

IN THE CIRCUIT COURT FOR CALHOUN COUNTY
STATE OF ALABAMA

SABRINA ABERNATHY, et al.,)
)
Plaintiffs,)
) CIVIL ACTION NO.
VS.) CV-96-269
) (Consolidated)
MONSANTO COMPANY, et al.,)
)
Defendants.)

DEPOSITION OF TOM BISTLINE

Taken on behalf of the Plaintiffs

July 18, 2001

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A P P E A R A N C E S

The Plaintiffs were represented by Mr. Donald W. Stewart and Mr. Charles L. Cunningham, Jr., of the law firm of Donald W. Stewart, P.C., 1131 Leighton Avenue, Anniston, AL 36207.

The Defendants were represented by Mr. Adam Peck of the law firm of Lightfoot, Franklin & White, L.L.C., The Clark Building, 400 North 20th Street North, Birmingham, AL 35203, and Mr. Michael E. Kelly of the law firm of Smith, Helms, Mulliss & Moore, L.L.P., 300 North Greene Street, Suite 1400, Greensboro, NC 27401, Post Office Box 21927, Greensboro, NC 27420.

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S T I P U L A T I O N S

IT IS STIPULATED AND AGREED by the parties, through their respective counsel, that the deposition of TOM BISTLINE may be taken before Sheila L. Ford, CSR, RPR, as Commissioner and Notary Public, Missouri at Large, at St. Louis, Missouri, on July 18, 2001, at 10:00 a.m.

IT IS STIPULATED AND AGREED that it shall not be necessary for any objections to be made by counsel to any questions except as to form or leading questions and that counsel may make objections and assign grounds at the time of trial or at the time said deposition is offered in evidence or prior thereto.

IT IS STIPULATED AND AGREED that notice of filing by the Commissioner is waived.

1 STATE OF MISSOURI, CITY OF ST. LOUIS,

2

3

TOM BISTLINE,

4

of lawful age, produced, sworn, and examined

5

on behalf of the Plaintiffs, deposes and says:

6

7

DIRECT-EXAMINATION

8

QUESTIONS BY MR. STEWART:

9

Q. You are Tom Bistline?

10

A. Bistline.

11

Q. I'm sorry. I always make that mistake.

12

MR. PECK: I think he would like

13

to read and sign.

14

MR. STEWART: That's fine.

15

MR. PECK: And are we operating

16

under the usual stipulations?

17

MR. STEWART: Yeah. We, of

18

course, would be using this

19

for the trial, but we're

20

operating under the usual

21

stipulations, and for

22

hearing.

23

Q. (By Mr. Stewart) You are what position

1 with Monsanto?

2 A. I'm with Solutia, and my title is
3 assistant general counsel, litigation.

4 Q. Am I to understand that you were
5 previously with Monsanto in the same
6 position?

7 A. That's correct.

8 Q. You were general counsel for Monsanto?

9 A. Assistant general counsel.

10 Q. Assistant?

11 A. Assistant general counsel, litigation,
12 for Monsanto.

13 Q. And that's the position you hold with
14 Solutia?

15 A. That's correct.

16 Q. Now, in connection with this deposition
17 today, we sent a deposition notice out
18 to you. And are you appearing here
19 today in connection with documents, or
20 your knowledge of documents that are
21 Monsanto's or Solutia's? I'm trying to
22 figure out --

23 A. Right. Well, I'm here pursuant to the

1 deposition --

2 Q. I know what hat you're wearing; I'm
3 trying to find out whose documents these
4 are.

5 A. Right. The documents now belong to
6 Solutia, because under the terms of our
7 separation from Monsanto, we agreed to
8 undertake responsibility for the PCB
9 litigation.

10 Q. When you say the "documents," tell me
11 exactly what documents you're referring
12 to that are now Solutia's?

13 A. Documents relating to our former
14 business of manufacturing and selling
15 PCBs, as well as documents relating to
16 the plants which went with Solutia when
17 we spun off from Monsanto, one of which
18 is the Anniston plant and another is the
19 Krummrich plant.

20 Q. You understand that we're here today,
21 Mr. Bistline, about the documents that
22 are in a repository at North Carolina?

23 A. Correct.

1 Q. And are those documents that you just
2 described for me that were transferred
3 from Monsanto to Solutia the documents
4 that we have asked for to look at in the
5 repository?

6 A. That's the litigation archive in North
7 Carolina. Yes. Those are some of the
8 documents, yes.

9 Q. Maybe I didn't phrase my question well.
10 But you just referred to some documents
11 that were transferred from Monsanto to
12 Solutia at the time Solutia was spun
13 off?

14 A. That's correct.

15 Q. You listed a series of documents, and
16 those documents were the documents that
17 were related to the plants, the
18 documents that were related to your
19 former business of production and sales
20 of PCBs?

21 A. That's correct.

22 Q. And is that one in the same as those
23 documents that are now located or housed

1 in North Carolina?

2 A. The documents that are in North Carolina
3 are part of the documents that I
4 referred to earlier.

5 Q. Okay. What part?

6 A. Well, those documents in North Carolina
7 are what we call the PCB litigation
8 archive. And it is a collection of
9 documents that was selected by counsel,
10 by my predecessor, Joseph Nassif, and
11 David Moore of the Smith Helms firm,
12 Mike's firm.

13 Q. Back in '81?

14 A. Back in '81. When they were organizing
15 the larger group of documents relating
16 to PCBs, trying to identify those
17 documents which were in their view, in
18 their opinion as lawyers, going to be
19 those which would be most relevant to
20 and needed for defense of PCB
21 litigation.

22 Q. I'm going to ask you some more questions
23 about those. But what's left?

1 A. Well, the documents that were in their
2 judgment not going to be as relevant to
3 litigation as the documents that were
4 selected to be placed in the archive.

5 Q. Like what?

6 A. Well, Donald, they exercised their
7 lawyers' judgment about what documents
8 to put in there, and I think that
9 exercise is privileged.

10 Q. I'm not asking you what is in the
11 repository at North Carolina,
12 Mr. Bistline. I'm asking you what is
13 left?

14 A. And I can't describe them other than to
15 say it's the ones that weren't selected
16 for the archive.

17 Q. How many pages would that be?

18 A. Probably in the 100- to 150,000 page
19 range. But that's just a ball park
20 guess.

21 Q. So what is left with Solutia now, used
22 to be left with Monsanto, is 100- to
23 150,000 pages?

1 A. That's --

2 MR. PECK: Of PCB documents?

3 A. Of PCB documents, yes.

4 Q. (By Mr. Stewart) What would be the
5 document number that were related to the
6 plant? Let's just say the Anniston
7 plant?

8 A. I didn't follow your question. Restate
9 it, please.

10 Q. How many more documents, pages of
11 documents, Mr. Bistline, in your opinion
12 would be left with Solutia, outside of
13 the repository with Monsanto and now
14 with Solutia, how many pages of
15 documents would that be?

16 A. Relating to the Anniston plant?

17 Q. Yeah.

18 A. I don't have an estimate on that,
19 Mr. Stewart.

20 Q. Would it be more than 150,000 pages?

21 A. All documents relating to the Anniston
22 plant without regard to subject matter
23 or --

1 Q. Right.

2 A. I would say probably more than 150,000
3 pages.

4 Q. If someone -- Have we got an idea if it
5 was more than 250,000 pages?

6 A. I don't have any idea how many pages of
7 documents the plant might have in its,
8 you know, in the collective archive
9 that's with it.

10 Q. Since those documents are not in the
11 repository, how are they categorized?
12 Those related -- that 100- to 150,000
13 that are related to PCBs that these
14 lawyers chose not to put somewhere else?

15 A. I don't know in general what kind of
16 categories they're organized in as I sit
17 here.

18 Q. Who does?

19 A. I could find out, but I don't know as I
20 sit here.

21 Q. What form are they?

22 A. They're in hard copy.

23 Q. They are not on microfiche?

1 A. No, sir.

2 Q. So if someone wanted to look at those
3 documents, you all, as you sit here
4 today, you're not claiming that those
5 documents are privileged?

6 MR. PECK: Let me object to the
7 form of the question.

8 MR. STEWART: That's all you can
9 do. I would ask --

10 MR. PECK: It's a privilege issue.

11 MR. STEWART: And I would ask,
12 Adam, for you to do that.

13 MR. PECK: No. Because it's a
14 privilege issue. I can do
15 more than that. And it's our
16 objection to the privilege.

17 MR. STEWART: It's a privilege for
18 him to say that -- to answer
19 a very simple question as to
20 whether or not some of those
21 documents are privileged or
22 not? He's a lawyer.

23 MR. PECK: He is a lawyer. But

1 you asked him whether or not
2 he's claiming those are
3 privileged. We're the ones,
4 his lawyers, are asserting,
5 and he's part of a legal
6 team, but his lawyers in this
7 litigation are us, and we are
8 asserting a privilege for
9 certain documents, and I
10 wanted to define what that
11 is.

12 MR. STEWART: You're not entitled
13 to define that, Adam.

14 MR. PECK: Sure, I am.

15 MR. STEWART: I'm asking the
16 witness questions. You have
17 put him up. I'm asking him
18 about these things. You
19 don't have a right to make a
20 speaking objection.

21 MR. PECK: I'm not making a
22 speaking objection. I have
23 just got to clarify the

1 nature of the privilege that
2 we're asserting. If you
3 don't want me to do that, I
4 won't.

5 Q. (By Mr. Stewart) The privilege, as I
6 understand it, you're asserting, has to
7 do with the repository of documents,
8 Mr. Bistline, in North Carolina?

9 MR. PECK: It has to do with
10 access --

11 MR. STEWART: I'm not asking you,
12 Adam; I'm asking this man
13 right here.

14 MR. PECK: You didn't ask a
15 question; you stated
16 something.

17 MR. STEWART: I'm asking him a
18 question.

19 MR. PECK: That was not a
20 question; that was a
21 statement.

22 MR. STEWART: Adam, I don't want
23 to sit here all day long

1 while you try to figure out
2 what I'm trying to do.

3 MR. PECK: I'm not going to sit
4 here -- And I'm not going to
5 sit here and let you invade a
6 privilege or distort a
7 privilege.

8 MR. STEWART: I'm not asking him
9 about a privileged document;
10 I'm just asking him what he's
11 asserting the privilege for.
12 It's a real simple question.

13 Q. (By Mr. Stewart) Mr. Bistline, do you
14 even know?

15 MR. KELLY: Bistline.

16 MR. STEWART: Bistline. Pardon.
17 I'll try to get it right
18 before the day's over.

19 A. What is the question? Because I have
20 heard several.

21 Q. (By Mr. Stewart) I know. That's the
22 purpose of this, I guess, is to try to
23 sort of alert you to some things.

1 That's what a speaking objection does.

2 But I'm asking you,

3 Mr. Bistline --

4 A. Bistline.

5 Q. Pardon me. I'll try to get it right.

6 What are you asserting the privilege
7 for, documents, in these documents in
8 Monsanto?

9 A. It's two-fold, really. There are
10 privileged documents within the four
11 corners of privileged documents.

12 Q. Because they are communications between
13 lawyers and people like that --

14 A. That's correct.

15 Q. -- in preparation for litigation? Those
16 documents --

17 A. That's correct.

18 Q. And that's the kind of privilege you're
19 talking about?

20 A. That is one set of privilege, one area
21 of privilege, which is asserted on a
22 document-by-document basis.

23 The other more general claim of

1 privilege we have with respect to the
2 North Carolina litigation archive is
3 that it, as an archive, is a privileged
4 -- the concept of the archive is
5 privileged, how it's organized is
6 privileged.

7 Q. We'll get into that in a minute.

8 A. Those sorts of things are privileged.

9 Q. I want to stay, if we can, on this part.

10 A. Right. One more thing to clarify that,
11 if I might. We are not saying that the
12 documents in the North Carolina archive
13 are privileged simply because they're
14 in the possession of the Smith Helms law
15 firm or they are in the custody of the
16 law department. That is not being
17 asserted.

18 Q. I assume it's because of the
19 organization of those documents by
20 lawyers; is that correct?

21 A. That's correct.

22 Q. But back to these other documents.

23 There are documents there that are not

1 communications between lawyers and
2 clients, that don't fit that kind of --

3 A. In North Carolina?

4 Q. No. I'm talking about the Monsanto
5 documents. I'm staying on Monsanto.

6 A. I'm trying to figure out which documents
7 we're talking about; that's all.

8 Q. The ones that are not in North Carolina.

9 A. Okay.

10 Q. I want to stay on those, if we can?

11 A. Fair enough.

12 Q. And you don't know the categories, but
13 you have got somebody who can give us
14 those categories?

15 A. I can find out what those categories
16 are; I probably knew it at one time and
17 I just don't have it in my head.

18 Q. Did you work with those documents at one
19 time?

20 A. I have seen them. I have worked with
21 some of them, yes.

22 Q. Would they be documents like
23 communications, letters about a

1 particular topic, perhaps, be segregated
2 off in one file?

3 A. They would not be segregated off, no.
4 They would be part of -- There are memos
5 on some topics.

6 Q. It would be related to the topic?

7 A. Right.

8 Q. And those documents were generated when?
9 When did y'all start sort of gathering
10 PCB documents, maintaining PCB
11 documents?

12 MR. PECK: Are you talking about
13 the archive again?

14 MR. STEWART: No, I'm not. I'm
15 talking about the documents
16 that -- So that we're clear,
17 I'm talking about the
18 documents that were not
19 selected. I'm trying to
20 focus on those, if we can.
21 I'm sorry.

22 A. There is a broad range of dates in those
23 documents.

1 Q. (By Mr. Stewart) I'm not asking that,
2 sir. I'm asking you, if you would, to
3 tell me when you started gathering
4 these? Were they documents that were
5 maintained or gathered in the normal
6 course of business?

7 A. These are business documents that were
8 collected over the course of time,
9 beginning in 1970 to 1971.

10 Q. So in 1970 to 1971 someone -- and that's
11 before the '81 selection process began?

12 A. That's correct.

13 Q. Someone began to gather PCB documents?

14 A. That's correct.

15 Q. Now, did those documents, did they
16 relate to production processes, perhaps,
17 some of them?

18 A. Those documents relating to the
19 production of PCBs were part of the
20 collection of documents which began in
21 the 1971 time frame.

22 Q. I'm just asking you to give me some
23 general information.

1 A. Right. But those documents may not be
2 the ones that are in this archive in St.
3 Louis.

4 Q. I'm not asking you to segregate those
5 now. I'm going to ask you about that
6 later. To make you feel comfortable
7 about it, I'll do it that way.

8 A. Fair enough.

9 Q. Let's just stay with this gathering of
10 documents in the 1970-'71 period. Okay?

11 A. Okay.

12 Q. Would they deal with waste disposal?

13 A. At that time frame probably not.

14 Q. When did that happen? When were they
15 added?

16 A. The collection of documents grew from
17 the original gathering in response to
18 some litigation that occurred in the
19 '70-'71 time frame.

20 Q. What was that?

21 A. It was the Holly Farms case, I think was
22 the first.

23 Q. Where was that filed?

1 A. North Carolina.

2 Q. And what part of North Carolina?

3 A. I don't recall the specific court.

4 Q. State court, federal court?

5 A. I believe it was federal court, but I'm
6 not positive.

7 Q. Do you remember the town?

8 A. No, sir, I don't. I wasn't even with
9 Monsanto at that time.

10 Q. When exactly, by the way, did you go
11 with them?

12 A. I started with Monsanto on February 1st,
13 1982.

14 Q. And did you go into the law department?

15 A. Yes.

16 Q. Were you assistant general counsel?

17 A. At that time I was -- my title was
18 litigation attorney.

19 Q. Did you work under Nassif? Is that how
20 you pronounce --

21 A. Nassif, N-A-S-S-I-F.

22 Q. Did you work under him?

23 A. Mr. Nassif was a colleague; he wasn't my

1 superior.

2 Q. Did you work with him, though, in
3 connection with those documents?

4 A. I didn't have responsibility for PCB
5 litigation until January of '85.

6 Q. After that did you work with him?

7 A. Briefly, yeah. He moved on shortly
8 after that to private practice.

9 Q. Now, you were telling me that the waste
10 disposal documents were added later?

11 A. Correct.

12 Q. Was that at the time of the Holly Farms
13 case?

14 A. I don't know precisely when those
15 documents would have been added to the
16 collection, but it was between the
17 initial gathering, the '70-'71 time
18 frame.

19 Q. To '85?

20 A. Up to about 1980 or '81.

21 Q. Oh. '80 or '81?

22 A. That's really when -- That time frame
23 was when Monsanto, because we got out of

1 the PCB business, stopped generating
2 documents that would relate to the
3 manufacture and sale of PCBs.

4 Q. Okay. Now, were there documents in that
5 group that were originally gathered that
6 came from Krummrich?

7 A. Yes.

8 Q. The Sauget plant?

9 A. That's correct.

10 Q. Were there documents that came from
11 Japan?

12 A. I don't recall. I don't believe we ever
13 made PCBs over in Japan. There may have
14 been documents that related to Japan in
15 the archive.

16 Q. There were perhaps documents?

17 A. Perhaps.

18 Q. What would they have been related to?

19 A. I know there are documents in the
20 archive related to Yusho incident which
21 occurred in Japan.

22 Q. What kind of documents are those? Just
23 information that you got about it?

1 A. Mostly, yes. That's correct.

2 Q. What else?

3 A. Relating to Japan?

4 Q. Right.

5 A. That's all I know of.

6 Q. Was there any correspondence between
7 various -- internal correspondence, I'm
8 talking about, about that incident?

9 A. Yes. There are memos about Yusho in
10 those.

11 Q. Where are those?

12 A. Those documents would be in the
13 litigation archive in North Carolina.

14 Q. Would those have been generated at the
15 time that incident came to light, and
16 there were some people in the company
17 commenting about it?

18 A. Those would be -- Documents like that
19 would be in that collection, yes.

20 Q. Well, I would assume that if documents
21 or correspondence -- Strike that.

22 I guess -- Let's get to this
23 privilege you're asserting about those

1 documents. Are you telling me this
2 morning -- let's just take those
3 documents as an example -- that those
4 documents, internal correspondence
5 between various people in Monsanto --
6 I'm talking about people that are
7 non-lawyers.

8 A. That's correct. I understand that.

9 Q. And that's how you would categorize
10 those too? Non-lawyer type
11 correspondence back and forth between
12 different people?

13 A. Yes.

14 Q. Who are perhaps talking about in their
15 correspondence this incident?

16 A. Yes.

17 Q. Those have been taken out of this body
18 of documents and put over in this
19 repository. First it was put in
20 Monsanto somewhere, wasn't it? In the
21 law department?

22 A. Those documents were collected over the
23 time frame that we have discussed and --

1 Q. No. But when you selected them in '81
2 and they were part of this litigation
3 archive, they were put in Monsanto,
4 weren't they?

5 A. Well, they were already part of
6 Monsanto.

7 Q. I mean, the law department, under
8 y'all's responsibilities?

9 A. That's correct. But the lawyers have
10 always had control over the documents
11 that were collected from 1971 forward.
12 Because those were litigation archives.
13 Those documents were collected for
14 litigation. And as litigation developed
15 over the course of 1970 and 1980, the
16 collection grew.

17 Q. So this privilege you're talking about
18 would extend back or was used or y'all
19 relied on it before this selection
20 process took place in 1981?

21 A. I'm confused. Because I'm not sure what
22 privilege you're referring to.

23 Q. Well, one of the privileges, as I

1 understand it, that you are asserting
2 here today is that these are part of the
3 litigation archives? That's part of
4 your basis for making it?

5 A. That's correct. But it's how that
6 collection is organized, not the fact
7 that there are documents.

8 Q. Not the document itself.

9 A. That's correct.

10 Q. So am I to understand then as we sit
11 here today, even about the North
12 Carolina archive, that you're not
13 claiming that the document itself is
14 privileged necessarily. Because it
15 might be something that somebody
16 generated similar to this correspondence
17 about Yusho that happened maybe in the
18 '60s or early '70 or something like
19 that?

20 A. That's correct. We have never asserted
21 that the documents themselves, if
22 they're responsive and not otherwise
23 privileged, are privileged just because

1 they are in the archive.

2 Q. Let me show you a letter, and I want to
3 make sure we understand each other.
4 Because you're saying something that's a
5 little different than what somebody else
6 said. And I want to be sure before we
7 leave here today that that's your
8 position, because that's what I thought
9 it was.

10 MR. STEWART: How about marking
11 these documents and we would
12 use it as an exhibit? First,
13 let's mark this deposition
14 notice as Plaintiffs' One and
15 Plaintiffs' Two for this
16 document.

17 [Plaintiffs' Exhibits Numbers
18 One and Two were marked.]

19 Q. (By Mr. Stewart) If you would, take
20 Exhibit Two. And that letter -- on page
21 three, paragraph 8, read that. I want
22 to ask you a question about that.

23 A. Yes, sir.

1 Q. Have you read it?

2 A. Yes.

3 Q. Okay. What that says is that -- and
4 maybe I'm parsing words here and I don't
5 want to do that; that's why I'm asking
6 you the question. Says, "Document
7 Repository." The first sentence says,
8 "Counsel discussed Monsanto/Solutia's
9 position that the PCB document
10 repository in Greensboro, North
11 Carolina, is protected from review by
12 the plaintiffs' counsel by the
13 work-product privilege/doctrine."

14 You're saying something a little
15 different than that, aren't you?

16 A. No. Really, I'm saying exactly the same
17 thing.

18 Q. Tell me how you're saying exactly the
19 same thing.

20 A. We're talking I think about two
21 different concepts.

22 Q. Explain.

23 A. What Mr. Kelly said here and what I'm

1 saying here at the deposition also is
2 that archive as an archive and the way
3 it's organized and the documents that
4 are in it that have been selected by
5 counsel to be in that archive, that's a
6 privilege.

7 Now, if you make a discovery
8 demand and ask for a category of
9 documents, say Yusho, if those documents
10 are in there, we produce those documents
11 to you, because those documents as they
12 relate to the litigation are not
13 privileged. But the archive as an
14 archive and how it's organized and how
15 we work with it is privileged.

16 Q. Okay. So what you are saying is that
17 even though these documents that are
18 there are not privileged documents, many
19 of them, because they are internal memos
20 that might relate to the Yusho incident
21 or to some other stuff y'all knew about
22 this poison that you put off over there
23 in Anniston at an early date, doesn't

1 necessarily make it privileged; it's
2 just the way y'all have organized them
3 in these files --

4 MR. PECK: Object to the form.

5 Q. -- up there; is that right?

6 MR. PECK: Object to the form of
7 the question.

8 A. That's part of it. How it's organized,
9 the kinds of documents that are there,
10 because that would reflect our opinion
11 of what we felt was important in the
12 litigation.

13 Q. (By Mr. Stewart) Well, now, let me see.
14 Are those two different things, or is
15 that just one thing?

16 A. It's two aspects of the same privilege.

17 Q. Go back through that again, because I
18 may have a question to ask you about
19 that.

20 A. You spoke of how they are organized.

21 Q. Uh-huh (indicating yes)

22 A. I said yes, that is also part of what we
23 claim to be privileged here. And the

1 other aspect -- and I just wanted to
2 clarify -- is that the categories, the
3 types of documents that are there, the
4 subject matters that they deal with.

5 Q. Let's talk about the Yusho incident.

6 A. Okay.

7 Q. If I ask you about the Yusho incident
8 correspondence, would that not be
9 located in a particular file?

10 MR. PECK: Object to the form of
11 question. I believe
12 answering that question in
13 and of itself would invade
14 the privilege.

15 MR. STEWART: Hogwash.

16 MR. PECK: If you can answer
17 without invading the
18 privilege, then --

19 MR. STEWART: Doesn't have
20 anything to do with the
21 privilege.

22 MR. PECK: Otherwise instruct you
23 not to --

1 Q. (By Mr. Stewart) Are those located in
2 the same file?

3 A. They are located in the repository.

4 Q. No. I'm not talking about the
5 repository total or the way you have
6 them organized. I'm just asking you if
7 in fact you had to retrieve it if
8 they're located in the same place. All
9 the correspondence about the Yusho
10 incident is organized in one place,
11 isn't it, Tom?

12 MR. PECK: Object to the form of
13 the question. I'm going to
14 object on the basis that
15 answering that question by
16 its very nature has to
17 disclose the way it's
18 organized, which is part of
19 the privilege objection we're
20 asserting.

21 A. That's correct.

22 Q. (By Mr. Stewart) Well, it's possible,
23 is it not, Tom -- Do you mind if I call

1 you Tom?

2 A. Go right ahead.

3 Q. It's possible, Tom, for those documents
4 to be organized chronologically, isn't
5 it?

6 A. That's possible.

7 Q. It's possible for them to be organized
8 by subject matter?

9 A. It would be, yes.

10 Q. And all I'm asking you is if in fact --
11 just take the Yusho documents. If they
12 are organized in a fashion,
13 correspondence about that between these
14 people, so that you can go to one place
15 and find all of them?

16 MR. PECK: If you're asking him to
17 answer that question is that
18 the way it's organized, then
19 that in and of itself invades
20 the privilege.

21 MR. STEWART: I don't think so,
22 Adam. Just make your
23 objection so we can --

1 MR. PECK: I do. And I'm
2 instructing you not to answer
3 because it does.

4 MR. STEWART: -- go on. If you
5 are going to instruct him not
6 to answer, we'll mark that
7 and take that up with the
8 judge at the appropriate --
9 that's what you're supposed
10 to do.

11 MR. PECK: That's all I'm doing.
12 I not trying to be
13 obstructive. I'm just not
14 going to allow you to invade
15 what I believe is a privilege
16 today. You're entitled to
17 ask nonprivileged questions.
18 I'm entitled to assert what I
19 think privileges are. And
20 we'll have to discuss that
21 later.

22 MR. STEWART: I don't need to have
23 a lecture. I understand

1 that, Adam. Make your
2 objection and let's mark it
3 and go on. You are
4 instructing him not to answer
5 that?

6 MR. PECK: If in answering that
7 question he believes he has
8 to disclose information about
9 how it is organized, then I
10 instruct him not to answer --

11 MR. STEWART: If you want to take
12 him out and --

13 MR. PECK: Then I instruct him --

14 MR. STEWART: Go ahead and do
15 that.

16 MR. PECK: Donald --

17 THE REPORTER: Okay. One at a
18 time, please. I have got to
19 get both of y'all; remember.

20 MR. PECK: I was talking. Can we
21 do it that way?

22 MR. STEWART: That's fair.

23 MR. PECK: I'm providing him

1 guidance on the scope of the
2 privilege issues that he can
3 answer your question. If he
4 thinks he can answer the
5 question without disclosing
6 information about how the
7 archive is organized, then he
8 can answer. If he can't,
9 then he cannot answer.

10 That's my instruction.

11 Q. Are you telling me that you cannot
12 because of some privilege tell me if
13 those Yusho documents are located -- the
14 correspondence -- located in this
15 repository in one place?

16 A. I'm saying that I would have to tell you
17 how they are organized, and how they are
18 organized is the product of counsels'
19 organization of the archive there, which
20 is work product.

21 Q. Okay. Let me see if I understand. I'm
22 really trying to understand this.

23 A. Sure.

1 Q. Those documents you say are not
2 privileged in and of themselves; they
3 are just something that happen to be
4 there?

5 A. That's correct.

6 Q. And the next thing you're saying is how
7 we organize them --

8 A. In the archive.

9 Q. -- in the archives --

10 A. Is the product of counsel's mind, his
11 work product, our work product
12 collectively.

13 Q. (By Mr. Stewart) So we can't see those
14 because of that?

15 A. You may see the documents. And I will
16 represent to you that if you have asked
17 for all the Yusho documents, we have
18 produced to you all the Yusho documents.

19 Q. No, sir. I'm not asking that question.
20 It was probably phrased poorly.

21 But you're saying that we can't go
22 to North Carolina and see those
23 documents because of the way you have

1 them organized?

2 A. That's correct.

3 Q. Tell me, are those hard copies up there
4 or on the computer?

5 A. We have hard copy. And --

6 Q. You have hard copies of those documents?

7 A. That's correct.

8 Q. How many thousands of pages of documents
9 is that?

10 A. Approximately 800,000.

11 Q. You got 800,000 pages of documents that
12 the lawyers chose to put under this
13 organization that you consider to be
14 privileged; is that correct?

15 A. That's correct.

16 Q. Now, are those all the universe of the
17 PCB documents that you have, other than
18 this 150,000 that are located in St.
19 Louis in Solutia's headquarters in that
20 little dummy office down the hall?
21 Pardon me, Tom, but I have to get some
22 humor in here every once in a while.

23 A. As I understand your question, the PCB

1 archive in Greensboro, plus the
2 documents that are still in our
3 possession here in St. Louis in our
4 document archive, defines -- I would say
5 the intent would be that those are all
6 of the PCB documents.

7 Q. Where are the others?

8 A. We have collected them all.

9 Q. Y'all have collected them all either
10 here or there?

11 A. Right.

12 Q. How many have you produced in this case?

13 A. From the archive, I don't know. I think
14 we are at --

15 THE WITNESS: What, Adam? 300,000
16 plus pages? But that would
17 include --

18 MR. PECK: 300- or 400,000 pages.

19 A. But that would include some from the
20 plant that were not necessarily part of
21 the PCB archive because it didn't relate
22 strictly to PCBs.

23 Q. So we're short a little, aren't we, Tom?

1 A. On what?

2 Q. Production. Let's just say we sent you
3 an interrogatory or request for
4 production saying we want to see all
5 these documents that you all have
6 gathered that are related to PCBs. So
7 out of it, all --

8 A. I believe you did.

9 Q. We did do that?

10 MR. PECK: No.

11 MR. STEWART: That's what he said.

12 A. I'm sorry. I misspoke. You asked to
13 see the index.

14 MR. PECK: What he has asked you
15 is to come see -- Are you
16 asking have you asked to come
17 see --

18 MR. STEWART: No. I'm asking the
19 questions, Adam.

20 MR. PECK: Obviously, there's --
21 Can you rephrase the
22 question?

23 MR. STEWART: Make any objections

1 you want to make --

2 MR. PECK: Obviously somebody here
3 -- everybody here on this
4 side doesn't understand what
5 you're asking.

6 THE WITNESS: Me. I'm confused.

7 Q. (By Mr. Stewart) You're telling me
8 there's 800 pages of documents, hard
9 copies --

10 A. 800,000. That's correct.

11 Q. 800,000. Up there in North Carolina,
12 used to be in Monsanto. Y'all claim
13 this was a litigation file?

14 A. It is a litigation file. Yes.

15 Q. And it's what y'all knew and didn't know
16 about PCBs, production, waste disposal,
17 epidemiological studies, all those kinds
18 of things?

19 MR. PECK: Wait. The way you have
20 asked that question, Donald,
21 basically asks him to
22 disclose what's been
23 collected. And that in and

1 of itself is privileged.

2 Q. (By Mr. Stewart) I'm just asking you if
3 those are the kinds of things that are
4 in there?

5 MR. PECK: I don't know if he can
6 answer that question without
7 invading the privilege. If
8 he believes he can, I'll
9 allow him to answer.

10 Q. (By Mr. Stewart) I'm still trying to
11 understand this privilege. I thought
12 you said the privilege was the index and
13 how you had them organized.

14 A. That's correct. But --

15 Q. That doesn't have anything to do with
16 what's there, does it?

17 A. It does. Because the --

18 Q. So it's sort of like hide the pea?

19 A. No. We're not hiding anything, Donald
20 we're protecting --

21 Q. So if we organize --

22 A. If I can finish my answer.

23 Q. If you organize this thing the way --

1 MR. PECK: Let him finish his
2 answer.

3 Q. -- we want to --

4 MR. STEWART: I want him to finish
5 his answer, but I want to ask
6 him the question in the way I
7 want to ask it.

8 Q. (By Mr. Stewart) If you organize the
9 things the way you want to, then you can
10 basically hide documents in either the
11 litigation department, the law
12 department of Monsanto, or in your
13 lawyer's office; isn't that correct?

14 A. No. That's not correct. We have not
15 hidden any documents. We would not hide
16 documents. That's not what this company
17 or this lawyer is about. And I resent
18 any suggestion of that. I want to make
19 that real clear. We don't hide things.

20 Q. Mr. Bistline, let me ask you this: What
21 categories is that in up there?

22 A. What category is what in?

23 Q. What kinds of documents, not categories.

1 What kinds of documents? Not how you
2 have got them organized. What kind are
3 up there in the archives?

4 A. The types of documents we have selected
5 for inclusion in the archive is the
6 product of counsels' review and
7 deliberation about what would be most
8 relevant to the litigation.

9 Q. Who would know about those documents?

10 A. I know about them, Mr. Nassif,
11 Mr. Moore, Mr. Kelly. Mr. Peck knows
12 some about them.

13 Q. So let me see if I understand your
14 position, now. These documents that
15 you're talking about are privileged
16 because of the method that you used for
17 selecting them and organizing them?

18 A. No. The documents themselves are not
19 privileged unless they happen to be
20 communications between attorney and
21 clients. That's not what we're talking
22 about for present purposes. But the
23 types of documents that we selected from

1 the large mass of PCB documents to be
2 included in the litigation archive,
3 categories that my counsel thought were
4 important to include, that description
5 of the documents is privileged.

6 Q. How are they -- are they also on a
7 computer now?

8 A. We have a litigation support system,
9 yes, computerized litigation support
10 system.

11 Q. Tell me about that.

12 A. I can describe it generally; I can't
13 tell you what's in it. It permits us to
14 interrogate the computerized system to
15 find out types of documents that may be
16 responsive to a production request. So
17 if you have asked for a category of
18 documents in a production request, we
19 form a query and put that in, input that
20 into the litigation support system, and
21 it gives us the -- by number, by
22 document number, documents that may
23 contain the kind of information that

1 we're looking for.

2 Q. And out of that 800,000 documents, what
3 you would do, you would plug the inquiry
4 in and say -- Let's just take the Yusho
5 incident again. You would say, "Give me
6 everything on Yusho that we have?"

7 A. If that were an inquiry, that could be
8 made. That's the kind of inquiry that
9 could be made.

10 Q. And if you said, "Give me everything on
11 waste disposal," you can make the
12 inquiry and get that?

13 A. Well, without telling you the categories
14 of documents we have, if you can think
15 of things that you would like to ask for
16 in discovery --

17 Q. I thought of one; I just gave you one.

18 A. Those are the kinds of things that we
19 would seek from the litigation archive.

20 Q. But I gave you one. I said "waste
21 disposal." Methods of waste, where it
22 was disposed, amount of waste. If you
23 were very detailed about that, you could

1 then take this retrieval system and tell
2 us that, couldn't you, to give us the
3 documents?

4 MR. PECK: Object on the basis of
5 the privilege. The extent
6 that you're trying to
7 enumerate every conceivable
8 document type you can and
9 therefore define what's in
10 there and force a waiver of
11 the privilege -- which is
12 what I think you're doing --
13 that's an objectionable
14 inquiry.

15 MR. STEWART: I note the
16 objection.

17 Q. (By Mr. Stewart) But if I had to ask
18 you about waste disposal and I said
19 methods of waste disposal, all that
20 stuff that I mentioned a minute ago, how
21 much waste was disposed, how much waste
22 was produced, what was the waste stream,
23 all PCB production, you could retrieve

1 what documents that would be related to
2 that particular inquiry from your
3 system, couldn't you?

4 A. I can't answer your question
5 specifically, Mr. Stewart, without
6 telling you the kinds of categories of
7 documents that we have in the system.

8 Q. Okay.

9 A. But the system permits us to make
10 specific inquiry. And if that type of
11 document is in the system, in the
12 archive, then it can be located and if
13 not privileged, produced.

14 Q. Can you in the hard documents segregate
15 those documents, Tom, that are
16 nonprivileged, as you said earlier,
17 generated during the normal course of
18 business and not communications between
19 lawyer and a client? Can you segregate
20 those hard documents in some fashion?

21 A. Not without a hand-review of them. We
22 would have to have counsel sit and
23 review all of those documents to make

1 the attorney-client privilege call on a
2 document-by-document basis.

3 Q. So, in other words, there would be some
4 letters and correspondence interspersed
5 in the documents? Is that what you're
6 saying?

7 A. There are privileged documents contained
8 in the litigation archive, yes.

9 Q. And they are just interspersed at
10 various places along the way?

11 A. Pretty much, yeah.

12 Q. Now, are those relegated to the letters
13 or correspondence -- is that limited to
14 that? To letters of correspondence
15 between an attorney and somebody from
16 Monsanto about a particular litigation
17 matter or some litigation question?

18 MR. PECK: Object to the form of
19 the question.

20 A. That would be one kind of privileged
21 document. I mean, there are several
22 kinds of attorney-client privileged
23 documents in the archive.

1 Q. (By Mr. Stewart) You mentioned the
2 letters. Tell me what else is in the
3 archives.

4 A. Types of privileged documents? Is that
5 what you're asking?

6 Q. You mentioned that yourself, some that
7 are different?

8 A. Well, just in terms of different types,
9 general categories of privileged
10 documents? There are memoranda.

11 Q. Memoranda that might be prepared by a
12 lawyer for someone?

13 A. That's correct.

14 Q. Or maybe prepared at the direction of a
15 lawyer in connection with some
16 litigation?

17 A. That's possible.

18 Q. Anything else?

19 A. I can't think of anything as I sit here,
20 but that's not to say that there might
21 not be another kind of attorney-client
22 privileged document in the archive.

23 Q. Those documents that are hard copies

1 that are, say, correspondence between
2 Mr. Jones or Mr. Smith, employees of
3 Monsanto about, say, the Yusho incident,
4 or waste production process, those
5 documents are clean copies, aren't they,
6 generally?

7 A. Clean copy, you mean --

8 Q. It's like the correspondence was when it
9 was sent to Mr. Jones or Mr. Smith?

10 A. Absolutely.

11 Q. And that is the type document that you
12 say are not privileged in and of
13 themselves but are privileged because of
14 the way you have them organized?

15 A. The organization and description of what
16 kinds of documents we have in there are
17 privileged. I'm not telling you that in
18 response to an appropriate discovery
19 request that kind of document wouldn't
20 be produced. It would.

21 Q. But what I'm saying to you is, those
22 documents -- Well, I think you have
23 answered my question.

1 On the index itself, does that
2 document contain summaries of those
3 documents that are in the archives,
4 litigation archives?

5 MR. PECK: Same instruction I have
6 been giving you, Tom. If you
7 can answer the question
8 without disclosing work
9 product, then you can answer
10 it in a way that does not
11 disclose work product.
12 Obviously, it's not our
13 intent to allow you to answer
14 the question to waive the
15 privilege we have been
16 asserting.

17 Q. (By Mr. Stewart) I'm not asking you
18 what the summaries say.

19 A. I understand.

20 Q. And I'm not asking you for the
21 categories. I'm asking you, very simply
22 put, if -- I'm just trying to understand
23 this privileged. It sort of wanders all

1 over the place, and I'm trying to hem it
2 up so that I understand it and Charlie
3 understands it. That's why we flew up
4 to St. Louis. Looked forward to this to
5 do that, and that's why we're here.

6 A. I understand.

7 Q. Tell me if a part of that index is a
8 summary of the document itself? You
9 said a minute ago that these documents,
10 hard copies, are clean.

11 A. Yes.

12 Q. If we looked at them, wouldn't see any
13 comments on them or anything that were
14 privileged?

15 A. For the most part. I mean, there are
16 some that do have those kinds of
17 comments on them.

18 Q. I'm talking about those 800,000?

19 A. Right.

20 Q. And then there's a category of summaries
21 -- whether it's in the index -- can you
22 type out that index at one point in
23 time?

1 A. We do not have a physical index of
2 documents.

3 Q. When I looked at it -- maybe it was late
4 last night when I read it or late night
5 before last when I read it, but in
6 looking at this thing that Mr. Nassif --
7 Is it Nassif?

8 A. Nassif.

9 Q. That Nassif put together, I thought he
10 said --

11 A. What page is that?

12 Q. I'll find it for you. I'm sort of
13 looking for it myself. But I thought he
14 said that there were summaries that were
15 done. Page four, paragraph 7. "Coded
16 summaries of the documents." Then 8,
17 Mr. Moore -- The reason Kelly is here
18 today -- "personally trained a small
19 number of document reviewers employed by
20 Monsanto for the purpose of classifying"
21 -- and then it says "summarizing the
22 documents pursuant to our instructions."
23 And that's where I got that. I assumed

1 there was some kind of summary of
2 documents.

3 A. What this is referring to is the process
4 of creating the litigation support
5 system. We did that by having trained
6 document coders look at the document and
7 fill out a sheet. Now, the sheet and
8 the categories that are on the sheets
9 were specified by counsel. And the
10 document coder would read the document
11 and then fill out the coding sheet with
12 the categories of information that
13 counsel outlined. That was done on a
14 document-by-document basis. Then that
15 coding sheet was keyed into a computer,
16 and that's what the computer litigation
17 support system consists of.

18 Q. But this also says that Mr. Moore, the
19 other gentleman, instructed them to
20 summarize the documents. So I would
21 assume that somewhere there's a summary
22 of what that -- you know, a letter from
23 so-and-so to so-and-so about the Yusho

1 incident, something like that. Does
2 that not exist?

3 A. That does not exist in that particular
4 form, no. It exists in the form that I
5 referred to earlier. And that is the
6 filled-out completed coding sheet for
7 each document could be viewed as a
8 summary of the document referring to the
9 categories of information that counsel
10 decided was appropriate for inclusion in
11 the litigation support system.

12 Q. Let's see. Would Yusho be something
13 like what we knew and when we knew it
14 about the incident and what we told each
15 other? Is that the kind of coding
16 system you're talking about?

17 MR. PECK: Object to the question,
18 invading privilege.

19 Q. (By Mr. Stewart) What are you saying?

20 A. Mr. Stewart, I can't tell you the
21 specific categories that we decided, the
22 lawyers decided was appropriate to use
23 and extract for the litigation support

1 system. That's the essence of what
2 we're saying is privileged.

3 Q. Am I to understand that your system
4 doesn't include some kind of summary of
5 the document itself?

6 A. That's correct. In the sense that
7 somebody went through and dictated, this
8 document is about blah, blah, blah.
9 That particular kind of memorandum does
10 not exist?

11 Q. Does it include a description of the
12 document itself so that if one were to
13 look at your coding system, you would
14 understand what that document was,
15 whether it be a report from Anniston to
16 St. Louis about some testing in
17 Choccolocco Creek or something like
18 that? Is that what it would be?

19 MR. PECK: Object to the question
20 as invading the privilege.

21 A. The coding sheets would specify the -- I
22 don't know how to describe this without
23 shooting myself in the foot.

1 Information about the documents and
2 about those characteristics of the
3 documents that we in the exercise of our
4 judgment thought was important for the
5 litigation is contained on those coding
6 sheets. That's the kind of information
7 that is there. It does describe the
8 document, yes.

9 Q. (By Mr. Stewart) You indicated earlier
10 that there were hard copies and that at
11 some point in time y'all went to a
12 computerized system. Before you went to
13 a computerized system, what method or
14 means did you use to organize them? Was
15 that a hard copy too?

16 MR. PECK: I think that's
17 invading --

18 Q. (By Mr. Stewart) The index itself?

19 MR. PECK: Object --

20 Q. (By Mr. Stewart) In other words, how
21 did you retrieve documents before you
22 went on computer? Let's say somebody
23 asked you in '85 or something.

1 A. Well, in '85 we had the computer system.

2 Q. But between '81 and '85 --

3 A. We had the computer --

4 Q. -- someone asked you about --

5 A. We had the computer system beginning in
6 1982.

7 Q. 1982?

8 A. Right.

9 Q. If someone asked you about a document,
10 you received it before then, somebody
11 asked you about a document, how did you
12 get it?

13 A. Well, as I understand how the process
14 worked then, there were -- there were
15 two paralegals, I believe, working at
16 Monsanto, plus Mr. Nassif, plus lawyers
17 at Smith Helms who were familiar with
18 the documents. And that collection of
19 individuals would review the archive of
20 documents which had been collected as
21 produced in litigation and would make a
22 selection from those documents.

23 Q. But would they go through, at that time,

1 some million pages of documents, or did
2 they have some kind of systematic
3 approach to take?

4 A. They didn't have to review all million
5 pages.

6 Q. How did they do it?

7 A. The review of documents was based on
8 their personal knowledge of what was in
9 the archive.

10 Q. Well, I mean, they had some kind of
11 index to those archives that pre-dated
12 1981, didn't they, Mr. Bistline?

13 A. They had indices of documents that had
14 been produced in litigation up to that
15 point.

16 Q. And would those indices of documents
17 that had been produced in litigation up
18 to that point encompass this 800,000
19 pages of documents and 150,000 pages of
20 documents?

21 A. I'm no --

22 MR. PECK: Wait a minute. I
23 object to the question to the

1 extent it seeks disclosure of
2 what was collected. But if
3 you can answer without
4 waiving the privilege, go
5 ahead and answer.

6 A. Mr. Stewart, I don't know if the indices
7 included all of the nearly million of
8 pages of documents that would be
9 collectively in both places.

10 Q. (By Mr. Stewart) Who were the people
11 working with Mr. Nassif?

12 A. Well, David Moore, as I said before.

13 Q. I understand Mr. Moore. We know his
14 name. But who are the paralegals?

15 A. One was named Jean Schifferdecker.

16 Q. Is she still with you all?

17 A. No, she's not.

18 Q. Where is she now?

19 A. I'm not sure where she is now.

20 Q. Where was she from?

21 A. She, I believe, was from St. Louis.

22 Q. J-E-A-N?

23 A. Yes.

1 Q. Who else worked --

2 A. I don't -- Gail Turner.

3 Q. Is that their name today or are they
4 married?

5 A. I don't know if Ms. Schifferdecker is
6 currently married. She was not when she
7 worked for Monsanto.

8 Q. But if someone had to retrieve a
9 document, those would be the people that
10 would have had to retrieve the document;
11 is that correct?

12 A. Those two paralegals, plus Mr. Nassif,
13 plus Mr. Moore, yes. And perhaps others
14 at Smith Helms that I'm not aware of.

15 Q. How would you retrieve a document today
16 from this 800 page thing?

17 A. When a discovery demand is made, it goes
18 to the Smith Helms firm, because they
19 are in charge of the archive.

20 Q. So they select what we get?

21 A. So they make the appropriate inquiry of
22 the computerized litigation support
23 system, which identifies documents that

1 have the categories of information to
2 answer the demand. And those documents
3 that are identified are then reviewed
4 for production by counsel.

5 Q. And then they make the selection from
6 this archive and send on to you, or to
7 whoever wants to deliver it to us, Adam,
8 whatever the process?

9 A. Yeah. That's correct.

10 Q. I want to get back to something I asked
11 you earlier because I don't want to get
12 off that. There are 400,000 pages of
13 documents that you all say you have
14 provided to us in the Abernathy and
15 Nelson case, Mars Hill, whatever?

16 A. I believe that's about the --

17 MR. KELLY: About right.

18 Q. (By Mr. Stewart) Would it be fair to
19 say that we're short a few documents
20 that you all have that are related to
21 PCBs, if one takes the very simple
22 mathematical calculation of the 800,000
23 pages that you have indicated that are

1 located at Smith Helms and then the
2 150,000, I think, that you said remain,
3 give or take a few --

4 A. Yes.

5 Q. That are here that didn't get involved
6 in the selection process, here in St.
7 Louis?

8 A. That's correct.

9 Q. But there is no question in your mind
10 that you are perhaps the most
11 knowledgeable person about these records
12 here in St. Louis. Is that fair to say,
13 about how they were put together and
14 what they constitute and that type
15 stuff?

16 MR. PECK: Are you talking about
17 the archive again?

18 MR. STEWART: I'm talking about
19 both.

20 A. I would say probably here in St. Louis
21 Mr. Nassif is -- or was at one time. I
22 don't know whether he still remembers it
23 all -- because he participated -- I

1 mean, he was the guy that was doing it.

2 He would be more knowledgeable about

3 that than I.

4 Q. (By Mr. Stewart) Where is he today?

5 A. He is a partner at the St. Louis law

6 firm of Thompson Coburn.

7 Q. But in the company today you would be

8 the one?

9 A. I would be the one most knowledgeable.

10 Q. And would it be fair to say that that's

11 your universe -- and by your, I mean

12 Monsanto's or Solutia's universe -- of

13 what y'all know about PCBs, what y'all

14 have by way of information about your

15 production of it, your sale of it, your

16 communication, regulators, whatever --

17 MR. PECK: Object to the form.

18 Q. (By Mr. Stewart) All of that would

19 be --

20 A. In the broad universe of documents?

21 MR. PECK: You're talking about in

22 and out of the litigation

23 archive?

1 A. Both added together?

2 Q. (By Mr. Stewart) Both added together,
3 is basically what you know?

4 A. It's the information that we have, yes.

5 Q. And if somebody sued you, say, in '85,
6 that would be the same; is that correct?

7 A. There may have been a few documents
8 added after the archive was initially
9 established. I think there probably
10 have been.

11 Q. Do documents contain minutes of meetings
12 that might have taken place in
13 connection with some of these same
14 issues?

15 MR. PECK: Object to the question
16 to the extent it intends to
17 invade the privilege.

18 A. As a document type, there are meeting
19 minutes.

20 Q. (By Mr. Stewart) And would it have
21 contained communications between
22 Monsanto and other chemical
23 manufacturers that were part of the

1 chemical manufacturer's association?

2 MR. PECK: We're not going to --

3 MR. KELLY: Pertaining to the

4 archives or the whole

5 universe?

6 A. You're talking about the whole universe,
7 not just the North Carolina?

8 Q. (By Mr. Stewart) Yeah.

9 A. There are probably -- Well, there are
10 communications with other companies,
11 yes.

12 Q. About PCBs, is what I'm talking about?
13 How to approach the PCB problem, how to
14 approach regulators, how to approach
15 scientists?

16 A. I can't tell you specifically whether we
17 have documents on each of those specific
18 topics. I'd have to go look and see.

19 Q. Could you tell me -- If I asked for
20 those, you could retrieve them from
21 either place, couldn't you?

22 A. If those kinds of documents exist, they
23 could be retrieved, yes.

1 Q. You would know how -- And some of those,
2 Mr. Bistline, would have to be done in
3 both places, wouldn't they, perhaps?

4 A. Perhaps. We have looked in both places
5 in the past for documents responsive to
6 discovery, yes.

7 Q. You would admit that if one found,
8 Mr. Bistline -- maybe ol' Donald asked
9 for something back in 1999, and he got a
10 part of it, and he got the rest of it
11 in, say, 2001 -- Let's just say this
12 Yusho incident and let's just say it's a
13 hypothetical.

14 A. Okay.

15 Q. Why would that happen or occur?

16 MR. PECK: Object to the form of
17 the question. It's an
18 incomplete hypothetical,
19 impossible to answer.

20 Q. (By Mr. Stewart) You want to make it
21 more complete for Adam, and then you
22 want to answer it?

23 A. As you have framed it, I can't answer

1 it. I couldn't.

2 Q. What are you telling me? Are you
3 telling me if I asked for it in '99 what
4 you had by way of correspondence from
5 the Yusho incident you could give it to
6 me?

7 A. What I would say is if you asked for
8 something in 1999 and were given a
9 response, I would consider that we
10 should be giving you the entire
11 response.

12 Q. Okay. And so are you telling me that
13 you have the capability, if I ask you
14 for the Yusho correspondence, to give it
15 to me, correspondence between people in
16 the plant?

17 A. Well, I can't -- I'm not going to talk
18 about a specific category of documents
19 that --

20 Q. I'm just using that as a hypothetical.
21 Let's call it the apple incident just
22 for the sake of -- if that will make you
23 feel more comfortable.

1 A. If you ask for documents relating to a
2 specific topic and we have them, and the
3 documents are not otherwise privileged
4 as communications between attorney and
5 client, and it's relative to the case,
6 we produce it.

7 Q. And you had the ability in 1999, did you
8 not, to produce that category of
9 documents that I mentioned? Let's go
10 back to the Yusho incident. You may be
11 uncomfortable with it, but it relates to
12 this case. The correspondence that
13 might have been exchanged?

14 A. If that were a request that were made,
15 it would have been appropriate to
16 respond to and completely respond to.

17 Q. And if I get a part of those documents,
18 say, maybe in 2001, that would mean
19 what, Mr. Bistline, that y'all made a
20 mistake in what you gave us the first
21 time, the retrieval system doesn't work?
22 Or perhaps somebody used their judgment
23 in selecting those documents and parsed

1 words a little bit and just gave us
2 something later rather than earlier?

3 MR. PECK: Object to the form of
4 the question.

5 A. I can't answer that question the way you
6 have stated it because I don't know what
7 you got when and what the requests were,
8 if it were the same request --

9 Q. (By Mr. Stewart) Well, if somebody
10 asked you for epidemiological studies,
11 you could give them to us, couldn't you,
12 out of this system?

13 MR. PECK: Object to the form of
14 the question.

15 A. There are some epi studies on the
16 system, yeah.

17 Q. (By Mr. Stewart) If somebody asked you
18 for the epidemiological studies that you
19 all had conducted at your plants, you
20 could give them to us in 1999, couldn't
21 you?

22 A. It would depend on what kind of
23 epidemiological study.

1 Q. On your workers.

2 A. Unless it specifically related to PCBs,
3 there would be no reason to have that.

4 Q. It did.

5 A. Well, if that question were asked in
6 1999 --

7 Q. We should have gotten it, shouldn't we?

8 A. Again, I don't know what question you
9 asked, so I can't really speak to it.

10 Q. Asked for the epidemiological studies
11 that you performed on your workers at
12 Sauget or Anniston where PCBs were
13 produced.

14 MR. PECK: Object to the form of
15 the question.

16 Q. (By Mr. Stewart) You could tell us,
17 couldn't you?

18 A. I could tell you whether we had them.

19 Q. And you could give us those documents in
20 '99, couldn't you?

21 A. If that was an appropriate response to
22 the question you asked, yes.

23 Q. What would you consider an appropriate

1 response to the questions asking you for
2 the epidemiological studies that you
3 performed on workers at Krummrich or
4 Sauget in '99?

5 A. Well, if you're representing to me that
6 that was your precise question, then I
7 would say that if we had those studies,
8 they should have been produced.

9 Q. What would have made it imprecise so
10 that someone could use their judgment
11 and determine whether or not to send ol'
12 Charlie and me that record?

13 A. I can't speculate on that.

14 Q. Let's just say we asked them for medical
15 studies. Would that fall out of the
16 category of epidemiological studies?
17 Would they have to be so precise as to
18 say epidemiological studies before you
19 could retrieve it or before you could
20 get it?

21 MR. PECK: Object to the form of
22 the question. It's calling
23 for speculation by this

1 witness.

2 A. I really can't answer that.

3 Q. (By Mr. Stewart) What if we asked you
4 for testing that was done in conjunction
5 with PCBs, air, water, fish, everything.
6 Do y'all have a category where you could
7 retrieve that?

8 A. I'm going to have to decline to answer
9 that the way you have asked it.

10 Q. Why? Because it's privileged because
11 you don't want to tell us what you have
12 got in those files?

13 A. No, sir.

14 Q. That have to do with air, soil, fish
15 data, that y'all have collected at the
16 plant?

17 A. No. Because I'm not going to describe
18 for you how we have organized the
19 archive and what categories of
20 information we have collected as
21 categories.

22 Q. I would like to know how that question
23 that I just asked you invades the

1 privilege. Can you articulate that for
2 me?

3 A. Well, you have asked me specifically
4 what categories -- or whether we have
5 this category of information in the
6 archive.

7 Q. No. I'm asking you if you can retrieve
8 for me from this system all of the tests
9 that you performed, air, soil, water, at
10 the plant in Anniston, in connection
11 with PCBs?

12 MR. PECK: The way you have asked
13 it, it does invade the
14 privilege.

15 Q. (By Mr. Stewart) The way it's asked
16 invades the privilege because I asked
17 you --

18 A. That's right.

19 Q. -- if the system could do that. And
20 you're saying that that is a unique
21 organizational thing that the lawyers
22 put together that involves what?

23 MR. PECK: If you're --

1 MR. STEWART: Hold it a minute.

2 Q. (By Mr. Stewart) Let me ask you: Are
3 those particular tests privileged?

4 A. No, sir.

5 Q. Is the way you organized the test
6 privileged?

7 A. The tests themselves and the results are
8 not privileged; how we have organized
9 the PCB litigation archive is
10 privileged.

11 Q. I'm not asking you how you --

12 A. If I may complete my answer.

13 Q. Go ahead.

14 A. What categories of information we have,
15 specific categories of information we
16 have in the archive.

17 Q. Oh, I'm not asking you, Mr. Bistline, if
18 you have a category that says "test" or
19 something like that. I'm asking you if
20 you can retrieve it from the system. If
21 Charlie asks, for instance, for all soil
22 tests, could you retrieve that from the
23 system?

1 A. To the extent that they are in the
2 system.

3 Q. Okay. Well, I would assume in the
4 universe of documents that you have, you
5 could retrieve it from one place or the
6 other, couldn't you?

7 A. I thought you were restricting your
8 inquiry to the North Carolina archive.
9 If you're talking about the entire
10 universe, then the answer is yes.

11 Q. Okay. And there might possibly be some
12 in both places?

13 A. That's theoretically possible.

14 Q. Well, it has to be more than
15 theoretically possible, doesn't it,
16 Mr. Bistline, because you have already
17 told me there are only 150,000 pages of
18 documents that are left in Monsanto's
19 possession and 800,000 pages in the
20 archive. You have already given us
21 400,000 pages.

22 A. Well, you asked if there could be those
23 kinds of documents in both places. And

1 I said yes, that's --

2 Q. Have to be, wouldn't there?

3 A. Well, you said both rather than one or
4 the other.

5 Q. Okay. So you are telling me that all
6 the tests may be over there at Monsanto,
7 then, as opposed to in the archives?

8 A. No, I didn't say that.

9 MR. PECK: Object to the form of
10 the question.

11 Q. (By Mr. Stewart) Let me ask you,
12 Mr. Bistline, if someone asked for tests
13 -- Go back to that -- someone asked for
14 tests and documents that were related to
15 those tests, whether it be soil, air,
16 water --

17 A. Uh-huh (indicating yes).

18 Q. -- there were soil, air, and water tests
19 performed, were there not, at the
20 Anniston plant?

21 A. Certainly.

22 Q. You don't have any difficulty
23 understanding that question, do you?

1 A. No, sir.

2 Q. If they asked you if they had tested the
3 creek and done any studies on fish, you
4 don't have any problems with that, do
5 you?

6 A. No.

7 Q. So if Charlie framed a question that had
8 to do with fish tests that were
9 conducted by your company prior to the
10 time of our suit at the Anniston plant,
11 you would understand what we meant, and
12 you could retrieve it if it was in these
13 archives, couldn't you?

14 MR. PECK: Related to PCBs?

15 MR. STEWART: Adam, that's not an
16 objection.

17 MR. PECK: Just trying to get
18 clarification of the
19 question.

20 MR. STEWART: That's not an
21 objection. Don't --

22 MR. PECK: Object to the form of
23 the question. It's

1 incomplete.

2 Q. (By Mr. Stewart) You could retrieve
3 that, couldn't you?

4 A. If you are saying related to PCBs, yeah.

5 Q. Well, if it wasn't related to PCBs, it
6 wouldn't be in the archives? Is that
7 what you're saying?

8 A. If the testing was not done in relation
9 to PCBs, it may not be in the archive.
10 It may be at the Anniston plant outside
11 the archive.

12 Q. May be in the Anniston plant?

13 A. Correct.

14 Q. Are you saying, Mr. Bistline, that y'all
15 have some tests or documents that were
16 related to this case that were produced
17 some time the first part of this year
18 that came from the Anniston plant that
19 had to do with fish tests?

20 A. I'm not saying that at all. All I'm
21 saying is that --

22 Q. Where did the --

23 A. If you would let me finish.

1 Q. I'm sorry.

2 A. All I'm saying is that if you ask for a
3 category of documents that didn't
4 specifically relate to PCBs, we would
5 probably have to look at the Anniston
6 plant for them.

7 Q. May be there?

8 A. They may be there.

9 Q. How many documents do y'all have there?

10 A. I said before, I don't know how many
11 documents they have there.

12 Q. Where are they housed?

13 A. In various locations in the plant,
14 depends on the kind of documents.

15 Q. Who maintains them?

16 A. Depends on the type of document.

17 Q. So say you would have to ask more than
18 one person?

19 A. Well, if we knew what kind of document
20 we were looking for.

21 Q. PCB production documents.

22 A. They would not be at the Anniston plant.
23 That would be part of the big PCB

1 archive.

2 Q. Test documents.

3 A. For?

4 Q. Fish, Choccolocco Creek.

5 A. Testing for what?

6 Q. Any test that you did in Choccolocco
7 Creek?

8 A. Well, if it was for PCBs, that would be
9 part of the PCB archive.

10 Q. Okay. Test documents that were related
11 to parathion?

12 MR. PECK: When you're talking
13 about PCB archive, do you
14 mean the broad sense?

15 A. The broad collection. The parathion
16 tests, would probably be at Anniston.

17 Q. (By Mr. Stewart) So the Ferguson study
18 that y'all presented to Mr. Owens and
19 them -- or not Mr. Owens, but Mr. Wright
20 and them in connection with the Owens
21 case and then later told us about it,
22 came from Anniston; is that correct?

23 MR. PECK: Object to the form of

1 the question.

2 A. I don't know specifically the answer to
3 that.

4 Q. (By Mr. Stewart) Who would know the
5 answer to that?

6 A. Well, if I knew specifically -- if I saw
7 specifically the document, I could
8 probably figure it out.

9 Q. Are you familiar with the test that the
10 Professor from Mississippi did -- I
11 think it was Mississippi State did in
12 connection with parathion in about '66?

13 A. I am not.

14 Q. Okay.

15 A. I am not.

16 Q. So sitting here today, you wouldn't know
17 whether it came from the Anniston
18 documents or the PCB archive?

19 A. If it was a test -- fish test for
20 parathion, my assumption would be that
21 it did not come in the PCB archive.

22 Q. It came from?

23 A. It came from the Anniston plant. If

1 that's what that particular document is
2 about.

3 Q. Okay. Do you know the number of
4 documents, size of documents, quantity,
5 pages, boxes, that are located in the
6 Anniston plant that are related to PCBs,
7 or to the operation of that plant?

8 A. Well, those are two different questions.

9 Q. PCBs first.

10 A. There should not be documents at the
11 Anniston plant related to the
12 manufacture and sale or PCB business.

13 Q. When did they leave?

14 A. They should have been collected during
15 the period 1970 to 1980, when we were
16 collecting for the PCB archive. We
17 didn't leave those kinds of documents at
18 the plants.

19 Q. So any tests that were performed, any
20 medical work that was done, any kinds of
21 things that were done like that, you all
22 would have removed from the Anniston
23 plant if they were related in any way to

1 PCBs?

2 A. That would have been the objective, you
3 know. We're not a hundred percent
4 accurate on everything.

5 Q. I understand.

6 A. But that would have been the objective.

7 Q. Anything that had to do with the
8 production of it and the waste stream,
9 anything like that?

10 A. That would have been part of the
11 documents that the attempt was made to
12 collect, all of them in that time frame.

13 Q. Any communications of local regulators
14 or anything like that, that would have
15 been --

16 A. That would have all been part of what
17 was the objective to collect. Yes.

18 MR. PECK: Take a break?

19 [A break was taken.]

20 Q. (By Mr. Stewart) What is the source --
21 We may have covered this, but I want to
22 make sure that we do.

23 What is the source of all these

1 documents, whether they be at Monsanto
2 or Solutia or at the archives?

3 A. Well, these are documents that were
4 generated in the course of our business
5 of manufacturing and selling PCBs.

6 Q. And that would also include
7 advertisements and things like that?

8 A. It wasn't a very heavily advertised
9 product.

10 Q. Sales promotions?

11 A. Very little of that. We sold mostly to
12 industrial companies. There wasn't much
13 by the way of sales promotion.

14 Q. Communications to those customers,
15 though, about product and stuff like
16 that?

17 A. To the extent that they were still in
18 existence when we swept for documents,
19 yeah.

20 Q. When you did what, now?

21 A. When the sweeps, when the document
22 collection efforts were undertaken.

23 Q. Maybe I'm missing something, but I

1 thought that there had been some group
2 of documents that had been pulled
3 together at some point in time before
4 1981 by a gentleman named Papageorge?

5 A. Mr. Papageorge had his files.

6 Q. And those were -- I mean, some of these
7 people that have testified earlier in
8 connection with this case, Tom, have
9 indicated he was Mr. PCB and that that
10 was his responsibility, to gather
11 documents and to gather files on PCBs
12 and to sort of handle problems that
13 began cropping up with the PCB
14 production and the PCB product beginning
15 in the '60s.

16 MR. PECK: Object to the form of
17 the question.

18 Q. (By Mr. Stewart) Is that fair?

19 A. My understanding is that Mr. Papageorge
20 would not have been collecting documents
21 on the manufacture and sales of PCBs as
22 an objective of his gathering of
23 information.

1 Q. What were his files? What did they
2 consist of?

3 A. I don't know because I never saw his
4 files.

5 Q. What did you understand they consisted
6 of?

7 A. What he has described are documents
8 relating to the issue of PCBs in the
9 environment as it began to emerge from
10 the late '60s and going forward and what
11 was considered to be the appropriate
12 response by Monsanto to that issue as it
13 developed.

14 Q. Would that include those IBT studies and
15 things like that? Would they have been
16 in Mr. Papageorge's files?

17 A. I don't know whether they would have
18 been or not.

19 Q. Stuff like communications with a person
20 like Renate Kimbrough be in these files,
21 that are related to PCBs?

22 A. We're talking about just out of the
23 whole document collection again or

1 Mr. Papageorge's files? Or what are we
2 talking about?

3 Q. The whole universe of these documents.

4 MR. PECK: Object to the form of
5 the question.

6 Q. (By Mr. Stewart) I assume they started
7 with Mr. Papageorge. Are you saying
8 that his files weren't subsumed into
9 these universal set of documents?

10 A. I believe they were.

11 Q. So there's a possibility that if he had
12 some communication or if someone from
13 Monsanto had some communication with
14 Renate Kimbrough, those would have
15 probably been in his files?

16 A. If he had communications with her, yes.

17 Q. Or if somebody from Monsanto did about a
18 response that they might make, perhaps,
19 a study that she did?

20 A. It's possible.

21 Q. And then that would have been subsumed
22 into the documents that you all would
23 have perhaps even put in the archives?

1 A. That would have been the objective,
2 would be to collect all the documents
3 that related to PCBs, yes.

4 Q. So if somebody asked for something about
5 Renate Kimbrough, that's probably in the
6 archives?

7 MR. PECK: Object to the question
8 the way it's asked, attempts
9 to invade the privilege.

10 A. Could be.

11 Q. (By Mr. Stewart) And what would be
12 privileged about the communication with
13 a scientist who worked for the CDC?

14 A. In what context? I'm not sure I
15 understand your question.

16 Q. Communications with a scientist while
17 she was an employee for CDC?

18 A. What would be privileged about that
19 communication?

20 Q. Yeah.

21 A. I'm not aware of any privilege that
22 would attach to it.

23 Q. What would be privileged about what you

1 pay that person? Renate Kimbrough is an
2 expert. What privilege would there be
3 about any document that had to do with
4 what you paid her?

5 MR. PECK: Object to the form of
6 the question. When?

7 MR. STEWART: Doesn't matter.

8 A. Again, Mr. Stewart, I'm not aware of
9 any.

10 Q. (By Mr. Stewart) So if you paid Renate
11 Kimbrough to consult with you as an
12 expert and someone later asked for that
13 information, that's certainly not
14 privileged, is it?

15 A. Could be.

16 Q. How?

17 A. Well, again, I'm not an expert on
18 Alabama procedural law, but in general
19 if an expert is retained for
20 consultation rather than testimony, that
21 relationship is a privileged
22 relationship with counsel.

23 Q. Let's say she later testifies. Wouldn't

1 that sort of destroy that?

2 MR. PECK: Object to the form of
3 the question, foundation.

4 A. I'm going to defer to Adam on the
5 matters of Alabama law.

6 Q. (By Mr. Stewart) Well, let's say in ol'
7 Missouri. You're familiar with that,
8 aren't you?

9 A. I'm familiar with Missouri law.

10 Q. In Missouri if somebody says, I'm going
11 to hire this consultant and later I'm
12 going to stick him up to testify,
13 wouldn't that sort of break that
14 privilege? If you had paid them, same
15 person?

16 A. If we're talking about the same subject
17 matter, yeah.

18 Q. PCBs?

19 A. Could.

20 Q. Back to this original set of documents.
21 Y'all put together -- or Mr. Papageorge
22 put together an original set of
23 documents that was subsumed into these

1 documents, that's taken up in these
2 documents, as far as you know, that are
3 now housed in part at North Carolina?

4 MR. PECK: Object to the form of
5 the question. The way that's
6 asked attempts to invade the
7 privilege.

8 A. I'll just repeat what I said before:
9 The objective in collecting the
10 documents was to collect all of the
11 documents.

12 Q. (By Mr. Stewart) Are you saying you
13 don't know whether Mr. Papageorge's
14 documents are located in North Carolina
15 or not?

16 MR. PECK: Object to whether or
17 not he knows -- answering
18 that question as to whether
19 or not Mr. Papageorge's
20 documents are now in North
21 Carolina, would, by it's very
22 definition, tell you
23 something about how the

1 documents are selected by the
2 lawyers. And that is the
3 nature of the privileged
4 objection.

5 MR. STEWART: So you're saying --
6 This thing sort of grows on
7 it.

8 Q. (By Mr. Stewart) But you're saying,
9 Tom, that the fact that they would
10 select a nonprivileged document to house
11 in North Carolina -- I'm not saying that
12 category -- that automatically makes it
13 a privileged document? Is that your
14 position?

15 A. No, as I think we have articulated --

16 Q. I'm trying to understand because that's
17 what I thought Mr. Peck just said.

18 MR. PECK: You don't listen very
19 well, Donald.

20 Q. (By Mr. Stewart) The very fact that you
21 would take a document and select it,
22 since a lawyer did the selecting and put
23 it over in North Carolina, would thereby

1 make that a privileged document, even
2 though it was nonprivileged?

3 MR. PECK: That's not what I'm
4 saying.

5 A. That's not what we have been saying.

6 Q. (By Mr. Stewart) What is it that you're
7 saying? I'm trying to understand it.

8 A. Mr. Stewart, what we're saying is that
9 the fact that it was selected and is
10 part of the archive is privileged
11 information. But a discovery request
12 seeking to elicit files of Bill
13 Papageorge is not going to be met with a
14 privilege objection because the document
15 might be located in North Carolina.

16 Q. Okay. What if one just did this: What
17 if one said for a particular category,
18 give me all the documents -- which is
19 what I said earlier -- may be beating a
20 dead horse here -- but give me all the
21 documents that pertain to a certain
22 subject matter, like you just said, Bill
23 Papageorge; if you had to go in the

1 archives, you would have to retrieve it,
2 wouldn't you?

3 A. If it was there, yes.

4 Q. And if someone didn't provide me with
5 all the documents that perhaps they
6 provided somebody else on that
7 particular subject matter, then wouldn't
8 that indicate to you -- and the question
9 was the same in both instances, whatever
10 they were asking for, didn't matter,
11 wouldn't that indicate to you that
12 there's a little more selection going on
13 even after the request is made?

14 MR. PECK: I'd object to the form
15 of the question.

16 A. I couldn't speculate on that,
17 Mr. Stewart.

18 Q. (By Mr. Stewart) How would one know
19 whether or not, Mr. Bistline, that was
20 done or not, if I don't know what's in
21 your document?

22 MR. PECK: Object to the form of
23 the question.

1 A. I don't know because I don't know what
2 questions were asked. I don't know when
3 they were asked --

4 Q. (By Mr. Stewart) I'm saying if the
5 question was identical. If the question
6 was identical and the documents
7 pre-dated those requests, and the
8 document production was different from
9 one case than another, in other words,
10 there was something left out, wouldn't
11 that indicate to you that there was a
12 little bit of selection going on after
13 the request was made?

14 MR. PECK: Object to the form of
15 the question.

16 A. Not necessarily.

17 Q. (By Mr. Stewart) Well, if I asked for
18 all of A, and you had it, and somebody
19 asked for all of A, and you had it, and
20 you produced just a part of A for him
21 and all of A for me, somebody had to
22 make a selection, didn't they,
23 Mr. Bistline?

1 MR. PECK: Object to the form of
2 the question. Calls for
3 speculation. Also goes well
4 beyond the scope of why
5 Mr. Bistline's here.

6 MR. STEWART: No, it doesn't.

7 MR. PECK: It does.

8 Q. (By Mr. Stewart) Go ahead.

9 MR. PECK: Show me where on your
10 notice you have indicated
11 that as a category of
12 inquiry.

13 MR. STEWART: Adam, make your
14 objection.

15 Q. (By Mr. Stewart) Go ahead,
16 Mr. Bistline.

17 MR. PECK: We're here to answer
18 the categories of inquiry.
19 He's been noticed as a
20 30(b)(6) and 30(b)(5), and
21 you have indicated the
22 categories to the court.

23 MR. STEWART: I'm asking about how

1 you retrieve documents from
2 the very system that we're
3 talking about and what
4 happens if this problem that
5 I'm talking about occurs.
6 And we're talking about a
7 real fact that had to do with
8 the discovery.

9 MR. PECK: You're not talking
10 about real facts --

11 MR. STEWART: Why we are here.

12 MR. PECK: You're asking rank
13 hypotheticals without any
14 foundation in facts and --

15 MR. STEWART: Hogwash. That's not
16 an objection. Make your
17 objection and let's go on.

18 MR. PECK: My objection is that it
19 goes beyond the scope of --

20 MR. STEWART: You're going to
21 instruct him not to answer?

22 MR. PECK: Yes.

23 MR. STEWART: Mark that, if you

1 would. And let's get the
2 judge on the phone. Because
3 I'm not going to go through
4 this for the rest of the day.
5 Let's call him.

6 I'm asking him about a
7 specific set of facts that
8 we're familiar.

9 [A break was taken.]

10 Q. (By Mr. Stewart) My question to you is
11 fairly simple. If I ask for a category
12 of documents similar to what I have
13 mentioned earlier, and another lawyer
14 does, and that question is identical,
15 and he gets a part of the documents and
16 I get all of them, doesn't that mean
17 that there has to be some selection done
18 in some way, somehow, by an individual,
19 whether it's a Monsanto employee or the
20 lawyers, about what to send to the
21 person that didn't get all of it?

22 MR. PECK: Object to the form of
23 the question.

1 A. I would say that it could indicate just
2 as easily that, first of all, the timing
3 may be different. And as you know,
4 there was a period of time when the
5 Abernathy case was stayed.

6 Q. (By Mr. Stewart) What, now?

7 A. It could indicate that the documents
8 were retrieved from different places.
9 So the timing there could have an impact
10 upon when the documents were acquired
11 and produced.

12 Q. Now, I want you to explain what you have
13 just gotten through telling me, because,
14 frankly, I'm having difficulty
15 understanding it.

16 A. Okay. We're all aware, are we not, that
17 there was a period of time when the
18 Abernathy case had been stayed by the
19 Alabama Supreme Court.

20 Q. Right.

21 A. And discovery responses that were made
22 in another case during that time period
23 would not necessarily have been

1 responded to in Abernathy. So add to
2 that the fact that -- and I'm not clear
3 from your hypothetical whether the
4 documents that were sought related to
5 topics dealing historically with the
6 manufacture and sale of PCBs or
7 whether --

8 Q. They did.

9 A. -- they related to perhaps other topics.

10 Q. They did. In my hypothetical, I asked
11 you to assume it was related to PCBs?

12 A. I didn't understand that. I apologize.

13 Q. In my hypothetical the same category of
14 documents were asked for.

15 A. If it was the same discovery request --

16 Q. In one instance a lawyer got a part of
17 those documents, and in another instance
18 a lawyer got all of them.

19 A. Well, I can't explain that to you then.

20 Q. Because under the -- and my question to
21 you was would that not indicate that
22 somebody did some selective judgment
23 after you put the archive together.

1 Because all this occurred after 1981.

2 MR. PECK: Object to the form of
3 the question.

4 A. All I can say is that all of the
5 discovery responses are responses
6 designed to be full and complete
7 responses. That's certainly the
8 objective.

9 Q. (By Mr. Stewart) That's not what I'm
10 asking. I'm asking you if that does not
11 indicate to you sitting here today that
12 one guy got a part of what was asked for
13 and one guy got all of it.

14 MR. PECK: Object to the form of
15 the question. Calls for
16 speculation.

17 A. That's a possible explanation but
18 perhaps not the real reason.

19 Q. (By Mr. Stewart) Now, that would mean
20 that there is some subjective
21 decision-making that goes into the
22 process of who gets what -- if they came
23 out of this archive -- out of the

1 archive; isn't that correct?

2 A. No.

3 Q. If both of those sets of documents or
4 part of both of those documents, any of
5 it came from the archives -- Let's just
6 say all of it came from the archive, and
7 one got part and one got all of it,
8 you're not saying that there's some
9 subjective judgment?

10 A. About who should get what?

11 Q. Right.

12 A. I don't believe that's been the case
13 here.

14 Q. And how you would respond?

15 A. That's correct.

16 Q. We're not necessarily talking about --
17 so you understand, Tom, about this
18 particular case?

19 A. Then I'm totally at sea, Donald. I
20 don't know what you're talking about.

21 Q. I'm not necessarily talking about this
22 particular case. Let's say we find out
23 that the same questions were asked in

1 our case that were asked in another
2 case, and those very same people got
3 documents that we didn't get. We
4 located documents that were -- should
5 have been provided to us, should have
6 been responsive to our specific request,
7 and we have to locate them by going to
8 another firm?

9 MR. PECK: Object to the form.

10 MR. STEWART: Let me lay the
11 predicate for him.

12 Q. (By Mr. Stewart) If someone asked about
13 documents in another PCB case after '81,
14 they would have to go to the archive or
15 the universal set of documents?

16 A. Those would be the sources of the
17 documents if they related to the
18 manufacture and sale of PCBs.

19 Q. They did. If there was a PCB case and
20 somebody made a discovery request, it
21 would have to come from those sets of
22 documents, wouldn't it?

23 A. Most likely, yes.

1 Q. And if somebody made a similar request
2 prior to our case and got certain
3 documents and we made a request now and
4 didn't get those documents, can you
5 explain that for me? Is there something
6 wrong with the retrieval system?

7 A. No, sir. There's nothing the matter
8 with the retrieval system.

9 Q. Then somebody had to at least make some
10 kind of judgment that ol' Donald doesn't
11 get what these other people get?

12 MR. PECK: Object to the form of
13 the question.

14 A. I don't buy that. I don't necessarily
15 agree with that.

16 Q. (By Mr. Stewart) But you would admit if
17 I find a set of documents that we asked
18 for in the same fashion that someone
19 else did and they got more than we did,
20 that would certainly be evidence that
21 something went wrong with the system,
22 wouldn't you?

23 MR. PECK: Object to the form of

1 the question. Calls for
2 speculation.

3 A. Again, it might be, but there might be
4 other explanations. I can't --

5 Q. (By Mr. Stewart) I'm talking about
6 nonprivileged documents because they
7 were produced in another case. They had
8 to do with things that were related to
9 information that Monsanto had about PCBs
10 historically. We asked for certain of
11 those things and we didn't get them.

12 A. I'm not aware of that circumstance.

13 Q. But all I'm asking you is if in fact
14 that indicates that there's something
15 wrong with the system?

16 A. And my response would be not
17 necessarily.

18 Q. It would just be a matter of judgment on
19 the part of the person that was
20 retrieving it?

21 A. It might. It also might be a function
22 of the way the discovery demand was
23 made.

1 Q. Maybe the discovery demand was poorly
2 made?

3 A. Possibly, yes.

4 Q. Which would mean that someone has to sit
5 there and say, well, they didn't
6 necessarily ask quite as well as these
7 people for these documents, so let's
8 make a judgment as to what to give them,
9 and let's leave something out. Isn't
10 that right?

11 A. No.

12 MR. PECK: Object to the form of
13 the question.

14 Q. (By Mr. Stewart) If I didn't get it and
15 he got it, what do you mean about the
16 way the discovery -- Maybe it didn't ask
17 specifically enough for it to identify
18 it specifically enough?

19 MR. PECK: Object to the form of
20 the question. Calls for
21 speculation.

22 A. That, again, is a possible explanation.

23 Q. (By Mr. Stewart) That's a possible

1 explanation. Now, if you don't know
2 what categories of documents you have
3 got there, how do you know what to ask
4 for?

5 A. Well, I assume, Mr. Stewart, that you
6 know your case, and you know that claims
7 that you're making, and you know what
8 might be relevant to that. And you're a
9 good lawyer, from my estimation, my
10 observation. You know how to ask for
11 documents.

12 Q. Let me ask you this, Mr. Bistline:
13 You're saying you know how to ask for
14 documents -- we know how to ask for
15 documents; wouldn't it be fair to say
16 that those documents that were related
17 to a specific category of PCBs, like
18 testing or something -- that's not real
19 hard to frame, is it?

20 A. I don't know what categories that you
21 have in mind.

22 Q. What about documents that are related to
23 environmental concerns about PCBs? Do

1 y'all have them put that way or
2 categorized that way, environmental
3 issues? I'm not talking about -- I'm
4 just talking about generally in the
5 company. Did y'all have sort of a break
6 there where you had environmental kind
7 of matters and then health and safety
8 matters?

9 MR. PECK: Are you talking not --
10 before the creation of the
11 archive?

12 MR. STEWART: Yeah.

13 A. (By Mr. Stewart) Mr. Papageorge, I
14 think, was probably the first
15 environmental employee of any company in
16 this.

17 Q. But you also had health and safety
18 people before that time?

19 A. Certainly.

20 Q. And isn't it true that at one point in
21 time these documents were segregated
22 before this archive thing took place, in
23 health and safety documents and then

1 environmental type documents?

2 A. Well, to the extent that different
3 employees had different functions in the
4 company, their files would reflect
5 different subject matters.

6 Q. Tell me who the health and safety person
7 was who had those files and they were
8 then placed in this archive? I mean, I
9 assume they were swept up too?

10 A. That was the objective --

11 MR. PECK: You're talking about
12 what --

13 A. The broad collection?

14 Q. (By Mr. Stewart) I'm talking about --
15 They did a sweep in '81 of all the
16 documents, and I assume that they took
17 all those documents -- and I was going
18 to ask about that, and this might be a
19 good time to do it.

20 I assume they took all those
21 documents and sat down in a room and
22 made some kind of selection or told
23 somebody how to do it. Isn't that

1 correct?

2 A. That's approximately, right.

3 Q. So all those documents would have been
4 together at one time, I assume, in a
5 nonprivileged fashion, even to the
6 extent of indexing them. Because they
7 were all in someplace; you had to get
8 them someplace.

9 A. They were in several places, and they
10 were collected.

11 Q. But you had to get them in some place,
12 did you not, and then start the process.
13 Is that how it happened?

14 A. I'm not sure whether they were all
15 collected in one place or whether there
16 were several places that had collections
17 that they went and looked at them and
18 made the decision.

19 Q. And then began -- Where were those
20 several places?

21 A. There were probably documents in
22 storage.

23 Q. In St. Louis or elsewhere?

1 A. St. Louis. But the storage facility is
2 different from the general office
3 facility. There probably would have
4 been files in -- again, the possession
5 of people who were working with them at
6 that point. I don't know whether there
7 were any files that we had to retrieve
8 from counsel. I don't think so.

9 Q. Where?

10 A. That may have been in the possession of
11 outside counsel. I don't believe there
12 were. But I think -- Well, would have
13 had to visit Krummrich and Anniston and
14 make sure we had all the documents from
15 there. Because those are the two
16 production facilities.

17 Q. I thought you said that those were left.

18 A. No, we did not leave those documents in
19 the plants.

20 Q. Picked all the PCB documents up that
21 went in the archive?

22 A. In the general collection, yes, that was
23 the objective, was to collect all those

1 documents, after the '78 or '79 time
2 frame.

3 Q. And then you were talking about health
4 and safety. There was somebody else
5 other than Papageorge who kept, I guess,
6 a larger file on the health and safety
7 issues that were related to PCBs that
8 you also went to?

9 A. Well, there were a number of people in
10 that health and safety.

11 Q. Who?

12 A. It was Dr. Kaley's organization.

13 Q. That would be --

14 A. That would be the toxicology people and
15 possibly industrial hygiene and
16 occupational medicine.

17 Q. And would it be fair to say that
18 Mr. Papageorge was environmental?

19 A. That was his main charge.

20 Q. And it would be his responsibility to
21 deal with scientists, regulators, people
22 like that on the environmental issues
23 and how Monsanto responded to that?

1 A. Yes.

2 Q. And the health and safety issues were
3 related to your plant, plant operations
4 and workers and industrial hygiene. And
5 that was handled by Dr. Kaley and who
6 else?

7 A. Well, Mr. Papageorge may have had some
8 involvement in that, but primarily that
9 would have been Dr. Kaley, Mr. Wheeler,
10 possibly Mr. Garrett, and folks that
11 worked with those folks.

12 Q. What kind of things did they do in that
13 area that would have generated
14 documents? Were they the ones that were
15 looking at the scientific side of
16 toxicological, epidemiological studies?

17 A. Toxicology was within Dr. Kaley's
18 organization.

19 Q. Rat, chicken tests, all that would fall
20 into that category?

21 A. They would have been involved in that,
22 yes. If it involved PCBs, Bill
23 Papageorge probably had some involvement

1 as well.

2 Q. At the time that those people maintained
3 them -- and I would assume they
4 maintained like you ordinarily -- They
5 weren't doing that in anticipation of
6 litigation in the late '60s or something
7 like that?

8 A. The tox testing?

9 Q. No. Just maintaining of the documents,
10 Mr. Wheeler and Kaley and Papageorge?
11 Keeping those documents?

12 A. In the normal course of business, yes.

13 Q. What drove the engine to generate the
14 kind of interest in putting these
15 documents into a litigation archive in
16 '81 and '82?

17 A. The pendency of litigation.

18 Q. What litigation?

19 A. I can't call off the cases for you,
20 Mr. Stewart. I think Mr. Nassif makes
21 reference to it in his affidavit.

22 Q. Thirty-four cases, including --

23 A. Is that the number? It's in there.

1 Q. Is there some kind of compilation of
2 those cases that you all have already
3 provided us?

4 A. I don't know whether a compilation of
5 cases has been provided or not.

6 Q. Is there a compilation of cases?

7 A. We have a list of PCB cases, yes.

8 Q. And do you have in connection with those
9 cases files that indicate the documents
10 that have been produced?

11 A. For some.

12 Q. Which ones?

13 A. I couldn't tell you offhand.

14 Q. Would you be the one to ask for that?

15 A. It would be -- That information would be
16 something that my group may have some
17 information on or the Smith Helms firm.

18 Q. You're not saying that's privileged, are
19 you?

20 A. Depends on what you're asking for, sir.

21 There is information about prior
22 litigation that is privileged, yes.

23 Q. What I'm asking you is the indexes of

1 document that you have produced.

2 A. If an index was prepared by counsel, it
3 may be privileged.

4 Q. You mean the index of documents you
5 produced for public record are
6 privileged. Is that what you're saying?

7 A. I'm not sure I understand your question.
8 What do you mean?

9 Q. Weren't those documents produced in some
10 response to some kind of request for
11 production in the case?

12 A. Produce documents in response for
13 request for production? Yes.

14 Q. And you're saying they are perhaps
15 privileged because an index would have
16 been prepared by Mr. Kelly?

17 A. Absolutely not. I'm saying the index
18 itself may be counsel's work product. I
19 wouldn't know without looking at it.

20 Q. But you kept files on certain cases, and
21 that would have given someone an
22 indication of what documents you
23 produced?

1 A. As I said before, we have that
2 information for some cases; I don't
3 think we have it for all of them.

4 Q. What about the Anniston case? Do y'all
5 have a file that's called the Anniston
6 file that would say what documents were
7 produced?

8 A. I don't have such a file, no.

9 Q. You don't have it in the archives?

10 A. As I said before, I don't have such a
11 file.

12 Q. Do you have Anniston plant documents
13 that are segregated or set aside in the
14 archives?

15 MR. PECK: Object to the way that
16 question is asked, Donald.
17 You're asking him for the
18 organization of the archive.

19 MR. STEWART: No. I'm asking if
20 within -- ask it this way.

21 Q. (By Mr. Stewart) If one asks for those
22 documents that were related to PCB
23 production at the Anniston plant,

1 including communications with anybody,
2 could you retrieve that? Internal,
3 external, whatever? Could you retrieve
4 that from the archives?

5 MR. PECK: You're talking about
6 the broad collection of --

7 MR. STEWART: No, sir. I'm
8 talking about these archives.

9 Q. (By Mr. Stewart) Can you retrieve that?
10 Do you have the capability to do that if
11 somebody asks for that?

12 A. Are you talking about the North Carolina
13 archives?

14 Q. Yeah.

15 A. Then I have to say that that specific
16 question is going to require me to
17 reveal how that archive is organized.

18 Q. Well, could you retrieve it from the
19 universe of documents that you have got,
20 anything that is related to PCB
21 production in Anniston?

22 A. Our objective was to select all those
23 documents, and to the extent that they

1 were in existence when we collected them
2 and we have them, yeah, we'd look for
3 them and reproduce them.

4 Q. If it related to testing, if it related
5 to correspondence with regulators, if it
6 related to contributions y'all might
7 make to politicians, you would have it
8 all, wouldn't you?

9 A. Regulators and things like that relating
10 to PCBs, the objective was to collect
11 it. We have never contributed to
12 politicians in connection with PCBs.

13 Q. Now, let me ask you if y'all gathered up
14 the studies that had been done about
15 PCBs, all the studies?

16 A. All the studies that we had done? Yes.

17 Q. Or anybody else had done?

18 A. Well, to the extent they were in the
19 published scientific literature.

20 Q. And the production and details and
21 procedures about the manufacturing of
22 the product?

23 A. Did we collect that information?

1 Q. Yes.

2 A. Yes, we did.

3 Q. And that would include detailed things
4 about how to produce PCBs?

5 A. Those -- Yeah. That information would
6 be in the standard manufacturing process
7 manual.

8 Q. And that would also include the waste
9 stream that would come off of PCBs,
10 wouldn't it?

11 A. It might.

12 Q. Well, if it does it, why wouldn't it?

13 A. In the SMP, Standard Manufacturing
14 Process?

15 Q. Yeah.

16 MR. PECK: Object to the form of
17 the question.

18 A. Again, it may and it may not.

19 Q. (By Mr. Stewart) Do you know of a
20 process, any manufacturing process, that
21 you all have where you don't tell what
22 waste stream would be generated?

23 A. I'm going to have to confess, I'm not an

1 engineer, so I don't really know.

2 Q. Okay. But that's generally designated,
3 isn't it, the waste stream that would
4 be --

5 A. I would expect it to be --

6 MR. PECK: Object to the form.

7 A. But, again, it either is or isn't. And
8 the document's going to have it or not.

9 Q. (By Mr. Stewart) Right. And we have
10 already talked about correspondence with
11 regulators that would be apparently in
12 Mr. Papageorge's stuff, and then
13 anything that was generated after that,
14 I assume -- and that sort of brings me
15 to a question I wanted to ask. What
16 happens to documents that were generated
17 after 1981? Was this an ongoing
18 process? Where if something was
19 generated after 1981, then y'all went
20 through the same process to put it in
21 the archives or to leave it with
22 Monsanto or Solutia?

23 A. We were not making PCBs after 1977.

1 Q. So you're saying there are no documents
2 that were generated after 1981 that
3 would find themselves in the archives?
4 There's no process that took place after
5 that --

6 A. Not necessarily, no.

7 Q. So there are some documents that might
8 have been generated after '81 and '82
9 that would be located in the archives?

10 A. There may be.

11 Q. So that would be an ongoing process that
12 takes place. Would that even be going
13 on today, where a document that was
14 generated today, might through the
15 attorney, quote, client selection be
16 made a part of the archive?

17 MR. PECK: Let --

18 A. I'm not sure --

19 THE WITNESS: Go ahead.

20 MR. PECK: I'm just going to
21 instruct you that in
22 answering this question -- In
23 allowing him to answer the

1 question, I'm not intending
2 to waive privilege on it. I
3 think the question as phrased
4 comes very close to the line,
5 but I think he can answer it
6 without waiving the
7 privilege. And by letting
8 him answer I don't want you
9 to later say I'm waiving the
10 privilege.

11 Q. (By Mr. Stewart) Mr. Bistline, what I'm
12 asking you is you have indicated the
13 process started in '81 and '82.

14 A. Well --

15 Q. And I'm asking you if documents that
16 were generated by some means or method,
17 you later discovered documents, or
18 documents that were generated after that
19 time found their way into the archives
20 and did so during this same selection
21 process that we're talking about?

22 A. The answer is yes, documents both -- in
23 both categories, both generated after

1 '82 and those that were discovered after
2 '82, are and have been evaluated for
3 inclusion in the archive by counsel.

4 Q. What's the criteria by which you would
5 make a decision as to whether or not to
6 take a look at those documents and see
7 whether they fit or not? Who makes that
8 decision? Is that a decision that's
9 made by you or made by Smith Helms, or
10 who does it?

11 A. Well, I can't tell you the specific
12 criteria we use to evaluate those
13 documents. That would invade the
14 privilege.

15 Q. Let me just ask it this way: Who does
16 that? Who makes the decision that
17 you're going to look at them and apply
18 those criteria and make a decision as to
19 whether or not a document might make it
20 into the archives or not?

21 A. Counsel, either -- I can't recall that I
22 have done that recently, but it would be
23 counsel that looks at the documents and

1 makes that decision.

2 Q. So there could be some documents that
3 were generated at the Anniston plant
4 after '93 that are in these archives now
5 that are related to remediation or
6 addressing the problem down there that
7 are generated by employees or Monsanto,
8 talking back and forth to each other
9 correspondence-wise, memos or something
10 like that, that y'all made a judgment
11 about since that time that made their
12 way into the archives?

13 A. I think that specific -- remediation
14 documents have not been added to the
15 archive.

16 Q. I don't mean remediation documents. I
17 mean correspondence that might be
18 related to those between employees of
19 Monsanto --

20 A. I don't believe those would be included
21 in the archives.

22 Q. What about the '80s? You were there
23 after '85 and in charge of this. Were

1 there some documents that might have
2 been generated during the '80s that were
3 related to PCBs that had to do with
4 correspondence that might have found
5 their way into the archives?

6 MR. PECK: I'm trying not to
7 hamper this with the
8 privilege issue and let you
9 ask your questions. I also
10 feel sometimes like you're --
11 I hope you're not -- trying
12 to ask a question that causes
13 a waiver. And by letting him
14 answer these questions, I'm
15 not intending to waive the
16 privilege.

17 I think you're asking
18 whether or not remediation
19 documents go into the
20 archive.

21 MR. STEWART: No. I didn't ask
22 him that. I asked him about
23 documents that were generated

1 internally or externally,
2 however, correspondence,
3 things like that, in the
4 '80s, whether it be with
5 government officials,
6 scientists, be with other
7 manufacturers, whoever, if
8 that found its way into the
9 archive.

10 MR. PECK: Without waiving the
11 privilege and discussion how
12 it is criteria decisions are
13 made, I think you can answer
14 that question, Tom.
15 Obviously, I'm instructing
16 you not to waive the
17 privilege. If you feel like
18 you would -- in answering
19 that you would disclose the
20 thought processes that went
21 into the selection of the
22 documents and the contents of
23 the archive, then don't

1 reveal the information.

2 A. There may have been. As I sit here now,
3 I don't know that there were or not.

4 Q. (By Mr. Stewart) What about
5 communications between Monsanto and
6 folks at Region 4?

7 A. With respect to PCBs?

8 Q. Yes. The PCB problem.

9 MR. PECK: What time period?

10 MR. STEWART: In the '80s.

11 MR. PECK: Same instruction I gave
12 you a minute ago. Same
13 objection.

14 A. They may.

15 Q. (By Mr. Stewart) They may have made
16 their way into the archive?

17 A. They may; they may not. As I sit here,
18 I don't know.

19 Q. Well, there were some documents
20 generated during that time that were
21 related to PCBs, were there not, Tom?

22 A. There probably were, but I can't recall
23 any as I sit here.

1 Q. What about communication with people in
2 Washington during that period of time,
3 regulators in Washington?

4 A. On PCBs specifically?

5 Q. Right. And on some Anniston plant
6 specifically.

7 A. I don't know about the Anniston plant.
8 I know that there were several
9 submissions made to the government on
10 PCBs over the course of years.

11 Q. And have those been placed in the
12 archives, since those are in the public
13 domain, sort of left them there?

14 A. I don't know whether they were left
15 there or not.

16 Q. But there were some done in '85?

17 A. Some what done in 1985?

18 Q. Submissions to the government in
19 Washington about PCBs in '85.

20 A. Specifically in '85? I don't recall.

21 Q. Or in the '80s?

22 A. In the '80s, yes.

23 Q. Now, what about the PCB problem or

1 correspondence that might have been
2 related to the PCB problem in Anniston,
3 say, in the '80s, that might have been
4 aimed at the state government? Do you
5 know of any of those that have made it
6 into the archives?

7 MR. PECK: Object to the form of
8 the question. I'm going to
9 give the same instruction I
10 have been giving you: Do not
11 disclose the contents of the
12 archive or the selection
13 process in answering each
14 question. I'm not sure the
15 question can be answered
16 without doing that.

17 A. My answer, Donald, is I don't know.

18 Q. (By Mr. Stewart) Would it be likely
19 that documents that were related to a
20 PCB problem, such as correspondence with
21 state officials, memoranda about meeting
22 with state officials in the '80s made
23 its way into the archives?

1 MR. PECK: Same instruction. Same
2 objection.

3 A. I don't know that it would, not into
4 that particular archive.

5 Q. (By Mr. Stewart) Probably be in the one
6 that's held by Monsanto and then passed
7 off to Solutia?

8 A. It may be there. It also may be just in
9 Anniston plant files.

10 Q. At the Anniston plant?

11 A. Correct.

12 Q. Maybe you told me, but can you tell me
13 again -- I keep forgetting things; I
14 guess I'm getting older -- but how many
15 documents there were, boxes, pages, in
16 Anniston?

17 A. I don't know.

18 Q. But you are not claiming those are part
19 of these archives here, are you?

20 MR. PECK: Object to the form of
21 the question.

22 A. Make sure I understand what your
23 question is.

1 Q. (By Mr. Stewart) The ones that are
2 left.

3 MR. PECK: The ones that are left?

4 MR. STEWART: In Anniston.

5 Q. (By Mr. Stewart) I thought you said
6 there were some left there. I assume
7 there were hard documents that y'all
8 left at the plant. You in fact said
9 earlier that y'all had retrieved some.

10 A. Our objective when we constituted the
11 PCB document collection was to retrieve
12 all the documents related to the
13 manufacture and sale of PCBs from the
14 plant, not to leave them there. So
15 there should not have been any documents
16 like that that were left at the plant.
17 Now, there may have been that we just
18 didn't discover.

19 Q. I just got through asking you about one
20 that had to do with something in '85,
21 and you said that might be at the plant.
22 But that's because it was after '81?

23 A. Because that wouldn't relate to the

1 manufacture and sale of PCBs. It would
2 relate to a regulatory matter affecting
3 the Anniston plant.

4 Q. And that might be there?

5 A. That might be there.

6 Q. Do you know whether y'all have given us
7 all of the documents from the Anniston
8 plant? Did y'all produce all those?

9 A. All --

10 Q. That are related to PCBs? Whether it be
11 with regulator -- that are left there,
12 whatever the heck they are?

13 A. If they have been fairly called for in
14 discovery, they should have been
15 produced to you.

16 Q. I assume that you're taking the same
17 position on those as you are with the
18 other Monsanto documents, that there's
19 no privilege attached to those?

20 A. Unless it's attorney-client
21 correspondence.

22 Q. Okay. So then a general request to
23 review those documents, you wouldn't be

1 opposed to?

2 A. I'd have to see the request.

3 Q. Just general request to review the

4 documents that are not privileged?

5 A. I would say that's probably going to be

6 too general for us to know what you're

7 looking for.

8 Q. You can assemble them? You have

9 indicated to me they're not a part of

10 the archives, what's left. And you have

11 indicated to me that they are there at

12 the plant, and you have indicated to me

13 that you're not claiming the privilege

14 that Mr. Kelly and Mr. Peck are claiming

15 for these archived documents?

16 A. That I'm claiming also for the archived

17 documents.

18 Q. That you are. What privilege -- other

19 than communication between

20 attorney/client, what makes those

21 documents not subject to review?

22 A. I'm not saying they're not subject to

23 review. But you know the rules of

1 discovery, the Alabama rules, better
2 than I do, that you have to reasonably
3 specify the documents that you want to
4 look at. I'm not going to sit here and
5 debate phraseology on discovery demands.

6 Q. So you're saying that if someone asks to
7 take a general look at those documents
8 that are related to PCBs, you couldn't
9 put them in a room somewhere similar to
10 what you have done otherwise?

11 A. I'm saying that might not necessarily be
12 an appropriate discovery demand.

13 Q. Well, do y'all have those documents that
14 are related to PCBs located in one place
15 in the plant?

16 A. I don't know. Probably not.

17 Q. What kind of repository or document
18 storage facility did you have there at
19 the plant?

20 A. At the Anniston plant? I don't know.

21 Q. But you're saying that unless we ask for
22 specific documents by name, then we
23 can't come out there and look at what

1 documents y'all have.

2 A. That's not what I said. I said if you
3 make an appropriate discovery demand --

4 Q. To look at the documents would not be an
5 appropriate discovery demand, related to
6 PCBs?

7 A. Again, Mr. Stewart, I'm not an Alabama
8 lawyer, and I don't know the ins and
9 outs of Alabama discovery rules.

10 MR. PECK: If you made such a
11 request, you would consult
12 with us, and we would
13 respond, I think is what he's
14 trying to say.

15 Q. (By Mr. Stewart) And you have told me
16 that there was not an index before 1981?

17 A. Not that I'm aware of.

18 Q. Other than perhaps what maybe
19 Mr. Papageorge did or Mr. Wheeler or
20 Kaley did of their own documents?

21 A. If they did such. I'm not aware that
22 they did.

23 Q. Do you know whether or not they

1 categorize those documents by subject
2 matter or chronologically?

3 A. It's probably some of both.

4 Q. And where were they housed?

5 A. Their files would have been housed where
6 they officed.

7 Q. In St. Louis?

8 A. St. Louis, yes.

9 Q. And there was nothing unique about the
10 chronological or categorizing that they
11 did; they were just sort of kept in the
12 normal course of events?

13 A. They would have organized them as best
14 suited their purposes.

15 Q. In other words, if they had
16 epidemiological studies, they would
17 probably keep those together. Rat
18 studies and everything, they would
19 probably keep those together? They
20 wouldn't just sling them around the room
21 somewhere; there would be some kind of
22 systematic organization where you would
23 find one thing that related to those

1 kinds of studies or the study, say, in
2 one particular area?

3 A. Could have.

4 MR. PECK: Object to the form of
5 the question; no foundation.

6 A. I don't specifically know exactly how
7 their files were organized.

8 Q. (By Mr. Stewart) Isn't that in fact
9 about the only way that you can organize
10 a set of documents like this, to either
11 do it chronologically or to do it by
12 subject matter? When you have got a
13 mass of documents, say 800,000 pages of
14 documents, you have got a mass of
15 documents, isn't that about what you
16 have to do?

17 MR. PECK: Object to the form of
18 the question.

19 A. Those are two ways you could do it,
20 yeah.

21 Q. (By Mr. Stewart) What other ways would
22 you suggest, just organizationally, that
23 you would do it, other than doing it

1 chronologically or other than doing it
2 by subject matter?

3 A. Subject matter takes in a lot of
4 territory, so I suppose that would cover
5 it.

6 Q. That would cover it. One would have to,
7 with 800,000 pages of documents, you or
8 me or anybody else, wouldn't they, say,
9 "Look, Fellows; we never will be able to
10 find this thing unless we do it by
11 similar types of things"?

12 MR. PECK: Object to the form of
13 the question.

14 Q. (By Mr. Stewart) You know, organize and
15 group them by similar types of things?

16 MR. PECK: Object to the form of
17 the question.

18 A. You have to organize them somehow, yes.

19 Q. (By Mr. Stewart) But you would
20 generally organize them by things that
21 were related to one another, either
22 chronologically or by subject matter?

23 MR. PECK: Object to the form of

1 the question.

2 Q. (By Mr. Stewart) Correspondence would

3 probably be -- about a particular

4 subject would generally be someplace?

5 A. The answer to that is no.

6 Q. There's some other way? You have

7 decided there's some other way to do

8 that?

9 A. That's what -- a litigation support
10 system.

11 Q. Let's just take a different
12 hypothetical.

13 A. If you're just trying to physically
14 organize a collection of documents
15 without any other assistance, you would
16 have to do some spatial or chronological
17 organization.

18 Q. Right. But there's something unique
19 about this?

20 MR. PECK: If you're asking him
21 how these are organized,
22 Donald --

23 MR. STEWART: I'm not asking him

1 -- I'm just saying it's
2 unique from what I just asked
3 him about, Adam. I'm not
4 asking him to tell me what it
5 is. He can answer that.

6 A. I'd appreciate it if you would ask the
7 question again so I'm sure what it is.

8 Q. (By Mr. Stewart) Okay. Something
9 unique about this thing. It's not
10 chronologically done and it's not done
11 by subject matter? If one were to look
12 at this index of this set of documents,
13 you wouldn't see that, would you? It's
14 unique from all organizational things
15 that I have known?

16 A. It is the product of by counsels'
17 efforts in organization and opinions on
18 how this ought to be done.

19 Q. Right. But what I'm saying to you --
20 What I'm asking you, rather, is it's
21 unique in that it's not done by subject
22 matter; it's not done chronologically?

23 A. Not what I said.

1 MR. PECK: You can't -- Well, the
2 way you have asked that
3 invades the privilege.
4 Because you're trying to get
5 him to rule things out.
6 Basically, you're trying to
7 discover the organization,
8 whether you intend to or not.
9 What the question asks him to
10 do is to rule out different
11 methods of organization.

12 MR. STEWART: Well, I'm stupid in
13 asking my questions. I
14 really don't know where I'm
15 going, so that's probably the
16 reason for it, Adam, I guess.
17 I apologize. You will have
18 to just put up with that.

19 MR. PECK: I'm just stating the
20 basis for my objection.

21 MR. KELLY: Could we have two
22 minutes?

23 MR. STEWART: Let me ask just a

1 series of questions. If you
2 want to go take -- he won't
3 be by himself. Keep on this
4 same thing.

5 MR. KELLY: That's fine.

6 Q. (By Mr. Stewart) Let's just say that if
7 you were involved in a bank case, say
8 somebody sued a bank and wanted to get
9 their records and there were say,
10 800,000, a million records. Tell me,
11 wouldn't you expect -- if you were
12 looking at loans, say, for instance,
13 wouldn't those things be saying "loan
14 files" and things like that, organized
15 like that?

16 MR. PECK: Object to the question.

17 A. If it's a bank branch?

18 Q. (By Mr. Stewart) Yeah.

19 A. Yes. I would --

20 Q. If it had to do with Mr. Jones and the
21 correspondence with Mr. Jones, you would
22 expect the correspondence to be in
23 specific categories?

1 A. Yeah.

2 Q. Not anything unique about that, is
3 there?

4 A. Not about that, no.

5 Q. And, generally, if I'm suing a bank or
6 something like that and I want to look
7 at those documents, and I ask for how
8 those documents -- those particular
9 documents, you couldn't be prevented --
10 nobody could be prevented from looking
11 at them, the million -- set of documents
12 that were indexed according to that kind
13 of categorization, could you? Not on
14 the basis of the privilege you're
15 talking about?

16 A. The documents themselves? No.

17 Q. Right. And the index.

18 A. Depends upon what the index was.

19 Q. I'm talking about if it said "Mr. Jones'
20 loan file," a category.

21 MR. PECK: Created by Mr. Jones in
22 the ordinary course of the
23 business.

1 MR. STEWART: No, a lawyer.

2 Q. (By Mr. Stewart) All loan files that
3 apply to Mr. Jones, and then here are
4 all the loan files. There isn't
5 anything unique about that, is there?

6 MR. PECK: Object to the form of
7 the question.

8 A. If that's all it said.

9 Q. (By Mr. Stewart) What would be the
10 attorney-client -- the judgment or
11 whatever it is selective about that?
12 That is just what's kept in the normal
13 course of events, isn't it?

14 A. The hypothetical way you have stated,
15 yes.

16 Q. No uniqueness about that organization at
17 all, is there?

18 A. As you have stated it, no.

19 Q. And if someone were to ask, I want all
20 the loan files, you would give them all
21 the loan files. And even the
22 description of all the loan files
23 wouldn't be privileged, would it?

1 A. Depends upon whose description it was.

2 Q. The attorneys. Let's just say the
3 attorneys said, "That's our description
4 of the loan file." If those loan files
5 were clean copies and had no comments on
6 them about the attorneys?

7 A. Again, the documents aren't privileged,
8 as you have described them. The
9 description might be.

10 Q. The description of those documents might
11 be?

12 A. By the lawyer might be privileged.

13 Q. And it just said "loan files," then that
14 would be -- Let me ask you the question
15 about your archives. Is there any way,
16 then, to redact or to take away those
17 things in this index that you all have
18 put together that would remove what
19 you're concerned about?

20 A. First of all, that assumes that we have
21 a written index, which we don't.

22 Q. What form does it take?

23 A. We have a system, our computer system.

1 Q. Okay. If one wanted to -- Now, I don't
2 know a whole lot about computers, but if
3 one wanted to pull up something, that
4 would describe all of what you had in a
5 particular category -- I'm not asking
6 any category, not trying to get into
7 that -- you have the capacity to do
8 that, don't you?

9 A. I'm not sure I can answer that question
10 the way you have stated it.

11 Q. You're not a computer person either?

12 A. I am not terribly literate with computer
13 systems, no.

14 Q. You can't get a printout of --

15 A. I'm not sure I understand what your
16 question is.

17 Q. You can't get a printout -- Let's start
18 there. You can't get a printout of
19 what's in the archive?

20 A. Certainly I can.

21 Q. And you can't get a printout of what's
22 in the archive by category? You can,
23 can't you?

1 A. Yeah.

2 Q. And is what you're objecting to, that
3 that printout would contain the lawyer's
4 summary of what that document is?

5 A. It might. It might also --

6 Q. What in there --

7 A. Donald, can I --

8 Q. Go ahead.

9 A. But the objection would also be to the
10 type of category that the document is
11 related to, that particular category as
12 described by counsel.

13 Q. So the document itself or the summary of
14 documents may not be privileged, but the
15 category it's in makes it impossible for
16 us to look at that; is that right?

17 A. No. You can look at the document if an
18 appropriate discovery demand --

19 Q. No, no. I mean looking at the index
20 that you would print out.

21 A. Anything that would reflect an
22 evaluation of the documents of the
23 categories that the document -- that may

1 pertain to the document would be
2 privileged, because that would be what
3 the lawyer has looked at the document
4 and said, this relates to that, in
5 estimation in looking at these
6 litigation issues.

7 Q. So that's what the index would tell you?

8 A. Yeah, in part.

9 Q. But it doesn't describe the particular
10 document? And it doesn't summarize the
11 particular document?

12 A. It doesn't summarize.

13 Q. I'm trying to separate out what the
14 lawyers part of that is. I'm trying to
15 figure out what that is on that index.

16 MR. PECK: Again, without
17 disclosing the content of the
18 index, you can describe the
19 manner -- I think you have
20 already done this -- but you
21 can describe the manner in
22 which this index came about.

23 MR. STEWART: I'm not asking him

1 how it came about; I'm
2 talking about what the end
3 product would be.

4 Q. (By Mr. Stewart) If we get the index
5 printed out, you're saying that -- as I
6 understand it -- that the summary of the
7 document wouldn't necessarily be
8 privileged?

9 A. Yes, it would.

10 Q. The document itself wouldn't be
11 privileged?

12 A. Yes. The document wouldn't be
13 privileged. But we're not looking at
14 the document; you're looking at the
15 index, which is an entirely different
16 creature.

17 Q. But does that contain a summary of the
18 document?

19 A. In a form, yes.

20 Q. And does that summary include some kind
21 of evaluation of the document by the
22 lawyer?

23 A. Inherent in the summary would be

1 counsel's evaluation of it, yes.

2 Q. You're saying inherent in the summary.

3 If I looked at the summary, would I know

4 what the document was? I'm not talking

5 about what the lawyer's thoughts were.

6 Would I know what it was?

7 A. Would you know what the document was by

8 looking at the index? Probably not just

9 by doing that.

10 Q. But let's just say the Judge ordered you

11 to print the thing out and provide it to

12 him and he looked at it in camera, would

13 he know what documents you had in that

14 archive from looking at that index?

15 A. Not without a whole lot of assistance

16 from counsel.

17 Q. Because it doesn't necessarily describe

18 the document, then?

19 MR. PECK: Well, I --

20 A. It does in a sense. It does. But that,

21 again, goes to how we have it organized

22 and the categories we have found

23 relevant to the litigation support.

1 MR. STEWART: Now we can take a
2 short break.

3 [A break was taken.]

4 Q. (By Mr. Stewart) Let me ask you about
5 this computer system. Is it a key word
6 or searchable system?

7 A. Searchable, but not full text.

8 Q. Explain to this ignorant person here
9 what do you mean by not full text?

10 A. If you recall, I gave you a description
11 of the coding process from the coding
12 sheets. There is a hierarchical subject
13 matter classification system for the
14 information that the coders recorded on
15 the coding sheet. And it is the code
16 for that classification system that's
17 entered into the litigation support
18 system. And it's that hierarchy of
19 classifications that you query the
20 computer system and it identifies
21 documents.

22 Q. At the time this was put together I'm
23 assuming that the lawyers didn't look at

1 every document, Mr. Moore or Mr. Nassif.

2 They had somebody else do it?

3 A. They had legal assistants that helped

4 them, yes.

5 Q. And based on what I understood, there

6 were some people who had sort of a grid

7 or categories or some kind of

8 delineation that they had, and they

9 would rate a document based on that?

10 A. No.

11 Q. Maybe I missed something, then. I

12 thought according to Mr. Nassif and

13 Mr. Moore, put a classification system

14 -- So they had a classification system?

15 A. Can you show me where that --

16 Q. Page four.

17 A. What paragraph are you reading from?

18 Q. Page four of Exhibit Two. Paragraph 8.

19 Well, really you have got to read

20 paragraph 7. He says that he prepared a

21 classification system along with

22 Mr. Moore.

23 A. That's right.

1 Q. As part of that PCB document database
2 system.

3 A. Right.

4 Q. And then following that he personally
5 trained a small number of document
6 reviewers, who would not be Mr. Moore,
7 because Mr. Moore also personally
8 participated in training them.

9 A. That's correct.

10 Q. And they gave them the classification
11 system and then gave them the documents
12 so that they could, following the
13 classification system, classify each of
14 the documents under that code system; is
15 that correct?

16 A. That's correct.

17 Q. And then once that was done, you would
18 make a query under -- what did you say?
19 the search? It's a searchable thing?

20 A. That classification system is that
21 hierarchical code that I spoke of.

22 Q. So you can plug into that classification
23 system, and it'll pull up those

1 documents that they put into the system
2 based on this coding process that
3 Mr. Moore and Mr. Nassif figured out to
4 begin with?

5 A. It will identify the documents by
6 number.

7 Q. So somebody looking at that document had
8 to make some kind of decision based on
9 the classification system he was given,
10 not Mr. Moore and not the other
11 gentleman?

12 A. Mr. Nassif --

13 Q. Doesn't matter who it is. No lawyer was
14 involved in that process?

15 A. In actually coding the documents? No.
16 The lawyers supervised it; the legal
17 assistants assisted in supervising it.

18 Q. I understand. But at some point in time
19 those people had to make certain
20 decisions as to whether or not this
21 document or that document, whatever it
22 might be, fit into that classification
23 of that one?

1 A. That's correct.

2 Q. So if the system won't retrieve
3 something based on a search, and let's
4 say the query may be down -- maybe you
5 have five parts of this classification
6 system, and somebody down in part five
7 really doesn't state it right, or more
8 importantly, that particular thing that
9 appears in the document wasn't important
10 to the reviewer, might not ever get it.
11 Is that possible?

12 MR. PECK: Object to the form of
13 the question.

14 A. Well, the system will only give you back
15 what you put into it.

16 Q. (By Mr. Stewart) Right. And if that
17 judgment was made by that person,
18 whoever it might be -- I'm going to ask
19 you a little bit about them -- then you
20 wouldn't be able to retrieve it?

21 MR. PECK: Object to the form of
22 the question. Question calls
23 for speculation.

1 A. I would say this, Mr. Stewart, that the
2 classification system was so
3 comprehensive, and there are different
4 ways to ask for and get at documents,
5 that it would seem to me very unlikely
6 that any significant document or
7 significant category of documents was
8 missed.

9 Q. (By Mr. Stewart) But that significance
10 you're talking about would be dependent
11 in part on what that person felt was
12 significant as to whether or not it fit
13 in a classification.

14 A. Well, it wasn't just what he felt was
15 significant. It was governed by the
16 description of the information that the
17 coder was looking for.

18 Q. Well, it could be information, since it
19 was being prepared by defense
20 litigators, that might not be important
21 to somebody who was suing you?

22 A. I could only speculate on that.

23 Q. And there may be something in that

1 document that would benefit a plaintiff
2 or someone suing you that just wasn't in
3 that classification?

4 A. I don't believe that's the case, no.

5 Q. Whose employees were threes?

6 A. That did the coding? It was a
7 contractor to Monsanto. Actually it was
8 a contractor that Smith Helms hired. I
9 don't recall whether it was Smith Helms
10 or Monsanto that hired the document
11 coding company.

12 Q. Were they from here?

13 A. Minneapolis.

14 Q. What was the name of the company?

15 A. Control Data.

16 Q. And do you know the employees, or can
17 you give us the name of the employees
18 that worked on that particular system?

19 A. Not from memory, no.

20 Q. But you have them somewhere and can you
21 provide them to us?

22 A. I suppose we have got those files. I
23 can -- We can find out who the

1 supervisors were, certainly.

2 Q. And they in turn, perhaps, can provide
3 us with the names of those employees?

4 A. Possibly. I don't believe we kept the
5 names of the employees.

6 [Discussion held off the
7 record.]

8 Q. (By Mr. Stewart) You were telling me
9 how a search was done. You would make a
10 query of the system itself, if some
11 documents are asked for. You make a
12 query based on, what? This
13 classification system and what's asked
14 for?

15 A. That's correct.

16 Q. And are there people in Smith Helms that
17 do that, or are those people that you
18 all have hired?

19 A. Right now it's Smith Helms.

20 Q. And is that person paid by Smith Helms
21 or by Monsanto?

22 A. I get billed for the time.

23 Q. I don't want to know anything about

1 that. I can imagine what it is, but I
2 don't want to know anything about it.
3 I'd just feel real bad about it, so I
4 don't want to feel bad today.

5 What would be the problem with,
6 Tom, if there are hard copies there,
7 taking those hard copies and just making
8 them available along with the 150,000
9 pages of documents for somebody to
10 review?

11 A. There's a lot of privileged documents in
12 there.

13 Q. What would it take to get those out?

14 A. It would require a search by counsel
15 through the archives to segregate them
16 and then log them.

17 Q. That search, I believe, that you have
18 indicated earlier that you could do.
19 Just by simply querying the system. You
20 can't do that?

21 A. No. We did not ask the coders to make a
22 judgment as to whether a document
23 carried a legal privilege. Only a

1 lawyer, trained legal professional could
2 do that.

3 Q. So you basically interspersed throughout
4 this 800,000 documents all of these
5 privileged documents and then didn't set
6 up a retrieval system so that it would
7 protect those?

8 A. We did not do -- prior to establishing
9 the litigation archive -- a lawyer
10 hand-search through all the documents to
11 segregate potentially privileged
12 documents.

13 Q. My understanding was that you were
14 setting up the system to protect it
15 based on privilege; is that right?

16 MR. PECK: Object to the form of
17 the question.

18 A. I'm not sure I understand what you mean
19 by that. We didn't set up that document
20 archive to protect the contents of the
21 documents from discovery.

22 Q. (By Mr. Stewart) Oh, I thought that's
23 why you did it.

1 A. I told you at the outset, we don't hide
2 things, Mr. Stewart.

3 Q. Maybe I missed something. I thought
4 y'all were involved in some litigation,
5 somebody was asking for some discovery,
6 and so this gentleman decided he would
7 set up a litigation thing and start
8 indexing it. Is that not what happened?

9 A. That in general is what happened, that
10 we needed a better way --

11 Q. One would just make the assumption that
12 what you were doing under those
13 circumstances was trying to protect
14 certain documents?

15 A. No. We were trying to put in place a
16 system that would let us efficiently
17 respond to discovery requests.

18 Q. I see. So you wouldn't put on there
19 those documents that might be privileged
20 and have those people while they were
21 going through there and give them
22 certain criteria to say, now, let's make
23 sure that we locate our privileged

1 documents so we may not make a mistake
2 and send somebody something that is
3 privileged, or so that we could
4 segregate those if somebody asked for
5 them so that we could make a more
6 efficient review of these documents and
7 give them what they wanted without
8 giving them privileged documents? You
9 didn't do that?

10 A. We didn't believe it was appropriate to
11 ask nonlegal people -- The document
12 coders were not paralegals. We didn't
13 believe it was appropriate to have them
14 make a judgment of a legal privilege.
15 That judgment is made when the documents
16 are reviewed for production by counsel.

17 Q. Wouldn't it be a fair assessment of a
18 situation like that that what I was
19 talking about could be done? If you
20 didn't set up something where you could
21 retrieve only those documents that were
22 not privileged in a system, you could
23 say just what you're saying today,

1 couldn't you, Mr. Bistline; "I'm sorry;
2 I can't give you access to all these
3 documents because they're privileged
4 documents"?

5 MR. PECK: Object to the form of
6 the question.

7 Q. (By Mr. Stewart) All through them. And
8 we didn't set up our system so we could
9 segregate those. How many do you
10 anticipate there are in these documents?

11 A. I don't know how many privileged
12 documents there are.

13 Q. How long do you think it would take you
14 to look through them and see what you
15 would find? A month?

16 A. We'd have to sit down -- I'd need to
17 talk to counsel and --

18 Q. Maybe a month to do that?

19 A. I don't know.

20 Q. Because --

21 A. I would have to ask counsel to give me
22 an estimate on how long that would take.

23 Q. There are no comments, as I understand

1 it, from the lawyers on these documents.

2 They are clean, nonprivileged documents.

3 So what we would have access to is those

4 that are not attorney-client letters or

5 memoranda from lawyers and things like

6 that. Basically what you could do, is

7 it not, just segregate those out and let

8 us look through the rest of them? Isn't

9 that right?

10 A. That would be a very time-consuming and

11 burdensome process.

12 Q. But that could be done, couldn't it?

13 A. Theoretically, it's possible.

14 Q. Well, it happened to begin with, didn't

15 it?

16 A. No.

17 Q. Didn't somebody from that group look at

18 every one of these documents and

19 categorize them?

20 A. As I said before, the documents weren't

21 categorized by privilege.

22 Q. No. But they were categorized.

23 Somebody looked at every piece of paper

1 and categorized them in some fashion?

2 A. The document coders reviewed them, yes.

3 Q. And that is how the coding system would
4 go. And that was done. So it's not
5 impossible to do?

6 A. No.

7 Q. The only thing you would object to doing
8 -- and certainly we wouldn't want to see
9 it -- would be those documents that
10 would be privileged, like communications
11 between you and Adam or you and Mike
12 Kelly or a memorandum from you.

13 MR. PECK: As we said earlier, not
14 only that, but the actual
15 collection itself is
16 privileged because it was
17 collected based upon the --

18 MR. STEWART: Bullshit. Pardon
19 me.

20 MR. PECK: -- input of lawyers.

21 MR. STEWART: You can put that on
22 the record.

23 MR. PECK: That's been part of our

1 objection.

2 MR. STEWART: You may hear more of

3 that than you want to hear.

4 You may be turning those

5 records over to somebody

6 else.

7 Q. (By Mr. Stewart) What are these things

8 right here that you have handed me

9 today?

10 A. Ask Adam to identify those because --

11 Q. Oh. I thought that was something that

12 you brought me. I asked -- if you'll

13 look at Plaintiff's Exhibit One, we

14 asked for a privilege log. Is that what

15 you are providing in connection with

16 these documents?

17 MR. PECK: You asked for a

18 privilege log of documents.

19 What you asked for was if any

20 documents are considered by

21 the defendant to be relevant

22 but privileged, a log of such

23 and the grounds upon which

1 the claim of privilege is
2 asserted.

3 MR. STEWART: That's what I asked.

4 MR. PECK: What this says is the
5 privilege law based upon the
6 documents that you have asked
7 for in litigation that we
8 have not been able to produce
9 due to privilege.

10 MR. STEWART: So you finally gave
11 us this?

12 MR. PECK: It's a supplement. You
13 already have some prior
14 privilege logs. This is a
15 supplement.

16 MR. STEWART: This is a
17 supplement.

18 Q. (By Mr. Stewart) But this has nothing
19 to do with what we're asking you about
20 today?

21 A. This is not --

22 Q. This would not be -- Heavens to Betsy, I
23 thought I had sort of a gift here. I

1 thought this was the privileged
2 documents that were located in these
3 800,000, but that's not it?

4 A. No.

5 Q. What is this?

6 A. These are the documents, as I understand
7 it, that have been identified, based on
8 your discovery request, as privileged.

9 Q. Couldn't some of these documents be in
10 that archive?

11 A. They certainly are.

12 Q. They certainly are?

13 A. This is not a comprehensive privilege
14 log for the litigation archive.

15 Q. Well, how is it that you generated this
16 out of that privilege --

17 MR. STEWART: I want to put these
18 as an exhibit.

19 Q. (By Mr. Stewart) How did you put those
20 together?

21 A. But --

22 Q. Some of those --

23 A. By the review process.

1 Q. Some of those documents came out of the
2 documents that were --

3 A. Out of the litigation archive.

4 Q. Out of the litigation archive?

5 A. Yes.

6 Q. So the privilege log that you have given
7 us today, you generated in some fashion.
8 How did you do that?

9 A. By counsel's review of documents.

10 Q. Review of the whole archive?

11 A. Review of the documents that were
12 identified based on your discovery
13 demand.

14 Q. So those 400,000 pages of documents that
15 we have asked for, or that y'all have
16 provided us -- By the way, Charlie says
17 that may be high. But the 400,000 --
18 Says he doesn't know but that may be a
19 little high.

20 A. Excuse me. Maybe 300,000. Between 300-
21 and 400,000

22 Q. Maybe 300,000. But out of the 300,000
23 y'all have been able to put together a

1 privilege log which segregates those
2 documents that were privileged in that
3 400,000 that you have provided us so
4 far. Is that fair to say?

5 A. But we have not produced the privileged
6 documents, obviously.

7 Q. No, I didn't say you had done that.

8 A. But yes.

9 Q. But you have done this 400,000?

10 A. Correct.

11 Q. Which would indicate you have got the
12 ability to do it on the remaining -- I'm
13 trying to figure what the number was,
14 600- or 700,000. Just like you did on
15 this first one?

16 A. As I said before, it's theoretically
17 possible; it would be very burdensome.

18 Q. But you will admit that there are things
19 that are in the archives that you have
20 not provided to us?

21 A. Because they weren't responsive to your
22 demands.

23 Q. Well, how did you do this?

1 A. I think we described the process
2 already.

3 Q. I mean, what was the actual mechanical
4 process that you did, just retrieve the
5 documents out of the archives? Does it
6 print a document out?

7 A. It can. But that's not --

8 Q. Does it print all the documents out that
9 I request?

10 A. It provides for review the documents
11 that based on the elements of the coding
12 system are requested.

13 Q. And when somebody reviews them, they can
14 say, oops, can't send that, that's a
15 letter from a lawyer --

16 A. That's a privileged document. Yes.

17 Q. How did they make that decision? Is
18 that the people who retrieve it or
19 lawyers?

20 A. That's the lawyers.

21 Q. That's the lawyers?

22 A. Yes.

23 Q. So they could do that for us on the

1 remaining documents? Do you have any
2 idea of the time?

3 A. I have already said before I don't know
4 how long that would take.

5 Q. How do you know how long this took?

6 A. I don't know how long that took.
7 Probably haven't seen the bill for it
8 yet.

9 Q. But you don't know how long it took?

10 A. No, sir; I don't.

11 Q. I'd say from the size of it, a fairly
12 substantial amount of time.

13 THE REPORTER: Do you want me to
14 mark that?

15 MR. STEWART: No. Let's just say
16 for the record that I'm
17 referring to the privilege
18 logs, and I want to identify
19 them. It's supplement to
20 redaction log, redacted
21 document log, privileged
22 document form, and -- Do you
23 have a date on them? Or

1 anything with it that can
2 identify --

3 MR. KELLY: Each form, Donald, is
4 for a separate document.

5 MR. STEWART: Each form is for a
6 separate document?

7 MR. KELLY: You will see a
8 privilege log form for each
9 document. That would be
10 identified as a privileged
11 document.

12 Q. (By Mr. Stewart) So there are some 135
13 pages of -- 135 documents, and this
14 would be 136. And here are a number
15 here from Papageorge?

16 MR. KELLY: The redacted document
17 logs where a section like a
18 paragraph was excised because
19 of privilege.

20 MR. STEWART: Okay.

21 MR. PECK: And you have prior logs
22 that were provided in the
23 Swift case.

1 [Discussion held off the
2 record.]

3 Q. (By Mr. Stewart) There was something I
4 wanted to ask you in connection with
5 this affidavit in Plaintiff's Exhibit
6 Two to your deposition by Mr. Nassif.
7 He said something that I wanted to make
8 sure is necessarily -- it differs to
9 some extent. It's on page three. It
10 said, "Before commencing review of the
11 documents, Mr. Moore and I had extensive
12 discussions regarding the documents."
13 And they were selected, categorized and
14 selected and placed in this litigation
15 archive. Then the last sentence says --
16 said, "Those documents which we
17 determined to be relevant and
18 significant were included in the
19 litigation resource library."

20 A. Right.

21 Q. The last sentence says, "Documents not
22 selected for this library were retained
23 by Monsanto and remained available for

1 appropriate litigation discovery."

2 A. Correct.

3 Q. Did you all take the position at the
4 time that he made this affidavit, which
5 was in July of '92 -- and I would assume
6 you did not, but I want to be clear
7 about it -- that only those documents
8 that were in the library were available
9 for appropriate litigation discovery?

10 A. Oh, no.

11 Q. There is not a duplicate, obviously, of
12 those documents, though, in this
13 Monsanto library?

14 A. In the Smith Helms archive, the PCB
15 litigation archive, no.

16 Q. That is the only source of that
17 document?

18 A. No.

19 Q. It ain't somewhere else? It ain't -- It
20 is not duplicated somewhere else?

21 MR. PECK: Ask that again.

22 Q. (By Mr. Stewart) If they selected it
23 and put it in the archives in -- first

1 in St. Louis here, there's no identical
2 document in Anniston or Monsanto or
3 anywhere else; it's there?

4 A. No. No. The original of these
5 documents is still in storage at
6 Monsanto. The archive in Smith Helms'
7 custody are Xerox copies of the original
8 documents.

9 Q. So there's an original of these
10 documents in Monsanto?

11 A. With Solutia now.

12 Q. And not categorized like they have got
13 it categorized?

14 A. No. They are just in storage in the
15 files.

16 Q. So if we wanted to come up and look at
17 those, you wouldn't have the same
18 objection?

19 A. I would have other objections.

20 Q. State those.

21 A. Well, right now, the primary one would
22 be burden in terms of re-collecting all
23 those files and reconstituting them.

1 Q. What do you mean re-collecting them?

2 Aren't they all in one place?

3 A. They are not all in one place. They are

4 in one place in the sense that they're

5 in our document storage facility.

6 Q. But all the PCB documents that these

7 people pulled together and swept and

8 then reviewed have been disbursed

9 throughout your storage system.

10 A. They have been put back in the files

11 from which they originally came. See,

12 the PCB documents were collected by a

13 review of a large number of files. And

14 documents from within those files were

15 identified as relevant to PCBs.

16 Q. Weren't those files closed when you

17 closed down production?

18 A. They were.

19 Q. And weren't those files assembled in one

20 place?

21 A. But they were not all relevant to PCBs.

22 The PCB relevant documents were taken

23 from those files and copied and then

1 either put in the archive that Smith
2 Helms now has or retained in the
3 non-archived documents, in the other
4 150,000 pages that we have been talking
5 about. The original documents were then
6 replaced in the files from which they
7 came. And those files are still in
8 storage in St. Louis.

9 Q. But they are not segregated in such a
10 way that you could just look at the
11 PCB-related documents?

12 A. Right. We would have to go back and
13 retrieve the original document from the
14 file where it was located.

15 Q. So the only place that you could find
16 some of these documents without the
17 burden that you're talking about, if we
18 wanted to look at them, the hard copy
19 would go to North Carolina?

20 A. Correct.

21 Q. After y'all cleaned out everything other
22 than what you have got over here on this
23 log?

1 A. That would be a major project.

2 Q. But I mean, after you did that?

3 A. Well, you have got the log there for the
4 documents that we have so far produced.

5 Q. But I want to make sure that it's clear
6 for the record. There's nothing on the
7 document itself, necessarily, that is
8 privileged, based on the comments that
9 might have been made by Mr. Moore or
10 your colleague there at the time or even
11 these coders or anybody at the time they
12 copied them or at the time they did
13 them?

14 A. They did not mark on the documents, no.

15 Q. So you wouldn't have to redact that part
16 of it?

17 A. Correct.

18 Q. No lawyer comments?

19 A. Well, there might be other lawyer
20 comments that were made on the documents
21 originally.

22 Q. I understand. That would be taken up in
23 the privilege thing. What I'm talking

1 about is you don't have the problem we
2 would have in some of these other cases
3 where y'all wrote on the documents
4 certain types of things?

5 A. No. That was not done.

6 Q. Why did y'all move them to North
7 Carolina?

8 A. At the time that Solutia was spun off
9 from Monsanto, we believed it was more
10 efficient to have them housed and
11 manipulated -- or not manipulated but
12 housed and reviewed --

13 Q. You could use that word.

14 A. Housed and reviewed in North Carolina.
15 It was a matter of not having space in
16 our new building and not really wanting
17 to have that many people working in the
18 law department at Solutia. It seemed a
19 more efficient use of talent to have the
20 documents at Smith Helms.

21 Q. Are you all generating documents for
22 other litigants now who have sued you
23 over PCBs?

1 A. Are we generating documents?

2 Q. Producing documents?

3 A. Yes. We produce in discovery.

4 Q. At the request of lawyers?

5 A. Yes.

6 Q. So in addition to the lawsuits that you
7 have agreed to provide us where you did
8 produce documents and segregate them,
9 those kinds of things, thirty-four, can
10 you tell us now as we sit here today who
11 you are producing documents for out of
12 these archives?

13 A. I can't tell you, not as we sit here,
14 no.

15 Q. You have a list of them, do you?

16 A. We have a list, yes.

17 Q. Do you know what the number would be?

18 A. How many pending lawsuits we have
19 currently?

20 Q. Yes. On PCBs.

21 MR. PECK: Not involving Anniston?

22 MR. STEWART: I'm not worried
23 about Anniston. I think

1 y'all have covered the
2 waterfront and produced the
3 names of those people.

4 Q. (By Mr. Stewart) But I want to know if
5 in fact you have got the non-Anniston
6 cases on a list somewhere where you can
7 let us know what they are, where you are
8 producing documents.

9 A. We could generate that list. I do have
10 that information. Not in my head, but I
11 do have it.

12 Q. And those would have to do with
13 documents that y'all produced -- I'm
14 asking you -- out of these archives and
15 out of these other 150,000 that have
16 been located at our office?

17 A. Documents produced in discovery in those
18 cases would come from that collection.

19 Q. PCB type cases?

20 A. Yes. I understand.

21 Q. Let me ask you this: You mentioned
22 earlier you all had documents that were
23 related to PCBs located either in

1 Monsanto or Solutia's headquarters now
2 in St. Louis, 150,000 pages or better.
3 And you had about 800,000 pages over
4 there in North Carolina. But if one
5 asked you a question about something
6 that was unrelated to PCBs but might
7 have to do with the operation of the
8 Anniston plant, where would you go to
9 get those documents?

10 A. The Anniston plant.

11 Q. The Anniston plant?

12 A. Yes.

13 Q. Do y'all have stuff on the production of
14 Sarin?

15 A. As I understand it, we didn't produce
16 Sarin there. We produced a component.

17 Q. Do y'all have it at Anniston?

18 A. I don't know where that documentation is
19 now. It may be in Anniston. It may be
20 somewhere else. I don't know.

21 Q. When did y'all produce that, where you
22 would have generated records? When did
23 y'all produce nerve gas there at

1 Anniston?

2 A. As I said before, we didn't produce
3 nerve gas at Anniston.

4 Q. What?

5 A. We did not produce nerve gas at
6 Anniston.

7 Q. You did not?

8 A. Correct. That's my understanding.

9 Q. Who gave you that understanding?

10 MR. PECK: Well, to the extent --
11 I guess you can answer that.

12 A. I can't remember whether it was through
13 counsel or from -- where it would have
14 been. Jerry Brown probably at the
15 plant.

16 Q. (By Mr. Stewart) Mr. Brown knew about
17 it?

18 A. As I said, Mr. Stewart, I can't recall
19 whether it was counsel or Mr. Brown that
20 I talked with about that.

21 Q. Wasn't that in the '50s?

22 MR. PECK: Object to the form of
23 the question; no foundation.

1 A. Or earlier.

2 Q. (By Mr. Stewart) Could have been
3 earlier?

4 A. You're beyond what I know of my personal
5 knowledge at this point.

6 Q. What did y'all do with the waste from
7 that production? Whether it was
8 intermediates or nerve gas? What did
9 y'all do with the waste from that?

10 MR. PECK: Object to the form of
11 the question; no foundation.

12 A. I don't have that knowledge. I don't
13 know.

14 Q. (By Mr. Stewart) But it was --
15 intermediates, at least, were something
16 that y'all produced there at the plant?

17 MR. PECK: Object to the question;
18 no foundation.

19 A. Again, Mr. Stewart, you're going to have
20 to ask the question a little better,
21 because I'm not understanding what
22 you're asking.

23 Q. Well, I thought you said y'all didn't

1 produce nerve gas but you produced
2 something else. Was it intermediates?

3 A. My understanding is it was a component
4 for a nerve gas.

5 Q. Well, it was toxic, wasn't it?

6 A. My understanding is that it was not.

7 Q. It was not?

8 A. The final product may have been, but
9 what we produced at the Anniston plant
10 was not.

11 Q. Was not?

12 A. Correct.

13 Q. It's your understanding, as you sit here
14 today, Mr. Bistline, that y'all did not
15 have a pilot project to produce nerve
16 gas in the Anniston in the '50s for the
17 military?

18 MR. PECK: Object to the question;
19 no foundation.

20 A. That is my understanding

21 Q. Was your understanding of nerve gas or
22 Sarin be that it was a bad product,
23 toxic substance, might kill somebody?

1 MR. PECK: Object to the question;
2 no foundation. Donald, this
3 is not the witness to ask
4 about the history of the
5 Anniston plant or nerve gas.
6 We came here to talk about
7 documents. We're way beyond
8 that now.

9 MR. STEWART: Well, I'm trying to
10 find out where these
11 documents are located. He's
12 the document repository man.

13 MR. PECK: For PCBs.

14 MR. STEWART: For PCBs.

15 Q. (By Mr. Stewart) So if somebody asked
16 in connection with our lawsuit for what
17 was produced, what toxic substances were
18 made there at the plant, you wouldn't
19 tell them about the nerve gas in
20 response to that question?

21 A. We didn't make nerve gas at the plant,
22 as I have said.

23 Q. And you're saying that what you made was

1 not toxic or wouldn't hurt anybody?

2 A. My information is that the component
3 that we made was not a toxic substance.

4 Q. So that determination you made, so when
5 somebody asks what toxic substances you
6 made, is that the basis on which you
7 didn't provide it to us?

8 A. I was not aware that you were not
9 provided any information that you
10 sought.

11 Q. I don't remember seeing any information
12 about nerve gas and the production of
13 nerve gas at the Anniston plant in the
14 documents that we have been provided so
15 far. Maybe we didn't query whatever
16 retrieval system y'all had for that in a
17 manner in which we should.

18 MR. PECK: Object to the form of
19 the question; no foundation.

20 Q. (By Mr. Stewart) But you have documents
21 on what you did?

22 MR. PECK: Object to the form of
23 the question; no foundation.

1 He's the PCB document
2 repository. You're not
3 talking about some other
4 substance --

5 MR. STEWART: Well, if he knows
6 enough about that.

7 Q. (By Mr. Stewart) You have those
8 documents, don't you?

9 MR. PECK: About something we
10 didn't produce?

11 Q. (By Mr. Stewart) You have the documents
12 that are related to the production of
13 nerve gas at the plant, don't you?

14 A. For last time, I hope, my information is
15 that we did not produce nerve gas at the
16 Anniston plant.

17 Q. Whatever you produced in connection with
18 the Army's attempt to make nerve gas,
19 y'all have those records, don't you?

20 A. I don't know as I sit here whether we
21 have them or not.

22 Q. Have they been destroyed?

23 A. Mr. Stewart, as I sit here I don't know

1 whether we have them or not. If we had
2 them when you made the request -- and we
3 would not have destroyed them
4 subsequently; I can tell you that.

5 Q. Would you have destroyed them before
6 that?

7 MR. PECK: Object to the form of
8 the question; no foundation.
9 He doesn't know.

10 A. I'm not aware of any reason why we would
11 have kept those since I'm not aware of
12 any litigation prior to this one that
13 has raised that issue.

14 Q. (By Mr. Stewart) Let me ask you, if I
15 could, if you had some documents about
16 Mercury, would those documents be
17 located in the PCB files?

18 A. They may be if it was involved in the
19 production of PCBs. It may also be at
20 the Anniston plant.

21 Q. Is your statement that there's nothing
22 related to PCBs that were involved in
23 that Sarin gas project there at -- nerve

1 gas project there at the Anniston plant?

2 A. My understanding is we didn't make Sarin
3 or nerve gas at the plant.

4 Q. What did you do with the waste?

5 MR. PECK: Object to the form of
6 the question; no foundation.

7 Donald, he doesn't know.

8 He's not an engineer; he's in
9 charge of those documents.

10 This is just not fair.

11 Q. (By Mr. Stewart) What if you utilized
12 that waste in -- or disposed of it
13 through the PCB process? Wouldn't that
14 be related to the PCBs?

15 MR. PECK: Object to the form of
16 the question; no foundation.

17 A. I have no knowledge of the fact --

18 Q. Would that not be related to PCBs?

19 A. That is so hypothetical and speculative
20 that I couldn't answer that.

21 Q. It's not hypothetical, and it's not
22 speculative. I'll say it when I'm
23 asking you a question on a hypothetical

1 or speculative basis.

2 I'm just asking you simply put,
3 Tom, if that would not have something to
4 do with PCBs?

5 A. I'm not aware of any circumstance like
6 that, Donald.

7 Q. If that occurred, wouldn't that have
8 something to do with PCBs?

9 A. If it occurred?

10 Q. Yes.

11 A. Well, it didn't occur, number one.

12 Q. But if it occurred, it would have
13 something to do with PCBs?

14 A. In an alternate universe, yeah, it
15 might.

16 Q. All right. Thank you. Now, have y'all
17 destroyed any of the documents that were
18 gathered in 1981 at any point in time?

19 A. No.

20 Q. You have maintained sacrosanct since
21 they were gathered and put in the index
22 in '81?

23 A. If they have been destroyed, it's been

1 without the knowledge of any of the
2 lawyers. As I said before, we don't
3 hide things.

4 MR. STEWART: Let me talk to
5 Charlie just a minute.

6 [A break was taken.]

7 Q. (By Mr. Stewart) You have produced --
8 and I believe you said -- Let's just
9 take your 400 number. You have produced
10 400,000 pages of documents for us. And
11 if those came out of this archive,
12 wouldn't you say you're halfway home
13 with the indexing of the privilege log
14 on those things?

15 A. Not all 400,000 -- At least according to
16 my information, not all 400,000 pages of
17 documents came out of the archive.

18 Q. It's not privilege as to how many came
19 out of the other one, the 150,000?
20 That's not a privileged matter, is it?

21 A. What? The number of pages? No. I told
22 you the number of pages, to the best of
23 my knowledge.

1 Q. What I'm saying is it's not privileged
2 as to how many came out of the archives?

3 A. As I sit here, Donald, I'm not sure how
4 many came out of the archive and how
5 many came out of other files in
6 Anniston.

7 Q. But you're not saying it's privileged as
8 to how much came out of the other files,
9 are you?

10 A. No.

11 Q. And if, say, 300,000 came out of those
12 archives, pages of documents, then
13 you're almost halfway home on this
14 privilege log on these documents, aren't
15 you?

16 A. I don't know how many pages actually
17 came out of the archive.

18 Q. I'm not asking you that. I'm just
19 saying -- Let's make it simple for you.
20 Let's just say 300,000 did come out of
21 the archive.

22 A. Make that assumption?

23 Q. Yeah.

1 A. Okay.

2 Q. Then you would almost be halfway home on
3 the privilege log?

4 MR. PECK: Object to the form of
5 the question.

6 A. Not necessarily.

7 Q. (By Mr. Stewart) Oh. You mean there
8 are other documents in the 300,000 that
9 you would have asserted the privilege
10 for or given us a privilege log and
11 withheld?

12 A. There are other privileged documents in
13 the archive other than ones that weren't
14 included in the 300,000 that -- on your
15 assumption may have been produced here.

16 Q. What is that, now?

17 A. Well, the rest of the archive has
18 privileged documents.

19 Q. I admit that. That was my question.

20 A. And it may not be a uniform distribution
21 throughout the archive, either.

22 Q. Well, you at least have been through
23 those 300 pages and picked out what --

1 A. Those have been reviewed, yes.

2 Q. Well, that means we haven't got the good
3 stuff, then. Because you have got all
4 this stuff sort of hidden over there
5 with these privileged documents. Maybe
6 we need to go through those?

7 A. You have gotten the documents that you
8 have asked for, sir.

9 Q. Now, let me ask you if those documents
10 that you have there have to do with
11 correspondence or communications that
12 you might have had with an entity that
13 Monsanto had in Europe?

14 MR. PECK: The way you have asked
15 that question, Donald,
16 invades the privilege. You
17 can ask it differently and I
18 think get an answer. I'm not
19 sure --

20 Q. (By Mr. Stewart) Are there possibly
21 documents in there that have to do with
22 correspondence that y'all had with a
23 European entity about PCBs?

1 A. Well, within the entire collection --

2 Q. In the archive.

3 A. The North Carolina, is that what you're
4 talking about?

5 Q. Yes.

6 MR. PECK: To answer that invades
7 the privilege.

8 A. I decline to answer that.

9 Q. (By Mr. Stewart) Okay. But you would
10 admit, wouldn't you, Tom, that if we
11 asked a question that was -- for which
12 there were documents in that group of
13 documents that might have included
14 correspondence between somebody from
15 Monsanto and somebody from one of your
16 European entities, there's nothing that
17 protects that, is there, if it was
18 generated the way these other
19 documents --

20 A. I'm not aware of any reason why they
21 would not have been produced.

22 Q. In other words, if I asked for
23 correspondence about a particular

1 incident or a particular issue, and
2 y'all had some of that with your
3 European entities, it should have been
4 produced if it related to the question
5 that I asked you, if it was related to
6 the PCBs in the case and no proper
7 objection was made, or appropriate
8 objections made?

9 A. Correct.

10 Q. And if we didn't get that and it was in
11 that archive up there, then there's
12 something wrong with that ol' retrieval
13 system again, isn't it?

14 A. No.

15 MR. PECK: Object to the form.

16 Q. (By Mr. Stewart) Let me ask you this:
17 Since you all made PCBs, y'all were the
18 only manufacturer here in the country?

19 A. Major manufacturer here in the country.

20 Q. Well, you all would be the ones that
21 were sort of leading the fight on the
22 regulatory side, scientific side, all
23 that kind of stuff. At the time this

1 stuff broke in '66, y'all would have the
2 bulk of documents?

3 A. For the manufacture of PCBs in this
4 country?

5 Q. Well, the toxicity of PCBs, what y'all
6 knew, when you knew it, all that kind of
7 stuff? That stands to reason because
8 it's your document that you're looking
9 at, but general knowledge about PCBs and
10 what harm they cause and everything
11 else? Y'all would have those documents,
12 wouldn't you?

13 A. We would have what we knew about it,
14 yes.

15 Q. Well, I would assume that this would be
16 sort of the -- I guess the universe of
17 these documents in this country about
18 it, wouldn't it? It would be where
19 people would find out about it if they
20 really wanted to --

21 A. Find out about what, sir?

22 Q. What y'all knew about it and really what
23 the chemical industry knew about it.

1 MR. PECK: Object to the form of
2 the question; calls for
3 speculation.

4 Q. (By Mr. Stewart) Nobody else made it?

5 A. But many other companies used it.

6 Q. You sold it to other companies, but when
7 they had to find out about something,
8 they called y'all, didn't they?

9 MR. PECK: Object to the form of
10 the question; no foundation,
11 calls for speculation by this
12 witness.

13 A. Depends upon what the question was.

14 Q. (By Mr. Stewart) Well, how to use it or
15 whether or not it was safe. They called
16 on y'all?

17 MR. PECK: Object to the form of
18 the question; calls for
19 speculation by this witness.

20 A. We had information on toxicity and
21 physical characteristics that we freely
22 shared with our customers and others.

23 Q. (By Mr. Stewart) Didn't take this

1 privilege stance at that stage in the
2 proceedings?

3 A. We're not taking the privileged stance
4 with respect to any information properly
5 discoverable, Mr. Stewart.

6 MR. STEWART: Could Charlie ask
7 one question while I quickly
8 look at my notes? It's a
9 computer question that --

10 THE WITNESS: I don't want to
11 listen to any questions from
12 Charlie.

13 MR. CUNNINGHAM: The hierarchical
14 code, does it lead you to one
15 end point, or can a document
16 theoretically be coded in
17 more than one category?

18 THE WITNESS: The latter.

19 MR. PECK: I understand why you
20 didn't want to ask that
21 question, Donald.

22 Q. (By Mr. Stewart) Can you give me some
23 idea how long it took those people to

1 review those documents from that entity
2 that y'all had working on them and
3 coding them into the system?

4 A. You mean how long did the coding project
5 take?

6 Q. Yeah. That's what I was looking for.

7 A. Eight to ten months, I believe.

8 Q. How many people worked on it?

9 A. I don't know.

10 Q. And was there a larger universe than the
11 800,000 pages and the 150,000 pages, or
12 was that it that they looked at during
13 that period of time?

14 A. The documents that the coders looked at?
15 Is that what you're looking for?

16 Q. Yeah. The PCB documents that were swept
17 and coded.

18 A. Those documents were the documents that
19 Mr. Moore and Mr. Nassif identified the
20 coding. That is the approximately
21 800,000 page litigation archive that is
22 at Smith Helms.

23 Q. But my question is, they really -- ask

1 it this way: They really looked through
2 more than those 800,000 and that 150,000
3 because they had to look through these
4 files, didn't they?

5 A. Yes.

6 Q. So there might be something that was
7 unrelated to PCBs or something like
8 that, so they were sweeping at the time
9 they were coding? Is that what they
10 were doing?

11 A. No. The documents were identified prior
12 to the coding project.

13 Q. And pulled together?

14 A. And pulled together and provided to the
15 coders.

16 Q. And then they went through the million
17 or so documents and coded those?

18 A. No.

19 Q. This took, what, took eight to ten
20 months?

21 A. The 800,000 pages took eight to ten
22 months. But no documents other than the
23 ones that were coded were provided to

1 the coders.

2 Q. Well, but it didn't take eight to ten
3 months -- it really wouldn't take eight
4 to ten months to separate out these
5 privileged matters, would it? Because
6 what they were doing was actually
7 classifying and coding them one document
8 at a time, weren't they?

9 A. That's correct.

10 Q. So they were going through a rather --
11 be a little quicker process to segregate
12 out the documents for which you were
13 claiming a privilege, wouldn't it?

14 A. It would take less than eight to ten
15 months, I assume, yeah.

16 Q. Might take something like a month,
17 wouldn't it?

18 MR. PECK: Object to the form of
19 the question; no foundation,
20 asked and answered.

21 A. I don't know how long it would take.

22 Q. (By Mr. Stewart) Who would know how
23 long it would take to do this here?

1 You?

2 A. Counsel.

3 Q. You don't know that?

4 A. No, not as I sit here, no.

5 Q. Now, do you know the names of the people
6 who are hired by you, I guess basically
7 through Smith Helms, to retrieve
8 documents if somebody were to ask for
9 one?

10 A. I believe I do.

11 Q. What are their names?

12 A. Jane Turpin.

13 Q. Who?

14 A. Jane, J-A-N-E, and Turpin, T-U-R-P-I-N.
15 Jan Lavere.

16 Q. Jan what?

17 A. Lavere, L-A-V-E-R-E. And Charlotte --
18 Is it Belvedere?

19 MR. KELLY: Belvin.

20 A. Belvin.

21 Q. (By Mr. Stewart) So when you get a
22 request in from some case, then y'all
23 would send it to those ladies and they

1 would retrieve it, right?

2 A. That is part of the process, yes.

3 MR. KELLY: Point of clarification

4 just to help all of us.

5 Charlotte would not do

6 searches as such.

7 MR. CUNNINGHAM: Give her a list

8 of page numbers or something

9 and she would get them off

10 the shelf --

11 MR. KELLY: She would not use the

12 database.

13 Q. (By Mr. Stewart) Do you have any idea

14 of the number of boxes that these things

15 are in? Y'all got any estimation?

16 A. Are you talking about the North Carolina

17 archive?

18 Q. Yeah.

19 A. They are in file drawers, I think, in

20 file folders on shelves.

21 Q. Do you have any estimation as to how

22 many we're talking about?

23 A. How many file folders?

1 Q. Not file folders, I guess boxes. Some
2 of these boxes we have looked at in
3 their office.

4 A. I couldn't tell you offhand, Donald.

5 Q. So I understand this privilege, what you
6 all are saying is the classification
7 system and the method of retrieval is?

8 A. That is privileged, yes.

9 Q. -- is privileged?

10 A. Yes.

11 Q. Because it involved lawyers making
12 decisions about how to set up the
13 classification system and how to rate
14 certain documents?

15 A. Correct. And also the identity of the
16 documents that are in the 800,000 in
17 North Carolina as a comprehensive
18 archive.

19 Q. Oh. The identity of the documents
20 themselves?

21 MR. CUNNINGHAM: The cut, if you
22 will,

23 THE WITNESS: Exactly.

1 MR. CUNNINGHAM: What goes to
2 North Carolina and what
3 doesn't.

4 THE WITNESS: Precisely.

5 Q. (By Mr. Stewart) What is in Monsanto
6 and what is in North Carolina?

7 A. Right.

8 Q. But you would not include in that
9 privilege us looking at the hard
10 documents themselves that are
11 nonprivileged?

12 A. If I was ordered to do that, that would
13 not be --

14 MR. PECK: You mean if it comes
15 out of there? So that you
16 can't see the cut? Or how or
17 the index? No. If I
18 understood your question. If
19 the document is taken out
20 like many documents in this
21 case are, no.

22 Q. (By Mr. Stewart) I'm going to ask this
23 last question. Let's just say you had

1 the index of fifty documents, fifty
2 documents organized in a certain way,
3 that were related to a particular case;
4 if you just laid them out on a table and
5 jumbled them up, you all wouldn't have
6 any objection to us looking at them?

7 A. You would still be able to tell what
8 categories of documents were there.

9 Q. Maybe I'm not understanding what you're
10 asserting.

11 MR. CUNNINGHAM: How far back are
12 you asserting the cut goes in
13 the privilege sense? In
14 other words, are we going
15 back literally all the way to
16 the beginning of '81 when
17 Nassif and your partner,
18 Mr. Moore, sat down and said,
19 here's a bunch of stuff Bill
20 Papageorge brought over; this
21 we want to keep, this we want
22 to keep, this we want to --
23 no, this doesn't make the

1 cut. Are you saying that
2 process is a privilege?

3 THE WITNESS: Yes.

4 MR. CUNNINGHAM: If we were to see
5 that, that would give us some
6 insight into the mind-set of
7 your counsel?

8 THE WITNESS: Exactly.

9 Q. (By Mr. Stewart) So you're saying if
10 y'all took basically 800,000 documents
11 that were PCB related and you stored
12 them in the law deal or in Mike's, the
13 reason we can't see those documents is
14 because y'all say they made a
15 determination or a judgment that these
16 are relevant to litigation and this
17 stuff over here is not.

18 A. In a sense.

19 MR. CUNNINGHAM: That's what they
20 are saying.

21 And is there a
22 compilation somewhere of what
23 they looked at? If we try to

1 get before the privilege was
2 invoked, before the attorney
3 decision was --

4 MR. STEWART: I asked about that,
5 and they said --

6 Q. (By Mr. Stewart) Are you saying there
7 is no compilation before that time?

8 THE WITNESS: I'm not aware of any
9 comprehensive index of
10 documents before that.

11 MR. CUNNINGHAM: Okay. What was
12 reviewed in order to make the
13 cut? That's what I -- I
14 realize you said you never
15 tossed them; they just went
16 back to their -- after you
17 took out what you thought was
18 relevant and created the
19 archive, you sent the broader
20 more comprehensive files back
21 to their respective homes.
22 And most in theory now are in
23 some archive, broad record

1 storage.

2 THE WITNESS: They're all in
3 storage here in St. Louis.

4 Q. (By Mr. Stewart) I guess what I'm
5 asking, though, to follow up on what
6 Charlie is saying, wasn't there a
7 compilation of the documents that
8 Mr. Moore and Mr. Nassif had to look at?

9 A. Again, Donald, I'm not aware of any
10 comprehensive index of those documents.

11 Q. Then how in fact did they make the cut?
12 If they didn't look at an index of
13 documents, other than looking --

14 A. They went through --

15 Q. -- at all the documents, and as I
16 understand it, they did not?

17 A. They looked at the documents.

18 MR. CUNNINGHAM: Is there a list
19 of the sources of files that
20 they went through? Did they
21 make themselves a list of --
22 we checked Papageorge, we
23 checked with Anniston, we

1 checked with Sauget, we

2 checked the toxicology.

3 THE WITNESS: I don't know.

4 MR. CUNNINGHAM: In other words,

5 do we know where they looked?

6 THE WITNESS: I don't know whether

7 there is such a thing or not.

8 Q. (By Mr. Stewart) So in response to my

9 question, if we say we want to look at

10 the hard copies, y'all are still not

11 objecting to that if you can remove the

12 privilege?

13 A. If we can resolve the privilege issue.

14 Q. No.

15 MR. PECK: Well, wait.

16 MR. KELLY: We are --

17 MR. PECK: Not to the extent you

18 can see the cut, as Charlie

19 calls it. We would have to

20 mix --

21 MR. STEWART: Hold just a minute.

22 THE REPORTER: One at a time,

23 please.

1 MR. CUNNINGHAM: They're saying
2 they would want to bring the
3 set that is still in St.
4 Louis to North Carolina and
5 put them together so we can't
6 discern which is where. That
7 doesn't --

8 MR. PECK: Subject to the
9 privilege review.

10 MR. CUNNINGHAM: Sure.

11 MR. PECK: And you guys would do a
12 lot of unnecessary work
13 because you would be looking
14 at a lot of documents that
15 aren't really very important
16 to your case.

17 MR. CUNNINGHAM: I understand.

18 MR. STEWART: All right.

19 MR. PECK: Read and sign.

20
21 (AND FURTHER DEPONENT SAITH NOT.)
22
23

July 24, 2001
Mr. Tom Bistline
C/O Adam Peck, Esq.
Lightfoot, Franklin & White, L.L.C.,
The Clark Building
400 North 20th Street North
Birmingham, AL 35203

Dear Mr. Bistline:

This page is incorporated as page 221 of your deposition. Your deposition transcript has been completed, and as per requested, is ready for you to read over. Please do not write on the transcript but make any changes you wish on the errata sheet provided. If there are no corrections, write across page "no corrections." Please sign the signature page before a notary, and then return errata and signature page.

Under the Rules of Civil Procedure you have thirty days to read and sign your deposition transcript.

If you have any questions, please feel free to call me at (314) 729-0575 and I'll be glad to help in any way I can.

Sincerely,

Sheila L. Ford, RPR, CSR
KRIEGSHAUSER REPORTING & VIDEO

cc: Michael E. Kelly, Esq.

Donald W. Stewart, Esq.

SIGNATURE PAGE

TOM BISTLINE

Subscribed and sworn before me on this
_____ day of _____, 2001

[NOTARY PUBLIC]

My commission expires:_____.

NOTARIAL CERTIFICATE

I, SHEILA L. FORD, a Registered Professional Reporter and duly commissioned Notary Public within and for the State of Missouri, do hereby certify that there came before me at offices of Kriegshauser Reporting, 319 N. 4th Street, Suite 322, St. Louis, MO 63102,

TOM BISTLINE,

who was by me first duly sworn to testify to the truth and nothing but the truth of all knowledge touching and concerning the matters in controversy in this cause; that the witness was thereupon carefully examined under oath and said examination was reduced to writing by me; and that the signature of the witness was not waived by agreement of witness and all parties, and that this deposition is a true and correct record of the testimony given by the witness.

I further certify that I am neither attorney nor counsel for nor related nor employed by any of the parties to the action in which this deposition is taken; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this the 25th day of July 2001.

My commission expires: March 13, 2002

Sheila L. Ford
Notary Public

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