

I N D E X

TUESDAY, APRIL 10, 2001..... 2: 2281: 3
1: 35 P. M 2: 2281: 7

WITNESSES

NEAL BENOwitz

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ALLAN FEINGOLD

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EXHIBITS

I. D. 5819 - 1989 BENOwitz ARTICLE..... 2: 2309: 3

1 CASE NUMBER: BC 226593
2 CASE NAME: BOEKEN V. PHILIP MORRIS
3 LOS ANGELES, CALIFORNIA TUESDAY, APRIL 10, 2001
4 DEPARTMENT 308 HON. CHARLES W MC COY, JUDGE
5 APPEARANCES: (AS NOTED ON TITLE PAGE.)
6 REPORTER: LINDA STALEY, CSR NO. 3359, RMR, CRR
7 TIME: 1: 35 P. M

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10

11

NEAL BENO WITZ,

12

WITNESS, RESUMED THE STAND AND TESTIFIED FURTHER AS FOLLOWS:

13

14

THE COURT: OUR JURY PANEL IS BACK WITH US.

15

GOOD AFTERNOON, COUNSEL. GOOD TO SEE ALL OF

16

YOU.

17

MR. CARLTON: GOOD AFTERNOON, YOUR HONOR.

18

THE COURT: MR. BENO WITZ, SIR, YOU MAY STEP UP.

19

LADIES AND GENTLEMEN, YOU REMEMBER MR. BENO WITZ

20

WAS HERE, AND HE' S NOW RETURNED.

21

SIR, YOU UNDERSTAND THAT YOU' RE STILL UNDER

22

OATH.

23

THE WITNESS: I DO.

24

THE COURT: YOU MAY SIT.

25

MR. CARLTON, I BELIEVE YOU WERE CROSS-EXAMINING

26

MR. BENO WITZ FOR THE LAST --

27

MR. CARLTON: YES, YOUR HONOR. I' LL RESUME WITH

28

DR. BENO WITZ, AND THEN I UNDERSTAND WE' LL GO FORWARD WITH

1 DR. FEINGOLD.

2 THE COURT: ALL RIGHT.

3

4

CROSS-EXAMINATION

5 BY MR. CARLTON:

6 Q. GOOD AFTERNOON, DR. BENOWITZ.

7 A. GOOD AFTERNOON.

8 THE COURT: SIR, IF YOU' LL PULL THAT JUST RIGHT ON
9 AROUND.

10 Q. BY MR. CARLTON: WHAT I' D LIKE TO DO TO START
11 OFF HERE IS TO RETURN TO A DOCUMENT, ONE OF THE DOCUMENTS
12 THAT YOU TALKED ABOUT DURING YOUR LAST VISIT ON FRIDAY.

13 AND THE DOCUMENT I' D LIKE TO TALK ABOUT IS
14 EXHIBIT 3.00.

15 LET' S SEE HERE. I' M GOING TO HAVE TO KEEP
16 PUTTING MY GLASSES ON AND OFF TO SEE IF I CAN FOCUS.

17 NOW, THIS WAS A DOCUMENT FROM WILLIAM DUNN OF
18 PHILIP MORRIS.

19 DO YOU RECALL THIS DOCUMENT?

20 A. YES.

21 Q. "MOTIVES AND INCENTIVES IN CIGARETTE SMOKING"?

22 A. YES.

23 Q. AND JUST TO REMIND THE JURY WHAT THIS DOCUMENT
24 WAS, THIS IS THE DOCUMENT WHERE DR. DUNN REFERS TO CIGARETTES
25 AS A NICOTINE DELIVERY DEVICE, ISN' T IT?

26 A. YES.

27 Q. OKAY. NOW, THERE WASN' T ANY SCIENTIFIC DATA
28 CONTAINED IN THIS REPORT, WAS THERE?

1 A. THAT'S CORRECT.

2 Q. SO LET'S -- LET'S LOOK A BIT AT THIS DOCUMENT.
3 IT SAYS -- LET'S LOOK AT THE FIRST PARAGRAPH ON
4 THE SECOND PAGE.

5 THIS DOCUMENT REFERS TO A CONFERENCE, DOESN'T
6 IT, A CONFERENCE IN WHICH SCIENTISTS MET TO DISCUSS WHY
7 PEOPLE SMOKE?

8 A. YES.

9 Q. AND DR. DUNN EXPLAINS ON THE SECOND PAGE THE
10 REASON FOR HOLDING THE CONFERENCE; ISN'T THAT RIGHT?

11 A. YES.

12 Q. AND I'LL READ IT HERE. IT SAYS (READING):

13

14 "IN JANUARY, 1972, THE DUTCH
15 SIDE OF ST. MARTIN" -- AN ISLAND IN THE
16 CARIBBEAN -- "WAS INVADED BY AN UNLIKELY
17 PARTY OF 25 SCIENTISTS. THERE WERE
18 PHARMACOLOGISTS, SOCIOLOGISTS,
19 ANTHROPOLOGISTS AND A PREPONDERANCE OF
20 PSYCHOLOGISTS. THEY CAME FROM ENGLAND,
21 CANADA AND THE UNITED STATES. EACH BROUGHT
22 WITH HIM A CAREFULLY PREPARED SCIENTIFIC
23 PAPER WHICH REPRESENTED HIS BEST EFFORTS AT
24 ATTACKING THE QUESTION, 'WHY DO PEOPLE
25 SMOKE' " -- "'WHY DO THEY SMOKE
26 CIGARETTES?' " -- I SHOULD SAY.

27

28 ISN'T THAT RIGHT?

1 A. YES.

2 Q. AND THEN HE ALSO SAYS, LATER ON (READING):

3

4 "MUCH OF WHAT FOLLOWS IN THIS
5 PRESENTATION COMES FROM THAT ST. MARTIN
6 CONFERENCE, " DOESN' T IT?

7

8 A. YES.

9 Q. NOW, ACTUALLY, THIS PAPER, THE ONE WE' RE
10 LOOKING AT HERE, WAS A PRESENTATION AT ANOTHER CONFERENCE,
11 WASN' T IT, A CORESTA CONFERENCE?

12 A. I DON' T RECALL THE DETAILS, ACTUALLY, OF WHEN
13 THAT WAS PRESENTED.

14 Q. IN ANY EVENT, MUCH OF THE INFORMATION CONTAINED
15 IN THIS DOCUMENT COMES FROM THE ST. MARTIN CONFERENCE; ISN' T
16 THAT RIGHT?

17 A. YES.

18 Q. AND THIS WASN' T SOME SECRET PHILIP MORRIS
19 MEETING, WAS IT?

20 A. NO.

21 Q. IT WASN' T JUST A SECRET TOBACCO INDUSTRY
22 MEETING EITHER, WAS IT?

23 A. NO.

24 Q. THERE WERE OUTSIDE SCIENTISTS AT THIS MEETING?

25 A. YES.

26 Q. THERE WERE RESPECTED OUTSIDE SCIENTISTS AT THAT
27 MEETING; ISN' T THAT TRUE?

28 A. YES.

1 Q. YOU' RE FAMILIAR WITH THE SCIENTIST BY THE NAME
2 OF DR. JARVIK?

3 A. YES.

4 Q. HE WAS THERE?

5 A. YES.

6 Q. HE' S A WELL-REGARDED SCIENTIST?

7 A. YES.

8 Q. INDEPENDENT OF THE TOBACCO COMPANIES?

9 A. YES.

10 Q. YOU' VE HEARD OF A DR. STANLEY SCHACHTER?

11 A. YES.

12 Q. HE WAS THERE?

13 A. YES.

14 Q. ANOTHER WELL-REGARDED SCIENTIST?

15 A. YES.

16 Q. ANOTHER SCIENTIST INDEPENDENT OF THE TOBACCO
17 COMPANIES, RIGHT?

18 A. SO FAR AS I KNOW I NEVER KNEW DR. SCHACHTER
19 QUITE WELL, SO I CAN' T TELL YOU WHERE HE GOT HIS RESEARCH
20 SUPPORT.

21 Q. ALL RIGHT. IF YOU' RE INVITING PROMINENT
22 OUTSIDE SCIENTISTS TO A CONFERENCE TO DISCUSS THINGS LIKE THE
23 ROLE OF NICOTINE, DOES THAT SUGGEST TO YOU THAT IT' S AN OPEN
24 SUBJECT FOR SCIENTISTS TO TALK ABOUT AND DISCUSS?

25 A. YES.

26 Q. NOW, OF THESE CONFEREES, DR. DUNN SAYS, ON PAGE
27 4 -- LET' S SEE IF THAT' S STILL VISIBLE THERE -- "THE MAJORITY
28 OF THE" -- WELL, LET ME GO BACK.

1 LET' S GO BACK A PAGE TO PAGE 3, THIS
2 HIGHLIGHTED PORTION HERE WHERE HE TALKS ABOUT WHAT THE
3 PURPOSE OF THIS WAS.

4 (READING:)

5
6 "THE ST. MARTIN CONFERENCE WAS
7 CALLED BY THE COUNCIL FOR TOBACCO RESEARCH,
8 USA, IN AN EFFORT TO GOAD THE SCIENTIFIC
9 COMMUNITY INTO HAVING ANOTHER GO AT THE
10 PROBLEM'; IS THAT RIGHT?

11

12 A. YES.

13 Q. YOU KNOW WHAT THE COUNCIL FOR TOBACCO RESEARCH
14 IS, DON' T YOU?

15 A. YES. IT' S AN ORGANIZATION THAT WAS FUNDED BY
16 THE TOBACCO INDUSTRY TO SUPPORT RESEARCH.

17 Q. OUTSIDE RESEARCH?

18 A. YES.

19 Q. AND THE PROBLEM THEY WERE BEING GOADED --
20 INSIDE AND OUTSIDE SCIENTISTS -- WERE BEING GOADED INTO
21 ADDRESSING WAS WHY DO PEOPLE SMOKE CIGARETTES AT THIS
22 CONFERENCE, RIGHT?

23 A. YES.

24 Q. IT SAYS AT THE NEXT PAGE (READING):

25

26 "THE MAJORITY OF THE CONFEREES
27 WOULD GO EVEN FURTHER AND ACCEPT THE
28 PROPOSITION THAT NICOTINE IS THE ACTIVE

1 CONSTITUENT OF CIGARETTE SMOKE. WITHOUT
2 NICOTINE, THE ARGUMENT GOES, THERE WOULD BE
3 NO SMOKING. "

4

5 SO THAT WAS SOMETHING THAT WAS DISCUSSED OPENLY
6 AT THIS CONFERENCE, RIGHT?

7 A. YES.

8 Q. THIS DOCUMENT IS JUST REPEATING WHAT
9 25 SCIENTISTS FROM AROUND THE WORLD REPORTED AT A CONFERENCE
10 ATTENDED BY DR. DUNN?

11 A. WELL, NOT EXACTLY. THE SCIENTISTS PRESENTED
12 DIFFERENT ASPECTS OF THEIR RESEARCH RELEVANT TO SMOKING. I
13 THINK DR. DUNN SYNTHESIZED THE IMPRESSIONS THAT HE HAD FROM
14 THE RESEARCH AS A WHOLE.

15 Q. ALL RIGHT. SO HE'S SYNTHESIZING WHAT WAS
16 PRESENTED AT THIS CONFERENCE?

17 A. YES. THERE MAY HAVE BEEN SOME PEOPLE WHO
18 DIDN'T AGREE WITH THIS, BUT I THINK THIS IS WHAT DR. DUNN
19 THOUGHT THE CONFERENCE CONCLUSIONS WERE.

20 Q. ALL RIGHT. NOW, THE DATE OF THIS DOCUMENT,
21 JUST TO REMIND THE JURY, IS SOMETIME IN 1972, ISN'T IT?

22 A. YES.

23 Q. SO THAT EVEN IN 1972, THE NOTION THAT THE
24 ACTIVE CONSTITUENT IN CIGARETTE SMOKE IS NICOTINE WASN'T SOME
25 NEW PROPOSITION, WAS IT?

26 A. NO.

27 Q. NOW, DURING YOUR TESTIMONY LAST WEEK, YOU
28 REFERRED TO THE PHRASE THAT DR. DUNN USED THAT CIGARETTES

1 SHOULD BE CONCEIVED NOT AS A PRODUCT BUT AS A PACKAGE, THE
2 PRODUCT IS NICOTINE?

3 A. YES.

4 Q. AGAIN, HE'S REPORTING IN HERE.

5 NOW, ARE YOU FAMILIAR WITH A JOURNAL IN LANCET
6 WRITTEN BY A DR. JOHNSTON IN 1942?

7 A. YES.

8 Q. AND DR. JOHNSTON, 30 YEARS BEFORE THIS
9 CONFERENCE, SAID, "SMOKING TOBACCO IS ESSENTIALLY A MEANS OF
10 ADMINISTERING NICOTINE," DIDN'T HE?

11 A. YES.

12 Q. SO YOU'D AGREE THAT THE CONCEPT OF A CIGARETTE
13 AS A NICOTINE DELIVERY DEVICE WASN'T ONE THAT ORIGINATED WITH
14 DR. DUNN EITHER, WAS IT?

15 A. NO.

16 Q. SO IT'S HARDLY SURPRISING THAT THAT IDEA WAS
17 BANDIED AROUND AT THIS CONFERENCE AT ST. MARTIN?

18 A. THAT'S CORRECT.

19 Q. TURNING TO PAGE 6, DR. DUNN GOES ON TO QUALIFY
20 A BIT WHAT HE'S BEEN SAYING ABOUT CIGARETTES BEING A NICOTINE
21 DELIVERY DEVICE, DOESN'T HE?

22 I'LL READ IT.

23 A. PLEASE.

24 Q. (READING:)

25

26 "LEST ANYONE BE MADE UNDULY
27 APPREHENSIVE ABOUT THIS DRUG-LIKE
28 CONCEPTUALIZATION OF THE CIGARETTE, LET ME

1 HASTEN TO POINT OUT THAT THERE ARE MANY OTHER
2 VEHICLES OF SOUGHT-AFTER AGENTS WHICH
3 DISPENSE IN DOSE UNITS: WINE IS THE VEHICLE
4 AND DISPENSER OF ALCOHOL, TEA AND COFFEE ARE
5 THE VEHICLES AND DISPENSERS OF CAFFEINE,
6 MATCHES DISPENSE DOSE UNITS OF HEAT, AND
7 MONEY IS THE STORAGE CONTAINER, VEHICLE AND
8 DOSE-DISPENSER OF MANY THINGS. "

9

10 THE INFORMATION FROM THIS CONFERENCE WOULD HAVE
11 BEEN AVAILABLE TO ANYONE LOOKING FOR INFORMATION ABOUT WHY
12 PEOPLE SMOKE, WOULDN'T IT, DOCTOR, BECAUSE IT WAS PUBLISHED?

13 A. THE CONFERENCE PAPERS WERE PUBLISHED. I AM NOT
14 AWARE THAT DR. DUNN'S TALK OR THE TEXT THAT YOU JUST SHOWED
15 WAS PUBLISHED. IN THE BOOK THAT HE EDITED, THIS WAS NOT PART
16 OF IT. THE PAPERS WERE PART OF IT.

17 Q. RIGHT.

18 A. BUT I DIDN'T SEE THIS CONCEPTUALIZATION, AND
19 HIS COMMENTS IN THE BOOK ARE ACTUALLY MUCH MORE RESERVED
20 ABOUT SAYING THAT TOBACCO IS A DRUG-DELIVERY DEVICE. I DON'T
21 THINK HE SAYS THAT IN THE BOOK AT ALL. HE'S MUCH MORE
22 CAUTIOUS.

23 Q. LET'S TURN TO THE END OF THIS DOCUMENT, THE
24 VERY LAST PAGE, IF WE COULD. AND I DON'T KNOW IF YOU CAN
25 READ THAT OR IF IT'S --

26 A. I CAN'T READ IT VERY WELL.

27 Q. -- IF IT'S FOCUSED AT ALL.

28 LET ME TRY THIS ONE MORE TIME.

1 I DON'T KNOW IF THAT'S MUCH OF AN IMPROVEMENT.
2 IT SAYS THIS AT THE VERY END OF THIS PAPER (READING):

3
4 "THIS IS THE END OF MY
5 PRESENTATION. IF YOU'VE BEEN INTRIGUED BY
6 ANY OF THESE IDEAS, I RECOMMEND THE RECENTLY
7 PUBLISHED VOLUME ENTITLED, 'SMOKING BEHAVIOR:
8 MOTIVES AND INCENTIVES,' A COMPENDIUM OF
9 PAPERS PRESENTED AT THE ST. MARTIN
10 CONFERENCE, PUBLISHED BY V. H. WINSTON & SONS
11 OF WASHINGTON, D. C. "

12
13 YOU'RE FAMILIAR WITH THAT BOOK, AREN'T YOU?

14 A. YES. I HAVE A COPY OF THAT BOOK.

15 Q. YOU'VE SEEN IT?

16 A. YES.

17 Q. HERE'S A COPY OF THE BOOK, CHECKED OUT OF THE
18 USC MEDICAL LIBRARY.

19 AND THIS BOOK CONTAINS A NUMBER OF THE
20 PRESENTATIONS MADE AT THIS ST. MARTIN CONFERENCE, DOESN'T IT?

21 A. YES.

22 Q. IT'S BEEN AVAILABLE TO THE PUBLIC AND, IN FACT,
23 IT STILL IS AVAILABLE TO THE PUBLIC, ISN'T IT?

24 A. YES.

25 Q. IN LIBRARIES LIKE USC?

26 A. YES.

27 Q. NOTHING SECRET ABOUT WHAT WAS DISCUSSED AT THAT
28 CONFERENCE, IS THERE, DOCTOR?

1 A. NO. BUT AGAIN, I NEED TO RESTATE, THAT THE
2 CONCEPTUALIZATION THAT PHILIP MORRIS OR DR. DUNN CONSIDERED
3 CIGARETTES TO BE A DRUG-DELIVERY DEVICE WAS NOT STATED IN
4 THOSE TERMS IN THAT BOOK.

5 Q. BUT IT WAS STATED AT THE CORESTA CONFERENCE AT
6 WHICH HE MADE THIS PRESENTATION; ISN'T THAT TRUE?

7 A. YES.

8 Q. NOW, I'D LIKE TO TURN TO A SECOND DOCUMENT THAT
9 YOU DISCUSSED LAST WEEK. AND THIS IS EXHIBIT 421. THIS WAS
10 A MEMO DATED JUNE 2ND, 1976 FROM AL UDOW TO J. J. MORGAN.

11 DO YOU RECALL THIS?

12 A. YES.

13 Q. AND I BELIEVE WHAT YOU'VE TALKED ABOUT IN
14 RELATION TO THIS DOCUMENT WAS THE FOLLOWING.

15 THIS PARAGRAPH HERE, YOU POINTED OUT (READING):

16
17 "FOR PERSONS WHO ARE
18 SELF-CONSCIOUS AND INSECURE, SMOKING PROVIDES
19 AN ACTIVITY AND SOMETHING TO DO WITH THEIR
20 HANDS THAT TAKES THEIR MINDS OFF THEMSELVES.
21 MANY ACCEPT THE IMAGE CREATED BY CIGARETTE
22 ADVERTISEMENTS OF CIGARETTE SMOKING AS A
23 SYMBOL OF POISE, SELF-CONFIDENCE AND SOCIAL
24 SUCCESS. BUT ONCE ONE BECOMES DEPENDENT UPON
25 CIGARETTES, HABITUATION OR ADDICTION ARE
26 IMPELLING DRIVES TO CONTINUE. "

27
28 DO YOU SEE THAT?

1 A. YES.

2 Q. NOW, DURING THE DISCUSSION LAST WEEK, THIS
3 LITTLE PART RIGHT HERE WAS NOT HIGHLIGHTED. AND THAT SAYS,
4 "NO SOURCE GIVEN. "

5 DO YOU SEE THAT?

6 A. YES.

7 Q. AND IT SAYS, "NO SOURCE GIVEN, " BECAUSE THIS
8 DOCUMENT, THE WORDS THAT WE JUST READ, WERE NOT THE WORDS OF
9 THE AUTHOR OF THIS DOCUMENT, WERE THEY?

10 A. IN PARTS OF THE DOCUMENT, THEY WERE THE
11 AUTHOR'S WORDS. IN PARTS, THEY WERE QUOTES FROM SOMETHING
12 ELSE. I HAVE NO IDEA IF THOSE COMMENTS -- WHERE THEY CAME
13 FROM

14 Q. THE WORDS THAT I JUST READ AND THAT WAS
15 DISCUSSED LAST FRIDAY APPEAR BELOW THIS?

16 A. YES.

17 Q. WHERE IT SAYS (READING):

18

19 "HAROLD S. DIEHL, M D. ,
20 (1969), OF THE AMERICAN CANCER SOCIETY QUOTES
21 LIBERALLY FROM DAVID HORN OF THE NATIONAL
22 CLEARINGHOUSE FOR SMOKING AND HEALTH. MUCH
23 OF WHAT HE SAYS IS STATED AUTHORITATIVELY
24 WITHOUT SOURCE OR SUPPORT DATA. "

25

26 AND THE FOLLOWING PARAGRAPHS ARE FROM THAT
27 SOURCE WITHIN -- THEY EVEN HAVE QUOTATION MARKS.

28 SO IT'S CLEAR THAT THAT PORTION OF THE

1 MEMORANDUM AND MOST OF THE REST OF THE MEMORANDUM CONSIST OF
2 A SUMMARY OF PUBLISHED LITERATURE CONCERNING WHY PEOPLE SMOKE
3 AND ISN'T A SUMMARY OF THE BELIEFS OF PHILIP MORRIS; ISN'T
4 THAT RIGHT?

5 A. CERTAINLY, THAT SECTION, THAT'S CORRECT.

6 Q. I'D LIKE TO CHANGE SUBJECTS VERY, VERY BRIEFLY.
7 ARE YOU FAMILIAR WITH THE 1989 SURGEON
8 GENERAL'S REPORT?

9 A. I BELIEVE SO. WHAT WAS THE TITLE OF THAT
10 REPORT AGAIN?

11 Q. LET ME SEE. I'LL PULL IT OUT.
12 "REDUCING THE HEALTH CONSEQUENCES OF SMOKING,
13 25 YEARS OF PROGRESS. "

14 A. YES, I AM FAMILIAR WITH THAT REPORT.

15 Q. AND YOU'RE FAMILIAR, THEN, WITH PAGE 223, WHERE
16 IT SAYS (READING):

17
18 "ALTHOUGH EMPIRICAL EVIDENCE
19 IS SPARSE, TOBACCO INDUSTRY ACTIVITIES IN THE
20 FORM OF ADVERTISING AND PROMOTION, PUBLIC
21 RELATIONS AND LOBBYING MAY INTERFERE WITH
22 PUBLIC BELIEFS AND PERSONALIZED ACCEPTANCE OF
23 THE HEALTH RISKS OF SMOKING. "

24

25 A. YES.

26 Q. ARE YOU FAMILIAR WITH THAT?

27 A. YES.

28 Q. THERE'S ONLY SPARSE EVIDENCE OF THAT, RIGHT?

1 A. WELL, THERE HAS BEEN A LOT OF INTEREST IN THAT
2 QUESTION, AND THERE'S BEEN MORE RESEARCH SINCE 1989.

3 Q. BUT THAT WAS THE POINT IN 1989.

4 A. THAT WAS -- THAT WAS THE CASE IN 1989, THAT'S
5 CORRECT.

6 Q. I WANT TO TALK A LITTLE BIT ABOUT NICOTINE.
7 PEOPLE DON'T START TO SMOKE BECAUSE OF
8 NICOTINE, DO THEY?

9 A. NO.

10 Q. A MAJOR REASON THEY START TO SMOKE IS BECAUSE
11 OF BEING INFLUENCED BY THEIR PEERS; ISN'T THAT RIGHT?

12 A. YES.

13 Q. THE MAJOR DETERMINANT OF WHETHER A PERSON
14 CHOOSES TO SMOKE IS WHETHER THEIR BEST FRIEND SMOKES?

15 A. YES.

16 Q. SMOKING DOESN'T PREVENT SOMEONE FROM READING
17 THE WARNINGS ON THE SIDE OF A CIGARETTE PACKET, DOES IT?

18 A. NO.

19 Q. DOESN'T PREVENT SOMEONE FROM UNDERSTANDING THE
20 WORDS ON THE SIDE OF A CIGARETTE PACKAGE, DOES IT?

21 A. IT DOES -- NOT THE DRUG ITSELF. AS WE TALKED
22 ABOUT BEFORE, ADDICTION CAN AFFECT PERCEPTION OF WARNINGS
23 WITH RESPECT TO ONE'S SELF, BUT IT DOES NOT INTERFERE WITH
24 READING IT OR UNDERSTANDING THE WORDS.

25 Q. OR UNDERSTANDING WHAT THEY MEAN.

26 NICOTINE DOESN'T AFFECT A SMOKER'S ABILITY TO
27 HEAR WHAT PARENTS OR DOCTORS OR FRIENDS ARE SAYING ABOUT
28 STOPPING SMOKING, DOES IT?

1 QUITTING SMOKING, ISN'T IT?

2 A. YES.

3 Q. IT'S MORE IMPORTANT THAN PATCHES OR INHALERS OR
4 CLINICS; ISN'T THAT RIGHT?

5 A. WELL, IT'S HARD TO COMPARE THOSE THINGS. BUT
6 CERTAINLY, MOTIVATION IS CRITICAL TO QUITTING SMOKING.

7 Q. WELL, ISN'T IT TRUE THAT A PERSON WHO IS
8 SUFFICIENTLY MOTIVATED CAN QUIT WITHOUT PATCHES OR INHALERS?

9 A. THAT'S CORRECT.

10 Q. A PERSON WITHOUT MOTIVATION IS HIGHLY UNLIKELY
11 TO QUIT EVEN WITH PATCHES OR INHALERS?

12 A. THAT IS CORRECT.

13 Q. SO IS IT FAIR TO SAY, THEN, THAT FOR THE
14 50 MILLION PEOPLE WHO HAVE QUIT, THERE CAME A TIME WHEN THEIR
15 DESIRE TO SMOKE WAS OUTWEIGHED BY THEIR DESIRE TO QUIT?

16 A. YES.

17 Q. NOW, IN ADDITION TO MOTIVATION, PERSISTENCE IS
18 ALSO VERY IMPORTANT, ISN'T IT?

19 A. YES.

20 Q. AND YOU'VE TESTIFIED THAT A LOT OF THE FORMER
21 SMOKERS, A LOT OF THOSE 50 MILLION FORMER SMOKERS, MIGHT NOT
22 HAVE SUCCEEDED THE FIRST TIME THEY TRIED TO QUIT?

23 A. THAT'S CORRECT.

24 Q. AND EVEN IF A SMOKER FAILS TWO OR THREE OR FOUR
25 TIMES, YOU WOULD URGE THEM TO KEEP TRYING, WOULDN'T YOU?

26 A. YES.

27 Q. SOME PEOPLE QUIT AFTER ONE OR TWO TRIES, OTHERS
28 HAVE TO TRY MORE OFTEN; ISN'T THAT RIGHT?

1 A. MST HAVE TO TRY MDRE OFTEN. BUT, YES, THAT' S
2 CORRECT.

3 Q. BUT A FACT THAT A PERSON WAS UNSUCCESSFUL IN
4 THE PAST DOESN' T MEAN THEY' LL BE UNSUCCESSFUL IN THE FUTURE?

5 A. THAT' S CORRECT.

6 Q. IN FACT, THE ODDS OF SUCCESSFULLY QUITTING
7 INCREASE THE MDRE TIMES ONE TRIES?

8 A. YES.

9 Q. NOW, IF A SMDKER ENGAGES IN MULTIPLE QUIT
10 ATTEMPTS, THE ODDS OF SUCCEEDING GO UP TO ABOUT 50 PERCENT,
11 DON' T THEY?

12 A. SOMETHING LIKE THAT.

13 Q. SO WHEN YOU ADVISE YOUR PATIENTS, YOU DON' T
14 TELL THEM TO QUIT TRYING AFTER THE FIRST TIME?

15 A. NO.

16 Q. OR THE SECOND TIME?

17 A. NO.

18 Q. YOU KEEP TELLING THEM, KEEP TRYING?

19 A. YES.

20 Q. YOU WOULD ADVISE A PERSON WHO YOU BELIEVED TO
21 BE HIGHLY ADDICTED TO KEEP TRYING?

22 A. YES.

23 Q. NOW, I THINK YOU TESTIFIED LAST WEEK THAT
24 SMDKERS -- MAYBE YOU DIDN' T.

25 DO YOU THINK A SMDKER WILL SMOKE A CIGARETTE
26 WITHOUT NICOTINE?

27 A. NO. WELL, NOT FOR VERY LONG. THEY MIGHT SMOKE
28 A FEW, BUT THEY WON' T KEEP SMOKING THEM

1 Q. NOW, NICOTINE HAS AFFECTS FOR THE SMOKERS OTHER
2 THAN PHARMACOLOGICAL EFFECTS, DOESN'T IT?

3 A. WELL, I THINK I UNDERSTAND WHAT YOU'RE DRIVING
4 AT. BUT IT'S NOT EXACTLY CORRECT. ALL THE THINGS NICOTINE
5 DOES ARE PHARMACOLOGIC. EVEN ITS TASTE IS A PHARMACOLOGIC
6 EFFECT. I THINK YOU'RE TRYING TO SEPARATE OUT SYSTEMIC
7 PHARMACOLOGICAL EFFECT AS COMPARED TO A LOCAL PHARMACOLOGIC
8 EFFECT.

9 Q. YOU WOULD DEFINE TASTE AS A PHARMACOLOGICAL
10 EFFECT?

11 A. IT'S AN EFFECT OF NICOTINE ON RECEPTORS THAT
12 ARE RELATED TO TASTE, TASTE BUDS.

13 Q. SO THAT BEING THE CASE, ANYTHING WE EAT HAS A
14 PHARMACOLOGICAL EFFECT -- A LOCAL PHARMACOLOGICAL EFFECT?

15 A. TO SOME EXTENT, YES.

16 Q. THEN LET'S JUST FOCUS ON THE LOCAL EFFECT.
17 IT IS IMPORTANT TO MANY SMOKERS, ISN'T IT, THAT
18 SMOKE HAVE A CERTAIN TASTE AND FEEL IN THE MOUTH?

19 A. YES.

20 Q. AND YOU WOULD AGREE THAT IT'S IMPORTANT THAT
21 NICOTINE OR THE NICOTINE IS IMPORTANT TO THAT TASTE AND FEEL?

22 A. YES.

23 Q. AND YOU'VE HEARD OF FREE NICOTINE?

24 A. YES.

25 Q. CAN YOU DESCRIBE WHAT FREE NICOTINE IS?

26 A. WELL, NICOTINE, WHEN IT'S IN SMOKE, CAN BE
27 PRESENT IN TWO FORMS. AND THAT DEPENDS ON THE ACID BASE
28 BALANCE OF THE SMOKE, HOW MUCH IS IN WHICH FORM

1 ONE FORM IS WHAT'S CALLED CHARGED, SO IT'S --
2 IONIZED, AND IT TENDS TO STAY WITH WATER. IT DISSOLVES IN
3 WATER.

4 THE OTHER PART OF IT IS WHAT'S CALLED FREE
5 NICOTINE OR FREE-BASE NICOTINE. IT'S SORT OF LIKE THE
6 CONCEPT OF FREE-BASE COCAINE. SO IT'S NOT CHARGED. IT GOES
7 INTO THE GAS PHASE OF SMOKE. AND IT'S WHAT GETS ABSORBED
8 THROUGH THE MOUTH. AND IT'S WHAT INFLUENCES THE RECEPTORS
9 THAT ARE INVOLVED WITH THE TASTE OF SMOKE, WITH THE
10 SCRATCHINESS IN THE THROAT, WITH THE IMPACT OF SMOKE.

11 Q. SO THE PRESENCE OF FREE NICOTINE HAS AN IMPACT
12 ON TASTE AND FEEL?

13 A. YES.

14 Q. MOST OF THAT IS ABSORBED IN THE MOUTH AND THE
15 THROAT, RIGHT?

16 A. YES.

17 Q. SO THAT IS, THE PHYSICAL IMPACT OF THE SMOKE IS
18 AFFECTED BY THE FREE NICOTINE?

19 A. YES.

20 Q. THAT'S PART OF THE OVERALL SENSATION, THEN,
21 THAT A SMOKER GETS WHEN SMOKING?

22 A. YES.

23 Q. NOW, BOTH THE TASTE AND THE FEEL OF SMOKE ARE
24 IMPORTANT TO CONSUMERS; ISN'T THAT RIGHT?

25 A. YES.

26 Q. SMOKERS WON'T CHOOSE TO SMOKE A CIGARETTE THAT
27 DOESN'T TASTE OR FEEL RIGHT TO THEM?

28 A. WELL, IF THEY DO -- IF THEY DO SWITCH -- AND

1 THIS HAS HAPPENED, I THINK I MENTIONED BEFORE, WHEN FILTERED
2 CIGARETTES CAME IN. PEOPLE FOUND THEM TO BE VERY WEAK IN THE
3 BEGINNING AND, OVER TIME, THEY DID LEARN TO SMOKE THEM BUT
4 CERTAINLY, WHEN YOU CHANGE CIGARETTE CHARACTERISTICS IN THE
5 SHORT-TERM, A SMOKER DOES NOT LIKE A CIGARETTE THAT TASTES
6 DIFFERENT.

7 Q. SO THEY CHOOSE THEIR CIGARETTES BASED ON,
8 LARGELY, ON THE WAY THEY TASTE AND FEEL?

9 A. USUALLY, IT'S WHAT THEY'RE USED TO. IT'S A
10 TASTE THAT THEY ASSOCIATE WITH A CIGARETTE AND KNOW THE
11 EFFECTS OF NICOTINE, SO THEY LIKE TO SMOKE CIGARETTES THAT
12 THEY'VE SMOKED BEFORE.

13 Q. AND YOU'VE READ MR. BOEKEN'S DEPOSITION
14 TRANSCRIPT, HAVEN'T YOU?

15 A. YES.

16 Q. SO YOU KNOW THAT HE SMOKED MARLBOROS BECAUSE HE
17 LIKED THEIR TASTE?

18 A. YES.

19 Q. ISN'T IT TRUE, DR. BENOWITZ, THAT IF YOU TOOK A
20 TOBACCO LEAF RIGHT OUT OF THE FIELD, ROLLED IT UP IN A PIECE
21 OF PAPER, THERE WOULD BE MORE NICOTINE FOR ITS WEIGHT IN THAT
22 CIGARETTE OR THOSE CIGARETTES -- HOWEVER MANY YOU COULD MAKE
23 FROM THE LEAF -- THERE'D BE MORE NICOTINE IN THAT CIGARETTE
24 THAN IN A REGULAR COMMERCIAL CIGARETTE PRODUCED TODAY?

25 A. WELL, IN GENERAL. IT DEPENDS, OF COURSE, ON
26 WHAT TOBACCO LEAF YOU'RE TALKING ABOUT. BUT THE AVERAGE
27 TOBACCO CIGARETTE IS MADE WITH A CERTAIN PERCENTAGE OF
28 RECONSTITUTED TOBACCO, WHICH HAS A LITTLE BIT LESS NICOTINE

1 THAN DOES WHOLE TOBACCO LEAF.

2 Q. SO IF THERE'S A PERCENTAGE OF RECONSTITUTED
3 TOBACCO IN A CIGARETTE THAT HAS LESS NICOTINE THAN NORMAL
4 TOBACCO, IT'S GOING -- AS A CIGARETTE, IT'S GOING TO HAVE
5 LESS NICOTINE THAN AN EQUIVALENT WEIGHT OF NATURAL TOBACCO?

6 A. YES. SLIGHTLY LESS, THAT'S CORRECT.

7 Q. YOU MENTIONED A FEW MINUTES AGO THAT FREE
8 NICOTINE IS AFFECTED BY THE ACID-BASED BALANCE OF THE TOBACCO
9 OF THE CIGARETTE?

10 A. OF THE SMOKE.

11 Q. OF THE SMOKE.

12 AND -- GIVE ME A MOMENT, PLEASE.

13 THE COURT: SURE.

14 Q. BY MR. CARLTON: HAVE YOU EVER -- DO YOU KNOW
15 WHETHER AMMONIA CAN AFFECT THE PH LEVEL?

16 A. WELL, TOBACCO INDUSTRY DOCUMENTS SUGGEST THAT
17 IT CAN. I HAVE NOT SEEN GOOD EVIDENCE RECENTLY ABOUT THAT.
18 BUT CERTAINLY, THE DOCUMENTS THAT WERE PUBLISHED MOSTLY BY
19 R. J. REYNOLDS SHOW RELATIONSHIPS BETWEEN AMMONIA CONTENT OF
20 CIGARETTES AND PH CIGARETTES, I THINK, BACK IN THE '70'S OR
21 '80'S.

22 Q. NOW, YOU HAVEN'T DONE ANY PERSONAL RESEARCH IN
23 THIS AREA, HAVE YOU?

24 A. NO. I HAD SOME INTEREST IN TRYING TO DO IT,
25 BUT I HAVE NOT BEEN ABLE TO GET THE APPROPRIATE CIGARETTES TO
26 DO THAT RESEARCH.

27 Q. NOW, YOU KNOW FROM DOCUMENTS THAT YOU'VE
28 REVIEWED THAT AMMONIA IS USED IN PROCESSING CIGARETTES FOR

1 REASONS ENTIRELY UNRELATED TO PH; ISN'T THAT RIGHT?

2 A. YES.

3 Q. AND ONE OF THE REASONS IS THAT AMMONIA IMPROVES
4 THE SMOKE QUALITY?

5 A. WELL, IT AFFECTS THE TASTE OF THE CIGARETTE.

6 Q. AND THAT'S PARTICULARLY TRUE WITH RESPECT TO
7 THE USE OF RECONSTITUTED TOBACCO; ISN'T THAT RIGHT?

8 A. YES.

9 Q. NORMALLY, RECONSTITUTED TOBACCO WOULD HAVE A
10 POOR SMOKE QUALITY?

11 A. THAT'S WHAT I'VE HEARD.

12 Q. BECAUSE IT'S MADE OF STEMS AND THINGS LIKE
13 THAT?

14 A. YES.

15 Q. AND AMMONIA IS USED AS AN AID IN PROCESSING
16 THAT?

17 A. YES.

18 Q. NOW, AMMONIA IS WIDELY PRESENT IN A LOT OF
19 DIFFERENT SUBSTANCES, ISN'T IT?

20 A. YES.

21 Q. AND IT'S BEEN THE FACT THAT IT'S BEEN USED AS A
22 PROCESSING AID OR A FLAVORANT IN CIGARETTES AND HAS BEEN
23 PUBLISHED IN SCIENTIFIC JOURNALS AND OTHER PUBLICATIONS OVER
24 THE YEARS; ISN'T THAT RIGHT?

25 A. YES.

26 Q. THERE ARE PATENTS THAT HAVE BEEN PUBLISHED TO
27 DESCRIBE THE USE OF AMMONIA IN THE MANUFACTURER OF
28 CIGARETTES, HAVEN'T THERE?

1 A. PROBABLY, I'M NOT SPECIFICALLY AWARE OF THEM

2 Q. AND YOU KNOW THAT AMMONIA REACTS WITH SUGARS
3 THAT ARE FOUND IN TOBACCO?

4 A. YES.

5 Q. AND YOU KNOW THAT THE REACTION OF AMMONIA WITH
6 THESE SUGARS CAUSES THE RELEASE OF CERTAIN FLAVORFUL
7 COMPONENTS FROM THE TOBACCO?

8 A. YES.

9 Q. AND THAT IMPROVES THE OVERALL TASTE SENSATION
10 FOR THE SMOKER, DOESN'T IT?

11 A. WELL, FOR SOME SMOKERS -- FOR SMOKERS THAT LIKE
12 THAT TASTE, YES.

13 Q. YOU KNOW, DON'T YOU, THAT THE PH RANGE OF
14 COMMERCIALY AVAILABLE AMERICAN CIGARETTES IS BETWEEN 5.5 AND
15 6.6?

16 A. YES.

17 Q. MAYBE YOU COULD EXPLAIN FOR THE JURY WHAT THAT
18 MEANS. WHAT IS A HIGH PH AND WHAT'S A LOW PH.

19 A. WELL, PH IS A NUMBER THAT RELATES TO THE
20 ACID-BASED BALANCE. IF SOMETHING WERE NEUTRAL, THE PH WOULD
21 BE 7. SO THE PH OF WATER, PLAIN WATER WITH NOTHING IN IT,
22 WOULD BE 7. ANYTHING LESS THAN 7 IS ACIDIC, SO THERE'S MORE
23 ACID THAN BASE. ANYTHING ABOVE 7 HAS MORE BASE THAN ACID.
24 SO 5.5 TO 6.5 IS ACIDIC. 5.5 IS MORE ACIDIC THAN 6.5.

25 Q. ALL RIGHT. NOW, THAT RANGE, 5.5 TO 6.5, 6.6,
26 IT'S BEEN PRETTY CONSTANT SINCE THE 1970'S, HASN'T IT?

27 A. YES.

28 Q. SO THAT THE SMOKE PH OF 6 IS ABOUT AVERAGE FOR

1 ALL AMERICAN CIGARETTES?

2 A. SOMETHING LIKE THAT.

3 Q. SO YOU'RE NOT OFFERING AN OPINION HERE THAT THE
4 USE OF AMMONIA AFFECTS THE PH OF CIGARETTES?

5 A. I AM NOT OFFERING MY DIRECT OPINION. THE ONLY
6 THING I KNOW ABOUT THAT IS WHAT I'VE READ IN INDUSTRY
7 DOCUMENTS FROM THE '70'S, BUT I HAVE NOT DONE ANY RESEARCH
8 MYSELF.

9 Q. OKAY. YOU KNOW THAT THERE'S VERY LITTLE FREE
10 NICOTINE IN A PH RANGE OF 5.5 TO 6.5, ISN'T THERE?

11 A. WELL, THAT'S A COMPLICATED QUESTION TO ANSWER.
12 THE PERCENTAGE OF FREE NICOTINE COMPARED TO
13 TOTAL NICOTINE IS SMALL, BUT IF YOU GO FROM 5.5 TO 6.5, THEN
14 THERE IS TEN TIMES MORE FREE NICOTINE. SO WHATEVER EFFECT
15 YOU GET, WHETHER IT'S TASTE OR WHETHER IMPACT OR WHETHER
16 ABSORPTION, IS GOING TO BE TEN TIMES GREATER COMPARED TO A PH
17 OF 5.5 TO 6.5.

18 Q. AT A VERY SMALL LEVEL?

19 A. SMALL LEVEL IS TO BE IMPORTANT.

20 AGAIN, IT'S COMPLICATED. THERE'S WHAT'S CALLED
21 EQUILIBRIUM BETWEEN FREE-BASED AND IONIZED. AND IF IT'S FREE
22 BASE, AND YOU ABSORB IT QUICKLY, THEN IONIZED WILL BECOME
23 FREE QUICKLY, AND SO THAT ONE PH UNIT CAN HAVE A BIG EFFECT
24 ON ABSORPTION.

25 Q. NOW, THE MAIN EFFECT OF INCREASED PH IN
26 CIGARETTE SMOKE IS SENSORY, ISN'T IT, RATHER THAN ABSORPTION
27 OR BIOAVAILABILITY?

28 A. WELL, THAT HAS NEVER BEEN FULLY STUDIED,

1 BECAUSE THE CIGARETTES ARE NOT AVAILABLE. THAT'S WHAT I'VE
2 BELIEVED TO BE THE CASE, BUT OTHER SCIENTISTS THINK THAT IT
3 DOES AFFECT ABSORPTION, AND THE STUDIES HAVE NEVER BEEN DONE
4 TO SHOW ONE WAY OR THE OTHER.

5 Q. YOU'VE TESTIFIED IN THE PAST THAT THE MAIN
6 EFFECT IS SENSORY RATHER THAN ABSORPTION OR BIOAVAILABILITY,
7 HAVEN'T YOU?

8 A. WHAT I'VE TESTIFIED IS THAT'S WHAT'S KNOWN.
9 BUT I'VE ALSO TESTIFIED THAT I HAD WANTED TO DO THE RESEARCH
10 AT ONE TIME AND HAVE NEVER GOTTEN THE CIGARETTES TO DO THEM,
11 TO DO THAT RESEARCH.

12 Q. AND IN THE PAST, YOU'VE ACTUALLY EXPRESSED THAT
13 YOU ARE SKEPTICAL OF ANY THEORY THAT PH AFFECTS THE
14 AVAILABILITY OF FREE NICOTINE, HAVEN'T YOU?

15 A. I AM SKEPTICAL, BUT I THINK THE RESEARCH STILL
16 NEEDS TO BE DONE.

17 Q. AND YOU HAVE SEEN NO EVIDENCE THAT THE PH OF
18 CIGARETTE SMOKE CORRELATES WITH THE MARKET SHARE OF
19 INDIVIDUAL CIGARETTES, HAVE YOU?

20 A. THE ONLY EVIDENCE I'VE SEEN IS FROM THE
21 R. J. REYNOLDS INDUSTRY DOCUMENTS WHERE THEY CLAIM THAT IS THE
22 CASE.

23 Q. AND AS YOU SAID, THOSE WERE IN THE '70'S?

24 A. YES.

25 Q. YOU'VE SEEN NO DOCUMENTS OF ANY SORT
26 CORRELATING PH WITH MARKET SHARE SINCE THAT TIME?

27 A. CORRECT.

28 Q. AND YOU DON'T KNOW OF ANY EVIDENCE THAT THE

1 AMOUNT OF FREE NICOTINE IN THE SMOKE OF A PARTICULAR BRAND --
2 WELL, LET ME TAKE THAT BACK.

3 ARE YOU FAMILIAR WITH A HYPOTHESIS THAT WE'VE
4 HEARD ABOUT THAT AMMONIA -- WELL, YOU'VE TESTIFIED -- MAY
5 CHANGE THE CHEMICAL CONDITIONS IN SMOKE?

6 A. YES.

7 Q. AND HAVE YOU EVER HEARD OF A THEORY THAT,
8 ACTUALLY, AMMONIA -- WHEN AMMONIA IS PRESENT, NICOTINE IS
9 DISPLACED MORE EASILY?

10 A. YES.

11 Q. CAN WE REFER TO THAT AS THE NICOTINE
12 DISPLACEMENT THEORY?

13 A. YES.

14 Q. AND THE PERSON RESPONSIBLE FOR CREATING THIS
15 THEORY IS DR. FARONE; ISN'T THAT RIGHT?

16 A. I DON'T KNOW IF HE'S RESPONSIBLE. I'VE HEARD
17 HIM TALK ABOUT IT. I DON'T KNOW IF HE WAS THE FIRST ONE TO
18 TALK ABOUT IT.

19 Q. AND YOU KNOW THAT DR. FARONE HAS SERVED ON MORE
20 THAN ONE OCCASION AS A WITNESS FOR PLAINTIFFS IN TOBACCO
21 CASES?

22 A. YES.

23 Q. NOW, YOU'VE NEVER SEEN ANY EVIDENCE TO SUPPORT
24 DR. FARONE'S NICOTINE DISPLACEMENT THEORY, HAVE YOU?

25 A. I'VE NOT SEEN PUBLISHED RESEARCH ON THAT,
26 THAT'S CORRECT.

27 Q. AND WITHOUT SEEING ANY PUBLISHED RESEARCH, YOU
28 WOULDN'T ASSUME IT TO BE TRUE, WOULD YOU?

1 A. NO. I WOULDN'T ASSUME IT TO BE TRUE OR UNTRUE.
2 ALL I CAN SAY IS I HAVE NOT SEEN THE RESEARCH.

3 Q. IN YOUR MIND -- THAT'S WITHOUT SEEING ANY
4 RESEARCH -- IT'S NOT ANY BETTER THAN SPECULATION, IS IT?

5 A. WELL, I CERTAINLY WOULDN'T MAKE A COMMENT THAT
6 I THOUGHT THAT WAS THE CASE, BUT DR. FARONE HAS HIS OWN
7 INFORMATION, AND I WOULDN'T QUESTION HIS OPINION ABOUT IT.

8 Q. IF HE HAS INFORMATION -- WELL, LET'S SAY, THIS.
9 YOU'VE READ WIDELY IN THE AREA OF NICOTINE
10 ADDICTION, HAVEN'T YOU?

11 A. YES.

12 Q. YOU'VE READ WIDELY IN THE AREA OF CIGARETTE
13 COMPOSITION?

14 A. YES.

15 Q. YOU'VE PUBLISHED WIDELY IN THE AREA OF NICOTINE
16 ADDICTION?

17 A. YES.

18 Q. AND OF NICOTINE -- THE ROLE OF NICOTINE IN
19 CIGARETTES?

20 A. YES.

21 Q. AND YOU'VE NOT SEEN ANY RESEARCH VALIDATING
22 DR. FARONE'S NICOTINE DISPLACEMENT THEORY, HAVE YOU?

23 A. THAT'S CORRECT.

24 Q. I'D LIKE TO MOVE TO A DIFFERENT TOPIC, IF WE
25 COULD.

26 THE COURT: VERY WELL.

27 Q. BY MR. CARLTON: I WANT TO TALK ABOUT THE TAR
28 AND NICOTINE AND CIGARETTES AND THE FTC METHOD FOR MEASURING

1 THAT. ALL RIGHT?

2 A. YES.

3 Q. NOW, YOU KNOW, DON'T YOU, THAT THE PUBLIC
4 HEALTH COMMUNITY ENCOURAGED CIGARETTE MANUFACTURERS TO LOWER
5 THE YIELD OF TAR AND NICOTINE IN THEIR CIGARETTES?

6 A. YES. AT LEAST INDIRECTLY. AND SOMEWHAT
7 DIRECTLY, I GUESS.

8 Q. AND FROM TIME TO TIME, THERE HAVE BEEN
9 STATEMENTS OF ENCOURAGEMENT IN THE MEDICAL AND SCIENTIFIC
10 LITERATURE THAT MANUFACTURERS SHOULD REDUCE THE TAR AND
11 NICOTINE YIELD OF CIGARETTES BECAUSE IT MIGHT REDUCE THE
12 HEALTH RISKS ASSOCIATED WITH SMOKING; ISN'T THAT RIGHT?

13 A. YES.

14 Q. PHILIP MORRIS AND OTHER MANUFACTURERS WERE
15 ENCOURAGED TO DO THAT BY VIRTUALLY THE ENTIRE PUBLIC HEALTH
16 COMMUNITY DURING A PERIOD OF TIME; ISN'T THAT RIGHT?

17 A. YES.

18 Q. AS A MATTER OF FACT, YOU WROTE AN EDITORIAL
19 ENTITLED, "HEALTH AND PUBLIC POLICY IMPLICATIONS OF THE
20 LOW-YIELD CIGARETTE"?

21 A. YES.

22 Q. DIDN'T YOU?

23 A. YES.

24 Q. THAT WAS PUBLISHED IN 1989 IN "THE NEW ENGLAND
25 JOURNAL OF MEDICINE"?

26 A. YES.

27 Q. IS THAT THE ARTICLE YOU PUBLISHED?

28 A. YES.

1 Q. THIS IS EXHIBIT 5819.

2

3 (I. D. 5819 - 1989 BENOWITZ ARTICLE)

4

5 Q. AND DIDN'T YOU HAVE THIS TO SAY IN THE ARTICLE
6 THAT YOU WROTE (READING):

7

8 "FROM THE PERSPECTIVE OF
9 PUBLIC HEALTH, HOWEVER, THE MOVEMENT TOWARD
10 LOW-YIELD CIGARETTES MAKES SENSE. THERE HAS
11 BEEN CONSIDERABLE PROGRESS IN REDUCING THE
12 PREVALENCE OF SMOKING IN THE UNITED STATES,
13 CANADA AND MANY EUROPEAN COUNTRIES, BUT
14 SMOKING RATES ARE MUCH HIGHER IN OTHER PARTS
15 OF THE WORLD, AND THE CIGARETTES SMOKED IN
16 MANY OTHER COUNTRIES HAVE A MUCH HIGHER YIELD
17 THAN THEIR AMERICAN COUNTERPARTS. A
18 WORLDWIDE ATTEMPT SHOULD BE MADE TO REDUCE
19 THE YIELD OF TOXIC SUBSTANCES AND TO MAKE THE
20 YIELD OF ALL CIGARETTES AS LOW AS POSSIBLE.
21 PUBLIC HEALTH POLICY SHOULD ENCOURAGE SMOKERS
22 WHO HAVE NOT YET QUIT TO SMOKE CIGARETTES
23 WITH THE LOWEST POSSIBLE YIELD. "

24

25 DIDN'T YOU WRITE THAT?

26 A. YES.

27 Q. AND YOU ALSO STATED THAT (READING):

28 /

1 "THE YIELDS OF AMERICAN
2 CIGARETTES SHOULD NOT BE ALLOWED TO DRIFT
3 HIGHER AS RESEARCH FINDS THAT LOW-YIELD
4 CIGARETTES ARE NOT LESS HAZARDOUS. "

5 A. YES.

6 Q. RIGHT?

7 WOULDN' T YOU AGREE THAT THE INDUSTRY DID JUST
8 WHAT THE PUBLIC HEALTH COMMUNITY WANTED IT TO DO?

9 A. WELL, SORT OF. THEY DID MANUFACTURE CIGARETTES
10 THAT REGISTERED LOWER YIELD ON MACHINES. THEY DIDN' T
11 MANUFACTURE CIGARETTES THAT EXPOSED THE SMOKER TO LOWER
12 YIELDS.

13 Q. SINCE THE 1950' S, DOCTOR, THE TAR AND NICOTINE
14 YIELDS OF CIGARETTES IN THIS COUNTRY HAVE DROPPED
15 DRAMATICALLY, HAVE THEY NOT?

16 A. AS TESTED BY A SMOKING MACHINE, YES. NOT AS
17 MEASURED IN PEOPLE.

18 Q. WELL, AND AS WE DISCUSSED LAST WEEK, THE METHOD
19 BY WHICH CIGARETTES ARE TESTED IS MANDATED BY THE FTC, RIGHT?

20 A. YES.

21 Q. THE NUMBERS DERIVED FROM THAT TESTING ARE
22 PUBLISHED BY VIRTUE OF LEGAL REQUIREMENTS?

23 A. YES.

24 Q. SINCE THE 1950' S, THE SALES-WEIGHTED AVERAGE OF
25 TAR AS MEASURED BY THE FTC METHOD HAS DECREASED FROM 38 TO 40
26 MILLIGRAMS PER CIGARETTE TO 10 TO 12 MILLIGRAMS PER
27 CIGARETTE; ISN' T THAT RIGHT?

28 A. YES.

1 Q. THAT'S A REDUCTION OF 60 TO 70 PERCENT,
2 CORRECT?

3 A. BY MACHINE TESTING, THAT'S CORRECT. NOT HUMAN
4 EXPOSURE.

5 Q. AND A REDUCTION IN NICOTINE HAS BEEN DRAMATIC?

6 A. BY MACHINE TESTING, YES.

7 Q. I UNDERSTAND YOUR OPINIONS ABOUT MACHINE
8 TESTING.

9 BUT YOU WOULD AGREE, WOULDN'T YOU, THAT IT'S
10 BEEN A GOOD THING THAT THOSE YIELDS HAVE COME DOWN?

11 A. DEPENDS HOW YOU LOOK AT IT.

12 FOR AN INDIVIDUAL CIGARETTE, I HAVE NO PROBLEM
13 WITH LOW-YIELD CIGARETTES. THE PROBLEM WITH THE LOW-YIELD
14 CIGARETTE POLICY IS THAT IT HAS PROVIDED WHAT SEEMS TO BE A
15 LESS HAZARDOUS ALTERNATIVE TO SMOKERS.

16 IF ONE IS ADDICTED TO NICOTINE, AND THEY WANT
17 TO KEEP ON SMOKING, AND THEY SEE A LOW-YIELD CIGARETTE THAT
18 THEY THINK IS LESS HAZARDOUS, THEY WILL SAY, THIS IS A WAY
19 FOR ME TO KEEP ON SMOKING AND NOT HURT MYSELF AS MUCH.

20 AND THE FACT OF THE MATTER IS, THAT IS NOT
21 TRUE, AND IT'S BEEN KNOWN BY THE INDUSTRY AND BY SCIENTISTS
22 FOR A LONG TIME THAT THAT'S NOT TRUE. AND THE CONSUMER HAS
23 NEVER BEEN PROPERLY INFORMED ABOUT THAT. AND I THINK THAT
24 THAT'S A TERRIBLE MISTAKE, AND IT MAY HAVE KEPT MORE PEOPLE
25 SMOKING THAN WOULD HAVE OCCURRED HAD THERE NOT BEEN THAT
26 ALTERNATIVE.

27 Q. FOR YEARS AND YEARS, IT WAS THE POLICY OF THE
28 UNITED STATES GOVERNMENT TO PROMOTE THAT ALTERNATIVE, WASN'T

1 IT?

2 A. YES.

3 Q. THE SURGEON GENERAL RECOMMENDED THAT SMOKERS
4 WHO WEREN' T GOING TO QUIT SHOULD SMOKE LOW-TAR CIGARETTES?
5 DIDN' T THE SURGEON GENERAL DO THAT?

6 A. YES.

7 Q. AND YOU KNOW THAT THE CIGARETTE COMPANIES ARE
8 PRECLUDED BY LAW FROM ADVERTISING THE HEALTH EFFECTS OF THEIR
9 CIGARETTES, DON' T YOU?

10 A. WELL, THEY ARE, BUT IF YOU SEE AN
11 ADVERTISEMENT, AND YOU SAY THIS CIGARETTE HAS GOT THE LOWEST
12 TAR --

13 MR. CARLTON: AGAIN, YOUR HONOR, THIS IS
14 NONRESPONSIVE.

15 THE COURT: YOU OPENED THE DOOR.
16 PROCEED.

17 THE WITNESS: IF A PERSON SEES AN ADVERTISEMENT THAT
18 SAYS, THIS IS THE LOWEST TAR -- THIS IS THE ONE MILLIGRAM TAR
19 CIGARETTE COMPARED TO A 10 MILLIGRAM TAR CIGARETTE OF SOME
20 OTHER BRAND, PEOPLE THINK THAT THAT MEANS THERE' S LESS
21 EXPOSURE FOR THEM THEY DO NOT KNOW THAT THEY' RE GOING TO BE
22 GETTING 9 OR 10 MILLIGRAMS OF TAR FROM THAT CIGARETTE. THEY
23 THINK THAT THAT CIGARETTE IS LESS HAZARDOUS, AND THAT' S BEEN
24 SHOWN IN MANY SURVEYS.

25 Q. BY MR. CARLTON: WELL, WE' VE GONE ROUND AND
26 ROUND WITH THIS. BUT THOSE NUMBERS ARE REQUIRED BY LAW TO BE
27 ON THE CIGARETTES, AREN' T THEY?

28 A. YES. BUT NO ONE TELLS THE SMOKER WHAT THEY

1 NEED TO DO NOT TO COMPENSATE, FOR EXAMPLE. AND THAT COULD BE
2 DONE.

3 Q. LET' S TALK ABOUT SOME OF THE TECHNOLOGIES THAT
4 HAVE BEEN USED TO REDUCE THE TAR IN CIGARETTES.

5 FILTERS WERE ONE, RIGHT?

6 A. YES.

7 Q. AND THOSE MADE GREAT LEAPS DURING THE '50'S?

8 A. YES.

9 Q. RECONSTITUTED TOBACCO THAT YOU' VE TALKED ABOUT,
10 THAT' S ANOTHER TECHNOLOGY, RIGHT?

11 A. YES.

12 Q. AND RECONSTITUTED TOBACCO REDUCES TAR -- HAS
13 REDUCED TAR AND NICOTINE IN IT, CORRECT?

14 A. IT' S GOT LESS NICOTINE; IT GENERATES LESS TAR.

15 Q. OKAY. EXPANDED TOBACCO REDUCES TAR AND
16 NICOTINE, DOESN' T IT?

17 A. YES.

18 Q. LET' S TALK ABOUT EXPANDED TOBACCO FOR JUST A
19 MDMENT.

20 THAT EXPANDED TOBACCO IS REALLY PUFFED TOBACCO,
21 RIGHT?

22 A. YES.

23 Q. IT' S LIKE PUFFED WHEAT, EXCEPT IT' S PUFFED
24 TOBACCO?

25 A. YES.

26 Q. SO THEY TAKE TOBACCO LEAVES, PUFF THEM UP AND
27 PUT THEM IN A CIGARETTE?

28 A. YES.

1 Q. AND THE REASON FOR THAT IS BECAUSE THEY THEN
2 FILL UP THE CIGARETTE WITH LESS TOBACCO?

3 A. YES.

4 Q. ISN' T THAT TRUE?

5 A. YES.

6 Q. NOW, TO THE EXTENT THAT A CIGARETTE IS FILLED
7 WITH LESS TOBACCO, YOU CAN' T COMPENSATE BY TAKING -- WELL,
8 YOU CAN' T COMPENSATE FOR THAT; THERE' S LESS TOBACCO IN THE
9 CIGARETTE, RIGHT?

10 A. TO THAT EXTENT, YES.

11 Q. AND THEN WE' VE TALKED ABOUT FILTRATION DESIGNS?

12 A. YES.

13 Q. AND VENTILATION AND AIR DILUTION DESIGNS?

14 A. YES.

15 Q. ALL OF THESE TECHNOLOGIES --

16 A. YES.

17 Q. -- HAVE BEEN IMPLEMENTED BY THE TOBACCO
18 COMPANIES TO REDUCE THE YIELD TO CONSUMERS?

19 A. WELL, I DON' T KNOW ABOUT THAT. CERTAINLY, THEY
20 HAVE BEEN DONE TO REDUCE THE YIELD AS MEASURED BY MACHINE. I
21 CANNOT TELL YOU WHAT THE INTENT WAS FOR THE CONSUMER.

22 Q. LET' S TURN OUR ATTENTION TO THE SURGEON
23 GENERAL.

24 AS DEFINED BY THE SURGEON GENERAL TODAY,
25 PHILIP MORRIS DOES NOT DISPUTE THAT NICOTINE IS ADDICTIVE,
26 DOES IT?

27 A. NO.

28 Q. IN FACT, THE PHILIP MORRIS WEBSITE, CURRENTLY

1 POSTED, STATES (READING):

2

3

"WE" -- MEANING

4

PHILIP MORRIS -- "AGREE WITH THE OVERWHELMING

5

MEDICAL AND SCIENTIFIC CONSENSUS THAT

6

CIGARETTE SMOKING IS ADDICTIVE. IT CAN BE

7

VERY DIFFICULT TO QUIT SMOKING, BUT THIS

8

SHOULD NOT DETER SMOKERS FROM TRYING TO QUIT

9

TO DO SO. "

10

11

YOU'VE SEEN THE WEBSITE, HAVEN'T YOU?

12

A. YES.

13

Q. THAT'S WHAT IT SAYS?

14

A. YES.

15

Q. YOU ADVISE YOUR PATIENTS TO QUIT SMOKING, DON'T

16

YOU?

17

A. YES.

18

Q. YOU DON'T TELL YOUR PATIENTS THAT THEY'LL BE

19

UNABLE TO QUIT BECAUSE THEY'RE ADDICTED?

20

A. NO.

21

Q. AND WHEN YOU'RE DISCUSSING CIGARETTE SMOKING

22

WITH YOUR PATIENTS, YOU DON'T CALL THEM ADDICTS, DO YOU?

23

A. NO.

24

Q. YOU DON'T EVEN THINK IT WOULD BE HELPFUL TO

25

LABEL THEM ADDICTS, DO YOU?

26

A. NOT IN GENERAL.

27

Q. HELPFUL TO THEM?

28

A. NOT IN GENERAL. SOMETIMES, I TALK ABOUT THE

1 DRUG DEPENDENCY ISSUES, WHAT THE DRUG IS DOING TO THEM AND
2 SOME OF THE THINGS THEY CAN EXPECT WHEN THEY TRY TO DETOXIFY
3 THEMSELVES FROM NICOTINE. SO I DO TALK IN THOSE TERMS, BUT I
4 DON'T NECESSARILY SAY THEY'RE ADDICTS.

5 Q. ALL RIGHT. NOW, DOCTORS IN CALIFORNIA HAVE
6 BEEN ADVISING PATIENTS WHO SMOKE FOR MANY YEARS TO QUIT
7 SMOKING; ISN'T THAT RIGHT?

8 A. YES.

9 Q. AND ONE OF THE GENERAL KINDS OF MEDICAL ADVICE
10 THAT PHYSICIANS ARE SUPPOSED TO GIVE PATIENTS IS TO ADVISE
11 THEM TO QUIT SMOKING; ISN'T THAT TRUE?

12 A. YES.

13 Q. AND THEY'VE BEEN DOING THAT SINCE AT LEAST THE
14 1970'S, WOULDN'T YOU AGREE?

15 A. YES.

16 Q. AND WOULDN'T YOU ALSO AGREE THAT ANY DOCTOR IN
17 CALIFORNIA WHO DOESN'T ADVISE THEIR PATIENTS TO QUIT SMOKING
18 IS REALLY NOT PRACTICING UP TO THE STANDARD OF PROPER CARE?

19 A. THAT IS MY OPINION, YES.

20 Q. AND OBVIOUSLY, ONE OF THE REASONS DOCTORS
21 CONTINUE TO ADVISE PATIENTS TO STOP SMOKING IS BECAUSE THEY
22 CAN -- THEY CAN STOP?

23 A. THEY CAN AND THEY SHOULD, YES.

24 Q. DURING YOUR TESTIMONY LAST FRIDAY IN EVALUATING
25 MR. BOEKEN, YOU REFERRED TO SOMETHING CALLED THE DSM-IV.
26 DO YOU REMEMBER THAT?

27 A. YES.

28 Q. THE DSM-IV IS PUT OUT BY THE AMERICAN

1 PSYCHIATRIC ASSOCIATION?

2 A. YES.

3 Q. AND THAT MANUAL GETS REVISED AND UPDATED FROM
4 TIME TO TIME?

5 A. YES.

6 Q. THE DSM IS THE DEFINITIVE STATEMENT REGARDING
7 THE DIAGNOSIS OF PSYCHIATRIC DISORDERS IN THIS COUNTRY, ISN' T
8 IT?

9 A. THE PSYCHIATRIC DISORDERS IN GENERAL, YES.

10 Q. IT IS THE BIBLE, I SUPPOSE, OF DIAGNOSING
11 PSYCHIATRIC DISORDERS USED BY PSYCHIATRISTS TO TREAT AND
12 EVALUATE PATIENTS IN THE UNITED STATES, IS THAT FAIR TO SAY?

13 A. YES. THERE ARE PROBLEMS WITH NICOTINE
14 DEPENDENCE WITH IT, BUT FOR GENERAL PSYCHIATRIC DISORDERS,
15 THAT' S CORRECT.

16 Q. AND THEY HAVE A SECTION IN THERE REGARDING
17 SUBSTANCE ABUSE, SUBSTANCE DEPENDENCE DISORDERS, DON' T THEY?

18 A. YES.

19 Q. AND UNTIL 1980, THE DSM SPECIFICALLY EXCLUDED
20 TOBACCO AND NICOTINE AS DEPENDENCE PRODUCING, DIDN' T THEY?

21 A. YES.

22 Q. AND IN 1980, FOR THE FIRST TIME, THE AMERICAN
23 PSYCHIATRIC ASSOCIATION CREATED A DIAGNOSIS FOR TOBACCO
24 DEPENDENCE, RIGHT?

25 A. YES.

26 Q. AND IN 1980, THEN, THE APA DID NOT USE -- CHOSE
27 NOT TO USE THE WORD "ADDICTION"?

28 A. YES, THAT' S CORRECT. BUT I DON' T THINK THEY

1 USE ADDICTION FOR ANY DRUGS. I'M NOT -- I DON'T RECALL
2 EXACTLY, BUT I THINK THEY'VE ALWAYS USED "DEPENDENCE" RATHER
3 THAN "ADDICTION."

4 Q. SO THEY'VE STAYED AWAY FROM THE WORD IN EVERY
5 CONTEXT?

6 A. I BELIEVE SO.

7 Q. AND EVEN THOUGH THE SURGEON GENERAL CHANGED HIS
8 DEFINITION OF ADDICTION IN 1988, THE AMERICAN PSYCHIATRIC
9 ASSOCIATION HASN'T GONE ALONG WITH THAT, RIGHT; THEY HAVEN'T
10 CHANGED THEIR DEFINITION TO CONFORM TO THE SURGEON GENERAL'S?

11 A. WELL, THE SURGEON GENERAL USED ADDICTION AND
12 DEPENDENCE AS INTERCHANGEABLE.

13 Q. BUT THE APA HAS NOT USED, TO THIS DAY, THE WORD
14 "ADDICTION" IN THEIR DSM?

15 A. THAT'S CORRECT.

16 Q. IS IT FAIR TO SAY THAT REASONABLE PEOPLE CAN
17 HAVE DIFFERENCES OF OPINION AS TO WHETHER OR NOT "ADDICTION"
18 WAS THE PROPER TERM TO CHARACTERIZE SMOKING IN 1988?

19 A. WELL, THERE WERE SOME SCIENTISTS WHO LIKE
20 DEPENDENCE BECAUSE THEY THOUGHT THERE WAS SOME CONNOTATIONS
21 OF ADDICTION THAT DIDN'T FIT SMOKING. LIKE, FOR EXAMPLE,
22 CRIMINALITY OR ANTISOCIAL BEHAVIOR. SO THERE WERE SOME
23 PEOPLE WHO DID OPPOSE AND PROBABLY STILL DO OPPOSE THE USE OF
24 ADDICTION.

25 Q. SO THERE WERE SOME PEOPLE IN THE SCIENTIFIC
26 COMMUNITY WHO THOUGHT IT WAS AN INAPPROPRIATE WORD TO BE
27 USING?

28 A. WELL, CERTAINLY, THEY CHOSE NOT TO USE IT

1 THEMSELVES, THAT' S CORRECT.

2 Q. NOW, THE WORLD HEALTH ORGANIZATION ABANDONED
3 THE USE OF THAT WORD?

4 A. WELL, THEY ABANDONED IT BACK IN 1965 WHEN THERE
5 WAS THE DISTINCTION BETWEEN ADDICTION AND HABITUATION, SO
6 THEY LUMPED THEM BOTH TOGETHER AS DEPENDENCE IN 1965.

7 Q. BUT YOU WOULD AGREE THAT SOME PEOPLE IN THE
8 PAST, AND POSSIBLY EVEN TODAY, HAVE ASSOCIATED ILLEGAL --
9 ILLEGALITY AND CRIMINALITY WITH THE WORD "ADDICTION," RIGHT?

10 A. AT ONE TIME, IT WAS MUCH MORE SO THAN AT
11 PRESENT.

12 Q. NOW, YOU' VE REVIEWED MANY PUBLIC STATEMENTS BY
13 THE TOBACCO COMPANIES REGARDING ADDICTION, HAVEN' T YOU?

14 A. YES.

15 Q. AND ISN' T IT CORRECT THAT YOU CAN' T POINT US --
16 YOU HAVEN' T POINTED US TO A SINGLE DOCUMENT WHERE THE TOBACCO
17 COMPANIES HAVE DENIED THAT QUITTING CAN BE DIFFICULT?

18 A. WELL, SOME OF THE ADVERTISEMENTS WE LOOKED AT
19 SUGGESTED THAT ANYONE CAN QUIT, MAKING IT SEEM LIKE IT' S NOT
20 VERY DIFFICULT. BUT I DON' T RECALL ANY INTERNAL DOCUMENTS
21 THAT SAY THAT.

22 Q. AND YOU' VE NEVER SEEN ANY INTERNAL DOCUMENT OR
23 ANY PUBLIC STATEMENT -- I SAID THAT -- I' LL SAY THAT.

24 YOU' VE NEVER SEEN ANY PUBLIC STATEMENT DENYING
25 THAT NICOTINE HAS PHARMACOLOGICAL EFFECTS?

26 A. NO.

27 Q. AND YOU' VE NEVER SEEN ANY PUBLIC STATEMENT BY
28 THE TOBACCO COMPANIES DENYING THAT NICOTINE IS PSYCHOACTIVE?

1 A. NO.

2 Q. SO LET'S RETURN, IF WE COULD, TO THE TESTIMONY
3 BY THE CEO'S IN CONGRESS IN 1994.

4 YOU'VE HEARD THAT TESTIMONY --

5 A. YES.

6 Q. -- YOU'VE SEEN THE TRANSCRIPT?

7 A. YES.

8 Q. THE CEO'S IN 1994 DID NOT DISPUTE THAT SMOKING
9 COULD BE HARD TO QUIT, DID THEY?

10 A. I DON'T RECALL SPECIFICALLY, BUT I WOULDN'T --
11 I DON'T QUESTION THAT. I JUST DON'T RECALL.

12 Q. THEY DIDN'T DISPUTE THAT NICOTINE HAS
13 PHARMACOLOGICAL EFFECTS, DID THEY?

14 A. I DON'T RECALL SPECIFICALLY.

15 Q. THEY DIDN'T DENY THAT NICOTINE WAS
16 PSYCHOACTIVE, DID THEY?

17 A. I DON'T RECALL THEIR TESTIMONY ABOUT THAT.

18 Q. SO WHAT THEY DID IN 1994, AND WHAT
19 PHILIP MORRIS DOES NOT DO NOW, IS DISPUTE THE USE OF THE
20 SURGEON GENERAL'S CHANGED DEFINITION OF "ADDICTION" IN THE
21 CONTEXT OF SMOKING; ISN'T THAT RIGHT?

22 A. I DON'T KNOW SPECIFICALLY IF THEY WERE
23 DISPUTING THE SURGEON GENERAL'S DEFINITION. THEY CERTAINLY
24 SAID THAT THEIR OPINION WAS CIGARETTE SMOKING WAS NOT
25 ADDICTING OR ADDICTIVE.

26 Q. AND AS YOU TESTIFIED LAST WEEK, UNDER THE
27 SURGEON GENERAL'S OLDER DEFINITION, IT WOULDN'T QUALIFY AS
28 ADDICTIVE?

1 A. THAT'S CORRECT.

2 Q. YOU YOURSELF HAVE STATED THAT THE WORD
3 "ADDICTION" SHOULDN'T BE USED IN FRONT OF JURIES BECAUSE IT'S
4 A LOADED TERM, ISN'T THAT RIGHT?

5 A. WELL, I SAID THAT MAYBE TEN OR FIFTEEN YEARS
6 AGO. I THINK PEOPLE UNDERSTAND IT AS A LOSS OF CONTROL OF
7 DRUG USE, OR A LOSS OF CONTROL OF SOME BEHAVIOR NOW, WITHOUT
8 THE CONNOTATION THAT I WAS CONCERNED ABOUT AT THAT TIME,
9 WHICH, AGAIN, WERE CRIMINALITY AND PERSONALITY PROBLEMS AND
10 THINGS LIKE THAT.

11 I THINK PEOPLE DO UNDERSTAND, AND MOST PEOPLE
12 UNDERSTAND WHAT'S MEANT BY SMOKING AS ADDICTING. THEY
13 UNDERSTAND THAT IT MEANS THAT ONCE YOU START SMOKING, YOU
14 HAVE EFFECTS OF NICOTINE, AND YOU HAVE A HARD TIME QUITTING
15 THE USE OF THE DRUG WITHOUT THE OTHER CONNOTATIONS. SO AT
16 THE PRESENT TIME, I DON'T HAVE THAT. I DID HAVE CONCERNS
17 BACK IN THE '80'S, THOUGH.

18 Q. SO FOR A PERIOD OF TIME, EVEN AFTER THE SURGEON
19 GENERAL CHANGED HIS DEFINITION, YOU HAD CONCERNS ABOUT THAT
20 WORD, RIGHT?

21 A. FOR A FEW YEARS, YES.

22 Q. I'D LIKE TO CHANGE SUBJECTS ONCE AGAIN, IF WE
23 COULD.

24 YOU TALKED ABOUT MR. BOEKEN'S QUIT ATTEMPTS
25 LAST WEEK.

26 DO YOU RECALL THAT?

27 A. YES.

28 Q. AND WHAT YOU KNOW ABOUT MR. BOEKEN'S QUIT

1 ATTEMPTS, YOU'VE GOTTEN FROM THAT TOBACCO ADDICTION
2 QUESTIONNAIRE THAT MR. PIUZE'S OFFICE SENT YOU, RIGHT?

3 A. YES.

4 Q. AND FROM READING MR. BOEKEN'S DEPOSITIONS?

5 A. THAT'S CORRECT.

6 Q. AND I BELIEVE YOU TESTIFIED -- I KNOW YOU
7 TESTIFIED LAST FRIDAY THAT A SERIOUS QUIT ATTEMPT IS AN
8 ATTEMPT WHERE SOMEBODY ACTUALLY QUILTS SMOKING FOR AT LEAST
9 24 HOURS, RIGHT?

10 A. WELL, THAT'S HOW IT'S BEEN RATED IN TERMS OF
11 SURVEYS. THERE ARE PEOPLE WHO ARE SO ADDICTED THAT THEY
12 EXPERIENCE, BEFORE 24 HOURS, SUCH SEVERE DISCOMFORT THAT THEY
13 START SMOKING AGAIN. AND IN THAT CASE, IT'S HARD TO KNOW --
14 IT COULD BE A SERIOUS ATTEMPT. IT'S JUST HARD TO ASSESS
15 THAT. IT DEPENDS ON THE INDIVIDUAL.

16 Q. WELL, JUST LAST FRIDAY, YOU TESTIFIED THAT AN
17 ATTEMPT THAT DIDN'T INVOLVE 24 HOURS WASN'T SERIOUS, SO IS
18 YOUR OPINION DIFFERENT?

19 A. NO, NO, NO. THAT IS WHAT HAS BEEN USED BY THE
20 CDC. FOR EXAMPLE, PEOPLE WHO HAVE TRIED TO QUIT, THAT'S SORT
21 OF A STANDARD DEFINITION THAT'S USED OPERATIONALLY IN
22 RESEARCH.

23 Q. JUST FOR THE LADIES AND GENTLEMEN OF THE JURY,
24 CDC MEANS THE CENTERS FOR DISEASE CONTROL?

25 A. YES.

26 Q. ALL RIGHT. SO LET'S LOOK AT THIS FIRST QUIT.
27 AND THIS WAS IN 1967.

28 AND THIS WAS THE ATTEMPT OR THE QUIT WHERE HIS

1 GIRLFRIEND, MR. BOEKEN'S GIRLFRIEND, TOLD HIM SHE WOULDN'T GO
2 OUT WITH HIM IF HE DIDN'T QUIT?

3 A. YES.

4 Q. AND THAT WAS FOR THREE OR FOUR WEEKS, RIGHT?

5 A. YES.

6 Q. YOU WOULD CLASSIFY THAT AS A SERIOUS QUIT
7 ATTEMPT, WOULDN'T YOU?

8 A. YES.

9 Q. AND THEN THE NEXT ONE, THE NEXT ONE THAT HE
10 TALKED ABOUT, AT LEAST IN HIS DEPOSITION, WAS IN 1974.

11 DO YOU RECALL THAT?

12 A. YES.

13 Q. AND DO YOU RECALL HIM TESTIFYING THAT HE
14 COULDN'T RECALL WHY HE WANTED TO QUIT?

15 A. I DON'T RECALL SPECIFICALLY EITHER WAY. ALL I
16 KNOW IS THAT HE TRIED TO QUIT ON HIS OWN BUT WAS NOT
17 SUCCESSFUL. I DON'T RECALL WHAT HIS MOTIVATION WAS.

18 Q. OKAY. AND DO YOU RECALL THAT HE COULDN'T
19 REMEMBER AT ALL HOW LONG HE WAS ABLE TO QUIT, IF AT ALL?

20 A. I CERTAINLY DON'T HAVE INFORMATION HERE ABOUT
21 HOW LONG HE WAS ABLE TO QUIT.

22 Q. SO IF THERE'S NO INFORMATION ABOUT HOW LONG HE
23 WAS ABLE TO QUIT, THERE'S NO WAY TO EVALUATE WHETHER THIS
24 EFFORT IN 1974 WAS SERIOUS?

25 A. WELL, WHAT HE DID SAY, WHICH MAKES ME THINK IT
26 WAS SERIOUS, IS THAT HE TRIED QUITTING, HE WAS WORKING OUT
27 WITH WEIGHTS, HE WAS TRYING TO GET HIMSELF HEALTHY. AND HE
28 SAID WHEN HE TRIED TO QUIT, HE DEVELOPED SEVERE CRAVING,

1 BECAME NASTY, HE HAD AN INCREASE IN HIS APPETITE, HE BECAME
2 ANGRY AND EDGY, HAD A BAD ATTITUDE.

3 THOSE MAKE ME THINK THAT HE REALLY DID TRY TO
4 MAKE A SERIOUS ATTEMPT, HAVING EXPERIENCED THOSE THINGS. I
5 MEAN, THAT'S ALL I HAVE. BUT THOSE SYMPTOMS ARE CONSISTENT
6 WITH SOMEONE WHO'S HAVING SIGNIFICANT WITHDRAWAL AND SUGGESTS
7 TO ME, IF HE GOT THAT FAR, IT WAS A SERIOUS QUIT ATTEMPT.

8 Q. OKAY. BUT WE DON'T KNOW HOW LONG THAT WENT ON,
9 DO WE?

10 A. THAT'S CORRECT.

11 Q. SIMILARLY, IN 1976, THERE'S NO EVIDENCE AS TO
12 HOW LONG THAT QUIT ATTEMPT WENT ON, IS THERE?

13 A. THAT'S CORRECT.

14 Q. NOW, WHEN WE MOVE UP TO 1980, THAT WAS THE
15 ATTEMPT WHERE HE AND HIS SISTER WERE HYPNOTIZED.

16 DO YOU REMEMBER THAT?

17 A. YES.

18 Q. HE QUIT FOR FIVE WEEKS THERE, DIDN'T HE?

19 A. YES.

20 Q. SO THAT WOULD CLEARLY BE A SERIOUS ATTEMPT?

21 A. YES.

22 Q. WOULDN'T YOU AGREE?

23 A. YES.

24 Q. THEN IN 1982, HE ATTENDS SMOKENDERS.

25 REMEMBER THAT?

26 A. YES.

27 Q. AND I BELIEVE YOU TESTIFIED ON FRIDAY THAT
28 BASED ON THE INFORMATION THAT WAS GIVEN TO YOU, HE HAD

1 ATTENDED SMOKERS FOR FOUR YEARS?

2 A. NOT SMOKERS. HE SAID HE WENT THREE TO FOUR
3 TIMES A WEEK FOR TWO TO THREE WEEKS.

4 Q. OKAY. THEN THAT WAS MY MISUNDERSTANDING. I'M
5 SORRY.

6 A. I THINK SMOKERS ANONYMOUS WAS THE THING THAT HE
7 ATTENDED LONGER.

8 Q. SMOKERS, THEN, 1982, TWO TO THREE TIMES A
9 WEEK FOR TWO TO THREE WEEKS?

10 A. THREE TO FOUR TIMES A WEEK FOR TWO TO THREE
11 WEEKS.

12 Q. OKAY. AND HE DIDN'T STOP SMOKING AT ALL DURING
13 THAT EFFORT, DID HE?

14 A. THAT'S CORRECT.

15 Q. HE DIDN'T CUT DOWN AT ALL DURING THAT EFFORT,
16 DID HE?

17 A. I DIDN'T RECORD THAT IN MY NOTES HERE.

18 Q. IT WOULDN'T BE A SERIOUS EFFORT IF HE NEVER
19 STOPPED AT ALL?

20 A. WELL, YOU KNOW, AGAIN, IT GETS BACK TO SOMEONE
21 WHO'S HIGHLY ADDICTED. WHY WOULD SOMEONE GO TO SMOKERS
22 AND ATTEND IT THREE TO FOUR TIMES A WEEK FOR TWO TO THREE
23 WEEKS IF THEY DIDN'T HAVE SOME DISSATISFACTION WITH WHAT THEY
24 WERE DOING, WITH THEIR BEHAVIOR?

25 SO I THINK IT CERTAINLY INDICATES THAT HE HAD A
26 DESIRE TO STOP SMOKING. I DON'T KNOW IF HE CUT BACK AND
27 COULDN'T OR HAD SYMPTOMS IF HE TRIED TO. I DON'T KNOW, BUT
28 AGAIN, THERE ARE PEOPLE WHO ARE HEAVY SMOKERS WHO TRY, EVEN

1 FOR A SHORT PERIOD OF TIME, AND BECOME SO UNCOMFORTABLE THAT
2 THEY JUST GO BACK TO SMOKING AGAIN.

3 Q. WELL --

4 A. BUT I THINK ANYONE WHO WOULD ATTEND A PROGRAM
5 TO STOP SMOKING FOR SEVERAL WEEKS, TO ME, THERE IS AN
6 INTENTION TO QUIT SMOKING OR HOPE TO QUIT SMOKING.

7 Q. BUT UNDER THE STANDARD SET FORTH BY THE CDC, IT
8 WOULDN'T QUALIFY AS A SERIOUS ATTEMPT, WOULD IT?

9 A. IT WOULDN'T, BUT IN THIS CASE, I THINK THAT
10 WOULD BE AN EXAMPLE OF WHERE THAT CRITERION IS NOT REFLECTIVE
11 OF WHAT'S GOING ON.

12 Q. SMOKERS ANONYMOUS. WE KNOW HE WENT ONE TO TWO
13 TIMES A WEEK FOR SOME UNKNOWN PERIOD OF TIME, RIGHT?

14 A. YES.

15 Q. AND AGAIN, HE NEVER QUIT SMOKING, DID HE?

16 A. I DON'T KNOW EXACTLY WHAT HIS SMOKING WAS, HOW
17 MUCH HE SMOKED. I DIDN'T HAVE THAT IN MY RECORDS. I DIDN'T
18 READ IT IN TERMS OF HOW MUCH HE SMOKED OR WHETHER HE QUIT FOR
19 SOME PERIOD OF TIME. I DON'T KNOW.

20 Q. OKAY. SO YOU DON'T KNOW AS WE SIT HERE WHETHER
21 HE STOPPED SMOKING OR WHETHER HE EVEN CUT DOWN HIS SMOKING?

22 A. NO. BUT AGAIN, THE SAME THING. GOING TO A
23 12-STEP PROGRAM, IT'S LIKE ALCOHOLICS ANONYMOUS WHERE YOU
24 SAY, I'M ADDICTED, I'VE GOT A PROBLEM THAT I NEED TO CHANGE,
25 YOU TALK ABOUT IT, YOU TRY TO CHANGE.

26 I MEAN, THAT'S, TO ME, A SERIOUS CONCERN ABOUT
27 SMOKING, AND CERTAINLY, AN INTENSE DESIRE TO CHANGE YOUR
28 BEHAVIOR. AND TO ME, THAT WOULD QUALIFY AS A SERIOUS QUIT

1 ATTEMPT EVEN IF HE WAS NOT SUCCESSFUL AT ALL.

2 Q. WOULD N'T SATISFY THE CDC'S STANDARDS FOR ONE,
3 WOULD IT?

4 A. AGAIN, THAT'S A LIMITATION OF DOING A BIG
5 SURVEY, AND SOMETHING -- YOU TRY TO GET QUESTIONS THAT ARE
6 EASY TO ANSWER AND EASY TO INTERPRET. AND YOU CAN'T GET THIS
7 SORT OF INFORMATION IN AN EASY SURVEY. BUT FOR SOMEONE TO
8 ATTEND A PROGRAM FOR WEEKS OR MONTHS OR YEARS IS SERIOUS.
9 WHY WOULD THEY SPEND SO MUCH TIME AND EFFORT IF THEY DIDN'T
10 WANT TO CHANGE THEIR BEHAVIOR?

11 Q. NICORETTE GUM WHERE ARE WE?
12 1987. ONE PRESCRIPTION OF NICORETTE, DIDN'T
13 USE IT UP, DIDN'T STOP SMOKING, DIDN'T REDUCE SMOKING.

14 A. WELL, HE DIDN'T QUIT. BUT AGAIN, THE QUESTION
15 WOULD COME UP, WHY WOULD SOMEONE GO TO THE EFFORT, SPEND THE
16 MONEY, BUY NICORETTE GUM IF THEY DIDN'T HAVE SOME DESIRE TO
17 QUIT?

18 AND IF HE HAS PERSISTENT DESIRE TO QUIT AND
19 CAN'T QUIT, THAT IS VERY CLEAR EVIDENCE OF BEING ADDICTED.

20 THE COURT: MR. CARLTON, WOULD YOU MIND IF I
21 INTERRUPTED YOU?

22 I WOULD TRY TO WAIT UNTIL THE END HERE BUT --

23 MR. CARLTON: I'VE ONLY GOT A FEW MORE QUESTIONS, YOUR
24 HONOR.

25 THE COURT: OKAY. PROCEED, SIR. EXCUSE ME.

26 Q. BY MR. CARLTON: LET'S LOOK AT THE USE OF
27 NICOTINE PATCHES IN 1989.

28 AGAIN, HE WORE THE PATCH FOR TEN HOURS. DIDN'T

1 STOP SMOKING. DIDN'T REDUCE HIS SMOKING.

2 WOULDNT' T SATISFY THE CDC STANDARDS, WOULD IT?

3 A. NO.

4 Q. TRIP TO HAWAII. 1991 OR '2. CHEWED SOME GUM
5 WORE THE PATCH ON THE FLIGHT OVER.

6 AND THAT WAS -- THE FLIGHT WAS THE ONLY TIME HE
7 DIDN'T SMOKE. WOULDNT' T SATISFY THE CDC CRITERIA, WOULD IT?

8 A. NO.

9 Q. NO QUIT ATTEMPTS BETWEEN 1991 AND 1999, RIGHT?

10 A. YES.

11 I'D POINT OUT, 1999, ONE THING THAT'S NOT ON
12 THAT FIGURE IS THAT HE TRIED -- HE DID QUIT SMOKING, BUT IT
13 DIDN'T LAST VERY LONG. HE RELAPSED, EVEN WITH CANCER, WHICH
14 IS ANOTHER PART OF BEING ADDICTED WHEN YOU SMOKE DESPITE
15 OBVIOUS HARM TO YOURSELF.

16 MR. CARLTON: YOUR HONOR, I THINK THIS WOULD BE A GOOD
17 TIME.

18 THE COURT: THANK YOU, COUNSEL.

19 ALL RIGHT, LADIES AND GENTLEMEN, WE'RE GOING TO
20 TAKE A BREAK. WE'LL BE BACK AT 10 MINUTES AFTER 3:00.

21

22 (RECESS.)

23

24 THE COURT: ALL RIGHT. THANK YOU.

25 OUR JURY PANEL IS WITH US; COUNSEL IS PRESENT;
26 WITNESS IS ON THE STAND, SIR.

27 SIR, YOU UNDERSTAND YOU'RE STILL UNDER OATH.

28 LADIES AND GENTLEMEN, I UNDERSTAND THAT THERE

1 ARE SEVERAL OF YOU WHO NEED SOME ACCOMMODATION FOR YOUR
2 RELIGIOUS PRACTICES FOR FRIDAY. IT'S NOT UNCOMMON FOR THE
3 COURTS TO ACCOMMODATE THAT, OF COURSE, OBVIOUSLY. SO FRIDAY
4 AFTERNOON, WE WILL ALLOW ALL OF YOU OFF, AND THOSE OF YOU WHO
5 WISH TO USE THE TIME FOR RELIGIOUS PURPOSES, YOU CAN DO SO.

6 ALL RIGHT. COUNSEL.

7 MR. CARLTON: NOTHING FURTHER, YOUR HONOR.

8 THE COURT: THANK YOU VERY MUCH, MR. CARLTON.

9 REDIRECT.

10

11 REDIRECT EXAMINATION

12 BY MR. PIUZE:

13 Q. I GET TO ASK A COUPLE MORE QUESTIONS.

14 ARE YOU READY?

15 A. YES.

16 Q. WHAT ARE THE WORDS THAT HAVE BEEN USED
17 INTERCHANGEABLY OR THAT ARE INTERCHANGEABLE; ADDICTION,
18 HABITUATION, WHAT ELSE?

19 A. DEPENDENCE.

20 Q. DEPENDENCE.

21 DO YOU CARE -- IF YOU'RE CHARACTERIZING THE
22 FACT THAT SOMEONE IS GOING TO HAVE A TOUGH, TOUGH TIME
23 QUITTING A DRUG, DO YOU REALLY CARE WHICH ONE OF THOSE WORDS
24 YOU USE?

25 A. NO. THE ESSENCE OF ALL THREE IS WHAT I SAID
26 WHEN I FIRST TESTIFIED, WHICH IS A LOSS OF CONTROL OF DRUG
27 USE, WHICH MEANS THAT ONCE YOU START USING A DRUG, THERE ARE
28 EFFECTS OF THAT DRUG ON YOUR BODY AND YOUR BRAIN, SUCH THAT

1 WHEN YOU WANT TO QUIT IT, IT'S DIFFICULT, AND THAT IS A
2 COMMONALITY, AND IT DOESN'T MATTER WHAT YOU CALL IT.

3 Q. HAS THE TOBACCO INDUSTRY IN ANY WAY, FROM WHAT
4 YOU CAN SEE AS A RESULT OF YOUR BROAD, BROAD STUDIES, HAS THE
5 TOBACCO INDUSTRY IN ANY WAY EVER ATTEMPTED TO GET ACROSS TO
6 CONSUMERS THAT THIS STUFF IS VERY, VERY HARD TO QUIT?

7 A. I HAVE NEVER --

8 MR. CARLTON: OBJECTION. SPECULATION. "EVER
9 ATTEMPTED."

10 THE COURT: AS FAR AS YOU KNOW, SIR.

11 YOU CAN TAKE IT ON CROSS, MR. CARLTON.

12 THE WITNESS: I HAVE NEVER SEEN ANY COMMUNICATION FROM
13 THE TOBACCO INDUSTRY THAT SMOKING IS A CHEMICAL DEPENDENCY,
14 THAT NICOTINE IS WHY PEOPLE KEEP ON SMOKING, THAT TOBACCO IS
15 A NICOTINE DELIVERY SYSTEM

16 THE ONLY THINGS I'VE SEEN ARE DENIALS THAT
17 NICOTINE -- THAT SMOKING IS NOT ADDICTING, AND THAT LOTS OF
18 PEOPLE HAVE QUIT, AND IF YOU'RE MOTIVATED, YOU CAN QUIT. AND
19 I JUST THINK THAT IS MISLEADING BECAUSE IT IS A CHEMICAL
20 DEPENDENCY AS STRONG AS ANY OTHER CHEMICAL DEPENDENCY THAT
21 PEOPLE HAVE TO DEAL WITH.

22 Q. BY MR. PIUZE: OKAY. SO THANK YOU. YOUR
23 ANSWER, ACTUALLY, DOVETAILED INTO A QUESTION I WAS GOING TO
24 ASK HERE.

25 BECAUSE WE HEARD MR. CARLTON SAY, 50 MILLION
26 PEOPLE HAVE QUIT. BUT HOW MANY HAVEN'T?

27 A. THERE ARE CURRENTLY ABOUT 50 MILLION SMOKERS,
28 AND 70 PERCENT OF THOSE WOULD LIKE NOT TO BE SMOKERS, AND

1 THEY ARE STILL SMOKING.

2 Q. AND WE HEARD MULTIPLE ATTEMPTS TO QUIT RAISE
3 THE ODDS OF SUCCESS -- YOU AGREE WITH THAT?

4 A. YES.

5 Q. MULTIPLE ATTEMPTS TO QUIT RAISE THE ODDS OF
6 SUCCESS TO ABOUT 50 PERCENT, YOU AGREE WITH THAT?

7 A. YES.

8 Q. AND THEREFORE, THE ODDS OF FAILURE ARE?

9 A. 50 PERCENT. 50 PERCENT OF PEOPLE WHO WOULD
10 LIKE TO QUIT HAVE TROUBLE DOING SO OR CAN'T. SOME PEOPLE
11 ACTUALLY NEVER ARE ABLE TO QUIT DESPITE LIFELONG ATTEMPTS AND
12 END UP DYING OF TOBACCO-RELATED DISEASE STILL SMOKING.

13 Q. THERE WAS SOMETHING NEW THAT I HEARD SOME
14 DISCUSSION THAT I DON'T RECALL HAVING WITH YOU, BUT I THINK
15 THE QUESTIONS TODAY HAD TO DO WITH '70'S, 1970'S R. J. R.
16 DOCUMENTS THAT CORRELATE PH WITH MARKET SHARE.

17 DO YOU REMEMBER BEING ASKED ABOUT THAT?

18 A. YES.

19 Q. WHAT'S THAT ALL ABOUT?

20 A. WELL, IN THE 1970'S, R. J. REYNOLDS NOTICED THAT
21 MARLBORO CIGARETTES WAS TAKING AN INCREASINGLY LARGE PORTION
22 OF THE MARKET, AND THEY TRIED TO DO AN ANALYSIS OF WHY. WHY
23 WERE THERE CIGARETTES WHICH USED TO BE MUCH MORE WIDELY SOLD
24 NOT DOING SO WELL COMPARED TO MARLBORO?

25 AND ONE THING THEY FOUND WAS THAT THE PH OF THE
26 MARLBORO CIGARETTE SMOKE WAS MUCH HIGHER THAN R. J. REYNOLDS'
27 SMOKE. AND THEY REASONED THAT MAYBE WHY -- MAYBE THE REASON
28 WHY MARLBORO WAS SO SUCCESSFUL WAS BECAUSE THE HIGH PH MEANT

1 THERE WAS MORE FREE-BASE NICOTINE, AND THERE WAS MORE
2 NICOTINE ABSORPTION. AND THEY DID PLOTS OF PH VERSUS SALES,
3 PH VERSUS FREE NICOTINE, AND R. J. REYNOLDS WAS CONVINCED THAT
4 THAT WAS THE REASON FOR MARLBORO'S SUCCESS.

5 Q. SO I KNOW I DIDN'T ASK YOU ABOUT THAT, BUT
6 SINCE IT WAS BROUGHT UP.

7 ONCE UPON A TIME --

8 MR. CARLTON: OBJECT TO THE COMMENT.

9 THE COURT: SUSTAINED. IT'S HAPPENED MULTIPLE TIMES.
10 LET'S TRY TO BE MORE SELF-CONTAINED IN THESE QUESTIONS.

11 PROCEED.

12 MR. PIUZE: THANK YOU. SORRY.

13 THE COURT: YES, SIR.

14 Q. BY MR. PIUZE: ONCE UPON A TIME, WINSTON
15 OUTSOLD MARLBORO IN THIS COUNTRY?

16 A. YES.

17 Q. AND A LONG TIME AGO, MARLBORO KNOCKED WINSTON
18 WAY OFF OF THE THRONE?

19 A. YES.

20 Q. SO THE PEOPLE THAT MADE WINSTONS WANTED TO
21 FIGURE OUT WHY, AND IN TRYING TO FIGURE OUT WHY, THEY CAME UP
22 WITH THIS PH STUFF, RIGHT?

23 A. YES.

24 Q. IS THERE SOME CORRELATION BETWEEN PH AND THIS
25 TERM FREE NICOTINE?

26 A. YES. THE HIGHER THE PH, WHICH MEANS THE MORE
27 BASIC OR MORE ALKALINE, THE HIGHER THE LEVEL OF FREE
28 NICOTINE.

1 Q. WHEN YOU WERE ASKED ABOUT THIS THIS AFTERNOON,
2 IT WAS SORT OF AN AREA WHERE AMMONIA WAS ALSO BEING
3 DISCUSSED.

4 DOES AMMONIA PLAY INTO THIS DISCUSSION OF PH?

5 A. YES. ONE OF THE THEORIES WAS THAT THE HIGH PH
6 WAS BECAUSE THERE WAS AMMONIA ADDED TO THE TOBACCO. AND IT
7 IS KNOWN THAT AMMONIA CAN DO THAT. AN AMMONIA CAN CREATE THE
8 PH OF TOBACCO SMOKE.

9 Q. OKAY. SO THANK YOU.

10 THE LITTLE DISCUSSION WE JUST HAD WAS ONE
11 TOBACCO COMPANY, R. J. REYNOLDS, TALKING ABOUT ANOTHER TOBACCO
12 COMPANY, PHILIP MORRIS, AND WHY, PERHAPS, SOME MORE AMMONIA
13 OR SOME MORE NICOTINE OR A HIGHER PH WAS THE REASON WHY
14 MARLBORO CIGARETTES TOOK OFF?

15 A. YES.

16 Q. OKAY. NOW, THERE WAS SOME DISCUSSION THIS
17 AFTERNOON HERE ABOUT DEFINITIONS OF NICOTINE -- EXCUSE ME --
18 DEFINITIONS OF ADDICTION. DEFINITIONS. DEFINITIONS.

19 IN 1988, WHEN THE SURGEON GENERAL SAID NICOTINE
20 WAS ADDICTIVE, HAS THE SURGEON GENERAL EVER CHANGED THAT EVER
21 SINCE?

22 A. NO.

23 Q. SINCE 1988, WHEN YOU EDITED AND HELPED AUTHOR
24 THE SURGEON GENERAL'S REPORT ON NICOTINE ADDICTION, RIGHT UP
25 UNTIL TODAY, HAS THAT PART OF THE SURGEON GENERAL'S REPORT
26 CHANGED AT ALL?

27 A. NO.

28 Q. SO ANY QUESTIONS THAT WERE ASKED TO YOU HERE

1 ABOUT OLD DEFINITIONS, OLD DEFINITIONS, THE SURGEON GENERAL'S
2 OLD DEFINITIONS, THAT WAS BEFORE 1988?

3 A. YES.

4 Q. SO GOING BACK TO THE TAPE THAT WE PLAYED OF THE
5 CHIEF -- THE CEO'S OF THESE SEVEN COMPANIES GETTING UP BEFORE
6 CONGRESS AND SAYING, NOT ADDICTIVE -- LET'S NOT -- I'M SORRY.
7 I'M GOING TO WITHDRAW THAT. I ONLY WANT TO CONCENTRATE ON
8 PHILIP MORRIS.

9 THIS IS 2001 HERE.

10 MR. LEITER: MAY WE SEE WHAT YOU'RE SHOWING THE JURY,
11 PLEASE?

12 THANK YOU.

13 Q. BY MR. PIUZE: THIS IS PHILIP MORRIS.
14 (READING:)

15

16 "CIGARETTE SMOKING AND
17 ADDICTION.

18 "WE AGREE WITH THE
19 OVERWHELMING MEDICAL AND SCIENTIFIC CONSENSUS
20 THAT SMOKING IS ADDICTIVE. "

21

22 NOW, YOU RECALL THAT IN 1994, THE BOSS AT
23 PHILIP MORRIS TOLD THE CONGRESS THE OPPOSITE?

24 A. YES.

25 Q. SO HAS THE SURGEON GENERAL'S REPORT CHANGED
26 SINCE THEN?

27 A. NO.

28 Q. WHAT'S CHANGED SINCE THEN?

1 A. NOTHING'S CHANGED. IT WAS THE CONSENSUS OF THE
2 SCIENTIFIC COMMUNITY THEN, AND IT IS NOW

3 Q. SO ANY CHANGE OF HEART HERE, TO YOUR KNOWLEDGE,
4 IS IT BASED ON ANY SCIENCE, ANY ADVANCES, ANYTHING THAT YOU
5 CAN THINK OF?

6 A. I DON'T KNOW WHAT CAUSED THE CHANGE OF HEART.

7 Q. THE DSM-IV, IF I HEARD YOU RIGHT, IS IT OR IS
8 IT NOT THE BIBLE REGARDING NICOTINE ADDICTION?

9 A. NO. IT IS DEVELOPED FOR OTHER DRUGS OF ABUSE.
10 MOSTLY, THE HEROIN AND ALCOHOL MDEL. THAT SORT OF
11 ADDICTION.

12 IT HAS BEEN USED FOR TOBACCO. SOME OF THE
13 ITEMS ARE RELEVANT. SOME OF THE ITEMS ARE NOT. SO IT'S A
14 PROBLEM I'VE WRITTEN ABOUT, OTHER PEOPLE HAVE WRITTEN ABOUT
15 THE PROBLEMS WITH THE DSM-IV, BECAUSE THE LANGUAGE IS NOT
16 CORRECT, AND I THINK I TESTIFIED IN MY DIRECT TESTIMONY THAT
17 IF YOU TAKE THE SPIRIT OF THE ITEMS, WHAT THEY'RE MEANT TO
18 ASSESS, AND YOU SET UP THE QUESTIONS RELEVANT TO CIGARETTE
19 SMOKING, THEN I THINK IT WORKS PRETTY WELL. BUT MANY PEOPLE
20 USE IT STRICTLY AS IF IT WERE ALCOHOL OR HEROIN, AND IT
21 DOESN'T WORK BECAUSE THE QUESTIONS JUST AREN'T RELEVANT.

22 SO THE ANSWER IS, IT COULD BE USEFUL, BUT AS
23 IT'S SET UP NOW, IT'S NOT DESIGNED FOR SMOKING. IT'S
24 DESIGNED FOR OTHER SUBSTANCES, PRIMARILY.

25 Q. OKAY. IT IS THE BIBLE -- IT IS NOT THE BIBLE
26 OF NICOTINE ADDICTION?

27 A. NO. OTHER -- MOST SMOKING RESEARCHERS USE THE
28 FAGERSTROM DEPENDENCE QUESTIONNAIRE. SOME PEOPLE USE BOTH

1 THE FAGERSTROM AND THE DSM BUT THE FAGERSTROM IS WHAT'S
2 USED IN THE VAST MAJORITY OF RESEARCH.

3 Q. IN 1989, YOU APPARENTLY PUBLISHED SOMETHING IN
4 "THE NEW ENGLAND JOURNAL OF MEDICINE," "HEALTH AND PUBLIC
5 POLICY CONSIDERATIONS OF LOW-YIELD CIGARETTES."

6 DID I GET THAT RIGHT?

7 A. YES.

8 Q. IF I COULD ASSURE YOU THAT SMOKERS WOULD GET
9 LESS TAR AND LESS NICOTINE, WOULD YOU PAT ME ON THE BACK?

10 MR. CARLTON: OBJECTION. ARGUMENTATIVE.

11 THE COURT: SUSTAINED.

12 Q. BY MR. PIUZE: IF PHILIP MORRIS, OR ANY OF THE
13 TOBACCO COMPANIES, COULD ASSURE YOU THAT SMOKERS, NOT A
14 MACHINE, BUT SMOKERS, HONEST TO GOD SMOKERS INHALING THE
15 STUFF IN THEIR LUNGS, WOULD GET LESS TAR AND LESS NICOTINE,
16 WOULD THAT BE A GOOD IDEA?

17 A. IF -- IN FACT, TO BE COMPLETE ABOUT THAT
18 EDITORIAL, I DID COMMENT A LOT ABOUT COMPENSATION. AND I
19 COMMENTED THAT THE BENEFITS TO AN INDIVIDUAL SMOKER WERE VERY
20 SMALL, BECAUSE OF COMPENSATION. AND I WAS CONCERNED ABOUT
21 THE FACT THAT SMOKERS WOULD BE FALSELY REASSURED THAT BY
22 SWITCHING TO LOW-YIELD CIGARETTES, THEY COULD STILL SMOKE.
23 SO THAT WAS PART OF THE EDITORIAL.

24 WHAT I SAID IS THAT FOR THE WHOLE POPULATION --
25 AND WHAT I WAS TALKING ABOUT MOSTLY WAS REDUCING THE YIELDS
26 OF EVERY CIGARETTE ACROSS THE BOARD. I THOUGHT ALL
27 CIGARETTES SHOULD HAVE LOWER YIELD, NOT THAT INDIVIDUAL
28 SMOKERS SHOULD BE ENTICED BY SMOKING A LOW-YIELD CIGARETTE

1 INSTEAD OF QUITTING. BECAUSE THE BENEFIT TO AN INDIVIDUAL IS
2 VERY SMALL, IF ANY.

3 Q. OKAY. ONE OF THE THINGS YOU TOLD MR. CARLTON
4 WAS THAT NO ONE TELLS A SMOKER HOW NOT TO COMPENSATE.
5 REMEMBER THAT?

6 A. YES.

7 Q. CAN THAT BE DONE?

8 A. YES. ONE EXAMPLE IS THAT MANY LOW-YIELD
9 CIGARETTES HAVE VENTILATION HOLES IN THE FILTER. THESE ARE
10 LITTLE HOLES THAT ARE LASER CUT THAT LET IN FRESH AIR TO
11 DILUTE THE SMOKE, IF THE SMOKE -- IF THE CIGARETTE IS SMOKED
12 FROM THE VERY TIP, LIKE A MACHINE DOES.

13 BUT THESE HOLES ARE PLACED RIGHT WHERE MANY
14 SMOKERS HOLD THEIR FINGERS, OR IF THEY PUT THE CIGARETTE A
15 LITTLE BIT FAR IN THEIR MOUTH, AND LIPS WILL COVER THE HOLES,
16 AND THEY BLOCK THE HOLES, AND WHEN YOU BLOCK THE HOLES, IT
17 DEFEATS, TO A LARGE PART, THE LOW-YIELD ENGINEERING.

18 THESE HOLES COULD HAVE BEEN MARKED WITH COLORS.
19 THERE COULD BE A BAND AROUND THEM YOU COULD TELL PEOPLE,
20 DON'T BLOCK THE HOLES, IF YOU WANT THIS TO BE A LOW-YIELD
21 CIGARETTE. THAT WAS NEVER DONE, SO FAR AS I KNOW

22 Q. AS PART OF THE CROSS-EXAMINATION, I THINK IT
23 WAS ON FRIDAY, I HEARD, WELL, EVERYONE KNOWS THAT THESE
24 MACHINES DON'T REALLY REPRESENT PEOPLE, AND EVERYONE KNOWS
25 THAT LOW-YIELD CIGARETTES REALLY AREN'T LOW YIELD FOR PEOPLE.

26 MR. CARLTON: I'D OBJECT TO THE MIS --

27 THE COURT: CHARACTERIZATION. SUSTAINED.

28 Q. BY MR. PIUZE: DO YOU RECALL QUESTIONS HAVING

1 TO DO WITH THE GENERAL KNOWLEDGE THAT SO-CALLED LOW-TAR,
2 LOW-NICOTINE, OR IN YOUR WORDS, LOW-YIELD CIGARETTES REALLY
3 AREN'T SO LOW YIELD?

4 A. YES.

5 Q. YOU AS A SCIENTIST HAVE KNOWN THAT FOR HOW
6 LONG?

7 A. WELL, I PUBLISHED MY FIRST STUDY IN 1983, SO I
8 PROBABLY KNEW IT SINCE 1982 OR 1981.

9 Q. YOU'RE GOING ON 20 YEARS?

10 A. YES.

11 Q. AND BASED ON YOUR READING OF THE INDUSTRY'S
12 DOCUMENTS, THE INDUSTRY'S KNOWN IT FOR HOW LONG?

13 A. WELL, THEY HAD EVIDENCE THAT I HADN'T READ YET
14 WHEN I FIRST STARTED THE RESEARCH, BUT THERE WAS SOME
15 EVIDENCE IN THE 1970'S, EARLY 1970'S ABOUT COMPENSATION.

16 Q. 30 YEARS?

17 A. 30 YEARS.

18 Q. THE GOVERNMENT'S KNOWN IT FOR HOW LONG, BASED
19 ON YOUR READING?

20 A. 20, 25 YEARS.

21 Q. AND THE PEOPLE WHO ACTUALLY SMOKE THE
22 CIGARETTES, THEY'VE KNOWN IT FOR HOW LONG?

23 A. THE PEOPLE WHO SMOKE CIGARETTES STILL, BY AND
24 LARGE, DO NOT KNOW THAT.

25 MR. CARLTON: OBJECTION. LACK OF FOUNDATION.

26 THE COURT: I'LL LET YOU CROSS HIM ON THAT ONE.

27 OVERRULED.

28 Q. BY MR. PIUZE: HERE'S A NEW TOPIC.

1 DOES ADDICTION INTERFERE WITH AN INDIVIDUAL
2 PERSON' S PERCEPTION OF THE RISK TO THAT PERSON?

3 A. YES.

4 Q. HOW?

5 A. IF YOU ARE ADDICTED -- AND THIS IS TRUE FOR ANY
6 DRUG -- THERE IS A DESIRE TO KEEP ON USING THAT DRUG. AND IF
7 THERE ARE REASONS WHY YOU SHOULDN' T, SAY, HEALTH CONCERNS,
8 THEN YOU WILL TRY TO LOOK FOR ANY WAY TO MINIMIZE THOSE
9 HEALTH CONCERNS.

10 SO IF YOU SEE SOMETHING THAT IS INFORMATION TO
11 THE OPPOSITE, YOU' LL SEIZE ON THAT. IF YOU SEE -- IF SOMEONE
12 TELLS YOU, WELL, I SMOKED FOR A LONG TIME, AND IT DIDN' T HURT
13 ME, YOU' LL SEIZE THAT. IF SOMEONE SAYS, WELL, AS LONG AS YOU
14 DON' T FEEL SICK, YOU CAN KEEP ON SMOKING.

15 ANYTHING THAT ALLOWS YOU TO KEEP ON TAKING THE
16 DRUG, YOU WILL SEIZE UPON IT, AND THAT, IN A SENSE, IS
17 MINIMIZING THE RISK. AND THIS HAS BEEN STUDIED BY ASKING
18 SMOKERS HOW HAZARDOUS THEY THINK SMOKING IS. AND MOST
19 SMOKERS THINK THAT, ONE, IT' S MORE HAZARDOUS FOR SOMEONE ELSE
20 THAN IT IS FOR THEM AND THEY DON' T HAVE AN ACCURATE IDEA OF
21 HOW HAZARDOUS IT IS COMPARED TO OTHER THINGS, OTHER SORTS OF
22 HAZARDS. SO SMOKERS PERCEIVE THE RISK OF SMOKING TO BE LESS
23 THAN NON-SMOKERS DO.

24 Q. HOW ABOUT THIS?

25 WOULD THIS HELP AN INDIVIDUAL TOBACCO OR
26 NICOTINE ADDICT GIVE HIMSELF OR HERSELF A RATIONALE FOR
27 SMOKING, THE FOLLOWING (READING):

28 /

1 ". . . IT IS NOT KNOWN WHETHER
2 SMOKE HAS A ROLE IN THE DEVELOPMENT OF
3 VARIOUS DISEASES. "

4
5 WOULD THAT HELP?

6 MR. CARLTON: OBJECTION. SPECULATION.

7 THE COURT: OVERRULED.

8 THE WITNESS: YES. WHAT THAT DOES IS PROVIDE DOUBT
9 ABOUT WHETHER THE HEALTH RISKS THAT THEY'VE HEARD ABOUT FROM
10 SOME OTHER SOURCE ARE ACCURATE. AND WHEN THAT DOUBT EXISTS,
11 THEN A SMOKER WILL ASSUME THE BEST. OR THE BEST FOR THEM FOR
12 WHAT'S THE BEST TO HELP KEEP ON SMOKING.

13 Q. BY MR. PIUZE: (READING:)

14
15 . . . "A GREAT DEAL MORE
16 RESEARCH IS NEEDED TO UNCOVER THE CAUSES AND
17 THE MECHANISMS INVOLVED IN THE ONSET OF THESE
18 DISEASES. "

19
20 DOES THAT HELP A SMOKER RATIONALIZE?

21 A. YES. SAME REASON.

22 Q. WHAT ABOUT A RESPECTED, HIGH-POWERED,
23 HIGH-RANKING HEAD OF ONE OF THE MAJOR CORPORATIONS IN THE
24 UNITED STATES --

25 MR. CARLTON: OBJECTION. ARGUMENTATIVE.

26 Q. BY MR. PIUZE: -- SWEARING TO THE UNITED STATES
27 CONGRESS THAT ON THE ISSUE OF, DOESN'T YOUR TOBACCO CAUSE
28 LUNG CANCER, HOW ABOUT THAT PERSON SAYING, I DON'T KNOW WHAT

1 CAUSES LUNG CANCER --

2 THE COURT: OBJECTION OVERRULED.

3 YOU MAY ANSWER THE QUESTION.

4 Q. BY MR. PIUZE: -- WOULD THAT HELP A PERSON
5 RATIONALIZE THE CONTINUED USE OF THAT PRODUCT?

6 A. YES. THE SAME REASON.

7 Q. LAST AREA I WANTED TO ASK YOU ABOUT.

8 IT SEEMS TO ME THAT MAYBE THERE'S SOME KIND OF
9 A CONTROVERSY HERE OVER THE MEANING OF THE WORD "ADDICTION"?

10 MR. CARLTON: OBJECT TO THE COMMENT.

11 THE COURT: SUSTAINED.

12 Q. BY MR. PIUZE: ARE YOU AWARE OF THE FACT THAT
13 THERE WAS, ACCORDING TO THE TOBACCO INDUSTRY, A CONTROVERSY
14 OVER WHETHER OR NOT TOBACCO CAUSED CANCER?

15 A. WELL, I KNOW THAT'S WHAT THE INDUSTRY HAS
16 STATED.

17 Q. OKAY. NOW, BY SPLITTING DEFINITIONS, ADDICTION
18 VERSUS HABITUATION VERSUS --

19 WHAT'S THE THIRD ONE -- DEPENDENCE?

20 A. DEPENDENCE.

21 Q. -- ISN'T THAT CREATING A CONTROVERSY OVER
22 WHETHER OR NOT NICOTINE IS ADDICTIVE?

23 MR. CARLTON: OBJECTION.

24 THE WITNESS: YES.

25 MR. CARLTON: ARGUMENTATIVE.

26 THE COURT: SUSTAINED. IT'S LEADING. LEADING ON
27 REDIRECT.

28 MR. PIUZE: LET ME WITHDRAW THE QUESTION.

1 THE COURT: THANK YOU.

2 MR. PIUZE: APOLOGIZE FOR IT.

3 AND I' M NOT GOING TO ASK ANY MORE QUESTIONS.
4 I' M DONE.

5 THE COURT: VERY WELL.

6 RECROSS.

7 MR. CARLTON: JUST A FEW, YOUR HONOR.

8

9

RECROSS-EXAMINATION

10 BY MR. CARLTON:

11 Q. YOU' VE TESTIFIED THAT A PERSON WHO -- SMOKERS
12 THINK THAT SMOKING IS MORE HAZARDOUS FOR OTHERS THAN FOR
13 THEMSELVES.

14 A. YES.

15 Q. YOU DON' T KNOW, DO YOU, WHETHER PEOPLE WHO
16 CHOOSE TO SMOKE TO BEGIN WITH ARE MORE LIKELY TO BELIEVE THAT
17 THINGS ARE MORE RISKY FOR OTHERS THAN FOR THEMSELVES?

18 A. I HAVE NOT SEEN RESEARCH ON THAT.

19 Q. THERE BEING NO RESEARCH ON THAT, THERE' S NO
20 PROOF OF IT TO THE CONTRARY, RIGHT?

21 A. I' M NOT -- I DON' T KNOW. I' M NOT AWARE OF
22 THAT.

23 Q. SO AS WE SIT HERE TODAY, YOU CAN' T SAY THAT IT
24 IS THE FACT OF BEING A SMDKER THAT CAUSES PEOPLE TO
25 UNDERESTIMATE THE RISKS FOR THEMSELVES, OR WHETHER THEY
26 UNDERESTIMATED THE RISKS FOR THEMSELVES BEFORE THEY STARTED
27 SMOKING?

28 THAT A PERSON WHO UNDERESTIMATES THE RISKS FOR

1 THEMSELVES IS MORE LIKELY TO SMOKE, AND ONCE SMOKING, MORE
2 LIKELY TO UNDERESTIMATE THE RISKS FOR THEMSELVES OF SMOKING?

3 A. WELL, THERE HAS BEEN RESEARCH ON YOUTH AND --

4 Q. WELL, MY QUESTION WASN' T ON YOUTH.

5 A. WELL --

6 Q. IT WAS ON SMOKERS IN GENERAL.

7 A. WELL, YOU MENTIONED WHEN PEOPLE BEGIN TO SMOKE,
8 AND THAT' S YOUTH.

9 AND RESEARCH ON YOUTH INDICATES THAT MOST KIDS
10 DO UNDERSTAND. THEY' VE HEARD ABOUT THE RISKS OF SMOKING.
11 AND WHAT THEY THINK IS THAT, IF I DON' T SMOKE FOR VERY LONG,
12 THAT I WON' T BE IN TROUBLE. I' LL SMOKE FOR AWHILE, AND I' LL
13 SMOKE AND IT WON' T BE A RISK. AND THAT' S PROBABLY TRUE. IF
14 YOU DON' T SMOKE FOR VERY LONG, YOU WON' T SUFFER VERY MUCH OF
15 A RISK.

16 SO THERE IS AN UNDERSTANDING OF RISK, EVEN
17 AMONG KIDS WHO START SMOKING. BUT IT' S -- IT' S THE IDEA THAT
18 IF THEY DON' T SMOKE, THAT THEY WON' T BE SUBJECT TO IT BECAUSE
19 THEY' RE NOT GOING TO SMOKE FOR VERY LONG, AND THAT DOESN' T
20 HAPPEN IF THEY KEEP ON SMOKING.

21 I' VE NEVER SEEN EVIDENCE, LIKE I SAID, FOR
22 REGULAR SMOKERS IN KIDS THAT IS A DIFFERENCE IN RISK
23 PERCEPTION BEFORE KIDS START SMOKING. I HAVE NEVER SEEN ANY
24 EVIDENCE OF THAT.

25 Q. WELL, MOST KIDS STILL DON' T SMOKE, RIGHT?

26 A. YES.

27 Q. SO IT' S A SUBGROUP OF KIDS WHO CHOOSE TO SMOKE?

28 A. YES.

1 Q. AND ISN'T THE DECISION OR THE MINDSET THAT
2 YOU'VE DESCRIBED, UNDERESTIMATING THE RISK FOR THEMSELVES,
3 ISN'T THAT SIMILAR TO SOMEONE WHO DECIDES TO GO FOR A DRIVE
4 AND DECIDES, TODAY, I'M NOT GOING WEAR MY SEAT BELT, IT'S NOT
5 GOING TO HAPPEN TO ME TODAY?

6 A. THERE IS SOME COMMONALITY TO THAT. THEY'RE NOT
7 EXACTLY THE SAME. BUT I GUESS THERE COULD BE AN ELEMENT OF
8 THAT.

9 Q. OR SOMEONE WHO DECIDES, I'M GOING TO RIDE A
10 MOTORCYCLE ALL OVER EUROPE, I'M SURE I'LL BE OKAY.

11 SAME KIND OF AN EVALUATION OR ESTIMATION OF
12 RISKS, ISN'T IT?

13 A. WELL, THE RISKS ARE DIFFERENT. SMOKING IS MUCH
14 MORE HAZARDOUS THAN RIDING A MOTORCYCLE. BUT I GUESS THE
15 CONCEPT OF TAKING SOME RISK HAS BEEN ASSOCIATED WITH SMOKING.

16 Q. AND WITH RIDING MOTORCYCLES?

17 A. YES.

18 MR. CARLTON: NOTHING FURTHER.

19 MR. PIUZE: I HATE TO DO IT, BUT THERE'S --

20 THE COURT: NO. PROCEED. THAT'S FINE. JUST WITHOUT
21 THE MARGINALIA.

22 MR. PIUZE: OKAY.

23

24 FURTHER REDIRECT EXAMINATION

25 BY MR. PIUZE:

26 Q. JUST TO BE SURE. ALL THIS STUFF ABOUT KIDS
27 KNOWING. THAT'S NOW WE'RE NOT TALKING ABOUT 1954, ARE WE?

28 A. THAT IS CORRECT. I'M TALKING ABOUT NOW IN

1 1954, THERE WAS VERY LITTLE INFORMATION THAT CHILDREN HAD
2 ABOUT THE RISKS OF SMOKING.

3 Q. CHILDREN OR ADULTS?

4 A. OR ADULTS.

5 Q. AND BACK THEN, THE MAJORITY OF MEN SMOKED?

6 A. BACK IN THE 1950'S, THERE WAS A TIME WHEN
7 50 PERCENT OF THE MEN WERE SMOKING.

8 MR. PIUZE: OKAY. THAT'S ALL I HAVE.

9 MR. CARLTON: NOTHING FURTHER, YOUR HONOR.

10 THE COURT: SIR, YOU MAY STEP DOWN.

11 THE WITNESS IS EXCUSED.

12 DR. FEINGOLD.

13 SIR, IF YOU'D PLEASE STEP FORWARD.

14

15

ALLAN FEINGOLD,

16 WITNESS, RESUMED THE STAND AND TESTIFIED FURTHER AS FOLLOWS:

17

18 THE COURT: DO YOU NEED A MOMENT TO SET UP YOUR
19 COMPUTER AGAIN?

20 THE WITNESS: YES, YOUR HONOR.

21 THE COURT: WELL, THEN, WE'RE GOING TO STRETCH. IT'S
22 A GOOD IDEA, YOU KNOW, EVERY NOW AND THEN, AS A JUROR.
23 EVEN -- I KNOW I GIVE YOU BREAKS. BUT I SIT HERE --
24 SOMETIMES, I'LL SIT IN THE CHAIR, AND I'LL DO LIKE THIS.
25 DON'T BE EMBARRASSED, IF YOU NEED TO DO THAT.

26 BECAUSE THE IDEA IS TO KEEP YOUR MIND ALERT AND
27 ABSORBING INFORMATION OPEN-MINDEDLY, AND PART OF THAT PROCESS
28 IS KEEPING YOUR BODY RELAXED AND COMFORTABLE. SO IF YOU GET

1 DISTRACTED BY YOUR BODY DISCOMFORT, YOUR MIND DOESN'T TEND TO
2 FOCUS ON ANYTHING EXCEPT, AWE, HOW DO I GET COMFORTABLE.

3

4 (SHORT PAUSE.)

5

6 THE WITNESS: I'M READY, YOUR HONOR.

7 THE COURT: PLEASE BE SEATED, SIR.

8 YOU UNDERSTAND YOU ARE STILL UNDER OATH.

9 THE WITNESS: YES, YOUR HONOR.

10 THE COURT: VERY WELL.

11 MR. CARLTON, YOUR WITNESS.

12 MR. CARLTON: ALL RIGHT.

13

14 CROSS-EXAMINATION

15 BY MR. CARLTON:

16 Q. ARE WE ALL SET UP?

17 A. YES, SIR.

18 Q. ALL RIGHT. I NOTICE YOU BRING THAT COMPUTER
19 WITH YOU WHENEVER YOU TESTIFY; IS THAT RIGHT?

20 A. YES, SIR.

21 Q. AND THAT'S NOT JUST IN THIS CASE, IS IT?

22 A. NO. IT'S IN ALL CASES.

23 Q. SO THAT THE POWERPOINT PRESENTATION THAT WE SAW
24 YESTERDAY ISN'T SOMETHING THAT YOU CREATED FOR THIS CASE, IS
25 IT?

26 A. I MODIFIED IT FOR THIS CASE BECAUSE OF THE
27 LIMITATIONS THAT WERE --

28 THE COURT: YOU DON'T NEED TO GO INTO ANY OF THAT.

1 Q. BY MR. CARLTON: ALL RIGHT. LET ME REPHRASE
2 THE QUESTION.

3 YOU HAVE A POWERPOINT PRESENTATION ON YOUR
4 COMPUTER, DON'T YOU, THAT IS GENERALLY APPLICABLE TO MOST OF
5 YOUR TOBACCO CASES?

6 A. MULTIPLE POWERPOINT PRESENTATIONS APPLICABLE TO
7 TOBACCO CASES, YES. NOT JUST ONE. MANY DIFFERENT ONES.

8 Q. I SEE. AND SO WE GOT ONE VERSION OF ONE OF
9 THOSE?

10 A. YES. WELL, I THINK YOU GOT ONE VERSION OF TWO
11 OF THEM ACTUALLY.

12 Q. AND YOU HAVE THIS ON YOUR COMPUTER BECAUSE YOU
13 TESTIFY IN A LOT OF TOBACCO CASES; ISN'T THAT RIGHT?

14 A. YES, SIR. I TESTIFY IN MANY TOBACCO CASES AND
15 OTHER KINDS OF CASES AS WELL.

16 Q. YOU USE THE POWERPOINT PRESENTATION AT
17 DEPOSITIONS?

18 A. YES, SIR, I DO.

19 Q. YOU USE IT TO TESTIFY IN COURT?

20 A. CORRECT.

21 Q. SO YOU'VE ALWAYS GOT IT WITH YOU WHEN YOU'RE
22 UNDER OATH?

23 A. NO. I DON'T, ACTUALLY, ALWAYS HAVE IT. BUT IT
24 DEPENDS ON THE CASE. TYPICALLY, I DO HAVE THE INFORMATION IN
25 THE COMPUTER, WHICH IS THE POWERPOINT, AND MANY OTHER THINGS
26 AS WELL IN THIS LITTLE COMPUTER.

27 Q. I NOTICE AS YOU WERE SETTING IT UP, THERE WAS A
28 DIRECTORY TREE OR SOMETHING LIKE THAT. IT APPEARED TO ME TO

1 BE A LIST OF CASES. WAS THERE A LIST OF CASES IN THERE?

2 A. YES. YOU'RE QUITE RIGHT. YOU'RE OBSERVANT.
3 THERE IS ONE FILE OR ONE DIRECTORY TREE ON THE FORENSIC
4 PATHOLOGY CASES. I AM THE -- I THINK I MENTIONED, I'M THE
5 HEAD OF THE FORENSIC PATHOLOGY DEPARTMENT IN OUR HOSPITAL. I
6 HAVE MULTIPLE DIFFERENT KINDS OF FORENSIC PATHOLOGY CASES IN
7 THE COMPUTER, NOT JUST ASBESTOS, DIFFERENT KINDS OF THINGS,
8 NOT JUST TOBACCO, ASBESTOS AND SOME OTHER KINDS OF CASES.

9 Q. OKAY. WE'LL GET BACK TO THAT.

10 BUT JUST FOR NOW, SO WE ALL UNDERSTAND WHAT
11 YOU'RE TALKING ABOUT, WHEN YOU SAY, "FORENSIC PATHOLOGY,"
12 WHAT YOU'RE TALKING ABOUT IS PATHOLOGY IN RELATION TO LEGAL
13 MATTERS?

14 A. EXACTLY. MEDICAL/LEGAL MATTERS, NOT JUST
15 LEGAL. THE WORD "FORENSIC," IF I UNDERSTAND CORRECTLY, MEANS
16 MEDICAL/LEGAL, THE CONNECTION, THE NEXUS BETWEEN MEDICINE AND
17 THE LAW

18 Q. OKAY. ALL RIGHT. AS I SAID, WE'LL GET BACK TO
19 THAT.

20 YOU MOVED TO FLORIDA FROM CANADA IN 1982?

21 A. EXACTLY.

22 Q. AND ONE OF THE REASONS YOU MADE THAT MOVE WAS
23 TO MAKE MORE MONEY IN THE UNITED STATES; ISN'T THAT RIGHT?

24 A. OH, ABSOLUTELY. NOT JUST MONEY, BUT SUCCESS.
25 SOME OF WHICH SUCCESS MEANS MONEY AND OTHER THINGS.

26 Q. NOW, ISN'T IT TRUE THAT WITHIN A FEW MONTHS OF
27 YOUR ARRIVING FROM CANADA, YOU BECAME INVOLVED IN LITIGATION
28 AS A TESTIFYING AND AS A CONSULTING WITNESS?

1 A. EXACTLY. I THINK THE FIRST -- AT FIRST, JUST
2 ASBESTOS CASES, AND THEN SUBSEQUENTLY, OTHER KINDS OF CASES.

3 Q. AND YOU'VE CONTINUED TO DO THAT, TO WORK AS A
4 TESTIFYING AND CONSULTING WITNESS SINCE THEN, SINCE 1982?

5 A. YOU ARE RIGHT.

6 Q. NOW, YOU HAVE MENTIONED THIS, BUT I JUST WANT
7 TO MAKE SURE I'M CLEAR ON IT. YOU BEGAN TO WORK IN ASBESTOS
8 CASES --

9 A. I THINK --

10 Q. OR --

11 A. -- THE VERY FIRST ONES WERE ASBESTOS CASES,
12 BUT -- AND I DON'T REMEMBER THE VERY FIRST TIME I WAS
13 INVOLVED IN, SAY, CRIMINAL CASES OR OTHER KINDS OF CIVIL
14 LITIGATION. BUT MANY DIFFERENT KINDS OF ENTITIES, INCLUDING
15 THE COUNTY ATTORNEY, U. S. ATTORNEY, ALL KINDS OF PEOPLE
16 EVENTUALLY VERY QUICKLY STARTED TO CONSULT ME AS SOON AS I
17 CAME TO THE UNITED STATES.

18 I DON'T REMEMBER WHEN THE FIRST CASES WERE
19 OTHER THAN ASBESTOS, BUT I'M PRETTY CERTAIN THE FIRST CASES
20 WERE ASBESTOS IN WHICH I ENDED UP IN A COURTROOM

21 Q. OKAY. SO EARLY ON, YOU BEGAN WORKING WITH
22 LAWYERS ON ASBESTOS CASES?

23 A. YES, SIR.

24 Q. AND JUST, AGAIN, TO EXPLAIN WHAT WE'RE TALKING
25 ABOUT WHEN WE SAY ASBESTOS CASES, WE'RE REFERRING TO -- OR
26 YOU'RE REFERRING TO CASES IN WHICH PEOPLE ARE SUING THE
27 ASBESTOS COMPANIES FOR SOME DISEASE THAT THEY CLAIM IS
28 RELATED TO ASBESTOS; ISN'T THAT RIGHT?

1 A. EXACTLY. ALTHOUGH, I SHOULD ADD, THAT I WAS
2 TYPICALLY BEING RETAINED BY THE COMPANIES THEMSELVES AS
3 OPPOSED TO THIS SITUATION. I RARELY, IF EVER, WAS RETAINED
4 BY THE PLAINTIFF OR THE PERSON DOING THE SUING. I WAS
5 RETAINED BY THE COMPANIES.

6 Q. OKAY. AS THE 1980'S MOVED ALONG, THOUGH, THAT
7 WORK, CONSULTING AND TESTIFYING IN ASBESTOS CASES, BECAME A
8 LARGER AND LARGER PART OF YOUR, I GUESS --

9 A. PRACTICE.

10 Q. -- PRACTICE?

11 A. YES, SIR, THAT'S TRUE.

12 Q. AND AS EACH YEAR WENT BY, YOU GOT MORE INVOLVED
13 IN LITIGATION AND MADE MORE AND MORE MONEY IN CONNECTION WITH
14 YOUR WORK AS A WITNESS IN THOSE CASES; ISN'T THAT TRUE?

15 A. ABSOLUTELY. I CERTAINLY MADE MORE MONEY AS I
16 DID MORE AND MORE CASES.

17 Q. NOW, DIDN'T YOU SET UP -- AND THIS IS SEPARATE
18 AND APART FROM THE FORENSIC PATHOLOGY DEPARTMENT -- DIDN'T
19 YOU SET UP A PART OF YOUR LABORATORY AT SOUTH MIAMI HOSPITAL
20 IN ORDER TO HANDLE OR DEAL WITH THIS LITIGATION-RELATED WORK?

21 A. YES, WE DID. NOT JUST THE LABORATORY, BUT THE
22 WHOLE DEPARTMENT. I'M THE HEAD OF THE DIVISION OF PULMONARY
23 MEDICINE, AND IN THE DIVISION OF PULMONARY MEDICINE, THERE IS
24 A DEPARTMENT OF FORENSIC PULMONARY MEDICINE. I THINK THAT'S
25 WHAT YOU MEANT.

26 Q. OKAY. AND YOU RENT SPACE FOR THAT DEPARTMENT
27 FROM THE HOSPITAL; ISN'T THAT RIGHT?

28 A. CORRECT.

1 Q. AND THE CASES THAT YOU SEE IN THAT DEPARTMENT,
2 THE FORENSIC PULMNOLOGY DEPARTMENT, ARE CASES THAT ARE
3 REFERRED TO YOU BY ATTORNEYS?

4 A. NOT JUST ATTORNEYS. GOVERNMENT AGENCIES,
5 MILITARY, BUT MOSTLY BY ATTORNEYS, YES.

6 Q. AND THEY REFER THESE CASES TO YOU IN THE
7 FORENSIC PULMNOLOGY DEPARTMENT SO THAT YOU CAN RENDER AN
8 OPINION THAT MIGHT OR MIGHT NOT BE OF USE IN RELATED
9 LITIGATION?

10 A. I AGREE. MOSTLY, IT'S RELATED TO LITIGATION,
11 YES, SIR. BUT I JUST -- TO MAKE SURE I'M STATING COMPLETELY
12 CLEARLY. SOME OF IT'S NOT USED FOR LITIGATION. SOME OF IT'S
13 STATUTORY OR USED BY THE MILITARY IN HANDLING OF INDIVIDUAL
14 PEOPLE, NOT -- NOT BIG ISSUES, BUT INDIVIDUAL RECRUITS AND
15 SOLDIERS AND THINGS.

16 Q. OKAY. BUT THE BULK OF IT IS LITIGATION
17 RELATED?

18 A. ABSOLUTELY, THE BULK IS RELATED TO LITIGATION.
19 NO MATTER WHAT KIND OF ATTORNEYS. IT'S NOT ALL CIVIL
20 ATTORNEYS. SOME OF IT'S STATE AND COUNTY AND U. S. ATTORNEYS
21 AND SO ON.

22 Q. OKAY. NOW, OVER THE YEARS, YOU HAVE EXAMINED
23 ABOUT, I THINK IT'S 14,000 CLAIMS ON BEHALF OF ASBESTOS
24 COMPANIES?

25 A. CORRECT. YES, SIR.

26 Q. AND ISN'T IT ALSO TRUE THAT YOU'VE WORKED FOR
27 LAWYERS ON BEHALF OF AT LEAST 45 DIFFERENT COMPANIES
28 INVOLVING ASBESTOS CLAIMS?

1 A. I THINK SO. I'VE MADE DIFFERENT ESTIMATES AT
2 DIFFERENT TIMES. I THINK IT'S A LARGE NUMBER OF COMPANIES.
3 THE EXACT NUMBER I DON'T KNOW, BUT IT'S 40 OR 50 OR 60 OR
4 SOMETHING LIKE THAT.

5 Q. AND I THINK YOU'VE TESTIFIED PREVIOUSLY THAT
6 YOU HAVE DONE MORE TESTIFYING THAN ANY OTHER DOCTOR IN SOUTH
7 FLORIDA ON BEHALF OF ASBESTOS COMPANIES?

8 A. THAT'S ABSOLUTELY TRUE. I THINK THAT'S TRUE,
9 AND I THINK WHAT I ACTUALLY TESTIFIED TO IS THAT I'VE BEEN
10 RETAINED MORE -- OR I AM THE MOST ACTIVE MEDICAL/LEGAL EXPERT
11 IN FLORIDA ON ASBESTOS CASES AND, IN FACT, ON ALL
12 MEDICAL/LEGAL PULMONARY CASES.

13 Q. SO NATURALLY, ALL OF THIS WORK GENERATES QUITE
14 A BIT OF MONEY FOR YOU?

15 A. IT DOES, YES, THANK GOD.

16 Q. I DON'T SUPPOSE YOU'D DO IT IF IT DIDN'T?

17 A. ACTUALLY, A GOOD QUESTION. I DO QUITE A BIT
18 FOR FREE. I'M RETAINED BY THE STATE OF FLORIDA PRO BONO.
19 I'VE BEEN RETAINED BY THE STATE OF FLORIDA ON CONTRACT -- FOR
20 FREE, YOU WONDER WHY YOU SIGN A CONTRACT TO WORK FOR FREE --
21 ON CONTRACT, FOR FREE FOR YEARS. I THINK TEN YEARS. AND I
22 DO CERTAIN OTHER WORK THAT IS MEDICAL/LEGAL WORK FOR NO
23 MONEY. BUT THE MAJORITY OF IT, THE GREAT MAJORITY, IS
24 COMPENSATING.

25 Q. YOU MAKE ABOUT \$250,000 A YEAR ON YOUR WORK IN
26 ASBESTOS CASES; ISN'T THAT RIGHT?

27 A. YES, SIR, I HAVE TESTIFIED TO THAT IN THE PAST.
28 AND THIS YEAR, THAT IS, THE YEAR THAT'S JUST CONCLUDED, 2000,

1 I THINK IT WILL BE SIGNIFICANTLY MORE, BECAUSE THERE WAS A
2 TREMENDOUS RISE, SUDDEN, EXPLOSIVE INCREASE IN ASBESTOS
3 LITIGATION ALL OVER THE UNITED STATES IN THE YEAR 2000.

4 Q. IN THIS LAST YEAR?

5 A. YES, SIR. IN 2000. THERE WAS SOME INCREASE IN
6 '99 AS WELL, BUT IT WAS A STRANGE PHENOMENON IN THE YEAR
7 2000.

8 Q. OVER THE YEARS SINCE YOU'VE BEEN DOING THESE
9 KINDS OF CASES, YOU'VE MADE, WHAT, ABOUT \$5 MILLION?

10 A. IN 20 YEARS, YES, APPROXIMATELY. I'M NOT SURE
11 EXACTLY, BUT I'VE TESTIFIED TO THAT APPROXIMATELY, YES, IN
12 20 YEARS.

13 Q. AND THAT'S MONEY THAT GOES TO YOU AND NOT TO
14 SOUTH MIAMI HOSPITAL?

15 A. WELL, IT'S MONEY THAT GOES TO ME, ALTHOUGH A
16 SIGNIFICANT AMOUNT OF THE MONEY GOES TO OTHER PEOPLE. THAT'S
17 GROSS COLLECTION.

18 AS I'VE TESTIFIED BEFORE, OF COURSE, THERE ARE
19 CONSIDERABLE STAFF EXPENSES AND ALSO FEES FOR PROFESSIONALS.
20 FOR EXAMPLE, A PATHOLOGIST WHO WORKS IN OUR DEPARTMENT. BUT
21 THE GROSS BILLINGS ARE THAT, AT LEAST. MOST OF WHICH HAS
22 GONE TO ME.

23 Q. ALL RIGHT. NOW, BESIDES WORKING IN ASBESTOS
24 CASES, WE CAN, I THINK, CONCLUDE FROM YOUR SITTING HERE
25 TODAY, YOU ALSO WORK IN TOBACCO CASES, WOULD THAT BE FAIR?

26 A. OBVIOUSLY, YES, SIR. AND MANY DIFFERENT KINDS,
27 BUT CERTAINLY TOBACCO.

28 Q. AND YOU ENCOURAGE CASES LIKE THIS, DON'T YOU?

1 A. IN A SENSE, YES, I THINK I DO, YES.

2 Q. AND ISN'T IT TRUE THAT YOU'VE GIVEN LECTURES TO
3 GROUPS OF LAWYERS ABOUT THE ISSUES INVOLVED IN CASES LIKE
4 THIS?

5 A. YES, SIR. AND I'M ABOUT TO DO IT AGAIN AT THE
6 END OF THIS MONTH IN NEW ORLEANS, ANOTHER CONFERENCE. I HAVE
7 TESTIFIED MANY TIMES AT THE ANDREWS CONFERENCE. YOU'RE
8 SPEAKING -- I THINK YOU'RE REFERRING TO SOMETHING LIKE THAT.
9 AND I HAVE, AGAIN, BEEN INVITED TO GIVE SUCH A LECTURE THIS
10 YEAR.

11 Q. AND YOU'VE ALSO WORKED AS A LITIGATION
12 CONSULTANT FOR ATTORNEYS, HAVEN'T YOU, IN HELPING THEM
13 DEVELOP EXAMINATIONS, QUESTIONS, TO USE IN CASES LIKE THIS
14 ONE?

15 A. IF THAT'S WHAT YOU WOULD CALL IT, I THINK IT'S
16 A GOOD TERM. I HAVEN'T -- I DON'T THINK I'VE BEEN ASKED
17 WHETHER I'VE BEEN A LITIGATION CONSULTANT, BUT I AGREE WITH
18 IT, THAT'S WHAT IT HAS BEEN. SO YES, THE ANSWER'S YES.

19 Q. AND YOU'VE DEVELOPED A COMPUTER PROGRAM OF SOME
20 SORT, I UNDERSTAND, TO SELL THAT YOU SELL TO LAW FIRMS
21 INVOLVED IN THE DEFENSE OF ASBESTOS CASES; ISN'T THAT TRUE?

22 A. IN THE PAST. THAT PARTICULAR COMPUTER PROGRAM
23 IS A LITTLE OUT OF DATE. IT'S PROBABLY ABOUT 12 YEARS OLD OR
24 SO, BUT IT WAS A COMPLEX STATISTICAL ANALYSIS OF CAUSATION,
25 AND IT WAS SOLD TO PLAINTIFF AND DEFENSE.

26 Q. UH-HUH. NOW --

27 A. AT LEAST DEFENSE. I THINK SOME PLAINTIFFS
28 BOUGHT IT, ALSO.

1 Q. SOMEWHERE ALONG THE WAY, I THINK IT WAS
2 PROBABLY BACK IN 1982 OR '83, YOU MET A MAN NAMED
3 WOODY WILNER, DIDN'T YOU?

4 A. NORWOOD WILNER. WOODY. WE CALL HIM WOODY,
5 ABSOLUTELY.

6 Q. I COULDN'T REMEMBER WHAT THE FIRST NAME WAS.
7 HE'S A LAWYER IN JACKSONVILLE, FLORIDA; IS THAT
8 RIGHT?

9 A. HE'S A LAWYER AND AN ENGINEER, YES.

10 Q. AND WHEN YOU MET HIM, HE WAS REPRESENTING --
11 WAS HE REPRESENTING ASBESTOS COMPANIES?

12 A. I THINK WHEN I MET HIM HE WAS REPRESENTING
13 SOMETHING CALLED CCR, WHICH WAS A GROUP OF ASBESTOS
14 DEFENDANTS.

15 Q. YOU DEVELOPED A CLOSE PERSONAL AND PROFESSIONAL
16 RELATIONSHIP WITH HIM?

17 A. YES. WELL, FIRST, IT WAS A PROFESSIONAL
18 RELATIONSHIP. BUT SUBSEQUENTLY, YES, WE BECAME VERY GOOD
19 FRIENDS AS WELL, AND WE'VE WRITTEN A BOOK TOGETHER, AND WE'VE
20 DONE MANY DIFFERENT THINGS TOGETHER.

21 Q. THAT BOOK IS CALLED, "ASBESTOS MEDICINE ON
22 TRIAL," ISN'T IT?

23 A. IT IS, YES.

24 Q. NOW, THAT IS NOT A PEER REVIEW BOOK, I TAKE IT?

25 A. IT IS NOT. IT'S A TEXTBOOK.

26 Q. AND IN THAT BOOK, THERE'S SAMPLE TESTIMONY,
27 ISN'T THERE, FOR DOCTORS WHO ARE TESTIFYING IN ASBESTOS
28 CASES?

1 A. ABSOLUTELY. THERE'S A CHAPTER WHICH IS
2 CONSISTENT WITH WHAT I EXPLAIN IN THE BOOK; THAT IT'S THAT
3 DOCTORS HAVE A DUTY TO GIVE ABSOLUTELY FACTUALLY CORRECT
4 TESTIMONY, AND THEN THERE'S AN EXAMPLE OF FACTUALLY CORRECT
5 TESTIMONY.

6 Q. BUT IT GIVES AN EXAMPLE OF THE TYPES OF
7 QUESTIONS THEY CAN EXPECT AND THE TYPES OF ANSWERS THAT CAN
8 BE GIVEN?

9 A. NO. THE TYPES OF QUESTIONS THAT THEY CAN
10 EXPECT, YES. THE TYPES OF ANSWERS THAT THEY MUST GIVE, IN
11 OTHER WORDS.

12 Q. NOW, YOU'VE TESTIFIED THAT ASBESTOS CASES HAVE
13 EXPLODED AT SOME POINT DURING '99 AND 2000. BUT THERE WAS A
14 TIME DURING THE EARLY AND MID '90'S WHEN ASBESTOS CASES --
15 THE NUMBER OF ASBESTOS CASES WENT WAY DOWN?

16 A. OH, YES, ABSOLUTELY.

17 Q. AND DURING THAT TIME, DURING THE TIME THAT
18 ASBESTOS CASES DIMINISHED, ISN'T IT TRUE THAT YOU ENCOURAGED
19 MR. WILNER TO BRING LAWSUITS AGAINST CIGARETTE COMPANIES?

20 A. ABSOLUTELY. MR. WILNER CAME TO ME AND INQUIRED
21 ABOUT THE SCIENTIFIC BASIS FOR LITIGATION AGAINST THE TOBACCO
22 INDUSTRY. I WAS CERTAINLY SKEPTICAL AT FIRST.

23 THIS INITIATED SOME VERY INTENSE STUDY, WHICH
24 WAS DONE BY MYSELF AND THEN BY MR. WILNER AND THEN BY BOTH OF
25 US. I HAD AN AWFUL LOT TO DO AT THAT TIME, IN THE 1990'S,
26 AND I DID ACCOMPLISH A LOT OF THINGS. IT WAS JUST ONE OF THE
27 MANY MEDICAL/LEGAL ACTIVITIES THAT I UNDERTOOK DURING THAT
28 TIME.

1 Q. AND ONE OF THE OTHER THINGS YOU DID WAS TO
2 PREPARE SPECIAL BROCHURES THAT YOU GIVE TO PATIENTS REFERRING
3 THEM TO MR. WILNER IF THEY HAVE A DISEASE YOU ASSOCIATE WITH
4 SMOKING?

5 A. YES. I DID DO THAT. AND NOT ONLY DID I DO
6 THAT, BUT I ACTUALLY WROTE A LETTER TO MY COLLEAGUES IN
7 FLORIDA EXPLAINING THAT PATIENTS DO HAVE CERTAIN LEGAL RIGHTS
8 AS FAR AS LITIGATION OF DISEASES CAUSED BY CIGARETTE SMOKING
9 AND SUGGESTING TO THEM THAT THEY CONSIDER SPECIALIZED
10 REPRESENTATION FOR THEIR PATIENTS.

11 SO THERE WAS A BROCHURE FOR THE PATIENTS, AND I
12 THINK WE MAY HAVE SENT A COPY OF THAT BROCHURE TO THE
13 PHYSICIANS IN FLORIDA AS WELL.

14 Q. NOW, YOU AND MR. WILNER HAVE A TRAINING PROGRAM
15 THAT YOU PUT TOGETHER IN FLORIDA FOR LAWYERS WHO WANT TO
16 LEARN ABOUT SUING TOBACCO COMPANIES, DON'T YOU?

17 A. THE -- I WOULDN'T CHARACTERIZE IT AS SUCH, BUT
18 I WOULD SAY THAT WE CERTAINLY DO HAVE A TRAINING PROGRAM WE
19 DO PUT IT ON OCCASIONALLY. PROBABLY AT LEAST ABOUT ONCE A
20 YEAR. AND IT IS ATTENDED BY ATTORNEYS WHO ARE EITHER
21 INVOLVED IN LITIGATING AGAINST THE TOBACCO INDUSTRY OR WHO
22 ARE INVOLVED WITH THE DEFENSE OF OTHER COMPANIES IN CASES
23 WHERE THEY THINK THAT THE DISEASES WERE CAUSED BY CIGARETTE
24 SMOKING AND NOT BY THEIR CORPORATE PRODUCTS.

25 Q. NOW, WHEN YOU REFER A PATIENT TO MR. WILNER,
26 YOU NORMALLY EXPECT THAT HE'LL RETAIN YOU TO WORK IN THE
27 LAWSUIT, DON'T YOU?

28 A. NO. NOT NECESSARILY. IN FACT, I WOULD SAY THE

1 MAJORITY OF CASES WHERE I'VE ACTUALLY REFERRED THE PATIENT TO
2 WILNER OR OTHERS, I HAVE NOT BEEN RETAINED.

3 Q. IF --

4 A. I HAVE NO FINANCIAL EXPECTATION. AND AS A
5 MATTER OF FACT, I DON'T THINK A SINGLE PATIENT WHO I'VE
6 REFERRED TO WILNER HAS EVER PROCEEDED TO LITIGATION WHERE
7 WILNER HAS RETAINED ME, NOT ONE. BUT I WOULD BE HAPPY TO DO
8 IT.

9 Q. CERTAINLY. OTHER LAWYERS TO WHOM YOU'VE
10 REFERRED PATIENTS HAVE RETAINED YOU?

11 A. ON TOBACCO, I DON'T REMEMBER. I JUST DON'T
12 KNOW

13 MR. CARLTON: WOULD THIS BE A GOOD TIME, YOUR HONOR?

14 THE COURT: VERY WELL. THANK YOU VERY MUCH, COUNSEL.

15 LADIES AND GENTLEMEN, WE'LL TAKE OUR BREAK
16 UNTIL TOMORROW AT 8:45 A.M.

17 DON'T DISCUSS THE CASE WITH ANYONE.

18

19 (THE FOLLOWING PROCEEDINGS WERE HELD
20 IN OPEN COURT OUT OF THE PRESENCE
21 OF THE JURY:)

22

23 (DISCUSSION HELD OFF THE RECORD.)

24

25 THE COURT: ALL RIGHT. AS TO UNAVAILABILITY.

26 MR. PIUZE: UNAVAILABLE WITH AN ASTERISK. THIS IS THE
27 FIRST CASE OF FIRST IMPRESSION FOR ME. SO I SHARE IT WITH
28 THE COURT.

1 WHEN MR. BOEKEN WAS YOUNGER, STRONGER AND
2 FEELING BETTER, HIS DIRECT TESTIMONY TOOK TWO DAYS OF
3 VIDEOTAPING BECAUSE HE COULDN'T SIT FOR MUCH MORE THAN TWO
4 HOURS AT A TIME. HIS CROSS-EXAMINATION FOR DISCOVERY
5 PURPOSES TOOK FOUR DAYS FOR THE SAME REASONS. AND THEN HIS
6 CROSS-EXAMINATION FOR TRIAL TOOK YET ANOTHER DAY. SO WE'RE
7 TALKING ABOUT SEVEN SEPARATE SESSIONS.

8 NOW, IF MR. BOEKEN'S MENTAL FACILITIES AND
9 PHYSICAL ABILITIES WERE AS GOOD NOW AS THEY WERE THEN -- AND
10 THEY'RE NOT -- I THINK WE WOULD HAVE TO BREAK HIS TESTIMONY
11 UP INTO PROBABLY A MINIMUM, ABSOLUTE MINIMUM, OF FOUR
12 DIFFERENT DAYS, AND THAT'S CONSERVATIVE. AND THE REASON FOR
13 THAT IS BECAUSE THE MAN CAN'T KEEP IT TOGETHER. HE JUST
14 DOESN'T HAVE THE STAMINA, PHYSICAL OR MENTAL, TO BE DOING IT
15 FOR MORE THAN A COUPLE HOURS, MAXIMUM. SO THAT'S THE FIRST
16 THING.

17 THE SECOND THING IS THAT, IN MY PERSPECTIVE,
18 NON-MEDICAL, JUST PERSONALLY, HE HAS DETERIORATED SINCE THEN.
19 HE, AS THE COURT WILL SEE -- REGARDLESS OF WHAT KIND OF
20 TESTIMONY THE COURT SEES, YOU'LL SEE THAT HE'S CONFUSED AND
21 VERY, VERY THICK ON SOME STUFF, AND IT'S CERTAINLY A RESULT
22 OF WHAT HE'S GOING THROUGH, BECAUSE I THINK HE WAS A VERY,
23 VERY SHARP GUY AT ONE TIME.

24 BUT AS THE COURT WILL SEE FROM THE VIDEOS, THE
25 GUY GETS ABOUT TWO-AND-A-HALF HOURS SLEEP. HE'S TAKING ALL
26 THESE DIFFERENT KINDS OF DRUGS, AND HE HAS TO HAVE STUFF
27 REPEATED TO HIM AND SOMETIMES, HE'LL ANSWER THE SAME
28 QUESTION TWO DIFFERENT WAYS SIMULTANEOUSLY OR BACK TO BACK,

1 THEN. I THINK IT WOULD BE WORSE NOW

2 AND SO, AS FAR AS PHYSICAL AVAILABILITY, HE IS
3 IN THE CITY. HE WAS IN THIS BUILDING LAST WEEK, BECAUSE I
4 BROUGHT HIM DOWN HERE TO SORT OF SPEC HIM OUT AND GET MY FEEL
5 FOR HIM IN THESE SURROUNDINGS. AS FAR AS HIS ABILITY TO
6 TESTIFY FULLY, I DON'T THINK HE HAS IT. AND IF IT WAS GOING
7 TO HAPPEN, IT WOULD TAKE A TRULY LONG, LONG TIME. AND I'D
8 LIKE TO ADD ONE THING.

9 I HAD NOT WANTED AND DO NOT WANT TO BE
10 PRECLUDED FROM CALLING HIM LIVE FOR A VERY BRIEF TIME AND
11 LIMITED PURPOSES, EVEN THOUGH WE GO THE VIDEOTAPE ROUTE. I
12 DON'T KNOW THAT THERE'S ANYTHING THAT SAYS THAT IT'S AN
13 ALL-OR-NOTHING PROPOSITION. OF COURSE, IF WE WERE TALKING
14 GEOGRAPHY HERE, IT SHOULD BE AN ALL OR NOTHING PROPOSITION,
15 AND IT SHOULDN'T BE MY CHOICE. HE EITHER IS AVAILABLE OR HE
16 ISN'T AVAILABLE.

17 BUT THIS IS AN UNUSUAL SITUATION. AND AS I
18 STARTED OFF BY SAYING, I'VE NEVER BEEN IN IT BEFORE. I DON'T
19 KNOW IF ANY OF US HAVE. BUT I'VE SORT OF BEEN BURDENED WITH
20 WHAT I KNOW AND WHAT I THINK. I THINK DOING THE VIDEO WOULD
21 BE PREFERABLE TO HAVING HIM TESTIFY LIVE.

22 THE COURT: LET ME COMMENT TOWARD YOU A LITTLE BIT AND
23 THEN TOWARDS THE DEFENSE.

24 THE PROBLEM IS, IF COUNSEL RESERVES HIS RIGHTS
25 AND THEN STARTS WITH A VIDEO DEPOSITION AND THEN PUTS HIM ON
26 THE WITNESS STAND FOR SELECTIVE PORTIONS, THAT, IN ESSENCE,
27 DEPRIVES THE OTHER SIDE OF THE RIGHT OF CROSS-EXAMINATION.

28 HERE'S THE PROBLEM FOR THE DEFENSE. IF HE

1 TAKES THE STAND -- IF I INSIST ON HIM TAKING THE STAND, AND
2 HE TAKES THE STAND, AND AFTER SOME PERIOD OF TIME, FROM
3 OBSERVING HIM, I DRAW THE CONCLUSION THAT HE'S UNAVAILABLE --
4 ESSENTIALLY, YOU KNOW, ONE DAY, HE JUST CAN'T COME -- THE
5 COURT MIGHT VERY EASILY BE PERSUADED BY THAT.

6 I HAVEN'T SEEN HIS VIDEOTAPE. I ONLY KNOW WHAT
7 MY LAWYERS HAVE BEEN SAYING TO ME AS WE'VE GONE THROUGH THIS
8 PROCESS. BUT AT SOME POINT, IN THE DIRECT, THE COURT MIGHT
9 DECIDE THAT HE'S UNAVAILABLE, AND AT THAT POINT, THERE WOULD
10 BE NO OPPORTUNITY FOR CROSS-EXAMINATION. AND THE COURT WOULD
11 NOT DECLARE A MISTRIAL BASED ON THAT. SO WE HAVE TO BE VERY
12 CAREFUL HERE. THE DEFENSE HAS TO BE CAREFUL TO PRESERVE ITS
13 RIGHTS AS WELL.

14 MR. LEITER: AND IF I MAY SET FORTH WHAT OUR POSITION
15 IS.

16 WE ARE NOT HERE TO INSIST THAT MR. BOEKEN TAKE
17 THE STAND IN PERSON. WE DO NOT CHALLENGE THE PLAINTIFF'S
18 ARTICULATION THAT HIS PHYSICAL CONDITION IS IFFY AND THAT HIS
19 MENTAL CAPACITY MAY BE IFFY AS WELL.

20 WE ARE VERY TROUBLED BY THE NOTION OF HIM
21 TESTIFYING LIVE FOR AN HOUR ON DIRECT, THEN BEING EXCUSED,
22 AND WE DON'T HAVE AN OPPORTUNITY TO CROSS-EXAMINE. THAT
23 HAPPENED IN ANOTHER CASE, A TOBACCO CASE. WE DO NOT WANT
24 THAT TO HAPPEN HERE.

25 SO IT IS OUR POSITION THAT IF PLAINTIFF TELLS
26 THE COURT THAT MR. BOEKEN IS PHYSICALLY AND MENTALLY
27 INCAPABLE OF WITHSTANDING TESTIMONY IN THIS CASE, WE DO NOT
28 CHALLENGE THAT.

1 WHAT WE ARE TROUBLED BY, IN ADDITION, IS THE
2 TWO BITES AT THE APPLE NOTION. THE NOTION THAT HE CAN BE
3 UNAVAILABLE NOW, WHICH ALLOWS HIS DEPOSITION TO BE PLAYED,
4 AND THEN AT SOME POINT LATER IN THE TRIAL, BECOMES AVAILABLE
5 FOR THE PLAINTIFF TO CLEANUP HIS TESTIMONY.

6 THE COURT: IF THE COURT WOULD MAKE A COMMITMENT UP
7 FRONT -- BECAUSE I WOULDN'T BE DOING IT ON THE RIGHT GROUNDS.
8 IF I MADE A COMMITMENT THAT, LATER ON, HE COULD BECOME
9 AVAILABLE, I WOULDN'T BE DECIDING HE WOULD BE UNAVAILABLE,
10 AB INITIO, SO --

11 MR. LEITER: THAT'S OUR POINT.

12 AS I HEAR MR. PIUZE MAKE THE SUGGESTION THAT WE
13 MAY WANT TO CALL HIM LATER LIVE, WE WOULD STRENUOUSLY OBJECT
14 TO HIM AS BECOMING AVAILABLE AT SOME POINT. IT MIGHT BE
15 STRATEGICALLY CONVENIENT FOR THE PLAINTIFF.

16 ONE FINAL POINT. THE STATUTE WE'RE TALKING
17 ABOUT IS CODE OF CIVIL PROCEDURE 2025. AND I'M GOING TO TRY
18 TO GET THESE SUBSECTIONS CORRECT. IT'S (U) (3) (B), THREE
19 LITTLE I'S. THAT'S (U) (3) (B), THREE LITTLE I'S, AND IT
20 SPECIFICALLY --

21 THE COURT: HOLD ON. HOLD ME. LET ME GET IT.

22 ALL RIGHT.

23 MR. LEITER: OKAY. STARTING AT SUBSECTION (3),
24 (READING):

25

26

27

28

"A PARTY MAY USE FOR ANY
PURPOSE THE DEPOSITION OF ANY PERSON OR
ORGANIZATION, INCLUDING THAT OF ANY PARTY TO

1 THE ACTION, IF THE COURT FINDS ANY OF THE
2 FOLLOWING. "

3
4 AND I'M SKIPPING TO SUB (B), (READING):

5
6 "THE DEPONENT, WITHOUT THE
7 PROCUREMENT OR WRONGDOING OF THE PROPONENT OF
8 THE DEPOSITION, FOR THE PURPOSE OF PREVENTING
9 TESTIMONY IN OPEN COURT" -- AND SKIPPING TO
10 THREE LITTLE I'S -- "DID OR UNABLE TO ATTEND
11 OR TESTIFY BECAUSE OF EXISTING PHYSICAL OR
12 MENTAL ILLNESS OR INFIRMITY. "

13
14 NOW, IT IS THE DEFENSE POSITION THAT IF
15 MR. PIUZE NOW BELIEVES THAT HIS CLIENT FITS WITHIN THIS
16 SECTION, WE THINK THE COURT SHOULD FIND IT AND MAKE HIM
17 UNAVAILABLE FOR THE DURATION OF THE TRIAL, AND WE'LL ALL USE
18 THE VIDEOTAPE TESTIMONY.

19 THE COURT: I HAVE NOT REACHED THE POINT, BUT I HAVE A
20 FEELING THAT IF I MAKE ONE FINDING AS TO UNAVAILABILITY, AND
21 IF I GO BEYOND THAT, WITHOUT AGREEMENT OF THE PARTIES -- I
22 HAVEN'T REACHED THE POINT -- BUT IF I TRY TO GO BEYOND THAT,
23 THEN I'M OUT OF MY BOUNDARIES. I THINK I'M PROBABLY RIGHT.

24 I HAVEN'T -- LET ME JUST SUGGEST SOMETHING TO
25 THE PARTIES, THOUGH. ONE OTHER POSSIBILITY IS: BY
26 AGREEMENT, THE PARTIES WOULD AGREE THAT HE WOULD BE HERE FOR
27 A CERTAIN PERIOD OF TIME, IN WHICH BOTH SIDES WOULD HAVE AN
28 OPPORTUNITY TO ASK CERTAIN LIVE QUESTIONS OF HIM, BUT IT

1 WOULD BE A LIMITED AMOUNT OF TIME.

2 THE COURT DOES HAVE DISCRETION TO SET
3 PARAMETERS ON THE AMOUNT OF TIME. FOR EXAMPLE, I CAN SAY --
4 I MEAN, WITH ANY WITNESS -- I COULD SAY, THIS WITNESS IS
5 COMING HERE, AND THERE WILL BE 25 MINUTES OF DIRECT AND THERE
6 WILL BE 25 MINUTES OF CROSS, AND THAT'S ALL THERE WILL BE
7 WITH THIS WITNESS. AND I THINK THAT WOULD STAND UP ABOVE. I
8 COULD SET THAT KIND OF LIMITATION.

9 OR BY AGREEMENT, THE PARTIES COULD AGREE TO A
10 CERTAIN PERIOD OF TIME EQUAL TO BOTH SIDES, AND THEN BEYOND
11 THAT, THE DEPOSITION TESTIMONY.

12 MR. LEITER: AND I WOULD CERTAINLY BE WILLING TO TALK
13 TO PLAINTIFF'S COUNSEL ABOUT SOME SORT OF POSSIBILITY. BUT
14 HERE'S THE POINT.

15 IF THE PLAINTIFF WANTS TO PUT IN HIS CASE IN
16 CHIEF HIS CLIENT'S DEPOSITION, THEN THIS FINDING NEEDS TO BE
17 MADE OR THE DEPOSITION ISN'T ADMISSIBLE. AND IT'S OUR
18 POSITION THAT IF THAT FINDING IS MADE, ABSENT AGREEMENT BY
19 THE PARTIES, THIS MAN WITH A TERMINAL ILLNESS WHO IS
20 DETERIORATING IS NOT GOING TO BECOME AVAILABLE LATER IN THE
21 TRIAL. THAT'S OUR POSITION.

22 THE COURT: ALL RIGHT. ALSO, I WOULD SAY TO THE
23 PARTIES NOW, THAT AT THIS POINT, WITHOUT SUCH A FINDING, WHAT
24 THE COURT CAN DO, AT THIS POINT, IS JUST MAKE A DETERMINATION
25 THAT THERE'LL BE "X" AMOUNT OF TIME WITH THIS WITNESS, AND AS
26 LONG AS I'M NOT BEING UNREASONABLE IN MY DETERMINATION, IN A
27 CASE SUCH AS THIS, I THINK IT WILL STAND UP. AND THEN NO
28 SUCH FINDING WOULD BE REQUIRED.

1 MR. LEITER: THAT'S A POSSIBILITY. AND THEN, OF
2 COURSE, THE PLAINTIFF'S DIRECT DEPOSITION TESTIMONY ISN'T
3 ADMISSIBLE.

4 THE COURT: NO. IT WOULD NOT BE. IT WOULD ONLY BE
5 ADMISSIBLE FOR INCONSISTENCIES ON CROSS.

6 MR. LEITER: RIGHT.

7 MR. PIUZE: SO HERE'S MY RESPONSE.

8 SOMEHOW, THERE SEEMS TO BE A THOUGHT ON MAYBE
9 THE COURT'S BEHALF, MAYBE THE DEFENSE BEHALF, THAT WHEN I
10 SAID I'D LIKE TO BRING HIM IN FOR A LIMITED AMOUNT OF TIME
11 LIVE, THAT WAS A UNILATERAL THING. NEVER HAD THAT IN MIND.
12 OBVIOUSLY -- I MEAN, WHY WOULD I EVEN BOTHER SAYING THAT?

13 I HAD IN MIND THAT THE DEFENSE, OF COURSE,
14 WOULD HAVE ITS OPPORTUNITY TO CROSS-EXAMINE FOR A LIMITED
15 AMOUNT.

16 I DON'T KNOW IF THERE'S A CASE IN THIS STATE --
17 OR ANY STATE, FOR THAT MATTER -- BUT THIS STATE ON THIS EXACT
18 POINT. THERE IS LITTLE DOUBT IN MY MIND THAT IF MR. BOEKEN
19 HAD TO SIT UP THERE AND CONCENTRATE REALLY, REALLY, REALLY
20 HARD FOR A HALF HOUR OR AN HOUR, WE'D GET SOMETHING. BUT FOR
21 HIS WHOLE TESTIMONY, IT'S -- BELIEVE ME, HE'S UNAVAILABLE, HE
22 IS, FOR THE WHOLE TESTIMONY. BUT THIS IS, YOU KNOW, THIS IS
23 AN UNUSUAL SITUATION. THIS IS NOT A BLACK-AND-WHITE KIND OF
24 SITUATION.

25 AS FAR AS HIM DETERIORATING, HAVING A FATAL
26 DISEASE, OF COURSE, BOTH OF THOSE THINGS ARE CORRECT. AND
27 I'M NOT BANKING ON A MIRACULOUS RECOVERY OR THAT HE'S GOING
28 TO GO INTO REMISSION OR ANYTHING LIKE THAT.

1 IT'S JUST THAT I THINK HE PROBABLY HAS THE
2 WHEREWITHAL ON A COUPLE OF LIMITED ISSUES OR FOR A LIMITED
3 AMOUNT OF TIME TO GIVE A LITTLE LIVE TESTIMONY. THAT'S ALL.

4 SO I'VE BEEN AS FORTHCOMING AS I CAN WITH THE
5 COURT HERE, AND I DON'T KNOW WHAT ELSE TO SAY.

6 THE COURT: BUT HERE'S THE DEAL. IF YOU WANT TO
7 DECLARE HIM UNAVAILABLE, YOU'RE NOT GOING TO HAVE ANY
8 OPPOSITION FROM THE DEFENSE, BECAUSE THE DEFENSE KNOWS THAT
9 THE SECOND YOU MAKE THAT DECLARATION, ABSENT SOME LEGAL
10 PRECEDENTS, OF WHICH I'M NOT AWARE, THAT WOULD BE IT. I
11 WOULD ACCEPT THE DECLARATION, BUT THEN HE WOULD NOT APPEAR
12 LIVE IN THIS TRIAL AT ALL.

13 THE OTHER OPPORTUNITY, THOUGH, IS FOR A
14 DISCUSSION AMONG THE PARTIES THAT YOU CAN RESERVE SOME "X"
15 AMOUNT OF TIME EQUAL ON BOTH SIDES WHERE HE WOULD BE BROUGHT
16 IN LIVE.

17 AND IF -- I WOULD SAY THIS: IF IT WERE DONE BY
18 WAY OF STIPULATION AND A CERTAIN AMOUNT OF TIME IS RESERVED,
19 AND THEN ONE PARTY -- AND PRINCIPALLY, I IMAGINE IT WOULD BE
20 THE DEFENSE -- WERE THEN LATER DEPRIVED OF THAT AMOUNT OF
21 TIME, THE COURT WOULD SERIOUSLY CONSIDER WHETHER THAT HAD
22 UNDERMINED THE FAIRNESS OF THIS TRIAL TO AN EXTENT WHERE IT
23 COULD NOT GO FORWARD.

24 MR. PIUZE: UNDERSTOOD.

25 THE COURT: ALL RIGHT. OKAY. LET ME MOVE ON TO
26 ANOTHER SUBJECT, BECAUSE YOU ALL HAVE TO HAVE SOME KIND OF
27 DISCUSSION ON THIS, APPARENTLY.

28 AND THAT IS -- WELL, IT'S INEVITABLE WE'RE

1 GOING TO USE THE VIDEOTAPE.

2 MR. LEITER: WELL, THAT'S SORT OF MY POINT, YOUR
3 HONOR. THE DEFENSE CLEARLY WILL USE SOME OF THE VIDEOTAPE,
4 BECAUSE WE'RE ENTITLED TO. HE'S THE OPPOSING PARTY.

5 THE QUESTION IS WHETHER THE PLAINTIFF IS
6 ENTITLED TO USE THE VIDEOTAPE AS PART OF HIS CASE IN CHIEF.
7 AND ALTHOUGH THERE MAY NOT BE A CASE, THERE'S A CLEAR STATUTE
8 THAT SAYS HE CAN'T, ABSENT THE FINDING OF UNAVAILABILITY.

9 THE COURT: HERE'S THE THING, THOUGH. MR. PIUZE, YOU
10 ARE GOING TO BE USING THE VIDEOTAPE, I WOULD IMAGINE. YOU'RE
11 NOT JUST GOING TO TRY TO BRING HIM IN HERE AND GET THROUGH
12 IT.

13 MR. PIUZE: I CAN'T DO THAT, YOUR HONOR.

14 THE COURT: I DIDN'T THINK YOU COULD.

15 MR. PIUZE: IN OTHER WORDS, I'VE GOT NO LEVERAGE HERE,
16 TO PUT IT ANOTHER WAY.

17 THE COURT: YOU UNDERSTAND, YOU HAVE TO EDIT THOSE
18 PORTIONS. HAVE YOU DONE THAT, THE --

19 MR. LEITER: WE HAVE -- AND I APOLOGIZE IF I'M BEING A
20 LITTLE THICK, BUT I'M A LITTLE LOST AS TO WHERE WE ARE IN
21 THE STATE OF THE WORLD. ARE WE --

22 THE COURT: YOU HAVE TO HAVE A DISCUSSION WITH
23 MR. PIUZE AS TO WHETHER OR NOT THERE'S GOING TO BE SOME
24 RESERVE TIME.

25 MR. LEITER: BUT AS OF THE MOMENT, WE ARE PROCEEDING
26 WITH THE VIDEOTAPE AND A FINDING OF UNAVAILABILITY.

27 THE COURT: IT SEEMS LIKE THAT'S WHERE WE WOULD END
28 UP.

1 MR. LEITER: AS TO PLAINTIFF'S DIRECT TESTIMONY, THE
2 TESTIMONY THAT MR. PIUZE WANTS TO PUT IN, WE HAVE RESOLVED
3 ALL OBJECTIONS EXCEPT FIVE, WHICH WOULD NEED TO BE RESOLVED
4 BY THE COURT. I DON'T KNOW IF MR. PIUZE WANTS TO DO THAT AT
5 THIS TIME OR --

6 MR. PIUZE: I'M READY.

7 MR. LEITER: OKAY.

8 MR. PIUZE: I DON'T KNOW THAT I AGREE WITH THE NUMBER
9 FIVE, BUT I'M READY TO RESOLVE WHAT HAS TO BE RESOLVED.

10 MR. LEITER: OKAY.

11 AND I WILL TAKE THEM IN ORDER.

12 AND I WILL BRING THESE UP TO THE COURT. THIS
13 IS A MARKED VERSION OF THE TESTIMONY.

14 AND THE FIRST SECTION EXTENDS FROM PAGE 140,
15 LINE 7, TO PAGE 148, LINE 7.

16 IT IS, ESSENTIALLY, A DISCUSSION OF
17 MR. BOEKEN'S EMPLOYMENT AT JASON SMITH PETROLEUM AND HERE
18 IS OUR CONCERN: THIS IS THE EMPLOYMENT THAT GAVE RISE,
19 ULTIMATELY, TO THE FRAUD CONVICTION IN 1992, AN ISSUE WHICH I
20 MENTIONED I WOULD LIKE TO REVISIT WITH THE COURT.

21 BUT CERTAINLY, UNDER THE PRESENT STATE OF
22 AFFAIRS, WE THINK IT WOULD BE HIGHLY INAPPROPRIATE, FOR
23 MR. PIUZE AND MR. BOEKEN, FOR MR. BOEKEN TO TESTIFY ABOUT HIS
24 EMPLOYMENT THERE AND CHARACTERIZE IT AS A POSITIVE EXPERIENCE
25 AND CHARACTERIZE IT AS A SOURCE OF INCOME AND CHARACTERIZE IT
26 AS CAREER ADVANCEMENT OR CHARACTERIZE IT IN ANY OTHER WAY, IF
27 WE ARE DEPRIVED OF THE OPPORTUNITY OF POINTING OUT THAT THIS
28 EMPLOYMENT LED TO A FELONY CONVICTION FOR FRAUD.

1 THE COURT: I HAVEN'T READ THIS TESTIMONY, BUT IF IT
2 WERE AS CHARACTERIZED BY THE DEFENSE, SUCH TESTIMONY MIGHT
3 INCLINE THE COURT IN THE DIRECTION OF THE DEFENSE ON THE
4 RULING AS TO THE FRAUD CONVICTION.

5 MR. LEITER: AND I WOULD POINT OUT -- AND I KNOW YOUR
6 HONOR WANTS TO HEAR ABOUT THE FRAUD CONVICTION LATER -- THAT
7 MR. PIUZE IN HIS OPENING STATEMENT MENTIONED JASON SMITH
8 PETROLEUM, MENTIONED HOW MR. BOEKEN HAD TURNED HIS LIFE
9 AROUND AFTER HIS HEROIN AND ALCOHOL PROBLEMS, CITED THIS AS
10 AN EXAMPLE OF HOW HE HAD TURNED HIS LIFE AROUND, AND
11 SPECIFICALLY TOLD THE JURY THAT THE ONLY SIN MR. BOEKEN
12 COMMITTED WAS THAT HE KEPT ON CIGARETTES.

13 MR. PIUZE: THOSE LAST THINGS ARE BUTCHERED AND
14 TOTALLY OUT OF WHACK. THE LAST THING WAS, MR. BOEKEN'S SIN
15 WAS TO BELIEVE THEM WHEN THEY SAID THEY WOULDN'T KILL HIM
16 WITH THEIR TOBACCO. I DON'T THINK ONE THING HAS ANYTHING
17 REMOTELY TO DO WITH ANOTHER.

18 ANYWAY, YOUR HONOR, I DON'T REALLY CARE ABOUT
19 JASON SMITH AT ALL EXCEPT FOR A LITTLE CONTINUITY IN THE
20 MAN'S LIFE. SO WHAT I DID IS, I SAW WHAT THEY WANTED TO TAKE
21 OUT. THEIR REASONING DOESN'T MAKE IT FOR ME. THERE'S
22 NOTHING IN HERE THAT SAYS THAT HE WAS DOING SOMETHING FOR
23 SOCIETY OR HELPING BOY SCOUTS OR ANYTHING ELSE. IT'S JUST
24 HOW HE TRANSITIONED OUT OF THE HOSIERY SALES BUSINESS --

25 THE COURT: ALL RIGHT.

26 MR. PIUZE: -- AND INTO --

27 THE COURT: IN FAIRNESS TO BOTH PARTIES, I JUST NEED
28 TO SAY THIS: THE COURT IS DISINCLINED TO ALLOW THE

1 CONVICTION IN AT THIS POINT, BUT WANTS TO LEAVE IT OPEN IN
2 THE EVENT THAT THE COURT SEES FROM THE DIRECT EXAMINATION
3 THAT IT' S RELEVANT.

4 MR. LEITER: I APPRECIATE THAT, YOUR HONOR. AND WE
5 WOULD ASK FOR THE OPPORTUNITY TO BE HEARD ON THAT AFTER YOUR
6 HONOR HAS HEARD THE DIRECT TESTIMONY.

7 THE COURT: ABSOLUTELY. THAT' S WHY I RESERVED IT.

8 MR. PIUZE: AT ANY RATE, YOUR HONOR, ALL THIS IS --
9 I' VE AGREED TO TAKE SOME OF THIS STUFF OUT, BUT ALL THIS IS
10 HERE IS SIMPLY A SEGUE OF HOW I GOT INTO THE OIL AND GAS
11 BUSINESS. NOTHING MORE, NOTHING LESS.

12 SOME OF THIS STUFF ORIGINALLY HAD TO DO WITH
13 DIFFUSING THE POTENTIAL FOR THIS SEC STUFF. BUT NOW THAT
14 THAT' S GONE, AT LEAST TEMPORARILY, ALL OF THE LANGUAGE THAT I
15 USED IN HERE TO DIFFUSE IT CAN ALSO SIMILARLY BE GONE, AND I
16 THINK IF WE' RE GIVEN 15 OR 20 MINUTES OR LESS, WE CAN
17 PROBABLY WORK OUT A NICE LITTLE TRANSITION THING WHERE WE' RE
18 NOT -- IT' S JUST, HERE' S HOW I GOT INTO THE OIL AND GAS
19 BUSINESS, THIS IS MY FIRST JOB, AND THEN I WENT ON TO MY NEXT
20 JOB, AND THAT' S BASICALLY ALL IT IS.

21 THE COURT: HERE' S THE DEAL. THE OBJECTION AS BEING
22 RAISED BY THE DEFENSE IS NOT ACTUALLY SUBSTANTIVE. IT' S
23 REALLY A WARNING TO THE COURT -- IT' S A RED FLAG TO THE
24 COURT -- NOT A WARNING -- A RED FLAG.

25 THE PLAINTIFF IS THE MASTER OF HIS OWN CASE --

26 MR. PIUZE: SURE.

27 THE COURT: -- AT THIS POINT. I DON' T HAVE -- IF YOU
28 WANT TO PUT THIS IN THERE, PUT IT IN THERE. USE YOUR OWN

1 JUDGMENT. AND THE COURT WILL JUST RESERVE JUDGMENT AS TO THE
2 FRAUD.

3 MR. LEITER: OKAY.

4 THE COURT: ALL RIGHT.

5 MR. LEITER: THE SECOND PORTION IS -- IT BEGINS ON
6 PAGE 158, LINE 15, CONTINUES TO 165, LINE 2.

7 IT SHOULD BE IN THAT SAME TRANSCRIPT.

8 THE COURT: I'VE GOT IT.

9 MR. LEITER: HERE'S THE ISSUE. YOUR HONOR WILL
10 REMEMBER, BEFORE OPENING STATEMENTS, PLAINTIFF CAME IN WITH A
11 LARGE STACK OF ADVERTISEMENTS, AND WE WENT THROUGH THEM AND
12 SELECTED SOME THAT PLAINTIFF COULD USE AND SOME THAT
13 PLAINTIFF COULD NOT USE.

14 THIS IS ONE OF TWO PLACES IN THE DEPOSITION
15 WHERE THAT LARGE STACK OF ADS IS SHOWN AGAIN, AND WE WOULD
16 SIMPLY LIKE TO LIMIT IT TO THE ADS THAT THE COURT HAS FOUND
17 APPROPRIATE AND EXCLUDE THOSE ADS THAT -- AS THE COURT MAY
18 RECALL, SOME OF THEM AREN'T EVEN PHILIP MORRIS ADS. SOME OF
19 THEM HAVE MARGINALIA AND TEXT. WE SIMPLY DON'T WANT THOSE
20 EXHIBITS DISPLAYED TO THE JURY.

21 THE COURT: ARE THEY ON THE VIDEOTAPE?

22 MR. LEITER: I BELIEVE -- AND CORRECT ME IF I'M
23 WRONG -- THAT MR. BOEKEN HELD SOME OF THEM UP, OR MR. PIUZE
24 HELD SOME OF THEM UP.

25 THE COURT: AND THE POINT THAT'S BEING MADE BY THIS
26 PARTICULAR SEGMENT OF TESTIMONY?

27 MR. PIUZE: HE'S SHOWING THE ADS THAT HE SAW AND WHY
28 AND HOW THEY AFFECTED HIM

1 SO, FOR INSTANCE, JUST AS AN EXAMPLE -- BECAUSE
2 I JUST HAPPENED TO HAVE, UNFORTUNATELY, SPENT LAST NIGHT
3 UNTIL AFTER 12 O' CLOCK WATCHING SOME OF THIS STUFF. SOME OF
4 THE VERY EARLY ADS, WHICH WE'VE SEEN ON VIDEOTAPE, HE
5 DISCUSSED WHEN HE SAW THOSE. HE DISCUSSED THE FACT THAT THEY
6 ATTRACTED HIM THERE WAS ONE WITH SOME PEOPLE, SOME MARINES.
7 HE DISCUSSED THE FACT THAT THAT ATTRACTED HIM

8 THERE WAS ONE WHERE HE THOUGHT IT WAS
9 JOHN WAYNE. I THINK HE'S FACTUALLY WRONG. BUT HE DISCUSSED
10 THE FACT THAT THAT ATTRACTED HIM AND I DON'T REALLY KNOW
11 WHY THE DEFENSE IS COMPLAINING. HE HOLDS THESE THINGS UP.
12 NO ONE CAN SEE ANY MARGINALIA OF ANY KIND IN A MILLION YEARS.
13 ALL YOU CAN SEE IS, BASICALLY, MARLBORO, AND HE DOESN'T HOLD
14 UP MANY OF THEM EITHER.

15 MR. LEITER: AS THE COURT MAY RECALL, THIS STACK
16 INCLUDED, FOR EXAMPLE, A SMALL AFRICAN-AMERICAN BOY
17 LIGHTING -- IN FRONT OF A CIGARETTE, STANDING IN FRONT OF A
18 MARLBORO AD. THEY'RE THAT KIND OF MATERIAL.

19 THE COURT: IS THAT IN HERE --

20 MR. PIUZE: NOT TO MY KNOWLEDGE.

21 THE COURT: -- ON THE TAPE?

22 MR. PIUZE: NOT ONLY THAT, BUT -- I'M NOT DISPUTING
23 YOU -- BUT I DON'T REMEMBER THAT ONE IN STILL LIFE EITHER,
24 BUT --

25 MR. LEITER: IT'S THERE. IT MAY BE IN THIS SECTION.
26 IT MAY BE IN THE SECOND SECTION THAT COMES. BUT IT WAS
27 CLEARLY PART OF THE PILE THAT THE PLAINTIFF TESTIFIED --

28 THE COURT: WELL, WAS IT SHOWN?

1 MR. LEITER: I DON'T REMEMBER WHETHER THAT ONE, IN
2 PARTICULAR, WAS HELD UP. BUT THERE ARE SEVERAL EXAMPLES LIKE
3 THAT.

4 THE COURT: I'VE READ THIS PORTION, MR. LEITER.
5 THERE'S NOTHING IN HERE -- I MEAN, AS FAR AS I'M CONCERNED,
6 THIS SEGMENT CAN BE ALLOWED. THERE'S JUST NOTHING IN THERE.

7 UNLESS YOU CAN SHOW ME A PARTICULAR AD -- AND
8 YOU'VE SEEN THE DEPOSITION. SO YOU CAN -- IF THERE'S A
9 PARTICULAR AD THAT YOU CAN SHOW ME THAT'S PARTICULARLY A
10 PROBLEM, THEN I MIGHT CUT IT OUT, SUCH AS THE YOUNG
11 AFRICAN-AMERICAN BOY WITH A CIGARETTE. IT WOULD GO OUT IF I
12 WAS SHOWN IT.

13 MR. LEITER: VERY WELL. LET US REVIEW THE VIDEOTAPE
14 ITSELF TONIGHT TO SEE IF WE HAVE ANY CONTINUED OBJECTION.

15 THE COURT: ALL RIGHT.

16 MR. LEITER: PAGE 213, LINE 11 TO LINE 16.

17 SIMPLY AN ARGUMENTATIVE QUESTION.

18 MR. PIUZE: I DON'T THINK IT'S ARGUMENTATIVE, BUT EVEN
19 IF IT WAS THAT FORM OF THE QUESTION, THEY DIDN'T TAKE IT --
20 IF THEY WANTED TO TAKE IT, THAT WAS THE TIME TO TAKE IT. IT
21 CAN'T BE CURED NOW THAT'S THE WHOLE POINT; THE FORM OF --
22 THE FORM OF THE OBJECTIONS BEING TAKEN AT THE TIME.

23 THE COURT: THAT'S TRUE. BUT LET ME JUST READ IT.

24 I'LL ALLOW IT.

25 MR. LEITER: OKAY.

26 THE COURT: HIS ANSWER IS SAYING HE CAN'T EVEN MAKE
27 SENSE OF IT.

28 MR. LEITER: I WILL SKIP OVER THE SECOND PORTION

1 CONCERNING ADS.

2 THE LAST UNRESOLVED OBJECTION IS PAGE 233.

3 THE COURT: BUT LET ME READ THIS PORTION CONCERNING
4 THE ADS, JUST TO SATISFY MYSELF THAT THERE'S NOTHING IN THE
5 LANGUAGE.

6 MR. LEITER: THE SECOND SECTION IS PAGE 219, LINE 25
7 THROUGH 231, LINE 14.

8 THE COURT: THERE'S NOTHING IN THE LANGUAGE ITSELF
9 THAT'S PARTICULARLY TROUBLESOME TO THE COURT.

10 I WOULD OVERRULE AS TO THE LANGUAGE.

11 MR. LEITER: THANK YOU, YOUR HONOR.

12 LAST UNRESOLVED OBJECTION IS THE SERIES OF
13 QUESTIONS BEGINNING ON PAGE 233, LINE 4, AND CONTINUING TO
14 236, LINE 24, ALL OF WHICH ARE OBJECTED TO WHICH CALL FOR
15 SPECULATION AND ARE ARGUMENTATIVE.

16 THE COURT: WELL, BUT THEY GO TO THE ULTIMATE ISSUE
17 HERE. IT WOULD SEEM TO ME THAT A PLAINTIFF IN A CASE SUCH AS
18 THIS OR SIMILAR CASES, PARTICULARLY WHERE HIS MOTIVATION IS
19 IN ISSUE, WOULD BE ABLE TO BE ASKED THESE KINDS OF QUESTIONS
20 BY EITHER SIDE AND BE ABLE TO ANSWER THEM I CAN THINK OF
21 SOME CROSS-EXAMINATION QUESTIONS THAT WOULD GO THE OTHER WAY.

22 THESE ARE ADMISSIBLE QUESTIONS. OVERRULED.

23 MR. LEITER: OKAY.

24 MR. PIUZE: NOW -- EXCUSE ME. PLEASE GO AHEAD,

25 MR. LEITER.

26 MR. LEITER: I WAS SIMPLY GOING TO POINT OUT -- THIS
27 WAS MOVING SOMEWHAT ON. WE HAVE RESOLVED THE REMAINDER OF
28 THE OBJECTIONS. WE WILL BE PLAYING SOME PORTIONS FOLLOWING

1 THE PLAINTIFF'S PRESENTATION. I EXPECT WE'LL BE SEEING SOME
2 OBJECTIONS FROM THE PLAINTIFF SHORTLY, AND WE'LL TRY TO WORK
3 THOSE OUT AS WELL.

4 THE COURT: ALL RIGHT. SO JUST TO LEAVE THIS ISSUE
5 WHERE IT IS.

6 AND THAT IS, NUMBER ONE, THE COURT CAN SIMPLY
7 MAKE A DETERMINATION AS TO AN AMOUNT OF TIME THAT THIS
8 WITNESS WILL TESTIFY. I'M WILLING TO DO THAT RIGHT NOW
9 WITHOUT RULING ON UNAVAILABILITY. I WOULD SET UP AN AMOUNT
10 OF TIME. IT WOULD BE IN THE NATURE OF AT LEAST A DAY. AT
11 LEAST A MORNING ON ONE SIDE AND AN AFTERNOON ON THE OTHER.
12 AT LEAST. IN FACT, THAT MAY BE EXACTLY WHAT I WOULD DO. AND
13 I'D BE WILLING TO DO THAT.

14 THE OTHER SITUATION IS, I THINK HE'S GOING TO
15 BE RULED UNAVAILABLE FROM WHAT I HEAR HERE, AND YOU'D HAVE TO
16 DISCUSS BETWEEN YOU WHAT YOU'RE GOING TO DO. BUT IF I MAKE A
17 RULING NOW THAT HE'S -- IF HE'S GOING TO BE HERE FOR A WHOLE
18 DAY, THEN HE'S GOING TO HAVE TO BE HERE FOR A WHOLE DAY.
19 THAT MIGHT HAVE TO HAPPEN IN A COUPLE OF SEGMENTS, BUT IT
20 WOULD HAVE TO HAPPEN.

21 DO YOU WANT TO THINK ABOUT IT OVER THE NIGHT OR
22 TALK OUTSIDE MY PRESENCE?

23 MR. PIUZE: YES TO BOTH. AND LET ME HAVE A
24 CLARIFICATION, IF I COULD, PLEASE.

25 THE COURT: YEAH.

26 MR. PIUZE: IF THE COURT SAID, PUT A LIMIT -- WELL,
27 THERE'S NO -- IT DOESN'T GO ANYWHERE. I WAS TRYING TO -- I
28 WAS TRYING TO FIGURE OUT WHAT WOULD HAPPEN IF, LET'S SAY, THE

1 COURT DID SAY A DAY, AND IT JUST COULDN'T GET DONE, AND IT
2 WAS GOING TO TAKE CHOPPING HIM UP INTO FOUR PIECES OVER, YOU
3 KNOW, LIKE, FOUR HALF-DAYS.

4 THE COURT: I'M WILLING TO DO THAT. I MEAN, AGAIN,
5 I'M WILLING TO SAY SOMETHING LIKE -- OR TWO MORNINGS AND TWO
6 AFTERNOONS. OR -- I MEAN, I'M WILLING TO LISTEN TO MY
7 LAWYERS. OR TWO, HALF A SEGMENT AND THEN ANOTHER HALF A
8 SEGMENT. ANY KIND OF PORTIONS THAT CAN BE RECOMMENDED TO THE
9 COURT, THE COURT'S WILLING TO GO ALONG WITH IT.

10 BUT ONCE I SET PARAMETERS -- I'VE JUST GOT TO
11 SAY TO YOU, ONCE I SET THESE PARAMETERS, THEN THEY HAVE TO BE
12 ACHIEVED, BECAUSE IT'S NOT FAIR FOR HIM TO GO ON THE WITNESS
13 STAND IN DIRECT, COMPLETE THAT, AND THEN NOT HAVE AN ADEQUATE
14 AND EQUAL OPPORTUNITY FROM THE DEFENSE FOR CROSS-EXAMINATION
15 OF A LIVE WITNESS.

16 MR. PIUZE: YOU'RE OBVIOUSLY CORRECT. I MEAN, I
17 UNDERSTAND THAT.

18 THE COURT: OKAY.

19 MR. PIUZE: WE HAVE -- THERE ARE ABOUT FOUR EARLIER
20 OBJECTIONS THAT I AGREED TO THAT NEED JUST FINE TUNING AS TO
21 LINES. I REALLY DON'T THINK WE SHOULD KEEP THE COURT SITTING
22 THERE TO DO IT. I THINK WE CAN TAKE CARE OF IT OURSELVES.

23 THE COURT: ALL RIGHT. OKAY.

24 MR. PIUZE: THANK YOU.

25 MR. LEITER: AND ONE FINAL POINT, JUST TO CLARIFY ON
26 THE RECORD WHAT WE DISCUSSED OFF THE RECORD.

27 IT'S THE DEFENSE'S UNDERSTANDING, ASSUMING THE
28 PLAINTIFF PLAYS THE VIDEOTAPE, THAT WE WILL BE ALLOWED TO

1 PLAY SOME PORTIONS OF THE DEPOSITION CROSS-EXAMINATION
2 IMMEDIATELY FOLLOWING AND RESERVE THE RIGHT TO PLAY
3 ADDITIONAL SECTIONS IN THE DEFENSE CASE SO LONG AS WE DO NOT
4 REPEAT OURSELVES.

5 THE COURT: RIGHT. THE ONLY ONE THING YOU'VE GOT TO
6 WATCH OUT FOR IS THAT WHEN IT'S IN THE CASE IN CHIEF, WATCH
7 OUT FOR THE LEADING QUESTIONS.

8 MR. LEITER: YES, SIR.

9 THE COURT: THEY'VE GOT TO BE DIRECT QUESTIONS.

10 MR. LEITER: THEY WOULD BE CROSS-EXAMINATION OF THE
11 PLAINTIFF.

12 THE COURT: YEAH. BUT THE THING ABOUT -- NOT IN YOUR
13 CASE OF CHIEF. IN OTHER WORDS, IF THERE'S CROSS-EXAMINATION
14 QUESTIONS --

15 MR. LEITER: I UNDERSTAND.

16 THE COURT: YOU SEE WHAT I MEAN?

17 YOU'RE GOING TO HAVE TO PUT THEM IN WHILE YOU
18 HAVE YOUR OPPORTUNITY TO CROSS HIM

19 MR. LEITER: I UNDERSTAND.

20 THE COURT: RIGHT. OKAY.

21 MR. LEITER: I UNDERSTAND. I UNDERSTAND.

22 THE COURT: VERY WELL.

23

24 (AT 4:35 P.M., AN ADJOURNMENT WAS TAKEN
25 UNTIL WEDNESDAY, APRIL 11, 2001 AT 9:00 A.M.)

26

27

28