

I N D E X

THURSDAY, MAY 17, 2001.....	6037: 3
1:45 P.M.....	6037: 7
ARGUMENT BY MR. LEITER.....	6037: 23

1 CASE NUMBER: BC 226593
2 CASE NAME: BOEKEN V. PHILIP MORRIS
3 LOS ANGELES, CALIFORNIA THURSDAY, MAY 17, 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

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11 THE COURT: ALL RIGHT. GOOD AFTERNOON, LADIES AND
12 GENTLEMEN. WELCOME BACK.

13 OUR JURY PANEL IS WITH US; COUNSEL IS WITH US
14 AS WELL.

15 GOOD AFTERNOON, LADIES AND GENTLEMEN.

16

17 (CHORUS OF GOOD AFTERNOON' S.)

18

19 THE COURT: MR. LEITER. THE JURY IS YOURS, SIR.

20 MR. LEITER: THANK YOU, YOUR HONOR.

21 THE COURT: YES, SIR.

22

23

ARGUMENT

24 BY MR. LEITER:

25 GOOD AFTERNOON, EVERYBODY.

26

27 (CHORUS OF GOOD AFTERNOON' S.)

28 /

1 MR. LEITER: WELCOME BACK.

2 THE FIRST THING I WANT TO DO IS ACTUALLY ONE OF
3 THE FIRST THINGS MR. PIUZE DID IN HIS CLOSING ARGUMENT, WHICH
4 IS TO THANK YOU.

5 IT'S BEEN A LONG TRIAL. I THINK THIS IS THE
6 END OF OUR SEVENTH WEEK TOGETHER SINCE OPENING STATEMENTS. I
7 KNOW THERE WERE A COUPLE OF WEEKS BEFORE THAT THAT WERE JURY
8 SELECTION WEEKS. SO IT'S BEEN A LONG HAUL. AND WE KNOW
9 YOU'VE BEEN ATTENTIVE, YOU'VE BEEN LISTENING CAREFULLY, AND
10 MR. CARLTON AND I APPRECIATE THAT AND THANK YOU FOR IT.

11 NOW, IT'S THE DEFENSE'S TURN TO PRESENT CLOSING
12 ARGUMENT TO YOU NOW. AND BECAUSE WE KNOW YOU'VE LISTENED
13 CAREFULLY TO ALL OF THE EVIDENCE FOR ALL OF THESE MANY WEEKS,
14 I'M NOT GOING TO REPEAT ALL THE EVIDENCE FOR YOU. I'M NOT
15 GOING TO SUMMARIZE EVERY BIT OF TESTIMONY THAT YOU HEARD.
16 AND IN TURN, IT'S FRIDAY AFTERNOON. IT'S BEEN A LONG WEEK.
17 AND I'M GOING TO ASK FOR YOUR PATIENCE AND INDULGENCE,
18 BECAUSE I DO HAVE A LOT THAT I WANT TO SAY TO YOU.

19 BUT ALTHOUGH I'M NOT GOING TO REPEAT
20 EVERYTHING, THERE ARE GOING TO BE A LOT OF THINGS THAT COME
21 UP AND A LOT OF ISSUES THAT I WANT TO MENTION TO YOU. AND
22 BEFORE WE GET TO THE ISSUES, I WANT TO MAKE A COUPLE OF VERY
23 BROAD POINTS.

24 THE FIRST ONE IS ABOUT REPETITION. YOU'VE
25 HEARD A LOT OF ALLEGATIONS IN THIS CASE, A LOT OF ALLEGATIONS
26 ABOUT THINGS THAT MY CLIENT, PHILIP MORRIS, SUPPOSEDLY DID
27 OVER THE YEARS. AND YOU HEARD THOSE ALLEGATIONS REPEATED AND
28 REPEATED AND REPEATED AND REPEATED. YOU HEARD A VERY, VERY

1 LONG CLOSING ARGUMENT FROM THE PLAINTIFF'S LAWYER IN WHICH
2 THOSE ALLEGATIONS WERE REPEATED AGAIN AND AGAIN AND AGAIN.

3 MY CLOSING ARGUMENT, I DON'T THINK, IS GOING TO
4 BE QUITE SO LONG. BUT THE POINT THAT I WANTED TO MAKE RIGHT
5 UP FRONT IS, REPEATING THE ALLEGATIONS DOESN'T MAKE THEM
6 TRUE. REPEATING THEM 100 TIMES DOESN'T MAKE THEM TRUE.

7 IT'S THE EVIDENCE. IT'S THE EVIDENCE THAT YOU
8 HAVE TO COME BACK TO. IT'S THE EVIDENCE THAT I WANT TO TALK
9 WITH YOU ABOUT TODAY. AND I WANT TO MAKE SOME SUGGESTIONS
10 ABOUT WAYS THAT WE THINK YOU OUGHT TO CONSIDER THE EVIDENCE
11 AND PUT THE EVIDENCE TOGETHER IN THE CASE.

12 I THINK IT WAS, ACTUALLY, DR. GOLDBERG,
13 REMEMBER, WHO WAS CALLED BY THE PLAINTIFF FAIRLY EARLY ON IN
14 THE TRIAL WHO SAID THERE'S SOMETHING CALLED A REPETITION
15 THEORY. HE MAY HAVE HAD A SIMILAR NAME TO IT. THE IDEA THAT
16 IF YOU WERE TO REPEAT SOMETHING OFTEN ENOUGH, IT BEGINS TO
17 SOUND TRUE. I HOPE YOU KEEP THAT IN MIND.

18 LET'S FOCUS ON THE EVIDENCE. LET'S NOT FOCUS
19 ON AN ALLEGATION SIMPLY BECAUSE IT'S MADE AGAIN AND AGAIN AND
20 AGAIN.

21 AND IF YOU'RE THINKING ABOUT THE EVIDENCE --
22 AND THIS IS ONE OF THE MOST BASIC POINTS, AND I BELIEVE
23 JUDGE MC COY MENTIONED IT TO YOU BEFORE THE CLOSING ARGUMENTS
24 EVER BEGAN -- YOUR RECOLLECTION OF THE EVIDENCE IS WHAT
25 CONTROLS IN THIS CASE. NOT MINE, NOT MR. PIUZE'S.

26 I'VE GOT TO TELL YOU, I HAVE SERIOUS, SERIOUS
27 DISAGREEMENTS WITH THE WAY MR. PIUZE CHARACTERIZED A LOT OF
28 THE EVIDENCE. HE DID IT AGAIN AND AGAIN AND AGAIN ON A

1 NUMBER OF DIFFERENT POINTS. SOME OF THEM MAY BE NOT
2 NECESSARILY THE BIGGEST POINTS IN THE CASE.

3 FOR EXAMPLE, WHETHER OR NOT PHILIP MORRIS WAS
4 ALWAYS THE BIGGEST TOBACCO COMPANY, THE BIGGEST PLAYER. YOU
5 HEARD IT TIME AND AGAIN. THEY WERE THE BIGGEST. NOT BACK IN
6 1950, 1960, 1970. IT'S IMPORTANT TO PUT THE FACTS IN CONTEXT
7 OF TIME.

8 SOME OF THE MISCHARACTERIZATIONS WERE ON MORE
9 IMPORTANT FACTS, SUCH AS WHETHER DR. CARCHMAN, THE
10 PHILIP MORRIS SCIENTIST, NOW RETIRED, TOLD YOU THAT HE
11 BELIEVED THERE WAS NO BENEFIT TO LOW-TAR CIGARETTES.

12 I'M NOT GOING TO GO THROUGH MR. PIUZE'S
13 ARGUMENT AND REPEAT EVERYTHING THAT HE SAID AND TRY TO POINT
14 OUT ALL THE PLACES WHERE I BELIEVE HE DIDN'T QUITE ACCURATELY
15 TELL YOU WHAT THE TESTIMONY WAS. I'M GOING TO POINT OUT SOME
16 OF THEM AS WE GO ALONG.

17 BUT THE POINT IS, IT'S YOUR RECOLLECTION THAT
18 CONTROLS. AND HOPEFULLY, I WON'T MISSTATE ANY OF THE
19 EVIDENCE EITHER, BUT IF I DO, AGAIN, YOUR RECOLLECTION SHOULD
20 CONTROL.

21 I WANT TO BEGIN BY TALKING ABOUT THE BIG
22 PICTURE. BY TALKING ABOUT SOME CONTEXT.

23 CIGARETTES. THIS CONSUMER PRODUCT IS MAYBE THE
24 MOST STUDIED, ANALYZED, CONTROVERSIAL, DEBATED, DISCUSSED
25 CONSUMER PRODUCT EVER. EVER.

26 THERE ARE ALL SORTS OF PEOPLE AND ORGANIZATIONS
27 THAT HAVE BEEN PART OF THE DEBATE, THE DISCUSSION, THE
28 CONTROVERSY, THE WORLD OF CIGARETTES OVER THE LAST 50 YEARS.

1 THERE ARE SCIENTISTS WHO HAVE BEEN STUDYING THE
2 HEALTH RISKS OF TOBACCO, THE ADDICTIVENESS OF TOBACCO, HOW
3 DIFFICULT IT IS TO QUIT, FOR DECADES AND DECADES. NOT JUST
4 SCIENTISTS IN THE TOBACCO INDUSTRY, BUT SCIENTISTS ALL AROUND
5 THE WORLD. BECAUSE YOU HEARD MR. CARCHMAN SAY, THERE ARE
6 TENS OF THOUSANDS OF SCIENTIFIC PUBLICATIONS ABOUT SMOKING
7 AND HEALTH.

8 THE GOVERNMENT HAS BEEN AN IMPORTANT PLAYER IN
9 THE WORLD OF TOBACCO OVER THE YEARS. AND YOU HEARD AN AWFUL
10 LOT ABOUT THAT DURING THE COURSE OF THE TRIAL. WAY BACK IN
11 THE BEGINNING PART OF THE CENTURY, THERE WERE A NUMBER OF
12 STATES THAT BANNED CIGARETTE USE ALTOGETHER. IN MORE RECENT
13 TIMES, THE SURGEON GENERAL, PART OF THE FEDERAL GOVERNMENT,
14 HAS BEEN ISSUING REPORTS, BIG, FAT ONES LIKE THIS -- THIS IS
15 THE 1964 ONE -- ALMOST EVERY YEAR SINCE 1964. HUGE VOLUMES
16 ABOUT SMOKING AND HEALTH AND ABOUT DIFFERENT ASPECTS OF
17 SMOKING AND HEALTH OVER THE YEARS.

18 IN ADDITION TO ISSUING REPORTS, THE FEDERAL
19 GOVERNMENT HAS PUT WARNINGS ON CIGARETTE PACKS THAT HAVE BEEN
20 THERE SINCE 1966. THE FEDERAL GOVERNMENT HAS ALSO REGULATED
21 WHAT THE TOBACCO COMPANIES CAN DO IN LOTS OF DIFFERENT WAYS.
22 YOU HEARD SOME EXAMPLES.

23 FOR EXAMPLE, NO CIGARETTE ADVERTISING HAS BEEN
24 ON RADIO OR TELEVISION SINCE 1971. LISTS INGREDIENTS THAT
25 ARE IN CIGARETTES. PRODUCTS GET SENT OVER TO THE FEDERAL
26 GOVERNMENT.

27 STATE AND LOCAL GOVERNMENTS, ALSO, HAVE BEEN
28 HEAVILY INVOLVED IN THE TOBACCO STORY OVER THE LAST 50 YEARS.

1 REGULATIONS ABOUT WHERE YOU CAN SMOKE, WHERE YOU CAN'T SMOKE.
2 PEOPLE IN CALIFORNIA ARE VERY FAMILIAR WITH THOSE WARNINGS.
3 HEALTH CAMPAIGNS TALKING TO PEOPLE ABOUT THE HEALTH RISKS,
4 TRYING TO HELP PEOPLE TO QUIT. THE GOVERNMENT, STATE AND
5 LOCAL AND FEDERAL HAVE BEEN AN IMPORTANT PART OF THE STORY
6 FOR YEARS.

7 PUBLIC HEALTH COMMUNITY. AMERICAN CANCER
8 SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG
9 ASSOCIATION. LOTS OF OTHER ORGANIZATIONS LIKE THAT HAVE BEEN
10 INVOLVED IN RESEARCHING ISSUES ABOUT TOBACCO AND HEALTH.
11 HAVE BEEN INVOLVED IN WARNING PEOPLE ABOUT THE RISKS OF
12 TOBACCO AND HEALTH. HAVE BEEN INVOLVED IN CLINICS AND
13 PROGRAMS AND OTHER ORGANIZATIONS TRYING TO HELP PEOPLE WHO
14 WANT TO QUIT SMOKING.

15 DOCTORS. REAL PART OF THE PUBLIC HEALTH
16 COMMUNITY. HEARD FROM DR. TRABULUS. WE'LL TALK ABOUT IT A
17 LITTLE BIT MORE. DOCTORS FOR DECADES CONTINUALLY WARN THEIR
18 PATIENTS ABOUT THE HEALTH RISKS OF SMOKING AND ADVISE THEM

19 MEDIA. WE HEARD A LOT ABOUT THAT DURING THE
20 COURSE OF THE TRIAL. NEWSPAPERS, TELEVISION, BILLBOARDS,
21 MAGAZINES, RADIO, FILLED WITH INFORMATION ABOUT THE HEALTH
22 RISKS OF SMOKING, ABOUT THE ACTIVITIES OF SCIENTISTS AND
23 GOVERNMENT AND PUBLIC HEALTH COMMUNITY OVER THE YEARS.

24 AND THE LAST ONE I'M GOING TO INCLUDE FOR A
25 MOMENT -- AND I'LL ADD A COUPLE MORE IN A MINUTE -- PEOPLE
26 LIKE YOU AND ME TALKING TO EACH OTHER ABOUT SMOKING, ABOUT
27 SMOKING BEING DANGEROUS, ABOUT SEEING YOUR FRIENDS AND
28 SAYING, YOU OUGHT TO QUIT, DON'T YOU KNOW WHAT YOU'RE DOING.

1 THIS IS A DANGEROUS, RISKY PRODUCT.

2 I'M GOING TO SAY THAT AGAIN. CIGARETTES ARE A
3 DANGEROUS, RISKY PRODUCT. YOU HEARD STATISTICS IN THIS CASE.
4 10 TO 15 PERCENT OF THE PEOPLE WHO SMOKE CIGARETTES GET LUNG
5 CANCER FROM SMOKING. THE MOST RECENT NUMBERS IS FROM THE
6 FEDERAL GOVERNMENT -- WHICH WE DON'T QUIBBLE WITH AND DISPUTE
7 IN THIS CASE -- THAT 400,000 PEOPLE DIE FROM SMOKING IN
8 RECENT YEARS.

9 BY THE WAY, I DO HAVE TO STOP ON ONE POINT,
10 BECAUSE THIS IS ANOTHER ISSUE. MOST RECENT NUMBER FROM THE
11 GOVERNMENT IS 400,000 A YEAR. IT'S A VERY BIG NUMBER. BUT
12 IT HAS NOT BEEN 400,000 GOING BACK TO 1960, '70, '80, '90.

13 IN FACT, MR. PIUZE ASKED THOSE QUESTIONS OF HIS
14 OWN WITNESS. ISN'T IT 400,000 TIMES 20 YEARS?

15 THE ANSWER IS NO.

16 NOT QUIBBLING WITH THE NUMBERS. I'M JUST
17 POINTING OUT THAT YOUR RECOLLECTION OF THE TESTIMONY IN THIS
18 CASE IS WHAT CONTROLS. IT'S A BIG NUMBER.

19 BUT OUR SOCIETY, ALL OF THESE PEOPLE AND
20 OTHERS, HAVE MADE DECISIONS ABOUT THIS DANGEROUS PRODUCT.
21 OUR SOCIETY HAS MADE JUDGMENTS ABOUT WHAT TO DO ABOUT
22 CIGARETTES. AND THE JUDGMENTS ARE TO WARN PEOPLE ABOUT THE
23 RISKS, TO DISCOURAGE PEOPLE FROM USING IT, TO HELP PEOPLE WHO
24 WANT TO QUIT TO QUIT. TO RESTRICT WHERE IT CAN BE USED. YOU
25 CAN SMOKE HERE, YOU CAN'T SMOKE THERE. BUT AT THE END OF THE
26 DAY, TO LET THE PEOPLE WHO WANT TO SMOKE MAKE THE CHOICE.
27 THAT'S THE DECISION OUR SOCIETY HAS MADE ABOUT SMOKING.

28 RICHARD BOEKEN LIVED IN THAT WORLD, LIVES IN

1 THAT WORLD. HE'S ONE OF THOSE PEOPLE WHO CHOSE TO SMOKE.
2 AND YOU'RE ALL PRETTY FAMILIAR WITH HIS STORY BY NOW HE
3 SMOKED HEAVILY FOR JUST ABOUT 40 YEARS. TWO PACKS A DAY.
4 THAT'S HEAVY SMOKING. HIS DOCTOR TOLD HIM TO STOP. YOU
5 HEARD ABOUT DR. TRABULUS. HE CAME IN AND TESTIFIED.

6 ALL OF THESE PLAYERS THAT WE'VE TALKED ABOUT
7 PUT OUT INFORMATION ABOUT THE HEALTH RISKS OF SMOKING.

8 MR. BOEKEN DID QUIT A FEW YOU TIMES OVER THE
9 YEARS, AND EACH TIME, HE WENT BACK TO SMOKING. HE HAD
10 BRONCHITIS. SWITCHED TO LOW-TAR, CIGARETTES AT ONE
11 POINT -- I WANT TO TALK TO YOU ABOUT WHEN THAT POINT WAS,
12 BECAUSE IT'S A VERY IMPORTANT ISSUE IN THIS CASE -- SWITCHED
13 TO LOW-TAR CIGARETTES BECAUSE THEY WERE LESS IRRITATING TO
14 HIM WHEN HE HAD BRONCHITIS.

15 IN 1999, AFTER 40 YEARS OF HEAVY SMOKING,
16 MR. BOEKEN WAS DIAGNOSED WITH LUNG CANCER. WE DON'T DISPUTE
17 IN THIS CASE THAT HIS LUNG CANCER WAS MORE LIKELY THAN NOT
18 CAUSED BUT HIS SMOKING.

19 SO WHAT CHOICE DID MR. BOEKEN MAKE AFTER HE WAS
20 DIAGNOSED WITH LUNG CANCER?

21 HE CHOSE TO SUE PHILIP MORRIS. THAT'S WHY
22 WE'RE HERE. HIS STORY IS THAT IN THOSE 40 YEARS -- HE WAS
23 SMOKING UNTIL 1994 -- HE NEVER KNEW THAT SMOKING WAS
24 DANGEROUS. HE NEVER KNEW THAT SMOKING COULD SHORTEN HIS
25 LIFE. THAT PEOPLE WHO SMOKE ARE TAKING A SERIOUS RISK. SAYS
26 ALL HE REMEMBERS HEARING IS WHAT PHILIP MORRIS AND THE OTHER
27 TOBACCO COMPANIES TOLD HIM OVER THE YEARS.

28 IN FACT, IN PLAINTIFF'S CLOSING ARGUMENT OVER

1 THE LAST COUPLE OF DAYS, THE THEORY KIND OF EXPANDED FOR
2 MR. BOEKEN TO, REALLY, THE QUESTION THAT EVERYBODY WHO SMOKES
3 SMOKES BECAUSE THEY'VE PUT ALL OF THAT OTHER INFORMATION OUT
4 OF THEIR MINDS AND LISTENED ONLY TO WHAT THE TOBACCO
5 COMPANIES SAID. AND I DON'T KNOW WHETHER THAT'S A THEORY
6 THAT HAS ANY SUPPORT FOR IT, BUT LET'S TALK ABOUT MR. BOEKEN,
7 BECAUSE IT'S CERTAINLY HIS THEORY OF THE CASE. HE PUT
8 EVERYTHING ELSE ASIDE, DIDN'T HEAR IT, DIDN'T REMEMBER IT,
9 DIDN'T LISTEN, DIDN'T BELIEVE. HE BELIEVED JUST WHAT
10 PHILIP MORRIS SAID.

11 MR. BOEKEN IS TELLING YOU, BY BRINGING THIS
12 LAWSUIT, THAT HE IS NOT RESPONSIBLE FOR HIS CHOICE TO SMOKE.
13 HE IS TELLING YOU THAT PHILIP MORRIS IS RESPONSIBLE FOR HIS
14 SMOKING ALL THAT TIME. AND HE ASKS YOU TO AWARD HIM MONEY.
15 AND WE JUST FOUND OUT JUST BEFORE LUNCH HOW MUCH MONEY HE'S
16 ASKING YOU TO AWARD HIM HE'S ASKING YOU TO AWARD HIM
17 MILLIONS AND MILLIONS OF DOLLARS. \$10 MILLION IN
18 COMPENSATORY DAMAGES. AND I'M NOT ENTIRELY SURE WHAT IN
19 PUNITIVE DAMAGES; \$100 MILLION, \$10 BILLION. I SAW SOME
20 NUMBERS BEING PUT ON THE ELMD JUST BEFORE LUNCH.

21 SO HE'S BRINGING THIS LAWSUIT AND SAYS, NOT MY
22 RESPONSIBILITY THAT I SMOKED. PHILIP MORRIS' RESPONSIBILITY
23 THAT I SMOKED, AND I GET MILLIONS OF DOLLARS.

24 WHAT'S THIS LAWSUIT ABOUT?

25 WELL, THE VERY FIRST THAT WE NOW KNOW IS THAT
26 IT'S ABOUT MONEY. IT'S ABOUT MONEY.

27 WHAT ELSE IS THIS LAWSUIT ABOUT?

28 WELL, ACTUALLY, BEFORE WE TALK ABOUT WHAT ELSE

1 THIS LAWSUIT IS ABOUT, MAYBE TO MR. BOEKEN, MY CLIENT LOOKS
2 LIKE EASY PICKINS. ITS OPERATED LIKE THE OTHER TOBACCO
3 COMPANIES IN THIS WORLD AS WELL. CLEARLY, ONE OF THE PLAYERS
4 INVOLVED IN SMOKING OVER THE YEARS. IT SELLS A PRODUCT THAT
5 IS DANGEROUS. NOBODY'S DISPUTING THAT.

6 IT'S PROBABLY THE MOST UNPOPULAR COMPANY IN THE
7 UNITED STATES. AND THERE'S NO DOUBT -- AND I TALKED ABOUT IT
8 FROM OPENING STATEMENT, AND WE TALKED ABOUT IT WITH WITNESSES
9 AND WE'LL TALK ABOUT IT AGAIN DURING MY CLOSING ARGUMENT --
10 NO DOUBT THAT PHILIP MORRIS CLEARLY MADE SOME CHOICES OVER
11 THE YEARS THAT WERE NOT APPROPRIATE CHOICES.

12 AND AS YOU HEARD, IT'S A PROFITABLE COMPANY.
13 BUT IS THIS LAWSUIT JUST ABOUT AN UNPOPULAR COMPANY THAT DID
14 SOME THINGS THAT NONE OF US LIKES?

15 NO. NO.

16 WHAT YOU HAVE TO DECIDE, LADIES AND GENTLEMEN,
17 IS WHETHER THIS PLAINTIFF HAS PROVED HIS CASE, WHETHER HE IS
18 ENTITLED UNDER THE LAW TO BE AWARDED DAMAGES.

19 THIS CASE IS NOT -- DESPITE ALL THE RHETORIC
20 YOU'VE HEARD, DESPITE ALL THE GRAND PRONOUNCEMENTS -- THIS
21 CASE IS NOT ABOUT SOCIETY'S DECISIONS ABOUT SMOKING. IT'S
22 NOT ABOUT WHETHER CIGARETTES SHOULD BE ON THE MARKET. IT'S
23 NOT ABOUT WHETHER, AS WE SIT HERE TODAY, WE THINK THE WORLD
24 MIGHT BE DIFFERENT OR THE WORLD MIGHT BE BETTER IF THERE WERE
25 NO SMOKING. IT'S A CHOICE SOCIETY HAS MADE OVER THE YEARS.

26 AND IT'S NOT A CASE SIMPLY ABOUT WHAT
27 PHILIP MORRIS DID OVER THE YEARS, ALTHOUGH THAT'S CERTAINLY A
28 PART OF IT, AND I WANT TO TALK WITH YOU ABOUT IT DURING THIS

1 ARGUMENT.

2 THE CORE OF THIS CASE IS WHETHER, UNDER THE
3 LAW, PHILIP MORRIS DID SOMETHING THAT MADE MR. BOEKEN SMOKE,
4 OR DID SOMETHING THAT PREVENTED MR. BOEKEN FROM QUITTING, OR
5 FAILED TO PUT ON THE MARKET A CIGARETTE PRODUCT THAT COULD
6 HAVE BEEN PUT ON THE MARKET, WHICH, IF HE HAD SMOKED IT, HE
7 WOULDN'T HAVE GOTTEN SICK.

8 SO REALLY, WHAT THIS CASE IS ABOUT IS WHERE
9 PHILIP MORRIS' CONDUCT OVERLAPS MR. BOEKEN'S CONDUCT. THIS
10 CASE IS ABOUT WHERE THOSE TWO CIRCLES INTERSECT.

11 NOW, WE KNOW THEY INTERSECT A LITTLE BIT,
12 BECAUSE PHILIP MORRIS MADE AND SOLD CIGARETTES, AND
13 RICHARD BOEKEN BOUGHT THOSE CIGARETTES. BUT HERE'S THE
14 IMPORTANT POINT. UNDER THE LAW, AND CERTAINLY IN THIS CASE,
15 YOU CANNOT FIND PHILIP MORRIS LIABLE SIMPLY BECAUSE IT MADE
16 AND SOLD CIGARETTES, AND MR. BOEKEN SMOKED THOSE CIGARETTES
17 AND GOT SICK.

18 UNDER THE CLAIMS THAT ARE MADE IN THIS CASE,
19 THERE HAS TO BE SOMETHING MORE. THERE HAS TO BE SOME
20 WRONGFUL CONDUCT THAT AFFECTED MR. BOEKEN, THAT CAUSED HIM TO
21 MAKE THE DECISIONS THAT MADE OR PREVENTED HIM FROM MAKING
22 OTHER DECISIONS, OR THIS HAS TO BE A PRODUCT THAT THEY DIDN'T
23 PUT ON THE MARKET THAT THEY COULD HAVE PUT ON THE MARKET.

24 NOW, MOST OF THE CLAIMS IN THIS CASE -- NOT ALL
25 OF THEM -- BUT MOST OF THEM TURN ON MR. BOEKEN'S TESTIMONY
26 THAT HE PAID NO ATTENTION TO THE REST OF THESE PEOPLE,
27 LISTENED ONLY TO PHILIP MORRIS, AND THAT'S WHY HE SMOKED.

28 SO I WANT TO TURN TO THAT, BECAUSE THAT'S

1 REALLY A KEY PART OF THIS CASE. IF YOU DO NOT BELIEVE HIS
2 TESTIMONY, IF YOU DO NOT BELIEVE THAT TESTIMONY, YOU CANNOT
3 FIND FOR MR. BOEKEN ON ALMOST ALL OF THE CLAIMS IN THIS CASE.
4 AND THE ONES THAT ARE REMAINING, I'LL TALK TO YOU ABOUT
5 SEPARATELY. THAT'S A KEY POINT. HIS TESTIMONY IS CRITICAL
6 TO THIS CASE.

7 SO LET'S TURN TO IT, AND I WANT TO SPEND A
8 LITTLE BIT OF TIME TALKING TO YOU ABOUT IT.

9 I THINK YOU'VE HEARD HIS DEPOSITION. WE'VE
10 TALKED ABOUT IT THROUGHOUT THE TRIAL, SO I'M ASSUMING THAT
11 YOU'RE ALL PRETTY FAMILIAR AT THIS POINT WITH MR. BOEKEN'S
12 BASIC STORY. HE SAYS HE DIDN'T BELIEVE SMOKING WAS
13 DANGEROUS, THAT SMOKING CAUSED CANCER --

14

15 (JUROR SNEEZES.)

16

17 MR. LEITER: BLESS YOU.

18 -- UNTIL 1994 WHEN HE WAS 50 YEARS OLD. 50
19 YEARS OLD. ALL RIGHT. HE SAID -- AND REMEMBER I PLAYED THIS
20 VIDEO CLIP A COUPLE OF TIMES -- HE DIDN'T HEAR ABOUT THE
21 HEALTH RISKS IN THE NEWSPAPERS OR ON THE TELEVISION OR ON THE
22 RADIO OR ON BILLBOARDS. HE DIDN'T HEAR ANYTHING ABOUT THE
23 HEALTH RISKS IN THE 1960'S, THE 1970'S, THE 1980'S.

24 HE DID THINK SMOKING, HE SAID, AFFECTED HIS
25 WIND. HE WANTED TO BE A RUNNER. HE DID REALIZE THAT SMOKING
26 HURT HIS BRONCHITIS, SO THAT'S THE REASON HE WANTED TO SWITCH
27 TO LOW-TAR CIGARETTES. BUT NOTHING SERIOUS, HE SAYS. NOT
28 UNTIL 1994 WHEN HE WAS 50 YEARS OLD. HE HEARD ONLY WHAT

1 PHILIP MORRIS AND THE OTHER TOBACCO COMPANIES SAID. AND I
2 WANT TO MAKE SURE I SAY THIS RIGHT. HE BELIEVED THEM BECAUSE
3 HE HAD A NAIVETE ABOUT HIM HE BELIEVED THEM BECAUSE IT WAS
4 HIS MIND SET TO TRUST BIG CORPORATIONS.

5 MR. BOEKEN'S STORY ALSO IS THAT HE TRIED TO
6 QUIT ON SEVERAL OCCASIONS, BUT HE WAS NEVER ABLE TO QUIT
7 BECAUSE HE WAS TOO ADDICTED TO QUIT. AND I THINK THERE WAS
8 ALSO A SUGGESTION IN HIS TESTIMONY THAT IF HE HAD REALLY
9 BELIEVED SMOKING WAS HARMFUL TO HIM OR DANGEROUS FOR HIM HE
10 WOULD HAVE TRIED HARDER. BEFORE WE EVEN TALK ABOUT HIS
11 TESTIMONY, BEFORE WE EVEN TALK ABOUT HOW THAT TESTIMONY
12 MATCHES UP WITH THE OTHER EVIDENCE IN THE CASE, THINK ABOUT
13 THAT FOR A SECOND.

14 HIS TESTIMONY IS THAT HE WAS ESSENTIALLY A
15 PASSIVE GUY BEING LED AROUND BY THE NOSE, BY PHILIP MORRIS
16 AND THE OTHER TOBACCO COMPANIES. THAT WHAT THEY SAID, HE
17 BELIEVED; EVERYTHING ELSE PUSHED ASIDE.

18 YOU HEARD A LOT OF TESTIMONY FROM MR. BOEKEN.
19 YOU SPENT PROBABLY, WHAT, TWO DAYS WATCHING THAT VIDEOTAPE
20 ALMOST ALL OF THE TESTIMONY THAT HE GAVE IN DEPOSITION. AND
21 YOU PROBABLY HAVE FORMED SOME JUDGMENTS ABOUT HIM YOURSELF.
22 BUT THINK ABOUT THAT CHARACTERIZATION THAT HE HAS GIVEN TO
23 HIMSELF OF HIS DECISIONS ABOUT SMOKING AND THINK ABOUT
24 WHETHER IT MATCHES UP WITH WHAT YOU KNOW ABOUT THE REST OF
25 HIS LIFE, WHAT YOU KNOW ABOUT WHAT HE DID, AND WE'LL TALK
26 ABOUT THAT IN A COUPLE OF MINUTES.

27 FIRST PART -- AND IN OUR CASE, WE PUT IN A FAIR
28 AMOUNT OF TESTIMONY ABOUT THIS.

1 WHAT ABOUT THE POINT THAT HE NEVER HEARD
2 ANYTHING ABOUT THE HEALTH RISKS FROM ALL OF THOSE PEOPLE FOR
3 ALL OF THOSE YEARS?

4 CREDIBLE?

5 IT IS UNCONTESTED IN THIS CASE. THERE IS NO
6 CONTROVERSY IN THIS CASE THAT THERE WAS AN AVALANCHE OF
7 INFORMATION OUT THERE ABOUT THE HEALTH RISKS OF SMOKING.

8 DR. HOFFMAN TESTIFIED ABOUT IT EXTENSIVELY.
9 THERE HAS BEEN NO TESTIMONY TO THE CONTRARY. GOING ALL THE
10 WAY BACK TO THE 1950'S, THOSE SCIENTIFIC STUDIES STARTED TO
11 COME OUT, AND THIS WAS AN ENORMOUS AMOUNT OF PUBLICITY ABOUT
12 IT, AND DR. HOFFMAN EXPLAINED WHY.

13 AS WE'VE HEARD FROM A NUMBER OF WITNESSES, A
14 NUMBER OF HALF OF ADULTS SMOKED IN 1950'S. STUDIES ARE
15 COMING OUT LINKING SMOKING WITH LUNG CANCER. SCIENTIFIC
16 STUDIES. HUGE STORY. HUGE AMOUNT OF MEDIA ATTENTION.
17 SMOKING WAS EXTREMELY POPULAR.

18 WOULD YOU PUT UP, PLEASE, 11066.

19 AND I'M GOING TO TRY TO MOVE THIS OUT OF THE
20 WAY WITHOUT CLOBBERING THE COURT REPORTER.

21 JANUARY 1954. 83 PERCENT OF THE PEOPLE -- THIS
22 IS FROM DR. VISCUSI -- HAD HEARD OR READ SOMETHING RECENTLY
23 THAT CIGARETTE SMOKING MAY BE THE CAUSE OF CANCER OF THE
24 LUNG. 90 PERCENT BY JUNE 1954. 82 PERCENT HEARD ABOUT THAT
25 ONE STUDY THAT CAME OUT IN 1957. AND YOU SEE THE NUMBERS ARE
26 HIGH THROUGHOUT TIME.

27 ENORMOUSLY HIGH NUMBERS BY POLLING STANDARDS,
28 AS YOU HEARD. EVERYBODY HEARD. EVERYBODY WAS AWARE OF THE

1 PUBLICITY THAT CAME OUT ABOUT THE HEALTH RISKS OF SMOKING.
2 WARNING CAMPAIGNS BEGAN JUST THEN AND THERE,
3 BEFORE WE EVEN GET TO THE 1960' S.

4 TAKE A LOOK AT -- AND LET' S GO TO 11072 -- WHAT
5 THE SURGEON GENERAL SAID IN 1957, THE YEAR THAT MR. BOEKEN
6 BEGAN TO SMOKE (READING):

7
8 "OUR POSITION IS THAT WE HAVE
9 INFORMED THE PUBLIC THROUGH THE EXCELLENT
10 COVERAGE OF THE PRESS, RADIO AND TV, WE HAVE
11 INFORMED THE OFFICIAL HEALTH AGENCIES IN THE
12 STATES WHO ARE RESPONSIBLE FOR THIS AREA, AND
13 WE HAVE INFORMED THE AMERICAN MEDICAL
14 ASSOCIATION, RECOGNIZING THAT MANY PEOPLE
15 WILL GO TO THEIR OWN PHYSICIANS FOR ADVISE. "

16
17 WAY BACK IN 1957.
18 NATIONAL CANCER INSTITUTE, 11073.
19 ALSO, 1957 (READING):

20
21 "NEWSPAPERS, RADIO, TV AND
22 OTHER MEDIA HAVE DONE AN EXCELLENT JOB
23 COVERING THIS PROBLEM AND A VERY OBJECTIVE
24 JOB. THIS IS AN EXCEEDINGLY VALUABLE WAY OF
25 INFORMING THE PUBLIC. "

26
27 1960' S. SURGEON GENERAL' S REPORT.
28 YOU CAN TAKE THAT DOWN, PLEASE.

1 SURGEON GENERAL REPORT COMES OUT. EXTENSIVE
2 MEDIA COVERAGE, WHICH YOU'VE SEEN EXTENSIVELY, AGAIN,
3 UNREPUTED TESTIMONY.

4 BY -- ACTUALLY, LET'S PUT UP 11074.

5 BY 1964, THE AMERICAN MEDICAL ASSOCIATION SAID,
6 YOU DON'T NEED WARNINGS ON CIGARETTE PACKS BECAUSE --
7 STARTING WITH THE SECOND SENTENCE -- (READING):

8
9 "THE HEALTH HAZARDS OF
10 EXCESSIVE SMOKING HAVE BEEN WELL-PUBLISHED
11 FOR MORE THAN TEN YEARS AND ARE COMMON
12 KNOWLEDGE. LABELING WILL NOT ALERT EVEN THE
13 YOUNG CIGARETTE SMOKER TO ANY RISKS OF WHICH
14 HE IS NOT ALREADY AWARE."

15
16 AND AS YOU HEARD DR. HOFFMAN EXPLAIN, THE
17 SURGEON GENERAL'S REPORT STARTED INTENSIVE EFFORTS BY STATE
18 AND LOCAL GOVERNMENTS, PUBLIC HEALTH COMMUNITIES, ALL THE
19 PLAYERS ON THAT CHART TO WARN PEOPLE ABOUT THE RISKS TO
20 ENCOURAGE PEOPLE TO QUIT.

21 LET'S GO TO 11076.

22 BY 1968, DR. DANIEL HORN AT THE NATIONAL
23 CLEARING HOUSE FOR SMOKING AND HEALTH, 1968 (READING):

24
25 "YOU COULD STAND ON A ROOFTOP
26 AND SHOUT 'SMOKING IS DANGEROUS' AT THE TOP
27 OF YOUR LUNGS AND YOU WOULD NOT BE TELLING
28 ANYONE ANYTHING THEY DIDN'T ALREADY KNOW"

1 BY 1968, MR. BOEKEN WAS 24 YEARS OLD. HE HAD
2 ALREADY TRIED TO QUIT SMOKING ONCE. HE HAD ALREADY QUIT
3 SMOKING ONCE WHEN HE MET THE WOMAN WHO HE LIKED WHO WAS
4 AGAINST SMOKING. THIS IS THE STATE OF HOW MUCH INFORMATION
5 THERE WAS OUT THERE EVEN IN 1968.

6 TAKE THAT ONE DOWN, PLEASE.

7 THANKS.

8 OBVIOUSLY, AS THE YEARS MOVED FORWARD, AS YOU
9 HEARD FROM THE TESTIMONY, THERE DIDN'T GET TO BE LESS
10 INFORMATION ABOUT THE HEALTH RISKS THAT WAS OUT THERE. THERE
11 WAS MORE. BY THE 1980'S, REMEMBER, SECRETARY CALFANO
12 DECLARING WAR ON SMOKING, DECLARING WAR ON THE TOBACCO
13 COMPANIES. THE FOCUS SHIFTED, AS YOU MIGHT REMEMBER. STILL
14 AN AWFUL LOT OF INFORMATION ABOUT THE HEALTH RISKS, BUT NOW,
15 THE FOCUS TURNED TO REGULATIONS, SMOKING RESTRICTIONS,
16 ISOLATING SMOKERS, AND YES, DEMONIZING AND VILIFYING THE
17 TOBACCO COMPANIES.

18 ALL OF THIS CONTINUED OVER THE TIME THAT
19 MR. BOEKEN WAS SMOKING AND THE TIME THAT HE SAYS HE DOES NOT
20 RECALL HEARING ANYTHING ABOUT THE HEALTH RISKS.

21 AND YOU'LL REMEMBER -- I'LL TRY TO DO THIS
22 WITHOUT HURTING MY BACK. DR. HOFFMAN WENT BACK TO THE
23 "LOS ANGELES TIMES" WITH HER RESEARCHERS AND LOOKED THROUGH
24 ALL THE "LOS ANGELES TIMES" -- PRETTY BORING PROJECT, BUT A
25 PRETTY IMPORTANT ONE -- ALL THE "LOS ANGELES TIMES" FROM 1950
26 TO 1994, A 44-YEAR PERIOD. , SHE FOUND THAT ONE NEWSPAPER,
27 WHICH WE'VE BEEN USING BY WAY OF EXAMPLE, HAD 2,287 ARTICLES
28 ABOUT THE HEALTH RISKS OF SMOKING.

1 AND MR. BOEKEN SAYS HE DIDN'T SEE IT. DIDN'T
2 SEE ANY OF IT. MR. BOEKEN WAS A BRIGHT GUY. WE KNOW THAT
3 BECAUSE --

4 WOULD YOU TURN THE ELMD ON, PLEASE.

5 WE KNOW THAT BECAUSE HE TELLS US THAT. AND WE
6 HAVE NO REASON TO DISAGREE WITH HIM THIS IS FROM HIS
7 DEPOSITION ON THE 18TH OF DECEMBER. MR. PIUZE ASKING THE
8 QUESTIONS.

9 (READING:)

10
11 "IN THE MID 1970'S, WHY DID
12 YOU GO BACK TO VALLEY COLLEGE FOR A COUPLE OF
13 YEARS?

14 "I WANTED TO FURTHER MY
15 EDUCATION . I'M A BRIGHT PERSON AND I ENJOY
16 LEARNING. "

17
18 BUT HE DIDN'T HEAR ANYTHING ABOUT THE RISKS OF
19 SMOKING.

20 A FEW PAGES LATER IN THE DEPOSITION, WHY DID HE
21 GO INTO BUSINESS?

22 (READING:)

23
24 "PUTTING THE FINANCIAL PART
25 ASIDE -- YOU MENTIONED THE INTELLECTUAL
26 SIDE -- DID YOU GET SATISFACTION,
27 INTELLECTUAL SATISFACTION, FROM WORKING IN
28 BUSINESS?

1 "YES, I HAVE, ALWAYS. I'VE
2 ALWAYS GOTTEN A LOT OF SATISFACTION FROM
3 USING MY MIND."

4
5 AND YOU REMEMBER, THERE WAS A FAIR AMOUNT OF
6 TESTIMONY IN HIS DEPOSITION THAT HE KEPT UP WITH THE NEWS.
7 IN FACT, THE TESTIMONY ABOUT HIM KEEPING UP WITH THE NEWS
8 CAME NOT FOR THE FIRST TIME IN THE CONTEXT OF, DID YOU SEE
9 ALL THIS INFORMATION FROM THE PUBLIC HEALTH COMMUNITY ABOUT
10 THE HEALTH RISKS. IT CAME UP WHEN MR. PIUZE WAS ASKING
11 MR. BOEKEN QUESTIONS ABOUT WHAT HE HEARD FROM THE TOBACCO
12 COMPANIES.

13 IMPORTANT SUBJECT THAT WE'LL COME BACK TO IN A
14 COUPLE OF MINUTES, BUT LOOK AT THIS. PAGE 80 OF THE SAME
15 DAY, MR. PIUZE ASKING THE QUESTIONS (READING):

16
17 " DID YOU GET INFORMATION FROM
18 THE TOBACCO COMPANIES THAT THEY THOUGHT THE
19 SURGEON GENERAL WAS ALL WET, AND THIS WAS NO
20 PROOF WHATSOEVER THAT CIGARETTES CAUSED ANY
21 ILL-EFFECTS TO YOUR HEALTH?

22 "A. YES. YES, I DID.

23 "Q. WHERE DID YOU GET THAT
24 INFORMATION?

25 "A. FROM THE NEWS. I'M A REAL
26 ADVOCATE OF FOLLOWING THE NEWS. THE NATIONAL
27 AND THE INTERNATIONAL NEWS."

28 /

1 NOT TESTIMONY WE ELICITED. WE FOLLOWED UP WHEN
2 WE CROSS-EXAMINED HIM AND WE FOUND OUT WHEN WE
3 CROSS-EXAMINED HIM THAT HE ALWAYS HAD KEPT UP WITH THE NEWS
4 WHEN HE WAS A KID. TALKED ABOUT GOING TO SEE THE NEWS REELS
5 WHEN HE WAS LIVING IN THE VAN. REMEMBER, LIVING IN THE VAN
6 IN THE LATE '60'S, DIDN'T SUBSCRIBE TO THE NEWSPAPER WHEN HE
7 WAS LIVING IN THE VAN, BUT, YEP, I CERTAINLY TRIED TO KEEP UP
8 WITH THE NEWS.

9 WELL, LET'S STOP HERE. DO YOU REALLY
10 BELIEVE -- DO YOU REALLY, REALLY BELIEVE THAT MR. BOEKEN
11 DIDN'T SEE ANYTHING ABOUT THE HEALTH RISKS OF SMOKING IN THE
12 '60'S, THE '70'S OR THE '80'S?

13 DO YOU REALLY THINK HE HAS NO RECOLLECTION OF
14 SEEING ANYTHING ABOUT THE HEALTH RISKS IN THE '60'S, '70'S OR
15 '80'S?

16 DO YOU BELIEVE THAT OF THE -- LET ME ASK YOU
17 ABOUT SOME OF THE OTHER THINGS THAT HE SAID DURING HIS
18 DEPOSITION.

19 MOST OBVIOUS ONE. DO YOU BELIEVE THAT HE
20 DIDN'T THINK SMOKING WAS DANGEROUS UNTIL HIS MOTHER DIED IN
21 1994 WHEN HE WAS 50 YEARS OLD?

22 DO YOU BELIEVE THAT?

23 DO YOU BELIEVE THAT NO DOCTOR EVER TOLD HIM TO
24 QUIT SMOKING?

25 WHICH HE SAYS, IN HIS DEPOSITION, WE KNOW THAT
26 ONE'S NOT TRUE BECAUSE DR. TRABULUS CAME HERE AND TESTIFIED
27 ABOUT THAT.

28 DO YOU BELIEVE THAT HE AND HIS WIFE JUDY, WHO

1 WERE MARRIED FOR 20 YEARS, STILL ARE MARRIED, SHE'S A SMOKER,
2 HE'S A SMOKER, THEY'VE BOTH TRIED TO QUIT SMOKING AT VARIOUS
3 TIMES -- WHEN THEIR SON DILLON WAS BORN IN 1991, SHE
4 INSTITUTED A RULE. REMEMBER SHE TOLD YOU ABOUT THAT?

5 NO SMOKING IN THE HOUSE. NO SMOKING AROUND
6 DILLON. DO YOU REALLY BELIEVE THAT RICHARD AND JUDY BOEKEN
7 IN THOSE 20 YEARS NEVER TALKED ABOUT THE HEALTH RISKS OF
8 SMOKING?

9 BECAUSE THAT'S WHAT THEY BOTH TESTIFIED TO IN
10 THIS CASE. DO YOU BELIEVE THAT IN 1980 WHEN MR. BOEKEN WENT
11 TO HYPNOSIS WITH HIS SISTER, BECAUSE THEY BOTH WANTED TO STOP
12 SMOKING, DO YOU BELIEVE THAT HE AND HIS SISTER NEVER TALKED
13 ABOUT WHY THEY WANTED TO DO IT?

14 THEY NEVER TALKED ABOUT THE HEALTH RISKS OF
15 SMOKING?

16 THAT'S IN HIS TESTIMONY, TOO.

17 I WANT TO SHOW YOU A LITTLE BIT --

18 JUROR: I'M SORRY.

19 MR. LEITER: THAT'S ALL RIGHT. TAKE A SECOND.

20

21 (JUROR COUGHING.)

22

23 MR. LEITER: ALL SET.

24 JUROR: THANK YOU.

25 MR. LEITER: I WANT TO SHOW YOU A LITTLE CLIP, PART OF
26 THE TESTIMONY THAT YOU SAW WHEN IT WAS PLAYED DURING THE
27 TRIAL ABOUT WHAT MR. BOEKEN SAID ABOUT HIS VISIT TO
28 SMOKENDERS IN THE MID 1980'S. ONE OF HIS QUIT ATTEMPTS.

1 (PORTION OF MR. BOEKEN'S VIDEOTAPE
2 DEPOSITION BEING PLAYED.

3

4 MR. LEITER: WENT TO SMOKENDERS BECAUSE HE WANTED TO
5 QUIT SMOKING. DIDN'T KNOW THAT SMOKING WAS DANGEROUS.
6 DIDN'T TALK TO HIS WIFE ABOUT IT. NEVER CAME UP AT
7 SMOKENDERS.

8 ONE OF THE FIRST THINGS I SUGGEST YOU NEED TO
9 DECIDE ABOUT MR. BOEKEN'S TESTIMONY, BEFORE WE EVEN GET TO
10 THE PART ABOUT THE TOBACCO COMPANIES, IS WHETHER YOU BELIEVE
11 THAT HE REALLY, REALLY DIDN'T KNOW THAT SMOKING WAS DANGEROUS
12 UNTIL 1994, WHICH IS WHAT HE SAID.

13 LET'S TURN TO THE OTHER PART OF HIS STORY,
14 WHICH IS THE PART ABOUT NOT ONLY DID I NOT HEAR ANY OF THAT
15 STUFF, BUT I DID HEAR ABOUT THE TOBACCO COMPANIES' POSITION
16 AND PHILIP MORRIS' POSITION, AND I CHOSE TO BELIEVE THAT.

17 WELL, I GUESS BEFORE WE EVEN TALK ABOUT WHAT HE
18 SAW AND WHAT HE BELIEVED, IT'S INTERESTING HOW HE PUTS THE
19 WAY HE APPROACHED THIS ISSUE. HOW HE PUTS WHAT HE WAS
20 LISTENING TO AND WHAT HE WASN'T LISTENING TO.

21 COULD YOU PLAY THE SECOND VIDEOTAPE, PLEASE.

22

23 (PORTION OF MR. BOEKEN'S VIDEOTAPE
24 DEPOSITION BEING PLAYED.)

25

26 MR. LEITER: HEARD THAT THE SURGEON GENERAL WAS TAKING
27 A POSITION. HEARD THAT TOBACCO COMPANIES DIDN'T AGREE. YOU
28 REMEMBER THAT FROM EARLIER TESTIMONY. DIDN'T BOTHER. DIDN'T

1 BOTHER. DIDN' T BOTHER TO FIND OUT WHAT THE SURGEON GENERAL
2 WAS SAYING IN HIS TESTIMONY.

3 YOU MUST REMEMBER, HE DIDN' T BOTHER TO EVEN
4 READ THE WARNINGS ON THE SIDE OF THE CIGARETTE PACKS THAT HAD
5 BEEN THERE FOR 35 YEARS. DIDN' T BOTHER TO EVEN READ THE
6 WARNINGS, HE SAID, UNTIL CHRISTMAS 2000 -- THAT' S HIS
7 TESTIMONY -- AFTER HE HAD FILED HIS LAWSUIT. AFTER HE HAD
8 BEEN SMOKING FOR 35 YEARS, PACKS OF CIGARETTES, EACH AND
9 EVERY ONE OF WHICH HAD A WARNING, HE DIDN' T BOTHER TO READ
10 THE WARNING UNTIL HE HAD SUED PHILIP MORRIS.

11 WHY?

12 WELL, HIS TESTIMONY IS -- THE ANSWER TO THE WHY
13 QUESTION IS, BECAUSE ALL HE HEARD, ALL HE LISTENED TO, ALL HE
14 BELIEVED WAS WHAT PHILIP MORRIS AND THE TOBACCO COMPANIES
15 SAID.

16 WELL, THE FIRST REACTION IS, IT' S JUST NOT A
17 CREDIBLE STATEMENT FOR A LOT OF REASONS. BUT LET' S TALK
18 ABOUT WHY THAT' S NOT A CREDIBLE STATEMENT.

19 THE FIRST IS, WHAT EXACTLY DID HE HEAR FROM THE
20 TOBACCO COMPANIES?

21 YOU FOLKS WHO HAVE BEEN SITTING HERE FOR THE
22 LAST SEVEN WEEKS -- OR IT MIGHT FEEL LIKE 700 WEEKS -- YOU
23 FOLKS WHO HAVE BEEN SITTING HERE HAVE HEARD LOTS OF
24 STATEMENTS MADE BY PHILIP MORRIS AND THE OTHER TOBACCO
25 COMPANIES OVER THE YEARS. BUT WHAT DID MR. BOEKEN HEAR?

26 DO YOU KNOW WHAT HE TOLD US IN HIS DEPOSITION?

27 DOESN' T RECALL A SINGLE SPECIFIC STATEMENT. HE
28 CAN' T PUT HIS FINGER ON ANYTHING HE HEARD FROM THE TOBACCO

1 COMPANIES, EXCEPT FOR TWO THINGS. ONE, IN 1994, THE
2 CONGRESSIONAL TESTIMONY -- AND WE' LL TALK ABOUT THAT. AND
3 TWO, IN 1996, HE HEARD SOMETHING ABOUT ADDITIVES IN
4 CIGARETTES.

5 PRIOR TO THAT, HIS TESTIMONY IS, WELL, I KNEW
6 WHAT THEIR POSITION WAS, AND THAT' S WHAT I HEARD, AND THAT' S
7 WHAT I BELIEVED. BUT HE DOESN' T IDENTIFY WHAT IT IS HE
8 HEARD. SO THAT' S KIND OF A VEHICLE OF INVESTIGATION THAT
9 DOESN' T REALLY TAKE US ANYWHERE. THAT ROAD DOESN' T LEAD
10 ANYWHERE, BECAUSE HE DOESN' T SAY, I HEARD THIS, THAT AND THE
11 OTHER THING. HE SAID, I HEARD STUFF.

12 WELL, THE PLAINTIFF IN THIS CASE, IN THE
13 LAWSUIT, HAS PICKED OUT OF THE MILLIONS AND MILLIONS OF
14 PIECES OF PAPER A FEW OF, I GUESS, CAREFULLY SELECTED
15 FAVORITE STATEMENTS MADE BY PHILIP MORRIS OR PEOPLE AT
16 PHILIP MORRIS OR PEOPLE AT OTHER TOBACCO COMPANIES AND SHOWN
17 THEM TO YOU AGAIN AND AGAIN AND AGAIN.

18 YOU SAW A COUPLE OF PRESS RELEASES FROM THE
19 TOBACCO INSTITUTE. YOU SAW MR. BOWLING AND DR. WAKEHAM ON
20 THAT VIDEOTAPE. YOU' VE SEEN THOSE STATEMENTS NOW THREE,
21 FOUR, FIVE, SIX TIMES. NO EVIDENCE MR. BOEKEN EVER SAW THEM
22 EVEN ONCE. NO EVIDENCE WHATSOEVER.

23 AND IN FACT, NOT ONLY DO YOU NOT HAVE ANY
24 EVIDENCE THAT HE ACTUALLY SAW ANY OF THE THINGS THAT YOU' VE
25 SEEN IN THIS TRIAL. MOST OF THEM, THERE' S NO EVIDENCE THAT
26 THEY WERE EVEN AVAILABLE FOR HIM TO SEE. THE WAKEHAM AND THE
27 BOWLING CLIPS THAT GET PLAYED EVERY DAY, EVERY COUPLE OF DAYS
28 THROUGHOUT THE TRIAL, NO EVIDENCE WHATSOEVER THEY WERE EVER

1 SHOWN PUBLICLY. NO EVIDENCE.

2 THE PRESS RELEASES. YOU SAW A STATEMENT --
3 REMEMBER THEM -- STATEMENTS PREPARED BY THE TOBACCO
4 INSTITUTE; TODAY, WE'RE ISSUING A PRESS RELEASE THAT SAYS,
5 THIS, THAT, OR THE OTHER THING, RIGHT?

6 WHERE'S THE EVIDENCE THAT THOSE WERE PUBLISHED?

7 WHERE IS THE EVIDENCE THAT THOSE STATEMENTS
8 THAT THE PLAINTIFF SO CAREFULLY CHERRY PICKED FOR YOU?

9 THESE ARE THE REALLY BAD ONES, SAYS THE
10 PLAINTIFF. WHERE IS THE EVIDENCE THAT MR. BOEKEN SAW THEM OR
11 THAT THEY WERE EVEN AVAILABLE FOR HIM TO SEE?

12 IN FACT, THE PLAINTIFF SHOWED YOU ALMOST NONE.
13 ALMOST NO ACTUAL PUBLICATIONS IN WHICH STATEMENTS THAT HE
14 SPENT SO MUCH TIME FOCUSING ON ACTUALLY APPEARED.

15 WE, WHEN LOOKING AT THE L. A. TIMES, YOU MIGHT
16 REMEMBER, WE FOUND OVER 44 YEARS A TOTAL OF 41 ARTICLES THAT
17 WERE BASICALLY ABOUT THE TOBACCO COMPANIES' POSITION. ABOUT
18 ONE A YEAR. DON'T KNOW WHAT MR. BOEKEN SAW

19 HE DOESN'T REMEMBER WHAT HE SAW BUT NO
20 EVIDENCE THAT HE SAW THOSE THINGS THAT THE PLAINTIFF HAS BEEN
21 POINTING YOU TO. AND IN FACT, ALL WE DO KNOW, IF WE LOOK AT
22 WHAT THE ENVIRONMENT WAS, WHAT THE VOLUME WAS, 2,287 ARTICLES
23 IN THE NEWSPAPER, BASICALLY, ABOUT THE PUBLIC HEALTH RISKS.
24 41 ARTICLES OVER 44 YEARS -- MOST OF THEM KIND OF BURIED IN
25 THE NEWSPAPER -- ABOUT THE TOBACCO COMPANIES' POSITION.

26 SO BEFORE WE EVEN GET TO WHAT MR. BOEKEN
27 BELIEVED, YOU HAVE TO THINK ABOUT WHAT HE SAW AND NOT JUST
28 WHAT THE ACCUSATIONS ARE. BUT WHAT IS THE EVIDENCE OF WHAT

1 HE SAW BEFORE HE FORMULATED THE OPINION THAT WE'VE HEARD
2 ABOUT SO MANY TIMES IN THE CASE?

3 AND BY THE WAY, REMEMBER, 2,287 VERSUS 41.
4 REMEMBER WHAT MR. BOEKEN SAID, WHETHER HE SAW MORE FROM THE
5 TOBACCO INDUSTRY OR MORE FROM THE PUBLIC HEALTH COMMUNITY?
6 WOULD YOU PLAY THAT NEXT VIDEO CLIP, PLEASE.

7
8 (PORTION OF MR. BOEKEN'S VIDEOTAPE
9 DEPOSITION BEING PLAYED.)

10
11 MR. LEITER: MR. BOEKEN SAYS, HE SAW MORE FROM THE
12 TOBACCO INDUSTRY. WE KNOW THAT JUST IN THE L. A. TIMES -- AND
13 AS DR. HOFFMAN SAID -- THERE'S NO REASON TO BELIEVE ANY OTHER
14 MEDIA WOULD BE DIFFERENT -- THE SCORE IS 2,287 TO 41 OVER 44
15 YEARS.

16 WELL, THAT'S NOT TRUE. SO HERE'S AN EVEN MORE
17 POIGNANT PART ABOUT MR. BOEKEN'S STORY. HE JUST LISTEN TO
18 THE TOBACCO INDUSTRY, DIDN'T KNOW ANYTHING ABOUT THE HEALTH
19 RISKS, DIDN'T KNOW SMOKING WAS HARMFUL IN A SERIOUS WAY UNTIL
20 1994, AND THAT IS, HE REALLY DOES NOT KEEP HIS STORY STRAIGHT
21 IN HIS DEPOSITION.

22 LET'S PLAY THE NEXT CLIP.

23
24 (PORTION OF MR. BOEKEN'S VIDEOTAPE
25 DEPOSITION BEING PLAYED.)

26
27 MR. LEITER: SO DIDN'T HEAR ANYTHING ABOUT THE HEALTH
28 RISKS FROM ANYBODY OTHER THAN THE TOBACCO COMPANIES. PUT ALL

1 OF THAT STUFF ASIDE. TRUSTED BIG CORPORATIONS. HAD A
2 NAIVETE ABOUT HIM BELIEVED THE TOBACCO INDUSTRY. BUT ONLY
3 WHEN THEY WERE TALKING ABOUT HEALTH RISKS, NOT ON
4 ADDICTIVENESS. BECAUSE HE KNEW HE WAS ADDICTED. BUT HIS
5 TESTIMONY IS, DIDN'T KNOW ABOUT THE HEALTH RISKS, BELIEVED
6 THE TOBACCO INDUSTRY.

7 WHICH BRINGS US TO THE 1994 TESTIMONY BEFORE
8 CONGRESSMAN WAXMAN, WHICH YOU'VE SEEN -- I'VE LOST TRACK --
9 FIVE, SIX, SEVEN, EIGHT, TEN TIMES DURING THE COURSE OF THE
10 TESTIMONY. REMEMBER, IT'S NOW 1994. MR. BOEKEN IS 50 YEARS
11 OLD, AND HE DOES RECALL HEARING THIS TESTIMONY. AND YOU'VE
12 HEARD THIS BEFORE.

13 LET'S TAKE A LOOK WHAT HE SAYS ABOUT HIS
14 REACTION TO THAT TESTIMONY.

15
16 (PORTION OF MR. BOEKEN'S VIDEOTAPE
17 DEPOSITION BEING PLAYED.)

18
19 MR. LEITER: BEFORE THE BREAK, IN THE LAST CLIP, WHICH
20 WAS, BY THE WAY, THE SAME DAY OF THE DEPOSITION QUESTIONING
21 BY MR. PIUZE, HE BELIEVED THE TOBACCO COMPANIES, HE SAYS,
22 WHEN THEY WERE TALKING ABOUT HEALTH RISKS. HE DID NOT
23 BELIEVE THEM ABOUT ADDICTIVENESS.

24 NOW, WE GET TO 1994., THE CEO'S TESTIMONY.
25 DIDN'T BELIEVE HIM ABOUT ANYTHING. THEN A BREAK WAS TAKEN.

26 LET'S LOOK AT THE CLIP AFTER THE BREAK.

27 (PORTION OF MR. BOEKEN'S VIDEOTAPE
28 DEPOSITION BEING PLAYED.)

1 MR. LEITER: WAY BACK IN THE BEGINNING OF THE CASE IN
2 THE OPENING STATEMENT, AT THE VERY END OF MY OPENING
3 STATEMENT, I SUGGESTED TO YOU THAT I WAS GOING TO COME BACK
4 IN CLOSING ARGUMENT AND ASK YOU, WHEN YOU EVALUATE THE
5 EVIDENCE, TO EVALUATE IT USING YOUR GOOD COMMON SENSE.

6 WHAT DOES YOUR GOOD COMMON SENSE TELL YOU ABOUT
7 THIS TESTIMONY?

8 ABOUT A MAN WHO LIVED -- AND I'M SORRY I
9 KNOCKED MY CHART DOWN, SO IT'S A LITTLE BIT HARD TO READ.

10 A MAN WHO LIVED IN THE WORLD LIKE THE REST OF
11 US, FILLED WITH INFORMATION ABOUT THE HEALTH RISKS, SAYS HE
12 PUT IT ALL ASIDE, LISTENED ONLY TO THE TOBACCO COMPANIES.

13 NO EVIDENCE IN THE CASE OF WHAT HE SAW NO
14 EVIDENCE HE SAW THE THINGS YOU SAW DOESN'T REALLY EVEN HAVE
15 THE STORY STRAIGHT WHEN HE'S QUESTIONED ABOUT IT. BY THE
16 WAY, NONE OF THESE QUESTIONS WERE EVEN CROSS-EXAMINATION.
17 THESE WERE QUESTIONS BY MR. PIUZE.

18 CREDIBILITY IS AN IMPORTANT PART OF YOUR
19 EVALUATION OF THE EVIDENCE. AND FLAT OUT, YOU HAVE TO DECIDE
20 IF YOU BELIEVE HIS TESTIMONY.

21 NOW, WHY DID MR. BOEKEN SMOKE?

22 DID MR. BOEKEN REALLY SMOKE BECAUSE HE DIDN'T
23 THINK IT WAS DANGEROUS FOR HIM?

24 BECAUSE THAT'S THE TESTIMONY THAT YOU'VE HEARD,
25 AND THAT'S THE ARGUMENT BY THE PLAINTIFF. HE SMOKED ALL
26 THOSE YEARS, AND HE CONTINUED TO SMOKE BECAUSE HE BELIEVED
27 THE TOBACCO COMPANIES, AND HE DIDN'T HEAR ANYTHING ABOUT THE
28 HEALTH RISKS.

1 WELL, IF IT'S OUR POSITION, AND IT IS, THAT
2 THAT TESTIMONY IS NOT CREDIBLE, THAT THAT'S NOT WHAT
3 MR. BOEKEN SMOKED, THEN WHY DID HE SMOKE?

4 I THINK THE ANSWER TO THAT QUESTION LIES IN THE
5 TESTIMONY AND THE STORY YOU'VE HEARD FROM MR. BOEKEN HIMSELF.
6 MR. BOEKEN IS A MAN WHO DID RISKY THINGS.

7 HE TOOK HEROIN. NOT BECAUSE HE DID NOT KNOW IT
8 WAS DANGEROUS. BUT BECAUSE THAT'S WHAT HE WANTED TO DO. GOT
9 HOOKED UP IN SAN FRANCISCO WITH FRIENDS. REMEMBER THAT?

10 ACTUALLY, NOT EVEN FRIENDS, ACQUAINTANCES WHO
11 WERE USING HEROIN. HE KNEW IT WAS BAD. HE DIDN'T KNOW WHERE
12 THE HEROIN WAS COMING FROM INJECTED IT INTO HIS VEINS.

13 NOW, I TELL YOU THIS NOT TO CAST ANY ASPERSIONS
14 ON MR. BOEKEN OR TO TELL YOU THAT HE'S A BAD MAN IN ANY WAY
15 BECAUSE HE TOOK HEROIN. THAT'S NOT WHAT I'M SUGGESTING TO
16 YOU AT ALL.

17 WHAT I'M SUGGESTING IS MUCH MORE SIMPLE. HE'S
18 A GUY WHO TOOK RISKS. HE'S A GUY WHO RODE MOTORCYCLES. HE'S
19 A GUY WHO, EVEN IN HIS PROFESSIONAL CAREER, SELLS HIGH-RISK
20 SECURITIES. YOU HEARD THAT FROM MR. MENDEZ. IN FACT, THE
21 HIGH-RISK SECURITIES AT ONE POINT DIDN'T PAN OUT AND
22 MR. BOEKEN DECLARED BANKRUPTCY.

23 ONE OF THE BASIC UNDERLYING PROBLEMS WITH THE
24 PLAINTIFF'S THEORY OF THE CASE IS THE SUGGESTION -- AND YOU
25 HEARD FROM IT MR. PIUZE OVER AND OVER AGAIN IN HIS CLOSING
26 ARGUMENT -- THAT THE ONLY PEOPLE WHO SMOKE ARE THE PEOPLE WHO
27 HAVE BEEN TRICKED. THE PEOPLE WHO HAVE BEEN DECEIVED.

28 NO EVIDENCE OF THAT. SMOKING IS A RISKY

1 ENDEAVOR. CIGARETTES ARE A RISKY PRODUCT. PEOPLE TAKE RISK.
2 AND THAT'S PART OF THE CHOICE THAT OUR SOCIETY HAS MADE ABOUT
3 SMOKING. TELL THEM ABOUT IT. TRY TO GET THEM TO STOP.
4 DISCOURAGE THEM FROM USING IT. REGULATE WHERE THEY CAN USE
5 IT. BUT IF PEOPLE WANT TO TAKE THE RISK, IT'S A FREE
6 SOCIETY, AND THEY'RE ALLOWED TO DO THAT.

7 IS MR. BOEKEN AT THE END OF THE DAY REALLY ANY
8 DIFFERENT?

9 I THINK THE ANSWER IS NO.

10 NOW, I WANT TO RAISE JUST ONE OTHER POINT ABOUT
11 MR. BOEKEN IN HIS TESTIMONY AND THEN IT MAY BE TIME, I'D
12 SUGGEST, TO TAKE A BREAK --

13 THE COURT: YES, SIR.

14 MR. LEITER: -- AND THAT IS THIS.

15 DURING THE COURSE TRIAL, YOU HEARD FROM
16 PLAINTIFF, SUGGESTIONS THAT EVEN FROM THE PLAINTIFF'S SIDE,
17 THERE'S SOMETHING ABOUT MR. BOEKEN'S STORY THAT YOU JUST
18 CAN'T ACCEPT ON ITS FACE. THAT THERE'S GOT TO BE SOME OTHER
19 EXPLANATION FOR IT. AND YOU HEARD SUGGESTIONS FOR A COUPLE
20 OF EXPLANATIONS.

21 ONE IS THAT WHEN HE GAVE HIS DEPOSITION, IT WAS
22 IN THE MIDDLE OF HIS TREATMENT. HE WAS UNDERGOING CHEM AND
23 RADIATION. REMEMBER THAT?

24 AND SO MAYBE HE WASN'T ALL THAT CLEAR. MAYBE
25 HE WAS KIND OF FOGGY ON THE DETAILS. AND MAYBE YOU SHOULD
26 TAKE WITH A GRAIN OF SALT SOME OF THE THINGS HE SAID,
27 PARTICULARLY WHEN HE WAS BEING CROSS-EXAMINED BY MR. CARLTON.

28 I'M NOT GOING TO ARGUE AT GREAT LENGTH ABOUT

1 WHAT YOUR PRESUMPTIONS OF THAT TESTIMONY OUGHT TO BE. YOU
2 SAW DAYS OF THE TAPE. YOU SAW HOURS. WE ALL SAT HERE -- IT
3 MUST HAVE BEEN FOR TWO FULL DAYS, I THINK -- WATCHING
4 VIDEOTAPE OF MR. BOEKEN'S DEPOSITION. CERTAINLY, HIS
5 APPEARANCE CHANGED DURING THE COURSE OF THE DEPOSITION. HE
6 LOST HIS HAIR.

7 BUT YOU HAVE TO -- AND CERTAINLY, BY THE WAY,
8 HIS WAY OF ANSWERING QUESTIONS CHANGED. HE WAS CERTAINLY
9 MUCH MORE CHEERFUL AND FORTHCOMING WHEN MR. PIUZE WAS ASKING
10 HIM QUESTIONS THAN WHEN MR. CARLTON WAS ASKING HIM QUESTIONS.

11 BUT THE STORY DIDN'T CHANGE MUCH. THE
12 TESTIMONY DIDN'T CHANGE. IT WAS CONSISTENT FOR DAYS AND DAYS
13 AND DAYS.

14 AND BY THE WAY, IT'S NOT JUST WHAT IMPRESSIONS
15 YOU HAVE FROM THE TESTIMONY. DR. SARNA TESTIFIED IN THIS
16 CASE. REMEMBER, HE'S THE TREATING ONCOLOGIST. AND SAID,
17 YEAH, THE TREATMENT CAN HAVE SOME MINOR AFFECT ON HIS ABILITY
18 TO FOCUS, BUT NOTHING THAT WOULD PREVENT HIM FROM RECALLING
19 THINGS IN THE PAST. NOTHING THAT WOULD SUPPORT THE KIND OF
20 SUGGESTION THAT YOU GET FROM THE PLAINTIFF'S COUNSEL THAT YOU
21 CAN'T REALLY BELIEVE ALL OF WHAT HE SAID.

22 AND FINALLY, I WOULD SUGGEST THAT YOU JUST
23 SHOULD BE VERY SKEPTICAL WHEN YOU GET AN ARGUMENT FROM A
24 LAWYER THAT SAYS YOU SHOULD BELIEVE THE PARTS OF THE
25 TESTIMONY THAT ARE ADVANTAGEOUS TO OUR SIDE OF THE CASE. BUT
26 MAYBE HE WASN'T ALL THAT CLEAR WHEN THERE WAS TESTIMONY THAT
27 NOW DOESN'T LOOK SO ADVANTAGEOUS TO OUR SIDE OF THE CASE.

28 I THINK YOU JUST OUGHT TO BE SKEPTICAL OF THAT

1 KIND OF AN ARGUMENT. YOU HEARD A NEW ONE TODAY. YOU HEARD A
2 NEW ONE IN THE CLOSING ARGUMENT OF THE PLAINTIFF THAT, WELL,
3 MAYBE WHEN YOU WERE LOOKING AT THAT JURY INSTRUCTION ABOUT
4 SUBSTANTIAL FACTOR, MAYBE MR. BOEKEN HAD SOME SORT OF
5 CONTRIBUTION BECAUSE MAYBE HE BELIEVED WHAT THE TOBACCO
6 INDUSTRY SAID, BUT HE SHOULDN'T HAVE. SO MAYBE WE HAVE TO
7 TEMPER WHAT HE SAID A LITTLE BIT. AND THEN YOU'VE GOT A
8 DISCUSSION ABOUT LAW AND ABOUT HOW THERE COULD BE TWO CAUSES
9 THAT LEAD TO AN INJURY.

10 I WANT TO BE VERY CLEAR ABOUT WHAT WE THINK THE
11 FACTS ARE IN THIS CASE. WE ARE NOT SUGGESTING TO YOU THAT HE
12 BELIEVED, BUT HE SHOULDN'T HAVE. WE ARE SUGGESTING TO YOU
13 SOMETHING MUCH MORE SIMPLE. THAT WHEN HE SAYS HE IGNORED
14 EVERYTHING ELSE AND HE LISTENED ONLY AND BELIEVED ONLY
15 PHILIP MORRIS AND THE TOBACCO COMPANIES, THAT'S JUST NOT
16 CREDIBLE ON ITS FACE. IT'S NOT A QUESTION OF TWO COMPETING
17 CAUSES. IT'S SIMPLY -- IT'S NOT BELIEVABLE TESTIMONY. AND
18 IT'S REALLY THAT SIMPLE.

19 ONE FINAL POINT, WHICH YOU HEARD FROM THE
20 PLAINTIFF, TO KIND OF EXPLAIN HOW MR. BOEKEN COULD BE TELLING
21 THE STORY THAT HE PUT ASIDE EVERYTHING ELSE, DIDN'T HEAR
22 ANYTHING ELSE AND LISTENED ONLY TO THE TOBACCO COMPANY'S
23 STORY. AND THAT WAS DR. BENOwitz TALKING ABOUT
24 RATIONALIZATION AND DENIAL. REMEMBER THAT TESTIMONY?

25 WELL, SMOKERS RATIONALIZE, SAID DR. BENOwitz.
26 SMOKERS DENY HEALTH RISKS. AND MAYBE THAT'S WHAT'S GOING ON

27 .

28 NOW, REMEMBER, DR. BENOwitz NEVER EXAMINED THE

1 PLAINTIFF. DR. BENO WITZ WASN'T REALLY OFFERING YOU AN
2 OPINION ABOUT MR. BOEKEN IN PARTICULAR. HE WAS JUST
3 GENERALLY OFFERING THE THEORY THAT MAYBE SMOKERS
4 UNDERESTIMATE THE RISKS.

5 BY THE WAY, DR. VISCUSI HAD SOMETHING JUST THE
6 OPPOSITE TO SAY. BUT MAYBE SMOKERS UNDERESTIMATE THE RISK,
7 RIGHT?

8 OR MAYBE SMOKERS THINK, I CAN QUIT LATER ON.
9 OR MAYBE SMOKERS THINK, IT WON'T HAPPEN TO ME. AND THOSE ARE
10 DR. BENO WITZ' THEORIES OF RATIONALIZATION AND DENIAL, AND
11 THEY'RE VERY INTERESTING THEORIES.

12 THE PROBLEM WITH THEM IS, NONE OF THEM APPLIES
13 TO THE STORY MR. BOEKEN TOLD IN THIS CASE. MR. BOEKEN IS NOT
14 SOMEBODY WHO SAYS, I UNDERSTOOD THE HEALTH RISKS, BUT I
15 DIDN'T THINK IT WOULD HAPPEN TO ME. I UNDERSTOOD THE HEALTH
16 RISKS, BUT I THOUGHT I COULD QUIT. I UNDERSTAND THERE ARE
17 HEALTH RISKS, BUT THEY'RE NOT QUITE AS BAD.

18 MR. BOEKEN IS SOMEBODY WHO SAYS, I HAD NO IDEA
19 THERE WERE HEALTH RISKS OF ANY KIND OF A SERIOUS NATURE UNTIL
20 I WAS 50 YEARS OLD IN 1994.

21 SO DR. BENO WITZ' THEORY DOESN'T HELP EITHER.

22 AT THE END OF THE DAY, I WANT TO SUGGEST TO YOU
23 THE MOST BASIC COMMON SENSE EXPLANATION OF ALL. MR. BOEKEN
24 DID NOT SMOKE BECAUSE HE LISTENED ONLY TO THE TOBACCO
25 COMPANIES. HE DIDN'T. HE MADE A CHOICE TO SMOKE, PERIOD.

26 YOUR HONOR, IT MIGHT BE TIME TO TAKE A BREAK.

27 THE COURT: VERY WELL.

28 LADIES AND GENTLEMEN, WE'LL BE BACK HEAR AT

1 FIVE MINUTES PAST 3:00.

2 DON' T DISCUSS THE CASE WITH ANYONE.

3

4 (RECESS.)

5

6 THE COURT: OUR JURY PANEL IS PRESENT WITH US; COUNSEL
7 ARE PRESENT AS WELL.

8 MR. LEITER.

9 MR. LEITER: THANK YOU, YOUR HONOR.

10 THE COURT: PROCEED, SIR.

11 MR. LEITER: OKAY. LAST TIME SEGMENT OF THE WEEK.
12 FRIDAY AFTERNOON. AND YOU' RE DONE UNTIL THE WEEKEND. AND
13 I' M GOING TO TRY TO FINISH UP ON MONDAY MORNING AS QUICKLY AS
14 I CAN, BECAUSE I KNOW WE' RE GETTING VERY CLOSE TO A POINT OF
15 SENDING YOU OFF TO DELIBERATE, DECIDE THE FACTS, APPLY THE
16 LAW TO THE FACTS AND DECIDE THE CASE.

17 JUST BEFORE THE BREAK, WE WERE TALKING ABOUT
18 DR. BENOVMITZ' THEORIES. AND I MENTIONED HOW NONE OF THAT
19 REALLY APPLIED TO MR. BOEKEN IN ANY WAY. BUT I WANTED TO
20 MAKE ONE OTHER POINT ABOUT THEM BEFORE WE MOVE ON. AND THAT
21 IS THAT THERE IS CONFLICTING TESTIMONY ABOUT WHETHER THOSE
22 THEORIES -- THEORY OF RATIONALIZATION OR DENIAL OR IT WON' T
23 HAPPEN TO ME ARE REALLY PROVED OR NOT.

24 WOULD YOU PLEASE PUT UP 11087.

25 DR. VISCUSI TALKED ABOUT THIS. AND THIS IS A
26 STUDY, NOT BY DR. VISCUSI, BUT BY -- IF YOU CAN SEE -- IF YOU
27 CAN READ VERY CAREFULLY AT THE BOTTOM OF THAT CHART --
28 DR. JENKS IN "THE JOURNAL OF SOCIOLOGY. "

1 (READING:)

2
3 "CONTRARY TO EXPECTATIONS,
4 SMOKERS WERE MORE, NOT LESS, LIKELY TO FEEL
5 THAT SMOKING IS ADDICTIVE, BOTH PHYSICALLY
6 AND PSYCHOLOGICALLY, AND THAT IT COULD LEAD
7 TO MAJOR HEALTH PROBLEMS. THESE SMOKERS
8 SEEMED TO RELIEVE ANY DISSONANCE" -- THAT'S
9 DENIAL OR RATIONALIZATION -- "CONCERNING
10 THEIR SMOKING BY SAYING THAT SMOKING IS
11 ADDICTIVE, BOTH PHYSICALLY AND
12 PSYCHOLOGICALLY, RATHER THAN DENYING THE
13 HEALTH HAZARDS. QUITE POSSIBLY, THE
14 INFORMATION BOMBARDMENT BY THE MEDIA HAS
15 BECOME SO STRONG THAT IT IS NOW IMPOSSIBLE TO
16 AVOID THE INFORMATION OR DENY THE HEALTH
17 COSTS OF SMOKING."

18
19 AND YOU MIGHT REMEMBER DR. VISCUSI TESTIFYING
20 THAT DR. JENKS ACTUALLY WAS THINKING HE WAS GOING TO FIND THE
21 OPPOSITE WHEN HE DID THAT STUDY, BUT THAT'S WHAT HE FOUND.
22 SO SMOKERS, EVEN SMOKERS WHO RATIONALIZE, ARE NOT DENYING THE
23 RISKS. ARE NOT DENYING THAT SMOKING IS DANGEROUS. JUST THE
24 OPPOSITE OF MR. BOEKEN'S STORY.

25 TAKE A LOOK AT 11088, PLEASE.

26 AGAIN, THIS IS POLLING DATA FROM DR. VISCUSI
27 ASKING JUST SMOKERS, IS SMOKING HARMFUL TO YOUR HEALTH.
28 VERY, VERY, VERY HIGH NUMBERS.

1 NOW, WE CAN TAKE THAT DOWN, PLEASE.

2 I WANT TO SWITCH GEARS A LITTLE BIT. I WANT TO
3 TALK ABOUT QUITTING. IF MR. BOEKEN'S STORY ABOUT WHAT HE
4 KNEW ABOUT THE HEALTH RISKS AND WHERE HE GOT HIS INFORMATION
5 FROM IS NOT A STORY THAT YOU CAN CREDIT -- AND WITH ALL
6 RESPECT, I DON'T THINK IT IS -- WHAT ABOUT HIS TESTIMONY THAT
7 HE COULDN'T QUIT?

8 HE COULDN'T QUIT. OR HE DIDN'T QUIT BECAUSE HE
9 DIDN'T TRY REALLY, REALLY, REALLY, REALLY HARD ENOUGH.

10 LET'S PUT UP 11008, PLEASE.

11 AND THIS CAME FROM DR. BOEKEN'S TESTIMONY.
12 REMEMBER, DR. BECKSON IS THE PSYCHIATRIST WHO ACTUALLY
13 EXAMINED MR. BOEKEN. ACTUALLY MET HIM FOR A COUPLE HOURS,
14 TALKED WITH HIM CONDUCTED A PSYCHOLOGICAL EXAMINATION.
15 ADMINISTERED ONE OF THOSE STANDARDIZED TESTS TO MR. BOEKEN.
16 AND CAME HERE AND TESTIFIED ABOUT MR. BOEKEN AND WHETHER HE
17 WAS CAPABLE OF UNDERSTANDING THE RISKS. AND HE WAS, IN
18 DR. BECKSON'S VIEW, CAPABLE OF QUITTING.

19 BUT HERE ARE ALL OF THE QUIT ATTEMPTS FROM THE
20 PLAINTIFF THAT WE HEARD ABOUT. 1967. THAT'S WHEN HE QUIT
21 SMOKING FOR THREE OR FOUR WEEKS BECAUSE OF THE GIRLFRIEND.

22 '74 AND '76. I DON'T THINK THERE WAS ANY
23 TESTIMONY ABOUT HOW LONG HE QUIT FOR AT THAT POINT, BUT,
24 AGAIN, YOUR RECOLLECTION CONTROLS.

25 1980 WAS WHEN HE AND HIS SISTER WENT TO
26 HYPNOSIS, AND MR. BOEKEN QUIT FOR FIVE WEEKS.

27 AND THEN ALL OF THE OTHERS WERE ESSENTIALLY
28 EFFORTS TO QUIT, WHICH DIDN'T REALLY GO ANYWHERE, DID NOT

1 STOP SMOKING. YOU' LL REMEMBER, AND SMOKENDERS, DIDN' T STOP
2 SMOKING IN SMOKERS ANONYMOUS, GOT A PRESCRIPTION -- THIS IS
3 IN THE LATE 80' S FOR THE PATCH AND THE GUM THOSE ARE THE
4 DAYS WHEN YOU NEEDED A PRESCRIPTION. GOT THOSE FROM
5 DR. TRABULUS. NEVER USED THEM UP. NEVER WENT BACK. NEVER
6 ASKED FOR ADDITIONAL HELP. CLEARLY, MR. BOEKEN THOUGHT ABOUT
7 QUITTING.

8 AND A PERFECTLY LOGICAL VIEW WAS HE THOUGHT
9 ABOUT QUITTING ALL OF THOSE TIMES BECAUSE HE KNEW SMOKING WAS
10 DANGEROUS, NOT BECAUSE HE WANTED TO BE A RUNNER. HE
11 CERTAINLY THOUGHT ABOUT QUITTING. HE CERTAINLY TRIED TO
12 QUIT. DIDN' T SUCCEED.

13 NOW, DID HE NOT SUCCEED BECAUSE THERE WAS
14 SOMETHING ABOUT HIM OR SOMETHING ABOUT HIS ADDICTION THAT
15 MADE IT IMPOSSIBLE FOR HIM TO QUIT?

16 IS THERE SOMETHING ABOUT HIM THAT HE WASN' T
17 CAPABLE OF QUITTING?

18 DR. BECKSON' S OPINION IS PRETTY MUCH EVERYBODY
19 WHO REALLY PUTS HIS MIND TO IT AND CAN THINK CAN QUIT. AND
20 WE KNOW -- WE KNOW FROM MR. BOEKEN' S OWN HISTORY THAT HE CAN
21 QUIT ADDICTIVE SUBSTANCES.

22 NOW, I DON' T WANT TO GET INTO A LONG DEBATE
23 OVER WHETHER HEROIN IS MORE ADDICTIVE THAN NICOTINE OR
24 COCAINE IS LESS ADDICTIVE THAN THIS OR THAT. I' M NOT SURE
25 THAT THAT' S A FRUITFUL EXERCISE. I THINK WE' VE PUT ON
26 EVIDENCE ON THE POINT, AND I THINK WE CAN ALL AGREE THAT
27 NICOTINE' S ADDICTIVE, HEROIN IS ADDICTIVE, OTHER SUBSTANCES
28 ARE ADDICTIVE. AND I' M NOT SURE GRADING THEM IS GOING TO

1 HELP YOU VERY MUCH IN DECIDING THE CASE.

2 BUT MR. BOEKEN WAS ABLE TO QUIT HEROIN. IT WAS
3 HARD, HARD WORK FOR HIM AND YOU REMEMBER THE TESTIMONY
4 ABOUT HOW, WHEN HE DECIDED HE WANTED TO QUIT, HE LIED TO GET
5 HIMSELF INTO THE PROGRAM BECAUSE HE HAD DECIDED THAT QUITTING
6 HEROIN WAS IMPORTANT TO HIM AND GOOD FOR HIM

7 IT TOOK HIM SIX MONTHS TO STABILIZE HIS
8 METHADONE DOSE. WHEN HIS METHADONE WOULD WEAR OFF TOO EARLY,
9 HE WOULD GO INTO CRAVINGS. HE WOULD FEEL AWFUL. HE WOULD
10 WANT THE HEROIN. AND I BELIEVE HE TESTIFIED THERE WERE A
11 COUPLE OF TIMES THAT HE GAVE IN. IT WAS HARD WORK, AND HE
12 STUCK TO IT. HE CAME BACK FROM SAN FRANCISCO. IT WAS THE
13 END OF HIS HIPPIE DAYS, THE END OF HIS LIVING IN THE VAN
14 DAYS, THE END OF HIS TAKING HARD DRUGS DAYS.

15 CAME BACK TO LOS ANGELES. WENT OVER TO THE
16 V. A. THREE AND A HALF YEARS ON METHADONE. I THINK IT'S FAIR
17 TO SAY THAT FOR MR. BOEKEN QUITTING ADDICTIONS WAS HARD WORK,
18 AND HE KNEW IT WAS HARD WORK, BUT WHEN IT WAS IMPORTANT TO
19 HIM, HE DID IT.

20 SAME STORY WITH ALCOHOL. I DON'T REMEMBER
21 WHETHER HE WAS A DAILY DRINKER OR WHATEVER IT WAS, HOW OFTEN
22 HE DRANK. BUT CLEARLY, IN HIS OWN MIND, WE KNOW, HE KNEW HE
23 HAD A DRINKING PROBLEM HE KNEW IT WAS TIME TO QUIT. GOT
24 HIMSELF INTO ALCOHOLICS ANONYMOUS. BEEN DOING THIS FOR 25
25 YEARS.

26 AT THE BEGINNING, WENT TO AA MEETINGS TWO,
27 THREE TIMES A DAY. HAD A SPONSOR. READ THE PROGRAM, THE
28 TWELVE-STEP PROGRAM FOLLOWED IT. SPONSORS OTHER PEOPLE.

1 BEEN ACTIVELY INVOLVED IN ALCOHOLICS ANONYMUS FOR 25 YEARS.
2 HARD WORK. AND AS YOU CAN TELL FROM
3 MR. BOEKEN'S SUCCESS -- AND GOOD FOR HIM THAT HE
4 SUCCEEDED -- HE RECOGNIZED THAT FOR HIM AT LAST TO STAY OFF
5 OF ONE OF THESE SUBSTANCES WAS A CONSTANT ACTIVITY. IT WAS
6 SOMETHING HE HAD TO PAY ATTENTION TO. IT WAS SOMETHING HE
7 HAD TO WORK HARD ON.

8 DO YOU SEE ANY OF THAT EFFORT WITH THE SMOKING
9 QUIT ATTEMPTS?

10 DO YOU SEE ANY OF THAT SUSTAINED EFFORT?

11 AS DR. BECKSON SAID, THE LIFESTYLE CHANGES THAT
12 ARE NECESSARY SO THAT IF YOU ASSOCIATE SMOKING WITH SOMETHING
13 PLEASURABLE OR STRESS OR WHATEVER -- THE LIFESTYLE CHANGES
14 TODAY, I'M NOT GOING TO SMOKE. MR. BOEKEN WAS CAPABLE OF
15 QUITTING. QUIT IN 1967. QUIT IN 1980. AND SADLY, AFTER HE
16 WAS DIAGNOSED WITH CANCER AND IT BECAME A MATTER OF LIFE AND
17 DEATH, AN IMMEDIATE MATTER OF LIFE AND DEATH, HE STOPPED, AND
18 HE STOPPED FOR MANY MONTHS. MR. BOEKEN WAS CAPABLE OF
19 QUITTING CIGARETTES.

20 WHY DIDN'T HE?

21 WHY DIDN'T HE?

22 WELL, IT'S INTERESTING. GO BACK TO HIS
23 DEPOSITION TESTIMONY AND YOU ASK HIM AND YOU LOOK AT THE
24 TESTIMONY ABOUT WHY HE QUIT HEROIN, WHY HE QUIT ALCOHOL. AND
25 I THINK WE EVEN ASKED ABOUT MARIJUANA, WHICH HE HAD TRIED FOR
26 A LITTLE WHILE IN THE LATE '60'S.

27 WHY DID YOU QUIT THOSE?

28 WHY?

1 BECAUSE HE WAS READY. HE QUIT THOSE SUBSTANCES
2 WHEN HE WAS READY TO QUIT, NOT BECAUSE HE HAD A SUDDEN
3 REVELATION THAT THEY WERE DANGEROUS. CERTAINLY, HE KNEW --
4 HAD TO KNOW HEROIN WAS DANGEROUS BEFORE HE STARTED IT IN THE
5 FIRST PLACE.

6 LET'S TAKE A LOOK. I JUST WANT TO TAKE A
7 MINUTE AND SHOW YOU -- THIS IS PART OF OUR CROSS-EXAMINATION
8 OF MR. BOEKEN -- WHY HE CHOSE TO QUIT THOSE OTHER SUBSTANCES.

9 (READING:)

10

11 "DID YOU FIND IT DIFFICULT TO
12 STOP DRINKING?"

13 "NOT WHEN I WAS READY.

14 "WHEN DID THAT POINT COME?"

15 "1976.

16 "SO MAYBE A YEAR AFTER YOU
17 FIRST MET WITH MR. FELCHER?"

18

19 I BELIEVE MR. FLECHER WAS THE PERSON WHO GOT
20 HIM INTO ALCOHOLICS ANONYMUS.

21

22 (READING:)

23 "ABOUT NINE MONTHS.

24 "NINE MONTHS?"

25 "IS IT CORRECT, THEN, THAT YOU
26 DID FIND IT DIFFICULT DURING THAT FIRST NINE
27 MONTHS?"

28

"I WASN'T READY.

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"MARIJUANA.

"WHY DID YOU SMOKE IT?

"WHAT DID YOU WANT TO GET OUT
OF IT?

"IT WAS AN INTOXICANT. IT WAS
PART OF THE CULTURE.

"HOW DID YOU STOP?

"I JUST STOPPED.

"WHEN WAS THAT?

"PROBABLY BY 1970.

"WAS THERE SOMETHING IN
PARTICULAR THAT CAUSED YOU TO DECIDE TO STOP
SMOKING MARIJUANA?

"YES.

"WHAT WAS THAT?

"IT MADE ME SLEEPY, HUNGRY AND
TIRED. "

INTERFERED WITH HIS LIFE. DIDN'T LIKE WHAT IT
WAS DOING TO HIM HE WAS READY.

(READING:)

"HEROIN.

" WHAT WAS IT THAT CAUSED YOU
TO DECIDE YOU DIDN'T WANT TO USE IT ANYMORE?"

I HIGHLIGHTED "HEROIN" IN THE QUESTION ABOVE SO
YOU CAN SEE THAT'S WHAT WE WERE TALKING ABOUT.

1 (READING:)

2
3 "I DIDN'T LIKE THE ATMOSPHERE
4 THAT SURROUNDED IT. I DIDN'T LIKE THE
5 DEPENDENCY ON IT. I DIDN'T LIKE THE
6 INDIVIDUALS ASSOCIATED WITH IT."

7
8 THAT WAS HEROIN. WHY, WE ASKED MR. BECKSON
9 WHEN HE CAME IN TO TESTIFY, DIDN'T MR. BOEKEN QUIT SMOKING.
10 PUT UP 11110, PLEASE.

11 DR. BECKSON'S TESTIMONY AFTER EXAMINING
12 MR. BOEKEN, READING INFORMATION ABOUT HIM AND CONDUCTING
13 STANDARDIZED TESTS, IT WAS CLEAR, SAID MR. BECKSON, THAT HE
14 ENJOYED SMOKING. HE WAS NEVER READY TO QUIT. HE NEVER MADE
15 THE DECISION TO QUIT. HE NEVER FOLLOWED THROUGH.

16 BECAUSE HE DID NOT KNOW ABOUT THE RISKS OR WAS
17 HE NOT CAPABLE OF KNOWING ABOUT THE RISKS?

18 NO. SMOKING AT THE TIME DIDN'T INTERFERE WITH
19 HIS LIFE THE WAY THE OTHER SUBSTANCES DID. THE RISKS OF
20 SMOKING, AS WE ALL KNOW, ARE NOT IMMEDIATE RISKS. THE RISK'S
21 IN THE FUTURE. MR. BOEKEN DIDN'T STOP SMOKING BECAUSE HE
22 WASN'T READY TO QUIT.

23 NOW, YOU CAN TAKE THAT DOWN, PLEASE.

24 THAT'S DR. BECKSON'S OPINION. AND IT SEEMS
25 BORNE OUT BY MR. BOEKEN'S TESTIMONY, AND IT SEEMS BORNE OUT
26 BY COMMON SENSE.

27 YOU ALSO HEARD FROM DR. BECKSON THAT THE
28 PLAINTIFF HIRED A PSYCHIATRIST TO EXAMINE MR. BOEKEN, TOO.

1 HIS NAME WAS DR. BLINDER. WE HEARD DR. BECKSON SAY THAT HE
2 SAW THE REPORT, AND HE SAW THE STANDARDIZED TEST THAT THE
3 PLAINTIFF'S PSYCHIATRIST HAD GIVEN TO MR. BOEKEN. BUT YOU
4 NEVER SAW MR. BLINDER, DID YOU?

5 WUNDER WHY.

6 MR. PIUZE: YOUR HONOR, GIVEN THE FACT I TRIED TO
7 CROSS-EXAMINE ON THAT DOCUMENT --

8 THE COURT: JUST A SECOND. HOLD ON.

9 MR. PIUZE: -- I OBJECT.

10 THE COURT: WE'LL TAKE IT UP OUTSIDE THE PRESENCE OF
11 THE JURY. NOTHING MORE ON IT AT THIS POINT.

12 MR. LEITER: I DON'T WANT TO SUGGEST TO YOU WHAT HIS
13 TESTIMONY WOULD HAVE BEEN. BUT I DO WANT TO SUGGEST TO YOU
14 JUST THE POINT, JUST THE ONE POINT, PLAINTIFF COULD HAVE
15 CALLED HIM AS A WITNESS. WE DON'T KNOW WHAT HIS TESTIMONY
16 WOULD HAVE BEEN. THE PLAINTIFF COULD HAVE CALLED HIM AS A
17 WITNESS. THAT'S MY POINT. AND I'M GOING TO MOVE ON.

18 WHY WAS QUITTING IMPORTANT?

19 WELL, YOU HEARD THAT FROM A NUMBER OF PEOPLE,
20 BUT MOST IMPORTANTLY, DR. DOLL. DR. DOLL SAID -- THANK
21 YOU -- PEOPLE WHO QUIT SMOKING -- PEOPLE WHO QUIT SMOKING
22 REDUCE THE RISK THAT THEY WOULD HAVE HAD IF THEY CONTINUED
23 SMOKING.

24 NOW, IT CAME OUT IN THE PLAINTIFF'S CLOSING
25 ARGUMENT AS SORT OF THE OPPOSITE. THERE IS NOBODY IN THE
26 SCIENTIFIC COMMUNITY THAT WE'RE AWARE OF THAT YOU HEARD
27 TESTIMONY ABOUT THAT SUGGESTS THERE'S NO BENEFIT TO QUITTING
28 SMOKING TO YOUR HEALTH. IN FACT, THE SCIENTIFIC COMMUNITY --

1 AND YOU SAW A LOT OF THESE DOCUMENTS DURING THIS TRIAL --
2 ENCOURAGES PEOPLE TO QUIT, BECAUSE QUITTING REDUCES THE RISK.

3 WHAT DOES THAT MEAN?

4 WELL, DR. DOLL SORT OF PUT IT A DIFFERENT WAY.
5 IT MEANS THAT IF YOU CONTINUE TO SMOKE, YOUR RISK GOES WAY
6 UP. IF YOU DON'T SMOKE, EVERYBODY, AS THEY GET OLDER, HAS A
7 SOMEWHAT INCREASED RISK. YOURS IS MUCH, MUCH LESS THAN IF
8 YOU HAD CONTINUED TO SMOKE.

9 THERE'S NO TRUE DEBATE THAT QUITTING SMOKING IS
10 A WHOLE LOT LESS RISKY THAN CONTINUING TO SMOKE. AND
11 DR. DOLL -- AN ARTICLE THAT HE WAS SHOWN, THAT HE WROTE --
12 ACTUALLY, I WANT TO SAY THAT BETTER. THIS IS FROM
13 AUGUST OF 2000. YOU SEE. BY RICHARD PETO, SEVERAL PEOPLE,
14 INCLUDING DR. DOLL AT THE END.

15 (READING:)

16

17 "FIGURE 3" -- WHICH IS
18 ACTUALLY KIND OF A FANCIER VERSION OF THAT
19 BIG BUTCHER PAPER CHART -- "INDICATED THAT
20 EVEN PEOPLE WHO STOP SMOKING AT 50 OR 60
21 YEARS OF AGE AVOID MOST OF THEIR SUBSEQUENT
22 RISK OF DEVELOPING LUNG CANCER, AND THAT
23 THOSE WHO STOP AT 30 YEARS OF AGE AVOID MORE
24 THAN 90 PERCENT OF THE RISK ATTRIBUTABLE TO
25 TOBACCO OF THOSE WHO CONTINUE TO SMOKE. "

26

27 IF MR. BOEKEN HAD FOLLOWED THROUGH AND QUIT, HE
28 WOULD HAVE DRAMATICALLY REDUCED THE RISK THAT HE WOULD GET

1 SICK.

2 YOU HEARD TESTIMONY THAT THE FIRST CANCER CELLS
3 MAY HAVE APPEARED IN MR. BOEKEN IN 1989. DON'T KNOW TEN
4 YEARS OF GROWTH BEFORE HE WAS DIAGNOSED. BY 1989, HE HAD
5 BEEN SMOKING FOR MORE THAN 30 YEARS.

6 I WANT TO SWITCH GEARS. WE'VE TALKED ABOUT
7 MR. BOEKEN AT SOME LENGTH. I APOLOGIZE IF IT WAS TOO LONG.
8 I KNOW IT'S FRIDAY AFTERNOON.

9 BUT MR. BOEKEN'S TESTIMONY IS A KEY, KEY PART
10 OF THE CASE. BECAUSE AS YOU'LL HEAR ON MONDAY MORNING WHEN I
11 TALK TO YOU ABOUT THE JURY INSTRUCTIONS AND THE VERDICT FORM,
12 WHAT HE KNEW, WHAT HIS TESTIMONY IS, ARE KEY ELEMENTS TO
13 SEVERAL OF THE CLAIMS IN THIS CASE -- TO MOST OF THE CLAIMS
14 IN THIS CASE.

15 DID HE RELY ON SOMETHING PHILIP MORRIS SAID OR
16 DID?

17 WAS HE TRICKED INTO SMOKING?

18 THE ANSWER TO THAT QUESTION, WE BELIEVE, IS NO.
19 AND THAT REALLY BRINGS US TO THE FLIP SIDE OF THE CASE. IT
20 REALLY BRINGS US TO THE PART OF THE CASE WHERE WE ARE GOING
21 TO TALK ABOUT ALL OF THOSE ACCUSATIONS -- MAYBE NOT ALL OF
22 THOSE ACCUSATIONS -- BUT AS MANY AS I CAN DO IN A REASONABLE
23 AMOUNT OF TIME -- THAT THE PLAINTIFF HAS MADE IN THIS CASE
24 AGAINST MY CLIENT.

25 AND AS I TOLD YOU AT THE BEGINNING OF OUR
26 DISCUSSION THIS AFTERNOON, THERE ARE A LOT OF THEM AND THEY
27 CHALLENGE PRETTY MUCH EVERY ASPECT OF PHILIP MORRIS' BUSINESS
28 FOR THE LAST, I DON'T KNOW, 40 OR 50 YEARS.

1 THE CORPORATE FOLKS, THE RESEARCH AND
2 DEVELOPMENT FOLKS, THE MARKETING FOLKS, THE ADVERTISING
3 FOLKS; ALL SUBJECT TO A LOT OF ALLEGATIONS, OLDER CONDUCT
4 SUBJECT TO THE ALLEGATIONS, MORE RECENT CONDUCT SUBJECT TO
5 THE ALLEGATIONS AS WELL.

6 I WANT TO ADDRESS THOSE.

7 BUT I FIRST WANT TO TALK TO YOU ABOUT THE
8 TESTIMONY THAT YOU HEARD FROM THE PHILIP MORRIS PEOPLE WHO
9 CAME. YOU HEARD THREE PHILIP MORRIS WITNESSES. THEY WERE:
10 ELLEN MERLO, ONE OF THE TOP RANKING PEOPLE IN THE COMPANY
11 CAME HERE TO TESTIFY; DR. CARCHMAN AND DR. WHIDBY, BOTH NOW
12 RETIRED, BUT BOTH OF WHOM SPENT A LOT OF YEARS AT
13 PHILIP MORRIS IN RESEARCH AND DEVELOPMENT.

14 IN MY VIEW, THEY TOLD YOU ABOUT PHILIP MORRIS.
15 THEY TOLD YOU ABOUT THE GOOD CHOICES THAT PHILIP MORRIS MADE
16 OVER THE YEARS. AND THEY TOLD YOU ABOUT THE NOT-SO-GOOD
17 CHOICES THAT PHILIP MORRIS MADE OVER THE YEARS.

18 YOU HEARD FROM ELLEN MERLO, FOR EXAMPLE, ABOUT
19 WHAT THE COMPANY DID SAY FOR ALL THOSE YEARS, WHAT ITS
20 POSITION WAS ON CAUSATION AND ADDICTION.

21 YOU HEARD THAT AFTER THE 1964 SURGEON GENERAL'S
22 REPORT, IN WHICH THE SURGEON GENERAL SAID, LET'S USE THE
23 STATISTICALLY-BASED DEFINITION FOR CAUSATION, WE DON'T NEED A
24 CAUSE AND EFFECT IN THE TRADITIONAL EFFECT, WE DO NOT NEED AN
25 ANIMAL MODEL, WE DON'T NEED TO KNOW HOW OR WHY, THE
26 STATISTICS ARE STRONG, AND THEY'RE GOOD ENOUGH.

27 BUT PHILIP MORRIS CONTINUED TO USE THE OLDER
28 TRADITIONAL DEFINITION. THAT'S WHAT THEY DID. THEY ISSUED

1 STATEMENTS THAT SAID, AS WE DEFINE CAUSE, CAUSE HAS NOT BEEN
2 PROVED, BECAUSE WE DON'T KNOW THE CONSTITUENT, WE DON'T KNOW
3 WHAT IT IS IN SMOKE THAT MAKES PEOPLE SICK, AND WE DON'T KNOW
4 THE MECHANISM

5 WERE THOSE STATEMENTS TRUE?

6 YES.

7 WERE THOSE STATEMENTS A GOOD IDEA FOR ALL THOSE
8 YEARS?

9 I THINK YOU HEARD ELLEN MERLO -- NO, THEY
10 WEREN'T.

11 YOU HEARD SIMILAR TESTIMONY FROM HER ABOUT
12 PHILIP MORRIS' POSITION ON ADDICTION. WHEN PHILIP MORRIS AND
13 ITS PEOPLE DENIED THAT SMOKING WAS ADDICTIVE -- EVEN AS LATE
14 AS THAT GOD AWFUL TESTIMONY IN 1994 THAT YOU PROBABLY ALL CAN
15 RECITE FROM HEART -- THEY WERE RELAYING ON A DEFINITION OF
16 ADDICTION THAT HAD ELEMENTS IN IT THAT SMOKING DIDN'T MEET,
17 AND NOBODY DISAGREED THAT SMOKING DIDN'T MEET THOSE ELEMENTS.
18 IT WASN'T INTOXICATING. PEOPLE DON'T ROB CIGARETTE STORES TO
19 DO THEIR CIGARETTE HABITS. BUT THE SURGEON GENERAL IN 1988
20 SAID THAT DEFINITION DOES NOT APPLY ANYMORE, WE HAVE A
21 DIFFERENT DEFINITION WHICH FITS CIGARETTES, AND PHILIP MORRIS
22 DIDN'T AGREE.

23 WAS WHAT PHILIP MORRIS SAID ACCURATE, APPLYING
24 THE DEFINITION THAT THEY HAD?

25 YES.

26 WAS IT A GOOD IDEA TO STICK WITH IT ALL OF
27 THOSE YEARS?

28 THE ANSWER YOU HEARD FROM ONE OF THE TOP

1 EXECUTIVES AT PHILIP MORRIS WAS NO. NO. AND THE NO IS
2 PRETTY OBVIOUS. I MEAN, YOU'VE SEEN THESE STATEMENTS.
3 YOU'VE SEEN THESE STATEMENTS A NUMBER OF TIMES.

4 WHAT HAPPENED TO PHILIP MORRIS IN THOSE YEARS
5 IS THAT IT STOPPED LISTENING TO EVERYBODY ELSE. YOU HEARD
6 FROM MS. MERLO. IT BECAME DEFENSIVE. IT HUNKERED DOWN. IT
7 ISOLATED ITSELF.

8 IT HAPPENED AT A TIME WHEN, AS YOU SAW FROM
9 DR. HOFFMAN, THE MEDIA COVERAGE OF THE TOBACCO INDUSTRY
10 BECAME MORE HOSTILE. IT BECAME MORE CYNICAL. IT BECAME --
11 YOU SAW SOME OF THOSE ARTICLES -- PREDICTABLY, THE TOBACCO
12 INSTITUTE SAYS SUCH AND SUCH. HERE'S COMES THE TOBACCO
13 INDUSTRY TO SAY THIS, THAT AND THE OTHER THING. IT COST THE
14 COMPANY DEARLY THEIR CREDIBILITY, THEIR PRESTIGE, THEIR
15 ABILITY TO WORK WITH THE GOVERNMENT, THE PUBLIC HEALTH
16 COMMUNITY, THE PUBLIC.

17 WHEN YOU HEARD ELLEN MERLO TELL YOU, WE'RE
18 TRYING TO DO BETTER NOW, WE'RE TRYING TO DO THINGS
19 DIFFERENTLY NOW. BUT YOU KNOW WHAT?

20 THERE ARE STILL PEOPLE OUT THERE WHO DON'T FIND
21 US CREDIBLE. YOU HEARD THAT FROM ONE OF THE TOP EXECUTIVES.
22 OUR WITNESS. OUR TESTIMONY. IT WAS NOT A GOOD THING TO DO.
23 IT WAS NOT A WISE CHOICE BY PHILIP MORRIS.

24 AND I HAVE NO DOUBT THAT PART OF THE REASON
25 WE'RE HERE IS THAT MR. BOEKEN'S STORY IS, YEAH, ALL THOSE
26 THINGS THAT EVERYBODY FINDS TO BE NOT CREDIBLE, YEAH, THAT'S
27 THE STUFF THAT I BELIEVED. BUT I WANT YOU TO CONSIDER A
28 COUPLE OF FACTS ABOUT THOSE STATEMENTS.

1 MS. MERLO TOLD YOU THAT EVEN IN THOSE YEARS,
2 THE 1980'S, EARLY 1990'S, PHILIP MORRIS' POSITION WAS NOT
3 JUST, IT'S NOT PROVED. THEY DID ACKNOWLEDGE THAT IT WAS A
4 RISK FACTOR. NOT GOOD ENOUGH, BUT NOT QUITE WHAT YOU'RE
5 HEARING FROM THE PLAINTIFF'S SIDE.

6 THEY DID ACKNOWLEDGE THAT IT WAS RISKY
7 BEHAVIOR. THEN IN THE MID 1990'S, THEY DECIDED THEY WEREN'T
8 GOING TO SAY ANYTHING AT ALL, BECAUSE AT THE TIME, THAT JUST
9 SEEMED THE BEST THING TO DO. LET'S JUST KEEP OUR MOUTHS
10 SHUT. AND PEOPLE SHOULD LISTEN TO THE PUBLIC HEALTH
11 COMMUNITY, AND WE'RE NOT GOING TO SAY ANYTHING.

12 AND THEN THEY DECIDED IN THE LATE 1990'S JUST
13 TO ADOPT THE SURGEON GENERAL'S POSITION.

14 BUT EVEN BACK IN THOSE YEARS, WHERE WAS THE BIG
15 CAMPAIGN THAT YOU HEAR ABOUT FROM THE PLAINTIFF TO PERSUADE
16 MILLIONS AND MILLIONS OF AMERICANS TO SMOKE?

17 WHERE WAS THE BIG PR CAMPAIGN?

18 YOU SAW A HANDFUL OF STATEMENTS FROM THE
19 PLAINTIFF, AND I'M NOT ENDORSING THOSE STATEMENTS. BUT HOW
20 MANY OF THEM DID YOU SEE?

21 FIVE, TEN. AND A LOT OF THEM, NO EVIDENCE THAT
22 THEY WERE -- THAT THEY WERE EVER EVEN PUBLISHED OR SHOWN.

23 YOU HEARD MS. MERLO SAY, YEAH, THAT WAS THE
24 POSITION WE TOOK. AND IN FACT, IT WAS OUR POLICY NOT TO GIVE
25 INTERVIEWS. THERE WAS NO CAMPAIGN TO GET IT OUT THERE. THAT
26 WAS OUR POSITION WHEN PEOPLE ASKED. THAT WAS OUR POSITION
27 WHEN WE PUT SOMETHING OUT. AND YEAH, THE TOBACCO INSTITUTE
28 DID, SURE, IT DID, ISSUE THOSE PAMPHLETS FROM TIME TO TIME.

1 YOU SAW ONE OF THEM I' M NOT SURE THAT THERE WERE MANY MORE
2 OR ANY MORE.

3 WHERE WAS THE BIG CAMPAIGN?

4 WHERE ARE THE PILES AND PILES OF PUBLIC
5 STATEMENTS?

6 THE PILES AND PILES OF PUBLIC PRONOUNCEMENTS?
7 DIDN' T SEE ANY OF THEM FROM THE PLAINTIFF.

8 DR. HOFFMAN LOOKED THROUGH THE L. A. TIMES, AND
9 WE ALREADY TALKED ABOUT WHAT SHE FOUND.

10 NONE OF THIS IS TO SAY THAT PHILIP MORRIS, WHEN
11 IT DID THAT MADE GOOD CHOICES. BUT IT' S ONE THING TO MAKE A
12 POOR CHOICE AND TO SUFFER THE CONSEQUENCES. IT' S ANOTHER
13 THING FOR THAT POOR CHOICE TO BE MISCHARACTERIZED AS
14 SOMETHING THAT IT WAS NOT, AS SOME MASSIVE CAMPAIGN, SOME
15 MASSIVE CAMPAIGN TO CREATE DOUBT.

16 AND ALTHOUGH I WAS PLANNING TO DO THIS LATER,
17 I' M ON THE SUBJECT NOW YOU DIDN' T SEE PILES AND PILES OF
18 PUBLIC STATEMENTS. YOU DIDN' T SEE PILES AND PILES AND PILES
19 OF PRESS RELEASES. YOU SAW THE ALLEGATION AND YOU SAW THE
20 SAME FEW STATEMENTS OVER AND OVER AGAIN. THERE WAS NO
21 EVIDENCE CONTRADICTING MS. MERLO WHEN SHE SAID THERE WAS NO
22 CAMPAIGN. THERE WAS NO EVIDENCE CONTRADICTING DR. HOFFMAN
23 WHEN SHE SAID SHE DIDN' T FIND A BIG PILE OF STUFF.

24 TURN ON THE ELMO, PLEASE.

25 WE' VE GOT WHAT THE PLAINTIFF TELLS YOU IS HIS
26 FAVORITE DOCUMENT IN THE CASE. JUST LIKE THAT. THIS IS MY
27 FAVORITE DOCUMENT. THE ROPER PROPOSAL. YOU HAVE SEEN THIS
28 DOCUMENT, I HAVE NO IDEA HOW MANY TIMES. YOU' VE SEEN IT IN

1 ITS LITTLE FORM UP ON THE ELMD. YOU'VE SEEN IT IN BIG FORM
2 IN THE POSTER. YOU'VE SEEN OTHER POSTERS WHERE SEGMENTS OF
3 IT WERE PULLED OUT. THAT "CREATING-DOUBT" PHRASE WAS ON,
4 WHAT, TWO, THREE, FOUR, DIFFERENT POSTERS. I KIND OF
5 EXPECTED PLAINTIFF IN CLOSING ARGUMENTS TO HAND OUT T-SHIRTS.

6 WHAT DO WE KNOW ABOUT THIS DOCUMENT?
7 THIS MOST IMPORTANT FAVORITE DOCUMENT OF THE
8 PLAINTIFF?

9 WHAT DO WE KNOW?
10 PLAINTIFF SAYS, AWE-HUH. THIS IS THE
11 HOLY GRAIL. THIS IS THE DOCUMENT THAT TELLS YOU WHAT THE
12 INDUSTRY WAS UP TO FOR ALL OF THOSE YEARS. THERE IT IS,
13 FOLKS, IN BLACK AND WHITE.

14 FIRST THING WE KNOW, IT'S NOT EVEN A
15 PHILIP MORRIS DOCUMENT. IT'S FROM THE TOBACCO INSTITUTE.
16 THAT'S THE FIRST THING WE DID.

17 WHO AT PHILIP MORRIS SAW IT?
18 WHAT EVIDENCE DO YOU HAVE OF THAT?
19 NONE.

20 WHO AT PHILIP MORRIS REACTED TO IT?
21 WELL, WE DON'T KNOW WHO SAW IT, SO WE DON'T
22 KNOW WHAT ANYBODY THOUGHT ABOUT IT. IT WAS SHOWN TO
23 MS. MERLO. SHE SAID SHE HAD NEVER SEEN IT. NO EVIDENCE
24 ANYBODY DID.

25 MR. PANZER, THE AUTHOR OF THIS MEMO, WHO
26 REVEALED TO YOU THE STRATEGY THAT HAS BEEN CARRIED OUT FOR
27 ALL OF THOSE YEARS. WHO IS FRED PANZER?

28 DO YOU KNOW?

1 HEAR ANY TESTIMONY ABOUT WHO FRED PANZER IS
2 OTHER THAN HE'S SOME GUY AT THE TOBACCO INSTITUTE?
3 HOW LONG HAD HE BEEN AT THE TOBACCO INSTITUTE?
4 WAS HE THE BOSS OF THE TOBACCO INSTITUTE?
5 WHAT WAS THIS HIS MEMO ABOUT?
6 WHAT DID HE KNOW ABOUT THE HISTORY?
7 SECOND PARAGRAPH (READING):
8

9 "FOR NEARLY 20 YEARS, THIS
10 INDUSTRY HAS EMPLOYED A SINGLE STRATEGY TO
11 DEFEND ITSELF. "
12

13 WELL, THAT'S WHAT IT SAYS. HOW DO WE KNOW THAT
14 MR. PANZER GOT IT RIGHT?

15 WHERE'S THE OTHER EVIDENCE THAT SAYS MR. PANZER
16 GOT IT RIGHT?

17 YOU GET THE IDEA. I CAN GO ON AND ON.

18 YOU SAW THIS FAVORITE DOCUMENT FLASHED IN FRONT
19 OF YOU A THOUSAND TIMES IN A THOUSAND DIFFERENT FORMS, AND
20 YOU KNOW WHAT?

21 THERE'S NOTHING GOOD IN THIS DOCUMENT FOR MY
22 CLIENT. BUT THIS IS THE PROOF OF THE BIG CONSPIRACY. THIS
23 IS THE PROOF, THIS ONE DOCUMENT, OF THE SCHEME.

24 YES, THERE ARE OTHER DOCUMENTS THAT ARE NOT
25 VERY GOOD FOR MY CLIENT, AND WE'RE GOING TO TALK ABOUT THOSE.
26 WE'LL TALK MOST OF THEM ON MONDAY IN THE MORNING.

27 BUT HERE'S MY POINT. TALK ABOUT THIS CASE
28 FILED BECAUSE PHILIP MORRIS IS EASY PICKINS. NO QUESTION.

1 NO QUESTION, STICKING TO THOSE STATEMENTS ABOUT CAUSATION AND
2 ADDICTION FOR ALL THOSE YEARS WAS NOT A GOOD DECISION BY
3 PHILIP MORRIS. IT WASN' T.

4 BUT DOES THAT MEAN THERE WAS THIS BIG, MASSIVE
5 CAMPAIGN THAT EVERYBODY WHO SMOKES WAS TRICKED?

6 THAT THERE WAS THIS HUGE CONSPIRACY FOR 50
7 YEARS TO DECEIVE PEOPLE ABOUT SMOKING IN THE FACE OF ALL OF
8 THE INFORMATION OUT THERE?

9 THAT WITH SCIENTISTS AND GOVERNMENT AND PUBLIC
10 HEALTH COMMUNITIES AND DOCTORS AND MEDIA AND WORD OF MOUTH,
11 THAT THIS AVALANCHE OF INFORMATION ABOUT THE PUBLIC HEALTH
12 RISKS -- MR. PANZER TELLS US, WE GOT A SCAM, WE GOT A PLAN.
13 THAT'S THE PROOF.

14 MR. PANZER -- WHATEVER HE WAS THINKING, WE
15 DON'T KNOW -- WHATEVER HIS SOURCES OF INFORMATION, WE DON'T
16 KNOW. DOES THE REST OF THE EVIDENCE SUPPORT THIS BIG SCAM,
17 THIS BIG PLAN, THIS BIG SCHEME?

18 NO. AND AGAIN, I WANT TO BE VERY CLEAR. THIS
19 IS NOT TO SAY THAT PHILIP MORRIS IS STICKING WITH THOSE
20 POSITIONS ON CAUSATION AND ADDICTION WAS A GOOD IDEA. BUT IT
21 WASN'T -- IT WASN'T WHAT THE PLAINTIFF HAS CHARACTERIZED IT
22 TO BE. PERIOD.

23 YOU ALSO HEARD FROM TWO SCIENTISTS, DR. WHIDBY
24 AND DR. CARCHMAN IN THE RESEARCH AND DEVELOPMENT DEPARTMENT.
25 AND I WANT TO PAUSE FOR A MINUTE AND TELL YOU WHAT THEY SAID
26 AND THAT IT IS ESSENTIALLY UNCONTRADICTED TESTIMONY.

27 PHILIP MORRIS DIDN'T JUST MAKE POOR CHOICES.
28 IT MADE SOME PRETTY GOOD CHOICES, TOO, WHILE OPERATING IN

1 THIS WORLD OVER THE LAST 50 YEARS. AND ONE OF THE GOOD
2 CHOICES IT MADE WAS IN THE PRODUCT DEVELOPMENT AREA. IT
3 RESPONDED TO THE PUBLIC HEALTH COMMUNITY'S SUGGESTION THAT IT
4 LOWER THE TAR AND NICOTINE IN THE CIGARETTES. LOWER THE
5 TAR -- THE NICOTINE FOLLOWS WHEN YOU LOWER THE TAR.

6 IT WAS THE PUBLIC HEALTH COMMUNITY'S
7 SUGGESTION. THERE IS NO EVIDENCE TO THE CONTRARY. THEY DID
8 IT. YOU HEARD FROM DR. WHIDBY AND ALL OF THE DIFFERENT
9 TECHNOLOGIES. REMEMBER, HE CUT UP THE CIGARETTES FOR YOU?
10 HE SHOWED YOU WHAT WAS IN THE FILTER. HE
11 SHOWED YOU THE POROUS PAPER. SHOWED YOU THE VENTILATION
12 HOLES. THESE THINGS DIDN'T JUST COME TO SOMEBODY IN THE
13 MIDDLE OF THE NIGHT, AS DR. WHIDBY TOLD YOU. THEY TOOK YEARS
14 OF EFFORT TO REDUCE THE TAR AND NICOTINE, BECAUSE THAT'S WHAT
15 THE PUBLIC HEALTH COMMUNITY SUGGESTED.

16 NOW, THERE HAVE BEEN SOME ALLEGATIONS ABOUT LOW
17 TAR, AND I'M GOING TO COME BACK TO THOSE -- PROBABLY WON'T
18 GET TO THEM THIS AFTERNOON. BUT HERE'S THE POINT, WHICH
19 NOBODY HAS REFUTED.

20 THE WHOLE NOTION OF LOWER TAR CIGARETTES WAS
21 ENDORSED BY THE HEALTH COMMUNITY AND THE GOVERNMENT. I
22 SHOWED YOU THE DOCUMENTS DURING THE COURSE OF THE TRIAL FOR
23 YEARS AND YEARS AND DECADES AND DECADES. AND WHAT
24 PHILIP MORRIS DID WAS TO FOLLOW THAT LEAD AND DO WHAT IT WAS
25 BEING ASKED TO DO. RISK REDUCTION. THE TAKING OUT OF
26 SPECIFIC COMPONENTS IN CIGARETTE SMOKE.

27 LET ME START WITH THE ONE BASIC PREMISE THAT,
28 AGAIN, NOBODY DISAGREES WITH. NOBODY -- NOBODY TODAY CAN

1 IDENTIFY FOR YOU THE ACTUAL COMPONENTS, CONSTITUENTS IN A
2 CIGARETTE THAT ARE RESPONSIBLE FOR CAUSING DISEASE. BELIEVE
3 YOU ME, IF SOMEBODY KNEW THAT, YOU PROBABLY WOULD HAVE HEARD
4 HIM OR HER. YOU WOULD HAVE HEARD THE TESTIMONY IN THIS
5 TRIAL. YOU DIDN'T. IT'S A SCIENTIFIC FACT AS OF TODAY, AND
6 THAT'S PART OF WHAT HAS MADE THE SEARCH FOR LOWER RISK
7 PRODUCTS FRUSTRATING AT TIMES.

8 PHILIP MORRIS -- YOU HEARD FROM
9 DR. WHIDBY -- HAS TRIED LOTS OF DIFFERENT THINGS TO TAKE OUT
10 HARMFUL CONSTITUENTS. THERE ARE CLEARLY A WHOLE LOT OF
11 THINGS IN CIGARETTE SMOKE THAT ARE CARCINOGENS, ALTHOUGH, WE
12 DON'T KNOW WHICH OF THEM IS THERE IN ENOUGH QUANTITY OR IN
13 WHAT COMBINATION, BUT THERE ARE BAD THINGS IN CIGARETTE
14 SMOKE, AND PHILIP MORRIS HAS WORKED VERY HARD OVER THE YEARS
15 TO TRY TO GET THEM OUT.

16 NOW, YOU HEARD ALLEGATIONS ABOUT SOMETHING
17 CALLED THE NOD PROGRAM DO YOU REMEMBER THAT ONE?

18 AND YOU BASICALLY HEARD IT FROM TWO GUYS WHO
19 USED TO WORK AT PHILIP MORRIS WHO DID NOT COME HERE TO
20 TESTIFY. AND I WOULD SUGGEST TO YOU THAT WHEN YOU'RE HEARING
21 ABOUT FORMER PHILIP MORRIS EMPLOYEES OR WHISTLE-BLOWERS, OR
22 WHATEVER THE PLAINTIFF CALLED THEM, IT WOULD BE KIND OF NICE
23 TO BE ABLE TO LOOK THEM IN THE EYE AND ASSESS THEIR
24 CREDIBILITY AND GET A SENSE OF WHAT IT IS THEY'RE SAYING AND
25 WHO THESE PEOPLE ARE.

26 NEITHER OF THEM WERE CALL AS WITNESSES IN THIS
27 TRIAL. YOU JUST GOT THEIR TESTIMONY FROM SOME TRANSCRIPT
28 FROM ANOTHER CASE, AND THEY SAID, AWE, THERE WAS THIS THING

1 FROM THE NOD PROGRAM THAT WOULD HAVE REMOVED NITRATES, AND
2 PHILIP MORRIS SHUT IT DOWN.

3 WELL, YOU HEARD FROM DR. WHIDBY. GOT SHUT DOWN
4 BECAUSE IT DIDN'T WORK. AND HERE'S EVEN THE MORE IMPORTANT
5 FACT. PHILIP MORRIS DEVELOPED ANOTHER WAY TO GET MOST OF THE
6 NITRATES OUT OF THE CIGARETTES. THE NOD PROGRAM DIDN'T WORK.
7 CRYSTALLIZATION, WHICH DR. WHIDBY TOLD YOU ABOUT, DID.

8 AND HERE'S THE OTHER IMPORTANT FACT. EVEN
9 GETTING THE NITRATES OUT DOESN'T MAKE A SAFE CIGARETTE.
10 DOESN'T MAKE A SAFE CIGARETTE BECAUSE YOU GET THE NITRATES
11 OUT. YOU STILL KNOW THERE'S A LOT OF STUFF LEFT.

12 BUT DR. WHIDBY TOLD YOU ABOUT PHILIP MORRIS'
13 EFFORTS TO TAKE OUT CONSTITUENTS. WE TALKED ABOUT THE
14 PROGRAM -- REMEMBER, THEY BUILT THE BIG PLANT FOR THE
15 CIGARETTE THAT DIDN'T HAVE ANY NICOTINE IN IT OR THAT WAS
16 99 PERCENT NICOTINE FREE?

17 DIDN'T WORK. A LOT OF MONEY. A LOT OF EFFORT.
18 CAN'T QUARREL WITH THE EFFORT. YOU JUST CAN'T. AND NOBODY
19 HAS.

20 THE PROCESS THAT WENT ON FOR 20 YEARS TO
21 MAKE -- 30 YEARS TO MAKE NONCONVENTIONAL CIGARETTES THAT
22 ULTIMATELY TURNED INTO, ULTIMATELY, THE ACCORD. STICKING
23 WITH THE PROGRAM TO TRY TO MAKE THAT CONCEPT OF HEATING THE
24 CIGARETTE RATHER THAN BURNING IT COME TO PASS, HUNDREDS OF
25 MILLIONS OF DOLLARS. THIS WAS NOT A BAD CHOICE BY
26 PHILIP MORRIS. THIS WAS A GOOD CHOICE TO TRY TO REDUCE THE
27 RISKS OF SMOKING.

28 NOW, WE'RE GOING TO TALK MORE ABOUT SOME OF

1 THESE SAFER CIGARETTE CLAIMS. BUT I WANT TO MAKE A COUPLE OF
2 POINTS BEFORE YOU GO HOME THIS AFTERNOON THAT ARE JUST
3 CRITICAL. JUST CRITICAL TO THIS WHOLE SAFE CIGARETTE. AND
4 THE CLAIMS IN THIS CASE THAT SOMEHOW THERE WAS A PRODUCT OUT
5 THERE THAT PHILIP MORRIS COULD HAVE MADE THAT IT DIDN'T MAKE.

6 LET'S START WITH, WHAT'S THE PRODUCT?

7 HAVE YOU SEEN IN THIS TRIAL ANY CIGARETTE
8 PRODUCT ACTUALLY ON THE MARKET ANYWHERE IN THE WORLD THAT IS
9 MORE RISK REDUCTION -- MORE RISK REDUCING THAN THE PRODUCTS
10 PHILIP MORRIS MAKES?

11 WHERE IS THE CIGARETTE MADE BY, I DON'T KNOW,
12 JAPAN TOBACCO, EUROPE, ANYWHERE?

13 WHERE IS THE PRODUCT?

14 NOT THIS. IF THERE WERE A SAFE CIGARETTE
15 SOMEWHERE IN THE WORLD, SOMEBODY WOULD HAVE MADE IT.

16 DR. FARONE -- AND WE'LL TALK ABOUT
17 DR. FARONE -- DR. FARONE SAYS, AWE, YOU COULD HAVE MADE A
18 SAFE CIGARETTE, AND SO NOW, WHAT I DO, I DON'T GO AROUND
19 TRYING GET COMPANIES TO MAKE SAFE CIGARETTES, I DON'T TAKE MY
20 IDEAS TO A TOBACCO COMPANY TO TRY TO GET THEM TO MAKE A SAFE
21 CIGARETTE, I TESTIFY IN TRIALS. THAT'S WHAT I DO.

22 IF DR. FARONE HAD SOME GREAT SAFE CIGARETTE
23 IDEA AND HE WANTED TO HELP EVERYBODY AND HE WANTED TO DO A
24 PUBLIC SERVICE, DON'T YOU THINK HE'D MAKE THE CIGARETTE OR
25 GET SOMEBODY TO MAKE THE CIGARETTE?

26 THERE IS NO CIGARETTE. THE ONE YOU HEARD ABOUT
27 OVER AND OVER AND OVER AGAIN IS CAMBRIDGE. AND CAMBRIDGE --
28 THE ARGUMENT ABOUT CAMBRIDGE KIND OF BOGGLES THE MIND.

1 FIRST OF ALL, IT WAS ON THE MARKET. THIS IS
2 NOT A PRODUCT THAT GOT HIDDEN. THIS IS NOT A PRODUCT THAT
3 GOT STOPPED OR BURIED. PHILIP MORRIS PUT CAMBRIDGE ON THE
4 MARKET.

5 NOW, YOU HEARD AN ALLEGATION THAT IT FAILED
6 BECAUSE IT WASN'T MARKETED PROPERLY.

7 DID YOU SEE ANY EVIDENCE AT ALL ABOUT HOW IT
8 WAS MARKETED?

9 DID YOU SEE ANY ADS?

10 DID YOU SEE ANYTHING?

11 YOU GOT AN ALLEGATION THAT IT FAILED BECAUSE IT
12 WASN'T MARKETED PROPERLY. AND SO, THEREFORE, IT WAS NOT A
13 GOOD THING. BUT PHILIP MORRIS PUT THIS PRODUCT ON THE
14 MARKET. IT WAS AVAILABLE FOR SMOKERS. IT WAS AVAILABLE TO
15 MR. BOEKEN HAD HE WANTED TO SMOKE IT.

16 THAT PRODUCT FAILED BECAUSE PEOPLE DIDN'T LIKE
17 IT. IT WAS HARD TO LIGHT. IT WAS HARD TO DRAW IT DIDN'T
18 HAVE AN AWFUL LOT OF TASTE. AND AS DR. WHIDBY TOLD YOU, IF
19 YOU MAKE A SAFER CIGARETTE THAT NOBODY BUYS, YOU HAVEN'T
20 REALLY ACCOMPLISHED ANYTHING.

21 NOW, YOU HEARD A COUPLE OF THEORIES ABOUT,
22 WELL, THEY COULD HAVE PUT NICOTINE ON THE TIP, THEY COULD
23 HAVE PUT FLAVOR ON THE TIP. I DON'T KNOW I'M NOT A
24 CIGARETTE DESIGN EXPERT. BUT MY SENSE IS, IF YOU PUT
25 NICOTINE ON THE TIP OR FLAVOR ON THE TIP, IT'S STILL GOING TO
26 BE TOO HARD TO LIGHT. IT'S STILL GOING TO BE TOO HARD TO
27 DRAW

28 BUT HERE'S THE SORT OF TWO INTERESTING FACTS

1 THAT I'D LIKE TO LEAVE YOU WITH THIS AFTERNOON.

2 THIS IS MR. BOEKEN'S CASE. I KEEP SAYING THAT.
3 AND IT'S IMPORTANT TO REMEMBER IT.

4 MR. BOEKEN WAS A MARLBORO SMOKER, AND HE WAS A
5 MARLBORO SMOKER BECAUSE HE LIKED THE FLAVOR OF MARLBORO. HE
6 SAID THAT TIME AND AGAIN IN HIS DEPOSITION.

7 IF MR. BOEKEN WANTED THE LOWEST CIGARETTE TAR
8 DELIVERY ON THE MARKET, THERE WERE AN AWFUL LOT OF OPTIONS
9 AVAILABLE TO HIM FROM PHILIP MORRIS, FROM PHILIP MORRIS'
10 COMPETITORS. HE COULD HAVE SMOKED CAMBRIDGE. HE COULD HAVE
11 SMOKED CARLTON. OR NOW OR AS YOU HEARD FROM DR. WHIDBY,
12 MERIT. MERIT ULTIMA.

13 THERE IS NO SAFER CIGARETTE -- SAFE CIGARETTE
14 THAT PHILIP MORRIS DIDN'T PUT ON THE MARKET. AND HERE'S
15 REALLY THE FINAL POINT, WHICH IS KIND OF THE MOST
16 MIND-BOGGLING OF ALL.

17 MR. PIUZE -- I DON'T KNOW -- TWICE, MAYBE THREE
18 TIMES DURING HIS ARGUMENT SAID, WELL, DO YOU KNOW WHY -- DO
19 YOU KNOW WHY THEY DIDN'T WANT TO PUT THESE PRODUCTS ON THE
20 MARKET AND THEY DIDN'T WANT TO PUSH THEM AND THEY DIDN'T WANT
21 PEOPLE TO USE THEM?

22 BECAUSE -- REMEMBER THIS -- IT WOULD RUIN THE
23 FRANCHISE. RIGHT?

24 REMEMBER THIS?

25 IT WOULD DESTROY -- THIS WAS A COMPANY BUILT ON
26 THE MARLBORO FRANCHISE, AND IT WOULD DESTROY THE FRANCHISE.

27 WELL, THINK ABOUT THAT FOR JUST A MINUTE.

28 PHILIP MORRIS, BIG COMPANY, PUTS OUT LOTS OF BRANDS OF

1 CIGARETTES, RIGHT?

2 IF SMOKERS GET A LOWER TAR BRAND THAT THEY LIKE
3 BETTER AND IT'S MADE BY PHILIP MORRIS AND THEY SWITCH TO IT,
4 IS PHILIP MORRIS UNHAPPY?

5 IS PHILIP MORRIS CONCERNED?

6 WAS THE MAKER OF COCA-COLA UNHAPPY WHEN DIET
7 COKE TOOK OFF?

8 YOU PUT OUT ANOTHER PRODUCT, SAME COMPANY, YOU
9 WANT PEOPLE TO USE IT. LOTS OF CONSUMER PRODUCT COMPANIES
10 PUT OUT LOTS OF CONSUMER PRODUCTS. PHILIP MORRIS PUT OUT
11 MARLBORO, BENSON & HEDGES. YOU HEARD ABOUT GENTS. YOU HEARD
12 ABOUT PARLIAMENT.

13 IN FACT, PART OF WHAT COMPANIES DO IS PUT OUT
14 NEW PRODUCTS AND, HOPEFULLY, PEOPLE WILL USE THEM THINK
15 ABOUT THE LOGIC. IF PHILIP MORRIS COULD PUT OUT A SAFE
16 CIGARETTE AND TELL PEOPLE THAT THEY COULD SMOKE AND GET THE
17 PLEASURES OF SMOKING WITHOUT THE HEALTH RISKS, DON'T YOU
18 THINK THAT WOULD BE A PROFITABLE THING TO DO?

19 THE WHOLE CONCEPT THAT SOMEHOW IT WAS SOMETHING
20 PHILIP MORRIS DIDN'T WANT JUST DOESN'T MAKE ANY COMMON SENSE.

21 AND DO YOU KNOW WHAT?

22 DO YOU KNOW WHAT THE BEST SELLING CIGARETTE IN
23 THE UNITED STATES IS TODAY?

24 IT'S NOT THIS ONE. IT'S THIS ONE. YOU HEARD
25 THAT IN THE TESTIMONY IN THIS CASE. THAT'S EXACTLY WHAT
26 PHILIP MORRIS DID. IT TOOK ITS MOST POPULAR CIGARETTE AND
27 PUT OUT A REDUCED-TAR VERSION OF IT. SORT OF A MIDDLE LEVEL
28 REDUCED TAR. HAS MARLBORO FLAVOR. AND THIS IS NOW THE BEST

1 SELLING CIGARETTE IN THE UNITED STATES.

2 WHEN YOU THINK ABOUT THESE ALLEGATIONS, THINK
3 ABOUT NOT JUST THE EVIDENCE -- AND I THINK THE EVIDENCE IS
4 PRETTY CLEAR ON THIS -- THINK ABOUT THE LOGIC. THERE IS NO
5 SAFE CIGARETTE FROM ANYWHERE. DR. FARONE DOES NOT HAVE A
6 SAFE CIGARETTE. IF THERE WERE A SAFE PRODUCT, YOU WOULD HAVE
7 SEEN IT. AND BY GOD, IF THERE WERE A SAFE PRODUCT, SOMEBODY
8 COULD MAKE A PROFIT ON THAT PRODUCT, DON'T YOU THINK?

9 SO THE NOTION THAT SOMEHOW IT WAS AGAINST THEIR
10 BUSINESS INTERESTS JUST DOESN'T MAKE ANY SENSE.

11 WE'RE COMING CLOSE TO 4 O' CLOCK, AND I WANT TO
12 LEAVE YOU WITH JUST A COUPLE OF THOUGHTS.

13 TALKED AT GREAT LENGTH ABOUT THESE DOCUMENTS.
14 YOU HAVE SEEN IN THIS CASE -- I DON'T KNOW -- 45, 50 INTERNAL
15 DOCUMENTS, MOSTLY FROM PHILIP MORRIS, SOME FROM OTHER
16 COMPANIES SELECTED FROM MILLIONS AND MILLIONS AND MILLIONS OF
17 AVAILABLE DOCUMENTS, AND THOSE DOCUMENTS HAVE BEEN USED TO
18 WEAVE TOGETHER A STORY.

19 ON MONDAY, I'M GOING TO FINISH TALKING ABOUT
20 THE DOCUMENTS. NOT ALL OF THEM, BECAUSE I'M NOT GOING TO
21 TAKE ALL OF THAT TIME. BUT SOME OF THE MAJOR THEMES, SOME OF
22 THE MAJOR ALLEGATIONS, SOME OF THE MAJOR ACCUSATIONS IN THE
23 CASE. AND THERE'S REALLY GOING TO BE TWO POINTS.

24 AND THE TWO POINTS ARE THESE. FIRST, DOES THE
25 EVIDENCE OF WHAT HAPPENED IN THE WORLD SUPPORT THE
26 CHARACTERIZATION OF THE DOCUMENTS, THE SNIPPETS OF THE
27 DOCUMENTS THAT THE PLAINTIFF SHOWED YOU?

28 PLAINTIFF TELLS YOU A STORY BASED ON THE

1 DOCUMENTS. WHAT ABOUT WHAT HAPPENED IN THE REAL WORLD?

2 AND THE SECOND PART, WHAT DO THOSE ACCUSATIONS
3 HAVE TO DO WITH RICHARD BOEKEN?

4 WHAT DO THOSE ACCUSATIONS HAVE TO DO WITH
5 RICHARD BOEKEN?

6 SOME OF THEM, THERE'S A CONNECTION SUGGESTED BY
7 THE PLAINTIFF. WE'LL TALK ABOUT THEM A LOT OF THEM, NOT.
8 NOT. AND THEN YOU HAVE TO DECIDE WHAT THEY HAVE TO DO WITH
9 THIS CASE. MR. BOEKEN'S CASE.

10 ULTIMATELY, IT'S MR. BOEKEN, WHO, THROUGH HIS
11 LAWYER, IS ASKING YOU TO AWARD HIM \$10 MILLION IN
12 COMPENSATORY DAMAGES AND TO AWARD TO HIM 100 MILLION,
13 10 BILLION, WHATEVER THE NUMBER WAS, IN PUNITIVE DAMAGES TO
14 AWARD MR. BOEKEN TO PUNISH PHILIP MORRIS.

15 YOU'RE GOING TO HAVE TO DECIDE WHETHER THE
16 EVIDENCE PROVES THAT.

17 AND WE'LL SEE YOU ON MONDAY.

18 THE COURT: THANK YOU, COUNSEL.

19 LADIES AND GENTLEMEN, WE WILL SEE YOU AT 8:45
20 IN THE MORNING ON MONDAY MORNING.

21 REMEMBER, DO NOT DISCUSS THIS CASE WITH ANYONE.

22 THANK YOU.

23

24 (THE FOLLOWING PROCEEDINGS WERE HELD

25 IN OPEN COURT OUT OF THE PRESENCE

26 OF THE JURY:)

27

28 THE COURT: WE'RE OUTSIDE OF THE PRESENCE OF JURY.

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WE' RE STILL ON THE RECORD.

DOES ANYONE WSH TO BE HEARD AT THIS POINT?

MR. PIUZE: ON A MINOR THING, BUT IT DOES NOT HAVE TO
BE ON THE RECORD, THOUGH.

THE COURT: ALL RIGHT. COUNSEL, IF YOU' D JOIN ME IN
CHAMBERS.

(AT 4:00 P. M , AN ADJOURNMENT WAS TAKEN
UNTIL MONDAY, MAY 21, 2001 AT 9:00 A. M)