

1 AFTERNOON SESSION

2 1:35 p.m.

3 E X A M I N A T I O N (Continued)

4 BY MR. SIMON:

5 Q. Mr. Timmeny, just before the lunch break
6 when you were talking about your views on scienter
7 you made reference to the fact that -- you made
8 reference to the concept of recklessness, and I
9 don't want to try to recharacterize your testimony
10 but you said something about it applied in some
11 circumstances, or scienter could --

12 A. The scienter element would be satisfied by
13 recklessness.

14 Q. Would be satisfied in some circumstances.
15 Could you tell us your understanding of when
16 recklessness satisfies the scienter standard for
17 purposes of section 10(b)?

18 A. Well, I would say that recklessness would
19 suffice in the absence of an intentional conduct, or
20 in the absence of knowledge of a specific fact.
21 Recklessness would suffice to establish the scienter
22 element, by recklessness I of course would mean a
23 complete disregard for due care. I mean that's
24 something that's a shade above negligence or
25 whatever. I mean we both know the legal standard

1 that the courts have used with respect to
2 recklessness, but some conduct, you know, refusal to
3 look, for example, because of an understanding that
4 one might find something that one would not want to
5 disclose would be tantamount to recklessness.

6 Q. It's not clear to me now whether you are
7 saying that that will always suffice or that will
8 suffice in some circumstances, I believe were the
9 words you used this morning.

10 A. I said in some circumstances, that's right,
11 because I think that recklessness is not necessarily
12 a standard that would be applied to every party
13 defendant in the litigation. For example, I mean
14 you are probably familiar with the Lanza V Drexel
15 standard in the Second Circuit where essentially is
16 the Second Circuit said we will apply the
17 recklessness standard to those directors who are
18 direct participants in a transaction as opposed to
19 those directors who merely function in a review
20 capacity with respect to a transaction. It's a
21 little bit like the flexible duty standard in the
22 Ninth Circuit in applying a recklessness standard to
23 the role of various participants.

24 Q. Do you have a professional opinion as to
25 which of the defendants in this case would have a

1 reckless standard applicable to them in the
2 circumstances of this case?

3 A. Do I have one, as opposed to have I been
4 asked to formulate one?

5 Q. That's correct.

6 A. I would have to say very preliminarily,
7 because I haven't given a great deal of thought to
8 this point, but I would say that a recklessness
9 standard would in any view be most likely
10 inappropriate with respect to representatives of the
11 participants and to the directors of the Supply
12 System in the sense that these people would be in a
13 position analogous to the inactive director, you
14 know, the nonparticipating director in the Lanza V
15 Drexel sense. Lanza is L A N Z A.

16 Q. Is there anyone else in the case among the
17 defendants that you would put in this category?

18 A. There may be. I really haven't thought it
19 through.

20 Q. I take it you would not put the Supply
21 System in that category of comparable to an inactive
22 defendant?

23 A. Meaning a Supply System official who was
24 participating --

25 Q. I meant the Supply System, the entity.

1 A. Well, no. I probably would put the entity
2 in that category.

3 Q. You would?

4 A. You could, you could.

5 Q. I guess I wasn't asking --

6 A. The entity's responsibility is going to
7 flow from an analysis of the conduct of the
8 individuals who are acting on behalf of the entity.
9 So in some cases the entities -- you are going to
10 assess the entity's responsibility based on the
11 actions of the directors, in some cases you are
12 going to assess the responsibility based on the
13 actions of the employees, and I think there would be
14 a different standard applied.

15 Q. All right. When we are assessing the --
16 let's take the work of the finance group which we've
17 discussed earlier, let's assume we are trying to
18 gauge the liability of the Supply System as a
19 defendant in this case, entity defendant in this
20 case, based upon the conduct of Mr. Perko in his
21 role as a member of the finance group, in that case
22 I take it you would agree with me that under your
23 attempt to break the defendants into groups Mr.
24 Perko and the Supply System would be in the group of
25 active participants as to whom the recklessness

1 standard would apply?

2 A. Could apply, yes.

3 Q. I really wasn't asking you whether it
4 could apply, I guess I was asking you whether it
5 would apply. And I'm not sure what distinction you
6 are making.

7 A. There would have to be a lot of other
8 factors analyzed before you would say that it would
9 apply.

10 Q. Give me an example of the factors that
11 would have to be analyzed?

12 A. Factual circumstances, degree of knowledge
13 and that sort of thing.

14 Q. I'm not asking whether Mr. Perko would be
15 guilty of recklessness in a particular case, I'm
16 asking whether that would be the standard. Now are
17 you telling me you need to know the facts before you
18 know the legal standard?

19 A. It would help, uh-huh. I said a standard,
20 one of the standards that could apply would be
21 recklessness, and you are saying would apply. I say
22 you don't get to the would analysis, the would
23 determination until you are aware of more facts.

24 Q. Well, let's assume we are talking about
25 Project 4-5, we are talking about this lawsuit,

1 these Official Statements, and the charge is that
2 the Supply System through Mr. Perko misstated a
3 particular fact. The question I'm asking you is
4 whether showing recklessness on the part of Mr.
5 Perko would suffice in your professional judgment to
6 attach liability to the Supply System?

7 A. It might or it might not depending on the
8 facts.

9 Q. What facts are --

10 A. I wouldn't preclude the application of the
11 standard, but I would have to know more about the
12 factual circumstance before I would say it would
13 apply. I wouldn't apply it in a blanket way just
14 because he is a participant.

15 Q. What additional facts would you need to
16 know, what kinds of facts are you referring to?

17 A. The facts surrounding the circumstance
18 that's not disclosed or that's misrepresented.

19 Q. Let's assume that the fact that's
20 misrepresented is alleged to be the fact that the
21 existing budget for the completion of Projects 4 and
22 5 is understated by \$2 billion, that's the
23 plaintiff's charge, and the question I'm asking you
24 is whether it is your professional judgment that
25 recklessness on the part of Mr. Perko regarding that

1 budget understatement would suffice to attach 10(b)
2 liability to the entity by whom he is employed, the
3 Supply System?

4 A. It could, and then I think you would have
5 to get into an analysis, and I think this is really
6 a jury analysis, as to whether the jury felt that
7 what he did was a form, you know, of recklessness
8 that is sufficient to rise to the level of the
9 equivalent of intent, because that's what I think
10 recklessness is really, a substitute for intent in
11 the context of scienter.

12 Q. Let's move forward. I guess we can come
13 back to this later if we need to.

14 I believe we started this discussion of
15 your views in the course of attempting to complete
16 our discussion of the proceedings at the fall 1987
17 meeting in Seattle. Do you recall any other views
18 that you stated at the meeting regarding scienter or
19 recklessness or reliance or other issues in this
20 case that we have not discussed today?

21 A. Not offhand.

22 Q. Do you recall any comments that were made
23 at the meeting by any of defense counsel other than
24 things you've told us today?

25 A. No, not offhand.

1 Q. And I believe you have already told me
2 that you were not at that meeting given either
3 additional materials to review or additional tasks
4 to undertake, is that correct?

5 A. That's correct.

6 Q. What's the next thing that happened in
7 connection with your retention in this case after
8 that fall 1987 meeting?

9 A. I believe Mr. Cohen and Mr. Stengel,
10 either one or the other, possibly Mr. Kieffer, said
11 that they would be sending some material for me to
12 review, and I did receive material to review.

13 Q. And did they send you material?

14 A. Yes.

15 Q. What did they send you at that time?

16 A. I think it was the Rule 42 material. They
17 were preliminary pretrial submissions of the
18 plaintiffs and the defendants, and I think, I'm not
19 sure, at some point in here I believe I received,
20 started to receive transcripts of Mr. Buck's
21 testimony, Stephen Buck.

22 Q. Did you have any input into the selection
23 of materials that were sent to you at that time?

24 A. If any it would have been simply in
25 response to a comment that I would like to see some

1 material that spelled out the process that was gone
2 through by the parties in preparing the OS in the
3 various offerings.

4 Q. Did you review the materials that you were
5 sent?

6 A. I started to. It went on for some time.
7 I started the review process.

8 Q. Do you recall what was the next meeting,
9 meeting in person you had with any defense counsel
10 after the fall meeting we've discussed?

11 A. I think we had a meeting, I had a meeting
12 with Mr. Stengel and Mr. Cohen with respect to a
13 26-B statement.

14 MR. SIMON: Let's mark as the first
15 Exhibit the 26-B statement with cover letter.

16 A. My recollection is, too, I think at some
17 point in here, too, we -- I also received additional
18 OSs. That's my recollection.

19 I had started out with just one in the
20 file and at some point the file got to be several
21 feet of OSs and whatever.

22 (Marked Deposition Exhibit Timmeny 1.)

23 Q. Mr. Timmeny, take a look at what's been
24 marked as Exhibit 1. When you have had a chance to
25 familiarize yourself with it tell me if you've seen

1 it before.

2 A. Yes, I have.

3 Q. And what is it?

4 A. It is a copy of a letter transmitting to
5 the Court the 26-B statement with respect to myself
6 and a witness named Stanley J. Scott, and with a
7 copy of the expert witness designation attached.

8 Q. Let me focus your attention just on the
9 portion of the statement that relates to you, pages
10 1, 2, 3, 4, 5 and 6. I'm sorry, do we have the
11 supplemental statement stapled to the document that
12 you handed to the witness?

13 (Discussion off the record.)

14 MR. COHEN: The first one should just go
15 through page 7?

16 THE WITNESS: The supplemental is attached,
17 you are right.

18 Q. I would rather break them up but we can
19 treat them as one document. Let's just treat the
20 first seven pages as Exhibit 1 and we will mark the
21 rest Exhibit 2.

22 Let's talk about the first statement to
23 begin with. That's what I'm going to refer to as
24 Exhibit 1 from this point forward.

25 (Discussion off the record.)

1 (Marked Deposition Exhibit Timmeny 2.)

2 Q. Could you tell me when you first saw this
3 statement in draft or final form?

4 A. I first saw this statement in final form
5 within the last couple of days, I guess, in
6 preparation for the deposition. Sometime prior to
7 the meeting that I referred to that I had with Mr.
8 Cohen and Mr. Stengel with respect to a 26-B
9 statement, we had the meeting with respect to the
10 26-B statement before there was any draft.

11 Q. Where did the meeting take place?

12 A. In my office in Washington.

13 Q. How long did it last?

14 A. I would say a few hours, maybe a couple of
15 hours and then lunch thrown in, maybe three in total.
16 I'm not sure, really.

17 Q. Okay. And that was before any draft 26-B
18 statement was written as far as you know?

19 A. Before a draft -- as far as I know, yes.

20 Q. Was one of the purposes of the meeting to
21 discuss the content of a 26-B statement?

22 A. That's right.

23 Q. Was that one of the purposes of the
24 meeting?

25 A. That was the only purpose of the meeting

1 as I recall.

2 Q. Do you recall any subject areas for
3 potential expert testimony which were discussed at
4 the meeting but do not appear in the statement?

5 A. I don't think so. I don't think there
6 were any.

7 Q. When did you first see a draft of this
8 statement, if ever?

9 A. I saw a draft of what would amount to the
10 first two and a half pages of this statement. I
11 never saw a draft that encompassed all six pages.

12 Q. All right. But you did see a draft of
13 what I would call the textual portion of the first
14 two and a half pages?

15 A. The textual, exactly, exactly.

16 Q. Do you recall about when you saw it either
17 in relationship to the meeting or in relationship to
18 the date of the statement?

19 A. It was shortly after the meeting. I
20 thought, we are getting close to a deadline here
21 that it had to be submitted, that is my recollection,
22 and it was shortly after the meeting, so that put
23 the meeting maybe a couple of weeks before the
24 deadline. And shortly after the meeting I received
25 a copy of a draft in the mail. And I made some

1 changes in it and had some reaction to it and
2 telephoned Mr. Stengel, I believe, and told him I
3 was making some changes, and then either Telexed
4 something back to him or sent it back overnight mail,
5 Federal Express, one or the other.

6 Q. Do you recall whether your changes were
7 made?

8 A. I think they were.

9 Q. Do you recall receiving a copy of a second
10 draft?

11 A. I'm not sure.

12 Q. And you testified a few minutes ago I
13 guess that you didn't see the final until this week,
14 is that right?

15 A. That's right, that's right.

16 Q. Do you recall discussing your changes with
17 any defense counsel?

18 A. I think Mr. Stengel and maybe Mr. Cohen.

19 Q. Tell us what you recall about the nature
20 of your discussion of the changes.

21 A. I can't remember much about it except that
22 it went to the Chemical Bank discussion on page 2 of
23 the exhibit, and that's why I was communicating with
24 Mr. Stengel, as I recall.

25 Q. Did a time come when you signed off

1 literally or figuratively on this document?

2 A. I thought I had after I made whatever
3 changes there were and after I told Mr. Stengel
4 about the changes. My recollection was in that
5 process he said fine, whatever changes, you know, he
6 just agreed that the change would be appropriate,
7 and that was it.

8 Q. So you assumed the changes were going to
9 be made and you were -- essentially signed off at
10 that point?

11 A. That's right.

12 Q. When you saw the document this week in
13 final form for the first time was there anything in
14 it that you disagreed with or were surprised by?

15 A. No.

16 Q. Would it be fair to say that as of
17 mid-November 1987 this was a fair and accurate
18 description of the opinions you intended to give in
19 this case at that time?

20 A. Yes, with the qualification that my review
21 of materials with respect to Chemical Bank was very,
22 very preliminary at this time. I think we had
23 discussed that, I think we have discussed that with
24 Mr. Stengel. In fact that may have been one of the
25 points we discussed. I really hadn't looked at a

1 lot of things with respect to Chemical Bank, and --
2 although I had the opinion as noted on the exhibit
3 that I was expressing, I think I expressed some
4 concern that I had to review more materials in
5 connection with that opinion.

6 Q. Have you reviewed additional materials in
7 connection with that opinion?

8 A. Not much.

9 Q. Now, moving from November 1987 to the
10 present can you tell me whether this remains a fair
11 and accurate description of the opinions you intend
12 to give at the trial of this matter?

13 A. Yes.

14 Q. Are there additional opinions not
15 reflected here which you now intend to give?

16 A. When you say that I intend to give, I mean
17 as I understand the way the process works I may be
18 asked for an opinion. I'm not going to volunteer
19 one.

20 Q. Let me rephrase the question. Are there
21 additional -- you understood when you read this in
22 November that it was an effort to summarize for
23 plaintiffs' counsel and the Court the nature of the
24 opinions that you were expected to give?

25 A. Yes.

1 Q. And you signed off on it?

2 A. Yes.

3 Q. So you had some understanding at the time
4 of what opinions you would be expected to give at
5 trial?

6 A. That's right.

7 Q. Even though you have no control over what
8 questions are asked of you?

9 A. That's right.

10 Q. And at the time you were comfortable with
11 it as a fair statement of those opinions?

12 A. That's right.

13 Q. Subject to the qualification that you
14 don't know what the attorneys are going to ask?

15 A. That's right.

16 Q. Now, based on what you know today having
17 done I suppose further work, having had further
18 meetings with defense counsel, does it remain an
19 accurate statement of what you expect to testify
20 about in this case, or --

21 A. Yes.

22 Q. -- do we need to modify it by adding --

23 A. You don't need to compound the question.
24 Yes to the first part of your question.

25 Q. There are no additional opinions you

1 expect to testify on?

2 A. That's right.

3 Q. And there are no opinions stated in here
4 that you no longer intend to testify on?

5 A. That's right.

6 Q. On the first page, line 21, there is a
7 reference in describing your background to private
8 litigation. We didn't hear a lot about that this
9 morning. I wonder if you could elaborate on the
10 kinds of private litigation you have been involved
11 in in private practice.

12 A. Primarily defense of class actions,
13 securities class actions.

14 Q. Could you identify one or two of those
15 that, possibly the most recent ones you have been
16 involved in if you recall them?

17 A. I am involved in some in the Southern
18 District of Florida, it's litigation involving an
19 issuer called Captain Crab, there are some five or
20 six actions that have been consolidated for pretrial
21 purposes down there.

22 Q. Who do you represent?

23 A. I represent the former chairman of the
24 board of Captain Crab.

25 Q. And your adversaries in that case are a

1 class of stock purchasers?

2 A. Yes.

3 Q. Who represents them?

4 A. A lot of lawyers. I forget. I really --

5 Q. Anybody whose name sticks out as a leader,
6 a formal or informal leader?

7 A. No. They are mostly out of Chicago. I
8 really didn't know them before the case.

9 Q. Can you identify any other securities
10 class actions you have been involved in?

11 A. The class actions in Kansas City involving
12 the securities of a company called the Midwestern
13 Companies. I think there was a plural in it.

14 Q. Who do you represent there?

15 A. I don't any longer.

16 Q. Who did you?

17 A. Well, I shouldn't say I don't. I mean, I
18 filed a motion to get out but that hasn't been ruled
19 upon yet to my knowledge.

20 I represented the former president of the
21 Midwestern Company.

22 Q. And you filed a motion to withdraw?

23 A. Yes.

24 Q. On what basis?

25 MR. COHEN: Is that something you feel

1 comfortable discussing, because if it isn't I don't
2 think you really have to. It's pretty far afield.

3 MR. SIMON: Probably ought to be -- I
4 suppose it ought to be on the face of the motion if
5 we went and checked the Court file so it ought not
6 to be confidential.

7 A. It is on the face of the motion. I think
8 more or less inability to communicate with the
9 client.

10 Q. Let me digress and go back to an issue we
11 discussed this morning and didn't get back to.

12 We were discussing the subject of
13 conflicts, and I believe there was a reference to
14 the fact that there was some additional potential
15 conflict other than the kind of conflict I was
16 discussing with you, some additional conflict issue
17 had come up in the course of your representation or
18 your retention here. Tell me about that.

19 A. I'm sorry, I'm not sure I follow you.
20 There was some additional discussion about conflicts?

21 Q. I thought the nature of the comment you
22 made, or maybe it was Mr. Cohen or Mr. Stengel, was
23 that there was some additional conflict item that
24 had arisen in connection with your retention in this
25 matter.

1 MR. COHEN: Let's go off the record just
2 for a second.

3 (Discussion off the record.)

4 MR. SIMON: I will withdraw the question
5 for the moment.

6 Q. Will you look at Exhibit 1, please, and
7 I'm referring to the sentence on page 2, lines 4 to
8 6, quote, "Mr. Timmeny is expected to offer his
9 opinion that the Supply System met or exceeded
10 applicable disclosure standards for municipal bond
11 issues."

12 Is that an opinion that you held in
13 November 1987?

14 A. Yes.

15 Q. And you still hold it today?

16 A. Yes.

17 Q. Could you tell me what you mean in that
18 sentence by "applicable disclosure standards for
19 municipal bond issues"?

20 A. Well, what I meant by that was that I felt
21 that the Supply System had provided disclosure in
22 appropriate detail with respect to the matters
23 covered in the Official Statement, and I further
24 meant that they had essentially -- that they
25 essentially discussed projections in connection with

1 the Official Statement. And I felt that they had
2 met the applicable disclosure standards with respect
3 to projections; and furthermore I felt that they met
4 the applicable disclosure standards with respect to
5 the process that they followed, and that is in the
6 way the information was put together and the way
7 they consulted with the market professionals in
8 connection with disclosure issues.

9 Q. Which applicable disclosure standards were
10 you referring to in that sentence?

11 A. The ones I just mentioned.

12 Q. I guess I'm not communicating with you
13 here. I didn't hear you identify any particular
14 standard in that answer, and what I'm asking is when
15 you say applicable disclosure standards are you
16 talking about a particular statute, a particular
17 regulation, an MFOA guideline, something different?

18 A. What I'm discussing is a standard that
19 would be encompassed, first of all, with the
20 umbrella of the federal securities laws and the
21 anti-fraud provisions and then working on down to
22 industry standards within that or under that
23 umbrella, and also the MFOA guidelines in a sense,
24 although I don't think that they were, the MFOA
25 guidelines were at that point industry standards. I

1 think that the MFOA guidelines were goals that the
2 MFOA hoped that the industry would achieve, but they
3 were more aspirational than operational at that
4 point.

5 Q. Is the gist of this statement that you
6 don't believe that the Supply System violated
7 section 10(b)?

8 A. You could say that. I said more than that,
9 but that's certainly encompassed in what I said.

10 Q. Let's focus on what you said that is more
11 than that. That part I understand, we will set that
12 aside and we will come back to it.

13 What are you saying more than that in this
14 sentence?

15 A. Well, that's included in what I said. I
16 also said, if you want -- she can read my answer
17 back unless you want me to repeat it. I think it
18 would be better if she read it back.

19 Q. Well, I heard the answer. Are you saying
20 that they met industry standards?

21 A. Oh, yes.

22 Q. Are those industry standards written down
23 anywhere?

24 A. No.

25 Q. And those industry standards are the

1 standards you have in mind based upon your
2 experience in the field?

3 A. Yes. For example, I said they met
4 standards with respect to the level of detail that
5 would be required in a disclosure document of this
6 sort.

7 Q. The Official Statement is detailed, that's
8 what you are saying?

9 A. Yes. It met a level of detail that would
10 be expected by -- in the industry at that time.

11 Q. Okay. Are you giving an opinion in this
12 sentence with regard to whether those details were
13 accurate?

14 A. Yes, as far as I know, yes, based on what
15 I have reviewed.

16 Q. And what you have reviewed are the
17 materials listed in these various lists we have been
18 provided by Mr. Stengel and Mr. Cohen?

19 A. That's right.

20 MR. COHEN: He said he hasn't seen the
21 lists -- you know, he hadn't seen them at that point.
22 He doesn't know what number so and so is, but he
23 testified he has reviewed no more than we gave him
24 other than as he has testified.

25 Q. You don't purport to have reviewed all of

1 the evidence that the plaintiffs rely upon in this
2 case, do you?

3 A. No, no. I relied heavily in my analysis
4 on the plaintiffs' preliminary pretrial statement
5 and also on the plaintiffs' opposition on the
6 defendants' motions for summary judgment, so to the
7 extent that they review the evidence, or at least
8 are arguably a review of the evidence, then that's
9 what I've reviewed.

10 Q. Let's use that, that's a good illustration.
11 Let's use that as an example to be sure we are both
12 on the same wavelength.

13 You read the plaintiff's opposition to the
14 most recent round of summary judgment, it's about a
15 450-page document?

16 A. Yes.

17 Q. Would you agree with me that the -- well,
18 let me put the question a different way. You
19 understand that there is evidence referred to
20 therein and in fact filed in separate binders of
21 materials that I don't know whether you've seen
22 those or not. Have you seen the binders of
23 evidentiary material?

24 A. In support of the memorandum?

25 Q. Right.

1 A. I don't think so.

2 Q. But you are aware that the opposition to
3 the motion for summary judgment contains citations
4 to deposition testimony and exhibits and other
5 evidence which the plaintiffs claim is evidence of
6 legal violations here, right?

7 A. I've seen the representations in the
8 plaintiffs' memorandum in opposition to the motion,
9 yes.

10 Q. And you've seen that those representations
11 include references to exhibits and deposition
12 transcripts?

13 A. That's right.

14 Q. And you understand that those things were
15 filed with the court?

16 A. Yes.

17 Q. Even though you haven't seen them?

18 A. Well, I shouldn't say I have not seen them.
19 I have asked for some of the exhibits and I have
20 asked for some testimony.

21 Q. All right.

22 A. So I may have seen some.

23 Q. Did you ask -- are you saying you have
24 asked specifically for certain exhibits and
25 testimony referred to in that document, or that you

1 have asked for exhibits and testimony from time to
2 time and they may coincidentally be the same
3 materials cited in portions of that document?

4 A. More the latter than the former.

5 Q. All right. Now, when you say that you've
6 seen -- you say you are of the opinion that the
7 Supply System did not violate section 10(b), how
8 have you disposed of that evidence on which the
9 plaintiffs rely?

10 A. Let's take an illustration. With respect
11 to the allegation that there was an insufficient
12 discussion in the offering statement or the Official
13 Statement with respect to the need for power, the
14 further allegation that because of the absence of
15 some discussion with respect to price elasticity in
16 connection with load factor projections, that there
17 was a material nondisclosure.

18 It was my view after reviewing that
19 allegation and the evidence relating to it that the
20 Official Statement contained sufficient detail with
21 respect to load factor that an omission with respect
22 to an elasticity factor was not a material omission
23 because the load factor projections were based on
24 projections that contained or utilized reasonable
25 methodology. And there also was disclosure in the

1 registration, or in the Official Statement, to the
2 effect that there were other projections that were
3 higher and lower, and to the extent that the
4 projections were -- that were utilized were
5 projections for which there was a reasonable basis
6 and methodology and to the extent that there was
7 disclosure with respect to the availability of other
8 load factor projections, I thought that the Official
9 Statement was sufficient.

10 Q. Do you recall whether that statement about
11 there being other projections, some higher and some
12 lower, was contained in every Official Statement?

13 A. I don't know that it was contained in
14 every Official Statement. I really don't know.

15 Q. Did you think the Official Statements in
16 which it was not contained were misleading?

17 A. I don't know that there were some that it
18 was not contained in as a starter. I just don't
19 know. I did check a number of Official Statements,
20 I went back and forth, you know, generally looking
21 at the various provisions, and I believe seeing it
22 in a number of them.

23 Q. Were you aware of the fact that the
24 plaintiffs allege in this case that at the time of
25 certain of those Official Statements that the other

1 projections which are described in the Official
2 Statement as "some higher and some lower" were
3 virtually all lower?

4 A. I don't know whether the majority were
5 lower or the majority were higher. No. I don't
6 know.

7 Q. You didn't inquire as to that?

8 A. No.

9 Q. You don't recall the plaintiffs'
10 allegation regarding that?

11 A. Offhand I don't.

12 Q. Would you agree with me that a statement
13 that there are other projections, some higher and
14 some lower, would be misleading if the vast majority
15 of the projections or virtually all of the
16 projections were lower, some markedly lower?

17 A. No, I don't think so. I think the purpose
18 in disclosing that there were some higher and some
19 lower would be to enable the persons who had the
20 ability or the capability of going forward with an
21 analysis to either inquire about them or to do their
22 own analysis.

23 Q. Do you think it would be important to
24 identify those other projections so that such a
25 person could find them?

1 A. No.

2 Q. How would the person find them?

3 A. Ask for them.

4 Q. Who would you ask?

5 A. You could ask the Supply System if you
6 wanted to know, you could ask the underwriter, or
7 you could ask the financial advisor, you could ask
8 the consulting engineer.

9 Q. What about the allegations in the
10 opposition to the motion for summary judgment that
11 the cost and schedules were understated, how did you
12 come to dispose of the plaintiffs' allegations in
13 that regard?

14 A. I thought the cost and scheduling
15 disclosures were essentially -- are essentially
16 projections, and I thought that there was a -- based
17 on the evidence that I reviewed that there was a
18 reasonable basis for those projections, and I think
19 that's the only standard that would be required with
20 respect to the use of projections in an offering
21 document.

22 Q. What do you mean by a reasonable basis in
23 that context?

24 A. I mean that the projections would have to
25 be -- come from sources that were reliable, and that

1 there would have to be a reasonable methodology in
2 utilizing this material.

3 Q. And you don't recall any evidence in the
4 plaintiffs' opposition to summary judgment which
5 raised any doubts in your mind as to whether the
6 projections were reasonably based or made in good
7 faith?

8 A. No, I don't recall any such evidence that
9 raised any doubts in my mind.

10 Q. Is that because you rejected some of the
11 evidence as unbelievable or unreliable?

12 A. No. I pretty much took it at face value.
13 I thought that there was -- the plaintiffs'
14 memorandum was probably the best compilation that I
15 would find of the evidence that would go to the
16 issues of these various disclosure issues, so I
17 pretty much accepted the evidence at face value. On
18 some occasions with respect to certain items I might
19 ask for more detail to see if there was something
20 out there that the plaintiffs hadn't referred to,
21 but I wasn't rejecting what the plaintiffs said.

22 MR. COHEN: Let's take five minutes.

23 (Recess.)

24 BY MR. SIMON:

25 Q. The next sentence in your Rule 26

1 statement, Exhibit 1, says that you are expected to
2 offer the opinion that the Supply System and the
3 Washington Public Utilities Group defendants
4 reasonably relied upon financial advisors,
5 underwriters, counsel involved in the disclosure
6 process and other financial professionals with
7 respect to disclosure.

8 Could you tell me the basis for your
9 opinion -- I guess we better break this up so we
10 don't have a compound question.

11 Can you tell me the basis for your opinion
12 that the Supply System reasonably relied upon its
13 financial advisor with respect to disclosure in
14 connection with this case?

15 A. The basis was my review of the testimony
16 and my understanding of the federal securities laws
17 and as I would apply them to this case.

18 Q. What testimony did you review?

19 A. Testimony with respect to the processes
20 that were followed by the Supply System in compiling
21 information for the disclosure document and
22 reviewing that information with the financial group.

23 Q. Is that Mr. Buck's testimony?

24 A. Principally. I also looked at some -- a
25 little bit of Perko testimony, and the references to

1 other testimony in the plaintiffs' submissions, and
2 in the defense submissions, too.

3 Q. Did you read Patterson's testimony?

4 A. No.

5 Q. On what issues did you understand the
6 Supply System to have relied upon Blyth?

7 A. I took the reliance to be general; in
8 other words, it was my impression having read the
9 disclosure -- I mean the information that I reviewed
10 that the way the process was structured, that the
11 Supply System would put together a preliminary draft
12 disclosure document and that would be presented to
13 the finance group and the finance group would review
14 it and ask questions and probe with respect to the
15 adequacy of the disclosure. And after a first
16 meeting there would be a round of amendments or
17 what-not based on the comments of the finance group.
18 And then there would be a second meeting where it
19 was reviewed some more, and finally in the third
20 meeting perhaps after the opening of the bid an
21 underwriter was on the scene.

22 Q. Is it your judgment that the process
23 itself demonstrates that the Supply System relied on
24 the financial advisor?

25 A. What I reviewed. I mean I had the

1 impression from what I reviewed that the finance
2 group would make the final call with respect to
3 disclosure issues, in other words the issues were
4 presented to the finance group or would evolve in
5 the course of this process that I've described, and
6 that ultimately the decisions with respect to
7 disclosure would be decisions of this finance group
8 with each of the members playing a significant role.

9 Q. Well, when you talk about decisions, again,
10 you are referring to items which are discussed at
11 finance group meetings, correct?

12 A. Yes, uh-huh, or which the finance group
13 would be aware of.

14 Q. Let me give you an example of something
15 that doesn't fit in that category. I want to get an
16 example of what you are saying, if anything, on that
17 subject. Let's talk about the authority issue. You
18 are aware of the fact that there is an authority
19 issue in this case.

20 A. Yes.

21 Q. And you are aware that the plaintiffs
22 claim that there were undisclosed risks regarding
23 authority?

24 A. Yes.

25 Q. Do you recall seeing anywhere in the

1 record evidence that the need to disclose various
2 matters was discussed among the finance group?

3 A. No. That's an area where I wouldn't
4 expect to find it, either. I think you picked one
5 area where I would expect that once counsel has
6 opined in an area that it would be beyond the
7 expertise and the ability of the other members of
8 the finance group to second-guess that opinion. So
9 I think that's a bad area for, you know, for the
10 kind of discussion that you want to get into.

11 Q. So you are not of the opinion that the
12 Supply System was relying on Blyth with regard to
13 authority issues?

14 A. That's right. I think the Supply System
15 would be relying on counsel with respect to
16 authority issues.

17 Q. And you are not of the opinion that the
18 Washington Public Utilities Group was relying on
19 Blyth with regard to authority?

20 A. That's right.

21 Q. Let's take another example, let's take --
22 go back to cost and schedules again. Are you aware
23 of there being discussions among the finance group
24 of whether or not to disclose certain matters
25 regarding cost and schedules, or how to disclose

1 them?

2 A. I think there were, yes.

3 Q. Are you aware of whether there were
4 discussions at the finance group level of each of
5 the disclosures that are charged as misleading in
6 plaintiffs' opposition to the motion for summary
7 judgment?

8 A. If that's what the plaintiffs' motion says,
9 then I took that as part of my analysis.

10 Q. I guess you misunderstood my question. My
11 question was whether it isn't the case that some of
12 the matters the plaintiffs charged were misdisclosures
13 or nondisclosures were never discussed at a finance
14 group meeting, isn't that true?

15 A. There may have been some. I mean, you
16 might have to refresh my recollection as to what
17 they were.

18 Q. Well, I guess let's shift subjects to an
19 even easier topic. You are aware that one of the
20 areas of alleged nondisclosure here is ability to
21 pay, right?

22 A. Yes.

23 Q. Do you recall any evidence in the record
24 that ability to pay was discussed as a disclosure
25 item at finance group meetings?

1 A. It must have been. I mean, there was
2 disclosure with respect -- in that general area with
3 respect to ability to pay in the offering statement,
4 so I assume they discussed it at some point.

5 Q. What disclosures are you referring to?

6 A. The revenue analysis that Beck prepared, I
7 think you referred to it generally in the litigation
8 as the Beck spread sheets or something.

9 Q. But do you recall there being a discussion
10 of that among the finance group?

11 A. Offhand I don't.

12 Q. Would it be fair to say if it was not
13 discussed among the finance group that it is not an
14 item as to which you can say the Supply System or
15 the Washington Public Utilities Group reasonably
16 relied upon the advice they got regarding disclosure
17 from their finance professionals?

18 A. I think they would have relied on the
19 advice of Beck with regard to feasibility and
20 therefore as long as Beck was coming up with a
21 feasibility report I don't think there would be an
22 issue with respect to additional disclosures that
23 would have to be discussed.

24 Q. Do you understand that the Beck
25 feasibility report has as an input load forecasts

1 from the participants?

2 A. Yes.

3 Q. Do you understand that it's Beck's
4 position that it relied on the participants for the
5 accuracy of those load forecasts?

6 A. Yes.

7 Q. Isn't it the case then as to a party like
8 the City of Tacoma, for example, that City of Tacoma
9 cannot take the position that it is relying upon
10 Beck for the accuracy of the feasibility report when
11 Beck is taking the position that it's relying on the
12 City of Tacoma for one of the key inputs to that
13 feasibility report?

14 A. No, I don't agree with that.

15 Q. You think they are both right?

16 A. Sort of.

17 Q. Would you elaborate on what you mean by
18 "sort of" there.

19 A. I think the point is that when you have a
20 feasibility report, a consulting engineer like Beck
21 could not have issued a feasibility report if they
22 thought that the underlying data that they relied on
23 was unreliable. So I think that the fact that they
24 would have to have a good faith belief that the
25 underlying data was reliable coupled with the fact

1 that they in my understanding had some familiarity
2 generally with the projection process followed or
3 the methodology followed by a number of the
4 participants, and with the whole subject of load
5 forecasting generally in the Northwest because Beck
6 is not, you know, a fly-by-night outfit that just
7 happened to show up for these transactions. They
8 have been involved in the process for a long time,
9 so in that context, given those factors, I think
10 that Beck could not have issued a feasibility report
11 if they thought that the information was of
12 questionable reliability and would not have issued
13 the report in that context.

14 In other words, an expert of Beck's
15 caliber would pull the plug on an opinion, would
16 have to pull the plug on an opinion before -- rather
17 than issue an opinion if they thought that the
18 information that's floating around upon which they
19 base assumptions is unreliable.

20 Q. Are you aware that it is Beck's position
21 in this case that it accepted the load forecasts of
22 the participants at face value and did not check
23 them or confirm them?

24 A. Yes. But there is a difference between
25 accepting something at face value and not believing

1 that it was unreliable. In accepting something at
2 face value it would follow that you would have to
3 believe that it was basically reliable or you
4 wouldn't use it.

5 Q. You don't believe Beck could have
6 delegated its responsibility in that regard to the
7 participants themselves?

8 A. They delegate the responsibility to the
9 participants to prepare the information at the first
10 instance, but it would have been improper for Beck
11 to use information prepared by the participants if
12 they had any inkling it was unreliable.

13 Q. Would it have been improper for the Supply
14 System to allow these Official Statements to go out
15 if they had any inkling that the load projections
16 contained in them were unreliable?

17 A. Well, the Supply System now would look to
18 Beck presumably with respect to the propriety of
19 using these projections.

20 Q. The Supply System has professionals in its
21 employ also, doesn't it?

22 A. Yes, it does.

23 Q. People knowledgeable about power and
24 public power?

25 A. Yes.

1 Q. And if the Supply System had an inkling
2 that the load forecasts being provided by the PUDs
3 or the cooperatives were unreasonable, wouldn't it
4 have the same obligations that Beck had to assure
5 the accuracy and fairness of its own disclosure
6 statement?

7 A. Well, in a general sense I think they
8 would, although I don't like the use of the word
9 "inkling" even though I through it into the
10 discussion. I think you get into a materiality
11 factor here someplace so it's not just a hint or an
12 inkling, it would be significant. One would have
13 knowledge that the information was unreliable in
14 some significant respect.

15 Q. How about if one suspected the information
16 might well be unreliable. Wouldn't that be a time
17 when one should check further?

18 A. Well, the further check on the part of
19 these participants it would seem to me would be with
20 Beck. If it was okay with Beck, then I think they
21 satisfied their responsibilities.

22 Q. Well, my question actually related to the
23 Supply System itself rather than the participants.

24 A. Well, I'm using the participants in a
25 general sense, all people who were within the scope

1 of your inquiry here, your concern.

2 Q. So your position is that the City of
3 Tacoma can send a load forecast which it is doubtful
4 about to Beck and so long as it gets past Beck the
5 City of Tacoma has not violated a 10(b) --

6 A. You introduced something that wasn't in
7 your prior discussion. You didn't say before the
8 City of Tacoma had doubts about the load forecast
9 that it was using.

10 Q. Let's assume they did.

11 A. Well, that could present difficulty. Then
12 I think that would eliminate a reliance element. It
13 could go a long way toward it, if the doubts were
14 significant. If they were not acting in good faith
15 in sending in a load forecast, they couldn't hide
16 behind the fact that it slipped past Beck.

17 Q. I suppose the same would be true of the
18 City of Tacoma with regard to authority, isn't that
19 right, if the city attorney was aware that there
20 were authority problems in participating in Projects
21 4 and 5 Tacoma could not rely upon or hide behind
22 Wood Dawson merely because it got past Wood Dawson's
23 review of 88 agreements, isn't that correct as well?

24 A. That's a little bit different. I mean
25 it's different in the sense that Wood Dawson might

1 have a different view with respect to authority than
2 local counsel. I mean, Wood Dawson, if they did an
3 independent analysis they could come to a different
4 conclusion, and properly so because of their
5 expertise. So that even if local counsel had a
6 differing view it might not -- it wouldn't be in the
7 same category as a city sending in a load forecast
8 that was -- that they believed to be significantly
9 inaccurate.

10 Q. And Wood Dawson would have more expertise
11 on Washington law than the lawyer for the City of
12 Tacoma?

13 A. Possibly.

14 Q. Possibly the contrary?

15 A. Possibly.

16 Q. In what way did the Supply System
17 reasonably rely upon the underwriters, if at all?

18 A. Well, to the extent they would be
19 negotiated transactions presumably the underwriters
20 would be involved in the process of formulating the
21 disclosure document, it would bring to the process
22 more expertise than the Supply System officials.

23 Q. How about on a competitive bid
24 underwriting, would they be relying on the
25 underwriters?

1 A. Less likely unless they brought something
2 to the attention of the underwriters and then the
3 underwriters specifically passed on it.

4 Q. What were you referring to when you signed
5 off on Exhibit 1 which states that the Supply System
6 and the WPUG defendants reasonably relied upon
7 underwriters?

8 A. I was referring to the possibility that
9 the underwriters were involved in the process of
10 determining what would be appropriate disclosure in
11 the context of the offerings.

12 Q. Were you aware then as to whether these
13 offerings were done by competitive bid or negotiated
14 sale?

15 A. I thought then, and I think now, that some
16 were negotiated and some were competitive.

17 Q. Would you agree with me that as to those
18 which were competitive that the Supply System and
19 WPUG defendants would not be relying upon the
20 underwriters in connection with the disclosure
21 process?

22 A. No, I don't agree with that. I think the
23 underwriters would still play a very significant
24 role and would probably be the final arbiters of
25 disclosure even in a competitive bid situation. The

1 underwriters even if they are not participating in
2 the drafting of the disclosure document and even if
3 they are not participating in the process all the
4 way along still bring to the process a great deal of
5 expertise with respect to disclosure. So that it is
6 still possible that the underwriters would review
7 the disclosure even in a quick and hurried fashion
8 and bring more to it than a lot of other people.

9 Q. When would they get their input; aren't
10 they presented with a final Official Statement as a
11 fait accompli after they buy the bonds?

12 A. Yes, but they have -- they have due
13 diligence meetings, in effect they had an
14 opportunity to discuss these matters with the Supply
15 System staff and with the finance group.

16 Q. Have you read the testimony of any of the
17 underwriters who were deposed in this case?

18 A. No.

19 Q. Are you aware that almost to a man or a
20 woman they all testified that they had no due
21 diligence obligation, no due diligence opportunity,
22 that industry standards were precisely the contrary
23 of what you are testifying to?

24 A. I have heard that.

25 Q. And that in a competitive bid situation

1 the underwriters had no role whatsoever in the
2 disclosure process?

3 A. I have heard that.

4 Q. Do you have a view on that subject?

5 A. Yes.

6 Q. And what is it?

7 A. Well, I think they had -- I think the
8 underwriters -- I think as I mentioned to you before
9 I think the whole concept of due diligence is
10 basically sometimes turned on its head, but due
11 diligence is in essence from the strictest
12 theoretical sense a defense that one would put
13 forward if there was a charge that they had failed
14 to take reasonable steps or had failed to adequately
15 disclose something. But wholly apart from that
16 strict theoretical construct there is I think an
17 expectation in the industry, and I think even more
18 so in the courts and among judges that the
19 underwriter stands between the issuer and the public,
20 and that the underwriter while not necessarily
21 having a strict legal obligation to do due diligence,
22 is expected to do some diligence in order to protect
23 the public in the process of offering securities to
24 the public. There has been a lot of debate, as you
25 know, with respect to the opportunity for an

1 underwriter to do due diligence either in the
2 context of a shelf offering or in the context of a
3 competitive bid. But there are authorities who
4 believe that the due diligence is something that
5 should be performed in both contexts.

6 Q. Wouldn't it be fair to say, Mr. Timmeny,
7 that as a matter of industry practice that the
8 underwriters involved in these projects did not
9 engage in a review of the Official Statement either
10 in these or similar projects when they were sold by
11 competitive bid?

12 MR. COHEN: I don't understand the
13 question. Could you read it back? I didn't get the
14 sequence.

15 (Record read as requested.)

16 A. I think there are two concepts involved in
17 your question, and I think you would have to break
18 it down. In other words you are talking about these
19 underwriters in these transactions, and these
20 underwriters in practice in other transactions, and
21 then you also threw in industry standards. I'm not
22 so sure it all goes together.

23 Q. All right. Let me break it down for you
24 then. Wouldn't it be fair to say that the industry
25 practice in the underwriting community in the period

1 1977 to 1981 was not to involve itself in the
2 disclosure process on a competitive bid municipal
3 offering?

4 A. I'm not so sure I would say that was the
5 industry practice.

6 Q. What evidence do you have of a contrary
7 industry practice?

8 A. I'm just thinking back to the discussions
9 that I had with people following the New York City
10 report, and I think there was a real question that
11 was raised in the industry generally after the New
12 York City report with respect to the responsibility
13 of underwriters in competitive bid situations. And
14 I think there was some movement, at least concern
15 that I was aware of on the part of counsel to
16 underwriters, that the due diligence was necessary
17 even in a competitive bid situation, and that
18 certainly was the case with respect to the
19 transactions that I was involved with in the Kutak
20 law firm.

21 And it was our posture as counsel to the
22 underwriters that we should attempt as much
23 diligence as would be possible even in the context
24 of a competitive offering. And I know that we were
25 -- I considered the firm to be an important player

1 in that industry at the time.

2 Q. What involvement did you have with -- let
3 me start the question again.

4 What opportunity did you have to observe
5 industry practice regarding this matter between
6 March 1977 when the first 4-5 offerings were sold
7 and March 1981 when the last were sold?

8 A. During that time I think -- well, the
9 principal opportunities that I had were in the
10 context of continuing legal education seminars where
11 we had discussions along these lines, just as the
12 kind of debate or discussion that you and I are
13 having. And they were fairly extensive, and I think
14 that they involved counsel to the principal
15 underwriters of the business. And I know the issue
16 was in the forefront at the time.

17 Q. Have you ever been involved in drafting or
18 reviewing an Official Statement for a municipal bond
19 offering?

20 A. Yes, uh-huh, yes.

21 Q. Were you involved in that function between
22 March '77 and March '81?

23 A. Some, I mean not with the government,
24 obviously. I was with the government from '77 to '79,
25 so not from that time. '79 to '81 I was involved in

1 the process. I didn't sit down and do first drafts.

2 Q. What I'm trying to distinguish is a role
3 in the actual process, whether it's first drafts,
4 editing, meetings, what have you, as distinct from
5 the guru role you described earlier in which you
6 might sit in your law office and be consulted by one
7 or more of your partners about the particular,
8 unique, novel item that came up. Now focusing on
9 the former you were involved in a job from beginning
10 to end, give us an example or two of that kind of
11 participation.

12 A. I attended drafting sessions, you know,
13 with respect to an Official Statement.

14 Q. In that time period?

15 A. Yes.

16 Q. Which issuers would that have been?

17 A. They were principally the municipal
18 utility district offerings that I was doing.

19 Q. The water and sewer offerings we discussed
20 earlier?

21 A. Yes, that type thing; drafting and due
22 diligence sessions.

23 Q. Would you please tell me the basis for
24 your view that the Supply System and the WPUG
25 defendants reasonably relied on counsel involved in

1 the disclosure process on issues other than
2 authority? We'll come back to authority separately.

3 A. It's my understanding that the counsel in
4 the form of a partner from Wood Dawson was pretty
5 much a member of the finance group, Mr. O'Brien, and
6 I believe Mr. Metzger, a partner of the law firm
7 that served as special counsel was also a member of
8 the finance group, and I've seen materials where --
9 that indicated to me that they were involved in the
10 disclosure process, if I can put it that way,
11 reviewing disclosure, and essentially making
12 decisions with respect to whether something should
13 be disclosed.

14 Q. So again this reliance -- and I am
15 excluding authority at this point.

16 A. Yes.

17 Q. This reliance would be, as we discussed
18 earlier, reliance upon the group's professional
19 judgment as to how to handle a particular disclosure
20 item that surfaced?

21 A. Yes.

22 Q. I take it you are not suggesting that the
23 Supply System or the WPUG defendants were relying
24 upon Wood Dawson to review the entire Official
25 Statement and attempt to unearth contrary facts?

1 A. That's correct. I'm talking about them
2 being, Wood Dawson and Houghton Cluck being part of
3 the finance group when it reviewed disclosure issues,
4 and those law firm representatives participating in
5 discussions about disclosure issues as part of the
6 finance group.

7 Q. So, for example, if there was a fact
8 regarding the load forecasts of some of the
9 participants which was arguably known to the
10 participants, maybe discernable by R. W. Beck, you
11 would not expect the participants to be relying upon
12 Wood Dawson to find that misdisclosure and rely --
13 and bring it to anybody's attention?

14 A. I don't recall any instance when that was
15 the case, I mean, in the evidence that I reviewed.

16 Q. Mr. Timmeny, your testimony appears to be
17 that if an issue was brought to the finance group
18 and was discussed by Metzger, O'Brien, Patterson,
19 Peterson from Beck, Perko, whoever else was there,
20 that if a decision was made that a particular
21 disclosure was appropriate, that that decision must
22 have been the correct one, is that your testimony?

23 A. I didn't say correct. It may have been
24 the wrong decision but at least the Supply System
25 could rely on the expertise of these other

1 disclosure experts as to whether or not there should
2 have been disclosure.

3 Q. So long as an item was discussed by the
4 finance group and a resolution was made that would
5 be sufficient for the Supply System to rely?

6 A. Yes, as long as everything was in good
7 faith, that's right.

8 Q. And again as long as a decision was made
9 that would be sufficient for the participants to
10 rely?

11 A. Yes.

12 Q. Even if the wrong decision was made?

13 A. Yes.

14 Q. Now, what about the group relying upon one
15 another, for example can Blyth rely upon Wood Dawson,
16 Wood Dawson rely upon Beck, Beck rely upon Blyth?

17 A. It might work that way.

18 Q. So long as they come to a resolution, even
19 if its consistently the wrong one, they are all
20 immunized by the presence of the others?

21 A. Not just the presence of the others but
22 the expertise of one or another that might -- that
23 would be brought to bear and then the good faith
24 reliance on the expertise on the part of the others.
25 Everything I say here is modified by the concept

1 that it would have to be carried out in good faith,
2 and I am not aware of any instance where anybody is
3 winking or nodding or pretending that they are
4 acting in good faith when in fact they are not.

5 Q. Have you listened to any of the tapes of
6 the Participants Committee meetings?

7 A. No.

8 Q. Have you seen the transcripts of any of
9 the Participants Committee meetings?

10 A. I think I did but in a very abbreviated
11 form. I mean maybe attached to or as an appendix to
12 some filing or something.

13 Q. On line 10 of page 2 of your Rule 26
14 statement is a reference to "other financial
15 professionals." Would you tell me who you were
16 referring to there, if anyone?

17 A. I think that it's really not clear at this
18 point, but I think that it would be other financial
19 professionals involved in the transactions.

20 Q. Do any come to mind in this case?

21 A. There is no specific reference in this
22 sentence to Beck, for example.

23 Q. Okay. That would be one.

24 A. I think Beck would fall into that category.

25 Q. Anybody else come to mind?

1 A. Not offhand.

2 Q. Wouldn't it be fair to say, Mr. Timmeny,
3 that the Supply System as the issuer of these bonds
4 had the paramount responsibility for disclosure in
5 the Official Statements?

6 A. If I could substitute "first line" I guess
7 for the word "paramount" I would say yes. I don't
8 know what you mean by "paramount." We can go get
9 Webster's --

10 Q. First line is a good start.

11 Let me give you an example and see if I
12 can illustrate the problem I am having with part of
13 your testimony.

14 In a publicly traded company, equity
15 security, you have financial statements that are
16 signed off on by an accounting firm, correct?

17 A. Uh-huh.

18 Q. Now, that doesn't immunize the issuer from
19 liability for its financial statements, does it?

20 A. No.

21 Q. In fact there is sort of a basic truism in
22 the securities field stated from time to time by
23 people discussing that kind of issue that the issuer
24 is responsible for his own financial statements, is
25 that correct?

1 A. Yes, but in some circumstances, as you
2 know, an issue might arise with respect to the way
3 financial information is presented, and if the
4 issuer consults with the accounting professionals
5 concerning the presentation and if the accounting
6 professionals render an opinion as to how it should
7 be presented, and if the issuer relies on that
8 opinion, I think the issuer then has done all that
9 it can do and is absolved from liability absent a
10 showing that the whole thing was a charade and not
11 engaged in in good faith.

12 Q. That's true in the expertised portions of
13 a financial statement under section 11, but is that
14 true on a, say, a stub period, not expertised
15 portion under section 10(b)?

16 A. I go back and -- what I said was if you
17 review my answer, that if there was consultation
18 between the issuer and the accounting firm, and if
19 the accounting firm made a suggestion or rendered an
20 opinion as to how something should be presented, I
21 think that would be sufficient to relieve the issuer
22 of liability if their conduct were later called into
23 question.

24 MR. SIMON: Could I hear the answer back?
25 Mr. Timmeny, your voice is fading a little bit just

1 in the last half hour.

2 (Record read as requested.)

3 Q. Is it your testimony that in that
4 situation that the advice given by the accounting
5 firm would immunize the issuer or that it would be
6 one of the many factors that the jury would have to
7 review in determining the scienter of the issue?

8 A. Well, immunity is not the right word.
9 Immunized, I mean, the concept of immunizing someone
10 from liability doesn't enter into the civil picture
11 at all, so yes, it would be a factor that would be
12 considered.

13 Q. I guess the problem I'm having is that you
14 are seeming to rely so heavily on this issue of
15 professionals involved that I'm reading it almost as
16 an immunization, a dispositive issue, and I'm trying
17 to get a handle on whether you think it is a
18 dispositive issue or it's one of many factors that
19 go into a determination of scienter.

20 A. Well, it could be dispositive. Again,
21 absent a showing that the reliance was not in good
22 faith, I don't see how one can have scienter in a
23 transaction if they in good faith rely on the
24 expertise of an expert with respect to a disclosure
25 question.

1 Scienter requires an intent to defraud.
2 If I bring a question to a disclosure expert and
3 say, "Should this be disclosed," if I don't have the
4 same level of expertise as that expert, and the
5 expert says to me, "No, it's not necessary to
6 disclose that," the expert says "I don't believe
7 it's necessary," then I in good faith can rely on
8 that expert's determination.

9 Q. Do you remember the National Student
10 Marketing case?

11 A. A little bit.

12 Q. Isn't it the case that the matters for
13 which the principals were, I believe indicted, and
14 also charged civilly by the SEC and also sued by a
15 class of stockholders, were matters on which they
16 had consulted with their accountants and their
17 attorneys and that the accountants and the attorneys
18 and the principals were all found at fault for
19 precisely the same matters?

20 A. I think the conduct of the accountants and
21 the attorneys were called into question in that case;
22 in other words, that the way they conducted
23 themselves after learning of the information that
24 was not disclosed was not deemed to be in good faith.

25 Q. By the professionals?

1 A. The way the professionals conducted
2 themselves after learning of the nondisclosures was
3 not deemed to be in good faith. That's why there
4 were indictments and lawsuits.

5 Q. But the issuer and the principals of the
6 issuer relied upon the accountants and the attorneys,
7 didn't they?

8 A. I don't think so. I don't recall that --

9 Q. You don't think that those were accounting
10 matters that they relied on Peat Marwick for and
11 legal matters they relied on White & Case for?

12 A. There definitely were accounting and legal
13 issues, but what happened, as I recall, as I recall
14 what happened was when there was a last minute
15 discovery of information that was not properly
16 presented in the financial statements, that the deal
17 was pushed through, notwithstanding this discovery,
18 and that that conduct in effect was not in good
19 faith on the part of the professionals.

20 Q. But the professionals signed off on it,
21 didn't they?

22 A. Yeah.

23 Q. And the issuer and the issuers' principals
24 still got in trouble?

25 A. Sure. But I'm telling you the whole

1 concept was undercut because of the absence of good
2 faith on the part of the participants. As I said to
3 you before, I don't think that one could go to an
4 expert and attempt to use the expert as a shield if
5 the person going to the expert were not operating in
6 good faith.

7 Q. So you would agree with me then that if
8 the City of Tacoma or the Supply System was aware
9 that matters were misstated in the Official
10 Statement, that the views of the finance group and
11 its members would not operate as a shield from
12 liability in this case?

13 A. Not necessarily. I don't agree with you,
14 no, because you are leaving out the concept of
15 materiality as a starter.

16 Q. All right. Then let's put that in. A
17 material misstatement is contained in the Official
18 Statement that's known to the City of Tacoma or the
19 Supply System.

20 A. So you are saying a city, the officials of
21 a city are of the view that some material fact is
22 not disclosed.

23 Q. Right.

24 A. And they have discussed this with the --

25 Q. No discussion.

1 A. No discussion.

2 Q. But the Official Statement has been
3 through the review process which you place so much
4 reliance upon, it has been passed upon by Blyth and
5 Beck and Wood & Dawson.

6 A. We have been over this before. This is
7 all repeat testimony. I mean you asked me this
8 question before. I said if there is no disclosure
9 to the experts I don't see how one could rely on the
10 experts.

11 Q. So if the City of Tacoma has not disclosed
12 the matter to the experts the experts cannot be
13 relied upon?

14 A. Generally. I mean I suppose there are
15 some areas where even if the City of Tacoma has not
16 presented something to the experts, the experts
17 would be expected to know and be familiar with that
18 topic generally, and therefore their review of an
19 offering document would suffice under the
20 circumstances, but we'd have to get down to some
21 specific issue. We have got too many generalities
22 floating around here.

23 Q. Isn't it the case that reliance on an
24 expert requires consultation with the expert on that
25 subject?

1 A. I think you are referring to the defense
2 of advice of counsel.

3 Q. I am referring more generally to reliance
4 on experts but it may well be that that defense
5 flows from what you are referring to.

6 A. I would think generally you would have to
7 consult with the expert. There might be some
8 circumstance where the experts' level of expertise
9 would be such, and so far exceed the expertise of
10 the lay party, if I can use that word, that just the
11 participation of the expert would be enough; in
12 other words the expert would be expected to ferret
13 out certain information and be aware of the fact
14 that would be absent. If that got by the expert it
15 would be more the experts' problem than the lay
16 person's problem.

17 Q. Mr. Timmeny, on lines 14 to 16 of page 2
18 of Exhibit 1 there is a reference to the possibility
19 of responsive testimony and opinions to those of
20 Geoffrey Hazard.

21 I take it from your prior answers that you
22 do not have any additional opinions that are
23 responsive to Mr. Hazard, is that right?

24 A. I don't think so. It's my understanding
25 based on -- I read, reviewed Mr. Hazard's testimony,

1 Professor Hazard's testimony, and I thought that he
2 and I were pretty much in agreement, or I would be
3 in agreement with him with respect to the issue of
4 reliance. I thought he said something to the effect
5 that the officials of the issuer could rely on
6 counsel with respect to counsel's opinion on the
7 authority question.

8 Q. I'm asking a much more general question.
9 I just want to be sure that this is now a dead issue
10 and that there are no new opinions responsive to
11 Professor Hazard that you possess which are not in
12 this statement, is that correct?

13 A. There are no new opinions that I possess --
14 well, this doesn't refer to any opinion that I
15 possess. The statement is I may offer responsive
16 opinions and testimony to plaintiff's expert
17 Professor Hazard.

18 My recollection is he was either about to
19 testify or in the middle of his testimony when this
20 was prepared, and I may be off on the dates but I
21 don't think he had completed his testimony and I
22 think there was some consideration on the part of
23 counsel that they might offer me as an expert with
24 respect to matters that Professor Hazard was
25 testifying on. And as time went on I think that

1 decision, a decision was made that that wouldn't be
2 the case. But I did read his testimony, and I said
3 I did agree with him with respect to the reliance
4 point as I understood him to be making it.

5 Q. Mr. Timmeny, I have a supplemental
6 designation of exhibits that you've reviewed, or
7 documents that you've reviewed, and one is it
8 appears that you've reviewed 10 pages from the
9 deposition of Franklin Fisher. Do you recall that?

10 A. I think I reviewed some Fisher testimony.

11 Q. Do you recall drawing any conclusions or
12 opinions, reactions, after having reviewed that
13 portion of Fisher's testimony?

14 A. At this point I don't.

15 Q. It's also indicated that you reviewed the
16 testimony of Kai Lee. There are no page indications
17 so that suggests to me you read the whole thing, is
18 that correct?

19 A. I read lots of it, until my eyes glazed
20 over.

21 Q. Could you tell us about any opinions,
22 conclusions or observations you had from reading
23 Lee's deposition?

24 A. You challenge me to remember what he was
25 talking about. I think I had some views, you have

1 to refresh my recollection as to what he was
2 testifying about. Wasn't it power -- I mean load
3 forecasting generally.

4 Q. Probably a broader variety of things than
5 that would be a better description, but if it
6 doesn't form a current part of your --

7 A. My recollection --

8 Q. -- your expert opinion, I assume you read
9 these things to further your --

10 A. I was trying to get background on the case,
11 but I think -- I thought he opined on everything in
12 the case, if I'm not mistaken now that I think about
13 it, almost everything, every disclosure issue.

14 Q. I suppose that's partially consistent with
15 my reaction to your comment that he testified on
16 ability to pay. He certainly testified on more than
17 one issue.

18 A. I just remember there was a lot of it.

19 MR. COHEN: He didn't say ability to pay.

20 MR. SIMON: What did he say, load
21 forecasting?

22 MR. COHEN: Yes.

23 MR. SIMON: Whatever he said was one issue.

24 THE WITNESS: Right, whatever.

25 Q. I take it reading Mr. Lee's testimony has

1 not added significantly to your background in the
2 case?

3 A. It did add some, I mean obviously I picked
4 up something as I went through it. Don't ask me to
5 tell you exactly what it was.

6 Q. It has not modified your opinions?

7 A. No.

8 Q. Fisher has not modified your opinions?

9 A. No.

10 Q. Hazard has not modified your opinions?

11 A. No.

12 Q. It also says that you read David Freeman's
13 testimony. Do you recall that?

14 A. I read it.

15 Q. Did you read it all the way through?

16 A. How much was there?

17 Q. I don't know.

18 A. About three volumes? Freeman, about three
19 volumes, fairly short? I think so.

20 MR. COHEN: Two or three.

21 THE WITNESS: I wish they were all like
22 that.

23 MR. SIMON: That's because we took it.

24 Q. Did that have any influence on your
25 opinions in the case?

1 A. No -- yes, apart from background, I think
2 I was trying to pick up background in going through
3 these things more than anything else.

4 Q. I notice you read a lot of documents filed
5 by the defendants, the Well's submission of the
6 Supply System, the motions in support of partial
7 summary judgment and the like.

8 A. Bear with me just a second. I want to
9 pick up -- you are looking at the supplemental --

10 Q. Do you want me to mark this one so you'll
11 have it?

12 A. Show me a copy. I don't care if it's an
13 exhibit.

14 Q. I was referring to that, and I was also
15 referring from memory to the list of documents on
16 Exhibit 1, and I believe there is one more that is
17 kicking around. The other list is a July 18th
18 letter from Mr. Cohen to lead and liaison counsel.
19 I'll give you that, too.

20 And my only question is it looks like you
21 read a lot of material generated by the defendants
22 and you've read the opposition to the motion for
23 summary judgment generated by the plaintiffs.

24 A. Yes.

25 Q. Is that a fair description?

1 A. Uh-huh. Well, I also read -- I read your
2 -- the plaintiffs' preliminary written pretrial
3 material that was --

4 Q. The Rule 42 statement?

5 A. Yes. That was hefty. I mean, if you are
6 going to start stacking this stuff up I can put a
7 stack up just as high on the plaintiffs' side as the
8 defense side.

9 Q. Do you intend to review any additional
10 evidence supporting the plaintiffs' case prior to
11 testifying at trial?

12 A. Well, I don't know. I've reviewed quite a
13 bit. I'm going to go back over the same ground
14 presumably if I'm called upon to testify at trial.
15 I am open to looking at any additional plaintiff's
16 evidence if it's out there. And I have from time to
17 time, as I said, basically the technique that I
18 followed was to read through the -- I relied most
19 heavily on the plaintiffs' memorandum in opposition
20 to the defendants' summary judgment motions, and
21 then asked for the material underlying the
22 statements made by the defendants as we went along.
23 I asked for a lot of things.

24 MR. SIMON: Why don't we take a break.

25 (Recess.)

1 BY MR. SIMON:

2 Q. Mr. Timmeny, this opposition to the motion
3 for summary judgment was filed, I believe, on March
4 1, 1988. Do you recall when you saw it?

5 A. I really don't. I think it was not too
6 long after it was filed.

7 Q. And is it your testimony that you then
8 requested of a defense counsel that they provide you
9 with certain of the underlying evidentiary material?

10 A. I started to ask them for additional
11 information at that point, yeah, I think so.

12 Q. Did you get it?

13 A. Yeah.

14 Q. Did you review it?

15 A. Yes.

16 MR. SIMON: We don't have anything like
17 that in any of the lists of documents.

18 THE WITNESS: It's on the list of stuff --
19 I think what happened was I already included some of
20 the material in my possession. For example, the
21 Buck exhibits included a lot of what I asked for so
22 I either went back and looked at the Buck exhibits
23 or got some supplemental material. I think the
24 supplemental material I obtained was mostly in the
25 way of some additional transcripts, on O'Brien,

1 maybe an O'Brien transcript, maybe a Metzger
2 transcript.

3 Q. That was what you found interesting in
4 this opposition to summary judgment?

5 A. Pardon?

6 Q. That was what you found interesting in
7 this opposition to summary judgment were references
8 to the Metzger and O'Brien transcript?

9 A. I found it all interesting.

10 Q. I thought you testified earlier before the
11 break that you had looked at some of the evidence
12 underlying the plaintiffs' claims, evidence that the
13 plaintiffs thought was demonstrative of scienter.
14 Did I misunderstand you?

15 MR. COHEN: He said he took it at face
16 value.

17 A. I said I asked for additional materials
18 underlying the plaintiffs' claims, or the
19 plaintiffs' statements in the memo in opposition to
20 the summary judgment motion.

21 Q. I'm still not clear whether you looked at
22 them or you simply accepted them at face value?

23 A. Oh, well.

24 Q. Let me make the point clear. You are a
25 lawyer, you understand these terms. This document

1 is loaded with references to evidence which the
2 plaintiffs find probative on the plaintiffs' side of
3 the case.

4 A. Yes.

5 Q. Exhibits, deposition testimony,
6 transcripts of taped meetings, et cetera.

7 A. Yes.

8 Q. Did you ask for any of that stuff?

9 A. Yes, and I had it. I mean, I had some of
10 the stuff in my possession.

11 Q. I understand you might have coincidentally
12 had a few of the items in your possession based on
13 having had the Buck transcript but frankly it's
14 inconceivable to me the documents you chose to look
15 at, having reviewed this document, could have been
16 coincidentally all documents that are attached to
17 the Buck transcript. If that's your testimony,
18 that's fine.

19 A. Some of them were, some of them were, as I
20 recall.

21 Q. What about the rest of them?

22 A. Well, I think I asked for some Perko
23 testimony in connection with my review of that, of
24 the plaintiffs' motion, plaintiffs' memorandum in
25 opposition to summary judgment motion.

1 I don't know. My recollection, I mean I
2 probably, -- I didn't question the evidence that was
3 presented there, or the representations with respect
4 to the evidence in the plaintiffs' memorandum. I
5 just on some occasions asked for some supplemental
6 material.

7 As I said what comes to mind, I do
8 remember looking at some Perko testimony. I do
9 recall looking at some exhibits referred to in there
10 that were specifically Buck exhibits.

11 Q. But if they weren't Buck exhibits you
12 didn't ask for them?

13 A. No, I didn't say that. I said I recall
14 looking at some exhibits that were Buck exhibits.

15 MR. SIMON: Well, Mr. Stengel and Mr.
16 Cohen, I guess it's a pretty simple proposition. If
17 the witness looked at anything else we don't have it.

18 MR. COHEN: You have gotten notified of
19 everything we sent to him.

20 MR. SIMON: Then I am assuming you looked
21 at nothing that was attached to this memorandum
22 other than things that coincidentally he already had
23 in his possession.

24 MR. COHEN: You can make whatever
25 assumptions you want, you can ask him a question,

1 he'll answer it for you as best as he remembers, and
2 I can represent to you that we have sent to the
3 plaintiffs lists of everything he has looked at, you
4 say that you never got our -- never got his CV that
5 we sent back in January. I see another counsel here
6 had a copy of it so somebody got it. I don't know
7 what you got or what you didn't get. I know we sent
8 you lists of everything that he has looked at, or at
9 least everything we sent to him.

10 MR. SIMON: Well, the last list I got,
11 which I will now mark as the next in order to make a
12 record of this.

13 (Marked Deposition Exhibit Timmeny 3.)

14 MR. SIMON: Includes the opposition to the
15 motion for summary judgment, it does not include any
16 additional materials, so I would suggest that if the
17 witness --

18 MR. COHEN: It's not the last one we sent
19 out.

20 MR. SIMON: The last one you sent out has
21 a bunch of pleadings in it. I have not gotten any
22 list which includes any evidentiary material since I
23 got that list.

24 (Conference between witness and counsel
25 out of the hearing of the reporter.)

1 MR. SIMON: Which suggests to me if the
2 witness asked you for evidentiary material
3 underlying this memorandum and got it, and read it,
4 it has not been listed.

5 MR. COHEN: What do you want me to tell
6 you? I told you you have received a list of
7 everything we sent him, period. I can't tell you
8 anything more.

9 MR. SIMON: That's fine.

10 MR. STENGEL: The last letter makes
11 reference to affidavits and deposition testimony.

12 MR. SIMON: Of Bert Metzger and Brendan
13 O'Brien?

14 A. That's what I just said.

15 Q. That's it. Okay. If that's what you
16 think is the core evidence underlying this
17 memorandum, so be it.

18 A. I didn't say I looked for the core -- I
19 asked for the core evidence. I said I asked for
20 some evidence underlying the memorandum. I
21 testified that I took your representations with
22 respect to evidence at face value. I wasn't
23 questioning your representations, but on some
24 occasions I wanted to see something beyond what was
25 referred to or I wanted to see specifically what was

1 referred to.

2 Q. How did you choose the Metzger and O'Brien
3 materials as the ones you wanted to see?

4 A. I wanted to read their testimony.

5 Q. Why?

6 A. Because I thought it was going to be of
7 great interest to me on the issues in the case.

8 Q. Do you recall in the opposition to summary
9 judgment reference to a memorandum from a Mr.
10 Wagenhoffer at Bonneville who, referring to the
11 Supply System and Bonneville, said that "Their view
12 is to put off or postpone as long as possible
13 acknowledgment of delays because in their view it
14 would have a counterproductive impact on their
15 management of the projects, I mentioned to Strand
16 that this philosophy conflicts with our need from a
17 resource and financial planning standpoint as well
18 as full disclosure to investors," do you recall that?

19 A. Yes.

20 Q. Did you accept that at face value?

21 A. I accepted the fact that there was such a
22 memo. I didn't accept the representations. I
23 mean --

24 Q. Did you reject the representations?

25 A. No. I take it as a fact that the

1 representation was made as encompassed in the memo.

2 Q. Does that cause you to have some concern
3 about the good faith of the Supply System regarding
4 disclosures?

5 A. No.

6 Q. Why not?

7 A. Well, I reviewed that -- I think I might
8 have asked specifically for that memorandum.

9 Q. It's not on the list.

10 A. Maybe I didn't. But -- I'd like to see it.
11 Let me see a copy of it again. I can't treat it
12 from memory. I recall reading this, and it was my
13 view after reading this that it would be appropriate
14 to look to other evidence with respect to the
15 possibility that there was some sort of an
16 intentional effort on the part of the Supply System
17 staff to put off acknowledgment of delays. And I
18 looked at the -- I looked at additional material and
19 came to the conclusion that there were disclosures
20 with respect to delays, and I thought that there
21 were adequate disclosures with respect to delays.

22 Q. So you disagree with Mr. Wagenhoffer who
23 says that "This conflicts with our need for full
24 disclosure to investors"?

25 A. He is talking about -- he is talking about

1 a philosophical conflict that I really don't know
2 whether in fact exists. I mean, I can't buy into
3 this concept that there was a philosophical conflict
4 because everything I saw with respect to the
5 position of the Supply System staff in disclosing
6 delays illustrated to me that there was a genuine
7 effort to disclose delays. I thought the offering
8 documents were laced with disclosures with respect
9 to matters that were causing the delays.

10 Q. Did you read the rest of this section?

11 MR. COHEN: Excuse me, would you mind
12 asking questions from over there, please.

13 Q. I'll ask the question. I'll just be back
14 with the document again.

15 MR. COHEN: Give him a copy of the
16 document. I'm just asking you not to stand over his
17 shoulder asking the questions.

18 MR. SIMON: I'm sorry, the witness asked
19 for the document. If he had asked me to move away I
20 would have done it as a matter of common courtesy.

21 MR. COHEN: The witness is not going to be
22 protected by himself only, I am his lawyer, I am the
23 lawyer for the clients on whose behalf he may be
24 offering testimony if asked, and I am asking you to
25 please ask questions from the table, not from

1 standing over his shoulder.

2 Q. Do you recall this memorandum stating Mr.
3 McElwee of the Supply System had testified that the
4 Supply System, "Did everything it could to schedule
5 at a more optimistic rate than the industry averages."

6 A. I read it. I don't recall. I read the
7 thing cover to cover so I know I read it.

8 Q. When you say the Official Statements are
9 laced with disclosures of possible delays or
10 whatever your last answer was, isn't it fair to say
11 that this document is laced with evidence of
12 intentional misstatements of costs and schedules?

13 A. No, no.

14 Q. Do you recall it saying that Mr. Clayhold
15 of Benton County PUD said in 1980, "As I understand
16 it the budgets assume average production rates
17 consistent with industry average rates. My concern
18 is that the Supply System's track record may not
19 support this assumption."

20 A. If it's there I read it.

21 Q. Didn't that cause you to have concern both
22 about the budgets and about Mr. Clayhold's good
23 faith in signing off on these Official Statements?

24 A. No.

25 Q. Why not?

1 A. I thought the budget process was
2 responsible. I thought they engaged in a good faith
3 effort to prepare a budget that was essentially a
4 projection. If in fact the projection didn't come
5 true that doesn't mean they didn't engage in a good
6 faith effort to prepare one.

7 Q. Clayhold said they used average production
8 rates consistent with the industry average and that
9 the track record doesn't support the assumption.
10 That wouldn't be a good faith projection if he was
11 right, would it?

12 MR. COHEN: Why don't you identify who Mr.
13 Clayhold was.

14 MR. SIMON: You don't know who Clayhold
15 was?

16 A. You would have to tell me at this point.

17 Q. He was a Benton County PUD representative
18 who served as a director of the Supply System.

19 A. And he is saying, again, you can show this
20 document to me, I mean, it's hard for me to pick up
21 on this as you read it. Why don't you just show it
22 to me.

23 Okay. Mr. Clayhold is expressing a
24 concern that the Supply System's track record may
25 not support an assumption in the budgets because the

1 budgets assume average production rates consistent
2 with industry averages. I don't think it would be
3 improper for the Supply System to put out a budget
4 that assumed an average production rate just because
5 they had not met that production rate in the past.
6 If they felt in good faith that they could meet that
7 production rate, and if in fact their consulting
8 engineers, their construction engineers felt that
9 that was an appropriate standard, then I think they
10 should -- they were acting in good faith in adopting
11 that standard.

12 I have the opinion of one here who is
13 voicing a sentiment, as you put it, in this document,
14 that he didn't think that the track record supported
15 the assumption. Maybe they improved on their track
16 record.

17 Q. How do you know they felt that way? You
18 said if they felt that way in good faith it would be
19 okay. How do you know that? What investigation did
20 you do to discern if they felt that way or if they
21 made an improper budget assumption?

22 A. I reviewed the information in the -- the
23 information that I have indicated that the budgets
24 were prepared as part of a process involving the
25 construction engineers preparing the initial budget

1 and the Supply System staff reviewing that and
2 coming up with what they called owner's
3 contingencies and adding in very substantial amounts
4 under the concept of owner's contingencies. I
5 thought that was a good faith effort to arrive at a
6 realistic budget.

7 Q. Do you have any expertise on construction
8 budgets?

9 A. No.

10 Q. Nuclear plant construction?

11 A. No.

12 A. Is Mr. Clayhold an expert on nuclear
13 construction?

14 MR. COHEN: Huh-uh.

15 Q. Do you recall a memorandum from Ebasco, an
16 internal Ebasco engineers memorandum referred to in
17 this same summary judgment paper which says,
18 referring to the 1978 budget, "At the time the
19 client," the client being the Supply System here,
20 "At the time the client for internal political
21 reasons accepted only 58 million dollars of the
22 increase, the remainder was not formally submitted,"
23 do you recall reading that?

24 A. Yeah, I think I did.

25 Q. Does that give you a concern about the

1 good faith of the process?

2 A. My recollection was that the evidence
3 surrounding this comment was that the Ebasco
4 increase was reviewed by the Supply System and that
5 they accepted some and rejected some.

6 Q. And the gentleman from Ebasco says they
7 rejected it for internal political reasons. Doesn't
8 that cause you to have some concern about the good
9 faith of the process?

10 A. I really don't -- no, it doesn't.

11 Q. Isn't that the kind of document that would
12 have caused your ears to perk up if you were still
13 at the SEC and you were investigating these matters?

14 A. It would cause me to try to find out what
15 he was talking about, and my understanding is that
16 in this area that the Ebasco increases in some part,
17 in large part, related to Ebasco fees.

18 Q. Those aren't real costs?

19 A. They may be subject to debate, that is
20 certainly the kind of thing that would cause Ebasco
21 to characterize their rejection being for internal
22 political purposes.

23 Q. Do you recall a 1979 memorandum referred
24 to in this same summary judgment paper in which it
25 is alleged that the Supply System told Ebasco in

1 reviewing the budget in 1979, about halfway through
2 the process of selling these two and a quarter
3 billion dollars worth of bonds, to use, "A whole new
4 set of ground rules, a total change in philosophy
5 from the previous estimates, namely the most
6 realistic estimate possible, tell it like it is."

7 Did that one get your attention?

8 A. I remember reading that.

9 Q. Did it cause you any concern as to the
10 good faith of the process?

11 A. No.

12 Q. Why not?

13 A. It is my recollection, and I may be wrong
14 on this, that about this time that there was a new
15 director of the Supply System, Mr. Ferguson, and I
16 thought that Mr. Ferguson had come in and was
17 basically implementing a sort of, a new budget
18 process. And I think that what Ebasco is referring
19 to here is Ebasco's characterization of the new
20 budget process. It doesn't follow because of that
21 characterization that the old budget process was
22 something other than tell it like it is.

23 Q. Well, it may not follow as the day follows
24 the night, but didn't that raise some questions in
25 your mind as to what the old budget process was?

1 A. No. I read a lot about what the old
2 budget process was and I read a lot of the concerns
3 on the part of the plaintiffs with respect to the
4 old budget process, and the idea that this was
5 somehow a management tool as opposed to a document
6 that was assigned solely to estimate costs. I'm
7 drawing a distinction between a recognition that
8 when a budget, apparently when the budget was
9 prepared prior to '79 that the budget process was
10 viewed on the part of the Supply System as being a
11 proper process if the goal was tight but attainable,
12 I think that's the language that was used.

13 And I see the Ebasco comment, and what it
14 reflects, what it means to me, is that they are sort
15 of scrapping the tight but attainable and going to
16 something other than tight but attainable.

17 Q. Something realistic?

18 A. Well, I wouldn't use the term "realistic."
19 I don't think the others were deemed to be
20 unrealistic when they were prepared. I saw no
21 evidence that the Supply System people viewed their
22 budgets as unrealistic.

23 Q. Do you recall reading that Mr. Strand, who
24 was then running the Supply System, told the
25 executive committee of the Supply System in 1978

1 that "It is unlikely that a real date," referring to
2 a date of completion, "and a real cost can be
3 predicted"?

4 A. I don't recall reading that but if it's in
5 there I read it.

6 Q. Does that cause you any concern about the
7 accuracy of the budgets or the schedules?

8 A. I would have to look at the representation
9 again.

10 Yes, I recall reading this. I think you
11 are taking it out of context. Even in your
12 memorandum you introduce this as being in the
13 context of regulatory change. So basically what
14 this represents is he was saying that it's unlikely
15 that a real date and a real cost can be predicted,
16 but it's in the context of the possibilities of
17 regulatory change. He didn't know what was coming
18 up.

19 And after all, these are projections, we
20 are talking about projections.

21 Q. Do you recall that some of these
22 projections were viewed internally as having a 50 or
23 a 25 or a 20 percent prospect of attainment
24 depending on what date we are talking about and
25 which Official Statement we are talking about?

1 A. I recall the topic. I don't adopt your
2 characterization of the topic.

3 Q. Do you recall that some of them had as low
4 as a 20 percent probability of attainment?

5 A. I think that the, was it 1980C Official
6 Statement disclosed that there was a 25 percent
7 probability of attainment with respect to the budget.

8 Q. Would you agree with me that if a prior
9 Official Statement had included budgets which had a
10 probability of attainment as low as 25 percent but
11 did not disclose that fact, that that would be a
12 misleading assertion to make in an Official
13 Statement?

14 A. No.

15 Q. Why not?

16 A. Well, because a lot would depend on the
17 quality of the probability analysis as a starter.

18 Q. Let's assume it's the best --

19 A. I'm not so sure.

20 Q. Go ahead.

21 A. I'm not so sure when you stack up a
22 probability analysis that it's material as compared
23 to the entire budget process that has been gone
24 through in a very careful and meticulous way and
25 resulted in the production of a budget in great

1 detail, as opposed to a system that somebody comes
2 up with that, you know, might be a lot like flipping
3 quarters to see how many times you get heads and how
4 many times you get tails.

5 Q. Did you draw a conclusion as to whether
6 the probability analysis was as weak as you have
7 just characterized it potentially being?

8 A. I reviewed material somewhere along the
9 line to the effect that Mr. Ferguson viewed it as
10 being very weak and essentially instructed that it
11 be canned.

12 Q. Do you know, Mr. Timmeny, a lot of these
13 issues are debated in this case, tight but
14 attainable is a Supply System term for budgets that
15 we consider unrealistic, budgeting for management
16 purposes or whatever they called it we view as an
17 euphemism for keeping the budgets low and the
18 schedules tight; the probability statistics are
19 considered important by the plaintiffs, unimportant
20 by the defendants. How have you made all these
21 determinations which are consistent with the
22 defendants' interpretation of each of these matters?

23 A. Honestly.

24 Q. What have you looked at?

25 A. I have already told you what I looked at.

1 Q. Pardon me?

2 A. I have been over that ground. I told you
3 what I looked at.

4 Q. I guess you looked at Buck who works for
5 the Supply System, you looked at Perko who works for
6 the Supply System, you looked at Metzger whose law
7 firm was a defendant at the time, O'Brien whose law
8 firm is still a defendant in the case.

9 A. I looked at your memorandum, I just looked
10 at your memorandum and I come to a conclusion that's
11 different from yours in terms of materiality. I
12 think that's the essence of it.

13 MR. COHEN: He has also got hundreds --

14 MR. SIMON: Excuse me, Don, just sit here.

15 MR. COHEN: I think --

16 MR. SIMON: I think it's totally improper.
17 You have done it two or three times and enough is
18 enough.

19 MR. COHEN: I think you are becoming rude
20 towards the witness and I will ask you not to use a
21 vocal form that I interpret at least as being that
22 way. You are free to ask him whatever you want and
23 he will attempt to answer it.

24 MR. SIMON: That's exactly what I intend
25 to do, but I think you are moving into the area of

1 improper comments on the record. You started at
2 about lunch and you are continuing and I think you
3 should stop.

4 Q. Let's talk about the willingness to pay
5 case for a moment. Do you recall there is a part of
6 the case that goes by that name?

7 A. Yes, I do.

8 Q. Do you recall that there is evidence
9 marshalled in this memorandum which plaintiffs view
10 as evidence that the participants had an undisclosed
11 unwillingness to pay from the outset?

12 A. I recall a discussion in your memorandum,
13 yes.

14 Q. You don't recall that being a disclosure
15 item that was ever discussed at any finance group
16 meeting, do you?

17 A. No, I do not.

18 Q. That wouldn't be an issue on which anybody
19 would be relying on Blyth or Wood Dawson or Houghton
20 Cluck or Beck to pass on the sufficiency of the
21 disclosures, correct?

22 A. No, there is nothing to disclose. I don't
23 see how they could pass on it. You are talking
24 about something that hadn't taken place.

25 Q. Would you agree with me that if the

1 participants in fact had a hidden unwillingness to
2 pay for a dry hole that that would have been a
3 material fact that should have been disclosed in the
4 Official Statements?

5 A. That's hard because I viewed the
6 obligation that the participants incurred as a
7 result of the participants agreement to be binding,
8 so even if they harbored a view that they didn't
9 want to pay I think it would be tough luck under
10 normal circumstances.

11 I am surprised, I think, as are many
12 others that the courts have overturned the
13 obligation of the participants reflected in the
14 participants agreement, so the answer would be not
15 necessarily. I mean even if they harbored that view,
16 if they signed the agreement I would think that the
17 agreement would be binding.

18 Q. I didn't ask you if the agreement would be
19 binding, I asked you if it would be a material
20 nondisclosure?

21 A. I know what you asked me but I'm saying
22 it's related. The binding nature of the agreement
23 is related to your question.

24 Q. Would it or would it not be a material
25 nondisclosure?

1 A. I think I've tried to answer the question.

2 Q. You are you saying no or are you saying
3 maybe?

4 A. I don't follow you, no or maybe.

5 Q. Would it or would it not be a material
6 nondisclosure to withhold from the market the fact
7 that a participant or several participants were
8 unwilling to pay for a dry hole in this case?

9 A. What I tried to say to you was that I'm
10 not so sure it would be material if they signed the
11 agreement because they would have bound themselves
12 by signing the agreement.

13 Q. If you were a bond purchaser you would not
14 want to know that the participants or some large
15 number of them planned to force Chemical Bank into
16 court to refuse to pay, and if necessary to take
17 bankruptcy, is that your testimony?

18 A. I'm not adopting your characterization.
19 There are people out there who had that planned in
20 advance?

21 Q. You know what the allegation is, you read
22 the summary judgment papers.

23 A. I don't see any evidence to support that
24 allegation. I think that's a hypothesis that the
25 plaintiffs have come up with but I don't see there

1 is any evidence to support it whatsoever.

2 Q. I asked you if it was material?

3 A. I don't think it is. I think it's such a
4 far out allegation, you are taking a litigation
5 position that occurred much after they signed the
6 participants agreement saying, from that we deduce
7 that early on they intended not to honor the
8 agreement. I don't think there is any evidence to
9 that effect.

10 Q. Well, let's see if we can keep it on one
11 topic.

12 If they harbored that intent wouldn't that
13 have been a material misstatement, a material
14 omission?

15 A. If they harbored that intent but
16 nevertheless signed the agreement?

17 Q. Right.

18 A. I think you have to add another factor
19 here, and that would depend, I think, upon the --
20 who harbored the intent within the organization that
21 harbored this intent, and what steps they intended
22 to take with respect to this intent and how much of
23 the obligation of the participants agreement that
24 they were responsible for. If you have got somebody
25 off in the corner that has got .004, you know, of

1 the obligation, I don't think it's a big deal.

2 Q. Let's assume the City of Tacoma and
3 Snohomish County PUD harbored that intent.

4 A. We are assuming that they are major
5 participants.

6 Q. That's correct.

7 A. Like more than one or two percent each?

8 Q. I'm sorry, I thought you might have been
9 aware of what they have in this case.

10 A. I'm not offhand.

11 Q. They have got close to 10 percent apiece,
12 does that sound about right, Don?

13 MR. COHEN: It's your examination, Len.

14 A. Take 10 percent.

15 Q. Assume it's 10 percent apiece.

16 A. And they harbored, you are saying they
17 harbored the intent?

18 Q. Right.

19 A. Who is they?

20 Q. The principal people at the entities.

21 A. Who would that be? I don't understand. I
22 mean, what, the mayor?

23 Q. Mr. Timmeny, I'm prepared to stay here as
24 long as it takes to finish the deposition but I
25 think we are fencing over very minor details here.

1 If you are uncomfortable answering the
2 question on materiality, that's fine. I'm trying to
3 get from you an understanding -- I thought what you
4 said when I opened the whole subject matter of
5 willingness, you are quite aware of our assertions
6 on willingness because you have read --

7 A. If you are irritated because I won't adopt
8 your assertions in the memorandum, say so. All I'm
9 asking I think are reasonable questions in trying to
10 answer your question because your question is very
11 much -- it's sort of simple to the point and it
12 doesn't take in all the complexities that underlie
13 the topic.

14 Q. Sir, I'm not irritated that you won't
15 adopt my memorandum. I understand who you are
16 retained by in the case. I understand your position
17 in the case.

18 A. I think, you know, I think that's unfair.

19 Q. I am irritated that you will not answer
20 the question.

21 A. I am sworn here under oath to tell the
22 truth, not to take a position, and I resent the fact
23 that you say I am here because I have been hired by
24 certain people. I'm going to tell it a certain way.

25 Q. I am irritated I'm not getting an answer

1 to a very simple question. I opened the subject of
2 willingness and your immediate response, to simplify
3 it somewhat, it's immaterial. I have attempted to
4 follow up on that subject and I've gotten nothing
5 but a series of questions rather than answers.

6 MR. COHEN: We are going to break for a
7 few minutes because I think we are -- break for
8 about three minutes. We are at a point where you
9 guys aren't communicating well enough. Just going
10 to calm down for a minute.

11 (Recess.)

12 BY MR. SIMON:

13 Q. Let's see if we can go back on this
14 subject and make some more peaceful progress than we
15 did before the break.

16 Mr. Timmeny, I guess we will have a
17 transcript in the morning, but my distinct memory is
18 when I raised the subject of willingness to pay
19 claims your immediate response was along the lines
20 of materiality or immateriality, and what I was
21 attempting to inquire into is whether you believe
22 that the entire willingness to pay case was
23 immaterial or that certain disclosures that we say
24 should have been made would have been immaterial and
25 why.

1 Now, obviously we could embroider the
2 hypothetical fact situation a hundred different ways
3 and every time I ask you the question you could ask
4 me for additional hypothetical facts about whether
5 it was Snohomish or Tacoma or Clark County and
6 whether they had 10 percent or 8 percent, and
7 whether it was all of the commissioners or two of
8 the three commissioners, whether the commissioner
9 expected to be around in 1983 when the projects came
10 on line, and we could play that game indefinitely.

11 A. I wasn't playing a game.

12 Q. But I don't think it's productive.

13 A. I wasn't playing a game. What I wanted to
14 establish before I tried to answer the question is
15 would this be -- were you referring to evidence of
16 an actual determination by an entity that they did
17 not intend to pay.

18 The determination that was really
19 meaningful at high levels in the entity by people
20 who could bind the entity as opposed to somebody
21 musing in a hallway.

22 Q. I am referring to a meaningful, high level
23 intent which is different from the intent that one
24 would discern from reading the Official Statement.

25 A. You are assuming that there is such

1 evidence.

2 Q. Right. And I'm asking you whether that,
3 whether it would have been material to the market
4 for that to be disclosed if that was the case in
5 1977?

6 A. I think it would have been material,
7 certainly, to counsel when they were rendering their
8 opinion.

9 Q. Well --

10 A. This is bound up in the authority issue,
11 as I see it.

12 Q. You understand that as the plaintiffs see
13 it there are two issues.

14 A. Yes, I do.

15 Q. You can call one of them immaterial but
16 there are two distinct issues.

17 A. Yes, I understand that.

18 Q. Let's focus just on willingness for the
19 moment. Let's assume the authority case is resolved,
20 favorably, unfavorably, not in the case, just focus
21 on willingness. Wouldn't it be material to the
22 market, to the investor, to know that Snohomish
23 County and Tacoma, City of Tacoma, intended in the
24 event of a dry hole rather than an operating,
25 economically effective plant, to repudiate their

1 obligations, seek relief from the courts, and if
2 necessary relief from a federal bankruptcy
3 proceeding, what have you, and take whatever steps
4 were available to avoid paying money for a project
5 which was delivering them no electricity?

6 A. On the assumption that the participants
7 that you are referring to are substantial
8 participants, I think that could be material.

9 Q. Do you have an opinion as to whether or
10 not the Washington PUD utility group defendants in
11 this case violated section 10(b) with regard to
12 willingness to pay issues?

13 A. I don't know who was in the Washington
14 Public Utility Group individually.

15 Q. Mr. Cohen's clients, the entities.

16 A. I can't identify those entities
17 individually without somebody giving me a list. I
18 haven't committed that to memory.

19 Q. Do you have an opinion as to whether the
20 City of Tacoma violated section 10(b) with regard to
21 the willingness issues?

22 A. I have not seen any evidence to that
23 effect.

24 Q. Do you have an opinion as to whether any
25 of the participants violated section 10(b) with

1 regard to willingness to pay issues?

2 A. I have not seen any evidence to that
3 effect.

4 Q. Now, you are aware that the final Official
5 Statement for Projects 4 and 5 was issued in March
6 1981?

7 A. Yes.

8 Q. And you are aware that certain of the
9 participants were in court in late 1981 challenging
10 their obligations, isn't that correct?

11 MR. COHEN: That's a total
12 mischaracterization, Len.

13 THE WITNESS: I don't know.

14 MR. COHEN: I think you are doing it
15 inadvertently. That's wrong. That's just dead
16 wrong.

17 MR. SIMON: I may be wrong on my date.

18 MR. COHEN: That was a ratepayer group if
19 that's what you are talking about, the DeFazio case.

20 Q. Are you aware that the ratepayers in
21 DeFazio were in court by late 1981?

22 A. I've heard that said.

23 Q. Do you accept that as true?

24 A. Yes.

25 Q. Are you aware that certain of the Oregon

1 utilities joined on the side of the ratepayers in
2 DeFazio in early '82?

3 A. I will accept that as true. I'm not aware
4 of it, really.

5 Q. Are you aware that other participants were
6 in court in Washington by the spring of 1982?

7 A. I'll accept that if that's a fact, that's
8 fine.

9 Q. And you are aware that most participants
10 were challenging their obligations in their defense
11 of the Chemical Bank state court litigation by the
12 middle of 1982?

13 A. Well, if that's the case I'll accept that.

14 Q. Were you aware of that before I said it?

15 A. Yeah, generally, yeah.

16 Q. How have you made a determination as to
17 whether the intent which is reflected by those
18 litigation positions and that conduct in 1982 was
19 present or absent in March of 1981 when the final
20 Official Statements were issued?

21 A. I saw no evidence of any -- of that intent
22 being present in 1981 in March.

23 Q. How about the conduct in 1982?

24 A. You are suggesting that once you draw an
25 inference from conduct in 1982 that the intent was

1 present in 1981.

2 Q. I'm suggesting that one might.

3 A. I'm telling you I saw no evidence to that
4 effect. You are attempting to draw that inference,
5 that's your prerogative.

6 Q. And you are rejecting the inference.

7 A. I wouldn't draw that inference. I don't
8 think it follows.

9 Q. Why not?

10 A. Because I think there are other reasons
11 for asserting an unwillingness to pay that could
12 crop up after 1981.

13 Q. What are those reasons?

14 A. In effect I would characterize it as sort
15 of a fiduciary obligation on the part of, say, the
16 public officials in the entities to go to court to
17 see whether or not they could be relieved of the
18 obligation to pay. That doesn't follow that they
19 had the intent to do that prior to the time they did
20 it, but I can see that as something that would occur,
21 in other words a responsible public official could
22 well say, well, rather than writing a check here why
23 don't we file a lawsuit to see whether or not in
24 fact we have to pay in this context.

25 Q. Those fiduciary obligations existed in

1 March 1981, didn't they?

2 A. You are misunderstanding what I mean by
3 fiduciary obligations.

4 Q. I guess I am. What changed?

5 A. Well, the projects were no longer in being.
6 The projects were shut down. There was a moratorium
7 on the projects.

8 Q. Right. That's what changed.

9 A. Yes, that changed.

10 Q. Anything else?

11 A. There may have been other things that
12 changed but that was the principal factor that
13 brought about this issue.

14 Q. You are aware that these participants
15 agreements are referred to commonly in the industry
16 as take-or-pay contracts?

17 A. Yes.

18 Q. Hell or high water agreements?

19 A. Yes.

20 Q. And the idea is that you pay whether you
21 finished the project or not, right?

22 A. Yes, that's right.

23 Q. That was what the bond market understood
24 these to be?

25 A. That's what I would have expected.

1 Q. All right. And you are telling me, if I
2 understand it, and correct me if I'm wrong, that
3 it's perfectly all right to sign off on an Official
4 Statement in March of 1981 which includes a
5 take-or-pay obligation --

6 A. To have the intent -- to honor it, to have
7 the intent to honor it,.

8 Q. Without making any disclosure of these
9 fiduciary obligations you are referring to, and then
10 to learn -- when did they learn about the fiduciary
11 obligation?

12 A. The fiduciary obligation I am referring to,
13 you asked me if there was any context in which one
14 could possibly come up with a scenario other than
15 the inference that they had the intent in 1981, and
16 I'm giving you an example.

17 Q. That they --

18 A. I'm not saying they had it.

19 Q. That they discovered the fiduciary
20 obligations between 1981 and 1982?

21 A. Recognized, recognized the possibility
22 that before they signed the check that they might
23 have to go to court to see whether or not they
24 should.

25 Q. So you are telling me two inferences are

1 possible, one is that they had the same mindset in
2 March '81 as they had in '82; and they didn't
3 disclose it; and the other is that they had a
4 different mind set in 1982 because they recognized
5 for the first time their fiduciary obligations?

6 A. You can characterize it that way.

7 Q. Is that a fair characterization of what
8 you are saying?

9 A. Those two inferences are possible.

10 Q. How have you chosen to make one inference
11 when the plaintiffs choose to make the other?

12 A. Because I see no, there was no evidence of
13 intent in 1981 that they did not intend to honor
14 their agreement.

15 Q. Do you see any evidence of changed
16 circumstances?

17 A. Yes.

18 Q. What?

19 A. The projects shut down.

20 MR. COHEN: Chemical sued them, too.

21 MR. SIMON: Don, sit there and be quiet.

22 You are feeding the witness information, I won't put
23 up with it, we will call the Judge and ask him to
24 muzzle you if --

25 MR. COHEN: Call the Judge. You have

1 asked him about an area that is not covered in the
2 Rule 26 thing. You are asking him the exact same
3 thing --

4 MR. SIMON: I do not want to hear it. If
5 it's a waste of time then sit there and play by the
6 rules. If you are so concerned about the answers
7 you wouldn't be jumping up and down, just sit there
8 and be quiet.

9 MR. COHEN: This is the least thing I am
10 concerned about.

11 MR. SIMON: Then you can nod off then and
12 stop interrupting the witnesses.

13 THE WITNESS: I know counsel can object
14 but I don't think it's fair to say counsel is
15 jumping up and down. It seems to me to be a pretty
16 low key discussion.

17 Q. Is it your opinion, Mr. Timmeny, that
18 without independent evidence of wrongful intent that
19 one cannot draw an inference of wrongful intent in
20 1981 from conduct in 1982?

21 A. You could draw that inference. The
22 inference could be drawn.

23 Q. But you won't draw it?

24 A. I wouldn't draw it. I don't think it's a
25 reasonable inference.

1 Q. You would agree that's a jury question in
2 this case, wouldn't you?

3 A. That's right.

4 Q. Do you expect to testify on that subject
5 at trial?

6 A. I would expect to testify if asked that
7 there was nothing to disclose, that there was no
8 omission, no material omission in March of 1981 with
9 respect to this area because in my view there was
10 nothing to disclose.

11 Q. Because in your view the inference is
12 unreasonable to draw?

13 A. That's right, that's right.

14 Q. So you are going to testify on the jury
15 question?

16 A. If I'm allowed to.

17 Q. Would you tell me on how many prior
18 occasions you have testified as an expert in a court,
19 an administrative proceeding, or at a deposition, if
20 any?

21 A. Once in court. I recall one other time as
22 an expert when I was deposed, I was deposed a second
23 time. I was deposed twice prior to this as an
24 expert and I testified once in court.

25 Q. Please identify the cases for me.

1 A. I was deposed and I testified in court in
2 an action called Garber versus A. G. Edwards.

3 Q. G A R B E R?

4 A. I believe so.

5 Q. What was the nature of the action?

6 A. Actually -- well, maybe, I think it was
7 Garber versus AGM, there may have been another
8 defendant in there, too.

9 Q. What was the nature of the action?

10 A. It was an action by a customer against a
11 brokerage house.

12 Q. What kind of securities did it involve?

13 A. It involved equity securities for lack of
14 a better word.

15 Q. Who did you testify for?

16 A. A. G. Edwards.

17 Q. What subject or subjects did you testify
18 on?

19 A. It started out, I think I was offered
20 initially with respect to the compliance procedures
21 of the law firm -- of the brokerage house. I think
22 I also testified some on materiality, if I'm not
23 mistaken.

24 Q. And you testified in the court proceeding?

25 A. Yes.

1 Q. What year was that, do you recall?

2 A. Last summer, '87.

3 Q. Summer of '87?

4 A. I think so. Summer or early fall of '87.

5 Q. Were you deposed in the same case, is that
6 what you are saying?

7 A. Yes.

8 Q. What court is that pending in?

9 A. The Eastern District of Pennsylvania.

10 Q. And who were the counsel on each side of
11 the case as best you can recall?

12 A. Feiper Martin, a St. Louis law firm, is
13 representing A. G. Edwards; and I can't remember the
14 name of plaintiff's counsel.

15 Q. Do you have a copy of your trial testimony
16 or your deposition testimony in your office?

17 A. I don't believe so.

18 Q. You said you had been deposed in another
19 matter?

20 A. Yes.

21 Q. What was that?

22 A. It was a, it was called a Minnesota Zoo
23 Ride case. The exact caption of the case escapes me.
24 I don't know who the plaintiffs were, who the
25 defendants were. I know the, a Minneapolis law firm

1 was a defendant.

2 Q. It was called the what?

3 A. The Minneapolis Zoo Ride case, zoo, like
4 Z O O.

5 Q. What did it concern?

6 A. It concerned allegations of nondisclosure
7 in connection with the Official Statement in a bond
8 offering relating to the.

9 Q. Ride.

10 Q. What did you testify on?

11 A. I think I testified with respect to the
12 adequacy of the disclosure in the Official Statement.

13 Q. What year were you deposed in?

14 A. In 1985 or 1986. I think '85.

15 Q. Who were the lawyers involved on both
16 sides of the case, or as many sides of the case as
17 you recall if it was more than two.

18 A. The only lawyer, the only name I remember
19 is Timothy Thornton, who was counsel for the -- for
20 bond counsel, for the bond counsel defendants.

21 Q. Is that who you testified on behalf of?

22 A. Yes.

23 Q. Who was bond counsel there?

24 A. One of the large Minneapolis firms. I
25 can't remember the name of the firm.

1 Q. And what firm is Thornton in?

2 A. I think he has got his own firm. I forget
3 the name of his firm. He is in the name of the firm,
4 one of the named partners.

5 Q. Does that complete any expert testimony
6 you've given in deposition, trial or administrative
7 proceedings?

8 A. Yes.

9 Q. Have you been retained as an expert in
10 other cases but not yet testified?

11 A. No. I have been retained I think in
12 another case and never testified. The case is over.

13 As a matter of fact I don't even think I
14 was retained in the case I have in mind.

15 Q. In your work on this case have you
16 consulted any books, articles, scholarly or finance
17 works of any kind to further familiarize yourself
18 with any of the issues that you will be testifying
19 on?

20 A. Well, yes in the sense that I think I
21 reviewed the MFOA guidelines as they existed at I
22 think in 1977 or '78, I think '79, and some
23 subsequent revisions of the guidelines, or
24 amendments.

25 Yes, I did. I also, I looked at the,

1 there was a treatise prepared by Joe Daily, Joseph
2 Daily, who is a partner in the law firm Mudge Rose
3 with respect to disclosure in municipal offerings,
4 and I remember looking at the table of contents in
5 that treatise, sort of trying to decide whether I
6 wanted to read some of it, and reading a little of
7 the prefatory material, but that's as far as I got.

8 Q. I notice that two of the items you
9 reviewed in the course of your work here were
10 Official Statements for offerings of the
11 Massachusetts Municipal Wholesale Electric Company.
12 Could you tell me why you looked at those?

13 A. I looked at them because they were sent to
14 me by counsel.

15 Q. Do they play any part in the opinions that
16 you intend to give at trial?

17 A. I didn't review them very carefully. I
18 sort of flipped through them.

19 Q. Could you tell me what you have done to
20 prepare for your deposition?

21 A. You mean other than reviewing the
22 materials?

23 Q. Well, I mean other than your first review
24 of the materials prior to the time this deposition
25 was scheduled, what have you done recently, say, in

1 the last two or three weeks by way of material
2 review, consultation with counsel, organizing your
3 notes or thoughts, what have you, specifically to be
4 prepared to give testimony today?

5 A. Well, I read a lot of -- I read some of
6 the material that had been sent to me within the
7 last few weeks. In other words, I spent time
8 reading the memos in support of and in opposition to
9 the motion for summary judgment. I went back and
10 looked at testimony again; I looked at some notes
11 that I had prepared, I have been looking at this
12 stuff on and off, picking it up and putting it down,
13 and I looked at some notes that I had with respect
14 to the early reading that I had done, and I met with
15 counsel here in Seattle, Monday and Tuesday prior to
16 this deposition.

17 Q. Did you spend most of Monday and most of
18 Tuesday with counsel?

19 A. Yes, I did.

20 Q. Was it Mr. Stengel and Mr. Cohen?

21 A. Yes.

22 Q. Anyone else present?

23 A. No.

24 Q. You've read the court's opinion on the
25 summary judgment motion, the one that was issued a

1 couple of weeks ago?

2 A. Yes, largely. I don't think I read it to
3 the end. I read portions of it.

4 Q. Did you find anything in it that you
5 believed to be a misstatement of the law under
6 section 10(b) as you understand it?

7 MR. COHEN: Excuse me. Hold on a second,
8 please.

9 (Discussion off the record.)

10 MR. COHEN: Can I hear the question back,
11 please.

12 (Record read as requested.)

13 MR. COHEN: I think I'm going to instruct
14 him not to answer unless you can give me an idea of
15 where you think the relevance is. I mean, it really
16 is --

17 MR. SIMON: What's the basis for your
18 instruction?

19 MR. COHEN: It goes beyond anything that
20 he has been asked to opine on in the case and it's
21 highly prejudicial and beyond the realm of probity.

22 MR. SIMON: Beyond the realm of probity?

23 MR. COHEN: Beyond the realm of probative
24 inquiry.

25 MR. SIMON: That could be said as to 99

1 percent of Professor Hazard, but nobody instructed
2 him.

3 MR. COHEN: He can't rod.

4 MR. SIMON: That's because we play by the
5 rules, you are not allowed to instruct except on
6 grounds of privilege.

7 MR. COHEN: If you want to take this to
8 the Judge, if the Judge says he should answer then
9 he can do it.

10 MR. SIMON: I would like an answer to the
11 question. You are instructing him on that ground?

12 MR. COHEN: Yes.

13 MR. SIMON: He is testifying as to what
14 10(b) means. He has been doing it all day, whether
15 the defendants violated 10(b) or not. I think I'm
16 entitled to inquire as to what his understanding is
17 of section 10(b) and whether he is applying an
18 interpretation of section 10(b) which is at variance
19 with the law in this case. If he finds the opinion
20 to be at variance with his views, which he is
21 entitled to do, I am entitled to know that those are
22 the standards he is applying to your clients.

23 MR. COHEN: The only problem is, or one of
24 the problems is that was our motion for summary
25 judgment and I mean a Judge determined that there

1 were factual issues on a variety of things, that's
2 not the standard at trial upon which Mr. Timmeny is
3 going to testify. If you ask him some specific
4 things in the opinion, call it to his attention, I
5 will withdraw the instruction.

6 THE WITNESS: You can blow through this
7 whole discussion because I didn't read the legal
8 analysis in the opinion. As I recall reading the
9 opinion, the Judge sets out what he thinks are
10 factual issues with respect to various issues. He
11 said the plaintiffs produced evidence on this, the
12 defendants produced evidence on that and I think
13 there is enough in issue here so I'm not going to
14 grant summary judgment and that's about as far as I
15 got. I didn't read the whole thing, as I testified
16 before, I didn't read the whole thing so I don't
17 know what he said about 10(b)5.

18 MR. SIMON: Well, it's 5:00. Why don't we
19 pick it up in the morning.

20 (Deposition adjourned at 5:00 p.m.)

21

22

23

24

25

PG LN	confidential	
4 6	with the order on	confidentiality dated
12 19	there are any	confidentiality problems
13 2	there was a lot of	confidential treatment
34 17	If there is a	confidentiality problem here
122 6	it ought not to be	confidential. A. It is on

PG LN	exhibit	
3 6	PAGE MR. SIMON 4	EXHIBIT: DESCRIPTION PAGE
49 25	depositions,	exhibits which have been
112 15	mark as the first	Exhibit the 26-B statement
112 22	(Marked Deposition	Exhibit Timmeny 1.) Q. Mr.
112 24	been marked as	Exhibit 1. When you have had
113 20	first seven pages as	Exhibit 1 and we will mark
113 21	will mark the rest	Exhibit 2. Let's talk about
113 24	to refer to as	Exhibit 1 from this point
114 1	(Marked Deposition	Exhibit Timmeny 2.) Q. Could
116 23	on page 2 of the	exhibit, and that's why I
118 2	as noted on the	exhibit that I was
123 6	Q. Will you look at	Exhibit 1, please, and I'm
128 4	testimony and	exhibits and other evidence
128 11	references to	exhibits and deposition
128 19	for some of the	exhibits and I have asked
128 24	for certain	exhibits and testimony
129 1	you have asked for	exhibits and testimony from
134 1	Rule 26 statement,	Exhibit 1, says that you are
146 5	you signed off on	Exhibit 1 which states that
164 18	to 16 of page 2 of	Exhibit 1 there is a
166 6	designation of	exhibits that you've
169 13	care if it's an	exhibit. Q. I was referring
169 16	of documents on	Exhibit 1, and I believe
171 21	example, the Buck	exhibits included a lot of
171 22	looked at the Buck	exhibits or got some
173 5	case. A. Yes. Q.	Exhibits, deposition
174 9	looking at some	exhibits referred to in there
174 10	specifically Buck	exhibits. Q. But if they
174 11	if they weren't Buck	exhibits you didn't ask for
174 14	looking at some	exhibits that were Buck
174 14	that were Buck	exhibits. MR. SIMON: Well,
175 13	(Marked Deposition	Exhibit Timmeny 3.) MR.