

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.
Defendants. . June 1, 2005
.

VOLUME 111
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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Scott L. Wallace, RDR, CRR
Official Court Reporter

1 MORNING SESSION, JUNE 1, 2005

2 (9:32 a.m.)

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

5 I received -- I don't know when it came in. Well, I don't
6 think it came in yesterday, though; I think I got it this
7 morning, the government's Notice of Amended Objections to the
8 Written Examination of Dr. Wittes.

9 I want to make sure -- Dr. Wittes should remain outside
10 while we have this conversation, please.

11 (Witness left the courtroom.)

12 THE COURT: Thank you.

13 Mr. Brody, anything you want to add to it before I hear
14 the other side?

15 MR. BRODY: No, Your Honor. I don't think we have
16 anything to add to what's presented in the papers. I believe
17 we -- and defendants have filed a written response this
18 morning --

19 THE COURT: Which I haven't seen at all.

20 MR. BRODY: -- to it, and so they have papers as well
21 where they've argued against --

22 THE COURT: I'm curious. When did you file yours?

23 MR. BRODY: We filed it at 5 and I believe our papers are
24 delivered to chambers at approximately 5:30.

25 THE COURT: Really? I didn't leave until 7:15 last night.

1 but maybe -- I don't know what happened. Ms. Soneji wasn't here,
2 so that's probably what happened.

3 And when did the defendants' come in?

4 MR. MINTON: Mike Minton, Your Honor.

5 We filed ours, I believe, about 45 minutes ago. We
6 received ours I think around 7:00 last night. I can briefly
7 summarize for the Court what the arguments are in the documents.

8 THE COURT: Well, let me really try to be more efficient
9 about this. Obviously, there's a great deal to cross-examine
10 this witness about. Can we at least put off this issue until, at
11 a minimum, after the morning break and then I will have read
12 everything and I think we'll be able to proceed more quickly?

13 MR. BRODY: Certainly, Your Honor. I don't think we're
14 going to get to this issue before the morning break and we can do
15 that.

16 There is one additional issue due to the -- one of the
17 documents that is referred to in the written direct and that was
18 submitted with the written direct is covered by the protective
19 order in the Delaware case. There was, I believe, a
20 misunderstanding as to what was covered and what was not. And so
21 defendants have agreed to withdraw JD 25219 and have agreed to
22 strike the testimony at page 51, lines 1 through 6.

23 THE COURT: Wait a minute. 51, lines 1 through 6. Okay.

24 MR. BRODY: Yes.

25 THE COURT: All right. With that we're ready to proceed,

1 everyone.

2 MR. BRODY: Thank you.

3 THE COURT: Thank you.

4 (JANET WITTES, PH.D., DEFENDANT'S WITNESS, SWORN)

5 DIRECT EXAMINATION OF JANET WITTES, PH.D.

6 BY MR. MINTON:

7 Q. Would you state your name for the record, please.

8 A. Janet Wittes.

9 Q. Dr. Wittes, have you brought along with you your written
10 direct examination?

11 A. Yes, I have.

12 Q. All right. Are there any changes or alterations that you
13 need to make to the direct examination before adopting it?

14 A. Yes, there are two. On page 13, the second line, it says
15 I'm currently on the editorial board of Statistics in Medicine.
16 That's no longer true. I'm not on the board anymore.

17 THE COURT: And what line is that?

18 THE WITNESS: It's line 2 of page 13.

19 And then on page 89, which is the very last page, it
20 says -- on line 5, it says: "In fact, the issue is on the agenda
21 for the meeting of this Committee the week of May 23rd." We
22 didn't have a meeting because people didn't show up, so it was on
23 the agenda, but the meeting didn't occur.

24 BY MR. MINTON:

25 Q. All right. With those changes, do you adopt your written

1 testimony?

2 A. Yes, I do.

3 MR. MINTON: All right. Your Honor, at this point, on the
4 basis of Dr. Wittes's written testimony and her CV, we proffer
5 her as an expert in biostatistics, statistics and the design,
6 analysis and interpretation of scientific studies dealing with
7 prevention and treatment.

8 THE COURT: Any challenge to the field of expertise,
9 Mr. Brody?

10 MR. BRODY: We have no objection to the field of
11 biostatistics and statistics; I would like to reserve on the
12 remainder because I'm not sure how broad that is and what it's
13 intended to cover.

14 THE COURT: All right. I'll reserve until we finish all
15 the testimony.

16 BY MR. MINTON:

17 Q. Dr. Wittes, let's get right to it. You were asked to
18 analyze two studies, the Farrelly 2002 and 2005 studies?

19 A. Yes, that's correct.

20 Q. Let's go right to the Farrelly 2002 study. Could you
21 describe for the Court the basic design of that study, just a
22 sketch or an overview.

23 A. Sure. It was a pair of cross-section surveys, one done
24 before the "truth" campaign started, one done about nine months
25 later, to ask about the respondents' -- to identify the effect

1 of the "truth" campaign on respondents' attitudes, youth
2 attitude toward cigarette smoking and their intention to smoke.

3 Q. All right. Have you prepared a demonstrative that lists
4 problems in the design and interpretation of that study?

5 A. Yes, I have.

6 Q. All right. Is JDEM 020247 that demonstrative?

7 If you could bring that up, please, Jamey.

8 A. Yes, it is.

9 Q. The first bullet point you referred to, "Pre-specifying a
10 primary hypothesis" -- what does that mean?

11 A. Well, when you do a study, a scientific study, you -- the
12 study is designed -- one designs a study to test a hypothesis
13 and the whole structure of the experiment or the study is
14 designed for that purpose. And therefore, it's essential to the
15 study itself and to the interpretation of the study how the data
16 relate to that primary hypothesis.

17 Q. And from the standpoint of the science of statistics, is
18 it necessary to specify a hypothesis before you begin analyzing
19 and testing the data?

20 A. Yes, because fundamental to classical statistics is being
21 able to assign probability statements to hypotheses that you're
22 testing. And if you don't have a primary hypotheses or you're
23 testing a hypothesis that's not primary, the probabilistic basis
24 on which the inference is drawn falls apart.

25 Q. Is the technical term sometimes used for a hypothesis

1 that was formulated before analysis and testing "a priori"?

2 A. Yes.

3 Q. And are the results that are reported in the Farrelly
4 2002 article the product of an a priori hypothesis?

5 A. No, they're not.

6 Q. And is that consistent with the scientific method of
7 specifying a hypothesis in advance?

8 A. No, it's not.

9 Q. All right. How do we know that the results reported in
10 the Farrelly 2002 study were not an a priori hypothesis the
11 authors initially planned to test?

12 A. Well, that's actually an interesting question.

13 Looking -- if you looked at the paper itself, you wouldn't
14 know -- there's nothing in the paper that tells you what the
15 a priori hypothesis is, so that's sort of missing, but you
16 wouldn't know that none of the hypotheses there were actually
17 not primary.

18 If you look at the interview form, you notice very --
19 it's not clear from the interview form what would be primary,
20 and I think I'd like to talk about that later, if possible.

21 But it turns out that Dr. Healton in her testimony stated
22 that the hypothesis that they tested, the "truth" -- to compare
23 "truth. Don't smoke" -- I'm sorry -- "Think. Don't smoke" to
24 "truth" was not planned at all; that that was -- she said they
25 saw the results and were startled, so that shows this was not a

1 primary hypothesis at all.

2 Q. How does one interpret the statistical significance of a
3 test result that was arrived at only after observing
4 relationships in the data?

5 A. Well, as I've said in the paper that I wrote years ago,
6 it's like betting on a horse after the race is over. You
7 can't -- you can't put a probabilistic statement on something
8 that you've observed and then say, "Ah-ha. Eureka, I found it."

9 Q. You just mentioned that you wanted to talk about other
10 indications in the study that may suggest the authors reported
11 out or tested things that they didn't initially set out to test.
12 Does JDEM 020248 contain or illustrate some of those things?

13 A. Yes.

14 Q. All right. Could you explain what's illustrated on that
15 demonstrative.

16 A. Well, yes. You need to think about the way the paper is
17 structured. If you see the paper, you'll see that the most
18 important inferences come from a table -- I believe it's
19 table 2, but I don't have it right in front of me -- that
20 compares two columns, "Think. Don't smoke" and "truth."

21 So you would expect, since that's what the paper focused
22 on, that the way in which they ask questions about the two
23 surveys would be the same, but in fact they weren't. The -- for
24 "truth," the entire age target of the "truth" campaign was
25 included in the survey, but only 40 percent of the target for

1 "Think. Don't smoke." There were different target age groups
2 and they weren't covered -- that "Think. Don't smoke" was not
3 covered.

4 All the "truth" ads that were aired during the period of
5 the survey were included in the questionnaire, not all the
6 "Think. Don't smoke" ads.

7 THE COURT: But isn't that in question? Isn't that a
8 factual issue that at least at this point isn't yet clear as to
9 whether all of the "Think. Don't smoke" ads were included?

10 THE WITNESS: I think it's been pretty well established
11 that they are not included. There -- do you want me to describe
12 how I know that they weren't included?

13 THE COURT: I think you're probably going to get to that a
14 little later, Mr. Minton.

15 MR. MINTON: I didn't plan on following up on it, Your
16 Honor.

17 BY MR. MINTON:

18 Q. So would you -- could you respond to Your Honor's
19 question -- Judge Kessler's question about the basis.

20 MR. BRODY: Your Honor, I think that the answer to this
21 question probably relates to the objection --

22 THE COURT: I think it does as well.

23 MR. BRODY: -- the exhibit in question.

24 THE COURT: So we'll reserve that and we'll go past my
25 question.

1 Go ahead, please.

2 BY MR. MINTON:

3 Q. All right. I think you were about to talk about the
4 attitudes issue that's on the demonstrative.

5 A. Yes. The paper described -- tested attitudes about --
6 attitudes toward the cigarette industry that "Think. Don't
7 smoke" was not designed to impact, so it's not surprising,
8 therefore, that it didn't impact that.

9 But the most -- let me do the bottom and then the time
10 differences. The two campaigns started at different times and
11 the "Think. Don't smoke" started earlier than the "truth"
12 campaign did, but the time of the interview -- the two
13 questionnaires were done to correspond to just before the
14 "truth" campaign started and then about nine months later, so it
15 corresponded to the period when the -- when people were first
16 exposed to the "truth" campaign. For "Think. Don't smoke,"
17 that had started earlier, so that the times were not coterminous
18 at all.

19 But perhaps the most important part of this has to do
20 with the way in which questions were elicited from the
21 interviewees.

22 What happened was in each of the -- in the interview
23 form, they asked the subject, the kid who answers the phone or
24 the kid who's the interviewee -- they'll make a description.
25 Let's say it's a "truth" add. They'll say: "Do you remember an

1 ad where somebody jumped off a bridge -- a bungee jumper jumped
2 off a bridge?" And the kid will answer either -- the
3 permissible answers are "yes," "no," "I don't remember" or
4 "Refused."

5 If they answer "yes" or "I don't remember" --

6 Q. Let me ask it: Was "maybe" on that list?

7 A. Oh, "maybe," yes. It's a category of "maybe -- don't
8 remember" -- yes, absolutely.

9 THE COURT: That was indeed leading. And yes, I might or
10 might not have sustained it, but I've read the direct and,
11 obviously, the witness knows the answer to that question, just to
12 clear up the record and all the shaking heads on the government's
13 side.

14 Go ahead, please.

15 THE WITNESS: Thank you. Anyhow, if they answered that
16 category, which was the "uncertain" category, the "maybe"
17 category, or "yes," they were then asked to say -- then asked,
18 "Well, what else -- can you tell me a detail about the ad?"

19 And I may have the words -- I don't have the questionnaire
20 in front of me so I may not have the -- I'm sure my wording is
21 not precise.

22 And then there's a list of different things that were in
23 the ads and if the kid answers one of those things, then it's
24 categorized as "confirmed aware."

25 If the kid answers -- and there's a line for "other" and

1 if the kid answers something other, if in the line -- if in his
2 answer or her answer, the child uses the word "truth," then the
3 interviewee prompts the child for more information, so that that
4 leads to a prompt and lets the kid remember more. The
5 interviewer prompts them and then if they're categorized as
6 positive for "truth" if they say the word "truth" or -- and then
7 if on prompting -- if they choose one of the other categories,
8 they're put into that category.

9 BY MR. MINTON:

10 Q. How did that compare with the way that the questions
11 about the "Think. Don't smoke" ads were asked in the Confirmed
12 awareness section?

13 A. The important difference is there was no prompting for
14 "Think. Don't smoke," so that if the child didn't answer one of
15 the categories that was listed on the form, even if the child
16 answered, "Oh, it was 'Think. Don't smoke,'" there was no more
17 prompting and the child was categorized as not having confirmed
18 awareness of "Think. Don't smoke"

19 Q. How did the differences or the asymmetries that you have
20 listed on JDEM 020248 impact the interpretation of the results
21 of the study?

22 A. Well, these are totally different methods of measuring
23 the -- well, not totally. These are very different methods of
24 measuring the two campaigns. In each case it's very clear that
25 the interview form is targeted to get the best information about

1 the impact of "truth," because it's targeted at the time, the
2 age -- all the ads for "truth," but the -- but it's asymmetric
3 with respect to "Think. Don't smoke"; it's not targeted to get
4 at that same information, the analogous information for
5 "truth" -- "Think. Don't smoke".

6 Q. All right. And since the targeting is different or there
7 is asymmetry, how are we to interpret the results of the study?

8 A. You can't interpret the comparison between the two
9 groups. It's like if you had two different pain medications and
10 you asked -- and you had two different ways of asking about
11 pain. For medication A was asked one way; medication B was
12 asked another way. You got a difference in the response. You
13 couldn't tell whether the difference was due to the difference
14 in the medication or the difference in the way the measurement
15 was done. And that's the problem we have here.

16 Q. Let's go back to JDEM 020247, which is the list of
17 problems, and there's a bullet point there, the third one, that
18 refers to "Survey weights and strata." What are survey weights
19 and strata?

20 A. Okay. I think the best way to talk about strata is to
21 give an example. "Strata" are basically homogenous groups, but
22 let me give you an example to make it clear.

23 When you're doing a survey, you very often want to divide
24 the population into groups that are homogenous with respect to
25 the question you're asking. So for those of us who are living

1 in D.C., we're interested in: Are we being exposed to lead in
2 our water? Suppose you were to -- somebody were to survey -- to
3 find out what proportion of people in D.C. are using bottled
4 water, tap water. A good design would say, "I'm going divide
5 the city into three categories, three strata: Those areas where
6 there's no problem with the lead, those areas where there is
7 problem with the lead, but the particular household doesn't have
8 a problem, and those households that have a problem with the
9 lead." And you would stratify into those three groups because
10 you would expect the relationship of how much tap water you're
11 drinking to be related to being in those strata.

12 Q. So is the key with respect to stratification some
13 similarity in the group that's related to the outcome variable
14 that you're attempting to study?

15 A. That's exactly why you stratify, yes.

16 Q. Okay. What about weights? What about weights?

17 A. Let's stay with the lead example. Suppose you then say,
18 well, what I'm really worried about is not adults. Their brains
19 are already established. I'm really worried about the kids from
20 zero to two years old, so I want to make sure that I get lots of
21 them and I'm going to over-sample them. I'm going to sample,
22 let's say, one out of every hundred kid in that age group, but
23 only one out of every thousand adults.

24 Then when I want to reconstruct my population, I have to
25 re-weight the population so that I get back the actual

1 distribution; instead of having ten times relative -- ten times
2 as many children as I should be having, I need to re-weight it
3 so that I have the right allocation of adults to children.

4 Q. Can the way that investigators use weights and strata
5 create problems in analyzing and interpreting the results of a
6 study?

7 A. Yes. First of all, you need to know what the strata are.
8 I mean, it's essential. The strata are fundamental to the way
9 in which the investigators are thinking about the study and the
10 way the sample is done, so you have to know what the strata are
11 to interpret the data.

12 As far as the weights, if the weights are very extreme,
13 so there's a very, very big difference between the low weights
14 and the high weights, that can make the results extremely,
15 exquisitely sensitive to individual people's responses.

16 Q. Did the Farrelly 2002 authors use weights and strata?

17 A. Yes, they did.

18 Q. And did you examine whether there were problems with the
19 weights and strata that they used?

20 A. Well, with the strata, we can't tell what the strata are.
21 I tried my best to figure out what the strata are and I don't
22 know what they are.

23 So the fundamental problem with the strata -- there are
24 actually two. One is they're not defined any place, not in the
25 paper, not in the survey. I know Dr. Healtton said they were

1 race strata, but that's not true. If you look at the data
2 themselves, you'll see that in every stratum, there are several
3 races.

4 Q. We'll get to that point in just a second.

5 Jamey, if you could bring up JDEM 020249.

6 Does that demonstrative list some of the problems or
7 issues with the weights and strata in Farrelly 2002?

8 A. Yes. The second pairs of bullets show the problem with
9 the weights. I already described the problem with the strata.

10 The weights are hugely different. They range in
11 LMITS-I -- that's the first survey -- from six to 70,000. That
12 means one kid is worth six kids, another kid is worth 70,000.

13 And actually, it was -- the maximum was more like 73-.

14 Now, if you say, okay, I'm going to reconstruct the
15 population from the weights, which you can do -- I mean, that's
16 the whole theory of weighting -- what you get is that bottom
17 panel. There were -- you can calculate from the weights and the
18 data that are on the website the population of 12-to-17-year-old
19 nonsmokers.

20 And what you see is that -- what you would calculate is
21 that there were 27 million nonsmokers in this age group,
22 74 percent of whom were white in LMITS-I. Nine months later, the
23 same calculation produces 21 million nonsmokers, 6 million fewer
24 at a time when we know that actually non-smoking increased, and
25 the population in the U.S. of that age group went from

1 74 percent white to 61 percent white, which is patently absurd.

2 You can't -- that kind of change doesn't happen over a very
3 short time.

4 Q. All right. Let's move to the strata. Does JDEM 020251
5 show the strata from the two studies?

6 A. Yes, it does.

7 Q. In order for the results from the Farrelly 2002 paper to
8 be valid, should the strata be consistent from LMTS-I, which is
9 pictured on the left, to LMTS-II, which is pictured on the
10 right?

11 A. Yes. These are the nine strata, one through nine, in the
12 first survey and in the second survey. And the way the analysis
13 has to be done is that you compare each stratum before and after
14 and then you average over all the strata. So if the strata in
15 the two surveys are not the same, then the fundamental purpose
16 of stratification is sort of thrown out the window.

17 Q. All right. And in terms of explaining to the Court what
18 is pictured up there --

19 A. Well, what I did was to look at each stratum in the two
20 year -- the two periods, and look at the distribution of
21 weights. And so those -- you have to excuse my hand -- the
22 distribution that you see show the weights. The stuff on the
23 left of each little rectangle is the low weights and the stuff
24 on the right would be the high weights.

25 In general -- so if you look, for example, at the sixth

1 stratum, the one that says "N equals 531" in LMTS-I and --

2 THE COURT: Wait just a minute.

3 "N equals 531." Go ahead.

4 THE WITNESS: That means that stratum had 531 respondents;

5 there were 531 kids in that stratum in LMTS-I and 544 in LMTS-II.

6 But what's very strange is that that 531 in LMTS-I corresponded

7 to 9.5 million people and only 1 million six months later. It

8 doesn't make sense.

9 BY MR. MINTON:

10 Q. And what's the third line, then, in that series of
11 numbers?

12 A. The third line is the average weight. So in LMTS-I, the
13 average weight of the kids in that stratum was 18,000. It was
14 only 1,800 nine months later.

15 Q. Did the authors of the Farrelly 2000 paper say anywhere
16 that they changed the strata or the criteria for stratification
17 between LMTS-I and LMTS-II?

18 A. No, they did not.

19 Q. Did they ever say that they based their results on
20 anything other than a stratum-to-stratum comparison from LMTS-I
21 to LMTS-II?

22 A. No, they did not.

23 Q. Is the premise of a cross-sectional design such as
24 Farrelly 2002 that it compares the stratum in LMTS-I to the
25 stratum in LMTS-II?

1 A. Yes, it is.

2 MR. BRODY: It was going to be a leading objection, but --

3 THE COURT: Well, I'm going to overrule it for two
4 reasons. Number one, obviously, the witness can answer yes or no
5 and, as an expert, knows -- presumably knows the answer.

6 And second of all, much of this information -- not all of
7 it, but much of it is contained in the direct and, clearly, this
8 witness will correct counsel if she is being led.

9 Go ahead, please.

10 BY MR. MINTON:

11 Q. Are those strata comparing LMTS-I to LMTS-II too
12 different to make a valid scientific comparison?

13 A. Well, I don't know how to actually answer that. They are
14 very different. They don't look to me as if they really are the
15 same strata. I mean, look at stratum number seven, which goes
16 from -- the estimated population goes from 27 million to 3
17 million. That can't be.

18 So -- so I guess my answer is yes, you can't use these
19 strata as they are defined in the paper and in the data set to
20 make sense of what's going on in the data.

21 Q. You mention that Dr. Healtton described in her testimony
22 what she believed the strata represented. Was she correct?

23 A. No, she was not.

24 Q. Let's go back to the weighting for a moment. Did you
25 investigate whether the weighting problem that you talked about

1 in the Farrelly 2002 paper was just a theoretical problem?

2 A. Yes, I did.

3 Q. All right. How did you test that?

4 A. Well, remember, we're talking about hugely different
5 weights, from six to 73,000, so you would say -- one of the
6 things you do in statistics is you ask the question: How
7 sensitive are your results to individual observations? Here's a
8 study of 3,000 people. You want the results not to be too
9 sensitive to individual numbers.

10 So what I did was to choose two people. This is one
11 example; I mean, there are lots of examples one could do. But
12 just a few people of high weights -- see if their response
13 switched and then see -- ask if they had answered differently,
14 how much would the results have changed. And what you won't --

15 Q. I'm sorry.

16 A. And you want the results to not change not very much if
17 there are a few numbers difference.

18 Q. Is JDEM 020253 a big picture illustration of the analysis
19 that you were just describing?

20 A. Yes. This is one of the analyses we did, yes.

21 Q. And is JDEM 020258 the result of that particular
22 sensitivity analysis?

23 A. Yes, it is.

24 Q. And what does it show?

25 A. It shows if you take -- if you remember on the previous

1 demonstrative, you saw two figures. That represented changing
2 two people's responses. Now, they were -- they were
3 deliberately chosen as two people with high weights because
4 we're looking at the sensitivity of the results to specific
5 observations.

6 And this is the confirmed awareness of "Think. Don't
7 smoke." If you look at the original data, you got an odds ratio
8 of .73. That means that those people that were aware of "Think.
9 Don't smoke" -- confirmed aware of "Think. Don't smoke" were
10 more likely to say they are going to smoke or they're not going
11 smoke than people who didn't have confirmed awareness.

12 If you switched two observations, the .73 turns to 1.03,
13 which is slightly in the other direction, saying that confirmed
14 awareness of TDS is slightly -- ever so slightly protective.

15 MR. MINTON: All right. Let's go to JDEM 020247 -- go
16 back to that.

17 BY MR. MINTON:

18 Q. And the last bullet point there refers to a "weak,
19 unstable association." I would like to focus on the work
20 "weak." Are weak associations in observational studies
21 something that you personally investigated during your career?

22 A. Yes, very often.

23 MR. MINTON: All right. Jamey, if you could bring up JDEM
24 020245.

25 BY MR. MINTON:

1 Q. Does that illustrate an example of one of the
2 investigations you were personally involved with?

3 A. Yes, it does.

4 Q. All right. What does it refer to?

5 A. This is a Women's Health Initiative. I chaired for ten
6 years the Data Safety Monitoring Board for that study. It was a
7 study of, among other things, the effect of hormone replacement
8 therapy -- which we no longer call hormone replacement therapy
9 as a result of that study -- to look to see whether it would
10 reduce heart disease, specifically coronary heart disease --
11 probability of heart attacks.

12 The reason for doing that -- the reason that that --
13 well, there had been decades of observational studies showing --
14 and I use "showing" in quotes -- that hormone replacement
15 therapy reduced -- in post-menopausal women reduced heart
16 disease risk by 50 percent.

17 And the Women's Health Initiative was designed over --
18 I'm sure, if you remember the data -- if you remember ten years
19 ago -- over a huge amount of objection in the scientific,
20 medical and public community -- designed to test that
21 hypothesis.

22 And the objection at the time was: Well, we know from
23 observational studies that estrogens reduce heart attack risks;
24 it's unethical to do an experiment.

25 Those of us who were involved in the design -- and later,

1 as I say, I was on -- the chair of the Data Monitoring
2 Committee, which looks at the data over time -- said we don't --
3 you know, the observational studies are highly suggestive; they
4 give ethical mandate to do the study, but we really need to do
5 the randomized study to find out whether what we're seeing
6 observationally is true or not.

7 Q. What did the randomized studies show?

8 A. Just the opposite.

9 MR. BRODY: Your Honor, I'm going to object at this point.

10 This is straight out of the written direct.

11 THE COURT: It is. And this portion of the direct was
12 certainly very clear and comprehensible. That's not true of all
13 of it.

14 MR. MINTON: Very good, Your Honor.

15 BY MR. MINTON:

16 Q. Let's move to the Farrelly 2005 study, then.

17 A. Okay.

18 Q. Dr. Wittes -- actually, let's go back.

19 Taking into account all your criticisms of the Farrelly
20 2002 study, what is your bottom line opinion on the value of the
21 2002 study in answering the question whether the "truth"
22 campaign prevents kids from smoking?

23 A. I don't believe you can use those data to answer that
24 question.

25 Q. All right. And now with respect to the 2005 study, let's

1 talk about your bottom --

2 THE COURT: I want to come back to a point that you
3 started out with with this witness. You asked her to talk about
4 and explain "weak association." She went off in response to
5 questions about the HRT study. I would like you to focus her
6 back on what her views are regarding weak association in terms of
7 the Farrelly study.

8 MR. MINTON: I will, Your Honor. I misunderstood your
9 comment about the portion that you felt was clear.

10 BY MR. MINTON:

11 Q. Dr. Wittes, let's go back a moment to the conclusion of
12 the HRT study. And let me ask you: Is there a guideline or a
13 general rule for interpreting data from observational studies
14 that relates concern about bias and the estimated strength of
15 association?

16 A. Yes. And actually, what I had said in my expert
17 report -- I used the word "treacherous," that making inferences
18 from observational studies is treacherous because of the
19 potential for all kinds of bias. And the rules of thumb, and
20 these are just rules of thumb -- that when you see an odds ratio
21 coming from an observational study that's in the neighborhood
22 of -- and it varies, depending on what the study is and what the
23 potential biases are -- but in the neighborhood of one and a
24 half to two -- less than one and a half or less than two or less
25 than three, depending on what the study is and who you are --

1 that's considered a weak association in observational studies
2 because it's so easily caused by or amplified by the intrinsic
3 biases of observational studies.

4 Q. Is there any serious debate in the scientific community
5 that as the estimated magnitude of an association in an
6 observational study goes down, that concerns about bias go up?

7 A. No, there's no serious debate on that.

8 Q. All right. Let's move to the Farrelly 2005 study.

9 And I asked you your bottom line opinion about the 2002
10 study and whether it is of assistance in answering the question
11 of whether the "truth" campaign prevents kids from smoking.

12 Is your opinion about the 2005 study the same or
13 different?

14 A. The 2005 study asked a different question. It asked --
15 well, it was a pretty related question. And yes, my answer
16 would be the same: That the data from the 2005 study cannot
17 address the question of whether the "truth" campaign affected
18 the probability that children would smoke.

19 Q. All right. Could you give the Court a brief sketch of
20 the 2005 study design.

21 A. Yeah. The 2005 study design was also a survey, but it
22 was very different. It was a -- the U.S. -- the continental
23 U.S. was partitioned into 231 media groups -- media areas
24 which -- defined by television media. And they -- the study
25 looked to see the prevalence of smoking among youth as a

1 function of what the -- function of the amount of media exposure
2 in those media areas, those 231 areas.

3 Q. And how was that media exposure measured?

4 A. By the -- gross rating points. These are the intensity
5 of advertising on national television -- specific national
6 television networks.

7 Q. All right. Now, I plan to ask you some questions about
8 statistical models and how the model that the Farrelly authors
9 used related GRP exposures to smoking prevalence, but let's go
10 back to a more preliminary question.

11 What does the term "model" mean in the context of
12 scientific studies of prevention?

13 A. Well, a mathematical model is a description of -- a
14 description of life or a description of physical reality in
15 terms of a mathematical formula. In the simplest cases, these
16 are equations of motion, like distance equals rate times time.
17 And those are very simple and they reflect physical laws, but
18 they're mathematical models reflecting physical laws.

19 In statistical models, which are the kind of things we're
20 doing in prevention, you have a bunch of -- a splatter of data
21 and you're trying to make a model -- a mathematical model that
22 will reasonably fit the data, but you don't have the physical
23 interpretation that you have in things like equations of motion.

24 Q. All right. You mentioned "fit." When a scientist fits a
25 statistical model to the data, are there core principles that

1 should be adhered to?

2 A. Well, I think so. You should make sure that you fit the
3 entire range of the data; you should be extremely wary about
4 extrapolation beyond the data; you should test your goodness of
5 fit; you should see how sensitive the fit is to specific
6 observations.

7 So there's a lot of things that you do to be reasonably
8 comfortable that the model that you've developed is a reasonably
9 good fit to the data.

10 Q. All right. Well, let's just -- let's talk about one of
11 those points very briefly. You just mentioned the term
12 "goodness of fit." What is that at the highest level?

13 A. "Goodness of fit" just asks how well does the model fit
14 the data.

15 Q. All right. Do the Farrelly 2005 authors ever answer that
16 question?

17 A. No.

18 Q. All right. In a moment, we're going to be looking at the
19 model that the Farrelly 2005 authors fit, but first, could you
20 describe for the Court when you fit a statistical model, could
21 you explain generally how lines are fit to data in a model.

22 And let me combine that with the next question. Is there
23 always a straight line that best describes the data?

24 A. Oh, no, no. Of course not. Data can be described --
25 again, think of laws of motion. Distance equals rate times

1 time? That's linear, but equations of acceleration -- there's a
2 quadratic term -- there's a square term in it.

3 So relationships -- physical relationships and
4 relationships of treatments and prevention aren't always
5 straight lines.

6 Q. Is there a treatment or prevention example that you could
7 give that wouldn't be a straight line model?

8 A. Yeah. Levels of diastolic hyper -- diastolic blood
9 pressure. If you ask, what's the relationship between the
10 probability of dying in the next month as a function of
11 diastolic blood pressure? If your diastolic blood pressure is
12 very, very low, you might -- your likelihood of dying is very
13 high. If your diastolic pressure is very, very high, your
14 probability of dying is also high, but in the middle it's not,
15 so there's a relationship that's curvilinear, not linear at all.

16 Q. Okay. Do the Farrelly 2005 authors describe their model
17 in terms of a straight line or curved line?

18 A. Curved line.

19 Q. All right. And Jamey if you could bring up JDEM 020259,
20 the second bullet point there refers to the shape of the fitted
21 curve. And Jamey if you could, please, bring up JDEM 020265.

22 Is that a graphic illustration of the curves that the
23 Farrelly 2005 authors said represented their model relating GRP
24 dose to smoking prevalence?

25 A. Yes, those are directly from the paper.

1 Q. Now, are there data removed from this particular
2 illustration?

3 A. Yes. Remember, I said you should be fitting the data to
4 the entire -- the curve to the entire set of data. The x-axis
5 the bottom line goes from zero to 1.5. That's -- so 1.5 is
6 15,000 GRPs, gross rating points. That was the average gross
7 rating point in 2002 or cumulative through 2002. That means
8 that any media market where the average GRP -- who had GRPs
9 exposure greater than the average is not included in this
10 figure.

11 Q. All right. And are there two curves that have been
12 removed from this illustration as well?

13 A. Yes -- sorry, yes there are.

14 Q. And why were those two curves removed?

15 A. Just to make this clear so it wasn't cluttered with four
16 curves, but the same statement goes for the other two curves as
17 well.

18 Q. All right. Let's look at the curves for both 2001 and
19 2002. It appears that those curves are on the left side that
20 they slope down and then on the right side they slope up. Is
21 that right?

22 A. Yes.

23 Q. All right. What is that model, then, saying?

24 A. Well, the model says, if you believe the model, it says
25 that as you increase the dose, the exposure -- I'm using dose

1 and exposure synonymous. As you increase at low levels, the
2 odds of smoking decreases, then there's not much effect in the
3 middle between 5,000 and 10,000, but as you get to higher
4 levels, the odds of smoking increases again.

5 THE COURT: So, is it correct that that chart shows that
6 when you increase youth at least moderately, substantially to
7 increase their exposure to these ads, that you are increasing the
8 prevalence of youth smoking?

9 THE WITNESS: If you believe this model, yes.

10 THE COURT: Okay. That's what I wanted to make sure.

11 BY MR. MINTON:

12 Q. And what is it about the way that this model is
13 estimated? How is it that we have a curved line, and what is
14 creating the downward influence in the line and what's creating
15 the upward influence in the line?

16 A. Well, these lines are -- these curves, I'm going to call
17 these curves. These curves have essentially two coefficients.
18 They have a linear coefficient, which is a line, and in the
19 paper itself, if you have the paper -- I think it's table 2 and
20 it says GRP, and then it has a quadratic component, which is GRP
21 squared.

22 Q. Could you bring up GRP in Farrelly 2005, is that
23 possible?

24 Is that what you were just mentioning?

25 A. Yes, it is, and it's the yellow -- those two yellow

1 lines. So those are -- that first line shows the linear
2 component. That's the line. And remember here, anything below
3 1 is protective in the sense that more is better; anything above
4 1 means more is worse.

5 And the square term, that GRP squared, is the part that's
6 pulling the curve back up.

7 Q. In laymen's, then, explanation, would it be fair to say
8 the linear term is trying to push smoking prevalence down, but
9 the quadratic term is trying to push smoking --

10 THE COURT: That objection, I'm going to sustain.

11 MR. MINTON: All right. Could you...

12 THE COURT: Just let the witness describe it.

13 BY MR. MINTON:

14 Q. Could you describe the basic influence of the linear and
15 quadratic terms, in terms of the shape of the curve?

16 A. Sure, let's just look at the first two, because it's
17 easier, the .78 and the point 1.11, which are the first two
18 numbers over in the left. What that's saying, that .78 is the
19 linear. Thank you.

20 That .78 is the linear part and it's saying, I'm trying
21 to pull you down, i.e., I'm trying to -- "truth" is reducing the
22 probability of smoking, but at the same time the next line, that
23 1.11, is pulling up. That's the square term. And what's
24 important to recognize is, remember if you have a little number
25 and you square it, it gets littler, but if you get a big number

1 and you square it, it gets bigger. So over on the left part of
2 the equation, the linear part dominates. But over on the right
3 part, where there's a lot of exposure, the quadratic term
4 dominates.

5 Q. And, Jamey, if you could bring up 020265. JDEM 020265.
6 It was the one that was previously up. And when you're
7 referring to left and right, the left and right would be the
8 left and right on this --

9 A. Exactly, the left toward zero, the right toward 1.5.

10 Q. Now, in terms of the linear term and the quadratic term,
11 can you look at just one in isolation and say that's the model
12 that the authors actually estimated?

13 A. No, it's like find me, I'm at latitude 35. You need
14 latitude and longitude. You need both the linear and the
15 quadratic, they work together.

16 Q. Let me read you a statement from the Farrelly 2005
17 article. It says quote:

18 "The results of the logistic regression for all grades
19 indicated that there was a statistically significant
20 dose-response relationship between "truth" campaign exposure and
21 current youth smoking prevalence."

22 And then it cites the odds ratio of .78. Is that the odds
23 ratio for the linear term in the model?

24 THE WITNESS: That's the linear term, but you can't
25 separate it from the quadratic term. It makes no sense to

1 separate them.

2 BY MR. MINTON:

3 Q. All right. Do you recall Dr. Healton's testimony that it
4 was necessary to use a quadratic term because the outcome
5 variable of smoking was a yes/no variable?

6 A. Yes, I recall that.

7 Q. Is she correct about that?

8 A. No. In fact, when I read that, I burst out laughing.
9 That's ridiculous.

10 Q. In fact, did the authors test the relationship between
11 "truth" exposure and smoking prevalence without putting in the
12 squared or quadratic term?

13 A. Yes, they did.

14 Q. And so that would be then, they were just estimating a
15 straight line to see if, as "truth" exposure increased, there
16 was a relationship with smoking prevalence?

17 A. That's correct.

18 Q. And what happened to the results?

19 A. It wasn't statistically significant.

20 Q. Okay. Now, you mentioned earlier that a model should
21 cover the entire range of data, and is JDEM 0202 --

22 THE COURT: Excuse me a minute. I would like to go back
23 to the last slide you put up, which was just a portion of a quote
24 from the Farrelly article, and let me ask the witness this
25 question about that same sentence.

1 I think I know your answer, but I just want it to be very
2 clear.

3 Do you agree or disagree with that sentence quoted from
4 the Farrelly article?

5 THE WITNESS: I don't think that sentence makes sense,
6 because you can't talk about -- see, the odds ratio that you need
7 to be talking about is the odds ratio at a specific exposure, at
8 a specific dose. The odds ratio at a specific dose has both the
9 linear component and the quadratic component, so you can't
10 disentangle them and it doesn't make sense. The second sentence
11 talks about the quadrat -- the one right below that one, again,
12 looks at just the quadratic, but you can't look at one or the
13 other, you have to look at them together. And you have to look
14 at them at a specific dose, because they are not the same from
15 dose to dose because of the nature of the relationship.

16 THE COURT: Okay.

17 BY MR. MINTON:

18 Q. Jamey, if you could please bring up JDEM 020265.

19 Dr. Wittes, this is the demonstrative that we were
20 looking at earlier that has two of the curves removed, but the
21 question that I wanted to ask you, on the x-axis or the
22 horizontal axis, it goes out to 1.5, which would be 15,000 gross
23 rating points, does the model that the authors depicted in the
24 article cover the entire range of their data?

25 A. Not in -- not in these graphs, no.

1 Q. All right. And using the authors' own coefficients, did
2 you create a graph to show what the curve would look like if it
3 extended over the entire range of GRP exposure data?

4 A. Yes, I did several of those graphs.

5 Q. All right. And Jamey if you could bring up JDEM 020268.
6 Is that an example?

7 A. Yes. This is an example for 8th graders over the entire
8 period, '97 to 2002.

9 Q. What does it show?

10 A. It shows that if you look at the entire range of exposure
11 from here to about 2. -- to I think, 23,000 or 25,000, that the
12 curve -- not only does it start going up at about 10,000, but it
13 goes up beyond the 1 -- the 1 on the y-axis, the one on the
14 vertical axis. Meaning that kids who were exposed to a lot of
15 ads -- again, if you believe the model, had a higher
16 probability -- higher prevalence of smoking than -- than kids
17 who were exposed to no ads at all.

18 Q. All right. Now you mentioned a couple times, "if you
19 believe the model."

20 Did you conduct an investigation looking at the validity
21 of the model from another perspective?

22 A. Yes, I did.

23 Q. All right. Jamey, if you could bring up JDEM 020259.
24 You mentioned confounding of GRP dose, and GRP dose is the
25 exposures that were at the bottom or the x-axis of the curve

1 we've been looking at?

2 A. That's right.

3 Q. And it says confounding of GRP dose and important
4 predictors of smoking. Let me ask you this is race an important
5 predictor of smoking?

6 A. Yes, it is.

7 Q. All right. And are race and GRP dose confounded?

8 A. In this study, they are very confounded, yes.

9 Q. And Jamey, if you could bring up JDEM 020260.

10 Is this an illustration that helps answer that question?

11 A. Yeah. This picture speaks to the whole story, I think.

12 This is a map that comes right out of the paper, and what it
13 shows is the 231 media markets, and it categorizes them into
14 five categories, that's the legend. Where the lightest group,
15 the low exposure group, and the highest group are -- the darkest
16 group are the high. Now, not surprisingly, the lowest group
17 are -- you know, I shouldn't say that the fly-over states, the
18 Dakotas and -- not Wisconsin, Minnesota and Idaho, and Montana,
19 the ones up in the north, and also northern Maine and some parts
20 of Texas. And so those, they're rural, they tend to be white,
21 we know rural and white are very predictors of smoking.

22 By contrast the very dark areas are the ones with high
23 exposures, that's New York. You can just see there's New York,
24 there's Chicago, there's Milwaukee, there's L.A., San Francisco,
25 actually, is a little lighter, Houston, Miami, all the big

1 population density cities.

2 Q. And how do those differences in population densities lead
3 to a difference in racial characteristic?

4 A. Because we know that the very rural areas in the U.S.
5 tend to be white with actually some American Indians, and the
6 urban areas tend to be very much more racially mixed.

7 Q. Was the map in the 2005 article, itself, a warning to the
8 investigator about confounding between race and GRP dose?

9 A. Yes, it's a red light.

10 Q. Okay. And did the Farrelly 2005 authors, themselves,
11 find race to be a powerful predictor of smoking prevalence?

12 A. Yes, they did.

13 Q. And did you go beyond the map and make a further analysis
14 of whether the racial characteristics of the low and the high
15 GRP markets were too different for regression to control?

16 A. Yes, I did.

17 Q. All right. And how did you do that?

18 A. Well, I took census data from the U.S. census and
19 overlaid it onto the media markets calculating for each media
20 market the racial composition of the market. And what -- I'm
21 sorry, for the low and the high, I looked at the extremes which
22 are the ones most influential in fitting curves. And not
23 surprisingly, you can see from the map, but not surprisingly
24 what one knows from just knowing what American distributions are
25 like, the racial distribution and the low and the high group

1 were very, very different from each other.

2 MR. MINTON: And, Your Honor, there's a data table at page
3 77 of the written direct that is relevant to that.

4 BY MR. MINTON:

5 Q. And other than extracting the census data on the racial
6 characteristics, did you do anything further to examine whether
7 the racial characteristics of the low and high groups were too
8 different for the type of control that the authors attempted in
9 the Farrelly 2005 article?

10 A. Yeah. Remember what regression is trying to do. It
11 controls for variables. It's trying to make, in this case, the
12 low like the high, it's trying to make the South Bronx like
13 South Dakota. That's what it's doing mathematically.

14 And so what I did was to look at each of these counties,
15 or each of these media markets and calculate -- I did a logistic
16 regression that would allow one to predict whether a county -- a
17 media market was in the high group or the low group, simply on
18 the basis of race, not asking anything else, not asking urban or
19 rural, not asking density, not asking where, just on the basis
20 of race. And what you would want is that -- if regression were
21 to work -- is that the probability of correct classification
22 should be about half. In fact, it was 90 percent. I then
23 looked to see -- there's a paper by Cochrane, Rubin and Senke in
24 '79 that describes the conditions under which regression models
25 can be used. Well, you can always use them -- the computer can

1 spit out an answer -- that can be used without bias or without
2 undue bias, and I looked at the parameters from this fit that I
3 did, and the Cochrane-Rubin paper gives a table with two
4 variables and you're supposed to look where in the grid you are
5 to see how biased you are. It turns out that this particular
6 analysis showed that for each of the variables we were way
7 outside the grid.

8 Q. Just going back to one thing really quickly. If GRP
9 exposure had been randomized, would it be correct to say that
10 the probability -- that the racial characteristic you would
11 expect to find in any particular media market would be like
12 tossing a coin 50/50?

13 A. Yeah, that's what I meant by 50/50, yes.

14 Q. And you found that instead what -- how did racial classic
15 identification predict media market?

16 A. It predicted 90 percent of the media market.

17 Q. Bottom line, Dr. Wittes, based on the differences that
18 you found and the problem of confounding, what's the overall
19 validity of the model that the authors used in the Farrelly 2005
20 paper?

21 A. You can't use regression in a situation like this because
22 you can't separate the GRP from predictors of smoking.

23 Q. All right.

24 MR. MINTON: That concludes my live direct, Your Honor.

25 Thank you.

1 THE COURT: Do you think it's possible to construct a
2 study that would measure what the Farrelly studies said, after
3 the fact, they were trying to measure?

4 THE WITNESS: Oh, absolutely, but you have to do
5 randomized study, but I think it would be easy to do. You'd have
6 to do the experiment.

7 CROSS-EXAMINATION OF JANET WITTES, PH.D.

8 BY MR. BRODY:

9 Q. Good morning, Dr. Wittes, how are you?

10 A. Good morning.

11 Q. Before we jump into things, I want to go back just for a
12 second to a question that the Court asked. And the Court asked,
13 regarding the table that we saw from the Farrelly 2005 study
14 that showed the curves, whether it was correct that the chart
15 shows increased exposure to "truth" shows an increase in
16 prevalence of youth smoking, and your answer was yes, correct?

17 A. Yes, it -- my answer was yes. It actually shows a
18 decrease for a while and then an increase after.

19 Q. But even on the upslope, what the chart shows -- and
20 actually we can take a look at it. Give me a moment here to
21 find exactly --

22 THE COURT: It's in the direct, Mr. Brody.

23 MR. BRODY: It's in the direct at page -- and that's what
24 I'm looking for. I think it's page 66, 65 or 66 of the direct
25 examination.

1 THE WITNESS: Sixty-six I have.

2 BY MR. BRODY:

3 Q. And we can bring it up on the screen. What this chart
4 actually shows is that at higher exposures to the "truth"
5 campaign, there is less of a decrease in youth smoking
6 prevalence, correct?

7 A. Well, yes, because this chart doesn't go beyond the mean.

8 Q. Right. So what the chart shows is at the higher exposure
9 levels, there is still a decrease in youth smoking prevalence,
10 but there is less of a decrease in youth smoking prevalence, but
11 still it's coming down, correct? That's what the chart shows.

12 A. But I don't think that was the question the Court asked.

13 The Court asked --

14 Q. Well, my question, Dr. Wittes, is what the chart shows at
15 the higher levels, as we look at this chart on the screen, is
16 that at the higher levels? There is less of a decrease in youth
17 smoking prevalence than at the mid point, correct?

18 A. Yes, at the higher levels depicted on this chart, which
19 are limited to less than the mean exposure overall the media
20 markets.

21 Q. Right. And in your chart that we looked at, where you
22 included up to 22,239 GRPs, can you tell the Court -- and that
23 was for 8th grade only, correct?

24 A. That's correct.

25 Q. And so it was not for the 8th, 10th and 12th grades that

1 are discussed in the Farrelly 2005 papers, correct?

2 A. That's correct, that curve is just 8th graders.

3 Q. Can you tell the Court how many schools you added back in
4 to extend the results out of the more than 300 -- actually more
5 than 400 schools that are part of the "Monitoring the Future"
6 Study for the time period in question?

7 A. Oh, you misunderstood what we did. We didn't add
8 schools.

9 Q. Can you tell me how many schools -- let me ask the
10 question a little differently.

11 Can you tell me how many schools are covered -- how many
12 schools within that gross rating points range are covered by the
13 "Monitoring the Future" Survey?

14 A. The data aren't available to us, so I don't know how many
15 schools were there. What I did was to take --

16 Q. Dr. Wittes, thank you. You don't know how many schools
17 are included in the upper level GRP doses, correct?

18 A. That's correct, that's correct.

19 Q. And you yourself do not know what level of data is
20 available to researchers from the "Monitoring the Future" Study
21 and what level of data is protected due to statute, do you?

22 A. That's correct.

23 Q. That's not something you've looked at, correct?

24 A. That's correct.

25 Q. And you didn't contact "Monitoring the Future" to try to

1 find out what level of data was available and what level of data
2 was not available, did you?

3 A. No, I did not.

4 Q. I want to start just briefly -- you talked about the
5 architecture, if you will, of the two papers and what they
6 looked at. And just for the benefit of the Court, the 2002
7 paper, as we saw, is based on the results of two telephone
8 surveys, LMTS-I and II of 12-to-17-year-olds, which asked
9 participants about exposure to counter-marketing campaigns,
10 right?

11 A. That's correct.

12 Q. And the surveys also asked participants about their
13 attitudes and beliefs toward tobacco and their intentions to
14 smoke during the next year, right?

15 A. That's correct.

16 Q. And the first survey -- first wave of the LMTS Survey was
17 conducted prior to launch of the "truth" campaign and the second
18 wave was conducted 10 months after, right?

19 A. That's correct.

20 Q. And the authors of the study compared exposure as
21 measured in the LMTS surveys to "truth" and Philip Morris's
22 "Think. Don't smoke" campaigns to changes in attitudes and
23 beliefs towards tobacco and intention to smoke during the next
24 year, right?

25 A. Well, that's a little more complicated. That's what the

1 authors reported, but that's evidently not what they designed.

2 Q. Let's ask the question that way. That's what the study
3 reports? The study reports the results of that analysis by the
4 authors, correct?

5 A. That's correct. Actually, may I have --

6 Q. And the authors -- we'll get there.

7 And the authors concluded that exposure to the "truth"
8 campaign was associated with an increase in anti-tobacco
9 attitudes?

10 A. Actually, I really would like the paper, if that's okay.

11 Q. Is there something that you can't answer without
12 reference to the paper?

13 A. When you quote a statement, I need to know whether that's
14 a direct quote from the paper or not. The words can be -- the
15 meaning of the conclusion can be subtly different, depending on
16 the words.

17 Q. Let me tell you this. I'm not quoting anything exactly.
18 I'm asking you if it's your understanding that the results
19 reported by the authors -- and if you can't tell me what the
20 overall results reported by the authors were, you know, that's
21 fine; you can tell me that you can't tell me that.

22 But is it your understanding, having laid out in your
23 written direct examination an extensive criticism of these two
24 papers, that the authors' overall conclusion was that exposure
25 to "truth" was associated with an increase in anti-tobacco

1 attitudes and a decrease in intention to smoke?

2 A. Yes. That is what they say at some places in the paper,
3 yes.

4 Q. Right. And they also -- let me know if it's also your
5 understanding, and I'm not quoting anything, that they concluded
6 that exposure to the "Think. Don't smoke" campaign was
7 associated with an increase in participants' intention to smoke?

8 A. I'm -- I must say I'm uncomfortable with -- you see,
9 there are -- there were many outcomes here.

10 Q. So is it your understanding that that is not something
11 that was concluded?

12 MR. MINTON: Your Honor, at this point I would like to
13 object. I think it would be appropriate -- I mean, Mr. Brody's
14 saying he's not quoting from the paper. These are technical
15 issues. I don't see why there should be an issue. We want
16 accuracy with respect to what's being stated here.

17 THE COURT: I think that's a fair objection. This is
18 highly technical material; the critique itself is extremely
19 technical and it seems to me that working with the article
20 itself, which is, of course -- or the article that's under -- the
21 two articles that are under attack -- that the witness is
22 entitled to have the articles.

23 MR. BRODY: Well, Your Honor, let me ask this question,
24 then.

25 BY MR. BRODY:

1 Q. Dr. Wittes, is it your testimony that you can't speak to
2 the conclusions without having the articles in front of you?

3 A. It's my contention that there's not a single conclusion
4 in the article. There are two tables, table 1 and table 2 --
5 two relevant tables. Each of those tables has many results.
6 Some of those results have odds ratios that are greater than 1;
7 some of them have odds ratios that are less than 1. And I don't
8 have in my head all those odds ratios.

9 Q. Okay. Well, we will get you the papers when we're going
10 to be asking you questions about it. I want to ask you some
11 background questions first, before we do that.

12 In your live examination that you just gave, you talked
13 about the fact that the authors of the 2005 study looked at data
14 from the "Monitoring the Future" surveys asking about smoking
15 behaviors of students in grades 8, 10 and 12, right?

16 A. That's correct.

17 Q. And you yourself have never done, before your work on
18 this case, any work at all with the "Monitoring the Future"
19 Survey, right?

20 A. That's correct.

21 Q. And you've never spoken with anyone involved with the
22 survey at the University of Michigan, correct?

23 A. That's correct.

24 Q. And when I asked you at your deposition if you knew who
25 Lloyd Johnson is, you said you did not know, correct?

1 A. That's correct. I didn't know then and I didn't check
2 and so I still don't know.

3 Q. Okay. And you wouldn't know whether he is the principal
4 investigator on the "Monitoring the Future" Survey?

5 A. I don't know.

6 Q. Now, are you at least aware that the "Monitoring the
7 Future" Survey is a national survey conducted in approximately
8 420 or up to 420 public and private high schools and middle
9 schools around the country?

10 A. I know it's a national survey; I don't know how many
11 schools it is conducted in.

12 Q. Now, the opinions that you are offering in this case are
13 limited to an analysis of the two papers, correct?

14 A. Well, an analysis of the two papers, but I had other
15 material that I reviewed as well. But my focus is on those two
16 papers; that's correct.

17 Q. Okay. And if I refer to those two papers as "Farrelly
18 2002" and "Farrelly 2005" during the course of the examination,
19 you'll know what I'm referring to, right?

20 A. Yes, I will.

21 Q. You've never seen an ad for the "truth" campaign, have
22 you?

23 A. I don't think so.

24 Q. And you've never seen a "Think. Don't Smoke" ad either,
25 have you?

1 A. I don't think so.

2 Q. Now, in your expert report that you filed in this case
3 and in your written direct examination, you indicated that you
4 looked at the two papers initially as if you were a peer
5 reviewer, right?

6 A. Yes. That was my first action.

7 Q. And you have never served as a peer reviewer for a
8 journal article or other research evaluating the effectiveness
9 of a youth smoking prevention campaign, have you?

10 A. I don't believe I have.

11 Q. And you don't recall ever serving as a peer reviewer for
12 a journal article or other research evaluating the effectiveness
13 of a public education campaign, right?

14 A. I think I have not.

15 Q. And you can't recall, sitting here today, ever serving as
16 a peer reviewer for a journal article evaluating a media
17 campaign, correct?

18 A. That's correct.

19 Q. And you can't recall ever serving as a peer reviewer for
20 a journal article evaluating the impact of a television
21 advertisement, right?

22 A. That's correct.

23 Q. As you come before the Court today, you're not offering
24 any opinions about what remedies the Court should or should not
25 impose in this case, correct?

1 A. That's correct.

2 Q. You're not offering the opinion today that counter-
3 marketing campaigns are ineffective, whether directed at youths
4 or adults, correct?

5 A. That's correct.

6 Q. You're not offering the opinion that counter-marketing
7 campaigns are ineffective at countering misinformation, right?

8 A. I'm not offering opinions -- I'm offering opinions about
9 the validity of the two studies that I looked at.

10 Q. You're not offering the opinion that counter-marketing
11 campaigns are ineffective at countering misinformation, right?

12 A. That's correct.

13 Q. And you have not analyzed whether a counter-marketing
14 campaign can have an effect on the way a tobacco company
15 conducts itself in the future, correct?

16 A. That's correct.

17 Q. The area of counter-marketing is an area in which you
18 have no experience, isn't it?

19 A. I think it's an area in which I have no experience.

20 Q. You're not offering the opinion here today that the
21 Legacy Foundation's "truth" campaign has been ineffective at
22 reducing youth smoking, right?

23 A. That's correct.

24 Q. And you haven't done any analysis of whether Philip
25 Morris's "Think. Don't smoke" campaign was at all effective in

1 combatting youth smoking, right?

2 A. That's correct.

3 Q. And in your written direct testimony -- this is a subject
4 that's related to what we talked about this morning -- at page
5 24, beginning at line 26 --

6 We can pull the question. Start at line 24 there, Chris.

7 Thanks.

8 First of all, let me ask you: Have you made any notes in
9 the copy of the written direct testimony that you have up there
10 with you?

11 A. No, I haven't.

12 Q. Okay. You tell the Court that bias can impact a study by
13 creeping in on little cat feet or leaping in on big panther
14 feet, right?

15 A. That was an image, yes.

16 Q. And you testified it comes in many forms, correct?

17 A. Yes.

18 Q. I want to talk about a form of bias or perspective that I
19 think's very important here and that's the perspective that you
20 bring to this analysis.

21 Now, before we jump into that, if we look at your written
22 direct, page 89, line 8, the question is posed: "In conclusion,
23 Dr. Wittes, do these two studies provide adequate scientific
24 evidence of a causal connection between the 'truth' campaign and
25 youth smoking attitudes or behavior?"

1 And you answer: "No. For the reasons I have expressed,
2 they do not."

3 That was your testimony; is that correct?

4 A. That's correct.

5 Q. Now, you do not believe that an observational study can
6 lead to causal inferences about the effectiveness of an
7 anti-smoking campaign, correct?

8 A. I -- I wouldn't put -- I wouldn't say that there is no
9 observational -- this is going to be a very -- there are going
10 to be many negatives in this.

11 I would not say that there is no condition under which --
12 there's no condition and no advertising campaign that -- I'll
13 try it more positively.

14 If there were a very, very, very effective advertising
15 campaign and a very, very, very well designed observational
16 study, one might be not too uncomfortable inferring causation.

17 Q. Let's take a look at your deposition that you gave in
18 this case.

19 If we can hand Dr. Wittes a copy of that.

20 And, Dr. Wittes, I want to take a look at page 101, the
21 question beginning at line 12. The question begins on the prior
22 page, but I want to look at your answer, beginning at line 12
23 through line 18, and you told us at your deposition: "First is:
24 Can an observational study, either cross-sectional or not, lead
25 to causal inferences about the effectiveness of an -- in this

1 case an anti-smoking campaign? That's question number one. And
2 then I would say the answer to that is, no; for that, you need a
3 randomized study."

4 That was your testimony, correct?

5 A. Yes.

6 Q. And you gave that testimony under oath less than two
7 weeks ago, correct?

8 A. That's correct.

9 Q. Now, you believe that --

10 MR. MINTON: Your Honor -- well --

11 BY MR. BRODY:

12 Q. -- to --

13 You believe, Dr. Wittes, that to test the hypothesis of
14 whether exposure to the "truth" campaign results in a decrease
15 in intention to smoke, you need a randomized controlled trial,
16 correct?

17 A. Let me clarify the difference between what I said --

18 Q. Dr. Wittes, that's not the question. The question is:

19 You believe that to test the hypothesis of whether exposure to
20 the "truth" campaign results in a decrease in intention to
21 smoke, you need a randomized controlled trial, correct?

22 A. Yes, that's correct.

23 Q. And no matter what the structure or methodology of the
24 two Farrelly papers, you would say that they cannot provide an
25 answer to the questions addressed so long as they are

1 observational studies, correct?

2 A. I think you're intertwining two different things.

3 Q. So is answer to that "no"?

4 A. That's not a "yes/no" question. The structure --

5 Q. Let's look at your deposition.

6 MR. MINTON: Could the witness be permitted to respond,

7 Your Honor?

8 THE COURT: Yes, she may.

9 THE WITNESS: What I believed you asked was: Given the
10 structure of the two Farrelly papers, could they be -- could you
11 make an inference about the effectiveness of the "truth"
12 campaign?

13 And the answer to that is no. We have the structures of
14 the two papers. We know what they are. They can't -- they can't
15 speak to causation. We know that. So --

16 But then there was another part of your question that I
17 didn't understand.

18 BY MR. BRODY:

19 Q. You think we need a randomized controlled trial, right?

20 A. A randomized controlled trial, if one wants to know, for
21 the "truth" campaign, is the "truth" campaign efficacious in
22 reducing prevalence of smoking among children, I believe the
23 only way to answer that is through a randomized controlled
24 trial.

25 Q. Are you familiar with Dr. Robert Hornik?

1 A. No, I'm not.

2 Q. Let's take a look at U.S. Exhibit 93883, which contains
3 some information about his background.

4 Do you see Dr. Hornik is a Professor of Communication and
5 holds the Wilbur Schramm Chair in Communication and Health
6 Policy at the Annenberg School For Communication at the
7 University of Pennsylvania?

8 A. Yes, I read that.

9 Q. And he's also Director of the Center for International
10 Health and Development Communication and is affiliated with the
11 Health Communication Group at the Annenberg Public Policy
12 Center, right?

13 A. That's what it says.

14 Q. And the summary of his work indicates that in those
15 roles, he has "led efforts to design and evaluate large scale
16 public health communication and education programs," correct?

17 A. That's what it says.

18 Q. And that is something that you have not done, correct?

19 A. I have not led efforts, but I certainly have been
20 involved in large scale public health communication/education
21 programs. But I have not led such efforts.

22 Q. I want to look at an excerpt from a book by Dr. Hornik.
23 The book is entitled Public Health Communication: Evidence For
24 Behavior Change. And we're handing you the first chapter of
25 that book, which has been marked as U.S. Exhibit 93906.

1 And if there is any need, Your Honor, for reference to
2 the entirety of the book, Dr. Hornik is the editor, but I have
3 the entire book here in case there's a need to reference it.

4 THE COURT: Actually, I have a sense you're about to begin
5 a major area here. Or do you just have two or three --

6 MR. BRODY: I just have two or three questions. Actually,
7 I only want to look at one part of the book and then it would be
8 a good time for a break.

9 BY MR. BRODY:

10 Q. If you could turn to page 16. And I want to look at the
11 first full paragraph on the page. And this is from --

12 It's a little blurry on the screen. I apologize. Is the
13 hard copy better? Maybe we can use the ELMO.

14 It is.

15 In the first chapter of the book, Dr. Hornik indicates:
16 "Finally, accept that evaluations of public health communication
17 programs will rarely produce the unequivocal evidence promised
18 in randomized controlled trials of pills. Sometimes this is
19 feasible for smaller scale trials where enough resources can be
20 mustered to produce a substantial additional dose of exposure,
21 but most often this is not the case. If evaluations are to
22 respect the way that public health communication programs work,
23 then they will likely depend on alternative approaches: Natural
24 experiments, correlated time series and other such
25 non-experimental and quasi-experimental approaches. They are

1 less definitive methodologically than controlled trials, but
2 they respond to the nature of the intervention at issue. A
3 moderately good answer to the right question is better than a
4 very good answer to the wrong question. The effects of
5 communication interventions must be evaluated with a methodology
6 that respects their character and the way they work, but is
7 still credible enough to influence policy discussion."

8 Now, that's what Dr. Hornik wrote about the nature and
9 evaluation of public health communication programs, correct?

10 A. Well, I assume this is the book and you read it, so yes,
11 I assume that's correct.

12 MR. BRODY: Your Honor, we can take a break now.

13 And two things. One, can we get an instruction about
14 reviewing materials and communication with counsel; and number
15 two, do you want to discuss the objections immediately after the
16 break? And if that's the case, should the witness remain
17 outside?

18 THE COURT: Yes. Dr. Wittes, let me give you
19 instructions. First of all, during the break, you have to figure
20 out how to turn your cell phone off, please.

21 THE WITNESS: Yes, I will.

22 THE COURT: Second of all, you're not allowed to confer
23 with counsel or anybody else about your testimony or any other
24 witness's testimony. And third, you're not allowed to do any
25 preparation during the break. In other words, you can't go back

1 and look at your direct or at any of the documents that have been
2 handed to you during your examination this morning.

3 I'm going to ask you to be back at 11:20 and wait outside
4 until you're called in. I'm hoping we'll be ready for you by
5 11:20. We're going to do our best.

6 And a 15-minute break for the rest of us, everybody.

7 (Thereupon, a break was had from 11:00 until 11:16
8 a.m.)

9 THE COURT: And Dr. Wittes is not present, I don't
10 believe.

11 All right. Let's just focus on what really is in issue
12 here. I understand that the government was given an extra hour
13 of deposition with the witness to explore how she had gotten this
14 VMS report and how all of that came about. The objection --
15 well, the response of the joint defendants, their first response
16 that the government's objection is untimely is just silly, that's
17 the only word for it, so let's get to substance.

18 Mr. Brody, state your position, and then I'll hear from
19 Mr. Minton as to substance. And let me just say one final thing,
20 and that is I don't think there is any answer to -- but I'm sure
21 the government will try to give me one -- to the final response
22 of the joint defendants, namely that even if the report itself is
23 inadmissible -- and I'm not making that determination yet --
24 under Rule 703 it's precisely the kind of information upon which
25 Dr. Wittes as an expert in her field could rely. So, Mr. Brody.

1 MR. BRODY: Well, Your Honor, I think the answer to the
2 last question is that if somebody had given her a report like
3 that, that she could, she could rely on it, but that's a very
4 different question than offering the testimony that she's
5 offering which says that --

6 THE COURT: I understand those are two different issues.

7 MR. BRODY: And that's what we really want to focus on,
8 which is that the testimony that she offers in her written direct
9 is that this is a report that is normally created in the course
10 of VMS's business and it's the type of thing that's available to
11 them and it -- you know, the testimony really goes to the
12 foundational issues that would be needed to prove that this
13 document was an authentic and accurate report from VMS, albeit
14 created five years after the fact, and all of that is based, as
15 you know from our papers, on what Dr. Wittes was told by an
16 employee in her office who told her that he spoke to someone at
17 VMS who he was directed to by counsel for Philip Morris after
18 getting a copy of the document delivered to the office, the
19 document that defendants had, in on you view, failed to lay any
20 foundation for the admission of through Dr. Healtton, because
21 obviously she had never seen it before and couldn't comment on
22 the accuracy or validity of it. That happened the day before
23 Dr. Wittes's first deposition, and all of these events, the
24 document arriving at her office and the set up with the phone
25 call --

1 THE COURT: Are you objecting only to the admissibility of
2 the document?

3 MR. BRODY: I'm objecting to the admissibility of the
4 document as well as her testimony -- the hearsay testimony that
5 is contained in her testimony.

6 THE COURT: About how she obtained the document?

7 MR. BRODY: About how the document was created, about the
8 validity of the document, about the document being a normal VMS
9 report, all of the things that she cannot speak to.

10 THE COURT: All right, Mr. Minton.

11 MR. MINTON: Your Honor, Mr. Brody just said something
12 very interesting, and that is the nature of their objection is
13 based upon what she said about the authenticity of the document
14 in the written direct. They didn't object to authenticity on the
15 basis of the written direct --

16 THE COURT: Well, because they knew they were going to
17 have, I think at that point, it was clear they were going to have
18 an additional deposition, perhaps not.

19 MR. MINTON: There was no agreement. The only objection
20 they made was this was not disclosed reliance material.

21 MR. BRODY: But if -- I'm sorry, but on that one point,
22 Your Honor, if there had not been an additional deposition under
23 Order 861, which was the objection we raised, this document would
24 be out because it was never disclosed to us until after we had
25 deposed her, and in fact, we didn't even get a supplemental

1 reliance list and see the document identified as a document
2 relied on by Dr. Wittes until after the written direct was filed,
3 so it wouldn't be an issue in the case.

4 MR. MINTON: It was the same evening, but Your Honor, the
5 point is, is the foundational testimony appropriate? The rules
6 say it is. It doesn't have to comply with the formal standards
7 of 104. The way the world works is that people, employees in
8 offices, in fact, do jobs for more senior people. That's the way
9 it works all the time. She testified that she asked one of her
10 employees to do this. That's all spelled out in the written
11 direct. This is exactly the type of testimony you'd expect to
12 see for foundational purposes, and Rule 104 does not say that
13 that testimony must meet all of the formal requirements of the
14 Federal Rules of Evidence.

15 And bottom line, Your Honor, you're correct, even if it
16 were not admissible, she can still rely on it in her testimony.
17 So, A, the document's admissible because the testimony about
18 admissibility does not itself have to satisfy the Federal Rules,
19 and second of all, she can testify because it's a typical
20 reliance material.

21 MR. BRODY: I think part of that last statement is
22 incorrect, Your Honor. I don't think that you can establish
23 facts sufficient for the admission of a document with
24 inadmissible testimony. If the testimony is not going to be
25 admitted, how can it form the Foundation for the admission of the

1 document?

2 MR. MINTON: Well, that's pretty much how we've done it
3 for thousands and thousands of documents in this case.

4 THE COURT: Well, there's no question, which was the
5 position I started out with, that she may rely on the
6 testimony -- excuse me. She may rely on the report under 703.
7 In other words, she may rely on whatever data is contained in
8 that report. As to the admissibility of the report itself, the
9 proponent of an exhibit has to establish that it meets one of the
10 exceptions to the hearsay rule, i.e., the proponent has to
11 establish that it is a business record, and I think that's what
12 your essential argument is, Mr. Minton; is that right?

13 MR. MINTON: Yes. And starting with it's a business
14 record, Federal Rule 104 A states that "the Court is not bound by
15 the Rules of Evidence in determining admissibility."

16 THE COURT: I know that's what you're saying. I must say,
17 I haven't done research on this issue and there's no time to do
18 it now, and I'm sure you're correctly quoting the rule.

19 MR. MINTON: I have it, and my version has two ellipses in
20 it, and I don't know what's in the ellipses, but it says:
21 "Preliminary questions concerning the admissibility of evidence
22 shall be determined by the Court. In making its determination,
23 it is not bound by the Rules of Evidence except those with
24 respect to privileges."

25 THE COURT: My inner legal sense is there's more to it

1 than that. That's hardly the most scholarly response in the
2 world, although after this many years, sometimes one's inner
3 legal sense is as good a point of reliance as anything else. But
4 in any event, the issue then is whether defendants have
5 established that this is a business record, because again, I just
6 want to be clear with you, Mr. Minton, that's the exception
7 you're seeking to get it in under; is that correct?

8 MR. MINTON: It would be, Your Honor.

9 THE COURT: All right.

10 MR. BRODY: Your Honor, I would suggest that we can
11 proceed today and it may be, given the argument that's raised,
12 that we can refer you to -- I believe I've been told this issue
13 has been briefed in connection with the testimony of
14 Dr. Appleton. I have to look at that, but I can go back and look
15 at it. It may be that given the indication that, well, as an
16 expert she can refer to it, given that the admissibility is a
17 separate question, it may be that we should come back and, based
18 upon that determination, amend -- and I'm actually told in the
19 Appleton brief we cited a case from this district that --

20 THE COURT: She certainly can refer to it because she can
21 rely on it.

22 MR. BRODY: Right.

23 THE COURT: I'm not going to rule on admissibility right
24 now. Certainly 104 A is being quoted correctly. I'm not
25 questioning that, but I don't feel comfortable with the ruling

1 that's being asked of me this morning without at least doing some
2 further checking out of the case law. So, that leaves open the
3 opportunity for the government to cross-examine her on all of
4 this, and again, the only question that's unresolved is the
5 actual admissibility into evidence of the report itself.

6 MR. BRODY: Right, that's correct.

7 MR. MINTON: And I would just point out, Your Honor, that
8 the DOJ has not raised a hearsay objection with respect to the
9 admissibility of the document. It's simply the foundational
10 question.

11 MR. BRODY: Well, Your Honor, that's part of it.

12 Foundation is relevancy, authenticity and nonhearsay, so --

13 THE COURT: All right. Let's bring the doctor back in,
14 please.

15 (Witness entered the courtroom.)

16 THE COURT: All right. Mr. Brody, please.

17 BY MR. BRODY:

18 Q. Now, Dr. Wittes, I want to continue to talk about bias,
19 and if we could look at page 25 of your written direct, line 7
20 to 8, you testify that, "in the Farrelly 2005 Study selection
21 bias could have arisen because of non-response or because of
22 absence from school," right?

23 A. Yes, that's what I wrote.

24 Q. We're going to hand you a copy of U.S. Exhibit 93873,
25 which is the results of the "Monitoring the Future" Study for

1 2003. Are you aware that the principle investigators of the
2 "Monitoring the Future" Study survey explicitly addressed the
3 omission of dropouts from the study?

4 A. Explicitly address the what of dropouts?

5 Q. The omission of school dropouts from the survey which was
6 conducted in schools.

7 A. Yes.

8 Q. And do you know how they address that?

9 A. The survey did not include school dropouts, the survey
10 was a survey of children in schools.

11 Q. Right. And do you know if the investigators of the
12 "Monitoring the Future" Survey looked at that issue and its
13 potential impact?

14 A. I don't know.

15 Q. All right. Well, let's take a look -- that's not
16 something you looked at in connection with your analysis for
17 this case, right?

18 A. Well, that's correct.

19 Q. All right. Let's look at page 54 of U.S. Exhibit 93873
20 where the omission of dropouts is specifically discussed, and
21 I'll give you a second to get there.

22 A. Okay.

23 Q. The authors indicate in the middle of that paragraph:
24 "Further, since the bias from missing dropouts should remain
25 just about constant from year to year, their omission should

1 introduce little or no bias in change estimates. Indeed, we
2 believe the changes observed over time for those who finished
3 high school are likely to parallel the changes for dropouts in
4 most instances." That was the conclusion about that potential
5 bias from the investigators of the "Monitoring the Future"
6 Survey, right?

7 A. Yes. I mean, what they're saying is -- I mean, both
8 their language and my language were tempered. Their language is
9 it should remain just about constant, it should introduce little
10 or no bias, so they are saying -- they're thinking about it and
11 it should not produce much bias, and I said something very
12 similar.

13 Q. Okay. But you didn't tell the Court that the number of
14 dropouts should remain constant, did you?

15 A. No, I did not say that.

16 Q. And you didn't tell the Court that because of that it
17 shouldn't produce bias, did you?

18 A. No, and that's actually not what they're exactly saying.

19 Q. Okay. Well -- but the question was a simple one. You
20 didn't mention that to the Court, did you?

21 A. No, I did not.

22 Q. All right. If we look at page 69, we see a table with
23 sample sizes and response rates, and again I'll give you a
24 moment to get there. I know it's a big document.

25 A. I'm here.

1 Q. Now, between 1997 and 2002, the response rate for the
2 "Monitoring the Future" Study ranges from 82 to 91 percent,
3 right?

4 A. Um, I'm sorry, I'm -- yes.

5 Q. And you have no basis for any assertion that the greater
6 than 80 percent response rate achieved does not provide a
7 representative sample, correct?

8 A. There are several negatives in there.

9 Q. Let me ask it differently to make sure it's clear. You
10 can't -- you don't assert that the greater than 80 percent
11 response rate makes this a non-representative sample for any
12 reason, do you?

13 A. What I'm asserting is that the --

14 Q. Well, I'm asking you whether or not -- answer it yes or
15 no first. Are you asserting that the greater than 80 percent
16 response rate that we see here is a non-representative sample?

17 A. One cannot assert whether the non-response leads to
18 representative or non-representative samples. One can't tell
19 unless one knows who are the children that are missing. And so
20 I can't assert in either direction. All we know is that
21 10 percent are missing and we can presume that children who
22 aren't in school on a particular day are in some respects
23 different from people who are in school on a particular day.

24 Q. You -- so let me get this right. You are not asserting
25 that the non-respondents -- let me ask you this: You are not

1 asserting that the "Monitoring the Future" Survey provides a
2 non-representative sample, are you?
3 A. I am not asserting that it's representative or
4 non-representative. I simply don't know. All we know is that
5 10 percent of the sample -- approximately 10 percent is missing.
6 We know they're missing in a particular way: They weren't in
7 school. Children not in school are different from people in
8 school, but whether that represents -- so it's not -- if you ask
9 the question, is it non-representative in terms of attendance in
10 school, the answer is yes, it's non-representative in terms of
11 attendance in school. It depends on what it's
12 non-representative or representative for, so you can't ask a
13 global question --

14 THE COURT: Is that 10 percent the dropout rate that the
15 editors or the people who conduct this study said remained
16 constant over time, or is that a different body of children?

17 THE WITNESS: I believe this is a different body of
18 children. I believe, and I haven't -- I believe these are the
19 response rates of the kids who were in school. In contrast,
20 there are -- the kids who were enrolled. There's sort of three
21 kinds of kids, the kids who dropped out of school, the kids who
22 are absent from school, and the kids who don't respond when
23 they're in school, and I don't have time -- I don't know what
24 this particular 10 percent -- but there's three bodies of
25 children not responding.

1 THE COURT: So, you think, based on your examination of
2 the relevant data, that there are A, dropouts, and B, absent
3 kids, and then, of course, C, present kids?

4 THE WITNESS: (Nodded head affirmatively.)

5 MR. BRODY: We need a verbal response.

6 THE COURT: I'm sorry.

7 THE WITNESS: Yes.

8 BY MR. BRODY:

9 Q. You haven't looked at the data, have you?

10 A. No, I have not looked at the data. The data, as far as I
11 know, the data aren't available to the public.

12 Q. And as we discussed before, you don't know if there are
13 different levels of data, some of which are available, some of
14 which are not, do you?

15 A. That's correct, I have not looked at the data.

16 Q. You haven't done any analysis to see if the
17 non-responding students in the survey had a different
18 relationship from the responding students between exposure to
19 "truth" and "smoking," have you?

20 A. No, I haven't, but one couldn't. If children are
21 non-respondent -- responding, if they don't answer, if they're
22 not there, you don't know whether their relationship is the same
23 or different, but I haven't looked at it either.

24 Q. Right. So you have no idea whether your criticism has
25 any effect whatsoever on the results reported in the study, do

1 you?

2 MR. MINTON: Your Honor, at this point, Mr. Brody keeps
3 referring to data about which the United States consistently
4 objected to the joint defendants getting from the University of
5 Michigan. I don't think he can have it both ways. He can't on
6 the one hand --

7 THE COURT: First of all, this is cross-examination,
8 that's number one, so that we establish what the witness did or
9 didn't do or did look at or didn't look at. And number 2, I do
10 know that history, I do know the assertions that this is not
11 public data and the assertions that people couldn't have access
12 to it.

13 BY MR. BRODY:

14 Q. The -- did we get an answer to the last question?

15 A. I don't think I did.

16 Q. No. You have no idea whether your criticism has any
17 effect whatsoever on the results reported by Farrelly and his
18 colleagues in 2005, do you?

19 A. Well, in order to answer that, I want to go back to my
20 exact language.

21 Q. Well, if you can answer my question, which is, you have
22 no idea whether your criticism has any effect whatsoever on the
23 results reported by Farrelly and his colleagues in 2005, do you?

24 A. The point is, that when --

25 Q. I don't want the point, I want to know the answer to my

1 question, Dr. Wittes, which is -- my question is, you have no
2 idea whether your criticism about the non-response rate has any
3 effect whatsoever on the results reported by Farrelly and his
4 colleagues in 2005, do you?

5 A. One cannot know whether data that one -- that are missing
6 have an effect. What one can say and what one does say is if
7 there are missing data, how different would the missing -- the
8 inference in the missing data be in order to affect the overall
9 response, the overall relationship. And that --

10 THE COURT: But you don't know that.

11 THE WITNESS: Don't know that, but nobody can know that.

12 MR. BRODY: Okay.

13 THE COURT: Therefore, just to make the record clear, I
14 believe your answer to Mr. Brody's question is no, you don't
15 know?

16 THE WITNESS: That's correct.

17 BY MR. BRODY:

18 Q. Okay. Or yes, I don't know.

19 A. Right, I don't know.

20 THE COURT: Don't confuse things, Mr. Brody.

21 MR. BRODY: I'm sorry, Your Honor, I wasn't being flip. I
22 was just -- I wanted to make sure that everything was accurate
23 based on the way I asked the question. I'm sorry.

24 BY MR. BRODY:

25 Q. Now, your opinion is that even in the absence of any

1 basis for believing there to be any effect resulting from the
2 less than 100 percent response rate, the survey should be
3 criticized because in your words that's why you do a randomized
4 study, right?

5 A. The -- I want to distinguish the survey, which is
6 Monitoring the Future, from the study, which is the relationship
7 of the Monitoring the Future data to the advertising. I'm not
8 criticizing the survey.

9 Q. All right. Well, let's say the study. Your opinion is
10 that even in the absence of any basis for believing there to be
11 any effect resulting from the less than 100 percent response
12 rate, the study should be criticized because it's not a
13 randomized study, right?

14 A. The study should be criticized because there are
15 fundamental -- there are fundamental problems with the study
16 even as an observational study.

17 Q. My question was that even in the absence of any basis for
18 believing there to be any effect resulting from the less than
19 100 percent response rate, the study should be criticized
20 because it's not a randomized study, correct?

21 MR. MINTON: Asked and answered.

22 MR. BRODY: She didn't answer the question Your, Honor.

23 THE COURT: The objection's overruled.

24 THE WITNESS: The study should be criticized for a number
25 of reasons, one of which is that it wasn't randomized.

1 BY MR. BRODY:

2 Q. And you believe that even -- you believe that even if you
3 could eliminate any -- even if you could design a survey that
4 eliminated any bias from a non-response rate -- and I know here
5 we don't know whether there is any or not -- but you should
6 still do a randomized study to avoid potential problems?

7 A. My main criticism of the study has not been the
8 non-response rate, so I think --

9 Q. But Dr. Wittes, maybe we could focus on my question,
10 which is that even in the absence, even if -- even in the
11 absence of any basis to assert that the non-response rate
12 resulted in bias, you still take the position that we should do
13 a randomized study, correct?

14 A. I don't think the -- I don't think the two clauses of
15 your sentence follow, but yes, I believe that in order to know
16 whether the "truth" campaign was effective, one had to have done
17 a randomized study.

18 Q. All right. Well, we'll move on from that point. Let me
19 ask you this: Are you aware of any national survey with a
20 100 percent response rate?

21 A. No, I'm not.

22 Q. Are you familiar with the Medical Expenditure Panel
23 Survey or MEPS?

24 A. No, I'm not.

25 Q. You've never heard of the NHIS subset called MEPS?

1 A. No, I've never heard of it.

2 Q. Well, let me take a look at U.S. Exhibit 93864 A, which
3 is Methodology Report 11 on Sample Design of the 1997 MEPS
4 Survey, Household Component. And just for comparison sake, I
5 want to look at page 12 --

6 THE COURT: What's AHRQ, which was in the corner of that
7 document?

8 MR. BRODY: That's the Agency for Healthcare Research and
9 Quality, Your Honor.

10 THE COURT: Okay.

11 BY MR. BRODY:

12 Q. And at the top of the first column, we see the heading:
13 "Sample Yields and Survey Response Rates," right?

14 A. Yes.

15 Q. And we can, if we go further down to -- let's look at
16 Panel 1, top of the second column, Chris. We see that "Overall
17 the joint NHIS and MEPS Round 1 response rate for the 1996 MEPS
18 Household Survey was 77.7 percent, which is approximately 10 to
19 15 percent lower than the survey results obtained in the
20 'Monitoring the Future' Study," correct?

21 A. Yes.

22 Q. And the overall MEPS Panel 1 response rate at the end of
23 Round 3 was 70.2 percent, reflecting response to the 1995 NHIS
24 interview and the MEPS interviews for Rounds 1 through 3, and
25 that is 12 to 22 percent -- I'm sorry, 12 to 21 percent below

1 the response rate obtained by the "Monitoring the Future"
2 Survey, correct?

3 A. That's correct.

4 Q. Now, you are, are you not, aware of the NHIS Survey,
5 right, National Health Interview Survey?

6 A. Yes.

7 Q. In addition to criticizing the "Monitoring the Future"
8 Survey, you're also critical of the LMTS survey, right?

9 A. I, I respectfully repeat that I didn't criticize the
10 "Monitoring the Future" Survey.

11 Q. Well -- I'll tell you what, we looked at that portion of
12 your written direct; I don't see any need to go back to it at
13 this point in time. Let's see if you can answer the -- I'll
14 take the opening clause off the question. You're critical of
15 the LMTS survey, right?

16 A. Yes, I am.

17 Q. And LMTS is a random-digit dialing telephone survey,
18 isn't it?

19 A. That's what the paper says it is.

20 Q. And it asks questions about exposure and about attitudes
21 and beliefs, including intentions to smoke, right?

22 A. That's correct.

23 Q. Now, your own publication history related to telephone
24 surveys is a series of three papers, the last of which was
25 published 14 years ago, correct?

1 A. That's correct.

2 Q. I want to start by looking at one of those three papers
3 marked as U.S. Exhibit 93865, which is "Change In Public
4 Perspective on Cholesterol and Heart Disease Results from Two
5 National Surveys" and we've handed you a copy of that as well.

6 A. Okay.

7 Q. And if we could turn to the second page, you and your
8 coauthors wrote at the top of the second column: "Since
9 '97 percent of U.S. households have telephone service, telephone
10 surveys offer an economical way to obtain nationally
11 representative samples of the population. Random-digit dialing
12 permitted all households with telephones, including those with
13 unlisted numbers, to be included in the sampling frame." And
14 that was what you and your coauthors wrote, correct?

15 A. That's correct.

16 Q. And at the bottom of the middle column, carrying on to
17 the top of the third column, Chris -- close enough -- we see
18 that the overall completion rate computed as the number of
19 completed interviews divided by the total of eligible households
20 for the 1986 survey was 67 percent. This was considerably
21 higher than the 56 percent completion rate for the 1983 survey
22 conducted over the December holiday period," right?

23 A. Yes.

24 Q. And if we turn two more pages into the article to the
25 page that's marked 3530 at the bottom, we see that you and your

1 authors reached conclusions under the "Comment" heading, right?

2 A. Yes.

3 Q. And you reach conclusions about changes in public
4 awareness of issues relating to high blood cholesterol levels,
5 and you did so based on the 56 percent response rate in the 1983
6 telephone survey, right?

7 A. Let me clarify.

8 Q. First if you could answer my question, which was you
9 reached conclusions, you and your coauthors, about changes in
10 public awareness of issues relating to high blood cholesterol
11 levels based in part on the 56 percent response rate to the 1983
12 telephone survey, correct?

13 A. The 56 percent is not a response rate, it's a completion
14 rate. Those are very different, they're very different, and
15 yes, we did make conclusions from those surveys, that's correct.

16 Q. There is no mention of selection bias in your article, is
17 there?

18 A. I'm -- I would have to read it again to see if we mention
19 selection bias, but I do think it's important to distinguish --

20 Q. Well, the question was, there's no mention of selection
21 bias in your article?

22 A. If you found no mention of selection bias, there is no
23 mention of selection bias.

24 Q. And we don't see a statement in your article like we see
25 if we turn to your written direct, page 25 line 2 -- actually,

1 we'll start at line 1. "In the Farrelly 2002 study I worry
2 about selection bias because of the very high non-response
3 rate," right?

4 A. Yes.

5 Q. And you indicate in your written direct at page 25, if we
6 pull down a little bit -- lines 5 through 7, Chris -- "People
7 who are unwilling or unable to respond to surveys, particularly
8 where there are extensive efforts to follow up, are often quite
9 different than those who are willing to respond." That's what
10 you indicated, right?

11 A. That's correct.

12 Q. And in the article of yours that we're looking at, there
13 were ten attempts to reach respondents, weren't there?

14 A. Yes, there were -- I think. I don't remember. If it
15 says there were ten, then there were ten.

16 Q. And this concept that we see here in your written direct
17 examination, we don't find any mention of that issue in your own
18 article, do we?

19 A. We may not have mentioned it, but again I do want to
20 distinguish --

21 Q. Well --

22 MR. MINTON: Your Honor, may the witness finish her
23 answer?

24 THE COURT: She may, because I need to know the
25 distinction that she's trying to make, whether I hear it now or

1 whether I hear it in redirect. I gather what you want to tell me
2 is that there's a distinction between completion rate and
3 response rate.

4 THE WITNESS: That's correct.

5 THE COURT: Does the distinction turn on the different
6 meaning of those two words, meaning that somebody has completed a
7 questionnaire as opposed to someone saying, hello, I'll answer
8 question number one and now leave me alone?

9 THE WITNESS: That's correct, and we used a very stringent
10 definition that completion had to be completion of every question
11 in the survey.

12 THE COURT: Right. Okay.

13 BY MR. BRODY:

14 Q. And there's no mention in your article about the
15 potential impact of non-response to certain questions by certain
16 respondents, is there?

17 A. That's correct. We had available for anybody --

18 Q. That's --

19 A. Okay.

20 Q. Okay. Now, you also reached conclusions at page 3530
21 there about physician-thinking on issues related to cholesterol,
22 right?

23 A. Yes, this is the -- this is the public, but I think the
24 other one was the --

25 Q. Right, and the public one refers to the physician

1 responses?

2 A. That's correct.

3 Q. And we're going to hand you a copy of U.S. Exhibit 93866,
4 and this is the companion piece, correct?

5 A. That's correct.

6 Q. And you are a coauthor there, correct?

7 A. That's correct.

8 Q. And in the Physician Study, if we look at the second page
9 of the article at the top of the second column, we see that the
10 response rates were 56 percent and 62 percent, respectively,
11 correct?

12 A. Yes, and these are also completion rates. We call them
13 "response," but the respondents who completed an interview.

14 Q. Right, respondents from whom you received answers to all
15 of the questions and all of the variables, if you will, that you
16 were measuring in the survey, correct?

17 A. That's correct.

18 Q. And you had a, therefore in 1983, a 44 percent -- and you
19 call it a response rate -- 44 percent non-response rate based on
20 the definition in your article, correct?

21 A. That's correct.

22 Q. Now, despite your statement in your written direct
23 testimony that you're worried about selection bias, you can't
24 tell us how or whether selection bias affected the population
25 surveyed in the LMTS Survey, can you?

1 A. Remember, we were asking a very different kind of
2 question.

3 Q. So, is the answer to my question no, you can't tell us
4 how or whether --

5 A. No, I can't tell you how.

6 Q. Okay. Or whether? You can't tell me whether it
7 affected --

8 A. I can't tell you how or whether.

9 Q. Thank you. Now, you admit that most of your own work has
10 related to randomized clinical trials rather than observational
11 studies like those you're criticizing here, right?

12 A. Yes, but that's actually -- in order to do the randomized
13 trials, I use a lot of information from observational studies.

14 Q. Well, let's look at your written direct, page 15 lines 4
15 to 6. And you were asked: "You have described work that you
16 have done on randomized clinical trials. Does most of your work
17 relate to that kind of study rather than observational studies?"

18 And you answer: "Yes." And that's your written direct
19 testimony, right?

20 A. Yes, that's correct.

21 Q. You have no experience working with media ratings, do
22 you?

23 A. No, I don't.

24 Q. And you've never worked with Nielsen ratings?

25 A. That's correct.

1 Q. You've never done any analysis of media markets, have
2 you?

3 A. That's correct.

4 Q. And you have no understanding of what it means to launch
5 a media campaign nationally versus locally, do you?

6 A. Well, "no understanding" is a pretty broad term. I have
7 no experience in launching a media campaign.

8 Q. Are you aware that gross rating points are a standard
9 measure based on media bias?

10 A. I first learned about gross rating points when I read
11 these papers.

12 Q. So you can't tell us whether gross rating points are a
13 standard measure based on media bias?

14 A. I cannot tell you.

15 Q. All right. And can you even tell us what gross ratings
16 points represent?

17 A. Yeah, they represent -- they're a measure of the
18 intensity of the exposure to ads within a media cam -- within a
19 media market.

20 Q. They are -- let me ask it this way: Are you aware that
21 GRPs are the cumulative targeted audience ratings points
22 delivery of an advertising campaign as measured by reach and
23 frequency?

24 A. I -- I don't know the exact words defining GRP, so I --
25 if those are the exact words, then that's what they are, but I

1 don't -- I don't know the exact words.

2 Q. Okay. Well, let me ask you this question: Do you know
3 what targeted audience ratings points are?

4 A. Not technically, no.

5 Q. So, you're not aware that a target audience rating point
6 is a survey-based estimate of the size of the audience to a
7 channel, program or time zone expressed as a percentage of the
8 potential for the particular target audience?

9 A. That's correct, I don't know that definition.

10 Q. Okay. So, you wouldn't be able to tell me whether GRP
11 measurement is, in fact, not a proxy for what was delivered with
12 a media buy but an actual measurement of the media buy?

13 A. That's correct, I can't tell you whether it was a
14 measurement or a proxy.

15 Q. All right. Let's look at page 26 of your written direct
16 examination. You indicate on line 7 to 9, "In order to be
17 adequate controls, the students --" and we're talking about the
18 Monitoring the Future students, right?

19 A. Yes.

20 Q. -- would, at a minimum, have to have provided responses
21 during the time period of the exposure under study." That's
22 what you wrote, correct?

23 A. Yes, that's what I wrote.

24 Q. And what the Farrelly 2005 Study relies on is a repeated
25 time series, correct?

1 A. That's correct.

2 Q. Are you aware that group randomized trials are an
3 outgrowth of repeated time series studies?

4 A. I have no idea what that sentence means. Group
5 randomized trials have been done for years and years. The issue
6 here is that --

7 Q. Well, that's --

8 A. No, I'm not aware that that's what they're an outgrowth
9 of.

10 Q. At the bottom of page -- let me ask you this: The
11 statement that we just looked at at line 7 to 9, is that a
12 criticism that you are making of the Farrelly 2005 Study?

13 A. This is a point that a control needs to have control
14 over, the time period as well as -- that there's a temporal
15 issue that we need to control for, so, yes, this is a criticism
16 of the Farrelly Study.

17 Q. And the only way to control, then, for that would be to
18 have a group of students in the "Monitoring the Future" Survey
19 who were not exposed to the "truth" campaign over time, correct?

20 A. That would be the only way to -- that I know to make sure
21 that the secular trends that are occurring at that time are
22 controlled for.

23 Q. And that would change the nature of what was done and
24 bring it from an observational study down to -- or over to, over
25 to what you have said you think is the only way to do this,

1 which is a randomized controlled study or at the very least a
2 controlled study?

3 A. I was going to say, what I just said about the timing
4 doesn't speak to randomization, it speaks to temporal control.

5 Q. So, you would either have to find a group of students
6 that had no exposure to the "truth" campaign or -- and survey
7 them over time in your opinion -- or you would have to
8 specifically set out to deprive certain students of exposure to
9 the "truth" campaign, right?

10 A. The first -- finding people who were not exposed has the
11 potential for selection bias, so that would not be a study that
12 I would recommend. I would not use the word "deprive." I think
13 that's a loaded verb, but yes, one would want to compare
14 contemporaneous controls who are similar in all respects,
15 measured and unmeasured, to the exposed group.

16 Q. So basically what you're saying here is not let's do the
17 study in a different way, but let's do a different study, in
18 essence?

19 A. Yes, let's do a different study.

20 Q. All right. The -- are you aware of any data set that
21 would allow us to do what you're recommending?

22 A. No.

23 Q. Okay. At the bottom of page 26, you indicate, "With
24 respect to cross-sectional studies lacking a time dimension,
25 that even if they show an association, you cannot tell which way

1 the causal direction runs. It may be that your focal variable
2 causes the outcome variable, but it may instead be that the
3 outcome variable causes the focal variable or they both may be
4 caused by something else." That's your testimony, right?

5 A. Yes. Now that's, of course, a single cross-sectional
6 study.

7 Q. That's your -- the question was, that's your testimony,
8 correct?

9 A. That's my testimony, yes.

10 Q. Are you aware that the authors of the Farrelly Study used
11 a fixed effects model to remove the possibility of such a
12 contrary outcome?

13 A. They used a fixed effects model that they said was their
14 purpose in doing it, yes.

15 Q. Now, do you know what a fixed effects model is?

16 A. Yes, I do.

17 Q. All right. Now, in an observational study, in contrast
18 to controlled trials, we often have the situation where
19 treatment groups are not the same as the control groups, right?

20 A. That's correct.

21 Q. And for example, putting it in the context of the
22 Farrelly 2005 Study, one could argue that more "truth" ads were
23 delivered to urban than rural areas and because smoking rates
24 tend to be higher in rural than urban areas, some of the
25 correlation between reduced smoking in "truth" is not due to a

1 causal mechanism but due to a preexisting relationship between
2 smoking rates and the way the campaign was delivered, correct?

3 A. One could argue that that's one of the issues, yes.

4 Q. And if the authors did nothing to address that, we might
5 have a legitimate concern about a flaw in the study, right?

6 A. Yes.

7 Q. Right. Now, what the authors did here is they included
8 an indicator variable for every media market in the sample
9 survey, right?

10 A. Yes.

11 Q. And we see that reported in the article itself, right?

12 A. Yes.

13 Q. And we'll actually hand you a copy of that now.

14 A. I actually don't need the -- I know they did that.

15 Q. Okay. We're going to look at the bottom of the first
16 column on page 426. And the -- I want to actually, Chris, pick
17 up at the very bottom of that column and carry it over to the
18 next one. And I'll wait for you to switch those up for us. Got
19 it.

20 The authors indicate that "to illustrate the variation in
21 potential exposure, we grouped the 210 media markets into one of
22 five levels of exposure on the basis of the range in total GRPs,
23 647 to 22389, that accumulated in each market from campaign
24 launch in February 2000 until the second quarter of 2002,"
25 right?

1 A. Yes.

2 Q. And you're not aware, are you, of any difference in
3 smoking rates between markets that received 647 GRPs and those
4 that received, for example, 4,000 GRPs, are you?

5 A. Not 4,000, no.

6 Q. And you haven't looked at differences in youth smoking
7 rates by variations in the availability of FOX, UPN and the WB
8 Network, have you?

9 A. No, I have not.

10 Q. Okay. Now, the indicator variable approach described
11 here is a control for differences in smoking rates at the media
12 market level that existed prior to the launch of the campaign,
13 correct?

14 A. That's what the model purports to do.

15 Q. Now, including the indicator variable wipes out any
16 systematic differences in smoking rates at the market level so
17 that after controlling for fixed effects you no longer have to
18 worry about the possibility of the "truth" variable picking up
19 differences that already existed across markets, correct?

20 A. No, that's not correct.

21 Q. So, it's your testimony that measuring -- let's just take
22 an example. It's your testimony that if you measure smoking
23 rates in a certain market and then you measure smoking rates in
24 the same market over the time series and you also measure
25 exposure to the "truth" campaign in that same market, that you

1 are not controlling for the actual difference in that market as
2 compared to another one? Yes or no?

3 A. If you want me to answer yes or no, I will say that's
4 correct, you're not correcting --

5 Q. Thank you. That's what I wanted to know. Thank you.

6 A. Okay.

7 Q. I want to talk about a different topic, and -- you were
8 deposed in this case on Friday, May 20th, right?

9 A. It was the Friday before I went to Portland. If that's
10 the 20th, that's when I was deposed.

11 Q. That was just a couple weeks ago, right?

12 A. Yeah.

13 Q. And your written direct testimony was filed on May 23rd,
14 2005, correct?

15 A. That's correct.

16 Q. But you left town on Sunday, May 22nd --

17 A. That's correct.

18 Q. -- to go to a meeting on the West Coast, correct?

19 A. That's correct.

20 Q. And at the time of your deposition you hadn't seen a
21 draft of what was eventually filed as 89 pages of written direct
22 testimony, had you?

23 A. That's correct.

24 Q. So sometime after 5:30 p.m. on May 20th when the
25 deposition ended, you got a first draft, questions and answers

1 from the lawyers representing the tobacco defendants in this
2 case, right?

3 A. Yes. Now, I had --

4 Q. That's right?

5 A. Yes.

6 MR. MINTON: Your Honor, may she finish the response?

7 THE COURT: No, it was a straightforward question and she
8 answered.

9 BY MR. BRODY:

10 Q. Now, they filed a final version of the testimony less
11 than three days later, right?

12 A. Yes.

13 Q. And I want to ask you some questions, just a couple
14 questions designed to address the issue of how decisions were
15 made as to what went in there and how it went in and we can look
16 at page 30 as an example. You were asked the question: "Have
17 there been other instances in which observational studies were
18 later contradicted by randomized studies?" Do you see that?

19 A. Yes.

20 Q. And you said, "Yes, there have been. Observational data
21 had shown, in quotes, that beta carotene protects against lung
22 cancer, but the randomized CARET and Finish cancer studies later
23 showed that it increases the probability of developing lung
24 cancer."

25 Now, that's not completely accurate, is it?

1 A. I don't know what you mean by "completely accurate."

2 Q. Well, beta carotene has only been shown to increase the
3 probability of developing lung cancer in smokers, correct?

4 A. That was the Finish Study, yes.

5 Q. Right. And the Physicians's Health Study showed that
6 beta carotene neither increases nor decreases the probability of
7 developing lung cancer in nonsmokers, correct?

8 A. Well, it's more complicated than that. The Physicians
9 Health Study, if you look at the confidence interval for the
10 beta carotene, and I think it's a beta carotene Vitamin E, it's
11 a very wide confidence interval. So it didn't -- these were
12 people at low risks. The Physician's Health Study were people
13 at low risks for lung cancer, so the -- I think the jury is out
14 on the Physician's Health Study.

15 Q. Well, let's look at the results as they were reported in
16 The New England Journal of Medicine and that's U.S.
17 Exhibit 93862. And if we look at the conclusions of the report
18 by Henikins and others, including Sir Richard Peto, we see that:
19 "In this trial among healthy men, 12 years of supplementation
20 with beta carotene produced neither benefit nor harms in terms
21 of the incidence of malignant neoplasms, cardiovascular disease
22 or death from all causes, and that includes lung cancer in the
23 malignant neoplasms," right?

24 A. Yes, I guess so. I don't see the language, but yes. I'm
25 sure you're reading it correctly.

1 Q. Now, my question is, the language that we looked at in
2 your written direct, who initially drafted the language that
3 does not include the words "in smokers" at the end of that
4 sentence on page 30, line 10 at the end of your testimony which
5 we can go back to.

6 A. I drafted that.

7 Q. Is there any way that you can go back through your
8 written direct testimony and tell us which of the words are your
9 words and which of the words were presented to you in the first
10 draft from the lawyers?

11 A. I -- I believe that this section was fully all my words,
12 but I don't have -- the process by which we did this was that
13 I -- I spoke and they typed, so this was over a period of a
14 number of days, and I can't attest to a specific word. Certain
15 places here I know those are my words. This is very -- I
16 believe these were my words.

17 Q. Okay. So it was your -- you were the one who left out
18 the additional information about the randomized CARET and the
19 Finish studies, right?

20 A. My purpose was to show --

21 Q. I think that's a yes or no.

22 A. Yes, I did not put in the words -- I did not put in the
23 other words.

24 Q. All right. Was it your idea to include the testimony at
25 pages 30 to 32 of your written direct testimony about whether it

1 would be unethical to deprive certain adolescents of exposure to
2 the "truth" campaign?

3 A. Yes, that was my idea.

4 Q. And there you reference two studies that looked at the
5 effectiveness of the Florida "truth" campaign at the bottom of
6 page 31. Chris, you can take the exhibit down.

7 Are you there?

8 A. Yeah. Actually, the paper that I refer to there, there
9 were two Sly papers and I refer -- that were published within
10 the same month, and I referred to the wrong paper. There's a
11 different Sly paper that I should have referred to.

12 Q. Okay. You haven't made any assessment of the
13 effectiveness of the Florida "truth" campaign, have you?

14 A. No, I have not.

15 Q. And similarly, you're not offering any opinions about the
16 validity of the Sly study itself on the Florida "truth"
17 campaign, are you?

18 A. No, I'm not.

19 Q. You've never seen an advertisement from the Florida
20 "truth" campaign, have you?

21 A. That's correct.

22 Q. And you have no idea which elements from the Florida
23 "truth" campaign were adopted by the Legacy Foundation and which
24 elements were rejected, do you?

25 A. That's correct, I don't know.

1 Q. And you don't know whether the elements that were adopted
2 by the Legacy Foundation are the elements that led to what Sly
3 reported as success in Florida, do you?

4 A. That's correct, I don't know what the overlap in the two
5 campaigns was.

6 Q. So at the end of the day, you have no basis to question
7 the expectation that depriving kids of exposure to the "truth"
8 campaign as launched by the Legacy Foundation would lead to
9 increased youth smoking, do you?

10 A. I don't think I ever said that.

11 Q. So the answer to my question is yes, you have no basis to
12 question the expectation that depriving kids of exposure to the
13 "truth" campaign as launched by Legacy would lead to increased
14 youth smoking?

15 THE COURT: Whose expectation, Mr. Brody? That question
16 is not clear.

17 MR. BRODY: Anyone's expectation, Your Honor. We're going
18 to get to some of the additional testimony which will show you
19 where this is going, but any expectation.

20 THE WITNESS: Well, I don't know who -- I don't really
21 know what you mean by this question.

22 BY MR. BRODY:

23 Q. Okay. Let me ask it this way: You have no basis to
24 question the expectation at the time that the "truth" -- that
25 Legacy Foundation's "truth" campaign was launched, that

1 depriving kids of exposure to the campaign would lead to
2 increased youth smoking, do you?

3 A. You just have to wait while I parse the sentence. Could
4 you say it one more time? I'm really sorry, but I don't get it.

5 Q. In that case I'll ask it a little differently.

6 A. Okay.

7 Q. If someone had said in the year 2000, we don't want to
8 deprive kids of exposure to the American Legacy Foundation's
9 "truth" campaign because depriving them of that exposure will
10 lead to increased youth smoking, you'd have no basis to dispute
11 that expectation, correct?

12 A. To dispute --

13 Q. To dispute that statement.

14 MR. MINTON: Well, again, Your Honor, we don't know whose
15 expectation is being -- it's just a hopelessly confused question.

16 THE COURT: No, this time it's clearer.

17 THE WITNESS: Say it one more time.

18 BY MR. BRODY:

19 Q. Sure. If somebody had said, you know, as of the year
20 2000 we expected that depriving kids of exposure to the American
21 Legacy Foundation's "truth" campaign will lead to an increase in
22 youth smoking, you'd have no basis to disagree with that
23 expectation, correct?

24 MR. MINTON: Your Honor, there wasn't even an ALF "truth"
25 campaign as of the date he just named.

1 THE COURT: But this is a hypothetical question.

2 THE WITNESS: I would take the position that -- an
3 agnostic position on that.

4 BY MR. BRODY:

5 Q. That's what I thought. Thank you. As we discussed
6 previously, you're expressing no opinions on whether the "truth"
7 campaign has been effective at decreasing youth smoking, right?

8 A. That's correct.

9 Q. But at page 32, lines 18 to 19 of your written direct
10 examination, you indicate that -- and we'll pull that up. You
11 believe it was unethical not to conduct a randomized trial of --
12 to address the question of whether the "truth" campaign has been
13 effective, right?

14 A. That's correct.

15 Q. We discussed the subject of ethics -- the ethics of
16 conducting certain randomized trials during your deposition,
17 didn't we?

18 A. Yes, we did.

19 Q. And I asked you whether in your opinion it would be
20 unethical to conduct a randomized controlled trial to test the
21 hypothesis that exposure to cigarette brand advertising causes
22 kids under 18 to begin smoking, but you refused to answer the
23 question, right?

24 A. I had a lot of trouble with the premise of the question.
25 I don't believe I refused to answer the question. I felt that

1 I'm not -- one does an experiment on people to see whether an
2 intervention improves their health, prevents disease, or does
3 something else positive, and I don't -- experiments aimed to
4 show harm are not experiments that I believe one should be
5 doing.

6 Q. So it's correct that in the deposition you wouldn't give
7 me an answer to that question, correct?

8 A. I just gave you the answer pretty -- I gave you the
9 answer that I think I gave you in the deposition. I think at
10 the deposition I said I wouldn't be involved in a study like
11 that.

12 Q. But that's the question -- the question went to the
13 ethics of it. Why don't we --

14 A. No, I believe the question --

15 Q. Actually, my question was that you refused to answer the
16 question of whether it would be unethical to conduct a
17 randomized, controlled trial to test the hypothesis that
18 exposure to cigarette brand advertising causes kids under 18 to
19 begin smoking; is that right?

20 MR. MINTON: It's been asked and answered, Your Honor.

21 THE COURT: No, objection's overruled.

22 THE WITNESS: And I said that the issue of ethics there is
23 not related to the randomization itself, it's related to the
24 nature of the experiment; that we think about experiments --
25 First you ask, is an experiment itself something that should be

1 done, is ethical to be done. If the answer to that is yes, then
2 you ask what's the best way of doing it, and there's where the
3 ethics about randomization come in. If you -- but I will not
4 answer a question that asks what's the ethical way to do an
5 unethical experiment. I don't believe that that's a reasonable
6 question.

7 BY MR. BRODY:

8 Q. Let's look at your deposition, page 193 to 194, beginning
9 at line 18 on page 193 and carrying over to line 4 on page 194.
10 And you were asked -- beginning on line 14, actually, Chris --
11 "Are you refusing to answer the question as to your opinion as
12 to whether conducting such a study would be unethical?" Your
13 answer was, "I'm not going to answer this question. I don't --
14 studies of this kind are not part of my expertise. And when I'm
15 saying 'of this kind of study' related to the effect of -- this
16 study is not in my area of expertise. The study that you're
17 proposing is not in the area of my expertise." That was your
18 testimony, correct?

19 A. That was part of my testimony.

20 Q. All right.

21 MR. BRODY: Tell me where you would like to break, Your
22 Honor.

23 THE COURT: Well, let's go a little bit longer.

24 BY MR. BRODY:

25 Q. Now, despite your testimony on the subject of the limits

1 to your expertise, you did not limit any of your answers in your
2 written direct examination concerning the ethics involved in --
3 the ethical issues involved in a decision that would deprive
4 certain kids of exposure to the "truth" campaign, did you?

5 A. Can you run that by me again?

6 Q. Sure. Despite your testimony that the question of the
7 effects -- the question of whether it would be unethical to
8 conduct a randomized, controlled trial to test the impact of --
9 let me start it over.

10 Despite your testimony about the limits to your
11 expertise, you did not express in your written direct
12 examination any reservations or limits to your ability to opine
13 on the ethics of doing or not doing a randomized, controlled
14 trial that would deprive kids of exposure to the "truth"
15 campaign, did you?

16 A. Well, I limited my expertise in the sense that I'm not an
17 expert in doing experiments that try to prove harm. That's not
18 part of my expertise. So, I don't consider limiting that as
19 relevant at all to the issue about how best to do a study to
20 show that an intervention aimed to decrease children smoking,
21 how best you should do that study.

22 Q. You wouldn't do that study, would you?

23 A. I absolutely would, a study --

24 Q. I'm referring to the former study, you wouldn't do the
25 former study to see whether kids under 18 who are exposed to

1 cigarette brand advertising have an increase in smoking
2 prevalence, would you?

3 MR. MINTON: Object to the form of the question, Your
4 Honor. That is not the same question that has been repeatedly
5 posed in the past with respect to cigarette brand advertising
6 where the purpose of the randomization is to see if --

7 MR. BRODY: Your Honor, this is a speaking objection,
8 first of all.

9 THE COURT: It is, indeed, and the fact that it's a
10 different question is not a reason for objecting to the question.
11 If it was the same question, you would have a legitimate
12 objection.

13 MR. BRODY: Well, it was a simple question. Maybe I can
14 state it for the record.

15 BY MR. BRODY:

16 Q. You wouldn't participate in a randomized controlled trial
17 to test the hypothesis that exposure to cigarette brand
18 advertising causes kids under 18 to begin smoking, would you?

19 MR. BERNICK: Your Honor, I would have an objection to
20 this. This is an obvious attempt to get back into what was a
21 liability case issue; that is, whether it's ethical or not, would
22 it be possible or not to do randomized controlled trials
23 regarding the effect of advertising. We spent a long time
24 with --

25 THE COURT: She discusses this issue in her direct and,

1 therefore, it's legitimate cross. You may answer the question.

2 If you need it read back, Mr. Brody will read it back.

3 THE WITNESS: I discuss in my direct --

4 BY MR. BRODY:

5 Q. That's not the question. The question is, you, Dr.

6 Wittes, would not participate in a randomized controlled trial

7 to test the hypothesis that exposure to cigarette brand

8 advertising causes kids under 18 to begin smoking, would you?

9 A. That's correct, I would not be involved in a study like

10 that.

11 Q. Okay. Your written direct examination includes reference

12 to a number of exhibits, correct?

13 A. Yes.

14 Q. And those exhibits were drawn from lists of reliance

15 materials that were submitted by counsel, correct?

16 A. Submitted to you by counsel.

17 Q. Yes.

18 A. Yes.

19 Q. I want to talk about how many of the documents you looked

20 at were provided to you by lawyers for the tobacco companies,

21 and I'm going to hand you, I think it's actually five documents

22 marked as U.S. Exhibits 93878 through 93882.

23 And Your Honor, if you do want to break, actually maybe

24 we could take a lunch break now. This is a fairly long section

25 of what I have left.

1 THE COURT: Will the witness need to look at these
2 documents during the lunch break?

3 MR. BRODY: No.

4 THE COURT: All right.

5 MR. BRODY: I'm being prompted to ask Your Honor if you
6 would like us to have people here so that if we do conclude
7 before 4:30 -- and I assume we will based on an estimate on the
8 redirect; I probably have another hour -- whether you would like
9 us to have people here to address the outstanding exhibit
10 objections related to other witnesses.

11 THE COURT: Well, we certainly could do some of them.

12 There are a number that are up in the air. I don't know if we
13 have the defense lawyers here.

14 MR. BERNICK: We need to know a little bit about who
15 Mr. Brody has in mind, which witnesses we're talking about, and
16 we also have some other matters that we would like to take up
17 with the Court concerning scheduling at some point later on this
18 afternoon. So it would be good if we can finish and get to it,
19 but I would like to know what witnesses we're talking about as
20 far as the objections are concerned.

21 THE COURT: Who will you be ready to address? I signed an
22 order relating to Dr. Viscusi's exhibits. Obviously that must
23 have been worked out between everybody or amongst everybody.

24 MR. BRODY: Right. I think we could probably address the
25 exhibits related to Dr. Fiore. I know there's been a lot of back

1 and forth on that, and those are pretty well settled, and I can
2 confer with counsel for the defendants and we can tell you after
3 lunch another two or three or four based on the time estimate
4 that we'll be ready to address.

5 MR. WELLS: I would be ready to address Dr. Fiore.

6 THE COURT: All right. Well, we'll definitely do that.

7 How long, based on what you heard, do you think your redirect
8 will be?

9 MR. MINTON: I think it's only about 15 minutes, Your
10 Honor. And might we -- Dr. Wittes is scheduled to make a
11 presentation tomorrow at Harvard and I would very much like to
12 get her off in time today.

13 THE COURT: I'm sure we'll finish.

14 MR. MINTON: So if we could just take an hour for lunch,
15 would that be okay?

16 THE COURT: All right. Although it seems to me we have
17 enough time.

18 MR. MINTON: Probably so.

19 THE COURT: But if we take an hour for lunch, we're going
20 to end at 4:30, okay. That's the trade-off.

21 You may step down at this time. The rules that I gave you
22 before do apply about not talking to anybody, not doing any
23 additional study or research.

24 We'll come back at 1:30, everybody.

25 (Thereupon, a luncheon recess was had beginning at

1 12:32 p.m.)

2

3 C E R T I F I C A T E

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

6 -----
7 Scott L. Wallace, RDR, CRR
Official Court Reporter

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Scott L. Wallace, RDR, CRR
Official Court Reporter

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, : CA No. 99-2496 (GK)
: June 1, 2005
Plaintiff, :
: 1:33 p.m.
: :
v. : Washington, D.C.
: :
PHILIP MORRIS USA, et al., :
: :
Defendants. :
* * * * *

VOLUME 111
AFTERNOON SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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1 PROCEEDINGS

4 MR. BRODY: Yes, I expect it's about an hour. I'm
5 about two-thirds of the way through.

6 THE COURT: Okay.

7 MR. BRODY: As to the issue of exhibit objections, we
8 are still just at Dr. Fiore. We are going to see whether
9 counsel for defendants are ready to argue the exhibit objections
10 outside of the motion to strike that's been filed related to
11 Mr. Myers, because we are ready for those. So, it's definitely
12 going to be Dr. Fiore. It may be Mr. Myers, I'm not sure on
13 that. And I'm happy to report that it looks like we will reach
14 agreement as to Dr. Wyant and Dr. Gruber. We are just
15 finalizing a few things on those.

16 THE COURT: So, at best, this afternoon we will get
17 Dr. Fiore's done.

18 I don't know what the scheduling issues are that
19 Mr. Bernick has. I thought we worked out our scheduling issues.

20 MR. WEBB: Your Honor, there is one scheduling issue.
21 It won't take long and I prefer not to take up time with the
22 witness. It's a short issue which I was going to raise with the
23 court.

24 THE COURT: If you're going to raise it, perhaps I can
25 count on the fact it will be relatively short. All right. And

1 I won't fill in the other part of that sentence.

2 All right. Let's go.

3 MR. BRODY: Could we also ask the court to ask
4 defendants to make sure that we can count on knowing what it is
5 before it's raised?

6 THE COURT: During the afternoon recess you and
7 Mr. Webb can actually have a conversation on this subject.

8 MR. BRODY: Thank you.

9 JANET WITTES, Ph.D., Defendant's witness, SWORN
10 CROSS-EXAMINATION (Cont'd.)

11 BY MR. BRODY:

12 Q. Dr. Wittes, you were reviewing some documents up there
13 before we came back into session. What were you reviewing?

14 A. Oh, I was actually counting the number of my papers that
15 were methodology clinical trials and nonclinical trials and
16 discovered --

17 Q. I just want to know what you were looking at. You were
18 looking at your CV?

19 A. Yes, I was.

20 Q. And that's what you were studying up there?

21 A. Yes.

22 Q. Anything else?

23 A. No.

24 Q. Now, your CV is part of U.S. Exhibit 93878; correct?

25 A. Yes.

1 Q. That contains your expert report, your CV, and a list of
2 materials that you considered before filing your expert report
3 in this case; right?

4 A. Yes.

5 Q. And I want to look at that list, which is attachment 2 to
6 your expert report. So if you can pull that up.

7 Now, there are a total of 38 entries on the list;
8 correct?

9 A. Yes.

10 Q. And there is a reference to a couple of websites, the Legacy
11 website and the Census Bureau website, and taking out those two
12 entries leaves us with 36; right?

13 A. 38 minus two is 36.

14 Q. And now all but -- I believe all but two of those 36 entries
15 were provided to you by lawyers for the tobacco companies; is
16 that right?

17 A. (Pause) It depends a little bit how you count. It's either
18 two or four.

19 Q. Okay. We can agree that all but two or four of those 36
20 entries was provided to you by lawyers for the tobacco
21 companies?

22 A. That's correct.

23 Q. And you have no idea what methodology, if any, the lawyers
24 for the tobacco companies employed in selecting the items they
25 chose to give you; correct?

1 A. Oh, when I said -- some of these were not, they didn't
2 choose to give me, I asked for, but they gave me in response to
3 requests. So, some of them they gave me, some of them I asked
4 for.

5 Q. The question was -- let me see if we can shorten this.

6 With respect to the items the lawyers chose to give
7 you, you have no idea what methodology, if any, they employed in
8 selecting the items that they chose to give you; right?

9 A. Well, the methodology was sometimes I requested something,
10 and so if I requested something they gave it to me. Sometimes
11 it was obvious that there was material that was germane to the
12 papers, so they gave those to me. And those are -- that's kind
13 of the method by which these were given to me.

14 Q. Let's look at Page 210 of your deposition in this case at
15 line 7. You were asked the question, "Do you know what
16 methodology they employed in selecting the items that they chose
17 to give you?" And your answer was "No." Correct?

18 A. Well, that's right. The ones that they chose to give me I
19 don't know their methodology.

20 The ones that they gave me because I asked them --

21 Q. That was your testimony; correct?

22 A. Yes, but the important verbiage is chose.

23 Q. That was your testimony under oath less than two weeks ago,
24 correct?

25 A. Yes, that's correct.

1 Q. All right. Your list includes a total of four -- you can
2 just go to the list, Chris -- four letters between Philip Morris
3 and the American Legacy Foundation; right?

4 A. Yes.

5 Q. And you don't know how many letters were exchanged between
6 Philip Morris and the American Legacy Foundation on the subject
7 of the Farrelly papers, do you?

8 A. That's correct, I don't know.

9 Q. You didn't select these four letters as part of the process
10 of forming your opinions in this case, did you?

11 A. If you mean that I didn't select them out of a larger
12 universe of letters, that's correct.

13 Q. Well, in fact, the lawyers were -- the letters were selected
14 for you by lawyers for the tobacco companies; correct?

15 A. That's correct.

16 Q. And you didn't ask the lawyers whether there were additional
17 letters in the chain of correspondence, did you?

18 A. That's correct.

19 Q. You drew conclusions from these letters, but you had no
20 interest in reviewing the entire chain of correspondence to view
21 all of the information, right, that was exchanged?

22 A. The relevance of the letters -- I drew one conclusion I
23 think from the letters.

24 Q. Right. And you tend to believe what you read; right?

25 A. It depends what I read whether I believe it or not.

1 Q. Well, let's look at your deposition, at Page 204, beginning
2 at line 13 continuing on to 205, line 12.

3 And you were asked, "And as of the time you provided
4 your expert opinions in your expert report in this case, you had
5 no basis for that particular criticism beyond your assumption
6 that what appears in Dr. Levy's letter is true?"

7 And your answer was, "Well, it would be -- I tend to
8 believe what I read."

9 That was your answer; correct?

10 A. Yes, it was my answer.

11 Q. Now, on this subject of Karen Levy's letter; you know that
12 Dr. Levy's letter was a letter that concerned, among other
13 things, the number of "Think. Don't Smoke" ads that were airing
14 during the time period of the LMTS survey; right?

15 A. Yes, I do.

16 Q. And on this subject in your written direct you also
17 discussed a report from Video Monitoring Service that has been
18 marked as JD 55410; correct?

19 A. Yes, that's correct.

20 Q. And this is discussed beginning at Page 55, line 20 of your
21 written direct; correct?

22 A. Yes.

23 Q. Now, you had never heard of VMS at the time that you were
24 first deposed in this case on May 20th, right, or possibly the
25 evening before?

1 A. Yeah. I think I -- I think I said in my deposition that I
2 had -- was not aware of them before, which was true, but I also
3 think --

4 Q. Okay, that's what I wanted to know.

5 You were not aware of Video Monitoring Service before
6 your deposition; correct?

7 A. I was not aware of it, but I think that they were actually
8 mentioned in the papers, so I could have been aware.

9 Q. Fair enough. You had never relied on or used a report from
10 Video Monitoring Service in any of your professional work;
11 correct?

12 A. That's correct.

13 Q. And, in fact, if we go to the second page of the document --
14 and, Chris, you will need to flip it... the report indicates
15 that it is a commercial log; correct?

16 A. Yes.

17 Q. And you have no knowledge or understanding about what a
18 commercial log is, do you?

19 A. I can deduce, from looking at the fact that it's a bunch of
20 commercials and it's a log of them, that that's what a
21 commercial log is, but I had no independent knowledge of that.

22 Q. And that's just a guess; right?

23 A. Well, I'll consider it an educated guess. A log is
24 something that you do in a temporal order. There is a list of
25 times. There's a list of ads. There's two words that say

1 commercial log. So it's not just a random guess, it's an
2 educated guess, having seen many logs in many situations.

3 Q. You don't know, do you, whether statisticians who are
4 conducting analyses of media surveys or -- I'm sorry, let me
5 ask -- let me start that over.

6 You don't know whether statisticians who are conducting
7 analyses of the impact of media campaigns customarily rely on
8 commercial logs like this, do you?

9 A. I don't know any statisticians who are involved in media
10 campaigns, so I don't -- so I don't know.

11 Q. Okay. Now, you yourself didn't ask that VMS create this
12 report for you; right?

13 A. That's correct.

14 Q. And, in fact, your office didn't request of VMS that they
15 create this report for you, did it?

16 A. I believe that's correct.

17 Q. And, in fact, you don't know who requested that VMS create
18 this report, do you?

19 A. I believe I know, but I'm not certain.

20 Q. You believe it was lawyers for the tobacco companies; right?

21 A. Yes.

22 Q. All right. And you personally have never spoken to anyone
23 at VMS about the 2005 VMS report, have you?

24 A. I have not.

25 Q. And all of the information that you have about this

1 particular report came to you from an employee at Statistics
2 Collaborative, your company, who told you that he had spoken
3 with someone at VMS who he was directed to by one of the lawyers
4 for Philip Morris; correct?

5 A. Yes. The name of the person that he called, one of the
6 lawyers from the tobacco industry told him to call, referred him
7 to that person, yes.

8 Q. Now, at the bottom of Page 56 of your written direct --

9 THE COURT: Let me just interrupt a minute.

10 What is Statistics Collaborative?

11 THE WITNESS: Oh, that's the company that I own.

12 THE COURT: That's right. Okay.

13 BY MR. BRODY:

14 Q. At the bottom of Page 56 of your written direct you provide
15 your view that it is likely that more TDS ads were running
16 during the 6-week period preceding the start of LMTS-II than
17 those that were asked about in the survey; right?

18 A. Yes.

19 Q. I want to show you the testimony of Dr. Cheryl Healton from
20 the morning of May 12, 2005. We're going to hand you a copy of
21 that. And I want to take a look at -- we're going to start at
22 Page 20872. Let's Chris pull out lines 20 to the end.

23 The question is posed. "Actually, what Philip Morris
24 told you is that at the time of the survey -- at the time of the
25 survey, they were running nine ads, not two or not three, but

1 nine. And they told you that the place to contact is Star Com
2 Worldwide in order to verify that; is that correct?"

3 Now, Star Com Worldwide, that's not the organization
4 that's listed on the cover of the document that the lawyers for
5 the tobacco companies provided to Mr. Fowler at your office, is
6 it?

7 A. No. The cover is VMS.

8 Q. The answer given, beginning at line 25 and continuing on to
9 the following page, is -- from Dr. Healton is -- "Let me just
10 respond to that. I know that we attempted to reach any name
11 they gave us, and the problem was that they don't keep archival
12 data once it's been -- I don't know how many months we were out
13 of field, but it was some substantial number of months when this
14 communication took place.

15 "So in all fairness, I believe it was incumbent upon
16 them -- if they knew where their ads are running, they can hand
17 us a report and say these ads were running at the same time, but
18 they never did that.

19 "Not only did they never do it, when asked a direct
20 question, Were those ads airing nationally, Mr. Willard declined
21 to answer me."

22 Do you see that testimony?

23 A. Yes.

24 Q. Did you give any consideration at all, in the process of
25 coming to the conclusions that are expressed on Page 56 of your

1 written direct examination, did you give any consideration at
2 all to why the evidence in this case indicates that Philip
3 Morris never provided any proof to Legacy beyond the bare
4 assertion contained in Dr. Levy's letter?

5 A. No, I didn't -- that was not the question I was looking to
6 answer.

7 Q. Did you consider, in coming to conclusions about whether it
8 was likely that more than two ads were running nationally, the
9 question of why Philip Morris might refuse to tell Legacy
10 whether ads were running nationally or locally?

11 A. No. It was not part of what I was looking at.

12 Q. Let's look at U.S. Exhibit 93879, which you have in front of
13 you already, which is the supplemental expert disclosure that
14 was filed after your expert report.

15 A. I have it.

16 Q. Eleven of the 15 items on that list were provided to you by
17 lawyers for the tobacco companies; right?

18 A. Let me count.

19 Yes, that's correct.

20 Q. I want to look at Page 2 where we see two articles by
21 Dr. Connie Pechmann, and they were provided you by lawyers for
22 the tobacco companies; right?

23 A. Yes, they were.

24 Q. And you have no idea what methodology, if any, the lawyers
25 for the tobacco companies utilized to decide what current

1 literature to provide to you; correct?

2 A. Yes, that's correct.

3 Q. And, in any event, you take the position that the issues
4 that are addressed by Dr. Pechmann, including the impact of
5 advertising restrictions -- if we could pull it out, Chris --
6 including the impact of advertising restrictions -- excuse me --
7 advertising interventions in changing adolescent smoking
8 prevalence, you take the position that those issues are not
9 relevant to what you are offering here at all; correct?

10 A. The -- they provide a context for thinking about the two
11 papers that I reviewed, but they don't directly bear on the
12 scientific validity and a statistical validity of those two
13 papers.

14 Q. So your testimony is that your testimony is not related to
15 the subject of the impact of advertising interventions and
16 changing adolescent smoking prevalence?

17 A. Well, related is a -- as you know, I'm very fussy about
18 words. It's not unrelated, it's the same topic, but my
19 conclusions aren't -- my conclusions about the two papers are
20 not informed by these two Pechmann papers.

21 Q. Let's look at your deposition, Page 171, lines 12
22 through 17. You were asked the question, "What methodology did
23 they utilize in order to decide which of the current literature
24 to select to provide to you as background?"

25 You said, "I don't know and I actually -- my, my

1 opinions actually were not related to these at all."

2 That was your testimony; correct?

3 A. Well, it was an unfortunate use of the word related then.

4 Q. That was your testimony?

5 A. That was my testimony.

6 Q. I want to talk a little bit more about what you've done and
7 what you haven't done.

8 You've never spoken to anyone at the American Legacy
9 Foundation about the development of the Truth Campaign; right?

10 A. That's correct.

11 Q. And you don't know whether the process of providing you the
12 materials that you have considered in forming the opinions that
13 you're offering to the court, you don't know whether the lawyers
14 for the tobacco companies have shared with you all of the
15 documents in their possession that relate to the results
16 reported in the two studies; right?

17 A. That's correct.

18 Q. And you have never asked the lawyers for the tobacco
19 companies if you could see all the documents in their possession
20 that relate to the results of the two Farrelly studies; right?

21 A. That's correct.

22 Q. You haven't made any effort to figure out what Philip Morris
23 has in its files related to the "Think. Don't Smoke" campaign,
24 have you?

25 A. I have not.

1 Q. And you haven't talked to anyone at Philip Morris about the
2 development of the "Think. Don't Smoke" campaign; correct?

3 A. That's correct.

4 Q. And, in fact, you looked at a total of two internal Philip
5 Morris' documents for your opinions in this case; correct?

6 A. If those are what's listed, those are the two that I looked
7 at, yes.

8 Q. Well, you can take a look at it to confirm it.

9 A. I..... you see, I don't know what's an internal -- I also
10 did look at story boards. Whether that's an internal document.
11 So the two I think you're referring to are the two on Page 3 of
12 93878.

13 Q. Are you referring to the story boards that were added as an
14 exhibit between the time of your deposition and the time that
15 you filed your written direct examination?

16 A. That's correct.

17 Q. And that would be a story board that is identified on the
18 fourth supplemental expert disclosure that is marked as U.S.
19 Exhibit 93882; correct? You have it in front of you?

20 A. I have -- okay, I'm getting a little bit -- there are a lot
21 of pieces of paper right now.

22 Q. Take at much time as you need to find it.

23 A. What number is that one?

24 Q. I believe it's 93882. It's the fourth supplemental.

25 We can make this faster. We will bring it up on the

1 screen.

2 A. Okay.

3 Q. And so that would be first item listed there; correct? It's
4 marked -- it's identified by the Bates number.

5 A. No. That's the VMS report.

6 Q. Above the VMS report.

7 A. PM looked like Philip Morris. I assume those are the story
8 boards.

9 Q. So if you add the story boards, we are up to three internal
10 Philip Morris' documents that you looked at; correct?

11 A. Yes.

12 Q. Philip Morris hasn't told you how many documents it has
13 relating to the development of the "Think. Don't Smoke"
14 campaign, has it?

15 A. No, they have not.

16 Q. And they haven't shared any of -- Philip Morris hasn't
17 shared any of its own analysis, to the extent there is any, of
18 the "Think. Don't Smoke" campaign; right?

19 A. That's correct.

20 Q. You didn't ask the company to share any analysis with you,
21 did you?

22 A. No, I did not.

23 Q. They haven't shared any of the TABS data with you, have
24 they?

25 A. No, they have not.

1 Q. And you don't know what TABS data is, do you?

2 A. That's correct, I don't know.

3 Q. I want you to take a look at the exhibit we've marked as JD
4 051272.

5 A. Okay.

6 Q. And this is research report number 2 from Philip Morris's
7 teenage attitudes and behavior study.

8 I want you to turn to Page 5 where we see the heading
9 Purpose, and if you look at the third paragraph Philip Morris
10 states that "TABS provides a current view of underage smoking
11 and enables us to understand what may differentiate youth who
12 don't smoke from those who do. The Youth Smoking Prevention
13 Department uses the results of this study to develop
14 communications and identify programs that may be effective in
15 preventing youth smoking."

16 So, Philip Morris, at least according to this document,
17 believes that surveys of teen attitudes are useful in
18 identifying programs that may be effective in preventing youth
19 smoking; correct?

20 A. Yes. There are -- but look at those verbs: what may
21 differentiate and what may be effective.

22 I think, you know, everybody would agree that one
23 starts with observational data to see what may be effective.

24 Q. Okay. And, of course, you don't know whether Philip
25 Morris -- well, at least if Philip Morris has ever compiled and

1 released analysis of the TABS data, you've never seen it; right?

2 A. I don't know anything about the TABS data.

3 Q. Let's shift gears a little bit and talk about the subject of
4 hypothesis testing.

5 Page 35 of your written direct testimony you offer
6 opinions about hypothesis testing; correct?

7 A. I did in my written direct, so I assume if you say Page 35,
8 that's where it is.

9 Yes.

10 Q. Now, in the course of offering those opinions.... let me ask
11 you this.

12 In the live direct examination this morning when you
13 were talking about the time at which a researcher forms a
14 hypothesis you mentioned the relationship of a hypothesis to the
15 design of a study. Do you recall that?

16 A. Yes, I do.

17 Q. You are not telling the court here today to reject the
18 entire field of secondary data analysis, are you?

19 A. You mean -- I assume by secondary data analysis, that's the
20 word that you used for what I would use exploratory.

21 Q. Well, you're not telling the court that a researcher can't
22 say, "You know, I want to investigate something and I'm going to
23 use the NHIS survey to do it."

24 You're not telling the court to reject any research
25 based on any NHIS, are you?

1 A. Of course not.

2 What I'm talking about is how one interprets
3 probability statements that come out of exploratory analysis.

4 Q. So you weren't suggesting that somebody who wants to look at
5 a question and wants to utilize existing data to do it should
6 start all over again in designing a new survey, are you?

7 A. I'm... it depends what the question is. It depends what the
8 data are.

9 One can take data that have already been collected and
10 set up a priori hypothesis looking at the data. So there's all
11 kinds of things one can do.

12 Of course one uses data in as efficient a way as
13 possible. One doesn't want to waste data.

14 Q. Right. And also, you're not suggesting that different
15 researchers cannot look at different questions with the same
16 data sets; correct?

17 A. This very, very much depends on context. Sometimes it's
18 appropriate and sometimes it's not.

19 Q. So you concede that it is appropriate for researchers -- and
20 I'm going to put your caveat in there -- if the data in question
21 relates to the subject matter to look at different questions
22 using the same data sets?

23 A. We all do that, of course.

24 Q. Now, is it your contention that, in the evaluation of the
25 effectiveness of the Truth Campaign, that the authors of the

1 Farrelly papers did not have a hypothesis?

2 A. My contention is that the -- you speak about the 2002 paper,
3 that there's no hypothesis specified. Whether they had a
4 hypothesis or not, only they know. They didn't tell us what
5 their hypothesis was. And therefore, it's extremely difficult,
6 you know, it's impossible to know how to evaluate the results
7 that they claim.

8 I would also say that it's very clear, not only from
9 the questionnaire but from Dr. Healtion's testimony, that the
10 hypotheses that they had going into the study changed by the
11 time they wrote the paper.

12 Q. My question to you, Dr. Wittes, was are you telling the
13 court that the authors of the Farrelly papers did not, when they
14 went into measure -- let's put "Think. Don't Smoke" aside --
15 when they assessed whether the Truth Campaign -- whether
16 exposure to the Truth Campaign resulted in a decrease in youth
17 smoking, are you telling the court that it's your opinion that
18 they did not have a hypothesis?

19 MR. MINTON: It's the same question.

20 MR. BRODY: But she didn't answer it.

21 THE COURT: Correct. So the objection is overruled.

22 A. I don't have an opinion about whether they had a hypothesis
23 or not.

24 Q. Okay.

25 A. I --

1 Q. That's -- that answers the question. Thank you.

2 THE COURT: Let me just ask another question on this
3 subject.

4 If data is correct -- I'm sorry -- if data is collected
5 honestly and accurately, why is it so impermissible to either
6 analyze that data in terms of a different hypothesis than the
7 one a researcher started with or to develop a new hypothesis
8 after the collection of the data?

9 This, of course, as I emphasize, is on the assumption
10 that the data itself is accurately and honestly collected.

11 THE WITNESS: Can I separate those two conditions?

12 One is looking at other -- looking at other questions
13 from the same data, and the other is finding something. Is that
14 a fair distinction?

15 Well, obviously, you do want to look at as much as you
16 can because you've got data, there's a rich supply of
17 information and you want to use it. But what you want to do is
18 structure your inference to make very clear what's
19 probabilistically -- what you can say probabilistically and what
20 you can't.

21 So if you use data for hypothesis generation -- and I'm
22 look at data, I'm exploring, I'm trying to find things, "Oh,
23 look, I found something," you've generated a hypothesis from the
24 data, but you then need to test in an independent -- independent
25 set of data; otherwise, you can always find relationships. When

1 you have numbers, you can always find relationships among them.
2 So, you want to make sure that the relationship you found is
3 real, and so you check it again. You check against another set
4 of data.

5 In terms of looking at more than one question from a
6 set of data, you could say, "I'm going to look at 10 questions."
7 And what you usually do in order to preserve the probabilistic
8 interpretation, is what P-values are all about, is you specify
9 up front the hierarchy of questions. Which is the most
10 important and how do I allocate the P-value, the error rate for
11 that? So it's a very highly-structured way of asking questions.
12 So at the end of the day you can make inferences that have
13 probabilistic meaning.

14 So those are two very -- so one approach is I have a
15 lot of questions I'm going to ask, I'm going to prespecify, but
16 I'm going to tell how I do that analysis. And the other is I'm
17 going to explore the data, but then I have to confirm.

18 THE COURT: I think what you're saying is, as to the
19 second group of issues, that you can manage to massage the data
20 in any way you want so as to support a particular hypothesis
21 and, therefore, you need to go out and confirm it. Is that
22 right?

23 THE WITNESS: Yes, that's an even stronger than I would
24 have put it. But that's correct.

25 THE COURT: That's because I'm not a biostatistician.

1 Go ahead, Mr. Brody.

2 BY MR. BRODY:

3 Q. Dr. Wittes, you're not telling the court that we should
4 ignore -- that researchers should ignore surprising findings,
5 are you?

6 A. No, but what I'm telling the court is that if you have a
7 surprising finding you ought to first ask the question, Is there
8 something artifactual that might be happening that might lead
9 that surprising finding to happen?

10 So, for example, in the particular case that we're
11 talking about, the surprising finding was "Think. Don't Smoke"
12 showed a negative effect.

13 Well, what you ought to do when you see it is say, "Oh,
14 my goodness, is there something artifactual that made that
15 happen?" You go back into the -- in this case it would have
16 been easy. You go back into the questionnaire and you say, "Oh,
17 these were asked asymmetrically." So what I found is really a
18 function -- is very largely a function of the way I asked the
19 question.

20 Q. So your criticism in this case, then, is dependent upon your
21 other criticisms of the survey questionnaire; right?

22 A. Oh, I said that was the first thing you do.

23 Q. Right. So --

24 A. But that's not the whole story.

25 Q. Let me walk through it, because the....

1 You have -- I don't think you're making this
2 contention. You don't contend that upon discovering what was a
3 surprising indication and showing of the data, you don't contend
4 that the researchers in Farrelly 2002 didn't go back to test the
5 hypothesis question generated by the surprising findings in
6 order to report the results that are reported in the paper, do
7 you?

8 A. Well, they didn't say -- that would mean they have a second
9 study that tests the same -- that asks the same question. They
10 didn't mention that at all.

11 Q. Right. But you're not saying that they didn't go -- they
12 didn't -- let's take it one step at a time.

13 They are doing a study to see -- to test the
14 effectiveness of the Truth Campaign; right?

15 A. That's correct.

16 Q. And in the course of doing that study they, in looking at
17 the data, say, "Wow, this is really surprising." The data, in
18 the course of looking at it, suggests, based on the responses to
19 awareness of the "Think. Don't Smoke" campaign, suggests that
20 exposure to "Think. Don't Smoke" results in an increase in
21 intentions to smoke. So they get to that point; right?

22 A. Well, right, but remember --

23 Q. No. That's the question?

24 A. No, but this very --

25 Q. I want to take this in steps.

1 A. But you skipped a step.

2 Q. We can -- you know, Mr. Minton is going to have time to do
3 redirect and he can say what step we missed.

4 A. Okay.

5 THE COURT: Mr. Minton.

6 MR. MINTON: Your Honor, it seems more efficient if we
7 could just spell it out all at once. Why fractionate the whole
8 process?

9 THE COURT: I think in this case that is true.

10 MR. BRODY: Your Honor, if I may -- I mean, it's really
11 a hypothetical question. And I was merely separating it out
12 into steps to make the hypothesis comprehensible.

13 THE COURT: You can do that. But the witness in
14 testifying as an expert needs to let me know if she thinks
15 you're missing a step. I mean, obviously, that changes her
16 answer to your question and it changes the analysis. I need to
17 hear that all at once, not in bits and pieces.

18 I know you don't want to hear it, but there are times
19 when an expert has to explain their answers.

20 So why don't you go ahead?

21 THE WITNESS: Well, "Think. Don't Smoke" was -- the
22 data for "Think. Don't Smoke" was collected as a predictor
23 variable. They were a control variable. They weren't an
24 outcome variable.

25 So in order to find -- and I'm putting "find" in

1 quotes -- in order to find what the authors found for "Think.
2 "Don't Smoke" -- I'm sorry -- for Truth, they removed the "Think.
3 "Don't Smoke" variable from predicting side of the equation. So
4 even the hypothesis related to truth was not the same as their
5 prior hypothesis. They no longer corrected for "Think. Don't
6 Smoke".

7 They then pulled that variable out, made "Think. Don't
8 Smoke" an outcome variable rather than a predicted variable, and
9 I believe that is why the data are collected in that asymmetric
10 way, because the purpose of the variable was different -- the
11 purpose of collecting the data on "Think. Don't Smoke" was
12 different from how they used the data. So that's the important
13 thing that you removed. That they changed the model for Truth
14 and then they looked at "Think. Don't Smoke".

15 BY MR. BRODY:

16 Q. Okay. So in the course of creating, or attempting to walk
17 through the steps to draw out the hypothetical that I was going
18 to present to you, the only thing that I didn't include was an
19 assumption that your criticism of the study design is correct?
20 That's the only thing I left out; right?

21 A. You left out the way they changed their model going in --
22 their hypothetical model that the hypothesized going in. That's
23 the step you left out.

24 Q. Right. And that's one of your criticisms, is that that
25 model is, in your view, asymmetrical with respect to the

1 questions that they reported on?

2 A. No. You're confusing two things.

3 Q. Let me ask you this. Is that not a contention?

4 A. That is a contention, but that's not what I'm speaking about
5 now.

6 Q. Let me see if I can ask it this way.

7 In the case of the assessment of the "Think. Don't
8 Smoke" campaign, you in your written direct examination -- this
9 will simplify things -- have not pointed to any difference in
10 the analysis of the LMTS-I and LMTS-II ways if Farrelly and his
11 colleague had set out initially to look at "Think. Don't
12 Smoke", have you?

13 A. If they had set out initially to look at "Think. Don't
14 Smoke" they would have asked a different series of questions and
15 they would have had a different age range. So, the whole design
16 of the study would have been different.

17 Q. Let's look at the age range. I'm glad you bring that up,
18 because on Page 37, lines 9 through 18 of your testimony, you
19 criticize the Farrelly study on the basis that "Think. Don't
20 Smoke" was targeted at ages 10 to 14 and Truth at ages 12 to 17;
21 right?

22 A. Yes.

23 Q. And the authors of Farrelly 2002 reported on the effect of
24 exposure to "Think. Don't Smoke" on intention to smoke among 12
25 to 17-year-olds; right?

1 A. Yes.

2 Q. And they had in the survey a measurement of exposure;
3 correct?

4 A. Yes.

5 Q. And they had a measurement of intention to smoke; correct?

6 A. Yes.

7 Q. And whether the campaign itself was targeted to 10 to
8 14-year-olds or 12 to 17-year-olds or 25 to 29-year-olds is
9 irrelevant to the issue of the effect of exposure to the
10 campaign on 12 to 17-year-olds; right?

11 A. Yes, that's correct.

12 Q. Right. The campaign could be targeted to 5-year-olds, but
13 we can still analyze data to see whether 17-year-olds who see
14 the ads were more likely to smoke; correct?

15 A. That's correct.

16 Q. And you know we could also do a separate study to see
17 whether exposure to the Truth Campaign by -- and I'm talking
18 about Truth as opposed to "Think. Don't Smoke" -- whether
19 exposure to the Truth Campaign by 10 and 11-year-olds resulted
20 in decreased intention to smoke; right?

21 A. Yes. That's true.

22 Q. And you're not claiming, are you, first of all, that --
23 well, let me ask you this.

24 How many -- you haven't studied any of the literature
25 concerning how many kids age 10 to 11 begin to smoke, have you?

1 A. No, I haven't.

2 Q. And you're not claiming, are you, that 15 to 17-year-olds
3 didn't see "Think. Don't Smoke" ads, are you?

4 A. I have no idea who saw the ads. I don't -- I don't know.

5 Q. Okay. Well, you're not -- you don't claim that 15 to
6 17-year-olds surveyed who reported seeing "Think. Don't Smoke"
7 ads were lying to the surveyors; right?

8 A. No, I never said that.

9 Q. So the age range of the survey itself does not invalidate a
10 comparison of the effect of the Truth Campaign and the effect of
11 the "Think. Don't Smoke" campaign on 12 to 17-year-olds, does
12 it?

13 A. May I see the paper, please?

14 Q. Which paper?

15 A. The 2002 paper.

16 Q. You can't answer -- that question is not dependent on -- let
17 me ask you this.

18 Can you answer the question without reference to the
19 paper?

20 A. The --

21 Q. That's a yes or no. Can you answer my question without
22 reference to the paper?

23 A. I'm unwilling to answer your question without reference to
24 the paper.

25 Q. And the answer to my question is that the age range of the

1 survey itself does not invalidate a comparison of the effect of
2 exposure to the campaigns by kids who fall within the age range
3 of the survey; correct?

4 A. My contention would be that the answer to that question
5 depends on what the design of the study was. If they said --

6 Q. My question -- I'm sorry, Dr. Wittes. My question was --

7 MR. MINTON: Your Honor --

8 Q. -- limited to the age range of the survey itself. And
9 taking that element, the age range of the survey itself does not
10 invalidate a comparison of the effect of the campaigns on 12 to
11 17-year-olds; correct?

12 A. I -- you're parsing the pieces of the study into two narrow
13 pieces.

14 Q. Does it make a difference?

15 A. Absolutely.

16 Q. Okay. That's fine. Let's talk about confounding.

17 You criticize Farrelly and his colleagues for failing
18 to control for what you call important confounding factors,
19 beginning on Page 50 of your written direct examination;
20 correct?

21 A. Yes.

22 Q. And you mention state and local tobacco control spending;
23 right?

24 A. Yes.

25 Q. You've never undertaken a review of tobacco control

1 spending; correct?

2 A. That's correct.

3 Q. None of the documents you identified with your expert report
4 and expert work in this case analyze exposure to state tobacco
5 control activities by residents of a state; right?

6 A. That's correct.

7 Q. And you've never done any research in that area, have you?

8 A. That's correct.

9 Q. And you don't know whether state or local tobacco control
10 spending had any impact at all on the results of the Farrelly
11 studies, do you?

12 A. No, because they didn't control for it. They didn't test
13 for it. So it's not possible to know whether it had an effect.

14 Q. You concede, do you not, that the authors of the studies
15 controlled for secular trends?

16 A. I concede that the authors of the study attempt to control
17 for secular trends. I never said they succeeded. Remember,
18 when you -- when you control for variables --

19 Q. That's fine.

20 MR. MINTON: Your Honor, I think the witness should be
21 permitted to respond.

22 THE COURT: She may finish her answer.

23 A. What you're doing -- we talked about this earlier. You're
24 building a mathematical model. And when you control for a
25 variable -- and again, the control is in quotes now -- that's

1 dependent on the assumption that the mathematical model is true.

2 So if the mathematical model is not valid or not
3 completely true or a little -- even a little bit off, then the
4 putting of variable in the model or taking it out of the model
5 doesn't -- is not sufficient to control for the variable.

6 So, yes, they went through -- they put the variable in
7 the model, but we don't know that the model fits. And so,
8 therefore, the parsimonious explanation is there are no
9 interactions in this model. There's no -- on the face of it, a
10 model this simple could not explain what was going on.

11 You would expect to see interactions and they are not
12 there. You would expect to see discussions of interactions, and
13 it's not there.

14 So, I see the way that they included the secular trend
15 as kind of the first primitive step that you would do, but would
16 do many more explorations of models and model fit to know how
17 well you dealt with the secular trend.

18 BY MR. BRODY:

19 Q. So I guess the answer, then, to my question is yes, they did
20 control for secular trends; correct?

21 A. No. My answer -- my answer would be they did not control.
22 In a formal way they stuck in a variable that was called
23 controlling for secular trend. But did that actually control
24 for secular trend? We have no such evidence.

25 Q. You have no evidence that it's not controlled for secular

1 trends, do you?

2 I mean, let's just take tobacco control spending. You
3 have no idea whether it made a difference or not, do you?

4 A. That's why -- that's why you put variables in and out of
5 models and test them. Remember, I said earlier --

6 Q. The question was you have no idea whether it made any
7 difference or not; correct?

8 A. That's correct.

9 Q. Okay.

10 A. But that's why --

11 Q. That's the question, Dr. Wittes. I'm sorry.

12 I want to talk about peer smoking.

13 A. Okay.

14 Q. You criticize the authors of the study for failing to
15 control for peer smoking; correct?

16 A. Yes.

17 Q. And you, however, cannot identify specifically how failing
18 to control for peer smoking would confound the relationship
19 between youth smoking and exposure to the Truth Campaign;
20 correct?

21 A. In the absence of the model that includes peer smoking one
22 can't know that.

23 Q. You -- so the answer to my question is, is yes. You cannot
24 identify specifically how failing to control for peer smoking
25 would confound the relationship between youth smoking and

1 exposure to the Truth Campaign?

2 MR. MINTON: Your Honor, this is just an argument. He
3 asked the question. He got an answer. He didn't like the
4 answer, and now we are going back to the well.

5 MR. BRODY: Your Honor, I didn't get an answer, and
6 what I got was an attempt to explain a different concept.

7 THE COURT: Well, what's the pending question,
8 Mr. Brody? I thought you got an answer, too.

9 MR. BRODY: The question was, can you identify
10 specifically how failing to control for peer smoking would
11 confound the relationship between youth smoking and exposure to
12 the Truth Campaign?

13 THE COURT: The answer given was to the effect that you
14 can't know the answer to that.

15 MR. BRODY: Okay.

16 THE COURT: Is that correct?

17 THE WITNESS: That's correct. It wasn't measured and,
18 therefore, you can't know the answer.

19 BY MR. BRODY:

20 Q. Now, you're not familiar with the literature on whether
21 youth choose their friends in part based on their friends'
22 smoking behavior; correct?

23 A. I have not reviewed that literature.

24 Q. And you don't know whether peer smoking is controlled for in
25 the literature measuring the effect of tobacco counter-marketing

1 on youth smoking behavior; correct?

2 A. I'm not familiar with that literature.

3 Q. And you don't know whether peer smoking would be considered
4 endogeneous to the statistical models the authors of the 2002
5 study used; correct?

6 A. Well, remember, the 2002 study was a study of nonsmokers, so
7 therefore the question of whether this is endogeneous or not is
8 not relevant. That's a relevant question if you're dealing with
9 kids already smoking. So that's not relevant here.

10 Q. Let's go to your deposition, Page 270, line 11, and you were
11 asked, "Do you know whether peer smoking would be considered
12 endogeneous in the statistical model the authors used in the
13 2002 study?" And your answer was, "I don't know whether they
14 would consider it endogeneous or not." Correct?

15 A. I would say the "they" was referring to the authors.

16 Q. You've never spoken to the authors about their work?

17 A. No. No.

18 Q. You've never seen any correspondence from them about their
19 work; correct?

20 A. No. I haven't seen --

21 Q. And you --

22 A. At least, I don't remember having seen anything.

23 Q. You haven't seen any correspondence related to -- actually,
24 let me amend that question.

25 Other than the letters back and forth between the

1 Legacy Foundation and Philip Morris, you haven't seen -- the
2 four letters, you haven't seen -- and I think two of them are
3 from either Dr. Healtton or Dr. Haviland -- other than those you
4 haven't seen --

5 MR. MINTON: Your Honor, now we are back into the area
6 of all the discovery we requested and were unable to get in this
7 case.

8 MR. BRODY: Actually, we are -- this line of
9 questioning, Your Honor, is completely unrelated to that.

10 THE COURT: Objection overruled. Go ahead, please.

11 BY MR. BRODY:

12 Q. So because you haven't reviewed that correspondence, I
13 assume you're not aware that the authors of the study, the study
14 authors from Research Triangle Institute where Dr. Farrelly
15 works, gave a presentation to members of the Philip Morris Youth
16 Smoking Prevention Department about the methods used in the 2002
17 study, are you?

18 A. I'm not aware of such a presentation, no.

19 Q. No one told you that happened; right?

20 A. Not that I remember.

21 Q. One thing you would agree with is that if -- this is still
22 related to the peer smoking and your criticism of the authors
23 for failing to control for peer smoking -- you would agree that
24 if the Truth Campaign affected the number of youths friends who
25 smoked, then controlling for friends smoking would underestimate

1 the effects of the Truth Campaign; correct?

2 A. What I know is -- I don't know what would happen if you put
3 certain variables in or take them out of the model. I'm not
4 going to hazard a guess about that.

5 It's likely -- I would say that it's likely that that
6 would happen, but I don't know.

7 What I do know --

8 Q. So the answer to the question is you don't know?

9 MR. MINTON: Again, Your Honor, she wasn't through with
10 the answer to her question. She gave half the answer, and I
11 think --

12 THE COURT: Basically, the answer was that she didn't
13 know the answer.

14 Go ahead, please.

15 BY MR. BRODY:

16 Q. You do concede that if the Truth Campaign is designed to,
17 and does effectively, reduce youth smoking, that it will have
18 the effect of impacting not just kids but also their friends;
19 correct?

20 A. Sure.

21 Q. I want to talk about this concept of the effect in terms of
22 statistical analysis.

23 Do you know who Dr. James Robins is?

24 A. Of course.

25 Q. And he's a Professor of Epidemiology at the Harvard School

1 of Public Health; right?

2 A. That's correct.

3 Q. And I assume, then, you're aware that one of the principal
4 focuses of Dr. Robins's research has been the development of
5 analytic methods appropriate for drawing causal inferences from
6 complex, observational, and randomized studies with time varying
7 exposures or treatments?

8 A. Yes, I'm aware of the literature.

9 Q. I want to look at a comment that he made to an article that
10 we've marked as U.S. Exhibit 93874. And it's a copy of a 1999
11 article published in Statistical Science by Professor Paul
12 Rosenbaum from the Wharton School called "Choice is an
13 Alternative to Control in Observational Studies".

14 And beginning at Page 281 there's a comment from
15 Dr. Robins, and I want to pick that up -- pick his comment up
16 on Page 284.

17 He goes through a hypothetical in the second column and
18 then he indicates in the first full paragraph that "An extension
19 of this last example provides an explanation of the well known
20 adage that one must not adjust for variables affected by
21 treatment."

22 Are you familiar with that well known adage?

23 A. Yes.

24 MR. BRODY: Thank you, Dr. Wittes. That's all I have.

25 THE COURT: Mr. Minton, what do you think? A half an

1 hour?

2 MR. MINTON: Maybe a little more than a half an hour.

3 I will move as quickly as I can.

4 REDIRECT EXAMINATION

5 BY MR. MINTON:

6 Q. Dr. Wittes, do you recall Mr. Brody asking you questions
7 about whether or not you would be involved in a particular type
8 of randomized study?

9 A. Yes, I do.

10 Q. And the specific questions he referred to had to do with
11 cigarette brand advertising. Do you recall that?

12 A. Yes, I do.

13 Q. And he pointed you to one particular exchange in your
14 deposition. Did that dialogue extend for about 10 pages in your
15 deposition?

16 A. Yes. It went on and on and on.

17 Q. Let me point you to deposition testimony that didn't -- that
18 Mr. Brody didn't show you that appears on Page 195. I'll just
19 put it up on the screen.

20 And I'll direct your attention to line 9 where you
21 said, "Because I'm not interested in being involved in a study
22 that is looking to see how you might increase the probability of
23 smoking." Do you see that?

24 A. Yes, I do.

25 Q. What did you understand to be the purpose of the

1 hypothetical, this study Mr. Brody was asking you about?

2 A. I understood that he was asking me about a study that would
3 look at advertisements aimed to convince children to smoke and
4 he wanted to know how I would design that study. And I said,
5 "I'm not interested in being involved in such a study."

6 Q. Mr. Brody asked you some questions about -- well, moving
7 back to that.

8 Who was it, then, that would have been the person, or
9 entity conducting the study?

10 A. Oh, I think he was -- I think he meant that a cigarette
11 company would conduct the study.

12 Q. And the purpose was to what?

13 A. To increase children's smoking.

14 Q. Mr. Brody asked you some questions having to do with
15 observational studies and he pointed you to some testimony on
16 Page 101 of your deposition. And I'd like to ask you about a
17 line that appears in your answer immediately above the part of
18 the answer that he directed you to on Page 101.

19 He pointed you to the paragraph that begins on line 12
20 and runs through line 18. But the portion that he pointed you
21 to about causal inference there, did you precede your reference
22 there with a statement about the issue of inference in this
23 paper, these papers?

24 A. Yes, I did.

25 Q. And with that reference, what were you referring to? Which

1 papers were you referring to?

2 A. The 2002 and 2005 papers.

3 Q. And the Farrelly 2002 --

4 A. Yes.

5 Q. -- and Farrelly 2005?

6 And are those two papers based on cross-sectional data?

7 A. Yes, they both are.

8 Q. Is there a core problem in using cross-sectional data to
9 address the question of causation?

10 A. Yes, there is.

11 Q. Do the Farrelly authors themselves point that out in the
12 2005 article, Dr. Wittes?

13 A. Yes, I believe they do in the discussion.

14 Yes, there it is.

15 Q. What is it that they say?

16 A. I can -- I can't read it. "Our results also rely on
17 repeated cross-sectional surveys, not repeated measures on the
18 same students which weakens the strength of our causal
19 inference."

20 Q. Is there a basic hierarchy study designs in terms of the
21 relative assistance a particular study might have in -- or lend
22 in the process of causal inference?

23 A. Yeah. There's a pyramid that Sylvan Green and Dave Byar
24 published in "Statistics in Medicine" about 15 years ago.

25 Q. All right.

1 A. That's the one.

2 Q. Is that pyramid included in your written direct examination?

3 A. Yes, it is.

4 Q. Mr. Brody didn't ask you about that?

5 A. No, he didn't.

6 Q. And is that reflective of your opinion?

7 Do you believe that some study designs are less helpful
8 in the process of causal inference and some study designs are
9 more helpful?

10 A. Yes, I do, and I believe that this is a -- this is a good
11 hierarchy. There are other kinds of studies, it's not totally
12 inclusive, but it shows that there's a hierarchy of -- hierarchy
13 of studies related to cause.

14 Q. All right. In terms of the hierarchy and what your opinion
15 is, did Mr. Brody point you to pages 32 and 33 of your written
16 direct where you were asked a question, "Are you saying that an
17 observational study can never show a causal relationship?"

18 And you answered, "No, I am not. But I am saying that
19 relying on observational data to make inferences about causation
20 is treacherous as the hormone beta carotene and Vitamin E
21 studies show." Did he point you to that?

22 A. No, he did not.

23 Q. Is that your opinion?

24 A. Yes, it is.

25 Q. With respect to the beta carotene study that was

1 mentioned -- first of all, did I or any other lawyer influence
2 the answer that you gave about the beta carotene study?

3 A. Not at all. And I was using it as an example of relying on
4 observational studies, doing the experimental study and finding
5 a different result.

6 One could even say that the physicians' health study
7 also found a different result. It found no effect which is
8 different from finding benefit. You guys had -- I'm sorry.

9 Q. Dr. Wittes, is there anything that I could say or do that
10 would cause you to express an opinion in this courtroom that did
11 not reflect your true beliefs or opinions?

12 A. No, sir.

13 Q. Have I ever or any lawyer representing the tobacco industry
14 ever attempted to do that?

15 A. You haven't attempted, and if you did, you wouldn't have
16 been successful.

17 Q. Mr. Brody asked you some questions about fixed effects.

18 First of all, with respect to quote/unquote the
19 control, using fixed effects, did the Farrelly authors in the
20 2005 article where they put the fixed effects term, did they use
21 regression as the method to estimate their model?

22 A. Yes, they did.

23 Q. All right. And you testified about the problem of the
24 distribution of race across the GRP category.

25 By the way, did Mr. Brody ask you a single question

1 about that?

2 A. Not that I remember.

3 Q. Okay. And your testimony about that issue was that
4 invalidates the whole regression; right?

5 A. That's correct.

6 MR. BRODY: Objection, Your Honor. I mean, if
7 Mr. Minton is going to argue that it's preliminary, but -- it's,
8 one, leading, and if it's preliminary to something that I didn't
9 ask about, it's outside the scope.

10 THE COURT: Well, Mr. Minton, why don't you confine
11 yourself to appropriate redirect, please.

12 BY MR. MINTON:

13 Q. Could a fixed effects term, if it was included in the
14 Farrelly 2005 regression, fix the problem of the race GRP
15 confounding that you described?

16 A. No, it could not.

17 Q. And even if that race GRP confounding problem did not exist,
18 could a fixed effects term, the way the Farrelly 2005 article
19 proposes using it, could that wipe out the confounding or
20 control for the differences across the media markets?

21 A. No, it could not.

22 Q. You were asked a question or two about Dr. Hornick, and
23 Mr. Brody put up on the screen a reference to Page 16 from the
24 Hornick exhibit, which was 93906, and I just have one question
25 about that.

1 The article says, "A moderately good answer to the
2 right question is better than a very good answer to the wrong
3 question."

4 First of all, did either the Farrelly 2002 or 2005
5 articles provide a moderately good answer to the question of
6 whether the Truth Campaign is effective?

7 A. The -- I find the studies, the analysis so invalid that we
8 don't know whether the answer is good or bad or right or wrong.
9 It's indeterminate.

10 Q. Is it important to get a right answer to that question?

11 A. Yes, it's important to know how to make kids stop smoking or
12 prevent them from smoking.

13 Q. Is that why you believe a randomized trial is the
14 appropriate way to approach the problem?

15 A. Yes, because I think it's an important question and it
16 deserves an answer, an unbiased answer.

17 Q. You were asked a question about ethics and the potential
18 efficacy of the Truth Campaign and how it related to doing a
19 randomized trial.

20 Was the concern over ethics the only reason the study
21 authors cited for not doing a randomized trial?

22 A. No. They had two reasons. One was ethics and one was
23 finances.

24 Q. Does it appear that ALF has, in fact, randomized exposure in
25 at least one setting involving Truth?

1 A. Yes, they have. The ALTURS study was a randomized study.

2 Q. You were asked some questions about nonresponse and you were
3 pointed to two telephone surveys that you were involved with.

4 First of all, was the purpose of those studies to
5 assess prevalence or to analyze the potential relationship
6 between variables?

7 A. They were prevalence studies, and they were successive
8 prevalence studies.

9 Q. Just one question about the 1987 study. I'd like to point
10 you to Page 3528.

11 Mr. Brody asked you some questions about whether or not
12 there was any analysis of nonresponse that was done. Did you
13 and the other study authors in that study investigate the
14 similarity of those who responded to the United States'
15 population?

16 A. Yes. We actually did it to all the surveys. Part of the
17 issues when -- but this was the one -- so we did it so that we
18 ourselves were comfortable that we understood what was going on.

19 In this survey we described the differential under-
20 representation. And that's pretty typical that the kinds of
21 underrepresentation that we saw here is pretty typical of
22 responses in questionnaires, telephone questionnaires.

23 Q. The Farrelly authors, the Farrelly 2002 authors where the
24 nonresponse rate was nearly 50 percent, did they do any of the
25 things that you report there?

1 A. They didn't report any of it.

2 And one of the things that was really distressing to me
3 was that when you look in the data, we actually had the data, we
4 tried -- tried to find out what you would expect to see in the
5 data set is a record of the nonresponders so you can figure out
6 what their effect was, but there was no such information in the
7 data set.

8 Q. And how about, is the same true with respect to 2005? Did
9 the authors tell us anything about the nonresponders?

10 A. Not in the paper, no.

11 Q. In assessing the potential role of bias in nonresponse, does
12 it make a difference whether or not you're estimating simple
13 prevalence or whether or not you are attempting to determine an
14 association or a causal link between variables?

15 A. Yes, it does, and that's actually related to one of the
16 questions that Mr. Brody was asking about the successive ways,
17 the children that didn't -- the absent children; that when you
18 do prevalent studies, the effect of nonresponse, what you're
19 doing is looking at difference in prevalence and you have to
20 posit a second order effect for nonresponse to be very
21 worrisome. It's always worrisome, but very worry some. You
22 have to posit that. They are different. The nonresponders are
23 different and that difference is different from year-to-year.
24 So that's a second order response.

25 In the Farrelly study, what you're looking at is the

1 relationship between an exposure truth and a behavior or an
2 intention, and that can be -- even a small difference in that
3 kind -- a small difference in the relationship among the
4 responders and the nonresponders can have a very big difference
5 in the results.

6 And I also do want to distinguish again between what we
7 called nonresponse, which was noncompletion, and what Farrelly
8 called nonresponse.

9 My understanding that Farrelly's nonresponse -- in
10 fact, we know that from looking at the data. Nonresponse was
11 somebody who didn't answer the questions at all. They didn't
12 respond. Our noncomplete was somebody who didn't answer the
13 entire questionnaire.

14 MR. BRODY: Your Honor, I'm going to object at this
15 point. This is not an answer to the question that was posed by
16 Mr. Minton in any respect and --

17 MR. MINTON: I'll ask the question then, Your Honor.
18 We will make it structurally sound.

19 BY MR. MINTON:

20 Q. You mentioned a difference in your cross-examination between
21 completion rates and nonresponse rates.

22 What is that difference and why does it matter?

23 A. A nonresponse is somebody who doesn't -- basically doesn't
24 pick up the phone and says, "I refuse to answer."

25 A non -- an incompletion rate is the proportion of

1 people, it's the nonresponders, plus those who don't get to the
2 end of the questionnaire.

3 When we set up the questionnaire we deliberately made
4 sure that the most important questions, the cholesterol
5 questions were right up front so that even though they didn't
6 get to the bottom of the questionnaire, the questions that we
7 felt were most important had a much higher response rate, answer
8 rate, than the noncompletion rate would suggest.

9 Q. Let's step back two steps. You can measure prevalence and
10 you can measure associations between variables.

11 In which case should the concern about nonresponse be
12 greater?

13 A. Association.

14 Q. And that's what was being measured in both Farrelly studies?

15 A. That's correct.

16 Q. In order for selection bias not to have influenced the
17 results of the Farrelly 2002 studies, what would have had to
18 have been the condition?

19 A. The condition would have had to have been that those
20 children who didn't respond were -- were -- had the same
21 relationship -- were affected the same way by truth as those
22 people who did respond.

23 Q. Did the Farrelly 2002 authors make any attempt to say
24 whether or not that was the case?

25 A. No, they don't make any attempt in the paper, and they don't

1 tell us what -- they don't do -- or at least they don't report
2 any sensitivity analysis.

3 Q. Mr. Brody asked you a question about the exchange of
4 correspondence between Philip Morris and ALF, and he read to you
5 a part of your testimony where you said, "I tend to believe what
6 I read." What he didn't read was the remainder of that
7 response, and I'd like to show it to you.

8 What did you say right after that part of your
9 testimony?

10 A. Well, it was the internally consistent that's a very
11 important modifier of tending to believe what I read.

12 I'm actually very -- I was amused when I heard, when
13 Mr. Brody said I tended to believe what I read, because in fact
14 my antenna are always up for is there something not right about
15 what I'm reading? And so I look to see internal consistency. I
16 look to see whether I -- whether what I'm reading makes sense.
17 I'm actually very critical reader. But I start off believing
18 that the authors are telling the right thing and then I check to
19 see whether it is.

20 Q. All right. And in terms of what you read that appeared
21 internally consistent, was one of those things a letter from
22 Carolyn Levy to Lyndon Haviland dated February 21, 2002?

23 A. I don't remember the date, but there was a letter around
24 that time.

25 Yes. Yes, I read that letter.

1 Q. And was Dr. Levy expressing concern about whether or not the
2 LMTS study had picked up all of the Philip Morris' ads?

3 A. Yes, she was.

4 Q. And did you also look at the letter that Dr. Haviland from
5 ALF wrote in reply, which says, "It is true that the survey did
6 not include every ad that was airing at the time."

7 A. Yes.

8 Q. Was that part of the internally consistent correspondence?

9 A. That's correct, that they confirmed each other's statements.

10 Q. Now, Mr. Brody asked you about what could be out there in
11 the universe, other letters that might be there.

12 Did he show you any correspondence that contradicted
13 what was in that series of letters?

14 A. No, he didn't.

15 Q. And in terms of -- there was a mention made of VMS. Who
16 brought up VMS. Okay? And you were pointed to a page in
17 Dr. Healton's testimony, 20872. And let's look at who it was
18 that brought up VMS.

19 Was it Dr. Healton who herself brought up the VMS data
20 in the context of the Philip Morris' ads and whether the VMS
21 data would show the airings of those ads?

22 A. Yes. The A -- the As there are Dr. Healton's As. She did
23 the answer, yes.

24 Q. Mr. Brody also asked you some questions about where and how
25 you received documents. Did he show you any data that indicates

1 that any opinion that you reached about Farrelly 2002 or 2005
2 was incorrect?

3 A. No, he did not.

4 Q. He mentioned the TABS data. Did he point you to any data in
5 TABS that calls into question any of your opinions?

6 A. No, he did not.

7 Q. With respect to hypothesis testing, is there any question
8 that Dr. Healton testified that whatever their initial
9 hypothesis was, they changed it?

10 A. No, that's what she testified.

11 MR. BRODY: Your Honor -- I mean, she testified to what
12 she testified to. If he wants to show it to her and read it, we
13 can do that. But I mean, it's --

14 THE COURT: Sustained.

15 BY MR. MINTON:

16 Q. Are you familiar with the book, "Common Errors in Statistics
17 and How to Avoid Them," by Phillip Good and James Harding?

18 A. No.

19 Q. Well, let me read you a statement from their book and I'll
20 ask you if you agree with it with respect to hypothesis testing.

21 MR. BRODY: Your Honor, I'm waiting for a copy.

22 MR. MINTON: JD 025263.

23 BY MR. MINTON:

24 Q. Those authors write under a heading, "Ad hoc, post hoc
25 hypotheses. Formulate and write down your hypotheses before you

1 examine the data. Patterns in data can suggest, but cannot
2 confirm hypotheses unless these hypotheses were formulated
3 before the data were collected."

4 Do you agree with that?

5 A. Yes, I do.

6 Q. They go on on the next page to say, "How can we determine
7 whether an observed association represents an underlying cause
8 and effect relationship or is merely the result of chance? The
9 answer lies in our research protocol. When we set out to test a
10 specific hypothesis, the probability of a specific event is
11 predetermined. But when we uncover an apparent association, one
12 that may well have arisen purely by chance, we cannot be sure of
13 the association's validity until we conduct a set of controlled
14 trials."

15 Do you agree with that.

16 A. Yeah. That's very well said.

17 Q. One final thing, Dr. Wittes. You were asked about the
18 Farrelly 2002 authors' decision not to control in their model
19 for friends who smoke.

20 Did you evaluate how powerful that variable was in
21 terms of its relationship to what kids said about their intent
22 to smoke?

23 A. Yes. Remember, these are nonsmokers. It was the
24 probability of the association was two to the minus 16th.

25 Q. Can you give the court some understanding of what that

1 number means?

2 A. It is a tiny number. It's an infinitesimal small number.

3 If something happens with -- it's kind of the probability that
4 this paper would jump up. All of a sudden all the molecules
5 would get together and jump up. It's a tiny, tiny number.

6 Q. Just so the court understands. When you say tiny in this
7 context, does tiny mean that it's likely or unlikely to be
8 related to an intent to smoke?

9 A. It means that it is highly unlikely to be unrelated.

10 Q. All right. Can you think of any legitimate scientific
11 reason for not including that in their model?

12 A. No, no legitimate scientific reason.

13 There may be reasons why in this particular model you
14 wouldn't put it in, but you would choose a different model. The
15 idea is that it's a variable that's very important and,
16 therefore, you need to include it, and how you do it depends on
17 what kind of a model you are.

18 MR. MINTON: Thank you, Dr. Wittes.

19 That concludes my redirect, Your Honor.

20 THE COURT: Let me ask you just a couple of background
21 questions. I find it very interesting that I think you're the
22 only expert on the defense side who wasn't asked these
23 questions.

24 When were you first approached to testify in the case?

25 THE WITNESS: Actually, I checked that this morning.

1 April the 11th, plus or minus about two days.

2 THE COURT: And then when were you actually retained to
3 testify? Or was that the same date?

4 THE WITNESS: Oh, to testify? Oh, not until later. I
5 was retained to read the papers; I think I agreed to do that
6 right away.

7 THE COURT: Approximately when did you agree to testify
8 and write a piece of written direct testimony?

9 THE WITNESS: Well, I actually didn't understand the
10 process very well. So, when I agreed -- I agreed to testify
11 after I read the papers.

12 My first response, I told Rick -- Mr. Cornfeld, I'll
13 read the papers, I'll give you my comments, but I'm not
14 testifying. But after I read the papers and realized how
15 scientifically and statistically defective they were, I said,
16 "Okay, I'll testify." But I didn't understand what, I didn't
17 know that there was a written direct. I didn't know all the
18 pieces that happened.

19 THE COURT: Do you remember when you finished reading
20 the papers? Approximately.

21 THE WITNESS: The first time? I've read them over and
22 over.

23 THE COURT: The first time.

24 THE WITNESS: Well, if I was given them -- it would be
25 the day that I received them, so it would have been sometime

1 around April 15th, something like that.

2 THE COURT: And then when did you prepare your first
3 draft or your -- well, your first draft of your written direct
4 testimony?

5 THE WITNESS: The written direct? You mean this last?

6 The first physical draft was the day of the deposition,
7 so that would have been May 20th.

8 THE COURT: May 20th?

9 THE WITNESS: Yeah. It was a busy weekend.

10 THE COURT: And how much are you being paid by the
11 joint defendants for the time that you're putting in on this
12 case?

13 THE WITNESS: 400 an hour.

14 THE COURT: Is there any differentiation in the amount
15 you're being paid for the time in court or the time out of
16 court?

17 THE WITNESS: No. It's all the same.

18 THE COURT: Is that your standard rate for clients?

19 THE WITNESS: Yes, it is.

20 THE COURT: Okay. All right. Thank you. You may step
21 down at this time.

22 We will take a recess now, everybody. And then,
23 Mr. Webb, we need to address the scheduling issue before the
24 recess.

25 MR. WEBB: It won't be long.

1 THE COURT: All right.

2 MR. BRODY: I'd like to hear it first.

3 MR. WEBB: You can take a break.

4 MR. BRODY: No, we're going to converse first, figure
5 out what it is. We don't know what it is.

6 One question that maybe we can put to Mr. Bernick
7 before we break is whether he or somebody from his office will
8 be ready to address the Myers' exhibit objections this
9 afternoon?

10 MR. BERNICK: Yes.

14 THE COURT: If we can do both of those. Do you want to
15 address the scheduling issue now?

16 MR. WEBB: It's very brief. The only issue it deals
17 with is the issue of the timing on closing arguments, which I
18 just want to raise one issue.

19 I was not in court at the end of the day yesterday. It
20 got raised by Ms. Eubanks. And the reason I just want to
21 briefly raise it is that I honestly think that we could resolve
22 it. It's a big -- the reason it's a big issue, Your Honor, is
23 that everybody is here ready to give a closing argument, we are
24 all here.

25 THE COURT: I know all of that, Mr. Webb.

1 MR. WEBB: Let me get to my point and I'm not going to
2 belabor it.

3 But when I realized what -- the issue that came into
4 play was whether the government can have any basis for a
5 rebuttal case on refuting the issue of the impact the MSA had on
6 the defendants and their ability to compete in the marketplace.

7 I went back and looked at the case law last night. The
8 case law I think answers the question. The case law says the
9 only time -- first of all, you indicated in two of your earlier
10 orders you were going to strictly follow the law of rebuttal.
11 You put all of us on notice of that.

12 When I looked at the case law last night the case law
13 makes very clear that the only thing that is proper rebuttal is
14 if the defendants raise an issue in their defense case that the
15 plaintiff could not reasonably have anticipated. That's the
16 standard that this circuit seemed to apply across the country.
17 I don't think that's in dispute.

18 On that issue, all I'm saying is that because this
19 issue of the impact the MSA had on the defendants and their
20 ability to compete, it could never ever be concluded that the
21 government couldn't anticipate that because I talked about it in
22 my opening statement in some detail. It was discussed in more
23 detail in the preliminary findings of fact. And before the
24 remedies case began Mr. Beran from my client from Philip Morris
25 talked in some detail about the pricing and the impact that it

1 had on the defendants.

2 So I honestly -- this idea that a rebuttal case could
3 possibly delay the closing arguments I believe can be put to
4 rest as a matter of law.

5 It's not a matter of arguing over the details of what
6 the testimony would be. The issue that the government wants to
7 rebut is not a proper rebuttable issue.

8 And the reason I'm raising it now is that last night we
9 had a meeting at the trial site, because when Your Honor told us
10 last week we were going to do these closings arguments on the
11 7th, 8th and 9th, we're aware that you're out of town on the
12 13th, the week of the 13th.

13 Other defendants' lawyers, including me, already have
14 set court hearings before other courts the week of the 20th and
15 27th because we have been holding off for months. And we're not
16 going to let -- nothing is going to interfere with this trial,
17 and I will give Your Honor that pledge. But it is a big
18 scheduling issue.

19 For some reason we don't do it next week, we can't do
20 it the week of the 13th, we can't do it the week of the 20th or
21 27th, then we are into the 4th of July, we're going to be coming
22 back here in July sometime when nothing is fresh in your --
23 anyway --

24 THE COURT: No way, Mr. Webb.

25 MR. WEBB: And --

1 THE COURT: No way. And I don't like to speak that way
2 on the record in open court.

3 MR. WEBB: I'm not asking to do that.

4 THE COURT: I know.

5 MR. WEBB: I'm asking to do it next week.

6 THE COURT: I'm telling everybody.

7 MR. WEBB: And all I'm respectfully suggesting is that
8 the legal question about the scope of rebuttal I think could be
9 resolved today. Doesn't have to be resolved next week and keep
10 everyone in this -- it's a big issue and that's why I wanted to
11 raise it.

12 THE COURT: Ms. Eubanks.

13 MS. EUBANKS: Well, Your Honor, first off, I'd like to
14 know what law Mr. Webb is relying upon because I, too, have
15 looked at the precedent from the circuit.

16 But also we know that the trial court has substantial
17 discretion in terms of whether or not to permit certain
18 proceedings. When -- and a rebuttal case is one of those.

19 What I represented to the court yesterday still stands
20 true, and it's simply this. Until we hear the testimony that's
21 going to come in through Dr. Carlton we are not going to know
22 with any degree of certainty whether or not a rebuttal case is
23 something that we're interested in.

24 The testimony that came in -- or some of the testimony
25 on the MSA that came in could not have been reasonably

1 anticipated, despite -- these are the affirmative defenses of
2 the defendants.

3 There was no basis or need or it would have been highly
4 improper as a matter of, I think, judgment as a trial lawyer for
5 the United States to introduce evidence during its case in chief
6 that would rebut a potential affirmative defense of the other
7 side.

8 The way the works is, an affirmative defense is raised,
9 and an affirmative defense is brought and an affirmative defense
10 is proven by the party who is proffering it.

11 There is no obligation for the other side to anticipate
12 what might come in. And I'd represent to the court that there
13 was evidence on some of these matters that we did raise with
14 respect to the MSA.

15 Also, defendants raised in the testimony that occurred
16 yesterday with the witness, Professor Weil, there were questions
17 there about suggestions of ability to pay.

18 We need to analyze that because there isn't anything in
19 the record that I can recall where defendants have put on any
20 evidence of that. But we need to highlight or we may need to
21 highlight these issues for the court.

22 As I said yesterday, I don't want to alarm the court
23 and represent that we most definitely will have a rebuttal case,
24 but we've already addressed it with the potential rebuttal
25 witness who will here at the time listening to the testimony

1 that's going to come in with Dr. Carlton, when that comes in
2 tomorrow, and we will make an informed decision.

3 But my review of the precedent -- and again, I'm very
4 interested in what case Mr. Webb is relying upon that would
5 remove the discretion from the trial court in exercising the
6 determination of the propriety of a rebuttal case under
7 circumstances such as these where an affirmative defense is
8 being presented by the other side.

9 But that's where we stand on it. And if there is, if
10 our assessment -- if our informed assessment after defendants
11 present their last witness is that we don't need one, that's
12 fine, but no one -- no one -- should have been making plans that
13 excluded that. That's -- you know, poor planning on their part
14 does not constitute an emergency on the part of us.

15 I made representations yesterday about the difficulty
16 that the United States was having in meeting the time frame for
17 closing, but if closing is next week, we will be here, we will
18 represent the United States interests, and we will argue the
19 case in a way that we hope is helpful to the court, if we
20 conclude the testimony. But if we don't conclude that
21 testimony, the fact is if the case is ongoing and if a rebuttal
22 case is needed, a rebuttal witness is needed, we will be
23 prepared to proceed with that.

24 The question then becomes one of whether the court is
25 interested in, it seems to me, a couple of options. One, if we

1 have a rebuttal witness, if that is necessary, then the court
2 conceivably could say, Put the witness on in the ordinary
3 course. You don't need to do a written direct, do an ordinary
4 examination.

5 And if the schedule is so difficult for the defendants,
6 then we could go forward with the post trial briefing and not
7 have an oral argument. After all, we've had three interim
8 summations and an opening statement.

9 That's up to the court as well. Those are
10 determinations that the court will make, and whatever it is that
11 assists the court we will be there to do that. But I'm not
12 prepared to stand here, based on my review of the case law, I
13 see no impediment to bringing a rebuttal witness forward under
14 the circumstance here.

15 And again, I'd love to know that case law so I could
16 take a look at it.

17 MR. WEBB: Your Honor, first of all, I did not suggest
18 the court did not have discretion. I agree with Ms. Eubanks.
19 But when you read the cases, the discretion that is exercised is
20 within the confines of that principle of law.

21 Ms. Eubanks, respectfully, is just wrong on this issue.
22 If they are on notice that there's an issue that's being
23 litigated in this case, you don't bring it down to some minute
24 level of what look at what one witness testified about some
25 facts, that you now want to refute those facts.

1 If the issue, in this case the issue of the MSA and its
2 impact on the defendants, was clearly known to the government as
3 an issue being litigated in this case, which it was because of
4 my opening statement and because of the preliminary finding fact
5 and because of Mr. Beran's testimony, then if they want to go
6 forward and address it, they should have done so in their case
7 in chief and not wait for rebuttal.

8 As far as poor planning is concerned. There's no poor
9 planning here. Last week Your Honor set down the dates for
10 closing argument. In fact, when you did that last week it's my
11 recollection at the end of the day the government wasn't even
12 objecting to those dates and we were going forward on the 7th,
13 8th, and 9th.

14 So no one is trying to do poor planning. All I'm
15 respectfully suggesting is that this is an issue that -- knowing
16 what the issue is that the government want to rebut, I
17 respectfully suggest that we could resolve it based on the
18 principle of law that I just articulated.

19 THE COURT: Mr. Bernick, are you going to read into the
20 record the cases you're holding in your hand?

21 MR. BERNICK: I was going to do something like that.
22 Actually, there are cases that I have right here. But I know
23 Your Honor asked -- or suggested that we were going to have a
24 break, and I don't want to try Your Honor's patience. I have
25 something additional to say that hasn't been said, but I know

1 from long experience that when the time starts to shrink, things
2 kind of go back and forth.

3 So my proposal is I'm happy to obviously stay around.
4 I think that there is some significant additional material that
5 ought to be put before the court. It's an important issue. We
6 have other document objections to deal with. I'm going to be
7 around for that. So I'm happy to speak now or to do so after
8 the break. I don't know --

9 THE COURT: We will take our recess now.

10 There's another option on which Ms. Eubanks failed to
11 mention. Somewhat unusual, perhaps, but as far as I'm concerned
12 an option that falls within my discretion. And that is, if
13 we're going to have -- if, major if -- there's going to be a
14 rebuttal witness, I see no reason why, given the magnitude of
15 the evidence that I've heard in this trial, why we can't have
16 the closing arguments on the days that I have designated. And
17 those arguments will obviously be subject to any testimony that
18 is presented thereafter. After all, I'm going to get briefs
19 from everybody. I'm going to get proposed findings of fact. It
20 will certainly be helpful, albeit arduous but definitely
21 helpful, for me to hear closing arguments from everyone.

22 The only issue on which the government has even
23 suggested there would be rebuttal testimony would be a very
24 particular discreet, albeit important issue, very important in
25 terms of remedies.

1 MR. BERNICK: That is exactly what I would like to
2 address briefly before the court is, you know, there are a
3 couple of other scheduling matters that relate to this, but that
4 particular issue. So again I'm happy to do it after the break
5 rather than having everybody stand here now.

6 THE COURT: We will take a 15-minute break.

7 (Recess began at 3:16 p.m.)

8 (Recess ended at 3:30 p.m.)

9 THE COURT: All right. Mr. Bernick, on the issue of
10 rebuttal, I believe.

11 MR. BERNICK: Yes, Your Honor. It's a difficult
12 situation to be in, but I think that -- I agree with Mr. Webb, I
13 think that this is a discrete issue and it's actually relatively
14 well defined, and there really should not be a reason why this
15 should get in the way of a schedule or take very much time to
16 resolve, but let me be more concrete and get to the point.

17 The whole approach that we have pursued in connection
18 with the remedies case, as I know Your Honor --

19 THE COURT: Mr. Bernick, let me ask you this.

20 I've indicated that we're going to go ahead next week
21 with closing arguments so everybody's schedules can keep some
22 semblance of rationality and sanity. That's number 1.

23 Number 2, the government hasn't made a commitment, not
24 even made a commitment, hasn't taken been a position yet, so why
25 do we need to address this issue?

1 MR. BERNICK: Because I think what's happening is the
2 government is holding back on putting the issue before the court
3 for a decision unnecessarily.

4 That is, they've already told the court that they are
5 going to have a witness here or an expert here tomorrow to watch
6 Dr. Carlton, and from our point of view, they've already
7 identified what the issue is on which they want to have
8 rebuttal. And it's such a clear case, that there shouldn't be
9 any reason for ambiguity or doubt about whether there's going to
10 be a rebuttal case, and we would like to get matter settled.

11 The worst thing is Your Honor indicated that, Well, you
12 know, what if we go forward with the closings next week and have
13 the rebuttal take place thereafter?

14 Your Honor, I have to tell you I'm not aware of any
15 rule of procedure or trial practice that would permit that
16 result. When the evidence closes, the evidence closes and then
17 you do your closing argument.

18 But I think that, Your Honor, in a way that this
19 remedies case has been pursued, we have been extraordinarily
20 diligent to preserve the sequencing here so it's fair to both
21 sides and everybody has got an adequate opportunity.

22 And right now -- and frankly, Your Honor, there are
23 many, many requests, as Your Honor well knows, that we wanted to
24 make discovery that we wanted to have and that didn't take place
25 both as a matter of our volunteering that we could do without it

1 in order to keep this case moving and by virtue of orders issued
2 by Your Honor. The net effect being the case has stayed on
3 track. Everybody has had to make due with the schedule and with
4 the evidence that's coming in in order to preserve the sequence.
5 We all went down this road.

6 The one issue that they've raised is the impact of the
7 MSA on this industry, including profitability. And, Your Honor,
8 this -- actually, as of April 21, which is, you know, five, six
9 weeks ago -- this is the description for Dr. Weil, and he talks
10 about -- he's going to say, "I'm going to talk generally about
11 competition in the market for cigarettes in the United States
12 prior to and after the adoption of the Master Settlement
13 Agreement."

14 One of the specific things that he's talking about is
15 the defendants' cigarette manufacturers, including their
16 economic incentives to avoid future RICO violations,
17 profitability and the ability to survive.

18 They say that this is somehow something that's new. It
19 was totally flagged at that time. It then gets worse, because
20 on April the 30th we actually made full disclosures, including
21 our disclosure for Dr. Carlton. And I could take you through
22 page after page where Dr. Carlton specifically discusses the
23 competitive impact of the MSA.

24 The depositions are then taken on May 23. Dr. Carlton
25 is deposed. On May 25 the government files objections. They

1 nowhere take issue with the idea that Dr. Carlton having
2 specifically made reference to testimony on the MSA.

3 So this issue not only has been out there since the
4 beginning, as Mr. Webb indicates, but specifically in connection
5 with this very fast paced, very deliberate and sequenced
6 remedies process, we gave them total notice of the fact that we
7 were going to address the issue.

8 So they've known about it all along, and now we're the
9 ones that are facing the prospect of having to close without
10 knowing exactly what their evidence might be or might not be,
11 and not really knowing, you know, where the case really is going
12 to end.

13 They should -- they have identified the issue. Your
14 Honor is in a position to know whether it's rebuttal, proper
15 rebuttal or not now. Let's get this matter decided.

16 I agree that -- we would certainly love to keep the
17 dates next week, but the two things are completely consistent
18 with one another.

19 If we get the issue decided now as opposed to waiting
20 until after Dr. Carlton is done, what are they going to learn
21 from Dr. Carlton that's new on this issue? His testimony is
22 what it is.

23 We have tailored our testimony to be totally responsive
24 to their case. Your Honor has seen that again and again. We
25 have our witnesses comment on what they have done.

1 She says it's an affirmative defense. It's nothing to
2 do with an affirmative defense. We say that the MSA as an
3 enforcement mechanism means that it's not necessary to issue any
4 kind of remedy. There's no reasonable likelihood.

5 That is not the aspect of the MSA that's the subject of
6 testimony. The aspect the MSA that's the subject of testimony
7 is that the experience with the MSA demonstrates what the actual
8 effect of the remedies proposed by the government might be.

9 That is a defense by way of denial. So defense by way of saying
10 their remedies are not tailored to the conduct at issue and it
11 will have collateral effects.

12 There's no affirmative defense. It goes to the issue
13 of efficacy and causation. So this is not an affirmative
14 defense. The issue was raised squarely before the other side.
15 They have had witnesses in fact who have addressed this during
16 the course of their own testimony, and what they are really
17 saying is, depending upon how the cross-examination goes, they
18 might like to have another bite at the apple. That is not the
19 standard.

20 And I do have a case to cite to the court. It's a
21 Tenth Circuit decision. It is 203 F3d 1202. It's the Koch
22 case. K-o-c-h. The standard articulated by the court is when
23 plaintiffs, however, seek to rebut defense theories which they
24 knew about or reasonably could have anticipated, the district
25 court is within its discretion in disallowing rebuttal

1 testimony.

2 I would say that's a broad test. It talks about
3 theories that they knew or reasonably should have anticipated --
4 could have anticipated.

5 But even if you took a narrower test which focuses on
6 whether there is a new fact that has emerged, a new fact as
7 opposed to a new issue or a new theory, which would be a very
8 conservative test, they've already told us what the fact is,
9 which is the impact of the MSA on our conduct as kind of a
10 benchmark for what might happen with remedies. That fact has
11 been out there for the last several weeks repeatedly.

12 And, by the same token that we were constrained and we
13 had to have a streamline case decided what matter, what didn't
14 matter, and we didn't have another opportunity to take a bite at
15 the apple, they should not get a bite at the apple now.

16 We all know what happened if this matter is deferred
17 and they get to, in the fullness of time, T this issue up, we're
18 going to have a very elaborate process, and if Your Honor then
19 were to permit rebuttal, you can be well assured that we would
20 then have a significant issue that's developed out there on its
21 own during this period of time and we would be in there wanting
22 surrebuttal because they will have raised now new materials that
23 we didn't have a reason to anticipate.

24 The end has come, Your Honor, and we believe that the
25 most important thing is for the court to address this issue, as

1 Mr. Webb indicates, as a matter of law based on this record. If
2 the government wants to submit some letter or brief today or
3 tomorrow or respond within 12 hours, let's keep this schedule
4 for next week, but let's get this issue resolved so we don't
5 face the uncertainty of what the record is going to look like
6 down the road.

7 MS. EUBANKS: Your Honor, one thing that Mr. Bernick
8 said that I do agree with is the fact that it's not proper for
9 the parties to have closing argument without all of the evidence
10 being presented.

11 Imagine the scenario where the defendants are
12 presenting what they have demonstrated what they believe they
13 have proven and what the evidence shows at closing when, in
14 fact, there's a gap and the United States is not in a position,
15 if it decides to call a rebuttal witness, to effectively refute
16 that and to do it in a proper way at closing. He's correct
17 about that. We completely agree, that if closing argument is to
18 be had, it's at the close of the case.

19 It should be clear on the record, but I'll state it
20 here again. Every single time the question has arisen with
21 respect to the dates for closing, I have stood before the court
22 and I have expressed our concern that there is a possibility of
23 a rebuttal witness.

24 I do not know -- and I don't want to be confined to the
25 fact that I said yesterday and today about the effectiveness of

1 the MSA. I've also said, and maintained as well, that it's
2 important to note what testimony comes in through Dr. Carlton,
3 how we believe that testimony is weighted, and it's not just how
4 it's weighted.

5 As this court knows, with the number of trips to the
6 appeals court, there's no question that what will happen here,
7 it probably will end up in the appeals court as well and we do
8 need to make a record.

9 If that record contains information from one side, even
10 if the court weighs it in a certain way, or even if we believe
11 that the court is going to weigh it in a certain way given how
12 it came in or comments from the bench, nothing is to prohibit
13 the appellate court from on the record making findings based
14 upon that evidence --

15 THE COURT: The appellate court never makes findings.

16 MS. EUBANKS: They do under certain circumstances.

17 They are limited and they do.

18 Whether they do that expressly or not, there's even
19 rules of law that suggests when it's proper to do so. And on
20 the record, when you do not have anything in to refute it or to
21 at least make the determination, put it before the court, that
22 there was sufficient evidence going the other way, the court is
23 left, the Court of Appeals in that case, is left with only one
24 side.

25 Now, the reason that Mr. Bernick makes such a big

1 argument over the fact that his claim that it's not an
2 affirmative defense is because he obviously knows that we're
3 correct about this.

4 A party proffering an affirmative defense bears the
5 burden of pleading it under Rule 12 and proving it. If we look
6 back at the responses to the complaints in this case we have the
7 Rule 12 motions, which argued MSA effectiveness. We had the
8 responses to the complaints later on after the ruling on those
9 motions, and set forth as affirmative defenses in the case were
10 a variety of issues surrounding the MSA.

11 Now, things changed when the court allowed a different
12 remedies case, and in allowing that different remedies case, as
13 it was fashioned, it became very clear that defendants want to
14 demonstrate, based upon the remedies evidence that the United
15 States was permitted by the court to put on, that those
16 particular remedies are remedies that with respect to the MSA
17 are things that are not proper.

18 Now how could we reasonably have anticipated what it
19 was that those witnesses were going to say and put in our case
20 in chief?

21 It would be malpractice for us to put on a case
22 anticipating what the other side would say when perhaps they
23 might not see it that way. For us to put on evidence during the
24 limited time that the court had given the parties for proving
25 their case, to prove an affirmative, an ephemeral affirmative

1 defense had not yet been demonstrated at that point would not
2 have been wise.

3 THE COURT: Ms. Eubanks, when you put on any witness in
4 the world, whether it's a criminal case or whether it's a civil
5 case, lawyers have to make the hard tactical judgments about
6 whether they want to bring out in advance to the fact finder
7 what the alleged weaknesses might be in the case or whether they
8 want to take their chances and hope that the defense won't
9 figure it out.

10 Certainly in terms of Dr. Gruber's testimony -- I'll
11 just take him for the moment -- it couldn't have been any secret
12 to anybody that -- anybody on the government's side -- that one
13 of the issues that simply had to be explored was what the impact
14 of his remedy would be, if adopted, on the state of competition
15 within the tobacco industry; on the allocation of market
16 shares -- allocation is not the right word -- but on what would
17 happen to market shares; and on how nonparticipants in the MSA
18 would be affected by those changes. So, this cannot be subject
19 matter that never occurred to anybody.

20 MS. EUBANKS: That's not my point, that it never
21 occurred to us. I don't think that that would be fair to say
22 given that it was set forth in the responses to the complaints.

23 But the form that it has taken in defendants' case in
24 chief on remedies is different from what we anticipated. In
25 fact, Your Honor struck the testimony of Matt Myers on the MSA.

1 We certainly anticipated certain testimony --

2 THE COURT: He wasn't going to talk about allocation of
3 market shares, it is my recollection.

4 MS. EUBANKS: Exactly, Your Honor. The allocation of
5 market shares and how that worked --

6 THE COURT: So the fact that I struck part of his
7 testimony had nothing to do with whether you put on a rebuttal
8 witness.

9 MS. EUBANKS: What it does have to do with, Your Honor,
10 is a response to your question, or your suggestion, that we were
11 surprised. Certainly, we were not surprised by MSA testimony.
12 And my point is that we certainly tried to proffer some and
13 that's been stricken.

14 I think the defendants' approach suggesting that the
15 United States before the close of defendants' evidence should be
16 boxed into a commitment whether or not to present a rebuttal
17 witness invites error. That is not how it's done.

18 Defendants have not yet rested. We have been, I think,
19 very good about giving the court notice of our position as we've
20 gone on. We haven't been greedy with respect to wanting -- I
21 think all of the issues in the case have been presented and the
22 court has given the parties a great deal of time and focused on
23 those issues in a way that makes it clear that there are certain
24 things, certain rocks you don't need to look up under.

25 But Your Honor stated before the break that this is an

1 important issue. If it is an important issue for this court to
2 resolve, it's important for the United States to consider the
3 propriety of bringing forward appropriate rebuttal evidence that
4 fairly meets the same type of evidence that's submitted.

5 Certainly, what we have with respect to Dr. Gruber's
6 testimony was our own evidence and something that we put forward
7 with the court with respect to the formulation of his remedy and
8 how it would work.

9 How defendants, however, look at the issue of the MSA
10 and how the remedies broadly that the United States is asking
11 the court to consider would be effective is something that we
12 have not looked at.

13 Furthermore, Order 471 expressly, way before we started
14 this trial, states that, "At the close of defendants' case the
15 United States shall inform the court of the total number of
16 hours it requests to present its rebuttal case."

17 When I've spoken on this before I've told Your Honor we
18 wouldn't want any additional hours from the original 265 that
19 the court has allowed because we are well within the court's
20 limitations, but the court clearly anticipated this and this is
21 how we planned our case when we went into it.

22 For defendants to now attempt to change the rules on us
23 in the middle of the game, it's not proper and it does invite
24 error.

25 We would like the opportunity to hear the testimony of

1 defendants' final witness and then to make an informed judgment
2 as to whether we will need to bring forward rebuttal evidence,
3 then to tell the court exactly what it is that we contemplate
4 and see what the court's view is on that, whether that will be
5 accepted or not, and obviously we will abide by whatever the
6 court orders.

7 THE COURT: You're not going to have much time to make
8 that decision.

9 MS. EUBANKS: We will live with whatever Your Honor
10 gives us, but we do have a right.

11 MR. WEBB: Your Honor, what's going on here, quite
12 frankly, is that there's an effort made to delay the closing
13 arguments next week.

14 The government -- look, the issue -- there's nothing
15 that's going to change with Dr. Carlton's testimony. The issue
16 right now that we've argued this afternoon based on -- Your
17 Honor clearly has the discretion under the case law to conclude
18 that, in fact, this could have been anticipated.

19 Delaying this until tomorrow afternoon is not going to
20 change that decision or the record. They know exactly what
21 Dr. Carlton is going to testify to. And the argument that
22 they've made here, which is that they have a right to present
23 rebuttal evidence and that somehow it's error, is just wrong.
24 That's clearly not the law. It's in Your Honor's discretion
25 based on the standard that I articulated, which is that if they

1 could have reasonably anticipated it they should have put it in
2 their case and chief.

3 And Your Honor is absolutely correct. We make judgment
4 calls like that every day of the week as far as whether or not
5 we are going to go ahead and anticipate something and T it up or
6 whether we're afraid that's going to queue the other side to
7 something they may not have thought about. But that's a
8 judgment call they made in their case in chief.

9 And clearly with the -- Your Honor, this issue and the
10 record that has been made on this issue, clearly not having
11 rebuttal testimony on this because of their failure to proceed,
12 when you've got in opening statement we talked about the issue,
13 in findings of fact we talked about the issue, in our answer we
14 talked about the issue, and Mr. Beran's testimony we talked
15 about the issue, and then all this testimony has been filed in
16 which they know about the issue; for them to say that they could
17 not have presented their evidence clearly is wrong.

18 MS. EUBANKS: Your Honor --

19 THE COURT: Final comment from one of you, please.

20 MS. EUBANKS: Go ahead.

21 MR. BRODY: First of all, Your Honor, Ms. Eubanks wants
22 me to members that she has looked fairly closely at the law
23 governing the presentation of rebuttal evidence in this circuit
24 and that the law governing the presentation of rebuttal evidence
25 supports this determination that we wish to be able to make at

1 the conclusion of Dr. Carlton's testimony tomorrow. We hope
2 that we will not have to call a live witness in rebuttal, but we
3 don't feel comfortable --

4 THE COURT: Everybody, Order 471 is in existence. I
5 remembered it very well. I know what it provided in terms of
6 laying out a road map. That's number 1.

7 Number 2, I think as a general proposition of law that
8 the government has a right to at least hear all of the defense
9 case before it makes its decision whether -- whether, if at that
10 point it asks for a rebuttal witness, if I allow it, that's a
11 whole different question, but I'm not going to decide it this
12 afternoon. I know counsel want it decided, but I'm just not
13 going to. I don't think it's the orderly way to do things.

14 It's interesting that all of you agree on a proposition
15 that I certainly haven't researched, but I don't think I agree
16 with you on, but I don't have to decide that either at this
17 moment, and that is whether it wouldn't be within my discretion
18 if there is one witness remaining out there, to go ahead and
19 hear closing argument. But I don't want to hear from you all on
20 that right now. The less advisory opinions I give, the better.

21 MR. BRODY: The other point, and this doesn't affect
22 the schedule for closing, but we have previously advised the
23 court of our intention to submit a limited number of prior
24 designations as rebuttal to the liability phase of the trial.
25 We still plan to do that, and we can submit those on Monday and

1 then the parties can just proceed on the normal schedule for
2 responding to them and then replies --

3 THE COURT: That's correct.

4 MR. BRODY: -- and objections, and it will be -- I
5 believe it's seven witnesses, it may be eight, it won't exceed
6 the limit that's in place for any given week, and they are going
7 to be very, very minor and address very, very minor points. And
8 those -- as I said, we plan to submit those on Monday and they
9 go to liability issues.

10 THE COURT: How long do the defendants anticipate -- I
11 don't know who is going to do the testimony -- how long do you
12 anticipate the direct will be of Dr. Carlton?

13 MR. BERNICK: The direct will probably go pretty close
14 to the hour, it may be a little bit shorter, but not that much
15 shorter.

16 THE COURT: I've read his direct.

17 MR. BERNICK: I --

18 THE COURT: Now, Dr. Wittes was another question,
19 but --

20 MR. BERNICK: You know, like everything else, Your
21 Honor, I'll be happy to follow any cues that you might feel is
22 fit to give about things that you don't need to hear again.

23 But I'll tell you exactly what it is that we intend to
24 walk through, which is that there's been a lot of testimony and
25 questioning, frankly, by the court regarding what an economist

1 would say about analyzing the impact, for example, of the look
2 back provision; you know, how that really works. And I think
3 that that is probably one of the most important things to cover
4 in his testimony, and it is an area that other witnesses have
5 commented on, but I don't -- I think we still feel it's
6 important to have a economist drill down on kind of laying out
7 the different paths by which the industry could seek to comply
8 with look back. So that's going to take a little bit of time.

9 THE COURT: I think it's very important for all the
10 logistical reasons we've been talking about to finish his
11 testimony tomorrow. Who is going to be doing the cross for the
12 government?

13 MR. BRODY: Ms. Brooker and she still anticipates four
14 to five hours depending on how things go.

15 THE COURT: Well, we will see how it goes. I haven't
16 consulted with court staff, either. If we can get it done a
17 little later -- again, not that I'm encouraging people to go
18 late, but if that's what it will take to complete it, I would be
19 willing to do that tomorrow, and I'm able to do that tomorrow.

20 MR. BERNICK: I know that I previously told the court,
21 but there's been a lot of discussion about scheduling.
22 Dr. Carlton cannot be here on Friday.

23 THE COURT: Yes. You told me that.

24 MR. BERNICK: So we would have to -- I think he's
25 available on really Monday of next week if that is what we have

1 to do.

2 THE COURT: All right. Well, we will see how tomorrow
3 goes.

4 Dr. Fiore.

5 MR. GOLDFARB: Good afternoon, Your Honor. Andrew
6 Goldfarb for the United States.

7 THE COURT: All right. Let's begin.

8 MR. GOLDFARB: Your Honor, I think that we have a
9 fairly narrow set of outstanding things to bring before the
10 court.

11 With respect to the United States' exhibits originally
12 proffered with Dr. Fiore's testimony, the defendants had raised
13 10 hearsay objections. In the government's response, we had
14 indicated that we thought three of them should come in for the
15 truth. The rest were not being offered for the truth. And I
16 think that we have agreement on at least two of them. I'll let
17 Mr. Christopher speak to them.

18 But with respect to U.S. Exhibit 89463 and 89464, I
19 think the defendants have withdrawn those objections. And the
20 other one at issue is 64554, and that's --

21 THE COURT: Wait a minute. Tell me, after all your
22 agreements, what's left.

23 MR. GOLDFARB: Okay. Well, what I'm -- the only one
24 that is outstanding, potentially outstanding, from Dr. Fiore's
25 written direct is U.S. Exhibit 64554.

1 THE COURT: 64554.

2 MR. GOLDFARB: And I'll let --

3 THE COURT: Go ahead.

4 MR. CHRISTOPHER: And, Your Honor, we are -- what we
5 have agreed to do is rest on our written objections, which are
6 hearsay objections on a number of documents.

7 With respect to this document, I believe Mr. Goldfarb
8 just wants to try to admit it for the truth of the matter
9 asserted because it contains government statistics. And my
10 response to him was that he's objected to a number of our
11 documents that we used on cross which cited government
12 statistics like CDC, National Quit Line figures, so I didn't see
13 that we could agree to allow that to go in without our written
14 objection.

15 THE COURT: Well, is the principle you're all
16 presenting to me that it -- is the principle you're all
17 presenting to me the principle that government statistics per se
18 should not be subject to a hearsay objection if, even if -- not
19 even if -- but if they are being offered for the truth of them
20 and they are public documents?

21 MR. GOLDFARB: We certainly aren't, Your Honor, and I
22 think --

23 THE COURT: You are or are not?

24 MR. GOLDFARB: The United States is not.

25 The defendants -- I don't think there's an exact

1 parallel between --

2 THE COURT: I think we need to go through things one by
3 one.

4 MR. GOLDFARB: That may be a better way to do it.

5 THE COURT: And let me find the objections, which are
6 right here.

7 I'm going to start with the defendants', and 64554; is
8 that right?

9 MR. CHRISTOPHER: I think that's the only one that
10 Mr. Goldfarb wanted to raise on our list. The rest we are
11 relying on our written objections.

12 THE COURT: Well, someone has to remind me what that
13 is.

14 MR. GOLDFARB: That is the report of the U.S. -- the
15 Task Force on Community Preventive Services that is one of the
16 underlying documents upon which -- that underlies the 2003
17 action plan.

18 THE COURT: Is that the task force he chaired?

19 MR. GOLDFARB: It is not the task force he chaired.

20 THE COURT: It's a different task force.

21 MR. GOLDFARB: Yes.

22 THE COURT: And that's a report. You're seeking to get
23 in the report; is that right?

24 MR. GOLDFARB: Yes.

25 THE COURT: And you're seeking to get it in for the

1 truth of it?

2 MR. CHRISTOPHER: Well, just for the record, it's an
3 American Journal of Preventive Medicine article, Your Honor.

4 MR. GOLDFARB: Right.

5 THE COURT: About which there was much testimony. Am I
6 right?

7 MR. GOLDFARB: Yes. Well, with respect to -- with
8 respect to this one, actually, I don't think there was a lot of
9 testimony.

10 Dr. Fiore, in his written direct examination,
11 identified this as one of the documents upon which the action
12 plan and the subcommittee relied in reaching its conclusions.
13 It was -- the report of the task force was reprinted in a
14 journal in a special edition.

15 THE COURT: Let me hear the defense arguments, please.

16 MR. CHRISTOPHER: Your Honor, we didn't bring this
17 document up at all on our cross. And our position is just that
18 we are resting on our papers that this is hearsay. We didn't
19 intend to bring this before, Your Honor.

20 THE COURT: I don't think -- I have your objections in
21 front of me. I don't think you made a particular -- wait a
22 minute.

23 I don't think -- I don't think you made a particular
24 briefed argument, you simply referred to the fact that it's
25 hearsay. Is that right?

1 MR. CHRISTOPHER: That's correct, Your Honor.

2 THE COURT: What's the government response?

3 MR. GOLDFARB: At a minimum, Your Honor, we think the
4 document should come in obviously for the court to consider the
5 weight of Dr. Fiore's opinions and his conclusions about the
6 cessation program he has proposed.

7 THE COURT: That's not the issue in terms of whether
8 it's hearsay or not.

9 MR. GOLDFARB: I understand. My fall back -- I'm now
10 falling back to the argument that it should come in to evaluate
11 his opinions --

12 THE COURT: It's nothing wrong with me because it's
13 late in the day, but I just want to state that for the record.
14 No, the objection is sustained to that. That is not coming in
15 for the truth of the document. No.

16 Next.

17 MR. CHRISTOPHER: We have a couple of different groups.
18 We have -- I guess going in order with our cross
19 exhibits. Mr. Goldfarb last Wednesday sent me a list of 16
20 hearsay objections -- well, hearsay objections almost
21 exclusively to 16 of the documents we used on cross out of about
22 40 exhibits that we had asked to be moved into evidence.
23 Although today Mr. Goldfarb informed me that one of those
24 exhibits, JD 55364, he's withdrawing his objection.

25 THE COURT: Fifteen objections.

1 MR. CHRISTOPHER: We are down to 15.

2 THE COURT: To joint defendants' exhibits used on
3 cross.

4 MR. GOLDFARB: Your Honor, again, just so the record is
5 clear, the defendants indicated they wanted to admit this
6 document for its truth. We maintain our objection that the
7 document is hearsay.

8 THE COURT: What are the documents? What types?

9 MR. GOLDFARB: This is -- again, this is another
10 journal article published by the -- one of the people involved
11 in the Group Health Cooperative in the state of Washington that
12 was in the tobacco control.

13 THE COURT: You're referring to one, but there are 15
14 objections now.

15 MR. CHRISTOPHER: I guess, then, Mr. Goldfarb is not
16 withdrawing his objection, so let me tell you what happened.

17 Mr. Goldfarb had hearsay objections to 16 exhibits,
18 although he said he would be fine admitting them if we were not
19 seeking to admit them for the truth of the matter asserted.

20 And we made an agreement on four of those exhibits,
21 that that would work just fine. So we're here today to argue
22 about 11 of the exhibits, it sounds like including this one as
23 well that I just brought up. We need to talk about that.

24 THE COURT: So we're down to 10?

25 MR. CHRISTOPHER: Well, 10 or 11. We can take them in

1 order from Mr. Goldfarb's list.

2 THE COURT: All right. Let me hear one by one.

3 MR. GOLDFARB: Okay. The first group, Your Honor, is a
4 group of four exhibits, and I'll just read them for the record.
5 They are: JD Exhibit 055317, JD 055319, JD 055320, and JD
6 055321.

7 These are a series of documents that were printouts
8 from the website of the North American Quit Line consortium that
9 were shown to Dr. Fiore early in his cross-examination, and the
10 objection is hearsay.

11 THE COURT: And are you seeking to admit them for the
12 truth of what's on those documents?

13 MR. CHRISTOPHER: We are, Your Honor.

14 THE COURT: Well, what types of material is on those
15 documents?

16 MR. CHRISTOPHER: I could hand up the four exhibits to
17 you. Would you like to see them from the website that we used
18 with Dr. Fiore on cross?

19 And, Your Honor, this was -- this is an organization
20 that you may recall Dr. Fiore testified to was a wonderful
21 source -- that was his quote -- a wonderful source of
22 information with respect to information about Quit Lines that
23 exist in the United States today, and so clearly this is a
24 reliable source. In fact, it's used by the CDC as a link for
25 information on Quit Lines nationwide.

1 And we asked Dr. Fiore a series of questions and he
2 agreed, you know, that these statistics were reliable. He had
3 some -- as you may recall on redirect, he had some concerns, and
4 even on cross, that the information in these documents, while
5 accurate, supported some of his opinions on the fact that the
6 Quit Lines were only open from 9 to 5, and that they weren't --
7 that they weren't in all the languages that he wished them to be
8 in. But the fact is that he did not dispute the reliability of
9 this information and, in fact, supported its reliability.

10 MR. GOLDFARB: And, Your Honor, I would say that's a
11 mischaracterization of Dr. Fiore's testimony on that point.

12 He made clear that while it was a good resource to
13 provide information about who has Quit Lines and who doesn't,
14 when you actually got down to the questioning -- and I can read
15 from the transcript if Your Honor is interested.

16 For example, there was an example of the New York State
17 Quit Line that was showed, and if you recall, the website had
18 certain boxes checked for whether services were offered. And
19 Dr. Fiore made clear that while the information was an overview
20 it didn't provide the sort of detail that one would need to
21 truly understand the extent of the services offered. But he
22 agree that the information was on the page.

23 Further -- and that was at transcript cite, Page 21311.

24 Later on --

25 THE COURT: Why doesn't this come in under 803(8) as a

1 record, report, statement, or data compilation in any form of
2 public offices or agencies setting forth the activities of the
3 office or agency or matters observed, et cetera, in regard to
4 criminal cases?

5 MR. GOLDFARB: It's not a public -- it's not --

6 THE COURT: Is this not a public agency?

7 MR. GOLDFARB: It is not, Your Honor.

8 MR. WELLS: No, Your Honor.

9 MR. CHRISTOPHER: It's a link, though, that is relied
10 upon by the CDC is what I represented to the court.

11 MR. GOLDFARB: Your Honor, there are other examples
12 where Dr. Fiore and, in fact, defense counsel in his questioning
13 took issues with the accuracy of the information that was on the
14 site. So these documents should not come in.

15 THE COURT: I don't think this comes in for the truth
16 of it. It is a close question. And, you're right, that CDC
17 refers people to it. That doesn't necessarily overcome the
18 hearsay objection. I don't think it fits within any of the
19 exceptions.

20 I was considering whether it fits within the residual
21 exception which, of course, is a very narrow one, but I don't
22 think it does. So, therefore, that particular exhibit is not
23 going to be admitted for the truth of it.

24 Next.

25 MR. GOLDFARB: And that would go for that group of

1 four, Your Honor?

2 THE COURT: Yes, it would cover the four.

3 MR. GOLDFARB: The next one at issue is JD 055324, and
4 this is a printout or a statement from the Campaign for Tobacco
5 Free Kids titled Medicaid and Medicare Cost and Savings From
6 Covering Tobacco Cessation. It was an analysis of a bill. And
7 again the objection is hearsay.

8 THE COURT: And the joint defendants are moving that
9 in? Are you sure?

10 MR. CHRISTOPHER: We're withdrawing that, Your Honor.

11 THE COURT: I think so. I don't mean to jump to an
12 assumptions, but anyway next one, please.

13 MR. GOLDFARB: Excuse me. The next one is JD 055326.
14 And this is a journal article titled Addressing Tobacco and
15 Managed Care Results of the 2002 Survey. That was used on
16 cross-examination with Dr. Fiore, and again the objection is
17 hearsay.

18 MR. CHRISTOPHER: Your Honor, this is a publication
19 that was -- this was in a publication by the CDC which Dr. Fiore
20 acknowledged and he had some caveats, you may recall, that
21 Mr. Wells discussed with him, and they are on the record, that
22 he felt that it relied on HMO numbers and not on all private
23 health insurance numbers. But he did not have any reason to
24 dispute the accuracy of the underlying article or its
25 statistics, so for that reason it should be admitted.

1 THE COURT: That may be admitted.

2 MR. GOLDFARB: Your Honor, just so the record is clear.

3 This is not -- the authors of this article are not -- they are
4 not CDC authors.

5 THE COURT: It's a CDC study, is it not?

6 MR. GOLDFARB: No, Your Honor. It was by authors who
7 happened -- who published in the journal that's put out by CDC,
8 but they are not CDC authors.

9 MR. CHRISTOPHER: Your Honor, in addition to the fact
10 that it's a CDC publication, Dr. Fiore acknowledged that he had
11 absolutely no reason to dispute the underlying study or the
12 statistics, and that's on the record, and I can read those
13 quotes if you like.

14 THE COURT: That may be admitted then.

15 Next one, please.

16 MR. GOLDFARB: I believe the next one, Your Honor, is
17 JD 055330, and that is a document that defense counsel spent a
18 fair amount of time cross-examining Dr. Fiore on that -- I don't
19 know if Your Honor will recall.

20 THE COURT: I can't see it.

21 MR. GOLDFARB: It presented -- it had a faxed cover
22 line with an OMB stamp on it, and it presented various options,
23 potential options, I suppose, for a smoking cessation
24 initiatives.

25 There was no foundation laid for where this document

1 came from. Dr. Fiore testified there was no -- that there was
2 no information about who it had prepared it or where it had come
3 from, or what authority, under what authority it was written,
4 and so for those reasons it's both hearsay and there's a --

5 THE COURT: I remember the cross.

6 Go ahead, Mr. Wells. I think some journalists who is
7 undoubtedly sitting in the courtroom now described the cross as
8 quote/unquote blistering; is that right?

9 Mr. Wells, I'm sure you read that article, wherever it
10 appeared.

11 MR. WELLS: I'm with the -- Your Honor.

12 But, Your Honor, this document was produced from the
13 files of OMB. I start there. The front page shows it's dated
14 July 21, 2003, and we see the name of the person named Tom.

15 Now, the document that the government has not objected
16 to is the e-mail that's dated July 22, one day later. This is
17 the OMB document.

18 THE COURT: Well, they can't object to that.

19 MR. WELLS: Yes, but they are one and the same. This
20 document I can show you, and that's what I'm about to do.

21 THE COURT: Does the government admit they are one and
22 the same?

23 MR. GOLDFARB: No, Your Honor.

24 I think what counsel may be suggesting is that the --
25 it was an attachment to the e-mail, but that's neither here nor

1 there for purposes of whether it's -- it's a document --

2 MR. WELLS: It goes to the question of weight, Your
3 Honor, and not admissibility. It begins, "Tom." Remember, this
4 is Tom on the front of the document.

5 THE COURT: Right. But there are a few Toms who work
6 for OMB.

7 MR. WELLS: Okay. I added the sheet called summary
8 with the information you requested. Then it goes on and they
9 discuss the document, the proposal for which they have provided
10 cost estimates total \$219 million.

11 The testimony in the record is that the proposals in
12 this document that they do not want to admit, because they are
13 trying to act like it's not a government document, total \$218.5
14 million. It then goes on to discuss the \$10 million with
15 respect to movie trailers, which is also discussed in this
16 document.

17 And, Your Honor, if you look at the date, the fact that
18 it's to the opinion in terms of what OMB is discussing, that it
19 refers specifically to the trailers. This is clearly a
20 government document. They are discussing the proposals. They
21 comment on the proposals. And you just can't separate the
22 document that's in evidence from this document. This is the
23 very document they are talking about.

24 THE COURT: No. 055330 is not admitted. That's all
25 speculation on Mr. Wells' part.

1 Ms. Hightower, you may give this back to whoever gave
2 it to me.

3 Next 1, please.

4 MR. GOLDFARB: The next --

5 THE COURT: Good try, Mr. Wells, but no.

6 MR. GOLDFARB: The next one at issue is JD 055359,
7 which was an article in the Seattle Post Intelligencer, I
8 believe, and the objection is hearsay.

9 THE COURT: The article was where?

10 MR. GOLDFARB: It was in the Seattle Post.

11 THE COURT: Seattle Post.

12 MR. GOLDFARB: I think it's Seattle Post Intelligencer.

13 MR. WELLS: I'll withdraw that article.

14 THE COURT: All right.

15 MR. GOLDFARB: The next one at issue is JD 055362, and
16 Your Honor may recall this was a newsletter from the Group
17 Health Cooperative that included a round table discussion from
18 employees of Group Health talking about some of their
19 activities, and again the objection is hearsay.

20 MR. WELLS: And, Your Honor, I would submit that under
21 the residual hearsay rule this document should be admitted,
22 especially in the context of what took place in this case.

23 The government does not want this document admitted
24 because that's the document that talks about the demographics of
25 the Group Health organization where they talk about our members

1 are middle class, our members are educated, and that's why they
2 do not want it in evidence.

3 This document is the Group Health's own publication.

4 It's a conversation piece with its own employees, talking about
5 its own demographics.

6 And especially in this case, Your Honor, where we
7 started off in the beginning our discovery requests, we wanted
8 to get discovery of other Group Health people, or at least
9 Mr. McAfee I believe was the person I asked for, and Your Honor,
10 based on various reasons, decided not to let us go there.

11 But I think in terms of the circumstances of this case
12 in an effort for the court to keep things moving, the fact that
13 this is an inherently reliable document because it's their
14 employees, I submit that this document should be admitted. And,
15 furthermore, Dr. Fiore testified that he had no reason to
16 question the information in the document.

17 THE COURT: Anything further? Very briefly.

18 MR. GOLDFARB: No, Your Honor. Just that it's a
19 newsletter. The document itself is hearsay and the statements
20 made therein by employees of Group Health is hearsay --

21 THE COURT: There's only one level of hearsay, and
22 that's the statement of the employees, but it certainly does
23 have inherent reliability. There's no reason in the world for
24 them to misrepresent in their own newsletter what their
25 demographics are, and Dr. Fiore didn't question it. So 055362

1 may be admitted.

2 Next.

3 MR. GOLDFARB: I think we are down to, Your Honor,
4 three exhibits that were proffered by the United States on
5 redirect examination, and these are U.S. Exhibit 92138, 92139,
6 and 92140.

7 These are the exhibits that were used to demonstrate,
8 and the redirect examination, that Dr. Fiore had complied with
9 the requirements of the American Journal for Public Health in
10 submitting the action plan for publication in 2000 -- I think it
11 was 2003.

12 The first one was the website statement of the American
13 Journal of Public Health's requirements for author submissions.
14 The second was the letter that Dr. Fiore testified was the
15 letter that he sent along with the article for submission to the
16 American Journal of Public Health. And the third was -- the
17 third exhibit was the attachment to that letter that Dr. Fiore
18 identified as the disclosure of potential conflict information
19 to the American Journal in accordance with its policies.

20 THE COURT: Did he prepare that disclosure letter?

21 MR. GOLDFARB: Yes, he did. He testified that it
22 was -- he testified -- and I have the testimony.

23 THE COURT: He signed off on it, one or the other.

24 MR. GOLDFARB: Yes, Your Honor. He said he recognized
25 the letter as -- he was asked whether he recognized that it was

1 not signed. In fact, the American Journal does electronic
2 submissions, so it's not clear there is a signed copy anywhere.

3 But he was asked whether he recognized it as a copy of
4 the cover letter that was submitted with the article. He
5 testified at Page 21606, yes, it is. It's on our stationery and
6 it's got my nameplate as the author of the letter and he
7 similarly testified with respect to the disclosure.

8 MR. WELLS: Your Honor, this is a fairly serious issue
9 because there --

10 THE COURT: One is off the website. The first exhibit
11 is right off the Journal's website stating -- I believe --
12 stating what its disclosure requirements are. Is that right?

13 MR. WELLS: Yes, Your Honor, and I don't have any
14 objection to that.

15 THE COURT: 92138 is admitted.

16 The second one is, at least according to Mr. Goldfarb,
17 a letter that Dr. Fiore himself sent; correct?

18 MR. WELLS: Well, he testified to that, and the real
19 question -- that's why I say it's a serious issue -- is whether
20 or not he testified truthfully and whether or not there's a
21 fraud being perpetrated on the court.

22 If I can take a second, Your Honor, and give you the
23 background --

24 THE COURT: All right.

25 MR. WELLS: -- of facts.

1 As you recall, I first deposed Dr. Fiore in Madison,
2 Wisconsin on May 5. I asked him about the American Journal
3 article with respect to disclosure of conflicts. He said it was
4 not disclosed. There was no mention in any way, shape or form
5 about, oh, but I sent the letter and they made a mistake.
6 Nothing like that was mentioned. That was May 5.

7 He then testifies May 18 on cross-examination. He
8 notes that there is no disclosure of the conflict. And then
9 Your Honor asked the question, you say, "Isn't the general
10 procedure, or isn't the general requirements for peer-reviewed
11 journals that" -- I lost my place. "That the authors disclosed
12 any financial connections whatsoever that could create even the
13 appearance of a conflict?"

14 And the bottom line is, he then responds to Your Honor.
15 "So this was an oversight. And I don't know why it occurred."

16 I then asked him later on, a couple pages later, about
17 the second article, and he responds about the second article,
18 this article, it did not get included, too, and for that reason
19 it is an oversight. So that's the second article.

20 I then at the conclusion, right as I leave this area,
21 Dr. Fiore states -- this is his testimony -- "In any case, I
22 think your more important point, sir, is that overdisclosure of
23 potential conflicts of interest is appropriate and you've
24 pointed out some examples where I didn't do that."

25 So that's how the cross-examination ended. He had

1 conceded that he didn't do that. He had said to the court he
2 had no reason why the American Journal of Public Health didn't
3 have the disclosures.

4 Then one hour later, the testimony is like day and
5 night, he suddenly says in response to Mr. Brody's question,
6 "And my question is, Dr. Fiore, did you submit a list of authors
7 and affiliations and potential conflicts of interest as you
8 recall being -- as you recall being required by the American
9 Journal of Public Health?"

10 "Answer: Yes, I did."

11 And then he goes on the next page. "Question: Was the
12 letter and the list of potential conflicts of interest sent to
13 the Journal in advance of publication?"

14 "Answer: Yes, it was."

15 So we had just day and night testimony within about
16 60 Minutes. I then stood up -- the witness was excused -- asked
17 that I have some re-examination, because one of the things I was
18 concerned about, I had been given this letter during the
19 redirect, I had not seen it before, but I found it very strange
20 that I was given color letterhead. It actually didn't make
21 sense to me. And it's dated June 18, 2003. In the body of the
22 letter it says, "The affiliations and conflict of interest
23 declarations from all authors are included in an attachment to
24 this cover letter."

25 And as Dr. Fiore testified, he said, Oh, now I send

1 everything. And it has no signature, as Your Honor can see.

2 Now, we went back -- because I'll be honest, I thought
3 the letter was not authentic. We went on the website of
4 Dr. Fiore's group and we were able -- we were only able to find
5 one letterhead from the 2003 period. And one letterhead we were
6 able to find from the website is a different letterhead than
7 what they used in June of 2003.

8 You can see on this letterhead the address is at the
9 bottom, and then on the June 2003 the address is at the top.
10 Now, maybe it's possible they had different letterhead. I don't
11 know because I could only find one.

12 THE COURT: One is in February and one is in June.

13 MR. WELLS: I'm sorry?

14 THE COURT: One letter was in February and one letter
15 was in June.

16 MR. WELLS: That's correct, so it was just one date
17 point I didn't know. So what I did I hired an investigator to
18 go --

19 THE COURT: For this?

20 MR. WELLS: Just to go to the state of Wisconsin
21 because the University of Wisconsin is a public institution, and
22 I asked could we get some letterhead from there, okay, from the
23 public records.

24 They called the government, let them know because the
25 investigator identified himself as working for us. And that was

1 last Monday. On Wednesday, the government gave us its list of
2 documents that it wanted to move in. Interestingly, on the list
3 of documents it wanted to move in it did not include this letter
4 that we're discussing.

5 I found this very strange. And we told the government
6 it was our intention both to move to strike the testimony, we
7 were going to question the authenticity of that letter and we
8 were going to raise everything with the court.

9 The government then did a 180-degree reversal and said,
10 well, now, we're going to move the documents in, having said
11 initially they weren't going to move them in, which I found
12 extraordinarily peculiar. So where we are today is as follows.

13 We will not get from the University of Wisconsin until
14 next Wednesday under the Public Disclosure Act whatever
15 documents they have on file during this 2003 period. And what I
16 would like is the following, Your Honor.

17 I would like that you defer ruling on this issue until
18 next week until we hear from the University of Wisconsin, and I
19 also would like you to ask directly of the government is whether
20 the government has any reason to believe that the letter we have
21 been discussing, the letterhead, is not the 2003 letterhead. I
22 have no idea one way or the other.

23 We're just trying to run this down, because the
24 testimony is so radically different from what was in the
25 deposition, what was in the cross-examination, and then

1 60 minutes later we are in this, where "oh, yes, I sent it." So
2 that is where we are, Your Honor.

3 THE COURT: One of you.

4 MR. BRODY: Well, Mr. Goldfarb can address the
5 substance of the characterizations of the testimony which we
6 think are incomplete and inaccurate as they relate to both the
7 deposition and to the cross-examination.

8 I just wanted to correct one statement that Mr. Wells
9 made about the purported disclosure by these investigators. The
10 way that we learned about it was that the -- there were
11 investigators showed up at two places in Madison, Wisconsin,
12 last week: One was the Wisconsin Medical Society and the other
13 was the State Department of Health, demanding to see all letters
14 on CTRI letterhead between 2000 and 2005, between CTRI and the
15 Wisconsin Medical Society, in one case between CTRI and the
16 State Department of Health.

17 The investigators were asked who they were there on
18 behalf of. They refused to say. They were told by the
19 Wisconsin Medical Society, do you -- you know, the Wisconsin
20 Medical Society is a private organization. The Medical Society
21 said, Well, look, if you -- it was asked by the investigators,
22 "If we tell you who we're working for, will you give us the
23 documents?" Because there's no equivalent of FOIA for a private
24 organization.

25 And they said, Well, you know, it's possible, unlikely

1 but possible. And they said, Okay. It was only then they said,
2 "Okay, we are here on behalf of the tobacco industry."
3 Ultimately, a disclosure was made to the Department of Health in
4 Wisconsin, from the information I have, and the request was made
5 that Dr. Fiore not be told that the Center was being
6 investigated by these investigators, and that if somebody at the
7 Department of Health in the state of Wisconsin knew Dr. Fiore,
8 that they not tell him that this investigation was going on.

9 The only reason that we were able to find out about
10 this was because Madison, Wisconsin is not a big place, and
11 obviously Dr. Fiore is well respected in that community and does
12 a lot of work that involves a number of organizations and
13 agencies, and somebody called him and said, you know, "Mike,
14 there are investigators trying to get correspondence from the
15 Center." And he told us and we were then able to get in contact
16 with the State Department of Health.

17 So just to correct that's what happened. I will say
18 that it is not something that is at all comforting to the people
19 who work at the Center, to think that they are being
20 investigated by the tobacco industry.

21 And I know from the reports that I've gotten, that
22 Madison being a small community, word has gotten out and the
23 people there are worried that there may be some effort, given
24 the 5-year request that was made for correspondence, to
25 interfere with their funding. Seventy people work there. They

1 are feeling, wondering if they feel like their jobs are going to
2 be threatened in the future.

3 So it has not been a minor issue, this private
4 investigator showing up, one from Atlanta and I believe one from
5 Madison, to root out through various organizations in an attempt
6 to find documents.

7 But I'll let Mr. Goldfarb address what I believe a very
8 important issue for the court, which is the mischaracterization
9 or omission of certain testimony on the issue to try to make a
10 bigger issue than exists, when the only testimony in the record
11 is the testimony about the documents themselves.

12 THE COURT: Mr. Goldfarb.

13 MR. GOLDFARB: Just quickly, Your Honor. I do think
14 that in terms of -- there just is no -- if you look at the
15 testimony in deposition, on direct and redirect -- on cross and
16 redirect there is no inconsistency. It is clear from the
17 deposition testimony, it is clear from the cross-examination
18 testimony, that the questioning and the answers of Dr. Fiore
19 concerned what was on the face of those journal articles.

20 And if I can read from Page 310 -- well, Your Honor, I
21 don't want to take the time to read page after page of his
22 deposition, but he was shown the article from the American
23 Journal of Public Health by defense counsel. It was the
24 National Action Plan journal.

25 And then he was asked, "Do you disclose anywhere in the

1 article that you had a financial relationship with
2 GlaxoSmithKline, the company that is involved in manufacturing
3 smoking cessation drugs?

4 "Answer: Did I disclose that in the article?

5 "Question: Yes, sir.

6 "Answer: I do not -- I don't see a list of disclosure
7 in this article. I will, though, alert you to the National
8 Action Plan."

9 Dr. Fiore in his answer then goes to read the
10 disclosure that appears on the face of the National Action Plan.

11 "Question: Just so the record is clear you were just
12 raiding from the National Action Plan; correct?

13 "Answer: Correct.

14 "But in terms of this article that was published in a
15 Journal, unless somebody went back and actually read the
16 conflict section of the National Action Plan, they would not
17 know that you had served as a consultant for GlaxoSmithKline;
18 correct?

19 "Answer: That specific information is not in this
20 article, that is correct."

21 So then we go to the cross-examination, and this is at
22 Page 21537 of the transcript.

23 And Mr. Wells introduced the National Action Plan,
24 American Journal of Public Health article or -- excuse me -- the
25 article in the American Journal that summarized the action plan.

1 The question was asked at line 18, "And in that article
2 published in the Journal you did not disclose anywhere that you
3 had financial relationships with GlaxoSmithKlein and other
4 pharmaceutical companies that manufacture smoking cessation
5 treatments; correct:

6 "Answer: It's not listed in there, but as I told you
7 in the deposition, it is explicitly stated in the National
8 Action Plan which is referenced and served as the basis for the
9 American Journal of Public Health article."

10 The next page of the transcript, 21538 --

11 THE COURT: Mr. Goldfarb, I think --

12 MR. GOLDFARB: (Interrupting) Your Honor, it's clear,
13 every single question goes to what was on the face of the
14 article. Dr. Fiore acknowledged and, as you saw from the
15 testimony, believed it to be an oversight that the disclosure
16 was not in the face of article, but it is plain from the
17 testimony on redirect that he complied with the American
18 Journal's requirements and provided, both through the cover
19 letter and the attached conflict, that he complied exactly with
20 what the Journal requirements were at the time he submitted the
21 article.

22 MR. WELLS: Your Honor, could I just say one thing?

23 We get here in court arguing about this really because
24 there's no question. I found it extraordinary that when the
25 government submitted its list of documents that it was going to

1 introduce, it did not submit that letter.

2 Now, I asked if the government would represent to the
3 court that it was its understanding as it stands here today that
4 the letterhead on which that letter is printed out was in fact
5 the June 2003 letterhead, because I think if they have different
6 information they are obligated ethically to set it forth.

7 But I think it's clear from the cross-examination these
8 were the issues in play. This is what, Your Honor even asked
9 the question. He said I don't know. The notion that an hour
10 later, "Oh, yes, I sent it all." It was just like day and
11 night.

12 But we went out to get, under the public records law,
13 just to try to get the correspondence. The one piece we got off
14 the website certainly shows, at least between February and June,
15 that there is different letterhead.

16 THE COURT: My ruling is as follows, everybody.

17 92139 and 40 are admitted. If the defendants come up
18 with anything that they really think is worth bringing to my
19 attention, they can file a motion about it.

20 I would make two points.

21 Number 1, neither the letter nor the disclosure is, in
22 fact, hearsay under 801(c).

23 And Number 2, the fact that I admit the letter and the
24 disclosure certainly doesn't necessarily mean that I'm crediting
25 Dr. Fiore's explanation. However, nobody should jump to any

1 conclusions, either, that I'm not going to credit his
2 explanation. Without making a final determination, I really
3 find it hard to believe that that man would commit perjury in a
4 Federal Court over something of this nature. But that's not a
5 final ruling. Obviously, I haven't reread things.

6 But the exhibits come in subject to any extraordinary
7 motion the government wants to make -- not the government, the
8 joint defendants.

9 MR. WELLS: Thank you, Your Honor.

10 THE COURT: Do we still have one more exhibit,
11 everybody?

12 MR. GOLDFARB: I think that's it for Dr. Fiore.

13 THE COURT: All right. Well, finally. I don't know if
14 we can cover -- who is the one remaining person we were going to
15 try to cover?

16 MR. BERNICK: Myers.

17 THE COURT: How many exhibits?

18 MR. BERNICK: I don't think it's that bad.

19 MS. EUBANKS: None of the -- all of the exhibits are
20 objected to, Your Honor. I don't know whether that's bad or
21 good, but Mr. Schwind will be addressing it.

22 THE COURT: What numbers? How many are we talking
23 about?

24 MR. BERNICK: There are a total of one, two, that we
25 object to that the government is proffering.

1 Mr. Frederick also has the Formula 1 issue. And then
2 with respect to the documents that we are proffering, we have
3 two summary demonstratives and then a total of, I think, three
4 or four or five backup documents. But basically you're really
5 talking about the demonstratives and there are two of them.

6 THE COURT: No, I'm not going to do those today,
7 everybody. It's clear to me it will take a while. I do have
8 that file. We will do that first when we come back to these.

9 MR. SCHWIND: Your Honor --

10 THE COURT: I'm just thinking about Monday, and I don't
11 know whether counsel were planning to be in town or not. If we
12 can get more -- well, if we can get more than one witness in
13 shape for decisions on exhibits, I would consider doing them
14 Monday afternoon.

15 Monday morning I made some commitments and, of course,
16 all of this is subject to Dr. Carlton, in any event, and counsel
17 may not want to do that because of wanting to prepare for
18 closing arguments.

19 Mr. Schwind, what were you going to say?

20 MR. SCHWIND: Yes, Your Honor. Philip Morris has, of
21 course the court may be aware, transformed its objections to the
22 Myers' exhibits into a separate freestanding motion. We would
23 like to --

24 THE COURT: I'm aware of the motion, I haven't looked
25 at it. It's not ripe.

1 MR. SCHWIND: Correct, Your Honor. The United States
2 has not responded.

3 We would be prepared to oppose that motion, I guess,
4 orally, if that would speed the process along, and we do feel
5 that the court addressed those objections as part of the
6 defendants' objections on the front end of Myers' testimony.
7 But we, again, just to try to be more efficient, we would like
8 to address those objections when we address Mr. Bernick's
9 objections.

10 MR. BERNICK: I'm completely indifferent about timing.
11 I think that I will be here in any event on Monday getting ready
12 for closing argument. Closing argument, God willing, so I'll be
13 happy to do it on Monday afternoon.

14 THE COURT: Mr. Frederick, you can be here?

15 MR. FREDERICK: Absolutely, Your Honor. I can be here.
16 And I just want to be clear, the motion goes to the testimony as
17 well as the exhibits.

18 THE COURT: Yes, I knew that. But let me find out what
19 other witness counsel will be ready to address on Monday
20 afternoon.

21 MR. BRODY: Your Honor, I would hope to start that we
22 would be ready to address Dr. Healton on Monday afternoon, and
23 beyond that, as I said, we're trying to work things out with
24 respect to Dr. Wyant and Dr. Gruber and I expect we will be
25 submitting agreed upon orders as to those witnesses.

1 As to Dr. Weil and Dr. Wittes I don't know yet. It
2 will depend on what each side ultimately says they wish to have
3 admitted. So I don't know if I can speak much beyond saying
4 that we would be ready on Mr. Myers and Dr. Healton, although
5 I'd like to consult with Ms. Eubanks as to the impact of a
6 Monday afternoon session, assuming Dr. Carlton does not carry
7 over, on our preparations for closing argument.

8 THE COURT: All right. I will leave the afternoon open
9 for everybody. If it turns out that that is too much of an
10 interference with preparation, I certainly have other things to
11 do, and if we are going to come together on Monday afternoon I
12 would make it at 2:00 o'clock. We certainly can take care of --
13 the exhibits relating to two witnesses by sitting at 2:00
14 o'clock on the afternoon.

15 And if we get those two people done and you're able to
16 work out the few you've talked about, then there would not be
17 many left at all, at least not according to my calculations.

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

19 THE COURT: All right, everyone, 9:30 tomorrow morning.

20 (Proceedings concluded at 4:38 p.m.)

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8 *****
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11
12 CERTIFICATE13 I, EDWARD N. HAWKINS, Official Court Reporter, certify
14 that the foregoing pages are a correct transcript from the
15 record of proceedings in the above-entitled matter.16
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18 Edward N. Hawkins, RMR
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