

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	May 31, 2005
Plaintiff,	:	
	:	9:43 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 110
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	SHARON Y. EUBANKS, DIRECTOR U.S. DEPARTMENT OF JUSTICE Civil Division 1331 Pennsylvania Avenue, NW Suite 1150 Washington, DC 20004 (202) 616-8280
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STEPHEN P. BRODY, DEPUTY DIRECTOR U.S. DEPARTMENT OF JUSTICE Civil Division 1331 Pennsylvania Avenue, NW Suite 1150 Washington, DC 20004 (202) 616-1438

RENEE BROOKER, ASSISTANT DIRECTOR U.S. DEPARTMENT OF JUSTICE Civil Division Tobacco Litigation Team 1331 Pennsylvania Avenue, NW Suite 1150 Washington, DC 20004 (202) 616-3797
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1 APPEARANCES: (Cont'd.)

2 For the Plaintiff: LINDA McMAHON, ESQ.
3 U.S. DEPARTMENT OF JUSTICE
4 Civil Division
5 1331 Pennsylvania Avenue, NW
6 Suite 1150
7 Washington, DC 20004
8 (202) 307-0448

9 JAMES D. GETTE, ESQ.
10 U.S. DEPARTMENT OF JUSTICE
11 1331 Pennsylvania Avenue, NW
12 Washington, DC 20004
13 (202) 305-1461

14 PATRICK KLEIN, II, ESQ.
15 U.S. DEPARTMENT OF JUSTICE
16 Civil Division
17 1331 Pennsylvania Avenue, NW
18 Washington, DC 20004

19 For the Defendant: DAN K. WEBB, ESQ.
20 Philip Morris USA, Inc. WINSTON & STRAWN
21 35 West Wacker Drive
22 Chicago, IL 60601-9703
23 (312) 558-5700

24 For the Defendant: PATRICIA M. SCHWARZSCHILD, ESQ.
25 Philip Morris USA, Inc. HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8728

For the Defendant: J. WILLIAM NEWBOLD, ESQ.
Lorillard Tobacco Company THOMPSON COBURN LLP
One US Bank Plaza
Suite 3500
St. Louis, MO 63101-1693
(314) 552-6000

For the Defendant: DAVID M. BERNICK, ESQ.
Brown & Williamson KIRKLAND & ELLIS
Tobacco Company 200 East Randolph Drive
Chicago, IL 60601
(312) 861-2248

1 APPEARANCES: (Cont'd.)

2 For the Defendant: KENNETH N. BASS, ESQ.
3 Brown & Williamson KIRKLAND & ELLIS
4 Tobacco Company 655 15th Street, NW,
Suite 1200
Washington, DC 20005
(202) 879-5000

5 For the Defendant: PETER J. BIERSTEKER, ESQ.
6 R.J. Reynolds Tobacco Company JONATHAN M. REDGRAVE, ESQ.
7 DAVID T. MILLER, ESQ.
8 JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939

9 For the Defendant: NANCY ELIZABETH STRAUB, ESQ.
10 Liggett Group, Inc. KASOWITZ, BENSON, TORRES & FRIEDMAN
11 1633 Broadway
New York, NY 10019
(212) 506-1700

12
13 For the Defendant: J. WILLIAM NEWBOLD, ESQ.
14 Council for THOMPSON & COBURN LLP
Tobacco Research USA, Inc. One US Bank Plaza
Suite 3500
15 St. Louis, MO 63101-1693
(314) 552-6000

16 For the Defendant: ROBERT E. CONRAD, ESQ.
17 British American Tobacco CHADBOURNE & PARKE
18 30 Rockefeller Plaza
New York, NY 10112
(212) 408-5100

19
20 Court Reporter: EDWARD N. HAWKINS, RMR
21 Official Court Reporter
22 Room 6806, U.S. Courthouse
Washington, D.C. 20001
(202) 682-2555

23
24 Proceedings reported by machine shorthand, transcript produced
25 by computer-aided transcription

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

2 THE COURT: We are ready for United States versus
3 Philip Morris, CA 99-2496.

4 Would counsel please come forward? And we are ready
5 for the next defense witness at this time.

6 MR. BIERSTEKER: Thank you, Your Honor. Defendants
7 call Professor Roman Weil.

8 MR. GETTE: Your Honor, we did have some objections
9 pending regarding this witness.

10 THE COURT: Just a moment. I know that. This is what
11 we're going to do. We're going to start with this witness. I
12 will deal with the objections either during the recess or at
13 lunch, but certainly no later than that.

14 The witness may take the stand and I will swear you in.

15 MS. EUBANKS: Your Honor, just for planning purposes,
16 if we could know whether at the time that we deal with the
17 objections regarding this witness you would also deal with those
18 for the upcoming witness, the witness to follow, because we have
19 the proper people here and could do it as well.

20 THE COURT: All right. We will do that all during the
21 midmorning break.

22 MS. EUBANKS: Thank you, Your Honor.

23 THE COURT: Would you please stand and raise your right
24 hand?

25 MS. EUBANKS: Your Honor, I'm sorry. I do apologize.

1 THE COURT: No. I want to swear the witness in.

2 Just a minute, please. I've already made him stand up.

3 We're going to do it this way.

4 Raise your right hand.

5 ROMAN L. WEIL, Ph.D., Defendant's witness, SWORN

6 THE COURT: All right. Please be seated.

7 Go ahead.

8 MS. EUBANKS: Your Honor, the witness is Carlton, not
9 Wittis. Wittis is the next witness, but it's Carlton that we
10 would want to address the objections on. They are more
11 substantial.

12 THE COURT: And I can deal with the Wittis' objections
13 as well.

14 Go ahead, please.

15 DIRECT EXAMINATION

16 BY MR. BIERSTEKER:

17 Q. Good morning, Professor Weil. I'm Peter Biersteker. As you
18 know, I represent R.J. Reynolds Tobacco Company.

19 I have placed on the witness stand a copy of your
20 written direct examination. Do you adopt your written direct
21 examination as your testimony in this case?

22 A. Yes.

23 MR. BIERSTEKER: At this time, Your Honor, defendants
24 ask that the court accept Professor Weil as an expert in
25 economics and accounting.

1 THE COURT: Does the government have any challenge to
2 the expertise area?

3 MR. GETTE: Only as we raised in the objections, Your
4 Honor, not specifically in the broad areas of accounting and
5 economics, but in some specific areas that were outlined in our
6 objections.

7 THE COURT: Of course, I haven't yet ruled on those,
8 but the witness may be accepted as an expert in the field of
9 economics subject to any rulings I make on the objections.

10 MR. BIERSTEKER: Thank you, Your Honor. At this time
11 we will start our live direct examination.

12 BY MR. BIERSTEKER:

13 Q. Professor, in your written direct examination you address
14 four remedies: Dr. Fiore's proposed National Smoking Cessation
15 Program, Dr. Healton's antismoking advertising program,
16 Dr. Gruber and his youth smoking targets, and injunctive relief.

17 On which of those remedies would you like to focus your
18 live testimony this morning?

19 A. I think we should focus on injunctive relief and
20 Dr. Gruber's proposed remedy.

21 Q. Why did you select those two as your focus?

22 A. Because the other two, as a result of their lump sum major
23 levied in advance, having no direct deterrent effect in the
24 future, it seems so obvious that we should devote our scarce
25 time to things a little more subtle. But those remedies which

1 involve payments now unaffected by future defendants' behavior
2 seems do not target the prohibition of future RICO violations.

3 Q. All right. If I could have J-DEM 060673, please? And
4 Professor, what are you showing on this?

5 MR. BIERSTEKER: This demonstrative, Your Honor, is
6 found in the written direct examination on Page 15.

7 A. The purpose of this demonstrative is to compare the
8 effective or, as it says on the left, "directly linked" remedy
9 against the alternative from Dr. Gruber, which we will look at
10 in a minute, but this shows what an effective remedy I believe
11 should have.

12 That is, if there is a future RICO violation, yes --
13 that's the first column, I don't know how to point to it -- but
14 it says "Future RICO Violations, Yes," and then over on the
15 right, penalties or "Payments Assessed, Yes," independent of
16 where youth smoking target would be.

17 There's a RICO violation, there should be a payment.
18 Contrary wise, if there is no RICO violation, there should be no
19 payment no matter what the youth smoking target level would be.

20 So that's what an effective remedy would look like and
21 that's what "If Directly Linked" means, an effective remedy that
22 serves its purpose. This is in contrast to.

23 Q. I'm sorry, in contrast to.

24 Why don't we take a look, then, at the remainder of
25 this demonstrative and discuss Dr. Gruber's remedy.

1 What are you displaying in the bottom half of this
2 demonstrative?

3 A. I believe the Gruber remedy fails the logic of an effective
4 remedy in those two places where the words appear in red.

5 Situations can arise where there is a future RICO
6 violation and there's no penalty, that's the "No" third from the
7 bottom, and there are situations where there is no future RICO
8 violation and there is a penalty. That's the red "Yes" second
9 from the bottom.

10 So the logic of the Gruber remedy does not match what
11 an effective directly linked remedy would have.

12 Q. All right. Why don't we bring up J-DEM 060674? Which, Your
13 Honor, is at Page 17 of the written direct.

14 And this one is a little busy. It's got a number of
15 headings. Why don't you use this demonstrative to explain to
16 the court the effect of the remedy described by Dr. Gruber on
17 defendants' economic incentives to avoid future RICO violations?

18 A. In this exhibit I've tried to arrange things so the green is
19 good and red is bad. That's the way this is structured. And no
20 effect is not necessarily good but probably is bad.

21 THE COURT: I'm sorry. Would you repeat that, please?

22 THE WITNESS: I arranged this exhibit so that you can
23 see green means the remedy is having its intended effect; that
24 is, provides an economic incentive to avoid the RICO violation.
25 Red means it does not; it goes the other way. And "No Effect"

1 means the remedy has no effect, good or bad, on youth smokers
2 even though there is a RICO violation.

3 THE COURT: As an expert economist, have you
4 considered -- and it may not have been part of your compensated
5 charge in this case -- but have you considered whether
6 adjustments could be made to the Gruber remedy, proposed remedy,
7 that would take into account those situations, whether few or
8 many -- and, of course, we don't know at this point -- where the
9 remedy he proposes does not exactly hit the target that the
10 statute is aimed at, namely preventing future RICO violations?

11 And to be a little clearer, perhaps, let me throw out a
12 suggestion.

13 Wouldn't it be possible to devise some kind of
14 procedure/formula that would allow defendants to get credit in
15 certain instances if they had, in essence, overpaid on their
16 assessment?

17 THE WITNESS: That is --

18 THE COURT: Would you like me to reread those two
19 questions?

20 THE WITNESS: I don't think it's necessary. There's a
21 lot going on in those questions, and I will tell you what I have
22 thought about, whether it rises to the level that would be
23 necessary to give me a -- give you an unambiguous yes, I don't
24 know, but I have thought a little bit about that.

25 And I tend to think about things as a theorist and I

1 tend to look and teach from the top down before I get to the
2 details. And what I had thought about is the Gruber remedies
3 target youth smoking, they do not target RICO violations.

4 And so any mechanism that I have tried to think about
5 is like a Rube Goldberg device because the basic fundamental aim
6 of the Gruber remedy, Dr. Gruber's remedy, is not pointed at
7 RICO violations but is pointed at youth smoking.

8 And so it would certainly be possible within the Gruber
9 remedy to patch it, but it still pointed at youth smoking, not
10 at RICO violations. And so I don't see how to make it work
11 effectively in contrast to the other mechanisms I've thought
12 about equally hard, that it would work.

13 It would be a patchwork. I'm not saying I couldn't do
14 it. I haven't given a great deal of thought to it, but the
15 fundamental theory is it's pointed in the wrong direction. It's
16 pointed at youth smoking, not at future RICO violations.

17 THE COURT: Go ahead, please.

18 BY MR. BIERSTEKER:

19 Q. Well, you were discussing this demonstrative, Professor, and
20 why don't we start, why don't you explain the green arrow, the
21 good arrow that was pointed in the right direction?

22 A. All right. So if a defendant finds that it has clients,
23 customers, above the target -- that is, more youths smoke its
24 cigarettes than these targeted levels -- and there is a RICO
25 violation that increases the number of youth smokers, then the

1 Gruber remedy would have the intended effect. That is, you
2 increase youth smoking, your fine goes up, that's bad. You
3 would have an incentive to cut back on that violation.

4 Q. All right. How about the red arrow that points the other
5 way?

6 A. The red arrow says there are RICO violations that would
7 decrease the number of youth smokers. This has gotten so
8 abstract, the example I keep in mind is research on a safer
9 cigarette.

10 I understand that it is an alleged RICO violation for a
11 tobacco company to discover how to make a safer cigarette and
12 then keep that a secret. That is a RICO violation.

13 So insofar as publicizing "Here is a safer cigarette"
14 encourages youth to smoke, we get incentive in the wrong
15 direction here.

16 That is to say, by committing the violation I decrease
17 youth smoking relative to not committing the RICO violation and
18 letting the youth smoking go down, so that's backwards. That's
19 why it's in red.

20 The bottom row is if the defendants' -- particular
21 defendants' percentage of youth smokers is below the target,
22 then RICO violation has got no effect on the filing. It's just
23 like free reign of variance below the target. So it's not aimed
24 at RICO violations, it's not aimed against them. It's just no
25 effect. So this does not look to me to be a logically concise

1 way to deal with the problem.

2 MR. BIERSTEKER: All right. Thank you, Professor.

3 Cross-examination.

4 CROSS-EXAMINATION

5 BY MR. GETTE:

6 Q. Good morning, Professor.

7 A. Hi. Good morning. I'm sorry.

8 Q. Let's pick up --

9 THE COURT: Counsel, I think you should identify
10 yourself for the record.

11 MR. GETTE: James Gette on behalf of the United States,
12 Your Honor.

13 BY MR. GETTE:

14 Q. Professor, let's start with the injunctive relief that you
15 mentioned during your direct testimony just now.

16 What you said then was that you believed that an
17 injunction is more effective than the remedies proposed by
18 Dr. Gruber, for example; correct.

19 A. I did.

20 Q. In essence, in your opinion an injunction is better?

21 A. Well, by effective, I have in mind it satisfies two
22 criteria. And if "better" means a synonym for effective with
23 those two criteria, yes.

24 Q. You didn't analyze injunction versus Professor Gruber's
25 remedy outside of those two parameters, did you?

1 A. I'm not sure what the question means. I did think about two
2 parameters, but whether I thought about other aspects is not
3 clear what you're asking me about. I did think about two
4 parameters.

5 Q. You don't provide any analysis to the court on any other
6 parameters comparing your injunctive relief versus Professor
7 Gruber's proposed remedy, do you?

8 A. I think I agree with that, but I don't know what you mean by
9 parameters in that question.

10 I did look at whether this is targeted, whether it's
11 direct, whether it's effective, what we could do about
12 injunctive relief to make it work, why Dr. Gruber's doesn't
13 work. It seems to me that's a lot of parameters, but I'm not
14 sure which ones you have in mind that I didn't address.

15 Q. Well, let's talk about that a little bit.

16 In your deposition we talked about something that you
17 termed "side effects of the proposed remedies." Do you recall
18 that?

19 A. I do. I recall using that word -- that term, yes.

20 Q. And isn't it true that at the time of your deposition you
21 were not able to provide a comprehensive list of the side
22 effects of your proposed injunctive relief, were you?

23 A. I certainly provided a list, but I didn't claim that it was
24 comprehensive.

25 It's like proving a negative. I don't know that I had

1 thought about all factors. I thought about some factors. So a
2 list, but not necessarily a comprehensive list.

3 Q. Let's look at your testimony, the May 18 deposition,
4 Page 29, line 21.

5 And you start out -- I start out, I ask you, "Do you
6 believe there to be any side effects to the injunctive remedy
7 that you discuss in your report?" You answer, "Yes."

8 A. Yes.

9 Q. And then we go on and I say, "What are they?"

10 And you say, "I'm not going to give you a complete
11 list, because I haven't systematically tried to do it."

12 You didn't systematically look at the potential side
13 effects of the injunctive relief that you proposed to the court,
14 did you?

15 A. I did not look for all of them. I thought of some.

16 The answer in my deposition is virtually a paraphrase
17 of what I said to you a moment ago. I looked at some. I didn't
18 systematically set out to look at all. But I looked at some and
19 I discussed with you at some length what those were and what the
20 costs would be.

21 Q. Just a simple question. You didn't systematically analyze
22 all the side effects of your injunctive relief?

23 A. You are correct. You put the word "all" in the question. I
24 can certainly agree.

25 Q. And in that context, let's look at your written direct in

1 this case and let's go to Page 8, lines 13 through 16. And here
2 you say --

3 A. Excuse me a minute. I want to get where you are.

4 Q. Sure. Line 13.

5 A. Yes, I'm there. This is in the context of Dr. Gruber agrees
6 injunctive relief is enough, yes.

7 Q. Professor, perhaps you could wait until I ask you questions
8 before you provide answers. Would that be fair enough?

9 A. Yes.

10 Q. Okay. Here you say, "Monitoring defendants' future public
11 statements seemingly would not be too difficult, particularly if
12 the court retains experts to assist in compliance, for example,
13 to vet the public statements of defendants and to bring to the
14 court's attention any questionable statements."

15 That was your testimony in your written direct;
16 correct?

17 A. Yes, in response to a question that is asked me about
18 Gruber's -- Dr. Gruber's agreeing with me.

19 Q. And you effectively here are suggesting to the court that
20 your proposed injunction should not be too difficult because it
21 entails only collecting and vetting of public statements;
22 correct?

23 A. Yes.

24 Q. But the court's role in actually determining whether public
25 statements are true or not would be much more difficult than

1 simply capturing all of their public statements into a notebook,
2 wouldn't it?

3 A. I'm not sure what you mean by difficult. Difficult comes in
4 two flavors for me. One is the amount of time it takes to do
5 the task and the other is the amount of judgment required in
6 executing the task.

7 And I'm confident that the mechanism I have in mind,
8 where the court hires somebody like Charles Rivers Associates
9 and has the defendants pay to gather the data, that will take
10 hundreds of man-hours for them to do it. They would present the
11 results to the court and the court would not take hundreds of
12 man-hours to deal with it, targeted points, but would require
13 more judgment.

14 So, no, not more difficult in terms of demands on time.
15 Yes, more difficult in times of judgment and interpreting.

16 Q. Let's talk about time and what time it would take.

17 The hundreds of hours you're talking about is for
18 somebody like you suggested, Charles Rivers Associates, to
19 collect and review all of those public statements; correct?

20 A. Yes.

21 Q. But this is my point. Monitoring is a lot more than just
22 collecting those statements, isn't it, because you have to
23 determine whether those statements are true or false. Perhaps I
24 can give you an example.

25 What if defendants make a public statement that we do

1 not provide promotional items like sweaters, lighters, or
2 baseball caps at bar events without first checking the ID of
3 each person at the event? Let's say that's their public
4 statement.

5 Now, Charles Rivers Associates has to go out and
6 actually monitor what they do at these bar events all across the
7 country to know whether that's a truthful statement or not,
8 don't they?

9 A. No, that's not correct, and I explained to you in the
10 deposition that under the new rules for internal controls under
11 Sarbanes Oxley, it's going to be the public accountant's job,
12 the auditor to make sure that the internal controls are in place
13 and that the company is not violating its contractual
14 agreements.

15 Charles River Associates, that outsider, is going to
16 have to look at audit workpapers, but the auditor is the one who
17 is trying to make sure that the company is not running afoul of
18 loss.

19 Q. And your testimony to this court is that under Sarbanes
20 Oxley, that this company is going to send its auditors out to
21 bars all around the country and see whether or not they are
22 checking IDs as people come in the door --

23 A. That's not what I said.

24 Q. Can I finish the question, please?

25 A. I'm sorry.

1 Q. When they are sponsoring a bar event at that establishment?

2 A. That's not what I said.

3 The company does not send its public accountants out to
4 check. The auditors decide what tests it needs to conduct in
5 order to ensure the companies' internal controls are adequate.

6 PriceWaterhouse Coopers or Deloitte & Touche would
7 decide what kinds of sampling, what kind of monitoring to
8 undertake.

9 Q. Exactly. This court would not, their auditors would; isn't
10 that right?

11 A. That's right. The court would be spared that work because
12 it would be relying on a series of independent professionals
13 hired for that purpose.

14 In addition to PriceWaterhouse Coopers, then there's
15 Charles Rivers Associates looking over their shoulder.

16 Q. The question remains, the court would not have control over
17 that function; isn't that right?

18 A. The court need not have control. The court could take
19 whatever control it shows.

20 Q. In establishing the parameters of the public accountants'
21 auditing of these various defendants, then it may be necessary
22 under your proposed injunctive relief that the court set the
23 parameters of that audit engagement; correct?

24 A. I just said that the court has the option to set it, not
25 that it is required to set it. The court could exercise

1 whatever option she chose in this regard.

2 Q. So now at a minimum, in addition to having its outside
3 consultant who collects and reviews all the public statements,
4 the court may have to become involved in establishing the audit
5 engagements for these defendants' auditors; correct?

6 A. That is certainly possible in the case where the company
7 makes statements of the sort that are hard to check. But, of
8 course, the company is looking out for its own costs. We don't
9 want to have big audit bills, the company says, so let's just
10 not make any statements about what we do or don't do in bars.

11 We can't be found liable for RICO violations if we
12 remain silent on that. It's the speaking silent. It is not a
13 RICO violation, I think, to distribute whatever it is -- it may
14 be a violation of MSA, but it's not a RICO violation to remain
15 silent.

16 The company, in reacting to this injunctive relief and
17 the big penalties it would face, will probably change its
18 behavior about what it says. I'm not sure what they will do.
19 But it is not obvious to me that the court would have this large
20 task of setting the audit work schedule, work plans.

21 Q. So the court won't have this large task --

22 A. Need not. Might.

23 Q. Need not. And, as you said, because probably the defendants
24 just will stop making false public statements; right?

25 A. That's not what I said. What I said, they will have an

1 incentive to. Whether they respond to that incentive, I
2 don't -- I can't guess. But if I were the management, I know
3 what I would do.

4 Q. Professor Weil, in the last 50 years --

5 THE COURT: Is it Professor "We'll" or "while"?

6 THE WITNESS: Ma'am, I answer to both, but I'm from the
7 south and we say "we'll."

8 THE COURT: All right.

9 THE WITNESS: What I observed is my students learn how
10 to pronounce my name a lot faster than my Professors ever did.

11 BY MR. GETTE:

12 Q. Professor, in the last 50 years how many of these
13 defendants' external auditors cited them in their audit findings
14 for violation of the RICO statute?

15 A. In the last 50 years we had no Sarbanes Oxley until
16 recently. The answer is I don't know.

17 Q. Professor --

18 A. I don't know.

19 Q. -- if you can focus on the questions that I ask. The
20 question here was simply, How many times in the last 50 years
21 have these defendants' auditors cited them for violations of the
22 RICO statute?

23 MR. BIERSTEKER: The question has been answered, Your
24 Honor.

25 THE COURT: Sustained.

1 BY MR. GETTE:

2 Q. Let's go on to another example of the difficulty or ease
3 with which your proposed injunctive relief might be applied by
4 the court.

5 What if the example changes to defendants make a public
6 statement that they do not set their prices in an effort to keep
7 their product affordable to youth. Okay? Do you have that
8 predicate?

9 A. Let me just say we do not set prices in order to make
10 cigarettes more attractive to youth.

11 Q. Sure. That's a statement.

12 A. That is, we don't set low prices purposely to attract youth.

13 Q. Correct.

14 A. So that's the statement.

15 Q. Now, again Charles River Associates has to determine,
16 correct, at the court's direction whether that's a violation of
17 the injunctive relief? The injunctive remedy, rather. Correct?

18 A. Yes.

19 Q. And isn't that effectively what this court has spent the
20 last nine months struggling with and trying to determine whether
21 or not just such statements were true or false?

22 A. Absolutely. And as I said in my report, when you know --
23 when the court knows it's going to have to do this in the
24 future, then it's going to be a lot easier than going back
25 through 50 years of statements trying to understand statements

1 of the past. There will be an effort required, but I cannot
2 imagine it would be within two orders of magnitude of the same
3 effort as required to look backwards after the fact as opposed
4 to planning to monitor these going forward.

5 Yes, it will require some work by the court. I cannot
6 imagine it would be anything like the effort of this trial.

7 Q. And that's based on some analysis of the evidence that's
8 been put in this trial as opposed to what you think the evidence
9 will look like in the future that you make this speculation?

10 A. It has to do with how documents are gathered, how they are
11 saved, how they are stored, how they are analyzed.

12 It's way easier today to input all of the public
13 statements of a company into a computer searchable database than
14 it was to reconstruct those documents over the last 50 years.

15 That was an enormous task. I did not do an analysis of
16 it, but I have a sense of it from talking to you and others
17 about it.

18 Q. You keep coming back to this database -- or this is the
19 first time you mentioned the database, but you keep coming back
20 to that it wouldn't be so difficult to collect all these public
21 statements.

22 And my point is here when the public statement is that
23 they don't make their product attractive to youth, there's an
24 awful lot of additional investigation underlying that, that you
25 have to go to to get at the truth or falsity of that statement,

1 isn't there?

2 A. What's an awful lot mean?

3 There's some work. There doesn't seem to me to be a
4 hundred million dollars worth of work. It seems it's on the
5 order of several hundred thousand dollars worth of work for a
6 company like Charles River Associates.

7 Q. Where is your analysis that backs up those figures that
8 you've just thrown out to the court?

9 A. It's my intuition, judgment and experience from working with
10 consulting firms like Charles River Associates for 30 years. I
11 did not do an analysis. I have prepared budgets, helped prepare
12 budgets for consulting engagements many times.

13 Q. The bottom line is, as you just said, you did not do that
14 analysis, did you?

15 A. I did not.

16 Q. Now, it seems to suggest in one of your prior answers -- and
17 I just want to determine whether this is true or not -- that you
18 were suggesting that it would be easier for the court moving
19 into the future to monitor potential RICO violations because the
20 court would know what it's looking for having gone through the
21 process of this trial.

22 Did I understand you correctly?

23 A. That's not what I had in mind when I said it, but that is a
24 true statement. I had in mind that the assistants that the
25 court hired would know what they were looking for.

1 Q. And the assistants or the court -- the assistants that the
2 court hired or the court itself knowing what its looking for
3 only holds true if defendants don't modify their behavior
4 towards some new or different RICO violation; isn't that true?

5 A. I don't understand the question.

6 Q. Well, if these monitors know what they are looking for
7 because they've got this history and this information now to
8 base it off of, that only --

9 A. That means like a list of thou shalt nots is the way you and
10 I talked about it in deposition. So they have a list of thou
11 shalt nots.

12 Q. Sure.

13 A. Seven of them.

14 Q. So they've got a list of thou shalt nots to look for; right?

15 A. Uh-huh.

16 Q. What if the new RICO violation is not on the thou shalt not
17 do list?

18 A. I don't -- it's a hypothetical I don't understand.

19 How can there be a RICO violation that's not on the
20 list of RICO violations? Thou shalt not --

21 Q. Do you understand that there's only seven RICO violations
22 possible in the world?

23 A. I understand there are seven alleged in this case, some of
24 which are quite broad, and they all have to do with
25 misrepresenting the facts, the truth.

1 Q. My question is, if they engage in an eighth RICO violation
2 that isn't on that list --

3 A. Such as?

4 Q. Then, number one, the court won't be -- it won't even be on
5 the injunction, will it?

6 A. If there is a thou shalt not that is illegal and it's not on
7 the list, then it's not on the list, and so the court procedure
8 is not going to find that one, unless it's instructing its
9 assistants to look for other RICO violations in the seven.

10 Q. Professor Gruber's remedy, on the other hand, if the 8th
11 RICO violation we're talking about is something that attracts
12 youth to smoking, Dr. Gruber's remedy, even without knowing what
13 that 8th RICO violation is, may in fact catch that?

14 A. Well, "may" is a really weasel word in that question.

15 "May" means possible. One in 10 million, one in 10,
16 one in two. Who knows what "may" means? I'm certainly going to
17 agree with "may."

18 But the chart we had up on the board shows the
19 circumstances which it wouldn't. Yes, I agree might, may. It
20 also may not.

21 Q. Let's talk about the chart you put up on the board. And I'd
22 like to start by talking about the 1 in 2, or 1 in 10, or 1 in a
23 million that you just talked about in your last answer. Okay?

24 So, first, let's talk about -- this is in J-DEM 060674,
25 and I'd like to start by talking about the left-hand column of

1 the none, the increased and the decreased. So we're in the none
2 column. Are you with me?

3 A. Let me think. Hold on.

4 I'm sorry, the left-hand column.

5 Yes. What I wanted to do is to think of an example so
6 I could have something concrete in mind. I've got one now.

7 Q. Hopefully you will wait until I ask for it.

8 In the "none" column you are assuming there that a RICO
9 violation would have no effect on youth smoking; correct?

10 A. Yes.

11 Q. Now, what is the likelihood that the RICO violations that
12 have been alleged in this case fall into the "no effect" column?
13 Is it 1 in 2? Is it 1 in 10? Or is it 1 in a million?

14 A. I don't know.

15 Q. And what figures, what estimations, what data do you have to
16 demonstrate to the court that RICO violations are neutral with
17 respect to their impact on youth smoking?

18 A. I have none, only examples.

19 Q. And so let's go to your testimony, actually.

20 Chris, if you could put up written direct testimony at
21 Page 18, lines 13 through 17.

22 And there you say, "For example, although I am not an
23 expert in this area, one could imagine that denials that
24 environmental tobacco smoke causes lung cancer in otherwise
25 healthy adult never smokers, which counsel advised me is one of

1 the alleged RICO violations, might not importantly affect the
2 number of youth smokers of a particular defendant cigarette
3 manufacturer's brands."

4 So, number one there you admit you aren't an expert on
5 where RICO violations will fall in these different columns that
6 were on J-DEM 060674, are you?

7 A. Yes.

8 Q. Yes, you are not an expert?

9 A. Yes.

10 Q. And, in fact, here you indicate that you simply imagined
11 what impact defendants' behavior has on youth smoking; correct?

12 A. Yes, I did.

13 Q. Did you do anything other than just imagine?

14 A. I assumed, I thought, I analyzed.

15 Q. But you're not an expert, and you didn't identify what
16 portion of RICO violations would lead you to fall in that first
17 column, did you?

18 A. Yes.

19 Q. Let's talk about -- let's go back to the chart here, and
20 since we have no data or information to demonstrate that we're
21 in that first column, let's put an X through there.

22 Now I'd like to talk about the column on the right-hand
23 side, and here I'd like to ask you the same question. In this
24 column you're assuming that a RICO violation would lead to a
25 decrease in youth smoking; correct?

1 A. Yes.

2 Q. What figures, what estimations, what data do you have that
3 would demonstrate to the court that RICO violations actually
4 decreased youth smoking?

5 A. I do not. And if it will help you move things along, you
6 can put Xs on both of those columns as well if they mean the
7 same thing as that first X.

8 Q. Professor, again, if you could respond to my questions --

9 A. Yes.

10 Q. -- that would be helpful because, in fact, you have a fair
11 amount of experience being a witness in litigation, don't you?

12 A. I've done it several dozen times. I guess that rises to a
13 fair amount of experience.

14 Q. And, in addition to doing it several dozen times, you've
15 actually published on the topic of how to be an expert witness,
16 haven't you?

17 A. I have edited a book that's now in its third edition. We're
18 working on the fourth on litigation services support for
19 lawyers, accountants and economists, yes, I have.

20 Q. And let's pull up U.S. Exhibit 93831. Let's go to Page 3.
21 Let's look at your edited ventures.

22 And there we see that the third entry is that you have
23 a book, it's called "Litigation Services Handbook: The Role of
24 the Accountant as Expert." Correct?

25 A. Yes, indeed.

1 Q. And right above that you have another book that you
2 published on how to be an expert witness. It's called,
3 "Litigation Support Report Writing: Accounting, Finance, and
4 Economic Issues." Correct?

5 A. Yes.

6 Q. If we go to U.S. Exhibit 93833, this is that first
7 publication, a portion of one of the editions of that first
8 publication that we talked about on your CV, isn't it?

9 A. The first we talked about, the second in the list, yes,
10 exactly.

11 Q. And if you will turn to chapter 8, which is probably about
12 20, 25 pages in. Keep going and I'll tell you when you're
13 there.

14 There we go.

15 The 8th chapter in the book that you're the lead editor
16 on, chapter 8 is called the "The Art of Testifying." Correct?

17 A. Yes.

18 Q. Hopefully with that understanding and that background of
19 your experience, then, we can stay a little more focused on the
20 questions that I'm asking.

21 MR. BIERSTEKER: Objection. The witness has been very
22 focused and very responsive.

23 THE COURT: He has been, but let me just give you this
24 instruction, Professor.

25 Sometimes we move more slowly in court than all of us

1 would like. I know that counsel are often trying to make a
2 record for a higher court. I'm well aware of that.

3 And so just in order to move things along in an orderly
4 way, just answer the question that's being asked, even though
5 you probably are aware of the order in which we're going to be
6 jumping around. But just stick to the question being asked.

7 Go ahead, please.

8 MR. GETTE: Thank you, Your Honor.

9 Chris, let's go back to the written -- first let's go
10 back to the chart just momentarily.

11 BY MR. GETTE:

12 Q. You recall, Professor, that we're talking about the
13 right-hand column of that chart on J-DEM 060674. Okay? And in
14 that column, again, you're looking at the impact that RICO
15 violations will have and you're assuming here that the RICO
16 violation would, in fact, decrease youth smoking in that column;
17 correct?

18 A. Yes.

19 Q. And we talked about the fact that you didn't have any data
20 to indicate the likelihood of a RICO violation falling into that
21 column. And now I'd like to look at what you said in your
22 written direct testimony about that, which is at Page 18, line
23 23, to Page 19, line 3.

24 And there you say, "Again, one could imagine that
25 suppressing the explicit health claims for a truly safer

1 cigarette, which counsel advised me is one of the alleged RICO
2 violations, might tend to prevent increases in the number of
3 youth smokers by keeping youth's perceptions of the health risks
4 of smoking high."

5 Again, you simply imagined this; correct?

6 A. I'm not sure what the adjective "simply" does. I imagined
7 it. I thought about it. I analyzed it.

8 Q. You did no systematic analysis of the likelihood that a RICO
9 violation would lead to a decrease in youth smoking, did you?

10 A. Yes.

11 Q. Chris, let's put an X through this column, which is the
12 right column on J-DEM 060674.

13 Let me ask you for a clear record this way. Did you do
14 a systematic analysis of the likelihood of a RICO violation
15 leading to a decrease in youth smoking?

16 A. No.

17 Q. Now, I have a simple question about the middle column on
18 J-DEM 060674. And in this top box with the green arrow, that
19 assumes, correct, that a RICO violation would lead to an
20 increase in youth smoking and that the defendant is above the
21 youth smoking target; correct?

22 A. Yes.

23 Q. And in that square, as you've said, Professor Gruber's
24 remedy would act to increase the incentive for defendants not to
25 commit a future RICO violation; correct?

1 A. Yes.

2 Q. In terms of where a RICO violation might fall in the three
3 columns that we were just talking about; aside from doing any
4 systematic analysis, did you go out and seek any advice or
5 assistance from experts in the area of marketing?

6 A. No.

7 Q. Did you seek any assistance from individuals who had
8 expertise in youth smoking?

9 A. No.

10 Q. Did you seek out assistance of any experts who have
11 knowledge in the area of advertising?

12 A. No.

13 Q. Now, in making your comparison where you compare your
14 proposed injunction to Professor Gruber, you don't actually
15 propose to the court what the injunction would actually contain,
16 do you?

17 A. Yes.

18 Q. You haven't created, as you called it before, the list of
19 thou shalt nots that you're recommending to the court be
20 included in an injunction, are you?

21 A. Yes. I think the way you asked it, you had a "you did not"
22 at the beginning and "are you" at the end. So yes to the first
23 part, no to the second part.

24 Q. Let me ask it more clearly. I apologize to that. It was a
25 poor question.

1 You haven't created the so-called list of thou shalt
2 nots, have you?

3 A. Yes, I have not.

4 Q. And you've done no analysis in terms of estimating what the
5 court should impose as a penalty if the list of thou shalt nots
6 is violated; correct?

7 A. Repeat the question because I think that's not correct. Say
8 it again, please.

9 Q. You have done no analysis in terms of estimating what the
10 court should impose as a penalty if the list of thou shalt nots
11 is violated; correct?

12 A. No, and I talked about it in the deposition. I'm sorry.
13 Never mind.

14 Q. Well, since you haven't -- since we don't know what the list
15 of thou shalt nots is, you don't have a number next to -- you
16 can't have a number to propose to the court if each of those is
17 violated, can you?

18 A. Well, you can't and I talked to you about it. I think you
19 and I are missing here. But under the -- I'm told not to
20 volunteer. You and I talked about this, but I'll be quiet and
21 you ask the next question.

22 Q. Well, what's the number you proposed to the court as the
23 penalty?

24 A. I said large enough so that it would pay the defendant to
25 hire a staff to look out for it, which I thought would be on the

1 order of a couple of hundred thousand dollars. I think we
2 discussed this.

3 So long as the fine is big enough to warrant a
4 defendant company deputizing or hiring or putting into place
5 someone to make sure these violations didn't occur, then that
6 number would be large enough.

7 Q. What is the number?

8 A. It was a number I estimated between 500,000 and a million
9 dollars. And a number that large it would pay a company to hire
10 two or three lawyers at \$200,000 each and a staff to monitor
11 this.

12 Q. Where is your written analysis that you've provided to the
13 United States or to this court to arrive at that figure?

14 A. I didn't do it in writing. I developed it with you in
15 deposition, and so it's in the transcript of the deposition, but
16 I didn't do any analysis on paper.

17 Q. And, in fact, at the time of your deposition, what you told
18 me is that you had not given thought to the optimal schedule of
19 fines; isn't that correct?

20 A. Yes.

21 Q. And as you sit here today with specificity, you have still
22 not estimated an appropriate schedule of fines, have you?

23 A. Yes.

24 Q. Now, if we don't know what the thou shalt nots are and we
25 don't know much about what the penalty is, how is it that you're

1 capable of doing this comparison of the merits and values of
2 your proposed remedy versus all these other experts from the
3 United States who have proposed remedies to the court?

4 A. Well, it works like this.

5 My understanding is that there is a list of seven
6 allegations of RICO violations and that the court will find that
7 some of those are violations or perhaps all. So we know what
8 the set of violations would be found from the complaints that
9 you filed and the allegations.

10 And then I have said, I have an understanding of lower
11 bounds on what the fines would need to be to be deterrent. I
12 have not done a systematic analysis to know whether \$1 million
13 is the right number or \$10 million.

14 But just because I haven't narrowed it down to the
15 nearest million dollars or the nearest \$10 million doesn't mean
16 we can't think about the order of magnitude effects and
17 understand that it's more targeted and that fines on that order
18 of magnitude would be enough.

19 Q. In trying to think about these issues as you've said you
20 have, did you go back and look at the evidence in this case
21 about youth smoking to help inform you when you were doing this
22 comparison between your remedy and those proposed by the United
23 States?

24 A. I'm sorry. Do you mean look at evidence about youth smoking
25 or about defendants' statements about youth smoking? Youth

1 smoking is not the violation, right? It's the statement about
2 it; correct?

3 Q. Let me ask you this. Did you look at the evidence in this
4 case aside from the testimony of the three plaintiff's witnesses
5 whom you alleged you're addressing here?

6 A. I do not have clearly in mind all of the studies and
7 articles that I looked at. They are listed in my reliance
8 materials, and I had thought those -- that list shows some
9 articles written by others than the three people who have
10 remedies, but if they don't, I didn't. I just thought I had.
11 But it's on the list if I did.

12 Q. I'm not talking about articles, Professor, I'm talking about
13 the evidence that's been provided to the court in this case.

14 A. To a scientist evidence gets compiled and put into articles.
15 I'm sorry, I don't understand what you mean by evidence that
16 isn't articles.

17 Q. I'm talking about the testimony that was provided to this
18 court. Have you looked at any of the testimony provided to this
19 court, other than the three witnesses who you mentioned in your
20 direct?

21 A. Not thoroughly, not systematically. And I guess the answer
22 is I'm not sure that I have, but I'm not sure that I haven't.
23 Certainly not systematically.

24 Q. Let me... so, for example -- Chris, let's pull up the
25 written direct of Robert Doland, Page 146, line 4.

1 Let me ask you first. Did you review Dr. Dolan's
2 testimony before you arrived here in court today?

3 A. No.

4 Q. Now, let's look at the testimony that he provided to the
5 court.

6 A. You direct me to the page number. Did you say 146?

7 Q. 146, line 4.

8 A. Thank you.

9 Q. And he's asked the question, "How would you describe the
10 nature of the limitations defendants did agree to under the
11 MSA?"

12 And he says, "Answer: The tobacco companies agreed to
13 provisions on inputs to the marketing system, i.e. their
14 marketing activities, but not on the outputs or end results of
15 their marketing efforts, e.g., youth smoking rates. By inputs,
16 I am referring to the tobacco companies' inputs into the
17 marketing system -- their marketing programs such as point of
18 purchase, product lines, their advertising communications, and
19 so forth. Outputs would include things like sales and adoption
20 rates by new customers, the percent of people who have been
21 quitting, who come back into the system, and so forth."

22 Chris, let's jump down to the next question at the
23 bottom of the page.

24 And then he's asked in conclusion. "So have defendants
25 continued to market to youth following the Master Settlement

1 Agreement?" And he says, "Yes, they have."

2 Now, did you consider this testimony regarding the
3 effectiveness of the inputs from the MSA when you proposed to
4 the court that injunctive relief was better than the relief
5 being suggested by the United States?

6 A. Yes. I'm sorry. Yes.

7 Q. You considered this testimony without having ever reviewed
8 it?

9 A. I was told what Professor Doland had said and I had thought
10 about -- I had thought about whether it is a RICO violation to
11 market to youth in contrast to a RICO violation to lie about
12 whether you are marketing to youth.

13 As I understand it, marketing to youth is not a RICO
14 violation. Saying you don't when you do is the RICO violation.
15 Now, it may be a violation of the MSA, and I don't know what the
16 interaction is between MSA violations and RICO violations, but I
17 think they are disjoint.

18 Q. So all the testimony in this case related to the actual
19 actions of the defendants that underlie their public statements.
20 That's still very relevant to the public statements, isn't it?

21 A. If I say I don't do X, then an analysis of X is important.
22 Did you do X? Didn't you do X? If you say you didn't, let's
23 see what it is and whether you did. But you can deal with that
24 by just not saying anything at all.

25 Q. So, in fact, your remedy becomes very easy, your injunction

1 to enforce, as long as defendants keep their mouth shut;
2 correct?

3 A. That is correct. The less they say, the easier it is to
4 monitor what they do say. And the RICO violation, as I
5 understand it, is what they say about what they do, not what
6 they do.

7 Q. But you have done no analysis of the likelihood of
8 defendants in the future opening their mouth or not; correct?

9 A. I have not done written analysis.

10 I've described to you earlier the nature of my thought
11 experiments, which I have discussed with you. I won't say them
12 again. No written analysis.

13 Q. Aside from your thought experiments, you didn't write down
14 any analysis; correct?

15 A. Yes.

16 Q. Correct; you did not?

17 A. Yes.

18 Q. Let's pull up U.S. Exhibit 93833. And if we go back to
19 chapter 8 again, if we go to the second page. I'm sorry, right
20 there. And we look at the bottom paragraph that starts, "Keep
21 in mind."

22 And we look at the middle of that paragraph in your
23 book, and the recommendation that's provided in your book is, in
24 fact, "Do not prepare a report or reduce any of your conclusions
25 to writing unless counsel specifically directs you to do so."

1 Correct?

2 A. The sentence says that. I was focusing on the sentence and
3 not the predicate, the word you said before it. The book does
4 say those words you just read, yes.

5 Q. And that's the advice that was contained in the book that
6 you're the lead editor on; correct?

7 A. Yes.

8 Q. I want to come back to your proposed injunction and what you
9 considered in suggesting that to the court. And I'd like to
10 look here at -- well, let me ask you the question this way.

11 We looked at Dr. Dolan's testimony which you indicated
12 that you had not read before you came here today. What about
13 the testimony by Dr. Krugman?

14 A. I'm sorry. I don't understand the question. What about it?
15 What about it?

16 Q. Have you read Dr. Krugman's testimony before you arrived
17 here in court today?

18 A. No.

19 Q. And Mr. Chaloupka's testimony, did you review that?

20 A. I have reviewed some Chaloupka. Whether it was testimony
21 articles or reports, I don't have in mind.

22 Q. So you don't recall --

23 A. But it would be on the list. I haven't done it since I
24 submitted that list.

25 Q. And what about Dr. Eriksen? Did you review his testimony?

1 A. I am aware of some of it, but in no sense of the word
2 review, would we say I reviewed it.

3 Q. Now, are you aware that Professor Gruber, on the other hand,
4 in proposing his remedy to the court did go out and look at that
5 testimony and did provide examples from that testimony to the
6 court in terms of the implications for remedies that were being
7 suggested to the court?

8 A. I don't know.

9 Q. You don't know if you're aware?

10 A. I don't know what Dr. Gruber did. My react -- my feeling is
11 that Dr. Gruber looked at things like youth smoking, not
12 statements about youth smoking and not stopping statements. He
13 was looking at, well, outcomes. He was targeting youth smoking,
14 not future RICO violations. That's what I know.

15 Q. The question is fairly simple, actually.

16 Are you aware that Professor Gruber went out and looked
17 at the actual testimony in this case and cited that testimony to
18 the court in talking about the benefits and detriments of the
19 different remedies that are being proposed to the court?

20 A. I'm not -- I don't recall. I did read his testimony, and if
21 he said he did, I read those words. I don't have in mind what
22 he said about it.

23 Q. Professor, I'd like to move on to a new area aside from your
24 injunction, and that is in your written direct testimony you
25 talk about potential for bankruptcy; correct?

1 A. Yes.

2 Q. Let's look at that testimony. Chris, it's at Page 21, lines
3 7 to 8 -- I'm sorry, 17 to 18. And, actually, let's look at the
4 question as well, Chris.

5 So you were asked the question, "Would requiring
6 defendants to pay approximately \$5.5 billion annually likely
7 have adverse consequences on innocent third parties?"

8 You answer, "Yes. Paying \$5.5 billion annually poses a
9 significant risk of economic hardship, conceivably including
10 potential bankruptcy, to these defendants."

11 That was your testimony; correct?

12 A. Yes.

13 Q. What are the odds that if the remedies proposed by the
14 United States are implemented your client R.J. Reynolds will go
15 bankrupt?

16 A. Your hypothetical doesn't give me enough information.

17 If all the 5.5 were levied on RJR, then it would be
18 certain. If none of it, it would be zero. And in between, the
19 probabilities would vary. And if you gave me a specific number,
20 I would need to do further analysis to answer the question. So
21 I'm not going to be able to develop a specific answer here for
22 any specific number.

23 5.5 billion would, I think, bankrupt RJR.

24 Q. All right, fair enough. I wasn't thinking they would have
25 to shoulder the whole thing.

1 A. But you didn't tell me.

2 Q. I certainly didn't. So let me just ask it this way.

3 Have you written down any analysis of any number that
4 would lead to the bankruptcy of your client R.J. Reynolds?

5 A. I have written down numbers that would serve that purpose,
6 but I didn't label them that way, nor have I thought about it,
7 but sitting here I know there are numbers in my reports in
8 writings that could serve that purpose. I have not thought
9 about that question. I have not labeled them with that result.

10 Q. So, for example, let me put it this way.

11 If R.J. Reynolds was assessed a portion of that 5.5
12 billion that was equivalent to their share of the market,
13 vis-a-vis the other defendants in this case, you haven't done an
14 estimation of the likelihood in that case that R.J. Reynolds
15 would go bankrupt, have you?

16 A. Yes.

17 Q. Can you show that to the court?

18 A. Wait a minute. You said you haven't and I agree. Yes, I
19 haven't.

20 Q. Thank you. And more broadly, let's look at the rest of the
21 testimony here.

22 You say, "Even if defendants could survive the
23 imposition of the proposed annual payments, the payments would
24 impair defendants' ability to compete meaningfully in the U.S.
25 cigarette market."

1 What number would impair R.J. Reynolds' ability to
2 compete meaningfully in the U.S. cigarette market?

3 A. I do -- I have not done an analysis of a specific number.
4 The number would be that which increased RJR's costs relative to
5 those nondefendants so that the marketplace would notice the
6 difference in the retail price of cigarettes.

7 Q. Sitting here right now you can't give the court a number,
8 can you?

9 A. Yes.

10 Q. Yes, you cannot give the court a number?

11 A. Yes.

12 Q. Is there some reason you made the statement in your written
13 direct but didn't actually calculate the likelihood that it
14 would happen?

15 A. Yes.

16 Q. Let me go at it this way.

17 Meaningfully. You used the word meaningfully. What do
18 you mean there even by the word "meaningfully"?

19 A. Recall that this is in the context of harming innocent
20 parties. To me, meaningfully means without significantly
21 reducing the scope of its operations.

22 If it did reduce the scope of operations innocent third
23 parties, like employees and suppliers, shareholders, would be
24 hurt.

25 So a meaningful reduction in competition means one that

1 imposes harm on RJR's constituents. Stakeholders is the word
2 people use.

3 Q. Any harm?

4 A. I'm sorry? What's the question?

5 Q. You said, that a meaningful reduction in competition means
6 one that imposes harm on RJR's constituents, stakeholders. And
7 my question is any harm?

8 A. From a logistician's point of view, any harm. My
9 understanding is, all else equal, RICO remedy is supposed to
10 leave innocent third parties unaffected. So if there is harm,
11 then it affects them.

12 I'm not an expert on law. I do not know how much harm
13 has to be to rise to materiality in a legal sense. I understand
14 materiality from an accountant's sense, but not legal. So it
15 logically fails the test that a RICO remedy should have because
16 it imposes harm on innocent third parties. That's my point, my
17 whole point.

18 Q. In that context, then, meaningful means any reduction of
19 their revenue; correct?

20 A. No.

21 Q. Well, a reduction in revenue would likely lead to harm to
22 their stakeholders, would it not?

23 A. There are reductions in revenue sufficiently small that it
24 wouldn't. They might be trivially small but you said any.

25 Q. So in this case with these specific defendants, you haven't

1 identified what that number is, have you?

2 A. Yes.

3 Q. Let's look at some of the harm that you suggest to the
4 court.

5 One of the stakeholders that you talk about as an
6 innocent third party are shareholders; correct?

7 A. Yes.

8 Q. And, in fact, in your written direct you suggest that
9 shareholders may be harmed by the imposition of the remedies
10 sought by the United States; correct?

11 A. Yes.

12 Q. You made no attempt to quantify that alleged harm, have you?

13 A. Correct.

14 Q. Now, one of the things you talk about in your testimony is
15 that the remedies proposed by Dr. Fiore, for example, you find
16 fault with it because you say it's an unconditional payment;
17 correct?

18 A. That's part of what's wrong with it, yes. I certainly say
19 that.

20 Q. And we have some history of unconditional payments being
21 imposed upon these defendants; correct?

22 A. I don't know what you have in mind.

23 Q. Let me clarify that. Under the MSA they were subject to
24 unconditional payments; correct?

25 A. I thought they voluntarily agreed to make those.

1 Q. Having done that, they are now an unconditional payment;
2 correct?

3 A. Yes.

4 Q. And, in fact, the payments under the MSA were, in fact, of a
5 larger magnitude than the \$5.5 billion you discuss in your
6 written direct testimony; correct?

7 A. Yes.

8 Q. Chris, if you could pull up U.S. Exhibit 93838. Go to the
9 second page.

10 A. May I take time out to look at it a second?

11 Q. You may.

12 A. (Pause) Thank you for that pause.

13 Q. Professor, you see that is reported by the Campaign for
14 Tobacco Free Kids as the payments that have been made by the
15 settling defendants under the MSA; correct?

16 A. I see that.

17 Q. And if you will look on the second page you will see that
18 the various years are across the top, and across the bottom
19 there are the amounts that are paid.

20 And you see that beginning in the year 2000 all the way
21 out to currently and then with some projections into the future,
22 but putting aside the projections, the magnitudes of payments
23 reach as high as 9.7 billion in 2002; correct?

24 A. Yes.

25 Q. That's a significant order of magnitude higher than the 5.5

1 billion that's being proposed by Dr. Fiore and Healton; correct?

2 A. Well, significant order of magnitude to a mathematician
3 usually means a power of 10 and this is more like a power of 2.
4 It's on the order of twice as large, I'll concede that, but I
5 wouldn't call that an order of magnitude.

6 Q. But it's twice as large as the amount that's being proposed
7 by Dr. Fiore and Healton; correct? Close to that.

8 A. Yes.

9 Q. And have you looked at the literature regarding the impact
10 of the MSA on the profitability and return to shareholders to
11 these defendants as a result of the MSA?

12 A. I may have looked at them all, but I can recall only looking
13 at RJR, my client.

14 Q. Let me specifically ask you. Chris, if you could pull up
15 Exhibit 93846.

16 Professor, this is an article in the Journal of Tobacco
17 Control by a gentleman by the name of Frank Slone and it's
18 called Impacts of the Master Settlement Agreement on the Tobacco
19 Industry.

20 This document was not on your reliance list, so I'm
21 assuming that you didn't review this prior to offering the
22 opinions that you've provided to the court in this case. Am I
23 correct?

24 A. Yes. The article you handed me has three authors, not one.
25 You said --

1 Q. Fair enough. It was authored by Slone, Matthews and
2 Trogdon; correct?

3 A. Yes. As a man whose name appears third on most things I've
4 written, I like people to look at all the authors.

5 Q. Fair enough. Let's look at what these authors actually
6 wrote, since you hadn't before you came to court today, and
7 let's look at the objective.

8 And the objective there was to assess the effects of
9 the Master Settlement Agreement and the four individual state
10 settlements on tobacco company decisions and performance.

11 Do you see that?

12 A. I do.

13 Q. And I'd like to look at the main outcome measures just so we
14 see what exactly, who exactly we're talking about. The first
15 line there says, "The main outcome measures included" --

16 A. I'm sorry. Where are you? I see. I can see the shading
17 there.

18 Q. You see that we're looking at stockholder returns and
19 operating performance of defendant companies. Okay.

20 A. Yes.

21 Q. Okay. And those are the defendants that settled the MSA.
22 And if we look at the results in the conclusion -- I'm sorry,
23 the conclusion, this author concluded, "The experience during
24 the post-MSA period demonstrates that the MSA did no major harm
25 to the companies." And those companies, as the outcome measures

1 tell us, are the defendant companies; correct?

2 MR. BIERSTEKER: I'm going to object. I think that's
3 two questions. I'm not sure which one --

4 BY MR. GETTE:

5 Q. Let's cut through it. Let me ask it more simply.

6 The conclusion states, "The experience during the
7 post-MSA period demonstrates that the MSA did no major harm to
8 the companies." Continues. "Some features of the MSA appear to
9 have increased company value and profitability." Correct?

10 A. It does say that.

11 Q. And, in fact, let's go to Page 358 in the left-hand column,
12 be the second paragraph, the first full paragraph, and there the
13 author writes, the first sentence, "Domestic tobacco revenues
14 increased in 1999 and remained at a higher level during
15 1999-2002 than during the pre-MSA years."

16 Correct? That's what this author reports.

17 A. It does. Can you show me where he defines what revenue is
18 for the purposes of these statements, save me having to read the
19 article?

20 Q. I can't quickly, Professor.

21 A. Well, you have read the words correctly. But who knows?
22 These are not accountants. I have no idea what they mean by
23 revenues.

24 THE COURT: That's perfectly clear. I mean, if the
25 witness hadn't raised that issue, I was certainly going to ask

1 you whether we're talking about -- well, what we're talking
2 about. There's no word "net" in front of revenues or net
3 profits or anything of that sort. The witness hasn't read this
4 document.

5 I think we will take a break now. The witness may read
6 this document during the break. However, Professor, you're not
7 allowed to discuss your testimony with anybody, you're not
8 allowed to go back and look at any of your reliance materials or
9 deposition or direct testimony for that matter. In other words,
10 other than reading this particular article, you're to act as if
11 your testimony had not been interrupted in any way at all.

12 We are going to take a 20-minute break.

13 MR. GETTE: I think I could actually short-circuit this
14 because we've looked at what I wanted to look at, and my point
15 was that really he hasn't considered this article. And I think
16 we already have this testimony. If he would like to review the
17 article.

18 THE COURT: He may review the article. Mr. Biersteker
19 may have questions about the article. And I'm going to have
20 some questions at the end and I may come back to the article.
21 To my recollection, I have not seen anything in evidence thus
22 far that says what this article says, and therefore I want to be
23 clear about what it's really saying.

24 You may step down at this time. You may have
25 20 minutes. We're going to take care of some other matters in

1 the meantime.

2 THE WITNESS: That means I should leave the room or sit
3 in the back?

4 THE COURT: Oh, no, you can leave.

5 THE WITNESS: May I sit in the back?

6 THE COURT: I think it would be best if you not sit in
7 the back, even though we probably won't be discussing anything
8 relating to you. Actually, we may be. I take that back.

9 Let me go in a different order than everybody expects
10 for the moment.

11 As to Dr. Wittis' testimony, and she's due to testify
12 tomorrow --

13 MS. EUBANKS: Yes, Your Honor, and there was a
14 deposition --

15 THE COURT: I just learned that.

16 MS. EUBANKS: -- yesterday, on Friday, and for that
17 reason we would like the opportunity -- we need to amend some of
18 those objections and make a difference. So rather than address
19 those now, and I had mentioned to Mr. Newbold that I would
20 represent to the court that we would prefer to do that at the
21 beginning of her testimony. That will give us a chance to take
22 into account what new objections we may have based upon the
23 deposition that occurred Friday evening.

24 THE COURT: It would appear as if the government's
25 objections have effectively been mooted out by the deposition.

1 MS. EUBANKS: I'm not sure that's the case given the
2 content of the deposition, Your Honor, so we would like the
3 opportunity to amend that.

4 Certainly we did have the deposition, but I think
5 there's a little more information that we would like to provide.

6 THE COURT: Mr. Newbold, anything you need to say at
7 this point?

8 MR. NEWBOLD: We have no objection to postponing it
9 until tomorrow so long as we get the, quote, changes to their
10 objections in a timely manner so that we can address the issues
11 with the court.

12 THE COURT: What time are you going to submit those?

13 MS. EUBANKS: We can do that by 5:00 o'clock today,
14 Your Honor.

15 THE COURT: All right. That's fine. I guess we better
16 take a recess for our court reporter. We will come back and
17 address the objections pertaining to Dr. Weil and to
18 Dr. Carlton.

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

20 (Recess ended at 11:29 a.m.)

21 THE COURT: As to the objections pertaining to
22 Dr. Weil, let's deal with those first. And let me make sure
23 he's not in the courtroom at this time.

24 MR. BIERSTEKER: I don't believe he is, Your Honor.

25 THE COURT: I didn't think so.

1 Let me just take a final look, everybody.

2 I don't think I need to hear from counsel on any of
3 these. I've read everybody's submissions over the weekend.

4 First of all, there's no question that Dr. Weil is
5 eminent in his field, that he possesses the appropriate
6 credentials, and all of that is spelled out in substantial
7 detail in his direct testimony.

8 What he has done in his testimony is to apply the
9 principles of standard basic economics to what he knows about
10 this case. He doesn't know all that much about this case. He
11 was obviously asked by defense counsel to presume or assume that
12 there were RICO violations in the delineated areas.

13 In my view there is no reason under Rule 702 to strike
14 his testimony. He has applied the principles of his discipline.

15 The government has already brought out on cross, and I
16 wouldn't be surprised if it continues to bring out as cross goes
17 on, the fact that this witness has -- without any question --
18 not done specific monetary economic analyses applicable to these
19 defendants and applicable to different scenarios that could
20 rise. That cross-examination testimony obviously relates very
21 significantly to the weight and persuasiveness of his testimony.

22 The fact that he hasn't performed those kinds of very
23 specific and narrow and fact-based analyses does not in my view,
24 given the nature and the tenor of his general testimony, does
25 not justify striking all of the testimony under the Federal

1 Rules. That deals essentially with the government's arguments
2 under issue 1A and also applies to issue number 1B.

3 As to issue 1C, which concerns what, if any, impact
4 there will be on third parties, essentially the analysis is the
5 same.

6 There is no detailed factual evaluation that the
7 witness has provided, he doesn't purport to have provided that.
8 At the same time, he is opining, which is what experts do, as an
9 expert in the field of economics as to what would be the impact
10 of the remedies proffered by the government's witnesses.

11 And again, I don't think there's justification for
12 striking his testimony. I do want to see something about the
13 government's argument about the MSA.

14 Again, he has presented opinion testimony about the
15 impact of the MSA. He has applied the kinds of economic
16 principles that he has used and set forth in not only his own
17 writings, but in the writings of others, but certainly concedes
18 that, he has conceded in his deposition, at least, undoubtedly
19 would in court as well, that he has not done an independent
20 analysis of the impact of the MSA on market share of the
21 participating and nonparticipating members of that agreement.
22 That all goes to weight. It goes very significantly to weight.
23 I don't think it's grounds for completely striking his testimony
24 and not allowing it in at all.

25 The government in issue Roman numeral number 2

1 indicates that Dr. Weil -- argues, I should say -- argues that
2 Dr. Weil lacks scientific or expert knowledge outside his field
3 of economics and, therefore, much of his testimony criticizing
4 Dr. Gruber's remedy should be struck on that ground,
5 particularly on the ground that he is not an expert on the issue
6 of youth price elasticity.

7 Much of his testimony critiquing Dr. Gruber's analysis
8 and proffered remedy has nothing to do with being an expert on
9 the youth price elasticity, it has nothing to do with knowledge
10 of the areas of expertise possessed by Dr. Chaloupka or
11 Dr. Biglan or Dr. Dolan, for that matter; rather, it is rather
12 straightforward, a rather straightforward economic critique of
13 certain assumptions that Dr. Gruber made and certain definitions
14 that Dr. Gruber used. We haven't yet gotten into that
15 testimony -- or that cross. I will certainly have questions
16 about it. But, again, all of that testimony was well within
17 Dr. Wiel's area of expertise.

18 And finally as to whether it will be duplicative with
19 Dr. Carlton. When I first read it, I had not yet read
20 Dr. Carlton's, so I couldn't assess whether it would be
21 duplicative or not. I have not read Dr. Carlton's. There's
22 some overlap in the testimony. I wouldn't deny that. I don't
23 know if I would use the word repetition, but some overlap. They
24 are testifying from somewhat different perspectives.

25 I certainly don't believe that it would result in a

1 waste of time for the court under Rule 403, and so Dr. Weil's
2 testimony is certainly not going to be struck on that ground.

3 As to Dr. Carlton, let me get that. Legal issue number
4 1 from the government is that Dr. Carlton does not have the
5 appropriate expertise to evaluate the testimony of the United
6 States' remedies witnesses.

7 That's just wrong for all the reasons set forth, not
8 only in his direct testimony which outlines his credentials, but
9 in the response from the joint defendants.

10 It is true that he doesn't have expertise in the area
11 of tobacco matters, public health matters, cessation matters and
12 cigarette marketing matters, but again his testimony didn't
13 focus on subjects that required expertise in those particular
14 areas, and he clearly has expertise in the area for which he is
15 being offered, namely in microeconomics and in industrial
16 organization.

17 As to legal issue number two, that objection is really
18 very similar to the objection that the government raised about
19 Dr. Weil, namely that the witness is offering in a certain sense
20 generalities in terms of his critique of all the government
21 remedies.

22 To some extent, that is true. It is true that he has
23 not done any independent analyses, but the opinions he's
24 offering are all based on his extensive expertise and experience
25 in the area of microeconomics and industrial organization, and

1 he even narrows it further in terms of saying that he is
2 offering expertise as to how individual companies organize
3 themselves and operate in order to conform to certain outside
4 imperatives.

5 And legal issue number 3 I think I've addressed
6 already, and that is the fact that it's cumulative with
7 Dr. Weil's cumulative -- to Dr. Weil's testimony and would be a
8 waste of time. I don't think that's accurate.

9 There is one other matter the government raises and
10 that's as to legal issue number 4. That pertains to
11 Dr. Carlton's refusal -- I'm sure pursuant to counsel's
12 instructions -- to refuse to answer a particular question at his
13 deposition.

14 I haven't had a chance to look at the cases that all of
15 you cite. I will just say preliminarily that his failure to
16 answer that one question would certainly not justify the
17 Draconian relief requested, namely to strike his entire
18 testimony. I may decide that he has to answer that question in
19 a sealed portion of the exhibit, but I would -- I do need to
20 take a little bit of time to look at the cases cited by counsel.

21 I think we're ready to proceed everyone; is that right?

22 MR. BIERSTEKER: We will get the witness.

23 THE COURT: And Mr. Gette, let me just ask you for some
24 rough proximations at this point or estimates. How long do you
25 think your cross is going to be if you know yet?

1 MR. GETTE: I would say probably looking at about two
2 more hours, Your Honor.

3 THE COURT: I guess, Mr. Biersteker, any way of
4 estimating your redirect?

5 MR. BIERSTEKER: So far, Your Honor, I think I'll be
6 very brief. Maybe 15 minutes.

7 THE COURT: I will have a few questions for this
8 witness at the end on a very specific area of his examination,
9 but it may be that Mr. Gette covers it on cross, but I know I
10 want to make sure that I cover it.

11 MR. BIERSTEKER: Do you want to go before I do?

12 THE COURT: Pardon?

13 MR. BIERSTEKER: Would you like to ask your questions
14 before I do?

15 THE COURT: No. I always prefer to let counsel do
16 their work, and then if the area is not covered I'll make sure I
17 do.

18 MR. BIERSTEKER: Thank you, Your Honor.

19 MR. GETTE: Your Honor, with respect to the article
20 that we were dealing with before the break, actually, my
21 intention right now, just so you know, is to come back to that
22 after lunchtime so that I have a chance to, having heard Your
23 Honor's questions and the witness's statements, to fully kind of
24 try and cover that.

25 THE COURT: That's up to you. That's fine. You might

1 mention that to the witness, however.

2 MR. GETTE: Yes, I will.

3 THE COURT: Dr. Weil, please.

4 BY MR. GETTE:

5 Q. Professor, before you came in I had let the court know, and
6 now I'll let you know, that with respect to the article we were
7 looking at before the break, we are going to come back to that
8 after the lunch break and so that we have a chance to fully look
9 at it and think about the court's questions in particular and
10 address those in your testimony. So we will come back to that
11 after lunch, but for the moment we're going to move on to
12 something different.

13 And that is, we're still going to stay in the area of
14 the alleged harm to third parties, but I'd like to move on from
15 shareholders, which is what we were addressing at that point, to
16 employees.

17 And my question to you is, have you analyzed the number
18 of layoffs occurring at these defendant companies following the
19 imposition of the MSA?

20 A. No.

21 Q. Have you done any analysis of the change in salaries or
22 wages for defendants' employees following post -- a pre-MSA
23 versus post-MSA?

24 A. I have not.

25 Q. In that context, Chris, if you could pull up actually U.S.

1 93855.

2 Do you see, Professor, that this is a portion of the
3 schedule to the 10-K, I believe, of R.J. Reynolds Tobacco
4 Holdings, Inc.?

5 And if you could turn to the second page of that
6 exhibit, I'd like to focus on the chart on that second page
7 which provides information related to the compensation of Andrew
8 Schindler. Do you see where I am?

9 A. Yes. You characterized this document when you handed it to
10 me as part of the 10-K.

11 Q. I believe that's correct. It's actually a proxy statement.

12 A. Yes.

13 Q. That was filed by R.J. Reynolds; correct?

14 A. Yes. Right. Okay. I was trying to figure out why you
15 thought it was a 10-K.

16 The information that's in here is often seen in a 10-K.

17 Q. Correct.

18 A. But this is not a 10-K.

19 Q. But in this instance it was a proxy statement, was it not?

20 A. That's what it says. I don't know what it is.

21 Q. In looking at the second page of that, you will see that
22 Andrew Schindler's compensation is provided for the years 1997,
23 1998, and 1999; correct?

24 A. Yes.

25 Q. And Mr. Schindler was chairman of the board, president and

1 chief executive officer of R.J. Reynolds; correct?

2 A. Yes.

3 Q. And 1997 predated the MSA; correct?

4 A. Yes.

5 Q. 1998 came after the MSA; correct?

6 A. I don't have in mind the exact date. I'm not sure of the

7 whole year. I forget when the MSA was signed, but it was

8 somewhere around the end of '97, beginning of '98.

9 Q. And if we look at the aggregate base salary for

10 Mr. Schindler for each of those years beginning in 1997, he

11 starts at \$575,000; correct?

12 A. Yes.

13 Q. Well, he grows in 1998 to in excess of \$616,000 each year;

14 correct?

15 A. Yes.

16 Q. And finally in 1999 it grows to 775,000; correct?

17 A. Yes.

18 Q. And then if we look at the Bonus column. From 1997 to 1999

19 his bonuses grew from approximately 400,000 to in excess of

20 \$1 million a year; correct?

21 A. Yes.

22 Q. Did you consider this information about the wages of one of

23 the officers of R.J. Reynolds when you offered the opinion that

24 imposition of an unconditional payment of \$5.5 billion upon

25 defendants would have adverse impacts on employees?

1 A. I did not specifically consider Mr. Schindler, but I thought
2 about issues of this sort and why it's perhaps harder to manage
3 a company under the MSA than before and why you might expect
4 compensation of top management to increase, but not with respect
5 to Mr. Schindler.

6 Q. And, in fact, if we go to U.S. Exhibit -- I'll put it up
7 here -- 18285, we can see that in fact in each of the years --
8 are you still waiting for it? Sorry about that.

9 Using those proxy statements, we plotted the salary,
10 the bonus, the other compensation that's listed on there for
11 Mr. Schindler. And, in fact, this demonstrative demonstrates
12 that in each year following the MSA his compensation has been
13 significantly in excess of the compensation that he received in
14 1997 the year prior to the enactment of the MSA; correct?

15 A. We might need to define what significant means, but I would
16 say in lay terms it looks significantly bigger. Certainly
17 that's what the eye detects in these bar graph heights.

18 Q. Now, aside from Mr. Schindler, who was the president and CEO
19 of R.J. Reynolds, did you look at the salary or compensation
20 packages for hourly wages for any other employees of R.J.
21 Reynolds?

22 A. No.

23 Q. Did you look at any of the wages or salaries pre and
24 post-MSA for employees of Philip Morris?

25 A. No.

1 Q. Did you look at the salaries or wages pre and post-MSA for
2 Lorillard?

3 A. No.

4 Q. Same question for Liggett.

5 A. Yes, I didn't. I'm not sure which way that works.

6 Q. You did not review -- did you review the compensation, wages
7 or wages of employees of Liggett?

8 A. No.

9 Q. Did you do an analysis of the benefits, if any, to
10 defendants' employees over the past 50 years as a result of the
11 defendants' alleged RICO violations?

12 A. Say it again, please.

13 Q. Sure. Did you do an analysis of the benefits, if any, to
14 defendants' employees over the past 50 years as a result of the
15 defendants' alleged RICO violations?

16 A. No.

17 Q. Let's turn to the next group of individuals that you talk
18 about in terms of third parties and those are retirees. Again,
19 you made no attempt to quantify the alleged harm with respect to
20 retirees?

21 A. Yes, you are correct.

22 Q. And in your testimony you admit that retirees would only be
23 harmed to the extent that the tobacco company pension plans are
24 underfunded; correct?

25 A. I'm not sure I put the word "only" in my testimony. I

1 certainly said to the extent they are underfunded they would be
2 harmed. I'm not sure that I -- I'm confident I didn't think
3 about other forms of harm.

4 Q. So this was the --

5 A. I can think of other forms of harm. I did not -- if I said
6 "only," then I misspoke, but I'm not sure that I said "only."

7 Q. Okay. If we could pull up deposition Page 125, and if you
8 go to the prior question, actually.

9 I asked you about retirees, and you say, "If the
10 pension fund is not funded, and the company deserts its pension
11 plan, then the employees are stuck with the PBGC's benefit,"
12 that's Pension Benefit Guaranty Corporation benefit, "which are
13 typically less than the amounts promised in the corporate
14 pension plans."

15 And I said, "That would only hold true if the pensions
16 are underfunded; correct?"

17 And your testimony is, "That's what it says."

18 And when you said that, you were referring to your
19 report that you wrote in this case; correct?

20 A. Yes, but I was speaking in this answer only about the
21 shortfall in pension benefits, not about other impacts on
22 retired employees. So that only has to do with pensions
23 underfunded, not with all forms of harm to retirees.

24 Q. But to the extent we're talking about pension benefits, then
25 the retirees are only harmed to the extent that the pensions are

1 underfunded; correct?

2 A. If you would move that "only" two words later in the
3 question, then I would be able to agree with it without problem.
4 They are harmed only if, yes.

5 Q. They are harmed only if the pension --

6 A. Yes.

7 Q. Okay. Thank you, Professor.

8 And as of the time of your deposition you had done no
9 analysis and hadn't looked up the information to determine
10 whether or not defendants' pension funds were in fact
11 underfunded, had you?

12 A. Yes, I hadn't.

13 Q. Did you look to see if defendants' pension plans were
14 underfunded prior to your deposition?

15 A. No.

16 Q. The final area of harm to third parties that you talk about
17 in your testimony relates to the 50 states; correct?

18 A. I know that I talk about harm to 50 states. Whether it's
19 the final one, I have to look and see, but it certainly is one.
20 If you say it's the final, that's fine with me, but I'd need to
21 check it.

22 Q. And again you've done no estimation of what reduction in
23 payments under the MSA the states would incur if the United
24 States' remedies are entered in this case; correct?

25 A. No written analysis, but I've certainly had some thought

1 experiments.

2 Q. You haven't said if the \$5.5 billion remedies are imposed in
3 this case, then the states will lose X dollars. You haven't
4 done that; correct?

5 A. Yes, you are correct.

6 THE COURT: Is there a provision to your knowledge in
7 the MSA that would lower the yearly financial obligations of the
8 defendants to the states if any of the proposed financial
9 remedies were imposed by me?

10 THE WITNESS: Yes, ma'am, but it takes two steps to get
11 there. Let me just tell you what I have in mind and you can
12 decide whether this is responsive.

13 Unlike the MSA, this proposed remedy applies to only
14 certain tobacco companies. Those tobacco companies, in paying
15 \$5.5 billion, will have a cost disadvantage. They will -- by
16 economics, we know that the people who don't have to pay the
17 penalty will have an increase in market share. This is textbook
18 economics. Because they don't have these extra costs, they will
19 have lower prices because they are not subject to it. The MSA
20 was uniform. This is differential.

21 Now, insofar as market shares move to tobacco companies
22 that have lower penalties under the MSA, then there's going to
23 be a reduction.

24 BY MR. GETTE:

25 Q. I'll come back to that aspect of the MSA in just one moment,

1 but I have one question before we move on to that area, and that
2 is with respect now again to the states and the potential harm
3 that they may suffer as a result of any remedies that this court
4 enters, did you consider the reduction in health care costs the
5 states will incur if this court enters its remedies?

6 A. I thought about it, but I did no written analysis. And I'm
7 not sure there will be any because of the shift from -- to other
8 brands of cigarettes that are not covered.

9 Q. But you're not sure --

10 A. Either way. It could go either way.

11 Q. You've not done that analysis?

12 A. Correct.

13 Q. Now, let's talk about the MSA -- Chris, if you could pull up
14 U.S. Exhibit 18278.

15 Now, in your answer to the court previously you talked
16 about the impact that might occur in terms of sales and,
17 therefore, resulting payments to the states if these defendants
18 alone are forced to bear the remedies that the court is
19 considering; correct?

20 A. I'm not thinking about your question. I'm trying to figure
21 out why you call this Weil's Tobacco Market, and so I'm looking
22 for an exhibit I've got here.

23 And now I understand what you are doing. Now I'd like
24 you to ask the question again.

25 Q. In your answer to the court previously you talked about the

1 impact that might occur in terms of sales and then resulting
2 payments to the states if these defendants are forced to bear
3 the remedies -- if these defendants alone are forced to bear the
4 remedies that the court is considering; correct?

5 A. Yes.

6 Q. And this demonstrative walks us through, I believe, some of
7 your thinking related to those -- that testimony, and what this
8 indicates is that you suggested in your testimony that because
9 of the MSA these defendants faced a cost differential with other
10 nondefendant manufacturers of about 20¢; correct?

11 A. In your question you used the word "cause." And a social
12 scientist like me is careful to use the word "associate" and not
13 "cause." And I have the word "associated" in my exhibit with
14 these data, which is 060676 on Page 24.

15 Q. You're getting one step ahead of me, but you're right.
16 Let's pull that up. J-DEM 060676.

17 And there you say, "The SPMs market share gains
18 associated with 20¢ per carton cost advantage," and you were
19 careful there to use the word "associated." Correct?

20 A. Yes.

21 Q. If we go back, Chris, to the demonstrative.

22 And so having said "associated," this cost differential
23 that resulted from the MSA, that arrow in the middle, you can't
24 say that that cost differential caused the change in market
25 share of the SPMs or the OPMs, can you?

1 A. You're absolutely right. You used the word "cause." I
2 never used the word "cause" in that sense. Associated with.

3 Q. Nothing nefarious here, Professor. I just want to establish
4 that you cannot say that that cost differential caused the
5 change in market share. Would that be accurate?

6 A. Yes.

7 Q. And, as such, the increase in market share -- let's focus on
8 B here. The increase in market share of the SPMs, which are the
9 Subsequent Participating Manufacturers under the MSA; correct?

10 A. Yes.

11 Q. And looking at the market share of the SPMs, you indicated
12 that the pre-MSA market share was about 2.7 percent, and that
13 had increased by 2004 post-MSA to about 7 and a half percent;
14 correct?

15 A. Yes. I'm sure a few more significant digits than you, but
16 you've got it rounded correctly.

17 Q. Thank you. What portion of that 4.8 percent increase is the
18 result of the cost differential created by the MSA?

19 A. I did not analyze that. I don't know.

20 Q. Conversely, you don't know what other potential causes may
21 exist with respect to that increase in market share of the SPMs,
22 do you?

23 A. Yes, I don't.

24 Q. Did you consider, when you were doing your analysis related
25 to the cost differential and the associated market share gain of

1 the SPMs, the growth in the generic market for products
2 generally in the United States over that same time period from
3 1997 to 2004?

4 THE COURT: For all products?

5 MR. GETTE: Correct.

6 THE WITNESS: I'm sorry. What did the court say?

7 THE COURT: My question was for all products? And the
8 answer was yes.

9 THE WITNESS: I did not.

10 BY MR. GETTE:

11 Q. So you don't know if from 1997 to 2004 there was generally
12 in the United States a shift toward generic products. Would
13 that be accurate?

14 A. I think that's inaccurate because I believe it to be the
15 case there has been such a shift.

16 Q. So you do believe that from 1997 to 2004 there has been a
17 shift in general in the United States towards generic products,
18 correct?

19 A. If a shift, in general, means a higher market share for
20 unbranded generic products, yes. I'm not sure what other
21 connotations come with your putting it.

22 Q. It's the only connotation I have.

23 A. Right.

24 Q. So with respect to that potential cause of the change in
25 market share, you can't say what portion of the market gained by

1 the SPMs was the result of just people liking generic brands
2 more than they used to; correct?

3 A. Liking cheaper brands more than they used to. Yes, I cannot
4 say.

5 Q. In fact, you've done no independent analysis of the impact
6 of the MSA on market share of the original participating
7 manufacturers, have you?

8 A. Other than what's in this exhibit that you -- of mine.
9 Other than that, no. I consider that some analysis of the
10 market share of the OPMs, but other than that, no.

11 Q. Let's take a look at what you said in your deposition,
12 May 18 deposition, at line 108 -- page 108, line 17. And I just
13 asked you the simple question again, "Have you done an analysis
14 of the impact of MSA on market share of the OPMs?"

15 And your answer was, "No. I have consumed his analysis"
16 meaning I think there Dr. Gruber's; correct?

17 A. Yes.

18 Q. You said, "I had to think about it, but I did no independent
19 work." That remains true; correct?

20 A. No. Since that time I did the work that led to
21 Exhibit 60676, but that's the only work that I've done. But I
22 did it since the deposition. That was a correct answer and my
23 answer here is a correct answer.

24 Q. And if we look at 60676. What you did here was calculate
25 that 7.15 percent and that 2.7 percent from data that came from

1 PriceWaterhouse Coopers; correct?

2 A. I have the question in mind. Yes, to the extent it comes
3 from, which is your word which means compiled by, they didn't
4 make up the date, they found it somewhere and brought it
5 together and certified to it the way they had been hired to do.

6 Q. So you took some data compiled by PriceWaterhouse Coopers
7 and from that data you calculated this change in market share of
8 approximately 4.8 percent from 1997 to 2004; correct?

9 A. Yes.

10 Q. And aside from that analysis that appears on J-DEM 060676,
11 you've done no other independent analysis of the impact of the
12 MSA on market share of the OPMs; correct?

13 A. If, by analysis, you mean in writing, you are correct. But
14 I have thought about it, including reading what's in the article
15 you gave me today which speaks to this subject.

16 Q. And aside from this case, have you ever conducted any
17 analysis of the impact of the MSA on market share of the
18 original participating manufacturers?

19 A. No.

20 Q. Have you ever published any peer-reviewed articles about any
21 aspect of -- I'm sorry.

22 Have you ever published any peer-reviewed articles
23 about the impact of the MSA on the cigarette market?

24 A. No.

25 Q. Are you aware that Dr. Gruber has published in this area?

1 A. It does not surprise me to understand that among the things
2 I have read Dr. Gruber wrote one of the articles on that subject
3 as opposed to someone else.

4 I do not have clearly in mind who wrote which of the
5 things I've read prior to now. So, I have no reason to doubt
6 what you say, but I can't be sure that I can say which article
7 he wrote.

8 Q. So your testimony is that you may or may not have read
9 something authored by Professor Gruber on this subject; correct?

10 A. I have read things on this subject. What I'm unsure about
11 is who wrote what.

12 Q. And at the time of your deposition, in fact, you couldn't
13 recall whether you had reviewed any literature on the impact of
14 the MSA on market share of the OPMs; correct?

15 A. If I said in my deposition, that was correct.

16 I know what I know. What I can't keep of track of is
17 when I learned things. But if I said it then, that was true.
18 And I don't deny that I said it, I just don't recall.

19 Q. Let's look at what you said. This is May 18, deposition,
20 Page 108, line 17 and actually over on to 109, Chris. It's line
21 11 on Page 109.

22 I said, "Did you review any published literature on the
23 impact of the MSA on market share of the OPMs?"

24 And you said, "Answer: I don't recall."

25 That was truthful then; correct?

1 A. Yes, as was the answer on the preceding page where I said I
2 consumed his analysis, but I don't know which analysis it was,
3 whether it was a report or a refereed article, an unrefereed
4 article or an affidavit of some testimony.

5 What I said there is truthful and what I said today is
6 truthful.

7 Q. So you consumed some of Dr. Gruber's analysis, but you're
8 not sure what the source of it is. Is that fair?

9 A. That is correct. I have in mind one source that I've read
10 recently that is helpful, but not all. So I could say some
11 sources.

12 Q. Chris, if we could look at U.S. Exhibit 18278, again. Do
13 you still have that, Professor? Good.

14 Now, I'd like to focus on the A section a little bit
15 instead of the B section and talk about this cost differential
16 of 206.

17 What is your basis for saying that the average cost
18 differential between the SPMs and the OPMS is 206?

19 A. If you will refer to Page 23 of my written direct at lines
20 7, 8, 9 -- starting on the sentence on line 8, I get it from
21 Dr. Gruber, and the various sources are given in the paragraphs.
22 So I've read that and Dr. Gruber's work.

23 Now I don't -- so it says it in part in his deposition.
24 Both of these are from depositions.

25 Q. And did Professor Gruber actually refer to this 206 as the

1 average cost differential between SPMs and OPMS post-MSA?

2 A. I have recently reviewed Dr. Gruber on that subject, and
3 whether he said it in his deposition or in the Oklahoma
4 affidavit which I have in mind, I can't recall, but I think it
5 is marginal.

6 Q. You think it's marginal?

7 A. Not average.

8 Q. So --

9 A. But I don't recall the sources. One of those two.

10 Q. So the average differential here would be if we take all of
11 the cartons sold by the SPMs and figure out the cost to them per
12 carton on average as a result of the payments they have to make;
13 correct?

14 A. We certainly could compute the average, and I think that you
15 just defined average in your question. Yes, you did define a
16 way of computing the average, but that's not the marginal or the
17 incremental.

18 Q. Correct. So this is the average. And when we talk --

19 A. I'm sorry. What's the antecedent of this?

20 Q. The 20-cent cost differential -- actually, the 20-cent cost
21 differential from Dr. Gruber, as I understand your testimony, is
22 you believe now it's actually the marginal and not the average
23 cost differential; correct?

24 A. I believe that's what he said in his Oklahoma affidavit.

25 Q. And at the time of your deposition, however, after you had

1 already written your report in this case, you were under the
2 impression that it was actually average cost differential;
3 correct?

4 A. I don't recall. I may have been. I do know that I studied
5 Oklahoma only after my deposition, and what I have in mind now
6 is what I read in the Oklahoma affidavit, and if I said at the
7 time I thought it was average and wasn't sure, that was
8 truthful.

9 Q. So you didn't study the Oklahoma declaration until after you
10 even gave your deposition and wrote your report in this case; is
11 that correct?

12 A. Yes.

13 Q. Let's actually look at what the actual -- first let me ask
14 you. Related to the Oklahoma. Did you bother to review
15 anything else from that case, any other materials?

16 A. I read his entire statement, not just the paragraphs on this
17 subject.

18 Q. You read Professor Gruber's entire statement?

19 A. Yes.

20 Q. Did you read any other materials from that case?

21 A. Is that the case where the opposing expert was Jeremy Bulow,
22 Professor Bulow?

23 Q. I believe that's correct.

24 A. I think I may have looked at some of Jeremy's material. I
25 know him. But I'm not certain. It's certainly conceivable

1 that's the only thing I looked at. That's the only thing I can
2 be sure I looked at.

3 Q. You didn't identify that as material you had considered in
4 this case to the United States, did you?

5 A. Yes, I did not, because I did not look at it until after the
6 deposition.

7 Q. Did you ask your counsel to file a supplemental disclosure
8 of what you considered in this case?

9 A. I did not.

10 Q. Do you know if your counsel did that?

11 A. I do not.

12 Q. Putting Professor Bulow aside, I'd like to talk about some
13 other materials from the Oklahoma case, and that's the
14 declaration of a woman by the name of Patricia Tilton. Did you
15 review that material?

16 A. No.

17 Q. Chris, if we could pull up 93834. I'd like to go to the
18 first page of that.

19 Now, the material you had initially reviewed from --

20 MR. BIERSTEKER: Counsel, just for the record, this is
21 from the New York case, not Oklahoma, and I think there is a
22 misstatement as to the case in which this was prepared.

23 THE COURT: That's certainly correct.

24 MR. GETTE: I think that's right. Let me clear that
25 up.

1 Q. The declaration that you read by Professor Gruber was also
2 in this case, the Freedom Holdings case; correct?

3 A. I have in mind that there were two distinct statements, and
4 I have looked at them both. I have in mind something I think of
5 as the Gruber/Spitzer and something else the Gruber/Oklahoma.
6 If they are identical documents, then I've forgotten that fact.

7 Q. With respect to the Oklahoma case did you disclose to the
8 United States that you had reviewed any materials from that
9 case?

10 A. No, because it happened only after the deposition, and I do
11 not know whether the counsel -- this is the question you asked
12 me a moment ago.

13 Q. There I was asking specifically you had referenced one
14 declaration, and now I'm just saying -- I'm expanding it to say
15 anything from the Oklahoma case.

16 A. If it's not on the list, I did not look at it before my
17 deposition. And after the deposition I know that I looked at
18 Dr. Gruber's Oklahoma, and I have some recollection of reading
19 some of Jeremy's work, and I have a recollection I have not read
20 anyone else's work.

21 And it's possible that the Jeremy work that I read is
22 just quotes from his work embedded in the Gruber work.

23 Q. Let's put Oklahoma aside for a second and let's focus on the
24 Freedom Holdings' case, which is in fact the section of the
25 declaration that you cite and quote from on Page 23 of your

1 direct testimony; correct?

2 A. I am confused by the question. I think it's going to be
3 correct. But you focused my attention on something in my hand
4 by Tilton and this is referring to something by Gruber. And
5 maybe you want me to not to be looking at this, in which case I
6 won't look at it. I'll think about what you had in mind. But
7 I'm confused about what I'm supposed to be thinking about.

8 Q. Let's take one step back. Let put this new declaration
9 aside for a second.

10 In your written direct you cite from and quote
11 statements by Dr. Gruber in a declaration that he prepared in
12 the Freedom Holdings' case; correct?

13 A. Yes, although I think of it as the Spitzer declaration. I
14 presume you mean the same thing because it says Freedom Holdings
15 versus Spitzer.

16 Q. And did you review anything else from the Freedom Holdings-
17 Spitzer case?

18 A. I don't know things by source without looking them, so I'll
19 say this if it's on -- if it's not on the list of things I
20 looked at before my deposition, then I did not.

21 I am fairly confident that since my deposition fairly
22 recently I have not looked at anything other -- anything else
23 from the Spitzer from Freedom Holdings. Fairly confident of
24 that.

25 Q. So in preparation in the last week or so for your testimony

1 here today, you did not review anything from the Freedom
2 Holdings-Spitzer case, other than Professor Gruber's
3 declaration; correct?

4 A. I think that's right.

5 Q. Now, let's turn to the declaration that I gave you here, and
6 I'll reask the question since we were a little bit confused
7 before in talking about the Oklahoma case.

8 Did you review the declaration at any point -- at any
9 point did you review the declaration of Patricia Tilton from the
10 Freedom Holdings-Spitzer case?

11 A. I have no recollection of seeing it in this form, but I have
12 seen a pile of documents from PWC about the work that she's
13 declaring here. And I have seen tables of this format. Whether
14 the tables that I have seen came from this declaration or some
15 other place where she uses the same tables or someone else from
16 PWC used the tables, I don't know. But this document intact is
17 not something I have reviewed. I have seen tables like this and
18 looked at tables like this.

19 Q. So you've not seen this declaration before today; correct?

20 A. Not that I can recall. Not intact, the whole thing.

21 Q. Let's turn to table 3, which is the next to the last page of
22 that document.

23 THE COURT: Which document now are you talking about?
24 This Tilton affidavit?

25 MR. GETTE: That's correct. Actually -- and let me

1 back up. Let's go back to the first page, Chris.

2 BY MR. GETTE:

3 Q. We are talking about the Tilton declaration from the Freedom
4 Holdings' case. And you see that Ms. Tilton indicates in
5 Paragraph 1, "I am a principal in the Advisory Services Group of
6 PriceWaterhouse Coopers LLP in Houston, Texas. I am qualified
7 to make this declaration." Do you see that, Professor?

8 A. Yes.

9 Q. And then she goes on in the next paragraph to say, PWC,
10 which is PriceWaterhouse Coopers, has been engaged to provide
11 the services of the independent auditor under that certain
12 Cigarette Master Settle Agreement with an effective date of
13 November 23, 1998, the MSA. Do you see that?

14 A. I do, and it causes me to realize I answered something
15 incorrectly earlier with you, but...

16 Q. The date?

17 A. Date of it, yes. I said late '97. It's late '98. But I
18 was mistaken.

19 Q. Now, and in fact, as the independent auditor under the MSA
20 you relied upon information from PriceWaterhouse Coopers in
21 preparing your exhibit, J-DEM 060676, which was the change in
22 market share of the SPMs; correct?

23 A. Yes.

24 Q. Now, let's look then at the tables that Ms. Tilton attached
25 to her declaration. And if we look at table 3, we can look at

1 and see actually what the average amount owed per carton of the
2 different portions of the tobacco market owed under the MSA.

3 And let's look first at the OPM, those are the original
4 participating manufacturers, average amount per carton.

5 And let's look post-MSA in 2001 and you will see that
6 in 2001 the per carton cost under the MSA to the original
7 participating manufacturers was \$5 and approximately sixteen
8 cents; correct?

9 A. I see that, yes.

10 Q. And if we look at the SPM with grandfathered shares average
11 amount, and we look at the per carton amount of their average
12 cost in 2001 it's a dollar sixteen, approximately; correct?

13 A. Yes.

14 Q. And can we agree that the difference between those two is
15 approximately \$4?

16 A. It's good arithmetic, yes.

17 Q. And that's a far cry from the 20¢ that we've been talking
18 about in terms of the cost differential caused by the MSA, isn't
19 it?

20 A. It's apples and oranges, but they are certainly different,
21 just the way my weight and pounds differs from the number of
22 home runs Babe Ruth had. They are not commensurate.

23 Q. Because we are only looking at the grandfathered share of
24 the SPMs?

25 A. No. We are looking at averages, not marginals.

1 Q. We are looking at averages, which is exactly what you
2 thought was the case at the time of your deposition, and now
3 you're saying it's marginal, and yet your opinions haven't
4 changed in the meantime, have they?

5 A. Well, I think you have mischaracterized what I said in my
6 deposition. I wasn't sure. It's not the case that I was sure
7 it was average. And my opinions have always -- are about
8 directions of effects, not magnitudes.

9 If the 20-cent cost differential is an incorrect
10 number, then the thought experiment about how much effect there
11 will be from the \$5.5 billion fee will be different, but the
12 direction will be correct, and the order of magnitudes would be
13 more like MSA amounts than less if those numbers are comparable.
14 But my opinion about direction certainly does not need to
15 change.

16 Q. Now, putting direction aside, a \$4 cost differential is
17 actually in excess of the cost differential that would be
18 incurred if the \$5.5 billion of remedies were entered by the
19 court in this case, isn't it?

20 A. It is a bigger number, but it's not a pertinent number. I
21 agree it's a bigger number.

22 Q. And taking these numbers, Chris, let's go to U.S. 18283.
23 And you see, Professor -- and you can compare this to the table
24 we've just looked at -- but that the difference in average MSA
25 amount due per carton of the OPMS versus the grandfathered SPMS

1 has from 1999 to 2003 at all times been in excess of \$2 per
2 carton; correct?

3 A. This average amount including again grandfathering benefits,
4 yes.

5 Q. And --

6 A. Not marginal, yes.

7 Q. Right. And, in fact, in all year but one it was in excess
8 of \$3 per carton; correct?

9 A. That's what this graph shows. I have no reason to doubt
10 your arithmetic, but I haven't done independent check. This
11 draft does show numbers bigger than three, except for one.

12 Q. And are you aware that throughout most of this period that
13 the grandfathered SPMs made up the overwhelming majority of the
14 universe of the subsequent participating manufacturers?

15 A. Yes, I'm aware of that. Actually, I'm aware of it by logic,
16 not by fact.

17 Q. Well, let's take a quick look. We can look at the actual
18 numbers. Let's look at table 2 from U.S. 93834.

19 So if we look at the total share of the SPMs with
20 grandfathered shares, and we were talking about 2001 before, so
21 let's stick with it. In 2001 their share of the market was
22 about 6 percent; correct?

23 A. Yes.

24 Q. And those without grandfathered shares in 2001 was actually
25 in the area of .08 percent; correct?

1 A. Like 1-tenth of 1 percent.

2 Q. So the nongrandfathered -- or let's put it the way they used
3 it in the chart -- the SPMs without grandfathered shares really
4 made up a fairly de minimis portion of the cigarette market;
5 correct?

6 A. I think that's a fair use of that phrase. On the order of
7 one-sixtieth.

8 Q. And grandfathered versus nongrandfathered SPMs; since we've
9 been talking about them, let's put on the record the difference
10 between the two.

11 Grandfathered SPMs, there is a provision in the MSA
12 that provides that all of their sales up to 125 percent of their
13 market share is exempt from payments under the MSA; correct?

14 A. I know that the grandfathered provision has characteristics
15 of that sort, but I don't have the parameters in mind. If it
16 were 120, I wouldn't know that you were wrong. But it's like
17 that.

18 Q. That's the concept, though?

19 A. Exactly.

20 Q. The nongrandfathered SPMs, on the other hand, don't get that
21 benefit; correct?

22 A. Follows as a matter of logic, I assume that is true based on
23 what nongrandfathered means, but I haven't done any independent
24 check of that.

25 Q. And so, in fact, if we go back to table 3, we see that

1 because they don't get the same benefit, and we look at the per
2 carton cost to the SPM without grandfathered shares in 2001,
3 they are actually closer to the OPMS than are the SPMs with
4 grandfathered shares; correct?

5 A. The number in row 6 is closer to the number in row 2 than
6 the number in row 4 is to the number in row 2, but I haven't
7 studied this enough to know whether your characterization of the
8 row headings are right. I can read what it says, but I don't
9 have an independent expertise on this, other than to see what I
10 just said about the relations of those numbers.

11 Q. And, in fact, your knowledge of the MSA doesn't go a whole
12 lot deeper than what we've touched on today, does it?

13 A. You are right. I would say that virtually all of what I
14 know about the MSA you've taught me in my deposition by having
15 me read various pages.

16 THE COURT: Well, that's high praise, Mr. Gette.

17 MR. GETTE: Thank you, Your Honor.

18 THE COURT: Perhaps.

19 BY MR. GETTE:

20 Q. Now, we've talked about the cost differential. I want to go
21 back to U.S. Exhibit 18278.

22 THE COURT: Are you changing major topics or are you
23 finishing up this particular portion?

24 MR. GETTE: I am finishing up this particular portion,
25 which should not be too long.

1 THE COURT: Let's finish this, then, and then we will
2 take a lunch break.

3 MR. GETTE: In actuality, Your Honor, it just occurred
4 to me that the small section that I'm going to do does relate in
5 some respects to the article that we were going to touch on
6 after lunch, so in fact it may even make more sense to take our
7 break now and then address this when we return.

8 THE COURT: Five of 2:00, everybody. And it sounds to
9 me as if, hopefully, we can get out a bit earlier than usual
10 today, depending on how the cross and the redirect goes.

11 THE WITNESS: Excuse me, ma'am. May I talk about the
12 article to anybody?

13 THE COURT: No, you cannot talk about the article with
14 anyone, but you can read it and reread it if you want.

15 THE WITNESS: Thank you.

16 (Lunch recess began at 12:40 p.m.)

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CERTIFICATE

I, EDWARD N. HAWKINS, Official Court Reporter, certify
that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

Edward N. Hawkins, RMR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	Docket No. CA99-02496
	.	
v.	.	
	.	
PHILIP MORRIS USA, et al.,	.	Washington, D.C.
	.	May 31, 2005
	.	
Defendants.	.	
.	

VOLUME 110
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	U.S. DEPARTMENT OF JUSTICE Civil Division Sharon Y. Eubanks, Director 1331 Pennsylvania Avenue, N.W. Suite 1150 Washington, D.C. 20004 202.616.8280
	U.S. DEPARTMENT OF JUSTICE Civil Division Stephen D. Brody, Deputy Director 1331 Pennsylvania Avenue, N.W. Suite 1150 Washington, D.C. 20004 202.616.1438
	U.S. DEPARTMENT OF JUSTICE Civil Division Renee Brooker, Asstitant Director, 1331 Pennsylvania Avenue, N.W. Suite 1150 Washington, D.C. 20004 202.616.3797

Scott L. Wallace, RDR, CRR
Official Court Reporter

APPEARANCES: Cont.

U.S. DEPARTMENT OF JUSTICE
James D. Gette, Esq.
Tobacco Litigation Team
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
202.616.4875

For Defendant:
Philip Morris USA,
Inc.

WINSTON & STRAWN
Thomas J. Frederick, Esq.
35 West Wacker Drive
Chicago, IL 60601-9703
312.558.5700

HUNTON & WILLIAMS
Patricia M. Schwarzschild, Esq.
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
804.788.8728

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON
James L. Brochin, Esq.
Theodore V. Wells, Esq.
1285 Avenue of the Americas
New York, NY 10019
212.373.3000

For Defendant:
Lorillard Tobacco
Company

THOMPSON COBURN
J. William Newbold, Esq.
One US Bank Plaza
St. Louis, MO 63101
314.552.6000

For Defendant:
Brown & Williamson
Tobacco Corporation

KIRKLAND & ELLIS, LLP
David M. Bernick, Esq.
Kenneth N. Bass, Esq.
200 East Randolph Drive
Chicago, IL 60601
312.861.2248

For Defendant:
R.J. Reynolds Tobacco
Company

JONES DAY
Peter J. Biersteker, Esq.
Robert Francis McDermott, Esq.
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
202.879.3939

Scott L. Wallace, RDR, CRR
Official Court Reporter

For Defendant:
British American
Tobacco
(Investments), Ltd.

CHADBOURNE & PARKE, LLP
David Wallace, Esq.
Bruce Sheffler, Esq.
Philip Pfeffer, Esq.
30 Rockefeller Plaza
New York, NY 10112
212.408.5498

For Defendant:
Liggett Group, Inc.

KASOWITZ, BENSON, TORRES & FRIEDMAN
Nancy Straub, Esq.
Leonard A. Feiwus, Esq.
1633 Broadway
New York, NY 10019

For Defendant:
Tobacco Institute

COVINGTON & BURLING
Phillip Dube, Esq.
James A. Goold, Esq.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20009

For Defendant:
The Council for
Tobacco Research USA,
Inc.

THOMPSON COBURN
J. William Newbold, Esq.
Michael B. Minton, Esq.
Richard P. Casetta, Esq.
One US Bank Plaza
St. Louis, MO 63101
314.552.6000

For Defendant:
British American
Tobacco Australian
Services, Ltd.

SHAW PITTMAN, LLP
Jack McKay, Esq.
Alvin Dunn, Esq.
2300 N Street, N.W.
Washington, D.C. 20037

Court Reporter:

Scott L. Wallace, RDR, CRR
Official Court Reporter
333 Constitution Avenue, N.W.
Room 6814, U.S. Courthouse
Washington, D.C. 20001
202.326.0566

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Scott L. Wallace, RDR, CRR
Official Court Reporter

1 AFTERNOON SESSION, MAY 31, 2005

2 (1:58 p.m.)

3 THE COURT: Good afternoon, everybody. All right,
4 Mr. Gette, please.

5 MR. GETTE: Thank you, Your Honor.

6 Chris, if we could pull up U.S. Exhibit 18278. 18278.
7 That will do it.

8 CONTINUED CROSS-EXAMINATION OF ROMAN L. WEIL, Ph.D.

9 BY MR. GETTE:

10 Q. Professor Weil, do you still have that exhibit?

11 A. Yes.

12 Q. Okay. I'd like to talk about -- we've talked a little
13 bit about different portions of this and I would like to talk
14 now about the B section in terms of why we even care about B and
15 the market shift there. Okay.

16 And let me ask you: From a business perspective, losing
17 market share is not necessarily a bad thing, is it?

18 A. Yes, you are correct.

19 Q. So if, for example --

20 A. But not with -- that probably applies to non-competitive
21 markets. In competitive markets, probably it's never a good
22 thing to lose market share.

23 Q. Okay.

24 A. That's not true. I take that back. Even in competitive
25 markets, I can think of situations where everybody would like to

1 lose market share.

2 Q. Right. And so for example, if a company can raise the
3 price of its product enough to more than offset any loss
4 resulting from the loss of market share, it can actually become
5 more profitable, correct?

6 A. The difficulty with that question has to do with the
7 mixing of dollars and percentages. It is certainly true that
8 one could lose volume, raise prices and be better off.

9 Now, when you change that into percentage terms, is it
10 possible that one could raise prices in percentage terms and
11 lose market share in percentage terms without any statement
12 about what's happening to the overall market?

13 We probably could say it's possible, yes, but the
14 analysis is a little trickier because you switch from dollars to
15 percentages.

16 Q. That's fine. Let's think about it in the first context,
17 which is that you can actually sell less product and make more
18 money?

19 A. That could happen.

20 Q. Have you done an analysis of whether that happened to
21 these defendants following the Master Settlement Agreement?

22 A. I understand from your earlier questioning that by
23 "analysis," you mean written and I have not. I certainly have
24 thought about it, but I have not written anything on the
25 subject.

1 Q. You've not calculated any numbers with respect to the
2 profitability of the companies pre- and post-MSA, correct?

3 A. Yes.

4 Q. Have you calculated any numbers with respect to the
5 profitability of the companies pre- and post-MSA?

6 A. Did you say "any of the companies" or "all of the
7 companies"?

8 Q. Have you calculated numbers with respect to the
9 profitability of all these defendants pre-MSA and post-MSA?

10 A. I think not.

11 Q. Now, do you know whether today as you sit here, the
12 defendants have priced their product at a profit maximizing
13 point?

14 A. The easy answer to that is I don't know, but I have a
15 suspicion and I could give you the evidence of that suspicion
16 and I would be willing to wager on it, but I don't know.

17 Q. In your written direct, I believe that you speculate that
18 in a competitive market, that defendants are likely close to the
19 optimal price, correct?

20 A. Would you point me to the page and line number, please.

21 Q. Well, I knew you were going to do that to me. In a
22 moment I can.

23 A. I'll just tell you why. "Speculate" is not a word I use
24 often and it's a loaded word when lawyers use it and I want to
25 see what I did say.

1 Q. Well, you've stumped me with that one so let's not stick
2 on that. Let's come back to it in a moment.

3 So I asked about the profit maximizing point and you said
4 you don't know; you have some speculation, perhaps, but you
5 don't know as you sit here today, or you have some suspicion --

6 A. Yes. Have I used the work "speculation" except in
7 response to you?

8 Q. You're right. You said you have some "suspicion" --

9 A. Yes.

10 Q. -- but that you weren't sure, sitting here.

11 A. That's right. Yeah.

12 Q. Okay. All right. Now, let's come back to the Sloan
13 article that we were talking about earlier.

14 Chris, if you could put up U.S. Exhibit 93836. And I'd
15 like to look at page 358 and if you could blow up figure 2 in
16 the accompanying text at the top.

17 Professor, you see that this is an analysis of the
18 revenue, which we talked about earlier, not knowing what --
19 whether this was net or gross revenue. But also, this chart
20 indicates the level of profit made by the industry pre- and
21 post-MSA, correct?

22 A. It does.

23 Q. Okay. And that's the lower series of squares at the
24 bottom of the page, correct?

25 A. Yes.

1 Q. Okay. And if you look at the --

2 A. But you understand, just like we don't know what revenue
3 is, we don't know what measure of profit this is. It's some
4 measure of profit.

5 Q. You'll notice in the text that accompanies that, it says
6 the data came from the company's 10-K submitted to the SEC,
7 correct?

8 A. Yes, it did.

9 Q. Okay.

10 A. It does say that.

11 Q. And as somebody who's an accountant, are you familiar
12 that these defendants have, with respect to revenue -- let's
13 start there -- have only reported net revenue in their 10-Ks?

14 A. Since I don't know what you mean by "net revenue," I
15 don't know how to answer that question. I believe that there's
16 bound to be at least one revenue line; there may be more than
17 one.

18 What do you mean by "net revenue"? Some people equate
19 that with net income; some people equate it with gross margin;
20 some people equate it with cash received minus excise taxes.
21 And I don't have in mind what that means in a tobacco company
22 10-K as I sit here without reference to a 10-K.

23 Q. Okay. Well, let's look at something to see if that
24 helps.

25 Chris, this is U.S. Exhibit 93852.

1 And this is a portion --

2 A. Can you hold on a second?

3 Q. Sure.

4 MR. BIERSTEKER: Excuse me. Does the United States have
5 a -- this is not the entire 10-K, and I don't know if having the
6 remainder of it would be helpful to the professor.

7 THE COURT: Well, let's see. Hopefully, this is a portion
8 of the 10-K which provides the statutory definition for the word
9 "revenue." That's what I would hope.

10 BY MR. GETTE:

11 Q. Professor, do you need some additional time?

12 A. Yes. I'll give you the signal when I'm finished looking
13 at this. I'll give you a signal.

14 Q. Okay.

15 (Brief pause.)

16 THE WITNESS: Let's try moving ahead. I may call for
17 another timeout, but let's try it.

18 BY MR. GETTE:

19 Q. All right. This document was not brought by me here
20 today in an attempt to answer this question, so I'm simply
21 trying to help us along in the hopes that this may do it and it
22 may not. And I apologize if it doesn't.

23 This is a portion of the 10-K for Altria Group in 2004,
24 correct?

25 A. That's what the cover page says.

1 Q. Okay. And if you look at the second page of that
2 document at the bottom, it indicates that Altria only reported
3 here net revenues, not gross revenues, correct?

4 A. This is the second page of the handout you gave me. It's
5 not the second page of the document, which is the 10-K, but it
6 says it's Exhibit 13. And it -- on the page you gave me, there
7 is an indication of only net revenue, but we don't know that the
8 rest of the 10-K doesn't have more detail and we don't know what
9 this "net revenue" means; at least I don't. I can guess, I can
10 imagine, I can speculate, but in the pages you've given me, it's
11 not defined that I can find.

12 Q. Okay. If we look --

13 A. I used the word "speculate." Naughty.

14 Q. If you look at the operating company's income on the
15 right side there, you'll see that in 2002 for domestic tobacco,
16 Altria reported \$5 billion of operating company income, correct?

17 A. That's what it says.

18 Q. All right. And if you look at -- if we flip back now to
19 look at figure 2 on the Sloan article in 2002 --

20 Chris, it's U.S. Exhibit 93836. Go to --

21 If you look there in 2002, you'll see the total industry
22 profits, the real domestic -- what they call the "real domestic
23 tobacco profit" is in the range of about \$78 billion, correct?

24 A. I think that box for 2002 lies below the horizontal line
25 for the 10,000, which means 10 billion, I think, and if so, that

1 would be correct.

2 Q. Okay. So the \$5 billion reported on the 10-K would seem
3 to put us in about the right order of magnitude for the table
4 that these authors report from the 10-K's of the companies,
5 correct?

6 A. Well, again, you may be doing apples and oranges. It's
7 certainly true that the number is the same order of magnitude,
8 but the number in the exhibit you handed me, 852, is from a note
9 about the MSA agreement and the article suggests this is from
10 the segment report part of the 10-K and I don't recognize this
11 as a segment report. It may be, but I doubt it.

12 Q. Okay.

13 A. But I think what you're pointing me to in the exhibit is
14 not what the authors of this articles used. Those numbers may
15 be the same, but I think what you've shown me is not what
16 they're talking about.

17 Q. Let's just capture what the authors of this article
18 concluded and then we may have to save it for another day, I
19 believe, trying to provide some additional information to the
20 Court on this.

21 A. You see what I'm talking about? "Number 2, Source."

22 Q. Yes.

23 A. It says "Segment financial data."

24 Q. Right. Yep.

25 So let's, Chris, go down in that same column to the full

1 paragraph there.

2 And you'll agree with me, won't you, that the authors
3 concluded that domestic tobacco revenues increased in 1999 and
4 remained at a higher level during '99 to 2002 than during the
5 pre-MSA years?

6 You'll agree with me that that's what these authors
7 reported, correct?

8 A. Yes, I agree that's what those words say, but those words
9 don't get defined. We don't know what "revenues" mean any more
10 now than we did before lunch.

11 Q. Okay. And if we look at the right-hand column, the very
12 last paragraph on the page, picking up with "Discussion," you'll
13 see, continuing to the next page --

14 It's U.S. 93836.

15 A. While he's doing that, you mean it's page 359 of the
16 article?

17 Q. It starts on page 358 --

18 A. And carries over.

19 Q. -- to 359.

20 A. So I'm looking at the right thing.

21 Q. I just want to make sure everyone can see it. Okay.

22 And you'll see there that what the authors reported was
23 that: "Overall from 1999 through 2002, participating
24 manufacturers maintained or improved performance in terms of
25 investor stock returns and profit from domestic tobacco sales."

1 Do you see that they reported that, right?

2 A. Yes. Can we also look at what they reported about six
3 lines later?

4 Q. And I'm sure your counsel will cover what he thinks needs
5 to be covered when he questions you.

6 My question to you on this information that has
7 analyzed -- this article that has analyzed the profitability and
8 stock returns of the defendant tobacco manufacturers, whether
9 you considered and reviewed this before you offered the opinions
10 to the Court regarding the impact of your remedies on
11 stockholders, for example?

12 A. I did consider these facts and the qualifications that
13 these authors give, but not from this article.

14 What's in here you quoted out of context six lines later,
15 but I have considered this set of facts, not from this article.

16 Q. Could we stick to the question.

17 A. I have considered these facts, not from this article.

18 Q. Did you read this article before you opined about this to
19 the Court?

20 A. No.

21 Q. Thank you. Now, did you consider determining -- when
22 thinking about the change in market share, did you consider --

23 A. I'm sorry. Pre- or post-MS?

24 Q. The change from pre- to post-MSA.

25 A. Okay.

1 Q. Thinking about that change, did you give any
2 consideration to whether or not the loss of market share for the
3 original participating manufacturers occurred in their premium
4 brands versus their discount and generic brands -- discount
5 brands and generics?

6 A. No.

7 Q. You're aware, are you not, that with respect to your
8 client, for example, R.J. Reynolds, and with respect to, say,
9 Philip Morris, that certainly a majority of their revenues and
10 profits are derived from the premium market?

11 A. I believe that to be true for the two you mentioned, but
12 not for all the defendants. I think Liggett goes the other way.

13 Q. But you believe it would be true for Lorillard as well?

14 A. I believe so.

15 Q. And what happened -- putting aside the market share that
16 you calculated, what happened to the market share of these
17 defendants in their premium brands pre- to post-MSA?

18 A. I say the question you ask is ambiguous because I
19 understand the numerator to be sales of premium brands, but I
20 can't tell whether you mean the denominator to be the sales of
21 premium brands or all sales. But whatever you mean, I don't
22 know.

23 Q. And so, for example, let's take a look at U.S. 93844.

24 A. Is that that 10-K excerpt?

25 Q. It may -- I don't think it's the one I gave you. It is a

1 10-K excerpt.

2 A. I don't think I have it.

3 Thank you.

4 Q. And this actually is a series of excerpts from 10-Ks.

5 MR. BIERSTEKER: Again, Your Honor, I object to using what
6 appears to be a collection of excerpts from multiple 10-Ks
7 instead of giving the witness the whole document.

8 THE COURT: What are they?

9 MR. BIERSTEKER: Pardon me?

10 THE COURT: I'm asking the government: What are those?

11 MR. GETTE: These are portions of the 10-Ks that report
12 the total volume sale of Marlboro in various years over the last
13 ten years or so. And that's all we're seeking to elicit from
14 them here, is to see if the witness considered the sales volumes
15 of those -- of that premium brand.

16 THE COURT: Well, it seems to me the problem with doing it
17 that way is that it's impossible to tell whether the portions
18 you're asking him about are complete in and of themselves or
19 whether they're out of context, unless you can make certain
20 representations to me about that, and I don't know whether you
21 can or not.

22 Are they separate portions or sections of the 10-K?

23 MR. GETTE: They are not, Your Honor. They are the places
24 in which, for example, in this series, that Philip Morris
25 reported specifically its sales of Marlboro in each of the

1 various years that I've given the witness.

2 THE COURT: Mr. Biersteker, do you have anything else on
3 this issue?

4 MR. BIERSTEKER: Well, I mean, Marlboro is one brand.
5 What if I wanted to ask him about other brands? I don't have the
6 information here to --

7 THE COURT: Well, that's a different issue.

8 MR. BIERSTEKER: Well, there's that. And it seems to
9 me -- I mean, why doesn't he establish -- he can ask him straight
10 out the question of whether or not he specifically looked at
11 Marlboro share of the market figures for any year and get an
12 answer from that. We don't have to go through all of this.

13 THE COURT: Well, no, he may certainly show him what
14 documents he has. My concern, as I've indicated, is whether what
15 is being shown to the witness is a complete presentation of the
16 government's information on that subject -- information as it's
17 contained in the 10-K.

18 You can question him. We'll see where we go. I'm not
19 sure what the witness can answer or not.

20 MR. GETTE: All right.

21 Chris, if you would go to page 12, 4 to 13.

22 Chris, why don't you just give me the ELMO.

23 BY MR. GETTE:

24 Q. Professor, 12 pages into this document is a cover page --

25 A. If I counted right, this is what I get for the 12th page

1 (indicating). Is that right?

2 Q. Back one.

3 A. Back one. Okay.

4 Q. This is a portion, you see, of Philip Morris Companies,
5 Inc. 10-K for the year 1997. And if we look at the next page,
6 you see that they reported in the 10-K: "Marlboro is the
7 largest selling cigarette brand in the United States with
8 shipments of 164 billion units in 1997, up 5 percent from 1996,
9 equating to 34.1 percent of the United States' market, up from
10 32.3 percent in 1996."

11 Now, did you consider this market share information when
12 you rendered your opinion regarding the impact of the change in
13 market share pre- and post-MSA?

14 A. Certainly not specifically. Those data are imbedded in
15 the numbers in my chart, but I did not separately analyze Philip
16 Morris or Marlboro or any other brand.

17 Q. And so to look, then, as we jump forward --

18 A. How many pages, please, to jump forward?

19 2002, so that's near the back, isn't it?

20 I found the page.

21 Q. Okay. And if you look there, this is now -- if I go back
22 one page, we can see that this is now in the year 2002. We're
23 now post-MSA. So pre-MSA, they were reporting a market share of
24 34.1 percent for Marlboro and now in 2002, they report "Marlboro
25 is the largest selling cigarette brand," using the same language

1 again in the United States with shipments of 148.6 billion
2 units, equating to 37.9 percent of the domestic market."

3 So they've gone from 34.1 pre-MSA to 37.9 post-MSA. And
4 I think you've already answered my question, but you didn't
5 consider that change an increase in Philip Morris market share
6 for Marlboro cigarettes in rendering your opinion regarding the
7 change in market share, did you?

8 A. It looks to me like the shipments have declined by 8
9 billion units. When you talk in percentage terms, you can often
10 reach incorrect inferences. I did not consider either the
11 percentage changes or the unit changes. It looks to me like it
12 was 156 billion in 1996 and then 148 billion in '02.

13 Q. Sure.

14 A. So the number of cigarettes sold is down.

15 Q. Right.

16 A. The market share --

17 Q. The market overall may be shrinking, correct?

18 A. That's correct.

19 Q. And in fact, you have to -- you can draw that conclusion
20 from that, can't you?

21 A. Yes.

22 Q. So the market overall is shrinking, but with that
23 cigarette, Philip Morris's share of the market was actually
24 increasing, correct?

25 A. It's share of the market increased.

1 Q. And in fact, when you reported market shares here, you
2 looked at the same thing, correct? You looked at the change in
3 percentage of market share, correct?

4 A. I did. And it shows that Philip Morris decreased its
5 market share over seven years.

6 Q. Well, it shows that the OPMS decreased their market
7 share, correct?

8 A. Well, it says that Philip Morris went from 48.3 percent
9 to 46.6 percent.

10 THE COURT: And what are you reading from? Is that from
11 your report or from the --

12 THE WITNESS: Well, it's the exhibit we've already had up
13 on the screen and it comes from the Price Waterhouse Coopers
14 data, but we had this up earlier. It's Exhibit 60676, page 24 of
15 my report.

16 BY MR. GETTE:

17 Q. And that gets to my point exactly. That is the overall
18 Philip Morris market share for all of its various brands,
19 correct?

20 A. Yes.

21 Q. Okay. And when you narrow it down to just the premium
22 brands, the most profitable brands, you didn't do an analysis of
23 just the market shift in those premium brands, did you?

24 A. How do you know -- how am I to know that the premium
25 brands are the most profitable brands? You just asserted that

1 in your question and I have not done an analysis of that.

2 And in order to decide questions like that requires a
3 huge amount of accounting cost allocations. I'm not going
4 concede that the premium brands are the most profitable brands.
5 It may be true, but it's not something we've looked at.

6 Q. All right. So you don't know if they're the most
7 profitable or not? You have not done that analysis?

8 A. Correct.

9 Q. But you do admit that the overwhelming majority of the
10 revenue, where we talked earlier for Lorillard, Philip Morris
11 and R.J. Reynolds, comes from the sale of premium brands,
12 correct?

13 A. Earlier I agreed that it was "most" and you now have
14 switched that to "overwhelming majority." And that may be true,
15 but I didn't agree to that. I don't know.

16 Q. You don't know --

17 A. That it's "overwhelming"? It's "most."

18 Q. Okay. You do know it's a majority, but you do not know
19 how much more than 50 percent it is; is that right?

20 A. Exactly.

21 Q. Professor, I'd like to turn to one last area to discuss
22 with you and then I may have a few wrap-up questions, but this
23 is the last large area.

24 I'd like to talk about the number \$3,000 that Professor
25 Gruber suggests should be the assessment for each youth by which

1 the targets in his remedy is missed. You're familiar with that
2 number, yes?

3 A. Yes.

4 Q. And it's your opinion, is it not, that Professor Gruber
5 has set that assessment amount too high?

6 A. Professor Gruber set out to construct a number higher
7 than the present value of the profits that would inure to a
8 company who lured a customer who was a youth smoker. And he has
9 done that. \$3,000 is a number greater than the profits.

10 And the issue is how much greater it is. So if
11 Dr. Gruber says, "My goal was to get a number bigger than
12 profits," \$3,000 works. But if he's trying to get a number that
13 is bigger than profits, but not much bigger, not punitively
14 bigger, just at "bigger," then it's wrong.

15 Q. Okay. So it is correct that it's higher than the profit
16 amount, but it may be unnecessarily high, is your opinion?

17 A. I believe it is unnecessarily high if the goal is merely
18 to recapture the profits from selling to that customer.

19 Q. How much too high is it in number terms? And I'm looking
20 here for an exact figure.

21 A. I understand that. And I have done some back-of-the-
22 envelope calculations and looked at some -- it probably would be
23 best for me to say I had not done a thorough analysis; I suspect
24 it's on the order of three to five times too large.

25 Q. But that's based purely on a back-of-the-envelope

1 analysis, correct?

2 A. Looking at the Fisher proceeds, looking at the proceeds,
3 it's -- I actually did some computations with my calculator and
4 pencil and paper, but I didn't do a systematic analysis that is
5 anything like a report.

6 Q. The analysis didn't raise to the level that you produced
7 it to the United States, right?

8 A. Yes, it did not.

9 Q. Now, when you were determining or opining that this
10 figure is unnecessarily high, did you consider the testimony of
11 any of the executives of the defendants in this case related to
12 the value of a share of the market to the defendants?

13 A. I did not consider such evidence in writing the material
14 on page 28 and following.

15 Q. Okay. So for example, let me just confirm -- this
16 particular testimony was the written direct testimony of David
17 Beran. Do you know who Mr. Beran is?

18 A. No.

19 Q. If we look at page 1 of his testimony, he's asked:
20 "Where are you employed and what is your current position?"

21 It says: "I am the Executive Vice President of Strategy,
22 Communications and Consumer Contact" at Philip Morris.

23 And then if you'll turn to page 35, Mr. Beran is asked:
24 "Can you explain the objective of Philip Morris USA's cigarette
25 brand marketing? "

1 And at lines 15 to 17, in the course of answering that
2 question, he says: "If Philip Morris USA loses one market share
3 point, Philip Morris USA would have lost income of approximately
4 \$155 million."

5 Do you see that testimony?

6 A. The hesitation is that I'm going to read the whole
7 paragraph, not just the lines you focused on and see if I can
8 understand the context.

9 (Brief pause.)

10 THE WITNESS: I see it.

11 BY MR. GETTE:

12 Q. Okay. And you didn't consider that testimony in reaching
13 your opinions in this case, did you?

14 A. Yes, I didn't, and I couldn't until I know what he means
15 by "income."

16 Q. Okay. Now, knowing the value of a market share point to
17 the defendant, you could reduce that down to the value of each
18 individual cigarette that they sell, correct?

19 A. If you knew what they meant by this number, you could
20 certainly divide this number by the number of cigarettes and get
21 some ambiguous number per cigarette instead of an ambiguous
22 number in total. So we could do that arithmetic, but it would
23 have no more meaning than this has meaning, or no less.

24 I don't know what this means. I don't know what that
25 division would mean.

1 Q. If we could look at this. And Professor Gruber -- his
2 analysis does include a proceeds amount per cigarette in his
3 calculations, correct?

4 A. Do I have that sheet of paper?

5 Q. Not yet, you don't. I just posed a question and we'll
6 come to this. I didn't mean to turn your attention away from my
7 question.

8 A. I'm sorry. Then ask the question again. I was going up
9 on the screen as you were asking.

10 Q. Okay. In his analysis, Dr. Gruber includes a proceeds
11 amount per cigarette, correct?

12 A. Dr. Gruber does take a proceeds amount per cigarette from
13 the work of Professor Fisher and takes the highest number he can
14 find for any company for any year and makes an adjustment for
15 taxes. So he does some work; he relies on Professor Fisher for
16 some work.

17 Q. Now, I understand you feel like the number reported by
18 Mr. Beran is unclear to you, what that is intended to signify,
19 but at least what I did was I reduced that \$155 million figure
20 to a per cigarette amount and we get .0396. So at least per
21 cigarette, whatever value it is that Mr. Beran is measuring in
22 his number of \$159 (sic) million per market share point reduces
23 down to a figure of .0396 on a per cigarette basis.

24 And you'll agree with me, won't you, that that is
25 substantially -- and in fact, 72 percent higher than the

1 proceeds amount per cigarette that Professor Gruber reported?

2 A. That number is bigger. And now that you do this
3 calculation with it, I can understand why that is not the right
4 number for comparison.

5 Mr. Beran is saying if all of a sudden we lose a
6 percentage point, here's how much money we're going to lose --
7 how much income we lose. But that means in the short run; that
8 doesn't take into the long run, how he would shrink capacity,
9 lay off employees, have less inventory.

10 This is like an infinitesimal-in-time change. This is
11 not the long-run adaptation we need for this calculation.

12 I can see that the number you have on line 4 is bigger
13 than the number you have on line 5 and I'm prepared to discuss
14 with you why neither one is appropriate.

15 Q. And whether or not Mr. Beran's number has what you
16 call -- whether it takes into account the long run, whether
17 shrink capacity, lay off employees, have less inventory -- that
18 whole analysis -- other than some back-of-the-envelope work,
19 you've not done that analysis either, have you?

20 A. I have not done the analysis of what it would be, but
21 I've done the thinking analysis to understand why it's an
22 inappropriate number to use for these purposes.

23 Q. Just a few clean-up questions that I promised before,
24 Professor.

25 Did you play any role in the preparation or negotiation

1 of the 1997 Proposed Resolution?

2 A. No.

3 Q. Apart from this litigation, have you ever analyzed any of
4 the provisions contained in the 1997 Proposed Resolution?

5 A. No.

6 Q. In fact, you didn't even review the 1997 Proposed
7 Resolution as part of your preparations for this case, did you?

8 A. I have read some of it. And if it's not in my list of
9 reliance materials, it means I read it since the deposition and
10 this would be added to the list of things I've looked at since
11 the deposition.

12 I have looked at some of that Proposed Resolution and if
13 it's not in the list, it means I looked at it post-deposition.

14 Q. Let's look at your list, actually.

15 If you pull up JD 068098, and if you can page back to
16 probably about the tenth page.

17 A. How about the very last page, maybe?

18 Q. Yeah, that's probably it.

19 That's it.

20 A. That's the last page.

21 Q. And if you look at that, that's the list of items that
22 you informed the government that you had reviewed, correct?

23 A. Through my lawyers, yes. I did not type this page.

24 Q. Right. And the 1997 Proposed Resolution doesn't appear
25 on that page, does it?

1 A. Yes, it does not.

2 MR. GETTE: And let's go, Chris, to U.S. Exhibit 93860.

3 BY MR. GETTE:

4 Q. Professor, this was a supplemental list that was provided
5 with respect to materials you reviewed prior to your deposition,
6 correct?

7 A. I'm willing to agree if that's what you assert it is. I
8 don't keep track of legal documents like this.

9 Q. Did you review it before your counsel produced it to the
10 United States?

11 A. No.

12 Q. All right. Do you find on there, on either page 1 or
13 page 2 -- it's only two pages long -- the 1997 Proposed
14 Resolution?

15 A. No, but this reminds me that when I say I have some -- I
16 have read something about the Resolution, it could have been in
17 one of these e-mails or attachments to e-mails from Dr. Gruber.
18 I don't remember exactly what these e-mails cover. I read them,
19 and they were articles and narratives that talked about how that
20 proposal was made, how it was negotiated, how it broke down.
21 And it may have been in these documents rather than the proposal
22 itself.

23 Q. So as you sit here right now, you can't say whether
24 you've ever looked at the proposed resolution or not, correct?

25 A. Not without more hints. Could you tell me how long it

1 is?

2 Q. I can't.

3 A. Okay. I can't be sure. If you showed it to me, then I
4 would tell you.

5 Q. Now, on the last two exhibits that I've given you, U.S.
6 Exhibit 93860 and JD 068098, you'll review those two documents
7 and tell me: Do the materials from Mr. Bulow that you
8 referenced earlier appear on either of those lists?

9 MR. BIERSTEKER: Objection, Your Honor. The witness
10 wasn't certain that he had read Bulow materials. He said he may
11 have read excerpts or something contained in Gruber's stuff.
12 It's not even clear in this record that he's examined anything
13 written by Mr. Bulow other than quotations from Bulow although --
14 that were contained in Gruber's materials, but --

15 MR. GETTE: Well, the speaking objection has probably
16 indicated to the witness what he needs to know.

17 THE COURT: The objection's overruled. The witness may
18 answer the question, if he can.

19 THE WITNESS: Will you repeat the question?

20 BY MR. GETTE:

21 Q. On either of those lists, do any of the Bulow materials
22 appear?

23 A. Is any of these the Oklahoma declaration from Mr. Gruber?
24 I don't think so. I don't know what it would be called.

25 Q. You're not able to tell from those lists whether it's

1 included or not?

2 A. Well, I'm just trying to speed things up and I guess I
3 shouldn't do that. Memorandum, facsimile, facsimile,
4 memorandum, letter, written direct, live, committee's package,
5 e-mail.

6 It seems clear that none of these bulleted items is
7 obviously the Oklahoma declaration. It might have been an
8 attachment to one of these. I can't say. But I'm confident
9 that I read the Oklahoma declaration after the deposition.

10 Q. As an experienced litigation expert, did you tell your
11 counsel that he should produce those materials that you had
12 effectively reviewed to the opposing party?

13 A. The major lesson of my book is: Don't pretend to effect
14 expertise outside of your own area, and I have no expertise in
15 the requirements of litigation for the lawyers and filing and
16 disclosing. I rely on the counsel that I work with to take care
17 of those obligations and I don't try to second-guess it. That
18 might be a mistake, but they are experts in their field and I'm
19 an expert in my field, and their field is not my field. I did
20 not.

21 Q. Did you tell counsel that you had reviewed those
22 additional materials?

23 A. Counsel sent them to me and asked me to review them. I
24 don't know if I ever wrote back and said I've read them, but I
25 may have. Oh, in fact, I do. I do recall speaking to Mr.

1 Biersteker after reading them. So I think he knew that I had
2 read them, read the Oklahoma thing.

3 Q. Professor Weil, how much are you being paid per hour for
4 your testimony here today?

5 A. My testimony is not for sale. I am being paid for my
6 time.

7 Q. And how much are you being paid for your time today?

8 A. I am charging and I hope getting paid \$1500 an hour.

9 Q. Thank you.

10 MR. GETTE: No further questions, Your Honor.

11 THE COURT: All right, Mr. Biersteker, redirect.

12 REDIRECT EXAMINATION OF ROMAN L. WEIL, Ph.D.

13 BY MR. BIERSTEKER:

14 Q. Jamey, if I could have the ELMO, please.

15 THE WITNESS: Excuse me, Your Honor, may I stand up a
16 second just to walk around?

17 THE COURT: Yes, you may.

18 (Brief pause.)

19 BY MR. BIERSTEKER:

20 Q. Okay. During cross-examination, counsel showed you U.S.
21 Exhibit 18,288 that -- yes, you've got it -- and you said that
22 both of these numbers, Professor Gruber's number and the number
23 that apparently counsel derived by dividing some numbers, were
24 not the appropriate numbers to use to estimate likely gains from
25 lifetime sales to a youth smoker.

1 Why do you believe that these are not the appropriate
2 numbers to use?

3 A. Fundamentally, it's the difference between marginal
4 costs, which is -- and marginal revenue, which economists well
5 understand, and the confusion of that with incremental costs and
6 incremental revenues that I think Dr. Gruber has confused.

7 That's the basic theory that's going on here. In the
8 long run, if -- and in the long run here -- I mean, the decades
9 covered by this youth smoker facing a decline in customer base
10 and sales, a company would shrink its costs; close a factory, as
11 I said, layoff workers. And the numbers here, these proceeds do
12 not take into account the costs that would be avoided by
13 shrinking the market. These are close to revenue -- not exactly
14 revenues, but they're revenues reduced by some direct costs, and
15 in Dr. Gruber's case in taxes, but there are just tons of costs
16 that are left out that would shrink over the period covered by
17 this Gruber remedy, Dr. Gruber's remedy.

18 Q. And you're saying -- I'm sorry, those additional costs
19 are not deducted from these numbers or they are?

20 A. They are not.

21 Q. If I could have JDEM 060674, please. This was a chart
22 that you discussed with Mr. Gette at the beginning of the
23 cross-examination, and he asked you whether you had data that
24 would enable you to take each of the alleged RICO violations and
25 put them into one of these three categories: Those that had no

1 effect on the number of youth smokers of a defendants' brands,
2 those that would tend to increase, and those that would tend to
3 decrease.

4 And if you recall, Mr. Gette X'd out the "none" and the
5 "decrease" line?

6 A. I think you mischaracterized it. He didn't do all the
7 columns, he just did the two outside columns. He didn't do the
8 inside column.

9 Q. Okay. And let me ask you: Did Professor Gruber
10 categorize which alleged RICO violations fell into which of
11 those three categories in his testimony?

12 A. I believe he did not, and I have some recollection that
13 he specifically was asked could he do it, and he said he
14 couldn't. I may be wrong about that. He didn't do it.

15 Q. Well, let's take a look, then, at -- you did review
16 Dr. Gruber's trial testimony; is that right?

17 A. Yes.

18 Q. Let's take an excerpt of it. It's his trial testimony
19 from May 10th, 2005, page 20,618, starting on line 20. I've got
20 it here.

21 20,618 starting on line 20.

22 A. Yes. I'm there, I've read it, and I'm actually over to
23 the next page and it refreshes my memory.

24 Q. We have to do this dance in steps.

25 A. Okay.

1 Q. I asked Dr. Gruber here at trial: "Now, in your written
2 direct on pages 10 to 11" -- but you don't have to look -- but
3 "on pages 10 to 11 you list a long list of actions that
4 Dr. Chaloupka told you defendants might take to make their
5 cigarettes more (sic) appealing to youth. Do you remember
6 that?"

7 And Dr. Gruber said, "Yes, I do." Could we have the next
8 page, Jamey? And I asked him: "Now, you don't believe that all
9 of those activities constituted RICO violations, do you?"

10 And Dr. Gruber answered: "As you pointed out to me in my
11 deposition, I'm not an expert on exactly what does or does not
12 constitute a RICO violation, so I can't tell you which on the
13 list do or do not. I believe that, you know, at least some of
14 them do, but I can't tell you which ones."

15 That was Dr. Gruber's testimony. Now, based upon your
16 review, did Dr. Gruber find it necessary to have a detailed
17 understanding of what the RICO violations were in this case,
18 much less which of the three categories they fell into on this
19 demonstrative in order to fashion his remedy?

20 A. I can't remember whether the right answer is yes or no,
21 but it's clear that Dr. Gruber did not know what was a RICO
22 violation when he constructed his remedy and testified about
23 them.

24 Q. Do you have a belief whether or not it is necessary for
25 you to have a detailed understanding of what the alleged RICO

1 violations were or which of these three categories they fall
2 into in order to give the opinions that you gave here at trial?

3 A. I have the opinion that I do not need to know.

4 Q. All right. Now, the government asked you whether you had
5 read the testimony of its various advertising and marketing
6 experts. Do you remember that? Dr. Dolan, Dr. Eriksen and some
7 others?

8 A. Yes.

9 Q. Okay. Let's take a look at the trial testimony of one of
10 those experts, Dr. Eriksen, from February 2nd of 2005, and it's
11 the transcript starting on page 11,877.

12 Actually, if I could have, I think, the earlier -- there
13 you go, good.

14 A. I'm sorry, what page are you on?

15 Q. 11,877.

16 A. Hold on, hold on.

17 Q. Okay.

18 A. I can't go any faster for you than I can for Mr. Gette.

19 Q. I guess it's --

20 A. I'm at 877 now.

21 Q. Yeah, okay. And Mr. Bernick asked Dr. Eriksen, starting
22 at around line 6: "Yeah, it was kind of tricky. There's a
23 claim that's being made in this case, I'll tell you,
24 Dr. Eriksen, that the tobacco companies represented publicly
25 that they only marketed to people 21 and over. I'll give you

1 that as a statement, regardless of what the evidence is.

2 And my question is: Are you aware of any scientific
3 studies that have analyzed whether any such representations
4 actually had an impact on smoking initiation among adolescents?"

5 And the answer was: "If the question is has the
6 representation of advertising only to those under 21 has been
7 scientifically studied to have some type of adverse effect?"

8 "Yes, on anybody really?"

9 "Answer: I'm not aware that that particular study has
10 been -- that that question has been studied or published in
11 those terms."

12 And Mr. Bernick was about to sit down when the court
13 pointed out that the question asked about marketing and the
14 answer was about advertising. And so if we go to the next page
15 of the transcript, Mr. Bernick comes back and addresses that
16 question, and if we go to page --

17 A. 878.

18 Q. Yeah, 78, on line 15, if we start there, yes, okay. So
19 Mr. Bernick comes back and he says: "Assume for purposes of my
20 question that one or more companies represented that at a
21 certain point in time they were not marketing to people who were
22 under the age of 21. Has any scientific study addressed whether
23 there was any impact of any such representation?"

24 And Dr. Eriksen says: "Again, my confusion is about the
25 impact of the representation versus the impact of the

1 marketing."

2 And Mr. Bernick said: "No, it's the impact of the
3 representation, I'm glad you asked that question." And then the
4 testimony came "I am not aware of studies that have looked at
5 the impact of the representation. I am aware of studies that
6 have looked at the impact of the marketing, but not of the
7 representation."

8 So, with that testimony in mind, Professor, if you had
9 read this portion of Dr. Eriksen's trial testimony, would you
10 have been able to place the alleged RICO violation, the alleged
11 misrepresentations concerning the targeting of defendants'
12 marketing into one of these three categories?

13 MR. GETTE: Objection, Your Honor, it's calling the
14 witness to speculate what he would have done if he had reviewed
15 this testimony, which he clearly said he has not done, before he
16 arrived in court today.

17 THE COURT: No. Objection's overruled.

18 THE WITNESS: Reading this answer today and understanding
19 in my mind what it means, I believe one would be unable to say
20 whether the RICO violation, the representation about the
21 marketing would be a none, an increase or a decrease. I don't
22 think one could tell.

23 BY MR. BIERSTEKER:

24 Q. Now, last topic here. We'll be short. The government
25 showed you data on the average cost difference between

1 subsequent participating manufacturers or SPMS, under the MSA,
2 and the original participating manufacturers under the MSA. Do
3 you remember that?

4 A. Do you mean the document from Price Waterhouse Coopers,
5 that lady, the table?

6 Q. That was the document.

7 A. Table 3, I have it in front of me. I have 93834.

8 Q. Yes, that's it. Do you remember being asked about those
9 average cost differences?

10 A. Yes.

11 Q. And in your testimony, you focused on the 20 cent per
12 carton marginal cost difference and I wanted to ask you some
13 questions about that: First, where did you get the 20 cent per
14 carton marginal cost difference between the subsequent
15 participating manufacturers and the original participating
16 manufacturers?

17 A. I think I answered at least part of that on -- I guess
18 it's called cross-examination this morning. On page 22, I
19 have -- wait a minute. Yes, page 23, in the first full
20 paragraph I cite to the Gruber deposition.

21 Now, I do not have in mind whether that deposition was
22 clear as to whether it was average or marginal. I did not have
23 that distinction clearly in mind when I wrote it. I was just
24 quoting from Dr. Gruber, and I certainly at my deposition wasn't
25 clear on the subject. But since my deposition, I have looked at

1 something, I think it was the Oklahoma thing, where it makes
2 clear that it means marginal.

3 Q. From an economic perspective, what is the relevant cost
4 differential for assessing the effect on movements in market
5 share?

6 A. I don't think there's any --

7 MR. GETTE: Objection, Your Honor, this is beyond the
8 scope of what's been disclosed by this expert leading up to his
9 report and his deposition. Questions were asked about this at
10 his deposition. He didn't provide any supplementation following
11 that deposition in which he said he didn't know whether it was
12 average or marginal, and now he's having the opinion elicited
13 from him whether it matters, whether it's one or the other. If
14 he's going to offer that opinion, certainly it seems to me some
15 supplementation was required and due to the United States.

16 THE COURT: Well, let me see the question.

17 What's your response, Mr. Biersteker?

18 MR. BIERSTEKER: My response is simply this. There was a
19 long line of cross-examination by Mr. Gette pointing out that the
20 average cost difference was significantly greater than 20 cents
21 per carton between the grandfathered SPMs and the OPMs. And the
22 witness actually said during the course of that
23 cross-examination, that of course this is average cost, not
24 marginal cost.

25 And now I'm trying to draw out from the witness why that

1 distinction between average cost and marginal cost is important.
2 That's all I'm trying to do. It's direct follow up on the cross,
3 Your Honor.

4 THE COURT: I don't think he's giving any new
5 information -- any information based on new reliance materials.
6 Wasn't that the essence of your objection?

7 MR. GETTE: The essence of my objection is that he's
8 offering a new opinion. His opinions previously were based on
9 whether it didn't matter and he didn't know whether we were
10 talking about average or incremental or marginal, rather.

11 THE COURT: This is an allegedly new opinion which flows
12 from your questioning on cross-examination; isn't that right?

13 MR. GETTE: Well, he says it's based on additional
14 materials that he reviewed since his deposition, which were never
15 produced to the United States.

16 MR. BIERSTEKER: The question goes to what's important --
17 this is just a matter of basic economics. And it's asking -- the
18 question that I last asked, I believe, was what cost difference
19 is important, average cost or marginal cost, in terms of looking
20 at changes and the effect in changes in the market share. That
21 was my question and that's straight economic theory. It has
22 nothing to do with reliance materials.

23 MR. GETTE: If it's straight economic theories, then
24 Dr. Weil would have known at the time of his deposition which one
25 we were talking about.

1 THE COURT: The question was from an economic perspective,
2 what is the relevant cost differential for assessing the effect
3 on movements in market share?

4 MR. BIERSTEKER: That was a terrible question, but the
5 gist.

6 THE COURT: It was a terrible question.

7 MR. BIERSTEKER: I can rephrase it to make it clear, but
8 it doesn't depend on new reliance materials, it just doesn't?

9 THE COURT: That question -- I don't understand that
10 question. I don't know whether the witness will, so ask another
11 question.

12 BY MR. BIERSTEKER:

13 Q. Let me try to do it this way. In economics, as I
14 remember it from back when I actually studied this stuff, there
15 are a bunch of different costs. Total costs is one, average
16 cost is another, and then there's marginal cost.

17 And Mr. Gette's questions asked you about average cost,
18 differences between the SPMs and the MPMs.

19 From the standpoint of economics, does average cost -- do
20 differences in average costs drive prices and market share in
21 the market?

22 A. Now, that's a really tough one. The economics textbook
23 say they shouldn't. All of the textbook writing is "make
24 decisions based on marginal costs," but in the real world, some
25 businesses under some circumstances look at average costs,

1 because in the long run all costs are variable; therefore, all
2 costs can become marginal, and if you don't cover all costs, you
3 will go out of business.

4 So the way you asked the question, sometimes people pay
5 attention to average costs, but the textbooks say, make
6 decisions based on marginal costs. And if you read an
7 accounting book, it says use incremental costs, not just
8 marginal costs when they differ.

9 THE COURT: What's the difference between marginal costs
10 and incremental costs?

11 THE WITNESS: If I ask you -- or let me put it another
12 way. If you ask me, what is the cost of producing one more
13 cigarette? That's a marginal cost, one small item. If you ask
14 me, what is the cost of producing one billion more cigarettes?
15 That's no longer at the margin, that's an incremental cost.

16 If I have to produce another billion cigarettes and then I
17 have to build a new factory, certainly I have to acquire more
18 inventory. So marginal -- I don't know if you studied
19 calculus -- means infinitesimal changes, incremental means just
20 changes, whether it's a hundred a thousand or a billion and you
21 cannot get an incremental cost by taking a marginal cost and
22 multiplying it by a billion. It just doesn't work that way,
23 because of these lines are curves, not straight lines.

24 BY MR. BIERSTEKER:

25 Q. And how does that testimony that you gave just now about

1 marginal versus incremental relate, if at all, back to this
2 exhibit and the inappropriateness of the two numbers that -- the
3 one that Professor Gruber used and the one that Mr. Gette
4 apparently calculated?

5 A. I don't know what -- let's see -- what the 396 is since
6 that comes from Beran or somebody like that, and I don't know
7 what he had in mind, but the Gruber 2.3, he says is a marginal
8 cost in his own work.

9 Q. Is not a marginal cost, you meant to say, I think.

10 A. It's marginal revenue, it doesn't have all the costs.
11 He's saying this is what happens with one more cigarette's
12 proceeds, net proceeds after taxes, but he ignores a bunch of
13 costs.

14 Q. And if you take --

15 A. Because it's a marginal cost.

16 Q. And if one takes as your incremental amount, the sales of
17 cigarettes to youth smokers in excess of the target, would you
18 then look at incremental costs or marginal costs?

19 A. Well, you would want to look at incremental costs. The
20 issue would be how do they differ from marginal costs? And I
21 remember doing one on the back of the envelope calculations,
22 that says that the reduction in youth smoking would be on the
23 order of the magnitude of closing down a whole cigarette plant,
24 one whole plant. That would save costs. So we should subtract
25 the costs of a plant in doing that, at the very minimum, but

1 that's back of the envelope.

2 Q. Now, one of the things that Mr. Gette asked you about
3 was, he was asking you about -- this is from your written direct
4 at page 24, Professor.

5 He was asking about changes in the market share for one
6 brand of cigarettes, Marlboro. And I just wanted to focus back
7 for a moment on the exhibit in your written direct, JDEM 060676,
8 and from the period in 1997 to 2001, you noted that Philip
9 Morris's market share had declined by a little less than two
10 percent. And if we look at Lorillard, Lorillard was pretty
11 flat, didn't really change very much.

12 However, when you look at my client, R.J. Reynolds, went
13 from almost 40 percent of the market to about 28 and a half
14 percent of the market after the MSA. Do you know whether or not
15 R.J. Reynolds Tobacco Company and Brown & Williamson, who's
16 included for these purposes in these numbers because they've
17 merged, whether or not they had a much bigger presence relative
18 to Philip Morris and Lorillard in the generic or discount brand
19 market?

20 A. I don't want to guess -- I could guess, but.

21 THE COURT: What did you mean by the term "preference,"
22 Mr. Biersteker?

23 MR. BIERSTEKER: Preference? Did I say preference? I
24 said presence. I meant to say presence.

25 THE COURT: That's the realtime. Go ahead.

1 BY MR. BIERSTEKER:

2 Q. Now, in cross-examination, the government, in addition to
3 asking you about average costs, asked about total costs, and
4 they compared the total cost of the MSA. And you said it was
5 about 9.7 billion at its highest. Looking at one of the
6 exhibits, I believe, from Campaign For Tobacco-Free Kids, U.S.
7 Exhibit 93833, and they talked about the total cost of at least
8 the remedies proposed by Doctors Fiore and Heulton in this case,
9 of 5.5 billion, and they made the point, well, "The remedies
10 being proposed by those two experts is less than the total cost
11 under the MSA." Do you remember that?

12 A. Yes, but you certainly mischaracterized my understanding
13 of this. The government characterized this, as the chart seems
14 to say, as payments to the states, but that's not the same as
15 the costs to the companies, because I think there were some
16 extra fees paid to lawyers and other things, so the costs to the
17 companies are higher than the amounts paid to the states, if I
18 remember correctly.

19 Q. No, that's right, that's fine, and I accept that. But
20 the point of my question was a little different, which is, it
21 is -- is looking at the difference in total cost of 10 million
22 versus 5 and a half billion or whatever the comparison is,
23 roughly twice as big under the MSA, is that comparison
24 instructive in projecting the likely effects of the government's
25 proposed remedies in this case on these defendants, on innocent

1 persons, on competition?

2 A. Not only do I think it's not instructive, I think it's
3 positively misleading.

4 Q. Okay. And why do you think that, Professor?

5 A. I have been aware for some time in the article by --
6 Sloan, Mathews and Trogdon mentions this point, that under the
7 MSA, virtually everybody has higher costs. So, it may have
8 facilitated collusion in price because they all have these
9 costs.

10 Under the proposed remedies here, only some of the
11 tobacco companies, cigarette companies would have increases in
12 costs. This would impose a cost wedge, which in the long run
13 has to be covered by prices. And it means that some combination
14 of prices would go up for the people paying the fines or
15 companies would go out of business. Market share would shift to
16 the ones not paying the fines because they could keep their
17 prices lower, and there would be various things going on because
18 only some of the people are paying the fines, not everybody.
19 And under the MSA, if not everybody, lots of people, lots more
20 people had to pay.

21 MR. BIERSTEKER: I have no further questions. Thank you.

22 THE COURT: Well, Doctor, I want to focus on that portion
23 of your testimony that's approximately between pages 28 and 32,
24 where you focus in very closely on what you believe to be the two
25 fundamental mistakes that Dr. Gruber has made in proposing the

1 \$3,000 ceiling that, as you know, he proposes as a penalty. Are
2 you with me?

3 THE WITNESS: Yes, ma'am.

4 THE COURT: As I understand it, your first major criticism
5 is that he doesn't properly differentiate between proceeds and
6 profits. And the reason he doesn't do that -- or the reason he
7 fails to do that is because he doesn't include all of the costs
8 that should properly be included in computing revenues minus
9 costs. Is that accurate, so far?

10 THE WITNESS: Yes, ma'am.

11 THE COURT: And so that would be your first major
12 criticism of Dr. Gruber's -- of the steps Dr. Gruber takes in
13 reaching his final \$3,000 figure. Am I right about that?

14 THE WITNESS: Yes.

15 THE COURT: All right. Now, in discussing that, you move
16 into a discussion of incremental costs, and to some extent, you
17 answered my -- I don't know about confusion, but lack of
18 understanding of your testimony. Dr. Gruber uses "marginal
19 costs" and I think that's pretty clear in working out his
20 analysis; is that right?

21 THE WITNESS: Yes, that's what he says, and along with the
22 notion that if you produce one more cigarette, the marginal
23 costs, other than the ones he takes into account are zero, and I
24 would even dispute that, but that's what he does.

25 THE COURT: And your criticism of that is that we are not

1 properly talking about just the cost of producing that final
2 marginal cigarette, but rather in the real world, we need to
3 factor in the much higher costs of producing the incremental
4 cigarettes, which would obviously be far more than one; is that
5 accurate or have I misstated it?

6 THE WITNESS: That's right, you've got it.

7 THE COURT: Now, -- and I guess your second major
8 criticism is that in your view, no manufacturer, or you say no
9 defendant manufacturer. I suspect you would say that no
10 manufacturer would raise prices sufficiently to reduce the youth
11 smokers to zero.

12 THE WITNESS: To zero above the target.

13 THE COURT: Right, to zero regarding -- relative to the
14 target. And is that because, in your view, the rise in prices
15 would overlap into the adult market and therefore cause the
16 defendant manufacturers to lose a "precious" share, precious in
17 quotes, share of the adult market.

18 THE WITNESS: Yes, ma'am, you have that concept exactly
19 right. If they raise prices for youth, they must raise them for
20 non-youth. If you raise prices for non-youth and other competing
21 manufacturers don't, there will be a shift away. So, every
22 dollar that you get from youth in extra prices, you're losing
23 some of or even maybe more than \$1 from the adults, from the non-
24 youth.

25 THE COURT: But if you're correct in that assumption, why

1 is that a criticism of Dr. Gruber's analysis? Wouldn't he
2 respond by saying, so be it? My only purpose is to reach the
3 target for youth smokers, and if the defendants choose to reach
4 that target by either raising their prices high enough or by not
5 raising their prices high enough and therefore suffering the
6 penalty, that's their free choice?

7 THE WITNESS: You are certainly correct in that, but
8 Dr. Gruber said, and I would need help in finding the testimony
9 where he said it, that the defendants can solve this problem by
10 raising prices 42 percent, because of his analysis of the
11 elasticity of demand of youth smokers and some other factors.

12 He actually said that they could do it that way, and I
13 want to argue that they couldn't do it that way. So that maybe
14 they could do as you say, some other way, but they can't do it
15 that way and he said they could do it that way.

16 THE COURT: And, of course, he sets forth as one of the
17 great advantages of his proposal, if you will, that the
18 defendants can make their own choice about how they reach the
19 target rate.

20 THE WITNESS: Yes, but he forgets that he doesn't give
21 them the choice to comply about failing to tell -- by failing to
22 talk. The choice he does not give the defendants is the choice
23 to stop talking. If the RICO violation is misrepresentation --

24 THE COURT: I don't understand that, what do you mean by
25 "stop talking"?

1 THE WITNESS: The RICO violation, as I understand it, is
2 misrepresentations about things in cigarettes. One way to deal
3 with that is to quit making representations at all. That's what
4 I meant by stop talking. So I can't be guilty of a
5 misrepresentation if I don't say anything. So he denies the
6 defendants that option, so it's less flexible, in my opinion.

7 THE COURT: Any counsel need to do follow up? Or is
8 everybody glazed over?

9 MR. GETTE: Nothing from the United States, Your Honor.

10 THE COURT: Mr. Bernick never loses an opportunity.

11 MR. BERNICK: We'll see.

12 MR. BIERSTEKER: No, nothing, Your Honor.

13 THE COURT: Okay. Thank you. You may step down at this
14 time.

15 Do we have any estimates for tomorrow, everyone?

16 MS. EUBANKS: Your Honor, I'm not certain for Dr. Wittes,
17 how much time Mr. Brody has. I think when he spoke with him
18 yesterday about it, that he thought he had probably three hours.

19 THE COURT: Who's going to be doing the cross?

20 MS. EUBANKS: Steve Brody.

21 THE COURT: All right. Three hours, approximately.

22 MS. EUBANKS: And, again, that was yesterday. I'm not
23 sure if he's revised that.

24 THE COURT: Right. I understand that. What do counsel --
25 do you plan to do an opening direct?

1 MR. NEWBOLD: There will be a short opening direct, Your
2 Honor.

3 THE COURT: I'm sorry?

4 MR. NEWBOLD: There will be a short opening direct by
5 Mr. Minton.

6 THE COURT: What do you think? About a half hour, or
7 you're not sure?

8 MR. NEWBOLD: I'm not sure, Your Honor.

9 THE COURT: I will tell everybody in advance, for whatever
10 it's worth, that I certainly found that testimony very difficult,
11 maybe it was too late at night or something, but just keep that
12 in mind, everybody, and we'll see how that testimony goes
13 tomorrow.

14 MS. EUBANKS: Your Honor, I do want to address a
15 scheduling issue and also to bring you up to date on questions
16 that have been raised, with respect to the United States'
17 potential rebuttal case.

18 And this factors in because of the schedule for closing
19 right now, which is set for next week. Basically, depending upon
20 whether -- we're considering renewing certain motions that were
21 made -- or arguments that were addressed in the Court's ruling
22 this morning or this afternoon, whenever it was, with respect to
23 Professor Weil and Professor Carlton who will testify later this
24 week.

25 Depending on what comes out during cross-examination,

1 given these rulings, it may give rise to a motion to strike
2 certain portions of that testimony, and we would present those
3 arguments to the Court. However, if that motion to strike is not
4 granted, we are certainly considering at this point a possible
5 rebuttal case with respect to one narrow issue that was addressed
6 in those motions. And it does deal with the impact of the MSA on
7 defendants' business and testimony that did come in and was
8 crossed on today. And as we argued also in our papers, there is
9 some duplication with respect to the testimony, that we
10 anticipate will come in through the witness Carlton later in the
11 week as well.

12 So we don't think that the issue is going to go away.
13 Quite apart from that, though, in looking at the schedule for the
14 closing arguments, frankly and honestly, we need more time to
15 prepare to do a focused presentation. And to be able to put
16 before the Court a summary of arguments for a nine-month trial is
17 something that, while the same people you see in court examining
18 the witnesses, Ms. Brooker will be examining Professor Carlton,
19 tomorrow, Mr. Brody will be examining Dr. Wittes, these are the
20 same people who are going to be presenting the closing arguments,
21 and we have responsibilities here in court.

22 We don't have staff to go and write it up for us and then
23 we just waltz in and do a presentation. We have to be here and
24 we need to obviously spend time in preparing the closing. So,
25 frankly, we need more time in order to put together coherent

1 closing arguments, something that we think would be helpful to
2 the Court, especially in light of the submissions that the
3 parties made that advise the Court, whichever side you look at,
4 it's going to be some period of time before you get before you
5 the proposed findings.

6 And given what the Court has said about wanting to start
7 thinking about this case, we would like to be able to give the
8 Court something more useful than just what we would have to
9 quickly put together and present in such a short fashion to do it
10 next week, while at the same time we're examining these
11 witnesses, considering the potential for a rebuttal case,
12 fashioning arguments to strike testimony, and so forth, and then
13 just rolling into the next thing, being closing arguments,
14 because we are focusing on whether we even will need a rebuttal
15 case.

16 And I don't want to tell the Court that even if the
17 motions aren't granted and so forth that we need one. I want to
18 carefully consider the evidence that's come in and make an
19 informed judgment about what we do need and why we need it and if
20 there are other alternatives with respect to protecting the
21 record that we could engage in to get us to the end of the trial
22 without a rebuttal case. I'm aware of how narrow the rebuttal
23 case would be and quite frankly, until today -- last week, when
24 we finished last week, it was not our intention that we needed a
25 rebuttal case, based upon the evidence thus far in, but at this

1 point, we just don't know.

2 So what we would propose in terms of a closing, is what we
3 had originally proposed, and that is the week of the 20th. We
4 could certainly be ready then. I know that the Court is off on
5 the week of the 13th, and I know that Mr. Biersteker has a
6 vacation, and so does Ms. Brooker that same time, but that's as
7 soon as I think we could reasonably be ready to do it.

8 THE COURT: Mr. Biersteker was probably not going to do
9 part of the closing or were you, Mr. Biersteker?

10 MR. BERNICK: He is.

11 MR. BIERSTEKER: Yes, Your Honor.

12 MR. BERNICK: I don't know if it's worth taking up time
13 this afternoon. I have a lot of things I would say in response,
14 but I know that other counsel will want to have input into how we
15 respond to this, because, frankly, it comes very, very late in
16 the day.

17 We're pretty much set to give our closings next week.
18 I've been here every day myself, doing work on my closings and
19 doing work on other things related to this case. This is a
20 crunch, but I think Your Honor has to bear in mind what I think
21 are the drivers of the scheduling discussion we had on this very
22 issue a little while ago. Your Honor is, I think, anxious to
23 proceed with this matter.

24 I think that the closing arguments really should take
25 place as soon as possible in light of that. No one is going to

1 have the ultimate masterpiece. I don't know how critical it is,
2 given nine months of trial, but in any event, to hear that the
3 government is not prepared to go forward and give a closing
4 argument in this case at this point in time, this is the very
5 issue that we took up a week ago. And I know on my side that a
6 lot of people have set their schedules in reliance upon the fact
7 that we were going to have closings next week. Now, the only
8 thing that we've heard so far, apart from the need to have more
9 time to prepare for the closing, is this continued suggestion
10 that there's going to be a rebuttal case. If the government
11 wants to put on that case, I think they have two hurdles to clear
12 at this point. Number one is the standard for any kind of
13 rebuttal case and, number two is how in the world they're raising
14 this at this point in time, given the fact that all the testimony
15 that's taking place this week was submitted in writing last
16 Monday. And they even, in fact, had the opportunity to file
17 their various objections. And up until today, there was no
18 suggestion that we could not proceed next week with closing,
19 since the matter was originally discussed with the Court -- I
20 believe it was in the early part of last week.

21 So, I think this really comes down to, there isn't really
22 going to be a rebuttal case, and what we're really talking about
23 is more time for whatever purpose the Court believes -- or the
24 government believes is appropriate to get ready for closing and I
25 just don't think -- we're going to be of the view that at this

1 point in time it's too late to change this, we have been working
2 very hard to meet the schedule for next week and there is no
3 reason given, the prior summations that have taken place, why the
4 government can't put together their submission for next week. We
5 talked about this four or five times.

6 THE COURT: I tend to agree with that. I'm just going to
7 say one thing at this point. I don't even try to suggest to
8 counsel how I'm going to rule in advance, but on one issue, I
9 will without binding myself. But I will suggest to the
10 government, because I certainly know how pressed the government
11 is in terms of resources. I spend a lot of time on the
12 objections and go over them very carefully.

13 This is a bench trial, not a jury trial. The objections
14 would be even more time-consuming and difficult if it were a jury
15 trial, but it's not.

16 And I keep in mind many things long term, as well as short
17 term in my rulings. And I think it's very doubtful that I would
18 change my rulings and strike testimony when I have given full
19 consideration to that issue the first time around and decided
20 that it is admissible testimony.

21 As I have emphasized in prior lengthy oral rulings, there
22 is a big difference between admissibility and believability or --
23 we're not talking credibility for the moment, about anybody lying
24 now, but between admissibility and the weight to be given to
25 testimony.

1 I'm not going to say anything more than that.

2 MS. EUBANKS: That's certainly helpful, Your Honor, and
3 that certainly provides some guidance as we think about the
4 propriety of a rebuttal case and what our oppositions are.

5 THE COURT: Well, I'm thinking about the motions you
6 mentioned to me.

7 MS. EUBANKS: Well, that's what I'm saying is helpful to
8 us. If there's -- the rulings obviously, particularly with
9 respect to Carlton, were made before hearing Carlton's testimony.
10 Depending upon cross-examination and what's brought out there, my
11 thought was, it's possible that a foundation could be made for --
12 that would give rise to a motion to strike.

13 Similarly, I want to go back and review this record,
14 keeping in mind the Court's comments and see if there is a
15 similar situation with respect to Dr. -- with respect to
16 Professor Weil, whether that is something that we would do, but
17 your comments are very helpful in that regard and also in
18 planning.

19 But as I said, we have to review our options and make
20 determinations. And while we're confident that the Court can
21 certainly make findings from the bench and make determinations
22 about the credibility of the witnesses, as we frequently say, we
23 do want to make sure that we have things in the record for appeal
24 purposes. And so we do need to take a close look at whether it's
25 proper to put on at least one rebuttal witness on the topic that

1 I mentioned and that's a decision that, obviously, will have to
2 be made this week.

3 THE COURT: Is Mr. Brody doing both Dr. Wittes and
4 Dr. Carlton or just Dr. Wittes?

5 MS. EUBANKS: No, just Dr. Wittes. Dr. Carlton is being
6 done by Ms. Brooker.

7 THE COURT: That's right. And certainly Mr. Brody
8 indicated, I think on Thursday or Friday, Friday last week, that
9 it was close whether Dr. Carlton would be finished on Thursday.
10 I don't know if that's still the case.

11 MS. EUBANKS: I think that's still the case, especially
12 given the fact that nothing was ruled out in the objections and
13 there's a lot to cover in cross.

14 THE COURT: Well, as far as I am concerned, as of this
15 moment, our schedule stands. I am strongly, strongly motivated
16 to maintain that schedule. I don't know if the word is
17 motivated, but intending to maintain that schedule.

18 But I'll have to hear from the government in terms of
19 rebuttal witnesses. We have some time on Monday to get in a
20 rebuttal witness. Of course, that raises some questions that we
21 haven't even addressed in terms of who it might be, the provision
22 of direct testimony, any deposition that might be necessary,
23 et cetera.

24 I just don't -- I've stated what my view is, that I'm
25 going to make every, every effort to have closing argument next

1 week. At the same time, the government has certain procedural
2 rights, which I'm well aware of, so I'll have to hear from you on
3 Thursday about that.

4 MS. EUBANKS: Thank you, Your Honor.

5 THE COURT: I know you'll convey that to counsel on your
6 side.

7 Mr. Biersteker, I'm not sure where that leaves you and
8 your family.

9 MR. BIERSTEKER: I'm not sure either, Your Honor.

10 THE COURT: Well, you can tell them for me, it's almost
11 over, and we'll all go back to some degree of normalcy, but
12 that's where we are right now.

13 MR. BIERSTEKER: I appreciate it.

14 THE COURT: Okay, everybody, thank you.

15 (Proceedings adjourned at 3:36 p.m.)

16

17 C E R T I F I C A T E

18

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

22

23 -----

24 Scott L. Wallace, RDR, CRR
25 Official Court Reporter

25

Scott L. Wallace, RDR, CRR
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