

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
Monday, 9:35 a.m
December 21, 1998

TRIAL - VOLUME 165

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

APPEARANCES:

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CLIFFORD DOUGLAS, ESQ.

On behalf of Plaintiffs

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On behalf of Defendant Philip Morris

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On behalf of Defendant Philip Morris

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On behalf of Defendant Philip Morris

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On behalf of Defendant R. J. Reynolds

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RICHARD M KIRBY, ESQ.

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On behalf of Defendant R. J. Reynolds

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On behalf of Defendant Brown & Williamson

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On behalf of Defendants Liggett Group

and Brooke Group

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On behalf of Defendant Brown & Williamson

JAMES T. NEWSOM, ESQ.

On behalf of Defendant Lorillard

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On behalf of Defendant The Council for Tobacco Research

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and Tobacco Institute

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I N D E X

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| WTNESS | PAGE |
| PAUL C. MELE, Ph. D. | |
| Voir Dire By Mr. Rosenblatt | 18215 |
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E X H I B I T S

| PLAINTIFFS' EXHIBITS | OFFERED PAGE | ADMITTED PAGE | FOR ID PAGE |
|-------------------------|-----------------|------------------|----------------|
| 498 | | 18231 | |
| 5429 | | 18214 | 18207 |
| 5430 | | 18214 | 18207 |
| 5444 | | 18225 | 18194 |
| 5448 | | 18225 | 18195 |
| 5451 | | 18204 | 18194 |
| 5459 | | | 18194 |

E X H I B I T S

| DEFENDANTS' EXHIBITS | OFFERED PAGE | ADMITTED PAGE | FOR ID PAGE |
|-------------------------|-----------------|------------------|----------------|
| None | | | |

1 (Whereupon, the following proceedings were had:)

2 THE COURT: Good morning, all. Have a seat.

3 This was the weekend. Students of history
4 are going crazy.

5 Anyway, what are we going to do this morning?

6 MR. ROSENBLATT: Dr. Mele, continuation of
7 Dr. Mele.

8 THE COURT: Okay. Is that going to take all
9 day?

10 MR. ROSENBLATT: No. I certainly wouldn't
11 think so.

12 THE COURT: What are we going to do when
13 that's finished?

14 MR. ROSENBLATT: Goldstone and Bible.

15 THE COURT: I did Goldstone and Bible, didn't
16 do Sandefur, because Sandefur is this big one. That's
17 a problem

18 MR. HEIM Judge, I just was handed the list
19 of documents. As I understand it, where we are with
20 Dr. Mele is we're up to documents. I think pretty much
21 finished the direct, and where we stopped, if you
22 remember, was there was a pile of documents, and these
23 are documents which counsel tells me they want to
24 introduce through Dr. Mele. And I've just taken a fast
25 look at them in the last five minutes. There are some

1 to which I have no objection and there are some which I
2 believe are objectionable.

3 We could probably do it in ten minutes,
4 rather than try to --

5 THE COURT: You want to go over it ten
6 minutes with counsel or with the Court?

7 MR. HEIM I've already looked at them. We
8 can either look at them with counsel or just go over it
9 with the Court and decide which ones are properly
10 admissible with Dr. Mele and which ones aren't. There
11 aren't that many. About 10, 12, 15.

12 THE COURT: All right. Separate those that
13 you have objection to and we'll talk about them.

14 MR. HEIM Just give me five minutes to do
15 that.

16 MR. REID: Judge, could I mention, there's
17 apparently been a new designation for Goldstone, so it
18 may be different than the one you read. We've filed
19 new objections to that this morning. When we get to it
20 later this morning, we can discuss it. Because I
21 understand Goldstone hasn't been discussed.

22 THE COURT: The new one I had -- this was
23 additional for Sandefur. Let me see if I got these --
24 well, the 18th. But Goldstone, here is corrected
25 designations. I'm not sure, to be perfectly honest

1 with you.

2 MR. REID: Okay. We can pick that up when we
3 get to it. But I wanted to let you know there are
4 apparently some additions, and we can cover it when we
5 argue it.

6 And we have a motion to exclude in general
7 based on a number of grounds that were filed also. You
8 should have a copy of that.

9 THE COURT: Yes, I just got it. This is the
10 one that was put on this morning?

11 MR. REID: Motion in limine?

12 THE COURT: Yes.

13 MR. REID: That's the one. Generic, has to
14 do with the fact that he's not connected to parties in
15 this lawsuit.

16 THE COURT: Then I have some copies on my
17 desk here. Things I can hardly read. Wonder where
18 these came from

19 THE CLERK: That was from Friday I think.

20 MR. REID: Judge, you have a marked-up copy
21 of the deposition, I understand, in a black binder up
22 there. That's marked up pursuant to the new
23 designations.

24 THE COURT: You just took an orange pen and
25 went through the whole thing?

1 MR. REID: That's apparently what happened.
2 Went from not very much to everything.

3 THE COURT: You just want to eliminate it,
4 right?

5 MR. REID: That's his designation. He added
6 the whole deposition. It was less than that to start
7 with.

8 THE COURT: The orange markings are yours,
9 right, those are your objections?

10 MR. REID: Right.

11 THE COURT: So you object basically to the
12 whole thing?

13 MR. REID: Yes, sir. And we have our motion
14 in limine also.

15 THE COURT: All right. There was a whole
16 bunch of objections originally, because he had yellowed
17 most of it anyway. And I am just wondering why the
18 change of heart.

19 MR. REID: Yes, sir, but then, as I said, we
20 have a motion in limine that covers the whole subject
21 matter.

22 THE COURT: That's another story.

23 MR. REID: Yes, sir.

24 THE COURT: I'll have to look this over.

25 Olga, mark that. That goes with the Sandefur

1 deposition. I have a copy.

2 Who's doing Sandefur for the defense?

3 MR. MOSS: Doc Schneider.

4 THE COURT: Is he here?

5 MR. MOSS: No, but he'll be here in a couple
6 of minutes. We just received additional designations,
7 and that's why he's not here. He's working on those.

8 THE COURT: Okay. Let's take a few minutes
9 while you go over that and we'll be right back.

10 MR. HEIM I won't be much longer.

11 THE COURT: All right.

12 (A brief recess was taken.)

13 THE COURT: Okay. Is Dr. Mele here?

14 Would you step out, if you would, please,
15 sir?

16 (Dr. Mele left the courtroom.)

17 THE COURT: Now, what have we got?

18 MR. HEIM Your Honor, plaintiffs have 14
19 documents, at least a couple of which are an assembly
20 of documents. I've been through them. I only object
21 to four of them. The other ten I don't have a problem
22 with.

23 So why don't I read off to Your Honor the
24 numbers that I have no objection to.

25 THE COURT: Hold on. Let me get my paperwork

1 put together here.

2 All right. Sir, go ahead.

3 MR. HEIM Your Honor, the documents that I
4 don't object to are: Numbers 498, 25, 5446, 5462,
5 5447, 5335, 5453, 5080 -- there are two of those in
6 this pack here that look identical to me, so I'm sure
7 that was just a mistake. 5087, and 410.

8 THE COURT: Okay.

9 MR. HEIM Then there are other documents
10 that we need to at least know what they are.

11 THE COURT: Let's mark them for ID right now.
12 And they are?

13 MR. HEIM 5444, 5449, 5451, 5448, and I'm
14 sorry, there's a fifth that doesn't have a number.
15 That's just -- it's unmarked.

16 THE COURT: Okay.

17 MR. HEIM So perhaps we can take these five.

18 THE COURT: Let's take a look at those four
19 or five that you're talking about and get some idea of
20 what they are.

21 (Plaintiffs' Exhibit 5444 was marked for
22 identification.)

23 (Plaintiffs' Exhibit 5459 was marked for
24 identification.)

25 (Plaintiffs' Exhibit 5451 was marked for

1 identification.)

2 (Plaintiffs' Exhibit 5448 was marked for
3 identification.)

4 MR. HEIM Some of these may depend on the
5 purpose for which they're being offered. The first one
6 is 5444. This is a --

7 MR. MDSS: You don't have this document?

8 THE COURT: No. Anybody have an extra copy?

9 MR. ROSENBLATT: I gave you the Judge's copy.

10 MR. HEIM Okay.

11 THE COURT: I'll tell you what. Give me the
12 group right now, those four or five. Let me just scan
13 them and see what they are, so I can get some idea of
14 what you're talking about.

15 The second one is 5459, not 49. I wrote down
16 5449, but it's actually 5459. It may have been my
17 mistake.

18 MR. HEIM No, it was mine, Judge. Looking
19 at my pad here, I called out the wrong number.

20 THE COURT: All right. At least I have an
21 idea of what you're talking about.

22 MR. HEIM You can keep those, Judge, because
23 we're finding them as we go along here. Why don't we
24 do them one at a time.

25 THE COURT: Yes, sir.

1 MR. HEIM 5444 is apparently a paper
2 described as intravenous nicotine self-administration
3 in rats, effects of mecamylamine, hexamethonium and
4 naloxone.

5 I will provide this to the Court reporter.

6 THE COURT: M-E-C-A-M-Y-M-A-L-I-N-E, then the
7 other one is H-E-X-A-M-E-T-H-O-N-I-U-U-M, and the third
8 one is N-A-L-O-X-O-N-E.

9 MR. HEIM Right. And again, it's undated,
10 so I saw that it referred to Dr. De Noble being at a
11 location other than Philip Morris. I don't know
12 whether this was before his employment at Philip
13 Morris, after his employment at Philip Morris, or what
14 it was. That's the reason I raised the objection.

15 THE COURT: We can find that out easily
16 enough when we talk with Dr. Mele.

17 MR. HEIM I don't believe it's a Philip
18 Morris document, and I don't know the purpose for which
19 it's being offered, if it's being offered to bolster
20 something that Dr. Mele has said on direct or whether
21 it's to show some other -- for some other reason.

22 MR. ROSENBLATT: Something he wasn't allowed
23 to publish, Judge.

24 THE COURT: Was not allowed by whom?

25 MR. ROSENBLATT: Philip Morris.

1 THE COURT: Okay. At the time of his
2 employment?

3 MR. ROSENBLATT: Afterwards.

4 THE COURT: How could they stop him?

5 MR. ROSENBLATT: Well, they said based on the
6 agreement. They wrote lawyer letters. He touched on
7 that last week, with the concept being that Philip
8 Morris took the position: Well, you had an agreement.
9 You did this research at Philip Morris. Even though
10 you're not with Philip Morris anymore, you can't
11 publish it.

12 THE COURT: I see it, a contract situation.

13 MR. MOSS: Yes, and Philip Morris claimed it
14 was proprietary.

15 MR. ROSENBLATT: And Mele says it wasn't
16 proprietary.

17 THE COURT: That never came to court? It was
18 never resolved?

19 MR. HEIM: No, it was never resolved.

20 MR. ROSENBLATT: Mele backed off.

21 THE COURT: The problem with that is, that
22 leads to litigation. In the event that it is
23 published -- which you said it was never published,
24 right, made public?

25 MR. ROSENBLATT: Yes.

1 THE COURT: Then that would be a fight
2 between the two of them I'm going to have to ponder
3 that situation a little bit.

4 Are you saying, then, this is a different
5 document?

6 MR. HEIM No, Your Honor. Apparently, now
7 that counsel has explained what it is, and I actually
8 think that the reason I'm puzzled is that I actually --
9 I could be wrong here, but I actually think that this
10 did get published.

11 In any event, there was a dispute plainly,
12 and Dr. Mele testified briefly about it last week; that
13 after he left the company, he tried to present some
14 papers and publish some work about his research, and he
15 got some lawyers from some Philip Morris saying: You
16 can't do that. That's proprietary information.

17 And it may be that counsel is correct and
18 this is a paper that he wanted to publish, that he was
19 deterred from publishing because of a lawyer matter. I
20 think that's what it comes down to. It's kind of a --
21 not directly.

22 THE COURT: Wouldn't make it inadmissible
23 here as such if it's his work.

24 MR. HEIM It is his work. It is his work,
25 co-authored with Dr. De Noble.

1 THE COURT: Yes.

2 MR. HEIM And I gather it's being offered as
3 evidence of what he didn't get to publish, correct,
4 essentially?

5 MR. ROSENBLATT: Yes.

6 THE COURT: Like they say, I don't think we
7 have a dog in that fight, is my problem

8 MR. HEIM That's the issue. Is this issue
9 of Philip Morris taking a position that it's
10 proprietary and him taking the position it's not and
11 wanting to publish and not getting to publish because
12 he got a letter from a lawyer, what does that have to
13 do with anything, is the issue.

14 THE COURT: I'm only concerned about content
15 of this particular study and the reason that the study
16 was made and what the content is, if that proves
17 something material to the case; otherwise, I don't care
18 about their office fight or whatever it might be.

19 MR. MOSS: Well, the contents of what is in
20 that report is already in evidence.

21 THE COURT: Well, that's what I thought.

22 MR. HEIM That's plainly the content is
23 already in evidence. He's already testified as to what
24 happens when you self-administer nicotine when rats are
25 given the opportunity to self-administer nicotine.

1 THE COURT: Okay.

2 MR. HEIM So the contents already met --

3 THE COURT: And the reason -- I mean, I don't
4 know what you're going to do with it. Are you going to
5 say: Is this the report? And he's going to say: Yes,
6 it's the report?

7 MR. ROSENBLATT: This is his article, Judge,
8 that he wanted to have published, and it deals -- it
9 shows in some detail the kinds of research that he was
10 involved in when he was working at Philip Morris.

11 MR. MOSS: But the very documents from which
12 this report is taken are already in evidence. And his
13 testimony is already there. If you take a look at some
14 of the documents that we've agreed to, you'll see it.

15 THE COURT: I don't know. There is a
16 reference at the end of this thing as to some material
17 used to formulate this report.

18 I don't know. Let me put this one aside for
19 a minute. I think it presents an unusual problem

20 What is the next one here? 5459. This comes
21 apparently from a book. It's called: Chapter 1,
22 Tobacco Smoking and Nicotine Dependence by M.A.H.
23 Russell, from London, England.

24 MR. HEIM Well, the objection here, it's
25 hearsay. It's an article by someone else. It

1 wasn't -- it's not identified as a proposed exhibit,
2 and you know, as we've said before, he's here as a fact
3 witness. He testified as to the facts. I don't know
4 what this would have to do with his testimony.

5 THE COURT: Okay. My objection is that half
6 of it is upside down. But I'll straighten that out.

7 What is the relevance of that?

8 MR. ROSENBLATT: This is the kind of research
9 that Dr. Mele relied upon when he was at Philip Morris.
10 There was testimony about the necessity to keep up with
11 the outside literature on the same general topic.
12 We've got in evidence article request forms, and this
13 is part of what he did. This is one of the articles:
14 Tobacco Smoking and Nicotine Dependence, which was
15 helpful to him, and if he relied upon in his
16 research --

17 MR. HEIM Well, Judge, this is just a way of
18 trying to get inadmissible hearsay in through this fact
19 witness. I mean, this is an article written by
20 somebody else. When he says, "It's the kind of
21 article," well, there may be different kinds of
22 articles that he read or relied upon over a course of
23 three years. But to put in just one of them, and this
24 one in particular, which has both -- is not only
25 hearsay itself, but has hearsay within hearsay, and it

1 wasn't even identified with this witness.

2 THE COURT: Well, I think this would be more
3 appropriate with cross examination, if you get into the
4 area of trying to figure out what his basis is for his
5 opinions, rather than put it in on direct.

6 MR. MDSS: Well, he's here as a fact witness.

7 MR. HEIM He didn't offer any opinions. He
8 just said: This is my research, this is what it did,
9 and here is what it showed.

10 What I intend to ask him is questions about
11 what his research showed and what it did not show,
12 basically.

13 THE COURT: Well, I'll have to -- I don't see
14 this one as a piece of direct evidence. So 5459, the
15 objection will be sustained.

16 Next one is 5451. This is a Philip Morris
17 document apparently, interoffice correspondence of June
18 6, 1983, from Mr. Dunn to circulation as listed below,
19 and there's a whole bunch of names involved there, and
20 some people whose names have been crossed off.

21 Subject: Nicotine Triation Hypothesis Review
22 Printed and Psychological Bulletin.

23 What's he going to do about this?

24 MR. ROSENBLATT: Well, this is a memo from
25 Dr. Dunn, who is the boss of the overall department

1 that he was in. I mean, I don't have to get this
2 document in through Mele necessarily, but it was during
3 the period of time that he was employed there, and he
4 was aware of this document. I'm not going to do a lot
5 with him and have him explain a lot of stuff.

6 It's just a document I want to put in.

7 THE COURT: Was he one of the people to whom
8 it was circulated, one of those crossouts, on the
9 right-hand side?

10 MR. ROSENBLATT: Yes. He's the very last
11 one. I don't know if you can make it out.

12 THE COURT: Oh, yeah, I can see that.

13 MR. HEIM I don't think they're crossouts; I
14 think somebody highlighted this. And sometimes the
15 highlighters they use, whoever highlighted it --

16 THE COURT: On a copy a highlight looks like
17 a crossout. So if he was a recipient of this document,
18 what is the objection?

19 MR. HEIM Whether or not he was a recipient,
20 it has to have something to do with him. And he
21 didn't -- as I understand it, this is not an area, that
22 based on his testimony on direct, that he worked in.
23 He worked on self-administration in rats.

24 THE COURT: Well, he's talking about
25 nicotine, experimental procedures.

1 MR. HEIM I guess what this really is is an
2 explanation of the article that's attached to it.

3 THE COURT: Yes. All right. I'll admit this
4 one, 5451.

5 (Plaintiffs' Exhibit 5451 was admitted into
6 evidence.)

7 THE COURT: Next one is 5448. This is
8 something else he and Dr. De Noble apparently
9 collaborated on.

10 MR. HEIM Right. I didn't know what this
11 was either. I couldn't read fully the top. And I
12 didn't know the date.

13 Is this another article that they tried to
14 publish?

15 MR. ROSENBLATT: I believe so, yeah.

16 MR. HEIM But without knowing what it was,
17 what purpose --

18 THE COURT: Let's wait and see what his
19 testimony is on this, what he wants to do with it. We
20 could take a few minutes and do it.

21 MR. MDSS: You mean a voir dire?

22 MR. HEIM A short voir dire on this
23 document.

24 THE COURT: So we'll hold this one out.
25 Okay. This last one, it's a multipage

1 document. I don't have a number on it, do you,
2 Counsel?

3 MR. HEIM There is no number on this
4 document, Your Honor, because this document is not even
5 on plaintiffs' exhibit list. I mean, much less a
6 reliance document, it's not even on the exhibit list.
7 That's the reason I couldn't find it.

8 THE COURT: These are the letters about the
9 publication of the document?

10 MR. HEIM Right. The point I was going to
11 make is that some of these are separate exhibit
12 numbers.

13 THE COURT: Yes.

14 MR. HEIM The second, third and fourth pages
15 are separate plaintiffs' exhibit numbers, and they are
16 the letters from the lawyers about the publications.

17 THE COURT: I have the numbers 8721.12, .1,
18 .07, .09 and .08, on the series of letters.

19 MR. HEIM And the next to last page -- I
20 don't have it in front of me -- that's the only -- as I
21 said, we don't have that document. But the next to
22 last page is virtually unintelligible. At least it was
23 for me. Maybe you can make it out, Judge.

24 THE COURT: Well, one could really fight with
25 it and figure it out, I think. It's very, very

1 difficult because of the copy.

2 MR. HEIM But my objection principally is to
3 the parts of this that have never been disclosed or
4 been on an exhibit list.

5 THE COURT: Okay. Well, you said there is an
6 exhibit number, the 8721 point --

7 MR. HEIM There are three pages of it
8 separately marked as plaintiffs' exhibit numbers that
9 are attached to it.

10 THE COURT: Maybe I don't have what you have.

11 MR. HEIM No, they aren't marked on it, but
12 I happen to know they are separately-marked exhibit
13 numbers. I could probably find those.

14 THE COURT: Those are the attorney letters,
15 right?

16 MR. HEIM Yes, sir. But the rest of it is
17 not, and I object to it.

18 THE COURT: All right. What do you say about
19 that?

20 MR. ROSENBLATT: Well, the witness has
21 already testified that Philip Morris would not allow
22 him to publish or make presentations about research
23 that was done at Philip Morris, and these documents
24 demonstrate that.

25 THE COURT: All right. What he's saying is

1 only three of the documents contained in this packet
2 have been listed on your evidence and exhibit list; the
3 rest are not. So if they're not, they shouldn't be
4 considered. Those three that were -- that you can
5 identify as what, which ones?

6 MR. HEIM I can identify them. If I can
7 find my book here, I can identify them. One is the
8 first letter from the lawyer, Plaintiffs' Exhibit 5429.
9 That's the April letter from Mr. Taussig.

10 THE COURT: April 23, 1986, that's 54 what?

11 MR. HEIM 29, Your Honor.

12 THE COURT: When did we see that? Have we
13 taken it up before?

14 MR. HEIM No, you haven't taken it up. I'm
15 saying it's at least marked and on their exhibit list.
16 It has been offered but -- I can't complain that I
17 wasn't aware of that one because I was.

18 (Plaintiffs' Exhibit 5429 was marked for
19 identification.)

20 THE COURT: The next one is September 10,
21 '86?

22 MR. HEIM Right. That's 5430.

23 (Plaintiff's Exhibit 5430 was marked for
24 identification.)

25 THE COURT: And the next one is August 30?

1 Is that the one you're looking at?

2 MR. HEIM 5430 is September 10, 1986, yes.

3 THE COURT: Right. But the next one is the
4 withdrawal by De Noble. That's the August 30 letter.

5 MR. ROSENBLATT: 5431?

6 THE COURT: I don't know.

7 MR. HEIM I don't know either. I would
8 imagine.

9 MR. MDSS: Well, if it was listed --

10 MR. HEIM I don't know. I'm looking around
11 trying to --

12 MR. ROSENBLATT: Well, all of these documents
13 were given to counsel at the time of Dr. Mele's
14 deposition. And in our Engle class partial
15 reconstructed exhibit list, these were all delivered on
16 December the 4th.

17 MR. HEIM Well, I don't think counsel means
18 all, because I know that first document could not have
19 been.

20 THE COURT: Okay. The important documents --
21 all right. The first letter involved in this thing is
22 from somebody, I guess it's Osdene, dated May 2, 1985,
23 which says, basically, that the company made the
24 decision it's proprietary and please do not publish.

25 Then the next one you marked, 5429, is the

1 April 23, '86 letter from Mr. Taussig to Dr. Mele about
2 the proposed publication reminding him of their
3 contract.

4 The next letter would be September 10th of
5 '86, from Mr. Taussig to Dr. Mele and/or De Noble,
6 again reminding them not to publish because of their
7 contract.

8 The next letter, August 30 of 1983, is
9 really -- I don't understand -- is a letter from
10 Dr. De Noble to Mr. Barry at the University of
11 Pittsburgh withdrawing the manuscript. But which
12 manuscript, because it's three years earlier? I don't
13 understand that. Maybe that's the first --

14 MR. HEIM That letter would be hearsay in
15 any event. That's not a Philip Morris document.

16 THE COURT: I realize that. They talked
17 about withdrawing a manuscript of '83, but they're
18 talking about letters dated '85 and '86. So I'm not
19 sure which one they're talking about.

20 In any event, if the purpose of the letters
21 is to show that there was a dispute between the parties
22 over their proprietary interest in that and they agreed
23 that they wouldn't publish on that basis, so be it.
24 But he's already testified about that. I thought.
25 Although --

1 MR. MDSS: What is the relevance of that,
2 Your Honor?

3 THE COURT: I don't know what they're going
4 to make of it.

5 MR. ROSENBLATT: Pardon me?

6 THE COURT: I don't know what you're going to
7 make of it.

8 MR. ROSENBLATT: Philip Morris -- it's
9 perfectly consistent with his other testimony as to why
10 they closed the laboratory, because Philip Morris did
11 not want this information to get out.

12 MR. MDSS: That is speculation upon
13 speculation.

14 THE COURT: That's a conclusion that the jury
15 can make, I suppose, based upon all the evidence in the
16 case.

17 MR. HEIM It's best as kind of a side light
18 to his testimony. His testimony was about what his
19 research was.

20 MR. ROSENBLATT: Well, doing research in this
21 kind of scientific milieu leads to writing about your
22 research in terms of advising -- that's how scholars,
23 experts in the same field, learn what their colleagues
24 are doing in various parts of the country. He was not
25 permitted to do that. It was very relevant.

1 What is the point of the research if it's
2 kept secret and nobody can learn about it?

3 MR. HEIM Well, he signed an agreement
4 saying he wouldn't disclose research he was doing while
5 he was a Philip Morris employee.

6 MR. MOSS: Judge, every company has
7 proprietary research that doesn't get published.
8 Otherwise, you wouldn't have the concept of
9 proprietary.

10 We're getting into an absolute -- a whole
11 issue outside of the issues we're trying in this case.

12 MR. ROSENBLATT: Proprietary in the sense of
13 developing a product that your competitor might be
14 interested in. This on its face is not proprietary.
15 This is scientific information; it's not proprietary.
16 It's our position that Philip Morris just broadened the
17 terms of their contract to keep this information from
18 getting out.

19 MR. MOSS: Okay. Therein, Judge, lies the
20 problem that you identified earlier. We are now making
21 this Court and this jury attempt to resolve a side
22 issue between these -- between Dr. Mele and PM, as to
23 whether or not the contract prohibited them from --

24 THE COURT: There's where the problem comes
25 in. If it was merely one of those issues where we

1 don't want you to do it because it hurts us and we
2 think it would be beneficial to us if you didn't do it,
3 that's one thing.

4 But if it's a pure contract dispute,
5 regardless of the effect of the document, whether it be
6 good, bad or indifferent, and they want to invoke their
7 sense of proprietary interest under contract, they may
8 have an absolute right to do so, regardless of the
9 effect of the document. So you've got to determine
10 what was the real motivation behind it all. I don't
11 know that he can.

12 He can show that -- and he's already
13 testified to it, I guess, that we tried to write an
14 article about it; they claimed a proprietary interest.
15 They said: Under our contract, no, you can't do it.

16 MR. ROSENBLATT: Judge, you know, some of
17 these things are not worth arguing about a long time.

18 THE COURT: I understand that.

19 MR. ROSENBLATT: If that's how you see it,
20 that's how you see it. I disagree. But if that's how
21 you see it, that's how you see it.

22 THE COURT: I haven't ruled on it yet.

23 MR. ROSENBLATT: Maybe I'm giving up too
24 quickly.

25 THE COURT: Maybe you are.

1 MR. ROSENBLATT: It's very clear to me that
2 the jury should be aware of these documents.

3 THE COURT: It works both ways.

4 MR. ROSENBLATT: And they have a right to
5 decide what the motive was of Philip Morris.

6 THE COURT: Here's what the problem is.
7 You're going to say the motivation was: I was trying
8 to hide information.

9 You're going to say: Look, we have a
10 proprietary interest; good, bad or indifferent, we're
11 going to enforce our contract, and we have every right
12 to do so.

13 So it works to the benefit of the defense and
14 it works to the benefit of the plaintiff, and the jury
15 has to make up their mind.

16 MR. ROSENBLATT: Exactly.

17 MR. MOSS: The jury has to decide a contract
18 issue?

19 THE COURT: No, they don't have to decide the
20 contract issue. They decide motivation. Is it really
21 done for that purpose?

22 MR. HEIM Well, he has testified -- without
23 benefit of documents, he has already said that: We
24 wanted to publish things; we weren't allowed to
25 publish.

1 I remember him testifying: We got letters
2 from a lawyer and they said it was proprietary, you
3 shouldn't do it. The first one we ignored and the
4 second one we followed.

5 That's been his testimony so far.

6 THE COURT: And the letters substantiate
7 that. So I will allow those two letters in: 5430 and
8 5429.

9 (Plaintiffs' Exhibit 5429 was admitted into
10 evidence.)

11 (Plaintiffs' Exhibit 5430 was admitted into
12 evidence.)

13 THE COURT: Olga? Where did she go?

14 Okay. All right. Are we ready to go, then?
15 Let's bring them in.

16 MR. HEIM Your Honor, you were going to ask
17 him -- there was one document that we went through that
18 none of us were sure what it was, and I think we were
19 going to ask Dr. Mele two questions --

20 MR. ROSENBLATT: Let me --

21 THE COURT: Before you go, we've got two
22 documents here, both the articles that he and Dr. De
23 Noble wrote, which are on hold, depending on his -- why
24 don't you bring him in first before the jury.

25 MR. HEIM Dr. Mele is here.

1 THE COURT: Why don't you come up here and
2 have a seat, Doctor, and we'll do a quick voir dire on
3 these two documents and see where we go.

4 THE BAILLIFF: Bringing in the jury.

5 THE COURT: No, no. Hold off.

6 Okay. These are the two documents, and we
7 want to ask you a couple questions about them without
8 the jury being present. (Handing)

9 I've given him 5444 and 5448.

10 VOIR DIRE EXAMINATION

11 BY MR. ROSENBLATT:

12 Q. Okay. Dr. Mele, first of all, looking at
13 document 5448, what is the title of that? That's from
14 the Biochemical Research Division?

15 A. Correct. It's called: Development of
16 behavioral tolerance following chronic nicotine
17 administration.

18 Q. Okay. This is an article you and Dr. De
19 Noble did which was based upon your research?

20 A. That's correct.

21 Q. What became of this article? Was it
22 published anywhere?

23 A. No, this was actually the first major study I
24 completed when I was at Philip Morris. It took most of
25 1982 to run this study.

1 When I had a draft of this manuscript, it was
2 sent up through our chain of command at the research
3 center for -- there was a request to publish this in
4 the outside literature, and Jim Charles came to my
5 office one day and told me he could not allow this to
6 go out for publication because -- because we
7 demonstrated tolerance to nicotine. He equated that
8 with demonstrating drug dependence and said that we
9 could not be publishing data in-house that indicated
10 nicotine was a substance that produced dependence.

11 Q. So it was never published?

12 A. It was never published. We were denied the
13 right to do that.

14 Q. And how about after you left Philip Morris?
15 Was it ever published after that?

16 A. We put out an abstract in the federation
17 meetings at the Federation for the American Societies
18 of experimental biology in St. Louis in 1986.

19 There was an abstract published, and we did a
20 poster presentation, which means you stand there for
21 about three hours with the data hanging up on a poster,
22 and people come by and talk to you and you explain it
23 to them

24 Q. Okay. Now --

25 A. And it was after that that we started to

1 receive the first of several letters from the company
2 warning us not to do that and threatening subsequent
3 legal action if we were to continue.

4 Q. Okay. Engle Plaintiffs' Exhibit 5444, the
5 title of which is: Intravenous Nicotine
6 Self-Administration in Rats, and then, Effects of
7 Certain Compounds.

8 This is another article by you and Dr. De
9 Noble, correct?

10 A. That is correct.

11 Q. And was this article ever published?

12 A. This article was submitted twice for
13 publication. It was accepted twice for publication,
14 and it was retracted both times at the insistence of
15 the company: The first time, around mid '83 when we
16 were still working at Philip Morris, and the second
17 time several years after that when we again tried to
18 publish it. That's when we were receiving the
19 threatening letters from their legal department, so we
20 retracted it the second time.

21 Q. So Plaintiffs' Exhibit 5444, for all
22 practical purposes, was never published?

23 A. Was never published, not until we got into
24 the Congressional Record in 1994.

25 MR. HEIM I have no questions, but I would

1 like to discuss it with the Court on the document.

2 THE COURT: If you'll step out just a minute,
3 please.

4 (The witness exited the courtroom)

5 MR. HEIM Well, Your Honor, it seems, now
6 that we know what they are, it seems this is what he's
7 already testified to. He already testified on direct
8 that there were two articles. I believe he identified
9 them, and he said that they weren't allowed to publish
10 those articles. So this is just cumulative on what
11 he's already testified to before.

12 To the extent that that's relevant at all
13 because this was -- these -- as these letters show, it
14 was the company saying these are proprietary to the
15 company, and you signed an agreement and you're going
16 ahead and doing things that are contrary to your
17 agreement.

18 And you know, all he's done other than his
19 cumulative testimony is to add some, you know, hearsay
20 of what Dr. Charles supposedly told him about this.

21 So it seems to me that it is prejudicial.
22 The relevance of it is, at best, tangential. At best.
23 Because it is a contract dispute between the two of
24 them That's what it comes down to.

25 THE COURT: I'll overrule the objection. I

1 think it's admissible because it's his work; and number
2 two, it's the kind of thing that you would have
3 definitive exhibit as to his testimony. I have no
4 problem with that, and any hearsay in there is an
5 admission against interest.

6 So I will admit 5444 and 5448.

7 THE COURT: Okay. Let's bring them back in.

8 (The witness entered the courtroom)

9 THE COURT: Okay. Now you can bring the jury
10 out.

11 THE BAILIFF: Bringing in the jury.

12 (The jurors entered the courtroom)

13 THE COURT: All right. Have a seat, folks.
14 How are you all today?

15 JURORS: Fine, great.

16 THE COURT: All footballed out? No.

17 Who is going to watch the game tonight?

18 Anything happen over the weekend by way of
19 television, newspapers, magazines, periodicals or
20 discussions about any tobacco issue or this case or any
21 other issue that might be relevant? Anybody see or
22 hear anything?

23 THE JURORS: No, sir.

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

25 DIRECT EXAMINATION (Continued)

1 Q. Dr. Mele, hopefully you still look familiar
2 to the jury. You were here last week.

3 For the record, please state again your full
4 name and your address.

5 A. Paul Camille Mele, 17212 Fallstaff Lane,
6 Olne, Maryland.

7 Q. Now, Dr. Mele, when the rat laboratory was in
8 operation, from the time you were first employed by
9 Philip Morris in November of 1981 until the laboratory
10 was closed in April of 1984, had you been promoted
11 within Philip Morris?

12 A. Yes.

13 Q. From what to what?

14 A. The title I started off with was called
15 scientist, and I was promoted to the research scientist
16 level, the next step up, after a year or so.

17 Q. Okay. Did Philip Morris have a system in
18 place whereby your work as a scientist and then as a
19 research scientist was evaluated by your superiors?

20 A. Yes. All my work went up through my chain of
21 command: First, Dr. De Noble, and then up through
22 either Dr. Dunn initially. But most of the time it was
23 Dr. Jim Charles, and ultimately Dr. Osdene.

24 Q. What kind of evaluations did you receive
25 during the period of time that you were employed at

1 Philip Morris?

2 A. They were all highly positive. They're all
3 very good, very positive. I always received very top
4 ratings, good raises, bonuses, and ultimately the
5 promotion. So there was never any dissatisfaction
6 whatsoever.

7 Q. To your knowledge had you ever received a
8 negative evaluation?

9 A. Never.

10 Q. Now, let me ask you about several exhibits.
11 Engle Exhibit Number 5448, the title of which is:
12 Development of Behavioral Tolerance Following Chronic
13 Nicotine Administration.

14 This is something that you authored along
15 with Dr. De Noble; is that correct?

16 A. Correct.

17 Q. What was the thrust of this article?

18 A. This paper looked at several aspects of
19 tolerance to nicotine. Certainly tolerance to nicotine
20 had been known up until that point. The various types
21 of tolerance, I think as we discussed last week, this
22 looked at two particular types of tolerance to
23 nicotine, one referring to brain or behavioral
24 tolerance and one to another general, what we call
25 metabolic tolerance, the way the body clears nicotine

1 out of the system when it sees it regularly.

2 So it showed two aspects of tolerance, and
3 what we call a brain tolerance that develops when the
4 body sees it on a regular basis.

5 Q. In academic or research circles, is it normal
6 for a scientist, such as yourself, a Ph.D., to write up
7 your research and the results of your research?

8 A. That's probably the most basic thing you do
9 as a scientist. You do your study, you write a
10 manuscript, and you try and publish it.

11 Q. Now, was Plaintiffs' Exhibit 5448 ever
12 published?

13 A. No. It was never published.

14 Q. And what reason were you given by your
15 superiors at Philip Morris as to why it was not
16 published?

17 A. That was my first large study at Philip
18 Morris. It took about a year to complete, and -- in
19 late 1982, I submitted it up through the review chain
20 for approval for publication, or at least to submit it
21 to a journal and try and get it published.

22 And Dr. Charles came down to my office one
23 day and told me he could not, would not, approve it to
24 go outside of Philip Morris. His statement was that
25 because we were demonstrating tolerance to nicotine, we

1 were then demonstrating that nicotine was a
2 dependence-producing substance based on the diagnostic
3 and statistical manual of the American Psychiatric
4 Association. That was at the time their definition of
5 substance dependence. One of their definitions was --

6 MR. HEIM Objection, Your Honor. This part
7 of it is hearsay.

8 THE COURT: Overruled.

9 Go head, sir.

10 A. (Continuing) One of the criteria for
11 substance dependence in that volume by the American
12 Psychiatric Association was tolerance.

13 So, Dr. Charles concluded that if we're
14 showing tolerance in rats, we are then demonstrating
15 substance dependence to nicotine, and he indicated that
16 would not be acceptable for the company or good for the
17 company to have go out to the world.

18 Q. So this research that was done and written up
19 by you and Dr. De Noble basically never saw the light
20 of day; is that correct?

21 A. It wasn't until several years later, after we
22 left Philip Morris -- it was 1986 -- we submitted an
23 abstract of that, a shorter version of that research to
24 a meeting, the Federation of American Societies for
25 Experimental Biology. It was a professional scientific

1 meeting that meets every year.

2 And we went to that meeting, and we did
3 what's called a poster presentation. You hang up the
4 data, you hang it up on a poster board, and people walk
5 by for three hours and talk to you about it.

6 So we did that, and it was shortly after that
7 that we started receiving the letters from the Philip
8 Morris legal office telling us not to do this anymore,
9 and then threatening legal action if we continued to do
10 this.

11 Q. But that poster that you're talking about in
12 1986 related to the article and the conclusions --

13 A. Yes.

14 Q. -- that you had written about in Plaintiffs'
15 Exhibit 5448?

16 A. Correct.

17 MR. ROSENBLATT: Judge, my understanding is
18 that basically the documents I'm talking about have
19 already been admitted. Should I give them to the
20 clerk?

21 THE COURT: Yes, you can identify them. The
22 clerk will give you the number. This is 5448. She's
23 got copies here.

24 THE CLERK: Not all of them I don't.

25 THE COURT: Just the two I just gave you.

1 MR. ROSENBLATT: 5448.

2 THE COURT: Admitted.

3 MR. HEIM No objection.

4 THE CLERK: 5448 admitted in evidence.

5 (Plaintiffs' Exhibit 5448 was admitted into
6 evidence.)

7 MR. ROSENBLATT: We've been through this. I
8 was making sure --

9 THE COURT: We want to make sure we identify
10 the right one. And the other one?

11 MR. ROSENBLATT: Yes. The other article is
12 Engle Plaintiffs' Exhibit 5444: Intravenous Nicotine
13 Self-Administration in Rats, by Drs. Mele and De Noble.

14 THE COURT: That will be admitted.

15 THE CLERK: 5444 into evidence.

16 (Plaintiffs' Exhibit 5444 was admitted into
17 evidence.)

18 BY MR. ROSENBLATT:

19 Q. Okay. Now, Dr. Mele, as I say, the title of
20 5444 is Intravenous Nicotine Self-Administration in
21 Rats. And what was the focus of this article by you
22 and Dr. De Noble?

23 A. This was our first paper on
24 self-administration of nicotine. This is the paper
25 that demonstrated that rats will indeed work to obtain

1 injections of nicotine directly into the bloodstream
2 That's where they are pressing the lever and operating
3 a pump which then squirts a small amount of the
4 nicotine solution, you know, into the blood.

5 This paper demonstrates really conclusively
6 for the first time in rats that nicotine can act as a
7 positive reinforcer, in a very thorough and complete
8 study, which was really the main criteria for studying
9 drug abuse and drug dependence.

10 Q. Now, was this article, Exhibit 5444,
11 Intravenous Nicotine Self-Administration in Rats, was
12 this ever published?

13 A. This paper was submitted twice for
14 publication. It was accepted twice for publication,
15 and was retracted both times.

16 Once when we were still working at Philip
17 Morris, they did allow this; they did allow us to send
18 this out. It was accepted at the Journal of
19 Psychopharmacology, which was and still is one of the
20 preeminent journals in this field.

21 In mid 1983, we were forced to contact the
22 journal and say we don't wish to publish it, please
23 take it back.

24 That's the time when we were having -- the
25 company was having legal difficulties with lawsuits --

1 MR. HEIM Objection, Your Honor.

2 THE COURT: All right. Sustained.

3 A. (Continuing) And then the second time was
4 several years again after we had left Philip Morris, we
5 sent this out to the same journal for publication.
6 They reviewed it again, and again they accepted it.
7 But about that time we started receiving the letters
8 from the Philip Morris attorneys saying if we continued
9 to try and put data out, they would take legal action
10 against us, similar to the tolerance paper. And once
11 again, we had to contact the journal and say we can't
12 publish this, please don't do it.

13 Q. Now, these two journals, which had accepted
14 this article for publication, were they peer-reviewed
15 journals?

16 A. Oh, yes. Psychopharmacology is, again, one
17 of the preeminent journals. It's been around for quite
18 a number of years and has a very esteemed set of
19 reviewers.

20 Q. Now, you mentioned lawyer letters in
21 connection with research that you wanted to publish,
22 and I'd like you to look at Engle Exhibit 5429, which
23 is a letter from the assistant general counsel of
24 Philip Morris to you dated April 23, 1986.

25 Now, the first sentence of the letter says:

1 It has come to our attention that you presented a paper
2 at the Federation of American Societies for
3 Experimental Biology in St. Louis on the development of
4 behavioral tolerance following chronic nicotine
5 administration.

6 Is that the presentation you just told the
7 jury about?

8 A. Yes, correct.

9 Q. Okay. Now, after having received this letter
10 from the assistant general counsel of Philip Morris
11 dated April 23, 1986, did you comply with this letter?

12 A. No, we ignored it. We felt it was important
13 enough to try and get some more of the data out. This
14 one was already presented. We had a number of other
15 studies on various aspects of nicotine. We just felt
16 it was critical that the -- you know, the scientific
17 community and the world find out what we did and what
18 we found out, and allow them to make a decision whether
19 this work was important and useful in any way.

20 So we put out another abstract and had
21 submitted another paper for publication.

22 Q. Okay. And then on September 10, 1986, and
23 I'm talking about Plaintiffs' Exhibit 5430, you and
24 Dr. De Noble received a letter certified mail, return
25 receipt requested, again by Mr. Taussig, the assistant

1 general counsel of Philip Morris.

2 The first sentence of the letter says as
3 follows: Gentlemen: On April 23, 1986, I sent each of
4 you a letter advising you of your obligation pursuant
5 to your agreement which you signed with the company at
6 the commencement of your employment.

7 And then the letter goes on, and the jury
8 will have the opportunity to read this letter in its
9 entirety later. But toward the end of the letter, the
10 lawyer for Philip Morris says: The company cannot
11 tolerate this type of conduct.

12 And the last sentence of the letter says:
13 Any further breach of your agreement will result in
14 action being taken. Very truly yours.

15 What was your response to this letter of
16 September 10, 1986, from the assistant general counsel
17 of Philip Morris?

18 A. Well, we actually called the counsel and
19 discussed this with him, and he was very emphatic that
20 if we were to continue this, they would take legal
21 action against us. Being two independent people
22 without resources to challenge a company like Philip
23 Morris in any legal proceedings, we thought it was wise
24 at that point to stop publishing data.

25 Q. You backed off?

1 A. We backed off.

2 Q. Now, Dr. Mele, Engle Plaintiffs' Exhibit
3 Number 5446 are these library request forms, and we had
4 discussed this last week, that when there was an
5 article in the literature that you were interested in,
6 and it was not on the premises of Philip Morris in
7 their library, you had the option of filling out one of
8 these cards, and within a relatively short period of
9 time you would get the article; is that correct?

10 A. That is correct.

11 Q. Why don't you just identify these. (Handing)

12 A. These are the standard request forms we put
13 in through the library there. They had a nice library,
14 a good selection of journals, but not all the journals
15 we needed. If we needed something else, this was the
16 mechanism for getting them

17 Q. Okay. Who did you actually give those cards
18 to?

19 A. The librarian.

20 Q. There was, in fact, a librarian at Philip
21 Morris?

22 A. They had two or three. They had an actual
23 library there, like a small medical library there, like
24 any hospital would have, with quite a collection of
25 books in scientific and health-related journals.

1 Q. Now, Dr. Mele, I would like you to look at
2 the next plaintiffs' exhibit, which is 498, a memo on
3 the stationery of Philip Morris dated June 18, 1980,
4 from L.W. Dunn to Dr. T.S. Osdene, and the subject is
5 possible restructuring of the behavioral research lab.

6 THE CLERK: 498 into evidence.

7 (Plaintiffs' Exhibit 498 was admitted into
8 evidence.)

9 BY MR. ROSENBLATT:

10 Q. What essentially is the thrust of this memo?

11 A. This memo outlines the behavioral research
12 group. There were four components or sections of this
13 group. The group I was in, the behavioral pharmacology
14 project, was headed by Vic De Noble, and then there
15 were three other groups: experimental neuropsychology,
16 experimental psychology, social psychology, all run by
17 professional investigators to study certain aspects of
18 smoking behavior.

19 Q. Now, in terms of -- looking at this document,
20 498, in terms of the behavioral pharmacology project,
21 it says the objective was to identify the unique
22 pharmacological actions of nicotine as manifested in
23 lower-ordered mammalian behavior. Is this what your
24 rat research focused on?

25 A. Correct. That's essentially a fancy way of

1 saying we looked at what nicotine did to rats.

2 The main, or one of the main thrusts of the
3 lab again was to work on the nicotine analog program
4 It was to find a substitute, a replacement compound,
5 for nicotine, one that would have the same effects in
6 the brain as nicotine, one that would keep people
7 smoking, but one that did not have the negative
8 cardiovascular effects of nicotine, the adverse effects
9 on the heart and blood system

10 Q. Okay. Now, the next document I'm going to
11 ask you about, Dr. Mele, is Plaintiffs' Exhibit Number
12 25 on the stationery -- interoffice correspondence on
13 the stationery of Philip Morris USA from J.L. Charles
14 to Dr. R.B. Seligman dated March 18, 1980.

15 Now, remind us again, please. J.L. Charles
16 is who?

17 A. Jim Charles. He was two levels above me. He
18 was -- Victor De Noble was my supervisor. Charles was
19 his supervisor. He was the director of the biochemical
20 research division, and eventually took over for Tom
21 Osdene in '84 when Osdene gave up that position.

22 Q. Now, the subject is nicotine receptor
23 program, University of Rochester.

24 What was the relationship between the
25 University of Rochester and the nicotine receptor

1 program as it related Philip Morris research?

2 A. Well, this, again, refers to the analog
3 program, when we were looking for a substitute for
4 nicotine. Our chemists in-house would synthesize these
5 analogs, these molecules that looked like nicotine, and
6 they were tested in several ways.

7 We had a large collaboration with Dr. Leo
8 Aboud at the University of Rochester in Rochester, New
9 York, and he did studies that looked at the effects of
10 these analogs on brain tissue, on tissue that measured
11 cardiovascular effects. He was a
12 neurochemist/neuropharmacologist, and he essentially
13 complemented the work we did with the neurological.

14 Q. When you look at the second page, it's
15 obvious to see that Dr. Osdene is receiving a copy of
16 this memo, correct?

17 A. That's correct.

18 This memo outlines not only the basics of the
19 analog program, but also the broader approach of our
20 lab, also to look at the effects of nicotine. They
21 mention the effects of nicotine on the smoker. We only
22 worked with rats, but the broader aspects of looking at
23 nicotine on the behavior and physiology and brain
24 activity of the animal -- not just the analogs -- it
25 was broader than that.

1 Q. Now, Plaintiffs' Exhibit 410, which is again
2 interoffice correspondence from the Philip Morris home
3 office in New York City from Attorney Eric Taussig
4 concerning yourself and Dr. De Noble, and the date of
5 this interoffice correspondence is April 7, 1986.

6 I just want to ask you in a general way what
7 this relates to.

8 A. This is a memo that -- where Philip Morris
9 was evaluating the approach they were going to take
10 when we put out the abstract at St. Louis, the
11 tolerance abstract at the federation meetings. This
12 obviously, then, predated the first letter we got from
13 Taussig telling us we should not be doing that anymore.

14 Q. Okay. The next exhibit is 5087, and the date
15 of this is June 1st, 1983, and the report title, signed
16 by you and Dr. De Noble, is: Behavioral Pharmacology,
17 Annual Report 1983.

18 And tell us basically what this document
19 covered.

20 A. This was one of our annual reports. We did
21 these every year. We basically summarized what we
22 wanted to do, what we did do, and what we found out.
23 So this was a way for management to know the kinds of
24 studies we were doing, the questions we were asking,
25 and the results we were obtaining.

1 Mbst of the time I was there there was a very
2 limited distribution of these documents. Very few
3 people saw them

4 In this case, because it was -- looks like
5 mid to late '83, the distribution list shows that it
6 was being distributed a little wider throughout the
7 research center, at least to the upper level
8 scientists.

9 But this basically described what we did and
10 what we found over a given year.

11 Q. Okay. Go to Page 66. And there is a
12 heading, III on Page 66: Nicotine Acetylaldehyde
13 Interactions, and there is A and 1 and 2.

14 I want to ask you a question about Number 2,
15 under that title, which says: The optimal combinations
16 of nicotine and acetylaldehyde that result in enhanced
17 positive reinforcing effects appear to be low doses of
18 nicotine added to acetylaldehyde.

19 In nontechnical terms, what are you saying
20 there?

21 A. This was part of our studies that were
22 looking at nicotine acetylaldehyde combinations. Both
23 nicotine and acetylaldehyde exist in cigarette smoke,
24 and we determined earlier that acetylaldehyde itself
25 can function as a positive reinforcer for rats. And if

1 you put the two together, you have what we call a
2 synergistic or super additive effect, where with both
3 compounds together the rat would work harder for it
4 than either compound alone. And we were asked to
5 determine if we could identify optimal ratios and
6 optimal combination of the two drugs that would produce
7 the greatest amount of responding on the part of the
8 rat.

9 Q. And when you go to Page 68, it mentions
10 electroencephalographic analysis. So you did these
11 brain wave tests on the rats?

12 A. Correct. Those were done at Rochester with
13 Leo Abood. There were two trips where we actually went
14 up to his lab to work there for a period of time.

15 Q. Again, what were the electroencephalograph
16 results, generally speaking, in a nontechnical way,
17 when the rats were self-administering both nicotine and
18 acetylaldehyde?

19 A. Well, in these studies we were actually just
20 giving the compounds to a rat. These rats were
21 anesthetized on the table and we were measuring their
22 brain activity.

23 And again, we found if we gave two compounds
24 together, they interacted to produce changes in the
25 hippocampus. It's a large area of the brain that

1 differed from the effects of each compound alone.

2 So if the -- at the brain level, the two
3 drugs were working together to produce effects that you
4 didn't find with either drug alone.

5 So it provided some brain support for the
6 behavior we were measuring in the self-administration
7 studies.

8 Q. Now, the next exhibit I want to ask you about
9 is Plaintiffs' Exhibit Number 5453.

10 Now, this is a memo from you and Dr. De Noble
11 to Dr. Dunn, April 21, 1982. And I guess, again, this
12 is what, your annual report? (Handing)

13 A. Yes, this is an annual report. Again, these
14 are done every year. There were often a lot of small
15 memos during the year. But every year we summarized,
16 again, what we were doing, what we wanted to do, what
17 we were finding. So the company was aware at all times
18 of our activities and our results.

19 Q. Now, on Page 16 of this document, Dr. Mele,
20 there's a heading called: Results. And it says: The
21 results show that acetylaldehyde readily permeates the
22 blood/brain barrier. What does that mean?

23 A. That means if you inject acetylaldehyde into
24 a vein, the same veins we were using when we were doing
25 the self-administration studies, or in some cases we

1 looked at tail veins. But when you inject it right
2 into the bloodstream, it passes the blood/brain barrier
3 and gets into the brain.

4 The blood/brain barrier is a series of
5 tightly, grown-together capillaries, small blood
6 vessels, that try to keep out things that do not belong
7 in the brain, things you find in your peripheral blood
8 system

9 But acetylaldehyde crosses that barrier, gets
10 into the brain, and these studies at Rochester
11 identified that.

12 Q. And the significance of a substance that is
13 able to cross the blood/brain barrier is what?

14 A. Well, it shows that it can get into the
15 brain. If it can get into the brain, it can alter the
16 brain.

17 In a case where you have an animal
18 self-administering a drug, the basis for all drug
19 self-administration is changes in brain or brain
20 activity, and this just confirmed that acetylaldehyde
21 does indeed get into the brain as a basis for its
22 self-administration.

23 Q. When you talk about the concept of behavior
24 and drugs which might alter behavior, is there any part
25 of the body of either a rat or a human being which

1 impacts and affects behavior other than the brain?

2 A. Well, theoretically, yes. You could paralyze
3 an animal with curare, then he won't respond very well
4 because he can't move. You can make an animal very
5 sick and ill in his GI tract, and then it becomes very
6 obvious when animals like that, and they may not
7 respond very well.

8 But for any drug of abuse, the locations
9 invariably have always been found to be activity in the
10 brain.

11 Q. The next document, Plaintiffs' Exhibit 5335,
12 and this is actually a memo from Dr. De Noble to
13 Dr. Charles in July of 1982, where among the objectives
14 recited is -- he says: Number one, to develop a
15 behavioral profile of the reinforcing effects of
16 nicotine and acetylaldehyde; and A, under number one
17 is, define a ratio or ratios of acetylaldehyde to
18 nicotine that will have optimal reinforcing effects;
19 and B is to examine the potential physical
20 dependence-producing properties of acetylaldehyde.

21 So put that in a framework that we can all
22 understand.

23 A. These just outlined a series of studies we
24 were doing with the nicotine acetylaldehyde
25 combinations, again to identify how nicotine and

1 acetylaldehyde interact to promote more
2 self-administration behavior on the part of the rat, to
3 determine whether there was a physical
4 dependence-producing effect or a withdrawal effect of
5 these combinations which was asked for by the company,
6 again, with the idea that this was very exciting data;
7 this was a very hot topic at the research center.

8 There was the great interest that, like the
9 analogs, this information could be used subsequently in
10 a product that would maintain or enhance smoking
11 behavior, you know, of a product.

12 Q. And Dr. Mele, then the next exhibit is
13 Plaintiffs' Exhibit 5447. Now, this apparently is
14 another article that you and Dr. De Noble did, the
15 title of which is: Nicotine as a Positive Reinforcer
16 for Rats: Effects of Infusion Dose and Fixed Ratio
17 Sizes.

18 So, first of all, tell us what that title
19 means and what the focus of the research was.

20 A. This covered some of the early
21 self-administration results with the rats. One of the
22 things you do, when you have animals self-administering
23 a drug, you want to know the effect of dose. Like any
24 drug, dose is critical. Too little doesn't do
25 anything; too much, it can be toxic or have adverse

1 effects. And somewhere in the middle is your optimal
2 dose.

3 So this was, again, one of the early studies
4 to try and determine which dose the rats liked the most
5 of nicotine, and to see how much responding we could
6 get out of them at that dose.

7 Fixed ratio size was a way to look at how
8 hard the rat would work to get the nicotine, how many
9 times would he press the lever to get one infusion.

10 Q. And was this article ever published?

11 A. This article ultimately evolved into one of
12 the other ones you showed me, the self-administration.
13 Again, this was accepted twice and retracted twice on
14 the --

15 Q. This was an earlier version of the exhibit we
16 discussed earlier?

17 A. Correct.

18 Q. Now, in terms of the next exhibit, I want to
19 know the relationship between these articles. This is
20 Plaintiffs' Exhibit Number 5462, and again, you and
21 Dr. De Noble are the authors, and the manuscript title
22 is: Influence of Behavioral Factors in the Development
23 of Tolerance to Nicotine.

24 Is this a different article or --

25 A. I would have to look at that. That would

1 probably be a summary of the one we've already talked
2 about.

3 Q. Okay. Just look at it and tell us what it
4 is.

5 A. Yeah. This is actually the summary that went
6 through internal review, that Jim Charles ultimately
7 said that we could not publish because it showed
8 nicotine to be a substance -- dependence-producing
9 substance.

10 Q. I'm not sure if I did this already.
11 Plaintiffs' Exhibit 5451, Nicotine Titration Hypothesis
12 Review, printed in Psychological Bulletin, dated June
13 6, 1983, from Dr. W. L. Dunn, who circulated it to a
14 number of people including yourself.

15 So why don't you take a look at that and tell
16 us what it is. (Handing)

17 A. Yeah. This is an article that appeared in
18 the Psychological Bulletin, one of the -- probably the
19 top journal then, and even now, on a lot of aspects of
20 behavior, including drug addiction.

21 Bill Dunn, early on, when I got there, as I
22 mentioned, as the head of the behavioral research unit,
23 he would regularly scour the literature, find relevant
24 articles, and circulate them around the research
25 center.

1 In this case, it looks like it went up to the
2 vice president, lawyer Max Hauserman, and all the
3 directors, Bill Farone, Osdene and those guys.

4 So, Dunn basically was circulating, on a
5 regular basis, articles, current literature on the
6 question of nicotine and addiction, and how it's being
7 studied, and the implications and that sort of thing.
8 So he was keeping people up with the latest scientific
9 results.

10 Q. Okay. Dr. Mele, when you testified last
11 week, you described for the jury an instance where the
12 president of Philip Morris came down from New York,
13 along with a lawyer for Philip Morris, to walk through
14 the lab and go through the laboratory.

15 Now, did there come a time when someone
16 from -- an executive from Philip Morris named Jim
17 Remington inspected the lab?

18 A. Yes. Mr. Jim Remington was -- he was located
19 in Richmond. His title was, I believe, director of
20 operation support.

21 There were three components in Richmond: the
22 research center, the operations center and the
23 manufacturing center. He was considered a VIP. You
24 know, he was talked about frequently, and one day Jim
25 Charles brought him into our lab for a private tour.

1 He saw the rats self-administering nicotine.
2 He got a quick discussion of what we were doing, and we
3 proceeded to have a discussion on -- Jim Charles was
4 trying to make some finer points, technical points, on
5 drug abuse, especially as it relates to cigarette
6 smoking and --

7 MR. HEIM Your Honor, before we proceed, may
8 we approach on this subject? I'm not sure where we're
9 going.

10 THE COURT: If you like.

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

13 MR. HEIM Your Honor, we've been all through
14 this lab closing the last time that Dr. Mele was here.
15 There was testimony about who visited and when.

16 I don't know who Mr. Remington is. I've
17 never even heard of him. So this is all new to me.
18 But without knowing who he is and where it's going,
19 what he's going to say about it --

20 MR. MOSS: Last time we were here and
21 Dr. Mele was here, Judge --

22 THE COURT: Let's see what else.

23 Richmond, director of operations, VIP, came
24 in for a view. Okay.

25 MR. HEIM He was considered a VIP. I don't

1 know who this person is. I've never heard any mention
2 of him in this lawsuit before.

3 MR. MOSS: See, one of the problems we have
4 is when Mele was here last time, Mr. Rosenblatt said:
5 I'm through with my direct. The only thing we have is
6 these documents. Your Honor, do you mind if Mr. --
7 whatever the guy's name was -- that's what we have
8 left.

9 THE COURT: Yes.

10 MR. MOSS: And we're going over substantially
11 everything that this man testified to, for a second
12 time.

13 THE COURT: All right. What document are we
14 talking about at this moment, or aren't we?

15 MR. ROSENBLATT: I'm not talking about a
16 particular document at this moment. I mean, although
17 Mr. Moss is correct, I said that, the reality is I'm
18 still on direct. I never said I, you know, turned it
19 over.

20 THE COURT: Okay. I don't have any problem
21 with him -- he's still on direct and he can get into
22 those areas if he wants to.

23 MR. ROSENBLATT: Remington made an admission
24 against interest.

25 THE COURT: Obviously, this Remington fellow

1 is in operations of Philip Morris.

2 MR. ROSENBLATT: Right.

3 MR. HEIM Well, I don't --

4 MR. ROSENBLATT: And Mele was -- he was
5 personally involved in the conversation.

6 MR. HEIM If this is going to go to legal
7 liability, if that's where we're heading with it, since
8 I have no idea where we're going, I would object on
9 that basis. If it's going somewhere else --

10 MR. MOSS: What is he going to say Remington
11 said?

12 MR. HEIM What is the admission?

13 THE COURT: I don't know yet.

14 MR. HEIM I would like to get some sense of
15 it before he says it, if it's something Your Honor has
16 already ruled on.

17 THE COURT: I assume he's going to say the
18 same thing that Dr. What's-his-name, the other one,
19 said.

20 MR. ROSENBLATT: No. This is a little
21 different.

22 THE COURT: This is different.

23 MR. ROSENBLATT: I'll tell you.

24 THE COURT: Tell me.

25 MR. ROSENBLATT: But not them

1 THE COURT: Don't listen.

2 MR. ROSENBLATT: Remington, at this
3 meeting -- there came up a discussion. They were
4 discussing this fine point, technical point, and
5 Remington blurted it out: Come on. We all know
6 nicotine is addictive. We all know nicotine is
7 addictive.

8 And he basically said: I'm addicted.
9 Remington himself. It was an admission against
10 interest.

11 MR. HEIM That's not an admission against
12 interest.

13 THE COURT: Well, "We all know nicotine is
14 addictive" may be; but "I'm addicted," may not be.

15 MR. ROSENBLATT: Fine. He will possibly say
16 that. That was part of the --

17 MR. MOSS: We all know it's not an admission
18 against interest. You've got to, number one, put this
19 man in a position of having the knowledge and
20 information; and secondly, speaking for the company as
21 opposed to himself.

22 Clearly, all you're hearing now is some guy
23 that says -- this is not an admission against interest,
24 Your Honor.

25 MR. HEIM And operations support, for all I

1 know, may be the computer people. Because I've never
2 heard of this guy.

3 THE COURT: What was he doing there? What
4 were they discussing at the time?

5 MR. ROSENBLATT: He was just a VIP, wanted to
6 go through the lab, see stuff. And he did, got an
7 inspection, which was very rare in the rat laboratory.
8 Only big shots got this kind of guided tour.

9 MR. HEIM But for him to say, "We all know,"
10 there is no basis for that.

11 MR. ROSENBLATT: Sure he has a basis for it.

12 THE COURT: Overrule the objection on that
13 first part, the first half. The second half, the
14 personal one, I will sustain the objection.

15 MR. MDSS: We object -- additional objection
16 is there's absolutely no foundation in weighing this
17 testimony. It is incredibly prejudicial and has no
18 real value. Other than that --

19 MR. HEIM Yes. The prejudice here for him
20 being able to say "we," as if everybody in the company
21 thought that, is I think substantial, Your Honor,
22 compared --

23 THE COURT: Well, I've ruled.

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

1 BY MR. ROSENBLATT:

2 Q. Okay. You were describing a situation where
3 Jim Remington was getting the VIP tour and where there
4 was a discussion. And what was the discussion about?

5 A. Well, again, we were giving him a tour of our
6 work and telling him what we did and what we felt it
7 meant, and Jim Charles was making some subtle point of
8 cigarette smoking as it relates to drug abuse, and Jim
9 Remington just stopped him in his tracks, interrupted
10 him, and said something to the effect of: We all know
11 it's addicting. It's addicting as hell.

12 MR. HEIM Objection, Your Honor.

13 THE COURT: Go ahead.

14 A. (Continuing) And he made an --

15 Q. Don't tell us what he said about his personal
16 situation. Just tell us what he said -- if he said
17 anything more generally on the subject of "We all know
18 it's addicting."

19 A. Well, again, he said: We know it's
20 addicting. It's addicting as hell. And our real
21 concern is stopping these antismoking people outside
22 the gates --

23 MR. HEIM Objection, Your Honor.

24 A. -- from making these kinds of arguments.

25 MR. HEIM Move to strike.

1 THE COURT: Overruled.

2 BY MR. ROSENBLATT:

3 Q. Now, you say Jim Remington was talked about
4 and he was getting the VIP tour. What was your
5 understanding of his position with Philip Morris?

6 A. Well, he was -- other than a high level
7 executive -- there are many of those -- we didn't see
8 many. Not many came to our lab. Those that they
9 brought in, they brought in for a reason, to try to
10 show them what we were doing.

11 MR. MDSS: Your Honor, may I suggest the
12 question was: What was Jim Remington?

13 THE COURT: Yes. Let's stick with the
14 question as closely as we can.

15 He was a high level person?

16 THE WITNESS: He was an example of one of the
17 few VIPs that came to the lab and got a direct tour and
18 discussion of what we did.

19 BY MR. ROSENBLATT:

20 Q. Okay. Now, when you gave testimony before
21 Congress in 1994, did anyone from Philip Morris
22 discount or impugn your research results?

23 MR. HEIM Your Honor, objection. We've been
24 through this on Tuesday.

25 MR. MDSS: Can we go sidebar?

1 THE COURT: Yes. We'll have to.

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

4 MR. HEIM Your Honor, my objection is, we
5 had a sidebar about this very topic, and we did
6 something out of the presence of the jury. Your Honor
7 considered a document and Your Honor considered a whole
8 subject.

9 MR. ROSENBLATT: This is different. I'm not
10 talking about that same document.

11 MR. HEIM Whether you're talking about the
12 document or not, the subject of his 1994 Congressional
13 testimony is irrelevant and the issue of impugning his
14 1994 testimony before as doubly irrelevant was
15 discussed and argued last Tuesday, and Your Honor said
16 it was not an appropriate area for examination.

17 So we go right back to the question of
18 impugning again. Whether it's in the context of the
19 document or not, it's not a proper area for testimony.

20 MR. MOSS: But it's even worse because
21 having -- you having ruled, we took it up sidebar, he
22 now blurts it out in front of the jury, something that
23 Your Honor said should not come in. Now he decides,
24 rather than come up here and say: I want to go into an
25 area --

1 THE COURT: You mean the whole area?

2 MR. MDSS: Of impugning.

3 THE COURT: The area of impugning or
4 Congressional testimony?

5 MR. MDSS: Both.

6 THE COURT: Look at it this way. I thought
7 he testified he went to Congress and testified, or was
8 that sidebar?

9 MR. MDSS: No, that was sidebar, Your Honor,
10 and we took it up because of the sensitivity. Your
11 Honor made the rulings.

12 Now Mr. Rosenblatt said it's a different
13 area. Whether it's a different area or not, the way to
14 handle it is not to just sneak something in in front of
15 the jury and the damage is done. That's where we are.

16 THE COURT: Let's see what he says.

17 MR. ROSENBLATT: My clear recollection of
18 what happened was Your Honor had made a ruling that if
19 someone contradicted his testimony, that was okay; we
20 could bring that out.

21 Then you looked at a document and you said:
22 Well, this document doesn't contradict.

23 So I'm not talking about that document. I'm
24 talking about specifically, while he was testifying in
25 front of Congress, Kathy Ellis, who was a muckety-muck

1 at Philip Morris, high up, impugned his research,
2 knocked his research.

3 And my understanding of what Your Honor said
4 last week was that that was okay, that area of
5 testimony was okay.

6 MR. HEIM No, no.

7 THE COURT: He said A, Kathy comes up before
8 Congress and says B --

9 MR. ROSENBLATT: I don't know if she came up
10 personally or she read from a statement they submitted,
11 but there was no question in his mind that some big
12 shot at Philip Morris was knocking his research:
13 It didn't really show that, this isn't so important.
14 That kind of thing.

15 MR. MDSS: Judge, we've got a couple of
16 problems here. He throws out the term "impugn" which
17 is improper. I think he should have come up here, but
18 Your Honor may disagree with me, before he brought that
19 up. Clearly at this point you need to voir dire this
20 witness and see where we're going here.

21 MR. HEIM We don't even have to get to that.
22 I believe that Your Honor ruled that the subject of the
23 1994 Congressional testimony was -- since he said
24 nothing new in 1994 in his Congressional testimony that
25 he didn't say here in this courtroom --

1 THE COURT: Here's the point. He said here
2 he tried to publish the documents, couldn't publish the
3 documents for whatever reason. But he went to Congress
4 and relayed the information to Congress, relayed
5 unpublished documents, basically is what happened,
6 correct?

7 MR. ROSENBLATT: Correct.

8 THE COURT: I don't see any problem with
9 that. Okay.

10 MR. HEIM But he already said that.

11 MR. MDSS: Already said that.

12 THE COURT: Now the question is: Well, in
13 making this presentation to Congress, did anybody from
14 the tobacco industry try to show or disparage, impugn
15 you or deny or object to the testimony that you were
16 giving?

17 MR. MDSS: But don't suppose -- I mean, let's
18 just take it --

19 THE COURT: Let's supposing the answer to
20 that -- we'll get to your point -- the answer is yes.

21 MR. MDSS: Suppose it's yes. What is the
22 relevance in this case? What is it --

23 THE COURT: I was going to do it the other
24 way. Suppose he said no and nobody objected? That
25 could be an admission by silence, is one thing.

1 The next thing is, suppose they said yes and
2 said: Your research is all wrong.

3 MR. MDSS: What is the relevance of that?

4 THE COURT: What is the relevance of that
5 testimony? Your research is wrong, your facts are
6 wrong.

7 MR. MDSS: Your research is wrong and you are
8 a goofball, a jerk or anything else.

9 MR. ROSENBLATT: Because they know it's not
10 wrong. They know it's not wrong, and their public
11 position is it's wrong.

12 THE COURT: The only time you get the
13 disparagement, or the condition you're talking about,
14 is an admission by silence; if you're accusing them of
15 committing some wrong and they sit there and don't say
16 anything. That would be something you could say they
17 didn't respond. But if they do respond, you've got a
18 problem

19 MR. ROSENBLATT: But --

20 THE COURT: I will sustain the objection.

21 MR. ROSENBLATT: Now, again, as I'm
22 understanding you at this sidebar, it's okay for me to
23 ask him if part of the subject matter of his testimony
24 before Congress was the result of the research that he
25 wasn't allowed to publish?

1 THE COURT: I don't have any problem with
2 that.

3 Where are you going to go?

4 MR. ROSENBLATT: That's it.

5 MR. MOSS: Whether that's it or not, what is
6 the relevance of that to this case, Your Honor?

7 THE COURT: To show that he felt that it was
8 important enough to get in front of the public, I
9 suppose.

10 MR. MOSS: But what is the relevance to this
11 case, sir? You can't, really -- it is not relevant
12 except to show he was before Congress. It is not.

13 MR. HEIM Gets to get some validation
14 because he was before Congress?

15 MR. ROSENBLATT: Goes to the issue of
16 credibility.

17 MR. MOSS: You can't go to credibility, Your
18 Honor, on your own witnesses on direct examination.

19 THE COURT: True.

20 MR. ROSENBLATT: Not the credibility of Paul
21 Mele; the credibility of the plaintiffs' position
22 vis-a-vis the defense position in this case.

23 THE COURT: Credibility of the defense
24 position vis-a-vis what?

25 MR. ROSENBLATT: The plaintiffs' position in

1 this case, our position being they knowingly lied.

2 THE COURT: I don't know if that's going to
3 do it.

4 MR. MDSS: Judge, this is after this case is
5 filed. I mean, we were in an area --

6 MR. ROSENBLATT: No, it's before. Oh, it's
7 before. The testimony was in April. The lawsuit was
8 filed in May of '94.

9 MR. MDSS: That's a month before.

10 THE COURT: So he goes and gives this
11 information to Congress, although the tobacco industry
12 will not let him, for reasons of proprietary interest,
13 produce it. Then he goes and gives it to Congress. In
14 his sense, so what?

15 MR. MDSS: Yeah, a big "so what."

16 THE COURT: The fact it was given to
17 Congress, what does it prove?

18 MR. ROSENBLATT: It proves Congress was
19 interested in it. It proves that he was right.

20 THE COURT: No, it doesn't. I'll sustain the
21 objection. It doesn't really have any relevance to the
22 issues here. It doesn't prove anything, the fact that
23 he went to Congress.

24 MR. MDSS: This was exactly what you ruled
25 before.

1 THE COURT: I don't know if it's exact.

2 MR. ROSENBLATT: It's not exact.

3 THE COURT: It's a little different.

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

6 BY MR. ROSENBLATT:

7 Q. Dr. Mele, and you described this last week,
8 at the time that you were notified in April of 1984
9 that your laboratory was to be closed, were the Shook
10 Hardy lawyers still in the laboratory visiting the
11 laboratory during that time frame?

12 A. Yes. They had come in mid '83 and were there
13 through the closing and even after the closing. So
14 they were there basically -- I mean off and on, they
15 would come and go. But they were a regular presence by
16 that time.

17 Q. Did anyone ever explain to you the reason for
18 that persistent, chronic lawyer involvement in a
19 scientific laboratory over a period of months?

20 MR. HEIM Object, Your Honor.

21 MR. MDSS: Your Honor, number one, we object
22 and ask you to instruct the jury.

23 THE COURT: I will sustain the objection as
24 to the descriptive words and ask you to rephrase.

25 The jury will disregard.

1 BY MR. ROSENBLATT:

2 Q. Did anyone ever explain to you what the
3 function or role was of the Philip Morris, Shook Hardy
4 lawyers in the laboratory over that extended period of
5 time?

6 A. Yes.

7 Q. And what were you told?

8 MR. MDSS: This is what you -- Your Honor,
9 sidebar.

10 THE COURT: Let's go sidebar.

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

13 MR. MDSS: Judge, you ruled on this. You
14 told them they couldn't do it last week.

15 THE COURT: Depends on what he's going to
16 say.

17 What are you talking about?

18 MR. HEIM What is he going to say?

19 MR. ROSENBLATT: I don't know.

20 THE COURT: You don't know what he's going to
21 say? Somebody said: Why are the lawyers here?

22 MR. ROSENBLATT: This is an admission
23 against --

24 THE COURT: First of all, who is the one that
25 made the statement?

1 A. He was two levels above me. He was
2 De Noble's superior. He was head of the biochemical
3 research division.

4 Q. Was anyone in a better position to know than
5 Jim Charles as to why the Shook, Hardy & Bacon lawyers
6 were in the rat laboratory over this extended period of
7 time?

8 MR. MDSS: We would object to that question,
9 but we know it's on voir dire. How does he know what
10 somebody else's state of mind would be?

11 THE COURT: Yes. He couldn't answer that
12 question.

13 That would be speculation on your part.

14 BY MR. ROSENBLATT:

15 Q. And while we're outside the presence of the
16 jury, I want to ask you this question:

17 Did any superior, in April of 1984 or any
18 time thereafter, during your employment with Philip
19 Marris, give you any more specific reason about why the
20 laboratory was closed with no gradual phase-out
21 program, other than that it was a business decision?

22 A. No. No.

23 MR. MDSS: Your Honor, that question has been
24 asked and answered.

25 THE COURT: That is repetitious, yes.

1 were the ones that would be defending the company in a
2 court case. And that we were to cooperate with them

3 Q. Do you know what a discovery request is?

4 A. Vaguely, finding information and --

5 Q. One side is allowed to ask the other for
6 documents, and then you have to go and see whether
7 there are documents that are responsive to the request
8 that was made.

9 Does that refresh your recollection at all as
10 to what the purpose of the Shook Hardy lawyers was?

11 A. We didn't get into legal maneuvering or
12 strategy, so in terms of that specifically, no.

13 Q. You don't remember that?

14 A. No. I don't remember the issue of discovery
15 specifically ever being raised, other than they clearly
16 looked through everything we had.

17 MR. HEIM Okay. That's all.

18 THE COURT: Okay. Do you want to discuss the
19 statement again?

20 MR. HEIM Yes, sir.

21 THE COURT: I think we can do it in the
22 presence -- it's either allow it or not. Do you still
23 object to the statement?

24 MR. HEIM Your Honor, my view is that this
25 whole area ought to be out of bounds and stricken. I

1 think this whole area, because of the company defending
2 itself and in there looking at documents, I just think
3 it should be out of bounds.

4 THE COURT: Well, you know, there's again, a
5 ying-yang situation here.

6 MR. HEIM I know there is.

7 THE COURT: I don't of necessity feel it's
8 appropriate to talk about the Cippolone case, because I
9 don't think it has anything to do with it. The fact
10 that they were there on official business, that's okay;
11 I have no problem with that. They weren't there out of
12 curiosity. It explains why they're there.

13 MR. HEIM The problem I have -- and I don't
14 mind Dr. Mele saying this -- the problem I have is the
15 presence of the Shook Hardy lawyers has been raised and
16 now it's before the jury. God knows what they think.

17 THE COURT: That's what I say. It's better,
18 "They were there because there was some official
19 business that they were conducting," than to leave it
20 up in the air and it's a "Why were they there?"

21 MR. HEIM But I know why they were there.
22 They were there to collect documents.

23 THE COURT: I'll sustain the objection if
24 that's why they were there.

25 MR. MOSS: But the problem is, I think the

1 jury needs to be instructed that the testimony relating
2 to the presence of the lawyers should be disregarded.
3 It's not relevant to anything they have to decide.

4 THE COURT: No. I think in this case it
5 might be.

6 MR. ROSENBLATT: He was told something by Jim
7 Charles, his superior two steps above. The most
8 natural question in the world was: If it is as
9 Mr. Heim said, that would have been the most
10 innocent thing in the world. These guys are here
11 responding to lawsuits. That was not said. What was
12 said to him --

13 MR. HEIM No, no.

14 MR. MDSS: Let's excuse the witness, then,
15 please, because I don't think we should be arguing.

16 THE COURT: Why don't you step outside. We
17 don't want to affect your testimony, sir. I'm not sure
18 we would, but that's the fear.

19 (The witness exited the courtroom.)

20 MR. ROSENBLATT: What was said to him by Jim
21 Charles, very succinctly and very clearly, was:
22 They're here because of litigation concerns about other
23 lawsuits.

24 And I think he should be permitted to say
25 that.

1 THE COURT: What has the Cippolone case got
2 to --

3 MR. ROSENBLATT: He doesn't have to mention
4 Cippolone.

5 THE COURT: So he was here regarding pending
6 litigation. That's perfectly normal and natural, what
7 a lawyer does.

8 MR. MDSS: But, Your Honor, if they're here
9 because of litigation, what is the relevance of that to
10 things this jury --

11 THE COURT: Because that may be the very
12 reason why they have to shut it down, rather than any
13 other reason.

14 MR. ROSENBLATT: And that's the inference we
15 will argue; that that's precisely the reason the lab
16 was closed.

17 THE COURT: There were two reasons: to shut
18 the lab down, or maybe three or four, one of which
19 would be that maybe pending litigation requires it. I
20 don't know.

21 MR. MDSS: But that testimony is already in
22 there. There is no relevance and there cannot be any
23 such conclusion reached because a law firm is there.

24 THE COURT: All right. As far as I'm
25 concerned, you can leave the issue up in the air and

1 let the jury draw its own conclusions. Sustain the
2 objection. All right?

3 Bring the witness back.

4 MR. ROSENBLATT: But then --

5 THE COURT: Okay.

6 MR. ROSENBLATT: No, but then do I understand
7 that if you are sustaining the objection, they would
8 not be permitted on cross to go into: Well, they were
9 there complying with discovery requests?

10 THE COURT: Right.

11 MR. MDSS: Right?

12 MR. HEIM Wait a minute, Your Honor.

13 MR. MDSS: You've allowed the testimony, his
14 testimony.

15 THE COURT: No. I said no. I'm sustaining
16 your objection. You don't want to talk about why they
17 were there, what Charles said to them, and all that.

18 Bring the jury back in.

19 MR. MDSS: What came in last week, Your
20 Honor --

21 MR. ROSENBLATT: If you're sustaining the
22 objection, I'll just announce --

23 THE COURT: All right.

24 MR. HEIM Well, Your Honor -- are you
25 finished, Stanley?

1 MR. ROSENBLATT: Unless I can think of a
2 closing question.

3 THE CLERK: You want me to get the witness?

4 THE COURT: Yes, bring him out.

5 MR. HEIM Your Honor, do you want to take
6 the morning recess at this point?

7 THE COURT: Hold them because they're going
8 to --

9 (Witness entered the courtroom)

10 THE COURT: If you need a break, if you
11 really need one.

12 MR. ROSENBLATT: Fine.

13 THE COURT: How much more time are you going
14 to be?

15 MR. ROSENBLATT: I may have two questions.

16 THE COURT: Let's finish that.

17 All right. Get the jury back in. Bring them
18 in.

19 (The jurors entered the courtroom)

20 THE COURT: All right. Have a seat.

21 DIRECT EXAMINATION (Continued)

22 BY MR. ROSENBLATT:

23 Q. Dr. Mele, since leaving the employ of Philip
24 Marris in December of 1984, for the past 14 years
25 you've been employed by the Department of Defense; is

1 that correct?

2 A. Correct. Beginning in 1985.

3 Q. And this is the first case involving your
4 former employer, Philip Morris, where you have given
5 testimony; is that correct?

6 A. That's correct.

7 MR. ROSENBLATT: Thank you very much.

8 THE COURT: Okay. Now you want to go into
9 cross? Are you going to be long on cross?

10 MR. HEIM I think we will be a while.

11 THE COURT: How about a lunch break? Do you
12 want to take a lunch break if it's going to be a while?

13 We will take a lunch break and come back here
14 at 1:30. All right. 1:30, folks. Same rules.

15 (The jurors exited the courtroom)

16 THE COURT: Okay. You're on the witness
17 stand, sir, so you must not discuss your testimony with
18 anybody, including the lawyers. You may have lunch
19 with whoever you wish, talk about anything in the
20 world. Lots to talk about this week. But not this
21 case. Okay?

22 THE WITNESS: Understood.

23 THE COURT: Okay. 1:30.

24 (A lunch recess was taken at 12 Noon.)

25