

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	May 27, 2005
Plaintiff,	:	
	:	9:30 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 109

TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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by computer-aided transcription.

25

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

2 THE COURT: Good morning, everybody.

3 This is United States of America versus Philip Morris.
4 CA 99-2496. And I believe we are ready for the defendants' next
5 witness.

6 MR. BERNICK: That's right, Your Honor. Mr. Webb had a
7 very, very short matter that he wanted to take up. It would be
8 appropriate in advance.

9 MR. WEBB: Very briefly, Your Honor, this is what it
10 relates to.

11 When we addressed the court last week about closing
12 argument, I think both sides had agreed that six hours would
13 seem -- we said we have three days to do it in, but we thought
14 each side could do it in six hours, which is clearly less than
15 three days.

16 I've been trying to talk to the defendants. We're
17 trying to divide time between seven different defendants and,
18 quite frankly, I'm having some issues.

19 Here is what I'm respectfully requesting. That we
20 simply extend the time from six to six and a half hours, and
21 then we can allocate time in a way that we're comfortable with.
22 I think, after a 9-month trial, that it's a fairly reasonable
23 request. And I don't know if the government objects to it or
24 not.

25 MS. EUBANKS: If each side gets six and a half hours,

1 that's fine.

2 One of the things that we haven't talked about in terms
3 of the timing, but we did allude to at one of the discussions
4 was that because the United States does want to do rebuttal,
5 that with the split of the three days, it would be our
6 preference that defendants get as much of their presentation in
7 before the third day as possible.

8 THE COURT: I understand that. Tell me how you are
9 going to do your time first.

10 MS. EUBANKS: Well, Your Honor, what we were
11 anticipating when we had the six hours was a split of five, plus
12 one for rebuttal. But if we get six and a half, I think we may
13 want to re-evaluate whether we want just one for rebuttal or one
14 and 15, and how we allocate the extra 30 minutes, if that's what
15 happens.

16 But what we would anticipate is taking five hours the
17 first day, and what we thought would be appropriate is for
18 defendants to, on the second day, take their five hours and then
19 the extra hour and an and a half, if that's what it's going to
20 be, on the third day come forward with that and then have the
21 government's one hour rebuttal. That would be the schedule.

22 THE COURT: So it be five, five, and then on the third
23 day one and a half, one and a half.

24 Is that agreeable, Mr. Webb?

25 MR. WEBB: Could I just consult at some point with my

1 co-counsel about this and maybe interact with Ms. Eubanks on
2 that issue this morning? I just haven't talked to my co-counsel
3 on that issue. And we will try to do it this morning and report
4 back to the court.

5 THE COURT: That's fine. We can either talk about it
6 after or before the lunch recess, but before the end of the day.

7 MR. WEBB: That's fine, Your Honor.

8 MS. EUBANKS: I believe Mr. Wise has a matter, too,
9 Your Honor.

10 MR. WISE: I did, Your Honor. I just have an objection
11 to raise before we begin.

12 We received some new demonstratives last night at about
13 11:30. As near as we can tell -- well, I received them at
14 11:30. As near as we can tell, they were done sometime last
15 evening. We didn't get a call or we weren't alerted they were
16 coming.

17 My concern is they are either a material change that we
18 are prejudiced by because we haven't had time to prepare in
19 response to them or they are simply an attempt to recast the
20 demonstrative in such a way that it might sort of get in under
21 the court's ruling yesterday.

22 I think it's important that we have on the record that
23 we're objecting to these new demonstratives, in large part for
24 the reasons that were stated yesterday.

25 We don't think they are permissible under court's

1 ruling, and I reserve the right to object.

2 THE COURT: Let me ask one question to begin with.

3 This is a yes or no, Mr. Bernick.

4 Are you going to be moving the demonstratives in?

5 MR. BERNICK: No.

6 THE COURT: Let's proceed. And they -- I mean, I
7 haven't seen them. Were they delivered to me at all? I don't
8 think so.

9 MR. BERNICK: I don't know that they were delivered to
10 Your Honor. They were delivered to Mr. Wise by e-mail at 6:33
11 PM. It's right on our computer here.

12 MR. WISE: The department was not receiving external
13 e-mails because of a server problem. If we had gotten a call we
14 could have arranged some other way.

15 THE COURT: But they didn't know that, Mr. Wise.

16 Okay. Please, let's proceed.

17 THE DEPUTY CLERK: Please remain standing and raise
18 your right hand.

19 DANIEL R. FISCHER, Defendant's witness, SWORN

20 THE DEPUTY CLERK: You may be seated.

21 DIRECT EXAMINATION

22 BY MR. BERNICK:

23 Q. Good morning, Professor Fischer.

24 Do you have before you the written direct examination
25 of Daniel R. Fischer submitted by the joint defendants pursuant

1 to Order Number 471?

2 A. I do.

3 Q. Have you had an opportunity to review it carefully to
4 determine if there are any changes that need to be made?

5 A. I have.

6 Q. And are there any changes to be made?

7 A. No.

8 Q. Do you adopt that written direct examination as your written
9 direct examination in this case?

10 A. I do.

11 MR. BERNICK: Your Honor, we proffer that examination.
12 We also proffer Professor Fischel as an expert in economics and
13 the law.

14 THE COURT: That may be admitted subject to the rulings
15 I made yesterday.

16 Do you want to raise any objection on the expertise
17 issue or any issue?

18 MR. WISE: Yes, Your Honor.

19 We object to the proffer of Professor Fischel's
20 expertise and ask the court to defer ruling until after the
21 examination and perhaps further submissions in line with what
22 the court allowed Mr. Webb to submit with Dr. Bazerman.

23 THE COURT: I will defer then at this time.

24 BY MR. BERNICK:

25 Q. Professor Fischel, we have an opportunity to conduct a live

1 examination for a little while this morning, so let's proceed
2 with that. I want to begin with the hypothetical question --
3 actually, with an hypothetical question.

4 MR. BERNICK: We had a discussion internally last
5 night, Your Honor, about whether you say "a" hypothetical or
6 "an" hypothetical and it's clearly "an" hypothetical. So,
7 that's what's up there, is "an hypothetical."

8 Q. I want you to assume that a train is coming down a track and
9 the track has a fork in it, or two paths for the track to verge,
10 and there's a switch, and very conveniently the CEO of a major
11 corporation is positioned at the ready to throw the switch.

12 And I further want you to assume in the hypothetical
13 that, much less conveniently for them, there are five people
14 situated on one fork of the track and a poor soul on the other
15 fork of the track, none of them able to move so that the CEO
16 must make on his own a life-or-death decision or a
17 death-or-death decision depending upon how you view it.

18 Do you have that hypothetical in mind?

19 A. I do.

20 Q. Now, in your work as I've looked through the direct
21 examination you've studied corporate management decisions for
22 many years. Is that fair?

23 A. Yes.

24 Q. Have you published in the area?

25 A. Yes, quite extensively.

1 Q. Have you also analyzed actual real world decisions in the
2 litigation context?

3 A. Yes, that's what my work is focused on.

4 Q. Now, in your experience, both in your published work, your
5 academic work and also in connection with your litigation work,
6 have you ever seen or read about an executive management
7 decision of the nature that I've described in the hypothetical?

8 MR. WISE: Your Honor, I'm going to object.

9 The question, "now in your experience, both in your
10 published work, your academic work, litigation," first of all,
11 it's certainly compound, and I think it's vague.

12 I'm having trouble understanding how the hypothetical,
13 even when I heard Mr. Bernick saying it sort of in the way he
14 did, how the hypothetical is even relevant. It's almost to the
15 point of being sort of a joke it's so contrived phrased in that
16 way.

17 THE COURT: Well, the objection is overruled.

18 First of all, it's not a compound question. And second
19 of all, its relevance is obvious in terms of this witness's
20 experience with corporate behavior.

21 Go ahead, please.

22 BY MR. BERNICK:

23 Q. Do you have the question in mind, Professor Fischel?

24 In all of your experience have you ever seen or read
25 about a decision of the nature that we've described in the

1 hypothetical?

2 A. No. I think the hypothetical would be a completely
3 unrealistic description of decision making with respect to a
4 decision of any magnitude in a modern business enterprise of any
5 scale.

6 Q. Do you have a demonstrative, J-DEM 010425, that you've put
7 together in order to compare that hypothetical to the business
8 decisions that you've become familiar with during the course of
9 your work?

10 A. I do.

11 MR. BERNICK: And let me be clear, Your Honor.

12 There was a revised version of this that was sent
13 through early last evening that, by reason of Your Honor's
14 rulings yesterday, simply replaced the label for the first one.

15 Then based upon Professor Fischel's further review,
16 added "prior experience" to the second column, and then you will
17 also see that that one change carries over to the third column.
18 But that's the nature of the change that was made.

19 THE COURT: And this is revised from what defendants
20 had earlier submitted to government?

21 MR. BERNICK: That's correct, in those two respects
22 alone.

23 MR. WISE: I'm going to renew my objection, Your Honor,
24 both for the reasons I gave this morning and for the reasons I
25 gave on the record yesterday.

1 THE COURT: The objection is overruled.

2 BY MR. BERNICK:

3 Q. Using the hypothetical and your own knowledge, Professor
4 Fischel, can you explain to us the comparison that you're
5 drawing between the hypothetical that we laid out and business
6 decisions as you have studied them, become familiar with them
7 during the course of your work at both academic and litigation?

8 A. Well, I think the list of bullet points summarizes some of
9 the significant differences between business decisions in the
10 real world and the conditions in the hypothetical.

11 Whereas, the hypothetical has a single decision maker,
12 the one individual set of contrived or at least unrealistic
13 facts which don't occur in a business environment.

14 In the real world, first of all, you have multiple
15 decision makers. In a modern corporation a decision of any
16 complexity would be made by some combination of executives,
17 directors, investors, unions or other labor representatives,
18 possibly interaction with consumers, specialists of various
19 types: financial specialists, legal specialists, marketing
20 specialists, technical specialist and countless others,
21 depending on what the issue happen to be. And it would be as a
22 result of input from all those different groups going up the
23 chain of decision making that a decision would ultimately be
24 made.

25 Complex business situations. I think the paren "See

1 case studies". One of the reasons that there are articles
2 written, or even books written, business school curriculums
3 designed around case studies is precisely because complex
4 business decisions in the real world involve many different
5 factors, a complex weighing of costs and benefits, an
6 interaction between issues that are internal to the firm and the
7 external environment, the regulatory environment, public
8 opinion, advertising, public relations, and the like. And many
9 business decisions are studied for years on end and written
10 about and taught in curriculums precisely because they are so
11 complex and so different from the hypothetical.

12 Governance framework. Every modern corporation has an
13 extensive governance framework with a majority of independent
14 directors, sophisticated committee structure, with an audit
15 committee, a nominating committee, a compensation committee,
16 institutional investors, a general counsel's office, a
17 compliance department.

18 And again all of these different organs of the firm
19 interact to ensure that the decisions on the business side are
20 consistent with the firm's obligations on the compliance side.
21 And again it's an interaction among many different actors in a
22 complex and sophisticated way.

23 Financial accountability. Very important difference
24 between the real world example and the hypothetical. In the
25 real world, firms have analysts who are following the firm and

1 tracking their business decisions. There's rating agencies that
2 study the financial condition of the firm in terms of the terms
3 in which the government -- the firm, rather, can borrow money.

4 There are sophisticated lenders, banks and other
5 financial institutions. There's compensation structures within
6 the firm. There are large investors who are monitoring the
7 firm's performance.

8 And in the real world for all those reasons decision
9 makers know that there is a price tag associated with decisions
10 that they make so that good decisions, decisions that make good
11 business sense and don't get the firm into trouble with either
12 litigation or regulatory intervention, are rewarded; and
13 conversely, bad decisions, decisions that are inferior from a
14 business point of view or result in the firm getting embroiled
15 in costly legal disputes or regulatory disputes or result in
16 legislative intervention, those decisions are penalized in the
17 real world.

18 And, finally, the last significant difference between
19 decision making in the real world and the hypothetical is that
20 people who succeed in the real world typically are not making
21 decisions for the first time. They have experience. They've
22 proven their ability to make complex decisions other time.
23 They've risen through the ranks. They've learned from mistakes.

24 There's also checks and balances within the firm so
25 that if one person does not have experience, other people may

1 have experience in a particular area. And again, that
2 experience is another kind of fundamental difference between the
3 hypothetical and the real world because, as in most things in
4 life, people tend to get better at doing a certain task when
5 they have experience doing it.

6 Q. I want to turn from that general description to talk about a
7 certain kind of business decision for a little bit and then we
8 will push on.

9 We are here to talk about remedies, as I'm sure you're
10 aware, and I want to talk about those business decisions that
11 are focused on legal compliance.

12 Is there another portion of J-DEM 010426 that talks
13 about the factors that are involved in compliance-related
14 decisions?

15 A. Yes.

16 Q. Could you just briefly tell us whether or not, or to what
17 extent compliance decisions are either the same or different
18 from the kinds of business decisions that you have just finished
19 describing for the court?

20 A. Well, they are similar in terms of the complexity of the
21 decision making process within the firm, but there are now
22 additional actors that have to be taken into account, and that's
23 why there's the bottom entry: Judicial and regulatory
24 proceedings.

25 Namely, the decisions that firms make are monitored by

1 judges, obviously. They are monitored by regulatory agencies.
2 They are monitored by Congress. And that is an additional set
3 of actors that both have to be taken into account before
4 decisions are made by the complex interaction of individuals
5 that I described earlier as well as a remedy for misconduct by
6 firms when misconduct occurs.

7 Q. Let me ask you this, Professor Fischel.

8 In all the work that you've done over the years, both
9 academic and in litigation, the hypothetical that we posed and
10 is briefly portrayed -- pictorially portrayed in the
11 demonstrative, is that hypothetical one which would have been
12 illuminating for you in any of the work that you've done?

13 MR. WISE: I'm going to object, Your Honor.

14 Again, I think to the extent we are referring to
15 Dr. Bazerman's experiment --

16 THE COURT: Sustained.

17 BY MR. BERNICK:

18 Q. Professor Fischel, I want to focus more closely on a
19 particular kind of decision going even beyond compliance which
20 is a decision to remove a prominent member of management.

21 Have you done -- have you and your firm at your
22 direction done a survey regarding decisions to remove members of
23 management?

24 A. Yes, I have.

25 Q. Could you describe for the court the nature of that survey,

1 please?

2 A. Yes.

3 I conducted a survey, with the assistance of other
4 members of my firm, of analyzing during the period from 2000 to
5 2005 situations where senior executives of public corporations
6 were removed both as a result of allegations or findings of
7 misconduct, or alternatively for other reasons such as poor
8 performance or whatever other miscellaneous reasons occur to
9 prompt the removal.

10 THE COURT: Did your survey cover only financial
11 misconduct or personal misconduct?

12 THE WITNESS: It covered all causes of removal,
13 including misconduct, other than financial misconduct, Your
14 Honor.

15 BY MR. BERNICK:

16 Q. Showing you J-DEM 010418. Is this a compilation of the
17 results of the survey?

18 A. It is. And just -- if I could just further respond to the
19 court's question.

20 If you look at just on the first page, item 3, the
21 recent case of Boeing would be a classic example of a CEO being
22 forced to resign because of personal indiscretions or perceived
23 personal indiscretions as opposed to any kind of financial
24 misconduct.

25 MR. BERNICK: I've got on the screen, Your Honor, the

1 entry relating to that.

2 Q. That was Harry Stonecipher who was long time CEO and
3 prominent player of Boeing?

4 A. Correct.

5 Q. And what specifically was the issue there that resulted in
6 his being forced out?

7 A. My understanding is that he had some kind of romantic --
8 secret romantic relationship which violated company policy and
9 was told that he had to resign.

10 Q. Based upon this survey, what learning do you derive from
11 that?

12 THE COURT: In all fairness to the company, he was also
13 married at the same time, wasn't he?

14 THE WITNESS: Yes. Yes, Your Honor. I didn't mean to
15 suggest the contrary, Your Honor.

16 BY MR. BERNICK:

17 Q. Professor Fischel, based on that survey, what learning did
18 you derive of interest to your testimony from the survey?

19 A. What the survey demonstrated to me was in terms of the
20 complex decision making that I described earlier; that there are
21 these decision making methodologies within a firm, interaction
22 between various groups that are a powerful check on the
23 discretion of the chief executive.

24 And the hypothetical again, there's only one decision
25 maker and the decision maker in the hypothetical has absolute

1 discretion to decide one way or another way.

2 What the survey demonstrates in the real world, there's
3 not just one decision maker, and, in fact, there's sufficient
4 power as a check on the powerful decision makers, that in
5 circumstances where either the board or some other group decides
6 that there needs to be replacement of the chief executive or
7 other senior executive, that's what occurs.

8 Q. I want to go to another item on this survey and spend a few
9 minutes with it and then we will wrap up. And that item relates
10 to, the very first one, to AIG, American International Group,
11 and Maurice Greenberg, the executive in his position as
12 chairman, and it discusses basically what happened at one point
13 in time with respect to Mr. Greenberg.

14 Are you familiar with, in general terms based on
15 newspaper coverage, are you familiar with the facts of that
16 situation?

17 A. I am.

18 Q. I just want to spend a couple of minutes.

19 AIG is the company of interest?

20 A. Correct.

21 Q. I'm assuming that AIG had management?

22 A. Yeah, it had a complicated -- or has had a complicated
23 corporate structure, but certainly had management.

24 Q. Was Mr. Greenberg actually part of management?

25 A. Yes. He was the CEO.

1 Q. So we will put him here. Did and does AIG also have a board
2 of directors?

3 A. Yes. It has a very sophisticated board of directors with a
4 majority of independent directors.

5 Q. Okay. So we have both the independent -- I should probably
6 have said "O" for outside. We have the management directors.

7 A. Correct.

8 Q. Again, was Mr. Greenberg -- was Mr. Greenberg on the board?

9 A. Yes.

10 Q. Now, when it comes to the ownership of AIG, were there
11 entities that were major shareholders of AIG?

12 A. Yeah. There were three Star entities that were also
13 controlled by Mr. Greenberg.

14 Q. We will put Star 1, Star 2, Star 3. And roughly what was
15 the ownership position of the three Star entities?

16 A. I think they held a little bit over 15 percent of the
17 outstanding stock of AIG.

18 Q. Did Mr. Greenberg also have a personal stake of his own in
19 AIG itself?

20 A. He did. He had a very large stake in the Star entities and
21 then he also had a very significant stake, over a million
22 shares, in AIG itself.

23 Q. Did these Star entities have boards?

24 A. Yes, they did.

25 Q. Was Mr. Greenberg on those boards?

1 A. Yes.

2 MR. WISE: I'm going to object. Mr. Bernick is leading
3 the witness through this diagram. The last half-dozen questions
4 have been leading.

5 THE COURT: Oh, they have been, Mr. Wise, and
6 technically your objection is well taken, but obviously the
7 witness knows the fact. We are just moving along a little more
8 quickly. So there's nothing prejudicial right now.

9 BY MR. BERNICK:

10 Q. Based upon your experience, could you just characterize the
11 nature of Mr. Greenberg's role? That is, to what extent he was
12 a prominent player in the affairs of AIG.

13 A. Well, he was the founder and clearly the dominant
14 personality both at AIG and at the three Star entities that had
15 the 15 percent ownership interest in AIG.

16 Q. Beyond the management of AIG, as this situation unfolded,
17 were there people on the outside who became -- or organizations
18 on the outside that also became players in this process?

19 A. Yes, many.

20 Mr. Greenberg hired outside counsel, the independent
21 directors hired outside counsel, the board hired outside
22 counsel.

23 There was a regulatory intervention by Eliot Spitzer.
24 Warren Buffett got involved because of a transaction alleged to
25 be questionable between AIG and Buffett controlled entity,

1 Berkshire Hathaway.

2 And, in addition to that, there were sort of
3 representatives of various groups that were involved in complex
4 negotiations. Pete Peterson from Lehman Brothers and a variety
5 of others.

6 Q. What about the financial markets? Did they also play a role
7 in this process?

8 A. Yes, a huge role because of the various groups that I
9 mentioned before: analysts, rating agencies. There were also a
10 number of other large investors. AIG's largest investor is
11 Fidelity Group, a very powerful institutional investor.

12 And obviously, the financial markets and the various
13 constituents of the financial markets played a very active role
14 in monitoring the situation at all points in time, still are.

15 MR. BERNICK: I should note parenthetically, Your
16 Honor, that the fact of Warren Buffett is involved in the
17 situation I will represent to the court had no connection
18 whatsoever with Mr. Wells' hypothetical on whether Mr. Buffett's
19 insurance coverage includes cessation. If you remember the
20 questions. We did not converse on this subject at all.

21 Q. In this kind of structure, Professor Fischel, does any one
22 individual have the ability to act unilaterally?

23 A. Obviously not. If anybody did, it would have been
24 Mr. Greenberg himself, but as my exhibit demonstrates, and I
25 think is well known in current events, he was pushed out as a

1 result of the joint decision making of all the other actors.

2 Q. Where you have a situation that becomes this important and
3 this number of people on the outside are looking in -- I suppose
4 we ought to add the press here. Has the press been focused on
5 the situation?

6 A. Yes. Obviously, there are stories virtually every day or
7 multiple stories virtually every day.

8 Q. What happens to transparency?

9 A. I think in a situation like this, transparency is enhanced.
10 Every move is so closely watched and so closely scrutinized,
11 there's -- when you get to this stage, when the stakes are so
12 high, transparency is the greatest, and the actors make sure
13 that that's the case.

14 Q. What happened to Mr. Greenberg?

15 A. He was, in effect, forced to resign as a result of pressure
16 from the independent directors and Eliot Spitzer and currently
17 the subject of various, according to the press, civil and
18 criminal investigations.

19 Q. I want to use this as a bridge to talk about this last
20 subject and from this point of view I want to go to J-DEM
21 010423. The court previously has seen these scales and --

22 MR. BERNICK: Your Honor, we did modify this graphic so
23 that there's no reference to any prior testimony. So we're just
24 going to take it straight with Professor Fischel.

25 Q. And we have here incentives for business decisions. During

1 the course of your career and your work, both academic and
2 litigation represented, have you analyzed incentives for
3 business decisions?

4 A. Yes, extensively.

5 Q. I've got a series of incentives or possible incentives I'm
6 going to ask you about, and my questions are all going to go to
7 this.

8 We have a scale that has compliance with the law on one
9 side and a scale that says noncompliance on the other.

10 And my questions are going to be how do these various
11 incentives that we're going to talk about weigh in the context
12 where business decisions are made in the multifactorial world
13 that you've just described? That is within the corporate
14 structure, what happens to these incentives?

15 Are you with me?

16 A. I am.

17 Q. Threat of lawsuits, where does that go? Is that an
18 incentive for compliance or noncompliance?

19 A. Compliance, obviously.

20 Q. Internal governance mechanisms?

21 A. The same. That's one of the reasons that internal
22 governance mechanisms exist.

23 Q. Watchdog groups?

24 A. Again that's -- they are functioned to, among other things,
25 to ensure compliance.

1 Q. Threat of government regulations?

2 A. Obviously goes on the compliance side.

3 Q. "Do the right thing."

4 A. Compliance.

5 Q. Okay. Let's talk about some others and I want to focus on
6 these a little bit, perhaps, less self-evident.

7 Does market share as an incentive play a role in
8 business decisions?

9 A. Yes, frequently a big role.

10 Q. Shareholder value, does that also play a role in business
11 decisions?

12 A. Yes, very much so.

13 Q. Tell me how shareholder value, maximizing shareholder value,
14 relates in the corporate context as you've described it to
15 compliance or noncompliance.

16 A. Well, in the modern environment many large firms have been
17 really penalized in the marketplace. Tobacco industry being an
18 example. But there are many other examples of firms whose value
19 is sufficiently lower as a result of litigation and regulatory
20 problems that the firms make compliance and avoidance of future
21 problems one of their highest priorities.

22 So I would say in the current world in which we live
23 for a complex business entities, maximizing shareholder value
24 very much goes on the compliance side.

25 Q. What about market share? Is that another incentive for

1 business decisions?

2 A. Yes, it's the same point, because if your value is crippled
3 by being embroiled in legal and regulatory proceedings, that
4 obviously has an adverse impact on market share.

5 Q. If we talked about stock options profits and bonuses and
6 incentives, would the analysis be the same?

7 A. Exactly the same.

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

9 THE COURT: All right. Counsel, please.

10 MR. WISE: May I have just a moment, Your Honor?

11 (Pause)

12 Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. WISE: Leo Wise for the United States.

15 CROSS-EXAMINATION

16 BY MR. WISE:

17 Q. Good morning, Professor Fischel. My name is Leo Wise and I
18 represent the United States.

19 A. Good morning, sir.

20 Q. Professor Fischel, I want to ask you some general questions
21 before we move into some specifics on your testimony, and I want
22 to start with talking about the preparation of the testimony
23 which you adopted at the very beginning of your live
24 presentation.

25 David Gross wrote the first draft of your expert report

1 in this case; isn't that correct?

2 A. That's correct.

3 Q. And he is an employee of your firm, Lexecon?

4 A. That's correct.

5 Q. And lawyers from Kirkland & Ellis wrote the first draft of
6 your supplemental expert opinions; isn't that right?

7 A. I think taking what the work product that we had generated
8 Lexecon and then translating it into a document called
9 supplemental opinions, that's correct.

10 Q. And, in fact, you made relatively minor changes to their
11 draft of your supplemental opinions?

12 A. That's correct, but their supplemental opinions were taken
13 from the work product that we generated.

14 Q. And lawyers from Kirkland & Ellis wrote the first draft of
15 your written direct examination as well?

16 A. That's correct.

17 Q. Including the answers?

18 A. I'm not actually not sure about that.

19 Q. Do you recall giving your deposition in this case --

20 A. I do.

21 Q. -- on May 16th just about two weeks ago?

22 A. I do.

23 MR. WISE: If we could have a copy of Mr. Fischel,
24 Professor Fischel's deposition for him. And Chris, if I could
25 have -- just a moment, Professor.

1 THE WITNESS: Sure.

2 A. I have a copy now.

3 Q. You have a copy now?

4 A. Yes.

5 Q. If we could go to Page 25 of your deposition. At lines 19
6 through 21, you were asked, "When you say the first draft was
7 written by attorneys, does that include your answers?" And you
8 responded "Yes."

9 Do you see that?

10 A. Yes, although then I -- the reason I hesitated before was
11 because of the next answer of -- that we added things, changed
12 things, deleted things in interacting with the lawyers.

13 Q. Professor Fischel, my question was, the lawyers from
14 Kirkland & Ellis in the first draft of your testimony wrote the
15 answers, and that's what your testimony says; isn't that right?

16 MR. BERNICK: Your Honor, I object.

17 This is a classic situation where the question has got
18 to be put in the context of the next question.

19 THE COURT: No. The objection is overruled.

20 Go ahead, please.

21 BY MR. WISE:

22 Q. Do you need the question again?

23 A. No, I understand the question, and that's what I testified
24 to in the deposition.

25 Q. Now, Professor Fischel, you understand that you had to

1 disclose the materials you relied on in reaching your opinions;
2 isn't that right?

3 A. Yes.

4 Q. And, in fact, you're aware that a list of materials was
5 attached to your expert report when that was filed?

6 A. Yes, sir, I am aware of that.

7 MR. WISE: Can I have U.S. Exhibit 93828 on the screen?

8 Q. Do you have a copy of that yet?

9 A. I don't think I do.

10 Thank you.

11 Q. Do you recognize that as your expert report?

12 A. I do.

13 Q. If you go to Exhibit B, do you recognize that as the list of
14 reliance materials that was contained within the document?

15 Unfortunately, it's not numbered or I'd give you the
16 page number. I think it's right after the report.

17 A. Yes. I have it.

18 Q. Now, this is titled, reliance -- this is entitled, Exhibit
19 B, Materials Reviewed by Lexecon. Isn't that right?

20 A. Correct.

21 Q. It's not titled, Materials Reviewed by Daniel R. Fischel?

22 A. That's right.

23 Q. In fact, you haven't read everything that's on this list?

24 A. That's right.

25 Q. You read some things on the list?

1 A. As I think I said in the deposition, I read a lot of it.

2 There were some things which -- particularly some of these
3 financial reports at the bottom I didn't read personally.

4 Q. And among those things you read, you didn't read any single
5 document on this list in its entirety.

6 A. That's probably fair. I didn't read every single word in
7 any of these documents.

8 Q. Now, you were hired to respond to the report and testimony
9 of Dr. Bazerman in this case; isn't that correct?

10 A. That's correct.

11 Q. And for no other purpose?

12 A. That's correct.

13 Q. But you didn't read Dr. Bazerman's expert report in its
14 entirety?

15 MR. BERNICK: Your Honor, at this point -- Your Honor
16 has very carefully ruled with respect to Dr. Bazerman and his
17 response to Dr. Bazerman. And now counsel is squarely going
18 down that path.

19 THE COURT: He hasn't opened any substantive doors.
20 He's just establishing the ground rules under which this witness
21 was retained.

22 Go ahead, please.

23 BY MR. WISE:

24 Q. Do you need the question again, Professor Fischel?

25 A. No.

1 I think it's fair to say that I read some parts of the
2 report very carefully, other parts of the report I skimmed.

3 Q. And you also didn't read his written direct examination in
4 its entirety?

5 A. Same answer. Some parts I read very carefully and other
6 parts I skimmed.

7 Q. Now, you've only read two publications that Dr. Bazerman
8 authored; isn't that right?

9 A. Yes. I think I've glanced at some others, but in terms of
10 looking carefully, I would say I've looked at two of them, and
11 of those two, one -- really only part of one.

12 Q. And the two articles that you say you've read as opposed to
13 glanced at, those are the publications that are listed on the
14 reliance list materials reviewed by Lexecon?

15 A. Again, I have to find -- I assume that's right, but I have
16 to find the page again.

17 Yeah, the two that are quoted in my report.

18 Q. And that's really my next question, Professor Fischel.

19 The two publications that you read happened to be the
20 ones that you assert are in contradiction with Dr. Bazerman's
21 opinions.

22 A. Correct.

23 Q. Professor Fischel, do you believe it's important for an
24 expert witness to be impartial and neutral? Is that fair to
25 say?

1 A. I do, yes.

2 Q. Now, you're being compensated a thousand dollars an hour for
3 your work in this case; isn't that right?

4 A. Correct.

5 Q. You're not actually -- well, your arrangement is not with
6 the defendants directly. The defendants' arrangement is with
7 your firm, Lexecon?

8 A. That's correct.

9 Q. And you're the president of Lexecon?

10 A. That's correct.

11 Q. And you've been the president of Lexecon since the
12 mid-1980s.

13 A. Or something similar; some title of comparable significance,
14 correct.

15 Q. Professor Fischel, the University of Chicago limits outside
16 employment by faculty members to 11 days a quarter; isn't that
17 correct?

18 A. Except by understanding with the Dean.

19 Q. In fact, you've spent more than 11 days on this case, given
20 that you've spent about a hundred hours working on this case so
21 far.

22 A. Yes, but I have a very clear understanding with the Dean, my
23 successor, as I did with my predecessors on that issue. So, I
24 have always fully complied with university policy.

25 Q. And that special arrangement allows you to work much more

1 than 11 days per quarter on outside engagements?

2 A. Correct.

3 Q. Now, virtually all of your income is derived from your work
4 with Lexecon; correct?

5 A. For all practical purposes, all of it.

6 Q. All of it?

7 A. Correct.

8 THE COURT: Well, are you not on the payroll of the law
9 school any more?

10 THE WITNESS: I am currently on the payroll, Your
11 Honor, for -- for most of the -- the recent past. I donated my
12 salary back to the university and then a number of years ago,
13 when Lexecon and me personally had a -- something of a financial
14 windfall, I made a very large gift to the university. It's far
15 in excess of all the salary I ever received from the university,
16 even if I hadn't given it back.

17 BY MR. WISE:

18 Q. Now, virtually all of your work with Lexecon concerns
19 litigation, broadly defined, either actual or pending; isn't
20 that right?

21 A. Correct. That's what Lexecon does.

22 Q. And, in fact, you've given sworn testimony on 192 occasions
23 before today.

24 A. I haven't counted, but if that's what my resume reflects.

25 Q. I'll represent to you that we counted.

1 A. Okay.

2 Q. And that's what it reflects.

3 And you've testified six times already in this year, in
4 2005?

5 A. Actually, I think it might be seven.

6 Q. And it's fair to say that there are many other cases that
7 aren't on your CV where you have acted as a litigation
8 consultant but haven't actually testified because your CV is, in
9 fact, just your sworn testimonies?

10 A. That's accurate.

11 Q. Professor Fischel, you earned \$20 million with your work
12 with Lexecon in 2003; correct?

13 A. I personally earned \$20 million?

14 Q. Yes, that's my question.

15 A. Not to the best of my knowledge.

16 MR. WISE: Chris, can I have U.S. Exhibit 93792.

17 Q. Professor Fischel, you have in front of you 93792. Do you
18 recognize this document?

19 A. I don't, actually, but now I know what you're referring to.

20 Q. Well, let's just -- just so the record is clear. You are
21 familiar with these kinds of documents, an SEC filing. Is that
22 fair statement?

23 A. Yes, that's fair.

24 Q. And if you turn to Page 9 -- and also, just so the record is
25 clear, this is an SEC document filed by Nextera Enterprises;

1 correct?

2 It says that on the first page.

3 A. Yes.

4 Q. And Nextera Enterprises owned Lexecon from 1998,
5 approximately, to 2003; is that correct?

6 A. Correct.

7 Q. And if you turn to Page 9 and the Summary Compensation
8 Table, your name appears and it lists several categories. This
9 is a summary compensation table, so I'll just refer to them as
10 several categories of compensation. And it has your name and
11 then entries for 2001, 2002, and 2003, and I've asked you about
12 2003.

13 Now, in the first column for salary in 2003 it lists
14 your salary at approximately \$1.5 million; correct?

15 A. Correct.

16 Q. And your bonus at approximately \$2.78 million; is that
17 correct?

18 A. That's correct.

19 Q. And maybe just while we are there, your bonus is actually
20 determined by the -- it's a percentage of the operating income
21 of Lexecon's Chicago office; isn't that right?

22 A. That's right.

23 Q. So, in addition to generating -- in addition to the
24 defendants billing -- submitting -- excuse me.

25 In addition to billing the defendants for your time for

1 your salary you also get a portion of the operating income
2 generated by other consultants at Lexecon based in Chicago?

3 A. That's correct.

4 Q. And under all other compensation, it lists approximately
5 \$15 million; isn't that right?

6 A. That's right.

7 Q. And if you add those up, it roughly equals \$20 million in
8 2003.

9 A. Correct.

10 Q. Now, while we have it up. In 2002 you earned approximately
11 \$4 million between salary and bonus; correct?

12 A. Correct.

13 Q. And in 2001 approximately 4 million?

14 A. Correct.

15 Q. Now, during your deposition you testified that in 2004 you
16 probably earned over 3 million from Lexecon. Do you recall
17 that?

18 A. I do.

19 Q. And then when you were asked about your 2003 income, you
20 testified you earned not exactly but comparable, something of
21 comparable magnitude.

22 Do you recall that testimony?

23 A. I do.

24 Q. Now, Lexecon works principally for law firms. Is that a
25 fair statement?

1 A. Yes.

2 Q. Lexecon is retained by law firms who may have clients of
3 various kinds, but you work -- you work for law firms?

4 A. Correct, primarily.

5 Q. Now, the tobacco industry and many of the law firms in this
6 room have been sources of income for you and for Lexecon.

7 A. Correct.

8 Q. And, in fact, you're the third defense expert in this case
9 affiliated with Lexecon.

10 A. Correct.

11 Q. Dennis Carlton, who is the senior managing director at
12 Lexecon, is also a witness in this case; correct?

13 A. Correct.

14 Q. And, in fact, you and he and some of the defense counsel and
15 other professionals at Lexecon met and talked about how areas
16 of -- I think you said areas of expertise and testimony would be
17 allocated between you and Dr. Carlton?

18 A. Correct.

19 Q. And James Heckman, another expert in this case, is also
20 affiliated with Lexecon; correct?

21 A. Correct.

22 Q. And for each of these expert witnesses there are other
23 Lexecon employees that work with them that provide various kinds
24 of services to them?

25 A. That's right.

1 Q. For instance, you have two Lexecon employees working with
2 you on your testimony this case.

3 A. Correct.

4 Q. And --

5 A. At least, really. Probably more.

6 Q. Probably more. And they are all billing separately for
7 their time on this case?

8 A. That's right.

9 Q. And Mr. Carlton, he has a Lexecon employee working with him,
10 or at least one maybe.

11 A. I'm sure more than one, correct.

12 Q. Do you have an estimate of how many?

13 A. You know, I don't, but if you include the research staff,
14 our lowest level of professionals, certainly it's significantly
15 higher number than one or two.

16 Q. Higher than five?

17 A. I'd suspect if you included everybody who has ever worked on
18 this matter it would be higher than five.

19 Q. Is that the same go for you, that the research staff
20 probably more than five has also worked with you?

21 A. Yes, I would think so.

22 Q. And Dr. Heckman also has at least two Lexecon employees
23 assisting him?

24 A. Again, probably more. Two directly and then some below
25 those two.

1 Q. And would they -- would those be members of the research
2 staff?

3 A. Probably, yes.

4 Q. So holding aside the research staff, at least in terms of
5 testifying witnesses in their sort of direct, direct reports or
6 direct support, there's at least eight professionals from
7 Lexecon working on this case?

8 A. Well, again, if -- yeah, that sounds like a reasonable
9 estimate.

10 Q. Plus research staff?

11 A. Plus the research staff right.

12 Q. More than five?

13 A. Correct.

14 Q. Now, when we were looking at the Nextera SEC filing earlier,
15 I asked you, the question that Nextera had owned Lexecon from
16 1998 to 2003. Do you recall that?

17 A. I do.

18 Q. In 2003, Lexecon was sold to FTI Consulting Company?

19 A. Correct.

20 Q. And FTI also works both on this case -- well, start that
21 way. FTI also works on this case providing support to defense
22 counsel; correct?

23 A. That might be right, but I don't know that one way or the
24 other.

25 Q. And you've done other work in the past for the tobacco

1 industry and the law firms in this case; isn't that right?

2 A. I would say I've done very little work for the tobacco
3 industry; some, but very, very little. And the law firms in
4 this case I've -- yes, I've certainly done some work with them
5 in the past, some work against them as well.

6 Q. And Dennis Carlton has also done work in the past both for
7 the tobacco industry and for the law firms in this case?

8 A. That's correct.

9 MR. WISE: If I could have U.S. Exhibit 93797 on the
10 screen.

11 Q. Do you recognize this document, Professor Fischel?

12 A. I think -- yeah, I mean I haven't -- I'm not sure I've ever
13 seen this document, but I do recognize it.

14 Q. And just so to sort of move things along. It's from the
15 website and maybe you can tell by the notation at the bottom,
16 it's from the Lexecon website. Do you see that?

17 A. I do.

18 Q. And it's a list of law firms clients of Lexecon. Do you see
19 that?

20 A. I do.

21 Q. If you look at this list, you can see that your clients
22 include Winston & Strawn, I think that's the last entry; Jones,
23 Day; Kirkland & Ellis; Paul Weiss; and Arnold & Porter.

24 You're aware that those are all law firms -- in fact,
25 they are defense -- the defense counsel in this case are all

1 from those law firms. Are you aware of that?

2 A. I am.

3 Q. And, in fact, you've personally worked with some of the
4 attorneys in this case; isn't that correct?

5 A. Yes, I have.

6 Q. In a case called Shields v Keating -- just by way of
7 background, Charles Keating was a client of Lexecon's in the
8 late 1980s; correct?

9 A. That's correct.

10 Q. In fact, you and Charles Keating and Lexecon were sued in a
11 civil racketeering case; correct?

12 A. That's correct.

13 Q. And in that case Mr. Webb represented Lexecon?

14 A. That's correct.

15 Q. And won dismissal of the case?

16 A. Correct.

17 Q. And Lexecon sued its insurer for defense cost; correct?

18 A. Correct.

19 Q. And Mr. Frederick represented Lexecon in that case?

20 A. I thought it was Mr. Webb and Mr. Frederick, but whoever it
21 was. They did a good job.

22 Q. And they did a good job because --

23 A. I wouldn't be sitting here without them.

24 Q. And they did a good job because this was a case that was
25 settled, correct, after a verdict?

1 A. Which case are you talking about?

2 Q. Well, we will start with Lexecon versus Crumb and Foster.

3 You said they did a good job, why did they do a good job in that
4 case?

5 A. Because the legal fees were quite expensive and they got a
6 good settlement from the insurance company to help us defend
7 ourselves, which we very much wanted to do.

8 Q. When you say "quite significant," what do you mean?

9 A. I don't remember exactly what they were, but I remember it
10 was a multimillion dollar settlement with the insurance company.

11 Q. Now, you testified in both of those cases I just mentioned,
12 Shields v Keating and Lexecon v Crumb and Foster; is that right?

13 A. No, that's not correct.

14 Q. You testified in Shields v Keating, though; is that right?

15 A. That's correct.

16 Q. And, generally -- I think that's a useful way to start --
17 Shields v Keating was a savings and loan case, generally
18 speaking?

19 A. Correct.

20 Q. And generally your litigation work is in the regulation of
21 financial markets and the economics of financial markets;
22 correct? Is that fair to say?

23 A. Generally, yes, that's correct.

24 Q. And typically your testimony involves issues related to
25 damages?

1 A. I would say they include damages frequently, but my work and
2 my testimony has frequently been much broader than just damages.

3 Q. You mentioned in your written direct testimony that you've
4 testified in one of the Enron cases, and since there's many of
5 them. You referenced Enron litigation; is that right?

6 A. Correct.

7 Q. And in that case you gave testimony rebutting damage
8 calculations filed by the government's expert witness; correct?

9 A. That's correct.

10 Q. And you also mentioned in your written direct that you've
11 testified on behalf of the Department of Justice; isn't that
12 right?

13 A. That's right.

14 Q. And you've testified on behalf of the Department of Justice
15 on the economics of the saving and loan industry and the effects
16 of regulatory changes on the value of financial institutions;
17 correct?

18 A. Among other subjects, correct.

19 Q. Now, you're aware that in this case, only equitable remedies
20 are under consideration by the court?

21 A. I am aware of that.

22 Q. And when you were deposed you couldn't recall if you had
23 ever given testimony about equitable remedies before?

24 A. Correct.

25 Q. Now, in your consulting work you don't advise boards of

1 directors of corporation other than providing advice through
2 counsel related to litigation?

3 A. Generally speaking, that's correct.

4 Q. And you've never consulted directly with senior management
5 of a corporation other than perhaps through a general counsel
6 who might be a member of senior management?

7 A. Correct.

8 Q. And you've not consulted directly with corporations on
9 reorganizations or restructuring.

10 A. Correct.

11 Q. You have no experience hiring or firing executives other
12 than employees at Lexecon?

13 A. Correct.

14 Q. And you have no experience hiring or firing personnel within
15 tobacco companies, that's correct?

16 A. Correct.

17 Q. Now you've never acted as a consultant to a Judge in a case
18 where there was a corporate restructuring?

19 A. That's right.

20 Q. In fact, you've never acted as a consultant to a Judge on
21 any subject?

22 A. Correct.

23 Q. Professor Fischel, in your testimony you cite a book you
24 wrote called, Payback, The Conspiracy to Destroy Michael Miliken
25 and His Financial Revolution?

1 A. That's correct.

2 MR. WISE: Chris, if we could have Professor Fischel's
3 written direct.

4 Q. Do you still have your copy of your written direct,
5 Professor?

6 A. I think I do.

7 Q. Page 4 of your written direct, the subheading at line 17 is,
8 "Expertise of Particular Relevance to this Matter." Right?

9 A. Yes.

10 Q. And if you flip over to Page 5 you were asked at lines 3 to
11 4, "How is your academic and consulting work and research
12 related to your opinions in this case?" Right?

13 A. Correct.

14 Q. And then further down, at lines 13 and 14, you were asked,
15 "Have any of your publications dealt with the area of corporate
16 governance in the face of scandals?" Correct?

17 A. Correct.

18 Q. And it's in that answer that you cite that book, Payback?

19 A. That's correct.

20 Q. In fact, that's the only publication you cite in this
21 answer, if we bring the box down a little bit.

22 A. Correct.

23 MR. WISE: Now, Chris, if I could have 93796 on the
24 screen. We will get you a copy.

25 A. Thank you.

1 Q. Are you familiar with the document I've -- you've just been
2 handed?

3 A. I am.

4 Q. And it's a copy of your book Payback; correct?

5 A. Correct.

6 Q. If you go to the page XII in the introduction. In the first
7 paragraph, just by way of background, you write, "The many
8 existing books about the Wall Street and savings and loan
9 scandals during the 1980s have been written by journalists."
10 Correct?

11 A. Correct.

12 Q. And in the last line of that paragraph, you write, My
13 prospective in this book is different, and so are many of my
14 sources." Correct?

15 A. Correct.

16 Q. If we scroll down on the page, Chris. In the third
17 paragraph, you write. "Whenever possible, I have relied on the
18 actual record in these cases as documented in trial and hearing
19 transcripts, indictments and complaints, and supporting legal
20 briefs and memoranda. I believe this actual record is a far
21 more reliable source for reconstructing events than the self-
22 serving statements and recollections of interested parties that
23 have filled the existing books on the period."

24 That's what you're wrote generally in the introduction
25 here.

1 A. Correct.

2 Q. You say, "interested parties," but it's in fact the case
3 that Mr. Miliken was a client of yours at Lexecon in the late
4 1980s; correct?

5 A. Yeah, prior to writing book, that's correct, as I state in
6 the introduction.

7 Q. And Mr. Miliken pleaded guilty to six felony offenses in
8 Federal Court and was sentence to 10 years in prison; correct?

9 A. Correct.

10 Q. You contend in this book that Mr. Miliken did nothing
11 illegal.

12 A. That's right.

13 Q. And you believe that the United States was wrong to
14 prosecute Mr. Miliken.

15 A. That's correct, that's what I believe.

16 Q. And you believe it was a result of a conspiracy by various
17 actors against him, that the United States essentially aided and
18 abetted?

19 A. That's right.

20 Q. And if we go to Page 7 of your book --

21 MR. BERNICK: Your Honor, at this point I'm going to
22 object.

23 I'm more than happy to elicit from Professor Fischel
24 the details of what is contained apparently in a multihundred
25 page book about what happened in connection with Michael Miliken

1 and the prosecution of the case against him.

2 But this really is -- it's just -- it's a side show.

3 What he's trying to do, obviously, is suggest that this witness
4 would defend even the Mike Milikens of the world.

5 There's no evidence before the court about what Michael
6 Miliken did or did not do, all the circumstances surrounding
7 that, and it's basically a cross-examination equivalent of guilt
8 by association.

9 And how can the court deal with this? Are we going to
10 sit there and now relitigate the Michael Miliken and the S&L
11 crisis?

12 THE COURT: Mr. Wise, very briefly.

13 MR. WISE: Your Honor, this is the only publication
14 that Mr. Fischel authored that's referenced in his opinions. I
15 need to probe the basis of this ever so slightly, and I have
16 another purpose for asking questions about this. I really have
17 a few more questions, but I think it goes to Mr. Fischel's
18 views.

19 It's a basis for his opinion, and he's identified this
20 as a publication that dealt with the area of corporate
21 governance in the face of scandals, which is what he's being
22 offered for. And I think it's important that we probe ever so
23 slightly some of Mr. Fischel's views on corporate governance in
24 the face of scandals.

25 THE COURT: Mr. Wise, let me say this. It's very

1 interesting testimony, having not read the book, although that's
2 not the test of anything. It is very far afield thus far from
3 what I have to consider.

4 I'll give you three or four minutes unless you get to
5 something that is really relevant to my concerns here.

6 MR. WISE: Thank you, Your Honor.

7 BY MR. WISE:

8 Q. Now if we go to Page 7 of your book. I just have one
9 paragraph starting, "Drexel and Miliken upset the status quo and
10 made phenomenal amounts of money in the process. The
11 establishment losers in the marketplace, desperate for revenge
12 and to restore their lost positions of dominance, turned to the
13 government for help. There the losers found ambitious but
14 unscrupulous prosecutors, like Rudolph Guiliani, who were
15 willing to help because they saw opportunities to further their
16 other careers by capitalizing on the public's historic distrust
17 and envy of financiers."

18 That's what you wrote; correct?

19 A. That's what I wrote.

20 Q. In fact, you dedicate a whole chapter to these prosecutions
21 chapter 4, that you referred to as a reign of terror.

22 A. Actually, more than a chapter to the prosecutions, but
23 that's correct.

24 Q. More than a chapter.

25 You also talk about Judge -- well, now the late Judge

1 Milton Pollock who presided over some of the cases you talk
2 about in your book; correct?

3 A. That's right.

4 Q. And you described him as the recognized leader of the
5 government's lynch mob?

6 A. Correct.

7 Q. And you called this whole episode a national disgrace.

8 A. That's what I said.

9 Q. Now, Mr. Miliken was a client of yours in the 1980s and you
10 wrote Payback in 1995; correct?

11 A. Correct.

12 Q. In 1998, you've testified Nextera purchased Lexecon?

13 A. Correct.

14 Q. And Nextera is a company that was owned and controlled by
15 Mr. Miliken, his brother and Lawrence Ellison; correct?

16 A. Yeah, I think that's fair.

17 Q. If I could have U.S. Exhibit 93795. This is another SEC
18 form again for Nextera, slightly different format. I think this
19 is an older one.

20 And you can see on the first page, it says Company,
21 conformed name Nextera Enterprises; correct?

22 A. Yes, I see that.

23 Q. And if you go to the next page at the very top it identifies
24 this as a filing for the fiscal year ended December 31, 2000?

25 Do you see that?

1 A. I do.

2 Q. And if we go to Page 14, if you scroll down to the paragraph
3 in the middle, the first sentence starts, "We were formed in
4 February 1997 by entities which were under the direct or
5 indirect control of Lawrence J. Ellison, Michael Miliken and
6 Lowell Miliken. Correct?

7 A. I think that's what I said.

8 Q. Now, you profited substantially from the sale to Nextera;
9 correct?

10 A. I did.

11 Q. And you maintained your position as president of Lexecon?

12 A. Not -- no, that's not right.

13 Q. Well, what position did you hold when Nextera owned Lexecon?

14 A. During most of the time that Nextera owned Lexecon, or at
15 least much the time, I was Dean of the University of Chicago Law
16 School.

17 Q. My question was what position did you hold with Nextera?

18 A. Oh, I'm sorry. I thought -- I don't think I held any
19 position with Nextera.

20 Q. In your deposition you testified you were on the board of
21 Nextera.

22 A. Yes. After I left the Deanship, but while I was Dean I
23 basically removed myself from consulting -- excuse me -- from
24 any official positions at Lexecon or Nextera.

25 Q. And just so the record is clear. How long were you Dean of

1 the law school?

2 A. A little over two years.

3 Q. So that was within the time period that Nextera owned

4 Lexecon. And Nextera owned Lexecon from approximately 1998 to

5 2003; correct?

6 A. Correct.

7 Q. About five years.

8 A. I think it was maybe 1999 to 2003. Until, really until the

9 end of 2002.

10 Q. When you were not president, Dennis Carlton was president of

11 Lexecon; correct?

12 A. I assume that's true, but I don't know.

13 Q. Now, you entered into a noncompete agreement with Nextera

14 that was -- and you can correct me if I am wrong -- that it was

15 renewed in 2002 and you were paid \$5 million in 2003 for that

16 renewal; correct?

17 A. No, that's not right.

18 The renewal was the additional compensation that you

19 put on the board, put on the screen earlier, to cover a

20 multiyear period.

21 Q. Maybe this will make it easier. Let's go to -- just have a

22 second.

23 MR. WISE: If I could just have a moment, Your Honor.

24 Q. If I could have U.S. Exhibit 93794. Maybe this is an easier

25 way to do it. This is another SEC filing for Nextera. Do you

1 see that?

2 A. I do.

3 Q. Do you have a copy of it, Professor Fischel? I'm sorry.

4 A. I do.

5 Q. And this is an invitation to a special meeting of
6 stockholders to approve the sale of Lexecon to FTI; correct?

7 I think if you go to Page 5 you will see that.

8 A. Yes, I see that.

9 Q. Now, if you go to Page 15, that's the internal Page 15 of
10 207 up at the top, I think that's the easiest way to navigate
11 it.

12 Under the heading, "reasons for the sale" it says, "The
13 sellers' success is highly dependent upon the efforts, ability,
14 business generation capabilities and project execution skills of
15 a limited number of senior consulting executives and other key
16 personnel, including Daniel R. Fischel and Dennis W. Carlton.

17 On December 31, 2002, we entered into new employment
18 and noncompetition agreements with each of Messrs. Carlton and
19 efficient shell. These new agreements required us to make
20 noncompete payments of approximately 5 million to each of
21 Messrs. Carlton and Fischel during 2003. To extend the
22 employment and noncompetition agreements through December 31,
23 2008, additional 10 million noncompete payments to each of
24 Messrs. Fischel and Carlton are required to be made on or before
25 January 15, 2004. We have no viable alternatives other than the

1 asset sale to enable us to meet these obligations." Correct?

2 A. That's what it says.

3 Q. And that's the 15 million that we saw in other compensation
4 earlier?

5 A. That's right.

6 Q. Now, Professor Fischel, in your testimony and in your live
7 presentation you focused on one of the structural changes
8 Professor Bazerman recommended the court consider: Removal of
9 senior management. Is that correct?

10 A. That's what I focused on, although I did discuss the other
11 proposed changes as well.

12 Q. Were you aware Professor Fischel that the portion of your
13 testimony where you referenced the other changes was struck?

14 MR. BERNICK: Well, actually that's not really
15 accurate.

16 MR. WISE: I want to make sure we don't go into areas,
17 Your Honor.

18 MR. BERNICK: If he keeps on doing this, at a certain
19 point the door really is going to be opened. But I believe --

20 THE COURT: The question that was asked that was
21 appropriate was about removal of senior management and certainly
22 cross may be held on that.

23 Why don't you just move in that area for right now and
24 be careful about your questioning.

25 MR. WISE: I will. Thank you, Your Honor.

1 BY MR. WISE:

2 Q. Now, even though you focused your testimony on removal, you
3 are aware that Dr. Bazerman recommended other structural
4 changes; correct?

5 A. I am. And again I don't want to violate anything that the
6 court has instructed, but I also considered the other proposed
7 changes.

8 Q. Well, I want to -- I'll just ask you a couple of questions
9 about that, then.

10 If I could have Professor Bazerman's written direct on
11 the screen, Page 2, line 11 through 19. This is just so we can
12 have a reference point Professor Fischel.

13 THE COURT: Wait a minute. I think you misspoke.
14 Maybe you did not, though. I just want to be clear. This is
15 Dr. Bazerman's direct.

16 MR. WISE: Yes, Your Honor.

17 THE COURT: You did not misspeak.

18 BY MR. WISE:

19 Q. And Professor Fischel, without reading this, this in fact is
20 the portion of Dr. Bazerman's testimony where he outlines the
21 five structural changes that he recommends the court consider;
22 correct?

23 A. Correct.

24 Q. Now, I want to -- we will start with the second, Changing
25 compensation and promotion policies for managers and executives

1 to produce outcomes inconsistent with misconduct.

2 I'm going to ask you to assume something, Professor
3 Fischel. If you assume that a company profits in conventional
4 financial terms from engaging in fraud, would you agree that it
5 logically follows that one of the ways to discourage managers
6 from engaging in these behaviors is to compensate them based on
7 nonfinancial measures, such as not engaging in fraudulent
8 behavior?

9 MR. BERNICK: I object to the form of the question. I
10 don't understand that question.

11 THE COURT: I think you better clarify it. I may know
12 what you mean, but I think you better clarify it.

13 BY MR. WISE:

14 Q. Professor Fischel, if you assume that a company profits from
15 fraud, doesn't it logically follow, and compensate -- we will do
16 it this way.

17 First, I would ask you to assume that a company
18 compensates its executives largely based on conventional
19 financial measures. I want you to assume that.

20 Second, if you assume that it is profitable for the
21 company to engage in fraud, doesn't it logically follow that one
22 of the ways to discourage managers from engaging in fraud would
23 be to compensate them perhaps using the nonfinancial measures
24 for activities inconsistent with fraud?

25 A. If I accept those assumptions, yes, that sounds

1 tautological.

2 Q. Well, Mr. Fischel, in your deposition you agreed that it
3 sounded logical without saying it sounded tautological. Do you
4 remember that?

5 A. Yeah, I think I do remember that.

6 Q. Now, if we look at the third structural change, "removing
7 senior management," you would agree that removal of is a logical
8 response in certain instances to allegations of wrongdoing by
9 senior management; correct?

10 A. Yes, I would.

11 Q. And if we look at the fourth, "requiring subcontracting of
12 research" -- I'll just refer to it that way to keep things
13 moving -- I want to give you another hypothetical.

14 I want you to assume that a consumer products company
15 uses its Research and Development Department for the purpose of
16 generating research that shows its products are safe for the
17 public.

18 I also want you to assume that the company suppresses
19 the results that are unfavorable to it.

20 Assuming both those facts are true, would you agree
21 that it logically follows that one mechanism to address this
22 behavior is to subcontract research functions to another entity
23 under the control of a third party?

24 A. Yes, I think that would be one logical response, not
25 necessarily the only one or the best one, but certainly one

1 logical response.

2 Q. And finally, for the fourth structural change, "requiring
3 defendants to sell their research and development" -- I'll just
4 refer to that generally as to divest their assets related to
5 less hazardous cigarettes.

6 I want you to assume that a company develops but then
7 keeps from market a product that is safer than its existing
8 product and that the company does so because introduction of
9 this safer product will reduce its profits.

10 Now, if you assume this is true, wouldn't you agree
11 that it logically follows that one way to bring those products
12 to market is to take the assets associated with their
13 development and put them in the hands of another firm that has
14 the capacity to bring them to market?

15 A. Same answer again.

16 If I accept those assumptions, that would be one
17 logical response, not necessarily the only one or the best one,
18 but certainly a logical response, accepting those assumptions.

19 Q. So these four changes that Dr. Bazerman recommends, just in
20 sum, you find to be logical?

21 MR. BERNICK: Your Honor, I think that that -- he
22 cannot answer that question without totally opening the door on
23 what this witness thinks of Dr. Bazerman.

24 THE COURT: Sustained.

25 MR. BERNICK: Either way.

1 MR. WISE: That's fine.

2 THE COURT: Sustained.

3 BY MR. WISE:

4 Q. Now, you are also aware that Dr. Bazerman recommends the
5 court consider seven other interventions in addition to these
6 structural changes; correct?

7 A. I guess my understanding of Dr. Bazerman's testimony is
8 slightly different.

9 Q. Well, if you could just -- if that prevents you from
10 answering my question, I understand.

11 But are you aware that Dr. Bazerman recommends seven
12 other interventions that the court consider?

13 MR. BERNICK: Objection to the form of that question.
14 That is totally contrary to the testimony of Dr. Bazerman.

15 THE COURT: No. The objection is overruled. The
16 witness may certainly answer if he knows the answer and, of
17 course, answer accurately. And his answer may be no.

18 THE WITNESS: Again, that's different from my
19 understanding of what Dr. Bazerman testified to.

20 BY MR. WISE:

21 Q. Well, you've read at least part of his written direct;
22 correct?

23 A. I have.

24 Q. Let's have Dr. Bazerman's written direct on the screen.
25 Dr. Bazerman's written direct, not yours, Professor Fischel.

1 And at Page 3, lines 4 through 14, Dr. Bazerman was
2 asked, "What are other court interventions that you" -- well,
3 I'm not going to read the question. I'm just going to read the
4 answer.

5 "I would recommend the court consider interventions
6 that include" and then if you count up the letters, you get to
7 seven. Do you see that?

8 A. I do.

9 Q. And I'm not going to take you through each of those,
10 Professor Fischel. I just want to make it clear that, so it's
11 clear on the record, in your testimony you don't have -- you
12 don't express any opinions on the appropriateness of any
13 particular remedy that might be ordered by the court?

14 A. Correct. My testimony focused on my understanding of
15 Dr. Bazerman's suggestion for court-appointed monitors in
16 addition to what might be ordered by the court in and the bases
17 for that recommendation of Dr. Bazerman and the criticisms that
18 I had of that recommendation.

19 Q. And you don't focus on any particular remedy because you
20 don't know the relevant facts and circumstance -- you don't
21 focus -- I apologize -- on the appropriateness of the court in
22 ordering any of these particular remedies because you don't know
23 the relevant facts and circumstances from this case; correct?

24 A. Yes. I want to be clear as I've stated throughout.

25 I don't have any opinion on the remedies that the court

1 should order or not order.

2 My opinions as stated in my report and written direct
3 focus on Dr. Bazerman's recommendations for independent monitors
4 in addition to whatever remedies the court orders, and I gave
5 the bases for any criticisms of Dr. Bazerman's recommendation
6 for the reasons stated.

7 Q. And we can get to that. But again, my question is just that
8 you have not offered opinions on the appropriateness of the
9 court ordering any particular remedy from these two lists we've
10 just looked at because you don't know the relevant facts and
11 circumstances in this case; correct?

12 A. Correct.

13 Q. Now, since you've mentioned your understanding of your
14 testimony, I just want to ask you a couple of questions about
15 that.

16 Now, you're not an expert in court-appointed agents?

17 A. No, I'm not.

18 Q. And you've never served as a court monitor?

19 A. Correct.

20 Q. And you don't have any specific expertise with the use of
21 court-appointed monitors?

22 A. That's correct.

23 Q. And you've never served as a Special Master?

24 A. Correct.

25 Q. And you've never published anything on institutional reform

1 litigation?

2 A. Correct.

3 Q. At your deposition you couldn't cite a single case where a
4 court had refused to appoint a monitor citing the concerns
5 you've raised in your testimony?

6 A. That's correct, I couldn't cite a case where a -- the
7 factors that Dr. Bazerman articulated were ever discussed by a
8 court.

9 Q. You also couldn't cite a case, any case, where a monitor was
10 used for any reason?

11 A. That's not quite right.

12 No. I think I said I was familiar with and been
13 involved in a number of cases where monitors had been appointed
14 as a part of compliance orders of a court.

15 Q. But you also testified that you hadn't studied any of those
16 cases; isn't that right?

17 A. As far as the role of the monitor, that's right, but I said
18 I was involved in those cases.

19 MR. WISE: Your Honor, I think this would be a good
20 time for a break if it's not too early. I'm about to switch
21 topics.

22 THE COURT: All right.

23 MR. BERNICK: Could we get an estimate from counsel?

24 THE COURT: I'm sorry.

25 MR. BERNICK: Could we get an estimate from counsel

1 about how much longer the cross is going to last?

2 THE COURT: Well, are you ready to give me an estimate?

3 MR. WISE: Not quite yet, if that's all right.

4 THE COURT: All right. 15 minutes, everybody.

5 (Recess began at 10:58 a.m.)

6 (Recess ended at 11:16 a.m.)

7 THE COURT: Mr. Wise, please.

8 MR. WISE: I think I've got an estimate, Your Honor. I
9 think about two, two and a half more hours.

10 BY MR. WISE:

11 Q. Professor Fischel, I'd like to ask you some specific
12 questions about lines in your written direct testimony, so it
13 might be helpful if you had that in front of you, and I want to
14 start with Page 9, starting at line 14 and carrying over to
15 Page 10, line 14.

16 What I'm going to ask you, Mr. Fischel -- Professor
17 Fischel, is only about the fact of what is contained in these
18 quotes just so we are clear.

19 But before I do that, I want to ask you. You're aware,
20 and again this is just the fact, you're aware of the fact that
21 Dr. Bazerman testified he uses executives, in addition to
22 students, in his experiments. Are you aware of that fact?

23 A. I aware of that fact, that he so testified.

24 Q. Now, my question is, in both of these quotes, both of these
25 quotes, in fact, discuss students -- research subjects that are

1 students, not executives; correct?

2 A. That's right.

3 Q. And Professor Fischel, who selected these quotes? Did you
4 select them or did the attorneys from Kirkland & Ellis select
5 them?

6 A. Certainly not the attorneys from Kirkland & Ellis.

7 I think the process was that from my familiarity with
8 the literature on behavioral research, there is a well known
9 limitation in behavioral science research --

10 MR. WISE: Your Honor, I'm going to interrupt. I think
11 we are moving into --

12 Q. My question was simply who selected these quotes? Was it
13 yourself or the lawyers from Kirkland & Ellis?

14 A. Okay, neither. And I was trying to explain the process by
15 which they were selected.

16 THE COURT: Well, you've answered neither and then it's
17 up to Mr. Wise to ask the next question.

18 THE WITNESS: Thank you, Your Honor.

19 BY MR. WISE:

20 Q. Now, on Page 13 at lines 12 through 14, you offer the
21 opinion --

22 THE COURT: 13 line what?

23 MR. WISE: 12 through 14, Your Honor.

24 THE COURT: All right.

25 BY MR. WISE:

1 Q. You offer the opinion, "Future managers will face the same
2 alleged incentives to increase market share and profits and to
3 avoid misconduct as do current members. As a result,
4 Dr. Bazerman does not show that removal of senior managers will
5 prevent unlawful conduct." Correct?

6 A. Future unlawful conduct, that's correct.

7 Q. Future unlawful conduct. Thank you.

8 You're aware, Professor Fischel, that Dr. Bazerman
9 talked about a series of, a comprehensive set of organizational
10 changes; correct?

11 A. I would say potential organizational changes.

12 Q. But you chose to focus on removal and whether that alone
13 would affect incentives; correct?

14 A. That's true in this question.

15 Q. That's just -- that's my question.

16 A. But not elsewhere in the testimony.

17 Q. Professor Fischel, my question, as I've said, having read
18 this to you, is about this question. And just so the record is
19 clear.

20 While Dr. Bazerman chose to talk about a set of
21 organizational changes, you focused on removal alone and its
22 effect on incentives in this question.

23 MR. BERNICK: Well, I object to the form of the
24 question.

25 THE COURT: No. Overruled. You may answer.

1 A. In this question, correct, elsewhere not correct.

2 Q. Professor Fischel, I'm not asking about elsewhere. This is
3 going to -- I'm going to try to move through your testimony
4 focusing you on lines, and to the extent that we can do it that
5 way, I think we will get through this a lot quicker. So again
6 just so the record is clear.

7 In this question you talk about only removal and its
8 effect on incentives; correct?

9 A. In this question, that's correct.

10 Q. But you're aware that Dr. Bazerman talks about a set of
11 organizational changes?

12 A. I am aware of that.

13 Q. Professor Fischel, on Page 14 at lines 7 through 10 -- well,
14 it's actually 7 to the end through 13, but I'm going to read
15 part of that -- you testify, "If the managers are hired
16 exclusively from inexperienced candidates, this would greatly
17 increase the social costs of imposing this remedy because the
18 new managers may know little or nothing about running a tobacco
19 company. This could have devastating results not only for the
20 companies' employees and shareholders, but also for the
21 public" -- and the answer goes on.

22 My question, Professor Fischel, is you've never
23 published anything that discusses or evaluates the social costs
24 of hiring executives or managers from outside an industry;
25 correct?

1 A. That's correct.

2 Q. And you haven't done any work in any field in which you
3 evaluated the social costs that result from hiring managers or
4 executives outside of a particular industry?

5 A. Correct.

6 Q. Professor Fischel, was this answer written by you or was
7 this answer written by attorneys from Kirkland & Ellis?

8 A. I actually don't recall who did the actual drafting of this
9 answer.

10 Q. Now, if we go to Page 15, you testify at lines 13 through 14
11 to the contrary.

12 "There is no reason to assume that the defendant
13 companies or their current management will fail to follow the
14 directions of the court." Correct?

15 A. Correct.

16 Q. When you filed your written direct examination you were not
17 aware that several defendants in this case had been found in
18 contempt for failing to follow the directions of this court.

19 A. Correct.

20 Q. And you didn't look at any instances in which the defendants
21 in this case have followed or not followed directions of this
22 court.

23 A. At the time I wrote those, that's right.

24 Q. At the time you wrote your testimony.

25 A. Correct.

1 Q. Now, you're familiar with what the Master Settlement
2 Agreement is; correct?

3 A. Only in a general way.

4 Q. You're aware that it settled lawsuits between these
5 defendants and a number of the states?

6 A. I am aware of that.

7 Q. And it was entered into as a judgment that could be enforced
8 by a court.

9 A. Again, I assume that's the case, but I don't have personal
10 knowledge that that's true.

11 Q. But when you filed your testimony you hadn't studied whether
12 any of the defendants in this case had complied with the
13 provisions of that agreement or any court enforcing that
14 agreement; correct?

15 A. That's correct.

16 Q. Now, staying on Page 15 at lines 16 to 23. In this answer
17 you're discussing -- we can see the word at line 19, "an
18 injunction." And what I want to focus on starts at line 20, you
19 write or testify.

20 "Indeed, such a solution would be a much more direct
21 and efficient means of accomplishing the goals of preventing
22 future misconduct than to require the wholesale replacement of
23 senior managers who may or may not have participated in
24 misconduct in the past and who may or may not engage in
25 misconduct in the future."

1 Now, before you reached that conclusion you didn't
2 investigate any of the costs that would be associated with
3 enforcing such an injunction; correct?

4 A. Not specific to this case, no.

5 Q. Well, Mr. Fischel, if I could have your deposition at
6 Page 179 -- 178, I'm sorry, you were asked at lines 9 through
7 11, "Before you reached this opinion in your report, did you
8 investigate any of the costs that would be associated with
9 enforcing injunctions?"

10 And at line 12 you gave the answer "No." Correct?

11 A. Correct.

12 Q. And that was your testimony?

13 A. That was it.

14 Q. And that was the truth?

15 A. Yes.

16 Q. Now, did you even consider what any of the costs might be?
17 Holding aside that you didn't investigate them, didn't analyze
18 them, did you even consider what any of the costs might be?

19 A. I think it's hard for me to answer that question because I
20 don't know what injunctions may or may not be entered in the
21 case, depending on what the court chooses to do.

22 Q. Professor Fischel, my question is, you've mentioned
23 injunctions in your testimony, and you've said "such a solution
24 would be a much more direct and efficient means of accomplishing
25 the goals of preventing future misconduct."

1 And my question to you is: Did you even consider any
2 of the costs associated with enforcing or implementing an
3 injunction?

4 A. I would say yes relative to the alternative proposed by
5 Dr. Bazerman. Not with any specificity because there is no
6 injunction.

7 Q. Professor Fischel, I didn't ask about -- well, strike that.

8 It's fair to say that there would be monitoring costs;
9 correct?

10 A. Yes.

11 Q. For instance, the United States or the court, or both, would
12 have to monitor these defendants, their behavior, to ensure they
13 were complying with an injunction; correct?

14 A. Yes, I think that's fair.

15 Q. And there would be litigation costs for both the United
16 States and the defendants, because the United States would have
17 to come before the court and prove that a violation had occurred
18 and the defendants would have the right to argue that it hadn't
19 and put on evidence to the contrary; correct?

20 A. Not necessarily correct. It would depend on if there were
21 litigation.

22 Q. Well, I've asked you -- well, I think implicit in my
23 question, assuming there were litigation, assuming there were
24 violations, there would in fact be litigation costs; correct?

25 A. Again, that's tautological. Assuming that there's

1 litigation, there would be litigation costs.

2 Q. Well, I'll rephrase, then.

3 Assuming there's violations, it's fair to say there
4 would be litigation; correct?

5 A. Not necessarily, but that's certainly possible.

6 Q. And it's possible because violations may go unnoticed?

7 A. Well, if they go unnoticed they probably wouldn't result in
8 litigation, but if there's no -- if they are noticed and there's
9 no solution, other than litigation, they might result in
10 litigation.

11 Q. So the answer to my question is that yes, there may be
12 litigation costs. I think that was where we started.

13 A. Actually, that wasn't your question, but yes, there might be
14 litigations cost.

15 Q. And assuming there were violations found, there be would be
16 enforcement costs if the court found the defendants liable and
17 ordered them to take some action or a series of actions;
18 correct?

19 A. Correct.

20 Q. And assuming there were violations and litigation and
21 enforcement, there would be administrative costs borne by the
22 court associated with adjudicating and remedying any violations?

23 A. That's certainly a possibility, correct.

24 Q. And monitoring costs would be continuous?

25 A. Correct.

1 Q. And costs associated with enforcement could also be
2 continuous if a remedy ordered by the court was long term?

3 A. Again, that's possible.

4 Q. But you didn't consider any of those costs when you made the
5 statement that -- or gave the testimony that an injunction was a
6 more direct and efficient means of accomplishing the goals?

7 A. No, I think that's incorrect.

8 Q. Well, it was your testimony that you didn't consider any of
9 these costs.

10 You said something, that was impossible to do it
11 because you didn't know what the injunction would look like.

12 A. I think I said was that I didn't consider any of the
13 specific costs of any injunctions, but I did make a comparison
14 of the relative costs of an injunction, taking into account all
15 of the possible costs that you identified, which may or may not
16 materialize, none of the costs that you identified might
17 materialize, relative to the proposal that Dr. Bazerman made for
18 monitors to consider the possibility of removing senior
19 management of tobacco companies whether or not they had ever
20 engaged in wrongdoing or whether or not they will engage in
21 wrongdoing in the future.

22 Q. Professor Fischel, you would agree that the costs I just
23 mentioned are specific costs; correct?

24 A. They are specific costs, but it's hard to put them in any
25 context without knowing whether there will be an injunction, and

1 if there will be an injunction, what it is.

2 Q. Professor Fischel, I didn't ask you if it was hard or not
3 hard to put them into context. I simply asked you, those were
4 specific costs; correct?

5 A. They are specific potential costs.

6 Q. I didn't ask if they were potential or real. I simply asked
7 if they were specific costs.

8 A. They are not specific costs because they haven't been
9 incurred and they may never be incurred.

10 Q. It's your understanding that they may only be specific if
11 they are incurred; that the term specific can't be assigned to
12 them without them having to actually have been incurred?

13 MR. BERNICK: I object to the form of the question.

14 We've now gone down this semantic path because,
15 frankly, the word "specificity" was not defined by counsel or
16 made clear when the question first was posed.

17 Where is this going? Is it a quarrel about what
18 specific means?

19 THE COURT: The objection is sustained for this reason.
20 I think your point is perfectly clear, so let's move on.

21 MS. EUBANKS: Thank you, Your Honor.

22 BY MR. WISE:

23 Q. Professor Fischel, on Page 16, at lines 11 through 14, you
24 testify, "I understand there was, and still is, substantial
25 uncertainty over which activities carried out by defendants'

1 management in the past were or were not lawful. I also
2 understand that there is substantial uncertainty about the
3 relationship, if any, between...conduct by the defendants and
4 youth smoking behavior." Correct?

5 A. Yes.

6 Q. Professor Fischel, defendants haven't discussed with you
7 what evidence of fraud has been presented in this case; correct?

8 A. That's correct.

9 Q. And attorneys for defendants haven't given you any
10 assessment of whether fraud has been proven; correct?

11 A. That's right.

12 Q. And you haven't read the complaint?

13 A. I don't remember if I've ever read the complaint.

14 Q. And you haven't read the amended complaint.

15 A. I certainly haven't studied it.

16 Q. And you don't know what the specific allegations are against
17 these defendants.

18 A. I know only to the extent of the discussion of them in
19 Dr. Bazerman's report and testimony.

20 Q. And you understand that Dr. Bazerman assumed liability had
21 been found?

22 A. I do.

23 Q. Now, staying on this page you testify at line 16, "once this
24 case has been resolved and the court has delineated" -- I'm
25 sorry -- "has delineated permitted versus prescribed conduct,

1 there is no reason to assume that managers will not act in
2 accordance with these delineations. On the contrary, it is more
3 plausible to assume that defendant companies and their
4 management will act lawfully to avoid future legal sanctions."

5 THE COURT: Let me just point out something to our
6 court reporter. In testimony, it is proscribed, p-r-o, not
7 prescribed.

8 MR. WISE: I'm sorry. I apologize.

9 THE COURT: Go ahead.

10 BY MR. WISE:

11 Q. Professor Fischel, you would agree, wouldn't you, that if
12 it's profitable -- if it's more profitable for these defendants
13 to engage in illegal conduct than legal conduct, they will do
14 so?

15 A. No, I would not agree with that. I wouldn't agree either
16 with the assumption or with the prediction even if the
17 assumption were correct.

18 MR. WISE: Chris, could I have U.S. Exhibit 93821 on
19 the screen?

20 Q. Professor Fischel, do you recognize this document?

21 A. I do.

22 Q. And it's a Law Review article you wrote entitled Antitrust
23 Suits By Targets of Tender Offers?

24 A. Co-authored article, that's correct.

25 Q. Professor Fischel, I want to direct your attention to a

1 footnote in the article because it summarizes an entire section,
2 and for the sake of time I guess the best way to do it. On
3 Page 1177, you write:

4 "As we have argued in Part 1, however, managers do not
5 have an ethical duty to obey economic regulatory laws just
6 because the laws exists. They must determine the importance of
7 these laws. The penalties Congress names for disobedience are a
8 measure of how much it wants firms to sacrifice in order to
9 adhere to the rules. The idea of optimal sanctions is based on
10 the supposition that managers not only may, but also should
11 violate the rules when it is profitable to do so."

12 And you wrote that; correct?

13 A. I did. Co-wrote it, but I did.

14 Q. Co-wrote it?

15 THE COURT: When was that article written?

16 THE WITNESS: I believe 1982, Your Honor.

17 BY MR. WISE:

18 Q. Now if we continue on Page 16, you were asked the question
19 at line 20, "What other mechanisms exist to give managers and
20 other incentives to act lawfully?"

21 And you describe in the first line at line 21,
22 "Companies boards of directors and shareholders (particularly
23 large and institutional shareholders)".

24 Do you see those references?

25 A. I do.

1 Q. And you would agree with the statement that the boards of
2 directors and large institutional shareholders at these
3 defendants have been in existence to monitor the behavior of
4 defendants' managers for at least as long as this conspiracy has
5 been alleged?

6 A. I would agree with that.

7 Q. You would also agree that if you assume the court finds
8 liability, then these mechanisms have not been effective in
9 preventing the defendants from engaging in fraud.

10 A. Well, again by definition I would agree, although -- well, I
11 won't say what the context of which...

12 Q. I don't think you gave -- you would agree?

13 A. I would agree by definition, but as my -- the previous
14 testimony of mine that you put on the screen reflected, my
15 understanding is that's what's being litigated in the context of
16 a contested proceeding, and my focus is on whether or not
17 defendants are -- its reasonable to assume that defendants will
18 violate the orders that the court ultimately enters in this
19 case.

20 Q. Just so we are clear. You haven't studied whether these
21 defendants have violated the orders already in this case?

22 A. Correct.

23 Q. And you haven't studied whether the defendants in this case
24 have violated their settlement agreements with the states?

25 A. Correct.

1 Q. And you haven't discussed what evidence of fraud has been
2 presented in this case with defense counsel?

3 A. That's correct.

4 Q. And they haven't provided you with any assessments of that
5 evidence?

6 A. That's correct.

7 Q. Now, in that answer on Page 16, you first mention boards of
8 directors. But, Professor Fischel, you haven't studied the
9 behavior of the boards of directors of these defendants, have
10 you?

11 A. No.

12 Q. And if we look when you're asked -- give me just a moment.

13 On Page 17, if we look where you're asked at lines 16
14 through 17, you were asked, "Is there any evidence that
15 companies actually do take actions to prevent misconduct?"

16 You answer at lines 18 through 20, "There is strong
17 evidence that companies have responded to economic incentives
18 associated with litigation, regulatory investigations, and other
19 allegations of wrongdoing by removing senior management without
20 the intervention of a court or regulatory body." Correct?

21 A. Correct.

22 Q. Let's take the first item. You list litigation. Now just
23 looking at one of the defendants in this case, when you filed
24 your testimony you were not aware that there were over 1300
25 lawsuits pending against R.J. Reynolds and Brown & Williamson,

1 were you?

2 A. No, I wasn't.

3 Q. In fact, when you filed your testimony you didn't know how
4 many cases were pending against any of these defendants?

5 A. Correct.

6 Q. You had a general idea that there was litigation against the
7 tobacco industry because Lexecon had been involved in some of
8 those suits.

9 A. And just from being aware of current events. Yes, I was
10 aware there was a lot of litigation against tobacco companies.

11 Q. But you hadn't studied litigation against these defendants
12 in any systematic way?

13 A. That's correct.

14 Q. And you didn't investigate whether any tobacco executive had
15 been removed as a result of pending litigation against any of
16 these defendants ever.

17 A. Correct.

18 Q. Now, next on your list is regulatory investigations. And in
19 fact, you cite an article on the next page by Feroz discussing
20 SEC investigations; correct?

21 A. Correct.

22 Q. Now when you filed your testimony you didn't know if the
23 defendants in this case were the subject of any regulatory
24 investigations.

25 A. Not with any specificity, correct.

1 Q. And you didn't know if any executive had been removed as a
2 result of any regulatory investigations.

3 A. Correct.

4 Q. And next on your list is a general category, other
5 allegations of wrongdoing.

6 And you would agree that allegations of wrongdoing can
7 be made in the context of criminal investigations or formal
8 grand jury proceedings.

9 A. Correct.

10 Q. When your testimony was filed with the court you didn't know
11 if the defendants in this case had ever been the subject of a
12 criminal investigation.

13 A. Correct.

14 Q. And when your testimony was filed with the court you didn't
15 know if a formal grand jury had been convened because of a
16 criminal investigation again these defendants?

17 A. Correct.

18 Q. You didn't know if a single executive of these defendants
19 had ever been removed because of criminal proceedings or grand
20 jury proceedings.

21 A. Correct.

22 Q. You would agree that allegations of wrongdoing can also be
23 made in the context of a civil enforcement action like this
24 case; correct?

25 A. Yes.

1 Q. Now, when your testimony was filed you didn't know when this
2 case was filed; correct?

3 A. Correct.

4 Q. And you didn't know whether a single executive had been
5 removed because of the allegations of misconduct in this case.

6 A. Correct.

7 Q. When you filed your testimony you weren't aware -- when you
8 filed your testimony you didn't know whether a single executive
9 had been removed as a result of the state litigations that we've
10 talked about; correct?

11 A. Correct.

12 Q. Now, in that same answer you testify on Page 17, at lines 20
13 to 22, "Academic research has documented increased turnover of
14 senior management surrounding litigation or allegations of
15 wrongdoing." Correct?

16 A. Correct.

17 Q. But you've never published a single academic paper of
18 turnover of senior management in this industry, have you?

19 A. Correct.

20 Q. And you didn't ask defense counsel on any of these points,
21 either litigation, regulatory investigations or all the
22 allegations of misconduct, you didn't ask defense counsel for
23 any information about this industry before you filed your
24 testimony.

25 A. That's right.

1 Q. Now, staying with this part of your testimony, Professor
2 Fischel, you testify, as we've said, about the role that boards
3 of directors can play in monitoring management; correct?

4 A. Correct.

5 Q. And if we look at your specific testimony you testify on
6 Page 17 at lines 12 through 14, "The board of directors of each
7 company takes into account potential biases by senior management
8 of the type discussed by Dr. Bazerman when deciding whether to
9 retain its executives." Correct?

10 A. Correct.

11 Q. And then you cite on the next page an article by Feroz, I
12 believe an article by Romano, and an article by Strahan;
13 correct?

14 A. Correct.

15 Q. And I think these are the only three academic arts you cite
16 in your testimony?

17 A. Well, I don't think that's correct.

18 Q. Would you point to where you cite another academic article
19 in your testimony?

20 A. I discuss some of Professor Bazerman.

21 Q. Besides Professor Bazerman.

22 A. I cite articles pointing out the limitations of behavioral
23 science research.

24 Q. And where are those?

25 A. I think they are in my expert report.

1 Q. My question, Professor Fischel, was about your testimony.

2 A. I don't see them in the testimony, but they are in the
3 report.

4 Q. Do you know why they are not in your testimony?

5 A. I think, frankly, it's an oversight.

6 Q. Now, are you aware that these three articles you cite on
7 Page 18, after you've made the statement on 17 that the board of
8 directors of each company take into account potential biases of
9 the type discussed by Professor Bazerman, are you aware that
10 none of these articles -- and again this is just a factual
11 matter -- none of these articles discussed the biases discussed
12 by Dr. Bazerman?

13 A. I think that's correct.

14 MR. BERNICK: At this point, Your Honor, again I
15 object. The line is just being drawn far too finely.

16 This is basically cross-examination that goes to the
17 credibility of this witness's criticisms of Dr. Bazerman's
18 testimony. That's the only purpose for it.

19 MR. WISE: Your Honor, it's just the factual issue of
20 whether they even discussed them. And Your Honor has said he
21 can cite Professor Bazerman's testimony for factual issues,
22 whether it's consistent or inconsistent. I just want to point
23 out to the court that these articles as a factual matter don't
24 even mention what Dr. Bazerman is talking about.

25 MR. BERNICK: That's not the --

1 THE COURT: And then on redirect -- of course, I
2 haven't read the articles -- but on redirect you've opened the
3 door to allowing Mr. Bernick to come back with, Well, doesn't
4 the article say on Page 69, such and such?

5 No, it does cut it too fine. I don't want the door
6 opened at all. And so, therefore, the objection to that
7 question is sustained.

8 MR. WISE: Thank you, Your Honor.

9 BY MR. WISE:

10 Q. Now, staying with boards of directors. You mention in your
11 testimony -- you make reference in your testimony and you did
12 again this morning to independent directors; correct?

13 A. Correct.

14 Q. And you state in your written direct on Page 19 at lines 5
15 to 6, "There is evidence that corporate boards have recently
16 become more independent and more likely to challenge senior
17 executives." Correct?

18 A. Correct.

19 Q. And then you cite two -- and I don't know quite how to refer
20 to them together -- but they are basically two citations that
21 follow; correct?

22 A. Correct.

23 Q. This is what you described as evidence that boards have
24 become more independent.

25 A. Correct.

1 Q. And the first evidence is an Op Ed by Arthur Levitt; right?

2 A. Right.

3 Q. It's not an excerpt from an academic paper, it's an opinion
4 piece that Mr. Levitt wrote in the Wall Street Journal.

5 A. That's right.

6 Q. And the second evidence you cite is a survey by the Business
7 Roundtable; correct?

8 A. Correct.

9 Q. And just so the record is clear. This was a partial survey
10 of the membership of the Business Roundtable; correct?

11 A. Correct.

12 Q. And the Business Roundtable is an advocacy organization made
13 up by CEOs of companies?

14 A. I'm not sure that's exactly correct. I just don't know
15 enough exactly of who is a member and whether it's fair to
16 characterize it as an advocacy group. It's certainly an
17 interest group, that's fair.

18 Q. Let's just take a look for a moment. Why don't we look at
19 U.S. Exhibit 23815? I'm sorry, 93815. Do you have that
20 document?

21 A. I do.

22 Q. I'm going to represent to you this is a page from the
23 Business Roundtable's website, and I just want to read to you a
24 portion of it and you can tell me if that's consistent with your
25 understanding.

1 In the first paragraph it reads, "The Roundtable is
2 committed to advocating public policies that ensure vigorous
3 economic growth, a dynamic global economy and well trained and
4 productive U.S. work force essential for future
5 competitiveness."

6 And then in the last paragraph, it reads, "The chief
7 executives work on task forces on specific issues that direct
8 research, supervise preparation of position papers, recommend
9 policy, and lobby Congress and the administration on select
10 issues."

11 Is that consistent with your understanding? I think
12 you used the word of the Roundtable being an interest group.

13 A. Yes, it is.

14 Q. This isn't an academic research organization that conducted
15 this survey. This is an interest group.

16 A. That's right, but the results are consistent with what's
17 been found in many academic studies.

18 Q. That wasn't my question, Professor Fischel.

19 My question was, is this a research organization or an
20 interest group?

21 MR. BERNICK: Objection to the form of the question.
22 It assumes that there can be only one or the other.

23 THE COURT: The objection is overruled.

24 A. I was going to say the same thing. Many interest groups
25 provide very valuable research.

1 Q. But just so the record is clear. You have used the term
2 "interest group" to describe this organization; correct?

3 A. Because that's what I think they are.

4 Q. And this is a partial survey of their membership?

5 A. Correct.

6 Q. Now --

7 THE COURT: And you didn't know that the Business
8 Roundtable was an advocacy group?

9 THE WITNESS: It's just the meaning of advocacy group,
10 Your Honor.

11 THE COURT: And you're not sure of the meaning of the
12 term "advocacy"?

13 THE WITNESS: In this particular context I wasn't
14 really sure, no.

15 I think they are clearly an interest group. They have
16 a perspective. I guess, you can call them an advocacy group if
17 you want, but because they engage in a lot of activities that
18 I'm familiar with, I wasn't sure whether it was fair to
19 characterize them as an advocacy group.

20 BY MR. WISE:

21 Q. On Page 19 you describe this survey as revealing a trend
22 towards independence; correct?

23 A. Yes.

24 Q. Now, you've written, Professor Fischel, that while --
25 whether there's a trend or not aside, while independent

1 directors are more likely to be impartial, they also may be less
2 competent than management directors; correct?

3 A. Correct.

4 Q. And have you studied the boards of directors -- and you
5 haven't studied -- I apologize -- the boards of directors of
6 these defendants, have you?

7 A. Correct.

8 Q. So, you don't know, for instance, how many independent
9 directors are on these boards?

10 A. I might know that or at least I have looked at that, but I
11 haven't studied them other than looking at the identity of who
12 the directors were.

13 Q. And you haven't studied whether those independent directors
14 have been effective monitors on management?

15 A. Correct, I've not studied that.

16 Q. Now, you also talk about institutional investors in your
17 answer. Again, I believe the answer is on Page 20. I'm sorry.
18 It's on Page 16.

19 You also talk about institutional investors as
20 potential monitors of management. Isn't that right?

21 A. I do.

22 Q. Now, in your text the economic structure of corporate law --
23 maybe we can have that -- do you have the exhibit number for
24 that?

25 We will come back to that. I'll get the exhibit number

1 for that and we will come back to it.

2 Did you do any research about who the institutional
3 shareholders were in these defendants before you filed your
4 testimony in this case?

5 A. No, I did not.

6 Q. So you weren't aware that the institutional investors, the
7 largest institutional investors in these defendants also provide
8 pension management services to these defendants?

9 A. No, not specifically aware of that.

10 Q. And you understand that when a company contracts for pension
11 management services, they pay fees to the financial institution
12 that manages those funds; correct?

13 MR. BERNICK: Actually, I don't have a problem with
14 pursuing this, although it has no established relevance to this
15 industry. But the questions now basically assume facts that are
16 not in evidence.

17 THE COURT: Sustained. I've not heard a word about
18 this before, that I can recollect at least.

19 BY MR. WISE:

20 Q. Professor Fischel, assuming the largest institutional
21 investors in this industry provide pension services and are
22 contracted to provide pension services for these defendants, you
23 would agree, would you not, that that may create a conflict of
24 interest in terms of their monitoring of defendants' managers?

25 A. Potential conflict of interest, yes, I would agree.

1 Q. Now, Professor Fischel, if I could have Exhibit 93827. If
2 we look at Page 83, in the third paragraph. Just orient myself
3 for a moment.

4 THE COURT: Let's get it identified for the record.

5 BY MR. WISE:

6 Q. Professor Fischel, do you recognize U.S. Exhibit 93827?

7 A. I do.

8 Q. And what is it?

9 A. It's a book that I co-authored entitled, The Economic
10 Structure of Corporate Law.

11 Q. And if you look to Page 83, in the third paragraph, I think
12 it's the second sentence, you write, "As we have emphasized,
13 there is no reason why those are who supply capital to the firm
14 should have interest or expertise in managing the firm's
15 affairs. Given the combination of a collective action problem
16 and easy exit through the stock market, the rational strategy
17 for most dissatisfied shareholders is to sell rather than incur
18 costs in attempting to bring about change through votes."

19 Correct?

20 A. Correct.

21 Q. And if we further look on Page 89 where you discuss
22 institutional shareholders, at the very top you write, "Indeed,
23 the practice of institutional investors voting against
24 antitakeover amendments suggests that investors vote against
25 management when it is in their interest to do so." Is that

1 correct?

2 A. Yes.

3 Q. Now, of course, there's instances in which institutional
4 investors -- when institutional shareholders' interest -- strike
5 that. I'm sorry.

6 Of course, there are instances in which it is simply
7 not in the institutional shareholders' interest to vote against
8 management; is that right?

9 A. That's right.

10 Q. And, for instance, it's fair to say one of those instances
11 might be assuming management had contracted with those
12 institutional shareholders to provide pension management
13 services, that might be one instance where it was in their
14 interest not to vote against management?

15 A. Yes, hypothetically, that could be true.

16 Q. Now, if we flip ahead to Page 24, starting at line 6, you
17 were asked, "Why would it be helpful for the monitors' work to
18 be subject to cross-examination and reviewed by outside
19 experts?"

20 And in your answer you assert, at line 13 to 15, "One
21 of the purposes of the legal system is to allow each side to
22 present their own analysis, examine the other side's analysis,
23 and have a judge or jury make a final determination."

24 Correct?

25 A. Correct.

1 Q. Now, Mr. Fischel, in all of the consulting work you've done
2 you've never been retained as a legal expert; correct?

3 A. That's correct.

4 Q. And again, as you testified earlier, you are not an expert
5 in court-appointed monitoring schemes; correct?

6 A. Correct.

7 Q. Was this an answer that you wrote, Professor Fischel, or
8 that the attorneys at Kirkland & Ellis wrote?

9 A. I think, actually, this was something that we drafted once
10 we got the initial draft from attorneys from Kirkland, as I
11 recall.

12 Q. I think I understand.

13 Who is we? Who do you mean by we?

14 A. David Gross and myself.

15 Q. Now, Professor Fischel, I'm going to have J-DEM 010417 put
16 on the screen. This is one of two tables you have in your
17 testimony. I think it's on Page 14. And the table appears on
18 Page 14 and it's in the context of where you discuss replacement
19 managers.

20 Do you recall that?

21 A. I do.

22 Q. Now, it was David Gross's idea to put this table in your
23 expert report; correct?

24 A. I just -- frankly, I don't remember.

25 Q. And this table was prepared by Lexecon's research staff, not

1 by you personally?

2 A. Under my supervision, that's correct.

3 Q. You didn't identify anywhere in your testimony the principle
4 or methodology you applied selecting the companies in this
5 table?

6 A. I don't recall whether I specifically identified the
7 methodology or not.

8 Q. I'm going to represent to you, Professor Fischel, that you
9 did not identify a methodology for how you selected these
10 executives. Can you cite me anywhere where you did that?

11 A. I think the title and the source -- you know, to me that's a
12 description of the methodology.

13 Q. My question, Professor Fischel, is how did you select these
14 particular executives?

15 Not what's the source and not what's the title, but
16 just how did you select these particular executives?

17 A. Because they are the highest ranking officers.

18 Q. But you don't identify -- well --

19 A. As the title suggests.

20 Q. We will get into this in a moment.

21 Now, you've listed Liggett Group, Inc, Vector Tobacco
22 Inc., Liggett Vector Brands, Lorillard, Philip Morris
23 International, Philip Morris USA, and R.J. Reynolds; correct?

24 A. Correct.

25 Q. Are you aware that Philip Morris International is not a

1 defendant in this case?

2 A. Because it's part of Altria? Is that the --

3 Q. I'm just asking the question. Are you aware?

4 A. I would have to see the caption to know who -- the name of
5 the corporate entities that are defendants in the case.

6 Q. So the answer to my question is no, you don't know if Philip
7 Morris is or isn't a defendant in this case?

8 THE COURT: Almost.

9 MR. WISE: International. Sorry, Your Honor.

10 A. I'm not sure without looking at the caption.

11 Q. Are you aware that Vector Tobacco Inc. isn't a defendant in
12 this case?

13 A. Again, I'm not sure without looking at the caption.

14 Q. Are you aware that Liggett Vector Brands is not a defendant
15 in this case?

16 A. Same answer. Without looking at the caption, I'm not sure.

17 Q. Are you aware that Altria is a defendant in this case?

18 A. Again, I know that Philip Morris is a defendant in the case,
19 and whether the formal defendant is Philip Morris or Altria or
20 both, I'd have to see the caption.

21 Q. But you haven't listed the highest ranking officer from
22 Altria; correct?

23 A. Correct, because that's not just the tobacco company.

24 Q. Well, that wasn't my question. I simply asked you, did you
25 list the highest ranking officer from Altria?

1 A. No, for the reason that I stated.

2 Q. So you don't know how long he or she has worked in the
3 industry?

4 A. Not from memory, no.

5 Q. And you don't know, in fact, who that person is?

6 A. Not without checking, no.

7 Q. And you didn't ask the lawyers for any of that information?

8 A. No, I did not.

9 Q. And they didn't offer it to you?

10 A. Correct.

11 Q. Are you aware that British American Tobacco is also a
12 defendant in this case?

13 A. I am aware of that.

14 Q. But you also have not included them in your table; correct?

15 A. For the same reason, correct.

16 Q. I just asked if you included them in your table.

17 A. Correct.

18 Q. I'm sorry?

19 A. No, I did not. The entities on the table are listed.

20 Q. Do you know how long the highest ranking officer of BATCo
21 has served in the industry or with that company?

22 A. No, I don't.

23 Q. And you didn't ask defense counsel for that information?

24 A. No, because I was focused on tobacco companies.

25 Q. Is it your understanding that British American Tobacco is

1 not a tobacco company?

2 A. No, that's not my understanding. But my understanding is
3 that the -- the relevant tobacco company, at least in the United
4 States, is R.J. Reynolds.

5 Q. Well, you say the relevant tobacco company in the United
6 States, but you've listed Philip Morris International.

7 Is it your understanding that they are the relevant
8 tobacco company in the Philip Morris family in the United
9 States?

10 A. No, but my understanding is that BAT has holdings outside of
11 tobacco companies and also international holdings.

12 Q. But you didn't ask the defense counsel in this case for any
13 of that information?

14 A. No, I didn't.

15 Q. And they didn't give it to you?

16 A. Correct, for the reasons that I've stated.

17 Q. Now, you've included some tobacco companies that operate in
18 the United States but not all; correct?

19 A. Correct.

20 Q. And you've included some international tobacco companies or
21 companies that operate internationally like Philip Morris
22 International; correct?

23 A. Correct.

24 Q. So in terms of a methodology for selecting these companies,
25 it's fair to say that you've included some defendants but not

1 all; correct?

2 A. Well, I wasn't trying to identify defendants, I was trying
3 to identify tobacco companies.

4 Q. I'm just asking you.

5 It's fair to say, isn't it, that in terms of a
6 methodology to select these companies, you didn't select some
7 defendants, you didn't -- you selected some defendants but not
8 all?

9 A. Again, I'd have to see the caption, but I assume that that's
10 correct.

11 Q. That's my question, Professor Fischel. You included some
12 defendants but not all?

13 A. Again, assuming that your representations about the identity
14 of defendants is correct, which I'm happy to assume, that would
15 be right.

16 Q. And you included some U.S. tobacco companies, but not all?

17 MR. BERNICK: Your Honor, we can keep on going through
18 this a second time. I think all these questions have been asked
19 and answered before. Every one.

20 THE COURT: I think certainly this one has been, yes,
21 in your earlier cross.

22 BY MR. WISE:

23 Q. Well, I'll just finish up, then. And you've included some
24 or at least one international company but not all, correct? A
25 company that operates internationally.

1 A. Correct, because it's a tobacco company.

2 Q. You've listed Susan Ivey, chairman and CEO of R.J. Reynolds,
3 as 25 years tenure at company and 25 years in tobacco industry.

4 Is it your understanding that Ms. Ivey has been with
5 R.J. Reynolds Tobacco Company for 25 years?

6 A. Well, there's a footnote that says includes tenure at prior
7 entities. So, not necessarily.

8 Q. Do you know where she's worked previously?

9 A. Not from memory, no.

10 Q. Now, while we are speaking of specific executives. When you
11 filed your testimony you weren't aware that Michael Szymanczyk,
12 the chairman and CEO of Philip Morris USA, had no prior
13 experience with the tobacco industry before he was named Senior
14 Vice President; correct?

15 A. Right. I didn't investigate what he did before the time
16 period that's referred to on the exhibit.

17 Q. But you would agree that Senior Vice President is a member
18 of senior management?

19 A. Typically, yes.

20 Q. And you don't know, based on your answer, you don't know if
21 any of these individuals joined senior management with any
22 previous experience in the tobacco industry?

23 A. Correct. I only investigate the time period that's
24 reflected on the exhibit itself.

25 Q. Which excludes all of their previous employment before they

1 joined senior management?

2 A. Right, but that would be more than 15 years ago.

3 Q. Is it your understanding that Mr. Szymanczyk was not
4 employed more than 15 years ago?

5 A. No, I don't have an understanding about what his employment
6 was more than 15 years ago.

7 Q. Now, in your testimony at Page 14, at the very top, you
8 offer the opinion, "experience in the tobacco industry appears
9 to be particularly important in running a tobacco company."

10 Correct?

11 A. Correct.

12 Q. I want to focus on that word "particularly."

13 Now, the only data in this table relates to tenure. In
14 other words, the number of years an executive has either been at
15 the company they head or, more generally, been in the industry;
16 correct?

17 A. Correct.

18 Q. So you're concluding that experience is particularly
19 important because the executives you've listed have these
20 experience -- have this experience?

21 A. Correct.

22 Q. Even though you've testified that experience is particularly
23 important, you didn't examine whether other factors are more or
24 less important in running a tobacco company.

25 A. No, I didn't.

1 Q. And you've never published a scholarly article that examines
2 what qualities are particularly important for running a tobacco
3 company?

4 A. Correct.

5 Q. You also didn't explain -- you also didn't study whether
6 some other factor explains why the people on your list have the
7 tenures they have; correct?

8 A. I didn't study why they have the tenures that they have,
9 that's correct.

10 Q. You didn't study whether another factor explains this?

11 A. Another factor than what?

12 Q. Well, for instance, you didn't study if whether other
13 industries won't hire top managers from this industry and,
14 therefore, perhaps that explains the long tenures according to
15 your testimony?

16 MR. BERNICK: Again, I object, lack of foundation. It
17 assumes facts not in evidence.

18 THE COURT: No. The objection is overruled.

19 As an example the witness wasn't sure what Mr. Wise was
20 referring to and he offered an example.

21 Go ahead. Objection is overruled.

22 A. That doesn't make sense to me. Whether or not other
23 industries would be willing to hire tobacco executives in
24 comparable positions does not explain why tobacco companies
25 themselves would be willing to hire them at those positions.

1 Q. Professor Fischel, my question was simply -- well, now, I
2 can't remember it, given the objection.

3 My question was well, for instance, you didn't study if
4 whether other industries won't hire top managers from this
5 industry and, therefore, perhaps that explains the long tenures
6 according to your testimony.

7 A. That's what I just said doesn't make sense to me.

8 Q. I didn't ask if it makes sense. I asked if you studied
9 that, if you explored that.

10 A. I did not study whether other industries are willing to hire
11 tobacco executives.

12 Q. So you weren't aware that there's been testimony in this
13 case by former employees of tobacco companies that they had
14 difficulty obtaining employment outside the industry?

15 MR. BERNICK: If this is -- it's a reference to
16 Dr. Wigand, in particular, it's completely inapposite and it's a
17 misleading question.

18 THE COURT: Sustained.

19 BY MR. WISE:

20 Q. Professor Fischel, you also didn't collect any comparative
21 data on whether executives in the tobacco industry have longer
22 or shorter tenures than executives in other industries; correct?

23 A. Correct, not in any formal way.

24 Q. Well, in no way that's reflected in this testimony; correct?

25 A. Well, I have a view of that based on my background and

1 experience, but I did not study that specifically.

2 Q. So reading your table, the court has no idea if these
3 executives' tenure with their companies in this industry is
4 particularly unusual compared to other industries?

5 A. It is, but you would not know that just from reading the
6 table itself.

7 Q. Or any of the testimony?

8 A. Correct.

9 Q. Now, Professor Fischel, the other table in your testimony is
10 J-DEM 010418. You have a copy of it. We can give you a copy as
11 well.

12 A. Thank you.

13 Q. And you were asked on Page 18 at lines 17 through 19, "Have
14 you performed your own investigation of whether companies
15 frequently remove senior management due to private incentives
16 arising from allegations of wrongdoing?" Correct?

17 A. I'm sorry. Line 18 of what?

18 Q. In your testimony, Page 18.

19 A. I just have -- I'll find it. I have so much paper in front
20 of me.

21 Q. It's your testimony at Page 18.

22 A. You put it on the screen and I'll be happy to read the
23 screen.

24 Q. It's lines 17 through 18. The question is, "Have you
25 performed your own investigation of whether companies frequently

1 remove senior management due to private incentives arising from
2 allegations of wrongdoing?" Do you see that question?

3 A. I do.

4 Q. And you answer at lines 20 do 22. "Yes. There are many
5 recent examples" -- I'm going to skip down.

6 The next question at line 23 asks, "Have you prepared a
7 summary table that reflects some of these examples?" And you
8 identify this exhibit, J-DEM 010418; correct?

9 A. Correct.

10 Q. Now you've testified that there are many recent examples of
11 large companies that remove senior managers, and those are
12 collected in your table; correct?

13 A. Correct.

14 Q. But your table doesn't include any tobacco companies;
15 correct?

16 A. Correct.

17 Q. And your table also, you've testified, looks at dismissals
18 undertaken by the board; correct?

19 A. Yes. I'm not sure it's limited to that, but that certainly
20 would be included, probably the dominant example in the table.

21 Q. But it's your understanding or -- let me ask it this way.

22 You didn't study whether any of these -- you didn't
23 study dismissals as a result of an action by a court, by a
24 court-appointed agent, for instance?

25 A. Not at the time of the testimony. Subsequent to the

1 submission of the testimony I did look at that question and
2 found a couple of examples of that.

3 Q. But none of those examples are in the table that we've got
4 here; right?

5 A. Not listed as in the description, correct.

6 Q. Now, at the last page of the table you identify under the
7 sources, the very last sentence, "after excluding duplications
8 or extraneous articles and excluding non-US firms the result is
9 the 157 entries in this table." Correct?

10 A. Correct.

11 Q. At Page 18 of your testimony you testify that J-DEM 010418
12 displays 157 companies that have dismissed senior executives;
13 correct?

14 A. Correct.

15 Q. Now, were you aware that on Page 22 of your table -- I'm
16 sorry -- Page 7. On Page 7 at entries 22 and 23, you double
17 counted Computer Associates International Incorporated. Were
18 you aware of that?

19 A. Well, I wouldn't call it double counting.

20 Q. Well, were you aware that there are two entries for Computer
21 Associates International?

22 A. Yes, very aware.

23 Q. In your testimony you state, J-DEM 010418 displays 157
24 companies that have dismissed senior executives; right?

25 A. Right.

1 Q. If we flip all the way to the end of J-DEM 010418, the last
2 entry is 157?

3 A. Correct.

4 Q. Were you also aware that on Page 12 you have two entries for
5 the New York Stock Exchange, entry 38 and entry 41?

6 A. Yes, I see that.

7 Q. Were you aware that on Page 15, at entry 55 you list E*Trade
8 Group and then you list them again on Page 18 at entry 65?

9 A. I see that.

10 Q. Were you aware of these multiple entries, the last few I've
11 done?

12 A. Yes.

13 Q. But it's your testimony at Page 18 that this table displays
14 157 companies; correct?

15 A. If -- I guess you could say displays 157 instances by 150-
16 some-odd companies, if that would make it clearer.

17 But the table was meant to capture all the instances
18 where companies removed senior executives even if it was the
19 same company.

20 Q. But it was your sworn testimony that the table reflected 157
21 companies that removed senior executives; correct?

22 A. Yes.

23 Q. And were you aware that Enron appears five times in your
24 table?

25 A. I was aware that it appeared multiple times. I'm not sure I

1 counted five different times.

2 THE COURT: Mr. Wise, maybe if we could get to the
3 bottom line it would be a little faster.

4 What's your bottom number to ask the witness about?

5 MR. WISE: That's the question, Your Honor.

6 BY MR. WISE:

7 Q. Does the witness know, in fact, how many companies this
8 table reflects?

9 A. I haven't separately counted to see if I were trying to
10 identify different companies as opposed to instances of
11 dismissals by companies what the number would be.

12 MR. WISE: I think we can -- I don't know if it's too
13 early for lunch, Your Honor.

14 THE COURT: Are you still on this topic?

15 MR. WISE: I've got some more.

16 THE COURT: We should finish this topic.

17 MR. WISE: We may be not be able to finish this topic
18 before lunch.

19 THE COURT: Let's try it.

20 BY MR. WISE:

21 Q. It also says -- well, let's go back to your last page in
22 terms of your -- you do say that you've excluded duplications;
23 correct?

24 A. Correct.

25 Q. But just so the record is clear. You haven't excluded

1 duplications of companies?

2 A. I meant duplications of news stories.

3 Q. Now, you also say you've excluded non-U.S. firms. Do you
4 see that on the last page?

5 A. I do.

6 Q. Were you aware on Page 3 at entry 8 you cite a French
7 company, I'm sorry, Canadian company, Bombardier, Incorporated?
8 B-o-m-b-a-r-d-i-e-r.

9 MR. BERNICK: Is counsel making that representation to
10 be factually accurate?

11 BY MR. WISE:

12 Q. Are you aware that Bombardier is a Canadian, French
13 Canadian, a Canadian company?

14 A. I'm not aware one way or the other without researching the
15 issue.

16 Q. Were you aware at Page 5, at entry 17, you list the Credit
17 Suisse Group? Are you aware that that's a Swiss company?

18 A. You know, again I'd have to check where they were -- the
19 company that this dismissal refers to, where they are
20 incorporated.

21 Q. While we are on the topic of selection criteria, Professor
22 Fischel. On Page 18 of your written direct you describe the
23 table -- you describe many recent examples of large companies.

24 Did you identify in your testimony the selection
25 criteria you applied to determine what a large company is?

1 A. No, but I think it's public companies.

2 Q. Were you aware that you have an entry for a company as small
3 as 12 employees?

4 A. No, I'm not aware of that.

5 Q. If you look at page -- entry 82 on Page 23. You list Dor
6 BioPharma, and in the center -- if we could have the
7 description -- the line that starts, "In a press release Friday
8 the company said it reduced its head count to 12 employees from
9 22 and intends to review additional cost cutting measures."

10 Do you see that?

11 A. I do, but it's a public company as the next sentence
12 suggests.

13 Q. My question, Professor Fischel, is how you defined large.

14 A. I said public companies.

15 Q. So large means public?

16 A. I think that's the selection criteria.

17 Q. So the range in terms of the selection criteria for this
18 table is 12 and up, 12 employees and up?

19 A. The selection criteria doesn't focus on the number of
20 employees. And I'm sure if it did, 12 employees would be
21 extremely unusual, a major outlier.

22 But the selection criteria was on other grounds other
23 than the number of employees.

24 Q. You think it's an outlier, but you don't really know sitting
25 here, do you?

1 A. No, but I think I can just look at the list of companies and
2 I think I do know without having studied the issues
3 specifically.

4 Q. Without having studied the issue of the information in your
5 table.

6 A. I have studied the information in my table. I just have not
7 tried to look at how many employees all of the individual
8 companies on the table have.

9 But that said, I am very confident that 12 employees
10 would be an outlier, although the number of employees, as I've
11 stated, was not the selection criteria for the table.

12 Q. Do you think it was obvious from your testimony that large
13 means public?

14 A. Well, I think it was obvious once defined.

15 Q. But you didn't define it in your testimony?

16 A. Not that I recall, no.

17 Q. Now, in your deposition when you were asked how you defined
18 dismissal, you said termination of employment; correct?

19 A. Correct.

20 Q. But you don't define dismissal anywhere in your testimony.

21 A. Well, I think the word dismissal has a certain meaning in
22 the ordinary use of the English language.

23 Q. Well, you have entries in this table both for executives
24 that resigned and executives that were dismissed; correct?

25 A. Yes, although the -- frequently, that's a distinction

1 without a difference, as in the AIG case where the resignation
2 is in light of allegations, or to avoid dismissal, something of
3 that nature.

4 Q. But you've identified this table as dismissals of top
5 management.

6 A. Correct.

7 Q. But you've said it's a distinction without a difference
8 whether they were actually dismissed or resigned.

9 A. In many cases, that's true.

10 Q. Now, you've also said it's your opinion that this table
11 shows there are substantial number of cases where managers were
12 removed because of alleged wrongdoing; correct?

13 A. Correct.

14 Q. But when you say substantial, you haven't identified your
15 baseline. You haven't identified how large a population you're
16 looking at; correct?

17 A. That's right.

18 Q. You didn't look at the Fortune 500, for instance?

19 A. Correct.

20 Q. Or the 2500 largest companies in America by market
21 capitalization?

22 A. Correct.

23 Q. In fact, the methodology you employed or your research staff
24 at Lexecon employed was, if we look at the back page, to
25 search -- I think under sources -- to search the Dow Jones News

1 Wire and Wall Street Journal between January 1, 2000 and 2005?

2 A. Correct.

3 Q. So these were all newspaper articles that you've relied on
4 for the table?

5 A. And newswire services, correct.

6 Q. Newswire services carry newspapers articles; right?

7 A. Yes, sir, but they also carry additional information.

8 Q. Is it your understanding that any of these are not -- well I
9 won't quibble about what article means.

10 And this is what you've referred to as your empirical
11 study?

12 A. Correct.

13 Q. So if a dismissal was not reported in the press, you didn't
14 capture it?

15 A. If it wasn't reported in one of these sources it would not
16 be included, correct.

17 Q. That's an important distinction. Even if it was reported in
18 the press, if it didn't happen to be on Dow Jones News Wire or
19 the Wall Street Journal, you wouldn't capture it; correct?

20 A. Correct.

21 MR. WISE: Your Honor, I think this would actually be a
22 decent time to break, and I think I can --

23 THE COURT: Let me conclude with asking the witness a
24 question.

25 Why did you follow that policy in deciding when to

1 report or not to report dismissals?

2 THE WITNESS: Which policy specifically, Your Honor?

3 THE COURT: That it had to be reported, that the
4 dismissal had to be reported not just in the press, but in
5 addition, in the Wall Street Journal and the Dow Jones reporter
6 of some kind.

7 THE WITNESS: The Dow Jones News Wire, because the Dow
8 Jones News Wire is actually a much broader source of information
9 than just the press.

10 There will be more things reported in the Dow Jones
11 News Wire about business news than in the press, and it's just a
12 filter. I think it's generally recognized that important
13 financial information is contained in the -- is provided in the
14 Dow Jones News Wire.

15 Now, it's possible that there may be more dismissals
16 than the ones reported that weren't picked up by the Dow Jones
17 News Wire, but I would expect that would be a very small number,
18 if any number.

19 THE COURT: All right, everybody, at this point does
20 your estimate remain about the same in toto?

21 MR. WISE: I think it's reduced, Your Honor. I think
22 we can reduce it further.

23 THE COURT: Mr. Webb. All right, Mr. Bernick.

24 MR. BERNICK: That's actually pretty important, because
25 a broad range of topics has now been covered and I'm going to

1 have a not insignificant redirect examination. So if we can get
2 an estimate from counsel about how much longer he's going to go.

3 MR. WISE: I really -- I think I gave an estimate. I'm
4 going to try to cut back. I know everyone wants to leave for
5 the Memorial Day, but I'm going to try to keep it shorter.

6 THE COURT: We've all lost Memorial Day Weekend, don't
7 worry about that, or at least I think we all have.

8 The original estimate of time was two to two and a
9 half. Certainly Mr. Wise has that estimate a little over an
10 hour left and perhaps he can cut it down to less. Is that a
11 fair statement?

12 MR. WISE: Yes, Your Honor.

13 THE COURT: So we're talking approximately an hour.

14 MR. BERNICK: That then leaves it. And then counsel
15 just was going to say that it's been reduced and then it
16 changed. But if we come back at 2:00 and he goes --

17 THE COURT: No, we're not coming back at 2:00. We are
18 coming back at a quarter to 2:00 or maybe earlier.

19 How long do you think your redirect will be?

20 MR. BERNICK: Right now I think my redirect would go an
21 hour and a half.

22 THE COURT: We will be all right if we don't get off
23 into tangents.

24 Mr. Webb.

25 MR. WEBB: To answer the question that you were asking

1 myself and Ms. Eubanks about this morning as far as -- right
2 now, just based on how we're going to -- when we change lawyers
3 would make sense to end -- our second day, we will end the day
4 with about 1 hour and 40 minutes left to go the following
5 morning. That would, in effect, on Wednesday, we will end the
6 day with about an hour and 40 minutes left to complete our
7 closing argument on Wednesday morning and then the government --
8 or Thursday morning, I guess, on Thursday morning.

9 THE COURT: And the government will have approximately
10 an hour and a half left at that point.

11 MS. EUBANKS: I think that's right, Your Honor.

12 THE COURT: All right. Fine, thank you.

13 Okay, quarter of 2:00, everybody.

14 (Recess began at 12:35 p.m.)

15 (Recess ended at 1:44 p.m.)

16 THE COURT: Mr. Wise, are you almost ready?

17 MR. WISE: Yes.

18 BY MR. WISE:

19 Q. Good afternoon, Professor Fischel.

20 A. Good afternoon.

21 Q. I'd like to pick up where we left off, and that is
22 discussing the methodologies you used in preparing your table,
23 and I actually want to address something that the court raised
24 with you.

25 If we go to the last page of the table, that's Page 44,

1 myself and Ms. Eubanks about this morning as far as -- right
2 now, just based on how we're going to -- when we change lawyers
3 would make sense to end -- our second day, we will end the day
4 with about 1 hour and 40 minutes left to go the following
5 morning. That would, in effect, on Wednesday, we will end the
6 day with about an hour and 40 minutes left to complete our
7 closing argument on Wednesday morning and then the government --
8 or Thursday morning, I guess, on Thursday morning.

9 THE COURT: And the government will have approximately
10 an hour and a half left at that point.

11 MS. EUBANKS: I think that's right, Your Honor.

12 THE COURT: All right. Fine, thank you.

13 Okay, quarter of 2:00, everybody.

14 (Recess began at 12:35 p.m.)

15 (Recess ended at 1:44 p.m.)

16 THE COURT: Mr. Wise, are you almost ready?

17 MR. WISE: Yes.

18 BY MR. WISE:

19 Q. Good afternoon, Professor Fischel.

20 A. Good afternoon.

21 Q. I'd like to pick up where we left off, and that is
22 discussing the methodologies you used in preparing your table,
23 and I actually want to address something that the court raised
24 with you.

25 If we go to the last page of the table, that's Page 44,

1 under Sources. We've already discussed that these articles all
2 came from the Dow Jones News Wire and the Wall Street Journal in
3 this time period. Do you recall that?

4 A. Yes, I do.

5 Q. And the next line reads, "The search terms included
6 variations of dismissed or fired or terminated or stepped down
7 or replaced or canned or ousted or removed or resigned or leave
8 and top management," and then you identify a couple of different
9 positions.

10 Just so the record is clear. This was a computer based
11 search like a LexisNexis search; correct?

12 A. Correct.

13 Q. Using these terms?

14 A. Yes.

15 Q. In these two sources: The Dow Jones News Wire and the Wall
16 Street Journal?

17 A. That's right.

18 Q. And, actually, one thing one mistake I had forgotten to
19 make. I didn't ask for an instruction before lunch and I just
20 wanted to ask Professor Fischel just a few questions about that.

21 Did you speak -- did you call anyone over the lunch
22 break, Professor Fischel?

23 A. Yes, I did.

24 Q. And who did you call?

25 A. I called my secretary and I called David Gross.

1 THE COURT: I didn't hear the last thing.

2 THE WITNESS: David Gross.

3 BY MR. WISE:

4 Q. And why did you call David Gross?

5 A. I just gave him a -- just sort of a sense of timing, and I
6 mentioned a couple of the questions that you had asked me.

7 Q. And did you discuss with Mr. Gross these questions?

8 A. Well, in some fashion. I said -- he said, "How's it going?
9 What are you" -- and I just mentioned a couple of the areas that
10 you had asked about.

11 Q. And what did he say to you after you mentioned a couple of
12 those areas?

13 A. He didn't really say anything. Just sort of interested and
14 that was it.

15 Q. Did you speak to anyone else?

16 A. I did not.

17 Q. Do you know if Mr. Gross was in contact with any of the
18 counsel in this case?

19 A. I'm confident he was not.

20 Q. Do you recall which questions that I had asked you, you
21 discussed with Mr. Gross?

22 A. Yeah. I think I said, because it was fresh in my mind, I
23 told him there were a lot of questions about the two tables.

24 Q. Again, do you recall which of the questions that I asked?

25 A. I think I said what I just said.

1 I think I said -- I think I said that you were asking a
2 number of questions about the sources, the definitions. That's
3 basically what I said.

4 Q. And why did you do that, Professor Fischel?

5 A. Well, first and foremost I wanted to give him a report of
6 what was going on. I told him what I, you know, said in
7 response to a couple of areas in response and, you know,
8 basically wanted to both fill him in and make sure that what I
9 had said was accurate about some of the definitional issues
10 about the tables.

11 Q. And so in making sure what you said is accurate, he must
12 have responded in some way when you raised these questions. Is
13 that right?

14 A. Yes, I think that's fair.

15 Q. And what did he say when you tried to verify if you were
16 accurate?

17 A. You know, the only thing that I think would fall -- the sort
18 of response that would fall into that category was he agreed
19 that the tobacco companies on the -- the list of the tenure of
20 tobacco executives were chosen because those are the tobacco
21 operating companies.

22 Q. Professor Fischel, I thought you were speaking about the
23 dismissal table. Did you also speak with him about the tenure
24 table?

25 A. I thought I said both tables. If I didn't -- I think I did,

1 but I meant to.

2 MR. WISE: Your Honor, I would just like on the record
3 to make sure that defense counsel didn't speak with Mr. Gross in
4 preparation for the redirect.

5 MR. BERNICK: I did not speak with Mr. Gross.

6 I had a very brief contact with Mr. Fischel right here,
7 and I think counsel for the government was right behind me, and
8 I said I couldn't talk with him about the case, and then I sat
9 down. I think he went to have lunch.

10 THE COURT: All right.

11 BY MR. WISE:

12 Q. Professor Fischel, did you review any materials over the
13 lunch break?

14 A. No, I did not. I had largely, really exclusively a social
15 lunch with Mr. Webb who I've known for a long time.

16 Q. And you and Mr. Webb didn't discuss the substance of your
17 testimony in any way?

18 A. No. We discussed a number of other cases, but not this one.

19 Q. Now, Professor Fischel, before we started talking about this
20 topic we were looking at the last page of your table and you had
21 testified that this -- I think you used the word -- well, you
22 used the word "survey" in your one-hour live, but you've also
23 used the word "empirical study."

24 I asked you some questions about the fact that this was
25 the product of a computer-based search using these terms;

1 correct?

2 A. Correct.

3 Q. And someone on Lexecon's research staff entered these terms
4 into the LexisNexis database or whatever database you used and
5 then it produced these articles?

6 A. Correct.

7 Q. Now, you didn't search publicly-available filings, like SEC
8 filings or proxy statements, or any of the kind of documents
9 we've been using in your examination today; isn't that right?

10 A. What I did was referred to there -- I searched Dow Jones
11 News Wire and the Wall Street Journal or, more accurately, those
12 searches were performed under my supervision.

13 Q. By someone on the research staff?

14 A. Correct.

15 Q. Professor Fischel, do you recall at your deposition in the
16 course of your questioning you were told that there were
17 multiple entries and that therefore the 157 companies figure was
18 inaccurate?

19 A. I do.

20 Q. And you also recall that this morning before you took the
21 stand and adopted your sworn testimony you had an opportunity to
22 make any corrections to that testimony; correct?

23 A. Correct.

24 Q. But you chose not to?

25 A. I don't consider it to be inaccurate.

1 Q. Well, let's look at the specific statement, then. I think
2 it's on Page 18 of your testimony at lines 24 to 25.

3 The specific statement is, "J-DEM 010418 displays 157
4 companies that dismissed senior executives between January 1,
5 2000 and April 1, 2005." Correct.

6 A. Correct.

7 Q. But it's your testimony that you don't think it's inaccurate
8 even though, as we've established, there are multiple instances
9 of double counting in your table.

10 A. I don't agree that there are multiple instances of double
11 counting.

12 Q. Well --

13 A. It also doesn't say -- I mean, if you want to be hyper-
14 technical and semantic, as apparently you do, it does not say
15 157 different companies. It says "157 companies that dismissed
16 senior executives," which is what the table shows.

17 Q. So it's your testimony, Professor Fischel, that 157
18 companies doesn't mean 157 different companies? Is that your
19 testimony?

20 A. In this context, that's my testimony, correct.

21 Q. Now, you also testified that you disagree that there are
22 numerous instances of the same company in the table. Is that
23 your testimony?

24 MR. BERNICK: Your Honor, I think we've been over this
25 about three times now.

1 THE COURT: Well, certainly once. We have. I mean, we
2 went through it this morning.

3 MR. WISE: I think, Your Honor, that's what I heard
4 Professor Fischel say, that he disagreed that there were
5 multiple instances of the same company in the table.

6 MR. BERNICK: We will stipulate that there are multiple
7 instances of the same company in the table.

8 I think Professor Fischel's testimony has been clear,
9 which is that the intent of the document was to list instances
10 in which companies dismissed or took action against --

11 THE COURT: That was his testimony, but there's no
12 question this morning that at a very minimum he admitted that
13 there were five entries, if you will, for Enron and then you
14 queried him about another three or four at a minimum. So all of
15 that is -- at least that much is in the record.

16 BY MR. WISE:

17 Q. But you commented you thought that was hyper-technical or
18 semantic. Did I get that part of it right?

19 A. I thought the question about whether 157 companies refers to
20 157 different companies or 157 instances of companies,
21 particularly given the clear meaning of the table where
22 everything is clearly identified. I think that distinction I do
23 believe is hyper-technical in this context, correct.

24 Q. And that's why you didn't correct it on the record before
25 you adopted the testimony?

1 A. I didn't correct it because I don't consider it to be
2 inaccurate as I stated.

3 Q. But, of course, the court didn't have your deposition where
4 this was addressed nor this discussion when the court was
5 reviewing your testimony; correct?

6 A. I'm not sure what the court had, but I assume the court had
7 the table which clearly lists the identity of the companies.

8 Q. But the court also had your testimony that described the
9 table as displaying 157 companies that dismissed senior
10 executives; correct?

11 A. Yes, it did.

12 Q. Now, before your research staff put together the table, did
13 you or anyone else do any research to determine if the issue of
14 CEO dismissal was studied in a systematic way anywhere?

15 A. You mean other than this table?

16 Q. My question is did you investigate whether the issue of CEO
17 succession was studied anywhere in a systematic way?

18 A. I think the table does that.

19 Q. I think my question was before you -- just to clarify --
20 before you put together this table, did you attempt to find out
21 if the issue of CEO succession was studied in a systematic way?

22 A. You know, it's a yes. I would say I looked at a number of
23 articles and stories in the press that discussed that issue.

24 Q. Do you know who the consulting firm Booz Allen Hamilton is?

25 A. I do.

1 Q. Are you familiar with their work?

2 A. In this context, no, I'm not.

3 Q. In any context?

4 A. I know they are a well regarded, well known consulting firm.

5 Q. Were you aware that Booz Allen Hamilton does an annual
6 survey of CEO succession?

7 A. No, I was not.

8 Q. So it's fair to say you weren't aware that they routinely
9 survey the largest 2500 companies in America by market
10 capitalization and code the reasons for CEO succession?

11 You weren't aware of any of that?

12 A. No, I was not.

13 Q. Now, the last column of your table is headed "Alleged
14 Wrongdoing" and you have a yes or a no next to every entry.

15 A. Correct.

16 Q. Actually, before I do that.

17 MR. WISE: If I could have a second, Your Honor.

18 Could I have is -- I'm going to pick up on that last
19 point. Could I have U.S. Exhibit 93829 on the screen? And we
20 will just get you a copy of this.

21 A. Thank you.

22 Q. Professor Fischel, I'm going to represent to you this is the
23 annual survey -- annual study of CEO succession done by Booz
24 Allen Hamilton. I want to ask if you're familiar with this
25 document, if you've ever seen it before.

1 A. I'm not familiar with it. I could probably review it if you
2 give me a minute or two looking at the substantive findings.

3 But I'm not familiar with it, no.

4 Q. That was my only question.

5 A. Okay.

6 Q. Now, back to the table. If we look at that last column, the
7 column Alleged Wrongdoing you have a yes or a no next to each of
8 the summaries you provide. Isn't that right?

9 A. Yes.

10 Q. But you don't actually tally up those yeses or nos anywhere
11 in your testimony; correct?

12 A. That's correct.

13 Q. Now, in fact, you can't do that because sometimes it's not
14 clear from the newspaper article whether there was a combination
15 of wrongdoing and some other factor that led to the dismissal;
16 right?

17 A. I think that's fair.

18 Q. If you had done a more detailed investigation you might have
19 been able to tell?

20 A. Or no matter how much investigation you do, it still might
21 be a combination of factors.

22 Q. I'm going to represent to you that we counted your yeses and
23 nos and you had 68 yeses and 89 nos. Does that sound like--

24 A. That sounds reasonable.

25 MR. BERNICK: Your Honor, at this point I don't have

1 any objection with pursuing this further. We offered this as a
2 demonstrative. It's now being used as a summary of actual
3 survey results.

4 I have no difficulty with that for whatever value it
5 has to the court, but I want it to be clear that this has now
6 become the government's document.

7 That is, they are putting into evidence their
8 characterization of the data that the witness gathered. It's no
9 longer a demonstrative. It's their document. It's their data.

10 We used it for the purpose of eliciting a survey that
11 went just to the propositions that are contained in his direct
12 examination. They are turning it into their own document. It's
13 no longer a demonstrative since it's now being used.

14 MR. WISE: Your Honor, it's referred to in the
15 testimony.

16 THE COURT: I don't know what Mr. Bernick's point is.
17 Certainly the government can't be required to put into evidence
18 a document that they don't want to put in. And they can
19 question him.

20 I do think that you should be mindful of the time
21 though, Mr. Wise.

22 MR. WISE: At this point, Your Honor, I can move then
23 to -- I think we finished with talking about methodology and I'm
24 just going to focus on the substance I think of the conclusions
25 you make based on this.

1 BY MR. WISE:

2 Q. On Page 18 of your testimony you were asked the question at
3 lines 17 through 19, "Have you performed your own investigation
4 of whether companies frequently remove senior management due to
5 private incentives arising from the allegations of wrongdoing?"

6 And then again lower down on the page you refer to this
7 table as summarizing what's referred to in the question as your
8 investigation of how frequently CEOs are removed.

9 And I think the easiest way to do this is, if I could
10 have U.S. Exhibit 18277. This is a demonstrative that the
11 United States prepared where we've got the numbers -- the tally
12 from your table in the quadrants that are pink.

13 In other words, according to the table there were 68
14 dismissals where there was an allegation of wrongdoing and 89
15 dismissals where there was no allegation of wrongdoing, and then
16 in the blue boxes is some data that I want to ask you about.

17 Now, you've already testified that you didn't identify
18 the baseline for this study in terms of Fortune 500 or the
19 largest 2500 companies.

20 So, that lower quadrant, that lower cell, there's no
21 number in because we don't know how many companies didn't change
22 top management, period. Is that fair to say?

23 A. That's fair to say from this table.

24 Q. And it's fair to say from your testimony, because you don't
25 provide any information about a universe of companies that you

1 looked at and whether or not there was succession at some but
2 not others. Isn't that right?

3 A. That's right, although some of the articles in the press
4 stories that I discuss in my written testimony do address that
5 issue.

6 Q. Well, I'm not sure.... Professor Fischel, you don't testify
7 about -- for instance, you don't provide data on overall CEO
8 succession in the economy; isn't that correct?

9 A. Let me just have a moment.

10 (Pause) I think that's correct. None of the articles that I
11 quoted address that exact question.

12 Q. And nowhere in the testimony is it addressed, either?

13 A. Correct.

14 Q. Now, the other blue cell with the question marks goes to
15 another issue of data, and that is you didn't study how
16 frequently boards do not remove executives when there's an
17 allegation of misconduct; correct?

18 A. Correct.

19 Q. So I'm going to ask you to make an assumption for me. We're
20 going to do this with two scenarios.

21 If we assume in scenario A that you had done that
22 research and found that there were 10 instances, based on the
23 review of the News Wire and the Wall Street Journal, there were
24 10 instances where there were allegation of wrongdoing but no
25 dismissal. If you found that data, let's assume you had, it's

1 fair to say, isn't it, that your opinion that allegations of
2 wrongdoing frequently lead to dismissal is correct; right?

3 A. Well, I think what I said was -- at least what you had on
4 the board is that there are many recent examples which I think
5 is correct.

6 I didn't make any attempt to compare the number of
7 situations where there was dismissal with something other than
8 dismissal, which a wide range of possible responses other than
9 dismissal as well.

10 Q. If I could have Page 166 of Professor Fischel's deposition.
11 I think you have it up there, Professor. I think it's at lines
12 2 through 6.

13 "So is it your opinion that boards are likely to act if
14 there's alleged wrongdoing?"

15 And your answer is, "You can't really determine that
16 from the table. It's my opinion that boards frequently do act
17 when there's alleged wrongdoing."

18 And that was your testimony; correct?

19 A. Yes, I think that's a correct statement.

20 Q. But again my question, Mr. Fischel, was you didn't study the
21 frequency with which boards don't act; correct?

22 THE COURT: That was just asked and answered.

23 MR. WISE: If we could go back to the demonstrative.

24 Q. And I think my question was: You would agree, wouldn't you,
25 that if you had found that there were 10 instances of alleged

1 wrongdoing and no dismissal, that would support the opinion that
2 allegations of wrongdoing frequently lead to dismissal. Is that
3 fair to say?

4 A. I think my testimony would be the same regardless of whether
5 it was 10 or a hundred or 200. It wouldn't make any difference
6 for purposes of the point I was making.

7 Q. Let's look at another scenario, scenario B.

8 Let's assume you had done the research and found that
9 in a thousand cases where there was alleged wrongdoing there was
10 no dismissal, is it your testimony that you would still -- it
11 would still be your opinion that allegations of wrongdoing
12 frequently lead to dismissal?

13 A. Again, that wasn't the question and answer in my deposition.

14 My testimony that you put up before was somewhat
15 different than that. But it would still be my testimony that
16 there are frequent situations where dismissal results no matter
17 how many times there are situations where dismissal does not
18 result or some other internal adjustment mechanism is taken to
19 deal with the allegations.

20 Q. Professor Fischel, I don't think you've answered my
21 question.

22 My question is: If you assume that you had done the
23 research and had this data that showed that while in a thousand
24 cases there was no dismissal and in only 68 there was, would it
25 still be your opinion that allegations of wrongdoing frequently

1 lead to dismissal?

2 A. Yes. In the way that I described in the written testimony
3 which is somewhat different from your question.

4 Q. Well, in fact, let's look at the written testimony at
5 Page 18 at line 17 through 19, you were specifically asked.

6 "Have you performed your own investigation of whether
7 companies frequently remove senior management due to private
8 incentives arising from allegation of wrongdoing?" Correct?

9 A. Correct.

10 Q. And you answer, "Yes. There are many recent examples of
11 large companies that removed senior managers" and then if we
12 scroll down further, you were asked, "Have you prepared a
13 summary table that reflects some of these examples?" And you
14 cite J-DEM 010418; correct?

15 A. Yes. So as I think is clear from the answer to the
16 question --

17 Q. Professor Fischel, I just asked if that was your testimony.

18 A. That was my testimony.

19 Q. I would like to briefly go back to an issue that I addressed
20 earlier, but I unfortunately couldn't lay my hands on the
21 document for, and that was the role of the institutional
22 shareholders.

23 Now, Professor Fischel, you recall I asked you a series
24 of questions where I asked if an institutional shareholder
25 provided pension management services to a company, did that

1 raise the possibility of a conflict of interest in terms of its
2 monitoring role. Do you recall those questions?

3 A. I do, and I answered yes.

4 Q. And that was just going to be my next question. You recall
5 you answered yes, that might rise a role of conflict of
6 interest.

7 Chris, can I have 93817?

8 Professor Fischel, you've been handed U.S. Exhibit
9 93817, it's a document at the top entitled: "Altria Group,
10 Inc., CDA/spectrum 13-F institutional ownership."

11 Are you familiar with CDA/spectrum database?

12 A. I am.

13 Q. So you understand that this database is maintained by
14 Thompson Financial and it contains ownership information on
15 institutions that file SEC Form 13-F; right?

16 A. That's my understanding.

17 Q. I'll do this with a couple. If you look at the second
18 largest by rank owner in Altria Group Inc., it's State Street
19 Corporation; correct?

20 A. Correct.

21 Q. And it lists in shares in the column Shares Held over 82
22 million shares. Do you see that?

23 A. I do.

24 Q. And you see, in fact, that ownership is ranked based on
25 shares in the length and breadth of this document?

1 A. I see that.

2 Q. Now, are you also familiar with IRS Form 5500, which is the
3 Annual Report of employee benefit plans?

4 A. I am.

5 Q. And I'll have that handed to you. Actually, while Chris has
6 this up, I want to draw your attention -- if we can scroll down,
7 Chris. If you scroll down to the 14th largest shareholder you
8 will see it's JP Morgan Chase and Company; correct?

9 A. Correct.

10 Q. And their ownership is listed at over 26 million shares;
11 correct?

12 A. Correct.

13 Q. Now a moment ago you testified you're familiar with IRS Form
14 5500.

15 Chris, can I have U.S. Exhibit 93818, please?

16 Professor Fischel, are you familiar with these kinds of
17 documents, the Schedule C, Form 5500?

18 A. Generally, yes.

19 Q. If you flip to the second to last page I would draw your
20 attention to, under part 1, the entry for State Street Global
21 Advisors, which is B under part 1.

22 And under C, it lists dollar value of interest in, and
23 it lists a couple of what I'll represent to you are pension
24 funds, and the dollar value is approximately 2.7 billion. Do
25 you see that?

1 A. I do.

2 Q. If we scroll down, we see another entry for State Street
3 Global Advisors and another entry for dollar value of interest
4 and that's about 181 million.

5 And then finally, if we go to the last entry, I'm
6 sorry, the last entry in part 1, we see JP Morgan Chase and
7 their value, about 86 million.

8 You do see, Professor Fischel, that it list Altria
9 Corporate Services, Inc. as the plan sponsor name; correct?

10 A. I do.

11 Q. Professor Fischel, would this be an example of the kind of
12 conflict of interest you testified might arise where large
13 institutional investors were also contracted to manage pension
14 funds by senior managers?

15 A. Yes. Might arise.

16 I think you would need to do some investigation to know
17 what the internal separation is within the firm -- within the
18 State Street firm of the different functions as is typically the
19 case. But I haven't investigated this one way or the other.

20 Q. That was going to be my next question.

21 When you were preparing your testimony did you look at
22 any of the information on the institutional shareholders that
23 own these defendants?

24 A. No, I did not.

25 Q. And you didn't look at the form we just looked at, the

1 spectrum, the 13-F institutional ownership form; is that
2 correct?

3 A. Correct.

4 Q. And you didn't look at Form 5500; is that correct?

5 A. That's correct.

6 Q. Did you ask anyone at Lexecon to collect that information
7 for you?

8 A. No, I did not.

9 Q. Did the defense counsel offer to provide you with any of
10 that information?

11 A. No.

12 MR. WISE: Your Honor, I have nothing further.

13 REDIRECT EXAMINATION

14 BY MR. BERNICK:

15 Q. Good afternoon, Professor Fischel.

16 A. Good afternoon.

17 Q. Could we bring over this little flip chart here?

18 MR. BERNICK: I once had an opposing lawyer, Your
19 Honor, who said that they were going to take away my flip chart
20 because then I wouldn't be able to think.

21 There may be truth to that.

22 THE COURT: No comment, Mr. Bernick. Go ahead.

23 BY MR. BERNICK:

24 Q. You were asked several questions that were predicated by the
25 general question of whether you felt it was important to be

1 neutral and impartial. Do you recall that?

2 A. I do.

3 Q. And then a series of questions were put to you about various
4 facts and a lot of those facts related to a firm called Lexecon
5 of which you've been a principal; correct?

6 A. Correct.

7 Q. Let's first of all talk about the questions that were asked
8 of you concerning money that you have made in connection with
9 your work at Lexecon.

10 Has Lexecon turned out to be a very valuable company?

11 A. Extremely valuable.

12 Q. Let's just give the court a little bit of history about your
13 personal involvement and how it came about.

14 Roughly when was Lexecon founded?

15 A. 1977.

16 Q. And were you one of the original principals of Lexecon?

17 A. No, I was not.

18 Q. Who were the original principals of Lexecon?

19 A. Three individuals: Richard Posner, William Landes, and
20 Andrew Rosenfield.

21 Q. Judge Posner is well known to the court. Could you tell us,
22 could you tell the court who William Landes is?

23 MR. WISE: Your Honor, I'm going to object. I don't
24 know what the relevance is of the founders of Lexecon when
25 Professor Fischel has testified that he wasn't even at the firm

1 at that point.

2 THE COURT: I'm not sure.

3 MR. BERNICK: What?

4 THE COURT: I'm certainly not sure what the relevance
5 is.

6 MR. BERNICK: The relevance is basically this witness's
7 affiliation with Lexecon has been made out to be basically an
8 affiliation that's led him to be a witness for sale. That's
9 essentially what has been suggested in no uncertain terms by the
10 government. That he represents people who are prepared to pay
11 him off in various respects.

12 MR. WISE: I think this is a speaking objection.

13 THE COURT: It certainly is. It certainly is. You can
14 ask a couple of questions about the beginning of the firm but
15 then just move on, please.

16 BY MR. BERNICK:

17 Q. I want to establish what the value of the firm is. Let me
18 just ask you. When you were asked questions about the value of
19 Lexecon, tell us what comprised the value of Lexecon that gave
20 rise to the kinds of numbers that were being discussed?

21 A. The willingness of our clients primarily to hire us in the
22 biggest and most complicated cases in the country, and then the
23 willingness of different entities to purchase Lexecon because of
24 the value that they felt Lexecon represented and created for
25 them.

1 Q. Okay. The value that was create, did that have something to
2 do with the services that were provided by the principals of
3 Lexecon?

4 A. That's really the only source of value. We don't have any
5 other business other than the people that we have that do the
6 work that we're engaged to perform.

7 Q. Let's talk about some of the people who have done work in
8 connection with Lexecon.

9 Professor Heckman was referred to during the course of
10 the examination. The court well knows who Professor Heckman is.

11 What other kinds of witnesses, or I should say, what
12 other kinds of -- I'll say it -- witnesses have become
13 affiliated with Lexecon in connection with its work over the
14 years?

15 MR. WISE: Your Honor, I object again on relevance
16 ground. It's one thing to ask questions about Professor Heckman
17 or the others that I mentioned, but to ask about other witnesses
18 that weren't mentioned in the cross that aren't in the direct, I
19 think it's like asking about the principals.

20 MR. BERNICK: Your Honor --

21 THE COURT: I'm going to allow a couple of questions,
22 since clearly the thrust of the -- a significant part of the
23 government's cross was openly or inferentially the integrity of
24 the organization. Go ahead.

25 MR. BERNICK: That's where I'm going.

1 Q. Could you tell us some of the other Professors, faculty
2 luminaries that have become affiliated with Lexecon over the
3 years?

4 A. We've had a number of Nobel Prize winners from different
5 universities.

6 We had an affiliation with Professor Kenneth Arrow, a
7 very prominent Noble Prize winner from Stanford.

8 Professors Gary Becker and George Steigler, Nobel Prize
9 winners from the University of Chicago.

10 We've had affiliations with many other prominent
11 academics, a number of whom are, you know, certainly in line to
12 win additional Nobel Prizes.

13 In addition to that, we have large full-time staff of
14 professionals.

15 Q. Give me a flavor. Give the court -- I'm sorry -- a flavor
16 of some of the professionals that were the subject of questions
17 by the government this morning in terms of people who work with
18 witnesses. Give the court a flavor for their professional
19 qualifications.

20 A. Yes. For example, David Gross, the individual that I
21 mentioned as well as Rick Flyer, who is the individual who
22 worked with Professor Heckman. Those are Ph.D.s, former
23 Professors of economics at NYU and the University of Chicago,
24 who joined us because they would rather do what we do as opposed
25 to continue their academic career.

1 We have a number of other former Professors on our
2 professional staff. And then we have a significant group of
3 Ph.Ds and people with advanced degrees behind Ph.Ds, and then we
4 have people with masters degree, MBA degrees, and then we have a
5 staff of research assistants, which would be our lowest level.

6 Q. Let's talk about Michael Miliken.

7 Michael Miliken, or his firm, the firm with which he
8 was affiliated, a client of Lexecon's during a certain point in
9 time?

10 A. Yes.

11 Q. And it was brought out that you've actually published a book
12 concerning Mr. Miliken. Do you recall those questions this
13 morning?

14 A. I do.

15 Q. Now, what role did Lexecon play in connection with Michael
16 Miliken's litigation?

17 A. There was extensive criminal and civil litigation that
18 Mr. Miliken was involved in, in the late 1980s and early 1990s,
19 and we were retained by -- really by counsel for Mr. Miliken to
20 assist in defense of that litigation.

21 Q. Okay. Was that a fairly extensive engagement?

22 A. Yes, very extensive.

23 Q. This book called Payback, which is U.S. Exhibit 93796, it
24 was published by, as I see, Harper Business, a division of
25 Harper Collins Publishers?

1 A. Correct.

2 Q. What kinds of people -- tell me, did you write this book
3 alone or were there other people who worked with you in
4 connection with the book?

5 And I'm really focused very specifically on people who
6 gave substantive contribution to the book but who were also
7 fairly well noted academics in their own right.

8 A. I got input from a number of significant academics in the
9 University of Chicago and elsewhere. I gave a number of talks
10 around the country about the book or the subject matter of the
11 book at various universities and got a lot of input from a lot
12 of different individuals.

13 Q. I see here on Page 12 of the preface mention made of Andy
14 Rosenfield and Dennis Carlton. They were at Lexecon?

15 A. Correct.

16 Q. Bill Landes, also with Lexecon?

17 A. Correct.

18 Q. Was he a faculty member?

19 A. Yes, was and is.

20 Q. Judge Frank Easterbrook. I know the court is familiar with
21 Judge Easterbrook. Parts of this book were presented to
22 academic audiences at Harvard University and the University of
23 Chicago. Were those presentations made by you?

24 A. Yes.

25 Q. You also make special note of Walter Blum. Who was Walter

1 Blum?

2 A. As the paragraph suggests, Walter Blum was my very close
3 colleague at the University of Chicago who unfortunately died
4 shortly before the publication of the book.

5 Q. Was he also a Professor at the law school?

6 A. He was.

7 Q. In terms of the research that went into this book, was this
8 book simply a question of editorial comment or was there
9 research that actually was conducted with respect to a wide
10 variety of scholarly publications?

11 A. The book was really an attempt to use scholarly publications
12 and a learning from academia and apply that learning to a lot of
13 the high profile legal proceedings that went on in the late
14 1980s and early 1990s; everything from the reasons for why
15 companies used high-yield bonds to the types of financial
16 transactions that were frequently attacked during that period.

17 Q. I take it that from time to time during the course of your
18 appearance in court you've been cross-examined with respect to
19 this book?

20 A. Sometimes I've been cross-examined, sometimes it's been used
21 to establish credentials.

22 Q. I see. Was there anything that counsel for the government
23 pointed out in this book that was wrong?

24 A. No. Obviously, some of the issues are controversial and I
25 took a position in the book that not everybody would agree with,

1 but I think the book has done well and standing the test of time
2 and very proud to have written it.

3 Q. Let's talk a little bit more about the second purpose for
4 which apparently the government introduced the subject of
5 Michael Miliken, was to bring out the fact that a company
6 controlled, at least in part by Michael Miliken, ended up
7 purchasing Lexecon in 1998?

8 A. Correct.

9 MR. WISE: Your Honor, I object. It happened very
10 quickly. I object to the form of the question. The first part
11 of it was, essentially, I think Mr. Bernick testifying, and then
12 I just -- I object to the form.

13 THE COURT: Objection is overruled. Go ahead.

14 Q. There was a suggestion made that in some fashion,
15 particularly in connection with the reference to the book, that
16 Michael Miliken as a current or former client did you some kind
17 of favor by buying Lexecon. At least, that was the inference
18 that I think was attempted to be drawn. Let me ask you.

19 In 1998 did one of the companies owned in part by
20 Michael Miliken, in fact, make a purchase of Lexecon for
21 approximately \$90 million?

22 A. They did.

23 Q. Now, if we go forward from 1998, when the purchase price was
24 \$90 million, to the time that the company was sold again in
25 2003, did it turn out that Mr. Miliken's company had overpaid

1 for Lexecon?

2 A. No. They got a very good deal, actually, in terms of
3 subsequent history.

4 Q. What was Lexecon sold for by Mr. Miliken's company in 2003
5 when they sold it to FTI?

6 A. I think approximately \$125 million.

7 Q. There was also a reference made -- again this question of
8 neutrality and impartiality -- reference was made to the fact
9 that a RICO lawsuit, a civil RICO lawsuit at one point in time,
10 was prosecuted against Lexecon.

11 Do you remember that question?

12 A. I do.

13 Q. Would it be fair to say that over the years Lexecon, through
14 its testimony, has been adverse to a number of very powerful and
15 influential lawyers?

16 A. That's certainly fair.

17 Q. And was one of those powerful and influential plaintiff
18 firms involved in the process of prosecution of that civil RICO
19 suit?

20 MR. WISE: Your Honor, I'm going to object.

21 First, he's leading.

22 And secondly, I simply asked if one of the counsel at
23 the table had represented him in that suit. I didn't ask about
24 the suit at all. And -- I mean, this is way beyond the scope of
25 what I did. I simply wanted to establish that he in fact

1 personally had worked with counsel on that suit.

2 It was, I think, three questions.

3 MR. BERNICK: Well, you could have easily elicited --
4 the only purpose was to show that there had been historical ties
5 between Mr. Fischel's firm and counsel in this case or other
6 counsel involved for the industry, that would have been simple.
7 But counsel went out of the way to point out that this was a
8 civil RICO lawsuit, just like the kind of lawsuit we're talking
9 about here, against Mr. Fischel's firm, and we're entitled to
10 bring out exactly what that lawsuit was about and what
11 ultimately happened to it.

12 MR. WISE: Your Honor, the testimony was elicited
13 ultimately counsel won dismissal of the suit. It was simply to
14 orient the witness --

15 THE COURT: The objection itself is overruled. But,
16 number one, I do know what happened to the lawsuit, obviously
17 based on the cross-examination. And why don't you bring out
18 what you need to as quickly as possible. It has limited
19 relevance.

20 BY MR. BERNICK:

21 Q. Is it a fact that the lawsuit was prosecuted by the Milberg
22 Weiss firm on behalf of the plaintiffs?

23 A. Yes.

24 Q. Did it subsequently emerge that the Milberg Weiss firm
25 actually was involved in unlawful conduct when it came to the

1 prosecution of that case?

2 MR. WISE: Your Honor, again it's leading and --

3 MR. BERNICK: I'm trying to get through to the point.

4 THE COURT: No, the objection is overruled. Let the
5 witness answer.

6 BY MR. BERNICK:

7 Q. Tell us what happened.

8 A. Basically what happened was after the suit was dismissed we
9 believed that the suit was, as well as collateral-related
10 conduct, was improper and unlawful, and we then sued the lawyers
11 who sued us. And if you want the capsule version of the full
12 story, after a period of time we eventually prevailed, got a
13 jury verdict, a substantial jury verdict, \$45 million, and the
14 case was settled before the punitive damages' phase for
15 \$50 million.

16 Q. Was that the financial windfall that you referred to earlier
17 on that then led to your gift to the University of Chicago Law
18 School?

19 A. It was.

20 Q. Let's talk about another fact that was brought out as part
21 of the examination, which is the fact that both in connection
22 with that case and in connection with other cases, that your
23 firm has had relations with some of the law firms that represent
24 the tobacco industry in this case. And in order to be
25 noncontroversial as possible, I'll pick out my own firm.

1 Is Kirkland & Ellis a firm with whom Lexecon has had
2 professional relations over the years?

3 A. Yes, I would say close professional relations over the
4 years.

5 Q. Now, tell us, have you been involved in lawsuits where
6 Lexecon has been retained by Kirkland & Ellis?

7 A. Yes, many times.

8 Q. Have you also been in lawsuits where you've been retained by
9 clients to testify against Kirkland & Ellis' clients in cases
10 where Kirkland & Ellis is on the other side?

11 A. Yes, also many times. I have several large cases currently
12 where I've testified recently against Kirkland & Ellis, against
13 clients represented by Kirkland & Ellis.

14 Q. In fact, just a few days ago lawyers from my firm
15 cross-examined you in one of those cases.

16 A. That's correct.

17 Q. Let's also talk about another situation where sometimes
18 you've been for, sometimes you've been against, let's talk about
19 the Department of Justice.

20 Has your firm or have they not done significant work
21 for the Department of Justice over the years?

22 A. Yes. I would say in the last six or seven years the
23 Department of Justice has been our largest client.

24 Q. In connection with those matters have you provided testimony
25 as an expert in economics and damages?

1 A. Yes, many, many times.

2 Q. Could you tell us in connection with those matters roughly
3 how much money you believe that the United States Government may
4 well have saved in connection with your work on those cases, if
5 you can?

6 A. Well --

7 MR. WISE: Your Honor, I object.

8 THE COURT: Sustained.

9 BY MR. BERNICK:

10 Q. Let me put it this way. The cases in which you have worked
11 for the Department of Justice, are they multibillion dollar
12 cases?

13 A. Yes.

14 Q. Have you been recognized, Professor Fischel, by the courts
15 for the quality of your work?

16 A. Yes, many times.

17 Q. I want to show you remarks made by Judge Ackerman of the
18 District Court for the District of New Jersey in March of 2004.

19 MR. WISE: Your Honor, I'm going to object on relevance
20 grounds.

21 THE COURT: I'm going to sustain the objection.

22 I'm sorry. I don't need to hear what other judges,
23 federal or state, have concluded. Every case is different. The
24 testimony is different in every case. Obviously, the
25 presentation, the expert witness presentation is different. It

1 is different. Objection sustained.

2 MR. BERNICK: That's fine, Your Honor.

3 The only real purpose was to make sure, in light of the
4 objection that the government has lodged to his qualifications,
5 that in fact these decisions are of record in this case.

6 THE COURT: You presented that to me when we had the
7 earlier argument.

8 MR. BERNICK: I understand that, but I just want to
9 make sure -- that was the purpose for the proffer, is to make
10 sure it was in the record.

11 THE COURT: It's in the record.

12 BY MR. BERNICK:

13 Q. Let's turn to the work that you did in connection with this
14 case specifically.

15 First of all, there was reference made to a meeting
16 where there was discussion about who involved with Lexecon
17 should be addressing what issues; that there was an allocation.
18 What was the nature of that allocation? Just tell us in your
19 own words.

20 A. Just based on the issues that were involved, the relative
21 areas of expertise of really myself and another individual,
22 Dennis Carlton.

23 Q. I want to try to capture now on the subject of the substance
24 of the work that you did the following question.

25 Your purpose in connection with your testimony -- was

1 it your purpose in connection with your testimony to offer an
2 independent analysis of what remedies might be appropriate in
3 this case or was there a different purpose for your work in this
4 case?

5 A. Very different purpose.

6 Q. Tell us what the purpose was of the work that you did in
7 this case.

8 A. The purpose was to analyze I would say the real world
9 applicability of the opinions and testimony of Professor
10 Bazerman in terms of his recommendation that, subsequent to the
11 court's ultimate decision in this case, the court should appoint
12 monitors who should then consider all of the different possible
13 structural changes that he discussed.

14 Q. So we have an evaluation of Bazerman.

15 A. Correct. That really was the sole purpose.

16 Q. Now, counsel asked you a whole bunch of questions about did
17 you look at litigation history for the tobacco industry. Do you
18 recall those questions?

19 A. I do.

20 Q. Do you recall he asked you whether you had done an analysis
21 to find out whether there were, you know, criminal or grand jury
22 investigations? Do you recall that?

23 A. I do.

24 Q. Do you recall him asking whether you had analyzed the
25 industry's compliance with court orders? Do you recall that?

1 A. I do.

2 Q. He just got done, I think right after lunch, asking you
3 questions about, Gee, did you go back and do some work dealing
4 with some kind of other survey that was done with respect to
5 turnover of CEOs. Do you remember that?

6 A. I do.

7 Q. Did you on your own conduct any independent review of any of
8 these things, as litigation history against the industry,
9 criminal investigations, industry compliance with court orders
10 or a thorough investigation of CEO turnover?

11 A. No, I did not.

12 Q. Just tell the court why it is that that was not something
13 that you did given the purpose of your testimony in this case.

14 A. Because I wasn't offering any opinions on either the
15 liability or the damage phase of this case.

16 I understand there's evidence and testimony about those
17 issues, and the court will ultimately decide, but those were not
18 issues that were part of the work that I did.

19 The work that I did, as I said, was limited to
20 analyzing whether the proposals that Dr. Bazerman made were
21 consistent with relevant economic theory and evidence of what
22 occurs, not in these laboratory experiments, but in the real
23 world.

24 Q. So your touchstone was him?

25 A. Correct, as I think my testimony makes clear.

1 Q. Now, I want to ask you some questions that relate to that.

2 During the course -- you reviewed his testimony in this
3 case?

4 A. I did.

5 Q. And I think that you were asked, you know, in what detail
6 you reviewed different parts of it. Not to go back over it, but
7 let me ask you this.

8 Do you see anywhere where Dr. Bazerman himself analyzed
9 the full history of litigation against the tobacco industry?

10 A. No.

11 Q. Do you see anywhere where Dr. Bazerman himself went through
12 and did an analysis of what kinds of criminal investigations had
13 taken place at the industry and what their outcome was?

14 A. No.

15 Q. Now, there was a reference to a court order in this case.
16 Do you recall that?

17 A. I do.

18 Q. Do you see anywhere where Dr. Bazerman actually went back
19 and took a look systematically at all of the different orders
20 that have been issued against the tobacco industry over time and
21 the industry's track record of compliance?

22 Did Dr. Bazerman go back and do that kind of thorough
23 analysis?

24 A. Not that I saw.

25 MR. WISE: Your Honor, I'm sorry, I didn't get up

1 quickly enough. I have two problems with these questions.

2 First, it's assuming facts not in evidence.

3 Professor Fischel has testified he didn't read all of
4 Dr. Bazerman's testimony.

5 Second, these are Professor Fischel's opinions. It's
6 just not relevant whether or not Dr. Bazerman conducted work
7 that Professor Fischel said was essential to making the opinions
8 he's made.

9 MR. BERNICK: Saying that just doesn't make it so.
10 It's just the opposite way around. It is they who have
11 misconceived the burden that was undertaken by this witness.

12 I brought out the fact that it was not his burden, and
13 moreover, based upon his review of what their witness has done,
14 he didn't even do these things.

15 MR. WISE: Your Honor, those are the factors he
16 identified in his testimony, not that Dr. Bazerman identified in
17 his testimony.

18 THE COURT: Everybody, those were factors you -- you
19 meaning the government -- asked this witness about.

20 Now, Mr. Bernick in his redirect is attempting to turn
21 the tables, if you will, and find out whether Dr. Bazerman's
22 testimony addressed the very issues which the government raised
23 with this witness in cross-examining him about his analysis.

24 The objection is overruled.

25 BY MR. BERNICK:

1 Q. Do you see anywhere where Dr. Bazerman did a thorough
2 investigation of CEO turnover anywhere?

3 A. No.

4 Q. You testified -- you were asked on cross-examination about
5 things that you said in your direct examination concerning the
6 appropriateness of issuing an injunction with contempt
7 sanctions. Do you recall that?

8 A. I do.

9 Q. Based upon your review of what Dr. Bazerman has testified
10 about, is there anything that he testified about that, based
11 upon your economic analysis, would make compliance issues in
12 this industry different from compliance issues elsewhere?

13 MR. WISE: Your Honor, I'm going to object. I think
14 we're getting -- that question gets us dangerously close to
15 testimony that was struck.

16 MR. BERNICK: Absolutely not. He testified, and it was
17 not stricken in his direct examination, as to the
18 appropriateness of injunctive relief.

19 There were questions this morning that probed the basis
20 for his making those statements; that is, his statements about
21 injunctive relief.

22 I am focusing like a light beam on that specific thing
23 and asking him whether anything that he learned from
24 Dr. Bazerman would single out this industry as being different
25 from the point of view of injunction compliance.

1 It's nothing to do with the opinions of Dr. Bazerman.
2 It has to do with the facts that Dr. Bazerman set out in order
3 to touchstone for this witness's analysis.

4 MR. WISE: Dr. Bazerman discusses a theory from
5 behavioral decision research in a section of his testimony that
6 addresses this very issue.

7 Now, to the extent that Mr. Bernick is asking Professor
8 Fischel to comment on that and to provide an analysis of that,
9 it goes clearly to issues that were struck from the testimony.

10 MR. BERNICK: That's not what I'm doing.

11 THE COURT: But this witness was allowed to testify,
12 and I did leave in his direct testimony and he was
13 cross-examined on the issue of compliance with court orders. So
14 the objection is overruled.

15 BY MR. BERNICK:

16 Q. Was there anything that you learned from the facts set
17 forward by Dr. Bazerman that would tell you that the compliance,
18 the facts relating to injunction or order compliance with
19 respect to this industry are different from other industries?

20 A. No. If anything, I think because this industry is so
21 scrutinized and so closely monitored by so many different public
22 and private monitoring entities, I think, if anything,
23 compliance would be easier in this industry than other
24 industries.

25 Q. I want to ask you this question and get it in the following

1 way.

2 You were asked a whole bunch of questions on a
3 hypothetical basis about various potential structural changes, I
4 think they were called, that were outlined by Dr. Bazerman. I
5 think it was Bazerman direct 2-3.

6 Do you recall being asked a whole series of potential
7 structural changes that were described by Dr. Bazerman?

8 A. I do.

9 Q. And you were also asked about monitoring. Not monitoring,
10 but monitors. And I got this question for you.

11 As you understood Dr. Bazerman's testimony, did
12 Dr. Bazerman actually recommend any structural change to the
13 industry?

14 A. No. I think he was very clear in not recommending any
15 specific structural change to the industry.

16 Q. I want to show you the following question and answer from
17 Dr. Bazerman's examination. This is at Page 20360.

18 The court asked the question. "And is it also your
19 testimony that you are not actually recommending that particular
20 action at this point, but rather you are simply including that
21 action as a possible option for the court and its advisers to
22 consider. Is that a fair summary?"

23 And the witness says, "That's an excellent summary,
24 Your Honor."

25 Is that consistent or inconsistent with your own

1 analysis of Dr. Bazerman's work; that is, he did not recommend
2 anything other than that monitors be appointed for potential
3 consideration of further changes?

4 A. That's my understanding of his testimony.

5 Q. Now, when you were asked about these monitors this morning
6 there were questions put to you about your level of expertise
7 with respect to monitors. Do you recall that?

8 A. I do.

9 Q. Let me just begin with some facts.

10 As you understood Dr. Bazerman's recommendation for the
11 appointment of monitors, would these be monitors whose charge
12 was to actually assure compliance with given remedies or were
13 these monitors, monitors who had a different role?

14 A. My understanding of Dr. Bazerman's testimony was in his view
15 the court did not have enough information or expertise to decide
16 on what the appropriate remedy was and instead there was a need
17 to appoint monitors.

18 I didn't fully understand what -- the process that the
19 monitors would follow, but that the monitors were the ones who
20 were going to consider the structural changes in some
21 unspecified interaction with the court as opposed to enforcing
22 compliance with the remedies that the court eventually decides
23 to impose in this case, if that's what the court eventually
24 decides to do.

25 Q. So we have in this case discovery and pretrial proceedings,

1 we have a trial on liability, we have a trial on remedies, and
2 then Professor Bazerman comes in and says at some point
3 thereafter monitors would be appointed and they would then
4 consider and make recommendations regarding remedies rather than
5 entering the remedies now.

6 Is that your understanding?

7 A. That is my understanding.

8 Q. Aside from whether you have a particular expertise in
9 monitors, are you aware of any provision of the civil rules,
10 evidentiary rules or any rules, that would authorize the court
11 to hold an entire trial and then appoint monitors to go ahead
12 and make recommendations for the ultimately relief in the trial?

13 MR. WISE: Your Honor, I'm going to object.

14 THE COURT: Sustained.

15 BY MR. BERNICK:

16 Q. Let's talk a little bit about injunctions.

17 You were asked questions with respect to this testimony
18 here. At Page 15 of your direct examination you were asked,
19 "What tools does the court have available to it to provide
20 incentives to current management to refrain from engaging in
21 misconduct?"

22 And your answer was, "The one that first comes to mind
23 is the court's power to identify certain wrongful conduct and
24 enter an injunction preventing defendants from engaging in such
25 conduct in the future."

1 And the part that was quoted to you this morning was
2 "Indeed, such a solution would be a much more direct and
3 efficient means of accomplishing the goals of preventing future
4 misconduct than to require the wholesale replacement of senior
5 managers" -- and it goes on to completion.

6 You were asked questions about whether you actually had
7 performed an analysis of the costs that would be involved in the
8 enforcement activities in connection with an injunction. Do you
9 recall that?

10 A. I do.

11 Q. Did you, in fact, perform a specific analysis for this
12 industry of the particular costs that would be associated with
13 an injunction?

14 A. No, other than noting that it would depend on what the
15 injunction was, what the court ultimately decides to do.

16 Q. Conversely, or on the other side of the equation, did you
17 actually perform an analysis of the costs of what would be
18 involved, specific costs that would be involved, in replacing
19 senior managers?

20 A. In general terms, yes, I did.

21 Q. Now, this comparison that you're drawing here, what is the
22 basis of the comparison?

23 In particular, is this a comparison that hinges on the
24 particular facts of what the injunction involves or what the
25 change in management provides?

1 A. No. It's a general statement that I think would have broad
2 applicability.

3 Q. What is the basis for that statement?

4 A. That you have a comparison of two remedies.

5 One is an injunction against engaging in conduct, which
6 I'm assuming the court concludes that there was sufficient
7 misconduct to warrant an injunction, although obviously I don't
8 have any opinion on the liability, let alone prediction about
9 what the court might do, which is targeted to this basic
10 proceeding: the fact finding, the testimony of the witnesses as
11 well as the conclusions of the court.

12 As I stated, I believe in the current environment in
13 which tobacco companies operate, any injunction by a court
14 would -- a compliance with that injunction would be closely
15 followed by analysts, regulators, rating agencies, plaintiffs
16 attorneys, consumer watch dog groups, and all the other
17 different types of monitoring entities that I discuss in my
18 testimony.

19 That's to be compared with a wholesale remedy of
20 eliminating a set of managers who have expertise in running
21 tobacco companies, which includes the ability to reform, to do
22 things in the future such as I discuss in my testimony,
23 manufacture, just as an example, a safer cigarette, where's
24 there no showing that the people removed had any involvement in
25 misconduct or, more importantly, perhaps, that the new people,

1 in addition to lacking expertise, won't have the same or worse
2 incentives to engage in misconduct than the removed people if
3 such incentives exist.

4 MR. WISE: Your Honor, I'm going to object to
5 Mr. Bernick writing. It seems like he's filling in the blanks
6 on his own chart while Professor Fischel was testifying.

7 I couldn't tell if any of what Professor Fischel was
8 testifying to had to do with what Mr. Bernick has written. And
9 I just think -- I mean, it's one thing to lead the witness, but
10 to put notes on the board for him.

11 THE COURT: Oh, I don't really think that's what he's
12 doing.

13 MR. BERNICK: Every word that the witness I've got
14 written on here the witness has already said, and the blank that
15 I've left is the blank for him to fill in based upon my next
16 question.

17 THE COURT: That's correct. So the objection is
18 overruled. Let's have the next question, please.

19 BY MR. BERNICK:

20 Q. You testified just now, Professor Fischel, that an
21 injunction could be targeted, specifically targeted on
22 misconduct, and I want to flip to the next question, which is if
23 you're replacing management, if you're simply replacing
24 management who historically was involved in the operation of the
25 company, is that targeted or is that not targeted specifically

1 to misconduct?

2 A. It's the opposite of targeted. It's not targeted.

3 Q. Now you were asked questions on Page 16 -- I thought this
4 was an interesting kind of question. In fairness, you paused,
5 making it even more interesting what your answer was going to
6 be. But the question that got put to you related to the
7 question and answer that appears at lines 9 through 19 of
8 Page 16.

9 Do you recall being asked the question about, well,
10 gee, if it turns out that this industry in fact has engaged in
11 RICO violations -- that is, Judge Kessler decides that my client
12 and other clients have been involved in RICO violations --
13 doesn't that give lie to the notion that the usual checks and
14 balances are adequate to assure compliance with the law? And
15 that's the question I want to go back to. Let me ask you this
16 question.

17 We are here in the middle of a trial concerning conduct
18 that has taken place in the past and may take place in the
19 future. At the end of this trial the court will decide whether
20 there's liability and, if so, what relief and may issue an
21 injunction.

22 One of the things we've been talking about is whether
23 the injunction is a good idea or whether some more novel remedy
24 would be better.

25 The hypothetical that counsel gave you this morning,

1 which is that it turns out that there was unlawful conduct in
2 the past in whatever corporate governance context there was,
3 does that tell you whether, in fact, the same companies will be
4 able or unable to comply with a traditional injunction backed up
5 by contempt sanctions.

6 A. No. They are very different and that's the reason that I
7 paused, because there's a big difference between litigating your
8 position in good faith and losing on the one side, and
9 deliberately violating an order of a court, particularly again
10 in the context in which this industry is operating for reasons
11 that I've already described and won't repeat.

12 Q. In talking about compliance with orders and compliance with
13 the law, you were asked about this article that you wrote with
14 Judge Easterbrook, I guess while he was still -- before he had
15 been elevated and he was a Professor of Law at the University of
16 Chicago. This was Exhibit 93821. It was called Antitrust Suits
17 by Targets of Tender Offers. Do you recall that?

18 A. I do.

19 Q. And a question was raised concerning a footnote, if I can
20 lay my fingers on it.

21 THE COURT: I remember it quite well, Mr. Bernick.

22 MR. BERNICK: That's why I'm asking, Your Honor.

23 Q. It was an eye popper here, Professor Fischel, so I went back
24 and decided whenever you get a footnote, you got to see what
25 else is there, but I don't know how you're going answer the

1 question and I'm interested in it.

2 This says, footnote 57, "As we have argued in part 1,
3 however, managers do not have an ethical duty to obey economic
4 regulatory laws just because the laws exist."

5 Now, let's be clear on that. Does that mean that, are
6 you saying affirmatively that managers don't have to behavior
7 ethically?

8 MR. WISE: Your Honor, I'm going to object because this
9 is really leading now.

10 THE COURT: Sustained.

11 BY MR. BERNICK:

12 Q. I'll go on.

13 THE COURT: What are you saying.

14 THE WITNESS: This reflects a very well known principle
15 in law and economics literature, Your Honor, that the
16 difference --

17 THE COURT: That anything that earns money is okay;
18 right?

19 THE WITNESS: No, no, no.

20 THE COURT: Sorry.

21 MR. BERNICK: That's the way that it sounded, Professor
22 Fischel.

23 THE WITNESS: Then we should write more -- we should
24 write our footnotes more artfully.

25 But the basic idea is that there are some types of

1 regulatory offenses, and elsewhere we have a careful distinction
2 between regulatory offenses and other types of offenses that are
3 more serious, involve health and safety and things of that
4 nature, but there are some times of regulatory offenses that
5 have a fine associated with them. Because the idea, as the
6 footnote suggests, is that the fine is the penalty that Congress
7 or a regulatory body sets for whether or not you choose to
8 comply.

9 A trivial example, but one that communicates the idea,
10 is a parking ticket. That there are times that if you have a
11 medical emergency you might be willing to park in a No Parking
12 area, or if you're in a rush or whatever it is, because you know
13 that you can either park legally or park illegally and pay the
14 fine. As long as you pay all the parking tickets you're not, at
15 least from the framework that we're discussing in this article,
16 you're not doing anything that's unethical or immoral because
17 the regulatory body sets the penalty for a parking ticket. And
18 there's all kinds of economic regulations that have that
19 quality. That you can repeat the offense so long as you pay the
20 fine and you're not behaving in an unethical way.

21 That's why the focus is on economic regulations as
22 opposed to, for example, health and safety regulations, which at
23 other points we carefully distinguish as the type of law that
24 has to be obeyed in every case and is not the type of law where
25 Congress sets or a regulatory body sets a price for violating

1 the particular regulation at issue.

2 As I said, it's a very well recognized, widely written
3 about concept in law and economics.

4 BY MR. BERNICK:

5 Q. In fairness to you, Professor Fischel, unless the court
6 believed that this is an illustration of your talents as a
7 witness in responding to questions, footnote 1 does -- footnote
8 57 does refer to part 1 of the paper. Do you see that?

9 A. Correct.

10 Q. Let's go to part 1. I've got a whole bunch of notes here
11 which I will remove. Do we see in part 1 a discussion of the
12 role of antitrust sanctions.

13 A. Yeah. That's a further elaboration on the same point.

14 Q. Is there a doctrine that is kind of shorthand for talking
15 about this concept; that is, the Congress or the law maker sets
16 a sanction that's appropriate for the nature of the injury and
17 there's kind of a commensurate relationship?

18 A. Yeah. It's really the application of the economic -- excuse
19 me -- the efficient breach principle from contracts which has
20 evolved into this literature on prices versus sanctions.

21 Q. Does this have anything to do with, you know, moral or
22 societal laws? Is this a commentary on ethics?

23 A. No. In fact, elsewhere Judge Easterbrook and I explicitly
24 make that distinction that for certain types of offenses,
25 particularly health and safety offenses, the understanding in

1 terms of compliance is very different precisely because of
2 the -- it's not a situation where the right thing to do, if the
3 legislature sets a certain fine, is to violate and pay the fine.

4 Q. Where you have an injunction with contempt sanctions, does
5 the court or does it not have the flexibility to set the
6 sanction at a level depending upon the kind of conduct that is
7 sought to be prevented?

8 MR. WISE: Your Honor, I think that calls for a legal
9 conclusion. Does the court have the power to set a sanction?

10 THE COURT: Sustained.

11 BY MR. BERNICK:

12 Q. The doctrine of injunctions and contempt sanctions, does
13 this or does this not offer the flexibility to accommodate the
14 economic balancing that you've just referred to?

15 A. It's clearly related because an injunction in effect denies
16 firms the choice of engaging in a certain conduct and paying a
17 fine or not engaging in the conduct.

18 An injunction is a prohibition on engaging in a certain
19 type of conduct. So that remedy in effect would take the whole
20 situation out of the context that we were writing about in this
21 article.

22 Q. Got it. A couple of miscellaneous questions and then I've
23 got one last topic.

24 First, with regard to the Business Roundtable. You did
25 make reference to the fact that you at least had the impression

1 that they might be involved in conducting also research in
2 addition to their advocacy activities. Do you recall that?

3 A. Correct.

4 Q. In fact, has the Business Roundtable sponsored research?

5 A. Yes, they sponsored a lot of research, which is one of the
6 reasons I was hesitant to characterize it as purely an advocacy
7 organization.

8 Q. What kind of research are you familiar with?

9 A. They've sponsored a lot of research on board structure.
10 They've sponsored a lot of research on the effect of
11 the choice between federal and state law in the -- particularly
12 in the tort area in connection with various proposals for tort
13 reform.

14 They've been involved in trying to assess the effects
15 of certain types of litigation on companies and the economy as a
16 whole. Those are the things that I'm aware of.

17 Q. Let's talk a little bit about the hypothetical questions
18 that you were asked. I'm sorry, I forgot one other
19 miscellaneous thing.

20 THE COURT: When you're done with your miscellaneous
21 questions, we ought to take a short break.

22 MR. BERNICK: I'm not going to run into time problems
23 this afternoon, Your Honor.

24 THE COURT: I know, but our court reporter.

25 MR. BERNICK: I understand. I'm saying any time you

1 would like to --

2 THE COURT: Let's finish the miscellaneous and then we
3 will take a short break.

4 BY MR. BERNICK:

5 Q. Showing you an excerpt from Exhibit 93827, which was the
6 book that you co-authored with Judge Easterbrook. It says here
7 at Page 83, "As we have emphasized, there's no reason why those
8 who supply capital to the firm should have an interest or
9 expertise in managing the firm's affairs. Given the combination
10 of a collective action problem and easy exit through the stock
11 market, the rational strategy for most dissatisfied shareholders
12 is to sell rather than incur costs in attempting to bring about
13 change through votes."

14 Now, this was offered up by way of questioning to what
15 extent institutional or other shareholders really could be
16 counted on to perform a monitoring kind of function. Do you
17 recall that?

18 A. I do.

19 Q. The specific context of this quote is a chapter on voting
20 and the quote relates to voting. Let me ask you this.

21 Whether or not shareholders decide to stick around or
22 instead to sell and vote, is voting the only way that
23 shareholders reactions to corporate conduct make a difference?

24 A. No. No.

25 Q. In what other ways --

1 A. Particularly for institutional shareholders.

2 Q. In what ways do institutional shareholders make a difference
3 other than in their votes?

4 A. Well, frequently the management of the firm is responsive to
5 the interests of the larger shareholders, and when the
6 performance of the firm is inferior, meaning that the profits
7 are too low or the firm is involved in scandal or anything of --
8 any other reason to cause dissatisfaction on the part of the
9 institutional investors, they can -- first of all, they can
10 organize together, they can pressure management as they
11 frequently do to make changes. Sometimes management are
12 designated by institutional investors so they can be replaced by
13 institutional investors as sometimes occurs.

14 MR. BERNICK: Your Honor, I am done with the
15 miscellaneous, and I have got one more topic left and I'll be
16 done.

17 THE COURT: All right. About how long will you be?

18 MR. BERNICK: I think it will probably take about 10 or
19 15 minutes.

20 THE COURT: Let me ask one final question before we
21 break for a few minutes.

22 I am operating on the assumption, I hope correctly,
23 that we are going to be able to finish Dr. Carlton's testimony
24 on Thursday, June 2nd.

25 MR. BERNICK: I certainly would hope so, but that's --

1 THE COURT: I do, too, since I just made two
2 appointments for that morning. But, Mr. Brody, and I didn't
3 forget or blank out, Mr. Brody.

4 MR. BRODY: Your Honor, it will be close by our current
5 estimate. It will be very close.

6 THE COURT: Okay. Let's just take 10 minutes,
7 everybody.

8 (Recess began at 3:13 p.m.)

9 (Recess ended at 3:25 p.m.)

10 THE COURT: Mr. Bernick.

11 MR. BERNICK: Thank you, Your Honor.

12 BY MR. BERNICK:

13 Q. I want to show you Page 2 of Dr. Bazerman's direct
14 examination, which was the subject of some of the hypothetical
15 questions that were asked of you this morning by the government.
16 I want to go through each of these and ask you to make some
17 hypothetical assumptions as well.

18 First, I want you to assume -- these are all the
19 structural changes that Dr. Bazerman recommends that the court
20 consider. Do you recall that?

21 A. I do.

22 Q. We look at A. A is eliminating economic incentives for
23 defendants to sell cigarettes to young people. And I want you
24 to assume that the -- probably the better word would have been
25 market, because I want you to assume that the defendants here do

1 not actually sell cigarettes directly to young people. So let's
2 make that, eliminating economic incentives for defendants to
3 market cigarettes to young people.

4 I further want you to assume that, according to the
5 government's own economist, changes in the defendants' marketing
6 practices are not expected to change youth smoking.

7 A. Okay.

8 Q. And the question is, would eliminating profits actually
9 earned by the tobacco companies from sales that do take place to
10 young people, regardless of the defendants' marketing practices,
11 would that make economic sense from your point of view?

12 A. No, it would not from my point of view.

13 Q. And why is that?

14 A. Because there's a disconnect between the conduct of the
15 defendants, which if I understood the hypothetical correctly,
16 they either did not engage in misconduct or stopped engaging in
17 misconduct, and the remedy, it would just be a tax on the
18 defendant companies as a result of no wrongdoing of theirs, if
19 I'm making that assumption.

20 And moreover, it would create perverse incentives for
21 other firms to increase their efforts to sell and to market to
22 young people because the penalty would not be borne by those
23 firms, it would be borne by the firms that haven't engaged in
24 any wrongdoing.

25 Q. I see the court has got a little bit of a frown. Let me go

1 back over the hypothetical to make sure that it's --

2 THE COURT: No, I understand. You're asking him to
3 assume that there's been no misconduct.

4 MR. BERNICK: I'm sorry?

5 THE COURT: You're asking him to assume that there has
6 been no misconduct.

7 MR. BERNICK: Well, actually, that's part of why I want
8 you to go back.

9 BY MR. BERNICK:

10 Q. I want you to assume that the testimony from the
11 government's own experts is that the defendants' marketing
12 practices, whether they change or not -- whether they change or
13 not -- and I'm obviously having reference, Your Honor, to
14 Dr. Gruber -- whether they change or not is not going to affect
15 youth smoking, would it make economic sense to nonetheless
16 remove all of the profits that accrue to the sale of cigarettes
17 to young people from the defendants even though their marketing
18 practices are assumed not to have an impact on youth smoking?

19 A. It wouldn't make economic sense for the reasons that I
20 stated.

21 There's a disconnect between the assumption that you're
22 asking me to make and the remedy, which is not -- under the
23 assumption, the challenge for wrongful conduct is not causally
24 related to the harm, and because of that absence of causal
25 relationship there would be this disconnect in the remedy that

1 would be imposed.

2 Q. Let's go to B. B says, changing compensation and promotion
3 policies for managers and executives -- that's understandable,
4 fair?

5 A. Yes.

6 Q. But it says, for executives to produce outcomes inconsistent
7 with misconduct.

8 Can you parse that for us? Changing compensation and
9 promotion practices for managers and executives to produce
10 outcomes inconsistent with misconduct. Do you know what that
11 means?

12 A. I think I understand what it means.

13 Q. Tell us what you think it means.

14 A. I think he is advocating that the monitor consider, and then
15 ultimately the court consider depending on the conclusions of
16 the monitor, that the compensation and promotion policies for
17 managers and executives -- managers and executives of tobacco
18 companies be changed in order to produce outcomes that do not
19 involve misconduct. That's my best --

20 Q. Do you understand -- let me give you a different
21 hypothetical.

22 Would it make economic sense, if you wanted to assure
23 that managers and executives did not engage in misconduct, would
24 it make economic sense, to make this a little simpler --

25 THE COURT: What's the objection?

1 MR. WISE: Your Honor, the questions that were asked of
2 Professor Fischel on cross were whether these remedies flowed
3 logically from the assumptions.

4 To ask Professor Fischel in this broad way if it makes
5 economic sense when his proffer was for a very specific purpose
6 I think takes us outside of what he was proffered for and back
7 into the problems we had yesterday where it was sort of -- it's
8 almost like an ambush.

9 Again, it's sort of whatever -- whatever can be labeled
10 as economics is appropriate for Professor Fischel to testify
11 about. That's not -- I think that's not the case.

12 And to the extent that we asked -- that I asked whether
13 a certain response was logical does not mean that then opens the
14 door for discussion of the economics of a particular principal
15 when that is not what the witness has been proffered for.

16 MR. BERNICK: I think I understand the point.

17 The point is the government can ask their hypothetical
18 questions and then ask whether the result makes logical sense,
19 but we can't ask our hypothetical questions and ask whether the
20 remedy makes economic sense.

21 MR. WISE: That uses the word --

22 MR. BERNICK: I'm sorry. I don't believe that counsel
23 can control the scope of the redirect examination quite so
24 finally.

25 They have opened the door for hypothetical questions of

1 this witness regarding these different possible remedies, and
2 I'm simply asking him a question that falls directly within the
3 scope of his original direct examination, no part that was
4 stricken, that deals with the economic reality of how decisions
5 get made. And this door is squarely open.

6 MR. WISE: Your Honor, the use of the word "logical"
7 came from Professor Fischel's deposition where he repeatedly
8 referred to his criticisms as flowing from logic, as being
9 logical criticisms, and the choice of the word "logic" was very
10 deliberate.

11 As a result of that, further to change the hypothetical
12 like this does not place us within the scope of the cross. If
13 the questions were within the hypothetical, that would be one
14 thing, but to morph it in this way and attempt to bring in new
15 expert testimony is inappropriate.

16 THE COURT: The objection is overruled.

17 BY MR. BERNICK:

18 Q. Within the spirit of B, would a simpler way of putting this
19 B, to change the compensation and promotion practices for
20 managers and executives, not geared to outcomes consistent or
21 inconsistent but simply geared to misconduct?

22 MR. WISE: I object, Your Honor. I think the question
23 is vague.

24 THE COURT: Sustained. I don't think I heard a
25 question.

1 BY MR. BERNICK:

2 Q. Well, I'll put it this way?

3 Would it make -- if you want to provide economic
4 disincentives for misconduct by changing compensation and
5 promotion practices so that it is targeted to misconduct, how
6 should this read?

7 A. It should read --

8 MR. WISE: Objection, Your Honor. How should this
9 read? This is the kind of the literary criticism that I raised
10 in the objection.

11 THE COURT: Sustained.

12 Honestly, Mr. Bernick, I don't understand what you're
13 trying to elicit from this witness.

14 Are you trying to ask him what, in his expertise, what
15 structural changes would accomplish a particular goal? Namely,
16 how would he change compensation and promotion policies in order
17 to provide disincentives for misconduct. Is that what you're
18 asking?

19 MR. BERNICK: That's pretty close, and that's fair.

20 I'm trying to bring out, Your Honor, the language here
21 is --

22 THE COURT: We're not correcting that language. That's
23 done, and done.

24 MR. BERNICK: Fine. I won't pursue it any further.

25 BY MR. BERNICK:

1 Q. Dr. Fischel, if you want to misconduct economically, how do
2 you target misconduct economically?

3 A. I think it's very important to have a remedy that is
4 directly related to the misconduct because otherwise you're
5 penalizing conduct that might be socially beneficial and might
6 be beneficial for the company, its consumers, employees,
7 investors and the like.

8 And I think the problem, if I understand this provision
9 correctly, is that it doesn't limit the changes to any specific
10 findings of misconduct.

11 Q. Let's talk about D, requiring subcontracting of all research
12 to private companies monitored by the court.

13 Does Dr. Bazerman anywhere in his testimony indicate
14 what research can even be done by subcontractors for the tobacco
15 industry?

16 MR. WISE: Your Honor, I just want to make it clear
17 that his answer is confined by the scope of Your Honor's
18 rulings. We are again going into what I think is dangerous
19 territory.

20 THE COURT: I don't think my rulings, though, excluded
21 anything on this particular issue.

22 MR. WISE: I agree, Your Honor. It's the issue of when
23 Mr. Bernick asks Professor Fischel to go into analyzing
24 Dr. Bazerman's -- I'm looking for the specific line.

25 THE COURT: Subcontracting of research.

1 MR. WISE: Right. Does he indicate what research --
2 I'm sorry.

3 MR. BERNICK: What research can even be done by
4 subcontractor for the tobacco industry.

5 THE COURT: Objection is overruled. I think this
6 witness can answer it.

7 BY MR. BERNICK:

8 Q. Does Dr. Bazerman anywhere indicate what research actually
9 could be subcontracted by the tobacco industry?

10 A. No. He just said something the monitor should consider.

11 Q. E, requiring defendants to sell intact their research and
12 development, current product development activities, and all
13 other relevant material regarding safer cigarettes.

14 Let me ask you this. I want you to assume for purposes
15 of my question that the industry believes and does safer
16 cigarette research as a central part of their competition both
17 among themselves and with nondefendants. I want you to make
18 that assumption.

19 If safer cigarette research is a central part of their
20 competitive effort, does it make any economic sense to require
21 that industry members be forced to sell their R&D activities in
22 a safer cigarette area?

23 A. If I make that assumption, then this particular remedy would
24 inflict a lot of harm.

25 Q. Going back to the discussion that we had here at the outset

1 this morning referring to J-DEM 010426, the factual difference
2 that you pointed out between the hypothetical -- the railroad
3 hypothetical on the one hand and business decisions and
4 compliance decisions in the real world as you discussed them on
5 the other.

6 Is there any fact that was brought to your attention on
7 cross-examination, any fact, that would call into question the
8 factual contrasts that you identified between the hypothetical
9 and the real world?

10 A. No.

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

12 THE COURT: All right.

13 MR. WISE: Your Honor, I'd like to make a motion that I
14 think would best be done out of the presence of the witness, but
15 I'll ask the witness not to be released yet.

16 THE COURT: Do you want to do it at bench or ask him to
17 step outside?

18 MR. WISE: Perhaps stepping outside would be easiest.

19 THE COURT: All right, Professor Fischel.

20 (Professor Fischel left the courtroom.)

21 MR. WISE: Your Honor, I'd like to renew or make anew
22 the 702 and Daubert objections that we raised initially based on
23 the content of the cross and the redirect. And I think it
24 really, without taking too much time, it really boils down to a
25 couple of salient features.

1 There were clearly gross methodological problems with
2 the two sources of data, for lack of a better word, that
3 Mr. Fischel relied on as bases for his opinions, being the
4 tenure table and the dismissal table.

5 And I think this really -- it comes almost right out of
6 the committee notes to Rule 702. In Sheehan, the Seventh
7 Circuit said, One of the factors to consider is whether the
8 expert is being as careful as he would be in his regular
9 professional work outside his paid litigation consulting. I
10 think we saw that it was a real lack of care on the part of all
11 of that work.

12 Further, I think in addition to the methodological
13 problems, bases for the other opinions unrelated to those two
14 tables was shown to be wholly unrelated to facts from this case
15 in terms of defendants' conduct, the conduct of their boards,
16 whether Professor Fischel had done any study of their compliance
17 efforts, their ability to abide by the court's orders. I mean,
18 there were just categories of information of relevant facts that
19 were ignored.

20 And I think that's really something that came out on
21 cross that goes another of the factors in the committee rules,
22 and that is whether the expert has ruled out other -- the
23 precise language is, Whether the expert has accounted for
24 obvious alternative explanations. And that's from Claire v
25 Burlington.

1 I think on many, many instances -- for instance, in the
2 tenure table where there was data left out about, for instance,
3 Mr. Szymanczyk's background. Time and time again the expert
4 couldn't rule out obvious alternate explanations for his
5 opinions, his conclusory opinions, like experiences particularly
6 important in the tobacco industry, or boards frequently
7 dismiss -- frequently dismiss senior executives. Again, there
8 was a lack of data and a lack of care with the data that was
9 even offered.

10 And I think another issue that really came out was not
11 only was there a lack of care on the part of the witness, but
12 there was a lack of care in sort of two directions.

13 The information wasn't provided to the witness from the
14 source where it most likely would have come from, and I think
15 that really goes to a problem, a real methodological problem,
16 which is this witness was in both of the -- again, the sort of
17 data tables he produced, he was unable to test the null
18 hypothesis. In other words, the converse from the conclusion he
19 reached, and that's a clear, clear methodological problem.

20 I would just say, Your Honor, that I think it really
21 can be summed up by the fact that 702 says that you need to have
22 your opinions based on sufficient facts or data and that it
23 needs to be the product of reliable principles and methods.

24 And I think the cross showed there are problems both
25 with the sufficiency of the factual data and the fact that it

1 wasn't, even what data was looked at was not reliably -- was not
2 reliably looked at in reaching a conclusion.

3 MR. BERNICK: Very briefly, Your Honor.

4 THE COURT: All right.

5 MR. BERNICK: First, we have -- it's kind of an irony,
6 but there's been a consistent misapprehension of what Professor
7 Fischel was offered to do.

8 It is the government's burden to present witnesses who
9 have the ability to support their recommendations and opinions
10 regarding remedies. That's their burden.

11 The sole purpose of calling Professor Fischel was to
12 expose in a sense the irrelevance of the data that had been
13 gathered by Dr. Bazerman and to explore the absence of factual
14 support introduced by Dr. Bazerman.

15 Professor Fischel did not purport to have done his own
16 analysis. He didn't purport to have ruled out the null
17 hypothesis. He didn't purport to have done any kind of
18 controlled study and, for that matter, offer any ultimate
19 economic opinion about what remedies should be offered here. He
20 was directly a response to Dr. Bazerman and the factual
21 predicates for Dr. Bazerman's testimony.

22 So to say that he didn't go ahead and do his own study
23 completely misses the point. He was there to point out that the
24 government through its witness did not discharge its burden of
25 proof.

1 With regard to the two tables that are at issue. Again
2 there's a misapprehension of even what the tables purport to
3 say. The table dealing with the highest ranking officers of
4 tobacco companies was not even designed to be specific to these
5 defendants. It was designed to talk about a characteristic of
6 the tobacco industry and that's what it says.

7 "Experience in the tobacco industry appears to be
8 particularly important in running a tobacco company." So any
9 tobacco company would do, and that's what he did, he listed a
10 whole bunch of tobacco companies. They want him to have been
11 dealing with these particular defendants, but that's not what
12 the table was offered for.

13 With respect to the survey, the survey in his own
14 testimony was designed to be exemplary. Those are his words.
15 Here are some examples. They are set forth here.

16 And all the quarreling with whether it's one company or
17 more than one company is kind of generally instructive on how
18 precise the analysis is, but it certainly doesn't go to undercut
19 substantially the weight of what he was saying which is, Look
20 all around you. It's happening. Read the newspapers every day.
21 It's happening.

22 To perform a more detailed study would certainly have
23 been instructive but it was not our burden. It's the burden of
24 their witness to do it. And that is the ultimate irony is all
25 these statement about empirical data, null hypothesis, we

1 completely endorsed the idea that they ought to be applied to
2 this case, but first and foremost they ought to be met by the
3 government's own witnesses, and that's why we are filing the
4 motion we are filing because they haven't done it.

5 All that Professor Fischel did was not to try to make
6 Dr. Bazerman's evidence better than it was or to bring more
7 evidence to the table, it was to point out the absence of
8 supported data for Dr. Bazerman's testimony.

9 So, this is just a mismatch. This not a question of a
10 witness who has performed a formalized analysis and is offering
11 an opinion based upon a thorough going analysis of all the
12 literature and data.

13 He completely disavowed that. That's not what he's
14 there. We do have a unique situation where their witness have
15 failed to carry that burden, we're certainly entitled to call
16 our own witnesses to point out that fact.

17 MR. WISE: Your Honor, there aren't two sets of rules.
18 One set for government experts and another set for defense
19 experts. The same rules apply.

20 And regardless of whether defendants called Professor
21 Fischel to respond to Dr. Bazerman or do something else, he
22 still needed to do the work, and I think that's what came out on
23 cross.

24 There are not sufficient bases for the opinions that he
25 has reached. You know, identifying or conceding that those

1 opinions are criticisms, they still need to be supported in
2 order to be evidence in this proceeding.

3 But Mr. Bernick -- I mean, at one point to say that,
4 you know, he relied on the fact that it's out there. They are
5 in the newspapers. That's exactly right. That's what that
6 table amounted to. And the court doesn't need someone to tell
7 the court what's in the newspapers. That's not scientific
8 expert testimony. And that is really the core problem with
9 Professor Fischel's testimony.

10 Even if it's simply criticism, it still needs to
11 satisfy the rules in order to be evidence, and it's only
12 evidence if it's based on reliable principles and methods.
13 We're not quarreling with the outcome.

14 But again the cross has revealed that there were
15 significant methodological problems both in the conclusory
16 statements he made that were based on no study and in the two
17 attempts to collect some data to support more conclusory
18 statements.

19 THE COURT: The government's correct about one thing
20 and that is that the Daubert and the Rule 702 rules apply
21 across-the-board even when an expert witness is, as was the case
22 with Professor Fischel, being proffered to submit a critique of
23 an opposing expert witness. The critiquer still has to meet the
24 standards and still has to have the requisite credentials, et
25 cetera, and meet all the requirements that we know are in Rule

1 720 and Daubert.

2 I don't think that different rules apply when an expert
3 is being used, not to proffer his own independent remedy -- in
4 this case, independent substantive remedies for the court but
5 rather to critique a prior witness.

6 Having said that, I ruled initially as to what portions
7 of his testimony could be admitted and what portions did meet
8 the Daubert standards. I think at this point the issue before
9 the court goes to the weight of the testimony.

10 I think the government certainly brought out in cross
11 many additional things that I did not know about in my initial
12 ruling, but all of those issues that were raised in the cross in
13 terms of matters that were not considered by the witness and in
14 terms of what bias might or might not exist as to that witness,
15 it seems to me that all of those questions or issues, I should
16 say, go to my weighing as a fact finder the validity and
17 accuracy and usefulness of his testimony. They don't go to the
18 antecedent issue of admissibility. I think at least at a
19 minimum level the witness met those standards. And so,
20 therefore, the government's motion is denied at this time.

21 I think we're done for today, everybody. Tuesday at
22 9:30. I have not begun to look at those papers yet and so we
23 will have to, not discuss them, but make rulings on Tuesday
24 morning, everyone.

25 And I think that counsel are going to be submitting

