

1 CASE NUMBER: BC 226593
2 CASE NAME: BOEKEN V. PHILIP MORRIS
3 LOS ANGELES, CALIFORNIA WEDNESDAY, MAY 16, 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: 9:25 A. M

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

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THE COURT: GOOD MORNING, COUNSEL.

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(CHORUS OF GOOD MORNING' S.)

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THE COURT: ALL RIGHT. WE HAVE OUR HANDS FULL FOR
TODAY. MANY TASKS WE NEED TO GET COMPLETED, SO LET' S TRY TO
BE AS EFFICIENT AS WE CAN IN THIS PROCESS.

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LET' S BEGIN WITH THE EXHIBITS.

23

WHICH ONES ARE IN ISSUE?

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MR. LEITER: THERE ARE NOT THAT MANY, YOUR HONOR, AND
WE APPRECIATE YOUR PATIENCE. WE HAD LONG DISCUSSIONS
YESTERDAY. WE HAD AGREEMENTS, AND THEN AGREEMENTS THAT WERE
ULTIMATELY AGREED TO, SO IT WAS A VERY LONG AND FLUID
PROCESS.

1 WE HAVE AGREED TO A LARGE NUMBER OF EXHIBITS,
2 WHICH WE'VE PROVIDED TO MARTY, WHICH ARE AGREED TO BE
3 ADMITTED AND SENT TO THE JURY. WE HAVE REACHED A GENERAL
4 AGREEMENT NOT TO SEND TO THE JURY BLOW-UPS AND DEMONSTRATIVES
5 THAT WE PUT ON THE SCREEN --

6 THE COURT: WHICH IS MY PRACTICE.

7 MR. LEITER: -- WITH THE EXCEPTION OF A FEW THAT WE DO
8 WANT TO DISCUSS WITH YOUR HONOR. AND THEN WE HAVE A SMALL
9 SET OF DOCUMENTS THAT ARE IN DISPUTE. MAYBE A HALF A DOZEN
10 OR SO.

11 THE COURT: I NOTICE YOU HAVE SOME VIDEOTAPES IN HAND.
12 TYPICALLY, VIDEOTAPES WOULD NOT GO TO THE JURY AS WELL,
13 ALTHOUGH IF THEY WERE TO SPECIFICALLY REQUEST A REPLAYING OF
14 A VIDEO, THE COURT WOULD PROBABLY HANDLE IT AS WE WOULD IF WE
15 HAD READ BACK.

16 MR. LEITER: IF THAT'S YOUR HONOR'S INDICATION -- WE
17 DID HAVE IN THE AGREED-UPON PILE A COUPLE OF VIDEO CLIPS OF
18 WAKEMAN AND BOLIN, BUT I WOULD PREFER TO PUT THEM IN THIS
19 PILE AS WELL.

20 THE COURT: IF THEY ASK FOR THEM AND COUNSEL CAN
21 FEEL FREE IN CLOSING ARGUMENT TO ASK THE JURY TO SPECIFICALLY
22 LOOK AT CERTAIN THINGS.

23 MR. LEITER: OKAY.

24 THE COURT: BUT I WON'T AUTOMATICALLY SEND THEM IN.

25 MR. LEITER: OKAY. WE HAVE A SMALL SET OF DOCUMENTS
26 TO DISCUSS. ONE IS --

27 MR. PIUZE: IS IT OKAY IF I TAKE OFF MY COAT?

28 THE COURT: NO CAN DO. NOT WHEN I GOT MY BLACK ON.

1 MR. LEITER: ONE IS, I BELIEVE IT'S DEFENDANTS'
2 EXHIBIT 7097, WHICH HAS ALREADY BEEN ADMITTED IN EVIDENCE.
3 THIS IS THE BANKRUPTCY PETITION FROM THE PLAINTIFF IN 1992.
4 THAT, I BELIEVE, PLAINTIFF HAS AN OBJECTION TO.

5 MR. PIUZE: TO THE WHOLE THING. BECAUSE THERE'S LOTS
6 OF STUFF IN THERE THAT'S OTHERWISE INADMISSIBLE THAT THE
7 COURT HAS RULED IMPERMISSIBLE, AND THERE'S ALL KINDS OF
8 IRRELEVANT STUFF IN THERE, TOO. IT'S JUST STRAIGHT 352.

9 AND I THOUGHT THE WAY WE LEFT IT YESTERDAY IS,
10 YOU'RE GOING TO PULL THE PAGES YOU WANTED SO WE COULD JUST
11 HAVE A DISCUSSION WITH THE JUDGE, IF WE HAD A DISAGREEMENT.

12 MR. LEITER: WELL, I MEAN, PERHAPS THE EASIEST THING
13 TO DO WITH THIS --

14 DO YOU WANT TO JUST PUT IN THE INCOME --

15 MAYBE WE COULD JUST PUT IN THE COVER PAGE AND
16 THE TWO PAGES RELATED TO MR. BOEKEN'S INCOME IN THAT YEAR.

17 THE COURT: THE COURT WOULD ALLOW THAT.

18 MR. PIUZE: THAT'S WHAT THEY WANTED IT FOR.

19 THE COURT: YEAH.

20 MR. LEITER: SO IF WE COULD REDACT THIS, THEY WOULD BE
21 THE SEAL, THE COVER PAGE, AND THEN THE TWO PAGES RELATED TO
22 INCOME.

23 MR. PIUZE: WELL, WHAT I SUGGEST IS, IT ISN'T THE
24 CLERK'S JOB TO REDACT THESE THINGS. IT'S OURS. I DON'T WANT
25 TO PUT ANYTHING ON THE COURT OR ITS STAFF. WE SHOULD AGREE
26 ON WHAT PAGES, AND THAT WILL BE THAT. OKAY.

27 MR. LEITER: OKAY.

28 MR. PIUZE: NOT A PROBLEM

1 THE COURT: BUT THE INCOME INFORMATION IS RELEVANT,
2 AND THE COURT WOULD ALLOW THAT.

3 MR. PIUZE: ABSOLUTELY. THERE'S NO OBJECTION TO THAT.

4 THE COURT: ALL RIGHT. OKAY. THEN YOU'LL TAKE CARE
5 OF THAT.

6 MR. LEITER: WE'LL TAKE CARE OF THAT.

7

8 (EVID. - 7097)

9

10 THE COURT: ALL RIGHT. NEXT.

11 MR. CARLTON: YOUR HONOR, THERE'S A GROUP OF DOCUMENTS
12 WHICH WERE SHOWN ON THE SCREEN WHICH ARE BASICALLY CHARTS
13 THAT WITNESSES TESTIFIED TO. THE INFORMATION IN THE CHARTS
14 IS AUTHENTICATED. THIS REFLECTS THE WITNESS' TESTIMONY, AND
15 IT'S BASICALLY AN AID TO UNDERSTANDING WHAT THEY WERE SAYING.
16 AND WE DON'T THINK THAT THIS IS REALLY OBJECTIONABLE, AND
17 WE'D LIKE TO PUT IT IN.

18 THE COURT: I THINK THOSE WERE DEMONSTRATIVES, AS I
19 RECALL. ANYTHING THAT A WITNESS PREPARED FOR THE PURPOSES OF
20 THE TRIAL WOULD BE A DEMONSTRATIVE. I DON'T ALLOW THOSE INTO
21 EVIDENCE. THEY DON'T GO INTO THE JURY ROOM

22 COUNSEL, OF COURSE, CAN REMIND THE JURY DURING
23 CLOSING ARGUMENT, SHOW THEM TO THE JURY DURING CLOSING
24 ARGUMENT, AND EVEN ASK THE JURY TO PLEASE WRITE THEM DOWN,
25 TAKE NOTES OF THEM, AND TELL THEM THAT THE ACTUAL
26 DEMONSTRATIVES ARE NOT ALLOWED TO GO INTO THE JURY ROOM

27 MR. CARLTON: VERY GOOD. THANK YOU.

28 MR. LEITER: YOUR HONOR, EXHIBIT -- DEFENDANTS'

1 EXHIBIT 5451 IS THE PUBLIC DOCUMENT. IT IS THE SUBMISSION BY
2 THE TOBACCO COMPANIES TO THE FEDERAL TRADE COMMISSION IN 1966
3 IN WHICH THE TOBACCO COMPANIES ADVISED THE FEDERAL TRADE
4 COMMISSION ABOUT THE SMOKING MACHINE AND THE LIMITATIONS ON
5 THE SMOKING MACHINE. IT'S A PUBLIC DOCUMENT. WE SEE NO
6 REASON WHY IT SHOULDN'T BE ADMISSIBLE.

7 MR. PIUZE: I SAY IT'S HEARSAY. IT'S THEIR SUBMISSION
8 TO THE GOVERNMENT. IT'S NOT A GOVERNMENT DOCUMENT. IT'S A
9 HEARSAY DOCUMENT THEY GAVE TO THE GOVERNMENT.

10 MR. LEITER: BUT IT'S NOT BEING OFFERED FOR THE TRUTH.
11 IT'S BEING OFFERED FOR THE FACT THAT WE ADVISED THE
12 GOVERNMENT.

13 THE COURT: THAT THEY ACTUALLY ADVISED THE GOVERNMENT.

14 YOU'RE RIGHT. IF IT WAS HEARSAY, IT WOULD BE
15 THEIR DOCUMENT AND THEY WOULD NOT BE ABLE TO GET IT IN THAT
16 WAY, EVEN IF THERE WERE AN EXCEPTION. BUT IN THIS INSTANCE,
17 IT'S NOT OFFERED FOR THE TRUTH OF THE MATTER BUT RATHER THE
18 COMMUNICATION ITSELF.

19 MR. LEITER: THANK YOU, YOUR HONOR.

20 THE COURT: SO IT WOULD BE ADMISSIBLE.

21 MR. LEITER: THANK YOU, YOUR HONOR.

22 MR. PIUZE: SO WE CAN HAVE A CLEAR RECORD, WOULD YOU
23 PLEASE TELL THE NUMBER OF THIS SO WE'LL KNOW

24 MR. LEITER: THIS IS DEFENSE EXHIBIT 5451, AND I'M
25 GOING TO HAND IT TO THE CLERK TO ADD TO THE ADMITTED PILE.

26 MR. PIUZE: JUST SO WE'VE GOT A RECORD, THAT'S ONE THE
27 PLAINTIFF OBJECTS TO.

28 THE COURT: I UNDERSTAND.

1 (EVID. - 5451)

2
3 MR. CARLTON: YOUR HONOR, WE HAVE EXHIBIT 5449 HERE,
4 "CHEMICAL CONSTITUENTS IN TOBACCO SMOKE." IT'S A COMPILATION
5 OF PUBLIC INFORMATION BY PHILIP MORRIS THAT WAS SUBMITTED TO
6 THE SURGEON GENERAL LISTING CONSTITUENTS IN TOBACCO SMOKE,
7 IT'S BASICALLY -- THE RATIONALE IS THE SAME FOR THE LAST
8 DOCUMENT. THE FACT THAT IT EXISTS AND WAS SUBMITTED IS
9 IMPORTANT, NOT NECESSARILY FOR THE TRUTH.

10 THE COURT: THERE'S BEEN TESTIMONY BY NUMEROUS
11 WITNESSES THAT THERE'S 4,000 CONSTITUENTS OR SOMETHING LIKE
12 THAT IN TOBACCO SMOKE.

13 WHAT WOULD BE THE OBJECTION?

14 MR. PIUZE: IT'S HEARSAY. IT IS THE EXACT SAME
15 OBJECTION. THERE'S ALL KINDS OF HEARSAY IN THERE. I DON'T
16 KNOW HOW -- I UNDERSTAND HOW, DURING A TRIAL, THE COURT CAN
17 INSTRUCT THE JURY TO USE A PARTICULAR BIT OF INFORMATION
18 THEY'RE ABOUT TO HEAR FOR ONE PURPOSE BUT NOT ANOTHER.

19 BUT WHEN A BIG, THICK DOCUMENT GOES INTO A JURY
20 ROOM, IT DOESN'T HAVE A STAMP ON IT THAT SAYS, HEY, THIS
21 ISN'T FOR THE TRUTH OF THE MATTER STATED, THIS IS FOR REALLY
22 SOME OTHER REASON, WE'RE REALLY STIPULATING THAT WE SEND A
23 DOCUMENT LIKE THAT IN --

24 THE COURT: WHAT'S IN THERE THAT'S HEARSAY THAT'S
25 PARTICULARLY OF CONCERN TO THE PLAINTIFF?

26 MR. PIUZE: YOUR HONOR, I HAVEN'T GONE THROUGH IT.
27 IT'S 50 MORE PAGE THAT I DON'T HAVE TO READ.

28 THE COURT: WELL, MY GUESS IS, THEN, I'M GOING TO RELY

1 ON THE PLAINTIFF. IF YOU CAN SHOW ME SOMETHING IN THERE THAT
2 WOULD BE PARTICULARLY DISTURBING OR CAUSE A PROBLEM, THEN I
3 WOULD RECONSIDER.

4 BUT AT THIS POINT, IT SEEMS TO ME IT'S JUST A
5 DOCUMENT THAT SHOWS THAT THEY COMMUNICATED THIS CONSTITUENT
6 INFORMATION TO THE GOVERNMENT, AND I DON'T HAVE A PROBLEM
7 WITH IT.

8 MR. PIUZE: OKAY. SO WOULD ONE OF YOU PLEASE TELL THE
9 RECORD WHICH NUMBER THAT IS THAT WE JUST DISCUSSED THAT THE
10 JUDGE ADMITTED?

11 MR. CARLTON.

12 MR. CARLTON: I'M SORRY.

13 MR. PIUZE: WHAT'S THE EXHIBIT NUMBER THAT THE JUDGE
14 HAS RULED ON?

15 MR. CARLTON: 5449.

16 MR. PIUZE: THANK YOU. IT'S IN. YOU WON.

17 MR. CARLTON: THANK YOU.

18

19 (EVID. - 5449)

20

21 MR. CARLTON: YOUR HONOR, THERE'S SEVERAL OTHER
22 ARTICLES HERE. WE HAVE JOURNAL OF THE AMERICAN MEDICAL
23 ASSOCIATION FROM 1959. WE HAVE HEARINGS BEFORE THE HOUSE OF
24 REPRESENTATIVES IN 1957. ANOTHER NEW ENGLAND JOURNAL OF
25 MEDICINE FROM 1961 IN WHICH VARIOUS PEOPLE IN THE PUBLIC
26 HEALTH COMMUNITY TAKE PUBLIC POSITIONS ON THE SMOKING AND
27 HEALTH ISSUE.

28 AND WHETHER TRUE OR NOT, IT'S THE FACT THAT

1 THEY TOOK THE POSITIONS THAT WE' RE CONCERNED WITH, AND THEY
2 WERE PUBLISHED. AND IT DEMONSTRATES THAT THERE WAS A DEBATE
3 GOING ON.

4 MR. PIUZE: SAME OBJECTION.

5 THE COURT: WERE THESE SHOWN TO THE JURY --

6 MR. CARLTON: YES.

7 THE COURT: -- DURING THE TRIAL?

8 MR. CARLTON: THEY WERE FLASHED TO THE JURY.

9 THE COURT: ADMITTED.

10 MR. PIUZE: I REMEMBER THAT THE JOURNAL OF MEDICINE
11 WAS SUBMITTED -- WAS SHOWN TO THE JURY AT LEAST TWICE, BUT
12 THE OTHERS, I DON'T HAVE A RECOLLECTION.

13 MR. CARLTON: YES. THIS WAS, BECAUSE I DID IT. AND
14 THIS ONE -- WELL, I' M SURE THEY ALL WERE.

15 MR. PIUZE: SO WE CAN HAVE A CLEAR RECORD, YOUR HONOR,
16 THE JOURNAL OF MEDICINE IS EXHIBIT 7478; RULING IS ADMITTED;
17 PLAINTIFF OBJECTS.

18 THE COURT: YES.

19

20 (EVID. - 7478)

21

22 MR. CARLTON: 7430.

23 MR. PIUZE: SAY WHAT IT IS, PLEASE.

24 MR. CARLTON: THIS IS THE JOURNAL OF THE AMERICAN
25 MEDICAL ASSOCIATION, DECEMBER 12TH, 1959.

26 MR. PIUZE: PLAINTIFF OBJECTS. HEARSAY.

27 THE COURT: ADMITTED.

28 /

1 (EVID. - 7430)

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3 MR. CARLTON: THE LAST ONE HERE IS
4 7434, HEARINGS BEFORE DEPARTMENTS OF LABOR AND HEALTH,
5 EDUCATION AND WELFARE, APPROPRIATIONS FOR 1957.

6 MR. PIUZE: PLAINTIFF OBJECTS. HEARSAY.

7 THE COURT: ADMITTED.

8 MR. CARLTON: THANK YOU, YOUR HONOR.

9

10 (EVID. - 7434)

11

12 MR. LEITER: MR. PIUZE, I ASSUME YOU'RE GOING TO
13 WITHDRAW YOUR CHARTS AND GRAPHS BASED ON THE COURT'S RULINGS.

14 MR. PIUZE: SURE. MANY, BUT WE'VE NEVER SAID ON THE
15 RECORD WHICH ONES ARE IN. WE DON'T HAVE TO TALK ABOUT THAT.
16 IT'S JUST SURPLUSAGE. WE'LL JUST STATE WHAT'S IN, AGREED
17 UPON. THAT'S A DONE DEAL.

18 MR. LEITER: YES.

19 IN THAT CASE, I THINK WE HAVE RESOLVED THE
20 REMAINING DOCUMENT ISSUES, UNLESS YOU THINK THERE ARE OTHERS.

21 THE TWO THAT REMAIN OPEN -- THE TWO THAT REMAIN
22 OPEN, WE DISCUSSED, DEFENDANTS' 7097, WHICH IS THE BANKRUPTCY
23 PETITION, WHICH WE WILL REDACT.

24 AND THERE'S STILL AN ISSUE ON FOUNDATION AS TO
25 PLAINTIFF'S EXHIBIT 10026, WHICH WE'RE AWAITING TO SATISFY
26 WHETHER THERE IS ADDITIONAL FOUNDATION INFORMATION ON.

27 THE COURT: I DON'T KNOW WHICH ONE THAT IS --

28 MR. PIUZE: LENNOX HILL HOSPITAL. IT WAS SHOWN WITH

1 DR. HOSHIZAKI.

2 MR. PIUZE: YOUR HONOR, MAY I MAKE AN INQUIRY THERE --

3 THE COURT: YES, SIR.

4 MR. PIUZE: -- IN RESPONSE, AND TRIGGERED BY YOUR
5 INQUIRY ABOUT WAS SOMETHING SHOWN TO THE JURY, OF WHAT WEIGHT
6 IS THAT TO THE COURT IN DETERMINING ADMISSIBILITY WHETHER THE
7 JURY'S ALREADY SEEN IT?

8 THE COURT: WELL, IT'S SOMETHING THAT I WOULD TAKE
9 INTO CONSIDERATION IF THEY ALREADY KNOW ABOUT IT.

10 MR. PIUZE: RIGHT.

11 WELL, HERE IS A GROUP OF DOCUMENTS -- AND THIS
12 IS, I THINK, THE ONLY OUTSTANDING THING RIGHT NOW THEY WERE
13 ALL SHOWN TO DR. HOSHIZAKI.

14 THE COURT: HOSHIZAKI.

15 MR. PIUZE: HOSHIZAKI.

16 THE COURT: YES.

17 MR. PIUZE: SHE WAS CROSS-EXAMINED ON ALL OF THEM AND
18 THEY FALL INTO TWO BASIC CATEGORIES.

19 THE FIRST CATEGORY IS EXHIBIT 10019, WHICH IS A
20 PRESS RELEASE OF THE TOBACCO INDUSTRY.

21 THE COURT: THESE ARE THE DOCUMENTS THAT WERE ON HER
22 RELIANCE LIST?

23 MR. PIUZE: YES.

24 THE COURT: AND SHE CLAIMS IN SOME INSTANCES -- I
25 THINK SHE, FOR THE MOST PART, SAID THAT SHE READ THEM ALL OR
26 SAW THEM ALL, BUT THAT SHE SAID THAT SHE DIDN'T REALLY PAY
27 MUCH ATTENTION TO SOME OF THEM

28 MR. PIUZE: TRUE.

1 THE COURT: IN ONE INSTANCE, I BELIEVE, THE ATTORNEY
2 REPRESENTING PHILIP MORRIS TOLD HER THAT A COUPLE OF THE
3 DOCUMENTS SHOULD NOT HAVE BEEN IN THE STACK.

4 MR. PIUZE: I DON'T RECALL THE LAST PART.

5 THE COURT: I LOOKED OVER HER TESTIMONY LAST NIGHT.

6 MR. PIUZE: THIS WAS ONE DOCUMENT THAT I, AFTER SOME
7 BACK AND FORTH BETWEEN THE WITNESS AND I, I NEVER SHOWED, AND
8 WE'VE ALREADY PULLED THAT. SO THAT'S INCLUDED IN OUR
9 DISCUSSION.

10 AT ANY RATE, THESE FIRST TWO ARE 10030 AND
11 10031. THESE ARE BOTH PRESS RELEASES FROM THE TOBACCO
12 INSTITUTE. PHILIP MORRIS, OF COURSE, WAS A MEMBER OF THE
13 TOBACCO INSTITUTE.

14 SO BECAUSE THESE ARE PRESS RELEASES FROM THE
15 TOBACCO INSTITUTE, I WANT THESE TWO IN EVIDENCE. THEY'VE
16 BEEN SHOWN. SHE WAS CROSS-EXAMINED ON THEM THE OBJECTION
17 IS --

18 MR. LEITER: WELL, LET ME ADDRESS THOSE.

19 WE HAVE AGREED TO ADMIT OTHER TOBACCO INSTITUTE
20 PRESS RELEASES WHICH ANNOUNCE, FOR EXAMPLE, TOBACCO INSTITUTE
21 TODAY SAYS CTR WAS REORGANIZED, OR SOMETHING LIKE THAT. OR
22 HERE IS A STATEMENT FROM THE PRESIDENT OF THE TOBACCO
23 INSTITUTE. THESE TWO PRESS RELEASES ARE DIFFERENT BECAUSE
24 THEY ARE PRESS RELEASES REPORTING SOMETHING THAT HAPPENED
25 ELSEWHERE.

26 FOR EXAMPLE, 10031 IS A PRESS RELEASE FROM THE
27 TOBACCO INSTITUTE FROM 1983 REPORTING WHAT OTHER PEOPLE SAID
28 AT A CONGRESSIONAL HEARING.

1 AND SO OUR OBJECTION TO THIS IS NOT FOUNDATION.
2 IT'S HEARSAY. BECAUSE IT IS A PRESS RELEASE PURPORTING TO
3 TELL US WHAT SOMEBODY SAID BEFORE CONGRESS. AND THAT'S
4 HEARSAY.

5 THE SECOND ONE --

6 THE COURT: THE PROBLEM IS, IT WAS ON HER RELIANCE
7 LIST.

8 MR. LEITER: IT WAS ON HER RELIANCE LIST, AND SHE SAW
9 IT, BUT THAT DOESN'T MEAN THAT IT IS NOT HEARSAY AND THAT
10 IT'S ADMISSIBLE INTO EVIDENCE. SHE WAS ALLOWED TO BE
11 CROSS-EXAMINED ON IT TO SEE WHETHER IT CONTRADICTED HER
12 OPINION OR UNDERCUT HER OPINION, AND THAT WAS APPROPRIATE
13 CROSS-EXAMINATION.

14 BUT THAT'S DIFFERENT FROM SAYING, THE
15 UNDERLYING DOCUMENT IS ADMISSIBLE. IT'S ALMOST -- IT'S THE
16 SAME CATEGORY, WE BELIEVE, AS A SCIENTIFIC EXPERT BEING
17 CROSS-EXAMINED ON AN ARTICLE WRITTEN BY SOMEBODY ELSE WHICH
18 CONTRADICTS HIS OPINION. HE CAN BE CROSS-EXAMINED BY THAT
19 ARTICLE, BUT DOES THAT MAKE THE ARTICLE ADMISSIBLE INTO
20 EVIDENCE?

21 THE COURT: I UNDERSTAND.

22 MR. LEITER: WE THINK IT'S THE SAME POINT.

23 THE SECOND ONE IS ALSO A TOBACCO INDUSTRY PRESS
24 RELEASE FROM NOVEMBER 1963 REPORTING ABOUT A SPEECH GIVEN
25 ELSEWHERE BY THE PRESIDENT OF THE TOBACCO INSTITUTE. AND
26 AGAIN, THAT'S A HEARSAY PROBLEM, AND THAT'S WHY WE BELIEVE
27 THESE TWO PRESS RELEASES ARE DIFFERENT FROM THE PRESS
28 RELEASES THAT WE HAVE AGREED TO THE ADMISSIBILITY OF.

1 MR. PIUZE: MY RESPONSE. THE REASON I JUST BROKE
2 THESE TWO OUT SEPARATELY FROM THE REMAINDER IS I BELIEVE THIS
3 FALLS SORT OF INTO THE SAME CATEGORIES OF THOSE DOCUMENTS
4 MR. CARLTON -- I'M MESSING UP NAMES THIS
5 MORNING -- MR. CARLTON JUST FINISHED DISCUSSING WITH THE
6 COURT.

7 I DON'T CARE ABOUT THE TRUTH OF THE MATTER
8 STATED HERE. THAT'S THE EXACT SAME IDEA. THAT THIS STUFF BY
9 PHILIP MORRIS' INDUSTRY SPOKESPERSON WAS OUT THERE, AND IT
10 DOESN'T HAVE TO BE FOR THE TRUTH OF THE MATTER SAYING -- SHE
11 SAYS WHAT A GREAT, GREAT, GREAT, GREAT THING CTR IS. SHE SAW
12 THIS STUFF. SHE PUT BLINDERS ON.

13 THE COURT: I THINK THAT THAT'S THE REASON THAT THE
14 COURT WOULD BE INCLINED TO STATE THAT HER CREDIBILITY IS
15 DIRECTLY ON THE LINE HERE, AND THERE'S A MAJOR QUESTION, IT
16 SEEMS TO ME, THAT THE JURY IS GOING TO HAVE TO STRUGGLE WITH
17 IN ASSESSING CREDIBILITY, BECAUSE SHE WAS GIVEN CERTAIN
18 DOCUMENTS AND WAS NOT GIVEN OTHER DOCUMENTS. AND CERTAIN
19 DOCUMENTS THAT SHE WAS GIVEN, SHE DECIDED TO IGNORE.

20 AND THE QUESTION IS WHETHER OR NOT THE QUESTION
21 OF BIAS, INTEREST, OTHER MOTIVE IS VERY MUCH IN ISSUE AS TO
22 HER.

23 MR. LEITER: TWO RESPONSES, YOUR HONOR.

24 THE FIRST IS AS TO THE HEARSAY POINT. WE'RE
25 STILL ONE STEP REMOVED. IT'S NOT AS THOUGH HE'S PUTTING IN
26 THE TRANSCRIPT OF THE CONGRESSIONAL HEARING --

27 THE COURT: I DON'T SEE HIM -- I DON'T SEE HIM
28 OFFERING THIS FOR THE TRUTH OF THE MATTER ASSERTED, BUT

1 SIMPLY AS IMPEACHMENT TO SHOW WHAT SHE CHOSE TO IGNORE AND
2 WHAT SHE CHOSE TO RELY ON.

3 MR. LEITER: THAT'S MY POINT, YOUR HONOR. IS BEFORE
4 YOU EVEN GET TO THE STEP OF WHETHER WHAT THE PERSON SAID IN
5 FRONT OF CONGRESS WAS TRUE, YOU HAVE THE HEARSAY QUESTION OF
6 WHETHER THAT'S WHAT THE PERSON SAID IN FRONT OF CONGRESS.
7 THAT'S THE HEARSAY STATEMENT.

8 THE COURT: THAT'S NOT THE ISSUE. THE ISSUE IN FRONT
9 OF THE JURY IS WHAT DID SHE RELY ON, WHAT DID SHE CHOOSE NOT
10 TO RELY ON. THAT'S THE ONLY ISSUE.

11 MR. LEITER: I UNDERSTAND THAT, YOUR HONOR. BUT UNDER
12 THAT REASONING, ANY DOCUMENT SHOWN TO ANY EXPERT THAT THAT
13 EXPERT SAW OR MIGHT HAVE RELIED ON OR MIGHT HAVE SEEN WHILE
14 PREPARING HIS OR HER OPINION WOULD THEN BE ADMISSIBLE INTO
15 EVIDENCE. I DON'T SEE THAT THIS IS --

16 THE COURT: MANY OF THE DOCUMENTS THAT SHE LOOKED AT
17 ARE JUST LITTERED AND LOADED WITH HEARSAY. AND ALL OF THAT
18 WAS, SHE RELIED ON IT, SHE OPENLY SAID SHE RELIED ON ALL
19 KINDS OF HEARSAY IN DRAWING HER CONCLUSIONS, AND THIS IS JUST
20 ANOTHER EXAMPLE OF THAT. ONLY THIS MIGHT BE A NEGATIVE
21 EXAMPLE THAT SHE DIDN'T RELY ON IT.

22 MR. LEITER: BUT YOUR HONOR, WITH ALL RESPECT, THE
23 DOCUMENTS THAT SHE RELIED ON IN FORMING HER OPINION DON'T
24 COME INTO EVIDENCE UNDER 721 OR ANY OTHER RULE SIMPLY BECAUSE
25 SHE RELIED ON IT. SHE'S ALLOWED TO RELY ON HEARSAY. SHE'S
26 ALLOWED TO STATE HER OPINION, BUT THE UNDERLYING DOCUMENTS
27 DON'T COME INTO EVIDENCE.

28 THIS IS THE SAME POINT ON THE OTHER SIDE. SHE

1 SAW DOCUMENTS THAT DISAGREED WITH HER OPINION. ARGUABLY, SHE
2 WAS CROSS-EXAMINED ABOUT THOSE DOCUMENTS. THAT'S WHAT PUTS
3 CREDIBILITY AND BIAS INTO ISSUE. BUT IT DOESN'T MAKE THE
4 UNDERLYING DOCUMENTS ADMISSIBLE INTO EVIDENCE. THAT'S OUR
5 OBJECTION.

6 THE DOCUMENT DOES NOT BECOME ADMISSIBLE SIMPLY
7 BECAUSE IT'S A CROSS DOCUMENT THAT SHE SAW THAT MIGHT
8 CONTRADICT HER TESTIMONY. THERE IS AN ISSUE AS TO BIAS AND
9 AS TO MANY EXPERTS IN THIS CASE. MANY EXPERTS WERE SHOWN
10 OTHER DOCUMENTS THAT THEY SAW IN PREPARATION FOR THEIR
11 TESTIMONY. THE FACT THAT SHE SAW THEM DOESN'T MAKE THEM
12 ADMISSIBLE. IT MAKES IT CROSS-EXAMINATION. BUT IT DOESN'T
13 MAKE THE UNDERLYING DOCUMENT ADMISSIBLE.

14 THE COURT: MR. PIUZE.

15 MR. PIUZE: SUBMIT.

16 THE COURT: ALL RIGHT. ARE WE DOWN TO -- ARE THOSE
17 THE LAST TWO -- IS IT TWO DOCUMENTS?

18 MR. PIUZE: THERE'S ANOTHER.

19 THE COURT: OTHER THAN THE CRIME/FRAUD DOCUMENTS THAT
20 COUNSEL WANTS TO GET IN, ALLEGEDLY, ON FRAUD.

21 MR. PIUZE: THE ANSWER IS NO, THEY'RE NOT THE LAST.
22 BUT DARN CLOSE.

23 IF THE COURT WANTS TO LAG ON THAT, IT'S FINE.

24 THE COURT: I'D LIKE TO TAKE A LOOK AT THEM

25 MR. PIUZE: FINE.

26 NOW, THE NEXT GROUP ARE DOCUMENTS 10020, 10021,
27 10023, 10024, 10030, 10016, AND 10025.

28 ALL OF THESE DOCUMENTS, ALSO WERE SHOWN TO

1 DR. HOSHIZAKI ON HER CROSS-EXAMINATION. ALL WERE DISPLAYED
2 TO THE JURY. THESE ARE NOT PRESS RELEASES, HOWEVER, AND
3 THESE DOCUMENTS --

4 I BELIEVE THE OBJECTION IS, WHAT, FOUNDATION?

5 MR. LEITER: OBJECTION IS FOUNDATION.

6 MR. PIUZE: OKAY. SO ON THESE DOCUMENTS, THEY OBJECT
7 AS FOUNDATION, WHICH IS A DIFFERENT OBJECTION. SHE SAW ALL
8 THESE. SHE WAS CROSS-EXAMINED ON THEM THESE COME FROM
9 EITHER LORILLARD OR THE TOBACCO INSTITUTE, OR THE TOBACCO
10 INSTITUTE --

11 MR. LEITER: WE THINK --

12 MR. PIUZE: -- OR LORILLARD.

13 SO TWO OF THEM -- TWO OF THEM ARE FROM THE
14 TOBACCO INSTITUTE WHICH IS, AGAIN, PHILIP MORRIS' SORT OF
15 UMBRELLA ORGANIZATION TO WHICH THEY BELONG. THE REASON FOR
16 THE FOUNDATION OBJECTION HERE IS, IS BECAUSE THEY DIDN'T COME
17 OFF OF PHILIP MORRIS' WEBSITE. THEY CAME OFF THE TOBACCO
18 INSTITUTE'S WEBSITE. BUT IT'S A DIFFERENT OBJECTION FOR
19 THESE. THEY WERE ALL IN PLAY, AND THAT'S ALL I HAVE TO SAY
20 ON THEM

21 THE COURT: ARE YOU SAYING, WERE OR WERE THEY NOT ON
22 HER RELIANCE LIST?

23 MR. PIUZE: EVERY ONE WAS ON THE RELIANCE LIST. EVERY
24 ONE OF THESE SHE SAID SHE HAD READ. AND EVERY ONE OF THESE
25 SHE WAS CROSS-EXAMINED ON. THE ONE SHE SAID SHE HADN'T READ,
26 I PULLED AND NEVER SHOWED TO THE JURY.

27 THE COURT: ALL RIGHT. AND WITH THE DEFENSE, WHEN AN
28 EXPERT HAS RELIED ON CERTAIN DOCUMENTS, THE PARTY OFFERING

1 THE WITNESS INITIALLY CANNOT GET THE DOCUMENTS INTO EVIDENCE.
2 BUT THE DEFENSE ON CROSS-EXAMINATION CAN CROSS-EXAMINE THE
3 WITNESS ON THE RELIANCE DOCUMENTS AND AT THAT POINT CAN OFFER
4 THEM INTO EVIDENCE.

5 MR. LEITER: IF THEY'RE OTHERWISE ADMISSIBLE,
6 YOUR HONOR. WE DON'T BELIEVE THEY'RE ADMISSIBLE.

7 THE COURT: THEY CAN BE ADMISSIBLE FOR THE PURPOSE OF
8 IMPEACHING THE WITNESS AND ONLY FOR THAT PURPOSE.

9 MR. LEITER: WELL, FIRST OF ALL, YOUR HONOR, THE
10 DOCUMENTS THAT ARE PHILIP MORRIS' DOCUMENTS THAT WERE ON HER
11 RELIANCE LIST THAT SHE WAS SHOWN, BECAUSE THEY'RE
12 PHILIP MORRIS' DOCUMENTS, WE HAVE STIPULATED TO THEIR
13 ADMISSIBILITY, AND THOSE ARE IN EVIDENCE. OKAY.

14 THE COURT: WHICH I THINK EVERYBODY UNDERSTANDS ARE
15 JUST FILLED WITH HEARSAY.

16 MR. LEITER: SOME ARE, SOME ARE NOT. THERE IS SOME
17 HEARSAY IN SOME OF THE DOCUMENTS, THAT IS TRUE.

18 THE COURT: SURE, OF COURSE. SHE RELIED ON HEARSAY.

19 MR. LEITER: BUT EXPERTS RELY ON HEARSAY.

20 THE COURT: RIGHT. RIGHT.

21 MR. LEITER: OKAY. THESE ARE DOCUMENTS FROM LORILLARD
22 RENTALS. THERE ARE SOME HANDWRITTEN DOCUMENTS THAT HAVE
23 NEVER BEEN IDENTIFIED AS FROM ANYWHERE IN PARTICULAR, FROM
24 ANY PARTICULAR AUTHOR, NO AUTHOR, NO RECIPIENT. THEY WERE
25 JUST FOUND IN THE FILES OF SOME COMPANY. THESE WERE
26 DOCUMENTS THAT WERE SHOWN TO HER, WHICH SHE SAID SHE LOOKED
27 AT. HERE'S ONE FROM BRITISH AMERICAN TOBACCO COMPANY DATING
28 BACK TO 1958.

1 THE COURT: THESE ARE -- THE THING IS, THESE ARE -- AS
2 I RECALL THE TESTIMONY, THESE DOCUMENTS WERE IMPEACHING,
3 ARGUABLY, IMPEACHING OF HER TESTIMONY THAT CTR WAS AN
4 UP-AND-UP LEGITIMATE RESEARCH COMPANY.

5 AND SO COUNSEL FOR THE DEFENSE HAS AT LEAST A
6 LEGITIMATE ARGUMENT THAT IF SHE DID NOT TAKE THESE INTO
7 ACCOUNT, IF SHE DOES NOT HAVE AN ADEQUATE EXPLANATION FOR
8 THESE DOCUMENTS, THAT BASICALLY, FROM THE PLAINTIFF'S
9 PERSPECTIVE, SHE IS A BIASED WITNESS.

10 MR. LEITER: WE UNDERSTAND THE PLAINTIFF'S ARGUMENT,
11 AND HE'S CERTAINLY FREE TO MAKE THAT ARGUMENT, AND HE'S
12 CERTAINLY FREE TO HAVE SHOWN THE DOCUMENTS TO CROSS-EXAMINE
13 HER ON IT.

14 WHERE WE DISAGREE IS WHETHER THAT MAKES THE
15 DOCUMENTS THEMSELVES ADMISSIBLE INTO EVIDENCE. THERE'S BEEN
16 NO FOUNDATION LAID FOR THESE DOCUMENTS OTHER THAN THE FACT
17 THAT THEY WERE SHOWN TO HER WHEN SHE WAS PREPARING FOR HER
18 TESTIMONY, AND WE DON'T BELIEVE THAT MAKES THEM ADMISSIBLE
19 INTO EVIDENCE.

20 THE COURT: I UNDERSTAND YOUR POSITION. ALL RIGHT.

21 MR. PIUZE: YOUR HONOR, MAY I HAVE A MOMENT TO CONFER
22 HERE?

23 THE COURT: YES.

24 MR. PIUZE: 10026, WHICH WE HAVE BEEN SUBMITTING ON
25 SEPARATELY, IS ALSO A DOCUMENT WHICH WAS SHOWN TO THE SAME
26 WITNESS, AND SHE WAS CROSS-EXAMINED FOR PROBABLY A HALF HOUR
27 ON THIS PARTICULAR DOCUMENT, WHICH IS THE LENNOX HILL
28 HOSPITAL, SHELDON SUMMERS' DOCUMENT IN WHICH SHE SAYS

1 (READING):

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9 "ADVICE OF COUNSEL AT ANOTHER
10 LEVEL OF AUTHORITY TO RELEVANCE. I THINK CTR
11 SHOULD BE RENAMED COUNCIL FOR LEGALLY
12 PERMITTED TOBACCO RESEARCH."

13 AT ANY RATE, WE BELIEVE THAT THERE'S
14 INDEPENDENT FOUNDATION FOR THIS, WHICH IS ALL THAT
15 MR. LEITER'S WAITING FOR, BUT IF THE OTHERS ARE COMING IN,
16 THEN THIS ONE GOES WITH THEM
17 THE COURT: HOLD ON. SHE TESTIFIED THAT FROM HER
18 REVIEW OF THE DOCUMENTS, IT DIDN'T APPEAR THAT THE -- IT
19 APPEARED TO HER THAT CTR WAS COMPLETELY ON THE UP AND UP,
20 THAT THEIR RESEARCH DECISIONS WERE MADE INDEPENDENTLY, THAT
21 THEY WERE NOT CONTROLLED BY THE TOBACCO INDUSTRY IN ANY WAY,
22 SHAPE OR FORM THAT PARTICULAR DOCUMENT, WHICH WAS IN HER
23 RELIANCE LIST, ARGUABLY, AT LEAST, SAYS JUST THE OPPOSITE.

24 MR. PIUZE: CORRECT.

25 THE COURT: RIGHT.

26 MR. PIUZE: ABSOLUTELY.

27 THE COURT: AND SHE WAIVED IT OFF. SHE WAIVED OFF THE
28 DOCUMENT.

MR. PIUZE: RIGHT.

THE COURT: SAYING THAT SHE FOR ONE REASON OR ANOTHER
IGNORED IT.

MR. PIUZE: RIGHT.

MR. LEITER: ACTUALLY, YOUR HONOR, SHE SAID THAT, NO,

1 SHE DIDN'T IGNORE IT. ACTUALLY, SHE SAID SHE WENT BACK TO
2 FIND OUT WHAT HAPPENED TO THE FUXE, F-U-X-E, APPLICATION.

3 THE COURT: FAIR ENOUGH.

4 MR. LEITER: THAT'S REFERRED TO, AND SHE SAID THAT, IN
5 FACT, IT WAS FUNDED.

6 THE COURT: YOU'RE CORRECT. YOUR MEMORY IS MUCH
7 BETTER THAN MINE, MR. LEITER.

8 BUT IT REINFORCES THE COURT'S VIEW THAT THE
9 TRUTH OF THE MATTER, IN THE COURT'S VIEW, IS REALLY NOT THE
10 ISSUE HERE. IT IS HER CREDIBILITY AND TO THE EXTENT TO WHICH
11 SHE INVESTIGATED THE INFORMATION THAT SHE WAS GIVEN.

12 MR. LEITER: NOW, ON THAT DOCUMENT, YOUR HONOR, WHAT
13 WE HAVE TOLD PLAINTIFF'S COUNSEL IS, WE ARE WAITING TO SEE
14 THEIR EVIDENCE OF FOUNDATION, AND IF THEY CAN ESTABLISH THE
15 FOUNDATION, WE'RE NOT OBJECTING TO THAT PARTICULAR DOCUMENT.
16 SO THAT'S THE STATUS OF 11126.

17 THE COURT: WELL, IT APPEARS TO THE COURT -- ARE THERE
18 ANY OTHER DOCUMENTS?

19 MR. PIUZE: YES. ONE MOMENT, PLEASE.

20 YES. EACH OF MR. BOEKEN'S TAX RETURNS HAS BEEN
21 SITTING HERE WITH NO OBJECTION. NO OBJECTIONS OF ANY KIND
22 FROM PHILIP MORRIS.

23 DR. TRABULUS' RECORDS, SAME THING. SO I DON'T
24 HAVE THE EXHIBIT NUMBERS, BUT I'LL PULL THEM AND PUT THEM ON
25 A STACK. THERE'S NO OBJECTION FROM PHILIP MORRIS. I'M GOING
26 TO OFFER THE INCOME TAX RETURNS.

27 AS FAR AS TRABULUS' RECORDS ARE CONCERNED,
28 THERE ARE A COUPLE OF THINGS IN THERE THAT HAVE TO BE

1 REDACTED, BUT IT'S MY INTENTION TO OFFER THOSE, TOO.

2 MR. LEITER: UM --

3 MR. PIUZE: WITH THAT, I -- EXCUSE ME. I APOLOGIZE.

4 MR. LEITER: I'M SORRY. I WAS CONFERRING FOR A
5 MOMENT.

6 AS TO THE TAX RETURNS, WE HAVEN'T PREVIOUSLY
7 ASSERTED AN OBJECTION BECAUSE THEY'VE NEVER BEEN OFFERED.
8 THERE'S BEEN NO TESTIMONY FROM ANYBODY IN THIS CASE
9 AUTHENTICATING THOSE TAX RETURNS. NONE. WE DON'T THINK THAT
10 THEY'RE ADMISSIBLE EVIDENCE. THEY WERE GIVEN BY MR. PIUZE TO
11 THE ACCOUNTANT WHO LOOKED AT NET WORTH. BUT THERE'S NEVER
12 BEEN ANY TESTIMONY IN THIS CASE THAT THOSE ARE ACTUALLY
13 MR. BOEKEN'S TAX RETURNS.

14 MR. PIUZE: WELL, MY RESPONSE IS THIS: BECAUSE THERE
15 WAS NO OBJECTION WHEN WE OFFERED THEM, AND OF COURSE, THAT
16 WAS THE REASON THAT WE WENT THROUGH ALL OF THIS ABOUT
17 OBJECTIONS, BECAUSE THERE WAS NO OBJECTION, AND THEY ASSERTED
18 NO OBJECTION, I DIDN'T DO ANYTHING WITH THEM. I RELIED ON
19 THE FACT THAT THEY WEREN'T GOING TO OBJECT TO IT.

20 MR. LEITER: WELL --

21 MR. PIUZE: WELL -- HANG ON.

22 MR. LEITER: I'M SORRY. I'M SORRY. GO AHEAD.

23 MR. PIUZE: I MEAN, WE WENT THROUGH THIS ELABORATE
24 PROCESS WHERE THEY TOOK 19 OBJECTIONS TO SOME DOCUMENTS IN
25 SOME CASES AND SO --

26 THE COURT: AS TO HIS TAX RETURNS, I MEAN, THINK ABOUT
27 IT FOR A MOMENT, COUNSEL. YOU KNOW, IT'S A CRUCIAL ELEMENT
28 OF PLAINTIFF'S CASE. PLAINTIFF OPERATED ON CERTAIN

1 ASSUMPTIONS, I THINK, IN GOOD FAITH, WITH OPPOSING COUNSEL AS
2 TO THESE TAX RETURNS. I MEAN, YOU KNOW, I COULD LET HIM
3 REOPEN, AND THEY COULD BE AUTHENTICATED, I THINK, FAIRLY
4 EASILY. I CAN'T IMAGINE THAT COUNSEL REALLY WANTS TO --

5 MR. LEITER: JUST SO OUR RECORD IS CLEAR, YOUR HONOR.

6 I'M ADVISED BY MY LEGAL ASSISTANT, WHO'S HERE,
7 THAT WE DID ASSERT OBJECTIONS ON AUTHENTICITY AND HEARSAY
8 RIGHT AT THE BEGINNING OF THE CASE WHEN WE EXCHANGED EXHIBITS
9 LISTS, AND THEN WE EXCHANGED BIG, FAT COMPUTER PRINTOUTS
10 WHICH LISTED OUR OBJECTIONS. WE OBJECTED AT THAT TIME TO
11 AUTHENTICITY AND HEARSAY.

12 PLAINTIFF'S COUNSEL MADE A CHOICE TO PROCEED.
13 NOW, HIS ACCOUNTANT CAN RELY ON WHAT MR. PIUZE GAVE HIM
14 WHETHER THERE'S AN OBJECTION OR NOT. BUT THEY WERE NEVER
15 OFFERED INTO EVIDENCE. WE DID HAVE OBJECTIONS TO THEM FROM
16 THE OUTSET, AND MR. PIUZE MADE A STRATEGIC CALL.

17 THE COURT: OKAY. I --

18 MR. PIUZE: I JUST WANT THE RECORD TO REFLECT THE
19 COURT CAN ACTUALLY WATCH WHAT'S HAPPENING HERE, BUT WHOEVER'S
20 GOING TO READ THIS SOMEDAY MIGHT BE -- I'M SIMPLY A
21 MOUTHPIECE AND FRONTMAN FOR MY TECHNICAL PERSON, SO I'M NOT
22 TRYING TO MISLEAD ANYBODY. I'M GETTING MY INFORMATION
23 WHISPERED IN ONE EAR, JUST AS MR. LEITER IS GETTING HIS
24 INFORMATION WHISPERED IN ONE EAR.

25 COULD WE HAVE OUR TECHNICAL PEOPLE PUT THEIR
26 HEADS TOGETHER ON THIS A LITTLE BIT?

27 THE COURT: GO AHEAD AND DO THAT. LET'S PASS ON THE
28 TAX RETURNS AT THIS POINT.

1 WHAT ABOUT THE TRABULUS DOCUMENTS?

2 MR. LEITER: WE DON'T HAVE AN OBJECTION TO THE MEDICAL
3 RECORDS.

4 MR. PIUZE: SO YOUR HONOR, I MAY OFFER THOSE LATER
5 THIS AFTERNOON AFTER WE CONFER ON REDACTIONS.

6 THE COURT: ALL RIGHT.

7 MR. PIUZE: AND I BELIEVE WE HAVE NOW TOUCHED -- I
8 BELIEVE WE HAVE NOW TOUCHED ON EVERYTHING.

9 MR. LEITER: JUST ONE FINAL POINT FOR OUR RECORD.

10 I DO HAVE IN MY HAND A COMPUTER PRINTOUT,
11 DEFENDANTS' OBJECTIONS TO PLAINTIFF'S EXHIBITS.

12 THE TAX RETURNS WERE MARKED AS 8004.01, .02,
13 .03, .04, .05, .06 AND .07, AND WE HAVE ASSERTED AUTHENTICITY
14 AND HEARSAY OBJECTIONS TO EACH.

15 MR. PIUZE: OKAY. SO I WANT TO DOUBLE-CHECK ON THAT.
16 BUT I'LL JUST ADVISE THE COURT OF THE FOLLOWING.

17 AT MR. BOEKEN'S LAST SESSION OF HIS DEPOSITION,
18 I GAVE MR. CARLTON ALL OF THE TAX RETURNS. I KNOW FOR A
19 CERTAINTY THAT MR. BOEKEN AUTHENTICATED AT LEAST TWO OF THEM
20 ON THAT RECORD. IT'S NOT BEEN READ HERE BEFORE THIS JURY,
21 BUT I COULD HAVE IT READ BEFORE THE COURT.

22 AND, IF NECESSARY, I'D ASK THAT -- MR. BOEKEN
23 IS GOING TO ATTEND FINAL ARGUMENTS, AT LEAST THE BEGINNING OF
24 THEM IF NECESSARY, I'D ASK THAT HE JUST AUTHENTICATE THEM
25 TO THE COURT, BECAUSE HE CAN DO ALL HIS INCOME TAX RETURNS.
26 THEY WERE ALL SITTING ON THE TABLE WHEN MR. CARLTON
27 CROSS-EXAMINED HIM AT THE DEPOSITION.

28 MR. LEITER: ONE FINAL POINT, AND THEN I'LL BE QUIET.

1 THE TESTIMONY OF THE ACCOUNTANT IS IN. THE
2 ACCOUNTANT IS ENTITLED TO RELY ON EVIDENCE, IF IT'S NOT
3 ADMISSIBLE EVIDENCE. THAT TESTIMONY IS BEFORE THE JURY. WE
4 CROSS-EXAMINED THE ACCOUNTANT.

5 ONE OF THE POINTS RAISED ON CROSS-EXAMINATION
6 WAS THE TAX RETURNS WERE UNSIGNED AND JUST HAD BEEN PROVIDED
7 TO HIM BY COUNSEL. THAT EVIDENCE ALL GOES TO THE JURY. AND
8 THE TAX RETURNS THEMSELVES DON'T HAVE TO BE ADMISSIBLE
9 EVIDENCE. WE'RE STILL ENTITLED TO ARGUE TO THE JURY THAT THE
10 JURY SHOULDN'T RELY ON THAT TESTIMONY.

11 BECAUSE THOSE ARE NOT OFFICIAL TAX RETURNS, AND
12 THERE'S BEEN NO EVIDENCE OF THAT. THIS HAS BEEN AN ISSUE
13 THAT HAS BEEN AROUND IN THE CASE SINCE THE BEGINNING, AND
14 IT'S SOMETHING THAT WE RAISED ON CROSS-EXAMINATION WHEN THE
15 ACCOUNTANT TESTIFIED.

16 MR. PIUZE: AND I JUST HAVE THIS LAST SHOT, YOUR
17 HONOR. I DON'T KNOW WHAT A SO-CALLED OFFICIAL TAX RETURN IS.
18 ALL OF MY TAX RETURNS, THE COPIES OF MY TAX RETURNS THAT I'VE
19 KEPT FOR THE LAST UMPTEEN MILLION YEARS, NONE OF THEM BEAR
20 IRS OR FRANCHISE TAX BOARD STAMPS.

21 THE COURT: OR YOUR SIGNATURE.

22 MR. PIUZE: OR MY SIGNATURE, ABSOLUTELY.

23 MR. LEITER: FINAL -- I'M SORRY.

24 MR. PIUZE: SO THIS MAN CAN JUST COME IN HERE AND SAY,
25 I FILED ALL THOSE, END OF STORY.

26 MR. LEITER: FINAL POINT. WE ALSO ELICITED FROM THE
27 WITNESS ON THE STAND THAT YOU CAN GO TO THE IRS, THE
28 FRANCHISE TAX BOARD AND GET CERTIFIED COPIES.

1 THE COURT: I KNOW OKAY.

2 AS TO THE HOSHIZAKI DOCUMENTS, THE COURT WILL
3 ADMIT ALL OF THOSE DOCUMENTS INTO EVIDENCE GOING DIRECTLY TO
4 THE ISSUE OF CREDIBILITY OF DR. HOSHIZAKI AND HAVING BEEN
5 OFFERED BY THE DEFENSE BY WAY OF IMPEACHMENT AND NOT TO THE
6 TRUTH OF THE MATTER ASSERTED IN THE DOCUMENT BUT MORE TO THE
7 CREDIBILITY OF THAT WITNESS, WHICH IS VERY MUCH IN ISSUE IN
8 THIS CASE, IN THIS COURT'S VIEW

9 AS TO THE TAX RETURNS, I'M OPEN. RIGHT NOW, I
10 DON'T HAVE A RECORD THAT WOULD BEAR THEIR ADMISSION. AND WE
11 NEED TO GO FROM THERE. AND IT MAY WELL BE THAT THEY WON'T BE
12 ADMITTED INTO EVIDENCE.

13 THE TRABULUS DOCUMENTS, WE'LL LEAVE THAT OPEN
14 BECAUSE YOU'RE GOING TO LOOK AT THOSE AND THERE'S GOING TO BE
15 REDACTIONS ON THE DOCUMENT THAT HAS BEEN -- THAT'S AN
16 OFFICIAL RECORD.

17 MR. PIUZE: WE'VE JUST -- THANK YOU.

18 WE'VE JUST AGREED ON HOW TO -- WHICH PORTIONS
19 OF 7097, WHICH IS THE BANKRUPTCY PETITION, TO GO IN, SO WE NO
20 LONGER HAVE A PROBLEM WE'VE MADE AN AGREEMENT. WE'LL
21 REDACT THEM THANK YOU.

22 THE COURT: LET'S MOVE TO THE NEXT ISSUE.

23 I HAVE READ THE MATERIALS THAT WERE GIVEN TO ME
24 ON THE ISSUE OF ATTORNEY-CLIENT PRIVILEGE AND CRIME/FRAUD
25 EXCEPTION.

26 MY FIRST QUESTION TO COUNSEL FOR PLAINTIFF IS,
27 WHAT EXACT DOCUMENTS DOES THE PLAINTIFF WISH TO OFFER INTO
28 EVIDENCE, AND DO YOU -- IS ONE OF THEM THE SELIGMAN DOCUMENT

1 DRAFTED TO FILE ON NOVEMBER 17TH, 1978, REGARDING A MEETING
2 IN NEW YORK ON NOVEMBER 15TH, 1978.

3 MR. PIUZE: THAT'S THE ONE AND ONLY.

4 THE COURT: THAT'S THE ONLY DOCUMENT YOU WANT TO GET
5 INTO EVIDENCE UNDER THIS EXCEPTION?

6 MR. PIUZE: THAT'S THE ONE AND ONLY.

7 WE JUST GAVE PHILIP -- EXCUSE ME --
8 PHILIP MORRIS SOME UNINTENDED GOOD NEWS, BUT THAT'S THE ONLY
9 ONE.

10 THE COURT: WELL, LET'S HAVE A CHAT ABOUT THIS.

11 AND I WANT TO HEAR FROM THE PLAINTIFF FIRST.
12 AND LET ME JUST TELL YOU RIGHT NOW, UP FRONT, BY WAY OF SORT
13 OF A TENTATIVE IMPRESSION.

14 I REVIEWED VERY CAREFULLY DR. HOSHIZAKI'S
15 TESTIMONY LAST NIGHT, AS I RECORD ON MY NOTES -- AND I THINK
16 COUNSEL WATCHED ME DURING THE COURSE OF THE TRIAL. I HAVE
17 ALMOST 100 PAGES OF SINGLE-PAGE NOTES IN THIS CASE.

18 SHE BASICALLY TOLD THIS JURY THAT, IN HER
19 OPINION, CTR WAS DOING LEGITIMATE RESEARCH, THAT THEY WERE
20 MAKING THEIR OWN DECISIONS THROUGH THE SRB, AND THAT THERE
21 WAS NO OTHER MECHANISM THAT SHE WAS AWARE OF AT CTR BY WHICH
22 ANY OTHER -- THAT IT WAS DOING ANYTHING ELSE.

23 SO THIS -- THIS JURY IS LEFT WITH THE
24 IMPRESSION FROM HER TESTIMONY THAT ALL THE RESEARCH DONE BY
25 CTR WAS ESSENTIALLY INDEPENDENT, AND THERE WAS A TREMENDOUS
26 AMOUNT OF BACK AND FORTH BETWEEN HER AND COUNSEL OVER THE
27 ISSUE OF WHETHER OR NOT CERTAIN DECISIONS BY CTR AS TO WHAT
28 PROJECTS TO FUND AND WERE NOT TO FUND WERE AFFECTED OR

1 CONTROLLED BY COUNSEL.

2 HAVING READ THIS MATERIAL AND, IN FACT, HAVING
3 READ THIS SELIGMAN DOCUMENT, I CAN TELL YOU THAT IN THIS
4 COURT'S MIND, THERE IS, AT LEAST FROM A LEGAL PERSPECTIVE, A
5 SIGNIFICANT QUESTION AS TO WHETHER OR NOT HER TESTIMONY IS
6 ACCURATE. IT'S A QUESTION.

7 I MEAN, IT'S NOT MY JOB TO DECIDE THE FACTS IN
8 THIS CASE. BUT THIS WHOLE CONCEPT OF THIS SO-CALLED SPECIAL
9 PROJECTS SITUATION AND WHAT THEY WERE DOING THERE AND SOME OF
10 THE DOCUMENTS, THE HISTORY THAT'S IN THIS DOCUMENT, AND
11 WHETHER OR NOT IN CERTAIN INSTANCES CTR WAS REQUIRED TO GO
12 FORWARD WITH THESE SPECIAL PROJECTS, EVEN THOUGH IT DIDN'T
13 WANT TO GO FORWARD WITH THESE SPECIAL PROJECTS.

14 WAS THIS DOCUMENT SHOWN TO HOSHIZAKI?

15 MR. PIUZE: IT'S NOT ON HER RELIANCE LIST.

16 THE COURT: ALL RIGHT. THEN LET ME JUST TELL YOU
17 TENTATIVELY WHAT MY CONCERN IS.

18 MY CONCERN IS -- IF YOU WANT TO TALK
19 CRIME/FRAUD EXCEPTION, MY CONCERN IS -- FRANKLY, I HAVE TO BE
20 RATHER BLUNT ABOUT THIS -- BUT IT'S MY CONCERN, A FRAUD ON
21 THEM

22 BECAUSE THE PROBLEM IS THAT THIS WITNESS WAS
23 SHOW A SELECTIVE NUMBER OF DOCUMENTS, AND FOR HER NOT TO BE
24 SHOW THIS KIND OF DOCUMENT, AND THEN TO SIT UP HERE AND SAY
25 WHAT SHE SAID TO THIS COURT, AND THEN FOR THAT JURY NOT TO
26 KNOW ABOUT THAT RAISES VERY, VERY DEEPLY DISTURBING
27 QUESTIONS.

28 ALL RIGHT. COUNSEL.

1 MR. PIUZE: PHILIP MORRIS SHOULD BE BOUND BY THE
2 MINNESOTA CRIME/FRAUD RULING.

3 COLLATERAL ESTOPPEL APPLIES IF, ONE, THE ISSUE
4 DECIDED IN A PRIOR CASE IS IDENTICAL WITH THE ONE NOW
5 PRESENTED; TWO, THERE WAS A FINAL JUDGMENT ON THE MERITS IN
6 THE PRIOR CASE; THREE, THE PARTY TO BE ESTOPPED WAS A PARTY
7 TO THE PRIOR ADJUDICATION.

8 TEITELBAUM VERSUS DOMINION, 1962, 58 CAL. 2D
9 601, 604; BERNHARD VERSUS BANK OF AMERICA, 1942, 19 CAL. 2D
10 807, 813.

11 THE PRINCIPLES OF COLLATERAL ESTOPPEL MAY BE
12 USED BY ONE WHO IS NOT A PARTY TO THE PRIOR ACTION, EXCEPT IN
13 CERTAIN CIRCUMSTANCES WHEN APPLICATION, QUOTE, "WOULD BE
14 UNFAIR TO A DEFENDANT," CLOSED QUOTE.

15 PARKLANE HOSIERY COMPANY VERSUS SHORE, '79,
16 U. S. 322; STOLZ VERSUS BANK OF AMERICA, '93, 15 CAL. APP. 4TH
17 217 AND 222.

18 STATE FARM VERSUS SUPERIOR COURT, 1997,
19 54 CAL. APP. 4TH 625 AT 643 THROUGH 649 NOTES, QUOTE (READING):

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"EXTREME CAUTION MUST BE
EXERCISED WHEN AN ACCUSATION IS MADE THAT
WILL INVADE THE ATTORNEY-CLIENT RELATIONSHIP
IN CONNECTION WITH ONGOING LITIGATION,"
CLOSED QUOTES.

 THESE ISSUES HAVE BEEN LITIGATED ALL THE WAY
TO THE UNITED STATES SUPREME COURT IN THE MINNESOTA CASE. I

1 DON' T BELIEVE THERE' S ANYTHING IN THE STATE FARM DECISION
2 THAT INTERFERES WITH THE PRINCIPLES OF COLLATERAL ESTOPPEL.

3 THANK YOU.

4 MR. CARLTON: YOUR HONOR, I HAVE A NUMBER OF POINTS TO
5 MAKE, AS I' M SURE YOU CAN IMAGINE.

6 FIRST --

7 THE COURT: I' M READY TO LISTEN.

8 MR. CARLTON: I WANT TO RIGHT UP FRONT ADDRESS WHAT
9 YOU JUST SAID ABOUT DR. HOSHIZAKI.

10 YOU NEVER -- AND I WAS NOT INVOLVED -- BUT YOU
11 DO NOT SHOW PRIVILEGED DOCUMENTS TO AN EXPERT WITNESS WHO CAN
12 THEN BE QUESTIONED ABOUT THEM THEY LOSE THE PRIVILEGE BY
13 DOING THAT. NO ONE DOES THAT.

14 TWO. SHE COULD HAVE TESTIFIED ABOUT SPECIAL
15 PROJECTS. SPECIAL PROJECTS WERE NO SECRET. MR. PIUZE KNEW
16 ABOUT SPECIAL PROJECTS, BECAUSE HE HAD ACCESS TO THAT
17 DOCUMENT AND OTHERS. HE DIDN' T EVEN ASK HER ABOUT SPECIAL
18 PROJECTS.

19 WHAT SHE TESTIFIED TO WAS THE WORK OF THE
20 SCIENTIFIC ADVISORY BOARD AND THE GRANT RESEARCH PROGRAM THAT
21 CTR FUNDED. THAT WAS MOST OF ITS WORK. SPECIAL PROJECTS WAS
22 SOMETHING ELSE. IT DIDN' T GO THROUGH THE SCIENTIFIC ADVISORY
23 BOARD. HE DIDN' T ASK HER ABOUT IT. SHE DIDN' T TELL HIM
24 ABOUT IT.

25 SHE TALKED ABOUT THE WORK THAT THE CTR SPECIAL
26 SCIENTIFIC ADVISORY BOARD DID, AND THAT' S THAT. THERE WAS NO
27 FRAUD ON THE COURT. THERE WAS -- SHE WAS ABSOLUTELY STRAIGHT
28 FORWARD ABOUT WHAT SHE TESTIFIED TO. AND IF HE DIDN' T GET

1 INTO IT, THAT'S MR. PIUZE'S CHOICE.

2 AS TO THIS WHOLE CRIME/FRAUD THING. MR. PIUZE
3 HAD THIS DOCUMENT AND ANY OTHER DOCUMENT HE WANTED FROM
4 MINNESOTA FROM BEFORE THE COMMENCEMENT OF THIS CASE. IF HE
5 WANTED TO BRING A CRIME/FRAUD PROCEEDING, HE SHOULD HAVE DONE
6 THAT WHEN THERE WAS TIME TO DEAL WITH IT IN A FULL AND AN
7 APPROPRIATE MANNER.

8 HE MENTIONED A FEW WEEKS AGO THAT HE MIGHT BE
9 DOING THIS. HE KEPT SAYING THERE WERE ADDITIONAL BRIEFS THAT
10 WERE GOING TO BE FILED THAT HE WANTED TO DROP ON US. WE
11 DIDN'T GET THE FINAL BRIEFS UNTIL YESTERDAY. THIS IS NOT AN
12 APPROPRIATE WAY TO BE PROCEEDING IN DETERMINING SOMETHING AS
13 SERIOUS AS CRIME/FRAUD ALLEGATIONS, FOR A NUMBER OF REASONS.

14 IN CALIFORNIA, FOR INSTANCE, CRIME/FRAUD
15 DOESN'T APPLY TO OPINION WORK PRODUCT. HAS THERE BEEN ANY
16 DETERMINATION AS TO WHETHER THIS IS OPINION WORK PRODUCT?

17 WE CONTEND THAT IT IS. IF IT IS, THEN THE COLD
18 CRIME/FRAUD PROCEEDING DOESN'T HAVE ANY APPLICABILITY TO IT
19 AT ALL.

20 THE COURT: THIS PARTICULAR DOCUMENT ISN'T AN OPINION.
21 IT'S A RENDITION OF A HISTORY OF CTR AS WRITTEN BY
22 MR. SELIGMAN, WHO WAS THE HEAD OF RESEARCH AND DEVELOPMENT
23 FOR PHILIP MORRIS.

24 MR. CARLTON: WHO'S REPEATING WHAT A LAWYER FOR
25 PHILIP MORRIS AND OTHER TOBACCO COMPANIES SAID AT A MEETING.
26 AND SO THAT DOESN'T LOSE ITS PRIVILEGED STATUS BECAUSE HE
27 WROTE IT AND PUT IT IN THE FILE. IT IS SOMETHING, AS I SAID,
28 THAT WE CONTEND IS ATTORNEY-CLIENT PRIVILEGE AND IS

1 WORK PRODUCT.

2 NOW, THAT'S THE FIRST STEP THAT --

3 THE COURT: HOLD ON. HOW AM I, BY LOOKING AT THIS
4 PARTICULAR DOCUMENT, TO KNOW THAT THIS IS AN ATTORNEY-CLIENT
5 PRIVILEGED DOCUMENT?

6 MR. CARLTON: WELL, YOUR HONOR, LET ME MAKE A POINT.
7 AND WE HAVEN'T HAD A CHANCE TO SUBMIT A BRIEF ON THIS, AND
8 THIS IS ONE OF THE ISSUES.

9 IN CRIME/FRAUD PROCEEDINGS, NORMALLY, THE
10 PLAINTIFF HAS TO MAKE A PRIMA FACIE SHOWING THAT A LAWYER WAS
11 CONSULTED FOR PURPOSES OF A CRIME OR FRAUD.

12 THE COURT: I DON'T SEE ANY LEGAL ADVICE BEING
13 COMMUNICATED IN THIS DOCUMENT EITHER.

14 MR. CARLTON: WELL, I'M NOT QUITE THERE YET.

15 HE HASN'T CHALLENGED THE PRIVILEGE CLAIM OF
16 THIS DOCUMENT. AS A MATTER OF FACT, HE'S AFFIRMED IT,
17 ESSENTIALLY, BY FILING THIS PROCEEDING.

18 BUT, YOU HAVE TO FIRST DETERMINE, UNDER
19 CRIME/FRAUD, THAT THE PLAINTIFF HAS MADE A PRIMA FACIE
20 SHOWING THAT A LAWYER WAS CONSULTED, OR THERE WAS A
21 COMMUNICATION BETWEEN A LAWYER AND A CLIENT THAT WAS, FOR
22 PURPOSES OF FURTHERING A CRIME OR FRAUD, AND THAT IS THE
23 DOCUMENT FOR PURPOSES OF FURTHERING THE CRIME OR FRAUD.

24 NOW, UNDER STANDARD OR TYPICAL CRIME/FRAUD
25 PROCEDURES, THAT INITIAL PRIMA FACIE SHOWING, THAT
26 DETERMINATION, HAS TO BE MADE WITHOUT REFERENCE TO THE
27 UNDERLYING DOCUMENT.

28 THE COURT: BUT THE UNDERLYING DOCUMENT IS OUT. IT'S

1 ON THE PUBLIC RECORD.

2 MR. CARLTON: THAT'S RIGHT. AND I'M NOT -- I'M JUST
3 POINTING OUT --

4 THE COURT: HERE'S THE SITUATION. MY JOB AS A JUDGE
5 IS TO MAKE SURE THAT A FAIR TRIAL OCCURS. AND MY CONCERN --
6 I'VE SEEN THIS DOCUMENT NOW. IT IS A DOCUMENT THAT IS OUT IN
7 THE PUBLIC RECORD. AND FOR ME TO SIT HERE AND RULE THAT THIS
8 JURY CAN'T KNOW ABOUT THIS PARTICULAR DOCUMENT, GIVEN THE
9 TESTIMONY OF MS. HOSHIZAKI, MAKES ME VERY, VERY
10 UNCOMFORTABLE.

11 IT MAKES ME WORRY AS TO WHETHER OR NOT A
12 MISCARRIAGE OF JUSTICE MIGHT OCCUR IF THIS IS NOT TAKEN INTO
13 ACCOUNT IN THEIR ULTIMATE DECISION MAKING. AND ULTIMATELY,
14 IF THE JURY GOES THROUGH AND MAKES THIS DECISION, AND LATER
15 ON, THEY FIND OUT, OR THE PUBLIC FINDS OUT, THAT THIS WAS NOT
16 PUT IN FRONT OF THE JURY AFTER WHAT MS. HOSHIZAKI TOLD THE
17 JURY ABOUT CTR, WOULD CALL THE COURT INTO SERIOUS QUESTION AS
18 TO WHETHER OR NOT IT'S CONDUCTED A FAIR TRIAL IN THIS
19 PARTICULAR MATTER.

20 AND THAT'S WHY, IT SEEMS TO ME -- AND MIGHT
21 EVEN EXPOSE THE COURT TO ACCUSATIONS THAT IT HAS SOMEHOW
22 PARTICIPATED IN A FRAUD ON THIS JURY. AND I, FRANKLY, CAN'T
23 SEE HOW I, AS A TRIAL JUDGE, CAN BE A PARTY TO SOMETHING LIKE
24 THAT.

25 MR. CARLTON: WELL, I RESPECTFULLY DISAGREE WITH THE
26 COURT'S -- YOUR HONOR'S CONCLUSIONS ABOUT THIS. AND I MERELY
27 GO BACK TO THE ARGUMENT THAT WE MADE EARLIER. THIS IS
28 SOMETHING THAT COULD HAVE BEEN AND SHOULD HAVE BEEN RESOLVED

1 MUCH EARLIER THAN IT IS NOW BEING PRESENTED THE COURT.

2 THE COURT: AND I WISH IT HAD. SERIOUSLY.

3 MR. LEITER: AND I WANT TO ADD A POINT, YOUR HONOR,
4 BECAUSE I THINK THERE'S SOMETHING NOT FAIR GOING ON HERE, AND
5 I MEAN NOT FAIR TO US, AND I'M GOING TO SPEAK VERY CANDIDLY
6 TO THE COURT.

7 THE COURT: ALL RIGHT.

8 MR. LEITER: I WANT TO PUT ASIDE THAT DOCUMENT FOR A
9 SECOND, AND I WANT TO TALK ABOUT THE ISSUE OF SPECIAL
10 PROJECTS.

11 AS MR. CARLTON SAID, THAT DOCUMENT, THAT
12 PRIVILEGED DOCUMENT, IS NOT ONLY THE MANIFESTATION OF
13 SOMETHING CALLED SPECIAL PROJECTS. SPECIAL PROJECTS IS
14 SOMETHING THAT EXISTS. IT HAD NOTHING TO DO WITH THE
15 SCIENTIFIC ADVISORY BOARD. IT WAS A COMPLETELY SEPARATE
16 PROJECT. AND DR. HOSHIZAKI KNEW ALL ABOUT IT.

17 MR. PIUZE ALSO KNEW ABOUT IT OR COULD HAVE
18 KNOWN ABOUT IT, BECAUSE IT'S COME UP IN A LOT OF TRIALS IN
19 THE TOBACCO WORLD. IT'S NO SECRET. AND IT'S BEEN OUT THERE
20 FOR YEARS AND YEARS AND YEARS AND YEARS.

21 MR. PIUZE HAS HAD ACCESS TO ALL THE DOCUMENTS.
22 THERE ARE LOTS OF NON-PRIVILEGED DOCUMENTS OUT THERE ON THE
23 SUBJECT. THERE'S LOTS OF TESTIMONY OUT THERE ON THE SUBJECT.
24 AND DR. HOSHIZAKI KNEW ALL ABOUT SPECIAL PROJECTS. AND
25 MR. PIUZE COULD HAVE ASKED HER ABOUT IT.

26 THE COURT: COUNSEL. I'M SORRY.

27 MR. LEITER: I'M GETTING UPSET.

28 THE COURT: THE DECIBEL LEVELS.

1 BUT ALSO, COUNSEL FOR DEFENSE COULD HAVE ASKED
2 HER ABOUT IT AS WELL AND PUT IT ON THE TABLE.

3 MR. LEITER: WE COULD HAVE ASKED HER, BUT THE ISSUE IS
4 NOW, SOMETHING WAS KEPT FROM THE COURT OR THE JURY OR EVEN
5 FROM PLAINTIFF'S COUNSEL.

6 OUR POSITION IS, SPECIAL PROJECTS IS COMPLETELY
7 SEPARATE FROM WHAT SHE TESTIFIED ABOUT. IT'S COMPLETELY
8 SEPARATE FROM THE SCIENTIFIC ADVISORY BOARD. IF MR. PIUZE
9 HAD A DIFFERENT VIEW ON IT, HE WAS CERTAINLY ENTITLED TO ASK
10 HER ABOUT IT, AND SHE WOULD HAVE ANSWERED HIM

11 IF HE THOUGHT THAT SPECIAL PROJECTS IMPEACHED
12 HER TESTIMONY ABOUT CTR AND THE SCIENTIFIC ADVISORY BOARD, HE
13 COULD HAVE ASKED HER ABOUT IT WITHOUT GETTING TO ANY
14 PRIVILEGED DOCUMENTS WHATSOEVER. HE COULD HAVE RAISED THE
15 SUBJECT WITH HER, AND HE WOULD HAVE GOTTEN AN ANSWER AND HE
16 COULD HAVE FOLLOWED UP. HE KNEW ALL ABOUT IT.

17 HE MADE A DECISION NOT TO ASK HER ABOUT SPECIAL
18 PROJECTS, NOT TO GET HER TESTIMONY ON WHAT IT WAS. AND NOW,
19 THROUGH THE VEHICLE OF THIS ONE PRIVILEGED DOCUMENT, THERE'S
20 A SUGGESTION THAT SOMETHING WAS WITHHELD, AND SOMETHING NEEDS
21 TO BE SHOWN TO THE JURY THROUGH A PRIVILEGED DOCUMENT -- AND
22 I DON'T KNOW WHAT HE'S GOING TO SAY ABOUT THE PRIVILEGED
23 DOCUMENT IN ARGUMENT -- BUT THAT SOMEHOW SOMETHING HAS BEEN
24 KEPT.

25 IF THE INFORMATION ABOUT SPECIAL PROJECTS,
26 ASIDE FROM THIS DOCUMENT, DID NOT GO TO THE JURY, IT DIDN'T
27 GO TO THE JURY BECAUSE MR. PIUZE CHOSE NOT TO CROSS-EXAMINE
28 HER ABOUT IT, AND THAT DOESN'T MAKE THIS DOCUMENT ADMISSIBLE.

1 IT DOESN'T MAKE THIS DOCUMENT NECESSARY TO ADDRESS SOME OTHER
2 PROBLEM

3 THE COURT: WELL, IT SEEMS TO ME THAT HE COULD ARGUE
4 THAT IF SHE WAS TRULY A CREDIBLE WITNESS THAT SHE WOULD HAVE
5 TOLD THE JURY ABOUT IT. SHE WOULDN'T HAVE HAD TO BEEN ASKED.

6 MR. LEITER: YOUR HONOR, THAT'S WHY WE HAVE
7 CROSS-EXAMINATION.

8 THE COURT: THAT'S WHY WE HAVE DIRECT EXAMINATION.

9 MR. LEITER: YOUR HONOR, I'VE ALREADY EXPLAINED, IN
10 OUR VIEW, SPECIAL PROJECTS WAS NOT PART OF HER TESTIMONY. IT
11 WAS NOT PART OF THE SCIENTIFIC ADVISORY BOARD. IT WAS
12 SEPARATE AND APART. THAT'S OUR VIEW, AND THAT'S WHY WE
13 DIDN'T ASK HER ABOUT IT. IT'S THAT SIMPLE.

14 IF MR. PIUZE DISAGREES WITH US -- THIS IS WHY
15 WE HAVE AN ADVERSARY SYSTEM IF HE DISAGREED WITH THE WAY WE
16 PRESENTED HER TESTIMONY ABOUT SPECIAL PROJECTS, HE WAS
17 CERTAINLY ENTITLED TO DISAGREE, AND HE IS CERTAINLY ENTITLED
18 TO ASK HER WHETHER, AH-HAH, DIDN'T THE DEFENSE REALLY LEAVE
19 SOMETHING REALLY IMPORTANT OUT WHEN THEY ASKED YOU ABOUT THE
20 SCIENTIFIC ADVISORY BOARD, DIDN'T THE DEFENSE BLOW IT, DIDN'T
21 THE DEFENSE HIDE SOMETHING FROM THE COURT, DIDN'T THE DEFENSE
22 HIDE SOMETHING FROM THE JURY. HE HAD EVERY OPPORTUNITY TO
23 RAISE THAT ON CROSS-EXAMINATION, IF HE THOUGHT WE HAD MADE
24 THE WRONG CALL.

25 I WILL TELL THE COURT IN ALL HONESTY AND
26 SINCERITY, THAT'S OUR VIEW ABOUT SPECIAL PROJECTS. WE DIDN'T
27 THINK IT WAS PART OF HER TESTIMONY. IF HE DISAGREED, HE
28 COULD HAVE RAISED IT. HE COULD HAVE IMPEACHED IT. HE COULD

1 HAVE BROUGHT IT OUT. AND THEN THE JURY AND THE COURT COULD
2 HAVE DECIDED WHAT THEY THOUGHT ABOUT IT.

3 THE COURT: MR. PIUZE, WHAT'S YOUR ANSWER TO THAT?

4 MR. PIUZE: MY ANSWER IS, FIRST AND FOREMOST, IT'S A
5 FALSE CONFLICT. AND IT'S A MICROCOSM THE ENTIRE CASE --
6 IT'S A SMOKE SCREEN. AND NOW, I GET BLAMED BECAUSE -- I GET
7 BLAMED BECAUSE THERE WAS A CRIME/FRAUD EXCEPTION THAT THE
8 UNITED STATES SUPREME COURT HAS PUT ITS BLESSING ON.

9 THIS DOCUMENT, WHETHER DR. HOSHIZAKI EVER
10 TESTIFIED OR NOT, SHOULD COME INTO EVIDENCE FOR TOTALLY
11 DIFFERENT REASONS. BECAUSE IT'S AN INTERNAL PHILIP MORRIS
12 DOCUMENT. IT'S GOT ALL KINDS OF ADMISSIONS ON THERE WHICH
13 CONTRADICT -- WELL, IT DOES NOT EVEN MATTER. THEY DON'T HAVE
14 TO CONTRADICT. IT'S AN ADMISSION. IT'S A PHILIP MORRIS
15 ADMISSION.

16 THE ONLY QUESTION IS WHETHER OR NOT IT CAN BE
17 PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE. IT HAS BEEN
18 RULED BY THE HIGHEST COURT, I THINK IN MINNESOTA, BY THE
19 U. S. APPEALS COURT, BY THE U. S. SUPREME COURT -- I THINK ALL
20 THREE -- THAT IT IS NOT PROTECTED.

21 SO ON THAT BASIS ALONE, AND ON THE BASIS THAT
22 I'VE ALREADY DISCUSSED HERE, BECAUSE IT IS COLLATERAL
23 ESTOPPEL, IT SHOULD BE IN, AND THAT'S THE END OF THE --
24 THAT'S THE END OF THE DISCUSSION.

25 BUT BECAUSE NOW, THE DISCUSSION HAS TILTED
26 ABOUT MIKE PIUZE AT FAULT, SOMEHOW WHY AM I AT FAULT?

27 I CROSS-EXAMINED HER. THEY KNEW DARN WELL I
28 WANTED THIS DOCUMENT IN. THIS CRIME/FRAUD THING HAS BEEN OUT

1 THERE FOR FOREVER. THEY KNEW THEY WERE WAITING TO FINALIZE
2 THE DOCUMENTS. THEY KNEW THAT WAS ONE OF THE DOCUMENTS.
3 IT'S ALWAYS BEEN ONE OF THE DOCUMENTS. AND I KNEW THAT WAS
4 GOING TO BE AN ISSUE.

5 NOW, AM I HEARING SOMEHOW HERE THAT IF THEY
6 COULD HAVE ANTICIPATED THIS COURT'S RULING, THEY WOULD HAVE
7 ASKED HER BETTER QUESTIONS TO PROTECT HER?

8 I'M NOT HEARING THAT. IF I'M NOT HEARING THAT,
9 SO IT'S A BIG SO WHAT?

10 I'M NOT ON THE DEFENSIVE HERE. I HAVEN'T DONE
11 ANYTHING WRONG.

12 MR. LEITER: WITH ALL RESPECT, YOUR HONOR, THAT DIDN'T
13 ANSWER THE QUESTION. THE QUESTION WAS: PUTTING ASIDE THIS
14 DOCUMENT, WHAT I HEAR YOUR HONOR IS CONCERNED ABOUT IS THE
15 NOTION THAT SOMEHOW THIS ISSUE WITH SPECIAL PROJECTS WAS KEPT
16 FROM THE JURY.

17 I'VE EXPLAINED OUR POSITION AS TO WHY WE DIDN'T
18 RAISE IT ON DIRECT EXAMINATION. AND THERE IS NO REASON
19 WHATEVER THAT IF PLAINTIFF'S COUNSEL THOUGHT THAT SPECIAL
20 PROJECTS WAS SOMETHING THAT IMPEACHED HER TESTIMONY, SEPARATE
21 AND APART FROM ONE PRIVILEGED DOCUMENT, HE COULD HAVE ASKED
22 HER ABOUT THE SUBJECT.

23 AND IF IT WAS THE GOLD MINE THAT IT'S NOW BEING
24 CHARACTERIZED AS, PRESUMABLY, HE WOULD HAVE MADE SOME HEADWAY
25 WITH IT, IF HE HAD ASKED HER ABOUT IT.

26 SO SEPARATE AND APART FROM THE FACT IT'S
27 REFLECTED IN A PRIVILEGED DOCUMENT, THE SUBJECT ITSELF IS NOT
28 PRIVILEGED. IT'S BEEN THE SUBJECT OF GOBS AND GOBS OF

1 TESTIMONY, AND IF MR. PIUZE THOUGHT THAT THAT WAS A FRUITFUL
2 BIT OF CROSS-EXAMINATION, THAT IT IMPEACHED HER INTEGRITY AND
3 IMPEACHED THE INTEGRITY OF THE DEFENSE, HE COULD HAVE ASKED
4 HER.

5 THE COURT: HERE'S THE DEAL. THE PLAINTIFF'S
6 POSITION, ESSENTIALLY, IS THE CTR WAS A FRONT FOR THE TOBACCO
7 COMPANIES. I DON'T KNOW WHETHER THAT'S TRUE OR NOT. BUT
8 THAT IS THE ARGUMENT THAT THEY'RE MAKING -- THAT THE
9 PLAINTIFF IS MAKING.

10 AND THERE WAS A FAIRLY EXTENSIVE EXAMINATION ON
11 THE QUESTION OF WHETHER OR NOT CTR WAS CONTROLLED BY THE
12 TOBACCO INDUSTRY IN THE DECISIONS OF WHAT PROJECTS IT DECIDED
13 TO FUND AND WHICH PROJECTS IT DECIDED NOT TO FUND.

14 AND MS. HOSHIZAKI, BASICALLY, TESTIFIED THAT,
15 AT LEAST IN THE EXAMPLE THAT WAS PRESENTED TO HER, THAT WHILE
16 THERE MAY HAVE BEEN SOME OBJECTION TO SOME PARTICULAR PROJECT
17 THAT CTR DID, THAT IT WAS OVERRULED, AND THAT CTR HAD THE
18 BACKBONE TO DO WHAT IT THOUGHT WAS RIGHT IN TERMS OF
19 RESEARCH, AND IT OPERATED ON ITS OWN.

20 AND HERE WE HAVE A DOCUMENT FROM
21 R. B. SELIGMAN, WHO IS -- THE RECORD IS VERY CLEAR AS TO WHO
22 HE WAS. ALSO PRESENT AT THIS MEETING WAS TOM OSDENE, WHO AT
23 THAT TIME WAS THE DIRECTOR OF RESEARCH FOR PHILIP MORRIS.
24 AND SELIGMAN WAS THE VICE-PRESIDENT OF RESEARCH AND
25 DEVELOPMENT.

26 AND THE DOCUMENT -- IN IT, SELIGMAN
27 IS -- THEY'RE TALKING ABOUT POLICIES OF THIS AD HOC
28 COMMITTEE, AND SELIGMAN WRITES (READING):

1 "BILL SHIN FEELS THAT SPECIAL
2 PROJECTS ARE THE BEST WAY THAT MONIES ARE
3 SPENT. ON THESE PROJECTS, CTR HAS ACTED AS A
4 FRONT. HOWEVER, THERE ARE TIMES WHEN CTR HAS
5 BEEN RELUCTANT TO SERVE IN THAT CAPACITY, AND
6 IN RARE INSTANCES, THEY'VE REFUSED TO SERVE
7 IN THAT CAPACITY. "

8
9 IN OTHER WORDS, IT WAS THE EXCEPTION TO THE
10 RULE WHEN THEY DIDN'T OPERATE AS A FRONT, AND THAT THE RULE
11 WAS, GENERALLY, THEY DID WHATEVER THEY WERE TOLD TO DO. THAT
12 IS DIRECTLY -- THAT -- NOW, LOOK. I DON'T KNOW WHETHER THIS
13 IS TRUE OR NOT, AND IT'S NOT MY JOB TO SIT UP HERE AND MAKE A
14 DECISION AS TO WHETHER OR NOT IT'S TRUE.

15 BUT I DO KNOW THAT IT'S THE -- IT IS THE
16 DIAMETRIC OPPOSITE POLE OF THE POSITION THAT THE WITNESS WAS
17 TAKING ON THE WITNESS STAND AND, THEREFORE, A LOT OF -- FROM
18 THE PLAINTIFF'S PERSPECTIVE, IT'S VERY STRONGLY IMPEACHING OF
19 HER CREDIBILITY AS A WITNESS.

20 MR. CARLTON: IT MAY WELL HAVE BEEN CONSIDERED BY THE
21 PLAINTIFF TO BE IMPEACHING, YOUR HONOR. AND WHAT MR. LEITER
22 HAS BEEN SAYING IS THAT THIS IS NOT A SECRET TO THE
23 PLAINTIFF. NEVER HAS BEEN. IT COULD HAVE BEEN FULLY
24 EXPLORED ON CROSS. OUR POSITION IS THIS: HAD IT BEEN FULLY
25 EXPLORED ON CROSS, THIS IS WHAT WOULD HAVE COME OUT.

26 CTR -- THERE WAS AN ADMINISTRATIVE BODY. THERE
27 WERE A GROUP OF PEOPLE WHO -- THERE WAS AN EXECUTIVE
28 DIRECTOR, AND THERE WAS A SMALL STAFF, OKAY. THERE WAS THE

1 SCIENTIFIC DIRECTOR. THE SCIENTIFIC DIRECTOR HAD A GROUP OF
2 SCIENTISTS, HE SAID, OUTSIDE SCIENTISTS, THE SAB, WHO
3 REPORTED TO HIM OR MADE RECOMMENDATIONS TO HIM

4 THE SAB WAS RESPONSIBLE FOR MAKING
5 RECOMMENDATIONS ON A GRANT PROGRAM AND WE HAD ALL SORTS OF
6 TESTIMONY ABOUT ALL OF THIS. I'M NOT GOING TO GO INTO IT IN
7 GREAT DETAIL. BUT PROFESSOR HOSHIZAKI TALKED ABOUT THE GRANT
8 PROGRAM AND THE SAB'S INVOLVEMENT WITH THE GRANT PROGRAM AND
9 WHAT CTR WAS DOING UP THERE. NOW, THAT WAS THE BULK OF WHAT
10 CTR DID.

11 SPECIAL PROJECTS HAD NOTHING TO DO WITH THAT.
12 CTR ADMINISTERED THESE SPECIAL PROJECTS -- WHICH WAS A VERY,
13 VERY SMALL ASPECT OF WHAT IT DID -- THAT WERE DONE, HAVING
14 NOTHING TO DO WITH THE SCIENTIFIC ADVISORY BOARD. THESE WERE
15 DONE SEPARATELY. THAT'S WHAT MR. SHIN IS TALKING ABOUT.

16 AND DR. HOSHIZAKI TALKED ONLY ABOUT THE SAB
17 RESEARCH PROGRAM SHE'S AFFIRMING THAT THE RESEARCH PROGRAM
18 THROUGH THE SAB WAS ON THE UP AND UP AND DID EVERYTHING ON
19 THE UP AND UP. AND SPECIAL PROJECTS ARE SIMPLY OFF TO ONE
20 SIDE.

21 HAD SHE BEEN ASKED ABOUT IT AND QUESTIONED BY
22 MR. PIUZE -- WHO KNEW HE WANTED TO GET INTO IT, BECAUSE
23 BEFORE THAT TIME, HE HAD THIS DOCUMENT, AND HE SUBMITTED IT
24 TO THE COURT -- HAD HE PURSUED IT, IT WOULD HAVE BEEN
25 EXPLAINED. FROM OUR PERSPECTIVE, IT DIDN'T HAVE ANYTHING TO
26 DO WITH HER TESTIMONY. IF HE THOUGHT HE COULD IMPEACH HER
27 ON IT, HE HAD EVERY OPPORTUNITY TO DO IT. HE HAD THE
28 KNOWLEDGE TO GET INTO THE ISSUE. BUT HE DIDN'T DO IT.

1 THAT' S NOT A FRAUD ON THE COURT.
2 AS AN ANALOGY. LET' S LOOK AT CRIMINAL LAW IN
3 CRIMINAL LAW, THE PROSECUTION GETS INVESTIGATIVE REPORTS.
4 THEY GET ALL SORTS OF STUFF, AND SOMETIMES, THEY GET
5 EXCULPATORY EVIDENCE. THEY HAVE AN OBLIGATION TO TURN THAT
6 OVER TO THE DEFENSE. THEY DON' T HAVE AN OBLIGATION TO PUT
7 THE EXCULPATORY EVIDENCE ON. THE DEFENSE IS FREE TO
8 INTRODUCE IT OR CROSS-EXAMINE ON IT. THAT' S THEIR CHOICE.
9 AND IT' S NOT FRAUD. IT' S NOT IMPROPER FOR THE PROSECUTION
10 NOT TO GET INTO THAT.

11 WHAT' S THE DIFFERENCE HERE WHERE WE PUT ON A
12 WITNESS WHO TESTIFIED ABOUT A CERTAIN THING, THE PLAINTIFF
13 HAD INFORMATION AVAILABLE TO, IF THEY THOUGHT, IMPEACH THE
14 WITNESS THROUGH THIS SPECIAL PROJECTS ISSUE AND CHOSE NOT TO
15 USE IT?

16 THIS ISN' T THE ONLY WAY THEY COULD HAVE DONE
17 IT, THROUGH THIS DOCUMENT. AS MR. LEITER SAID, THE SUBJECT' S
18 NOT PRIVILEGED. THERE ARE MANY OTHER DOCUMENTS THAT THEY
19 COULD HAVE USED. HE HAD THE KNOWLEDGE ABOUT THE SUBJECT
20 AVAILABLE TO HIM, AND MR. PIUZE CHOSE NOT TO CROSS-EXAMINE ON
21 THAT.

22 THIS, NOT THE SUBJECT, THIS CRIME/FRAUD
23 PROCEEDING IS THE RED HERRING, NOT WHAT DR. HOSHIZAKI
24 TESTIFIED TO.

25 I MEAN, THAT IS BASICALLY OUR POINT OF VIEW
26 CTR DID SEVERAL THINGS. DR. HOSHIZAKI TESTIFIED ABOUT THE
27 SCIENTIFIC ADVISORY BOARD. HAD MR. PIUZE WANTED TO IMPEACH
28 HER THROUGH WANTING TO LOOK AT SOMETHING ELSE THE CTR WAS

1 DOING, HE COULD HAVE DONE THAT. HE CHOSE NOT TO DO THAT.

2 THE COURT: THE BURDEN IS ON THE PLAINTIFF. I'LL GIVE
3 YOU THE LAST SAY.

4 MR. PIUZE: SURE. IT'S REPETITIVE AND REDUNDANT,
5 HOWEVER, YOUR HONOR.

6 WHAT IF SHE HAD NEVER BEEN CALLED AT ALL?

7 WHAT IF SHE DIDN'T EXIST AS A WITNESS?

8 THIS IS STILL ADMISSIBLE EVIDENCE. ONCE THE
9 CRIME/FRAUD EXCEPTION IS ESTABLISHED, THIS IS AN ADMISSION BY
10 PHILIP MORRIS' HIGHEST EXECUTIVES THAT THEY WERE PART OF A
11 CONSPIRACY AND THAT THEY WERE PART OF A COVER ORGANIZATION.
12 IF SHE NEVER, EVER CAME, IT WOULD BE ADMISSIBLE. THAT'S
13 NUMBER ONE.

14 NUMBER TWO. AS I SAY, IT'S A MICROCOSM OF THE
15 TRIAL IN WHICH I'VE BECOME THE BAD GUY. LET'S LOOK AT IT
16 THIS WAY. THEY KNEW I WANTED THAT DOCUMENT IN EVIDENCE.
17 THEY'VE KNOWN IT FOREVER. THEY'VE KNOWN IT WAS COMING. THEY
18 KNOW IT EXISTS. THEY HAD A WITNESS THERE. IF THEY WANTED TO
19 DIFFUSE IT IN ADVANCE, WHY AM I HAVING TO EXPLAIN ANYTHING?

20 WHY DIDN'T THEY?

21 BECAUSE THEY KNEW THAT THIS CONVERSATION WAS
22 COMING.

23 LAST. DURING MY CROSS-EXAMINATION OF
24 DR. HOSHIZAKI, I DID ASK HER, I BELIEVE, WHETHER OR NOT THE
25 LAWYERS RECOMMENDED CERTAIN PROJECTS, AND I ALSO ASKED HER
26 WHETHER THE LAWYERS NIXED CERTAIN PROJECTS. AND WE HAD AN
27 EXTENDED CONVERSATION ABOUT THAT, AND THAT STUFF WAS ALL OUT.

28 THE ADMINISTRATIVE DIRECTOR OF THE CTR -- I

1 MEAN, YOU' RE BEING GIVEN A LITTLE OFF-THE-RECORD KIND OF
2 INFORMATION HERE. OKAY. I' LL GO WITH THAT.

3 THE ADMINISTRATIVE DIRECTOR OF THE CTR, I
4 BELIEVE, WAS A MAN NAMED HOYT, WHO WAS FORMERLY A
5 HILL & KNOWLTON PUBLIC RELATIONS EXECUTIVE. THAT' S WHO WAS
6 IN CHARGE OF THE CTR. AND THIS KIND OF TALK FROM THE DEFENSE
7 ABOUT, OH, MY GOD, OH, MY GOD, OH, MY GOD, SHE WAS ONLY
8 TALKING ABOUT THE SAB, IS NOT BORNE OUT BY THE RECORD.

9 SHE CAME IN HERE AND DEFENDED THE CTR. SHE MAY
10 HAVE TALKED ABOUT THE SAB, BUT SHE SURE DIDN' T LIMIT HER
11 DISCUSSIONS TO THAT. SHE WAS HERE TO TELL THE JURY IN NO
12 OTHER UNCERTAIN TERMS, THE COMMITTEE FOR TOBACCO RESEARCH WAS
13 AN UP-AND-UP ORGANIZATION THAT FUNDED YOUNG RESEARCHERS --
14 AND SHE WAS SILENT -- BUT IT WAS LIKE ME.

15 AND THEY DID GREAT WORK OVER THE YEARS, AND I
16 WAS SORRY TO SEE THEM GO. I WROTE A LETTER TO THE CTR WHEN I
17 KNEW THEY WERE GOING OUT OF BUSINESS TELLING THEM HOW SORRY I
18 WAS THEY WERE GOING OUT OF BUSINESS, BECAUSE THEY WERE SO
19 UPSTANDING. SHE WASN' T TALKING SAB, SAB, SAB. SHE WAS
20 TALKING ABOUT THE COMMITTEE FOR TOBACCO RESEARCH.

21 SO THAT' S WHAT I HAVE TO SAY. THANK YOU FOR
22 LISTENING.

23 MR. CARLTON: ONE LAST THING, YOUR HONOR.

24 THE COURT: SURE.

25 MR. CARLTON: IF YOUR HONOR IS INCLINED --

26 THE COURT: I' M NOT GOING TO RULE RIGHT NOW I' M
27 GOING TO THINK ABOUT THIS. BUT GO AHEAD.

28 MR. CARLTON: WE' D LIKE TO FILE A BRIEF. WE HAVE A

1 BRIEF THAT WE CAN FILE THIS MORNING.

2 THE COURT: I'D APPRECIATE THAT. I WOULD APPRECIATE
3 THAT.

4 ALSO, IF THE COURT REPORTER COULD GIVE ME A
5 TRANSCRIPT OF THE ENTIRE TESTIMONY OF HOSHIZAKI, I'M GOING TO
6 READ IT THROUGH. I'VE READ MY NOTES, BUT THERE'S A COUPLE OF
7 POINTS I WANT TO CHECK OUT IN THE TRANSCRIPT.

8 I WOULD IMAGINE THAT THERE'S ALREADY -- YOU'VE
9 BEEN GETTING DAILIES ON THIS, SO I SHOULD HAVE IT. AND I CAN
10 READ TRANSCRIPTS A LOT FASTER THAN WITNESSES CAN TESTIFY.

11 ALL RIGHT. THIS IS SUBMITTED. THANK YOU.

12 COUNSEL, I REALIZE THAT YOU HAVE TO ARGUE
13 RATHER VIGOROUSLY TO ME, AND I WANT TO TELL BOTH SIDES THAT I
14 APPRECIATE WHAT YOU HAD TO SAY TO ME.

15 AND WHILE I HAD TO SAY SOME THINGS RATHER
16 BLUNTLY, WHICH I WISH I DIDN'T HAVE TO SAY, NONETHELESS, I
17 FELT COMPELLED, AND I DID HAVE TO SAY THOSE THINGS SO THAT
18 YOU WOULD UNDERSTAND HOW SERIOUSLY THE COURT IS TAKING THIS
19 MATTER.

20 IT WILL BE TAKEN UNDER SUBMISSION.

21 OKAY. NEXT, WE NEED TO PROBABLY TAKE A MORNING
22 BREAK. AND JURY INSTRUCTIONS.

23 MR. CARLTON: YOUR HONOR, WE'VE SUBMITTED -- AND I
24 WASN'T QUITE SURE WHAT YOUR FORMAT WOULD BE. WE SUBMITTED
25 SOME PROPOSED JURY INSTRUCTIONS, MODIFIED, AND A LIST OF
26 OPPOSED JURY INSTRUCTIONS. AND I SUPPOSE ONE WAY TO DO
27 THIS -- WELL, ACTUALLY, LET ME BACK UP A BIT.

28 WE FILED SOME MOTIONS THIS MORNING FOR DIRECTED

1 VERDICT ON --

2 THE COURT: RIGHT.

3 MR. CARLTON: -- A COUPLE CAUSES OF ACTION, AND
4 PERHAPS THOSE SHOULD BE RESOLVED BEFORE WE GET TO JURY
5 INSTRUCTIONS.

6 THE COURT: WE'RE READING THOSE DOCUMENTS RIGHT NOW
7 I HAVE MY RESEARCH ATTORNEY GOING THROUGH THEM, AND THEN I
8 WANT TO SPEND THE NOON HOUR READING YOUR MOTION PAPERS.

9 MR. PIUZE: I'VE GOT OPPOSITIONS, YOUR HONOR,
10 CALLED -- MY WRITER CALLED THEM "BENCH BRIEFS," BUT THEY JUST
11 CAME OVER THE FAX.

12 THE COURT: RIGHT. OKAY. I'M GOING TO SIT DOWN AND
13 READ THEM MYSELF AND ALSO WORK WITH MY RESEARCH ATTORNEY ON
14 THAT, SO THAT I'LL BE PREPARED TO TAKE YOUR ARGUMENTS AFTER
15 NOON ON THAT.

16 MR. CARLTON: ALL RIGHT.

17 MR. PIUZE: AND I'D LIKE TO APOLOGIZE IN ADVANCE IF
18 THESE AREN'T EXACTLY ON POINT. WE WERE SORT OF AIMING IN THE
19 DARK, BUT WE HAD AN IDEA WHERE WE WERE AIMING.

20 THE COURT: OKAY. AND I MUST SAY TO THE PLAINTIFF, I
21 THINK YOU HAVE A SERIOUS ISSUE, OR THE DEFENSE HAS A SERIOUS
22 ISSUE, AND I HAVEN'T READ THE PAPERS YET, BUT I MUST TELL
23 YOU, I THINK THEY HAVE A SERIOUS QUESTION ON THIS QUESTION OF
24 EXPRESS --

25 MR. PIUZE: WARRANTY.

26 THE COURT: -- WARRANTY. I THINK THERE'S A VERY
27 SERIOUS QUESTION THERE.

28 SO, OKAY. LET'S TAKE A BREAK. IF I CAN, DO

1 MAKE SURE THAT I HAVE THE JURY INSTRUCTION LIST. I'VE GOT
2 THE PLAINTIFF'S LIST HANDED TO ME. THERE'S A DEFENSE LIST.

3 THE CLERK: THE DEFENSE LISTS WERE WITH THE MOTION
4 PAPERS. I CROSSED THEM SO YOU KNEW WHICH ONE WAS WHICH.

5 THE COURT: I'M GOING TO SIT IN FRONT OF THE COMPUTER
6 AND DO THIS. THE WAY I DO JURY INSTRUCTIONS, WE'LL JUST GET
7 TOGETHER, NOT FORMALLY, PROBABLY BACK IN THE JURY ROOM, SIT
8 DOWN AND GET AROUND THE TABLE AND JUST WORK THEM OUT.

9 MR. CARLTON: WHEN SHALL WE RECONVENE, YOUR HONOR?

10 THE COURT: HOW ABOUT 10 AFTER 11:00.

11
12 (RECESS.)

13
14 (AT 12:00 P. M., A LUNCH RECESS WAS TAKEN
15 UNTIL 1:30 P. M. OF THE SAME DAY.)

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1 CASE NUMBER: BC 226593
2 CASE NAME: BOEKEN V. PHILIP MORRIS
3 LOS ANGELES, CALIFORNIA WEDNESDAY, MAY 16, 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: 1:45 P. M
8

9 - - 0 - -
10

11 THE COURT: LET'S DO A COUPLE OF THINGS ON THE RECORD,
12 AND THEN WE'LL GO BACK TO OUR JURY INSTRUCTIONS.

13 AND LET ME SUGGEST THAT WE GO AHEAD AND TAKE UP
14 THESE MOTIONS AT THIS TIME, AND THEN IT WILL BE PRODUCTIVE IN
15 TERMS OF WHAT WE'RE GOING TO BE DOING BACK IN THE JURY ROOM
16 AND WORKING OVER THE INSTRUCTIONS.

17 SO LET'S START WITH THE MOTION FOR DIRECTED
18 VERDICT AS TO NEGLIGENCE AND STRICT LIABILITY FOCUSING ON
19 DEFECTIVE DESIGN AND FAILURE TO WARN.

20 IF I MAY HEAR FROM THE DEFENSE, MOVING PARTY ON
21 THIS.

22 MR. CARLTON: YES, YOUR HONOR. JUST GIVE ME A MOMENT
23 HERE.

24 WE HAVE A FEW POINTS, YOUR HONOR, TO MAKE ON
25 THIS MOTION.

26 AND THE THRUST OF THE MOTION IS AS FOLLOWS: AT
27 LEAST WHEN THIS WAS WRITTEN, THE PLAINTIFF HAD FOREGONE THE
28 CONSUMER EXPECTATION TEST, SO LET'S JUST PUT THAT TO THE

1 SIDE, IF IT'S STILL AN ISSUE.

2 TALK ABOUT THE RISK-BENEFIT TEST.

3 AND THE ISSUE IN THE RISK-BENEFIT TEST IS
4 WHETHER THE PLAINTIFF CAN PROVE THAT ANY INJURY HE SUFFERED
5 WAS PROXIMATELY CAUSED BY THE DESIGN OF THE PRODUCT. WE
6 BELIEVE THAT THERE IS NO EVIDENCE IN THIS CASE ESTABLISHING
7 THAT ANY INJURY SUFFERED BY MR. BOEKEN WAS CAUSED BY ANYTHING
8 IN PARTICULAR RELATED TO THE DESIGN OF THE CIGARETTES THAT HE
9 SMOKED.

10 THE COURT: THE ALLEGATION IS NO SPECIFIC ASPECT OF
11 THE DESIGN CAN BE POINTED TO AS BEING A PROXIMATE CAUSE OF
12 THE INJURY SUFFERED. FAIR ENOUGH.

13 MR. CARLTON: WELL, THAT'S RIGHT.

14 THE COURT: ALL RIGHT.

15 MR. CARLTON: THERE IS NO ASPECT OF THE DESIGN THAT HE
16 CAN POINT TO. WHAT HE CAN POINT TO IS THAT HIS CANCER WAS
17 CAUSED BY SMOKING CIGARETTES. AND THERE IS NO EVIDENCE THAT
18 ANYTHING COULD HAVE BEEN DONE TO RENDER THE CIGARETTES THAT
19 HE SMOKED OR ANY OTHER CIGARETTES SAFE. THERE IS NO PROOF.
20 THERE IS NO EVIDENCE THAT HAD HE SMOKED A CIGARETTE WITH SOME
21 OTHER DESIGNED FEATURE, HE WOULD NOT HAVE GOTTEN SICK WITH
22 THE DISEASE THAT HE HAS.

23 THE COURT: ALL RIGHT. NOW, THE EVIDENCE HERE IS THAT
24 FROM A TOXICOLOGICAL -- TOX -- TOX --

25 MR. CARLTON: ONE OF THOSE WORDS.

26 MR. LEITER: TOXICOLOGY.

27 THE COURT: TOXICOLOGY -- A THEORY OR A PREMISE OF
28 TOXICOLOGY IS LESS EXPOSURE, LESS QUANTITY, LESS TIME EQUALS

1 LESS RISK.

2 MR. CARLTON: ALL RIGHT.

3 THE COURT: ALL RIGHT. AND WASN' T DR. FARONE' S
4 TESTIMONY ALONG THE LINES THAT THERE WERE CERTAIN THINGS THAT
5 COULD BE DONE TO ACHIEVE THOSE PARTICULAR POSSIBILITIES AND
6 THAT THEY WEREN' T NECESSARILY PURSUED EVEN THOUGH, IN HIS
7 VIEW, THEY OUGHT TO HAVE BEEN PURSUED?

8 MR. CARLTON: WELL, I THINK THE THRUST OF DR. FARONE' S
9 TESTIMONY HAD TO DO WITH THE CAMBRIDGE CIGARETTE, WHICH WE' VE
10 ALL HEARD ABOUT. WAS A CIGARETTE THAT YOU COULDN' T LIGHT,
11 YOU COULDN' T DRAW ON IT, NOBODY BOUGHT IT, AND THIS PLAINTIFF
12 DIDN' T BUY IT ANYWAY, EVEN THOUGH IT WAS ON THE MARKET FOR
13 SIX YEARS. SO I DON' T KNOW WHAT THE RELEVANCE OF THAT WAS.

14 THE EVIDENCE THAT WE HAD FROM THE COMPANY WAS
15 THAT, BASICALLY, EVERYTHING THAT THEY CAN DO TO TAKE
16 SUBSTANCES OUT OF THE CIGARETTE TAR IS BEING DONE AND HAS
17 BEEN DONE, BUT THE PROBLEM IS -- AND MR. FARONE DIDN' T
18 ADDRESS THIS, BECAUSE NO ONE CAN. NO ONE TO THIS DAY KNOWS
19 WHAT CONSTITUENTS IN CIGARETTE SMOKE CAUSE CANCER OR THESE
20 OTHER DISEASES. NO ONE KNOWS WHICH OF THOSE THINGS, IF TAKEN
21 OUT, MIGHT RENDER THE CIGARETTES SAFE. AND THEREFORE, NO ONE
22 KNOWS WHAT COULD HAVE BEEN DONE, WHICH HAD IT NOT BEEN DONE,
23 WOULD HAVE PREVENTED THE PLAINTIFF FROM GETTING THE DISEASE
24 THAT HE HAS.

25 THE COURT: AND SO THE ONLY THING WE KNOW OF TO DO AT
26 THIS TIME BY THE EVIDENCE IS TO TRY TO REDUCE THE EXPOSURE
27 SOMEHOW

28 MR. CARLTON: EVEN THAT IS NO GUARANTEE THAT THE

1 PLAINTIFF WOULDN'T HAVE GOTTEN THE DISEASE. BECAUSE THE
2 TESTIMONY WE'VE HEARD IS THAT, WHILE THERE'S A THEORY THAT,
3 IF YOU REDUCE THE TAR, YOU'RE REDUCING THE TOXICITY -- THAT'S
4 CERTAINLY THE THEORY THAT EVERYBODY HAS BEEN GOING ON FOR
5 DECADES. EVIDENCE THAT MR. PIUZE WAS PUTTING ON SORT OF
6 CALLS THAT INTO QUESTION. BUT EVEN WHEN YOU REDUCE THE
7 EXPOSURE, YOU CANNOT REDUCE IT TO ZERO OR TO NOTHING. YOU
8 DON'T HAVE A CIGARETTE THEN. AND ABSENT THAT, YOU DON'T HAVE
9 A SAFE CIGARETTE. THERE IS NO SAFE CIGARETTE.

10 SO THERE'S NO EVIDENCE THAT HAD THERE BEEN SOME
11 LOWER TAR CIGARETTE THAT THE PLAINTIFF STILL WOULDN'T HAVE
12 GOTTEN THE DISEASE. WHAT WE DO HAVE EVIDENCE OF IS THAT
13 THERE WERE LOWER TAR CIGARETTES ON THE MARKET THAT MR. BOEKEN
14 CHOSE NOT TO BUY. THAT IS WHAT WE HEARD IN THE CLIP
15 YESTERDAY.

16 SO THIS IS NO SAFE CIGARETTE. HIGH TAR, LOW
17 TAR. MAYBE THERE IS A RANGE OF TOXICITY THERE, BUT THERE'S
18 NOTHING THAT'S SAFE. THERE'S NO EVIDENCE THAT WOULD
19 ESTABLISH THAT ONE CIGARETTE WOULD NOT HAVE CAUSED
20 MR. BOEKEN'S DISEASE, THAT ANOTHER ONE DID. THERE'S JUST
21 NOTHING TO BE POINTED TO.

22 THAT LEAVES MR. BOEKEN, IF HE'S GOING TO USE
23 THE RISK-BENEFIT TEST, WITH ESSENTIALLY ONE ARGUMENT -- AND
24 WE THINK IT'S AN INAPPROPRIATE ARGUMENT -- THAT CIGARETTES
25 THEMSELVES, THE DANGERS OF CIGARETTES THEMSELVES, OUTWEIGH
26 THE BENEFITS, AND THEY SHOULD -- THEREFORE, THEY SHOULD FIND
27 LIABILITY IN THIS CASE.

28 BECAUSE HE CAN'T POINT TO ANY ELEMENT OF THE

1 DESIGN THAT WOULD HAVE PREVENTED HIS -- OR THAT CAUSED HIS
2 INJURY OR IN OTHER DESIGN THAT WOULD HAVE PREVENTED IT.
3 THERE' S NOTHING. HIS ARGUMENT HAS TO DO WITH CIGARETTES AS A
4 PRODUCT. AND YOUR HONOR HAS ALREADY ADDRESSED THAT ISSUE IN
5 ONE OF YOUR EARLIER RULINGS.

6 IN RESPONSE TO THE MOTION IN LIMINE TO EXCLUDE
7 EVIDENCE OF THE RISK-BENEFIT TEST, YOU RULED THAT (READING):

8
9 "THE COURT DOES NOT AT THIS
10 TIME ANTICIPATE A CIRCUMSTANCE WHERE IT WOULD
11 BE ASKED TO INSTRUCT THE JURY ON A
12 STRAIGHTFORWARD RISK-BENEFIT THEORY INVOLVING
13 CIGARETTES GENERICALLY APART FROM ALLEGED
14 DEFECTIVE DESIGN. "

15
16 THE COURT: THANK YOU FOR REMINDING ME OF THAT.

17 MR. CARLTON: AND THAT' S ESSENTIALLY, I THINK, WHERE
18 WE ARE. AND IT WAS MY UNDERSTANDING AT THE TIME THAT
19 YOUR HONOR ENTERED THIS RULING THAT YOU WERE ANTICIPATING
20 SOME EVIDENCE, PERHAPS, OF AN ALTERNATIVE DESIGN.

21 THE COURT: ALL RIGHT. NOW, WHAT ABOUT FAILURE TO
22 WARN?

23 AND I THINK AT THIS TIME, IF I CAN, SINCE
24 YOU' RE ON YOUR FEET, AND IT' S MY OPPORTUNITY TO TALK TO YOU,
25 AND IT' S HELPFUL, LET' S GO TO YOUR BRIEF ON THE PUTTING
26 INSTRUCTIONAL CERTIFICATES OR SOMETHING LIKE THAT IN
27 PACKAGES.

28 IT COULD ALSO BE DONE BY PUTTING SOMETHING ON

1 THE OUTSIDE OF THE PACKAGE. IT WOULDN'T HAVE TO BE AN
2 INSERT. IT COULD BE SOME SORT OF DRAWING OR OTHER INDICATION
3 ON THE OUTSIDE OF A PACK OF CIGARETTES.

4 MR. CARLTON: LET ME ADDRESS THAT, YOUR HONOR.
5 ALTHOUGH, I MAY AT SOME POINT STOP AND SEE IF I CAN FIND THE
6 BRIEF ON THAT ONE.

7 THE COURT: FIRST OF ALL --

8 MR. CARLTON: THE ARGUMENT --

9 THE COURT: EXCUSE ME. YOU HAVE THE FCLAA --

10 MR. CARLTON: YES, YES.

11 THE COURT: -- WHICH BASICALLY SAYS, "NO REQUIREMENT
12 SHALL BE IMPOSED WITH RESPECT TO THE ADVERTISING OR PROMOTION
13 OF ANY CIGARETTE."

14 BUT THE COURT WOULD ASK COUNSEL WHETHER OR NOT
15 THAT WOULD APPLY TO USE. IN OTHER WORDS, IT DOESN'T SAY NO
16 REQUIREMENT SHALL BE IMPOSED WITH RESPECT TO THE USE OR THE
17 PROPER USE OF ANY CIGARETTE.

18 SO MY FIRST QUESTION IS: HOW COULD THE FCLAA
19 PREVENT OR PREEMPT A CLAIM?

20 MR. CARLTON: WELL, THE ESSENCE OF THAT CLAIM, WHY YOU
21 WOULD PUT AN INSTRUCTION ON HOW TO USE THE CIGARETTE
22 NECESSARILY IMPLICATES HEALTH ISSUES. WHY -- AS WE TALKED
23 ABOUT EARLIER, AND I'LL REITERATE FOR THE RECORD HERE.

24 THE COURT: PLEASE.

25 MR. CARLTON: WHEN THE CIGARETTE COMPANIES ORIGINALLY
26 BEGAN LOWERING THEIR TAR AND NICOTINE NUMBERS BACK IN THE
27 1950'S, THEY BEGAN TO ADVERTISE THOSE, AND THEY'D ADVERTISE
28 THEIR CIGARETTES AS LOWER IN TAR, LOWER IN TAR.

1 THE COURT: RIGHT. AND A COMPETITION STARTED.

2 MR. CARLTON: RIGHT. THERE WAS A COMPETITION IN THAT
3 CATEGORY. AND EVERYONE WAS CLAIMING TO BEING THE LOWEST.

4 AND THE FTC DECIDED THAT MERELY TALKING ABOUT
5 TAR FIGURES, COMPETING ON THE BASIS OF TAR FIGURES, WAS AN
6 IMPLIED CLAIM THAT LOWER TAR WAS HEALTHIER. AND BECAUSE THAT
7 COULDN'T BE AUTHENTICATED, YOU COULDN'T PROVE LOWER TAR WAS
8 HEALTHIER, THE FTC DECIDED BACK THEN THAT THERE SHOULDN'T BE
9 ANY ADVERTISING ALLOWED IN THAT AREA.

10 SO THEY BANNED PUTTING TAR AND NICOTINE NUMBERS
11 ON CIGARETTE PACKAGES.

12 WITH PASSAGE OF TIME AND THE DEVELOPMENT OF
13 EVIDENCE THAT PERHAPS LOWER TAR CIGARETTES WERE LESS TOXIC,
14 THE FTC CHANGED ITS MIND, AND THEY CHANGED THEIR MIND WITH
15 CONDITIONS. THEY DECIDED, WELL, THIS IS INFORMATION THAT
16 PEOPLE SHOULD HAVE TO MAKE CHOICES, AND IT IS HEALTH-RELATED
17 INFORMATION, TAR AND NICOTINE NUMBERS, BUT WE CAN'T JUST HAVE
18 THE CIGARETTE COMPANIES OUT THERE BANGING ON EACH OTHER AND
19 COMPETING ANY WAY THEY WANT AND SAYING WHATEVER THEY WANT IN
20 WAYS THAT AREN'T VERIFIABLE.

21 THE COURT: WITHOUT STANDARD. SO THEY CAME UP WITH AN
22 INDUSTRY STANDARD METHOD OF MEASURING AND REQUIRED EVERYBODY
23 TO ABIDE BY THAT WITH RESULTS.

24 MR. CARLTON: THAT'S RIGHT. AND IT WAS REQUIRED THAT
25 THE TAR AND NICOTINE NUMBERS, THE FIGURES THAT WERE DERIVED
26 FROM THIS PARTICULAR METHOD, BE POSTED SO EVERYBODY COULD
27 KNOW AND EVERYBODY COULD MAKE A DECISION BASED ON THE
28 RELATIVE RANKINGS, NOT THAT THIS IS THE WAY -- AND AS THEY

1 KNEW, THAT THAT'S NOT NECESSARILY THE LEVELS OF TAR THAT
2 EVERYONE WOULD GET -- BUT THE RELATIVE RANKINGS OF THE
3 CIGARETTES WOULD BE KNOWLEDGE THAT PEOPLE COULD USE TO MAKE
4 THEIR DECISIONS.

5 THROUGHOUT THIS WHOLE PROCESS, THE ASSUMPTION
6 UNDERLYING THE FTC'S RULING WAS THAT THE TAR AND NICOTINE
7 FIGURES WERE HEALTH-RELATED FIGURES. SO WHAT WE HAVE ENDED
8 UP WITH IS A CERTAIN TYPE OF INFORMATION THAT CAN, AND
9 INDEED, MUST BE POSTED ON CIGARETTES. ALL RIGHT. AND IT'S
10 POSTED THERE FOR HEALTH REASONS.

11 WE HAVE THE WARNINGS THAT ARE POSTED UNDER THE
12 FCLAA. THAT'S A DIFFERENT WARNING BESIDES THE TAR AND
13 NICOTINE NUMBERS. AND THE WARNINGS, BY LAW, ARE SUFFICIENT
14 TO TELL PEOPLE OF THE HEALTH RISKS OF SMOKING AND ANYTHING
15 ELSE THAT MIGHT BE REQUIRED UNDER STATE LAW REGARDING
16 ADVERTISING OR PROMOTION OF HEALTH RISKS WOULD BE PREEMPTED.

17 NOW, THIS GETS US UP TO THE PACKAGE INSERT AND
18 WHY YOU CAN'T SEPARATE SOME SORT OF WARNING REGARDING USE
19 FROM HEALTH CONCERNS. WHAT YOU'RE ESSENTIALLY REQUIRING OR
20 WHAT WOULD BE REQUIRED UNDER THE CIGARETTE COMPANIES -- UNDER
21 THIS HEALTH INSERT INCLUSION IS AN IMPLICATION THAT, IF THEY
22 SMOKE IT ACCORDING TO THIS INSTRUCTION, THEY'RE MORE LIKELY
23 TO GET THE NUMBERS THAT APPEAR ON THE PACKAGE. IF THEY DON'T
24 SMOKE IT ACCORDING TO THE INSTRUCTION, THEY'RE LESS LIKELY TO
25 GET THOSE NUMBERS. THEY MAY GET MORE. THEY MAY GET LESS.
26 MOST LIKELY, MORE.

27 AND THE RELEVANCE OF ALL OF THOSE NUMBERS, TO
28 EVERYONE, IS A HEALTH-RELATED ISSUE. NECESSARILY, IF STATE

1 LAW WERE TO REQUIRE THESE INSERTS, THERE WOULD BE AN
2 IMPLICATION THAT WITHOUT THE INSERTS, THE CIGARETTES, IF YOU
3 DON'T SMOKE ACCORDING TO THE INSTRUCTIONS, THE CIGARETTES
4 WOULD BE MORE DANGEROUS. IF YOU DO SMOKE ACCORDING TO THE
5 INSTRUCTIONS, THE CIGARETTES WOULD BE LESS DANGEROUS. AND
6 THAT'S EXACTLY THE KIND OF REQUIREMENT THAT THE FCLAA
7 PRECLUDES.

8 CIGARETTE COMPANIES ARE REQUIRED TO PUT CERTAIN
9 INFORMATION ON THE PACK REGARDING TAR AND NICOTINE. THEY'RE
10 REQUIRED TO PUT CERTAIN WARNINGS ON THE PACK UNDER THE
11 FCLAAA, AND TO REQUIRE THE PACKAGE INSERTS WOULD BE TO
12 EFFECTIVELY UNDERMINE THE SUFFICIENCY OF THE WARNINGS AS
13 THEY'RE PRESENTLY INCLUDED ON THE PACKAGE.

14 THE COURT: LET ME PUT THIS TO YOU, THEN, TO SEE IF
15 THIS IS THE ARGUMENT THAT'S BEING MADE TO THE COURT. AND
16 THAT IS, UNDER THE CURRENT STATE OF THE LAW, A MANUFACTURER
17 OF CIGARETTES CANNOT GIVE ANY INSTRUCTIONS TO CONSUMERS OF
18 THE CIGARETTES ON THE USE OF THOSE CIGARETTES IF IT IS
19 IMPLIEDLY RELATED IN ANY WAY TO A HEALTH ISSUE.

20 MR. CARLTON: WELL, MAY I JUST CONFER FOR HALF A
21 SECOND WITH MY CO-COUNSEL HERE?

22 I GUESS THE POINT I WANT TO MAKE IN RESPONSE TO
23 THAT IS, A MANUFACTURER MIGHT DO THAT VOLUNTARILY, BUT A
24 MANUFACTURER CAN'T BE REQUIRED BY STATE LAW TO DO THAT.
25 THAT'S THE EFFECT OF THE PREEMPTION.

26 THE COURT: OKAY. FAIR ENOUGH.

27 WHAT ABOUT THE 1955 CIGARETTE ADVERTISING GUIDE
28 THAT THE FTC PUT OUT?

1 AGAIN, MY QUESTION WOULD BE: ISN'T THAT REALLY
2 RELATED TO ADVERTISING AND PROMOTION AND NOT DIRECTED -- AT
3 LEAST DIRECTLY TO PROPER USE OF THE PRODUCTS?

4 MR. CARLTON: WELL, THERE IS AUTHORITY, AND WE'VE
5 CITED IT TO YOU IN OTHER BRIEFS, THAT ANY REQUIREMENT THAT
6 INVOLVES A COMMUNICATION WITH A MASS AUDIENCE, THE MASS
7 AUDIENCE, THE BODY OF PEOPLE WHO BUY CIGARETTES, IS
8 ESSENTIALLY ADVERTISING AND PROMOTION. YOU CANNOT SEPARATE
9 THE TWO. I MEAN, THAT'S ONE POINT, AND I'LL PUT THAT TO THE
10 SIDE.

11 BUT -- AND I JUST WANT TO GET BACK TO THE
12 NOTION THAT I TRIED TO MAKE EARLIER, WHICH IS: A REQUIREMENT
13 THAT YOU NOTIFY PEOPLE IN A MASS WAY OF HOW TO USE THE
14 PRODUCT ISN'T FUNCTIONALLY DIFFERENT FROM A REQUIREMENT THAT
15 YOU TELL THEM THAT THE PRODUCT HAS MORE DANGER THAN MAYBE THE
16 LABEL DOES.

17 YOU'RE ESSENTIALLY SAYING, AT LEAST BY
18 IMPLICATION, IF YOU DON'T USE IT THIS WAY, IT'S GOING TO BE
19 MORE OR LESS DANGEROUS. YOU CAN'T GET AWAY FROM THE
20 HEALTH-RELATED ISSUES SIMPLY BY LOOKING AT IT AS AN ISSUE OF
21 USE AS TO A DIRECT REQUIREMENT THAT YOU PROVIDE INFORMATION,
22 BECAUSE THE INFORMATION'S CONVEYED WHETHER IT'S COINED AS A
23 USE REQUIREMENT OR SOMETHING ELSE.

24 THE ONLY WAY TO CONVEY THE INFORMATION IS BY
25 COMMUNICATING WITH THE CONSUMING PUBLIC IN A WAY THAT WOULD
26 OTHERWISE BE ADVERTISING AND PROMOTION. OR REQUIRING AN
27 ADDITIONAL LABEL ON THE PACKAGE. YOU KNOW THAT CAN'T BE
28 DONE. THE FACT THAT AN INSERT MIGHT BE PUT INSIDE A PACKAGE

1 ISN' T FUNCTIONALLY DIFFERENT THAN REQUIRING SOME ADDITIONAL
2 LABELING ON THE PACKAGE. SO I DON' T SEE THAT THERE' S A REAL
3 DIFFERENCE THERE.

4 THE COURT: ALL RIGHT. I ABSOLUTELY UNDERSTAND THE
5 ARGUMENT THAT' S BEING MADE.

6 NOW, LET ME TURN TO THE PLAINTIFF. AND I' M NOT
7 TAKING ANY ARGUMENT FROM THE POINT ON -- FROM THE DEFENSE ON
8 THE EXPRESS WARRANTY, BUT WILL GIVE YOU AN OPPORTUNITY TO
9 ADDRESS THAT, IF NEED BE, IN A MOMENT.

10 ALL RIGHT. STARTING WITH THE PLAINTIFF HERE.
11 WHAT SPECIFICALLY IS THE DESIGN DEFECT THAT COUNSEL IS GOING
12 TO ARGUE TO THIS JURY IS THE DEFECT INVOLVED HERE?

13 NOT WELL SAID, BUT I THINK COUNSEL UNDERSTANDS
14 THE QUESTION.

15 MR. PIUZE: THREE. TO START WITH.

16 THE FIRST -- UNLIKE MR. CARLTON, I DO NOT
17 REMEMBER THE COURT MAKING UP ITS MIND ON MY ARGUMENT THAT
18 UNDER STRICT LIABILITY, IF THE PRODUCT CAN' T BE FIXED AND IS
19 DANGEROUS, IT SHOULD BE ABOLISHED. I DO RECALL THE COURT WAS
20 SOMEWHAT SKEPTICAL OF THAT.

21 THE COURT: AND REMAINS SO.

22 MR. PIUZE: SO BE IT.

23 BUT FOR THE RECORD, THE COURT NEVER SAID ANY
24 SUCH THING THAT IT WASN' T GOING TO LISTEN TO ME LATER ON. SO
25 I START WITH THAT, NUMBER ONE.

26 IF A PRODUCT IS SO DANGEROUS THAT IT KNOCKS OFF
27 15 MILLION PEOPLE -- AND THAT' S A NUMBER THAT HASN' T REALLY
28 BEEN CHALLENGED HERE IN THIS COURT SINCE 1964 -- THEN IT

1 SHOULD BE WITHDRAWN FROM THE MARKET, IF IT CAN'T BE MADE
2 SAFE. THAT'S MY NUMBER ONE ARGUMENT.

3 THE COURT: OKAY. WHAT'S THE DESIGN DEFECT?

4 MR. PIUZE: THE DESIGN DEFECT IS THAT THE ENTIRE THING
5 IS DEFECTIVE AND UNSAFE AND DANGEROUS AND CAN'T BE MADE SAFE.
6 THE DESIGN DEFECT IS THAT THE SMOKE THAT COMES OUT OF THE
7 CIGARETTE CAUSES CANCER. AND IF YOU SMOKE IT, THEORETICALLY,
8 YOU GET CANCER, YOU PUT YOURSELF AT RISK. AND I SAY
9 THEORETICALLY, BECAUSE MY NEXT POINT IS GOING TO CONTRADICT
10 THAT. BUT MY POINTS DON'T ALL HAVE TO BE CONGRUENT.

11 THE DESIGN DEFECT IS THE FACT -- THE DESIGN
12 DEFECT IS THE FACT THAT THIS PRODUCT, WHEN USED AS INTENDED
13 BY REASONABLY FORESEEABLE USERS, IS GOING TO HURT PEOPLE
14 BADLY. AND IF A PRODUCT IS OUT THERE THAT'S GOING TO HURT
15 PEOPLE BADLY AND CAN'T BE FIXED, IT SHOULD BE WITHDRAWN.

16 THAT'S MY POINT. I MADE THAT POINT TO THE
17 COURT BEFORE WE STARTED PICKING A JURY. THERE IT IS AGAIN.
18 IT'S STARK. I'VE GOT NOTHING TO ADD TO IT.

19 SECOND. THE COURT IS RIGHT. DR. FARONE DID
20 DISCUSS THESE THINGS. WHAT WE HEARD FROM THE DEFENSE
21 WITNESSES, BASICALLY, IS DOSE RESPONSE. AND DOSE RESPONSE
22 IS, THE MORE YOU TAKE, THE BETTER IT IS, THE LESS YOU TAKE --

23 THE COURT: I KNEW THERE WAS A TECHNICAL TERM THERE
24 SOMEWHERE. IT'S EASIER. RESPONSE.

25 MR. PIUZE: DOSE RESPONSE COULD ALSO BE THAT. I'VE
26 GOT ALTERNATIVE ARGUMENTS, BUT --

27 THE COURT: BUT WHAT ABOUT DESIGN DEFECT WAS RELATED
28 TO DOSE RESPONSE?

1 MR. PIUZE: THE DESIGN DEFECT -- THEY, THE
2 MANUFACTURERS, AND SPECIFICALLY PHILIP MORRIS, WHICH KNEW
3 BETTER, WAS LETTING IN WAY TOO MUCH TAR INTO THE SMOKER'S
4 LUNGS. PHILIP MORRIS HAS DEMONSTRATED --

5 THE COURT: AT A TIME WHEN THEY COULD HAVE REDUCED IT.

6 MR. PIUZE: ABSOLUTELY.

7 THE COURT: AND HAD THE TECHNOLOGY TO DO SO, BUT
8 CHOSE, FOR ITS OWN REASONS, WHATEVER, NOT TO.

9 MR. PIUZE: AND -- IN A NUTSHELL, YES.

10 CAMBRIDGE WAS MADE BY PHILIP MORRIS. CAMBRIDGE
11 WAS ON THE MARKET. DR. FARONE TESTIFIED THAT CAMBRIDGE WAS A
12 ZERO, ZERO NICOTINE CIGARETTE -- EXCUSE ME -- TAR CIGARETTE.

13 THE DEFENSE SAYS, THEY OFFICIALLY ADVERTISED IT
14 AS A 0.1 TAR CIGARETTE. OKAY. WELL, THAT'S A DISPUTED FACT,
15 AND THE DISPUTED FACT CAN GO TO A JURY JUST ON THAT ALONE,
16 BUT I'LL GET TO THE 0.1.

17 BECAUSE ONE OF THE LITTLE PIECES OF EVIDENCE
18 THAT THE JURY'S GOING TO HAVE SHOWS HOW DR. WHIDBY AMENDED A
19 GRAPH BAR CHART SHOWING A REDUCTION IN TAR. AND DR. WHIDBY
20 SAYS THAT THE CAMBRIDGE CIGARETTE REDUCED THE TAR OF A
21 MARLBORO CIGARETTE 99 PLUS PERCENT. 99 PLUS PERCENT. THE
22 TAR IS THE BAD STUFF. THAT'S WHAT THEY ALL SAID, THEIR
23 WITNESSES. THAT'S WHAT DR. FARONE SAID. THE TAR IS THE BAD
24 STUFF. AND THEY HAD A CIGARETTE ON THE MARKET THAT WOULD
25 REDUCE THE TAR 99 PLUS PERCENT AND DIDN'T USE IT.

26 I GOT LOTS OF REASONS WHY THEY DIDN'T USE IT,
27 BUT I'M NOT ARGUING TO THE JURY NOW, SO I DON'T HAVE TO GO
28 FURTHER. THERE WAS AN ALTERNATIVE DESIGN OUT. THEY HAD IT.

1 THEY MADE IT. IT WAS THEIR DESIGN. THEY WERE PROUD OF IT.
2 END OF STORY. RIGHT THERE. DOES THE COURT HAVE TO HEAR MORE
3 ON THAT?

4 THE COURT: WHAT'S THE THIRD DEFECT?

5 MR. PIUZE: THE THIRD DEFECT -- NOW, I'M NOT SURE I'M
6 FOLLOWING THE COURT'S LEAD ON ITS QUESTIONS NOW

7 THE COURT: I'M NOT TRYING TO LEAD COUNSEL. I WANT TO
8 KNOW WHAT THE THIRD DEFECT IS.

9 MR. PIUZE: I'M NOT SAYING YOU'RE LEADING ME. WHEN
10 YOU WERE QUESTIONING MR. CARLTON, THERE WERE CERTAIN
11 QUESTIONS. I'M NOW FOLLOWING ALONG WITHOUT ANY QUESTIONS.
12 THAT'S ALL I MEANT BY THAT.

13 THE COURT: RIGHT.

14 MR. PIUZE: WARNINGS. BEFORE 1969, WARNINGS ARE
15 ABSOLUTELY 100 PERCENT FAIR GAME. PERIOD. FAILURE TO WARN,
16 FAILURE TO WARN, FAILURE TO INSTRUCT, FAILURE TO TELL THEM
17 HOW TO -- FAILURE TO INSTRUCT THEM ON HOW TO USE A LIGHT
18 CIGARETTE.

19 AND BEFORE JULY 1, 1969, IT'S ABSOLUTELY FAIR
20 GAME, AND I WON'T GIVE UP ONE DAY OF THAT. I'LL ARGUE RIGHT
21 UP UNTIL MIDNIGHT OF JUNE 30TH, 1969.

22 THE COURT: AND WHAT DO YOU DO AFTER 1969?

23 MR. PIUZE: AFTER JUNE 1969, YOUR HONOR, I'M GOING TO
24 STAY AWAY FROM WARNINGS. AND I HAVE MADE MY DECISION OVER
25 LUNCH.

26 I'LL SAY FOR THE RECORD -- AGAIN, I MAY BE
27 BEING OVERLY CAUTIOUS HERE, BUT THAT'S MY CHOICE, AND I HAVE
28 CHOSEN THAT -- ON THE FAILURE TO INSTRUCT REGARDING LIGHT

1 CIGARETTES, I'M GOING TO GO WITH THE CUTOFF OF JULY 1, 1969
2 ON THAT.

3 THE COURT: YOU UNDERSTAND THE COURT MAY HAVE TO
4 INSTRUCT THE JURY AS A RESULT OF SOME OF THE EVIDENCE THAT'S
5 IN ON THAT.

6 ALL RIGHT. NOW, AS TO THE -- WELL, THEN, THE
7 WHOLE BRIEF THAT'S BEEN PLACED IN FRONT OF THE COURT AS TO
8 THE INSTRUCTIONAL PACKAGE INSERTS REALLY IS MOOTED BY
9 COUNSEL'S DECISION, AT LEAST WITH RESPECT TO THE POST-1969
10 CONDUCT.

11 OKAY. AND THAT TAKES CARE OF THAT. AND THAT'S
12 FINE.

13 I WILL JUST SAY, FOR THE RECORD, THAT THE
14 COURT'S OWN OBSERVATION HERE IS THAT THE FCLAA DOES NOT, IN
15 THIS COURT'S VIEW, REGULATE USE INSTRUCTIONS.

16 AND THE FTC -- THE 1955 CIGARETTE ADVERTISING
17 GUIDE, SIMILARLY, DOES NOT RECOGNIZE LATE INSTRUCTIONAL USE
18 OR INSTRUCTIONS.

19 AND THAT IT APPEARS TO THE COURT, IN ANY EVENT,
20 THAT A VIABLE CAUSE OF ACTION COULD BE STATED. I'M NOT
21 SAYING THAT IN THIS CASE IT EXISTS ON THE FACTS OF THIS CASE.
22 THAT'S NOT MY JOB. BUT A VIABLE CAUSE OF ACTION COULD BE
23 STATED FOR FAILURE TO INSTRUCT IN THE POST-1969 ENVIRONMENT.

24 ALL RIGHT. AS TO THE EXPRESS WARRANTY. WHAT I
25 HAVE TO ASK PLAINTIFF'S COUNSEL IS: WHAT EXACTLY WAS THE
26 PROMISE THAT WAS MADE TO MR. BOEKEN THAT CONSTITUTES THE
27 BREACH OF WARRANTY?

28 NOW, I RECOGNIZE THAT THERE ARE RELIANCE

1 ARGUMENTS THAT ARE TO BE MADE WITH RESPECT TO RELIANCE, AND
2 THE COMMERCIAL CODE HAS SOME RATHER LIBERAL LANGUAGE, WHICH I
3 THINK IS APPLICABLE HERE ON THE ISSUE OF RELIANCE. BUT
4 NONETHELESS, THERE MUST HAVE BEEN A PROMISE MADE TO HIM THAT
5 BECAME A BASIS OF THE BARGAIN.

6 WHAT WAS THAT?

7 MR. PIUZE: MAY I GET A COUPLE OF DOCUMENTS?

8 THE COURT: YES.

9 MR. PIUZE: THERE'S NO ELMD TODAY, SO WHAT I'M GOING
10 TO DO, YOUR HONOR --

11 MR. LEITER: HANG ON ONE SECOND.

12 MR. PIUZE: -- IS START YOU OFF WITH PLAINTIFF'S
13 29501, WHICH WAS DISPLAYED TO THE JURY. THIS PARTICULAR
14 DOCUMENT IS NOT ACTUALLY GOING TO GO TO THE JURY IN EVIDENCE,
15 BUT IT WAS DISPLAYED TO THEM AND THAT'S THE EARLIEST
16 DOCUMENT I CAN FIND IN OUR MATERIALS WHERE PHILIP MORRIS IS
17 PROMISING SOMEONE A SAFER OR LESS HAZARDOUS SMOKE.

18 FROM THERE, THE NEXT STEP IS THE FRANK
19 STATEMENT. AND IN THE FRANK STATEMENT, PHILIP MORRIS, AS
20 PART OF THE CONSORTIUM OF TOBACCO COMPANIES, SAID (READING):

21
22 "WE ACCEPT AN INTEREST IN
23 PEOPLE'S HEALTH AS A BASIC RESPONSIBILITY
24 PARAMOUNT TO EVERY OTHER CONSIDERATION IN OUR
25 BUSINESS. WE BELIEVE THE PRODUCTS WE MAKE
26 ARE NOT INJURIOUS TO HEALTH. WE ALWAYS HAVE
27 AND ALWAYS WILL COOPERATE CLOSELY WITH THOSE
28 WHOSE TASK IT IS TO SAFEGUARD PUBLIC HEALTH. "

1 AND THEN LATER IN THE SAME YEAR,
2 GEORGE WEISMAN, WHO WAS THE VICE-PRESIDENT OF PHILIP MORRIS
3 THAT CORROBORATED IN A SPEECH IN CHICAGO, SAID (READING):

4
5 "IF WE HAD ANY THOUGHT OR
6 KNOWLEDGE THAT IN ANY WAY WE WERE SELLING A
7 PRODUCT HARMFUL TO CONSUMERS, WE WOULD STOP
8 BUSINESS TOMORROW."

9
10 THOSE ARE THE ONES THAT ARE A SLAP IN THE FACE.
11 THEN AFTER THAT, IT'S THE CONTINUOUS PRESS RELEASES THROUGH
12 THE TRADE ORGANIZATIONS THAT WE HAVE SEEN DURING THE COURSE
13 OF THE TRIAL. I'M NOT GOING TO PULL THEM ALL OUT AND QUOTE
14 THEM FOR THE COURT. THEY'VE BEEN DISPLAYED EXTENSIVELY AND
15 DISCUSSED DURING THIS TRIAL. THAT'S THE START OF IT RIGHT
16 THERE. WE AIN'T GOING TO HURT YOU. IF THIS STUFF HURTS YOU,
17 WE'RE OUT OF BUSINESS. WE'RE NOT GOING TO HURT YOU. WE
18 PROMISE, WE'RE NOT GOING TO HURT YOU. SO THAT'S IT.

19 THE COURT: THAT'S THE ESSENCE OF IT.

20 MR. PIUZE: YES. BUT IT CONTINUED, YOUR HONOR. IT
21 CONTINUED AND CONTINUED, AND IT CONTINUED.

22 THE COURT: WELL, CONTINUED. I MEAN, THAT'S SORT OF A
23 BROAD STATEMENT. THE CONTINUATION OF IT WOULD BE WHAT?

24 MR. PIUZE: A CONTINUATION OF IT WOULD BE CREATING
25 DOUBT ABOUT THE HEALTH ISSUES IN THE MIND OF THE CONSUMER.
26 GIVING THEM TOBACCO -- ADDICTED PEOPLE SOMETHING TO HANG ON
27 TO, GIVING THEM FALSE HOPE. HOPE THAT WAS KNOWN TO BE
28 FALSE.

1 SO IN THIS -- IN THE BRIEF THAT I GAVE THE
2 COURT -- THAT, AS I SAY, WAS ANTICIPATORY, BUT I BELIEVE MOST
3 OF THE DOCUMENTS -- MOST OF THE DOCUMENTS -- JUST GIVE ME A
4 SECOND, PLEASE.

5 I BELIEVE SOME OF THE DOCUMENTS ARE ALLUDED TO
6 IN HERE. SO WE HAVE EVIDENCE THAT PHILIP MORRIS
7 SPECIFICALLY, THROUGH WEISMAN, AND PHILIP MORRIS AS A MEMBER
8 OF THE TOBACCO GROUP, CARTEL, CONSORTIUM, WHATEVER IT WAS,
9 MADE PROMISES TO THE PUBLIC THAT, YOUR HEALTH IS THE MOST
10 IMPORTANT THING, AND WE'RE NOT GOING TO DO ANYTHING TO HURT
11 YOUR HEALTH.

12 AND THERE IT IS. IT DID GO ON FROM THERE. IF
13 THE COURT WANTS, I'LL GO UP AND PULL OUT EVERY DOCUMENT, BUT
14 I DON'T THINK THAT'S NECESSARY.

15 THE COURT: NO, I UNDERSTAND. I JUST WANTED TO KNOW
16 THE SENSE OF IT.

17 ALL RIGHT. PLEASE.

18 MR. CARLTON: A FEW COMMENTS, YOUR HONOR, REGARDING
19 THE ADVERTISEMENT THAT MR. PIUZE GAVE YOU. I JUST WANT TO
20 POINT OUT. THERE IS NO EVIDENCE ANYWHERE AS TO THE DATE OF
21 THAT DOCUMENT.

22 THE COURT: WELL, BUT I JUST CAN LOOK AT THE
23 CIGARETTES, AND YOU KNOW IT'S A PACKAGING BEFORE MARLBORO,
24 AND WE DID HAVE ONE OF THE PACKS OF THE OLD, WHAT, COMMANDERS
25 OR SOMETHING?

26 MR. CARLTON: WELL, THAT'S WHAT I WANTED TO POINT OUT.
27 THOSE AREN'T MARLBOROS. THOSE ARE PHILIP MORRIS CIGARETTES.

28 THE COURT: RIGHT.

1 MR. CARLTON: JUST FOR THE RECORD HERE TODAY, WE'VE
2 ALREADY TALKED ABOUT THE 1955 ADVERTISING GUIDES, AND I DOUBT
3 THAT WOULD HAVE SURVIVED THOSE.

4 THERE'S NO EVIDENCE THAT THE PLAINTIFF SMOKED
5 THOSE CIGARETTES OR THAT HE EVER SAW THAT AD, SO ITS
6 RELEVANCE HERE -- I DON'T THINK IT HAS ANY RELEVANCE.

7 AS TO THE FRANK STATEMENT. WE HAVE SPECIFIC
8 TESTIMONY FROM MR. BOEKEN THAT HE DID NOT SEE THAT. HE
9 SPECIFICALLY DENIED SEEING THE FRANK STATEMENT.

10 THE COURT: SEE, THAT'S MY QUESTION. I'M GOING TO
11 HAVE TO GO BACK TO THE PLAINTIFF WITH THIS. IT HAS TO BECOME
12 THE BASIS OF THE BARGAIN. NOW, THERE IS LIBERAL LANGUAGE AS
13 TO RELIANCE, BUT THE QUESTION IS, WHERE IS THE TESTIMONY FROM
14 MR. BOEKEN THAT HE RELIED ON ANYTHING THAT THE PLAINTIFF'S
15 COUNSEL HAS POINTED OUT TO ME SO FAR?

16 AND I HAVE YET TO SEE A SPECIFIC OFFER.

17 MR. CARLTON: WELL, ON THE WEISMAN DOCUMENT, THERE'S
18 CERTAINLY NO TESTIMONY THAT HE EVER HEARD ANYTHING FROM
19 GEORGE WEISMAN, AND I WOULD POINT OUT THAT THE DOCUMENT THAT
20 MR. PIUZE IS REFERRING TO IS A TEXT OR RETYPING OR SOMETHING
21 OF A SPEECH THAT MR. WEISMAN GAVE TO SOME GROUP OF PEOPLE IN
22 1954. NOW, THAT'S CERTAINLY NOT A PROMISE THAT WAS MADE TO
23 THE PLAINTIFF OR EVEN TO THE PUBLIC. IT WAS A SPEECH. AND
24 IT -- ANYWAY, I THINK NOTHING MORE NEEDS TO BE SAID ABOUT THE
25 GEORGE WEISMAN ISSUE.

26 THE PRESS RELEASE. NOW, AGAIN, MR. PIUZE
27 HASN'T REFERRED TO A SINGLE PRESS RELEASE THAT SAYS THE
28 THINGS THAT HE KEEPS REFERRING TO.

1 THE COURT: WELL, BUT THE CONCERN HERE ISN'T THE
2 SUBSTANCE. THE CONCERN IS, WHERE IS MR. BOEKEN?

3 THE EXPRESS WARRANTY BEING MADE TO MR. BOEKEN.
4 THE ONLY EVIDENCE I HAVE FROM MR. BOEKEN IS, HE SAW CERTAIN
5 ADVERTISEMENTS. HE THINKS HE CAN POINT TO CERTAIN
6 ADVERTISEMENTS THAT HE SAW. THE OTHER THING IS, HE DID SAY
7 THAT HE WITNESSED THE 19 --

8 MR. LEITER: 94.

9 THE COURT: -- 94 CONGRESSIONAL TESTIMONY. BEYOND
10 THAT, IT'S STUFF ON THE PACKAGES, AND THAT'S ABOUT IT, ON THE
11 PACKAGING OF THE MARLBOROS.

12 MR. CARLTON: WELL, I'M AFRAID THAT'S PRETTY MUCH WHAT
13 THE RECORD IS. I'M NOT GOING TO POINT TO YOU ANY OTHER
14 EVIDENCE MORE SPECIFICALLY BECAUSE I DON'T KNOW THAT THERE
15 IS.

16 THE COURT: I DON'T THINK THERE IS. ALL RIGHT. I'M
17 GOING TO HAVE TO TURN BACK TO THE PLAINTIFF AGAIN.

18 MR. PIUZE: THERE IS SOME --

19 THE COURT: ALL RIGHT. WHAT IS IT?

20 MR. PIUZE: AND I DON'T THINK -- FORGIVE ME. I WAS
21 GOING TO SAY SOMETHING SHARP.

22 I'M AFRAID THERE IS SOME -- MR. BOEKEN WAS
23 ASKED BY MR. CARLTON ON CROSS-EXAMINATION AND TESTIFIED, YOU
24 KNOW, I DO REMEMBER IN THE '60'S WHEN THE WARNINGS CAME OUT
25 ON THE PACKS. I REMEMBER THAT. THERE WAS A BIG TO-DO. I
26 FORGET THE WORD HE USED. IT WAS A --

27 MR. LEITER: HOOP-DE-GAW

28 MR. PIUZE: HOOP-DE-DO?

1 MR. LEITER: HOOP-DE-GAW

2 MR. PIUZE: HOOP-DE-GAW

3 THE COURT: THAT IS ACTUALLY AN ENGLISH WORD.

4 I WANT YOU TO KNOW, I LEARNED IT FROM MY
5 FATHER.

6 THE COURT: EXCUSE ME. GO ON. THERE WAS A BIG
7 HOOP-DE-GAW AND HE SAID --

8 MR. PIUZE: IN SAN ANTONIO, THEY USED TO HAVE
9 HOOP-DE-GAW

10 THERE WAS A BIG HOOP-DE-GAW BETWEEN THE SURGEON
11 GENERAL AND THE TOBACCO COMPANIES, AND THE SURGEON GENERAL
12 SEEMED TO HAVE A VENDETTA AGAINST THE TOBACCO COMPANIES, AND
13 THE TOBACCO COMPANIES DENIED THOSE ALLEGATIONS UP AND DOWN
14 AND SAID THERE WAS NOTHING TO THEM THEY SAID, THERE'S
15 NOTHING WRONG WITH CIGARETTES. IT HASN'T BEEN PROVED THAT
16 CIGARETTES HURT YOUR HEALTH. NONE OF THIS STUFF HAS BEEN
17 PROVED. AND HE BELIEVED THEM HE BELIEVED BIG BUSINESS.
18 CERTAINLY, THE COURT REMEMBERS THAT LINE OF TESTIMONY THAT
19 WAS IN THAT --

20 THE COURT: I HAVE A VAGUE RECOLLECTION OF IT, YES.

21 MR. PIUZE: SO THAT'S WHERE MR. BOEKEN -- BESIDES THE
22 1994 HEARINGS WHEN HE HEARD THAT, HE WAS AWARE, STARTING WAY
23 BACK WHEN THE SURGEON GENERAL'S REPORT CAME OUT, HE WAS AWARE
24 THAT THE REPORT CAME OUT. HE WAS AWARE OF A CONTROVERSY. HE
25 WAS AWARE OF HOOP-DE-GAW, IF YOU WILL -- AND I'VE NEVER
26 PERSONALLY HEARD OF THAT WORD BEFORE -- AND HE WAS AWARE THAT
27 THE TOBACCO COMPANIES TOOK A DIAMETRICALLY OPPOSITE VIEW FROM
28 THE SURGEON GENERAL AND SAID, WE DENY IT. AND HE LISTENED TO

1 THEM, AND HE BELIEVED THEM

2 AND WHY DID HE BELIEVE THEM?

3 I BELIEVED THE SURGEON GENERAL WAS ON A
4 POLITICAL VENDETTA, AND I ALSO BELIEVED IN BIG BUSINESS. AND
5 THEN LATER ON, HOW IN THE WORLD -- THIS IS LATER AT THE LAST
6 STAGE -- HOW IN THE WORLD COULD A CEO OF A CORPORATION OF
7 THIS SIZE AND ITS SIX SISTERS EVER GET UP AND LIE TO THE
8 UNITED STATES CONGRESS?

9 I COULD NEVER FATHOM THAT NEVER OCCURRED TO
10 ME THAT THEY'D BE DOING THAT.

11 THERE'S RELIANCE ALL THE WAY ALONG, AS FAR AS
12 I'M CONCERNED. STARTING IN 1964 IS WHEN HE TESTIFIED TO IT.

13 THE COURT: ON WHAT REPRESENTATION?

14 MR. PIUZE: THE REPRESENTATION WAS -- HANG ON A SECOND
15 NOW -- THE REPRESENTATION IN -- THAT HE STARTED TALKING ABOUT
16 WAS THAT THE SURGEON GENERAL IS FULL OF IT. WHEN THE SURGEON
17 GENERAL SAYS, TOBACCO CAUSES CANCER, TOBACCO WILL KILL YOU,
18 CAUSES LUNG CANCER, THE TOBACCO INDUSTRY SAID, NO, IT DOES
19 NOT, IT HAS NOT BEEN PROVEN, AND IT'S BOLOGNA, AND IT'S BS.
20 ON THAT REPRESENTATION.

21 NOW, IF I COULD, PLEASE, I'VE -- ARE ALL THESE
22 IN EVIDENCE?

23 RAY: YES.

24 MR. PIUZE: I HAVE A SERIES OF DOCUMENTS HERE THAT I
25 OBTAINED OVER LUNCHTIME THAT SEEM TO ADDRESS THIS BRIEF. AND
26 ONE IS -- THESE ARE ALL IN EVIDENCE NOW

27 ONE IS A PRESS RELEASE FROM THE TIRC, AND THIS
28 IS DATED 12-16-57, BY DR. LITTLE (READING):

1 " NO SUBSTANCE HAS BEEN FOUND
2 IN TOBACCO SMOKE KNOWN TO CAUSE CANCER IN
3 HUMAN BEINGS. "

4
5 AND THEN I'VE GOT ONE FROM 1961. AND THIS IS A
6 PRESS RELEASE FROM THE TOBACCO INSTITUTE, MARCH 17, 1961
7 (READING):

8
9 "THE REPETITION BY DR. WYNDER
10 OF HIS FIRM OPINIONS DOES NOT ALTER THE FACT
11 THAT THE CAUSE OR CAUSES OF LUNG CANCER
12 CONTINUE TO BE UNKNOWN AND ARE THE SUBJECT OF
13 CONTINUING EXTENSIVE SCIENTIFIC RESEARCH BY
14 MANY AGENCIES. "

15
16 AND THEN THAT GETS FOLLOWED UP IN 1965, IN
17 MARCH, BY A PRESS RELEASE FROM THE TOBACCO INSTITUTE,
18 MARCH 24, 1965 (READING):

19
20 "WE DO NOT BELIEVE THAT ANY
21 GOVERNMENTAL ACTION IS NECESSARY OR CALLED
22 FOR WITH RESPECT TO CIGARETTE ADVERTISING OR
23 LABELING. "

24
25 AND THE FINAL ONE I HAVE FOR THE COURT IS
26 DECEMBER 29, 1965, TOBACCO INSTITUTE (READING):

27
28 "IF THERE IS SOMETHING IN

1 TOBACCO THAT IS CAUSALLY RELATED TO CANCER OR
2 ANY OTHER DISEASE, THE TOBACCO INDUSTRY WANTS
3 TO FIND OUT WHAT IT IS, AND THE SOONER, THE
4 BETTER. "

5

6 ALL OF THIS STUFF WAS OUT THERE. THIS IS THE
7 STUFF THAT WE TALKED ABOUT AT THE IN LIMINE STAGE OR IN THE
8 SUMMARY JUDGMENT STAGE WHERE NO ONE HAS TO SAY ANYTHING TO
9 HIM DIRECTLY. HE DOESN'T HAVE TO HEAR THESE THINGS DIRECTLY.

10 THE COURT: THAT'S TRUE.

11 MR. PIUZE: THIS STUFF IS OUT AND IN PUBLIC. AND THE
12 CALIFORNIA SUPREME COURT CASE THAT WE DISCUSSED AT THAT TIME
13 AND IS CITED IN THIS BRIEF, I HOPE, IS -- HANG ON, PLEASE.

14 I JUST SAW IT THIS MORNING, AND I CAN'T COME UP
15 WITH IT RIGHT NOW BUT IT HAD TO DO WITH ADVERTISING TO
16 CHILDREN IN CALIFORNIA.

17 MR. LEITER: YOU'RE THINKING OF CHILDREN'S TELEVISION?

18 MR. CARLTON: CHILDREN'S TELEVISION.

19 MR. LEITER: WE'VE ARGUED THAT.

20 MR. PIUZE: SO THE COURT'S FAMILIAR WITH THAT CASE,
21 RIGHT?

22 THE COURT: YES.

23 MR. PIUZE: OKAY. THAT'S WHERE I AM

24 AND SO THANK YOU FOR LISTENING.

25 THE COURT: JUST ONE SECOND, PLEASE.

26 MR. LEITER: TWO POINTS, YOUR HONOR.

27 FIRST -- AND I'M DOING THIS FROM MY

28 RECOLLECTION, BECAUSE I DON'T HAVE THE TESTIMONY IN FRONT OF

1 ME -- THE HOOP-DE-GAW IN MR. BOEKEN'S TESTIMONY DEALT WITH
2 THE ISSUE OF WHETHER THERE OUGHT TO BE WARNINGS ON THE PACKS
3 IN THE AFTERMATH OF THE '64 SURGEON GENERAL'S REPORT. THAT'S
4 WHAT HE RECALLS THERE BEING A HOOP-DE-GAW ABOUT. THAT'S WHAT
5 I BELIEVE TO BE THE CASE.

6 BUT MORE IMPORTANTLY, I THINK WHAT MR. PIUZE
7 HAS DONE IS CONFUSE TWO DISTINCT ISSUES AND TWO DISTINCT
8 MOTIONS THAT WE'VE HAD BEFORE THE COURT. WE'VE ARGUED
9 REPEATEDLY AND EXTENSIVELY IN THIS CASE WITH RESPECT TO THE
10 FRAUD CLAIM AND THE NEGLIGENCE CLAIM AS WELL AS EXPRESS
11 WARRANTY ON THE ISSUE OF RELIANCE.

12 THE COURT: AND HE --

13 MR. LEITER: AND OUR POINT IS --

14 THE COURT: WHAT IS HAPPENING HERE, HE HAS ARGUED
15 EFFECTIVELY THE FRAUD CLAIM, AND THOSE MAY HAVE BEEN FALSE
16 REPRESENTATIONS THAT WERE MADE, BUT THAT'S DIFFERENT FROM A
17 WARRANTY THAT BECOMES THE BASIS OF THE BARGAIN THAT
18 MR. BOEKEN, WHEN HE BOUGHT HIS CIGARETTES --

19 MR. LEITER: THAT'S EXACTLY WHERE I WAS HEADED.

20 IT'S BEEN OUR POSITION ON THE FRAUD CLAIM, HE
21 HAD TO POINT TO SPECIFIC REPRESENTATIONS THAT HE RELIED ON.
22 YOUR HONOR HAS DISAGREED WITH US ON THAT MOTION, AND THAT'S
23 NOT THE ISSUE BEFORE THE COURT RIGHT NOW. THE RELIANCE
24 QUESTION.

25 THE ISSUE BEFORE THE COURT RIGHT NOW IS
26 SPECIFICALLY ON EXPRESS WARRANTY AND REPRESENTATIONS THAT
27 FORMED THE BASIS OF THE BARGAIN. AND WHAT MR. PIUZE HAS DONE
28 IS ESSENTIALLY REPEAT THE RELIANCE ARGUMENT, WHICH IS,

1 MR. BOEKEN HAS A GENERAL RECOLLECTION, HE SAYS, OF THINGS
2 THAT THE TOBACCO INDUSTRY SAID THAT HE SAYS HE RELIED ON IN
3 SMOKING. AND THAT'S THE RELIANCE ARGUMENT WHICH WE'RE
4 PUTTING ASIDE FOR THE MOMENT. THAT'S NOT SUFFICIENT TO THE
5 POINT WE'RE MAKING IN THIS MOTION TO GET HIM OVER THE EXPRESS
6 WARRANTY HURDLE OF A REPRESENTATION TO FORM THE BASIS OF THE
7 BARGAIN.

8 THE COURT: I MEAN, FOR EXAMPLE, HOW COULD CREATING
9 DOUBT CONSTITUTE A WARRANTY?

10 MR. PIUZE: OKAY. SO THAT ONE, I GOT A LITTLE CARRIED
11 AWAY WITH GRANT YOU. THAT'S FRAUD. THAT'S FRAUD.

12 THE COURT: OKAY.

13 MR. PIUZE: BUT SO --

14 THE COURT: WHAT'S THE EXPRESS --

15 MR. PIUZE: WE'VE TAKEN AWAY ONE.

16 THE COURT: WELL, WHAT IS THE EXPRESS WARRANTY MADE TO
17 MR. BOEKEN?

18 MR. PIUZE: (READING:)

19
20 "WE ACCEPT AN INTEREST IN
21 PEOPLE'S HEALTH AS A BASIC RESPONSIBILITY
22 PARAMOUNT TO EVERY OTHER CONSIDERATION IN OUR
23 BUSINESS. WE BELIEVE THE PRODUCTS WE MAKE
24 ARE NOT INJURIOUS TO HEALTH."

25

26 WHAT COULD BE MORE --

27 THE COURT: WELL, 1954.

28 MR. PIUZE: 1954.

1 THE COURT: IT'S, WE BELIEVE, STATEMENT OF OPINION.

2 MR. PIUZE: WE BELIEVE THE PRODUCTS WE MAKE ARE NOT
3 INJURIOUS TO HEALTH.

4 THE COURT: YEAH. THAT MIGHT BE A FALSE OR FRAUDULENT
5 STATEMENT, BUT IT'S COUCHED IN THE FORM OF AN OPINION. IT'S
6 NOT A WARRANTY THAT SAYS, OUR PRODUCTS ARE NOT DANGEROUS TO
7 HEALTH, WHICH IS A CERTIFICATION WHICH COULD CONSTITUTE A
8 WARRANTY.

9 MR. PIUZE: (READING:)

10

11 "IF WE HAD ANY KNOWLEDGE OR
12 THOUGHT THAT IN ANY WAY WE WERE SELLING A
13 PRODUCT HARMFUL TO CONSUMERS, WE WOULD STOP
14 BUSINESS TOMORROW "

15

16 THE COURT: ALL RIGHT. AGAIN, THAT MAY BE A
17 COMPLETELY FRAUDULENT AND FALSE REPRESENTATION. BUT
18 NEVERTHELESS, DOESN'T RISE TO THE LEVEL OF A WARRANTY.

19 MR. PIUZE: THE TOBACCO INDUSTRY ARGUED, AND
20 PHILIP MORRIS ARGUED, THAT THIS WAS A LEGITIMATE CONTROVERSY
21 OUT THERE. ISN'T THAT -- IN ARGUING THAT, WEREN'T THEY
22 SAYING, THIS IS -- THE OTHER SIDE IS WRONG WHEN THEY SAY, OUR
23 PRODUCTS ARE UNSAFE, THEY'RE WRONG, OUR PRODUCTS ARE NOT
24 UNSAFE?

25

ISN'T THAT A WARRANTY?

26

THE COURT: I DON'T SEE IT, COUNSEL.

27

MR. PIUZE: OKAY.

28

THE COURT: ALL RIGHT. LET ME GO DOWN

1 THROUGH -- WELL, LET ME GO TO ONE OTHER SUBJECT HERE, AND I
2 CAN MAKE SOME RULINGS.

3 BACK TO THE NOVEMBER 17TH, 1978 DOCUMENT
4 PREPARED BY ROBERT B. SELIGMAN. IN THE DEFENSE PAPERS, THERE
5 IS A FOOTNOTE, FOOTNOTE 1 ON PAGE 2 (READING):

6
7 "PHILIP MORRIS ASSERTS ITS
8 CLAIM OF PRIVILEGE AS TO ONLY THOSE PORTIONS
9 OF THE DOCUMENT CONTAINING PRIVILEGED
10 INFORMATION, AND IT WILL AGREE THAT THE
11 DOCUMENT MAY BE ADMITTED INTO EVIDENCE IF
12 SUCH INFORMATION IS REDACTED. "

13
14 SO I'M GOING TO GIVE YOU AN OPPORTUNITY RIGHT
15 NOW BEFORE I MAKE A RULING AS TO WHETHER OR NOT THIS ENTIRE
16 DOCUMENT SHOULD COME IN.

17 WHAT PORTIONS OF THE DOCUMENT WOULD COUNSEL --
18 OR IS COUNSEL REFERRING TO IN CONNECTION WITH REDACTIONS?

19 MR. CARLTON: YOUR HONOR, WE HAVE A REDACTED COPY, AND
20 I CAN SHOW IT TO YOU, IF YOU'D LIKE.

21 THE COURT: ALL RIGHT. THAT WOULD BE FINE.

22
23 (SHORT PAUSE.)

24
25 THE COURT: ALL RIGHT. OKAY. LET ME JUST MAKE SOME
26 RULINGS. THIS ONE IS STILL UNDER SUBMISSION.

27 AS TO THE MOTION FOR DIRECTED VERDICT AS TO
28 NEGLIGENCE AND STRICT LIABILITY, THAT MOTION WILL BE GRANTED

1 IN PART, DENIED IN PART.

2 IT IS GRANTED AS TO ANY CLAIM THAT CIGARETTES
3 ARE SO INHERENTLY DANGEROUS THAT THEY CANNOT BE MARKETED IN
4 THE UNITED STATES TODAY.

5 BUT IT WOULD BE DENIED AS TO DESIGN DEFECT
6 BASED ON CLAIMS THAT PHILIP MORRIS COULD HAVE CHOSEN TO
7 REDUCE TAR AND NICOTINE MORE QUICKLY THAN THEY DID, AND THEY
8 HAD AVAILABLE DESIGNS THAT THEY CHOSE, FOR WHATEVER REASON,
9 NOT TO IMPLEMENT.

10 AND ALSO, THE FAILURE TO WARN PRIOR TO 1969 AND
11 FAILURE TO INSTRUCT PRIOR TO 1969 WOULD BE AVAILABLE
12 THEORIES. ALSO, THE COURT AGAIN WOULD REITERATE THAT A
13 FAILURE TO INSTRUCT POST-1969 WOULD, IN THE COURT'S VIEW, BE
14 A VIABLE CLAIM

15 AS TO THE EXPRESS WARRANTY MOTION FOR DIRECTED
16 VERDICT, THAT WILL BE GRANTED.

17 THERE HAS BEEN NO SHOWING -- THERE IS NO
18 EVIDENCE WHICH WOULD SUPPORT AN EXPRESS PROMISE TO MR. BOEKEN
19 WHICH FORMED THE BASIS OF THE BARGAIN BETWEEN HIM AND
20 PHILIP MORRIS AS THAT TERM IS UNDERSTOOD IN WARRANTY LAW
21 THERE MAY WELL BE CLAIMS OF FRAUD, BUT THAT'S NOT -- THAT IS
22 A DIFFERENT THEORY OF RELIEF.

23 ALL RIGHT. LET'S GO BACK INTO THE JURY ROOM
24 AND FINISH UP OUR JURY INSTRUCTIONS.

25 MR. LEITER: THANK YOU, YOUR HONOR.

26 MR. PIUZE: YOUR HONOR, WE CAN BE OFF THE RECORD.

27 (IN THE P. M., AN ADJOURNMENT WAS TAKEN
28 UNTIL THURSDAY, MAY 17, 2001, AT 9:00 A. M.)