

NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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 In the matter of the Arbitration :
 between: :
 :
 GRAND RIVER ENTERPRISES SIX NATIONS LTD., :
 et al., :
 :
 Claimants/Investors, :
 :
 and :
 :
 UNITED STATES OF AMERICA, :
 :
 Respondent/Party. :
 - - - - - x Volume 4

HEARING ON THE MERITS

Thursday, February 4, 2010

The World Bank
 1818 H Street, N.W.
 MC Building
 Conference Room 4-800
 Washington, D.C.

The Hearing in the above-entitled matter came
 on, pursuant to notice, at 9:00 a.m. before:

MR. FALI S. NARIMAN, President

PROF. JAMES ANAYA, Arbitrator

MR. JOHN R. COOK, Arbitrator

Also Present:

MS. KATIA YANNACA-SMALL,
Secretary to the Tribunal

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1	ARBITRATOR CROOK: This is just another
2	copy of what we have?
3	MR. LUDDY: Yes, just for convenience.
4	ARBITRATOR CROOK: Thank you, sir.
5	(Discussion off microphone.)
6	PRESIDENT NARIMAN: Is this the
7	witness?
8	MR. LUDDY: Yes.
9	PRESIDENT NARIMAN: Sorry to disturb
09:06:33 10	you but would you go outside for a minute.
11	Now, I request counsel on both sides to
12	please pay attention to what I'm saying at the
13	moment, and this is what the Tribunal would like
14	to convey.
15	The Tribunal is concerned about
16	documents that would be relevant or may be
17	relevant but for one reason or another have not
18	been made available to Claimants or for any other
19	reason cannot be used in this proceeding.
09:07:32 20	The Tribunal has so far understood
21	that, at different times, references have been
22	made to three broad groups of documents. First,

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P R O C E E D I N G S	
1	PRESIDENT NARIMAN: What are we doing
2	today, Mr. Luddy?
3	MR. LUDDY: We're starting with
4	Professor Gruber, who's witness for Respondent.
5	Then I believe we take Arthur Montour out of turn
6	because we're joined here today with his counsel
7	in the Seattle matter who will appear in the
8	matter, and Mr. Calfo has to be back in Seattle
09:04:33 9	for a court appearance tomorrow so we want to get
10	him on his flight.
11	Then after that, Mr. DeLange, who is
12	New Mexico's Assistant AG, will be cross-examined.
13	And then I don't really know where that will leave
14	us at the end of the day.
15	PRESIDENT NARIMAN: So can we begin?
16	Mr. Feldman, can we begin?
17	MR. FELDMAN: Yes.
18	MR. LUDDY: Housekeeping. I've already
09:05:09 19	provided these to -- this is just some
20	supplemental core documents for the record.
21	(Discussion off microphone.)
22	

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1	documents being generated in connection with
2	arbitration proceedings between states and tobacco
3	companies.
4	Second, documents that have been
5	produced in the litigation between Grand River and
6	31 attorneys general and for some reason, which
7	remains undisclosed, cannot be made available in
8	this proceeding.
9	And third, another group of documents
09:08:40 10	which are believed by Claimants to be relevant in
11	this proceeding, such as those in relation to what
12	has been described as the Grand River Working
13	Group.
14	The Tribunal would request counsel on
15	both sides to address these issues at some time
16	before the end of next Friday. Thanks.
17	Now proceed.
18	MR. LUDDY: Thank you, your Honor.
19	Shall I get Jonathan?
09:09:21 20	MS. CATE: I'll get him.
21	MR. LUDDY: Professor Jonathan Gruber,
22	who is an economist.

1 PRESIDENT NARIMAN: Sorry that we had
 2 to --
 3 THE WITNESS: That's okay.
 4 PRESIDENT NARIMAN: Mr. Feldman?
 5 MR. LUDDY: This is going to be closed.
 6 Yes, the whole cross is going to be closed.
 7 PRESIDENT NARIMAN: Gruber is witness
 8 for the Respondent?
 9 MR. FELDMAN: Yes.
 09:11:14 10 PRESIDENT NARIMAN: And you're
 11 requesting the proceedings is closed?
 12 MR. LUDDY: Yes -- well, there's some
 13 confidentiality constraints with respect to some
 14 of the documents that we're putting in. None of
 15 it is confidential as to GRE but I have
 16 obligations under court order to do so.
 17 MR. VIOLI: We don't mind it being
 18 open. It's Respondent's restriction, not ours.
 19 PRESIDENT NARIMAN: It's agreed.
 09:11:45 20 MR. LUDDY: It's agreed.
 21 MR. KOVAR: Mr. President, I just want
 22 to be clear that it's not the United States that

1 strict view on the confidentiality of many of
 2 their presentations.
 3 So, one way or the other we would be
 4 happy to sit down with the Claimants and make
 5 virtually the entire record in this case
 6 releasable and maybe we can try. Thanks very
 7 much.
 8 PRESIDENT NARIMAN: At the moment it's
 9 closed.
 09:13:17 10 MR. LUDDY: Correct.
 11 MR. FELDMAN: Mr. President, I would
 12 add to that, that the cross-examination of
 13 Professor Gruber will involve four documents
 14 from -- excerpts from the significant factor
 15 hearing.
 16 PRESIDENT NARIMAN: What was that?
 17 MR. FELDMAN: The significant factor
 18 hearing will Mr. Luddy will discuss on
 19 cross-examination.
 09:13:41 20 And those documents we have negotiated
 21 with the Claimants a side letter, those are
 22 subject to confidentiality protection in New York

1 has made most of the documents in this case
 2 confidential. It's the Claimants. Thank you.
 3 MR. LUDDY: Excuse me. What do you
 4 mean most of the documents in this case?
 5 The only thing we requested
 6 confidentiality with was with respect to
 7 proprietary GRE and NWS financial information.
 8 That is by far not most of the documents in this
 9 case.
 09:12:16 10 The documents that are confidential in
 11 this matter are because they have been --
 12 confidentiality has been requested by the states
 13 not through the State Department but the states.
 14 So, as far as I'm concerned, we could do this out
 15 on the street, this particular cross-examination.
 16 MR. KOVAR: Mr. Chairman, if you'll
 17 notice that there are quite a number of documents
 18 that are in the Claimants' pleadings, various
 19 submissions in evidence that have been marked
 09:12:47 20 confidential and we would be happy to make
 21 virtually everything in this case open and not
 22 confidential but the Claimants have taken a pretty

1 court. And so for those reasons the
 2 confidentiality interest of the OPMS together with
 3 the side letter that we've executed with the
 4 Claimants, given those concerns, we also have
 5 equities in ensuring that the discussion of those
 6 four documents are closed in this proceeding.
 7 MR. VIOLI: Just so that it's clear,
 8 these four documents do not belong to Claimants.
 9 These four documents were agreed -- they asked us
 09:14:18 10 if we were going to use them in this case, we had
 11 to use them under their confidentiality
 12 requirement. We said fine. They're not documents
 13 we believe are confidential, should be made
 14 confidential. The people who have produced it
 15 demanded that they be made confidential and we
 16 agreed, otherwise we wouldn't be able to show them
 17 to you.
 18 However, there are more documents that
 19 we haven't even seen yet which we would agree to
 09:14:43 20 have put them under confidentiality but they still
 21 did not produce them to us.
 22 So this is a very small subset of the

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1 documents you were mentioning earlier,
2 Mr. Chairman. And the only way we could use these
3 four that they gave us was to enter into this
4 confidentiality requirement that he stipulated to.

5 MR. FELDMAN: The confidentiality
6 interest at issue in these four documents are the
7 interest of the OPMS. We're protect being the
8 confidentiality interests.

9 MR. LUDDY: I'm not entirely sure
09:15:12 10 that's correct.

11 I agree that the OPMS have expressed an
12 interest in confidentiality. It's my
13 understanding that your representative -- that
14 your states have also expressed on interest in the
15 confidentiality.

16 MR. KOVAR: Mr. Chairman, we will get
17 into this more. You asked for more clarification
18 about some of the things that I called wild
19 allegations yesterday which we will provide later.
09:15:35 20 We're still working up some detailed information
21 about this proceeding.

22 But these particular documents they're

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1 confidentiality and other things attached to that.

2 So basically if all these different
3 proceedings with different confidentiality rules,
4 and when people try to bring documents from one to
5 the other, it's not always that easy. So we're
6 trying our best -- we're trying our best and we
7 can talk about that more later. But I just wanted
8 to give you a little background on that. Thank
9 you.

09:17:10 10 MR. LUDDY: The parties will make full
11 submission.

12 PRESIDENT NARIMAN: All right. You
13 may. But, you see, I just want to point to you a
14 little, you may reserve ten-minute segment of your
15 closing arguments on this.

16 How should the Tribunal deal, if at
17 all, with these documents if they are found
18 necessary? I mean if they are confidential then
19 surely we cannot deal with them either. So that's
09:17:36 20 a conundrum which I would request both of you to
21 please consider and address. Just don't fire off
22 anything just now. That's very important because

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1 talking about have been produced in litigation
2 between tobacco companies that are not in this
3 proceeding and the states and the U.S. Federal
4 Court. They have some protections attached to
5 them by that court. It has nothing to do with the
6 Department of State. It has nothing to do with
7 Claimants. And it has nothing to do with this
8 proceeding.

9 We're obliged by the U.S. District
09:16:08 10 Court to make sure that our use of those documents
11 in this proceeding remain confidential. So we
12 worked out with the Claimants a confidentiality
13 agreement to make sure that we could then assure
14 the court in New York that they would be kept
15 confidential.

16 And as you know, because there's a
17 number of documents in this proceeding which are
18 confidential, those are not allowed to be used in
19 other proceedings. And it's quite common for
09:16:37 20 proceedings involving the Claimants, whether in
21 state court or in Federal Court or in arbitration,
22 to have various confidentiality -- business

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1 we must know this.

2 And I would request Mr. Kovar and you,
3 Mr. Luddy, that if you can get together and just
4 give us which amongst the core bundle in your
5 bundle which in the core bundle of the Claimants
6 and Respondent, which cannot be disclosed. So
7 we'll write ND or something like that, not
8 disclosed so that we know -- this sort of vague
9 idea of some documents can be disclosed, some
09:18:10 10 documents cannot be, at the end of the day we'll
11 find it very difficult to assimilate.

12 So if you can, if you don't mind, give
13 us a list of those documents on which you are
14 agreed that we could deal with them by agreement
15 between you, or that they cannot be disclosed.
16 All right. But at least we must know where we
17 stand. Thank you.

18 MR. LUDDY: We will do that. Thank
19 you, Mr. Chairman.

09:18:33 20 MR. FELDMAN: Thank you.

21 PRESIDENT NARIMAN: Proceed.

22 (End of open session. Confidential

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1 business information redacted.)
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1 1997, 1998 when I led an interagency
 2 team to evaluate the original agreement between
 3 the tobacco manufacturers in the states and then
 4 worked with the senate, particularly Senator
 5 McCain, to try draft comprehensive tobacco
 6 legislation which ultimately did not pass.
 7 Upon returning to MIT in 1998 I then
 8 wrote a series of research articles on
 9 tobacco-related matters, and then over the past
 09:19:39 10 decade have testified in numerous tobacco-related
 11 matters, in particular working on the significant
 12 factor proceedings and in a number of state cases
 13 brought by NPMs against the Master Settlement
 14 Agreement.
 15 MR. FELDMAN: Thank you, Professor
 16 Gruber.
 17 CROSS-EXAMINATION
 18 BY MR. ROBINSON:
 19 Q. When did you first get involved with
 09:20:01 20 the Master Settlement Agreement itself?
 21 A. Well, I mean I started doing research
 22 on the Master Settlement Agreement itself shortly

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1 CONFIDENTIAL SESSION
 2 DIRECT EXAMINATION
 3 BY MR. FELDMAN:
 4 Q. Professor Gruber, thank you for
 5 appearing today.
 6 Could you please state your full name
 7 for the record?
 8 A. Jonathan Gruber.
 9 Q. And what is your current position?
 09:18:45 10 A. I'm a professor of economics at MIT.
 11 Q. And could you please summarize your
 12 educational background?
 13 A. I have a bachelor of science from MIT
 14 and a Ph.D. from Harvard University.
 15 Q. Did you prepare two expert reports in
 16 this case?
 17 A. Yes, I did.
 18 Q. And could you please summarize your
 19 relevant experience?
 09:19:03 20 A. I -- my experience working on tobacco
 21 matters began when I was working in the Treasury
 22 Department in 1998.

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1 after it was signed, understanding it. And so
 2 from a research perspective, pretty shortly after
 3 it was signed and then from a testimony
 4 perspective in or around 2001 or -- 2001 perhaps I
 5 started talking to states about the significant
 6 factor proceedings.
 7 Q. 2001?
 8 A. Yeah. I don't remember the exact date.
 9 Q. Okay. Before we get to the significant
 09:20:31 10 factor proceedings, can you describe for me or
 11 identify for me the other MSA-related litigation
 12 you have been involved with as an expert?
 13 A. Certainly. So I've been involved in
 14 the significant factor proceedings and I've been
 15 involved in a number of state cases that were
 16 brought by NPMs against the MSA, against the
 17 Master Settlement Agreement.
 18 Q. About how many of those?
 19 A. I don't know, maybe six.
 09:21:02 20 Q. Okay. And in each of those you were
 21 representing the interests of the settling states,
 22 correct?

1 A. Yes, that's correct.

2 Q. And in testifying adverse to the
3 parties claiming -- making claims against the
4 settling states, correct?

5 A. That's correct.

6 Q. Now, the significant factor proceedings
7 that we've been talking about, these are the
8 arbitration proceedings between the participating
9 manufacturers and the settling states under the
09:21:34 10 MSA?

11 A. Say that one more time.

12 Q. Withdrawn.

13 Tell me what the significant factor
14 proceedings are.

15 A. Well, in the MSA there was something
16 called a novitus paying manufacturer adjustment to
17 the payments that the OPMS had to make under the
18 MSA and that was an adjustment that would reduce
19 their payments were it found -- well, would reduce
09:21:57 20 their payments if non-participating manufacturers
21 grew to be too much of the market and it was found
22 that the MSA was significant factor causing that

1 A. Well, if they lost more than two
2 percent of the market share, that triggered the
3 proceeding.

4 Q. Right.

5 A. The proceeding was about whether that
6 was -- whether the MSA was a significant factor in
7 causing that two percent or more decline.

8 Q. Okay. Whether the MSA was a
9 significant factor as opposed to something else
09:23:14 10 such as, for instance, the actions of the PMs
11 themselves, correct?

12 A. Correct.

13 Q. And what position did the settling
14 states take in that action with respect to the
15 reason for the loss of the PM -- participating
16 manufacturers market share?

17 A. Well, the position of the settling
18 states was that there were a number of reasons for
19 that loss, but that the MSA was not -- did not
09:23:40 20 cause significantly more than two percent of that
21 loss.

22 Q. Okay. How much market share did the

1 growth. So significant factor proceedings were
2 really about trying to evaluate that aspect of the
3 MSA.

4 PRESIDENT NARIMAN: Which clause was
5 that?

6 THE WITNESS: The NPMs adjustment, the
7 non-participating manufacturer adjustment. Yes.

8 There's a lot of acronyms, so if you're
9 not clear, let me know.

09:22:23 10 Q. Was there a specific standard -- a
11 specific number market share that was implicated
12 in terms of NPMs growth or PM market share loss?

13 A. Yes. So basically if the NPMs grew to
14 be more than two percent of the market, that
15 triggered this NPM adjustment proceeding in
16 arbitration.

17 Q. Okay. Was it if the NPMs grew to be
18 more than two percent or if the PMs lost more than
19 two percent of their market share?

09:22:52 20 A. You're right. It's if the PMs lost two
21 percent of the market share.

22 Q. Okay. As a result of the MSA?

1 PMs lose as of the first significant factor
2 proceeding, which I think was 2003?

3 A. I don't remember exactly, but it was
4 between six and eight percent.

5 Q. Between six and eight?

6 A. Yeah. I don't remember exactly.

7 Q. And the settling states in that
8 significant factor proceeding attributed a
9 significant amount, at minimum, of that loss of
09:24:13 10 market share to the fact that the participating
11 manufacturers, and particularly the original
12 participating manufacturers had significantly
13 increased their prices beyond the amount needed to
14 cover MSA costs and that that had left
15 opportunities in the discount section, correct?

16 A. You have to start again. I --

17 Q. I'll restate it.

18 In identifying -- it was incumbent upon
19 the states in the significant factor proceedings
09:24:42 20 to try to explain why the OPMS lost six, seven,
21 eight, whatever the number was, market share in
22 the 2003 significant factor proceedings, correct?

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1 A. That actually was not our position.
 2 Our position was it was incumbent upon
 3 the OPMs to prove that the MSA had caused them to
 4 lose it.
 5 Q. Okay.
 6 A. This is the art of -- there was a
 7 burden of proof dispute between us and the OPMs.
 8 Q. Okay. Right. And the OPMs took a
 9 position, but in refuting their position, the
 09:25:08 10 states put forward explanations why for the OPMs
 11 lost market share, correct?
 12 A. That's correct.
 13 Q. And one of the reasons they put forth
 14 was that the OPMs had raised their prices by a
 15 multiple of the amount required to cover MSA
 16 costs, correct?
 17 A. Correct.
 18 Q. Is that topic discussed at all in any
 19 of your reports in this matter, the fact that the
 09:25:33 20 PMs lost market share to the NPMs because the PMs
 21 had raised their prices by a multiple of the
 22 amount required to cover MSA cost?

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1 were set up, what the procedure was, what your
 2 involvement was?
 3 A. So basically what happened was, there
 4 was an arbitrator who was for the first three
 5 years Dan McFadden, an economist at Berkley, and
 6 we and the OPMs -- well, each set of experts
 7 submitted --
 8 PRESIDENT NARIMAN: Who's this we?
 9 THE WITNESS: I'm sorry. I did my work
 09:27:04 10 with another economist named Robert Pendyke.
 11 PRESIDENT NARIMAN: Who's we?
 12 THE WITNESS: Okay. Let me start over
 13 because I don't know where I used we.
 14 So the way the proceeding was set up,
 15 there was an arbitrator. And there were initial
 16 expert reports produced by the states which was
 17 consistent expert report of myself and another
 18 economist Robert Pendyke. And then there were
 19 several different expert reports produced by the
 09:27:30 20 OPMs for their side.
 21 Those reports went to the arbitrator.
 22 The arbitrator then came back with a set of

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1 A. I don't think so, no.
 2 Q. Now, how many significant factor
 3 proceedings were there?
 4 A. There were -- I believe there were --
 5 there was one in 2003, one in 2004. For 2005 I
 6 believe the states and the OPMs agreed to just not
 7 have a proceeding and go right to 2006, which I
 8 believe was the last one.
 9 Q. Okay. And you were involved in each of
 09:26:14 10 them?
 11 A. No. I was only involved in the
 12 first -- I was involved in the first two and the
 13 discussions over what to do on the third one. I
 14 was really -- I was a little bit involved in the
 15 fourth one, but only very tangentially.
 16 Q. Okay. So 2003 and 2004 were the ones
 17 that you were particularly involved in?
 18 A. Yes, that's right.
 19 Q. Let's focus a minute on 2003, then
 09:26:33 20 we'll go to 2004.
 21 Can you tell the Tribunal
 22 approximately, you know, how these arbitrations

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1 questions to each of us that we then had to
 2 answer. And then there was a day-long sort of
 3 they call it an interview where basically it was
 4 sort of like this, sort of a hearing in front of
 5 the arbitrator and then the arbitrator issued a
 6 decision and then we could sort of -- a
 7 preliminary decision. We could then comment on
 8 that preliminary decision and then a final
 9 decision was issued.
 09:27:58 10 Q. Okay. And who is Daniel McFadden?
 11 A. He's the economist -- the Nobel prize
 12 winning economist at Berkley.
 13 Q. Okay.
 14 PRESIDENT NARIMAN: What's his name?
 15 THE WITNESS: Daniel McFadden.
 16 Q. Now, also in connection with this, the
 17 OPMs produced a substantial amount of econometric
 18 data concerning their participation in the tobacco
 19 market, did they not?
 09:28:21 20 A. Yes.
 21 Q. Can you tell us what they produced?
 22 A. The tobacco companies produced in

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1 particular a set of what's called scanner data
 2 which is basically when people buy their -- it's
 3 basically, you know, you scan the UPC code when
 4 you buy cigarettes, it basically is that database
 5 for a sample of sales of information on what
 6 cigarettes people buy over -- you know, for a
 7 large sample of cigarette purchases. And we use
 8 that to sort of develop econometric demand models
 9 of cigarette purchases.

09:28:57 10 Q. And they also produced a significant
 11 amount of data that had been provided to the FTC
 12 by the major tobacco companies, did they not?
 13 A. Yes. They produced some information.
 14 I don't remember how much. I'm having trouble
 15 remembering what. But they produced some
 16 information on their advertising expenditures.
 17 There was sort of -- I don't remember
 18 what was publicly available for the FTC and what
 19 we got from them, per se, but we got breakdowns of
 09:29:29 20 different kinds of advertising expenditures.
 21 Q. And they produced some internal
 22 business strategy documents?

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1 Q. Was any of that document -- and that
 2 document, I take it, was provided to you in your
 3 capacity as a representative of the settling
 4 states in the significant factor proceedings,
 5 correct?
 6 A. Well, it wasn't provide today me.
 7 There was a huge confidentiality procedure where
 8 it was sort of kept in a lock room and analyzed
 9 under certain conditions, but it was -- certainly
 09:30:59 10 our team relied on that data for our analysis.
 11 Q. Right. And you were permitted to see
 12 it as a representative of the settling states,
 13 correct?
 14 A. Yes.
 15 Q. Okay. Do you know whether any of that
 16 econometric data has been made available in this
 17 proceeding?
 18 A. No, I don't.
 19 Q. Do you know whether any of that
 09:31:19 20 econometric data was made available to Grand River
 21 in the Antitrust action in New York?
 22 A. No, I don't.

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1 A. Yes, they did.
 2 Q. And all of those materials that the
 3 major tobacco manufacturers produced concerned the
 4 domestic tobacco market after the MSA was signed
 5 in 1998, correct?
 6 A. No. I mean some was before.
 7 Q. Thank you. Some was before, but some
 8 of it addressed how the domestic cigarette
 9 manufacturer -- industry operated after the MSA,
 09:30:06 10 correct?
 11 A. Yes.
 12 Q. And that information was the --
 13 essentially the econometric data that you and
 14 Professor Pendyke used to prepare your opinions in
 15 the significant factor proceedings, correct?
 16 A. That's part of what we relied on to
 17 prepare opinions, yes.
 18 Q. Okay. And that econometric data was
 19 very valuable to you and Professor Pendyke in
 09:30:32 20 analyzing the state of the domestic tobacco market
 21 after the MSA, wasn't it?
 22 A. Yes.

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1 Q. Do you remember Dr. Eisenstadt
 2 complaining -- noting in his reports in the
 3 antitrust matter that he had not been permitted
 4 access to the underlying econometric data that you
 5 and Professor Pendyke had used in the significant
 6 factor proceeding?
 7 A. No, I don't remember that.
 8 Q. Do you agree that it would have been
 9 helpful to Dr. Eisenstadt in assessing the impact
 09:31:52 10 of the MSA on the NPMs and others in the tobacco
 11 industry to have had access to the underlying
 12 econometric data you and Professor Pendyke had in
 13 the significant factor proceedings?
 14 A. I mean, you know, more data is always
 15 better but it's not clear as I think through what
 16 Professor Eisenstadt was writing about in his
 17 report, it's not clear why it would have really
 18 helped what he wrote about, but, you know, sure,
 19 more data is always better.
 20 Q. Well, he couldn't write about some of
 21 the things that he wanted to write about without
 22 the econometric data; isn't that correct?

1 A. I don't know what he -- I couldn't read
2 his mind. I didn't know what he wanted to write
3 about that he couldn't write about without the
4 data.
5 Q. Fair enough.
6 And what did the Brown Group
7 conclude -- can you identify the Brown Group?
8 A. Sure. So the -- one thing I didn't
9 clarify. So Professor McFadden was supported by a
09:32:48 10 team of -- a support group called the Braddle
11 Group, a consulting firm that sort of provided the
12 support to him to analyze and develop his opinion.
13 Q. And what did the Braddle Group
14 conclude -- withdrawn.
15 We've been through the 2003 proceeding.
16 Did the 2004 proceeding differ at all from the
17 2003 proceeding?
18 A. The basic structure was the same. Our
19 reports were a bit briefer because a lot of the
09:33:20 20 issues had been -- it was the same arbitrator. A
21 lot of the issues were just getting relitigated.
22 So our submission was shorter but the basic

1 Their argument was that the MSA raised
2 the marginal costs of the OPMS relative to other
3 participants in the market. So therefore, it
4 caused them to have to raise their prices
5 accordingly because their marginal costs were
6 higher and, therefore, their relative price ratio
7 was higher and so people shifted to other tobacco
8 products that weren't part of the MSA.
9 Q. Okay. And what did the other class of
09:35:32 10 manufacturers they compared themselves to in that
11 regard was the non-participating manufacturers,
12 correct?
13 A. Yes.
14 Q. And it was the settling states'
15 position in the significant factor proceedings
16 that the NPMs did not have as significant an
17 advantage of the OPMS argued, correct?
18 A. I don't -- I don't -- you have to
19 clarify that.
09:35:58 20 Q. Well, the OPMS were arguing that their
21 market share was lost in part because of the -- a
22 perceived advantage that the NPMs had in the

1 procedure was the same.
2 Q. Do you know if any of the reports that
3 you and Professor Pendyke authored in the 2004
4 significant factor proceedings were provided to
5 Grand River Enterprises in the New York antitrust
6 matter?
7 A. I don't know.
8 Q. Do you know whether they've been
9 provided to the State Department or produced in
09:33:45 10 this matter?
11 A. I don't know.
12 Q. Okay. If you can return to -- strike
13 that.
14 In trying to show in the significant
15 factor proceedings that its loss of six, seven,
16 eight percent, whatever the exact number is, and
17 you can find that later, in trying to show their
18 loss of six, seven, eight percent market share was
19 caused by the MSA, to what issues did the OPMS
09:34:52 20 point in the significant factor proceedings? What
21 was their argument?
22 A. What was their argument.

1 marketplace, correct?
2 A. Yes.
3 Q. Okay. And part of the states' argument
4 was to diminish that argument, right? They did
5 not agree that the NPMs had as big an advantage in
6 the marketplace as the OPMS argued, correct?
7 A. Again, I guess the way I'd put it is
8 that basically we disagreed about the extent to
9 which that six to eight percent decline in the PM
09:36:37 10 share was due to the MSA versus other factors.
11 Q. All right. I'll come back to that.
12 Can you go to Core Document 53.
13 Paragraph 3.
14 In -- just to set this up.
15 PRESIDENT NARIMAN: This is the core
16 bundle report?
17 MR. LUDDY: Correct.
18 Q. Just to set this up, we're going to be
19 talking about an E and D analysis. And so the
09:38:11 20 record is clear, that's the initial report
21 submitted by the experts for Claimants,
22 Drs. Eisenstadt and Dalkir, correct?

1 A. Yes, that's right.

2 Q. Okay. And then later we'll get to a
3 rebuttal report or reply report that was done -- I
4 think submitted solely under the name of
5 Dr. Eisenstadt?

6 A. That's correct.

7 Q. And in Paragraph 3, you criticized the
8 E and D analysis and you state, second full
9 sentence, I'll read it, In fact, as I discussed at
09:38:56 10 length in my earlier report, basic economic theory
11 is quite straightforward on this point. Colon.
12 Prices in a competitive margin are determined by
13 marginal costs, emphasis on marginal.

14 A. It's competitive market. You said
15 competitive margin. Competitive market.

16 Q. Thank you.

17 Explain for -- I was going to say
18 explain for the Tribunal but maybe explain for me.
19 What is average cost?

09:39:28 20 A. Average cost is the total cost incurred
21 by a firm divided by the total units sold.

22 Q. And what is marginal cost?

1 marginal cost is just that cost that last
2 cigarette produced.

3 Q. Okay. And your cost focuses on
4 marginal cost, correct?

5 A. I discussed average and marginal costs,
6 but as I point out here, pricing is driven by
7 marginal cost.

8 Q. Okay. Let's look at Document 61 of
9 your -- of the supplemental core documents. It's
09:40:55 10 a document appendix, calculations of Jonathan
11 Gruber by Jonathan Gruber. And these are annexed
12 to, I guess, your first report, correct?

13 A. I believe so. I don't recall exactly.

14 Q. I think that's right, but it's not
15 important.

16 If you could go to Page 13.

17 You have here a -- well, these are
18 payments under the MSA scheme that you have
19 calculated for the various classes of
09:41:52 20 manufacturers, OPMs, SPMs, NPMs, correct?

21 A. It's their -- right. It's their
22 payments.

1 A. The marginal cost is the cost of
2 producing the last unit sold.

3 Q. Okay. And it excludes fixed costs,
4 right?

5 A. The marginal cost is a different
6 concept than fixed cost.

7 Q. Okay. Explain how fixed cost fit into
8 marginal cost analysis, or don't.

9 A. Sure. So basically if you want to
09:39:57 10 think about the average cost, you take the total
11 cost to the firm, that's going to include both
12 fixed costs, things which don't depend on how many
13 units you sell.

14 Q. Such as?

15 A. Such as a building that was already
16 built. A plant that was already built.

17 So -- and marginal costs, which are the
18 costs of producing that last additional unit, such
19 as the cost of tobacco leaf for that last
09:40:21 20 cigarette. And the total cost will be the fixed
21 costs plus the marginal cost times the number of
22 units produced. That's the total cost. The

1 Q. Okay. Now, for the SPM -- what are the
2 SPMs?

3 A. That's the subsequent participating
4 manufacturer, so they're not the original
5 participating manufacturers who negotiated the
6 deal, but folks who came in afterwards.

7 Q. Okay. And let's look at Page 3 of your
8 calculations, which is the formulaic -- the backup
9 and formula by which you arrived at that number of
09:42:34 10 5.06638.

11 A. It wouldn't be Page 3 because
12 5.06638 is SPMs. That starts -- starts on Page 9.
13 I started doing the SPM calculations on Page 9.

14 Q. Okay. Nine. I'm sorry.

15 A. Then I go for a couple pages there to
16 get to the end point.

17 Q. Right. What is the -- there's one,
18 two, three, four, five, six numbers -- there's
19 eight across. I'm looking at particularly number
09:43:06 20 six, adjusted for volume. What is that
21 calculation purport to be?

22 A. So basically the MSA payment was set up

1 to in many ways to approximate a tax, and so the
 2 payment amount is adjusted downward by a decline
 3 in sales so that it essentially becomes a per
 4 cigarette or per carton charge.
 5 Q. Now, is there any fixed cost component
 6 included in that calculation?
 7 A. Cost component.
 8 Q. What's the .02?
 9 A. The .02 is basically -- sort of hard to
 09:43:46 10 described. The .02 was basically put in place to
 11 sort of penalize to not fully volume adjust to
 12 make it a little bit different from a tax. It was
 13 basically a little extra penalty put on
 14 participating manufacturers so that they weren't
 15 getting a full volume adjustment for decline in
 16 their sales.
 17 Q. But that number there, the 7.195, that
 18 includes some component of fixed cost, does it
 19 not?
 09:44:12 20 A. No.
 21 Q. How about the next number, .022?
 22 A. No.

1 A. Yes.
 2 Q. For all SPM?
 3 A. For any SPM that -- for any SPM sales
 4 above what their grandfather chairs.
 5 Q. So the answer is then is no, it's not a
 6 marginal cost for all SPM, correct?
 7 A. It's a marginal cost for the 99 percent
 8 of SPM that exceed to the grandfather's level.
 9 Q. Okay. We'll come back to that.
 09:45:53 10 Now, look at Page 52 of your report.
 11 A. Which -- which report?
 12 Q. The first one.
 13 A. What's the tab?
 14 Q. I'm sorry. Tab 52, I'm sorry.
 15 A. Tab 52. Okay.
 16 Q. Paragraph 26.
 17 A. Okay.
 18 Q. You identify the ratio of sales above
 19 grandfather share to the grandfather share levels
 09:47:07 20 since 2001 for the SPMs, right?
 21 A. Right.
 22 Q. And so -- I did some math and I hope I

1 Q. Do you remember testifying up in Boston
 2 a year ago almost exactly and telling me that
 3 there was a fixed cost component included in your
 4 calculation for the SPM number?
 5 A. No. I mean there's this .02 piece and
 6 that's fixed. I mean so in that sense there's a
 7 fixed component of this calculation but is not in
 8 any -- you've been talking about fixed costs of
 9 production.
 09:44:49 10 Q. Correct?
 11 A. This does not in any way relate to
 12 fixed cost production. It's a fixed component to
 13 the calculation but it's a leap. It's got nothing
 14 to do with the fixed cost you're just talking
 15 about. They jus set up the formula to have this
 16 extra piece that's fixed.
 17 Q. Let me do it this way.
 18 On Page 13, is that 5.06638 a marginal
 19 cost number --
 09:45:11 20 A. Yes.
 21 Q. -- under your definition of marginal
 22 cost?

1 didn't screw it up, but for 70 percent --
 2 ARBITRATOR CROOK: If you could give us
 3 a minute to read the paragraph.
 4 MR. LUDDY: Absolutely.
 5 ARBITRATOR ANAYA: This is Paragraph 26
 6 of the original report?
 7 MR. LUDDY: Correct.
 8 (Pause in the Proceedings.)
 9 ARBITRATOR CROOK: Thank you, sir.
 09:48:03 10 Q. I did some quick math on this. Let's
 11 look at the first one for 2001. 70 percent. You
 12 say that the sales ratio -- the ratio of sales
 13 above the grandfather share to the grandfather
 14 share level since 2001 has been 70 percent and
 15 then a series of numbers.
 16 So on the 70 percent number, would that
 17 mean that about 58 or 59 percent of the actual
 18 shares were sticks that were within the exemption?
 19 And there's a calculator here. I mean
 09:48:38 20 I just divided a hundred by 170.
 21 A. Yeah, that sounds about right.
 22 Q. Okay. And I did the same thing for

1 '02, '03, '04, '05 and '06, and I'll just read into
2 the record the numbers. You can do them if you
3 want, but it's very simple math.
4 For '01 I have 58 percent of the sticks
5 being exempt sticks. For '02, 51 percent. For
6 '03, 54 percent. For '04, 56 percent. For '05,
7 48 percent. And for '06, 47 percent. Okay?
8 A. Okay.
9 Q. And based upon those numbers, and just
09:49:24 10 doing rough justice here, I'm suggesting that
11 during that period of '01 to '07, roughly one-half
12 of the sticks sold by exempt PMS during that
13 period were within the SPM exemption?
14 A. That's right.
15 Q. Okay. And for those sticks, the SPMs
16 paid zero under the MSA, correct?
17 A. On those exempt sales they did not pay
18 anything, that's true.
19 Q. So using your calculation that we saw
09:50:08 20 earlier of 5.066 and then some, of a marginal
21 cost -- again using my rough justice number of
22 50 percent it might be 49, it might be 51,

1 A. That's correct.
2 Q. And their average cost of the NPMs that
3 you just described would also be 5.02138, correct?
4 A. That's right.
5 Q. So unlike the exempt SPMs whose average
6 cost goes down by a factor of 50 percent, the NPMs
7 average cost is unaffected by how many cigarettes
8 it sells, correct?
9 A. If the Allocable Share has been
09:51:55 10 repealed then it complies, that's correct.
11 Q. Correct.
12 Now, if you could turn to Page 21 of
13 your first report -- I'm sorry, Core Document 52.
14 A. You mean Paragraph 21?
15 Q. Correct. Allocable Share -- I'll read
16 this into the record, as E and D -- and as we
17 talked about before, E and D are Eisenstadt and
18 Dalkir, the experts for the Claimants in this
19 matter. As E and D state in Paragraph 10,
09:52:59 20 quote -- this is you quoting them. Quote, for
21 purposes of this report we define the term
22 competitive disadvantage, quote within a quote, as

1 whatever -- but using 50 percent, the average
2 costs paid on a per stick basis by the SPMs for
3 '01 through '07 would be about one-half of that
4 5.06, so about 2.51, whatever, right? \$2.51?
5 A. Roughly, that sounds about right.
6 Q. Okay. And the costs that you have for
7 the NPMs in that period, \$5 -- 5.021 on Page 13 of
8 your calculations, you have what you I guess would
9 describe as a marginal cost for the NPMs there?
09:51:09 10 A. That would be a marginal cost for an
11 NPM that wasn't benefiting from the Allocable
12 Share.
13 Q. Right. Because this is post-Allocable
14 Share, right?
15 A. Once the Allocable Share is repealed,
16 that's right.
17 Q. Okay.
18 A. Well, post-Allocable Share and NPM that
19 complies. So the NPM that complies and after
09:51:26 20 Allocable Share, that would be their marginal
21 cost.
22 Q. Right. And that's 5.02138, correct?

1 the ability of an exempt SPM to profitably
2 underprice Claimants' post-ASR due to the exempt
3 SPMs differential, parens, and lower, end parens,
4 payments, in quotes, per unit under the MSA,
5 period.
6 And then you criticize that in
7 Paragraph 22 because they're focusing somehow on
8 average as opposed to margin, correct?
9 A. Correct.
09:53:39 10 Q. Explain to -- withdrawn.
11 If I understand your testimony, then,
12 if an exempt SPM has an exemption of one million
13 sticks -- make it one million cartons, okay -- and
14 they sell one million and one. It's your
15 testimony that that exempt SPM will price all one
16 million and one cartons at an amount that would
17 reflect the cost that it will have to pay under
18 the MSA for just the last carton, correct?
19 A. That would be correct if there was
09:54:34 20 perfect certainty. I don't think any manufacturer
21 could ever predict with perfect certainty they
22 would sell one unit above.

1 Q. Make it ten?

2 A. But even ten, it's going to be very
3 hard to predict.

4 Q. It's always hard to predict, isn't it?

5 A. Always hard to predict, but the point
6 is if you knew with certainty that the last unit
7 you were going to sell would be above the
8 grandfather exemption then you would price to hit
9 the marginal cost that you have above that
09:54:59 10 exemption.

11 Q. Okay. Even though -- all right. Let's
12 take your example then and let's inject certainty
13 into the situation.

14 If they knew that they were only going
15 to pay \$5.66 because we're only going to sell one
16 carton above a million, your testimony is,
17 notwithstanding the fact that they're only going
18 to pay \$5.66, your testimony is they're going to
19 charge \$5.66 on every one of the million cartons
09:55:30 20 that went before that last one, correct?

21 A. Once again, I find it hard to imagine
22 they'd be certain that they would only sell one

1 understating the role of the government in the
2 economy.

3 Q. Is there a difference between that and
4 economists that focus on industrial organizations,
5 IO economists?

6 A. Yes.

7 Q. And what are IO economists?

8 A. IO economists are economists whose
9 study is primarily focused on how firms make
09:56:59 10 decisions.

11 Q. Such as pricing decisions?

12 A. Such as pricing decisions.

13 Q. Now, you would agree the situation
14 under the MSA whereby one class of manufacturer
15 gets an exemption for an enormous amount of its
16 productivity and then suddenly a marginal cost
17 kicks in at some point during its production
18 capacity. But that doesn't happen for other
19 members of the market. You would agree that
09:57:42 20 that's a fairly unique animal?

21 A. I don't know. I mean I don't --

22 Q. Can you think of another situation

1 more or ten more or a hundred more. But in the
2 theoretical case that you're laying out where
3 literally they know somehow they're only going to
4 sell one more, then, yes, that's my contention.

5 Q. But your entire opinion is based upon
6 the theoretical case of the last carton dictating
7 everything that went before it, correct?

8 A. My opinion is based upon basic
9 economics.
09:55:58 10 Q. Which is?

11 A. Which is that it's marginal cost that
12 determines prices.

13 Q. Right. And in your view that applies
14 even if the -- with certainty they know one carton
15 over a million is going to drive the first
16 million, correct?

17 A. Once again, I don't know how they could
18 ever know that, but if that's what they knew, then
19 that's right.

09:56:28 20 Q. Okay. What is your primary area of
21 expertise as an economist?

22 A. Public policy economics, so

1 anywhere in a market that has circumstances that
2 are analogous to the SPM exemption and how that
3 fits into the tobacco market? In other words,
4 another example of a market participant who,
5 unlike all of its competitors, doesn't pay
6 anything on a fixed cost until it reaches a
7 certain level of productivity or capacity?

8 A. I can't run through my head all the
9 various -- there are public policies that are out
09:58:38 10 there. I don't have one at my fingertips but I
11 would not -- I don't know about whether there are
12 other examples like that.

13 Q. Do you remember me asking you that a
14 year ago in Boston?

15 A. No.

16 Q. Do you remember our deposition in
17 Boston?

18 A. Yes.

19 PRESIDENT NARIMAN: He doesn't want to
09:59:01 20 remember you.

21 MR. LUDDY: I'm insulted. I feel so
22 bad. I thought we got along so well.

1 Q. So since you can't think of an example
2 at your fingertips, I assume then you've never
3 seen any empirical evidence of marginal cost
4 theory that we've been talking about applied in a
5 circumstance such as an SPM having an exemption
6 until it reaches some capacity level in its
7 production as distinguished from the rest of the
8 market?

9 A. I don't know of an analysis of an
10:59:40 10 example like that.

11 Q. Okay. The federal proposal that you
12 worked on I guess back in -- was it '98 with
13 Senator McCain?

14 A. Yes.

15 Q. Did that have any type of exemption
16 built into it for any participants in the market?

17 A. I mean, there was -- what I worked on
18 primarily was the so-called youth look-back
19 provisions.

10:00:14 20 Q. Right.

21 A. Which were basically penalties based on
22 youth smoking levels and there were -- those

1 It depends.

2 Q. Well, you haven't put a different
3 number in for nonexempts or any -- you've only put
4 one number in your report, correct?

5 A. Yes.

6 Q. So you essentially assume for purposes
7 of your report that all SPM exempt and nonexempt
8 are homogenous for purposes of the cost under the
9 MSA, correct?

10:01:58 10 A. What I point out in my report is that
11 for well above 90 up to 99 percent, that's the
12 relevant marginal cost. I do admit there are some
13 who do sell below the grandfather level but that's
14 a very, very small minority of the sales.

15 Q. Okay. Yeah, I wasn't suggesting that
16 you ignored it. I'm just saying for purposes of
17 your report you just put one number in or marginal
18 cost for all SPM?

19 A. Right.

10:02:26 20 Q. Okay. And SPMs are not a homogenous
21 group, though, are they?

22 A. No, they're not all the same. There

1 penalties -- you're allowed to have a certain
2 amount of youth smoking before the penalties
3 kicked in. That was an example of that kind of
4 policy. But the overall payments I don't think
5 had an exemption. I don't remember.

6 Q. Okay. And the same is true with
7 respect to the federal proposal that was under
8 consideration this year, FDA that passed the --

9 A. That's a totally different animal.
10:00:39 10 That has nothing to do with financial penalties.
11 That's just about FDA regulations.

12 Q. Okay. Are there no assessments under
13 that act?

14 A. Not that I know of. I don't know. I
15 didn't study that act.

16 Q. Now, we looked at your 5.066 which is
17 your SPM cost calculation above grandfather share
18 on Page 13 of your calculations, right?

19 A. Right.

10:01:26 20 Q. And you assume that number for all SPM
21 exempt or nonexempt, correct?

22 A. I don't know what you mean by I assume.

1 are different firms.

2 Q. And exempt SPMs in particular are not a
3 homogenous group, correct?

4 A. Some are much larger than others.

5 Q. And there's other distinctions, too,
6 weren't they?

7 A. I would imagine so yes.

8 Q. Let's look at Dr. Eisenstadt's report,
9 which is 51, Core Document 51. And specifically
10:03:14 10 Table 4.

11 A. 51 is the Eisenstadt and Dalkir.

12 Q. Correct. I'm sorry.

13 ARBITRATOR CROOK: Where are we?

14 MR. LUDDY: Core Document 51. It's the
15 Eisenstadt-Dalkir report. It specifically --
16 Table 4.

17 A. Figure 4? Figure 4 or Table 4?

18 Q. Table 4. I think there's a Figure 1,
19 and then there's a number of tables.

10:04:18 20 A. About 40 percent of the way through it
21 says individuals and SPM share cigarette volume;
22 is that the one?

1 Q. Correct. Lots of numbers.
 2 MR. LUDDY: And it's in another volume.
 3 Q. Okay. We had been talking about I had
 4 suggested that all SPMs were not a homogenous
 5 group. And here Dr. Eisenstadt has assembled some
 6 data with respect to SPM sales generally and
 7 relative to their exempt share during the period
 8 '03 to '07. And he's broken it down into the
 9 first category is identified as how much of an
 10:05:46 10 exemption they have; in other words, how many free
 11 sticks they could sell without an MSA payment,
 12 right?
 13 A. That looks right.
 14 Q. And then the second trunk of data is
 15 their actual share, you know, what their actual
 16 sales were during the relevant time period here,
 17 correct?
 18 A. Correct.
 19 Q. And then the third chunk is a ratio of
 10:06:07 20 the first two, actual share divided by exempt
 21 share, right?
 22 A. Right.

1 Now, go back a little bit to table one,
 2 same document, just three or four pages earlier.
 3 What percentage of SPM sales were made
 4 by Commonwealth? What percentage of exempt SPM
 5 sales during the period '03 through '07 were made
 6 by Commonwealth? I think it's the second to last
 7 column.
 8 A. I mean I can't vouch for the validity
 9 of the numbers but the second to last column
 10:08:21 10 indicates it's 45 percent.
 11 Q. So 45 percent of all exempt SPM shares
 12 during this period, according to Dr. Eisenstadt's
 13 data, were made by Commonwealth?
 14 A. That's what this table would seem to
 15 indicate.
 16 Q. Okay. So Commonwealth, relative to the
 17 rest of the exempt SPMs, is a giant, correct?
 18 A. Well, I mean I think it's really fair
 19 to say Commonwealth and Liggett are giants and the
 10:08:48 20 rest are smaller.
 21 Q. Okay. So instead of focusing on the
 22 SPMs as a homogenous group, Dr. Eisenstadt also

1 Q. And if you look down at the bottom,
 2 weighted average across all firms, Dr. Eisenstadt
 3 includes a weighted average for all firms, all
 4 exempt SPMs during the years '03 through '07 is
 5 1.962. Do you see that?
 6 A. Yes.
 7 Q. Okay. And that's kind of the number
 8 you were talking about earlier, that as a whole,
 9 exempt share, exempt SPMs sold about twice the
 10:06:47 10 amount of their exempt share during these years,
 11 right?
 12 A. Right.
 13 Q. Okay. But as I was saying before, all
 14 SPM -- exempt SPMs are not created equally, are
 15 they?
 16 Look at Commonwealth, for instance.
 17 Commonwealth sold its ratio -- as compared to the
 18 1.962 for the exempt SPMs as a whole, its ratio
 19 was 4.362, right?
 10:07:28 20 A. Right.
 21 Q. Where two times the average of the
 22 class.

1 focused on a weighted average ratio across
 2 selected firms, did he not?
 3 A. Yeah, I see that in this Table 4.
 4 Q. And he selected Vector, Premier, Japan
 5 Tobacco International -- I'm reading footnote
 6 number one back on Table 4 -- Lay Unlimited,
 7 Lignum-2, Inc., and Sherman Broadway. And he
 8 found that their actual sales relative to exempt
 9 shares were how much?
 10:09:51 10 A. Looks like 1.105.
 11 Q. So that's a lot closer to one-to-one
 12 than it was for the group as a whole that you have
 13 always focused on, isn't it?
 14 A. Sure. You can always select a set of
 15 numbers from any heterogenous set and get what you
 16 want. That's right. So those ones he selected is
 17 closer to one.
 18 Q. You know what's interesting about that
 19 group, though?
 10:10:16 20 A. Nope.
 21 Q. If you look at their aggregate exempt
 22 shares, those -- that select group, and you can

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1 check my math on this either now or at the break,
 2 if you add up their exempt shares up in the top
 3 chunk of data, those -- that select set of firms
 4 accounts for 70 percent of all exempt sticks sold
 5 in the United States during the period 2003
 6 through 2007. And we can do the math now, if
 7 you'd like.

8 A. Yeah, I don't -- I don't quite see
 9 that, so maybe you want to do that math now,
 10:11:11 10 because I don't see how that's possible.

11 Q. Okay.

12 A. I mean I'm not quick at doing it in my
 13 head, so I'm not seeing it.

14 Q. That's fine. I count up --
 15 ARBITRATOR CROOK: Mr. Luddy, excuse
 16 me.
 17 What should the Tribunal be looking at
 18 now?

19 MR. LUDDY: Table 4.
 10:11:25 20 ARBITRATOR CROOK: Table 4.

21 MR. LUDDY: Yes.
 22 Q. You'll see Dr. Eisenstadt has concluded

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1 A. I added up Vector, Premier, Japan,
 2 Lane, Lig -- everybody in the footnote one.

3 If you add up their -- I mean I could
 4 do it again, but I jut -- what I just got -- I
 5 mean look at it this way. If it's 3.65, you can
 6 immediately see the first two are already --

7 Q. Liggett is actually included in that
 8 group.

9 A. No, it's not. It's not in the
 10:13:22 10 footnote.

11 Q. Well, it's a mistake, then, in the
 12 footnote. But Vector is, yeah --
 13 ARBITRATOR CROOK: The chairman stepped
 14 out for a moment. Do you want to pause for a
 15 second.

16 MR. LUDDY: Sure. Absolutely.
 17 (Pause in the Proceedings.)
 18 MR. LUDDY: Ready? Okay.

19 Q. We're going to move to -- so your
 10:15:06 20 position is that the exemption doesn't give exempt
 21 SPMs a cost advantage in the marketplace, correct?
 22 A. It does not give a marginal cost

1100

1 or has identified a weighted average of ratios
 2 across selected firms rather than the SPMs as a
 3 homogenous group. And right now we're trying to
 4 determine what the percentage is of all exempt
 5 sticks that are actually sold by this select group
 6 that Dr. Eisenstadt has identified.

7 ARBITRATOR CROOK: I'm sorry,
 8 Mr. Luddy, could you tell me where -- the select
 9 group is --
 10:12:01 10 MR. LUDDY: Footnote one.

11 ARBITRATOR CROOK: Footnote one. Thank
 12 you.

13 A. Can I write in this?
 14 Q. Sure.
 15 I think we determined yesterday, I
 16 think Mr. Hering, you might be able to save one
 17 step. I think the total in the exempt shares
 18 weighted average add up to 3.65.

19 A. Well, the total for the group in the
 10:12:48 20 footnote adds up to 8.78. So I don't see how
 21 that's 70 percent of 3.65.
 22 Q. Wait a minute. Who did you add up?

1102

1 advantage.

2 Q. Okay. Who do you think is a better
 3 judge of the competitive abilities of a market
 4 participant? You as an observer on the outside or
 5 the market participant itself?

6 A. Depends what you define by better.
 7 There's two components to better. One would be
 8 who has more information and does this for a
 9 living. That would include the market participant
 10:15:52 10 itself.

11 The second is who's more objective.
 12 And it's not -- I mean I'm clearly objective. I
 13 don't know if they'd be objective.

14 Q. Okay. Let's look at Core Document 24,
 15 which is the Vector Group 10-K from 2004.
 16 And Vector at this point had owned
 17 Liggett, correct? You can take a minute to look
 18 at it.

19 A. Yes, looks like it.

10:16:57 20 Q. And let's look at Page 3, bottom of the
 21 last paragraph.
 22 Quote, all of Liggett's unit volume in

1103

1 2004 in approximately 94.6 percent of Liggett's
 2 unit volume in 2003 were in the discount segment
 3 which Liggett's management believes has been the
 4 primary gross segment in the industry for over a
 5 decade. Do you see that?
 6 A. The bottom of the first paragraph, but
 7 yes, I see that.
 8 Q. Yes. Did I say something else?
 9 A. You said last paragraph.
 10:17:40 10 Q. I'm sorry, bottom of the first
 11 paragraph. Thank you.
 12 And that's the segment of the market
 13 that Seneca competes in, correct, GRE cigarettes?
 14 A. As far as I know, yeah.
 15 Q. Okay. Let's look at the next page.
 16 The third full paragraph.
 17 Quote, we believe that Liggett has
 18 gained a sustainable cost advantage --
 19 PRESIDENT NARIMAN: Where?
 10:18:19 20 MR. LUDDY: First sentence, third
 21 paragraph of the fourth page of the 10-K.
 22 (Discussion off microphone.)

1105

1 favorable treatment Liggett receives under the
 2 settlement agreements with the State Attorneys
 3 General and the Master Settlement Agreement.
 4 And if I understand your testimony
 5 correctly, you have -- you deny that Liggett is
 6 saying here that it has a cost advantage pursuant
 7 to which it can underprice NPMs in the
 8 marketplace?
 9 A. What I'm saying here is they're talking
 10:20:35 10 about an overall cost advantage. The pricing is
 11 based on marginal cost. I'm not saying that if a
 12 firm -- yeah, that's basically -- I'll stop there.
 13 So basically they have overall cost
 14 advantage, they have a fixed cost advantage
 15 because of this exemption they don't have a
 16 marginal cost advantage.
 17 Q. Okay. So when you're talking about
 18 capitalizing here, if you can look at page --
 19 Paragraph 9 of your rebuttal report, which is 53.
 10:21:23 20 You've stated as follows:
 21 Paragraph 9, Core Document 53,
 22 Claimants also cite the Liggett 10-K form which

1104

1 PRESIDENT NARIMAN: Thank you.
 2 Q. First sentence -- actually probably the
 3 first several sentences.
 4 We believe Liggett has gained a
 5 sustainable cost advantage over its competitors
 6 through its various settlement agreements. Under
 7 the Master Settlement Agreement reached in
 8 November, 1998 with 46 State Attorneys General and
 9 various territories, the three largest cigarette
 10:19:18 10 manufacturers must make settlement payments to the
 11 states and territories based on how many
 12 cigarettes they sell annually, period. Liggett,
 13 however, is not required to make any payments
 14 unless its market share exceeds approximately
 15 1.65 percent of the U.S. cigarette market.
 16 And I'll read one more quote from this
 17 before I ask you a few questions about this. And
 18 that is the bottom paragraph under business
 19 strategy.
 10:19:52 20 Quote, Liggett's business strategy is
 21 to capitalize upon its cost advantage in the
 22 United States cigarette market due to the

1106

1 refers to a cost advantage, in quotes, due to
 2 Liggett's grandfather chair. This report is
 3 completely consistent with my point that Liggett
 4 has a windfall fixed cost advantage as in my
 5 example of the wealthy competitor, which we'll
 6 discuss later. Economic theory would dictate this
 7 windfall cost advantage would be reflected not in
 8 lower prices but either in higher return or higher
 9 fixed cost of production, parens, e.g., higher
 10:22:06 10 executive compensation, end parens.
 11 MR. FELDMAN: Counsel, that was not a
 12 complete quotation of the excerpt.
 13 MR. LUDDY: What did I leave out?
 14 MR. FELDMAN: Higher returns to
 15 shareholders or in the higher fixed cost of
 16 production.
 17 MR. LUDDY: Okay. Thank you.
 18 Q. Professor, you're not really suggesting
 19 that Liggett in its 10-K for shareholders or
 10:22:36 20 potential investors is bragging that they're going
 21 to capitalize on their cost advantages by paying
 22 their executives more, are you?

1107

1 A. I'm just saying that they say they have
2 a cost advantage. They're not -- they're bragging
3 that they have a cost advantage.

4 Q. Yeah, I know, but that's what you're
5 saying now, but in your report you said, what they
6 could mean is that they're just going to pay their
7 executives higher compensation?

8 A. Sure.

9 Q. Do you think that they would be putting
10:23:04 10 that in their 10-K that they're going to brag that
11 they're going to capitalize on their cost
12 advantage by paying executives more?

13 A. They don't put that in their 10-K.

14 Q. But why would you -- what fixed
15 costs -- can you give me an example of how you
16 could capitalize or why an investor would think
17 you were capitalizing on a cost advantage if you
18 were plowing it into fixed cost somehow?

19 A. Well, if -- well, Liggett was done,
10:23:37 20 they're given this windfall. Think of that as the
21 chunk of money they were given by their ability to
22 sell these exempt cigarettes. That's the money

1109

1 example that we'll get to in a minute.

2 Liggett could decide that they want to
3 price below marginal cost under your theory that
4 you've articulated here, price below marginal
5 costs to capture critical market shares from NPMs
6 and then raise their prices later when the NPMs
7 are gone, right?

8 A. Liggett could decide to do that. So
9 could any other company decide to do that.

10:24:58 10 Q. Sure.

11 A. Absolutely.

12 Q. That got a windfall --

13 A. No, any company without a windfall
14 could decide to do that.

15 Q. Okay. But this windfall was a result
16 about the scheme about which we're here to discuss
17 today, right?

18 A. But you made the statement that -- you
19 somehow implied because Liggett, because they got
10:25:15 20 this fixed cost exemption, would be the only kind
21 of firm that could lower prices for a while and
22 then raise it. Any firm could do that, to lower

1108

1 that they can return to their shareholders and/or
2 use to pay higher salaries or have a nicer
3 building or whatever they want to do with it.
4 They don't have to pick either/or. They can do
5 both.

6 But the point is, if I were the company
7 and the Government had just provided me with this
8 extra fixed cost advantage, I would tell my
9 shareholders about it.

10:24:05 10 Q. You could also use that windfall to
11 price below marginal costs?

12 A. There would be no reason to because, if
13 you did, you'd be eating into your own windfall.

14 Q. What if you wanted to capture the
15 critical market share?

16 A. I mean you could think about -- that's
17 right, you could think of sort of a dynamic
18 business strategy, if I'm going to lower my price
19 today and raise it again tomorrow, that's
10:24:28 20 possible.

21 Q. Right. And that's exactly what you
22 said in the context of your wealthy investor

1110

1 prices for a while and then raise it. That's just
2 part of a dynamic pricing strategy. It doesn't
3 matter whether you got a fixed cost advantage or
4 not.

5 Q. Well, you can't price below marginal
6 cost. Firms don't price below marginal costs
7 indefinitely, do they?

8 A. Right. And neither would Liggett.

9 Q. But Liggett gets a windfall every year,
10:25:44 10 doesn't it? It's a renewable fee, isn't it?

11 A. Well, what they get, they get this
12 continued grandfather exemption every year.
13 That's what --

14 Q. So they could price below marginal cost
15 strategically every year?

16 A. But they wouldn't do that.

17 Q. If they wanted to drive out the
18 non-participating manufacturers they would, until
19 their gone and then they could do whatever they
10:26:02 20 want on prices in the discount segment, couldn't
21 they?

22 A. Any firm could keep prices below

1111

1 marginal costs for a long time if they have a
 2 coherent plan to drive everyone else out and then
 3 raise them above marginal cost. It's got nothing
 4 to do Liggett's fixed cost advantage. Any firm
 5 could have that strategy, but it's only a viable
 6 strategy if you know within some amount of time
 7 you'll be able to drive people out and you'll be
 8 able to then raise your price above marginal cost.
 9 Q. Right.
 10:26:29 10 PRESIDENT NARIMAN: I want to ask you
 11 one question.
 12 THE WITNESS: Sure.
 13 PRESIDENT NARIMAN: I would like to
 14 know at Page 4, your attention was invited to this
 15 paragraph, we believe that Liggett has gain.
 16 You've seen that paragraph?
 17 THE WITNESS: This is in the 10-K?
 18 PRESIDENT NARIMAN: The 10-K.
 19 THE WITNESS: So what document --
 10:26:48 20 MR. ROBINSON: Document 26 -- I'm
 21 sorry, 24.
 22 PRESIDENT NARIMAN: 24. 24.

1113

1 1.65 of the U.S. cigarette market.
 2 All I want to know is, is there a
 3 distinction made in the Master Settlement
 4 Agreement itself between the three largest
 5 cigarette manufacturers and Liggett?
 6 THE WITNESS: Yeah. So part of the
 7 Master Settlement Agreement is they have this
 8 grandfather exemption, not just for Liggett but
 9 for other --
 10:27:56 10 PRESIDENT NARIMAN: No, so Liggett
 11 comes along with some others?
 12 THE WITNESS: Yes.
 13 PRESIDENT NARIMAN: In this section,
 14 that Liggett, however, is not required to make
 15 payment unless its master share exceeds
 16 1.65 percent.
 17 THE WITNESS: Right. Different
 18 companies got different grandfather shares but
 19 they're not the only company.
 10:28:14 20 PRESIDENT NARIMAN: Was there anybody
 21 in the same class as Liggett --
 22 THE WITNESS: Yeah.

1112

1 THE WITNESS: Okay. I'm sorry. Could
 2 you refer to me again where you're looking?
 3 PRESIDENT NARIMAN: Yeah, Page 4.
 4 THE WITNESS: Page 4.
 5 PRESIDENT NARIMAN: Pages are at the
 6 bottom.
 7 THE WITNESS: Okay.
 8 PRESIDENT NARIMAN: Second paragraph,
 9 we believe that Liggett has gained. He read that
 10:27:04 10 to you.
 11 THE WITNESS: Yes.
 12 PRESIDENT NARIMAN: Yeah. I want to
 13 understand one thing.
 14 Has gained a sustainable cost advantage
 15 over its competitors through its various
 16 settlement agreements under the Master Settlement
 17 Agreement reached in November with 46 states
 18 Attorneys General, three largest cigarettes
 19 manufacturers must make settlement payments to
 10:27:24 20 states based on how many cigarettes they sell
 21 annually. Liggett, however, is not required to
 22 make any payments unless its market share exceeds

1114

1 PRESIDENT NARIMAN: In the Master
 2 Settlement Agreement?
 3 THE WITNESS: Yes.
 4 PRESIDENT NARIMAN: There was a large
 5 group?
 6 THE WITNESS: I don't know if it was a
 7 large group. There was basically --
 8 MR. LUDDY: 14, I believe.
 9 PRESIDENT NARIMAN: 14.
 10:28:30 10 MR. LUDDY: 14 companies listed on that
 11 table --
 12 MR. FELDMAN: 15.
 13 MR. LUDDY: 15 companies that were
 14 listed on that Table 4 that we looked at a moment
 15 ago.
 16 PRESIDENT NARIMAN: That's the same?
 17 MR. LUDDY: Correct. Liggett is one of
 18 them.
 19 THE WITNESS: They got different
 10:28:40 20 amounts. Liggett got 1.65. Some got 1.23,
 21 whatever. They got different amounts but that
 22 basic principle that they were exempt on a certain

1 amount of their sales is true for about 15
2 manufacturers.

3 PRESIDENT NARIMAN: But all of that is
4 part of this negotiated Master Settlement
5 Agreement?

6 THE WITNESS: Yes.

7 PRESIDENT NARIMAN: Thank you.

8 Q. Did any NPMs get that exemption at any
9 time either then or when Allocable Share
10:29:07 10 Amendments were passed?

11 A. Everyone was under the same rules.
12 When they joined, they could get a grandfather --
13 they'd get a grandfather exemption for any sales
14 they had as of the time the MSA was signed.

15 Q. In the first 90-day window?

16 A. In the first 90-day window, that is
17 right.

18 Q. But when Allocable Share Amendments
19 were enacted and increased the cost the amounts
10:29:27 20 that NPMs had to pay, there was no exemption
21 provided for any market share, right?

22 A. No, after the first 90 days there are

1 rid of your come that you could never make the
2 money back, that would not be profit maximizing
3 strategy.

4 If you get rid of your competition
5 quickly enough that you could make the money back,
6 then it would be a profit maximizing strategy
7 regardless of your fixed cost advantage.

8 Q. Right.

9 A. So in that sense Liggett it not
10:31:03 10 different than any other company.

11 Q. Let's look at Core Document 48.

12 This is Core Document 48. This is a
13 witness statement of Marvin Wesley who from
14 January '99 through mid December of 2004 -- I'm
15 reading Paragraph 2 -- was employed by Liggett
16 first as a sales representative for four years and
17 then later as regional account manage are for
18 government sales in 15 states.

19 Let's look at Paragraphs six and seven.
10:32:22 20 I'll read them into the record.

21 While I was employed by Liggett, we
22 often discussed the non-participating

1 no more exemptions.

2 Q. Now, we're talking about Liggett and
3 this sustainable cost advantage. Let's look at --
4 you know, you talked earlier about any firm could
5 price below marginal cost temporarily, but you
6 can't do it indefinitely, right?

7 A. No.

8 Q. Now, Liggett, though, describes its
9 cost advantage as sustainable, right? Because
10:30:18 10 it's a renewable fees, because they get it --

11 MR. FELDMAN: Objection to your
12 characterization.

13 MR. ROBINSON: Objection to who?

14 MR. FELDMAN: Your characterization.

15 A. Yes, they get this grandfather
16 exemption every year.

17 Q. Every year. So they could sustain a
18 strategy of pricing below marginal cost?

19 A. That would not be a profit maximizing
10:30:39 20 strategy.

21 Q. Until you got rid of your competition?

22 A. Once again, if it took so long to get

1 manufacturers who are not part of the Master
2 Settlement Agreement, period. We referred to them
3 as renegade companies, period. In 1999, Liggett
4 introduced its first national deep discount
5 Liggett brand called Liggett Select. This product
6 was intended to compete directly with NPMs in the
7 value brand segment of the market, period. To
8 undercut and underprice NPMs, I could receive
9 permission from Liggett management to use special
10:33:03 10 buy-downs to further decrease the price of Liggett
11 products. Because of Liggett's ability to sell
12 billions of sticks free of any MSA payments, we
13 could afford to underprice as needed to drive out
14 NPM competitors from particular markets.

15 Do you see that?

16 A. Yes, I do.

17 Q. And there Mr. Wesley is testifying to
18 strategic use by Liggett of the exempt share it
19 has under the MSA to undercut NPM pricing,
10:33:36 20 correct?

21 A. Well, he's testifying to strategic
22 pricing by Liggett. He then draws the conclusion

1119

1 that it's because of Liggett's ability to sell
 2 billions of sticks free of any MSA payments. But
 3 he just -- that's his contention, but what he's
 4 really testifying here to is that there's just
 5 underpricing.
 6 Q. Well, he worked for the company, right?
 7 A. Yeah.
 8 Q. Okay. So presumably -- and he was
 9 there for five years and at some point in time he
 10:34:04 10 was a regional account manager. You would assume
 11 that at that level of position in the company that
 12 he would have discussions in the company with
 13 respect to why the company could discount so
 14 aggressively and what their business strategy is,
 15 don't you think?
 16 A. I don't know. I don't know about his
 17 position.
 18 (Discussion off microphone.)
 19 MR. LUDDY: The Claimants did,
 10:34:45 20 Mr. Chairman.
 21 Q. Now, let's look at Core Document 51
 22 which is Eisenstadt-Dalkir, Paragraph 42.

1121

1 differences in exempt SPM pricing between areas
 2 according to the extent of competition faced from
 3 NPMs. For example, in areas or markets, quote,
 4 where the exempt SPM faces less intense
 5 competition from NPMs, it will charge a price
 6 slightly below NPM marginal MSA costs, period.
 7 However, if its sales at this price do not reach
 8 its expected cap quantity, it will further lower
 9 price to make additional sales in the more
 10:38:09 10 competitive markets in which it operates, i.e.,
 11 those with relatively greater NPM presence. Since
 12 its marginal MSA cost is zero, it can profitably
 13 lower price to make those additional sales up to
 14 its cap amount. And by cap amount, we're talking
 15 about the exempt share amount, correct?
 16 A. Yeah.
 17 Q. So he's talking here about strategic
 18 geographic pricing based upon pockets of NPM
 19 competition to Liggett's brand -- to an exempt
 10:38:44 20 SPMs brands, correct?
 21 A. He's made a model that has that
 22 feature, that's right.

1120

1 Eisenstadt-Dalkir. Core Document 51.
 2 (Discussion off microphone.)
 3 MR. LUDDY: Actually, having said that,
 4 I'm now going to throw you a curve ball and ask
 5 you to go to Paragraph 30 instead.
 6 Q. Professor, Eisenstadt and Dalkir had
 7 included a lengthy addendum to their report and at
 8 some point in time I assume you had reviewed that,
 9 correct?
 10:36:31 10 A. Yes.
 11 Q. Okay. And they've described that -- I
 12 guess it's an appendix, in Paragraph 30, I'll read
 13 it, quote, appendix A discusses there's two models
 14 of exempt SPMs pricing over the course of a year
 15 to show how its MSA cost advantage will be used to
 16 underprice an equally efficient NPM, period.
 17 And specifically they described the
 18 second of those models in Paragraph 42, which I
 19 had directed everyone to earlier and now I direct
 10:37:17 20 them to again.
 21 Model two also captures -- I'm reading
 22 Paragraph 42, quote, model two also captures

1122

1 Q. And that type of strategic geographic
 2 pricing that Dr. Eisenstadt modeled is precisely
 3 the type of pricing strategy that Mr. Wesley
 4 describes in his affidavit when he was employed by
 5 Liggett, correct?
 6 A. I can't say exactly but they sound
 7 similar.
 8 Q. And Dr. Eisenstadt's model revealed a
 9 marginal cost -- a blended marginal cost for
 10:39:22 10 exempt SPMs operating in that fashion as described
 11 by Mr. Wesley different from and lower than the
 12 marginal cost indicated by general marginal cost
 13 theory that you've testified about here today,
 14 right?
 15 A. I lost your track on that one. Sorry.
 16 Q. Well, Dr. Eisen- -- your testimony,
 17 this goes back to the million -- million cartons
 18 and the last one dictates everything that went
 19 before, right?
 10:39:52 20 Well, Dr. Eisenstadt has created models
 21 based upon how exempt SPMs can use their exempt
 22 share to have a blended marginal cost during the

1123

1 course of the year to underprice NPMs, right?

2 A. He calls it a blended marginal cost.

3 It's a mix of average and marginal cost. But he

4 has a model --

5 Q. And those costs are lower than the

6 5.066 that you've identified as the standard

7 marginal cost theory applicable to exempt SPMs?

8 A. Well, what he does, he takes an average

9 of the average cost and the marginal cost. The

10:40:38 10 marginal cost is everywhere above the average

11 cost. So mathematically if he averages those two,

12 it will be lower than the marginal cost.

13 Q. Right.

14 A. That's true.

15 Q. And then he models that based upon a

16 company that would, as a business strategy, decide

17 to strategically price to underprice NPMs in a

18 particular market or particular geographic

19 location, correct?

10:41:00 20 A. He has a model of a company that does

21 that.

22 Q. Right. And Mr. Wesley has described a

1125

1 rebuttal report -- which number is that? Which

2 number is my rebuttal report?

3 MR. LUDDY: 52.

4 THE WITNESS: 52. So if you look at my

5 rebuttal report --

6 PRESIDENT NARIMAN: Would you please

7 look at first Paragraphs 8 and 9 --

8 THE WITNESS: Sure.

9 PRESIDENT NARIMAN: -- because I want

10:42:12 10 to understand this.

11 THE WITNESS: Sure. Which number is

12 Wesley again?

13 PRESIDENT NARIMAN: Wesley is 48.

14 THE WITNESS: Paragraphs 8 and 9.

15 PRESIDENT NARIMAN: Just read it to

16 yourself.

17 THE WITNESS: Okay.

18 PRESIDENT NARIMAN: Talking of the deep

19 discount market and so on.

10:42:28 20 THE WITNESS: Yep.

21 PRESIDENT NARIMAN: And he's talking of

22 pricing out the Seneca cigarettes.

1124

1 company that does that, Liggett, in his affidavit,

2 correct?

3 A. Mr. Wesley described -- yeah,

4 Mr. Wesley talks about is strategic pricing.

5 Q. Right.

6 (Discussion off microphone.)

7 MR. LUDDY: We offered him and the

8 Respondents chose not to examine him.

9 PRESIDENT NARIMAN: His affidavit is

10:41:35 10 not controverted?

11 MR. LUDDY: It is not.

12 MR. FELDMAN: Mr. President, Professor

13 Gruber addressed Mr. Wesley's statement in his

14 rebuttal report.

15 THE WITNESS: I mean I can go into that

16 if you want. If you look at my --

17 PRESIDENT NARIMAN: Sorry. Let me

18 mention it.

19 Have you dealt with Paragraphs 8 and 9

10:41:55 20 of Mr. Wesley's affidavit which is not pointed out

21 to you?

22 THE WITNESS: Yeah. If you look at my

1126

1 THE WITNESS: Right.

2 PRESIDENT NARIMAN: Right. Now, I just

3 want to know, have you dealt with this point?

4 THE WITNESS: The way I dealt with it,

5 I have addressed this in my rebuttal report.

6 PRESIDENT NARIMAN: All right. Let's

7 see that.

8 THE WITNESS: So I direct you to the

9 rebuttal report.

10:42:47 10 PRESIDENT NARIMAN: Where is that?

11 THE WITNESS: Number 53.

12 MR. LUDDY: 53. Correct.

13 PRESIDENT NARIMAN: 53 is in another

14 volume.

15 THE WITNESS: Paragraph --

16 PRESIDENT NARIMAN: Just a moment.

17 THE WITNESS: You bet.

18 PRESIDENT NARIMAN: Okay. 53, yes.

19 THE WITNESS: Paragraph 8, which is on

10:43:20 20 Page 4, I address it very briefly.

21 What I say is, Claimants cite the

22 witness statement by Mr. Wesley but that statement

1127

1 simply states his opinion that Liggett underpriced
2 the Seneca brand. Mr. Wesley shows no evidence
3 that Liggett's prices were, in fact, lower over
4 any time period. So the general tenor of my
5 rebuttal report is basically that we have an
6 economic model which is what we teach in basic
7 economics that pricing is due to marginal cost,
8 that you can develop alternative models.
9 If you like, and as the experts do on
10:43:55 10 the other side, Eisenstadt and Dalkir, but absent
11 empirical evidence that the alternative models are
12 true, we revert to our basic assumption, which is
13 that you price for the marginal cost.
14 PRESIDENT NARIMAN: Yes. Yes. It
15 doesn't matter whether you've dealt with it. I'm
16 just asking you, because you should be given an
17 opportunity to deal with this Paragraph 8.
18 THE WITNESS: Yes.
19 PRESIDENT NARIMAN: What do you say to
10:44:19 20 it now?
21 You may or may not have dealt with it
22 specifically. That's not difficult.

1129

1 this group. I mean that's what he says.
2 THE WITNESS: Right.
3 PRESIDENT NARIMAN: I don't -- I'm
4 saying he's part -- no one is cross-examining him
5 so I'm therefore giving you an opportunity to say
6 whatever you want to say about it.
7 THE WITNESS: Yeah. And basically what
8 I want to say is I'd respond the same way I'd
9 respond to the Eisenstadt and Dalkir report, which
10:45:56 10 is that he can claim what he likes, but in the
11 absence of evidence, that they are pricing in a
12 way which my basic economic model refutes, then I
13 would stick with the basic model and not turn to
14 this alternative view.
15 PRESIDENT NARIMAN: Then you are
16 disputing that Liggett priced it like this in
17 order to put the NPMs out of market share?
18 THE WITNESS: I'm not disputing that
19 Liggett had a pricing strategy but the --
10:46:23 20 PRESIDENT NARIMAN: No pricing strategy
21 to this effect.
22 THE WITNESS: I'm disputing that

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1 Liggett's favorable treatment under the
2 Master Settlement Agreement and the laws that were
3 used to impose it on the rest of the industry was
4 part of Liggett's sales strategy. We would
5 explain to customers that because of Liggett's
6 special treatment under the Master Settlement
7 Agreement, the NPMs would not compete with our
8 pricing and probably would not remain in business,
9 especially after the Escrow Statutes were changed
10:44:52 10 to directly the NPMs and so forth. Is there a
11 specific allegation made?
12 THE WITNESS: Yes. There's a specific
13 allegation made, and that's an allegation that's
14 made by the experts on the other side as well.
15 And I -- that's an allegation that I've seen no
16 proof is true. It certainly -- you can alligate
17 about a pricing strategy but I see no evidence
18 that they're actually using that -- they're
19 actually doing what he says here, that they're
10:45:21 20 actually using their special treatment.
21 PRESIDENT NARIMAN: Bu he's importing
22 his own special knowledge because he's part of

1130

1 because of their fixed cost advantage they priced
2 this way. I'm not disputing they priced this way,
3 but it -- temporarily firms can always price lower
4 to try to drive someone out of business. That's a
5 strategy we see all the time. I'm disputing that
6 because of their fixed cost advantage, they
7 systematically underpriced the competitors.
8 PRESIDENT NARIMAN: Right.
9 ARBITRATOR ANAYA: Excuse me.
10:46:50 10 How would you know that? I mean they
11 could have done it, right?
12 THE WITNESS: They actually could have.
13 ARBITRATOR ANAYA: And they could have
14 done it because of the advantage, but they could
15 have just been wrong in the economics of it.
16 THE WITNESS: Well, basically --
17 ARBITRATOR ANAYA: You're disputing
18 that they were right or they would be right to
19 develop a pricing strategy this way because of the
10:47:11 20 price advantage. That's what you're disputing?
21 THE WITNESS: What I'm -- yes.
22 Exactly.

1131

1 ARBITRATOR ANAYA: But do you know that
2 they didn't, in fact, intend or that they
3 didn't -- that they didn't price this way because
4 of the price advantage, whether or not that was a
5 wise thing to do?
6 THE WITNESS: I don't know that. What
7 I know is that it would not be profit maximizing.
8 It wouldn't would not be in the interest of their
9 shareholders to do so.
10:47:40 10 ARBITRATOR ANAYA: Right. Thinking of
11 bad economists.
12 THE WITNESS: Absolutely. Some do
13 exist, unfortunately.
14 PRESIDENT NARIMAN: You want to break
15 now?
16 MR. LUDDY: That's fine.
17 PRESIDENT NARIMAN: How long would you
18 take?
19 MR. LUDDY: I'd hope to be done in
10:47:58 20 another hour.
21 PRESIDENT NARIMAN: Okay.
22 MR. LUDDY: Maybe.

1133

1 All right. We'll talk about it at the
2 break.
3 PRESIDENT NARIMAN: Make up your mind.
4 (End of confidential session.)
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1132

1 Yeah. I would like -- this is going a
2 little bit longer than I thought.
3 As I said earlier, Mr. Calfo is here
4 for Mr. Montour. I don't know how the chairman
5 feels about it, but if we could go a little bit
6 longer through lunch for a little while today
7 so -- Mr. Calfo has a Federal Court appearance
8 tomorrow. He has to catch a plane at four. So I
9 would like to, if we could, put Arthur Montour on
10:48:37 10 the stand unless we want to take Arthur out of
11 turn.
12 PRESIDENT NARIMAN: How long with you
13 take for Arthur Montour?
14 MR. FELDMAN: Perhaps 45 minutes to an
15 hour.
16 MR. LUDDY: Maybe we could do that and
17 that way Mr. Calfo could --
18 Do you guys have a problem with that?
19 Jonathan.
10:49:09 20 (Discussion off microphone.)
21 MR. LUDDY: Or we go through lunch,
22 either one.

1134

1 OPEN SESSION
2 (Whereupon, at 10:45 a.m., the hearing
3 was adjourned until 11:00 a.m., the same day.)
4 ARBITRATOR CROOK: Who will be
5 examining for the Respondent?
6 PRESIDENT NARIMAN: Mr. Feldman --
7 you're next now?
8 MR. VIOLI: Yes, I would introduce the
9 panel--introduce the panel to Arthur Montour.
10:05:18 10 He's been requested to appear and testify by the
11 Respondent and we've obliged and made him
12 available. We'd like to begin first with a
13 statement from Mr. Montour's counsel, Angelo
14 Calfo.
15 PRESIDENT NARIMAN: What is it?
16 MR. VIOLI: Angelo Calfo with the
17 Yarmuth, Wilson Firm out of Seattle.
18 MR. CALFO: Good morning, Mr. Chairman.
19 Just to explain the background, I'm Mr.
10:05:46 20 Montour's personal counsel. I represent him in
21 connection with the criminal indictment that has
22 been brought by the United States Government

1135

1 against him, arising out of allegations of the
2 Contraband Cigarette Trafficking Act, which is
3 United States law.

4 As the court knows there was some
5 question as to whether it was appropriate from my
6 perspective as his counsel in a criminal case for
7 him to be questioned here today by the United
8 States Government and I understand that that was
9 subject of a motion or letters to the Tribunal
11:06:17 10 which was resolved by a December 14th, 2009,
11 letter. I've read the letter and I think I
12 understand what the ground rules are. What I
13 would like to be able to do is that, if the
14 cross-examination gets into an area where I think
15 Mr. Montour will be prejudiced I would like to be
16 able to interrupt the questioning.

17 PRESIDENT NARIMAN: You alert us about
18 that. You alert us at that time and we'll see.

19 MR. CALFO: Yes. I will do that then.
11:06:46 20 Aside from that, unless the panel has any
21 questions, we're prepared to proceed.

22 MR. VIOLI: We just have one question

1137

1 this action?

2 A. Mr. Violi I would like to respectfully
3 ask the --

4 Q. Into the microphone.

5 A. I would like to respectfully ask the
6 Tribunal just that -- in my way --

7 Q. Just, if you first answer that
8 question, did you submit two declarations?

9 A. Before I can answer any questions, as
11:08:23 10 Haudenosaunee, as Ungwehuay (ph), as a
11 continuation of the people of this ground, Turtle
12 Island, it is customary for us before our matters
13 to give our greetings and our thanks and to
14 acknowledge all of those people who have come and
15 brought our minds together to resolve this matter
16 in a respectful and a mutual way.

17 And I first would like to give my
18 thanks to all of you who are here today. It's an
19 honor but it's also a very heavy responsibility
11:08:52 20 and as a continuation of these discussions in this
21 type of forum is what's happening today and this
22 is a continuation of the Haudenosaunee, the

1136

1 in that we would ask Respondent to please advise
2 if it has, Respondent -- the State Department if
3 it had been in communication with the federal
4 authorities in Washington regarding Mr. -- in any
5 way, regarding this matter or Mr. Montour's
6 testimony in this matter.

7 MR. KOVAR: Mr. President, you know,
8 any discussions we might have would be
9 attorney-client privilege, but one thing I can
11:07:29 10 tell you is that we have not coordinated in any
11 way with the U.S. Department of Justice or the
12 U.S. Attorney's office in Mr. Arthur Montour's
13 criminal case. We have been solely focussed on
14 our case.

15 MR. VIOLI: Slightly different than the
16 question I had asked, but we'll proceed. I asked
17 if they had discussed it. It may advise the --
18 his personal attorney.

19 DIRECT EXAMINATION

11:07:57 20 BY MR. VIOLI:
21 Q. Mr. Montour, did you submit two
22 declarations in support of Claimants' claims in

1138

1 Canukihaga (ph), the Onitdawaga (ph), the
2 Ungwehuay, the Original People, this is one way
3 that we were always supposed to relate with one
4 another, very much in accordance to the Guswanta
5 (ph) the Two-Row Wampum, mutual respect, and I
6 just wanted to give you my thanks for giving the
7 Ungwehuay, the Onitdawaga, who you know as the
8 Seneca the mutual respect that's been a long time
9 coming and yes, I have given two separate, because
11:09:39 10 I was asked.

11 MR. VIOLI: And I owe you a tremendous
12 apology.

13 Q. I didn't mean to disrupt your custom
14 and I'm greatly -- truly sorry for that and I
15 thank you for that introduction. I think it
16 informed me and the panel.

17 Can you state, generally, Mr. Montour
18 -- Mr. Montour we know you as what has been
19 described as Arthur Montour, but is that your
11:10:08 20 given name, your birth name? Are you known by
21 another name perhaps?

22 A. With due respect we stand when we're

1139

1 asked to speak. I have been given the name Arthur
 2 Montour Junior by the Government of Canada by my
 3 birth in the village of Montreal, Quebec. The
 4 Bureau -- the Department of Indian Affairs of
 5 Canada had given me a band counsel number due to
 6 my father also having been -- unilaterally been
 7 given band counsel number by the Department, by
 8 the Bureau -- by the Department of Indian Affairs
 9 in Canada. I'm known as Arthur Montour also due
 11:11:00 10 to my mother who is present, due to my birth from
 11 my mother who is an Onitdawaga, known to you as a
 12 Seneca and by the Bureau of Indian Affairs is
 13 recognized with tribal enrollment number. I am
 14 been given the name Aguidayonda (ph) but the
 15 Onitdawaga through the Gayanitgoa (ph), through
 16 our longhouse traditions that I am a continuation
 17 of. We have many systems of governance within our
 18 communities and the one that has been ongoing that
 19 has been non-extinguished that binds us to the
 11:11:44 20 land through our mothers is Gayanitgoa, and we are
 21 Ungwehuay -- Ungwehuay meaning we are a part of
 22 the Original People of Turtle Island, the

1141

1 MR. VIOLI: With that I'll pass it to
 2 Mr. Feldman.
 3 CROSS-EXAMINATION
 4 BY MR. FELDMAN:
 5 Q. Mr. Montour, thank you for appearing
 6 today.
 7 My name is Mark Feldman representing
 8 the United States in this matter.
 9 Mr. Montour, you currently live in the
 11:13:37 10 State of New York?
 11 A. I reside on the Seneca Nation
 12 territory. I sleep in many different places but
 13 my home is not in the State of New York. My home
 14 is on the Onitdawaga Territory known as the Seneca
 15 Nation of Indians. We're unfortunately surrounded
 16 by the State of New York, though, geographically.
 17 Q. I'm going to be asking you several
 18 questions so would you prefer to stand throughout,
 19 or would you...
 11:14:11 20 A. Yeah, I will stand.
 21 PRESIDENT NARIMAN: Whenever you want
 22 you can sit down.

1140

1 continent.
 2 Q. Thank you. And I noted earlier you
 3 couldn't make it the first day -- the first half
 4 of your first day, because of your back injury and
 5 I know you are suffering from that injury and have
 6 been for many years. If you find that you need to
 7 take a break or would like to take a break or sit
 8 down during your testimony, that's fine. With
 9 that, I would like to ask you, can you state
 11:12:22 10 generally the subject matter of your two
 11 declarations that were submitted.
 12 A. I was asked a number of questions in
 13 relation to the corporation under the Sac and Fox
 14 Nation operation in my name that I use to conduct
 15 business by importing and distributing the Seneca
 16 brand of tobacco products, also Opals through the
 17 years which -- and we've evolved into you know, we
 18 went from two different names, but I guess I was
 19 asked the evolution of our first-generation way of
 11:13:04 20 doing business and the economic system we've just
 21 entered into.
 22 Q. Thank you?

1142

1 THE WITNESS: Thank you. Thank you.
 2 Q. And for how long have you lived on that
 3 territory?
 4 A. By territory -- define your definition
 5 of territory.
 6 Q. I'm sorry, the Seneca Nation territory
 7 you are now, for how long have you lived there?
 8 A. If you added all the years together
 9 that I have lived on Turtle Island, you can add
 11:14:41 10 them all. If you want to know how many years I
 11 have lived on the community that my mother was
 12 born to? I would say 14, the other of which I
 13 resided either on the Canukihaga, which is another
 14 of the Haudenosaunee, which is where my father is
 15 from, the land, but I have always resided on
 16 Turtle Island.
 17 Q. Thank you. For how long have you owned
 18 Native Wholesale Supply?
 19 A. Native Wholesale Supply as an organized
 11:15:31 20 corporation, I believe 2000 was the incorporation
 21 after -- the previous was made of Tobacco Direct
 22 which preceded Native Wholesale Supply.

1143

1 Q. And what kind of promotional activities
2 have Native Wholesale Supply engaged in over the
3 years?

4 A. I would say everything from matches to
5 automobiles and everything in between.

6 Q. And have you been personally involved
7 in those promotional activities?

8 A. I have never picked what we promote. I
9 get a kick out of seeing the posters maybe about a
11:16:18 10 week or so after they're posted. My job is to
11 build relationships with other Nations other, the
12 Nations meaning Ungwehuay upon Turtle Island. I
13 have been involved in doing that since about the
14 age of 16 and at 28 I also was the Chairman of the
15 Tribal Council of the Seneca Nation of Indians
16 which is a form of government. That's been
17 predominantly my job as I've given -- taken upon
18 myself. The economic redevelopment in our
19 communities have been a focus of mine since I was
11:16:57 20 about 15 I learned in high school about the
21 Marshall plan and I thought, isn't it interesting
22 that the perpetrator of genocide got a Marshall

1145

1 I've heard from my uncles and my grandparents.

2 So, yes, in continuation I have traveled as many
3 places upon this island as I possibly could.

4 Q. And is it fair to say you've traveled
5 fairly widely throughout the United States as part
6 of these activities?

7 A. As much as this territory as I have
8 been able to see I've gone to see with my own eyes
9 and to speak to the people with my own voice and
11:18:42 10 hear them with my own ears, yes.

11 Q. Would that include travels to
12 Reservations located within the State of
13 California?

14 A. The territories upon which I have
15 traveled are located throughout Turtle Island as
16 defined by any imaginary lines, I've never seen a
17 visual line, no.

18 Q. I understand that Seneca cigarettes are
19 sold in Germany; is that correct?

11:19:09 20 A. As far as I know. I've not been to
21 Germany.

22 Q. And I understand that Seneca cigarettes

1144

1 plan and the Haudenosaunee the Ungwehuay, we never
2 asked, but isn't there a way we can find to
3 redevelop the economic destruction that's occurred
4 to my people. At 15 I saw Philip Morris and R.J.
5 Reynolds trucks being delivered -- cigarettes, and
6 I got paid five bucks to unload them, I thought,
7 there's an avenue; that was my introduction.

8 Q. And when you've been building
9 relationships with other Nations, have you at
11:17:40 10 times traveled to those Nations in furtherance of
11 building those relationships?

12 A. In continuation to the way our people
13 the Haudenosaunee and the Ungwehuay traded from
14 time immemorial -- the reason we call our island
15 Turtle Island is because -- through the
16 development of trade over thousands of years and
17 the stories passed down by generation to
18 generation. We can actually visualize the shape
19 of this continent due to hundreds and hundreds and
11:18:06 20 maybe thousands of years of trading. So, when you
21 ask me I can see in my mind what I've heard from
22 my mother, what I've heard from my father, what

1146

1 are also sold in Mexico; is that correct?

2 A. I have not been to Mexico but as far as
3 I know, very proudly, I believe they are. I am
4 the trademark owner and I have licensing
5 agreements and by recognition of that, I believe
6 they are, but yeah.

7 Q. Okay. Thank you.

8 In your second witness statement in
9 this matter, in Paragraph 21 -- and I'll just read
11:19:45 10 it for you if it's okay -- you state that
11 establishing a tobacco brand and growing equity in
12 it is a very costly, ongoing undertaking.

13 As the attached spreadsheets at
14 Exhibit 5 demonstrate, since 2000, NWS has spent
15 over \$5 million on all kinds of promotional
16 activities from prizes such as snowmobiles and
17 cars to promotional items such as bingo dabbers
18 and ball caps?

19 A. And everything in between.

11:20:20 20 Q. So, for example, a snow mobile prize,
21 how would that work as promotional activity? How
22 would that be given away?

1147

1 A. Somebody picks -- somebody picks a name
 2 out of a bin of names.
 3 Q. And does the snow mobile have the
 4 Seneca name on it anywhere?
 5 A. I've seen one of the snow, mobiles that
 6 we gave away on a poster and I don't believe it
 7 did, the one that I saw.
 8 Q. And what the what about the cars as
 9 promotional items?
 11:20:55 10 A. I've seen maybe four or five of the
 11 vehicles. Some of them had the Seneca name which
 12 is the name of the people. There's an RV that's
 13 called Seneca that we don't own or distribute but
 14 I've seen the name on vehicles, yes. But if you
 15 were to ask me how many vehicles and what types, I
 16 have no idea; that's not my job. I don't do the
 17 promotions.
 18 Q. And you go on to say, "We spent this
 19 money on banners, posters, billboards, donations,
 11:21:26 20 hockey tickets, dinner events, donations, inserts,
 21 cash prizes, gift cards, decals, and all kinds of
 22 promotional clothing.

1149

1 original stance of the Ungwehuay, just to be
 2 respected on our territory.
 3 Q. And the billboards that you refer to,
 4 would those billboards have the Seneca brand on
 5 them?
 6 A. Absolutely.
 7 Q. And would those bill boards be on
 8 interstates?
 9 A. All our advertising is on Ungwehuay
 11:23:13 10 land of Turtle Island.
 11 Q. And on that land, would the billboards
 12 be on major roads?
 13 A. The variety of roads that have been
 14 imposed to our territories are both state and
 15 federal. Our land was there before you put the
 16 roads in. So, whether the signs are close to
 17 those roads is obvious.
 18 Q. And you mentioned promotional clothing.
 19 Can you think of some examples of promotional
 11:23:45 20 clothing that you've used as part of your
 21 promotional activities? Please let the record
 22 reflect --

1148

1 The banners that you refer to, would
 2 those banners have the Seneca name written on
 3 them?
 4 A. That's -- absolutely. That is the
 5 trademark that we have invested in promoting that
 6 is the name of the people upon which I represent
 7 and that is the name, the name that we were given
 8 in recognition to our similarity to the Roman
 9 scholar Annaeus Seneca who was the scholar to Nero
 11:22:08 10 and we hold that with some pride. Onitdawaga was
 11 our original name, but in 1998, as we developed
 12 the brand, the Seneca name was widely known among
 13 the United States, which we call Turtle Island,
 14 all of North America, because of the stance we've
 15 taken against the State of New York's illegal
 16 imposition or attempted imposition of taxation.
 17 The pride that that brought amongst Ungwehuay
 18 people across Turtle Island was an obvious
 19 resonance and I saw that and I was very proud to
 11:22:40 20 represent our community with that product and that
 21 trademark and that's why we have done so much
 22 promotion, because the name brings forth the

1150

1 A. Seneca, on the back is the logo.
 2 Q. Please let the record reflect -- or
 3 Mr. Montour, if you could please describe the
 4 shirt you were wearing?
 5 A. It's the letters that write Seneca, and
 6 on the back is the image of a Seneca with the
 7 gestalt (ph) -- actually the living man that
 8 introduced my mother and father in 1969 -- that's
 9 a photo I use out of respect of his introduction
 11:24:23 10 of my parents together.
 11 Q. Thank you. Would it be okay if we're
 12 able to see the shirt one more time; I'm not sure
 13 if everyone was able to see?
 14 PRESIDENT NARIMAN: Don't take it off.
 15 THE WITNESS: The logo is on the back.
 16 I mean, if you want me to striptease that's pretty
 17 insulting, but here you go.
 18 Q. Okay. That's fine. Thank you.
 19 A. With all due respect.
 11:24:54 20 Q. And do you know about how many of these
 21 Seneca shirts have been either sold or given away?
 22 A. In the hundreds of thousands. People

1151

1 are very proud to wear the shirts all Native --
 2 all Ungwehuay people. I see them worn with pride
 3 by non-Natives and Natives alike, as you would
 4 call them.
 5 Q. And the spokesperson, Seneca Sam --
 6 what is Seneca Sam's role in the promotion of the
 7 Seneca brand?
 8 A. He's a family friend and he's a member
 9 of the community and he is also very much involved
 11:25:35 10 in the promotion of the economic development of
 11 our community. One of his roles is to represent
 12 the image that is on the package and he is the
 13 living man that is on the package.
 14 Q. And does he make public appearances?
 15 A. As often as -- yes. Yes.
 16 Q. And does Seneca Sam as appear on the
 17 Internet?
 18 A. I think if you Googled all of us we
 19 would appear on the Internet. That's obvious.
 11:26:03 20 Q. Thank you. In your rebuttal report you
 21 attached what you describe as certain spreadsheets
 22 of NWS's promotional activities and we actually

1153

1 Q. Thank you.
 2 Next. At the top of the slide there is
 3 a reference to Seneca motorcycle. What is this
 4 Seneca motor cycle?
 5 A. There was a promotional giveaway that I
 6 actually did help participate in designing,
 7 something that represented the brand and did have
 8 the logo on there and, you know, all those
 9 promotion were promoted on Turtle Island.
 11:27:50 10 Q. And you see there are several
 11 references to displayed Seneca bike -- are these
 12 references to the Seneca motorcycle?
 13 A. With all due respect sir, if you can
 14 interpret the English language, we -- this is very
 15 transparent I believe. So, if you're going to ask
 16 me about every line that says "Seneca," we promote
 17 heavily our product on Ungwehuay territories.
 18 Q. Okay. I just have a few more slides I
 19 would like to one through, if that's okay?
 11:28:22 20 A. That's good.
 21 Q. Next slide, please.
 22 And you had referred earlier, Mr.

1152

1 had some slides, some excerpts from those
 2 spreadsheets, and on the slides we've blown up
 3 certain entries because the entries are quite
 4 small and difficult to read, so we've blown some
 5 up on some slides and I may just ask you a few
 6 questions about certain -- the line items.
 7 You see on the slide there,
 8 Mr. Montour, an item concerning 12 Seneca golf
 9 shirts, red, with B and W logo. So, would these
 11:26:48 10 be golf shirts that would have the Seneca name
 11 written on them, Seneca brand name?
 12 A. Yes. That's the local design they do,
 13 like a silk screening right -- I reckon Silver
 14 Creek.
 15 Q. Thank you.
 16 Next slide, please. Next line item you
 17 see blown up there is for Seneca logo decals.
 18 Would the decals also have the Seneca brand name
 19 written on them?
 11:27:18 20 A. The Seneca logo decals sir?
 21 Q. Yes.
 22 A. They're called Seneca logo decals, sir.

1154

1 Montour, to billboard advertising and there's a
 2 line item referring to billboard advertising. So,
 3 again I would just ask to confirm this is the
 4 Seneca brand being advertised on bill boards?
 5 A. Correct, on Ungwehuay territory.
 6 Q. Thank you. Okay. There's a line item
 7 for ten thousand Seneca shirts. So, again, all
 8 the shirt would have the Seneca brand?
 9 A. Of course, that we distribute from
 11:28:55 10 Ungwehuay territory.
 11 Q. And who receives the ten thousand
 12 shirts?
 13 A. Whoever picks one up off the table.
 14 Q. And where are they made available?
 15 A. At retail outlets on Ungwehuay
 16 territory, only.
 17 Q. Next slide, please.
 18 Few more references to bill boards so
 19 this again would be --
 11:29:15 20 A. On Ungwehuay territory.
 21 Q. Seneca brand?
 22 A. Seneca brand, absolutely.

1155

1 Q. 50 thousand books of Seneca matches,
2 where would the Seneca books be made available?
3 A. At Ungwehuay retailers.
4 Q. The same for the moccasins?
5 A. On Ungwehuay territories, yes, all on
6 Turtle Island.
7 Q. And as well as the hundred thousand
8 books of Seneca matches?
9 A. Obviously, yes.
11:29:43 10 Q. Next slide, please. Just a few more
11 items there. So, again just to confirm Seneca
12 brand on the 1,000 do-rags, 5,000 bandanas, 2,500
13 mugs, 10,000 pens, 2,500 tote bags and 4 table
14 covers, all Seneca brand?
15 A. All Seneca brand logo on Ungwehuay
16 territories.
17 PRESIDENT NARIMAN: Excuse, but this
18 "wa-wa" (ph) territory that you're talking about
19 means the Indian Reservation or...
11:30:15 20 THE WITNESS: Yes, what you would --
21 the word you would use Reservation --
22 PRESIDENT NARIMAN: What we would use.

1157

1 THE WITNESS: On Native territory --
2 what you would call Reservation.
3 PRESIDENT NARIMAN: Only on native
4 territory or outside the native territory as well?
5 THE WITNESS: Where they're picked up
6 and displayed is on our territory.
7 ARBITRATOR ANAYA: I'm not clear.
8 Just--
9 THE WITNESS: People wear them wherever
11:31:17 10 they wish.
11 ARBITRATOR ANAYA: So we can find these
12 things throughout Turtle Island.
13 THE WITNESS: Correct.
14 ARBITRATOR ANAYA: Including the part
15 that's known as the United States.
16 THE WITNESS: Predominantly, my job is
17 -- I don't travel very often north of the
18 imaginary line that's called Canada or south of
19 the imaginary line.
11:31:37 20 ARBITRATOR ANAYA: I'm just trying to
21 understand your testimony --
22 THE WITNESS: My job is what you'd call

1156

1 THE WITNESS: We would use Ungwehuay
2 land.
3 PRESIDENT NARIMAN: No, quite right.
4 And that's within that territory?
5 THE WITNESS: Yes, sir.
6 PRESIDENT NARIMAN: Fine. And the
7 Turtle Island you mention is the United States.
8 THE WITNESS: North America.
9 PRESIDENT NARIMAN: Of the whole of
11:30:35 10 North America.
11 THE WITNESS: North America.
12 PRESIDENT NARIMAN: So, this is in
13 North America, also, on Turtle Island.
14 THE WITNESS: Well, you consider the
15 United States as part of Turtle Island. To be --
16 to define -- I only impact what you would consider
17 the United States what I consider the lower -- the
18 southern part of the imaginary line defined by the
19 Jay Treaty.
11:30:56 20 PRESIDENT NARIMAN: Yes, yes, but in
21 that all these items -- they would be exhibited
22 you.

1158

1 the United States, yes.
2 ARBITRATOR ANAYA: Right. And the
3 United States including the western United States
4 what many would call --
5 THE WITNESS: All of them -- all --
6 from coast to coast.
7 ARBITRATOR ANAYA: So these items would
8 be found not just on your ancestral territory...
9 THE WITNESS: But on other's ancestral
11:31:59 10 territory also.
11 ARBITRATOR ANAYA: Okay.
12 THE WITNESS: Other inheritors of this
13 island, yes.
14 Q. For example, the motorcycle promotion
15 that we had discussed, was that promotion open to
16 the public? Could anyone attend if there was a
17 motorcycle giveaway or snowmobile giveaway, could
18 anyone attend?
19 A. Everyone is welcome to our territory as
11:32:22 20 long as they're not trying to enforce illegal laws
21 unilaterally. Yes.
22 Q. And for the 100,000 matchbooks or

1159

1 20,000 T-shirts, any member of the public would
2 have access to that merchandise?
3 A. Our retail outlets are obviously retail
4 outlets. So, the obvious answer is yes, on our
5 territories.
6 Q. Next slide.
7 So, again -- so, the 13,000 Seneca
8 shirts and 15,000 Seneca hats, those would be
9 available to any member of the public?
11:32:53 10 A. Yes, on our territories. If they come
11 to our territories, that's where they will find
12 those products available, for free.
13 Q. And the 3,000 Seneca bandanas 2,500
14 Seneca tees, also available to any member of the
15 public?
16 A. If they come to our territories, yes.
17 Q. Next slide.
18 MR. CALFO: May I have a moment?
19 (Pause in the Proceedings.)
11:33:47 20 Q. Mr. Montour, does Native Wholesale
21 engage in any kind of magazine advertising?
22 A. Yes.

1161

1 Island. That includes all the original Ungwehuay,
2 the people whose bloodlines through their mothers
3 or through whatever their cultural way has bound
4 them to this Earth. That's who I mean, so do not
5 try to exclude or just make exclusive just my
6 words -- I include all of those people that have
7 the ancestral right by birth to Turtle Island.
8 ARBITRATOR ANAYA: Just to be clear,
9 Mr. Montour, as you know, a lot of indigenous
11:35:36 10 people's territories in the United States is not
11 within what the dominant legal system would call a
12 reserve or a Reservation, but that would still be
13 ancestral territory. I could actually point to
14 the example of my own ancestral territory. So,
15 would it include such territories not within a
16 Reservation, what's known as a Reservation, but
17 nonetheless ancestral territories of indigenous
18 peoples.
19 THE WITNESS: To give you an example of
11:36:09 20 why that's a very hard question, I grew up on the
21 territory known as Gonyongay (ph). Gonyongay was
22 ancestral land that in 1974 was repossessed by the

1160

1 Q. What are some examples of the magazine
2 advertising?
3 A. I haven't seen any.
4 Q. I'm sorry?
5 A. I haven't seen any of them. I don't
6 get involved in such minor issues. I'm trying to
7 promote a brand, so if you ask me leadership
8 issues I can answer those, but as far as the
9 day-to-day activities, you have the spreadsheets.
11:34:18 10 Q. Thank you.
11 Next slide, please. So, again, the
12 100,000 Seneca matchbooks would be available to
13 any member of the public?
14 A. Obviously, yes, according to this.
15 Q. Thank you. Next slide, please.
16 A. You have to understand when I say our
17 territories I mean Ungwehuay. I'm not saying
18 Seneca, I'm not saying just Canokowa (ph), just
19 Canukihaga, this would --when I say "ours," I mean
11:34:45 20 the family in general, the hereditary inheritors
21 by birthright, the continuation for the connection
22 of this land we call our mother, this Turtle

1162

1 Ungwehuay, by the Haudenosaunee, by a group made
2 up of many nations who went and repossessed land
3 in what was known as the State of New York and
4 today that land is, has --is still occupied and
5 has been reoccupied by the original owners -- by
6 the original title holders, by the women of the
7 Haudenosaunee, the men are there also, and the
8 children have been born to that land as free as
9 before the encumbrances that came with the
11:36:56 10 European contact. I know there are places that
11 are called Reservations. I know there is a Bureau
12 of Indian Affairs. I know people call the places
13 territories, some people call them Reservations;
14 some people use Nations; some have PIA numbers;
15 some aren't even on the registry, Konawanda (ph),
16 Kustarura (ph), Onadaga (ph), Gonyongay. The list
17 can go on. There's territories where nobody has
18 asked for your recognition because we will never
19 give you that right to say no. That's the closest
11:37:23 20 I can give you to an answer. There are many
21 territories, if the people have in them and they
22 are taking the stance, who are we to judge them.

1 ARBITRATOR ANAYA: I appreciate your
 2 position and I do understand it but I also believe
 3 you understand that for many, there is a
 4 difference between lands that are included within
 5 the Reservation in the country and without, and
 6 it's important, I think, for the Tribunal to
 7 understand, without disrespecting your position,
 8 about the connection with ancestral territory.
 9 It's important to understand whether or not you're
 10 talking about ancestral territories that are
 11 outside of Reservation lands, what are identified
 12 as Reservation lands. So, whatever you can do to
 13 help us understand is very useful.

14 THE WITNESS: The easiest way I guess
 15 for me to answer that is that, although there are
 16 a number of litigations out there and anybody can
 17 stop me, I've never -- me, Native Wholesale Supply
 18 and GRE -- I as myself, Native Wholesale Supply,
 19 have never been accused of selling a product to
 20 off -- what you call an off-Reservation.

21 ARBITRATOR ANAYA: Right.
 22 THE WITNESS: The retail sales I have

11:38:09

11:38:45

1 predominantly as a representative of what you
 2 would call the Seneca Nation of Indians, which I
 3 was an elected official of. I lent myself to that
 4 system. They were trying to develop gaming, I saw
 5 them stumbling, so I was elected in the year '99,
 6 2000, we opened our casino in 2001. I get stuff
 7 done. And people have asked for my help and my
 8 knowledge through -- see, the way I have been
 9 raised, when you ask for my birth certificate and
 10 you ask for enrollment numbers and such. Was
 11 very, it was -- why it was not my first response
 12 was to send you those certifications because this
 13 is what we hold. When we are born to this land,
 14 what binds us to it in our way, is these what you
 15 call wampum, the Quahog where my people come from
 16 have been amongst what you would call the Finger
 17 Lakes. You will not find those shells there. We
 18 have had these since our first memorial meeting
 19 the Guswanka (ph). You have found some that are
 20 tens of thousands of years old. We obviously have
 21 traded from coast to coast, because I know not of
 22 a territory within my mother's homeland or my

11:40:38

11:41:19

1 exclusively focussed upon are on territories that
 2 would be considered to be state or federally
 3 recognized -- as with all the respect the
 4 terminology would be --

5 Arbitrator ANAYA: Thank you.
 6 THE WITNESS: --as close as I have --
 7 I've never been accused of selling them off Native
 8 territory.

9 Q. [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]

14 A. [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]

18 Q. [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 A. [REDACTED]

22 [REDACTED] -- I traveled for four years

11:39:17

11:39:53

1 father's homeland where the Quahog comes from.
 2 The continuation of trade across coast to coast is
 3 just that: It's a continuation of that which has
 4 always been ours. It has always been an
 5 interrelationship, whether you call it Reservation
 6 today, whatever status your department, and
 7 whatever type of government system that exist
 8 today didn't exist 200 years ago and whatever
 9 system it was they've always evolved, yet that
 10 trade has been consistent.

11 Q. [REDACTED]
 12 [REDACTED]

13 A. [REDACTED]
 14 Q. Next slide, please.

15 This is a screen shot from the
 16 Internet. Are you aware of this Internet
 17 advertisement for Seneca Sam?

18 A. First time I've seen it. It's pretty
 19 good.

20 Q. The screen shot refers to a -- it says
 21 enter to win this Seneca chopper. Are you aware
 22 of any promotions of giving away a Seneca chopper?

11:42:04

11:42:30

1167

1 A. I helped design the motorcycle itself
2 and the layout. And if you see the gestalt on the
3 back, you see our emblem is on there. You see it
4 on the tank. There is the great tree of peace,
5 and you see that represent the Gayanitgou (ph),
6 represents our laws. It represents who we are as
7 Ungwehuay. It doesn't represent the Department of
8 Indian Affairs or the Bureau of Indian affairs.
9 That represents our connection to Turtle Island
11:43:12 10 those white roots that you see on the tape. The
11 tree you see atop is atop a turtle. The Eagle you
12 see a top is our warning there are threats upon
13 our Nation. That represents to me what I have
14 been trying to portray and the continuance of
15 expanding the understanding of Gayanitgoa, is why,
16 on the Hanuata Belt (ph), there are two notches at
17 each end. That's so that we can continue to add
18 Nations, to build our alliance stronger, not in
19 defiance of each other but as friends and allies
11:43:48 20 and try to move forward alongside of those that
21 are in the same river.
22 Q. And but below the chopper on the screen

1169

1 Nevada. Was that located on what we would
2 consider on-Reservation territories?
3 A. I'm not sure what the lankly (ph)
4 status is of the Peyote People but I relate with
5 the people of the Peyote Nation. I have actually
6 sun danced with them, and you would have to ask
7 them what their understanding is, whether there's
8 a pending land claim or not. I know not what
9 their position would be on that. You can ask the
11:46:02 10 Peyote People.
11 MR. VIOLI: Mr. Feldman, just to
12 clarify you asked about the Erie Newspaper, and I
13 don't have a problem with that, generally, and you
14 asked about the slide. Are either one of those
15 two in the record?
16 MR. FELDMAN: Reference to the Erie
17 Newspaper. This we took from the Internet. This
18 is available on the Internet.
19 MR. VIOLI: So it's not in the record.
11:46:21 20 It is not something I've seen or my client have
21 seen.
22 MR. FELDMAN: That's correct. That's

1168

1 shot, it says, "As Seneca Sam says, Smoke'em If
2 You Got'em." Is that something Seneca Sam says
3 often?
4 A. I think he got it from one of your
5 movies.
6 Q. Mr. Montour, the spreadsheets of the
7 Seneca promotional items included a few references
8 to advertisements in the Erie Newspaper. Are you
9 aware of advertisement you've done in the Erie
11:44:42 10 Newspaper?
11 A. The Erie Newspaper is distributed to
12 retailers in the Allegheny Territory. I'm not
13 surprised. That's a great place to advertise. To
14 bring people to our territory, we always send --
15 we used to send runners, send messengers by way of
16 your media to bring people to our territories and
17 to promote the economic development, our own
18 Marshall plan. We've obviously let people know
19 that we exist still.
11:45:22 20 Q. And Mr. Montour, the add for the entry
21 to win the Seneca chopper refers to a drawing
22 being held on March 29, 2006, in Las Vegas,

1170

1 correct.
2 MR. VIOLI: And the Erie Newspaper is
3 in the record.
4 MR. FELDMAN: It's in the record, yes.
5 Okay. Thank you, Mr. Montour.
6 THE WITNESS: Thank you.
7 PRESIDENT NARIMAN: I would just like
8 to ask you something. Mr. Montour, if you or your
9 company was a party to the MSA or you were
11:46:48 10 subsequent participating manufacturer, could you
11 have made all these various promotions and
12 advertisements, according to you?
13 THE WITNESS: I believe everything that
14 we have been able to accomplish with all of the
15 encumbrances put forth in front of our people with
16 the minds that are involved and working together,
17 we've done this in spite of all of those
18 encumbrances. Had we been brought to the table,
19 the future for our people would be much brighter
11:47:24 20 because we are thriving, we strive to better each
21 generation.
22 I do not crystal ball forecast

1171

1 anything. We deal with issues as they come along.
 2 Would Web employing more people today? I believe
 3 we would. Would we have gone to the table in a
 4 mutual manner of respect? Yes, we would, because
 5 we need to trade between each other, we have
 6 always come to agreements; that is how we function
 7 as a people.

8 PRESIDENT NARIMAN: I'm sorry. I
 9 didn't make may self clear. My question was that,
 11:48:02 10 if you had gone to the table as you put it and
 11 participated as in this venture of MSA and
 12 subsequent participating manufacturer, would you
 13 have been able to undertake all these promotions
 14 that you have done, the motorcycle and shirts. Et
 15 cetera, would you have?

16 THE WITNESS: My belief, yes because
 17 our positions --

18 PRESIDENT NARIMAN: You could?

19 THE WITNESS: --would be unwavering.

11:48:29 20 PRESIDENT NARIMAN: Our position?
 21 THE WITNESS: Our positions on those
 22 issues would be unwavering. We are unwavering in

1173

1 Sante Fe, owned by R.J. Reynolds now, joined in
 2 1999, and the states only settled their issues --
 3 the issue was, how do you define what is allowed
 4 or not allowed under the MSA. That was not
 5 resolved until last year, January 2009, 10 years
 6 later. So, I will give to you this afternoon an
 7 article which press releases the settlement by the
 8 -- what they call -- the states call the
 9 settlement of the description or definition under
 11:50:07 10 the MSA -- we didn't see any payments for it, but
 11 in fact many manufacturers have done these sorts
 12 of things even under the MSA until the states --
 13 we saw it in the record also with the federal
 14 case, where the experts in the federal case said,
 15 look, the MSA isn't doing its job, let's see what
 16 they have done under the MSA. They've advertised,
 17 they've promoted. See, the MSA really only stops
 18 these promotions in non-adult-only facilities.
 19 These things we've seen are not to children.

11:50:40 20 MR. KOVAR: Mr. President, I don't
 21 understand why we're having legal argument,
 22 because we had called a witness for

1172

1 our issues. We would negotiate those until we
 2 would have. Our positions are non-negotiable when
 3 it comes to the sovereignty of our territory.

4 PRESIDENT NARIMAN: I don't think you
 5 followed what I said. I'm not asking about
 6 negotiations. The pattern of things being as they
 7 were, namely, the MSA and all the various other
 8 things that you have brought about, would you
 9 have, if you had become a party to it, an SPM,
 11:49:07 10 would you have been in a position to undertake all
 11 of these promotional activities which you now
 12 speak of about Seneca?

13 THE WITNESS: Yes.

14 MR. VIOLI: Mr. Chairman, I can speak
 15 -- that's really a question of what the MSA says
 16 and its definitions. I don't think he's an expert
 17 on that and doesn't have that, but I can speak to
 18 it and I certainly will because I will present to
 19 you this afternoon an article of a lawsuit the
 11:49:31 20 state brought of lawsuit against an SPM only last
 21 year that had trinkets, it had tin cans, it had
 22 all kind of promotional materials, a company named

1174

1 cross-examination, now, Mr. Violi is offering
 2 legal argument. I don't understand. This is sort
 3 of an unusual procedure.

4 MR. VIOLI: Well, I am not directing it
 5 to Mr. Montour -- I'm directing -- you know --

6 MR. KOVAR: And now he's talking about
 7 introducing new evidence in this proceeding and I
 8 just don't understand that.

9 MR. VIOLI: Like the slide you just
 11:51:01 10 showed? Like the slide that you just showed?

11 MR. KOVAR: The evidence on the record
 12 was about a chopper.

13 Mr. Violi, Mr. President, if I may, the
 14 evidence on the record indicated that there were a
 15 number of choppers and motorcycles that were sold
 16 as promotional items. And on cross we wanted to
 17 ask Mr. Montour if that was one of the motorcycles
 18 and he indicated that it was.

19 PRESIDENT NARIMAN: Yes.

11:51:22 20 MR. KOVAR: Thank you very much.

21 MR. VIOLI: He didn't indicate it was
 22 one of the ones you pointed out or what was in the

1175

1 record, but be that as it may.
 2 I would like just a couple of
 3 questions, if I may.
 4 Do you wish to stand, Mr. Montour?
 5 THE WITNESS: Yes.
 6 REDIRECT EXAMINATION
 7 BY MR. VIOLI:
 8 Q. Were any of these choppers, T-shirts,
 9 matchbooks to your knowledge provided to youths or
 11:51:42 10 anyone under 18?
 11 A. Absolutely not. As I sat on the
 12 recognized form of government, the Tribal Council,
 13 one of my very first things we put together was
 14 our Business Code and the policies requiring the
 15 18 statute, and you can see that in the Business
 16 Code it's a requirement under the so-called Seneca
 17 Nation of Indians law and. . .
 18 Q. And to get a chance to win that
 19 chopper, you have to be over the age of 18 don't
 11:52:12 20 you?
 21 A. I believe you have to be over the age
 22 of 18 to register any vehicle in the United

1177

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 A. [REDACTED]
 5 Q. [REDACTED]
 6 [REDACTED]
 7 A. [REDACTED]
 8 Q. [REDACTED]
 9 [REDACTED]
 11:53:48 10 Any regulations, to your knowledge, any
 11 advertising regulations that you know or any
 12 promotional regulations that precluded the
 13 distribution of shirts or the --
 14 A. If there is such an allegation, nobody
 15 has brought it to my attention.
 16 Q. And how many years have you been in
 17 this business, Mr. Montour?
 18 A. Since I was 15 years old.
 19 Q. And you've never heard of any such type
 11:54:13 20 regulation, have you?
 21 A. Nobody has ever looked me in the eye or
 22 served me with a piece of paper saying such a

1176

1 States.
 2 Q. And these T-shirts, they're distributed
 3 to retailers, Native American retailers; correct?
 4 A. Yes.
 5 Q. Any of them sized for children?
 6 A. Seneca size starts at extra large and
 7 up.
 8 Q. Unfortunately, I fit the description of
 9 a Seneca. A description I don't mind.
 11:52:38 10 A. The answer is no.
 11 Q. And aren't there advertisements in
 12 various newspapers of coupons of R.J. Reynolds's
 13 products. Nationwide advertisements?
 14 A. I would believe there would be. I
 15 wouldn't see why they wouldn't be promoting their
 16 product.
 17 Q. And aren't there advertisements of R.J.
 18 Reynolds's products? We see them in all kinds of
 19 magazines, do we not?
 11:53:06 20 A. I've seen them.
 21 Q. [REDACTED]
 22 [REDACTED]

1178

1 thing, no.
 2 Q. Okay. Can you describe your role
 3 briefly -- you said you're on the Seneca
 4 Development Council; is that what it's called?
 5 A. Presently?
 6 Q. Presently.
 7 A. Presently, I still give some of my time
 8 to the Seneca Free Trade Association which is an
 9 association of manufacturers, distributors
 11:54:44 10 retailers. There are many other Native
 11 manufacturers out there, also, and we get together
 12 mostly because we are generally faced with
 13 legislation brought forth by foreign governments.
 14 Q. And is it a role or is it a purpose of
 15 this development council or committee -- is it to
 16 promote business on native land?
 17 A. Our economic development is in its
 18 infancy stages and we try to work together as much
 19 as we can to promote jobs in our community.
 11:55:18 20 That's our primary goal -- right now is just
 21 recovering. We've not even barely scratch the
 22 surface of employment percentages, of income

1179

1 that's generated on our territories. The
 2 economics on our territories, right now, if --
 3 unless you eat gas or cigarettes, everything else
 4 you have to purchase off of their territories. We
 5 are trying to build economic infrastructure and
 6 we're at step one, and it's a big job.
 7 Q. And the Seneca Nation of Indians,
 8 that's the Government structure that's there, or
 9 that's known as, it is adopted recently an import
 11:55:59 10 export tax; correct.
 11 A. Very correct.
 12 Q. And that applies to tobacco products?
 13 A. Tobacco products, presently, and I
 14 believed there is one for petroleum products, and
 15 that --
 16 Q. And how much, do you have an idea of
 17 how much was paid under those assessments or under
 18 that program that arose from the sale of Seneca
 19 cigarettes?
 11:56:23 20 A. Actually I was at Council on Saturday
 21 previous to travelling down here and the number at
 22 that point was approx -- just over, close to

1181

1 to promote education, to help with the social
 2 disadvantages that occur on Native territories
 3 throughout Turtle Island.
 4 It was mentioned by somebody that
 5 exclusively -- there's no -- there's no line of
 6 demarkation. There have been projects on both
 7 side of the imaginary line funded as I've, as far
 8 as I know solely by Grand River. These are not
 9 government monies or grants, these are out of deep
 11:57:49 10 respect for the people upon which land we all --
 11 we share the sovereignty with.
 12 Q. That's the Dream Catcher Fund; correct?
 13 A. Correct.
 14 Q. And you said Dream Catcher Fund scope
 15 is not strictly limited to what is above the
 16 imaginary border between Canada and the United
 17 States or between those territories; right?
 18 A. Correct.
 19 Q. It's Turtle Island; it's North America?
 11:58:11 20 A. Correct.
 21 Q. We have a slide of the Free Trade Area,
 22 the North American Free Trade Area, that is Turtle

1180

1 \$8.2 million.
 2 Q. \$8.2 million?
 3 A. Yes.
 4 Q. And how much money has the Seneca
 5 agreement received under the MSA?
 6 A. Zero.
 7 Q. Zero. So, the MSA, with all its
 8 apparent restrictions that our friends --
 9 A. That's just in the last fiscal year.
 11:56:51 10 Q. Just in the last -- \$8.2 million just
 11 in the last --
 12 A. On sales taking place on the Cataragus
 13 (ph), the Allegheny, and the Kuba Lake
 14 territories.
 15 Q. Are you familiar with the Dream Catcher
 16 Fund, Mr. Montour?
 17 A. Yes, probable.
 18 Q. And could you explain briefly what the
 19 Dream Catcher Fund is.
 11:57:09 20 A. Dream Catcher was put together by Mr.
 21 Jerry Montour, Kenny Hill, and the Grand River
 22 Enterprise, the manufacturer of the Seneca brand

1182

1 Island correct, North American continent?
 2 A. Correct.
 3 Q. And did the Dream Catchers do anything
 4 recently or fund any project or program recently
 5 on Seneca Nation planned?
 6 A. Every week, we have people come who
 7 need anything from computers to a water heater, to
 8 requests for ambulances, fire trucks, the amount
 9 of grants that the elective system has relied upon
 11:58:54 10 even the gaming monies they have relied upon, all
 11 of those revenues have crashed with the American
 12 system, and I believe they are starting to
 13 question whether the American system's economic
 14 structure is something to follow, but the tobacco
 15 sales have remained steady and now, within our
 16 Nation, they realize there is a steady opportunity
 17 to take some of those sales at a price -- an
 18 adjusted price that passed on to the retailer to
 19 benefit the community and we are more than happy
 11:59:28 20 that our brand is about 80 percent of those monies
 21 that go to our community.
 22 Q. So, the Seneca people or the economic

1183

1 community there have felt the brunt of the recent
 2 recession, the financial times, as well; is that
 3 what you're saying?
 4 A. Yes, unfortunately the Seneca Nation of
 5 Indians as that system has invested and bonded and
 6 done things in the American financial system that
 7 has come back to kick them right in the butt.
 8 Q. And the programs that you just
 9 mentioned that were funded, the charitable
 12:00:02 10 programs, and the tax of 8.2 million --
 11 A. It's not a tax.
 12 Q. The assessment that you --
 13 A. We -- it's a fee that is paid to be
 14 spread out throughout the community.
 15 Q. So this 8.2 million fee and these
 16 charitable contributions and programs, it's all
 17 funded from the sale of Seneca cigarettes?
 18 A. Yeah, that number is, is just a small
 19 representation of that.
 12:00:31 20 That -- those things which we do for
 21 our people, we do not advertise because that is
 22 not what we -- we have not been raised to be

1185

1 Haudenosaunee, as Onitdawaga is, as we learn --
 2 one of first things we learn in our language,
 3 (speaking Seneca). Those words that come before
 4 all else. We give thanks to all of creation to
 5 all of that which we know of. We know there are
 6 organisms and there are things that dwell beneath
 7 the Earth. We know there are those things that
 8 are upon the Earth, the plants the medicines, the
 9 animals, all those things that sustain life -- the
 12:02:21 10 waters and all of their natural abilities to
 11 promote the life that we rely upon -- the water --
 12 the veins of our mother. We then give thanks to
 13 all of those things above the Earth whether it be
 14 the oxygen and all those things that we know we
 15 need to be sustained; we give thanks. We know not
 16 of all of them. We give thanks to the stars, the
 17 guidance they give us in travel so we can commence
 18 trade. Even we can travel at night. We give
 19 thanks all the way up to those things that we call
 12:02:51 20 our grandfathers, our grandmothers, those things
 21 that we pay contribute to for they enlighten us
 22 even in the dark of night. We pray -- we give

1184

1 self-promoting as far as individualistic...
 2 Q. And on the Seneca Nation land, is that
 3 a substantial number, substantial contribution to
 4 give back to the community?
 5 A. Should the brand not be available next
 6 week there will not be a paycheck for 80 percent
 7 of the people that are working there. Those jobs
 8 would be gone. They are working from check to
 9 check.
 12:01:00 10 Q. So, if the brand disappears --
 11 A. Back to welfare commodity cheese USDA
 12 food. We have risen to where our people can hold
 13 themselves with pride, even though maybe even the
 14 income has not gained as much as we wanted, the
 15 income is the derived from ourselves. The esteem
 16 we hold has risen. Our children's pride has
 17 risen.
 18 Q. Can you explain the parable or the
 19 concept first, of seven generations, and second
 12:01:37 20 when an elder walks in front of and has a child
 21 follow him in his shoes?
 22 A. Part of our learning process as

1186

1 thanks and we pay respects to the moon and the sun
 2 and the way that they have an effect on the
 3 natural life here that we rely upon.
 4 We always give thanks to the coming
 5 generations, we call them the faces that just we
 6 can barely see them like shadows coming through
 7 the Earth and we give thanks to them for they hold
 8 -- they hold -- because they are connected still
 9 through -- whether it's through the umbilical cord
 12:03:39 10 there the mother -- they're connected to the blood
 11 line that connects them to this land, to Turtle
 12 Island. We give them thanks, for once they break
 13 that cord, they then have the right to use the
 14 land but they also have the responsibility to
 15 protect it so that those yet uncoming who cannot
 16 defend themselves will inherit it. That seventh
 17 generation we will never see and we thank them
 18 because they take the heavy burden of being able
 19 to give this away which is not ours. They take
 12:04:12 20 that away -- they take it and relieve us of that
 21 pressure.
 22 Q. So that which come before you and this

1 which you are continuing?

2 A. No -- well, yes, and the reason we give
3 the words is because we're taught under Ungwehuay
4 and our way is an unbroken chain of -- that
5 connects us so Turtle Island -- an unbroken chain
6 that is a continuance of being Ungwehuay, of being
7 Onitdawaga, of being Gonyongay, of being the
8 people that I know.

9 As we travel, it is our responsibility
12:04:46 10 as a man, as a father. It is my responsibility as
11 my eight children -- my two sons and my six
12 daughters walk and follow myself and my wife.
13 They figuratively look up to me. It is my job to
14 follow this path that was already laid forth by
15 that knowledge which was handed to me from my
16 father and from my uncles and from my community
17 and it's my path to not stray. Should I stray off
18 that path, then those white roots of peace, those
19 will bring me back to the tree and I will follow
12:05:26 20 them. It's my job as I walk down this path is if
21 I see a stump, a rock, an encumbrance, it is my
22 job not to step over it; it is my job to face it,

1 attribute them to the cost of experience, the
2 decision to work with the honorable men that I
3 work with were very, very much a consideration
4 because the pieces of paper that you see there,
5 those mean less than our words and our hand
6 shakes.

7 MR. VIOLI: I have no further
8 questions.

9 MR. KOVAR: Just a very short recross,
12:07:18 10 Mr. President, if I may.

11 RECCROSS EXAMINATION

12 BY MR. KOVAR:

13 Q. Mr. Montour, my name is Jeffrey Kovar
14 and I'm also at the U.S. Department of State.
15 Thank you very much.

16 Now, Mr. Montour you've said that
17 you're a businessman, right?

18 A. I didn't use those words, no.

19 Q. Would you describe yourself as a
12:07:36 20 businessman?

21 A. I believe that my one small faction of
22 my job is promote the economics -- if you give a

1 to pick it up, and cast it as far aside from the
2 path that is straightforward in front of us so
3 that my children as they walk and they enjoy the
4 time -- the small time they have to learn and to
5 be a child that they don't trip over that and no
6 longer look up to me and no longer follow the same
7 path I did. They will maybe try to go in a
8 different way. That's my job.

9 Q. And I gather you didn't take it lightly
12:06:06 10 when you decided to enter into --

11 A. I take very little lightly.

12 Q. Well, hopefully you can have some fun
13 sometimes, but when you took the decision to enter
14 into a relationship, a business relationship, with
15 Mr. Jerry Montour, Mr. Kenny Hill, and with their
16 company, did you take that and make that decision
17 with the concept of the seven generations.
18 Looking out to what will come after you?

19 A. As far as I can remember, the decisions
12:06:30 20 that I have made willingly and not under
21 circumstances of pressure, I stand by all my
22 decisions. The mistakes that I may have made I

1 title to that that's up to your discretion. I
2 don't accept that as limited terminology.

3 Q. But you do sell a product?

4 A. The company that I own, yes, it does
5 sell a product and it does promote a product.

6 Q. And that product is cigarettes?

7 A. The product is the Seneca brand which
8 we formulated and, you know, we basically followed
9 that which was shown to us when I was 15.
12:08:17 10 Backwards integration of a product that was
11 already introduced to us, yes.

12 Q. And there are different kinds of
13 cigarettes, right, there's filter Kings and 100s
14 and --

15 A. Everything you know, sure.

16 Q. -- 120s? And why are they sold in
17 different formulations like that?

18 A. The same reason that there are
19 different flowers in a meadow. I'm sure people
12:08:41 20 would like to see a variety. You'd have to ask a
21 smoker.

22 Q. So, smokers like different kinds so you

1191

1 try to produce -- you try to give them cigarettes
2 they're most interested in?

3 A. I hate to point out the obvious in
4 life, but yes.

5 Q. Now, you know cigarettes are a very
6 dangerous product, right?

7 A. Since the day we started we had the
8 Surgeon General's warning on them and, the FTC, it
9 was very -- they communicated -- I directly
12:09:09 10 communicated with New York's City's office from
11 day one. The FTC was filed, the Surgeon General's
12 warnings are on there. The type of tobacco the
13 that people in this country have gotten used to is
14 the type of tobacco that, because of the
15 manufacturer's wanting to quickly get to market,
16 they manipulated by kiln drying it. Whenever you
17 add heat -- I'm not a scientist, but it's common
18 sense if you went to high school and you took
19 chemistry or science, you add heat to any
12:09:40 20 molecular -- any organic -- you're going to have a
21 -- come out molecular change. The tobacco my
22 people have smoked for thousands of years, the

1193

1 not in question here. So, I -- with all due
2 respect that's a ludicrous question. I'm not an
3 expert. Find a scientist.

4 Q. I withdraw it. Mr. Montour, do you
5 have a pack of cigarettes on you?

6 A. Do I?

7 Q. Yeah.

8 A. Yeah.

9 Q. Could we see it?

12:11:13 10 A. Over there. Do you see them? Do you
11 want to smoke?

12 PRESIDENT NARIMAN: Why don't you ask
13 him the question.

14 MR. KOVAR: Well, if he doesn't have
15 one, he doesn't have one.

16 THE WITNESS: Sure, is that what you'd
17 like --

18 Q. I would like you to read the warning on
19 the outside, if we could do that, if someone has a
12:11:26 20 pack --

21 A. It's the Surgeon General's warning. If
22 you go to the FTC Web site you can take a listing

1192

1 tobacco that your ancestors manipulated, there
2 were no such cancers on Turtle Island. So, the
3 toxic chemical, the what you call the -- here, the
4 deadly addictive products those -- I saw those
5 first products by Phillip Morris, R J Reynolds.
6 Yeah, so what happened is your people are addicted
7 today by a flavor that was introduced by the big
8 manufacturers and they demand that still.

9 Q. So, what you're saying is that the
12:10:20 10 Seneca cigarettes then are formulated in a way
11 that people demand and that way makes them more
12 dangerous?

13 A. Absolutely not. Absolutely not. We
14 blend our brand. There's nothing added to our
15 products that does not come from your fields.

16 Q. Are your cigarettes then less
17 dangerous?

18 A. I'm not a scientist.

19 Q. Do you believe they're less dangerous?

12:10:47 20 A. You know I heard a mathematician up
21 here use his imagination earlier. I always
22 thought math was definitive. My imagination is

1194

1 of all of the requirements by the FTC. We follow
2 them. Read them all if you'd like. Read them out
3 loud. All of those would be on -- and the cycle
4 that's demanded, we respect that, so we put those
5 labels on there. We adhere to that which makes
6 common sense to us.

7 Q. And that label, just for the record,
8 says those cigarettes cause cancer, death?

9 A. You wrote them. Yes, their you're
12:11:55 10 labels. You know what they say and we put them on
11 there in mutual respect.

12 Q. But you don't disagree with it?

13 A. We have no reason to.

14 Q. Okay.

15 A. The facts have shown themselves over
16 the years that the big companies lied, so I'm
17 pretty sure you guys have now -- you have made
18 them accountable to that.

19 Q. Mr. Montour do you smoke?

12:12:16 20 A. Yes.

21 Q. Have you smoked for a long time?

22 A. As a child we -- I have my pipe right

1 here. Tobacco for us is a way of communication.
 2 It is a way of coming to an understanding. It is
 3 the way to clear our minds maybe so that we can
 4 think thoroughly a situation through. When it
 5 comes to tobacco in general, you don't want to
 6 start an argument that goes to a belief system,
 7 and you certainly don't want to start that
 8 argument with the Ungwehuay.
 9 Q. Okay. So, Mr. Montour you smoke a
 12:13:05 10 pipe.
 11 A. That's one form of tobacco. I smoke
 12 the Seneca brand cigarettes too.
 13 Q. Oh, you do? Okay.
 14 A. Absolutely, because there's sometimes
 15 when tobacco needs to be accessible. I take my
 16 pipe out and smoke it out there, unfortunately you
 17 people smoke other things in pipes I don't want it
 18 to be misconstrued so I will have a cigarettes.
 19 Q. How old were you when you started
 12:13:28 20 smoking?
 21 A. This is a part of our process. It's
 22 very irrelevant. If you're talking about smoking.

1 Q. So, I'm gathering the implication young
 2 people from your Nation do smoke periodically,
 3 because it's part of your culture. Is that a fair
 4 restatement of your --
 5 A. Nothing about your statement is fair.
 6 It's very trivial.
 7 Q. Okay. Let me just ask you --
 8 A. It's very manipulative and I'm sorry to
 9 tell you that it's hard for me to answer you in a
 12:14:39 10 way that can properly address the manipulation of
 11 your words that's not the way -- I don't know
 12 those words.
 13 PRESIDENT NARIMAN: You have to be a
 14 little more respectful to counsel, please, and
 15 don't go on using those words, "manipulative."
 16 Q. I just have a little more questions.
 17 You told us that you had a wife and eight
 18 children; is that correct?
 19 A. Yeah.
 12:14:58 20 Q. Does your wife smoke?
 21 A. No.
 22 MR. VIOLI: Objection. Mr. President.

1 I'm not going to answer your question; it's
 2 ludicrous.
 3 MR. VIOLI: Objection.
 4 (Discussion off the record.)
 5 Q. SO, what you're saying is that would
 6 have been natural to smoke at a fairly young age
 7 because it was --
 8 MR. VIOLI: Objection. Now he's
 9 talking about youth smoking which is not anywhere
 12:13:48 10 in any of the cross.
 11 THE WITNESS: Do you know anything
 12 about any of my culture?
 13 MR. KOVAR: I'm afraid I don't know.
 14 THE WITNESS: Then your ignorance is
 15 not acceptable.
 16 Q. Well, it would help if you could answer
 17 my question --
 18 A. Tobacco is a part of the process for
 19 which our people use to come to this -- I cannot
 12:14:09 20 answer that in the definitive. Tobacco is
 21 something that was here long before you, you and
 22 your ancestors.

1 THE WITNESS: Women don't generally
 2 smoke pipes.
 3 MR. VIOLI: How much more offensive can
 4 we--the witness how more offensive. He's going
 5 into this man's personal life?
 6 PRESIDENT NARIMAN: Do you drink?
 7 MR. VIOLI: On occasion. Are you
 8 offering?
 9 Q. My last question. Do any of your
 12:15:18 10 children smoke?
 11 MR. VIOLI: Objection. He asked him if
 12 his children smoked.
 13 MR. KOVAR: Let him answer.
 14 PRESIDENT NARIMAN: He can answer if he
 15 wants.
 16 A. This year I sun danced in August and
 17 all of my children participated in a pipe
 18 ceremony.
 19 Q. Have they ever smoked a Seneca
 12:15:39 20 cigarette?
 21 MR. VIOLI: That's enough. He said one
 22 question.

1199

1 Mr. President, please. Please.
 2 Q. Have they ever smoked Seneca cigarette?
 3 A. No.
 4 Q. What would you think if they did smoke
 5 a Seneca cigarette?
 6 A. None of my children are 18.
 7 Q. What about when they become of an adult
 8 age?
 9 MR. VIOLI: Mr. I think you can sit
 12:15:58 10 down Mr. Montour.
 11 Mr. President, we're allowing him to
 12 sit down.
 13 MR. KOVAR: Thank you very much, Mr. --
 14 thank you very much, Mr. Montour, for listening to
 15 our questions. Thank you very much.
 16 THE WITNESS: Thank you. Thank you.
 17 MR. CALFO: Thank you very much for
 18 accommodating my schedule I appreciate it.
 19 THE WITNESS: Again, I would like to
 12:16:18 20 thank the pan panel -- if any of my words seemed
 21 offensive, the -- I apologize but that's --some
 22 things are hard for us to take time and time

1201

1 CONFIDENTIAL SESSION
 2 Q. I want to talk about the Allocable
 3 Share Amendment a little bit, and particularly
 4 your perception of -- or how you have described
 5 the states' objectives.
 6 Let's go to your second report I think
 7 it's 53, Paragraph 14. This is kind of a confused
 8 paragraph because of the background of how it
 9 starts and what you're doing in this paragraph,
 12:26:10 10 but at the end of it, and you'll correct me if I'm
 11 wrong, I think it contains an accurate statement
 12 of your position with respect to the states's
 13 objective on Allocable Share appeal. So, if you
 14 take a moment and read that, Professor, I'll see
 15 if you agree with that proposition.
 16 A. (Reviewing document.) Okay.
 17 Q. Okay. And I'll read this into the
 18 record. This is from Paragraph 14 of the rebuttal
 19 report.
 12:26:57 20 "States Allocable Share objective is to
 21 impose escrow obligations on NPMs equal to that
 22 imposed on the non grandfathered SPMs and the

1200

1 again.
 2 PRESIDENT NARIMAN: Thank you very
 3 much. Let's get back to the witness. We are
 4 changing witnesses.
 5 (Whereupon, at 12:16 p.m., the hearing
 6 was adjourned until 12:25 p.m, the same day.)
 7 PRESIDENT NARIMAN: Okay let resume.
 8 MR. LUDDY: I managed to draw blood
 9 over here. My own.
 12:25:27 10 CROSS-EXAMINATION
 11 BY MR. LUDDY:
 12 (End of open session. Confidential
 13 business information redacted.)
 14
 15
 16
 17
 18
 19
 20
 21
 22

1202

1 Grandfathered SPMs for their sales above the
 2 grandfather share, whichever is the relevant cost
 3 for grandfathered SPMs" -- I'm sorry, "which is
 4 the relevant marginal cost for grandfathered
 5 SPMs." Do you see that?
 6 A. Yes, I do.
 7 Q. Can we agree that's an accurate
 8 statement of your perception of the state's
 9 objective with respect to Allocable Share appeal
 12:27:39 10 when they took away the Allocable Share release?
 11 A. I think, I would only make one change
 12 -- this was my reinterpretation of someone else's
 13 statement. If this was my statement, I would have
 14 just clarified it one way. I would say to impose
 15 escrow allegations on NPMs no greater than that
 16 imposed on the non-Grandfathered SPMs. I don't
 17 think they necessarily were -- necessarily always
 18 intended to be exactly equal but certainly we're
 19 making sure it was no greater than.
 12:28:11 20 Q. No greater than?
 21 A. Yeah.
 22 Q. Fair enough.

1203

1 PRESIDENT NARIMAN: This question you
2 asked after the amendment or before the amendment.
3 MR. LUDDY: I guess the witness can
4 answer it.
5 THE WITNESS: This is about the goal of
6 the amendment. The goal of the amendment.
7 Q. Right. Now what is a "but for" world
8 in economic parlance?
9 PRESIDENT NARIMAN: What?
12:28:42 10 MR. LUDDY: A "but for" world.
11 A. THE WITNESS: It's basically a baseline
12 measure of what the world will look like except if
13 some change was made. So ceteris parabis is
14 another -- would be a common sort of legal way to
15 think about it.
16 Q. For the record, I'm now going to be
17 going into the next several exhibits -- are
18 exhibits that we received from the New York action
19 and got permission from the judge in the New York
12:29:20 20 action to use here and which the State Department
21 agreed to use and they have a heightened level of
22 -- pursuant to the judge's order -- have a

1205

1 extent the Tribunal could refer to these in any
2 award? What are the implications of the
3 restrictions you described for us?
4 MR. LUDDY: To the extent the Tribunal
5 refers to this, these documents in its report
6 which obviously we have no objection to and
7 encourage the Tribunal to do so, that part of the
8 report at a minimum, will have to be redacted from
9 any public version.
12:31:27 10 Q. Now, we had just established or you had
11 just testified --
12 PRESIDENT NARIMAN: What is this
13 document?
14 MR. LUDDY: This is a document -- this
15 is an excerpt of a document, and I'll have
16 Professor Gruber describe it in a moment, but this
17 is an excerpt of a report that Professor Gruber
18 together with a colleague, Professor Pendyke
19 submit the in the significant factor proceedings,
12:31:53 20 the disputes between the tobacco companies and the
21 states back in -- well, the document was submitted
22 in '06, but it was in connection with the 2003 NPM

1204

1 heightened level of --
2 PRESIDENT NARIMAN: Before you go to
3 that, may I say I would like to tell you very
4 frankly that, speaking only for myself, that I am
5 impressed with what this witness has said in
6 Paragraph 16 of the report. If you wish to ask
7 him anything you can, because I think that that is
8 relevant for the purposes of our decision on
9 various points.
12:29:59 10 MR. LUDDY: I will get to that.
11 PRESIDENT NARIMAN: That's your choice.
12 MR. LUDDY: Yeah, I def -- it is my
13 intention to get there. I want to finish up this
14 marginal cost issue.
15 Q. If you could turn to Core Document
16 Number 4.
17 PRESIDENT NARIMAN: Original or --
18 MR. LUDDY: Original. Actually, it's
19 Core Document Number 5. I'm sorry.
12:30:45 20 ARBITRATOR CROOK: Mr. Luddy? As you
21 move into these documents could you clarify for
22 the Tribunal whether or in what manner or in what

1206

1 adjustment proceedings.
2 Q. And we had just talked about,
3 Professor, your view that the goal of the states
4 in pursuing Allocable Share appeal was to raise
5 the marginal cost of the NPMs to an amount no
6 greater than that experienced by Grandfathered
7 SPMs above their exempt share; correct?
8 A. Correct.
9 Q. Now, if you could look at --
12:32:35 10 PRESIDENT NARIMAN: Just one minute.
11 (Pause in the Proceedings.)
12 PRESIDENT NARIMAN: Is this your
13 document?
14 THE WITNESS: Yes. This is a report
15 that my colleague and I did in the significant
16 factor proceedings. This is our initial
17 submission to McFadden and the Braddle Group.
18 Q. Okay. Now, with that --
19 A. I'm sorry, let me clarify. This is our
12:33:21 20 -- the Braddle Group an initial determination and
21 this is our comment on that initial
22 interpretation. This is sort of -- they made

1207

1 their initial decision, we were allowed to comment
 2 on their initial decision. This is our comment on
 3 their initial decision.
 4 PRESIDENT NARIMAN: Have they issued a
 5 final decision.
 6 THE WITNESS: Yes, they then, after
 7 this, issued a final decision.
 8 PRESIDENT NARIMAN: Is that also
 9 confidential.
 12:33:41 10 THE WITNESS: I don't -- you'd have to
 11 ask them.
 12 MR. LUDDY: Yes. We have--there are
 13 parts of it are public, parts of it that are not,
 14 but none of it is in the record here.
 15 PRESIDENT NARIMAN: Why is it not on
 16 the record?
 17 MR. LUDDY: It was not produced by the
 18 respondents because the states did not give it to
 19 the respondents.
 12:34:05 20 MR. KOVAR: Mr. Chairman, Mr. Luddy
 21 just said he has the documents.
 22 MR. LUDDY: I can't put them in if it's

1209

1 Q. Look at Paragraphs 8 and nine. I'm
 2 going to read this into the record, Professor.
 3 [REDACTED]
 4 PRESIDENT NARIMAN: What.
 5 MR. LUDDY: The firm, which is the
 6 Braddle Group.
 7 THE WITNESS: Paragraph 8.
 8 Q. Paragraph 8, Page 4 of Core Document 5.
 9 MR. LUDDY: [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 12:35:22 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

1208

1 under a court order.
 2 MR. KOVAR: He said -- Mr. Luddy just
 3 said there were redacted versions of these
 4 documents --
 5 PRESIDENT NARIMAN: Court order against
 6 him --
 7 MR. KOVAR: Yes, but Mr. Luddy also
 8 said there are redacted versions that are public
 9 and he chose not to put them in the proceedings.
 12:34:20 10 MR. LUDDY: Redacted versions.
 11 (Simultaneous discussion.)
 12 MR. KOVAR: The Chairman asked why he
 13 hadn't seen them.
 14 MR. LUDDY: Again this is the same
 15 issue we're going to have to walk the Tribunal
 16 through. I think doing it piecemeal is --
 17 PRESIDENT NARIMAN: I think it's going
 18 to be a blind man's walk. We don't know anything.
 19 Sometimes you disclose it, sometimes you say you
 12:34:41 20 don't disclose it. We don't know why you don't
 21 disclose it or where you don't.
 22 MR. LUDDY: We will explain all that.

1210

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 And you wrote that together with
 8 Professor Pendyke; correct?
 9 A. That's correct.
 12:36:43 10 Q. Can you explain -- can you show me in
 11 your two reports that you submitted in this action
 12 to this Tribunal, where you talk about an average
 13 SPM marginal cost or even acknowledge an average
 14 SPM marginal cost?
 15 A. So, let me explain what the issue here
 16 is because now we're -- I just want to be clear on
 17 the distinction between average, marginal and
 18 average marginal.
 19 So, an average cost, as we described
 12:37:16 20 before, incorporates fixed cost. We're not
 21 discussing that. The marginal cost is what we
 22 discussed before, which is the cost of the last

1211

1 unit.

2 Now, you have the problem where what
3 this gets to is issue of the vast majority of
4 SPMs, their sales are above their grandfather
5 level. So, their marginal cost is the cost above
6 the grandfathered level.

7 For a small minority of NPMs, their
8 sales are within the grandfather level, so their
9 marginal costs are much lower. So, what we did in
10 this report is we said, you want to take -- when
11 you compute the right marginal cost, if a firm is
12 in its grandfathered range, it hasn't exceeded its
13 grandfathered level, then its marginal cost is
14 zero, as you mentioned. If it's exceeded its
15 grandfather level its marginal cost incorporates
16 the marginal cost of the MSA.

17 So, we were making what turns out to be
18 a very, very minor point, which is that if you use
19 -- if you take a weighted average where you put in
20 zero for the ones that are in the grandfather
21 range and the marginal costs for the ones above
22 the marginal range, you get a slightly smaller

12:37:42

12:38:12

1213

1 so, are you for it or are you against it? Results
2 in a situation where NPMs face a cost
3 disadvantage, so you'd prefer to have that cost
4 disadvantage or you wouldn't? What's your stand?

5 THE WITNESS: So, I don't have a
6 normative stand on what I prefer or not. All I'm
7 saying is that, in this context -- in this other
8 hearing we're fighting over very, very small
9 amounts and all this paragraph is pointing out is
10 that it makes about a half a cent -- it makes like
11 one percentage point small difference whether you
12 take the -- how you define the marginal cost you
13 define the marginal cost as just the amount above
14 the grandfathered level or you take the average of
15 amount above the grandfathered level and within
16 the grandfathered level.

17 For the purpose of today's discussion,
18 it's not important because it's a very, very small
19 adjustment. For the purpose of this other hearing
20 where we're fighting over precise numbers, whether
21 you're exactly above or below 2 percent, it
22 mattered. That little adjustment we felt

12:39:46

12:40:16

1212

1 number than if you use the value just above the
2 grandfathered range.

3 Q. You didn't give the Tribunal in this
4 matter the weighted average for marginal cost for
5 SPM, did you?

6 A. It makes such a trivial difference, I
7 didn't -- I did not, but as I pointed out, since
8 in recent years 99 percent of sales are made by
9 firms above the grandfathered region, it makes
10 essentially no difference whether you just use the
11 above grandfathered number or you average a zero
12 for one percent of the people.

13 PRESIDENT NARIMAN: I don't follow this
14 last sentence. Increasing NPM marginal cost to
15 the marginal cost of non-Grandfathered SPMs as the
16 firm did -- firm means your firm.

17 THE WITNESS: No. No, I'm sorry, this
18 is confusing. The firm is basically the McFadden
19 and the Braddle Group. The firm --

20 PRESIDENT NARIMAN: Firm arbitrator.

21 THE WITNESS: Yeah.

22 PRESIDENT NARIMAN: Oh. The results --

12:38:45

12:39:17

1214

1 mattered. For purposes of what we're discussing
2 today, at least my view it doesn't matter.

3 PRESIDENT NARIMAN: Well, it does
4 matter.

5 I'm asking you why should NPMs face a
6 cost disadvantage consciously? I mean, if it's
7 unconscious, it's all right.

8 THE WITNESS: I don't think.

9 PRESIDENT NARIMAN: I don't follow
10 this. Whatever that cost disadvantage. I mean
11 what's your approach for that. Should they face a
12 cost disadvantage or shouldn't they? I mean, I'm
13 asking you in this proceeding, not in the other
14 one.

15 THE WITNESS: If you're asking now my
16 view normatively --

17 PRESIDENT NARIMAN: Yes, yes.

18 THE WITNESS: No I believe we should
19 have a level playing field --

20 PRESIDENT NARIMAN: Yes, that's right.

21 THE WITNESS: Where everybody plays
22 exactly the same cost.

12:40:41

12:40:54

1215

1 PRESIDENT NARIMAN: Yes I should have
2 thought you answer like that. I follow.
3 THE WITNESS: Yes.
4 PRESIDENT NARIMAN: Now you're making
5 yourself clearer, to me at least.
6 THE WITNESS: And basically, I think
7 the key point is sir, that basically, essentially
8 what the Allocable Share appeal does is sets that
9 level playing field. Now, whether it sets -- in
10 the sense it matters for this hearing, it may in
11 some context set it NPM cost one percent below or
12 one percent above, and depending on how you set
13 things -- but for the broad sense which it matters
14 for determining competition it levels the playing
15 field and that's what matters.
16 Q. Professor, in your calculations in this
17 case you took out the marginal cost for SPMs to
18 five decimal points, correct, when you calculated
19 it here, in this case?
12:41:49 20 A. Yes.
21 Q. You understand that marginal cost in
22 this case and any case requires some measure of

1217

1 Whether you end that situation and pay exactly the
2 same or one percent less or one percent more I
3 don't think that was the purpose of these, because
4 you have other factors that matter. I think the
5 point was to get away from the situation was a
6 huge loophole and they're paying a huge amount
7 less. That's the point of these appeals.
8 Q. Okay. I'll ask the question again.
9 In Paragraph 14 of your second report,
10 you said the state's Allocable Share objective --
11 PRESIDENT NARIMAN: Where? Where?
12 Where?
13 MR. LUDDY: Paragraph 14 of the
14 rebuttal report.
15 THE WITNESS: 53?
16 MR. LUDDY: 53. I'm sorry,
17 Mr. Chairman. 53. Paragraph 14.
18 MR. LUDDY: Yes. You said, quote --
19 Paragraph 14.
12:44:03 20 Q. You said, quote, "states Allocable
21 Share objective is to impose escrow obligations on
22 NPMs equal to that imposed on the

1216

1 precision; correct?
2 A. That's correct.
3 Q. Okay. And in this case, you have told
4 the Tribunal that the goal of the States in
5 Allocable Share appeal was to raise the marginal
6 cost of the NPMs to the marginal costs of
7 Grandfathered SPMs above their exempt share;
8 correct?
9 A. The goal of the Allocable Share appeal
10 was -- the goal to Allocable Share appeal was to
11 end a loophole which was giving the NPMs an
12 enormous marginal cost advantage. What I said is
13 that the idea was to end that loophole.
14 Now, as I pointed out in my report,
15 even after that loophole, the NPMs have a one
16 percent marginal cost advantage because of the
17 calculations in the MSA are such that if you look
18 at their escrow amounts, they're one percent below
19 what the SPMs had to pay.
12:42:52 20 So, but I think the point is you had a
21 situation where the NPMs were paying massively
22 less. The idea was to end that situation.

1218

1 non-Grandfathered SPMs," all right? Let's take
2 that piece of language in our mind and move to the
3 last sentence of Paragraph 9?
4 A. Can I just clarify. What I'm doing in
5 this paragraph, you are attributing a quote to
6 someone -- I'm clarifying what I thought this
7 person meant; that is not my statement.
8 Q. All right. Let's find another --
9 A. This is my clarification --
10 Q. Let's find another place where you said
11 it directly, then. I thought you had agreed five
12 minutes ago that that was an accurate statement of
13 your position. Is that an accurate statement of
14 your positio or not?
15 A. What I said five minutes ago is this is
16 not my statement and that this --and that the goal
17 of these Allocable Share was to move the NPMs to
18 pay no more than.
19 Q. No more than?
12:44:59 20 A. Than what the -- what the -- no more
21 than the marginal cost of the SPMs above their
22 grandfathered level.

1 Q. Okay. Let's look at the last sentence
 2 of Paragraph 9. [REDACTED]
 3 [REDACTED]
 4 PRESIDENT NARIMAN: Where is that?
 5 Where is this?
 6 MR. LUDDY: Last -- I'm sorry. The
 7 last sentence of Paragraph 9 on Core Document
 8 Number 5.
 9 You're going want to keep that open,
 12:45:33 10 Mr. Chairman, because we're going to be going back
 11 and forth to compare these statements.
 12 Paragraph 9 on Core Document Number 5.
 13 Q. [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 A. As I said, roughly, they wanted to
 18 close the loophole.
 19 Q. Right. Results in a situation where
 12:46:25 20 NPMs face the cost disadvantage with respect to
 21 the average SPM.
 22 So, in this proceeding you're saying

1 releases and we were trying to close -- not we, I
 2 wasn't part of it -- but the goal of the states
 3 was to close the loophole.
 4 Now, in fact, for the purpose of this
 5 case, if that loophole was closed plus or minus
 6 half a percent, it is totally irrelevant.
 7 For the purposes of this other case, we
 8 had argued precisely around this exact two percent
 9 target, it was relevant.
 12:47:59 10 Q. Well, here we're arguing about the
 11 ability of NPMs and SPMs to compete and small
 12 differences in marginal cost can make big
 13 differences in the marketplace, can't they,
 14 Professor Gruber?
 15 That's why you took your number out to
 16 five decimal points in this case?
 17 A. I took my number out to five decimal
 18 points because that's where the spreadsheet took
 19 it. I don't think I chose ---
 12:48:17 20 Q. Do small marginal cost make big
 21 differences when applied in a marketplace, yes or
 22 no?

1 the objective was to take it to the marginal cost
 2 of the Grandfathered SPMs, but in the significant
 3 factor proceeding, you opined that to do just
 4 that, what you have acknowledged the States want
 5 to do, creates a cost disadvantage for NPMs with
 6 respect to the average SPM; correct?
 7 A. Once again --
 8 Q. Yes or no? Can you answer me that yes
 9 or no or tell me you can't.
 12:47:01 10 A. I can't answer it yes or no. I have to
 11 give you a more complete answer than that. Okay.
 12 Once again, the point is, in that other case we're
 13 arguing over very precise numbers.
 14 Q. I'm arguing we go over very precise
 15 numbers here, too.
 16 A. What we're saying in that case is if
 17 you take it to the weighted average of the
 18 grandfathered and non-grandfathered then that can
 19 -- may take you slightly above the marginal cost
 12:47:28 20 to the SPMs, like half a percent. But the point
 21 is the whole goal here was the NPMs had this huge
 22 cost advantage through these Allocable Share

1 A. Depends on the profitability of the
 2 enterprises.
 3 PRESIDENT NARIMAN: Is it okay that
 4 this -- that the increasing the NPM marginal cost
 5 to the marginal cost of non-Grandfather SPM
 6 results in a situation where NPMs face a slight
 7 cost disadvantage with respect to the average SPM.
 8 THE WITNESS: Very slight, but yes.
 9 PRESIDENT NARIMAN: Very slight.
 12:48:45 10 That's how you rephrase this.
 11 THE WITNESS: What I would say is -- I
 12 think the correct rephrasing is where they could
 13 face a very slight. "Could" means, if they
 14 completely comply with the -- with their escrow
 15 obligations, and in that case they could face a
 16 very slight cost disadvantage, that's true.
 17 Q. Well, let's see if some other language
 18 that you used in the significant factor proceeding
 19 is consistent with what you're telling the
 12:49:15 20 Chairman now about slight.
 21 If you could look at Core Document 6,
 22 Paragraph 13.

1223

1 ARBITRATOR ANAYA: So, for purposes of
 2 this proceeding, they could suffer a slight
 3 disadvantage.
 4 THE WITNESS: For the purposes of this
 5 proceeding, the NPMs, if the Allocable Share is
 6 repealed and they fully comply with their escrow
 7 obligations it is possible they could suffer a
 8 slight cost disadvantage, marginal cost
 9 disadvantage, relative to the SPMs. However,
 12:49:57 10 actually I do have to clarify the statement.
 11 There's so many things going on, it's hard to keep
 12 track of them all. I do have to clarify that
 13 statement because there's another aspect of the
 14 Escrow Statutes that we haven't discussed, and I
 15 discuss this in my -- if you turn to my FIRST
 16 EXPERT report, I think it's Exhibit 52.
 17 If you turn to -- if you turn to
 18 Paragraph 13 on Page 8, so Exhibit 52,
 19 Paragraph 13, on Page 8. And this is something
 12:50:38 20 I'm sorry I should have added a few minutes ago; I
 21 just remembered.
 22 If you don't mind my reading it, what

1225

1 that any cost advantage you may have been
 2 describing in the previous document was slight.
 3 You said --
 4 ARBITRATOR ANAYA: I'm sorry. I'm not
 5 clear on that. So, you would have added or should
 6 have added the word "slight" to this report as
 7 well, the one in the previous proceeding.
 8 THE WITNESS: What I should have added
 9 -- exactly. What we should have added in the
 12:52:10 10 other proceeding is the word "could" and "very
 11 slight," so it could be very slight advantage.
 12 But what I've then amended is what we didn't -- we
 13 should have acknowledged that in the previous
 14 proceedings, of course, at the same time as this
 15 other part of the Escrow Statutes, which the NPMs
 16 presumably -- If I'm wrong and it wasn't very
 17 slight, the NPMs could appeal to -- which is the
 18 Escrow Statutes explicitly say they can't pay more
 19 than they would as SPMs.
 12:52:35 20 It's all -- that's the key point, is
 21 that the Escrow Statutes are set up to make sure
 22 they never pay more than they would as SPMs,

1224

1 it says is second -- "the release provision the
 2 amended Escrow Statutes ensures that NPMs will not
 3 pay more in escrow for their sales in a particular
 4 state than they would in settlement payments for
 5 those same states if they were to sign as an MSA,
 6 assigned to the MSA as SPMs.
 7 So, if they pay more -- basically, the
 8 escrow has essentially an insurance component to
 9 it that says to the SPM, look, you will not have
 12:51:16 10 to pay more than you would have as an SPM. It
 11 sort of sets this ceiling. Now, I don't know if
 12 that's precise to the fifth digit, maybe if they
 13 -- half a percent more, they wouldn't get that
 14 back, but the point is to -- sort of insurance
 15 mechanism in these escrow statutes. They are
 16 essentially telling the NPMs, you will not have to
 17 pay more than you would have as an SPM. So, it
 18 sets the ceiling on how far up they could go, and
 19 I think that's an important point to recognize I
 12:51:39 20 should have brought up earlier. I'm sorry.
 21 Q. Let's go back to Core Document 6. You
 22 have described to the Chairman and Professor Anaya

1226

1 explicitly.
 2 ARBITRATOR ANAYA: Can you explain to
 3 me why the sentence reads the way it does.
 4 There's a difference between, it could, slight,
 5 and just to say, results in a situation. I mean,
 6 I understand it has something to do with the
 7 context, the nature of the proceedings, but I'm a
 8 bit unclear on that. I mean, you seem very
 9 precise --
 12:53:03 10 THE WITNESS: Quite frankly, the
 11 language is sloppy. I mean, you know, I don't
 12 honestly have a better excuse than that. We
 13 should have been more precise in how we wrote it.
 14 I mean --
 15 ARBITRATOR ANAYA: Does the difference
 16 between how it reads in this document and how it
 17 should have read, does that matter -- did that
 18 matter to these proceedings or could it have
 19 mattered to these prior proceedings?
 12:53:31 20 THE WITNESS: Well, the prior
 21 proceedings were all about the language. The
 22 prior proceedings were very much about numbers and

1227

1 econometric calculations. None of the language in
 2 the end really mattered that much in the prior
 3 proceedings. It was more the exact, precise
 4 calculations of where you were relative to 2
 5 percent and 8 percent. So, I don't believe it
 6 would have mattered at all in the prior
 7 proceedings if we had added that qualifier,
 8 because at the end of the day, Professor McFadden
 9 cared about the exact calculations that were in
 12:53:57 10 the report --
 11 PRESIDENT NARIMAN: Well they do matter
 12 here because the point that is being made by the
 13 Claimants and disputed by the Respondent is that
 14 the whole purpose of the allocable may be wrong or
 15 that the Allocable Share Amendment was in order to
 16 deliberately deprive the NPMs of any cost
 17 advantage and in fact put them in a situation
 18 where they had a cost disadvantage. That's the
 19 thrust of their case, you follow?
 12:54:28 20 THE WITNESS: Mr. Chairman, I
 21 understand. And what I'm saying is --
 22 PRESIDENT NARIMAN: So, they're point

1229

1 THE WITNESS: Absolutely. And I do not
 2 -- what I'm saying is it is possible that it could
 3 have gone beyond.
 4 PRESIDENT NARIMAN: That's what I
 5 thought.
 6 THE WITNESS: But I do not think it did
 7 and the reason I know it didn't is because the
 8 NPMs had a provision where if it went beyond they
 9 could say, we're not paying this, because we are
 12:55:48 10 guaranteed by the Escrow statutes to not go
 11 beyond.
 12 So, it may be that it went half a
 13 percent beyond, but it went meaningfully beyond,
 14 the NPMs could have just said, we're not paying it
 15 because there's-a provision which ensures that
 16 they never pay more than they would pay as SPMS.
 17 PRESIDENT NARIMAN: Mr. Kovar -- this
 18 is off the record.
 19 (Discussion off the record.)
 12:57:05 20 Q. All right. So, your -- you said a
 21 number of times the states with Allocable Share
 22 appeal wanted to level the playing field; right?

1228

1 is, don't say it's not relevant; it is relevant.
 2 So, when we add the word "slight," et cetera, et
 3 cetera to your report, then that becomes -- it
 4 changes the whole sense of it.
 5 THE WITNESS: I completely agree. I
 6 didn't mean to imply it wasn't relevant for this
 7 proceeding. What I'm saying is that the purpose
 8 was to end that loophole -- was to bring it to the
 9 same level. Moreover, I think what I want to
 12:54:56 10 highlight is what I say in my initial report,
 11 which is that there's a provision in the Escrow
 12 Statutes themselves which ensures they can never
 13 pay more. So there's a ceiling set in the
 14 original Escrow Statutes which ensures that the
 15 NPMs would not pay more than they would as SPMS.
 16 PRESIDENT NARIMAN: My question is
 17 that, in closing the loophole, which may have been
 18 very justifiable, et cetera, did they go beyond
 19 closing the loophole and to the disadvantage of
 12:55:25 20 NPMs? I want to know from you. You are the
 21 expert. You are the economics expert; that's why
 22 I'm asking you.

1230

1 A. That's right.
 2 Q. Okay. Let's look at Core Document
 3 Number Six, Paragraph 13, second sentence, and
 4 again we're talking about this but for world and
 5 the --
 6 PRESIDENT NARIMAN: What is "but for"?
 7 THE WITNESS: Once again this is a
 8 ceteris parabis which is the term you may be
 9 familiar with, which is basically everything else
 12:57:38 10 unchanged.
 11 PRESIDENT NARIMAN: All things equal.
 12 THE WITNESS: All things equal,
 13 exactly.
 14 So, if it wasn't an MSA but everything
 15 else had been the same, what would have happened?
 16 Q. [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 12:57:58 20 [REDACTED]
 21 A. Of document six.
 22 Q. Of Core Document Number 6. [REDACTED]

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1231

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED] So, a moment ago
 4 you're trying to add slight to your previous
 5 language, but here you're acknowledging it was
 6 decidedly tilting the playing field against the
 7 NPMs, weren't you?
 8 A. Actually, no I'm not, because you're
 9 mixing up two issues. So, one issue -- so, let me
 12:58:36 10 clarify --
 11 ARBITRATOR CROOK: Excuse me, Professor
 12 I want to be clear. Are these the same
 13 proceedings or are they two different proceedings
 14 in two different years?
 15 MR. LUDDY: Same year.
 16 ARBITRATOR CROOK: Okay. One of them
 17 says 2003 NPM adjustment and the other says --
 18 MR. LUDDY: Oh, I'm sorry. Yes, it --
 19 ARBITRATOR CROOK: --2004 NPM
 12:58:48 20 adjustment --
 21 MR. LUDDY: I'm sorry, it is two
 22 different years, yes.

1233

1 said -- the way we, the settling states did, is we
 2 said the but for world should be take what
 3 happened after the MSA -- take, say, 2007, and
 4 take -- or 2004 -- and take out the cost of the
 5 MSA. That is, take the prices that are there as
 6 of 2004 and take out the marginal cost of the MSA.
 7 That is, lower everybody's price by 30 cents, or
 8 lower the NPMs prices by less, but just take out
 9 the prices.
 13:00:07 10 The firm. The ultimate decider of this
 11 case --
 12 PRESIDENT NARINAN: The arbitrator.
 13 THE WITNESS: The arbitrator, they had
 14 a different view. They said, no, our definition
 15 of the but for world is take the world before the
 16 MSA and add in the MSA costs. They might say,
 17 well, those are the same things but it turns out
 18 econometrically they're not, because the
 19 econometric model depends on price ratio and if
 13:00:31 20 you do a price ratio, it's different if you reduce
 21 the numerator and you increase -- if you reduce
 22 the denominator versus decreasing the numerator,

1232

1 ARBITRATOR CROOK: So we're talking
 2 about two different years.
 3 MR. LUDDY: Correct.
 4 ARBITRATOR CROOK: Thank you, sir.
 5 THE WITNESS: But actually, it is an
 6 important --
 7 Q. But as the -- go ahead. I'm sorry.
 8 Thank you.
 9 A. It is an important distinction here.
 12:59:04 10 We were discussing a moment ago -- was the
 11 technical issue about whether when you close the
 12 loophole, as you asked, could that marginal cost
 13 rise above the SPM marginal cost. [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 12:59:35 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED] The way we did is we

1234

1 those have different effects on the price ratio;
 2 that's what this refers to. This has nothing to
 3 do with what we were discussing a minute ago.
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 13:00:55 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 Q. [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 13:01:24 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

1235

1 [REDACTED]
 2 [REDACTED]
 3 A. No. Once again, you're mixing the
 4 points. What we're saying is, and this is
 5 confusing, so let me be clear on it. We're saying
 6 -- is the arbitrator, their but for world was one
 7 where they said -- their but for world was one
 8 where they said, imagine there'd been no MSA, take
 9 the MSA -- take the NPM cost and raise them up to
 13:02:07 10 the level of the SPM cost; that's what they do.
 11 We say, no, take a world with an MSA and take the
 12 OPN costs and lower them by that amount. This is
 13 a dispute about denominators versus numerators,
 14 this is not a dispute about defining marginal
 15 costs. This is a completely different dispute.
 16 PRESIDENT NARIMAN: I think all this is
 17 pretty useless for us, at least for me, for this
 18 reason: We are deprived of knowing what the
 19 arbitrator decided. I mean, what's the use of
 13:02:35 20 your opinion of but for world and what you say --
 21 what ultimately was the decision in the case may
 22 have had some relevance to us, but since that is

1237

1 we just don't know what the argument result is.
 2 So, this is just in the air. What he says is of
 3 little relevance for us.
 4 MR. LUDDY: Chairman I understand your
 5 point.
 6 PRESIDENT NARIMAN: You either agree to
 7 put the final decision in or you say that, no, we
 8 put it out and all this -- to my mind is all
 9 useless.
 13:04:09 10 MR. KOVAR: Well, Mr. Chairman, of
 11 course it's the Claimants that are trying to make
 12 their case, but in a different case in New York
 13 State, they received much of the information from
 14 this arbitration proceeding.
 15 PRESIDENT NARIMAN: Bothered to put it
 16 in --
 17 MR. KOVAR: No, no, no, no.
 18 PRESIDENT NARIMAN: That doesn't
 19 enlighten us --
 13:04:37 20 (Discussion off the record.)
 21 PRESIDENT NARIMAN: I want to make
 22 myself clear to you I'm sorry.

1236

1 closed to us, all this is pretty useless, at least
 2 in my view.
 3 MR. LUDDY: 1:00 o'clock for lunch?
 4 Okay.
 5 MR. KOVAR: Mr. Chairman, just to
 6 clarify, the decision of the arbitrator is a
 7 public document with certain econometric data
 8 redacted. Thank you --- but it's never been
 9 introduced by the Claimants.
 13:03:18 10 MR. VIOLI: I don't think the 2004
 11 document has ever been redacted or unredacted.
 12 The second reference that Mr. Crook made was to a
 13 2004 proceeding and that has never been made
 14 public or redacted or unredacted.
 15 PRESIDENT NARIMAN: Mr. Kovar, I don't
 16 know.
 17 You see, this -- hello.
 18 MR. VIOLI: At least, I haven't -- we
 19 haven't been provided it. We've only seen the --
 13:03:44 20 PRESIDENT NARIMAN: Mr. Kovar, you see
 21 this witness is speaking to something that had
 22 something to do with an arbitration proceeding and

1238

1 MR. LUDDY: I understand.
 2 PRESIDENT NARIMAN: And of course
 3 you're entitled to speak but I am also entitled to
 4 tell you what I feel. So, you see, all this
 5 evidence, to my mind, is of little consequence to
 6 anything that you people are going to discuss
 7 about or mention about unless and until we have
 8 the final result. And if we don't have the final
 9 result, so be it. Whoever is responsible for it
 13:05:04 10 will suffer or whoever is not responsible for it
 11 will gain.
 12 MR. KOVAR: Mr. Chairman, may I just
 13 say that we agree with you that this isn't proving
 14 their case and we will give you our best
 15 understanding of what's available publicly and
 16 what's not in that arbitration proceeding and --
 17 PRESIDENT NARIMAN: That's better.
 18 MR. KOVAR: And what's happened so far
 19 in this case and we helped the Claimants make this
 13:05:36 20 available that they're now using on
 21 cross-examination, and we'll get to all that, so
 22 we're actually all very sorry that you feel

1239

1 frustrated.

2 PRESIDENT NARIMAN: Very frustrated.

3 MR. KOVAR: There's obviously a lot of

4 aspects of this case where things don't all seem

5 to be that clear. And when we put on our case we

6 hope to be as clear as we can be and we'll try to

7 answer questions when you have them. Thank you.

8 MR. VIOLI: One item before we break,

9 Mr. President, because it may affect this

13:06:10 10 afternoon. We made a request for the updated

11 version of the MSA from the Respondent, and one of

12 the witnesses we did want to question about that

13 -- I haven't seen it yet today.

14 MR. FELDMAN: We will supply it: We

15 have it on the ninth floor and we'll supply it

16 this afternoon.

17 MR. VIOLI: So I'll have it after the

18 lunch break?

19 MR. FELDMAN: Yes.

13:06:35 20 MR. VIOLI: Thank you.

21 PRESIDENT NARIMAN: 2:15. Thank you.

22 (Whereupon, at 1:00 p.m., the hearing

1241

1 OPEN SESSION

2 A F T E R N O O N S E S S I O N

3 MR. FELDMAN: Mr. President?

4 SECRETARY YANNACA-SMALL: The remaining

5 time for the parties is 12 hours and 59 minutes

6 for the Respondent and 5 hours and 50 minutes for

7 the Claimants with a Reservation of the 75 minutes

8 that were extensive reply by Mr. Violi yesterday.

9 Now, I don't know if this is up to the

14:14:39 10 Tribunal to decide.

11 When there were questions yesterday

12 from the Tribunal, you gave an extensive argument.

13 MR. VIOLI: 75 minutes long?

14 SECRETARY YANNACA-SMALL: Yes, right.

15 So this is a reserve.

16 (Discussion off microphone.)

17 MR. FELDMAN: Mr. President, we just

18 wanted to note on the record that in response to

19 Mr. Violi's request, we have made available all of

14:15:12 20 the amendments to the MSA.

21 PRESIDENT NARIMAN: Oh, can we have

22 copies?

1240

1 was adjourned until 2:15 p.m., the same day.)

2 (End of confidential session.)

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1242

1 MR. FELDMAN: Copies have been

2 provided.

3 ARBITRATOR CROOK: Mr. Luddy, before

4 you begin, could you describe for us how you see

5 the next 24 hours evolving?

6 MR. LUDDY: Well, we're going to finish

7 with Professor Gruber and then I believe we're

8 going to do Mr. DeLange and then we will do --

9 MR. VIOLI: I had a couple of things,

14:15:59 10 one I wanted to submit was -- actually it was two

11 articles. One was the one I made reference to

12 yesterday from the South Dakota Attorney General.

13 And the second article --

14 MR. FELDMAN: Counsel, are these legal

15 authorities?

16 MR. VIOLI: I'm venturing to say

17 they're more authoritative than the Buffalo News,

18 but they're not legal authorities.

19 So this article that I mentioned --

14:16:34 20 ARBITRATOR CROOK: This is the one you

21 said was in the record or this is not something

22 we've seen before?

1243

1 MR. VIOLI: I searched all the
2 jurisdictional and all the pleadings about the
3 South Dakota Attorney General making a comment
4 about that he lost that battle but the 15 or 20
5 other states, you know, we haven't lost the war.
6 So that article.
7 And then the other article dealt with
8 something in response to what we saw today on the
9 screen and it's an article reporting a settlement
14:17:01 10 with an SPM about advertising and marketing.
11 Those are the only two things I would
12 ask to add at the end of our proceedings today.
13 Before Mr. DeLange testifies, we wanted
14 to submit a brief that was submitted by
15 Mr. DeLange -- well, actually his office. This
16 was in the proceedings that I mentioned where --
17 not the proceedings that are the subject of the
18 econometric stuff -- where the state, like the
19 State of New York did, against the Philip Morris
14:17:41 20 companies and also brought in the Native American
21 Tribes and Nations where they sued and they said,
22 we want a declaration where it doesn't apply on

1245

1 brief. There's one page in it, two paragraphs,
2 that deal with sales on Indian country and whether
3 or not they're units sold. So that will take you
4 all of maybe five minutes to read.
5 MR. FELDMAN: Well, we reserve the
6 right to supplement the record in response.
7 MR. VIOLI: So other than that -- we'll
8 offer that at the time Mr. DeLange is testifying.
9 The other two articles will not need
14:19:03 10 any comment by us. We're just putting them in the
11 record, noting what we noted yesterday regarding
12 the South Dakota Attorney General's statement.
13 MR. FELDMAN: Mr. DeLange has not been
14 provided notice of these documents?
15 MR. VIOLI: I don't know if he's been
16 provided notice of these documents. They're from
17 his office.
18 MR. KOVAR: I think when you say --
19 ARBITRATOR CROOK: But I think,
14:19:40 20 Mr. Chairman, we can finish with Professor Gruber
21 but we may want to tie up a loose end or two about
22 these additional documents that Mr. Violi wants to

1244

1 Reservation.
2 Idaho brought a similar lawsuit, not
3 particularly for Reservations, but brought a
4 lawsuit against Phillip Morris but made an
5 application to the Court for a finding there was
6 diligent enforcement in Idaho. There was a brief
7 by Mr. DeLange and I really -- there's only one
8 page in it -- or his office, I should say, one
9 page of it I wanted to refer to.
14:18:14 10 MR. FELDMAN: Counsel, is that in the
11 record, that brief?
12 MR. VIOLI: This brief is not in the
13 record. Like the affidavit of Mr. Williams that
14 you offered yesterday, it's a court document filed
15 by a party and I only have one.
16 MR. FELDMAN: Right. But I seem to
17 remember yesterday your team raising the issue of
18 how much notice you've been given when we
19 submitted the three-page affidavit.
14:18:35 20 MR. VIOLI: Well, I'm more than happy
21 to just submit the one page in this brief. I mean
22 I'm submitting the brief -- not for the whole

1246

1 bring in.
2 MR. VIOLI: You want to do that now?
3 ARBITRATOR CROOK: The chairman, I
4 think, wants to go on with Professor Gruber.
5 MR. VIOLI: And we have no objection
6 to -- they've submitted --
7 PRESIDENT NARIMAN: Just sit with him.
8 Instead of arguing, talk with him.
9 (Discussion off microphone.)
14:20:09 10 PRESIDENT NARIMAN: How much you agree.
11 MR. VIOLI: Very good. Thank you.
12 CROSS-EXAMINATION (continued)
13 BY MR. LUDDY:
14 (End of open session. Confidential
15 business information redacted.)
16
17
18
19
20
21
22

1 CONFIDENTIAL SESSION
 2 Q. I would like to talk about Paragraph 17
 3 and 17 about your second report.
 4 PRESIDENT NARIMAN: What is that?
 5 MR. LUDDY: Core Document No. 53.
 6 Q. And here you make the point, Professor,
 7 that in your view for probably health reasons, it
 8 was important to make sure that all cigarettes --
 9 or that all manufacturers had to make payments
 10 with respect to cigarettes so as to internalize
 11 the cost of smoking, correct?
 12 A. In particular -- that's correct. In
 13 particular what I'm talking about here is the fact
 14 that the Allocable Share releases before they were
 15 amended offered the ability of some manufacturers
 16 to offer cigarettes at a much lower price than
 17 others could, and that led to a loophole that
 18 could lead to other cigarettes prices.
 19 Q. Right. Now, of course, exempt SPMs
 14:21:39 20 aren't required to make payments under the Master
 21 Settlement Agreement and I assume you agree from
 22 the public health -- with respect to their exempt

1 that differs from your position?
 2 A. Evidence of a person saying they priced
 3 that way, price data.
 4 Q. Okay. Lawyers generally call that
 5 evidence, but go ahead.
 6 A. Okay. So, however, the reason the but
 7 for world matters is the reason they got -- I was
 8 not at the negotiation of the MSA, but my
 9 understanding is the reason they got this
 10 exemption was to buy their agreement with the
 11 deal. And the issue is without the exemption
 12 would the deal have even come together.
 13 So in some sense when you talk about do
 14 we wish the exemption weren't there, well, if the
 15 exemption not being there would have mean would
 16 have had the MSA at all, then the exemption in my
 17 mind was a small price to pay to get the MSA to
 18 come together.
 19 Q. And they got that exemption because
 14:23:01 20 they were at the table?
 21 A. Yes.
 22 PRESIDENT NARIMAN: Because what?

1 share, exempt SPMs are not required with respect
 2 to their grandfather share to make any payments
 3 under the MSA. And I assume you agree that for --
 4 in an optimal world, for public health reasons
 5 there would not have been an exemption for that,
 6 correct?
 7 A. You know, it's a very hard question
 8 because it depends on the but for world, depends
 9 on the kind of factual.
 10 If you could say take the MSA as it
 11 exactly changed nothing and get rid of the
 12 exemption then I think that would have been a good
 13 thing to do.
 14 Q. From a public health perspective?
 15 A. No, it wouldn't have mattered from a
 16 public health perspective because the public
 17 health perspective is the not price of cigarettes
 18 as I've already described my position, it wouldn't
 19 have affected the price of cigarettes.
 14:22:35 20 Q. Your position is it wouldn't have
 21 affected the price of cigarettes and the Claimants
 22 have introduced evidence of pricing in a manner

1 MR. LUDDY: Because they were at the
 2 table.
 3 Q. And they were consulted, correct?
 4 MR. FELDMAN: Counsel, pleas clarify
 5 who they is.
 6 MR. LUDDY: The exempt SPMs.
 7 A. That's why I say I can't speak to what
 8 would have happened if they hadn't gotten the
 9 exemption because I wasn't at the table --
 10 Q. Right.
 11 A. -- but my understanding is that the
 12 rationale for this was that it was sort of a
 13 reward for them for coming forward with -- for
 14 coming forward and being sort of a leading mover
 15 in trying to make this happen.
 16 Q. Right. Let's look -- one second.
 17 PRESIDENT NARIMAN: According to you is
 18 what I want to understand.
 19 The PMs and exempt SPMs were placed on
 14:23:46 20 the same footing for whatever reason.
 21 THE WITNESS: The -- in terms of the --
 22 according to me the exempt SPMs and OPMs had the

1251

1 same marginal cost. They were in the same footing
2 in terms of pricing cigarettes.

3 Actually, the truth is the OPMs were at
4 a slight disadvantage because of the way the
5 formulas worked, they were actually about five
6 percent higher than the SPMs. So we've been
7 arguing about NPMs relative to SPMs. The only
8 thing we haven't discussed is the OPMs. They're
9 actually about five percent higher.

14:24:47 10 PRESIDENT NARIMAN: Was there a price
11 control provision?

12 THE WITNESS: No, the MSA imposed an
13 assessment that was well expected and passed
14 through to prices. The MSA imposed -- what I had
15 mentioned in my academic work, the MSA essentially
16 imposed a tax for reasons that made -- political
17 reasons, I don't know why, they didn't call it
18 tax. They called it an assessment with a volume
19 adjustment, but basically it was a tax and we know
14:25:14 20 from previous evidence on cigarettes prices that
21 would be passed through to prices of cigarettes
22 much like a tax is.

1253

1 more pages, Jonathan.

2 A. Okay. Is it cigarette manufacturer MSA
3 segment market shares?

4 MR. LUDDY: Yes, it looks like this.

5 PRESIDENT NARIMAN: I don't have it.

6 MR. ROBINSON: It's one of the
7 appendices in his report.

8 THE WITNESS: About halfway through and
9 there's a tab in the front that says figure.

14:27:09 10 ARBITRATOR CROOK: Is it this document?

11 MR. LUDDY: Correct. It's after the
12 tables.

13 (Discussion off microphone.)

14 Q. If you look at this in the year 2003,
15 Professor, the exempt SPM and the NPM market
16 share, looks like the exempt SPM was about 6.77
17 and the NPM was about 5.87, right?

18 A. Yup.

19 Q. And then you saw earlier when we --
14:28:08 20 when I converted those numbers from your report, I
21 think we agreed that in '03, 54 percent of
22 cigarettes sold by exempt SPMs were exempt from

1252

1 PRESIDENT NARIMAN: But in order to
2 keep the price higher?

3 THE WITNESS: Yes. Yes. In order to
4 keep the price high, if the goal was just to
5 penalize the companies, they could have just taken
6 money from them and not adjusted it depending on
7 what their sales were. The fact that they
8 adjusted it for their sales meant that it wasn't
9 just to penalize the company. It was also to keep
14:25:40 10 the price high.

11 PRESIDENT NARIMAN: So you dissuade
12 people from smoking.

13 THE WITNESS: Exactly.

14 PRESIDENT NARIMAN: That's your point?

15 THE WITNESS: Exactly.

16 Q. Looking at Exhibit or Core Document 51,
17 I think, the Dalkir-Eisenstadt, Core Document 51,
18 Figure 1, at the end. It's about -- it's right
19 after the conclusion of the tax, just about, after
14:26:14 20 the tables.

21 A. After the tables?

22 Q. After the tables. Keep going a few

1254

1 any payment?

2 A. I don't remember the exact number, but
3 it was around 50 percent.

4 Q. Yes. I have it here. Actually it's
5 54 percent.

6 So in 2003, the exempt SPMs didn't have
7 to make any payments with respect to 54 percent of
8 their cigarettes. And their total market share
9 that year was about 6.7 just under a point
14:28:49 10 actually higher than the NPMs?

11 PRESIDENT NARIMAN: Any payments?

12 Q. Any payments?

13 A. On their grandfather cigarettes.

14 Q. On 54 percent of their cigarettes.

15 And we saw the other day -- if everyone
16 wants to look at it, we can look at it again. It
17 was Mr. Herring's affidavit, which is Core
18 Document 60.

19 A. It's not 60.

14:29:37 20 Q. 59, I'm sorry.

21 We saw from Mr. Herring's affidavit
22 that in 2003, the same year, the exempt -- or the

1255

1 NPMs received back in releases 58 percent of the
 2 escrow deposit that they made, right? So in 2003,
 3 the NPMs did not make payments with respect to
 4 58 percent of their sticks and their market share
 5 was about 6.87, about a point below the exempt
 6 SPMs?
 7 A. You see the -- they received 58 percent
 8 back. That doesn't mean they paid the other
 9 42 percent. There was also compliance issues. So
 14:30:41 10 the fact --
 11 PRESIDENT NARIMAN: There was what?
 12 THE WITNESS: So that doesn't mean they
 13 paid the other 42 percent because sometimes they
 14 just didn't pay. So there's a difference between
 15 the fact that they got 58 percent back. They
 16 didn't initially pay the whole other 42 percent.
 17 Q. Okay. You don't have any evidence what
 18 that was, though, right?
 19 A. I don't remember the facts that were
 14:30:59 20 in -- I don't know the facts at hand but I know
 21 there were compliance issues.
 22 Q. Okay. Okay. But the point here is

1257

1 described it as NPMs getting released monies,
 2 right?
 3 A. No, it would not.
 4 Q. Why?
 5 A. Because the public health issue is not
 6 about the wealth of the tobacco companies. The
 7 public health issue is about the price of
 8 cigarettes.
 9 Q. Correct.
 14:32:29 10 A. And the price of cigarettes is
 11 determined by marginal cost.
 12 Q. Right. And that was my point.
 13 If the exempt SPMs were pricing as we
 14 assert and without regard to your theory on -- or
 15 the theory on marginal cost but rather we're using
 16 the exemption to underprice NPMs and lower prices,
 17 that would affect your healthcare argument,
 18 correct?
 19 I mean our position is -- your position
 14:32:55 20 is you're internalizing the entire cost of the MSA
 21 payment and pricing as if they had to pay full
 22 boat MSA payments on every stick essentially,

1256

1 that as between the exempt SPMs and the NPMs, they
 2 had comparable market shares within a point of
 3 each other, exempt SPMs actually a little bit
 4 larger, and they were paying within four, five,
 5 six percentage points of each other, MSA payments
 6 or escrow, on the sticks they were actually
 7 selling in 2003; isn't that true?
 8 A. Once again, I don't believe that's
 9 true. I believe the NPMs paid a lot less because
 14:31:38 10 what they actually paid was -- because there was a
 11 lot of -- I don't remember the exact amount but
 12 there was sufficient noncompliance that they
 13 actually paid a lot less.
 14 Q. But you don't have that information and
 15 there's nothing in the record on that subject, to
 16 you knowledge, is there, sir?
 17 A. Not to my knowledge, no.
 18 Q. Okay. But to the extent exempt SPMs
 19 were pricing as Claimants assert and contrary to
 14:32:03 20 the position that you've articulated here, pricing
 21 in a manner that Claimants assert, that would have
 22 a similar impact on the healthcare issue as you've

1258

1 right?
 2 A. Their price -- right. But they're --
 3 Q. And our position is, as I think we've
 4 made clear, they're not doing that. They're
 5 pricing far lower than that so that they can
 6 underprice NPMs in the marketplace.
 7 And if that position is true, if our
 8 evidence is accepted, then that would have the
 9 same impact on the healthcare issue as NPMs
 14:33:26 10 getting releases under the Allocable Share release
 11 statutes, correct?
 12 A. You're mixing up directions and
 13 magnitudes in the sense that let's say your theory
 14 was true and to some extent they were
 15 incorporating fixed costs of their pricing
 16 strategy. That wouldn't -- it would have to be
 17 they're incorporating them all the way to come
 18 close to where the NPMs were. So you'd have to
 19 take the extreme case of your theory, which would
 14:33:53 20 have to be that literally they are completely
 21 incorporating the fixed cost pricing on this
 22 average cost basis, which I've disputed --

1 Q. Right.

2 A. -- and in that case they would -- then
3 their pricing would be still above the NPMs
4 because, as you said, 58 is above 54 and because
5 of the noncompliance. But nonetheless, it would
6 go in -- you're right, it would go in that
7 direction. It would certainly -- certainly you're
8 right that if the SPMs were underpricing, that
9 would undercut some of the goals of the MSA.

14:34:24 10 Q. Right. With respect to underage
11 smoking, you're aware of the literature on that
12 subject as to preferences -- brand preferences
13 among youths?

14 A. Yes, I am.

15 Q. And correct me if I'm wrong, but my
16 understanding of the -- general understanding of
17 the literature out there is that in excess of
18 85 percent of youths have been shown to have a
19 preference for three brands, Marlboro, Camel and
14:34:58 20 Newport; is that accurate?

21 A. I knew that as of about five or
22 six years ago I know that was true. I don't know

1 the literature -- I assume this to be true since
2 you said you haven't looked at it for five years,
3 you haven't seen any evidence in the literature
4 that during the period of Allocable Share release
5 when you claim inexpensive NPM cigarettes were
6 available, that youth smoking increased at all,
7 correct?

8 A. No, I'm not really aware of youth
9 smoking patterns over that time period. Youth
14:36:23 10 smoking certainly increased throughout the
11 nineties and then fell again due to price
12 increases of the MSA but I haven't seen real
13 evidence relating the Allocable Share release
14 provisions to youth smoking. I haven't seen that.

15 Q. Okay.

16 A. And I will say there's -- you know,
17 I've studied youth smoking a lot. They're a very
18 price sensitive population. And certainly the
19 presumption would be that while they have a
14:36:44 20 preference for the name brands, eventually if the
21 price of the non-name brands were low enough for
22 long enough, they'd switch. But I don't know. I

1 of more recent evidence than that. But when I
2 last looked at it, which is about five or
3 six years ago.

4 PRESIDENT NARIMAN: What's that?

5 Q. The literature on the subject in
6 indicates at least as of --

7 A. Five or six years ago.

8 MR. LUDDY: Professor Gruber is
9 corroborating that at least as of five, six years
14:35:17 10 ago, the evidence in the medical literature is
11 that underage smokers, 85 percent of them smoke
12 three brands, Marlboro, Camel or Newport.

13 PRESIDENT NARIMAN: Those are the three
14 main majors?

15 MR. LUDDY: Correct. Three major
16 brands.

17 Q. And they have a decided preference for
18 those brands over less expensive, discount brands.
19 It's basically a status symbol type thing is I
14:35:48 20 think what the literature suggests, correct?

21 A. That's right.

22 Q. And you have not seen any evidence in

1 haven't seen a study of that.

2 Q. You haven't seen any evidence of that?

3 A. No.

4 Q. Now, as you probably recall from the
5 Eisenhardt-Dalkir report, they attributed the
6 decline in the Claimants' market share to the --
7 or a significant portion of it to the Allocable
8 Share appeal. And you raise some questions in
9 that regard with respect to causation, right?

14:37:22 10 A. That's right.

11 Q. And you raised a number of factors. I
12 just want to walk through them. And if you want
13 to refer to your report, you can, but I think
14 you'll probably have a recollection of most of
15 this.

16 You suggested that there may have been
17 alternative causes such as, the first one you
18 mentioned I think was the Internet, correct?

19 A. That's correct.

14:37:41 20 Q. Okay. You don't know whether -- I mean
21 Seneca brand could have been a net loser or a net
22 gainer from the Internet, correct?

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1 A. That's right.

2 Q. Okay. And are you aware that as the

3 Respondents have put evidence into this manner

4 what they claim are significant sales by Seneca

5 brand itself on the Internet?

6 A. No. The only point there of this

7 section -- we can go through it all if you like --

8 but just to the cut to the chase, the point is

9 just that there are lots of things that are

14:38:10 10 changing over this time period which might have

11 affected the taste for different experience of

12 cigarettes.

13 Q. Right.

14 A. But I don't have any evidence for the

15 Internet, per se.

16 Q. Right. And then you suggest that there

17 may have been aggressive marketing by competing

18 brands that could have eaten into Seneca market

19 share, correct?

14:38:27 20 A. Correct.

21 Q. Are you aware of any instances of

22 competitive marketing or aggressive marketing by

1265

1 PRESIDENT NARIMAN: Why did it rise?

2 THE WITNESS: Why did it rise?

3 Well, my contention is that it rose for

4 several reasons. One is that there was enormous

5 cost advantage because of the Allocable Share

6 loophole, so they were basically competing with

7 other cigarettes that had the higher price.

8 But there are other factors too.

9 For instance, the growth and sales over

14:40:00 10 the Internet. Over the Internet people were

11 buying these new brands that were sometimes harder

12 to find in stores, they could find them on the

13 Internet.

14 There was in general a change in taste

15 in generic product in America. We saw in many

16 contexts consumers were moving away from name

17 brands towards generic versions of those brands.

18 And you could see the same in cigarettes. The

19 consumers seem more willing to move away from the

14:40:22 20 name brands towards the less name brand products.

21 So a variety things going on that could have

22 attributed to that change over time.

1264

1 competing brands that actually did that, though?

2 A. No.

3 Q. And you suggested the possibility of

4 new entrants into the market as something that may

5 have impaired Seneca sales?

6 A. That's right.

7 Q. You've been at this cigarette business

8 for eight or nine years now. Are you aware of any

9 specific and material new entrants to the market

14:38:59 10 that could have taken share from Seneca brand?

11 A. I can't say specifically, but there's

12 been a large growth in NPM in new -- there's

13 new -- ever since the MSA, there's been a large

14 growth in new competitors in the NPM space. And

15 presumably those new competitors reduce the market

16 share of the existing players in the market.

17 Q. But during that entire period until the

18 Allocable Share appeal, it was GRE's market share

19 that continued to increase, correct?

14:39:32 20 A. GRE's market share rose, as most did

21 all the other -- as did most of the other NPMs.

22 Q. Right.

1266

1 Q. Another factor is, of course, was that

2 the major tobacco manufacturers decided to raise

3 the price of multiple of the amount of money it

4 cost to pay of the MSA payments, correct?

5 A. Exactly. That's a very good point.

6 Another factor was there was large increase in the

7 price of the OPMs especially of their products.

8 Q. And that was one of the principal

9 arguments that the settling states made in the

14:40:54 10 significant factor proceedings, was it not?

11 A. That's right.

12 Q. And something that was not mentioned by

13 the Respondents as a cause for the rise in the

14 NPMs in this matter, correct?

15 A. I don't know the context in which it

16 should have been raised but. . .

17 Q. You also suggested that at some point,

18 I think '05 to '07 or so, there was a dip in the

19 sales -- GRE's Canadian sales -- the sales of

14:41:21 20 GRE's cigarettes in Canada and you suggested that

21 whatever was causing that may have been a problem

22 in the United States as well, correct?

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1 A. Yeah. It's very hard to interpret
2 movements up and down over time because many
3 things changed and I was just highlighting that
4 GRE seemed to be facing problems in other markets
5 as well.
6 Q. Right. Do you know if Seneca brand is
7 sold in Canada?
8 A. No, I do not.
9 Q. Have you seen -- have you reviewed the
14:41:47 10 reports by the evaluators, the damages evaluators
11 in this case?
12 A. No, I have not.
13 Q. Okay. This is from Wilson reply
14 report. I don't think we need to look at it.
15 We've been through this in another context. But
16 it's Page 20 of the Wilson reply report, for the
17 record.
18 But during the period that you
19 suggested a dip in the Canadian sales, the facts
14:42:13 20 show that in California, in 2005, sales at Seneca
21 increased by a hundred and eighteen percent. 2006
22 they increased by hundred and four percent. 2007,

1269

1 story for that decline in Canada. I think I
2 mentioned in the report.
3 Q. Okay. And then -- and that's basically
4 what you did in the significant factor
5 proceedings, too. I guess it was Breslihand and
6 his colleagues -- am I mispronouncing that name?
7 A. No, you got it right.
8 Q. Breslihand and his colleagues had
9 suggested a similar cause in his relationship
14:43:46 10 between Allocable Share appeal and the decline of
11 NPM market shares. And in your report here you
12 suggested that the evidence that they adduced was
13 very fragile, correct?
14 A. That's correct.
15 Q. But like here, you're not able to
16 actually prove anything else caused it?
17 A. That's correct.
18 Q. Okay. Now, you had said you saw all of
19 the documents in -- I don't want to put words in
14:44:24 20 your mouth. You saw documents in the significant
21 factor proceedings with respect to the major's
22 advertising expenditures?

1268

1 by ten percent. 2008 by 81 percent. So assuming
2 the accuracy of those numbers, which I'm asking
3 you to take at face value, it wouldn't appear that
4 whatever was affecting sales of GRE's Canadian
5 brands was at all impacting their Seneca brand, at
6 least in California?
7 A. You know, I think basically it's a very
8 good point. But basically the key -- the only
9 point I was trying to make here is that when you
14:42:54 10 see a decline, you can't prove that was because of
11 the Allocable Share as opposed to lots of other
12 things that were going on. I didn't say it wasn't
13 increasing in other places. I didn't say I can
14 prove why it's declining. I was just sort of, if
15 you will, issuing the criticism that just because
16 it declined, you can't assume that was the
17 Allocable Share. It could have been something
18 else.
19 For example, look at decline in Canada,
14:43:16 20 which didn't have Allocable Share.
21 Q. Right.
22 A. But, you know, there may be another

1270

1 A. Yes, I believe I did.
2 Q. And isn't it true that they increased
3 enormously after the signing of the MSA?
4 A. What happened was their expenditures
5 and advertising and promotion increased. What
6 happened was their expenditures and what you
7 traditionally think of as advertising, like
8 magazines and stuff, that fell but there was a
9 huge decrease in discounting. Essentially price
14:44:55 10 promotions went up enormously after the MSA.
11 Q. Right. Okay.
12 PRESIDENT NARIMAN: As an economist, I
13 just want to know, what would be the major
14 disincentive to promotional smoking? Major
15 disincentive.
16 THE WITNESS: The major disincentive is
17 price.
18 PRESIDENT NARIMAN: That's all.
19 THE WITNESS: I think the major
14:45:39 20 evidence is that people are very price --
21 especially youth are very price sensitive in their
22 smoking decisions. And there are a number of

1 things that work. You know, tobacco cessation
 2 programs work. Some counter-advertising, like
 3 talking about how smoking is bad for you works.
 4 But it's all dominated by price. Price is by far
 5 the most important aspect.
 6 PRESIDENT NARINAN: Now, the higher the
 7 price, the lesser the incidence of smoking which
 8 is deleterious to health?
 9 THE WITNESS: Yes.
 10 14:46:09 CROSS-EXAMINATION
 11 BY MR. VIOLI:
 12 Q. Professor Gruber, good afternoon.
 13 A. Good afternoon.
 14 Q. Following up on what the chairman just
 15 mentioned.
 16 With respect to price, do you know
 17 whether or not exempt SPMS sell -- on the
 18 pre-allocable share, whether they sold at a price
 19 that was higher or lower than Grand River?
 20 14:46:38 A. No, I don't have that evidence
 21 available.
 22 Q. You don't have that evidence.

1 meaning roughly 80, 85 percent of premium, those
 2 three brands that were mentioned, and the rest,
 3 the other 10 or 15 percent in other segments of
 4 the market for other brands, right? There's been
 5 no analysis of the switch, has there?
 6 A. Well, yeah, once again, I know the
 7 evidence as of five, six years ago was exactly
 8 what you say. Three brands dominated. I don't
 9 know what's happened over the past five or
 10 14:48:06 six years.
 11 Q. And you haven't seen anything in the
 12 record which suggested that youth switched
 13 consuming an OPM or an SPMS product and went over
 14 to an NPMs product, have you?
 15 A. No, I have not.
 16 Q. Okay. Now, if I could ask you to turn
 17 to Core Document No. 7 in Claimants' core
 18 documents. You see that there, the table the
 19 second page? You already turned to it.
 20 14:48:56 Can you explain for the -- it's Core
 21 Document No. 7. Two pages. The table there.
 22 [REDACTED]

1 Do you have any evidence that a youth
 2 started smoking by smoking one of Grand River's
 3 products?
 4 A. No.
 5 Q. Do you have any evidence that a youth
 6 started smoking by smoking an NPMs product?
 7 A. We know that youth -- the survey data
 8 suggests that some small share of youth do smoke
 9 NPM products.
 10 14:47:08 Q. NPM or discount?
 11 A. I don't remember exactly how finely the
 12 evidence is sliced.
 13 Q. And exempt NPMs are generally in the
 14 discount segment of the market, third or fourth
 15 tier?
 16 A. That's right.
 17 Q. Okay. And the change -- you haven't
 18 seen any evidence of a switch, have you, that
 19 youth are switching to discount cigarettes, isn't
 20 14:47:31 it? Although the rate of consumption among 8th
 21 and 12th graders I believe has gone down, the mix
 22 of the products that they smoke hasn't changed,

1 [REDACTED]
 2 [REDACTED]
 3 A. Yes, I do.
 4 Q. And this table comes from where? Do
 5 you recognize it?
 6 A. Yeah. It comes from one of the reports
 7 we did for the significant factor hearings.
 8 Q. You did?
 9 A. That Professor Pendyke and I created,
 10 14:49:29 yes.
 11 Q. What was the purpose of submitting this
 12 report?
 13 A. Of submitting --
 14 Q. Oh, excuse me, this table in the
 15 report?
 16 A. Oh, the point of the table in the
 17 report was really to make the same point I made a
 18 couple minutes ago which is that -- [REDACTED]
 19 [REDACTED]
 20 14:49:48 [REDACTED]
 21 look -- once again, it's not super compelling
 22 evidence. They're trying to make a point. And

1 the point we're trying to make is, look, take a
 2 country without an MSA and it grew there too. So
 3 based on that, it's sort of hard to argue the MSA
 4 caused it.
 5 Q. Precisely the point we've been trying
 6 to make, right? We, Claimants been trying to
 7 make, right?
 8 A. I don't understand what you're saying.
 9 Q. Canada does not have an MSA, correct?
 14:50:17 10 A. That's correct.
 11 Q. And you look at the major manufacturers
 12 you have there. You show them declining in market
 13 share from '97 to 2003, right?
 14 A. Right.
 15 Q. Without an MSA in Canada?
 16 A. Right.
 17 Q. And interestingly, you also, one of the
 18 few statistics, and I thank you for it, that I've
 19 found where there's been a mention of Grand River?
 14:50:36 20 A. Right.
 21 Q. Not such a bad light.
 22 Grand River you show growing from

1 report, the significant factor proceedings, to
 2 show that a company like Grand River without the
 3 MSA would have done what it did and achieve the
 4 market share growth that it did, not because of
 5 some costs that the OPMs faced or participating
 6 manufacturers faced under the MSA, but because of
 7 other causes.
 8 Maybe Grand River has a very good
 9 product. It's very efficient. Good brand. By
 14:52:08 10 the way I meant Seneca before. Seneca is not sold
 11 in Canada. I meant Grand River brand, because
 12 you're not talking about Seneca here when you talk
 13 about Grand River sales, are you?
 14 A. Just Grand River Enterprises.
 15 Q. Just their brands. They don't sell
 16 Seneca in Canada.
 17 But their brands grew from .1 to
 18 .4 percent.
 19 So I'm just trying to convey -- or not
 14:52:33 20 convey, but understand, and I would like the
 21 Tribunal to understand, how this relates to what
 22 you were trying to show in the significant factor

1 .1 percent in 2000 to 2.4 percent in 2003, right?
 2 A. Right.
 3 Q. So Grand River, without an -- in a
 4 country without an MSA, without an exempt SPM
 5 verses a non-exempt SPM, without an OPM versus an
 6 NPM, it grows from .1 percent to 2.4 percent of
 7 the market. Tremendous growth, right?
 8 PRESIDENT NARIMAN: This is in Canada
 9 or U.S?
 14:51:11 10 MR. VIOLI: Canada. Canada.
 11 A. Yes.
 12 Q. Substantial growth?
 13 A. Yes.
 14 Q. Do you know what percentage Grand River
 15 had or Seneca had of the U.S. market in 2003?
 16 A. I don't recall.
 17 Q. Do you know what it had in 2000?
 18 A. No, I don't recall.
 19 Q. So you don't know the growth rate in
 14:51:26 20 the United States of Seneca?
 21 A. Not offhand, no.
 22 Q. Okay. And you put this table in the

1 proceedings. Why were you pointing to the success
 2 of Grand River in these proceedings?
 3 A. Sure. So basically let's go back to
 4 the significant factor proceedings.
 5 What the OPMs were arguing in the
 6 significant factor proceedings was that the MSA
 7 had caused this gigantic growth in NPM market
 8 share.
 9 What we were arguing was no, in fact --
 14:53:09 10 well, we were arguing that you could not prove
 11 that. We were arguing, look, there were many
 12 other things that changed at the same time that
 13 may have driven this increase in the NPM market
 14 share.
 15 And as a point of evidence on that, not
 16 really to prove our side but to really sort of
 17 more disprove their side, as a point of evidence,
 18 we said, look. Look at Canada. If your
 19 conclusion is right that the MSA caused this, then
 14:53:32 20 why is it happening in Canada too.
 21 So really this has sort of disproved
 22 the contention of the OPMs that the MSA is what

1 caused this enormous -- caused all of -- we all
 2 agree the MSA caused some of the growth of NPMs.
 3 We weren't disputing that. We just were saying it
 4 caused -- it was not a significant amount.
 5 Q. Not above two percent?
 6 A. Not significantly above two percent.
 7 Q. And the states can't get any money
 8 back -- I mean, excuse me, the tobacco companies
 9 can't get any money back under the NPM adjustment
 14:53:58 10 provision unless it's over two percent loss of
 11 market share, right?
 12 A. It has to be over two percent and shown
 13 to be a significant factor.
 14 Q. So if you're opining -- and I'm not
 15 saying I disagree -- that the MSA and the cost
 16 disparity between NPMs and participating
 17 manufacturers was not a cause of greater than two
 18 percent market share loss, then why change the
 19 Allocable Share Amendment if it didn't cause that
 14:54:23 20 loss of market share? Why impose a greater cost
 21 on a marginal cost?
 22 I don't necessarily agree with you on

1 effect is significant enough in terms of serving
 2 the public health purposes if that's a viable
 3 thing to do.
 4 Q. Do you know where the two percent went
 5 after the Allocable Share Amendment was passed?
 6 A. Two percent went?
 7 Q. Isn't it is true that NPMs lost almost
 8 precisely two percent to exempt SPMs after the
 9 Allocable Share Amendment?
 14:55:51 10 A. I don't remember exactly what happened.
 11 I know they -- over time -- once again -- over
 12 time, although, once again, you know, that's a
 13 point of the other Canada evidence. As we said,
 14 once again, after the Allocable Share Amendments
 15 the NPM shares fell but it also is true that at
 16 least Grand River also fell in Canada as well. So
 17 once again, we don't know if that was due to the
 18 MSA. We're not sure why that was. We know that
 19 there was decline in use of NPM products in the
 14:56:20 20 mid 2000s.
 21 Q. Now, is there another term for the
 22 average of marginal costs along the production and

1 average cost, that the NPMs have a -- have a --
 2 that the average costs aren't relevant. But we'll
 3 jus leave those -- just your marginal cost theory,
 4 we'll keep that in play.
 5 You say that under the old regime there
 6 was a marginal cost disparity. But if it didn't
 7 cause a -- was not a cause for the market share
 8 loss greater than two percent, why change the
 9 Allocable Share?
 14:54:56 10 A. Well, as we argued in our report, we
 11 think it caused the market share loss of around
 12 two percent and that's a lot more smoking. And so
 13 the reason it changed Allocable Share, even if it
 14 only was -- so the whole -- what we argued in our
 15 report was that it was about six to eight percent
 16 shift from PMS to NPMs. We argued we thought
 17 about two percent of that was due to the MSA. We
 18 said we should not -- that was a big effect and
 19 one would not want the two percent shift, so let's
 14:55:24 20 close the loophole and level the playing field.
 21 And, granted, that won't cause an eight percent --
 22 have an eight percent effect, but the two percent

1 sale line of any producer? If you took the
 2 average, the average marginal costs along --
 3 marginal costs is the cost of producing one extra
 4 unit of a good, right?
 5 A. Right.
 6 Q. So if you took the average cost --
 7 excuse me, if you took the marginal cost of
 8 producing the tenth unit and you took the marginal
 9 cost of producing the hundredth unit, the
 14:56:57 10 thousandth unit, up to the last point and if you
 11 took all of those marginal cost data points and
 12 averaged them, wouldn't they equal average cost?
 13 A. No, not necessarily, because of fixed
 14 costs. So that -- so --
 15 Q. How about average variable cost, right?
 16 Marginal costs would be the incremental variable
 17 cost --
 18 A. Correct.
 19 Q. -- per unit. That's what I'm talking
 14:57:26 20 about. Not to include the fixed cost?
 21 A. So that would give you the average
 22 variable cost, that's right.

1283

1 Q. Okay. And I want you to assume for the
2 moment that Mr. Wesley is correct, that Liggett
3 does use its exemption to factor into the pricing
4 of its product, and I want you to assume that
5 Liggett's 10-K accurately describes that Liggett
6 capitalizes on its cost advantage under the MSA,
7 its exemptions, in pricing its products.
8 Does that result in a -- or reflect --
9 or would it reflect, excuse me, a marginal cost
14:58:21 10 for Liggett that is less than marginal cost for an
11 NPM post-Allocable Share?
12 A. Once again, it depends on -- so you're
13 asking me to assume that they used their exemption
14 to lower their price --
15 Q. Right.
16 A. -- as Mr. Wesley claimed?
17 Q. Right.
18 A. Whether that would take them below an
19 NPM would depend on how much they use that
14:58:55 20 exemption to lower their price and the extent to
21 which the NPM was complying with the Escrow
22 Statute.

1285

1 it's, let's say, twice as much -- let's take the
2 number twice as much. You have an exemption of a
3 billion cartons and you sell a billion cartons on
4 to the MSA, you have zero payment exempt SPM and
5 the NPM has whatever it's -- \$5 per carton, right?
6 \$5 billion, if it's a billion cartons and it's \$5
7 per carton. So the SPM pays zero, the NPM pays
8 \$5 billion.
9 Let's take it where the exempt SPM
15:00:42 10 sells two billion cartons. Two billion cartons,
11 what would be its total MSA payment?
12 A. It would be the, you know, \$5 billion.
13 Q. \$5 billion.
14 And what would be the payment by the
15 NPM for selling two billion cartons, the same
16 number of cartons, total payment? Hundred percent
17 compliance.
18 A. Be about ten billion.
19 Q. Ten billion. Twice as much, which
15:01:09 20 would mean in that situation the exempt SPM pays
21 on average 2.50 per carton, whereas the NPM has to
22 pay on average \$5 per carton, right?

1284

1 Q. Now, when you say that post-Allocable
2 Share, NPMs -- withdraw that.
3 When you say post-Allocable Share
4 exempt NPMs above their grandfathered share do not
5 have a cost advantage, vis-à-vis NPMs, you're
6 talking about marginal costs, correct?
7 A. That's right.
8 Q. What about average costs? Do exempt
9 SPMs have greater or less average costs than NPMs
14:59:39 10 post-Allocable Share?
11 A. It depends on how much their sales or
12 above or below the grandfathered share versus the
13 compliance rate of the NPMs.
14 Q. A hundred percent compliance with the
15 NPMs and at any point above the grandfathered
16 share?
17 A. If the NPMs are complying at a hundred
18 percent then the average cost of the SPM will
19 generate below the marginal cost of the NPM.
15:00:02 20 Q. It's always below, and if it's just
21 past their grandfathered market share, then it's
22 significantly below the average cost. But if

1286

1 A. In terms of average cost, that's right.
2 Q. Yeah. So if you're looking at average
3 cost, NPMs have a disadvantage?
4 A. In your example where you assume full
5 compliance, and where you assume that their --
6 that the amount sold above the grandfather levels
7 are very large, I mean you already showed for
8 Commonwealth it was four times as large as the
9 grandfathered level.
10 Q. So let's take four times as large. A
15:01:47 11 billion stick exemption -- a billion carton
12 exemption, Commonwealth sells four billion
13 cartons?
14 A. No, they sell five billion because
15 they're four times as much above the exemption
16 than they were below it.
17 Q. Fair enough. Five billion.
18 What is Commonwealth's average cost per
19 carton?
15:02:06 20 A. Well, they just sold -- they have to
21 pay out four billion cartons, five bucks a carton.
22 We're rounding, of course, but five bucks a

1 carton, roughly, is 20 billion.
 2 Q. And they would have had to pay 25?
 3 A. If there's no exemption, would have had
 4 to pay 25.
 5 Q. So what is that average per carton?
 6 A. You know, \$4 a carton on average.
 7 Q. Roughly 20 percent less, right?
 8 A. Twenty percent less than what they
 9 would have had to pay if they weren't exempt.
 15:02:33 10 Q. Twenty percent less than an NPM has to
 11 pay?
 12 A. Than a fully compliant NPM has to pay.
 13 Q. Right. Now, have you looked at
 14 Liggett's 10-K?
 15 A. Yes -- well, I've looked at the little
 16 bit that's in the --
 17 Q. Have you ever looked at the entire
 18 document?
 19 A. No, I don't think so.
 15:02:52 20 Q. What would it tell you if Liggett's
 21 profit -- if anything, what would it tell you if
 22 Liggett's profit was less than -- let me withdraw

1 saying?
 2 A. Yes.
 3 Q. Okay. Now, at various times under this
 4 marginal cost theory have said that there's not
 5 cost advantage or a price advantage between exempt
 6 SPMs and NPMs when the exempt SPM goes over its
 7 market -- grandfathered share, right?
 8 A. That there's not a marginal cost
 9 difference.
 15:04:25 10 Q. Okay. No, I said marginal cost
 11 advantage?
 12 A. Marginal cost advantage.
 13 Q. Is there a difference?
 14 A. No.
 15 Q. Okay. But you've also said that that
 16 does not preclude a determination that Liggett and
 17 the exempt SPMs get some form of subsidy or
 18 favorable treatment, correct, under the MSA?
 19 A. Subsidy is a tough term because subsidy
 15:04:54 20 usually refers to marginal cost, but --
 21 Q. Windfall, do you call it windfall?
 22 A. Windfall, yes.

1 that.
 2 I want you to assume that Liggett has a
 3 two billion carton exemption, two billion carton
 4 exemption. And I want you to assume that the cost
 5 per carton under the MSA is \$5 per carton,
 6 effectively equals a grandfathered value or share
 7 that equates to \$10 billion.
 8 A. Yeah.
 9 Q. Does that sound right?
 15:03:27 10 A. Yup.
 11 Q. If Liggett's profit is less than
 12 \$10 billion, let's say it's \$5 billion, would that
 13 suggest -- wouldn't that suggest to you that it's
 14 pricing its product at a price that does not
 15 include the full cost -- MSA cost for every unit
 16 sold?
 17 A. I mean, no, it just suggests that they
 18 are choosing to take their \$10 billion and spend
 19 it in ways -- and spend it in ways other than
 15:03:55 20 return to their shareholders.
 21 Q. So they're choosing to use that
 22 \$10 billion somewhere else; is that what you're

1 Q. So exempt SPMs get windfall under the
 2 MSA that NPMs don't, right?
 3 A. Well, exempt SPMs get a windfall
 4 relative to if they paid the full amount.
 5 NPMs got a different windfall, which is
 6 the Allocable Share loophole. They -- I don't
 7 know call lack of compliance, how you deal with
 8 that but they're all different treatments.
 9 Q. So they both got a windfall, and one
 15:05:20 10 got a windfall under the Allocable Share release
 11 and one got a windfall under the exempt SPM market
 12 share?
 13 A. Well, the difference is what the NPMs
 14 got was something which actually lowered their
 15 marginal cost and therefore affected their
 16 pricing.
 17 What the SPMs got was a lump sum amount
 18 that just goes to their bottom line or to spend
 19 more on other stuff.
 15:05:43 20 Q. Or to lower their price?
 21 A. If they want to -- if they so choose,
 22 that's right.

1291

1 Q. Okay. Now, have you worked with the
2 Attorney Generals from the various states?
3 A. A number of them, yeah.
4 Q. A number of them.
5 Are they fairly familiar with the
6 market -- the cigarette market, tobacco market in
7 the United States, to your understanding?
8 A. The ones I've worked with are, yeah.
9 Q. Are you familiar with a company called
15:06:16 10 General Tobacco?
11 A. Yes.
12 Q. General Tobacco is a nonexempt SPM;
13 right?
14 A. That's right.
15 PRESIDENT NARIMAN: What is nonexempt?
16 THE WITNESS: It means that they signed
17 up after the first 90 days. So they basically
18 have this enticement to sign the MSA that said, if
19 you're not an OPM, not one of the big three, as
15:06:35 20 long as you sign up within the first 90 days,
21 we'll except the sales as of the previous year, a
22 hundred twenty-five percent of your sales as of

1293

1 the ones with no grandfather share, they pay
2 roughly or approximately -- or they're supposed to
3 pay roughly or approximately what the NPMs pay
4 post-Allocable Share, correct?
5 A. Yes.
6 Q. The idea was to bring the cost of the
7 NPMs up to the nonexempt SPM level, right?
8 A. That's correct.
9 Q. All right. So I'll read you a passage
15:08:02 10 from the Kentucky Attorney General's brief, which
11 was signed also by a member of NAAG.
12 By the way, did you work -- are you
13 familiar with a lawsuit that was in Kentucky
14 whereby the exempt SPMs sued because they were not
15 happy with the treatment -- what they believed to
16 be favorable treatment that General Tobacco
17 received when it joined the MSA?
18 A. Yeah, I think I remember hearing about
19 that.
15:08:27 20 Q. Did you work on that case, by any
21 chance?
22 A. No, I did not.

1292

1 the previous year. If you signed up after the
2 90 days you can still get the protections of the
3 MSA but you don't get the exemption.
4 MR. VIOLI: And so therefore you must
5 pay on every carton you sell? You must -- you
6 don't get a --
7 THE WITNESS: The exemption was a bribe
8 to sign up early.
9 Q. Now, the -- so your feeling of General
15:07:12 10 Tobacco, that's a company that's not exempt,
11 doesn't have the windfall, it doesn't have this
12 exempt market share. It must pay on every carton
13 it sells, right?
14 A. Let me clarify. I don't exactly
15 remember whether General was exempt or not. I
16 mean --
17 Q. Okay. I will tell you they're
18 nonexempt?
19 A. I'll take your word for it.
15:07:26 20 Q. All right. And I would like to read
21 this -- and let me just mention for the record,
22 get your understanding of it. The nonexempt SPMs,

1294

1 Q. Okay.
2 PRESIDENT NARIMAN: What happened?
3 MR. VIOLI: The exempt SPMs, Liggett --
4 I don't think there was a final determination yet.
5 This was case where the exempt SPMs complained.
6 The states let in a company called General Tobacco
7 into the MSA. And what they told General Tobacco
8 is, you can come into the MSA and these are the
9 conditions.
10 One is you must pay -- as a nonexempt
11 SPM, you'll have to pay the nonexempt rate going
12 forward for every carton of cigarettes that you
13 sell. We will not give you an exemption, General
14 Tobacco, like the other companies. But we will
15 give you a certain amount of years, maybe 12 years
16 to pay for back payments under the MSA, because
17 when you join the MSA you must pay for all the
18 payments you had to make in the past. \$4 per
19 carton going back since the beginning of the MSA.
15:09:33 20 So it's a big number, it was maybe
21 close to a hundred million dollars or whatever it
22 was, but they gave General Tobacco, the states

1 did, or they offered them more time to pay those
 2 back payments and to remain current on the future
 3 payment.
 4 And Liggett complained. And the exempt
 5 SPMs, as a group, they came together and said, no,
 6 no. You are giving some favorable treatment to
 7 General Tobacco to come into the MSA, because
 8 you're giving them time and low interest to pay
 9 back payments. And so those companies sued and
 10 they sued in Kentucky.
 11 And the adversary was the State of
 12 Kentucky. These exempt SPMs said, how could you
 13 let this company in on those terms?
 14 MR. KOVAR: Mr. President, if I may,
 15 I'm not sure why this is relevant. They lost this
 16 case.
 17 MR. VIOLI: This is argument and I'm
 18 presenting my case. If I've got 15 hours --
 19 MR. KOVAR: But they lost this case and
 15:10:32 20 you just said that you didn't know the outcome of
 21 it.
 22 MR. VIOLI: That's fine.

1 their case.
 2 MR. VIOLI: Very good. Excellent.
 3 Then it's even better than I thought.
 4 In that case, the Grandfathered SPMs
 5 made the argument that I just gave you and the
 6 Kentucky Attorney General with NAAG filed a brief.
 7 And so I guess the Court accepted the Kentucky
 8 Attorney General's view, and I wish to read from
 9 it, Professor.
 15:11:48 10 ARBITRATOR CROOK: Could you -- is this
 11 one of the documents you gave us at the beginning
 12 of the proceeding on Monday or Tuesday?
 13 MR. VIOLI: I'm sorry, this is Core
 14 Document 17.
 15 ARBITRATOR CROOK: Thank you very much,
 16 sir.
 17 MR. VIOLI: I refer to it in my opening
 18 Core Document 17.
 19 Claimants' Core Document 17, Members of
 15:12:10 20 the Tribunal.
 21 ARBITRATOR CROOK: What page, please?
 22 MR. VIOLI: Page 3, the second full

1 MR. KOVAR: And I'm concerned because
 2 Mr. Violi repeatedly characterizes the outcome of
 3 cases in ways that just is inaccurate and the
 4 stuff is not on the record but he's --
 5 MR. VIOLI: Mr. Kovar, I did not know
 6 that this case was decided. Thank you for telling
 7 me. I know only that an Attorney General filed a
 8 brief with NAAG. If you'd like to provide me the
 9 rest of the documents in the case, I'll gladly
 15:11:00 10 look them over and report to the Tribunal.
 11 MR. KOVAR: Mr. Violi, as you know, it
 12 would be a public document. You could have looked
 13 it up for yourself.
 14 MR. VIOLI: Some things are not that
 15 public, I found out today, apparently.
 16 PRESIDENT NARIMAN: He said that they
 17 lost the case.
 18 MR. VIOLI: Very good. They may have,
 19 Mr. President, but the point I'm making is --
 15:11:18 20 Who lost the case, Mr. Kovar, by the
 21 way? If you want to edify the Tribunal.
 22 MR. KOVAR: The Grandfathered SPMs lost

1 paragraph. The second full paragraph on Page 3.
 2 I would like to read this into the
 3 record, and I will ask the question of the
 4 professor after.
 5 Quote, it is not difficult to
 6 understand why movants -- and in this case the
 7 movants would be the exempt SPMs -- seek as their
 8 primary remedy exclusion of an MSA competitor. As
 9 Grandfathered SPMs, they already enjoy terms much
 15:12:54 10 more favorable than those imposed on General
 11 Tobacco, but apparently this is not good enough.
 12 Q. Now, you see the terms much more
 13 favorable? Do you agree with that description,
 14 Professor, that an exempt SPM enjoys terms, quote,
 15 much more favorable, end quote, than the terms
 16 imposed on a nonexempt SPM? An SPM who has to
 17 pay, as we said before, approximately the same
 18 amount per carton as an NPM after the Allocable
 19 Share. Do you agree with that description, terms
 15:13:37 20 much more favorable?
 21 A. It's more favorable than -- it's more
 22 favorable because they got this grandfather

1 exemption. Yes, they get what I call the
2 windfall, but the ones who join after 90 days
3 don't get the windfall.
4 Q. And then on Page 4 -- oh, I'll start in
5 the middle of the sentence where it says movants.
6 Movants will owe MSA payments only on
7 sales above their grandfathered shares. If it's
8 MSA payment obligation for 2004 sales as any
9 guide, movant Vector will likely owe no MSA
15:14:14 10 payments at all for 2005 sales, whereas the
11 average payment by the others will range between
12 approximately 70¢ and \$3 per carton.
13 You see that there?
14 A. Yes, I do.
15 Q. And that's comparing it to the rate of
16 \$4.20 on the prior page, \$4.20, which is the MSA
17 rate for nonexempt SPMs which is approximately the
18 rate for NPMs, correct?
19 A. Well, once again, in 2005 not all
15:14:42 20 states have appealed their Allocable Share. But
21 it's Allocable Share --
22 Q. Yes.

1 more favorable terms, and is noting the contrast
2 or the distinction between average payment of
3 these competitors.
4 It's not -- he's not talking about a
5 windfall or a subsidy. He's talking about an
6 average payment comparison which is presumably an
7 average cost comparison, correct?
8 A. He's talking about a windfall and he's
9 expressing it in terms of average payments.
15:16:07 10 That's just how he's expressing their data.
11 Q. So is that an improper way to express
12 it?
13 A. No. I mean he could express the
14 windfall in terms of average payments. I think
15 that's -- I mean it's sort of a weird way to
16 present it but it's not improper.
17 Q. And on Page 14, the heading there,
18 heading three of that document, the Attorney
19 General of Kentucky along with NAAG write, movants
15:16:36 20 already enjoy MSA payment terms that are far more
21 favorable than those afforded General Tobacco. Do
22 you know what is meant there by far more

1 A. -- rate for compliant NPMs.
2 Q. All right. So the rate for compliant
3 NPMs post-Allocable Share is 4.20, approximately,
4 and the compliant rate for SPMs, because we've
5 also have some SPMs who haven't been a hundred
6 percent compliant too, right?
7 A. I don't know for sure.
8 Q. Okay. So the compliant rate for SPMs
9 was 4.20 then the Attorney General notes here, and
15:15:06 10 NAAG notes, that the rate, what is called the
11 average payment will be approximately 70¢ to \$3
12 per carton. You see that?
13 A. Yes.
14 Q. Do you have any dispute with those
15 figures, 70¢ and \$3 per carton?
16 A. No, I don't know that --
17 Q. Now, you made much mention of the
18 marginal cost in a hypothetical profit maximizer
19 with marginal costs in mind, right?
15:15:34 20 A. Right.
21 Q. But the Attorney General, here, is
22 noting favorable terms on the prior page, much

1 favorable?
2 A. What the -- I think -- I presume that
3 refers to the windfall they got through the
4 grandfather shares.
5 Q. And if I could point you to the middle
6 of that paragraph I'll read.
7 General Tobacco was also required to
8 provide a security interest to the settling states
9 in its brand name trademarks to provide a quick
15:17:08 10 remedy in event of default. Do you know what the
11 purpose was of requiring this SPM to provide
12 security interest in its trademark?
13 A. No, I don't.
14 Q. Is the trademark an asset?
15 A. A trademark is typically an asset, yes.
16 Q. Now, if I can, direct you to Page 15 --
17 excuse me, 16. The first sentence of the last
18 full paragraph.
19 It states, quote, movants, of course,
15:17:51 20 will not agree to such similar payment provisions
21 because they already enjoy a -- excuse me, they
22 already enjoyed far more favorable treatment under

1 the MSA.
 2 Do you see the term far more favorable
 3 treatment?
 4 A. Yes, I do.
 5 Q. And what does that mean, far more
 6 favorable treatment under the MSA?
 7 A. It means that they got this windfall
 8 for the exempt.
 9 Q. That the exempt SPMs received this
 15:18:18 10 windfall that you've been talking about?
 11 A. Yes.
 12 Q. And non-Grandfathered SPMs don't
 13 receive that windfall or favorable treatment,
 14 correct?
 15 A. Let's be clear. Non-Grandfathered
 16 SPMs, some non-Grandfathered SPMs -- actually,
 17 yeah, you're right. No, you're right. Just
 18 generally they do not.
 19 Q. They do not.
 15:18:35 20 A. Right.
 21 Q. And NPMs post-Allocable Share do not
 22 receive that far more favorable treatment?

1 well.
 2 ARBITRATOR CROOK: Okay. So everyone
 3 was in there?
 4 THE WITNESS: Yeah.
 5 ARBITRATOR CROOK: Okay. Second
 6 question.
 7 And here I'm not trying to put you in a
 8 difficult point, but to the extent that you can,
 9 subject to whatever contractual or professional
 15:19:52 10 obligations you may have, what can you tell us
 11 about the outcome of the significant factor
 12 proceedings?
 13 THE WITNESS: I guess I don't know what
 14 I can tell you about the outcome. I don't know
 15 what my limits are. I don't know if I should
 16 start answering. You can tell me to stop when I
 17 go too far or how you want to handle that.
 18 ARBITRATOR CROOK: Well, this is
 19 obviously a matter of interest to the Tribunal.
 15:20:09 20 THE WITNESS: Yeah.
 21 ARBITRATOR CROOK: If you want to --
 22 THE WITNESS: Sure.

1 A. Under the windfall, no.
 2 MR. VIOLI: Okay. No further
 3 questions.
 4 Thank you, Professor Gruber.
 5 (Discussion off microphone.)
 6 ARBITRATOR CROOK: Thank you, Professor
 7 Gruber. Those of us who didn't do all that well
 8 in economics are grateful to you.
 9 Two questions, maybe three.
 15:19:09 10 Question number one. Back about
 11 9:30 this morning you were talking about the
 12 econometric data. Did I correctly understand that
 13 that is basically data provided by the OPMs
 14 regarding their sales and pricing and so forth?
 15 THE WITNESS: Yeah, it's -- basically,
 16 it's what we call micro level data. It's
 17 literally records of each sale for a sample of
 18 sales which includes the price.
 19 ARBITRATOR CROOK: Okay. So it's OPM
 15:19:34 20 data regarding the --
 21 THE WITNESS: It wasn't just OPM. It
 22 was actually all -- we had SPM and NPM sales as

1 ARBITRATOR CROOK: -- consult with
 2 somebody, please do, but we'd be happy to hear as
 3 much as you can tell us.
 4 THE WITNESS: Okay. SO about the
 5 outcome, basically the outcome was that there was
 6 essentially -- there were essentially legal
 7 decisions that the arbitrator had to make and
 8 economic decisions. I was involved on the
 9 economic side.
 15:20:31 10 The economic side was, did they like
 11 our econometric model better than the other side's
 12 econometric model. And on that one they sort of
 13 liked both, state elements of both they liked. I
 14 would say probably the other side did a bit better
 15 in 2003. We did a bit better in 2004. But kind
 16 of it was a compromise between the different
 17 econometric models we proposed.
 18 But I think at the end of the day it
 19 was much more important decisions over, for
 15:20:58 20 example, who bore the burden of proof. Our
 21 contention was that the OPMs in bringing this
 22 procedure bore the burden of proof to prove that

1307

1 the MSA had caused their market share loss.
 2 And what that means in econometric
 3 terms is that they had to prove beyond statistical
 4 doubt that the market share loss was caused by the
 5 MSA. They claimed we had to prove it wasn't
 6 caused by the MSA.
 7 Now, in theory, that should be the same
 8 thing, but in fact, in one case the certainty is
 9 on them to resolve and in the other case
 10 15:21:27 uncertainty is on us to resolve. He decided in
 11 favor of them on that.
 12 The other issue is this definition of
 13 the but for world. We discussed about do you
 14 change the denominator or change the numerator.
 15 He decided in favor of them on that.
 16 And then finally and most importantly,
 17 probably, we argued -- or our lawyers argued.
 18 This is really my expertise -- that the proper way
 19 to read the MSA was that -- was that the -- they
 20 15:21:50 only got a judgment if the MSA caused a
 21 significant decline in their share beyond the
 22 initial two percent. That the initial two percent

1309

1 2005 we basically agreed to disagree
 2 and then 2006 I was not involved in. They brought
 3 in some other economists who I understand did an
 4 even better job making the economic case to new
 5 arbitrator who pretty clearly liked the economic
 6 case for the settling states, but once again
 7 disagreed on the legal issues and as a result the
 8 settling states lost again.
 9 ARBITRATOR CROOK: Okay. So the bottom
 10 15:23:12 line is that in terms an international lawyer can
 11 understand, the OPMS won.
 12 THE WITNESS: The OPMS won every year.
 13 ARBITRATOR CROOK: Thank you, sir.
 14 THE WITNESS: Sorry. It was a
 15 long-winded way of saying that.
 16 ARBITRATOR CROOK: It was very
 17 informative. Thank you, sir.
 18 REDIRECT EXAMINATION
 19 BY MR. FELDMAN:
 20 15:23:41 Q. Good afternoon, Professor Gruber.
 21 A. Good afternoon.
 22 Q. Could you please turn to Tab 53 in

1308

1 didn't matter. Where they argued, no, once you
 2 cross two percent then you went back and any
 3 significant decline caused a judgment in their
 4 favor.
 5 We thought -- I mean, I'm obviously
 6 biased, but we thought that was a silly reading of
 7 the MSA. We thought the MSA clearly said, you
 8 take out the first two percent and then say
 9 whether beyond that the MSA caused them in
 10 15:22:18 decline. And the arbitrator disagreed with us.
 11 He said -- disagreed with me, with what I'm
 12 saying.
 13 He's said, once you cross the two
 14 percent threshold you go back and say at that
 15 point if it's significant decline that's due to
 16 the MSA, then the OPMS win. And so basically they
 17 won -- they won -- and they won the procedure.
 18 ARBITRATOR CROOK: That's 2003 or --
 19 THE WITNESS: 2003, 2004, similar
 20 15:22:44 outcome. Once again, I think in 2004 we did a bit
 21 better on economics but didn't make any headway on
 22 the legal issues.

1310

1 Claimants' core bundle?
 2 A. Okay.
 3 Q. Specifically -- I'm sorry, Tab 52, and
 4 specifically Paragraph 7 and 8.
 5 PRESIDENT NARIMAN: That's the first
 6 report?
 7 MR. FELDMAN: Yes. Professor Gruber's
 8 first report.
 9 Q. Now, in paragraph -- are you there?
 10 15:24:37 A. Yes.
 11 Q. In Paragraph 7, in your report, you
 12 state that for 2007 sales the per cigarette MSA
 13 annual payments due to be made by SPMs on account
 14 of each cigarette sold in excess of any
 15 grandfather share on a per carton basis was about
 16 \$5.06 per carton, between \$5.06, \$5.07?
 17 A. That's right.
 18 Q. Then in Paragraph 8 with respect to
 19 NPMS for 2007 sales, you state that the per carton
 20 15:25:12 amount is about five point -- \$5.02 per carton?
 21 A. That's right.
 22 Q. So for 2007 sales, were NPMS paying

1311

1 less per carton than SPMs for payments above their
2 grandfather share?

3 A. Yes, that's right. As I mentioned,
4 there was about -- I mentioned this earlier, that
5 the OPMs pay about five percent more than -- or
6 about four percent more than the SPMs and the SPMs
7 pay about one percent more than the NPMs.

8 Q. And then also in your report you refer
9 to 2008 sales, estimating that the per carton
10 amount for SPMs above any grandfather share would
11 be about \$5 and almost 22¢ per carton; is that
12 correct? In Paragraph 7.

13 A. Yes.

14 Q. And then in Paragraph 8 for NPMs the
15 total will be about \$5.17 per carton?

16 A. Right.

17 Q. So again for 2008, the per carton
18 amount for SPMs above the grandfather share
19 exceeds the per carton amount for NPMs?

15:25:47 20 A. Yes. Once again, by about one percent.
21 That's the gap between the SPMs and the NPMs.
22 Q. And that gap would apply consistently,

1313

1 the per carton price for SPMs above a grandfather
2 share?

3 A. No.

4 MR. LUDDY: Objection to form.

5 A. No, it wasn't, actually. That -- it
6 was not.

7 Q. And why is that?

8 A. So basically this is a important
9 clarification and it comes to what I tried to
10 describe before, which is the two separate issues
11 at play here.

12 One issue is literally the measurement
13 of could it be that the NPM marginal cost above
14 the SPM marginal cost. And here I'd say, no, it
15 would not.

16 The second issue is, could you set up
17 the but for world in a way which would make the
18 NPMs looked advantageous relative to the SPMs.
19 And that you could. And this referred to that
15:27:48 20 second issue.

21 Q. Okay. With respect to the real world,
22 what is your position on the real world in terms

1312

1 let's say, for years 2002, 2003, 2004, 2005?

2 A. Yes. Basically the way the MSA was
3 written, the escrow amount for SPMs is about one
4 percent less than the actual above the grandfather
5 share payment by the SPMs.

6 Q. Okay. Thank you.

7 And if we could please turn back to --
8 I believe it was Core Tab No. 5. And it was
9 Paragraph 9.

10 And in Paragraph 9 in your report, you
11 refer to a but for world?

12 A. Right.

13 Q. Is Paragraph 9 addressing this but for
14 world?

15 My question is, the statements you're
16 making in Paragraph 9, do those concern the real
17 world or do they concern the but for world?

18 A. They concern the but for world assumed
19 by the firm -- by the arbitrator which we didn't
15:26:56 20 agree with.

21 Q. And in that but for world was the
22 price -- the per carton price for NPMs lower than

1314

1 of the obligations of -- per carton obligations of
2 NPMs as opposed to SPMs above any grandfather
3 share?

4 A. In the real world the per carton
5 obligations of an NPM can never be as high -- will
6 never be as high as the per carton obligations of
7 SPMs above the grandfathered share.

8 Q. And that applies after the Allocable
9 Share Amendment?

10 A. Well, yeah. They would be way less --
11 the NPMs would be way less before the Allocable
12 Share. After the Allocable Share, if they fully
13 comply, they'll be about one percent less than
14 what the SPMs pay above the grandfathered share.

15 Q. Thank you.

16 Under the MSA, how are payment
17 obligations calculated under the MSA?

18 A. You have to ask a more specific
19 question.

15:28:52 20 Q. In terms of number of sales, do the
21 MSA -- are federal excise taxes looked to to
22 calculate payment obligations under the MSA?

1315

1 A. Yes.

2 Q. And for a cigarette manufacturer, let's
3 say, located in Canada which was -- let's assume a
4 cigarette manufacturer in Canada exporting a
5 billion sticks into the United States, and let's
6 say that all of those one billion sticks were
7 destined for sale on-Reservation in the United
8 States, would MSA payment obligations arise from
9 those one billion sticks?

15:29:47 10 A. I believe not, if they're
11 on-Reservation. Well, no, it depends -- no, no,
12 if they're imported, I guess you pay them -- they
13 accrue on the import. I don't actually know. I'm
14 sorry. I'm speaking out of turn. I'm not exactly
15 sure.

16 Q. Okay. Okay. That's fine.

17 If you could please turn to
18 Mr. Wesley's statement, which is this document.
19 Document 48, please.

15:30:59 20 In Paragraph 4 of Mr. Wesley's
21 statement, Mr. Wesley states, part of my job was
22 to make sure that we never sold under the cap

1317

1 such pricing decisions?

2 A. Over some period of time. You know, as
3 I said, as a strategy it could underprice
4 strategically to try to gain market share.
5 Certainly. And any firm could do that. Obviously
6 thy can't do it forever. It would have to
7 eventually make up that underpricing, but for a
8 period of time it could certainly do that.

9 Q. Okay. The marginal cost advantage that
15:32:30 10 NPMs enjoyed under the original Escrow Statutes,
11 was that marginal cost advantage a key factor in
12 the rise in NPM market share?

13 A. Yes.

14 Q. On cross-examination you were asked
15 some questions about the proposed 1997 federal
16 settlement. How would you compare the 1997
17 federal settlement to the MSA?

18 A. It was very different, but I'd say in
19 general it was not nearly as -- not nearly as
15:33:05 20 punitive on the OPMS, not nearly as good for
21 public health as was the MSA.

22 Q. And why is that?

1316

1 amount -- and by they I take it he's referring to
2 Liggett -- because of the very high profitability
3 of cigarettes sold without requiring matching MSA
4 payments.

5 Do you know whether Liggett in fact has
6 exceeded its cap amount in the past?

7 A. Yeah, every single year it exceeded its
8 cap amount.

9 Q. Has there ever been a year when Liggett
15:31:29 10 did not exceed its cap amount?

11 A. Not according to today. It's in my
12 report. My report doesn't go to all that, doesn't
13 include 2009. But as far as the use of my report,
14 Liggett has always exceeded the cap amount I
15 believe by at least ten percent in every year.

16 Q. And the pricing decisions that are
17 alleged by Mr. Wesley in his statement, could
18 those same pricing decisions have been made by a
19 manufacturer that did not enjoy grandfather share
15:31:54 20 under the MSA?

21 A. Certainly.

22 Q. Could Grand River, if it wished, adopt

1318

1 A. Well, basically the 1997 settlement
2 would have settled all the private lawsuits as
3 well as the state lawsuits.

4 PRESIDENT NARIMAN: That's federal
5 settlement?

6 THE WITNESS: Well, no, this was the
7 original proposed settlement. Never came into
8 play. It was the original proposed settlement,
9 would have settled all the Federal lawsuits --
15:33:32 10 would have settled all the private lawsuits as
11 well as the state lawsuits, which would have been
12 a huge windfall to the tobacco companies.

13 PRESIDENT NARIMAN: You said it was not
14 as good as.

15 THE WITNESS: Yes. Not as good as the
16 MSA. I mean, it's really a different beast. It
17 was -- in some ways it was more comprehensive
18 because it would have settled not only the state
19 suits, but the private suits. It also had them
15:33:59 20 pay more than the MSA did, but it didn't -- but
21 the extra amount it had them pay was not nearly
22 enough to compensate from the huge legal risks

1319

1 they were getting from under by having all these
2 private lawsuits settled.
3 MR. FELDMAN: Okay. Thank you,
4 Professor Gruber.
5 THE WITNESS: Thanks.
6 MR. VIOLI: I just have a few
7 questions.
8 RECCROSS EXAMINATION
9 BY MR. VIOLI:
15:34:32 10 Q. You worked on evaluating the federal
11 proposal, correct?
12 A. Yeah.
13 Q. What is the amount that is quantified
14 or normally given for the value of the MSA to the
15 state, the numbers of dollars paid?
16 A. I don't remember offhand.
17 Q. Two hundred and seven billion for the
18 MSA states?
19 A. Something like that.
15:34:52 20 Q. And two hundred forty billion if you
21 add the four previously settled states, right?
22 A. That sounds roughly right. I don't

1321

1 A. No, I wasn't actually aware of that.
2 Q. Okay. Now, from a healthcare
3 economist's point of views as opposed to just
4 gross dollars, wasn't the federal proposal a much
5 better deal?
6 A. The initial proposal?
7 Q. Yeah.
8 A. No. As I said, I don't think it was as
9 good a deal.
15:36:04 10 Q. Are you familiar with the youth look
11 back provisions in that proposal?
12 A. Yes.
13 Q. And the surcharges to the states and
14 the tobacco companies if they didn't meet certain
15 reductions in smoking?
16 A. That's right.
17 Q. And the MSA doesn't have that, does it?
18 A. MSA doesn't have that.
19 Q. Wouldn't that be better -- wouldn't th
15:36:21 20 have been better to have a settlement that had
21 youth look back provisions and surcharges for
22 failure to meet reductions and consumption? As

1320

1 remember exactly.
2 Q. And the federal proposal would have
3 given -- required a payment of \$365 billion,
4 right?
5 A. I don't remember exactly, once again.
6 I know it was basically they would have required a
7 larger payment but in return for a much bigger
8 give back to the companies which was settling
9 their private suits as well as their state suits.
15:35:19 10 Q. And you're a health economist, correct?
11 A. I do a lot of health economics, yeah.
12 Q. Did you ever work with Attorney General
13 Harshbarger, Mr. Herring's former boss, the
14 Attorney General of Massachusetts?
15 A. I advised him a little bit in his run
16 for Governor, but that was it.
17 Q. Not in connection with any healthcare
18 related to the MSA or the --
19 A. No.
15:35:41 20 Q. Were you aware that he walked away from
21 the negotiating table of the MSA because he was
22 not happy with the health provisions of the MSA?

1322

1 healthcare economist, wouldn't you have rather
2 seen that in the agreement?
3 A. I would have rather seen that in
4 agreement. And if you could have taken the MSA
5 and added those additional penalties on the
6 companies not reducing smoking, that would have
7 made the MSA better. But as I said, there were
8 lots of differences between these two bills.
9 In fact, the McCain bill which I then
15:36:46 10 worked on had a lot of the good features of the
11 settlement, including a much stronger youth look
12 back and higher payments. I would have liked that
13 but that one failed.
14 Q. And you mentioned that the NPMs -- I
15 was just reading your testimony on the computer
16 there, trying to read it back -- the NPMs enjoyed
17 a cost advantage that Mr. Feldman asked you about
18 under the Allocable Share provision? You remember
19 that?
15:37:11 20 A. Marginal cost advantage.
21 Q. Marginal cost advantage.
22 Now, for NPMs, if they don't get a

1323

1 release there is no marginal cost advantage under
2 the old system, correct?
3 A. Right. Right.
4 Q. And if they --
5 A. Well, once again, if they comply and
6 there is the slight one percent advantage I was
7 just talking about.
8 Q. It depends for an NPMs marginal cost
9 under the old system depended how many states it
10 was in, where its products were sold, right?
11 A. It could never be higher than the SPM,
12 but how much lower it was depended on the factors.
13 Q. So its marginal cost varied depending
14 on whether it went into additional states or
15 stayed in just one market, correct?
16 A. Yes.
17 Q. And, in fact, California never gave a
18 release, so at least in California the marginal
19 cost for an NPM was one which no release was
15:37:59 20 given, which was the full nonexempt SPM, roughly
21 about the same price, right?
22 A. Yeah, little bit less, right.

1325

1 the real world, not about a theoretical marginal
2 cost, profit maximizing firm. He wanted to talk
3 about the real world.
4 The real world -- in the real world,
5 are you familiar with something called an NPM
6 adjustment?
7 A. Yes.
8 Q. And didn't some manufacturers actually
9 receive a reward or an NPM adjustment, dollars
10 back, credits under these NPM adjustment
11 proceedings for certain years?
12 A. Not yet.
13 Q. There wasn't a settlement for the
14 NPM --
15 A. Oh, that's right. That's right. There
16 was a settlement for some of the earlier years.
17 You're right.
18 Q. That's right. There was a settlement.
19 A. Right.
15:39:43 20 Q. And that was X hundred of millions of
21 dollars, right?
22 A. I don't remember.

1324

1 Q. Now, Mr. Feldman asked you as Liggett,
2 I believe it was -- have they ever had a year
3 where they didn't make a payment under the MSA.
4 Remember that?
5 A. Yes.
6 Q. You were just speaking about Liggett,
7 right? Not any other exempt SPM?
8 A. Right.
9 Q. Were you talking about the years 2003
15:38:29 10 forward or were you going back to the year 2000
11 when you made that statement?
12 A. I forget what the years were in my
13 report, what I used in my report.
14 Q. You didn't go back to the year 2000,
15 did you, for Liggett?
16 A. I don't remember.
17 Q. Liggett may have had a year or two
18 where it didn't make any MSA payments; isn't that
19 true?
15:38:50 20 A. That's possible. I don't recall.
21 Q. And this is, I think, very important,
22 because Mr. Feldman brought out, let's talk about

1326

1 Q. Well, if there was a settlement, the
2 way the formulas work under the MSA, if it is,
3 it's either a credit or a payment for the year in
4 question, correct?
5 A. I don't know how it works exactly. But
6 I know they -- they settled -- see, what I don't
7 remember exactly is there's this extra stage in
8 the NPM adjustment. First you have to find the
9 significant factor which they settled and agreed
15:40:07 10 it was or the arbitrator decided. Then you have
11 to also find that the states did not diligently
12 enforce. And those positions haven't been held so
13 I don't know which years stopped at which level of
14 the proceedings. I don't know.
15 Q. It was a settlement for a certain
16 period of time, right, in 2002?
17 A. I believe so. I don't know for sure.
18 Q. And that NPM adjustment settlement,
19 they took it outside the purview of the
15:40:29 20 arbitrator, they took it outside the purview of
21 the public, and they entered into a settlement of
22 the NPM adjustment conflict or dispute.

1 When there was a credit given to the
2 manufacturers, all the participating
3 manufacturers, the way it's given, it affects or
4 it reduces their marginal cost, does it not?
5 A. Well, it depends how it's given. I
6 mean if it's just given -- they just wrote them a
7 check, then it doesn't affect their marginal cost.
8 If it was done as saying, well, from
9 now on your payments will be reduced by a little
10 bit to account for this, then it could affect
11 their marginal cost. I don't know how it was
12 done.
13 Q. But if it's done in the form of a check
14 for prior behavior or conduct or sales, if you
15 were to apply it to that prior behavior or conduct
16 or sales, you could quantify the marginal cost
17 figures using that payment, correct?
18 A. No, because marginal cost is a
19 forward-looking concept. It's the notion of what
15:41:21 20 am I going to have to pay on my last unit. If two
21 years later I get a check, then it doesn't affect
22 marginal cost. It's just a check. It's a

1 Alaska and one other state.
2 MR. VIOLI: Mr. Hering, what was the
3 other state, if I may?
4 MR. Hering: Minnesota.
5 MR. VIOLI: Oh, that's not an MSA.
6 Just those three states.
7 Q. Do you recall giving your deposition in
8 Massachusetts? Do you recall we had a deposition?
9 A. I recall we had a deposition.
10 Q. And do you recall me asking you about
11 your computation of marginal costs, and you said
12 marginal costs are based on national costs all
13 across the country, total figures, total volume?
14 Do you remember that?
15 A. Not particularly, no.
16 Q. Okay. That's how you calculated
17 marginal costs here when you were comparing an
18 NPMs cost -- marginal cost post-allocable Share
19 with nonexempt SPM. You calculated it based on --
15:42:42 20 A. National.
21 Q. -- national numbers?
22 A. That's right.

1 windfall.
2 Q. Have you seen something that suggests
3 the OPMs, the participating manufacturers price
4 their products based the potential that they will
5 receive an NPM adjustment in the future? Is that
6 a factor that you think is considered in the
7 pricing of participating manufacturers under the
8 MSA?
9 A. It might be. I don't know. That's
10 something we thought about in the significant
11 factor proceedings. We could never prove it but
12 it might be.
13 Q. Something you've thought about and
14 written about in the significant factor
15 proceedings?
16 A. I don't remember.
17 Q. Okay. Those documents aren't in the
18 record here, do you know?
19 A. No.
15:42:09 20 Q. Okay. Again to the real world.
21 In the real world we have an equity
22 assessment fee that is imposed in Michigan, Utah,

1 Q. And you said they're roughly the same,
2 give or take one percent.
3 And I asked you, Professor Gruber, did
4 you account for the equity assessments in those
5 three states that only apply to NPMs but not
6 nonexempt SPMs? This is a variable cost, the
7 equity assessment, right? It's a per unit cost?
8 A. I believe so, yes.
9 Q. And it's imposed only on NPMs, correct?
15:43:45 10 A. I believe so.
11 Q. And I asked you whether or not in your
12 analysis, when you came up with the \$5.06 per
13 carton versus a \$5.04, I asked you whether your
14 analysis would have and should have changed to
15 include the fact that nationally you need to
16 include the equity assessment costs that are
17 imposed on NPMs which elevates their marginal
18 cost. Do you remember me asking you that?
19 A. No.
15:44:14 20 Q. Do you remember you saying that you
21 should have included that?
22 A. No.

1331

1 Q. I'll ask you in the context of this
2 report.
3 Did you include in this report -- when
4 you calculated the marginal cost comparisons of
5 NPMs and nonexempt SPMs, did you include the
6 equity assessment fees that are imposed only on
7 SPMs in those three states?
8 A. No, I do not.
9 Q. Okay. And that would have affected the
15:44:39 10 national marginal cost for NPMs, correct?
11 A. It's a marginal cost so, yes, it would
12 have.
13 Q. Would have increased it?
14 A. Yeah.
15 Q. Okay.
16 MR. VIOLI: No further questions.
17 PRESIDENT NARIMAN: There's one thing I
18 would like to know from you.
19 If Grand River or any NPM had signed
15:44:58 20 the MSA or come on board, as it were, could they
21 have arbitrated, just like you told us about that
22 arbitration in which you made an expert report, a

1333

1 THE WITNESS: Sure.
2 ARBITRATOR ANAYA: Maybe we could have
3 a break. I don't know. I'm suffering from
4 Mr. Weiler's condition yesterday.
5 Anyway, as I understand it, the
6 strategy in the MSA is to raise the marginal cost
7 and thereby affect price and reduce consumption --
8 THE WITNESS: Right.
9 ARBITRATOR ANAYA: -- for the
15:46:10 10 overarching health objective?
11 THE WITNESS: Right.
12 ARBITRATOR ANAYA: Right. That's the
13 core of the design?
14 THE WITNESS: That's the core to get to
15 the public health objective.
16 ARBITRATOR ANAYA: And your position is
17 that the scheme has worked?
18 THE WITNESS: That -- yes, that we've
19 seen a very large reduction in smoking because the
15:46:24 20 MSA --
21 ARBITRATOR ANAYA: Maybe the word
22 scheme is not the --

1332

1 monetary claim against the settling states under
2 the MSA?
3 THE WITNESS: No, the NPM adjustment
4 was only for the original participating
5 manufacturers.
6 PRESIDENT NARIMAN: Oh, that's why you
7 said OPM?
8 THE WITNESS: Yeah.
9 PRESIDENT NARIMAN: So they couldn't
15:45:25 10 have?
11 THE WITNESS: No.
12 PRESIDENT NARIMAN: That door was shut.
13 THE WITNESS: Yeah.
14 PRESIDENT NARIMAN: Even if they had
15 signed the MSA?
16 THE WITNESS: Even if they later signed
17 the MSA.
18 PRESIDENT NARIMAN: Later signed.
19 THE WITNESS: Yeah, that door was shut
15:45:37 20 it was just for the original purchasing
21 manufacturers.
22 ARBITRATOR ANAYA: If I could just. . .

1334

1 THE WITNESS: Yeah. But it's reduced
2 smoking.
3 ARBITRATOR ANAYA: Yeah. It's worked.
4 And from an economist standpoint you see that this
5 is a fair and adequate way of achieving this
6 objective --
7 THE WITNESS: Yes.
8 ARBITRATOR ANAYA: -- using market
9 forces and so forth.
15:46:45 10 THE WITNESS: Yes.
11 ARBITRATOR ANAYA: All right. How
12 about the Allocable -- your position is the same
13 with regard to the Allocable Share amendments and
14 those arrangements that have tried to, as you say,
15 close the loophole and so forth.
16 THE WITNESS: Yes.
17 ARBITRATOR ANAYA: This works fairly
18 from an economic standpoint.
19 THE WITNESS: From an economic
15:47:08 20 standpoint, the way we think about fair is a level
21 playing field, the notion that all competitors are
22 competing on a level playing field. And we feel

1335

1 that closing the Allocable Share loophole ensured
2 a level playing field where it wasn't level
3 before. Or moved us toward a level playing field,
4 where it wasn't level before. Before the NPMs had
5 this large marginal cost advantage.
6 ARBITRATOR ANAYA: Now, do you see any
7 other factors or motives coming in for the
8 particular design of the overall MSA arrangement
9 for the Allocable Share Amendments, like to punish
10 certain NPMs or to make them less competitive
11 or --
12 THE WITNESS: No, I certainly don't
13 think the goal was -- I mean the goal -- certainly
14 anyone would recognize -- anyone would have
15 recognized that if you raise their marginal cost,
16 it's going to make them less competitive. But
17 it's going to take the position that they were
18 artificially extra competitive and moved them back
19 to a fair competition with the others. But I
15:48:04 20 don't think the goal was to punish those
21 companies. It was just to make sure the public
22 health needs were served with the MSA by getting

1337

1 underprice and therefore undercut the public
2 health goals and their straightforward way to deal
3 with that was to close the loophole. So I think
4 it's very straightforward and transparent.
5 MR. FELDMAN: Professor Gruber, just
6 one more question.
7 REDIRECT EXAMINATION
8 BY MR. FELDMAN:
9 Q. The grandfather share, is the
10 grandfather share tied to a certain volume of
11 cigarettes?
12 A. It's tied to their -- yes, it's tied to
13 their share of the volume of the market. So, in
14 other words, the grandfathered share would be, you
15 know, X percent of the market they are not taxed
16 on.
17 Q. But for SPMs that enjoy a grandfathered
18 share, is it a certain number of cigarettes that
19 is set or does it vary year by year? Does anyone
15:49:44 20 have a grandfathered share to say one billion
21 sticks?
22 A. I honestly don't remember. I have to

1336

1 everybody's marginal cost and getting prices up
2 and not a lot of loopholes where some could
3 underprice then attract smokers.
4 ARBITRATOR ANAYA: From a level playing
5 field standpoint or an efficiency standpoint, has
6 the process been sufficiently transparent in
7 your --
8 THE WITNESS: Well, I don't know about
9 transparent. I don't think the public knows this
10 is going on, but can you define transparent to
11 who?
12 ARBITRATOR ANAYA: Well, maybe I don't
13 mean transparent. I mean that there aren't any --
14 anything's hidden in there that should be open to
15 public scrutiny.
16 THE WITNESS: No, I don't think so. I
17 mean I'm not a politician or an ethicist or an
18 expert to say what should be more transparent and
19 what should not.
15:48:52 20 But certainly from my perspective this
21 loophole was an unfortunate feature of the MSA
22 that a lot of certain set of manufacturers to

1338

1 go back and look at the computation.
2 MR. FELDMAN: Okay. Thank you.
3 MR. VIOLI: Two very short questions.
4 RECROSS EXAMINATION
5 BY MR. VIOLI:
6 Q. Professor Gruber, when you were
7 comparing the rates between the SPMs and NPMs,
8 this is --
9 PRESIDENT NARIMAN: Is this
10 unnecessary --
11 MR. VIOLI: No, no. Just two quick
12 question I forgot to ask him before. That's why.
13 But the professor and I are minor.
14 (Discussion off microphone.)
15 Q. The SPMs, the rate under -- the
16 inflation adjustment is three percent or the CPI,
17 correct, whatever is greater?
18 A. Right.
19 Q. Did you apply the three percent or the
15:50:37 20 relevant CPI across the board to both SPMs and
21 NPMs by the same amount? Wasn't there a year
22 where it wasn't three percent, it was little more

1 than three percent?
 2 A. I believe so.
 3 Q. Did you just assume three percent
 4 across the board for both companies?
 5 A. I don't actually remember.
 6 Q. And you don't know if the calculation
 7 or the MSA used one CPI versus the different CPI
 8 number for the NPMS, did you?
 9 A. I don't remember that.
 15:50:59 10 Q. That may account for the one percent
 11 difference?
 12 A. I don't know why that one percent gap
 13 is in there.
 14 Q. Okay. Last question --
 15 (Discussion off microphone.)
 16 MR. VIOLI: One last question.
 17 ARBITRATOR CROOK: Well, you're up to
 18 seven.
 19 MR. VIOLI: Well, it was just the same
 15:51:11 20 question. But it has to do with the professor and
 21 I. I mean if you don't want me to -- I mean I
 22 think it's relevant. You raised an interesting

1 happened to prices and the significant factors and
 2 the SPM prices went up.
 3 Q. For exempt SPMs?
 4 A. I don't recall exactly the different --
 5 Q. And whether they met the goals of the
 6 MSA, the pricing -- the pricing that the exempt
 7 SPMs were using in the market, whether they met
 8 the goals of the MSA?
 9 MR. KOVAR: Mr. Chairman, I object.
 15:52:25 10 He's not a legal expert.
 11 PRESIDENT NARIMAN: Okay. Okay. Tea
 12 time.
 13 We'll meet again at 4:05 or 4:10.
 14 Thank you very much.
 15 (Whereupon, at 3:52 p.m., the hearing
 16 was adjourned until 4:10 p.m., the same day.)
 17 PRESIDENT NARIMAN: There's an
 18 announcement to be made.
 19 SECRETARY YANNACA-SMALL: Yes, because
 16:08:38 20 of the snowstorm that's expected tomorrow, it is
 21 very likely that the Bank will close earlier, as
 22 early as 2:00. So, I understand that the Tribunal

1 point. And I --
 2 ARBITRATOR ANAYA: I'm looking for an
 3 interesting point but go ahead. Go ahead.
 4 Q. But the goal of the MSA was this health
 5 concern in raising prices, right? Have you seen
 6 anything in the record here that the Attorneys
 7 General are actually looking at the prices of
 8 exempt SPMs to see if they're high or low?
 9 MR. KOVAR: Mr. President, objection.
 15:51:40 10 He's not an attorney. He's here as an expert on
 11 economic issues. He's not here to evaluate the
 12 record.
 13 PRESIDENT NARIMAN: He doesn't know
 14 anything about this record.
 15 Q. Have you seen it outside this record
 16 that someone has compared from the Attorney
 17 General's office the prices, looked at the prices
 18 of the exempt SPMs to see if they raised their
 19 prices to satisfy or meet the conditions that you
 15:52:02 20 were mentioning, raising prices for health
 21 concerns under the MSA?
 22 A. And certainly we looked at what

1 agreed to end the hearing tomorrow at one or two?
 2 1:00.
 3 PRESIDENT NARIMAN: Maximum 1:00.
 4 MR. VIOLI: If there's no snow or not
 5 so bad we keep going or no?
 6 PRESIDENT NARIMAN: It depends on what
 7 the Bank --
 8 SECRETARY YANNACA-SMALL: The Bank
 9 closes?
 16:09:08 10 PRESIDENT NARIMAN: If the Bank closes
 11 of course in the Bank doesn't close, then of
 12 course we can go on, but I mean you should all
 13 plan for closing at 1:00.
 14 SECRETARY YANNACA-SMALL: And there's a
 15 question mark about Monday as well.
 16 PRESIDENT NARIMAN: Oh, is that so?
 17 SECRETARY YANNACA-SMALL: We don't
 18 know. It depends on what kind of snowstorm it
 19 will be and the decision of the Bank. Yes, but I
 16:09:35 20 will inform you in any event. Yes, yes.
 21 MR. LUDDY: Mr. Weiler is going to make
 22 a brief follow-up on matters that were said

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1 yesterday.
 2 SECRETARY YANNACA-SMALL: Is all of
 3 this open, now, from here on?
 4 MR. WEILER: Yes.
 5 (End of confidential session.)
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1345

1 mentions of the concept at 118, we have a quote
 2 that starts with the hallmark of a substantive
 3 denial of justice can be found in the
 4 arbitrariness of the decision in question -- I'm
 5 sorry, I'm not quoting. This is me speak -- us
 6 writing -- a decision is arbitrary, and so it --
 7 but arbitrariness -- and then down below we talk
 8 about Professor Mann who mentions that a decision
 9 is -- decision that is quote, "arbitrary,
 16:11:36 10 discriminatory, or abusive treatment" is contrary
 11 to customary international law.
 12 And then, on Paragraph 120, we quote
 13 Professor Schwartzberger: "Arbitrariness in any
 14 form is or ought to be abhorrent to homo
 15 juridicus. His whole professional outlook is
 16 dominated by the attitude that, in the eyes of the
 17 law, equal situations require equal remedies, yet
 18 any --
 19 ARBITRATOR ANAYA: Just so I'm clear,
 16:12:08 20 is this the abuse of right?
 21 MR. WEILER: Yes, the -- he then goes
 22 on to say "If discretion is exercised within a

1344

1 OPEN SESSION
 2 MR. WEILER: There were two points that
 3 I wanted to return to. I said that I would and so
 4 I'd like to do so. They were about denial of
 5 justice in good faith.
 6 Professor Anaya wanted to know where
 7 abuse of rights was found, so I thought that I
 8 would like help you with that. It was found in
 9 two places, one of them was the particularized
 16:10:28 10 statement of claim, and the other is the Memorial
 11 of the investor. The pages are --
 12 PRESIDENT NARTMAN: What's the
 13 paragraph?
 14 ARBITRATOR CROOK: And the date, too,
 15 please.
 16 MR. WEILER: I don't have the dates
 17 here because I printed off the pages that I needed
 18 today have. 115 -- this is the particularized
 19 statement of claim -- paragraph -- because you
 16:10:51 20 just asked, Paragraph 115, the section that I was
 21 dealing with was 115 until 129. So, those are the
 22 sections for context and then the specific

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1 wide framework of" -- I'm sorry, if discretion is
 2 exercised within as wide a framework of
 3 territorial jurisdiction, only the most potent
 4 abuses of sovereignty could possibly be caught by
 5 any prohibition of the arbitrary use of sovereign
 6 rights.
 7 Then, we have over here -- this is an
 8 angle -- Norwegian fisheries at 127 -- principle
 9 of good faith requires every right be exercised
 16:12:41 10 honestly and loyally, and it talks about
 11 fictitious exercises --
 12 ARBITRATOR ANAYA: Mr. Weiler, I think
 13 my question was where you have alleged this. I
 14 mean, as I understand, what you're reading are
 15 authorities where someone talking about this --
 16 MR. WEILER: Sure -- well, to be clear
 17 I couldn't have alleged Mr. -- I think it was
 18 Mr. Eckhart's, what I now see to be his abuse of
 19 right because he didn't, we didn't know about it
 16:13:03 20 until he testified to it. So, I make the
 21 allegation now, but the concept clearly ran
 22 through our Memorial. And I understood that you

1347

1 had asked yesterday -- you said you had done a
 2 control F search and couldn't it so I thought I
 3 could provide you with --

4 ARBITRATOR ANAYA: No, no. Just to be
 5 clear, Mr. Crook asked you, were you making a new
 6 allegation and you said, no, you made the
 7 allegation repeatedly and from the beginning.

8 MR. WEILER: Without trying to be
 9 disrespectful, I think if we looked at the
 16:13:34 10 transcript you'll see I actually didn't say. I
 11 actually referred to the fact Mr. Eckhart gave us
 12 new evidence that we didn't have before and that's
 13 why we were --

14 ARBITRATOR ANAYA: I misunderstood
 15 then. I misunderstood.

16 ARBITRATOR CROOK: So, Professor Weiler
 17 is this a new claim, or what is it?

18 MR. WEILER: I wouldn't call it a new
 19 claim. As I said, I have two -- we clearly have
 16:13:55 20 talked about these -- the measures and the way
 21 they've been enforced, we believe they are
 22 enforced very arbitrarily. We think that that's

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1 made there. In cases where the state has long
 2 since enjoyed the benefits of a treaty but now no
 3 longer willing to honor the obligations over that
 4 treaty, it is committing an abuse of right
 5 contrary to the principle of good faith and
 6 international law and such conduct would be
 7 directly germane to a Tribunal's jurisdiction of
 8 whether the standard of fair and equitable
 9 treatment has been met in a given case. So, I
 16:15:34 10 mean, these are just better examples of what --
 11 not better, but more examples of what we've been
 12 talking about.

13 PRESIDENT NARIMAN: You're saying
 14 administrative law in the United States as far as
 15 I know, the principle of unequal application is in
 16 Yick Wo, the Chinese laundry case where the
 17 principle is administered with an evil eye and
 18 unequal hand, with an evil eye and unequal hand.
 19 Now, if you have, I mean, material to show, you
 16:16:09 20 gather it altogether and give it to us later, that
 21 -- which are those instances from which you
 22 suggest that it is clear that these measures are

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1 tied to the notion of abuse of rights, that
 2 arbitrariness is itself evidence of abuse of
 3 right. It is true that through witness testimony
 4 I have new examples of what that is, but no, it's
 5 not a new claim. It's part of the reason we're
 6 here. We think we've been treated arbitrarily.

7 We root that in abuse of right; we root
 8 that in good faith; and we can compare it to
 9 breaches of procedural justice, which goes to
 16:14:33 10 denial of justice.

11 MR. LUDDY: I think it is clearly just
 12 further evidence of a claim that had been
 13 previously articulated -- further evidence of a
 14 claim that had been previously articulated.

15 MR. WEILER: So, anyway -- so, the
 16 other reference in the Memorial, that was the
 17 particular statement and claim in the Memorial of
 18 -- the Ben Chang that I quoted from because I was
 19 asked about that Ben Chang quote. Well, yes, that
 16:15:00 20 was definitely there; that's Paragraphs 173 to
 21 176.
 22 So, well, and here's the argument we

1350

1 being directed against you with an evil eye and
 2 unequal hand.

3 MR. WEILER: Thank you. Just to be
 4 clear, I'm not an American lawyer but I get your
 5 point.

6 PRESIDENT NARIMAN: No, nor am I. I'm
 7 not an American lawyer. I'm just telling you
 8 something I happen to know. This case was
 9 followed in India, as well.

16:16:38 10 MR. WEILER: Okay. And then, denial of
 11 justice --

12 PRESIDENT NARIMAN: The Chinese laundry
 13 case.

14 MR. WEILER: I was asked by Mr. Crook
 15 about denial of justice.

16 There were a couple things you were
 17 asking me, one was just the reference to it, but
 18 more specifically, if I recall correctly was the
 19 issue of whether denial of justice is just about
 16:16:59 20 maintaining a good judicial system. So, there
 21 we'd find that in a particularized statement of
 22 claim in the Memorial and in the Reply.

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1 With respect to the particularized
2 statement of claim, it's Paragraph 92 --
3 ARBITRATOR CROOK: No, Professor
4 Weiler, you misunderstood me. You made this
5 argument very clearly in your rebuttal, your last
6 submission in its current state so that really
7 wasn't the issue. The question I asked you was
8 just authorities and you referred me to Paulson's
9 book which I have in my bag to read on the subway
10 tonight.
11 MR. WEILER: Okay. With Paulson, by
12 the way, I remember it was Page 44 and I think
13 it's to 52. Also, the Harvard Draft Convention
14 1961 and I've got a few more for you. Professor
15 Garcia-Amador's work on the minimum standard which
16 we've -- these are citations from the -- so, I'll
17 make sure you get them all. That one talks about
18 an administrative Tribunal.
19 Let's see. This one here, not Roth,
16:18:05 20 but --
21 ARBITRATOR CROOK: Just save everyone
22 time, Professor Weiler, if you'd like, to just

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1 Mr. DeLange.
2 (Discussion off microphone.)
3 MS. CATE: Mr. Chairman, I object on
4 the grounds that this is a, not just one page.
5 This is a very long document that has been given
6 to me one minute, not even, at the time of the
7 cross-examination. The witness, neither the
8 witness nor I have seen it and I have not been
9 able to read all 47 pages of it.
10 16:20:31 PRESIDENT NARIMAN: Just give her the
11 relevant page.
12 MR. VIOLI: I'm just offering it for
13 the page, do you have the page on top there,
14 Paragraph 35, yeah.
15 MS. CATE: Mr. Chairman, if I may, may
16 I ask for clarification on where the Claimants got
17 this document. What is the source of the
18 document?
19 MR. VIOLI: Where I personally got it?
16:20:59 20 MS. CATE: Yes.
21 MR. VIOLI: I personally got it from
22 our local counsel in Idaho.

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1 hand us a piece of paper with the citations we'd
2 be happy to receive that.
3 MR. WEILER: Sure. I told you I'd come
4 back with these, so --
5 ARBITRATOR CROOK: Just make sure the
6 other side gets it as well.
7 MR. WEILER: These are already in the
8 -- these are in the record.
9 PRESIDENT NARIMAN: But anything you
10 16:18:19 give us give to them.
11 ARBITRATOR CROOK: But as an aid to me,
12 perhaps on one page of paper, you can indicate in
13 handwriting if need be the particular documents
14 and pages you think we ought to look at then give
15 them a copy too.
16 MR. WEILER: Certainly. No problem. I
17 was just going to enter it into the record but I
18 have no problem doing it that way. Thank you.
19 PRESIDENT NARIMAN: Okay, so now?
16:18:43 20 MR. LUDDY: I think we're going to have
21 Mr. DeLange.
22 PRESIDENT NARIMAN: Come on, where's

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1 MS. CATE: And where did your local
2 counsel get it?
3 MR. VIOLI: I believe it went to the
4 courthouse, but I'm not certain. This courthouse
5 here that's noted Fourth Judicial District of the
6 State of Idaho.
7 ARBITRATOR CROOK: And when did you get
8 it Mr. Violi.
9 MR. VIOLI: I received it from my local
10 16:21:36 counsel, and I believe it was two or three weeks
11 ago.
12 MS. CATE: What is the date of the
13 document?
14 MR. VIOLI: You can ask the witness but
15 the date stamp is April 25th, I think, 2006.
16 MS. CATE: And why was this not
17 produced earlier?
18 MR. VIOLI: I just received it in the
19 context of two or three weeks ago a court
16:22:05 20 proceeding in Idaho against Native Wholesale
21 Supply; otherwise, I would have put it in the
22 record with our Counter Memorial.

1355

1 PRESIDENT NARIMAN: Let's go on.
 2 MS. CATE: Would you, if you haven't
 3 already, provide it to the witness, please?
 4 I would like to note that if the
 5 Claimants are going to be submitting this document
 6 then I too have documents that I might like to
 7 submit for the record; is that possible?
 8 PRESIDENT NARIMAN: Yes.
 9 MS. CATE: It would involve this binder
 16:22:56 10 and this binder.
 11 PRESIDENT NARIMAN: For what purpose?
 12 MS. CATE: For the purpose that the
 13 Tribunal would have all the facts, the full truth
 14 about all of the cases that have been -- involved
 15 GRE and NWS.
 16 PRESIDENT NARIMAN: We'll see it, but
 17 at the same time let him start it.
 18 MS. CATE: Of course I will.
 19 MR. LUDDY: Did you have any
 16:23:20 20 preliminary questions of the witness?
 21 MS. CATE: I do, thank you.
 22 DIRECT EXAMINATION

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1 the Consumer Protection Division for that office.
 2 Q. And how long have you been working at
 3 the office of the Attorney General for the state
 4 of Idaho?
 5 A. I'm now in my 20th year.
 6 Q. So, that's since approximately 1990?
 7 A. 1990.
 8 Q. And how long have you been in your
 9 current position as the Chief of the Consumer
 16:24:41 10 Protection Division?
 11 A. The Attorney General created that
 12 Division two years ago, so I've been chief since
 13 that date.
 14 Q. Okay. And so that's roughly --
 15 A. About two years, coming on three.
 16 Q. Okay. And broadly speaking, what are
 17 your responsibilities as Chief of the Consumer
 18 Protection Division?
 19 A. Well, a number of responsibilities. We
 16:25:04 20 have responsibility for antitrust and consumer
 21 protection matters.
 22 PRESIDENT NARIMAN: Speak up a little.

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1 BY MS. CATE:
 2 PRESIDENT NARIMAN: Witness for
 3 Respondent.
 4 MS. CATE: Exactly.
 5 Q. My name is Alicia Cate. It is our
 6 fourth witness --
 7 PRESIDENT NARIMAN: Fourth witness?
 8 MS. CATE: Well, actually, fifth, I
 9 believe. There was Michael Hering, Dennis
 16:23:49 10 Eckhart, David Thomson, Mr. Gruber, and now
 11 Mr. DeLange, yes.
 12 With that I will begin, thank you very
 13 much.
 14 Q. Please state your name until full.
 15 A. Brett DeLange.
 16 Q. And where are you currently employed?
 17 A. I am employed at the Office of the
 18 Idaho Attorney General.
 19 Q. What is your title?
 16:24:14 20 A. I am Deputy Attorney General.
 21 Q. And what is your current position?
 22 A. My current position is I am Chief of

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1 THE WITNESS: Excuse me. Thank you,
 2 Mr. Chairman.
 3 A. We have a variety of responsibilities
 4 related to ANTITRUST and consumer protection. Our
 5 division, as it probably relates most relevantly
 6 here, is we're responsible for oversight
 7 administration of a variety of tobacco sales laws
 8 in our state as well as the Master Settlement
 9 Agreement.
 16:25:31 10 Q. Okay. And you submitted two
 11 declaration in this case along with several
 12 exhibits; is that correct?
 13 A. Yes.
 14 Q. All right. And can you briefly
 15 describe what you discussed in those declarations.
 16 A. Well, briefly we talked about how we
 17 enforce our Escrow Statute, what we call our
 18 Tobacco Master Settlement Agreement Complementary
 19 Act. How we interact with domestic and foreign,
 16:25:59 20 non-participating manufacturers and participating
 21 manufacturers; how we interact with both tobacco
 22 companies or distributors that are owned by or

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1 operated by Native Americans as well as non-Native
 2 Americans; and the purposes for these laws and
 3 some of the things that we've done under those
 4 laws over the years.
 5 Q. Thank you very much.
 6 MS. CATE: Counsel, your witness.
 7 CROSS-EXAMINATION
 8 BY MR. LUDDY:
 9 Q. Okay. The only two additional
 10 16:26:32 documents that I believe are in the record is
 11 Exhibit 3 to our notice of intent.
 12 PRESIDENT NARIMAN: Notice of what.
 13 MR. LUDDY: Notice of intent to submit
 14 a claim to arbitration. It's a press release that
 15 was attached to their, which I'll give copies of
 16 to the panel, the Tribunal.
 17 And Exhibit 18 from our Supplemental
 18 Appendix to Claimants' factual materials in
 19 opposition to objection to jurisdiction, both of
 10 16:27:02 which are in the record, and we'll hand those out
 21 now.
 22 MS. CATE: Counsel, may both the

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1 PRESIDENT NARIMAN: Of course talk to
 2 him then she will object.
 3 MR. LUDDY: That's what I was
 4 anticipating might be the case. Are you ready to
 5 go?
 6 MS. CATE: I would defer to the witness
 7 on that.
 8 THE WITNESS: I guess so.
 9 CROSS-EXAMINATION
 10 16:29:25 BY MR. LUDDY:
 11 Q. Okay. Good afternoon, Mr. DeLange.
 12 A. Good afternoon.
 13 Q. I note from your declaration, the first
 14 of which is Core Document 60?
 15 PRESIDENT NARIMAN: Which bundle?
 16 MR. LUDDY: Core Document, actually
 17 that's his second. One second.
 18 His first is Core Document 57 and I
 19 note from Paragraph 2 of that declaration that
 10 16:30:10 you've been with the office of the Idaho AG since
 21 1990; correct?
 22 A. Yes.

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1 witness and I have some time to look at these
 2 documents?
 3 MR. LUDDY: Absolutely.
 4 MS. CATE: Thank you.
 5 PRESIDENT NARIMAN: Where is this
 6 second document located?
 7 MR. LUDDY: Supplemental Appendix to
 8 Claimants' factual materials in opposition to the
 9 objections to jurisdiction.
 10 16:28:27 (Pause in the Proceedings.)
 11 MS. CATE: Counsel, with respect to the
 12 in the notice of intent, Exhibit 3.
 13 MR. LUDDY: Yes.
 14 MS. CATE: Could you please explain the
 15 relevance here and how it's related in any way,
 16 shape, form, or fashion to the declarations that
 17 were submitted by Mr. Eckhart -- Mr. DeLange,
 18 excuse me. It says here the participant involved
 19 and I don't see anyone from Idaho.
 10 16:29:03 MR. LUDDY: If the Tribunal would like
 21 me to make an offer of proof on that, I'd be happy
 22 to do it.

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1 Q. And you say in Paragraph 2 that you
 2 were involved in the Attorney General's office,
 3 litigation against the various tobacco companies
 4 and in negotiations leading up to the signing of
 5 the Master Settlement Agreement; correct?
 6 A. Yes.
 7 Q. Okay. Now isn't it true, Mr. DeLange,
 8 that immediately after execution of the Master
 9 Settlement Agreement, the tobacco -- the major
 10 16:30:47 tobacco companies raised their prices several fold
 11 more than the -- more than was anticipated by the
 12 Attorneys General that negotiated the MSA?
 13 A. That's my understanding.
 14 Q. Okay. And just so we have numbers to
 15 put on that, I wanted to refer first to the
 16 document I just handed out which is the press
 17 conference from November 16th, 1998, and this was
 18 a press conference held by then Attorney General
 19 -- now I guess Governor Gregoire, the State of
 10 16:31:30 Washington together with 6 or so of her colleague
 21 Attorneys General, and on Page 12, although
 22 they're not numbered, but I think the 12th page of

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1 this exhibit --

2 MS. CATE: Mr. Chairman I would

3 reiterate that I object to the use of this

4 document for the purposes of cross-examination

5 because it does not involve the Idaho Attorney

6 General's Office as participants and therefore I

7 do not see the relevance here.

8 PRESIDENT NARIMAN: What do you...

9 MR. LUDDY: Mr. DeLange identified

16:32:13 10 himself as involved in the negotiations of the

11 Master Settlement Agreement and therefore with

12 knowledge of the negotiations. Ms. Gregoire is

13 speaking in a public news conference describing

14 those negotiations.

15 ARBITRATOR CROOK: The top of the

16 page--

17 MR. LUDDY: Yes, the top of the page is

18 Ms. Gregoire and then she -- her following words

19 are, Attorney General Fisher has led the

16:32:38 20 negotiations with respect to --

21 PRESIDENT NARIMAN: What page?

22 MR. LUDDY: It's the 12th page.

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1 MR. LUDDY: No.

2 ARBITRATOR CROOK: Thank you.

3 PRESIDENT NARIMAN: What document?

4 MR. LUDDY: Core Document Number 12,

5 specifically Page 3, the paragraph towards the

6 bottom that starts with the word "fourth." I'll

7 read it briefly.

8 "Fourth, the report correctly notes the

9 massive increases in the price of cigarettes since

16:35:13 10 1997. However, the report erroneously intimates

11 that costs imposed by the MSA were the principle

12 cause of the price increase. In fact, the major

13 cigarette manufacturers raised prices by several

14 multiples of their MSA costs. MSA costs have been

15 about \$0.30 per pack, parens, or \$3 per carton for

16 the major manufacturers. As noted, however, the

17 price differential between OPM brands and those of

18 companies outside the agreement is far more, as

19 much as \$17 per carton. The price increase that

16:35:52 20 created the market opportunities for NPMs is not

21 attributable to the MSA but rather the decision by

22 the OPMs to inflate per pack profit margins at the

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1 Unfortunately, the document is not numbered.

2 Q. Yeah. About halfway down there,

3 there's a question put to Ms. Gregoire, what will

4 this do to the cost of a pack of cigarettes.

5 Ms. Gregoire responds, "By the year 2003, the

6 estimate is that the per pack increase will be

7 somewhere between \$0.35 and \$0.45 per pack and

8 she's referring to what the impact of the MSA will

9 be there; correct sir?

16:33:27 10 MS. CATE: Correction for the record.

11 It does not say \$0.45; it says 35 and 40.

12 MR. LUDDY: Forty. Thank you.

13 A. I have not seen this document before.

14 If this is an accurate transcription of what

15 General Gregoire said, I think she's saying back

16 in 1998 that's what they expected the per pack

17 increase would be as a result of the MSA.

18 Q. Okay. And then, let's look at Core

19 Document 12, if you would, which I think you

16:33:58 20 should have there, sir.

21 ARBITRATOR CROOK: Mr. Luddy, will we

22 need this press conference again?

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1 cost of losing market share."

2 So, here we have what was then Attorney

3 General, I guess, Sorrell, saying that the major

4 tobacco companies had increased their cost by

5 several multiples of the MS -- had increased their

6 prices by several multiples of the MSA and that

7 the MSA at this time was about \$0.30 per pack, so,

8 several multiples of \$0.30 per pack.

9 Is that your recollection Mr. DeLange,

16:36:40 10 as well?

11 A. No. I don't have a recollection of

12 what the increase was.

13 Q. Okay.

14 A. I understand that they did raise their

15 prices it's my understanding they raised their

16 prices at a level that was more, was greater than

17 what it would take to capture their MSA

18 obligations, but I don't have any recollection of

19 how large or how much additional that would be.

16:37:03 20 Q. But you also -- I thought you said you

21 also had a recollection of the fact that the

22 Attorneys General had, not prior to signing the

1367

1 MSA, anticipated that the major manufacturers
2 would raise their cost by a multiple of their MSA
3 costs?
4 A. That's incorrect. I didn't say that.
5 In fact, I don't think I said anything about that,
6 yet. I -- at least with respect to Idaho and the
7 Attorney General at that time who was Alan Lance,
8 we expected the price to go up because the MSA
9 imposed significant financial obligations. We
10 didn't speculate if they were going to raise it
11 more than that or just at that level. At least in
12 our state, we just didn't speculate on it.
13 Q. Okay. The Attorneys General that
14 negotiated the deal as evidenced by Ms. Gregoire's
15 statements at the press conference, however, only
16 anticipated that the prices by 2003, a year after
17 Mr. Sorrell's letter would only have gone up \$0.35
18 to \$0.40 per pack, right?
19 A. I don't think that's -- that's not how
16:38:14 20 I read her testimony. I think she was trying to
21 estimate how much the MSA would increase the price
22 of cigarettes. I don't think -- but I'm not

16:37:39

16:38:14

1369

1 that less people would smoke it?
2 THE WITNESS: That was certainly one of
3 our thoughts -- is with internalizing the cost of
4 cigarettes with this sizable financial obligation,
5 in the billions, would raise the price and we
6 thought that as a public good on a number of -- a
7 public health good on a number of levels. There's
8 a fair amount of research literature --
9 peer-reviewed literature, I believe -- that talks
10 about, as the price of the cigarette goes up it's
11 a disincentive for youth to start smoking. It
12 also helps encourage some people to quit that
13 might not otherwise quit.
14 So, it's a public health positive for
15 the price of cigarettes to go up and so we
16 certainly viewed -- first of all, for the states
17 to begin to recoup some of these costs that we
18 were incurring as a result of cigarettes -- and
19 that's a plus too in our minds, but also raising,
16:40:01 20 getting the price up, that's a public health
21 benefit. The --
22 Q. Let's talk about the Allocable Share

16:40:01

16:40:33

1368

1 General Gregoire and, you know, this is something
2 that happened 12 plus years ago -- I don't think
3 she was trying to give an estimate of how much the
4 manufacturer, in general, were going to raise
5 their prices. I think she's just saying, we think
6 by 2003 the MSA will cause a pack of cigarettes to
7 be between \$0.30 and \$0.45 a pack.
8 Q. So, do you deny, sir, that the major
9 tobacco companies raised their prices
10 substantially more than the Attorneys General that
11 negotiated the MSA anticipated?
12 A. No, I don't deny that. I don't know at
13 what point it becomes substantial. My
14 understanding, they raised their price at a level
15 that was -- was beyond what it would have taken to
16 pay for their MSA. To be honest, I don't know how
17 much -- I'm talking to you today. I don't know
18 how much more it was; I really don't. I believe
19 it was beyond what they needed to. You know, at
16:38:49 20 what point you call it substantial? I don't know.
21 PRESIDENT NARIMAN: Wasn't the purpose
22 of the MSA to increase the price of cigarettes so

16:38:49

16:39:22

1370

1 appeal in Idaho for a minute. Or the Allocable
2 Share release prior to the Allocable Share
3 Amendment.
4 A. Okay.
5 Q. Did Idaho's release any funds to NPMs
6 under the Allocable Share release?
7 A. Yes.
8 Q. What was the first year that that
9 occurred; do you remember?
10 A. I believe Carolina Tobacco filed a
11 request for release, I believe it was in 2003, but
12 it was for two years. It was for 2002. It might
13 have been 2001 as well, but certainly 2002 and
14 2003.
15 Q. Okay. And when was the first year --
16 when was the first year -- strike that. Prior to
17 Carolina Tobacco doing that in Idaho, had you
18 learned prior to that in 2001 that some
19 manufacturers in some states had sought Allocable
16:41:01 20 Share releases?
21 A. Probably. I mean, we're talking ten
22 years ago and nine years ago. So, I don't recall

16:41:01

16:41:38

1371

1 exactly when. I believe it was sometime -- it had
 2 to have been sometime in that time frame, probably
 3 the end of '01 where we start hearing about this
 4 and then started saying, what's the effect of this
 5 and we started looking at the issue.
 6 Q. Let's look at Paragraph 14 of your --
 7 A. Declaration?
 8 Q. Yeah, your first one.
 9 PRESIDENT NARIMAN: The first one?
 16:42:25 10 MR. LUDDY: Correct.
 11 PRESIDENT NARIMAN:
 12 (Discussion off microphone.)
 13 THE WITNESS: Correct yes, sir.
 14 Q. Paragraph 14 -- and you talk about in
 15 Paragraph 14 a judgment being entered against
 16 Grand River under the Escrow Statute; correct?
 17 A. Yes, sir.
 18 Q. The brands that were subject of that
 19 suit, they were not -- they were third-party
 16:42:50 20 brands to your recollection; is that correct, as
 21 oppose to Seneca or Opal? Do you remember?
 22 A. I don't understand what you mean by the

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1 to require companies beyond their jurisdiction to
 2 make escrow payments under the Escrow Statutes?
 3 A. I don't recollect that. Can you show
 4 me where it says that?
 5 Q. Yeah, Page 13.
 6 A. I don't recall seeing this document.
 7 I'm not saying we don't have it, I just don't --
 8 Q. Fair enough.
 9 A. Which number?
 16:44:36 10 Q. It's 39B. We've had it before, but
 11 obviously you weren't here at the time, so I'll
 12 read it into the record. And you read along by
 13 yourself, obviously.
 14 "If the manufacturer is out of state,
 15 we may not have jurisdiction over the company and
 16 may not be able to require it to make escrow
 17 payments. Likewise, if an importer is out of
 18 state and sells imported product through an out of
 19 state intermediary, e.g., an offshore corporation
 16:45:09 20 to an out-of-state wholesaler, we may not have
 21 jurisdiction over the importer and could not
 22 require to make escrow payments."

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1 term third-party.
 2 Q. They weren't Seneca or Opal brand.
 3 A. I don't recollect. I have to go back
 4 and look at the distributor reports.
 5 Q. Okay. And then, in Paragraph 15 you
 6 say it has proven very difficult to enforce or
 7 collect that judgment; correct?
 8 A. Yes.
 9 Q. Now, weren't -- you were involved with
 16:43:25 10 the MSA and the Idaho Attorney General's office
 11 since the inception back in '98; correct?
 12 A. Yes. Actually '97.
 13 Q. And didn't the -- let's go to Core
 14 Document Number 9 which is a document we've looked
 15 at before, Page 13.
 16 A. When you say "we," you mean you and I?
 17 Q. We, the Tribunal.
 18 A. Okay.
 19 Q. And others in the room I guess.
 16:43:57 20 A. Okay.
 21 Q. Didn't NAAG advise its constituent
 22 members back in 1999 that they would not be able

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1 "ANSWER: Correct."
 2 A. I think it's probably true we may not.
 3 We may. It would depend upon the specific facts
 4 of the manufacturer; what sort of direction and
 5 intent they have with respect to those cigarette
 6 sales; whether they're intending them for
 7 marketing in the United States; what sort of
 8 stream of commerce flow those cigarettes are
 9 having that end up in a given state. I imagine
 16:45:43 10 there's factual scenarios where a court would rule
 11 that there isn't personal jurisdiction. I think
 12 that's probably what the South Dakota court rules
 13 in the Grand River cas, but I think there are
 14 other instances where a court would rule to the
 15 contrary, like the Ohio Supreme Court -- or maybe
 16 it's the court of appeals -- ruled with respect to
 17 a different NPM manufacturer that was personal
 18 jurisdiction. So, I think that's just -- this is
 19 a truism. You may, you may not have personal
 16:46:11 20 jurisdiction. It would depend upon the specific
 21 facts related to those sales at issue.
 22 Q. Fair enough. I guess my point is a

1 broader one, though, and that is what the document
 2 also seems to be saying is that if you don't have
 3 jurisdiction, personal jurisdiction over the
 4 out-of-state manufacturer, then you cannot require
 5 that manufacturer to make escrow payments, right?
 6 A. Well, I think that's true --
 7 MS. CATE: Objection to the
 8 characterization of this particular wording.
 9 MR. LUDDY: Fine.
 16:46:41 10 A. If an Idaho trial court or other
 11 Supreme Court says a court may not exercise
 12 personal jurisdiction, then we don't have a
 13 judicial way to require escrow to be deposited.
 14 Q. Okay. Now, in Paragraph 17 of your --
 15 A. Declaration?
 16 Q. Declaration. We start talking about --
 17 or you start talking about the contraband statute,
 18 correct?
 19 A. Complementary Act.
 16:47:17 20 Q. Complementary Act, thank you.
 21 A. Yes.
 22 Q. I guess you identify several root

1 companies unwilling to establish an escrow
 2 agreement and comply with the Act. So, those are
 3 all negatives in our view and we had experience by
 4 then with companies coming in and out of business
 5 within a year. They would be online on January,
 6 they'd sell their cigarettes, and then they go out
 7 of business in December. And so by the time the
 8 escrow obligation would come due that next April
 9 they're already out of business and there's no one
 16:49:11 10 to go collect that escrow from, and that happened
 11 repeatedly.
 12 And we had other companies that did
 13 other types of things or we could not reach them,
 14 we couldn't get service on them, for example. And
 15 so in the end we realized, this is a tough statute
 16 to enforce to try to fulfill the purposes that the
 17 legislature had for enacting it. So, that's why
 18 the legislature determined to enact the
 19 Complementary Act to strengthen and make
 16:49:44 20 enforcement more effective.
 21 Q. So the fiscal effect was to help you
 22 collect escrow.

1 things that I guess you perceive as purposes of
 2 that. One is the integrity of Idaho's agreement
 3 with the tobacco companies, one is the fiscal
 4 soundness of your state, and the third is public
 5 health; right?
 6 A. Yes. And just to be clear, that's what
 7 our legislature said.
 8 Q. Okay. And how does the Complementary
 9 Act concern physical soundness?
 16:48:02 10 A. Well, our experience under the Escrow
 11 Statute was, by 2003, there was a number
 12 deficiencies in the Act that were allowing
 13 non-participating manufacturers to sell cigarettes
 14 without making their escrow payments, and that's a
 15 negative in a couple of ways.
 16 First of all, the cigarettes are being
 17 sold by companies who are not internalizing to
 18 respect of those cigarettes with respect of the
 19 cigarettes with respect to the units sold portion.
 16:48:35 20 They're coming in cheaper than they otherwise
 21 would be, and that's a negative to our youth and
 22 for people quitting, and they're coming from

1 A. I think that's part of it, yes.
 2 Q. Okay. And in terms of the public
 3 health, I guess it's similar in that, by
 4 collecting escrow, in your mind or in the
 5 legislature's mind, you're furthering the prospect
 6 of tobacco companies internalizing the healthcare
 7 costs.
 8 A. I think to some degree, yes. When the
 9 Escrow Statute was passed, the legislature said --
 16:50:21 10 had its own legislative findings and what the
 11 legislature said is, we want all tobacco companies
 12 to do one of two things in our state: We want
 13 them to either join the Master Settlement
 14 Agreement, which has a whole bunch of public
 15 health provisions that you couldn't get in a court
 16 of law. I mean, essentially, they gave up First
 17 Amendment rights right and left: They agreed not
 18 to do billboards, not to do cartoons, to limit
 19 brand name sponsorships, to cut out free giveaways
 16:50:55 20 and no more cartoons. And so -- and also to pay
 21 sizable amounts of money to the state. What the
 22 legislature did not want is a company to come in

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1 as an NPM and say, we're not going to agree to
2 those things. We're going to seriously under cut
3 the companies who have agreed to change their
4 culture and change the way they're doing business,
5 score some big bucks quickly, and leave the scene
6 before culpability could be established by the
7 state.

8 And so, we want them if they're not
9 going to agree to those things, to establish an
16:51:31 10 escrow account, kind of like a bond, if you will,
11 so if the state is able to establish culpability,
12 there will be a place to get money from because we
13 didn't want them leaving the scene quick, and
14 frankly we had experience with that. As it bore
15 out, Intercontinental Pacific and the 61 brand,
16 you had companies that got into the scene knowing
17 they could blaze in, make some quick sales and
18 blaze out before the state could react to it.

19 Q. But again, the predicate is built upon
16:52:10 20 the assumption that the escrow will be paid and
21 from that flows the public health benefits that
22 you perceive from the Complementary Act.

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1 with AGs from the State of California and New
2 Mexico and likely Oklahoma prior to your
3 commencement of this action, evidenced by Core
4 Document 35 and prior to your letter to the Nevada
5 FTZ evidenced by Core Document 36; correct?

6 A. I've had conversations with -- I don't
7 recall any -- probably I did with New Mexico and
8 I'm not just remember -- I know I talked a couple
9 -- several times with California.

16:54:05 10 Q. Okay. And you talked to them about
11 this very issue of trying to interrupt the
12 commerce involving FTZ and Seneca brand cigarettes
13 into Idaho -- into Idaho, at least.

14 A. I disagree with that characterization.
15 We talked about our shared concern. I mean, we
16 were starting to get data that showed Native
17 Wholesale Supply was showing what was
18 non-compliant cigarettes into Idaho. It turns out
19 they were non-compliant cigarettes in to
16:54:36 20 California and New Mexico, as well. And we were
21 saying, are you seeing the same thing. And we
22 were saying, yeah, there's a lot of cigarettes,

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1 A. I think in part that's correct.

2 Q. Okay. Now, if you could look at Core
3 Documents 38, which is the complaint that Idaho
4 filed against NWS.

5 And just briefly, I'm not going to ask
6 questions about it, but Core Document, actually
7 the complaint is Core Document 37 and Core
8 Document 38 is a letter you wrote to the FTZ of
9 Nevada.

16:52:54 10 A. Core Document 37 is New Mexico.

11 Q. Did I screw this up?

12 A. Maybe it's a different place?

13 Q. Yeah, it's right around here.

14 The Idaho complaint is Core
15 Document 35.

16 A. 35.

17 Q. The letter by you to the FTZ is Core
18 Document 36. Thank you, Mr. DeLange. Now we've
19 gone through this with Messrs. Thomson and
16:53:24 20 Eckhart, so, we could probably do it fairly
21 quickly.

22 You obviously had some conversations

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1 and it looks like the way Native Wholesale is
2 doing it is out of this Foreign Trade Zone that's
3 located in Las Vegas.

4 And so, we said, well, that's what
5 we're seeing too and we're concerned about it.
6 It's a lot of cigarettes for our state. It was
7 over 92 million cigarettes that were sold into
8 Idaho by Native Wholesale Supply.

9 So, I did talk to them. I said, you
16:55:09 10 know, are you guys seeing that too? And they
11 said, we're concerned about it. We're going to do
12 something about it.

13 Q. Who initiated those conversations? Do
14 you remember?

15 A. I don't remember. I mean, I'm sure
16 there was a time I picked up the phone and called
17 Dennis and said, I'm looking at some documents
18 and, man, they're selling a lot into our state and
19 I think Dennis probably said, yeah, I think
16:55:39 20 they're selling a lot in our state, too.

21 Q. And you say you were concerned about
22 it?

1 A. Yes. We didn't have any other
2 distributor anywhere remotely close to the
3 magnitude of the non-compliant cigarettes being
4 sold to our state than Native Wholesale Supply.
5 Q. Yeah. Let's look at that. You say at
6 some point in your -- Paragraph 27, I think, of
7 your declaration, you say that Idaho has had very
8 few cigarettes sold in the state that were non --
9 in compliance, and that 82 percent of them were
10 from NWS. How did you determine that?
11 A. I think we went back and looked at all
12 of our -- the reports that we get. We get lots of
13 reports from distributors and sellers and compare
14 them to our directory to make sure that only the
15 cigarettes that are on our directory are being
16 sold, and when we see some that are non-compliant,
17 we say, well, we've got to address this one.
18 We've had some Internet sellers. Scott Maybee is
19 a large Internet seller -- he operates a number of
16:56:18 20 Internet Web sites, three of them, to my
21 knowledge. He was selling quite a few
22 non-compliant cigarettes into our state. We had

1 remember.
2 Q. Well you say there's some type of
3 reporting system that alerts you to these things.
4 Was it the reporting system that alerted it to you
5 or was it something outside the ordinary course of
6 your regulatory functions?
7 A. It wasn't through the reporting system
8 because it had -- the reporting system captured --
9 see, if Native Wholesale was complying with Idaho
10 law, they would have been reporting these sales to
11 us and then we would have known, but because they
12 don't have a permit, refused to get a license --
13 Idaho requires licensed wholesalers to report to
14 us their cigarette sales, and they tell us the
15 grand and they tell them, and so that's how we
16 find out about, in general, compliance and
17 non-compliant cigarettes. Federal law requires
18 Internet sellers to report when there are sales
19 going interstate to tell the receiving state about
16:58:47 20 those sales. That's how we found out about the
21 Scott Maybee cigarettes. The call them the
22 Jenkins Act reports.

1 Native Wholesale supply selling all these
2 cigarettes into our state.
3 So, I just -- we gathered up all of the
4 sales and looked and saw that, you know, we had a
5 sizable problem with respect to Native Wholesale's
6 importing and causing to be imported into our
7 state these cigarettes.
8 Q. So, you had been receiving these
9 reports and this information since back in 2004
10 but you didn't act at all until 2008?
11 A. That's not accurate. With respect to
12 Native Wholesale, we were not getting reports. At
13 some point, it came to our attention in 2000, I'm
14 going to -- I believe it was 2008, it came to our
15 attention this information that -- about these
16 sort of sales, and so we started our investigation
17 at that point in time.
18 Q. Who brought it to your attention?
19 A. I don't recollect.
16:57:29 20 Q. Was it somebody within the Idaho
21 Government?
22 A. I truly -- I don't collect -- I don't

1 I'm not remembering how we found out or
2 discovered the Native Wholesale supply cigarettes
3 coming into our state, but the fact of the matter
4 is we did find out about it and we started
5 investigating. We contacted the Foreign Trade
6 Zone in Las Vegas. We contacted the recipient of
7 the cigarettes, War Path Inc. We contacted the
8 trucking company, at least one of them -- maybe
9 more than one, Conway, to find out and that's how
10 we discovered all these cigarettes that were being
11 transported and imported into our state.
12 Q. Do you know whether it was Mr. Eckhart
13 from California who told you about the commerce in
14 question?
15 A. I don't remember, but I think if it had
16 been Dennis I would remember that but I don't
17 remember. I don't think it was Dennis.
18 Q. Okay. Look briefly at Core Document 60
19 which is your second declaration.
17:00:39 20 A. Okay.
21 I'm there.
22 Q. And specifically, Paragraph 11. Before

1387

1 I get to that, I note the complaint you filed
2 against NWS does not seek to collect any taxes
3 with respect to the Seneca brand sales in
4 question; correct?
5 A. Correct.
6 Q. And that's because no taxes are due on
7 those sales under Idaho law; correct?
8 A. Correct. Idaho law exempts from
9 taxation -- Idaho law puts the obligation to tax
17:01:25 10 on the wholesaler and it requires the wholesaler
11 to affix the stamp and pay for the stamps, but
12 there's an exemption for -- if a wholesaler sells
13 to a purchaser who's either a Native American or a
14 corporation or business wholly owned by a Native
15 American then we have a provision in our law that
16 exempts that from state excise tax. So, there's
17 no tax obligation. So, yeah, we did not and do
18 not seek any taxes from Native Wholesale Supply.
19 Q. And similarly, the complaint does not
17:02:01 20 seek the collection of any escrow payments from
21 NWS in connection with the Seneca brand cigarettes
22 that are the subject of your lawsuit; correct?

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1 THE WITNESS: Yes.
2 ARBITRATOR ANAYA: But as to the
3 escrow?
4 THE WITNESS: Well, see, an escrow
5 flows -- the Escrow Statute then says, if you're
6 an NPM, you need to pay escrow on units sold. And
7 units sold is a very defined term, but it's
8 basically those cigarettes for which state excise
9 tax is collected and bears the cigarette tax of
17:03:52 10 the state. And so, since they're not taxed under
11 other Idaho law, they're not a unit sold so there
12 is not an escrow obligation.
13 Yes, sir.
14 ARBITRATOR CROOK: Going to that
15 Paragraph 11, so you had three million some odd
16 Grand River cigarettes that were units sold,
17 apparently.
18 THE WITNESS: Yes.
19 ARBITRATOR CROOK: They did have a tax
17:04:15 20 stamp on them.
21 THE WITNESS: Yes.
22 ARBITRATOR CROOK: Who sold those?

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1 A. Well, that's true, but even if there
2 were an escrow obligation it would be against the
3 manufacturer, not the distributor. So, we
4 wouldn't be seeking escrow either way, but we
5 would not seek escrow from Grand River for these
6 cigarettes because they're not units sold.
7 Q. And they are not units sold, why?
8 A. Because there -- units sold are
9 cigarettes that have tax collected and bearing the
17:02:42 10 excise stamp of the state. These cigarettes do
11 not meet that definition.
12 Q. Okay. And it's also because they're
13 being sold to a -- to Indians on-Reservation;
14 correct?
15 A. It's pursuant to state law exemption
16 that exempts those types of sales.
17 Q. What types of sales?
18 A. To a purchaser or a -- who is a Native
19 American or a business entity that is wholly owned
17:03:22 20 by a Native American on the Reservation.
21 ARBITRATOR ANAYA: Pardon me, that's as
22 to the taxation.

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1 THE WITNESS: Idaho distributors. We
2 got -- the information for this is from various
3 licensed Idaho distributors who -- they report to
4 us monthly their various cigarette sales and they
5 reported to us these cigarettes and that reflects
6 the cigarette units sold for 2001, and when you
7 added them all up it was the 3.2 million
8 cigarettes.
9 Q. Those were from 2001; correct?
17:04:50 10 A. Yes.
11 Q. They're not the subject of the lawsuit
12 filed against NWS in 2008; correct?
13 A. Correct.
14 ARBITRATOR ANAYA: So, Idaho
15 distributors did pay tax on those Grand River
16 cigarettes.
17 THE WITNESS: Yes.
18 Q. And this is a non-Indian distributor?
19 THE WITNESS: I don't think they were
17:05:14 20 Indian distributors. I think there was more than
21 one distributor, but they obviously must have been
22 cigarettes that were not going to a purchaser or a

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1 retail outlet.
 2 ARBITRATOR ANAYA: To non-Indian
 3 purchasers.
 4 THE WITNESS: Yes.
 5 ARBITRATOR ANAYA: Retailers.
 6 THE WITNESS: Yes. Just, probably your
 7 normal smoke places and retail outlets that fall
 8 for the definition of a wholly owned...
 9 ARBITRATOR ANAYA: One more question.
 17:05:34 10 On the tax exemption under Idaho law,
 11 it applies -- purchasers retailers who are
 12 themselves Native American or companies who are
 13 wholly owned by Native Americans.
 14 THE WITNESS: Yes.
 15 ARBITRATOR ANAYA: Does it matter
 16 whether or not whether the retail business is
 17 on-Reservation land.
 18 THE WITNESS: Yes, they need to be on
 19 the Reservation as well. So, just so we're clear.
 17:05:58 20 If Brett DeLange had a retail outlet on the Couer
 21 d'Alene Reservation and you weren't a licensed
 22 Idaho distributor, you'd have to pay tax if you

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1 inter state commerce which is then defined in
 2 rule. What I think was meant, I didn't write this
 3 brief, by the way, but we --
 4 MS. CATE: Is this a document you have
 5 just submitted?
 6 MR. LUDDY: Yes.
 7 MS. CATE: I would like to object to
 8 the document, again. This is my moment to do so,
 9 I assume?
 17:07:23 10 MR. LUDDY: It is.
 11 MS. CATE: Okay. Thank you.
 12 Mr. Chairman, objection to the document
 13 that's just been submitted within moments before.
 14 PRESIDENT NARIMAN: What are you
 15 asking?
 16 MR. LUDDY: I'm asking Mr. DeLange if
 17 there's an exemption under Idaho law with respect
 18 to tax -- excise taxes on cigarettes sold in
 19 interstate commerce.
 17:07:44 20 PRESIDENT NARIMAN: That you can ask
 21 but bring on the documents and it's sustained --
 22 if you're going do ask any questions on this

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1 sold those cigarettes to me because I'm not a
 2 Native American. So, it's only -- so, even if
 3 you're on the Reservation you still have to be a
 4 Native American or a -- wholly owned by a Native
 5 American.
 6 ARBITRATOR ANAYA: And then if you are
 7 a Native American, and I assume but by that
 8 meaning hey member of a tribe -- recognized tribe
 9 and your smoke shop was off-Reservation, does the
 17:06:33 10 tax apply?
 11 THE WITNESS: No -- excuse me, the
 12 exemption does not apply. The tax -- there would
 13 be a tax.
 14 ARBITRATOR ANAYA: Yes.
 15 Okay.
 16 Q. Okay. And you also acknowledge in your
 17 brief filed in the Watson case that was the
 18 subject of a brief conversation before you took
 19 the stand, that under Idaho law, no excise tax is
 17:06:52 20 collected on cigarettes sold in interstate
 21 commerce either, correct?
 22 A. Well, there's a separate exemption for

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1 document, then she's entitled to object and she
 2 has already made known her objection.
 3 MR. VIOLI: Mr. President, this is a
 4 document filed by Mr. DeLange's office in a
 5 proceeding involving these laws. There's a
 6 statement of his office regarding the application
 7 of these laws. So, that's why we've offered it we
 8 did not have it until recently. We were handed in
 9 the past couple days four or five documents. We
 17:08:24 10 were shown a slide today for the first time -- we
 11 weren't even handed it before the presentation
 12 before our witness was questioned. The first time
 13 I saw that document is when it appeared on the
 14 screen up in front of me.
 15 So, I don't think it's that unfair I
 16 give them a document, tell them about it this
 17 morning, give it to them right before the
 18 examination in comparison what they did to me with
 19 Mr. Montour.
 17:08:50 20 PRESIDENT NARIMAN: We can't have this
 21 sort of thing.
 22 MR. VIOLI: Well, I understand that.

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1 What I'm saying is that I think it's fair or
2 reasonable that I be allowed to put in this
3 document since they put in this document. They
4 didn't even hand me this document before the
5 cross-examination.
6 PRESIDENT NARIMAN: Ask him a question
7 without it.
8 MR. LUDDY: I hear you, Mr. Chairman.
9 PRESIDENT NARIMAN: It's a much simpler
17:09:17 10 matter. Why are you going on with --
11 Q. Mr. DeLange, is there an exemption
12 under Idaho law for excise taxes in connection
13 with interstate sales?
14 A. No, not in general. There is -- the
15 rules talk about interstate commerce but then
16 define it and it's the sort of -- to describe it
17 briefly, it's, the state did not want -- say
18 Phillip Morris sells cigarettes to someone holding
19 onto those cigarettes in Spokane and they're
17:09:46 20 ultimately going to be sold in Idaho, does Phillip
21 Morris have an obligation? And they're saying, no
22 -- at that level, no. When they get actually

1397

1 nor is entitled to, under its law, to excise taxes
2 or escrow payments; correct?
3 A. Yes.
4 Q. Okay. Now let's go back and revisit
5 what you had said were the purposes of the
6 Complementary Act, and I think we had talked about
7 three.
8 One of them was fiscal soundness. I
9 assume since Idaho is entitled to neither escrow
17:11:32 10 tax or escrow -- or excise tax in connection with
11 these sales, there is not a question of fiscal
12 soundness associated with these sales to an
13 on-reserve entity in Ohio; correct?
14 A. You lost me there. You said Ohio.
15 Q. Idaho.
16 A. I mean, to the degree we're talking
17 fiscal impact as it relates to tax revenues,
18 correct -- or escrow, correct.
19 Q. And similarly, I think you agree that
17:12:07 20 the public health function in connection with the
21 Escrow Statute was a function of trying to
22 internalize cost by raising price. So, to the

1396

1 introduced in Idaho that's when we want it to
2 affix. So, there's not an exemption, in general,
3 for sales in interstate commerce. I would imagine
4 most of the sales in our state are interstate
5 commerce. Most of the distributors are
6 multistate, they are located outside our borders,
7 and they sell into Idaho and they affix a tax.
8 So, this was meant to deal, though,
9 with the situation of before those cigarettes
17:10:21 10 reach Idaho, making it clear that there's not a
11 tax obligation until they go into Idaho.
12 Q. Okay. Let's go back -- and just to
13 recap where we are with respect to the sales of
14 Seneca brand to War Path, which was their
15 customer, I believe your complaint alleges?
16 A. Yes.
17 Q. War Path is on the -- what Reservation
18 are they on?
19 A. I believe the Couer d'Alene.
17:10:45 20 Q. Couer d'Alene. And I think you agree
21 that, with respect to those sales to Seneca brand
22 to War Path on-Reservation, Idaho neither seeks

1398

1 extent there's no escrow payments made in
2 connection with these sales to War Path, the
3 public health aspects of the Complementary Act
4 they're also not implicated; correct?
5 A. Well, that limited part, yes. But
6 understand, we have two separate laws and our
7 legislature said that the Complementary Act, which
8 is a standalone piece of legislation, is important
9 for the public health of our state.
10 And in fact this matter was just
11 litigated in our Scott Maybee case and we just had
12 recent decision of Idaho Supreme Court on it about
13 -- I think it was January 15th, Mr. Maybee argued
14 similarly that you should apply the Complementary
15 Act only to apply to units sold and to Escrow
16 Statute-like claims. And the Supreme Court
17 rejected that and said, the Escrow Statute applies
18 to units sold, which is a limited subset of
19 cigarettes. The Complementary Act applies to all
17:13:23 20 cigarettes. And so, whether it's a taxed
21 cigarette or not, you can't sell the cigarette in
22 Idaho if it's not on our directory. And so, we

1399

1 viewed our action against Native Wholesale in part
2 as trying to uphold the integrity of that
3 statutory scheme, that if it's a cigarette, which
4 it is, and it's not on directory, which it's not,
5 it ought not be sold or imported or shipped into
6 our state. And so, that's what we're trying to up
7 hold.

8 And so, in that respect, that's the
9 public health as well. The legislature set the
10 policy for our state and said it's important for
11 our state to have this statutory regime in place,
12 and we expect it to be obeyed.

13 Q. Maybe involved off-Reservation
14 Internet didn't it?

15 A. What's that?

16 Q. Maybe case involved off-Reservation
17 Internet sales, didn't it?

18 A. Certainly -- Scott Maybee sold millions
19 of cigarettes into our state. I can't tell you
17:14:25 20 every one -- I can't tell you they were all
21 off-Reservation. Certainly, I know lots of them
22 were off-Reservation.

1401

1 sold onto a Reservation?

2 MS. CATE: Objection. I would like
3 counsel to be reminded that he should not be
4 putting words into the witness' mouth.

5 (Discussion off microphone.)

6 A. Could you state the question again?

7 Could you ask it again?

8 Q. Do you have an understanding of what a
9 public policy justification there would be for a
10 decision not to charge excise tax for sales onto
11 an Indian Reservation?

12 A. I can imagine several reasons why.

13 Q. Please do.

14 A. Well, I imagine one would be the state
15 wanting to encourage tribal smoke shop, because
16 that does give a tribally owned smoke shop a
17 competitive advantage on someone that does have to
18 collect aim tax on it. So, I imagine that's one
19 possible reason. We have a much older Supreme
17:16:52 20 Court decision in our state that said that you
21 could not collect the tax -- it's a very old -- I
22 shouldn't say it's very old but it's pre-Colville

1400

1 Q. Well, let me ask you, what is the
2 public policy behind Idaho's decision not to
3 collect excise tax on cigarettes sold onto a
4 Reservation in the state of Idaho?

5 A. Well --

6 Q. Is it a question -- is it a respect to
7 the sovereignty of those Reservations?

8 A. I would only speculate. I don't know.
9 The rule has been on the books for a long, long
10 time. So, I don't know all the reasons why. The
11 reasons may have changed over time. It is what it
12 is: The state does not opt to collect taxes on
13 certain -- on those types of sales. I'm not aware
14 of a public statement by the Governor or others,
15 you know, that would explain that, so we'd just be
16 speculating.

17 Q. So you're not even able to articulate
18 or reason as to what the public policy would be or
19 your -- withdrawn.

17:15:31 20 Is it your testimony that you
21 personally don't understand what the public policy
22 could be of not charging excise tax for cigarettes

1402

1 which is a case that kind of laid the landscape
2 for on-Reservations and state taxation.

3 But perhaps the rule -- another
4 possible reason is the rule is just trying to
5 capture that Supreme Court holding that -- Idaho
6 Supreme Court holding saying we'll just codify it.
7 So, those are two reasons that come to my mind as
8 possible reasons for the rule.

9 Q. Does anything come to your mind in
10 respect of the sovereignty of the Indians on those
11 Reservations to be free of excise taxes imposed by
12 the state of Idaho?

13 MS. CATE: Objection again. The
14 counsel is putting --

15 MR. LUDDY: Would you like me to
16 restate it? I'd be happy to do that.

17 MS. CATE: No, I would like you to
18 please stop putting words into the witness' mouth.

19 Ask a question, he will answer, but
17:17:55 20 don't put words into his mouth.

21 A. I will not couch it in those sort of
22 terms. The United States Supreme Court in the

1403

1 Colville case made it pretty clear that states can
2 collect taxes from tribal retailers to nonmembers
3 of the resident tribe and so -- and that tribal
4 sovereignty isn't impinged upon in that sort of
5 scheme; that's my understanding, at least.
6 And so, this rule that we have -- this
7 exemption that we have is broader than what the
8 Supreme Court has -- the U.S. Supreme Court has
9 said.
10 17:18:36 Q. Colville didn't address the sales on to
11 the Reservation, it addressed the sales by the
12 smoke shops to non-Indians coming on to purchase,
13 correct?
14 A. And also Native Americans who are not
15 members of the resident tribe.
16 Q. Right, that's what I meant?
17 A. Oh, yeah. Yeah, Colville addresses
18 that, yes.
19 Q. But not the sales such as are the
20 17:19:00 subject of your complaint here from NWS into War
21 Path?
22 A. Well, I think -- you're going to test

1405

1 A. I hope I'm not misunderstanding. The
2 Complementary Act applies to wholesalers, for
3 example, selling into our state or within our
4 state, yes.
5 Q. And that -- do you -- when you say,
6 into your state, do you include within that phrase
7 into Reservations embraced by the state of Idaho?
8 A. Yes.
9 Q. So, anyone -- as you understand the
10 17:20:52 statute, anyone who wants to sell onto a
11 Reservation embraced by the State of Idaho, they
12 have to comply with the Complementary Act and do,
13 among other things -- submit to the jurisdiction
14 of the State of Idaho; correct?
15 A. When we think by virtue of selling into
16 our state they are subject to the Complementary
17 Act's application.
18 Q. Now, these sales into the reserve --
19 into War Path by NWS --
20 17:21:29 A. Yes.
21 Q. -- to the extent they -- to the extent
22 consumers substitute those cigarettes for

1404

1 my memory. I think Colville also had an issue
2 about seizing those cigarettes before they get on
3 the Reservation, but Colville's focus is clearly
4 on-Reservation, tribal retailer -- what sort of
5 tax obligations may the State of Washington impose
6 and what sort of regulatory regime may the State
7 of Washington exact or expect from that tribal
8 retailer in terms of reporting and tracking those
9 sorts of cigarettes.
10 17:19:36 Q. The net result here, though, is despite
11 the absence of any escrow obligation with respect
12 to these sales and the resulting fiscal impacts
13 and healthcare impacts, the net result is that the
14 statute effectively applies or effectively forces
15 anyone selling cigarettes to a non-reserve
16 purchaser to submit to the jurisdiction of Idaho,
17 doesn't it?
18 A. Which act are we talking about?
19 Q. The Complementary Act, because it
20 17:20:14 requires someone selling cigarettes onto a
21 Reservation, in Idaho, to be on the directory;
22 right? That's essentially the position, isn't it?

1406

1 cigarettes they would have otherwise purchased
2 from OPMS, that could result in a reduction to MSA
3 payments to the state under the volume adjustment;
4 correct?
5 A. So, what you're saying is, instead of
6 Joe Consumer buying a pack of MSA, they by a pack
7 of Senecas and therefore there's one less pack of
8 MSA payment? I suppose that would be true.
9 Q. And since 2006, haven't the major
10 17:22:24 tobacco companies been exerting pressure on Idaho
11 and the other states to try to interrupt or
12 diminish the amount of sales conducted on-reserve
13 that are free of escrow payments?
14 A. I don't think so. I mean, they're
15 never happy with us and we're never happy with
16 them.
17 You know, they complain about
18 everything and we tell them what we think they're
19 doing wrong. You know, they have their own
20 17:23:02 selfish interests obviously. We have laws to
21 enforce and MSA agreement to uphold. So, you know
22 we hear from all sides. We hear from SPMS, we

1 hear from NPMs, we hear from OPMs. All --and we
 2 hear from tobacco distributors, we hear from
 3 consumers all expressing their views we listen to
 4 them all. Sometimes you can learn some about
 5 things from any of them, and we just try to figure
 6 out what we ought to be doing under our laws, what
 7 the legislature intended for us to do and go
 8 forth.

9 Q. Well, are you -- didn't you commence an
 17:23:41 10 action against Philip Morris and the other major
 11 tobacco companies addressing, among other things,
 12 the very issue of whether or not Idaho's refusal
 13 to collect excise tax with respect to the very
 14 sales -- the very type of sales that are subject
 15 of your NWS complaint, constituted failure of due
 16 diligence under the -- or diligent enforcement
 17 under your Escrow Statute?

18 A. I wouldn't characterize it that way.
 19 We did file an action in 2006 because R.J.
 17:24:19 20 Reynolds and Lorillard withheld a portion of their
 21 MSA payment. They had a Claimant, their claim is
 22 the NPM adjustment, which is a very complicated

1 moving toward that arbitration.

2 Q. And one of the things that tobacco
 3 companies were claiming in that suit and now
 4 presumably in the arbitration, is that Idaho's
 5 failure or refusal as the case may be to collect
 6 excise tax on on-Reservation sales constituted a
 7 failure to diligently enforce Idaho's Escrow
 8 Statute; right?

9 A. No, they haven't been that specific
 17:26:08 10 yet. I mean, they've argued the states -- their
 11 argument to date has been much broader -- you
 12 didn't diligently enforce your statute; you
 13 haven't done enough and so we're entitled to the
 14 NPM adjustment. I think, you know, their
 15 arguments over time -- everything we've done has
 16 been wrong, and we disagree with that, of course,
 17 and we think we've done exactly what we're
 18 supposed to do.

19 Q. But you fully anticipate that they're
 17:26:34 20 going to make that argument in the arbitration
 21 proceeding, don't you?

22 A. Probably. They're going to make every

1 adjustment, but in essence this adjustment applied
 2 and they didn't have to pay the states. And our
 3 action is the declaration that we're entitled to
 4 that money. We're out right now several millions
 5 of dollars as a result of their withholding it
 6 from the state of Idaho.

7 So, we did file an action. I actually
 8 think this brief, this is probably -- yeah, this
 9 is the brief we filed in connection with that
 17:24:56 10 motion for court to declare our rights and declare
 11 that we're entitled to that money.

12 And so, we're in some deep litigation
 13 --- arbitration actually as it turns out, with 50
 14 tobacco companies -- or maybe it's 45 tobacco
 15 companies -- about this matter right now.

16 Q. So, that suit was essentially bounced
 17 to arbitration; correct?

18 A. Yes. The district court ruled under
 19 the Master Settlement Agreement, the arbitration
 17:25:27 20 clause in there should govern our entitlement to
 21 those payments and their argument that their
 22 entitled to an NPM adjustment. So, we're now

1 single last argument out there, I suppose.

2 ARBITRATOR CROOK: Mr. Luddy can I ask
 3 the witness a question?

4 MR. LUDDY: Absolutely.

5 ARBITRATOR CROOK: Mr. DeLange, can you
 6 clarify the procedural situation in this
 7 arbitration.

8 THE WITNESS: Yes.

9 ARBITRATOR CROOK: Is it a single
 17:26:54 10 arbitration with all of the states and all of the
 11 concerned tobacco companies or are there lots of
 12 different arbitrations or similar paths? How does
 13 it work procedurally?

14 THE WITNESS: It's going to be one
 15 arbitration, you're going to have 52 states --
 16 settling states because the territories are part
 17 of it. You're going to have 50 tobacco companies
 18 and you have one arbitration panel of three
 19 arbitrators. The MSA has a fairly -- the MSA
 17:27:26 20 requires them to be retired Article 3 judges,
 21 neutral arbitrators, is what the MSA refers to,
 22 and so it's going to be one massive arbitration.

1411

1 MR. LUDDY: You say that with some
2 glee. You sound excited.

3 THE WITNESS: No, I'm not excited about
4 that.

5 ARBITRATOR CROOK: And the issue that
6 will go to the arbitrator is whether the states
7 have met their obligations to enforce under the
8 MSA.

9 THE WITNESS: Yes. The NPM adjustment
10 is about 28 pages in the MSA, but boiled down it
11 says this: If you have a market share lost in a
12 given year that's more than two percent and
13 econometric firm determines that a market share
14 lost -- that the MSA was a significant factor in
15 that market share loss -- then you have an NPM
16 adjustment, unless an individual state diligently
17 enforced its Escrow Statute. So, for the year
18 2003, which shows you how long this has taken, you
19 have market share also greater than two percent.
17:27:53 20 The econometric firm rendered a decision that the
21 MSA was a significant factor in that market share
22 lost. So, now you have states like Idaho saying,

1413

1 we're still out millions of dollars because we
2 don't have a declaration yet that we did
3 diligently enforce our statute --

4 ARBITRATOR CROOK: Thank you, sir.

5 Q. But to the extent -- it's a fair bet
6 that these proceedings will not be open to the
7 public though; correct?

8 A. I don't know why we'd say that. I
9 don't know. I don't know why.

10 Q. Were the significant factor proceedings
11 open to the public?

12 A. I would assume mostly not. I don't
13 know why these would be or wouldn't be. I can't
14 remember. I don't believe the MSA talks to it. I
15 hope I'm just not blanking out. I don't recall.

16 Q. Now, to the extent Idaho could
17 successfully shut down this commerce between NWS
18 and War Path, that would obviously enhance your
19 position on the question of due diligence, because
17:30:12 20 the OPMs could not argue under any circumstances
21 that the cigarettes somehow were depriving them of
22 the market share; right?

1412

1 that's all fine and dandy, but we diligently
2 enforced our statute so there's no MPM adjustment
3 you're entitled to about with respect to us.

4 ARBITRATOR CROOK: Are you able to tell
5 us, what are the sort ground rules or expectations
6 regarding the confidentiality of these
7 proceedings?

8 THE WITNESS: The process is being
9 negotiated right now with the participating
10 manufacturers. It's quite contentious. We don't
11 agreement -- we don't even have a third arbitrator
12 picked yet. And fairly confidential negotiations
13 are going on to try to determine, ultimately, you
14 know, for the panel the panel needs to constitute
15 itself and I imagine the panel may determine the
16 process itself because it's hard when you've got a
17 hundred different parties who all are lawyers and,
18 you know, they all think they know best. So we
19 don't have a process in place yet. We don't even
17:29:08 20 have an arbitration panel in place yet and we're
21 seven years past the NPM adjustment.

22 And the bottom line is, for Idaho,

1414

1 A. Well I want to clarify. Our goal is
2 not to shut down Native Wholesale's commerce with
3 War Path. If Native Wholesale wanted to sell any
4 one of 254 brand on our directory they can do so
5 today and we wouldn't be dealing with them. We
6 have 250 plus brands on our directory that are
7 legal to be sold on in our state. They're from
8 PMS, they're from NPMs -- if Native Wholesale
9 would just sell any one of those we wouldn't be in
10 this lawsuit. So, our goal is not to shut down
11 anyone; it's just, you've got to obey our law.
12 You can't sell the ones not on our directory. Go
13 ahead and sell the cigarettes that are and go from
14 there.

15 Now, with respect to your other
16 question, I suspect that, no matter what we do
17 with Native Wholesale, the PMS won't be happy and
18 not give any credit for it.

19 Q. It's certainly not going to help your
17:31:23 20 case in the diligent enforcement matter, is it?

21 A. I don't think it will hurt. I don't
22 think it will be an issue, because it's not

1415

1 dealing with units sold.
 2 PRESIDENT NARIMAN: May we stop here
 3 for a minute.
 4 MR. LUDDY: We may.
 5 PRESIDENT NARIMAN: Maybe stop here for
 6 a minute, because there seems to be a slight
 7 change in the program for tomorrow.
 8 (Discussion off microphone.)
 9 SECRETARY YANNACA-SMALL: We just got
 10 17:32:32 an announcement the Bank that the Bank will be
 11 closed tomorrow. The whole day.
 12 MR. LUDDY: The whole day?
 13 SECRETARY YANNACA-SMALL: The whole
 14 day. It will not open, but exceptionally, if you
 15 wish, we can have a morning session, but not later
 16 -- we have to finish not later than noon. And
 17 exceptionally, they can provide some limited
 18 services with extra cost.
 19 PRESIDENT NARIMAN: Which will have to
 10 17:33:03 be shared by both parties.
 21 MR. KOVAR: Mr. Chairman, we obviously
 22 are in your hands. If you want to go until noon

1417

1 when we finish all the witnesses then, you know,
 2 we wouldn't insist on coming tomorrow.
 3 MR. LUDDY: Yeah, we're going to be in
 4 agreement on that we'll finish Mr. DeLange. We
 5 may have more presentations, but we're not going
 6 to have more bodies.
 7 MR. VIOLI: So, tomorrow is fine. If
 8 the panel wants --
 9 PRESIDENT NARIMAN: No point, yeah. I
 10 17:34:41 hope Monday will be --
 11 (Discussion off microphone.)
 12 MR. LUDDY: So do I. I lied --
 13 MS. CATE: On the record, please.
 14 MR. LUDDY: -- although there are 17
 15 subparts.
 16 Q. What was the basis of Idaho's initial
 17 suit against GRE back in 2001?
 18 A. They failed to deposit into escrow for
 19 their units sold.
 10 17:35:33 Q. And what did to your knowledge, GRE do
 21 in Idaho that gave you the impression, you
 22 generally -- gave you the impression that you had

1416

1 tomorrow, that's okay, and we're willing to bear
 2 half the cost, but perhaps the most effective
 3 thing to do would be to stay a little later
 4 tonight until we're completely finished with
 5 Mr. DeLange. We don't know how much more time Mr.
 6 Luddy needs.
 7 MR. LUDDY: I'm very close with
 8 Mr. DeLange. I think we can certainly --
 9 MR. KOVAR: And then maybe we can for
 10 17:33:35 go tomorrow altogether.
 11 ARBITRATOR ANAYA: You?
 12 MR. LUDDY: He has two questions.
 13 MR. VIOLI: I brought them down to you.
 14 MR. LUDDY: I think the plan is --
 15 (Discussion off microphone.)
 16 MR. VIOLI: Do you prefer tomorrow
 17 Jeff? No? You prefer --
 18 MR. KOVAR: Since tomorrow may be sort
 19 of a disruptive day --
 10 17:34:12 PRESIDENT NARIMAN: It's a disruptive
 21 day. We may not get any --
 22 MR. KOVAR: So perhaps we should --

1418

1 -- that Idaho had personal jurisdiction over GRE?
 2 A. It's eight years ago, so bear with me.
 3 They intended for the cigarettes to be sold in the
 4 United States. They knew they would be sold in
 5 various states, including Idaho. They benefited
 6 and profited from those cigarette sales, and you
 7 know, they didn't pay the escrow.
 8 Q. Okay. So, in your view of the issue of
 9 personal jurisdiction, is it essentially that if a
 10 17:36:31 product in this case, cigarettes, ends up within
 11 the borders of the State of Idaho, you have
 12 personal jurisdiction over the manufacturer of
 13 those cigarettes?
 14 A. I think we'd want more facts than just
 15 that.
 16 Idaho -- our own individual Supreme
 17 Court cases have some cases that talk about stream
 18 of commerce as a valid basis for exercising
 19 personal jurisdiction. And, you know, we'd want
 10 17:37:05 to know a little bit more. We certainly believed
 21 we had enough to bring our complaint and file it,
 22 and so we did.

1419

1 Q. Have you taken any efforts, any
 2 measures to enforce that judgment?
 3 A. We've hired a collection lawyer. So
 4 far, we haven't seen any results.
 5 Q. Do you remember any other specific
 6 facts with respect to GRE's involvement with Idaho
 7 back in 2001 beyond what you've identified so far?
 8 A. I'm not recalling any. I don't recall.
 9 MR. LUDDY: I have no more questions of
 17:38:10 10 the witness at this time.
 11 MR. VIOLI: No, the questions were not
 12 -- the questions were not -- the questions about
 13 the lawsuit precluded the need for us to submit
 14 the brief and the page. He asked him the
 15 questions; that was fine. So we don't need to put
 16 the brief that I --
 17 PRESIDENT NARIMAN: I just wanted to
 18 know what happened to this complaint. You said
 19 that you got judgment -- the complaint that you
 17:38:43 20 mentioned that was filed by the State of Idaho
 21 against Native Wholesale you obtained a judgment.
 22 That was an ex parte judgment or. . .

1421

1 PRESIDENT NARIMAN: Oh, sorry.
 2 THE WITNESS: With respect to NWS, we
 3 --
 4 PRESIDENT NARIMAN: NWS means that
 5 complaint you filed -- state filed against NWS.
 6 THE WITNESS: Yes, we filed a complaint
 7 against NWS which is still being litigated at the
 8 trial court level and we don't have a judgment
 9 yet.
 17:39:45 10 PRESIDENT NARIMAN: Oh, I see. Okay.
 11 Thank you.
 12 So, hopefully --
 13 ARBITRATOR CROOK: We have this matter
 14 of a big binder of Grand River-related cases which
 15 Ms. Cate was referring to -- do we --
 16 ARBITRATOR ANAYA: Can I ask, that was
 17 a default judgment against Grand River; correct?
 18 THE WITNESS: Yes, sir.
 19 ARBITRATOR ANAYA: And was that for on-
 17:40:03 20 or off-Reservation sales or Indian sales to a --
 21 THE WITNESS: Off, presumably because
 22 they were for units sold. And so, I don't think

1420

1 THE WITNESS: Yes, excuse me.
 2 MR. LUDDY: Actually, I think the
 3 Chairman and the witness may be speaking past each
 4 other.
 5 THE WITNESS: Mr. Chairman, are you
 6 stalking about the lawsuit against Grand River.
 7 Are you talking about our lawsuit against --
 8 PRESIDENT NARIMAN: No, I'm not talking
 9 about the lawsuit. I'm talking about the
 17:39:10 10 complaint which was put to you in the beginning.
 11 MR. LUDDY: Against NWS.
 12 PRESIDENT NARIMAN: Against NWS, Native
 13 Wholesale.
 14 THE WITNESS: No, that's being
 15 litigated at the trial court level. We don't have
 16 a judgment yet.
 17 PRESIDENT NARIMAN: I thought in your
 18 affidavit you said you've obtained judgment.
 19 MR. LUDDY: Two different actions.
 17:39:30 20 PRESIDENT NARIMAN: Oh, that's a
 21 different action.
 22 THE WITNESS: Yes.

1422

1 the distributors would be telling us they had
 2 these units sold for cigarettes that were not, you
 3 know -- that require tax. So --
 4 ARBITRATOR ANAYA: They were for units
 5 sold. So --
 6 THE WITNESS: They were all for unit --
 7 it was exclusively for units sold, the lawsuit
 8 against Grand River.
 9 ARBITRATOR ANAYA: Did they -- pardon
 17:40:32 10 me, to your knowledge -- to your knowledge, do
 11 they still use non-Native distributor that pays
 12 taxes on their cigarettes?
 13 THE WITNESS: Well, we have had no
 14 reports from any of our distributors relating to
 15 Grand River's cigarettes since that date -- well,
 16 I mean, since about 2003. So, I mean, we did have
 17 units sold in 2002, as well, but we don't have any
 18 reports since then. So, to our knowledge no one
 19 else is selling Grand River cigarettes into our
 17:41:04 20 state except for NWS.
 21 PRESIDENT NARIMAN: Okay. Now, there's
 22 a -- Ms. Cate has threatened to give us whole

1423

1 bundle of documents.
 2 MR. LUDDY: I think that complaint is
 3 not in evidence, so the issue is --
 4 PRESIDENT NARIMAN: Ah, yes.
 5 MR. VIOLI: You're not still going
 6 trying to put that in, are you?
 7 PRESIDENT NARIMAN: She was trying.
 8 ARBITRATOR CROOK: Mr. Chairman, didn't
 9 we make a request to the parties on the first day
 17:41:35 10 pull together all the related Grand River
 11 litigation. I believe we made such a request, did
 12 we not?
 13 MR. LUDDY: I thought there was a
 14 request -- I thought there was a request by
 15 Mr. Feldman to put in a number of Grand River
 16 pleadings and those went in, is my understanding.
 17 MS. CATE: Mr. -- to the extent it's
 18 helpful to the Tribunal, Mr. Chairman, I would be
 19 more than happy to provide all the documents
 17:41:59 20 submitted in those two cases.
 21 PRESIDENT NARIMAN: No, not these,
 22 only, but there is a complete set; that is, those

1425

1 break. Let's finish.
 2 MS. CATE: Thank you, sir.
 3 PRESIDENT NARIMAN: Now, on the record.
 4 REDIRECT EXAMINATION
 5 BY MS. CATE:
 6 MS. CATE: If I could have one minute
 7 to gather my thought.
 8 MR. VIOLI: I would like to make one
 9 request while she's gathering her thoughts.
 17:46:07 10 Today, as I said at the put in a document from the
 11 Internet, and then I had one document I wanted to
 12 put in from the Internet. I'll hand it to them.
 13 It was the document that referred to the South
 14 Dakota Attorney General that said we lost the
 15 battle but won the war. It's from the Internet --
 16 MR. KOVAR: Mr. Violi, did you use this
 17 document in the cross-examination?
 18 MR. VIOLI: I did --
 19 MR. KOVAR: When?
 17:46:33 20 MR. VIOLI: -- not use it in the
 21 cross-examination.
 22 MR. KOVAR: So, then I object.

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1 where, even where they have succeeded or they have
 2 failed; it has to be complete. It can't be just
 3 one-sided.
 4 MS. CATE: I agree. I agree. I agree
 5 with you, all sides.
 6 MR. VIOLI: And they have submitted
 7 previously in this case their list of judgments,
 8 default judgments, that they've entered.
 9 PRESIDENT NARIMAN: Which have been set
 17:42:22 10 aside.
 11 MR. VIOLI: They put those in they're
 12 already in the record. And previously in the case
 13 and we have put in the decisions in our case -- in
 14 our case is vacating the default judgment and the
 15 other day they put in two decisions -- one from --
 16 PRESIDENT NARIMAN: The point is only
 17 this -- this is all off the record.
 18 (Discussion off the record.)
 19 MS. CATE: I would very much like to
 17:45:29 20 redirect. If you would like to take a break, we
 21 can.
 22 PRESIDENT NARIMAN: No, no, no. No

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1 MR. VIOLI: I did use it during the
 2 presentation yesterday, yes.
 3 PRESIDENT NARIMAN: Why don't you have
 4 a look, if you object to it, you object to it.
 5 MR. KOVAR: My problem, Mr. President,
 6 is that, as you can imagine, there are hundreds
 7 and hundreds and hundreds of newspaper articles
 8 out there that one could argue are interesting and
 9 raise issues related to this arbitration, and this
 17:47:02 10 is dated 25th October 2008. He could have put
 11 this in during his regular presentations to the
 12 Tribunal.
 13 PRESIDENT NARIMAN: Why don't you go
 14 through it and if you object to it, we won't admit
 15 it, that's all.
 16 MR. KOVAR: Thank you very much.
 17 MR. VIOLI: This is in the record,
 18 then?
 19 PRESIDENT NARIMAN: Which one?
 17:47:27 20 MR. VIOLI: The one they put in today.
 21 PRESIDENT NARIMAN: Yes, it is in the
 22 record, because they asked questions on it.

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1 ARBITRATOR CROOK: The Tribunal does
2 not have a physical manifestation of with a was on
3 the screen. We do not have a piece of paper --
4 PRESIDENT NARIMAN: At the moment no
5 one has given us.
6 (Discussion off microphone.)
7 MR. VIOLI: They did give that to you
8 they said they gave it to you: We have no
9 objection to that going in, but obviously we don't
10 17:47:58 have an objection to our own Internet document
11 going in.
12 PRESIDENT NARIMAN: That has nothing to
13 do with this. So we wait until Monday now, but
14 let her finish now redirect.
15 MR. VIOLI: Oh, is this -- you wanted
16 this on the list too you want me to put this on
17 the list too this additional document.
18 ARBITRATOR CROOK: I don't understand
19 your question.
10 17:48:23 MR. VIOLI: The article about the South
21 Dakota Attorney General, we'll put that on the
22 list of documents --

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1 recall very well, what the President asked and the
2 President asked two things.
3 One he asked the parties to get all of
4 the case law in that was relevant, and to do that
5 before Friday and he also asked for it not to
6 dribble in.
7 And Mr. Chairman, the reason that we
8 asked to put in these documents related to Idaho
9 litigation is because the Claimants had tried to
10 17:49:55 get in their document related to Idaho litigation,
11 even though it was inconsistent with --
12 (Discussion off microphone.)
13 MR. KOVAR: Exactly. So, my own
14 suggestion is, we had already satisfied your
15 earlier order. Both sides had submitted some
16 documents related to lawsuits, you had accepted
17 them, there was no more dispute.
18 PRESIDENT NARIMAN: Not to my
19 satisfaction --
10 17:50:19 MR. KOVAR: Well, I should say --
21 PRESIDENT NARIMAN: We have to optimize
22 that effect I want a list of them.

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1 ARBITRATOR CROOK: I'm not asking to
2 you do anything.
3 PRESIDENT NARIMAN: No, no, no.
4 MR. VIOLI: It says, so much for
5 Monday, that's all --
6 ARBITRATOR CROOK: I'm expressing a
7 certain amount of frustration because we had a
8 very deliberate discussion on Monday about new
9 things coming in -- and please don't lecture me
10 17:48:51 Mr. Violi -- we have new things coming in all
11 around and it would be desirable, I think, for
12 both parties to hew to the guidance that was given
13 on Monday and the promises that were made at that
14 time.
15 MR. VIOLI: I thought you were talking
16 about Monday you wanted a list and I thought you
17 wanted this on the list that you were going to get
18 Monday. This coming Monday, you wanted a list --
19 ARBITRATOR CROOK: No, I mean what I
10 17:49:15 said Mr. Violi. I made no representations no
21 requests, nothing with respect to next Monday.
22 MR. KOVAR: Mr. President, I mean, I

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1 MR. KOVAR: We can make you a list sir
2 but I guess my point is it seems to me we would be
3 going beyond your original order if now we were
4 going to undertake a new document search and
5 introduction in this case.
6 PRESIDENT NARIMAN: Whatever Mr. Crook
7 said for Monday and if you already put them in
8 just give a list that's all of these various
9 documents, not any new documents you're thinking
10 17:50:50 of.
11 MR. KOVAR: I think we could easily
12 have for you a list of the documents we have put
13 in during this week and Claimants could do the
14 same.
15 (Discussion off microphone.)
16 MR. KOVAR: Yes. Thank you.
17 MS. CATE: Thank you Mr. Chairman.
18 REDIRECT EXAMINATION
19 BY MS. CATE:
10 17:51:17 Q. Mr. DeLange, did any tobacco
21 manufacturers ever receive an Allocable Share
22 release in the state of Idaho?

1 A. Yes.

2 Q. Which ones?

3 A. Carolina Tobacco.

4 Q. And do you ever any idea how much of a

5 release they received?

6 A. It was sizable: It was in the hundreds

7 of thousands of dollars.

8 Q. And what did you do as a result?

9 A. Well, we agreed to the release. They

17:51:44 10 were entitled to it under the original Allocable

11 Share release provisions after we crunched the

12 numbers, they were entitled to it.

13 Q. And did the release raise any concerns

14 in your office?

15 A. Well, it fueled those concerns. We had

16 started to -- by the time we agreed to the release

17 it was 2003, but we had already determined to

18 propose legislation to address the Allocable Share

19 release matter.

17:52:15 20 So, it was just more fuel for the fire

21 if you will. This isn't what we intended, this

22 isn't what we wanted, and we needed to make a

1 So, after we saw it in effect working,

2 we said that isn't what we think the legislature

3 intended. We need to go back and explain that to

4 the legislature and explain -- here's the net

5 effect of what's happening and we don't think this

6 is what you intended and we proposed it. It was

7 vigorously opposed by some NPMs who came to Idaho

8 and disputed and argued their position and our

9 legislature adopted it, and agreed to make the

17:54:14 10 changes. And so, we amended it in 2003.

11 Q. And you just said that there were NPMs

12 that came to the legislature to oppose it?

13 A. Yes.

14 Q. Do you know who it was?

15 A. It was an organization called CITMA.

16 They hired some former Attorneys General to come

17 and they spent a lot of time and effort and some

18 local lobbyists. To be honest, I'm not sure who

19 all the members of CITMA are. It was a number of

17:54:43 20 NPMs who kind of gathered their resources

21 together.

22 Q. And could GRE have engaged in the same

1 change because the law wasn't the way we wanted it

2 to operate.

3 Q. And how is it an untended version of

4 the law?

5 A. Well, in its most extreme form, the way

6 the original Allocable Share release worked, if

7 you were a tobacco company and you chose only to

8 market your cigarettes in Idaho, say it's a

9 million cigarettes, and you would pay roughly

17:52:55 10 \$0.02 a cigarette escrow, so, I guess that's

11 \$20,000. But then, because you only sold in

12 Idaho, Idaho's Allocable Share .63 of 1 percent.

13 So, that company would get over 99 percent of its

14 escrow released at the end of the career. So,

15 you're talking, change left in the escrow account

16 after the Allocable Share release worked. That's

17 not we intended. That's not what we imagined and

18 quite frankly, as much as anyone, I'm the one who

19 took the blame. I'm the one who didn't realize

17:53:37 20 the effects when I was advising my Attorney

21 General of the original legislation that that's

22 what would happen.

1 kinds of activities in that legislature of Idaho?

2 A. Oh, absolutely this is all on the

3 Internet, it's all -- you know the bills are all

4 proposed. I mean, CITMA certainly found out about

5 it they were there. Certainly, they could have.

6 Q. And you submitted in your declaration

7 in Exhibit A, and that -- if we could turn to it

8 which I think, if I recollect was Core Tab 57 and

9 then there should be exhibits thereafter.

17:55:45 10 And the tabs are not here, so I

11 apologize for that, but it is --

12 A. The first one?

13 Q. It's the first document after the table

14 of contents that follows Brett DeLange's first

15 declaration. And the document is Section 39-7801

16 --

17 A. Yes.

18 Q. -- of the Idaho law. And it's entitled

19 "Findings and Purpose." What is the -- in sum,

17:56:17 20 the purpose of the statute, which it's the Escrow

21 Statute; is that correct?

22 A. This is. And I talked about this

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1 previously briefly. But this is essentially the
 2 legislature's findings and declaration for why it
 3 wanted to pass the Escrow Statute, and essentially
 4 it was saying we want to -- the Master Settlement
 5 Agreement is an important public health agreement.
 6 We want to preserve that, that will be undermined
 7 if a tobacco company would choose not to join the
 8 MSA and not be subject to the public health
 9 strictures, not subject to the payment
 17:56:58 10 obligations, sell a lot of cigarettes, and then
 11 leave before culpability could be established by
 12 the state so that the state has no place to turn
 13 for financial remuneration for the culpable
 14 conduct. That's what the legislature said in this
 15 section.
 16 Q. Okay.
 17 PRESIDENT NARIMAN: If I could
 18 interrupt you for a --
 19 MS. CATE: Sure.
 17:57:23 20 PRESIDENT NARIMAN: If I could just,
 21 see, my experience in the part of the world where
 22 I come from is when some amendment is proposed in

1437

1 online.
 2 ARBITRATOR CROOK: Just, Mr. Chairman
 3 -- just to avoid confusion, when you say "this
 4 legislation," you mean the Allocable Share
 5 Amendments.
 6 PRESIDENT NARIMAN: Yes, yes.
 7 ARBITRATOR CROOK: Because he was
 8 actually talking about a different piece of
 9 legislation.
 17:58:40 10 THE WITNESS: But we could -- but I
 11 think I understood the question.
 12 PRESIDENT NARIMAN: Yes, the Allocable
 13 Share Amendment. I was not talking about those.
 14 THE WITNESS: Sure, we can get it.
 15 PRESIDENT NARIMAN: If you could
 16 possibly give it to counsel, yeah, that would be
 17 --
 18 THE WITNESS: Sure, it's online.
 19 PRESIDENT NARIMAN: Because that would
 17:58:49 20 be part of the legislative record, however brief,
 21 whatever the position.
 22 THE WITNESS: Sure. In Idaho it's

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1 a legislation, then, when the bill is introduced,
 2 there is what is known as a statement of objects
 3 and reasons which is given by the sponsor of the
 4 bill, and then the bill is passed and it becomes
 5 an Act.
 6 Now, my question to you is, in this
 7 case, when you went back to the legislature, as
 8 you said, because you found this loophole, was
 9 there -- is this system under your legislation
 17:58:03 10 where there is a statement of objects and reasons
 11 which is in the record of the legislature for this
 12 measure?
 13 THE WITNESS: In Idaho, we generally
 14 attach what's called a statement of purpose.
 15 PRESIDENT NARIMAN: A purpose, that's
 16 right.
 17 THE WITNESS: It's very, very brief in
 18 our state, you know to be honest I can't remember
 19 --
 17:58:25 20 PRESIDENT NARIMAN: I would like to see
 21 the statement of purpose for this legislation.
 22 THE WITNESS: We can get it, it's

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1 generally fairly brief.
 2 PRESIDENT NARIMAN: Whatever it is, I
 3 would like to see it.
 4 ARBITRATOR CROOK: Just following up on
 5 that, Mr. DeLange, does the legislature also
 6 include within the text of its legislation a
 7 statement of the legislature's objects and
 8 purposes?
 9 THE WITNESS: Generally, they don't.
 17:59:12 10 Sometimes they do -- like, with the Escrow
 11 Statute, that whole first section is kind of --
 12 the legislature opted to set forth its reasons;
 13 it's not the normal. I guess I could go back and
 14 look at the chapter for the Allocable Share
 15 Amendment. I don't believe there's a section like
 16 that with respect to that. I'm not recalling, but
 17 I could look.
 18 PRESIDENT NARIMAN: Thank you.
 19 THE WITNESS: Sure.
 17:59:41 20 PRESIDENT NARIMAN: Yes, thank you.
 21 MS. CATE: Of course. Feel free to ask
 22 as many questions as you'd like. Thank you.

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1 Q. During the ten years that you've been
 2 the Chief of the Consumer Protection Division in
 3 Idaho, approximately how many different
 4 enforcement actions have you and your colleagues
 5 in the AG's office, the office of Idaho's State
 6 Attorney General, have you brought against
 7 non-participating manufacturers such as Grand
 8 River under the Escrow Statute as amended by the
 9 Allocable Share Amendment?
 18:00:13 10 A. Well, I can't speak for other states
 11 because I know they've brought lots. Idaho, I
 12 believe we've had five or six matters that I'm
 13 recalling.
 14 Q. And can you provide examples?
 15 A. Sure. We've had litigation -- well,
 16 we've had the Grand River case. We've had
 17 litigation with a company called Parker Tobacco.
 18 We've had litigation with a company called
 19 Carolina Tobacco. We've had a matter with Chang
 18:00:43 20 Di Tobacco, which is a Chinese tobacco company.
 21 We've had a litigation with a Greek company -- a
 22 company based in Greece called Sea Cap. Those are

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1 that violates the MSA; you're cheating us on our
 2 money, and we had the same thing with the House of
 3 Prince, the same sort of -- they were
 4 manufacturing cigarettes for an NPM too.
 5 We've had matters where I've spent
 6 hundreds of hours in a lawsuit against R.J.
 7 Reynolds for deceptively marketing the Eclipse
 8 cigarette. It's a matter pending in the trial
 9 court in Vermont.
 18:02:34 10 There's been -- states are dealing with
 11 general tobacco right now with respect to MSA
 12 payments, so we always seem to have something
 13 going on with the PMs.
 14 Q. And with regard to RJR, could you
 15 describe in more detail the matter regarding
 16 deceptive marketing of the Eclipse cigarette?
 17 A. RJR has done a lot of deceptive
 18 matters, in my view. The one I've been most
 19 involved in is related to the he clips cigarette.
 18:03:07 20 JR advertised the cigarette -- essentially, it may
 21 reduce cancer and it may be a safer cigarette than
 22 the current one and the reason is the -- it's

1440

1 the ones that are coming to my mind.
 2 Q. And in that list, can you somewhat
 3 identify whether the entity is domestic, U.S., or
 4 foreign?
 5 A. Carolina is domestic. Sea Cap, Grand
 6 River, Chang Di are all foreign companies -- of
 7 course Grand River is foreign, and Parker, I
 8 believe, is foreign.
 9 Q. Okay. And have you been involved in
 18:01:31 10 enforcement actions against participating
 11 manufacturers?
 12 A. Yes.
 13 Q. Can you provide some examples of that?
 14 A. Well, Idaho has worked on a number of
 15 matters that relate to participating
 16 manufacturers. Some of them relate to their
 17 failure to make all the payments they're supposed
 18 to. We had a large matter with respect to Brown
 19 and Williamson that the State of Vermont brought
 18:01:59 20 the lawsuit but we worked a lot on it. They were
 21 manufacturing cigarettes for an NPM and then not
 22 making MSA payments on them. And we just said,

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1 heated as compared to a cigarette you don't inhale
 2 smoke, you get your nicotine from a heat element.
 3 And we just alleged that they couldn't make these
 4 claims. The consumers were taking away a message
 5 of a safer cigarette and this might be a better
 6 way to go, for example, than quitting. In fact, I
 7 think one of RJR's ads was, it's go good to quit
 8 the next best thing is to smoke Eclipse, and we
 9 just said, you can't say that. The science does
 18:03:52 10 not support you -- and spent a lot of time on this
 11 matter, lots of expert depositions and lots of
 12 briefing. About a core group of about 10 to 12
 13 states have worked on that case. It's pending
 14 trial court resolution right now.
 15 And then, other states done lawsuits
 16 against R.J. Reynolds for a variety of other
 17 promotions.
 18 Right now, there's quite a bit of
 19 litigation called the Farm Roth litigation. Had
 18:04:19 20 to do with promotional campaign of R.J. Reynolds
 21 that a number of states brought against them in
 22 their own respective courts.

1 Q. What exact limb was RJR doing to cause
 2 states to bring an action against them in that
 3 particular matter?
 4 A. Well it was -- we allege they were
 5 using cartoons and they were appealing to youth.
 6 I mean, it's a really trendy sort of add that we
 7 said, you're crossing -- these states -- Idaho is
 8 not a party to these litigations, but the state
 9 said, you're crossing the border; you're targeting
 18:04:55 10 youth; you're doing the sorts of promotions that
 11 the MSA says you ought not to be doing.
 12 Of course, the largest matter is the
 13 NPM adjustment arbitration. That's taking a
 14 sizable amount of time that each state is working
 15 on.
 16 Q. So you have an adversarial relationship
 17 with --
 18 A. Oh, yes.
 19 Q. And --
 18:05:25 20 A. On fundamental different levels. On
 21 their culture, we're talking adversarial in terms
 22 of billions of dollars and it is what it is.

1 is here?
 2 A. Sure.
 3 The legislature find that violations
 4 of Idaho's Tobacco Master Settlement Agreement Act
 5 threatened the integrity of Idaho's Master
 6 Settlement Agreement with leading tobacco product
 7 manufacturers, the fiscal soundness of the state,
 8 and the public health. The legislature finds,
 9 enacting procedural enhancements will help prevent
 18:07:20 10 violations of Idaho's Tobacco Master Settlement
 11 Agreement Act and thereby safeguard the Master
 12 Settlement Agreement, the fiscal soundness of the
 13 state, and the public health.
 14 Q. Thank you. And with respect to the
 15 complementary legislation in Idaho, approximately
 16 how many enforcement actions have you brought?
 17 A. Quite a few.
 18 Q. Under the statute?
 19 A. Probably, I'm guessing close to ten.
 18:07:46 20 They're mostly -- they're mostly with respect to
 21 distributors who have stamped or otherwise sold
 22 non-compliant cigarettes into our state.

1 Q. Turning now to Exhibit A, again, you've
 2 also submitted, in that same exhibit, Exhibit A,
 3 the complementary legislation and I believe it's
 4 further back a few pages, and again without tabs
 5 it's kind of hard to see, but I believe it starts
 6 at Section 39-7803. Is that -- no?
 7 A. No, complementary starts 8401.
 8 39-8401.
 9 Q. Thank you. Thank you for the
 18:06:08 10 correction. There it is, thank you.
 11 And what is the purpose here of this
 12 legislation?
 13 A. Well, I just said that the legislature
 14 rarely enters findings but again here they did it
 15 with the Complementary Act, the section that says
 16 because of the violations and abuse of the Escrow
 17 Statute, we needed to strengthen it and, to
 18 protect the state, its public health, its fiscal
 19 health, and so they were going to pass the
 18:06:51 20 Complementary Act.
 21 Q. Okay. Would you mind reading into the
 22 record since it's very short, the paragraph that

1 Interestingly, our most interesting matter is
 2 Scott Maybee litigation, and there he's a retailer
 3 retailing cigarettes in our state. But the
 4 Complementary Act doesn't apply just to
 5 wholesalers or distributors, it applies to
 6 retailers. So we used the Complementary Act
 7 against Mr. Maybee.
 8 Q. And I have a case here, let me see.
 9 A. Just so the record is clear, almost all
 18:08:25 10 these enforcement actions ended in settlements.
 11 We call them consent decrees. We would go to
 12 distributor and say, look you've sold, I don't
 13 know, hundred thousand cigarettes, they're not on
 14 our directory, and they go, you're right, what do
 15 we do? They say, well, we need you to settle this
 16 with us. And here's what we propose to do: We're
 17 going to do consent decree. It's going to be
 18 approved by the court. It is going to obligate
 19 you to X, Y, and Z in terms of reports and
 18:08:54 20 compliance and generally we'll have them pay an
 21 amount of a penalty. Probably the most recent one
 22 is \$3,500, not much. But then, it becomes an

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1 order of the court then they are under court order
 2 to comply. Most of the cases ended in consent
 3 decrees. Of course, the one with Scott Maybee is
 4 a judgment that went all the way to the Supreme
 5 Court, but every other one ended in a consent
 6 decree. So, I call them enforcement actions, but
 7 there was a complaint filed and then there was a
 8 resolution with the distributor.
 9 Q. And just for the record, this Idaho
 18:09:31 10 versus Maybee case was submitted earlier this week
 11 and I just would like to note that, and to the
 12 extent you'd like to look at it right now, I have
 13 it. I don't know if you have it online.
 14 PRESIDENT NARIMAN: We have it.
 15 MS. CATE: You have it? Okay.
 16 MR. KOVAR: We'll put it on the list.
 17 MS. CATE: Yeah. I'm going to
 18 continue, counsel. I just wanted to make sure
 19 they had it on hand if they needed to look at it.
 18:10:02 20 It's already submitted to them.
 21 MR. VIOLI: For purposes of law, right?
 22 We said developments in the law. Yes.

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1 sells via the Internet --
 2 Q. If you wouldn't mind holding for just a
 3 moment until the phone call is over here. I
 4 apologize.
 5 (Pause in the Proceedings.)
 6 A. Anyway, Mr. Maybee is a member of the
 7 Seneca Nation. He's located on the Seneca
 8 Reservation. I don't believe that's the correct
 9 title, but it's that Reservation that I think NWS
 18:12:04 10 actually is located at. He sells his cigarettes
 11 via the Internet, and he sold millions to Idaho.
 12 Turns out, quite a few of those cigarettes are
 13 Seneca -- they're Grand River cigarettes. They're
 14 not the only ones; he sells lots of different
 15 cigarettes. In fact, some of them are compliant.
 16 28 percent of his cigarettes sales are of
 17 compliant brand, but 72 percent are noncompliant.
 18 The largest share were Seneca cigarettes. He
 19 wrote, so we, you know, we wrote Mr. Maybee like we
 18:12:37 20 wrote NWS and advised him of the law and asked for
 21 his compliance. He refused, so we filed a
 22 lawsuit, then we litigated, and we sued him under

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1 PRESIDENT NARIMAN: (Off microphone.)
 2 Q. Thank you. So, if you would, could you
 3 please describe the facts and the holding in the
 4 Idaho versus Maybee case that was decided by the
 5 Supreme Court on January 15th, 2009?
 6 MR. VIOLI: Mr. President, excuse me
 7 one second.
 8 Mr. President, do we -- she's asking
 9 the witness to describe the facts of law -- of a
 18:10:35 10 law case that was handed to you. Do we -- we
 11 don't need that.
 12 (Discussion off microphone.)
 13 MR. VIOLI: Is there a particular need
 14 of describe be the facts of that case?
 15 MS. CATE: Yes, I believe the facts of
 16 the case are quite relevant to this case and I
 17 believe that his response will show us as to why.
 18 A. Real briefly, the facts you have --
 19 Mr. Maybee, who is a seller of cigarettes via the
 18:11:10 20 Internet. Now interestingly enough, he's located
 21 on the Seneca Nation in western New York -- I
 22 think about the same place NWS a located. And he

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1 the Complementary Act just like we sued NWS, under
 2 the Complementary Act. Mr. Maybee made arguments
 3 related to his status as a Native American on the
 4 Reservation. He made argument -- so he talked
 5 about ending federal law preemption, he talked
 6 about the commerce clause and he, like NWS, talked
 7 about his view title passes in New York therefore
 8 are Complementary Act doesn't apply. And then, he
 9 also made the same arguments that the
 18:13:23 10 Complementary Act should only apply to units sold
 11 and our court rejected --
 12 MR. VIOLI: Note my objection. The
 13 witness is now arguing law in comparing NWS's case
 14 to this case as a matter of law, not a fact. Just
 15 don't --
 16 MS. CATE: Counsel, it is in the
 17 interest of these proceedings that the full truth
 18 and nothing but the truth comes out. Allow the
 19 witness to speak. You have --
 18:13:48 20 A. I think you could look at both cases
 21 and you'd see that that's the case. Anyways, our
 22 Supreme Court -- ultimately we went on summary

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1 judgment and Mr. Maybee appealed and we ultimately
 2 have the decision which is before the panel. The
 3 court upheld our claim, said that --
 4 PRESIDENT NARIMAN: Supreme Court of?
 5 THE WITNESS: Excuse me?
 6 PRESIDENT NARIMAN: Supreme court of?
 7 THE WITNESS: Of Idaho.
 8 A. Idaho Supreme Court upheld our
 9 judgment, affirmed it, and ruled, you know, the
 18:14:17 10 commerce, the commerce clause was not violated by
 11 our Complementary Act as it's applied and
 12 interpreted.
 13 MS. CATE: If you wouldn't mind holding
 14 until the chairman is able to participate.
 15 MR. KOVAR: Can we have a short break
 16 to use the rest room? Three minutes.
 17 PRESIDENT NARIMAN: Yes three minutes.
 18 (Whereupon, at 6:12 p.m., the hearing
 19 was adjourned until 6:18 p.m., the same day.)
 18:19:54 20 PRESIDENT NARIMAN: Ready? Carry on.
 21 We're on the record.
 22 MS. CATE: Okay. Where was I? I

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1 state passed a law, actually in 2003, as well,
 2 that said we want Internet sellers to obey the
 3 same tobacco sales laws that wholesale
 4 distributors and others have to obey in terms of
 5 the Complementary Act, for example.
 6 Q. And also under the decision of the
 7 Supreme Court of Idaho in Idaho v Maybee, what did
 8 the Court decide with respect to any linkage, if
 9 any, between the Escrow Statute and the
 18:21:35 10 Complementary statute?
 11 A. The Court said they're separate laws.
 12 And the Court expressly said, look, we understand
 13 the concept of units sold and that applies to the
 14 Escrow Statute, but the Complementary Act applies
 15 to cigarettes. So when we're talking
 16 Complementary Act, don't sell a non-compliant
 17 cigarette.
 18 So they rejected that argument that
 19 complementary is only meant to apply to units
 18:22:00 20 sold.
 21 Q. And with respect to Idaho's case
 22 against Native Wholesale Supply, how is it that

1452

1 apologize.
 2 Q. You were speaking of the Idaho verses
 3 Maybe Supreme Court decision of Idaho?
 4 A. Yes.
 5 Q. You have just completed discussing the
 6 facts and the holding in that case; is that
 7 correct?
 8 A. Yes.
 9 Q. And so are Internet sales a big issue
 18:20:22 10 in Idaho?
 11 A. Internet sales is a tremendous problem.
 12 Internet cigarette sales growth have been
 13 exponential. And there are some real problems --
 14 states have done number of stings over the years
 15 and some of the studies, half the Internet sites
 16 don't do age verification. Now maybe it's getting
 17 better, some sites are fine. But there's a youth
 18 access problem. Some of them are misrepresenting.
 19 They're telling consumers buy with us and don't
 18:20:55 20 worry about taxes and then consumers get a tax
 21 bill or a penalty bill.
 22 So it's a concern to our state and our

1454

1 Arthur Montour and Native Wholesale Supply are
 2 violating the complementary legislation of Idaho?
 3 MR. VIOLI: Objection. There's no
 4 evidence of any accusation against Mr. Montour
 5 personally in that action.
 6 MS. CATE: I will rephrase.
 7 Q. How is it that Native Wholesale Supply
 8 have violated the complementary legislation? My
 9 apologies.
 18:22:33 10 A. Native Wholesale Supply is violating
 11 the Complementary Act by selling, importing,
 12 causing to be imported, shipping cigarettes that
 13 are not on the Idaho directory.
 14 Q. And did you notify Native Wholesale
 15 Supply of this violation?
 16 A. Yes, we wrote Mr. Montour.
 17 Q. Did you receive any response?
 18 A. No.
 19 Q. And what is the effect of the Native
 18:23:10 20 Wholesale's non-compliance with the complementary
 21 legislation?
 22 A. I talked previously about this. We

1455

1 have cigarettes that are coming in to our state
 2 that are non-compliant cigarettes. So our law is
 3 being subverted and it's not being obeyed.
 4 Q. What is the evidence that you have that
 5 this is occurring?
 6 A. Well, we issued a number of civil
 7 investigative demands and we got documents from
 8 the trucking companies, from the Foreign Trade
 9 Zone, from Warpath, all linking up, you know, the
 18:23:43 10 connection between Native Wholesale, selling it to
 11 Warpath and having it -- and paying for and having
 12 it shipped from the Las Vegas Foreign Trade Zone
 13 up to our state.
 14 Q. Did you send any correspondence to the
 15 Foreign Trade Zone?
 16 A. Yes, we did.
 17 Q. And what did you state in that
 18 response?
 19 A. We just advised them, you know, come to
 18:24:09 20 our attention now and having reviewed the
 21 documents, that they were releasing cigarettes
 22 into our state that were illegal. And we wanted

1457

1 MS. CATE: With apologies, I'm just
 2 trying to find where in the record the letter is
 3 so we can note it for the record.
 4 MR. LUDDY: I think it's hard core
 5 documents 35 or 6.
 6 MS. CATE: It's in front of me so
 7 that's what I was looking to do.
 8 MR. LUDDY: 35 or 36. 36.
 9 MS. CATE: Yes, it's Claimants' core
 18:26:02 10 bundle document number 36.
 11 ARBITRATOR CROOK: Do you need to look
 12 at it?
 13 MS. CATE: No, I'm noting it for the
 14 record so you'll be able to find it.
 15 Q. And with regard to the Foreign Trade
 16 Zone in Nevada, did you ask them for any
 17 information?
 18 A. Yes. We asked them for the shipping
 19 records and they gave them to us.
 18:26:39 20 Q. What exactly did those shipping
 21 documents contain?
 22 A. Well, there was a variety of different

1456

1 to put them on notice saying you're facilitating
 2 violations of Idaho law, would you please stop.
 3 Please don't be part of this problem and hopefully
 4 they agreed.
 5 Q. And what authority under Idaho law did
 6 you have to do that?
 7 A. Well, Idaho law -- we also have
 8 authority under -- the Complementary Act says a
 9 violation of the Complementary Act is also deemed
 18:24:45 10 as a violation of the Consumer Protection Act and
 11 that gives us a variety of investigatory tools.
 12 But Idaho law, essentially it's kind of like
 13 aiding and abetting, you can't facilitate
 14 violations. If you know about the problem, you're
 15 benefitting from it and you're facilitating it,
 16 you can be held responsible.
 17 Here we, you know, we didn't want an
 18 adversarial -- the letter speaks for itself, but
 19 we just told them about the problem, asked them
 18:25:11 20 for their cooperation in not facilitating this
 21 violation and ultimately, I guess, they agreed
 22 because I believe they've stopped.

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1 shipping, but essentially they showed their
 2 releasing these cigarettes to Warpath in the
 3 amounts and the brands, showing the dates -- you
 4 know, it's kind of like dates -- and, so it was
 5 able for us to then tally up these many cigarettes
 6 over this period of time was released and shipped
 7 to Idaho.
 8 Q. And were there any customs documents
 9 with that?
 18:27:12 10 A. Yes, there were customs documents and
 11 tally out sheets and I think there were some bills
 12 of lading. But, yeah. Yes.
 13 Q. And then customs documents, who did it
 14 say the importer was?
 15 A. NWS.
 16 Q. Okay. Now, let's see. You brought an
 17 action also against Grand River Enterprises,
 18 correct?
 19 A. Yes.
 18:27:47 20 Q. And that's already been discussed here.
 21 In your verified complaint which is
 22 your Exhibit C to your declaration which is

1 Tab 57.
 2 A. Yes.
 3 Q. Exhibit C. There's a verified
 4 complaint, Idaho verses GRE?
 5 A. Yes.
 6 Q. What were the allegations made against
 7 GRE again?
 8 A. They did not deposit into escrow for
 9 the units sold in our state.
 10 18:28:29 Q. And approximately how many units sold
 11 was that?
 12 A. I think it was about 3.2 million.
 13 Q. Okay. And did you notify Grand River
 14 Enterprises?
 15 A. Yes. We notified them three different
 16 times.
 17 Q. Did you receive a response?
 18 A. No.
 19 Q. And how did the court resolve the
 20 18:28:45 matter?
 21 A. Entered a default judgment after Grand
 22 River did not appear to defend.

1 A. Judgments in our favor with respect to
 2 all of the issues that were raised in the case.
 3 Q. And if we could --
 4 ARBITRATOR CROOK: Mr. DeLange, do I
 5 understand -- Parker, when you say was foreign,
 6 you mean non U.S.?
 7 THE WITNESS: Correct. Yes.
 8 ARBITRATOR CROOK: So a non U.S. entity
 9 hired counsel and came in and defended it?
 10 18:30:19 THE WITNESS: Yes. Parker had both
 11 national counsel -- when I mean national, there
 12 was outside of Idaho and they had local counsel as
 13 well. Former Attorney General for our state.
 14 Q. If I could ask you to look at Exhibit B
 15 to Mr. DeLange's first declaration.
 16 A. Is that the directory?
 17 Q. That is the directory.
 18 A. Getting there.
 19 Q. I'm not. There we go. Okay.
 20 18:30:55 So can you tell me what this document
 21 is?
 22 A. Well, this is the directory as was the

1 Q. Is a default judgment still in place?
 2 A. Yes.
 3 Q. Of the other enforcement actions
 4 against NPMs, have they all resulted in default
 5 judgments?
 6 A. No. Most of the NPM actions -- let's
 7 see. We got judgments against Parker, we
 8 litigated that one to the hilt. They hired a
 9 former Attorney General. Our lawsuit with
 10 18:29:23 Carolina ended in a judgment, that was vigorously
 11 litigated. Chain D, after we litigated we had a
 12 consent decree with them. And Sea Cap, we have a
 13 default judgment against.
 14 Q. And again, if you could just remind --
 15 Parker is?
 16 A. Foreign.
 17 Q. And Carolina is --
 18 A. I think they're all foreign except for
 19 Carolina which is domestic.
 20 18:29:48 Q. Right. And these decisions that were
 21 in the Parker and Carolina cases, what was the
 22 results?

1 case, I guess, December of 2008. The directory
 2 changes, of course, over time. But this was what
 3 the directory showed on that date.
 4 Q. And where is this document found?
 5 A. Online. If you look down the bottom
 6 left you can see the Internet site for where you
 7 can access it from the Attorney General's Web
 8 site.
 9 Q. And in addition to this document, what
 10 18:31:27 other documents might you have on your Web site
 11 related to tobacco issues?
 12 A. We have all the forms that a PM or an
 13 NPM need to utilize to certify themselves and
 14 their brands, to report their escrow. We have all
 15 the forms that distributors need to report their
 16 sales activity. We have links to all the laws
 17 applicable. We have a link to the Master
 18 Settlement Agreement itself.
 19 Q. Okay. Going back to this document, if
 20 18:31:56 you wouldn't mind and it's short. Could you just
 21 briefly go through quickly and just tell us
 22 whether or not the manufacturer noted is domestic

1463

1 or foreign?

2 A. American Cigarette is surprisingly --

3 not surprisingly, domestic. Carolina is domestic.

4 Choice Tobacco is from Canada. Commonwealth is

5 domestic. Daughters of Ryan is domestic. Don Raj

6 is foreign. Dosal is domestic. Farmers is

7 domestic. General Tobacco is domestic.

8 International Masters, is I think in Armenia, so

9 they're foreign. ITL is domestic. Japan is

10 18:32:35 Japan. King Maker, I don't recall. I think King

11 Maker is foreign. King Mountain is domestic.

12 King Mountain is owned by some Native Americans.

13 Condy -- I mean Conse, I think that's how you

14 pronounce it, I think is foreign. Cretech I think

15 is domestic. KT&G is Korea tobacco, they're

16 foreign. Lane, Liggett, Lignum and Lorillard are

17 all domestic. M&R is domestic. Monty Pas I think

18 is Uruguay. Don Raj is foreign. Nasco, National,

19 Native are domestic. Nada Tradings is another one

10 18:33:15 owned by Native Americans. Opportunities

21 Unlimited, PT -- Opportunities Unlimited is

22 domestic. PT Dezharm(ph) Gurdam/Gurong(ph), are

1465

1 Q. And there are both native and

2 non-native NPMs complying with the complementary

3 legislation of Idaho?

4 A. Yes.

5 Q. With respect to native or tribal

6 entities, have you had any interactions with them

7 in relation to --

8 A. Yes, we've had a number. In addition

9 to certifying the companies I just told you about,

10 18:34:42 at one time the Seneca Cayuga, who are also a

11 federally recognized tribe, they also are a

12 tobacco manufacturer, they were on our directory

13 and they had their cigarettes and they had some

14 units sold. And at the end of the year -- they

15 were depositing. But at the end of the year we

16 came up with some numbers that showed they were

17 short about five thousand bucks. So we wrote

18 them, said, you know, you're short. They said,

19 you're right and they deposited the money and, you

10 18:35:10 know, we worked it out amicably.

21 They later asked to have themselves

22 removed from our directory so we honored the

1464

1 foreign. People's True Taste, domestic. Peter

2 Stokelby is -- I can't remember, somewhere in

3 Europe, they're foreign. Phillip Morris, Premier,

4 R.J. Reynolds, RSV, Rosco, Sandia, Santa Fe,

5 Shermans are all domestic.

6 Skookum Creek are domestic, they're

7 owned actually by the Squaxin tribe which is a

8 federally recognized tribe to Washington.

9 Smokin' Joe's is owned by a Native

10 18:33:50 American, it's domestic. Tobacco Laris(ph) is

11 foreign, Top Tobacco, Truth, U.S. Fluke Cured,

12 Vector are all domestic. Von Icahn is foreign and

13 Wynn River is domestic.

14 Q. Thank you. Based on what you noted

15 here, it appears that on this list there are both

16 domestic and foreign NPMs complying with the

17 complementary legislation of Idaho?

18 A. Yes.

19 Q. And there are also domestic and foreign

10 18:34:18 PMs complying with the complementary legislation

21 of Idaho?

22 A. Yes.

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1 request and removed them. So they're not on our

2 directory today.

3 Smokin' Joe's, we had --

4 ARBITRATOR ANAYA: Pardon me. Can I

5 ask a question?

6 THE WITNESS: Yes.

7 ARBITRATOR ANAYA: Do they still, to

8 your knowledge, sell cigarettes?

9 THE WITNESS: To my knowledge now, no.

10 18:35:36 Well, they sell cigarettes in other states.

11 ARBITRATOR ANAYA: I mean in Idaho.

12 THE WITNESS: To my knowledge, no.

13 None of our distributors are showing any cigarette

14 sales of the Seneca Cayuga.

15 ARBITRATOR ANAYA: And before, were

16 they selling through retailers on Indian land?

17 THE WITNESS: To my knowledge, no. At

18 least the ones that we were dealing were units

19 sold reported cigarettes so that suggests to me

10 18:36:01 they were non -- they were -- cigarettes were

21 being sold to non-Reservation locations or at

22 least locations that -- the purchasers weren't

1 Native American or weren't owned by Native
2 Americans.

3 ARBITRATOR ANAYA: Okay.

4 A. We had a problem with Smokin' Joe's who
5 sold some cigarettes into our state that were not
6 on our directory. So we wrote them and we ended
7 up in consent decree which I think that's attached
8 to my declaration as well. And that's how we
9 solved it. I think they paid us \$3,700 and they
10 18:36:40 agreed to certain reporting restrictions and to be
11 sure to only sell compliant cigarettes.

12 Q. For the record, the consent decree that
13 Mr. DeLange mentioned is Exhibit G to his first
14 declaration.

15 You also mentioned King Mountain.

16 A. King Mountain is a company owned by
17 some Native Americans on the Yakima Reservation
18 and they're on our directory.

19 Q. Okay.

10 18:37:15 ARBITRATOR ANAYA: Let me clarify one
21 thing. Cigarettes that are sold to retailers that
22 are tax exempt or that are sold through

1 under obligation to report to us.

2 ARBITRATOR ANAYA: So what happens to
3 the escrow? What are the implication for paying
4 escrow or not? It's not a unit sold, right?

5 THE WITNESS: It's not a unit sold so
6 the NPM would not need to report that as a unit
7 sold and put escrow in for it.

8 ARBITRATOR ANAYA: So if Native
9 Wholesale Suppliers -- sorry, if Grand River were
10 18:38:48 to register and be on the directory, and sell and
11 have -- and their cigarettes were only sold
12 on-Reservation through native retailers, they
13 wouldn't be paying.

14 THE WITNESS: They wouldn't pay an
15 escrow. The wholesalers would not be paying a tax
16 on it and there would not be an escrow obligation
17 on Grand River.

18 ARBITRATOR ANAYA: So what's the
19 state's interest in enforcing the escrow against
10 18:39:17 Grand River?

21 THE WITNESS: Well, in that sale there
22 is -- we don't have -- the law is not being

1 distributors that don't have to pay tax.

2 THE WITNESS: Yes.

3 ARBITRATOR ANAYA: Because they're
4 selling to retailers on-Reservation, those
5 cigarettes are not units sold?

6 THE WITNESS: Correct. They're not
7 units -- if I understand your question, for
8 example, a wholesaler who sells to Warpath, NWS,
9 Warpath is wholly owned by members of the Couer
10 18:37:55 d'Alene Reservation. So under our tax law, they
11 don't need to collect or pay a tax, whoever the
12 wholesaler might be. It could be -- it could be
13 Brett DeLange.

14 ARBITRATOR ANAYA: But the wholesaler
15 needs to report --

16 THE WITNESS: Yes. They still have to
17 report that to us so we know what's going on out
18 there.

19 ARBITRATOR ANAYA: And they get a tax
10 18:38:14 exempt stamp?

21 THE WITNESS: They just don't have to
22 affix a stamp. There's no stamp. But they are

1 violated and so, you know, we don't have an escrow
2 act violation or law to enforce.

3 ARBITRATOR ANAYA: So the enforcement
4 action is against Grand River because of sales
5 going through --

6 THE WITNESS: That were units sold.

7 ARBITRATOR ANAYA: That were units
8 sold.

9 THE WITNESS: Remember the lawsuit we
10 18:39:43 did have is because we did have units sold that
11 where the stamp was affixed, the tax was
12 collected. So now we have an escrow act
13 obligation that we need to follow-up on.

14 ARBITRATOR ANAYA: But say they're
15 going through a distributor, the distributor is
16 selling to a retailer on the Reservation.

17 THE WITNESS: Yes.

18 ARBITRATOR ANAYA: Which is a native
19 owned retailer.

10 18:40:09 THE WITNESS: Yes.

21 ARBITRATOR ANAYA: There would be no
22 escrow violation.

1471

1 THE WITNESS: Correct.

2 ARBITRATOR ANAYA: And there would be
3 no complementary legislation violation, as long as
4 they register.

5 THE WITNESS: Yes. Yes. In fact, we
6 have cigarettes, for example, Dosal have
7 cigarettes that are sold exclusively, almost
8 exclusively on our Reservations, they're on our
9 directory. Native Wholesale could sell Dosal
18:40:42 10 cigarettes and we wouldn't be suing them for it.

11 So yes, if Grand River were on our
12 directory, those cigarettes could be sold without
13 an escrow obligation under that type of business
14 plan or operation.

15 ARBITRATOR ANAYA: Thanks.

16 Q. What is the Idaho Attorney General's
17 relationship to the association, National
18 Association of Attorneys General?

19 A. We're members. The Attorney General is
18:41:15 20 a member. It's a member organization made up of
21 the various Attorney General.

22 Q. What does it mean that you're a member?

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1 there's quite a few.

2 Q. Are there any groups that are more
3 specifically related to a certain tobacco entity?

4 A. Well, generally when we get sued, you
5 know, when more than one of us get sued by a
6 company, we'll work together. I mean, try to
7 coordinate our responses and make sure we're
8 operating from the same page.

9 So you know, for example when Grand
18:42:54 10 River sued us in 2002, I think they sued 30 -- I
11 can't remember, 31, 33 states. We were one of
12 them that got sued. So we interacted with the
13 other states in that lawsuit to respond to the
14 discovery, to the motions, to the pleadings that
15 that case has engendered.

16 Q. What is that group called?

17 A. I don't think it really has a name.
18 The Grand River group. I mean, it's not like we
19 have role or attendance or anything like that so.

18:43:31 20 But it makes sense, instead of a
21 federal judge hearing from 30 different states on
22 an issue, we try to coalesce so the judge just

1472

1 What does that --

2 A. It's an association of Attorneys
3 General and Idaho is one of them.

4 Q. Are there any sub committees or sub
5 groups within NAAG?

6 A. There's all sorts. There's lots.
7 There's environment, there's criminal law, there's
8 appeals, there's consumer, antitrust, privacy,
9 tobacco, of course.

18:41:45 10 Q. And which groups are you --

11 A. I'm most familiar with the tobacco,
12 consumer, antitrust and privacy.

13 Q. With respect to the NAAG tobacco group,
14 are there any sub groups within that?

15 A. There's lots.

16 Q. Can you tell me about that?

17 A. All sorts. There's the Internet one,
18 there's legislation, we have a group on SPM
19 problems. There's one -- on Section 3 dealing
18:42:16 20 with PMs, their obligations with respect to the
21 injunctive provisions. There's -- of course
22 there's several that deal with arbitration. So

1474

1 hears from one of us collectively, here's our view
2 on this issue.

3 Q. You said that Grand River has sued 31
4 states. Could you tell me more about that?

5 A. It's a lawsuit in Federal Court
6 Southern District of New York, it alleges several
7 different claims, an antitrust claim and a
8 commerce clause claim is the ones I remember.

9 Q. And what is the current status of that
18:44:08 10 case?

11 A. It's been -- I think we're at the
12 summary judgment stage.

13 PRESIDENT NARIMAN: What?

14 THE WITNESS: Summary judgment stage.
15 Discovery was completed, well, I'm guessing, I
16 think it was last year. Maybe it was January of
17 last year. Now the parties have filed motions for
18 summary judgment and it's pending before Judge
19 Keenan.

18:44:31 20 Q. What is the name of the case?

21 A. I think it's Grand River Enterprises et
22 al verses Pryor et al. I think Pryor is because

1 Alabama is first in the alphabet, he's the Pryor
2 and the rest of us are the et al.
3 Q. And with regard to discovery, how long
4 did that process last?
5 A. Long time. There were extensions
6 requested by Grand River that were granted and
7 there was a lot of discovery.
8 Q. Do you have any idea how much
9 discovery, what it entailed?
18:45:12 10 A. Thousands of pages of documents were
11 produced by the states. We answered requests for
12 production, requests for admission, there was a
13 number of State AGs who were deposed, General
14 Gregoire was deposed by written deposition, I
15 think. I think Peter Levine from NAAG was
16 deposed. I think Price Waterhouse Cooper, the
17 independent auditor, was deposed. Lots of
18 econometric data was produced I believe.
19 Q. And in relation to this, were documents
18:45:48 20 of the group at NAAG working on, in defense of
21 litigation produced?
22 A. Generally. Certainly not the ones that

1 on one entity within NAAG?
2 A. There have been, sure. States got sued
3 by General Tobacco in Kentucky Federal Court. So
4 again, there's around 30-some states and we
5 collectively talked about how to respond to that.
6 At other times, different states, though, we got
7 sued by some entities in Federal Court in
8 California and Idaho was in one of those cases.
9 So we collectively talk about how we're
18:47:37 10 going to defend ourselves and that's what we've
11 done. The Freedom Holdings case is another case
12 where a number of people got sued, a number of
13 states, I should say, got sued so we collectively
14 worked on that case.
15 ARBITRATOR ANAYA: So the Grand River
16 group of AGs was formed to defend against the suit
17 by Grand River?
18 THE WITNESS: Essentially, yes, that's
19 been my participation in it.
18:48:12 20 ARBITRATOR ANAYA: It wasn't formed to
21 mount an -- coordinate an enforcement effort
22 against Grand River?

1 were privileged. There are a lot of privileged
2 documents. We didn't, you know -- so, no.
3 Q. What has Idaho's AG's office produced?
4 A. We produced over a hundred documents.
5 We produced a couple memos that Grand River cited
6 to in this, has in introduced into this hearing.
7 Some outlines of Indian law. So, you know, I
8 don't know the pages, it was over a hundred
9 documents that we produced.
18:46:32 10 Q. Is the GRE working group still ongoing?
11 A. Essentially. I mean, the states, you
12 know, we haven't talked in a long while because
13 things are pending right now. But, you know, we
14 do -- you know, I'm imagine when things heat up
15 again, we'll probably meet to collectively decide
16 how to respond to this certain whatever is coming
17 on board.
18 Q. Thus in sum, the group was formed in
19 order to defend in the litigation in GRE versus
18:47:02 20 Pryor?
21 A. Yes.
22 Q. Are there other working groups focussed

1 THE WITNESS: No. We got sued in 2002,
2 so it's been around for a while and you know,
3 substantial claims being made seeking to
4 invalidate all of our statutes. And so we met to
5 figure how we were going to defend against this.
6 ARBITRATOR ANAYA: So you're saying the
7 origins of the group are in -- in the effort to
8 defend against this action?
9 THE WITNESS: Yes, sir.
18:48:49 10 ARBITRATOR ANAYA: The group wasn't
11 doing -- the group wasn't doing anything before
12 that?
13 THE WITNESS: I don't believe there was
14 a group before that. I'm not aware of one.
15 ARBITRATOR ANAYA: Okay.
16 THE WITNESS: And I can tell you, for
17 example, when we filed our lawsuit against Grand
18 River, we didn't consult with anybody and didn't
19 talk to other, you know -- we filed a lawsuit
18:49:15 20 because they were violating our law. But we have
21 talked to others about Grand River's lawsuit
22 against us.

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1 Q. And again, any discussions that would
2 occur in defense of litigation would be
3 privileged; is that correct?
4 A. I believe so.
5 Q. Have the states brought enforcement
6 actions against participating manufacturers?
7 A. We've had a lot of matters that never
8 end. I talked about them previously. The House
9 of Prince and the Brown & Williamson, R.J.
18:49:53 10 Reynolds, General Tobacco are just some that come
11 to my mind.
12 Q. Have you been involved in the review of
13 an MSA application of a tobacco manufacturer?
14 A. Yes.
15 Q. Can you describe in detail about that
16 process?
17 A. I volunteered to lead the process
18 against the MSA application process for Nasco and
19 so I kind of, with assistance from others, I kind
18:50:16 20 of coordinated it.
21 Q. And what did that mean, what does that
22 involve?

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1 A. I'm aware of others. I'm aware of the
2 Grand River's 2006 application. I'm aware -- I am
3 aware of some others. I'm aware of General
4 Tobacco's, when they joined the Master Settlement
5 Agreement.
6 Q. Do you know when that was more or less?
7 A. I think General Tobacco joined in 2004,
8 or maybe it was 2003. I think was 2004.
9 Q. When was Nasco?
18:51:56 10 A. Nasco, I can't remember. '08, '07.
11 Q. And you mentioned that GRE had
12 submitted an application --
13 A. Well, they did.
14 Q. -- to join the MSA?
15 MR. LUDDY: Object for the record. We
16 are so far beyond scope of cross that I'm going to
17 ask for a standing objection and when the chairman
18 decides that we've gotten there, we'll get there.
19 PRESIDENT NARIMAN: Do you have more?
18:52:27 20 MS. MONTOUR: I just want to know, are
21 we going to have an opportunity -- I mean, there's
22 a whole lot of evidence that we've never seen

1480

1 A. Well, you have an application and you
2 have to provide a variety of pieces of
3 information, then you have to kind of, you know,
4 do your due diligence, if you will, to make sure
5 these are who they are and inspect their factory
6 and look at their business plan and be sure we
7 have a corporate culture statement that, you know,
8 is in line with the MSA's principles and make sure
9 their trademarks are lined up properly. And then
18:50:48 10 advise the other states and contact them and let
11 them know, because every state has to review and
12 approve. So it takes a fair amount of time.
13 Q. Approximately how long did it take --
14 A. Nasco took months.
15 Q. And were they approved?
16 A. Yes. As an MSA member.
17 Q. In fact, I believe you mentioned in the
18 list --
19 A. They're on our directory, too, but
18:51:25 20 they're also a member of the MSA.
21 Q. Were you involved in the review of any
22 other MSA applications?

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1 before that my friend is now wandering off on a
2 trail. I just want to know if we are going to
3 have an opportunity --
4 PRESIDENT NARIMAN: He knows what to
5 do. He will apply for leave to cross-examination.
6 MS. MONTOUR: We can't bring witnesses
7 nor are we able to file statements from our
8 witnesses with respect to these matters that my
9 friend is now raising. These are new matters that
18:52:51 10 she's talking about and new evidence that we've
11 never heard before and certainly this gentleman is
12 well outside the scope of his affidavit.
13 Are we going to be able to file
14 affidavits in response?
15 MS. CATE: This is all within the
16 purview of this case.
17 MS. MONTOUR: It is within the purview
18 of the case, but it's not within the purview of
19 the evidence filed and we did not file evidence in
18:53:18 20 response to the statement this gentleman is now
21 making. It puts us in quite an unfair position.
22 MS. CATE: I believe, if you'll let me

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1 continue quickly, you'll understand why this is
 2 actually --
 3 PRESIDENT NARIMAN: No, the objection
 4 is different. The objection is that it should
 5 have been in his affidavit. They would have met
 6 it. Nothing is in his affidavit. We are giving
 7 you the liberty to go on, but we might have to
 8 shut out all this evidence because they are not in
 9 the affidavit. That's correct. And they should
 18:53:47 10 have been put first. I don't know your American
 11 system to ask this in redirect, if it's put forth
 12 then at least he can cross-examine.
 13 MS. CATE: I understand, Mr. Chairman.
 14 And I would just ask you to refer, for example,
 15 today to the redirect of Mr. Montour and examine
 16 that in light of the affidavits that he submitted
 17 to determine whether the redirect was actually
 18 within the scope of those declarations. And you
 19 could do that with any other witness, especially
 18:54:18 20 look at Mr. Herring's declaration with regard to
 21 the scope of the cross-examination that was given
 22 in that particular examination and you'll find

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1 PRESIDENT NARIMAN: If you're going to
 2 take more than five minutes, then please, let him
 3 common Monday.
 4 MS. CATE: I'll quickly proceed.
 5 PRESIDENT NARIMAN: Let him come back
 6 on Monday, then. I'm sorry. We can't go on like
 7 this until dooms day because tomorrow
 8 unfortunately, tomorrow is not there, that's all.
 9 Otherwise he's a witness, call him on Monday or
 18:55:46 10 Tuesday. And you can examine. Then you can sit
 11 for as long as you like, but this is not fair,
 12 Madam. I'm very sorry, it's not fair.
 13 You must include it in generally, a few
 14 things here and there outside the affidavit are
 15 all right, but not -- you go on with the whole set
 16 of things of what happened, Attorney General, and
 17 NAAG and so on.
 18 MR. KOVAR: Mr. Chairman, I think that
 19 when you examine what he's been testifying to,
 18:56:18 20 it's all directly within the scope of his
 21 responsibilities and it directly responds to
 22 evidence --

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1 it's well outside the declaration there.
 2 So I would just like you to bear with
 3 me quickly.
 4 PRESIDENT NARIMAN: We can go on.
 5 MS. CATE: I'll definitely proceed as
 6 quickly as possible. Thank you.
 7 MR. WEILER: One moment. There's
 8 obviously a difference between a cross and an
 9 additional chief.
 18:54:46 10 PRESIDENT NARIMAN: It should have been
 11 right at the beginning, Madam. Please, I have no
 12 doubt it should have been at the beginning. I was
 13 telling Mr. Crook, I didn't stop you because I
 14 like to indulge young people at the bar. I want
 15 them to do well.
 16 MS. CATE: I appreciate that.
 17 MS. MONTOUR: As is the Claimant is
 18 interested in getting the truth, the whole truth
 19 and nothing before the Court and I know my friend
 18:55:14 20 appreciates that position.
 21 MS. CATE: We are here in service of
 22 this tribunal to provide the truth.

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1 PRESIDENT NARIMAN: But Mr. Kovar, this
 2 all has to be done in the initial stage. When you
 3 call the witness you asked just two questions,
 4 then he cross-examined, then in re-examination you
 5 ask him all this. It's totally wrong. That is
 6 totally wrong.
 7 MR. KOVAR: I understand that.
 8 PRESIDENT NARIMAN: Please, don't
 9 defend on this. Just because we are letting her
 18:56:50 10 go on.
 11 MR. KOVAR: If I could ask for a
 12 clarification, Mr. President. We're willing to
 13 stay here and listen to the redirect or the
 14 recross of Mr. Violi, but obviously that's an
 15 issue for you and the Tribunal members.
 16 PRESIDENT NARIMAN: He's entitled to
 17 recross.
 18 MS. MONTOUR: With all due respect,
 19 Mr. President, the issue is not whether we're able
 18:57:17 20 to redirect. The issue is whether we're able to
 21 bring a witness in or to provide other witness
 22 statements which respond to this new testimony of

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1 this gentleman that was not in his affidavit.
 2 PRESIDENT NARIMAN: No, it doesn't have
 3 to be in his affidavit, Madam. That's not the
 4 point. Cross-examining witness can ask anything.
 5 The boot is on the other foot. The person who
 6 calls the witness doesn't then in re-examination
 7 ask him a whole set of new questions which is not
 8 in the affidavit. That's the principle. I mean,
 9 please don't alter the principle.
 10 18:57:51 In cross-examination you can ask this
 11 witness anything you like, but you're not
 12 cross-examining. He's your witness. That's the
 13 distinction. I hope -- you people here don't
 14 realize anything about practice. You go on asking
 15 all sorts of questions. It wouldn't happen in my
 16 court or in my country, I can assure you.
 17 But however, it's there so. Let's see.
 18 MS. CATE: Thank you.
 19 Q. So just to continue where we left off
 18:58:24 20 quickly. So you're saying that --
 21 PRESIDENT NARIMAN: I suggest now you
 22 better call him now on Monday, Tuesday, Wednesday,

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1 your witness.
 2 MR. KOVAR: This is their witness, sir.
 3 PRESIDENT NARIMAN: Your witness.
 4 MR. KOVAR: But they called him as part
 5 of their case for cross-examination.
 6 PRESIDENT NARIMAN: This is your
 7 witness.
 8 MR. KOVAR: Yes, I know. And this time
 9 comes off ours.
 10 18:59:47 PRESIDENT NARIMAN: I don't know how
 11 it's all right. That's a matter of administrative
 12 arrangement.
 13 MR. KOVAR: We would want a
 14 clarification that the most convenient thing would
 15 be to ask Mr. DeLange to come back on Monday.
 16 PRESIDENT NARIMAN: Ask him.
 17 MR. KOVAR: Then the Claimant, we would
 18 finish this redirect, the Claimants would be able
 19 to recross him and then that would be the end of
 19:00:09 20 the Claimants' case then we would bring our case.
 21 MR. LUDDY: Our time is not up.
 22 MR. WEILER: We have 15 hours. We

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1 whenever you want and ask him whatever number of
 2 questions you want. I'll give him opportunity to
 3 cross-examine. I'll give him opportunity to
 4 object. We can't go on until dooms day, until
 5 8:00 o'clock or 9:00 o'clock, that's not fair.
 6 MR. KOVAR: Mr. President, if everyone
 7 is exhausted and wants to finish, we can stop and
 8 we can resume our redirect on Monday, if that's
 9 more convenient to you and Claimants can do their
 10 18:59:02 recross.
 11 PRESIDENT NARIMAN: They can ask him
 12 any questions they want, certainly much better.
 13 MR. KOVAR: If you'd rather wait and do
 14 it on Monday.
 15 PRESIDENT NARIMAN: Whenever
 16 convenient, he's an outside witness.
 17 MR. KOVAR: But we'd like to finish. I
 18 guess what I would like to ask you, Mr. Chairman,
 19 this was supposed to be I think under the schedule
 18:59:28 20 the end of the Claimants' case. This was their
 21 last witness that they called.
 22 PRESIDENT NARIMAN: Who called? It's

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1 intend to use it.
 2 MR. KOVAR: You'll continue after that?
 3 MR. LUDDY: We may or may not. We'll
 4 advise on Monday --
 5 PRESIDENT NARIMAN: The point is not
 6 about the 15 hours. The point is we stop now, you
 7 call him anyway you like, whether the 15 hours is
 8 there or not there. We can't speak strictly to
 9 time, we want all the evidence that's there for
 10 19:00:39 ourselves. We don't want to shut out anybody.
 11 Please, it's not proper for a Tribunal, in my
 12 view, to shut out any evidence at all.
 13 Please ask. I have no objection
 14 between this as further examination in chief,
 15 that's all. Take cross-examination. This is
 16 further examination.
 17 MR. VIOLI: Mr. President, for the
 18 record, subject to the Reservation we've made --
 19 PRESIDENT NARIMAN: Yes, you make that.
 19:01:03 20 MR. VIOLI: But I have only three
 21 minutes of cross-examination now, not now, but for
 22 this witness thus far I estimate three minutes of

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1 cross-examination. But reserving our right -- but
2 I have only three minutes for this witness at this
3 point.

4 PRESIDENT NARIMAN: Try to finish,
5 Madam.

6 MS. CATE: I have about five questions
7 and I'm done.

8 PRESIDENT NARIMAN: Five questions will
9 take half hour indicate.

10 19:01:28 MS. CATE: No, I promise.

11 Q. So as to the application of GRE to the
12 MSA, can you tell me when they submitted that
13 application?

14 A. I believe it was April 3, 2006.

15 Q. And what do you understand to be the
16 context of that request?

17 A. My understanding is they wanted an
18 answer within ten days, I think, and then when
19 states had not responded yet, they treated it as a
20 19:02:05 rejection and then filed a motion in the Federal
21 Court to, I guess, compel the states to admit
22 them.

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1 time process involved.

2 Q. And you noted that Nasco and General
3 Tobacco joined, they were formerly NPMs and they
4 joined MSA?

5 A. Nasco was not -- they were a start-up
6 company, so they were not an NPM. They wanted to
7 start as a member of the MSA. But General Tobacco
8 was member of the NPM that then joined and they
9 became an MSA member.

10 19:03:55 Q. Did either of these companies receive a
11 grandfather share?

12 A. No.

13 Q. Would they have been able to request
14 one?

15 A. No.

16 Q. Has GRE ever submitted MSA application
17 after the one submitted in 2006?

18 A. I'm not aware of one.

19 19:04:15 MS. CATE: Thank you very much. That's
20 my final question. Your witness.

21 CROSS-EXAMINATION
22 BY MR. VIOLI:

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1 Q. Just for the record, the U.S. Counter
2 Memorial Volume 8, Tab 121 is Grand River
3 Enterprises Six Nations versus Pryor and in that
4 document, there is on Page 6, Paragraph 2, a
5 discussion of Grand River's MSA application. And
6 it notes, "Grand River's stance smacks of pretext,
7 ten days is not enough time for NAAG to consider
8 an application to join the MSA, let alone one
9 involving an applicant litigating to have MSA
10 19:03:01 declared illegal."

11 Could GRE have been accepted under that
12 application to the MSA?

13 A. No.

14 Q. Why is that?

15 A. Well, at the time they were not -- I
16 guess today they're not either escrow compliant,
17 for example. They're certainly not escrow
18 compliant in our state so they would have to been
19 that issue resolved. And then it takes time.
20 19:03:22 Nasco it took months. It would have taken time to
21 review the application, then you have to get all
22 the states to review it and approve and there's a

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1 Q. As I said, we're reserving. I just
2 have the questions that come to my mind, I'll ask
3 them quickly, Mr. DeLange. Thank you.

4 You mentioned a Grand River Working
5 Group and you made representations to the Tribunal
6 about that group. Do you recall --

7 19:04:44 PRESIDENT NARIMAN: Mr. Violi, I want
8 to warn you, there are very important questions
9 that have been answered at this stage of almost
10 re-re-examination and if you want to just finish
11 with him, finish with him. I have no objection.
12 That's your choice. But then don't say if we
13 decide this evidence is admissible and should be
14 admitted, then don't complain.

15 You are entitled to cross-examine him.
16 You're entitled to ask him to come back. I'm not
17 bothered about the hours. We will sit if
18 necessary until 6:00, 7:00, whenever it doesn't
19 snow. But he must then come back. But that's
20 19:05:13 your choice. Please note what he said is
21 significant.

22 MR. VIOLI: I will, thank you,

1 Mr. President. Perhaps I will bring him back. I
 2 will make a representation to the Tribunal that I
 3 have seen a document called the Grand River
 4 Working Group and it has list of Attorneys General
 5 and on that list of Attorneys General are some
 6 Attorneys General who are not sued by Grand River.
 7 PRESIDENT NARIMAN: Okay. What I'm
 8 saying, hold your horses. Please hold your
 9 horses. I mean, ask him whatever you want to at a
 19:05:43 10 convenient time.
 11 MR. VIOLI: We'll reserve to bring him
 12 back on Monday.
 13 PRESIDENT NARIMAN: Yes, he has to come
 14 back. Sorry, Mr. DeLange you have to come back
 15 whenever it's convenient to you in the course of
 16 next week. We'll stop everything and take you
 17 immediately. That can't be helped.
 18 MR. KOVAR: Mr. President, may I just
 19 ask then perhaps we could ask Claimants if we're
 19:06:16 20 not going to reconvene until Monday morning, how
 21 much longer they would plan to use their time
 22 before they turn the case over the United States

CERTIFICATE OF REPORTER

1
 2
 3 I, John Phelps, RPR, CRR, Court
 4 Reporter, do hereby certify that the foregoing
 5 proceedings were stenographically recorded by me
 6 and thereafter reduced to typewritten form by
 7 computer-assisted transcription under my direction
 8 and supervision; and that the foregoing transcript
 9 is a true and accurate record of the proceedings.

10 I further certify that I am neither
 11 counsel for, related to, nor employed by an of the
 12 parties to this action in this proceeding, nor
 13 financially or otherwise interested in the outcome
 14 of this litigation.

15
 16
 17 JOHN PHELPS, CSR, RPR, CRR
 18
 19
 20
 21
 22

1 for response.
 2 MR. WEILER: What is our time?
 3 SECRETARY YANNACA-SMALL: You have
 4 three hours and 48 minutes, minus 75 or plus 75,
 5 and you have 12 hours and 1 minute.
 6 MR. WEILER: I don't think we're in a
 7 position, unfortunately, to answer to what extent
 8 we're going to use that three hours because we
 9 need to think about this witness.
 19:06:56 10 PRESIDENT NARIMAN: Let's see. Take it
 11 as it comes.
 12 ARBITRATOR CROOK: Can we go off the
 13 record?
 14 PRESIDENT NARIMAN: This is all off the
 15 record.
 16 ARBITRATOR CROOK: We are on the
 17 record. Should we conclude the formal proceedings
 18 at this point, Mr. Chairman?
 19 PRESIDENT NARIMAN: I think so, yes.
 19:08:19 20 (Whereupon, at 7:07 p.m., the hearing
 21 was adjourned until 9:00 a.m., Monday, February 8,
 22 2010.)