

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  
1:55 p.m  
Tuesday, December 15, 1998

**TRIAL - VOLUME 160**

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

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None.			

1 (Whereupon, the following proceedings were had:)

2 THE COURT: Have a seat, please. Okay. What  
3 have we got?

4 MR. HEIM Your Honor, just maybe two minutes  
5 with regard to the next witness, and I believe he's  
6 here. So maybe we could excuse him for a second.

7 (The witness exited the courtroom )

8 MR. HEIM This is Dr. Mele, who is a former  
9 employee of Philip Morris.

10 MR. ROSENBLATT: M-e-l-e, Paul.

11 MR. HEIM Just so Your Honor knows, Mr. Mele  
12 was an employee of Philip Morris. He was a research  
13 scientist employed by the company from 1981 until 1984.

14 Based on his deposition, which was taken last  
15 week, it's my understanding that he is here testifying  
16 as a fact witness only, and his disclosure says as  
17 much, and he has also testified that, by virtue of the  
18 agreement that he has with his employer, the Department  
19 of the Army, he is not to give opinion testimony; so  
20 he's here to give fact testimony.

21 I only raise that subject because I would  
22 expect that there would be a foundation laid for  
23 personal knowledge with regard to his fact testimony of  
24 what happened during his employment from 1981 to 1984.

25 THE COURT: What has the Army got to do with

1 him rendering an opinion?

2 MR. HEIM The Army has certain policies  
3 about what they will permit one of their scientists to  
4 do in testifying in some other case. And as I  
5 understand it, they provided him with a letter that  
6 said you can testify as a fact witness, but he can't  
7 give opinions or testify as an expert as a term of his  
8 employment. That's my understanding, anyway.

9 MR. ROSENBLATT: There is no --

10 THE COURT: Do you think that would hold up  
11 in a court of law?

12 MR. HEIM I have no idea. I don't know what  
13 the Army will do, Judge.

14 MR. ROSENBLATT: There is no problem with the  
15 Army. The Army apparently has a policy where, if he  
16 wanted to hire himself out as an expert, as a pure  
17 expert --

18 THE COURT: Hire himself.

19 MR. ROSENBLATT: -- in a case that he had no  
20 personal knowledge of, that they have a policy. He's  
21 got no problem

22 THE COURT: You're putting him on as a fact  
23 witness, though. You are not going to elicit opinion  
24 testimony?

25 MR. ROSENBLATT: I'm going to try.

1           It's our position, Judge, that with a  
2 scientist, he is a fact witness. You know, without any  
3 question. But --

4           THE COURT: Well, you've designated him as a  
5 fact witness and not as an expert. So the rules  
6 provide that he doesn't register an opinion. All  
7 right. But that's very strange that the Army can  
8 control a witness's testimony.

9           But I can understand the position where they  
10 wouldn't want somebody hired out as an expert. That I  
11 can understand. But if he's subpoenaed to appear,  
12 what --

13           MR. HEIM As I understand it, I could be  
14 wrong, but as I understood it, it's a matter of if he  
15 wants to volunteer to give testimony in a case other  
16 than one involving his employer, they, for some reason,  
17 have some rules on what he can do and what he can't do.  
18 But he's here as a fact witness anyway.

19           THE COURT: We won't have to deal with it.

20           MR. MDSS: Judge, there is a federal  
21 regulation dealing with all this. We come across it  
22 all the time with FAA people, so this is not something  
23 prohibiting opinion testimony.

24           THE COURT: Well, maybe within the field he  
25 is working, such as an aviation expert working for the

1 FAA. But supposing he changed jobs. For example, he  
2 was a chemist over here and now he's doing something  
3 else.

4 MR. HEIM No. What was he, Stan, behavioral  
5 psychologist or something?

6 MR. ROSENBLATT: Correct.

7 THE COURT: Is that what he is?

8 MR. HEIM He worked with rats in the rat  
9 lab.

10 THE COURT: Okay. I won't touch that one.

11 Okay. Let's bring the jury in. I've got all  
12 this material here that belongs to somebody. I don't  
13 think this is evidence marked as such. But somebody's  
14 got to pick this stuff up.

15 THE BAILIFF: Bringing in the jury.

16 (The jurors and witness entered the  
17 courtroom )

18 THE COURT: Okay. All accounted and present  
19 for? You may be seated, please.

20 Okay. Witness?

21 MR. ROSENBLATT: Dr. Mele?

22 Thereupon:

23 PAUL C. MELE, Ph. D. ,  
24 having been called as a witness, was duly sworn,  
25 examined, and testified as follows:

## 1 DIRECT EXAMINATION

2 BY MR. ROSENBLATT:

3 Q. Finally we got to you. Dr. Mele, please tell  
4 the members of the jury your full name and your present  
5 address.6 A. My name is Paul Camille Mele. I live in  
7 Olney, Maryland.

8 Q. You spell your last name M-E-L-E?

9 A. Correct.

10 Q. The jury is very familiar with what a  
11 curriculum vitae is, and I'm going to go through your  
12 curriculum vitae. But initially I want to establish at  
13 one time you were employed by the Philip Morris Tobacco  
14 Company, correct?

15 A. That is correct.

16 Q. During what time frame were you employed by  
17 Philip Morris?18 A. I started working at Philip Morris in  
19 November of 1981, and stopped working there in December  
20 of 1984.21 Q. Okay. Let me begin with your educational  
22 background. Then I'll take you through your work  
23 history. You received a Bachelor of Science degree in  
24 biology and psychology in 1971; is that correct?

25 A. Correct.

1 Q. And from what institution was that?

2 A. Union College in Schenectady, New York.

3 Q. And then you received an M.A. degree in  
4 experimental psychology in 1975. And from what  
5 university?

6 A. Adelphi University in Garden City, Long  
7 Island.

8 Q. New York?

9 A. New York.

10 Q. The M.A. stands for what?

11 A. Master of Arts.

12 Q. And then after you completed your Master of  
13 Arts, you continued your schooling, and you received a  
14 Ph.D. degree, also in experimental psychology, and this  
15 was in 1980?

16 A. Correct.

17 Q. Now, for example, the witness who testified  
18 before you -- you know, we hear these words  
19 psychologist, psychiatrist, and there are different  
20 kinds.

21 Dr. Arnett was a developmental psychologist.  
22 You've got a Ph.D. in experimental psychology. Tell us  
23 what field that encompasses, experimental psychology.

24 A. That's a research degree that trains you to  
25 conduct studies on various aspects of behavior. My

1 specialty had to deal all with animal work, and the  
2 vast majority of my training and work in graduate  
3 school was in the field of behavioral pharmacology  
4 where we were looking at the effects of drugs on the  
5 behavior, using rats, and also trying to get some idea  
6 on how those drugs affected the brains of the rats as  
7 it altered their behavior.

8 Q. So as an experimental psychologist, you do  
9 not get involved with treating people --

10 A. Correct.

11 Q. -- and diagnosing people and that kind of  
12 thing.

13 A. That's correct.

14 Q. Now, in looking at your work history, and I'm  
15 a little confused by this, after you completed your  
16 Ph.D. in 1980, there is a listing here from 1979 to  
17 '81, post-doctoral trainee at the Environmental  
18 Toxicology Center, University of Wisconsin in Madison.

19 Did that follow?

20 A. Yes. Essentially I completed graduate work  
21 at the end of '79. The degree wasn't conferred until  
22 January, 1980, and it was just before that that I went  
23 to Wisconsin to do post-doctoral work. So it was --  
24 '79 I left graduate school. The end of '79 I started  
25 at Wisconsin.

1           Q.    And what was the focus of your post-doctoral  
2 work at the University of Wisconsin?

3           A.    That was to examine the effects of toxic  
4 agents, instead of drugs, more environmental  
5 pollutants, lead, polychlorinated biphenyls, dioxins,  
6 on the development and behavior of monkeys. We  
7 examined both the behavior and brain development and  
8 how they were altered by exposure to these  
9 environmental pollutants early in life.

10          Q.    Okay. Now, going through in chronological  
11 order, there's obviously a listing when you were a  
12 research scientist at Philip Morris, but I'll deal with  
13 that separately.

14          A.    Okay.

15          Q.    I'm going to go through the other positions  
16 that you've held.

17                For a period of time you taught in the  
18 department of psychology at Virginia Commonwealth  
19 University. Was that also when you were at Philip  
20 Morris?

21          A.    Yes. While we were at Philip Morris, I  
22 obtained an adjunct professorship at VCU where we were  
23 able to teach on a small scale.

24          Q.    And after you left Philip Morris, you went to  
25 work for the United States government, the Department

1 of Defense?

2 A. Correct.

3 Q. And specifically it says from 1985 to 1989,  
4 you were a research psychologist, behavioral sciences  
5 department, Armed Forces Radiobiology Research  
6 Institute in Bethesda, Maryland. So tell us what your  
7 work involved during that time frame.

8 A. That was a DOD, Department of Defense  
9 research lab, and the work there involved evaluating  
10 the effects of ionizing radiation, and drugs that would  
11 protect against ionizing radiation on the behavior of  
12 animals, primarily rats and monkeys, and also on some  
13 of the brain effects of radiation and how it would  
14 again affect behavior.

15 Q. What do you mean when you say ionizing  
16 radiation?

17 A. Ionizing radiation is the radiation you get  
18 from nuclear weapons explosions and also radiation that  
19 you find in space, things the astronauts up there are  
20 being exposed to right now. So it was DOD's primary  
21 lab for studying the effects of this one kind of  
22 radiation.

23 Q. And I see from 1990 to 1994, you were the  
24 project manager, Complex Task Performance Project,  
25 behavioral sciences department, Armed Forces

1 Radiobiology Research Institute.

2 Did your function there differ from what  
3 you've already told us about or pretty similar?

4 A. It was a promotion. I managed a laboratory  
5 then. I had several Ph.D.'s working under me in  
6 addition to conducting my own studies. So it was just  
7 a progression to a more responsible position.

8 Q. But doing essentially the same --

9 A. Same work, similar --

10 Q. -- same field?

11 A. Same areas.

12 Q. Now, at some point you made a transfer within  
13 the Department of Defense, and presently you're at the  
14 Walter Reed Army Hospital?

15 A. The Walter Reed Army Institute of Research,  
16 which is located next to the Walter Reed Army Medical  
17 Center, next to the hospital yes.

18 Q. When did you go with the Walter Reed Army  
19 Institute of Research?

20 A. In February of 1995.

21 Q. And you've been there ever since?

22 A. Correct.

23 Q. Doing what?

24 A. My job there is to take the results of  
25 biomedical research conducted by the Army. We do a lot

1 of work on drugs and vaccines against infectious  
2 diseases such as malaria, things the soldiers would be  
3 exposed to if they are fielded, and we try and develop  
4 those two actual products, either with a commercial  
5 partner who might make these for us or finding someone  
6 who we can partner with and continue their development  
7 so that we get products that the soldiers can use when  
8 they deploy.

9 Q. Okay. Now, in terms of how you describe your  
10 scientific expertise on your curriculum vitae, one  
11 field is behavioral pharmacology.

12 A. Correct.

13 Q. And that's exactly what?

14 A. The study of how drugs alter behavior, very  
15 simply; how drugs alter behavior by changing functions  
16 in the brain, chemistry in the brain; and how that is  
17 translated into the behavior of the animal.

18 Q. Well, for example, when you study rats or  
19 monkeys, how drugs alter the behavior of rats or  
20 monkeys, what conclusions does that kind of research  
21 allow you to reach in terms of human behavior?

22 A. Well, animals certainly serve as a very valid  
23 model for studying the effects of drugs on behavior.  
24 There's no drug development that goes on, whether it's  
25 behavioral drugs, the kind I've studied, or other

1 drugs, antibiotics, that are not first run in animal  
2 tests.

3 In my earlier work, there are certain other  
4 animal tests that are designed to mimic or identify  
5 drugs you might use to treat psychiatric diseases. We  
6 have animal tests that identify the anxiolytics, drugs  
7 to treat psychosis, depression. So these animal models  
8 are a step along the way in developing drugs that would  
9 be used in people.

10 Q. Now, we've also learned that whatever field a  
11 professional is in, whether he's an M.D. or Ph.D.,  
12 there are certain professional journals which are of  
13 particular interest to specialists in a particular  
14 field.

15 A. Uh-huh.

16 Q. You are a reviewer for a journal called  
17 Pharmacology, Biochemistry and Behavior. Just tell us  
18 in a general way the kinds of scientists that would  
19 subscribe to that publication, and what that  
20 publication deals with usually.

21 A. That's a very broad journal, as its title  
22 implies, because it covers three big areas: Behavior,  
23 pharmacology and biochemistry. And in general, it  
24 reports on the effects of animal or human research,  
25 where animals or humans may be given a drug; and the

1 interest is to see what that drug does, whether it  
2 improves learning, such as studies against Alzheimer's  
3 disease, how it affects brain activity that then might  
4 be translated into a behavioral change; it would study  
5 a lot of drug abuse literature, what drugs are abused,  
6 how they are abused, how we can treat that drug abuse.

7 Q. Now, in terms of professional organizations,  
8 just to mention two, you are a member of the Behavioral  
9 Pharmacology Society as well as the Behavioral  
10 Toxicology Society?

11 A. Correct.

12 Q. What is the difference between those two?

13 A. They're very similar, but they have a  
14 different emphasis on the types of chemicals they  
15 study. The behavioral pharmacologist is often  
16 interested in drugs that would be used for  
17 psychotherapeutic treatments, anxiety, depression,  
18 schizophrenia or drug abuse, cocaine, heroin, morphine,  
19 nicotine.

20 The behavioral toxicologist is interested  
21 more in things like environmental contaminants, lead,  
22 polychlorinated biphenyls, mercury, that sort of thing.

23 So, it's really a matter of what you're  
24 looking at as much as anything else.

25 Q. Now, I'm going to ask you specifically about

1 a few of your publications.

2 I notice that with several of your  
3 publications you had one or more coauthors, and in  
4 several of these publications you list someone named De  
5 Noble.

6 A. Correct.

7 Q. Who is that?

8 A. Dr. Victor De Noble. He was my supervisor,  
9 my immediate supervisor while I worked at Philip  
10 Mrris.

11 Q. He had a Ph.D. in what field? Same as you or  
12 different one?

13 A. In the same field. We actually came from the  
14 same graduate school, so he also was an experimental  
15 psychologist with a behavioral pharmacology background,  
16 and he went and received additional training in the  
17 drug abuse field prior to coming Philip Mrris.

18 Q. Now, the articles that you authored with  
19 Dr. De Noble, were all of them specifically related to  
20 your work during the period of time you were employed  
21 at Philip Mrris?

22 A. I believe so, yes.

23 Q. Let me ask you about --

24 A. I would have to read the titles.

25 Q. I will. That's exactly what I'm going to do.

1           There is one article by you and De Noble:  
2 Intravenous Self Administration of Phenobarbital and  
3 Ethanol in Rats.

4           What was the thrust of that article about?

5           A. That study also was conducted with our  
6 colleagues at Virginia Commonwealth University. It  
7 examined the effects of rats self-administering or  
8 working for phenobarbital alone and alcohol alone, and  
9 then we put the two drugs together to see how that  
10 would affect the rat's self-administration or how hard  
11 the rat would work to obtain that.

12           What we found out is that clearly the rats do  
13 work hard to maintain phenobarbital as injected  
14 directly into its veins, and when you add alcohol to  
15 it, they work even harder. The two drugs together are  
16 more powerful than either drug alone.

17           Q. The concept of self-administration, when  
18 you're talking about rats, how do you use the -- how do  
19 rats self-administer to themselves a given drug or  
20 medication?

21           A. There's several ways you can do it. The way  
22 we did it, you actually implant a catheter, a small  
23 tube into the vein of a rat. It lies in just above his  
24 heart, it comes out above the back, it travels under  
25 the skin. It's a surgical procedure, relatively simple

1 to do. They're sewn up, they heal very quickly, and  
2 the animal is placed in a box. He lives in a small  
3 experimental chamber, and every time he presses a  
4 lever, he gets a small squirt or dose of the drug in a  
5 bottle.

6 Now that's a very standard procedure for  
7 studying intravenous self-administration in an animal.  
8 Very reliable. Well-characterized.

9 Q. Does the rat know how to press the lever?  
10 How does the rat know, at least in the first instance?

11 A. Again, there are several ways you can do it.  
12 The way we like to do it, rats learn to press levers  
13 for drugs very quickly if it's the right drug. If you  
14 have a drug such as cocaine, within a few minutes or a  
15 few days, just by being in the box, the rats are very  
16 active, they move around, they explore, they'll come in  
17 contact with the lever. By chance they'll press it  
18 down. They will get their infusion of nicotine or  
19 cocaine or variety of other drugs.

20 That association is created very quickly  
21 where -- I don't know what a rat says to himself, but  
22 the association --

23 Q. If anything.

24 A. If anything. But pressing a lever, drug  
25 injection, that happens very quickly, and the rat is

1 off and running.

2 Q. Okay.

3 A. Go ahead. I'm sorry.

4 Q. Okay. Another article by you and Dr. De  
5 Noble, this one was in 1986: Brain Sites Involved in  
6 the Behavioral Effects of Intraventricularly  
7 Administered Nicotine.

8 What was the thrust of that?

9 A. That was a study -- much of our work at Philip  
10 Morris was designed to try and locate where in the  
11 brain nicotine was causing the effects.

12 And what we were doing there is putting small  
13 quantities of nicotine in a solution in the different  
14 parts of the brain and observing the effect on the rat.  
15 And what we were able to do is map out different areas  
16 and see which effects were particularly sensitive to  
17 nicotine injections and which ones were not sensitive.  
18 So ultimately it identified certain small areas in the  
19 brain where nicotine was acting.

20 Q. Then there was an article that you did with  
21 Dr. De Noble: Development of Behavioral Tolerance  
22 Following Chronic Nicotine Administration.

23 And my question to you is, how do you use the  
24 term "behavioral tolerance" in this context when  
25 applied to rats?

1           A.    Okay.  That was a very complicated study, but  
2 basically tolerance is a characteristic of all drugs of  
3 abuse, whether it's cocaine or heroin or morphine or  
4 alcohol or amphetamine or nicotine, they all show  
5 tolerance.

6                    What is tolerance?

7           Tolerance essentially occurs when you give a  
8 drug and you produce an effect on behavior or on the  
9 cardiovascular system or on some other biochemical  
10 measure, you give a drug, you produce an effect, and  
11 then you give that drug repeatedly, typically every day  
12 for a period of time.  What you find is that effect  
13 will lessen, will go away, and if tolerance is  
14 complete, you can no longer get the effect.

15                   So over repeated exposure to that drug, the  
16 drug is no longer producing the effect you saw  
17 initially.  And what you have to do then to recover the  
18 effect is typically give a much higher dose.  That  
19 defines tolerance and, again, that's a characteristic  
20 of drug abuse, one of the defining characteristics.

21                   There are a lot of ways for tolerance to  
22 occur.  When you give a drug, you're altering the body,  
23 and the body doesn't like that.  What the body wants to  
24 do is return to its normal state, its natural state.  
25 Well, the body is going to try and counteract the

1 effects of the drug in many cases, and it can do this  
2 in several ways.

3           One thing the body can do is just try to get  
4 the drug out of the body faster, to flush it out,  
5 metabolize it faster. So as it sees the drug every  
6 day, as you do those daily injections, one possibility  
7 is the metabolism will increase and remove the drug  
8 from the body quicker.

9           Another possibility which we're particularly  
10 interested in with behavioral tolerance is that the  
11 brain also will try and compensate for seeing that drug  
12 there on a regular basis, and the brain can alter  
13 itself in several ways: It can change the areas in the  
14 brain that will -- where the drug latches on to, where  
15 the drug connects.

16           Other areas in the brain can become more  
17 counteractive to counteract the effects of the drug.  
18 Basically the brain is going to try to counteract or  
19 compensate for the effect of the drug being there.

20           One way we measure these changes in the brain  
21 is by measuring behavioral characteristics or we  
22 measure different behaviors of the rat. If you believe  
23 behavior is controlled by the brain, and that's fairly  
24 common, you can get an idea of brain changes by  
25 measuring behavior.

1           So we conducted a study that measured both  
2 types of tolerance I mentioned. One to measure changes  
3 in behavior, and one to measure changes in how the body  
4 tries to eliminate the drug that it sees on a regular  
5 basis.

6           Q.    Okay. Now, let me focus in on your -- the  
7 period of time that you were actually employed at  
8 Philip Morris.

9           I believe you said you went to work there in  
10 November of '81.

11          A.    Correct.

12          Q.    And you left Philip Morris in December of  
13 '84?

14          A.    Correct.

15          Q.    Okay. Now, how did you get the job at Philip  
16 Morris in the first place? Was this something you  
17 sought? Were you recruited or what?

18          A.    I was at home. I was in Wisconsin at that  
19 point. I received a phone call early in the morning.  
20 I actually thought it was the Reagan people. The  
21 elections were going on, and they were soliciting  
22 votes. I thought it was the Reagan people calling me  
23 up, but it happened to be Vic De Noble. He said he had  
24 a position open at Philip Morris, asked me if I was  
25 interested in applying. I said yes, and it went from

1 there.

2 Q. Okay. De Noble is a colleague that you knew  
3 from Adelphi in New York?

4 A. Correct.

5 Q. Originally?

6 A. He was several years ahead of me in graduate  
7 school, yes.

8 Q. Okay. Just tell us in a general way the  
9 process that you had to go through before it was a done  
10 deal that you became a Philip Morris employee.

11 A. I expressed an interest in talking to Dr. De  
12 Noble. They flew me to Richmond. I went through a  
13 series of interviews with the staff of a unit called  
14 the behavioral research unit which was the group De  
15 Noble worked in. And shortly after that, I received an  
16 offer.

17 Q. Now, in terms of the -- so in other words,  
18 you were being interviewed specifically for a position  
19 in the behavioral research unit?

20 A. In the behavioral research unit and  
21 specifically in the behavioral pharmacology laboratory  
22 that had been established and was run by Dr. De Noble.

23 Q. Okay. Before it was a done deal and you were  
24 hired, who interviewed -- give me the names of the  
25 people who actually interviewed you.

1           A.    The head of the unit was Dr. William Dunn.  
2   He was my first and last interview of the day;  
3   Mr. Frank Ryan, Dr. Frank Gulotta, Dr. Sandra Dunn,  
4   these were all investigators there in the behavioral  
5   research unit that worked under Bill Dunn.

6           Q.    Once you were hired, in scientific terms, in  
7   your terms, you were a laboratory?

8           A.    Correct.

9           Q.    And you would describe it as behavioral  
10   pharmacology laboratory?

11          A.    Correct. Right.

12          Q.    So, again, in practical terms, what was in  
13   the laboratory?

14          A.    This was our standard rat lab. I mean, it  
15   had a series of -- it was a well-equipped lab. Philip  
16   Morris certainly was willing to support that type of  
17   research. It had approximately a dozen or 15  
18   experimental chambers, 50 to 100 rats at any given  
19   time, an expensive and complex series of control  
20   equipment.

21                The studies we run are all controlled  
22   automatically. Now they're run by computers. Back  
23   then computers were just coming into the labs, where  
24   basically you have a series of switches and electrical  
25   components that control what goes on in the

1 experimental chamber. They can count every time a rat  
2 presses a lever. They can present different stimuli to  
3 rats, levels and tones, and they can deliver food  
4 pellets to rats.

5 So it was a basic rat lab used for studying  
6 animal models of drugs.

7 Q. Okay. Now, Philip Morris, from an outsider's  
8 standpoint, Philip Morris is obviously in the business  
9 of manufacturing cigarettes?

10 A. Correct.

11 Q. And they've got this rat lab?

12 A. Right.

13 Q. And they've got scientists like you working  
14 in the rat lab?

15 A. Right.

16 Q. Why? What's the point?

17 A. The purpose of the lab -- well, the purpose  
18 of the lab was to study the behavioral pharmacology of  
19 nicotine and other tobacco smoke components. There  
20 were really two main goals: One was to identify,  
21 working in concert with other Philip Morris scientists,  
22 a substitute for nicotine, something we called a  
23 nicotine analog. It would be a molecule that might be  
24 related to nicotine but altered in some way.

25 It was our -- our primary job was to study

1 and evaluate these various analogs created by Philip  
2 Morris and see if we could identify one that had two  
3 characteristics.

4 One, they wanted to eliminate one of the  
5 negative or adverse effects of nicotine, and that  
6 referred to the cardiovascular effects. Back in the  
7 early '80s, there was great concern over the heart rate  
8 and blood pressure effects of nicotine, and the company  
9 was interested in trying to eliminate those effects.

10 At the same time, at Philip Morris it was  
11 well-understood that nicotine was the active component  
12 in cigarette smoke that maintained smoking behavior.

13 MR. HEIM Objection, Your Honor.

14 THE COURT: I'm sorry?

15 MR. HEIM I have an objection to him saying  
16 what was well-understood at Philip Morris. He can say  
17 what he understood.

18 THE COURT: Overruled.

19 BY MR. ROSENBLATT:

20 Q. You can continue your answer.

21 A. It was well-understood that nicotine was the  
22 active component in tobacco that kept people smoking,  
23 and the goal was to get a substitute nicotine in there,  
24 again, that would maintain smoking but not have this  
25 negative effect on the heart. And we had our animal

1 models to try and screen numbers of compounds and see  
2 if we could identify one that met those criteria.

3 Q. In terms of the analog or substitute for  
4 nicotine that you and the other scientists were looking  
5 for, did one of the criteria have to be that the  
6 substitute would have to have some impact on the brain?

7 MR. HEIM Objection, leading.

8 MR. MOSS: Leading, Your Honor.

9 THE COURT: I don't understand the objection.  
10 Do you want to talk about it at sidebar?

11 MR. HEIM Okay. Sure.

12 (The following proceedings were had at  
13 sidebar:)

14 THE COURT: The objection is what?

15 MR. HEIM Simply that he was leading the  
16 witness. That was my objection. He said what did you  
17 understand --

18 THE COURT: Well, it can be leading criteria.  
19 He is just focusing in on one area, which was studying  
20 the effects of nicotine on the brain. So if you're  
21 studying a substitute for effects of nicotine on the  
22 brain, I suppose that would be a criteria. We wouldn't  
23 have to worry about the rest. It's innocuous at this  
24 point.

25 MR. HEIM At this point, for that purpose, I

1 will withdraw the objection. But I'm concerned about  
2 opinions.

3 THE COURT: We haven't gotten to opinions  
4 yet.

5 Wait a minute. Gentlemen? We're getting  
6 back into what is going to be known as the Carter  
7 syndrome -- not the Carter syndrome. My brain isn't  
8 functioning either. I don't know what I had for lunch.

9 MR. MOSS: You and I ought to get along well  
10 today.

11 THE COURT: I was going to call it the  
12 Clinton syndrome. It shouldn't be on the record but --  
13 your definition of opinion is -- okay.

14 MR. HEIM Let me give you an example.

15 THE COURT: The reason I bring this up, if  
16 he's doing scientific studies and they did a series of  
17 studies and there was an end result that was translated  
18 into a study document, are you claiming that's an  
19 opinion that shouldn't be allowed?

20 MR. HEIM No, no. If they did a study and  
21 he was part of that study and he knows what the result  
22 of that study was, I think that, as a fact witness, he  
23 can testify to that. I don't have a problem with that.

24 Where I have a problem is where -- and I  
25 don't want to anticipate testimony. But if he were to

1 say, for example, and therefore, it would have been  
2 safer --

3 THE COURT: I see.

4 MR. HEIM See what I mean? That's my  
5 problem. But we didn't go there yet. So I --

6 THE COURT: Well, I'm interested in, first of  
7 all, the gathering of the data, the assimilation of  
8 that data or effect of that data on some other aspect  
9 is what you're talking about. We haven't gotten there.

10 MR. HEIM Right.

11 (The sidebar conference was concluded, and  
12 the following proceedings were held in open court:)

13 BY MR. ROSENBLATT:

14 Q. In terms of the substitute or the analog for  
15 nicotine, was one of the criteria that you and the  
16 other scientists were searching for was a substitute  
17 which would have some kind of impact on the brain?

18 A. Yes. It was certainly well-known that  
19 nicotine acted on the brain. We had a very eminent  
20 researcher, a colleague at the University of Rochester  
21 named Leo Abood, who basically had spent his whole  
22 career on how nicotine binds or latches on to nervous  
23 tissue, tissues such as in the brain. And he did many  
24 of those actual binding studies for us. He looked to  
25 see where in the brain nicotine and analogs would bind.

1           One of the criteria was that it looked like  
2 nicotine in terms of where in the brain it would bind  
3 and the type of effects in brain tissue it produced.

4           And that was just part of the program, that  
5 it acted in the brain and maintained behavior in the  
6 rats similar to nicotine.

7           Q.    Now, when you talk about the laboratory --  
8 first of all, where did these rats come from? How does  
9 the Philip Morris laboratory obtain these rats?

10          A.    Like any animal lab, you buy laboratory  
11 animals from a supplier. Ours was from Blue Spruce  
12 Farms in Altamont, New York, very reliable supplier of  
13 rats and mice to laboratories around the world. They  
14 are raised and bred in very carefully controlled  
15 conditions so they are healthy, they come in without  
16 disease, you specify ages and sex and that sort of  
17 thing. So it's a business.

18          Q.    How big are these rats?

19          A.    Physically?

20          Q.    Yeah.

21          A.    About that big (Indicating).

22          Q.    Let the record reflect --

23                THE COURT: In terms of inches or feet?

24          A.    We deal in terms of weight. I get the rats  
25 we worked with at 300 grams, less than half a pound, if

1 you don't count the tail. Most people don't like that  
2 long hairless tail. But you can find these rats in a  
3 lot of pet stores. We use the black and white kind  
4 instead of -- rather than the all white, the albino  
5 kind.

6 Q. Now, when you're observing these rats and  
7 they're involved in this whole exercise of  
8 self-administration, is it the kind of setup where 20  
9 or 40 rats are together, or is it individualized?

10 A. Each rat has its own experimental chamber.  
11 It's a small box about this big (indicating). It's  
12 made out of aluminum sheet and plastic, plexiglass, so  
13 it's easy to clean. You can observe the rat through  
14 the plastic door. He has a grid pan and drop pen.  
15 These are pretty expensive.

16 But it's basically a metal and plastic box  
17 with levers and lights and speakers for presenting  
18 tones and a little feeder that automatically will  
19 present food pellets, and then a series of wires that  
20 go out into another room and are connected to the  
21 control equipment to basically interact with the rats  
22 so that they live in these boxes 24 hours a day, at  
23 least in the self-administration studies, and we would  
24 observe them to clean and feed as needed.

25 Q. Now, the catheter that you describe whereby

1 the rat gets the infusion of the nicotine, is that  
2 something that's permanently implanted into the rat's  
3 body?

4 A. Yes. Yes. We do the surgery. Dr. De Noble,  
5 my colleague, was very good at doing this. It's very  
6 tricky; rats have very small veins. It's very hard to  
7 get even a very small plastic tube into a vein. You  
8 suture it, you glue it using, again, standard  
9 instruments as any surgeon would do. And once a  
10 catheter is in place and the rat has had a few days to  
11 heal, those catheters can last anywhere from weeks to  
12 months.

13 So these were chronic preparations. The rats  
14 certainly, once implanted, were used in studies for  
15 long periods of time.

16 Q. Now, in terms of the self-administration  
17 studies, in terms of food or water, did the rats have  
18 to press a lever to get food and water, or was water  
19 supplied to them?

20 A. We had a variety of types of studies,  
21 depending upon what we were doing. And the basic  
22 self-administration procedure, where the animal is  
23 pressing a lever to obtain a squirt of nicotine  
24 solution into his veins, we would feed those animals  
25 twice a day. We would simply give them a few food

1 pellets in the morning and the evening. And they  
2 always had a water bottle, so there was plenty of water  
3 to drink. It was a nice warm -- they were very  
4 comfortable. And their job was to press the lever for  
5 nicotine.

6 In other studies we had rats simply working  
7 for food pellets. There was no catheter, no IV  
8 administration of drugs, but we would train these  
9 animals to perform tasks, reward them with food  
10 pellets, then look and see how nicotine or analogs or  
11 other items of interest would modify that behavior.  
12 And there were studies where the rats had a choice to  
13 press a lever for food or nicotine, so they got to do  
14 both, and they were very good at it.

15 Q. And the rat was intelligent enough, if they  
16 wanted food, they pressed the right lever to food?

17 A. Rats are pretty smart. They learn quickly.  
18 When they're hungry, they learn where to go for the  
19 food. When they want their infusion of nicotine, they  
20 learn where to go for that. In most studies, we would  
21 give them different opportunities during the day when  
22 they could get one or the other, and we could often  
23 signify that with a light or tone. So they learn  
24 pretty quickly what they have to do to get what they  
25 need.

1           Q.    Okay.  So, again, if you were, you know, like  
2 with a friend of yours who was not a scientist and you  
3 explained generally your kind of work, what were you  
4 learning of value, to Philip Morris and to yourself, as  
5 a scientist in terms of these self-administration?

6           A.    Well, again, self-administration was the  
7 bedrock of the lab.  That was Dr. De Noble's particular  
8 specialty.  That's why he came in, to set that up.

9                    A point about self-administration is if a rat  
10 will self-administer a drug, a human will  
11 self-administer a drug.  It's a very good predictive  
12 model.  Rats are very -- there are drugs humans will  
13 self-administer that rats won't, like LSD.  Rats don't  
14 like LSD and other hallucinogenics.  But if you look at  
15 cocaine, heroin, morphine, amphetamine,  
16 phencyclidine/PCP, essentially rats will administer all  
17 these drugs with the exception of some I noted.

18                   So a rat is a conservative measure of what a  
19 human will do.  If the rat will work for it, the human  
20 will work for it.  I'm not aware of one drug that a rat  
21 will work for that a human will not.

22           Q.    So, essentially, what kind of actual  
23 scientific data were you collecting from these  
24 experiments and then tell us of what practical use this  
25 data was.

1           A.    Well, our job is to set up this  
2 self-administration model of nicotine. Philip Morris  
3 wanted us to be able to find a candidate compound that  
4 would substitute for nicotine.

5                    So our goal was to find -- first set up the  
6 model to show that rats will self-administer nicotine,  
7 indicating that it has positively reinforcing effects,  
8 the rats will work for it. And once the rats were  
9 doing that and telling us that they like it, in quotes,  
10 I mean, we would then use that as a model to evaluate  
11 these nicotine analogs, these other nicotine-like  
12 compounds that the chemists at Philip Morris were  
13 synthesizing.

14                   We had a large group or very good group of  
15 organic chemists. We essentially were functioning as a  
16 drug company. We had organic chemists that were  
17 upstairs in the research center making nicotine  
18 analogs. They would send them down to us for  
19 evaluation. It would go out to other labs such as the  
20 University of Rochester for evaluation, the whole  
21 purpose being to identify nicotine analog that, again,  
22 maintained self-administration in the rats and  
23 ultimately as an indication of maintaining smoking  
24 behavior in people but did not have these negative  
25 cardiovascular effects, did not have the effects of

1 increasing heart rate or increasing blood pressure,  
2 which were a concern at the time.

3 Q. Now, when you were employed at Philip Morris  
4 doing the kind of work that you've described, if you  
5 wanted to be totally up to date on whether other  
6 researchers in your field or similar fields were doing  
7 the same kind of research, whether in New York or  
8 Michigan or in Europe or anywhere, how would you go  
9 about obtaining that information to make sure that you  
10 were current?

11 A. Two basic ways: To read the literature, all  
12 good and current scientific literature is attempted or  
13 at least you attempt to publish it; and you attend  
14 meetings where you can physically meet face to face  
15 with your colleagues and exchange and share  
16 information.

17 Q. At Philip Morris, what was an article request  
18 form?

19 A. An article request form would have been from  
20 the library, a small card where, if you needed an  
21 article from a professional journal and Philip Morris  
22 did not have that journal, you would put in a request  
23 for a library to go and obtain it from another library.

24 Q. And what was usually the lapse of time, if  
25 Philip Morris did not have the particular journal on

1 its premises, if you filled out one of those article  
2 request forms, how long of a delay before you actually  
3 got the article?

4 A. Well, it wasn't long. A couple weeks maybe  
5 at the most. Sometimes less, sometimes more.

6 Q. To your knowledge, while you were at Philip  
7 Morris, did the Philip Morris scientists monitor the  
8 worldwide literature relative to nicotine and other  
9 smoke compounds?

10 A. Well, we certainly monitored the literature  
11 on our own area. The people in the behavioral research  
12 unit, I think, were very competent, up to date. In  
13 order to keep your research up to date and fresh and  
14 current, you have to know what other people are doing.

15 And in general, the Philip Morris library was  
16 very good at bringing in the recent literature that  
17 would be relevant to smoking, smoking and health,  
18 nicotine. And we also had some people working in  
19 the -- with one of our directors, Dr. Osdene, a woman  
20 named Judy John, spent a good part of her time doing  
21 literature searches to find out what was being done  
22 around the world in different laboratories.

23 Q. Now, you mentioned, I guess, in another  
24 department of Philip Morris there were organic  
25 chemists, and their focus was what in relation to what

1 you were doing?

2 A. The organic chemists' main job was to create  
3 analogs. A good --

4 Q. Substitutes for nicotine?

5 A. Substitutes for nicotine. A good organic  
6 chemist can take a parent molecule such as a nicotine  
7 molecule, and in their test tubes, manipulate that  
8 molecule. They can take things off, bend it and twist  
9 it, so come up with a second and third generation  
10 compound. Very standard type of procedure that any one  
11 of the major drug companies would do to create new  
12 drugs for their uses.

13 Q. When you were at Philip Morris, how would you  
14 relate the level of scientific sophistication and  
15 technology at Philip Morris when compared with a really  
16 first-rate drug company or chemical company located  
17 elsewhere?

18 MR. HEIM Objection. Elsewhere, it's  
19 speculation.

20 MR. MDSS: That's opinion.

21 (The following proceedings were had at  
22 sidebar:)

23 THE COURT: He can answer the question based  
24 on his experience in the laboratory, which was  
25 determined to be, in his mind, first rate. My

1 understanding was he thought this one was a first rate.

2 MR. MOSS: He already said that. Now he's  
3 asking him to compare it to a drug company.

4 MR. HEIM And he's never worked in a drug  
5 company. He has no --

6 MR. ROSENBLATT: No, but I think he could  
7 tell by requests that he got and --

8 THE COURT: Okay. The thrust of the question  
9 was it was a great lab or a poor lab.

10 MR. ROSENBLATT: The thrust of my question  
11 was Philip Morris was way ahead of everyone else.

12 THE COURT: Okay. What's wrong with that?

13 MR. ROSENBLATT: Why am I so honest?

14 MR. HEIM I don't have a problem with that.  
15 I have a problem with him comparing it to drug company  
16 laboratories. That's not what it was, and he doesn't  
17 know anything about them

18 MR. MOSS: Nor does he have any experience,  
19 nor has there been any foundation, and now you're  
20 getting into expert opinion.

21 MR. HEIM The question can be asked in a way  
22 to get the information he wants without --

23 THE COURT: Rephrase the question. If your  
24 thrust is to make known that they had all the  
25 facilities and more than most and all of that, they

1 were doing great work, that's wonderful. Do it that  
2 way. Okay?

3 (The sidebar conference was concluded, and  
4 the following proceedings were held in open court:)

5 BY MR. ROSENBLATT:

6 Q. In terms of the level of sophistication at  
7 Philip Morris, scientific sophistication in your area,  
8 organic chemistry, how would you rate it?

9 A. I think Philip Morris had a very top-notch  
10 research center. Being very modest, I mean, I think I  
11 was a competent researcher, I liked what I did, I  
12 studied hard. Vic De Noble, I thought, was an  
13 excellent researcher.

14 In terms of our organic chemists, they  
15 certainly had no trouble cranking out nicotine analogs.  
16 These guys were working magic in their labs. In fact,  
17 they would go to meetings and come back, they would  
18 talk to other chemists and chuckle and indicate to me  
19 on several occasions that Philip Morris was years  
20 ahead, ten years ahead of anybody else out there that  
21 was studying nicotine as a molecule.

22 Q. Did Philip Morris, in your department and  
23 other departments that you were familiar with on a  
24 first-hand basis, have very up-to-date, modern,  
25 scientific equipment?

1           A.    Well, ours was state-of-the-art at the time,  
2           and I don't order chemistry equipment, but I have no  
3           doubt that theirs was also state-of-the-art.

4           Q.    Now, were there, in fact, periodic nicotine  
5           analog meetings?

6           A.    Yes, these --

7           Q.    And you would attend these meetings?

8           A.    Correct.

9           Q.    How often were they held, about?

10          A.    They could be once a month, every couple  
11          weeks, depending upon how much new data was collected  
12          and what was the issues to be discussed.  But monthly  
13          at least.

14          Q.    Now, you started there in '81; and where was  
15          your research leading?  I mean, had you developed  
16          analogs that could be developed commercially?

17          A.    Well, when I started there in '81, the lab  
18          had been in existence for over a year, a year and a  
19          half, close to two years.  Actually, the lab had  
20          existed for some time prior to my arrival on a very  
21          small scale, and it was run by Carolyn Levy, who is now  
22          with upper management in New York in Philip Morris.  
23          Vic De Noble came in about a year and a half before I  
24          did with the mandate to expand the lab and start  
25          examining analogs on a larger scale.

1           So when I got there, the lab was quite large  
2 and active and up and running. The self-administration  
3 model had been established by Dr. De Noble. He was  
4 running a number of other studies. And I proceeded  
5 then to start a number of studies also.

6           Q. And were you able, before you left Philip  
7 Morris, to say that our research has proven such and  
8 such or established such and such?

9           A. We examined a number of analogs. What would  
10 happen is, as the chemists synthesized an analog, they  
11 would send it down to us and to other people for  
12 testing.

13           So over the two and a half years that I was  
14 in the lab there, we tested probably close to 100 or  
15 more compounds, and several of these seemed to meet the  
16 criteria that Philip Morris wanted, in that the analogs  
17 maintained self-administration in the rats in an amount  
18 equivalent to or greater than nicotine, and as reported  
19 by one of our colleagues, Dr. Abood of Rochester, had  
20 fewer cardiovascular effects than nicotine. So that  
21 seemed to be the compound or two candidates for the  
22 compound they were looking for.

23           Q. All right. You tested a lot of analogs as  
24 you've described. So what happened after that?

25           A. I'm not sure what you're asking.

1 Q. Well, in terms of was there ever an analog  
2 selected that was used in a commercial cigarette as a  
3 substitute for nicotine?

4 A. The --

5 Q. I'm trying to find out where, if anywhere,  
6 the research program, the analogs went in practical  
7 terms.

8 A. The two most promising compounds, 2-prime  
9 methylnicotine and 4-prime methylnicotine, were  
10 identified and agreed upon by the analog group as being  
11 the most promising. Over these meetings, there were a  
12 lot of discussions on if and when we identified one,  
13 what actually would we do with it, how would Philip  
14 Morris, how would they get it into a cigarette?

15 There were issues of regulatory concern with  
16 the FDA, when would they get it in, would they put it  
17 in with nicotine and take nicotine out gradually?  
18 There were a lot of these issues that came up. But I'm  
19 not aware that the analog was actually ever put into a  
20 commercial product.

21 Q. Now, did there come a time when the  
22 laboratory was closed?

23 A. Yes.

24 Q. So describe the events leading up to that,  
25 the closing of the laboratory.

1           A. I got there in November of 1981. The  
2 laboratory was closed in April of 1984.

3                   For the first year and a half I was there,  
4 work proceeded relatively smoothly. I would like to  
5 say this was a very sensitive lab at the research  
6 center, very secret. We were allowed to have very few  
7 visitors.

8                   When we ordered our rats, they were often  
9 wheeled up to the lab on a cart under a sheet so nobody  
10 could see them

11                   We did very few presentations. In fact, for  
12 the first year, no presentations to the research center  
13 as a whole. Our annual reports had a very restricted  
14 distribution.

15                   The people we interacted with for the most  
16 part were Dr. Dunn and then Dr. Jim Charles and  
17 Dr. Thomas Osdene being the chain of command that  
18 oversaw our laboratory.

19                   There came a time in 1983 where there was  
20 great concern on the company for pending litigation  
21 against Philip Morris.

22                   MR. HEIM Objection, Your Honor. It's a  
23 conclusion.

24                   Can we approach, Your Honor?

25                   THE COURT: Yes.

1           (The following proceedings were had at  
2 sidebar:)

3           MR. HEIM   In a long narrative answer to a  
4 simple question, it's hard to weed out what is fact and  
5 what is just opinion.  But when he says the company was  
6 very much concerned, that strikes me as his opinion and  
7 not necessarily a fact statement.

8           THE COURT:  Unless it was communicated to  
9 him

10          MR. HEIM   Unless it was communicated to him  
11 by someone who -- it would not be hearsay.

12          MR. ROSENBLATT:  It was.

13          MR. MDSS:  A problem we have here is this:  
14 We all agree that he is a fact witness.  We established  
15 that early on.  With fact witnesses, you certainly  
16 don't have a question and have them give you a long  
17 narrative answer, because what is going to happen is  
18 what exactly just did happen; that is, we're going to  
19 get into areas where he probably is not allowed to  
20 testify.

21                 So why don't we do it in a question and  
22 answer format rather than what he wants to say?

23          THE COURT:  I'm not exactly sure where you're  
24 going, but I suppose that what you expect him to say is  
25 that they eventually decided to send all animal studies

1 overseas. Is that the end result of this thing?

2 MR. ROSENBLATT: No. They killed the rats.  
3 They closed the laboratory and killed the rats.

4 MR. HEIM No, Stan's right. Where he's  
5 going is they shut the laboratory down.

6 MR. ROSENBLATT: Shut it down and basically  
7 fired him

8 THE COURT: You want to know why?

9 MR. ROSENBLATT: Exactly.

10 THE COURT: So the question is the why, and  
11 the answer to that was why? Why did they do that?

12 MR. ROSENBLATT: That's what I'm going to ask  
13 him

14 THE COURT: What do you think he's going to  
15 say?

16 MR. ROSENBLATT: Because they were getting  
17 too hot in terms of their research. They were very  
18 worried about what -- that their data would be  
19 discoverable in litigation.

20 THE COURT: Okay. Now that gets into that  
21 probative area.

22 MR. MOSS: Exactly.

23 THE COURT: There had been previous testimony  
24 that experimental studies on living animals were  
25 shifted overseas. That was some earlier study. Is

1 that part of this situation, or is it something  
2 different?

3 MR. DOUGLAS: That was under consideration.  
4 It was one of the things that was discussed leading up  
5 to the shutting down of the lab whether --

6 MR. MDSS: Hold on. The witness is hearing  
7 everything you're saying. He's not supposed to be  
8 listening.

9 THE COURT: The question is, what did he do,  
10 what part did he play in that? If he was just a  
11 soldier in the field and the generals have to come in  
12 and talk about it, all he can say is, I was there one  
13 day, I received information regarding the shut-down.

14 Now, if he received information such as a  
15 memo of some sort as to why they were shutting it down,  
16 that's a different story. You will have to go into  
17 that.

18 MR. DOUGLAS: Judge, it was a process which  
19 actually took several months which involved visits from  
20 executives to the lab. But the principal scientist,  
21 they discussed it directly.

22 THE COURT: But was it relayed to him? Was  
23 he part of the discussion?

24 MR. DOUGLAS: Yes. He was involved in  
25 discussions, and it let up to the closing of the lab.

1 THE COURT: He would have factual  
2 information.

3 MR. DOUGLAS: That's correct. First-hand  
4 discussion.

5 MR. MDSS: Whoa, whoa.

6 MR. HEIM Depends on actually where he got  
7 the information from. Now he's testified in his  
8 deposition what was told to him as to why the lab was  
9 shut down, and he obviously will testify as to what was  
10 told to him

11 When he asked the question -- when he asked  
12 the question of not the president, I'm sorry, whatever  
13 Charles was, he asked him why is the lab being shut  
14 down, he answered it was being shut down for business  
15 reasons.

16 MR. DOUGLAS: It included the president and  
17 CEO of Philip Morris that visited the lab to inquire  
18 what they were doing, and that was part of the process  
19 that actually led to the decision to close it.

20 THE COURT: You can make various suppositions  
21 from a series of facts. We're interested in not the  
22 suppositions but the facts. So we have to know what  
23 fact 1, fact 2, 3, 4 was and not worry about what the  
24 supposition was. I don't know what his position is.

25 If he can give you the facts leading up to

1 the shut-down, fine. But as to explain the theory  
2 behind it and the scuttlebutt that these people may  
3 have discussed in the lab as to why this was occurring,  
4 that's not fact. So I don't know where he's going at  
5 this point.

6 MR. DOUGLAS: What he can testify to, Judge,  
7 is that he was told directly, in very explicit terms by  
8 the directors who were overseeing the lab, the reasons  
9 for the lab being closed when it was and the manner in  
10 which it was closed.

11 THE COURT: So this was made known to him by  
12 the supervisor.

13 MR. DOUGLAS: Yes, it was, including Dr. De  
14 Noble, who was his supervisor. That's what this is  
15 leading up to, I believe.

16 MR. HEIM Well, I don't know whether he will  
17 say that. My recollection of his deposition testimony  
18 is that he was told -- he specifically --

19 THE COURT: Let's find out what his answer is  
20 going to be.

21 MR. HEIM But I think there's a hearsay  
22 component here that we're concerned about. I guess  
23 we'll just have to hear what he says.

24 THE COURT: Yes.

25 (The sidebar conference was concluded, and

1 the following proceedings were held in open court:)

2 THE COURT: Hold on.

3 (The following proceedings were had at  
4 sidebar:)

5 THE COURT: There are two people sitting in  
6 the second row behind Mr. Rosenblatt's seat. One is in  
7 a dark shirt. Another is in a sort of brownish plaid  
8 shirt. I noticed during the conversation they got up  
9 and were leaning over and reading from your computer.

10 MS. LUTHER: They are attorneys for the  
11 defendants.

12 THE COURT: I don't know who they are.

13 MR. DOUGLAS: They are counsel representing  
14 Philip Morris from Arnold & Porter in Washington, D.C.,  
15 so apparently they decided --

16 THE COURT: I got counsel. Now I got a  
17 reporter.

18 MR. DOUGLAS: No. Counsel representing  
19 Philip Morris, they're with Arnold & Porter, a law firm  
20 in Washington.

21 THE COURT: I was concerned with who they  
22 were.

23 MR. HEIM: They're lawyers.

24 THE COURT: They are entitled to look at --

25 MR. MDSS: They want to see what the

1 transcript --

2 THE COURT: I have no problem with that.

3 MR. ROSENBLATT: I do. Let them look at  
4 their screen.

5 MS. LUTHER: They weren't looking at yours,  
6 Stanley.

7 MR. ROSENBLATT: I'm kidding.

8 THE COURT: I noticed. I didn't know if they  
9 were civilians.

10 MR. MDSS: They just read what we were  
11 talking about and moved back.

12 (The sidebar conference was concluded, and  
13 the following proceedings were held in open court:)

14 THE COURT: All right. Let's proceed.

15 BY MR. ROSENBLATT:

16 Q. All right. At some point while you were  
17 employed at Philip Morris, the rat laboratory was  
18 closed, correct?

19 A. Correct.

20 Q. And obviously you asked why that was  
21 happening.

22 A. Correct.

23 Q. What were you told -- who did you ask and  
24 what were you told as to why your laboratory, Dr. De  
25 Noble's laboratory, was being closed?

1           A. I was given that information in April of '84  
2 by Dr. Jim Charles, who was Dr. De Noble's immediate  
3 supervisor, that the lab was being closed. We were  
4 told it was a business decision.

5           MR. HEIM Object to hearsay grounds.

6           THE COURT: Overruled.

7           Keep going.

8           A. (Continuing) I was told directly by  
9 Dr. Charles the lab was being closed. When I asked  
10 why, I was told it was a business decision. This was  
11 really the culmination of a series of events for the  
12 last six or nine months where the lab was in question.  
13 There were -- there were several times it came up in  
14 the previous six to nine months that the lab might be  
15 closed.

16           We were finally told it was to be closed. We  
17 were told the next day: Turn off your equipment, kill  
18 your rats, pack up your offices. And that's what we  
19 did.

20           Q. Based on the period of time that you worked  
21 there in the rat laboratory, and Jim Charles was your  
22 immediate supervisor -- well, De Noble was your  
23 immediate?

24           A. Yeah. I answered to De Noble. De Noble  
25 answered to Charles.

1 Q. Okay. When Charles answered your question  
2 and told you that the laboratory was being closed, that  
3 this was a business decision, did you understand what  
4 he meant?

5 A. No. Well, I got no further explanation,  
6 although it had been clear in discussions with Jim  
7 Charles directly and Dr. Osdene and Dr. De Noble for  
8 several months before that, that there was great  
9 concern that the work we were doing was causing --

10 MR. HEIM Objection, Your Honor.

11 A. -- a legal liability.

12 THE COURT: Just leave it at that.

13 MR. ROSENBLATT: Okay.

14 BY MR. ROSENBLATT:

15 Q. Now, you referred to this six or nine-month  
16 period before April of '84 when you got some indication  
17 the lab might be closed. In terms of specific events  
18 or anyone coming to the lab during that time frame the  
19 six or nine months before, what happened?

20 A. We had several visitors. In or around mid  
21 '83, we had a series of outside attorneys come from the  
22 firm of Shook, Hardy & Bacon in Kansas City. We were  
23 told that these attorneys --

24 MR. MDSS: Objection, Your Honor.

25 MR. HEIM Objection.

1 THE COURT: I guess we're going to have to --  
2 why don't you folks go in the jury room?

3 (The jurors exited the courtroom)

4 THE COURT: All right. Have a seat, folks.  
5 I guess we better find out where we're going before we  
6 get in front of the jury with this issue.

7 VOIR DIRE EXAMINATION

8 BY MR. ROSENBLATT:

9 Q. Okay. This is what's known as kind of a  
10 proffer, so I'm going to be asking you some questions.  
11 Just give the same answers you would have given if the  
12 jury was here.

13 I had asked you about the events within the  
14 six or nine-month time frame before the actual closing  
15 of the lab, what you had actually seen or heard about  
16 the possible closing of the lab, and you were in the  
17 process of answering that.

18 A. Well, in mid '83 we were visited by a series  
19 of lawyers from Shook, Hardy & Bacon in Kansas City,  
20 and were told by Dr. Charles that, because they would  
21 be representing Philip Morris in some pending lawsuits,  
22 they were coming down to examine the lab, find out what  
23 we did, find out what our results were, for that  
24 defense.

25 That led to questions on whether the lab

1 should continue to be open. And in November of that  
2 year, the president of the company, Mr. Shep Pollack,  
3 with one of his attorneys, Fred Newman, and several  
4 other people, came down firsthand to visit the lab, had  
5 a tour of the lab, talked to us, again with the  
6 understanding, as we were told directly, that they were  
7 going to decide whether the lab should stay open or be  
8 closed.

9 After they left, shortly around the first of  
10 the year, we were told that everything was okay, keep  
11 working. And then several months after that, very  
12 suddenly we were told the lab was -- the work was no  
13 longer to continue and we were to close the lab.

14 THE COURT: Okay.

15 BY MR. ROSENBLATT:

16 Q. Well, this is obviously a scientific  
17 laboratory. Did anyone give you an understanding as to  
18 why the lawyers were going through the rat laboratory  
19 and why the president of Philip Morris came from New  
20 York and he was personally going through the rat  
21 laboratory?

22 A. Well, the work we were doing we were told  
23 posed a potential legal liability for the company in  
24 the lawsuit, the Cipollone case, that had become very  
25 prominent in mid '83, and that they had to evaluate

1 whether this work should continue to go on or not.

2 Q. And without taking every event during that  
3 six or nine-month time frame, when the lab actually was  
4 closed and you were told that it was a business  
5 decision to close the laboratory, what did that mean to  
6 you, based on all your experiences of the previous nine  
7 months --

8 A. Well --

9 Q. -- relating to the possible closing of the  
10 lab?

11 A. It was obvious to me they were closing it  
12 because they were afraid of the work, and they didn't  
13 want it to continue anymore. It certainly was not an  
14 expensive lab to run.

15 Q. Was there any scientific reason that you were  
16 aware of for closing the lab?

17 A. None. We had both been promoted. We had  
18 both gotten great praise from the company, probably  
19 more than I would have given us. I thought we did a  
20 good job. They were very happy with the work. We  
21 identified the analogs they wanted. We identified  
22 other materials in smoke that were of very much  
23 interest to the company. So, scientifically, there was  
24 no reason that I was made aware of that there were any  
25 problem. We did our job.

1 THE COURT: Thank you.

2 Your objections, sir?

3 MR. HEIM Yes, Your Honor, several  
4 objections to it.

5 Do you want to excuse the witness or do you  
6 want to do it sidebar?

7 THE COURT: No. You can just step out in the  
8 hall, if you would for just a minute.

9 (The witness exited the courtroom )

10 MR. HEIM Judge, what you have here is a  
11 whole bunch of speculation and opinion as to what is  
12 happening. He said some lawyers showed up from a law  
13 firm He draws a conclusion from lawyers showing up.  
14 Who knows what else, other things they were doing at  
15 the company. Nobody. He doesn't.

16 He's only got a little picture of this thing.  
17 He said it led to questions, recontinuing the lab. The  
18 president of the company comes through, has a  
19 discussion with him, and then they're told the lab  
20 should stay open.

21 According to what he said, I wrote down,  
22 "Everything okay. " And he says several months later  
23 it's closed, and then he draws the conclusion -- he was  
24 told for business reasons, and he draws the conclusion:  
25 "It's obvious to me they were afraid of the work."

1 Well, that is pure conclusory speculation as  
2 to his conclusion. It has no -- it's just his opinion  
3 that that was the reason, when he gets to, "It's  
4 obvious to me that they were afraid of the work."

5 So this suggestion that there was a concern  
6 about legal liability, as he put it, just kind of  
7 wanders around out there, but it doesn't have a  
8 foundation in admissible evidence. There is no  
9 foundation for it.

10 And for him to then jump to the conclusion  
11 that business decision equals legal liability I think  
12 is unwarranted. It's not supported, and doesn't have  
13 foundation.

14 THE COURT: Well, part of his answer is not  
15 okay. I mean, we can understand that, and I can easily  
16 identify that. Part of his answer is open to question  
17 at this point.

18 You want to respond to that? In other words,  
19 he came down and said that the lawyers came down and  
20 they wanted to look at the lab because they were  
21 interested in the case they were doing. That's really  
22 not a problem, basically. And then they were told some  
23 higher-ups came down and decided for business purposes  
24 they were going to close the lab. Really nothing wrong  
25 with that. Okay?

1           Any supposition on his part as to anything  
2 else getting too close to something or other I think  
3 would be objectionable.

4           The question you asked I think would be an  
5 appropriate question as to was there any scientific  
6 reason why the lab should close, vis-a-vis a business  
7 reason. That's no problem I don't find any problem  
8 with that.

9           But any supposition that he may make on the  
10 area of what the lab was doing and whether they were  
11 afraid that they were getting close to a particular  
12 area or subject matter, I think all of that is  
13 speculation and supposition of which he doesn't have  
14 any direct knowledge.

15           But let me just start again from the top of  
16 what he stated and get that area and identify those  
17 areas which I think would be inadmissible.

18           See, it starts when he first said the lawyers  
19 from Shook, Hardy & Bacon came down and were told by  
20 Dr. Charles because they would be representing Philip  
21 Marris in some pending lawsuit, they were coming to  
22 examine the lab, find out what they did, find out what  
23 the results were for the defense. That's got some area  
24 of discussion he can talk about. But if he says that  
25 the lawyers came down to look over the lab, to become

1 educated for whatever reason, that's one thing.

2           Then that leads to the question whether the  
3 lab will continue to stay open or not. That's no  
4 problem. President comes down, and he visits the lab,  
5 talked with everybody, then they were told they may  
6 decide whether to close the lab or not. Then they  
7 left. He was working. Several months later they told  
8 me we weren't going to work anymore, continue to close  
9 the lab down.

10           Then the next question is the objectionable  
11 question, I think: Did anyone give you an  
12 understanding as to why the lawyers were doing what  
13 they were doing and so forth?

14           He says: Well, the work we were doing posed  
15 a potential legal liability for the company in a  
16 lawsuit, and I think that would be objectionable.  
17 Getting beyond that, another question -- what did it  
18 mean to you based upon closing the lab, based on your  
19 experiences? And this is when he says it was obvious  
20 that they were closing it because they were afraid of  
21 the works and didn't want it to continue. That's the  
22 supposition.

23           The next question was, was there any  
24 scientific reason, which was an appropriate question.  
25 So, within that framework, I think it's appropriate.

1           MR. MDSS: May I make a suggestion? I  
2 understand your ruling, and I'm not arguing with it.  
3 But I think that, in order to be sure we don't get into  
4 a problem --

5           THE COURT: I've got to talk to him first.

6           MR. MDSS: Exactly.

7           MR. HEIM That's what I was going to  
8 suggest.

9           THE COURT: Do you want to change sides? You  
10 come up here, I'll go down there?

11          MR. MDSS: Yes. How about maybe just a  
12 couple of hours?

13          THE COURT: One or two rulings?

14          MR. MDSS: Yes.

15          MR. KIRBY: Wouldn't take me that long.

16          THE COURT: Only one. I'm just kidding.

17          MR. ROSENBLATT: You want the witness?

18          THE COURT: Yes.

19          (The witness entered the courtroom )

20          THE COURT: Okay. The reason I've got you  
21 back here without the jury is we had to go over some of  
22 the legal aspects of this. You're a scientist, not a  
23 lawyer, and I'm not a scientist. We had to get to some  
24 understanding.

25                 It's okay for you to testify that some of the

1 attorneys came down to check the lab out and see what  
2 you were doing, so forth and so on. But the reasons  
3 for them coming down I think would be inappropriate to  
4 discuss. But the fact that they did come down, looked  
5 it over, the president coming down and him looking it  
6 over and deciding whether you may or may not close the  
7 lab, that's okay. No problem

8           The supposition as to what's really behind it  
9 all I think is inappropriate, and you can't discuss  
10 what you believe would have been the real reason. He  
11 said it was a business reason, that was relayed to you,  
12 that's fine. You can testify as to that. But I would  
13 stay away from this idea that you said you thought they  
14 thought it was apparent they were getting too close to  
15 something which would cause a problem for the company.

16           THE WITNESS: Let me clarify. Just as -- he  
17 told me it was a business decision. Prior to that, in  
18 mid '83, we were told that there was concern on the  
19 company that we were a liability. I didn't think that;  
20 I was told that.

21           THE COURT: Well, I understand that. But  
22 that gets into a legal question of legal  
23 responsibilities, and that's where we're at. That's  
24 different than science. So we have that restriction.

25           The next question was asked of you: Was

1 there any scientific reason for the lab being shut  
2 down? That's an appropriate question. You can answer  
3 that.

4 So, within that parameter. Just stay away  
5 from the legalese issue.

6 THE WITNESS: Sounds good.

7 THE COURT: All right. Bring the jury in.  
8 It's very difficult.

9 THE WITNESS: If I get out of line, just  
10 whack me.

11 (The jurors entered the courtroom)

12 THE COURT: All right, folks. Please be  
13 seated. You may resume.

14 DIRECT EXAMINATION (Continued)

15 BY MR. ROSENBLATT:

16 Q. You know, Dr. Mele, in terms of your being  
17 told the lab was closed for business reasons, let me  
18 ask you this: From your standpoint, was there any  
19 valid scientific reason to close the lab?

20 A. We were never given any reason scientifically  
21 why the lab should not continue. There was never  
22 anything but the highest regard for the lab and the  
23 work at Philip Morris.

24 Q. At the time the lab was closed in April of  
25 '84, had you completed your research?

1           A.    No.  We had a number of projects ongoing.  We  
2 had completed some studies.  We were in the middle of  
3 others.  And we were about to start yet another series.  
4 One study often leads to another.  There are many  
5 questions to be asked.

6           We had identified two candidate analogs that  
7 the company had asked us to look for, but there were  
8 clearly a number of other issues they asked us to  
9 pursue, and those answers had not been completed.  
10 Those studies were not finished.

11          Q.    Did you say that, during the six or nine  
12 months' time frame before the lab was actually closed  
13 in April of '84, that the president of Philip Morris  
14 came down to Richmond and went through the lab?

15          A.    That is correct.  Mr. Shep Pollack, head of  
16 Philip Morris, USA.

17          Q.    Did he come alone?

18          A.    He came with a small entourage.  One of the  
19 corporate attorneys, Mr. Fred Newman, who was the  
20 attorney in our chain, he reviewed and evaluated all of  
21 our work, our written reports; and then there were  
22 several other people from New York, I don't remember  
23 who.

24          Q.    When the president of Philip Morris was in  
25 the laboratory, did you have any direct discussion with

1 him?

2 A. Yes.

3 Q. Tell us what he said to you, what you said to  
4 him

5 A. Mr. Pollack and Mr. Newman and the other  
6 groups had took a tour of the lab. They wanted to see  
7 the rats working in the box, so they got to see a rat  
8 self-administering nicotine. The lab is composed of a  
9 series of rooms that are interconnected.

10 When we were out in one of the main rooms, I  
11 was there with Mr. Pollack and several other people,  
12 and he asked -- he asked -- I don't remember the exact  
13 words -- either is nicotine or is cigarette smoking  
14 addicting.

15 Q. Did you answer him?

16 A. The answer I gave was that -- there was a lot  
17 of work that needed to be done to address that question  
18 on nicotine. We had answered some of the questions  
19 from our work with self-administration and our  
20 tolerance studies. We felt we needed to do more work,  
21 we had other work in progress, and -- we felt the work  
22 needed to continue to address that more directly.

23 Q. When the president of the company left on  
24 that particular day, did he say one way or the other  
25 whether the lab was going to be closed or whether it

1 would remain open?

2 A. He didn't say anything to me. The feedback  
3 we got shortly --

4 MR. MDSS: Objection, Your Honor.

5 THE COURT: Sustained.

6 BY MR. ROSENBLATT:

7 Q. Now, I believe you had mentioned at some  
8 point during the several months prior to the actual  
9 closing, Philip Morris lawyers from the law firm of  
10 Shook, Hardy & Bacon came to visit the lab?

11 A. Correct.

12 Q. Did you have any direct interaction with  
13 them?

14 A. Yes. Quite a bit.

15 Q. Tell us about it.

16 MR. MDSS: Your Honor, may we go sidebar?

17 THE COURT: Yes. I guess we're going to have  
18 to.

19 (The following proceedings were had at  
20 sidebar:)

21 MR. MDSS: Now, this is exactly the area that  
22 you instructed him and opposing counsel not to go into,  
23 as to the liability part of it. I just looked at the  
24 transcript again as to what you said.

25 THE COURT: Yes. I'm sure we understand

1 that. So does Mr. Rosenblatt. But I'm taking it and  
2 making an assumption that he's not going to go into  
3 that area, but something else. Maybe I'm wrong.

4 MR. MDSS: Once again, I could be wrong.

5 MR. ROSENBLATT: They were -- we want to know  
6 what did they do, what did they do, what did they say  
7 to you?

8 THE COURT: Well --

9 MR. ROSENBLATT: I don't expect I'm going to  
10 get this answer. But if someone -- I would think that  
11 if someone from Shook Hardy said to him, well, we're  
12 worried about litigation, which I don't expect him to  
13 say, he would be entitled to say that.

14 MR. HEIM: It would be hearsay what outside  
15 lawyers would say, and may even be privileged. I don't  
16 know.

17 MR. MDSS: If we're going to do this, I  
18 thought you were clear in that we weren't going to do  
19 this.

20 THE COURT: I don't know what his answer is  
21 going to be.

22 MR. MDSS: And we need to hear what he's  
23 going to say. I hate to have the jury leave, but ---

24 MR. ROSENBLATT: I won't ask him what they  
25 said. I won't ask him. But I'm going to ask him what

1 he saw them do and how long they hung around.

2 THE COURT: That's fine. Okay.

3 (The sidebar conference was concluded, and  
4 the following proceedings were held in open court:)

5 BY MR. ROSENBLATT:

6 Q. Don't tell me what the lawyers from Shook  
7 Hardy said, if anything.

8 What did you see them do, if anything?

9 A. They came in --

10 Q. In the laboratory?

11 A. The lawyers saw the lab, they saw the  
12 animals, they saw our offices, they saw all our files,  
13 they saw the literature we read, they saw the data we  
14 collected, they saw the reports we wrote.

15 Q. They reviewed everything?

16 A. Correct.

17 Q. To your knowledge, did any one of those  
18 lawyers have a scientific background?

19 MR. MDSS: Objection, Your Honor.

20 THE COURT: If he knows.

21 A. I don't know.

22 Q. They were lawyers, as far as you knew?

23 MR. MDSS: Objection, Your Honor. He asked a  
24 question and he doesn't like the answer and --

25 MR. ROSENBLATT: I loved the answer.

1 MR. MDSS: He said they were lawyers --

2 THE COURT: He doesn't know if they had a  
3 scientific background, but he does know they're  
4 lawyers.

5 MR. MDSS: That's been established a long  
6 time ago.

7 THE COURT: The only reason he knows they're  
8 lawyers is because they told him

9 MR. HEIM If they're lawyers, they probably  
10 don't have any scientific background; that's why  
11 they're lawyers.

12 THE COURT: So the lawyers without scientific  
13 background came to talk to you?

14 BY MR. ROSENBLATT:

15 Q. And how long did the lawyers who had no  
16 scientific background hang around?

17 A. The lawyers with no scientific -- well --

18 THE COURT: They hung around, they --

19 Q. But how long did they hang around?

20 A. Mnths.

21 Q. Mnths? You mean on a daily basis?

22 A. There were one or two of the attorneys and  
23 one in particular we saw almost daily for several  
24 weeks. They would come and go. They would leave  
25 Richmond, go back to Kansas City and come back to

1 Richmond. But they were there when we were kicked out.  
2 So from beginning in mid June -- mid '83 to April of  
3 '84, they were there.

4 Q. And basically doing what? What you've  
5 already told us about, reviewing files and that kind of  
6 thing?

7 A. Correct.

8 Q. Again, don't tell me what was said. I just  
9 want to know if you ever asked these lawyers, you know:  
10 This is a scientific laboratory. What's going on? Why  
11 are you guys here?

12 Did you ever say anything like that?

13 MR. MDSS: Objection, Your Honor. This is  
14 exactly what we spoke about at sidebar.

15 THE COURT: This is basically a question  
16 without an answer.

17 MR. HEIM Right.

18 MR. MDSS: There makes no --

19 THE COURT: I probably think it's the same as  
20 did you ever ask.

21 BY MR. ROSENBLATT:

22 Q. Did you ever ask?

23 A. I didn't have to ask. I knew why they were  
24 there.

25 Q. Did the president of Philip Morris only pay

1 that one visit?

2 A. To our laboratory?

3 Q. To your laboratory.

4 A. To our laboratory.

5 Q. Now, when the laboratory was finally closed,  
6 did that come out of the blue? I mean, I know there  
7 were events which made you recognize there was a  
8 possibility that the laboratory would be closed. But  
9 on that particular day, did you have any warning that  
10 it was going to happen that day?

11 A. Our life for the last several months there  
12 was a roller coaster. We were up and down. But at  
13 that time, and for a period of time before that, a  
14 month, two or three, we had no warning. We were -- we  
15 felt we were good to go.

16 Q. Who told you the lab -- who actually was the  
17 person who said to you: Your work is done, the lab's  
18 closed?

19 A. Jim Charles.

20 Q. And you said why, and he said it's a business  
21 decision.

22 A. Right.

23 Q. Did you ever say to him: What do you mean, a  
24 business decision?

25 MR. HEIM Objection. Asked and answered.

1 THE COURT: Well, it's a rhetorical question,  
2 I think. You're getting into areas you're not supposed  
3 to get into.

4 BY MR. ROSENBLATT:

5 Q. I don't want to hear the answer. I just  
6 want to know did you ever ask Charles to be more  
7 specific: Hey, I would like to know what you mean by a  
8 business decision.

9 Don't tell us what he said.

10 MR. MDSS: Once again, Your Honor --

11 MR. KIRBY: Your Honor, same thing.

12 MR. MDSS: Your Honor, it's the same problem  
13 as we had before.

14 THE COURT: I'm not so sure it's a problem  
15 If he asked, he can say he asked. We haven't gotten to  
16 the answer.

17 BY MR. ROSENBLATT:

18 Q. Did you ask?

19 A. Can I answer yes or no?

20 Q. Yeah, yes or no.

21 A. No.

22 Q. Okay.

23 A. Can I explain that?

24 Q. No, no.

25 THE COURT: Wait for the next question.

1 BY MR. ROSENBLATT:

2 Q. Why not?

3 A. Why didn't I ask?

4 Q. Why didn't you ask?

5 MR. MDSS: Objection, Your Honor.

6 THE COURT: Now we may get into an area.

7 MR. ROSENBLATT: I think --

8 THE COURT: We better talk over here.

9 (The following proceedings were had at  
10 sidebar:)

11 MR. MDSS: Judge, you well understand what's  
12 going on here. You made a ruling --

13 MR. ROSENBLATT: He can't ever just make an  
14 objection. He always prefaces with you know what's  
15 going on, you know what Rosenblatt is pulling. I  
16 really resent it.

17 MR. MDSS: Well, you shouldn't resent it  
18 because you shouldn't do it.

19 But the point is, Judge, you've told him what  
20 areas not to -- you have heard the man answer before.  
21 It's more of the same. Getting into areas you told him  
22 not to.

23 Yes, I do criticize the way you do it.

24 MR. ROSENBLATT: I could care less about you  
25 criticizing.

1           THE COURT: Gentlemen, wait a minute. We've  
2 been at this thing since July, and you haven't fought  
3 yet. Little skirmishes. Let's not fight.

4           Let me see if I can understand what's going  
5 on here. He was told by --

6           MR. HEIM Charles.

7           THE COURT: -- Charles it was a business  
8 decision. Did you ask him why, and he said no, I  
9 didn't. Then you want to know why. He's going to say,  
10 in my opinion, he's going to say: Because I already  
11 knew.

12          MR. ROSENBLATT: That's right.

13          MR. HEIM He already said that.

14          MR. ROSENBLATT: Exactly right. Then I won't  
15 ask him what did you know. I won't --

16          THE COURT: The problem with that is that  
17 leads to a supposition. That leads to an open-ended  
18 supposition with the jury.

19          MR. ROSENBLATT: But the supposition is the  
20 truth.

21          THE COURT: Well, they have to make  
22 suppositions at this point with an answer of that type.  
23 I already knew. They're going to say, what did he  
24 know?

25          MR. HEIM He already said that once before.

1           MR. DOUGLAS: In that case, Your Honor, that  
2 question, wouldn't that permit the defendants then to  
3 cross-examine him on the question and clarify anything  
4 they felt --

5           THE COURT: If they want to.

6           MR. DOUGLAS: Any supposition --

7           THE COURT: But he's already indicated that  
8 he knew, whatever the reason was, that was a conclusion  
9 he reached in his own mind, and that's a conclusion  
10 that he can't testify about. So if he says he didn't  
11 do it -- I'll sustain the objection. I just don't  
12 think we ought to get into that area, unless they open  
13 the door.

14           (The sidebar conference was concluded, and  
15 the following proceedings were held in open court:)

16 BY MR. ROSENBLATT:

17           Q. Okay. From the time you go to Philip Morris  
18 until the time you're told the laboratory is closed,  
19 you always worked in the rat laboratory?

20           A. Correct.

21           Q. And then on April 5th, '84, you're told the  
22 rat laboratory is gone?

23           A. I was told Philip Morris does not do  
24 behavioral pharmacology anymore.

25           Q. Which --

1 A. Close the lab.

2 Q. So what happened to you? No laboratory, so  
3 what happens to your job?

4 A. Well, we were given three options at that  
5 point. They said: We'll pay you for six months and  
6 leave now, walk away, goodbye. They said: We could  
7 place you elsewhere in the company if you want. Or  
8 they said: You could take the six months, and we'll  
9 give you help and you can go out and look for another  
10 job for the six months.

11 The option I chose was to be placed elsewhere  
12 in the company. But over time, there was never another  
13 offer forthcoming, and as -- then I and also Dr. De  
14 Noble were looking for jobs, and we would inquire about  
15 this, we never received another offer. In fact, at one  
16 point finally we were told to stop asking --

17 MR. HEIM Objection, Your Honor. There's no  
18 relevance to this.

19 THE COURT: I think there's some relevance.  
20 Overruled.

21 BY MR. ROSENBLATT:

22 Q. You were told what?

23 A. We were told to stop asking or you might end  
24 up sweeping floors in the factory. So what happened  
25 was --

1 MR. HEIM Move to strike, Your Honor.

2 THE COURT: Overruled.

3 A. -- ultimately we found other jobs. And the  
4 six-month period, for science, is a very difficult  
5 time. Usually people in a university, when -- if  
6 someone is denied tenure, for example, and they know  
7 they're going to be looking for a job, they have a  
8 year, year and a half to search. We had on order of  
9 six months. So it was a difficult time.

10 Q. In your own mind, from your standpoint, in  
11 terms of how you left the employment of Philip Morris,  
12 did you quit? Were you fired?

13 A. We were fired. We were -- I don't know what  
14 else to call it. We were just fired and told to leave.

15 Q. You were never offered a substitute job?

16 A. Never.

17 Q. Did anyone explain to you why the lab had to  
18 be closed like this, and why the rats had to be killed,  
19 so quickly?

20 MR. MDSS: Objection, Your Honor.

21 Q. Was that ever explained?

22 MR. MDSS: Repetitive, Your Honor.

23 THE COURT: The answer is yes or no.

24 MR. ROSENBLATT: I know.

25 A. No.

1 Q. Okay.

2 A. In fact, I would just say we asked for one  
3 more day to finish one experiment, and that was denied.

4 Q. Now, you know, I notice -- I notice in  
5 looking at your curriculum vitae that there's a section  
6 which says: Technical reports proprietary restriction,  
7 Philip Morris USA, Inc., and its reports by you and  
8 Dr. De Noble relating to nicotine administration with  
9 the rats?

10 A. Right.

11 Q. These are articles you wrote or you were  
12 thinking about writing?

13 A. Those were titles of experiments we ran at  
14 Philip Morris. Those were papers we would have liked  
15 to have published. We were not allowed -- I don't  
16 remember exactly which ones are there. We were not  
17 allowed to publish those studies. When you're  
18 searching for a job and you've been somewhere for three  
19 years as a scientist and you have a three-year block  
20 with no publications, that certainly doesn't make you  
21 more employable.

22 So we worked out with Philip Morris that we  
23 wanted to let the world know, to have some indication  
24 that we were actively doing research while we were  
25 there, even though we were not able to produce

1 actually -- actual published papers because they would  
2 not let us publish the results.

3 Q. Now, you left the employ of Philip Morris in  
4 December of '84, although the laboratory was closed in  
5 April of '84?

6 A. Right, correct.

7 Q. From the time you left Philip Morris up until  
8 today, did you ever try to publish or present  
9 information concerning the work you had done on  
10 nicotine and rats while employed at Philip Morris?

11 A. Yes, on several occasions we tried to do  
12 that. We either submitted some of the results to  
13 scientific meetings where we would go and do a  
14 presentation, or we submitted manuscripts to  
15 professional journals for publication. And once Philip  
16 Morris found out about this and they found out by  
17 monitoring what goes on in science, keeping up with the  
18 literature, we received a letter from the counsel --  
19 the lawyers' office from Philip Morris in New York  
20 telling us that we should not be doing that; that we  
21 should stop.

22 Once we ignored that letter and continued to  
23 do it, we received a second letter. And at that point  
24 we were told that if we continued this activity, they  
25 would take legal action against us.

1 Q. So did you stop?

2 A. At that point we stopped.

3 Q. Now, when you were describing the work being  
4 done in the rat laboratory as secret, was it also  
5 secret from other departments at Philip Morris  
6 in-house?

7 A. We had -- I can't tell you what other  
8 departments knew what we were doing to what extent.  
9 But we had a very closed laboratory. Our colleagues  
10 from other groups were not allowed to come in and tour  
11 the lab. We did not give presentations to the research  
12 center the way all the other scientists did. We had a  
13 very restricted circulation for our documents. There  
14 were some words we were not allowed to use in our  
15 documents.

16 We were not allowed certainly to bring  
17 outside visitors in, outside the company in to see the  
18 lab. And as I indicated, even our rats were brought up  
19 to the lab in secret, under a towel on a cart so that  
20 people could not see that they were there.

21 Q. Now, if you had been permitted to publish  
22 what you wanted to publish, what would have been the  
23 focus of your articles?

24 A. We had completed studies on several areas  
25 related to nicotine abuse, articles on nicotine

1 self-administration in rats, articles on nicotine  
2 tolerance in rats, an article on nicotine physical  
3 dependence in rats and articles on brain sites, where  
4 in the brain nicotine is acting, again.

5 Q. In terms of your work in the rat laboratory  
6 while employed at Philip Morris, did you ever reach a  
7 conclusion as to whether nicotine was a positive  
8 reinforcer for rats?

9 A. Yes. That was a very early conclusion  
10 demonstrated by the very first self-administration  
11 study.

12 Up until that time, most self-administration  
13 studies in animals with a variety of drugs had been  
14 well-established, the cocaines, the heroins, that sort  
15 of thing. Studies with self-administration with  
16 nicotine had not been as successful, and I think we  
17 completed -- we did complete the first thorough  
18 demonstration and unequivocal demonstration in rats  
19 that nicotine functions as a positive reinforcer, which  
20 means the animals will work to get it. They will work  
21 to press a lever to get the infusion of nicotine into  
22 their bloodstream

23 Q. When a rat would press a lever and get this  
24 infusion of nicotine, was there anything immediately  
25 observable in their behavior, how they acted after they

1 got that shot?

2 A. They looked quite normal and then usually  
3 proceeded a short time later to press the lever again  
4 for more nicotine.

5 Q. In terms of writing up your reports and in  
6 terms of laboratory data, were there any restrictions  
7 imposed upon you as to language you could use or not  
8 use in referring to your findings and referring to your  
9 data?

10 A. We never used the word "drug" for nicotine.  
11 We were told not to call nicotine a drug. It was a  
12 compound. We were told to keep it out of the realm of  
13 the standard drugs of abuse, again, the cocaines and  
14 heroins.

15 In one case we were actually -- well, wrote  
16 down "nicotine." It was changed to just the word  
17 "compound." And the word "addiction" was certainly  
18 never used openly or written down.

19 Q. How about the word "cancer"?

20 A. Cancer, which was something we did not  
21 study -- there was a whole nother group studying it --  
22 that was never used openly. The word for cancer was  
23 "biological activity."

24 Q. During the period of time that you were  
25 employed in the laboratory, I'm sure -- I assume you

1 had interaction with Dr. De Noble just about every day.

2 A. Every day. We worked very closely together.

3 Q. How about Dr. Charles?

4 A. Dr. Charles we had a lot of interaction. He  
5 was our immediate supervisor. If we didn't see him  
6 daily, it was several times a week.

7 Q. And how frequently with Dr. Osdene?

8 A. Dr. Osdene was Dr. Charles' boss, and our  
9 contact was less frequent, but still on a regular  
10 basis, weekly, several times a month, depending on his  
11 schedule. He was a frequent visitor to the laboratory.

12 Q. And William Dunn was the head of the whole  
13 thing?

14 A. No, William Dunn was initially the head of  
15 the behavioral research unit. When I came to Philip  
16 Morris, he ran this group of psychologists called the  
17 behavioral research unit. About six months after I was  
18 there, that unit was disbanded, and our laboratory, the  
19 behavioral pharmacology laboratory, was shifted over to  
20 the biochemical research division that was run by Jim  
21 Charles. And at that point Dunn was no longer -- he  
22 was not in our chain of command.

23 Q. Now, during the period of time that you  
24 worked in the laboratory, other than nicotine, did you  
25 have occasion to study a compound called

1 acetylaldehyde?

2 A. Acetylaldehyde, yes.

3 Q. Is this how it's spelled:

4 A-c-e-t-a-l-a-l-d-e-h-y-d-e?

5 A. A-c-e-t-y-l-a-l-d-e-h-y-d-e.

6 Q. What is that?

7 A. It's a chemical. It's formed in cigarette  
8 smoke as the tobacco burns, and as you -- as a smoker  
9 sucks on the cigarette and you inhale the smoke, you're  
10 inhaling acetylaldehyde as part of the 4,000 or so  
11 chemicals that exist in cigarette smoke.

12 Q. Was there a lever for the rats to press if  
13 they wanted acetylaldehyde?

14 A. We did studies with acetylaldehyde, and we  
15 found that acetylaldehyde in rats also would maintain  
16 self-administration. They would work to get it,  
17 through the same procedure, the catheter into the vein.

18 Q. Did that mean that it was a reinforcing  
19 agent?

20 MR. MDSS: Objection.

21 A. That defines it as a positive reinforcer.

22 Q. To your knowledge, has any commercial  
23 cigarette manufactured by Philip Morris actually  
24 utilized increased levels of acetylaldehyde?

25 A. I've read reports where --

1           MR. HEIM   Your Honor, I'm going to object to  
2 anything that he doesn't have personal knowledge of  
3 here.

4           THE COURT:   Or part of his work, I would  
5 assume.   We all read reports.

6           MR. HEIM   While at the company.

7           THE COURT:   I think you better rephrase.

8 BY MR. ROSENBLATT:

9           Q.    In terms of your reading reports about  
10 increased levels of acetylaldehyde, are these reports  
11 you read when you were employed by Philip Morris?

12          A.    No, they were read subsequently.

13          Q.    But were they Philip Morris documents?

14          A.    They were reports in the press quoting Philip  
15 Morris documents.

16          Q.    What did they say?

17          THE COURT:   Sustained.

18          MR. HEIM   Sustained, Your Honor?

19          MR. ROSENBLATT:   You never know if you don't  
20 ask.

21          THE COURT:   As we know.

22          MR. HEIM   Sometimes you don't know even if  
23 you do ask.

24          MR. ROSENBLATT:   Is there an echo in here?

25 BY MR. ROSENBLATT:

1           Q.    When you were actually employed at Philip  
2 Morris in the laboratory, did you and Dr. De Noble have  
3 some of your articles published?

4           A.    Dr. De Noble had one article published just  
5 about the time I got there.

6           Q.    In terms of articles that were to be  
7 published, who did you or anyone else, the other  
8 scientists, have to run it by? Who had to give  
9 permission that this article was okay to publish, this  
10 article wasn't?

11          A.    Well, in our case, again, we had a very  
12 restricted audience. Articles from our laboratory went  
13 to Jim Charles, then to Tom Osdene. Then they would go  
14 to New York for review by Fred Newman, the attorney,  
15 and then we would get feedback, back down that chain.

16                  And if there were other people involved --  
17 there may have been -- I'm just not aware of who else  
18 might have read it. But those were people we talked to  
19 regularly and repeatedly if we wanted to know the  
20 status of a paper or abstract. Charles, Osdene, Fred  
21 Newman, those three were the three.

22          Q.    Specifically what research were you pursuing  
23 with respect to nicotine and acetylaldehyde in terms of  
24 self-administration in rats at the time the laboratory  
25 was closed in April of '84?

1           A.    The acetylaldehyde work was fascinating.  It  
2   was of a lot of interest to the company, and to our  
3   consultants.  We were all very interested in it because  
4   really here for the first time there was another  
5   product in cigarette smoke that was identified that  
6   would -- that had reinforcing properties.

7                In the rat it was clearly self-administered,  
8   and even more interesting, when you put acetylaldehyde  
9   and nicotine together in the same bottle, you've got an  
10  effect that we call super-additive.  The effect of the  
11  combined chemicals was greater than the effect of the  
12  two effects alone if you just added them together.  
13  There was a synergistic effect or a super-additive  
14  effect.  So the rats really worked hard to get that  
15  combination.

16               Once that was demonstrated, there were a --  
17  just as with our nicotine analog meetings -- a series  
18  of discussions on could this nicotine acetylaldehyde  
19  combination, which exists already naturally in  
20  cigarettes, be exploited and developed and used so that  
21  we could try and find the optimal ratio of each  
22  compound that could then be transitioned into a  
23  commercial cigarette.

24           Q.    In your curriculum vitae, you indicate that  
25  you gave testimony before the United States House of

1 Representatives on the subject of research in the  
2 tobacco industry in April of 1994. What were the  
3 circumstances leading up to your appearance before  
4 Congress? How were you contacted or --

5 MR. HEIM Objection, Your Honor. We've been  
6 here many times before.

7 MR. ROSENBLATT: We've been there many times  
8 before.

9 (The following proceedings were had at  
10 sidebar:)

11 MR. HEIM This is going to testimony before  
12 the FDA testimony in 1994, and it's hearsay and --

13 MR. MDSS: It has no relevance.

14 MR. HEIM -- it has no relevance to the  
15 case.

16 MR. MDSS: Has absolutely no relevance to  
17 this case.

18 MR. HEIM If anything it's -- I don't know  
19 if it's going to be viewed as bolstering or not. But  
20 what does this testimony before the FDA have to do with  
21 this?

22 THE COURT: Let's ask him

23 MR. HEIM It's hearsay.

24 MR. ROSENBLATT: These people are not plucked  
25 from the air. Here you have someone who left Philip

1 Morris in December of '84. Now he's in a courtroom in  
2 Miami, so I'm giving some --

3 THE COURT: No. If he did, in fact, go and  
4 testify --

5 MR. ROSENBLATT: He did testify.

6 THE COURT: What was it about? What did he  
7 testify about?

8 MR. ROSENBLATT: Research.

9 THE COURT: Which research, the research he  
10 has done?

11 MR. ROSENBLATT: Yes.

12 MR. MDSS: The same stuff he just testified  
13 about.

14 MR. DOUGLAS: It was not about the FDA, Your  
15 Honor. It was about the research that was conducted  
16 and the activities. He was familiar firsthand with  
17 what took place at Philip Morris with regard to that.  
18 That's correct.

19 THE COURT: So, he went before somebody,  
20 governmental body or somebody. You say it wasn't the  
21 FDA.

22 MR. DOUGLAS: That's correct, before  
23 Congressional --

24 MR. HEIM I may be wrong.

25 MR. MDSS: It was a Congressional

1 subcommittee.

2 THE COURT: So he went before a Congressional  
3 subcommittee and testified about the work he was doing  
4 at Philip Morris.

5 MR. MDSS: What he just testified about. So  
6 what is the relevance to show that Congress was  
7 investigating? That's improper.

8 THE COURT: I don't know. What is the  
9 relevance?

10 MR. MDSS: I do know.

11 MR. DOUGLAS: Well, Your Honor, among other  
12 things, when Dr. Mele, with Dr. De Noble, appeared  
13 before the Subcommittee on Health, Energy and Commerce  
14 Committee in the House of Representatives, Philip  
15 Morris actually responded publicly to their testimony  
16 and denied that some of the things he and Dr. De Noble  
17 were testifying to publicly were true about the  
18 research that was done.

19 So, it actually goes to the claims here,  
20 because this is back in the spring of 1994, of fraud,  
21 misrepresentation to the public about the company's  
22 knowledge of these matters.

23 MR. MDSS: Judge, Judge, we are absolutely  
24 getting into an area that -- I can't believe anyone is  
25 suggesting it. He testifies to Congress and PM has a

1 right to respond, and he is suggesting this is relevant  
2 to their fraud claim?

3 MR. HEIM: When we took his deposition, none  
4 of this came up in deposition.

5 MR. ROSENBLATT: It's on his curriculum  
6 vitae.

7 MR. DOUGLAS: The defendants actually  
8 questioned Dr. Mele about his Congressional testimony.

9 THE COURT: I understand that. We're just  
10 talking about relevancy. There are a lot of ways of  
11 looking at it. Nobody has protested what he says here  
12 in public because he's just saying it today. But he  
13 said the same thing before publicly. And there was  
14 some sort of protest indicating what he was saying was  
15 not true.

16 MR. DOUGLAS: In a very public forum, Your  
17 Honor. And actually, Mr. Heim -- I don't know if  
18 Mr. Heim suggested it, but the defendants actually  
19 raised the issue of the Congressional testimony in a  
20 deposition last Thursday with Dr. Mele and not us.

21 MR. MOSS: Judge, the fact that somebody was  
22 questioned on a deposition, I mean, we are getting into  
23 areas of incredible prejudice here. What in the world  
24 are we doing?

25 THE COURT: Prejudice is one thing. It could

1 be very legal and very substantive. It still may be  
2 prejudicial to your case. The fact that it's  
3 prejudicial doesn't mean it can't come in.

4 MR. MDSS: We haven't gotten over relevance.

5 THE COURT: That's what I'm talking about.

6 MR. MDSS: We're getting into areas of  
7 prejudice.

8 THE COURT: I don't know. If what he  
9 testified to today is the same as what he testified  
10 then, and you folks are saying publicly what he said  
11 was not true, it might become very relevant, the fact  
12 that he said it and there was a denial on your part.

13 MR. MDSS: And what was the relevance of  
14 that, sir, to issues to be tried in this case?

15 THE COURT: Credibility.

16 MR. MDSS: Credibility of who, sir?

17 THE COURT: Both parties.

18 MR. HEIM Judge, it's so far afield. But  
19 first of all, I read the deposition, and whether --  
20 whether there may have been some reference to the  
21 witness having testified in 1994 in front of Congress,  
22 but I don't remember anything of any -- I don't  
23 remember anything of any substance -- I don't remember  
24 him being asked what he said then, and I don't remember  
25 anything about Philip Morris' response, and I don't

1 know anything about a Philip Morris response. Pursuant  
2 to the Court's order, we were given a disclosure.

3 It's --

4 THE COURT: Your question to him was, did you  
5 appear before a Congressional subcommittee and testify,  
6 and what did you testify about. The thrust of what you  
7 said, the same thing as you've testified here.

8 MR. ROSENBLATT: Right.

9 THE COURT: Then what? What are you going to  
10 do?

11 MR. ROSENBLATT: That's it.

12 THE COURT: So he's told the story to  
13 somebody else.

14 MR. MOSS: But the --

15 THE COURT: Now, the rules are, if what you  
16 say is attacked as being false --

17 MR. ROSENBLATT: And I'm going to ask him --

18 THE COURT: -- then you can say and you can  
19 bring out some supporting information that what you're  
20 saying is the same as it was then and it's correct. In  
21 other words, if there hadn't been a denial on the part  
22 of Philip Morris or at least he thinks there was a  
23 denial --

24 MR. MOSS: You mean you're suggesting that a  
25 party who is offered can show a prior consistent

1 statement? There is no such rule, Your Honor.

2 THE COURT: If it's attacked as inconsistent,  
3 okay, which is where we're going. But we haven't  
4 reached the point of showing it was attacked as  
5 inconsistent.

6 MR. DOUGLAS: To clarify, Your Honor, the  
7 president, William Campbell, of Philip Morris at that  
8 time, a statement was issued by Philip Morris in his  
9 name, a document we have entered as an exhibit that we  
10 will seek to use later in the testimony. It was also  
11 reproduced in the Congressional hearing record.

12 THE COURT: That says?

13 MR. DOUGLAS: Well, that is where the  
14 company, through their president and CEO, denied what  
15 Dr. Mele and Dr. De Noble testified to was accurate,  
16 was true. So it was an admission against interest.  
17 Certainly a contradiction.

18 THE COURT: Well, that denial is a different  
19 story.

20 MR. DOUGLAS: That is just to clarify the  
21 background.

22 THE COURT: The question at this point is can  
23 you get into evidence the fact that he told the same  
24 story to another body, and then later come in and say  
25 the reason that question was relevant is because there

1 has been a denial by the other side to show the  
2 consistency of his statement?

3 I think, under those circumstances, you can  
4 do that, but not get into specifically what he was  
5 telling.

6 MR. ROSENBLATT: Same subject.

7 THE COURT: Same subject.

8 MR. DOUGLAS: It does go to the fraud claims  
9 here because it was Philip Morris again publicly --

10 THE COURT: Only insofar as it goes that far.  
11 Did you testify before a subcommittee? Was it the same  
12 as what you testified to here? Yes. Off we go.

13 MR. MDSS: Obviously we object.

14 MR. ROSENBLATT: I want to ask him what was  
15 Philip Morris's response to his testimony.

16 THE COURT: If he knows.

17 MR. DOUGLAS: He is aware of that, Your  
18 Honor; yes, he is.

19 MR. HEIM I'm looking at the document which  
20 I've just seen for the first time, and it doesn't say  
21 anything about him

22 (The sidebar conference was concluded, and  
23 the following proceedings were held in open court:)

24 THE COURT: Guess what, folks?

25 THE JURORS: Later.

1 THE COURT: But don't go home.

2 (The jurors exited the courtroom.)

3 THE COURT: All right. Have a seat, folks.

4 Let's see where we're going to go with the question.

5 VOIR DIRE EXAMINATION

6 BY MR. ROSENBLATT:

7 Q. Dr. Mele, I had asked you about testimony you  
8 gave before the United States House of Representatives  
9 on research in the tobacco industry in April of 1994.

10 You testified before Congress?

11 A. Correct.

12 Q. And did you testify generally in the same  
13 kinds of areas that you've discussed today?

14 A. Correct.

15 Q. What -- do you have knowledge of what  
16 position Philip Morris took with respect to your  
17 testimony following your testimony before Congress?

18 A. Following the testimony?

19 Q. Right.

20 A. Immediately following the testimony?

21 Q. Whenever.

22 A. They were not complimentary. They put out  
23 press releases and interviews right there that  
24 attempted to discredit our testimony, and they had  
25 their current director of research, Dr. Ellis, also

1 attempt to discredit some of our research.

2 Q. I'm going to show you Engle Plaintiffs'  
3 Exhibit Number 5460, the title of which is, Philip  
4 Morris USA Statement Responding to Congressman Waxman's  
5 Press Conference, March 31, 1994, and ask you if you've  
6 seen this before.

7 MR. HEIM Judge, you should have one of  
8 these. (Handing)

9 THE COURT: Thank you.

10 What about your writing on the bottom?

11 MR. HEIM Not my writing.

12 THE COURT: Somebody's writing.

13 MR. HEIM You can fold it.

14 THE COURT: He's got a clean copy.

15 THE WITNESS: Yes. What was the question?

16 BY MR. ROSENBLATT:

17 Q. Well, have you seen this document?

18 A. Yes. Yes, I have.

19 Q. And were you aware at the time of the  
20 response of -- of course, the response of Philip Morris  
21 to at least Dr. De Noble's testimony as well as your  
22 own?

23 A. I was aware of Philip Morris's response, yes.

24 Q. Which was what, with respect to your  
25 testimony?

1           A.    No, in terms of Dr. De Noble's.  I'm not  
2 aware that they actually commented on my testimony.

3           MR. MDSS:  Judge, I think that --

4 BY MR. ROSENBLATT:

5           Q.    Well, in terms of --

6           A.    Other than Dr. Ellis, who clearly did.

7           Q.    Dr. Ellis mentioned you by name?

8           A.    She mentioned the work I conducted.

9           Q.    And was Dr. De Noble's testimony to Congress  
10 in any way substantially different than your own, or  
11 did you cover the same subjects and reach the same  
12 conclusions?

13          A.    No, we were there at the same table and there  
14 was concurrence.

15          Q.    There was concurrence.  Okay.

16          THE COURT:  Well, it's a little bit  
17 difficult.

18          MR. MDSS:  It's --

19          MR. HEIM  We ought to excuse the witness.

20          THE COURT:  I suppose.  Step out in the hall  
21 for just a minute, please.

22                (The witness exited the courtroom.)

23          MR. HEIM  Your Honor, as you can see, the  
24 reason I wanted you to have the actual document in  
25 front of you is that Philip Morris wasn't responding to

1 Dr. Mele. They were responding to a press conference  
2 that Congressman Waxman had. So Congressman Waxman had  
3 a press conference after the testimony and said certain  
4 things.

5 Philip Morris is responding with factual  
6 information, as it saw it, to what was presented by  
7 Congressman Waxman in Congressman Waxman's press  
8 conference or by whomever attended Congressman Waxman's  
9 press conference.

10 So I can't find Dr. Mele's name in here at  
11 all, as I look at it.

12 MR. MDSS: A minute ago Dr. Mele just  
13 testified that they didn't make any response to what he  
14 said.

15 The whole thing is carrying -- you know, once  
16 again, Judge, to get back to what I said up there  
17 before, what is the relevance of all of this? It has  
18 none, and it only has a potential to visit severe  
19 prejudice on the defendant.

20 MR. DOUGLAS: Your Honor, may I clarify?

21 THE COURT: Yes, sir, if you want.

22 MR. DOUGLAS: Congressman Waxman's press  
23 conference that counsel just referred to was a press  
24 conference at which Congressman Waxman issued a study  
25 that had been prepared by Dr. Mele and Dr. De Noble

1 dealing with the research, a study that had been  
2 forcibly withheld by the company. And so, in fact, it  
3 was directly about the research that Dr. Mele and  
4 Dr. De Noble performed at the company; the same subject  
5 matter of which they then addressed very shortly  
6 thereafter in the testimony before Congress.

7           It was part of one and the same activity over  
8 a period just a couple of weeks. And the press release  
9 that you have in hand that was issued in the name of  
10 the CEO of Philip Morris deals with the refutation of  
11 that very same subject matter, the subject matter that  
12 was dealt with at the press conference that they  
13 released this gentleman's study at and was dealt with  
14 again at that Congressional hearing.

15           This happened again within a space of a very  
16 brief period of time within the same month or within a  
17 couple of weeks in the spring of 1994. It's  
18 inextricable, and it deals again with the research they  
19 did at Philip Morris and the time period that Dr. Mele  
20 was at the company. That's what he was testifying to.

21           MR. MOSS: Judge, we've already had the  
22 testimony of Dr. Mele as to what his research was.  
23 You've allowed them to fully explore that, and give it  
24 to the jury.

25           We now have a situation where -- well, you've

1 heard what the witness said. You still have not heard  
2 any response as to the relevance, because the subject  
3 matter of what he had to say has been given to the  
4 jury. We are now getting involved in a side issue and  
5 a side showing, I suggest, that has no relevance to  
6 allegations in this case. It is nothing but prejudice.

7 THE COURT: I've reviewed the document, and I  
8 agree with defense objection on this matter. It does  
9 not make any reference to Dr. Mele. It really doesn't  
10 make any reference to whether or not they are denying  
11 the results of the experimentation done by Dr. Mele  
12 and/or Dr. De Noble.

13 So I don't think it meets the test of what it  
14 was intended to be on plaintiffs' representation.

15 MR. DOUGLAS: Your Honor, if I may refer to  
16 the -- the document that you're holding --

17 THE COURT: You know, it's a funny thing.  
18 When I make a ruling, I make a ruling. If you don't  
19 like it, you don't like it. I'm sorry. But I'm not  
20 going to go back and review it.

21 MR. DOUGLAS: I appreciate that, Your Honor.  
22 I was seeking to clarify something here.

23 THE COURT: No, all you're trying to do is  
24 get me to change my mind. Okay? So let's move on.

25 If he went before the committee and

1 testified, so be it. But that document doesn't do  
2 anything.

3 Mark it as an exhibit for identification,  
4 plaintiffs' side, please.

5 Do you want five?

6 MR. ROSENBLATT: Yes, we would appreciate it.  
7 Thank you.

8 (Plaintiff's Exhibit 5460 was marked for  
9 identification.)

10 (Brief recess)

11 MR. MDSS: Dr. Mele, my name is Ed Mbss. We  
12 hadn't met. I had to ask you something outside the  
13 presence of the jury. During this break we just had  
14 about 15 or 20 minutes, did you discuss any aspect of  
15 what your testimony is going to be with Mr. Douglas?

16 THE WITNESS: None.

17 MR. MDSS: Okay. Fine.

18 THE WITNESS: Nothing at all.

19 MR. MDSS: Thank you. That's it.

20 THE COURT: All right. Let's get the jury  
21 back in.

22 (The jurors entered the courtroom.)

23 THE COURT: All right. Have a seat, folks,  
24 please.

25 DIRECT EXAMINATION (Continued)

1 BY MR. ROSENBLATT:

2 Q. Dr. Mele, did Philip Morris, during the  
3 period of time that you were there, have the scientific  
4 technology to remove all the nicotine from a cigarette  
5 if that's what they chose to do?

6 A. Correct, yes, they did.

7 Q. And did they, in fact, make cigarettes, some  
8 cigarettes -- I'm not talking about commercial  
9 necessarily, without --

10 A. They would make experimental cigarettes, as  
11 requested by Mr. Frank Ryan and Bill Dunn in the  
12 behavioral research unit. They could take out  
13 nicotine, they could add in nicotine, they could  
14 manipulate the levels of nicotine. These were all  
15 experimental cigarettes that were used in smoking  
16 studies with humans at the company.

17 Q. During the period of time that you were  
18 employed at Philip Morris, did Philip Morris, through  
19 its scientists, organic chemists, discover analogs,  
20 substitutes for nicotine, to meet the criteria of  
21 retaining the effects of nicotine on the brain and at  
22 the same time eliminating any possible adverse effects  
23 on the heart?

24 MR. HEIM Well, objection, Your Honor. He  
25 has no expertise to -- I would like to talk about this.

1 THE COURT: All right.

2 (The following proceedings were had at  
3 sidebar:)

4 MR. HEIM This witness has testified that he  
5 wasn't at all involved in the testing for  
6 cardiovascular effects. His role in the analog program  
7 was testing for reinforcement.

8 There were separate people who were qualified  
9 to and did test for the cardiovascular side of it, but  
10 it was -- he -- and I believe he testified in his  
11 deposition that he has no scientific knowledge or  
12 qualifications to make that judgment.

13 THE COURT: Okay. Your question incorporates  
14 the brain, which he already testified about.

15 MR. MOSS: He testified about.

16 THE COURT: And the heart. And I don't know  
17 what his expertise is as it relates to the heart, which  
18 is what counsel's complaint is.

19 MR. ROSENBLATT: I think he would know --

20 THE COURT: I don't know if he would or  
21 wouldn't -- you would have to establish a foundation  
22 that it would be within his area.

23 MR. MOSS: See, the problem we have is you're  
24 getting into opinion area.

25 THE COURT: I'm not so sure that's opinion

1 area.

2 MR. ROSENBLATT: I will ask him a different  
3 way.

4 THE COURT: If his test results and his  
5 testing was to determine the effects of a chemical on  
6 the brain and the heart, that's a different story. But  
7 if he doesn't do the heart studies and he's relying on  
8 somebody else's work, that's a different matter.

9 MR. HEIM And he didn't do heart studies.

10 THE COURT: Okay. You can confine it to the  
11 brain if you want.

12 MR. MDSS: He's already testified to that.  
13 He testified to the two and four methylnicotine.  
14 Remember that? He's already testified to the brain.

15 THE COURT: At the same time eliminating any  
16 possible adverse effects. He may know that. I don't  
17 know what he knows. It may be one of the elements of  
18 his study. I don't know.

19 (The sidebar conference was concluded, and  
20 the following proceedings were held in open court:)

21 BY MR. ROSENBLATT:

22 Q. You had told us earlier in your testimony  
23 about the goal of the analog that Philip Morris was  
24 hoping to achieve when you were first hired.

25 At the time the laboratory was closed in

1 April of '84, from a purely scientific standpoint, to  
2 your knowledge, was that goal achieved?

3 A. Yes. An analog had been identified that met  
4 the criteria.

5 Q. That met Philip Morris's criteria?

6 A. Yes; in fact, two.

7 Q. Which you've discussed already?

8 A. Yes, the 2-prime methyl nicotine was the best  
9 one and the 4-prime methyl nicotine was number two.

10 Q. To your knowledge, were either of those two  
11 compounds ever used in a commercial cigarette at Philip  
12 Morris while you were there?

13 A. I have no idea.

14 Q. Have you ever testified in a courtroom before  
15 today?

16 A. No.

17 Q. What are you charging for your testimony in  
18 this case?

19 A. Expenses, whatever it costs me to get here  
20 and get home.

21 Q. Not charging anything for your time?

22 A. Nothing.

23 MR. ROSENBLATT: Your Honor, as I had  
24 indicated, at this point we seek to introduce certain  
25 documents through Dr. Mele, and I'm going to ask

1 Mr. Douglas to do that. He's more familiar with them  
2 than I am

3 DIRECT EXAMINATION (Continued)

4 BY MR. DOUGLAS:

5 Q. Good afternoon, Dr. Mele. How are you,  
6 hanging in there?

7 A. Fine. I'm doing fine.

8 MR. DOUGLAS: Mr. Heim, I'm going to be  
9 looking at Exhibit 5452 to begin with.

10 Q. I'm going to ask you, Doctor, to take a look  
11 at this memorandum dated August 2, 1982, from Dr. De  
12 Noble to Dr. Charles on Philip Morris USA letterhead,  
13 and the subject matter is the promotion of Dr. Paul C.  
14 Mele to research scientist.

15 Do you see that?

16 A. Correct. Yes, I see it.

17 MR. HEIM Your Honor, I'm going to have an  
18 objection to this document. But perhaps, to save time,  
19 we could take a few minutes and talk about how we're  
20 going to do these documents. Because none of these  
21 have been preadmitted like the other ones we've dealt  
22 with on the case.

23 THE COURT: Let's talk about it sidebar and  
24 see what we're talking about, and bring the documents  
25 with you, the ones you intend to introduce.

1           (The following proceedings were had at  
2 sidebar:)

3           MR. DOUGLAS: This memo, Your Honor -- well,  
4 two things.

5           THE COURT: First let's find out what his  
6 objection is.

7           All of these?

8           MR. DOUGLAS: Some of them are thick, but  
9 yes, that's correct.

10          THE COURT: What is your objection to this  
11 particular document?

12          MR. HEIM Well, I gather it's used to show  
13 he got promoted. I'm reading the caption as I go  
14 along.

15           If that's the case, unless we attack his  
16 credibility, it's unnecessary bolstering. I mean, he  
17 got promoted. He already testified he got promoted.

18           Now, maybe there's some other reason I don't  
19 know about for offering the document.

20          THE COURT: What is the reason at this point?

21          MR. DOUGLAS: Well, Your Honor, the document  
22 not only pertains to Dr. Mele's promotion; actually  
23 gets into the substance of the research, deals with a  
24 couple factors we wanted to identify that he hasn't  
25 specifically spoken to yet.

1           As you can see, for example, on the first  
2 full paragraph on Page 2, Dr. Mele's research is  
3 described dealing with behavioral pharmacological  
4 factors and the development of tolerance. He's  
5 testified generally about tolerance. We wanted to  
6 enable him to get into a little more detail.

7           THE COURT: Why don't you ask him about that?  
8 You don't need that. All this does is bolster  
9 credibility. I'll sustain the objection, if it relates  
10 to that. But if it just shows how smart he is and what  
11 he's doing, he already testified about that. But if  
12 there's an area here that he hasn't testified yet  
13 about, you're still on direct. There is no reason why  
14 you can't flat-out ask him What is your work on so  
15 and so?

16           MR. DOUGLAS: I will be happy to use this as  
17 a reference for myself, without entering the document.

18           THE COURT: Okay. Now what are we going to  
19 do with the rest of these things? How are they going  
20 to work out? How many have you got? Looks to me like  
21 you've got dozens and dozens. Have you reviewed all of  
22 these?

23           MR. HEIM No, Your Honor. I don't know  
24 which ones -- I have a stack of documents, but I don't  
25 know which ones they are offering.

1 THE COURT: Wait a minute.

2 MR. DOUGLAS: All of the documents have been  
3 disclosed previously to defendants, and I can  
4 specifically identify the dates on which they were, for  
5 each document.

6 THE COURT: So they've been disclosed.

7 MR. MOSS: But not with reference to which  
8 witness. It makes a big difference.

9 MR. DOUGLAS: They actually were disclosed  
10 with regard to Dr. Mele, in connection with his  
11 deposition last week.

12 THE COURT: Why do we have to make this so  
13 darned difficult? You know --

14 MR. DOUGLAS: We can run through them  
15 actually rather quickly.

16 THE COURT: Sure we can. Look, the stack is  
17 only four inches thick. You know what's in them  
18 Somebody is going to have to read them and make  
19 reference to some of these things and find out whether  
20 or not there is any objection, and if there is an  
21 objection, why and what the objection is. And we've  
22 got to go through this whole mess here.

23 I don't know how many of these are going to  
24 be documents which could be objected to or not objected  
25 to, or accepted or -- I think we're -- looks to me like

1 the best thing to do here, unfortunately, is to recess  
2 this witness's testimony at this point, let you have a  
3 chance to go through the documents --

4 MR. MDSS: Right.

5 THE COURT: -- determine which of the  
6 documents you would agree to as coming in without  
7 objection, and if there is a substantive objection to  
8 any of these things, maybe we can --

9 MR. MDSS: We can take it up --

10 MR. HEIM We could do that on Friday, I  
11 guess.

12 THE COURT: It's a real time frame thing.

13 MR. HEIM Because it may be, if I look  
14 through these, I may say a bunch of them I have no  
15 objection to.

16 MR. ROSENBLATT: Sure.

17 MR. HEIM Don't be surprised.

18 THE COURT: Christmas is coming. It's  
19 Hanukkah, and you never know about that.

20 MR. ROSENBLATT: If it was Mr. MDSS, I'd say  
21 no, but Mr. Heim --

22 THE COURT: He might surprise you. He might  
23 give you seven gifts.

24 MR. MDSS: Don't count on it.

25 THE COURT: Yeah, being as late as it is, and

1 the fact that he's going to have to come back anyway,  
2 we ought to go through these before he does.

3 MR. ROSENBLATT: That will save time in the  
4 long run.

5 THE COURT: Save a lot of time and a lot of  
6 argument. So we'll take them on Friday if we have to.  
7 He's going to come back Tuesday?

8 MR. ROSENBLATT: Can I ask him?

9 MR. HEIM If he can come back Tuesday?

10 MR. ROSENBLATT: I'm sure he can. Thursday  
11 is impossible. Let me just --

12 THE COURT: Yes.

13 (The sidebar conference was concluded, and  
14 the following proceedings were held in open court:)

15 THE COURT: Counsel has permission to talk to  
16 the witness for just one second about scheduling  
17 problems. So don't get concerned.

18 (The following proceedings were had at  
19 sidebar:)

20 MR. ROSENBLATT: Thursday is out.

21 MR. HEIM Tuesday?

22 THE COURT: Tuesday is okay. All right.

23 We'll do that. That way it will be easier for us and  
24 for everybody.

25 MR. ROSENBLATT: Now, you haven't told them

1 yet --

2 THE COURT: Not yet. But I will.

3 (The sidebar conference was concluded, and  
4 the following proceedings were held in open court:)

5 THE COURT: Okay. Folks, I realize that,  
6 from your vantage points, things look very confused,  
7 disjointed, unconnected, and time wasting and all sorts  
8 of things.

9 It's just something that we have to go  
10 through in the presentation of a case. I've tried to  
11 explain that to you before. We're now at a stage now,  
12 it's twenty minutes to five, and counsel is going to  
13 get into an area regarding some documents. There was a  
14 stack of documents that he had, about four inches  
15 thick. That's a lot of documents. Each one has got to  
16 be gone through and discussed and so forth and so on,  
17 which will take a lot of time.

18 So what we decided to do, and with the  
19 cooperation of the witness, and I think it's very  
20 important, is recess the session today, and have the  
21 witness come back at another time, and in accord with  
22 his schedule, I have to tell you where we're going with  
23 that. And while he's out, the lawyers and I will work  
24 on the documents, and we will get a lot of that work  
25 out of the way so we won't have to take up your time as

1 you sit around wondering what we're doing as we go  
2 through all the documents and so forth. So that takes  
3 care of that problem

4 Now, as you know, unfortunately, Governor  
5 Chiles passed away, and because of that, the courts, in  
6 deference to his death, are being closed tomorrow. So  
7 we will not have court tomorrow, and we'll have an off  
8 day then. That's Wednesday.

9 We'll come back Thursday, and we will be in  
10 session Thursday. And Friday, we will have a workday.  
11 And I understand you, one of the jurors, is going to  
12 have a knee operation of some sort. So you can't be  
13 here, so we will excuse the jury for that. But you're  
14 coming back Monday, right?

15 JUROR: Yes, sir.

16 THE COURT: For sure?

17 JUROR: Hopefully. It's just a knee.

18 THE COURT: We will reconvene Monday. This  
19 witness will come back on Tuesday. We'll be picking up  
20 that testimony on Tuesday, but doing something else on  
21 Monday?

22 MR. HEIM Right, we are.

23 THE COURT: We're going to be doing something  
24 else on Monday, correct?

25 MR. ROSENBLATT: Yes, something.

1 THE COURT: Just want to straighten it out.  
2 That's the kind of schedule we have to  
3 follow. I know it sounds disjointed and disconnected  
4 and all of that. But believe me, that's just the way  
5 it is, folks. Sometimes you've just got to live with  
6 what you get.

7 So we appreciate your cooperation. I hope  
8 you have a pleasant day tomorrow under the  
9 circumstances, and we'll see you folks tomorrow on  
10 Thursday, usual time, 9:15.

11 JUROR: Are we coming back on the 4th or the  
12 11th?

13 THE COURT: Oh, yeah, I'm glad you told me.

14 JUROR: Thank you. We're coming back on the  
15 11th.

16 THE COURT: We originally told you you would  
17 be off in that week between the 4th and the 11th and,  
18 yeah, you can still maintain that position. We --  
19 there is -- the situation changed somewhat, but then,  
20 after due consideration of it all, it was decided that  
21 there are plans that had been made and we couldn't  
22 unmake, so we'll be off the week of the 4th through the  
23 11th. Right.

24 Let me get my calendar so you know what  
25 you're doing. We are going to be working, today being

1 the 15th, we'll be working on -- that's '99.

2 Okay. This is Tuesday the 15th. We'll be  
3 working the 17th for you folks. Come back and work the  
4 21, 22nd and 23rd. The 24th --

5 MR. HEIM Half day on the 23rd, right,  
6 Judge? Half day on the 23rd?

7 THE COURT: Depending on how the evidence is  
8 going, how the testimony is going.

9 JUROR: How many sidebars.

10 THE COURT: You're looking to get off. We're  
11 doing the best we can. Keeping in mind schedules and  
12 how things are, we'll do the best we can. But we'll be  
13 working the 21st, 22nd, and minimum half the 23rd.  
14 Then you're off until the 4th of January --

15 MR. ROSENBLATT: 11th.

16 THE COURT: Wait a minute. You're right.  
17 January 11th. Okay? That looks like the schedule  
18 we'll follow. Yes, sir.

19 JUROR: Let Kim know we don't have to come  
20 here on Friday.

21 THE COURT: She doesn't know that?

22 JUROR: She heard you, but she doesn't  
23 believe it.

24 THE COURT: You don't have to be here, but  
25 she will. Friday will be an off day. We were thinking

1 of calling you back to work on Friday, and I would have  
2 called you back to work on Friday so we could get our  
3 work done. But unfortunately, one of your number is  
4 going to have a minor operation, and I don't want to  
5 interfere with that.

6 They might send you a cake. Whatever.

7 Folks, I do appreciate your tolerance, your  
8 patience and your understanding, most of all. It gets  
9 very difficult. You know that.

10 THE BAILIFF: Judge, he doesn't want to work  
11 next week.

12 THE COURT: I've got to make a tough  
13 decision. You gotta.

14 Okay. Folks, those are the rules. That's  
15 the schedule we'll follow, and we'll see you on  
16 Thursday morning.

17 (The jurors exited the courtroom)

18 THE COURT: All right. During the recess  
19 between now and Tuesday, you must not -- and I  
20 emphasize not -- discuss your testimony or anything  
21 about this case with anybody, which includes the  
22 lawyers for either side, or any other person. Okay?  
23 It's important. Because you're still on the witness  
24 stand and under oath. It makes a difference.

25 THE WITNESS: Okay.

1 THE COURT: We do appreciate your cooperation  
2 and willingness to work with us. I know it's  
3 difficult. It's also difficult from this standpoint.

4 THE WITNESS: I understand.

5 THE COURT: Okay. You can be excused, sir.  
6 Thank you.

7 Okay. Everybody may remain seated.

8 (The witness exited the courtroom.)

9 THE COURT: Okay. We had other things that  
10 we were planning on doing on Friday, but this being a  
11 witness who is also on the stand, I guess we'll have to  
12 take a portion of Friday to work out this documentary  
13 stuff, in addition to the other things we were going to  
14 do.

15 We have this other problem with Dr. --

16 MR. HEIM Mr. Solberg.

17 THE COURT: -- Solberg is it? And we ought  
18 to discuss it also. Where are we going with that now?

19 MR. HEIM Where we left off, if Your Honor  
20 will remember this morning, I had moved to exclude  
21 Mr. Solberg on the grounds that he was, at the very  
22 least, cumulative of other witnesses.

23 And just to bring it back for a minute, Your  
24 Honor has made reference from time to time of Judge  
25 Postman's order that said you can have two witnesses

1 per subject area. And while we haven't always held to  
2 that strictly, my point this morning was that this  
3 gentleman really works for Dr. Blum or is associated  
4 with Dr. Blum and Doctors Ought to Care; that he is  
5 duplicative and repetitious of Dr. Blum in many ways  
6 with regard to sports promotion and using sports  
7 promotions to target youth.

8 Dr. Blum's already said that. He's testified  
9 about it at great length with the Marlboro Cup and all  
10 those other things I mentioned this morning. I'm not  
11 going to repeat my argument.

12 In addition, we've already had Dr. Cummings  
13 in this area. We've had Dr. Siegel. We've had  
14 Dr. Arnett all day today. We had Dr. Blum. And this  
15 would be either the fourth or fifth one of these  
16 witnesses, depending on how you count them, who is  
17 going to come in to testify again to the jury about  
18 advertising and promotion, which, for the many reasons  
19 I talked about this morning, I believe is irrelevant  
20 and preempted in any event.

21 But at the very least, it is cumulative.

22 Now, plaintiffs' counsel made reference this  
23 morning to saying that he wanted to use Mr. Solberg to  
24 testify about Philip Morris's advertising for its  
25 television commercials that say -- that feature

1 children that say children shouldn't smoke, youth  
2 shouldn't smoke.

3           And my response to that is this: It may be  
4 that that evidence would be relevant on rebuttal if the  
5 defense decides that it wants to introduce that  
6 evidence in its case for a purpose that the court would  
7 permit. And if I intend to -- if I decide that I want  
8 to do that, and Your Honor says yes, that's a fair  
9 purpose for it, then maybe it might be appropriate for  
10 Mr. Solberg, if he has something to say about it, to  
11 offer testimony in rebuttal about it.

12           But I don't know and I don't see how  
13 testimony by Mr. Solberg now about Philip Morris's  
14 campaign, one in which the jury expresses that it has  
15 not seen, and while counsel has said lots of people  
16 have seen it, I've -- I haven't seen it, and of course  
17 I don't watch much television, so I guess that's not a  
18 fair reference.

19           But I don't think just saying, well, the jury  
20 may have seen it, that makes it relevant, so that's why  
21 we should have Mr. Solberg testify about it makes a lot  
22 of sense to me.

23           As I said, if I decide it's relevant to some  
24 issue and seek to admit it and Your Honor permits, then  
25 it might be relevant. But I don't see that it would be

1 relevant until then.

2           And other than that, it's just cumulative  
3 testimony. It's just piling on of the same stuff. And  
4 as I said this morning, you read those last three  
5 sentences. You can see that it's flat-out preempted  
6 anyway.

7           So that's my objection to it. I don't think  
8 it's fair to pile on evidence generally, but especially  
9 this kind of evidence, when there's a real doubt, and I  
10 think Your Honor has expressed some doubt from time to  
11 time whether this testimony should be coming in at all.

12           THE COURT: Well --

13           MR. ROSENBLATT: Judge, I made the argument,  
14 you know, this morning. You know, very clearly told  
15 you as to why Eric Solberg is just a completely  
16 different area. His whole focus, I told you he worked  
17 on his thesis for seven years. It relates to sports  
18 promotions, not advertising per se. It's sports  
19 promotion. That's his area, that's his specialty. And  
20 to --

21           THE COURT: Well, to what end? That's what I  
22 want to know. We've already heard about promotion at  
23 sporting events from a witness, maybe more than once.  
24 So to what end are you going to present this testimony?

25           That they do this kind of thing, that they

1 sponsor sporting events, that they have their  
2 billboards and advertising plastered all over a  
3 television screen during a sporting event. Now the  
4 next question is: So what? Where do we go from there?

5 MR. ROSENBLATT: They attract kids. That's  
6 the whole purpose.

7 THE COURT: That's, again, youth targeting.  
8 We've had a lot of that.

9 MR. ROSENBLATT: This is a different  
10 perspective, Judge. This is from a different  
11 perspective.

12 This is a man who has attended 200 -- over  
13 200 -- he's got videos, he's watched them, he's seen  
14 them. There's no one in the country that's been to  
15 more sporting events -- no one has an explanation of  
16 what they do. Alan Blum car races. That's not going  
17 to be his testimony, how many times you see him on a  
18 television screen.

19 He's going to talk as a hands-on man who goes  
20 there and sees the interaction between the Philip  
21 Morris people and how they promote, how they induce  
22 kids, how they entice kids at sporting events.

23 MR. MOSS: This is pure and simple targeting  
24 testimony, Your Honor.

25 THE COURT: Sounds like it.

1                   MR. HEIM   It is targeting.  And virtually  
2 all of Mr. Solberg's articles were cowritten with  
3 Dr. Blum  At least --

4                   THE COURT:  You know the one thing I looked  
5 at in this --

6                   MR. HEIM   Disclosure.

7                   THE COURT:  -- designation which interested  
8 me, he's expected to provide specific example of  
9 tobacco industry efforts in the area of marketing to  
10 children, including but not limited to videotape  
11 example of such marketing activities.

12                   Now, that's one thing.  But prior to that you  
13 say:  In addition to the above, Mr. Solberg is also  
14 expected to testify concerning his knowledge of tobacco  
15 industry internal documents.  And then you put a colon  
16 in there.  And he is expected to provide specific  
17 examples of tobacco industry efforts in the area of  
18 marketing to children.

19                   That led me to believe that you are going to  
20 be talking about internal documents, company documents,  
21 relating to that subject.  What you're telling me now  
22 is he's talking about field work that he saw out in the  
23 field.

24                   MR. ROSENBLATT:  Both.  Both.  But his --

25                   MR. HEIM   On qualifications, Judge, this

1 witness wouldn't even get close to satisfying the Frye  
2 test for an expert testifying on advertising or  
3 marketing.

4 He has absolutely no background in it, and  
5 the only reason Dr. Blum got to testify about it, as I  
6 remember the argument about Dr. Blum, was he collected  
7 all this advertising all these years and put them in  
8 the archive and, therefore, knew all this advertising.  
9 And this man didn't do any of that either. He has no  
10 expertise in this. He doesn't meet the Frye test.

11 And we've heard so much about sports  
12 marketing, you know, Marlboro Cup, Winston Cup, images  
13 on television.

14 THE COURT: I do think we're beating a dead  
15 horse when it comes to that.

16 You know, if he's got a document that says:  
17 Why don't we do this, we'll generate a great deal of  
18 public interest if we only sponsor sporting events, and  
19 I think it would be a good idea, so forth and so on, if  
20 he has a document that he can show that, that might be  
21 something worth testifying about.

22 MR. ROSENBLATT: You know, he's been in town.  
23 He's in town now. My intention is for him -- well,  
24 would have been tomorrow. But to testify on Thursday,  
25 and let me -- I'm going to spend a lot of time with him

1 tomorrow. I think he has these documents, and I  
2 haven't had the time to really sit down and have a  
3 detailed conference with him

4 THE COURT: The way I see it, to be perfectly  
5 honest with you, I think we've beat this horse a lot.  
6 I don't know whether the horse is dead yet, but pretty  
7 close to it.

8 I do get the impression, and I'm not very  
9 happy about it, that we're spending too much time on  
10 it. And we're making it a focal point of the trial and  
11 putting too much emphasis on this point. There's so  
12 much to this trial other than that. And if what we're  
13 doing is putting all of that emphasis here, and it  
14 turns out we shouldn't have done it in the first place,  
15 as counsel for the defense says we have, we run into a  
16 lot, a lot of problems down the road, and up the hill.  
17 That's what I'm talking about.

18 So you know, enough is enough maybe. From  
19 what I can see here, his testimony is really  
20 duplicative of Dr. Blum's testimony; maybe more  
21 expansive, but nonetheless duplicative. What does he  
22 know that Dr. Blum doesn't know and hasn't already  
23 testified to?

24 MR. ROSENBLATT: A lot.

25 THE COURT: What could he say?

1           MR. ROSENBLATT: Dr. Blum runs a medical  
2 practice, Judge.

3           THE COURT: Yeah, but what can he say about  
4 the marketing aspect of being involved in sporting  
5 activities?

6           MR. ROSENBLATT: What he has eyeballed, what  
7 he's seen on the scene.

8           THE COURT: Every sporting activity he's ever  
9 attended? He will tell you he went to this game and  
10 that game and that game and there were a bunch of kids  
11 there with baseball caps on.

12           MR. MDSS: And they all liked it. So what?  
13 What's the point?

14           THE COURT: That's the "so what" of that  
15 testimony. If they want to stipulate that they sponsor  
16 sporting events, which they do --

17           MR. ROSENBLATT: No. They won't stipulate  
18 that they lie about the purpose of what -- why they  
19 sponsor sporting events.

20           MR. HEIM If --

21           THE COURT: That's something that I'm not so  
22 sure he can testify about. That's something for the  
23 jury to determine based upon what they've seen.

24           MR. ROSENBLATT: Hopefully, based upon the  
25 testimony of someone who has been -- the jury will not

1 hear from anyone on their side, from Philip Morris,  
2 whoever runs their sporting division, if they call  
3 them, who has been at as many events as Eric Solberg  
4 has.

5 THE COURT: I don't really necessarily think  
6 that just because you're putting out 50, 100, 200  
7 events at which children took part, because sporting  
8 events attract children, face it, that the jury is  
9 going to have any different idea and concept of what  
10 it's all about than if you say there were five events,  
11 baseball games, World Series baseball games, which will  
12 definitely attract children. You don't have to go  
13 through 100, 200 games.

14 MR. ROSENBLATT: It's not a question of  
15 games. It's rodeos, all kinds of hands-on.

16 MR. HEIM Testified about rodeos.

17 THE COURT: I have a real problem with it,  
18 Counsel. Maybe we are losing our focus here.

19 MR. HEIM In terms of documents, Judge, the  
20 same documents were produced by plaintiffs and said  
21 they applied to both Dr. Blum and Dr. Solberg, the very  
22 same ones.

23 THE COURT: Here's what the problem is. You  
24 want to use this testimony to show that, by sponsoring  
25 these sporting events, they're really targeting the

1 children. Get the children interested, get them to  
2 like the tobacco company or whatever it is they're  
3 selling, and we can attract future customers, starting  
4 from whatever age on up; and that you tie that in with  
5 something to the effect that the tobacco companies deny  
6 that's the ulterior motive.

7 Now, I don't know how you can tie the two  
8 together and make an assumption that just because they  
9 sponsor a sporting event, that not sponsoring it for  
10 any other purpose than merely to attract children, or  
11 at least that's the main, unless you find some document  
12 within the internal documents of the company that says  
13 that --

14 MR. ROSENBLATT: Well, obviously all my time  
15 has been with Arnett and Mele and, you know, Solberg  
16 is --

17 THE COURT: In my opinion, basically this is  
18 the guy you should have put on first, and you wouldn't  
19 have needed Blum or the other person, if he's that  
20 strong. But you've already run through two or three  
21 witnesses. I'm inclined to agree with the defense on  
22 this issue. But I'll give you until Thursday morning.  
23 Okay?

24 But you've got to see where you're going with  
25 this.

1           MR. ROSENBLATT: I will be able to tell you  
2 very definitively, when you ask me Thursday morning,  
3 I'll tell you exactly what I intend.

4           THE COURT: Okay.

5           MR. ROSENBLATT: What about the whole  
6 issue -- Mr. Heim gets up here in a very cavalier  
7 fashion: If I decide, you know, to put on evidence of  
8 100 million -- I've announced to the Court I want to  
9 get that in.

10          THE COURT: Let's put it this way: They've  
11 got the campaign going now. That's what you're talking  
12 about, the current campaign?

13          MR. ROSENBLATT: Yes.

14          THE COURT: I'm not going to let testimony in  
15 about that.

16          MR. ROSENBLATT: That's very prejudicial to  
17 the plaintiffs.

18          THE COURT: You may think so.

19          MR. ROSENBLATT: Why?

20          MR. HEIM I mean, this may be one where --

21          MR. ROSENBLATT: First I asked Your Honor to  
22 see --

23          THE COURT: I don't see the connection. I  
24 think this is something in your mind. I don't see the  
25 connection between it and what's going on, what has

1 gone on since the inception of the lawsuit. And unless  
2 you can tie it in -- you say you took somebody's  
3 testimony. Unless you can tie that in, that would be a  
4 different story.

5 MR. ROSENBLATT: It's obvious this is geared  
6 for this trial.

7 THE COURT: It's not obvious.

8 MR. ROSENBLATT: You don't know that yet.

9 THE COURT: I don't think it is.

10 MR. ROSENBLATT: Look at the date. She said:  
11 I came up with this idea after my deposition was taken  
12 in this case.

13 THE COURT: I don't know what she said.

14 MR. HEIM What was interesting about that  
15 transcript is six hours Mr. Rosenblatt's counsel,  
16 associate, took the deposition, and never asked one  
17 time the question that was supposedly the purpose of  
18 the deposition, which was: Did this have anything to  
19 do with the Engle trial?

20 Never asked the question. You can't find it  
21 in there. He was even asked by the counsel defending  
22 saying: Aren't you ever going to ask her does it have  
23 anything to do with the Engle trial or any other trial?

24 THE COURT: Let me ask you another thing.  
25 Did we ever consider the issue of remedial measures as

1 it may relate to testimony? If what you're talking  
2 about is remedial. Okay?

3 And that's got a prohibition, too. So I  
4 really don't see how you're going to work that in. I  
5 really don't.

6 So we'll talk about it on Monday -- I mean on  
7 Thursday. We'll see where we're going.

8 MR. ROSENBLATT: From our standpoint, Judge,  
9 it's incredibly ironic that they're complaining about  
10 our evidence on youth marketing, and they're now  
11 involved in a \$100 million national campaign directed  
12 toward youth with professional actors. Every one of  
13 those kids that you saw in the 30-second -- not one of  
14 them is a normal, natural kid. They're all actors.  
15 They are all professional actors.

16 THE COURT: I don't want to get into an  
17 esoteric argument with you as to what's going on. But  
18 that's a far cry from trying to get them addicted to a  
19 tobacco product. Okay? I mean, it's just a flip side  
20 of it.

21 And you think, just by doing that, they're  
22 going to endear themselves to the kids anyway. I  
23 really don't know where you're going with it.

24 Now this situation that's going on now may  
25 very well be tied in with the two settlements. I'm not

1 sure if it is to that degree. I don't know. But I  
2 know it came out right after the settlements were  
3 announced. How long it's been in the planning and if  
4 they understood that was going to be part of the  
5 settlement or whatever may be, I don't know.

6 MR. ROSENBLATT: In the history of the world,  
7 when you talk about the rules and applying, in the  
8 history of the world, in the history of not only  
9 American litigation, but world litigation, there has  
10 never been a situation, never -- I mean, think about  
11 it. In this case you really -- every now and then,  
12 really have to step back and see what's going on. And  
13 what's going on here is so incredible, it's beyond  
14 incredible.

15 You have the vigorous defense of a case by  
16 companies who have voluntarily paid out billions upon  
17 billions of dollars, and the premise here is -- the  
18 jury doesn't know anything about this. The jury  
19 doesn't know anything about this, they don't know  
20 anything about the \$100 million campaign.

21 We are -- you are dealing -- you know, you  
22 can go to meetings and all these judges can walk around  
23 and give you their two cents or two dollars, and they  
24 mean well, but you've got to be here to believe this.

25 This is an unbelievable situation when you

1 think about it. They have settled with 50 states for  
2 sums of money that have never been contemplated in any  
3 litigation anywhere in the world.

4 MR. MDSS: This is an incredibly improper  
5 argument.

6 THE COURT: Wait a minute. I don't know  
7 where he's going with the statements.

8 MR. ROSENBLATT: Where I'm going with it is  
9 there are just some absolutely unique -- you've got to  
10 look at the big picture. That's what I'm saying.  
11 You've got to look at the totality of the circumstances  
12 and the level of hypocrisy, the level of hypocrisy that  
13 we are dealing with, to pretend that the payment of  
14 these billions of dollars is not an admission of guilt,  
15 not an admission of the allegations in our lawsuit.  
16 That's what it is.

17 By anyone who's not involved in the legal  
18 system

19 THE COURT: That's the problem

20 MR. ROSENBLATT: By anyone normal who is not  
21 involved in the legal system. Of course, they're  
22 admitting --

23 MR. KIRBY: Which is why there's a rule of  
24 evidence why it's not admissible.

25 MR. HEIM Let me just respond to that very

1 briefly, Judge, because a couple --

2 MR. ROSENBLATT: Talk about fairness we're  
3 going to hear about fairness?

4 MR. HEIM No, we're going to talk about  
5 reality and talk about being straight about things, and  
6 not just being one-sided and unbalanced, and I mean  
7 unbalanced in the sense of only looking at one side of  
8 the issue and not possibly contemplating that there's  
9 something good going on and something right going on,  
10 and refusing to admit that that might be a possibility.

11 Because that's actually the TV commercials.  
12 The TV commercials are directed at saying peer pressure  
13 is why kids smoke. That's what we believe. And these  
14 kids are telling other kids: You don't have to be cool  
15 to smoke.

16 It's a good thing to do. It tries to do what  
17 the critics of the tobacco company have said for 20  
18 years they should be doing, they should be doing more  
19 of.

20 So finally when you come out and do it, it's  
21 always the same story. There's some way to criticize  
22 it, some way to be hyper-critical; it can't be good  
23 motives, it has to be something wrong with it.

24 And to start going after something like that  
25 is just remarkable to me. You just have to be very

1 cynical, very cynical to do that.

2           And to do it in the light of what's going on  
3 in this courtroom. Talk about what's going on in the  
4 courtroom. I mean, if the settlements are -- if the  
5 jury knows about the settlements, who is that hurting?  
6 That's hurting the defendants. Because the jury, if  
7 they learn about the settlements, they may well -- some  
8 will and some won't -- some may well say settlements  
9 are made for lots of reasons; we're sophisticated  
10 enough to know that. Maybe they think that's the only  
11 way they can survive.

12           Others say it's an admission of guilt. We're  
13 the ones who get hurt if they know that. I'm taking my  
14 chances with the jury when they say they haven't  
15 watched or listened. I believe them, and I'm willing  
16 to take my chances with it.

17           But what I'm not willing to take my chance  
18 with is presenting evidence to this jury that asks them  
19 to give a damage award and punitive damages for  
20 targeting youth when it's irrelevant and preempted, and  
21 that's what's going on here.

22           It's: Jury, there's something wrong with  
23 advertising in a way that gets kids to smoke. There's  
24 something wrong with advertising that appeals to  
25 African-Americans or Hispanics. You should be angry

1 about that, and you should award damages because these  
2 people are going to get addicted -- which is what  
3 counsel said -- and they're going to get sick. So you  
4 should be mad about that, and you should award damages.  
5 When everybody knows it's preempted and it shouldn't be  
6 done. That's something to be angry about.

7 MR. ROSENBLATT: Let me just mention just one  
8 thing. Mr. Heim made a statement about if the jury  
9 were to find out that the tobacco companies had  
10 voluntarily paid billions of dollars that they would  
11 get hurt. That's not true.

12 History will show that the people who are  
13 despised in these settlements are plaintiffs' lawyers,  
14 because the American public understands what a bonanza  
15 this has been. The tobacco company just passed it on  
16 to the poor addicted smoker. Wall Street understands  
17 this is brilliant. 200 billion. Sounds like a lot of  
18 money. It's not going to hurt them at all. They're  
19 doing very well in the stocks.

20 But I would say the people who are despised  
21 are these lawyers. Most of them who didn't do a lick  
22 of work, who never stepped into a courtroom and who are  
23 walking away with billions. Those are the people who  
24 are despised, and it's going to hurt our side of the  
25 case. And that's what they hope.

1 THE COURT: Okay.

2 MR. ROSENBLATT: And that's the strategy.

3 THE COURT: Now, with all that said and  
4 done --

5 MR. MDSS: Yes.

6 THE COURT: -- the problem that still faces  
7 the court is the legal reasons for doing anything. And  
8 that's what I'm faced with, is it legally permissible  
9 to do what you want to be done and, if so, what is the  
10 legal ground? And vice versa. Okay?

11 You know, I just can't see it at this stage.  
12 What you have as far as legal precedent for that  
13 purpose, I would like to see something.

14 MR. ROSENBLATT: There's no factual  
15 precedent, Judge. But I'm going to look. The truth of  
16 the matter is there is no factual precedent for a 100  
17 million dollar campaign impacting the issues of a trial  
18 in the middle of a trial.

19 THE COURT: Yes, but there is something to be  
20 said along the lines of what -- remedial measures  
21 issue. You can maybe find it under that concept.  
22 That's basically what you're talking about. They're  
23 taking remedial measures to downgrade what you claim  
24 was some fault that they -- negligence, fraud, whatever  
25 you want to call it.

1           So what are they doing now? Trying to  
2 correct it. Now they're trying to correct it with some  
3 other -- almost like fixing the broken step. So we've  
4 got to get into that concept and that idea. I'm sure  
5 you will be able to find something. Maybe both sides.

6           But I just can't hang my hat on some esoteric  
7 idea that you have that they're doing this purposely  
8 for some particular part of the case, and I'm not  
9 convinced of that. And until I am, I just can't see  
10 the relevance.

11           MR. ROSENBLATT: So they can run the  
12 campaign, and then they have the option of deciding  
13 whether they want --

14           THE COURT: I didn't even get into that now.  
15 That's not a given, either.

16           MR. ROSENBLATT: Sounds crazy.

17           THE COURT: Who says I'm going to let them do  
18 that?

19           MR. ROSENBLATT: No, I understand that. I  
20 understand that.

21           THE COURT: If you're going to try that,  
22 you're going to have to come up with some legal ideas  
23 why.

24           MR. HEIM I understand that.

25           MR. MDSS: We certainly understand. We

1 haven't asked you for anything. We've just raised the  
2 issue, Your Honor.

3 THE COURT: Okay.

4 MR. MDSS: On Thursday --

5 THE COURT: That's why as far as Solberg is  
6 concerned, I'm not going to let him testify about that  
7 stuff, not at this point.

8 MR. MDSS: Judge, on Thursday, just telling  
9 Mr. Rosenblatt at some point we would like to --

10 THE COURT: Assuming Mr. Solberg doesn't  
11 testify on Thursday.

12 MR. HEIM We don't have a back-up plan.

13 MR. MDSS: One of the things we need to talk  
14 about on Thursday, I suggest, is to bring to a  
15 conclusion the argument that Mr. Heim and I made this  
16 morning regarding -- the subject of the memo that we  
17 gave you.

18 THE COURT: You want a mistrial. That's what  
19 it said.

20 MR. MDSS: Judge, I think we need to talk  
21 about it.

22 MR. ROSENBLATT: We're not going to be ready  
23 to address that. I go back for lunch, I hand Susan  
24 this memo that who knows how many people have worked on  
25 for how long, and we're supposed to respond by

1 Thursday?

2 MR. MDSS: Judge, let me -- if he doesn't  
3 want to do it Thursday, we'll do it Friday.

4 MR. ROSENBLATT: I don't want to do it  
5 Friday.

6 MR. MDSS: Do it whenever you want.

7 MR. ROSENBLATT: Great. Thank you. The 12th  
8 of never.

9 MR. MDSS: I'm sure of that. But there will  
10 come a time, Your Honor --

11 THE COURT: Oh, yeah.

12 MR. MDSS: -- that all of us have to face  
13 where we are and what we're doing here in light of what  
14 we think the law is. We would like a chance to discuss  
15 with Your Honor whether plaintiffs want to participate  
16 or not, I don't care. They have a right to, and they  
17 have a right not to. But I think that we have a  
18 serious problem. Not a matter of anything other than  
19 the most serious type of problem. We've got to address  
20 it.

21 All I'm suggesting is that before we continue  
22 down this path, we need to do it.

23 THE COURT: Well, you took time to write a  
24 memo and substantiate it with case law. They have the  
25 same opportunity. I don't know how long it took to get

1 it put together, but it didn't happen overnight. And I  
2 do understand the difference and availability of a  
3 staff of your size and a staff of their size, so we've  
4 got to give them some time to get it done. Yeah, we do  
5 have to address the issue, I agree.

6 MR. MDSS: That's all I'm saying.

7 MR. HEIM Well, that's fair. I want him to  
8 have a full chance for him to respond so we can have a  
9 full discussion.

10 THE COURT: I agree with you. It's a serious  
11 issue that needs to be addressed, and we are addressing  
12 it in some regard, even as we speak.

13 MS. LUTHER: Judge, while we're on the  
14 subject, the memo of law that was filed was not filed  
15 on behalf of Liggett and Brooke. I filed a joinder  
16 today.

17 THE COURT: A one-paragraph joinder?

18 MS. LUTHER: One-paragraph joinder.

19 THE COURT: That's easy to read.

20 MS. LUTHER: It took forever to do it.

21 MR. HEIM Your Honor, in the event the Court  
22 decides that Mr. Solberg should not testify, I do think  
23 that we have already prepared some depositions that  
24 could be read on Thursday.

25 THE COURT: Of --

1           MR. HEIM   That is, we've been through some  
2 depositions.

3           THE COURT:  Of whom?

4           MR. HEIM   I think -- what's his name?

5           MR. MDSS:   Don't turn to me.

6           MR. HEIM   Begins with an "S."  CEO, Spears.

7           THE COURT:  You may have gone through Spears'  
8 deposition.

9           MR. HEIM   Your Honor may not have.

10          THE COURT:  That's that two-volume thing,  
11 isn't it?

12          MR. HEIM   I don't know.

13          MR. ROSENBLATT:  Well that's -- I think we  
14 intended for Dr. Cahan, C-A-H-A-N.

15          THE COURT:  Well, it's your side of the case.  
16 They can't dictate who you're putting on.

17          MR. MDSS:   We're not trying.

18          THE COURT:  You put on whoever you want to  
19 put on.

20          MR. ROSENBLATT:  But in practical terms --

21          THE COURT:  If you don't get Solberg on, you  
22 have to have something else.

23          MR. ROSENBLATT:  My understanding was we got  
24 some stuff over to you today.

25          THE COURT:  Today?

1           MR. ROSENBLATT: Yes. That was my  
2 understanding.

3           MR. MDSS: Could we know what it is?

4           THE COURT: You mean -- depositions you mean?

5           MR. ROSENBLATT: Yes.

6           Dr. Cahan is the only one that comes to mind.

7           THE COURT: All right. I'll look upstairs  
8 and see if I have it, try to review it and get it  
9 prepared in the event we need it.

10          MR. ROSENBLATT: Let me look and see if  
11 there's anything else.

12          No. I guess Cahan is the only one I know  
13 about. Wait -- well, I wanted to play the videotape of  
14 Carolyn Levy, but that's -- although you may watch --  
15 we may ask you to watch that.

16          THE COURT: I may have to watch it. How long  
17 does it take?

18          MR. MDSS: Five and some-odd-hour depo. I  
19 assume it takes five and some-odd hours to watch.

20          THE COURT: Not on fast forward.

21          MR. ROSENBLATT: Or Dr. Mbl, a former  
22 Liggett scientist. We have his videotape -- he is in  
23 ill health. We have the videotape deposition from  
24 Cipollone.

25          THE COURT: These have to be reviewed.

1           MR. MOSS: They have to be reviewed, and  
2 there's a lot we have to say about some of these.

3           MR. HEIM: There's things to do.

4           MR. ROSENBLATT: "Death in the West."

5           THE COURT: Maybe things we can do, but I'm  
6 not sure about the jury.

7           MR. MOSS: Right.

8           THE COURT: We'll have to meet that when we  
9 meet it.

10          MR. HEIM: The Cahan deposition, we'll work  
11 on that too.

12          THE COURT: All right. Meanwhile, maybe you  
13 can set the best brains to work and figure out some of  
14 the issues that I need to resolve.

15          MR. KIRBY: Your Honor, before you go, I am  
16 unclear about whether or not you have been submitted a  
17 Cahan deposition.

18          THE COURT: They said that some deposition  
19 was submitted. I'm going to go upstairs and take a  
20 look. Do you want to come with me?

21          MR. KIRBY: I will be happy to if you want me  
22 to. The reason I'm raising the question is we have  
23 responsibility for that witness.

24          THE COURT: Then come on up.

25          MR. KIRBY: And while we recently received

1 notice of their designations of that deposition, our  
2 objections are not yet due, and, therefore we haven't  
3 completed them and you don't have them I didn't want  
4 you to go and review that deposition and not have our  
5 objections at the same time, thinking there were none,  
6 because they're not yet due, and we have not yet  
7 finished them

8 THE COURT: That's going to be a problem

9 MR. MDSS: That's why I asked what was sent  
10 up there.

11 THE COURT: Is that a long deposition or  
12 short deposition?

13 MR. MDSS: Medium

14 THE COURT: 200 pages?

15 MS. LUTHER: Judge --

16 MR. MDSS: Longer than that. That's not  
17 medium No, I think it's less than that.

18 MR. KIRBY: Your Honor, it's quite long. It  
19 was taken as a deposition for use at trial.  
20 Mr. Rosenblatt's associate, Mr. Hoag, objected to every  
21 question we asked, and we have not completed our  
22 objections. If Your Honor intends to look at this  
23 before Thursday, then we'll make every effort to get it  
24 over here to you by noon tomorrow --

25 THE COURT: I'm not going to be here

1 tomorrow.

2 MR. KIRBY: We'll deliver it wherever you  
3 want it delivered if you're going to review it  
4 tomorrow.

5 THE COURT: That's not going to help.

6 MS. LUTHER: Judge, with regard to Dr. Mld,  
7 there is no way I can get the objections to you. I'm  
8 the only one in my firm working on this case.

9 THE COURT: Where does that leave us?

10 MR. ROSENBLATT: I'm sorry, Judge?

11 THE COURT: Well, they said that they don't  
12 have the objection designations on Dr. Cahan, and if I  
13 don't have the objections, I don't know what to rule  
14 upon, other than --

15 MR. HEIM Judge, why don't we do this? Why  
16 don't we come in at nine on Thursday. We'll have the  
17 objections, we can run through them pretty quickly so  
18 we don't delay the jury too much.

19 THE COURT: We can try that.

20 MR. HEIM Do you want to come in at nine on  
21 Thursday?

22 THE COURT: I have no problem. Come in at  
23 8:30, if you want.

24 MR. HEIM I think nine would be fine, Judge.

25 MR. MDSS: Judge, we will have the Cahan

1 objections to you before the start of business  
2 Thursday.

3 THE COURT: Okay. The start of business is  
4 now back to nine o'clock. So, get them to me, say,  
5 8:30 to quarter of.

6 MR. MDSS: Yes, sir. They'll be here by  
7 8:30.

8 (Court was adjourned at 5:22 p.m.)

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