ATTACHMENT A

TO

JOINT FILING OF PROPOSED REDACTED VERSION OF DECEMBER 5, 2003 HEARING TRANSCRIPT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, ET. AL.,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Docket No. CA 03-2169
	:	
FIRST DATA CORPORATION and	:	
CONCORD EFS, INC.	:	Washington, D.C.
	:	Friday, December 5, 2003
	:	1:00 p.m.
Defendants.	:	

REDACTED VERSION
TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROSEMARY M. COLLYER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Appearances Continued

By Phone:

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Pennsylvania:	Benjamin L. Cox, Esquire Joseph Betsko, Esquire Deputy Attorney Generals
Texas:	Janice Hacker, Esquire Attorney General Office Investigator
Washington, DC:	David Blake-Thomas, Esquire Janet Brody, Esquire
For Defendant First Data: (Present)	Frank Hinman, Esquire Christopher B. Hockett, Esquire Geraldine M. Alexis, Esquire BINGHAM MCCUTCHEN, LLP Suite 1800, Three Embarcdero Center San Francisco, CA 94111-4067

Appearances continued:

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Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

THE COURT: Dr. Hausman, hello.

MR. HAUSMAN: Good afternoon, Your Honor.

THE COURT: All right, this is Judge Collyer. We need everybody who is on the telephone call to identify themselves and to identify if there's anyone else in the room with them.

The Court has ordered this hearing sealed; therefore, during the course of the hearing people cannot walk in and out of the rooms in which the people on the telephone are sitting. You have to keep the door closed. You have to keep other people from hearing. And you have to remain -- or retain the information sealed whether it's during this hearing or later.

Does everybody understand that?

UNIDENTIFIED SPEAKER: Yes, Your Honor.

THE COURT: All right, so could we take a poll, please, as to who is in attendance?

MR. IOANNOU: Yes, this is John Ioannou, I-O-A-N-N-O-U from the New York State Attorney General's Office.

THE COURT: And is anyone with you, sir?

MR. IOANNOU: No, Your Honor, no one is here except me.

THE COURT: Okay, anyone else?

MR. HAUSMAN: I am Jerry Hausman, H-A-U-S-M-A-N, Professor of Economics, LIP, and there is no one in the room

with me.

THE COURT: Thank you, sir.

MR. BLAKE: David Blake-Thomas for the United States, B-l-a-k-e hyphen T-h-o-m-a-s, I'm alone.

THE COURT: Where are you?

MR. BLAKE-THOMAS: I'm in my office.

THE COURT: No, did you say you represent the United States?

MR. BLAKE-THOMAS: I'm with the DOJ.

THE COURT: All right, where is your office?

MR. BLAKE-THOMAS: Washington, in Washington.

THE COURT: Oh, well, we needed to have you on the phone. Okay, anybody else?

MS. WEST: Yes, Livia West from the Illinois Attorney General's office. My first name is spelled L-i-v-i-a, last name is W-e-s-t, and I am alone in the room.

THE COURT: Thank you, ma'am.

Thank you.

THE COURT: Any anyone else?

MS. HACKER: Janice H-a-c-k-e-r. I'm with the Texas Attorney General's Office in Austin, and I'm alone in the room.

THE COURT: Thank you.

Anyone else?

MS. BRODY: Janet Brody. I'm with the Department of Justice, it's B-r-o-d-y, and I'm alone in my office in

Washington, D.C.

THE COURT: There was one other speaker I think.

MR. BETSKO: Yes, my name is Joseph Betsko, I'm with the Pennsylvania office of the Attorney General representing the Commonwealth of Pennsylvania. Joining me in my office is another Deputy Attorney General Benjamin Cox.

THE COURT: All right.

MR. BETSKO: And my last name is spelled B as in boy e-t-s-k-o.

THE COURT: Thank you, sir.

MS. CREGAN: This is Nora Cregan representing First Data. With me in a conference room with the door closed in San Francisco are May Lee, Troy Sauro, Zora Braithwait, Todd Williams and Todd Anderson and Christina Wheeler, who are all attorneys.

THE COURT: Okay, and everybody understands -- is this it? Do we have them? Good. Everybody understands the rules of the road as I outlined them because the hearing is sealed?

UNIDENTIFIED SPEAKERS: Yes, yes, Your Honor, yes.

THE COURT: Thank you.

When we get to trial I don't know if there are going to be people on the telephone for purposes of trial, but we're going to have to have the telephone hookups arranged prior to the time that trial is scheduled to start each day and after breaks

of lunch and stuff because we don't have that much time and everybody is going to be operating on a chess clock and so we are going to be zipping through things.

You don't expect to have people on the phone?

MR. CONRATH: No, Your Honor, I don't think so.

MR. HOCKETT: Neither do we, Your Honor.

MS. ALEXIS: I think it will be the States Attorney General that expects to have somebody on the phone.

THE COURT: Yeah, the states may and if so, we'll make those arrangements. I just want every one to understand that because of the time constraints we are going to be dealing with, we certainly hope that anybody who, particularly the parties, who want to participate by phone are able to do that, but we may get going and wait for -- not wait for the phone hookup to be arranged if that's what is necessary at any given break, okay. Not to be rude to anybody, but that's the way we are going to have to do it.

All right. We're ready to begin. I think the ball is in your court, Mr. Conrath.

MR. CONRATH: All right. I thought maybe we would each just tell you the order that we are going to proceed and there's one just preliminary note that I would like to tell you we received late on December 3rd, a report from an additional, with an additional expert by defendants named Professor Myers.

I understand that they don't propose to put him forward

today. He was not identified on either of the witness lists and we think it is severely prejudicial to us and we will be filing a motion in that regard probably later today, Your Honor.

MS. ALEXIS: Yes, Your Honor, we'll be prepared to argue that, Your Honor.

THE COURT: Okay, that's fine. And I understand why you will and I understand everybody has to recognize that the people on the telephone can only hear you if you speak into the microphone. So please, did anybody, did everybody on the phone hear Mr. Conrath's statements?

UNIDENTIFIED SPEAKER: Yes.

UNIDENTIFIED SPEAKER: Yes, Your Honor.

THE COURT: Mr. Hausman -- Dr. Hausman, I'm most concerned about you.

DR. HAUSMAN: Your Honor, I'm can hear fine, thank you.

THE COURT: Okay.

MR. CONRATH: Your Honor, we have two experts we're presenting in order today. First Dr. Janusz Ordover who is an expert economist, and second, Dr. Mark Zmijewski who is the accounting and business expertise.

First of those Dr. Ordover will go first.

MS. ALEXIS: Your Honor, it's Gerri Alexis. We will have Professor Katz from the University of California in

California who will go first and then, of course, Professor Hausman who will be heard over the phone who will go after him.

THE COURT: Okay, thank you.

MR. CONRATH: May I introduce the lawyer who will be making the presentation with Dr. Ordover, that's Arnold Celnicker.

THE COURT: Good afternoon, sir.

MR. CELNICKER: Good afternoon.

THE COURT: Would you spell your last name for me?

MR. CELNICKER: Yes, C-E-L-N-I-C-K-E-R, Celnicker.

THE COURT: Thank you.

MR. CELNICKER: I think Mr. Conrath exaggerated when he said I would be making the presentation with Dr. Ordover.

The way we have this planned with the Court's approval is we have put together a power point presentation. In other words, we have not treated this as a question and answer testimony type situation.

THE COURT: That's absolutely right. We don't, I can promise you I have actually read Professor Ordover, Dr. Ordover's expert witness reports, I think I have read three haven't I?

So I, although I need the final one, all you did was add to the first one?

MR. CELNICKER: What we did, Your Honor, was add to the first one as a supplemental section based on data that was

obtained post-complaint.

THE COURT: But it's clear where the supplement is?

MR. CONRATH: Yes, it is the final six pages of the report.

THE COURT: That much I have not read, but I have read everything else.

MR. CELNICKER: Yeah, my condolences. Hopefully by doing it orally, and I don't mean any disrespect. These are tough readings to me at least.

THE COURT: I don't feel disrespected, go ahead.

MR. CELNICKER: What we intend to do, Your Honor is, is to as I said go through a power point presentation which will after introducing a little bit about the witness, and a short introduction to the PIN debit and how it functions, then get into the meat of it which is first talking about the concept of product market and how that concept is defined in the antitrust and why economist look at it a certain way and these as you see, from reading the papers there are some differences on how to do that.

So we intend to spend as much time as necessary and as you allow to try to explain why we think the concept is what we say it is.

THE COURT: Right.

MR. CELNICKER: Then apply that concept to this particular case.

THE COURT: Right.

MR. CELNICKER: After that, we are going to turn to what we view as the second big issue which is the competitive affects of the merger.

THE COURT: Right.

MR. CELNICKER: And talk about the manner in which we feel this merger will lessen competition and may lead to higher prices to merchants. Those two subjects, product market definition and competitor affects, is the heart of our presentation.

Time permitting we may say a few words about issues of entry and efficiencies in particular on efficiences. Dr. Ordover's input is limited, but he does provide some perspective on some of the concepts, economic concepts and underpinning. He has taken no part in performing any efficiency exercise per se.

THE COURT: Okay, okay.

MR. CELNICKER: So with that introduction if I can, do you want the witness to sit in the witness box?

THE COURT: That would be great, if he would come sit in the witness seat and be sworn.

MR. PATTON: Your Honor, could I make one preliminary objection because I don't want to interrupt Professor Ordover once he gets started?

THE COURT: All right.

MR. PATTON: We have a preliminary objection, this should only take a minute.

Your Honor, under the federal rules as you know, it's okay for an expert to rely on hearsay under Rule 703 of the Federal Rules of Evidence as a foundation or as a basis for forming expert opinions.

You may also remember that early on in this case we had a dispute about a number of declarations whether those would be admissible or not, the Government had collected a series of declarations. I think initially had intended to come in and at least prove up their case or case in chief in whole or in part through these hearsay statements. Your Honor made it quite clear that no, we'll have depositions or have live testimony, we won't have witness declarations.

In fact, as it's turned out, much of the foundation for Professor Ordover's testimony are these same witness declarations, and you have read them and portions of them, they are quoted throughout Professor Ordover's reports.

Here is our objection. It is not that it is inappropriate for Professor Ordover to rely on hearsay statements as a basis for expert opinion.

Our belief with all due respect to Professor Ordover is he goes over the line and does something that the case law is quite clear he can't do which is that he becomes simply in large part a vessel for communicating inadmissible hearsay and

injecting it into the record.

Here is the distinction that we try to draw. If an expert --

THE COURT: Wait, wait. I understand the point you are making and understanding that it's already 20, 25 after one and we are on a short clock here. What is it that you would have me do today?

MR. PATTON: Just be alert to the objection and to the fact that much of what I think we're going to hear and that's in the expert reports is not admissible evidence and in fact, as I think you'll see when we actually see the proof, there's substantial reliability questions about these declarations that form the basis for his expert opinions.

THE COURT: I got that.

MR. PATTON: Thanks.

MR. CONRATH: Your Honor, I had spoken with both counsel for both defendants before this hearing, and no one mentioned to me that this issue was going to be brought up so I'm kind of disappointed to hear it this way.

But let me just say it's perfectly appropriate for an expert to use hearsay in coming to his opinion and also more to the point by the time we have the trial as many of these declarants as we're able to fit into this very abbreviated and difficult schedule will be coming and testifying live and letting the Court hear their testimony directly.

THE COURT: Okay.

We can now swear the witness.

(GOVERNMENT WITNESS, JANUSZ ORDOVER, SWORN.)

MR. CELNICKER: Your Honor, I am going to, if I might, hand out a hard copy of the power point presentation and then technology willing it's also going to appear on the screens that are present throughout the court.

THE COURT: I have it right here. I have my copy here.

MR. CELNICKER: Is your screen monitor working?

THE WITNESS: It is.

MR. CONRATH: Your Honor, I think I'll assume the position of the proverbial potted plant in this proceeding largely and --

THE COURT: Okay. Dr. Ordover, I don't think that I need you to spend time on your qualifications. I am impressed enough by your qualifications and I don't think that anybody is challenging your expertise or at least your ability to testify as an expert.

My question about material reviewed which is -- I may be rushing ahead --

THE WITNESS: Page 2 or 3 on this?

THE COURT: Page 3 on this.

THE WITNESS: Yes.

THE COURT: My only question as to this is to ask you

whether this is the kinds of materials that an expert of your kind would customarily rely upon?

THE WITNESS: The answer is well first of all, let me say that skipping over my qualifications, the easiest part of what I have to do today, so yes, I think this is unquestionably what I normally would look at and rely upon or consider in any antitrust case including a merger investigation of this sort.

THE COURT: Perhaps for purposes of Dr. Hausman at the other end of the line, you could just read the bullets on the material reviewed slide which is page 3, and then you can go on to the rest of your presentation.

THE WITNESS: Thank you. Yes, I will be happy to do that. I am --

MS. ALEXIS: Excuse me, Your Honor.

We could expedite this. This is similar to the same thing that was sent to us last night by e-mail to Professor Hausman.

THE COURT: Oh, Dr. Hausman, you have this?

MS. ALEXIS: This is the power point.

DR. HAUSMAN: Yes, I do, Your Honor.

THE COURT: All right, then we can skip page 3 and just go to page 4.

THE WITNESS: Thank you, I will do that. In fact, I was considering borrowing slides from Michael Katz, but I also need to borrow cards from Mr. Celnicker that will help me

illustrate as I go along here today.

This is yet another case involving these pieces of plastic called credit cards, debit cards. And we are going to be talking a lot about them so I just wanted to say a few words about what it is that this case focuses on as opposed to many other matters involving this electronic transfer market.

What this case involves in my view is the state of competition what I'll define as a PIN debit market or market for PIN debit network services, and I'll try to explain in my view why that transaction is likely to lessen competition in what I consider to be a properly defined market.

In order to do that I do have to go through some of the technicalities of that so-called market, of the market because it differs in certain interesting or important ways from things that perhaps we are a little bit more familiar.

So if I am going too slow or I am going too fast, of course, it's your court and please interrupt me as often as you wish. Maybe we can have Michael sit on the other side and have an exchange. I have to interject for one second because Jerry Hausman is in Cairo.

And some years ago, he and I were on an opposing side of the case in a trial and they have something called a hot tub hearing. And when I was getting ready for it, my lawyers told me I was going to be in the hot tub with Jerry Hausman. I was rather concerned about that fact but I realized that it's not

really what I thought it meant. But anyway. Now Jerry is off to Cairo so that will be avoided here as well.

But in any case, I think that I want to go through some things which are not controversial but I think they are sort of foundational and important to lay out so that we can all use the same language. So this is really an introduction to basic of the PIN debit transactions and PIN debit network services.

The basic idea is that when you come to the store you can pull out one of these cards and use them to pay for the merchandise that you purchase whether it's a groceries or refrigerator or whatever it is, it can be paid for with one of these cards.

These cards are not the same thing as credit cards even though when you pay with a credit card you may be paying the balance at the end of the billing period and have no balances to carry forward. You may be called a transactor in such a case as opposed to a revolver.

But here the difference between debit cards in general and credit cards is that when you pay with debit the balance of your purchase gets deducted more or less immediately depending on the type of debit that you use. So if you use one type of debit that is called signature debit, there's a slight delay, there's some delay for use, maybe two days. It's now down perhaps to a day between the time that your purchase and the amount of your purchase will be deducted from your bank account

with the bank that issued one of these cards.

So my card was issued by what use to be called First Union. It's no longer and each one of these cards will have on the back of them -- well, on the front of it, it will have a Visa or MasterCard sign, a logo. It's going to say something like check card or it will say master money and those basically are logos for the signature side of the debit business.

In other words, when you come in and you swipe your card and if you choose to pay or if you do pay with the debit card and use it as a signature card, it will go over a MasterCard or Visa network and it will be treated as a signature payment, and in order to complete that payment you have to sign the little sheet of paper that comes out of the cash register the same way as when you do that if you pay with your credit card. It's exactly the same in that respect.

However, if you choose to pay using the same credit card, same card for your transaction using PIN instead of signing, you will enter your code, the same code that you have for your ATM transactions generally.

Now, that seems to be just the basics, but we need to go a little bit more in order to understand what it is that is on these cards.

We already talked about the check card which is the signature brand name for Visa, but I want to flip the card and there's all kinds of things on the other side. Those things on

the other side are called bugs which you probably read in my declaration and Professor Katz' and Professor Hausman's declarations, talking about bugs as if it were some kind of zoological case but it's not.

It's a case about debit and particularly PIN debit. Each one of the bugs denotes a network. On my card I'm actually well endowed in networks through my bank because I do have three PIN debits networks; one is called Interlink which is actually also on my Visa.

Then I have NYCE which is owned by one of the parties, First Data, and then I have STAR. I also have PLUS here which is an ATM. So I have three PIN debit bugs on my card.

So when I swipe this card, as long as my merchant accepts any one of these networks, my transaction will be billed to my account instanteously because this is a PIN debit transaction which basically applies that in the second that I finish the transaction, my account will be debited.

If I choose at the same time I can ask for some money back or cash back. In other words, if I say to the clerk please, I would like to get $50 cash from this transaction, that's what they will hand out to me, and that will be part of my transaction also instanteously debited from my account. So it's no different in that respect from going to a ATM and withdrawing $50.

If I show you for one second Mr. Celnicker's card you

will notice only that he has an ATM back here but only one PIN debit network which is STAR. So now if he swipes his card at the check out point of service, point of sale, the transaction will not go through unless the merchant takes the STAR network PIN debit, okay.

As we'll see as we talk a little bit about it, it matters in my assessment of this transaction as to what happens to the result of this deal to the distribution of cards which have more than one bug that is called multi-bug cards and what happens in particular to the number of cards that only have the bugs of STAR and NYCE, okay.

THE COURT: Okay.

THE WITNESS: Anyway, so let me just complete the story and focus on this diagram. As I said, Michael Katz, Professor Katz has a much nicer looking one, but so be it.

We talk about these PIN debit transaction as being taking place in a two-sided market. Again, you must have read about that in my declaration and Hausman's, Katz' declaration.

Most of it may appear that every transaction has two sides to it because there's a buyer and there's a seller. But what differentiates the PIN debit transactions -- Can you hit the, sir -- from the regular two side what you may think or we all may think as being a two-sided transaction with the buyer and the seller and you will find that in this transaction there's an actor in between.

The actor in between is the PIN debit network or it would be signature debit network or it would be a credit card network.

So in order to connect the merchant with the cardholder, we need to have the network in between which spans the cardholder's checking account, direct debit account and the merchant which is why in the phenomenic literature there has evolved over the past years people talk about the PIN debit markets to be two-sided because they involve this need to coordinate with the merchant side, with the card issuer side, it is that coordination that enables the customer and as the cardholder to complete the transaction in the first place.

You immediately can see that having the player in the middle creates economic complications that may not exist when we are dealing with, I use all of these examples of tofu and chicken any frozen peas. I don't know, maybe I was hungry when I wrote this, but be that as it may, what I'm thinking about here is the network standing the two sides and that network has to in the way act and I think again, this is a central feature of what I'm going to talk about.

It has to somehow balance the interests of the merchant and the interests of the bank that issues these cards.

THE COURT: I actually really read --

THE WITNESS: Oh.

THE COURT: -- what you submitted.

THE WITNESS: Oh, my God.

THE COURT: I actually understand that. I'm ahead of you on this because you have already made it clear.

THE WITNESS: Oh, I see. If that's the case --

THE COURT: You were more specific and more clear in your written documentation than maybe you are giving yourself credit for.

THE WITNESS: Thank you. I'm happy to skip all this if I may.

THE COURT: What I really want to talk about is the guidelines analysis of mergers. I understand, I mean, there's a really critical difference between your view as to how to analyze the relevant market and Dr. Hausman's. And I think that possibly is because you very strictly are following the analysis that the guidelines recommend; that is, your, the smallest possible market kind of thing.

Whereas Dr. Hausman is saying no, you have to look at the larger picture because what is happening in the real world isn't reflected in the small monopolist analysis that you were using.

So I understand the concepts on page 6, but talk to me about the hypothetical manopolist and whether or not that is actually the only way that one can define the relevant market or whether there aren't alternatives.

So is this it? You have to understand I am not

previously been an antitrust lawyer, so is this it? Is this the only way to do it?

THE WITNESS: Well, the answer is there's always more ways than one to skin a cat, but I think that the approach that I advocate is in fact not removed from the realities of the market place and what I want to --

THE COURT: Well, I'm sure you would say that.

THE WITNESS: Yes.

THE COURT: I'm just drawing the distinction between which is a rather crude way of distinguishing the way you were approaching and the way Dr. Hausman was approaching.

THE WITNESS: Yes, I think that in my view the proper place to start, I don't think that there's to many ifs and buts about that, is the test that has been developed in the merger guidelines. It's over 10 years or 12 years old, versions of it was available in the earlier versions of the guidelines.

I believe that the approach that I advocated here which is sensitive to day-to-day market conditions and in fact, is designed to capture these day-to-day conditions is the most effective way of approaching the question of whether or not the products that are those supplied by the two parties compete what is the market in which these two products compete.

Obviously, there's a lot of evidence that one can bring to bear on the question as to whether or not this SSNIP, the small but significant increase in price, nontransitory increase

in price will in fact be implemented would be profitable to this hypothetical manopolist, and this is where the evidence that is of the sort that is in some of the portions of the Professor Hausman's report and my report and Professor Katz' report, that's where it all comes in.

I think there were many, many mistakes made in the way the evidence brought in to answer the question what's the relevant market. But I don't ignore that information. In fact, I put it in together with whatever information I have in order to ask the fundamental question.

What would happen if this hypothetical manopolist were in fact to increase the price? Would it be profitable to do so by five or 10 percent and the answer to that depends on all kinds of issues.

THE COURT: Well, the question in the sense is if there are as you said two sides to the market, can even the hypothetical manopolist increase the price to merchants without worrying about the Interchange price to the banks?

THE WITNESS: Well, I think the answer is because of the two-sided nature of the market, this hypothetical monopolist has to understand what will happen on the issuer side.

THE COURT: Right.

THE WITNESS: If the price of the merchant is increased, okay. And I go through that in some detail but it

much depends and what it is that the hypothetical monopolist will attempt to do is a price increase to the merchants, okay.

For example, if the monopolist simply increases those switch fees, then in terms of the per transaction revenue, the issuer is left totally indifferent because the issuer only collects the Interchange minus the Switch fee it pays.

THE COURT: Well, it's not quite indifferent because you have to assume that at some point the merchant pays both. The merchant pays the Interchange fee and the Switch fee.

THE WITNESS: But it only pays its own Switch fee. It doesn't pay for the Switch fee that the issuer pays for.

THE COURT: Okay. But the merchant essentially pays a sum for use of the network that is both the merchant's Switch fee and the Interchange fee for the bank, right?

THE WITNESS: No, the merchant pays the Switch fee.

THE COURT: Right.

THE WITNESS: That it pays through the network like say five cents a transaction, and it pays the Interchange which flows through its entirety to the, to the issuer.

THE COURT: Right. To the bank.

THE WITNESS: To the bank or financial institution.

THE COURT: So if you add five cents for, we'll say five cents for it's a nice round number and --

THE WITNESS: That's by the way a hundred percent increase in the Switch fee so that's more than a SSNIP.

THE COURT: I thought five cents sounded like a lot of money.

THE WITNESS: It is a lot of money if you multiply it by a lot of transactions.

THE COURT: We'll use five cents because I am feeble, five cents for the Switch fee and forty cents for the Interchange fee for the bank.

THE WITNESS: That's true.

THE COURT: That's forty-five cents for each transaction.

THE WITNESS: Yes.

THE COURT: One has to assume that there is a cap on that; that is, whether the, the increase is in the Switch fee or in the Interchange fee, the merchant isn't really going to care.

I mean, the merchant doesn't care whether he is spending 45 cents and it gets forty and five or whether he pays 45 cents and it gets split 35 and 10, but he is going to care if he has to pay 47 cents, right?

THE WITNESS: Absolutely, so that's why we -- I'm sorry --

THE COURT: My point is therefore, that the bank can't actually be totally untouched by the increase in Switch fees because if the Switch fee increases from five to seven cents, the pressure from the merchant may effect the bank's

Interchange fee.

THE WITNESS: The pressure from the merchant, to the extent that the merchant can exercise any pressure which is what this case is about, the ability to actually keep those fees down to some level that would exist.

THE COURT: Oh, well, I didn't think that the issue was merchants exercising pressure.

Is that what you are thinking?

THE WITNESS: Well, I thought --

THE COURT: Are the merchants and consumers that we are worried about?

THE WITNESS: The merchants -- well, we are going through a lot of steps at the same time, so maybe I can try to unpack it.

THE COURT: Right.

THE WITNESS: I think when you start asking me all of these difficult questions, the question that we started with was whether or not the issuer which is the bank --

THE COURT: Right.

THE WITNESS: -- or credit union cares about what happens --

THE COURT: To the Switch fee.

THE WITNESS: -- to the Switch fee.

I said that the answer is as long as the Interchange is unaffected, as long as the Interchange that it receives it gets

the same amount per transaction and therefore, from their perspective it will be indifferent on a per transaction basis, okay.

Then we said oh, okay, well what happens if the Switch fee goes up by a lot and that requires the Interchange to go down.

THE COURT: Right.

THE WITNESS: That's the next step was that particular exercise.

THE COURT: On the concept that there's only so much money that a merchant will pay.

THE WITNESS: Well, this goes precisely to the question of the effects of that SSNIP. If the merchant is totally on the margin between willing to pay the extra two and a half cents, okay, or not, then if you try to impose the SSNIP, and I think you have got to the right answer very very effectively, if the merchant says look, you go up by two and a half cents whether it's an Interchange increase of two and a half cents or whether it is a switch fee increase of two and a half cents, I don't care. I pay two and a half cents, it's my money and I have to pay for it and that will be and translated in some way in the prices to consumers.

If that happens, then obviously the answer would be that the effect of that SSNIP which we have say is five cents or whatever it is, would be to drive away transactions from the

hypothetical monopolist that is imposing the increase and therefore rendering the increase unprofitable.

Now we are asking a question, and I have been trying to answer that using whatever, all of the evidence that I have at my disposal, whether or not in this case where we are starting right now, the 10 percent increase in let's say starting with a merchant Switch fee would dissuade the merchant in such numbers from accepting PIN debit or it would cause them to steer away from PIN debit to other means of payment that the increase that we are contemplating would in fact be unprofitable for the hypothetical firm and the answer to that I believe is that it would not be, that that would be a profitable thing to do for that hypothetical monopolist.

THE COURT: So if what I was sort of postulating was that there was only so much money available for each transaction that a merchant would pay and let's say it's 45 cents, so if the network wants to improve it's profitability in any way by increasing its Switch fee, it's going to have to persuade the issuer to decrease the Interchange fee because my theory is that the merchant will only pay 45 cents.

THE WITNESS: If your theory is that we are all of limits of willingness to pay, then the answer is yes. If you want to increase the amount collected in Switch fees, we'll have to pay less from the, you have to pay less to the issuers because there is only 45 cents to be divided between the two

parties.

THE COURT: And it's your concept that that is not so and that the networks can add at least 10 percent to the Switch fees without having defections, material defections from the merchants?

THE WITNESS: I could not have stated my conclusions better than that. It is a clear statement of exactly where I have come out at looking at this market.

In fact, I think I have made a statement that is even stronger in my the declarations saying that even if one were to increase not only just the Switch fee but the Switch fee plus the Interchange by the five to 10 percent amount which the one we are contemplating --

THE COURT: Right.

THE WITNESS: -- there would not be enough defections of merchants or lets make it less simple, more simple, just simply a reduction of diminution in the number of PIN debit transactions, then that would make such an increase unprofitable for the, this hypothetical monopolist.

Now I want to make sure that it's clear that when we are talking about a hypothetical monopolist imposing that SSNIP, we are not necessarily saying that this is what is going to happen post-transaction.

THE COURT: Oh, no, no, no.

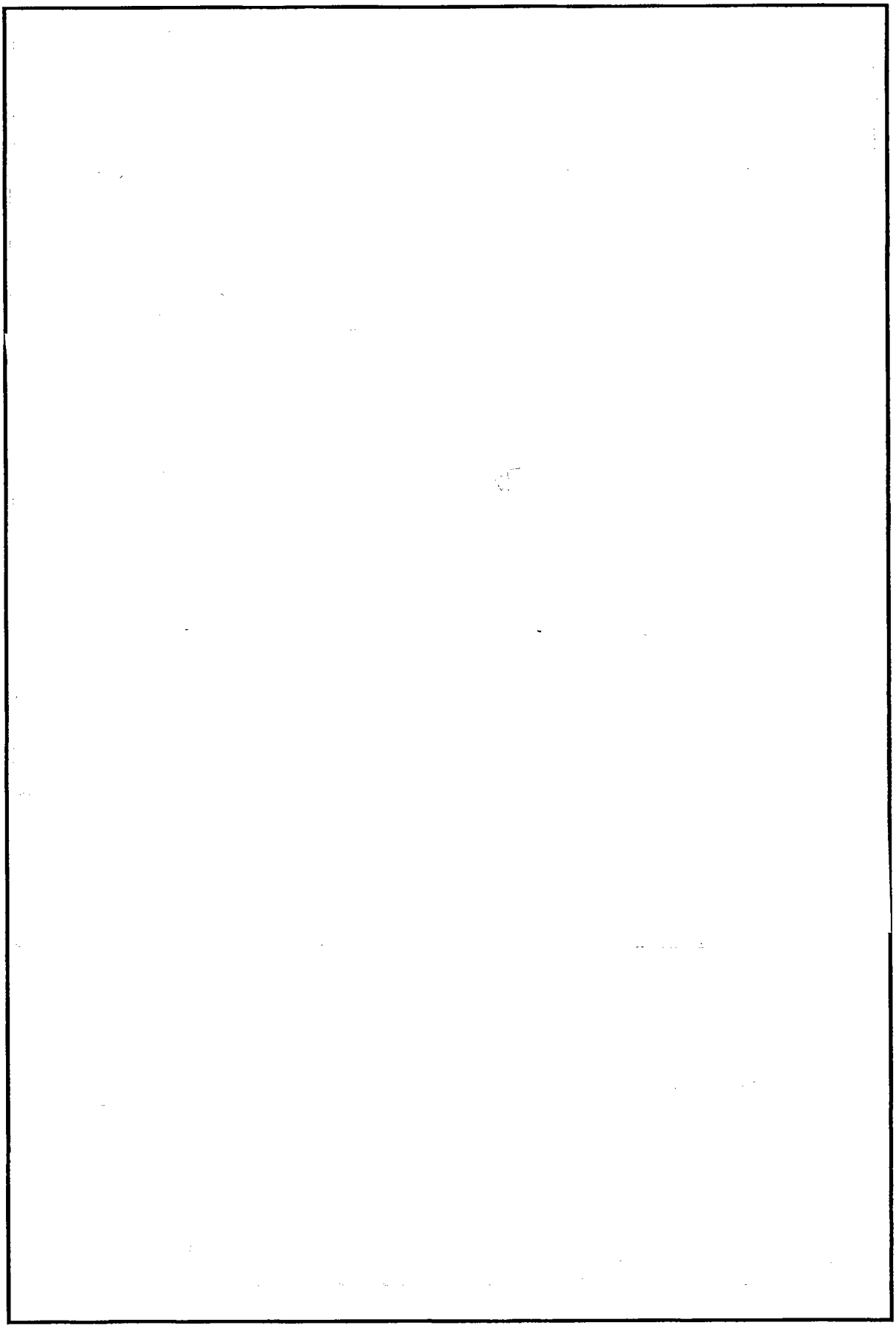
THE WITNESS: I want to make sure.

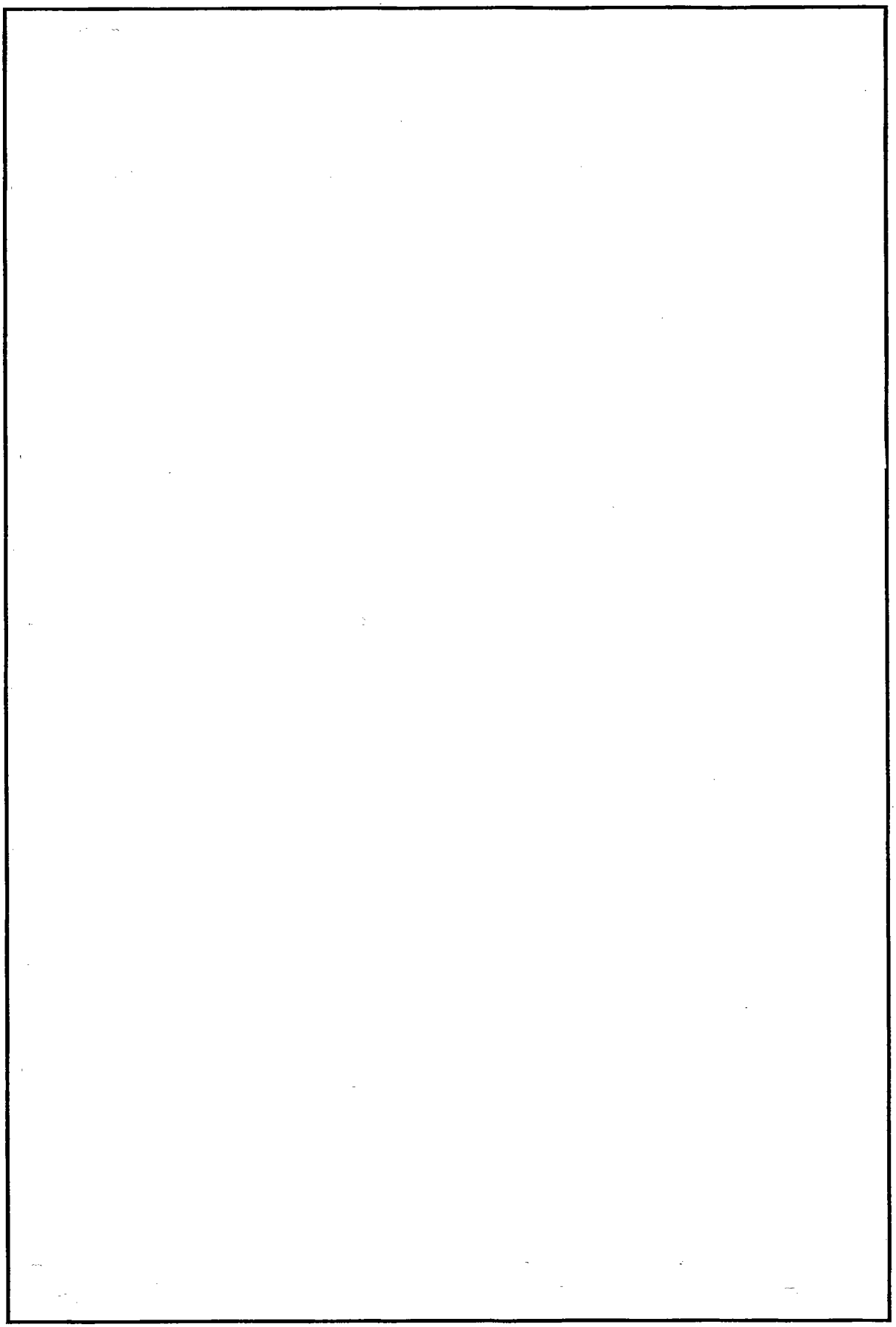
THE COURT: You are using that for purposes of defining the market?

THE WITNESS: Exactly, Your Honor.

THE COURT: I'm not quite sure -- no, but I understand that you are using it for defining the market.

But since Dr. Katz and Dr. Hausman say, well, but this market this year, last year, next year is being so impacted by





But setting that aside, maybe something down here percentage points, I still have to ask the question whether or not the effect of these strategies has been to create a market that comprises both signature debits and that and PIN debit, even despite all of these increases, and despite all of these purchases of market share, is there a gap still?

And I have here a slide, slide 12 that tends to, that summarizes the evidence or statements in the declarations that were put into this case.

MR. PATTON: Your Honor, I'm going to be very brief because I must preserve our record on this.

This is precisely the kind of thing we object to. This is based a hundred percent on hearsay and as the evidence at trial will show, for those witnesses on here who have actually been deposed in many cases it's extraordinarily unreliable and inaccurate hearsay.

So this goes way beyond the pale of Section 703 and the distinction that I was trying to raise before is it is appropriate for an expert to say --

THE COURT: No, no, I got it. I understand your argument.

MR. PATTON: Okay, all right.

THE COURT: I am not as smart as I like to pretend, but once I understand it -- I really don't need you to belabor the point.

MR. PATTON: I know you are smart, Judge.

THE COURT: -- once I understand I don't need you to belabor the point.

Yes, sir.

MR. CONRATH: I think I will just repeat what I said This is the kind of thing of which experts rely and we will be bringing many of those witnesses for Your Honor to hear during the trial.

THE COURT: Okay.

THE WITNESS: So getting back to whatever the probative value of this evidence is is for you to decide.

The fact of the matter is, and I think that the press that Professor Katz relies on and Professor Hausman cite to a great extent as well, everyone tends to agree that on the whole the PIN debit transactions are substantially cheaper still than the transactions run over signature networks, signature debit networks.

THE COURT: And that's because the Interchange fees are different. The Switch fees aren't the same.

THE WITNESS: There's some, there's some. The sum total of fees to the merchant whether you are looking at it, which is what you should be looking at. When one looks at the total sum of the Switch fees and Interchange or whatever merchant discounts are on the signature side versus the PIN debit side, that cost is to a merchant.

THE COURT: I don't dispute that. I was trying to make that point earlier, but right now we're dealing with the -- I have forgotten -- somebody called this the payment market or something like that. Industry I meant, payment industry or something. The question is does the network -- who runs the network on which signature debit operates, Visa?

THE WITNESS: Visa or MasterCard.

THE COURT: They are the only ones, right?

THE WITNESS: That's right, Visa with eighty percent and MasterCard was twenty percent.

THE COURT: And now Visa is Interlink and by using its resources to buy business away from, at least from STAR, we don't know how they are doing vis-a-vis First Data.

THE COURT: If I were a merchant and I had to decide whether I were willing, and I understand the issue about how much power merchants really can exercise here, but if I were a merchant and could make the determination as to whether or not I were willing to accept a PIN debit card or a signature debit

card, and the signature debit card cost more, so you are saying that I would be inclined to go with the PIN debit card?

THE WITNESS: Absolutely, and you see a lot of that happening and in fact, on yesterday we read about WAL MART saying they are going to discontinue or threaten to discontinue the MasterCard signature debit.

THE COURT: Right. My question is what's the Switch fee part of a signature debit charge to the merchant?

THE WITNESS: I don't recall. I don't think that there are any Switch fees there.

THE COURT: So all of the money for the cost of a signature debit card, it's all a quote Interchange fee of sorts that goes directly to the bank?

THE WITNESS: That's -- I have to clear by Mr. Celnicker.

MR. CELNICKER: Your Honor, may I just impose?

The signature card networks both of them, Visa or MasterCard are run by bank associations. They are set up slightly different from a legal perspective, but just associations of banks so that the money --

THE COURT: That's what Visa is.

MR. CELNICKER: That's what I'm saying, Your Honor; therefore, the money that flows from the merchant to the association and then it's in some way distributed to the member banks, that middle entity, the Visa or MasterCard is not in the

same position as an independent network.

THE COURT: I understand.

MR. CELNICKER: Therefore, the concepts don't follow through directly of Switch and Interchange because it's all one pot of money that is going to the banks that are members of Visa and MasterCard with some left over to run the association.

THE COURT: So with Visa such a hot competitor in the market and finding viable business growing and everything, why do you conclude that it's anti-competitive for First Data and Concord to merge?

I mean, I can understand where the Department of Justice started when this was announced and Concord had 51 percent of the PIN debit market and First Data had 10 or 12.

THE WITNESS: Around 12 percent, yeah.

THE COURT: And Interlink was sort of down there with the small guys, but that's not, doesn't seem to be the current facts or at least that doesn't seem to be the facts that will be in existence in 18 months.

So why are you concerned and your conclusion is that there is an anti-competitive result if these two merge?

THE WITNESS: I'm sorry. First of all, two things:

One, we don't know what the market share is, assuming that that's where we are focusing on which I'm not, will be 18 months down the road.

There have been losses obviously by STAR, and that does not mean that STAR confronted with these losses will not try to turn around and get market share for itself.

But I want to get away from market shares being the, the all and end all of the analysis. In fact, I go on and talk about many of the other things like the bugs and so forth so I don't want to get into that right now. I want to answer your question.

The reason I still believe that this transaction raises competitive concerns is because it does remove a network as an alternative to the networks that will, relative to what the world will look like if this transaction were to come --

THE COURT: What would be your reaction then if Visa didn't maintain Interlink as a separate network, one that is distinguishable and you can see there it's a network, absorb it into the Visa charge card so-called network or the signature debit network, wouldn't you then be worried that there's the loss of a network?

I mean, what I don't understand is why Visa isn't bigger for your analysis? It seems to me that Visa is out there gobbling up the world and nobody is paying attention.

THE WITNESS: I think just, I think a lot of people are paying attention to what Visa is doing, including the parties to the transaction and the merchants.

THE COURT: The defendants who are the ones who are giving --

THE WITNESS: Yes, and I am paying attention to that as well because I was trying to in answering your question

whether it is true first of all, whether the fact that Visa is doing whatever it is doing, whatever its incentives are, doesn't mean that somehow the relevant market has already now become PIN debit and signature debit and become a bigger market than lets say PULSE.

So I said despite all of these actions by Visa to gobble up business or to buy market share that this has not led to a circumstance whereby this hypothetical monopolist test, that is the relevant test I believe still, would fail.

In other words, whatever Visa has accomplished and whatever it is likely to accomplish over the next 18 months or two years, whatever the horizon one may want to look at, it's not going to be resulting in a complete, in a substantial further compression of the, of the rates as between the signature and the PIN such that the test would be failed.

It still does not mean that just because the firms failed the test then the market is what it is, it does not mean that there's a competitive concern. I may make it clear that one has to then go on and try to examine whether there will be a competitive concern.

THE COURT: Okay, but why don't we go to that part because I think you have -- I don't want to take all of your time.

THE WITNESS: No, it's whatever is good for you to understand my views is whichever going to be.

THE COURT: Well, I could spend a lot of time with just the experts and the lawyers, you know.

THE WITNESS: There is the fun part.

THE COURT: Go to your discussion of your concerns of the potential anti-competitive effect if in fact this merger were to take place.

THE WITNESS: All right. So this is on slide 16 if I may.

Well, my analysis focuses on two things really, others, there are others that one can worry about. But my assessment of the effects of the transaction focuses on the cost to the merchants of dropping the network post-merger, and also focuses on the cost to STAR/NYCE, the combined network, from the merchants' least cost routing. And I will take those --

THE COURT: This is your bug issue?

THE WITNESS: One is the bug issue and the other one is the multi writing issue which also obviously interplays with the bugs because it's only in those circumstances when there are more than one bug on the card that the potential for this least matter even arises.

So where I have come to analyze in connection with this merger is a question whether or not as a result of this transaction the merchants would somehow be disadvantaged vis-a-vis the networks in their continuous efforts to try to keep the cost to themselves down which is what they are

interested in because these costs will have to be passed onto customers which is you and I.

THE COURT: Who is the consumer we are suppose to be worried about in this, in this environment? Is it the merchant as the consumer of the PIN debit signature, debit other credit arrangements or is the ultimate private consumer?

THE WITNESS: Well, I think to the extent that we are worrying about the effects of that transaction on the cost to the PIN debit customer which is the merchant, if that cost goes up, then it's also going to follow that the cost to the customers will have to go up at least in reflection of the elevation of the cost.

So the merchant is in a way a weigh station between the PIN debit network and the person who avails himself or herself of the debit, actually anyone who walks into the store. Because under the current environment as we have in the United States unless you go to a store that does not accept cards, the price that you pay is independent of whether you pay with a credit card, whether you pay with signature debit, whether you pay with PIN debit and so on.

You get, you are charged a dollar for a can of peas irrespective. So that effect of the elevation, of course, will be felt by all people irrespective of how they pay, but the initial focus on my assessment is then on the ability of merchants to resist super competitive pricing but increase of

pricing to them following as a result of this transaction.

THE COURT: Was there an increase in consumer cost when Visa managed to push through an increase in the Interchange fees?

THE WITNESS: You want to -- Mr. Celnicker, you want to speak to her?

MR. CELNICKER:

I do think that Dr. Ordover's answer at least from where I am sitting might not have been the clearest.

The merchant is the customer in the context of the competitive effects analysis. It's the merchant's costs that are going up.

THE COURT: Right.

MR. CELNICKER:

MR. CELNICKER: The consumer like you and I come into play in two ways. The first is that if Safeway is paying more in PIN debit services, it may raise the price of peas a penny and we pay more. And that was in effect who ultimately pays the bill.

THE COURT: Right.

MR. CELNICKER: But it doesn't mean that you and I are the customer in that sense, we're not, you know, it's being

passed on to us to pay.

THE COURT: No, I understand that. Okay.

MR. CELNICKER:

MR. CELNICKER: But the consumer of the network services is the merchant, that's one point.

THE COURT: Okay.

MR. CELNICKER:

MR. CELNICKER: Just one related point. You and I come into the picture in one second way. And that is the merchant takes our desires into account to how we want to pay in deciding whether to accept or turn off PIN debit or signature debit or any other form of payment.

So we do feed in a sense to the merchant's incentives in what it's going to do. But the customer as it's being used in these reports --

THE COURT: Are really the merchant.

MR. CELNICKER: -- or at least by the Government are the merchants.

THE COURT: Are the merchants.

MR. CELNICKER: So you had a pending question which is whether or not --

THE COURT: No, no, I got an answer, that's okay. I'm satisfied.

Okay. So then you said post-merger -- I'm on page 18 -- Post-merger of all PIN debit transactions would

involve cards bugged with only STAR, only NYCE or both. Which means pre-merger, all PIN debit transactions involve cards. I mean, this is a statement that's true today?

THE WITNESS: That is true. Well, that is based -- sorry.

THE COURT: Is that that's, that's cards, not transactions?

THE WITNESS: No. This is based on PIN debit transactions. So when the numbers of cards or people have cards which they don't use and therefore to focus on the number of actual cards, we just have no way of knowing.

THE COURT: Right.

THE WITNESS: The only thing that we know is what happens with these cards.

THE COURT: Okay, but is this statement true today that of all PIN debit transactions involve cards bugged with only STAR, only NYCE or both?

THE WITNESS: That is based on the data that we have. The answer is yes because we have received the data that enabled us to calculate those shares and they are on page 19, and the thing to focus on I think is the actual increase in what happens to single bug percentages of all transactions as a result of the combining of STAR and NYCE.

So what you will notice is that not simply adding that , but in fact, what

happens is that there is this added increment in the percentage of card transactions that are going to be as of right now based on the data sets that we have available to us right now will in fact be on cards that only have these two bugs.

As I said earlier, it is that single buggedness -- I don't know if there is a word -- but let's say it is.

THE COURT: But I'm following you.

THE WITNESS: Single buggedness that is the factor that is relevant to the merchant in how to react to an attempt by a network to raise the fees to that merchant and each merchant will obviously react in possibly some different ways. Some may decide I'm going to turn off the network, we say that's highly unlikely given what the fees are now.

THE COURT: Except that right now if you are looking at these, this is a question of transactions.

If you look at all transactions right now, I thought STAR as of March last year anyway, STAR had something like 51 percent of all transactions.

THE WITNESS: That is true, but what this says is that it had of transactions on cards that had more than one bug and in particular, had transactions on I think, I don't recall the exact number, but I think something like -- you can see that of STAR's transactions were on cards that it only had their bug which is like the Celnicker card, this one. The rest of the transactions were on cards that had more

than one bug.

THE COURT: But if [redacted] of its transactions, STAR's transactions were on cards that had only its bug?

THE WITNESS: Yep.

THE COURT: And after the merger, [redacted] of the cards would be on STAR and NYCE and no other, [redacted]

THE WITNESS: But that's because I hate to say this to the Judge, but the Judge can be wrong sometimes.

THE COURT: No, that's fine.

THE WITNESS: So what I'm saying here is that you are skipping.

THE COURT: You are the expert, I'm just a Judge.

THE WITNESS: Well, yeah, who knows?

THE COURT: What am I skipping?

THE WITNESS: Well, you are moving from one column to another.

MS. ALEXIS: I am sorry to interrupt. I heard dropping off. I just wanted to make sure that Professor Hausman do a technical check and make sure he is still there.

THE COURT: Is Dr. Hausman still there?

DR. HAUSMAN: Yes, I am, Your Honor, although you seem to be fading in and out somewhat. If you, Professor Ordover, if you would speak in the microphone.

THE COURT: I'm sorry. After I told everybody else to speak in the microphone, I have been moving around, and I

apologize. I will try to be better.

THE WITNESS: I have been too.

THE COURT: All right. I see your point.

I moved from your own transactions to all transactions.

THE WITNESS: But if you want to go down the same column.

THE COURT: Right.

THE WITNESS: You would notice and that's an important number that of combined transactions of STAR and NYCE post-merger would in fact be under single-bug.

THE COURT: And this depends on, this depends on a study of transactions from what period of time?

THE WITNESS: Actually, there's one week in the fall of 2003. This is data that we got from First Data Merchant Services which is a processor.

THE COURT: Right.

THE WITNESS: And we were able to in fact extract from the data set information about transactions. So were you to interpret this number, if I can go for one sentence is to say if I am a merchant and I see, say I could see a customer walking in with the card that has -- all I can see is the, this, I don't see anything else. I see the STAR, Jerry, I'm showing the STAR logo just in case you are wondering what's happening here.

If I just show the card and see this, the merchant will

say there's a chance almost that this card will have no other bugs other than those of the merged firm and, therefore, from the merchant's standpoint, I believe that creates a serious concern as to whether or not that merchant can in fact act to disconnect the network.

THE COURT: No --

THE WITNESS: That's the point.

THE COURT: -- and that follows quite logically.

Let me ask you, that , would that be less if you took into effect the predations of -- I use predations.

THE WITNESS: Oh, Section 2.

THE COURT: That's the wrong group, wrong audience to use this term.

The competition from Visa, does that take into effect the loss of business that STAR projects or is that -- or that's with all of the business that STAR -- it's with their 51 percent of the market?

THE WITNESS: Your Honor, this is based on the transactions that run over FDMS and therefore, it reflects the current state of --

THE COURT: Yeah.

THE WITNESS: -- dissimination of cards and distribution of bugs on these cards.

THE COURT: And is it fair to assume that let's say we'll just pick Bank of America as an example, if Visa has

managed to persuade Bank of America because of their sterling sales pitch to move from STAR to Visa Interlink, would you assume that the STAR bug would be removed from those cards or would Interlink issue a card that contained STAR bug as well as the Interlink bug?

THE WITNESS: Well, the Bank of America is already in here because that occurred before October, October or November of 2003 which is where this data is from.

THE COURT: Okay.

THE WITNESS: So the answer depends very much on what Interlink or Visa can convince the bank of doing. What they can convince the bank of doing is to get rid of any and all bugs for debit other than Interlink or they could say look, we want to be a primary bug. We want all of the transactions to be steered over us unless there's some merchant that doesn't happen to accept it, so you as a bank have the opportunity to have a secondary bug and it could be STAR or PULSE or NYCE or anyone.

So the answer to that question is that very much depends on what their financial institution will feel comfortable with. If the financial institution says to itself well gee, I'm going to go with Interlink, but Interlink does not have enough merchant coverage, that's a very risky proposition to me which is why when Visa or Interlink was negotiating with Bank of America, they were very much concerned about the very fact and

tried to get the merchants to sign up with them as well as at the same time, you know, the chicken and the egg problem that we also talk about.

So you need to get both sides of the market in order to become a convincing proposition to both the bank and to the merchant to have acceptance and you have to have distribution, and you have to pay in some ways for both.

THE COURT: Okay.

THE COURT: That's very helpful thank you. And what was the other one?

THE WITNESS: The other one is perhaps more complex in some ways because it talks about the idea of something that is referred to as least cost routing. So if you go to slide 20 that's sort of the beginning of a fairly complex discussion of that context concept. So I'm going to try to boil it down to some slogans because we are running late, I presume.

THE COURT: I understand about lease cost routing and your point is that given an option, a merchant will choose the lesser cost and they wouldn't have that option if these two merged.

THE WITNESS: The range of the options will be removed if there is a transaction that previously could have

been least cost routed between NYCE and STAR, but following the merger that option will no longer exist. So the merchant will now have to route it to NYCE/STAR or you know if the merchant is willing to disobey all of the rules --

THE COURT: Hello, does anybody know where the sound comes from?

Dr. Hausman are you still there?

(No response.)

THE COURT: No.

Is everyone gone?

MR. IOANNOU: No, this is John Ioannou, New York, still here. I think we lost everyone, Your Honor.

UNIDENTIFIED SPEAKER: We're still here in San Francisco, Your Honor.

THE COURT: Okay, thank you.

Did Dr. Hausman call in or did we call him?

UNIDENTIFIED SPEAKER: The operator called him and we had a deal that he would call back to our office and we would get him back on.

MS. ALEXIS: Sounds like my partner has taken care of that.

THE COURT: So you will expect if you hear from him if he gets dropped and then you'll figure out how to add him again?

UNIDENTIFIED SPEAKER: Yes, that's our plan.

THE COURT: Can you turn to 23 and 24 and tell me what these are, explain these two.

THE WITNESS: We have two charts to try to illustrate the issues related to least cost routing.

What these try to depict is the opportunities for least-cost routing by first focusing on the number of transactions that are in so-called priority conflicts. Because I argue unless there is a priority conflict, the merchant may be reluctant to least-cost route or at least be in the process of being reluctant because there are often fines and all kinds of penalties that could be imposed on the processor that does not route according to the rule.

So when there's a priority conflict there's an opportunity to route to the least cost network at least that's when I say such opportunity arises that is not arising in the other setting.

So when you look at the two out most columns they have Xs the first, the third row has Xs in STAR and the NYCE column. What it says is that on those transactions where there's both STAR and NYCE, there's a conflict between STAR and NYCE with both STAR and NYCE wanting to be routed too, okay. And the

study where both STAR and NYCE are claiming priority.

Now what this says is that following the transaction and that particular when you add this all up the number of this priority conflicts between STAR and NYCE turns out to be

THE WITNESS: Well those are the transactions under which both STAR and NYCE bugs are present, but for some obscure reason somebody forgot because neither of them claim priority, okay. So that's a small number.

So what we are saying at least that looking for the study period that we have on FDMS and Concord the numbers potentially conflicting transactions between STAR and NYCE as , okay. And we say that as a result of the transaction if that the merger, if that merger takes place these conflicts will be resolved, will no longer enable the merchant to have the ability to least-cost route because presumably STAR and NYCE will figure out how to avoid being arbitraged against.

Either they will simply remove one of these bugs away from the card or it doesn't have to be removed from the card definitely, but remove one of the networks or lineup the prices so that there will be no problem that way, or they will simply put in information into the processors computers which says that if you see this kind of thing happening you always have to route to STAR and NYCE will not object and STAR will not object. So that is lost.

And if you look at the next table which is probably even more incomprehensible. We are now looking at total STAR and NYCE transaction over the study period which I guess is quite cumbersome than the other one. And we are trying to ask ourselves what is the diminution in the total transactions in conflict as a result of the merger.

So whereas previously we just looked at the two sets of the conflict in the STAR and NYCE. We are now trying to scale it relative to the overall volume of transactions during the study period, and say and I conclude that the merger will reduce the percentage of these transactions conflict on the combined network by which is the right hand number okay. So that's the bottom line.

In sum, when it comes to the least-cost routing we acknowledge that this is something that is open to merchants. It's open to merchants that are obviously willing to violate the rules, but in some since that is already in the mix.

We are now looking at diminution and the ability to least-cost route as a result of transactions, we say that there is a visible reduction in the number of such transactions that can be used to compete between the two networks against each other.

THE COURT: But in terms of the two concerns that you have expressed as to the anticompetitive effect of a merger, would I properly conclude that the first, that is the difficulty of getting out of the, getting out of the market would be more or greater concern to you than the second since the second is a little harder to predict?

I mean the second depends on STAR and NYCE actually coordinating their cost structure and being similar instead of operating as separate parts of the First Data or I don't know who is going to First Data is acquiring STAR, of the First Data corporate hiearchy where there are two different businesses in competition with each other.

THE WITNESS: I think that my view again I'm just opining here based on what I know. The effect of the transaction will be for them to coordinate how they put in the priority rules into the system. So they know what their relative costs are. They know what their cost of effectuating the transaction. They know what the cost is to the merchant, so they know which way the merchant would like to go. All of that is known to them more or less.

I would think that and based on historical facts we know that these networks when they merge they do resolve these issues that come from the overlap of the --

THE COURT: Right.

THE WITNESS: -- of routing rules.

THE COURT: Right.

THE WITNESS: So I would think if anything they can accomplish, they can figure out how not to compete against each other unless they think that it is a way to incentivise (sic) the managers of both. I think that that's probably a tertiary issue for them at this point.

So I again would think that the first concern relating to the ability of the merchant to disconnect as relates to the single-buggedness, a lot of people in the industry because of their view as expressed in the press and in depositions and declarations that this is almost the only thing they have in their quiver as a way of trying to limit these increases that have been taking place.

THE COURT: Okay, thank you sir.

MR. CELNICKER: I'm not going to stand up here and testify, but can I throw one softball question that I think --

THE COURT: Yeah.

MR. CELNICKER: -- goes back to a point that is important.

THE COURT: One softball question.

MR. CELNICKER: One softball question.

We were talking earlier about Visa and its incentives and how it plays into the analysis.

THE COURT: Yes.

MR. CELNICKER: So in that context if the merger goes through and the merged entity raised its price to merchants which is our fear, what would we expect Visa to do given its incentives?

THE WITNESS: That's a hard ball. But the answer is I think clear that Visa given especially the set of questions we had from the Judge, from you, Your Honor, would have very limited interest in trying to act as a maverick competitor that would keep these fees down.

We already agreed to some extent that their interest is in fact to raise the fees or to act in the way that will make these fees go up. So if somebody is taking the leadership and in fact raising the fees and therefore moving first to the merchants, I think they would be very happy to piggy back on that given the kind of incentive that you describe to that alleged gorilla. I don't think that they would like the characterization.

THE COURT: I'm sure they wouldn't except that it really recognizes their great success in the market with the signature check card which I do understand is an entirely different animal, but does give them enormous resources.

THE WITNESS: It does, well the fact of the matter yes it gives them enormous resources because they are able in some ways not only to tax the banks that benefit from their program such as those that receive these subventions, but also the ones that don't which have to pay into the association in order to generate the funds --

THE COURT: Right.

THE WITNESS: -- that are being disbursed.

So when you ask me about the Switch fees and so on the signature side Visa acts as a non-profit association what basically means that they get to spend as much as the association figures out they need to and, therefore, that's the way to balance the books, but the notion of what is profit and what's not in this context is somewhat relaxed concept, let me put it this way.

THE COURT: And presumably if they were to make significantly more money than they needed to operate that would be returned to their member banks as, I don't know, distribution I guess is the term because I don't know if they hold shares in Visa or what.

THE WITNESS: I'm not, I'm not privy at this point to their financial arrangements. My understanding since they are a non-profit association they have to do what it is that will maintain their status.

THE COURT: Yes.

THE WITNESS: So they can return it in a variety of ways. One of which they return it by paying for share to these banks, that's the way it comes out.

THE COURT: Right, okay, thank you sir.

THE WITNESS: Thank you ma'am.

THE COURT: This is not at all to suggest that Professor Ordover has said everything that he could possibly say on the subject, but we are running out of time. So thank you for the education and the assistance.

MR. CONRATH: Your Honor, I'm more or less in the role of an MC today and introducing the next act which would will be Dr. Zmijewski and Scott Sacks will be the lawyer in respect to that. And I think a little bit in the role of an MC while things are being set up providing a little entertaining moment or something I'll offer two thoughts.

THE COURT: All right.

MR. CONRATH: First relates to the question of whether companies under the same ownership can be thought of to compete with one another. I think that's a, which kind of came up in a little in the discussion.

I think one can go back to the Supreme Court in a way address that in the 1904 in the Northern Securities case in which two competing railroads were pulled under joint ownership and tried to defend on the grounds that well, even though we have the same owners we're going to compete with each other and

the Court said that's not a good defense under the antitrust laws.

THE COURT: I'll grant you that on easy, that's a softball.

MR. CONRATH: Thought I'd do a softball with a case cite attached to it.

And the second that I would just put out there is that we all talk often about someone becoming a strong competitor and we think of that often in the context of will they be in, will they be profitable in a stock market, will the company grow and stuff. The second question that breeds that with antitrust law is and will consumers benefit; that is, and will prices be kept down. That's the context in which strong competitor arguments have to be made under the antitrust laws.

THE COURT: Thank you.

MR. CONRATH: With that Mr. Sacks.

MS. ALEXIS: May we do a technical check again?

THE COURT: Dr. Hausman are you there?

No, sorry.

All right, we need you to stand so that you can be sworn in sir.

(PLAINTIFF WITNESS, MARK E. ZMIJEWSKI, SWORN.)

MR. SACKS: Your Honor, I'm Scott Sacks for the United States. I'm going to mostly stay in the same botanical garden my colleague Mr. Celnicker was in.

First, I would like to know if I could hand up a copy of a very short slide deck?

THE COURT: Yes.

MR. SACKS: Professor Zmijewski we're going to have him turn from over here as Dr. Zmijewski goes through his presentation.

THE COURT: All right, Doctor if I could ask you to do me a favor?

THE WITNESS: Of course.

THE COURT: Could you state your name about three times so I can write it down and get the phonics of it and then maybe I won't injure it. I know how to spell it.

THE WITNESS: May I give you my business card which also has a phonetic pronunciation. I have had this problem before.

THE COURT: Za-nef-ski.

THE WITNESS: Zme-Yev-ski.

THE COURT: Can you tell us whose talking? Who is on the telephone talking please?

(No response.)

THE COURT: Who is on the telephone?

MR. BLAKE-THOMAS: I'm still here Your Honor, David Blake-Thomas.

THE COURT: Anybody else?

MR. IOANNOU: This is John Ioannou from the New York

District Generals office.

THE COURT: Who is the woman speaking?

MS. BRODY: This is Janet Brody at the Department of Justice.

THE COURT: Was there anyone with you in your office?

THE WITNESS: No Your Honor.

THE COURT: Well we just heard a woman's voice speaking, who was that?

MS. BRODY: I was not speaking.

MR. COX: Pennsylvania is still on the line as well, but there's no one else in the room right now.

UNIDENTIFIED SPEAKER: San Francisco is still here, but we are on mute.

UNIDENTIFIED SPEAKER: Illinois is here and we're on mute too.

THE COURT: Well someone was just speaking and you would do us all a favor if you didn't. That's not to be rude, but we just can't here ourselves. Thank you, sorry.

(Pause, reporter changed paper)

THE COURT: Dr. Hausman, have you joined us yet?

(No response.)

THE COURT: All right, sir. Oh, I'm sorry. I don't need to know your background.

THE WITNESS: Okay.

THE COURT: I've got that.

THE WITNESS: Thank you.

THE COURT: With your report and everything.

And your expertise and your background which is all somewhat intimidating. So your first opinion is that there's insufficient documentation to reproduce calculations of alleged efficiencies?

THE WITNESS: That's correct, Your Honor.

THE COURT: Do the parties anticipate that there is more documentation to come or have we reached the end of the production of documentation?

MR. HOCKETT: Your Honor, I think that with possibly one small exception Concord has additional documents that it may be producing that the bulk of it has been produced. However, I believe Dr. Zmijewski indicates in his report that he may have further opinions depending on further review of the documents.

THE COURT: Well, but as of today your conclusion is that it is not possible to reproduce the calculations of the alleged efficiencies?

THE WITNESS: Correct.

THE COURT: If you cannot reproduce those calculations, you would conclude that they're not dependable; is that fair?

THE WITNESS: Yes, Your Honor, I would not rely on them.

THE COURT: You would not rely on them.

All right. We'll move on. We'll allow somebody if they want to question you on those issues, but for the moment I think I understand your conclusion anyway.

Now this, the reasonable documentation, reasonable factual foundation, reasonable methodologies and reasonable analysis. I remember your expert opinion tying itself to those foundational concepts. Is it your opinion --

Did someone just come in or off the phone?

(Response indiscernible)

THE COURT: I'm sorry, could the person who was just speaking speak again.

THE WITNESS: Yes, it's Jerry Hausman Your Honor. I was disconnected and just was reconnected.

THE COURT: We're glad to have you. Thank you.

MR. HAUSMAN: Thank you.

THE COURT: Is it the lack of reasonable documentation is that the most important missing ingredient here?

THE WITNESS: Well at this point without documentation I can't completely judge whether or not they use sufficient facts or whether or not they use reasonable methodologies because I don't have documentation to review that.

THE COURT: What would you need that's missing, what

do you think is missing?

THE WITNESS: This is a very large analysis. From my understanding they have had more than a hundred people working more than six months trying to calculate these numbers. So there's a lot of calculations at least I would expect a lot of calculations. And in the past, what I have seen is a summary number that's backed up by another spread sheet into computer terms with another calculation and each one of those numbers has another spread sheet and there's this big pyramid of spread sheets and when you have assumptions, assumptions have documents underneath them that each document explains how an assumption came to be.

And that's what I was expecting to see. I was expecting to get a box of documents or notebooks for each synergies and that's not what I received.

THE COURT: What did you receive?

THE WITNESS: Access to a computer data base where I believe both parties keep their documents and then through a deposition by executives at the companies. We asked, the lawyers asked questions and they gave some indication of some type of analyses that were conducted, but they did not point us to specific documents.

They gave names of people who might have kept documents on this data base, but we looked for those people and looked in their document section and didn't find the documents.

THE COURT: And so there's no -- excuse me, Dr. Hausman, there is no presentation or submission that's been made to the Government that you know of that says I think it's around million-dollars that we're talking about right in efficiencies?

THE WITNESS: In total yes.

THE COURT: Yes. There's no document or documentations to show how they came to those numbers?

THE WITNESS: No, no, that's, there's a summary spread sheet.

THE COURT: Okay.

THE WITNESS: I'll call it a spread sheet if I may and beneath that there are multiple line items and for some of those beneath that there's even another set of line items.

It's pretty much a set of accounts from a department and then somebody made a decision that here's an expense that's ongoing and here's an expense that's not ongoing, and here is a notation that

and there are notations. And where's all of the documentation behind that, there is where the documentation stops I believe. At least to the best of my knowledge, Your Honor.

MR. SACKS: Excuse me, Your Honor, if I might put a question this might be helpful.

THE COURT: Yes.

MR. SACKS: Professor Zmijewski could you sort of explain since your analysis is no small measure based on not finding things, exactly how you went about trying to find them and what resources and what efforts you went to to try and get to that?

THE WITNESS: Okay, I have one slide, oh I don't see it here. What page was that?

Page five Your Honor. So if you look at page five, Your Honor, this is a list of documents that I looked at. There's 65 boxes in the Department of Justice. I had a team of people two other PhDs in accounting, as well as MBA students and other people at our consulting firm Chicago Partners, everybody was going after documents, getting documents sent to Chicago, people going to D.C. People getting on the data base in the one, two, three, four, fifth bullet point down describes that data base; electronic documents produced at a company this is a separate third party and it has custodians.

That's how they keep track of the documents and the custodians, there's a couple integration data base and integration team that were topic oriented, so we looked there first. Didn't find this detail and then there are individual names so we started looking through individual names and again didn't find the detail that I described.

THE COURT: There are a number of separate areas in which the defendants project savings.

THE WITNESS: Yes, Your Honor.

THE COURT: Let's talk first about one of the . Is there anywhere that you found that I identified the nature of the positions that would be redundant in the event of a merger?

THE WITNESS: No.

THE COURT: So you don't know which ?

THE WITNESS: Correct.

THE COURT: You don't know whether we're talking about managers, executives, or clerks?

THE WITNESS: Correct.

THE COURT: Do we have a sum of money that's attached to it?

THE WITNESS: Yes.

THE COURT: Is there any offsetting sum of money to reach that that would show any separation payments or anything like that that were part of --

THE WITNESS: There's another section that you call total cost which is the total cost of implementing integration and they would be in --

THE COURT: That would be in there?

THE WITNESS: -- that calculation.

THE COURT: Now when you're looking for these things assuming for the present question that there's actually documentation that you would be looking at, for purposes of

evaluating efficiencies, are you evaluating efficiencies after the merger has completed its full integration or more immediately?

I mean if the parties for instance we have two huge databases here, two huge networks. Let's assume that Dr. Ordover is right and that the only sensible thing is to in some fashion merge those and if they want to do that it might be a very complicated thing, it might take a year and a half before it can get done.

When you look at efficiencies do you look at efficiencies three months out, six months out, two years out; what's it you're looking at?

THE WITNESS: I was looking at their documents and the efficiency I was looking at were based on their documents. And for the most part, for the most part there was a ramp up. I call it a ramp up until

million-dollar.

THE COURT: From the integration period if you will you let them define?

THE WITNESS: Yes.

THE COURT: Okay, so for the and it seemed to me as I recall although I don't have your expert report right here, it's closer to you than me. The as I recall there was a significant savings anticipated with the reduction in personnel. I mean that was a large part of the

million wasn't it?

THE WITNESS: Correct, I gave you for a line item in the department that we found in the document somewhere. There are many of those notations.

THE COURT: So it's many more than ?

THE WITNESS: Yes, many more than that was for one line item and one document that we found, that was just for a small piece of the merger. I don't know the number of people. I don't think that there's enough documentation so that I could calculate the number for the entire integration.

THE COURT: Is there any one of the -- what were the areas; one was personnel -- do you have it in the outline here? Can you remember what they were?

THE WITNESS: They were by department, Your Honor, or by area. So there was a set by merchant.

THE COURT: He's looking at his report for those people who are on the phone.

(Pause.)

MR. SACKS: I could be helpful, Your Honor, might be easiest to go through it and not by item such as personnel or the like, but by the functional categories they divided them into merchant.

THE COURT: Right.

MR. SACKS: Shared IT and shared non-IT and the like.

THE COURT: That's what I was really trying to go for

and the question was whether there was the support of the kind that you would be looking for any of those?

THE WITNESS: No Your Honor.

THE COURT: Any of those areas?

THE WITNESS: No, Your Honor, other than what I just described.

THE COURT: So for your purposes and I assume you have done these kinds of analyses before?

THE WITNESS: Yes Your Honor.

THE COURT: For your purposes you can't tell at all whether the efficiencies will occur?

THE WITNESS: I can't find foundation for those efficiencies that are claimed, yes.

THE COURT: Okay, we better get into some trade secrets here or we'll be in trouble with the press.

MR. SACKS: Are you okay Dr. Zmijewski?

THE WITNESS: Yes, I'm fine. Just warm at the moment.

THE COURT: You can turn that out.

THE WITNESS: It's all right. If you don't mind a little perspiration.

THE COURT: I don't mind. Did you have other specific questions that you wanted to ask?

The essence of the testimony is that I can't really give you any testimony because I have not gotten any documentation

on which I might opine?

MR. SACKS: That would be the theme of his expert report to be sure that there isn't any foundation.

I think it might be useful, I don't want to unduly take the Court's time here, if Dr. Zmijewski could perhaps elaborate some more on the types of documentation he would expect to see. The types of documentation he has seen in other context when he was looking to try and find with his staff on this and that he didn't see to support the calculations or estimates that the defendants made. That's not a softball, but I do think it's relevant.

THE COURT: Okay.

THE WITNESS: It's a softball.

It's very similar to what I just described, it's schedule after schedule and every calculation has input, some of those inputs are fact so that you go to the documents for facts; some of those inputs are assumptions so you try to find the source of the assumption and then one would expect for an assumption. If it's a major assumption, there's an analysis that supports that particular assumption.

THE COURT: What if the merger of these two companies the whole basis of the efficiencies is then to be able to argue that there won't be a cost increase to consumers right?

THE WITNESS: Correct.

THE COURT: And there may actually if they're

sufficient deficiencies there may actually be a deduction in cost to the consumer?

THE WITNESS: That's my understanding of the report, other expert reports yes.

THE COURT: That's the way they're trying to go?

THE WITNESS: Yes.

THE COURT: If the evidence in support of the alleged efficiencies, to use your term, is not there then we're left with the question of whether or not what, that there's just no evidence to support that there would be a reduction in cost for the ultimate consumer. No evidence on which you would opine that they're right or wrong?

THE WITNESS: With respect to the alleged efficiencies that's correct, Your Honor.

THE COURT: Now if they produced a witness to the efficiencies I'm not, I think Dr. Katz is the witness for the efficiencies isn't he? Who is the witness for the efficiencies?

MR. SACKS: Your Honor we had depositions of 30(B)(6) witnesses as recently as this week, that information has just recently been made available. Professor Zmijewski and some of it certainly is in his expert report. There was one principal 30(B)(6) witness designated by each defendant to explain the efficiencies of the transaction from that defendants perspective.

THE COURT: And is your testimony today cognizant of what those people testified to or is that new information that haven't yet had an opportunity to evaluate?

THE WITNESS: As of Monday, there were people deposed since Monday, but as of Monday of this week everything has been incorporated.

THE COURT: When were the 30(B)(6) people deposed?

MR. SACKS: They were deposed last week and as early as the beginning of this week.

THE COURT: Well my question is since Monday?

MR. SACKS: Monday I believe was Adam Coyle who is a 30(B)(6) designee with respect to the Nysok (phonetic) deposition.

THE COURT: Well let me ask --

MR. SACKS: Excuse me, Tuesday was the deposition of Mr. Scott Betts who is an executive in charge of the integration effort. He's the senior executive. He was just deposed on Tuesday.

MR. HOCKETT: May I say something, Your Honor, since these are our witnesses?

THE COURT: Yes.

MR. HOCKETT: The 30(B)(6) witness's depositions on this issue were complete accept for Adam Coyle's deposition on Monday of this week.

THE COURT: Well --

MR. HOCKETT: And that deposition concerned only the whether or not First Data achieved the predicted synergies in some other transaction that acquired NYCE.

THE COURT: Do the defendants plan to introduce evidence to counter the expert opinion of Dr. Zmijewski.

THE WITNESS: Excellent.

THE COURT: How am I doing?

THE WITNESS: Ninety percent good.

MR. HOCKETT: Your Honor, we do have expert evidence on efficiencies. Dr. Zmijewski as you know is a late arrival to the scene. We found out what his opinions were for the first time or his tentative opinions a week ago today at night, when we got his initial report. He has served another report two days ago.

We also served a report of a new expert you heard Mr. Conrath complaining about that because when Dr. Zmijewski appeared on the scene, we recognized that he had some expertise that potentially laid outside the economic's expertise that we had lined up. So we found somebody whose textbook Dr. Zmijewski cites in his paper and that person has prepared a report to address Dr. Zmijewski's opinions at least so far.

But the substance of what Dr. Zmijewski is doing is basically critiquing the extent of the documentation of the efficiencies and trying to cast doubt on whether this work was really done or is well founded.

We will present fact evidence to the Court on the thoroughness of the estimation of efficiencies which I think will be up to the Court to judge the sufficiency of without having Dr. Zmijewski opine that it's not sufficient for him.

But there will be expert testimony about whether these are the kinds of efficiencies that could be taken into account and to the extent that Dr. Zmijewski develops opinions that correspond to the expertise that Dr. Meyers, our newest expert, has then we would seek to introduce those opinions as a sir rebuttal I guess when Dr. Zmijewski finally gives us his final opinions. I believe it is the intention of the Government is to call him as a rebuttal expert and he promise to supplement his report after the other experts deposition are taken.

THE COURT: Well, one thing is clear is that Dr. Zmijewski --

THE WITNESS: Ninety-five percent.

THE COURT: -- right now thinks that the information supplied to him doesn't have a sufficient background for him to really opine except that the lack of information suggests that he can't duplicate the savings that are asserted and therefore he has no basis on which to say that they are valid, do I understand you correctly?

THE WITNESS: May I expand a little bit on what you said?

THE COURT: Surely.

THE WITNESS: Thank you. You said duplicate. I can always take the summary and duplicate those numbers.

THE COURT: No, no.

THE WITNESS: So it's going all the way back to the foundation of assumptions.

THE COURT: Well it' like any spread sheet is what you're talking about. I mean I understand.

THE WITNESS: Okay, so it's not just duplication.

THE COURT: No, it's not just adding and subtracting.

THE WITNESS: Your Honor, just to be clear, I read the deposition of the 30(B)(6) witnesses, 30(B)(6) witnesses and on page two my report is not handy, but on page two of Appendix E, I have a quote from Ms. Margaret Tully from First Data who is I believe heading up the integration team and may I just read a couple of sentences:

, so I went through that.

There was a group of knowledge based really experts and she lists some experts there and people concluded that they could get a hundred percent -- I'm paraphrasing now, they could get a certain percent of that particular line item. So that's

how she described what happened and she did mention financial analysis that the complex financial analysis to the extent that it was done in computer form and exists and turned over I haven't been able to find it.

(Court Reporter asks for clarification, have or have not?)

THE WITNESS: Have not been able to find it, that's important.

And based on her description it doesn't, it seems like they were using business judgment, people got together and they made decisions and that's how people make business decisions. So I'm not saying they made up numbers or people got together and they made business decisions. However, it's my job to go back and try to find foundation other than somebody saying this is my opinion and I can't find any analysis to substantiate any of the assumptions that were made.

THE WITNESS: Hopefully that clarifies.

MR. SACKS: Your Honor, may I make one comment, an additional point that I fear has gotten lost.

The comment is this is an issue upon which the defendants carry a burden, it's their affirmative defense. They have to demonstrate the existence of these alleged efficiencies as we will be arguing later they have to be verifiable.

The burden of going forward and demonstrating that these numbers are real and reliable is theirs and the fact that Professor Zmijewski cannot find the documentation has an

independent significance of its own. But before I realize time is short there are other opinions and other tasks that we put to Professor Zmijewski and at least one of them I would like to at least get to and that is task three, as we put it and I think I'll go back to the garden and let Professor Zmijewski talk about whether the efficiencies could be achieved without the merger of NYCE and STAR which is also one of the issues we put to him.

THE WITNESS: This is on page 10, Your Honor.

THE COURT: Yes, I'm with you.

THE WITNESS: Should I talk, I thought you were reading.

THE COURT: No, go ahead.

THE WITNESS: I was asked by the Department of Justice to assess whether or not the alleged synergies could be achieved without the merger of NYCE and STAR. And I was making the determination of how it would be used an assessment that I would make. I made that assessment based on two criteria. One where are the operation and assets part of STAR that were involved in this particular synergy and two, were there alternatives to realizing the synergy even if they didn't merge?

I went through that and found that of the and I should actually explain that number. You mentioned before the synergies, that's for the complete total

merger. On November 27th there was an e-mail that had synergies related to the PIN debit that were given by the defendants and that number is a .

MR. SACKS: Excuse me, that's November 21st.

THE WITNESS: Pardon me.

And of the of the alleged synergies, I found that are not related to the merger at all. Based on my criteria that they're not related to the NYCE and STAR operations and assets.

THE COURT: Give me an example of the sorts of things that you think were listed there and that are not related.

THE WITNESS: And again, I just want you to make sure that I'm clear on my definition of not related is that they're not part of the NYCE operations or STAR operations and are not part of the asset base.

THE COURT: Okay.

THE WITNESS: An example would be Paypoint is a merchant processor owned by FDC, First Data and one of the synergies that is accounted in the is that it will be merged into Concord operations. That to the best of my knowledge, that particular company is now part of NYCE and Mr. Betts who is one of the executives from First Data was deposed and since we knew where we were headed that question was asked and Mr. Betts confirmed that it's not part of NYCE.

So here is a company that does merchant processing that's

part of First Data, but not part of NYCE. That would be an example of something that I excluded.

THE COURT: Well, now wait a minute, I just got educated by Mr. Conrath that you can't distinguish just because there's separate subsidiaries, they're all part of the same company. I mean it would be a savings for First Data overall, wouldn't it, if they didn't have to, I'm not disagreeing with the point that you make. Paypoint is not part of NYCE, but for First Data it would be a savings if they didn't have to run Paypoint and Concord.

THE WITNESS: I'll give you my understanding. Now we're -- I'm the wrong person here. The economist should be talking about this okay.

THE COURT: Okay.

THE WITNESS: But let me give you my understanding. My understanding is that the issue is what would happen if First Data spun off NYCE, didn't own NYCE what would their synergies be? That's one way to look at this problem. I don't know how the economist are doing it. I read the reports, but I didn't go into that, but the issue is what does the merger look like with NYCE in it and without NYCE in it and if the assets aren't part of NYCE then that consolidation can occur even if they spun NYCE off.

Now I don't know --

MR. SACKS: Your Honor if I might.

THE COURT: Yes, was that the a proposal?

MR. SACKS: This goes to the issue related to the merger in the market. The market place in which the harm is occurring involves the PIN debit switching business which is the business of NYCE and STAR.

What we essentially asked Professor Zmijewski to figure out is whether the claimed efficiencies related to this combination of NYCE and STAR. The Government would readily concede that there are efficiencies that can be obtained by merging together First Data and Concord the corporate parents largely in their merchant processing business. That's not a perfect market place that we are alleging the anticompetitive harms.

We didn't ask Professor Zmijewski to make a legal judgment. What we asked him to do was essentially isolate what part of the efficiencies here are attributable to the merger of NYCE and STAR and put aside and separate out for us those which are attributable perhaps to the merger of their merchant processing business which is a part of the transaction which the Government did not impose an objection.

THE COURT: And so the reason, therefore, that the Professor can approach the analysis the way he just described which surprised me act as if they spun off NYCE, is that you're saying, the Government's position is that Concord and First Data can come together and I don't want to misstate this in any

way, but Concord and First Data can come together as long as they don't have both STAR and NYCE?

MR. SACKS: The Government's allegations of anticompetitive harm related to PIN, P-O-S, PIN debit switching businesses to essentially the NYCE network and the STAR network. We did not bring a case that alleged the problem with the combination of First Data's merchant processing business with Concords first, excuse me with Concord's merchant processing business.

THE COURT: But to run a network don't you have to have a merchant processing business?

MR. SACKS: No, you don't Your Honor.

THE COURT: Who runs a network without a merchant processing? Actually the history is kind of interesting. First Data was an extremely large merchant processing business and it only acquired NYCE in 2001. They were a very large merchant processor and decided to enter the PIN debit switching business by acquiring approximately 64 percent of NYCE.

Now the reason we put the --

THE COURT: So let me get back. I think Mr. Conrath nodded his head yes in response to my question.

If First Data and Concord were to merge and the merged company were to agree to spin off either STAR or NYCE and you're presuming it would be NYCE because that has less of the market in the PIN debit business then the Department of Justice

would be satisfied.

MR. CONRATH: Would be satisfied.

THE COURT: Would be.

MR. CONRATH: Yes.

THE COURT: And so it's approaching the analysis from that point of view that Dr. Zmijewski, I'm getting worse instead of better.

Looked at this to try to determine which part of the efficiencies really went to the merger by theorizing that NYCE would be spun off.

THE WITNESS: Your Honor, that's not why. I didn't do it with that theory in mind. I did it because I was asked to accomplish a certain task. That might have been the motivation why I was asked, but you're pulling me a little out of my domain.

THE COURT: Okay, I don't want to pull you out of your domain, but for purposes of allocating savings or efficiencies to the merger and not to the merger your approach to that was to determine what the company would look like if it didn't have NYCE?

THE WITNESS: What they could accomplish if they didn't, if what, what they could accomplish if they didn't have NYCE in the merger, yes, my analysis is consistent with that.

THE COURT: So and by merger here you're talking, therefore, just about the merger of the two PIN debit entities,

the two PIN debit businesses and not Concord and First Data?

THE WITNESS: That's correct Your Honor.

THE COURT: So the

are from efficiencies related to merging First Data and Concord and not merging NYCE and STAR?

THE WITNESS: They're not related to the NYCE operations or STAR operations that's correct.

MR. HOCKETT: Your Honor, if I could be heard briefly on this please?

THE COURT: Yes.

MR. HOCKETT: There's been a lot of legal argument and I just feel like I need to respond to it.

MR. CONRATH: If I might just finish up on this thought to be clear about why we asked that question to Dr. Zmijewski?

THE COURT: All right. You do me unhonoured, go ahead.

MR. CONRATH: All right, I lived in Poland for two years, Your Honor, so I got a little practice.

THE COURT: Well now I know.

MR. CONRATH: All right, there's a legal question that caused us to ask Dr. Zmijewski to perform this analysis and it is, are the alleged efficiencies merger specific and the way to think of that is this, first the question of

efficiencies comes up if there's anticompetitive harm and the affirmative defense of efficiencies is, well, even if there's harm it will be overcome by these efficiencies.

And then the logic says, well, should we endure this and anticompetitive harm in order to get these efficiencies and the principal is well, only if you need the anticompetitive harm in order to get the efficiencies.

THE COURT: Okay.

MR. CONRATH: So we asked, could you get the efficiencies without the harmful part and the harmful part of this merger is combining STAR and NYCE. If they were just combining the merchant processing operations, we wouldn't be here.

So the way -- and that's usually described in the efficiencies law and literature as merger specificity. And the question is, do you need the anticompetitive harm to get the efficiencies?

And so we asked Dr. Zmijewski to look at that so that we could say, okay, some of this you could get without imposing the harm.

So the merger guidelines for example direct us to look and say, well, could you get the efficiency by for example the divestiture, that's why we're here.

THE COURT: And I appreciate that. I understood the concept of the merger specific efficiencies, but I didn't

understand the backwards getting into it but now I do.

MR. HOCKETT: Your Honor, with respect we don't agree obviously with Dr. Zmijewski's conclusions on either front nor that the question should be framed as it was to him to do his work.

The transaction that the Government is trying to block is the merger of Concord and First Data, not of NYCE and STAR. This isn't an action to try to force the divestiture of NYCE or STAR. It's an action that would stop the merger and, therefore, stop the realization of the overall efficiencies whether they stem from a combination of the assets of NYCE and STAR or from some other assets that the Government is not worried about in this deal.

So it is part of the efficiencies analysis to consider all of the efficiencies from whatever part of the transaction.

THE COURT: Well I think there's some validity to what you say, but there's also validity to the Government's point. It as I understand it reviewed this potential merger from a number of perspectives, not just the merger of the PIN debit networks and probably even looked at the merchant processing part of it and came to the conclusion that as to other aspects of the businesses that are being merged, it didn't have an antitrust concern, but that it does when it comes to the PIN debit part of it.

And while its position is that the merger shouldn't occur,

its position that the merger shouldn't occur is because its in this Court anyway worried about the PIN debit businesses.

So that we now know from the Government now through Mr. Conrath that if you didn't merge the PIN debit businesses they wouldn't care if First Data and Concord merged. Presumably First Data and Concord aren't interested in that approach and so therefore here we are.

But since that's the Government's position it seems to me that it is certainly legitimate to try to break out such efficiencies as would exist only from the merger of those two businesses. And to the extent that your experts haven't quite looked at it that way yet, they may want to do that before we actually get to trial.

MR. HOCKETT: Yes, I appreciate that Your Honor. We do, we intend to contest both the facts and the law on this because I don't believe the law is as clear as the Government contends it is on that point.

We do not have an expert witness here to testify in opposition to either Dr. Zmijewski's audit, if you will, of the paper trail of the efficiences.

I seriously question whether that has any bearing on the issues before the Court even if accepted, but we don't have anybody here that's going to address that aspect of it, but we will have testimony if we get to us.

THE COURT: Yeah, we're going get to you right now.

This is the second of the Government's two witnesses to be presented right, excuse me, I didn't mean to act as if you weren't a person, you know.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you for coming.

But I think what we should do now and I do understand that you want to argue about on this point. I really don't want to hear the legal arguments today on whether or not Dr. Zmijewski's testimony is, you know, to be taken as gospel or not. We can argue about that another day.

I just needed to know where he was coming from and what his conclusions were and for right now I got it. I understand it. You actually spoke in English and it was very much appreciated.

THE WITNESS: Thank you.

THE COURT: Thank you.

So what we're going to do is take about a seven minute break so that everybody can go to other places if they choose to do so and I can get a fresh cup of coffee and we'll come back and reconvene at 3:32.

MS. ALEXIS: Could I just add one point Your Honor. My partner amply argued this, but our trial brief will address the issue of why this is a very artificial way to approach efficiencies and you should not break out this so-called PIN debit issue separately.

THE COURT: Okay.

MS. ALEXIS: Okay, Your Honor, thank you.

THE COURT: I understand that. I'm going to be much more educated by the time we get to the trial, but I'm feeling fairly educated by the experts to far.

Thank you, we'll be back in about five minutes.

(Recess.)

MR. CONRATH: May I raise this afternoon at 4 o'clock we were suppose to file weekend reading, Your Honor, in the form of transcripts, and I'm informed that unexpectedly perhaps weather related, the Clerk's office closed at three. So I have here --

THE COURT: Our Clerk's office?

MR. CONRATH: I'm only repeating what I was told.

THE COURT: Oh, no, it closed for the Christmas party.

MR. CONRATH: Ah hah!

THE COURT: It's much more important than the weather.

MR. CONRATH: I understand.

THE COURT: The Courthouse Christmas party is going on and I want you to know that we are not in attendance.

MR. CONRATH: We are --

THE COURT: That is really sad; isn't it, but you're all welcome. It's in the jury lounge, it goes until 6 o'clock

so we're going to be done by five.

MR. CONRATH: We'll do our best, but we are prepared to give you hand delivery if you like.

Do you want the CD or should we save that for filing on Monday?

THE COURT: Save the CD and give me the hard copies. That's what I need. Thank you, sir.

MR. CONRATH: You are welcome.

THE COURT: Thank you. Thank you, Mr. Conrath.

Go right ahead, sir.

MR. HOCKETT: Your Honor, for purposes of time management, we started at 1:20 and I'm just wondering are we going to go past five or will be ending right at five?

THE COURT: I would like to end right at five if we could possibly do that. Since the Government bears the burden, I figured that --

MR. HOCKETT: They get all of the breaks.

MR. CONRATH: Except for the overall schedule.

THE COURT: And I think --

MR. HOCKETT: Thank you, Mr. Conrath.

THE COURT: Oh, Mr. Conrath, I just count on you for those things.

MR. HOCKETT: Then we'll proceed forthwith and have Dr. Katz take the stand, please.

THE COURT: Yes, forthwith. Dr. Katz take the stand,

please.

Dr. Hausman, are you with us?

DR. HAUSMAN: Yes, I am, Your Honor, no party here though.

THE COURT: Oh, I'm sorry, but it's probably not Christmas either.

DR. HAUSMAN: That's what I meant, no Christmas in Cairo.

THE COURT: Can I ask a question? Excuse me for doing this.

Should we ask Dr. Hausman to testify first so that he doesn't have to hang on the phone?

MR. HOCKETT: Actually, we intended for him to hang on the phone so that he could go last and listen to all of this.

THE COURT: I tried, Dr. Hausman. Go ahead.

DR. HAUSMAN: Thank you, Your Honor.

(DEFENDANT WITNESS, MICHAEL KATZ, SWORN.)

MR. HOCKETT: Your Honor, we would like to proceed in the following fashion. Although we had prepared a free standing presentation, we really want in the interest of time to address head on the issues that have been brought to the floor by Dr. Ordover.

So we thought the most expedient way to do that would be for Dr. Katz to go over selected slides from Dr. Ordover's

presentation and explain what is wrong with his analysis and why we think that the Government has not met their burden of proof and are not going to.

So without further ado, I will turn it over to Dr. Katz to give a little bit of a framework to you, and then we'll see some of the individual slides and, of course, respond to the Court's question.

THE COURT: Okay.

THE WITNESS: If I could I thought I would just jump around a bit since you have heard the presentation, and certainly expect that you will ask questions.

So I thought maybe a good place to start would be with Professor Ordover's fourth slide which is the diagram of the industry. If I could, I would like to just make a couple of points with, with this slide because I think in some ways, it identifies what really is a critical difference in how the two sides are thinking about this two-sided market.

What I think is missing here is if you look at the cardholder diagram, it shows the purchasers and the cardholder's relationship with the merchant. The one thing that is missing is the cardholder's relationship with the issuer.

That's a sense in which Professor Ordover I think has really failed to fully take into account that this is a two-sided market, you know, all around because what he is

leaving out when he forgets that relationship is that we, you know, we have talked a lot about Interchange and how it goes from the merchant through to the issuer, and Professor Ordover has talked about how that would, an increase in the Interchange fee could be passed through to consumers in their role as customers or merchants.

But what he didn't talk about is that the increased Interchange goes to issuers which is then passed back to consumers in their role as bank customers and that they see that, you know, most directly in things like the rewards programs for some debit cards, but also they see it in overall fees or the lack of use fees or in account features to the extent that the bank used this as integrated with their overall checking account services that they are providing.

And I think that's really important because if you are going to look at the effects of this transaction on consumers and if you are going to allege that it's going to change the Interchange fee, and clearly that's something that is the subject of dispute here, but you are going to have to take into account the full effects of consumers. And from what I have seen, it looks as if Mr. Professor Ordover has not done that.

Another important thing that I think that comes out of the diagram is the following. And that what we are hearing is that much of the alleged harm is about an increase in Interchange. And that's looked at by focusing on the effects

of the merchant.

But again, although Professor Ordover does recognize issuer at times, it is not fully -- issuers are not fully integrated into his analysis, and let me just give an example or analogy to show why.

Suppose the Government had found that their best prediction is they think that the merger is going to drive Interchange down.

They could have come in here with the sorts of theories they are doing today and said, well, you know, that's really anti-competitive because think what that is going to do to issuers. Issuers are not getting the money that they were getting and as a result of this merger, Interchange is going to be driven down, that's going to harm issuers, and it's going to harm their customers.

So what you are left with is the position that Interchange rates go down, you are criticized for one side of the market, and if they go up, you are criticized for the other. And the way out of this apparent dilemma is, of course, you have got to look at both sides at once.

So I think that a fundamental disagreement you are hearing between the economist is that what we have all have said, it's a two-sided market I conclude, and I believe Professor Hausman agrees with me, that Professor Ordover really hasn't looked at both sides of the market and integrated it

into his analysis.

THE COURT: I'm not quite sure that I follow you. Are you saying that the anti-competitive consequence or harm that the Government sees here is an increase in Interchange fees?

THE WITNESS: Certainly it's my impression. I have some difficulty sometimes telling which things they are worried about with the anti-competitive harm, but I believe that that is an important part of what Professor Ordover has talked about.

He has talked about, you know, the total fees to merchants. He cited to, to the various declarations and those were about Interchange fees, not about Switch fees.

THE COURT: Well, I thought that he in terms of the concern if there were a merger, I thought he had two points.

One was that it would be harder for merchants to extract themselves, that is at page 16, and the second is that it would reduce the least cost routing option.

THE WITNESS: That's right, but the question on both of those is how does that show up? And I thought he was saying it would increase the charges that the merchants would face without asking what's happening on the other side.

Maybe -- I think where it's come up, not as a theoretical matter, but that is an imperical one of looking at the facts because one of the things that he pointed to was the

2002 round of increases.

Those increases were about Interchange rates. Those weren't increases in Switch fees. Another thing that has been brought up in this case at various points is people said well, merchants are complaining because they have seen concentration go up and they have seen a higher Interchange. Switch fees have not been increasing.

THE COURT: No, I got that from your materials. And I understood from your materials that the, one of the arguments made by the defendants is that the Government's case does confuse the difference between Interchange and the Switch fees. That's part of the reason I was questioning Professor Ordover earlier about it.

But in terms of what he says in this presentation and so therefore basically what he testified to about today, I thought that the cost to the merchant of dropping a network was the cost of substituting one network for another because STAR and NYCE together would have so much of the market.

THE WITNESS: Yes, but those costs would depend on the all end costs to the merchant. So if you are talking about cost from going from one to the other, it wouldn't be just the Switch fees. It would be the Switch fees, plus the Interchange.

THE COURT: If a -- maybe you know the answer to this. Does Interlink charge or get a Switch fee?

THE WITNESS: Interlink yes, they do and you maybe asked this earlier about what happens with Visa's signature.

THE COURT: Right.

THE WITNESS: I believe that they do have some sorts of network charges that they put on in addition to the Interchange.

THE COURT: Okay. Okay. But I understand your point about the difference between Interchange and Switch fees.

THE WITNESS: Okay. One of the points that I could make about --

THE COURT: If I could just ask one other question. The network in the middle here doesn't really have much to do with Interchange fees, does it?

THE WITNESS: Well, I would say the answer is yes and no. I mean, the network does pick the Interchange fee as a dimension of competition, but ultimately that Interchange fee is driven by competition to attract the issuers, to attract merchants, and again, as you have read, that's one of our points that the increases in Interchange fees that we have been seeing is a result not of the exercise of market power, but it is the result of competition as PIN networks have tried to keep issuer customers.

THE COURT: Right.

THE WITNESS: I'll stop there.

THE COURT: Okay.

THE WITNESS: I say one other thing from the diagram which comes back later, and it has to do with some of the good points that Professor Ordover has raised at least, I guess he get didn't to the slides, but that is the processor is shown here between the merchant and the network.

I think that an important point here to remember is that the processor is hired by the merchant and I think that matters because Professor Ordover has talked about processors doing various things to favor the networks, but I think it's critical to remember that a merchant can pick the processor it wants as we have talked about earlier today, the Government is not alleging some sort of competitive harm in the process or market and that that is a central fact then that the processors can be expected to serve merchant interests.

THE COURT: Hum. And STAR, is STAR a processor?

THE WITNESS: STAR is not. Concord is a processor. They have a processing operation that then again competes with other processing operations.

THE COURT: Okay.

THE WITNESS: Okay. As I said, I'll jump around a bit in the interest of speed.

I would like to touch on one thing and that is talking about the product market definition, and the issue that came up. This is on I guess his slide seven.

About saying how where the merger guidelines to the

analysis begins with the SSNIP test.

I think the correct statement about where economic analysis begins, I think Professor Ordover would agree with this, is you have got to ask the question, why are you doing market definition or what is the point.

And, you know, it's not to do the SSNIP test. It is to assess the dimensions of competition. What economist I think all agree on is the way you do that is to think about substitution.

And as again, that was something that was mentioned in the plaintiff's reports, something that I said earlier, that there are different degrees of substitution. The question is how close a substitute does something have to be to be a competitor.

The properly applied and in the right situations the SSNIP test can be a way to get at that and in fact, it's a standard way and it is frequently used, but it's by no means the only way.

And as you saw in my report, I looked at a variety of other considerations. I did the same thing when I looked at -- I was the Government's expert witness in the credit card case, U.S. v Visa, the same sorts of factors, other economists look at those factors as well.

So I think that the one thing there is a consensus on economist is the key of substitution, but then there are a

number of ways to go about looking at that, and I certainly can go into more detail if you wish, but I just wanted to make that one essential point.

THE COURT: I am interested in the issue of whether or not the merger guidelines are the only way to think about this, and the hypothetical monopolist because and you can correct me if I've mischaracterized your expert opinion or Dr. Hausman, of course, can correct me too, but it seemed to me that in the defendant's articulation of the market one of the critical points was that Visa's growth spurt has kind of warped the market and is not accounted for by the Government's hypothetical monopolist approach.

Is that -- am I misunderstanding your point?

THE WITNESS: I wouldn't say you are misunderstanding it. I guess I would say there's some different points in there in that I think a lot of what we're seeing with Visa is the intensity of the competition and the fact that the competition cuts across signature and PIN, and in that way I think it does show that the mechanical application of the SSNIP test in this particular market as leading to incorrect conclusions.

But I guess it's more the facts contradict the conclusion that is reached from the SSNIP test as opposed to it directly affecting the SSNIP test.

I think that there's another problem that does directly affect the SSNIP test and that is the use of Interchange in the

SSNIP. I think is conceptually incorrect.

THE COURT: Say that, explain yourself, I didn't understand what you said.

THE WITNESS: So this will take a little bit of time. But if you think about what happens in ordinary markets, lets take tofu because that was Professor Ordover's example, and I have had tofu, to be honest, at his house and it has a certain linkage here in the grand scheme of things.

If you think about what happens with tofu, suppose you were to ask does somebody have market power. You say okay, what happens when they raise their price? Well, what you figure happens if you charge more, you are going to lose some sales. So what you have to do is you balance out. Will I get a higher price for what I keep selling, but then I lose sales, okay. Well, which effect is bigger, and we say that if the price increase is profitable over some range, you could talk about having market power.

Now think about Interchange. When you -- what you are doing as we have heard and you have read a lot, the network doesn't keep the Interchange, okay. The network is just flowing it through, so why does the network care about Interchange?

They care about it for one reason. They want to maximize the number of transactions on the network because that's how they are going to make their money, collecting

Switch fees.

What that means is when you -- you may have incentives to raise Interchange to drive up your volume, and in particular in this market, what happens you are raising Interchange to get issuers. So if you think about that, the tofu market you raise your price because you are exercising market power. In this market you may be raising your price precisely because you are competing.

Now there's one more step in this argument. So let's go back to the SSNIP test. The SSNIP test says is it profitable to raise your price?

Well, now in the tofu market, the only way it's profitable if you have market power, and so, you know, the SSNIP is one way to do it, but at least conceptually can make some sense. But here you may be raising your price precisely because you face competition, so to then interpret the SSNIP test as proof of market power is just completely backwards.

So it's not that it's, you know, it is not that the SSNIP is always wrong, I'm not saying that, but I'm saying that the application of this hypothetical monopolist test in the SSNIP in using the Interchange is just potentially at least backwards.

You can interpret competitive behavior as evidence that you had the, the hypothetical monopolist in action and therefore, it's just invalid and I, you know, I think it's just

a mistake I think when Professor Ordover says in his rebuttal report that those price increases that we saw in 2002, the Interchange I think the line is something like that was the SSNIP test seven times over because the Interchange went up 70 percent, and I think that's not true at all.

I think precisely the fact that those 2002 price increases were competitive price increases shows how wrong this methodology is when applied the way it's been applied in this case.

MR. HOCKETT: So perhaps you could talk about some other ways, some other factors of, that are appropriate to use in connection with delineating market boundaries.

THE WITNESS: One of the things I went through was and actually, Professor Ordover mentions it on his slide eight is looking at the, you know, functional interchangeability of the products.

Now Professional Ordover says in his slide that's not the only way to define a relevant market, and I certainly agree with that, and I didn't just do it that way, but I think that it is important in this case that what PIN debit and signature debit are both doing is they are providing a particular card base form of access to people's checking accounts.

This is a footnote, I'm sorry, I can't resist. There's also some savings accounts and money markets, but roughly speaking, it's providing card base access to people's checking

accounts.

And you know, he makes his point that in earlier testimony in another matter I talked about wire line and wireless telephones, but I don't think that they do have the same functionality but because the whole point, the key selling point of wireless phones is they're mobile in a way that obviously a corded telephone isn't. So I think that's an inapt comparison.

So I think that the fact that they're really doing the same thing is important here. I also think -- that he mentions, you know, to try and counter that, he talks about Staples and Office Depot, and I will just stay away from any of the legal aspects of it, but I think his point misses the economics point which is sure, you must be right that you shouldn't do functional interchangeability in Staples and Office Depot by saying well, is the typing paper the same.

Just the way here, I wouldn't say you shouldn't do functional interchangeability by asking is the gasoline you buy with PIN debit the same as what you buy with signature. Obviously, it's the same gasoline, but that's not the issue. It's the service is actually being provided by PIN and signature debit are the same, that you can use them differently.

THE COURT: Is there any support for the notion that the ultimate consumer, the purchaser, someone like me cares

whether it's signature or PIN debit?

THE WITNESS: I would have to say that the evidence is mixed on that, there's different opinions in the industry.

I think what is clear is there are people who prefer PIN and there are people who prefer signature, and there are a lot of people who either don't care or don't, they don't even know the difference and a lot of people who go back and forth between the two which is why we see this battle we see going on in the debit industry where you have got issuers by and large not always pushing to get consumers to use signature because they think you can persuade the consumer, and then you have got the merchants trying to push them towards PIN. Not in all cases.

It is one of the things that certainly we'll be hearing later in the trial, but

But by and large, because the pre-WAL MART history of the industry, we don't have the full convergence yet, you have got this tug of war with merchants and issuers because they know they can move consumers back and forth.

MR. HOCKETT: Can explain just for a minute why a merchant might want to steer towards signature?

THE WITNESS: Well, the particular merchant what they are talking about is the fact is that where given the pricing schedules we see today for some merchants and I think we'll see increasingly, for them signature is cheaper than PIN, and that's what they indicated in that, and as I said, I expect to see more of that as we continue seeing the conversions.

THE COURT: But the only signature debit is really Interlink and Mistro, right or MasterCard?

THE WITNESS: No, it's MasterCard and Visa, the brands, yes, that's right.

In fact, that's one of the -- this may be too detailed to get into, but that's one of my points I actually make saying that if it were right that signature was a separate market and PIN were a separate market, the WAL MART litigation would not have made any sense because how would you be claiming that debit is a competitive market if there's only two people in it, but that's right, there are only those two in the United States.

THE COURT: And is your understanding of Professor Ordover's opinion that signature debit is a stand alone market?

THE WITNESS: I'm, my only understanding on that is that he wants to exclude it from his analysis of the competitive facts and doesn't see it as a restraint.

I don't know if he sees other products in it. I would be surprised if he could because if you thought that signature,

say if you thought signature and ACH based debit cards competed, I don't see how you could think that ACH didn't also compete with PIN debit.

And my understanding of his position, and I may be wrong about this when I say that he takes the view that ACH is not an irrelevant market.

THE COURT: And you would put signature debit in the same market because of the, what you think to be the interchangeability of them?

THE WITNESS: That's the fundamental.

THE COURT: Substitution.

THE WITNESS: That would be the fundamental driving force is the substitution. Now there are other pieces of evidence that support that in addition to surveys of consumer behavior or industry views on that. It's also the behavior of the industry participants, as again, we have already talked about other people talked with you about earlier today with Visa being concerned with what happened to signature.

Certainly I think when you read the document, various industry documents where people are talking about the history of PIN debit, it's been seen as taking business from signature that there's been a shift that has been going on and, you know, that's a fundamental part of --

THE COURT: Isn't it really debit cards taking business from credit cards?

THE WITNESS: Well, the largest thing -- I have to go back in my memory because some of this is actually from the previous case rather than this one. I did look at the credit card case.

The trend data seems to say what is happening is that debit cards are taking away from cashing checks, and certainly if you ask Visa and MasterCard who have the broadest credit lines, since they are in credit too, certainly what I testified to in the previous matter, they have targeted their debit products, financing or taking away business from cash and checks.

Credit is on the other side; in fact, it's the way I have thought about payment industry and a lot of people have, but it's the five years I have been doing this, there's a critical distinction in what you pay now or pay later, and the credit is on one side along with charge cards they give you a month to pay, and then cash and checks and both kind of signature are on the other side of that because defacto that you are paying right away.

I mean, you have heard some thing about signature.

MR. HOCKETT: You said both kinds of signature.

THE WITNESS: I mean both kinds of debit, I misspoke.

We have heard some things, and we have read them that signature, you know, clears more slowly, but my understanding is that what large issuers do is even if they don't actually

take the money out of your account for a while, if you go out and make a signature purchase, they will put a hold on that amount of money right away, and that most signature transactions actually clear, the vast majority of them at least on Visa, clear within a day and in fact, PIN debits sometimes does clear within seconds as you heard Professor Ordover say, but my understanding is also that, I don't know if it's the processor's decision, but somebody in that complicated link makes the decision that they actually clear a PIN at the end of the business day or the end of the banking day. So those things are really very close.

The one that is a little different obviously, the check, you get more of a float.

THE COURT: You kind of suggested in your opinion I think that or your report that checks could also be considered part of this market and checks do seem to me to be a different breed of cat.

THE WITNESS: Here is the thing and why you are correct if you read my -- when I say look, signature is in there, and what I also say is excluding checks from the analysis I believe is a mistake as a matter of economics.

Now where I certainly I guess it would seem to a critic is that I am waffling. Okay, did I say checks are in the market or not. It actually could come down both ways because the market definition is not the key economic issue. The key

economic issue is what does competition look like, and I think that checks absolutely have to be understood to understand the overall competition in this market.

If somebody wanted to say though okay, the market is PIN and signature and ACH and checks are outside of the market but will take them into account, I could live with that. If you want to say no, no, anything outside of the market we just don't count at all, then I think I would put checks in, but I would agree with you and wouldn't contradict that, the checks are not as close a substitute as the other things, but I think that they clearly have a competitive influence, but they are also clearly not as close a substitute.

THE COURT: Hum. Okay. Were there other things in Professor Ordover's --

MR. HOCKETT: You want to talk about steering or --

THE WITNESS: Well, actually if I could make just a couple more points. One, some apologies for jumping around, but some data points, but I do want to make one that comes up I guess on 13 which is the fundamental conceptual point, and I think a fundamental conceptual difference.

And that is this whole point about would merchants today have PIN pads and engage in PIN prompting, would they stop doing it? And I would disagree that that's the central question because what we know as a fact is that the majority of merchant locations in the United States don't have PIN pads.

Okay, we know that there are many more merchants that have just signature than there are that have either just signature or signature and PIN.

And so I think it's a mistake to forget that the issue is not necessarily getting people who have PIN to stop, people have already made the investment in PIN pads to stop, although that can happen, and I am told that it is happening as people have to upgrade PIN pads, some merchants reconsider whether they want to keep them.

But I think the big part of the issue here is with merchants have not bought PIN pads, and that's a majority of them, they have to ask themselves is it worth doing, and so when they do that, they are going to have to compare signature Interchange rates and PIN rates and it's a question of going forward.

And I don't agree that this is what is going to happen because I think people may actually may move both ways, but for the sake of argument, but suppose it were true somehow that we knew that what is going to happen over the next ten years is no one is ever going to go from PIN to signature, it's only the other way. Suppose that's what we knew, and again, I don't agree with that.

There's still a critical issue to the businesses and then to competition and then to consumers how quickly that will happen. I mean, nobody thinks that I know of any way that even

the people who are most pessimistic about signature think it's going to be around for a while.

So the critical issue is how quickly if you think this is going to happen, how quickly do you move from signature to PIN and that is influenced by the PIN Interchange rate and the signature Interchange rate and the cost of PIN pads and training employees and things like that and that's a dimension of competition. Because I mean, that's you know, that's one view of what signature is all about.

THE COURT: What do you think is the role that Visa plays in the current competition in the PIN debit market?

THE WITNESS: Well, they certainly Interlink participates directly in the PIN debit market.

THE COURT: Right. But it only has 10 percent or something like that, not much.

THE WITNESS: It's actually doing up dramatically, I mean, given that STAR is losing and Interlink is gaining, and I mean certainly, I don't have the numbers at the tip of my fingers but we are talking about STAR, just looking at PIN is the biggest network

MR. HOCKETT: Your Honor, there's a graph that shows the banks that are leaning up on the screen and the reduction in the share of PIN debit.

THE WITNESS: I believe also there's some questions -- I mean, the reason we have this graft, the important point again you have read me saying it several times already is about STAR losing the business. It appears and I believe people in the industry expect most of that business to go to Interlink, but it's not certain that that is what is going to happen, and I believe as part of the WAL MART settlement, Visa is not suppose to have exclusive contracts to guarantee these things.

THE COURT: Well, what are the chances that this business because I don't quite understand the double bugging issue when it comes to this, that these businesses would retain a STAR bug?

THE WITNESS: My understanding of it, and when we get done, I'll go check it is that these are banks that said to

STAR we are leaving, you know. I mean, particularly if --

THE COURT: So they are not going to have a STAR bug at all?

THE WITNESS: That's my understanding.

Now if I could touch on another issue that has come up related to this.

THE COURT: Let me back up, I'm sorry.

How much of this loss is associated with competition from Visa?

THE WITNESS: I believe that all of these banks have said that they are leaving STAR and announced that they are going to Visa's Interlink, but I believe some of them may also be having other bugs on their cards. So that's why I can't be sure that this is all going to Interlink, but certainly what I have read says the industry expectation is that the bulk of this is going to Interlink.

THE COURT: Okay.

THE WITNESS: Let me if I could say on this I believe the point has been made by or the assertion has been made by the plaintiffs is that well, okay, STAR has lost a lot, but how do we know that they won't gain a lot in the future.

I say two things to that. First, if you can lose something like a of your business, get a back, lose a if it's really going around that much, that suggests that it's pretty easy for people to Switch and there's a lot of

competition.

The other thing is that I don't think that there's a reason to think that STAR is going to bounce back up because these are long term contracts that were entered by and large when Concord bought up a network and it was part of getting the issuer owners to commit to staying around. It was what I say is a one enough event. Those contracts are now expiring and STAR is losing the people so I think this is a one time thing.

The other is certainly I think going forward STAR, you know, will get some more issuers, but they also may lose some more, and I don't think that there's any reason to think that going forward they are likely to gain more than that. You can isolate this as a special event.

THE COURT: These are kind of large banks to lose. Who is bigger than Wachovia?

THE WITNESS: I think Bank of America, they have already lost them to Interlink.

THE COURT: So they are gone.

What about Wells Fargo, is Wells Fargo bigger than Wachovia?

MR. HOCKETT: They are I think comparatively sized.

MR. PATTON: They have lost

in just the last several months. I think Wells Fargo is the second largest issuer of debit cards in the United States after Bank of America and

Wachovia is third. Bank One may be third or fourth, but those are the top four as I understand it. Bank of America --

THE COURT: For what period of time are these contracts when they're moving over to, are these long term contracts as well that one would be signing up with Interlink?

MR. HOCKETT: Yes, Your Honor.

MR. PATTON: I think.

THE COURT: I mean, I think it's hard to replace them then. There isn't another bank like Wachovia or Wells Fargo to substitute. You would have to go get a lot of little ones.

THE WITNESS: That's right.

THE COURT: All right.

But let me back you up a minute. Because it's very difficult for me to determine which of you, or how to untie this knot.

Do you say that we shouldn't use the guidelines hypothetical monopolist concept in order to define the market? Do you disagree with the way that Professor Ordover performed that analysis and you say yes, you can use the hypothetical monopolist, but that analysis doesn't, doesn't work because of some other reason or do you say that, that that's fine, he applied it properly, but the real word is actually somewhere else? What is the source of the disagreement?

THE WITNESS: It's a combination of things I guess. First, I would say that even conceptually that it's incorrect

applied to using Interchange as the price you're changing with the SSNIP. It's not even the right idea in theory, okay.

THE COURT: Okay. Because that's, because it would be the right idea in theory if it were the switching fee?

THE WITNESS: Conceptually if you were thinking just about Switch fee -- actually, I think there is a problem. The Switch fee is not the merchant price, the merchant pays the whole thing. There is a different conception.

THE COURT: No.

THE WITNESS: Different conceptual problem if you use the Switch fee because the merchant's price is the Interchange. Interchange plus the Switch fee, so they have to pay both of those. So I think that runs into a different difficulty applying the test.

THE COURT: But the problem with applying the Interchange fee is that that doesn't actually go to the persons accused of being monopolists. It's a funny way to monopolize.

THE WITNESS: That's correct.

THE COURT: To make money for somebody else.

THE WITNESS: That's why I say conceptually I think here it gets you in trouble is the wrong thing because you are competing to get those people. By getting more money for them, it's a form of competition, it's not an exercise of the market power, so I think that's one problem.

There's always, I am not sure the right word is problem.

One always has to be careful of applying the hypothetical monopolist test though to make sure that the results you get out of it makes sense because it is a particular, you know, mechanical way to do things, and it's a point I make that what it says is, okay, if you have properly applied it, so let's go with tofu and suppose we have done it and we really find out that we are sure that the tofu monopolist could raise price by five or 10 percent, okay.

Even if you knew that, it doesn't tell you what the merger of two tofu firms is going to do because they are not merging to monopoly, and that's why I talk about you have to worry about expansion and what rivals will do, what Interlink would do because you are not getting the hypothetical monopoly when you actually merge so you have got to -- and this is always the case, you have got to --

THE COURT: But, but the point is that it has or I thought the point was that it would have an anti-competitive effect not that you would end up with a hundred percent monopolist, but that by operation of the hypothetical monopolist construct, you can demonstrate that it would have an anti-competitive effect and therefore should be avoided.

THE WITNESS: Okay, and I would say that it, except that it never does that by itself. That applying the hypothetical monopolist test would tell you -- I mean, by construction it says if you have all of the firms selling this

product together in a perfect cartel, this is what they could do.

Now I think I haven't heard anybody say here today, they say we're getting all of the PIN debit firms together in a perfect cartel. So the idea of it from an economist point of view is not that it's competitive effects analysis, but it's they are trying to draw some boundaries to do it, but once you have got the boundaries, once you have got the boundaries, you have got, you want to check with the real world or the facts. These boundaries of the test really make sense to understand competition.

THE COURT: Well, we have lost everybody.

THE WITNESS: I think we might -- we are still on the line.

(Noise from phones.)

THE COURT: Is anybody there?

DR. HAUSMAN: This is Terry Hausman.

MS. ALEXIS: Hello.

THE COURT: We need you.

Are you still there, Dr. Hausman? Hello.

Why don't you hang up.

(Pause.)

Why don't you go ahead.

THE WITNESS: So as I was saying, I mean, and the merger guidelines would lay this out too, that it would be a

first step for drawing the boundaries, but by itself it can't tell you what the competitive effects are, and I'm sure that Your Honor would agree with that.

But it's just one step and then a step typically put in the merger guidelines with the guidelines then say to calculate market shares and now I guess I am getting into some of the legal stuff about whether that creates some sort of presumption or not.

Which I gather it is not Professor Ordover's approach here so in that sense I think even he is agreeing that you don't follow the merger guidelines, you know, mechanically and everything, because at least in these slides he has not tried to do what the merger guidelines would identify I think as the third step which would be calculating market shares, you know, and I think he's correct in that.

I have said that I don't think that market shares are a very good indicator here, but I think that it does illustrate that economist recognize that the merger guidelines are not the only way to do things.

THE COURT: I am sorry, I didn't hear that.

THE WITNESS: Oh, the merger guidelines are not the only way to do things, and I think that there's generally consensus among economist as well, that if do you follow the guidelines you have, you always want to check it against the facts and other pieces of evidence as well and there are other

ways to go about it.

THE COURT: Did you get anybody on the phone?

(Pause.)

THE DEPUTY CLERK: Are people still on the phone?

DR. HAUSMAN: I'm still here, Your Honor.

THE COURT: Is that Dr. Hausman?

MR. BLAKE-THOMAS: I'm sorry, it's David Blake-Thomas.

THE COURT: Washington D.C. can talk to Washington good. Is there anyone else on the phone?

MR. IOANNOU: This is John Ioannou from the New York State Attorney General's office.

MS. HACKER: Janice Hacker in Texas.

MR. BETSKO: Joseph Betsko and Ben Cox from Pennsylvania.

THE COURT: So did we lose you and you all stayed on the phone; is that the idea?

MS. ALEXIS: Yes, this is San Francisco, and the conference operator just called the people. There is some problem with Dr. Hausman and they are going to try to reconnect him.

THE COURT: Thank you. I'm sorry. I was just trying to figure out who is attending and who is not.

THE WITNESS: The person from Bloomberg still has not figured out how to tap the line or at least knows enough to be

quiet when you ask.

All right. If I could and also in the interest of time before we get Professor Hausman back, just jump to two of the tables Professor Ordover presented; one of them being I guess his page 19. My set didn't come with numbers, so I hope I numbered them correctly, but --

MR. HOCKETT: It's on the screen, Your Honor.

THE WITNESS: Yes, the single-bugged and multi-bugged transactions. And you and Professor Ordover did have a discussion about what to make of the different columns and as he I think correctly pointed out, one has to look at the first column with some caution because he said, and if he hadn't I would have, you know, that MasterCard has something like of its transactions, you know, you put the MasterCard number in there, something like for the first column.

So and I don't believe anyone is saying that, you know, that MasterCard's debit program is anything approaching a monopoly, so Professor Ordover pointed you, you know, to focus on the second column. So in between two columns he and I are in agreement that the second one would be the one to look at if you are going to do this because of the things like the

Now a couple of things though about this column, he and I have different calculations of what that number that appears

on his table as , and they are different for two reasons.

One, which I think is the smaller source of the difference, is that I believe that he only considered certain networks in his data set and I think there were some transactions that involve other networks, but that adjustment is quite small.

And then the other thing in my report you see a number I think just under percent was projecting out the loss of STAR issuers, the ones you saw identified in the previous graft so that the number is , percent.

And I would like to make a couple of points, maybe three points about this.

THE OPERATOR: Pardon the interruption, Jerry Hausman now joins your conference.

THE COURT: Thank you.

THE WITNESS: And that is and you have heard about this in a different context for when particularly Professor Hausman and I thought that Professor Ordover was using market share as his predictor of competitive harm and we said well, if that were true you would see STAR charging higher prices.

Well, I would make the same point here that you observed that STAR is at percent and that NYCE is at percent. Yet I think there's agreement and there's disagreement on how to interpret the data, but I believe there's agreement that the

MR. HOCKETT: Would you like me to show that graft?

THE WITNESS: It's up to Her Honor. She may have seen that enough times.

THE COURT: I think that given the way that everybody -- I don't think that's actually been challenged.

THE WITNESS: Yes. As I say, I believe the disagreement is on the interpretation, so I think it would be useful to go back to the other -- okay, so clearly there's disagreement on the interpretation, but I believe there's agreement on facts that the

, if anything it's the other way around.

So what I would point to here is that going from

doesn't show up on the data as having an effect and again, Professor Ordover has his reasons for thinking why it shouldn't, but then he is saying if you use the number projecting out for STAR that somehow going from say

would have a significant effect and would harm consumers.

My point would be that I don't think that the data show in effect going from at least anyone has been able to discern and I don't see any that he's offered evidence and I'm not aware of any that going that same amount upward from would have an effect.

So that's the first point I would like to make about the numbers.

A second one is I'm not quite sure what to make of combining these things and sometimes these things STAR and NYCE don't compete on these things that are uniquely bugged anyway, but maybe that is more of a throw away point.

I think the more important of the other points for this is this, that the degree of single bugging and multiple bugging is a choice made by issuers. Okay, it's not that STAR and NYCE are getting to pick what happens here. The issuer is making the choice.

So for example, if the issuers have reasons they want to have bugs for multiple networks and the issuers see STAR and NYCE merge and suppose they do combine the networks into one. It will be the issuer's decision whether then to put the bug of another network on those cards as well. So I think that's important to remember that these numbers, they're not set in stone and in particular they are not set by these two networks.

THE COURT: Well, in that sense isn't that what part of the in essence the WAL MART litigation was about? It's a different, it's a different concept, but as I understand it that Visa and MasterCard had an obligation that it was imposing that if you took their credit cards, you had to take their debit cards, right?

THE WITNESS: That's correct.

THE COURT: And it's the -- I mean, I don't quite understand how the issuer is ruled then by the network. The

network like Visa goes and says we'll pay you a lot of money.

Are those your facts or Dr. Hausman's facts, the ones about -- about how much --

THE WITNESS: He has talked about that, but the networks can try to influence the issuer decision to the extent they can create financial incentives to try to run more of the transactions over their particular network.

And in particular, you know, in the end and if a network -- and that's the way the competition can work is the network offers a good enough deal to the issuer, the issuer may put only that network's bug on it, but that in a sense is, in a sense it is the outcome of competition by networks to attract issuers.

THE COURT: What about the concern that Dr. Ordover testified to using his , that the percentage here putting STAR and NYCE together would make it difficult for a merchant to get out of the market because that one network would control so much of the debit PIN market?

THE WITNESS: Okay, I think there a few things here are relevant here. One, there's a question of whether the merchants in fact look at these numbers, and I believe that's an issue Professor Ordover himself raised in his report do the merchants actually even know these numbers, so that would be one point, but I think that the other important point, and this

is where I guess market definition would come into this or the question of substitution comes in.

You know, the question of where would the people go, okay. What he's saying is these people couldn't go to another PIN debit network but they could go to cash or signature debit or checks or in some cases, people would go to credit cards. In some cases they go to ACH.

So that's why I think we see another part of the difference and what you are hearing from the economist saying that there's enough substitution, that's one of the factors that goes into it, that the merchants can expect to get the business on a different payment instrument. I see that's an important part.

THE COURT: So would you not anticipate a loss of business? There's a question, it's mentioned in one of these slides, about what happens if the customer comes in and the merchant doesn't accept his card. Does the customer actually walk away or does the customer just pay by an alternative means?

Is there any fact to support that or is it, is this a hypothesis of the economist?

THE WITNESS: No, I think there are facts that suggest in fact that the merchant won't lose very many sales. I mean, I guess you could question whether it's a fact if it was made in their pleadings, but as I said, in the WAL MART

litigation certainly the merchant plaintiffs took the position that if they didn't accept signature, and that's right, it's starting with signature, they said if they didn't accept signature they wouldn't lose any sales because people would go somewhere else.

I would submit from that that if there, if they are going to go to PIN or cash or checks, the same thing is going to be true by and large for people with PIN debit that they could go somewhere else.

I think that one of the things I think in fact you heard earlier today and in the graft again is that people's debit cards tend to have a signature mark on them and also, you know, one or more PIN marks. So most people when they give the merchant their card have the, the person, consumer walking in could be switched over from one to the other and, you know, again all of this stuff we have heard about trying to -- the fact that merchants can steer, you see things like suddenly steering, you know, this big percentage of people away from signature in the PIN. They were using signature before they started doing it, so it's all the indications that they could steer them back.

I think when you do see people going back and forth there's data that

All of that suggests that in fact people will just move to another payment instrument rather than go out, you know, leave the store.

THE COURT: And not make the purchase at all?

THE WITNESS: That's right. I think particularly when you think about what goes on with debit and particularly I guess PIN debit is a significant percentage of those transactions are things like groceries.

So I mean, you know, someone goes in, they do their weekly grocery, now it's true you could try to go to another store, but I think it is important that groceries are so important here because it also suggests you tend to buy your grocery, at least most people buy their groceries in the same store, you can do things like your checks, you know, preapproved or various forms of verifications, and things like that, you have a relationship say with your supermarket.

I mean, it may not be a close one but you do have a commercial relationship with them in a way that say you wouldn't, certainly going to a hotel and that then makes other payment mechanisms a better substitute than you might otherwise think. That's why checks are used a lot at supermarkets.

THE COURT: Supermarkets don't do much steering though do they between debit and credit cards?

THE WITNESS: Certainly between, actually between debit and credit or between --

THE COURT: Between one kind of debit and another?

THE WITNESS: Between one kind of debit and the other kind they do.

THE COURT: They do?

THE WITNESS: They do do that. They will have ones like I believe that's right. I may be misremembering which ones, some of the large chains in fact will have things like, they will have PIN prompts that when you swipe your card, if it sees that the card can do either PIN or signature, it will ask you to put your PIN in. You know, some of them may try, they may also train their clerks to do it, that supermarkets are pretty savvy about that.

The other thing is that we have things like Safeway that has been a leader -- actually and I guess I think it's Publics as well having their own debit having their own debit network, and then Safeway having their ACH based debit card for a variety of reasons they would like people to use. The supermarkets, these big chains have been quite sophisticated in looking for other mechanisms or for moving people around in ways favorable to the merchants.

MR. HOCKETT: I do want to make sure that we leave enough time for Dr. Hausman. I don't know whether there were a couple of additional points that Dr. Katz wanted to --

THE WITNESS: I would like to make one additional point which I will make today and I'm sure you will be hearing

about in the future, but if I just could turn to slide 23 and just explain something that Professor Ordover in fact was careful to explain in his report, but I would like to highlight it here and then report some additional work that people under my direction have done in the last say 48 hours.

And that is and you went through this with him before but he reports the top of the first two columns the conflicts between STAR and NYCE. I guess because of the data he had available, at least that's my understanding of why this was done, he used the routing instructions that Concord has when he looked at the EMS data my understanding is that he didn't have the FDMS data, because my understanding is that he didn't have the FDMS routing instructions.

So the total FDMS and which things are conflicts is his estimation based on applying one company's process to another company. We were able to obtain, people under my direction, were able to obtain information in the last couple of days about what the routing instructions were or are for, for FDMS.

MR. CONRATH: This is material we sought, Your Honor, and were told was not available.

MR. HOCKETT: I don't think that's true.

MS. ALEXIS: It's been produced, it was produced months ago. You have routing instructions that were produced months ago.

MR. CONRATH: Not in this file.

THE COURT: Well, why don't you -- we'll let that one go.

THE WITNESS: I have no idea about that.

THE COURT: No, no, that's a different argument.

THE WITNESS: Anyway, the numbers that people under my direction calculated that -- I think I have got this right, it's a dramatic difference. Instead of

THE COURT: Under the FDMS column?

THE WITNESS: Yes, for the percent of total priority in conflict and the big change is that there just were many fewer dual bug cards, not just dual bugged, they just had many fewer transactions that had both an instruction to go to STAR first and an instruction at the same time to go to NYCE first.

THE COURT: Okay.

THE WITNESS: Again, this one where they would also, and then I'll stop, make the point again though that to the extent what we see and I believe this is what I believe we do see is networks competing for issuers. It's in the network's interest to figure out ways to end various routing conflicts and that's true whether or not the networks merge because otherwise, what you have happening is almost a default, you are letting the merchant choose and clearly, that's not what the issuers want.

So the competitive forces of networks trying to attract

issuers is at work here, and in fact, if I wrote it down correctly, Professor Ordover talked about something about arbitrage, you know, merchants arbitraging against the networks, and then that's what we saw going on here.

But of course, the way to think about it with Interchange is they are arbitraging against the issuers. It's obviously both, they are looking at Switch fees and Interchange, but the bigger component is Interchange and so when the merchant is trying to find the least cost routing, a lot of what they are doing is trying to avoid paying the issuer the money which tells us that the issuers have economic incentives to, you know, to get the networks to stop doing these things, and so to the extent that these do turn out to be significant effects, there are these economic incentives to stop that happening, and I guess I should say there are also economic incentives to stop me from talking any more so that Jerry can, unless you have any questions.

THE COURT: Okay. No, no, I think we need to hear from Dr. Hausman, and it is getting late.

MR. HOCKETT: Before we let Dr. Katz go, can we just make sure that Dr. Hausman is still present?

THE COURT: Dr. Hausman, are you still there?

DR. HAUSMAN: Yes, I am, Your Honor. I have been the whole time.

MR. HOCKETT: Very good. Let me just give the Court

a copy of the slides that we have already supplied to the Government.

THE COURT: All right. And could you also inform the Government as quickly as possible about the Bates number or whatever it is of the routing instructions for First Data?

MR. CONRATH: Your Honor, if I can address this very briefly. What we do not have is First Data's bin tables that identify the conflicts and can't do the routing instructions without that. We have been asking for that.

If I might, Your Honor, I know we have come to, to be amused by my repeated references to the same points, but it's a very serious point. The Government is seriously injured by this and this is a classic example of the kind of, you know, non-disclosure, we have to fight. If we are on a regular schedule, I'm familiar with those kind of litigation games, I know how to get information.

We don't have time to do it here and therefore, we are gravely prejudiced.

MS. ALEXIS: Your Honor, and I don't want to take the time from Professor Hausman, I think it's very late where he is, but I might add as I said from sitting back there that there are routing instructions at First Data, those were produced --

THE COURT: Yes, but what about the bin tables?

MS. ALEXIS -- months ago.

With respect to the bin tables, I don't think that and I will go back and check that issue, but they know if they looked at the documents just exactly how the transaction should be routed. Under the First Data algorithim it's a computer algorithim that says first you look at if it's an issuer selection has there been an issuer routing, if not, then you default to least-cost routing.

There's nothing to do with looking at STAR next, and that's been clear from the documents. They have had witnesses galore that they could have asked for clarification on that point, and for whatever reason haven't done that.

THE COURT: But the issue according to Mr. Conrath is bin tables.

MS. ALEXIS: Your Honor, I don't think that bin tables are not necessarily what tells you how we do the routing. The routing instruction is an algorithim that says first you look at this, then you move to that.

Could we reserve this argument for when Professor Hausman is no longer --

THE COURT: We'll reserve this because we have really imposed on Professor Hausman's ears. Go ahead.

MS. ALEXIS: Thank you.

Professor Hausman, can you hear me okay?

PROFESSOR HAUSMAN: Yes, I can. I'm trying to figure out based on the number of questions that have been asked today

what's left for you to address.

THE COURT: We need to swear the witness.

MS. ALEXIS: Oh, I am sorry, okay. I apologize, Your Honor.

(DEFENDANT WITNESS, JERRY HAUSMAN, SWORN.)

THE WITNESS: Yes. And would you ask Miss Alexis to speak directly into the microphone, she's breaking up.

MS. ALEXIS: I am, but you tell me if you can't hear me, okay.

THE WITNESS: I can hear you now.

MS. ALEXIS: I was trying to figure out what are the issues that are left that we could assist the Court with and, of course, I'm sure Judge Collyer will also pipe up and ask questions throughout.

But there are three that I thought -- actually four that I thought where we could be useful in the half hour or so that's left. One is to briefly touch on, you know, your view of the merger guidelines and how even if, even if Interchange were used in there in a kind of SSNIP test under the merger guidelines and looking only at the merchants whether they, the Justice Department or Professor Ordover has approached this properly in the way that they have applied their own guidelines.

Second --

THE COURT: Why don't we just do that one, let's

start with that.

MS. ALEXIS: Okay, let's start with that one.

THE WITNESS: Okay. That's good, Your Honor, because I can remember that one.

I do not think that the merger guidelines really can be applied here. I am not saying that but --

(he's breaking up.)

Under selling tofu or you can be selling many different products, but the whole thing here is, is that it's a two-sided market and --

(lost sound.)

THE COURT: Dr. Hausman, we can't hear you, you are breaking up, so we can't get your testimony into the record.

Can you slow down just a little bit and maybe if you speak a little more specifically it will come through.

THE WITNESS: Okay. I will try again, Your Honor.

What I was saying is that I do not believe that the merger guidelines adequately can take into account the dual status or the dual roles that Interchange and Switch fees take into account.

(Connection breaking up.)

THE WITNESS: Network by close merchants and issuers. And the Switches, Interchange has to do both and this -- you are now confusing competition for getting banks with what looks like what a monopolist might otherwise be of --

THE COURT: You can only take down what you can -- Jerry, it seems to be breaking up, and I don't know if -- we're not going to get any record on this.

Maybe would it be worthwhile to try to call in again and get a clearer connection?

THE WITNESS: Yeah, what I do is, there's a number and I can call in and I'll do that right now.

THE COURT: Thank you.

THE WITNESS: I will hang up and call back.

MS. ALEXIS: I apologize, Your Honor.

(Pause.)

THE COURT: He's in Egypt.

MR. CONRATH: I suppose, Your Honor, that this should just remind us that defendant's proposed schedule when they knew their expert would be out of the country.

(Pause.)

THE COURT: That's true.

We cannot go into a conference and sit there listening to a busy signal.

MS. ALEXIS: I understand that, Your Honor, and I apologize. I think there were a couple of key points that he did want to address with you. And I don't know what the, what the answer is besides the merger guidelines which I think have been addressed to some extent.

There he merely wanted to explain to you why Visa, why

you have to and I think you already picked up on a lot of that based on his earlier report, on the importance of Visa and how it views the two markets as very integrated; i.e. signature and PIN.

THE COURT: Although I don't think that you can testify for him.

MS. ALEXIS: I know that and I am not trying to. I am just saying that was the key issue that he wanted to be able to address with you and answer your questions.

THE COURT: Well, I think that we cannot hear from the Professor this afternoon which is unfortunate, but more unfortunate because the defendants are going to have to figure out how much of his testimony they want to put into the trial record and --

MS. ALEXIS: From today?

THE COURT: No, not from today. We don't have any testimony from him today. I mean live testimony and --

MS. ALEXIS: He will be here.

THE COURT: Oh, I understand but you have to understand that you are going to be running against a clock, and the longer that you have to take for his testimony, the less time you are going to have for something else, that's all I'm saying.

MS. ALEXIS: Oh, I see, Your Honor, yes.

THE COURT: I mean, luckily I have heard from the

other experts and so a fair amount of their testimony can be sculpted for purposes of trial in a way that everybody can know that I have already heard a lot of what they have to say.

And so hopefully, we can have their testimony without having to kick everybody out of the courtroom, without having to seal the record, and they can give their opinions and the basis for their opinions and you are going to have to figure out a way to get the testimony from Professor Hausman in without that advantage. That's all I'm saying because we can't reach him.

MS. ALEXIS: Again, I apologize. I thought that the telecommunications was better than it was, at least it was working this morning.

THE COURT: Well, he could hear us on and off, but I don't think that he could participate very effectively.

Let's talk about bin tables.

Mr. Conrath, would you tell me what bin tables are?

MR. CONRATH: Perhaps we could seek someone who is a little more expert than I am.

THE COURT: All right, whomever it is that knows what bin tables are.

Oh, we'll really getting -- now we're getting to the real expert.

MR. SOVEN: Exactly. Your Honor, I'm working -- my name is Joshua Soven, and I'm from the United States and I'm

working off some incomplete information.

Bin files are bank identification numbers and it's our understanding the way the process works that what a network will do will send lists of bin files which refer to debit cards to merchant processors, and those bin files contain instructions as to whether or not that network is the priority network for the particular network at issue.

So STAR on a weekly basis will send lists of files to the various merchant processor flagging certain ranges of cards as its cards, and it's my understanding that we do not have master routing tables from First Data which is what we thought Mr. Katz, Dr. Katz was testifying about.

And if I have got it wrong, I have got it wrong.

MS. ALEXIS: Let me partner Frank Hinman who is more familiar with that.

MR. SOVEN: Sure.

MR. HINMAN: Good afternoon, Your Honor, Frank Hinman.

Let me start by saying that as to the specific analysis that Dr. Katz' associate has done in the last 48 hours I don't know what it was based on, and so I can't tell you that.

I have been involved over the course of these negotiations in trying to determine what we have and can provide and what we don't have and can't provide.

That being said, there have been others in my office who

are right on the front lines of that issue.

All I guess I can say is that I will work with counsel immediately. I doubt seriously whether there actually is something that we have now decided to use at the eleventh hour and withheld from the Government. I mean, I think that would either be --

THE COURT: Whether you have withheld it and you're using it or whether you are not using it but they haven't got it and you do and they think that they need it --

MR. HINMAN: Oh, of course, Your Honor.

THE COURT: -- do you know what bin tables are?

MR. HINMAN: Do I know what bin tables are? I have a conceptual idea.

THE COURT: Is there anyone on the phone who would from the defendants who would -- oh, we are not on the phone any more.

MR. PATTON: Your Honor, I could take a stab at -- and Mr. Hinman feel free. As I understand bin tables --

THE COURT: I don't want an explanation about what they are, the Government has given me one.

I want to know whether they exist for First Data, and then I want to know why if the Government has asked for them, it doesn't have them?

MR. HOCKETT: Your Honor, I have asked Dr. Katz to step outside and to verify with his associate what exactly it

was that she used to run the calculations.

THE COURT: That's fine, and that would be helpful.

What I want to know is does First Data have bin tables, and if so, why doesn't the Government have them?

MR. HINMAN: Your Honor, to my knowledge, there is nothing that we have that they don't have. I mean, that's all I can tell you.

To the extent that I'm mistaken about that, which I don't think that I am, if I am, all we can do is remedy that immediately and that's what we will do. But I have no basis to think that's the case.

THE COURT: Okay. So as far as you are familiar and unfortunately, you happen to be very familiar, as far as you know, everything that you have, all of the documentation that you from First Data they have?

MR. HINMAN: Absolutely.

THE COURT: Okay. I'm not sure that answers Mr. Conrath's question but it certainly means that the lawyers have produced what they have. Yes, sir.

MR. SOVEN: Yes, Your Honor, I just have one point of clarification.

It's our understanding that we do have bin files. We asked for the data in a way that would identify the conflicts, and we were told that the data did not exist.

If the Court would like a more precise explanation I can

offer Scott Thompson who is an economist in our office who can explain it more fully.

MR. THOMPSON: Your Honor --

THE COURT: Wait, wait. Do I understand that you got something in a fashion or information from Concord that you did not get from First Data? That was the suggestion.

MR. HINMAN: There are differences in what the two -- what the companies.

THE COURT: I'm sure there are.

MR. HINMAN: So yes.

MR. SOVEN: That's correct.

THE COURT: As to this issue?

MR. SOVEN: Yes.

THE COURT: It's your opinion in the Department of Justice that the information that you think that you need from First Data must exist and you can't find it?

MR. SOVEN: No, Your Honor what we are -- Dr. Katz said several things in his testimony which suggested he had information from First Data which could identify the conflicts between network routing rules. That's the information we had sought from First Data and it was our understanding from them that that data did not exist.

THE COURT: Okay. Now I understand. So it's not exactly bin tables?

EURBGS: No, it's data which indicates the conflict

between the routing instructions of the various networks.

MS. ALEXIS: If I could interject, Your Honor, and we'll double check on this point, but I think it's exactly what I said before, it's the routing instructions, there is an algorithim, it's all done by computer as to what happens when you get a notification as to whether an issuer has designated a particular network as for its primary routing.

And First Data adopted this back in the late '90s and it follows it, and those instructions have been given and so they don't, as far as I know, there is no variance, it's a computer algorithim and that's what is followed and I believe that's what Dr. Katz is relying on, but we will confirm that.

THE COURT: Is there any -- As I understand it, NYCE is willing to use any network at all?

MS. ALEXIS: First Data will use -- what First Data does with its routing and as I said, they adopted this in the late '90s is they will look to see and this is by computer, they will look to see whether an issuer has designated a particular network as its primary network when they get a transaction through that might have several bugs on it.

If there is no issuer designation then --

THE COURT: Sorry, I am interrupting you. I have a note that says every one is back on the main conference line.

MS. ALEXIS: Okay, sorry.

THE COURT: Hold on.

(Pause.)

THE COURT: In the meantime, the expert is checking with his associates to find out?

MS. ALEXIS: Yes, he is.

THE COURT: Is every one there?

THE WITNESS: Yes, I'm here, this is Jerry Hausman.

THE COURT: My goodness.

MS. ALEXIS: He actually sounds clear.

THE WITNESS: Yes, we got a fiberoptic cable this time, Your Honor. I teach telecommunications so I can tell what happened.

THE COURT: We were deep into talking about bin tables and things, and maybe we'll slow down that conversation and give you a few minutes.

Dr. Hausman, you were just saying when we were so rudely interrupted as I say that, that the analysis used by the Government confuses competition with market --

THE WITNESS: Market power.

THE COURT: Market power, thank you, thank you.

Why don't you finish your thought.

THE WITNESS: Yes. Well, what I was saying is that in a one-sided market if done correctly, the SSNIP test usually is okay. But in a two-sided market where you have both Interchange and Switch and you have to satisfy two parties, the merchants and the banks -- I am going to call the issuers the

banks, Your Honor.

THE COURT: I tried that and got corrected.

THE WITNESS: Okay, well I will not do so.

The problem is that what is actually competition which is trying to get issuers by raising the Interchange. If you only look at the other side of the market, looks like you are exercising market power, and so that's why that SSNIP test which, you know, is designed to look at only one side of the market in my view is not designed to look at two-sided markets such as we are talking about here.

THE COURT: Okay. I got that. What was the second point? Second question that you had?

MS. ALEXIS: Well, the second question I had under the merger guidelines is that Professor Ordover says that he is looking at the current price. Even if you include interchange fees and just look at the merchant side of the market, he says that he is looking at the current price of signature debit versus PIN debit and says that it's so much more expensive.

Under the merger guideline approach if you were to follow that should you be looking at the current price given the situation that, you know, that's or the conditions under which signature debit has been sold over the last many years?

THE WITNESS: No, because what happened before was that Visa and MasterCard tied their credit card to signature debit so all economic theory would say that would lead to

decreased credit card rates and increase signature debit rates.

And with the WAL MART settlement said you are not allowed to do that any more, economic theory would then say that the credit card rates are going to go up which they have already started to, MasterCard has announced they are going to raise their rates, and that signature debit is going to come down and we have already seen that happen as well.

Now the merger guidelines are very careful to make two points. The first is that you are suppose to look to the future when the merger will happen. I don't think that Professor Ordover has done that, but secondly, there's something called the cellophane fallacy which is known to antitrust economists and judges, Judge Closner talked about this a long time ago and that is that if the prices in the market are artificially distorted and are not competitive prices, the Government is suppose to come in and use competitive prices. It says that right in the merger guidelines, I don't have the section handy, Your Honor, but if someone can point you to that.

So we know that the prices have not been competitive prices, they have been distorted by this tie which is no longer going to exist and the competitive prices is as Professor Ordover I think has argued is, is that signature doesn't really have very many advantages over debit, so we expect that -- over PIN debits -- so we expect the prices under competitive

conditions to come closer together.

report and most particularly, I think I got it from your rebuttal report, which if I misunderstood you, I need your correction.

Which was that Visa because of its strength in the signature end of credit and debit was able through Interlink to force an increase in the Interchange fees to the benefit of its member banks and thereby an increase to the cost of the merchants through good old fashioned competition with the networks including the two defendants here, and that was the result of competition from Visa and not the result of any, anything else and really these parties ought to be able to merge because you need somebody with a little weight as against Visa.

THE WITNESS: Okay. I'm totally with you; however, there is an argument which I heard one of the Government lawyers make, I think it was probably Craig Conrath, saying that the question is whether prices will go up and it's not just whether you, you know, create another gorilla to contend with Visa.

So I'm completely with you and I don't think that there's really any argument that Visa has led to an increase in Interchange rates for PIN debit and has forced the networks through competition to raise their Interchange rates, and of course, that helps Visa.

But I would like to make an additional point which I don't think that has come out in the hearing. Now as you know, I didn't hear the whole hearing, but I don't think that anyone said this.

We know that there's the graph that was shown to you that STAR is going to go from its current approximately 51 percent down to my latest calculation is that was in my rebuttal report.

We know also that Interlink is going to go up by quite a amount -- quite a bit. I think there is a

But what hasn't come out in this hearing is that under

the WAL MART settlement, Interlink is allowed -- or Visa is allowed to create a new tie and the new tie is that if you take Interlink you have to take their signature debit. That has been agreed to in the WAL MART. So in other words, if you take one debit instrument which is Interlink, you are going to have to take both.

Once Visa gets up to, and I'm going use a number here which is just approximate, of _ , that's going to mean, according to Professor Ordover's argument, that it's very difficult for a merchant not to take Interlink because they're going to be on a lot of cards and again, Professor Ordover testified, I heard him say that Interlink usually goes for either a single bug or an exclusive.

Now of course, under the settlement they are not allowed to do an exclusive for I think it's two years, but you can certainly fix it up from an economic point of view that it will be in the issuer's best interest to have only a single bug in many cases. And I can explain that at trial, of course.

But once Interlink gets up to a large share which they are going to have, and there is going to be a single bug or an exclusive on a card, then it's going to be difficult for merchants not to take them.

Once merchants take them and they are also making special deals with a lot of large merchants like WAL MART -- it was in the paper this week -- then you are also going to have

to take Visa signature debit so this whole 800-pound gorilla thing is going to be re-enforced by Interlink growing and therefore requiring merchants to take signature debit as well, and it will be in Visa's best interest then to continue to increase the Interchange on Interlink, force up the networks and drive the merchant fees even closer together in the future.

THE COURT: Now do you -- I think I even follow that. Do you understand that there really isn't a switching fee in the Visa arrangements because it runs its own network or it's already --

THE WITNESS: That's not correct, Your Honor. I

So there's no separate Switch fee for merchants but they do charge the issuers a Switch fee. That's how they make their money and they do other charges as well.

And the person's name is a

THE COURT: That's for signature debit, right?

THE WITNESS: Yes. I thought that was your question, Your Honor.

THE COURT: No, I was really thinking about

Interlink.

THE WITNESS: Oh, Interlink. Interlink has a -- excuse me -- has a merchant Switch fee which they charge and then they have Interchange as well.

THE COURT: So is it, as I understood your expert report, you believe that as a practical matter, putting aside for a moment the, how the guidelines might work, as a practical matter it's impossible to look at the debit PIN -- the PIN debit market without taking into account the aggressive growth that Visa is engaged in to enlarge its position in the PIN debit market but also to contract PIN and signature debit?

THE WITNESS: That's absolutely correct, Your Honor. Would you like me to explain or --

THE COURT: Yeah.

THE WITNESS: You certainly understood it.

Yes. What's going on there is what, if you don't put in signature debit you are missing the competitive dynamic of the market. Because remember, the Government has argued that STAR has market power now from the mergers that have taken place in the past, that's right in their complaint.

So if we look at STAR and that's a form of market power, they are acting in an economically irrational manner because what they are doing is they are raising the Interchange which they don't get to keep at all, and that means that there's going to be less demand for PIN debit because demand curve

slopes downward, but at the same time, the total Switch fees which they do get to keep are going down in real terms.

So they are just, you know, shooting themselves in the foot or harming themselves and since STAR is certainly a profit maximizing enterprise, that doesn't make economic sense. And so the only way to understand that is to bring in signature debit and say what Visa is up to is trying to protect its signature debit franchise and then it's undertaking the strategy that you and I were just discussing here.

THE COURT: Okay.

THE WITNESS: Because otherwise, you just don't have an economic explanation for what is going on. I mean, it's unheard of for a firm with market power to be harming itself and lowering its price, you know, which is here the combination of the Switch fees, yet that is what the Government is arguing.

THE COURT: Okay. Thank you.

Did you have another question for the Professor? It's five after five. I know that I said 5 o'clock, but we did run into technical problems.

MS. ALEXIS: Well, there are two other issues and I will let Jerry decide for himself whether he wants to follow it.

One is whether you wanted to address the competitive affects, the two issues that Professor Ordover addressed that he had on his slides.

And then the last was efficiencies in your view of how efficiencies should be addressed.

THE COURT: Why don't you go to the efficiencies point rather than the competitive effects.

THE WITNESS: Okay. Sure. The efficiencies and I am going to call them Professor Z if I might, because I don't have his business card in front of me. If that's okay with the Court?

THE COURT: Of course.

THE WITNESS: What Professor Z said was that he thinks that, and this is just under instructions from the Justice Department lawyers, that you should only look at effects that come directly from the merger. This is when they are talking, Your Honor, about what would happen if they -- and this is incorrect.

And I actually talked about this in the paper I published in 1999 at the conference which was partly held by the Department of Justice.

I mean, what do we do mergers for -- you said this exactly right, we look at the effect of prices on consumers.

Now I told First Data and they did this, I said, you know, there may be efficiencies for things like Western Union but most merchants don't sell or buy Western Union so you shouldn't take that into account and they did not.

But what he wants to do is to get rid of processor

efficiencies. Remember you were talking about FDMS or FDC, First Data Corp. and Concord. But who pays those processing fees and who will benefit from the efficiencies?

Well, it's the same mergers -- the same merchants -- excuse me -- who use the PIN debit networks because you can't use a PIN debit network unless you can process and so it seems to me that if it's going to be, if they're going to argue that prices might go up to merchants from the merger, we want to take into account both direct and indirect effects that are going to cause prices to go down to merchants because at the end of the day we want to know are merchants going to pay more or less for PIN debit. So I think --

THE COURT: If I can interrupt.

THE WITNESS: Sure.

THE COURT: If we took into effect the efficiencies at the processor level that I think that Dr. Zmijewski --

MS. ALEXIS: Sounds right.

THE COURT: Yes, I really apologize to the doctor for slaughtering his name.

But anyway, if we take into effect the

that he attributes to processor efficiencies are you saying that that would reduce the cost of processing and so therefore, you could increase your Switch fees and the merchants wouldn't mind?

THE WITNESS: No. The merchants would like to have

the prices go down period, they don't want you to increase the Switch fees either.

And I don't think that Switch fees will go up, you know, for all of the reasons that STAR --

But no, my point is --

THE COURT: Seems to me you are going too fast, we need to change the paper for the court reporter. That's where you dropped off.

THE WITNESS: Sure. Just tell me when to start again.

THE COURT: Yeah, but you are absolutely resorting to your fast talking too.

THE WITNESS: Oh, I apologize, Your Honor.

THE COURT: No, I don't mind, but the court reporter can't get it.

Did you just hang up?

THE WITNESS: No, I am here, Your Honor.

THE COURT: Good. If you could just read the last sentence for him.

(Last sentence read by the court reporter.)

THE COURT: That's where you dropped.

THE WITNESS: Why don't I just start that sentence again.

THE COURT: All right.

THE WITNESS: Okay. So what I'm saying is that I do

not believe that the merchant fees for the network will go up for the reason that we know now that , so I don't think that this merger is going to allow that to happen, but I think that lawyers, you know, talk about arguing in the alternative.

So let me alternatively assume that the Government is correct and that the, that the merchant fees could go up, you know, that the combination of Switch plus Interchange could go up.

What I'm saying is that merchants would then pay higher fees but the efficiencies in processing which will lead to lower processing fees are an offset to that because the merchants have to pay for processing and so that will be a negative number which would offset the positive number that the Government is claiming that merchants would have to pay.

THE COURT: Okay, I understand that. I mean, I understand the argument that you are making and now I can let the lawyers just argue about whether or not I should even take that kind of offset into account, but I understand where you are coming from.

All right. It's 10 after five and you have been about the most patient witness that I have ever met or not met as the case my be.

I think that you should hang up the telephone and go talk to your wife.

THE WITNESS: Okay. Could I just ask if I have done that fine, I just want -- Ms. Alexis had one other area, but --

MS. ALEXIS: No, I think we in fact are done.

THE COURT: I think we have run out of time, we have run out of time for the day.

MS. ALEXIS: Thank you, Jerry. What time is it in Cairo?

THE WITNESS: It's 12 past 12, so I think it is time for bed.

THE COURT: I would say a drink but all right. Have a nice evening. Thank you very much.

MS. ALEXIS: Good night.

THE WITNESS: Okay, bye.

THE COURT: Is everybody else still on the phone?

MR. COX: Pennsylvania is still on.

MS. HACKER: Texas is still on.

THE COURT: More patient people. All right, let's get back to the question of bin numbers.

Did we have any response from the expert?

MR. HOCKETT: Your Honor, we couldn't get any definitive information in this interval, so we'll just have to follow up. I don't think that anything is amiss, but we'll just have to double check to make sure.

MR. CONRATH: Your Honor, I reacted simply to the fact that Dr. Katz criticized Dr. Ordover for making, using an

assumption --

THE COURT: No, no I understand.

MR. CONRATH: -- for something that we had been asking and asking for. So if it exists and we didn't get it, that's a real problem.

THE COURT: Okay. Well, let's figure that out. What he was relying on and how he reached his calculation and then we can determine whether that's actually already in the Government's hands and they didn't read it the same way or whatever. Okay.

MR. HOCKETT: Very good, Your Honor. we'll do that.

THE COURT: All right. Now are there any other matters that we needed to address? I think there is an issue of the late blooming expert but the Government was going to file something?

MR. CONRATH: Yes, I didn't think that we need to address that now, Your Honor.

THE COURT: Okay.

MR. HOCKETT: That's fine with us, Your Honor.

THE COURT: Okay. Is there anything else we need to address?

MR. CONRATH: I don't think so. I take it from what you said and I think we have been taking it this way but maybe we should clarify that the testimony of these people is basically included as if it were given at trial ultimately and

so it can be cited and whatnot?

THE COURT: Yes.

MR. CONRATH: Is that what you intended?

THE COURT: Yes, I think that's right, and I think that it's for that reason that we will need to come up with a public and private version or sealed version of the transcript.

It is probable that there are large portions of transcripts that will not need to be sealed as it turns out. My greatest interest was for purposes of what might be confidential information was the Visa competition argument that's advanced most particularly by Dr. Hausman who turns out to be in Egypt and very briefly on the telephone.

So if you could review the transcript for that purpose, that purpose as quickly as possible, you would serve all of our interests since I did seal the hearing.

MR. HOCKETT: We'll do that, Your Honor.

THE COURT: All right. And but I agree with the point that you just made, Mr. Conrath, that it will not be necessary for any of these witnesses to specifically repeat the testimony that they gave here today, and certainly not to take any time to give me their backgrounds and their expertise and all of that.

I really accept them all as clearly the experts that they are and the fact that they don't agree doesn't do anything but perhaps help me, so.

MR. CONRATH: Very well, Your Honor.

THE COURT: Okay, good. I really want to thank everybody for making the effort given the schedule and I note the difficulty of this schedule for everybody and most particularly, for the Government trying hard to put this case together. But I do want to thank you very much for taking the time to put this hearing together because it has been of material assistance to me and just understanding some of the issues that we're dealing with, and I will now take some things home with me over the weekend and have something to work on.

MR. CONRATH: We thank you for the time to make these presentations, Your Honor.

MR. HOCKETT: Defendants thank you as well.

THE COURT: Very, very valuable. Thank you all a lot. I hope you have a good weekend, travel safely. And I think we're done for the day.

The party is actually open if anyone would like to attend.

(Recess at 5:25 p.m.)

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TABLE OF CONTENTS

On behalf of the Plaintiffs	Page
Janusz Ordover	14
Mark E. Zmijewski	64
On behalf of the Defendants	
Michael Katz	96
Jerry Hausman	140

Certificate

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in wich this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Crystal M. Pilgrim, RPR

10/8/03
Date