

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GK)
	:	April 14, 2005
Plaintiff,	:	
	:	9:30 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 93
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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20 Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription

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

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

4 I gather that counsel from the FTC was here this
5 morning and wanted to talk about scheduling. I did tell my law
6 clerk to tell him to come back between 11:00 and 11:15
7 because -- I wouldn't ordinarily do that, of course -- but we do
8 have real time constraints in terms of spending what time we
9 have on Dr. Heckman. So that's number one.

10 Number two, I gather that there is some new brouhaha
11 about some notes. That's about all I know. They are in an
12 envelope. They have not been looked at. As you know, I left
13 the courthouse as soon as we were done yesterday.

14 What's the issue? And again, I'm not going to spend a
15 lot time on this.

16 MS. EUBANKS: Your Honor, we don't need a lot of time
17 on it. I'll be very brief.

18 What we noticed yesterday when we were moving the
19 demonstratives was that -- and this should be done outside the
20 presence of the witness. He's not here.

21 THE COURT: I asked that the witness wait outside.

22 MS. EUBANKS: Thank you, Your Honor.

23 We noticed that there were some handwritten notes on
24 the top of the desk. The witness when he was leaving took --
25 rolled up the notes to take them with him and we said, "Oh,

1 everything is supposed to be left here," and you had give your
2 instruction.

3 And later, counsel for the defendant came back in to
4 retrieve the notes and said that it was for the witness. This
5 morning, in fact, the witness asked for the notes back when he
6 came into the courtroom and looked and he said something was
7 missing.

8 Our request is simple at this point. We do want to get
9 forward with the testimony. We understand the time constraints.
10 But under Federal Rule of Evidence 612, we are entitled to have
11 copies of those notes.

12 We would like an opportunity to review them and to
13 determine what questions are proper to be asked. We don't know
14 the notes were prepared by counsel and that he -- he certainly
15 had them at the witness stand and certainly asked about them
16 this morning.

17 So we certainly are entitled, Your Honor, at this point
18 to have a copy of those notes to be able to complete our
19 examination of this witness and to determine what remedy past
20 that is appropriate.

21 But we think it's fairly clear under the rules that if
22 a witness is sitting at the witness stand, unbeknownst to the
23 other party, and has notes, that the other party certainly has a
24 right to those notes and to ask questions about it.

25 At the beginning of the examination, the questions that

1 were asked were, "Dr. Heckman, have you brought with you a copy
2 of your written direct examination of James J. Heckman submitted
3 to the joint defendants pursuant to court Order Number 471. You
4 brought a copy of your direct examination with you?" "Yes."

5 That appears at page 18765 of the transcript, lines 3
6 through 8.

7 We had no way of knowing, until we saw the notes, and
8 then counsel came to request them. I understand from a
9 conversation with Mr. Bernick, that he knew that the witness had
10 the notes, but the only time we found out about it was after the
11 witness had left the stand.

12 So, Your Honor, we would request a copy of them, and
13 then to go ahead and proceed with the examination of the witness
14 as we had scheduled.

15 THE COURT: Let me just say this, even before I hear
16 from Mr. Bernick. I paid close attention to the witness's
17 testimony yesterday, for general reasons and in particular
18 because of the complexity of the testimony. I didn't see him
19 referring to any notes. That may not be dispositive in that
20 there's a water jug and all sorts of things up there. But
21 certainly as he answered questions I didn't see him looking down
22 to check anything. That's all I'll say at this point.

23 Mr. Bernick.

24 MR. BERNICK: Yes. Very briefly, Your Honor.

25 Dr. Heckman did have notes. The notes are notes that

1 he prepared. Counsel can elicit that testimony this morning if
2 that's appropriate.

3 The notes relate to certain of the studies because the
4 studies are complex studies. It's very much the same kind of
5 thing that we had with Dr. Wecker. When Dr. Wecker appeared --
6 I don't know if Your Honor will recall, and the testimony on
7 this is at page 15697. He, too, brought a binder with him that
8 did contain some notes, and he actually had reference to them
9 during the course of the testimony.

10 And I think that the examination by Mr. Gette beginning
11 at line 3 of that page basically treats this exactly as it
12 should be treated. He said, "Dr. Wecker, I noticed you've been
13 using a binder for your testimony. Is that something you
14 brought with you today?

15 "Answer: Yes, these are exhibits that we used.

16 "Question: Does that include notes that you prepared
17 to assist yourself in testifying today?

18 "Answer: These are notes that I made over time, yes,
19 and maybe I'll look at them, maybe they will be helpful."

20 And then later on -- this is actually about a hundred
21 pages later on -- there's a request by Mr. Gette to basically
22 assure that these notes are available so that they can be used
23 by the government and copies also should be made.

24 So, this is not a very unusual situation. It's a
25 relatively routine situation. I, too, did not believe that he

1 made reference to them yesterday because there wasn't reason to.
2 We haven't really had any cross-examination on the details of
3 those studies.

4 Yesterday afternoon as I was leaving court and
5 Dr. Heckman already had left, it was brought to my attention
6 that the notes were still there and I was just concerned that
7 they not be lost.

8 So, I asked my partner to come and get the notes from
9 the stand so that we could keep them. Obviously, the witness
10 had no use for them because he can't do any work. And it was at
11 that point that this controversy arose.

12 At that time, I said I had no problem. Indeed, I
13 offered to have copies made of the notes and furnished to
14 counsel. I have know problem with their looking the notes. My
15 only concern was that the notes be preserved.

16 THE COURT: Let's move along. We will have Dr. Heckman
17 come back to the stand. Ms. Brooker can proceed with cross.

18 In the meantime -- this isn't a very heavy packet --
19 I'll ask Ms. Hightower to please make copies of the notes.
20 There should be plenty of time for Ms. Brooker to take a
21 quick -- well, it would be a fairly quick look at them and
22 perhaps counsel aiding her could look at them as well.

23 If we need a very short break, I would grant that,
24 although I don't think it's in the government's interest, to
25 tell you the truth, to grant a break and we will proceed in that

1 fashion.

2 Let's bring in the witness, please. Thank you.

3 Ms. Hightower, I would say make two copies just in case
4 I need to look at them at some point.

5 MR. BERNICK: In fact, Dr. Heckman came in this morning
6 and wanted to know where the notes were, so it might be
7 appropriate just to explain that, if Your Honor believes that's
8 appropriate, to explain to him what's occurred so that he
9 doesn't think the notes somehow disappeared. We have not
10 discussed this with him at all.

11 THE COURT: All right.

12 JAMES J. HECKMAN, Ph.D., Defendant's witness, RESUMES

13 THE COURT: Dr. Heckman, you're still under oath this
14 morning.

15 Some notes of yours, I gather, were left here yesterday
16 afternoon. Copies are being made of those notes for counsel,
17 and when we get the copies made, then you can have your notes
18 back. If there's a question to which you would feel more
19 comfortable responding on the basis of your notes, then we can
20 just postpone that question and answer.

21 Let's proceed, please.

22 CROSS-EXAMINATION (Cont'd.)

23 BY MS. BROOKER:

24 Q. Good morning, Dr. Heckman.

25 A. Good morning.

1 Q. Just so I can establish the amount of time we have here.
2 You need to be out of here no later than 12:00 o'clock to catch
3 your flight.

4 A. That's correct.

5 Q. Okay. Thank you. We're going to endeavor to do that. I
6 would hope we would have no problem getting you out of here and
7 finishing you.

8 Now I just want to pick up where we left off yesterday
9 where we were discussing the four studies that you criticize in
10 your written direct, specifically: Pierce, Biener and Siegel,
11 Choi and Sargent.

12 Do you recall that that's where we left off?

13 A. Yes.

14 Q. Okay. And let's just take a look at the court's question
15 which is how we ended yesterday, and your response.

16 A. Where is that? I'm sorry.

17 Q. Do we have a copy of yesterday's transcript?

18 A. By the way, my notes concerned exactly these four studies.
19 It would be helpful in any statement about these notes -- about
20 these studies to actually have those notes.

21 Q. I think that we're going to be able to proceed without the
22 notes.

23 A. Okay. Fine.

24 THE COURT: It will be just a minute or two, I believe.
25 It didn't appear they were extensive.

1 A. Right. It's just a memory device for myself. There are a
2 lot of studies here. But go ahead, please. Which page

3 Q. If you would look at 18920. It should be at the very end of
4 the transcript since it would be at the end of the day.

5 A. Right. Yes. I see the page. I'm on the page.

6 Q. Now, the court asked you a question -- and it's actually at
7 18921. The page is 18921.

8 A. Yes.

9 Q. Okay. Beginning at line 12, I believe.

10 A. Yes.

11 Q. Okay. The court says, "Let me just close with a question."
12 Do you see that?

13 A. Yes.

14 Q. All right. "Am I correct that your objection was that these
15 four studies used receptivity as a proxy for exposure to
16 advertising?"

17 And you responded, "Well, there are two points. One is
18 the receptivity itself may be a consequence of choice...and the
19 second is that the measure used is a proxy for advertising
20 campaigns."

21 And then you explained, "It's not a direct measure of
22 media exposure. It's not a direct measure of the volume of
23 activity directed by the advertising effort of the tobacco
24 industry towards the customers."

25 So you raised two issues; correct?

1 A. Yes. One in direct response and the other to go back to an
2 earlier remark I made in response to the question of the Judge.

3 Q. And you feel that this creates a selection bias for those
4 four studies; is that correct?

5 A. No. These are different issues. There are two issues here
6 on the table.

7 Q. Okay.

8 A. One is the endogeneity question, and the other is the
9 question of whether or not the measure is a direct measure of
10 media exposure, as I say here on line 21.

11 Q. So one of your criticisms is that in order to measure the
12 actual marketing environment that people are exposed to, the
13 authors would need to do something specifically to address that
14 problem. Is that right?

15 A. Well, if one's interested, for example, in the impact of a
16 billboard or the impact of some media campaign, a direct measure
17 of it would be to look at what happens when people get more or
18 less of the campaign, including none of it whatsoever.

19 So you might have a campaign targeting towards
20 cigarettes smoking in one town versus another and ask whether or
21 not that affects the smoking rates.

22 So that would be a measure of what aggregate activity
23 is or activity on behalf of the media to support -- in the media
24 to support smoking, say.

25 Q. Okay. In order to do that type of a study, you would need

1 disaggregated data?

2 A. Well, you have to be careful by disaggregated.

3 You would need at a -- at a -- data -- well, depending
4 on how finally you can get it. As we discussed yesterday, it's
5 better in many -- for many reasons to have disaggregated data.

6 But this term is vague. So, if there was an
7 advertising campaign in an area you would want to be able to get
8 data on individuals, but in the entire area, so you would
9 aggregate to the area to get a measure of the campaign.

10 So that's what, so in some sense is aggregated the
11 measure of advertising, because everybody lives in the area
12 presumably would see it. That would be an assumption or people
13 might operate under.

14 Q. Now, that particular study that you're talking about is not
15 an econometric study, that would be a controlled experimental
16 study where half of the -- where a control group would receive
17 no advertising or no marketing campaign, or whatever the
18 specific measure is, or the variable, and the other group would
19 get a lot of the campaign, whatever the particular campaign is
20 that you were studying?

21 A. Not necessarily.

22 Q. I'm just asking you. Are you referring to an experimental
23 controlled study when you talk about this or are you talking
24 about an econometric study?

25 MR. BERNICK: Is the last question then withdrawn,

1 because I don't think the witness -- I think the witness was
2 beginning to answer and then was cut off.

3 THE COURT: All right. That question may be withdrawn.
4 The present question stands at this point.

5 BY MS. BROOKER:

6 Q. Can you answer the question?

7 A. I think the -- it's not a distinction that I think is
8 important here.

9 One could imagine if you had randomized trials it might
10 help you in this. It's not essential for investigating the
11 question. You could look at variations across regions for other
12 reasons. There would be nonexperimental and you would use
13 statistical/econometric methods.

14 Q. That's the type of study that I want to focus on. That
15 second type of study where you would be looking at variations
16 across regions.

17 A. In terms of advertising exposure?

18 Q. Yes.

19 A. Yes.

20 Q. Okay. Now, you would need -- in order to understand or
21 learn about variations across regions, you would need certain
22 types of data; correct?

23 A. You would need a measure of media exposure, correct.

24 Q. Okay. And to study across variations across regions, you
25 would need disaggregated data?

1 A. Disaggregated from national studies, yes, but still
2 aggregated within the region. It's not like you would get
3 person-by-person measure, although in principal that would be
4 very good, if you could actually develop a measure on stimulus
5 exposure of each person. Maybe you would want to use that in
6 place of media.

7 Q. It would depend upon precisely what you were trying to
8 measure; correct?

9 A. Yes, but here we were talking about advertising, so media
10 advertising.

11 Q. So, when you say that you would need geographical data, are
12 you referring to neighborhood level data, block level data?

13 What level of data would you be referring to?

14 A. Well, again, it's a question of how the media campaign was
15 structured.

16 If it were a campaign that actually was universal and,
17 in fact, at every area, then there would be no variation. The
18 basic idea in statistical analysis is to explore variation.

19 So -- but, you know, there are a lot of variation
20 across regions it would give you some information. And again
21 depending on how disaggregated the data were and how
22 disaggregated the campaigns were, so it's hardly a data-driven
23 requirement -- or a campaign driven requirement.

24 You would have to understand what the campaign was and
25 just the nature the media coverage.

1 Q. And when you refer to geographical data, what specific types
2 of data are you referring?

3 Marketing expenditures, sales data, some other kind of
4 data?

5 A. Well, again, it would very much depend on the campaign.

6 I mean, one could talk about ideal data, but one could
7 also say what one has in at one's disposal. So I was thinking
8 about media exposure measured in ways that would be most closely
9 linked to actual exposure, but people would get it. That they
10 didn't choose, but that they were subject to. So I mentioned
11 billboards, for example.

12 Q. Would you need budgetary data?

13 A. Well, it might be a measure of what economists would call
14 quality. But again, if you had an independent measure of that,
15 no.

16 I mean, in other words, you could imagine a low budget
17 ad which ran for 30 seconds but hit everybody in an area, or you
18 could imagine an extremely intensive ad which ran very often and
19 would be still in the same area but of a much higher level of
20 exposure.

21 So in some sense budgetary data or expenditure data
22 could be a measure, not invariably, but it could be a measure of
23 intensity.

24 Q. Let's assume that it was a large campaign such as the
25 Marlboro campaign.

1 A. Well, I have to get into the details of which Marlboro
2 campaign. I don't have all the details of the Marlboro, but --

3 Q. So if you were to study that, you would have to ask a lot of
4 questions in determining what types of data you would need or
5 even to understand what types of data you would need to perform
6 such a study?

7 A. Well, what I would need would be to -- I mean, again, I
8 would ask specifically which campaign and what -- where it was
9 directed. And so I would want to look at particulars on where
10 it was going, to whom it was directed. That would be, I think,
11 the beginning of any study.

12 Q. Okay. Now, where could the authors of any of those studies,
13 for example, get that kind of geographically disaggregated data
14 that you would be referring to?

15 A. Well, that's a good question.

16 I think there are data that are available but I don't
17 have it at my fingertips. I mean, data on geographical -- I
18 mean on sales. It could be a very complicated but I think
19 possible task to look at the -- to build an index of the total
20 media exposure in an area. Certainly prospectively you could do
21 that.

22 Q. Have you -- I'm sorry, go ahead.

23 A. No. I'm saying you could look at the measures of
24 billboards. It's not an impossible task. To my knowledge, it
25 hasn't been done systematically.

1 Q. Okay. To your knowledge, it has not been done
2 systematically?

3 A. No, but I think it's possible. It's not something that's
4 out of budget, it's not something that's impossible to do.

5 Q. Have you ever tried to ascertain whether that type of data
6 you're referring to is available to researchers, such as the
7 researchers in these studies?

8 THE COURT: Excuse me a moment. Would you give the
9 witness back his notes, please?

10 A. Well, at one stage, as I think I mentioned in a deposition I
11 gave earlier, I think it was -- I can't remember which one,
12 which deposition -- one of the two depositions that I gave I did
13 mention that it would be useful and that I had made some
14 inquiries to get such information when I was in this mode of
15 trying to do original research on the issue.

16 Q. And, in fact, specifically what -- we're going to explore
17 that a little bit.

18 Specifically what you're referring to is your
19 deposition in this case where I think you testified that you
20 would dearly love to do more of this type of basic research for
21 the tobacco companies.

22 A. That's correct, I did say that. I don't remember the word
23 dearly, but I like to do research. So, yes, I would like to
24 give more data. I always like more data.

25 Q. Let's just call up the transcript in this case, U.S. versus

1 Philip Morris. I think you should have it up there. 92 dash 5
2 to 17. Do you need help finding that transcript?

3 A. You mean the transcript of yesterday?

4 Q. No. It is the transcript of your deposition.

5 A. The deposition. I'm sorry, I misunderstood you. Well
6 here's the problem, I didn't even sort this stack, so I'm
7 very -- if you can find it, I'd be grateful.

8 Q. I'm sure you're used to paper.

9 A. Yes. Not in this quantity, though.

10 Is this it here? Let me get rid of what's not here.

11 This is Eriksen. You don't want Eriksen?

12 Q. I think this should be it.

13 A. That's it. Okay, that's fine. Oh, this is my deposition.

14 That document, yes.

15 Q. I think you can put those over there. Let me see if there's
16 a 2-day here.

17 A. Wait. This is more of it.

18 Q. Yes, it is.

19 A. All right.

20 Q. You may have to straighten yourself out there.

21 A. These go up here. Thank you. Let's see it connects.

22 MS. BROOKER: Charles, do you have the deposition in
23 2002.

24 A. I have it all here. It's two pieces, now one. All right.

25 Q. Okay. Look at page 92, so it would be the first day of your

1 deposition.

2 A. All right.

3 Q. Lines 5 to 7.

4 A. Yes.

5 Q. Okay. You know, feel free to -- there's several pages where
6 you discuss the same issue. We're going to go over different
7 portions of the transcript on this.

8 A. Yes.

9 Q. But feel free to take a moment to look at it.

10 Do you recall testifying in this case at your
11 deposition that you've received no funding to do basic research
12 on the tobacco industry? You would dearly love to. I have
13 requested it. I have not received it.

14 A. That's correct.

15 Q. Okay. Now, the types of data that you're referring to are
16 the exact types of data you were just testifying about, that
17 sort of disaggregated geographical level data.

18 A. Yes.

19 Q. Okay. And why were you looking to have that kind of data?
20 Was it for scholarly research?

21 A. Well, as I indicated yesterday, my task in this litigation
22 is to -- has essentially been to find to write a referee report
23 on some literature.

24 My own instincts take me into a different mode, which
25 is when the questions get to be as muddled as they seem to be,

1 it's better maybe to look at your own original research. That
2 simply was not an avenue opened to me.

3 Q. Okay. Why was that not an avenue open to you?

4 A. Well, there wasn't any interest on the part of the tobacco
5 industry to support the research.

6 Q. Okay. So you did request from the tobacco industry in this
7 case that type of disaggregated level data?

8 A. Well, to be precise, I requested it from the people that I
9 was working with in Lexicon and they passed the request along
10 and there was no interest in independent research on this topic.

11 Q. Okay. Do you recall testifying in this case at your
12 deposition that you requested that types of data from the
13 lawyers that you were working with here on this case?

14 A. I may have in a meeting. That, I don't remember. But I
15 mean, I don't remember making an explicit request to the tobacco
16 companies. So it may have been either the lawyers or the -- but
17 honestly I don't remember.

18 I don't remember talking to the people of Lexicon about
19 getting the data. And I may have talked to some of the lawyers
20 as well.

21 Q. And what's -- were you specific in your request for the
22 types of data that you wanted to perform research?

23 A. No, partly because it's a question of asking whether the
24 data were even available.

25 Q. Okay.

1 A. It's exploring what was out there in the larger community.
2 That's what I was trying to get.

3 Q. Now, did you try to ascertain what types of data the tobacco
4 companies themselves had internally so that you could decide
5 what types of data you might be interested in?

6 A. Well, there was no avenue for me -- for many documents that
7 I had, any information that I had, to know what was in the
8 internal records of the tobacco companies.

9 So, the answer is no. If I had had an avenue, I would
10 have pursued it, but I didn't.

11 Q. As you sit here today, do you know what types of
12 disaggregated data, geographical data that the tobacco companies
13 do have available to them that they could provide to you for
14 your research?

15 A. Well, I do know that there are -- there are data. I mean, I
16 know this from Dr. Eriksen's testimony more from any statement
17 with the tobacco industry, that there seemed to be data on some
18 measure of advertising exposure, which used in a paper with
19 Pollay, and that looked very interesting to me.

20 I was somewhat mystified that Dr. Eriksen and Pollay
21 didn't use that data actually to investigate smoking initiation
22 since they could have done it. But that, to me, was a tip off
23 that the data could exist, but that came very late in my
24 understanding of this case.

25 Q. What data are you referring to specifically that you say

1 Dr. Eriksen had available to him?

2 A. I'd have to look at the Dr. Pollay article. If I had it, I
3 could define it. I don't remember the exact data set. If you
4 gave me the Pollay article, I could -- I could probably tell you
5 at least the measures that were used.

6 Q. Well, I'll actually try to see if I can get that for you.

7 A. Yes, that would be helpful. I just don't have it.

8 Pollay, et al. I think the final author was Eriksen or
9 multiple authors.

10 Q. Do you know whether it was third-party information that they
11 had commercially-available data or was it data from the tobacco
12 companies?

13 A. I don't know. I don't know. I could make a guess. But to
14 be honest, I don't know the exact answer.

15 Q. Now, let's call up your testimony at page 127.

16 A. So we're going back to yesterday?

17 Q. Yes, to that same transcript a little bit later on in it.

18 A. But not the deposition?

19 Q. In your deposition transcript.

20 A. Sorry. I thought you meant yesterday. Sorry. So page 127?

21 Q. Page 127.

22 A. Yes.

23 Q. And if you would take a look starting at line 7.

24 A. Yes.

25 Q. Starting at 127, line 7 -- this is your testimony that you

1 gave under oath in this case -- you indicated -- or you were
2 asked.

3 "You indicated that you received information -- you
4 asked for information with regard to budgets --

5 "Answer: Oh, yes.

6 "Question: -- for certain -- for geographical
7 regions."

8 A. Could I clarify one thing?

9 Q. Yes.

10 A. And that is the question is not mine, and it's saying that I
11 received information. I don't believe I ever received
12 information. So I don't think I said -- I think I said yes to
13 the second part of it, that I asked for information. So there
14 are two parts to the question, that's all. It's the second part
15 that I said yes to, because I never received information.

16 Q. Okay, just to be clear. You asked for information with
17 regard to budgets?

18 A. Correct.

19 Q. But you did not -- and budgets with respect to certain --
20 for certain geographical regions, but you did not receive it;
21 correct?

22 A. Yes, as part of a larger study.

23 Q. Correct. And when you say you requested -- again, to be
24 perfectly clear, you requested that of Lexicon or the attorneys
25 in this case, or both?

1 A. Well, again, you're pressing my memory.

2 I have talked to the lawyers, and it would be
3 natural -- I certainly talk to the Lexicon people, but it not so
4 hierachal that I would quarantine myself from the lawyer, the
5 lawyers with whom I was dealing. So I may have posed the
6 request. But, to be honest, I cannot give you a date and a
7 time. But I would suspect I might have. I wouldn't rule it
8 out.

9 Q. And who were those lawyers that you're referring to?

10 A. It would probably be Barbara Harding and David Mendelson.

11 Q. Okay.

12 A. It would be certainly those two.

13 Q. Okay. If we could just -- you know, I just wanted to keep
14 reading on. But I appreciate your clarification there about the
15 request versus received.

16 The next question was, "Is there anything else that you
17 requested in connection with your opinions or reasons for your
18 opinions in the report marked as -- in the report contained in
19 Exhibit 1 that you have not received?"

20 I will not read the objections on the record but they
21 are there.

22 "Answer: I want to be clear about saying one thing."

23 Now, before I go on, Exhibit 1 was your expert report
24 you filed in this case; correct?

25 A. Yes. I had to look at it to be honest, but I take your word

1 for it. If it is, then I think you're an honest person, so yes.

2 Q. Okay. And then the question is -- well, there's an answer.

3 "When you ask -- I mean, I'm not a lawyer and I'm not
4 that familiar with legal proceedings.

5 "I would say that in the course of doing any kind of
6 empirical investigation, my own view is the more the merrier."

7 Now, when you say "the more the merrier," you're
8 referring to more data; correct?

9 A. Yes.

10 Q. Okay. And you would specifically in this instance be
11 referring to more of that geographic level data?

12 A. Yes.

13 Q. Okay. And then you went on to say, "So if anybody gave me
14 any information whatsoever and with enough background for me to
15 verify whether or not the information is reliable, I would like
16 more of it.

17 "So it's a very -- it would be very unusual any day
18 to -- for me not to ask more information about everything....so
19 in this case here I have tried to seek additional information on
20 an almost daily basis. I can't review this document or read
21 anything without asking for more information in the sense of
22 personally requesting it, I mean, asking myself or saying myself
23 I would like it.

24 "I have not filed a formal request, though, with the
25 tobacco companies to say would you give me this piece of

1 information. I have not gone that route."

2 Now, when you say in this case you tried to seek
3 addition information on an almost daily basis, what were you
4 referring to?

5 A. To be honest, in retrospect, this looks like a bit of an
6 exaggeration. This is getting carried away, I think.

7 But what I meant was that I had always thought, and
8 still do feel, that a better factual basis of understanding the
9 information relevant to this case would inform everybody: the
10 court and both sides. So in that sense, I have felt and still
11 feel it would be very important.

12 I don't know if it was every day, but I certainly would
13 think a good study improving on the literature would make it
14 clear on both sides what the nature of the claims are and how
15 solid they are.

16 Q. Okay. So, when you said you didn't literally mean that you
17 didn't seek additional information on an almost daily basis, did
18 you mean to say that you made frequent attempts to try to get
19 the data by asking for it?

20 A. Well, let me put it this way.

21 This looks like -- I mean, one could read this to say
22 that I was writing formal applications to Lexicon or the
23 attorneys to get data.

24 I think the way that I would interpret it is more like
25 a standard tool of research is to go to a search engine and to

1 try to find out just what's available. I do that all the time
2 in everything when I'm teaching classes. So I did try. I don't
3 know if I did it every day, but I certainly tried off and on
4 different avenues and read a lot of papers to see what kind of
5 information I could get my hands on.

6 Q. Okay. Now, do you know whether Lexicon, the group that
7 you're working with, requested this geographical disaggregated
8 level data from the tobacco companies that you so dearly wanted
9 to have to use for your research in this case?

10 A. Well, I don't know if there was a formal request.

11 I think my understanding was that the posture of the
12 companies was not favorable towards conducting original
13 investigations.

14 Q. Okay. And what was your understanding? Why was that? What
15 were you told?

16 MR. BERNICK: Objection, lack of foundation, calls for
17 hearsay, too.

18 THE COURT: It's certainly hearsay. Sustained.

19 BY MS. BROOKER:

20 Q. What was your understanding about why, as you just
21 testified, the tobacco companies -- and I just want to use your
22 exact words.

23 Okay. What was your understanding of why the tobacco
24 companies were not favorable towards conducting original
25 investigations or allowing you to?

1 MR. BERNICK: Objection. This is the same basic
2 question.

3 There are at least two or three levels of hearsay, and
4 his understanding does not -- the fact of his understanding is
5 irrelevant.

6 This can only be elicited for the purpose of the truth
7 of the matter asserted, which is to elicit why it is that the
8 request was turned down, so clearly this is hearsay.

9 MS. BROOKER: Your Honor, that's specifically why I
10 rephrased my question which is now very appropriate. What is
11 his understanding.

12 MR. BERNICK: Same thing.

13 MS. BROOKER: It's not. It's entirely different. It's
14 not asking for hearsay.

15 I am asking for this witness's understanding of why it
16 is he didn't get the data that he repeatedly requested and
17 wanted to use for purposes of his work he's performed in this
18 case.

19 THE COURT: The objection is overruled with the clear
20 understanding that the answer comes in, not for the truth of the
21 answer, but for -- as you've indicated -- the witness's
22 understanding of what the situation was.

23 A. Yes. I was told -- I was asked, as I said earlier, to write
24 something closer to what I would call a referee report. And
25 naturally when -- I say naturally, referring only to myself,

1 would try to supplement any such report.

2 My understanding was that there was no interest in
3 doing that, and I think there might have been -- but again, this
4 is total speculation, Your Honor. I don't have any -- so I
5 would fill in the blanks here and say possibly was just the
6 time -- what seemed to be a very urgent time frame for
7 conducting a study, and such a study could be too time-consuming
8 to be relevant to the litigation.

9 Q. Okay.

10 A. But I don't know that for a fact.

11 Q. I understand. If you would turn to page 130 of your
12 deposition right there.

13 A. Yes.

14 Q. Looking at line 18?

15 A. Yes.

16 Q. You were asked -- and again this question and answer goes on
17 for several pages. I'm sure you probably recall being asked a
18 lot about this, and you're free to look at it. But I just want
19 to focus you on the continuation of that line of questions where
20 you were asked at line 18 on page 130.

21 "What was that more information that you wanted?

22 "Answer: Well, it had to do with advertising, it had
23 to do with a number of things related to the conduct of
24 cigarette companies, so, again, advertising data, disaggregated
25 data, scanner data, marketing data by regions, by neighborhood

1 blocks, the kind of data that marketing people can sometimes get
2 access to, certainly something -- I'm quite aware of that
3 literature, I'm on the editorial board of a marketing journal
4 and know this data exists, so it's quite -- quite good data.

5 "So naturally just drawing on my professional expert I
6 saw ways to improve the quality of the data and I would ask,
7 gee, can we get data like this, and the answer typically was
8 no -- not typically, was universally no."

9 Then the question was, "Other than that information
10 that you just -- just discussed, is there any other subject
11 matter of data that you have requested but not received?"

12 And the answer is, "Well, again, when I say request,
13 remember, it's not a formal written request, it's a statement
14 about saying, well, can you get this data, and the answer seemed
15 to be no.

16 "Now, remember, you're dealing with lawyers who are
17 working for firms. You're not dealing with the tobacco company
18 itself. I never put in a request to the tobacco company. And
19 so the lawyers were not primarily in a position to be getting
20 data, they're not social scientists primarily, so it was
21 somewhat outside their boundary, so in that sense I was probably
22 going to the wrong place."

23 And the last line is, "So that's the kind of request I
24 mean to say, the difference between saying can we get this data
25 and people throwing up their hands because that's just not their

1 job, I mean, to be able to -- my asking a baseball player, you
2 know, where can I find information about the football uniforms
3 or something. It's just not their job."

4 Now, when you say "throwing up their hands because
5 that's just not their job," you're referring to the attorneys
6 that you were working with in this case?

7 MR. BERNICK: I object to this line of questioning on a
8 couple of different grounds.

9 First of all, there's a long recitation that just went
10 on for a page, and the only question that's being put to the
11 witness is "you're referring to the attorneys." So I don't know
12 what the purpose of this whole proffer is.

13 Secondly, to the extent that the government wants to
14 place the conduct of counsel at issue, which seems to be the
15 purpose of this line of examination, I don't believe that that's
16 relevant.

17 And third, counsel omitted to include the preceding
18 questions and answers on page 130 which make clear that this is
19 very misleading because all these questions were put in the
20 context of a request made in connection with this case; that is,
21 of Lexicon and of people at my firm.

22 Whereas, if you take a look at the earlier part of 130,
23 which was not read to the witness, this whole line of
24 examination relates to a request that was made in the Blue Cross
25 case, and my firm was not involved with the Blue Cross case.

1 So I think that there are -- this is a misleading line
2 of examination that does not serve a relevant purpose.

3 THE COURT: Did all these questions relate to the Blue
4 Cross case?

5 MS. BROOKER: No, Your Honor, they do not.

6 In fact, this witness has just testified that he has
7 asked for this -- now, I really feel like we have to do this
8 outside the presence of this witness.

9 THE COURT: No. Let's just go back in the transcript,
10 please. Scroll back in the transcript and let me see what it
11 says.

12 (Pause)

13 MR. BERNICK: Go back, Your Honor. It's just above
14 that, the prior paragraph.

15 Actually, if you take -- I'm sorry. Go up to line 4.
16 "In this case very little" -- that's line 7.

17 "I think in the earlier work -- and that's why I
18 emphasize, as I said, in my previous remark -- when I look at
19 Blue Cross/Blue Shield, for example, there I felt one could gain
20 a lot more precision in that case by having more information,
21 and I think I did request a bunch, and we talked about getting
22 information but we didn't get much action." So it clearly is
23 talking about --

24 THE COURT: How can you say it's not relating to the
25 Blue Cross/Blue Shield case?

1 MS. BROOKER: Your Honor, because we just went over
2 back on page 131 where this witness said he was asking for this
3 kind of data on a regular basis and was routinely --

4 THE COURT: You're going to have to clarify in your
5 questions to him.

6 In terms of the question being too long, the objection
7 is overruled in that I thought the purpose of the long quotation
8 from the deposition was to indeed give the witness context for
9 what he was going to be asked about. Actually, the question
10 should have been longer than shorter.

11 Second of all, if the issue -- and I'm not clear what
12 the issue is -- but if the issue is to place counsel's conduct
13 in question, yes, indeed, that is totally irrelevant at this
14 point. And again, if that's the purpose and if the questioning
15 relates only to Blue Cross & Blue Shield, then obviously it
16 doesn't concern this counsel.

17 And finally, I'm not sustaining the objection for this
18 reason, but it seems to me that this whole line of questioning
19 is extremely tangential. But certainly you may clarify whether
20 the questioning in the deposition related to -- and the answers,
21 naturally -- related to this case or to Blue Cross & Blue
22 Shield.

23 MS. BROOKER: Yes, Your Honor.

24 THE COURT: Or both.

25 MS. BROOKER: And, Your Honor, I will say that

1 Mr. Bernick has no idea where I'm going with this line of
2 questions. It absolutely has nothing whatsoever to do with the
3 conduct of counsel. So I think that was just an attempt to
4 miss -- you know, mislead the court. I hope it wasn't, but it
5 certainly seemed to be misleading to the court of where this
6 whole line is going.

7 And I don't think it's appropriate for me to stand here
8 and tell Your Honor what that is in front of the witness, but
9 I'm happy to make a proffer.

10 THE COURT: Just go ahead.

11 BY MS. BROOKER:

12 Q. Now, I was going to ask you a series of questions about this
13 whole line of questions. So the first one I believe that I
14 asked you when we just had that long dialogue was, when you
15 say -- just get to the page -- when you say "people were
16 throwing up their hands because that's not their job and they
17 couldn't get that data," you were referring to attorneys that
18 you were working with and not Lexicon; is that correct?

19 MR. BERNICK: Again, if we can establish in connection
20 with what case.

21 MS. BROOKER: I have to take it a bite size at a time.

22 THE COURT: Well, I don't know why. But all right.
23 Certainly by your second question you need to establish which
24 case we're talking about.

25 MS. BROOKER: Okay.

1 BY MS. BROOKER:

2 Q. Now, you indicated earlier in your testimony today that you
3 would like to have this kind of disaggregated data to perform
4 work in this case as well as other litigation you've been
5 involved in; is that correct?

6 A. Yes, but just to intervene, if it's appropriate. My
7 original request was in relationship to Blue Cross & Blue
8 Shield, which would have been relevant because there was a
9 question of misconduct. So my original requests were actually
10 put in at that point.

11 Q. Now, this --

12 A. So in that sense it was always -- the earlier work started
13 at the request. I would repeat the statement that it would help
14 understand the factual -- approve the factual base on all sides
15 of this case to have that information in the public domain.

16 Q. So that -- okay. So that information that you were seeking
17 on disaggregated level data, geographical disaggregated level
18 data, is data you would have used for purposes of this case as
19 well?

20 A. Well, no, because I was asked to write a referee report, as
21 I said. So I was not asked to conduct an original empirical
22 analysis.

23 If I had gotten the data I might have analyzed it at my
24 own cost, at my own expense, and I might have informed my
25 opinions. But I was not asked for original research. I was not

1 asked to do original research.

2 Q. Right. That was not what the tobacco companies in this case
3 asked you to do; correct?

4 A. That's correct.

5 Q. And they did not ask you to do that in the Blue Cross & Blue
6 Shield case, either. You did not do original research that was
7 peer-reviewed or refereed?

8 A. Not peer-reviewed. I did look at the data that was
9 submitted in the court by Dr. Harris and we did reanalyze that.
10 So that part was, I wouldn't call it peer-reviewed article, it
11 was an analysis of data. So there was an empirical component to
12 that study.

13 Q. How would the data, the disaggregated data that you
14 received, had you received it in this case, would have informed
15 your opinions for this case?

16 A. Well, I think a big chunk, a missing gap in the literature
17 is a direct measure of advertising and initiation, and if that
18 were firmly established or not established, it would clarify a
19 great deal of what is central -- what I perceived to be a
20 central issue in this literature.

21 Q. And your criticism of some of those studies that we talked
22 about earlier today could be addressed if those authors had used
23 that same type of disaggregated geographical level data;
24 correct?

25 A. Well, as I said, the whole literature could be improved, but

1 I'm not sure which studies you mean specifically.

2 You refer back to some studies, but several have been
3 mentioned that, for my purpose to answer the question, I'd like
4 to know exactly what studies you mean.

5 Q. Any of those four studies that we were referring to earlier.

6 A. I think that would have been clear -- cleaner and more
7 interpretable if such data were available and properly used, of
8 course. That's just not a question of the data, it's a question
9 of its use.

10 Q. Okay. So that same data that would inform your opinions in
11 this case, that disaggregate level of geographical data could
12 also be used by those authors to address some of the concerns or
13 criticisms you had with those four studies; correct?

14 A. Well, it would give you a direct measure instead of an
15 indirect measure, correct.

16 Q. Thank you.

17 Now, you did indicate earlier that you were continuing
18 to want to have that type of disaggregated level data that you
19 initially sought in the Blue Cross & Blue Shield case for
20 purposes of this case; correct?

21 A. Well, when I gave this deposition, I felt, as I said a
22 minute ago, that having such data would clarify.

23 Q. So you wanted the data, not just for Blue Cross & Blue
24 Shield, but you wanted the data for this case and for more
25 scholarly research on the relationship between advertising and

1 smoking behavior; correct?

2 A. Well, within the -- for the latter, yes, but for the
3 question of this case, the particular case which is now being
4 discussed, I wasn't asked to do original work.

5 So I could have used it, but it would have been a
6 private consumption act. It would not have been something I was
7 authorized or paid.

8 Q. Excuse me. I'm sorry.

9 A. No, authorized or paid to do.

10 Q. Had you been asked to do that work in this case, would you
11 have done it?

12 A. If the data were available, I think it would clarify
13 everything to have that data in the public domain and to look at
14 the question of smoking initiation and relationships of good
15 disaggregated data, yes.

16 (Repeating) Relationships of smoking initiation to good
17 measures of disaggregated media campaigns couldn't hurt. It
18 would be very helpful I think to get a very hard number or try
19 to get a hard estimate.

20 Q. That type of geographical level disaggregated data is
21 possessed by no one other than the tobacco companies; isn't that
22 correct?

23 MR. BERNICK: Objection, lack of foundation.

24 THE COURT: Overruled. This witness is a very aware of
25 different sources of data, so the witness may answer the

1 question.

2 A. Well, again, I don't know all the sources, but I can tell
3 you how one could construct an index. How one could by looking
4 back at print media, by looking back at exposure, by looking
5 back at records, one could imagine constructing an index. To my
6 knowledge, nobody has done so.

7 Q. Okay.

8 A. And I don't know that the tobacco companies actually have
9 this days aggregated data in any convenient form. It's just not
10 part of my knowledge set. The request was made and not
11 answered.

12 Q. Okay. But as far as you know, no outside organization that
13 you're aware of has collected that data and so has that data
14 available for use by researchers; correct?

15 A. Well, to my knowledge, there is some -- the ingredients are
16 there for sure, old magazines, newspapers, and the like.
17 Whether or not logs of advertising in the television and radio
18 when it was legal to do so, I don't know if those can be easily
19 recovered. But in principle, yes, there are records of all
20 these organizations.

21 Q. Now, when you said that you requested information and the
22 lawyers threw up their hands, which lawyers were you speaking of
23 at your deposition in this case?

24 A. Well, now you're testing my memory.

25 MR. BERNICK: Again, if we could clarify. That is

1 language directly taken out of the transcript relating to Blue
2 Cross. This is -- this is really -- it's not being fair to the
3 witness.

4 MS. BROOKER: I don't think that's clear at all.
5 That's why I'm asking.

6 THE COURT: You can ask him if that incident occurred
7 in the conduct of the Blue Cross litigation before you go on to
8 ask which lawyers threw up their hands.

9 What the relevance is of that, Ms. Brooker, escapes me.
10 But go ahead.

11 BY MS. BROOKER:

12 Q. When you were referring to requesting that type of
13 geographical level data disaggregated data from attorneys, were
14 you speaking of attorneys you were dealing with in this case or
15 in the Blue Cross & Blue Shield case, or both?

16 A. Well, my initial requests were in conjunction with the Blue
17 Cross & Blue Shield case because that's historically earlier.

18 And you're asking me to name the attorneys and I
19 honestly -- it's a blur. I don't know. I could check it, but I
20 don't know at this moment who the attorneys were.

21 Q. But they --

22 A. I don't know. I don't believe it was the same group of
23 attorneys, but I'm not a hundred percent sure.

24 Q. But they were attorneys for the tobacco companies?

25 A. They were representing tobacco companies, yes.

1 Q. Now, let me ask you a hypothetical question about
2 disaggregated data.

3 Let's assume that you had access to a database of
4 nearly 60 million names of people in the United States,
5 individual unique names, with the following information
6 contained in the database.

7 The name, the gender, the ethnic status, the educational
8 status, the marital status, income level, specific address
9 geographically, phone numbers, birth date, how much smoked,
10 cartons or pack buyers, what their regular brand was, what their
11 brands smoked was, what their previous brands smoked was, what
12 prior -- what redemptions, what types of coupons or promotions
13 they had redeemed in the past, the history of the individuals'
14 involvement with previous offers received from that cigarette
15 company, and the history of offers that they were sent.

16 If you had a database available to you with all of that
17 information, would that be the type of disaggregated level
18 geographical data that would have informed your opinions in this
19 case?

20 MR. BERNICK: I'm sorry. Are we -- it was unclear from
21 the question. I object to the form. Are we talking about
22 smokers or nonsmokers?

23 THE COURT: Well, that was included in the data.

24 MS. BROOKER: It was all individuals, Your Honor.
25 There's no way to know the answer to a question like that.

1 THE COURT: Right. Objection is overruled.

2 A. No. I think I was going to ask a similar question, and that
3 is, is it a sample of people who only smoked or have smoked, or
4 does it include -- is it a random sample of the population? Is
5 it including everybody? That's crucial for the question of
6 initiation.

7 Q. It is a database of simply 60 million people.

8 A. Taken at random? Smoking and nonsmoking.

9 Q. All I can tell you is it's a database of 60 million people
10 who are unique individuals who reside within the United States.

11 A. But --

12 Q. It clearly can't be all smokers, since there's only 47
13 million smokers in the United States. So it's 60 million unique
14 individuals who reside in the United States, and it has all of
15 that detailed level information about each one of them.

16 A. Well, I mean, the trouble is 60 million could include former
17 smokers, too. So -- it's really crucial. So let me answer it
18 conditionally. It was a hypothetical, so I'll answer it
19 conditionally. It's the only way I can deal with a
20 hypothetical.

21 That is, if they were smokers alone, they wouldn't be
22 that informative on the initiation issue. Even if it were
23 former smokers, it would not be informative on the initiation
24 issue.

25 And secondly, as I understand the data set you

1 described, it would be potentially useful if it were a random
2 sample and included information about initiation.

3 If it also had direct measure of media exposure -- I
4 believe you mentioned things like promotions. A lot of that is
5 price discounting, price cutting and the like. So a study like
6 that could be very helpful in looking at establishing the very
7 firmly established empirical study which shows price
8 responsiveness.

9 But I'm not sure in any of the measures you mentioned,
10 that you mentioned direct media exposure. So, I would have to
11 go back through your list. It was a long list, but it looked to
12 me like it would be price discounting, reducing prices and the
13 like, which is, you know, certainly a part of what's sometimes
14 called advertising. It's 90 percent of it, actually. But it
15 doesn't seem to have a direct measure of media. So, maybe you
16 could restate that part that related to the media.

17 Q. Let's add to the hypothetical that what is also contained in
18 that database is Unlimited Magazine, which is a Marlboro
19 magazine which has pictures of Marlboro imagery, that is mailed
20 to some number of the 60 million individual names on the
21 database.

22 A. This is one magazine?

23 Q. A single magazine that is referred to as Unlimited Magazine.

24 A. It's like a drop in the advertising bucket.

25 MR. BERNICK: I'm sorry. I object to the form of the

1 question.

2 The question is now the witness should be assuming that
3 the database contains -- I think the word was, contained this --
4 that the database is Unlimited Magazine.

5 I don't understand. What is the information that
6 counsel is asking the witness to assume?

7 THE COURT: The objection is sustained. It's very
8 unclear. At a minimum, the witness has to be told what this
9 magazine is, how often and under what conditions it's
10 distributed.

11 But Mr. Bernick has an additional objection which is
12 valid as well; namely, how would the information be captured in
13 the database?

14 MS. BROOKER: Maybe I can just clear up.

15 BY MS. BROOKER:

16 Q. In this hypothetical you are just simply given this
17 database. You have access to this database and you can use that
18 database for your research.

19 My question to you simply is: Is this the type of
20 disaggregated level data that would be useful to you to
21 perform -- this is your dream situation as a researcher. You're
22 given this database and you're told you can use this for
23 whatever purposes you want.

24 Would that database of substantial information about 60
25 million individuals who reside within the United States and

1 their smoking habits, including all of the information that I
2 went over -- what their regular brand is, how many brands
3 they've smoked, how much they've smoked, do they buy cartons or
4 packs, have they received promotional offers, have they received
5 copies of Marlboro Unlimited Magazine -- basically all
6 information about those 60 million individuals in every single
7 contact that the tobacco company had with that individual and
8 all of the information that they received and responded to, so
9 you're given that entire database --

10 MR. BERNICK: Objection.

11 Q. -- is that useful to inform your opinions in this case to
12 use to perform original research?

13 MR. BERNICK: That is hopelessly compound, and it
14 doesn't even answer the specific questions that the witness
15 already put to the government about -- I don't want to repeat
16 them -- but what he needs to know, what the database is and what
17 it contains, doesn't even address them.

18 So that question, no matter what he says, will leave a
19 record that is incomprehensible. It's got five questions in it
20 and it makes all kinds of assumptions --

21 THE COURT: No. The objection is overruled.

22 Of course, the question has many -- the question
23 includes many topics in the database. That's part of the
24 question. It may be an adequate database or it may not be for
25 the witness. That will be up to him to respond to, of course.

1 Well, this is repetition, whether it includes some
2 additional essential information, again will be up to the
3 witness to respond to.

4 A. Well, at the end, if you could read the end part of your
5 recitation, I think you supplemented it on the second round.

6 I would state it in a hypothetical conditional way just
7 the try to be clear.

8 One can very, very disaggregated data. If, as I said
9 earlier, the data were only on smokers it wouldn't be very
10 helpful about determining who started smoking. That's kind of
11 point one.

12 So you sample people who are sick, it doesn't tell you
13 how the illness began. That's kind of a basic study in
14 biostatistics. You want to get a sample of what's called the
15 incidence, the entry into the condition of smoking.

16 Secondly, on the first question you made the statement
17 something related to a magazine, which I didn't know, Unlimited
18 Magazine, and then you did say at the end of your second round
19 that this had a lot of information in the media.

20 So, if it did provide a lot of information about media
21 advertising campaigns by all tobacco companies related to these
22 individuals in geographical areas, tracked them over time, then
23 it could be potentially very useful.

24 But I would need to know exactly the nature of the
25 media exposure variables in the data, hypothetical or not, to

1 answer the question of how useful it would be to the question at
2 hand.

3 Q. But that's the type of information, disaggregated level type
4 of information that you would refer to when you're looking to do
5 some research. You would take a look at that information to see
6 whether or not it was something that you could use in performing
7 original research to determine a relationship between
8 advertising a particular advertising campaign and smoking
9 behavior?

10 A. If it were just smoking, it wouldn't help, and if it didn't
11 have information on the exposure of people to media campaigns,
12 however it is aggregated, it just would lack a key variable. It
13 might be supplemented by some other source. But the data itself
14 by -- as wouldn't that be that helpful on the question.

15 I really would like to have some measure of media
16 exposure, sort of independent of a choice the person made, but
17 an exposure to that treatment -- to that advertising.

18 Q. And you're aware that to supplement that database you could
19 use Monitoring the Future data of smoker -- smoker Monitoring
20 the Future data that is publicly available; correct?

21 A. Well, you could refresh my memory if I had the Pollay
22 article which does describe the data, that would be very helpful
23 at this point. If I could just get a copy of it because it does
24 describe some information about advertising. But my memory is
25 not perfect.

1 And I could find it in one second, or one very brief
2 time. Monitoring the Future, to my knowledge, has data on
3 smoking patterns, among other use, drug patterns, use of crack
4 cocaine, a lot of other risky measures, particularly related to
5 drugs, alcohol, and risky behavior. There's also teenage
6 pregnancy and other factors as well have used that data, and
7 it's very important data. That's probably available. You can
8 get that on a download from Michigan.

9 Q. It would be common practice for researchers, including
10 researchers, including you, to use in performing analysis data
11 from more than one source; is that right?

12 A. Yes, but always with caution, because different data sources
13 always have the possibility of inconsistent definitions.

14 In other words, you can define income one way from one
15 data set and income another way from another data set. You pull
16 the two together you can get sometimes very misleading results,
17 classical results. A classical point in the literature,
18 statistics in economics.

19 Q. If the tobacco companies -- if you were to learn that the
20 tobacco companies possess the exact type of disaggregated
21 geographical level data that you would like to use to perform
22 research, you couldn't just go and get it on your own without
23 requesting it and obtaining it from the tobacco companies;
24 correct?

25 A. I don't know that. I don't know what their information

1 distribution policy is.

2 Q. If you were to learn that only the tobacco companies had
3 that disaggregated level geographical data, if you learned that
4 that was only in their possession, you would have to request
5 that data from the tobacco companies. You couldn't just go out
6 and get it on your own from them; correct?

7 A. Well, by definition, if they own it, I'd have -- unless I
8 stole it, but yes, I would have to -- or unless it were posted.
9 It could be posted in some other media, maybe in its
10 relationship to some other case or litigation. But, yes.

11 Q. Are you familiar with the brand level specific marketing
12 expenditure data that the tobacco companies report annually to
13 the Federal Trade Commission?

14 A. I've seen the Federal Trade Commission reports that are
15 aggregated data, yes. I've read those records. It's an Annual
16 Report, I believe, right?

17 Q. Yes. Now, in order to make an Annual Report to Congress,
18 are you aware that the FTC gets disaggregated level brand
19 specific marketing expenditure data broken down by advertising
20 and promotional categories from the tobacco companies?

21 A. Presumably they get that information. I'd have to look
22 closely at the Federal Trade Commission document. If you gave
23 me a copy I could confirm --

24 Q. (Interrupting) I'm just asking you if you're aware.

25 A. I'm aware that they have to report such numbers, yes.

1 Q. Okay.

2 A. But there are two -- there are several ways to get
3 information on brands that are smoked and so forth and so on.

4 So I'm not sure what you're -- there are sources for
5 people being asked questions, interviews, and then tobacco
6 company reports.

7 Q. But there's no other source of information -- or no other
8 source, other than the tobacco companies, for the advertising
9 and promotion brand specific level expenditures; correct?

10 A. Well, you're testing my knowledge. I don't know that for a
11 fact.

12 Q. Okay. You haven't ever seen that brand specific level
13 advertising and promotion data before; correct?

14 A. I've seen it summarized in the reports, yes. I haven't
15 looked at it personally. I haven't worked with it personally,
16 correct.

17 Q. But not brand specific advertising and promotion level; is
18 that right? You've seen --

19 A. (Interrupting) I've seen reference to applications of use of
20 it. Again, I go back to the Pollay study, which I would dearly
21 like to have in front of me, which has -- using such data about
22 brand specific advertising.

23 Q. Well, you would agree that the FTC reports are aggregated
24 level data; correct? They report industry wide.

25 A. What I read in the FTC -- I haven't read every FTC report --

1 but what I have read from the FTC is highly aggregated, yes.

2 Q. Okay. Would you be surprised to learn that only the tobacco
3 companies possess brand level advertising and promotion
4 expenditure level data on cigarette brands?

5 A. I would be not surprised. I mean, it's in their interests
6 to do so, more so than I wouldn't be surprised if some other, in
7 a totally different product area, that people who are selling
8 goods in that area were -- had the best information about the
9 sales, distribution and the like of their product.

10 Q. Are you aware that no independent researcher can get access
11 to that data?

12 MR. BERNICK: Your Honor, we've been over this like
13 three times. It's chronological.

14 THE COURT: It's time to move on, please.

15 MS. BROOKER: Well, I was referring -- this is the
16 first time I've asked him about the specific FTC brand specific
17 advertising and promotion data, and I just want to ask him if he
18 knows that no independent --

19 THE COURT: There were other questions asked about it.
20 He's made clear what his knowledge is.

21 BY MS. BROOKER:

22 Q. Now, I have on the board J-DEM 010357, and Mr. Bernick asked
23 you about this demonstrative yesterday; correct?

24 A. That's correct.

25 Q. Okay. This is where you refer to or discuss the

1 unobservable effect. Is that the way you described it?

2 A. The problem of the unobservable and causal inference.

3 Q. Okay. Is that a concern that you had with the four studies
4 that we discussed earlier today?

5 A. Yes. It was a concern which I mentioned yesterday.

6 Q. And you indicated when you were discussing, I believe,
7 briefly this demonstrative during your one-hour live, as you
8 indicated up there on the second bullet, a factor is always
9 unobservable in relation to your data. Such a factor may become
10 observable through a different richer data set.

11 Is that correct?

12 A. Yes. That's what a lot of data analysis is about, to try to
13 refine previous knowledge and enhance it by collecting data.

14 Q. Okay. Now, your criticism of those four studies goes
15 directly in part to their data set which you would not consider
16 to be a sufficient or a rich data set, is that correct, or rich
17 enough?

18 A. Well, that was part of the criticism. There are many
19 aspects to the criticism. That was an aspect.

20 Q. But that's what you would consider one of your most
21 significant of your two criticisms; correct?

22 A. No. There are several, and I wouldn't want to weight them.
23 This is a point, but not the point.

24 Q. But certainly that point could be addressed by having the
25 appropriate data set; correct?

1 A. Well, again, the appropriate data set has to be in
2 relationship to the problem at hand, and that has -- so it's not
3 like a data set I could formulate independently of the problem.
4 But richer data cannot hurt -- cannot hurt to have more
5 information.

6 Q. And you certainly didn't speak with the authors of any of
7 the studies to determine what their data limitations were;
8 correct?

9 A. Well, I read their papers. They indicate the variables they
10 had and reported those data. And some of these data I do
11 believe, I understand from other reports rendered in this court,
12 or have been made available in public domain so people have been
13 able to test, replicate and the like.

14 So, the issue that I mentioned is not strictly one of
15 just excess to -- not particular and unobservable. It's a
16 question of being robust, doing a robust statistical analysis,
17 recognizing the potential problem of observables and also the
18 proxy question.

19 Q. So the answer to my question is no, you have not spoken with
20 any of those researchers to determine --

21 A. (Interrupting) No. The answer is no. Those research teams.
22 There are multiple researchers, actually, I believe in every
23 study.

24 Q. Just to be clear. The answer to my question is no, you did
25 not speak with those researchers to determine what data

1 limitations were -- they had with respect to performing their
2 studies; correct?

3 A. No, not those four people.

4 MS. BROOKER: Just a moment, Your Honor.

5 (Pause)

6 Your Honor, I think I'm finished on this topic, but I
7 wondered if we were going to take a break, a brief break to look
8 at the note, if that's a good idea.

9 THE COURT: All right. How much -- you said you're
10 finished on this topic. How much longer do you think you have
11 to go?

12 MS. BROOKER: I just may have questions on the notes.
13 I just want to look -- I just want to look over my notes to be
14 sure, but at the most, not including any questions about the
15 notes, I would have 15 minutes to finish up.

16 THE COURT: All right. Mr. Bernick, what do you
17 anticipate?

18 MR. BERNICK: Well, I guess I'm going to have -- well,
19 I think it will take an hour for me to finish.

20 THE COURT: Let's just take a 10-minute recess,
21 everybody.

22 (Recess began at 10:40 a.m.)

23 (Recess ended at 10:53 a.m.)

24 THE COURT: Any further questions, Ms. Brooker?

25 MS. BROOKER: Yes, Your Honor, about 15 minutes.

1 BY MS. BROOKER:

2 Q. Okay. Dr. Heckman, just to wrap up that last area we were
3 discussing about your assignment, the work that you performed in
4 this case. Let me just clarify.

5 Your assignment for purposes of your expert report and
6 the opinions that you expressed in this case was not to bring an
7 answer to the question whether marketing or advertising affects
8 smoking behavior; correct?

9 A. I would say that's not correct.

10 Q. You didn't look at all the literature, nor did you perform
11 your own original research for purposes of the opinions you
12 expressed in this case; correct?

13 A. I looked at the literature, but I didn't perform an original
14 analysis.

15 Q. Okay. And when you say you looked at the literature we went
16 over this a great deal yesterday.

17 You testified that you certainly did not look at all of
18 the literature or even all of the literature that Dr. Eriksen
19 looked at. You looked at a discrete set of studies which you
20 then discussed in your written direct testimony.

21 A. Not quite correct.

22 What I did is I looked at the literature that was
23 highlighted by Dr. Eriksen as provided the key fundamental
24 evidence in support.

25 I looked at the Cochrane Reports, the ones that were

1 the strongest of the Cochrane studies -- Cochrane Report
2 studies. So -- but I wrote a referee report. I did not do
3 original research, that's correct.

4 Q. And you did not look at all of the studies that Dr. Eriksen
5 looked at either, you just looked at some of the studies, which
6 I believe you testified in great detail yesterday.

7 A. Well, I'm not sure that I read everything that Dr. Eriksen
8 has referred or everything that he referred to, but I read quite
9 a few studies.

10 Q. And your written direct testimony is limited to the
11 discussion of only a handful of studies; correct?

12 A. Featured in the Cochrane Report, yes.

13 Q. I mean a handful of studies, period.

14 Your written direct testimony does certainly not
15 address the body of literature that's out there on the subject,
16 it addresses a discrete handful of studies.

17 A. Well, I mean, I certainly cover the question of advertising.

18 I certainly look at the vast econometric literature on
19 looking at the effect of advertising on cigarette consumption
20 and prices.

21 So, I think I did a fairly comprehensive search in the
22 econometrics literature for sure and the studies that were
23 highlighted by Dr. Eriksen.

24 Q. With all due respect, my question is just what you
25 discussed, actually discussed, in your written direct testimony.

1 You did not discuss all of the studies that Dr. Eriksen
2 looked at in your written direct testimony nor, for that matter,
3 all of the studies that Dr. Chaloupka discussed in his written
4 direct, you just discussed a discrete handful of studies in the
5 written direct.

6 MR. BERNICK: Well, it's about the fourth time the
7 question has been put, and not put well, because it continues to
8 cover many different subjects.

9 Really, the written direct examination is a matter of
10 record in this case. It covers whatever it covers.

11 THE COURT: It is. We don't need to go into that.

12 BY MS. BROOKER:

13 Q. You have, I think, mentioned several times today that you
14 would refer to your expert report as a refereed report; is that
15 correct?

16 A. Well, a close read of the literature. That's what a referee
17 report is for a journal, yes.

18 Q. What is your definition of a refereed report for purposes of
19 what you did in this case?

20 A. What I mean is I closely read the evidence that was put
21 forward: the articles, the arguments, and looked at them as one
22 would as reading the quality of the argument and the quality of
23 the evidence for the arguments in a series of papers. Typically
24 a referee reports for one paper. This is a referee report on
25 the literature, so...

1 Q. You looked at the literature looked at by the United States'
2 experts?

3 A. Oh, I can't say I looked at everything, no. But we said
4 earlier what I said in my report.

5 Q. You stand on your testimony that you gave yesterday in this
6 court; correct?

7 A. I believe so, yes.

8 Q. Okay. Let's -- you have your notes up there?

9 A. You mean the handwritten notes?

10 Q. Yes.

11 A. Yes, I do. There's a typed version as well, but probably
12 the typed version is easier to read, but I'm happy to deal with
13 either. In fact, the handwritten is...

14 Q. First, I want to talk about this in a few discrete sections.
15 First, I'm going to you about your creation of the notes
16 themselves.

17 A. Yes.

18 THE COURT: You know you're limited to 10 or 15
19 minutes?

20 MS. BROOKER: Yes, Your Honor.

21 THE COURT: All right.

22 MS. BROOKER: Your Honor, would you like me to pass up
23 a copy of these notes? We've marked them with an exhibit
24 number.

25 THE COURT: I have a copy of them. I've had them and

1 counsel understand I'm going to look at them at this point.

2 MS. BROOKER: Okay.

3 BY MS. BROOKER:

4 Q. Now, I have marked as your notes, the handwritten notes --
5 just put them up here just so we can see the ones we're talking
6 about and the exhibit number. It's U.S. Exhibit 92123. Those
7 are your handwritten notes.

8 Now, did you draft your handwritten notes or the chart,
9 which now is marked as 92124 -- which document was created
10 first: the chart or the handwritten notes?

11 A. Oh, the handwritten notes. I was trying to keep in mind all
12 of the complex structure of each of these four articles which
13 are the key note, the flagship articles introduced by witnesses.

14 So, just to keep straight, for myself, I wrote down the
15 studies which you might find useful in future deliberations,
16 with the location of the study, the age of the individuals, and
17 what you see on the left-hand column about each of the studies.
18 Sample size, the very high attrition rates in each of the
19 studies, the various other aspects of inconsistencies across the
20 studies. I'm happy to talk about those.

21 Q. That's your handwriting on U.S. Exhibit 92123?

22 A. Yes, it is.

23 Q. Okay.

24 A. That's why I have such trouble getting things typed.

25 Q. Who typed up the chart at 92124?

1 A. Actually, as I was making these notes, Colleen Lofland, a
2 colleague from Lexicon, was actually listening, and I went
3 through and she was in the room with me and she took down,
4 because she realized that my writing was a mess, because I was
5 actually trying to introduce this myself as part of my
6 testimony, or hoping to, but it never got really that far, was
7 to -- she put it in order, although I see -- although I have
8 studied her typed report less carefully, so I don't want to
9 vouch for it. I'm sure it's right. But I recognize what I
10 wrote, and the rest was kind like her transcription of what she
11 heard.

12 She didn't type from my report. It's just what we were
13 saying in a room. I was reading the papers, putting them side
14 by side, collating them in the way you see. So I would like to
15 stick to the handwritten because that's what I did. Her summary
16 is the typed summary. It came later.

17 Q. Okay. And at what point in time in terms of when you
18 drafted your written direct examination with Colleen from
19 Lexicon did you hand write those notes?

20 A. The written direct was done long in advance of these notes.
21 I mean, long -- I don't know long, but certainly at least a
22 few -- a few weeks in advance of the notes.

23 This was a memory device. I had the papers in front of
24 me in -- oh, when I wrote the report, the written direct. But
25 these were basically intended for me to remind myself in the

1 heat of this -- this event, under the stress of giving
2 testimony, just to remind myself of the complexity of these data
3 sets. So these are notes to my myself.

4 Q. Was Colleen also the one that assisted you with your draft
5 of your written direct testimony?

6 A. She assisted in the sense that she helped me try to
7 translate the language into something more understandable to a
8 broader audience and also Rick Flyer. The two of those were the
9 principal -- in fact, sole Lexicon individuals, Lexicon-related
10 economists who were helping me in this report.

11 Q. And in drafting -- so you drafted those notes after your
12 written direct testimony?

13 A. Well, memory device. I read the papers clearly before I
14 wrote the report, but again, you have to papers in front of you,
15 you can write a report. You can check things in a way, go over
16 each detail in a way that you can't on a witness stand.

17 So I was hoping to use these as a memory device, which
18 they are, actually. Things come back very clearly just looking
19 at these notes.

20 Q. Did you thoroughly read these four studies before finalizing
21 your written direct testimony?

22 A. Yes, I did.

23 Q. But you nonetheless needed these notes, which then became
24 typed up as a memory device, for your testimony here today?

25 A. Well, my memory isn't perfect. And the other part of it is

1 that there's some -- from my standpoint, I can remember
2 categories, but I can't remember facts. So, not perfect recall.
3 I need a source. If I'm going to make a statement under oath,
4 I'd like to not lie or misrepresent it. So I use this as a
5 device so I could tell you -- tell the court that -- you know,
6 you know, we lost, you know, close to 50 percent of the people
7 in the one sample and, you know, the definitions are different
8 across the samples, things like this, which are not easy to keep
9 in mind, especially who did what. You might have a category of
10 four names, four labels, but you might confuse the labels. I
11 don't want to mislead the court.

12 Q. And I think, as you testified earlier as an example, you
13 couldn't recall what data set Pollay had used in performing that
14 study; is that correct?

15 A. That's right. I could tell you instantly if I had the
16 Pollay article in front of me what the data set was. I could
17 show you the paragraph because I read it many times. But I
18 can't keep in mind the data set. It's not a standard data set,
19 it's like the U.S. census.

20 Q. Did you write those notes with Colleen -- you know, in the
21 presence of Colleen or alone, the handwritten notes?

22 A. Well, I mean, in the presence, yes. She was in the room.
23 There was a room, yes.

24 Q. Who else was present, anyone else?

25 A. Rick Flyer was present.

1 Q. Who?

2 A. Rick Flyer, the other economist at Lexicon.

3 Q. Anyone else?

4 A. Well, I believe there were lawyers coming and going. They
5 weren't actively engaged in this, but they were lawyers who
6 involved in this litigation who were in the room. They weren't
7 assisting me in preparing these notes. This is for my private
8 benefit.

9 Q. Okay. So there were a lot of people with you when you were
10 writing these notes?

11 A. Too many, actually. I kind of prefer to work alone, so yes.

12 Q. Okay. Did the -- did any of the attorneys in this courtroom
13 know that you were bringing these notes with you to court then?

14 A. Yes.

15 Q. Okay. Did any of them suggest that you use -- create these
16 notes?

17 A. No.

18 Q. Who knew that you were bringing these notes with you before
19 you took the stand?

20 A. I believe people saw me walk in with the notes. I put them
21 on the table. So I told -- I didn't try to hide from anybody
22 the notes. I had them visibly here when I walked in the
23 courtroom yesterday.

24 Q. Did you ask any of the attorneys from the tobacco companies
25 before you came in here with those notes whether or not it would

1 be permissible for you to bring them?

2 A. Actually, I probably didn't.

3 Q. I'm sorry. Did not?

4 A. No, I don't -- well, I don't recall -- I don't think so, no.

5 I may actually have erred in bringing them with me. It
6 was, as I say, a memory device. I don't recall asking
7 permission, no. So I think not, but maybe I did. It wasn't an
8 issue to me. I was going to bring them anyway, just as a
9 heuristic.

10 Q. When did the attorneys for the tobacco companies first learn
11 that you had those notes in court with you yesterday?

12 A. I think before I walked in here on Wednesday.

13 MR. BERNICK: Your Honor, I will stipulate that we knew
14 that the notes were coming in with Dr. Heckman. I can't
15 conceive of the relevance of this line of examination.

16 THE COURT: There is no relevance to it. There is no
17 utility to it. If you have a point you want to make in the next
18 five minutes in cross, Ms. Brooker, get to it.

19 MS. BROOKER: Your Honor, I will do that. Although I
20 will say this is -- obviously, this is like taking discovery
21 since we don't know anything about the notes.

22 THE COURT: Ms. Brooker, you know there comes a point
23 on cross when you have to use some judgment. So you've got
24 five minutes.

25 MS. BROOKER: Thank you, Your Honor.

1 BY MS. BROOKER:

2 Q. Did you have conversations with attorneys last evening about
3 those notes which you left on the stand?

4 A. No. I did not speak to any attorneys.

5 Q. How about this morning?

6 A. No.

7 MS. BROOKER: Okay, Your Honor, I have no more
8 questions.

9 THE COURT: All right, Mr. Bernick.

10 Do you have a limo waiting to take this witness to
11 Dulles?

12 MR. BERNICK: We have. We have all the arrangements
13 that are necessary to get Mister -- Dr. Heckman on his way. I
14 keep on saying Mister, but I think the witness will bear me out
15 that at the University of Chicago, it's okay to say Mister to
16 the Professor. It's a long-standing custom.

17 THE WITNESS: First name basis, usually.

18 THE COURT: And I think your mike is not on.

19 MR. BERNICK: It is.

20 REDIRECT EXAMINATION

21 BY MR. BERNICK:

22 Q. Dr. Heckman, let's just begin first of all with all of the
23 questions that were asked regarding the scope of your expertise.

24 I want to show you J-DEM 010384 and ask you if you
25 recognize this document?

1 A. Well --

2 Q. You have to speak into the microphone.

3 A. Yes. I'm just reading the document.

4 It looks to me like -- oh, yes. This is posted at the
5 Johns Hopkins University website. These are the lectures that I
6 gave last week at Johns Hopkins. So this describes who I am in
7 relationship to the lectures I was giving. Trying to build an
8 audience, I guess.

9 Q. Okay. And questions were raised about the scope of your
10 expertise. I see where it says here:

11 (Reading) Professor Heckman's work has been devoted to
12 the development of a scientific basis for economic policy
13 evaluation. In the course of the work he has made contributions
14 to economic theory and to econometrics, with special emphasis on
15 models of individuals or disaggregated groups, such as
16 organizations or firms, and to the problems and possibilities
17 created by heterogeneity, diversity and unobserved
18 counterfactual states.

19 It goes on to talk about how you developed the
20 economics in econometrics in life cycle, dynamic models to study
21 unemployment, wage growth and skill formation over the life
22 cycle.

23 Is that an accurate description as appears there of the
24 basic scope of your expertise?

25 A. Yes. It defines it in a methodological way. It doesn't

1 give the studies in detail. It's a short extract. It would
2 take too much space to go into detail. But it gives the broad
3 perspective that I'm working on for my life actually.

4 Q. Let me just ask you. Did you write this description or was
5 this description written by those who were sponsoring this
6 lecture?

7 A. No, I did not write this, but it was probably written from a
8 biography that's standard from the University of Chicago
9 website.

10 This document, I haven't really seen before, but it's
11 very close to the citation that was offered by the Nobel
12 Committee, so -- or at least the bottom parts of it.

13 Q. Okay. Let's talk about econometric studies in
14 Dr. Chaloupka's review. You were asked about a review article
15 that Dr. Chaloupka published together with Dr. Warner. It's
16 U.S. Exhibit 72984. Do you recall that?

17 A. Yes, I do.

18 Q. In particular, your attention was drawn to a criticism that
19 appears at page 32 in the paragraph. I think I've captured
20 here. The one that's very hard to read?

21 A. Yes. This is the one that's impossible to read. If you
22 could magnify -- yes.

23 Q. Here we go. It says, in short, given -- it goes on to make
24 a bunch of statements about limitations and criticisms that have
25 been offered.

1 Do these criticisms that appear here in the article
2 relate to a particular kind of econometric study?

3 A. Yes.

4 Q. Okay. What is the kind of econometric analysis that is
5 being described and is the subject of commentary in that
6 paragraph?

7 A. Oh, this is the standard study that I was describing
8 yesterday that's in the textbooks, about looking at aggregate
9 expenditures and looking at aggregate consumption.

10 Q. So this is a particular kind of study applying econometric
11 methodology?

12 A. Yes. It's one of, an example of studies of advertising, on
13 expenditures, on consumption, yes.

14 Q. Now, bear that point in mind, but I want to ask you a couple
15 of questions about the paragraphs that preceded the paragraph
16 that was quoted. If we go back to the beginning of that
17 section, it says, 4.2, Econometric Evidence.

18 As we go down that paragraph we see it says, "No
19 consensus concerning the effects of advertising on smoking has
20 emerged from the research, however." Do you see that?

21 A. Absolutely.

22 Q. Do you agree or disagree with that?

23 A. I think the -- what I think they are saying in a polite way,
24 not to insult authors, that there really isn't firm evidence.
25 So yes, there is no consensus. It's an honest summary of the

1 literature.

2 Q. Does it then go on and describe some of the particular
3 studies that have been reached in that area?

4 A. Uh-huh. Andrews and Franke and other studies, Duffey.

5 THE COURT: And that conclusion was -- if you could put
6 it back up there, Mr. Bernick -- was that there was a
7 significant relationship between advertising and cigarette
8 consumption. Is that accurate to say? Not a clause, but a
9 significant relationship.

10 THE WITNESS: Well, that's the claim of the Andrews and
11 Franke relationship, that there's a statistical relationship.
12 Not causal, as you say. But that's not his conclusion. It's
13 the conclusion of -- he's summarizing summaries. So he's
14 surveying surveys. There's a big literature.

15 So I think this sentence is about Andrews and Franke,
16 which is a document that I think actually takes exception to --

17 THE COURT: You're absolutely right.

18 BY MR. BERNICK:

19 Q. If you go down likewise at the bottom of that paragraph, is
20 there another summary?

21 A. Yes. He's referring to Duffey who has written original
22 papers, but also has his own survey. This is in juxtaposition
23 to the Andrews and Franke study saying that there's -- that
24 there's no little or no impact.

25 Q. If we then take a look on the next page, these authors then

1 go on to say as follows --

2 MS. BROOKER: What page, Mr. Bernick?

3 MR. BERNICK: This is at page 31. It was just before
4 the paragraph that the government read.

5 BY MR. BERNICK:

6 Q. (Reading) Based on the mixed evidence from the studies using
7 aggregate data, aggregate cigarette advertising appears to have
8 a small or negligible impact on aggregate cigarette sales.

9 However, as a number of researchers have observed, the
10 nature of competition in the cigarette industry and the
11 limitation of econometric analysis to estimate marginal affects
12 imply that there should be at most a small impact of cigarette
13 advertising expenditures on aggregate consumption.

14 Do you see that?

15 A. Yes.

16 Q. Now, these are all comments that deal with a particular area
17 of econometric work, which is the work that deals with on the
18 one hand expenditures on advertising and on the other hand
19 consumption of cigarettes. Is that fair?

20 MS. BROOKER: Objection. This is going in a leading
21 direction. That's a leading question.

22 THE COURT: No. The objection is overruled.

23 A. Well, you can see that that's correct from the section
24 heading, I think, here, the whole section heading your quoting
25 from. Go back a page.

1 Q. Do you agree or disagree that there are limitations on those
2 studies?

3 A. Well, I agree that more disaggregated data would be
4 productive as I testified yesterday and would testify any day.

5 Q. You said in response to Dr. Eriksen. Did Dr. Eriksen have
6 similar criticisms of these studies?

7 A. Yes, he did.

8 Q. You said, when asked about Dr. Eriksen's criticisms, as
9 follows.

10 You were asked, Would you agree that you and
11 Dr. Eriksen share the same criticism of econometric analysis as
12 we just compared your two statements?

13 I objected to the form. The court said, that's fine.
14 Let's go ahead.

15 Then you said: Well, let me be careful. Can I give
16 you my read of what he's saying. He's saying that the empirical
17 studies -- this is not a statement about a methodology; this is
18 a statement about a body of empirical work.

19 What distinction were you drawing in your answer with
20 regard to what the criticisms were criticisms of?

21 A. Well, I was making a distinction by saying that if the --
22 one could say -- it's not conclusive, a body of evidence in this
23 area or any other, that nonetheless the method used to reach
24 that conclusion is not at fault and is not being flawed --
25 faulted, I should say, in the analysis by me or Dr. Eriksen.

1 Q. Was your statement -- either your statement or
2 Dr. Chaloupka's comments or Dr. Eriksen's comments, comments
3 that were critical of econometric methodology generally?

4 A. Not that I read, no, by any of these authors.

5 Q. Is the econometric methodology and the econometric
6 methodological principles that you've described to the court,
7 are they in some fashion limited to studies regarding
8 consumption or studies regarding expenditures?

9 Are they limited in that fashion, Dr. Heckman?

10 A. Not at all. They are applied in many areas of human
11 knowledge, way outside of standard economic questions.

12 Q. Let's now go from Dr. Chaloupka to Dr. Eriksen. I have a
13 series of questions that I want to ask of you, and I've tried to
14 write them down here so we can move them promptly and get you on
15 your way.

16 With respect to Dr. Eriksen. I want to ask you first
17 questions about what did Dr. Eriksen say about your testimony
18 about -- what you said about what he said. So, we got
19 Dr. Eriksen and what did he say.

20 And counsel pointed out your testimony on your direct
21 examination live the following question.

22 This is at page 18809, line 17. I asked you, "Are you
23 aware of any situation in the testimony that you've seen, where
24 Dr. Eriksen actually has come out and said, not suggests or
25 substantial contributing factor, but said the causal

1 relationship between defendants' advertising on the one hand and
2 smoking initiation on the other has been scientifically
3 demonstrated to be causal?"

4 She pointed out -- remember being asked about that
5 question?

6 A. Yes.

7 Q. By way of questioning you on that statement, you were then
8 shown by the government the testimony by -- certain excerpts of
9 testimony by Dr. Eriksen in this trial. Do you recall that?

10 A. Yes.

11 Q. And at page 18 -- 18903 in particular, the colloquy between
12 you and the government was as follows. Question at line 7:

13 "Again just looking again at lines 15 to 19, Dr. Eriksen is
14 asked, 'So by choosing the "term substantial contributing
15 factor," you meant to indicate that marketing was one cause
16 among many?"

17 "And his answer was, 'Yes, I meant it to mean a cause
18 but not the cause."

19 And then you were asked, "Is that right? Is that his
20 testimony?"

21 And your answer was, "You're reading it correctly,
22 yes."

23 I want you to assume that counsel was reading it
24 correctly, that Dr. Eriksen did say that he meant to indicate
25 that marketing was one cause among many. I want you to assume

1 that that was a correct reading of what Dr. Eriksen said.

2 Did Dr. Eriksen in that statement actually come out and
3 say, not simply that marketing was one cause among many, but
4 that there had been a scientific demonstration of a causal
5 relationship?

6 Did Dr. Eriksen say that there?

7 MS. BROOKER: Objection. That's asking the witness to
8 read something into the one sentence taken out of context. I
9 mean, the sentence speaks for itself.

10 MR. BERNICK: The whole entire point is that the
11 questioning was designed to elicit this statement, that somehow
12 impeaching the witness's answer to my question. And it wasn't
13 proper impeachment. The two things are entirely different.

14 So my question to him is: Does he read the statement
15 that Dr. Eriksen made as a statement that causation has been
16 scientifically demonstrated with regard to that relationship?

17 THE COURT: I will allow the answer, but counsel have
18 to understand that even though that answer will come into the
19 record, I can assure you when it comes time to writing this
20 opinion, the testimony of Dr. Eriksen, Dr. Biglan,
21 Dr. Chaloupka, and Dr. Heckman will be parsed by me very, very
22 carefully.

23 MR. BERNICK: With that assurance and focus, maybe the
24 answer's at this point relevant.

25 BY MR. BERNICK:

1 Q. But do you read Dr. Eriksen's statement as a statement that
2 there has been an actual scientific demonstration of a causal
3 relationship?

4 A. No, not by this. And certainly reading his written
5 statements, he's very cautious about using the word
6 "association" versus "cause" as does the Cochrane Report that he
7 brags on.

8 Q. Let's now turn to the next question which is what
9 Dr. Eriksen did. There were a whole series of questions that
10 were posed to you about what Dr. Eriksen did. And, in
11 particular, do you recall being asked repeatedly questions along
12 the line of what appears here at line 22 --

13 A. I'm sorry. It's out of focus. Okay, thank you.

14 Q. Line 22 of page 18892. "Question: Now, you have no reason
15 to doubt as you sit here today that Dr. Eriksen applied those
16 standards of causality to his work in this case in arriving at
17 his conclusion that marketing is a substantial contributing
18 factor..."?

19 Do you remember being asked a whole bunch of questions
20 about, can you doubt that Dr. Eriksen actually did that causal
21 analysis using the criteria?

22 Do you remember being asked those questions?

23 A. Yes, I do. Although I certainly am refreshed in my memory
24 by looking at this exhibit.

25 Q. Now, in all of the testimony that was elicited on

1 cross-examination, in all of that process, did the government
2 actually show you a causal analysis by Dr. Eriksen that applied
3 those criteria?

4 A. No.

5 Q. Did counsel even show you a place in all of Dr. Eriksen's
6 reports, in all of his testimony, where he actually claimed to
7 have applied those causal criteria to the issue that we're
8 talking about?

9 A. No.

10 Q. Let's go to the third question. There are many questions
11 where it was suggested to you, Dr. Heckman, that the only
12 difference between you and Dr. Eriksen was how rigorously the
13 criteria were being applied. So I want to ask a bunch of
14 questions -- ask a few questions about the causal criteria
15 themselves and to get us focused back on the criteria. Let's
16 get them back up here.

17 Do you remember showing J-DEM 010366 in connection with
18 your live testimony that dealt with the criteria?

19 A. Absolutely. I wrote this myself.

20 Q. I want to ask a few questions about how these criteria are
21 actually applied as concerns the questions that the government
22 was asking you about, application of these criteria.

23 Are there any assumptions that these criteria make with
24 regard to whether a statistical association of any kind has
25 already been obtained?

1 A. Well, I'm not sure of the question, actually.

2 Q. Okay, I'll try to rephrase it.

3 We see that there are a bunch of criteria, including,
4 for example, strength of association.

5 A. Correct.

6 Q. What, if anything, does application of this criteria assume
7 about whether a statistical analysis has been done?

8 A. What did it assume?

9 Q. Yes. In other words, in order to apply this criteria, does
10 there already have to have been a statistical analysis?

11 A. Well, the criteria apply to a statistical analysis -- to an
12 analysis I should say yes. It includes statistics.

13 Q. So before you even get to these criteria, you have to have
14 done statistics?

15 A. Well, to apply criteria. These are applied to studies that
16 are, allegedly, are trying to establish causality. That's some
17 of the necessary conditions for doing so.

18 Q. It's a necessary condition. That's what I'm getting at.

19 A. Yes.

20 Q. Is there any necessary condition before you get to these
21 criteria, or satisfying these criteria, that there be a
22 statistically-significant association found?

23 A. I think if there's nothing found that's strong,
24 statistically. Statistically. Strength is used in two
25 sentences: the magnitude of the estimate and the size of the

1 statistical association measured by a T statistic or something.
2 That if there's not a lot of evidence, there's no smoking gun to
3 statistical methods, there's not much to look for.

4 Q. What if there is not even a showing of statistical
5 significance at all?

6 A. It's somewhat doubtful. The strength of the evidence.

7 Q. If we take a look at JD 03745, which is Dr. Hennekens' book
8 on epidemiology at page 45, table 3.1.

9 I will tell you, in fact, that Dr. Eriksen and you do
10 agree on something. Dr. Eriksen has testified in this case that
11 Dr. Hennekens is one of the foremost epidemiologists in this
12 country. And that's at page 11489.

13 He has at Table 3-1 a framework for the interpretation
14 of an epidemiological study. Do we see here that under the
15 second question, Is this valid statistical association, or can
16 this valid statistical association be judged as cause and
17 effect? He's got some of those same criteria that you've talked
18 about.

19 A. No. These are standard. This isn't Susser. It's also in
20 the 2004 Surgeon General's Report.

21 Q. He has the first question which is, Is there a valid
22 statistical association?

23 A. Yes.

24 Q. He's got that as kind of the first question.

25 Is that consistent or inconsistent with what you have

1 recited as being the preconditions or the conditions of even
2 getting to the causal criteria set out in the reports?

3 A. Well, you need to establish the strength of a relationship
4 before you start worrying about its causal status. But, as I
5 say a necessary condition, it's not a sufficient condition.

6 Q. That's really what I'm getting at.

7 So if we go back to -- if we assume that Dr. Hennekens
8 is -- he's been recognized to be a true authority and a person
9 of stature within his field, and we assume that there has to be
10 a valid statistical association, and we go to the issue that you
11 asked, Does the defendants' cigarette advertising on the one
12 hand, do they cause smoking initiation on the other, would it be
13 fair to say that before we even get to the causal criteria,
14 somebody has had -- somebody has to have demonstrated that
15 there's an association to begin with?

16 A. Excuse me. Yes. As a precondition, one wants to show,
17 you're trying to explain something, this data. Yes, a fact has
18 to be established.

19 Q. Now, in all of the studies that have been shown you, in all
20 of the studies that Dr. Eriksen did, did anybody even establish
21 this precondition of there being a valid statistical association
22 between defendants' cigarette advertising on the one hand and
23 smoking initiation on the other?

24 A. No.

25 MS. BROOKER: Objection, Your Honor. I would just say

1 this is a very leading. When he says "establish," is he
2 referring to put in the written direct examination or is he
3 asked about it on cross-examination?

4 I just -- you know, we are assuming a lot of things
5 here when Mr. Bernick is asking questions of Dr. Heckman.

6 THE COURT: Objection is overruled.

7 First of all, the question certainly wasn't leading.

8 And second of all, the question was clear enough to me.
9 If the witness thought it was unclear, you may certainly put in
10 any modifiers or ask Mr. Bernick what he meant.

11 A. No, I think it's clear. I mean, you're drawing on this
12 graph that I drew and I have used repeatedly. And the idea is
13 that -- if I could just get up for one second. Although I don't
14 have a microphone.

15 This link where you actually have advertising and
16 initiation directly is what's missing to me in this body of
17 evidence.

18 Q. Let me go to one article in particular, one of the four
19 studies, the Choi study, because a lot of these studies would be
20 fair, like Pierce and like Biener, they asked the question, not
21 simply of advertising, but they asked the question about people
22 who have received promotional items and the like.

23 Is that correct?

24 MS. BROOKER: Your Honor, I would just like the record
25 to reflect that Dr. Heckman is just pulling out his notes for

1 purposes of responding to these questions.

2 A. Yes. Again, this is my memory heuristic, and you all have a
3 copy of it now.

4 THE COURT: That's fine. Go ahead.

5 A. And I just simply -- again, I'm not a factoid. I can't
6 produce these things off the top of my head.

7 But I just refreshed my memory. Choi was a 1993 study
8 in California, and so I'm aware of that.

9 And the key point, as I've raised here, was the point
10 that -- yes, that, in fact, there's a sort of a slip between the
11 cup and the lip, because instead of doing the direct measurement
12 between defendants and smoking advertising -- smoking
13 initiation, there are receptivity measures that are used as
14 proxies, without, first of all, establishing that the proxy is
15 valid, related -- more or less of this receptivity is related
16 actually to more or less advertising.

17 And then the other question I raised, which was this
18 question we talked about yesterday, endogeneity, which is that
19 it may well be, and seems at least in the possibility that has
20 to be eliminated in any scientific study, that preferences are
21 giving rise to receptivity.

22 BY MR. BERNICK:

23 Q. While we are on that, let's take care of another point.

24 When you gave your illustration of endogeneity, which
25 is here --

1 A. Yes, it was there.

2 Q. We will get it. Nothing disappears.

3 A. No. I saw it when I walked in today.

4 Q. This omitted unobservable, you have an arrow pointing to
5 cause and an arrow pointing to outcome.

6 When you're referring to this omitted unobservable,
7 does it exist from a temporal point of view at the time before
8 the cause or as a result of the cause?

9 A. Maybe I could refine my picture and give it a name. Just --
10 to line it up with what's over there. I'm just -- when I wrote
11 this before I wrote it independent.

12 But a name for this omitted unobservable would be
13 something like preference, and you would think of it, each of
14 these are possible causes. So this is the -- I will use the
15 legal language here, although it's not completely familiar to
16 me, alleged cause and this is another cause which has to do with
17 preference. So both of these factors.

18 So we think that preferences may affect the outcome.
19 The question is whether or not the relationship that we find
20 empirically between just looking at the cause and the outcome is
21 a consequence that this alleged cause is causing the outcome or
22 it's serving only as a surrogate for this missing variable.

23 So even if there really is no relationship here, I can
24 still get a relationship, a statistical relationship between
25 cause and outcome because of that missing cause. So there's a

1 temporality and there's a notion that I have to control for. So
2 it combines several ideas.

3 Q. Now, you said that in these studies, for example,
4 Dr. Pierce, Dr. Choi, that instead of using the advertising,
5 they used receptivity?

6 A. Yes.

7 Q. And let's put in the receptivity here. They are looking for
8 a relationship between receptivity on the one hand and
9 initiation on the other.

10 A. Yes, that's what they report.

11 Q. That's what they report.

12 A. And other studies, but those are the four flagship studies.

13 Q. Now, you have on your chart there an arrow going from
14 preference to receptivity and from preference to initiation.

15 A. Yes.

16 Q. Could you please explain in concrete terms, when you talk
17 about preference being an omitted unobservable. How is it that
18 preference may be related both to receptivity and to initiation?

19 A. Well, preferences are part of how people are formed. So we
20 know from other studies, biology, you know, maternal smoking and
21 the like does influence preferences, a number of preferences.

22 The point is that we would think the choice puff, the
23 desire, whatever it is, glamour, whatever people see in smoking,
24 those preferences would be independent determinative factors of
25 actually causing smoking. Okay?

1 So that's a well established notion. Generally -- not
2 necessarily just in this case -- that preference matters. Time
3 preference, ability of self-regulation, desires and on and on
4 and on. I don't think anybody challenges that on either side as
5 I've read it.

6 The question at hand is the receptivity measure one has
7 not ruled out from the studies, that I've read, the chain
8 between preference and receptivity; that those people who have a
9 certain preference may be the ones who are going to get
10 T-shirts, remember more cigarette advertising, have some
11 paraphernalia, ashtrays and the like.

12 So unless one controls for this, one wonders whether or
13 not there is a causal relationship between this receptivity and
14 the smoking initiation. That's one point I make.

15 But that's a separate point from the point of whether
16 or not the advertising is at all related to this receptivity
17 measure.

18 Two distinct issues. One is how does the advertising
19 directly link to this? So in what sense is this a surrogate for
20 that?

21 And then secondly, how do preferences actually -- how
22 do the receptivity studies control for preferences? Two
23 distinct points I made in my testimony.

24 Q. If somebody had the promotional item -- that is, they had a
25 Marlboro bag or whatever -- and preference, in fact -- their

1 preferences, in fact, were causing -- well, put it in just those
2 terms.

3 If somebody in one of those studies is found to have a
4 T-shirt or a bag -- when you say that there may be unobservable
5 preferences, is that another way of saying the reason that they
6 took the bag or got the bag to begin with is that they already
7 had a preference?

8 A. Yes. I mean, if you think there's a predisposition, then
9 individuals who have the predisposition at some point will
10 manifest this in various ways, including taking up smoking later
11 down the line. An intermediate step could be smoking
12 paraphernalia, T-shirts and the like.

13 I should probably sit down.

14 Q. You can sit down.

15 This is a way of getting to one of the studies for a
16 slightly narrower purpose. The Choi study, Choi deals with this
17 receptivity and smoking initiation, I think you've told us.

18 A. Yes.

19 Q. Now, in Pierce, Pierce had people who were receptive based
20 both upon ads, that is having a favorite ad?

21 A. Yes.

22 Q. And having a promotional item?

23 A. And now you're testing my memory. But, yes, I can -- I put
24 this down here -- I think so, yes. Let me just check, though.

25 Own an item, yes. Okay.

1 Q. Now, I want you to assume for purposes of my questions,
2 Dr. Heckman, that it's no longer done by these defendants that
3 they sell or distribute promotional items in the form of
4 T-shirts or bags.

5 MS. BROOKER: Objection, beyond the scope of this
6 expert. This expert has no idea about these kinds of -- he
7 hasn't disclosed that he's looked at what the defendants are
8 selling or what items they are promoting.

9 THE COURT: No. The question was that he's asking him
10 to assume that.

11 MR. BERNICK: Right.

12 THE COURT: Go ahead, please.

13 BY MR. BERNICK:

14 Q. And I want you to assume that all that's out there today are
15 ads. They are fewer, but they are still there.

16 Do we see in Choi -- and you may want to look at --
17 I'll just put it up here in order to save time here. This is
18 Table 2 of Choi.

19 Is there a part of Choi's data where he teases out
20 receptivity as measured by having just the favorite ad and looks
21 for whether there's a tie to initiation?

22 MS. BROOKER: I would like Mr. Bernick to clarify --
23 because I think it's vague -- when he refers to ads, is he
24 referring to the millions of ads sent through the direct mail
25 database or ads in magazines or ads at retail?

1 MR. BERNICK: No. That really misses the point. But
2 the whole study -- this is not a study that focuses on the
3 source of the ad, this is a study that focuses on whether people
4 have a favorite ad.

5 THE WITNESS: Yes.

6 MS. BROOKER: But in the assumption you're asking,
7 Mr. Bernick is asking whether or not -- you know, his assumption
8 is that there are only ads, that the defendants are only using
9 ads, he said. And I'm asking for him to be specific as to which
10 types of ads he's talking about: At retail, in magazines, in
11 Marlboro Unlimited, through the direct mail database, for
12 purposes of this assumption.

13 MR. BERNICK: I've asked him to assume for purposes of
14 my question that we are no longer distributing promotional items
15 and that all that people who are nonsmokers, all that they see
16 or have access to are media ads.

17 And I'm simply asking the question, is there data in
18 Table 2 that teases out whether receptivity is measured by
19 having, not a promotional item, but simply a favorite ad,
20 whether it's tied to smoking initiation. That's my question.

21 MS. BROOKER: That doesn't address my problem. It's
22 what media ads?

23 THE COURT: No. I think the question is clear enough.
24 The question is any kind of a media advertisement.

25 MR. BERNICK: Yes.

1 BY MR. BERNICK:

2 Q. Is there a data point that we have here where he looks for a
3 receptivity and smoking initiation association where there's
4 simply a favorable ad?

5 A. Well, if you look at the line, Receptivity to Tobacco
6 Advertising, it says "moderate, favorable advertisement."
7 That's the definition.

8 You get a number over to the third column there, which
9 is called Odds Ratio, and it's 1.23, which would say on the face
10 of it that there is a relationship leading to established
11 cigarette smoking. Established cigarette smoking is 100
12 cigarettes or more in a lifetime in this article.

13 But if you look at the confidence interval, you realize
14 that it includes one, which means you can't reject the null
15 hypothesis that there's no statistical relationship.

16 Q. Which then means is it statistically significant or not?

17 A. It is not statistically significant. He reports it honestly
18 here as showing what the confidence -- it's given in the form of
19 a confidence interval instead of a T statistic, but the
20 95 percent confidence interval is ranging between .81 to 1.88,
21 which could suggest, if you took the lower boundary, that it
22 would actually discourage smoking to the other extreme which
23 would say would highly encourage it, which means it's not
24 precisely determined. So you can't reject the null of no effect
25 here in this table. He's very honest about that in the article.

1 He's not claiming otherwise.

2 Q. Let's push on and talk about the four studies as a group.

3 You were asked repeatedly what your complaint was
4 concerning the studies, and we've now -- you've now explained
5 carefully issues that you have based upon the end points and
6 outcomes that are being measured. Fair?

7 A. Yes.

8 Q. Did you have any other complaints or criticisms -- I think
9 it's probably better to say criticisms -- of those four studies
10 that go beyond the end points and deal with just how the
11 studies -- the quality of the data?

12 A. Well, there are two aspects. There are quality of data
13 questions and then there's a sensitivity analysis and what some
14 of us like to call sturdy econometrics or robust statistics.

15 A kind of an essential ingredient in any of these
16 studies is to do what's called a sensitivity analysis. You
17 report your results in relationship to inclusions and exclusions
18 of various variable. So you say yes, how are my conclusions
19 shifted?

20 So there are whole lines of work out there where you
21 can say I can get rid of all the variables except the variable
22 I'm interested in on the right-hand side, looking at its effect
23 on the left-hand side; in this case, the Choi case going to
24 establish smoking.

25 So I can go and ask how sensitive are my results to

1 inclusion and exclusion of these other variables. That's kind
2 of point one.

3 The second is something that's quite concerning me,
4 which is the very high nonresponse rates that are typical, it
5 seems, in almost all these studies.

6 Actually, for the benefit of court, although it's not
7 in the typed record, it's in the handwritten record, that you
8 get retention rates that are sometimes quite low, close to only
9 50 percent of the original observations are kept. So that's a
10 data quality issue.

11 So there are two aspects. One not enough regard for
12 what I think are standard sensitivity analyses, standard in many
13 areas of statistics and econometrics and, secondly, not proper
14 attention given to the survival and attrition problems which
15 seem very high by current standards in the many areas in
16 cross-sectional and longitudinal studies.

17 Q. Let's take the next step forward, Dr. Heckman, and deal with
18 these studies as a group.

19 If you take these four studies as a group, does taking
20 them as a group somehow make them stronger than the way they are
21 taken as individual studies?

22 A. No. In fact, I mentioned yesterday -- and it's actually in
23 my handwritten note if you want to see it, although I don't
24 think it made its way to the table, which I can't take much
25 responsibility for.

1 If you look at the Biener and Siegel result and you
2 look at their measure, that they are finding, what Pierce finds
3 to be statistically significant, insignificant in their study.
4 So there's an inconsistency across those two studies, which is
5 not noted by the authors -- later authors.

6 Secondly, there's a sense in which different measures
7 are used, smoking measures. And again a part of the robustness
8 study would be to say, well, you like to put these things on a
9 common metric if you're going to compare four studies.
10 Replication really says you use the same kind of data and use
11 the same kind of outcome and you see can you get it in different
12 populations. That hasn't been here. Maybe it will be done in
13 the future. I hope it is, actually.

14 Q. Let me ask you. I will direct your attention to a question
15 that the court asked at page 11805, line 25.

16 The court said -- this was question posed to
17 Dr. Eriksen. "And would it be correct to say, although this may
18 be a layperson's oversimplification, that in a certain sense
19 these studies that we talked about last time and that
20 Mr. Bernick has started with this morning, are comparing apples
21 and oranges because each of the studies compare a slightly
22 different population?" This is referring to the longitudinal
23 studies.

24 And Dr. Eriksen said, "Across the studies are different
25 populations, but within the study they're comparing all apples

1 to apples and then seeing what happens over time with the only
2 variable that's changing is exposure to marketing as measured by
3 this receptivity variable."

4 The court then says, "I understand that, but the
5 different" -- I'd be lying that the court is merely a lay person
6 at this point in the process -- "but the different studies are
7 measuring different populations; is that accurate?"

8 And Dr. Eriksen said, "Yes, Your Honor."

9 Would you agree with Dr. Eriksen's testimony that there
10 is an apples -- not direct testimony, but the testimony in
11 response to those questions -- that there are, in fact,
12 different populations being measured?

13 A. There are different populations. I would supplement it as
14 well. There are different outcome measures and different
15 measures of receptivity.

16 Q. And is that, in fact, an apples and oranges' problem?

17 A. It's almost more like apples and beef steak or something,
18 some changing food groups.

19 Q. Is there a technical term that is used in your field to talk
20 about these kinds of variations among studies?

21 A. A technical term?

22 Q. Well, just what is the term that you would use in talking
23 generically about this kind of problem?

24 A. Well, I think the English word would be incomparability or
25 difficulty to compare across studies.

1 Q. I'm sorry. Go ahead.

2 A. No. I mean, you can use different words from disparaging to
3 more polite. So I'll say, you know, a certain amount of
4 incompatibility. Incomparability, which is not a good thing
5 when you want to line four studies up in a row and say, This
6 proves a point.

7 Q. Dr. Eriksen relied, if you will recall, upon the Cochrane
8 Collaboration. I think you've actually referred to that.

9 A. Oh, yes, he relied on it. And as I mentioned yesterday I
10 became aware of it through his written records which were given
11 to me.

12 Q. Did the Cochrane Report itself make any finding or make any
13 comment with regard to the variability among the studies?

14 A. Yes, enormous. They cover nine studies altogether, but they
15 really focus on the fact that many of these are not directly
16 related to this receptivity measure and the outcome, but they do
17 consider various measures, various data sets, various
18 incomparabilities. They say that very clearly in the study.

19 Q. If we take a look at the top of the second column on page 9,
20 it says that -- the Cochrane study says, There are several
21 limitations. First, it included nine studies that are
22 comparatively heterogeneous. Does heterogeneous have a meaning
23 in your field?

24 A. Well, I think heterogeneous is another word for what I was
25 saying about incomparability. They are different studies and

1 they are not -- you can't lay them all out.

2 It's not like a chemical experiment where 500 people
3 and 500 different labs are pouring together the same two
4 chemicals and saying, yes, we get combustion, or whatever they
5 are looking for.

6 Q. Let's get to some general questions at this point following
7 on the government's -- that directly speak to the government's
8 questions of you in this question of, Has there been a causal
9 analysis that's been done by any of their experts?

10 Has any government expert in this case done a causal
11 analysis of the relationship between defendants' cigarette
12 advertising and smoking initiation applying the established
13 criteria for causality that you've testified to?

14 A. I think if you read the record, even of the witnesses on the
15 government, and the Cochrane Report, it's very clear on this,
16 you will find, to my memory, the word "cause" mentioned only
17 once in a hypothetical sense in the Cochrane Report.

18 The report, when it discusses the evidence, and most of
19 the witnesses that I've read, but I can't say I've read all of
20 the witnesses, certainly Dr. Eriksen we're talking about, used
21 the word association.

22 They used the fact that there's an association between
23 this receptivity measure and smoking. That might suggest to
24 some people there's causation, but I don't believe Cochrane -- I
25 know for a fact, I know Cochrane very well -- the Cochrane

1 Report never says there was a causal relationship ever.

2 THE COURT: Isn't that what all of this expert
3 testimony comes down to, that your fundamental critique is that
4 causation has not been established, that you have no quarrel
5 with the finding of a statistical association, and that the
6 government's experts have used different terms throughout their
7 testimony, as you pointed out, but are essentially establishing
8 strong statistical associations?

9 THE WITNESS: Well, yes, strong statistical
10 associations for sure. Strong statistical association with
11 receptivity, not strong statistical association with the direct
12 measure of advertising. So I would make that distinction.

13 But the receptivity studies are establishing for
14 certain measures -- well, we just went over one measure where
15 there wasn't such strong association, this memory of
16 advertising, the favorite advertising measure in the Choi study.

17 So there is a relationship between receptivity and
18 smoking established by different measures, but no strong
19 statistical association, to my knowledge, between the direct
20 measure of advertising and smoking initiation.

21 THE COURT: And in large part you reach that conclusion
22 because you find receptivity such an inadequate proxy for
23 advertising. Would that be accurate?

24 THE WITNESS: I would say that to make a judgment based
25 on that, it would need a stronger case than has been made in the

1 literature that I've read.

2 It's not saying it might be impossible, but it has not
3 been addressed, the question of how valid the relationship is
4 between advertising, direct campaign measures and the
5 receptivity measures. That's a missing link in the argument.
6 That's all. It could be established. I can't speculate about
7 whether it will be.

8 BY MR. BERNICK:

9 Q. Let me follow up just on the court's questions briefly.

10 You've talked about there being some studies that show
11 a statistical association between receptivity and smoking
12 initiation.

13 Is there even one single study that shows any kind of
14 statistical association between advertising and initiation?

15 A. No, unfortunately, and I think that's the missing smoking
16 gun.

17 Q. Number two, is there any government expert who, to your
18 knowledge, has actually gone ahead and applied the criteria of
19 causation set out in the '64 report, in Hennekens and Susser, in
20 the 2004 report, actually applied -- any government expert who
21 has applied those criteria to the relationship between
22 advertising and smoking initiation?

23 A. No, that hasn't been discussed.

24 Q. When it comes to the proxy, are you aware of any government
25 expert who has done anything, even one thing, to validate the

1 proxy of receptivity?

2 A. If, by validation, you mean the link between advertising
3 campaigns and the measure used, no. I looked very hard for
4 that. It may be in literature, but I haven't seen it yet and it
5 hasn't been introduced by any witness that I've read. I can't
6 say I've read every witness, though.

7 Q. I want to show you how Dr. Eriksen construed the criteria
8 that we're talking about. I asked him, "So when it comes to
9 observational studies, you have to have consistency, coherency,
10 you have to have a whole bunch of studies, all of which come out
11 basically the same way, right?

12 "Answer: Exactly, the whole bunch of studies."

13 Using Dr. Eriksen's interpretation of these criteria,
14 has any of the plaintiff's experts come forward and satisfied
15 his interpretation of those criteria?

16 MS. BROOKER: Objection. That calls for speculation,
17 whether or not Dr. Eriksen's criteria has been established. By
18 just using this one single line of question it's really
19 misleading and speculative.

20 THE COURT: That's not speculative, though.

21 The witness will give his opinion based upon,
22 naturally, what he's read in the record.

23 MR. BERNICK: I'll make it even --

24 BY MR. BERNICK:

25 Q. I want you to assume, Dr. Heckman, that what Dr. Eriksen

1 said here at page 11490 in this trial was the truth. That is,
2 that when it comes to observational studies, you have to have a
3 whole bunch of studies, all of which come out basically the same
4 way. Has any government expert satisfied that requirement in
5 this case?

6 A. None that I've read.

7 Q. Let's go beyond the government's experts.

8 Are you aware of any publication, any scientific
9 publication, that actually takes the criteria that we have here
10 for causation and applies those criteria to the relationship
11 between our ads and smoking initiation?

12 Is there any publication that actually goes ahead and
13 applies those criteria to that particular relationship?

14 A. Only in an indirect way, the econometric studies address it
15 through aggregate consumption. They don't have good measures of
16 initiation.

17 So the short answer is no. But you could say, well,
18 embedded in the econometric evidence, which we discussed earlier
19 as being mixed bag studies, you could say, well, initiation is
20 part of a dependent variable that's jumbling many dimensions of
21 smoking.

22 So I think the short answer is no. The qualified
23 answer is there's been attempts that have been unsuccessful by
24 using aggregate outcomes.

25 Q. Using the Surgeon General's own definition in 2004 of what

1 it means to say causation -- that is, when the same person is
2 observed with and without a purported cause and without changing
3 any other characteristic, a different outcome would be
4 observed -- would that basic definition that's been, the Surgeon
5 General says, in place as far back as the 1700s, are you aware
6 of any publication that demonstrates that that standard has been
7 achieved when it comes to the relationship between our
8 advertising and initiation?

9 A. No. But you have to be careful. When I say no, I say no in
10 a documented clearly stated way.

11 I haven't read every publication, so I can't say what
12 the claims are, but I've looked hard for the claims in the
13 literature, and the references that I rely on do not claim this.
14 They, in fact, claim it's tough to find it.

15 Q. Let's go to the next question. It's been said -- it was
16 pointed out from Dr. Eriksen -- or I should say more
17 specifically.

18 The government put you questions yesterday suggesting
19 that, at least in Dr. Eriksen's view, cause was taken to mean
20 sole cause. I want to ask you questions about that.

21 All of the criteria, all of the discussion we've had
22 about the epidemiological text, Surgeon General, these criteria
23 here, are these criteria that have been developed just to look
24 for sole cause?

25 A. No.

1 Q. Tell us what is the typical situation where these criteria
2 are so important.

3 A. Well, again, the even the term specificity is suggesting
4 possibility of multiple causes. I mean, in any complex study of
5 human behavior, and even for that matter chemical and animal
6 behavior, we find multiple causes, multiple factors, like we
7 already mentioned two on the table here in this case. One is
8 price, the other is media advertising, and as well as parental
9 influence, maternal smoking, maternal drinking, and so forth and
10 so on.

11 Q. Let's talk about what Dr. Eriksen said on cross-examination
12 on this very issue before he was asked the question by the
13 government on redirect. I want to read to you at page 11486,
14 line 19.

15 "Would you agree with me that even where you have
16 multiple factors, no one of which is either necessary or
17 sufficient to produce a result, it's still appropriate to refer
18 to those factors as being causal, if the tests for causation are
19 met? Would you agree with that?"

20 And his answer was there, "Yes."

21 Would you agree with Dr. Eriksen's statement that even
22 in a multiple factorial situation, if you got one cause among
23 many, it's still appropriate to call it a cause.

24 A. If you -- I mean, it's appropriate to call it a cause as a
25 theoretical idea. To say you've isolated the cause in data, you

1 really have to argue convincingly you've held the other factors,
2 the other causal factors constant.

3 So the answer is yes, multiple factors are an essential
4 part of almost any --

5 THE COURT: But your answer is that you agree with him
6 even with his statement that no one of those multiple factors is
7 sufficient to produce a result, i.e., a change in outcome with
8 the addition or the elimination of that factor?

9 THE WITNESS: Well, there's an interpretation here.

10 What you could say -- I mean, this is more of a
11 complexity here. But one could say that if one factor alone
12 were present, but another factor weren't at work, weren't joined
13 with it -- it's a little bit like planting a seed and then
14 watering it -- both are causal factors for the actual growth of
15 the plant. So you need the two conjoined together to actually
16 produce the growth of the plant.

17 And that would also be true, for example, in certain
18 kinds of disease interactions where you get -- so that's one
19 reading of this. I mean, there are multiple readings of this
20 notion about multiple factors.

21 But there's a simpler reading which was to say, Well,
22 you could have multiple potential factors that you would
23 consider, many of which you might rule out. They might be
24 logically plausible if you talk to it and think about it, just
25 abstractly, there might be multiple causes. They might not

1 actually survive a test, an empirical test for causality. But
2 if there are reasonable people and reasonable causes out there,
3 then you want to hold those constant and control for it, because
4 reasonable people would think this might be a factor that gives
5 rise to the outcome. So two different notions.

6 MS. BROOKER: I'm sorry. I was going to say, not to
7 interrupt at all, but I'm just concerned about Dr. Heckman's
8 time. I'm just letting you know.

9 THE COURT: I'm sure Mr. Bernick is watching it.

10 MR. BERNICK: I'm very concerned.

11 THE COURT: And people are watching it.

12 BY MR. BERNICK:

13 Q. Where you have potential causes A, B, and C and one outcome
14 that you're looking for, and B cause is the outcome, C causes
15 the outcome.

16 And I want you to assume that A is not necessary. It's
17 not necessary because the outcome can be caused by B or C. It's
18 not sufficient by itself to cause that outcome. But when it's
19 present, the outcome more often occurs than it does when it's
20 not present.

21 Would A still be a cause of the outcome?

22 A. Well, it's another -- I mean, your question embeds in the
23 idea that the outcome is a discrete event. You either get sick
24 or don't get sick.

25 You can imagine a statement about how much -- not just

1 to use smoke or not, but how many cigarettes a day you smoke, or
2 how much -- you know, how high your temperature is.

3 But the point is that if B and C are more likely in a
4 statistical sense when everything else is held constant to
5 produce the outcome, and then A is added to the mix, and it also
6 raises it when you hold B and C constant, that's an
7 interpretation of a cause, yes.

8 Q. Now, I want to get to substantial contributing factor and
9 then I've got one more topic and we're done, and I still think
10 we can get done in about 10 minutes because it shouldn't take
11 very long.

12 There's been discussion brought to your attention by
13 Dr. Eriksen where he talks about substantial contributing
14 factors. Are you familiar with those terms being used by
15 Dr. Eriksen?

16 A. Yes, I read that, I believe, in his report, but I'm not sure
17 I'm familiar with the term, though. It came up before.

18 Q. Do you remember Dr. Krugman? I'll show you J-DEM 010385.

19 Do you remember his using various terms to talk about
20 advertising relationship -- including the advertising and
21 promotion play an important role, that there's an influence and
22 that he doesn't want to use the word causal.

23 Do you remember that in Dr. Krugman?

24 MS. BROOKER: Your Honor, I would object to this as
25 being beyond the scope of my cross-examination, and this expert

1 explicitly said in his written direct examination that he was
2 responding to the testimony of Dr. Eriksen, not Dr. Krugman, and
3 I didn't ask him any questions about Dr. Krugman's opinions.

4 MR. BERNICK: We would seek to establish this is
5 directory relevant because he was asked all kinds of questions
6 about substantial contributing factor. And what I want to
7 establish is Dr. Krugman and Dr. Biglan actually stay away
8 from -- stay away both from cause and substantial contributing
9 factor.

10 THE COURT: But I don't think that Dr. Krugman was
11 mentioned at all in the direct examination.

12 MR. BERNICK: Fine. Then I'll talk about Dr. Biglan.
13 BY MR. BERNICK:

14 Q. Do you remember Dr. Biglan -- showing you J-DEM 010387 --
15 talked about influence as his term in talking about the
16 relationship between advertising initiation?

17 MS. BROOKER: This is beyond the scope for the same
18 exact reason that Dr. Krugman's was beyond the scope.

19 Asking this witness any question about Dr. Biglan is
20 beyond the scope of his written direct and my cross-examination.

21 MR. BERNICK: If counsel will represent to the court
22 that there wasn't a single question about Dr. Biglan, I'll push
23 on, but I think that there was.

24 MS. BROOKER: I really don't think so, Your Honor. We
25 asked -- maybe Mr. Bernick did, but it is beyond the scope of

1 the written direct and my cross.

2 MR. BERNICK: Let's go --

3 THE COURT: The issue is whether it's beyond the scope
4 of cross.

5 MS. BROOKER: Yes.

6 MR. BERNICK: I don't have time. I'll just push on,
7 Your Honor.

8 BY MR. BERNICK:

9 Q. I want to go through exactly what happened with respect to
10 Dr. Eriksen. Do you recall from Dr. Eriksen's expert report he
11 use the words "substantial contributing factor"?

12 A. I do recall that term, yes.

13 Q. Does he, in his written direct examination, again, does he
14 talks about substantial contributing factor?

15 A. Yes.

16 Q. Do you recall that in his live direct examination part of
17 the transcript, he says the only way you could establish cause
18 was through a randomized controlled trial, which hadn't been
19 done?

20 A. There's some people who believe that, yes.

21 Q. And do you remember that on cross-examination we got
22 colloquy like this.

23 "Question: As you've just said, you're not aware of
24 anybody who uses the word cause; correct?

25 "Answer: I said I'm not aware if anyone is now.

1 "Question: And, in fact, you don't use the word cause.
2 You said substantial contributing factor."

3 And his answer was "Yes."

4 Do you recall that?

5 A. Yes, I do remember this. I looked at the transcript.

6 Q. So now we get to the redirect examination and the question
7 that was put to you, the portion of the transcript that was
8 shown you with respect to Dr. Eriksen, in the words that were
9 used --

10 MR. BERNICK: And the emphasis obviously is ours, Your
11 Honor.

12 Q. -- was, "Question: So by choosing the term "substantial
13 contributing factor," you meant to indicate that marketing was
14 one cause among many?

15 "Answer: Yes, I meant it to mean a cause, but not the
16 cause. A cause, but not the cause."

17 Do you see that?

18 A. Yes, I do.

19 Q. Tell me, Dr. Heckman, is it a fact or not, do you know one
20 way or another whether, in fact, it was only and for the first
21 time in the redirect examination that Dr. Eriksen decided to
22 say, Oh, by choosing the term substantial contributing factor, I
23 really meant cause?

24 A. No. I was surprised by that when I read it, yes, if that's
25 what you mean. It hadn't been there before and it wasn't there

1 in the materials he relied on.

2 Q. Counsel didn't show you other parts of the examination that
3 I'm going to show you now and go through them quickly.

4 Do you recall that in the cross-examination of
5 Dr. Eriksen when he was asked whether a substantial contributing
6 factor, where it had been used by him before, those terms, that
7 the only place he was able to identify was legal proceedings?
8 Do you remember that?

9 A. Dimly, yes. But yes, I see it here. This is from his --

10 Q. Testimony on cross-examination.

11 A. Testimony on cross-examination, yes.

12 Q. Is that -- are you aware of any place where the term
13 "substantial contributing factor" had been used other than in a
14 legal setting?

15 A. Well, there a whole literature about what "substantial"
16 means. I mean, yes. I mean, it's a term that's common, so
17 people use it in empirical studies.

18 But there's a huge controversy surrounding it because
19 it's so ambiguous, it's not precisely defined, and there's no
20 agreement by what substantial means, unless you give a number
21 and say this is the magnitude of something.

22 Q. Well, that's why I then asked him at 11494, line 22.

23 "Question: And there is no established scientific
24 methodology that gives us a test that's accepted in the
25 literature for what constitutes a substantial contributing

1 factor, is there?

2 "We can't go to the textbooks of epidemiology. We
3 can't go to the textbooks of science and see an authoritative
4 methodology for defining when it is that you have a substantial
5 contributing factor, can we?

6 "Answer: Not statistically, and that's purposely it
7 was used substantially -- it was used to not imply statistical
8 significance."

9 Is that consistent with your understanding about why in
10 the way in which substantial contributing factor was used by
11 Dr. Eriksen, that is it was used not to imply statistical
12 significance?

13 A. Well, unfortunately, the word "significant" is misused a
14 lot, and I think people go back and forth and he may have in
15 this context.

16 People use it in the sense of a precise statistical
17 association, a big association. But the actual magnitude of the
18 empirical relationship, even if it's strongly established, may
19 be very, very weak.

20 People go back and forth with these two notions and
21 it's very hard to actually separate that out in popular
22 discussions in many areas of science and social science.

23 So I think here is an example where he's going back and
24 forth or at least he's trying to say no, it's not statistically
25 significant, it's, quote, big, substantial, but he never says

1 how big is big.

2 Q. Then the next question is, "The answer to my question is
3 that we can't go to the literature and find that established
4 methodology that tells us when that test is met; correct?

5 "Answer: I would agree with that, yes."

6 Would you agree with Dr. Eriksen's testimony that we
7 cannot find an established methodology in the literature to tell
8 us when that test is met?

9 A. Well, I wouldn't call it a test, I would call it a
10 description. And I think it's again a question of how big is
11 big. Is big -- you know, is big 300 or is it 3,000? That's
12 meaningless in the context.

13 3,000 deaths from a plane crash into a building is
14 enormous, you now. 3,000 ants killed in the Grand Canyon is
15 pretty small.

16 So you need a metric to measure against what the
17 outcome is, the cost, the consequences.

18 Q. Is there such an established metric published in the
19 literature, to your knowledge?

20 A. No, but a big literature going back 30, 40 years on both
21 sociology, economics, epidemiology also, because there's a
22 question of what you mean. You can only talk about big and
23 small relative to some criterion which has to be announced. You
24 have to say what's big and small. I mean, what's a big effect,
25 a big price effect. Elasticity of three can be huge but in

1 relationship to what?

2 Q. Here is the last excerpt I'm going to show you. Maybe it
3 just is repetitive of what you just said.

4 But at page 11853, again this is the cross-examination
5 of Dr. Eriksen at line 11.

6 "Oh, okay, 'substantial' means 'important', and
7 'contributing' doesn't necessarily mean 'statistically
8 significant' but it means 'important'?"

9 His answer is, "That it is a factor.

10 "Question: That it is a factor. Now, are you aware of
11 any objective methodology or test, a reproducible objective
12 methodology or test that tells us when a relationship is
13 'important'?

14 "Answer: No, not in the sense that you're meaning it.

15 "Are you aware of any objective reproducible test that
16 tells us when a relationship is 'substantial'?

17 "Answer: Not in those words. It's an issue of the
18 weight of the evidence and coming to a conclusion about the
19 influence of the factors.

20 "Question: Would it be fair to say that you're saying
21 that there is a 'substantial' or 'important' relationship
22 between cigarette advertising and youth initiation, is a
23 qualitative judgment of yours? Maybe based on evidence, but
24 it's a qualitative judgment of yours?

25 "Answer: It's qualitative in the sense that it's not

1 quantitative, but it's my conclusion based on the review of the
2 evidence."

3 Do we see there, Dr. Heckman, the same kind of
4 ambiguity that you were just describing in your last answer?

5 A. It's not precise in the sense that two people, objective
6 people without any axe to grind, would come along and agree this
7 was substantial. They would have to have more context.

8 And it's peculiar because three ideas are used here.
9 One is statistical significance.

10 One is the magnitude of an estimated effect which is
11 different from whether it's statistically significant. You can
12 have a huge regression coefficient and not be statistically
13 significant.

14 And third, this idea of a factor, which is like yet a
15 new idea, maybe this was just being pressed under testimony. I
16 wouldn't hold his feet to the fire, actually. It was a little
17 confused, yes.

18 Q. Is the term "substantial contributing factor" as described
19 by Dr. Eriksen in that last sequence of questions, if we used
20 that as a definition, is the conclusion that a factor is a
21 substantial contributing factor with all of the qualifications
22 that he gave, is that kind of conclusion one that is
23 scientifically reliable and reproducible?

24 MS. BROOKER: Your Honor, I have two objections to
25 that.

1 Number one, the testimony -- the deposition of
2 Dr. Eriksen on this point was like an entire day and, of course,
3 we are rushing through this now because Dr. Heckman has to get
4 on a plane. He has not been shown this transcript. Mr. Bernick
5 is taking these snippets out of context. So that would be my
6 objection.

7 MR. BERNICK: Trial transcript from this case.

8 MS. BROOKER: And he's leading.

9 THE COURT: Have you read the entire transcript of that
10 deposition?

11 THE WITNESS: You mean the examination and the
12 cross-examination?

13 MR. BERNICK: Your Honor, this was the trial testimony
14 of Dr. Eriksen and I'm entitled to have him comment on the trial
15 testimony.

16 THE WITNESS: I did read that. I did read that, not
17 recently.

18 MS. BROOKER: He's always leading, Your Honor.

19 BY MR. BERNICK:

20 Q. I'll put the question again.

21 If we use the definition of substantial contributing
22 factor that was given, to the extent that it was given by
23 Dr. Eriksen, would a conclusion reached that one factor was a
24 substantial contributing factor to an outcome, would that kind
25 of conclusion, based upon that definition, would it be

1 scientifically reliable and reproducible?

2 A. Well, because it's not well defined, no. I mean, the idea
3 of science, the idea of measurement is you have a scale that all
4 parties can read independently of subjective opinions.

5 So if he said he defined what substantial was, a range
6 between 1 and 6, and defined what 6 and 1 meant, then it would
7 be understandable anyway. Whether or not it would be
8 acceptable, the consequences are bad or good is another matter.
9 It's a little vague. It's ambiguous.

10 Q. Showing you the Surgeon General's Report, U.S. Exhibit
11 88847, the chapter dealing with smoking issues and statistical
12 and causal inference.

13 A. This is 2004?

14 Q. 2004. It says, "Given these implications, the grounds for
15 making the causal designation must be well-founded and clear."

16 Would you agree with that?

17 A. Oh, very much so.

18 The whole idea of the scientific process is you lay
19 your assumptions out and you make sure that anybody, even if
20 they hate you deeply, can at least reproduce what you said.
21 They can disagree with it, but they will not disagree with your
22 conclusion -- with your statements, I should say.

23 Q. Okay. Very briefly. It also says at page 24. "In this
24 report, language is used to make as clear as possible what kind
25 of statement is being made, and to avoid certain kinds of

1 ambiguities that are wide spread in the scientific literature."
2 Goes on to talk about certain words implying causal conclusions
3 by suggesting an active effect, and then talks about the
4 associated effect, contributor, increased risk.

5 It then says, "Such language often appears to be a
6 causal conclusion, albeit without consideration of all the
7 causally relevant evidence."

8 Would you agree with what the Surgeon General's Report
9 had to say there?

10 A. Well, I think he or she, whoever wrote this report -- or I
11 guess it was a committee report -- is basically asking for the
12 same kind of caution that I'm counseling against and any serious
13 person would raise, that association is not causation.

14 People slip into it all the time. Everybody slips into
15 it. I mean, it's -- I don't know if it's innocent always, but
16 it's a common mistake.

17 Q. It was brought out on cross-examination that you were not
18 involved in any kind of policy decision making with respect to
19 smoking and health in the government or otherwise; is that
20 correct?

21 A. That is correct.

22 Q. I asked Dr. Eriksen, "Isn't it true, Dr. Eriksen, that it is
23 a given, a given in the advocacy community, that advertising
24 encourages smoking? It's a given."

25 He says, "I would agree that it's a commonly-held

1 belief that advertising encourages smoking."

2 Are you familiar with that commonly-held belief among
3 the advocates.

4 A. There are many people who believe that, who state it in
5 writing.

6 Q. Finally, you were asked some questions about the
7 availability of data and I want to go through that relatively
8 quickly.

9 I want you to assume that the databases that counsel is
10 referring to are customer databases for tobacco companies. That
11 is, that the tobacco companies keep databases of who is a
12 customer, that they are not randomly sampled, and that they are
13 at least designed only to have people between the ages of 18 and
14 21 in the database. Not random, smokers or former smokers,
15 customers of a particular company, 18 or over.

16 Would that database be useful in studying initiation?

17 A. No. By definition, initiation you need to know the onset,
18 the how -- the incidence, I should say, of smoking. So you have
19 to take nonsmokers and ask how they transitioned to smoking.
20 That's what I was saying earlier when I was trying to get the
21 sense of the question.

22 Q. With regard to the request that you made concerning data and
23 the possibility of doing an original study, do you recall
24 whether one of the requests that was being made by you at that
25 time or perhaps by Lexicon was for funding to actually do some

1 original research and publish it? Was that also part of the
2 equation?

3 A. Well, this issue came up as to where the idea was.

4 My first impulse -- when the request initiated, whether
5 it was in the Blue Cross & Blue Shield case or this case here, I
6 would repeat even to this moment, that if I had data and
7 available to analyze these questions, I would, paid for or not.

8 Q. But historically, do you recall one way or the other. If
9 you don't, that's fine.

10 A. You mean in terms of when --

11 Q. When you first asked --

12 A. (Overtalking) I know I asked in the context of Blue Cross &
13 Blue Shield. That was historically prior to this case. That
14 would have been a question I asked anywhere any time.

15 Q. Do you remember there being any discussion of potentially
16 getting funding to do the study?

17 MS. BROOKER: Objection. He's already answered this.
18 This is the second time Mr. Bernick is asking the same question.

19 MR. BERNICK: I don't know if the witness has focused
20 specifically on the funding issue.

21 THE COURT: The objection is overruled. You may
22 answer.

23 A. It was simply looking -- I asked the data. The funding
24 issue, we never got that far. That's a separate question. One
25 might try to raise independent resources from other agencies to

1 look at this and it might be even more credible, so the funding
2 issue was totally separate.

3 Q. Now you did talk about the fact that there is data that's
4 already available to researchers that would facilitate the
5 process of doing a much better study and you repeatedly asked
6 for the article called The Last Straw, which is U.S.
7 Exhibit 73037.

8 Is this the article written by -- or where the
9 principal author is Dr. Pollay and that one of the coauthors is
10 Dr. Eriksen?

11 A. Yes, this is what I was asking for.

12 This is the study that I believe Dr. Eriksen -- he's a
13 co-author. He's the last author in this report. The last in
14 the sentence alphabetically -- listed last in the authorship
15 sequence.

16 Q. Now you've got the study, what about that study indicates
17 there may be data out there already available for purposes of
18 performing a better study?

19 MS. BROOKER: Your Honor, if we could ask Mr. Bernick
20 to be very specific in talking about the type of data because I
21 specifically asked about disaggregated geographical level data,
22 not the data in this Pollay, and I just think for the record to
23 be really clear we need to talk about and specifically know --
24 have Dr. Heckman explain what date is underlying the Pollay
25 article. It's different publicly available date that.

1 MR. BERNICK: That's just his -- it's just an argument,
2 Your Honor. I wanted to ask him a question that was nonleading
3 and completely open. I furnished him with the study.

4 THE COURT: Objection is overruled. That is argument.

5 If he wants to ask a question that's not responsive to
6 an issue that was raised in cross, that's Mr. Bernick's problem.
7 A. Actually, I said -- what I said earlier was wrong. I said I
8 could instantly find this. And this is my memory failure.

9 They are reporting -- I'm just trying to find -- maybe
10 somebody on either side, by the way -- I'm not trying to -- just
11 show me the definition of the advertising variable.

12 They do definitely talk about advertising and brand
13 switching.

14 Q. Do you recall if this study deals with share --

15 A. (Interrupting) It's share, correct, but it does have data.
16 This is what fascinated me.

17 And, actually, it was kind of like the dog that didn't
18 bark question that arose when I read this paper, which they
19 seemed to have data which would be possible, given their
20 advertising data, which I need to find here still on this paper,
21 to determine initiation.

22 They actually had random samples of people. They only
23 looked at people who were smokers and looked at brand switching.
24 But with these same data you could, in principle, look at
25 whether or not their measure of advertising -- which I can't

1 find for this second -- brand advertising aggregated in some way
2 to a cross brands, just some measure of aggregation would
3 actually cause initiation.

4 MS. BROOKER: I would just like to lodge an objection.
5 That last question was incredibly leading of Dr. Heckman.

6 MR. BERNICK: I suppose at this point if that's true,
7 it's no longer so incredible.

8 BY MR. BERNICK:

9 Q. Dr. Heckman, in order to expedite this, we have put -- I'll
10 tell the court this as well -- we have tabs at pages 10 and 17,
11 if that helps at all. It's my way of expediting this process.

12 A. Let me see this. Okay, yes. 10, I have.

13 I don't have any tabs here, but I see pages 10 and 17,
14 yes. 17, my paper stops at 16.

15 Q. Then it can't be 17.

16 A. Yeah.

17 Q. It's a fairly significant point. I would like to really
18 give him an opportunity to review the article, but it's getting
19 very late.

20 A. What I'm saying here is that I think it's possible from my
21 knowledge. This is now a rough recollection. If somebody could
22 direct -- can anybody in this room just tell me --

23 THE COURT: Doctor, that's just not the way we do it.

24 THE WITNESS: I understand. But I'm saying it's a
25 factual question here. I'm just looking at this data, because

1 if I sat here for -- I'm kind of scanning at random under a
2 little bit of pressure. And --

3 MR. BERNICK: Let's give the Doctor a couple of
4 minutes.

5 THE WITNESS: Here it is, I'm sorry. It's on the
6 bottom of page 7.

7 It's the bottom of page 7. The final column of this
8 handout. It says we obtained brand specific advertising
9 expenditures for the years 1974 to 1993 from the competitive
10 media reporting. Okay. This group showed annual expenditures
11 by brand in each of the following medias.

12 And then they show magazine, newspaper, Sunday
13 supplement and outdoor, and they used total expenditures. So
14 these are media. Data collected before 1988 do not include
15 newspapers.

16 So I don't want to keep reading what's here to be read
17 by everyone. But it's the bottom of 7 and top of page 8.

18 Then the data that they use consist individuals, some
19 of whom were not smoking. So they could have used this data.
20 And it amazed me. They did not use the data. And it leads to
21 suspicion. It's only a suspicion. I have no proof. But it's
22 odd, given the centrality of this issue that they did not
23 consider initiation as another variable outcome of this study.
24 And I think somebody should do it.

25 Q. Did you see Dr. Siddarth is an author?

1 A. Yes. He's a second author in this list. Siegel is another
2 author and those are other names we've seen before.

3 Q. The data that you're referring to, is that disaggregated by
4 brand?

5 A. Yes. That's the idea, is to see brand switching. What they
6 reporting here is brand switching across items.

7 Q. Is it also disaggregated by the type of media?

8 A. Well, they do have the data. They report they added it up,
9 though, in the sentence I just read, so it's when -- they
10 added -- they added it up. But they say we used total
11 expenditures over all four media. They could have reported
12 disaggregated measures.

13 Q. Do we know one way or another whether it was possible with
14 that data to disaggregate down to geographic areas? Do we know?

15 A. I do not know that. Do not know that.

16 MR. BERNICK: I have nothing further, Your Honor,
17 except to renew the proffer that we had originally where the
18 government apparently wanted to reserve. The proffer was of
19 Dr. Heckman as an expert economist and also as an expert in the
20 statistical analysis of human behavior.

21 THE COURT: Does the government need to argue that?
22 Are you still contesting?

23 MS. BROOKER: We would just object. Of course, we
24 would not object to Dr. Heckman being offered as an economist,
25 but the phrase yesterday that was used slightly different than

1 what Mr. Bernick said. Today was an expert on the empirical
2 analysis of human behavior, and I can't imagine any topic that
3 would not be covered by that.

4 I mean, clearly Dr. Heckman has not held himself out to
5 be an expert on all human behavior. He clearly established that
6 he's not an expert, for example, on risk perception or smoking
7 behavior relative to price because he hasn't done any work in
8 that area, and saying that --

9 THE COURT: Ms. Brooker, we can argue that out of the
10 presence of the witness.

11 MR. BERNICK: The only thing I'm concerned with, Your
12 Honor, the proffer is not that this witness actually has
13 analyzed data from all fields of human behavior. It's the
14 methodology. That's the nature of the proffer.

15 And if there is going to be some objection, and this is
16 going to be decided, I've got the witness here. I'm not going
17 to have him back, I know that. If there's anything further that
18 ought to be in the record, this is -- I'd like to be able to ask
19 any follow-up questions.

20 THE COURT: I think the record is complete enough on
21 the issue. I do.

22 Dr. Heckman, you may step down at this time.

23 THE WITNESS: Thank you.

24 MR. BERNICK: Is there any need for us to keep the
25 original notes here, Your Honor?

1 THE COURT: Oh, I don't think the originals are
2 necessary. I'm not going to keep my copy, so counsel better
3 keep theirs if you think you're going to need them.

4 MR. BERNICK: They have been marked as exhibits.

5 THE COURT: Don't we have a copy of the typed?

6 MR. BERNICK: Yes, we have a copy of both.

7 THE COURT: We have copies of everything, so you take
8 what you need for your files.

9 At this point I want to call Mr. Singer forward. He's
10 been waiting a long time and I asked him to wait because I
11 thought there was an urgency in terms of getting all of
12 Dr. Heckman's testimony on.

13 MR. SINGER: Thank you, Your Honor.

14 THE COURT: And just so that Mr. Wells knows, we're not
15 going to start the testimony of the next witness. We will take
16 a lunch break when we are done with this discussion and just
17 figure it will be somewhere between a quarter of 2:00 and 2:00
18 o'clock, Mr. Wells.

19 MR. WELLS: Your Honor, when the discussion is
20 finished, would you inquire of the government as to how long
21 they think the cross-examination will be?

22 THE COURT: Ms. Brooker?

23 MS. BROOKER: Your Honor, I think I said two and a half
24 to 3 hours remaining, and we will certainly be keeping it under
25 that amount of time. It will be less than 3 hours.

1 THE COURT: All right.

2 MR. WELLS: Thank you.

3 THE COURT: Mr. Singer.

4 MR. SINGER: Very briefly, Your Honor, I just would
5 like to get the court's agreement, and I think that the
6 Department of Justice and joint defendants are in agreement with
7 this as well, that Dr. Mulholland's corrected transcript be
8 filed by 5 PM on Wednesday, April 20th, and that his testimony
9 occur -- joint defendants requested Monday April 25th. He is
10 available that date. There's nothing magic from the FTC's
11 perspective with that, but that's fine with us.

12 MS. EUBANKS: That's fine with the United States in
13 terms of the timing, Your Honor.

14 You will recall that we do have a brief due to the
15 court tomorrow by 5:00 o'clock dealing with scheduling issues.
16 We will take this into consideration as we propose a schedule
17 for the court in terms of the remaining testimony and going
18 forward. But that's certainly not a problem with us.
19 Mr. Singer has explained the nature of the request and we
20 certainly don't object.

21 MR. REDGRAVE: Your Honor, Jonathan Redgrave for the
22 defendants. We also do not object to the FTC.

23 THE COURT: There must be something wrong with this if
24 all of you agree to it.

25 MR. REDGRAVE: Yes. You're suspicious, I know.

1 Your Honor, with respect to this, just so you know the
2 schedule of the briefing.

3 With the other adverse witnesses, the objections come
4 in -- I think the FTC is going to file some papers with the
5 corrected written direct on the 20th at 5:00 o'clock.

6 I understand that the government, meaning the plaintiff
7 in this case, wanted until the 22nd to file their papers with
8 respect to objections, and we, too, get the opportunity to file
9 the response to what the FTC files, and we were talking about
10 doing that both at 5:00 o'clock on Friday, the 22nd.

11 The strange item that this raises is typically under
12 471(a) we would get a chance to reply to whatever the
13 government, the plaintiff, would file in this case and that
14 would mean we would have an opportunity on Saturday, the 23rd,
15 if we chose to file a reply on anything to -- we would propose
16 doing that by 5:00 o'clock, just getting it to you somehow on
17 Saturday. I don't know how extensive that will be. We are
18 going to try and cover most of it in our response to the FTC's
19 filings on Friday.

20 So, in sum, the FTC files their papers 5:00 o'clock on
21 Wednesday the 20th, including the corrected written direct.
22 That will be filed in ECF.

23 The Department of Justice and the defendants file their
24 responses to that on the 22nd at 5:00 o'clock, and the
25 defendants then would file a reply to the Department of Justice

1 papers, if necessary, on the 23rd at 5:00 o'clock.

2 THE COURT: Well -- and I'm also informed that ECF is
3 not going to be operative on the 23rd.

4 MR. REDGRAVE: I think that notice from Mr. Burgess was
5 about this weekend, Your Honor.

6 THE COURT: Correct.

7 MR. REDGRAVE: I don't know if it's going to be working
8 the next weekend or not, but we have not been told about any
9 problem.

10 Your Honor, if that's acceptable, then we will proceed
11 on that schedule. There's one other item I did want to raise on
12 scheduling that Mr. Webb asked me to raise.

13 THE COURT: Well, that schedule is acceptable.

14 Mr. Singer --

15 MR. SINGER: Yes, it is.

16 THE COURT: -- you may be excused and I'm sorry about
17 the long delay this morning.

18 MR. REDGRAVE: Your Honor, Mr. Webb asked me just to
19 raise the issue with respect to interim summation for the
20 defendants. We were thinking of doing that on Thursday, the
21 21st.

22 I know we're going to have continuing testimony from
23 the witnesses we have right now into next Monday. I know we had
24 talked about maybe having a couple of days, but we were thinking
25 the 21st is a date we would like to do this. And then, of

1 course, with the caveat Mr. Bernick noted the other day, and
2 that Your Honor recognized, that obviously to the extent there
3 is any discovery going on, then that might impact that date. So
4 I wanted to bring that to the court's attention.

5 THE COURT: Well, certainly by Sunday night schedules
6 will be in place. And the interim summations will take place
7 sometime after the 18th, because you're going to need that
8 much -- defendants have one more witness after Mr. Willard,
9 Mr. Beran is his name.

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

11 THE COURT: His written direct was lengthy. I don't
12 know that the cross will be. Who is going to do the cross?

13 MS. BROOKER: Patrick Klein, Your Honor, will be doing
14 the cross. I believe we gave an estimate -- didn't we give an
15 estimate of 3 hours?

16 MR. REDGRAVE: That's correct.

17 THE COURT: And so he will probably take Monday. That
18 leaves Tuesday, Wednesday, Thursday open for interim summations.
19 Meaning available, not that we're going to do them that long.

20 Is Mr. Webb available Tuesday, Wednesday, Thursday?

21 MR. REDGRAVE: Your Honor, I think part of the issue is
22 that his schedule may not allow him. That's why he wanted me to
23 raise it. The 21st is the preferred date. Again of course
24 making sure that we don't run into problems with the discovery
25 that Your Honor is looking at.

1 THE COURT: All right. So Thursday needs to be set
2 aside definitely.

3 We will follow the preexisting time allocations, namely
4 you're going to have an hour and a half, the government will
5 have an hour and a half, and therefore we ought to be done by
6 the end of a long morning on Thursday.

7 MR. REDGRAVE: I think that's right, Your Honor.

8 THE COURT: And people will be excused that afternoon
9 unless we want to do a small amount on exhibits and we will get
10 to that later.

11 I will say that we will have to recess at 2:30 that
12 day. 2:45 at the latest, but 2:30 probably would be better.

13 MR. REDGRAVE: That should work, Your Honor.

14 MS. EUBANKS: Thank you.

15 THE COURT: And, therefore, we will take a lunch recess
16 until a quarter of 2:00. We will resume with Mr. Willard's
17 testimony. And you're not going to get it done this afternoon,
18 Ms. Brooker, are you?

19 MS. BROOKER: Yes.

20 THE COURT: You're not going to get your cross done.

21 MS. BROOKER: I will try to. Yes, I will absolutely
22 try to get it done this afternoon.

23 MR. BERNICK: How does Your Honor want to leave the
24 outstanding objection by the government to the witness's
25 qualifications?

1 THE COURT: No. We should do that right after lunch
2 and get that resolved on the record.

3 MS. BROOKER: Thank you.

4 (Lunch recess began at 12:34 p.m.)

5 INDEX

6 WITNESS: PAGE:

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9 REDIRECT EXAMINATION BY MR. BERNICK 18990

10 *****

11 *****

12 *****

13 CERTIFICATE

14 I, EDWARD N. HAWKINS, Official Court Reporter, certify
15 that the foregoing pages are a correct transcript from the
16 record of proceedings in the above-entitled matter.

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19 Edward N. Hawkins, RMR

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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 14, 2005
	.	
Defendants.	.	
.	.	

VOLUME 93
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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1 AFTERNOON SESSION, APRIL 14, 2005

2 THE COURT: Good afternoon. Sorry I'm so late, everybody.
3 Does the government want to make a final argument on the issue of
4 the extent of the last witness's expertise?

5 MS. BROOKER: Very briefly, Your Honor. I mean, obviously
6 the government is not contesting that Dr. Heckman is a qualified
7 economist. Really, our objection would be very similar to the
8 objection Mr. Bernick stood up here and made on behalf of
9 defendants when we offered some of our own experts, including
10 Dr. Harris, as an economist and then went on to describe him with
11 more particular description for purposes of this litigation, and
12 we withdrew that and offered in the example of Dr. Harris, we
13 offered him as an economist over -- as a result of the objection.
14 Here, obviously, Dr. Heckman was qualified as an economist, we
15 don't object to that, and I'll just say that no one could be
16 expected to not object to a proffer that is as broad as a proffer
17 as an expert on empirical analysis of human behavior. The
18 witness himself was very careful to convey to the Court the
19 limitations of his own expertise. He clearly said he's not an
20 expert in certain types of human behavior, such as he's not an
21 expert in risk perception, he's not an expert in the sense -- you
22 know, him and Dr. Chaloupka are both economists and
23 econometricians, but clearly he was not going to say that he had
24 expertise as Dr. Chaloupka did in the area of smoking behavior
25 and prices' affects on it. So our objection is that's just too

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1 broad empirical analysis of human behavior, every word in there,
2 even when strung together, is an overly broad statement and it's
3 just prejudicial to have that qualification.

4 THE COURT: Mr. Bernick very briefly.

5 MR. BERNICK: I don't really have an argument, but I
6 located something over the lunch hour that might be helpful, and
7 here's a copy for the government as well. But we went back to
8 get the announcement by the Royal Swedish Academy of Sciences of
9 the award of the Nobel Prize to Doctors Heckman and McFadden,
10 they shared the prize that year, and I thought the description --
11 I'm sorry if it's jiggled here -- was useful, because as we
12 indicated, the importance of the additional language in our
13 proffer is to recognize Dr. Heckman's particular -- not only
14 specific, but a broader expertise than simply an economist. He
15 has an additional expertise in certain kinds of methods, and I
16 think the method is properly described in our proffer, and it
17 just happens to marry pretty well to what's being said in this
18 announcement of the prize. "The methods they have developed" --
19 that is referring both to Dr. Heckman and to Dr. McFadden --
20 "have developed solid foundations in economic theory, but have
21 evolved in close interplay in applied research on important
22 social problems. They are now standard tools, not only among
23 economists, but also among other social scientists." And that's
24 exactly what we're talking about in the proffer.

25 THE COURT: It's been made clear that Dr. Heckman is being

1 offered for his expertise, not just as an economist, of course,
2 or as an econometrician -- I always have trouble with that word
3 myself -- but for the particular methodology that he has
4 developed and applies in trying to evaluate causation vis-a-vis
5 human behavior, and in using empirical data to evaluate social
6 programs that either benefit or don't live up to their promise of
7 benefitting people in terms of social and economic problems that
8 they face in our society.

9 So, it isn't that he is claiming to be an expert in the
10 empirical issues relating to all human kinds' problems, but
11 rather that he has developed a specific mode of analysis, which
12 clearly he is expert in, and that's what he will be accepted for
13 and recognized in.

14 Now, how that analysis plays out, how that analysis
15 compares to arguably different models used by other people, will
16 be for me to work through and figure out, but he is accepted as
17 an expert in the fields for which he was offered.

18 MR. BERNICK: Thank you.

19 THE COURT: I think we're ready at this point to proceed
20 with our next witness.

21 MS. BROOKER: Thank you, Your Honor.

22 THE COURT: Mr. Willard, you are still under oath this
23 afternoon.

24 MS. BROOKER: We removed his exhibits, the ones we already
25 used. Can you just check on them in case we're going to refer to

1 them again?

2 MR. WELLS: May I?

3 THE COURT: Yes.

4 CONTINUED CROSS-EXAMINATION OF HOWARD A. WILLARD

5 BY MS. BROOKER:

6 Q. Good afternoon, Mr. Willard, how are you feeling today?

7 A. I'm fine, thank you.

8 Q. Okay. I think you have some water up there if you need
9 it.

10 A. Yes, I do, thank you.

11 Q. Now, just a follow-up to where we left off on, I believe
12 it was Monday afternoon. Just briefly I wanted to go back
13 over -- I had asked you about Philip Morris parent brochures.
14 Do you recall that toward the end of the day?

15 A. Yes, I do.

16 Q. Okay. And you had testified that the focus of the
17 brochures was on encouraging people to talk to their kids about
18 not smoking. Do you recall giving that testimony?

19 A. Yes, I do.

20 Q. Okay. And I had asked you about peer-reviewed literature
21 on parent brochures. Do you recall that as well?

22 A. Yes, I do.

23 Q. All right. Charles, if we could call up Dr. Biglan's
24 written direct examination at 413, line 3.

25 Do you have these exhibits up here, copies?

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1 MR. WELLS: Your Honor, could I just have a standing
2 objection with respect to the witness being shown the testimony
3 of other experts?

4 THE COURT: Yes.

5 MR. WELLS: Other experts.

6 BY MS. BROOKER:

7 Q. Now, we are trying to locate those exhibits, Mr. Willard.
8 I'm going to ask you my question. If you can answer just by
9 looking at what's on the screen you should do so, if you feel
10 you need a copy of the exhibit, hopefully it will be up by then.
11 But I'm just directing your attention -- and you've already
12 testified that you've not seen Dr. Biglan's expert report or his
13 written direct testimony, correct?

14 A. That's correct.

15 Q. Okay. If you look at page 413, line 3, Dr. Biglan is
16 asked about studies and he answers, "My colleagues and I
17 conducted a study in which we randomly assigned parents to
18 receive or not receive a set of four mailed messages designed to
19 encourage parents to set rules about tobacco use. There was no
20 evidence that the messages deterred smoking." And then he cites
21 a peer-reviewed paper which is Biglan, Glasgow, Ary, et al.,
22 1987. Do you see that there?

23 A. Yes, I do.

24 Q. Now, are you familiar with that peer-reviewed paper?

25 A. No, I'm not.

- 1 Q. Okay. You've never seen it before or reviewed it?
- 2 A. No, I haven't.
- 3 Q. And it goes on, "there may be two reasons such messages
4 were ineffective, first the messages may be ineffective in
5 prompting parents to talk to their teenagers. Second, the
6 parents may not be very effective in talking to their teenagers.
7 Many families with teenagers at risk to smoke have a lot of
8 conflict between parents and teens. For a parent merely to tell
9 an adolescent not to smoke might simply motivate the teenager to
10 defy his or her parent." Do you see that?
- 11 A. Yes, I do.
- 12 Q. Now, I want to just ask you about the one other research
13 study at page 413, line 14, same document. Dr. Biglan describes
14 other research, and he indicates in one project, "my colleagues
15 and I at Oregon Research Institute did preliminary work in which
16 we flooded a small community with pamphlets urging parents to
17 talk to their children about not using tobacco. Despite the
18 fact that we distributed enough pamphlets to reach virtually
19 every parent of a 6 through 12th grade student in the community,
20 survey data indicated that we had no discernible effect on
21 parents actually talking to their children about tobacco use."
22 And then he cites another peer-reviewed paper, which is 1996,
23 Biglan, Ary, Yudelson, do you see that?
- 24 A. Yes, I do.
- 25 Q. Now, have you ever seen or heard of that peer-reviewed

- 1 paper?
- 2 A. No, I have not.
- 3 Q. All right. And you haven't studied it then, apparently?
- 4 A. No, I have not.
- 5 Q. Well, I want to show you -- talk about the types of
- 6 research that Philip Morris has conducted on one of your parent
- 7 brochures. You testified about the Start Talking brochure aimed
- 8 at parents; is that right?
- 9 A. Yes, that's correct.
- 10 Q. Okay. Let's look at your written direct at 48, line 17
- 11 to 22. And you can always open your book up there if you're
- 12 interested.
- 13 And on lines 18 and 19 you indicated "prior to the
- 14 Raising Kids Who Don't Smoke series we published a brochure in
- 15 2001 entitled Start Talking To Your Kids About Not Smoking.
- 16 That would be the time period for that brochure?
- 17 A. Yes, that's correct.
- 18 Q. Okay. I want to show you an exhibit which is marked as
- 19 JD 052971. Do you recall -- before I start asking you detailed
- 20 questions about this, do you recall being asked about this
- 21 document at your deposition in this case?
- 22 A. Yes, I do.
- 23 Q. Okay. So you're familiar with this particular document?
- 24 A. Yes, I have some familiarity.
- 25 Q. All right. And it's a document dated August 15, 2002

1 from Strategy One; is that right?

2 A. That's correct.

3 Q. And you were the Senior Vice President of Youth Smoking
4 Prevention at that time -- during that time period in August of
5 2002?

6 A. Yes, that's correct.

7 Q. Okay. And Strategy One is an outside contractor that
8 consults with Philip Morris USA, would that be accurate?

9 A. Yes, that's correct.

10 Q. They're a research organization?

11 A. Yes, that's correct.

12 Q. Okay. Now, this Strategy One document reflects a
13 research study by Philip Morris which compared the Start Talking
14 brochure and a web -- a similar Website brochure; is that
15 correct?

16 A. Yes, that's correct.

17 Q. Okay. And it was a message check kind of research study;
18 is that right?

19 A. Um, yes, I think it -- it was a message testing study,
20 yes.

21 Q. All right. If you will turn to -- and I'm going to have
22 to refer to a couple documents that are part of this exhibit, so
23 I'll refer to the Bates numbers on the side. PM 3002404704. So
24 you're basically looking for 704 is the last three numbers of
25 that document.

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- 1 A. Okay.
- 2 Q. Charles, is there a way for you to find it with the Bates
3 number?
- 4 Okay. And if you would look where it indicates "research
5 objectives". Now, this indicates what the research objectives
6 for this particular Strategy One survey was; is that right?
- 7 A. Yes, that's correct.
- 8 Q. Okay. And it indicates there, "Philip Morris needs to
9 ascertain which of the two brochures is more effective in
10 impacting its responsibility scores, which brochure better
11 communicates responsible behavior and which is more likely to
12 make recipients feel more favorable to PM USA. In addition to
13 determining if either brochure is more likely to drive
14 readership or Web use"; is that correct?
- 15 A. Yes, that's correct.
- 16 Q. Okay. And then there's an outline that identifies the
17 components necessary to measure the effectiveness, right?
- 18 A. Yes, that's correct.
- 19 Q. Okay. Now, when we flip back to the beginning of the
20 document, we find what the key findings of that research were,
21 correct?
- 22 A. Yes, I think that's correct.
- 23 Q. All right. Based on that being the objective that we
24 just read?
- 25 A. Yes, that's correct.

1 Q. Now, there were 200 interviews in a mall intercept study,
2 which means you go into a mall and you stop people in the mall
3 and you ask them questions; is that correct?

4 A. Right. I do think it's important to point out that this
5 research was not done for the Youth Smoking Prevention Group,
6 and this research was actually analyzing not the Bureau sure per
7 se but the free-standing insert as it states in this research.
8 So --

9 Q. But it was the same --

10 A. I want to make sure that's clear.

11 Q. Thank you, but it was the same Start Talking message,
12 right, it says the Start Talking brochure?

13 A. No, I think -- I think it's important to point out this
14 research was done by the Corporate Responsibility Group at a
15 time when I wasn't in charge of the Corporate Responsibility
16 Group, and this was really testing a free-standing insert that
17 was included in newspapers that was communicating with the
18 general public about the company's overall corporate
19 responsibility activities, which is something we continue to do
20 after that. And the brochure and the Web insert were two
21 options to include in that free-standing brochure. So this was
22 really not meant to test the stand-alone brochure. That was
23 done in prior testing. This was really meant to test the
24 free-standing insert that might include one of those two
25 brochures.

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1 Q. Which in content had the same messages inside whether it
2 was the Website or the Start Talking brochure?
3 A. Well, I think the Website booklet was actually quite
4 different in content from the Start Talking brochure.
5 Q. If you look on the first page in the second paragraph.
6 A. Yes.
7 Q. Okay. It indicates what is being tested there, correct?
8 "The following detailed analysis with key findings and strategic
9 recommendations is based on 451 mall intercept interviews"; is
10 that correct?
11 A. I'm sorry, you're reading the second paragraph?
12 Q. In the very first paragraph, I'm sorry.
13 A. I'm sorry, let me just -- I was looking at the second
14 paragraph, the first paragraph where are you reading?
15 Q. "The following detailed analysis with key findings and
16 strategic recommendations is based on 451 mall intercept
17 interviews".
18 A. Yes, I see that.
19 Q. Okay. "Interviews were" -- and I am now in the second
20 paragraph -- "interviews were conducted to test respondent
21 attitudes and perceptions toward a free-standing" -- that's FSI,
22 free-standing insert; is that correct?
23 A. Yes, that's correct, that's what I was referring to.
24 Q. "Ad concept." Strategy One tested two versions of the ad
25 concept, one version included the Start Talking brochure,

- 1 correct?
- 2 A. Yes, that's correct.
- 3 Q. All right. While the other included the Website
- 4 brochure, correct?
- 5 A. Yes, that's correct.
- 6 Q. And just to clarify your comment a few moments ago, half
- 7 of the respondents were exposed to the Start Talking brochure
- 8 and the other half were presented with a Website brochure; is
- 9 that right?
- 10 A. That's correct, that's part of that free-standing insert.
- 11 Q. Okay. Now, there were three audiences that were targeted
- 12 for this -- for review of the Start Talking brochure and the
- 13 Website brochure; is that right?
- 14 A. Yes, that's correct.
- 15 Q. And those audiences were the general public being one?
- 16 A. Yes, that's correct.
- 17 Q. Opinion Elite Group being another audience?
- 18 A. Yes, that's correct.
- 19 Q. And then parents were the third group?
- 20 A. Yes, that's correct.
- 21 Q. And what are Opinion Elites?
- 22 A. Opinion Elites are typically members of the general
- 23 public that are more media savvy and are more aware of and more
- 24 involved in understanding major issues.
- 25 Q. And that's how Philip Morris USA defines the "Opinion

- 1 Elite"?
- 2 A. I think that's fair. It's a fairly common term in survey
3 research.
- 4 Q. And the general public includes people of all ages; is
5 that right?
- 6 A. I think the general public here would be the adult
7 general public, so they'd be -- they wouldn't involve kids.
- 8 Q. I think it says adults age 21 and older in the first
9 paragraph.
- 10 A. Okay, that would make sense.
- 11 Q. Now, if we look at the key findings, there is an
12 indication in the first paragraph that both brochures positively
13 impact respondents' attitudes towards Philip Morris, correct?
- 14 A. Yes, I see that.
- 15 Q. All right. So when testing those two brochures it
16 indicates there that there was virtually no difference in the
17 impact of the Start Talking brochure and the Website brochure on
18 attitudes toward the notion of Philip Morris as a responsible
19 corporation. Both have a favorable impact on the Philip Morris
20 responsibility mean score, though the Start Talking brochure had
21 a slightly greater positive impact. That was the key finding;
22 is that right?
- 23 A. Yes, that's correct.
- 24 Q. So that was the message that was tested whether Philip
25 Morris was a responsible corporation?

1 A. I think that's right in this FSI research that's what
2 they concluded.

3 Q. That's what I'm asking, that was the message that was
4 tested?

5 A. I think I need to go back and -- I mean, typically this
6 type of research includes numerous questions that are answered.
7 I do think that was a key finding from the research, but I don't
8 know that I can state that it was the key message tested.
9 Typically from research you look at a number of questions and
10 you look at their respondents and you try to summarize a
11 finding.

12 Q. Well, let's look at the top of the next page. Philip
13 Morris responsibility mean scores. The pretest and the
14 post-test comparing the Start Talking brochure with the Website
15 brochure on a scale of one to ten, it was tested for whether
16 Philip Morris was seen as very irresponsible or very
17 responsible, correct?

18 A. Yes, I think it was a scale of one to ten, so I think the
19 scale was one to ten, it wasn't just those two points, but yes.

20 Q. I think if you go down to the end of the next -- the
21 bottom of page 2, it indicates more clearly what was the message
22 that was tested, and it says -- the last is sentence in the
23 second to last paragraph, which is bolded, "what is clear is
24 that both brochures have a clear and positive impact on the
25 tested message. As stated previously, there is, however, there

1 is slightly more intensity. Those answering 9 to 10 on the one
2 to ten mean score agreement scale among those who viewed the
3 Start Talking brochure as an example of the Philip Morris is a
4 responsible company message. 37 percent of the Start Talking
5 respondents answered with a 9 or a 10 indicating strong
6 agreement, compared to just 22 percent of the website
7 respondents." Do you see that?

8 A. Yes, I do.

9 Q. So very clearly this document lays out that the message
10 that was tested is Philip Morris is a responsible company. That
11 was the message that was tested on a scale of, I believe you
12 said, one to ten?

13 A. I think that -- I think I would agree that that is the
14 key finding, is that these two free-standing inserts with each
15 brochure in them resulted in the key finding that the general
16 public and the other audiences take away that Philip Morris's
17 actions, as laid out in those brochures, improve their judgment
18 of responsibility. So I think they're -- I think I would agree
19 with that. I'm just having trouble with summing up what I think
20 is a fairly lengthy research study as testing a single message
21 without looking in detail at the survey instrument.

22 Q. Well, I'm going to give you --

23 MR. WELLS: Excuse me, my exhibit is missing a page.

24 MS. BROOKER: What page?

25 MR. WELLS: I don't have the page 2, I don't have the page

1 that's up there.

2 MS. BROOKER: We'll try to get another copy, sorry Ted.

3 MR. WELLS: Just keep going.

4 MS. BROOKER: Thanks.

5 BY MS. BROOKER:

6 Q. My question is not about the results or the key findings
7 as you indicated. I'm very specifically asking you about the
8 message that was tested, which indicates on page 2, both at the
9 top as well as in the paragraph we just read, the message that
10 was tested is that Philip Morris is a "responsible company".

11 Now, we're going to get into some of the later parts of
12 the document, which indicates what some of the responses were,
13 but I'm just trying to get clear on what was the key message that
14 was tested. Isn't it true that the key message that was being
15 tested is Philip Morris is a responsible company?

16 A. No, I don't think you can distill it down to that single
17 message, particularly now that I've taken a look at the survey
18 which is, you know, 40 or 50 questions at least. I haven't
19 gotten all the way through it but --

20 MR. WELLS: Your Honor, Mr. Willard has never testified
21 before. Could you advise him that he does have the right to look
22 through this document.

23 THE COURT: Well, you certainly may look at the document,
24 absolutely.

25 THE WITNESS: Okay, I'm aware of that. It's a thick

1 document and I'm being asked to make judgments about the whole
2 document, so I'm trying to -- I'm trying to look at enough of the
3 document to be able to draw conclusions, but I'm fine. Thank
4 you.

5 BY MS. BROOKER:

6 Q. Let me just clarify. You -- this is not the first time
7 you've seen this document because you reviewed and answered a
8 lot of questions at your deposition about this same document,
9 correct?

10 A. Um, yes, I was asked a couple of questions about this
11 document.

12 Q. Okay. Did you prepare for your testimony here by looking
13 at that document again?

14 A. No, I didn't.

15 MR. WELLS: Objection, Your Honor, that's privilege.

16 THE COURT: No. It's overruled. That's a perfectly
17 proper question.

18 BY MS. BROOKER:

19 Q. I will certainly -- you can take an opportunity at the
20 next break to look at that document, but you would agree that in
21 the page that we've just looked at, what is indicated on that
22 page is that the message that was tested is Philip Morris is a
23 responsible company, at least that's what it indicates on that
24 page, correct?

25 A. I'm sorry, where are you reading?

- 1 Q. Where we just looked at.
- 2 A. The bolded text?
- 3 Q. On page 2. That entire page indicates, as we've just
4 gone through it, that the message that was tested on the
5 brochure and the Website, Philip Morris is a responsible
6 company?
- 7 A. I really can't agree with that. I understand that that's
8 one of the takeaways that I think could be drawn from the
9 research, but I think that there are multiple messages, and if
10 you turn to the next page there's a whole page full of, I think,
11 messages that were tested. So, I really can't draw that
12 singular conclusion.
- 13 Q. Okay, we're going to get to that next, that's where we're
14 going so let's go there. Page 4. Respondents were asked what
15 was the main message of the add, correct? And it's in the box
16 in the middle of page 4.
- 17 A. Yes, I do see that.
- 18 Q. Okay. And I believe you may have been asked about this
19 at your deposition. Do you recall?
- 20 A. No, I don't.
- 21 Q. Okay. Now, there were results indicating the percentage
22 of people that responded that the message they got from the
23 Start Talking brochure or the Website brochure listed there in
24 that box, correct?
- 25 A. Yes, I do see that.

1 Q. Okay. And you know, we don't need to go through all of
2 them. The first few ones, or the ones with the larger
3 percentages, there is a place to get information about smoking
4 or tobacco. 19 percent of the people thought that was the main
5 message of the Start Talking brochure and 38 percent thought
6 that was the main message of the Website brochure; is that
7 correct?

8 A. No, that's not correct.

9 Q. Okay. How would you read that?

10 A. Well, I think -- and I do believe I pointed this out at
11 my deposition as well. The piece of communication that's being
12 tested here is a free-standing insert, so that is a -- think of
13 a manila folder that has a front and back on two pages, and
14 there's writing on the outside of that. And I think there's an
15 example in this exhibit, at least there was when I was at my
16 deposition. And then on the right-hand side on the inside of
17 that manila folder is affixed either the Start Talking brochure
18 or a Website brochure. There were two different versions of
19 that have free-standing insert that were tested. And what is
20 really being asked here are what is the main message of the
21 entire free-standing insert that included a lot of information
22 beyond just the Start Talking brochure or the Website brochure.
23 The reason those are the two short names for the free-standing
24 insert are that that's what was different between the two, the
25 free-standing insert content was the same. What changed was the

1 Start Talking brochure or the Website brochure. So, I think
2 it's -- I think it's an error to say that this research is
3 referring to the Start Talking brochure. I think it's referring
4 to a free-standing insert that had a lot of information in
5 addition to the Start Talking brochure, but in at least the case
6 of half the respondents, also included the Start Talking
7 brochure.

8 Q. Well, look apartment what it says in the following
9 paragraph under the box. "Among the Start Talking respondents,
10 however, 32 percent indicated that their main take away from the
11 brochure was that kids should not smoke, compared to only
12 7 percent of the Website respondents who believed that this was
13 the main message." Do you see that in the paragraph, page 4
14 right under the box?

15 A. Yes, I do.

16 Q. "Meanwhile, 19 percent felt that there's a place to get
17 information about smoking or tobacco compared to 38 percent
18 among the Website respondents and 18 percent felt that the main
19 message was that Philip Morris is trying to be more
20 responsible." Do you see that?

21 A. Yes, I do.

22 Q. Okay. So they're referring expressly there to testing
23 the Start Talking brochure as compared to what they refer to as
24 the Website respondents, correct? It's expressly stated there
25 in the paragraph.

- 1 A. No, it's not. Again, this is referring to exactly what I
2 stated, which is it's -- I think this is saying for the
3 respondents, the Start Talking respondents, that received the
4 free-standing insert that had the Start Talking brochure in it,
5 this is what they indicated. If you actually turn back in the
6 document there's a way to see what was -- what they were being
7 handed in addition to the Start Talking brochure. I can give
8 you a Bates number if that will be helpful.
- 9 Q. What's the Bates number?
- 10 A. It's -- it ends in 4727.
- 11 Q. That's the Website, correct?
- 12 A. Um -- and I actually think that this is the -- this is
13 the version that had the Web brochure in it, but if you wanted
14 to take out on the right-hand side that Web brochure and put the
15 Start Talking brochure in it, that would be the -- what the
16 Start Talking respondents saw. And as you can see on the
17 left-hand side, in addition to seeing the Start Talking
18 brochure, they actually see the home page of the Philip Morris
19 USA Website with descriptions of things like the fact you can
20 learn about the health effects of smoking, and many other
21 things, which I think is part of what's resulting in their
22 responses to that question.
- 23 Q. So, the Start Talking brochure was part of the insert?
- 24 A. Yes, that's correct.
- 25 Q. Yes.

1 A. That's part of it.

2 Q. Okay. And that's exactly what's indicated in this
3 document, which I think we've been going through.

4 Now, here's what was not tested by Strategy One when
5 comparing the Start Talking brochure with the Website brochure in
6 the free-standing insert. Whether the brochures were more likely
7 to have parents speak to their kids about not smoking is not
8 tested; is that correct?

9 A. Um, again, I haven't gone through the whole document, but
10 that would not surprise me given that this was not the research
11 that was done on that Start Talking brochure when it was
12 developed.

13 Q. Okay. And also here was not -- what was not tested by
14 Strategy One is whether kids whose parents read these brochures
15 were more likely to not smoke, correct?

16 A. It wouldn't surprise me if that was not tested.

17 Q. Now, if you turn to page 7 under Summary and Strategic
18 Implications, it indicates there "Both ads meet the main
19 communication objectives. It is clear from above analysis that
20 both adds, whether they include the start talking or the Website
21 brochure, are effective in moving the needle on responsibility
22 and key attribute measures among all key audiences, the general
23 public, parents and Opinion Elites. Overall, the Start Talking
24 brochure enjoys a slight impact advantage with greater mean
25 scores -- excuse me with greater mean score increases on most

1 messages and slightly higher scores on most of the end of survey
2 metrics. Credibility, responsibility, likely to read, et cetera
3 over the Website brochure, though most of these margins are
4 within the survey's margin of error. Both concepts were
5 perceived as credible and important." Do you see that?

6 A. Yes, I do.

7 Q. Now, the Start Talking brochure, which was eventually
8 sent around, was really just a publicity stunt or a PR effort by
9 Philip Morris USA; isn't that right?

10 A. No, that's not right.

11 Q. This is not the only type of message check on Philip
12 Morris USA Youth Smoking Prevention activities that has been
13 done by Philip Morris USA; isn't that right? Other similar
14 types of message checks have been done?

15 A. Again, I think it's important to point out that this was
16 not research that was done by the Youth Smoking Prevention
17 Department nor is it research that was done under my leadership.
18 I certainly understand the research and I understand what the
19 conclusions are, but I just want to make sure that we don't
20 characterize this as the testing of the Youth Smoking Prevention
21 brochure because as I pointed out numerous times there was
22 separate testing that was done by the Youth Smoking Prevention
23 Department on each of our brochures, and I think we made a lot
24 of that available to you.

25 Q. And as well as the Youth Smoking Prevention Department

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- 1 doing the checks that you are now referring to, the Corporate
2 Affairs Department was doing message checks on those same bureau
3 expenditures being put out by the Youth Smoking Prevention
4 Department, correct, just as we've seen here?
- 5 A. I think this is an example of work being done by the
6 Corporate Responsibility Group to understand the public's
7 reaction to some of our corporate responsibility initiatives, so
8 I would agree with that, yes.
- 9 Q. Okay. And now you are also in charge of the Corporate
10 Responsibility Group that does that work; is that right?
- 11 A. Yes, that's correct.
- 12 Q. Okay. And you're responsible for both now, both putting
13 out bureau expenditures, or whatever other pieces that the Youth
14 Smoking Prevention Department is doing, as well as these types
15 of message checks that the Corporate Affairs Office used to do
16 under someone else's leadership is now under yours?
- 17 A. Yes, this type of research is done by the Corporate
18 Responsibility Group now, yes.
- 19 Q. Under you; is that right?
- 20 A. That's correct.
- 21 Q. Now, you testify about the Retail Leaders Program in your
22 written direct; is that right?
- 23 A. Yes, that's correct.
- 24 Q. And the Retail Leaders Program began in 1998, right?
- 25 A. Yes, I think that's correct.

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- 1 Q. Okay. And I think that you said in your written direct
2 that 200,000 retailer accounts in the United States participate
3 in the Philip Morris Retail Leaders Program. Does that sound
4 right?
- 5 A. Yes, that's correct.
- 6 Q. And it accounts for 85 percent of the volume of
7 cigarettes sold at retail?
- 8 A. Yes, that's correct.
- 9 Q. So that means that Marlboro is the most visible cigarette
10 brand at retail under the Retail Leaders Program; isn't that
11 right?
- 12 A. I think that is often the case.
- 13 Q. That's because in the Retail Leaders stores, which
14 account for 85 percent of the volume of cigarettes, Marlboro
15 signage would be more visibly placed than the other leading
16 brands, Newport or Camel?
- 17 A. I think given Marlboro's share in the market that's
18 typically the case.
- 19 Q. So in -- well, I'm not sure I understand your answer. In
20 the retail -- in your stores where the convenience stores or
21 the -- all of the stores that participate in the Retail Leaders
22 Program, if they're under a Retail Leaders account with Philip
23 Morris, that means that Marlboro signage is more visible in
24 their stores than Camel or the Newport?
- 25 A. I think the Retail Leaders Program does have Marlboro

1 signage requirements that would result in Marlboro having good
2 visibility in a Retail Leaders store.

3 Q. The number one visibility spot under the Retail Leaders
4 Program, correct?

5 A. That's typically right, it's position is usually in the
6 best spot.

7 Q. That's a requirement under Retail Leaders?

8 A. I think that's correct, yes.

9 Q. Now, because of the Retail Leaders Program, Marlboro is
10 the leader in the cigarette category; isn't that right?

11 A. Um, Marlboro is certainly the leader in the cigarette
12 category. It's by far the largest brand and I think -- so I
13 think I would agree with that, yes.

14 Q. And in part due to the Retail Leaders Program, Marlboro
15 is one of the most recognized global brands of cigarettes; isn't
16 that right?

17 A. I don't know that -- I certainly think that the Retail
18 Leaders Program is a contributor to Marlboro, but I think
19 Marlboro was the number one brand before the Retail Leaders
20 Program as well.

21 Q. And it contributes in what way?

22 A. I think it's a merchandising program that helps ensure
23 availability at retail.

24 Q. And visibility?

25 A. Yes, that's correct.

- 1 Q. Now, Retail Leaders, to this day, still requires
2 counter -- on the counter displays when Marlboro is in the
3 number one position; isn't that right?
- 4 A. No, I don't think that's correct.
- 5 Q. Well, isn't it true that under Retail Leaders, if a store
6 that participates in the program is going to have cigarettes on
7 the counter, then Marlboro has to be on the counter in the
8 number one position?
- 9 A. That's correct, that's slightly different than what you
10 said earlier. I think our Retail Leaders Program does have a --
11 does have an option where the retailer can opt to have a
12 completely clean counter that's free of cigarettes and cigarette
13 point-of-sale, and receive an additional payment for that.
- 14 Q. But if they decide to have cigarettes on the counter,
15 Marlboro has to be there in the number one spot?
- 16 A. Yes, if they make the decision to put cigarettes on the
17 counter, then Marlboro, if you're going to be a Retail Leaders
18 participant, needs to be in the primary position.
- 19 Q. Okay. So it's not accurate to say that under the Retail
20 Leaders Program retailers are required to put cigarettes off the
21 counter behind the counter, correct? That would not be correct
22 to say that?
- 23 A. Well, I think the Retail Leaders Program incents
24 retailers to put cigarettes behind the counter because the
25 maximum payment option would have them -- would have them taking

1 advantage of the option to have a clean counter, so I think it
2 does incent retailers to put the cigarettes behind the counter.

3 Q. Is it the difference of a few cents?

4 A. I don't know the complete dollar amount, but I do know
5 that the -- there's a higher payment that's designed to incent
6 retailers to keep cigarettes off the counter.

7 Q. Would you agree that it's not a significant difference?

8 A. No, I wouldn't agree with that.

9 Q. Okay. Well, we'll take a look at that. Now, under
10 Retail Leaders, it's also true that if there is outdoor signage,
11 that if a retailer is going to choose to have outdoor signage,
12 that Marlboro has to be in the number one position with respect
13 to that outdoor signage?

14 A. I do think that's accurate. I think that if a
15 retailer -- certainly under Retail Leaders a retailer has an
16 option to have no outdoor signage, but if they do decide to have
17 signage, in order to be a member of the Retail Leaders Program
18 Marlboro needs to get outdoor signage in the number one
19 position.

20 Q. Is it your position that the Retail Leaders Program is a
21 youth smoking prevention program?

22 A. No, I don't think it's a youth smoking prevention
23 program, it's a merchandising program that has elements that are
24 designed for retailers to take some responsible actions.

25 Q. Would you tout it as a youth smoking prevention measure?

1 A. No, I think -- I think I described it accurately earlier,
2 which I wouldn't describe it as a youth smoking prevention
3 program, but it is certainly a program that we have utilized to
4 try and incent retailers to take some actions that I think will
5 contribute to reducing youth smoking.

6 Q. Do you think increasing the visibility of Marlboro at
7 retail is a youth smoking prevention measure?

8 A. No, I do not.

9 Q. Now, I just wanted to go over the basic components of the
10 We Card Program that Philip Morris supports and that you
11 testified about. It's in your written direct; is that right?

12 A. Yes, that's correct.

13 Q. And you're very familiar with that program now that
14 you're the Senior Vice President of Youth Smoking Prevention?

15 A. Yes, I'm familiar with that.

16 Q. Now, it is a merchant education program, isn't that a
17 fairly accurate description of it?

18 A. Yes, I think that's accurate, as well as a -- providing
19 point-of-sale signage to discourage kids from purchasing
20 cigarettes at retail.

21 Q. Okay. And the extent of what Philip Morris provides to
22 its retailers, if I understand correctly, is We Card signage and
23 a videotape that retailers can watch on their own to train
24 themselves; is that correct?

25 A. Those are two of the things that are provided, yes.

1 Q. Okay. And there's no other kind of formal or -- there's
2 no other formal training, except for watching the videotape, am
3 I right about that?

4 A. No, that's not correct.

5 Q. Okay. What other kind of training is there?

6 A. Well, there's a variety of different training options.
7 There's live training available that can be set up with the We
8 Card organization, there's also online resources and online
9 training for people who choose to train people that way, and
10 then there are both written materials to help retailers train
11 their clerks as well as the video that you referred to.

12 Q. Now, under the Retail Leaders Program, can retailers
13 choose any of those options? Can they choose to either watch
14 the videotape or call up the We Card headquarters and receive
15 one-on-one training or a class training? Is that the option?

16 A. Yes, I think the retailers decide which type of training
17 they want to avail themselves of.

18 Q. Now, the enforcement mechanism for Philip Morris to
19 ensure that retailers are receiving this training, if I
20 understand correctly, is they have to sign a certification
21 saying, you know, I hereby declare under the Retail Leaders
22 Program that I've watched the videotape, if that's there -- if
23 that's the choice for training themselves; is that correct?

24 A. Yes, that's correct.

25 Q. Okay. Now, I have an exhibit here that defendants

1 produced. I guess it's JD 012761. This is the videotape,
2 correct? It's one videotape?

3 A. Yes, that looks correct.

4 Q. They can say that they watched it and then sign a
5 certification; is that right?

6 A. Um.

7 Q. This is the videotape that you just referred to?

8 A. Yes, that looks like it.

9 Q. Okay. And then you provide this, I guess this goes in
10 the supermarket line or something, is that something that's
11 provided?

12 A. There is a whole range of signage that's available.
13 That's typically not the signage that's used in the store, but
14 certainly in a supermarket line that may be one of the options.

15 Q. Well, who is made available this -- I don't know what I
16 would call it for the record. It's in a supermarket to be a
17 separator between the food items.

18 A. I think what is typically the case is that the We Card
19 Program has designed signage to be visibly featured at retail to
20 let under-age youth who come into that store know that this is a
21 store that cards them and to discourage them from even asking
22 for cigarettes, and oftentimes it's a door decal on a
23 convenience store as you're walking in. There will be signage
24 featured prominently in the point-of-sale area and there may be
25 other items that help the store get the message out that they

1 card kids who come in to buy cigarettes. That's one example, I
2 think.

3 Q. Okay. Now, if you use one of these at your retail
4 stores, does that meet the signage requirements for Retail
5 Leaders?

6 THE COURT: And "one of these", for the record, is the
7 grocery separator?

8 MS. BROOKER: The grocery separator.

9 THE WITNESS: No, I don't think that would meet the Retail
10 Leaders requirement. Typically there's two or three items that
11 are required and typically the retailer picks much more visible
12 signage, at least that's been my experience in going in the
13 stores.

14 BY MS. BROOKER:

15 Q. Well, you certainly haven't gone into all 200,000 of your
16 stores in the United States to see what their choosing for
17 signage, correct?

18 A. No, I haven't been in that many stores.

19 Q. Now, are you guessing or do you know exactly what are the
20 signage requirements for the Retail Leaders Program in terms of
21 the size or the number of signs that a retailer can choose to
22 place in their store?

23 A. I think one of the requirements of the Retail Leaders
24 Program is that they have -- I think it's at least three We Card
25 point-of-sale items, and I'm doing this from memory. And what

1 you will typically -- and I think one of them needs to be at the
2 point of purchase and one of them needs to be at the entrance to
3 the store. So, what is typically the case is that in a
4 convenience store, you'll see a decal at the door, is often the
5 case, with the idea that if kids are going to come into the
6 store you want them to see that this is a store that's going to
7 card them and discourage them from purchasing cigarettes. And
8 then you'll typically see We Card materials at the point of
9 purchase, which is, again, another place that you want to get
10 that message out to kids.

11 Q. And is this one of the choices they have for one of their
12 three signage requirements, this separator, the grocery store
13 separator?

14 A. Again, I've been in many many stores and I haven't seen
15 that item, so I don't think that's very typical, but that
16 certainly could be an option for the point of purchase in a
17 supermarket.

18 Q. But you're not sure it sounds like?

19 A. That's correct, I'm not sure.

20 Q. Well, who would know more than you about the requirements
21 of the We Card Program for retailers, or We Card signage?

22 A. Well, again, I have a manager in my organization that
23 oversees our relationship with the coalition for responsible
24 tobacco retailing, and I'm certainly aware, in general, of what
25 the program is trying to accomplish and I think I've laid out

1 for you the way I've seen it executed in numerous stores.
2 Again, I just haven't been in a store where I've seen that
3 utilized. However, I don't doubt -- again, I haven't been able
4 to analyze it carefully, but I don't doubt that that may be one
5 of the options that's available at a supermarket.

6 Q. Now, you answered many of my questions by saying
7 typically here's what you would see in a store. Do you have any
8 data or figures that you've brought here to Court to indicate of
9 your 200,000 retailers what signage, you know, which signage
10 they're choosing and where they're placing those signages --
11 those signs?

12 A. No, I haven't done an audit of what specific types of
13 point-of-sale material they opt to utilize. But again, I think
14 from my general observation, and I think from the requirements
15 of the program, we get very high We Card visibility at retail.

16 Q. What are you basing that upon?

17 A. Well, I'm basing that on the fact that We Card signage,
18 in a number of pieces, are required for every Retail Leaders
19 store and our salespeople are going into those stores on a
20 pretty regular basis and if that signage is not up, they're
21 going to raise that as a compliance issue and get additional
22 signage up.

23 Q. Now, Philip Morris has performed no studies or
24 evaluations of the effectiveness of the We Card Program in
25 reducing youth access; is that correct?

1 A. I think that's correct, we have not -- we've not done
2 separate studies.

3 Q. And the Coalition for Responsible Tobacco Retailing has
4 not performed any such evaluations, has it?

5 A. Um, not that I'm aware of. I know they were putting some
6 research into the market last year, I'm not sure if it's been
7 done yet.

8 Q. But you don't cite any that have in your written direct
9 testimony; is that right?

10 A. No, I do not.

11 Q. Now, are you aware of what research, peer-reviewed
12 research does show about the kind of merchant education program
13 that your company is supporting?

14 A. No, I don't think so.

15 Q. All right. Can we call up, Charles, and I think you
16 have -- do you have Dr. Biglan's written direct there?

17 A. Yes, I think I do.

18 Q. Okay. If you want to take a look at page 436, lines 11
19 to 19. And this is Dr. Biglan's written direct examination in
20 the youth smoking prevention section of his report. He's asked,
21 "What do you conclude from your review of the defendants'
22 materials and of the empirical evidence?"

23 Dr. Biglan says, "I draw three conclusions, first, three
24 methods for reducing sales of tobacco to those under the legal
25 age of purchase have been tested, but only two of these methods

1 appear to have a reliable and lasting impact on such sales to
2 adolescents. Second, existing studies show that it is unlikely
3 that even very significant reductions in illegal sales of tobacco
4 will significantly reduce the prevalence of adolescent smoking.
5 Third, the defendants are implementing the access reduction
6 method shown to be the least effective at reducing youth smoking
7 and least likely to produce sustained effects."

8 Have you heard that opinion before expressed by
9 Dr. Biglan?

10 A. No, I haven't.

11 Q. And again, you didn't read his expert report in this
12 case, correct?

13 MR. WELLS: Your Honor --

14 THE WITNESS: That's correct.

15 MR. WELLS: Your Honor, I want to lodge an objection. The
16 witness has been repeatedly asked if he read the expert report.
17 Everybody knows there's a Court Order that would preclude him
18 from reading it, but she must have repeated it 20 times now. He
19 could not read it, he was prevented from reading it and there's
20 some suggestion now implicit that he should have read it. There
21 was a Court Order preventing him from reading it.

22 MS. BROOKER: Your Honor, I'm not aware of it.

23 MR. WELLS: He's not an expert he's not permitted to read
24 any testimony in this case.

25 THE COURT: He's not permitted to read fact testimony and

1 I think we've had this -- excuse me, this discussion before. I'd
2 have to take a look at that Order. I'm pretty -- well, I think
3 that the Order in question precluded fact witnesses from reading
4 other fact witnesses, and I could be wrong about that.

5 MS. BROOKER: We did just have that argument recently
6 because we raised it because in the written direct examinations
7 of Lynn Beasley for RJR and another witness, Mr. Lindsley for
8 Lorillard, were specifically including in their written direct
9 examination their review of the expert written direct testimony
10 and so we've raised that as an issue and Your Honor addressed it,
11 and Your Honor indicated that in your Order that you had not
12 precluded, under Order 471, fact witnesses from being shown that.
13 However, going forward, we all agreed that we could show, in the
14 courtroom -- the issue that the United States had with what the
15 defendants were doing is before the witness was sworn and sitting
16 in the courtroom the witness was being shown prior testimony.
17 There's certainly nothing wrong, in any Court, perfectly
18 appropriate for a witness to be shown while they're under oath,
19 while they're on the stand any testimony and asked about it.
20 This -- you know, Mr. Willard is the head of the Youth Smoking
21 Prevention Department and I'm entitled to ask him about
22 peer-reviewed literature that he has or has not seen.

23 THE COURT: That relates to a smoking prevention.

24 MR. WELLS: Your Honor, I don't have any problem with her
25 asking him in a courtroom about what he's seen, but she has asked

1 Mr. Willard over the last couple days six times have you read
2 Mr. -- Dr. Biglan's testimony he said every time he hasn't read
3 it.

4 THE COURT: That particular question.

5 MS. BROOKER: I'm happy not to ask that again, Your Honor.

6 THE COURT: Then the objection is certainly sustained as
7 to that question regarding Dr. Biglan, yes, go ahead, please.

8 BY MS. BROOKER:

9 Q. If we could turn, Charles, to -- we're just flipping over
10 to the next page, 437 line 10 to 17.

11 "Question: What does the empirical evidence show about
12 the effectiveness of merchant education in reducing illegal
13 sales?" Do you see that question?

14 A. Yes, I do.

15 Q. Okay. And earlier, a few moments back, you indicated
16 that the We Card Program supported by the Retail Leaders Program
17 is a merchant education program, correct?

18 A. No, I didn't state that, I stated that that was one of
19 the things that it does. It also provides signage and other
20 tools for the retailers.

21 Q. Okay. Well, assuming that merchant education does
22 include signage and training, assuming that that is a merchant
23 education program, looking at this question, that's what --

24 A. So we're talking not about the We Card Program but about
25 a merchant education program that only does that?

1 Q. Yes.

2 A. Okay.

3 Q. And it indicates "one peer-reviewed study found this
4 approach to reduce sales to underage buyers in the short term."
5 A peer-reviewed paper describing this study is cited in a
6 demonstrative which was attached to Dr. Biglan's testimony. It
7 goes on to say, "however, another peer-reviewed study has shown
8 that large reductions in sales do not typically continue." And
9 then there's another peer-reviewed paper cited there, 1991, and
10 a 1989 study.

11 Now, my question to you is have you reviewed these
12 peer-reviewed papers previously?

13 A. No, my review did not go back that far in history, but
14 based on reviewing numerous studies, including the Surgeon
15 General's Reports and many other things in the late '90s, I
16 found that there was substantial recommendations coming from
17 many different directions that access prevention programs were a
18 useful part of preventing youth smoking, and certainly merchant
19 education and ensuring that they don't sell cigarettes to kids,
20 is one element of those.

21 Q. Now, you don't cite or you're not aware as you sit here
22 of any peer-reviewed studies that support the effectiveness of
23 merchant education in reducing illegal sales; is that right?

24 A. Well, again, I think that the Surgeon General's Reports
25 go through extensive review. I think that the book Combatting

1 Teen Smoking and also the book Growing Up Tobacco Free, again,
2 were extensively reviewed through the peer process, and I think
3 each of those three publications talks about the benefit of
4 access prevention programs and ensuring that youth that try to
5 purchase cigarettes at retail get asked for I.D. and the sale is
6 refused.

7 Q. Can you cite even one specific study that you're
8 referring to that is a peer-reviewed study that has looked at
9 the effectiveness in reducing youth smoking of Merchant
10 Education Programs?

11 A. Again, I'm not sure I can cite one that is as narrow as
12 what you described. But again, I would go back to those three
13 citations that I think all found that access prevention
14 programs, particularly those focussed at retail, were a
15 recommended approach to helping prevent youth smoking.

16 Q. Now, Dr. Biglan, you've just seen here in the prior
17 testimony, looked at the merchant -- excuse me, the We Card
18 Program that Philip Morris is supporting through Retail Leaders
19 and referred to that as a merchant education program. Did you
20 see that?

21 A. Where are you referring to?

22 Q. If you just go back.

23 A. Okay.

24 Q. I think we were at 436. "The defendants are implementing
25 the access reduction method shown to be the least effective at

1 reducing youth smoking and least likely to produce sustained
2 efforts". Do you recall that?

3 A. I do recall that. Is he referring to the We Card Program
4 there? He talks about three methods that can be used for access
5 prevention --

6 Q. Well --

7 A. -- in the prior paragraph.

8 Q. Let me take a break and I'll look at the Biglan
9 testimony. I don't want to take my time flipping back through
10 it now because I don't have the whole entire report in front of
11 me.

12 MR. WELLS: Your Honor, during the break could the witness
13 also review just the areas that he's being asked questions about?

14 MS. BROOKER: I don't have an objection to that, Your
15 Honor.

16 THE COURT: All right. You might want to indicate what
17 pages.

18 MS. BROOKER: He's at 436 and 437. If I had it here -- I
19 just don't think I have the whole Biglan report with me, because
20 I'd like to get clear on this. But I will come back to that.

21 THE COURT: You want to continue at this point?

22 MS. BROOKER: Yes.

23 THE COURT: Oh, yes.

24 MS. BROOKER: It's not time for a break yet, is it?

25 THE COURT: No, not necessarily.

1 MS. BROOKER: Oh, okay.

2 BY MS. BROOKER:

3 Q. Now, if I'm correct, you testified, and we can take a
4 look at this if you don't recall, you testified in your written
5 direct that since 1997 retailer compliance has steadily
6 increased from 59.5 percent to 86.8 percent in 2003. Do you
7 recall giving that testimony?

8 A. Yes, I do.

9 Q. Nowhere in your written direct testimony did you cite
10 support for those figures; is that right?

11 A. I don't remember whether we sourced that or not. That's
12 based on Synar reporting by the states.

13 Q. And when you say "we", did you write your written direct
14 testimony or did someone assist you with that?

15 A. No, I wrote my testimony and I drew that from a chart on
16 Synar compliance.

17 Q. Now, we looked at the TABS data earlier, if you recall on
18 Monday, and in the most recent survey performed on behalf of
19 Philip Morris USA, almost 70 percent of adolescents, 11 to 17,
20 in the past 30 days when surveyed bought cigarettes or the clerk
21 had handed them a pack of cigarettes. Do you recall us going
22 over that?

23 A. Yes, I do.

24 Q. And you didn't cite any figures in your written direct
25 for how many Philip Morris retailers sell cigarettes to minors,

- 1 correct?
- 2 A. No, I did not.
- 3 Q. Okay. Because you don't know that data because Philip
4 Morris does not collect it; is that right?
- 5 A. Um, I certainly don't know it based on our own survey;
6 however, I think that the best source for that kind of
7 information is from the government required Synar reporting data
8 that I referenced in my testimony.
- 9 Q. Do they identify which ones are the Philip Morris
10 retailers?
- 11 A. No, they don't because they have a sampling approach to
12 that. But again, because we call on, you know, the vast
13 majority of retailers that sell cigarettes, you would assume
14 that there is -- that it's a rough proxy for what's going on in
15 the Philip Morris retail universe.
- 16 Q. Philip Morris doesn't do it own sting operations of its
17 own retailers, correct, to determine which ones are responsible
18 for that 70 percent figure?
- 19 A. No, we don't, we rely on the states that do that and in
20 many states there are legal requirements on how those can and
21 can't be done.
- 22 Q. And Philip Morris USA has -- understands that it's
23 difficult to get states to do those checks, correct, and to
24 provide that information?
- 25 A. Well, I think we would certainly prefer to have states

1 putting more resources behind enforcement of minimum age laws.
2 There are some states that do it very well and there are others
3 where we think it should be a higher priority.

4 Q. Okay. And rather than Philip Morris paying to conduct
5 those types of enforcement operations, Philip Morris depends
6 upon the states to do that work; is that right?

7 A. Yes, I think the stings that are done as part of the
8 state enforcement mechanism so I think the states are in control
9 of how that gets done and how often, however, our approach has
10 been to lobby at the state level for greater resources to be
11 applied to sting operations because we think greater enforcement
12 of minimum age laws is an important part of reducing access of
13 youth access at retail.

14 Q. And Philip Morris doesn't spend any of its own money to
15 fund sting operations, correct?

16 A. I think that's correct. The states are responsible for
17 setting up that infrastructure.

18 Q. Okay. Philip Morris could do its own sting operations if
19 it chose to; isn't that right?

20 A. I'm not sure whether -- to what extent we could do it. I
21 know typically in sting operations the states use under-age
22 youth to purchase the cigarettes, and I know there are a number
23 of laws around who can and can't do that. And my understanding
24 is there's certainly some states where that has to be done by a
25 bona fide law enforcement organization. So there are some

1 limitations there, but I think that's one of the complexities of
2 it.

3 Q. Philip Morris doesn't have any plans in the future under
4 your leadership to look into conducting sting operations on its
5 own retailers, correct?

6 A. It's certainly not something that we do today. I think
7 we're always open to improvements in the future.

8 Q. Have you -- do you look, as part of your job at -- do you
9 know what the MMWR is?

10 A. Yes, I do. That's a publication of the CDC.

11 Q. It's a reliable weekly report?

12 A. Yes, I believe so.

13 Q. Okay. Do you from time to time look at MMWR figures?

14 A. Yes, I do.

15 Q. All right. Could we pull up U.S. Exhibit 93328 and if we
16 go to the last paragraph. You have to get a copy. It's April
17 1st, 2005, MMWR; is that correct?

18 A. Yes, that's correct.

19 Q. Okay. And if we go to, I believe I said page 298, and
20 the last paragraph. Now, there's a lot in this report we're
21 going to go over. But I just wanted to focus on, I believe, the
22 sentence which starts "in addition, in 2004, a total of
23 70.6 percent of current cigarette smokers in middle school said
24 they were not asked to show proof of age when they purchased or
25 attempted to purchase cigarettes from a store, and 66.4 percent

1 said they were not refused purchase of cigarettes because of
2 their age. No significant differences were observed from 2004".
3 Do you see that?

4 THE COURT: You mean from 2002?

5 MS. BROOKER: I'm sorry, from 2002.

6 THE WITNESS: Yes, I do see that.

7 BY MS. BROOKER:

8 Q. Have you reviewed this before?

9 A. Um, I haven't reviewed this specific report. But I've
10 reviewed data similar to this.

11 Q. Now, you don't know how many of Philip Morris's 200,000
12 retailers are responsible for the year 2004 for that 70 percent
13 figure; is that right?

14 A. Again, I don't know an exact number, but I think based on
15 the Synar information that you referenced earlier, I think that
16 based on sting operations, typically 88 percent of stores have
17 been found to not sell cigarettes to minors, to refuse the sale.
18 The challenge, I think, is that if you look at this data, I
19 think it's understood that kids become aware of, even the one
20 out of ten stores that may be willing to sell cigarettes to kids
21 and they tend to go to them more frequently. And so I think
22 that explains the fact that a relatively small number of stores
23 that in sting operations are selling cigarettes to kids, that
24 you still have relatively easy access by kids for cigarettes.
25 Q. You're speculating when you give that testimony, correct?

- 1 You have no basis for that?
- 2 A. Again, I think that there's quite a bit of research out
3 there that would explain the Synar data and this by that
4 conclusion.
- 5 Q. You have a listing of which of Philip Morris retailers
6 would represent that 70.6 percent of smokers in middle school
7 who were asked not to show -- excuse me, who were asked not to
8 show proof of age?
- 9 A. No, I don't.
- 10 Q. You have -- excuse me. So you don't know which of your
11 retailers are responsible for that figure? You could not
12 provide the Court a list of those retailers, correct?
- 13 A. No, I couldn't.
- 14 Q. And are you aware of this survey, whether it's a random
15 sample across the United States?
- 16 A. I'm not sure of the methodology they use here.
- 17 Q. Well, when you referred to what is typically the case,
18 and then you referred to "quite a bit of research", what
19 specific research can you cite to the Court for your position?
- 20 A. Supporting the fact that the majority of stores are not
21 selling cigarettes to kids?
- 22 Q. Well, how about that position, what are you citing to?
23 And when you say the majority of stores, you mean, I assume, the
24 majority of the 200,000 stores in which Philip Morris
25 participates in Retail Leaders?

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 A. Again, I would cite two things: One is the federal
2 government requires states to conduct sting operations, and
3 every state is required to do that in order to get federal
4 funding, and then they are required to report that to the
5 federal government. And based on those calculations, the
6 compliance rate of retailers -- and the states are required to
7 sample stores on a random basis within their states, I believe,
8 so those are pretty good representative numbers on a
9 state-by-state basis. And the federal government makes those
10 numbers available on a state-by-state basis, and if you actually
11 look at how they role up to the federal totals, that is what I
12 cited in my testimony, is that based on sting operations at the
13 state level, retailer compliance is up to about 87 percent,
14 which in my opinion is far too low, but it's a step in the right
15 direction.

16 Q. Your position is that 87 percent of Philip Morris
17 retailers -- what is your testimony?

18 A. I think my testimony is that when the states collect that
19 information, they find that 87 percent of the total universe of
20 retailers that they include in their sample reject a sale when a
21 youth tries to come in and buy cigarettes. And given that
22 Philip Morris calls on, you know, convenience stores and other
23 stores that sell over 90 percent of the cigarettes in the U.S.,
24 I have no reason to believe that there would be any difference
25 in that number for the Philip Morris stores versus retailers at

1 large.

2 Q. And what document are you citing to when you are
3 referring to this reporting document, the 87 percent of
4 retailers reject a sale, because that seems incredibly
5 inconsistent with what we see here for 2004 where a total of
6 70.6 percent of current cigarette smokers in middle school said
7 they were not asked to show proof of age?

8 A. I was referring to the state level Synar information,
9 which is, I think, publicly available and reported each year by
10 the states to the federal government.

11 Q. Now, let's go back to the first paragraph on page 300.

12 THE COURT: This is still the CDC document?

13 MS. BROOKER: This is still what is referred to as the
14 MMWR, yes, Your Honor.

15 BY MS. BROOKER:

16 Q. Now, it indicates there, we just looked at middle school
17 age. Now it says, "in addition, in 2004, a total of
18 70.6 percent of current cigarette smokers in" -- oh, I'm sorry,
19 I'm on the wrong one -- "among current smokers age greater
20 than -- less than 18 years in high school, 63.9 percent said
21 they were not asked to show proof of age when they purchased or
22 attempted to purchase cigarettes from a store, and 62.1 percent
23 said they were not refused purchase of cigarettes because of
24 their age. No significant differences were documented from
25 2002." Do you see that?

1 A. Yes, I do.

2 Q. Now, again, given that Philip Morris retailers account
3 for 200,000 of the retail stores that sell cigarettes, no doubt
4 a huge number of the 63 percent would be cigarettes sold at
5 stores in which Philip Morris sells its cigarettes, correct?

6 A. Again, potentially that some of the stores Philip Morris
7 calls on are the stores that these kids are purchasing
8 cigarettes from.

9 THE COURT: Well, I think we will take a recess now.

10 MS. BROOKER: Okay, this is a good time.

11 THE COURT: We will take 15 minutes, please.

12 (Thereupon, a break was had from 3:13 p.m. until 3:30
13 p.m.)

14 THE COURT: Ms. Brooker.

15 MS. BROOKER: Thank you, Your Honor. The break raced on
16 by. I'm pretty sure I'm going to finish up today, Your Honor. I
17 tried to really size things down at the break.

18 THE COURT: Okay.

19 BY MS. BROOKER:

20 Q. Now, let's -- I just wanted to clarify, now that you and
21 I both had a chance to look at Dr. Biglan's testimony at the
22 break -- you took a look at page 437; is that right?

23 A. Yes, I did.

24 Q. Okay. Let's --

25 Charles, put up 437. I believe there's a question at the

1 top.

2 And at the top of page 437 -- that's correct -- lines 1
3 to 9. This is where -- for a moment we had to take a break and
4 look at this -- where Dr. Biglan in his written direct defines
5 "merchant education," which he then later addressed and we
6 looked at; is that right?

7 A. Yes, that's correct.

8 Q. Okay. So "Merchant education," according to Dr. Biglan,
9 "includes visiting retail outlets and providing them with signs
10 and information to give to clerks in order to encourage them not
11 to sell tobacco to young people. For example, a tobacco
12 reduction coalition in a community might put together packets of
13 information on the problem of illegal sales of tobacco and have
14 teams of people go out -- teams of people go to each outlet in
15 the community. They might ask them to agree not to sell and
16 would give them their signs to post about how the store will not
17 sell tobacco to minors. In some cases, clerks receive training
18 about how to refuse to sell to minors. The tobacco companies We
19 Card Program is a form of merchant education."

20 Now, that you've seen that definition, would you agree
21 with Dr. Biglan that the We Card Program is a form of merchant
22 education?

23 A. I think what I would say is that the We Card Program has
24 some elements that he describes here, but I think that the We
25 Card Program, as executed by the Philip Morris sales

1 organization, has additional elements that I think do make it a
2 more powerful intervention than the community-based approach
3 that he describes here.

4 Q. What, other than -- specifically with regard to the We
5 Card signage and the We Card video training that is offered,
6 what else would you be referring to?

7 A. Well, I mean, it sounds to me like he's talking about a
8 community-based approach. You know, he mentions almost as an
9 afterthought, "In some cases, clerks receive training about how
10 to refuse to sell to minors." And I think that the We Card
11 Program operates in concert with some elements of the Retail
12 Leaders Program, including our Underage Cigarette Sales
13 Prevention Policy, to give substantially greater financial
14 incentive to the retailers to take not selling cigarettes to
15 kids as more than a nice thing to do, but to make it a
16 financially wise decision for them to really invest resources in
17 training their clerks and making sure they don't sell cigarettes
18 to kids. I think that the range of requirements in the Philip
19 Morris program are more substantial than is described here in
20 this community-based approach.

21 Q. Well, Dr. Biglan's definition is referring to the We Card
22 Program and not other aspects of the Retail Leaders Program
23 expressly in his written direct, correct?

24 A. Yes. I guess what you're saying is that he looked at the
25 We Card Program and didn't look at the other elements of the

- 1 Retail Leaders Program and our Underage Cigarette Sales
2 Prevention Policy --
- 3 Q. I'm only talking about his peer-reviewed literature on
4 merchant education programs or the We Card Program. You would
5 agree that the We Card Program, which is implemented by Philip
6 Morris, meets this definition, which includes visiting retail
7 outlets and training?
- 8 A. Yeah, I would certainly agree that there are similar
9 elements to what he describes here in the We Card Program.
- 10 Q. Now, Philip Morris employees are board members of the We
11 Card Coalition; is that right?
- 12 A. Yes, we have one representative on the board.
- 13 Q. Who is currently that representative?
- 14 A. Daniel Afonte.
- 15 Q. Okay. And where is Daniel Afonte? Is he in the Youth
16 Smoking Prevention Department right now at Philip Morris?
- 17 A. Yes, that's correct. He's a manager in the Youth Smoking
18 Prevention Department.
- 19 Q. And just to remind us, what was his prior position, prior
20 to being in the Youth Smoking Prevention Department at Philip
21 Morris?
- 22 A. He was a manager in the sales organization.
- 23 Q. And therefore, Mr. Afonte, as a board member, influences
24 policies and actions of the We Card Coalition; is that right?
- 25 A. He certainly has some oversight for the organization,

- 1 yes; that's correct.
- 2 Q. Do other tobacco company employees from other tobacco
- 3 companies also sit on the We Card Coalition?
- 4 A. Yes, they do.
- 5 Q. And control the budget and spending for the We Card
- 6 group -- for the We Card Program?
- 7 A. I do think that several of the tobacco companies provide
- 8 the majority of the funding for the We Card organization, so
- 9 they certainly have control over some of the budget. I think
- 10 the spending is decided by the We Card executives.
- 11 Q. Now, you claim in your written direct testimony that
- 12 Philip Morris is a financial sponsor of the We Card Program,
- 13 correct?
- 14 A. Yes, that's correct.
- 15 Q. Now, you didn't tell the Court the breakdown of how much
- 16 money Philip Morris puts into the We Card Program. Do you have
- 17 that figure here for 2004?
- 18 A. I think it's -- I can give you an approximate figure. I
- 19 think it's about three and a half to \$4 million.
- 20 Q. And what is the overall budget for We Card -- I'm sorry.
- 21 Was that for 2004?
- 22 A. Again, I think that's the approximate number for 2004,
- 23 yes.
- 24 Q. Okay. And what is the overall budget for the We Card
- 25 Program for 2004?

- 1 A. I'm not sure of the overall budget. I do know that
2 Philip Morris is the largest funder, so I think it would be on
3 the order of 5 or \$6 million in total.
- 4 Q. And that's for the entire program, correct, for the year
5 2004?
- 6 A. Yes, that's correct.
- 7 Q. Now -- boy, I don't know if I brought a copy.
8 Charles, do you have in there U.S. Exhibit 93329?
9 Charizma, can you see if we can get a copy in and I'll
10 skip it? As soon as possible. 93329.
11 We'll come back to that.
- 12 Now, do you recall that we had -- and I believe I
13 continued to say that you were testifying on Monday, but
14 apparently it was Tuesday that you were here last; is that
15 right?
- 16 A. That's correct.
- 17 Q. So the record is clear, when I referred to Monday, I was
18 meaning Tuesday.
- 19 You recall on Tuesday that we had some discussion about
20 whether any of the members of the two Youth Smoking Prevention
21 advisory boards had youth smoking prevention experience?
- 22 A. Yes, that's correct.
- 23 Q. Okay. And I believe you indicated that you were not sure
24 how I was defining that term?
- 25 A. Yes, that's correct.

1 Q. Okay. Now, if I provide you with this definition -- I
2 want you to assume that "youth smoking prevention experience"
3 means "experience in performing or conducting an experimental
4 evaluation of a youth smoking prevention intervention."

5 Do you understand that?

6 A. Let me just make sure I understand. So what you're --
7 you're eliminating all the people that are practitioners in
8 providing youth smoking prevention programs in this and you're
9 restricting it just to someone who's done research evaluations?

10 Q. Research evaluations.

11 A. Okay.

12 Q. And with that definition in mind, it's true that none of
13 the members of either of the two advisory boards have that youth
14 smoking prevention experience; is that correct?

15 A. Based on that narrow definition, I'm not sure I can -- I
16 can't say they do or do not.

17 Q. Because you don't know?

18 A. That's correct.

19 MS. BROOKER: Okay. If we could go, Charles, to the
20 Tuesday transcript at 18668.

21 BY MS. BROOKER:

22 Q. Do you have a copy of Tuesday's transcript up there?

23 A. No, I don't.

24 Q. Well, we'll look up on the board and if you -- I don't
25 think you'll need to go back, but if you do, we'll do that.

1 Look at 18- --

2 MR. WELLS: Your Honor, could I hand him a copy? I have
3 an extra.

4 MS. BROOKER: Oh, great. Thank you.

5 THE WITNESS: Thank you.

6 BY MS. BROOKER:

7 Q. 18668. Okay. I asked you at line 7: "Now, that input
8 would be provided at different phases in the development of the
9 advertisement, so prior to the advertisement's being finally
10 developed, the Senior Team would get to reviews those; is that
11 right? And comment upon them?"

12 And you answered: "I don't recall that being the case
13 prior to me becoming the head of Youth Smoking Prevention and I
14 can certainly comment better on the process we've used since
15 I've taken over the position."

16 And then I asked you: "Well, let me ask you, since you
17 have taken over the position, in the early development stages,
18 before final advertisements are approved, is that something that
19 is discussed at the Senior Team meeting?"

20 And you answered: "No. Typically, we do not discuss the
21 advertisements early in the process with the Senior Team."

22 Do you recall that testimony?

23 A. Yes, I do.

24 Q. Okay. And we were talking there, for example, about the
25 televised Philip Morris YSP advertisements; is that right?

1 A. Yes, that's correct.

2 Q. Okay. Now, back in 2002, you were, in March, the Senior
3 Vice President of Youth Smoking Prevention; is that right?

4 A. Yes, that's correct.

5 Q. Okay. Now, let's take a look at -- do you know who Marti
6 Kirschbaum is?

7 A. Yes, I do. She's in the -- she was in the Communications
8 Group of the YSP Department.

9 Q. Okay. Now, she was in that group prior to when you
10 became the Senior Vice President for Youth Smoking Prevention?

11 A. Yes, that's correct.

12 Q. Okay. And at the time that she was in that group, you
13 were on the Senior Team; is that right?

14 A. Yes, that's correct.

15 Q. Okay. Now let's take a look at what Marti Kirschbaum
16 said at her deposition in this case about running advertisements
17 by the Senior Team.

18 MR. WELLS: Objection, Your Honor. This is inappropriate
19 to show this witness now the testimony of another fact witness.
20 If they want to argue it at argument, they can do it, but this is
21 totally improper.

22 MS. BROOKER: Your Honor, what I'm intending to do is
23 specifically -- here at the trial testimony, Mr. Willard said, "I
24 don't recall that being the case prior to me becoming the Head of
25 Youth Smoking Prevention." I just established that he was on the

1 Senior Team at the time Marti Kirschbaum was in the Youth Smoking
 2 Prevention Department and I want him to take a look at this
 3 testimony to see if it refreshes his recollection about what he,
 4 as a Senior Team member, would have reviewed with regard to the
 5 televised advertisements during that time period.

6 MR. WELLS: I'll withdraw the objection, given that
 7 limitation.

8 THE COURT: Go ahead, please.

9 MS. BROOKER: Did you provide a copy of the deposition?
 10 Okay.

11 BY MS. BROOKER:

12 Q. Now, this is Marti Kirschbaum's deposition taken in this
 13 case in May of 2001. And actually at that time, you were the
 14 Senior Vice President of Youth Smoking Prevention, correct?

15 A. Yes, that's correct.

16 Q. Okay. You had just taken your position the month prior?

17 A. Yes, that's correct.

18 Q. Okay.

19 MR. WELLS: I'm sorry. I think you said "May 2001." You
 20 may have misspoke.

21 THE WITNESS: I thought you were talking about May 2002;
 22 is that correct?

23 BY MS. BROOKER:

24 Q. Yes. I'm sorry. I may have misspoke. Marti
 25 Kirschbaum's deposition is May 2002.

- 1 A. Okay.
- 2 Q. And just to be clear, you took your position as Senior
3 Vice President of YSP in March of 2002?
- 4 A. That is correct.
- 5 Q. Okay. Now, there are several pages here. To be fair to
6 the transcript, I'm, you know, going to read through several of
7 them so there's nothing missing from what I read. And of course
8 you can feel free to look back at prior pages. But we're going
9 to start at page 30.
- 10 I think I need to pull a document here. Do we also have
11 U.S. Exhibit 46387?
- 12 Now, I'm showing you this because this is the document
13 discussed in the beginning of the deposition so I want the
14 record to be complete and for you to understand what Marti
15 Kirschbaum is referring to.
- 16 Now, let's just look at the -- there's an e-mail, U.S.
17 Exhibit 46387. Do you have that?
- 18 A. Yes, I do, if that's the one on the screen.
- 19 Q. Yes. And there's an e-mail dated September 5, 2001,
20 correct?
- 21 A. Yes, that's correct.
- 22 Q. And Marti Kirschbaum is copied on that e-mail; is that
23 right?
- 24 A. Yes, that's correct.
- 25 Q. Okay. Now, do you know who the other two individuals are

1 on the e-mail whose names I probably cannot pronounce, but the
2 last name is A-N-E-J-A.

3 A. Ankur Aneja.

4 Q. Yes.

5 A. And Denise Cohen.

6 Q. And the "to" and the "from" -- who are the "to" and the
7 "from"?

8 A. Loraine is an Administrative Assistant in the YSP Group
9 and the "from" is an analyst that works -- or at the time worked
10 in the YSP Communications Group.

11 Q. Okay. And the e-mail reads: "Loraine, can you please
12 set up Senior Team meetings for us with Mike, Ellen, Nancy and
13 Steve Parrish."

14 Now, I assume that you would understand that to mean Mike
15 Szymanczyk, Ellen Merlo, Nancy Lund and Steve Parrish?

16 A. Again, that would seem to make some sense, but I --
17 again, I haven't received this e-mail, but those certainly could
18 be the individuals that were included.

19 Q. And they're all people on the Senior Team at that time?

20 A. I -- certainly Mike Szymanczyk, Ellen Merlo and Nancy
21 Lund were; Steve Parrish was not a member of the Senior Team.

22 Q. Okay. Would he attend Senior Team meetings at that time?

23 A. No, not to my knowledge. He may have on an unusual
24 basis, but he --

25 Q. Okay. Thank you. And it continues on: "We need

1 15 minutes with them together or separately. We'll be showing
2 them the parent TV ad called, quote, 'Reactions'; is that
3 right?
4 A. Yes.
5 Q. That's what it says?
6 A. Yes, that's correct.
7 Q. And then in the last sentence, it says: "Finally, we
8 need to set up a meeting with the YSP Council the week of
9 October 29th to show them the same two ads," correct?
10 A. Yes, that's correct.
11 Q. Now, those parent -- the "parent TV ad called
12 'Reactions,'" is that a parent-directed youth smoking prevention
13 advertisement?
14 A. Yes, it is.
15 Q. Okay. And did that ever air?
16 A. Yes, it did.
17 Q. Now let's look at page 30 of Marti Kirschbaum's
18 deposition, line 17. And the question is put: "Do you want to
19 take a moment just to look at the document? Do you recognize
20 this e-mail?"
21 And you know, Charles, we're going to run through this.
22 "Answer: I don't remember it specifically.
23 "Question: Okay. For the record, it has a Bates
24 number" -- and the Bates number is read. "And I think you spoke
25 about Ms. Aneja?

1 "Answer: Aneja.
2 "Question: Aneja. Okay. And she works in your
3 Communications Department?
4 "Answer: Yes.
5 "Question: And a Senior Team meeting referred to there
6 in the first sentence -- is that a meeting that you would have
7 regularly attended?
8 "Answer: It depends.
9 "Question: So sometimes you did go to Senior Team
10 meetings?
11 "Answer: Well, I don't know that they're regularly
12 scheduled meetings.
13 "Question: What is a Senior Team meeting?
14 "Answer: Well, in this e-mail, it says here a meeting
15 with Mike, Ellen, Nancy and Steve Parrish. That's what it
16 refers to here.
17 "Question: So when the first sentence reads: 'Can you
18 please set up Senior Team meetings for us with Mike, Ellen,
19 Nancy and Steve Parrish,' who is 'us'?
20 "Answer: Well, I didn't write the e-mail. Ankur wrote
21 it, but it might have been her and Denise.
22 "Question: Okay. You're also cc'd on this e-mail,
23 right? Do you recall going to a meeting with Mike, Ellen,
24 Nancy, Steve, Denise and Ankur?
25 "Answer: No.

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1 "Question: Mike is Mike Szymanczyk; is that correct?
2 "Answer: I would assume so from this.
3 "Question: Who is Ellen?
4 "Answer: I would assume it's Ellen Merlo.
5 "Question: Nancy?
6 "Answer: I would assume it's Nancy Lund.
7 "Question: Do you know Ellen Merlo's job title?
8 "Answer: Yes, I do.
9 "Question: What is it?
10 "Answer: I believe it's Senior Vice President of
11 Corporate Affairs.
12 "Question: And how about Nancy Lund? What is her job
13 title?
14 "Answer: I believe it's Senior Vice President of
15 Marketing.
16 "Question: Did you meet with the people named in this
17 e-mail while you were working at YSP?"
18 And there's an objection.
19 "Answer: Have I ever met with these people while in YSP?
20 "Question: Sure.
21 "Answer: Individually or separately?
22 "Question: Either way.
23 "Answer: Excuse me. Individually or together. Sorry.
24 I've been in meetings with some of these people.
25 "Question: Okay. What is the last meeting you recall

1 attending with any of these people?

2 "Answer: With Mike, Ellen, Nancy or Steve Parrish?

3 "Question: Um-hmm.

4 "Answer: I really can't recall specifically the last

5 meeting I've been in with them.

6 "Question: What kinds of meetings would they attend?

7 "Answer: I'm not sure I understand the question.

8 "Question: Did they regularly come to your

9 Communications Department meetings.

10 "Answer: No.

11 "Question: Did they come to your monthly meetings?

12 "Answer: No.

13 "Question: Then what kind of meetings did they come to?

14 "Answer: They didn't come to any of our meetings.

15 "Question: So you haven't ever met with any of them?

16 "Answer: Yes, I have met with them.

17 "Question: Okay. Then in what context have you met with

18 them?

19 "Answer: We would set up a meeting with them, Ankur is

20 trying to do in this e-mail.

21 "Question: For what purpose?

22 "Answer: As it states here in this e-mail, to show them

23 the parent ad. The purpose in here, it says, will be showing

24 them the parent TV ad, 'Reaction.'

25 "Question: Did you regularly set up meetings with these

1 people to show them TV ads?"

2 And there's an objection.

3 "Answer: We would meet with them. 'We,' being someone

4 in the Communications Department, would meet with, you know, one

5 or some of these people on ads.

6 "Now, when you say you would meet with them on ads, what

7 does that mean?

8 "Answer: It means we would -- meetings were set up with

9 them to look at ads, to view ads."

10 I'm almost getting to the end.

11 "Question: And would you do that before you ran a new

12 TV" -- excuse me -- "a new ad on TV?

13 "Answer: Yes.

14 "Question: Would you do that before -- would you -- at

15 what stage in the development of an ad would you set up a

16 meeting? Would you do that before the ad was shown to focus

17 groups or before the ad had a quantitative test? At what point

18 would you show them the ad?

19 "Answer: I think there were varied points that they saw

20 an ad."

21 Now, it goes on.

22 "Witness: There were varied points where they would see

23 a television add.

24 "Question: What is your understanding of why these

25 people would see the television ads?

1 "Answer: For review.

2 "Question: Did they provide comment on the ads?

3 "Answer: They might provide comment on ads.

4 "Question: Do you recall them providing comments on ads?

5 "Answer: Yes, they would make a comment on an ad.

6 "Question: And then would those comments be acted on?

7 "Answer: Well, I guess not all comments are actionable.

8 "Question: The last sentence of this e-mail refers to a

9 'YSP Council.' What is the 'YSP Council'?

10 "Answer: It's an internal council made up of members

11 within Philip Morris that also review ads.

12 "Question: Do you know who is in that council?

13 "Answer: I can remember at least some of the people on

14 that council.

15 "Question: Can you name the ones you remember, please.

16 "Answer: Brendan McCormick.

17 "Question: Do you know his job title?

18 "Answer: No, I don't.

19 "Question: Do you know what department he works in?

20 "Answer: I believe in Corporate Affairs.

21 "Okay. Who else?

22 "Answer: Tom Ryan.

23 "Question: Do you know his job title?

24 "Answer: No, I don't.

25 "Question: What department is he in?

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1 "Answer: Corporate Affairs.
2 "Okay. Who else?
3 "Answer: Mike Pfeil.
4 "Question: Who else?
5 "Rob Riggle.
6 "Can you spell that name? What department is he in?
7 "He is in Corporate Affairs.
8 "Question: Do you remember anyone else?
9 "Answer: I can't remember specifically any of the other
10 names right now.
11 "Question: Did you ever attend meetings of the YSP
12 Council?
13 "Answer: Yes.
14 "What is the purpose of the YSP Council?
15 "To review ads.
16 "That's their only purpose?
17 "Answer: Well, I didn't set up the council so I'm not
18 fully aware of the purpose, but my understanding is to review
19 ads.
20 "Question: Why do a group of people from Corporate
21 Affairs need to review the YSP ads?"
22 There's an objection.
23 "Answer: As I said, I wasn't the one who set up the
24 council so I am really not the one to understand -- to answer
25 that question."

1 Skipping down two lines:
2 "Question" -- on line 18: "Do you have any understanding
3 as to why the YSP Council reviewed YSP ads?
4 "Answer: My understanding is that they review ads to
5 make sure there are no problems with the ads."
6 And there's an objection and a couple more lines.
7 "Answer: I don't know. That's why we go to the council.
8 "Question: Have they ever said that there's a problem
9 with an ad?
10 "Answer: I don't know. Can't recall that they've ever
11 said there's a problem specifically with an ad."
12 You see that testimony, correct?
13 A. Yes, I do.
14 Q. Okay. I assume you've not seen that testimony
15 previously?
16 A. That's correct.
17 Q. Okay. Now, does that refresh your recollection during
18 this time period about whether advertisements at various levels
19 in progress were run by people outside of YSP, including the
20 Senior Team and this group called "the YSP Council"?
21 A. No, it doesn't. And let me explain. During my testimony
22 on Tuesday, we talked about the Senior Team and we had extensive
23 conversations and I think I explained that it was a regular
24 meeting; happened on Tuesdays; there's 14 or 15 members of the
25 Senior Team. And I think that was pretty clear in my testimony.

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1 I saw nothing in Ms. Kirschbaum's testimony that said she
2 was referring to those Senior Team meetings.

3 Secondly, I think that you also stated that
4 Ms. Kirschbaum worked for me in my organization, which is
5 accurate, and you stated some dates, but I think that all the
6 dates that she is referring to were during the time that I was
7 not leading the organization.

8 So again, I think we started with a piece of my testimony
9 and I'm not sure anything that Ms. Kirschbaum described is
10 anything that would provide any further insight into my
11 testimony.

12 Q. Ms. Kirschbaum indicated that she attended Senior Team
13 meetings or what she believed to be Senior Team meetings to run
14 television advertisement by the group, which she referred to
15 Mike, Ellen, Nancy and Steve Parrish. And we've already gone
16 over that, correct?

17 MR. WELLS: Your Honor, the purpose of this long reading
18 was to refresh his recollection. He has said his recollection
19 has not been refresh. She cannot now convert it into a
20 substantive evidence challenge. It was to refresh; it wasn't
21 refreshed.

22 THE COURT: Sustained.

23 MS. BROOKER: Thank you, Your Honor.

24 BY MS. BROOKER:

25 Q. Okay. Now I have copies -- here you go -- U.S.

1 Exhibit 93329. Okay. Take a look at U.S. Exhibit 93329.
2 Do you have that in front of you?
3 A. Yes, I do.
4 Q. Okay. This is a memo dated August 21, 2003, correct?
5 A. Yes, that's correct.
6 Q. Okay. And again, during that time period, you were the
7 Senior Vice President of Youth Smoking Prevention, correct?
8 A. Yes, that's correct.
9 Q. And Craig Johnson is a Senior Vice President who sits on
10 the Senior Team; is that correct?
11 A. Yes, that's correct.
12 Q. And this is a memo that goes out to the entire field
13 sales force; is that right?
14 A. Yes. I just want to -- did you say that Craig Johnson
15 was a Senior Vice President?
16 Q. Is he not?
17 A. No, on the memo here it states his correct title. He's
18 an Executive Vice President, but he does sit on the Senior Team.
19 Q. Okay. Thank you for that correction.
20 Now, this is entitled The Underage Cigarette Sales
21 Prevention Policy, correct?
22 A. Yes, that's correct.
23 Q. And I assume you're -- in your position you're very
24 familiar with this policy?
25 A. Yes, I am.

1 Q. Okay. I just want to go down to page -- I'm not sure
2 these have -- it's the last page or the second page, 1787 is a
3 number in the bottom left-hand corner. At the top it reads
4 "Philip Morris USA underage cigarette sales prevention policy",
5 do you see that?

6 A. Yes, I do.

7 Q. Okay. I'm really just trying to wrap up this area and
8 ask you a few questions about what you see at the bottom of the
9 page. It indicates that "if a state agency notifies" -- and I'm
10 in the last paragraph, "if a state agency notifies Philip Morris
11 USA that a workload store or any of its personnel has been
12 convicted or penalized for underage cigarette sales, Philip
13 Morris USA will impose penalties on that store according to the
14 schedule stated below. The penalties include suspension of
15 merchandising payments, eligibility for promotional resources
16 provided by Philip Morris USA directly to stores, and
17 eligibility for product promotions." Do you see that?

18 A. Yes, I do.

19 Q. Now, all of these penalties for being convicted of
20 selling cigarettes to minors are suspension only; no termination
21 penalties; is that right?

22 A. Yes, that's correct.

23 Q. So, if a -- according to this schedule, if some store
24 owner is convicted three times under the law for selling
25 cigarettes to minors, the worst that can happen to him is that

1 for 12 months he'll be suspended from the Retail Leaders
2 Program, is that how it reads?

3 A. I think that's how it reads. I'm not -- again, it's 12
4 months off the program. I think they would probably remove them
5 from the program and then put them back on for 12 months, but
6 the penalty period is a 12 month suspension from the program.

7 Q. And that's for being convicted under the law three times,
8 so that would be a repeat offender at worst would face, from
9 Philip Morris USA, a 12 month suspension of promotional
10 privileges, merchandising payments and product promotion
11 eligibility; is that right?

12 A. Yes, that's correct.

13 Q. So if an offender is convicted under the law for the
14 first time, the only penalty that Philip Morris USA imposes upon
15 that retailer is a one month suspension of some of these
16 merchandising payments, promotional resources or product
17 promotions, correct?

18 A. Well, I think it's important to point out that these
19 penalties would be in addition to any penalties that the state
20 would take against that retailer, and we worked with the
21 National Association of Attorneys General to get that
22 information so we could add an additional deterrent. And from
23 my conversations with them, in many cases our -- the cost of our
24 suspension may be in excess of what the state fines that
25 retailer, but that is the way it's described here as, is

1 accurate.

2 Q. I only asked you about the penalties imposed by Philip
3 Morris USA; is that correct?

4 A. Yes, this describes the penalties by Philip Morris USA.

5 Q. And as the Senior Vice President responsible for Youth
6 Smoking Prevention at Philip Morris, I would assume that you
7 approve of this policy?

8 A. Yes, I think these are very substantial penalties.

9 Q. Now, do you recall that we on Tuesday had some discussion
10 about -- I'm sorry, I think I already covered that.

11 Let's look at your written direct examination at page 80,
12 line 11. Now, we'll read the question and then we'll flip the
13 page, Charles.

14 The question that was put to you in your written direct
15 is: "Do you think that Philip Morris USA's YSP efforts have
16 contributed to the decline in youth smoking rates over the
17 years?"

18 And you answered: "I do. YSP is just one of many public
19 and private sector organizations that are focused on reducing
20 youth smoking. Although it is very difficult to connect specific
21 declines in youth smoking rates directly to the efforts of these
22 organizations, I do believe that the efforts of Philip Morris USA
23 have helped contribute to the decline. Of course, we believe
24 that there is more work to be done and we look forward to working
25 on this issue in the years ahead." Do you stand by this

1 testimony under oath?

2 A. Yes, I do.

3 Q. Let's turn to page 82, line 2 to 3, and I'm just focusing
4 on your response there. Did you give that testimony under oath:
5 "We have developed a program that has played a meaningful part
6 in helping bring youth smoking rates in this country to historic
7 lows." Is that your testimony?

8 A. Yes, that's correct.

9 Q. You have no problem making this statement under oath on
10 behalf of Philip Morris USA even though Marlboro is the number
11 one brand smoked by teenagers today?

12 A. No, I don't have any problem.

13 Q. Now -- so Philip Morris USA is taking responsibility, or
14 credit in this instance, for youth smoking rates; is that
15 correct?

16 A. No, I think I qualified it that it's very difficult to
17 connect specific programs to reductions in youth smoking, but I
18 do think that the efforts of our program have helped contribute
19 in a positive way.

20 Q. So you, on behalf of Philip Morris, are taking at least
21 part responsibility for youth smoking rates?

22 A. No, I think what I stated was that it's difficult to
23 connect specific programs to youth smoking rates, but when asked
24 whether or not we've made a positive contribution, I would have
25 to say I believe we do based on the breadth of programs we offer

1 and the positive impact I believe they're having.

2 Q. Well, you stand by the two responses you just gave under
3 oath, correct?

4 A. Yes, I do.

5 Q. Now, let's take a look, again, at the latest MMWR at page
6 300 in the last paragraph.

7 There it indicates, and again, this is from April 2005,
8 so it's the most recent MMWR, I believe. Does that look
9 correct?

10 A. Yes, that's correct.

11 Q. Okay. Now, it indicates there "because the overall
12 prevalence of any tobacco use or cigarette smoking did not
13 change during 2002 to 2004, data from future surveys will be
14 important in determining whether progress toward meeting the
15 national health objectives for the year 2010 is slowing." Now,
16 that time period, 2002 to 2004, is when you've been the Senior
17 Vice President at Philip Morris Youth Smoking Prevention,
18 correct?

19 A. Yes, that's correct.

20 Q. It continues to read, "several factors might be related
21 to this lack of change in prevalence. From winter 1997 to
22 spring 2000 -- the retail prices of cigarettes" -- oh, I'm
23 reading that wrong again. I guess it's late. "From winter 1997
24 to spring 2002, the retail price of cigarettes increased
25 approximately 80 percent, but from spring 2002 to spring 2004,

1 the price increased only 4 percent. Although smoking prevention
2 media campaigns are effective in preventing Youth Smoking
3 initiation, funding for these campaigns has substantially
4 declined" -- excuse me -- "declined substantially. Finally,
5 whereas factors preventing tobacco use, for example increasing
6 the retail price of tobacco products, implementing smoking
7 prevention media campaigns" --

8 MR. WELLS: I'm sorry, did you miss a whole sentence? "In
9 addition". You missed a sentence.

10 MS. BROOKER: I'm sorry, I'm reading from my paper.

11 BY MS. BROOKER:

12 Q. "Funding for these campaigns has declined substantially.
13 In addition, during the preceding three fiscal years, a
14 28 percent decline in the total investment in state wide
15 comprehensive tobacco prevention and control programs occurred
16 from 7.4 -- 749.7 million in fiscal year 2000 to 54" --

17 THE COURT: 2002.

18 MS. BROOKER: "In 2002. To 542.6 in fiscal year 2004.
19 Finally, whereas factors preventing tobacco use, for example
20 increasing the retail price of tobacco products, implementing
21 smoking prevention media campaigns, and funding for comprehensive
22 state tobacco prevention and control programs, declined from 2002
23 to 2004. Tobacco industry expenditures on tobacco advertising
24 and promotion increased from 5.7 billion in 1997 to 12.5 billion
25 in 2002." Do you see that?

1 THE WITNESS: Yes, I do.

2 BY MS. BROOKER:

3 Q. Now, one of the specific factors noted there in the
4 parenthetical Preventing Tobacco Use declined from 2004 to --
5 2002 to 2004 is increasing the retail price of tobacco products,
6 correct?

7 A. Yes, I do see that.

8 Q. Now, you're well aware that Philip Morris's marketing
9 expenditures are substantially concentrated on promotional
10 offers which reduce the price of cigarettes at retail; is that
11 correct?

12 A. Certainly that's an element of the marketing mix.

13 Q. And that's a substantial amount, correct?

14 A. Yes, it is.

15 Q. Now, let's look at what Dr. Chaloupka has said in this
16 case about the effect of certain tobacco company marketing
17 efforts on youth smoking rates, and if we could look at
18 Dr. Chaloupka's written direct at page 92.

19 MR. WELLS: Your Honor, I know you indicated earlier that
20 the witness could be confronted with expert testimony, but with
21 respect to Dr. Biglan, that related to testimony that went to
22 youth smoking prevention programs. We have now moved into the
23 area of marketing where he is not involved, and I think to now
24 start confronting him with expert witness testimony outside of
25 the area where he is involved, just goes beyond the bounds.

Scott L. Wallace, RDR, CRR
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1 THE COURT: Marketing is certainly involved with youth
2 smoking prevention. The objection's overruled.

3 BY MS. BROOKER:

4 Q. Now, let's just look at that figure.

5 A. What page are we on?

6 Q. At page 92 and we have to look a little bit, Charles, at
7 the testimony, just go up to line 7, Charles, so we can blow
8 that up a little more.

9 Now, that's figure 52 there, correct?

10 A. Yes, I see that.

11 Q. And that shows -- that's sort of just an illustration of
12 the testimony you just gave with respect to the significant
13 price-related marketing expenditures for the industry; is that
14 correct?

15 A. Yes, that's correct.

16 Q. Okay. Let's just turn the page to 93, line 15. And
17 Dr. Chaloupka is asked if he can provide estimates of the effect
18 of defendants' price related marketing on teenage smoking
19 initiation, and he answered: "Marketing activities that
20 significantly reduce cigarette prices will increase the
21 initiation of regular smoking and daily smoking by teenagers,
22 and will increase the number of cigarettes smoked by teenage
23 smokers beyond what would have been the case in the absence of
24 these marketing activities. Based on the 2002 FTC data,
25 marketing expenditures that directly reduce the price of

1 cigarettes amounted to about \$0.46 per pack. In November 2002,
2 as reported in the Annual Tax Burden On Tobacco, average
3 cigarette prices, not including generic brands and not including
4 temporary price reductions caused by the price-related marketing
5 described above, were just under \$4. Given this price-related
6 marketing activities" --

7 THE COURT: Ms. Brooker, \$4 per pack.

8 MS. BROOKER: "\$4 per pack. Given this, price-related
9 marketing activities reduced the average price per pack by at
10 least 11.6 percent, which, based on the estimates described
11 above, means that as many as 100,000 teenagers would have
12 initiated daily smoking in 2002 as a result of these marketing
13 activities." Do you see that testimony?

14 THE WITNESS: Yes, I do.

15 BY MS. BROOKER:

16 Q. And he goes on to say, "Given the likelihood that
17 defendants' marketing activities are concentrated on their
18 leading brands, which are the brands most likely to be smoked by
19 teenage smokers, it is likely that these price-related marketing
20 activities resulted in even larger increase in teenage smoking
21 initiation." Do you see that?

22 A. Yes, I do.

23 Q. Philip Morris's Youth Smoking Prevention Department has
24 not taken any action against its marketing departments for
25 decreasing the price of cigarettes at retail as has just been

1 described by Dr. Chaloupka, correct?

2 A. I think I would agree with you that the Youth Smoking
3 Prevention Department doesn't set pricing policy at Philip
4 Morris USA, but I do think that I need to point out that
5 Dr. Chaloupka is referring to the impact of those price off
6 promotions on a relative basis, and I think that, as was
7 stated -- I think in the MMWR -- cigarette prices have been
8 increasing. They increased 80 percent in the first period they
9 mentioned to and about 4 or 5 percent in the last period, but I
10 would agree that without the price off, cigarette prices would
11 have been higher.

12 Q. So Philip Morris's marketing is essentially reduces the
13 price of cigarettes at retail? That's what you're saying?

14 MR. WELLS: Objection, that's not --

15 THE WITNESS: No, I think what I would say is what I
16 described was that cigarette prices have been going up, again,
17 based on the MMWR from the CDC over both of these time periods,
18 but I think that what Dr. Chaloupka is describing is that there
19 is an element of the Philip Morris USA adult marketing programs
20 that does offer a price reduction, and I think after those price
21 reductions are applied there is still a price increase, but
22 certainly there is a price reduction as a result of those price
23 off offers.

24 BY MS. BROOKER:

25 Q. And as you've indicated, you're well aware of that fact

1 as Senior Vice President of Youth Smoking Prevention at Philip
2 Morris?

3 A. Yes, I do understand that part of the way Philip Morris
4 competes for adult smokers is through these offers.

5 MS. BROOKER: Your Honor, I believe that was my last
6 question.

7 THE COURT: All right. Let's start redirect, please.
8 Redirect is it 3:25?

9 MS. BROOKER: 4:15.

10 MR. WELLS: Because of the lateness in the day, he's been
11 here since early waiting, could we just begin on Monday?

12 THE COURT: How long do you think your redirect is going
13 to be?

14 MR. WELLS: A couple hours.

15 THE COURT: Oh, it will be that long.

16 MR. WELLS: Well, I would say a couple hours before and I
17 don't think given what happened today, probably will still be a
18 couple hours.

19 THE COURT: Am I correct that given what everybody has
20 told me and what we've worked out this morning, that there's a
21 good chance that Tuesday and Wednesday we will not be sitting?

22 MS. EUBANKS: I don't think that -- I think it's more
23 likely that perhaps Wednesday we wouldn't be sitting because we
24 do have another witness -- or they have another witness who is
25 following Mr. Willard. So just assuming that Mr. Willard gets

1 off the stand on Monday, because when Mr. Wells completes his
2 examination I suppose we'll start with the next witness, and he's
3 the only other witness besides Dr. Mulholland. And so with the
4 interim summations on next Thursday, I think it's likely, or
5 possible at least, that we would have Wednesday off unless Your
6 Honor wanted to do objections on that date to some of the
7 documents.

8 THE COURT: No.

9 MR. WELLS: I was just going to concur. I think testimony
10 in all likelihood, given the nature of Mr. Beran's testimony,
11 which deals with the database, is likely to spillover into
12 Tuesday, so we'll finish some time on Tuesday.

13 THE COURT: All right. 9:30 on Monday then. Thank you.

14 (Proceedings adjourned at 4:17 p.m.)
15

16 C E R T I F I C A T E
17

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

22 -----
23 Scott L. Wallace, RDR, CRR
24 Official Court Reporter
25

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3 Examinations

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5 CONTINUED CROSS-EXAMINATION OF HOWARD A. WILLARD
6 BY MS. BROOKER

19062

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E X H I B I T S

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8 Description

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