm sorry?

3 Q. Dear Valued Retailer, the salutation reads.

4 A. Yes.

5 Q. And you see that it notes in the penultimate paragraph, "If
6 you participate in PM-USA Retail Leaders 2003 Program, remember
7 that you may be subject to additional signage and youth smoking
8 prevention requirements." Correct?

9 A. Correct.

10 Q. Now I want you to take a look at the third page of this
11 exhibit, please.

12 You will notice at the bottom of the page under the
13 heading: Violation of Underage Cigarette Sales Laws, the
14 penalties that PM-USA would impose on a store for violation of
15 underage cigarette sales laws; correct?

16 A. Yes.

17 Q. Nowhere on there is termination referenced, is it?

18 A. No. It's a year-long suspension, kind of like what New York
19 had there, would be the third penalty. So they would be
20 suspended from the contract for a year.

21 Q. Now --

22 THE COURT: Excuse me. Let me just clarify a couple of
23 things.

24 It appears to me that this statement of the penalties
25 is a bit different than the statement we examined about

1 10 minutes ago. Is that accurate?

2 THE WITNESS: Yes, ma'am.

3 THE COURT: Is this the current -- well, I see revised
4 September '03. Is this what's in effect now?

5 THE WITNESS: I believe it is, yes.

6 THE COURT: Okay. All right. Ms. Eubanks.

7 BY MS. EUBANKS:

8 Q. And one of your retailers is still allowed to sell
9 cigarettes during any suspension, is it not?

10 A. Well, we have no authority to keep a cigarette retailer from
11 buying cigarettes from a wholesaler and selling them. The state
12 can do that. They can revoke a license. We have no authority
13 to do that.

14 Q. So there's nothing in your Retail Leaders Program, though,
15 that -- and I just want be to very clear on this -- that would
16 require a termination for a violation of cigarette sales to
17 underage people, correct?

18 A. Well, we would consider a 12-month suspension a termination
19 of the contract. It's usually an annual contract. So if you're
20 suspended for 12 months, you're off the contract and then you
21 would have to be re-signed under the new contract because the
22 contracts tend to change every year.

23 Q. But you didn't tell that to the court in your written direct
24 when you mentioned termination, did you?

25 You did not qualify it by the terms of, if a retailer

1 were suspended for 12 months, then that would automatically
2 result in a termination of its contract because a contract is
3 for only a 12-month period?

4 A. No, I didn't explain that. I apologize. It was not my
5 intent to mislead anybody, but we -- we suspend somebody for the
6 year and that's, in effect, terminating their contract for that
7 year.

8 Q. So if we wanted to be absolutely clear in your written
9 direct, you would retract the statement, wouldn't you, that
10 under the Retail Leaders Program that a retailer may be
11 terminated for a violation of underage cigarette sales laws?

12 A. Well, I don't know that I would retract it, because I would
13 suggest to you that if we had a consistent pattern where we had
14 to suspend somebody for 12 months, we would have to look at our
15 legal ability to terminate somebody forever.

16 I mean, we do have to operate within the context of the
17 antitrust laws. But if, in fact, we had a continual problem and
18 the state had not withdrawn the license from the individual, we
19 would have to examine the circumstance and decide whether or not
20 we could keep that person off Retail Leaders. I don't know of
21 any circumstance that has reached that point. But it is not on
22 a possibility -- it is not impossible for us to find a situation
23 like that. I just don't know of anyone where we ever reached
24 that.

25 Q. Let's talk about reality. You know what contractual

1 debarment is, don't you?

2 A. Do I know what?

3 Q. Debarment, contractual debarment.

4 A. No, I don't.

5 Q. You don't.

6 You've never at the end of such a period permanently
7 terminated a contractual relationship with any retailer, have
8 you?

9 MR. WEBB: Your Honor, I'm going to just object. This
10 is the third time the question has been asked.

11 THE COURT: Sustained.

12 BY MS. EUBANKS:

13 Q. At the end of a year of a contract, once it comes to a
14 close, the retailer can enter into a new contract for the next
15 year, can't it?

16 A. Most of the time, yes.

17 Q. And there's nothing at all whatsoever in your Retail
18 Leaders' contract that would suggest that a sale to underage --
19 underage -- a violation of the underage sale laws would result
20 in an inability or a failure for Philip Morris to re-up, if you
21 will, its contractual relationship after it had expired with one
22 of those retailers? Yes or no, please.

23 A. Well, I think -- I think you're incorrect about that.

24 There is a requirement in the MSA -- or in the Retail
25 Leaders Program relative to the MSA, and we would have to look

1 at that circumstance and see whether or not we could determine
2 that it was an ongoing violation of our obligations to the
3 Master Settlement Agreement in order to do that.

4 But I don't know of any circumstance that's reached
5 that level, where -- and, in fact, I think if it did, the state
6 would have withdrawn the license.

7 Q. Well, Mr. Szymanczyk, you said you believe I was wrong about
8 what I asked you regarding whether a violation of the underage
9 sale laws would result in an inability or failure for Philip
10 Morris to re-up if the contractual -- its contractual
11 relationship with the retailer, after it had expired, if there
12 had been sales to underage youth.

13 I'm going to show you what's been marked as JD 055039.
14 This was a document that your counsel recently provided to us.
15 And I'd like you to take a look at that and tell me, if you can,
16 first what is this? This is the Retail Leaders 2005 agreement?

17 MR. WEBB: Can I -- I don't have the document.

18 MS. EUBANKS: It's one that you gave to us. I only
19 have the copy you gave us.

20 THE WITNESS: I'll have to look at it.

21 MR. WEBB: I don't have it here in court.

22 Thank you.

23 BY MS. EUBANKS:

24 Q. Can you tell me where there is a qualification in the
25 document that I've handed you, which is the 2005 Retail Leaders'

1 document, that would prohibit or debar a contractual
2 relationship between Philip Morris and a retailer who had been
3 suspended for a violation of underage cigarette sales?

4 A. Okay. What's your question again?

5 Q. Where does it say in the 2005 Retail Leaders document that
6 I've handed you that it would prohibit or debar that PM would
7 prohibit or debar contractual relationship between itself and a
8 cigarette retailer who had been suspended for a violation of
9 underage cigarette sales?

10 A. It doesn't say that in the contract. As I said, that's
11 covered by another policy, which is this policy. There is a
12 page here that describes a retailer's obligations relative to
13 the --

14 Q. (Interrupting) That's not my question.

15 A. -- the debar program and the MSA compliance question --

16 Q. (Interrupting) That's not my question.

17 Now, that is a current version of your Retail Leaders
18 Program document, the contract that I handed you, 2005; correct?

19 A. Yes, it is.

20 Q. Now, the policy that you mentioned, a policy that Philip
21 Morris has is not something that binds contractually its
22 retailers now, is it?

23 A. No, it's not a contract.

24 Q. Now, much of your written direct testimony, Mr. Szymanczyk,
25 is focused on the Master Settlement Agreement and PM-USA's

1 efforts to comply with its agreement -- with this agreement.

2 And I'm sure you recall that; right?

3 A. Yes.

4 Q. Now, in fact, if we look at the Table of Contents for your
5 testimony you will see that from page 193 to 219 it relates to
6 the subject matter of the MSA and specifically Philip Morris's
7 conduct under the MSA; right?

8 A. Correct.

9 Q. And then there are various other places in your written
10 direct where you refer to the MSA at other points in your
11 testimony; correct?

12 A. Correct.

13 Q. Now, one of the areas that you talk about is section 7(g) of
14 the MSA, and I want to direct your attention to page 118, lines
15 2 to 4, of your written direct.

16 Do you have that before you, Mr. Szymanczyk?

17 A. Which lines?

18 Q. Lines 2 to 4.

19 A. I got it.

20 Q. Where you state, "There is a provision of the Master
21 Settlement Agreement that gives certain powers to the National
22 Association of Attorneys General to monitor the performance of
23 the tobacco companies under the terms of the Master Settlement
24 Agreement."

25 I just wanted to orient you. Do you generally recall

1 your testimony in this regard?

2 A. Yes.

3 Q. Now, let's look at the first relevant section of the MSA,
4 and I want to show you a document that's marked as JD 045158.

5 This is the Master Settlement Agreement, isn't it,
6 Mr. Szymanczyk?

7 A. It looks like it.

8 Q. I want you to turn to page 52. You're familiar with this
9 document, aren't you?

10 A. Generally familiar with it.

11 Q. Okay.

12 A. Which page?

13 Q. 52, please.

14 And, Charles, if you will fly out the section G,
15 Inspection and Discovery Rights.

16 A. Section G?

17 Q. Yes. I just want you to refer to that.

18 Now, in fact, that section gives the State Attorneys
19 General the right to inspect documents and interview employees
20 when an Attorney General has reason to believe that an MSA
21 violation has occurred. Right?

22 A. I believe it does, yes.

23 Q. And this section falls under the section preceding, on page
24 48, Enforcement, doesn't it?

25 A. Yes.

1 Q. So, this is one of the sections that you're referring to in
2 your testimony about the powers of the National Association of
3 Attorneys General to enforce the MSA; correct?

4 A. Yes.

5 Q. Now, referencing this page 52. In your testimony you failed
6 to mention the fact that the inspection and discovery rights
7 under the MSA expire seven years after state-specific finality
8 for each state, didn't you?

9 You don't mention that anywhere in your written direct,
10 do you?

11 A. I don't believe I do, no.

12 Q. But you see here it says, actually, in the MSA, that -- on
13 the third line, we see, "Following state-specific finality in a
14 settling state and for seven years thereafter." Do you see that
15 limitation?

16 A. I do.

17 Q. So the right to discovery and inspection is not an
18 indefinite right under the MSA; right?

19 A. Well, I think this right, this specific right expires after
20 seven years.

21 Q. Okay. And, in fact -- well, then the power to inspect and
22 interview -- to inspect documents and interview employees with
23 other discovery rights that are set forth to monitor the
24 participating manufacturers under the MSA are limited by the
25 sunset provision; right?

1 A. Well, some of them are.

2 Q. Okay.

3 A. In other words, there are other obligations relative to
4 posting documents on the website and in the Minnesota library.
5 So -- but I believe you're right relative to this particular
6 subject.

7 Q. Okay. Now -- so you're aware that these discovery rights,
8 in fact, as referenced here in the MSA on page 52, have proved
9 to be very difficult to enforce? Aren't you aware of that?

10 A. I'm not aware of that, no.

11 Q. Well, certain companies, including Philip Morris and its law
12 firms, have balked at producing documents in response to
13 notification of potential MSA violations by State Attorneys
14 General, haven't they?

15 A. I'm not aware of that. I don't know what you're talking
16 about specifically.

17 Q. Did you know that, in fact, requests pursuant to this
18 provision on page 52 of the MSA have led to demands for
19 confidentiality agreements and resulted in lengthy negotiations
20 to establish confidentiality agreements between the companies
21 and the State Attorneys General?

22 A. Well, I can't speak to other companies. Are you referring
23 to something in my company?

24 Q. I'm asking you.

25 A. I mean, I don't know of a specific circumstance, but I

1 suspect if it was proprietary information we would seek a
2 confidentiality agreement with the AGs as a part of producing
3 the information they requested.

4 Q. Now, you discuss at length a number of times in your
5 testimony where the Attorneys General have brought MSA
6 violations to the attention of Philip Morris and the violations
7 were resolved without formal enforcement action.

8 And for your reference I'm referring to pages 205 to
9 219 of your written direct.

10 A. Can I put this back together or are we still here?

11 Q. You can put it back together for now, but don't put it too
12 far away. We're going to probably refer to it again.

13 A. Am I finished with this?

14 Q. Here, I'll take those from you.

15 A. I'll put it down here.

16 Q. I'll take them from you. It's no need to crowd you. I'm
17 going to put them right here and if we need them again, we will
18 have them.

19 A. All right. I'm sorry. Now your specific question was?

20 Q. Okay. Let's look at page 210 of your written direct,
21 please, and I'm referring particularly to line 11.

22 A. Yes.

23 Q. Where you were asked the question, what is Philip Morris
24 USA's policy or philosophy regarding responding to inquiries by
25 the Attorneys General as to whether certain Philip Morris USA

1 business practices may be a violation of the MSA?

2 And you respond answering, "Philip Morris USA strives
3 to live by the spirit as well as the letter of the MSA. If the
4 Attorneys General raise a specific business practice relative to
5 the MSA, we listen to what they say, analyze the situation and
6 determine if action should be taken. There are numerous
7 examples of where we have taken action."

8 Do you see that?

9 A. I do, yes.

10 Q. Now, how many times have the Attorneys General raised a
11 question as to whether specific practices of Philip Morris
12 violate the MSA, either orally or in writing?

13 A. Specific number, I don't know off the top of my head.

14 Q. What about an estimate, Mr. Szymanczyk?

15 A. Well, I just don't know. I mentioned some in my testimony,
16 but I don't know that off the top of my head.

17 Q. Okay. Well, I'm going to refer you to a statement made by
18 your counsel on December 8, 2004.

19 MR. WEBB: Thank you.

20 Q. Now, if you look at the document that I've handed you, it's
21 from the transcript of proceedings, the trial in this case, and
22 I've handed you pages 8005 to 8006 all the way up through 8011.

23 Don't you have that? Those pages from the transcript?

24 MR. WEBB: Your Honor --

25 A. I do. I have actually --

1 MR. WEBB: I'm going to pose an objection. I don't
2 know what -- this apparently must be the testimony of another
3 witness in this proceeding. And it's my understanding of the
4 rules of evidence, if he were an expert witness, it's okay to
5 call his attention to someone else's testimony and elicit
6 testimony about it. But my understanding, at least in most
7 courtrooms, he's a fact witness. Calling his attention to
8 another fact witness's testimony is not proper examination
9 because he's supposed to give testimony on what he as a fact
10 witness. He's not supposed to be giving opinions or
11 observations about somebody else's testimony.

12 I don't know whose testimony this is. I can't remember
13 as I'm looking at the cold transcript, but it appears to be
14 Mr. Frederick is examining somebody. Okay? And, therefore, my
15 antenna went on, because counsel is now showing him testimony of
16 another witness and then going to elicit some observation or
17 comment by him as a fact witness and I think that's
18 inappropriate examination with the fact witness.

19 MS. EUBANKS: Your Honor, I have two responses to that.
20 Order 471 and Rule 615 of the Rules of Evidence
21 prohibit -- and we've discussed this on a number of occasions --
22 that a witness can be present during the testimony of another
23 fact witness. But in any event that objection isn't really
24 relevant to my purpose for showing this document to
25 Mr. Szymanczyk to refresh his recollection based upon a

1 statement of counsel, not testimony of a witness.

2 THE COURT: The purpose is to refresh his recollection.
3 Is that right?

4 MS. EUBANKS: That's correct, Your Honor. He said he
5 did not know how many times there had been a violation, and I
6 want to show him something and then elicit some testimony based
7 upon a statement of his counsel during this trial.

8 THE COURT: All right. The objection is overruled, but
9 let it be clear to the witness that what's being shown to him is
10 a statement of counsel so that he can orient himself.

11 Go ahead.

12 MS. EUBANKS: Thank you, Your Honor. With that
13 instruction, I'll do that.

14 BY MS. EUBANKS:

15 Q. Mr. Szymanczyk, if you could look at page 8006.

16 You know who Mr. Frederick is, don't you?

17 Is he one of your lawyers?

18 A. You're referring to Winston & Strawn?

19 Q. Yes.

20 A. Yes.

21 Q. And you see the statement of Mr. Frederick addressing
22 section 3A?

23 A. I'm sorry. Which line are you on?

24 Q. I'm --

25 A. 8006 and which line?

1 Q. And you will see that Mr. Frederick is referencing section
2 3A and that if you flip through the testimony that I've given
3 you, you would agree that this is a discussion about the MSA and
4 violations of the MSA; correct?

5 A. Well, let me read it.

6 (Pause) How far do you want me to read?

7 Q. I particularly want -- I was trying to orient you to the
8 document. You can read all of it if you like. But I would
9 really like you to focus on pages 8009 and 8010 of the
10 transcript if you will and I think that will orient you more
11 precisely. And I'm referring to line 19 on page 8009.

12 Do you have that before you?

13 A. Yeah. I'll just keep reading it.

14 (Pause)

15 Q. Have you gotten to page 8009 yet, Mr. Szymanczyk?

16 A. Yes. I'm on 010.

17 Q. All right. Do you see the question at line 19?

18 Do you know whether any formal enforcement actions have
19 ever been brought by State Attorneys General?

20 A. We're on 09.

21 Q. 09, lines 19 --

22 A. I see it, yes.

23 Q. Now I want you to turn the page to 8010 and I'd like to
24 direct your attention to the statement at line 5 through 10 of
25 your counsel where he states that, "that more than 40 such

1 instances involved my client, Philip Morris USA, even though
2 it's never been subject to a formal enforcement action; there
3 have been more than 40 practices raised by the States Attorneys
4 General of Philip Morris USA that have been resolved
5 informally." Do you see that?

6 A. I see it.

7 Q. You have no reason to disagree with Mr. Frederick about the
8 number of 40 MSA potential violations brought to the attention
9 of your company, do you?

10 MR. WEBB: I object to the form of the question because
11 there's been no foundation that this witness has any personal
12 knowledge of the specific number.

13 THE COURT: Well, sustained, although for a slightly
14 different reason.

15 The purpose of this document was to refresh the
16 witness's recollection. That hasn't been done yet. And then
17 there will probably be an adequate basis for a second objection,
18 but we will get to that when we get to it.

19 BY MS. EUBANKS:

20 Q. Mr. Szymanczyk, do you know whether the number -- does this
21 document refresh your recollection as to -- strike that.

22 This is a statement of your counsel, Tom Frederick, in
23 this case; correct?

24 A. Well, I'm sorry. I'm a little confused. Is counsel asking
25 the questions or -- I'm sorry. It's a little confusing here.

1 THE COURT: Mr. Szymanczyk, let me try and clarify
2 things. I understand your confusion.

3 Yes, your counsel was supposedly asking a question, but
4 during the course of asking his question he made the statements
5 contained on lines 5 through 10 --

6 THE WITNESS: I got --

7 THE COURT: -- to the witness.

8 THE WITNESS: I understand. Thank you.

9 A. So your question is?

10 Q. I said, Mr. Frederick is your counsel in this case, is he
11 not?

12 A. He is, yes.

13 Q. And he's authorized to represent PM-USA in this case, is he
14 not?

15 A. He is.

16 Q. And do you see the statement attributed to him at page 8010
17 of the transcript of the trial of proceedings in this case?

18 A. I do.

19 Q. Now, he references the fact that there were more than 40
20 instances of potential violations. I should be very clear here.

21 40 practices raised by the State Attorneys General of
22 Philip Morris USA that had been resolved informally. Do you see
23 that statement?

24 A. I do.

25 Q. 8010. In your direct written examination you state that all

1 actions by Philip Morris were resolved informally; correct?

2 A. That's my understanding.

3 Q. Well, that understanding is under oath, isn't it?

4 A. Well, my understanding is we -- we've never had an
5 enforcement action by the Attorneys General.

6 Q. And you testify at length in your written direct examination
7 about a number of different violations or -- strike that.

8 You testify at length in your written direct about a
9 number of times where State Attorneys General had contacted
10 PM-USA to discuss potential MSA violations; correct?

11 A. Well, not exactly.

12 The AGs contact us regularly sometimes inquiring about
13 things to understand them better, sometimes questioning a
14 practice, but they do contact us quite regularly.

15 Q. Is this figure referenced in the transcript at least
16 consistent with your recollection of the number of times that
17 the State Attorneys General have taken the time to notify PM-USA
18 of a violation, a potential violation of the MSA?

19 MR. WEBB: Your Honor, my only objection is I don't
20 mind if she asked if this refreshes his recollection. That's
21 what we started with. I don't have any objection to that
22 question.

23 I object to the form of this question because, as I
24 understand, why we started she wanted to use this transcript to
25 see if it refreshed his recollection about a very specific

1 number, and I don't object to the proper question. That
2 question is improper based on the purpose.

3 THE COURT: Sustained.

4 MS. EUBANKS: Well, Your Honor, I will ask Mr. Webb if
5 he will stipulate that the number that the state was stated by
6 his co-counsel in this case of over 40 practices raised by State
7 Attorneys General were addressed with Philip Morris USA.

8 THE COURT: He doesn't have to stipulate to that in the
9 middle of everything.

10 What is hanging in the air is a question to this
11 witness, which hasn't been asked yet, as to whether, having
12 looked at this transcript, his recollection is refreshed about
13 these facts. That's the question that comes next based upon
14 this transcript. If you don't want to ask that question, that's
15 fine. We can move on.

16 BY MS. EUBANKS:

17 Q. Is your recollection refreshed by a reference to your
18 counsel in this case who is authorized to represent you stating
19 that over 40 times, or at least 40 times there were potential
20 violations of the MSA by Philip Morris?

21 Does this document refresh your recollection as to the
22 number of potential violations?

23 MR. WEBB: And I do object that that question. There's
24 no indication these are potential violations.

25 This witness testified that he sometimes make inquiries

1 all the time just about -- I object to the form of the question
2 as stating something that's important that has not been
3 established and is not in evidence.

4 MS. EUBANKS: Your Honor, we would argue that that's an
5 admission. That's the equivalent of an 801(d)(2) admission when
6 a statement of counsel --

7 THE COURT: If so, it doesn't have to be proven through
8 this witness. If so. And I'm not ruling on that. That's a
9 completely separate straight legal issue.

10 BY MS. EUBANKS:

11 Q. Does this refresh your recollection, Mr. Szymanczyk?

12 A. No, I don't know the number.

13 Q. You have no idea of the number?

14 A. I am sorry, I do not.

15 Q. Do you know if it was more than 50?

16 A. I've answered your question.

17 Q. No. Do you know if it was more than 50?

18 A. I don't know the number.

19 Q. I'm sorry?

20 A. I said I do not know the number.

21 Q. Yet in preparing your written direct examination you must
22 have, because you testify, don't you, about a number of contacts
23 with State Attorneys General, about MSA violations, don't you?

24 A. No, I don't say that. I say that there are -- there have
25 been frequent interactions with us and the Attorneys General

1 regarding the interpretations of the MSA, but we have never had
2 an enforcement action relative to the MSA.

3 Q. Let's talk about a different number.

4 Of the times that the State Attorneys General have
5 brought potential MSA violations to the attention of PM-USA, how
6 many times did PM-USA take some sort of affirmative step in
7 response more than simply writing a letter back?

8 A. Well, I mentioned a number, but I don't know the number. I
9 haven't counted them. I mentioned a number in my testimony, but
10 I don't -- I don't know the --

11 Q. You mentioned a number in your testimony?

12 A. I mentioned a number of examples in my testimony, but I
13 don't know the total number.

14 Q. Do you know how many times Philip Morris USA changed its
15 practices or its behavior based upon notification from the State
16 Attorneys General as to a potential violation of the MSA?

17 A. Well, I don't know. I mean, I don't know the number.

18 Again, I mentioned circumstances where Attorneys
19 General have sometimes inquired about things, sometimes we had
20 discussions like on magazine advertising where there clearly was
21 not violation of the MSA, but we had discussions about things
22 that we thought might be worth looking into.

23 And I mentioned circumstances where we were notified or
24 contacted by an Attorney General to look into something and we
25 decided to do something differently after we examined it.

1 But I can't speak to specific allegations of violations
2 because those would be enforcement actions and we just haven't
3 had any.

4 Q. Okay. But as CEO of PM-USA you get regular updates, do you
5 not, as to complaints raised about MSA compliance by State
6 Attorneys General?

7 A. No, I don't. I get informed or involved when somebody in
8 the organization thinks I need to be informed or if I'm
9 contacted directly by an Attorney General, which has happened,
10 and I've mentioned some of those.

11 Q. Mr. Szymanczyk, who told you which examples to mention in
12 your written direct about MSA potential violations?

13 A. I did. These are examples that I was aware of.

14 Q. And these are examples that you were aware of because you
15 received updates from those within your organization about
16 potential MSA violations?

17 A. Well, no, because I was involved with them or I was in a
18 meeting, actually, with Attorneys Generals. It was a team of
19 Attorneys General at the beginning of the Master Settlement
20 Agreement and I would meet with them sometimes, and they would
21 come to the meeting with issues to discuss and we would have
22 issues to discuss, because it was very complex large agreement,
23 it was new to both of us, and we were both in the process of
24 interpreting it and try to make good decisions about how to
25 execute it.

1 Q. Don't you consider it a matter of significance or importance
2 when a state Attorney General writes to anyone at your company
3 about a potential MSA violation, any time?

4 A. Well, they are important, and they generally go to Denise
5 Keane, who is a very competent executive, and she is charged
6 with the responsibility for communicating with the Attorneys
7 General, and she believes that something calls for my
8 involvement, then she brings it to my attention.

9 Q. Now, in terms of your testimony given in this case in your
10 written direct, you've stated that you prepared that
11 examination, those answers and so forth; right?

12 A. That's correct.

13 Q. You also stated that you decided which exhibits to rely upon
14 and reference in your written direct examination; correct?

15 A. I did, yes.

16 Q. Among the exhibits that your counsel provided the United
17 States is a 2005 MSA update binder. Did you look that over
18 before coming to testify?

19 A. I reviewed it. I did not read it all. It's a rather
20 lengthy document, but it was the most current update. I
21 included several of them. In fact, I believe I included all of
22 them, and I included the most current one. So we do that every
23 year and that was the most current one.

24 Q. So you do get regular updates as the CEO of the company as
25 to MSA compliance issues, don't you?

1 A. Well, if you consider our Annual MSA Compliance Report to be
2 a regular update, then that would be issue.

3 Q. You've shown the court some potential MSA violations and
4 Attorney General notifications in your written direct testimony.
5 I want to look at some other specific MSA violations that were
6 reported to Philip Morris under the MSA but that you didn't
7 include in your written direct examination.

8 Now, on Thursday when you testified you recall that we
9 talked about the Think, Don't Smoke Program where Philip Morris
10 removed the book covers and stopped the program several months
11 after being warned by the California Attorney General.

12 Do you recall that line of examination?

13 A. I recall a discussion on the book covers, yes.

14 Q. We're not going to return to the book covers. I'm going to
15 show you some different documents, Mr. Szymanczyk.

16 Let's look at U.S. Exhibit 92113. Now you see that
17 this is a March 23, 2000, letter from the Kentucky Attorney
18 General's office to Philip Morris describing a potential MSA
19 violation related to two large Marlboro billboard signs.

20 Do you see that?

21 A. Yes.

22 Q. Now I want to quickly look at the first paragraph of that
23 letter where it states, "As you know, over the last nine months
24 this office has attempted to resolve amicably the issue related
25 to the Marlboro billboards at Smoke Shop number 2 in Paducah,

1 Kentucky. Unfortunately, the issue remains unresolved and the
2 billboards remain in place. Thus, Kentucky's MSA Compliance
3 Advisory Board has directed our office to issue this 30-day
4 notice pursuant to section 7(c)(2) of the Master Settlement
5 Agreement of Kentucky's intent to initiate proceedings related
6 to violations of the Consent Decree and/or the MSA."

7 Now we also see, don't we, in this letter that the
8 Kentucky Attorney General, based upon what I just read, this
9 letter from the Assistant Deputy Attorney General for the
10 Commonwealth of Kentucky indicates that it's been over nine
11 months of time that he has taken to attempt to resolve this
12 violation of Philip Morris; correct?

13 A. Yes. This particular issue took some time.

14 Q. Now, look at the third paragraph of U.S. Exhibit 92113.

15 Now, it states in the second sentence there that a
16 letter that was sent from Hunton & Williams, representing Philip
17 Morris, "did not respond to our request for copies of any
18 licensing agreement or contract between Philip Morris and the
19 Smoke Shop relating to the billboards at issue."

20 Do you see that?

21 A. I see it.

22 Q. Let's look at another document. Let's look at U.S.
23 Exhibit 92112. Do you have that before you, Mr. Szymanczyk?

24 A. I do.

25 Q. You see that this is a December 31, 1998, letter from the

1 Ohio Attorney General's office to Philip Morris describing an
2 MSA sampling violation, isn't it?

3 A. Well, let me read it.

4 (Pause) Okay.

5 Q. You see in the first sentence of the letter, it indicates,
6 or it states, "Philip Morris is providing free tobacco product
7 samples to Ohioians via its Get a Pack Back promotion."

8 Do you see that?

9 A. I do.

10 Q. And you also see in the second paragraph of the letter that
11 it indicates that, "Both the Master Settlement Agreement and the
12 Ohio Consent Judgment Entry and Order prohibit Philip Morris
13 from distributing free tobacco product samples in Ohio, unless
14 done so in an adult only facility." Correct?

15 A. Correct.

16 Q. And you will see at the bottom, two paragraphs down from
17 that, a specific request that Philip Morris terminate its
18 campaign because it violated the MSA. Do you see that?

19 A. I do.

20 Q. Let's look at another exhibit. Let's look at U.S.
21 Exhibit 92114.

22 Now, this is a March 23, 2000, letter to the Wisconsin
23 Attorney General's office from a state senator reporting a
24 Philip Morris violation of the MSA lobbying restriction, isn't
25 it?

1 A. I don't know. I have to read it. Just a minute.

2 Q. Okay.

3 A. (Pause) Okay.

4 Q. So, let's look at the first paragraph. The letter states,
5 "I am writing in regards to a violation of the tobacco
6 litigation Master Settlement Agreement."

7 And then following to the next paragraph, it states,
8 "Specifically, the agreement forbids the companies or their
9 lobbyists from opposing new state or local tobacco-control
10 legislation or administrative rules. Included in the list of
11 legislation on which the companies cannot lobby are measures
12 that enhance enforcement of laws forbidding sales of tobacco
13 products to youth."

14 Do you see that?

15 A. I do.

16 Q. Now, following down to the paragraph three more after I just
17 read from that begins, "Scott Stenger," it says, "Scott Stenger
18 is a registered lobbyist for Philip Morris. The Assembly
19 Committee on Public Health held a hearing on the bill, AB 868,
20 on March 22, 2000. Scott Stenger registered in opposition to
21 the bill." And the next sentence reads, "This is a clear
22 violation of the Master Settlement Agreement."

23 Now, if we look at the next page of this two-page
24 exhibit, it states that "Mr. Stenger will say that his
25 appearance was on behalf of the Tavern League, not on behalf of

1 Philip Morris. This is smoke and mirrors. If the tobacco
2 companies can have their lobbyist appear under the guise of
3 other entities, the entire prohibition against lobbying will be
4 gutted. It will become common practice for tobacco lobbyist to
5 appear on behalf of entities that just happen to share the same
6 perspective as the tobacco companies. The tobacco companies are
7 smart enough not to have their lobbyist work directly on
8 forbidden topics, but they are achieving their goals with end-
9 runs like this one."

10 Now, you know Scott Stenger, don't you?

11 A. Do I? No, I don't believe I do.

12 Q. Now, you're familiar with the circumstances that are
13 described in U.S. Exhibit 92114, are you not?

14 A. With this specific piece of legislation?

15 Q. No. The circumstances that are described in U.S.
16 Exhibit 92114.

17 A. Could you be more specific?

18 Q. My question is: Are you familiar with the circumstances
19 that are described in that exhibit?

20 Are you familiar with the circumstances, any of them,
21 that are described in U.S. Exhibit 92114?

22 A. I'm not familiar with this specific circumstance. I am
23 familiar with the component of the Master Settlement Agreement
24 relative to prohibitions on lobbying, if that's what you're
25 referring to.

1 Q. So as CEO of the company in March 2000, this isn't the kind
2 of thing that people would bring to your attention about a
3 potential MSA violation?

4 A. Well, I suspect, since, to my knowledge, we wouldn't have
5 opposed increased compliance checks on retail stores in 2000.
6 And this individual, lobbyist often work for different companies
7 or different entities. I have no reason that this was an issue.

8 I mean, it may very well have been this person's
9 opinion on this subject. And, in fact, I don't know what the
10 outcome what was, but I suspect we made our point of view clear
11 relevant to the bill, because I don't know why we would have
12 opposed to it to begin with. I don't think we did.

13 Q. Your registered lobbyist, according to this exhibit, or
14 registered lobbyist for Philip Morris, was taking an action
15 opposing the bill; correct?

16 A. But he said he was taking it on behalf of the Tavern League.

17 Q. And that's okay with you?

18 A. It's okay with us if that was what he did, representing
19 them. It wouldn't be okay if he made reference to the fact that
20 our point of view was the same as the Tavern League's, if it
21 wasn't. No, that wouldn't be acceptable.

22 And I don't know what the circumstance was here, but I
23 certainly can imagine this kind of a confusion taking place and
24 it has to be clarified.

25 That's why sometimes an Attorneys General office will

1 contact us because there needs to be clarification about what's
2 actually going on. Sometimes we might decide -- and I don't
3 know in this case -- we might decide well we're not going to use
4 that lobbyist if that's the circumstance, but I don't know the
5 specific instance.

6 Q. And this isn't the kind of thing that people would bring to
7 your attention as CEO of the company? And let me be specific
8 here.

9 A. No. They would take action on it.

10 Q. May I finish the question, please.

11 That if a registered lobbyist, who is registered for
12 both Philip Morris and some other organization, was lobbying in
13 opposition to a bill that prohibited the sale of tobacco to
14 youth and that the State Attorneys General thought that this was
15 a violation of the MSA's lobbying requirements, that that isn't
16 the kind of significant event that would be brought to your
17 attention?

18 MR. WEBB: Your Honor, can I object to the form of the
19 question. He's not an expert witness. She just added a fact in
20 that absolutely has not been established by this letter, that
21 any Attorney General ever thought this was a violation of
22 anything. So I object to the form of the question.

23 THE COURT: Sustained.

24 BY MS. EUBANKS:

25 Q. I show you another document --

1 THE COURT: No. We're going to take our morning break.
2 You may step down. Let me just one thing to counsel.

3 I know that counsel are working on some scheduling
4 memos, and I want to bring certain things to your attention.
5 Hopefully, they will be irrelevant, but I kind of doubt it.

6 May 30th, of course, is a day the court is not sitting
7 because that is Memorial Day. It pains me to mention this, but
8 I feel compelled to. The week of June 13th I can going to be at
9 a Judicial Conference committee meeting, and June 23rd and 24th
10 I will be at a Judicial Conference meeting for this circuit.
11 I'm pretty sure it's just those two days, although it might
12 require me to leave midday on the 22nd. All of which certainly
13 argues in favor of a cutoff date no later than June 10th if that
14 is humanly possible. That's something for people to factor in.

15 Okay. Fifteen minutes, everybody.

16 (Recess began at 11:04 a.m.)

17 (Recess ended at 11:22 a.m.)

18 THE COURT: Ms. Eubanks, please.

19 BY MS. EUBANKS:

20 Q. Before the break, Mr. Szymanczyk, we were discussing a
21 violation of lobbying requirements under the MSA. I want to
22 direct your attention now to another exhibit, and that is U.S.
23 Exhibit 92118.

24 Mr. Szymanczyk, you see that this exhibit --

25 A. I do.

1 Q. -- is a letter dated April 12th. Well, it's a memo, isn't
2 it?

3 A. April 12th, yes.

4 Q. April 12, 2000?

5 A. Right.

6 Q. From Paula Desel to Alphonzo Carney; correct?

7 A. Yes.

8 Q. And the subject is, Outstanding MSA Compliance Issues, May
9 NAAG meeting. Do you see that?

10 A. I do.

11 Q. Now, this specifically states that, "In response to a
12 request from Mike Szymanczyk, Marty asked me to follow up with
13 you regarding a MSA compliance issue that will likely be on the
14 agenda for the scheduled May 17th meeting with the States
15 Attorneys General.

16 "At the December 1999 meeting, as you know, the
17 Attorneys General inquired about the MSA compliance training for
18 Philip Morris lobbyists."

19 And then it asked the question, "In preparation for May
20 meeting, could you update us on the status of this work?"

21 And the memo goes on to state, "The recent request by
22 Wisconsin State Senator Robson," and that was the document we
23 just reviewed before the break.

24 A. I think so, yes.

25 Q. "That Attorney General Doyle investigate activities by Scott

1 Stenger makes it very likely that this issue will be raised
2 again especially regarding contract lobbyists who also lobby on
3 behalf of other entities."

4 Do you see that?

5 A. I do.

6 Q. Now, this memo says that you made a request to follow up for
7 information regarding a meeting, an upcoming meeting with the
8 States Attorneys General, doesn't it?

9 A. Yes.

10 Q. And it also states that it's a likely discussion topic at
11 that meeting, compliance activities regarding Philip Morris
12 lobbyists; correct?

13 A. Correct.

14 Q. And it references Scott Stenger, who was also referenced in
15 the previous document that we looked at, as a lobbyist both for
16 Philip Morris and another organization; correct?

17 A. It does.

18 Q. Now, you noticed that the date of this document, April 12,
19 2000, that's -- the MSA was signed in November of 1998; correct?

20 A. Correct.

21 Q. Yet, this document indicates that as late as April 2000
22 Philip Morris was considering compliance training for its
23 lobbyists. Do you see that?

24 A. Well, that's not what it says.

25 Q. Well, that's not my question as to what it says.

1 Doesn't the document indicate that the Attorneys
2 General had asked about MSA compliance training for Philip
3 Morris lobbyists? Yes or no, please.

4 A. It says the Attorneys General inquired about MSA compliance
5 training, that's correct.

6 Q. And in that same paragraph you're referenced; correct?

7 A. That's correct.

8 Q. Yet you don't have any recollection, do you, of complaints
9 from State Attorneys General about MSA compliance issues
10 regarding Philip Morris lobbyists?

11 A. Ask that question again.

12 Q. I'll try.

13 You have no recollection, do you, of at any time being
14 approached by State Attorneys General with complaints about
15 Philip Morris lobbyists compliance with the MSA?

16 A. No, I don't have any personal recollection relative to a
17 specific instance. I mean, obviously --

18 Q. (Interrupting) Thank you, Mr. Szymanczyk.

19 A. -- we were going to update people in compliance training in
20 this --

21 MS. EUBANKS: Your Honor, he's answered the question.
22 I'd ask that the remainder be struck.

23 A. I don't recollect one.

24 THE COURT: All right.

25 Q. Now, in fact, Philip Morris did have compliance training for

1 its lobbyists, didn't it?

2 A. I believe we did, yes.

3 Q. And it was sometime in 2000 or later. Do you recall when?

4 A. I don't recall specifically, no.

5 Q. And one of the issues -- strike that.

6 Now, at least two different points in your written
7 direct testimony you answer questions about Philip Morris's
8 continued sponsorship of auto racing and the MSA. You recall
9 that, don't you?

10 A. That I referenced it in my direct.

11 Q. Yes.

12 A. Yes, I do.

13 Q. And you include a photo of one of the race cars in your
14 written direct?

15 A. In a particular instance, yes, I do.

16 Q. First let's look at page 115 of your written direct.

17 A. Okay.

18 Q. And I invite your attention to beginning at the testimony on
19 line 5. Do you see that?

20 A. Yes.

21 Q. And the question that's raised is, "Let's review paragraph
22 3(c)(2) on page 19 of the MSA. Could you please explain this
23 provision?"

24 And you go on to explain the provision by stating,
25 "Philip Morris USA is allowed to engage in one brand named

1 sponsorship in the United States other than in an adult-only
2 facility during any 12-month period, provided it is not a
3 concert, it does not have an audience comprised of a significant
4 percentage of youth, it does not involve paid participants who
5 are youth and it is not an athletic event between opposing teams
6 in any football, basketball, baseball, soccer or hockey league."

7 Then your testimony continues regarding that paragraph
8 of the MSA when you answer the next question, which is, "What
9 has happened as a result of this provision?"

10 And you respond, "We have eliminated all tobacco brand
11 sponsorships except for one."

12 Then the question is posed, "Which sponsorship did
13 Philip Morris USA choose to keep?"

14 You answer, "Its sponsorship of Marlboro team Penske
15 racing."

16 "Could you explain the racing sponsorship?"

17 And you state, We sponsor a racing team that
18 participates in the Indy Racing League, or IRL, racing events."

19 And finally the question is posed, "Is that the only
20 brand named sponsorship that Philip Morris USA has as of today?"

21 And you answer, "That is correct."

22 Now, at pages 131 to 134 of your written direct you
23 talk about the specific incident where Washington Attorney
24 General Christine Gregoire notified you of a MSA violation
25 involving Philip Morris' multiple brand name sponsorship of

1 racing events.

2 Do you recall that.

3 A. I recall a discussion with her on this subject, yes.

4 Q. And you recall your testimony regarding that discussion,
5 don't you?

6 A. Yes.

7 Q. Now, the question at the top of page 131 is, "In 2001 did
8 Philip Morris USA have any dialogue with the Attorneys General
9 concerning Philip Morris USA's racing sponsorship?"

10 And you answer, "Yes."

11 In answer to the question, "Could you explain what
12 happened?" You state, "In the spring of 2001, Attorney General
13 Gregoire called me on behalf of the Attorneys General to express
14 concerns about our sponsorship of Marlboro team Penske in the
15 Indianapolis 500. They believed that our participation in the
16 Indianapolis 500 might violate the MSA.

17 "Question: What was their concern."

18 You provide this answer. "Under the MSA we are limited
19 to one brand name sponsorship per 12-month period. At the time,
20 Philip Morris USA's elected sponsorship was Marlboro team
21 Penske.

22 "Team Penske raced in events sanctioned by the
23 Championship Auto Racing Teams, Inc., otherwise known as CART.
24 That year CART sanctioned the participation of its teams in the
25 Indianapolis 500, which is an Indy Racing League event.

1 Marlboro team Penske elected to participate.

2 "The Attorneys General believed that if the team was
3 allowed to race in the Indy 500, that would constitute racing in
4 a second series and violate the MSA's restriction of only one
5 brand name sponsorship in a 12-month period."

6 "Question: Did Philip Morris believe that
7 participating in the Indianapolis 500 violated the MSA?"

8 And you answer, "No."

9 Now I want to follow up with your testimony about the
10 racing, and I want you first to look at the relevant section of
11 the MSA. And you still have that up there. It's JD 045158. In
12 particular, I'm going to direct you, Mr. Szymanczyk, to page 19
13 of the MSA.

14 A. Okay.

15 Q. You see at the bottom of page 19 of the MSA the clause,
16 limited sponsorships?

17 A. Yes.

18 Q. And it says, "No participating manufacturer may engage in
19 more than one brand name sponsorship in the states in any
20 12-month period, such period measured from the date of the
21 initial sponsored event."

22 Do you see that?

23 A. Yes.

24 Q. And you understand that the thought behind this restriction
25 was that the states wanted to reduce the exposure of youth to

1 the cigarette brand names and reduce the association of
2 cigarettes with athletic events?

3 A. Yes.

4 Q. Now, is there any doubt in your mind that the brand name
5 sponsorship restrictions similar to other advertising
6 restrictions was included to reduce youth exposure to brand name
7 advertising, in particular, with regard to sporting activities?

8 A. Yeah. It was to reduce exposure to overall marketing,
9 cigarette marketing, that's correct.

10 Q. And, in fact, brand name sponsorship is described at page 5
11 of the MSA, or at least defined, isn't it?

12 A. Yes.

13 Q. And, generally speaking, the sponsorship of one event or a
14 season of events, if all of the events are sanctioned by a
15 single approving organization is considered a brand name
16 sponsorship under the MSAs described on page 5; right?

17 A. Yes.

18 Q. Now, you would agree that examples of brand name
19 sponsorships would be Philip Morris's sponsorship of its Indy
20 racing team league events, Reynolds' sponsorship of the NASCAR
21 Winston Cup, and Brown & Williamson's sponsorship of the GPC
22 contract music festival?

23 A. Well, yeah, the auto racing ones I would agree. I'm not
24 familiar with the other one.

25 Q. You're not familiar with the GPC contract music festival?

1 A. No.

2 Q. But you are familiar with the fact that the Reynolds'
3 sponsorship of NASCAR and Philip Morris's sponsorship of the
4 Indy Racing League, the team events are examples of brand name
5 sponsorships?

6 A. Yes.

7 Q. Now, let's stick with Philip Morris, then, since you're
8 familiar with that.

9 Philip Morris's former brand name sponsorship event
10 prior to its Indy Racing League, or IRL, team was a sponsorship
11 of a CART racing team as you discuss in your testimony at page
12 131; correct?

13 A. Yes. The championship auto racing teams is what it was
14 called.

15 Q. In fact, Mr. Szymanczyk, the Indy racing team, or IRL, is a
16 wholly separate racing league, a wholly separate set of car
17 races, a wholly separate sanctioning body, a wholly separate
18 approval organization from CART, isn't it?

19 A. Yes. It's a different league.

20 Q. And the race itself, the Indianapolis 500, the subject of
21 the letter, or the call, I should say, mentioned from Attorney
22 General Gregoire was and is sanctioned by the IRL, not by CART,
23 right?

24 A. No, that's incorrect.

25 Q. Well, in terms of what it was that Attorney General Gregoire

1 was mentioning -- and I'm talking about the specific sanctioning
2 done -- it was by the Indy Racing League, was it not?

3 A. It was also sanctioned by CART that year, so it was a CART
4 race as well.

5 Q. You say it was a CART race, and Attorney General Gregoire
6 disagreed with your assessment of that, didn't she?

7 A. No.

8 Q. Well --

9 A. No, it was an unusual circumstance, but they both happened
10 to be sanctioned that year in both of those series.

11 Q. But the event itself was sanctioned by IRL only, wasn't it?

12 A. No. It was sanctioned by CART as well that year.

13 So, in other words, CART teams were sanctioned to go
14 ahead and race in the Indianapolis 500 that year.

15 Q. Let's go back to what the issue was as it's set forth, and
16 let's look back to your testimony in terms of what happened in
17 2001.

18 If the Marlboro vehicles had participated in both races
19 of both leagues, IRL and CART, and drivers bearing the name
20 Marlboro in each, wouldn't that have been a violation of the
21 MSA? Yes or no, please.

22 A. I have to make sure I understand your question. Do you want
23 to repeat it?

24 Q. Sure. If the Marlboro vehicles had participated in the
25 races of both leagues, that is IRL and CART, with vehicles and

1 drivers bearing the name Marlboro, that would have been a
2 violation of the MSA, wouldn't it?

3 A. That year, yes, if they had participated in all races in
4 both leagues, that would be true.

5 Q. Well, that's exactly -- I didn't say all races in all
6 leagues. Let's talk about any race in both leagues the same
7 year.

8 If they had participated in any race, Marlboro vehicles
9 participated in a race of both leagues in any given year with
10 vehicles bearing the brand name Marlboro, that would be a
11 violation of the MSA's restriction, wouldn't it?

12 A. With the exception of the Indianapolis 500, it would be.

13 Q. And you say that's because that CART sanctioned it. That's
14 your testimony, isn't it?

15 A. It's my understanding, yes.

16 Q. Your understanding, okay.

17 In fact, if Attorney General Gregoire had not contacted
18 you and warned the company of it, your plan was to put Marlboro
19 vehicles in the race -- in both -- in the Indy 500 both at the
20 same time; correct? Two different cars in one race; right?

21 A. I'm sorry. Now you've confused me. Two different cars.

22 Q. Let's --

23 A. The CART team -- our CART team would have raced in the
24 Indianapolis 500 that year with their cars the way they normally
25 would be configured.

1 They would have raced in that race and the cars would
2 have looked like they look in a CART race, that's correct.

3 Q. Now, if Philip Morris had done what it wanted to do before
4 it got the letter from Attorney General Gregoire, it would have
5 had Marlboro vehicles in both the CART-sanctioned event and an
6 IRL-sanctioned event, and that's two different circuits, two
7 different sanctioning bodies, and two different MSA brand name
8 sponsorships, isn't it?

9 A. No, it's not. It would have been a CART-sanctioned race for
10 CART drivers and so they would have been in that series.

11 And I would say I also got a phone call from Attorney
12 General Gregoire. I don't know if she sent me a letter late or
13 not, but she called me up.

14 Q. Now, we reviewed the brand name sponsorship at page 5, and
15 it's your testimony that that wouldn't be a violation of the
16 MSA; correct?

17 A. Yes. It's my understanding of the way that was configured
18 that year, that was not a violation of the MSA, although we
19 responded to Attorney Generals Gregoire's concern relative to
20 it, as I outlined in my testimony, my direct testimony. But no,
21 we did not view it as a violation.

22 Q. But Philip Morris never again tried to have its Marlboro
23 cars racing both in a CART circuit and an IRL circuit in a
24 similar fashion, did it?

25 A. Well, we changed leagues the next year. So, no, we haven't

1 had that circumstance arise again.

2 Q. Now, if we -- we see a picture of the vehicle and what the
3 background looked like for the Marlboro Penske vehicles at the
4 2001 Indianapolis 500 at page 133 of your written direct; right?

5 A. Correct.

6 Q. Which is J-DEM 040316. And that's your race car; right?

7 A. Yes.

8 Q. Now, in terms of what ultimately happened with the vehicles
9 that you raced in both races, you took the name Marlboro off one
10 of them, didn't you? Just the name.

11 A. Well, what we --

12 Q. (Interrupting) That's a yes or no.

13 A. -- agreed to do with Attorney General Greg Gore, what I
14 agreed to do and we discussed it was, I said, "Look. We'll
15 just -- we'll see if we can take the name off the car and
16 everything else that's it removal on, this is very short notice,
17 and that we'll make sure that we don't have any signage at the
18 track." And so we didn't put up any signage.

19 And they agreed that that was an appropriate approach
20 to the circumstance, because we didn't -- we didn't want to make
21 an issue out of it, but we thought it was a -- it was clear, it
22 was part of the CART-sanctioned season, so we didn't see any
23 reason why it should be a problem, but we didn't want to make an
24 issue out of it.

25 Q. You didn't tell them that you were leaving on the

1 distinctive chevron, the red and white design?

2 A. Yes, I did. I told her that we wouldn't be able to -- on
3 equipment where the information is painted on the equipment, the
4 logo is painted on the equipment, that's the same equipment we
5 would use in the CART race. So I was clear with her that we
6 wouldn't be able to remove it from everything we had, but we
7 would do the best job we could to remove it from things, so we
8 did.

9 Q. And so if I'm clear on this. The only thing you took off
10 your vehicle was the word "Marlboro," right?

11 A. Yeah, we took the branding off the vehicle, and then we --
12 we removed it from other locations at the track. But, for
13 example, we couldn't, in that short a notice, come up with new
14 uniforms and things like that.

15 Q. You can't really possibly see the chevron, those red and
16 white chevrons, and not think of Marlboro; right? Isn't that
17 the purpose?

18 A. Yeah, they were there.

19 Q. And that's really what you wanted, wasn't it, to display the
20 Marlboro chevrons on the car?

21 A. Well, what we did -- what we did was what I said we did.
22 Our intent was to race the car with Marlboro on it, but we agree
23 we would take the name off the car, so we did.

24 Q. Now, back on page 15 of your written direct, I know you
25 testified that Marlboro had decided to participate only in IRL

1 events with its Marlboro Penske team and that this is currently,
2 currently now, the company's only brand name sponsorship.

3 Do I have that right?

4 A. I believe that's correct, yes.

5 Q. And then on page 136 of your written direct, at lines 3
6 through 6, you were asked, "So, in sum, how would you
7 characterize Philip Morris USA's compliance with the sponsorship
8 provisions of the MSA?"

9 And you answered, "I think we have gone well beyond the
10 text of the MSA, as well as respecting the spirit of the MSA and
11 the concerns raised by the Attorneys General."

12 That's your testimony, isn't it?

13 A. That's correct.

14 Q. But isn't there actually another major factor that Philip
15 Morris's brand name, auto -- isn't there actually another major
16 really even larger event that Philip Morris brand name Auto
17 Racing Sponsorship applies to?

18 Let me start over again, Mr. Szymanczyk. You're
19 looking at me like you don't understand.

20 There is, isn't there, a larger Philip Morris' brand
21 name Auto Racing Sponsorship out there besides the ones that
22 we've already discussed, isn't there?

23 A. I don't know what you're talking about.

24 Q. Are you familiar with another league with its very own
25 distinct organization called the FIA or commonly known as

1 Formula 1?

2 A. Oh, I'm familiar with Formula 1, yes.

3 Q. And Formula 1, like the Indy Racing League, has its own
4 sanctioned body and season of races; correct?

5 A. It does.

6 Q. Perhaps the best known Formula 1 race is the Grand Prix of
7 Monte Carlo; right?

8 A. Well, I don't know if that's their best known race, but
9 certainly I've heard of that one, yes.

10 Q. And their Grand Prix races all over the world in places like
11 Germany, Italy, Canada and Japan; right?

12 A. Lots of countries. I don't know all the specific countries.
13 I'm sorry.

14 Q. But you do know that the Formula 1 season includes a race
15 here in the United States called the United States Grand Prix
16 which also happens to take place at Indianapolis each year;
17 right?

18 A. That's correct.

19 MS. EUBANKS: Your Honor, to try to make this go as
20 quickly as possible, I'm going to hand up, if I may, a binder
21 that I'll give to the witness as well. And I have a copy for
22 Your Honor. It might be easier to follow the testimony through
23 the binder. We have a copy for counsel.

24 BY MS. EUBANKS:

25 Q. Mr. Szymanczyk, I've given you a binder and there are tabs

1 on the binder. On the tabs contain exhibit numbers. When I
2 reference an Exhibit Number, I'm referencing one of the tabs and
3 I want to take you through some of the information that's
4 contained here.

5 A. The tabs are blank in this binder.

6 Q. Then I'll do it first tab, second tab, third tab and so
7 forth. Okay?

8 A. All right.

9 Q. Looking at the first tab, it says this is number 93343. If
10 you look at the document you can confirm for me, if you will,
11 that that's Exhibit 9343?

12 A. Sure.

13 Q. And I'll represent to you that this is from the United
14 States Grand Prix website, and this is a list of Formula 1 teams
15 in the season, and we see the name of the first team listed as
16 Scuderia Ferrari Marlboro. Do you see that?

17 A. I do.

18 Q. Now, we see that the drivers for the Ferrari Marlboro team
19 are Michael Schumacher and Rubin Barrichello?

20 A. Correct.

21 Q. And you're familiar with the Marlboro sponsorship of the
22 Ferrari Formula 1 team; right.

23 A. Well, that's just to be clear. That's a different company.
24 That's Philip Morris International that sponsors Team Ferrari.

25 MR. WEBB: Your Honor, may I object? I actually have

1 no idea what this is, and in fact still not familiar with it,
2 although I'm going to object. Clearly it's irrelevant.

3 Apparently, my assumption is looking at this book that
4 a totally different company that's not a defendant --

5 MS. EUBANKS: Your Honor, if I may ask the witness to
6 leave while we discuss this objection.

7 MR. WEBB: Fine.

8 MS. EUBANKS: If we're going to get into the details of
9 the material that are contained in the binder or this level, or
10 if we could approach, Your Honor.

11 THE COURT: Let's do it at the bench and save a little
12 time.

13 (Bench conference on the record.)

14 THE COURT: This is Philip Morris International?

15 MS. EUBANKS: The witness has stated that, and this
16 will become clear in the course of his testimony, and if counsel
17 wants to move to strike it at the end, I think that's fine.

18 But he stated repeatedly in his testimony, Your Honor,
19 that Philip Morris takes every effort to comply, not just with
20 the provisions of the MSA but its spirit as well.

21 THE COURT: Philip Morris USA.

22 MS. EUBANKS: That Philip Morris USA does comply with
23 the spirit.

24 What I want to do, and what my intent is with respect
25 to these exhibits, is to take him through the exposure that is

1 given with respect to Marlboro, how it comes back to the United
2 States, the fact that they own the brand, the copyright on
3 Marlboro, and furthermore that he has done nothing to stop that.

4 His testimony is replete with references to the spirit
5 of the MSA and the cooperative effort that the companies have
6 undertaken.

7 THE COURT: Philip Morris USA owns the copyright on the
8 Marlboro --

9 MS. EUBANKS: It does, Your Honor.

10 THE COURT: -- brand?

11 MS. EUBANKS: It does.

12 THE COURT: And did they license it out to Philip
13 Morris International? Or you don't know.

14 MS. EUBANKS: I don't know the answer to that, Your
15 Honor.

16 MR. WEBB: Your Honor, let me state my objection on the
17 record.

18 My objection, Your Honor, is that Philip Morris
19 International is not a defendant in this case.

20 Number two, Philip Morris International is not a party
21 to the MSA.

22 Number three, Philip Morris USA has no ability -- nor
23 should they have the ability to control the independent conduct
24 of the different corporation.

25 Apparently, Philip Morris International sponsors Grand

1 Prix racing which has one race in the United States.

2 The fact that Philip Morris International sponsors one
3 race in the United States is totally irrelevant to whether
4 Philip Morris USA is complying with the MSA. It couldn't
5 possibly have any relevancy whatsoever.

6 As far as the copyright is concerned, Philip Morris
7 International, if they have -- there's no way Philip Morris
8 International could not -- if Philip Morris USA owns the
9 copyright which I'll accept counsel's representation. I didn't
10 know that until this moment, but I'll accept this
11 representation.

12 It is not possible for Philip Morris International to
13 use it unless they are licensed. I mean, that's just not
14 possible.

15 THE COURT: That's why I asked that question.

16 MR. WEBB: We don't have any right to interfere with
17 the license agreement. This is clearly talked about.

18 THE COURT: Wait, Mr. Webb. I asked the question
19 because that's my understanding of copyright law. This is not a
20 copyright case. And, therefore, if Philip Morris International
21 had to have a license to use the Marlboro logos, et cetera, they
22 had to have gotten it from Philip Morris USA.

23 MR. WEBB: I'm sure they --

24 THE COURT: And that means that Philip Morris USA at
25 some point had to know what it was doing and had to have,

1 whether explicitly or implicitly, approved of this enormous
2 publicity venture, I guess -- I don't know much about car
3 racing -- on behalf of the Grand Prix.

4 MR. WEBB: I don't -- Your Honor, I don't doubt that
5 Philip Morris knew that Philip Morris International raced. I
6 don't know, but I don't doubt that. But that doesn't prove that
7 Philip Morris USA is --

8 THE COURT: No, but it certainly goes to the issue of
9 whether they are complying with, quote, the spirit of the MSA.

10 If they knew or had reason to know that, despite the
11 provisions of the MSA, their licensee was going to act in this
12 fashion, it certainly raises factual questions.

13 I believe that's what Ms. Eubanks is trying to get at.

14 MS. EUBANKS: That's correct, Your Honor.

15 MR. WEBB: But the only way that could be, if the
16 foundation is laid, I don't know what the license arrangement
17 is.

18 I'm standing here before the court -- some foundation
19 should be laid, because if this license agreement preexisted,
20 Philip Morris International existed for, I don't know how long,
21 years and years and years. If there's a license agreement, that
22 license agreement, by the way, may very well, I don't know -- I
23 don't know who the license agreement is with. I'm talking
24 without any knowledge whatsoever. But if that license agreement
25 predated --

1 THE COURT: I understand what you're saying.

2 MR. WEBB: -- there would be no relevancy whatsoever
3 that we had a license agreement with Philip Morris
4 International --

5 THE COURT: At which point on redirect, and I know you
6 will scurry around at lunch to get the facts on this, but on
7 redirect you can bring out either that it preexisted or that it
8 was airtight and there was no way that Philip Morris USA could
9 get out of it.

10 Ms. Eubanks will be asking questions about what did you
11 do to convince Philip Morris International not to go forward
12 with this even though it is clearly not a violation of the MSA,
13 and obviously we are in a bench trial and I know what the legal
14 issues are. But she can ask questions about it. I may end up
15 striking it or you may destroy the whole thing on redirect.

16 MS. EUBANKS: Thank you, Your Honor.

17 (End of bench conference.)

18 THE COURT: Mr. Szymanczyk, please.

19 BY MS. EUBANKS:

20 Q. Mr. Szymanczyk, in U.S. Exhibit 93343 which identified the
21 driver's of the Scuderia, Ferrari Marlboro; correct?

22 A. Yes.

23 Q. I want you to turn to the next tab 92263 in the notebook
24 I've given you. Now, you've already stated that you're familiar
25 with the sponsorship of the Ferrari Formula 1 team; correct?

1 A. I'm familiar with Philip Morris International's sponsorship
2 of it, yes.

3 Q. Okay. And the team whose vehicles in uniforms and
4 backgrounds signage bear -- this is the team whose vehicles and
5 their uniforms and the background signage bear the Marlboro
6 brand name; correct?

7 A. Well, if you're referring to the U.S. Grand Prix, you're
8 incorrect.

9 Q. No.

10 A. That would be incorrect.

11 MR. WEBB: Your Honor, then I do object.

12 There's a photograph in a book, which I made an
13 assumption, counsel, that this was a photograph of this U.S.
14 race and which somehow Marlboro was being prominently displayed,
15 and there's no authentication of where these photographs come
16 from.

17 Well, I object to the form of the question without a
18 foundation being laid as to what the photograph is a photograph
19 of, it's improper to use the photograph with the witness.

20 MS. EUBANKS: Your Honor, it's entirely appropriate,
21 and I can ask the witness a question that I think will tie this
22 together regarding trademark ownership, if I may.

23 THE COURT: You ask the witness a foundational
24 question.

25 BY MS. EUBANKS:

1 Q. The Philip Morris trademark is owned by Philip Morris USA,
2 isn't it?

3 A. For the U.S.

4 Q. Yes.

5 A. Only for the U.S. though.

6 Q. But my question to you is, that if you wanted to enforce
7 terms of abuse of the Philip Morris trademark, Philip Morris USA
8 would have that power, would it not?

9 A. No, not outside of the U.S.

10 Q. Not outside of the U.S. All right. What about --

11 MS. EUBANKS: Let's turn, Your Honor, to another
12 document if we could.

13 MR. WEBB: Your Honor, could I put an objection? I
14 don't want to belabor a point that I don't have all my facts,
15 but based on what this witness just said, counsel's position
16 apparently has been that Philip Morris USA owns the copyright or
17 the trademark. That's what I was just told at sidebar.

18 I now find out that's not accurate. That we own it
19 only for the United States which means that Philip Morris
20 International undoubtedly has a license from somebody, maybe
21 Philip Morris Companies. I don't know as I stand here. There's
22 no -- this issue that we control the license of Philip Morris
23 International, which is what I thought at the sidebar, is not
24 the fact now. Okay? And I really do object to a totally
25 tangential issue about a company that has nothing to do with

1 this company, not a defendant, and this license theory
2 apparently is not accurate.

3 MS. EUBANKS: Well, Your Honor, if I could speak to
4 that.

5 Certainly with respect to the Internet, which goes
6 through international communications, Philip Morris has
7 undertaken actions with respect to its own trademark. It has
8 taken those actions, despite what this witness has stated about
9 the ownership rights.

10 I would ask to be permitted to ask the questions and if
11 Mr. Webb is right and wants to bring a motion later I would say
12 that's appropriate, but these are directly relevant to this
13 witness's testimony as we discussed at sidebar with respect to
14 the effect of the MSA and statements that he has made, not about
15 the -- I hesitate to say too much because I do not want --

16 THE COURT: Let me say this, then, since we had our
17 sidebar conference and since it is clear that one -- it would
18 appear that one very important statement made at sidebar by the
19 government does not seem to be the case.

20 You're going to have to now first establish that Philip
21 Morris USA had any control at all in this situation.

22 MS. EUBANKS: Okay, Your Honor. If I could approach
23 the witness, I would like to give him U.S. Exhibit 92122.

24 BY MS. EUBANKS:

25 Q. The document --

1 MR. WEBB: I'm sorry. I just didn't catch the exhibit
2 number and it's not written on mine.

3 MS. EUBANKS: 92122.

4 BY MS. EUBANKS:

5 Q. Mr. Szymanczyk, I've handed you a document that comes from
6 Philip Morris USA website. Do you see that?

7 A. I do.

8 Q. And it notes, Philip Morris USA filed suits against
9 Internet-based cigarette vendors. Do you see that?

10 A. I do.

11 Q. And if you look at the third paragraph of U.S.
12 Exhibit 92122, it notes that the lawsuits allege that the
13 defendants have violated trademark and unfair competition laws
14 by misusing Philip Morris USA's trademarks in an effort to
15 attract Internet users to their website.

16 Do you see that?

17 A. I do.

18 Q. Now, in terms of Internet users of Philip Morris' website,
19 Philip Morris's website is not restricted to U.S. only users, is
20 it? Its Internet website --

21 A. This isn't our Internet website that this is referring to.

22 I said, this isn't referring to our Internet website.
23 It's referring to an offshore Internet website selling
24 cigarettes from, I believe, Switzerland into the United States,
25 which would have been a violation and not paying taxes on them.

1 If you want to look at the press reports on it, you
2 will see that the federal government worked with us to stop it.
3 But this was in the United States was the issue.

4 Q. Right.

5 A. Use of the trademark relative to the United States. It
6 isn't our trademark outside of the United States. It belongs to
7 somebody else.

8 Q. But it states here that, and you just testified, that it
9 involved a sale, Internet sale of cigarettes from Switzerland?

10 A. I believe that's where -- if this is referring to Oda media,
11 that's where I believe they were located.

12 Q. Now, which you would agree is outside of the United States;
13 right?

14 A. Would I agree that Oda media is outside the United States?

15 Q. Switzerland is outside the United States.

16 A. Yes, I would agree with that.

17 Q. Now, if you look at the top line, it states, "Lawsuits aimed
18 to stop trademark violations and illegal importation of
19 cigarettes." Do you see that?

20 A. I see it.

21 Q. So the lawsuit was one that both dealt with illegal
22 importation of cigarettes as well as what Philip Morris claimed
23 was a trademark violation; correct?

24 A. Philip Morris USA, yes.

25 Q. Your company; right?

1 A. Correct.

2 Q. Now, it states in the first paragraph of U.S. Exhibit 92122,
3 "The lawsuits aim to stop the defendants illegal use of Philip
4 Morris USA's trademarks, including the famous Marlboro mark, and
5 to stop the importation of the company's cigarettes in violation
6 of federal law." Correct?

7 A. That's what it says.

8 Q. So, again, there were two things that the lawsuit stopped --
9 aimed to stop.

10 One was the illegal use of Philip Morris USA's
11 trademark as well as the importation issue, alleged violation of
12 federal law; right?

13 A. That's what it says.

14 Q. Now, despite the fact that this lawsuit addressed actions
15 taking place in Switzerland, Philip Morris USA felt it was
16 important to bring this lawsuit, didn't it, to protect its
17 trademark; correct?

18 A. Well, the actions -- to be specific, the actions that we had
19 issue with were actions being taken in the United States by a
20 Swiss-based operation.

21 Q. And the Internet itself, you would agree, is not limited to
22 access in the United States; correct?

23 A. That's correct.

24 MS. EUBANKS: Now, let's go back to Formula 1 issues,
25 Your Honor. I think it's fairly clear what the power of Philip

1 Morris. You don't?

2 THE COURT: Not at all. Not at all. The situation is
3 totally different. I'll let Mr. Webb make the argument.

4 MR. WEBB: I'll just make it briefly.

5 THE COURT: Briefly.

6 MR. WEBB: I'm going to be brief.

7 From what I can tell from this document, Philip Morris
8 is enforcing its U.S. trademark against someone who does not
9 have a license to use our trademark.

10 That's totally different than if PMI apparently has a
11 license granted by somebody else, probably the parent company,
12 to do whatever they want to do with the trademark in other
13 countries.

14 So this example here is not an example of where Philip
15 Morris has the ability to enforce its trademark rights against
16 another licensee that has trademarks right.

17 THE COURT: PMI was not acting illegally based upon
18 what I've heard so far. The situation that you've just
19 presented to the witness is a situation in which some Swiss-
20 based company was acting illegally and PM-USA took action to
21 stop that. They are just totally different factors, situations.

22 MS. EUBANKS: But, Your Honor, but my argument is a
23 different one. It's not one whether they elected or not. PM
24 allows it to go on.

25 This certainly is an affiliate company of it, and I

1 would ask to be permitted to at least take the witness through
2 the planned testimony and then we can see at the end of the day
3 if this is something that appropriately should be stricken.

4 But the witness has testified over and over again about
5 MSA compliance and his company's intent with respect to that.
6 In order to rebut those statements that he makes expressly a
7 number of times, at least five or six specific times in his
8 written direct, we need to be able to put this before him and
9 then to ask him what questions -- ask him questions that deal
10 with what it is that Philip Morris USA could or may have been
11 able to do about these and whether it undertook any specific
12 actions to address these issues.

13 He stated that the Marlboro --

14 THE COURT: You may ask to begin with only what Philip
15 Morris could have done. We don't get to the issue of what it
16 did or didn't do until, or if, you can establish that they could
17 have done anything.

18 BY MS. EUBANKS:

19 Q. Mr. Szymanczyk, do you believe that PM-USA has any
20 obligation whatsoever to control how the Marlboro brand is used
21 by its sister subsidiaries?

22 A. Only within the United States.

23 Q. So it would have no obligation if the use by a sister
24 subsidiary would violate the spirit of the MSA, it would have no
25 obligation whatsoever to intervene to control the use of that

1 trademark; is that right? Is that your testimony?

2 A. No. What I said was that within the United States the
3 Master Settlement Agreement only covers the United States.
4 That's the only place that we have the ability to enforce any
5 provisions of the MSA relative to our trademarks.

6 Q. But that wasn't my question. I didn't ask you about
7 enforcement requirements.

8 You have a cooperative relationship, do you not, with
9 Altria; correct?

10 A. Yes.

11 Q. You have a cooperative relationship with Philip Morris
12 International, do you not?

13 A. Well, I don't know how you describe cooperative, but we have
14 a relationship with Philip Morris International, yes.

15 Q. How do you describe that relationship with Philip Morris?

16 A. It's a business relationship.

17 Q. And that business relationship is one where both your
18 company and Philip Morris International report up to Altria, a
19 defendant in this case; isn't that correct?

20 A. Altria owns both companies, that's correct.

21 Q. All right. Now, in terms of what your company, PM-USA,
22 could do vis-a-vis its relationship with its sister subsidiary,
23 Philip Morris International, is it your testimony that your
24 company PM-USA had no obligation to ensure that the use of the
25 Marlboro trademark did not act -- did not -- was not used in

1 such a way as would violate the spirit of the MSA?

2 MR. WEBB: Your Honor, never mind, I don't object. No
3 objection.

4 A. Can you give me an example of what you're talking about?

5 You're asking me a very general question that, do we
6 have -- is there anything we can do about anything is what
7 you're asking me. Why don't you give me a specific example?

8 Q. Okay. Let's look at the binder that you have in front of
9 you, and let's move from the topic of Philip Morris USA, and
10 let's go to the last page of the binder that I've given you.
11 The exhibit number on that is U.S. Exhibit 93331.

12 A. I don't believe I have an exhibit number on my last page.

13 Oh, it's a multiple page exhibit.

14 Q. It's the very last page of the binder with the children's
15 jacket. Do you see that?

16 You're there. That's the page.

17 A. I see it.

18 Q. Now, you see that the last page of 9331 is a Ferrari
19 children's jacket 2005 Schumacher jacket; right?

20 A. That's what it says.

21 Q. And you would agree, wouldn't you -- and you can see an HTML
22 at the bottom of that exhibit, can't you?

23 A. I do.

24 Q. So that's something that came from the Internet, isn't it?

25 A. I don't know, but I'm assuming it did.

1 Q. And this sells for 65 US dollars, doesn't it?

2 A. That's what it says.

3 Q. And it's a children's jacket with the Marlboro logo on it,
4 isn't it?

5 A. That's what it says.

6 Q. And it's got the Ferrari racing on it, doesn't it?

7 A. That's correct.

8 Q. And this is sold here in the United States, isn't it?

9 A. No, I don't believe it is.

10 Q. Well, you see here it says 65 U.S. dollars. Where else do
11 you spend U.S. dollars?

12 A. It says what the price is, but I don't know -- I don't think
13 that this is sold in the U.S. If it is, I don't believe it
14 should be.

15 Q. Well you haven't done anything to stop it now, have you?

16 A. I wasn't aware of where it was, but I'll find out.

17 Q. I see. Well, let's look at another --

18 MR. WEBB: Your Honor, I'd like to -- if they are going
19 to ask questions, there's got to be some foundation. There's
20 got to be a good-faith basis to believe -- there was a statement
21 made in the question. This jacket is sold in the United States.

22 I don't know that to be the case. This witness has now
23 said he doesn't think it's the case.

24 You've got to have a good-faith basis to ask the
25 question, and I would like to know what evidence there is that

1 it's sold in the United States.

2 That's not fair to a witness to tell him that it's sold
3 in the U.S. and then he says he doesn't think it is.

4 I object to the form of the question.

5 MS. EUBANKS: Your Honor, I most certainly do have a
6 good-faith basis for asking the question.

7 THE COURT: You may continue with your questioning.

8 I would add that this witness certainly can take care
9 of himself in answering the questions.

10 Go ahead, please.

11 BY MS. EUBANKS:

12 Q. Mr. Szymanczyk, flip back to the next exhibit, which is U.S.
13 Exhibit 93332, if you will.

14 A. That's back a tab?

15 Q. Yes, it is. Do you want me to help you find it?

16 A. 93332?

17 Q. That's correct.

18 A. I got it.

19 Q. Now, you see that this says Scuderia, Ferrari, Marlboro at
20 the top; right?

21 A. I see that.

22 Q. It's all in English, isn't it?

23 A. Yes, it's in English.

24 Q. And it says, AutoSportsGear at the very top. Do you see
25 that?

1 A. I'm sorry. Where are we?

2 Q. If you're looking at the exhibit, which is landscape, look
3 at the top of it. It says AutoSportsGear at the top.

4 A. I got it, yes.

5 Q. You see that it has a lot of Marlboro Ferrari team
6 merchandise, doesn't it?

7 A. On this page?

8 THE COURT: Throughout the exhibit and at the bottom of
9 this exhibit of the first page, Ferrari team merchandise.

10 THE WITNESS: I see Ferrari team merchandise. I'm just
11 having trouble finding something about Marlboro, but I see
12 Ferrari team.

13 BY MS. EUBANKS:

14 Q. Let's look on the first page of U.S. Exhibit 93332. Do you
15 see the Ferrari white Vodaphone polo for 39 U.S. dollars?

16 A. Yes, I see it.

17 Q. Now, turn the next page.

18 A. I just don't see Marlboro on it. That's what I'm asking you
19 about.

20 Q. Can you see the Marlboro logo on there on the shirt?

21 A. No.

22 Q. You can't see that?

23 A. I don't think there is one, unless my eyes are failing me.

24 Q. Then let's look at the first page, if you will. I hate to
25 keep moving you around, but I think you can see that very shirt

1 a little bit better if you look at Exhibit 93331, the next tab,
2 the very first page.

3 A. Back another tab?

4 Q. It's back farther in the book, the next tab, Mr. Szymanczyk.
5 93331. May I help you?

6 A. Just a minute. I've got 293 here. Did I go too far?

7 Q. Yes. Here's where we were. Here is the next tab.

8 A. Back. Okay, I got it. Thank you.

9 Q. That's a close up of the shirt we were just looking at. Do
10 you see the Marlboro logo on that shirt?

11 A. Wait a minute. I don't know that that's true. I don't
12 think that's the case necessarily.

13 Q. Why don't you verify it? Take a look. Do you see it?

14 A. I see this shirt, but it's a different exhibit, and I don't
15 know that it's the same shirt.

16 Q. Let's go back to 93332 and look at the description of the
17 shirt itself, Mr. Szymanczyk.

18 MR. WEBB: Your Honor, I'm just going to object because
19 I'm trying to respond as I go along.

20 I've just been past a note that someone has checked the
21 web. This is actually a website from a United Kingdom company
22 selling merchandise in another English-speaking country called
23 the United Kingdom. And I do object. I do object to the
24 misleading nature of this questioning that's going on.

25 If that website for AutoSportsGear is a United Kingdom

1 store, then this is a series of misleading questions to this
2 witness.

3 MS. EUBANKS: Your Honor, it states "free delivery
4 worldwide" right there on the document itself. That's not
5 misleading.

6 If it's free delivery worldwide, it clearly indicates
7 that it was available in this country and that the dollars that
8 are set forth are U.S. dollars. There's nothing misleading
9 about this line of examination.

10 THE COURT: I certainly wouldn't have known that
11 AutoSports was a British company.

12 MS. EUBANKS: Your Honor, I don't think that's of any
13 relevance here when you look at the fact that it's advertised
14 here in the United States. You can get it off the Internet.
15 You can pay for it worldwide. U.S. dollars are indicated here.

16 The fact that it happens to be a British company is of
17 no moment in terms of the types of questions that I intend to
18 ask the witness about the logo.

19 MR. WEBB: Here's where we are going. We have a
20 different corporation that's not on trial in this case that
21 apparently is selling merchandise to a United Kingdom company
22 called AutoSportsGear, and somehow that is going -- that's
23 connected to whether Philip Morris is complying with the MSA in
24 the United States.

25 I respectfully -- by the way, being sold on the

1 Internet. I respectfully suggest this is irrelevant.

2 MS. EUBANKS: Your Honor, it's more than -- it's not
3 irrelevant. It's wholly relevant that this witness's testimony
4 insofar as what actions he could undertake with respect to a
5 sister company.

6 He himself has stated on the stand, having looked at
7 the children's jacket, that he intends to look at that and do
8 something about it.

9 I'd submit to the court that he clearly is in a
10 position to address these issues; that he has testified
11 repeatedly in his written direct about the fact that his company
12 intends to adhere, not just to the terms of the MSA, but to its
13 spirit as well, and that if these things were sold in the United
14 States directly, this certainly would be a violation of the MSA,
15 and in that regard it's relevant to ask him in terms of questions
16 regarding what actions will be undertaken by PM-USA vis-a-vis
17 its sister company to address these issues that apparently he's
18 unaware of based upon his testimony.

19 But it's highly relevant. It's certainly not
20 irrelevant. They raised the issue of the spirit of the MSA. No
21 one has said in this case that there was any requirement that
22 they adhere to the spirit of the MSA. They brought that into
23 issue.

24 And we are entitled to cross-examine the CEO of the
25 company about his intentions with respect to the Marlboro logo,

1 its use by anybody on the Internet, and what actions could be
2 undertaken.

3 We've already established that they certainly can file
4 lawsuits, and often do, to protect their copyright. These are
5 all things that are directly relevant to the questions as the
6 written direct has been laid out, Your Honor.

7 MR. WEBB: Just very quickly. Counsel just stated that
8 this witness right on the stand said that he was going to go
9 look into something.

10 What he said he was going to look into is he told
11 Ms. Eubanks he did not believe that children's jacket was sold
12 in the U.S. She then said it was based on the form of her
13 question.

14 So he says back to her, And if it was, I would look
15 into that. I then wanted to find out if there's a factual basis
16 to show that a children's jacket is being sold in the U.S. with
17 the Marlboro logo on it from PMI, because I don't know, and I
18 basically raised that objection.

19 Counsel has not gone forward to show any factual
20 predicate whatsoever. That's why this is so misleading and I
21 object. It's totally irrelevant. It doesn't go to whether
22 PM-USA is complying in spirit or with the letter of the MSA.
23 And I object on relevancy grounds.

24 THE COURT: Counsel may proceed with a few more
25 questions on the issue of whether Philip Morris USA has any

1 ability to impact what appears to be foreign exporters from
2 their countries of sports gear with Marlboro logos. So far, I
3 haven't heard that PM-USA does, but you may ask a few more
4 questions on this line.

5 BY MS. EUBANKS:

6 Q. Mr. Szymanczyk, the brand name sponsorship of the -- the
7 Marlboro brand as it's displayed on the items that are set forth
8 at Exhibits 93331 and 93332, you would agree that those items do
9 contain the same Marlboro logo that you say PM-USA owns.

10 And I want to invite your attention in particular to
11 the first page of 93332 and the statement on the polo shirt
12 where it states, Ferrari white polo with the shell Vodaphone and
13 Ferrari and Marlboro logos.

14 A. I see that.

15 Q. And that the Marlboro logo that is set forth on the
16 merchandise that's in 93332 is no different in appearance from
17 the Marlboro logo that PM-USA owns; is that correct?

18 A. Well, I think the logo is -- this Ferrari logo, Ferrari,
19 whatever they call it, I don't even know what the name,
20 Scuderia, Ferrari, Marlboro team logo. They have a team logo.
21 But, I don't -- I mean, I don't have any knowledge of what the
22 licensing agreements are relative to that logo and Ferrari.

23 Remember, we don't own team Ferrari. Philip Morris USA
24 certainly doesn't, and neither does Philip Morris International.
25 They sponsor team Ferrari. I just am not knowledgeable on the

1 licensing or merchandising agreements that exists within those
2 entities.

3 Q. That's not my question. My question is -- and let's go to
4 the last page of U.S. 93331 that has the Ferrari children's
5 jacket, the Schumacher jacket.

6 Now, I want to direct your attention to on the sleeve,
7 the Marlboro logo. Do you see that?

8 A. Yes.

9 Q. In appearance, that logo is no different, is it, from the
10 PM-USA Marlboro logo?

11 A. Yeah. I don't think it's any meaningful difference that I
12 can see.

13 Q. Well, let's not just talk about what you can see.

14 Now, you don't know whether the Marlboro logo for your
15 company looks exactly like the Marlboro logo for PM
16 International?

17 A. The red roof you're talking about.

18 Q. I'm sorry?

19 A. That red roof logo up there?

20 Q. I've got a new question for you now.

21 I'm asking you whether you know or don't know that the
22 logo for your Marlboro PM-USA is any different from the logo for
23 Philip Morris International? Do you know or not?

24 A. I don't know. They may have some differences. I really
25 don't know if it's exactly the same or not.

1 Q. So when I go to Great Britain and I want to purchase
2 Marlboro cigarettes, is it your testimony that the Marlboro logo
3 might look different there in the United Kingdom than it looks
4 here when I go down the street if I wanted to purchase Marlboro
5 cigarettes?

6 A. Well, the packaging is different, but I would say the logo
7 is the same logo.

8 Q. Okay. The logo is the same, but the packaging may be
9 different?

10 A. Yeah.

11 Q. And when we say logo, we're looking at the white chevron on
12 the red pack; right?

13 A. The red chevron?

14 Q. Red chevron, white pack.

15 A. On the white background? Is that what you're talking about,
16 with Marlboro underneath it?

17 Q. In black, yes. It's the same; right?

18 A. Right.

19 Q. And in terms of brand name sponsorship -- I want to make
20 sure I understand your testimony, Mr. Szymanczyk, just so we are
21 clear on it. Absolutely clear.

22 Is it your position that PM-USA has no obligation to do
23 anything about the sale of products such as this children's
24 jacket as set forth in U.S. Exhibit 93331?

25 MR. WEBB: Your Honor, I'm going to object. She's

1 asked that question twice before.

2 And number two, you asked her to lay foundation
3 questions on the issue about does Philip Morris have any legal
4 ability or any ability to control foreign market activities.
5 There's been no foundation established that they do have.

6 So I think this has gone on long enough. And I object
7 to the line of questioning on the grounds I earlier stated.

8 MS. EUBANKS: Your Honor, my question here -- I decided
9 not to pursue that line of questioning and I think that that's
10 my prerogative.

11 But my question here is a different one, and it's one
12 that hasn't been answered. This witness has testified not just
13 about legal obligations, but about moral obligations as well.
14 His testimony is replete with that.

15 I'm asking him a different question now and it's
16 whether his company has any obligation to do anything about, in
17 his opinion, to do anything about the sale of products such as
18 what we see here on the exhibit. That's an entirely different
19 question, Your Honor.

20 MR. WEBB: Your Honor a moment ago ruled that counsel
21 could start trying to go into what could or would have been done
22 once they established the predicate as to whether or not Philip
23 Morris USA had any ability to do that. We haven't gotten over
24 the original predicate, and I object.

25 MS. EUBANKS: But, Your Honor, in terms of what it is

1 that I'm asking this witness, it goes directly -- it's
2 appropriate cross-examination to the statements that he set
3 forth about both legal and moral obligations that he believe his
4 company has.

5 And I'm simply asking him -- and I'll move on after I
6 get an answer to this question -- in terms of what is the
7 obligation that he believes PM-USA has to address issues such as
8 the sale of such merchandise as is set forth in U.S.
9 Exhibit 93331, the children's jacket that's on the screen.

10 THE COURT: He may answer this final question and then
11 I'm going to have you move on.

12 If you can answer it, you may.

13 THE WITNESS: Can she frame the question for me?

14 BY MS. EUBANKS:

15 Q. Sure. Does PM-USA have any obligation, legal or otherwise,
16 to undertake any actions to address the sale of products such as
17 those -- such as the children's jacket that's on the screen set
18 forth in U.S. Exhibit 93331?

19 MR. WEBB: I'm sorry. But my objection is that there's
20 no foundation laid that this jacket was sold in the U.S.

21 This witness a moment ago told Ms. Eubanks he did not
22 believe it was sold in the U.S. That's his best knowledge.
23 Counsel has not gone forward with any reason to show that it was
24 sold in the U.S.

25 This question is asking him about an obligation to do

1 something that relates to a factual situation that doesn't even
2 exist. He already said he doesn't think the jacket is sold in
3 the U.S., so how could he have an obligation to do something
4 about it?

5 It's a jacket that apparently is sold on a United
6 Kingdom website, and there's been no indication that it's
7 actually sold in the U.S.

8 MS. EUBANKS: Your Honor --

9 THE COURT: Excuse me a minute. U.S. Exhibit 93332, on
10 the second -- actually, on both the first page and the second
11 page where -- I guess it's on the second page -- where the long
12 sleeve jacket is shown indicates "free delivery worldwide."

13 So, therefore, it certainly appears as if it's very
14 possible that it's sold in the United States.

15 Let's have this witness answer this question and then
16 we're going to move on.

17 A. Well, if it's sold in the United States -- as I said, I'm
18 going to look into it. I don't know if we have any standing to
19 do anything about it.

20 But, you know, these are the kinds of things when you
21 find out about them, I don't think that we want children's
22 jackets with the Marlboro logo on them sold, so we will look
23 into it. But I wasn't aware of it.

24 THE COURT: Ms. Eubanks, you got your answer, move on,
25 please.

1 MS. EUBANKS: Certainly, Your Honor.

2 BY MS. EUBANKS:

3 Q. I want to show you U.S. Exhibit 18229, which is a
4 demonstrative. We will put this up on a board as well. And I
5 want to summarize some of the testimony that you've given thus
6 far in the case.

7 Can you see that, Mr. Szymanczyk?

8 A. I see it.

9 Q. All right. And just to take you through this very quickly.

10 You would agree, wouldn't you, that a large part of
11 your testimony addresses change that you believe that the
12 company has undergone since you've been its CEO? Is that fair
13 to say?

14 A. Yes. I would say it addresses a lot of significant changes
15 in the way we operate the business.

16 Q. I want to talk about the opposite of change and that is
17 continuity.

18 I want you to look at -- as you can see, U.S.

19 Exhibit 18229 has three different columns: 1990, 1997, and
20 today. Do you see that?

21 A. I do.

22 Q. We see that the Marlboro imagery in 1990, you could see it
23 in magazines; right?

24 A. That's what it shows.

25 Q. And that's true, isn't it? In 1990 and 1997, you could see

1 Marlboro imagery in magazine ads in this country; correct?

2 A. That's correct.

3 Q. And in 19 -- and today, you can go into a convenience store
4 and you can see the Marlboro imagery displayed where Marlboro
5 cigarettes are sold; correct?

6 A. That would have been true for all of those time frames.

7 Q. Okay. So that's consistency.

8 Marlboro sponsorship. We know from 1990, you see that
9 that's Marlboro racing sponsorship that occurred. Occurred in
10 1997, and as we discussed, it occurs today, doesn't it?

11 A. That's correct.

12 Q. And direct mail marketing has steadily increased in the
13 amounts of mailings over the years from 1990 to today, hasn't
14 it?

15 A. I believe direct mail has increased, yes.

16 Q. And Marlboro advertising and promotion expenditures have
17 increased as well from 1990 to today, haven't they?

18 A. Well, advertising hasn't, it has gone down. Price promotion
19 has gone up. I mean, you would have to break down the
20 components of that to be -- to give you an accurate answer.

21 Q. But overall you would agree, wouldn't you, that advertising
22 and promotion has increased from 1990 to today, wouldn't you?

23 A. Well, advertising hasn't. Price promotion has increased as
24 a component of the business, as the price has gone up
25 substantially higher.

1 Q. Let's talk about them together in the conjunctive and not
2 the disjunctive. So I want to add together advertising and
3 promotion expenditures with this question. All right? With
4 that premises in mind.

5 A. You're including pricing in your definition of promotion?

6 Q. What is your definition of promotion?

7 A. Well, I'm asking you.

8 Q. No, I'm asking you.

9 A. In the FTC report -- well, there are different components in
10 the FTC report. So it depends on how you choose to define it.
11 I would call it pricing because it's off revenue. It's not what
12 we would calculate as a marketing expense, but it's rather off
13 revenue. If you count it, it's gone up.

14 Q. Yes. It's gone up from 1990 to today steadily increasing;
15 correct?

16 A. It's increased. I don't know if it's steadily, but it's
17 increased.

18 Q. Okay. And we see at the bottom of the chart that throughout
19 the years 1990 to today, Marlboro has remained the number one
20 youth brand; right?

21 A. That's correct.

22 Q. And in 1990, that's when you came to the company; right?

23 A. That's correct.

24 Q. In 1997, that's when you became CEO; correct?

25 A. That's correct.

1 Q. And you're still CEO as you sit here today; correct?

2 A. Correct.

3 Q. Now, you know who Michael Watkins is, don't you?

4 A. I'm sorry. You will have to refresh my memory.

5 Q. You don't know who Michael Watkins is?

6 A. Well, I'm drawing a blank right now.

7 Q. Okay. Well --

8 MR. WEBB: Your Honor, I just object.

9 You entered an earlier ruling in the case that
10 prohibited evidence on banded paper.

11 MS. EUBANKS: That's not what this evidence is about,
12 Your Honor. It's not about banded paper.

13 MR. WEBB: I withdraw my objection.

14 THE COURT: All right. Go ahead.

15 BY MS. EUBANKS:

16 Q. You provide extensive testimony in your written direct about
17 the mission and core values that you developed when you became
18 CEO; right?

19 A. Correct.

20 Q. And according to your testimony, these are the mission and
21 core values that you want to guide the actions of PM-USA and its
22 employees; right?

23 A. Correct.

24 Q. As part of your discussion of the current company core
25 values -- and I'm referring particularly to page 34 of your

1 written direct, lines 7 through 10 -- you testify about
2 operating the company with integrity, trust, respect, and about
3 being honest with one another.

4 Do I have that right?

5 A. Yes.

6 Q. And your discussion on your second core value talks about
7 encouraging constructive dissatisfaction with results; isn't
8 that right?

9 A. Where are you?

10 Q. Lines 14 through 21 on page 35.

11 A. Yes.

12 Q. You testify at page 35, lines 18 through 20, about part of
13 being responsible is respecting the view of your employees and
14 encouraging them to constructively disagree; correct?

15 A. Where are you now?

16 Q. Page 35, lines 18 through 20. It's highlighted on the
17 screen if that's helpful.

18 A. Yes.

19 Q. And with respect to your fourth core value, that would be on
20 page 36, lines 7 through 13, you testify about encouraging
21 creativity and encouraging people to think about things
22 differently and to think about different things, bringing
23 vigorous challenge to everything we do. Right?

24 A. I did.

25 Q. Now, you say on page 36, lines 12 through 13, that according

1 to the text of the fourth core value, PM-USA is receptive to new
2 ideas, and applaud those who dare to think differently; right?

3 A. That's correct.

4 Q. And this core value is part of the core values that you
5 yourself developed in 1998 as we see on page 19; correct?

6 A. Well, that's not what I said. What I said was that my
7 senior executive team and I developed the core values.

8 Q. All right, fair enough.

9 You testified that you went out and gave presentations
10 about the mission and core values to thousands of employees by
11 live and by video; right?

12 A. Correct.

13 Q. And did you give that same talk to Mr. -- is it KNIFE-FLER,
14 the Senior Vice President -- Dr. Nyffeler, the Senior Vice
15 President of Research and Development and Engineering?

16 A. Who?

17 Q. Let me spell it for you. Perhaps I'm mispronouncing it.
18 Urs, U-r-s. Is it NIP-LER?

19 A. NEVE-FLER.

20 Q. And it's N-y-f-f-e-l-e-r. Correct?

21 A. Correct.

22 Q. Now, did you give him the same speech or presentation about
23 the mission and core values at any point in time?

24 A. He would have seen it, yes.

25 Q. But you didn't give it to him directly; right?

1 A. Well, he was in the room, I think more than once, when I
2 talked about the mission and the core values, yes.

3 Q. Now, despite your testimony here in your written direct and
4 here in court about the company's core values, some employees
5 who have constructively disagreed, who have challenged what PM
6 was doing and dared to think differently, were not always
7 applauded; isn't that right?

8 A. I don't know that to be true, no.

9 Q. Well, in fact, some -- with respect to Dr. Michael Watkins,
10 does it refresh your recollection, your counsel's objection,
11 when he referenced banded paper?

12 A. It does, yes.

13 MR. WEBB: Objection.

14 Q. Who is Michael Watkins?

15 MR. WEBB: I'm going to make my objection. I thought
16 counsel was going in a different direction, because what was
17 precluded from Your Honor's earlier order is this huge debate
18 over why Dr. Watkins was fired from the company. We filed --

19 MS. EUBANKS: Your Honor, if we are going to talk about
20 this, we shouldn't do it in the presence of the witness.

21 MR. WEBB: Fine.

22 THE COURT: I'll allow a few more questions and see
23 what direction you're going in, and then if I want to hear
24 argument, the witness can be excused for lunch and I'll hear
25 from everybody.

1 Go ahead.

2 BY MS. EUBANKS:

3 Q. You know who Dr. Watkins is now, don't you?

4 A. Yes.

5 Q. And he was a scientist who was fired from Philip Morris USA
6 in January 2002; right?

7 A. I don't remember the exact date, but I believe his
8 employment was terminated.

9 Q. And you know that he worked for Philip Morris for 15 years;
10 right?

11 A. I don't know exactly how long he worked with the company.

12 Q. And you met with him, didn't you?

13 A. I met with him?

14 Q. Yes, you did.

15 A. He gave a presentation at a meeting that I was in attendance
16 at, yes.

17 Q. And he brought to the company's attention what he believed
18 was a significant safety issue, did he not?

19 MR. WEBB: Your Honor, this is the area that has been
20 precluded.

21 THE COURT: All right. The witness may be excused for
22 lunch at this point, and you should return at 2:00 o'clock,
23 please, subject to the usual rules about not talking about the
24 case with anybody at all.

25 (The witness left the courtroom.)

1 THE COURT: All right. I want a proffer from the
2 government as to where you're going with this witness.

3 I ruled that the issue of these kinds of cigarettes --
4 and I'm not even familiar after all this time with the substance
5 of Dr. Watkins' testimony. I'm not sure I ever was familiar
6 with it, other than knowing the basic subject matter. I ruled
7 that it was irrelevant to the government's allegations in this
8 case. More than that, I will admit I don't know.

9 What are you trying to prove with this?

10 MS. EUBANKS: I'm trying to demonstrate through this
11 witness that his statements about the company's core values are
12 hollow. That when a safety issue was brought to his attention
13 directly, and he testified to this in his deposition, that he
14 did have a presentation given by Dr. Watkins, that instead of
15 addressing the issues that Dr. Watkins raised, Dr. Watkins was
16 fired by PM-USA. That he had knowledge of it.

17 This goes directly to counter his statements about how
18 the company has allegedly changed about its core values. It's
19 the same thing that has happened over time to many Philip Morris
20 employees who have brought problems to the attention of the
21 court.

22 I'm not interested in getting into a discussion of what
23 it is that the banded paper issue was. Rather it's a personnel
24 issue, his reaction to it, and what the company did.

25 And respectfully I would submit, Your Honor, that they

1 have opened the door. We have to be able to cross this witness
2 on the core values and their operation of those and how they
3 apply them to actual people at the company.

4 And insofar as the treatment of Dr. Watkins was
5 concerned. This witness has personal knowledge of that. He was
6 involved in meetings, and it's directly relevant to his
7 statements about the change and the core values.

8 THE COURT: It sounds to me as if there's no way you
9 can open the door only slightly regarding Dr. Watkins. That if
10 I let you pursue this line of questioning with Mr. Szymanczyk,
11 of course the defendants have to go into all of the details,
12 which I specifically didn't think were relevant, as to the
13 development of that cigarette and its potential or alleged
14 danger to the public.

15 Mr. Webb.

16 MR. WEBB: Mr. Frederick actually argued it. But
17 that's exactly correct.

18 This is the issue you precluded. The whole issue was
19 what was banded paper all about, and this whole story about how
20 Dr. Watkins was terminated, that's what you excluded already
21 from your ruling.

22 So if counsel wants to touch upon the issue and open
23 the door, then I've got to put witnesses on the stand to address
24 it and go into -- anyway, I object on the grounds that there was
25 nothing that's happened in our examination that opens the door

1 to this, and it's irrelevant.

2 MS. EUBANKS: Your Honor, we have to be able to cross
3 this witness. At page 36 of his written direct he states we are
4 receptive to new ideas and applaud those who dare to think
5 differently.

6 Just as this court reconsidered whether the FTC witness
7 should be allowed to testify about this matter, I would submit
8 to the court that this is directly relevant.

9 How are we supposed to cross this statement about the
10 company's operations with respect to the core values if we are
11 not able to bring in testimony through a witness who has direct
12 personal knowledge about a personnel issue and his handling of
13 that?

14 If they want to rebut that by bringing in the cold drop
15 off issue and its relevance to these proceedings, that's up to
16 them. But I would respectfully request that the court
17 reconsider, if that is the ruling, because how can we adequately
18 cross this witness when he's put forth all kinds of issues about
19 his company's operation under its core values, how it treats its
20 employees, if we are not able to bring in its reaction to a
21 whistle blower, if you will, and what they did to him, and how
22 that is exactly the same behavior that the company has engaged
23 in over the years; whereas, this witness testifies as to some
24 profound and significant change.

25 THE COURT: Mr. Frederick, did you have something to

1 say?

2 MR. FREDERICK: Just briefly, Your Honor.

3 Obviously, the government has given its side of the
4 story. Dr. Watkins was terminated for, insubordination, and we
5 would have brought in five witnesses to explain Dr. Watkins'
6 termination story if we had to do that. That's what the
7 government asks you to invite by allowing them to cross
8 Mr. Szymanczyk on this testimony.

9 He didn't make the decision to terminate Dr. Watkins.
10 He can't speak to all those facts. We would have to bring in
11 others to speak to all those facts.

12 MS. EUBANKS: Your Honor, the same basis that
13 Mr. Frederick is describing for the termination of Dr. Watkins
14 is exactly the basis for termination of Dr. Farone.

15 This is a key part of our ability to rebut the
16 testimony that has come in without any objection about the core
17 values and its --

18 THE COURT: You were allowed to put on earlier evidence
19 about Dr. Farone.

20 This is so far removed from anything that is going to
21 be really probative. That's number one.

22 And number two, you know, juries as fact finders are
23 asked to rely on their common sense. Hopefully, Judges as fact
24 finders have some common sense.

25 When I read two to 300 pages of self-serving testimony

1 about, "Oh, how wonderful we are," don't you think I can take
2 that into account without having to hear reams of very
3 attenuated testimony?

4 I'm just going to sustain the objection. It will open
5 the door to a vast amount of totally irrelevant testimony,
6 period.

7 How much more do you have of this witness? You
8 probably have more of this witness.

9 MS. EUBANKS: Not very much more, Your Honor.

10 But with respect, I have to state that while I have
11 ever confidence in the court's ability to separate the wheat
12 from the chaff, as you commented many times, there is a record
13 that's created and I won't have available -- the United States
14 won't have available to it certain arguments, and any appellate
15 court will not have had available to it direct interaction in
16 assessment of the witness.

17 So, I understand Your Honor's ruling. And I have
18 probably at this point less than half an hour that I can proceed
19 with on something that I think the court will find directly
20 relevant.

21 THE COURT: This is what you're always allowed to do.
22 I think defendants did it once. I know the government did it
23 once.

24 You can file a sealed proffer of what you think you
25 would elicit from this witness so that somebody can look at it

1 at some point. But I just don't think it's useful
2 cross-examination. I don't, everybody.

3 Mr. Webb, are you going to be able to finish your
4 witness this afternoon?

5 MR. WEBB: I don't know. There's a number of things
6 that came up this morning that I want to have the witness
7 explain. I honestly don't know. I'll try to get done this
8 afternoon. He certainly would like to get done. I'd like to
9 get done. I just don't -- I'll do the best I can.

10 THE COURT: All right. We will see. I timed matters
11 so that I could take a call at a quarter of 2:00, but I don't
12 expect it to be more than 15 minutes, which is why we're going
13 to take a full lunch hour today at 2:00; otherwise, I'd cut it
14 back unless you want to do 10 or 15 minutes more with him now.
15 It's up to you, Ms. Eubanks.

16 MS. EUBANKS: I would rather do it after lunch, Your
17 Honor. Perhaps I can organize it.

18 THE COURT: 2:00 o'clock, everybody.

19 (Lunch recess began at 12:47 p.m.)
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MICHAEL E. SZYMANCZYK

CROSS-EXAMINATION BY MS. EUBANKS

18314

CERTIFICATE

I, EDWARD N. HAWKINS, Official Court Reporter, certify
that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

Edward N. Hawkins, RMR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	Docket No. CA99-02496
	.	
v.	.	
	.	
PHILIP MORRIS USA, et al.,	.	Washington, D.C.
	.	April 11, 2005
	.	
Defendants.	.	
.	

VOLUME 90
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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Proceedings reported by machine shorthand, transcript produced
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1 AFTERNOON SESSION, APRIL 11, 2005

2 THE COURT: All right, Ms. Eubanks, please.

3 CONTINUED CROSS EXAMINATION OF MICHAEL E. SZYMANCZYK

4 BY MS. EUBANKS:

5 Q. Good afternoon, Mr. Szymanczyk. On page 180 of your
6 written direct you discuss the Philip Morris External Research
7 Program.

8 A. Would you give me the page number again?

9 Q. 180. It's up on the screen if you want to look. It's at
10 the top. The question is "What is the Philip Morris External
11 Research Program"?

12 Answer. "The External Research Program, or ERP, is a
13 program that is set up to fund research relating to smoking and
14 health issues. The research is conducted independent of Philip
15 Morris USA".

16 "Question: Why does Philip Morris USA need independent
17 external research?"

18 You state, "We believe we need to fund external research
19 in order to learn about smoking and health issues regarding our
20 products, including those risks related to cardiovascular
21 disease, respiratory disease and cancer."

22 "Question: How long has the ERP been in place?"

23 "The first request for application was issued in the fall
24 of 2000. The idea for the program originated in 1999."

25 "Question: How is the External Research Program

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1 structured?"

2 "Answer: Philip Morris USA's only role in the ERP is to
3 provide funding and a research agenda. An independent, outside
4 Scientific Advisory Board exclusively selects and approves for
5 funding the research projects that are carried out by independent
6 scientists."

7 Now, I understand what your testimony is, but isn't it
8 true that the program itself is administered by someone who is
9 not independent of Philip Morris in the industry?

10 A. Well, I don't know what you're referring to.

11 Q. Well, the program is the -- the Philip Morris External
12 Research Program is administered by Max Eisenberg, isn't it?

13 A. That's correct. He's the administrator, I believe,
14 that's right.

15 Q. And you know he was -- he administered the tobacco
16 industry's Center for Indoor Air Research from 1988 to its MSA
17 required dissolution in 1999, right?

18 A. I believe that's correct.

19 Q. And you know that Max Eisenberg testified in this case,
20 right?

21 A. That I don't know.

22 Q. You don't know that? Do you know that PM covered the
23 expenses associated with Mr. Eisenberg's presence before the
24 Court?

25 A. No, I don't know that.

1 Q. Okay. Now, from time to time, or at least when the --
2 when CIAR was winding down in 1999, you personally and directly
3 dealt with Max Eisenberg, didn't you?

4 A. I think I met him once.

5 Q. But you certainly played an active role in determination
6 of Max Eisenberg's severance payment, didn't you?

7 A. I don't recollect that. I mean, I don't remember. I may
8 have had to approve it, but I don't remember that specifically.

9 Q. All right. Let's look at U.S. Exhibit 93321. Now, let's
10 look at the first page of this exhibit. Do you see that that's
11 an e-mail dated June 2nd, 1999, from Mark Berlind to Denise
12 Keane and others?

13 A. I see that, yes.

14 Q. Now, look what it states. It says, "I've heard back from
15 C & B", that's Covington & Burling?

16 A. I don't know.

17 Q. You've never heard of Covington & Burling referred to as
18 C&B?

19 A. I haven't, no.

20 Q. Well, it states: "I've heard back and C&B on the
21 question of M. Eisenberg", that's Max Eisenberg, right?

22 A. I'm assuming.

23 Q. Okay. "Max Eisenberg's severance payment. Recall that
24 the issue is whether to make a payment of around 1.1 million
25 even though under his contract he is only entitled to \$900,000.

1 Figures are proximate." Do you see that?

2 A. I do.

3 Q. So, Max Eisenberg wanted \$200,000 more than his contract
4 required, correct?

5 A. I don't know that.

6 Q. All right. Do you recall this issue in 1999, the
7 question of Dr. Eisenberg's severance payment upon the
8 dissolution of CIAR?

9 A. No, I don't.

10 Q. Now, on the third page of this e-mail chain, you'll see
11 that Dr. Ellis reports that a dinner was planned on June 14th,
12 1999 with Dr. Eisenberg and a number of Philip Morris
13 executives, including you. Do you see that?

14 A. Well, let me read it.

15 Q. I'll read it for you. It states, "I spoke to Richard
16 today. He indicated that on the conference call he had,
17 Covington & Burling" -- C&B it says -- "indicated to him that
18 the other companies were in favor. Given this information, he
19 agreed that if we approach Max and ask for his assistance to
20 help PM establish its SAB research program as a consultant, then
21 PM could express its goodwill in that manner. A dinner is
22 planned for June 14th with Richard, Max, Nelson, Szymanczyk and
23 myself to set the record straight and attempt to promote
24 goodwill in the relationship with Max." Do you see that?

25 A. I do, yes.

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- 1 Q. Okay. Now, I want you to -- it also indicates, doesn't
2 it, though, that on that same page, "therefore, I vote no to the
3 enhanced payment and we will try to begin to establish an
4 appropriate goodwill relationship in this dinner on the 14th."
5 Do you see that?
- 6 A. I do.
- 7 Q. Now, do you remember having dinner with Max Eisenberg
8 around -- in June 1999 in order to discuss his situation with
9 respect to the dissolution of CIAR?
- 10 A. I don't. I may have, but I don't remember it.
- 11 Q. Now, I want you to look at the last page of that set of
12 e-mails in the exhibit that I've handed you, and you'll see that
13 that is an e-mail from Cathy Ellis sent June 17th 1999 to Mark
14 Berlind with the subject re: CIAR severance. Do you see that,
15 last page of the document that I've handed you, the last page of
16 U.S. Exhibit 93321?
- 17 A. Got it.
- 18 Q. All right. Now it says, "What is the status of this? We
19 met with Max who is still in the process of conversing with
20 Szymanczyk." Do you see that?
- 21 A. I see it.
- 22 Q. Yet it's your testimony that you don't recall
23 conversations, discussions with Max Eisenberg discussing
24 dissolution plans of CIAR and what might happen with respect to
25 severance payments or his continued employment?

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1 A. You know, I don't remember it. I'm sorry. I mean, it
2 may have occurred, I just don't remember it. I do know that --
3 Q. That's fine, thank you, you don't remember it.
4 Do you remember whether you had any discussions with
5 Dr. Eisenberg as to his joining PM USA to administer its External
6 Research Program?
7 A. Well --
8 Q. Yes or no, please.
9 A. I do not remember.
10 Q. Okay. Now, I'll represent to you that Dr. Eisenberg
11 testified in this case that his annual salary when he departed
12 from CIAR was \$210,000. Do you have any reason to doubt that?
13 A. I don't know the number. He would know, I wouldn't know.
14 Q. How much did Philip Morris, and the other members of
15 CIAR, pay Dr. Eisenberg as a parting gift, a severance payment
16 during his transition to Philip Morris external -- to the Philip
17 Morris External Research Program?
18 A. I don't know.
19 Q. Was it roughly \$1 million, as the first page of U.S.
20 Exhibit 93321 --
21 MR. WEBB: Your Honor, I'm just going to object. He said
22 he didn't know. When a witness says he doesn't know he doesn't
23 know.
24 THE COURT: Sustained.
25 BY MS. EUBANKS:

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1 Q. You'll look at 93321, you see that the first page does
2 indicate that the issue that was to be addressed was whether to
3 make a payment of around 1.1 million to Dr. Eisenberg rather
4 than the amount that his contract entitled him to, don't you?
5 A. That's what it says.
6 Q. And let's look at another document, Mr. Szymanczyk.
7 Let's look at U.S. Exhibit 93313. It's being handed to you,
8 Mr. Szymanczyk. You see that U.S. Exhibit 93313 is a memorandum
9 to Messieurs Berlind, Milstein, Paine and Pepples, do you see
10 that?
11 A. I do.
12 Q. They were all members of CIAR, right, or their companies
13 were all members of CIAR, right?
14 A. I don't know, I'm not sure I know who all these people
15 are, but --
16 Q. Look at the first sentence, it says "this memorandum
17 updates you on the status of TI and CIAR's dissolutions." Do
18 you see that?
19 A. Yes.
20 Q. And the memo is dated August 3rd, 1999 at the top
21 right-hand corner of the first page. Do you see that?
22 A. I do.
23 Q. Now, I want to direct your attention to the second page
24 of the memo, and I want you to focus on the paragraph that's on
25 the screen, which is under CIAR, the first full paragraph, and

1 it states: "First we need to reach a final agreement on Max
2 Eisenberg's bonus. As you will recall, Max's employment
3 contract provides that he will receive severance pay in the
4 amount of four times his base salary. Max had raised an issue
5 about whether the term "base salary" should include his bonus.
6 It is quite clear that the answer is no, but in light of the
7 pending shut down, there was some sentiment for using Max's
8 total compensation, rather than his base compensation, for
9 purposes of figuring out his severance benefits. Several
10 companies disagreed with this approach and as a result we will
11 use his base salary. But a related question is Max's bonus.
12 Max usually is advised of the size of his bonus at the beginning
13 of August. Last year the bonus was \$50,000. I had suggested in
14 earlier correspondence that as a way to resolve this issue, the
15 companies might consider paying Max a very generous bonus for
16 the year, possibly \$150,000. I have now heard back from each of
17 the companies. It appears the largest bonus on which we can
18 reach agreement is \$100,000. Assuming this is agreeable to each
19 of the companies, I would propose that we tell Max this amount
20 will be paid to him at the time as his severance pay." Do you
21 see that information?

22 A. Yes.

23 Q. Now, the subject of the dissolution, the subject then
24 discussed here is the dissolution of CIAR and the paragraph that
25 we just focused on discusses, doesn't it, the final agreement as

1 to Max Eisenberg's bonus, correct?

2 A. Yes, that's what it does.

3 Q. Do you know how much Eisenberg was paid as a bonus in
4 addition to his severance pay?

5 A. I do not.

6 Q. Now, Eisenberg still works out of his -- the location
7 where his CIAR's offices were in Linthicum, Maryland, doesn't
8 he?

9 A. I believe that's correct, yeah.

10 Q. And in the role as program administrator, I believe he
11 testified that he's paid, and you can confirm this if you can,
12 some \$400,000 annually?

13 A. I do not know.

14 Q. You don't know. Okay. So when Max Eisenberg began work
15 for CIAR it was in 1988 when CIAR was created, correct?

16 A. I don't know.

17 Q. When you came to work at Philip Morris USA, wasn't Max
18 Eisenberg the director of CIAR in 1990?

19 A. I don't know that.

20 Q. You don't know that?

21 A. In 1990 when I came to work for --

22 Q. When you came to work in 1990, wasn't he director of
23 CIAR?

24 A. I never heard of the CIAR when I came to work with Philip
25 Morris.

- 1 Q. When did you first hear of the CIAR?
- 2 A. Well, I started to have to get involved in that when we
- 3 --
- 4 Q. No, no, I didn't ask when you first game involved, I
- 5 asked when you first heard of it?
- 6 A. I don't remember. It may have been when I became CEO I
- 7 began to focus on the R & D side of the business.
- 8 Q. So, sitting here today, you really don't know that much
- 9 about Max Eisenberg and his work for CIAR; is that right?
- 10 A. Other than by reputation, that's all.
- 11 Q. Yet you offer testimony to the Court about the PM ERP of
- 12 which Max Eisenberg works, correct?
- 13 A. About the what?
- 14 Q. The Philip Morris External Research Program, correct?
- 15 A. That's correct.
- 16 Q. And you know that Max Eisenberg is associated with work
- 17 done for the PM ERP, don't you?
- 18 A. He's the administrator. He doesn't make decisions on the
- 19 research done, he's --
- 20 Q. I understand that. You've answered my question.
- 21 MR. BERNICK: Nothing further, Your Honor.
- 22 THE COURT: He's administrator of the program and he
- 23 doesn't make any decisions about the research, and he earns
- 24 \$400,000 a year?
- 25 THE WITNESS: I do not know what his compensation is, Your

1 Honor.

2 THE COURT: Do you know what he does, if anything?

3 THE WITNESS: Not -- well, I believe that you have in this
4 research program, you have a group of -- I think there are
5 esteemed people who form a Scientific Advisory Board, and Max
6 isn't part of that Scientific Advisory Board. Those are the
7 people to whom all the research is submitted by outside parties,
8 and then those research decisions, the decision to grant money
9 are made by the Scientific Advisory Board. They then, once they
10 make a grant, that grant has to be administered, so the payments
11 have to be made, and then the process has to be administered, in
12 other words, the people that have gotten money have to submit
13 what they said they were going to submit, it has to go through
14 peer review, just like any scientific research does, and all of
15 that process has to be managed to make sure that it's being
16 completed properly. So there's administration of millions of
17 dollars to make sure that what people have said they're going to
18 do to the SAB is actually done, and I think that's the role that
19 Max Eisenberg plays. He administers the process that is the
20 standard scientific process that is used in these kinds of
21 research programs. Ours is nothing outside of the ordinary once
22 the SAB has made a determination about granting funding for a
23 proposed piece of research that comes in.

24 MS. EUBANKS: Thank you, Your Honor.

25 THE COURT: Mr. Webb.

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1 REDIRECT EXAMINATION OF MICHAEL E. SZYMANCZYK

2 BY MR. WEBB:

3 Q. Mr. Szymanczyk, last week, I guess on Thursday, I think
4 during the morning session, Ms. Eubanks spent quite a bit of
5 time cross-examining you on a particular statement in your
6 written direct examination. Can I have tab Exhibit 1-A called
7 up, it's page 41 of your written direct examination, line 16 to
8 22. And I'm going to call this out and remind you of what
9 Ms. Eubanks was asking you questions about. In your written
10 direct examination, the question was posed to you: "Are you
11 aware that the Department of Justice has alleged that Philip
12 Morris USA has engaged in significant wrongful conduct including
13 making misrepresentations, concealing material information and
14 marketing to youth?"

15 "Answer: Yes."

16 "Question: Do you believe that it would be possible for
17 your company to engage in such conduct under Philip Morris USA's
18 current corporate culture?"

19 And you answered "No".

20 I want to go on. The next question -- do you have the
21 page there? The next question is "Why". Do you see that? Are
22 you on page 41, sir?

23 A. Yeah, I saw the "why".

24 Q. Go to the next page. If I could go to the next page,
25 please, you're asked why you did not believe that it could

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1 happen. And if I could go to page 42, please, at the top your
2 answer was, "All of the employees at Philip Morris USA have been
3 focused on and evaluated on our progress toward the mission and
4 values for the last seven years. We have also had a significant
5 change in our management and employee base over the past several
6 years. That significant change in the management and employee
7 base has had a profound impact on the culture of the company.
8 It is no exaggeration to say that the culture of this company
9 has been completely transformed over the past eight years. If I
10 left tomorrow, it would be extraordinarily difficult for this
11 company to go in a different direction. I do not believe that
12 our employees or other stake holders would allow it."

13 Now, Ms. Eubanks called your attention to that testimony,
14 and then do you recall that she asked you a series of questions,
15 Mr. Szymanczyk, she asked you whether or not you believed that if
16 Philip Morris wanted to, it was free to revert back to previous
17 business practices, in fact, she called it reverting back to your
18 former self. She asked you whether or not Philip Morris could do
19 that if they wanted to. Do you recall those questions?

20 A. Generally, yes.

21 Q. Now, do you recall Ms. Eubanks telling you in one of her
22 questions that all of these changes were reversible if you
23 wanted to reverse them? Do you recall those questions?

24 A. Generally, yes.

25 Q. As far as Philip Morris just abandoning all of the

1 changes that you have talked about through 230 pages of written
2 direct examination that Ms. Eubanks has now had an opportunity
3 to spend two days cross-examining you about, as far as Philip
4 Morris's walking away from all those changes, are you generally
5 aware that one of the major issues we're litigating in this case
6 is whether there's any reasonable likelihood that Philip Morris
7 would engage in fraudulent conduct in the future? You
8 understand we're litigating that as one of the issues in this
9 case?

10 A. Yes.

11 Q. Now, I want to ask you, if I could on that question, I
12 want to explore with you in the real world, based on where
13 Philip Morris is today, what is the likelihood that Philip
14 Morris would abandon all of the changes you've talked about and
15 revert back to what Ms. Eubanks called your former self? I want
16 to go back. Let's go back. You became CEO of the business
17 when?

18 MS. EUBANKS: Objection, Your Honor. Insofar as that
19 question is concerned, Mr. Webb has already demonstrated that
20 it's cumulative, that he was asked exactly -- that's the same
21 question that I had asked him the likelihood of it and he
22 testified at length on Thursday about exactly this matter.

23 MR. WEBB: Cumulative. She did her cross-examination, my
24 redirect can explore what she did on cross.

25 THE COURT: The objection's overruled.

1 BY MR. WEBB:

2 Q. Sir, when did you become the CEO of Philip Morris USA?

3 A. November 1st, 1997.

4 Q. Now, let's go back to that time. When you came on as the
5 new CEO, did you at least become generally aware of allegations
6 that were being made by Attorney Generals of many states that
7 were suing Philip Morris USA and the other companies?

8 A. Yes.

9 Q. In order to get up to speed on things, did you read some
10 of the lawsuits so you would at least understand what the nature
11 of those allegations were?

12 A. Yes.

13 Q. Now, Mr. Szymanczyk, if we could take the Court back to
14 that time, as you took over the reigns of the position, did you
15 believe at that time that you had any particular ability or any
16 reasonable way to go back in time 20, 30, 40 or 50 years ago and
17 determine for yourself one way or the other whether the
18 allegations, some or all of them, are true?

19 A. No.

20 Q. Why not?

21 A. Well, I just don't know. First of all, how you would
22 ever do that. You can't put yourself back in time, and besides,
23 I had taken over the company at a time where there was a lot of
24 turmoil. I needed to give the company a future direction, so I
25 simply took the position that these allegations were made, they

1 described a past, and that my view of it was that we would just
2 accept that as though it were true, and simply ensure that the
3 way we went forward in the company nobody could ever make those
4 allegations relative to the way I ran the company or the way we
5 were running it out in the future at some point in the future.

6 Q. And that assumption you made is what you then went
7 forward and tried to base the way you structured business
8 practices on in the next several years?

9 A. That's correct.

10 MS. EUBANKS: Objection, your Honor, this is leading.

11 THE COURT: Overruled, go ahead, please.

12 BY MR. WEBB:

13 Q. Now, as far as those allegations that were made in the
14 Attorney General lawsuit, are you generally aware that the
15 allegations in this case are essentially the same as what was
16 made by the Attorney Generals?

17 A. Yes.

18 Q. Now, did you believe that you had authority to make
19 whatever changes that you had to make to make certain that
20 things that were at least alleged in the past could not happen
21 while you were the CEO in the future?

22 A. Yes.

23 Q. And you've described a lot of those changes. I don't
24 intend to go back -- they're in your testimony. I'm only going
25 cover what Ms. Eubanks has covered, but let me, maybe, do it

1 this way. Mr. Szymanczyk, I'm going to show you a chart I
2 actually used during my opening statement. I'll try not to kill
3 you. Are you okay? I apologize.

4 THE COURT: It's a little late to ask, Mr. Webb.

5 BY MR. WEBB:

6 Q. Actually, maybe I can put that up on the screen, too.
7 It's tab 1. I divided this chart during my opening statement --
8 by the way, for the record this is JDEM 040100. And
9 Mr. Szymanczyk, as you can see, I divided this chart into three
10 columns or categories, the distant past, the recent past, and
11 the future.

12 Now, as far as the distant past is concerned, and things
13 that I referred to there alleged historical misconduct, is that
14 where you're saying you just made certain assumptions that
15 things that happened in the past based on what you read in the
16 lawsuit?

17 A. That's correct.

18 Q. Okay. And as far as the recent past, I actually put the
19 categories of 1997 to today. Is that the time period that
20 you've been the CEO?

21 A. Yes.

22 Q. Okay. And the categories that I have on the chart, those
23 are the categories that you generally addressed in some detail
24 in your written direct examination; is that correct?

25 A. Yes.

1 Q. I want you to tell the Court, what do you view to be the
2 relationship between these five categories of subject matters
3 that you addressed in your written direct to what you understood
4 had happened in the past -- what was alleged to have happened in
5 the past?

6 A. Well, I think they're the things that we put in place to
7 accomplish the objective that I set forth to accomplish, which
8 was to see that nobody could make that set of allegations
9 relative to the way we've run the business in the time that I've
10 led it or going forward into the future.

11 Q. Okay. Then, so -- and the relationship of that to the
12 future is what?

13 A. Well, I believe those are systemic changes in the way the
14 business operates, so I think they provide the direction for the
15 future.

16 Q. Well, let me ask you this, Mr. Szymanczyk. During the
17 seven and a half years that you have been the CEO of this
18 company, are you aware of any fraudulent conduct going on at
19 Philip Morris USA since you've been there?

20 A. I am not.

21 Q. Now, as far as those five subject matters that are on
22 that chart, let's take the first one. I want to just quickly go
23 through these. It says "responsible communications with public
24 regarding tobacco issues". Ms. Eubanks cross-examined you about
25 that subject matter during the course of your cross-examination.

1 I want you -- as far as that topic is concerned, and I don't
2 intend to go back what you said in your written direct, but as
3 you sit here now in front of this Court, can you think of
4 anything else that you think a reasonable tobacco company should
5 do in responsibly communicating with the public regarding
6 smoking and health issues that Philip Morris USA is not doing
7 today?

8 A. No, I think we're being very aggressive in that area and
9 I think there's always new things that come up to communicate,
10 but I think we've been very responsive in trying to do that.

11 Q. Well, when you say "new things that come up", is the
12 basic philosophy I think you set forth in your written direct is
13 that Philip Morris USA basically tries to communicate to the
14 American public conclusions reached by the public health
15 community; is that correct?

16 A. That's correct.

17 Q. If the public health community comes up with new findings
18 or consensus, do you change the way you communicate?

19 A. Yes.

20 Q. And is that set forth in some detail in your written
21 direct examination?

22 A. Yes, it is.

23 Q. And during the course of the government's entire
24 cross-examination they can ask anything they want about what
25 you're doing on the topic, do you remember Ms. Eubanks

1 suggesting anything different that Philip Morris should be doing
2 today to be a more responsible company in communicating with the
3 public regarding smoking and health issues?

4 A. No, I don't.

5 Q. Let's go to the next category. "Responsible marketing,
6 advertising, and retailing of cigarettes". You've described in
7 your written direct, again, a lot of detail about what you do
8 today in marketing, advertising and retailing of cigarettes.
9 Ms. Eubanks cross-examined you extensively on this topic. As
10 you sit here now before the Court, is there anything at least
11 you can think of or are aware of that you believe Philip Morris
12 could be doing differently or in addition to what you're doing
13 in that area that you think a responsible company should be
14 doing?

15 A. Well, no. I mean, again, this is one of these places
16 where we continue to look for ways to both compete and lower the
17 profile of our cigarette marketing in the country. So I believe
18 we've done a lot of things, but I think we'll continue to find
19 some things that we can be responsive to.

20 Q. Well, in fact, let me go back to that first issue I
21 forgot to ask you one question. On this issue about Philip
22 Morris somehow reverting back to its former self, to use
23 Ms. Eubanks' words. As far as everything that you've described
24 in your written direct regarding what Philip Morris does to
25 responsibly communicate with the public regarding tobacco

1 issues, do you think there's any practical way that Philip
2 Morris could somehow abandon all the statements on your Website,
3 all the statements you've made on TV and in ads and change all
4 that and somehow revert back to what was being said before on
5 issues like causation or addiction, et cetera?

6 A. No, I don't think.

7 Q. Why not?

8 A. I don't think anybody would tolerate. That the A.G.s
9 wouldn't tolerate it, the public wouldn't tolerate it. I don't
10 think that we could do that.

11 Q. What about the second issue, responsible marketing
12 advertising and retailing of cigarettes? Do you believe, as you
13 sit here now, that Philip Morris would ever reverse its course
14 and change what you're doing today and revert to any previous
15 practices in those areas?

16 A. No, I do not.

17 Q. Why not?

18 A. Well, for one, it's impractical. Most of the
19 infrastructure for the things we used to do has been dismantled
20 and much of its covered by the Master Settlement Agreement so
21 it's prohibited. And beyond that, we've simply moved to try to
22 market directly to adult smokers who wish to be marketed to and
23 we think that that's the preferred way for us to market. So I
24 don't think we have any desire to go backwards on this.

25 Q. Let me go to the third category on the chart where you

1 describe Philip Morris's youth smoking prevention activities.
2 Again, they're described in great detail in your written direct,
3 I don't intend to back through them, but as far as you sit here
4 now, in front of the Court, as far as what Philip Morris has
5 been doing in recent years in the youth smoking prevention area,
6 is there anything that you can think of that Philip Morris
7 should be doing in addition to what it's doing in this area that
8 you can think of?

9 A. Well, no. I think that we've picked places where we
10 think we can play a role, and we participate, along with other
11 people in this area, so, I don't think the company can by itself
12 deal with what is a social issue, but I do think that we pick
13 places that are appropriate for us to play a role, and that
14 we're doing those and we're doing them to the best of our
15 ability and we're leaving some other ones for people who we
16 think are better able to do them.

17 Q. By the way, it's probably hard to try to take the Court
18 inside your company, but can you describe how ingrained into the
19 culture of Philip Morris USA is youth smoking prevention today?

20 A. Well, you know, we have a significant amount of our
21 population that has been hired during the course of time that
22 the mission that we have in place is in place and they never
23 experienced the company without a youth smoking prevention
24 program. They haven't experienced the company without the kind
25 of information that we provide today, and so I think that people

1 expect this, our employees expect this of us in the company
2 today. It's one of the reasons why they find it acceptable to
3 work and contribute to the mission in the company is because
4 they feel like the company has responded to the things that a
5 responsible company needs to do relative to a product that
6 creates harm.

7 Q. If you look into the future, as far as that commitment to
8 youth smoking prevention that now is part of your culture, your
9 business today, if someone who replaced you tried to abandon
10 that commitment, what would you predict would happen?

11 MS. EUBANKS: Objection, calls for speculation, a
12 prediction?

13 MR. WEBB: Your Honor -- let me rephrase the question,
14 I'll rephrase the question. Fair objection.

15 BY MR. WEBB:

16 Q. I want you to use your current understanding today of
17 where that program is inside the company and tell the Court
18 whether you think there's any reasonable likelihood that that
19 commitment would be substantially changed in the future?

20 A. Well, it's a large program and it's highly visible within
21 the company, and no, I don't think that there's any reason to
22 expect that's going to change going forward in the future. It
23 may have some new elements added to it as we continue to look
24 for ways to make it better.

25 Q. Now, let me go to the next issue on your chart, recent

1 research and development activities regarding less hazardous
2 cigarettes. As far as that topic is concerned, and again, it's
3 set forth in detail in your written direct, but as you sit here
4 now, can you think of anything else Philip Morris can do in this
5 area of trying to develop less hazardous cigarettes that it's
6 not already doing today?

7 A. No, this is a very difficult scientific challenge, and
8 I've given R & D organization really a huge amount of latitude
9 to find the answer to this because it's to the company's benefit
10 and it's to society's benefit for that to occur. So I think
11 we're doing as much as we can as fast as we can, but it's a
12 difficult scientific issue and there are some significant
13 hurdles relative to having the frameworks in place, like FDA and
14 things like that, that will allow this to be done in such a way
15 that it meets the scrutiny of the public health community, for
16 example. So it's not just us involved in this, there are other
17 people that have to weigh in.

18 Q. Let me go to the last issue, compliance with the Master
19 Settlement Agreement. You've described, again in some detail,
20 how Philip Morris has made a commitment to comply with the
21 Master Settlement Agreement and what Philip Morris has done.
22 Are you aware of anything else Philip Morris can do, as far as
23 being a company, as far as your procedures and your methods that
24 you can add to what you're doing to date as far as efforts to
25 comply with the Master Settlement Agreement?

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1 A. Well, we have what we called -- we call a gold standard
2 compliance requirement in the company relative to the Master
3 Settlement Agreement. That's what we set as a standard. That's
4 why I said in my direct we want to comply with both the spirit
5 as well as the letter of that agreement and that's what we work
6 to do. And I think the Attorneys General feel like, as a leader
7 in the industry that that's, in fact, what we are very much
8 trying to do and I don't see that changing. I don't think --
9 again, they would allow that to change. I think they expect
10 that of us now.

11 Q. How long is the MSA going to be with Philip Morris USA?

12 A. Forever, as long as we're in business.

13 Q. And by the way, in the MSA now that's been in existence
14 now for what, six and a half years?

15 A. Yes, since the beginning of -- or the end of 1998.

16 Q. So there's already substantial track record the Court has
17 to rely upon; is that fair to say?

18 A. That's correct.

19 Q. Now, as far as Philip Morris reverting back to previous
20 business practices or abandoning the changes that you've
21 described in detail that have been implemented within your
22 company, I want to ask you some questions about the specific MSA
23 provisions and what affect they would have if Philip Morris USA
24 tried to do anything different than is set forth in the MSA.
25 Can I call up tab 2? It's JDEM 040295. And, Mr. Szymanczyk,

1 I'm going to hand you a hard copy of the exhibit and it's also
2 on the screen, whatever is easier for you to look at, but does
3 this appear to set forth the major areas of regulation under the
4 MSA?

5 A. Yes.

6 Q. And let's just take each one of these and try to quickly
7 go through it. As far as restrictions on advertising and
8 marketing, are you aware, at least generally aware, that the
9 government has made allegations in this case that Philip Morris
10 has engaged in fraudulent advertising and marketing activities?

11 A. Yes.

12 Q. And are there substantial restrictions on the face of the
13 MSA that affect what Philip Morris can and cannot do in the area
14 of marketing and advertising?

15 A. Yes.

16 Q. Could I have tab 3, which is JDEM 40010 called up,
17 please.

18 I'm handing you that demonstrative exhibit. I don't
19 intend to go through it, but does this set forth the major
20 provisions of the MSA that on the face of the MSA are prohibited
21 by the MSA?

22 MS. EUBANKS: Objection, Your Honor, this is leading,
23 showing him the documents and then asking him to confirm whether
24 it's what the MSA requires. I don't have any objection if
25 Mr. Webb wants to inquire about this witness's knowledge of

1 what's in the MSA point by point, but to hand him documents that
2 actually layout what the question is, it's leading, it's
3 completely leading to give him and then require a yes or no
4 response.

5 THE COURT: Hasn't this poster, if you will, been utilized
6 before?

7 MR. WEBB: It has.

8 THE COURT: I've seen it.

9 MR. WEBB: I was just trying to make the point that it's
10 there. I don't intend to go through it. I asked one question
11 about it.

12 THE COURT: You may proceed.

13 BY MR. WEBB:

14 Q. Is that your general understanding?

15 A. Yes.

16 Q. And has Philip Morris tried to go beyond the literal
17 terms of the MSA as far as -- strike the question. What is the
18 purpose, the general purpose of all those restrictions?

19 A. Well, the general purpose of this part of the Master
20 Settlement Agreement was to lower the overall profile of
21 cigarette marketing in this country because the Surgeon General
22 had concluded that the level of cigarette marketing caused, or
23 could cause, kids to think that cigarette smoking was a more
24 normalized behavior among adults than it actually is. So the
25 idea here is to lower it because in a declining industry the

1 level of competition had gotten very fierce so the objective was
2 to put limits on it so that it lowered and went down
3 substantially.

4 Q. And as far as that being what the goal of the MSA was,
5 what form of mass media advertising did the Attorney Generals
6 agree to leave still to the tobacco companies to use if they
7 wanted to in mass media advertising of cigarettes?

8 A. Magazine advertising.

9 Q. That was it, isn't it?

10 A. Pretty much it, newspapers if you wanted.

11 Q. Okay. As far as the spirit of the MSA, after the MSA was
12 passed, did Philip Morris try to go beyond the MSA as far
13 lowering the visibility of cigarette advertising?

14 A. Yes.

15 MS. EUBANKS: Objection, Your Honor. This is all straight
16 out of the written direct and repetitive of everything that's set
17 forth in the direct.

18 THE COURT: It's pretty repetitive, Mr. Webb, it's all in
19 the direct.

20 MR. WEBB: I agree it's in the direct and -- anyway. I'll
21 move on.

22 BY MR. WEBB:

23 Q. Now, Mr. Szymanczyk, let me ask you this question: I
24 want to go into some of the specific things that Ms. Eubanks
25 cross-examined you about this morning regarding MSA compliance,

1 but before I go through the specific issues that she touched
2 upon, as far as Philip Morris reverting back to its former self,
3 or not complying with the provisions of the MSA, can you, as a
4 CEO of Philip Morris USA, can you please give the Court an
5 overview of your perception of how vigorous and effective you
6 believe the Attorney Generals have been in enforcing those
7 provisions over the past six and a half years?

8 A. Well, I think there's, you know, there's plenty of
9 examples. We talked about some of them today, in fact. But the
10 states have put together resources and the A.G.'s offices most
11 have specific resources dedicated to tobacco enforcement
12 relative to the MSA, and what they do is they monitor activities
13 going on in the marketplace, in the various companies, and then
14 they ask questions or they file actions. I mean, there's a
15 whole array of things that go on, but I think the states now
16 have well established infrastructure in place and it's funded in
17 order to enforce the MSA and they're very active in it.

18 Q. And you told Ms. Eubanks this morning that sometimes
19 Attorney Generals contact Philip Morris because they have some
20 kind of issue they want to raise, sometimes they contact Philip
21 Morris because they actually think one of your practices may be
22 in violation of the MSA; is that correct?

23 A. Right, that's correct.

24 Q. And you told Ms. Eubanks this morning you honestly don't
25 remember or don't know how many times that's happened?

1 A. That's correct.

2 Q. But has it been -- it has happened a number of times over
3 the last six and a half years; is that fair to say?

4 A. I think it happens on a regular basis, they contact us.

5 Q. And by the way, from your standpoint, is that a good or
6 bad thing?

7 A. It's a good thing.

8 Q. Why?

9 A. Because it highlights things for us and we go and look at
10 them. Our objective, again, is to have gold standard compliance
11 so if there's something going on, it's a big country, if there's
12 something going on and it's a problem relative to the MSA, we
13 would like to know about it.

14 Q. Every time in the last six and a half years that an
15 Attorney General contacted Philip Morris regarding some practice
16 or some issue that they wanted to talk about or discuss, is
17 there any of those issues that ever was left unresolved on that
18 the Attorney Generals then had to file enforcement action
19 against Philip Morris?

20 MS. EUBANKS: Objection, Your Honor, complete lack of
21 foundation. When I attempted to establish through this witness
22 his knowledge of every single time they had been contacted, he
23 had no knowledge of that. So to ask him with respect to every
24 time that Philip Morris has been contacted in this regard, it
25 certainly goes beyond the knowledge that he expressed during his

1 cross. If he wants to limit his question to those that he's
2 familiar with, I don't have a problem with it.

3 MR. WEBB: Your Honor, I asked him whether or not they had
4 ever led to an enforcement action which she brought out on
5 cross-examination herself. So he has that knowledge.

6 THE COURT: Well, I certainly know there have been no
7 enforcement actions. I must have heard that 10 or 15 times
8 already, everybody.

9 MR. WEBB: All right. I'll move on, Your Honor.

10 BY MR. WEBB:

11 Q. I want you to give -- what kind of -- have you personally
12 been in meetings with the Attorney Generals?

13 A. Yes.

14 Q. What goes on in those meetings?

15 A. Well, generally there's an agenda in advance and they'll
16 have items they want on the agenda and we'll have some items on
17 the agenda. Generally, they'll have some areas where they will
18 ask us to prepare a presentation to show them what we're doing
19 on something in a particular area, what are you doing on youth
20 smoking prevention, what have you done on training, and so on
21 and so forth, so we would have those kinds of discussions. We
22 would respond to those agenda items on their behalf, and then in
23 some cases we would have things that we would want to show them
24 or we would want to share with them to get their input relative
25 to what we were planning on doing before we did it. So, you

1 know, we showed them our youth smoking prevention advertising,
2 for example. I mean, we've shared with them work on our -- some
3 of our R & D projects in advance of doing -- taking any
4 particular actions because want to get their opinion on it
5 before we do something. So it's a give and take. Them
6 questioning and wanting to learn, raising specific issues, and
7 us responding and sometimes asking for their input on particular
8 items.

9 Q. And when you actually look at the MSA that is in evidence
10 in this case, are there sometimes issues about how to interpret
11 what might be called loose language in some of those provisions?

12 A. I think that goes on sometimes.

13 Q. And does sometimes the A.G.s get involved in fairly small
14 details as far as how Philip Morris is conducting its business?

15 A. Well, yeah, there's -- they're small, but they're not
16 small to them, they're important to them.

17 Q. I didn't mean insignificant. Let me ask -- let me show
18 the witness JD 55045 which is tab 10. I want to show you what I
19 this is at least -- that's the wrong exhibit. There you go.
20 I'm going to use this just as an example. Is this an ad that
21 the Attorney Generals inquired of Philip Morris about?

22 A. Yeah, I think it is.

23 Q. Okay. And look at -- I know you may not have seen
24 this -- well, anyway. Tell the Court what the inquiry was and
25 what this issue related to.

- 1 A. Well, as I recollect, it was related to the fact that
2 they didn't think that balloon could lift that gondola with a
3 guy in it.
- 4 Q. Okay.
- 5 A. That that was a -- that would be physically impossible,
6 and if you read the definition of a cartoon in the MSA, if it
7 conveyed something that's physically impossible, then it can be
8 construed to be a cartoon.
- 9 Q. Okay.
- 10 A. I think that was the issue on this, if I remember
11 correctly.
- 12 Q. Now, did you actually look at -- did this get raised with
13 you personally?
- 14 A. Yeah.
- 15 Q. And did you actually think this was a cartoon?
- 16 A. Well, it wasn't intended to be a cartoon.
- 17 Q. What did you do with the ad?
- 18 A. We discontinued it. So --
- 19 Q. Now, this morning Ms. Eubanks went through some MSA
20 compliance issues with you, and as far as the issues -- I'm
21 going to go through most of the issues she raised and have you
22 explain to the Court what the issues related to. But just as
23 far as, so the court is aware, as far as Philip Morris's entire
24 MSA compliance activities over the last six and a half years, is
25 there a detailed record of that activity that is in exhibits

- 1 that have been put in your written direct?
- 2 A. Yes, I believe there is.
- 3 Q. What are those called?
- 4 A. We issue an MSA compliance review covering each year, so
- 5 that's what those are.
- 6 Q. Is that required by the MSA, if you know?
- 7 A. I don't believe it is, but it's something that we do.
- 8 Q. And you presented them to the Court so the Court can look
- 9 at them and make the Court's judgment about them; is that fair
- 10 to say?
- 11 A. Yes.
- 12 Q. Now, could I call up U.S. Exhibit 92113. What I'm going
- 13 to show you is a letter that was shown to you this morning by
- 14 Ms. Eubanks. If I can have the ELMO. I'm going to show this to
- 15 you, and it's a little hard probably -- can you see that on the
- 16 screen there?
- 17 A. Yeah.
- 18 Q. This was a letter that Philip Morris got from the office
- 19 of the Attorney General of the state of Kentucky; is that
- 20 correct?
- 21 A. I believe that's correct, yes.
- 22 Q. It's dated March 23, 2000 and addressed to -- are those
- 23 two gentlemen lawyers at Philip Morris?
- 24 A. Yes.
- 25 Q. Okay. And it says it's about "Marlboro billboards at

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1 Smoke Shop Number 2, 30-day notice of intent to initiate
2 enforcement proceedings."

3 Now, to your knowledge is this the first and only time in
4 six and a half years that Philip Morris ever got such a 30-day
5 letter?

6 A. I believe that's right, yeah.

7 Q. So, if we assume this is the most serious thing Philip
8 Morris has done to cause Attorney Generals to send them a letter
9 like this, are you generally aware of the issue that's addressed
10 in this letter?

11 A. I am, yeah.

12 Q. Just explain to the Court what the issue is that was
13 involved regarding Marlboro billboards at Smoke Shop Number 2
14 somewhere in Paducah, Kentucky?

15 A. Well, as I remember this, this store, I think it was a
16 tobacco store, all the guy sold was tobacco, and he had
17 connected to his building, actually I think up on the roof of
18 his building, he had these billboards. They were on his
19 building and he had Marlboro, I think he had a Marlboro Man on
20 one of them. They were physically constructed things that had
21 Marlboro on them, and they may have been -- the company may have
22 assisted him at some point in time in putting those up, but he
23 owned them and the company did not own them, and so he -- he was
24 kind of stubborn and he -- when we asked to take them down he
25 said he wasn't going to take them down. It kind of became an

1 issue with him because he owned them and he didn't want to take
2 them down.

3 Q. So, first of all, what -- just so the Court -- since he
4 owned the billboards, I take it he's got certain First Amendment
5 rights, too; is that correct?

6 MS. EUBANKS: Objection.

7 THE WITNESS: That's correct.

8 THE COURT: I think it was withdrawn. Go ahead, Mr. Webb.

9 BY MR. WEBB:

10 Q. What did Philip Morris, if you can remember, what did
11 Philip Morris try to do to encourage him to take them down?

12 A. Well, you know, we've had several instances where people
13 own billboards and they wanted to advertise their price on
14 Marlboro and other cigarette brands, and so we engage in them
15 and talk to them and explain to them the MSA and we ask them to
16 take them down. I think in this particular case, because it was
17 structural in nature, we offered to pay to take them down,
18 physically dismantle it for him. But he -- and actually I think
19 at one point in time he may have kind of agreed, but then he
20 decided he didn't want to take them down, so --

21 Q. What ability or legal right does Philip Morris have to
22 make him take it down?

23 A. Well, we couldn't make him take them down, and actually
24 once, once the Attorney General's office in Kentucky
25 understood the details on this, actually told the 30-day notice

1 on this thing, and then we all became engaged in trying to
2 convince this guy to do the right thing, and he ultimately did.
3 I mean, we had to -- his contract -- his Retail Leaders contract
4 or whatever our retail program was at that time, expired and so
5 we -- I think we refused to renew it and then he decided that he
6 would go ahead and let us take them down and they came down.
7 Q. And by the way, once the gentleman, the men and women of
8 the Attorney General's office of the Commonwealth of Kentucky
9 understood what happened, did they go forward on this
10 proceeding?
11 A. No, no, no, no. They started to try to work with us to
12 see if we couldn't convince this guy to do something.
13 Q. And they worked with you to get that done?
14 A. Yeah, that's right.
15 Q. And they finally came down.
16 A. It finally came down.
17 Q. Are there other examples of that happening during that
18 time period?
19 A. Yes.
20 Q. And did Philip Morris do everything it could to get the
21 owners of the billboards to take them down if you could use any
22 of your economic encouragement to do so?
23 A. That's right.
24 Q. And in fact, I'm going to show you, Mr. Szymanczyk, this
25 issue is talked about so we can trace this through, in these

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1 compliance reports that are prepared by Philip Morris USA that
2 are in your written direct examination. I'm going to show you a
3 page from JD 50566, which is the MSA 2000 compliance report, and
4 I'll just put this on the screen. If you want, if you have the
5 hard copies, I'm going to go to page 89, in fact, I've got it up
6 on the screen now. Could we call out the bottom there, number
7 5. If you look at what's on page 8, 9, and 10 of the 200 --
8 this 2000 compliance report, do you see this billboard issue
9 laid out by Philip Morris and explain as to what happened?

10 A. Yes.

11 Q. And I'm not going to go through the whole thing, but does
12 it layout, essentially, what you just told the Court as far
13 as --

14 A. I believe it does.

15 Q. And as far as how you worked with the A.G. and they came
16 down; is that correct?

17 A. I can't see it all, but yeah, I think that's right.

18 Q. Okay. Well, that's fine, that's fine.

19 Now --

20 THE COURT: By the way, did Philip Morris have to
21 contribute any money to getting them down?

22 THE WITNESS: Well, in the particular instance in Kentucky
23 we had to actually pay to dismantle it. I don't remember the
24 exact amount, but we had to send in a construction crew and
25 actually take it apart to get it down.

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1 BY MR. WEBB:

2 Q. And that's the only 30-day letter that Philip Morris has
3 ever received?

4 A. That's right.

5 Q. Now, let me go to another exhibit that Ms. Eubanks showed
6 you this morning regarding MSA enforcement. It's U.S.
7 Exhibit 92112. I think this was from the Ohio Attorney
8 General's office. Mr. Szymanczyk, I'm going to put this, again,
9 because they were just shown this morning they're not loaded in
10 our system, but let me put this here. Ms. Eubanks showed you
11 this this morning. This deals with a Philip Morris promotional
12 program called Get A Pack Back promotion. Do you see that?

13 A. I do.

14 Q. And this is an inquiry by the Attorney General of Ohio
15 about that promotional program; is that correct?

16 A. That's what it looks like, yeah.

17 Q. Okay. And do you recall this promotional program?

18 A. I don't.

19 Q. You don't. Okay. Let me see if I can show you how
20 Philip Morris responded to this.

21 MS. EUBANKS: Objection, Your Honor. The witness has said
22 he's not familiar with the program, so what's the relevance of
23 showing him a document as to how they responded? There's a lack
24 of foundation to elicit that testimony through this witness.

25 MR. WEBB: Well, actually, counsel is the one who elicited

1 it on her cross-examination, so if this letter is going to have
2 some significance I ought to be able to show how Philip Morris
3 responded to it. He didn't -- he obviously had nothing to do
4 with this letter.

5 MS. EUBANKS: He answered my questions on it without any
6 objection and he responded, but here he's definitely stated that
7 he didn't know anything about the Get a Pack Back promotion. So
8 to show him the follow on to that, there's a complete lack of
9 foundation through this witness to do it. He can do it with some
10 other witness but not this witness.

11 MR. WEBB: Actually, that's not true, Your Honor. Philip
12 Morris documents that are part of the -- made in the regular
13 course of --

14 THE COURT: You may show the document. If he's not
15 familiar with the document and can't answer your questions then
16 he'll say so.

17 BY MR. WEBB:

18 Q. Could I have -- and are these in -- Kevin, are these in
19 the system? Could I have JD 045883 called up, please? I'm
20 going to give you a hard copy of this document, sir, and I'm
21 going to ask you to just take a moment and look at it.

22 A. Okay.

23 Q. I want to get the right document on the screen. Could I
24 have JD 045865, please? And if I could go into the second page
25 of that document, please.

1 Maybe I'll just put it on the ELMO, then. This is -- do
2 you know who Marty Barrington is at Philip Morris?

3 MS. EUBANKS: Mr. Webb, can you tell me with that document
4 is in the package that I have?

5 MR. WEBB: Very well. Kevin, can you help Ms. Eubanks?

6 MS. EUBANKS: Thank you.

7 BY MR. WEBB:

8 Q. Mr. Szymanczyk, this particular letter, Marty Barrington,
9 who is he?

10 A. He was Senior Vice President and General Counsel for
11 Philip Morris USA at that time.

12 Q. Okay. And he's writing to Eric Brown in the A.G.'s
13 office of Columbus, Ohio dated January 7th, 1999; is that
14 correct?

15 A. That's correct.

16 Q. And Mr. Barrington explains to the Attorney General's
17 Office why this particular promotional program does not violate
18 the MSA. Do you see that?

19 A. I do.

20 Q. And can you explain to the Court what this -- if -- do
21 you understand the issue now being explained here?

22 A. I do.

23 Q. Explain it to the Court, please.

24 MS. EUBANKS: Your Honor, I'm going to object. There's a
25 complete lack of foundation. All he's doing is reading from the

1 letter. That's exactly the same issue that I was confronted with
2 on Thursday when I attempted to use letters that the witness had
3 no familiarity with, and was shut down. He hasn't established a
4 foundation for this witness to talk about this document,
5 especially given his testimony that he didn't know what the Get A
6 Pack Back situation was, and it's exactly the kind of objections
7 that Mr. Webb raised when I attempted to put the NBC document
8 before this witness because there was no foundation. It's the
9 same thing.

10 MR. WEBB: Your Honor, this is not NBC. This is a
11 document that -- she showed him the complaint from the Attorney
12 General's Office to Philip Morris. I have a right to show that
13 Philip Morris responsibly responded to the Attorney General and
14 satisfied their concerns. Otherwise, the -- either that or we
15 can strike the letter that Ms. Eubanks showed him because he
16 didn't know anything about it.

17 MS. EUBANKS: That wouldn't be appropriate, Your Honor,
18 because we must have spent 30 minutes on the situation with the
19 documents from the news program and I was forced to try to
20 establish an appropriate foundation with this witness in order to
21 ask any questions about the document at issue. This is no
22 different. Simply asking him for a document that's one page that
23 he's not listed on, and has already stated that he has a lack of
24 familiarity with the subject matter that's discussed is
25 insufficient foundation on the rules that applied to the United

1 States during the questioning of this witness to be sure.

2 MR. WEBB: You're comparing apples to oranges. That was
3 an NBC letter outside of Philip Morris. This is a document of
4 Philip Morris USA.

5 MS. EUBANKS: It doesn't mean he's familiar with it. He
6 hasn't stated he has any familiarity with all of the exhibits.

7 MR. WEBB: He just said --

8 MS. EUBANKS: Because they come from Philip Morris USA,
9 certainly I asked him questions about documents and he certainly
10 had an opportunity to say that he didn't know about them, but to
11 ask him to simply recite what's in this document, that's exactly
12 what I tried to do with the NBC news document and was shut down.

13 MR. WEBB: In fact, that's why I did not ask him. Once I
14 showed him the letter I asked him to explain what this promotion
15 is once he's seen the letter.

16 MS. EUBANKS: It's exactly the same thing he read the
17 letter and now he's being asked to summarize the content.

18 THE COURT: No, the situation is different in that these
19 are -- let me not phrase it differently but say it better, the
20 situation is different in that the government in its cross showed
21 him a document coming from outside the company. On redirect,
22 Mr. Webb is attempting to ask him, as the Chief Executive Officer
23 of the company, about a company created document, indeed a
24 document at least signed by the General Counsel of the company.
25 I think that's very different. He's already been cross-examined

1 about the underlying document. Mr. Webb can't go beyond the
2 scope of the cross-examination, but he can certainly go that far.
3 So the objection's overruled, but within the limits that I just
4 stated.

5 MR. WEBB: I don't intend --

6 BY MR. WEBB:

7 Q. Now that you've seen this letter, you understood the Ohio
8 Attorney General had raised an issue as to whether this
9 promotional program violated the sampling provision of the MSA;
10 is that correct?

11 A. Correct.

12 Q. Just explain to the Court, generally, what was the
13 sampling prohibition of the MSA as you understand it?

14 A. Well, you couldn't give away physical free samples of
15 product except in an adult only facility.

16 Q. Okay. And so, can you explain how -- what Philip Morris
17 responded to the Attorney General? Explain -- can you interpret
18 for the Court, what is the explanation about why this does not
19 violate the MSA?

20 A. Well, the reason it doesn't violate the MSA is, what this
21 was -- and I recognize, I just didn't know what it was called,
22 but this was an ad offering people the opportunity, smokers who
23 wished to sign up on our database, if they did that, if they
24 sent in the information and the verification, age verification,
25 to sign up on our database, then we would send them a coupon for

1 a free pack of cigarettes that was redeemable if they went into
2 a retail store to execute a face-to-face transaction. They
3 would have to provide us with certification that they were 21,
4 and then they could get a coupon and then when they went to the
5 store they would have to go through the transaction process in
6 the store in order to actually make the purchase. And then the
7 way the retailer would accommodate the purchase was he would
8 accept the coupon.

9 Q. And by the way, is this letter -- is this situation that
10 Ms. Eubanks asked you about involving the Ohio Attorney General,
11 asking about a business practice, and then Philip Morris
12 responding and explaining what the business practice is, was
13 that fairly common occurrence between you, Philip Morris, and
14 the Attorney Generals?

15 A. Yes.

16 Q. And by the way, once the Attorney -- Ohio did not proceed
17 with any action against Philip Morris, did they?

18 A. No. At least not to my knowledge. We never had an
19 enforcement action, so.

20 Q. Now, was this episode that Ms. Eubanks called to --
21 strike the question. Can I show -- I want to show
22 Mr. Szymanczyk the 1999 compliance report that's in his direct.
23 It's JD 41836, and could we go to page 26, if we could, of that
24 document.

25 And if you look at what's on the screen under Section D,

1 do you see this Ohio situation being discussed there?

2 A. Yes.

3 Q. And it's set forth right on the face -- and does it set
4 forth, if you go to the next page, how this was resolved?

5 A. Yes.

6 Q. Thank you. Now, do you recall this morning that
7 Ms. Eubanks showed you -- it was actually U.S. Exhibit 92114 --
8 in fact, actually can I call that up on the screen, please, U.S.
9 Exhibit 92114?

10 I don't think this is probably in our system yet so let
11 me just put it up on the ELMO. Thank you. This is U.S.
12 Exhibit 92114. It's from a state senator sent to -- actually
13 not to Philip Morris, it's sent to the Attorney General's Office
14 in the state of Wisconsin. Do you see that?

15 A. I do.

16 Q. And you explain -- you talked about this in some detail
17 that you told Ms. Eubanks you were not familiar with this
18 particular letter, but you -- there's a reference on the second
19 page to the fact that apparently there was a lobbyist that may
20 have been working for Philip Morris as well as another client.
21 Do you see that?

22 A. I do.

23 Q. By the way, just so it's clear, whatever -- I know you
24 don't know what happened here, but certainly the Wisconsin
25 Attorney General did not believe this was a violation -- strike

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1 that. Did the Wisconsin Attorney General ever accuse Philip
2 Morris of violating the MSA because of this episode?

3 A. No, I don't believe so.

4 Q. Now, in connection with -- just to make our point or my
5 point -- does Philip Morris actually train lobbyists to comply
6 with the MSA?

7 A. Yes.

8 Q. And what does Philip Morris do?

9 A. Well, we went through major training with a broad range
10 of people internally in the company and then we had to go to
11 third parties and train them. And so we take them through the
12 provisions of the MSA, and in particular what the company's
13 standards are relative to both the spirit and the letter of the
14 Master Settlement Agreement. And then in a case like lobbyists,
15 we would go under the particular provisions and provide them
16 with instruction relative to what our policies were going to be
17 regarding the Master Settlement Agreement and we would expect
18 them to carry them out. And I think that clearly in this
19 particular area there is some potential for conflicts to come on
20 because lobbyists do represent different parties, and they don't
21 always have congruent positions on these things, so we've had to
22 resolve that. Sometimes I think we've had to change lobbyists
23 in some cases where we felt like that lobbyist's position is
24 going to interfere with our position relative to a subject. I
25 just don't remember this particular case, but I do know this is

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1 a place where we had to do some work in the beginning of the
2 MSA.

3 Q. And to the best of your knowledge, has Philip Morris done
4 everything that the MSA requires it to as far as training its
5 lobbyists?

6 A. I believe so, yes.

7 Q. Let me go to the last enforcement issue that Ms. Eubanks
8 raised, which was auto racing. And if I could call up JD 42503,
9 please, and I'm going to see if I can get a hard copy of this
10 document for you Mr. Szymanczyk. Could we call up that first
11 page?

12 Now, why don't you look at this document and tell the
13 Court, is this a document that relates to that cart IRL issue
14 that you were explaining to Ms. Eubanks this morning?

15 A. It is.

16 Q. Can you, just in a concise way, explain to the Court
17 what -- strike the question. You indicated that the interest of
18 the Attorney Generals began by a phone call that you got with
19 Attorney General Gregoire of the state of Washington; is that
20 correct?

21 A. Well, that's the first I was aware of it.

22 Q. Is that how you first became aware of it?

23 A. I believe that's right, yes.

24 Q. And by the way, did you over time have fairly substantial
25 contacts with that particular Attorney General?

1 A. Yes, I did.

2 Q. Why?

3 A. Well, early on, after we signed the Master Settlement
4 Agreement I met with Attorney General Gregoire, she was part of
5 the team of Attorneys General that were assigned to our company.
6 She was kind of like the team leader and I think she was the
7 head of the Enforcement Committee of NAAG at that point in time,
8 and so I met her through that process. And we had an ongoing
9 dialogue about the MSA as we both launched into getting it
10 installed.

11 Q. And when she called you up about this issue, what did she
12 say to you?

13 MS. EUBANKS: Objection, hearsay.

14 MR. WEBB: Your Honor, I'm not offering it for the truth
15 of the matter asserted. I certainly have a right, as far as what
16 complaint -- he received a complaint from an Attorney General.

17 THE COURT: Well, you have to word your question very
18 differently, but as worded sustained.

19 BY MR. WEBB:

20 Q. Well, Mr. Szymanczyk, when Attorney General Gregoire
21 notified you -- contacted you, did she provide you with
22 information about something that she believed to be an MSA issue
23 or problem?

24 A. Well, yeah, she raised this issue. It was at that point,
25 it was a question about what was going on. And so I explained

1 it to her and we discussed it, and there were other A.G.s, I
2 think at that point, that had raised the issue with her, so she
3 contacted me. So I explained it to her, and then we had several
4 conversations about this because she was talking to other
5 Attorneys General, and during the course of that I simply
6 determined that, look, I didn't want this to be an issue, it
7 wasn't that important, that the Penske team which competes,
8 had -- was following its race schedule and entered into the
9 Indianapolis 500, but we didn't want that to be -- it certainly
10 wasn't more important to us than the Master Settlement
11 Agreement, so I began to work toward trying to solve the
12 problem. And Attorney General Gregoire and I worked out a
13 solution and that's what happened here, we did it over the
14 phone.

15 Q. You both resolved it over the phone; is that correct?

16 A. She was kind of representing some other Attorneys
17 General, and so we worked out a solution, she took it back to
18 the other A.G.s I think she was working with, and everybody
19 determined it was a reasonable solution, so that's what we did.

20 Q. What was the solution?

21 A. Well, the solution was that we would pull the Marlboro
22 markings off the car and we would attempt to -- and we wouldn't
23 put up any signage at the track relative to Marlboro signage
24 that in those days used to go up at these races and we would
25 attempt, as best we could, remove Marlboro signage and logos

1 from the equipment and such to the degree it was possible. But
2 I explained to Attorney General Gregoire that there were certain
3 things we couldn't do. This was like on a couple weeks,
4 three weeks' notice. There were certainly things that we
5 weren't going to be able to do, but we agreed that we would
6 lower the profile of it as much as we could and that's what we
7 tried to do.

8 Q. And what did Philip Morris -- what did you have to --
9 how -- was it a bit of a chore to be able to get all of this
10 done by race day?

11 A. Absolutely, yeah, it was a lot of hoops to jump through,
12 but I think people worked real hard to try to live up to the
13 spirit of that agreement and the A.G.s had people on site, the
14 Indiana A.G.'s Office had people on site and they were satisfied
15 with what we did.

16 Q. By the way, as far as that issue when it was raised with
17 you by Attorney General Christine Gregoire, did you folks at
18 Philip Morris actually believe that you had violated the MSA by
19 this Indianapolis 500 race plan that you had?

20 A. No.

21 Q. Why not?

22 A. Well, I think it was pretty clear that it was in the cart
23 schedule and so it was a cart sanctioned race and part of the
24 series, so we -- the event status we had was we could compete in
25 that series, however that series laid out. So, I think we were

1 in our right to go ahead and be in the series, even with the
2 Indianapolis 500, but we just decided it wasn't a point that we
3 wanted to argue on.

4 Q. Okay. And by the way, as far as what you did in a short
5 period of time to solve the issue, did any Attorney General ever
6 complain about what you did?

7 A. No.

8 Q. And just for the record, does this letter that I put on
9 the screen, which is JD 42503, does this letter set forth the
10 issue? If you would just read it over and look at it so I can
11 get that in the record, sir.

12 A. The letter to Joel Wresler?

13 Q. Yes. Could I go to page 2 of the letter, please. Call
14 out the first paragraph. Does this set forth the solution?

15 A. Yes, it does.

16 Q. That was reached by you and the Attorney Generals on a
17 telephone call?

18 A. Yes.

19 THE COURT: Mr. Webb, we better take a break soon or now.
20 How much longer do you think you'll be?

21 MR. WEBB: Your Honor, I have a ways to go. I don't think
22 we're going to finish today, I'm just being realistic. I just
23 don't think we're going to finish.

24 MR. WELLS: Could I release Mr. Willard, who has been
25 waiting?

1 THE COURT: Well, certainly if we're not going to call him
2 today, absolutely.

3 MR. WELLS: Thank you.

4 THE COURT: It's not a question of just going 10 or
5 15 minutes beyond the deadline?

6 MR. WEBB: I really don't think so. I'm just looking at
7 where I am in my outline, and I'm responding, actually, to things
8 that happened this morning that have just taken a little time to
9 respond to.

10 THE COURT: Okay. Let's just take 10 minutes now then,
11 please, everybody.

12 (Thereupon, a break was had from 3:27 p.m. until 3:44
13 p.m.)

14 BY MR. WEBB:

15 Q. Now, Mr. Szymanczyk, when we left off, we were talking
16 about auto racing and questions that Ms. Eubanks had asked you
17 about Philip Morris's auto racing issues. Let me go to one
18 other auto racing issue that Ms. Eubanks raised, which is, do
19 you recall this morning, towards the end of your
20 cross-examination this morning by Ms. Eubanks, she was asking
21 you about what was referred to as Formula One Racing sponsored
22 by Philip Morris International, which ran, apparently, you said,
23 one race in the U.S. called the Grand Prix U.S.; is that
24 correct?

25 A. Yes. They have one U.S. race on their schedule.

1 Q. Okay. I'd like to show --

2 THE COURT REPORTER: Counsel, I don't think you have your

3 mike on.

4 MR. WEBB: I'm sorry. I took it off.

5 THE COURT: Your voice doesn't really need a mike,

6 Mr. Webb, but --

7 MR. WEBB: Well, the court reporter thinks that I should,

8 so I'll put it back on.

9 THE COURT: -- it's tied into his recording equipment to

10 ensure 100 percent accuracy when Mr. Bernick's not paying full

11 attention to everything.

12 BY MR. WEBB:

13 Q. Let me ask the question again.

14 Mr. Szymanczyk, do you recall this morning Ms. Eubanks

15 asking you questions about what was called Formula One Racing,

16 where this other company, Philip Morris International,

17 apparently sponsors one race in the U.S. called the U.S. Grand

18 Prix? Do you recall those questions generally?

19 A. Yes, I recall that subject.

20 Q. Okay. I'd like to show you -- as far as that subject

21 matter is concerned, I'm going to show you the 2003 MSA

22 compliance report, which is JD 55119 -- I'm sorry. That's

23 wrong. That's wrong. It's JD 55037.

24 Do you have that in front of you? This is the 2003 -- do

25 you have the full document in front of you?

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1 A. Are you looking for the March 2005.

2 Q. No, '3. It's 2003.

3 A. This says -- wait a minute. Yeah, this is it, 2003. I'm

4 sorry. That's correct.

5 Q. You've got that in front of you?

6 A. I do, yes.

7 Q. I've put up on the screen a page out of that document

8 that relates to this topic. If I could call out, in the middle

9 of the page, it says "Affiliate activities with the United

10 States" and this reads -- what is in your compliance report is

11 "An international affiliate of PM USA sponsors an international

12 Formula One Racing driver of a car carrying the Marlboro

13 trademark and brand identification in non-U.S. markets."

14 Now, that international affiliate, is that Philip Morris

15 International?

16 A. I believe it is, yes.

17 Q. It says here: "One race in the Formula One series occurs

18 within the United States. PM USA works closely with

19 representatives of the PM USA affiliate as well as third-party

20 sponsors of other Formula One cars carrying tobacco trademarks

21 that PM USA owns in the United States to ensure that they

22 understand and comply with restrictions imposed by the MSA on

23 the trademark owner."

24 Now, let me stop there. Can you generally describe your

25 understanding of what Philip Morris does as far as this Formula

1 One race that's run in the United States by Philip Morris
2 International?

3 A. Well, we make sure that they understand what the
4 requirements of the MSA are. They have to essentially -- they
5 don't run a Marlboro Formula One car in the United States. It
6 essentially becomes a Ferrari-Vodafone car. Vodafone is the
7 other primary sponsor of the Ferrari team. They can't use
8 Marlboro or the Marlboro trademark at all relative to that race.
9 And we not only verify what they do, but then we compliance
10 check it at the actual race. But essentially, there is no
11 Marlboro related to Formula One when they've run in the United
12 States.

13 Q. And has your affiliate company, Philip Morris
14 International, been willing to comply and do what you ask them
15 to do?

16 A. Yes.

17 Q. Okay. And so it says here: "In addition, Philip Morris
18 USA" -- strike that question.

19 Has it been that way consistently since the MSA came into
20 being? Every year, whenever Philip Morris International comes
21 to the U.S. to sponsor that Grand Prix race, does Philip Morris
22 International agree not to display the Marlboro name in that
23 race?

24 A. Absolutely, yeah. I'm not sure they had that race when
25 the MSA started. I think it was added to the Formula One

1 schedule. But absolutely, they never failed to comply.

2 Q. Okay. It says: "In addition, Philip Morris USA
3 proactively communicates with third parties providing services
4 in connection with the Formula One race and informs them of
5 Philip Morris USA's intent to monitor the race site and
6 ancillary matters for potential MSA violations. As an example,
7 Philip Morris USA sent a letter to the U.S. Grand Prix office at
8 the Indianapolis Motor Speedway to request cooperation in
9 assisting Philip Morris USA in taking action against third-party
10 use of Philip Morris USA, Inc. trademarks in connection with the
11 race. The letter also provided advance notice that auditors
12 retained on behalf of Philip Morris USA would be present at the
13 site of the race to monitor compliance and issue cease and
14 desist letters when appropriate."

15 And as far as you know, did Philip Morris do exactly
16 that?

17 A. Yes.

18 Q. Now, over the lunch break -- let me show the witness -- I
19 want to show you JD 55119, if I can get it for you.

20 Over the lunch hour, I went out to try to find a picture
21 so we could show the Court that Formula One car, that this
22 particular one is June 2004. Do you see that in the legend
23 under "Formula One"?

24 A. Yes.

25 Q. And is this, to the best of your knowledge, what is done

1 with that car so that there's no Marlboro advertising or logos
2 on that car?

3 A. That's correct.

4 Q. And those gentlemen that Ms. Eubanks called to your
5 attention, their names up at the -- those are the Formula One
6 racers; is that correct?

7 A. That's them.

8 Q. And she showed you some photographs where they had big
9 Marlboro signs on them at some other race. Do you see any
10 Marlboro signs on those gentlemen?

11 A. No.

12 Q. Thank you.

13 Now, Ms. Eubanks -- I'm going to leave MSA compliance.
14 Those were areas that were covered with you this morning.

15 Ms. Eubanks last week asked you some questions about
16 whether Altria, your parent corporation, compensated you as the
17 Chairman of Philip Morris USA based on Philip Morris USA's
18 financial performance. And you responded by telling her that
19 Altria compensates you based on accomplishing the mission goals
20 of Philip Morris USA. Do you recall that testimony?

21 A. Yes.

22 Q. And when Altria does compensate you, based on the
23 compensation that you've laid out in your direct exam and you
24 discussed some with Ms. Eubanks, is that compensation based only
25 on financial performance of Philip Morris USA?

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1 A. No.

2 Q. In fact, tell the Court, have you had some trouble
3 meeting your financial goals in recent years?

4 A. Well, yeah --

5 MS. EUBANKS: Objection, Your Honor. I didn't raise any
6 questions about the specific financial goals of the organization.
7 If we're talking about his compensation package, that's one
8 thing, but this is beyond the scope. I didn't talk about the
9 financial goals overall of the company.

10 MR. WEBB: I don't intend to go into those financial
11 goals. I simply want to bring out that even though they didn't
12 always meet their financial goals --

13 THE COURT: But I know this, Mr. Webb. I know it from the
14 direct, that they didn't meet their financial goals for, I think,
15 two years -- I would have to go back to the direct -- and that
16 Mr. Szymanczyk was fortunate to get his bonus in any event
17 because they were happy with him.

18 MR. WEBB: Are you asking me not to repeat the direct?

19 THE COURT: Yes.

20 MR. WEBB: I'm going to try to avoid that. Your Honor,
21 sometimes I try to make points, because that was a long written
22 direct --

23 THE COURT: I know.

24 MR. WEBB: -- and I -- but I'll try to be careful, Your
25 Honor.

1 Could I show the witness -- as far as -- as far as being
2 compensated pursuant to the mission goals, can I show the witness
3 tab 39, which is JDEM 040312.

4 BY MR. WEBB:

5 Q. I don't intend to go through this in any great detail,
6 Mr. Szymanczyk, but I just want to make sure it's clear. For
7 example, in part, is your compensation based on your success in
8 aligning Philip Morris USA with society's expectations?

9 A. Yes.

10 Q. And the things that are listed on the left-hand column
11 under "Align with society": "Reducing youth smoking, supporting
12 reasonable regulation, complying with legal and regulatory
13 requirements, reducing environmental impact" -- are all of those
14 factors that you understand are taken into consideration in
15 trying to come up with your appropriate compensation?

16 A. Yes.

17 Q. Look at the second column. As far as whether Philip
18 Morris "Exceeds Consumer Expectations" as far as, again,
19 "Reducing the harm in its products, communicating health effects
20 of your products, providing cessation information to consumers,
21 marketing your products responsibly" -- if you achieve those
22 goals, does that come into play in the way you're compensated?

23 A. Yes.

24 Q. The third column here, "Creating Long-Term Value" -- one
25 of the prongs of long-term value is "providing shareholder

1 return." Is that where the financial performance would come
2 into play?

3 A. Yes, that's part of how you get long-term value for
4 shareholders.

5 Q. Okay. Now, Ms. Eubanks asked you a question last
6 Thursday as to whether, if Mr. Louis Camilleri, the Chairman of
7 Philip Morris -- I'm sorry -- the Chairman of Altria, your
8 parent, whether he could remove you if he did not like a
9 position that you and your company took on a smoking and health
10 issue. Do you recall that question?

11 A. I think so, yeah.

12 Q. Has anything like that happened in the last seven and a
13 half years while you've been Chairman?

14 A. No.

15 Q. In your interactions with the folks at Altria, have they
16 expressed support for all of the changes you've implemented in
17 your mission?

18 A. Yes, they have.

19 Q. Do you have any reason to believe that would ever change
20 in the future?

21 A. No. I mean, the Board is committed to this direction.

22 Q. Now, Ms. Eubanks called your attention to a chart that
23 appears actually on page 43 of your written direct. It's tab
24 42, if I could call it up. This is a chart that's JDEM.

25 And you recall this chart that appears in your written

1 direct examination?

2 A. I do.

3 Q. Now, Ms. Eubanks was asking you questions about whether
4 the chart was misleading because it reflects -- well, strike
5 that question.

6 Why did you put this chart in your written direct? What
7 are you trying to communicate?

8 A. Well, the point of this chart was simply to say that I've
9 appointed the Senior Executive Group in this company and that
10 is, in fact, a prerogative that I have as the Chief Executive
11 Officer of the business, so as I've selected these people, I've
12 evaluated them relative to the company's core values and whether
13 or not I think that they can make solid contributions in leading
14 the organization to accomplish the mission.

15 So that's the evaluation process. It's not about whether
16 or not -- where they came from as much as it is that they've
17 been particularly -- they've been picked individually by me for
18 the express purpose that I felt like they could help me
19 accomplish this mission.

20 Q. Now, as far as that being the goal of this chart, if you
21 go to page 44, and that's tab 57, line 17 to 20, I think you'll
22 see you actually set forth the importance of this chart.

23 MS. EUBANKS: Objection, Your Honor. This is certainly
24 repetitive of the written direct, if we're going through the
25 written direct.

1 MR. WEBB: I'm just trying to make a record that there's
2 nothing that he disclosed -- in the face of his direct, counsel
3 tried to make it appear as though this chart was misleading in
4 some way.

5 MS. EUBANKS: Well, Your Honor, he answered the questions
6 that I posed to him. But to go over the written direct to
7 establish that, that's purely something that can be done on
8 argument at the other end of the case.

9 THE COURT: Why don't you go as quickly as you can,
10 please, Mr. Webb.

11 MR. WEBB: I am, Your Honor.

12 BY MR. WEBB:

13 Q. This is set forth on the face of your written direct,
14 what you believe the importance of this chart to be?

15 A. Yes.

16 Q. Now, Mr. Szymanczyk, if I go back to that chart --

17 If I could call tab 42 back up, please.

18 -- the chart that appears on page 43 of your written
19 direct; I believe Ms. Eubanks brought out that most, if not all
20 of those people have had careers at Philip Morris that even
21 predate your arrival; is that correct?

22 A. That's true of some of them; that's correct.

23 Q. Can you tell the Court why you pick people to be on your
24 Senior Team that had had a career and were experienced in
25 various areas of Philip Morris.

1 A. Well, I picked them because I thought they could do the
2 job and I thought that they had the -- they had demonstrated
3 behaviors that were consistent with the company's values.

4 Q. Are you aware of any evidence that the government has
5 introduced in this trial that would indicate those people on
6 that list have ever engaged in any wrongdoing before or after
7 you came to the company?

8 MS. EUBANKS: Objection, Your Honor. Lack of foundation.
9 We haven't established that this witness is even familiar with
10 the evidence that the United States has --

11 MR. WEBB: I'll strike the question. That's a fair
12 objection. I'll strike the question.

13 BY MR. WEBB:

14 Q. Mr. Szymanczyk, set aside this trial. Has anybody ever
15 called to your attention that in any case that's gone forward,
16 have you received any knowledge from any source that any of
17 these people have engaged in any wrongdoing in the past or while
18 you've been at the company?

19 A. No.

20 Q. And do you believe each one of those people is very
21 qualified in their position?

22 A. Well, yes. I expect them to prove that every day, but
23 yes, that's what I believed when I appointed them.

24 Q. Let me go to a different topic.

25 You can take that down. Thank you.

1 Ms. Eubanks asked you a series of questions last Thursday
2 about what are called Philip Morris USA Corporate Responsibility
3 TV commercials. Do you recall questions about those?

4 A. Yes.

5 Q. And she asked you some questions as to whether those were
6 designed to influence court proceedings, legislative issues or
7 PR issues. Do you recall those questions?

8 A. Yes.

9 Q. I want you to tell the Court, what is the purpose of
10 those Corporate Responsibility ads that run on TV?

11 A. Well, one of the things that we say in our mission is we
12 want to provide information to smokers about our products,
13 relevant information, and we want to make progress relative to
14 Youth Smoking Prevention, for example, and now we have a desire
15 to provide cessation information.

16 So we've -- we've built this website that is the central
17 point of communication for these kinds of pieces of information.
18 And what we've wanted to do is make sure that we're conveying to
19 the general public the availability of the various types of
20 information that are on the website, so we've used television
21 advertising, because it's very broad in terms of its reach, in
22 order to convey the message about what's contained on our
23 website.

24 Q. Mr. Szymanczyk --

25 In fact, let me -- I'm going to -- can we play tab 55,

1 which is JD 53157.

2 MS. EUBANKS: Well, Your Honor, if we're about to play
3 something --

4 MR. WEBB: Stop, stop. I'm sorry. There's an objection.

5 MS. EUBANKS: Yes, there is, because in the content of the
6 witness's answer, he included a reference to cessation and that's
7 not something that we went into on the cross-examination. So I
8 want to ensure with respect to the ad that we're about to see
9 that this isn't something that deals with a subject that's beyond
10 the scope of the cross-examination and I can only do that if I
11 object before the ad is played.

12 MR. WEBB: Your Honor, what counsel did last week was they
13 showed him -- they asked him about Corporate Responsibility
14 commercials and then in midstream, counsel switched to a
15 different campaign called PM21, if Your Honor remembers, which is
16 a totally different PR campaign put on by the parent, okay.

17 I just want to show the Court what the Corporate
18 Responsibility commercials are so I then can go into what PM21
19 are because there was clearly confusion created in this courtroom
20 last Thursday because counsel intermingled two different
21 advertising campaigns and it's important for me to straighten out
22 the record on that.

23 All I'm showing are two of the Corporate Responsibility
24 commercials because I think I have a right to show the Court what
25 they are and then contrast them to the other campaign, which is a

1 totally different campaign. Counsel clearly tried to suggest
2 that all we do -- everything is simply to influence courts,
3 legislators, PR. And I think I have a right to at least show the
4 Court what these Corporate Responsibility commercials are, or two
5 of them anyway, so you have a sense.

6 If counsel didn't want to go into this -- they did go into
7 it.

8 MS. EUBANKS: Your Honor, I certainly didn't go into the
9 Quit Assist program, which was in some of the materials that were
10 sent to us overnight. I did not talk about cessation.

11 And that doesn't respond to my objection, which is why I
12 raised it. I don't have an objection to showing him ads if they
13 don't touch upon those topics, but those are topics that I
14 intentionally did not cover during cross-examination and if we're
15 going to cover them now with this witness, I'm going to need to
16 recross him if it's going to be fairly apportioned.

17 THE COURT: I can certainly watch the ads, which I'm sure
18 cover a lot more material than just cessation. I do think that
19 the defendant has a right to put on those ads. But there will be
20 no direct testimony about anything that refers to cessation since
21 that was not covered in the cross.

22 MR. WEBB: I agree with that.

23 Jamey, can we play JD 53157, tab 55.

24 (Video clip played.)

25 BY MR. WEBB:

1 Q. Now, the company that paid for and sponsored those
2 commercials, that's your company; is that correct? Philip
3 Morris USA?

4 A. Correct.

5 Q. When did these Corporate Responsibility commercials
6 begin, if you remember? What year?

7 If you remember.

8 A. I don't remember.

9 Q. Has it been -- do you have a general timeframe?

10 A. I'm sorry. It's the last few years. I mean, I don't
11 remember specifically.

12 Q. Okay. Now, right in the middle of asking you questions
13 about the Corporate Responsibility ad campaign, counsel started
14 to ask you questions about something that's called PM21. Do you
15 recall that?

16 A. Yes.

17 Q. Can you generally describe for the Court, what is PM21?

18 A. Well, PM21 referred to an advertising campaign run by
19 Altria group -- it was Philip Morris Companies, Inc. then --
20 which attempted to explain to people some things about Philip
21 Morris Companies, and in particular some of the things that
22 Philip Morris Companies does that it believes are worthwhile.

23 Q. And is there any relationship between those two
24 advertising campaigns?

25 A. No, none at all.

- 1 Q. Did they actually run at different times?
- 2 A. I believe that's correct, yes.
- 3 Q. Now, when counsel started -- Ms. Eubanks asked you
4 questions about the PM21 campaign, she showed you an exhibit.
5 Can I call up 93327. It's tab 52, Todd.
6 I apologize, Your Honor. I've been calling out Jamey's
7 name and they switched operators. And I apologize to you, Todd.
8 Todd's at the machine now.
9 I'm going to try to give you this hard copy of this
10 document because counsel spent 10 or 15 minutes on this document
11 last Thursday morning, I believe.
12 And do you see the subject matter says "Analysts"
13 comments on PM21," dated October 15, 1999?
- 14 A. Yes.
- 15 Q. And did you get a chance to review that document when
16 Ms. Eubanks showed it to you?
- 17 A. Yes.
- 18 Q. Can you generally tell the Court what this document is?
- 19 A. Well, it just looks like a compendium of analysts'
20 reports.
- 21 Q. "Analysts," meaning what kind of analysts?
- 22 A. Wall Street analysts.
- 23 Q. Okay. And do they appear to be analyzing the PM21 ad
24 campaign?
- 25 A. Yes.

1 Q. And so -- in fact, if you go in to the page that ends
2 Bates stamp 579, if I could call out that yellow highlighted
3 version, it says here: "The four television spots highlight
4 what the company is doing to address certain smoking issues,
5 various non-tobacco initiatives, hunger relief, funding of the
6 arts, employee volunteerism and so forth."

7 Did you see some of the Philip Morris 21 ads -- sorry --
8 the Altria -- the campaign -- Philip Morris 21 ads when they ran
9 several years ago?

10 A. Yes.

11 Q. Does it appear that there is a public relations aspect to
12 those ads?

13 A. Yes.

14 Q. And can you explain what that is?

15 A. Well, I think the idea was to -- I think the company felt
16 the need -- Philip Morris, obviously, received a lot of negative
17 publicity and I think the parent company wanted to educate the
18 public somewhat on the fact that Philip Morris Companies, Inc.
19 was a good company and did a lot of good, worthwhile things and
20 that it wasn't simply a tobacco company, but there were an array
21 of businesses that it was in. It was a consumer package goods
22 business.

23 Q. Are you aware if there's anything wrong -- if a company
24 in the United States wants to run advertisements to improve its
25 corporate image, are you aware of anything wrong with that?

- 1 A. No. Lots of companies do that.
- 2 MR. WEBB: And I'm going to just play one of the PM21
- 3 commercials so the Court can see it. Can I have tab 56, JD
- 4 55115. The ad was called, I believe, "Throwaway."
- 5 (Video clip played.)
- 6 BY MR. WEBB:
- 7 Q. Is there any doubt in your mind that there is a public
- 8 relations or corporate image goal as part of that campaign?
- 9 A. No.
- 10 Q. And if I could call that -- the exhibit you have in front
- 11 of you, the one that Ms. Eubanks spent 10 or 15 minutes on, U.S.
- 12 Exhibit 93327, the analysts' comments -- do those comments have
- 13 anything at all to do with Philip Morris's Corporate
- 14 Responsibility ads?
- 15 A. No.
- 16 Q. Were your Corporate Responsibility ads even running at
- 17 that time in 1999?
- 18 A. No.
- 19 Q. Now, as far as Ms. Eubanks' questions that Philip
- 20 Morris's communications about smoking and health have some type
- 21 of public relations aspect or gimmick to them, do you put on
- 22 your website your smoking and health positions you put there for
- 23 some public relations gimmick reason?
- 24 A. No.
- 25 Q. Why do you put them there?

1 A. Well, it says why we put them there in our mission
2 statement. We put them there because we believe that our
3 consumers and the general public are important stakeholders and
4 that this product has dangers associated with it and that they
5 should have available to them the information regarding the
6 product so that they can be well educated about it. And we want
7 to make that easily accessible.

8 Q. Do you want to also -- never mind. Strike the question.
9 Could I have tab 11, JDEM 40291.

10 I've simply called out -- I'm going to quickly -- on your
11 website, Philip Morris sets forth on the key issue of smoking
12 and disease causation: "Philip Morris USA agrees with the
13 overwhelming medical and scientific consensus."

14 The Court's seen this before. I don't have to read it.
15 It's there.

16 Is this a PR gimmick, Mr. Szymanczyk?

17 A. No.

18 Q. Does Philip Morris intend this to be an honest
19 communication on an important smoking and health issue?

20 A. Yes.

21 Q. Do you use those TV commercials to drive people to your
22 website so they can see this information?

23 MS. EUBANKS: Objection. This is all leading and
24 repetitive of the written direct.

25 THE COURT: Certainly the last question was leading. Just

1 rephrase it.

2 MR. WEBB: I'll rephrase it.

3 BY MR. WEBB:

4 Q. What are you trying to accomplish with your Corporate
5 Responsibility ads as far as getting people to look at your
6 website?

7 A. Well, I think I said that already. I'm trying to -- what
8 we're trying to do is make sure that people are broadly aware of
9 the kind of information that they can find when they come to our
10 website and that they are aware that that site exists. And so
11 we'll use different advertisements to convey some of the subject
12 matter that's on the website in an effort to make sure people
13 know they can go there to get that kind of information.

14 Q. Now, in response to questions from Ms. Eubanks last week,
15 I believe one of your answers was that after you became CEO, you
16 made a judgment call that you thought improvements could be made
17 in the way Philip Morris communicated with consumers on smoking
18 and health issues; is that correct?

19 A. Yes.

20 Q. And is what -- is that -- what you have on your website
21 today what you believe to be improvement?

22 A. Yes.

23 Q. Let's just take this issue, though: Causation. As far
24 as what Philip Morris had communicated in the past on the
25 causation issue, I believe you told Ms. Eubanks, in response to

1 one of her specific questions, that when you joined the company
2 in 1990, Philip Morris did two things to communicate the dangers
3 of cigarette smoking. One was a warning on brand, what you call
4 brand communications, and the other was -- I believe was -- you
5 said -- was it Philip Morris warned that it's a risk factor for
6 disease; is that correct?

7 A. Well, I think what I said was that on our brands, all of
8 our brands communicated to their consumers that smoking caused
9 various diseases, among other messages, and that all of our
10 advertising and P.O.S. communicated the same thing.

11 Q. What is the -- based on your experience, by the way, what
12 is the importance of brand communication as far as that and its
13 relationship to consumers who actually use the product?

14 A. Well, people buy brands. I mean, yes, most people who
15 mix Marlboro will tell you it's the Marlboro Company. People
16 won't bind the brand, so they look to the brand for information.
17 That's been kind of historical. I think in more recent times
18 the availability of the Internet has caused people to begin to
19 understand that they can get more information and they become
20 more educated beyond brands, but historically people looked at
21 the brand, they looked at the package, that's where they looked
22 to get information about what they purchased.

23 Q. And that's where the health warning is?

24 A. That's correct.

25 Q. At least -- now, you also mentioned risk factor when you

- 1 answered Ms. Eubanks' question last week?
- 2 A. Correct.
- 3 Q. What did you mean by that?
- 4 A. Well, I just said it was my understanding at the time
5 that I joined the company that the company believed that smoking
6 was a risk factor for disease. That's how they would describe
7 it.
- 8 Q. By the way, when you walked in the door to work at Philip
9 Morris back in 1990, did you, in your own mind as someone who
10 had not been involved in the tobacco industry before, did you in
11 any way distinguish between the concept of causation and risk
12 factor?
- 13 A. No.
- 14 Q. Ever in your life before then?
- 15 A. No. I knew smoking was bad for your health and all of
16 that said smoking is bad for your health. To me that's -- that
17 was the extent of the way I looked at it.
- 18 Q. Now, could I have tab 14, JDEM 40303? This is what
19 Philip Morris says today on its Website regarding addiction,
20 which the Court has seen before. By the way, can you think of
21 anything that could -- any clearer or more concise way to make
22 that statement?
- 23 A. No.
- 24 Q. And does Philip Morris intend that to be an honest
25 communication to the American public on an important smoking and

1 health issue?

2 A. Yes.

3 Q. Is this a PR gimmick?

4 A. No.

5 Q. Tab 16, JDEM 40306. Is this what Philip Morris

6 communicates to the American public regarding secondhand smoke?

7 A. Yes.

8 Q. And is this in any way a PR gesture on Philip Morris's

9 part?

10 A. No.

11 Q. You believe it's an important communication of the public

12 health community's position on this issue?

13 A. Yes.

14 Q. Tab 17, JDEM 040311. Is this what Philip Morris

15 communicates to the American public regarding low tar products?

16 A. Yes.

17 Q. Do you believe this is an important communication on a

18 smoking and health issue?

19 A. Yes.

20 Q. Is there anything PR gimmicky -- was it on there for PR

21 reasons?

22 A. No.

23 Q. JD -- tab 21, JDEM 040307. Is this what Philip Morris

24 communicates on the subject matter of quitting smoking to the

25 American public, "to reduce the health effects of smoking the

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 best thing to do is to quit. Public health authorities do not
2 endorse either smoking fewer cigarettes or switching to lower
3 tar and nicotine brands as a satisfactory way of reducing risk."
4 Is that a PR gimmick Mr. Szymanczyk?

5 A. No.

6 Q. Is that an honest communication on an important smoking
7 and health issue?

8 A. Yes.

9 Q. Tab 15, JDEM 04304678 smoking and pregnancy. "Women who
10 smoke have increased risk for delay in conceiving, infertility,
11 pregnancy complications, premature birth, spontaneous abortion
12 and still birth. Infants born to women who smoke during
13 pregnancy have a lower average birth weight than infants born to
14 women who do not smoke." Is that so that a PR gimmick?

15 A. No.

16 Q. Was that intended as a communication on an important
17 smoking and health issue that consumers might be interested in?

18 A. Yes, it was.

19 Q. Let me go to another topic. Ms. Eubanks asked you a
20 series of questions last Thursday about Philip Morris's
21 marketing, advertising and retail activities. Let me show you a
22 specific question she asked. Could I have tab 24-A called up,
23 which would be from page 18182 of the transcript.

24 I want to call this to your attention. Thank you very
25 much.

1 Now -- actually, Todd, can you come in on page 18181.
2 Line 22 -- I want to go to line 22, starting at line 22. Quote
3 by Ms. Eubanks, "Now, Mr. Szymanczyk, your company still to this
4 day spends vast sums on advertising and promotion of its brands
5 to make sure as many men, women and children recognize them as
6 possible, right?" And your answer on the next page was "No".
7 Do you see that answer?
8 A. Yes.
9 Q. As far as children, or people under the legal smoking
10 age, has Philip Morris done exactly that, have they tried to
11 reduce the visibility?
12 A. Yes.
13 Q. And I'm not going to go back through it, it's laid out in
14 great detail in your direct examination, but I'm just going to
15 use one example of a chart that's not in your direct. Could I
16 have tab 27, which is JDEM 040029. This is a chart that I used
17 in the opening statement to focus on one of your brands, your
18 most popular brand, Marlboro.
19 As far as the difference in visibility, today, of your
20 most popular brand -- maybe I should start with -- I hope this
21 chart is accurate since I've used it. Does it appear accurate to
22 you?
23 A. Yes, yes.
24 Q. And what I want to focus on is, at some point since
25 you've been CEO, Mr. Szymanczyk, did Philip Morris USA actually

1 decide to develop a strategy that could result in basically you
2 simply communicating privately with adult smokers with your
3 promotional and advertising conduct?

4 MS. EUBANKS: Objection, leading.

5 THE COURT: No, the witness can answer appropriately
6 either yes or no.

7 THE WITNESS: You're going to have to ask me the question
8 again, I'm sorry.

9 BY MR. WEBB:

10 Q. At some point in time since you've been CEO, did Philip
11 Morris make a conscious decision to try to move your advertising
12 and marketing and communications so that you would primarily be
13 communicating with adult smokers?

14 A. Yes.

15 Q. Just tell the Court how that came about.

16 A. Well, you know, again, this started with the Master
17 Settlement Agreement. I talked about this earlier, but
18 consistent with the Surgeon General's conclusions that amount of
19 competition in the cigarette industry raised the level of
20 availability of different kinds of marketing to cause kids to
21 think that smoking was a more normalized behavior than it
22 actually is among adults. The objective was starting with the
23 MSA to start to lower the profile of this, and we have continued
24 to pursue that direction, because that's consistent with the
25 MSA, and I think long term what the objective is is to continue

1 to push that down. We've looked for every way we could do it to
2 get out of mass market vehicles to the degree that we can
3 control that.

4 Q. Is it mass marketing, is that -- is it that form that is
5 most visible to underage people, to kids?

6 A. Yes.

7 Q. Ms. Eubanks -- we sealed the courtroom, closed the
8 courtroom last Thursday, and Ms. Eubanks went through and
9 discussed with the Court and you the actual marketing and
10 advertising expenditures that Philip Morris USA had in 2004. Do
11 you recall that testimony?

12 A. Yeah.

13 Q. I don't intend -- I don't want to seal the courtroom now,
14 so I'm not going to go through the specific numbers, but what I
15 want to talk about is, let's start with mass media advertising.
16 Is Philip Morris spending hardly -- don't give me an exact
17 number, but as far as Philip Morris's overall marketing
18 expenditures, how much is spent on mass media advertising today,
19 without giving me the exact number?

20 A. Hardly anything.

21 Q. Thank you. Now --

22 MS. EUBANKS: Your Honor, that's -- that's a really vague
23 answer. I mean --

24 THE COURT: It is. But I understand, number one, why
25 Mr. Webb phrased it that way. Number 2, it -- I have to say, is

1 consistent with the answer that was given, I guess, during
2 cross-examination. I'm not sure whether during the closed
3 portion of cross or in the open portion of cross, and the
4 alternative is to close the courtroom and I don't think that's
5 necessary.

6 More specific figures are in the closed portion of the
7 testimony, and as I say, we had some testimony of this nature in
8 what I believe was the open portion of the testimony. Go ahead,
9 please.

10 MR. WEBB: Thank you, Your Honor.

11 BY MR. WEBB:

12 Q. Now, if we look today at what Philip Morris is actually
13 spending its advertising and marketing dollars on, is it focused
14 on these private communications with adult smokers?

15 A. Well, yes. I mean, what we've done is we've built
16 different vehicles, direct mail and other adult only event
17 vehicles and that's where the money goes. X, the money that's
18 spent at retail, which I talked about previously.

19 Q. I'm going to come to retail in a moment. Let's just take
20 your marketing and promotional activities and I'm not going to
21 go into any amounts, the amounts are in the record and you put
22 them in the record.

23 For example, you spent -- you said you spent almost
24 nothing on mass media, but on direct mail does Philip Morris
25 today spend a substantial amount of money on direct mail

1 communications with your database?

2 MS. EUBANKS: Your Honor, as to that question, I mean
3 that's vague, a "substantial amount of money". If we already
4 have it in the record in the sealed portion, we should rely upon
5 the sealed portion, but I don't think it's productive or
6 appropriate to ask this witness questions about "substantial" and
7 whether something is small or not in the context of the
8 testimony. If he wants to get questions to him specifically
9 about this, then if he wants the numbers we should close the
10 courtroom, but I think asking him to characterize the figures --

11 THE COURT: As to this particular question, I am going to
12 sustain the objection. On the other question, I was very aware,
13 not only from the witness's prior testimony but from a lot of
14 other testimony I've heard as to the figures being extremely low
15 at this point. Now, you're asking questions where the figures
16 are not extremely low. Is there any reason --

17 MR. WEBB: I'll withdraw the question, I can do it a
18 different way.

19 THE COURT: Either that or what I was going to ask you is,
20 is there any reason why you can't rely on the answers he gave in
21 cross during the closed portion?

22 MR. WEBB: I'll do it that way. I'm not going to say
23 anything about the amount.

24 BY MR. WEBB:

25 Q. Whatever amount you identified last week, is your direct

1 mail communications, is that a means of trying to avoid
2 communicating with kids?

3 A. Yes.

4 Q. Why? Explain just generally.

5 A. Well, because you have to be -- we have to -- age is
6 certify people to put them on the database and then it's direct
7 mail to a specific individual who's certified to be 21 years of
8 age or older.

9 Q. So, whatever amount of money you spend on direct mail,
10 that is not visible to kids; is that fair to say?

11 A. That's correct.

12 Q. Let me go to the next one. What about -- whatever amount
13 of money you identified, did Philip Morris spends for your
14 unique experience events, such as the Marlboro ranch, the
15 Marlboro racing school, whatever amount you identified, are
16 those types of communications to kids or to adults?

17 A. No, you have to be 21 years of age and a smoker to be
18 able to attend the event, so those are communications that are
19 contained. Those are adult events as described by the MSA.

20 Q. As far as what you described, I think you called them
21 event nights or event -- special events such as bar nights.
22 Whatever number you identified as being spent on that category,
23 does that create any visibility to kids?

24 A. No. Again you have to be 21 years of age, you're I.D.'d,
25 you have to certify you're a smoker before you can participate.

1 Q. You mentioned a certain amount of money that is spent on
2 your continuity programs and your merchandise catalogs.
3 Whatever amount you spend on that program, are those
4 communications to kids or to adults?

5 A. No. Once again, those are through the database. That
6 works through the database, so you have to be age certified and
7 be a smoker to be in the database and so on.

8 Q. Price promotions. You've identified a sum of money that
9 you've identified as being price and product promotions; is that
10 correct?

11 A. Correct.

12 Q. Explain to the Court why Philip Morris today expends
13 money for price promotions and product promotions, whatever that
14 amount is.

15 A. Well, the cost of the price of cigarettes has gone up
16 significantly since the Master Settlement Agreement, and during
17 that period of time there's been, jeez, I guess roughly a couple
18 hundred new competitors that have entered the market, many of
19 which are offshore, a number of which aren't participants in the
20 Master Settlement Agreement, have very low cost basis. And what
21 they do is sell very low cost cigarettes, more than a dollar a
22 pack less expensive than, for example a pack of Marlboro sells
23 for, even after we fully promote the brand with some sort of a
24 price reduction. So we had to, in order to compete because of
25 the differential got so great, we've had to spend some money

1 relative to lowering our price to wholesalers in order to
2 compete in the marketplace. Otherwise, it's just -- the price
3 would be so much higher than these low price cigarettes that
4 people wouldn't buy them.

5 Q. Who are -- the communication of pricing and the price
6 promotions and product promotions, who are those directed at?

7 A. Retailers. The promotion goes to retailers so the
8 retailer then can have a competitive price in their store
9 relative to the other products they sell.

10 Q. Do those types have anything to do with visibility to
11 kids?

12 A. No.

13 THE COURT: All right, Mr. Webb, I think we're going to
14 stop now, because I want to go over where we are with witnesses
15 given the changes.

16 MR. WEBB: Sure.

17 THE COURT: Mr. Szymanczyk, you may step down at this
18 time. You're subject to the usual rules about not talking to
19 anyone about your testimony.

20 How much redirect will you have tomorrow?

21 MR. WEBB: 30 or 40 minutes.

22 THE COURT: Now, where are we at this point with
23 Mr. Willard? Are you going to call him tomorrow?

24 MR. WEBB: Yes.

25 MR. WELLS: Yes, Your Honor. The government has

1 represented to me they expect to examine him for approximately
2 four hours.

3 THE COURT: And who is going to be doing that?

4 MS. EUBANKS: Ms. Brooker is going to be doing that, and
5 before we do that, you may recall that during our conference call
6 on Friday you asked that we submit our position regarding
7 additional exhibits that were added with Mr. Willard before --

8 THE COURT: Your opposition --

9 MS. EUBANKS: We've submitted our opposition, and we'd
10 like, if the Court would, to entertain that motion -- that
11 decision.

12 THE COURT: I really don't want to for this reason, and
13 it's a timesaving issue. I gather from my law clerk that a
14 substantial number of exhibits have been withdrawn. I don't
15 quite know how many at this point. Even with some withdrawn, it
16 will take some time to go through them in the same manner that I
17 did with this witness. I'd rather get the testimony and get it
18 done and then, of course, we can deal with particular exhibits.

19 Four hours, and of course you're going to have your
20 redirect. I'm not at all clear that we'll get him done tomorrow.
21 Now, on Wednesday, Mr. Bernick's witness needs to take the stand
22 what, first thing in the morning?

23 MR. BERNICK: First thing, Dr. Heckman.

24 MR. WELLS: Your Honor, could we revisit what happens on
25 Wednesday -- right now, I'm somewhat -- I'm just not sure what

1 they intend to do for four hours. And so I don't know. I'm
2 going to try to have my redirect, if you ask me now, you know.

3 THE COURT: You mean tomorrow, don't you?

4 MR. WELLS: Yeah, but --

5 THE COURT: Wait a second. Mr. Wells, let's make sure
6 we're talking about the same witnesses. Are you talking about
7 Mr. Willard?

8 MR. WELLS: I'm talking about Mr. Willard.

9 THE COURT: All right.

10 MR. WELLS: And let's say Ms. Brooker does use four hours
11 tomorrow and they finish with him at the end of the day, if I
12 only have 45 minutes of redirect, and I can make a better
13 representation at the end of the day, I would like to -- I would
14 hope I could put him on for those 45 minutes and get him out of
15 here.

16 MR. BERNICK: I don't think so.

17 THE COURT: I don't think so because Mr. Bernick's witness
18 is going to be in Ireland and your witness lives where, in
19 Richmond?

20 MR. WELLS: I didn't realize if I just took 45 minutes
21 that it would create a problem. If it does, then I'll
22 accommodate.

23 THE COURT: From the discussions we've had, it appears
24 it's going to be very, very tight to get that witness on
25 Wednesday --

1 MR. WELLS: I didn't appreciate that.

2 THE COURT: -- and a short amount of time on Thursday.

3 MR. WELLS: I did not appreciate that, and Mr. Willard
4 will accommodate whatever is necessary to make things run
5 smoothly.

6 THE COURT: And if need be, and I realize it's
7 inconvenient, but it's not as inconvenient as Ireland, but if
8 need be, we can probably finish Mr. Willard's testimony on
9 Thursday afternoon. Everybody following me?

10 MR. WEBB: I guess we're assuming that whenever
11 Dr. Heckman finishes, whether it be Thursday morning or Thursday
12 afternoon, Mr. Willard would come back. If Mr. Willard is
13 finished tomorrow, if he happens to get finished tomorrow, if he
14 happens to, the next witness will be here to go on. Mr. Beran is
15 the next witness, and I will have him here to put him on the
16 stand at the end of Mr. Heckman. If he's not, then he won't go
17 on until next week.

18 THE COURT: Has the government made any estimate of how
19 long the cross will be of Mr. Beran?

20 MR. BRODY: Two to three hours, Your Honor.

21 THE COURT: And that brings me to my final concern, which
22 is Dr. Mulholland, where I made the mistake of promising the FTC,
23 but I promised them seven days in advance, and I guess I thought
24 you all would raise this first thing this morning, but nobody did
25 and I didn't. Has anybody talked with the FTC yet?

1 MR. FREDERICK: Your Honor, Tom Frederick. I have tried
2 to talk to the FTC. I've left Mr. Singer a voicemail message,
3 I've e-mailed him. I have not heard back from him yet.

4 MR. WEBB: I have an idea.

5 THE COURT: I want you all to know my law clerk had to
6 come in two different days this weekend to get this order out so
7 you could get them -- not that they are long, obviously they
8 weren't, but so that you could get the decisions about them with
9 as much advance timing as was possible.

10 MR. WEBB: I have one possible suggestion, Your Honor,
11 which I was going to raise this morning and I forgot. Could we
12 go back to the FTC and tell the FTC that if possible, if
13 possible, the Court would like them to get their objections in
14 sooner? The reason I ask that, we have a down week for part of
15 next week.

16 THE COURT: I know.

17 MR. WEBB: I would like, if we can, to do Dr. Mulholland
18 next week. Next week we'll have two major things to do. We
19 would have Dr. Mulholland and we will have the interim arguments.
20 We could do both of those next week and take up some of the week,
21 if that's acceptable to the Court. In order to make that happen,
22 we'll need some cooperation from the FTC, and I'm not suggesting
23 they won't cooperate, but can we at least communicate to them
24 that if possible, the Court would like them to get back sooner
25 because if we got their objections by Thursday of this week and

1 you had -- we had time to get our response on file -- I'm just
2 trying to get it done next week if possible.

3 THE COURT: I understand. Mr. Brody.

4 MR. BRODY: Your Honor, I looked at Order, I think it's
5 471A, it may be 471B, and spoke with Mr. Frederick at one of the
6 breaks, and if the FTC were to have seven days to turn it around,
7 I think the way that would work out is, running the seven days
8 from today, that Dr. Mulholland's corrected written direct
9 examination and any objections from the FTC would come in by
10 Monday at noon. The United States would have --

11 THE COURT: Meaning the 18th?

12 MR. BRODY: The 18th, correct, at noon. The United States
13 would have until Wednesday at 5 to file objections to the
14 corrected written direct and then, presumably, Dr. Mulholland
15 could testify Thursday of next week. And under that schedule it
16 would be consistent with what we saw previously with adverse
17 witnesses under the Court's orders and it would also allow us to
18 begin, and hopefully complete, the testimony of Dr. Mulholland at
19 the end of next week. That, of course, would raise the
20 possibility that defendants would be doing the sort of what they
21 had said would be the end of their liability
22 presentation/summation before Dr. Mulholland testifies, and of
23 course the United States will be doing a 90-minute response.
24 Otherwise, that would be pushed a little further out.

25 THE COURT: I did not look at his testimony at all, as you

1 know. How many pages was that?

2 MR. FREDERICK: It was 110 pages, Your Honor.

3 MR. WEBB: Your Honor, for all I know the FTC could be
4 working on it today and they might be able -- I don't know. If
5 they could file it at the end of this week and the government
6 could file its objections -- we will do our interim argument
7 without Mulholland, if that's what the Court wants.

8 THE COURT: Really?

9 MR. WEBB: We're perfectly willing to do that, but I
10 really wanted to try to get both of those things done next week,
11 is my suggestion. We can do the interim argument -- it's just
12 not going to be a problem. If you want to do the interim
13 argument Tuesday, Wednesday and do Mulholland Wednesday,
14 Thursday --

15 THE COURT: In terms of contacting the FTC, I am not
16 comfortable with only one side contacting the FTC and
17 representing what the Court says. If both you and the government
18 want to make a joint phone call to the FTC so each of you can
19 keep everybody else honest, pardon the expression, that's fine.
20 But I want it made clear that I made them a promise and I'll keep
21 it, but yes, of course, it would be good if they could get it
22 done before.

23 MR. WEBB: We'll do it that way.

24 THE COURT: Therefore, if anybody tries to strong arm the
25 poor FTC, the other person on the phone will step in and make it

1 clear what my position is, all right? The government will be
2 prepared to start, I gather, with its old remedies witnesses on
3 the -- I can't even think, the 25th. Is that right?

4 MR. BRODY: That's correct, Your Honor, although we
5 anticipate addressing that issue in response to whatever we
6 receive from the defendants at noon tomorrow and that may affect
7 what we --

8 THE COURT: It may.

9 MR. BRODY: -- suggest in terms of a beginning time.

10 THE COURT: It may, it may. And everybody, that will be
11 my first priority when it comes in, and so if for some reason I
12 can't get everything read for next week, we'll just have to deal
13 with it. But the long -- I don't want to say long term, but the
14 interim scheduling for remedies witnesses will be my first
15 priority when everything comes in, and I'm not going to read them
16 piecemeal, meaning I'm not -- when is everybody's due?

17 MR. BERNICK: Ours is due at 12 noon tomorrow.

18 THE COURT: Well, I probably won't read them piecemeal,
19 probably not. All right, everybody, 9:30 tomorrow.

20 (Proceedings adjourned at 4:43 p.m.)

21 C E R T I F I C A T E

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

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

Scott L. Wallace, RDR, CRR
Official Court Reporter

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