

1 IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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2 PENNSYLVANIA DEPARTMENT OF GENERAL: NO. 284
 SERVICES, PENNSYLVANIA : M.D. 1990
 3 DEPARTMENT OF TRANSPORTATION, :
 PENNSYLVANIA PUBLIC UTILITY :
 4 COMMISSION, PENNSYLVANIA EMERGENCY:
 MANAGEMENT AGENCY, and :
 5 PENNSYLVANIA DEPARTMENT OF STATE :
 Plaintiffs :
 6 Vs. :
 UNITED STATES MINERAL PRODUCTS :
 7 COMPANY, CERTAINTIED CORPORATION, :
 COURTAULDS AEROSPACE, INC., :
 8 CHEMREX, INC., PHILIPS ELECTRONICS:
 NORTH AMERICA CORPORATION, :
 9 ADVANCE TRANSFORMER COMPANY and :
 MONSANTO COMPANY :
 10 Defendants :

11 BEFORE THE HONORABLE CHARLES P. MIRARCHI, JR.

12 February 1, 2000

13 Trial testimony in the above-captioned
 14 matter, held at the Commonwealth Court of
 15 Pennsylvania, City Hall, Courtroom 453,
 16 Philadelphia, Pennsylvania, on Tuesday,
 17 February 1, 1999, at 9:55 a.m., before
 18 John W. Begley, a Registered
 19 Professional Reporter - Notary Public there
 20 being present.

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6 1 MR. EDGE: In the name of the 2 Commonwealth of Pennsylvania, this 3 Commonwealth Court is now declared open, 4 the honorable Charles P. Mirarchi, Jr., 5 presiding. Please be seated. 6 Good morning. 7 THE COURT: Good morning. 8 I would like to congratulate 9 each of the jurors on their ability to 10 overcome difficulties and be present and 11 on time. 12 Mr. Goutman. 13 MR. GOUTMAN: John Woodward. 14 MR. EDGE: Just state your 15 name for the record, please. 16 THE WITNESS: John Woodward. 17 MR. EDGE: I would remind you 18 that you are still under oath. 19 --- 20 JOHN P. WOODYARD, recalled to 21 testify. 22 --- 23 BY MR. GOUTMAN: 24 Q. Good morning.	8 1 Q. And you have done this all over 2 the world? 3 A. Yes, sir. 4 Q. Do you know of anyone who has 5 done more PCB cleanup work than you? 6 A. No, I don't. 7 MR. MC CLAIN: Objection, Your 8 Honor. This is self-serving testimony. 9 How would he know whether anyone has done 10 more PCB cleanup work? It is, essentially 11 it is a self-serving question, Your Honor. 12 MR. GOUTMAN: It is 13 credentials. 14 THE COURT: Overruled. 15 BY MR. GOUTMAN: 16 Q. I don't know if the jury heard 17 the answer. Do you know of anyone who has 18 done more PCB cleanup work than you, 19 Mr. Woodward? 20 A. No, I don't. 21 Q. Are there any standard 22 procedures that PCB specialists such as you 23 follow in cleaning up buildings that have 24 PCBs in them?
7 1 (Jurors respond good morning) 2 Good morning, Mr. Woodward. 3 A. Good morning. 4 Q. Mr. Woodward, I think we ended 5 up with your discussing your conclusions as 6 to where the PCBs came from. After the fire 7 were PCBs found in the T&S Building? 8 A. Yes, they were. 9 Q. To your knowledge, were there 10 any wipe or air samples taken before the fire 11 that showed PCBs in the building? 12 A. No, there were not. 13 Q. Now, do you know how to clean up 14 PCBs from a building? 15 A. Yes, I do. 16 Q. What kinds of buildings have you 17 cleaned up PCBs from? 18 A. Again, from last week, the list 19 is long. It includes apartments, office 20 buildings, a number of different multi-story 21 buildings, hospital facilities, nursing 22 homes, as one example, as well as 23 manufacturing plants, power plants, gas 24 plants, water treatment plants.	9 1 A. Yes, there are. There's a 2 standard series of steps that we typically 3 follow, those of us who have been doing this 4 for a long time, and these have been 5 developed over many, many years. 6 Q. Did you help us prepare an 7 exhibit that shows these standard steps? 8 A. Yes, I did. 9 MR. GOUTMAN: Your Honor, we 10 are going to show the jury Exhibit 3154. 11 Can everyone see that? 12 (The jury responds yes) 13 BY MR. GOUTMAN: 14 Q. Can you see it? 15 A. Yes, I can. 16 Q. Would it be easier if you came 17 down to discuss it? 18 A. Let's give it a try. 19 Q. You are going to have to keep 20 your voice up, Mr. Woodward. 21 A. This graphic is entitled, 22 "Standard PCB Cleanup Procedure". 23 Q. Can everyone hear the witness? 24 (The jury responds yes)

10 1 BY MR. GOUTMAN: 2 Q. Mr. Woodyard. 3 A. This, as I said, this is pretty 4 much a basic step wise procedure that has 5 been developed by those of us who do this 6 over many, many years. 7 Just to, perhaps, illustrate how 8 simple this is, you do this sort of thing 9 probably without even realizing that you are 10 doing it in your daily life. Not necessarily 11 related to PCBs, of course, but day-to-day 12 activities around the house, at work, or what 13 have you. Probably the best illustration of 14 how this procedure goes is through a home 15 illustration of mine. I have a six year old 16 little girl and -- 17 Q. The Indian princess? 18 A. Indeed. 19 MR. MC CLAIN: Your Honor, I'm 20 sympathetic to children and all and homey 21 stories, but it's not in the report. 22 MR. GOUTMAN: It is an 23 illustration. 24 THE COURT: The Court	12 1 see what is there. Looking at it and 2 saying, in this case it is very easy to 3 say it is Kool Aid. It's not Pepsi, it is 4 not something else, so you immediately 5 know it is Kool Aid. If it is grape Kool 6 Aid you start to panic because you are 7 worrying about staining the carpet, so you 8 characterize it right away. 9 Risk assessment is involved in 10 the same way. What damage might have been 11 done here by this Kool-Aid? Did it land 12 on the carpet? Did it land on a formica 13 counter top? You do that very quickly and 14 say it is not a problem. I can probably 15 mop this up. 16 The cleanup steps that we go 17 through, obviously there's different 18 things you might do, but you can pretty 19 much group it into two categories. 20 The first one is what we call 21 a gross cleanup, and this is usually what 22 you do is visibly trace, in the case of 23 the Kool-Aid, you are immediately going to 24 grab paper towels or something like that
11 1 recognizes what Mr. McClain has said. It 2 is correct, we are all sympathetic with 3 children. 4 THE WITNESS: Just to help 5 illustrate how this process works, to try 6 to relate it to something you could 7 probably relate to, my little girl, on a 8 fairly regular basis unfortunately, spills 9 Kool Aid and stuff like that. Knocks over 10 glasses of liquid at the dinner table, for 11 example. Using these steps, let's assume 12 we are sitting at the dinner table and she 13 does knock over a cup full of Kool Aid. 14 You go through the same steps. You would 15 go through the same steps very quickly in 16 your mind. 17 The first thing you do is 18 right the glass. Immediately throw down a 19 napkin, paper towel, anything you could 20 find to stop that liquid from moving 21 around or dripping off the table or 22 whatever the situation might be. That's 23 what we are calling containment. 24 Characterization is testing to	13 1 to soak up all the Kool-Aid that you can 2 see. That's this Phase 1. 3 When you are done with Phase 4 1, very quickly, hopefully, you have no 5 visible remains of this Kool-Aid, but what 6 you do have, if you put your hand on it, 7 on that formica counter top, is a sticky, 8 syrupy kind of residue, and you may not be 9 able to see that, but you still need to 10 clean it up. So cleanup Phase 2 is more 11 like a situation you have with your car, 12 where you actually take some Formula 409 13 or detergent out of the cupboard and spray 14 it straight on it again and again to get 15 rid of that stickiness material, feeling. 16 That's that step. 17 The next step is your 18 confirmation, and in the case of this 19 Kool-Aid, the confirmation is, again, that 20 stickiness test. Since you can't see it 21 after you have done this cleaning you 22 might touch it and see if there's any 23 stickiness feeling to it. If there is you 24 clean it again and if there's not you are

1 satisfied.
2 And final report is, in that
3 case I'm done. I need to go tell my wife
4 everything is okay or I need to tell my
5 girl not to do that again, for what that's
6 worth, but that final report process is
7 basically the closure documentation. It
8 is when you are all done, you take some
9 act to satisfy everybody that you are
10 done, and then you go on.

11 BY MR. GOUTMAN:

12 Q. Are you saying that Kool-Aid is
13 the same as PCBs?

14 A. No, of course not, but I think
15 the point is that clear that there's a
16 process that you go through and a lot of it
17 involves basic common sense. Some of the
18 details in here, risk assessment, types of
19 cleanup techniques, of course, are going to
20 vary for PCBs, but the basic principals of
21 process, the process that you go through, is
22 the same.

23 Q. Could you take us through the
24 process with respect to PCBs?

1 A. In the case of a PCB release,
2 the first thing you do is, again, it is
3 containment. It is identifying where the
4 release occurred and making sure you separate
5 that area from areas that are clean.

6 Q. Why do you want to do that?

7 A. To avoid cross contamination, to
8 avoid having people track through it. Like
9 the Kool-Aid, if it hits the floor you don't
10 want people walking through it around the
11 house. The same thing is true in a release
12 like this. You don't want people tracking
13 it, you don't want dust or other debris to be
14 carried back and forth in a room that has got
15 the PCBs and one that does not, so you are
16 trying to limit the extent of the cleanup at
17 that point.

18 Characterization, the second step,
19 is testing to see what is there. We have --
20 a lot of people have talked about this in
21 this trial. It is the process of collecting
22 samples to determine where the PCBs might be
23 and at what levels they might be there, and a
24 lot of times you are dealing with something

1 that is not obvious. You are dealing with
2 contamination that might be invisible because
3 it so low and that's why we do some of these
4 air and wipe tests, just to make sure that we
5 fully characterize where the PCBs are and,
6 more importantly sometimes, where they are
7 not, so you make sure you separate those
8 areas and you don't cross contaminate areas.

9 Q. Why do you do the
10 characterization before the cleanup?

11 A. You always want to know what you
12 are cleaning up before you get started. You
13 don't want to start mopping or cleaning in an
14 area that is dirty and then moving that
15 somehow, even though you may not see it, to
16 the areas that are clean.

17 The third step in this is a risk
18 assessment, and that, we have talked about
19 that a lot, I think. That's the process you
20 go through, when scientists look at the type
21 of facility where the PCBs may have been
22 released. Look at the work habits. Look at
23 the other things that factor into to
24 determining the safe level, and they do the

1 calculations to develop what that safe level
2 is.

3 And the risk assessment is specific
4 to the particular building that we are
5 talking about. It's not a general national
6 number; it is something that would be very
7 specific, say, to the Transportation & Safety
8 Building or this courtroom or what have you.
9 It factors in all of the work habits and
10 occupancy of the building.

11 Cleanup Phase 1 and Phase 2 are very
12 much like what I was describing before.
13 Maybe somewhat more sophisticated, maybe
14 bigger, of course, in the case of a PCB
15 release, but your Phase 1 is to remove
16 debris, remove liquid that may have been
17 spilled on the floor, if it is a transformer
18 leak, but whatever, what you want to do
19 immediately is get anything that you know
20 contains a lot of PCBs from that release and
21 get it out of there because all it is going
22 to do is raise the possibility of this cross
23 contamination, have people tracking it
24 around, moving it around, so the first thing

1 you do is remove those kinds of visible
2 traces. In the T&S Building it might be
3 soot. It certainly is burned up bags of fire
4 debris and things of that nature.

5 The second phase of cleanup is the
6 fine tuning. After you have removed all of
7 the PCBs or what you suspect that are PCBs
8 that you can see, you start to sample because
9 there are going to be levels there that you
10 may be able to see and you want to make sure
11 they are below that safe level, so you go
12 through and make a more meticulous job of
13 cleaning with special solvents, but you use
14 certain wiping procedures. Instead of just
15 wiping around like you do on your kitchen
16 counter, you actually don't move the
17 contamination. You wipe it and fold the wipe
18 on the clean side. A lot of meticulous work
19 goes on during this phase when you get into
20 it, but it is much like I was describing with
21 that Kool-Aid spill.

22 Confirmation sampling is the testing
23 that you do when you think you are done, to
24 prove that you are done, so if you have done

1 this Phase 1, Phase 2 cleaning in one of the
2 rooms, you go in and you take samples and you
3 determine, based on those sampling results,
4 whether you are, in fact, clean. If you are,
5 block it off and make sure nobody tracks
6 anything back in there, but you use this
7 confirmation sampling as final proof,
8 basically, that you are clean.

9 And then final report, what we in
10 the business often call closure
11 documentation, meaning you document all of
12 these things. You say what you have cleaned.
13 You include a risk assessment,
14 characterization data, but most importantly
15 this confirmation sampling data, all of the
16 information that occupants and building
17 owners would need to feel that you have met
18 that safe standard, whatever it is, whether
19 it is EPA or whatever the risk assessment is
20 based upon.

21 Q. How many times have you, over
22 the years, followed this standard PCB cleanup
23 procedure?

24 A. Dozens of times. It is pretty

1 much the standard used on any type of
2 release, big or small.

3 Q. Over what period of time has
4 this standard PCB cleanup procedure
5 developed?

6 A. 15 or 20 years.

7 Q. 15 or 20 years?

8 A. Yes. At least.

9 Q. Now, based upon your review of
10 the test data, how much of the T&S Building
11 would have required cleanup using the 19.8
12 risk assessment value?

13 A. Virtually none. It was -- all
14 the levels on the floors were below.

15 Q. Using the test data that you
16 have analyzed, the thousands and thousands
17 and thousands of tests, how much of the T&S
18 Building after the fire required cleanup to
19 meet the EPA safe level?

20 A. The statistics showed about five
21 percent that would have still required
22 cleaning.

23 Q. Only five percent --

24 A. Correct.

1 Q. -- needed cleanup?

2 A. Correct.

3 Q. Now, have you prepared an
4 exhibit, a diagram, applicable to the T&S
5 Building showing how the T&S Building could
6 have been cleaned after following these
7 standard procedures?

8 A. Yes, I did.

9 MR. GOUTMAN: Your Honor, we
10 are showing the jury Exhibit 3155.

11 MR. MC CLAIN: This is the
12 same one that is in the report?

13 MR. GOUTMAN: Yes.

14 This one is pretty big.

15 Can the members of the jury
16 see that? (Indicating)

17 (Jury responds yes).

18 BY MR. GOUTMAN:

19 Q. Now, this is titled, "Schedule
20 of Fire Cleanup"; is that correct?

21 A. Yes, sir.

22 Q. And what does this represent?

23 A. This represents the schedule and
24 steps that I would go through to clean up the

1 T&S Building under what I'm calling the worst
2 case situation, meaning that there are levels
3 throughout the building above this EPA safe
4 standard which, as the data shows, that's not
5 the case at all, but please assume the worst
6 case. These are the steps that you would
7 have to go through and how long it would
8 take. (Indicating).

9 Q. And just so we can orient
10 ourselves, how many weeks from soup to nuts
11 does this take?

12 A. 12.

13 Q. 12 weeks?

14 A. Yes.

15 Q. Now, can you take The Court and
16 the jury through this schedule of fire
17 cleanup? This worst case scenario as you
18 have called it.

19 A. Just to get you oriented because
20 this is a pretty busy picture, this is a
21 diagram, schedule, chart, that we would use
22 on a lot of projects. What this shows down
23 the left side is a series of steps that are
24 pretty much an extension of the seven steps

1 that I showed you before, but including more
2 detail. Across the top is the schedule and
3 these blue lines across here represent what
4 we call duration. It is how long it would
5 take from start to finish. Roughly when that
6 activity would start, how long would it take
7 and roughly when it would finish, so you can
8 see there's kind of a sequence that goes on
9 during the course of the project. Once you
10 get that it is pretty easy to follow.

11 (Indicating)

12 these activities over here, as I
13 said, are additional detail on top of the
14 seven that I already provided. (Indicating)

15 in this case I'm arriving at the
16 site immediately after the fire. Assessing
17 the condition. Doing initial sampling.

18 That first week is taken up with
19 getting familiar with the situation,
20 collecting some samples, looking for PCBs,
21 getting a sense for where they may be, where
22 they may not be, and beginning to start
23 planning more in depth work, depending on how
24 those results go. Now, of course, if you go

1 through that process and find, as I have in
2 some cases, that there are no PCBs or the
3 levels are well below a safe standard, you
4 don't go any further. You opt out of this
5 whole schedule, but let's assume for this
6 worst case scenario we found that the levels
7 are above ten.

8 The next week you are spending
9 communicating with EPA, reviewing the
10 sampling results, preparing a more detailed
11 sampling plan based on what you found the
12 first time. You are starting to get into
13 more detail on where the PCBs would be.

14 In the third week you begin
15 actually doing a broader test. You might
16 actually bring lab equipment on to the site
17 if you are going to be taking a lot of
18 samples and running the samples right there.
19 A lot of this equipment is not bigger than a
20 big microwave, so it's not that hard to move
21 it around and set up next door and start
22 running tests all the time, so you are
23 reviewing the test results as you get them
24 back and deciding from that what floors need

1 what type of cleaning, what levels are
2 present. Pretty basic. You see it follows
3 that same seven step process that I was
4 talking about before. At some point you are
5 going to start looking at cleanup standards,
6 you are going to, in a PCB release, look at
7 the safe standard, depending on the scenario
8 that you are involved in or the type of
9 building that you are likely to do a risk
10 assessment to set a clean level specific to
11 that location and see how that matches up
12 with EPA's safe standard, and then at that
13 point you have pretty much decided how much
14 cleaning needs to be done, and from that
15 point on you are identifying where the waste
16 is going to go, selecting a contractor to
17 come in and do the work, developing the scope
18 for the project and so forth, and you get
19 down into this area, this last line, building
20 clearance. Remember I talked about
21 confirmation sampling before? That's all
22 this is. If you got a multi-story building
23 you are probably going to be finishing up
24 different floors at different times. You are

1 working on all of them at the same time, but
2 as you get done within a given area you take
3 samples, satisfy yourself you are done, you
4 block it, document it, block it up and move
5 on and this process, as we said before, would
6 take about 12 weeks for the T&S Building
7 based on what we know.

8 Q. If, in fact, the levels are as
9 you say they were, the tests results safe
10 they were, on average less than ten
11 micrograms, would all of this be necessary?

12 A. No, you would be focusing
13 specifically on the areas where you found the
14 elevated levels and cleaning those, so the
15 amount of time it would take to get the work
16 done, the amount of sampling that you need to
17 get done would be much shorter. It might
18 take as little as three or four weeks to do
19 that.

20 Q. So this schedule of fire cleanup
21 means what in terms of PCB levels?

22 A. It assumes that the levels on
23 all of the floors are above the EPA's safe
24 standard, so there's a cleaning required

1 everywhere and you need to go through this
2 more deliberate process to get to clean up.

3 Q. And were they, in fact, above
4 the EPA level?

5 A. No.

6 Q. Now, sir, taking this as you
7 said, worst case scenario post fire cleanup,
8 can you tell the jury how much it would have
9 cost, assuming again the levels were much
10 higher than they actually were in the T&S
11 Building?

12 A. I estimated that the cost of the
13 worst case cleanup would have been \$4
14 million.

15 Q. How much did the government
16 spend on all of the environmental contractors
17 they hired?

18 MR. MC CLAIN: Your Honor, I
19 object. He is comparing apples to oranges
20 and we need a side bar on this.

21 MR. GOUTMAN: That's a
22 speaking objection, Your Honor. I object
23 to that.

24 MR. MC CLAIN: I object.

1 The Court: We will have it at
2 side bar.

3 (Side bar discussion).

4 MR. MC CLAIN: As The Court
5 will recall, we didn't claim Cocciardi's
6 sampling as damages in the case, and now
7 the comparison is being made to what he
8 says our damages are and what we paid
9 Cocciardi. That would be misleading to
10 the jury as if to say they are seeking to
11 have us pay for this cost of Cocciardi's
12 sampling versus what they now want us to
13 pay in cleanup. That would be false, and
14 so if The Court is going to allow him to
15 ask this, The Court has to clarify that we
16 are not seeking Cocciardi's sampling costs
17 as part of our damages. That would be
18 unfair.

19 MR. GOUTMAN: Your Honor, this
20 Court made a ruling that the jury was
21 entitled to hear about Cocciardi's
22 sampling costs because it was relevant to
23 our failure to mitigate damages claim.
24 The evidence is, and it is in his report,

1 by the way, that they spent \$15 million on
2 an assortment of unqualified environmental
3 contractors who did over 20,000 tests and
4 they never did any cleanup. Mr. Woodward,
5 according to Mr. Woodward, the worst case
6 scenario is they could have cleaned up the
7 whole building for \$4 million. That's
8 highly relevant to our defense, Your
9 Honor, and it is comparing apples to
10 apples. It is money spent on
11 environmental contractors, in one case \$15
12 million and they were getting nothing for
13 it; in our case they could have spent \$4
14 million and gotten a clean building.

15 MR. MC CLAIN: Your Honor, the
16 issue is the jury will be led to believe
17 that we are seeking these as damages from
18 Mr. Goutman, which we are not, so they at
19 least ought to be instructed that this vis
20 is not part of Plaintiffs' claim. The
21 amounts that were discussed that were
22 spent on contractors are not being sought
23 as damages against Mr. Goutman. The
24 suggestion to the witness now will make it

1 appear to the jury that, in fact, it is
 2 part of it. Now, the witness won't know
 3 that unless Mr. Goutman has told him about
 4 what we are seeking in damages, but The
 5 Court knows it and we are not seeking
 6 these numbers as damages in the case, and
 7 so it would be inappropriate to allow this
 8 question to go on because there's no way
 9 to cross examine it, so without some
 10 clarification from The Court as to what
 11 purpose this is being allowed for and some
 12 clarification for the jury that the
 13 Plaintiff isn't seeking the environmental
 14 contractor damages in this case, this is
 15 only for purposes of illustration of this
 16 witness's testimony or some other
 17 appropriate instruction that The Court
 18 would deem proper, then it will be
 19 misleading and there's no way to correct
 20 it.

21 MR. GOUTMAN: Your Honor, this
 22 is all argument on Plaintiffs' counsel's
 23 part. In fact, they are claiming
 24 environmental contractor costs: Gannett

1 Fleming, Pennoni, CRSS, those are
 2 environmental contractors' costs that went
 3 in as part of their case. It is true,
 4 they are not claiming some of them and
 5 they announced that in the middle of the
 6 trial, in the middle of my Cross
 7 examination, Your Honor, but that was the
 8 first time we were told that.

9 MR. MC CLAIN: Why is it
 10 included in this number? It is not in
 11 this report, how he gets to this number.
 12 He says it is all of this testing that
 13 didn't go into cleanup. PennDOT, Gannett
 14 Fleming, all of those were clean up
 15 numbers, so if you are representing to the
 16 jury that these numbers didn't go towards
 17 the cleanup, that would be false, so I
 18 thought you were talking about Cocciardi's
 19 numbers and that's that \$15 million number
 20 that you have, for Cocciardi; not with
 21 Gannett Fleming, Pennoni, and the others.
 22 Those people were employed to help
 23 decontaminate the building before the
 24 building was demolished, so I hope you are

1 not going to make that suggestion to the
 2 jury. That would not be a fair
 3 characterization of those numbers.

4 MR. GOUTMAN: Frankly, we are
 5 once again at a point where Mr. McClain is
 6 discussing avenues of Cross examination
 7 and not admissibility. He discusses in
 8 this report the \$15 million as contrasted
 9 with the \$4 million. He should be able to
 10 say that to the jury. If Mr. McClain
 11 wants to make a point on Cross
 12 examination, let him, but this is my case.

13 MR. MC CLAIN: If what you are
 14 saying is that it is a permissible
 15 question to say and you are aware, are you
 16 not, Mr. Woodward, that the Plaintiff is
 17 not seeking those as damages in this case,
 18 then you are right. I can correct that on
 19 Cross examination, but he has objected in
 20 the past and The Court sustained that
 21 objection because how would the witness
 22 know what I'm seeking as damages. The
 23 problem is that the way this is proceeding
 24 is that Mr. Goutman gets away, maybe

1 inadvertently, with creating a
 2 misimpression in the jury's mind that I'm
 3 seeking these damages from him, and I'm
 4 not, so it would not be appropriate to
 5 allow this and then not allow the Cross
 6 examination at least so I'm trying to --

7 THE COURT: But these were
 8 sums expended and to that extent it is not
 9 a misstatement that these were sums
 10 expended, and the fact that you are not
 11 seeking the damages is something that you
 12 could bring out if that be the case.

13 MR. MC CLAIN: Fine.

14 THE COURT: Ms. Herschel, you
 15 were --

16 MS. HERSCHEL: I was just
 17 going to say, Your Honor, it sounds like
 18 you have ruled, so you don't need to hear
 19 from me. I always shut up when the ruling
 20 is finished.

21 MR. GOUTMAN: May I proceed,
 22 Your Honor?

23 THE COURT: Yes.

24 BY MR. GOUTMAN:

1 Q. I think my question was, sir,
 2 how much did the government spend on an
 3 assortment of governmental contractors?
 4 A. They spent about \$15 million.
 5 Q. And can you tell the members of
 6 the jury how much cleanup they got for that
 7 \$15 million?
 8 A. None. Virtually none.
 9 Q. What did they get for that \$15
 10 million, sir?
 11 A. 20,000 or more samples, a
 12 specification to begin abating before
 13 demolishing the building. Not much more.
 14 Q. Sir, was this standard PCB
 15 cleanup procedure followed by the government
 16 in this case?
 17 A. No, certainly not in the first
 18 two-and-a-half years.
 19 THE COURT: Could we get
 20 Mr. Woodward to stand closer to the
 21 microphone?
 22 MR. GOUTMAN: I think you are
 23 dropping your voice.
 24 THE WITNESS: Sorry, Your Honor.

1 I'm trying really hard not to use that other
 2 microphone because of the feedback.
 3 MR. GOUTMAN: Did The Court
 4 hear the last answer?
 5 THE COURT: No.
 6 Please read back the last
 7 question and answer.
 8 (The last question and answer
 9 were read back by the Court Reporter)
 10 BY MR. GOUTMAN:
 11 Q. This standard cleanup procedure
 12 has been around for how long?
 13 A. 15 or 20 years in some form.
 14 Q. What did the government do if
 15 they did not do the standard PCB cleanup
 16 procedure?
 17 A. The government did a textbook
 18 job basically of doing all -- everything
 19 wrong. There was no relationship between
 20 what they did and what was done or what I'm
 21 proposing should have been done here.
 22 Q. Have you prepared an exhibit
 23 that outlines your views on what the
 24 government did?

1 A. Yes, I have.
 2 Q. And, bottom line, what did the
 3 government do?
 4 A. The government made a series of
 5 major mistakes that ultimately resulted in no
 6 cleanup for most of the two-and-a-half years
 7 we are talking about.
 8 MR. GOUTMAN: Your Honor, can
 9 I now turn this over? (Indicating).
 10 THE COURT: Yes. And that is
 11 exhibit number --
 12 MR. GOUTMAN: I'm sorry, Your
 13 Honor. It is Exhibit Number 3120 A, as in
 14 Andrew.
 15 BY MR. GOUTMAN:
 16 Q. Now, this exhibit is entitled
 17 what, sir?
 18 A. It is entitled, "The
 19 Government's Mistakes".
 20 Q. Can the members of the jury see
 21 this?
 22 (The jury responds yes)
 23 Could you start with number one.
 24 That's a good number to start with.

1 A. The first item I have listed
 2 here is ignored established procedures. We
 3 spent a lot of time a little while ago
 4 talking about how to go about cleaning up PCB
 5 spills. I think you probably understand that
 6 by now. That set of established procedures
 7 was never followed during the course of this
 8 project.
 9 Second item, hired inexperienced
 10 contractors. The state began this process
 11 with Mr. Cocciardi back when the fire
 12 occurred. He remained on the project for
 13 several years. He had no experience doing
 14 work of this nature.
 15 Q. Now, DGS hired Cocciardi.
 16 A. Correct.
 17 Q. Who did PennDOT hire?
 18 A. I don't recall.
 19 Q. Was it Kimball and Associates?
 20 MR. MC CLAIN: Your Honor, it is
 21 leading.
 22 MR. GOUTMAN: There's no
 23 dispute as to who this contractor was.
 24 MR. MC CLAIN: It is still

1 leading. If the witness doesn't remember
2 who our contractor was that's significant.

3 THE COURT: Sustained.

4 BY MR. GOUTMAN:

5 Q. DGS hired Cocciardi. Now, did
6 Mr. Cocciardi have any prior experience in
7 any projects of this type and scope?

8 A. No.

9 Q. How about PennDOT's contractor?

10 MR. MC CLAIN: He doesn't
11 remember who it was.

12 MR. GOUTMAN: Whether he
13 remembers the name, how about PennDOT's
14 contractor? Did it have any prior
15 experience in projects of this type and
16 nature?

17 MR. MC CLAIN: Your Honor,
18 when he was asked a direct question he
19 said I don't remember.

20 MR. GOUTMAN: The name, Your
21 Honor.

22 THE COURT: As The Court
23 understood it, it was that Mr. Woodward
24 didn't remember the name.

1 MR. GOUTMAN: That's correct.

2 THE COURT: You may determine
3 whether or not he had any recollection as
4 to that contractor and if did he what it
5 was.

6 BY MR. GOUTMAN:

7 Q. Do you have any recollection as
8 to that contractor about that contractor's
9 background in PCBs and performing the work
10 that it was hired to perform by PennDOT?

11 A. Yes, they had no experience
12 doing work of this nature.

13 Q. What, if any, significance is
14 there to hiring inexperienced contractors on
15 a PCB project?

16 A. Well, if you hire a contractor
17 that has not done this kind of work before
18 they are not going to know anything about
19 established procedures, understanding the
20 government's regulations, and how to use them
21 and interpret them. You are just setting
22 yourself up for failure.

23 Q. Number three.

24 A. Number three, had no objective.

1 The objective on releases like this is always
2 quick, safe reoccupancy. Get back in as fast
3 as you can. Make sure you don't compromise
4 the safety of the employees and do a good
5 job. This project had no such objective, it
6 is obvious from the evidence.

7 Number four, this --

8 Q. Why don't we step back a second
9 and you tell us what was the sequence of
10 events after the fire, sir?

11 A. The state used their emergency
12 response contractor.?

13 Q. Yes.

14 A. They used their emergency
15 response contractor to get somebody on board
16 to handle asbestos related issues and contain
17 the fire floors, four through seven, as you
18 have probably heard before. At some point
19 shortly thereafter, maybe a couple weeks
20 later, they found out that the PCBs were
21 present in the building because of some
22 materials that they had seen burned. During
23 that two week period or three week period
24 they had already hired contractors to come in

1 and clean up soot and deodorize the building
2 and prepare it for reoccupancy, independent
3 of the PCB issue.

4 Q. Number four says what?

5 A. Number four refers, it says
6 ordered a superficial cleanup and what we are
7 talking about here is a -- is basically the
8 mopping and cleaning and wiping and
9 deodorizing that they hired the contractor to
10 do within the first week or two after the
11 fire. It doesn't refer to a PCB cleanup, it
12 doesn't use the same procedures I was talking
13 about before to make sure that you are
14 cleaning it up and not spreading it around.
15 All of the bases that go into this
16 established procedure really weren't followed
17 here because their goal wasn't to clean up
18 PCBs.

19 Q. When they were doing the
20 superficial cleanup had PCBs been identified
21 in the areas that they were cleaning up?

22 A. Yes, they had or at least the
23 possibility that they had been released had
24 been identified.

1 Q. On the occupied floors had PCBs
2 been identified at the time they were doing
3 the superficial cleanup?

4 A. No, they had not been measured.

5 Q. By the way, should you do a
6 cleanup when you don't know what you are
7 cleaning up?

8 A. No, you would always want to
9 figure out what it is you are cleaning
10 because it makes a difference in how you
11 clean, what detergents you use. Things like
12 that basically.

13 Q. And did the state do that?

14 A. No.

15 Q. How much did this superficial
16 cleanup cost?

17 A. About \$1.2 million.

18 Q. Number five.

19 A. Number five, never performed a
20 risk assessment. As we outlined before, it
21 is always good in a situation like this to do
22 some type of cleanup standard setting using
23 information specific to the building. There
24 was never a risk assessment performed as part

1 of this project to set standards or decide
2 what the targets were going to be before they
3 started cleaning.

4 Q. How much would it have cost the
5 state to do a risk assessment?

6 A. For this kind of project maybe
7 ten or \$20,000.

8 Q. Did they ever do one?

9 A. No.

10 Q. What is the standard procedure
11 regarding risk assessment? Are risk
12 assessments done on projects like this?

13 A. All the time. All the time.

14 Q. Number six.

15 A. Number six, the state ordered
16 reoccupancy before the characterization and
17 risk assessment.

18 Q. Now, you just have to take us
19 through that. They ordered reoccupancy
20 before characterization and risk assessment.
21 What do you mean by that?

22 A. Before they had determined what
23 the levels of PCB were in the building and
24 before they determined what the safe level

1 would be that was appropriate to it, they
2 sent people back into the building to go to
3 work again after they had finished that soot
4 cleaning and deodorizing that we walked
5 about.

6 Q. And how many years did the
7 people remain in the building without having
8 a risk assessment being done?

9 A. About two-and-a-half years.

10 Q. Is that standard procedure?

11 A. No, in a situation like this you
12 would never reoccupy until you had better
13 information and had some reasonable assurance
14 that the people would be safe, the levels
15 were below the safe standard.

16 Q. By the way, what were the levels
17 in this building?

18 A. The levels after that initial
19 janitorial cleaning was less than ten
20 micrograms on average on just about every
21 floor.

22 Q. Number seven.

23 A. Number seven, ordered perpetual
24 containment and monitoring without clean up

1 of fire floors.

2 Q. Now, what do you mean by that,
3 perpetual containment and monitoring?

4 A. When I'm talking about perpetual
5 containment, what I'm referring to is the
6 fact that floors four through seven, which is
7 where visible traces of fire damage had been
8 or at least a buffer around that, were closed
9 off. They were vacated. There was
10 ventilation installed to exhaust those floors
11 so that any PCBs from those floors couldn't
12 get around the rest of the building. That
13 portion of the building was closed off for
14 two-and-a-half years until the building was
15 ready to be abated and demolished.

16 Q. Was that containment done before
17 or after PCBs were found in those floors?

18 A. It was done originally before
19 because of the asbestos hazard.

20 Q. And you have, you say, perpetual
21 containment and monitoring. What do you mean
22 by that?

23 A. Once those floors were closed
24 off, there were still debris bags and other

1 things on the floors. The state, through
2 their contract with Cocciardi, continued to
3 order sampling, air sampling, some wipe
4 sampling, as well as a lot of other types of
5 monitoring, fire watches and so forth on
6 those floors, for the whole time.

7 Q. How much did all of this
8 containment and monitoring cost the state for
9 two-and-a-half years?

10 A. Cocciardi's contract, if that's
11 what we are talking about, was on the order
12 of \$9 million or more.

13 Q. Is there any reason, based upon
14 your experience as a PCB specialist, that
15 those fire floors couldn't have been cleaned
16 up in the first 12 weeks as shown on your
17 schedule?

18 A. They certainly could have been
19 cleaned up right away. In fact, having those
20 cleaned floors would have given the state
21 some flexibility or I guess what they call
22 swing space to allow them to move people to
23 those floors while they took care of others,
24 while there was additional work to do.

1 Q. I think you mentioned earlier
2 about the Phase 1 cleanup, cleaning up the
3 worst first?

4 A. Yes.

5 Q. Is that consistent with what the
6 state did?

7 A. No, there was debris, there was
8 dust, there was other material on those
9 floors that was an accident waiting to
10 happen. It was just contamination from PCBs
11 that were just waiting to move around the
12 building through tracking or ventilation or
13 other means.

14 Q. I think there was testimony that
15 Mr. Cocciardi did tens of thousands of first
16 aid kit inspections, monometer readings, so
17 forth and so on. Would any of that activity
18 be necessary had they simply cleaned up the
19 fire floors?

20 A. Hardly any of it because they
21 would have only had to do that work for a
22 period of a few weeks while they were doing
23 the cleanup.

24 Q. Eight, ordered wasteful testing.

1 What do you mean by that?

2 A. Again, that goes back to this
3 extended monitoring program that was going
4 on. Not only lab tests and air samples and
5 wipe samples that were being done over
6 two-and-a-half years, that could have been
7 avoided if the cleanup had just been done
8 right away, but also these fire watches and
9 monometer readings and other activities they
10 did on these isolated floors that they could
11 have stopped within a matter of a weeks if
12 they had just cleaned it up.

13 Q. I think you indicated that they
14 had done over 20,000 tests.

15 A. Yes.

16 Q. Had they simply cleaned up the
17 building in 12 or fewer weeks, would those
18 20,000 tests have been necessary?

19 A. No, most of them would have been
20 totally unnecessary.

21 Q. Permitted excessive
22 environmental contractor costs, what do you
23 mean by that?

24 A. Well, we already talked about

1 how they spent \$15 million before they ever
2 started doing any serious cleaning in the
3 building after that two-and-a-half years.

4 They also, because of the procurement
5 process, the way they hired contractors
6 through the state, managed to keep
7 Mr. Cocciardi on board to keep his monitoring
8 program going instead of hiring people that
9 knew how to do cleanups, and there were
10 several. They advertised, they received
11 proposals. There were several companies that
12 responded that were qualified to do this kind
13 of work right away, but the state instead
14 hired Mr. Cocciardi again, even though he was
15 the most expensive, so that's what I'm
16 referring to when I'm talking about excessive
17 environmental contractor costs. They are not
18 only wasting time, but spending more money.

19 Q. No systematic oversight. What
20 do you mean by that?

21 A. Well, it was kind of like the
22 blind leading the blind. Aside from the
23 contractors not having any experience doing
24 this kind of work, the people managing them

1 at the state had no experience doing this
2 kind of work either, so they couldn't even
3 watch and manage or control the work that was
4 being done.

5 Q. So you have inexperienced
6 contractors --

7 A. Inexperienced contractors.

8 Q. And who is supervising them?

9 A. Inexperienced state employees.

10 The 11th, last one, no
11 systematic cleanup. It is amazing to me that
12 no work was done on these floors in this
13 building for two-and-a-half years, that
14 cleanup plan wasn't developed, the protocol
15 that we talked about here just wasn't
16 followed. It was a tremendous waste of time
17 and a tremendous waste of money.

18 Q. Now, sir, there has been talk,
19 you have been talking about cleaning up to
20 the EPA level or to the risk assessment
21 level, either ten or 19.8. Is there any
22 reason why they couldn't have cleaned up to
23 the NIOSH level if that was their preference?

24 A. No, not at all. They could have

1 cleaned up to that lower level if it was
2 their preference.

3 Q. Now, sir, are you familiar with
4 the contents strategy?

5 A. Yes, I am.

6 Q. And could you remind the jury
7 what the contents strategy was?

8 A. The state elected to deal with
9 the furniture and other building contents
10 that were being relocated under a separate,
11 what I will call, an environmental contract
12 where they had somebody testing or developing
13 a testing program, doing testing on furniture
14 and determining if there was any, at least in
15 their view, any additional cleaning that was
16 needed before that furniture could be used
17 again.

18 Q. Was it just furniture?

19 A. No, all building contents. It
20 was office equipment, partitions, things like
21 that.

22 Q. Did you review the test data
23 generated during this contents strategy?

24 A. Yes, I did.

1 Q. And what conclusions did you
2 draw from that data?

3 A. The contents strategy was
4 unnecessary. The surface contamination
5 levels were well below the EPA safe standard.
6 Reminding you, again, the samples that were
7 being taken by Cocciardi and others in the
8 building were sampling the same office
9 equipment, so there were no surprises. When
10 they finally did take hard surface samples,
11 if you will, and they also sampled what I
12 will call soft surface items, foam chairs and
13 other materials that you couldn't wipe, they
14 are made of cloth and so forth. They found
15 an average in those pieces of office
16 furniture two parts per million in all of the
17 samples that they collected. The Food and
18 Drug Administration has standards for food --

19 MR. MC CLAIN: Your Honor, I
20 object. It's not in his report.

21 MR. GOUTMAN: Contents
22 strategy is discussed, Your Honor, at
23 pages two and 26.

24 MR. MC CLAIN: The Food and

1 Drug Administration is not mentioned.

2 MR. GOUTMAN: It is just
3 background, Your Honor.

4 MR. MC CLAIN: It's not
5 background; it is an opinion.

6 THE COURT: What page, Mr.
7 Goutman?

8 MR. MC CLAIN: It is on page
9 26, Your Honor.

10 MR. GOUTMAN: As well as page
11 two, Your Honor.

12 MR. GOUTMAN: Can we see The
13 Court at side bar?

14 THE COURT: One minute.
15 Now we can go to side bar.
16 (Side bar discussion).

17 MR. GOUTMAN: Your Honor, he
18 was just going to mention another PCB
19 regulation in the area that he's already
20 been qualified as an expert in. The Food
21 and Drug Administration, food tolerances
22 for PCBs, and he will explain that the
23 furniture in this building was so clean
24 that you could eat off of it under the FDA

1 food tolerance levels for PCBs.

2 MR. MC CLAIN: It is not in
3 the report.

4 MR. GOUTMAN: Your Honor --

5 MR. MC CLAIN: It's not in the
6 fair scope of the report. There's no
7 discussion about food tolerances or he is
8 going to offer opinions about food
9 tolerances or the FDA regulations. This
10 is the first time that we have heard about
11 them in the case, it is surprise, and I
12 object to it.

13 MR. GOUTMAN: Well, it is not
14 the first time; it has been mentioned in
15 our briefs frequently, but it is another
16 PCB regulation. He doesn't have to cite
17 chapter and verse all of the PCB
18 regulations in his report. He doesn't
19 cite, for example, the code reference for
20 either the Mega rule or the spill policy
21 and so forth, but this is how this witness
22 would identify a safe level as saying they
23 have sampled this furniture and the levels
24 were compliant even with food tolerances

1 and that's how he would come to the
2 determination, reviewing the PCB
3 regulations, that it was, as he said,
4 absolutely unnecessary to throw out this
5 furniture. They didn't even have to clean
6 it, let alone throw it out.

7 MR. MC CLAIN: Your Honor,
8 that opinion is in his report and I'm
9 prepared for it, but he can't make
10 reference to the FDA without some advance
11 notice, and there is no notice, there is
12 notice about the spill policy, there is
13 notice about NIOSH and there's notice
14 about the Mega rule. I'm prepared to talk
15 about those things.

16 THE COURT: Now, if the levels
17 that he's going to address are the NIOSH
18 levels then that is not a surprise.

19 MR. MC CLAIN: No, I'm not
20 saying it is; it is the FDA, the Food and
21 Drug Administration, that he is going to
22 talk about and there's no reference in the
23 report to the FDA regulations, nor have we
24 ever heard about them, and they should

1 have been disclosed within the report that
2 he was going to opine about them.

3 MR. GOUTMAN: Your Honor, they
4 have heard about them because it has been
5 in our briefs that we filed with this
6 Court. It is not -- he does not have to
7 site every single statute or regulation.
8 There's no question about that.

9 THE COURT: If there is an FDA
10 regulation which was met, then that was
11 available to everybody.

12 MR. GOUTMAN: The FDA
13 regulation is a matter of record.

14 MR. MC CLAIN: It is a matter
15 of disclosure.

16 THE COURT: Now, the next
17 question is what did we have in the record
18 that would warrant bringing in the FDA? I
19 recognize that the FDA regulations are
20 open for everybody, but how would it have,
21 how would a person have been aware that he
22 was going to testify to the FDA
23 regulations?

24 MR. GOUTMAN: Well, he's

1 saying that -- I think, frankly,
2 Plaintiffs were on notice that this
3 witness would talk about PCB regulations.
4 The FDA is one of the government entities
5 that regulate PCBs, but he says very
6 clearly that choosing to dispose of any
7 large group of items was not supported by
8 the data. They threw them out, all of the
9 soft surface items. They threw out
10 millions and millions of dollars worth of
11 chairs and partitions, and after only
12 testing about 30 of them, and the levels
13 were met or were less than what the FDA
14 allows in food.

15 MR. MC CLAIN: But the
16 standard we are applying was the NIOSH
17 standard and they talked about the EPA
18 standard. We are aware of those because
19 it is in the report, but no one ever
20 suggested that we ought to have sampled
21 the furniture to see what was safe in
22 food. It is a leap of -- and there's no
23 disclosure here. We were sampling, we
24 have had testimony that the standard we

1 were applying was NIOSH. He says it
2 should have been EPA. I'm ready for that
3 but this FDA standard, no one suggested
4 that we should have used a standard for
5 food to test furniture.

6 MR. GOUTMAN: First of all,
7 NIOSH has no standard or guideline,
8 whatever term you want to use, for bulk
9 samples. There's no standard for that.
10 And no one has testified about that. What
11 this witness is saying is looking at what
12 the state did, as he says in his report,
13 they are throwing out millions and
14 millions of dollars of furniture that was
15 so clean that you could even sell it as
16 food in a supermarket.

17 THE COURT: I think that
18 introducing the FDA food samples is beyond
19 the scope of the report and the objection
20 is sustained.

21 MR. GOUTMAN: May I proceed,
22 Your Honor?

23 THE COURT: Yes.

24 BY MR. GOUTMAN:

1 people continue to use that furniture?

2 A. About two-and-a-half.

3 Q. What conclusions, then, did you
4 reach concerning the millions of dollars
5 spent by the state on their so called
6 contents strategy?

7 A. My opinion is that it was a
8 waste of money.

9 Q. By the way, PennDOT's contractor
10 who came up with this strategy, did the
11 contractor have any experience in this field?

12 MR. MC CLAIN: Objection, Your
13 Honor. I don't think the witness has
14 identified any knowledge about PennDOT's
15 contractor.

16 MR. GOUTMAN: This foundation
17 has been laid, Your Honor. The Plaintiff
18 made the same objection and it was
19 overruled.

20 MR. MC CLAIN: No, Your Honor,
21 it was not. I think The Court asked
22 counsel to lay a foundation about his
23 knowledge about the subject.

24 THE COURT: May I have

1 Q. Mr. Woodyard, you mentioned that
2 the average levels of PCBs found in the soft
3 surface items was about two parts per
4 million.

5 A. That's correct.

6 Q. Are you aware of any federal law
7 or regulation that says two parts per million
8 PCBs is unsafe?

9 A. No.

10 Q. What did the state do with this
11 furniture?

12 A. They threw it away. They
13 replaced it.

14 Q. By the way, how many pieces of
15 furniture did they actually test before they
16 threw them all away?

17 A. Small number. Like 30. On that
18 order.

19 Q. Do you have any opinions or
20 conclusions concerning that conduct, sir?

21 A. There was no basis for throwing
22 that furniture away based on 30 samples that
23 averaged such a low PCB concentration.

24 Q. For how many years did the

1 question read back.

2 (The last question was read
3 back by the Court Reporter).

4 THE COURT: Sustained.

5 BY MR. GOUTMAN:

6 Q. Sir, the contractor whose name
7 apparently escapes you now, did you review
8 any of that contractor's documents?

9 A. Yes, I did.

10 Q. Did you review his deposition?

11 A. Well, Mr. D'Andrea is the
12 person. I couldn't remember the name of his
13 employer. I reviewed his deposition and he
14 admitted that he had no experience doing any
15 work of this nature.

16 Q. Did you review his trial
17 testimony?

18 A. Yes, I did.

19 Q. The person who wrote this
20 multi-million dollar contents strategy had
21 how much experience in that field, sir?

22 A. None.

23 MR. GOUTMAN: This might be a
24 good time for our morning break, Your

1 Honor.

2 THE COURT: All right. We
3 will take a brief recess.

4 MR. EDGE: The Court will take
5 a brief recess until the call of the
6 crier. Please, everyone remain seated
7 until the jurors leave the room.

8 (Court recessed)

9 MR. EDGE: You may be seated.
10 This Court is in session.

11 MR. GOUTMAN: May I proceed,
12 Your Honor?

13 THE COURT: Yes.

14 BY MR. GOUTMAN:

15 Q. Mr. Woodward, let me just go
16 back to one subject briefly.

17 You were talking about the soft
18 surface items, furniture and so forth, and
19 the sampling indicating an average of two
20 parts per million bulk sample. Does NIOSH
21 have any guideline with regard to bulk
22 sampling?

23 A. No.

24 Q. The one microgram per 100

1 centimeters squared that the jury has heard
2 about, does that have anything to do with
3 bulk sampling?

4 A. No, it is hard surfaces, non
5 porous surfaces.

6 Q. Now, are you familiar, sir, with
7 the abatement and demolition specifications
8 for this building?

9 A. Yes, I am.

10 Q. And could you just tell the jury
11 what abatement and demolition specifications
12 are?

13 A. It is, in general, it is the
14 specification that an engineer would put
15 together to explain to a contractor what they
16 are supposed to do, or in the case of a bid
17 process, what they are supposed to bid on,
18 and in this case it specifically was the
19 removal of asbestos and PCBs in the building
20 before demolition.

21 Q. Is there any reason related to
22 PCBs that necessitated the demolition of the
23 T&S Building?

24 A. No, sir.

1 Q. Is there any reason why, if they
2 wanted to, the government could not have
3 cleaned up the T&S Building?

4 A. No reason at all.

5 Q. Did, in fact, they eventually
6 clean up the building?

7 A. Yes, they did, just prior to
8 demolition.

9 Q. Did you reach any conclusions
10 regarding the abatement specifications
11 written by the state's environmental
12 contractors?

13 A. I concluded that they were in
14 general put together by people with little or
15 no PCB experience.

16 Q. Why don't we go through that.
17 For the abatement, who did the
18 state hire to do the abatement
19 specifications?

20 A. They hired Gannett Fleming.

21 Q. And did Gannett Fleming have any
22 experience designing PCB abatement
23 specifications?

24 A. No, they did not.

1 Q. So who did Gannett Fleming hire
2 to assist them?

3 A. They hired an outfit called
4 Pennoni as consultants to help with the
5 specification.

6 Q. Did Pennoni have any experience
7 in designing abatement specifications for
8 PCBs?

9 A. No, they did not.

10 Q. So what did they do?

11 A. They hired individual
12 consultants to help them out with the
13 specification.

14 Q. What was the consultant's name?

15 A. The one that comes to mind is
16 Mr. Shortsleve.

17 Q. Mr. Shortsleve.

18 Had Mr. Shortsleve ever designed
19 an abatement specification for an office
20 building?

21 A. No, not to my knowledge.

22 Q. Was there any other contractor
23 on site during this time frame involved with
24 the abatement specifications?

1 A. I don't know if it was with the
2 abatement specifications, but CRSS was
3 managing the overall demolition project, so
4 they were involved as well.

5 Q. Did CRSS have any such
6 experience?

7 A. No, they did not.

8 Q. Now, who at the state was
9 overseeing or supervising all of these
10 inexperienced contractors?

11 A. Mr. Rados.

12 Q. Did Mr. Rados have any
13 background in environmental matters?

14 A. No, he did not; he's an
15 electrical engineer.

16 Q. Mr. Rados was an electrical
17 engineer?

18 A. By training that's my
19 understanding, yes.

20 Q. So you had Mr. Rados supervising
21 Gannett Fleming, which had no experience;
22 Pennoni, which had no experience --

23 MR. MC CLAIN: Your Honor, this
24 is just a -- I object, Your Honor. This

1 is just a leading question and an
2 argument.

3 MR. GOUTMAN: I'm just
4 summarizing where we were before we go on
5 to something else.

6 MR. MC CLAIN: By the nature
7 of summary it is an argument.

8 THE COURT: Sustained.

9 BY MR. GOUTMAN:

10 Q. Did anyone involved in this
11 multi-million dollar abatement project have
12 experience abating PCBs from office
13 buildings?

14 A. No.

15 Q. What happened as a result of
16 that?

17 A. Again, a tremendous waste of
18 time and money.

19 Q. Specifically, sir, with respect
20 to the abatement specifications, did you
21 reach any conclusions as to what, if any,
22 aspects of those specifications wasted time
23 and money?

24 MR. MC CLAIN: Can you just

1 refer me to a page? I'm not remembering
2 this.

3 MR. GOUTMAN: Page 28.

4 MR. MC CLAIN: I'm not seeing
5 it.

6 MR. GOUTMAN: 29, 24. 23, 24.

7 MR. MC CLAIN: Okay.

8 MR. GOUTMAN: Can you read
9 back the last question.

10 (The last question was read
11 back by the Court Reporter)

12 BY MR. GOUTMAN:

13 Q. With respect to those abatement
14 specifications that were written by these
15 individuals, did you reach any conclusions as
16 to whether there were any aspects or which
17 aspects of those specifications resulted in
18 the waste of time and money?

19 A. Well, in general, there are two
20 big cost aspects in a specification like
21 that. One is demolition preparation and one
22 is disposing of the waste material. In both
23 areas they showed their lack of experience in
24 developing the specification. For disposal,

1 for example, I think I mentioned this last
2 week, based on the sampling data showing only
3 one sample in Mr. Kominsky's database at
4 least above 50 parts per million, they
5 decided to remove all of the fireproofing and
6 treat it as a TSCA waste instead of just
7 removing that one little area and taking the
8 rest of it off to an asbestos landfill.

9 Q. What is the significance of
10 that?

11 A. The cost difference is
12 tremendous. The cost of going to an asbestos
13 landfill is relatively inexpensive and cheap
14 and the cost of going to a TSCA landfill,
15 which is heavily regulated and is very
16 expensive.

17 Q. Was it necessary for them to
18 take all of that asbestos and put it in a
19 TSCA landfill?

20 A. No, sir.

21 Q. And, again, why not, sir?

22 A. Because essentially it is
23 unregulated by EPA or it doesn't require that
24 it go to one of these TSCA or expensive

1 landfills for disposal.

2 Q. And why is that?

3 A. Because it was almost all below
4 this 50 part per million level that I have
5 talked about before.

6 Q. Any other aspects that involved
7 a waste of time and money?

8 A. Again, going back to disposal,
9 materials like ductwork, caulk that was
10 removed from the building contained PCBs, but
11 EPA would have allowed those materials to go
12 to a non TSCA landfill, which is, as I said,
13 is a significant savings of money.

14 Q. Let me start one at a time.

15 First with the ductboard,
16 ductwork, had the state taken out the
17 asbestos and put in the sprinklers, would the
18 ductboard be removed as part of that project?

19 A. Yes, it would.

20 Q. And why is that?

21 A. Because it is common to remove
22 duct before you do abatement because it is in
23 the way and it may have fireproofing over
24 spray on it. There could be a number of

1 reasons.

2 Q. So if you are taking out the
3 asbestos, for whatever the reason, what
4 happens to the ductboard? Is that going to
5 remain in place?

6 A. No, it is going to be removed
7 and thrown away.

8 Q. Now, sir, where did they take
9 the ductwork when they threw it away?

10 A. To a TSCA landfill.

11 Q. And did they have to do that?

12 A. No.

13 Q. Why not?

14 A. Because EPA was already on
15 record as permitting that type of waste
16 disposal in non TSCA landfills, the less
17 expensive option.

18 Q. How about, you mentioned the
19 caulk. What did they end up doing with the
20 caulk?

21 A. They ended up chiseling the
22 caulk off the exterior of the building and
23 throwing it away in a TSCA landfill.

24 Q. And how much did this exercise

1 of chiseling caulk from the exterior of the
2 building cost the state?

3 A. Almost a million dollars.

4 Q. And was that necessary?

5 A. No.

6 Q. Why not?

7 A. Again, because EPA had made it
8 clear that they thought demolishing buildings
9 with materials like this with caulk in it was
10 perfectly okay and that the demolition debris
11 from that building could be taken to a
12 regular demolition landfill, rather than one
13 of these TSCA, really expensive TSCA
14 landfills.

15 Q. And did they take the caulk to a
16 TSCA landfill?

17 A. Yes, they did.

18 Q. And along with all of the
19 concrete that they chiseled out?

20 A. Yes.

21 Q. And what is your opinion
22 concerning doing that?

23 A. Well, it was unnecessary. It
24 was a waste of money. A lot of money.

1 Q. Now, sir, we have heard, the
2 jury has heard, the phrase or the word Mega
3 rule before. Could you tell the jury what
4 the Mega rule is?

5 A. Well, the PCB regulations have
6 been in place for, I guess, 22 years now. It
7 has been a long time. And during that time
8 EPA has evaluated those rules, evaluated
9 their policies and procedures about PCB
10 disposal and about cleanup, and in 1991 they
11 proposed some pretty significant changes to
12 those rules.

13 Q. Who proposed these changes?

14 A. EPA.

15 Q. The EPA, itself.

16 A. Yes.

17 Q. Okay. And what happened between
18 1991 and the time it was formally adopted?

19 By the way, when was it formally
20 adopted?

21 A. It was formally adopted in June
22 of 1998.

23 Q. And between 1991 and June of
24 1998 what was the EPA's policy concerning the

1 Mega rule?

2 A. The EPA was willing to consider
3 the provisions that they were proposing in
4 these rules for specific projects?

5 Q. And during that time did you
6 have any actual experience dealing with the
7 EPA and the Mega rule?

8 A. Yes, I did.

9 Q. And based upon that experience
10 what did you conclude?

11 A. Relative to this project, that
12 the state should have gone to EPA and
13 proposed to use the provisions of those new
14 rules as part of this project.

15 Q. Had they done that what would
16 have resulted?

17 MR. MC CLAIN: Objection, Your
18 Honor. Calls for speculation.

19 MR. GOUTMAN: It is an opinion
20 of an expert.

21 MR. MC CLAIN: Your Honor,
22 opinion is fine, but clairvoyance is not.

23 MR. GOUTMAN: Your Honor --

24 THE COURT: Overruled.

1 BY MR. GOUTMAN:

2 Q. Had a proposal been made -- by
3 the way, do you just -- how is this done? Do
4 you just walk up and say, Hey, EPA. I want
5 to follow that Mega rule? Is that how it is
6 done?

7 A. No, of course not.

8 Q. How is it done?

9 A. The rules, since they were put
10 into force 22 years ago, have always had
11 provisions allowing for you to make an
12 argument, if you will, on the basis of risk.
13 We have heard a lot about that in this case.
14 Put together some data from the lab, put
15 together other scientific backup, and then
16 provide it to EPA and ask for permission to
17 do something that is different than what is
18 in the regulations. It is common to do this.
19 There's been dozens and dozens of people
20 receiving permits for different types of uses
21 and disposal options. It is a scientific
22 process. It is more than simply going in
23 with your hat in your hand and saying please
24 give me permission. You need to support that

1 argument with good technical information.

2 Q. Did the inexperienced
3 contractors and the inexperienced supervisor
4 at the state do that?

5 A. No, they did not.

6 Q. And what was the result?

7 A. The result was that they
8 proposed to do exactly what was in the
9 regulations without proposing any
10 alternatives to that to save money to do
11 things that were not significant risks to
12 human health or the environment. They pretty
13 much ended up doing exactly what was in the
14 rules. Actually, to some extent they went
15 beyond the regulations.

16 Q. And what was the result of that?

17 A. Again, in my opinion, a
18 tremendous waste of money doing things that
19 weren't really necessary.

20 Q. Sir, did you review the
21 abatement contract and the costs of the
22 abatement?

23 A. Yes, I did.

24 Q. Did you analyze that for actual

1 pre demolition costs incurred by the state?

2 A. Yes, sir.

3 Q. Who did the abatement? What
4 company?

5 A. An outfit called PDG.

6 Q. And what was PDG paid to abate
7 the entire building?

8 A. About \$12 million.

9 Q. And what is it that they abated
10 the building of?

11 A. Primarily asbestos and some PCB.

12 Q. Of that \$12 million actually
13 spent by the state to clean up the building
14 before they blew it up, how much is actually
15 related to PCBs?

16 A. Probably about two million of
17 their expenses.

18 Q. Let's break that down. How
19 about the caulk? What did PDG do with the
20 caulk pursuant to the state's specifications?

21 A. They chiseled it out of the
22 outside of the building and disposed of it.

23 Q. And was that necessary?

24 A. No.

1 Q. How much did that end up costing
2 the state?

3 A. Almost a million dollars.

4 Q. How about for PCB
5 decontamination costs?

6 A. I reviewed the payment schedule
7 for the contractor, how they broke out their
8 cost estimate so that they could get paid if
9 the project proceeded, and the PCB
10 decontamination portion of that was about
11 \$868,000.

12 Q. And how much was related to the
13 asbestos?

14 A. The balance.

15 Q. About what?

16 A. As I said, about \$10 million.
17 There were some additional costs that aren't
18 listed there related to changes in work
19 protection that were different. In fact, the
20 level of protection that had been used for
21 the two-and-a-half years was downgraded.
22 That's the term we use. Instead of having
23 air lines feeding the respirators for
24 breathing air, it was determined that they

1 didn't really need those to do this work, so
2 they would put on regular respirators like we
3 normally use for doing this type of work, so
4 that cost another \$100,000, so in round
5 numbers the asbestos portion was about \$10
6 million of the 12.

7 Q. Do I call the PCB PPE -- what do
8 you call that?

9 A. Personal Protective Equipment.

10 Q. And that was about 100,000?

11 A. Approximately, yes.

12 Q. And was that necessary, in your
13 opinion?

14 A. No. No, it wasn't.

15 Q. Did the state, itself, make any
16 determination as to whether that was
17 necessary?

18 MR. MC CLAIN: Objection, Your
19 Honor. It is leading.

20 MR. GOUTMAN: I'm asking
21 whether the state made a determination.

22 THE COURT: Overruled.

23 THE WITNESS: No, they
24 determined that it was unnecessary and

1 allowed the downgrade.

2 BY MR. GOUTMAN:

3 Q. Now, this deals with
4 pre-demolition costs. Based upon your
5 background, sir, were you able to determine
6 how much it would have cost to take out the
7 asbestos had they decided to not blow up the
8 building, but rather take out the asbestos,
9 put in sprinklers, and reoccupy the building?

10 A. Yes, I estimated that asbestos
11 abatement cost to be about, I believe, 13.3
12 million.

13 Q. And what does that include and
14 not include?

15 A. It includes abatement or removal
16 of fireproofing, pipe insulation, tile. It
17 is a straight forward asbestos abatement
18 project.

19 Q. Does it include replacement of
20 those items?

21 A. No, not in this case.

22 Q. Now, you mentioned tile. What
23 are you talking about?

24 A. Vinyl asbestos tile that was in

1 portions of the building was also removed
2 before demolition.

3 Q. It was floor tile?

4 A. Yes.

5 Q. Now, based upon there being
6 levels of PCBs in the asbestos, according to
7 Mr. Kominsky, an average of about 17 parts
8 per million, what additional cost would there
9 have been to the state to take out the
10 asbestos because of the PCBs in the asbestos?

11 A. Perhaps \$100,000, I believe I
12 estimated for slight changes in the way they
13 protect the workers, but there would have
14 been no effect, no significant effect
15 certainly, on the way that the waste was
16 disposed of when it was ultimately taken to a
17 landfill, as we discussed before.

18 MR. GOUTMAN: This is Exhibit
19 3120 A, Your Honor.

20 THE COURT: Could I see that?

21 Thank you.

22 BY MR. GOUTMAN:

23 Q. Sir, you have testified in some
24 detail about the government's mistakes. What

1 resulted from these mistakes?

2 A. Doing all of the things that
3 they did ended up resulting in millions
4 wasted on contractors, millions wasted on
5 sampling, monitoring, millions wasted upon
6 this contents strategy. We talked about
7 office equipment being thrown away for no
8 reason, the building being, building
9 occupants being relocated, the building being
10 blown up. These were all unnecessary. They
11 are all unnecessary.

12 Q. Sir, the contents strategy,
13 going back to that for one second, what, if
14 any, aspect of your post fire schedule would
15 have involved the contents strategy?

16 A. There would have been no
17 contents strategy. I have never heard of a
18 contents strategy as it relates to cleanups
19 like this.

20 Q. Sir, you have expressed a number
21 of conclusions in this case. Have you
22 reached those to a reasonable degree of
23 engineering certainty?

24 A. Yes, I have.

1 MR. GOUTMAN: May I confer
2 with counsel for a second?

3 THE COURT: Yes.

4 MR. GOUTMAN: No further
5 questions, Your Honor.

6 MR. MC CLAIN: It is to
7 Mr. Neal.

8 MR. NEAL: I don't believe so,
9 Your Honor. I think it is Mr. McClain
10 that is next.

11 THE COURT: I think we have
12 had Mr. McClain --

13 MR. MC CLAIN: Mr. Neal has
14 always followed --

15 THE COURT: Ms. Meyers?

16 MS. MEYERS: Your Honor, I
17 have a few questions for Mr. Woodward.
18 I'll go in whatever order The Court
19 prefers. I just wanted to let The Court
20 know that I have some questions.

21 MR. MC CLAIN: On what basis
22 is that?

23 THE COURT: What we have done
24 in the past, Mr. McClain had followed and

1 then Mr. Neal and then, if there were any
2 additional questions, Ms. Meyers or
3 Ms. Herschel.

4 Now, Mr. McClain, are you
5 suggesting that you defer your Cross
6 examination at this point?

7 MR. MC CLAIN: Oh, no, Your
8 Honor. I had remembered it differently.
9 I remembered that Mr. Neal followed Mr.
10 Goutman and that's the way we did it with
11 Mr. DeChiara and we did it with all of the
12 experts that he has called thus far, so I
13 thought we would follow that same order.
14 If The Court prefers it to be another way,
15 then I'm happy to do it that way, but I
16 had remembered that that's the way we had
17 been doing it. We can check that if you
18 want to.

19 THE COURT: I can appreciate
20 that. As far as The Court is concerned,
21 it's not absolutely certain and I would
22 have to go back into the record.

23 MR. MC CLAIN: If you want me
24 to go we need to take a break to get

1 organized here. I have get some
2 charts, et cetera.

3 THE COURT: Do you want to
4 take the lunch break now?

5 MR. MCCLAIN: Yes, we can do
6 that and come back.

7 THE COURT: All right.

8 MR. EDGE: This Court will
9 take a lunch recess until
10 1:30 p.m. Everyone remain
11 seated until the jury leaves the
12 room.

13 Okay, Jurors.

14 (Court recessed for lunch.)

15 MR. EDGE: This Commonwealth
16 Court is now reconvened. Good
17 afternoon, Your Honor.

18 THE COURT: Good afternoon.
19 I understand there are some
20 exhibits in question and we are to
21 review them now before we bring in
22 the jury. Is that correct?

23 MR. GOUTMAN: Yes, Your
24 Honor.

1 MR. MCCLAIN: I have shown
2 Mr. Goutman some of the blow-ups I
3 intend to use which are in the
4 nature of the same type of things
5 I've used on other witnesses. I
6 asked Mr. Woodyard to leave
7 earlier, but he's still here. I
8 would like Mr. Woodyard to absent
9 himself while we make the
10 argument.

11 MR. GOUTMAN: In fairness to
12 Mr. Woodyard, I don't think Mr.
13 Woodyard should be taking orders
14 from Mr. McClain. If he wanted
15 him to leave, he should have asked
16 me. In any event, it's
17 appropriate for him now to leave
18 the courtroom.

19 MR. MCCLAIN: I did ask your
20 partner, Ms. O'Neill, and she said
21 she would not. I did speak to
22 her.

23 MS. O'NEILL: I said Mr.
24 Woodyard will leave the courtroom

1 when the judge is sitting on the
2 bench and he's now doing so.

3 MR. MCCLAIN: I thought it
4 was inappropriate for him to be in
5 the courtroom while we looked at
6 the exhibits, but be that as it
7 may --

8 THE COURT: I believe as we
9 talk, Mr. Woodyard has left the
10 courtroom. Is that correct?

11 MR. GOUTMAN: Yes, sir.

12 MR. MCCLAIN: Most of the
13 blow-ups, Your Honor, are quotes
14 from articles or books that the
15 witness has written on PCBs. He
16 was qualified by counsel as a PCB
17 cleanup expert and most of these
18 relate to that subject matter
19 which he has testified to
20 extensively. So I've taken the
21 specific quotes from his articles
22 or books and put them on black
23 cards so they would be easier to
24 read as opposed to the TV screen

1 where we've had trouble seeing
2 them in the past.

3 So that's the nature of the
4 exhibits. I don't know what
5 specific ones they have objections
6 to, but we can take them up.

7 MR. GOUTMAN: I think the
8 first overall subject relates to,
9 and you don't have these, Mr.
10 McClain doesn't have small copies,
11 but they are for the record 4007
12 B, C, D and E.

13 THE COURT: They're the
14 numbers and we don't have copies
15 of them.

16 MR. GOUTMAN: Right. The
17 only ones that I'm aware of are
18 the blow-ups, Your Honor. But
19 they relate to this issue that the
20 court visited late last week
21 concerning the sending by Mr.
22 Ziegler of pre-fire samples to me
23 and then my sending them to a
24 laboratory for analysis, Mr.

1 Woodyard's laboratory for
2 analysis.

3 Apparently with these
4 exhibits Mr. McClain intends to
5 examine this witness as to whether
6 in fact the asbestos samples that
7 were analyzed were in fact
8 pre-fire. I most strenuously
9 object to that line of
10 questioning. I believe he is
11 estopped, because his office had
12 represented to me that those
13 samples were pre-fire, from now
14 pursuing that at this time and I
15 would respectfully move for a
16 mistrial if counsel does get into
17 that.

18 I have represented to the
19 court that I took whatever was
20 sent to me by Mr. Ziegler, and the
21 court will remember the cover
22 letter identifying those pre-fire
23 samples, and sent them to a
24 laboratory. To get involved with

1 this witness on that subject most
2 respectfully I think would be
3 completely wrong.

4 At this point, what am I
5 supposed to do, go on the witness
6 stand and testify? I believe it
7 would be highly prejudicial.
8 Plaintiffs represented to me they
9 were pre-fire samples. They
10 cannot now say or question this
11 witness or imply to the jury that
12 in fact they were not.

13 MR. MCCLAIN: Your Honor, we
14 went over all of this before. Mr.
15 Woodyard sat on the witness stand,
16 we objected to him testifying
17 about them at all because there
18 was no foundation for them. The
19 court said, and Mr. Goutman
20 agreed, these were matters that
21 could be handled on
22 cross-examination, Your Honor.
23 Mr. Mr. Woodyard could be asked
24 about them. He readily admitted

1 that his narrative in regard to
2 the fact that Mr. Ewing took
3 samples both before and after the
4 fire were in error. All of those
5 facts need to be brought out.
6 This document I never had before.
7 This one is the blown up document
8 of the chain of custody that Mr.
9 Goutman presented to us in court
10 that morning that has the notes of
11 the laboratory that says labels
12 001 through 014. Date added of
13 6-6-92. No date given on labels.
14 That's what the laboratory noted.

15 So the date that is recorded
16 there, the date in Mr. Woodyard's
17 report, the laboratory said they
18 made up because there was no date
19 on the package they received.
20 That's relevant to the jury to
21 understand. It's also relevant
22 for the jury to understand to see
23 the labels that they're talking
24 about. These labels have no dates

1 on them. They have no
2 identification. We don't know
3 where they came from. Did they
4 all come from one spot or did they
5 all come from different areas? No
6 one knows. And yet this witness
7 is opining about them being
8 samples widespread through the
9 building. No one represented that
10 to him. He said it. He made it
11 up. The laboratory didn't tell
12 him that. Likewise, are these
13 labels, I know it's difficult to
14 see with your prescription --

15 THE COURT: It would be
16 difficult to see even --

17 MR. MCCLAIN: But you have
18 this exhibit on the bench. I do
19 have smaller copies of the actual
20 exhibit that I'll hand to the
21 court. It's the chain of custody
22 that Mr. Goutman gave us. He gave
23 it to me in court and said this is
24 the basis upon which you could

1 admit these samples and these
2 results into evidence. I have a
3 right to cross-examine this
4 witness about the basis and what
5 the laboratory told him in this
6 chain of custody for him to make
7 these broad sweeping conclusions
8 that he's made. That the purpose
9 of them. I'm using the document
10 that Mr. Goutman gave me and the
11 information contained on the
12 document to demonstrate that what
13 is found in his report is not
14 accurate by the very document that
15 they presented us. So that's
16 point number one.

17 MR. GOUTMAN: Your Honor, I
18 would just like to correct the
19 record. At no time did I
20 represent to the court, and
21 counsel has the transcript and
22 will correct me if I'm wrong, at
23 no time did I represent to the
24 court that this was something that

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1 should be bandied about in front
2 of the jury. I represented to the
3 court during argument that I
4 believe any reference to this in
5 front of the jury would be a basis
6 for a mistrial. Just to correct
7 the record. And the reason for
8 that, Your Honor, is that I was
9 sent certain asbestos samples by
10 plaintiffs almost a year ago, and
11 Mr. Ziegler of his office in his
12 cover letter said these are
13 pre-fire samples. Now, almost a
14 year later -- and my expert wrote
15 a report on reliance upon that
16 representation. Almost a year
17 later, that expert is going to be
18 cross-examined to the effect that
19 that representation made by
20 plaintiffs' counsel is in error
21 and that in fact half of the
22 samples were not pre-fire.
23 Plaintiffs are estopped from doing
24 that now. If plaintiffs get

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1 involved in that, what are we
2 going to do, put Mr. Ziegler on
3 the witness stand? Put myself on
4 the witness stand? Recuse his
5 firm, recuse my firm since I
6 wouldn't be able to testify and
7 represent a client at the same
8 time? This, I think, is a very
9 serious matter, Your Honor. We
10 have defended this case based upon
11 representations by the plaintiffs
12 that what we got were pre-fire
13 samples and to allow plaintiff now
14 to get up and suggest to this jury
15 that they were not pre-fire
16 samples is -- there's a colloquial
17 term for it and it's called
18 sandbagging. A more precise legal
19 term for it is highly prejudicial.
20 Highly prejudicial and completely
21 inappropriate.
22 MS. HERSCHEL: Your Honor
23 has clearly ruled on this and
24 ruled this is not permissible.

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1 We're going over exactly the same
2 ground we went over last week.
3 MR. MCCLAIN: Your Honor,
4 that statement is just untrue. I
5 want to read to you the statement
6 that Mr. Goutman made to you about
7 whether I could cross-examine this
8 witness on it if you would permit
9 him to testify. Page 58, 59 and
10 60. That's the first reference.
11 MR. GOUTMAN: Excuse me,
12 page 58, 59, 60 of what date?
13 MR. MCCLAIN: January 27.
14 Thursday. First of all, Your
15 Honor, we never conceded that
16 these are the samples that we
17 sent. We sent the Gannett Fleming
18 samples. That's what the cover
19 letter said.
20 THE COURT: Excuse me.
21 What the court is concerned about
22 is the letter of January 18, 1999
23 from Humphrey, Farrington &
24 McClain signed by James M. Ziegler

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1 dated January 18, 1999 to Thomas
2 M. Goutman, Esquire, White and
3 Williams, re this case. Dear Tom,
4 I enclose the asbestos samples we
5 discussed earlier. They have been
6 split from samples taken by
7 Gannett Fleming from the T&S
8 Building before the fire occurring
9 in June 1994.
10 Is the plaintiff repudiating
11 this letter?
12 MR. MCCLAIN: We've made an
13 extensive record on it. Not at
14 all. We sent the Gannett Fleming
15 samples to them. The Gannett
16 Fleming samples are identified.
17 They're in the chain of custody.
18 They are those numbered samples
19 that are in the second part of Mr.
20 Woodyard's table. Those first
21 samples I have no idea about nor
22 does anyone else, and the
23 laboratory doesn't. Yet Mr.
24 Woodyard has gotten on the stand

1 and represented them to be
2 something they are not. No one
3 knows what they are. They are not
4 from all over the building. No
5 one knows where they were taken
6 from or when they were taken. A
7 date was placed on them by the
8 laboratory, not by plaintiffs'
9 counsel.

10 So the Gannett Fleming
11 samples that we represented we
12 sent to them are contained in
13 this, in the chain of custody,
14 Your Honor.

15 MR. GOUTMAN: Your Honor.

16 THE COURT: Wait a minute,
17 please.

18 MR. GOUTMAN: I'm sorry,
19 Your Honor.

20 MR. MCCLAIN: Could I bring
21 this to you?

22 THE COURT: Yes.

23 MR. MCCLAIN: Those are the
24 Gannett Fleming samples.

1 THE COURT: All of this may
2 be true. I am merely directing
3 the court's attention to the two
4 line paragraph -- one paragraph
5 letter of Mr. Ziegler that says
6 that these were before the fire
7 occurring June 1994.

8 Now, the first thing we have
9 to decide, if we're going to move
10 off of this point, is whether
11 you're repudiating this letter or
12 agreeing with the letter. If you
13 agree with the letter, then they
14 were pre-fire samples which is
15 what I believe may be the evidence
16 or the thrust of the defendant's
17 position in this matter.

18 If they're not pre-fire
19 samples, then this letter is in
20 peril. And the other question
21 would be, was there a second
22 delivery of samples from your
23 office to Goutman which could take
24 in the question of post-fire

1 sampling.

2 MR. MCCLAIN: Your Honor, to
3 answer your question, the letter I
4 believe is accurate, but what it
5 does not say is that we're sending
6 these unlabeled samples to you,
7 Mr. Goutman. That's the question
8 that I have. And we don't know
9 the answer to that, where those
10 samples came from. Mr. Ziegler's
11 letter refers to the Gannett
12 Fleming samples. Those are an
13 identifiable group of samples.
14 They are numbered correctly in Mr.
15 Woodyard's report and in the
16 analysis.

17 So we know what the Gannett
18 Fleming samples are and that they
19 are numbered properly and they are
20 identifiable. These are, I
21 believe, what Mr. Ziegler sent to
22 Mr. Goutman. What these other
23 samples are, I don't know. Let's
24 assume, Judge, for a minute that

1 Mr. Ziegler sent those. The
2 questions are still relevant for
3 this reason.

4 THE COURT: Mr. McClain.

5 MR. MCCLAIN: Yes, Your
6 Honor.

7 THE COURT: You say they
8 would be relevant, but the letter
9 doesn't address any other samples
10 except pre-fire samples. That's
11 why the court may be hung up on
12 that issue.

13 MR. MCCLAIN: I understand
14 your question. Here's the issue.
15 Let's assume that that is true, I
16 don't believe that it is, Your
17 Honor, but I can't prove it one
18 way or the other.

19 THE COURT: Then you don't
20 know if your office is accurate.

21 MR. MCCLAIN: I believe that
22 my office only sent these. That's
23 what I believe. I can prove to
24 you by the letters, I believe that

1 if I put this before the jury,
 2 they would find in favor of me as
 3 a statement of fact. Can I
 4 demonstrate exactly what samples
 5 were sent? The letter doesn't
 6 list for Mr. Goutman what samples
 7 were sent, but it does identify
 8 them as an the Gannett Fleming
 9 samples, which are an identifiable
 10 group, and they are not these
 11 samples that are listed 1 through
 12 14. Those are not Gannett Fleming
 13 samples as far as I know. There
 14 is nothing to identify them as
 15 such. I don't know what they are.
 16 Where he got them, how they got
 17 there, what they represent, I'm
 18 not sure. But even assuming that
 19 Mr. Goutman is being accurate and
 20 he believes they are pre-fire
 21 samples, if that is true, then
 22 where were they taken? No one
 23 represented anything about that.
 24 And Mr. Woodyard would not know

1 that. The laboratory doesn't know
 2 that because they have labels that
 3 say nothing except numbers, Your
 4 Honor. Were they all taken from
 5 one location? These are questions
 6 I would like to ask Mr. Woodyard,
 7 you see. Were they all taken from
 8 one location? Let's assume they
 9 were pre-fire, Mr. Woodyard.
 10 THE COURT: Again, somewhere
 11 I may be missing something. If
 12 these are the samples that are
 13 sent by Mr. Ziegler to a third
 14 party, in this case Mr. Goutman,
 15 either the samples themselves
 16 would be identifiable or Mr.
 17 Ziegler would know what samples he
 18 sent which could be identified,
 19 and he did identify them as all
 20 pre-the fire samples. Now, unless
 21 Goutman got two sets of samples.
 22 MR. MCCLAIN: And Your
 23 Honor, we had a number of samples
 24 we introduced in this litigation

1 on various occasions. We went
 2 over Mr. Ewing's testimony that he
 3 produced all 14 of his samples.
 4 Where are they? Where is the
 5 analysis? I don't know, are those
 6 confused? Did Mr. Goutman forward
 7 those? Were they sent directly by
 8 the laboratories between them?
 9 Were those obtained from Mr. Roux
 10 as part of the exchange of
 11 information between Mr. Roux and
 12 Mr. Goutman? I have no idea about
 13 these issues. All I'm trying to
 14 show is that as to these 14
 15 samples, they are a mystery. No
 16 one knows where they were taken
 17 even if you assume they were taken
 18 before the fire. Do you
 19 understand my meaning, Judge?
 20 THE COURT: I'm bound by
 21 your letter.
 22 MR. MCCLAIN: Judge, even
 23 assuming that that letter
 24 referring to those samples --

1 THE COURT: If they don't,
 2 then I would want testimony as to
 3 what Mr. Ziegler and Mr. Goutman
 4 talked about.
 5 MR. MCCLAIN: I'd be happy
 6 to put Mr. Ziegler on the stand to
 7 talk about that. He believes that
 8 what he sent him were these
 9 Gannett Fleming samples. That is
 10 what he told me was his belief
 11 about what was sent.
 12 Now, but Your Honor, if you
 13 could just look at the document in
 14 question, the one that we're going
 15 to cross-examine the witness about
 16 hopefully, from the laboratory,
 17 they don't identify what the
 18 location was. Nor does the letter
 19 say anything about location of
 20 these samples. It doesn't say on
 21 what date they were taken and yet
 22 they were all dated 6-6 of 1992.
 23 The laboratory put that date on
 24 there. The plaintiffs didn't.

1 And so there is a great
2 uncertainty about these samples.
3 Then if you looked at the
4 numbers and you raised the
5 question could these just be
6 splits of the previous samples?
7 Maybe. I don't know. Does the
8 witness know? We'll ask him if
9 that was his assumption because
10 they bear the same last three
11 digits. But if you look at the
12 results of those, the samples
13 diverge wildly in terms of the
14 results. It's only because he
15 lumps them all together and
16 averages them that he reaches
17 these conclusions that the
18 pre-fire and post-fire sampling
19 demonstrate that there was no
20 pre-fire contamination. All I'm
21 trying to show is the great
22 uncertainty in the date that he's
23 relied upon. Even if you assume
24 those are pre-fire samples.

1 Assuming that they are, which is
2 all the letter at its broadest can
3 represent. There is still great
4 uncertainty about what location
5 they came from and what they
6 represent. What dates they were
7 taken on. No one seems to know
8 nor did he care when he wrote his
9 report. In fact, what he did was
10 represented they were Mr. Ewing's
11 samples. Remember what Mr.
12 Goutman said about that, at page
13 58, 59 and 60 of the report he
14 said, "We got these samples from
15 plaintiffs' counsel." At the
16 bottom of 59, "And all Ewing's
17 reference is, is my mistake in
18 believing that Mr. Ewing, who was
19 working at the time in tandem with
20 Law Environmental, was in fact an
21 employee of Law Environmental."
22 But this is a subject of
23 cross-examination, he told the
24 court. We all know what the

1 sample are, Your Honor. Then he
2 goes on again and says later in
3 the discussion that this is
4 fertile subject of
5 cross-examination.
6 And that's where we left it
7 when we allowed Mr. Woodyard, who
8 didn't know where the samples had
9 come from and couldn't testify
10 about any of these matters,
11 testify and reach these broad
12 conclusions without an outside,
13 scientific basis for the most of
14 what he said. But this is the
15 subject of cross-examination. I
16 will bring that out on
17 cross-examination. Do you know
18 where the samples came from? No.
19 Do you know how many of them came
20 from the sixth floor? No. I
21 think he will agree with all those
22 matters.
23 So I have a right, Your
24 Honor, I believe, based upon the

1 very documents they gave to show
2 the great uncertainty about the
3 information there and it's not the
4 basis -- and it's not really the
5 issue as to whether or not all of
6 these were sent by Mr. Ziegler.
7 I'm sidestepping that issue
8 completely. It's the issue that
9 he doesn't know where they were
10 taken.
11 THE COURT: I don't know how
12 we could sidestep the question of
13 Mr. Ziegler because that
14 interjects another problem.
15 Because for Mr. Ziegler to send
16 them to Mr. Goutman, Mr. Ziegler
17 would have had to have those
18 samples in Mr. Ziegler's
19 possession. For Mr. Ziegler to
20 send them to Mr. Goutman, the
21 chain of custody for one-half,
22 because these were allegedly split
23 samples, half would have remained
24 with Mr. Ziegler of the splits and

1 half would have been sent to Mr.
2 Goutman.
3 Now, if there is no
4 identification of those samples or
5 where they came from except the
6 letter that these are the samples
7 about which we spoke, and they are
8 pre-fire samples, how can we get
9 other testimony to contradict this
10 and how can we then ensure that
11 the chain of custody to Ziegler
12 was not broken?

13 MR. MCCLAIN: They're
14 relying on the chain of custody.
15 You saw the chain of custody, of
16 which way it went. And Mr.
17 Goutman raised the issue and it
18 may be in fact the case that those
19 are split samples because they
20 bear the same numbers.

21 THE COURT: And I would have
22 to take it that Mr. Ziegler's
23 letter is an assignment and
24 admission of his chain of custody

1 of those samples which were
2 pre-fire samples.

3 MR. MCCLAIN: But Your
4 Honor, where is Mr. Goutman's
5 chain of custody to the
6 laboratory? We haven't seen the
7 transmittal letter. We don't know
8 what he sent. We have no idea
9 about these things. You were
10 given this chain of custody that
11 Mr. Goutman had from Severn Labs,
12 this thing here, and said this is
13 what the laboratories has. But he
14 claims not to have one. He claims
15 not to have a chain of custody
16 from his possession to the
17 laboratory, yet you allowed
18 testimony on it.

19 THE COURT: Mr. Goutman, how
20 do we establish chain of custody
21 once we get the chain of custody
22 of these samples to Mr. Goutman,
23 how do we get the chain of custody
24 to the laboratory they were sent

1 to?

2 MR. GOUTMAN: Because the
3 documents that were produced show
4 that within one week of my
5 receiving asbestos samples from
6 Mr. Ziegler represented to be
7 pre-fire, those samples arrived at
8 the laboratory and were logged in
9 as such. That letter is dated the
10 19th of January. They were logged
11 in the 26th, I believe.

12 I also want to correct the
13 record, Your Honor, and I think
14 counsel does owe this court an
15 obligation for candor, that I
16 never said to this court that this
17 is something that should be left
18 for cross-examination. As a
19 matter of fact, I said at page 86,
20 "Your Honor," starting at 85, "but
21 to take that position now, Your
22 Honor, in front of the jury, let
23 alone this court, that they are
24 not pre-fire samples when I

1 received them from plaintiffs'
2 counsel back a year ago and they
3 were at that time represented as
4 pre-fire samples, plaintiffs are
5 estopped from making that. If in
6 fact they pursue that on
7 cross-examination, I believe a
8 mistrial is appropriate.

9 So, Your Honor, just in the
10 interest of completeness, that was
11 what I represented to this court
12 last Thursday. But in terms of
13 chain of custody, we have a note
14 that I received it and we have a
15 note that within one week it was
16 received by the laboratory.

17 I would also like to correct
18 the record, plaintiffs' counsel
19 asserts to this court that
20 plaintiffs' counsel gave us other
21 asbestos samples. Plaintiffs
22 counsel never gave us any other
23 asbestos samples. We never
24 received any other T&S Building

1 samples from Mr. Roux, and Mr.
2 Roux's partner could probably
3 verify that. We never received
4 any asbestos samples from Mr.
5 Ewing or any other entity.

6 MR. MCCLAIN: Your Honor,
7 could I confer with Mr. Henderson
8 just for a moment?

9 THE COURT: Yes.

10 - - -

11 (Whereupon, a discussion was
12 held off the record.)

13 - - -

14 MR. MCCLAIN: Your Honor, on
15 this point that Mr. Goutman made
16 just a moment ago, I would like to
17 hand the court the full chain of
18 custody from the laboratory that
19 we blew those pages up if I could.

20 MR. EDGE: You may.

21 THE COURT: Do you have them
22 marked for identification?

23 MR. MCCLAIN: I have not
24 marked them, but we can. We'll

1 get an exhibit number for the
2 court.

3 These are the documents that
4 previously were handed to the
5 court at the hearing that we
6 identified in the transcript on
7 Thursday, January 27. These, Mr.
8 Goutman represented to be
9 documents from the laboratory,
10 Severn Trent Laboratories in
11 Chicago. And he says, "This
12 document establishes the chain of
13 custody of these samples."

14 MR. EDGE: We don't know
15 what number it is yet.

16 MR. MCCLAIN: 4,007, Your
17 Honor.

18 THE COURT: Do you have it
19 marked as PEN or DGS?

20 MR. MCCLAIN: PEN 4007.
21 This is the document that Mr.
22 Goutman gave us in court that day.
23 The documents establish a chain of
24 custody that Mr. Goutman gave us

1 in court that day and said it was
2 a document from the laboratory and
3 I have no reason to doubt that he
4 is being truthful about that.

5 However, I would tell the
6 court and remind the court that
7 Mr. Goutman's name does not appear
8 anywhere on this document. And
9 the client is RFW-Certainteed as
10 we see on the top of the document,
11 and on the back of the document it
12 says that the client contact/phone
13 is John Woodyard. So it could
14 well be that Mr. Goutman sent
15 these. I'd like to see a letter
16 saying that. As the court has
17 reminded us time and time again,
18 the palest ink is better than the
19 clearest recollection.

20 THE COURT: The strongest
21 memory, to be accurate.

22 MR. MCCLAIN: I was trying
23 to remember that last night how
24 that went. But the point is still

1 made. We demonstrated with a
2 written chain of custody where
3 these samples went, and then we
4 have a letter to Mr. Goutman which
5 gets the samples to Mr. Goutman.
6 Where is the correspondence that
7 gets the samples from Mr. Goutman
8 to the laboratory? The court
9 allowed that testimony without
10 that chain of custody, but we have
11 never seen it and apparently Mr.
12 Goutman says it does not exist.
13 So where are we then? Well, I
14 would think we don't have any
15 chain of custody for these samples
16 or the analysis that Mr. Woodyard
17 has provided. Without a chain of
18 custody, we can't be certain that
19 these are the samples that Mr.
20 Goutman was sent by Mr. Ziegler.
21 And that's the fundamental break
22 in the chain of evidence that we
23 have.

24 It was only because the

1 court allowed this testimony
2 without a chain of custody to come
3 in that I brought this to the
4 attention that the laboratory
5 doesn't even represent where these
6 samples came from. You can't make
7 the assumption they were taken
8 from different floors even and
9 that they supplied the date that
10 is found in the report because
11 there was no labels on the
12 samples. That's what they said
13 about them. Those are the points
14 that I want to bring out with Mr.
15 Woodyard. But if it's the court's
16 preference to strike this
17 testimony because there is no
18 chain of custody, I will withdraw
19 these questions because I do
20 believe that they would be proper
21 if the court is going to allow
22 this testimony. I think the court
23 has gone a long way by allowing
24 Mr. Goutman great leeway in

1 getting in samples without an
2 adequate chain of custody, and I
3 should at least be able to point
4 out from his own documents the
5 problems inherent in the witness'
6 report and the conclusions that he
7 draws without adequate
8 information. That's the essence
9 of what I wanted to ask him about.
10 MR. GOUTMAN: Your Honor,
11 there would be an inadequate chain
12 of custody if I weren't here. If
13 I didn't last week and this week
14 represent to this court as an
15 officer of the court exactly what
16 happened. Now, certainly the
17 court can decide that I am not
18 telling the truth. The court can
19 make whatever finding it wants,
20 but I will tell the court again
21 and I'll tell counsel again, who
22 continues to say I'm not
23 questioning Mr. Goutman's honesty,
24 but by the way, here is why I

1 question Mr. Goutman's honesty. I
2 received a letter, and the court
3 will recall, I sent a request for
4 production I believe it was in
5 August of the preceding year for,
6 among other things, pre-fire
7 samples. That was followed up by
8 correspondence I believe in
9 October and November or November
10 and December. That was followed
11 up by conversations that I had
12 with Mr. Ziegler and perhaps
13 others of his office. When am I
14 going to get the pre-fire samples?
15 And lo and behold I got the
16 pre-fire samples sometime shortly
17 after January 19, 1999.

18 I took the samples, gave
19 them to my secretary and said,
20 send those to Mr. Woodyard's
21 laboratory. And she did.

22 Now, there is no cover
23 letter. We did not generate a
24 cover letter. It was simply sent.

1 They noted receiving it
2 coincidentally within a week of my
3 receiving it.
4 We have defended this case
5 Your Honor for over a year now or
6 almost a year now based on the
7 assumption that what was in that
8 box from Mr. Ziegler were pre-fire
9 samples and it was a reliance upon
10 that that we generated an expert
11 report and we proceeded to trial.
12 The question now is whether this
13 court will permit plaintiffs to
14 say, uh-uh, we don't have any
15 evidence in fact that all 28
16 samples were not sent to you by
17 Mr. Ziegler, Mr. Ziegler obviously
18 will not come in here and so
19 testify, but we want to create the
20 impression to this jury that
21 something underhanded is going on,
22 that these in fact are not all
23 pre-fire samples. And in order to
24 litigate that factual issue, Your

1 Honor, in front of the jury, we
2 would have to have Mr. Ziegler
3 testify, we would have to have
4 myself testify, and that is a
5 serious tangent and it has
6 profound ethical considerations
7 concerning whether I could even
8 continue to represent Monsanto ten
9 months into this trial and whether
10 Mr. McClain can continue to
11 represent the plaintiffs.

12 Now, Your Honor, I believe
13 that plaintiffs are estopped at
14 this point from claiming that
15 anything, anything they sent me
16 was anything other than a pre-fire
17 sample. That's what they
18 represented to me, that's what I
19 represented to Mr. Woodyard, and
20 that's what is in his report and
21 that was what was in his
22 testimony. And most respectfully,
23 Your Honor, I believe that should
24 the court allow plaintiffs now to

1 essentially say, well, maybe we
2 were wrong, we can't say we were
3 wrong for sure, but maybe we were
4 wrong. Maybe we sent you some
5 non-pre-fire samples, or post-fire
6 samples. Maybe we sent you some
7 post-fire samples, and we're going
8 to cross-examine this witness on
9 that possibility, would do a grave
10 injustice to the defendants, be
11 severely prejudicial and in my
12 opinion, Your Honor, most
13 respectfully warrant a mistrial.
14 That's why we raise this
15 objection.

16 MR. MCCLAIN: Your Honor,
17 the issue is in the report of
18 Woodyard, he says that 14 of these
19 samples came from Ewing. He says
20 that there were 14 samples from
21 Ewing. That's the information we
22 had before we came to court until
23 last week when Mr. Goutman came
24 forward with this explanation for

1 the samples. Before that time we
2 had no explanation for them and in
3 fact called Mr. Ewing to the stand
4 to explain that yes, indeed, he
5 had sent samples to the PCB
6 defendants. That was never
7 challenged by the defendant when
8 Mr. Ewing was here. I have
9 subsequently confirmed with Mr.
10 Ewing that he in fact did send
11 fireproofing samples to the
12 defendants.

13 So we have these samples
14 that are an anomaly at best. The
15 real question is a technical legal
16 one and it doesn't involve anyone
17 testifying. It involves whether
18 we have a chain of custody that is
19 established. Mr. Goutman says he
20 gave them to his secretary. I
21 don't know how they do things at
22 White and Williams, but for the
23 life of me, how would the
24 secretary know where to send them?

1 Without a cover letter, what would
2 the laboratory know what to do
3 with them? Do they just get this
4 stuff in the mail with no kind of
5 identification and the laboratory
6 instinctively knows what to do
7 with them and to assign them to
8 Mr. Woodyard's account? And to
9 Certainteed? How do they know
10 that? How do they know to do
11 that? These samples according to
12 Mr. Goutman arrive at week later,
13 unidentified from Philadelphia and
14 the laboratory knows actually
15 where they're coming from, who
16 sent them and what purpose they're
17 going to be analyzed for. I don't
18 believe Mr. Goutman's memory is
19 accurate on this. I do not doubt
20 that he believes everything that
21 he is telling the court, but there
22 is something that doesn't add up
23 here. Why is there no transmittal
24 letter? Why does Ewing testify

1 that he had 14 samples, the 14
2 samples that are reflected here
3 perhaps. And that he turned those
4 over to the defendants. But Mr.
5 Goutman says he doesn't know
6 anything about them. There are
7 certain matters here that just
8 don't add up, Judge. And the
9 reality is we've let these samples
10 in without a chain of custody. So
11 we've got somewhat of a problem
12 here. The way that I intended to
13 handle it was --

14 THE COURT: Before we take
15 issue about not having a chain of
16 custody, we may not all agree on
17 the chain of custody, but the
18 court remembers correctly the last
19 person to sign off on the chain of
20 custody was Mr. Ziegler.

21 MR. MCCLAIN: And it goes to
22 Mr. Goutman and the issue is --

23 THE COURT: It goes to Mr.
24 Goutman in the form of the letter

1 we referred to earlier.

2 MR. MCCLAIN: Yes, and
3 that's the only chain of custody
4 we have. Under Pennsylvania law,
5 we have to have a chain of custody
6 from Mr. Goutman to the laboratory
7 and we do not have one. We do not
8 have one. And no one disputes
9 that we have one.

10 So the issue is, the witness
11 not knowing where the samples came
12 from, representing in the report
13 that they came from Ewing, should
14 we now be foreclosed from
15 demonstrating that from the
16 laboratory itself, that Mr.
17 Goutman represents analyzed these
18 samples, there is a lack of
19 identification of where these
20 samples came from or the dates
21 upon which they were taken. I
22 don't know on what principle we
23 can foreclose me from doing that.
24 It seems a matter of fundamental

1 fairness giving great liberality
2 to Mr. Goutman to these samples
3 into evidence without the general
4 pre-requisites the court normally
5 requires with regard to chain of
6 custody that I at least be able to
7 explore the lack of information
8 that we have for these samples.
9 That's what we ask the court to
10 consider in regard to making this.

11 Judge, I hesitate to say
12 this because I've not said it
13 before in the case, but we feel
14 strongly enough about these
15 samples that if we are foreclosed
16 from asking questions about them,
17 that we will have no choice but to
18 join in Mr. Goutman's motion for a
19 mistrial. This is fundamental to
20 our defense on these samples. And
21 the fact that the witness was able
22 to draw such conclusions from them
23 on the basis of misinformation
24 that has already been identified,

1 that is being Mr. Ewing took them
2 and he had them before the fire,
3 is a matter that the jury should
4 consider.

5 MR. GOUTMAN: Your Honor, I
6 don't like to belabor these
7 issues, but Mr. McClain has
8 continued to question my honesty
9 and I want to respond to this
10 court. First of all, again, he
11 says there is no question that we
12 don't have a chain of custody. We
13 do have a chain of custody. I
14 have stated as an officer of the
15 court what that chain of custody
16 is and what happened to those
17 samples.

18 Number two, this business
19 about Ewing and his testimony,
20 last week we heard that Ewing
21 testified there were really six
22 pre-fire samples. Mr. Ewing says
23 he sent them to "the defendants."
24 I told the court I never received

1 anything from Mr. Ewing. And this
 2 court you may recall said it would
 3 be unusual for Mr. Ewing to send
 4 samples directly to counsel and
 5 not through -- directly to defense
 6 counsel and not through
 7 plaintiffs' counsel. Then Mr.
 8 McClain said last week, well, Mr.
 9 Ewing sent them directly to the
 10 laboratory. The court may recall
 11 that. Mr. McClain said that to
 12 this court and I pointed out that
 13 Mr. McClain didn't know until last
 14 week what laboratory it was.

15 Now, the fact of the matter
 16 is that I got a box of samples
 17 from Mr. Ziegler and he told me
 18 they were pre-fire and I sent them
 19 to the laboratory. And that's
 20 what happened. Mr. McClain has
 21 nibbled at the edges to try to
 22 cast some doubt on the veracity of
 23 this. He says, for example, how
 24 is it that the lab would know what

1 to do with these without thinking
 2 about -- I have trouble listening
 3 and speaking at the same time --
 4 without considering, for example,
 5 that in addition to the U.S. Mail
 6 connecting Chicago with
 7 Philadelphia, there are
 8 telephones. And that Mr. Woodyard
 9 was an expert of ours, a
 10 consultant of ours and that I was
 11 in contact with him and that I was
 12 sending them to Mr. Woodyard's
 13 laboratory. Again, Mr. McClain
 14 again pointing out the client is
 15 identified as Mr. Woodyard. Yes.
 16 It's his laboratory, he's our
 17 expert. The client is also
 18 identified as Certainteed. As I
 19 advised the court last week, both
 20 Certainteed and Monsanto retained
 21 Mr. Woodyard. So, again, a lot of
 22 nibbling around the edges.

23 The point is that I received
 24 28 samples and I sent them to a

1 laboratory in reliance upon an
 2 assertion that they were pre-fire
 3 samples. I never received any
 4 other asbestos samples from Mr.
 5 Ziegler or anyone else in the
 6 claims office. Within a week
 7 there is written receipt of those
 8 samples from the laboratory.
 9 That's the record before this
 10 court.

11 MS. HERSCHEL: Your Honor, I
 12 don't want to oversimplify this,
 13 but it really isn't complicated as
 14 Mr. Goutman just said. We asked
 15 for, Monsanto asked for
 16 technically, pre-fire samples. As
 17 often happens in discovery, it
 18 took a little while, it took a
 19 formal request, it took a couple
 20 of letters, it took some telephone
 21 calls, but finally plaintiffs'
 22 produced pre-fire samples and as
 23 you're honor has focused again and
 24 again, there is a letter from Mr.

1 Ziegler, it has one critical key
 2 piece of information in it. It
 3 says, here are the pre-fire
 4 samples. He didn't give us dates
 5 when they were taken. He didn't
 6 give us places where they were
 7 taken. What information our
 8 laboratory got they took off the
 9 documentation that was with the
 10 samples. But he gave us one piece
 11 of information on which we relied
 12 and on which Mr. Woodyard relied
 13 and that was these are the
 14 pre-fire samples. And Mr. Goutman
 15 has told you those pre-fire
 16 samples from Mr. Ziegler stopped
 17 shortly in Philadelphia and went
 18 right on to our laboratory. They
 19 were analyzed. Mr. Woodyard
 20 relied on them, turned over a
 21 report relying on them to
 22 plaintiffs last February, and it
 23 is as simple as that.

24 MR. HENDERSON: If the court

1 please, may I ask Ms. Herschel a
2 question on the record? Do you
3 know who RFW Certainteed would be?

4 MS. HERSCHEL: I think it's
5 Roy Weston, but you could ask Mr.
6 Goutman if you would like to put
7 him on the witness stand.

8 MR. HENDERSON: Could you
9 tell me --

10 MS. HERSCHEL: Your Honor,
11 am I to be questioned here? I
12 will be glad to answer any
13 questions the court has, but I
14 guess I'm getting a little annoyed
15 at Mr. Henderson's approach to the
16 matter.

17 MR. HENDERSON: I would be
18 interested to know who Richard
19 Wright is.

20 MS. HERSCHEL: It's Roy
21 Weston, Tom. It's Mr. Woodyard's
22 company.

23 MR. MCCLAIN: Richard Wright
24 is on the document.

1 THE COURT: Was there an
2 answer to that?

3 MS. HERSCHEL: Roy Weston,
4 Your Honor. Mr. Woodyard's
5 company.

6 MR. MCCLAIN: Richard Wright
7 is written on the document.

8 MR. GOUTMAN: Richard Wright
9 is somebody in the laboratory,
10 Your Honor.

11 THE COURT: We're at a point
12 where that which was asked for was
13 sent from Mr. Ziegler to Mr.
14 Goutman. No quantities were
15 listed, no locations were listed
16 in Mr. Ziegler's letter. And they
17 were certified to be pre-fire.
18 And we have Mr. Goutman who states
19 that he sent those samples in the
20 manner in which he received them
21 to the laboratory. Did I
22 correctly state that?

23 MR. GOUTMAN: That's
24 correct, Your Honor.

1 THE COURT: And ultimately
2 the laboratory has sent back
3 reports of those samples. Until
4 this point in the trial, not just
5 today, but the day last week when
6 it was first surfaced, to the
7 court's understanding there has
8 been no question of Mr. Woodyard's
9 report or that there was
10 incorporated in that report
11 matters which were incorrect. If
12 the court is in error, we would be
13 glad to hear it. In other words,
14 I don't know that there was a
15 pre-trial challenge to this
16 report.

17 MR. MCCLAIN: When Mr. Ewing
18 was here, he testified under oath
19 that although Mr. Woodyard's
20 report said there were 14 samples
21 that he took pre-fire, he did not.
22 He only took six samples pre-fire
23 and Mr. Roux established that in
24 his examination of Mr. Ewing. Do

1 you want to see that again, the
2 transcript? I've got those pages
3 again. I showed you before.

4 THE COURT: Yes.

5 MR. GOUTMAN: Your Honor, to
6 correct the record, nowhere in Mr.
7 Woodyard's report did he say that
8 he received 14 samples or that
9 Ewing took 14 samples. And I just
10 remind the court that that was
11 based upon my misunderstanding
12 that Ewing I thought worked for
13 Law. Apparently he doesn't.
14 There's no doubt that Law
15 Associates pulled the samples
16 pre-fire.

17 In any event, that hardly
18 alerts us to a position now taken
19 by the plaintiffs that, oh, by the
20 way, those samples that Mr.
21 Ziegler sent were not all
22 pre-fire. There's nothing before
23 Thursday that would have alerted
24 us -- last Thursday, that would

1 have alerted us that plaintiffs
2 are taking that position.

3 MR. MCCLAIN: Your Honor,
4 page 31 of Mr. Woodyard's report,
5 this statement is contained.
6 "Finally samples of asbestos
7 debris were collected before the
8 fire by Ewing and analyzed
9 recently for this report. These
10 samples presumably represent outer
11 fireproofing that fell on the top
12 of the ceiling tiles over a period
13 of years. The results of the
14 analysis presented in Table 5 show
15 that the pre-fire PCB
16 contamination consisted entirely
17 of Aroclor 1262 at an average
18 pre-fire concentration of 3 ppm,
19 well below the average
20 concentration determined by
21 Kominsky after the fire."

22 Turn over to 25, "There are
23 two groups of samples listed."
24 Now, in looking at those samples,

1 we could identify the Gannett
2 Fleming numbers.

3 THE COURT: You're reading
4 from where?

5 MR. MCCLAIN: I'm reading
6 from page 31.

7 THE COURT: Of Woodyard's
8 report?

9 MR. MCCLAIN: Of Woodyard's
10 report.

11 THE COURT: But you had left
12 a sentence out.

13 MR. MCCLAIN: Your Honor,
14 then we have Mr. Ewing's testimony
15 that I've excerpted for the court.
16 I would like to hand that up. It
17 was because Mr. Woodyard's report
18 represented that these samples in
19 this table came from Mr. Ewing and
20 that they represented samples that
21 were taken before the fire, that
22 we asked -- that Mr. Roux asked
23 these questions from pages 354,
24 355, 356 and 357. "How many

1 samples did you take in May of
2 1994 of fireproofing?" This is
3 page 354, Your Honor. It says,
4 "Actually I took samples of
5 fireproofing debris, chunks of
6 fireproofing and I took six of
7 those samples."

8 Question: "You didn't take
9 seven. Right."

10 "No, I took exactly six."

11 "You didn't take 12 or 14.
12 Right?"

13 Answer: "No."

14 "All right."

15 Then we go over to the
16 answer, 357 where Mr. Goutman
17 says --

18 MR. GOUTMAN: I was not
19 asking questions.

20 MR. MCCLAIN: Mr. Goutman
21 said he was not on notice, he said
22 that here two minutes ago. At
23 357, this is still Mr. Roux asking
24 the questions of Mr. Ewing, "Fine.

1 So if Monsanto Company's experts
2 say you sent them 14 before the
3 fire, that would be wrong. Is
4 that true?" I never took 14
5 before the fire is what Mr. Ewing
6 responded. And so what we have is
7 a representation in this chart
8 there are 28 samples that Mr.
9 Ewing allegedly took, but Your
10 Honor, we can kind of figure out
11 what happened here on these lower
12 samples because we can track back
13 those numbers to the Gannett
14 Fleming samples. So we always
15 believed there was great confusion
16 on Mr. Woodyard's charts. And Mr.
17 Ewing, the only witness that could
18 testify about what was represented
19 to be the truth in Mr. Woodyard's
20 report, was here and testified to
21 the court on May 20 of this year
22 that in fact he did not take 14
23 samples, that he had only taken
24 six. So if you want to change the

1 question did you take 28 samples,
2 the answer is still the same. I
3 took six before the fire. And so
4 we took testimony on this issue
5 many, many months ago. And Mr.
6 Goutman was ready with an
7 explanation when he stood up, he
8 knew what the issue was and he
9 says now he gave this information
10 to Mr. Woodyard. That's the
11 source of the mistake. Okay.
12 Maybe. I have to accept his word
13 on that, but I don't have to force
14 all my cross-examination of the
15 witness about it. And everything
16 that that suggests, that an expert
17 witness blindly accepts the word
18 of counsel on such a crucial
19 matter particularly in light of
20 the fact that all the samples have
21 so many questions on their very
22 labels, I think is indicitive of
23 perhaps a lack of rigor on the
24 part of this witness in reaching

1 his conclusions.
2 MR. MCCLAIN: So the whole
3 situation of Mr. Woodyard's report
4 is in some question. How he
5 received the conclusion about
6 Ewing, he will have to testify
7 about. Whether or not he reviewed
8 Ewing's testimony, he said he
9 reviewed quite a bit of the
10 testimony and I think he was here
11 for Ewing's testimony, what effort
12 did you make to try to correct
13 this report following your
14 discovery that Mr. Ewing only took
15 six samples before the fire, Mr.
16 Woodyard? All those things are
17 certainly traditional issues for
18 cross-examination. I would ask
19 the court not to inhibit my right
20 to cross-examine this witness.
21 MR. GOUTMAN: Your Honor, I
22 think ask counsel a specific
23 question, which is, when we were
24 on notice that plaintiffs would

1 dispute that that which I received
2 from Mr. Ziegler were not pre-fire
3 samples. And he didn't give you
4 an answer. What he said was that
5 it was pointed out that whatever
6 we got were not from Ewing. We
7 realized that in May. They came
8 from Law Associates, not from
9 Ewing. But at no time before
10 Thursday did we have any inkling
11 that they would say they're not
12 pre-fire samples at all or at
13 least half of them are not
14 pre-fire samples. Regardless of
15 where they're from. They're not
16 pre-fire samples.

17 So Your Honor, the direct
18 answer to your question is, as of
19 May 1999, we were on notice that
20 Mr. Ewing took only six pre-fire
21 samples according to Mr. Ewing.
22 But we were never on notice that
23 that which I received from Mr.
24 Ziegler that was represented as

1 pre-fire samples, were anything
2 but that. Were anything but that.
3 The first time we heard that was
4 last Thursday when I believe this
5 court, in permitting us to pursue
6 the testing data generated from
7 those samples, ruled that in fact
8 we had relied detrimentally on
9 plaintiffs' assertions that they
10 were pre-fire samples. But all
11 this stands for is that the
12 pre-fire samples didn't come from
13 Ewing. They came from somebody
14 else. It doesn't stand for the
15 proposition that they aren't
16 pre-fire samples.

17 MR. MCCLAIN: Your Honor,
18 talk about unfair surprise, I had
19 no idea about these other group of
20 samples until Mr. Goutman stood up
21 and gave me the analysis last
22 week. Last week, Judge. I got
23 the analysis for this testimony
24 last week. Not May of last year.

1 Not any time that I could prepare
2 anything. It was last week I got
3 this stuff. He says where was Mr.
4 McClain to tell us we had messed
5 up these entire samples? I had no
6 idea about the nature of this
7 analysis. Mr. Goutman didn't
8 provide me with the analysis. All
9 he provided me was Mr. Woodyard's
10 conclusions. I didn't know about
11 the Severn Trent Laboratory. I
12 didn't know about this story about
13 his secretary shipping Mr.
14 Ziegler's samples. All of those
15 explanations came last week when
16 we pointed out the problems in Mr.
17 Woodyard's report. That was the
18 first time those explanations were
19 provided to us. We had no idea
20 about these matters. All we had
21 was his explanation that we were
22 given in the report and we knew
23 that was wrong. We knew that the
24 story they were telling in the

1 report was wrong. We have no idea
2 what the true story is and I still
3 don't know. I want to ask the
4 witness questions about these
5 samples. He ought to know them.
6 He is the expert. He's is the one
7 that is drawing scientific
8 conclusion on them. Is this what
9 a scientist does, simply to accept
10 samples blindly without an
11 identification of where they were
12 taken. What if they were all
13 taken from the same spot and split
14 14 times? Doesn't that impact on
15 his conclusion about the levels of
16 contamination of the building? Of
17 course it would. Yet we don't see
18 any analysis of that like a
19 careful scientist would engage in.
20 Instead what we have are positions
21 advanced without very much support
22 even from the documents produced
23 to us last week and we have a
24 right to explore those with this

1 witness on the stand.
2 MR. GOUTMAN: Your Honor,
3 finally, counsel said he didn't
4 know these test results until last
5 week. On page 32, Your Honor, of
6 Mr. Woodyard's report, all the
7 test results are there and there's
8 no allegation that he's
9 misrepresented what Trent Severn
10 said these test results were.
11 Plaintiffs' counsel has had these
12 test results since February, March
13 1999.

14 Secondly, those documents
15 were not produced to plaintiffs'
16 counsel because it wasn't until
17 Thursday that plaintiffs' counsel
18 raised any question, any question
19 at all as to whether or not we
20 received pre-fire samples. And
21 Your Honor, the time to have
22 raised this was pre-trial. That
23 was the time. The time when this
24 court gave all counsel an

1 opportunity to file motions,
2 motions in limine, concerning this
3 issue. But to now ten months on
4 in the trial say, by the way, what
5 you got from us wasn't all
6 pre-fire, we don't know where it
7 came from, but it's not pre-fire,
8 is, we believe, unfair. Thank
9 you, Your Honor.

10 THE COURT: I think we're
11 going to take a recess at this
12 point. I know we're going to take
13 a recess at this point. We will
14 not have this resolved before
15 closing time and I'm going to
16 dismiss the jury until tomorrow
17 morning. We'll wait a few more
18 minutes, but I want to go back and
19 analyze this. But I don't know
20 that we're going to be able to
21 save the day for the jury at this
22 point?

23 MR. GOUTMAN: We certainly
24 have no objection to the court

1 taking whatever time it needs.
 2 THE COURT OFFICER: This
 3 court will take a short recess,
 4 Call of the Crier.
 5 - - -
 6 (A recess was taken.)
 7 - - -
 8 THE COURT CLERK: All rise.
 9 MR. HENDERSON: Was the jury
 10 dismissed?
 11 THE COURT: No, not yet.
 12 I'm thinking about it, but I want
 13 to make a statement first.
 14 We have a very unusual issue
 15 in this respect. The question is,
 16 in some way the number of samples
 17 analyzed by Mr. Woodyard's
 18 laboratory. To make that
 19 decision, we have to look at the
 20 genesis of the chain of evidence.
 21 The chain of evidence starts with
 22 the transmission of certain
 23 samples from plaintiffs' law firm
 24 to the defendant's firm responding

1 to the request for samples for
 2 testing. And in that, Mr. Ziegler
 3 of the McClain firm forwarded to
 4 Mr. Goutman, representing
 5 defendant Monsanto, samples to be
 6 tested known as split samples
 7 since they were taken from the
 8 original samples.
 9 The letter from Mr. Ziegler
 10 to Mr. Goutman does not identify
 11 the quantity of samples nor the
 12 location from whence the samples
 13 were taken, but the admission that
 14 these samples were pre-fire which
 15 was in accordance with the request
 16 for pre-fire samples. Mr.
 17 Goutman, who dispatched those
 18 samples to the laboratory engaged
 19 by the defendant did not check the
 20 number of samples received, but if
 21 the court remembers accurately,
 22 sent them intact to the laboratory
 23 for analysis. The laboratory in
 24 turn sent back a report on the

1 results of the samples they
 2 received which, according to them,
 3 were 14 in number.
 4 MR. GOUTMAN: Excuse me,
 5 Your Honor, there are 28 in
 6 number.
 7 THE COURT: I saw two on
 8 there. Some had three digit
 9 identification numbers, 14 of them
 10 had three digit identification
 11 numbers and 14 had five digit
 12 identification numbers. And the
 13 question in the mind of the court,
 14 whether they were the same samples
 15 split or 14 separate samples, but
 16 they were in the report of Mr.
 17 Woodyard, the results of those
 18 samples, which was in the area of
 19 page 34 of his report as I
 20 remember. 32, Table 5.
 21 Mr. McClain counters that
 22 Ewing's testimony is to the effect
 23 that there were only six samples
 24 that Mr. Ewing had taken prior to

1 the fire, and that he had taken an
 2 additional number of samples
 3 subsequent to the fire. The
 4 report of Mr. Woodyard appears to
 5 be, if we read the bottom line of
 6 the report, of each page of the
 7 report, to be dated February 26,
 8 '99, does that appear to be
 9 correct? In fact it appears to be
 10 dated 26-2-99.
 11 MR. GOUTMAN: I think that's
 12 a good assumption, Your Honor. It
 13 certainly was February of '99.
 14 THE COURT: The court
 15 assumes that within the time
 16 period prescribed by this court
 17 for the transmission and the
 18 exchange of expert reports, that
 19 in due course that was forwarded
 20 to the plaintiff so that the
 21 plaintiff had it within the
 22 prescribed period of time.
 23 Now, this court is asked to
 24 reform the letter that Mr. Ziegler

1 sent to Mr. Goutman by introducing
2 evidence, parole evidence, that
3 the letter doesn't quite stand for
4 what it may appear to say. From
5 the time that the plaintiffs
6 received the report of Mr.
7 Woodyard, no objections or
8 exceptions were filed to that
9 finding of the chart on page 32 of
10 the report dealing with the
11 results of these tests.

12 MR. HENDERSON: Excuse me,
13 Your Honor, I don't think there's
14 any requirement that we file any
15 objections to something that we
16 didn't understand any better than
17 anybody else might have because
18 what we were proceeding under were
19 the samples were taken by Ewing
20 and that's what Mr. Woodyard
21 reported.

22 THE COURT: What we're
23 proceeding on is the letter of
24 transmittal from Mr. Ziegler to

1 Mr. Goutman.

2 MR. MCCLAIN: With all due
3 respect, Your Honor, how would we
4 have known that when in the report
5 he represented he got the samples
6 from Ewing? We had no idea about
7 these things until Mr. Goutman
8 stood up last week and gave us
9 this long explanation about the
10 source of the samples. How in the
11 world could we before last week
12 have tried to correct the
13 situation when we weren't provided
14 any explanation about this other
15 than that Ewing took the samples?

16 MR. HENDERSON: That's page
17 31 of the report, Your Honor.

18 MR. MCCLAIN: That's what
19 the report says. And to fault us
20 for not calling it to anyone's
21 attention, that in fact the
22 reality is that we did not have
23 any explanation for what had
24 happened.

1 THE COURT: On May 20, 1999,
2 Mr. Ewing testified that he took
3 six samples.

4 MR. MCCLAIN: And we called
5 that to everyone's attention.

6 THE COURT: Yes, and on the
7 report received by the plaintiffs
8 in February or early March that
9 there were 14 results or 28
10 results. Now, the court is not
11 challenging as to why they did or
12 didn't do something. The court is
13 merely pointing out the evidence
14 from which it can rule and the
15 evidence is the letter is most
16 straightforward.

17 MR. MCCLAIN: I don't mean
18 to interrupt the court again
19 except to say until last week we
20 had nothing on the record or even
21 to identify for us the source of
22 those samples other than Mr.
23 Goutman standing up saying I have
24 this letter. But that was not the

1 source as we understood it. He
2 didn't tell us what he did with
3 those samples until last week.
4 And now we find that that is the
5 explanation given for the report.
6 But that was not in the report.
7 And so before last week, we had no
8 identification of it.

9 THE COURT: I think that in
10 the report on page 32, the table
11 refers to pre-fire asbestos
12 samples and there's 28 of them.
13 Ewing's testimony back in May said
14 that he only took six. At some
15 point in time, these are all bits
16 of information that are within the
17 plaintiffs' realm as well as the
18 letter that they authored.

19 MR. HENDERSON: I would
20 submit, Your Honor, excellent fire
21 for cross-examination of Mr.
22 Woodyard.

23 THE COURT: If the question
24 goes as to the number of samples

1 the Commonwealth sent to the
2 defendant, an objection to the
3 question of how Mr. Woodyard would
4 know of his own knowledge would
5 certainly be relevant and an
6 objection to that question would
7 be sustained. I don't see how it
8 could not be.

9 MR. MCCLAIN: Your Honor, I
10 didn't follow.

11 THE COURT: You wanted to
12 ask Mr. Woodyard how many samples
13 were sent, and I don't see how Mr.
14 Woodyard under any stretch of the
15 imagination would be privy to that
16 except from hearsay, if he even
17 knew the hearsay.

18 MR. MCCLAIN: He's an expert
19 and can rely upon hearsay. That's
20 the rule upon what an expert could
21 do.

22 THE COURT: This isn't a
23 question of relying upon
24 something. This is a question if

1 he's given something as a fact.

2 MR. HENDERSON: He says,
3 Your Honor, and Mr. McClain
4 referred to it earlier, at page 31
5 in the second full paragraph,
6 where it begins, "Finally," it
7 says, "Finally, samples of
8 asbestos debris were collected
9 before the fire by Ewing and
10 analyzed recently for this
11 report." That's the only thing he
12 could be talking about. That's
13 what we want to question him
14 about.

15 THE COURT: If the question,
16 and this is not the question I
17 heard you wanted to ask, if the
18 question you want to ask is how
19 many samples did Mr. Ewing take
20 and if he knows, he may answer
21 that. But to cross-examine him on
22 the number of samples that Mr.
23 Ewing took when he would not be
24 privy to that information, would

1 be waving a red flag. In fact, it
2 would be --

3 MR. HENDERSON: I'm sorry,
4 Your Honor, because the next
5 question would be, if he said all
6 14 were from Mr. Ewing, then the
7 next question would be from whom
8 did you get that information?

9 THE COURT: You want to ask
10 him where he got the samples. He
11 didn't get the samples from Mr.
12 Ewing. But if you want to ask him
13 from where he got the samples, you
14 may. That's in the report that he
15 got the samples. I'm not telling
16 you that you can't question him
17 here. It's a question of that
18 which is an admission that the
19 samples requested were sent cannot
20 be challenged.

21 MR. MCCLAIN: Your Honor, is
22 it permissible to point out that
23 there was nothing on the labels
24 set in terms of the dates and

1 that's established on the record?
2 I'm not questioning pre-fire or
3 post-fire, there's no date and the
4 laboratory put the date on them.
5 So the laboratory -- sorry, Judge.

6 THE COURT: I'm not
7 questioning whether you're sitting
8 or standing. I understand that
9 and the court is not taking an
10 affront.

11 MR. MCCLAIN: I apologize.
12 The information contained
13 here in no way can be put on the
14 plaintiffs' shoulders when it says
15 the labels zero through one used
16 added date of 6-6-92, no date
17 given on label. So there's
18 nowhere to say that we put this
19 date on there. We never supplied
20 a date in Mr. Ziegler's letter.
21 The laboratory did. Likewise, no
22 location is given. We didn't
23 represent that they were from
24 different floors. To the extent

1 that that is an impression created
2 because there's 14 samples, we
3 have the right to demonstrate from
4 their own documents there is no
5 identification given to where
6 those samples are taken from. And
7 Mr. Woodyard needs to answer the
8 question could they have all been
9 from one floor or could it have
10 been a split of 14 -- that's all
11 that's is possible. Does that
12 impact upon your opinion, sir?
13 Those are legitimate questions,
14 Judge. Even if you assume that
15 all the samples are pre-fire.

16 MR. GOUTMAN: What we object
17 to, Your Honor, is any suggestion
18 that the samples are anything but
19 pre-fire.

20 THE COURT: That is what the
21 court is referring to.

22 MR. GOUTMAN: We understand
23 the court's ruling in that regard,
24 that they are bound by that

1 letter.

2 THE COURT: But as far as
3 asking the questions you have now
4 espoused, the court doesn't have
5 an objection. These are not the
6 questions I understood were going
7 to be the subject matter.

8 MR. MCCLAIN: That's what I
9 intended. That's why I blew up
10 these charts, that's what I
11 intended.

12 THE COURT: If you want to
13 ask those questions, I'll rule at
14 the time they're offered because
15 I've learned that questions
16 sometimes change over the course
17 of the night or whatever. But
18 basically those two questions that
19 you just espoused are not
20 questions which the court would
21 take issue with.

22 MR. GOUTMAN: I would add
23 one caveat. The fact that the
24 labels do not have a date on it, I

1 don't know what the relevance of
2 it is other than to create an
3 impression that there was
4 something other than pre-fire.
5 That's the problem I have with
6 that question.

7 MR. MCCLAIN: The date is
8 supplied in this document.

9 THE COURT: What is the date
10 on there?

11 MR. MCCLAIN: 6-6-92.

12 MR. GOUTMAN: And the point
13 he wants to make to the jury is
14 the laboratory supplied that date.
15 What is the relevance of that
16 other than to create a suggestion
17 that the samples were other than
18 pre-fire? What is the relevance?

19 MR. MCCLAIN: The issue is
20 in his report they're identified
21 as 6-6-92. And you've shown the
22 jury this chart.

23 MS. HERSCHEL: Your Honor,
24 the only place that Mr. Woodyard's

1 lab got information about these
2 samples was in the package that
3 Mr. Ziegler sent to Mr. Goutman
4 and Mr. Goutman sent on to the
5 laboratory. They got some chain
6 of custody information and they
7 transferred it. But to suggest
8 that because half of them had
9 dates on them and half of them
10 didn't to suggest that they might
11 have been post-fire is what we are
12 trying to avoid here because I
13 think it would be counter to Your
14 Honor's ruling.

15 MR. MCCLAIN: I'm not
16 suggesting anything other than on
17 463, 462, 461 and 460 no date is
18 given and the laboratory says they
19 put the date of 6-6-92 because
20 that was the oldest date. That's
21 what they said. They put the date
22 on these samples. True? Yes.

23 THE COURT: They were the
24 oldest date of Kominsky's samples?

1 MR. MCCLAIN: The Gannett
2 Fleming samples.

3 MR. GOUTMAN: But Your
4 Honor, I ask plaintiffs' counsel,
5 what is the relevance other than
6 to suggest to the jury that the
7 samples might not be pre-fire and
8 I didn't get an answer.

9 MR. MCCLAIN: What is the
10 definition of pre-fire? When were
11 they taken, Mr. Goutman? Were
12 they taken in 1985, '86, '87? Who
13 knows? The issue is nor does the
14 witness. Were they taken from
15 different floors?

16 THE COURT: There is a
17 marking zone and if we're to have
18 a hearing in camera on that as to
19 the meaning of the letter, the
20 request of the pre-fire samples
21 requested. Now, it's not any
22 magic date. It's referring to
23 specific samples that the two
24 parties are referring to and they

1 understand what samples that
2 they're talking about and if you
3 want to talk to both of them and
4 find out what the date is, fine.

5 MR. MCCLAIN: Pre-fire is
6 the issue according to Mr.
7 Goutman. I don't know what other
8 identification is provided.
9 Nothing is provided on the labels.
10 Nothing is provided in the letter.

11 THE COURT: The letter
12 refers to conferences between the
13 parties referring to the specifics
14 of this request.

15 MR. MCCLAIN: The request is
16 any samples pre-fire, Your Honor.

17 MR. GOUTMAN: The problem
18 with that, Your Honor, is Mr.
19 McClain represents the owner of
20 that building. He can't in good
21 faith represent to the court that
22 there were, or can he, that there
23 were samples taken in '85, '86 and
24 '87 and held and so forth. So the

1 plaintiffs are in possession in
2 essence of this and to suggest to
3 the jury -- we're not suggesting
4 post-fire, but we're suggesting it
5 might have been taken from '85,
6 '86, '87, where is that coming
7 from?

8 MR. MCCLAIN: I'm not
9 suggesting any date. I have no
10 idea what the date is. There's no
11 date provided. That's the whole
12 point. Neither does he, neither
13 do you. And to get the jury up
14 here to suggest it was immediately
15 before the fire, no one knows that
16 and we didn't represent that in
17 our letter.

18 THE COURT: There was a
19 request for discovery. And if
20 there is any misunderstanding,
21 it's based upon the fact that the
22 letter is not specific.

23 MR. MCCLAIN: Judge, I'm
24 sorry that that is your view. I

1 think that's an unfair view in
2 light of the fact that we sent
3 samples and if there's no
4 identification on the labels,
5 there's no identification on the
6 labels. We didn't represent them
7 to be anything other than
8 pre-fire. That's all that was
9 asked for. No dates were given to
10 say between those dates. It was
11 any samples taken pre-fire. These
12 samples, if in fact the court is
13 correct --

14 THE COURT: Are you
15 suggesting that these aren't the
16 Ewing or the Gannett Fleming
17 samples?

18 MR. MCCLAIN: I don't know.

19 THE COURT: You sent them.

20 MR. MCCLAIN: Judge, the
21 court has concluded that without a
22 chain of custody.

23 THE COURT: I haven't
24 concluded. I'm only reading your

1 letter. You can't get away from
2 the fact that your letter says
3 these are the pre-fire samples.

4 MR. MCCLAIN: Judge, be
5 accurate in regard to what we
6 said. The Gannett Fleming
7 pre-fire samples. And every one
8 of those labeled samples is a
9 Gannett Fleming pre-fire sample.
10 The labeled samples. Not the
11 unlabeled ones. Those all relate
12 to the Gannett Fleming report. It
13 all ties together for me. And I
14 have no idea how the laboratory
15 got them and I have no chain of
16 custody from Mr. Goutman about
17 what he sent. I do not have it.

18 THE COURT: Gannett Fleming,
19 were they in the picture in '85?

20 MR. MCCLAIN: I don't know.
21 But if you're suggesting that
22 these samples here were Gannett
23 Fleming samples, I don't know
24 that. 463, 462, 461, 460. If

1 you're suggesting that that is the
2 import of the letter, I understand
3 the court's ruling and I'll live
4 with it. But to suggest that we
5 told them the dates of these
6 things is false. We didn't. We
7 never represented it. The labels
8 don't represent it. The
9 laboratory recognized we hadn't
10 represent any dates. These other
11 ones, we did put dates on because
12 they're Gannett Fleming samples.
13 The dated samples tie back to the
14 Gannett Fleming report and every
15 one of the descriptions matches up
16 with the Gannett Fleming report
17 and you can trace it back. But as
18 to these, they're absolutely
19 without any identification. And
20 I'm not saying anything at this
21 point understanding the court's
22 ruling on pre-fire. I'm saying to
23 have this witness get up there and
24 make more in terms of a factual

1 representation about what they are
2 than is entitled to be made either
3 from this letter or these labels
4 is not correct. So it would be an
5 appropriate question in my view,
6 and the court will rule, of
7 course, to say to them what date
8 were they taken on and have him
9 say I have no idea. They were
10 pre-fire at some point. That's
11 the only question I intended to
12 ask. What date were they taken
13 on? I have no idea. And that's
14 what he'll have to say. The
15 laboratory dated --

16 THE COURT: Realistically he
17 can't even say that they're
18 pre-fire because he wouldn't have
19 any knowledge of whether they were
20 pre- or post- except what was told
21 to him and what has been certified
22 on the record that they are
23 pre-fire. That's all.

24 MR. MCCLAIN: That's right,

1 I'm not even contesting that point
2 at this point. I'm simply saying
3 that even the laboratory isn't
4 saying that they're anything other
5 be pre-fire. They're not saying
6 they're from different floors.
7 They're not saying that they were
8 evenly spread through the
9 building. They're not saying
10 anything about them except that
11 here are some samples of
12 fireproofing pre-fire, 14 of them.
13 Where they came from, no one can
14 tell you. And we didn't make that
15 representation to them that they
16 came from any particular floor,
17 any location or were evenly
18 distributed, none of that.

19 I want to demonstrate that
20 for a particular reason, Judge,
21 and you'll have to listen to my
22 questions about it, but there's a
23 particular reason in terms of
24 scientific validity of this

1 analysis. Not whether they're
2 pre-fire or post-fire. That's
3 secondary to my line of questions.

4 THE COURT: I'll listen to
5 the line of questions.

6 MR. GOUTMAN: I just want to
7 add one point and that is, I know
8 it's 4:00, that in fact a
9 representation was made about the
10 date when these samples were
11 taken. Everyone knows where the
12 Gannett Fleming samples came from.
13 They were taken by Law Associates
14 in 1992. Everyone knows that.
15 And it's not disputed. So they're
16 saying that there's no basis for
17 saying that those samples, 463,
18 462, 461 and 460, there's no
19 representation as to date is just
20 not true.

21 MR. MCCLAIN: Maybe we're on
22 to something here. If you're
23 saying that those are the same
24 samples reflected in that chart,

1 I'll have to think about it
2 overnight, but I might be willing
3 to say maybe you're right. Maybe
4 we can date them. Maybe they're
5 exactly the same. Are you willing
6 to say that? Those are the same
7 samples that are dated. In other
8 words, are you willing to say 463
9 matches up with the 63463 number?

10 MR. GOUTMAN: I didn't say
11 that before and I'm not saying it
12 now. What I'm saying is that
13 counsel is incorrect when he says
14 there has been no representation
15 by plaintiff about the date this
16 stuff was taken. They represented
17 in Mr. Ziegler's letter to me they
18 are the Gannett Fleming samples
19 taken pre-fire. Everyone knows
20 when the Gannett Fleming samples
21 were taken. They were taken by
22 Law Associates in 1992. That's
23 why I have some problems with
24 plaintiffs questioning him about

1 when these were taken. They
2 already represented to us that
3 they were taken implicitly in
4 1992.

5 MR. MCCLAIN: If you're
6 saying that is your understanding,
7 Mr. Goutman, then they must be
8 those 14 samples contained on the
9 Gannett Fleming chain of custody.
10 That's the only record of how many
11 samples Gannett Fleming took. 14,
12 not 28. So if there are 28
13 samples, these must be splits of
14 those same samples. If we can
15 identify where they came from,
16 that might be helpful in terms of
17 an examination. If Mr. Goutman
18 and I are in agreement that these
19 are the Gannett Fleming samples
20 and that they must be because
21 there haven't been any other
22 identified, those are all
23 contained on that chart and these
24 are all Gannett Fleming and we

1 have this chain of custody from
2 Gannett Fleming that identifies
3 the sources, then maybe we're
4 beyond this as being an argument.
5 Is that what you're willing to
6 stipulate to, Mr. Goutman?

7 MR. GOUTMAN: I'm not
8 willing to stipulate to anything,
9 Your Honor. I don't know why you
10 think I would be. What I'm
11 representing to the court is that
12 plaintiffs' counsel got up here
13 and said there's been no
14 representation as to when these
15 samples were taken and in fact
16 there was a representation in his
17 cover letter.

18 MR. MCCLAIN: If you're
19 saying you're willing to accept
20 that representation that these are
21 all Gannett Fleming samples,
22 that's okay, too. If that's your
23 representation. But if you're
24 saying I don't know where the

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1 samples came from and neither does
2 plaintiffs' counsel, then I want
3 to establish that with the
4 witness. One way or the other.
5 Either these are all Gannett
6 Fleming samples in your report or
7 not.
8 MR. GOUTMAN: Your Honor,
9 there are other exhibits we have
10 objection to. I don't know when
11 the court wants to take them up,
12 tomorrow morning, now, whatever.
13 It might take some time. I don't
14 know. The plaintiffs' counsel has
15 shown them to me, I'm going to go
16 back to the original sources and I
17 think that might inform some of my
18 objections and I might withdraw
19 some of my objections. I think an
20 overnight might make things run
21 more quickly.
22 THE COURT: Instead of
23 having the jury come in at 9:30
24 tomorrow morning, and they were

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1 here today, possibly it might be a
2 good idea to give us an extra hour
3 to review the other objections and
4 give you a chance to review what
5 Mr. McClain has said.
6 MR. GOUTMAN: I think that
7 would be smart, Your Honor. I
8 would be in favor of that.
9 THE COURT: We're going to
10 adjourn till 9:30 tomorrow
11 morning. We'll be here at 9:30.
12 The jury can come in at 10:30.
13 I think we can dismiss them
14 from out there if that's all right
15 with you.
16 MR. GOUTMAN: Absolutely.
17 MR. MCCLAIN: Yes.
18 THE COURT: With that, we
19 can stand in adjournment until
20 9:30 tomorrow morning.
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2 I hereby certify that the
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