

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GK)
	:	March 16, 2005
Plaintiff,	:	
	:	9:32 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
. . . . .	:	

VOLUME 77  
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

STEPHEN P. BRODY, DEPUTY DIRECTOR  
U.S. DEPARTMENT OF JUSTICE  
Civil Division  
1331 Pennsylvania Avenue, NW  
Suite 1150  
Washington, DC 20004  
(202) 616-1438

GREGG M. SCHWIND, ESQ.  
U.S. DEPARTMENT OF JUSTICE  
Civil Division  
1331 Pennsylvania Avenue, NW  
Suite 1150  
Washington, DC 20004  
(202) 353-2345

1 APPEARANCES: (Cont'd.)

2 For the Plaintiff:

LINDA McMAHON, ESQ.  
U.S. DEPARTMENT OF JUSTICE  
Civil Division  
1331 Pennsylvania Avenue, NW  
Suite 1150  
Washington, DC 20004  
(202) 307-0448

6

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

7

8

9 For the Defendant:  
10 Philip Morris USA, Inc.

DAN K. WEBB, ESQ.  
THOMAS J. FREDERICK, ESQ.  
KEVIN NARKO, ESQ.  
JOHN W. CHRISTOPHER, ESQ.  
WINSTON & STRAWN  
35 West Wacker Drive  
Chicago, IL 60601-9703  
(312) 558-5700

11

12

13

14

15 For the Defendant:  
Lorillard Tobacco Company

J. WILLIAM NEWBOLD, ESQ.  
THOMPSON COBURN LLP  
One US Bank Plaza  
Suite 3500  
St. Louis, MO 63101-1693  
(314) 552-6000

16

17

18

19 For the Defendant:  
20 Brown & Williamson  
Tobacco Company

DAVID M. BERNICK, ESQ.  
KIRKLAND & ELLIS  
200 East Randolph Drive  
Chicago, IL 60601  
(312) 861-2248

21

22

23

24

25

KENNETH N. BASS, ESQ.  
KIRKLAND & ELLIS  
655 15th Street, NW,  
Suite 1200  
Washington, DC 20005  
(202) 879-5000

1 APPEARANCES: (Cont'd.)

2 For the Defendant: ROBERT F. McDERMOTT, JR., ESQ.  
3 R.J. Reynolds Tobacco Company PETER J. BIERSTEKER, ESQ.  
4 JONATHAN M. REDGRAVE, ESQ.  
5 GEOFFREY K. BEACH, ESQ.  
6 JONES DAY  
7 51 Louisiana Avenue, NW  
8 Washington, DC 20001  
9 (202) 879-3939

10 DAVID B. ALDEN, Esq.  
11 JONES, DAY, REAVIS & POGUE  
12 North Point  
13 901 Lakeside Avenue  
14 Cleveland, OH 44114  
15 (216) 586-7121

16 For the Defendant: NANCY ELIZABETH STRAUB, ESQ.  
17 Liggett Group, Inc. KASOWITZ, BENSON, TORRES & FRIEDMAN  
18 1633 Broadway  
19 New York, NY 10019  
20 (212) 506-1700

21 For the Defendant: PHILLIP DUBE, ESQ.  
22 Tobacco Institute JAMES A. GOOLD, ESQ.  
23 JOSEPH A. KRESSE, ESQ.  
24 COVINGTON & BURLING  
25 1201 Pennsylvania Avenue, NW  
Washington, DC 20009  
(202) 662-6000

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

For the Defendant: PHILIP PFEFFER, ESQ.  
British American CHADBOURNE & PARKE, LLP  
Tobacco (Investments), Ltd. 30 Rockefeller Plaza  
34th Floor  
New York, NY 10112

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25

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

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P R O C E E D I N G S

THE COURT: Good morning.

This is United States of America versus Philip Morris.  
CA 99-2496. And we are still on cross-examination.

And, Dr. Wecker, you are still under oath.

Mr. Gette.

MR. GETTE: Thank you, Your Honor.

WILLIAM E. WECKER, Ph.D., Defendant's witness, RESUMES

CROSS-EXAMINATION (Cont'd.)

BY MR. GETTE:

Q. Good morning, Dr. Wecker.

A. Good morning.

Q. I have one area remaining that I'd like to cover today and  
that relates to some of the work you did related to chapter 3 of  
Monograph 13. And that chapter, chapter 3, was authored by  
Dr. Benowitz; correct?

1 A. Yes.

2 Q. And related to compensation; correct?

3 A. Yes.

4 Q. And you would admit that Dr. Benowitz is a seminal  
5 researcher on the issue of compensation; correct?

6 A. Yes.

7 Q. I'm sorry?

8 A. Yes.

9 Q. And, in fact, you've indicated previously that in the area  
10 of knowledge regarding compensation, you're not aware of why  
11 smokers compensate; correct?

12 A. That's correct, not at the behavioral level.

13 Q. From a behavioral standpoint you don't know whether people  
14 compensate for tar or for nicotine, for example?

15 A. Well, I have an understanding from reading that it's for  
16 nicotine.

17 Q. But you don't have a level of expertise to opine on the  
18 subject; correct?

19 A. Not beyond what I've read.

20 Q. Now, in your testimony you indicate -- or you provide to the  
21 court a measure of compensation of 47 percent; correct?

22 A. That's a median figure of several studies.

23 Q. A median figure of some studies that have otherwise looked  
24 at compensation; correct?

25 A. That have looked at compensation, yes.

1 Q. And if you were to be given the assignment to go out and  
2 using what data was available to create your best estimate of  
3 the amount of compensation that occurs, the process that you  
4 used in this case wouldn't be the process you would use to go  
5 about that, would it?

6 A. It's one reasonable process to look at the work of others  
7 and report what is in the literature.

8 Q. Well, you would agree that 47 percent is not the best  
9 estimate of the amount of compensation experienced by smokers in  
10 the United States who switch from high tar products to a lower  
11 tar product; right?

12 A. I wouldn't use that term because that's a term of art in  
13 statistics and therefore should be reserved for a particular  
14 situation.

15 In terms of sort of lay usage of the sentence, I don't  
16 think it's such bad language, and it certainly represents the  
17 median value of the literature.

18 Q. The median value of the literature that you include in your  
19 analysis; correct?

20 A. Included because it was in Monograph 13, yes.

21 Q. Now, you didn't go beyond Monograph 13 to look at the  
22 literature and see if there were any other studies or articles  
23 that you might want to include in this analysis; correct?

24 A. That's correct. I just looked at the ones that were listed  
25 in Monograph 13.

1 Q. So you exclusively looked at the articles and studies that  
2 Dr. Benowitz had collected and reported in Monograph 13.

3 A. Correct.

4 Q. Now, I'd like to go through the mechanics a bit of how you  
5 arrived at the 47 percent figure.

6 First, let me ask you while you were limiting yourself  
7 to the literature that Dr. Benowitz had collected and put in  
8 Monograph 13, within that universe of studies and articles you  
9 intended your consideration to be comprehensive; correct?

10 A. No. As I explained in the direct testimony, it was limited  
11 to 0.6 milligrams nicotine up to 1.3, the range I studied  
12 because that's what I was asked to do in the context of a lights  
13 case.

14 Q. Let's look at some -- you said in your deposition -- if you  
15 pull up from December 17, 2004, deposition, page 173, and if we  
16 look at starting at lines 7 to 18.

17 I asked you the question, "Is it the median of all the  
18 literature that was included in Table 3-1 on page 51 of the  
19 Monograph?"

20 And you said, "Answer: I forgot the details of that,  
21 but I intended it to be comprehensive. But as I recall in some  
22 cases that everything you'd like to have wasn't there, but I  
23 tried to be quite thorough and not be cherry picking in the way  
24 I did that."

25 So at the time of your deposition, while you couldn't

1 remember details, it was your intent to be comprehensive;  
2 correct?

3 A. Comprehensive in that I intended not to be picking and  
4 choosing, and comprehensive within the design of the study which  
5 was limited to the range of light to regular cigarettes.

6 Q. Now, you said you didn't want to be picking and choosing,  
7 but you also just said that you did pick only the studies that  
8 would compare certain tar bands; correct?

9 A. Yes, that was my intent, and that was what I was asked to  
10 do, because that was done for a case where those ranges were the  
11 ranges of issues: the light and the regular cigarettes.

12 Q. But not this case?

13 A. This was work that was done before I even knew about this  
14 case.

15 Q. So the tar bands you selected were for another case, not for  
16 this case?

17 A. That's right. And I think -- I didn't even select them. It  
18 was impressed upon me because that was the range of light and  
19 regular cigarettes.

20 Q. And those were pressed upon you by counsel?

21 A. Counsel, I don't think pressed them on me, but it was  
22 through counsel I got information that the case was about light  
23 and regular cigarettes in that range.

24 Q. I didn't mean to suggest press, other than to say that the  
25 information came from counsel that indicated to you what tar

1 bands you should use.

2 A. It indicated what tar bands were involved in the cigarettes  
3 of issue, and then it was obvious what to use.

4 Q. So the selection of the tar bands wasn't based on any  
5 expertise you brought to the case, it was simply tar bands that  
6 were provided by counsel?

7 A. It was tar bands that were the subject of the case, right.

8 Q. Now, that was in the Turner case?

9 A. I think it might have been Miles, but I could be wrong. It  
10 could have been Turner, but I thought it was Miles.

11 Q. And, as I recall, the Miles case was limited to Philip  
12 Morris as a defendant; correct?

13 A. No. I think -- well, whichever one was the Reynolds' case.  
14 I'm not sure of the names.

15 Q. So the case that you had them in, the only defendant  
16 involved in that case was Reynolds; correct?

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

18 Q. And not the rest of the defendants in this case; correct?

19 A. Yes.

20 Q. I'd like to move to the demonstrative that you prepared for  
21 the court to lay out your analysis here and that's J-DEM 060514.

22 This is the demonstrative that you prepared to provide  
23 the information to the court as to how you arrived at your  
24 47 percent figure; correct?

25 A. Yes.

1 Q. And if we look at the bottom of that in the source area, we  
2 see that the source was something called tab 20; correct?

3 A. Yes.

4 Q. And tab 20. "Tab" is a word that you use to suggest an  
5 electronic file where you can find the materials that back up  
6 your analyses; correct?

7 A. That, and also a physical tab in a notebook, because I made  
8 paper copies of electronic copies and wanted to use a word that  
9 would correspond with both.

10 Q. So, you will have a tab 20 in your book, and then in the  
11 electronic files you also have a file that will be called tab  
12 20; correct?

13 A. A directory that will be called tab 20.

14 Q. A directory. And if we go to that directory in your  
15 electronic materials we should then find the information that  
16 was used to generate the demonstrative that you prepared for the  
17 court; correct?

18 A. Yes. You should find there a spreadsheet with the name  
19 given at the bottom of the page, this Exhibit 514, and with an  
20 extension dot XLS. That's what you should find there.

21 Q. Let's pull up the tab 20 XLS file. That's U.S. 93178.

22 Now, Dr. Wecker, is this the -- this is, in fact, the  
23 document from tab 20, correct, that backs up and provides the  
24 information that leads to J-DEM 060514; correct?

25 A. Let me look just for a moment. I have a couple that look

1 very similar and I just want to make sure this is it.

2 (Pause)

3 I believe this is it. I haven't looked at every page,  
4 but I think this is the right one.

5 Q. Okay. I'll represent to you that this came from, and was  
6 the only XLS file in your tab 20 in the Turner materials.

7 A. Right. I'm in agreement with you. I think you have the  
8 right one. It was just that the file name is not printed on the  
9 document that you handed me and that's where I would have  
10 checked.

11 Q. Okay.

12 A. So I just tried to look at some numbers and they look right.

13 Q. Well, let's look at a few things about this.

14 If we can try and blow up the first author in the  
15 section under the first yellow line. Actually, if you can get  
16 the first yellow line in there as well, Charles.

17 Now -- so in the yellow line here we have Russell, et  
18 al., 1980. This is one of the articles that you included in  
19 your analysis; correct?

20 A. Yes.

21 Q. And then if we -- you provide some information on different  
22 types of cigarettes: plain, unventilated, ventilated, filters,  
23 correct? Along the top.

24 A. Yes.

25 MR. GETTE: And actually stay over at the left,

1 Charles. Perfect.

2 Q. And then -- and in that information it's nicotine yield,  
3 blood nicotine, tar yield. That's the kind of information that  
4 you were collecting; correct?

5 A. Yes.

6 Q. And those numbers are all collected from the studies that in  
7 this case, the Russell study; correct?

8 A. Yes.

9 Q. They are not numbers that you generated in any way; correct?

10 A. That's right.

11 Q. Now, if we go the next step down we then start looking at  
12 compensation, and you compare compensation in certain types of  
13 cigarettes. So the first line we have plain versus unventilated  
14 filter; correct?

15 A. Yes.

16 Q. And you calculate there an 82 percent compensation figure;  
17 correct?

18 A. Yes.

19 Q. That's the .82 as we come across to the right-hand side;  
20 correct?

21 A. Right.

22 Q. Okay. And then down the left-hand side next to only one of  
23 those three entries, the entry which is unventilated versus  
24 ventilated filter, you have the word "include"; correct?

25 A. Right.

1 Q. And that word "include" indicates that if we come across, we  
2 see 72 percent compensation, that that 72 percent is one of the  
3 numbers that you want to come over and be a part of J-DEM  
4 060514; correct?

5 A. Right, because it's part of the right range.

6 Q. So, in fact -- if we could flip back to the Elmo. And we  
7 were looking at the Russell 1980 article.

8 And if we look right at the top we see, here is Russell  
9 1980. And if we look on the second line and come across,  
10 there's the 72 percent. Correct?

11 A. Right.

12 Q. Okay. So let's look at a few more of these.

13 I'd like to go to -- Charles -- back to U.S. 93178, and  
14 I'd like to go to page 5, and if you will just give me the  
15 yellow line there so we can see whose study this is.

16 You see, Dr. Wecker, that on this page you have the  
17 Byrd 1995 study; correct?

18 A. Yes.

19 Q. And then if you look down -- if you can get rid of that pane  
20 now -- if you look down the left-hand side and come all the way  
21 down the left-hand side you will see there's four places where  
22 the word "include" is entered; correct?

23 A. Yes.

24 Q. And that would suggest that there ought to be four entries  
25 from this Byrd 1995 study that made it over to your J-DEM

1 060514; correct?

2 A. Yes.

3 Q. All right. Well, let's go back to J-DEM 060514 on the Elmo,  
4 Charles.

5 And if we look for Byrd 1995, we only find two entries;  
6 correct.

7 A. That's Byrd '95, right. I see two.

8 Q. But in your tab 20, we had four; correct?

9 A. Yes.

10 Q. So is J-DEM 060514 incorrect or is tab 20 incorrect?

11 A. I don't know without a moment's study the explanation for  
12 that. If I could take 10 seconds, maybe I can come up with it.  
13 Otherwise, I'll be not having a good answer.

14 Q. All right. Well, let's look at another one, maybe you can  
15 provide an answer to us on.

16 If we could go back and look at page --

17 THE COURT: Isn't it worth waiting the 10 seconds?

18 MR. GETTE: Oh, absolutely, Your Honor.

19 A. Let me just take a look.

20 So you can follow along with me, I'm looking at the  
21 first one from Byrd. It says .19 is the compensation. Looking  
22 for a .19, I don't see it on the list in the J-DEM 514, so I  
23 don't right now know why it was not included. If that one were  
24 included, it would lower the median.

25 Q. Okay. And the next one, the .11, that's also not included

1 on your J-DEM 060514; correct?

2 A. That's correct.

3 Q. Okay.

4 A. And I haven't finished looking at .11. I said it's correct,  
5 but I didn't really look, and I don't see it. If that were  
6 included it would lower the median.

7 Q. So that's not there as well.

8 Now, I want to come back to the answer that we were  
9 taking 10 seconds to answer, which was which of these is  
10 incorrect: the demonstrative that you prepared for the court or  
11 the tab 20 which was the source of the information that you used  
12 to create the demonstrative?

13 A. I agree with you on its face that it appears that those two  
14 lower compensation figures ought to have been included in this  
15 chart because they appear to be in this range that I was looking  
16 at, but I hesitate to call this an error. There's probably an  
17 explanation. It's just that I'm not able to give it to you.

18 Q. Okay. So as you sit here now, though, you don't have an  
19 explanation to provide?

20 A. No. I can tell you if they were included it would lower the  
21 compensation, and I -- I can suggest a possibility, but I don't  
22 know it, so I think I won't -- I won't bother. I'll wait, if  
23 time allows, to give you a correct answer.

24 Q. Did you prepare J-DEM 060514?

25 A. I didn't do the graphics work, but I was involved in the

1 work that led to the calculation of the 47 percent.

2 Q. Okay.

3 A. And I checked this 514 chart by hand and I saw that it was,  
4 in fact, showing a median of 47 percent. And I checked it as  
5 agreed with the number on page 7 of the exhibit that you've  
6 handed me and that agrees with 47 percent. So I had a hand in  
7 this, but I didn't do the typing.

8 Q. You didn't do the typing, but you did provide the content  
9 for that demonstrative that was provided to the court; correct?

10 A. I think that's fair, but I have other people helping me do  
11 this work.

12 Q. So you or somebody on your staff was responsible; correct?

13 A. I was responsible, and I was involved the whole time. I  
14 just didn't want to suggest I was the only one involved.

15 Q. Okay. I'd like to look at a few other areas of this. And  
16 I'd like to take a look at page 1, if we could, Charles.

17 A. I think I found the explanation.

18 May I? With your permission, I think I'm sure enough  
19 of this to mention it.

20 I see that Byrd numbers are coming from a regression  
21 equation, and even though it's possible to use a regression  
22 equation to look at differences within the right range, within  
23 the range I'm looking at, that regression equation itself is  
24 estimated based on data outside the range.

25 There were a few cases like that in my study. They are

1 coming back to mind now.

2 And because the data used to estimate the regression  
3 equation came from outside the range of the lights' case issues,  
4 I did not include that, since it was a special case that seemed  
5 to create only trouble in the context of a case involving 0.6 to  
6 1.3 range cigarettes.

7 Q. These are the ranges we talked about before, the ones that  
8 were provided to you by counsel; correct?

9 A. Provided by counsel I think is not really very fair. They  
10 were the range that was the subject of the litigation.

11 Q. They were the ranges that were the subject of some other  
12 litigation, other than the case we are here for today?

13 A. Right, in which I did this work.

14 Q. And that explanation that you just provided to us was an  
15 explanation with respect to many of the decisions you made in  
16 terms of what was included and not included in your ultimate  
17 estimation of the median; correct?

18 A. I don't understand.

19 Q. Well, it wasn't limited to just the Russell study and those  
20 two observations that we were looking at?

21 A. Right. If a regression was involved in the article and that  
22 regression used data from outside the range I mentioned, then  
23 even though it's possible to use that regression to calculate a  
24 compensation, at least on its face, for -- I'll call it the  
25 range for that particular case, there would be a deception there

1 that could be pointed out to me, because the data really is  
2 based on data outside the range, and there's a kind of  
3 duplicitous nature to all of that and I thought it best not to  
4 put those forward in the same group as the ones that were  
5 specific measurements within the range.

6 Q. Fair enough. But at the end of the day, besides the two  
7 numbers that we just looked at, you put the word "include";  
8 right?

9 A. Right.

10 Q. And, in fact, you didn't intend to include them; correct?

11 A. Well, at some point I decided it wasn't a good idea. Maybe  
12 at the time of this document.

13 Q. Was that decision before or after you were deposed in this  
14 case?

15 A. Well before.

16 Q. Let's look what you said about this at your deposition then.  
17 And if we could pull up the same deposition we had before,  
18 December 17th, Charles, at page 170 to 171.

19 Do you still have that deposition, Dr. Wecker?

20 And, Charles, if we take starting at just line 25 at  
21 page 170, and take the first 17 lines of the next. And have you  
22 found the location there, Dr. Wecker? Page 170 starting at line  
23 25.

24 A. Yes.

25 Q. And so I said to you, "And down in the left-hand side of

1 each of the pages of Exhibit 40 -- I shouldn't say each of the  
2 pages -- down the left-hand side of many of the pages next to  
3 some of calculations of the word 'include.'

4 "Answer: Yes.

5 "What did you mean to indicate by including the word  
6 include in those instances?

7 "I don't remember."

8 So it's fair to say at the time of your deposition you  
9 really didn't know what include meant completely; correct?

10 A. That's correct. And I apologize for that. Not knowing I  
11 was going to be asked about that area, I didn't prepare.

12 Q. And I went on note to suggest that, "Question: Do you know  
13 whether you intended to indicate that those were the  
14 calculations that would be considered in arriving at your median  
15 compensation amount of 47 percent?"

16 And you answered, "That seems like a good guess, but I  
17 don't recall why I picked some of those and not others."

18 So, at the time of your deposition you said that the  
19 word include was probably a good guess as to the fact that it  
20 was going to move forward into the 47 percent median  
21 calculation; correct?

22 A. Yes.

23 Q. And after the deposition did you ever notify me or anyone  
24 else that that testimony may not be accurate? That the word  
25 "include" didn't mean that the estimation should move forward

1 into your calculation of the median?

2 MR. BIERSTEKER: I'm going to object. And if you can  
3 ask that question, then I do think in fairness to the witness  
4 you have to read the rest of the answer.

5 MR. GETTE: I have no problem reading the answer, Your  
6 Honor.

7 THE COURT: All right.

8 MR. GETTE: But the question remains the same.

9 THE COURT: It does, but go ahead for completeness.

10 BY MR. GETTE:

11 Q. You went on to say, "I'm confident I had a reasoned basis at  
12 the time I did this work, but it's a long time ago and I've  
13 forgotten now what it was."

14 And my question to you was with respect to the first  
15 part of that answer, that that seems like a good guess, did you  
16 ever let me know or anyone else after that deposition that in  
17 fact it was an inaccurate guess and that the word "include" next  
18 to an entry did not mean that that estimation would be used in  
19 establishing your median compensation amount?

20 A. I did not either contact you or send a message that would  
21 get to you because I thought it was clear enough here that I was  
22 telling you I didn't remember. And so I didn't think you would  
23 take my answers here as definitive, since I was very cautious  
24 that I hadn't looked at that work for a couple of years and I  
25 didn't remember.

1 Q. But, in fact, Dr. Wecker, didn't at the time of the  
2 deposition you tell me that because of your uncertainty about  
3 some of these issues, that in fact if there were any errors in  
4 the transcript, that you would let me know about that?

5 A. Yes, and I did look through the transcript, and wherever I  
6 told you -- if I had found anything where I had definitely told  
7 you that I thought a certain thing was so, I intended to correct  
8 that, but I found no such thing. I found every time I was  
9 definite I was right. When I told you I didn't remember, I was  
10 right, I didn't remember. But I didn't think I was supposed to  
11 submit a narrative that would elaborate the answers.

12 Q. Let's look at a few other instances of some work from your  
13 tab 20.

14 I'd like to go, Charles, to the first page of that.

15 A. I'm sorry. What document?

16 Q. I'm sorry. That's U.S. Exhibit 93178, your tab 20.

17 A. Okay.

18 Q. And if we blow up the last author's entry right there. You  
19 see that's an article in -- actually, it's coming out so poorly  
20 up there, Charles, let me put it on the Elmo.

21 A. I can't tell what page --

22 Q. Page 1. And you will see that this is the analysis of an  
23 article by Dr. Benowitz who was also the author of chapter 3 of  
24 Monograph 13; correct?

25 A. Yes.

1 Q. And a study in 1986.

2 And again, if you go down the left-hand side we find  
3 the word "include"; correct?

4 A. Yes.

5 Q. And if we go over from there, what compensation amount do we  
6 find?

7 A. .82.

8 Q. Which would be 82 percent; correct?

9 A. Yes.

10 Q. Now, if we go back to your demonstrative that you provided  
11 in this case and we find Dr. Benowitz 1986, and we go across, we  
12 don't find 82 percent, do we?

13 A. If I'm looking in the same place, I see 85.

14 Q. Right. Let's look at one more item.

15 Charles, if you could turn to -- actually, I'll just do  
16 it again on the Elmo.

17 If we look at page 6 and we look at the first author  
18 there, we find an entry by Jarvis in 2001; correct?

19 A. Yes.

20 Q. And if we looked down the left-hand side under Jarvis in  
21 2001 you don't see the word "include" anywhere, do we?

22 A. Right.

23 Q. And if we go back now to the demonstrative that you prepared  
24 for the court and you look across the very last line, all of a  
25 sudden there's Jarvis 2001; correct?

1 A. Yes, I understand that one.

2 Q. My question is: Was it in your tab 20 that you provided to  
3 us and that we used at your deposition?

4 A. It was not in tab 20.

5 Q. Okay. But it does appear now in the demonstrative that you  
6 provided to the court? That's the question.

7 A. Okay, I won't explain it. I'll just say I agree with you  
8 it's there.

9 Q. Now, I'd like to look at some of the articles that  
10 Dr. Benowitz spent time talking about in Monograph 13.

11 And, Charles, if you will pull up U.S. 58700. One  
12 moment, and I'll give you a page number.

13 Do we have that exhibit -- do you have that exhibit,  
14 Dr. Wecker?

15 A. I have Monograph 13.

16 Q. And if we turn to page 50 -- page 49 first, Charles.

17 You see that at the bottom of that page Dr. Benowitz  
18 starts talking about studies of smokers smoking self-selected  
19 brands and he talks about cross-sectional population studies.

20 These are the very types of studies that you used in  
21 your calculation that led to the 47 percent figure; correct?

22 A. Just a moment.

23 (Pause) I think that's right, but now you've got me  
24 thinking I better check everything.

25 (Pause) I think this is the list.

1 Q. If you flip ahead in U.S. 58700 to pages 51 and 52, you see  
2 the list of studies.

3 A. Right. That's what I was looking for, 3-1. Table 3-1 from  
4 there is my list.

5 Q. And those studies in Table 3-1 are cross-sectional  
6 self-selection studies; correct?

7 A. Yes.

8 Q. Okay. So here is a section where Dr. Benowitz is talking  
9 about the cross-sectional self-selection studies.

10 And if we go, Charles, to page 50, which is the  
11 continuation of this section and we look at the second  
12 paragraph.

13 Dr. Benowitz says, "There were three large studies  
14 which involved general populations of smokers, and those warrant  
15 particular discussion." And you will see there's Gori and Lynch  
16 in 1985. Do you see Gori and Lynch?

17 A. Yes.

18 Q. If we come down two or three more lines we see Woodward and  
19 Tunstall Pedoe of 1992; correct?

20 A. Yes.

21 Q. And if we come fairly far down we will see Woodward and  
22 Tunstall Pedoe in 1993; correct?

23 A. Yes.

24 Q. So, Dr. Benowitz, the expert in compensation, said these are  
25 large studies and we ought to give them some particular

1 attention; correct?

2 A. That's fair.

3 Q. Okay. Let's go back to the Elmo and your demonstrative and  
4 your calculation, and let's start with Gori and Lynch 1985.

5 Did you have any observations that you were able to use  
6 in your estimation from the Gori and Lynch study in 1985 that  
7 Dr. Benowitz said deserved particular note?

8 A. Just a moment.

9 (Pause) No. That's using data outside the range of the  
10 case I was working on.

11 Q. Okay. So that study didn't get included because it was  
12 outside the range when you estimated your compensation amount;  
13 correct?

14 A. Didn't get included when I estimated the compensation and  
15 then created chart 541. I did in fact estimate the  
16 compensation. It's on the document we're looking at.

17 Q. But it fell outside the bounds that were established for  
18 that other case, other than the one that we are here about  
19 today; correct?

20 A. That is correct.

21 Q. Now, let's look at the next one: Woodward and Tunstall  
22 Pedoe, 1992. We don't see that one on your J-DEM 060514, do we?

23 A. Correct.

24 Q. So the next one that Dr. Benowitz said deserved particular  
25 attention also didn't fall within these ranges that were set for

1 another case and, therefore, didn't make it into your estimation  
2 of the 47 percent; correct?

3 A. Apparently so. I haven't looked it up yet, but that's the  
4 likely explanation.

5 Q. Let's look at the last one: that's Woodward and Tunstall  
6 Pedoe in 1993. Again we don't see that on your J-DEM 060514;  
7 correct?

8 A. Correct.

9 I haven't taken the time to find it, but I think you  
10 would find it in the tab 20 document.

11 Q. You said if we took the time we would find it in the tab 20  
12 material. But, in fact, for at least one of those studies,  
13 Woodward and Tunstall Pedoe in 1992, that one is not even in  
14 your tab 20, which is U.S. 94178, is it?

15 A. Just a moment.

16 (Pause) Correct, it does not seem to be on Monograph  
17 13, Table 3-1.

18 MR. GETTE: Your Honor, we have concluded our  
19 examination for this witness.

20 THE COURT: Well, you're early, Mr. Gette.

21 MR. GETTE: Your Honor, I would like to offer a motion  
22 that would probably be best done outside the presence of the  
23 witness.

24 THE COURT: Let's have the redirect at this point.  
25 Your motion is still preserved. Certainly the redirect is going

1 to be brief. I would rule on objections at that point. And, of  
2 course, I would take your motions as I think I know what it  
3 relates to.

4 Mr. Biersteker.

5 MR. BIERSTEKER: Yes, Your Honor. Just give me a  
6 moment.

7 (Pause)

8 I'm ready.

9 THE COURT: All right. Go ahead.

10 MR. BIERSTEKER: Thank you, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. BIERSTEKER:

13 Q. Dr. Wecker.

14 A. Yes.

15 Q. Let's start with the topic that Mr. Gette addressed just  
16 before he passed the witness, and that would be the compensation  
17 analyses that you did.

18 First, the selection of the nicotine range of  
19 six-tenths of a milligram FTC nicotine to 1.3 was, as you've  
20 indicated, something that was appropriate for the particular  
21 case in which you originally did the work. But are there  
22 additional reasons why one would want to look at that particular  
23 range?

24 A. Additional reasons I already described in my written direct.

25 Q. I understand, but I wanted to point them out.

1 I can give you a page cite, perhaps. Hang on.

2 MR. GETTE: Your Honor, if it's in the written direct,  
3 it seems it's rather duplicative at this time and already been  
4 asked and answered.

5 MR. BIERSTEKER: I merely wanted to point out that  
6 there were additional reasons, Your Honor. There was cross  
7 suggesting that this was somehow inappropriate.

8 THE COURT: The objection is overruled.

9 MR. BIERSTEKER: Thank you. One moment, please.

10 BY MR. BIERSTEKER:

11 Q. I think you will find it on page 14, Doctor.

12 A. Yes. Perhaps we'll just make reference to this.

13 Q. I can actually put it up on the screen, I think.

14 I was looking in particular at lines 19 through 22, and  
15 if you just want to briefly summarize the reasons why you  
16 continued to look at that particular range in the context of  
17 this case.

18 A. Yes.

19 This work that had been done previously I noticed  
20 represents the bulk of the cigarettes sold in the United States,  
21 and there had been testimony by Dr. Benowitz that the  
22 compensation is likely to be the highest when looking in these  
23 ranges and, therefore, I looked in those ranges.

24 I maintained the work I had already done because it  
25 seemed to be right -- in the right place to be looking for

1 compensation.

2 Q. Now, in addition to the 47 percent median compensation when  
3 you look at that particular range, the range where compensation  
4 is expected to be the highest and that constitutes the bulk of  
5 the cigarettes sold in this country, did you also do a  
6 calculation of the median percent compensation from the studies  
7 in figure -- in Table, excuse me, 3-1 of Monograph 13 without  
8 that limitation?

9 A. That's correct, I did.

10 Q. And what was the median percent compensation when you did  
11 that?

12 A. I can look it up. Just a moment.

13 MR. GETTE: Objection, Your Honor. This is not  
14 evidence that's been offered in direct and it was not crossed on  
15 at all. It's beyond the scope of the cross.

16 And it also is not anything that was the subject of his  
17 deposition or any prior testimony.

18 MR. BIERSTEKER: Your Honor, again, there's a  
19 suggestion here this was inappropriate to focus on that range,  
20 that that somehow affected the results, and I'm just asking him  
21 what's the result if you look at all ranges. He's already  
22 explained why he continued to look at this particular range.

23 THE COURT: No. The objection is sustained.

24 The cross-examination was extremely specific and  
25 focused and did not cover this particular issue. Sustained.

1 MR. BIERSTEKER: All right.

2 BY MR. BIERSTEKER:

3 Q. Dr. Wecker, you were asked about the Jarvis study and you  
4 were shown your tab 20 which, although it contained some  
5 calculations for Jarvis, didn't contain any in the particular  
6 nicotine range that was your focus.

7 And you were going to explain, but did not have the  
8 opportunity to do so, how it came about that the Jarvis study  
9 nonetheless ended up in your table, the demonstrative.

10 A. The Jarvis study indicated the data that was used in the  
11 course of that study, and although the work that the Jarvis and  
12 his authors, his coauthors did, included data outside the range  
13 that I was working on, the data was also available to me.

14 So I was able to just take the Jarvis method and the  
15 Jarvis -- the same data Jarvis used and put in that restriction  
16 of 0.6 to 1.3 milligrams nicotine. And with that restriction in  
17 place, then I was able to use what was essentially the Jarvis'  
18 article result, with that one modification.

19 Q. All right. And that was something that was produced to the  
20 United States in this case; is that correct?

21 A. Yes.

22 Q. Do you recall what the -- never mind. It's in the chart.

23 You spoke in your cross-examination in response to  
24 questions by Mr. Gette about the use of progression lines when  
25 they are estimated on nicotine ranges outside of those that were

1 your focus and your decision not to include those. And I have a  
2 question.

3 Which estimate for the range in which you were focused  
4 is more precise: one that comes from actual data within the  
5 range or an estimate that comes from a regression equation  
6 that's estimated over a broader range?

7 A. The regression that's estimated over a broader range has the  
8 potential that it has no information at all for the specific  
9 range that I was analyzing. So, there might -- each case would  
10 have perhaps have to be looked at.

11 But the concern is that, being based on data outside  
12 that range, you're looking at an extrapolation that might not be  
13 valid. So, I didn't think that was a reliable approach and I  
14 went to the data that was in the range.

15 Q. And, in fact, let me show you an excerpt from Dr. Benowitz's  
16 deposition in the Turner case. At page 70, lines 11 through 17,  
17 and Dr. Benowitz was asked.

18 "Doctor, I understand that you have reservations about  
19 whether or not it is appropriate to fit a regression line to the  
20 entire range of FTC nicotine yields presented here and whether  
21 or not you ought to maybe perhaps do it discretely for different  
22 ranges; is that correct?" And Dr. Benowitz answered, "Yes."

23 How, if at all, does this relate to your decision not  
24 to use regression equations estimated over the entire range in  
25 order to derive compensation estimates for a narrower range of

1 nicotine yields?

2 MR. GETTE: Objection, Your Honor. I object. This is  
3 beyond the scope of the cross-examination.

4 THE COURT: No. The objection is overruled.

5 A. These words have no influence, but it's another person who  
6 is aware of the same problem that I am.

7 I independently saw that potential problem and took  
8 what I thought was the proper statistical conservative course,  
9 but Dr. Benowitz is immediately alert, I think, to the same  
10 issue when he answers your question yes.

11 Q. Let me ask perhaps a different question.

12 Is the testimony that Dr. Benowitz provided consistent  
13 or inconsistent with your decision not to use regression  
14 equations to estimate the percent compensation in the  
15 range .6 milligrams FTC nicotine to 1.3?

16 A. It's consistent and indeed perfectly aligned.

17 Q. Thank you.

18 In fact, if we could have the transcript from the trial  
19 in this case dated November 2, 2004, pages 4737 from  
20 Dr. Benowitz. Actually, we will go to 4738.

21 And, Dr. Benowitz was asked at line 15 through 18 of  
22 that transcript, Dr. Wecker, about -- I'll read the question.

23 "Now, even for higher FTC nicotine yields, the 0.3 to  
24 1.5 milligrams of FTC nicotine, compensation is not 100 percent  
25 complete, is it?" And he answered, "No."

1                   Is Dr. Benowitz, his testimony about that range of FTC  
2 nicotine yields consistent or inconsistent with the estimates  
3 that you have presented to this court?

4           A. Consistent.

5           Q. Dr. Wecker, have you ever been entrusted with responsibility  
6 from your peers to serve as an associate editor on journals in  
7 the field of statistics?

8           A. Yes.

9           Q. Which -- for which journals have you been an associate  
10 editor?

11          A. The Journal of the American Statistical Association and the  
12 Journal of Business and Economics Statistics.

13          Q. Do you know of any more prestigious U.S. journals on  
14 statistics than those two?

15          A. None more prestigious than the first one. I think I'd rank  
16 the annals of statistics ahead of the second one.

17          Q. In, I believe it was 1999 or so, you stopped being an  
18 associate editor of the Journal of Business and Economic  
19 Statistics. Why did you stop?

20          A. I fell ill and was out of commission for about a year.

21          Q. Mr. Gette asked you yesterday whether your work in this case  
22 had been published. Do you remember that?

23          A. Yes.

24          Q. What is your understanding of whether your work concerning  
25 the new previously-unpublished analyses contained in Monograph

1 13 can be published?

2 A. I understand there's a prohibition against it arising from  
3 something I don't know the details of at the University of  
4 California.

5 Q. And let me just show you JD 067984, please, which is the  
6 agreement pursuant to which the University of California where  
7 Dr. Burns works made available to us the underlying computer  
8 materials in monograph -- the newly -- underlying computer  
9 materials for the new analyses in Monograph 13.

10 And if you look at paragraph 12, Doctor, "Defendants  
11 agree that their use of this material shall be limited to  
12 litigation. Defendants agree not" -- and I think the word "to"  
13 is missing -- "use this material for any commercial purpose, and  
14 agree not to publish any article based on any of the material."

15 Doctor, is that consistent with your understanding that  
16 you cannot publish the new analyses -- that you cannot publish  
17 the work that you did in this case concerning the new analyses  
18 in Monograph 13?

19 MR. GETTE: Objection, Your Honor. The document and  
20 the information is hearsay.

21 THE COURT: That objection is overruled.

22 First of all, it's referred to in the direct testimony.  
23 I'm not sure if -- I can't remember if the document itself is  
24 quoted, but I certainly knew about the situation from the direct  
25 testimony and there was no objection lodged at that point.

1                   And second of all, it is not hearsay.

2                   And, finally, the issue was certainly explored in great  
3 depth on cross-examination and. Obviously, the defendants are  
4 entitled to explain that situation through redirect.

5                   So the objection is overruled.

6 BY MR. BIERSTEKER:

7 Q. Yesterday, Dr. Wecker, you started to explain that your work  
8 concerning Monograph 13 and the new analyses contained in it,  
9 although not published, had in fact been reviewed by somebody,  
10 and you weren't able to complete your answer. Who was it who  
11 reviewed that work?

12 A. Professor Thisted, the head of the Epidemiology Department  
13 at the University of Chicago.

14 Q. And did Dr. Thisted come to visit your offices?

15 A. Yes.

16 Q. All right. And just tell me what happened when he visited.

17 A. I was either out of town or intentionally stayed away  
18 because I didn't have my eyes on that, but I left instructions  
19 that he be shown anything he wanted to see and go through the  
20 computer work and stay as long as he wanted and everyone should  
21 be helpful. And I think I might have been out of town.

22 Q. Did Dr. Thisted ever communicate to you any errors that had  
23 been found in the analyses of yours?

24                   MR. GETTE: Objection, Your Honor. This is hearsay.

25                   THE COURT: It's just a yes or no. Did he have any

1 communications, period?

2 MR. BIERSTEKER: That's fine.

3 A. He did not.

4 Q. Did he suggest any changes to your analyses? Again, you may  
5 answer yes or no.

6 A. He did not.

7 Q. Did he suggest that your analyses somehow missed the big  
8 picture or otherwise inappropriate?

9 MR. GETTE: Objection, Your Honor. This is still  
10 eliciting hearsay.

11 THE COURT: Sustained.

12 BY MR. BIERSTEKER:

13 Q. You produced some of these analysis -- well, actually all of  
14 them in litigation; is that correct?

15 A. Yes.

16 Q. In any of those cases, including this case, have you ever  
17 seen a report by an expert for the plaintiffs that said that  
18 your analyses are wrong?

19 A. I have not.

20 Q. Mr. Gette talked about the peer review process for Monograph  
21 13 briefly, but he didn't ask you whether or not the actual  
22 computer programs that you reviewed and that are the focus of  
23 your testimony in this case were included as part of that peer  
24 review process.

25 So I want to start with Monograph 13, U.S.

1 Exhibit 58700. And if you will turn to page 65, Doctor.  
2 There's a list of authors of Monograph 13. Who were the  
3 statisticians in that group of authors?

4 Maybe I should rephrase the question. Who were the  
5 individuals who did the statistical work in that list of  
6 authors?

7 A. That's Mr. Shanks. I was going to say that some of these  
8 people have more statistical training than others. Shanks  
9 appears to be a straight down the line statistician.

10 Q. Do you know whether Jacqueline Majors also did work that  
11 appeared in Monograph 13 in these new unpublished --

12 A. I'm not sure of her qualifications.

13 Q. Let me now turn to Mr. Shanks' deposition in this case and  
14 then we will look at Ms. Majors as well.

15 If you will turn to Mr. Shanks' U.S. deposition dated  
16 May 30, 2002, page 24, lines 1 through 3, and Mr. Shanks was  
17 asked, "Were any of your computer programs made available to the  
18 reviewers?"

19 And he answered, "I think not. Not by me."

20 THE COURT: Let me insert a question. I guess I'll ask  
21 it of Mr. Biersteker.

22 Does this deposition indicate that he was referring to  
23 the reviewers of the monograph?

24 MR. BIERSTEKER: I'm sorry. I didn't hear you.

25 THE COURT: Does this deposition make clear that

1 Mr. Shanks was referring to the reviewers of the monograph in  
2 that question?

3 MR. BIERSTEKER: Yes, Your Honor, I'll be happy to look  
4 for additional context if you would like.

5 MR. GETTE: Your Honor, again I'll suggest this is  
6 hearsay.

7 MR. BIERSTEKER: It's a deposition taken by one of the  
8 authors in this case.

9 THE COURT: Let me see that again. No, I don't believe  
10 it is, but let me see it again.

11 (Reading real time) Were any of your programs made  
12 available to the reviewers? Mr. Shanks is saying he thinks not.  
13 That's not hearsay.

14 MR. GETTE: It's an out-of-court statement by  
15 Mr. Shanks offered for the truth of the matter asserted.

16 THE COURT: Well, you may be right.

17 MR. BIERSTEKER: This is perfectly appropriate for a  
18 number of reasons.

19 Number one, it's reliance materials. Number two --

20 THE COURT: Number one what?

21 MR. BIERSTEKER: It is among the reliance materials for  
22 Dr. Wecker.

23 Number two, I believe this has been submitted as part  
24 of the prior testimony in this case as part of the designations  
25 from the defendants, and I think it's already in evidence. I

1 can check --

2 THE COURT: No, it's not in evidence. If it's been  
3 submitted as prior testimony, none of that's been looked at by  
4 me.

5 MR. BIERSTEKER: You're right, Your Honor, but it is in  
6 the packages that you have received of prior testimony in this  
7 case.

8 THE COURT: Well, it might be in the package. I don't  
9 know if the government -- obviously, I don't know if the  
10 government raised an objection.

11 I must say the vast majority of our questioning about  
12 depositions throughout this case has been depositions of people  
13 who later testified. That is not in case here with Mr. Shanks;  
14 at least, certainly not thus far.

15 MS. EUBANKS: Your Honor, this is one of them that I  
16 had raised the objection on a couple of days ago about priors  
17 being submitted that were outside the court's ruling with  
18 respect to Order 630, so I think Mr. Shanks is one such witness.  
19 I believe I specifically referred to him when I presented those  
20 arguments to the court. The defendants went forward and have  
21 continued those filings.

22 MR. BIERSTEKER: I think, Your Honor, Mr. Shanks is  
23 clearly somebody who was deposed in this case. He is clearly  
24 not available to us to haul into court. He's outside of the  
25 hundred-mile limit from this court.

1           I think this is perfectly appropriate testimony to be  
2 offered for the truth of the matter asserted. But, in addition,  
3 it is part of Dr. Wecker's reliance materials and he can  
4 certainly review that part of the transcript and comment on it.

5           THE COURT: The objection is sustained.

6           MR. BIERSTEKER: Mr. Redgrave refreshes my memory on a  
7 point. I know you've sustained the objection, Your Honor, but I  
8 just for the record wanted to note that there were two  
9 depositions of Mr. Shanks: one taken in this case to which I  
10 understand the government has not objected, and the other having  
11 been taken in a different case where they say they weren't  
12 present and therefore they have an objection. And I wanted to  
13 make sure it was clear which deposition we were talking about.

14          THE COURT: All right.

15          BY MR. BIERSTEKER:

16          Q. Let me ask this question, Dr. Wecker.

17                 If the computer programs that were prepared by  
18 Mr. Shanks and Ms. Majors to do the new analyses that appear in  
19 Monograph 13, chapter 4, were not provided to anybody else,  
20 could the computer programs themselves have been subjected to  
21 the peer review process?

22          A. No. If they were not provided, no one could look at them,  
23 obviously, and no one could ever see the typographical errors or  
24 the logical errors. It would just be impossible to detect.

25          Q. There seems to be some confusion, Doctor, about your

1 opinions in this case that I think arose yesterday during the  
2 course of Mr. Gette's questioning, and I wanted to turn to your  
3 written direct examination and to identify the opinions that you  
4 actually expressed in that written direct examination.

5 Why don't we first turn -- what I do is I went to the  
6 wind up to each particular section to try to get the broadest  
7 opinions that you expressed during the course of your written  
8 direct. And the first one is on page 34, lines 15 through 21,  
9 which is on cigarettes per day.

10 And the question was asked, "Based on your review and  
11 analysis of the evidence presented in chapter 4 of Monograph 13,  
12 have you formed an expert opinion regarding whether the  
13 statistical evidence demonstrates that smokers of low nicotine  
14 yield cigarettes smoke more cigarettes per day?"

15 And the answer was, "My opinion is that the statistical  
16 evidence supports the conclusion that smokers of lower nicotine  
17 yield cigarettes do not smoke more cigarettes per day than  
18 smokers of regular nicotine yield cigarettes."

19 MR. BIERSTEKER: And at the end of a series of these  
20 excerpts, rather than ask a question after each one, Your Honor,  
21 I was going to ask one question pertaining to all. Is that an  
22 acceptable way to proceed?

23 THE COURT: The same question for all?

24 MR. BIERSTEKER: Same question for all.

25 THE COURT: That's pretty compound.

1                   MR. BIERSTEKER: I'll just go ahead and do them one at  
2 a time then.

3 BY MR. BIERSTEKER:

4 Q. Is this opinion based on anything other than your expertise  
5 in statistics and the analyses that you performed and that were  
6 produced to the government in this case?

7 A. It is not.

8 Q. And did Mr. Gette ask you any questions about whether or not  
9 individuals who switched to lower nicotine yield cigarettes  
10 smoked more cigarettes per day?

11                   Do you recall him asking you any questions?

12 A. I don't remember that, but it will be in the record if he  
13 did.

14 Q. Why don't we turn to the next excerpt which is at page 50 --  
15 actually, skip that one. We will go to -- actually, no, let's  
16 do it. Page 50, lines 1 through 7.

17                   You were asked, "As a statistician, do you have an  
18 expert opinion regarding whether the epidemiological studies  
19 were biased by controlling for cigarettes per day?"

20                   "Yes, I do have an expert opinion on that topic."

21                   "What is your opinion?"

22                   "It is my opinion that there is no empirical evidence  
23 in Monograph 13 or the subsequent literature that the  
24 epidemiological studies were biased because they controlled for  
25 cigarettes per day."

1                   Now, again the same question, Dr. Wecker. Is that  
2 opinion based on anything other than your expertise in  
3 statistics, the analyses that you did and produced to the  
4 government in this case, and your reading of the literature?

5                   A. It's based on that and nothing else.

6                   Q. Let's turn to page 53, lines 6 through 11, where we see the  
7 decline in lung cancer rates which we will come to in just a  
8 minute, and you were asked -- again this was the wind up to the  
9 second -- "what conclusion do you draw from these analysis?"

10                   And you start off by quoting in your answer chapter 4.  
11 You say, "Chapter 4 states at page 145 that, quote, lesser risks  
12 for more recent cigarettes are one potential explanation for the  
13 rapid decline of lung cancer mortality at younger ages in the  
14 United Kingdom over recent years. The decline in lung cancer  
15 mortality at younger ages in the United States mirrors the  
16 decline in lung cancer mortality at younger ages in the United  
17 Kingdom. Both of these trends are consistent with lower lung  
18 cancer risk for smokers of lower-tar cigarettes."

19                   Again, Dr. Wecker, the same question. Is that opinion  
20 that you expressed based on anything other than your expertise  
21 in statistics, the analyses that you performed in this case of  
22 the U.S. data, and the literature that you have reviewed that  
23 addressed that same question?

24                   A. If we include in the word "literature" the letters written  
25 by Dr. Pedoe that would encompass everything I looked at and was

1 the basis for my opinion.

2 Q. Thank you. One more.

3 On pages 62, line 15, and it goes through 63, line 5,  
4 and I will have the same question.

5 In your written direct examination, Doctor, you were  
6 first shown a quotation from the trial testimony of Dr. Eriksen  
7 where he said he would expect to see the tie between receptivity  
8 to marketing and actual establishment of smoking to be  
9 observable in other studies and in other geographic locations.  
10 You said you agreed. You were asked why. And then your answer  
11 on the top of the next page, page 63, lines 1 through 6.

12 "The associations claimed in the Pierce and Biener  
13 articles, if true, should be consistently reproducible in  
14 similar populations using similar methods. I find that there  
15 are no consistently reproducible associations between," and then  
16 quoting Eriksen -- "between receptivity to marketing and actual  
17 establishment of smoking. Neither the Pierce article or Biener  
18 article provide a reliable basis to conclude that tobacco  
19 promotional activities are causally related to the onset of  
20 smoking."

21 Doctor, was that opinion based upon anything other than  
22 your expertise in statistics, the analyses that you performed in  
23 this case and that were produced to the government, and your  
24 review of the underlying articles?

25 A. It was based on that and nothing else.

1 Q. Doctor, are the opinions that you expressed and the basis  
2 for them the same or different than what statisticians do every  
3 day of the week in this country?

4 A. It's the same. It's routine.

5 Q. Do you have to be a medical doctor or an expert in nicotine  
6 pharmacology or cigarette design or marketing or anything else  
7 other than statistics to be able to do the work and to render  
8 the opinions that you actually gave in your written direct  
9 testimony?

10 A. You do not.

11 Q. Now, Mr. Gette, in contrast to your written direct, didn't  
12 limit himself to asking you about those opinions. In fact, it  
13 was Mr. Gette who pulled out Monograph 13 and he asked you about  
14 two very broad conclusions expressed in the monograph. The  
15 first was at page 10. Let's see if I can find it.

16 I'll put just both quotes up and then I want to ask you  
17 a question.

18 Mr. Gette asked you about conclusion number 1 on page  
19 10 of Monograph 13. "Epidemiological and other scientific  
20 evidence, including patterns of mortality from smoking-caused  
21 diseases, does not indicate a benefit to public health from  
22 changes in cigarette design and manufacturing over the last  
23 50 years."

24 And the next one Mr. Gette asked you about was the  
25 opinion -- the conclusion, rather, expressed at page 146 of

1 Monograph 13. He asked you about this broad conclusion.

2 "There is no convincing evidence that changes in  
3 cigarette design between 1950 and the mid-1980s have resulted in  
4 an important decrease in the disease burden caused by cigarette  
5 use either for smoker as a group or for the whole population."

6 Do you remember Mr. Gette asking you about that?

7 A. Yes.

8 Q. And in response to Mr. Gette's request that you express your  
9 agreement or disagreement with the two very broad conclusions  
10 taken from Monograph 13, you said that you disagreed. Do you  
11 remember that?

12 A. Yes.

13 Q. Okay. Why did you disagree, Dr. Wecker?

14 A. I disagreed to the extent that the opinions I expressed in  
15 my written direct seemed to stand in opposition to at least  
16 certain aspects of these conclusions.

17 For example, I find that the lung cancer risk has  
18 dropped in the United States at a faster rate than can be  
19 explained by changes in prevalence alone, suggesting strongly  
20 that the lower tar smoking is producing a health benefit. That  
21 seems to stand in opposition to these points.

22 Q. Now, when Mr. Gette asked you about that and got the answer  
23 that you gave, he proceeded to ask you a series of questions  
24 about your expertise.

25 And I just want to go back to this one -- and referred

1 repeatedly to the credentials contrasting your credentials to  
2 those of the authors of Monograph 13 in other areas of science  
3 besides statistics. Do you remember that?

4 A. Yes.

5 Q. And what I wanted to talk about are some of the things that  
6 Mr. Gette did not show you that relate, at least to this broad  
7 conclusion about whether or not anything in the last 50 years of  
8 cigarette design and manufacturing has produced a health  
9 benefit. And the first thing I want to show you is the  
10 testimony in this case from Dr. Samet.

11 And if I could have Dr. Samet's trial testimony from  
12 September 30, 2004, page 1233, starting on line 6, where we have  
13 a question from the court, and the answer goes on for quite a  
14 bit so I'll have to slide it up.

15 The court asked, "Dr. Samet, I may have misunderstood  
16 you. I'm going back over the last few questions of real time.

17 "Would you just clarify what your position is on the  
18 issue of the relative safety of 1950s unfiltered cigarettes as  
19 compared with today's quote, unquote, light cigarettes?

20 "Do you believe that they are -- that they were more  
21 dangerous, less dangerous, or as dangerous as current light  
22 cigarettes?"

23 And then Dr. Samet answered and he said, "Well -- and I  
24 think that was the question that Mr. McDermott was addressing  
25 with me.

1           "The evidence that, from the studies that were done,  
2 let's say, '50s, '60s, and '70s, where there was a comparison of  
3 the risk of the older unfiltered products, which I think were  
4 delivering 35 to 40 milligrams of tar, to the newer filters that  
5 came along that were delivering less, 30s, 20s, and even into  
6 the teens, showed reduced risks.

7           "And today's cigarettes I think are delivering  
8 about" -- excuse me -- "are delivering the average smoker around  
9 10 milligrams of tar. So that's about, you know, a four fold or  
10 three fold reduction from the earlier cigarettes." And then it  
11 continues.

12           "So if, in fact, what we observed earlier comparing the  
13 unfiltered, filtered reduction risk, remains true for today's  
14 product, my -- I mean, my opinion would be that presumably the  
15 direction is a lower risk for today's cigarettes compared to  
16 the -- those of the '50s.

17           "And, of course, we cannot make that comparison because  
18 we don't have people who are smoking 1950s cigarettes and  
19 today's cigarettes at the same time, so we have to make some  
20 surmises."

21           Dr. Wecker, was your disagreement with the broad  
22 conclusion enunciated at page 10 of Monograph 13 to the effect  
23 that nothing in the last 50 years of cigarette design mattered  
24 consistent or inconsistent with Dr. Samet's testimony that  
25 presumably the direction is a lower risk for today's cigarettes

1 compared to those of the 1950s?

2 MR. GETTE: Your Honor, objection. There's been no  
3 foundation that this expert relied on this material in reaching  
4 the opinions he's offered.

5 THE COURT: No, but that's not what the question goes  
6 to. He doesn't need to have relied on it to give his opinion as  
7 to whether his expert opinion is consistent or inconsistent with  
8 the testimony of Dr. Samet. So the objection is overruled.

9 THE WITNESS: Thank you, Your Honor.

10 A. It's consistent.

11 Q. Let me do just one more excerpt of testimony. That would be  
12 Dr. Farone's trial testimony from October 6, 2004, and I'm going  
13 to look at page 1681. I will start at line -- oops, hang on.  
14 That's the wrong page.

15 Why don't we start just to truncate it at line 20?

16 A. Page number, please?

17 Q. I'm sorry. 1681, Doctor.

18 Are you there?

19 A. Yes.

20 Q. At line 20 Dr. Farone was asked about filtration, and he  
21 said, the question was, "Because it's your belief today that  
22 cigarettes with filters are safer than cigarettes without  
23 filters; is that correct?"

24 And he answered, "You have the option of reducing those  
25 chemicals to very low levels, that is correct."

1           Is your testimony with regard to conclusion number 1 on  
2 page 10 of NCI Monograph 13 consistent or inconsistent with  
3 Dr. Farone's testimony in this case agreeing that filtered  
4 cigarettes are safer than cigarettes without filters?

5           A. It's consistent.

6           Q. You mentioned Dr. Pedoe and you had reviewed correspondence  
7 as part of your reliance materials in this case between Dr. Peto  
8 and Doctors Benowitz and Burns, so let me show you one of those  
9 pieces of correspondence. JD 004426.

10           And for now, we may come back to this exhibit, but in  
11 this letter to Dr. Benowitz, dated July 2000 from Richard Peto,  
12 one of the things that he addresses is this issue and he says,  
13 among other things, he's got a caveat. He said "if."

14           But he says, "The lung cancer hazards of the way  
15 smokers actually use one pack a day are less than half of what  
16 they used to be." And he also says that "tar level reductions  
17 should not be opposed."

18           Are those statements from Dr. Peto consistent or  
19 inconsistent with your testimony concerning the first opinion on  
20 page 10 of Monograph 13 that nothing in the last 50 years really  
21 mattered.

22           A. Consistent.

23           Q. Let's take a look at the IARC monograph, number 83,  
24 published in the year 2000.

25           MR. BIERSTEKER: It's U.S. Exhibit 86746, already

1 admitted in evidence, Your Honor.

2 Q. And, Dr. Wecker, you have the large tome?

3 A. Yes.

4 Q. The IARC monograph. Let's first go to page 168 if we could,  
5 and I have a limited purpose for showing this page and then we  
6 will go to the one that will be the focus of my question.

7 This paragraph here discusses three lines of evidence.  
8 Let's see if I can underline that. Three lines of evidence to  
9 examine the relationship between cigarette design and cancer  
10 risk. And I don't want to read all that out loud, but is that  
11 basically the same three lines of evidence that are reviewed in  
12 Monograph 13 about which Mr. Gette asked you yesterday?

13 A. Yes, those are the three basic ideas.

14 Q. All right. And if you will turn then, Dr. Wecker, to page  
15 171, and here there's a relatively long quote, let me read it.

16 "The working group considered each of the lines of  
17 evidence" -- excuse me -- "considered each of the lines of  
18 observational evidence that contribute to the assessment of the  
19 consequences of changes in cigarettes. Each has serious  
20 limitations that reflect the inherent difficulties of tracking  
21 the consequences of a single aspect of smoking that has varied  
22 over time concomitantly with other aspects of smoking, including  
23 intensity of smoking, particularly at younger ages. Successive  
24 birth cohorts have had differing profiles of exposure to  
25 cigarettes of differing characteristics. Those patterns have

1 varied between countries." And then they go on in the next  
2 paragraph.

3 "Nevertheless, after considering the limitations of the  
4 evidence, the working group concluded that changes in cigarettes  
5 since the 1950s have probably tended to reduce the risk for lung  
6 cancer associated with the smoking of particular numbers of  
7 cigarettes at particular ages."

8 Doctor, is the conclusion of the International Agency  
9 for Research on Cancer part of the World Health Organization in  
10 2004 that changes in cigarettes since the 1950s have probably  
11 tended to reduce the risk for lung cancer associated with  
12 smoking of particular number of cigarettes at particular ages  
13 consistent or inconsistent with your testimony concerning  
14 conclusion number 1 at page 10 of Monograph 13 that nothing in  
15 the last 50 years of cigarettes designs really mattered?

16 A. It's consistent.

17 Q. Thank you.

18 Now, Mr. Gette suggested to you in his questioning that  
19 you did not disclose to the court in your direct examination  
20 work that -- I believe, picking up on your phrase -- he  
21 suggested stood in opposition to your work, and I wanted to talk  
22 a little bit about that. First, let's talk about the work that  
23 you, your work.

24 Was there any data analysis that you did in connection  
25 with the formation of your opinions in this case that was not

1 produced to the government in this case?

2 A. No.

3 MR. GETTE: Objection to the foundation.

4 THE COURT: I'm sorry.

5 MR. GETTE: Knowledge --

6 THE COURT: Foundation?

7 MR. GETTE: His basis --

8 THE COURT: I suppose you could word it in terms of  
9 what he --

10 MR. BIERSTEKER: I did. I thought I did. If not, I'll  
11 rephrase it.

12 THE COURT: Well, that was not produced, so I think  
13 that's the objection. Why don't you just make it clear that  
14 your question is only limited to the work he did and whether he  
15 produced it or not.

16 BY MR. BIERSTEKER:

17 Q. Well, Dr. Wecker, is there any work that you did in this  
18 case in order to form your opinions that was not produced to the  
19 government?

20 MR. GETTE: Same question, Your Honor.

21 THE COURT: Objection is overruled. You may answer.

22 A. Everything I did was produced that was in support of my  
23 opinions.

24 Q. Did Mr. Gette show you any analyses that you did and that  
25 were produced to the government that contradict the testimony

1       you provide in your written direct examination?

2       A.   I don't think so.

3       Q.   Now, one of the things Mr. Gette noted was that your written  
4       direct examination did not address the data he presented in a  
5       U.S. demonstrative that was used with Dr. Burns, 17,804, but  
6       which actually came from Monograph 13 at page 122.  So let me  
7       show you that.  And he showed you a graph that looks something  
8       like the one on the top half of this page.  Do you remember  
9       that?

10      A.   Yes.

11      Q.   Do you disagree that lung cancer rates among all cigarette  
12      smokers of all ages in CPS-I and CPS-II increased from CPS-I to  
13      CPS-II?

14                 That was a terrible question.  Do you want me to try  
15      again?

16                 Do you disagree with the indicated increase in the lung  
17      cancer death rate among male and female smokers from CPS-I to  
18      CPS-II?

19                 MR. GETTE:  Objection, Your Honor, it's beyond the  
20      scope of the direct.

21                 The questions related to this were simply whether he  
22      presented this as part of his analysis to the court and he said  
23      no.

24                 This is going into the details of now offering a new  
25      opinion about what this table shows or doesn't show and whether

1 he agrees or disagrees with it. It's well beyond the scope of  
2 cross.

3 MR. BIERSTEKER: Your Honor, if I may.

4 The clear implication was that Dr. Wecker was not  
5 presenting a balanced view of the evidence. That was the thrust  
6 of this line of questioning. And so I think I'm entitled now to  
7 go back to these specific things that Mr. Gette mentioned that  
8 weren't in his written direct and ask them about them.

9 THE COURT: The objection is overruled.

10 A. I do not disagree that the lung cancer rates have increased  
11 as between CPS-I and CPS-II as shown on this chart.

12 THE COURT: By the way, is there any disagreement in  
13 the scientific community about what the actual lung cancer rates  
14 are over time?

15 THE WITNESS: Essentially no disagreement on that, Your  
16 Honor. That's well recorded and documented. In the U.S.  
17 population. We do not have good data on who are smokers and who  
18 are not, but we know when people die in the United States if  
19 they die of lung cancer.

20 BY MR. BIERSTEKER:

21 Q. Do you know whether or not this phenomenon, the increase in  
22 lung cancer death rates among smokers from CPS-I to CPS-II, has  
23 been discussed in the literature by, among others, Dr. Thun and  
24 Dr. Peto?

25 A. It has been discussed by them.

1 Q. Why don't we take a look at an article by Dr. Peto. JD  
2 000529. And this is an article entitled: Smoking, Smoking  
3 Cessation and Lung Cancer in the United Kingdom since 1950:  
4 Combination of National Statistics with 2 Case-control Studies.  
5 Dr. Peto being the first author.

6 And although it's difficult to read -- perhaps this  
7 might not help -- it appeared in the British Medical Journal in  
8 August of 2000.

9 And let me, if I might, Dr. Wecker, direct your  
10 attention to page 327, the discussion section of the article --  
11 have to do this in pieces.

12 Dr. Peto says, "By 1950 the increase in smoking was too  
13 recent to have had its full effect on disease rates, except  
14 perhaps among men in early middle age. The fact that by 1990  
15 many of the current smokers would have smoked substantial  
16 numbers of cigarettes throughout adult life is the chief reason  
17 for the large increase in the cumulative risk of lung cancer  
18 among continuing smokers."

19 And he goes on to say, "For the same reason, increases  
20 in the risks associated with smoking were also seen between the  
21 first 20 years, and the next 20 years of the British doctors  
22 study." And then he refers specifically to the American Cancer  
23 Society studies that were the focus of Mr. Gette's questioning.

24 Doctor, is it your understanding that Dr. Peto here is  
25 explaining the increase in lung cancer risks that you see in the

1 British doctors study in the earlier days and the later days and  
2 the same thing in the American Cancer Society CPS-I and CPS-II  
3 studies?

4 A. Yes, that's the explanation that he gives there and that I  
5 agree with.

6 Q. And let's turn to Dr. Thun, an article he published in 1997,  
7 JD 000540.

8 Dr. Thun was a co-author of chapter 4 of Monograph 13,  
9 wasn't he? Do you remember?

10 A. Yes, he was.

11 Q. An article that appeared in the Journal of Preventive  
12 Medicine in 1997, Dr. Thun and Dr. Heath are the authors  
13 entitled: Changes in mortality from smoking in two American  
14 Cancer Society prospective studies since 1959?

15 Is it your understanding that that refers to CPS-I and  
16 II, Doctor?

17 A. Yes.

18 Q. Now, there's two things I want to ask you about. Let me  
19 just get the quote out first.

20 Dr. Thun and Dr. Heath say that "First, although the  
21 sharp increase in lung cancer death rates from CPS-I to CPS-II  
22 is clearly an adverse consequence of cigarette smoking, we  
23 cannot tell whether lung cancer risk might not have increased  
24 even more but for the reduced tar yield in cigarettes.  
25 Early-life smoking increased markedly around World War II when

1 CPS-II smokers were adopting the habit." There's two things I  
2 want to ask you about.

3 First, is the statement that early-life smoking  
4 increased markedly around World War II when the CPS-II smokers  
5 were adopting the habit the same kind of explanation for the  
6 increase in lung cancer observed in between these two studies  
7 among smokers that was being offered by Dr. Peto?

8 A. Yes, it's essentially the same point.

9 Q. Okay. And the additional element here is that Dr. Thun  
10 says, "From looking at this increase, we cannot tell whether  
11 lung cancer risk might not have increased even more but for the  
12 reduced tar yield in cigarettes," and from your understanding as  
13 a statistician on how to analyze data, do you agree with that?

14 A. I agree with that.

15 Q. Let's turn to the discussion of the decline of lung cancer  
16 risks at specific ages.

17 THE COURT: Actually, Mr. Biersteker, we wish to take  
18 our break at this point.

19 MR. BIERSTEKER: That will be fine.

20 THE COURT: We will take a 15-minute break, everybody.

21 (Recess began at 11:08 a.m.)

22 (Recess ended at 11:24 a.m.)

23 THE COURT: All right. Mr. Biersteker, are you going  
24 to finish before lunch?

25 MR. BIERSTEKER: Yes, Your Honor.

1 THE COURT: Okay.

2 BY MR. BIERSTEKER:

3 Q. If I could have, Todd, J-DEM 060549 up on the screen.

4 You will remember that you showed this demonstrative to  
5 the court both in your written -- in your written direct, and  
6 there was testimony elicited from you yesterday on cross-  
7 examination by Mr. Gette concerning your decision when you  
8 prepared this plot to have all of the lines start at the same  
9 point. Do you remember that?

10 A. Yes.

11 Q. Doctor, would the slope of these lines have been any  
12 different if you started them in different places?

13 A. No. It has no effect whatsoever on the slope and it's only  
14 the slope that is the point of this chart and the point of  
15 Dr. Peto's recommendation.

16 Q. Why is it that the slope is the only thing that's important  
17 about this chart?

18 A. Because the point is not that a group has a particular value  
19 of risk, it's that whatever that is it's declining and declining  
20 faster than can be explained by prevalence alone.

21 So it's the decline and how fast it goes that counts,  
22 not where it starts from or where it ends up, just that it does  
23 go down.

24 Q. All right. Last night, Dr. Wecker, I contacted your office,  
25 and using the same data that are presented in this particular

1 demonstrative, I had them change it so that the starting point  
2 wasn't always the same and I wanted to just show you that  
3 briefly. J-DEM 060549 --

4 MR. KLEIN: Objection, Your Honor. This is not  
5 material that was relied upon by the witness.

6 MR. BIERSTEKER: It's an alternative presentation of  
7 the evidence to make the point that when you don't have them all  
8 start at the same place --

9 THE COURT: You can't do that now, Mr. Biersteker.

10 MR. BIERSTEKER: Fine. It's just a different  
11 formatting, but I'll skip it.

12 THE COURT: I don't know if it's just formatting. It  
13 doesn't sound like just formatting to me, but what it is, is  
14 counsel contacting the witness's office.

15 MR. BIERSTEKER: I didn't talk to Dr. Wecker. He's  
16 never seen this.

17 THE COURT: I know that. I know that. I heard you.

18 And getting further information or data and then  
19 working with that data, the objection is absolutely sustained.

20 MR. BIERSTEKER: That's fine, Your Honor, although the  
21 data I will say are the same. But I understand. I understand  
22 Your Honor's ruling.

23 THE COURT: Well, I'm not saying it was unethical, but  
24 certainly unusual. Go ahead.

25 MR. BERNICK: Your Honor, the way that just got

1 transcribed is "I am saying it was unethical."

2 MR. BIERSTEKER: I heard something different. I  
3 certainly hope I did hear correctly.

4 THE REPORTER: Mr. Bernick, there is a correction a  
5 couple of lines down.

6 THE COURT: Well, let it be clear I didn't say that.  
7 The comment was "it was not unethical, it was unusual."

8 MR. BIERSTEKER: Thank you.

9 BY MR. BIERSTEKER:

10 Q. Yesterday, Mr. Gette asked you about your decision to use  
11 some additional data beyond that, that was considered by  
12 Dr. Burns and his colleagues in assessing the change in actual  
13 and predicted lung cancer rate over time and I wanted to talk  
14 about that a little bit.

15 If we could bring up J-DEM 060573. This is the same  
16 chart that you used in your written direct, 060548, with the  
17 only difference is that the numbers that go into that, the  
18 plotting of those points have been displayed.

19 MR. BIERSTEKER: And Your Honor, if I -- I don't know  
20 that you had a copy of this, but if I may approach, thank you,  
21 because you will need it to follow along on the next  
22 demonstrative.

23 Q. And so keeping that demonstrative in front of you,  
24 Dr. Wecker, I want to now show you J-DEM 060572, and this is --  
25 the cite down there at the bottom refers to electronic materials

1 and am I correct that these are computer printouts from the  
2 materials produced by Dr. Burns?

3 A. Yes.

4 Q. All right. And what I want you to do, keeping these two  
5 demonstratives in front of you -- the one that's up on the  
6 screen that has little red boxes and little blue boxes, and the  
7 chart for age 40 in front of you -- but basically the question I  
8 want you to answer when you're done looking at these data points  
9 is, is it or is it not true that on J-DEM 060573, the chart and  
10 the graph, there is only -- only one number that did not come  
11 from Dr. Burns's computer materials and that is the predicted  
12 lung cancer death rates for 40-year-olds born in the period from  
13 1950 to 1954, the number being the 7.936?

14 A. That's correct.

15 Q. Why don't you just trace it through so the court can see how  
16 these numbers, with that one exception, came from Dr. Burns? If  
17 you can see it. I don't know. Maybe we can blow it up.

18 A. The colors help.

19 The numbers with the red rectangles in chart 60572,  
20 beginning with 11.991 you can see are depicted in red, beginning  
21 with 11.991 on 60573. So that shows the correspondence between  
22 the underlying Burns' production and my display.

23 You can see, also, that there are four of those red  
24 numbers on the Burns' data and therefore the last red number on  
25 my chart, 60573, did not come from Dr. Burns, but was calculated

1 by me using his method. In other words, the data points, except  
2 for the last one on 063073, and so if you would just cover up  
3 the last point in the lower right of 60573, are exactly from  
4 Dr. Burns.

5 My addition was to update to get to the more recent  
6 data and therefore put in one more point.

7 Q. All right. Mr. Gette asked you what the results would be --  
8 if I could have J-DEM 060573 back up on the screen, please --  
9 what the result would be if you analyzed the difference between  
10 actual and predicted lung cancer rates among individuals younger  
11 than age 40 and if you scaled the results. And he showed you a  
12 U.S. demonstrative, 18211, which is -- if I could have the Elmo  
13 please. Do you remember talking about that in your  
14 cross-examination?

15 A. Yes.

16 Q. Okay, now there's two pieces of that I want to talk to you  
17 about. First, the ages.

18 Dr. Burns testified at trial in this case that the  
19 average age of diagnosis of lung cancer was about age 70. Based  
20 upon your analysis of the CPS-I and CPS-II data does that seem  
21 about right to you?

22 A. Yes.

23 Q. Now, let me show you some testimony from Dr. Samet in this  
24 case on September 29, 2004, starting at page 1145, and I want to  
25 just go to line 8.

1           Dr. Samet was asked, "And one of the suggestions you  
2 made" -- referring to the folks who estimated health care cost--  
3 "was that they used age 40 as a cutoff because smoking-related  
4 diseases only appear very rarely in persons under the age of 40,  
5 correct, at least that that are attributable to smoking?"

6           And Dr. Samet answered, "The major specific  
7 smoking-related diseases are relatively uncommon before the age  
8 of 40, correct."

9           Doctor, based upon your analysis of the data in CPS-I  
10 and II, is it true that lung cancer deaths under the age of 40  
11 are relatively uncommon?

12          A. Yes, that's my understanding.

13          Q. Let me next show you an e-mail from Dr. Burns to Dr. Thun  
14 dated January 30, 2001, it's JD 063712, and you will see it's an  
15 e-mail from Dr. Burns of that date to Dr. Thun and I want to ask  
16 you about the paragraph I've highlighted.

17           Dr. Burns says, quote, the lung cancer death rates in  
18 35 to 39-year-old males in CPS-II from your chapter in monograph  
19 8 are 5.9 for smokers and 4.6 for never smokers, hardly  
20 different. If we can barely distinguish smokers from nonsmokers  
21 at age 35 to 39, how do we justify using rates in a younger age  
22 group as a measure of the change in the effect of smoking over  
23 time?"

24           Doctor, do you agree, based upon your analyses of the  
25 CPS-II data, that among individuals aged 35 to 39 the difference

1 in lung cancer rates for smokers, male smokers, compared to  
2 never smokers are hardly different?

3 A. They are very close.

4 THE COURT: And who wrote this e-mail?

5 MR. BIERSTEKER: It's Dr. Burns, Your Honor, at the  
6 top.

7 BY MR. BIERSTEKER:

8 Q. Is the fact that lung cancer is rare under the age of 40,  
9 and that from ages 35 to 39 the lung cancer experience or death  
10 rate among smokers and never smokers is hardly different,  
11 related at all to your decision not to present to the court an  
12 analysis of the difference in lung cancer death rates actual  
13 versus predicted for people under the age of 40?

14 A. Yes.

15 Q. How is it related?

16 A. Well, that's the reason. By the time you get below 40 you  
17 start running out of useful data to make these comparisons.

18 Q. Now, Mr. Gette suggested in his -- or actually said -- in  
19 his questioning of you yesterday that this chart presented  
20 scaled data. Do you remember that?

21 A. Yes, I heard that.

22 Q. And Dr. Burns testified in this trial quite emphatically  
23 that an analysis of actual and predicted lung cancer rates  
24 should not be scaled.

25 Why don't I get the trial transcript from February 15,

1 2005? Here we go. Bingo. And turn to page 13477, starting at  
2 line 23.

3 MR. BIERSTEKER: I'm sorry. Is there a problem?

4 (Mr. Biersteker speaking with Mr. Gette.)

5 BY MR. BIERSTEKER:

6 Q. Doctor -- thank you, Mr. Gette -- basically this was on  
7 redirect of Dr. Burns, questioning by the government, and he was  
8 asked, "This is an age-specific rate for folks age 40-year-old,  
9 right?

10 "Age specific is age 40, that's age specific and  
11 you --" I'm sorry -- "because of the scaling, you're not able to  
12 compare age-specific rates at the younger ages. It's a  
13 technical limitation." And then his answer continues.

14 Do you agree with Dr. Burns, Dr. Wecker, that in  
15 analyzing differences in predicted and actual lung cancer rates  
16 you should use the unscaled data, not the scaled data?

17 A. Yes. It's not a close call. It's simply a mistake to use  
18 scaled data, and Dr. Burns is correct about that.

19 Q. Is the analysis that Mr. Gette showed you using the scaled  
20 data appropriate?

21 A. It's not. And it would not be informative, with respect to  
22 the analysis suggested by Dr. Peto, to investigate whether lung  
23 cancer rates are declining faster than would be expected given  
24 declines in prevalence. This is not the kind of data that could  
25 show that one way or the other.

1 Q. Thank you.

2 MR. BIERSTEKER: Almost finished. A little bit more.

3 Q. If I could have J-DEM 060535, please. This is one of those  
4 bar charts. There have been a number of them. But this is one  
5 that you showed the court in your live direct as well as in your  
6 written direct.

7 And yesterday there were some questions about loss of  
8 data that occurs when you get to the right most set of bars and  
9 you're limiting the population that are included to individuals  
10 with flat cigarettes per day and flat tar yields.

11 And I just wanted to make it clear that when that  
12 restriction is imposed, Dr. Wecker, where does the loss of data  
13 occur? Is it something that occurs in all three sets of bars or  
14 is it limited?

15 A. The loss is only a loss in the third or right most set of  
16 bars. The loss is the people that don't make it from the second  
17 set to the third set.

18 And the difference in sample size is very great,  
19 meaning there is around 500,000 people in the middle set of bars  
20 and less than a hundred thousand in the right set of bars. We  
21 lose 80 percent of the data.

22 Q. And while not every bar on everyone of these charts is  
23 statistically significant, is it or is it not true that at least  
24 one bar is statistically significant in every one of these  
25 analyses where you had flat CPD and flat tar?

1 A. That, I'd have to review, but that's my memory, yes.

2 Q. Okay.

3 A. It's certainly true on this chart.

4 Q. How does your memory about that pattern of statistical  
5 significance relate to your testimony yesterday that there's a  
6 dose/response relationship between tar yield and lung cancer  
7 risk?

8 A. One can demonstrate that the higher -- and what I mean by  
9 dose/response is that higher tar has higher risk.

10 One could demonstrate that by looking at the right-hand  
11 side set of bars such as on this chart, 535. But I want to  
12 emphasize my point from yesterday that my analysis shows that  
13 there's no bias induced by the controlling of cigarettes per day  
14 and, therefore, I would far rather simply not look at the  
15 right-hand set of bars because that's attempting to cure a  
16 problem that doesn't exist and in the process reducing the  
17 sample size so much.

18 What I have learned in my study is that you can rely on  
19 the left-hand side, such as the second set of bars, either the  
20 first or the second. And that is where I would point the first  
21 and the second set of bars for the most definitive evidence,  
22 including the first and second set of bars in Monograph 13  
23 itself.

24 Q. Now, yesterday the court seemed to suggest that there was an  
25 inconsistency in your opinion about dose/response in figure 4-5

1 and the Pierce 34 percent estimate of the proportion of  
2 experimenting that was attributable to high receptivity and  
3 baseline among the group that you looked at.

4 Do you remember that?

5 A. Yes.

6 Q. And just for a little bit of context. When you looked at  
7 the Pierce analysis -- and if we could actually bring it up,  
8 it's J-DEM 060552. Just for context.

9 When you looked at the two Pierce receptivity  
10 categories and looked at smoking, experimental smoking, daily  
11 smoking, frequent smoking, cigarettes per day, none of those  
12 reported values up there show a statistically significant  
13 association; is that right?

14 A. The red numbers are not significantly different from zero,  
15 none of them.

16 Q. Is there, then, any inconsistency between your point that  
17 the relationship between receptivity and actual smoking defined  
18 in these four different ways is not statistically significant  
19 and your testimony about dose/response with respect to lung  
20 cancer and tar yield?

21 A. No, but it may take a sentence or two to explain that.

22 Q. Go ahead.

23 A. When a result gets a single numerical finding, like the  
24 34 percent finding in the top right of this chart, 552, the  
25 first thing to assess is whether there's sufficient data to

1 determine that in the sample that was looked at there's enough  
2 accuracy that has been developed that could even distinguish the  
3 34 percent here from zero.

4           If that's not the case, basically you have evidence  
5 that a statistician would describe as too weak to be conclusive  
6 on the point. It may be tending to show something or weakly  
7 showing something, but it's generally too weak to past the  
8 standard of statistical significance.

9           If a number like 34 percent shows up as statistically  
10 significant, then you move to the next step to see if you can  
11 repeat it. That's the consistency point that people use.

12           So if this is so, if this had turned out to be  
13 statistically significant, one would go on next to see, well,  
14 let's see if we can reproduce this result with slightly  
15 different variations, slightly different data.

16           And finally when you get statistically significant  
17 results that are repeated by different analyses that are  
18 reasonably interesting variations of the basic case, I think by  
19 that time you can become convinced that you found something.

20           The 34 percent fails on both scores. It wasn't  
21 statistically significant in the first place, and when I did  
22 reasonable variations within the data, none of them were even  
23 pointing in the same direction.

24 Q. Thank you. Now, Mr. Gette suggested --

25           THE COURT: Let me ask a question.

1 MR. BIERSTEKER: I'm sorry.

2 THE COURT: A very simplistic question. But is the  
3 34.3 percent not deemed statistically significant because it  
4 doesn't fall within the 95 percent confidence level, or am I  
5 mixing up two concepts?

6 THE WITNESS: You're very close, Your Honor. You're  
7 very close.

8 Not written on this page, but lying behind the point of  
9 statistical significance and shown in my workpapers, is a  
10 calculation that would amount to saying 34 percent, plus or  
11 minus some range of possible error, that could be a spurious  
12 induced error entirely because of the sampling fluctuations, not  
13 anything to do with the real point.

14 So, the statistical significance assessment is to  
15 figure out if -- just as if I had flipped a coin three times in  
16 a row and gotten three heads, does that tell me this is a two-  
17 headed coin? No. It's going to happen just by chance  
18 fluctuation.

19 So the assessment is that the 34 percent, because the  
20 sample size are not too large, is really not evidence that this  
21 comparison between receptivity and a particular definition of  
22 smoking is present at all. Zero being no relationship.

23 So it is a version of those air bars that you see in  
24 the bar charts, although the statistical method to calculate  
25 them is somewhat different, but it's based on the same

1 principle.

2 THE COURT: Go ahead.

3 BY MR. BIERSTEKER:

4 Q. Mr. Gette suggested yesterday that you didn't point out to  
5 the court in your written direct examination a statistically  
6 significant association that was reported by Pierce between  
7 receptivity and what he called progress towards smoking.

8 And let me just show you the excerpt that Mr. Gette  
9 read to you. It's in U.S. Exhibit 64696 at page 513. And this  
10 copy is really hard to read, so let me just zoom in.

11 He was talking about moderately receptive group, and he  
12 said, "compared with this group," meaning the minimal receptive  
13 guys, "those who have a favorite advertisement but were not  
14 willing to use a promotional item, the moderate level were  
15 82 percent more likely to progress toward smoking," which he  
16 says is a statistically significant increase.

17 And, Dr. Wecker, if we could turn to your written  
18 direct examination at page 60, lines 1 through 17. Do you or do  
19 you not discuss the statistically significant association  
20 between receptivity and what the article calls progression in  
21 smoking and the smoking uptake process?

22 A. Yes.

23 Q. Do you or do you not point out that that statistical  
24 association arises because some never smokers who were deemed  
25 not susceptible at baseline became susceptible, but that there

1 is no statistical association with actual smoking?

2 A. I pointed that out, yes.

3 Q. Thank you.

4 Just quickly. The authors of Monograph 13 -- coming  
5 back to what you have stressed often as the big point about  
6 figure 4-5 and the need to do that last set of bars. At page  
7 96, I think it is -- hang on -- that's the wrong page.

8 On page 96 the authors of the monograph have a sentence  
9 there, right after the heading, that explains what you have been  
10 saying, that they were concerned about potential bias from  
11 cigarettes per day.

12 "A reexamination of the CPS-I data set, see appendix,  
13 was inconclusive as to whether compensatory changes in the  
14 number of cigarettes smoked per day when smokers switched to a  
15 lower nicotine cigarette introduce a bias sufficient to explain  
16 the observed increase in lung cancer risk among smokers of  
17 high-yield cigarettes."

18 Is that your understanding of their purpose? Was to  
19 check to see if there was a bias.

20 A. Yes, that was their purpose, to check to see if there was a  
21 bias, or at least their concern and purpose, yes.

22 Q. And if there is no increase in cigarettes smoked per day,  
23 can there be a bias introduced by controlling for cigarettes  
24 smoked per day?

25 A. No. Their concern is allayed by the finding that there is

1 no increase.

2 Q. And the analyses that you have done and presented to the  
3 court, both in your written and your live direct, showing that  
4 there is no increase in cigarettes per day is a topic about  
5 which Mr. Gette asked you no questions. Is that right?

6 A. That's correct.

7 MR. BIERSTEKER: That concludes my redirect  
8 examination, Your Honor.

9 THE COURT: All right. Thank you, Dr. Wecker. You may  
10 step down at this time, and you're excused.

11 I'm prepared to rule on most of the objections which  
12 have been made, although I have occasional factual question. I  
13 can do that first or I can hear the government's motion first.

14 The government's motion will go to qualifications; is  
15 that right?

16 MR. GETTE: To the fact that Dr. Wecker fails under the  
17 standards of Rule 702 in terms of his analyses in several  
18 respects, including it's not been subject to peer review,  
19 consideration and testing by outside experts.

20 THE COURT: I'll hear the government's motion first.

21 MR. GETTE: Your Honor, we would move that the  
22 witness's testimony related to Monograph 13 and the Pierce  
23 receptivity materials fail under Rule 702.

24 And the points I would make are, first, that under Rule  
25 702 in the advisory committee notes, the standards indicated for

1 allowing the witness to be qualified for an expert -- to testify  
2 include that he's testifying about matters growing naturally and  
3 directly out of research they have conducted independent of the  
4 litigation or whether they have developed their opinions  
5 expressly for purposes of testifying.

6 I think this witness has made abundantly clear that his  
7 opinions and his research here were prepared exclusively for  
8 litigation and not for any outside research interests.

9 Rule 702 of the committee notes also indicate that the  
10 court should consider whether the expert has adequately  
11 accounted for obvious alternative explanations.

12 I think, here again, the testimony of the witness is  
13 very instructive that he did not consider substantial amounts of  
14 material related to the subjects he's opining on, including the  
15 statistical association between smoking different tar levels of  
16 cigarettes and the resulting disease burden from those,  
17 including a failure to consider someone who works in the area,  
18 such as the Surgeon General's Report, the World Health  
19 Organization, and consideration by the Canadian expert panel.

20 He did no analysis of issues that were considered by  
21 the authors of Monograph 13 outside of very confined limits that  
22 he's testified about and failed to take those into consideration  
23 in reaching his ultimate conclusions.

24 He also, as I said, has indicated that the material was  
25 never subjected to peer review and was never in each of the

1 areas, the Pierce area as well as the Monograph 13 areas, and  
2 under Daubert as well, whether the methodology has ever been  
3 tested. His analysis here has not been tested by anyone other  
4 than himself.

5 And so under those standards set forth in Rule 702 I  
6 think this expert has adequately demonstrated that he fails  
7 those and should not be -- and should be excluded by the court.

8 THE COURT: Mr. Biersteker.

9 MR. BIERSTEKER: Your Honor, there was a purpose to  
10 part of my redirect examination today and that was to point out  
11 to the court the very limited nature of the opinions expressed  
12 by Dr. Wecker in his written direct examination.

13 I don't think there is any dispute that he is qualified  
14 as a statistician and an expert statistician having taught for  
15 nearly two decades at the University of Chicago and the  
16 University of California. And so the question really is: Has  
17 he driven beyond his headlights?

18 And I think any fair examination of the written direct  
19 examination and the opinions expressed therein shows that he has  
20 very specifically limited his testimony to the field of his  
21 expertise and the analyses that he did.

22 With respect to whether or not those analyses were ever  
23 published or subject to peer review, as Your Honor has seen, we  
24 are prohibited from publishing them, but in any event, that is  
25 beside the point.

1           The real point under Daubert is whether the method used  
2 by the witness is one that is a method that is scientifically  
3 recognized and sound, and there can be no doubt that the methods  
4 used by Dr. Wecker to calculate things, such as statistical  
5 significance, come right out of the basic textbooks in the field  
6 of statistics in which he is certainly an expert.

7           This motion should be denied.

8           THE COURT: The motion is very similar to and really a  
9 reworking of issue number 1 that the government has raised in  
10 its objections, and that issue is that Dr. Wecker lacks the  
11 expertise necessary to offer opinions regarding nicotine and  
12 compensation.

13           The answer is very straightforward and simple. As the  
14 government brought out very clearly, he is not an expert in any  
15 of the many substantive areas that have been testified to in  
16 this very long trial.

17           He's not a doctor. He's not an epidemiologist. He's  
18 not a chemist, et cetera. He's not a toxicologist, et cetera,  
19 et cetera. But he is a statistician and that's all he was  
20 offered for, and that's all that his testimony was directed to.

21           He gave many different opinions, all of which were  
22 given from the perspective of a statistician. And in case there  
23 is any doubt whatsoever, they will only be considered by me as  
24 the expert opinion of a statistician, not an epidemiologist, an  
25 oncologist, any other kind of medical doctor, or toxicologist,

1 or any of the areas of expertise that have been presented in the  
2 trial. And so for that reason, the government's objection is  
3 overruled.

4 Additionally, Daubert, as we all know -- and I'm not  
5 clear whether there is a straightforward Daubert motion or  
6 whether this is just sort of a -- raises some of the issues in  
7 Daubert, but it doesn't matter because I believe that the  
8 rationale I'm presenting covers all of those grounds.

9 Daubert presents various factors for the court to  
10 consider in deciding whether to admit an expert witness's  
11 statement. One of the factors is peer review, no question about  
12 that, but it's not an absolute requirement, and I certainly  
13 don't read Daubert that way and I don't think that any of the  
14 subsequent case law does.

15 In this instance with Dr. Wecker, it is certainly true  
16 that there has been none of the traditional peer review that  
17 we've seen with so many of the other scientists testifying.

18 There was some testimony, which was very inconclusive,  
19 that some epidemiologist who Dr. Wecker knows came and looked at  
20 his materials and didn't get in touch with him about the  
21 materials. That evidence, as I say, was very inconclusive.

22 More significantly, there is definite evidence in the  
23 record that because of the agreement with the University of  
24 California and the conditions that the University of California  
25 imposed on allowing some of these materials to be submitted in

1 discovery, that they couldn't be peer reviewed or published at  
2 this time.

3 So, again, number one, peer review is not an absolute  
4 requirement, and number two, that particular factor, desirable  
5 as it is, simply couldn't be satisfied in this particular  
6 instance.

7 In terms of being a statistician, I don't think there's  
8 any question at all about Dr. Wecker's qualifications in terms  
9 of his academic background, in terms of his degrees, in terms of  
10 the fact that he taught for a number of years until, it was  
11 fairly clear to me, he decided he could make a whole lot of  
12 money in private consulting practice. And there is nothing to  
13 suggest that he didn't -- that he wasn't aware of or didn't know  
14 the standard procedures and practices of statisticians or that  
15 he wasn't following them.

16 So that I am certainly accepting him as an expert, but  
17 only, I again emphasize, as an expert in the field of statistics  
18 and all of his testimony is viewed from that perspective.

19 Therefore, the objection raised in issue number 1 is  
20 overruled.

21 As to issue number 2, that essentially goes to the same  
22 point, namely the objection is that Dr. Wecker lacks the  
23 expertise to offer opinions regarding the association between  
24 receptivity to defendants' marketing and subsequent actual  
25 smoking.

1           Once again, he certainly doesn't have the specific  
2 expertise that we have seen from a number of other witnesses,  
3 but his testimony was only on the issue of a statistical  
4 perspective and an evaluation from a statistical perspective of  
5 that association. And the objection is overruled.

6           The same is true for issue number 3. I certainly  
7 understand very well that there are many ways to judge whether  
8 community intervention on cessation of cigarette smoking has  
9 been effective, and Dr. Wecker is not an expert in any of those  
10 areas. But all he did was to analyze the particular -- I'll  
11 just check something -- a particular study and essentially  
12 critique it in his direct testimony.

13           Now, issue number 4, which is the disclosure of  
14 opinions. I will go through one by one. There are six issues  
15 that the government has raised. Some are clear to me from the  
16 papers which have been submitted, some are not, and so I will  
17 have questions.

18           Regarding the opinions relating to experimental  
19 switching studies, that objection is overruled.

20           Regarding the second point raised by the government on  
21 the opinion on the best way to assess the extent of compensation  
22 in a study by Doctors Benowitz and Lynch -- and I should reverse  
23 it because I think Dr. Lynch is mentioned first -- based upon  
24 the arguments of counsel in their written pleadings, that  
25 objection is overruled.

1           Now, on the third issue, which is the calculations  
2       Dr. Wecker presented regarding cigarettes per day equivalence.  
3       Based upon his review of the Coultas study and the 1998 Health  
4       Survey from England -- of England, I should say -- the  
5       government argues that neither of these analyses are mentioned  
6       anywhere in the expert reports prepared by Dr. Wecker, either  
7       for the Turner case or for this case. I am not clear at this  
8       point. The defendants argue that those materials were turned  
9       over.

10           I think I'm right about that, Mr. Biersteker.

11           MR. BIERSTEKER: Yes.

12           THE COURT: And I'm looking at page 7 of the  
13       defendants' response to the government's objections and mention  
14       is made that the Coultas article was on Dr. Wecker's reliance  
15       list, and that these new analyses were produced to the  
16       government as part of the materials accompanying the Turner  
17       report, which was also provided to the government.

18           Mr. Gette, do you have any further response on that  
19       issue?

20           MR. GETTE: Well, my response, Your Honor, would be  
21       that, even assuming everything that is set forth without  
22       apparent support in defendants' response, is that, at best,  
23       there was some calculation done related to Coultas by Dr. Wecker  
24       that was buried in the literally, if printed out, volumes of  
25       electronic materials provided along with his report with no

1 mention of that analysis and those calculations being set forth  
2 in the report that was provided with that voluminous backup  
3 material.

4           To suggest that even assuming defendants'  
5 representations are true, that the United States is somehow  
6 responsible to take a report that was prepared initially for  
7 another case, then produced in this one, hunt through the  
8 volumes of materials that's submitted along with the report and  
9 somehow piece together Dr. Wecker's opinions and conclusions  
10 seems inappropriate to me.

11           THE COURT: Is it your position that the only place  
12 that these analyses were contained were in the materials  
13 accompanying the Turner report?

14           MR. GETTE: I certainly see nothing in the text of the  
15 Turner report that would point me to those. And if they are in  
16 tab 112, which is the computer-generated backup material, if  
17 they are there, that would be the only place that I've been able  
18 to identify that they might be exist.

19           THE COURT: Is it your position that they were never  
20 mentioned in the expert report?

21           MR. GETTE: Absolutely.

22           THE COURT: Mr. Biersteker.

23           MR. BIERSTEKER: The materials certainly were produced.  
24 They were produced --

25           THE COURT: Mr. Biersteker, repeat that, please.

1           MR. BIERSTEKER: I'm sorry. The materials that -- the  
2 underlying calculations were produced. They were produced in  
3 two different components, but they were clearly produced to the  
4 government in this case.

5           THE COURT: When you say "the underlying materials"  
6 you're talking about the underlying materials to the Turner  
7 report which is a report for another case.

8           MR. BIERSTEKER: No, not entirely, Your Honor.

9           They were produced -- as I said, there were two pieces.  
10 One piece was part of the Turner report, which we provided to  
11 the government along with all the underlying calculations as a  
12 supplemental disclosure in this case.

13           Another part of those calculations was contained in  
14 materials not prepared in Turner, prepared in this case and  
15 provided to the government, separately in this case along with  
16 the production of other materials in this case.

17           THE COURT: Did that second portion of the materials  
18 produced, did that portion contain the analysis of the Coultas  
19 article, period?

20           MR. BIERSTEKER: If I may, maybe a little further  
21 explanation would help.

22           The Coultas' article sets forth a certain formula and  
23 he took that formula and applied it to other data, and he  
24 applied it to more than one set of other data because he wants  
25 to see if he gets sort of consistent results.

1           And the part that was disclosed in this case was the  
2           Coultas' formula as applied to the Health Survey for England  
3           data.

4           He had also applied it to another data set in the  
5           Turner case that was produced as part of the Turner report but  
6           also provided to the government here.

7           Does that make sense?

8           THE COURT: The real issue is, was the government on  
9           notice that this particular formula was going to be used, or had  
10          been used -- I should say -- in Dr. Wecker's analysis so they  
11          could figure out, A, what it was, and B, whether they had any  
12          grounds for attacking it?

13          MR. BIERSTEKER: I believe so, Your Honor. It was  
14          provided to them. When you give an expert -- when you produce  
15          to the opposition the work that an expert did in this case as  
16          well as in the Turner case, which we said he's going to do this  
17          here, too, I think that's adequate notice.

18          And the notion of cigarettes per day was certainly  
19          discussed at length in his expert disclosure reports, the formal  
20          handwritten reports, although I will concede that the specific  
21          calculation was not specifically discussed in the reports that  
22          he authored.

23          The calculations were produced, and the notion of this  
24          sort of thing was clearly discussed, but the specific results  
25          from this specific calculation was not called out in words in

1 the expert report, but it was certainly provided to the  
2 government, and I think that's fair notice.

3 THE COURT: I think you've said two different things,  
4 one of which I consider relevant, one not particularly.

5 You've said that the specific calculations were not  
6 spelled out. That's of a little less concern to me. What is of  
7 more concern to me is that you also said that the formula, which  
8 is what the plaintiff would have had to try to attack -- at  
9 least, it seems to me that's the most important issue, is the  
10 formula -- that that was not spelled out in the expert report.

11 MR. BIERSTEKER: Not in words, but it certainly was  
12 right there in the expert materials that were provided to the  
13 government twice. The formula was provided twice. They were  
14 just different applications of it to different data. In other  
15 words the formula -- they had the formula, but it was not  
16 specifically spelled out in the expert report.

17 THE COURT: Does the government have anything else to  
18 say?

19 MR. GETTE: Your Honor, I think that where the analysis  
20 goes, or where we are in the analysis, that instead of one  
21 needle in one haystack, we now have two needles in two different  
22 haystacks.

23 In either case, whether it was here in this case or in  
24 the Turner case, it was simply buried in the voluminous  
25 underlying materials, and in neither case, as Mr. Wecker has

1 admitted, was there a mention of that formula in the report  
2 itself and in neither case was Coultas even mentioned in the  
3 text of the reports.

4 MR. BIERSTEKER: I must say, Your Honor, if the test in  
5 this case is going to be that every formula that an expert uses  
6 has to be written down in words in the expert report itself as  
7 opposed to in the accompanying reliance materials, there are  
8 very few experts who are going to be able to testify.

9 MR. GETTE: But in this case, Your Honor, not only do  
10 we not have the formula, we don't even have the mention of  
11 Coultas and that they were going to use the analysis done in  
12 Coultas to do some other individual analysis of their own which  
13 was then buried in the underlying materials.

14 THE COURT: But certainly the expert witness report  
15 went into a great deal of detail -- this is going to be a  
16 question -- regarding Dr. Wecker's analysis of the cigarettes  
17 per day calculations and formulas, if you will.

18 MR. GETTE: It certainly discussed the issue of  
19 cigarettes per day. There's no question about that.

20 The question is how do you analyze the issue of  
21 cigarettes per day? I think we need to have some indication of  
22 what the different times of analyses that Dr. Wecker is then  
23 going to do in the report to understand what the underlying  
24 materials are.

25 THE COURT: How did you ultimately figure it out?

1           MR. GETTE: We didn't figure it out until we got the  
2 written direct testimony.

3           THE COURT: Had you had your experts go over  
4 Dr. Wecker's materials?

5           MR. GETTE: Certainly the underlying materials produced  
6 with the report in this case, I can speak to specifically that  
7 we did have experts, consulting experts, look at those  
8 materials.

9           THE COURT: Well, I'm sure it is correct that every  
10 expert report does not spell out every single formula that's  
11 used for calculations, and that that would impose a standard  
12 that probably 80 percent or more of the expert witness reports  
13 could not meet.

14           I admit this is a close question, which is why I'm  
15 taking so long on it this morning, but there's no question that  
16 the subject matter was fully discussed in the expert witness  
17 report.

18           There's no question that the calculations -- let me put  
19 it a little more accurately -- the results of the calculations  
20 was provided in the Turner report and accompanying materials and  
21 then in a second group of materials that were provided. And I'm  
22 going to rule that that is sufficient compliance with the rules  
23 and overrule the objection.

24           Number 4 raised by the government concerns Dr. Wecker's  
25 refutation of Dr. Burns' criticisms. And, according to the

1 government, at a deposition of Dr. Burns on February 12, 2003,  
2 Dr. Burns obviously had already received Dr. Wecker's criticisms  
3 of Dr. Burns' analysis and responded to them, and the government  
4 is now objecting to Dr. Wecker's response to Dr. Burns'  
5 criticism of Dr. Wecker's criticism.

6 According to the defendants, Dr. Wecker's response was  
7 produced -- I'm not clear where or when. I'm on page 8.

8 MR. BIERSTEKER: Yes, Your Honor. Page 8.

9 THE COURT: Yes, I know, but it is not clear to me what  
10 your response is. Are you saying that Dr. Wecker's response is  
11 contained in the two demonstratives?

12 MR. BIERSTEKER: Yes, those two demonstratives respond  
13 to those criticisms. They were contained within the Turner  
14 report in pictures and discussed, and the accompanying materials  
15 that generated them were provided both in Turner and in this  
16 case to the government. I don't see grounds for a complaint.

17 THE COURT: Mr. Gette.

18 MR. GETTE: I take issue with that representation, Your  
19 Honor. What Dr. Wecker produced in the Turner case and again in  
20 this case was a comparison -- if you remember the last set of  
21 bars. It was an issue of whether tar remains flat and  
22 cigarettes per day remain flat. And the analysis that  
23 Dr. Wecker had provided in Turner and in this case was holding  
24 both of them constant.

25 He now is trying to provide information in which he

1       only holds cigarettes per day constant. That just was never  
2       produced before his written direct.

3               THE COURT: This is a straight factual question, right?

4               MR. GETTE: I agree, Your Honor.

5               MR. BIERSTEKER: I strongly disagree, but I think maybe  
6       what we should do is resolve this factual dispute so that we can  
7       come to the court and say yes or no, or if there are -- if  
8       there's some ambiguity, address that, but right now, I think  
9       with us both making different representations, it's not useful.

10              THE COURT: All right. Let me turn to issue number 5  
11       that the government has raised -- and it's not issue, it's sort  
12       of subissue number 5 -- and that is that Dr. Wecker never  
13       produced a report analyzing the longitudinal advertising studies  
14       of Pierce and Biener.

15              The response of the defendants is quite clear on that,  
16       namely that the government was fully informed on this issue and  
17       certainly by the time of the deposition had the information that  
18       was necessary and that there could be no prejudice to the  
19       government. And, therefore, subissue number 5 on that, the  
20       objection is overruled.

21              The final issue raised by the government is that  
22       Dr. Wecker's report of May 10, 2002, was silent on whether the  
23       findings in the COMMIT study which, of course, was a study of  
24       community intervention on smoking cessation, that the findings  
25       regarding whether -- I'm sorry -- that the discussion of whether

1 the findings in that study were statistically significant was  
2 never produced.

3 I think the defendants' response is, to refer to a  
4 footnote in the underlying literature and to Dr. Wecker's  
5 accompanying computer programs, demonstrating that the results  
6 were not statistically significant. Is that right?

7 MR. BIERSTEKER: Almost. The sentence that's quoted in  
8 the defendants' response reads, straight from his report, not in  
9 a footnote in the text, "Results from the COMMIT intervention  
10 show that it had no effect on smoking quit rates."

11 That particular sentence in his report is accompanied  
12 with a footnote that refers the government to the electronic  
13 materials that performed these statistical significance  
14 calculation.

15 And so our view is the computation was produced. They  
16 were told that he found no effect. If there was any doubt in  
17 their own mind about whether or not that should have been  
18 modified with statistically significant, it should have been  
19 resolved by examining the underlying materials and they could  
20 have asked him in any one of his three depositions.

21 THE COURT: Anything further, Mr. Gette?

22 MR. GETTE: I really think this is an analysis similar  
23 to the prior conversation that we had, which was again the kind  
24 of paucity of information that was actually provided in terms of  
25 the opinions that were going to be offered by Dr. Wecker in his

1 reports and somehow putting the burden on the United States to  
2 dig through the thousands of lines of code and information that  
3 he provided attached to those reports as trying to identify what  
4 the bases for his opinions are. I think the rules require not  
5 only the opinions, but the bases for the opinions to be set out  
6 in the report, and that just wasn't done here.

7 THE COURT: Was there any indication of where, in what  
8 I gather were the very extensive computer programs supplied by  
9 Dr. Wecker, of where he examined this issue of the statistical  
10 significance of the COMMIT report?

11 MR. GETTE: Certainly the footnote to which  
12 Mr. Wecker -- I'm sorry -- Mr. Biersteker refers did indicate  
13 some set of files that could be looked at. But even there, Your  
14 Honor, I think that -- I mean, if you look at the conclusory  
15 sentences that were included in Dr. Wecker's report, for us to  
16 determine that his analysis was turning on the lack or existence  
17 of the statistical significance of that just isn't in his  
18 report.

19 THE COURT: But particular computer files were  
20 referenced; is that right?

21 MR. GETTE: Some set -- I can't give you specifics as  
22 to how large or how many, but certainly there was some  
23 information in the footnote. I can't deny that.

24 THE COURT: The objection is overruled.

25 Issue number 5. The government argues that Dr. Wecker

1 should be precluded from testifying because the government was  
2 denied a meaningful opportunity to depose him and file rebuttal  
3 reports because Dr. Wecker, according to the government, was,  
4 quote, almost universally unavailable to provide answers to  
5 questions relating to his re-analyses of Monograph 13, unquote.

6 The government very effectively in its cross in trial  
7 used Dr. Wecker's lack of specificity, lack of memory at times,  
8 lack of precision, and certainly used it effectively in  
9 cross-examination. I don't see that the government has suffered  
10 any prejudice at all, nor were they denied any relevant  
11 information, and that objection is overruled.

12 I think that was the last -- I know that was the last  
13 objection raised. I believe that covers all of Dr. Wecker's  
14 testimony.

15 We might as well, since we have a couple of minutes, go  
16 over the objections to Dr. Ogden's testimony.

17 MS. EUBANKS: Your Honor, Mr. Gette will be addressing  
18 those and -- Mr. Schwind will be addressing those, and not  
19 Mr. Gette, and he's on his way into the courtroom. He's in the  
20 building, Your Honor.

21 THE COURT: Is he here?

22 MS. EUBANKS: Yes, he is, Your Honor.

23 THE COURT: I think I'm prepared to rule on these, but  
24 wait just a minute.

25 I don't think you will need to look at your boxes for

1 this.

2 MR. SCHWINN: Your Honor, I'm ready.

3 THE COURT: Fine. Would everyone please identify  
4 themselves on this issue?

5 MR. SCHWINN: Your Honor, it will be Gregg Schwinn for  
6 the United States.

7 MR. ALDEN: Your Honor, David Alden for R.J. Reynolds.

8 THE COURT: Now again, everyone, these are the  
9 plaintiff's objections to the written direct of Dr. Ogden. I've  
10 looked them all over. I'm prepared to rule on most. I'm not  
11 sure if I have a question or not. I may not have any questions  
12 on this one. Dr. Ogden, of course, is a fact witness.

13 I have a pretty firm intuition that this issue is going  
14 to arise with virtually all of the defendants' fact witnesses,  
15 at least those who are employees of the defendants, and so I'm  
16 going to be hearing from everybody on this a lot.

17 I'm going to say preliminarily. Sometimes it is going  
18 to be a hard line to draw. I've tried to set forth in a much  
19 earlier opinion what some of my guidelines are. I hope they are  
20 clear to everybody.

21 These people are fact witnesses, but fact witnesses who  
22 come with an expert background. I have to take that into  
23 account in my view, everyone. It's almost -- again, I like to  
24 use the analogy the tort law all the time, but I think it's a  
25 useful one. You take -- just like you take your plaintiff as

1       you find them in a tort case; in a certain sense, you take your  
2       fact witnesses as you find them. And so clearly these people  
3       are going to be able to testify to things or to facts that an  
4       ordinary, moderately, well-educated lay person would not be able  
5       to testify to.

6               That doesn't mean there isn't a line between their  
7       giving factual testimony and opinion testimony. And in the  
8       instance of Dr. Ogden, he crosses the line at least once and  
9       maybe twice.

10              I'm on page 3 now of the United States' objections  
11       where the government clearly states and sets forth those pages  
12       and lines to which it is raising objections.

13              Page 7, line 15, to page 10, line 2, overruled. Not  
14       opinion testimony. I'm not going to open up the direct  
15       testimony to each and every one of these, but I can assure you,  
16       everybody, I've read it and this is my rationale.

17              Page 15, line 10 to line 20, overruled.

18              Page 39, line 1 through 19, overruled.

19              Page 42, lines 11 through 14 -- just make sure, having  
20       said that I'm still going to make sure that.... Lines 42 -- I'm  
21       sorry -- page 42, lines 11 to 14, clearly expert opinion and the  
22       objection is sustained.

23              Page 43, lines 7 to page 44, line 18, the objection is  
24       sustained. Clearly expert opinion.

25              And I do want to go back to one. No, all of those

1 rulings stand, everyone. I think that covers the objections.

2 MR. ALDEN: Your Honor, I recognize you just ruled --

3 THE COURT: I did.

4 MR. ALDEN: Is that the end of the day or can I make an  
5 argument?

6 THE COURT: I assume your arguments are contained in  
7 your written responses, plus I know what the issue is.

8 MR. ALDEN: Your Honor, unless there they are going to  
9 stipulate that our client as good faith belief that ETS doesn't  
10 cause disease, he's offering his good faith expert opinion --

11 THE COURT: I saw that argument, but this is not --  
12 this doesn't turn on the personal good faith of one individual.  
13 The government is not suing Dr. Ogden.

14 You certainly are getting in all your testimony --  
15 well, the great majority of it -- let me put it that way -- of  
16 what Reynolds was doing, how hard it was working on these areas,  
17 what it was accomplishing. But his personal view as to the  
18 accuracy of his conclusion, number one, is not the issue in this  
19 lawsuit, and, number two, it clearly calls for an expert opinion  
20 from him. That is not his area of expertise.

21 MR. ALDEN: Again, Your Honor -- and I apologize, and I  
22 recognize that you've ruled -- but I don't know how I'm supposed  
23 to prove that a corporation believes something if I can't bring  
24 in a Ph.D. chemist who is a specialist in the area to testify  
25 about what he believes. The corporation has no belief outside

1 of that of its senior employees.

2 THE COURT: He's testifying as to everything that the  
3 corporation has done. He is demonstrate -- or it can be argued  
4 that he is demonstrating the corporation's good faith in terms  
5 of all of the activities that the corporation undertook. But he  
6 can't give his expert opinion -- and I forget what these  
7 individual things were, the individual questions -- but they  
8 clearly called for an expert opinion that was beyond the scope  
9 of a chemist expertise. That's the bottom line.

10 MR. ALDEN: Thank you, Your Honor.

11 THE COURT: All right. Any other preliminary matters  
12 that we can take of care of right now? I don't think so.

13 MR. SCHWINN: No.

14 THE COURT: We are going to start with cross of this  
15 witness. Am I correct everyone? I assume so. And Mr. Schwind,  
16 give me a rough idea of what you anticipate.

17 MR. SCHWINN: I anticipate three and a half to  
18 four hours, Your Honor.

19 THE COURT: Okay. All right, everybody, let's come  
20 back at five of 2:00, please.

21 (Recess began at 12:36 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.
	.	March 16, 2005
	.	
Defendants.	.	
. . . . .	.	

VOLUME 77  
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 Criminal Division Frank Marine, Sr. Litigation Counsel, Organized Crime and Racketeering Section 1301 New York Avenue, N.W. Suite 700, P.O. Box 27598 Washington, D.C. 20530 202.514.0908

Scott L. Wallace, RDR, CRR  
Official Court Reporter

APPEARANCES: Cont.

U.S. DEPARTMENT OF JUSTICE  
Civil Division  
Renee Brooker, Assttiant Director,  
1331 Pennsylvania Avenue, N.W.  
Suite 1150  
Washington, D.C. 20004  
202.616.3797

U.S. DEPARTMENT OF JUSTICE  
Gregg M. Schwind, Trial Attorney  
Tobacco Litigation Team  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
202.616.4875

For Defendant:  
Philip Morris USA,  
Inc.

WINSTON & STRAWN  
Dan K. Webb, Esq.  
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 Brochin, Esq.  
Theodore 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.  
William B. Minton, Esq.  
Richard P. Casetta, Esq.  
One US Bank Plaza  
St. Louis, MO 63101  
314.552.6000

Scott L. Wallace, RDR, CRR  
Official Court Reporter

For Defendant:  
Brown & Williamson  
Tobacco Corporation

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

For Defendant:  
R.J. Reynolds Tobacco  
Company

JONES DAY  
Jonathan M. Redgrave, Esq.  
Peter J. Biersteker, Esq.  
Robert Francis McDermott, Esq.  
David B. Alden, Esq.  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
202.879.3939

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

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

For Defendant:  
Liggett Group, Inc.

KASOWITZ, BENSON, TORRES & FRIEDMAN  
Aaron H. Marks, Esq.  
Nancy Straub, Esq.  
1633 Broadway  
New York, NY 10019  
212.506.1700

For Defendant:  
Tobacco Institute

COVINGTON & BURLING  
Phillip Dube, Esq.  
James 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.  
William 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  
202.663.8355

Scott L. Wallace, RDR, CRR  
Official Court Reporter

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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1           CROSS-EXAMINATION OF MICHAEL WAYNE OGDEN, Ph.D.  
2 BY MR. SCHWIND:  
3 Q.       Gregg Schwind for the United States, Your Honor. Good  
4 afternoon, Dr. Ogden.  
5 A.       Good afternoon.  
6 Q.       I'm sure we have not met before, am I correct?  
7 A.       I believe that's correct, yes, sir.  
8 Q.       Mr. McDermott mentioned, I guess the last phrase, subject  
9 to the Court's rulings before lunch, were you in the courtroom  
10 for those rulings prior to the lunch break?  
11 A.       No, sir.  
12 Q.       I'd like to just go over some of your background before  
13 we get into the more substantive parts of your testimony. First  
14 of all, you have been a chemist at R.J. Reynolds from  
15 approximately 1985 to present, correct?  
16 A.       I am a chemist by training. My job title has included  
17 chemist and presently it does not, but yes, I'm a chemist by  
18 training.  
19 Q.       And you were hired straight out of Virginia Tech,  
20 correct?  
21 A.       That's right.  
22 Q.       Where you completed your Ph.D.?  
23 A.       That's right.  
24 Q.       Now, you were in this case deposed on June 5th, 2002. Do  
25 you recall that?

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- 1 A. I do, yes.
- 2 Q. And that was at the law firm of Womble-Carlyle in  
3 Winston-Salem?
- 4 A. That's right.
- 5 Q. And by whom are you currently represented today?
- 6 A. By Mr. McDermott.
- 7 Q. All right. How many times, Dr. Ogden, have you testified  
8 previously in a Court of law?
- 9 A. Do you include deposition or just at trial?
- 10 Q. Just at trial.
- 11 A. Four times previous.
- 12 Q. And those were all in tobacco related cases, correct?
- 13 A. That's right.
- 14 Q. And in fact, they were all cases where the health effects  
15 of passive smoking were in -- was in some way at issue, correct?
- 16 A. That's right.
- 17 Q. Now, you mentioned depositions. Approximately how many  
18 times have you sat for a deposition?
- 19 A. About 10 or 12, I believe.
- 20 Q. And do you recall the month and year of the first time  
21 when you sat for a deposition?
- 22 A. It was 1997. I would say in the -- probably in the  
23 spring, but early in the year, relatively early in the year.
- 24 Q. And that was in the Broin litigation, correct?
- 25 A. Yes, sir, that's right.

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1 Q. And that was the first time you had actually been  
2 questioned by plaintiffs' lawyers, for lack of a better  
3 characterization, in smoking and health cases, correct?

4 A. Yes, sir.

5 Q. Now, you had -- you have testified previously as an  
6 expert and as a fact witness, correct?

7 A. Yes, sir.

8 Q. Now, is it true that you've also testified in other fora,  
9 in other places besides the Courts?

10 A. Yes.

11 Q. Can you tell us about that, please?

12 A. I testified in front of OSHA at their public hearing on a  
13 notice for proposed rulemaking related to indoor air quality. I  
14 also appeared before the Congressional Research Service. I  
15 suppose that was a hearing, or a meeting, I'm not sure exactly  
16 what the proper designation is, but I also appeared there as  
17 well.

18 Q. Any other times where you've testified or provided  
19 testimony?

20 A. Not that I can recall.

21 Q. And were the OSHA hearing and the CRS meeting, were they  
22 adversarial, did you feel like you were being cross-examined?

23 A. The Congressional Research Service, I would not say -- it  
24 was not controversial from a legal point of view. There was  
25 some heated scientific debate. The OSHA public hearing, I

1 believe there was some questioning by lawyers and others that  
2 was -- I would say was mildly adversarial, sure.

3 Q. Now, with respect to your written direct testimony that  
4 you've identified for Mr. McDermott, is it fair that -- or can  
5 we assume that one or more lawyers assisted you in the  
6 preparation of that document?

7 A. Sure.

8 Q. Can you tell us how you went about preparing that  
9 testimony, please?

10 A. Sure. I had discussed it a number of times with local  
11 counsel in Winston-Salem. The first draft that I saw was  
12 provided by that counsel. I reviewed that. We then had several  
13 discussions, telephone discussions, meetings, conference calls,  
14 that kind of a thing, to work through it leading up to when it  
15 was submitted to the Court, I believe a couple of weeks ago.

16 Q. And approximately -- over what period of time did you  
17 prepare that written direct testimony?

18 A. The first draft that I recall seeing was probably three  
19 or four months ago. I don't remember an exact date.

20 Q. And did you have access to the documents that are cited  
21 within that direct testimony?

22 A. Sure.

23 Q. For example, if you had a question about something, you  
24 know, some of the events, for example, take place back in the  
25 1980s, you could quickly look and see if the document said what

- 1 you thought it said, right?
- 2 A. Reasonably quickly, sure.
- 3 Q. All right. You -- if we could turn to page 1 of your  
4 testimony, you were asked at the bottom of the page "have you  
5 done any teaching or mentoring since obtaining your Ph.D.," and  
6 you answered, "yes, I was a visiting professor of chemistry and  
7 am an adjunct professor of chemistry at Virginia Tech with  
8 mentoring responsibilities for a post doctoral fellowship  
9 program." And then the rest of your answer follows. Do you see  
10 that?
- 11 A. I do.
- 12 Q. Now, have you ever taught a course at any university or  
13 Virginia Tech as part of the program that you describe in your  
14 answer?
- 15 A. As part of this program, no, sir.
- 16 Q. And in fact, as I understand from -- well, as I  
17 understand, am I correct that other than speaking at several  
18 lectures, you really have no teaching background?
- 19 A. That's -- I wouldn't say that's true, no, sir, that's not  
20 true.
- 21 Q. Have you taught any courses?
- 22 A. Yes, I've taught numerous short courses in my area of  
23 specialty. I've taught chemistry laboratories, presented  
24 lectures at both graduate and the undergraduate level.
- 25 Q. Now, were those at Virginia Tech?

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- 1 A. The majority of them -- well, the short courses would  
2 have been at a variety of places, the undergraduate and graduate  
3 teaching would be, I believe, entirely at Virginia Tech, yes,  
4 sir.
- 5 Q. And this is before you received your Ph.D., right?
- 6 A. Both before and after, yeah.
- 7 Q. When's the last time you taught a course, a college  
8 course, Dr. Ogden?
- 9 A. It's been some years, I would say 15 years probably.
- 10 Q. Now, you were hired in 1985 by a man named Charles Green,  
11 correct?
- 12 A. That's right.
- 13 Q. You're aware that he testified in this case, right?
- 14 A. Yes.
- 15 Q. Have you reviewed his testimony?
- 16 A. I have not.
- 17 Q. Now, in 1985, he was the principal scientist in charge of  
18 the ETS division that you became a part of, correct?
- 19 A. Yeah, his title was Principal Scientist and yes, he was  
20 in charge of that division when I was hired.
- 21 Q. Now, am I correct that you did not study tobacco  
22 chemistry, or more specifically ETS, while you were in graduate  
23 school?
- 24 A. I did some work with tobacco-related projects -- a  
25 tobacco-related project, but I did not study it in a formal way,

1 no.

2 Q. Now, you were -- your thesis, your project that you had  
3 to complete to get your Ph.D., was that tobacco related?

4 A. No, it was related in my area of specialty,  
5 chromatography. There were a number of applications there, I'm  
6 trying to recall if any of them that I published in the thesis  
7 were tobacco. I don't believe they were, no.

8 Q. But your work, at least as far as your hands-on work as a  
9 chemist in the area of ETS or passive smoking, has all come  
10 about as a result of your employment with R.J. Reynolds,  
11 correct?

12 A. Sure, that's right.

13 Q. I'd like to move to the bottom of page 2, Dr. Ogden.  
14 You're asked: "Have you served on any editorial boards for  
15 peer-reviewed scientific journals?" Do you see that?

16 A. I do.

17 Q. And your answer is, "Yes, I've served on the editorial  
18 boards of Tobacco Science, and a journal" -- hopefully the court  
19 reporter can look at the screen for the spelling -- Beitrage Zur  
20 Tabakforschung International, roughly translated "contributions  
21 to tobacco research." Do you see that?

22 A. You did that very well, yes.

23 Q. Thank you. And is -- are both of these journals still  
24 published?

25 A. The Beitrage is, the Tobacco Science still exists, but it

1 has gone through what I'll call some rough times in recent  
2 years. There is a backlog. They have a number of papers  
3 accepted, but they had some financial funding issues and they  
4 have not actually issued a journal in a year or two. But it  
5 still does exist, yes. But I don't currently sit on the board  
6 of Tobacco Science currently, just on Beitrage.

7 Q. Now, both of these journals, I don't know how to  
8 characterize this, I'll leave the characterization for you, but  
9 are they both funded and controlled by the tobacco industry?

10 A. No, they're not.

11 Q. Is their funding through the tobacco industry?

12 A. The Tobacco Science, the editor of Tobacco Science is a  
13 faculty member at North Carolina State University. Funding for  
14 Tobacco Science comes, I would say some from -- well, from a  
15 part of an attendance fee at a conference which is a tobacco  
16 conference. It's not entirely tobacco people that come, and  
17 also there's a page charge in that journal, so it's also partly  
18 funded by the authors who submit journals -- I'm sorry, submit  
19 papers or manuscripts to that journal.

20 Q. Am I correct you have representatives of R.J. Reynolds  
21 and Philip Morris on the board of that journal?

22 A. The -- I'm not -- there -- the editorial board, no one  
23 from Reynolds currently sits on that. I'm not sure about anyone  
24 from Philip Morris.

25 Q. Jerry Whidby, are you familiar with that name?

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- 1 A. I am.
- 2 Q. And he's a Philip Morris scientist, right?
- 3 A. He's retired, I believe, but he's a former scientist,  
4 yes, sir.
- 5 Q. And you're aware that he sat on the board of Tobacco  
6 Science, right?
- 7 A. I'm not aware of that. He may have.
- 8 Q. Let's move to the other journal. Before I do that, did  
9 Dr. Green sit on the boards of both of these journals as well,  
10 prior to your taking that place?
- 11 A. I don't know whether he did or not.
- 12 Q. With respect to the Beitrage, in fact, the -- this  
13 publication is controlled by and published by an organization  
14 called the Verband der Cigaretten Industry, the V.D.C., in Bonn,  
15 correct?
- 16 A. They are the funded journal, yes, sir.
- 17 Q. And they publish it, right?
- 18 A. Right, they publish it.
- 19 Q. And Reynolds, Philip Morris, British American Tobacco,  
20 and other cigarette manufacturers are the Verband, correct?
- 21 A. Reynolds is not, to my knowledge presently, but the  
22 others I'm sure are, yes.
- 23 Q. And though you state in your testimony that you are a  
24 member of the editorial board, Dr. Ogden, isn't it more accurate  
25 to state that you're a member only of the advisory board for

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1 that journal?

2 A. I'm not sure of the language you use. I believe it is  
3 editorial board for Tobacco Science. The Beitrage may say  
4 advisory board. It is the only Scientific Advisory Board for  
5 that journal that I'm aware of.

6 MR. SCHWIND: May I approach the witness Your Honor?

7 THE COURT: You may.

8 BY MR. SCHWIND:

9 Q. Dr. Ogden, I would like to hand you a document that's  
10 been marked U.S. Exhibit 92091. Do you recognize this as a  
11 subscription -- I'll put this on the ELMO here -- as a  
12 subscription application to the journal we're talking about, the  
13 Beitrage.

14 A. It's clearly read as the Beitrage. I don't know if  
15 it's -- I'm not sure what it is. It appears to be copied from  
16 the journal from some sort of advertisement.

17 Q. Well, on the first page on the left column near the top,  
18 you see a list of names there, right?

19 A. Sure.

20 Q. And we see the editors of the two -- or the two editors  
21 of the journal are Wolf-Dieter Heller, and Gerhard Scherer; is  
22 that right?

23 A. That's correct.

24 Q. Do you know both of these gentlemen?

25 A. Yes, sir, I do.

- 1 Q. Do you know how long the two of them have been working  
2 for the Verband?
- 3 A. Dr. Scherer does not currently work for the Verband. He  
4 did previously, I believe. As to how long either one of them  
5 may have worked there, no, sir, I don't know.
- 6 Q. And we see under the advisory board your name listed  
7 there, correct?
- 8 A. That's right.
- 9 Q. And there are some other names?
- 10 A. Um-hmm.
- 11 Q. Can you -- looking at that list, can you confirm that the  
12 advisory board for the journal consists of persons employed by  
13 British American Tobacco, Reynolds, Philip Morris, Lorillard,  
14 and Japan Tobacco?
- 15 A. I don't see anyone employed by Lorillard. But the others  
16 look right along with other institutions, yeah.
- 17 Q. Do you know a gentleman named Dan Heck?
- 18 A. I do.
- 19 Q. He works for Lorillard, right?
- 20 A. As far as I know he still does, yes.
- 21 Q. And although his name is not on the list, are you aware  
22 that he's currently on the advisory board for this journal?
- 23 A. I believe that he is. I was going to comment, this isn't  
24 the current list, but I believe that he is on the current board,  
25 yes.

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1 Q. Dr. Ogden, I'd like to move to a different subject, and  
2 start off with this question: Are you compensated for your  
3 testimony?

4 A. No, sir, I'm compensated as an employee of the company,  
5 but not anything special or different because of testimony.

6 Q. So what compensation do you expect to receive as a result  
7 of your testimony here today?

8 A. Just my normal salary.

9 Q. Just whatever you get every two weeks or every month; is  
10 that right?

11 A. That's right, every month.

12 Q. Now, Dr. Ogden, isn't it true that you have, in fact,  
13 received other compensation in the form of awards and promotion  
14 for your ETS testimony in the past?

15 A. Possibly some R & D awards, peer awards, but I wouldn't  
16 say I received any promotion because of that. Certainly it  
17 factors into part of my job, and, you know, it's -- I've done it  
18 some over the history and, you know, there's some involvement  
19 there, so that would be recorded in my, you know, ongoing  
20 accomplishments and as part of my normal workload, sure.

21 Q. I'd like to hand you a document that's marked U.S.  
22 Exhibit 30052. Now, this is a document that's titled in the  
23 upper left-hand corner, Chairman's Award Luncheon for March 7th  
24 1995, 10th floor Reynolds building, from 12:30 to 2:30. Do you  
25 see that?

- 1 A. I do, yes.
- 2 Q. Now, do you -- well, first of all, do you recognize this  
3 document? Have you seen it before?
- 4 A. I have seen it in conjunction with this case, but not  
5 before that, no.
- 6 Q. Do you recall this particular luncheon or this particular  
7 event?
- 8 A. I was not in attendance at this luncheon.
- 9 Q. Do you recall receiving an award connected to this  
10 luncheon?
- 11 A. I do, yes.
- 12 Q. Can you turn to page 11, please, of this document?
- 13 A. Okay.
- 14 Q. And at the top, we see a list of Reynolds' scientists  
15 that include you, right?
- 16 A. That's right, along with some other names, yes.
- 17 Q. Well, they're all Reynolds' persons, right?
- 18 A. Past or present, yeah, sure.
- 19 Q. And the list identifies everyone of R & D who compiled  
20 data from ETS studies they've conducted at Reynolds Tobacco  
21 since 1983, and then we see the next paragraph, the middle  
22 paragraph, they provided testimony entering their scientific  
23 data into the public record at the OSHA hearing. Do you see  
24 that?
- 25 A. That's what that says, but that's not quite true. There

- 1 appears to be a mistake here.
- 2 Q. Did you provide testimony?
- 3 A. I did, but not all of these people did. Not all of these  
4 people did what is represented here. It appears to be a typo of  
5 some sort.
- 6 Q. But you can confirm that you did give the testimony,  
7 right?
- 8 A. At OSHA hearing?
- 9 Q. Yes.
- 10 A. Yes, sir, absolutely.
- 11 Q. Now, what is or what was the chairman's award that you  
12 were receiving?
- 13 A. The chairman's award, well the chairman's designation  
14 derives from the chairman of the company. R.J. Reynolds, as I'm  
15 sure many if not most companies do, they have an awards type of  
16 structure that they do conduct generally on an annual basis that  
17 includes a variety of awards. They're individual accomplishment  
18 awards, there's team awards, we have one called a China breaker  
19 award for like innovation and that sort of thing.
- 20 Q. Dr. Ogden, if I can interrupt you, what do you physically  
21 receive?
- 22 A. I'm sorry.
- 23 Q. That's my question.
- 24 A. Okay. So your question is what did I receive for this?
- 25 Q. Yes.

- 1 A. Okay. There were two items I recall receiving. One is a  
2 crystal statute of some sort, and a check for \$2500, I believe.
- 3 Q. Let's move forward in time now to 1997. Again, the  
4 chairman's award we just saw was in 1995. Let's move to 1997.  
5 I'll hand you a document marked U.S. Exhibit 30351, and this is  
6 a July 10th, 1997 letter from Charles Green to Dr. Lippiello, is  
7 that pronounced correctly?
- 8 A. That's right.
- 9 Q. And he's with the Technical Review Committee or was with  
10 the Technical Review Committee at that time, right?
- 11 A. That's right. I presume he was the chairman at that  
12 time.
- 13 Q. And if we look at the first paragraph of Dr. Green's  
14 letter, he writes, "I hereby join with Dr. David Doolittle to  
15 co-nominate Dr. Michael W. Ogden" -- and he identifies your  
16 group there -- "for promotion from R & D Master Scientist to R &  
17 D Principal Scientist." Do you see that?
- 18 A. I do, yes.
- 19 Q. Now, Dr. Doolittle and Dr. Green were, of course, both  
20 superiors of yours at the time, right?
- 21 A. That's right, yes.
- 22 Q. And if I'm correct, Dr. Green retired in 1998?
- 23 A. About that time, sure.
- 24 Q. Do you still work for Dr. Doolittle?
- 25 A. I do, yes.

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1 Q. If we look at the bottom of page 1, and the top of page  
2 2, we can see where Dr. Green provides six reasons, or six bases  
3 to recommend your promotion. Do you see those?

4 A. There are six reasons that are covered in this  
5 co-nominating letter, yes.

6 Q. And he writes, "The topics that I will cover for the  
7 Technical Review Committee in this co-nominating letter are the  
8 following." Can you read the second reason, please?

9 A. The second reason? It says "testimony by RJRT's panel of  
10 experts during the U.S. occupational and safety administration's  
11 paren, OSHA, closed paren, hearings on a proposed indoor air  
12 quality rule."

13 Q. And that's referring back to the OSHA testimony we saw in  
14 the 1995 award, right?

15 A. That's right.

16 Q. Can you read reason 6, please?

17 A. Number 6 is, "providing expert testimony on the subject  
18 of environmental tobacco smoke, paren, ETS."

19 Q. So Dr. Ogden, is it fair to observe that two of the six  
20 reasons for your promotion relate to your providing testimony?

21 A. No, I don't think that's fair. Two of the six reasons  
22 enumerated in this co-nominating letter are as I've just read.  
23 This is a co-nomination, along with Dr. Doolittle, and I believe  
24 this is also -- this may be a renomination letter. I'm not  
25 entirely sure, so -- but clearly part of the work that I've

1 done, in addition to what I've testified to in my direct on  
2 making measurements and developing methods and whatnot, was to  
3 provide that information when called upon to do so to the OSHA  
4 public hearing and other venues.

5 Q. Well, not every scientist at Reynolds testifies, right?

6 A. That's right.

7 Q. It's only certain ones, right?

8 A. The ones that have the knowledge that's called for in  
9 whatever proceeding or hearing that it's required, sure.

10 Q. Dr. Ogden, you were promoted to Principal Scientist,  
11 weren't you?

12 A. I was, yes.

13 Q. Can you give us an idea of what that translated into pay  
14 wise?

15 A. I would hazard to guess. I don't recall exactly. Normal  
16 promotions, this would be part of the normal progression for a  
17 senior level scientist within the R & D Department at Reynolds.  
18 Normal promotions entail 10, 15 percent pay increase, that sort  
19 of thing, but I don't recall specifically what this one was.

20 Q. Now, when you joined Reynolds back in 1985, what was your  
21 proximate starting salary?

22 A. Good question. \$38,000 a year.

23 Q. And with the promotion to Principal Scientist, I know  
24 there were a few steps along the way?

25 A. There were several steps, yes.

1 Q. But with the promotion to Principal Scientist, what did  
2 that take your salary to, approximately?

3 A. I'm guessing, I'm reticent to do that, but I would guess  
4 in the neighborhood of a \$100,000.

5 Q. Now, according to your expert report filed in this case,  
6 you testified in the trial of another case called Butler,  
7 Mississippi case back in 1999. Do you recall that?

8 A. I do, yes.

9 Q. And generally speaking, Butler was a case brought by the  
10 family of a former Mississippi barber who claimed that his death  
11 was caused by his customers smoking, right?

12 A. I believe that's a fair representation, yes.

13 Q. So it was a passive smoking or ETS case, right?

14 A. Sure.

15 Q. And your -- and was your testimony in that case related  
16 to individual exposure to ETS measurements or ETS markers, and  
17 Mr. Butler's probable exposure?

18 A. Yes, it was.

19 Q. So your testimony, Dr. Ogden, was similar in many  
20 respects to your written testimony submitted in this case, aside  
21 from, of course, your opinion as to Mr. Butler's probable  
22 exposure, right?

23 MR. McDERMOTT: Your Honor, could we ask the witness to  
24 speak up? I couldn't hear the last answer he gave.

25 THE WITNESS: Sorry. Where do I go now, to your question?

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- 1 BY MR. SCHWIND:
- 2 Q. I guess your last answer was "yes"?
- 3 A. Well, depends on what the last question was. Maybe we  
4 should do that again. I don't want --
- 5 Q. Sure. I had just asked you to confirm that Butler was a  
6 case brought by the family of a Mississippi barber who claimed  
7 that his death was a result of his customers smoking?
- 8 A. That's right, that's a fair representation, I believe,  
9 yes, sir.
- 10 Q. And your testimony in that case related to individual  
11 exposures to ETS and measurements of ETS markers, right?
- 12 A. Yes, that was my area of expertise and that's what I  
13 provided to the Court.
- 14 Q. And those are the same topics that you've testified to in  
15 your written direct testimony in this case, right?
- 16 A. That's -- yes, sir, I mean, that's the subject of my  
17 work, certainly up to that time.
- 18 Q. And that's typically what you'll testify to when you are  
19 called as a witness by R.J. Reynolds, right?
- 20 A. In my area of expertise, yes, sir, that's related to ETS  
21 the chemistries, exposures and what Reynolds has done.
- 22 Q. Now, in the case of Butler, Reynolds and the other  
23 cigarette manufacturer defendants received a favorable verdict,  
24 a defense verdict, right?
- 25 A. That's right, yes, sir.

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- 1 Q. And do you recall that the verdict was at the very  
2 beginning of June 1999?
- 3 A. That sounds -- I testified, I believe, in late May, so it  
4 would have been approximately that time. I don't remember an  
5 exact date.
- 6 Q. And your position in June of 1999 was, was it still  
7 Principal Scientist that you had been promoted to?
- 8 A. Yes, it was.
- 9 Q. Now, who is Don deBethizy?
- 10 A. Don deBethizy was the product evaluation group within R &  
11 D at that time.
- 12 Q. So he was, of course, senior to you?
- 13 A. He would have been my boss's boss, yes.
- 14 Q. Dr. Ogden, I would like to hand you a document marked  
15 U.S. Exhibit 30353. Now, this exhibit is a -- I guess an e-mail  
16 string, for lack of a better descriptive phrase, that starts  
17 with a message from you at the bottom on Thursday June 3rd at  
18 12:24 a.m. Do you see that?
- 19 A. I do, yes.
- 20 Q. And you report to a number of persons that in the Butler  
21 trial there was a unanimous verdict for the defense, right?
- 22 A. That's right.
- 23 Q. The next e-mail, right above it, is later on that day,  
24 because your message was just after midnight, later on that day  
25 from Mr. -- is it Dr. deBethizy or Mr. DeBethizy?

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- 1 A. Doctor.
- 2 Q. Who writes "FYI, please notify your staff and pass on  
3 your congratulations to Mike Ogden for his excellent testimony  
4 in the Butler case, which allowed the scientific facts and  
5 commonsense to prevail in the courtroom." Do you see that?
- 6 A. I do.
- 7 Q. And that message was passed along with the message right  
8 above it from Dr. Doolittle, your boss, right?
- 9 A. That's right.
- 10 Q. And he writes "Please join me in congratulating Mike and  
11 the rest of the defense team on the Butler verdict. This was an  
12 extremely important precedent setting case" and he describes the  
13 case there. "Mike did an exemplary job representing RJR's  
14 scientific efforts on ETS chemistry and exposure assessment."  
15 Do you see that?
- 16 A. I lost the place, but --
- 17 Q. It's on the screen, second highlight from the top.
- 18 A. First sentence, right. Efforts on ETS -- right, okay.
- 19 Q. Now, Dr. Ogden, is acknowledgment, is recognition from  
20 your superiors important to you?
- 21 A. Sure it is.
- 22 Q. And is this one of the comments in this e-mail correct  
23 that you were considered part of the defense team in the Butler  
24 case?
- 25 A. I would think all the witnesses that were called on

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1 behalf of the defense would be part of the defense team, sure.

2 Q. Did you consider yourself part of the defense team?

3 A. I don't know that I would have used those words, but I

4 clearly was part of the defense's case, which I suppose means

5 part of the team.

6 Q. Is it true that recognition for your testimony in Butler

7 didn't end with that e-mail chain?

8 A. I think that's true, sure.

9 Q. I'll hand you a document marked U.S. 61782. And this is

10 another e-mail. This one's from Dr. deBethizy dated June 4th,

11 the day after this string of e-mails we just saw, and the

12 subject is "commendation award recommendation", and its

13 addressed to a person named Jo -- I'll let you pronounce the

14 last name.

15 A. Peay.

16 Q. Jo Peay. First of all, who is Ms. Peay?

17 A. She would be Dr. deBethizy's administrative assistant, or

18 would have been, sorry.

19 Q. I'm sorry?

20 A. She would have been at that time, right.

21 Q. And can you read, please, the paragraph that

22 Dr. deBethizy wrote?

23 A. "I want to recommend Mike Ogden for a special cash award

24 for his testimony in the Butler case. Do not discuss this with

25 anyone. Ask Mary Ward if she could supply a page describing why

1 Mike should be awarded for his effort in Butler. You don't have  
2 to tell her we're seeking a cash award. Add the text she  
3 provides, edit it to your liking, and send it to me via e-mail.  
4 Thanks, Don."

5 Q. Now, on June 4th, did you know that Dr. deBethizy was  
6 requesting this award or this statement?

7 A. No, I didn't.

8 Q. Mary Ward is a lawyer, correct?

9 A. Yes.

10 Q. What was your working relationship with Ms. Ward at this  
11 time?

12 A. Well, Ms. Ward was one of the several attorneys that I  
13 worked with over the years. Mary was, in terms of her area of  
14 specialty, she was, I would say, the company's -- or at least R  
15 & D's point person on certain issues that included ETS. So I  
16 certainly would work with Mary in the context of preparing  
17 public comments like OSHA that we talked about earlier and she  
18 would be the one that would have been kept involved or -- I'm  
19 sure from the outside lawyers as to how trials were progressing  
20 and that sort of thing. So we didn't meet all that often, but  
21 we had opportunities to exchange information, for me to advise  
22 her of the science, et cetera.

23 Q. Did she work with you in -- with respect to the Butler  
24 case?

25 A. I don't recall that she did, no, sir.

1 Q. Now, Mr. -- I'm sorry, Dr. deBethizy is asking through  
2 Mr. Peay if Mary Ward can supply a page describing why you  
3 should be rewarded. Are you aware that that eventually turned  
4 into a statement in support of your award?

5 A. A statement from Mary Ward?

6 Q. Are you aware that this -- well, eventually, subsequent  
7 to this e-mail, a statement, a written statement was prepared in  
8 support of the award that was being requested by Dr. deBethizy?

9 A. I'm aware that there's a derivative document, right, that  
10 furthers that request.

11 Q. I'm hand you a document marked U.S. Exhibit 61781 and  
12 perhaps you can tell me if this is the derivative document that  
13 you're familiar with?

14 A. Yes, sir, and I just have become familiar with it in the  
15 context of this litigation, but I am familiar with this document  
16 now.

17 Q. All right. If we could fly out the first third -- top  
18 third of this document. The document's titled "commendation  
19 award recommendation". And, of course, it's got your name at  
20 the top and the amount is \$5,000.

21 And if we could just highlight part of the first  
22 paragraph. "The jury's decision in the recent Butler case in  
23 Mississippi was a major victory for our company. The lawyers,  
24 outside counsel and RJR, indicate that Mike Ogden's testimony  
25 was instrumental in the outcome of the verdict." Do you see

- 1 that?
- 2 A. Yes, sir, I do, you read that correctly.
- 3 Q. Have you -- do you know who wrote this document?
- 4 A. No, sir, I don't. I can look at the names at the end of
- 5 it, but I don't know who prepared it.
- 6 Q. Well, the nominator, again, on the second page is
- 7 Dr. deBethizy, right?
- 8 A. That's what this draft says, yes, sir.
- 9 Q. Now, if we go down to the -- farther down on the first
- 10 page, the second paragraph from the bottom, we see that -- well,
- 11 the person wrote, "this sort of testimony has been presented in
- 12 past trials by Dave Townsend." Do you see that?
- 13 A. I do.
- 14 Q. And then we see in the -- at the bottom paragraph, the
- 15 last sentence, "R.J. Reynolds Tobacco Company should reward Mike
- 16 for his outstanding performance on behalf of our company in the
- 17 Butler trial." Do you see that?
- 18 A. Yes, sir, I do. I mean, I see the sentences that you're
- 19 pulling out of some context here, but I see those.
- 20 Q. Now, you -- you said you've seen this document before,
- 21 right?
- 22 A. That's right.
- 23 Q. Did it refresh your recollection of events that happened
- 24 back in 1999?
- 25 A. In terms of the -- of this particular issue?

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- 1 Q. In terms of this -- of the Butler trial and what you did  
2 and the recognition you received?
- 3 A. Well, sure, it would be hard to read that and not  
4 recollect something about the Butler trial situation.
- 5 Q. Let's move forward in time to the next year, to 2000.  
6 I'm going to hand you a document that's been marked U.S.  
7 Exhibit 61867. You've probably seen this document recently as  
8 well, correct?
- 9 A. That's correct.
- 10 Q. And this is a document dated February 4th, 2000. And the  
11 subject is the G.R. DiMarco award for Dr. Mike Ogden. And it's  
12 to a person named Linda Fulk, and it's from a Dr. Brian  
13 Lawrence. Are you familiar with those two individuals?
- 14 A. Yes, sir, I am.
- 15 Q. And according to this document we see "for the  
16 development, interpretation and presentation of technically  
17 complex information on the science of individual's probable ETS  
18 exposure to both scientific gatherings and as an expert witness  
19 in a legal environment in 1999." Do you recall receiving this  
20 award, Dr. Ogden?
- 21 A. The DiMarco award? Yes, sir, I do.
- 22 Q. And was it, in fact -- let me get this right. What did  
23 this award consist of?
- 24 A. It consisted of a computer generated certificate and a  
25 store bought frame.

- 1 Q. Anything else?
- 2 A. Recognition at our annual awards -- annual awards  
3 ceremony in R & D.
- 4 Q. And did any other scientist receive that award for their  
5 testimony in the Butler case or in any litigation that year?
- 6 A. It's only given one per year.
- 7 Q. So you got it for the company, then?
- 8 A. For R & D.
- 9 Q. For R & D?
- 10 A. And actually it's only for part of R & D. I can explain  
11 to you the entire award structure of R & D, but this is part  
12 of -- as I had in my direct testimony, describing the technical  
13 ladder of R & D scientists, so this is an award given by one's  
14 peers on the technical ladder. So those would be the master  
15 scientists, principal scientists and senior principal  
16 scientists. They would make the -- a person would be nominated  
17 and that group of individuals would make the selection.
- 18 Q. Now, the text that we see here, is that text what you  
19 have on the certificate in the store bought frame that you  
20 described?
- 21 A. It probably is. I mean it looks --
- 22 Q. It looks like the kind of thing you would see scribed on  
23 an award, right?
- 24 A. Printed on the certificate, sure.
- 25 Q. Now, the -- is it fair to say that this award had very

1 much to do with what you and the company did in litigation?

2 A. Well, as it says in this announcement, disseminating  
3 information technically complex information, was the essence of  
4 the award, that included both scientific gatherings and as  
5 called upon to do so in a legal environment during that year.

6 Q. Well, the "legal environment" being trials, right?

7 A. Being that trial. That's the only one I testified in in  
8 1999.

9 Q. Now, you said that there was some sort of ceremony where  
10 you received this award, right?

11 A. There as an annual R & D ceremony -- there has been up to  
12 this year, but generally there's one a year, yes, sir.

13 Q. I assume if it's an R & D ceremony it's attended by other  
14 scientists within R & D?

15 A. Oh, sure, it's an open invitation to everyone in R & D.

16 Q. Families, too?

17 A. No.

18 Q. And obviously that ceremony, this basis is announced or  
19 was announce to the rest of the attendees?

20 A. This along with dozens of other awards, yes, sir.

21 Q. But again, you were the one that got it out of R & D,  
22 right?

23 A. For this award, but it's a ceremony for many different  
24 awards. Patents that were issued during the year are awarded, a  
25 whole host of team awards; there are other individual awards,

1 awards for people who serve on voluntary committees. So all of  
2 the awards for R & D are wrapped into the, you know, one or  
3 two-hour ceremony that transpires generally in February of each  
4 year.

5 Q. But my point is that the other scientists who attended  
6 from R & D, were aware of the basis for your receiving this  
7 award, right?

8 A. I presume this language was read at that gathering, yes,  
9 sir.

10 Q. And in fact, you've been -- you testified in a number of  
11 cases after this date, correct?

12 A. Just one up until today.

13 Q. And is it fair to observe, Dr. Ogden, that testifying in  
14 support of Reynolds has enhanced your promotion potential at the  
15 company?

16 A. I don't believe that it has, no, sir.

17 Q. Even though it's been mentioned now on three awards and  
18 one statement in support of your promotion?

19 A. Well, I think a more fair characterization would be to  
20 say that I'm promoted for the same reasons that I testify. I  
21 mean, in my opinion, I've done good work, we as a group have  
22 done great work, we've published that to the scientific  
23 community, and I personally believe that I speak well and write  
24 well. Those are the same attributes that have allowed me to  
25 progress my career in the company that also allow me to explain

1 these concepts to audiences, including in the legal environment.  
2 Q. But the specific reasons for these awards, these  
3 recognition, these events that we've talked about has been your  
4 testimony, right?  
5 A. Which awards? We're only talk about one award here the  
6 DiMarco.  
7 Q. Well, we've seen the 1995 document, right?  
8 A. Which was the --  
9 Q. Chairman's award?  
10 A. Right, the chairman's award, sure.  
11 Q. We saw the 1999 -- well, let's keep it chronological.  
12 The 1997 promotion recommendation from Dr. Green, right?  
13 A. That includes that with other issues, sure.  
14 Q. We saw the 1999 e-mail from Dr. deBethizy, right?  
15 A. But -- and that's not anything I ever received. I didn't  
16 know anything about that until the context of this trial.  
17 Q. And we see that February 2000 DiMarco award, right?  
18 A. That relates to communicating complex information, sure.  
19 Q. But the commonality in all of them, Dr. Ogden, is  
20 testimony, right?  
21 A. No, it's not. The commonality is what I would say is the  
22 very good work that we had done as a group, and me individually,  
23 on ETS that had to be communicated both to the scientific  
24 audiences and as called upon by the company to relate that in a  
25 legal environment.

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1 Q. Well, if that's all it was, Dr. Ogden, let me ask you  
2 this: Have you ever tried to conceal this arrangement with your  
3 company, that is, receiving awards and promotions for your  
4 testimony?

5 A. I don't -- I disagree with your characterization. I  
6 don't believe I have received promotions for testimony or  
7 awards, certainly, you know, mention that as an accomplishment  
8 on difficult tasks that happen to be done well to present the  
9 science well. Your question is have I tried to conceal it? I  
10 don't believe I have, no.

11 Q. How many times have you been promoted since you started  
12 testifying for the company, Dr. Ogden?

13 A. You mean -- I lost you. How many times have I been  
14 promoted since I started testifying? Is that your --

15 Q. Since you started testifying.

16 A. Twice, I believe.

17 Q. And that would have been to Principal Scientist, right?

18 A. If my months are right, yeah, that would be the first one  
19 and --

20 Q. And then to some type of director position?

21 A. Director, which is my current title.

22 Q. I would like to show you a document marked U.S.

23 Exhibit 77852. This is the expert report that you submitted and  
24 was filed in this case. Do you recognize this document?

25 A. Yes, this appears to be the document over my signature.

- 1 Q. And, of course, you were shown this at your deposition in  
2 this case as well, right?
- 3 A. I don't specifically recall, but I have no doubt that I  
4 was.
- 5 Q. I'd like you to -- I would like you to look at your CV  
6 that follows this expert report. You attach a CV to it that's  
7 approximately -- not approximately, exactly 13 pages, right?
- 8 A. That's correct, yes, sir.
- 9 Q. And the last few pages, pages 10 through 13, contain a  
10 number of items under the heading "honors awards and  
11 memberships", right?
- 12 A. That's right.
- 13 Q. Now, I would like to go to entry V V, as in Victor  
14 Victor. That's the last entry on your CV. Can you read that  
15 entry for the Court, please?
- 16 A. Sure. It says "V V 2,000, hyphen, R.J. Reynolds Tobacco  
17 Company, G.R. DiMarco R & D fellow award for development,  
18 interpretation and presentation of technically complex  
19 information on the science of dot dot dot, ETS exposure" end  
20 quote.
- 21 Q. Does that sound familiar?
- 22 A. Sure.
- 23 Q. Dr. Ogden?
- 24 A. I read that, sure.
- 25 Q. In fact, where does that language come from?

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- 1 A. It's excerpted from the language that's on the  
2 certificate I received which I -- we discussed earlier, that was  
3 probably on the memo you just showed me.
- 4 Q. So it comes from the document marked U.S. Exhibit 61867,  
5 right?
- 6 A. Well, I wouldn't say it came from that document, but yeah  
7 the same genesis.
- 8 Q. But again, some language has been taken out?
- 9 A. Sure, I did that in an attempt to remain brief.
- 10 Q. And in fact, the language that was taken out includes the  
11 last phrase "to both scientific gatherings and as an expert  
12 witness in a legal environment in 1999," right?
- 13 A. That's taken out and also the individual and probable.  
14 As I said, I was attempting to be brief. Through the years this  
15 thing has grown and I've attempted to keep it at a manageable  
16 size by reducing the font and eliminating what I consider to be  
17 non essential language. I may have made an error in judgment.  
18 I certainly didn't intend to try to mislead anyone by taking out  
19 that phrase. I was simply trying to be brief.
- 20 Q. Dr. Ogden, you -- in your expert report you had  
21 two-thirds of a page left blank, right?
- 22 A. Well, I didn't regenerate this for the expert report. It  
23 is what it is. I simply attached the then current copy of my  
24 CV.
- 25 Q. I mean, you didn't omit this language about testifying

1 because you were trying to fit the CV on a certain number of  
2 pages, right?

3 A. Oh, no, no. As it grows, it becomes, you know, larger  
4 and then I simply try to maintain a manageable size. I've  
5 reorganized this thing many times to try to keep it brief and  
6 concise and as accurate as possible.

7 Q. Well, if you wanted to be as accurate as possible you  
8 would have included the entire basis, right?

9 A. Well, I would have included many things, possibly more if  
10 I wanted to include everything. I believe that is a reasonable  
11 representation of my receiving that award in that year.

12 Q. Now, your testimony is it was your idea to remove that  
13 language before --

14 A. Oh, this work is entirely my own. I generated this as  
15 soon as -- in fact, before I left graduate school and I just  
16 maintained it and edited it and kept it going about once a year  
17 since then.

18 Q. Now, the -- are you aware of other instances where  
19 scientists at Reynolds received awards for testifying in  
20 litigation?

21 A. Not -- you showed me the China -- I'm sorry, the chairman  
22 award but that was OSHA public hearing. I don't have a  
23 recollection of anything responsive to your question as I sit  
24 here, no, sir, I don't recall.

25 Q. You don't recall, again, in all the ceremonies that

1 you've undoubtedly attended, hearing that any scientist was  
2 receiving award, even in part, for testimony -- for providing  
3 testimony as you provided?

4 A. I don't recall it, no, sir.

5 Q. I'd like to go to -- you're aware that Dr. Townsend  
6 testified in this case, right?

7 A. Yes, sir, I am.

8 Q. Did you have a chance to review his written direct  
9 examination?

10 A. No, sir, I was instructed I was not to review any  
11 testimony of any other witness.

12 Q. Dr. Townsend was asked at the very end of his written  
13 direct testimony, "In your experience as a supervisor, and more  
14 recently as someone responsible for making decisions regarding  
15 promotions, what impact, if any, does the fact that a scientist  
16 has testified for Reynolds have on their promotion, evaluations  
17 and compensation?" And just so there's no problem with the  
18 context, I'll hand you a copy of the section of his testimony.

19 A. Can you tell me where you're reading?

20 Q. At page 199 at the bottom. Do you see where he's asked  
21 that question, Dr. Ogden, beginning at line 19?

22 A. Yes, I see it.

23 Q. And if we go forward to the continuation of his answer --  
24 I'll just read his answer, "Reynolds Research and Development  
25 Department is a scientific organization and our people are

1 rewarded for being good scientists and conducting good  
2 scientific research. If they go above and beyond their job  
3 requirements as a scientist, then those actions may be  
4 recognized by management for that very reason, because they went  
5 above and beyond what is expected. Some examples of that would  
6 include coordinating scientific conferences, being an adjunct  
7 professor, or serving on the board of a scientific organization.  
8 But, any suggestion that we expect our scientists to say certain  
9 things in litigation is completely false. Any promotions or  
10 awards that are given to our scientists are based on merit and  
11 have nothing to do with the substance of what they say in  
12 litigation, or any other public forum."

13 Do you see that?

14 A. Yes, sir, I do.

15 Q. Now, again, we've -- you received the award in 1995,  
16 right?

17 A. The chairman's award?

18 Q. Right. The promotion in 1997, right?

19 A. I was promoted in '97, sure.

20 Q. The award request in 1999, right?

21 A. Right.

22 Q. The award in 2000, right, that's on your CV partially,  
23 right?

24 A. The award is on my CV, yes.

25 Q. And you stated you were promoted one other time in that

1 timeframe to director?

2 A. Between '97 and 2001, right.

3 Q. Is it -- we see now that -- well, let me ask the question  
4 this way: Would you agree that Dr. Townsend's statement that  
5 any promotions or rewards that are given to our scientists are  
6 based on merit and have nothing to do with the substance of what  
7 they say in litigation is incorrect, at least with respect to  
8 you, Dr. Ogden?

9 A. No, I don't think that is correct. I believe that the  
10 statement as Dr. Townsend has worded it is fair.

11 Q. Is it correct with respect to you, Dr. Ogden?

12 A. I have received promotions and awards for many things.

13 Q. It's a yes or no question, Dr. Ogden?

14 MR. McDERMOTT: Objection, Your Honor. Let the witness  
15 finish his answer, please.

16 MR. SCHWIND: Your Honor, is he correct or not. He can  
17 explain that, but I think it's a yes or no question.

18 THE COURT: You need to answer yes or no first and then  
19 you may explain your answer.

20 THE WITNESS: May I ask you to either restate or have the  
21 question read back.

22 BY MR. SCHWIND:

23 Q. Is Dr. Townsend's answer, and I read in particular the  
24 last sentence that "any promotions or awards that are given to  
25 our scientists are based on merit and have nothing to do with

1 the substance of what they say in litigation or any public  
2 forum." Is that statement -- let me ask it this way: Is that  
3 statement is incorrect with respect to you, right?

4 A. No, sir, I don't believe that is. No award, no matter  
5 how small that I have ever received has been tied to any  
6 substance of my testimony or the substance of my science. The  
7 recognition that one often goes above and beyond the call of  
8 duty to do some of these extra tasks that are called on by the  
9 company, that's what's the subject of awards. Promotion is a  
10 technical exercise, and in fact, at the level that you're  
11 talking about, Principal Scientist, that has to go through a  
12 technical review committee and those are the individuals who  
13 judge -- it's a peer review process and they judge the merit,  
14 and testimony is -- it may be mentioned because it's a matter of  
15 fact, but it's -- it's certainly not a primary or even a  
16 secondary, in many cases, area for consideration.

17 Q. Well, I'm just going to ask one question back at you,  
18 because we've seen that in 1997 Dr. Green told that review  
19 committee that two of the six reasons you should be promoted  
20 were your testimony, right?

21 A. I don't believe that's a fair characterization. That's a  
22 co-nominating letter, and in fact, there was a -- I was  
23 nominated and had to be renominated for that particular award,  
24 so there are potentially many other things that are reviewed  
25 there. The fact that I did explain the science and have

- 1 publications and that included the legal environment, that's  
2 included there, but I don't think two of the six reasons why I  
3 was promoted is a fair characterization of that process.
- 4 Q. Now, you testified in cases where many of the cigarette  
5 manufacturers were defendants, right?
- 6 A. Sure. You mean U.S. cigarette manufacturers?
- 7 Q. Yes.
- 8 A. I think that's true.
- 9 Q. Including Philip Morris, right?
- 10 A. That's right.
- 11 Q. Can you look at your expert report again, please, page 11  
12 of that -- actually page 11 of your CV. This is U.S. Exhibit  
13 number 77852. And letter S, can you read what you wrote behind  
14 letter S?
- 15 A. Sure. It says "1992 hyphen the Philip Morris USA award  
16 for distinguished achievement in tobacco science."
- 17 Q. And what was that award, and again, by what was that  
18 award, what did you physically receive?
- 19 A. I physically received a much nicer certificate and a  
20 check for \$10,000.
- 21 Q. From a -- from the main competitor of R.J. Reynolds; is  
22 that right?
- 23 A. No, I don't think that's a fair characterization either.
- 24 Q. From at least a competitor of R.J. Reynolds?
- 25 A. No, no, let me explain to you how that award comes about.

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1 Q. Well, Dr. Ogden, that's not what I'm asking, I'm just  
2 asking you to confirm that you received a \$10,000 award from a  
3 competitor of the company you work for?

4 A. They funded that award, yes, sir. It was not given by  
5 them, but they funded it, sure, as they have for many years.

6 THE COURT: Did they have a veto over who got the award,  
7 if you know?

8 THE WITNESS: I'm sorry?

9 THE COURT: Did the competitor have a veto over who got  
10 the award, if you know?

11 THE WITNESS: No, ma'am, absolutely not. They had no say  
12 whatsoever as to who got the award or who was nominated or how  
13 they were selected.

14 BY MR. SCHWIND:

15 Q. But it's a Philip Morris award, right?

16 A. It's named after them, because they fund it, yes, sir.

17 Q. If they wanted to stop giving it they would stop giving  
18 it, right?

19 A. In fact, they have stopped giving it, but it went on for  
20 some 30 plus years. They have stopped in recent years. But it  
21 was tied to a conference and a congress that was the annual  
22 event that was given at that meeting.

23 Q. I would like to move forward to page 27 of your  
24 testimony, please.

25 On page 27, we're going to move on to something

1 substantive now. You testify, you're asked, "you testify that  
2 the third phase of Reynolds ETS related research effort was  
3 measurement. What did Reynolds' scientists do in this area?"  
4 And then you provide your answer. The part of your answer I  
5 would like to talk about begins at line 6. "In 1975, Reynolds  
6 contracted with Stanford Research Institute Laboratories, SRI,  
7 to develop equipment for estimating public ETS exposure. In  
8 1978, SRI provided Reynolds' scientists with a sampling device  
9 which was the size of a large suitcase."

10 Do you see that, Dr. Ogden?

11 A. Yes, I do.

12 Q. Now, obviously, in 1975 and 1978 you were not with  
13 Reynolds, correct?

14 A. That's right.

15 Q. So, my question is, how did you come to learn of this  
16 arrangement with SRI?

17 A. From discussing it with researchers who were there, from  
18 actually looking at the suitcase, and in general, I mean, what I  
19 would have done to familiarize myself with activities that went  
20 on in my area before I joined the company would be to do just  
21 that, to review the literature, memoranda and reports, and to  
22 talk with other scientists.

23 Q. But this was the first device, the first apparatus that  
24 Reynolds used to take samples of ETS, correct?

25 A. I'm sorry, I lost the end of your question.

- 1 Q. Was this the first apparatus that Reynolds had that  
2 Reynolds was able to use to perform measurements of ETS?
- 3 A. To my knowledge, yes, sir.
- 4 Q. Or I should say more accurately, ETS components, right?
- 5 A. That's right.
- 6 Q. What did this device measure, do you recall?
- 7 A. My recollection is that it tried to measure carbon  
8 monoxide and particles.
- 9 Q. Carbon dioxide and what?
- 10 A. Carbon monoxide and particles.
- 11 Q. Have you ever heard on the Committee of Counsel?
- 12 A. In the context of this litigation, but I don't recall  
13 hearing of it before.
- 14 Q. Now, were you aware that the SRI project that you refer  
15 to in your answer was actually approved by funding for -- this  
16 project was approved by the Committee of Counsel?
- 17 A. I don't recall ever seeing that or hearing that, no, sir.
- 18 Q. Were you aware that the SRI project was contracted not by  
19 Reynolds but by the law firm of Shook, Hardy & Bacon? Did you  
20 know that?
- 21 A. No, sir, I don't recall ever hearing that.
- 22 Q. Did you know that the SRI project was funded not by  
23 Reynolds alone but by the other cigarette manufacturers,  
24 including American brands, Brown & Williamson, Liggett,  
25 Lorillard, and Philip Morris jointly?

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1 A. No, sir.

2 Q. And were you aware that the payments -- that payments to  
3 SRI were made not by Reynolds, but by the law firm of Jacob &  
4 Medinger through something called the Industry's Special Account  
5 4?

6 A. No, sir, I'm not aware of how it was funded. I know  
7 Reynolds had the suitcase and I've seen it, but as to how the  
8 project was funded, I don't know.

9 Q. But you said you did review documents?

10 A. Well, to the extent there were any. I don't recall any  
11 specific documents in this case. I do recall speaking with  
12 scientists that were there at the time that were involved in  
13 that project. In fact, they led me to the suitcase so I could  
14 see it.

15 Q. I would like to talk about several documents here. I'm  
16 going to hand you a document that's been marked U.S.  
17 Exhibit 86405. Can you look at that, please? This is a letter  
18 dated January 21st, 1976. It's from the law firm of Shook,  
19 Hardy & Bacon from David Hardy. Do you see that on the second  
20 page?

21 A. That's correct, yes, sir.

22 Q. And it's to a number of individuals, Ahrensfeld, Bryant,  
23 Haas, Hetsko, Roemer and Stevens. Do you see that?

24 A. I do.

25 Q. Do you recognize any of those names?

1 A. No, sir, I don't.

2 Q. In the first paragraph of the document Mr. Hardy writes  
3 that "at the Committee of Counsel meeting held in New York on  
4 December 10th, 1975, you received two proposals related to  
5 nonsmoker research. One was the Stanford Research Institute  
6 project to develop a machine for testing atmospheric cigarette  
7 smoke. That project has been approved and our firm is, as  
8 directed, entering into a contract for the necessary work." Did  
9 you see this -- or have you seen this document before,  
10 Dr. Ogden?

11 A. I don't recall seeing it, no, sir.

12 Q. And did -- let me just move on to the next --

13 MR. SCHWIND: I know it's almost break time, Your Honor,  
14 I'll leave it to you, I do have probably about three or four  
15 documents on this issue.

16 THE COURT: Why don't you finish those documents.

17 MR. SCHWIND: Okay.

18 BY MR. SCHWIND:

19 Q. I'm going to hand you a document that's been marked U.S.  
20 Exhibit 93180, and this is a document dated February 1st, 1979.  
21 It's from SRI to the law firm Shook, Hardy & Bacon. Do you see  
22 that?

23 A. That appears to be the case, yes, sir.

24 Q. And it's addressed specifically to a Mr. Patrick  
25 Sirridge. Do you know Mr. Sirridge? Have you met him?

1 A. Not to my knowledge, no, sir.

2 Q. And we see on the second page of this document at the  
3 top, that "SRI International has designed fabricated and  
4 delivered two portable instrument systems to Shook, Hardy &  
5 Bacon. These systems are designed to measure carbon monoxide  
6 and to take filter samples for determining the concentration of  
7 nicotine in ambient air." Now, does this sound like the SRI  
8 machine that you have physically seen, Dr. Ogden?

9 A. Yes, sir, it does. It appears to be.

10 Q. I'm going to hand you a series of exhibits that have been  
11 clipped together just for efficiency sake. And the exhibit  
12 numbers, I'm going run through these, 36081, 20215, 16, 17, 18,  
13 19, and then 93181, 20059, 36654, 21862 and 29949. And doctor,  
14 I don't want to review all of these documents, I just want to  
15 talk about the first few just to save time.

16 If we could pull up U.S. Exhibit 36081. We have a cover  
17 letter to Jacob & Medinger, Special Account 4, dated March 25th,  
18 1976. Do you see that?

19 A. Yes, sir.

20 Q. Now, have you had any dealings with this law firm,  
21 Dr. Ogden?

22 A. The Jacob & Medinger?

23 Q. Yes.

24 A. No, sir, not to my knowledge.

25 Q. Now, you have had some contact with Shook, Hardy & Bacon,

- 1 right?
- 2 A. I'm sure I've met some attorneys from Shook-Hardy, but I  
3 wouldn't characterize that as contact with the firm. But if you  
4 do, yes.
- 5 Q. Now, we see on the second page of this document, a list  
6 of disbursements from special account 4, and the last, second to  
7 last item is Stanford Institute Research project, \$10,000. Do  
8 you see that?
- 9 A. I do, yes.
- 10 Q. And if we go through these exhibits, page through the  
11 first few, we go to 20215, we see a similar list. You see  
12 Stanford Research Institute being paid over \$50,000, right?
- 13 A. I'm sorry, where are you?
- 14 Q. Within Exhibit 20215 on the third page.
- 15 A. And your question is what?
- 16 Q. We see that Stanford Research Institute was paid over  
17 \$50,000 during this timeframe?
- 18 A. That's what this says, yes.
- 19 Q. Just one more. If you turn to the next Exhibit 20216.  
20 Again, the third page of this exhibit, we see again that  
21 Stanford Research Institute was paid in this timeframe 36 --  
22 over \$36,000?
- 23 A. Right.
- 24 Q. But your testimony is you didn't see these documents  
25 or --

1 A. No, sir. I mean, it's -- I was interested in the  
2 scientific equipment and what Reynolds had tried to do with it.  
3 As to how it came to be, I didn't -- I don't recall seeing any  
4 of these other than Stanford having developed it, as it was  
5 represented to me.

6 Q. Did you know that the Stanford apparatus was developed  
7 for litigation purposes?

8 A. No, sir, I didn't. I know that we have one. Apparently  
9 there were two made. We had one and scientists tried to make  
10 some measurements with it, but I don't know where the other one  
11 went or why it was developed other than to research ETS.

12 Q. Now, the -- I'm going to show you one last document on  
13 this. This has been marked U.S. Exhibit 20286. On the first  
14 page we see it's titled Research Liaison Committee.

15 A. Okay.

16 Q. Now, Dr. Ogden, from your review of documents, have you  
17 heard of this committee?

18 A. I don't recall it, no, sir.

19 Q. If we turn to the last page, we see the document is dated  
20 November 19th, 1977, and the initials J.C.B. Do you see that?

21 A. I do.

22 Q. I'd like to direct your attention to just one paragraph  
23 on page 35. It's marked page 35 at the bottom. And if we could  
24 fly out the top paragraph behind the number 2, we see that RLC,  
25 Research Liaison Committee, "considered a draft proposal from

1 the Stanford Research Institute to develop for legal  
2 utilization, by which is apparently meant for legal and  
3 legislative purposes a machine to measure CO" -- which is carbon  
4 monoxide, right?

5 A. That's right.

6 Q. "In the workplace public environments, et cetera. It was  
7 decided that arrangements for this project would be made by the  
8 Committee of Counsel, which would decide the manner of funding."  
9 Have you seen this document before, Dr. Ogden?

10 A. No, sir, I'm interested in the scientific equipment, not  
11 necessarily how it came to be.

12 Q. Sometimes we're reminded by defendants counsel these were  
13 all publicly available, did you know that?

14 A. I presume they are. Virtually everything we do is.

15 Q. Well, unfortunately I can't argue with you. I'm not  
16 allowed to. But, Dr. Ogden, this was -- this machine, as far as  
17 you know, was your company's first attempt to measure components  
18 of ETS, right?

19 A. To measure ETS directly in what I call realistic  
20 environments, yes, but we had smoke measurements that predate  
21 that that are related to ETS, but it's my understanding this was  
22 our first attempt to measure ETS directly.

23 Q. And from this this went on to a number of other  
24 apparatuses that you talk about in your testimony, right?

25 A. Sure we developed a program and carried it through to a

1 number of logical conclusions, yes.

2 MR. SCHWIND: Your Honor, it's a good time for a pause.

3 THE COURT: All right. We'll take a 15-minute break,  
4 everybody.

5 (Thereupon, a break was had from 3:10 p.m. until 3:26  
6 p.m.)

7 THE COURT: Before we go back to cross-examination,  
8 everyone, I want to raise two different scheduling issues.  
9 Number one, counsel may not remember it and I don't know that I  
10 have the relevant people; I do on the government's side, though.

11 My recollection is that Mr. Webb and either Mr. Brody  
12 and/or Ms. Eubanks were going to have a conversation about a  
13 proposed order for me, allowing the defendants an additional week  
14 to submit their expert reports and then talk through changes that  
15 would flow from that.

16 Have there been any such conversations? No.

17 MS. EUBANKS: Your Honor, my recollection was that we were  
18 to look at Order 894 and get back to the Court with respect to  
19 the proposal to move those deadlines and let Your Honor know if  
20 that presented any issues. And insofar as we're concerned, if  
21 the Court wants to do that, we just think it's appropriate to be  
22 aware of two things.

23 One, as you note in footnote number 2, that defendants  
24 predict that they will end their case on liability on the 11th of  
25 April. If these dates are moved, that certainly endangers us in

1 terms of having gaps or downtime.

2 THE COURT: It may be. That may be.

3 MS. EUBANKS: Well, I just wanted the Court to be aware  
4 because also, after we received defendants' witness list, we  
5 still had that hypothetical line which the United States doesn't  
6 know where it's drawn of the witnesses at the bottom who may drop  
7 off.

8 So I also want to alert the Court to the fact that in  
9 order to be prepared to present the United States' case on  
10 remedies, that we will need some kind of notice besides just  
11 dropping off four or five witnesses at the end and finding out on  
12 a Wednesday or Thursday that we're supposed to start up our  
13 liability case on Monday.

14 So we don't still have a witness list that is firm. We  
15 have a list --

16 THE COURT: And I know why we don't. I know there's  
17 history to that. So don't tell it to me again, Mr. Bernick. I  
18 understand that.

19 At some point -- it is too early -- I think two things.  
20 The government has to proffer a period of time that it thinks it  
21 needs for notice of when to be ready on its remedies case; and  
22 the defendants, as we get much further into their case, need to  
23 give me a more up-to-date estimate of where they will be and when  
24 they think they're going to end.

25 But I think it's too soon to do that unless, of course,

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1 you're ready to rest by next week, Mr. Bernick.

2 MR. BERNICK: Well, I'm ready to rest any time. I think  
3 my clients wouldn't -- their interest would not be served by that  
4 at this point.

5 First, I had thought -- I recalled Your Honor suggesting  
6 that we have precisely that conference and I apologize for being  
7 remiss and not following through on it. I think it's relatively  
8 short. We basically assumed that the easiest thing to do was to  
9 simply bump the dates for our submissions back by a week. And  
10 that's --

11 THE COURT: That's fine. That's what I'll do.

12 MR. BERNICK: -- that's what we would propose.

13 THE COURT: That's what I'll do. All right.

14 Now, the other thing I want to know is whether there are  
15 any scheduling issues of defendants that I should know about for  
16 next week. I gave you a heads-up yesterday, although I certainly  
17 didn't have all the details, but I now have two TROs that have to  
18 be addressed next week, although they're both in Guantanamo Bay  
19 cases and I haven't set the hearing date yet, although briefs are  
20 wending their way in.

21 Are there any difficulties in terms of people appearing  
22 next week? Not being able to appear? Anything you know about  
23 that?

24 MR. BERNICK: Well, I'll certainly inquire. I take it the  
25 thrust of Your Honor's question is if there are people who are

1 having difficulty and there is some flexibility to create a gap,  
2 maybe we can -- Your Honor would be able, if it's convenient with  
3 the Court, to --

4 THE COURT: We will definitely be in trial on Monday since  
5 briefing will not be finished before Monday. It may even be a  
6 day or two after. That's what I don't know yet. But Monday  
7 we'll definitely go forward and either Tuesday, Wednesday or  
8 Thursday, I'm going to have a lengthy hearing; I'm just not sure  
9 yet.

10 MR. BERNICK: I'll inquire. Let me inquire this evening  
11 rather than doing this piecemeal and I'll be able to report to  
12 the Court tomorrow morning.

13 THE COURT: Okay. Mr. Schwind, we're ready for cross.

14 MR. McDERMOTT: Your Honor, before we resume, could we ask  
15 the witness to move the mike a little bit closer and speak up.

16 THE COURT: Yes. It has been a problem with both these  
17 witnesses. I don't know why. Maybe scientists are more  
18 soft-spoken than lawyers.

19 But, Dr. Ogden, try and talk directly into the mike. I  
20 know that mike is not the most comfortably placed and the lawyers  
21 have an easier time of it, but you do need to speak up.

22 THE WITNESS: Okay.

23 MR. SCHWIND: Thank you, Your Honor.

24 BY MR. SCHWIND:

25 Q. Good afternoon again, Dr. Ogden.

1 A. Good afternoon.

2 Q. I would like to turn now to pages 27 and 28 of your  
3 testimony, at the bottom of the page we were on, page 27. You  
4 were asked about pilot studies and the exact question at line 18  
5 is: "You mentioned a pilot study. Why do you do pilot  
6 studies?"

7 And your answer was that: "Pilot studies are fairly  
8 common in science. Very generally, a pilot study is a  
9 preliminary, smaller-scale study you perform to see if the study  
10 design and methodology work." And then you have something in  
11 parentheses and then: "If they don't, we can address and  
12 resolve any such issues before spending larger sums of money on  
13 a full study."

14 At the top of page 28, you're asked: "In your  
15 experience, who made the decisions about whether to conduct  
16 pilot studies and, when they were conducted, about whether and,  
17 if so, how to proceed with a full study?"

18 And you answer: "In my experience, scientists always  
19 made decisions about whether to conduct a pilot study in the  
20 first instance and, after we conducted pilot studies, scientists  
21 always made decisions about whether and, if so, how to proceed  
22 with a full study."

23 Do you see those questions and answers?

24 A. Yes, sir, I do.

25 Q. Do these answers apply to passive smoking studies funded

1 by the industry since -- or funded by Reynolds that you're  
2 familiar with since you've been working for the company?

3 A. Well, as I've testified here, they certainly apply to  
4 studies that I'm familiar with, whether they be passive smoking  
5 studies or any other type of study. I can't -- I mean, I'm not  
6 sure I can answer your question beyond that. This is my  
7 experience.

8 Q. Your experience since 1985 working at Reynolds, right?

9 A. That's right.

10 Q. Well, isn't it true, Dr. Ogden, that pilot studies in ETS  
11 or passive smoking were in reality carried out so the lawyers  
12 and others within the industry and within R.J. Reynolds could  
13 see what the results were going to be in advance?

14 A. I would say that's a partially fair characterization. We  
15 certainly, on occasion, would inform many people about the  
16 results of pilot studies. I mean, Reynolds' position on ETS is  
17 driven by the science. Obviously -- or we wouldn't be sitting  
18 here today -- obviously, there are interfaces to the legal  
19 environment, so we, on occasion, would advise lawyers,  
20 executives and others within the company about what the state of  
21 the science would be.

22 Q. Well, Dr. Ogden, I'll ask it this way: Lawyers and  
23 others, particularly senior persons at R.J. Reynolds, wanted to  
24 see if the results would be helpful before --

25 THE COURT: What's that, everybody?

1 MR. SCHWIND: It was a mistake, I believe, Your Honor.

2 THE COURT: All right. Clearly.

3 BY MR. SCHWIND:

4 Q. Let me re-ask the question, Dr. Ogden.

5 Lawyers at Reynolds and senior scientists wanted to see  
6 in advance if certain studies would produce helpful results to  
7 the industry before they went ahead and funded full-blown  
8 studies, right?

9 A. That's not my experience. I'm not aware of that.

10 Q. Let me show you a document that's been marked U.S.  
11 Exhibit 22956. And this is a document dated October -- well, I  
12 don't know what the document's dated, but it refers to  
13 "presentation to the INFOTAB workshop on October 15th, 1986."  
14 And we see the name Dr. C. Green up at the top right, correct?  
15 The first page.

16 A. That's correct.

17 Q. Have you seen this document before?

18 A. Let me take just a moment to review it.

19 (Brief pause.)

20 THE WITNESS: I don't have any specific recollection of  
21 this document, no, sir.

22 BY MR. SCHWIND:

23 Q. On October 1986, you had been with the company for  
24 approximately one year, right?

25 A. That's right.

- 1 Q. And Dr. Green was your boss at that time?
- 2 A. Yes, that's right.
- 3 Q. And in fact, how many levels above you was he?
- 4 A. If memory serves, four levels.
- 5 MR. SCHWIND: And if we could go to page 4 of this  
6 document, please, and fly out the second paragraph.
- 7 BY MR. SCHWIND:
- 8 Q. You see the following: "One of the things that the  
9 lawyers always ask us before we do any experiment is what are  
10 the results going to be? So oftentimes, we conduct pilot  
11 studies." And then he references in the rest of the paragraph  
12 some studies in Winston-Salem and in New York City. Do you see  
13 that?
- 14 A. I see the paragraph, yes, sir.
- 15 Q. And those are specifically exposure studies of the type  
16 that you were involved in in 1986, right?
- 17 A. Just to be clear, I wouldn't characterize these as  
18 exposure studies, but they are ETS monitoring studies of a  
19 similar type that I've been involved in, yes.
- 20 Q. You mean the type were you go in with some type of  
21 machine and take air samples and figure out or analyze the air  
22 samples and figure out what's in the air samples themselves,  
23 right?
- 24 A. Right; that's right.
- 25 Q. And in the second or the third sentence of the paragraph:

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1 "We are concerned about the regulation of smoking in restaurants  
2 in the United States so we wanted to do some studies there."

3 Do you recall, Dr. Ogden, that in 1986, your company was  
4 in fact concerned about the regulation of smoking in  
5 restaurants?

6 A. Well, I recall that we made measurements in restaurants  
7 about that timeframe. As to the exact state of what regulation  
8 or what the discussion may have been, I'm not entirely sure.  
9 But we were making studies there that presumably could have been  
10 driven by that.

11 Q. Dr. Ogden, you knew that your company and the industry,  
12 the cigarette industry, was being faced with an increasing  
13 number of restrictions and regulations stopping smokers from  
14 smoking indoors, right?

15 A. Sure.

16 Q. And one of those places was restaurants, right?

17 A. Sure.

18 Q. Office buildings?

19 A. The whole gamut of public places.

20 Q. And you knew that your company was interested in stopping  
21 those regulations and restrictions as much as they possibly  
22 could, right?

23 A. I can only speak to the piece of the company that I was  
24 involved in. And our effort was to find out what ETS exposure  
25 concentrations were in those places, to study the effect of

1 accommodation, of segregation and that sort of thing. And  
2 that's what we did.

3 Q. I'm asking you, Dr. Ogden, about what you knew of your  
4 company. At this point you had been working at your company for  
5 a year. Isn't it true, and you knew this, that your company  
6 wanted to defeat -- wanted to stop as many of these smoking  
7 restrictions as it could?

8 A. I'm not entirely sure I'm comfortable with that  
9 characterization, but certainly we wanted to look into the issue  
10 and provide science into the matter so that it could be decided  
11 based on science and accommodation issues of smokers and  
12 nonsmokers.

13 Q. Well, Dr. Ogden, one way that your company was going to  
14 do that was to use scientists like you to go into restaurants  
15 and other indoor environments and test the air, correct?

16 A. Exactly. Sure.

17 Q. And by using those test results when they were helpful to  
18 the industry, the industry and your company could resist  
19 proposed smoking regulations, right?

20 A. No. Again, I don't think that's a fair characterization.  
21 We did the studies, we did studies in restaurants and other  
22 places and we published those studies. Whether they were  
23 helpful or not from a scientific perspective was never part of  
24 the equation.

25 Q. Didn't you know that the results of your studies were

1 being used by your company and the industry to resist smoking  
2 regulations?

3 A. They may well have been.

4 Q. You knew they were, right?

5 A. You're asking me what was happening in October of 1986.

6 I don't know how those results were being used. We were  
7 certainly at the infancy of our ability to make those kinds of  
8 measurements, so they very well were and at some point -- I  
9 mean, they have been published and have been used since then.

10 Q. Well, for example, when you testified in front of OSHA, I  
11 assume you and your company relied on these types of studies  
12 that you were carrying out in the late 1980s and early 1990s,  
13 right?

14 A. Absolutely. Yes, sir.

15 Q. Now, isn't it true that -- let me ask you this: Do you  
16 have any reason to disagree with the characterization in this  
17 paragraph that we just read?

18 THE COURT: Which characterization, though?

19 BY MR. SCHWIND:

20 Q. Well, "one of the things that the lawyers always ask us  
21 before we do any experiment is what are the results going to  
22 be?"

23 MR. McDERMOTT: Objection, lack of foundation. He's a  
24 fact witness.

25 MR. SCHWIND: That's what I'm asking: Does he have any

1 factual knowledge that would allow him to disagree with what's  
2 contained in this paragraph?

3 THE COURT: Well, I'll allow you to do it that way. I  
4 mean, it's sort of the reverse of the ordinary way, but go ahead,  
5 Mr. Schwind.

6 THE WITNESS: Could I ask you to restate your question?

7 BY MR. SCHWIND:

8 Q. Sure. In this paragraph, again, the first part of it:  
9 "One of the things that the lawyers always ask us before we do  
10 any experiment is what are the results going to be?"

11 Do you have any factual knowledge to disagree with that  
12 statement?

13 A. Yes, sir. The absence of this ever having occurred to me  
14 or the suggestion that this was common practice is what I can  
15 testify to. As I've said, we have advised many in the company,  
16 including lawyers, about what the state of the science would be,  
17 but I have never conducted a pilot study for the purpose of  
18 trying to forecast the results so that anyone could, you know,  
19 veto that type of study. That's not the way we do science at  
20 Reynolds.

21 Q. Well, was the pilot study carried out in Winston-Salem,  
22 as referred to in this paragraph?

23 A. I'm not sure to what study this may have referred to. We  
24 have made measurements of ETS in restaurants in Winston-Salem  
25 and in other cities as well.

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1 Q. Well, this refers to the summer of 1986 in Winston-Salem.  
2 Do you recall that pilot study?

3 A. Not by that description, no, sir. We were making  
4 measurements in the mid to late '80s in restaurants in many  
5 places. I know we've published results from restaurants in New  
6 York.

7 The latter part of this paragraph refers to a week-long  
8 study in New York City. I know we made measurements in  
9 restaurants in Winston. Others in our group had; I certainly  
10 have made those kinds of measurements, so I'm not sure what it  
11 refers to.

12 Q. Well, it refers to "pilot studies." Do you recall pilot  
13 studies in those two cities?

14 A. I don't recall anything by that description. I know  
15 that -- certainly in Winston-Salem, we had field-tested some  
16 equipment. In fact, in my direct testimony, we talked about --  
17 I talked about a large box that we took. That wasn't a  
18 restaurant; that was a Christmas party. But we would take  
19 equipment into places that we wanted to measure and certainly  
20 try it to make sure it worked, to make sure it wasn't too loud,  
21 make sure it didn't blow the circuits in the restaurant and that  
22 kind of thing. That's the normal practice that we would do.

23 Q. And you're also going to make sure that the readings you  
24 got on your machines of the various ETS components were minimal,  
25 right?

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- 1 A. Absolutely not.
- 2 Q. You wanted to get as low a reading -- as low a number as  
3 possible from your analyses of the air -- of the indoor air  
4 samples, didn't you?
- 5 A. That's flat wrong. No, sir, that's not the way we do  
6 science.
- 7 Q. In fact, that was the only way that your work -- your  
8 science could help your company, wasn't it?
- 9 A. No, sir. That is an incorrect characterization.
- 10 Q. Yet all of the work you did, Dr. Ogden, all of the papers  
11 that we see in your direct testimony was subsequently used by  
12 people like yourself, others within R.J. Reynolds and the  
13 industry to resist, to fight indoor air smoking restrictions,  
14 right?
- 15 A. Our data were used -- our methodology has been used by  
16 many people, including laboratories of the U.S. government, to  
17 make measurements. And we take pride in the quality of the work  
18 that we've done.
- 19 Q. But your results -- I'm talking about your results,  
20 Dr. Ogden -- were used by your company and your industry to  
21 fight indoor smoking restrictions, wasn't it?
- 22 A. To the extent that they showed segregation and  
23 accommodation were feasible strategies, absolutely.
- 24 Q. And they all did, didn't they?
- 25 A. That's the way it works.

1 Q. Are you familiar with a lawyer, a former attorney at  
2 Shook, Hardy & Bacon named Don Hoel?

3 A. I know the name.

4 Q. Have you ever met him?

5 A. Not to my knowledge.

6 Q. He testified in this case and I'd like to show you some  
7 of his testimony, if I could. We're going to go to page 179.

8 THE COURT: Is everybody alert on this side of the room?

9 MR. BERNICK: Yes. We're waiting for the next question.  
10 At least I am.

11 THE COURT: All right. All right.

12 MR. SCHWIND: This is Mr. Hoel's deposition that's been  
13 submitted. His prior designation part has been submitted; this  
14 is not his trial testimony, if that's the concern. And it's for  
15 impeachment.

16 BY MR. SCHWIND:

17 Q. But it's -- Mr. Hoel was asked: "Why would conducting  
18 pilot studies impact upon an attempt to pass regulations, if it  
19 would? "

20 And he answered: "Well, it would seem to me, within the  
21 context of what you just read, that the City of New York was  
22 proposing restrictive legislation to limit smoking in public  
23 places on the basis of a, quote, 'health risk' or 'factor.' And  
24 if the pilot study or other studies demonstrate that the amounts  
25 of materials in the air from tobacco smoke are minimal, it would

1 serve to weaken the allegations by the City."

2 And then he was asked: "And if it would show that they  
3 were minimal, would that be the kind of pilot study that you  
4 would want to commission as a complete and full-blown study?"

5 And he answered: "I would think so."

6 And then he's asked: "What if, conversely, such a study  
7 had shown that it was not minimal as a pilot study? Would then  
8 you not want to proceed with such a study?"

9 And he answered: "Probably not."

10 MR. McDERMOTT: Objection, Your Honor, no foundation and  
11 improper impeachment. This is not a statement of this witness  
12 and there's no showing that he has any information on this  
13 whatsoever.

14 THE COURT: I think the witness hasn't been asked a  
15 question yet.

16 MR. SCHWIND: That's correct, Your Honor.

17 MR. McDERMOTT: Excuse me. I jumped the gun.

18 BY MR. SCHWIND:

19 Q. Let me ask the question this way, Dr. Ogden. Again, he's  
20 referring to the City of New York, the study in the City of New  
21 York, right?

22 A. It mentions "City of New York" at line 8, yes, sir.

23 Q. Let me ask the question this way: Are you familiar with  
24 who Don Hoel was in 1986 at the time that Dr. Green wrote the  
25 document that we were just looking at?

1 A. I assume Mr. Hoel was an attorney with Shook Hardy, but I  
2 don't know exactly in what capacity he might have been at that  
3 time, no.

4 Q. Well, isn't it true you that Mr. Hoel has it right with  
5 respect to the pilot studies being carried out by R.J. Reynolds;  
6 that if the results turned out showing that the exposures or the  
7 concentrations of materials in the air from tobacco were  
8 minimal, the study would be turned into a full-blown study and  
9 if the opposite were true, it wouldn't?

10 MR. McDERMOTT: Objection, no foundation, improper  
11 impeachment.

12 MR. SCHWIND: Your Honor, we already laid the foundation  
13 with the pilot studies document that Mr. Hoel's (sic) being asked  
14 about.

15 THE COURT: The objection's overruled. Basically, the  
16 witness is being asked, I believe, whether he agrees or disagrees  
17 with Mr. Hoel's version; is that correct?

18 MR. SCHWIND: Yes, Your Honor.

19 THE COURT: All right. You may answer.

20 THE WITNESS: This is not the way that I've conducted  
21 science. It's not the way that Reynolds would conduct science.  
22 This appears to me to be Mr. Hoel's opinion on whatever the city  
23 and pilot study he's referring to, but that is not -- does not  
24 reflect the way that I've conducted an exposure monitoring study,  
25 nor any that Reynolds has conducted, to my knowledge.

1 BY MR. SCHWIND:

2 Q. To your knowledge, right? But again, Dr. Green was four  
3 levels above you; is that right, at this time?

4 A. Well, no, not quite. He was my direct supervisor. You  
5 asked me in terms of job title, he was four steps above me, but  
6 he was my direct supervisor.

7 Q. Did you know that he was attending meetings of a group  
8 called the Tobacco Institute ETS Advisory Group?

9 A. I'm aware that he attended meetings. I'm aware of that  
10 name, certainly in the context of litigation. I can't say that  
11 I was aware of exactly what meetings he might have been  
12 attending in this timeframe. But yes, I know he went to  
13 meetings.

14 Q. I mean, did he come back to you and the other ETS  
15 scientists and brief you on what happened at these advisory  
16 group meetings?

17 A. We had -- certainly had periodic review meetings. I  
18 don't recall specifically, you know, a meeting called to discuss  
19 the agenda of another meeting, but I'm certain that, you know,  
20 whatever scientifically useful information he gleaned from any  
21 meetings he would share with us, as we would with him.

22 Q. Now, let's move on to page 30 of your testimony, to a  
23 subject of aircraft cabin studies. And, Doctor, you know what  
24 I'm talking about when I say "aircraft cabin studies," right?

25 A. I assume you're talking about the ETS monitoring that we

1 did on board aircraft.

2 Q. Right. Now, you refer at page 30 to -- I'm looking at  
3 line 14: "What ETS levels were reported in the PASS briefcase  
4 study of ETS on airplanes that was published in Exhibit  
5 JD 064557?"

6 Now, without getting too technical, Dr. Ogden, can you  
7 describe -- well, let me do this. Let me give you a copy of the  
8 exhibit just so you can be exact. I'm going to hand you an  
9 exhibit marked JD 064557. Can you tell us what this study, this  
10 Reynolds study was about?

11 A. Well, allow me a moment to try to read this.

12 Q. Well, you referred to it in your testimony, Dr. Ogden.

13 A. Right, but you asked me to summarize the study for you.

14 Q. Just generally, what did the study look into?

15 A. Estimating effect of ETS on air quality in commercial --  
16 in passenger cabins in commercial aircraft -- in fact, I was  
17 just paraphrasing the title, "Estimation of effect of ETS on air  
18 quality in passenger cabins of commercial aircraft."

19 Q. Well, you're familiar with this study, right?

20 A. Sure.

21 Q. And in this study, Reynolds personnel went into aircraft  
22 with some type of testing apparatus, right?

23 A. That's right.

24 Q. And took air samples that were later analyzed and then  
25 certain measurements were made and reported in this study,

1 right?

2 A. That's right.

3 Q. And we see a summary of the measurements on the first  
4 page, upper left-hand corner. "Nicotine was measured in  
5 passenger cabins of Boeing" -- "certain Boeing aircraft," right?

6 A. I'm sure that's right. I'm not following you, but yeah,  
7 there were some Boeing aircraft measurements. Yeah, I see it  
8 now.

9 Q. All right. And then about two-thirds of the way down, we  
10 see what those measurements were. The mean nicotine  
11 concentration for samples acquired in no smoking sections was  
12 5.5 micrograms per cubic meter?

13 THE COURT: Excuse me a minute, Mr. Schwind. It would be  
14 a lot easier if you could magnify that. Thank you.

15 BY MR. SCHWIND:

16 Q. Again, "The mean nicotine concentration for samples  
17 acquired in no smoking sections was 5.5 micrograms per cubic  
18 meter and smoking sections of the aircraft, the mean nicotine  
19 concentration was 9.2 micrograms per cubic meter. These  
20 concentrations correspond to estimated mean exposures of .0041  
21 and .0082 cigarette equivalent per flight respectively." Did I  
22 read that correctly?

23 A. I believe you did, yes, sir.

24 THE COURT: Would it be fair to say that that translates  
25 into the fact that people in smoking sections of airplane cabins

1 were getting twice as much nicotine concentration as those in  
2 nonsmoking.

3 THE WITNESS: Yes, with explanation.

4 THE COURT: No, that's all right. I'm sure we'll get to  
5 an explanation.

6 THE WITNESS: It's a simple one, but you're right. Excuse  
7 me.

8 BY MR. SCHWIND:

9 Q. Dr. Ogden, at the time that this study was published  
10 we're back in 1987; passive smoking in aircraft was very  
11 important to your company and the industry, right?

12 A. Certainly it was an issue that we were interested in,  
13 yes, sir.

14 Q. Well, it wasn't just an issue you were interested in, you  
15 were facing federal regulation to ban smoking on aircraft,  
16 right?

17 A. That's right.

18 Q. For certain periods of time, two hours and less, I think  
19 at the time; is that right?

20 A. It progressed to a total ban, yes, sir.

21 Q. And you and your ETS division were part of the effort to  
22 stop that regulation from happening, right?

23 A. No, sir.

24 Q. You didn't think you were a part of that?

25 A. No, sir. We were charged with making measurements on the

1 aircraft cabin. In fact, that's what this shows. In fact, that  
2 was the caveat I was going to give just a moment ago. The  
3 nonsmoking sections here were measured at the boundary, so this  
4 would be the very -- if you recall, the way smoking was  
5 segregated in this time, it was front to back. These would be  
6 in the boundary rows, so this would be sort of the worst case  
7 scenario of the no smoking section.

8           The point of the research and the hypotheses that we  
9 would have tested is the segregation of smoking and nonsmoking  
10 sections effective at reducing exposure at that boundary.  
11 That's a scientific study, that's what we conducted. The answer  
12 is yes, that's what we published.

13 Q.       Well, your company, Reynolds, and the industry had the  
14 position -- they adopted this position that segregating smokers  
15 and non-smokers was all that was necessary on aircraft, right?

16 A.       Are you asking me about policy or scientific hypothesis?

17 Q.       I'm asking about your company's position.

18 A.       I'm not sure what I can say or if there was a company  
19 position on smoking and aircraft at this time. Our scientific  
20 hypothesis, as I just stated, that it was effective at reducing  
21 the concentration and that's what we tested and that's what  
22 turned out to be true and that's what we published.

23 Q.       Well, whose idea was it to go into an aircraft and test  
24 nonsmoking sections versus smoking sections as far as nicotine  
25 concentration?

1 A. I can't say where the genesis of the idea came from. In  
2 terms of this particular study, I'm sure it would have been the  
3 principle investigator, which would be the first author of this  
4 study, Dr. Oldaker.

5 Q. Now, if we see in your answer you wrote, at line 16  
6 through 18, the results are reported in tables 1 and 2 at pages  
7 996 and 997. I think it's referring to this study that we've  
8 got in front of us.

9 But then you say "To the best of my knowledge the  
10 measured levels of ETS nicotine in that study," The study we're  
11 looking at, are the highest reported in the published literature  
12 looking at ETS nicotine levels on aircraft."

13 Do you see that?

14 A. Yes, sir, I do.

15 Q. All right. Did you review the scientific literature on  
16 these types of studies, aircraft cabin nicotine measurements,  
17 before you gave that answer?

18 A. I have reviewed it in the past, yes.

19 Q. Did you intend with that answer to suggest that Reynolds  
20 -- that this Reynolds study was somehow adverse to the industry  
21 because it published nicotine data that was higher than all  
22 other air cabin studies?

23 A. The intent was to point out the fact that the number --  
24 and I can point to one there in table 2 -- is the highest  
25 nicotine number that I'm aware of that's ever been measured on a

1 commercial aircraft.

2 Q. My question was, did you intend by that comment -- that's  
3 not solicited by the question -- to imply that this study was  
4 somehow adverse to your company?

5 A. I wouldn't characterize it as adverse. It certainly was  
6 intended to portray the range of findings and happens to be one  
7 of the highest -- the highest one that I'm aware of that's ever  
8 been measured in this environment.

9 Q. Well, were you aware that this study was used by your  
10 company and other companies and the industry in many industry  
11 submissions as evidence that passive smoking was not a  
12 significant issue on aircraft and as evidence that simple  
13 segregation of non-smokers and smokers was sufficient?

14 A. Well, I'm not entirely sure I can accept your  
15 characterization, but I'm sure that the company used this  
16 scientific information in support of the hypothesis as I gave it  
17 to you a few minutes ago, that segregation was effective.

18 Now, what else may have been said in that context, I  
19 don't have any recollection, but that's what the science showed.

20 Q. Let's go to the conclusion section of this study on  
21 page -- marked at the bottom 998.

22 THE COURT: I want to explore one other thing.

23 MR. SCHWIND: Yes, Your Honor.

24 THE COURT: And it goes back to your testimony of maybe  
25 three, four, five minutes ago. Are you saying that in the

1 passenger cabin study, that your conclusion was that people who  
2 were sitting in the row right next to the first row of smokers  
3 were by virtue of that invisible line, protected from the effects  
4 of smoking?

5 Is that what your conclusion was?

6 THE WITNESS: No, ma'am, not at all. What it says is that  
7 the -- as I tried to say earlier, the hypothesis that we tested  
8 was that that invisible line, as you call it, the boundary  
9 between smoking and nonsmoking was effective at reducing; that  
10 is, making a statistically significant reduction in the  
11 concentration measured at the boundary in the nonsmoking section  
12 versus in the bulk of the smoking section.

13 So in other words, there is a statistically significant  
14 drop off at the boundary. And, in fact, as you go up three or  
15 four rows into the nonsmoking section, it's virtually, if not  
16 nondetectable.

17 THE COURT: And the conclusion of your study was that the  
18 approximately four, five, or 6 feet between the seat of a smoker  
19 and the seat of a nonsmoker reduced the amount of nicotine level  
20 by 50 percent?

21 THE WITNESS: Yes, ma'am. That's what our research has  
22 shown and other research has shown as well.

23 THE COURT: Okay. Go ahead, Mr. Schwind.

24 BY MR. SCHWIND:

25 Q. Thank you, Your Honor. Let's go to the -- let me back up

1 and just build on that last question. That's exactly what  
2 Reynolds needed to show to resist the flight restrictions, isn't  
3 it?

4 A. What was missing here is hard data, and that's what we  
5 went out to provide.

6 Q. Dr. Ogden, what I'm saying is, your company, in order to  
7 resist the aircraft smoking restrictions, had to generate data,  
8 had to come up with it, right?

9 A. Somebody had to.

10 Q. And it had to get data that was favorable to its position  
11 that no restrictions were necessary, that all we needed to do  
12 was keep the nonsmoking section away from the smoking section,  
13 right?

14 A. No. In the absence of data, data was called for, and  
15 that's what we went out to gather, to see what the data showed.  
16 If this had showed that that invisible data had no effect,  
17 that's what we would have published.

18 Q. Well, let's look at what you did publish in the  
19 conclusion section. "The results of this study show that A,  
20 segregation significantly reduces the exposure of persons seated  
21 in nonsmoking sections to ETS." That's exactly what Reynolds  
22 needed, right?

23 A. That's -- that's exactly what it showed.

24 Q. And B, aircraft's ventilation system -- that's what HVAC  
25 is, right?

1 A. Heating, ventilation and air conditioning system is  
2 generally what it means. Yes, sir.

3 Q. Essentially, aircraft ventilation is primarily  
4 responsible for effecting this reduction. In addition, results  
5 indicate that average exposures to ETS are orders of magnitude  
6 less than exposures represented by smoking a single cigarette.

7 Dr. Ogden, can you tell me how you, Reynolds -- by the  
8 way, I see your name in the study, in the acknowledgements,  
9 right?

10 A. That's right.

11 Q. How you and the other Reynolds scientists could have made  
12 those conclusions more favorable to your company than what we  
13 see written, right? What we see right there?

14 A. I don't know how we would have changed them in any way  
15 shape or form, favorable or unfavorable. These are the data.  
16 We published the data, we published the entire tables of data to  
17 allow others to make their own calculations to come to different  
18 conclusions if they desired so we could debate it in the  
19 scientific literature.

20 Q. Well, what I'm saying is -- well, I'll just leave it with  
21 that. But your answer says that to the best of your knowledge,  
22 the measured levels of ETS nicotine in this study are the  
23 highest reported in published literature, right?

24 A. Yes, sir, that's what it says.

25 Q. Let's look a little more closely at that. Let's look at

1 U.S. Exhibit 89401.

2 Now, this is a submission to the FAA dated -- Federal  
3 Aviation Administration dated September 16th, 1991. It's titled  
4 "The comments of the Philip Morris Companies Incorporated."

5 Do you see it on the first page?

6 A. Yes, I do.

7 Q. And it's -- the signature block is someone named Steven  
8 Parrish.

9 Do you see that on the first page?

10 A. It's not signed but that name is typed there. Yes, sir.

11 Q. Right. Now, if we look at this, let's go into one page,  
12 and we see that some history is provided there -- I'm not going  
13 to read all of it -- of why Philip Morris is making the  
14 submission.

15 And at the very bottom of that page, Philip Morris refers  
16 to some legislation, essentially that bans smoking on all  
17 scheduled airline flights of 6 hours or less of duration within  
18 the U.S. and then it refers to that -- there's a citation to  
19 that legislation on the next page.

20 And again in the middle paragraph on that next page, the  
21 flight attendants' petition would require the FAA administrator  
22 to prohibit smoking of tobacco on all foreign flights operated  
23 by U.S. air carriers.

24 Do you see that?

25 A. I lost your last piece there. Are we on top of page 3?

- 1 Q. In the middle of page 3, the flight attendants' petition.  
2 Do you see that?
- 3 A. Yes, I do. Second paragraph.
- 4 Q. "Would require the FAA administrator to prohibit smoking  
5 on all foreign flights operated by U.S. air carriers."  
6 Do you recall that this time back in 1991 when Reynolds  
7 and other members of the industry, having already had smoking  
8 restrictions in place from 1987, were now fighting further  
9 smoking restrictions on U.S. international flights?
- 10 A. Your question is, am I aware of it?
- 11 Q. Yeah, do you recall that? Do you recall that time in  
12 history when this was going on?
- 13 A. Sure.
- 14 Q. Philip Morris then goes on -- if we turn to the page  
15 ending in 1372, the next page, you see a section under Roman  
16 Numeral II, "Data do not support the prohibition of smoking."  
17 Do you see that?
- 18 A. I do.
- 19 Q. And if you turn the page, we see a list of studies  
20 following on the pages beyond from one to ten. "Philip Morris  
21 is providing data that do not support the prohibition of smoking  
22 in its view."  
23 Do you see that?
- 24 A. I've lost that exact quote.
- 25 Q. Well, that was just the heading under Roman Numeral II.

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- 1 A. Okay, sure.
- 2 Q. Now, if we take a quick look at those, I'm sure you're  
3 familiar with a lot of them, maybe we can go through them  
4 quickly.
- 5 A. Maybe not. I'm not sure that I've ever seen this  
6 document before. So --
- 7 Q. It's just the individual studies that I'm going to focus  
8 on right now.
- 9 A. That's fine.
- 10 Q. Number 3, do you see that, the first attempt to measure  
11 nicotine is a marker specific to tobacco smoke?
- 12 A. Um-hmm.
- 13 Q. And refers to a study by Muramatsu which found mean  
14 values of 15.2 micrograms per cubic meter, right?
- 15 A. Right.
- 16 Q. Are you familiar with that study?
- 17 A. I haven't reviewed it in some time, but yeah, I've seen  
18 it.
- 19 Q. Well, that study found a mean nicotine value higher than  
20 the Oldaker study, right?
- 21 A. The mean is higher, but that's not -- I assume you're  
22 going to tie that back into the numbers in the table in the  
23 Oldaker study.
- 24 Q. I'm going to tie them to the numbers that were reported  
25 in the study.

- 1 A. Right.
- 2 Q. But that mean value is higher than the mean value  
3 reported in the Oldaker study, right?
- 4 A. That's right.
- 5 Q. 1984, another Muramatsu study from 1987.
- 6 A. Wait a minute, if I could clarify. I'm not entirely sure  
7 these are the same mean values, and that may require some  
8 explanation. But there are different types of mean, there's an  
9 arithmetic mean and a geometric mean. Dr. Oldaker, from memory,  
10 and I can refresh my memory, he may have reported a geometric  
11 mean, but I'm not sure that will be important. But assuming  
12 these are the same type of calculation, then, yes, the 15.2 is  
13 higher than the 9.-whatever, but I'm not sure they're the same  
14 type of mean.
- 15 Q. And if we look at the study at number 4, another  
16 Muramatsu study reporting a mean of 13.5 in the smoking section  
17 and 5.3 in the nonsmoking, and 13.5 is higher than Oldaker -- it  
18 is higher than what was in the Oldaker study, right?
- 19 A. The mean reported for Muramatsu is higher than the mean  
20 reported in Oldaker, right.
- 21 Q. Right. And number 5, the next page of the 3rd Muramatsu  
22 document, we see the Oldaker study itself, the one we've just  
23 been looking through, right?
- 24 A. Right.
- 25 Q. And then in number 6, we see a Department of

1 Transportation study. At the very bottom of that page we see  
2 13.4 micrograms.

3 A. Um-hmm.

4 Q. Again higher than the mean value reported in the Oldaker  
5 Reynolds study, right?

6 A. Sure.

7 Q. Number 7 on that list, we see a study from Drake. We  
8 don't see the mean values there.

9 Do you by any chance know what they are off the top of  
10 your head?

11 A. No, I don't.

12 Q. And number 8 refers to a 1989 Canadian study, number 9  
13 refers to a 1989 European study.

14 Do you see that?

15 A. I do, yes.

16 Q. Do you know if those studies reported mean values above  
17 what was reported in the Oldaker study?

18 A. I don't recall here, no, sir.

19 Q. Do you -- but again you made the statement in your answer  
20 that to the best of your knowledge, "The measured levels of ETS  
21 nicotine in the Oldaker study were the highest reported in the  
22 published literature."

23 Would you agree, Dr. Ogden, that your answer is mistaken?

24 A. No, sir, it's not. I refer specifically in my testimony  
25 to the data in tables 1 and 2. Table 2 shows a level of

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1 nicotine measured at 112 micrograms per cubic meter. I'm not  
2 aware of any nicotine measurement in the aircraft made by any of  
3 these studies or others that exceeds that value.

4 Q. So you're referring to the one value in a table, not to  
5 the study's conclusions which found the mean value of -- what  
6 did we see? 9.2 and then 5.5, right?

7 A. My testimony says the measured levels, it doesn't say the  
8 average. It doesn't say the summary, it talks about the  
9 individual levels that were measured.

10 Q. Right.

11 A. That's what I was referring to.

12 Q. So not to the conclusions of the study.

13 A. No, this talks about the measured levels.

14 Q. Now, let's look, if we could, at that Drake study.  
15 That's at number 7.

16 Are you familiar with that study? Familiar with the  
17 name?

18 A. I put it away. Could you get me back there, please.

19 Q. Sure. Actually, I'm going to give you a copy of the  
20 study itself, but yes, I was referring to number 7 on the Philip  
21 Morris list. And I'm going to hand you a document marked  
22 U.S. Exhibit 92092. And this study is titled "Measurements of  
23 certain environmental tobacco smoke components on long-range  
24 flights," right?

25 A. That's right.

- 1 Q. Now, who wrote this study, Dr. Ogden?
- 2 A. The Drake study?
- 3 Q. Yes.
- 4 A. The author line is John Drake and Dallas Johnson.
- 5 Q. Who wrote the study, Dr. Ogden, if you know?
- 6 A. I mean, I can look through it. I don't have any other  
7 knowledge other than that. I can --
- 8 Q. Let's hand you another document. To your knowledge, this  
9 was written by someone named Drake and Johnson; is that right?
- 10 A. Well, you asked me who wrote it, I looked at the author  
11 line and that's what it says. Now, I know there's additional  
12 information in footnotes and acknowledgements. I can read that  
13 to see if there's any additional information but --
- 14 Q. Do you have any reason to believe that the authors of  
15 this study are anyone other than Drake and Johnson?
- 16 A. No, sir. Not from looking at the title line.
- 17 Q. Do you have any knowledge from your experience at  
18 R.J. Reynolds?
- 19 A. Let me read the footnotes then, let me make sure. Let me  
20 refresh my recollection of this study, then. I don't see any  
21 other attribution as to who may have written it, no, sir.
- 22 Q. And you don't have any knowledge from your work at  
23 Reynolds to suggest that anyone other than those two individuals  
24 wrote that report.
- 25 A. Nothing that I can recall, no, sir.

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1 Q. Well, I want to talk more broadly about the subject of  
2 affiliation and attribution. I notice throughout your written  
3 testimony at probably more than 10 points, you were asked: Is  
4 the affiliation of the author or are the affiliations of the  
5 authors reported in the study? And you answer consistently yes,  
6 they are, right?

7 A. That's right.

8 Q. For example, if we go to page 25, this is a sample. On  
9 page 24, you've listed some publications and then at 25, lines 4  
10 and 5, you're asked if the publications reflect the authors'  
11 affiliation with Reynolds. You answer yes.

12 You are a scientist, Dr. Ogden. Why is the affiliation  
13 of the author an important thing to have within the published  
14 study?

15 MR. McDERMOTT: Objection, he's here as a fact witness.  
16 If the department wants to get into expert opinion, that's fine,  
17 but they may be opening the door.

18 MR. SCHWIND: It's not his expert opinion, Your Honor,  
19 it's his factual opinion from actually publishing a number of  
20 studies within the scientific --

21 THE COURT: The objection's overruled.

22 THE WITNESS: So could you restate your question, please.

23 BY MR. SCHWIND:

24 Q. Sure. As a scientist, why is it important for the  
25 affiliation of the author to be noted within the published study

1    itself?

2    A.     Well, as a factual matter, it's certainly the affiliation  
3    is required by the journal.  I mean, whoever submits the paper,  
4    you have to have contact information there.

5            It's generally the practice that the affiliation is there  
6    so that, you know, you would recognize who the person is or who  
7    the people were that did the work.

8    Q.     Is that the only reason, just because it's required?

9    A.     Well, the second part of my answer was so that you would  
10   know who -- so you would know who published the paper.

11   Q.     And why is that important?

12   A.     For identity purposes, I suppose.

13   Q.     Is it important so you can assess the value of the study  
14   or the weight to give it as a reader, as someone reading the  
15   study?

16   A.     It may be important to some readers, sure.

17   Q.     All right.  Let's look at your articles.  With respect to  
18   articles written by you personally, Dr. Ogden, isn't it true  
19   that scientific publications, as you said, normally require and  
20   have required you to disclose your employer?

21   A.     I'm not sure that's quite a fair characterization, but I  
22   always have, as a matter of course, identified, you know, where  
23   I did the work and the address.

24   Q.     I mean, so for your articles, the fact that, you know,  
25   the name of your company appears under Michael W. Ogden, I mean

1 that's not particularly surprising if the journal requires or  
2 had required you to disclose your employer, right?

3 A. No, it's not surprising. I mean --

4 Q. Well, let's look at another type of paper. Would you  
5 agree that it would be inappropriate, if not deceptive, if a  
6 study were funded by, edited by or written by a cigarette  
7 manufacturer or someone on behalf of the cigarette industry and  
8 that fact were not disclosed within the study?

9 MR. McDERMOTT: Objection, beyond the scope of his written  
10 direct.

11 MR. SCHWIND: Your Honor, 12 times in his testimony, he's  
12 asked about affiliations and attribution of articles to R.J.  
13 Reynolds, CIAR and the industry. It's a major part of the  
14 written testimony and I think we have a right to test this  
15 witness's basis for giving the answers that he did.

16 MR. McDERMOTT: Your Honor, those are facts. He is not  
17 here as a scientific ethicist or a publication ethicist or  
18 anything else. He's here giving factual testimony. And the fact  
19 that he disclosed his affiliation is properly before the Court.  
20 He's not here standards of care, standards of practice or  
21 anything else. He can --

22 MR. SCHWIND: Well, again, Your Honor, he has 20 years'  
23 experience with a Ph.D. of publishing studies within the  
24 scientific literature.

25 THE COURT: No, the objection's sustained. You're asking

1 him for his opinion as to whether it would be misleading or  
2 deceptive. And I think that Mr. McDermott is right, that that  
3 does cross the line into expert testimony.

4 BY MR. SCHWIND:

5 Q. Isn't it true -- let me ask -- well, I'll ask a different  
6 question -- that your company, to your knowledge, your company  
7 and other cigarette manufacturers did exactly that; that is,  
8 they participated in and in some instances wrote published  
9 papers without industry attribution?

10 MR. McDERMOTT: Objection, beyond the scope of direct.

11 MR. SCHWIND: Well, Your Honor, again, this is a factual  
12 question.

13 THE COURT: It is. Objection's overruled.

14 THE WITNESS: Okay, could you ask the question again?

15 BY MR. SCHWIND:

16 Q. Sure. Isn't it true that your company, R.J. Reynolds,  
17 and other cigarette manufacturers did exactly that; that is,  
18 publish papers, publish scientific papers that were funded by,  
19 edited by or written by a representative of a cigarette  
20 manufacturer, yet failed to disclose that fact within the study  
21 itself?

22 MR. BERNICK: Your Honor, I will object on behalf of at  
23 least the other manufacturers, that there's no foundation  
24 established with regard to this witness in terms of his being in  
25 a position to even have personal knowledge of anything that's the

1 subject of that question that concerns my client.

2 MR. McDERMOTT: In addition, Your Honor, the government is  
3 just trying to get through the back door what it can't get  
4 through the front door. His attributions, the fact that he  
5 disclosed his name and affiliation in his publication is a fact.

6 He does not write about other publications, he is not here  
7 as an expert on business practices generally, or what others have  
8 done with respect to tobacco or anything else.

9 THE COURT: The objection is sustained as to other  
10 companies. It is not sustained as to Reynolds, his employer.

11 MR. SCHWIND: Yes, Your Honor.

12 BY MR. SCHWIND:

13 Q. With respect to Reynolds and studies that Reynolds funded  
14 edited, if not wrote, isn't there studies out there that failed  
15 to disclose the involvement of your company?

16 A. I don't have a specific recollection here. That may be  
17 true from some time in the past. I'm not aware of that  
18 happening, certainly not in recent history, but I don't have any  
19 specific recollection as we sit here today.

20 Q. Well, let's see if I can refresh your memory. I'm going  
21 to hand you a document marked U.S. Exhibit 29936. It has what  
22 appears to be almost a cover sheet on it, so we'll go to the  
23 page just inside. And it's entitled "1990 Program Review,  
24 environmental tobacco smoke division, real life measures."

25 Dr. Ogden, in 1990, you were part of the Environmental

- 1 Tobacco Smoke Division, correct?
- 2 A. That's correct, yes.
- 3 Q. And you were still working for Dr. Oldaker at the time?
- 4 A. No, I never worked for Dr. Oldaker, I reported to
- 5 Dr. Green.
- 6 Q. Well, there's four persons listed there. Was Dr. Oldaker
- 7 in your supervisory chain?
- 8 A. No, he was not.
- 9 Q. Were any of those persons in your supervisory chain?
- 10 A. No.
- 11 Q. All right. Do you know who prepared this document, this
- 12 program review for your division?
- 13 A. This is not a program review for the entire division. By
- 14 its title, it appears to be a subset of that division. But your
- 15 question is: Do I know who prepared it? Not based on what I
- 16 see here. I assume it's a collaboration of those four
- 17 individuals named.
- 18 Q. I mean, have you seen documents like this?
- 19 A. Let me take a minute just to flip through it.
- 20 (Brief pause.) I've seen documents similar to this,
- 21 sure.
- 22 Q. Let's go to the page marked 16 at the bottom. And if we
- 23 could try out, the top quarter of the page, we see a term at the
- 24 top called "Ghostwriting."
- 25 What is ghostwriting, Dr. Ogden?

1 A. That's a phrase that I'm familiar using where someone is  
2 generally contracted to write a document for another.

3 Q. Right, one person writes it, another person is listed as  
4 the author, right?

5 A. Well, I don't know about that. In fact, I'm aware of  
6 companies called Ghostwriters, Inc.

7 We hire people to write standard operating procedures and  
8 I believe they work for Ghostwriters, Inc., but that's -- I'm  
9 not sure of your point. That's what ghostwriting is.

10 Q. Well, ghostwriting, again, one person writes it, another  
11 person is listed as the author, right?

12 A. Possibly, sure, one person writes it at the funding or at  
13 the request of another. I think that would be a reasonable  
14 definition of ghostwriting.

15 THE COURT: I would like you to go up a little bit on that  
16 page, just so I get the context of it -- or the previous page.

17 MR. SCHWIND: Maybe we can go to the previous page. Let  
18 me just do one thing. I know what your confusion is, Your Honor.  
19 I'm seeing if I can -- if we can go two pages back to page 14, at  
20 the bottom. The very top of that publication: "Members of the  
21 group were associated with 14 papers, 12 papers published, two  
22 papers submitted for publication, and one ghostwritten paper  
23 during the 1990 review period and these are listed below."

24 Do you see that, Dr. Ogden?

25 THE WITNESS: Yes, I do.

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1 BY MR. SCHWIND:

2 Q. And then we see "Published" is the first category under  
3 that heading and then "Submitted for publication," and then of  
4 course the "One ghostwritten paper" is what we were looking at,  
5 at the top of page 16, right?

6 A. Right. Well, under the ghostwriting heading is what you  
7 asked me about. Yes, sir.

8 Q. Well, isn't it true, Dr. Ogden, that your company --  
9 employees of your company Reynolds, would ghostwrite papers for  
10 independent authors to actually sign and publish in the  
11 scientific literature?

12 A. That appears to be what this suggests, is the genesis of  
13 this paper.

14 Q. And that's one way that your company could avoid having  
15 to admit the affiliation of the authors of the published  
16 studies, right?

17 A. Well, it would accomplish that, yes.

18 Q. Well, let's look back at that Drake study that I handed  
19 you. This is marked U.S. Exhibit 92092.

20 Do you still have a copy up there? It's right on the  
21 top, closest to me.

22 The Drake study "Measurements of certain environmental  
23 tobacco smoke components on long-range flights" written by Drake  
24 and Johnson. It's exactly, Dr. Ogden -- if we could go back to  
25 page 16 -- the title and authors of the paper listed as having

1 been ghostwritten in U.S. Exhibit 29936, right?

2 A. It refers to the same paper, yes, sir.

3 Q. And, in fact, you see the ghostwriters were Dr. Fenner  
4 from Philip Morris, Ms. Mary Ward, and Dr. Oldaker, right?

5 A. That's what it says.

6 Q. Do you know Dr. Fenner?

7 A. I do.

8 Q. Do you know if this was the only paper that was  
9 ghostwritten as a collaboration between Philip Morris and  
10 R.J. Reynolds while you were within the ETS division?

11 A. No, I don't know.

12 Q. Now, let's move forward. You testified to a number of  
13 studies that were written.

14 THE COURT: Mr. Schwind, we're almost at stopping time,  
15 almost.

16 MR. SCHWIND: Yes, Your Honor. In that case, I will go to  
17 one other document, if I could find it, maybe just to tie this  
18 up.

19 BY MR. SCHWIND:

20 Q. I'm going to hand you a document that's been marked  
21 U.S. Exhibit 92095.

22 THE COURT: Do you happen to know if the individuals who  
23 were listed as having ghostwritten that article are -- do you  
24 know those individuals?

25 THE WITNESS: The three names we just discussed?

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1 THE COURT: No, the first two names.

2 THE WITNESS: The Drake and the other one?

3 THE COURT: Yes.

4 THE WITNESS: No, ma'am, I don't recognize those names.

5 THE COURT: Does it appear that they are scientists with  
6 either Ph.Ds or masters? It's not on the screen right now.

7 THE WITNESS: Right. The paper lists the credentials of  
8 the first author as MBA DBA, and the second author is Ph.D.

9 It says in the footnotes they're transportation  
10 consultants, Dr. Johnson as a statistical consultant in  
11 Manhattan. So, it lists their occupation as consultants.

12 BY MR. SCHWIND:

13 Q. Your Honor, are you asking about the credentials of the  
14 ghostwriters or the --

15 THE COURT: No, the authors. I know who the ghostwriters  
16 are based on the testimony that's been presented today. All  
17 right. I got my answers.

18 BY MR. SCHWIND:

19 Q. All right, Dr. Ogden, have you had a chance to look at  
20 Exhibit 92095?

21 A. I don't have it.

22 Q. This document on the first page, reads "Real Life  
23 Measures Group."

24 Do you see that?

25 A. I do.

- 1 Q. Was that part of the ETS division as well?
- 2 A. It was.
- 3 Q. And do you recognize the names Conrad, Eudy, Nystrom,  
4 Oldaker and Stancill?
- 5 A. Yes, I do.
- 6 Q. I'll turn to the next page of the document. This is  
7 dated 1988. "1988 objectives and accomplishments." And under  
8 accomplishments, letter B, second item there, ETS in Ottawa  
9 offices, Oldaker, ghostwriter, environmental technology, letters  
10 -- what's that an abbreviation for?
- 11 A. Which one?
- 12 Q. Of the journal?
- 13 A. Environmental Technology Letters is the name of the  
14 journal.
- 15 Q. And it gives a citation of the journal there, right?
- 16 A. Yes, sir.
- 17 Q. Are you familiar with a published paper looking at ETS in  
18 the Ottawa offices?
- 19 A. Yes, I am, very broadly. I haven't reviewed it recently.
- 20 Q. It rings a bell, right?
- 21 A. Sure.
- 22 Q. Did you know that that paper was ghostwritten by  
23 Dr. Oldaker?
- 24 A. Sitting here today, I don't recall. I mean, I'd like to  
25 see the paper. I don't have a specific recollection of that

1 from 1988, no.

2 Q. All right. Well, I just have two more documents and  
3 we'll finish this up. I'm going to hand you a document marked  
4 92096, it's a Reynolds memorandum dated 3 May 1988 to your boss,  
5 Dr. Green, from Dr. Oldaker, right?

6 A. That's right.

7 Q. And the very first item, survey of ETS on Ottawa offices.  
8 And he writes the report titled "Results from survey of  
9 environmental tobacco smoke in offices in Ottawa, Ontario, was  
10 completed and is being submitted for publication in  
11 environmental technology letters."

12 The journal you just mentioned a few minutes ago, right?

13 A. That's right, it's the same journal, right.

14 Q. Right. Let's take a look if we can at the study itself.  
15 I'm going to hand you a document marked 92097.

16 THE COURT: And this will be your last document,  
17 Mr. Schwind.

18 MR. SCHWIND: Yes, Your Honor.

19 BY MR. SCHWIND:

20 Q. And we see it's "Title Results of survey from tobacco  
21 smoke in -- I'm sorry, in "offices in Ottawa, Ontario," right?

22 A. Right.

23 Q. And the authors listed are John Carson and Carol  
24 Erickson, right?

25 A. Right.

- 1 Q. And then we see some handwriting underneath their  
2 address, "Submitted to environmental technology letters  
3 May 1988."
- 4 You recognize that handwriting, don't you, Dr. Ogden?
- 5 A. Yes, sir, I do.
- 6 Q. That's Dr. Oldaker, right?
- 7 A. I'm sure that it is.
- 8 Q. You're sure it is, right?
- 9 A. Well, I have no reason to believe it's not, he has a  
10 very --
- 11 Q. Distinctive handwriting --
- 12 A. Distinctive flair, right.
- 13 Q. And we see there is another note written in someone  
14 else's hand, "Accepted, October 1988."
- 15 Do you see any indication -- I'll let you read through  
16 this document -- where it's disclosed that Dr. Oldaker  
17 ghostwrote or actually wrote this published paper?
- 18 I'll direct your attention, Dr. Ogden, to the  
19 acknowledgements sections on the page with the Bates number  
20 ending in 9793.
- 21 A. I just got there, yes, thank you.
- 22 Q. The authors -- I'll read it, "The authors gratefully  
23 acknowledge the assistance provided by Mr. Paul Ducett for his  
24 efforts in locating sampling sites. We also thank Guy Oldaker,  
25 Terry Miller, Michael Barteau for their help and comments. And

1 this survey was funded by the Smokers' Freedom Society."

2 A. Right.

3 Q. Is there any indication in this paper as far as you can  
4 see, Dr. Ogden, that the author, the actual author of this  
5 document was an employee of R.J. Reynolds?

6 A. No, sir, not in this draft, I don't.

7 Q. All right. Thank you. That's all I have for today, Your  
8 Honor.

9 THE COURT: Is there any doubt in your mind that this is  
10 an example, a blatant example of scientific fraud, or are you  
11 going to tell me this is done routinely in the scientific world?

12 THE WITNESS: Well, I wouldn't say it's done routinely. I  
13 wouldn't say it's fraud either.

14 THE COURT: You wouldn't say it's fraud when one person  
15 lists their name as the author of a document that was written by  
16 somebody else? I guess we must have a different definition of  
17 fraud.

18 THE WITNESS: If the authors listed -- I know they  
19 participated in the study. I'm presuming they agree with  
20 everything written in the manuscript. If they disagreed in any  
21 way and it was published, I would agree with you, that's fraud.  
22 If they agreed with everything in the manuscript, I'm not sure I  
23 would call that fraud. I wouldn't do this today, I can't say  
24 that in 15 years --

25 THE COURT: You don't agree that when someone says they

1 wrote something it's not a fraud if they didn't write it?

2 THE WITNESS: If they said they wrote it and they didn't,  
3 that would be fraudulent.

4 THE COURT: Isn't that what that usually means when  
5 someone is listed as the author of a document?

6 THE WITNESS: That would be my interpretation, yes.

7 THE COURT: You may step down for tonight.

8 Mr. Schwind, how much more cross do you have?

9 MR. SCHWIND: I have probably about 2 hours. I should be  
10 finished by lunch tomorrow.

11 THE COURT: I hope so. And what do you anticipate on  
12 redirect?

13 MR. McDERMOTT: An hour, perhaps less, Your Honor.

14 THE COURT: All right. Now, you may step down. That's  
15 all right.

16 MR. SCHWIND: I would ask that you instruct the witness.

17 THE COURT: Yes. You are not allowed to discuss your  
18 testimony with anyone at all, and certainly not with any counsel.

19 You're not allowed to do any homework tonight or refresh  
20 your recollection or look back at your testimony or any of the  
21 materials that you might have looked at in preparing your factual  
22 testimony.

23 Do you understand that?

24 THE WITNESS: Yes, ma'am.

25 THE COURT: All right. Thank you. You may step down.

1 We're going to start Dr. McAllister tomorrow. Who's going to be  
2 doing the cross of Dr. McAllister?

3 MR. SCHWIND: Mary Jo Moltzen will be representing the  
4 United States and doing the cross of Dr. McAllister.

5 THE COURT: Do you have any idea what the estimate is on  
6 that cross?

7 MR. SCHWIND: I have a broad estimate right now of about  
8 two to three hours, Your Honor, but I don't know how firm it is  
9 right now.

10 THE COURT: So we're probably not going to finish him  
11 tomorrow, sounds like, or --

12 MS. EUBANKS: Well, we're going to take a look at things  
13 again this evening and if possible we would like to finish him  
14 tomorrow. But it's a goal, but I'm just not certain it's doable.

15 MR. BERNICK: Your Honor, if we could try to get -- I  
16 think the original estimate with respect to Dr. McAllister, I  
17 think we were told that it would be something like 4 hours.

18 Now it sounds like it's shorter, which no one's going to  
19 complain about it, but we can get greater certainty, and the  
20 reason is that the next witness after Dr. McAllister is Dr. Read,  
21 and he's flying in from England.

22 And with the uncertainty concerning when we're going to be  
23 on trial next week, it would be very helpful to have a firmer  
24 estimate for Dr. McAllister so that we can then address more  
25 meaningfully the question that Your Honor asked about scheduling

1 next week. So if there's any way by tomorrow morning that we can  
2 get a better indication from the government, that would be much  
3 appreciated.

4 MS. EUBANKS: I think we can have a better understanding.

5 THE COURT: And we will definitely be sitting on Monday.  
6 I indicated that. 9:30 tomorrow morning.

7 (Proceedings adjourned at 4:40 p.m.)

8

9 C E R T I F I C A T E

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

12 -----  
13 Scott L. Wallace, RDR, CRR  
14 Official Court Reporter

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Scott L. Wallace, RDR, CRR  
Official Court Reporter

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I N D E X

Examinations

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DIRECT EXAMINATION OF MICHAEL WAYNE OGDEN, Ph.D.  
BY MR. McDERMOTT:

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CROSS-EXAMINATION OF MICHAEL WAYNE OGDEN, Ph.D.  
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E X H I B I T S

Description

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