

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M D. ,
et al. ,

Plaintiffs,

vs.

R. J. REYNOLDS TOBACCO
COMPANY, et al. ,

Defendants.

Miami-Dade County Courthouse

Miami, Florida

1:35 p.m

Tuesday, November 24, 1998

TRIAL - VOLUME 147

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

APPEARANCES:

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SUSAN ROSENBLATT, ESQ.

On behalf of Plaintiffs

DECHERT PRICE & RHOADS

ROBERT C. HEIM, ESQ.

SEAN P. WAJERT, ESQ.

On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT

NORMAN A. COLL, ESQ.

On behalf of Defendant Philip Morris

ZACK KOSNITZKY

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On behalf of Defendant Philip Morris

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R. BENJAMINE REID, ESQ.

On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE

DIANE G. PULLEY, ESQ.

RICHARD M KIRBY, ESQ.

On behalf of Defendant R.J. Reynolds

KING & SPALDING

MICHAEL RUSS, ESQ.

RICHARD A. SCHNEIDER, ESQ.

On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY

KELLY ANNE LUTHER, ESQ.

On behalf of Defendants Liggett Group

and Brooke Group

SHOOK HARDY & BACON

EDWARD A. MOSS, ESQ.

WILLIAM P. GERAGHTY, ESQ.

On behalf of Defendant Brown & Williamson

JAMES T. NEWSOM, ESQ.

On behalf of Defendant Lorillard

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ANNE COHEN, ESQ.

JOSEPH R. MOODHE, ESQ.

On behalf of Defendant The Council for Tobacco Research

(APPEARANCES - Continued)

GREENBERG TRAUIG HOFFMAN LIPOFF ROSEN & QUENTEL

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On behalf of Defendant Lorillard

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On behalf of Defendant Dosal Tobacco Corp.

and Tobacco Institute

KASOWITZ BENSON TORRES & FRIEDMAN

AARON MARKS, ESQ.

NANCY STRAUB, ESQ.

On behalf of Defendants Liggett Group

and Brooke Group

I N D E X

WITNESS	PAGE
DR. IAN UYDESS	
Direct by Mr. Rosenblatt (Cont'd)	16031
Cross by Mr. Heim	16073
Redirect by Mr. Rosenblatt	16144

E X H I B I T S

PLAINTIFFS'	OFFERED	ADMITTED	FOR ID
EXHIBITS	PAGE	PAGE	PAGE
None.			

E X H I B I T S

DEFENDANT'S	OFFERED	ADMITTED	FOR ID
EXHIBITS	PAGE	PAGE	PAGE
036328			16105
036327			16095
036326			16117

1 (Whereupon, the following proceedings were had:)

2 THE COURT: Okay. Have a seat.

3 We are much better in here than they are out
4 there because it was miserable out there. I think they
5 had a monsoon.

6 MR. HEIM Wow.

7 THE BAILIFF: Are we ready for the witness?

8 MR. MDSS: It changed in a half hour.

9 THE COURT: Real quick.

10 Is the witness outside?

11 THE BAILIFF: Yes.

12 THE COURT: Bring the witness in, please, and
13 the jury.

14 THE BAILIFF: Bringing in the jury.

15 (The jury entered the courtroom)

16 THE COURT: Okay. I believe everybody is
17 here. You can have a seat. Thank you.

18 All right. We can proceed.

19 DIRECT EXAMINATION (Continued)

20 BY MR. ROSENBLATT:

21 Q. Dr. Uydess, just before we broke for lunch, I
22 was going to get to a new area, but I think you were
23 explaining -- I had asked you about the concept of
24 ratooning and what that meant with respect to tobacco.
25 I don't think you had finished your answer.

1 A. Again, that agricultural practice had several
2 possibilities; one of which, as I said, was yielding
3 another crop from the same field, so that was
4 economically beneficial for the farmer, you know, to do
5 that.

6 Philip Morris, I think, had some of that
7 possibly in mind, but what I knew better about that
8 particular study was that one of the target areas had
9 to do with things like nicotine, other constituents in
10 the leaves of those plants that were regrown, and
11 because one of my projects had to do with nicotine
12 synthesis in the plant, one of the programs that I was
13 asked to head up had to do with how nicotine is made in
14 the roots of the plant and gets shipped up to the
15 plant, which is what happens in the tobacco plant.

16 And during the growth of a tobacco plant,
17 when it's young and the roots are very small and it's
18 just starting to grow, nicotine is being synthesized
19 and those small number of roots are shipping the
20 nicotine to the plant, and as the plant grows and the
21 roots become much larger, more and more nicotine is
22 going up into the plant.

23 So one of the questions, scientific questions
24 that was asked, was if we ratoon the plants, if we cut
25 them back just before they actually reach maturity, and

1 let them continue to grow, regenerating some new plants
2 from that stem that was, you know, cut back, would we
3 have leaf with, let's say, higher nicotine in it? Is
4 that a possibility?

5 And so part of that study, not the entire
6 study, but part of it was to examine those kinds of
7 scientific questions.

8 Q. Were any conclusions reached about that, as
9 to whether you could increase the nicotine?

10 A. I wasn't privy to all of the results. I saw
11 some of them, the reports, and on occasion, what I saw
12 was, that, yes, higher nicotine was what you got in
13 some of the leaves that grew back, which is
14 scientifically what you would expect.

15 Q. Now, you left Philip Morris in 1989. Tell
16 us, you know, in a general way, what you have been
17 doing professionally to earn a living since then.

18 A. Well, for the last six years, in particular,
19 I have been working within the pharmaceutical industry,
20 until recently, as an employee of a company that
21 actually helps the pharmaceutical industry do all of
22 the testing, clinical -- what they call the clinical
23 trials and other kinds of testing, to make sure that a
24 new drug product that a pharmaceutical company is
25 trying to develop is safe and effective for the public

1 to use.

2 And the company I worked for helped those
3 pharmaceutical companies, their clients, set up and
4 conduct all these trials that they have to do as part
5 of the FDA regulatory system that the pharmaceutical
6 industry is under.

7 And so I've done that for like five or six
8 years, and within the last year, decided, kind of at
9 the prompting of some of the clients we had, to kind of
10 go out on my own as a consultant and supply the things
11 I did for that company, now to them directly.

12 So I'm now a consultant doing many of the
13 things I used to do at the previous company.

14 Q. Do you actually train people in terms of how
15 to obtain approval from the Food and Drug
16 Administration?

17 A. Certain aspects of that, with particular
18 regard to how scientific studies have to be conducted,
19 so that they can get FDA approval, with regard to
20 documentation practices, making sure that everything
21 learned from the scientific studies is disclosed, both
22 to the FDA and the public. Anything that's observed
23 has to be reported to the FDA, as part of the study,
24 even though it may or may not have something to do with
25 the drug being developed, because we don't know at that

1 point and so all of it has to be disclosed.

2 And so I deal with the regulatory compliance
3 issues as part of what I do for my clients. I train
4 them in these issues.

5 Q. What is the significance, from the standpoint
6 of a pharmaceutical company, of having or not having
7 FDA approval?

8 A. Without FDA approval, you cannot bring a
9 pharmaceutical product that's controlled under those
10 guidelines to market.

11 Q. You can't sell it?

12 A. You can't sell it, because they've been
13 designed to help protect the public against products
14 that are defective, that someone has put together
15 without covering the right bases, because of the
16 accidents that have happened over the last 30 years
17 where the public has been injured, sometimes
18 accidentally, sometimes through negligence, because
19 certain companies didn't do the right things when they
20 were developing their products.

21 Q. Give us an example of a couple of products
22 where you have actually walked it through FDA approval?

23 MR. MDSS: Your Honor, can we go sidebar?

24 THE COURT: Yes, sir.

25 (Proceedings were had at sidebar.)

1 BY MR. ROSENBLATT:

2 Q. Dr. Uydess, does the Food and Drug
3 Administration regulate cigarettes?

4 A. No.

5 Q. Does the Food and Drug Administration
6 regulate nicotine?

7 A. In the pharmaceutical industry, it does.

8 Q. Okay. It regulates nicotine patches, but it
9 doesn't regulate cigarettes?

10 A. Nicotine patches, gums, artificial devices
11 that look like cigarettes but are not -- all of those
12 vehicles that the pharmaceutical industry has developed
13 to help people quit smoking are all regulated, heavily,
14 but the FDA.

15 Q. As opposed to cigarettes?

16 A. Yes.

17 Q. Now, you left Philip Morris in 1989. Did
18 there come a time that you were contacted by the Food
19 and Drug Administration?

20 MR. HEIM Objection, Your Honor.

21 A. Yes. Many years after.

22 MR. MDSS: Just a minute. There's an
23 objection.

24 THE COURT: Okay. I have to talk to you
25 about this one, too.

1 Forgive us, folks.

2 (Proceedings were had at sidebar.)

3 BY MR. ROSENBLATT:

4 Q. You had a pretty good job at Philip Morris,
5 didn't you, for those 11 years?

6 A. I really had a great job.

7 Q. The pay was good?

8 A. Yes.

9 Q. Benefits were good?

10 A. Excellent.

11 Q. Working condition was good?

12 A. Wonderful.

13 Q. A lot of people you liked? A lot of
14 colleagues there?

15 A. Yes.

16 Q. So what happened? 1989, you, what, did you
17 get fired?

18 A. No. No.

19 Q. You quit?

20 A. Yes.

21 Q. Why?

22 A. Over those accumulated 11 years, 10 and a
23 half, 11 years of being there, and being part of,
24 directly or indirectly, so many programs that were
25 designed to try to make a safer product, which is what

1 I was told when I came in the door, this was the area I
2 would be working in. And seeing so many of them never
3 go to completion, just make a lot of accomplishments,
4 be shut down, not used, time and time again -- and
5 really not even my projects -- I'm not talking about me
6 and my projects, just throughout Philip Morris, in this
7 particular area is what I'm talking about, smoking and
8 health, you know, nicotine, to a certain extent, but
9 mainly smoking and health for me, which is, with my
10 background, the most important subject to me
11 personally, and after seeing all these opportunities --
12 and to me, these were missed opportunities. I mean,
13 you may not --

14 Q. Missed opportunities for who?

15 A. For the public, for the consumers of Philip
16 Morris' and other tobacco companies' products, but
17 mainly Philip Morris, who is who I worked for.

18 But they had all these opportunities to not
19 have the perfect solution yet maybe, but could
20 introduce one of these many processes that they had at
21 their hand into production, and at least offer maybe
22 one cigarette product on the market, and keep it there,
23 not let low market share deter them. Keep it there,
24 much like the cola industry when they came out with
25 decaffeinated colas.

1 I mean, I remember kind of when decaffeinated
2 colas came out, I didn't like them. I don't think they
3 really had a big market share, but they were put out
4 there for -- to offer an alternative to people who
5 wanted a healthier product without caffeine.

6 And I'm sure those companies weren't sure
7 that was the right decision then, and they did it. And
8 over the years, it became very popular and it was
9 beneficial to the public, and over the years I kind of
10 felt that's where we were going, that's where I thought
11 Philip Morris was going.

12 Q. Was there a particular incident or event
13 which convinced you that that's not where Philip Morris
14 was going?

15 A. Yes. I guess I'd have to say there was.

16 In addition to all these various programs,
17 many of which were not mine, were other people's
18 programs that were not being utilized in any fashion,
19 as far as I could tell, one day --

20 Q. Such as?

21 A. Oh, the various nitrosamine extraction
22 procedures that were, you know, being investigated, and
23 things like that.

24 Ways of controlling nicotine delivery, just
25 through the chemistry and physics of the cigarette,

1 without playing these additional games to kind of bring
2 it back up to above where most people thought it was,
3 you know.

4 I was asked to give a presentation at -- when
5 Philip Morris acquired a lot of other companies like
6 General Foods and Kraft, which were really great things
7 to have happen, and it was interesting because they
8 were acquiring other companies who were totally
9 regulated in these areas by the FDA, because they were
10 in the food and beverage industry, which is ironic, I
11 was asked to give a -- one of the few talks at what
12 they called a symposium, synergy symposium, trying to
13 bring all of the companies together, all their R&D
14 scientific people together, to kind of say, look, we're
15 all part of the same team, let's talk a little bit
16 about what we each do and see how we can pool
17 information in the future.

18 So they selected a few scientists from Kraft
19 and General Foods and Philip Morris, and I was
20 fortunate to be one of the people they asked to give a
21 talk.

22 And we were up at General Foods in
23 Westchester, outside of New York, for several days
24 doing this, and it was great.

25 On the way back on the corporate plane, I was

1 with my executive management team, Charles Lilly, and
2 others, I believe Houghton was there, and they began
3 talking about the industry, about what their goal as
4 executives at Philip Morris was, and it was really just
5 tied to market share and money.

6 I just realized on the plane that they
7 weren't interested in using a lot of the technologies
8 available.

9 Q. To make a safer cigarette?

10 A. Yes. And I just felt like if I was going to
11 spend my efforts working in this area, that I probably
12 should work somewhere else, and very hesitantly decided
13 that I needed to leave, because I just was very
14 disappointed scientifically in the company's decisions,
15 and morally felt that it wasn't right. And ethically.
16 And I just decided on that plane that the next few
17 weeks, next couple of months, I would find a way to
18 find other employment.

19 Q. And you followed through on that?

20 A. Yes.

21 Q. Now, when you -- when you left Philip Morris
22 in 1989, did you -- did you start calling lawyers and
23 telling -- tell them that you were an unhappy former
24 Philip Morris employee?

25 Did you volunteer your services to testify?

1 A. No.

2 Q. So, what was your next -- you quit in 1989.
3 What was your next involvement with the tobacco
4 industry, directly or indirectly?

5 A. One day --

6 MR. HEIM: Objection, Your Honor.

7 THE COURT: Overruled.

8 A. One day I came home. While I was being
9 employed at Pharmaco, which was the company that we
10 kind of alluded to before, the pharmaceutical type
11 company -- it doesn't make drugs or pharmaceutical
12 products, but it's one of the companies that are out
13 there, and there are several like them that helped
14 pharmaceutical companies test their drugs to make sure
15 they are tested properly, to get approval to put them
16 out to market. I'd been with them for a year or so and
17 came home, and had a voice mail, voice message on my
18 phone.

19 A gentleman identified himself as an agent --

20 MR. MOSS: Your Honor, just --

21 THE COURT: I don't want to get into the
22 conversation that you had with him

23 THE WITNESS: Oh, okay.

24 I found a phone message. That phone message
25 asked me if I would meet with someone to discuss the

1 tobacco industry and my employment at Philip Morris.

2 I did --

3 BY MR. ROSENBLATT:

4 Q. From who? Who was that individual?

5 MR. MOSS: Objection, Your Honor.

6 THE COURT: Overruled as to the individual.

7 A. It was an agent who was at the time assisting
8 the FDA. It was not a FDA person, but it was an agent
9 who had been assigned to the FDA to help them with the
10 investigation they had been conducting over a period of
11 a couple of years.

12 And I declined. I didn't --

13 MR. HEIM: Your Honor, I move to strike the
14 last part of that answer.

15 THE COURT: Overruled.

16 A. I felt very awkward about this. It wasn't a
17 comfortable feeling that I had. And never responded to
18 it. Didn't call anybody back.

19 BY MR. ROSENBLATT:

20 Q. You got the message, but you did not --

21 A. I got the message, and I decided, I'll just
22 pass for now on this.

23 A number of months went by, and I was
24 contacted again.

25 Q. By the same individual?

1 A. Yes.

2 Q. With the same request?

3 A. Yes. Very kind of standard request: Would
4 you consider meeting with us to discuss your
5 experiences at Philip Morris?

6 And hesitantly, myself, I kind of decided,
7 I'll try it. And spoke to them Spoke to him And
8 kind of established certain ground rules.

9 I wanted to know what this meant if I meet
10 with you. And they said the first meeting would be
11 just fairly superficial, just meet, say hello to each
12 other.

13 MR. HEIM Your Honor, I'm going to object to
14 going into this in any way.

15 THE COURT: Suffice to say that you met with
16 them You talked with them

17 THE WITNESS: Yes. I finally met with them,
18 talked to them, and that lead to subsequent meetings.

19 BY MR. ROSENBLATT:

20 Q. Okay. And what year was it -- you quit in
21 '89. What year was it that you actually sat down and
22 met with any representative of the Food and Drug
23 Administration?

24 MR. MDSS: Objection, Your Honor.

25 THE COURT: As to the year, overruled.

1 If you know.

2 A. Late '93, early '94. It's hard -- I can't
3 remember.

4 Q. In that period?

5 A. Yes.

6 Q. In that time?

7 A. It was in the '93/94 period.

8 Q. Before that first message you had from the
9 individual who said he was with the FDA, had you had
10 any inkling, any forewarning, that you were going to be
11 contacted, either by the FDA or any other governmental
12 agency relating to tobacco?

13 A. No. At that point in time, no.

14 Q. During the 11 years that you were at Philip
15 Morris, had any of your projects, which were in any way
16 related to the development of a safer cigarette, ever
17 come to fruition?

18 A. Be put into product to make a --

19 Q. Yes.

20 A. -- product that was sold to the public?

21 Q. Correct.

22 A. No.

23 Q. Dr. Uydess, this document is in evidence, A
24 Frank Statement to Cigarette Smokers, and I'm going to
25 ask you where my thumb is, the statement which says --

1 the statement of Philip Morris and others, which says:
2 We accept an interest in people's health as a basic
3 responsibility, paramount to every other consideration
4 in our business.

5 And my question to you, sir, is, during the
6 11 years that you were with Philip Morris --

7 A. Can I read that? I can't --

8 MR. HEIM Your Honor, while he's reading,
9 may we approach on this issue?

10 THE WITNESS: Is that okay?

11 MR. ROSENBLATT: Sure.

12 THE COURT: Yes.

13 (Proceedings were had at sidebar.)

14 BY MR. ROSENBLATT:

15 Q. Dr. Uydess, during the 11 years you were at
16 Philip Morris, and with particular reference to the
17 time of your decision to leave, in terms of the work
18 that you were doing and in terms of your area of
19 expertise during those 11 years, what was the paramount
20 consideration of Philip Morris?

21 A. Market share. Market share and money.

22 MR. ROSENBLATT: Thank you very much.

23 THE COURT: Cross?

24 MR. HEIM Yes, sir.

25 Your Honor, would you like to start for a

1 while and then take the afternoon break a little later,
2 or do you want to take it now?

3 THE COURT: It depends on how long you're
4 going to be.

5 MR. HEIM Oh, I'm probably -- do you want me
6 to guess? About an hour, I guess.

7 THE COURT: Okay. It depends on you folks.
8 Do you want a break now?

9 JURORS: (Responds negatively.)

10 MR. HEIM Keep going. All right. We'll
11 keep going.

12 Charge ahead.

13 Maybe we'll get out earlier then.

14 All right.

15 CROSS-EXAMINATION

16 BY MR. HEIM

17 Q. Good afternoon, Dr. Uydess.

18 My name is Bob Heim We met very, very
19 briefly for a moment this morning. And I'm going to be
20 asking you some questions on different topics that you
21 talked about. And I'll try to kind of let you know
22 where I'm going so you know what I'm talking about.

23 Okay?

24 A. Yes. Thank you.

25 Q. I want to start with some testimony earlier

1 today, about Philip Morris scientists avoiding the use
2 of the term addiction. Do you recall that testimony?

3 A. Generally, yes.

4 Q. Okay. Well, let me ask you about some of
5 these scientists.

6 When Dr. DeNoble wrote memoranda at the
7 company about his work with nicotine, I gather he
8 didn't typically, in the ordinary course of business,
9 send you a copy of his memos; did he?

10 A. No. I would not have been on the circulation
11 list for those reports.

12 Q. Okay. And would that be true also of
13 memoranda or reports that Dr. Dunn did; you wouldn't be
14 on the normal circulation list for his reports?

15 A. In most cases, probably not.

16 Q. And how about Frank Ryan? I can never
17 remember whether he was a Dr. Ryan or Mr. Ryan, and I'm
18 not sure it's important, but would you -- you would not
19 have been on the normal circulation list for Dr. Ryan's
20 work?

21 A. Again, probably in most cases not.

22 Q. And as I remember from your testimony this
23 morning, Dr. Osdene was a little higher up in the
24 organization than you were; right?

25 A. Yes.

1 Q. Okay. So, in terms of the memoranda and
2 things that he would write, typically, normally you
3 wouldn't be on the distribution list for that; right?

4 A. In most instances not.

5 Q. Okay. Now, have you ever, while you were
6 there, did you ever try to look in any systematic way
7 at the memoranda that were written by people like
8 Dr. Osdene and Dr. Dunn, Dr. DeNoble, to review their
9 memoranda to see whether they actually used the word
10 addiction or not in their memoranda?

11 A. No.

12 Q. Okay. And let me show you one as an example.

13 THE COURT: Before it is given to the
14 witness, it should be marked for identification.

15 MR. HEIM May I?

16 THE COURT: Yes. That's fine.

17 BY MR. HEIM

18 Q. Dr. Uydess, I'm handing you a document that's
19 been previously marked for identification as
20 Defendants' Exhibit 05514, and it's dated July 23rd,
21 1980.

22 Now, this is a memorandum that's actually
23 from all four of those people that I just mentioned; is
24 it not? Dr. DeNoble, Dr. Dunn, Dr. Osdene and
25 Dr. Ryan?

1 A. Yes. It appears to be.

2 Q. Okay. And the subject of it is,
3 Self-Administration, Reinforcement and Addiction.

4 Do you see that?

5 A. Yes.

6 Q. And if you look down through this document,
7 down to the end of the first paragraph, you'll see
8 where they talk about the word addictive as very poorly
9 defined.

10 Do you see that in there?

11 A. Yes, I do.

12 Q. Okay. And then down at the bottom, they talk
13 about the criteria for what is addictive and what is
14 not, and then they come to a conclusion about the
15 establishment of nicotine's position among reinforcers,
16 coupled with clear evidence that nicotine's
17 self-administration does not meet the established
18 criteria for addiction would be most helpful in
19 clarifying smoking behavior.

20 A. Where is that you're reading? I'm sorry.

21 Q. I'm sorry?

22 A. Where is it that you were reading?

23 Q. I was reading the last sentence.

24 A. Okay. Number three?

25 Q. Right.

1 Now, my question to you is -- did -- in this
2 work on -- that was being done on self-administration,
3 reinforcement and addiction, did you at any time see
4 the reports on this subject that Dr. DeNoble was
5 making?

6 A. Did I ever see them?

7 Q. Did you see them? I'm sorry. I meant to say
8 see them

9 A. Yes. On occasion I did see them

10 Q. Okay. Did you look in those reports to see
11 whether they used the word addiction or addictive?

12 A. No, I did not.

13 Q. You did not. In order to know whether
14 scientists like Dr. DeNoble and Dr. Ryan and Dr. Dunn
15 were using the word addiction in their memoranda, you
16 would have to kind of look through their memoranda and
17 see whether they were using that term or not; is that
18 fair?

19 A. With respect to those written documents, but
20 that also excludes the verbal use of the word, which I
21 never --

22 Q. I understand that.

23 A. -- heard while I was there.

24 Q. What you're saying is, to your knowledge, it
25 didn't occur while you were there; right?

1 A. Not only it didn't occur, was something you
2 would not do, normally.

3 Q. But you weren't privy to every time that
4 Dr. Dunn and Dr. DeNoble had a conversation, of course;
5 were you?

6 A. No, I was not.

7 Q. All right. So you can't testify of personal
8 knowledge, can you, sir, that Dr. Dunn and Dr. DeNoble
9 didn't use the term addiction, discuss addiction,
10 discuss what it meant?

11 A. Oh, I'm sure they may have done that. I
12 just, in speaking about that topic, mention it's not
13 normally something you would do publicly within Philip
14 Morris.

15 Q. Okay.

16 A. You didn't walk around the halls mentioning
17 the word addiction or addictive or nicotine with those
18 two other words. No more than you would cancer and
19 carcinogen.

20 Q. So you didn't mean to suggest that when
21 Dr. Dunn and Dr. Osdene, or Dr. DeNoble or Dr. Ryan
22 were discussing their work, that they weren't using the
23 word addiction among themselves?

24 A. No, because it would have been very
25 appropriate for them to have used that word with regard

1 to somebody that worked on nicotine.

2 Q. All right. And I think you just said that,
3 without looking at all of their memoranda, you couldn't
4 tell whether they were writing the word addiction and
5 discussing it in their papers; correct?

6 A. In some of their papers, no.

7 Q. Okay. Now, in fact --

8 A. Excuse me. Are we going to refer to this
9 anymore?

10 Q. I don't think so. You can set it down.

11 A. I didn't know if I have to refer back to it.

12 THE COURT: Put it there.

13 MR. HEIM Put it on the Judge's table.

14 THE WITNESS: I'm sure it's safe there.

15 THE COURT: That's fine.

16 BY MR. HEIM

17 Q. Now, the word -- the word addiction, that was
18 a word that had lots of different meanings, did it not,
19 as you understood it?

20 A. People used it within different contexts.
21 Its actual definition is fairly complex. It's not a
22 simple sentence, which is part of the reason we all
23 argue about the word, you know.

24 Q. So different people can mean different things
25 when they use the word addiction; you'd agree with

1 that?

2 A. Sometimes.

3 Q. Sometimes people use it strictly in a
4 confined way and sometimes they don't?

5 A. Yes. Or generally to discuss a topic.

6 Q. And are you aware that different
7 organizations have changed their definition of
8 addiction over time?

9 A. I understand that some of that has occurred,
10 although I don't know the exact changes that were made
11 each time.

12 Q. Okay. And you're not an expert on this
13 subject of the changing definitions of addiction?

14 A. Not on that particular subject, no.

15 Q. But you do know that there's a classic
16 definition of addiction that has been used in the
17 literature?

18 A. I understand there is --

19 Q. Okay.

20 A. -- a historic, classic definition, that's
21 quite old, I understand.

22 Q. All right. And that classic definition is
23 different -- and I'm not trying to make you an expert
24 on this subject, Doctor, but it's different than the
25 more -- what shall we call it -- broader, nonclassical

1 definition; right?

2 It has different criteria?

3 A. Yes. Sometimes we use the word more
4 generally than more strictly, yes.

5 Q. All right. So you would agree that certain
6 things that are considered addictive under the
7 classical definition might not be addictive under the
8 nonclassical definition, or vice versa; right?

9 A. Yes. Again, where we're using the word
10 casually, like I'm addicted to chocolate, which we
11 don't mean you're addicted to chocolate, you just like
12 it a lot and eat it a lot, but it doesn't necessarily
13 mean you're addicted to it, yes.

14 Q. What you're referring to is people just
15 generally using addictive in a -- in a vernacular
16 sense, I'm addicted to --

17 A. Love or something.

18 Q. -- to love?

19 A. To song.

20 Q. Or to --

21 A. I didn't mean you personally. Sorry.

22 Q. You're prodded by too many illustrations of
23 what people say they're addicted to in the public life;
24 right?

25 A. Yes.

1 Q. So it's a loose term in the public life. And
2 even in the scientific literature, addiction has had
3 different meanings, depending upon the criteria that
4 are used to define it; right?

5 A. Sometimes.

6 Q. You're aware, for example, that one
7 definition of addiction requires an intoxication aspect
8 to it?

9 A. Yes. I understand that word is used. And,
10 again, it goes back many, many years before we had the
11 understanding we have today about what addiction really
12 is. The molecular mechanisms involved. So, yes, that
13 term was in the original definition.

14 Q. Okay. And would you consider that term part
15 of what is known as the classical definition?

16 A. The original, older definition that some
17 people like to, you know, adhere to, yes.

18 Q. Okay. Now, there are other words that people
19 use as well, like habituating; right?

20 A. Yes.

21 Q. That's another term. You've heard the term
22 reinforcing used?

23 A. Yes.

24 Q. Okay. And you would agree, based on your
25 experience, that reinforcing is not the same as

1 addictive?

2 A. Not exactly, no.

3 Q. So, something can be reinforcing and not be
4 addictive?

5 A. Yes. Although when something is addictive,
6 it usually has a reinforcing component to it.

7 Q. So it works one way, but not necessarily the
8 other way?

9 A. Not necessarily.

10 Q. Okay. The fact that something is
11 pharmacologically active doesn't mean it's addictive;
12 correct?

13 A. Correct.

14 Q. Okay. And do you think that the fact that
15 something is habituating would necessarily equate it
16 with being addictive?

17 A. It depends on what other words you're
18 comparing it to. And, again, if you're going back to
19 the old classic definition of addiction, it may not be
20 equivalent, but is a lot closer than just, you know,
21 some of the other words like we were talking about.

22 Q. All right. So this is -- this whole area of
23 habituation, reinforcement, intoxication criteria is
24 one that really, it's -- in the scientific community,
25 it's something that you have to know what somebody

1 really means by it when you -- when you hear the term,
2 in order to understand what they're talking about;
3 right?

4 A. Yes. As you become more specific about what
5 you're talking about, you need to make sure you're
6 using the appropriate terms to describe that, within
7 the context of whatever you're discussing, yes.

8 Q. Okay. Now, I want to go to -- I want to move
9 to a different area, now, and I want to go to an area
10 that I believe you said you spent a lot of time on, and
11 that's in your own work at the company, and that's this
12 area of naturally-occurring denitrification. Since I
13 don't want to say naturally-occurring denitrification
14 all of the time, can we call it NODs?

15 A. Yes. That's why we called it NOD, because
16 nobody wanted to say denitrification.

17 Q. Okay. I want to make sure the jury
18 understands what this NOD process was.

19 And let me ask you this as a start.

20 How much of your time do you think you spent
21 on the NOD project?

22 A. Well, in the beginning, as I mentioned before
23 I left the first time, I was kind of a consultant to
24 it. I was kind of keeping in touch with it but not
25 participating directly because it was a microbiology

1 project --

2 Q. Sure.

3 A. -- in that point in my career at Philip
4 Morris, the last year before I left the first time, a
5 few a hours a week.

6 When I came back, fairly soon after I came
7 back, because that program was not doing well, I
8 started to do some side experiments and got more
9 involved, even though I really shouldn't have done
10 them, but then showed that data to my manager and
11 director, Dr. Farone.

12 A decision was made, based upon that work,
13 that that program needed to change, and I was actually
14 assigned to take over that project.

15 So for the next couple of years, or whatever
16 it was, I spent full time -- almost full time every day
17 on that project.

18 Q. So it was an important project for you?

19 A. Not just for me, for the corporation.

20 Q. All right.

21 A. The Philip Morris project, it was important
22 to the corporate entity.

23 Q. What I meant is, you were really vested in
24 the project personally?

25 A. Personal time is -- was one of the jobs I had

1 at Philip Morris.

2 Q. You cared about it, didn't you? You cared
3 about your work?

4 A. Well, we all, I hope, care about our work,
5 yes.

6 Q. All right. So if you were spending almost
7 full time on it, you would -- you obviously wanted it
8 to succeed; did you not?

9 A. I wanted it to succeed, and it did succeed.
10 Scientifically, technically it was a success.

11 Q. We're going to get to that, but I want to
12 make sure first that the jury understands what it was.
13 And I'm going to try to describe it, and if I fail in
14 my simple way of trying to describe it, maybe you'll
15 help me out. Okay.

16 Now, what it was is, there are microbial
17 agents -- did I say microbial right?

18 A. That's good.

19 Q. That's pretty good. That's a good start.
20 That naturally occur in tobacco; right?

21 A. Because they're in the ground. They're soil
22 micro-organisms. They're in the dirt, and they wind up
23 on the plants.

24 Q. And despite all that we've been talking about
25 for many weeks, even months now, tobacco is still just

1 a plant that grows from the soil; right?

2 A. The tobacco plant itself, before anybody
3 touches it, yes.

4 Q. That's right.

5 A. Yes.

6 Q. So when it grows from the soil, it absorbs
7 things from the soil?

8 A. Yes.

9 Q. So these microbes, the idea beyond using the
10 microbes, as I understand it, is that microbes -- do
11 you remember when the computers first came out and they
12 had like Pac Men?

13 A. Yes.

14 Q. Do you remember that?

15 A. Yes.

16 Q. Microbes are like Pac Men, right; they would
17 eat the nitrates?

18 A. Right.

19 Q. I would draw this, if I could.

20 A. No. I understand it. Yes. They utilized
21 nitrate as part of their energy system

22 Q. Okay. And the evolution here is that -- that
23 the process that you scientists were involved with was
24 to evolve the nitrates, with an a-t-e-s on the end,
25 into nitrites; right? I mean, this is a successive

1 process, right?

2 A. It's a cascade of events.

3 Q. Cascade of events is a good word.

4 So the first part of that cascade of events
5 was to take the nitrates, and then they would go into
6 nitrites, and then it would cascade further into
7 nitrogen oxides, right, and then the last event would
8 be into nitrogen gas, which just kind of -- what would
9 be a good word, vaporize?

10 A. Basically. Just go off as gas.

11 Q. Okay. So if the system works, if the system
12 works, the great thing about it is that you get the
13 little microbes, who work and digest the nitrates and
14 start this cascade of events going into place, so that,
15 at the end, you kind of turn everything into nitrogen
16 gas, which blows off, and it's a great success, right?

17 A. Yes.

18 Q. Now, prior to the time that you began work on
19 this process, Philip Morris actually did have a process
20 for removing nitrates; right?

21 A. Yes.

22 Q. And that would be the crystallization
23 process?

24 A. Yes. At Park 500.

25 Q. And the concern -- and Philip Morris' concern

1 was that while crystallization -- and you described it
2 earlier this morning, Doctor -- while crystallization
3 did get rid of a fair number of nitrates, it didn't get
4 rid of them all; right?

5 A. Correct.

6 Q. And what percentage do you think they --

7 A. I honestly don't remember. And I think it
8 varies quite a bit, which I think is another thing they
9 didn't like, because it wasn't consistent. It also
10 didn't get rid of the nitrite in between, one of the
11 other things. They wanted to improve it.

12 Q. They wanted to improve it?

13 A. Yes.

14 Q. Because they were trying to get rid of the
15 nitrites, and this process that you worked on very hard
16 and very well, I'm certain, was intended to do that.
17 It was to do a better job.

18 A. Yes. It was one of the several attempts that
19 were being evaluated by the company to do this.

20 Q. Okay. That's fair enough.

21 So now, this -- the intent here was to have a
22 commercial process, and what I mean by commercial
23 process is one that you could put and work on the
24 production line in the factories so that it would -- it
25 would work in the actual production of commercial

1 cigarettes; correct?

2 A. Yes.

3 Q. And for something to be used in that kind of
4 an application, where you're going to actually take it
5 and put it on the production line, the process does
6 have to be controllable; does it not?

7 A. Yes. And, again, the production line, in
8 this instance, was at Park 500.

9 Q. I understand that.

10 A. It's important to know that it wasn't the
11 manufacturing center.

12 Q. Park 500 was the place where reconstituted
13 tobacco leaf was being made; right?

14 A. Yes.

15 Q. So, since that reconstituted tobacco was
16 being used in lots of Philip Morris products, it was
17 important to be able to put it into a commercial
18 application, and you understood that; right?

19 A. Yes. Uh-huh. That was one of the goals of
20 the project, to make sure that it worked.

21 Q. Sure. Sure. And if it wasn't
22 controllable -- and I want to talk a little bit with
23 you about what controllable meant -- if it wasn't
24 controllable, then you couldn't use it in the
25 commercial application; right?

1 A. Right. And that's exactly what we had to
2 prove in the laboratory before anyone would allow us to
3 do anything else with that process.

4 Q. And, in fact, you got to the point not only
5 where you proved it in the laboratory, where you got it
6 going, but you -- you built a pilot plant for it;
7 right?

8 A. Yes.

9 Q. Okay. And a pilot plant -- just so the jury
10 knows, a pilot plant is just like a -- what would you
11 call it, a mini --

12 A. Small factory.

13 Q. A small -- it's like a miniature factory?

14 A. Small, not the size of the room, but it's not
15 the size of the whole production center.

16 Q. Right. It cost a lot of -- a lot of time and
17 money to make, but it's not the whole production thing.

18 A. Right.

19 Q. And, in fact, a lot of time and money was
20 being spent on this process; correct?

21 A. It was very important to the company.

22 Q. Right. Very important to the company.

23 Now, some of the things that have to be
24 controlled when you're using these microbial agents are
25 the temperature at which the bacteria are held; would

1 that be one?

2 A. Yes.

3 Q. And the time -- the time component of holding
4 it. And occasionally in the laboratory, you would run
5 into problems, would you not -- and I'm not suggesting
6 that you didn't get past them, but you'd run into
7 problems that the -- the little --

8 A. Guys.

9 Q. -- Pac Men, the little Pac Men or bugs, they
10 would start eating the nitrates, and then they'd stop.

11 A. As in the development of any new process, you
12 always are trying to work out problems that come up
13 while you're trying to finalize that process and
14 develop it, yes.

15 Q. And when that happens, sometimes you'd wind
16 up with a build-up of nitrites; right?

17 A. Sometimes, yes.

18 Q. And, of course, that's the last thing you
19 wanted to have happen was for nitrites to build up?

20 A. Absolutely.

21 Q. Okay. So, you had a number of years of
22 experimentation, and you got to the point where you
23 were in the pilot plant with it, and you would get some
24 very low nitrogen compounds; right?

25 In other words, you would get it working,

1 you'd get that thing working in the pilot plant, you
2 know, where the system was, to use your word -- I
3 thought was a good word -- cascading the way you wanted
4 it to.

5 A. Yes. The process in the laboratory, before
6 it went to the pilot plant, when it was scaled up in
7 these fermenter vessels, about this big, many of them,
8 ran for months, and typically the target was zero
9 nitrate -- zero nitrite. Everything gone to gas. And
10 there was zero, as far as we could measure it.

11 Q. Okay. But while you were in the laboratory,
12 you would occasionally have problems with this, what I
13 call the start -- the start-up and stopping, and you
14 can't have that in a commercial application; right?

15 A. Until we could learn to control that better,
16 in the beginning, yes.

17 Q. Now, were there also, am I right, Doctor,
18 there were also problems -- there was an odor problem
19 with some batches of the -- of what I'll call the SEL?

20 A. Uh-huh.

21 Q. The strongly extracted liquor that the
22 microbes would be in.

23 You would have some odor problems with that;
24 isn't that right?

25 A. Yes. Occasionally.

1 Q. And the company worked with its flavor
2 person -- is that Howard Speilberg?

3 A. The chief flavor chemist of the corporation,
4 world-wide, Howard Speilberg.

5 Q. All right. And the fact that Howard
6 Speilberg was brought in to try to deal with the odor
7 problem also showed how important --

8 A. He wasn't brought in to deal with the odor
9 problem. He was a natural part of the team that was
10 overseeing the development of the project.

11 Q. Okay. But odor was a problem, and one way to
12 deal with odor is to use flavors; right?

13 A. Possibly, or to develop the process better so
14 you don't --

15 Q. Don't have the odors?

16 A. -- don't have that problem very frequently,
17 which is one of the things we did do.

18 Q. Now, the odor -- part of the odor that was
19 associated with the use of this bacteria was a smell of
20 like rancid butter and fecal matter; right?

21 A. Well, most people identified it as like
22 smelly socks, gym socks.

23 Q. I don't know which is worse.

24 A. I don't know either.

25 Q. But it was not a pleasant odor, right?

1 A. It could be a fairly strong, kind of old
2 locker room, athletic sock kind of a smell, that was
3 identifiable in certain kinds of organic acids that can
4 be made.

5 Q. And things like odor, they are considered
6 part of what we would call subjectives; right?

7 A. Oh, yes. Product acceptability can be
8 dependent upon something like that which, again, we
9 were very aware of during this whole project.

10 Q. Now, I want to show you just a few of the
11 reports that were being issued during this period that
12 were dealing with some of these subjects.

13 A. Okay.

14 Q. So, I'm going to start, and I think I'll
15 start with Defendants' Exhibit 36327. I'm sure you're
16 familiar with these reports.

17 Doctor. (Handing)

18 A. Thank you.

19 Q. You're welcome.

20 Doctor, I've handed you Defendants' Exhibit
21 036327, which we'll mark for identification Defendants'
22 Exhibit 036327.

23 (Defendants' Exhibit 036327 was marked for
24 identification.)

25 Q. And it's dated March 19th, 1982, and what I'd

1 like you to do, Doctor, is this was -- this was a
2 report from Mr. Gomes to Mr. Burnley.

3 Maybe you could tell us who those gentlemen
4 were.

5 A. Roger Gomes, Jay Gomes -- to tell you the
6 truth, I don't remember Gomes. The names are familiar.
7 But to tell you the truth, it's been so long, I forget
8 what people were doing in certain stages. It's been a
9 long time.

10 Q. I understand that.

11 But this was an NOD project status report;
12 right?

13 A. Yes. I think it was an early one, and, again
14 I'm not sure of the exact dates. It's possibly before
15 I got involved with it. I don't know.

16 Q. Well, the date here is March 19th, 1982. Had
17 you returned?

18 A. Oh, yes. I didn't return and then
19 immediately go into NOD. It was -- I don't remember
20 how long, a year or so.

21 I just notice I'm not on the distribution
22 list, which is kind of interesting.

23 Q. Yes. So it may be that you hadn't started
24 back on the project yet. It's possible?

25 A. It's possible. I mean, that project had been

1 going on since the late '70s --

2 Q. Yes.

3 A. -- under different people and different
4 stages with different organisms, different
5 micro-organisms being used to do this work, when it
6 didn't work very well. That's why I was assigned the
7 project, to help find out what the problem was.

8 Q. So if one set of micro-organisms didn't work,
9 they would try another set to see if that worked
10 better?

11 A. Well, there was a set that was there, the
12 ones that naturally occurred on the tobacco, but within
13 those organisms were many, and in the beginning, people
14 thought it was one.

15 In the early years of the project, everyone
16 was focusing their attention on one or two organisms
17 that did part of the work and sometimes went to gas and
18 sometimes didn't and sometimes did and sometimes
19 didn't. And it was causing tremendous confusion, and
20 it turned out to be not the only organism. So this may
21 have been during that period.

22 Q. Okay. So just take a look at the first page,
23 under project status.

24 A. Which page is this?

25 Q. Right behind the cover page.

1 A. Okay.

2 Q. And it says: Object: To present an overview
3 status of the NOD project for management review.

4 And it says, you know, where the project is
5 as of that point in time.

6 A. Okay.

7 Q. And it says some favorable things,
8 denitrification by bacterial fermentation has been
9 achieved in the pilot plant.

10 You follow along with me --

11 A. Yes.

12 Q. -- under the numbered paragraphs.

13 And then when you get to 3, it says
14 consistent denite -- I'm sorry -- consistent
15 denitration rate results have not yet been achieved in
16 the pilot facility.

17 Now, is it your recollection when you joined
18 the project, as of that point, they had not been able
19 to get consistent denitration rate results?

20 A. I see now this was actually done in the pilot
21 plant, which is even more interesting to me since I
22 wasn't on the distribution list, but, nevertheless,
23 that was partially true, because actually over the
24 three months it was being run, except for a few -- I
25 think a few occasions, one or two, where the incoming

1 SEL, the material that bacteria were gobbling up the
2 nitrate in, poisoned the fermenter.

3 I mean, it came in and everything stopped
4 because of the SEL that was made at Park 500, which was
5 a problem inconsistent in the ways in which SEL was
6 made, except for a few of those occasions and one power
7 failure, as I remember, the process, as it ran faster
8 and faster and more efficiently and was running
9 basically at zero nitrate, nitrite.

10 So, yes, the statement that was inconsistent
11 is partially true, but not really reflective of what
12 was going on.

13 Q. Okay. Well, this writer thought that that
14 was true as of this point in time; right?

15 A. Yes. Again, it's interesting. There was an
16 engineering company associated with this called Pedco,
17 Philip Morris hired an outside expert, engineering
18 company that did this kind of stuff, and they were part
19 of this whole project. And during this whole period,
20 they were -- they originally predicted they didn't
21 think this would work early on in the lab, and then
22 became believers by the time it was scaled up in the
23 laboratory.

24 And one -- one of the proponents said, let's
25 go to pilot plant and engineer it. They worked with

1 Philip Morris' engineers to help build the pilot plant.
2 And during this period, they were very happy with the
3 way this was running.

4 Q. In fact, it says under Paragraph 4,
5 successful process start-up has been repeated in the
6 lab several times, but only once in the pilot plant.

7 Do you see that?

8 A. I don't think that's accurate, and I wish
9 someone had shown it to the people who were actually
10 conducting the work, and it would be nice to have that
11 input from the people on-line doing the work.

12 None of these people who were on this
13 distribution list had anything to do with running that
14 particular project.

15 Q. Well, Mr. --

16 A. That doesn't ring -- I don't think that's
17 perfectly true, because to start the whole project in
18 the pilot plant, actually start the process running, we
19 had to started it once. There were a couple of planned
20 shut-downs because we needed to test -- in the
21 manufacturing center, one of the things you have to do
22 is sometimes you have to shut down equipment to fix it,
23 clean it, to make sure it's going to work next week.

24 So we purposely would shut down the process
25 so we could show we could start it up again. That

1 process was patented by Philip Morris. That's one of
2 the patents issued, was this process of saving the
3 material that you just did, using it as the start-up
4 material again.

5 And we showed we could do that virtually
6 every time we did it.

7 So during the three or whatever months in the
8 pilot plant, my recollection is that it was started up
9 on a number of occasions. And since it did run for
10 three months, with a couple of failures because of the
11 SEL coming in, or a power failure that happened one
12 weekend, we had to have started it up again anyway.
13 So, I don't understand that statement.

14 Q. Okay. That's okay. But, Dr. Uydess, you
15 don't -- you have no reason to think that Mr. Gomes
16 would be trying to mislead Mr. Burnley; would you?

17 A. Oh, no, not intentionally. I would be very
18 surprised at that.

19 Q. All right. And when you look at --
20 Mr. Whidby is one of the people who got a copy of this.
21 Was he involved with the project at all?

22 A. Dr. Whidby was, I guess, at the time my
23 manager.

24 Q. So you would expect that if he thought this
25 was wrong, he would have said something about it;

1 right?

2 A. Since at this period in my career -- I have
3 to go back a little bit.

4 During these several years of this
5 development work, aside from my -- as I talked about my
6 meeting with Dr. Gullotta, Dr. Farone, Cliff Lilly, who
7 I think may or may not have been Dr. Lilly -- Mr. Lilly
8 and I would meet virtually every morning at about seven
9 o'clock, sometimes with Howard Spielberg, and sometimes
10 with Jerry Whidby, to discuss the process as it was
11 going from the lab to the pilot plant, but especially
12 in the pilot plant.

13 Q. So these would be people that you would feel
14 confident would know what was going on with this
15 project, and can you give me their names again?

16 A. Cliff Lilly.

17 Q. Cliff Lilly?

18 A. Almost every morning. Cliff Lilly,
19 Dr. Farone, myself, sometimes also right after that,
20 Jerry Whidby, sometimes Howard Spielberg. Again,
21 during which time we would review what had gone on the
22 previous day.

23 I would assume if somebody had some concern
24 or hesitation, would have brought it up immediately,
25 because they knew what we were going towards.

1 You're talking about a major capital
2 investment by the corporation to do this project. We
3 all were.

4 Q. Probably millions of dollars?

5 A. Yes. Tens.

6 Q. Tens of millions of dollars?

7 A. Maybe more. So we were all very, very
8 careful about the results, the quality of the process,
9 being sure as best we could, identifying areas where
10 there were problems and trying to overcome them

11 And this was an ongoing part of this process.

12 Q. All right. Item Number 6 on here says,
13 excessive levels of organic acids are unacceptable
14 because of the odor and taste they introduce to the
15 product.

16 A. Uh-huh.

17 Q. And then they go on to say: Subjective
18 testing is in process on sheet runs made with SEL
19 denitrate in the pilot plant during February 1982 to
20 determine acceptable acid levels.

21 My question to you is this: The question is,
22 the odor that you mentioned earlier, I think you called
23 it the smelly sock odor, was that a function
24 exclusively of the organic acids?

25 A. Would you repeat that, please?

1 Q. Yes. I'm sorry if it was a bad question.

2 A. No. I was reading just a little bit to see
3 where --

4 Q. The odor that you and I had talked about just
5 a minute ago.

6 A. The off-smell --

7 Q. The off-smell, whatever.

8 A. -- that occasionally occurred?

9 Q. Right. Was that exclusively a function of
10 the organic acids?

11 A. One of the major contributors were some
12 organic acids; one being this thing called butyric
13 acid, which is this smelly-sock type of smell.

14 I need to point out that that also
15 happened -- it happened at Park 500. That same
16 occurrence happened there independent of
17 denitrification process.

18 Q. Okay. Now, I want to show you another report
19 that follows this report. And this one you'll remember
20 because it's from you.

21 So if I --

22 A. Again, I'm a little confused about when this
23 actually -- I see this sentence, some of this material
24 was made during a denitrification run in the pilot
25 plant in February of '82.

1 There had been earlier studies on kind of a
2 fixed reactor with this older process, which didn't
3 work real well all of the time.

4 Q. Right.

5 A. Which, again, is what I think this is talking
6 about.

7 Q. This is dated, the one we just looked at that
8 you have in your hand is dated March 19th, 1982; right?

9 A. Yes.

10 Q. Okay. Now, let me show you, if I may --

11 A. Can we?

12 Q. Yes. Please.

13 A document that has been marked for
14 identification or is being marked for identification as
15 Defendants' Exhibit 036328.

16 Doctor. (Handing)

17 (Defendants' Exhibit 036328 was marked for
18 identification.)

19 A. Thank you.

20 Q. Now, if you'll take a look at the -- I know
21 you can't read the cover page -- I can't either, but
22 the second page refers to a special report. And is
23 that your signature?

24 A. Yes. It appears to be, yes.

25 Q. Okay. And this report is dated August 29th,

1 1983.

2 Now, when is it, Doctor, that this report --
3 that denitrification -- naturally-occurring
4 denitrification was, to use your words, shut down, or
5 counsel's word?

6 A. Again, the dates are kind of fuzzy to me.
7 The final process, the lab process that we all
8 developed at that time, went to the pilot plant, I
9 believe ran over that summer, June, July, August, if
10 that was '83, then it was shut down right after it.

11 Q. Okay. Now, would you take a look at -- by
12 the way, this is -- it says, Ian Uydess --

13 A. Yes.

14 Q. R. L. Dunn, did he work with you on the
15 project?

16 A. Yes. He was one of the team, but had been
17 there all of the time and actually did a tremendous
18 amount. He was -- he managed the evening shift when we
19 had evening shifts and really had been just a long-term
20 player in the development process.

21 Q. Okay. And it says approved by J.W. Whidby.
22 That's Jerry Whidby that you mentioned before?

23 A. Yes.

24 Q. Was he your immediate superior?

25 A. Yes. At that period of time he must have

1 been. That's why he signed the report.

2 Q. Now, if you'll go to the, I guess what would
3 be the page that says, Introduction. It's the page
4 right before the drawing.

5 Are you with me there?

6 A. What page is that, again? The page right
7 before the drawing of the bacteria?

8 Q. Yes, sir.

9 A. Okay.

10 Q. Now, in the first sentence of that second
11 paragraph, you write: Over the past six months, we
12 have made significant advances in our understanding of
13 the major operational and process parameters of NOD,
14 and then there's a parens, 5 comma 6, close parens.

15 What does that refer to?

16 A. That must be referring to other reports that
17 somebody had written.

18 Q. Okay. Then it goes on to say: However, one
19 of our greatest problems has been in gaining a better
20 understanding of the critical parameters regarding seed
21 storage and a consistent process start-up.

22 And then it goes on to explain that. Do you
23 see that?

24 A. Yes.

25 Q. And you concluded that paragraph by saying:

1 Although considerable light has recently been shed on
2 this topic as a result of the recent experimental
3 observations of the NOD laboratory and Dr. Hempfling,
4 et. al., with a 4, a complete understanding of the
5 relationship between the relative efficiency of
6 denitrification and the variability of our SELs lies
7 somewhere in the future.

8 Is that what you were writing in -- let's
9 see, what date is this -- August -- the end of August,
10 1983?

11 A. Yes.

12 Q. And you hoped to develop a complete
13 understanding of the relationship between the relative
14 efficiency of denitrification and the variability of
15 the SELs, did you not?

16 A. Yes. We hoped that, with continued
17 experimentation, we would learn more about the process
18 and it would work better, as a result of that.

19 Q. Where was Dr. Seligman in this hierarchy at
20 the time?

21 A. He had been the vice president of R&D. At
22 that point in time, I don't think he was any longer. I
23 thought he was --

24 Q. But he was senior to you?

25 A. Oh, yes. When I came to Philip Morris, he

1 was Dr. Farone's immediate supervisor, the vice
2 president of R&D, and several levels above myself.

3 Q. Okay. Did you know at that time who
4 Dr. Gaisch was, G-a-i-s-c-h?

5 A. Yes, I did. I didn't know him at the time.
6 I understood he was a researcher in Switzerland at
7 Philip Morris's R&D headquarter there. Helmut Gaisch.

8 Q. Helmut, yes. You're absolutely right.
9 Was he a pretty senior scientist?

10 A. I really don't know what level he was.

11 Q. All right. Now, I'd like to show you a
12 letter from Dr. Gaisch to Dr. Seligman, just a couple
13 weeks after this report.

14 A. Excuse me. May I just -- I mean, I know we
15 just went through the beginning here that I pointed out
16 that something needs to be improved.

17 I don't recall this verbatim, this report --

18 Q. Sure.

19 A. -- but it seems like we go on to discuss
20 that we evaluated and investigated this and maybe made
21 some inroads into this problem, so it wasn't like it
22 didn't work; we're going to figure it out in the
23 future. I think that was the lead-in to the work in
24 the report --

25 Q. I understand.

1 A. -- which then went ahead and evaluated,
2 modified what we were doing, and actually came up with,
3 I guess, some solutions, some improvements.

4 But, anyway -- go ahead. I'm sorry.

5 Q. That's perfectly fine.

6 A. Where are we now again?

7 Q. I'm going to show you a letter from Dr. --

8 A. May I put this aside?

9 Q. You may, certainly.

10 THE COURT: All right. We'll take a break,
11 folks.

12 We'll be in recess, folks.

13 (A brief recess was taken.)

14 THE COURT: Okay. Let's get the jury out.

15 THE BAILIFF: Bringing in the jury.

16 (The jurors entered the courtroom.)

17 THE COURT: Be seated, please.

18 Let's resume.

19 MR. HEIM Yes, sir.

20 BY MR. HEIM

21 Q. Doctor, I don't recall whether I -- before we
22 took that break, did I hand you Defendants' Exhibit
23 036328?

24 A. The letter?

25 Q. Yes.

1 THE COURT: This?

2 THE WITNESS: No, I don't have that.

3 But before we do that, can I go back a
4 second, because you presented me with a document and
5 you made some remarks about the introduction, and I
6 didn't really have a chance to review that document.

7 BY MR. HEIM

8 Q. Sure. We'll go back.

9 A. Can we just go back for a moment?

10 Q. Okay. We'll do that.

11 You're referring to questions that I asked
12 you; right?

13 THE COURT: Which document are you talking
14 about? There is a number on the bottom of it.

15 THE WITNESS: I need my glasses.

16 This is document 036328, which was my
17 internal report. Where is the date? Oh, August 29th,
18 1983.

19 And you introduced it; had me read something
20 from the introduction.

21 BY MR. HEIM

22 Q. Yes.

23 A. Where I was saying, there are some things
24 that need to be looked into in the future, that there's
25 some problems here and there, and we definitely need to

1 look into it.

2 Q. Sure. And you wanted to make a point about
3 that document?

4 A. Yes. I started to make --

5 Q. Why don't you go ahead and do that. That's
6 fine.

7 A. I started to make it before we took a break,
8 just so the Court understands.

9 That was the introduction to this document
10 that I haven't seen in --

11 Q. Many years?

12 A. -- a long time.

13 When you do an introduction to a scientific
14 document like this, you want to give the state of
15 affairs as of the time that you were going to start to
16 report this work. And you quite properly showed that
17 in my wording, there were some areas that weren't
18 working real well, we were concerned about, that needed
19 to be looked into in the future. Well, the future is
20 what was done in this report.

21 I just want the Court to understand that
22 although those questions were raised during that point
23 in time during the development of the process and we
24 didn't have control over certain things and we were a
25 little concerned about it, we went ahead and

1 investigated those things. And I made sure I read the
2 rest of the report, the conclusions and the results.

3 And I don't want to take the Court's time
4 because I know we're limited here.

5 Q. That's all right, Doctor.

6 A. But what this report basically reports to my
7 management is that we solved some of those problems,
8 some of the major problems, and things were looking
9 pretty good, and then identified some other things that
10 needed to be looked into.

11 And this is part of the scientific process.

12 Q. Of course.

13 A. I realize you introduced this to show that
14 things were not working well, but, in fact, the work of
15 this report solved many of those problems.

16 Q. In fact, didn't I, Doctor, say that while
17 there were some successes and some things were working
18 well, there were still some problems, and obviously
19 this report shows that there were some successes and
20 there were still some things that you were still
21 looking at; right?

22 A. I just didn't want to leave it with my
23 statement that there were problems that we wanted to
24 look in the future and not have that understood that
25 they were solved, and many of them in this report.

1 Q. And you were trying -- when you made that
2 report, you were trying to inform your management, as
3 well you could, as to your view of where the project
4 was at that time; right?

5 A. My responsibility was to report to my
6 management and the corporation everything I understood
7 or knew about how that process worked, where we could
8 take it, where we couldn't take it, doubts I might
9 have, and explore those until we had enough data to
10 make a decision, enough information.

11 Q. All right. And the decision -- and so I
12 think what you did is -- I think you answered my
13 question by saying, yes, that you were trying to fully
14 inform your management of every aspect of it that you
15 thought was material to making a decision; right?

16 A. Full disclosure.

17 Q. Right. Okay.

18 Now, and that's because management has to
19 make the -- has to make a decision about something like
20 this; it involves an awful lot of money; right?

21 A. And it's my responsibility, as a scientist,
22 if I do my job properly, to make sure they have all of
23 the possible information, accurate information, that I
24 can provide them with.

25 Q. And management, when it -- when it makes a

1 decision like this, people who are above you, the
2 managers who have to make this decision, they have to
3 look at things like what the prospect is for success;
4 right?

5 A. Absolutely.

6 Q. They have to look at what it will cost?

7 A. Which we did.

8 Q. And they have to look at whether or not the
9 process, in their judgment, based on the reports that
10 have been provided to them by the scientists is
11 controllable in the commercial setting; right?

12 A. Right. And this is the process we went
13 through, with, again, the management team being, not
14 me, Dr. -- well, Spielberg, the chief flavor chemist of
15 the corporation, Mr. or Dr. Lilly -- he became a doctor
16 in the middle of all of this time.

17 Q. He was the corporate scientist?

18 A. He was the corporate principal. He was the
19 highest-ranking corporate scientist who not only wanted
20 to make sure that it worked, that it was good, but that
21 it was his -- what do you call it -- his reputation.

22 His function at Philip Morris' R&D was to
23 help manage high level corporate projects. And if he
24 was standing behind that project and saying to New
25 York, this is something we need to do, to go on, it's

1 not that he just wanted good science; the bottom line
2 is, it better work. So, he was there to make sure it
3 worked, as did Bill Farone, as did Howard Speilberg, as
4 did others.

5 Engineers were also involved. And again as a
6 safety check, an outside independent engineering
7 company.

8 Q. So, all of these people, their opinion on
9 this subject of naturally-occurring denitrification,
10 and especially Dr. Lilly's, would be important to
11 management in making a decision whether to implement or
12 not; right?

13 A. And to, if at any point during the
14 development of this thing, if they felt it wasn't going
15 to go where they wanted it, to stop it there.

16 Q. And you would expect that management, when
17 they got to the point where they were going and made
18 their decision would -- would want to talk to somebody
19 like Dr. Lilly, especially Dr. Lilly, a principal
20 senior scientist; right?

21 A. And Dr. Lilly reported to his senior
22 management, which sometimes wasn't in Richmond, it was
23 in New York, his views of how the program was going.

24 Q. And you would expect that senior management
25 would talk to their senior scientific people about

1 their views of the subject, as well; right?

2 A. You mean information back down.

3 Q. Well, management has to make a decision about
4 whether to do something like this, they're going to
5 talk to their senior scientific people to get their
6 views as to whether or not it's something that can
7 be -- that will work; right?

8 A. Which is why the team of people involved in
9 this project -- it wasn't just Ian and his lab. I
10 mean, this involved the top engineers that built the
11 manufacturing center. It involved the top flavor
12 chemists who have to take care of a lot of things. It
13 involved all of the principal -- key principal, top
14 level technical people in the company.

15 Q. Let me show you another document. Since I
16 only have two here, I thought I handed it to you before
17 we took our break, but maybe I didn't.

18 THE COURT: 6326.

19 MR. HEIM Your Honor, it's marked as 036326.

20 THE COURT: Yes. He can look at this copy.

21 MR. HEIM If you have one -- I have the one
22 for the witness.

23 THE COURT: Okay. Here you go. Mark it for
24 identification.

25 (Defendants' Exhibit 036326 was marked for

1 identification.)

2 MR. HEIM You have one. I did hand it out.
3 Okay.

4 BY MR. HEIM

5 Q. Now, Doctor, you identified who Dr. Seligman
6 and who Dr. Gaisch was, the senior scientists in
7 Switzerland.

8 And this document dated 11 -- I'm sorry --
9 the 12th of September, 1983 is Dr. Gaisch essentially
10 saying that he reviewed the NOD paper, and it's his --
11 his statements about how -- what he thought as of that
12 point in time.

13 And I'd like to go over that with you.

14 He wrote: I had good luck at the NOD paper,
15 which contains a lot more information that had been
16 compiled before. In the introduction, the authors say,
17 for example, quote, a complete understanding of the
18 relationship between the relative efficiency of
19 denitrification and the variability of our SELs lies
20 somewhere in the future.

21 That's referring to the -- your sentence in
22 your report; right?

23 A. In the introduction of the report.

24 Q. To your report?

25 A. Which was heading -- it was old news.

1 Q. I know.

2 A. Okay.

3 Q. But that's what -- that's the reference that
4 Dr. Gaisch is making.

5 And then he says: I think this sums it up.
6 There are many conditions outlined, which must be
7 observed, but they are not terribly well-defined and
8 seem, to me at least, not easy to be controlled
9 experimentally.

10 Now, I gather, you disagree with Dr. Gaisch's
11 view of what you were -- what your report was
12 conveying; is that right?

13 A. He's talking about this introductory sentence
14 and agreeing, scientifically, that, yeah, we need to
15 look at a lot of things if we're going to go ahead with
16 this process. That's what he's saying, which is what
17 we did.

18 And if we were to -- I didn't want to read
19 the last two pages of the report, but it mentions a
20 success that had to do with some of the questions that
21 he's raised.

22 Q. Well, let's go on with what Dr. Gaisch
23 thought.

24 A. Okay.

25 Q. He said: The most important feature of any

1 industrial process is its controllability. Parameters
2 which spring to mind are temperature, pH, specific
3 nutrients, et cetera. I know that the process runs,
4 and I know that biochemically the interactions between
5 two cultures are rather complicated. Where I see a
6 problem, but I might be wrong, is how to keep the
7 process on the rails.

8 Now, you understand what he's referring to
9 about how to keep the process on the rails? He means
10 how to keep it working in a commercial setting; doesn't
11 he?

12 A. I guess that's what he meant. I never
13 discussed this with him, so no. I assume he meant to
14 keep the thing working.

15 Q. And then he goes on to say: For example,
16 what do you do if the start-up does not happen, or what
17 do you do if suddenly you accumulate the wrong
18 metabolites? However, the people who work with the
19 system must have a feeling of how well they can control
20 it. They are the only ones who can really judge.

21 Now, the people that work with the system are
22 the group that you referred to several times now;
23 right?

24 A. The Richmond, the U.S.-based project team

25 Q. Right. But this Dr. Gaisch is saying, as he

1 looks at it and as he studies the report, he has real
2 grave doubts about whether this use of microbial agents
3 in an actual commercial setting, despite all of the
4 investment, is actually going to work so that it can be
5 controlled and it can be used commercially; is that --

6 A. I don't agree that he said that at all. I
7 don't see where he had grave doubts, and I don't see
8 where he wrote that he doesn't think this thing would
9 work ever.

10 He's raising scientific questions which I
11 think, if you compared it to the report I'm talking
12 about, raises the same types of issues which were --
13 some of them addressed and some of them put off to the
14 next group of experiments.

15 You have to also remember, Dr. Gaisch -- I
16 went back a couple hours -- there were two biological
17 projects looking at denitrification, the European one
18 and U.S. one. We were competing in a way to see who
19 could come up with the best process. They used yeast;
20 we used micro-organisms.

21 Q. So you think --

22 A. He was attached --

23 Q. Excuse me. I'm sorry.

24 A. -- to the yeast project, so he had a vested
25 interest and rightfully so.

1 He was working on the yeast project. So he
2 was making what I think are appropriate -- again, I
3 didn't see this back then, which is interesting, but he
4 was making appropriate remarks, which happened to be
5 the same things I said in this report, which we had
6 read, and that we addressed.

7 And then went on to continue to address, step
8 by step, like you kind of do in any project, until we
9 had gotten to the point where we had enough of those
10 things in hand, understood them well enough, that we
11 could scale this thing up,

12 And there were several pilot plants, so we're
13 getting confused about what pilot plant we're talking
14 about. There was the pilot plant, but it got totally
15 re-engineered after a lot of this other work I'm
16 talking about was done and refined so this thing ran.

17 So to bring up questions that might be okay
18 that were done in the middle of a project while this is
19 part of a normal process of the project, I just don't
20 understand where you're kind of going with it.

21 Q. Doctor, keeping the process on the rails was
22 something that had to happen before you could do a
23 commercial application; right? You had to know that
24 each time you did this, it was going to work;
25 otherwise, you couldn't do a commercial application of

1 micro-organisms eating nitrates; right?

2 A. As best as possible, within the context of
3 the process -- and again, Park 500, which is where this
4 would be, where they squish out the hot water extract
5 of the tobacco and make this paper thing and put it all
6 back and it goes into tobacco, that process, for all of
7 the ten years that I was at Philip Morris, didn't run
8 the same way every day, had problems, smells, odors,
9 taste, got shut down, fixed.

10 I mean, that is the way -- that was the best
11 we could do at the time.

12 In the manufacturing center, where these
13 things get used and are made into billions of
14 cigarettes, there we wanted to make sure -- engineers,
15 not me, wanted to make sure those things ran 24 hours a
16 day, every day of the year.

17 But, I mean, this is not like we were going
18 to put this -- if you're making a case that here was a
19 process that worked, didn't work, worked, that was true
20 in the beginning, not at the end. You're taking these
21 facts from the middle of the process.

22 And it was also not going into an environment
23 where it had to work every second of the day. We would
24 have loved it if it did. It was going into an
25 environment where the resident process worked most of

1 the time; it would be part of that process, and it
2 would help the company do what it wanted to do.

3 Q. Doctor, did I mistake your testimony that you
4 thought that the project actually got shut down
5 somewhere around the time -- the end of 1983?

6 A. I'm not sure about the years. But after we
7 ran the final, what I knew was the final pilot plant
8 project, with the totally re-engineered system where
9 the outside company, Pedco came in, helped us scale it
10 up in the lab, was there as a third party to make sure
11 we weren't making some mistakes because they knew about
12 this stuff --

13 Q. Doctor --

14 A. Excuse me.

15 Q. Excuse me. I didn't mean to interrupt.

16 A. -- were there to make sure that even though
17 Cliff Lilly was attached to it, Jerry Whidby and Bill
18 Farone and Howard Spielberg and a team of people there
19 were in my lab, 10, 15 people working in my lab day and
20 night, because we didn't do this from eight in the
21 morning to five, Philip Morris, and shut it down. We
22 ran it over the weekends for many months.

23 COURT REPORTER: Can you slow down?

24 A. (Continuing) We ran this for long periods of
25 time, making sure that we understood what was going on.

1 That was all our responsibility. And we had multiple
2 checks to do that.

3 And Dr. Gaisch's remarks, again, to end this,
4 were appropriate at the time but wasn't the end of the
5 project.

6 Q. Doctor, you said that you were unaware of
7 Dr. Gaisch's views as they were communicated to
8 Dr. Seligman in September of 1983, until I showed you
9 that letter; is that right?

10 A. I do not remember ever seeing this letter
11 before.

12 I mean, I don't remember it.

13 Q. Now, and I gather, you're not aware of what
14 communications Dr. Lilly had with New York on the
15 subject of the commercial controllability of this
16 process, in and about this same time?

17 A. Before we actually got a handle on the whole
18 process and can make it work well?

19 Q. Well, my question is, do you know, of your
20 own personal knowledge, what Dr. Cliff Lilly was saying
21 to upper management about the commercial
22 controllability of this process?

23 A. I wasn't always with him when he had these
24 discussions. I know that while I was in charge of that
25 project for the last two years or so that it was

1 running, that whenever Cliff talked to me about it or
2 we presented material to the higher level management of
3 the company, that within the caveats that we're talking
4 about, that there were some things we're working on and
5 we think we can solve them, that he was a proponent of
6 it.

7 I mean, I couldn't imagine him allowing us to
8 spend company money, tie up 15, 20 people in our
9 department, 50 or 100 people around the company to do
10 this if he had a major concern. I mean --

11 Q. At some point you have to make a go or no-go
12 decision based on what you believe is the right thing
13 to do at the time; right?

14 A. Yes.

15 Q. I want to talk to you about cadmium for a
16 minute, because you made some reference to cadmium
17 earlier in your testimony.

18 I'm shifting -- I'm shifting gears. Okay.

19 And I think you said, with regard to cadmium,
20 that -- that that was something that you had gotten --
21 you had gotten started, but it wasn't anything that had
22 gotten to a point where you could actually apply it in
23 a -- in a finished way at the time, that, as you
24 understand it, that project was shut down?

25 Is that right?

1 A. Would you repeat that again? I'm sorry.

2 Q. Well, it was a bad question.

3 A. You lost me right near the end.

4 Q. Yes. I think I lost me in the middle.

5 A. Okay.

6 Q. You did work on cadmium, right?

7 A. I was asked by the company, by my management
8 to kind of, as we did in NOD, with -- because you guys
9 were successful in this other project, we would like
10 you to look at this new project, cadmium, that other
11 people had been involved in.

12 Q. All right. And just so we all remember,
13 cadmium is in the soil; right?

14 A. Yes.

15 Q. And cadmium gets into the roots of the plant?

16 A. Yes.

17 Q. And cadmium is a -- is a heavy metal?

18 A. Metal ion, yes.

19 Q. And it's a good thing to get rid of it?

20 A. Only because when you ingest the smoke into
21 your lungs, these particles settle on the surface of
22 your lungs and become a major irritant. Can cause
23 problems. It was known.

24 Q. That would be a good reason to get rid of it;
25 right?

1 A. Oh, yes.

2 Q. And at the time when this project, as you
3 understood it, was cancelled, a technology had not been
4 fully developed at Philip Morris that was able to
5 extract the cadmium from the tobacco leaves, right?

6 A. We were given --

7 Q. I think that's what you said earlier.

8 A. Well, we were given the project to find a
9 solution. So, no, in the beginning of the program, we
10 didn't have the solution. We were working towards it
11 and making major gains.

12 Q. You had what you described as the first
13 foothold in it?

14 A. Major foothold, yes.

15 Q. Now, do you recall a gentleman by the name of
16 George Wagner at the University of Kentucky?

17 A. Not really. I may have possibly -- was he an
18 associate of Don Dougal's?

19 Q. Well, do you remember that -- that Philip
20 Morris was using a consultant in this area of cadmium
21 removal?

22 A. I'm not sure what wording you're talking
23 about. I would have probably talked about -- we had a
24 consultant for the cell and tissue culture work, which
25 is where this cadmium program was placed.

1 The company had other experts in the cadmium
2 area that I did not deal with. I dealt primarily with
3 Don Dougal, who was a cell tissue culture expert.

4 Q. Okay. So I guess my question to you is
5 simply this. And I gather from your answer that
6 Dr. George Wagner at the University of Kentucky doesn't
7 ring a bell with you?

8 A. It was not someone I was conferring with
9 during this project, no.

10 Q. Do you know whether Philip Morris had a
11 consultant contract with the University of Kentucky and
12 Dr. Wagner to work on the subject of cadmium removal
13 from tobacco leaves?

14 A. I didn't know that.

15 Q. And so you don't know whether, after you
16 stopped working on cadmium extraction, a contract
17 actually went forward with an outside consultant to
18 work on this problem of cadmium in the tobacco? You
19 have no knowledge of that one way or the other?

20 A. All I knew at the time, because I asked
21 another individual who was in my management line, who I
22 reported to at the time, a gentleman named Bob McCuen,
23 kind of one day asked him, Bob, whatever happened with
24 the cadmium program? I was curious, did it ever go
25 anywhere, which I was interested to see if it went

1 anywhere. And he said it never went anywhere, and
2 that's all I knew about it.

3 Q. Did you ever have a conversation with Jerry
4 Whidby about what happened to the cadmium project?

5 A. All I knew at the time until I left Philip
6 Morris in 1989 was that.

7 Q. Okay. So the answer is, you don't know one
8 way or the other?

9 A. I don't know. To my knowledge, no, it didn't
10 go anywhere.

11 Q. Now, I want to switch to the subject of
12 Dr. Gullotta's work for a few minutes. Okay.

13 Doctor, you testified earlier about some
14 work --

15 A. Yes.

16 Q. -- that Dr. Gullotta did with EEGs; do you
17 remember that?

18 A. Yes.

19 Q. Now --

20 A. We're leaving the cadmium?

21 Q. Yes. You now know as much about it as I do.

22 A. Well, I mean, I understand what you're trying
23 to show. But, again, if I worked for you at that time
24 and I had done this great work that you had me present
25 to people internally, and you decided it should go

1 outside to someone else, you probably would want me to
2 confer and transfer what I knew to them, which never
3 happened. So I don't understand what relationship it
4 has with this guy.

5 Q. You don't know of personal knowledge whether
6 work that was done on the cadmium project was shared
7 with Doctor --

8 A. Wagner?

9 Q. -- with Dr. Wagner, do you?

10 A. No. They may have showed him a report. I
11 don't know.

12 Q. All right.

13 A. But, again -- well --

14 Q. Now, let's go to Dr. Gullotta.

15 The idea of testing smoke for a brain wave
16 response, the use of electrophysiology for this
17 purpose, that was -- that was -- the general concept
18 was well-known by the scientific community before
19 Dr. Gullotta started doing this work; right?

20 A. As bright as Frank is, and talented, he
21 didn't invent this whole area, no.

22 Q. All right. And I didn't mean to suggest that
23 he did. But I'm sure, you would expect that
24 Dr. Gullotta would use the prior work in the literature
25 on testing smoke for brain wave responses as a basis

1 for going forward with his work; right?

2 A. You always want to know what's in the
3 literature when you start a piece of work.

4 Q. Okay. Good.

5 And you are aware that there was published
6 literature on this whole subject of brain wave response
7 to smoke back at the time that Dr. Gullotta was doing
8 his work?

9 A. Generally, there was some. Again, it wasn't
10 my particular field, but, yes.

11 Q. In fact, there was a whole -- there was a
12 whole published international symposium on the EEG
13 effects of nicotine back in 1978; weren't there?

14 A. Oh, I don't know.

15 Q. You weren't aware of that?

16 A. There was -- in 1978? That's nice. That's
17 good.

18 Q. You're not aware of that at all?

19 A. No. Frank may have mentioned that to me, and
20 it may have been on his desk. But, again, no. This is
21 20 years ago, yes.

22 Q. When Dr. Gullotta was doing his work, you
23 were -- did you say you were next-door to him, or did I
24 get that mixed up? It was somebody else?

25 A. No. I was at that time, just before.

1 Q. Where were you in relation to him?

2 A. I was on the third floor next to Behavior
3 Research where he started. But sometime, and I don't
4 remember when, when Caroline Levy, who was at one time
5 in that group and moved and went to New York, there was
6 some reorganization of space, and there were people in
7 R&D moving around like you do, you move around offices,
8 wound up on the fourth floor, because they wanted him
9 to have a totally separate laboratory for his work.

10 So they built that laboratory on the fourth
11 floor, rather than in with the rest of the stuff on the
12 third floor, which is where Dr. DeNoble was and Bill
13 Dunn and others.

14 Q. And I think you said this morning that
15 Dr. Gullotta, in doing his tests, was testing for --
16 for nicotine response in the brain, and he was also
17 testing for flavor response in the brain; right?

18 A. Yes.

19 Q. Okay. So, for example, he would take a
20 vanillin compound, which was a flavorant, and would
21 test to see whether people had a brain wave response to
22 vanilla in his work; right?

23 A. Yes. They wanted an objective, technical
24 measurement, scientific measurement that they could
25 correlate to someone saying, yes, I like it more than

1 the thing I had before. And if they put a little more
2 vanillin, I think it's called --

3 Q. Vanillin is how you pronounce it?

4 A. Vanillin is the chemical. It's vanilla.

5 Q. It's vanilla?

6 A. They would do it that way so they had a
7 measurement, not just what someone said: How much do
8 you like it? A little bit more.

9 They had a measurement they could go back to.

10 Q. They were trying to objectify it?

11 A. Yes.

12 Q. There had been published literature on, for
13 example, brain wave response to what you get in a cup
14 of coffee from caffeine; right?

15 A. Oh, a lot of things.

16 Q. Okay.

17 A. Sure.

18 Q. And he was looking at things like citrus
19 smell and vanilla and nicotine and other things?

20 A. Menthol.

21 Q. Right. He was doing it all. Right. Okay.

22 Now, and he was actually able, as I
23 understand your testimony, to measure brain wave
24 responses for different flavors and smells; right?

25 A. He was able to measure a response having to

1 do with a nerve in the tongue or the mouth or the
2 throat being stimulated by something like that, among
3 other things that he was looking at, like nicotine,
4 yes.

5 Q. And the interpretation of a flavor occurs in
6 the brain, so you would expect to get an EEG response;
7 correct?

8 A. Everything we do is interpreted in the brain.

9 Q. Okay. And you believed -- you believed that
10 it was appropriate or not inappropriate for
11 Dr. Gullotta to be doing his work; didn't you?

12 A. Oh, yes. It was, again, excellent work.
13 Frank took what was known in the
14 literature -- and this is, again, something that Philip
15 Morris did frequently, and one of the things I admired
16 about the company, one of the things that disappointed
17 me ultimately, why I left, had the capability to take
18 what was out there, a technology that was at the
19 forefront of its field at the day, bring it inhouse,
20 and make a massive step up in a year, because they had
21 the horsepower to do it, the talented staff, the money,
22 the facilities.

23 And over a short period of time, they would
24 take what the rest of the world did, and without the
25 rest of the world knowing about it, would all of the

1 sudden go, swoop, like this, and do work that no one
2 else in the world that I knew could do.

3 Q. And, in fact, they had, I think you said -- I
4 believe it was you who had said they had 600 people
5 doing research and development work of various kinds?

6 A. When I first got there, around 600, 650. It
7 varied a little bit.

8 Yes, they had -- not just in R&D. They
9 had -- I don't know what the number of people in
10 Richmond was. They had a lot of talented people at
11 Philip Morris.

12 Q. And those talented people worked on lots of
13 different projects, like some of the ones you mentioned
14 this morning, expanded tobacco?

15 A. Yes.

16 Q. Right? And filtration?

17 A. Yes.

18 Q. Ventilation of filters. And NODs.

19 A. Yes.

20 Q. All kinds of projects that were part of the
21 research and development effort at Philip Morris.

22 A. Yes.

23 Q. And one of the things you mentioned, by the
24 way, was reconstituted leaf tobacco. You talked about
25 that for just -- just a smattering this morning, and I

1 just want to clear up one thing about that.

2 You're not aware, are you, Doctor, of any
3 nicotine being used in the reconstituted tobacco
4 manufacturing process, other than the nicotine that
5 came from the tobacco itself that was used in the
6 process?

7 A. That's correct. The only nicotine that was
8 resident, as far as I know, or would expect at Philip
9 Morris -- I mean, I remember that report back a number
10 of years ago where the spiking of nicotine out of a
11 bottle -- I mean, Philip Morris would never do that, as
12 far as I know.

13 Yes, whatever was in the leaves that gets
14 squished out in this liquid extract and concentrated --

15 Q. Yes.

16 A. -- was what was put back, the amount,
17 depending upon how they recombined all this stuff.

18 So they had control over how much they put
19 back on the sheets. So, within that context, yes.

20 Q. So, within that context, what you're saying
21 is they didn't add extraneous nicotine?

22 A. No. It was the nicotine that was originally
23 resident, whatever leaf products they were extracting.

24 Q. As far as you know, these allegations of
25 spiking are not true?

1 A. Yes. Absolutely. And it was nothing I would
2 have ever expected a company like Philip Morris to ever
3 think of, let alone do.

4 Q. Okay. And you're not aware of Philip Morris
5 ever using reconstituted leaf to adjust nicotine
6 upwards in any commercial product that it actually
7 used?

8 A. Well, I'm not sure what you mean by upwards.
9 It was my understanding that sheet could be used and
10 was, on occasion, used to obtain a certain targeted
11 level of nicotine in the final product. And that was
12 part of the efficacy of that process. That was part of
13 the use of the process.

14 It's not just a filler, just a space filler,
15 but a way to introduce what you wanted to introduce to
16 the product.

17 Q. Okay. But my question to you, Doctor, is
18 whether you're aware of whether Philip Morris ever
19 actually, in a commercial product, with a specific
20 commercial product, whether it ever adjusted nicotine
21 in some way by adding nicotine to make it higher?

22 You're not aware of that; are you?

23 A. Again, I'm not sure how you're using the word
24 higher. I mean, if you look at the amount of nicotine
25 that was resident on the sheet at any one point in

1 time, it could be varied by the way you handled the
2 process.

3 I mean, there were times where it could be at
4 the lower level, and there were times where it could be
5 at a higher level.

6 Whether the company used that process to
7 intentionally always make sure that the sheet had a
8 massively high nicotine level to put into the product,
9 I don't know if that ever occurred.

10 Q. Okay. Well, let me see if -- because I'm
11 concerned that we're -- we may be confused a little bit
12 here. I want to just show you a page from your
13 deposition and make sure we're talking about the same
14 thing. Okay?

15 A. Okay.

16 Q. So we'll take a minute.

17 Doctor, I'm going to hand it to you.

18 A. That's fine.

19 This is the deposition of --

20 Q. Yes. Yes. In this case.

21 A. Okay.

22 Q. Okay?

23 A. Yesterday?

24 Q. Right. This is a very timely deposition.

25 This is a deposition that took place yesterday.

1 And the question mainly -- it was confusing,
2 but the question that was asked was -- this is on Page
3 44, Doctor.

4 A. Okay.

5 Q. I'm asking whether you are aware of whether
6 Philip Morris ever used RL --

7 A. Excuse me. Where on the page? Where do I
8 look?

9 Q. I think it's at the bottom, but let me take a
10 look.

11 A. Okay. Down here?

12 Q. Yes.

13 A. Line 23?

14 Q. Right.

15 And the question is: I'm asking whether you
16 are aware of whether Philip Morris ever used RL --
17 that's reconstituted leaf, right -- to adjust nicotine
18 upwards, not whether it could be done, whether it was
19 done?

20 And you answered: Not with regards to a
21 specific product in which that was done.

22 Now, is that essentially -- you're not aware
23 of any specific product in which --

24 A. Right. Which is kind of what I said.

25 Q. Right?

1 A. I'm not aware of whether Philip Morris ever
2 loaded up the sheet with a tremendous amount of
3 nicotine and introduced it into a marketing product --
4 marketable product. I mean, they wouldn't have done
5 that for a lot of reasons, but, no.

6 Q. Okay. You mentioned the word ratooning in
7 connection with -- ratooning, r-a-t -- just hold it up
8 there. Just put it up on the Judge's desk.

9 And I think you explained that ratooning is
10 where you cut off the leaf before it's fully grown, you
11 cut off the plant.

12 A. You cut the plant off fairly close to the
13 ground, maybe just above the bottom few leaves.

14 Q. Okay. And I just had a question for you on
15 ratooning.

16 Now, am I right, Doctor, just so we can get
17 by this area, you don't know whether any leaves
18 produced through ratooning ever got into production in
19 any commercial cigarettes at Philip Morris?

20 A. No, I don't. I was only aware of it during
21 the research phases of those projects.

22 Q. And the research phases, they were simply
23 looking at various aspects of what happens when you
24 ratoon tobacco; right?

25 A. They were doing field experiments to look at

1 a number of criteria, one of which was nicotine
2 production in the new leaves that grew up after.

3 Q. Sure. Because when you cut them off like
4 that, a lot of things change; sugar can change, right?

5 A. Oh, a number of things can change.

6 Q. Right, so --

7 A. They were looking at a lot of things.

8 Q. They were looking at everything that changes
9 when you do that?

10 A. I'm not sure it was everything, but they had
11 certain targeted components, sugars, certain waxes,
12 flavorants, and nicotine was high on the list.

13 Q. And that was in an experimental phase, and as
14 far as you know, never used in a commercial process?

15 A. As far as I know. It was just being explored
16 for possibilities.

17 Q. Now, Doctor, you've given your time to come
18 here today, and I understand that the fee that you're
19 charging for your testimony is \$1,200 a day.

20 Is that approximately --

21 A. Something like that, only because it's taking
22 time out of my normal functions with my clients.

23 Q. Right. And I was just going to say that.

24 And that \$1,200 a day fee is to compensate
25 you for income that you would otherwise lose because

1 you're not doing your normal work; correct?

2 A. Yes. For specific clients --

3 Q. Right.

4 A. -- that I'm working with today. Well,
5 not --

6 Q. I understand that.

7 A. Again, I want -- I don't want to mislead the
8 Court. It's not like I get paid \$1,200 every single
9 day. But when I go to a client, which I would have
10 today and yesterday and had to rearrange -- I don't do
11 this every day of every year. I would be quite well
12 off if I did. I wish I did. You know, I'm sure all of
13 us do. But I had to be compensated because I'm on my
14 own now. I wasn't where I was before where I was being
15 paid by a corporation which was happy to give me time
16 to do this.

17 Q. You're self-employed at this time?

18 A. I'm self-employed. I have to go out there.

19 Q. And make some money?

20 A. Drum up my own business.

21 Q. And you're not going to be able to work and
22 be paid by your client. You're just simply making up
23 for the income you would have lost?

24 A. Yes. And this is the first time -- and I'm
25 not even happy that I had to do it this time. I just

1 had to. I would have preferred to not do that. I have
2 never in the past ever accepted monies or compensation,
3 because this is something I just am morally convinced I
4 need to do.

5 Q. And I understand your feelings, and I'm just
6 saying -- and nobody is suggesting there's anything
7 wrong with it -- your fee is \$1,200; right?

8 A. Yes. For the time I'm appearing either in
9 deposition or court, not for Sunday when I flew down
10 here and not for tomorrow morning when I guess I'm
11 flying back.

12 MR. HEIM May I just have a minute, Judge?
13 I may well be finished with the doctor.

14 I have no other questions, Your Honor.

15 THE COURT: Okay.

16 Redirect?

17 REDIRECT EXAMINATION

18 BY MR. ROSENBLATT:

19 Q. Dr. Uydess, your deposition was taken
20 yesterday here in Miami; correct?

21 A. Yes, it was.

22 Q. And with the magic of today's technology, it
23 was typed up fast; we all have it. It's 184 pages;
24 right?

25 A. I guess --

1 Q. Take my word for it. It's 184 pages.

2 THE COURT: Take a look.

3 THE WITNESS: Let me take a look.

4 Okay.

5 BY MR. ROSENBLATT:

6 Q. Who took your deposition? Who was
7 representing the tobacco companies; what lawyer?

8 I wasn't there, because I was here.

9 A. May I look at the names?

10 Q. Yes.

11 A. I don't want to take a guess. I think I know
12 the correct name.

13 Q. Do you recognize him in the courtroom?

14 A. Him?

15 Him and them. It was a team.

16 Q. Who asked the questions?

17 Don't make a production out of this stuff --

18 MR. HEIM: Raise your hand.

19 MR. OTERO: (Indicating).

20 BY MR. ROSENBLATT:

21 Q. I want to know if you recognize the lawyer in
22 the courtroom who asked you most or all of the
23 questions.

24 A. I believe it was Mr. Hoag.

25 MR. ROSENBLATT: You're wrong.

1 MR. HEIM That's Mr. Rosenblatt.

2 THE WITNESS: Oh, excuse me.

3 THE COURT: I don't want to make a big
4 production of it either.

5 THE WITNESS: Mr. Otero.

6 THE COURT: Whoever is the one who did it,
7 identify himself.

8 MR. ROSENBLATT: The guy sitting next to
9 Mr. Heim?

10 THE WITNESS: Forgive me.

11 BY MR. ROSENBLATT:

12 Q. You scientists make life -- the man sitting
13 next to Mr. Heim?

14 A. Yes.

15 Forgive me. I'm sorry.

16 Q. Got that straight?

17 A. Yes.

18 Q. By the way, did I understand you to say that
19 in other cases, where you've given testimony, you
20 didn't charge?

21 A. No. I did not want compensation, nor was I
22 offered it.

23 Q. How did I get so lucky, billing me 1,200?

24 A. You happen --

25 Q. Just worked out that way?

1 A. I happened -- I'm now an independent
2 consultant and have to earn my living, not that I
3 didn't earn it before.

4 Q. I haven't paid you anything yet, have I?

5 A. No.

6 Q. Be nice to me.

7 Now, you were asked about some documents.
8 One document, the first one that Mr. Heim discussed
9 with you was this document dated July 23, 1980 from
10 DeNoble, Dunn, Osdene and Ryan to Dr. Seligman.

11 The bottom-line conclusion of this document
12 is that nicotine is a reinforcer, but it's not
13 addictive; right?

14 A. That's what's stated here.

15 Q. Yes. That's what's stated here?

16 A. Yes.

17 Q. Well, during the 11 years that you were with
18 Philip Morris, wasn't that the party line at Philip
19 Morris to the public --

20 MR. HEIM Objection.

21 BY MR. ROSENBLATT:

22 Q. -- that it wasn't addictive?

23 THE COURT: Well, I'll sustain the objection
24 as it relates to the party line to the public.

25 You can rephrase.

1 BY MR. ROSENBLATT:

2 Q. Is this document consistent with the attitude
3 and discussions of scientists on the subject of
4 addiction during your 11 years with Philip Mrris, or
5 is it inconsistent with what you heard?

6 A. I'm sorry. Would you repeat that one time?

7 Q. Yes. I'm asking you if this document, which
8 says nicotine is not addictive, it's merely a
9 reinforcer, is consistent with what scientists were
10 saying in your presence, in your discussions with them
11 in meetings you attended during your 11 years at Philip
12 Mrris?

13 A. No. Not totally, no.

14 Q. Now you said that one of the reasons you quit
15 was because the paramount consideration of Philip
16 Mrris was market share and money. What ingredient in
17 cigarettes was the key to maintaining market share?

18 MR. HEIM Objection. Beyond the scope.

19 THE COURT: If he knows the answer. I don't
20 know. Maybe he knows the answer to it.

21 Do you think you can answer that question?

22 THE WITNESS: Yes.

23 THE COURT: All right.

24 THE WITNESS: To cut to the quick --

25 BY MR. ROSENBLATT:

1 Q. Yes, cut to the --

2 A. Bottom line, nicotine.

3 Q. Did the NOD project fail?

4 A. No. As far as I knew, it was technically
5 successful. May have needed a few things, they could
6 have improved it even further, but as far as what I was
7 told by my management, outside contractors who were
8 experts, other people at Philip Morris, chief
9 engineers, it was successful.

10 Q. Now, I believe you mentioned something about
11 the R&D headquarters in Switzerland.

12 Now, was INBIFO in Germany also considered to
13 be R&D headquarters or was that something else?

14 A. That was totally different.

15 Q. In what way?

16 A. Well, first of all, most people at R&D
17 understood that Philip Morris Europe's headquarters
18 were in Neuchatel, if they knew anything about it.
19 Almost no one at Philip Morris knew anything about
20 INBIFO. It was --

21 MR. HEIM Objection, Your Honor. It's
22 speculation. Move to strike.

23 THE COURT: Yes. It's a generalized term
24 I'll sustain it as referenced.

25 BY MR. ROSENBLATT:

1 Q. Now, the letter that Mr. Heim referred to
2 from Dr. Helmut Gaisch dated September 12, 1983,
3 Dr. Gaisch was with the R&D section in Neuchatel,
4 Switzerland; is that correct?

5 A. Yes.

6 Q. Was there -- was there a valid -- based on
7 everything that you learned during your tenure at
8 Philip Morris, was there a valid, scientific reason for
9 killing the NOD project?

10 A. Not that I was aware of.

11 Q. Was there a valid, scientific reason for
12 killing Dr. Gullotta's research or sending it to
13 Europe?

14 A. Scientific reason?

15 Q. Yes.

16 A. Not that I was aware of.

17 Q. And was there a valid, scientific reason for
18 killing Dr. DeNoble's research?

19 A. No. Not that I was aware of.

20 Q. Now, toward the end of Mr. Heim's
21 questioning, you were having a discussion about the
22 general level of science at Philip Morris in terms of
23 the qualifications of the scientists, which you said
24 was very high, and they made advances, and then you
25 said, quote, where they made these advances, quote,

1 without the rest of the world knowing about it, end
2 quote.

3 What did you mean by that?

4 A. When Philip Morris decided to utilize a
5 current technology and explore it for possible use
6 inside, it wanted to elevate -- raise the level of
7 science and quality associated with that so it could
8 have a corporate advantage, and sometimes we'd use that
9 work to develop new and novel information which it
10 didn't particularly want anyone else to know about, so
11 it kept it --

12 Q. Kept it secret?

13 A. Kept it secret, yes.

14 MR. ROSENBLATT: Thank you.

15 THE COURT: All right, sir. You may step
16 down. I appreciate it very much. You're free to go.

17 All right. Let me talk with the lawyers,
18 please.

19 (Discussion off the record.)

20 THE COURT: All right, folks. We were
21 discussing the scheduling, and it looks to me like we
22 won't have anything left for you to do this afternoon,
23 but we'll have to have you come back tomorrow. I know
24 that's going to break your heart.

25 But tomorrow should be a short day. Okay.

1 Probably break around, well, before noon, I guess. At
2 least that's what our intent is. So we'll do what we
3 can.

4 All right. So the usual regulations apply
5 over the night. Enjoy your evening and come back
6 tomorrow morning at 9:15.

7 (The jurors exited the courtroom)

8 THE COURT: You folks want to take five or
9 something?

10 MR. ROSENBLATT: Yes. Could we?

11 MR. HEIM Five minutes, Judge.

12 (A brief recess was taken.)

13 THE COURT: Mr. Heim, all this material you
14 used with Dr. Uydess you can have back.

15 Are we ready to proceed?

16 MR. HEIM Yes, Judge.

17 MR. ROSENBLATT: Yes, Judge.

18 THE COURT: Who is going to do it?

19 MR. REID: Miss Pulley.

20 MS. PULLEY: I am, Your Honor.

21 THE COURT: I am on Page 5, which starts --
22 and I'll just go run through it.

23 MS. PULLEY: Actually, Your Honor, before we
24 got started, we may be able to short circuit this
25 because the defense maintains the entire thing is

1 cumulative. We just heard --

2 THE COURT: I'm sorry?

3 MS. PULLEY: The entire deposition -- the
4 plaintiff wants to put in the defendants' CEO. That's
5 fine. We already put the CEO of RJ Reynolds. This is
6 a predecessor CEO deposition taken back in 1984, and
7 every single topic was covered with Schindler.

8 Perhaps, as we go through, that will become
9 more apparent. Perhaps, after we talk about it, I can
10 give you page numbers as to how they overlap.

11 Are cigarettes addictive? Are low-tar
12 cigarettes safer? Why do you say they are safer? Is
13 there a scientific controversy? What do the warnings
14 say, and do you think they're true? What would it take
15 to prove to you that smoking causes cancer?

16 So these are the exact same topics of a
17 different CEO of the same tobacco company. There's no
18 reason to repeat this testimony to the jury. Not only
19 is it confusing to the jury, but things have changed
20 since 1994 when Johnston was president, CEO of
21 Reynolds.

22 For example, he talks about whether or not
23 they're going to continue the Joe Camel campaign.
24 That's misleading to the jury today because, obviously,
25 Joe Camel has been ceased.

1 For these reasons, we think it's cumulative
2 and it's unnecessary. We should move on to the
3 deposition of another CEO.

4 MR. ROSENBLATT: Well, my -- my answer to
5 that is that, obviously, the plaintiff intends to
6 show -- we say all of CEOs are lying and they're
7 telling the same lies. And the fact, of course -- of
8 course it covers the same areas, to show from our
9 standpoint there is an industry party line, which is
10 the fraud.

11 THE COURT: He's CEO as of when?

12 MR. ROSENBLATT: And it ain't my fault that
13 they changed CEOs so often. Otherwise, there wouldn't
14 be -- Schindler had been there a period of time, and if
15 they hadn't fired Mbrgan and gotten somebody else, you
16 know, there wouldn't be several CEOs, but I have no
17 control over that.

18 MS. PULLEY: Sir, James Johnston was CEO from
19 late 1993 until June of 1995.

20 THE COURT: I'm trying to get his dates here.
21 You say he was a CEO from when to when?

22 MS. PULLEY: Late 1993 to --

23 THE COURT: To?

24 MS. PULLEY: -- spring of 1995.

25 THE COURT: Okay.

1 MS. PULLEY: And since 1995, Mr. Schindler
2 has been the CEO.

3 THE COURT: But he worked there from '79 to
4 '84.

5 MS. PULLEY: He worked there in the '80s, and
6 then he left the company and returned again.

7 THE COURT: Yes. Things may have changed.
8 He may have known things.

9 No. I don't have any problem with that.
10 We'll see if there's anything that's really cumulative,
11 as we go along to the point where it's inadmissible.

12 Let's just see what's in it. Okay.

13 Page 5, Lines 17 to 25. Page 6, Lines 1
14 through 6 are okay.

15 And then your counter-designation, Lines 7
16 through 25 on Page 6 and on Page 7, Lines 1 through 11
17 are all right.

18 Page 8, counter-designation, 15 through 25.

19 Line 1 on Page 9.

20 Line 23 through 25 on Page 9.

21 MR. ROSENBLATT: Wait. Excuse me.

22 THE COURT: Are you with me?

23 MR. ROSENBLATT: Yes.

24 THE COURT: Where did I lose you?

25 MR. ROSENBLATT: Our copy may not -- may

1 not -- so if you just go a little slower, Judge.

2 THE COURT: Page 10, Lines 1 through 12,
3 counter-designation.

4 MR. ROSENBLATT: 1 through 12.

5 THE COURT: Page 11, 14 through 23.

6 And then they skip.

7 Page 18.

8 Now, you designated, plaintiff, Lines 5
9 through 25; they've objected. And we're talking about
10 a full-page ad in New York Times and Wall Street
11 Journal, the subject matter is what you're talking
12 about. And the USA Today.

13 Roll call.

14 In other words, there's some advertising on
15 some national media.

16 What's the objection?

17 MS. PULLEY: Our whole problem with this,
18 Your Honor, in addition to the ads about secondhand
19 smoke, it's not relevant, is that it doesn't describe
20 what the ad is about. Therefore, the testimony is
21 meaningless to the jury, if this is read to the jury.

22 THE COURT: Well, let's see.

23 Yes. I put a question mark on this, because
24 I didn't know what you were talking about.

25 Anyway, what it means is that you're

1 advertising in various national publications. At the
2 bottom on Page 19, the question: Do you have any other
3 ads planned?

4 And the answer is: Yes, we do.

5 And then you drop it.

6 So I don't know what the relevance of these
7 ad -- reference to the ads is.

8 MR. ROSENBLATT: We don't need this, Judge,
9 on this page.

10 THE COURT: Okay. So we can eliminate Page
11 18 and 19.

12 Then there is a reference to the ads on Page
13 22 as to the cost, each bearing the cost of the ad. If
14 you eliminate 18 and 19 --

15 MS. PULLEY: Yes, Your Honor, we would
16 request all of 22 should be out, as well as the first
17 line of 23, which we counter-designated, as an
18 additional counter-designation.

19 THE COURT: Okay.

20 Now let's get to 26. There's a designation
21 on Line 23 through 25, and on the top of Page 27, Line
22 1.

23 And plaintiffs' designation is from Line 10
24 to 25 on Page 27. And Page 28, Lines 1 through 15 and
25 counter-designation by defense on 16 through 25.

1 So that full page should be in.

2 Page 29, the entire page is a
3 counter-designation. And on Page 30, Lines 1 through
4 12.

5 On Page 31, Lines 18 through 25, as well as
6 Page 32, Lines 1 through 7.

7 Page 34, plaintiffs' designations, Lines 7
8 through 25. And apparently there was some sort of an
9 error on Page 35, Lines 1 through 14, which was not
10 designated by plaintiff, which should have been, so
11 counter-designation is okay.

12 The rest of the page is plaintiffs'
13 designation, so all of Page 35 is in, as well as Lines
14 1 and 2 on Page 36.

15 Page 37, Line 23 through 25, all of Page 38
16 and Page 39, Lines 1 and 2 all are in.

17 Page 40, I've allowed this in through other
18 people.

19 MS. PULLEY: Yes, Your Honor, including
20 Schindler.

21 THE COURT: 24 and 25 is in, over your
22 objection. And all of Page 41.

23 Well, let's see.

24 42. Okay. We get down to Line 15 on Page
25 42. 1 through 15 is okay. Then you come up on Line

1 16: Who started Joe Camel?

2 And then he goes on to explain it.

3 I didn't have any problem with that, Page 42
4 or 43, Lines 1 through 15.

5 Now, on Page 45 -- when was this taken, this
6 depo, by the way?

7 MS. PULLEY: '94.

8 THE COURT: May 26th of '94.

9 Now, you ask here on Page 45, what are the
10 present plans with respect to Joe Camel?

11 It goes on to explain what the plan is or
12 whatever his interpretation is.

13 MS. PULLEY: Yes, Your Honor. Our problem is
14 it's misleading because Joe Camel has been
15 discontinued, and it's not relevant to this class
16 action.

17 THE COURT: Well, yes and no.

18 MS. PULLEY: Your Honor will recall yesterday
19 you only allowed in Joe Camel to go to show
20 credibility.

21 THE COURT: Yes, but it's different here. I
22 marked them all in, the whole kit and kaboodle here. I
23 looked at it. Through page --

24 MR. HEIM Your Honor, the relevance issue on
25 Joe Camel, I think, goes to class members, not -- not

1 possibly having seen or relied on Joe Camel.

2 THE COURT: No, but that's not the essence of
3 it either. It doesn't have to be that. It could just
4 go to show a pattern or plan of advertising, the mode
5 and methods by which you're doing it. You don't
6 necessarily have to use it for reliance.

7 So --

8 MR. REID: Unless we did something wrong with
9 it, just the fact that we have an ad, obviously it's
10 only being offered because they think there's something
11 wrong.

12 THE COURT: It depends on what they say about
13 it. Right now it doesn't say anything about it.

14 MR. REID: It shows that we were marketing to
15 children. We, of course, deny that.

16 THE COURT: Well, the ad speaks for itself.

17 MR. REID: But there are no children in the
18 case. If that's the reason they're arguing --

19 THE COURT: I'm not so sure there has to be
20 children in the case to get that issue out. That's my
21 problem. Okay.

22 It's difficult to see through this machine.

23 I let all of that in through Page 51,
24 including your counter-designations, Lines 1 through
25 14.

1 Now on Page 51, Lines 15 through 25, I marked
2 it out. But I'm just trying to think about how it
3 relates.

4 There's a question, a rhetorical question --
5 you say at the end of the question: I would bet you
6 that 90 percent of the American people don't believe
7 that. What do you think?

8 I mean, it's --

9 MS. PULLEY: Your Honor, this is in a larger
10 context of our counter-designations.

11 THE COURT: What? I'm sorry.

12 MS. PULLEY: This is a larger context to our
13 counter-designation. It's an ongoing conversation
14 between the plaintiffs and defendants. We're not
15 interested in that one particular question, but it
16 gives you flow in future questions when they refer back
17 to it.

18 THE COURT: He sure does answer the question.

19 Okay. I think what you could do -- if you
20 take out the rhetoric there and just end it at the end
21 of the new smokers line, on Line 20, leaving out, "I
22 would bet," et cetera, and then as far as the answer is
23 concerned, if you start with Line 23, "I would
24 speculate."

25 MS. PULLEY: Okay.

1 THE COURT: I think we could do that. So
2 that will then put in all of Page 52, 53 and 54 up to
3 Line 12. I don't think we need 23 and 25.

4 What are we doing getting into this? We're
5 talking about automobiles.

6 MS. PULLEY: Yes, Your Honor. It's an
7 analogy to advertising for cigarettes.

8 THE COURT: Wait a minute. Let me just
9 read -- I thought they were all tobacco until I got
10 down to this one. Because he brings it up in his
11 answer. He's the one who brings it up.

12 MS. PULLEY: Right, and it's important.

13 THE COURT: He says a perfect example, the
14 auto industry. Then he goes on to explain it in his
15 answer. It wasn't a question in his answer. He
16 brought it up.

17 MS. PULLEY: Right. It's his way of
18 explaining his point.

19 THE COURT: If it's his way of explaining,
20 then I'll leave it in.

21 Let's see. I would just put the whole page
22 in. Might as well get it all in there.

23 Okay. It makes more sense.

24 Page 54. Page 55, Line 1 through 4 and Line
25 5 and 6, and the first word on Line 7 I said should not

1 come in. Just start that colloquy there with, "My
2 point is," instead of having an academic discussion
3 there. I'm not sure it's really needed.

4 MS. PULLEY: I'm sorry, Your Honor. Did you
5 just leave the question, the following issues, or
6 delete the answer?

7 THE COURT: Yes. Just that line. In other
8 words, "No. You've been hanging around lawyers a lot
9 because, you know, you're good at controlling the
10 dialogue," none of that should be in.

11 So it just starts with, "My point." That's
12 on Line 7.

13 MS. PULLEY: Is 1 through 4 in?

14 THE COURT: 1 through 4 is okay.

15 That's the answer.

16 And then you pick it up on Line 7 and carry
17 it through.

18 There's another academic discussion here on
19 advertising. That's nice.

20 Page 56, all of 56, top of 57, Lines 1 and 2.

21 Okay. Now, 57, Line 9 through 25. And I
22 marked all that out, as well as the next page, 58.

23 And all of the sudden he comes in with a
24 question on Page 59, the question on Line 2 and 3,
25 which is okay.

1 And the rest of the page is okay.

2 MS. PULLEY: Actually, Your Honor, our
3 objection to the rest of the page is that the witness
4 does not get to answer the question.

5 THE COURT: Well, let's see. Well, he does.
6 He answers it down here on Line 23.

7 MS. PULLEY: Okay. The plaintiff asks the
8 question again at Line 16.

9 THE COURT: Yes. But it's in context. It's
10 all right.

11 Let's see. Page 60, the whole thing.

12 Page 61. What are we talking about?

13 We're trying to get a statistical sample of
14 how many people smoke or don't smoke Reynolds. Did
15 they do research? He doesn't have specific
16 recollection but it's in the millions. More than five.

17 Now we're getting very esoteric, talking
18 about advertising on Page 61.

19 You get down to Line 24, and the next page, I
20 marked that out. Page 61, Line 24, 25, the entire
21 thing.

22 MR. ROSENBLATT: Now, to us, Judge, the
23 question at the bottom of Page 61 is really so basic.

24 THE COURT: A basic question.

25 MR. ROSENBLATT: Yes, because what his -- his

1 thesis is that the millions of dollars spent on
2 advertising get a certain small percentage of
3 switchers.

4 THE COURT: Well, here is what the problem
5 with all of this is. You asked the question and you
6 say: Just have an agreement no one advertises, blah,
7 blah.

8 And he says: I think the FTC would have a
9 major problem with it.

10 Then we get into FTC and government
11 regulation, and I really didn't want to get into that.

12 MR. ROSENBLATT: Well, but I think he's -- I
13 think that's very instructive, because he's obviously
14 avoiding a very simple question: What's the point of
15 advertising?

16 You know, you're saying you spend these
17 millions of dollars on advertising. You get a few
18 Marlboro smokers, they get a few Winstons, it's a
19 switch.

20 That's why it's so unbelievable that this
21 party line that they don't advertise for new customers,
22 they only advertise for switchers. He's saying it's a
23 wash.

24 MS. PULLEY: Your Honor --

25 MR. ROSENBLATT: So the hundred million

1 Reynolds spends, it goes down the drain. The 300
2 million Philip Morris spends -- and he doesn't have an
3 answer. He is evasive. He said: Well the FTC would
4 have a problem with that.

5 THE COURT: Well, I don't even need that last
6 one.

7 MR. ROSENBLATT: I agree.

8 MS. PULLEY: Your Honor, it's argumentative.
9 It's an improper hypothetical, and it calls for an
10 opinion of the FTC.

11 THE COURT: I'm not worried about that. I
12 could always cut the FTC thing out. That's no big
13 deal.

14 All right. So he asked a question: What
15 would happen if you didn't advertise?

16 And you go way back down to Line 14 where he
17 says: Well, I wouldn't agree to it. Because he still
18 thinks he could win.

19 MR. ROSENBLATT: He says: I haven't lost my
20 job yet.

21 THE COURT: All right. Well, it doesn't
22 help; doesn't hurt.

23 If you take Page 61, Line 24 and 25 and just
24 ask right there, that's the question, and pick up the
25 answer on Line 14, Page 62, eliminating Lines 1 through

1 13, it should be okay.

2 But then we get into foreign advertising,
3 which I don't really care to talk about. Page 63,
4 Lines 1 through 16, out.

5 No, the whole page, actually.

6 And the next page. They're talking foreign
7 markets, which I don't think is necessary.

8 So, eliminate Page 64, 1 through 19.

9 Now we have got a whole section here on a
10 business, which I've marked here, family and personal
11 smoking habits.

12 The first question you ask on the
13 counter-designation for whatever is: Do you remember
14 why you quit?

15 That was the counter-designation.

16 MS. PULLEY: Yes, sir, Your Honor. That's
17 only conditional. Our preference would be the next
18 five designations are out.

19 THE COURT: I'm sorry?

20 MS. PULLEY: The next five sets of
21 designations should all be out, because they're family
22 smoking.

23 THE COURT: Well, it depends on where we're
24 going with it. Let's see. The other one talked about
25 when they were kids and they were playing soldier and

1 all that kind of thing, when they started to smoke.

2 MS. PULLEY: I'm afraid this one is not that
3 colorful.

4 THE COURT: And they were talking about how
5 to quit. Now they were talking about whether or not
6 you could quit.

7 MS. PULLEY: Page 68 starts with the
8 deponent's father's views on smoking, which clearly
9 aren't relevant to this case.

10 THE COURT: I'm not sure I'm there yet. I'm
11 on 68.

12 Okay. I left in Page 67, Lines 15 through
13 25; Page 68, Lines 1 through 24.

14 I don't see any -- any need to get into what
15 the father did or what the father died of.

16 Being a steelworker makes a big difference
17 here, so I kept out Lines 1 through 21 on Page 69.

18 Back at the kitchen table.

19 You get very esoteric in this thing.

20 MR. ROSENBLATT: Pardon me?

21 THE COURT: You have some pretty weird
22 conversations about babies.

23 MR. ROSENBLATT: I don't need all that.

24 THE COURT: Well, what do you want in or not
25 want in? Because that depends on -- if you take it

1 out, then all of their counter-designations or
2 objections get taken out.

3 I'm on Page 70. Do you need that?

4 MR. ROSENBLATT: Yes. No. I don't need
5 that.

6 THE COURT: Eliminate Page 70.

7 What about 71?

8 That's when he starts to work for RJR, and
9 they ask him -- oh, he tells them about smoking. They
10 said don't worry.

11 I don't have any problem with that being in
12 there, if you want. 71 and 72.

13 Line 8 through 25 on 71 and Line 1 on 72.

14 What else are we doing?

15 I skip now to Page 76. I culled that one
16 out. I think you're talking about the father's doctor
17 and his medical condition.

18 So, Lines 9 through 21 on Page 76 is out.

19 Page 81. That's your standard jury question.

20 MS. PULLEY: You kept out any discussions
21 with children at other depositions.

22 THE COURT: I know I have, but then it keeps
23 cropping up all of the time. I initially marked it out
24 because of the children.

25 MR. ROSENBLATT: That's okay.

1 THE COURT: 81, 82 is out. 83 is out.

2 84 I marked out from -- let's see. I better
3 get back here.

4 On Page 84, Line 2 through 12 is okay.

5 MS. PULLEY: Your Honor, again, this is
6 cumulative of Schindler's testimony about low-tar
7 cigarettes.

8 THE COURT: It's okay. He just wants to know
9 what he knows. He has a right to know that.

10 So, Line 13 through 22 on Page 84 is out, but
11 I did a little scribble here.

12 Let's see. The question is on -- is where?

13 Well, there really isn't a question. The
14 problem is this. When you get down to Line 12, then
15 you make a gratuitous comment that you're the only guy
16 in the tobacco industry that knows it by heart. We
17 really don't need that.

18 Now we get -- I don't understand the question
19 on Line 17. So I kept all that out, 13 through 25.

20 MR. ROSENBLATT: Well, the question on Line
21 25, Page 84 is --

22 THE COURT: Yes, but you don't know. If
23 it's -- no. I kept that in.

24 MR. ROSENBLATT: Yes.

25 THE COURT: I said that's in.

1 MR. ROSENBLATT: Okay.

2 THE COURT: I'm sorry. Line 13 through 22.

3 MR. ROSENBLATT: Okay.

4 THE COURT: Now, see, on Line 22, he starts
5 the answer about being legally required to have it on
6 packaging: Of course, we complied with that. Which
7 basically is in response to the question on Line 17,
8 except the question is so badly worded that you can't
9 make a connection between the two.

10 If you want Lines 22 to 24 in, I was inclined
11 to give it because it, more or less, is in favor of
12 your side, as it relates to the warnings, and then pick
13 up on Line 25 and the top of Page 85, Line 2.

14 MS. PULLEY: If we could start with --
15 deleted the "I don't know," the first one.

16 THE COURT: It says: I do know that we're
17 legally required to have that on the package.

18 MS. PULLEY: Right. Start there.

19 THE COURT: Yes. He's got to explain it some
20 way.

21 Okay. Page 90. All of Page 90 starting Line
22 8 to 25, and all of 91, from 1 to 22.

23 Now we get to another topic. Now we're back
24 to those ads again.

25 All right. I had a question mark on here

1 because I didn't know where you were going with it. It
2 doesn't say anything.

3 MR. ROSENBLATT: What page, Judge?

4 THE COURT: Page 93.

5 MR. ROSENBLATT: Well, this is -- the ad is
6 on secondhand smoke anyway.

7 THE COURT: So that's out, right.

8 MR. ROSENBLATT: Okay.

9 THE COURT: 2 through 16 on 93.

10 Page 100, Lines 7 through 10, no objection to
11 counter-designation.

12 Now, I don't know where we get into this Page
13 102.

14 MS. PULLEY: It's merely context for what's
15 coming up.

16 THE COURT: I'm sorry, ma'am?

17 MS. PULLEY: It's merely context for what's
18 coming up on Page 104.

19 THE COURT: Well, you've got me on that one.
20 I'm trying to figure out how we can talk about
21 hamburgers that haven't come up yet. So I have to
22 start looking and seeing why he's talking about
23 hamburgers.

24 MS. PULLEY: The hamburgers part isn't
25 important. If we could start at Line 15.

1 THE COURT: I know, but that's the question.
2 So I'm looking for a question.

3 MS. PULLEY: If it --

4 THE COURT: I'm just going to eliminate Page
5 102 and get to the question you're talking about,
6 because there's no question.

7 MR. ROSENBLATT: It's a long answer to no
8 question.

9 THE COURT: Yes.

10 MR. ROSENBLATT: Imagine if I asked a
11 question, he'd still be talking.

12 THE COURT: All right. 102 and 103 and the
13 top of 104 is out.

14 MS. PULLEY: Then all of 104 should come out.

15 THE COURT: Then now I've got a problem with
16 104: I rest my case, based on what you said.

17 I don't know what you wanted to do.

18 MS. PULLEY: Actually, Your Honor, I'd like
19 to amend our counter-designations. If we could go back
20 to Page 102 and start with line --

21 THE COURT: I don't know how you can put
22 anything in context, because I don't know where you're
23 going with it.

24 MS. PULLEY: If we can start with Line 15 on
25 Page 102.

1 THE COURT: Well, none of that makes any
2 sense because the stuff before that hasn't been brought
3 out.

4 MS. PULLEY: It's fine with me if you want to
5 take 102 through 104 all out.

6 THE COURT: I'm not sure. I don't know where
7 we're going with this. I'm looking for a definitive
8 question and a definitive answer.

9 I'm inclined to keep 102 out. If I keep 102
10 out, now what? Now we get the answer, which is a long
11 answer. And keep 103 out.

12 MR. ROSENBLATT: 102 out and 103 out?

13 THE COURT: Yes.

14 Now, you've just picked up on Line 6, and I
15 can't figure out --

16 MR. ROSENBLATT: That can come out.

17 THE COURT: Hum?

18 MR. ROSENBLATT: 104 can come out.

19 THE COURT: 104 is out. That eliminates the
20 problem

21 MR. ROSENBLATT: I'm trying to make it easy
22 for you, Judge.

23 THE COURT: I appreciate it.

24 Page 106, apparently, is in.

25 Then there is a counter-designation on 107.

1 So that's okay.

2 MR. ROSENBLATT: 106 is in from what line to
3 what line?

4 THE COURT: I'm sorry. Let me go back.
5 3 through 14.

6 All of 107 is in. I don't have any problem
7 with that.

8 And 108 is in, all of the way down from 1
9 through 16.

10 Page 109, Lines 18 through 25 is in. All of
11 Page 110.

12 Now we get to Page 111. Now, we talk about
13 the FTC requirements for tar and nicotine numbers.

14 And you're bumping up against preemption
15 here, because the question asked, this means -- the
16 advertising means that the cigarette with the least tar
17 and least nicotine is the least dangerous from a health
18 standpoint?

19 And then he said: No, that's not it. It's
20 FTC requirements. But, nonetheless, it still butts
21 heads with preemption.

22 Are you raising the preemption?

23 MR. ROSENBLATT: I'm sorry, Judge. This is
24 on what page?

25 THE COURT: 111.

1 MR. ROSENBLATT: 111.

2 THE COURT: I assume that you're going to --
3 you're jumping on that preemption issue.

4 MS. PULLEY: Yes, Your Honor.

5 THE COURT: Even though you say that's not
6 the case.

7 MS. PULLEY: Our argument is merely we're
8 required by the FTC to publish the tar and nicotine
9 numbers. You can't then argue we're deceiving the
10 public by doing so. That's why you run into
11 preemption.

12 THE COURT: Well, they're not arguing that.
13 That's the problem. You guys are.

14 MR. ROSENBLATT: We've never said -- we've
15 never taken a position the warnings are insufficient in
16 any way.

17 THE COURT: He just simply asked the
18 question, does this -- is this what it means.

19 MR. ROSENBLATT: Yes.

20 THE COURT: He said: No, that's not what it
21 means. All it means is that we're required to do it.

22 Now, then you get into an answer here, and
23 that's a problem

24 MR. ROSENBLATT: Well, this is --

25 THE COURT: Some smokers believe low tar is

1 better for them They have read whatever Readers'
2 Digest or whoever says it, and they say, okay, it may
3 be better for me. So, do we tell them it's better for
4 them? Absolutely not.

5 MR. ROSENBLATT: That's the position. And
6 you've heard -- you've heard me go through that with
7 them

8 Then what's the point? What's the -- and
9 they say, well, we say it's another one -- another one
10 of their big lies.

11 Well, that's what the market was; they wanted
12 this lighter cigarette.

13 But why?

14 Well, we don't know. Taste. We don't make
15 any health claims. Fine.

16 MR. HEIM Wait a minute. They're not
17 allowed to make health claims.

18 MR. ROSENBLATT: No. They just did in the
19 Kool ad.

20 MR. HEIM You can't make health claims you
21 can't prove.

22 THE COURT: That I don't understand, because
23 they did. The Kool ad did, and I don't understand
24 that. But that's really not before me at the moment.

25 But, you know, the thing that really bothered

1 me is, who are we trying to kid? We're sitting around
2 here and playing these esoteric games with each other.

3 Our cigarettes have the lowest tar in the
4 world, what is that supposed to mean to somebody?

5 That means it's better for you. I don't care
6 which way you slice it.

7 MR. HEIM Of course.

8 MR. ROSENBLATT: Of course.

9 MR. HEIM Of course.

10 THE COURT: Now the question is --

11 MR. ROSENBLATT: Now they deny it.

12 THE COURT: Now the question is, is that the
13 reason they're putting it in there? They say, no, we
14 can't say that. We can't say it's better for you, we
15 can't make any reference to the health characteristics.

16 MR. ROSENBLATT: But in a deposition --

17 THE COURT: We're going to say it's lower
18 than anybody else's, which makes it better.

19 MR. HEIM You'll get different people who
20 will say different things about the product.

21 MR. ROSENBLATT: The truth is, if it's a
22 safer cigarette -- they're admitting the old cigarettes
23 or the high-tar cigarettes are unsafe.

24 It's all litigation, all strategies, all
25 lies.

1 THE COURT: They say that that's preemptive,
2 because you can't even allude to it. If somebody else
3 alluded to it, they would jump up and down hollering
4 and screeching that somebody is violating the
5 preemption rule.

6 I mean, suppose one tobacco company says, our
7 cigarettes have less tar than the other does; that
8 means it's a safer cigarette than the other. If that's
9 the case, therefore, the warnings don't apply.

10 I mean, it boggles the mind.

11 MR. HEIM I think there's FTC regulations
12 that say you cannot say that your cigarette is safer
13 than another company's cigarette.

14 THE COURT: Yes, I know that.

15 MR. HEIM Unless you have absolute,
16 biological proof of that.

17 THE COURT: I'm not so sure they can even say
18 safer. They can just say what it is.

19 I don't know. Maybe you're right. Maybe
20 they could say if you have biological proof by having
21 less tar in your cigarette, it's a safer product than
22 the other guy's cigarette, who has more tar.

23 MR. HEIM Right.

24 THE COURT: And they allow you to say it's a
25 safer cigarette.

1 MR. HEIM Well, they say you can't say that.

2 THE COURT: No. Unless you can prove it.

3 MR. HEIM Unless you can prove it.

4 THE COURT: So, what do you do? You take
5 three people, each one smokes a different cigarette,
6 and you wait until someone dies? No, that doesn't make
7 any sense.

8 MR. HEIM No, it don't.

9 THE COURT: There's no way you can prove it,
10 which is the problem So it's a Catch-22.

11 MR. HEIM Exactly.

12 THE COURT: I don't know. I just questioned
13 it because it smacks of preemption. That was the first
14 impression I had, and I didn't want to run afoul of it.

15 And I'm not sure what to do with it. But the
16 more I try to think about it, the more I try to analyze
17 this situation, the more bogged down you get in it.

18 See, the tobacco companies realize that
19 there's only two reasons they smoke low-tar cigarettes.
20 One is largely driven by taste, and the other is
21 because they really, truly believe it's better for
22 them

23 MR. ROSENBLATT: But we don't tell them that.

24 MR. HEIM We just went through that.

25 THE COURT: Yes, I know. And do we tell them

1 it's better for them?

2 Absolutely not.

3 MR. ROSENBLATT: This is a fundamental
4 position of the tobacco industry, and this is the CEO,
5 and it should be in.

6 MS. PULLEY: The question runs right into
7 preemption, Your Honor. Your gut instinct is correct
8 to exclude it.

9 MR. ROSENBLATT: No, that is not the Judge's
10 instinct.

11 THE COURT: Yes. My gut instinct is it did,
12 and now I'm trying to figure out if it doesn't. First
13 impression.

14 I'm serious. I have a problem with this,
15 overall.

16 See, you first talk about advertising, and
17 the preemption talks about advertising and any means of
18 communication, about health issues and warnings, and
19 that is where it runs smack up against each other.

20 Okay. Page 111. I'm going to keep it out, 7
21 through 19.

22 MR. ROSENBLATT: You know, although --
23 that's -- I think that's an inconsistent ruling with
24 other CEOs. I think you've let other CEOs answer it.

25 THE COURT: Not like that.

1 MR. ROSENBLATT: Really? I thought I read
2 from Mbrgan and Schindler pretty much the same exact
3 thing --

4 THE COURT: I don't think so.

5 MR. ROSENBLATT: -- that they're saying we
6 don't say it is, but the public believes it. I think
7 that's in. I really do.

8 THE COURT: No. It's the way the question is
9 worded. You definitively talk about health aspects.

10 MR. ROSENBLATT: It's not that big a deal,
11 this question and answer.

12 THE COURT: It's not that big a deal. It's
13 so limited. I'm so hamstrung with the federal
14 regulations and this preemption stuff.

15 All right. 113, I don't have any problem
16 with 113.

17 And 114. I don't see any reason for 114.

18 MR. ROSENBLATT: I agree with you.

19 THE COURT: So we quit it at Page 113, Line
20 25, through 114, Lines 1 through 9.

21 MS. PULLEY: I'm sorry, Your Honor, is Page
22 114 --

23 THE COURT: Out?

24 MS. PULLEY: -- out.

25 THE COURT: 115, what are we talking about

1 here?

2 I had no problem with that, Lines 6 through
3 17 and the rest of the page is okay.

4 And the top of Page 116, Lines 1 through 4.
5 Okay. Page 117. What about Yul Brynner?

6 MR. ROSENBLATT: That's good stuff.

7 MS. PULLEY: We object to this on numerous
8 grounds. First of all, it's hearsay. The question
9 repeats out-of-court statements of Yul Brynner.

10 Second of all, it's irrelevant. This
11 deponent's opinion or reaction to the Yul Brynner
12 message isn't relevant.

13 Third, it's argumentative. Including, if
14 you'll notice, the plaintiffs' lawyers says in his
15 question that he found Yul Brynner's statement moving,
16 a very, very moving ad.

17 THE COURT: Okay. I marked it out, 117,
18 Lines 5 to 25; and 118, 1, 2, 3, out.

19 Is there much left?

20 MS. PULLEY: Page 140, Your Honor.

21 THE COURT: 140.

22 MR. ROSENBLATT: What did you do to Page 118?

23 THE COURT: The Yul Brynner thing is out.

24 You ask him this question: Did you lose any
25 sleep over it? And he starts to talk.

1 Page 140, let's see what I've got on 140.

2 A suit for the EPA -- I've been keeping other
3 lawsuits out. Page 140, Lines 7 through 21 is out.

4 Page 143, what statement are you talking
5 about?

6 You make a statement here, quote, in my book
7 you get an A-plus for this very forthright statement.
8 And then you quote a statement.

9 Is this a statement he made?

10 MR. ROSENBLATT: I'm sorry?

11 THE COURT: On Page 143.

12 MR. ROSENBLATT: Yes. That's a statement.

13 Yes, he said that to Congress.

14 THE COURT: He said to Congress?

15 MR. ROSENBLATT: Yes.

16 THE COURT: So, this is something he did say?

17 MR. ROSENBLATT: Yes. And I said: What you
18 were telling Congress was --

19 THE COURT: Well --

20 MR. ROSENBLATT: -- even if you put us out of
21 business --

22 THE COURT: Okay. 143, I left that in.

23 MS. PULLEY: Just for the record, Your Honor,
24 our objections were that it was protected speech,
25 because it was our CEO testifying before Congress as

1 the result of regulation.

2 And also it's irrelevant. We're talking
3 about a black market. That could be highly misleading
4 to this jury as to what's going to happen as a result
5 of this lawsuit and whether there will be a black
6 market in cigarettes.

7 It's not relevant to any issue being tried in
8 phase one.

9 THE COURT: Well, you may be right, too.
10 Yes, we're talking about criminal activity
11 here.

12 Well, overall, I guess you're right. It
13 really doesn't have anything to do with phase one.

14 Okay. 143 is out.

15 144. It says he doesn't know anything about
16 R. J. Reynolds and Brown & Williamson. Back in 1963, he
17 has no knowledge of that.

18 Okay. I cut out 144, unless you want in your
19 designation.

20 MS. PULLEY: That can be out.

21 THE COURT: All right. 144, 145 is out.

22 I kept it out in other cases.

23 Anything else?

24 MS. PULLEY: 154. This deals with a souvenir
25 shop in Winston/Salem

1 THE COURT: Souvenir shop?

2 MS. PULLEY: Yes, sir.

3 THE COURT: Souvenir shop. Smoking Joe's
4 Racing, what does that mean?

5 MS. PULLEY: I believe it's a bumper sticker,
6 sir.

7 THE COURT: "Thank you for smoking. Smoking
8 permitted." That's a sign.

9 Oh, come on, now. You really want all this
10 stuff in?

11 All right. I marked that out.

12 154. Stick with the case. Stick with the
13 case.

14 Page 159, question on Line 24 and 25 and top
15 of Page 160.

16 Let's see. You take this one down to Line
17 14. That's okay.

18 Then talking about statistics. Finish it off
19 with line -- the answer doesn't make any sense.

20 Okay. 1 through 14 is okay. 15 through 25
21 apparently is out.

22 And the same with 161. That's out.

23 What else do we have?

24 Page 164, Lines 18 through 21. That's a
25 counter-designation, which is okay.

1 I guess that's it.

2 It gets worse and worse.

3 All right. We'll do what we can with it.

4 Ten after five.

5 Okay. Well, see you folks at 9:30.

6 MR. ROSENBLATT: So, it's hard to say how
7 long this will take, but that's all --

8 THE COURT: It won't take a couple hours, at
9 most.

10 MR. ROSENBLATT: Judge, in terms of my
11 witnesses, first of all -- this will only take a minute
12 or two.

13 I gave defense counsel this letter. Why
14 don't you just look at it.

15 This has to do with scheduling for next week.
16 But there's another issue I want to bring up.

17 THE COURT: Let's see. Week after
18 Thanksgiving.

19 MR. ROSENBLATT: Right.

20 THE COURT: What are we doing the week after
21 Thanksgiving? That's the week of December --

22 MR. REID: Next week.

23 THE COURT: -- December 30th -- December 1st.
24 And I'm not so sure about the 4th.

25 MR. ROSENBLATT: The 4th?

1 THE COURT: The 4th. We've got a problem
2 with the 4th to begin with.

3 MR. ROSENBLATT: That's with installation.

4 THE COURT: Yes. Friday, the 4th, is the
5 bi-annual ceremony to honor judges who have retired.
6 Whatever that means. They need the courtroom

7 THE BAILIFF: They said we could have another
8 courtroom

9 THE COURT: We can have another courtroom,
10 yes, but I was hoping to be gone myself on Friday.

11 MR. ROSENBLATT: Now, the other thing I
12 wanted to bring up about -- about next week, in terms
13 of -- in terms of witnesses -- I'll let you read that.

14 THE COURT: Okay. You want to use
15 Dr. Cummings.

16 MR. ROSENBLATT: Yes. I mean, I'm just
17 basically offering -- and I don't think you have an
18 answer for me yet, as to whether you --

19 MR. HEIM No. I don't know what these
20 articles are.

21 MR. ROSENBLATT: That's fine.

22 MR. HEIM I just got handed the letter, and
23 I'll look at it.

24 MR. ROSENBLATT: I just want to make you
25 aware of that. That's not a problem

1 THE COURT: Okay.

2 MR. ROSENBLATT: The thing --

3 THE COURT: Yes.

4 MR. ROSENBLATT: Okay. You remember I
5 brought up this issue of Dr. Wanner.

6 THE COURT: No.

7 MR. ROSENBLATT: Okay. I'll remind you.
8 Dr. Wanner is a Miami pulmonologist.

9 THE COURT: Oh, yes. Okay.

10 MR. ROSENBLATT: Cumulative, cumulative.

11 So, I said, okay, I'll drop Dr. Wanner.

12 Then, what do they do? They designate stuff
13 they want to read from their discovery deposition. And
14 I say --

15 THE COURT: Of Dr. Wanner?

16 MR. ROSENBLATT: Yes. I said, if that's
17 permitted, I want to call him and put him on.

18 THE COURT: You want to call him as your
19 witness?

20 MR. ROSENBLATT: No, no.

21 THE COURT: He wants to call him

22 MR. ROSENBLATT: No, they don't want to call
23 him. They want to read.

24 THE COURT: From the plaintiffs' case.

25 MR. HEIM: No, Judge. Here is what --

1 THE COURT: You want to use Dr. Wanner's
2 testimony on your case?

3 MR. HEIM The pretrial --

4 THE COURT: You can do that. He's free to
5 use all of the testimony.

6 MR. HEIM He can counter-designate.

7 MR. REID: During our case.

8 THE COURT: He can do that.

9 MR. HEIM If we do.

10 THE COURT: Not a question. You can do that.

11 MR. HEIM Well, in the pretrial order, we
12 had actually talked about this before Your Honor signed
13 the pretrial order, we said, what happens if one side
14 offers a witness who is deposed and then withdraws it?

15 And we worked it out by talking it through,
16 that the other side would have five days to designate
17 from that deposition, if they wanted to designate it
18 for possible use in their case.

19 THE COURT: Uh-huh.

20 MR. HEIM So we did that. We used that part
21 of the pretrial order, and we took some of Dr. Wanner's
22 testimony, and we said, we're designating that for use
23 in our case when we get to it.

24 And that's what counsel is referring to.

25 THE COURT: I see. But it is part of the

1 order?

2 MR. HEIM Yes, sir. It's part of Your
3 Honor's order.

4 MR. REID: Yes, sir.

5 MR. ROSENBLATT: But that's a totally unfair
6 result, if they're permitted to do that.

7 It's there -- we didn't ask him questions.
8 It's their discovery deposition.

9 Because of their efforts to say it's
10 cumulative, you know, I can't call him, but they can
11 read the good stuff from their -- and I have the great
12 privilege of counter -- of counter-designating -- using
13 their, you know -- it's not fair.

14 Either he's not called because -- or if
15 they -- if it's that big of a deal to them to get in
16 his counter-designations, then I should be permitted to
17 call him I'm not saying you have to decide this, but
18 it's --

19 MR. REID: It's either cumulative or it's
20 not. We're getting several different issues all
21 intertwined here.

22 The first question, I guess, is it
23 cumulative. After that's decided, and you apparently
24 ruled --

25 THE COURT: Obviously, there is some good

1 stuff you want in it.

2 MR. ROSENBLATT: Absolutely.

3 MR. REID: It's cumulative.

4 MR. ROSENBLATT: Not in his deposition.

5 There's opinions.

6 THE COURT: In his deposition, there's not
7 any good stuff?

8 MR. ROSENBLATT: No. It's their discovery
9 depositions.

10 THE COURT: I've seen discovery depositions
11 where the whole kit and kaboodle was out.

12 MR. ZACK: I was there, Your Honor. What
13 happened is the original designations that he disagreed
14 with, and questions were asked by both sides --

15 MR. ROSENBLATT: Well, what, 95 percent and
16 five percent? There were a few questions.

17 MR. ZACK: You indicated there were not
18 questions asked.

19 MR. REID: But it boils down to, it's still
20 cumulative. Just because there might be a part we want
21 to read later in our case doesn't mean it's not
22 cumulative now. It would be unfair to allow the fifth
23 pulmonologist to come in and testify, or whatever we're
24 up to.

25 THE COURT: Supposing he wants to put him on

1 in your case?

2 MR. REID: You mean counter-designate from
3 the deposition?

4 THE COURT: Or take a deposition in order to
5 do so.

6 MR. REID: Take another deposition?

7 THE COURT: Yes.

8 MR. REID: That he would then cross --

9 THE COURT: Considering you're going to use
10 him for another purpose.

11 MR. REID: I've raised a lot of other
12 questions. I suppose -- are you asking could he be
13 called as rebuttal at that point?

14 THE COURT: No.

15 MR. REID: He couldn't take another
16 deposition to read to ours, because it would be our
17 case, not his, so --

18 THE COURT: We're running into a lot of
19 little technical problems.

20 MR. REID: Oh, sure.

21 THE COURT: I'm just trying to figure out how
22 to do it fairly so that everybody gets a fair shot.

23 Let's suppose, for example, you did have a
24 deposition and suppose they withdraw him and there was
25 no deposition. Then you would call him

1 If you figured you were going to call him,
2 wouldn't it be fair that they would have an opportunity
3 to take his depo?

4 MR. HEIM Yes, except that --

5 MR. REID: They would have had to list him,
6 and there would have a bunch of processes.

7 THE COURT: You would have had to list him,
8 too.

9 MR. REID: We would have had to list him

10 THE COURT: Did you in this case?

11 MR. HEIM No.

12 THE COURT: How can you read his depo?

13 MR. HEIM We can read his depo because --

14 THE COURT: They withdrew him

15 MR. HEIM Because, as we said, when we
16 talked about this beforehand --

17 THE COURT: If it wasn't for the trial order,
18 you couldn't do it.

19 MR. HEIM I don't know about the evidentiary
20 rules. If it wasn't for the trial order, we would not
21 have had him named as one of our experts, so I guess we
22 couldn't have done it. We wouldn't have known about
23 what his testimony was going to be.

24 But he testified in a particular way, some of
25 which -- a good part of which is helpful to the

1 plaintiff, but there were a couple of things that he
2 said that we liked.

3 So when he withdrew him, we said, okay, for
4 our case, we'll put those few things into our case. It
5 wasn't a lot. Just a few things that he said. That's
6 my understanding of what happened.

7 MR. REID: I think when you talk about
8 fairness, the plaintiffs have been able to put on a lot
9 of pulmonologists already. The jury has heard from a
10 lot of them. The plaintiffs aren't going to be
11 prejudiced by putting on the fourth or fifth, whatever
12 number it is, pulmonologist.

13 THE COURT: It depends on what you want to
14 read that he can't counter-designate, is the point.

15 MR. REID: We'd probably need to get the
16 deposition out.

17 MR. HEIM: I think we need to look at it --

18 MR. REID: When we get to our case.

19 MR. HEIM: -- because I don't remember what
20 it is.

21 MR. REID: It may be hypothetical, too. We
22 just had to do this in five days.

23 MR. HEIM: Well, we ought to go -- we ought
24 to look through the deposition.

25 THE COURT: Why don't you look through the

1 deposition and see what's in it, and there might just
2 be something in there that both of you want, and it
3 will work itself out.

4 I think we ought to file this, Bill.

5 THE CLERK: Yes, sir.

6 THE COURT: Okay.

7 (Court was adjourned at 5:30 p. m.)

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