UNITED STATES OF AMERICA, *et al.*, *Plaintiffs,* v. FIRST DATA CORPORATION, and CONCORD EFS, INC., *Defendants.*	CASE NUMBER: 1:03CV02369 (RMC)

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

Pursuant to this Court's Order of November 26, 2003, the parties hereby jointly file their proposed redacted version of the December 5, 2003 hearing, attached here as Attachment A.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

/s/

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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:

For Plaintiff United States:

Craig W. Conrath, Esquire
Joshua H. Soven, Esquire
Renata Hesse, Esquire
N. Scott Sacks, Esquire
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1 Appearances Continued

2

3 By Phone:
For Plaintiff States:
4 New York: John Ioannou, Esquire
Assistant Attorney General
5

6

7 Illinois: Livia West, Esquire
Attorney General
8

9 Pennsylvania: Benjamin L. Cox, Esquire
Joseph Betsko, Esquire
10 Deputy Attorney Generals

11

12 Texas: Janice Hacker, Esquire
Attorney General Office
13 Investigator

14

15 Washington, DC: David Blake-Thomas, Esquire
Janet Brody, Esquire
16

17

18

19 For Defendant First Data: (Present) Frank Hinman, Esquire
Christopher B. Hockett, Esquire
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1 Appearances continued:

2

3 For Defendant First Data: (By phone)
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Zora Braithwait, Esquire
4 Troy Sauro, Esquire
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14 Court Reporter:
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15 District of Columbia
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18

19

20

21

22 Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.
23

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25

1 THE COURT: Dr. Hausman, hello.

2 MR. HAUSMAN: Good afternoon, Your Honor.

3 THE COURT: All right, this is Judge Collyer. We

4 need everybody who is on the telephone call to identify

5 themselves and to identify if there's anyone else in the room

6 with them.

7 The Court has ordered this hearing sealed; therefore,

8 during the course of the hearing people cannot walk in and out

9 of the rooms in which the people on the telephone are sitting.

10 You have to keep the door closed. You have to keep other

11 people from hearing. And you have to remain -- or retain the

12 information sealed whether it's during this hearing or later.

13 Does everybody understand that?

14 UNIDENTIFIED SPEAKER: Yes, Your Honor.

15 THE COURT: All right, so could we take a poll,

16 please, as to who is in attendance?

17 MR. IOANNOU: Yes, this is John Ioannou,

18 I-O-A-N-N-O-U from the New York State Attorney General's

19 Office.

20 THE COURT: And is anyone with you, sir?

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

22 me.

23 THE COURT: Okay, anyone else?

24 MR. HAUSMAN: I am Jerry Hausman, H-A-U-S-M-A-N,

25 Professor of Economics, LIP, and there is no one in the room

1 with me.

2 THE COURT: Thank you, sir.

3 MR. BLAKE: David Blake-Thomas for the United States,

4 B-l-a-k-e hyphen T-h-o-m-a-s, I'm alone.

5 THE COURT: Where are you?

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

7 THE COURT: No, did you say you represent the United

8 States?

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

10 THE COURT: All right, where is your office?

11 MR. BLAKE-THOMAS: Washington, in Washington.

12 THE COURT: Oh, well, we needed to have you on the

13 phone. Okay, anybody else?

14 MS. WEST: Yes, Livia West from the Illinois Attorney

15 General's office. My first name is spelled L-i-v-i-a, last

16 name is W-e-s-t, and I am alone in the room.

17 THE COURT: Thank you, ma'am.

18 Thank you.

19 THE COURT: Any anyone else?

20 MS. HACKER: Janice H-a-c-k-e-r. I'm with the Texas

21 Attorney General's Office in Austin, and I'm alone in the room.

22 THE COURT: Thank you.

23 Anyone else?

24 MS. BRODY: Janet Brody. I'm with the Department of

25 Justice, it's B-r-o-d-y, and I'm alone in my office in

1 Washington, D.C.

2 THE COURT: There was one other speaker I think.

3 MR. BETSKO: Yes, my name is Joseph Betsko, I'm with

4 the Pennsylvania office of the Attorney General representing

5 the Commonwealth of Pennsylvania. Joining me in my office is

6 another Deputy Attorney General Benjamin Cox.

7 THE COURT: All right.

8 MR. BETSKO: And my last name is spelled B as in boy

9 e-t-s-k-o.

10 THE COURT: Thank you, sir.

11 MS. CREGAN: This is Nora Cregan representing First

12 Data. With me in a conference room with the door closed in San

13 Francisco are May Lee, Troy Sauro, Zora Braithwait, Todd

14 Williams and Todd Anderson and Christina Wheeler, who are all

15 attorneys.

16 THE COURT: Okay, and everybody understands -- is

17 this it? Do we have them? Good. Everybody understands the

18 rules of the road as I outlined them because the hearing is

19 sealed?

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

21 THE COURT: Thank you.

22 When we get to trial I don't know if there are going to be

23 people on the telephone for purposes of trial, but we're going

24 to have to have the telephone hookups arranged prior to the

25 time that trial is scheduled to start each day and after breaks

1 of lunch and stuff because we don't have that much time and
2 everybody is going to be operating on a chess clock and so we
3 are going to be zipping through things.
4 You don't expect to have people on the phone?
5 MR. CONRATH: No, Your Honor, I don't think so.
6 MR. HOCKETT: Neither do we, Your Honor.
7 MS. ALEXIS: I think it will be the States Attorney
8 General that expects to have somebody on the phone.
9 THE COURT: Yeah, the states may and if so, we'll
10 make those arrangements. I just want every one to understand
11 that because of the time constraints we are going to be dealing
12 with, we certainly hope that anybody who, particularly the
13 parties, who want to participate by phone are able to do that,
14 but we may get going and wait for -- not wait for the phone
15 hookup to be arranged if that's what is necessary at any given
16 break, okay. Not to be rude to anybody, but that's the way we
17 are going to have to do it.
18 All right. We're ready to begin. I think the ball is
19 in your court, Mr. Conrath.
20 MR. CONRATH: All right. I thought maybe we would
21 each just tell you the order that we are going to proceed and
22 there's one just preliminary note that I would like to tell you
23 we received late on December 3rd, a report from an additional,
24 with an additional expert by defendants named Professor Myers.
25 I understand that they don't propose to put him forward

1 today. He was not identified on either of the witness lists
2 and we think it is severely prejudicial to us and we will be
3 filing a motion in that regard probably later today, Your
4 Honor.
5 MS. ALEXIS: Yes, Your Honor, we'll be prepared to
6 argue that, Your Honor.
7 THE COURT: Okay, that's fine. And I understand why
8 you will and I understand everybody has to recognize that the
9 people on the telephone can only hear you if you speak into the
10 microphone. So please, did anybody, did everybody on the phone
11 hear Mr. Conrath's statements?
12 UNIDENTIFIED SPEAKER: Yes.
13 UNIDENTIFIED SPEAKER: Yes, Your Honor.
14 THE COURT: Mr. Hausman -- Dr. Hausman, I'm most
15 concerned about you.
16 DR. HAUSMAN: Your Honor, I'm can hear fine, thank
17 you.
18 THE COURT: Okay.
19 MR. CONRATH: Your Honor, we have two experts we're
20 presenting in order today. First Dr. Janusz Ordover who is an
21 expert economist, and second, Dr. Mark Zmijewski who is the
22 accounting and business expertise.
23 First of those Dr. Ordover will go first.
24 MS. ALEXIS: Your Honor, it's Gerri Alexis. We will
25 have Professor Katz from the University of California in

1 California who will go first and then, of course, Professor
2 Hausman who will be heard over the phone who will go after him.
3 THE COURT: Okay, thank you.
4 MR. CONRATH: May I introduce the lawyer who will be
5 making the presentation with Dr. Ordover, that's Arnold
6 Celnicker.
7 THE COURT: Good afternoon, sir.
8 MR. CELNICKER: Good afternoon.
9 THE COURT: Would you spell your last name for me?
10 MR. CELNICKER: Yes, C-E-L-N-I-C-K-E-R, Celnicker.
11 THE COURT: Thank you.
12 MR. CELNICKER: I think Mr. Conrath exaggerated when
13 he said I would be making the presentation with Dr. Ordover.
14 The way we have this planned with the Court's approval is
15 we have put together a power point presentation. In other
16 words, we have not treated this as a question and answer
17 testimony type situation.
18 THE COURT: That's absolutely right. We don't, I can
19 promise you I have actually read Professor Ordover, Dr.
20 Ordover's expert witness reports, I think I have read three
21 haven't I?
22 So I, although I need the final one, all you did was add
23 to the first one?
24 MR. CELNICKER: What we did, Your Honor, was add to
25 the first one as a supplemental section based on data that was

1 obtained post-complaint.

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

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

4 report.

5 THE COURT: That much I have not read, but I have

6 read everything else.

7 MR. CELNICKER: Yeah, my condolences. Hopefully by

8 doing it orally, and I don't mean any disrespect. These are

9 tough readings to me at least.

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

11 MR. CELNICKER: What we intend to do, Your Honor is,

12 is to as I said go through a power point presentation which

13 will after introducing a little bit about the witness, and a

14 short introduction to the PIN debit and how it functions, then

15 get into the meat of it which is first talking about the

16 concept of product market and how that concept is defined in

17 the antitrust and why economist look at it a certain way and

18 these as you see, from reading the papers there are some

19 differences on how to do that.

20 So we intend to spend as much time as necessary and as you

21 allow to try to explain why we think the concept is what we say

22 it is.

23 THE COURT: Right.

24 MR. CELNICKER: Then apply that concept to this

25 particular case.

1 THE COURT: Right.

2 MR. CELNICKER: After that, we are going to turn to

3 what we view as the second big issue which is the competitive

4 affects of the merger.

5 THE COURT: Right.

6 MR. CELNICKER: And talk about the manner in which we

7 feel this merger will lessen competition and may lead to higher

8 prices to merchants. Those two subjects, product market

9 definition and competitor affects, is the heart of our

10 presentation.

11 Time permitting we may say a few words about issues of

12 entry and efficiencies in particular on efficiences. Dr.

13 Ordover's input is limited, but he does provide some

14 perspective on some of the concepts, economic concepts and

15 underpinning. He has taken no part in performing any

16 efficiency exercise per se.

17 THE COURT: Okay, okay.

18 MR. CELNICKER: So with that introduction if I can,

19 do you want the witness to sit in the witness box?

20 THE COURT: That would be great, if he would come sit

21 in the witness seat and be sworn.

22 MR. PATTON: Your Honor, could I make one preliminary

23 objection because I don't want to interrupt Professor Ordover

24 once he gets started?

25 THE COURT: All right.

1 MR. PATTON: We have a preliminary objection, this
2 should only take a minute.
3 Your Honor, under the federal rules as you know, it's
4 okay for an expert to rely on hearsay under Rule 703 of the
5 Federal Rules of Evidence as a foundation or as a basis for
6 forming expert opinions.
7 You may also remember that early on in this case we had
8 a dispute about a number of declarations whether those would be
9 admissible or not, the Government had collected a series of
10 declarations. I think initially had intended to come in and at
11 least prove up their case or case in chief in whole or in part
12 through these hearsay statements. Your Honor made it quite
13 clear that no, we'll have depositions or have live testimony,
14 we won't have witness declarations.
15 In fact, as it's turned out, much of the foundation for
16 Professor Ordover's testimony are these same witness
17 declarations, and you have read them and portions of them, they
18 are quoted throughout Professor Ordover's reports.
19 Here is our objection. It is not that it is
20 inappropriate for Professor Ordover to rely on hearsay
21 statements as a basis for expert opinion.
22 Our belief with all due respect to Professor Ordover is
23 he goes over the line and does something that the case law is
24 quite clear he can't do which is that he becomes simply in
25 large part a vessel for communicating inadmissible hearsay and

1 injecting it into the record.
2 Here is the distinction that we try to draw. If an
3 expert --
4 THE COURT: Wait, wait. I understand the point you
5 are making and understanding that it's already 20, 25 after one
6 and we are on a short clock here. What is it that you would
7 have me do today?
8 MR. PATTON: Just be alert to the objection and to
9 the fact that much of what I think we're going to hear and
10 that's in the expert reports is not admissible evidence and in
11 fact, as I think you'll see when we actually see the proof,
12 there's substantial reliability questions about these
13 declarations that form the basis for his expert opinions.
14 THE COURT: I got that.
15 MR. PATTON: Thanks.
16 MR. CONRATH: Your Honor, I had spoken with both
17 counsel for both defendants before this hearing, and no one
18 mentioned to me that this issue was going to be brought up so
19 I'm kind of disappointed to hear it this way.
20 But let me just say it's perfectly appropriate for an
21 expert to use hearsay in coming to his opinion and also more to
22 the point by the time we have the trial as many of these
23 declarants as we're able to fit into this very abbreviated and
24 difficult schedule will be coming and testifying live and
25 letting the Court hear their testimony directly.

1 THE COURT: Okay.
2 We can now swear the witness.
3 (GOVERNMENT WITNESS, JANUSZ ORDOVER, SWORN.)
4 MR. CELNICKER: Your Honor, I am going to, if I
5 might, hand out a hard copy of the power point presentation and
6 then technology willing it's also going to appear on the
7 screens that are present throughout the court.
8 THE COURT: I have it right here. I have my copy
9 here.
10 MR. CELNICKER: Is your screen monitor working?
11 THE WITNESS: It is.
12 MR. CONRATH: Your Honor, I think I'll assume the
13 position of the proverbial potted plant in this proceeding
14 largely and --
15 THE COURT: Okay. Dr. Ordover, I don't think that I
16 need you to spend time on your qualifications. I am impressed
17 enough by your qualifications and I don't think that anybody is
18 challenging your expertise or at least your ability to testify
19 as an expert.
20 My question about material reviewed which is -- I may be
21 rushing ahead --
22 THE WITNESS: Page 2 or 3 on this?
23 THE COURT: Page 3 on this.
24 THE WITNESS: Yes.
25 THE COURT: My only question as to this is to ask you

1 whether this is the kinds of materials that an expert of your
2 kind would customarily rely upon?
3 THE WITNESS: The answer is well first of all, let me
4 say that skipping over my qualifications, the easiest part of
5 what I have to do today, so yes, I think this is unquestionably
6 what I normally would look at and rely upon or consider in any
7 antitrust case including a merger investigation of this sort.
8 THE COURT: Perhaps for purposes of Dr. Hausman at
9 the other end of the line, you could just read the bullets on
10 the material reviewed slide which is page 3, and then you can
11 go on to the rest of your presentation.
12 THE WITNESS: Thank you. Yes, I will be happy to do
13 that. I am --
14 MS. ALEXIS: Excuse me, Your Honor.
15 We could expedite this. This is similar to the same
16 thing that was sent to us last night by e-mail to Professor
17 Hausman.
18 THE COURT: Oh, Dr. Hausman, you have this?
19 MS. ALEXIS: This is the power point.
20 DR. HAUSMAN: Yes, I do, Your Honor.
21 THE COURT: All right, then we can skip page 3 and
22 just go to page 4.
23 THE WITNESS: Thank you, I will do that. In fact, I
24 was considering borrowing slides from Michael Katz, but I also
25 need to borrow cards from Mr. Celnicker that will help me

1 illustrate as I go along here today.

2 This is yet another case involving these pieces of

3 plastic called credit cards, debit cards. And we are going to

4 be talking a lot about them so I just wanted to say a few words

5 about what it is that this case focuses on as opposed to many

6 other matters involving this electronic transfer market.

7 What this case involves in my view is the state of

8 competition what I'll define as a PIN debit market or market

9 for PIN debit network services, and I'll try to explain in my

10 view why that transaction is likely to lessen competition in

11 what I consider to be a properly defined market.

12 In order to do that I do have to go through some of the

13 technicalities of that so-called market, of the market because

14 it differs in certain interesting or important ways from things

15 that perhaps we are a little bit more familiar.

16 So if I am going too slow or I am going too fast, of

17 course, it's your court and please interrupt me as often as you

18 wish. Maybe we can have Michael sit on the other side and have

19 an exchange. I have to interject for one second because Jerry

20 Hausman is in Cairo.

21 And some years ago, he and I were on an opposing side of

22 the case in a trial and they have something called a hot tub

23 hearing. And when I was getting ready for it, my lawyers told

24 me I was going to be in the hot tub with Jerry Hausman. I was

25 rather concerned about that fact but I realized that it's not

1 really what I thought it meant. But anyway. Now Jerry is off
2 to Cairo so that will be avoided here as well.
3 But in any case, I think that I want to go through some
4 things which are not controversial but I think they are sort of
5 foundational and important to lay out so that we can all use
6 the same language. So this is really an introduction to basic
7 of the PIN debit transactions and PIN debit network services.
8 The basic idea is that when you come to the store you
9 can pull out one of these cards and use them to pay for the
10 merchandise that you purchase whether it's a groceries or
11 refrigerator or whatever it is, it can be paid for with one of
12 these cards.
13 These cards are not the same thing as credit cards even
14 though when you pay with a credit card you may be paying the
15 balance at the end of the billing period and have no balances
16 to carry forward. You may be called a transactor in such a
17 case as opposed to a revolver.
18 But here the difference between debit cards in general
19 and credit cards is that when you pay with debit the balance of
20 your purchase gets deducted more or less immediately depending
21 on the type of debit that you use. So if you use one type of
22 debit that is called signature debit, there's a slight delay,
23 there's some delay for use, maybe two days. It's now down
24 perhaps to a day between the time that your purchase and the
25 amount of your purchase will be deducted from your bank account

1 with the bank that issued one of these cards.

2 So my card was issued by what use to be called First

3 Union. It's no longer and each one of these cards will have on

4 the back of them -- well, on the front of it, it will have a

5 Visa or MasterCard sign, a logo. It's going to say something

6 like check card or it will say master money and those basically

7 are logos for the signature side of the debit business.

8 In other words, when you come in and you swipe your card

9 and if you choose to pay or if you do pay with the debit card

10 and use it as a signature card, it will go over a MasterCard or

11 Visa network and it will be treated as a signature payment, and

12 in order to complete that payment you have to sign the little

13 sheet of paper that comes out of the cash register the same way

14 as when you do that if you pay with your credit card. It's

15 exactly the same in that respect.

16 However, if you choose to pay using the same credit

17 card, same card for your transaction using PIN instead of

18 signing, you will enter your code, the same code that you have

19 for your ATM transactions generally.

20 Now, that seems to be just the basics, but we need to go

21 a little bit more in order to understand what it is that is on

22 these cards.

23 We already talked about the check card which is the

24 signature brand name for Visa, but I want to flip the card and

25 there's all kinds of things on the other side. Those things on

1 the other side are called bugs which you probably read in my
2 declaration and Professor Katz' and Professor Hausman's
3 declarations, talking about bugs as if it were some kind of
4 zoological case but it's not.
5 It's a case about debit and particularly PIN debit.
6 Each one of the bugs denotes a network. On my card I'm
7 actually well endowed in networks through my bank because I do
8 have three PIN debits networks; one is called Interlink which
9 is actually also on my Visa.
10 Then I have NYCE which is owned by one of the parties,
11 First Data, and then I have STAR. I also have PLUS here which
12 is an ATM. So I have three PIN debit bugs on my card.
13 So when I swipe this card, as long as my merchant
14 accepts any one of these networks, my transaction will be
15 billed to my account instanteously because this is a PIN debit
16 transaction which basically applies that in the second that I
17 finish the transaction, my account will be debited.
18 If I choose at the same time I can ask for some money
19 back or cash back. In other words, if I say to the clerk
20 please, I would like to get $50 cash from this transaction,
21 that's what they will hand out to me, and that will be part of
22 my transaction also instanteously debited from my account. So
23 it's no different in that respect from going to a ATM and
24 withdrawing $50.
25 If I show you for one second Mr. Celnicker's card you

1 will notice only that he has an ATM back here but only one PIN
2 debit network which is STAR. So now if he swipes his card at
3 the check out point of service, point of sale, the transaction
4 will not go through unless the merchant takes the STAR network
5 PIN debit, okay.
6 As we'll see as we talk a little bit about it, it
7 matters in my assessment of this transaction as to what happens
8 to the result of this deal to the distribution of cards which
9 have more than one bug that is called multi-bug cards and what
10 happens in particular to the number of cards that only have the
11 bugs of STAR and NYCE, okay.
12 THE COURT: Okay.
13 THE WITNESS: Anyway, so let me just complete the
14 story and focus on this diagram. As I said, Michael Katz,
15 Professor Katz has a much nicer looking one, but so be it.
16 We talk about these PIN debit transaction as being
17 taking place in a two-sided market. Again, you must have read
18 about that in my declaration and Hausman's, Katz' declaration.
19 Most of it may appear that every transaction has two
20 sides to it because there's a buyer and there's a seller. But
21 what differentiates the PIN debit transactions -- Can you hit
22 the, sir -- from the regular two side what you may think or we
23 all may think as being a two-sided transaction with the buyer
24 and the seller and you will find that in this transaction
25 there's an actor in between.

1 The actor in between is the PIN debit network or it
2 would be signature debit network or it would be a credit card
3 network.
4 So in order to connect the merchant with the cardholder,
5 we need to have the network in between which spans the
6 cardholder's checking account, direct debit account and the
7 merchant which is why in the phenomenic literature there has
8 evolved over the past years people talk about the PIN debit
9 markets to be two-sided because they involve this need to
10 coordinate with the merchant side, with the card issuer side,
11 it is that coordination that enables the customer and as the
12 cardholder to complete the transaction in the first place.
13 You immediately can see that having the player in the
14 middle creates economic complications that may not exist when
15 we are dealing with, I use all of these examples of tofu and
16 chicken any frozen peas. I don't know, maybe I was hungry when
17 I wrote this, but be that as it may, what I'm thinking about
18 here is the network standing the two sides and that network has
19 to in the way act and I think again, this is a central feature
20 of what I'm going to talk about.
21 It has to somehow balance the interests of the merchant
22 and the interests of the bank that issues these cards.
23 THE COURT: I actually really read --
24 THE WITNESS: Oh.
25 THE COURT: -- what you submitted.

1 THE WITNESS: Oh, my God.

2 THE COURT: I actually understand that. I'm ahead of

3 you on this because you have already made it clear.

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

5 THE COURT: You were more specific and more clear in

6 your written documentation than maybe you are giving yourself

7 credit for.

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

9 if I may.

10 THE COURT: What I really want to talk about is the

11 guidelines analysis of mergers. I understand, I mean, there's

12 a really critical difference between your view as to how to

13 analyze the relevant market and Dr. Hausman's. And I think

14 that possibly is because you very strictly are following the

15 analysis that the guidelines recommend; that is, your, the

16 smallest possible market kind of thing.

17 Whereas Dr. Hausman is saying no, you have to look at

18 the larger picture because what is happening in the real world

19 isn't reflected in the small monopolist analysis that you were

20 using.

21 So I understand the concepts on page 6, but talk to me

22 about the hypothetical manopolist and whether or not that is

23 actually the only way that one can define the relevant market

24 or whether there aren't alternatives.

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

1 previously been an antitrust lawyer, so is this it? Is this
2 the only way to do it?
3 THE WITNESS: Well, the answer is there's always more
4 ways than one to skin a cat, but I think that the approach that
5 I advocate is in fact not removed from the realities of the
6 market place and what I want to --
7 THE COURT: Well, I'm sure you would say that.
8 THE WITNESS: Yes.
9 THE COURT: I'm just drawing the distinction between
10 which is a rather crude way of distinguishing the way you were
11 approaching and the way Dr. Hausman was approaching.
12 THE WITNESS: Yes, I think that in my view the proper
13 place to start, I don't think that there's to many ifs and buts
14 about that, is the test that has been developed in the merger
15 guidelines. It's over 10 years or 12 years old, versions of it
16 was available in the earlier versions of the guidelines.
17 I believe that the approach that I advocated here which
18 is sensitive to day-to-day market conditions and in fact, is
19 designed to capture these day-to-day conditions is the most
20 effective way of approaching the question of whether or not the
21 products that are those supplied by the two parties compete
22 what is the market in which these two products compete.
23 Obviously, there's a lot of evidence that one can bring
24 to bear on the question as to whether or not this SSNIP, the
25 small but significant increase in price, nontransitory increase

1 in price will in fact be implemented would be profitable to
2 this hypothetical manopolist, and this is where the evidence
3 that is of the sort that is in some of the portions of the
4 Professor Hausman's report and my report and Professor Katz'
5 report, that's where it all comes in.
6 I think there were many, many mistakes made in the way
7 the evidence brought in to answer the question what's the
8 relevant market. But I don't ignore that information. In
9 fact, I put it in together with whatever information I have in
10 order to ask the fundamental question.
11 What would happen if this hypothetical manopolist were
12 in fact to increase the price? Would it be profitable to do so
13 by five or 10 percent and the answer to that depends on all
14 kinds of issues.
15 THE COURT: Well, the question in the sense is if
16 there are as you said two sides to the market, can even the
17 hypothetical manopolist increase the price to merchants without
18 worrying about the Interchange price to the banks?
19 THE WITNESS: Well, I think the answer is because of
20 the two-sided nature of the market, this hypothetical
21 monopolist has to understand what will happen on the issuer
22 side.
23 THE COURT: Right.
24 THE WITNESS: If the price of the merchant is
25 increased, okay. And I go through that in some detail but it

1 much depends and what it is that the hypothetical monopolist
2 will attempt to do is a price increase to the merchants, okay.
3 For example, if the monopolist simply increases those
4 switch fees, then in terms of the per transaction revenue, the
5 issuer is left totally indifferent because the issuer only
6 collects the Interchange minus the Switch fee it pays.
7 THE COURT: Well, it's not quite indifferent because
8 you have to assume that at some point the merchant pays both.
9 The merchant pays the Interchange fee and the Switch fee.
10 THE WITNESS: But it only pays its own Switch fee.
11 It doesn't pay for the Switch fee that the issuer pays for.
12 THE COURT: Okay. But the merchant essentially pays
13 a sum for use of the network that is both the merchant's Switch
14 fee and the Interchange fee for the bank, right?
15 THE WITNESS: No, the merchant pays the Switch fee.
16 THE COURT: Right.
17 THE WITNESS: That it pays through the network like
18 say five cents a transaction, and it pays the Interchange which
19 flows through its entirety to the, to the issuer.
20 THE COURT: Right. To the bank.
21 THE WITNESS: To the bank or financial institution.
22 THE COURT: So if you add five cents for, we'll say
23 five cents for it's a nice round number and --
24 THE WITNESS: That's by the way a hundred percent
25 increase in the Switch fee so that's more than a SSNIP.

1 THE COURT: I thought five cents sounded like a lot
2 of money.
3 THE WITNESS: It is a lot of money if you multiply it
4 by a lot of transactions.
5 THE COURT: We'll use five cents because I am feeble,
6 five cents for the Switch fee and forty cents for the
7 Interchange fee for the bank.
8 THE WITNESS: That's true.
9 THE COURT: That's forty-five cents for each
10 transaction.
11 THE WITNESS: Yes.
12 THE COURT: One has to assume that there is a cap on
13 that; that is, whether the, the increase is in the Switch fee
14 or in the Interchange fee, the merchant isn't really going to
15 care.
16 I mean, the merchant doesn't care whether he is spending
17 45 cents and it gets forty and five or whether he pays 45 cents
18 and it gets split 35 and 10, but he is going to care if he has
19 to pay 47 cents, right?
20 THE WITNESS: Absolutely, so that's why we -- I'm
21 sorry --
22 THE COURT: My point is therefore, that the bank
23 can't actually be totally untouched by the increase in Switch
24 fees because if the Switch fee increases from five to seven
25 cents, the pressure from the merchant may effect the bank's

1 Interchange fee.

2 THE WITNESS: The pressure from the merchant, to the

3 extent that the merchant can exercise any pressure which is

4 what this case is about, the ability to actually keep those

5 fees down to some level that would exist.

6 THE COURT: Oh, well, I didn't think that the issue

7 was merchants exercising pressure.

8 Is that what you are thinking?

9 THE WITNESS: Well, I thought --

10 THE COURT: Are the merchants and consumers that we

11 are worried about?

12 THE WITNESS: The merchants -- well, we are going

13 through a lot of steps at the same time, so maybe I can try to

14 unpack it.

15 THE COURT: Right.

16 THE WITNESS: I think when you start asking me all of

17 these difficult questions, the question that we started with

18 was whether or not the issuer which is the bank --

19 THE COURT: Right.

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

21 happens --

22 THE COURT: To the Switch fee.

23 THE WITNESS: -- to the Switch fee.

24 I said that the answer is as long as the Interchange is

25 unaffected, as long as the Interchange that it receives it gets

1 the same amount per transaction and therefore, from their
2 perspective it will be indifferent on a per transaction basis,
3 okay.
4 Then we said oh, okay, well what happens if the Switch
5 fee goes up by a lot and that requires the Interchange to go
6 down.
7 THE COURT: Right.
8 THE WITNESS: That's the next step was that
9 particular exercise.
10 THE COURT: On the concept that there's only so much
11 money that a merchant will pay.
12 THE WITNESS: Well, this goes precisely to the
13 question of the effects of that SSNIP. If the merchant is
14 totally on the margin between willing to pay the extra two and
15 a half cents, okay, or not, then if you try to impose the
16 SSNIP, and I think you have got to the right answer very very
17 effectively, if the merchant says look, you go up by two and a
18 half cents whether it's an Interchange increase of two and a
19 half cents or whether it is a switch fee increase of two and a
20 half cents, I don't care. I pay two and a half cents, it's my
21 money and I have to pay for it and that will be and translated
22 in some way in the prices to consumers.
23 If that happens, then obviously the answer would be that
24 the effect of that SSNIP which we have say is five cents or
25 whatever it is, would be to drive away transactions from the

1 hypothetical monopolist that is imposing the increase and
2 therefore rendering the increase unprofitable.
3 Now we are asking a question, and I have been trying to
4 answer that using whatever, all of the evidence that I have at
5 my disposal, whether or not in this case where we are starting
6 right now, the 10 percent increase in let's say starting with a
7 merchant Switch fee would dissuade the merchant in such numbers
8 from accepting PIN debit or it would cause them to steer away
9 from PIN debit to other means of payment that the increase that
10 we are contemplating would in fact be unprofitable for the
11 hypothetical firm and the answer to that I believe is that it
12 would not be, that that would be a profitable thing to do for
13 that hypothetical monopolist.
14 THE COURT: So if what I was sort of postulating was
15 that there was only so much money available for each
16 transaction that a merchant would pay and let's say it's 45
17 cents, so if the network wants to improve it's profitability in
18 any way by increasing its Switch fee, it's going to have to
19 persuade the issuer to decrease the Interchange fee because my
20 theory is that the merchant will only pay 45 cents.
21 THE WITNESS: If your theory is that we are all of
22 limits of willingness to pay, then the answer is yes. If you
23 want to increase the amount collected in Switch fees, we'll
24 have to pay less from the, you have to pay less to the issuers
25 because there is only 45 cents to be divided between the two

1 parties.

2 THE COURT: And it's your concept that that is not so

3 and that the networks can add at least 10 percent to the Switch

4 fees without having defections, material defections from the

5 merchants?

6 THE WITNESS: I could not have stated my conclusions

7 better than that. It is a clear statement of exactly where I

8 have come out at looking at this market.

9 In fact, I think I have made a statement that is even

10 stronger in my the declarations saying that even if one were to

11 increase not only just the Switch fee but the Switch fee plus

12 the Interchange by the five to 10 percent amount which the one

13 we are contemplating --

14 THE COURT: Right.

15 THE WITNESS: -- there would not be enough defections

16 of merchants or lets make it less simple, more simple, just

17 simply a reduction of diminution in the number of PIN debit

18 transactions, then that would make such an increase

19 unprofitable for the, this hypothetical monopolist.

20 Now I want to make sure that it's clear that when we are

21 talking about a hypothetical monopolist imposing that SSNIP, we

22 are not necessarily saying that this is what is going to happen

23 post-transaction.

24 THE COURT: Oh, no, no, no.

25 THE WITNESS: I want to make sure.

1 THE COURT: You are using that for purposes of
2 defining the market?
3 THE WITNESS: Exactly, Your Honor.
4 THE COURT: I'm not quite sure -- no, but I
5 understand that you are using it for defining the market.
6 But since Dr. Katz and Dr. Hausman say, well, but this
7 market this year, last year, next year is being so impacted by
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1 But setting that aside, maybe something down here
2 percentage points, I still have to ask the question whether or
3 not the effect of these strategies has been to create a market
4 that comprises both signature debits and that and PIN debit,
5 even despite all of these increases, and despite all of these
6 purchases of market share, is there a gap still?
7 And I have here a slide, slide 12 that tends to, that
8 summarizes the evidence or statements in the declarations that
9 were put into this case.
10 MR. PATTON: Your Honor, I'm going to be very brief
11 because I must preserve our record on this.
12 This is precisely the kind of thing we object to. This
13 is based a hundred percent on hearsay and as the evidence at
14 trial will show, for those witnesses on here who have actually
15 been deposed in many cases it's extraordinarily unreliable and
16 inaccurate hearsay.
17 So this goes way beyond the pale of Section 703 and the
18 distinction that I was trying to raise before is it is
19 appropriate for an expert to say --
20 THE COURT: No, no, I got it. I understand your
21 argument.
22 MR. PATTON: Okay, all right.
23 THE COURT: I am not as smart as I like to pretend,
24 but once I understand it -- I really don't need you to belabor
25 the point.

1 MR. PATTON: I know you are smart, Judge.
2 THE COURT: -- once I understand I don't need you to
3 belabor the point.
4 Yes, sir.
5 MR. CONRATH: I think I will just repeat what I said
6 This is the kind of thing of which experts rely and we will be
7 bringing many of those witnesses for Your Honor to hear during
8 the trial.
9 THE COURT: Okay.
10 THE WITNESS: So getting back to whatever the
11 probative value of this evidence is is for you to decide.
12 The fact of the matter is, and I think that the press
13 that Professor Katz relies on and Professor Hausman cite to a
14 great extent as well, everyone tends to agree that on the whole
15 the PIN debit transactions are substantially cheaper still than
16 the transactions run over signature networks, signature debit
17 networks.
18 THE COURT: And that's because the Interchange fees
19 are different. The Switch fees aren't the same.
20 THE WITNESS: There's some, there's some. The sum
21 total of fees to the merchant whether you are looking at it,
22 which is what you should be looking at. When one looks at the
23 total sum of the Switch fees and Interchange or whatever
24 merchant discounts are on the signature side versus the PIN
25 debit side, that cost is to a merchant.

1 THE COURT: I don't dispute that. I was trying to
2 make that point earlier, but right now we're dealing with
3 the -- I have forgotten -- somebody called this the payment
4 market or something like that. Industry I meant, payment
5 industry or something. The question is does the network -- who
6 runs the network on which signature debit operates, Visa?
7 THE WITNESS: Visa or MasterCard.
8 THE COURT: They are the only ones, right?
9 THE WITNESS: That's right, Visa with eighty percent
10 and MasterCard was twenty percent.
11 THE COURT: And now Visa is Interlink and by using
12 its resources to buy business away from, at least from STAR, we
13 don't know how they are doing vis-a-vis First Data.
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21 THE COURT: If I were a merchant and I had to decide
22 whether I were willing, and I understand the issue about how
23 much power merchants really can exercise here, but if I were a
24 merchant and could make the determination as to whether or not
25 I were willing to accept a PIN debit card or a signature debit

1 card, and the signature debit card cost more, so you are saying
2 that I would be inclined to go with the PIN debit card?
3 THE WITNESS: Absolutely, and you see a lot of that
4 happening and in fact, on yesterday we read about WAL MART
5 saying they are going to discontinue or threaten to discontinue
6 the MasterCard signature debit.
7 THE COURT: Right. My question is what's the Switch
8 fee part of a signature debit charge to the merchant?
9 THE WITNESS: I don't recall. I don't think that
10 there are any Switch fees there.
11 THE COURT: So all of the money for the cost of a
12 signature debit card, it's all a quote Interchange fee of sorts
13 that goes directly to the bank?
14 THE WITNESS: That's -- I have to clear by
15 Mr. Celnicker.
16 MR. CELNICKER: Your Honor, may I just impose?
17 The signature card networks both of them, Visa or
18 MasterCard are run by bank associations. They are set up
19 slightly different from a legal perspective, but just
20 associations of banks so that the money --
21 THE COURT: That's what Visa is.
22 MR. CELNICKER: That's what I'm saying, Your Honor;
23 therefore, the money that flows from the merchant to the
24 association and then it's in some way distributed to the member
25 banks, that middle entity, the Visa or MasterCard is not in the

1 same position as an independent network.

2 THE COURT: I understand.

3 MR. CELNICKER: Therefore, the concepts don't follow

4 through directly of Switch and Interchange because it's all one

5 pot of money that is going to the banks that are members of

6 Visa and MasterCard with some left over to run the association.

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5 THE COURT: So with Visa such a hot competitor in the
6 market and finding viable business growing and everything, why
7 do you conclude that it's anti-competitive for First Data and
8 Concord to merge?
9 I mean, I can understand where the Department of Justice
10 started when this was announced and Concord had 51 percent of
11 the PIN debit market and First Data had 10 or 12.
12 THE WITNESS: Around 12 percent, yeah.
13 THE COURT: And Interlink was sort of down there with
14 the small guys, but that's not, doesn't seem to be the current
15 facts or at least that doesn't seem to be the facts that will
16 be in existence in 18 months.
17 So why are you concerned and your conclusion is that
18 there is an anti-competitive result if these two merge?
19 THE WITNESS: I'm sorry. First of all, two things:
20 One, we don't know what the market share is, assuming
21 that that's where we are focusing on which I'm not, will be 18
22 months down the road.
23 There have been losses obviously by STAR, and that does
24 not mean that STAR confronted with these losses will not try to
25 turn around and get market share for itself.

1 But I want to get away from market shares being the, the
2 all and end all of the analysis. In fact, I go on and talk
3 about many of the other things like the bugs and so forth so I
4 don't want to get into that right now. I want to answer your
5 question.
6 The reason I still believe that this transaction raises
7 competitive concerns is because it does remove a network as an
8 alternative to the networks that will, relative to what the
9 world will look like if this transaction were to come --
10 THE COURT: What would be your reaction then if Visa
11 didn't maintain Interlink as a separate network, one that is
12 distinguishable and you can see there it's a network, absorb it
13 into the Visa charge card so-called network or the signature
14 debit network, wouldn't you then be worried that there's the
15 loss of a network?
16 I mean, what I don't understand is why Visa isn't bigger
17 for your analysis? It seems to me that Visa is out there
18 gobbling up the world and nobody is paying attention.
19 THE WITNESS: I think just, I think a lot of people
20 are paying attention to what Visa is doing, including the
21 parties to the transaction and the merchants.
22 THE COURT: The defendants who are the ones who are
23 giving --
24 THE WITNESS: Yes, and I am paying attention to that
25 as well because I was trying to in answering your question

1 whether it is true first of all, whether the fact that Visa is
2 doing whatever it is doing, whatever its incentives are,
3 doesn't mean that somehow the relevant market has already now
4 become PIN debit and signature debit and become a bigger market
5 than lets say PULSE.
6 So I said despite all of these actions by Visa to gobble
7 up business or to buy market share that this has not led to a
8 circumstance whereby this hypothetical monopolist test, that is
9 the relevant test I believe still, would fail.
10 In other words, whatever Visa has accomplished and
11 whatever it is likely to accomplish over the next 18 months or
12 two years, whatever the horizon one may want to look at, it's
13 not going to be resulting in a complete, in a substantial
14 further compression of the, of the rates as between the
15 signature and the PIN such that the test would be failed.
16 It still does not mean that just because the firms
17 failed the test then the market is what it is, it does not mean
18 that there's a competitive concern. I may make it clear that
19 one has to then go on and try to examine whether there will be
20 a competitive concern.
21 THE COURT: Okay, but why don't we go to that part
22 because I think you have -- I don't want to take all of your
23 time.
24 THE WITNESS: No, it's whatever is good for you to
25 understand my views is whichever going to be.

1 THE COURT: Well, I could spend a lot of time with
2 just the experts and the lawyers, you know.
3 THE WITNESS: There is the fun part.
4 THE COURT: Go to your discussion of your concerns of
5 the potential anti-competitive effect if in fact this merger
6 were to take place.
7 THE WITNESS: All right. So this is on slide 16 if I
8 may.
9 Well, my analysis focuses on two things really, others,
10 there are others that one can worry about. But my assessment
11 of the effects of the transaction focuses on the cost to the
12 merchants of dropping the network post-merger, and also focuses
13 on the cost to STAR/NYCE, the combined network, from the
14 merchants' least cost routing. And I will take those --
15 THE COURT: This is your bug issue?
16 THE WITNESS: One is the bug issue and the other one
17 is the multi writing issue which also obviously interplays with
18 the bugs because it's only in those circumstances when there
19 are more than one bug on the card that the potential for this
20 least matter even arises.
21 So where I have come to analyze in connection with this
22 merger is a question whether or not as a result of this
23 transaction the merchants would somehow be disadvantaged
24 vis-a-vis the networks in their continuous efforts to try to
25 keep the cost to themselves down which is what they are

1 interested in because these costs will have to be passed onto
2 customers which is you and I.
3 THE COURT: Who is the consumer we are suppose to be
4 worried about in this, in this environment? Is it the merchant
5 as the consumer of the PIN debit signature, debit other credit
6 arrangements or is the ultimate private consumer?
7 THE WITNESS: Well, I think to the extent that we are
8 worrying about the effects of that transaction on the cost to
9 the PIN debit customer which is the merchant, if that cost goes
10 up, then it's also going to follow that the cost to the
11 customers will have to go up at least in reflection of the
12 elevation of the cost.
13 So the merchant is in a way a weigh station between the
14 PIN debit network and the person who avails himself or herself
15 of the debit, actually anyone who walks into the store.
16 Because under the current environment as we have in the United
17 States unless you go to a store that does not accept cards, the
18 price that you pay is independent of whether you pay with a
19 credit card, whether you pay with signature debit, whether you
20 pay with PIN debit and so on.
21 You get, you are charged a dollar for a can of peas
22 irrespective. So that effect of the elevation, of course, will
23 be felt by all people irrespective of how they pay, but the
24 initial focus on my assessment is then on the ability of
25 merchants to resist super competitive pricing but increase of

1 pricing to them following as a result of this transaction.
2 THE COURT: Was there an increase in consumer cost
3 when Visa managed to push through an increase in the
4 Interchange fees?
5 THE WITNESS: You want to -- Mr. Celnicker, you want
6 to speak to her?
7 MR. CELNICKER:
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11 I do think that Dr. Ordover's answer at least from where
12 I am sitting might not have been the clearest.
13 The merchant is the customer in the context of the
14 competitive effects analysis. It's the merchant's costs that
15 are going up.
16 THE COURT: Right.
17 MR. CELNICKER:
18 MR. CELNICKER: The consumer like you and I come into
19 play in two ways. The first is that if Safeway is paying more
20 in PIN debit services, it may raise the price of peas a penny
21 and we pay more. And that was in effect who ultimately pays
22 the bill.
23 THE COURT: Right.
24 MR. CELNICKER: But it doesn't mean that you and I
25 are the customer in that sense, we're not, you know, it's being

1 passed on to us to pay.

2 THE COURT: No, I understand that. Okay.

3 MR. CELNICKER:

4 MR. CELNICKER: But the consumer of the network

5 services is the merchant, that's one point.

6 THE COURT: Okay.

7 MR. CELNICKER:

8 MR. CELNICKER: Just one related point. You and I

9 come into the picture in one second way. And that is the

10 merchant takes our desires into account to how we want to pay

11 in deciding whether to accept or turn off PIN debit or

12 signature debit or any other form of payment.

13 So we do feed in a sense to the merchant's incentives in

14 what it's going to do. But the customer as it's being used in

15 these reports --

16 THE COURT: Are really the merchant.

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

18 the merchants.

19 THE COURT: Are the merchants.

20 MR. CELNICKER: So you had a pending question which

21 is whether or not --

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

23 satisfied.

24 Okay. So then you said post-merger -- I'm on page 18 --

25 Post-merger of all PIN debit transactions would

1 involve cards bugged with only STAR, only NYCE or both. Which
2 means pre-merger, all PIN debit transactions involve cards. I
3 mean, this is a statement that's true today?
4 THE WITNESS: That is true. Well, that is based --
5 sorry.
6 THE COURT: Is that that's, that's cards,
7 not transactions?
8 THE WITNESS: No. This is based on PIN debit
9 transactions. So when the numbers of cards or people have
10 cards which they don't use and therefore to focus on the number
11 of actual cards, we just have no way of knowing.
12 THE COURT: Right.
13 THE WITNESS: The only thing that we know is what
14 happens with these cards.
15 THE COURT: Okay, but is this statement true today
16 that of all PIN debit transactions involve cards
17 bugged with only STAR, only NYCE or both?
18 THE WITNESS: That is based on the data that we have.
19 The answer is yes because we have received the data that
20 enabled us to calculate those shares and they are on page 19,
21 and the thing to focus on I think is the actual increase in
22 what happens to single bug percentages of all transactions as a
23 result of the combining of STAR and NYCE.
24 So what you will notice is that not simply adding that
25 , but in fact, what

1 happens is that there is this added increment in the percentage
2 of card transactions that are going to be as of right now based
3 on the data sets that we have available to us right now will in
4 fact be on cards that only have these two bugs.
5 As I said earlier, it is that single buggedness -- I
6 don't know if there is a word -- but let's say it is.
7 THE COURT: But I'm following you.
8 THE WITNESS: Single buggedness that is the factor
9 that is relevant to the merchant in how to react to an attempt
10 by a network to raise the fees to that merchant and each
11 merchant will obviously react in possibly some different ways.
12 Some may decide I'm going to turn off the network, we say
13 that's highly unlikely given what the fees are now.
14 THE COURT: Except that right now if you are looking
15 at these, this is a question of transactions.
16 If you look at all transactions right now, I thought
17 STAR as of March last year anyway, STAR had something like
18 51 percent of all transactions.
19 THE WITNESS: That is true, but what this says is
20 that it had of transactions on cards that had more than
21 one bug and in particular, had transactions on I think, I don't
22 recall the exact number, but I think something like -- you can
23 see that of STAR's transactions were on cards that
24 it only had their bug which is like the Celnicker card, this
25 one. The rest of the transactions were on cards that had more

1 than one bug.

2 THE COURT: But if [illegible] of its transactions,

3 STAR's transactions were on cards that had only its bug?

4 THE WITNESS: Yep.

5 THE COURT: And after the merger, [illegible] of the

6 cards would be on STAR and NYCE and no other, [illegible]

7 THE WITNESS: But that's because I hate to say this

8 to the Judge, but the Judge can be wrong sometimes.

9 THE COURT: No, that's fine.

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

11 skipping.

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

13 THE WITNESS: Well, yeah, who knows?

14 THE COURT: What am I skipping?

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

16 another.

17 MS. ALEXIS: I am sorry to interrupt. I heard

18 dropping off. I just wanted to make sure that Professor Hausman

19 do a technical check and make sure he is still there.

20 THE COURT: Is Dr. Hausman still there?

21 DR. HAUSMAN: Yes, I am, Your Honor, although you

22 seem to be fading in and out somewhat. If you, Professor

23 Ordover, if you would speak in the microphone.

24 THE COURT: I'm sorry. After I told everybody else

25 to speak in the microphone, I have been moving around, and I

1 apologize. I will try to be better.

2 THE WITNESS: I have been too.

3 THE COURT: All right. I see your point.

4 I moved from your own transactions to all transactions.

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

6 column.

7 THE COURT: Right.

8 THE WITNESS: You would notice and that's an

9 important number that of combined transactions of

10 STAR and NYCE post-merger would in fact be under single-bug.

11 THE COURT: And this depends on, this

12 depends on a study of transactions from what period of time?

13 THE WITNESS: Actually, there's one week in the fall

14 of 2003. This is data that we got from First Data Merchant

15 Services which is a processor.

16 THE COURT: Right.

17 THE WITNESS: And we were able to in fact extract

18 from the data set information about transactions. So were you

19 to interpret this number, if I can go for one sentence is to

20 say if I am a merchant and I see, say I could see a customer

21 walking in with the card that has -- all I can see is the,

22 this, I don't see anything else. I see the STAR, Jerry, I'm

23 showing the STAR logo, just in case you are wondering what's

24 happening here.

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

1 say there's a chance almost that this
2 card will have no other bugs other than those of the merged
3 firm and, therefore, from the merchant's standpoint, I believe
4 that creates a serious concern as to whether or not that
5 merchant can in fact act to disconnect the network.
6 THE COURT: No --
7 THE WITNESS: That's the point.
8 THE COURT: -- and that follows quite logically.
9 Let me ask you, that , would that be less if
10 you took into effect the predations of -- I use predations.
11 THE WITNESS: Oh, Section 2.
12 THE COURT: That's the wrong group, wrong audience to
13 use this term.
14 The competition from Visa, does that take into effect
15 the loss of business that STAR projects or is that -- or that's
16 with all of the business that STAR -- it's with their
17 51 percent of the market?
18 THE WITNESS: Your Honor, this is based on the
19 transactions that run over FDMS and therefore, it reflects the
20 current state of --
21 THE COURT: Yeah.
22 THE WITNESS: -- dissimination of cards and
23 distribution of bugs on these cards.
24 THE COURT: And is it fair to assume that let's say
25 we'll just pick Bank of America as an example, if Visa has

1 managed to persuade Bank of America because of their sterling
2 sales pitch to move from STAR to Visa Interlink, would you
3 assume that the STAR bug would be removed from those cards or
4 would Interlink issue a card that contained STAR bug as well as
5 the Interlink bug?
6 THE WITNESS: Well, the Bank of America is already in
7 here because that occurred before October, October or November
8 of 2003 which is where this data is from.
9 THE COURT: Okay.
10 THE WITNESS: So the answer depends very much on what
11 Interlink or Visa can convince the bank of doing. What they
12 can convince the bank of doing is to get rid of any and all
13 bugs for debit other than Interlink or they could say look, we
14 want to be a primary bug. We want all of the transactions to
15 be steered over us unless there's some merchant that doesn't
16 happen to accept it, so you as a bank have the opportunity to
17 have a secondary bug and it could be STAR or PULSE or NYCE or
18 anyone.
19 So the answer to that question is that very much depends
20 on what their financial institution will feel comfortable with.
21 If the financial institution says to itself well gee, I'm going
22 to go with Interlink, but Interlink does not have enough
23 merchant coverage, that's a very risky proposition to me which
24 is why when Visa or Interlink was negotiating with Bank of
25 America, they were very much concerned about the very fact and

1 tried to get the merchants to sign up with them as well as at
2 the same time, you know, the chicken and the egg problem that
3 we also talk about.
4 So you need to get both sides of the market in order to
5 become a convincing proposition to both the bank and to the
6 merchant to have acceptance and you have to have distribution,
7 and you have to pay in some ways for both.
8 THE COURT: Okay.
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12 THE COURT: That's very helpful thank you. And what
13 was the other one?
14 THE WITNESS: The other one is perhaps more complex
15 in some ways because it talks about the idea of something that
16 is referred to as least cost routing. So if you go to slide 20
17 that's sort of the beginning of a fairly complex discussion of
18 that context concept. So I'm going to try to boil it down to
19 some slogans because we are running late, I presume.
20 THE COURT: I understand about lease cost routing and
21 your point is that given an option, a merchant will choose the
22 lesser cost and they wouldn't have that option if these two
23 merged.
24 THE WITNESS: The range of the options will be
25 removed if there is a transaction that previously could have

1 been least cost routed between NYCE and STAR, but following the
2 merger that option will no longer exist. So the merchant will
3 now have to route it to NYCE/STAR or you know if the merchant
4 is willing to disobey all of the rules --
5 THE COURT: Hello, does anybody know where the sound
6 comes from?
7 Dr. Hausman are you still there?
8 (No response.)
9 THE COURT: No.
10 Is everyone gone?
11 MR. IOANNOU: No, this is John Ioannou, New York,
12 still here. I think we lost everyone, Your Honor.
13 UNIDENTIFIED SPEAKER: We're still here in San
14 Francisco, Your Honor.
15 THE COURT: Okay, thank you.
16 Did Dr. Hausman call in or did we call him?
17 UNIDENTIFIED SPEAKER: The operator called him and we
18 had a deal that he would call back to our office and we would
19 get him back on.
20 MS. ALEXIS: Sounds like my partner has taken care of
21 that.
22 THE COURT: So you will expect if you hear from him
23 if he gets dropped and then you'll figure out how to add him
24 again?
25 UNIDENTIFIED SPEAKER: Yes, that's our plan.

1 THE COURT: Can you turn to 23 and 24 and tell me
2 what these are, explain these two.
3 THE WITNESS: We have two charts to try to illustrate
4 the issues related to least cost routing.
5 What these try to depict is the opportunities for
6 least-cost routing by first focusing on the number of
7 transactions that are in so-called priority conflicts. Because
8 I argue unless there is a priority conflict, the merchant may
9 be reluctant to least-cost
10 route or at least be in the process of being reluctant because
11 there are often fines and all kinds of penalties that could be
12 imposed on the processor that does not route according to the
13 rule.
14 So when there's a priority conflict there's an opportunity
15 to route to the least cost network at least that's when I say
16 such opportunity arises that is not arising in the other
17 setting.
18 So when you look at the two out most columns they have
19 Xs the first, the third row has Xs in STAR and the NYCE column.
20 What it says is that on those transactions where there's both
21 STAR and NYCE, there's a conflict between STAR and NYCE with
22 both STAR and NYCE wanting to be routed too, okay. And the
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1 study where both STAR and NYCE are claiming priority.
2 Now what this says is that following the transaction and
3 that particular when you add this all up the number of this
4 priority conflicts between STAR and NYCE turns out to be
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9 THE WITNESS: Well those are the transactions under
10 which both STAR and NYCE bugs are present, but for some obscure
11 reason somebody forgot because neither of them claim priority,
12 okay. So that's a small number.
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17 So what we are saying at least that looking for the
18 study period that we have on FDMS and Concord the numbers
19 potentially conflicting transactions between STAR and NYCE as
20 , okay. And we say that as a result of
21 the transaction if that the merger, if that merger takes place
22 these conflicts will be resolved, will no longer enable the
23 merchant to have the ability to least-cost route because
24 presumably STAR and NYCE will figure out how to avoid being
25 arbitraged against.

1 Either they will simply remove one of these bugs away from
2 the card or it doesn't have to be removed from the card
3 definitely, but remove one of the networks or lineup the prices
4 so that there will be no problem that way, or they will simply
5 put in information into the processors computers which says
6 that if you see this kind of thing happening you always have to
7 route to STAR and NYCE will not object and STAR will not
8 object. So that is lost.
9 And if you look at the next table which is probably even
10 more incomprehensible. We are now looking at total STAR and
11 NYCE transaction over the study period which I guess is quite
12 cumbersome than the other one. And we are trying to ask
13 ourselves what is the diminution in the total transactions in
14 conflict as a result of the merger.
15 So whereas previously we just looked at the two sets of
16 the conflict in the STAR and NYCE. We are now trying to scale
17 it relative to the overall volume of transactions during the
18 study period, and say and I conclude that the merger will
19 reduce the percentage of these transactions conflict on the
20 combined network by which is the right hand number
21 okay. So that's the bottom line.
22 In sum, when it comes to the least-cost routing we
23 acknowledge that this is something that is open to merchants.
24 It's open to merchants that are obviously willing to violate
25 the rules, but in some since that is already in the mix.

1 We are now looking at diminution and the ability to
2 least-cost route as a result of transactions, we say that there
3 is a visible reduction in the number of such transactions that
4 can be used to compete between the two networks against each
5 other.
6 THE COURT: But in terms of the two concerns that you
7 have expressed as to the anticompetitive effect of a merger,
8 would I properly conclude that the first, that is the
9 difficulty of getting out of the, getting out of the market
10 would be more or greater concern to you than the second since
11 the second is a little harder to predict?
12 I mean the second depends on STAR and NYCE actually
13 coordinating their cost structure and being similar instead of
14 operating as separate parts of the First Data or I don't know
15 who is going to First Data is acquiring STAR, of the First Data
16 corporate hiearchy where there are two different businesses in
17 competition with each other.
18 THE WITNESS: I think that my view again I'm just
19 opining here based on what I know. The effect of the
20 transaction will be for them to coordinate how they put in the
21 priority rules into the system. So they know what their
22 relative costs are. They know what their cost of effectuating
23 the transaction. They know what the cost is to the merchant,
24 so they know which way the merchant would like to go. All of
25 that is known to them more or less.

1 I would think that and based on historical facts we know
2 that these networks when they merge they do resolve these
3 issues that come from the overlap of the --
4 THE COURT: Right.
5 THE WITNESS: -- of routing rules.
6 THE COURT: Right.
7 THE WITNESS: So I would think if anything they can
8 accomplish, they can figure out how not to compete against each
9 other unless they think that it is a way to incentivise (sic)
10 the managers of both. I think that that's probably a tertiary
11 issue for them at this point.
12 So I again would think that the first concern relating
13 to the ability of the merchant to disconnect as relates to the
14 single-buggedness, a lot of people in the industry because of
15 their view as expressed in the press and in depositions and
16 declarations that this is almost the only thing they have in
17 their quiver as a way of trying to limit these increases that
18 have been taking place.
19 THE COURT: Okay, thank you sir.
20 MR. CELNICKER: I'm not going to stand up here and
21 testify, but can I throw one softball question that I think --
22 THE COURT: Yeah.
23 MR. CELNICKER: -- goes back to a point that is
24 important.
25 THE COURT: One softball question.

1 MR. CELNICKER: One softball question.
2 We were talking earlier about Visa and its incentives and
3 how it plays into the analysis.
4 THE COURT: Yes.
5 MR. CELNICKER: So in that context if the merger goes
6 through and the merged entity raised its price to merchants
7 which is our fear, what would we expect Visa to do given its
8 incentives?
9 THE WITNESS: That's a hard ball. But the answer is
10 I think clear that Visa given especially the set of questions
11 we had from the Judge, from you, Your Honor, would have very
12 limited interest in trying to act as a maverick competitor that
13 would keep these fees down.
14 We already agreed to some extent that their interest is in
15 fact to raise the fees or to act in the way that will make
16 these fees go up. So if somebody is taking the leadership and
17 in fact raising the fees and therefore moving first to the
18 merchants, I think they would be very happy to piggy back on
19 that given the kind of incentive that you describe to that
20 alleged gorilla. I don't think that they would like the
21 characterization.
22 THE COURT: I'm sure they wouldn't except that it
23 really recognizes their great success in the market with the
24 signature check card which I do understand is an entirely
25 different animal, but does give them enormous resources.

1 THE WITNESS: It does, well the fact of the matter
2 yes it gives them enormous resources because they are able in
3 some ways not only to tax the banks that benefit from their
4 program such as those that receive these subventions, but also
5 the ones that don't which have to pay into the association in
6 order to generate the funds --
7 THE COURT: Right.
8 THE WITNESS: -- that are being disbursed.
9 So when you ask me about the Switch fees and so on the
10 signature side Visa acts as a non-profit association what
11 basically means that they get to spend as much as the
12 association figures out they need to and, therefore, that's the
13 way to balance the books, but the notion of what is profit and
14 what's not in this context is somewhat relaxed concept, let me
15 put it this way.
16 THE COURT: And presumably if they were to make
17 significantly more money than they needed to operate that would
18 be returned to their member banks as, I don't know,
19 distribution I guess is the term because I don't know if they
20 hold shares in Visa or what.
21 THE WITNESS: I'm not, I'm not privy at this point to
22 their financial arrangements. My understanding since they are
23 a non-profit association they have to do what it is that will
24 maintain their status.
25 THE COURT: Yes.

1 THE WITNESS: So they can return it in a variety of
2 ways. One of which they return it by paying for share to these
3 banks, that's the way it comes out.
4 THE COURT: Right, okay, thank you sir.
5 THE WITNESS: Thank you ma'am.
6 THE COURT: This is not at all to suggest that
7 Professor Ordover has said everything that he could possibly
8 say on the subject, but we are running out of time. So thank
9 you for the education and the assistance.
10 MR. CONRATH: Your Honor, I'm more or less in the
11 role of an MC today and introducing the next act which would
12 will be Dr. Zmijewski and Scott Sacks will be the lawyer in
13 respect to that. And I think a little bit in the role of an MC
14 while things are being set up providing a little entertaining
15 moment or something I'll offer two thoughts.
16 THE COURT: All right.
17 MR. CONRATH: First relates to the question of
18 whether companies under the same ownership can be thought of to
19 compete with one another. I think that's a, which kind of came
20 up in a little in the discussion.
21 I think one can go back to the Supreme Court in a way
22 address that in the 1904 in the Northern Securities case in
23 which two competing railroads were pulled under joint ownership
24 and tried to defend on the grounds that well, even though we
25 have the same owners we're going to compete with each other and

1 the Court said that's not a good defense under the antitrust
2 laws.
3 THE COURT: I'll grant you that on easy, that's a
4 softball.
5 MR. CONRATH: Thought I'd do a softball with a case
6 cite attached to it.
7 And the second that I would just put out there is that
8 we all talk often about someone becoming a strong competitor
9 and we think of that often in the context of will they be in,
10 will they be profitable in a stock market, will the company
11 grow and stuff. The second question that breeds that with
12 antitrust law is and will consumers benefit; that is, and will
13 prices be kept down. That's the context in which strong
14 competitor arguments have to be made under the antitrust laws.
15 THE COURT: Thank you.
16 MR. CONRATH: With that Mr. Sacks.
17 MS. ALEXIS: May we do a technical check again?
18 THE COURT: Dr. Hausman are you there?
19 No, sorry.
20 All right, we need you to stand so that you can be sworn
21 in sir.
22 (PLAINTIFF WITNESS, MARK E. ZMIJEWSKI, SWORN.)
23 MR. SACKS: Your Honor, I'm Scott Sacks for the
24 United States. I'm going to mostly stay in the same botanical
25 garden my colleague Mr. Celnicker was in.

1 First, I would like to know if I could hand up a copy of a
2 very short slide deck?
3 THE COURT: Yes.
4 MR. SACKS: Professor Zmijewski we're going to have
5 him turn from over here as Dr. Zmijewski goes through his
6 presentation.
7 THE COURT: All right, Doctor if I could ask you to
8 do me a favor?
9 THE WITNESS: Of course.
10 THE COURT: Could you state your name about three
11 times so I can write it down and get the phonics of it and then
12 maybe I won't injure it. I know how to spell it.
13 THE WITNESS: May I give you my business card which
14 also has a phonetic pronunciation. I have had this problem
15 before.
16 THE COURT: Za-nef-ski.
17 THE WITNESS: Zme-Yev-ski.
18 THE COURT: Can you tell us whose talking?
19 Who is on the telephone talking please?
20 (No response.)
21 THE COURT: Who is on the telephone?
22 MR. BLAKE-THOMAS: I'm still here Your Honor, David
23 Blake-Thomas.
24 THE COURT: Anybody else?
25 MR. IOANNOU: This is John Ioannou from the New York

1 District Generals office.
2 THE COURT: Who is the woman speaking?
3 MS. BRODY: This is Janet Brody at the Department of
4 Justice.
5 THE COURT: Was there anyone with you in your office?
6 THE WITNESS: No Your Honor.
7 THE COURT: Well we just heard a woman's voice
8 speaking, who was that?
9 MS. BRODY: I was not speaking.
10 MR. COX: Pennsylvania is still on the line as well,
11 but there's no one else in the room right now.
12 UNIDENTIFIED SPEAKER: San Francisco is still here, but
13 we are on mute.
14 UNIDENTIFIED SPEAKER: Illinois is here and we're on
15 mute too.
16 THE COURT: Well someone was just speaking and you
17 would do us all a favor if you didn't. That's not to be rude,
18 but we just can't here ourselves. Thank you, sorry.
19 (Pause, reporter changed paper)
20 THE COURT: Dr. Hausman, have you joined us yet?
21 (No response.)
22 THE COURT: All right, sir. Oh, I'm sorry. I don't
23 need to know your background.
24 THE WITNESS: Okay.
25 THE COURT: I've got that.

1 THE WITNESS: Thank you.
2 THE COURT: With your report and everything.
3 And your expertise and your background which is all
4 somewhat intimidating. So your first opinion is that there's
5 insufficient documentation to reproduce calculations of alleged
6 efficiencies?
7 THE WITNESS: That's correct, Your Honor.
8 THE COURT: Do the parties anticipate that there is
9 more documentation to come or have we reached the end of the
10 production of documentation?
11 MR. HOCKETT: Your Honor, I think that with possibly
12 one small exception Concord has additional documents that it
13 may be producing that the bulk of it has been produced.
14 However, I believe Dr. Zmijewski indicates in his report that
15 he may have further opinions depending on further review of the
16 documents.
17 THE COURT: Well, but as of today your conclusion is
18 that it is not possible to reproduce the calculations of the
19 alleged efficiencies?
20 THE WITNESS: Correct.
21 THE COURT: If you cannot reproduce those
22 calculations, you would conclude that they're not dependable;
23 is that fair?
24 THE WITNESS: Yes, Your Honor, I would not rely on
25 them.

1 THE COURT: You would not rely on them.
2 All right. We'll move on. We'll allow somebody if they
3 want to question you on those issues, but for the moment I
4 think I understand your conclusion anyway.
5 Now this, the reasonable documentation, reasonable
6 factual foundation, reasonable methodologies and reasonable
7 analysis. I remember your expert opinion tying itself to those
8 foundational concepts. Is it your opinion --
9 Did someone just come in or off the phone?
10 (Response indiscernible)
11 THE COURT: I'm sorry, could the person who was just
12 speaking speak again.
13 THE WITNESS: Yes, it's Jerry Hausman Your Honor. I
14 was disconnected and just was reconnected.
15 THE COURT: We're glad to have you. Thank you.
16 MR. HAUSMAN: Thank you.
17 THE COURT: Is it the lack of reasonable
18 documentation is that the most important missing ingredient
19 here?
20 THE WITNESS: Well at this point without
21 documentation I can't completely judge whether or not they use
22 sufficient facts or whether or not they use reasonable
23 methodologies because I don't have documentation to review
24 that.
25 THE COURT: What would you need that's missing, what

1 do you think is missing?

2 THE WITNESS: This is a very large analysis. From my

3 understanding they have had more than a hundred people working

4 more than six months trying to calculate these numbers. So

5 there's a lot of calculations at least I would expect a lot of

6 calculations. And in the past, what I have seen is a summary

7 number that's backed up by another spread sheet into computer

8 terms with another calculation and each one of those numbers

9 has another spread sheet and there's this big pyramid of spread

10 sheets and when you have assumptions, assumptions have

11 documents underneath them that each document explains how an

12 assumption came to be.

13 And that's what I was expecting to see. I was expecting to

14 get a box of documents or notebooks for each synergies and

15 that's not what I received.

16 THE COURT: What did you receive?

17 THE WITNESS: Access to a computer data base where I

18 believe both parties keep their documents and then through a

19 deposition by executives at the companies. We asked, the

20 lawyers asked questions and they gave some indication of some

21 type of analyses that were conducted, but they did not point us

22 to specific documents.

23 They gave names of people who might have kept documents on

24 this data base, but we looked for those people and looked in

25 their document section and didn't find the documents.

1 THE COURT: And so there's no -- excuse me, Dr.
2 Hausman, there is no presentation or submission that's been
3 made to the Government that you know of that says I think it's
4 around million-dollars that we're talking about right in
5 efficiencies?
6 THE WITNESS: In total yes.
7 THE COURT: Yes. There's no document or
8 documentations to show how they came to those numbers?
9 THE WITNESS: No, no, that's, there's a summary
10 spread sheet.
11 THE COURT: Okay.
12 THE WITNESS: I'll call it a spread sheet if I may
13 and beneath that there are multiple line items and for some of
14 those beneath that there's even another set of line items.
15 It's pretty much a set of accounts from a department and
16 then somebody made a decision that here's an expense that's
17 ongoing and here's an expense that's not ongoing, and here is a
18 notation that
19 and there are notations. And
20 where's all of the documentation behind that, there is where
21 the documentation stops I believe. At least to the best of my
22 knowledge, Your Honor.
23 MR. SACKS: Excuse me, Your Honor, if I might put a
24 question this might be helpful.
25 THE COURT: Yes.

1 MR. SACKS: Professor Zmijewski could you sort of
2 explain since your analysis is no small measure based on not
3 finding things, exactly how you went about trying to find them
4 and what resources and what efforts you went to to try and get
5 to that?
6 THE WITNESS: Okay, I have one slide, oh I don't see
7 it here. What page was that?
8 Page five Your Honor. So if you look at page five, Your
9 Honor, this is a list of documents that I looked at. There's
10 65 boxes in the Department of Justice. I had a team of people
11 two other PhDs in accounting, as well as MBA students and other
12 people at our consulting firm Chicago Partners, everybody was
13 going after documents, getting documents sent to Chicago,
14 people going to D.C. People getting on the data base in the
15 one, two, three, four, fifth bullet point down describes that
16 data base; electronic documents produced at a company this is a
17 separate third party and it has custodians.
18 That's how they keep track of the documents and the
19 custodians, there's a couple integration data base and
20 integration team that were topic oriented, so we looked there
21 first. Didn't find this detail and then there are individual
22 names so we started looking through individual names and again
23 didn't find the detail that I described.
24 THE COURT: There are a number of separate areas in
25 which the defendants project savings.

1 THE WITNESS: Yes, Your Honor.
2 THE COURT: Let's talk first about one of the
3 . Is there anywhere that you found that I identified the
4 nature of the positions that would be redundant in the event of
5 a merger?
6 THE WITNESS: No.
7 THE COURT: So you don't know which ?
8 THE WITNESS: Correct.
9 THE COURT: You don't know whether we're talking
10 about managers, executives, or clerks?
11 THE WITNESS: Correct.
12 THE COURT: Do we have a sum of money that's attached
13 to it?
14 THE WITNESS: Yes.
15 THE COURT: Is there any offsetting sum of money to
16 reach that that would show any separation payments or anything
17 like that that were part of --
18 THE WITNESS: There's another section that you call
19 total cost which is the total cost of implementing integration
20 and they would be in --
21 THE COURT: That would be in there?
22 THE WITNESS: -- that calculation.
23 THE COURT: Now when you're looking for these things
24 assuming for the present question that there's actually
25 documentation that you would be looking at, for purposes of

1 evaluating efficiencies, are you evaluating efficiencies after
2 the merger has completed its full integration or more
3 immediately?
4 I mean if the parties for instance we have two huge
5 databases here, two huge networks. Let's assume that Dr.
6 Ordover is right and that the only sensible thing is to in some
7 fashion merge those and if they want to do that it might be a
8 very complicated thing, it might take a year and a half before
9 it can get done.
10 When you look at efficiencies do you look at efficiencies
11 three months out, six months out, two years out; what's it
12 you're looking at?
13 THE WITNESS: I was looking at their documents and
14 the efficiency I was looking at were based on their documents.
15 And for the most part, for the most part there was a ramp up.
16 I call it a ramp up until
17 million-dollar.
18 THE COURT: From the integration period if you will
19 you let them define?
20 THE WITNESS: Yes.
21 THE COURT: Okay, so for the and it seemed
22 to me as I recall although I don't have your expert report
23 right here, it's closer to you than me. The as I
24 recall there was a significant savings anticipated with the
25 reduction in personnel. I mean that was a large part of the

1 million wasn't it?

2 THE WITNESS: Correct, I gave you for a

3 line item in the department that we found in the document

4 somewhere. There are many of those notations.

5 THE COURT: So it's many more than ?

6 THE WITNESS: Yes, many more than that was

7 for one line item and one document that we found, that was just

8 for a small piece of the merger. I don't know the number of

9 people. I don't think that there's enough documentation so

10 that I could calculate the number for the entire integration.

11 THE COURT: Is there any one of the -- what were the

12 areas; one was personnel -- do you have it in the outline here?

13 Can you remember what they were?

14 THE WITNESS: They were by department, Your Honor, or

15 by area. So there was a set by merchant.

16 THE COURT: He's looking at his report for those

17 people who are on the phone.

18 (Pause.)

19 MR. SACKS: I could be helpful, Your Honor, might be

20 easiest to go through it and not by item such as personnel or

21 the like, but by the functional categories they divided them

22 into merchant.

23 THE COURT: Right.

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

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

1 and the question was whether there was the support of the kind
2 that you would be looking for any of those?
3 THE WITNESS: No Your Honor.
4 THE COURT: Any of those areas?
5 THE WITNESS: No, Your Honor, other than what I just
6 described.
7 THE COURT: So for your purposes and I assume you
8 have done these kinds of analyses before?
9 THE WITNESS: Yes Your Honor.
10 THE COURT: For your purposes you can't tell at all
11 whether the efficiencies will occur?
12 THE WITNESS: I can't find foundation for those
13 efficiencies that are claimed, yes.
14 THE COURT: Okay, we better get into some trade
15 secrets here or we'll be in trouble with the press.
16 MR. SACKS: Are you okay Dr. Zmijewski?
17 THE WITNESS: Yes, I'm fine. Just warm at the
18 moment.
19 THE COURT: You can turn that out.
20 THE WITNESS: It's all right. If you don't mind a
21 little perspiration.
22 THE COURT: I don't mind. Did you have other
23 specific questions that you wanted to ask?
24 The essence of the testimony is that I can't really give
25 you any testimony because I have not gotten any documentation

1 on which I might opine?

2 MR. SACKS: That would be the theme of his expert

3 report to be sure that there isn't any foundation.

4 I think it might be useful, I don't want to unduly take

5 the Court's time here, if Dr. Zmijewski could perhaps elaborate

6 some more on the types of documentation he would expect to see.

7 The types of documentation he has seen in other context when he

8 was looking to try and find with his staff on this and that he

9 didn't see to support the calculations or estimates that the

10 defendants made. That's not a softball, but I do think it's

11 relevant.

12 THE COURT: Okay.

13 THE WITNESS: It's a softball.

14 It's very similar to what I just described, it's

15 schedule after schedule and every calculation has input, some

16 of those inputs are fact so that you go to the documents for

17 facts; some of those inputs are assumptions so you try to find

18 the source of the assumption and then one would expect for an

19 assumption. If it's a major assumption, there's an analysis

20 that supports that particular assumption.

21 THE COURT: What if the merger of these two companies

22 the whole basis of the efficiencies is then to be able to argue

23 that there won't be a cost increase to consumers right?

24 THE WITNESS: Correct.

25 THE COURT: And there may actually if they're

1 sufficient deficiencies there may actually be a deduction in
2 cost to the consumer?
3 THE WITNESS: That's my understanding of the report,
4 other expert reports yes.
5 THE COURT: That's the way they're trying to go?
6 THE WITNESS: Yes.
7 THE COURT: If the evidence in support of the alleged
8 efficiencies, to use your term, is not there then we're left
9 with the question of whether or not what, that there's just no
10 evidence to support that there would be a reduction in cost for
11 the ultimate consumer. No evidence on which you would opine
12 that they're right or wrong?
13 THE WITNESS: With respect to the alleged
14 efficiencies that's correct, Your Honor.
15 THE COURT: Now if they produced a witness to the
16 efficiencies I'm not, I think Dr. Katz is the witness for the
17 efficiencies isn't he? Who is the witness for the
18 efficiencies?
19 MR. SACKS: Your Honor we had depositions of 30(B)(6)
20 witnesses as recently as this week, that information has just
21 recently been made available. Professor Zmijewski and some of
22 it certainly is in his expert report. There was one principal
23 30(B)(6) witness designated by each defendant to explain the
24 efficiencies of the transaction from that defendants
25 perspective.

1 THE COURT: And is your testimony today cognizant of
2 what those people testified to or is that new information that
3 haven't yet had an opportunity to evaluate?
4 THE WITNESS: As of Monday, there were people deposed
5 since Monday, but as of Monday of this week everything has been
6 incorporated.
7 THE COURT: When were the 30(B)(6) people deposed?
8 MR. SACKS: They were deposed last week and as early as
9 the beginning of this week.
10 THE COURT: Well my question is since Monday?
11 MR. SACKS: Monday I believe was Adam Coyle who is a
12 30(B)(6) designee with respect to the Nysok (phonetic)
13 deposition.
14 THE COURT: Well let me ask --
15 MR. SACKS: Excuse me, Tuesday was the deposition of
16 Mr. Scott Betts who is an executive in charge of the
17 integration effort. He's the senior executive. He was just
18 deposed on Tuesday.
19 MR. HOCKETT: May I say something, Your Honor, since
20 these are our witnesses?
21 THE COURT: Yes.
22 MR. HOCKETT: The 30(B)(6) witness's depositions on
23 this issue were complete accept for Adam Coyle's deposition on
24 Monday of this week.
25 THE COURT: Well --

1 MR. HOCKETT: And that deposition concerned only the
2 whether or not First Data achieved the predicted synergies in
3 some other transaction that acquired NYCE.
4 THE COURT: Do the defendants plan to introduce
5 evidence to counter the expert opinion of Dr. Zmijewski.
6 THE WITNESS: Excellent.
7 THE COURT: How am I doing?
8 THE WITNESS: Ninety percent good.
9 MR. HOCKETT: Your Honor, we do have expert evidence
10 on efficiencies. Dr. Zmijewski as you know is a late arrival
11 to the scene. We found out what his opinions were for the
12 first time or his tentative opinions a week ago today at night,
13 when we got his initial report. He has served another report
14 two days ago.
15 We also served a report of a new expert you heard
16 Mr. Conrath complaining about that because when Dr. Zmijewski
17 appeared on the scene, we recognized that he had some expertise
18 that potentially laid outside the economic's expertise that we
19 had lined up. So we found somebody whose textbook Dr.
20 Zmijewski cites in his paper and that person has prepared a
21 report to address Dr. Zmijewski's opinions at least so far.
22 But the substance of what Dr. Zmijewski is doing is
23 basically critiquing the extent of the documentation of the
24 efficiencies and trying to cast doubt on whether this work was
25 really done or is well founded.

1 We will present fact evidence to the Court on the
2 thoroughness of the estimation of efficiencies which I think
3 will be up to the Court to judge the sufficiency of without
4 having Dr. Zmijewski opine that it's not sufficient for him.
5 But there will be expert testimony about whether these are
6 the kinds of efficiencies that could be taken into account and
7 to the extent that Dr. Zmijewski develops opinions that
8 correspond to the expertise that Dr. Meyers, our newest expert,
9 has then we would seek to introduce those opinions as a sir
10 rebuttal I guess when Dr. Zmijewski finally gives us his final
11 opinions. I believe it is the intention of the Government is
12 to call him as a rebuttal expert and he promise to supplement
13 his report after the other experts deposition are taken.
14 THE COURT: Well, one thing is clear is that Dr.
15 Zmijewski --
16 THE WITNESS: Ninety-five percent.
17 THE COURT: -- right now thinks that the information
18 supplied to him doesn't have a sufficient background for him to
19 really opine except that the lack of information suggests that
20 he can't duplicate the savings that are asserted and therefore
21 he has no basis on which to say that they are valid, do I
22 understand you correctly?
23 THE WITNESS: May I expand a little bit on what you
24 said?
25 THE COURT: Surely.

1 THE WITNESS: Thank you. You said duplicate. I can
2 always take the summary and duplicate those numbers.
3 THE COURT: No, no.
4 THE WITNESS: So it's going all the way back to the
5 foundation of assumptions.
6 THE COURT: Well it' like any spread sheet is what
7 you're talking about. I mean I understand.
8 THE WITNESS: Okay, so it's not just duplication.
9 THE COURT: No, it's not just adding and subtracting.
10 THE WITNESS: Your Honor, just to be clear, I read
11 the deposition of the 30(B)(6) witnesses, 30(B)(6) witnesses
12 and on page two my report is not handy, but on page two of
13 Appendix E, I have a quote from Ms. Margaret Tully from First
14 Data who is I believe heading up the integration team and may I
15 just read a couple of sentences:
16
17
18
19
20
21 , so I went through that.
22 There was a group of knowledge based really experts and
23 she lists some experts there and people concluded that they
24 could get a hundred percent -- I'm paraphrasing now, they could
25 get a certain percent of that particular line item. So that's

1 how she described what happened and she did mention financial
2 analysis that the complex financial analysis to the extent that
3 it was done in computer form and exists and turned over I
4 haven't been able to find it.
5 (Court Reporter asks for clarification, have or have not?)
6 THE WITNESS: Have not been able to find it, that's
7 important.
8 And based on her description it doesn't, it seems like
9 they were using business judgment, people got together and they
10 made decisions and that's how people make business decisions.
11 So I'm not saying they made up numbers or people got together
12 and they made business decisions. However, it's my job to go
13 back and try to find foundation other than somebody saying this
14 is my opinion and I can't find any analysis to substantiate any
15 of the assumptions that were made.
16 THE WITNESS: Hopefully that clarifies.
17 MR. SACKS: Your Honor, may I make one comment, an
18 additional point that I fear has gotten lost.
19 The comment is this is an issue upon which the defendants
20 carry a burden, it's their affirmative defense. They have to
21 demonstrate the existence of these alleged efficiencies as we
22 will be arguing later they have to be verifiable.
23 The burden of going forward and demonstrating that these
24 numbers are real and reliable is theirs and the fact that
25 Professor Zmijewski cannot find the documentation has an

1 independent significance of its own. But before I realize time
2 is short there are other opinions and other tasks that we put
3 to Professor Zmijewski and at least one of them I would like to
4 at least get to and that is task three, as we put it and I
5 think I'll go back to the garden and let Professor Zmijewski
6 talk about whether the efficiencies could be achieved without
7 the merger of NYCE and STAR which is also one of the issues we
8 put to him.
9 THE WITNESS: This is on page 10, Your Honor.
10 THE COURT: Yes, I'm with you.
11 THE WITNESS: Should I talk, I thought you were
12 reading.
13 THE COURT: No, go ahead.
14 THE WITNESS: I was asked by the Department of
15 Justice to assess whether or not the alleged synergies could be
16 achieved without the merger of NYCE and STAR. And I was making
17 the determination of how it would be used an assessment that I
18 would make. I made that assessment based on two criteria. One
19 where are the operation and assets part of STAR that were
20 involved in this particular synergy and two, were there
21 alternatives to realizing the synergy even if they didn't
22 merge?
23 I went through that and found that of the and
24 I should actually explain that number. You mentioned
25 before the synergies, that's for the complete total

1 merger. On November 27th there was an e-mail that had
2 synergies related to the PIN debit that were given by the
3 defendants and that number is a .
4 MR. SACKS: Excuse me, that's November 21st.
5 THE WITNESS: Pardon me.
6 And of the of the alleged synergies, I found
7 that are not related to the merger at all. Based
8 on my criteria that they're not related to the NYCE and STAR
9 operations and assets.
10 THE COURT: Give me an example of the sorts of things
11 that you think were listed there and that are not related.
12 THE WITNESS: And again, I just want you to make sure
13 that I'm clear on my definition of not related is that they're
14 not part of the NYCE operations or STAR operations and are not
15 part of the asset base.
16 THE COURT: Okay.
17 THE WITNESS: An example would be Paypoint is a
18 merchant processor owned by FDC, First Data and one of the
19 synergies that is accounted in the is that it
20 will be merged into Concord operations. That to the best of my
21 knowledge, that particular company is now part of NYCE and
22 Mr. Betts who is one of the executives from First Data was
23 deposed and since we knew where we were headed that question
24 was asked and Mr. Betts confirmed that it's not part of NYCE.
25 So here is a company that does merchant processing that's

1 part of First Data, but not part of NYCE. That would be an
2 example of something that I excluded.
3 THE COURT: Well, now wait a minute, I just got
4 educated by Mr. Conrath that you can't distinguish just because
5 there's separate subsidiaries, they're all part of the same
6 company. I mean it would be a savings for First Data overall,
7 wouldn't it, if they didn't have to, I'm not disagreeing with
8 the point that you make. Paypoint is not part of NYCE, but for
9 First Data it would be a savings if they didn't have to run
10 Paypoint and Concord.
11 THE WITNESS: I'll give you my understanding. Now
12 we're -- I'm the wrong person here. The economist should be
13 talking about this okay.
14 THE COURT: Okay.
15 THE WITNESS: But let me give you my understanding.
16 My understanding is that the issue is what would happen if
17 First Data spun off NYCE, didn't own NYCE what would their
18 synergies be? That's one way to look at this problem. I don't
19 know how the economist are doing it. I read the reports, but I
20 didn't go into that, but the issue is what does the merger look
21 like with NYCE in it and without NYCE in it and if the assets
22 aren't part of NYCE then that consolidation can occur even if
23 they spun NYCE off.
24 Now I don't know --
25 MR. SACKS: Your Honor if I might.

1 THE COURT: Yes, was that the a proposal?

2 MR. SACKS: This goes to the issue related to the

3 merger in the market. The market place in which the harm is

4 occurring involves the PIN debit switching business which is

5 the business of NYCE and STAR.

6 What we essentially asked Professor Zmijewski to figure

7 out is whether the claimed efficiencies related to this

8 combination of NYCE and STAR. The Government would readily

9 concede that there are efficiencies that can be obtained by

10 merging together First Data and Concord the corporate parents

11 largely in their merchant processing business. That's not a

12 perfect market place that we are alleging the anticompetitive

13 harms.

14 We didn't ask Professor Zmijewski to make a legal

15 judgment. What we asked him to do was essentially isolate what

16 part of the efficiencies here are attributable to the merger of

17 NYCE and STAR and put aside and separate out for us those which

18 are attributable perhaps to the merger of their merchant

19 processing business which is a part of the transaction which

20 the Government did not impose an objection.

21 THE COURT: And so the reason, therefore, that the

22 Professor can approach the analysis the way he just described

23 which surprised me act as if they spun off NYCE, is that you're

24 saying, the Government's position is that Concord and First

25 Data can come together and I don't want to misstate this in any

1 way, but Concord and First Data can come together as long as
2 they don't have both STAR and NYCE?
3 MR. SACKS: The Government's allegations of
4 anticompetitive harm related to PIN, P-O-S, PIN debit switching
5 businesses to essentially the NYCE network and the STAR
6 network. We did not bring a case that alleged the problem with
7 the combination of First Data's merchant processing business
8 with Concords first, excuse me with Concord's merchant
9 processing business.
10 THE COURT: But to run a network don't you have to
11 have a merchant processing business?
12 MR. SACKS: No, you don't Your Honor.
13 THE COURT: Who runs a network without a merchant
14 processing? Actually the history is kind of interesting.
15 First Data was an extremely large merchant processing business
16 and it only acquired NYCE in 2001. They were a very large
17 merchant processor and decided to enter the PIN debit switching
18 business by acquiring approximately 64 percent of NYCE.
19 Now the reason we put the --
20 THE COURT: So let me get back. I think Mr. Conrath
21 nodded his head yes in response to my question.
22 If First Data and Concord were to merge and the merged
23 company were to agree to spin off either STAR or NYCE and
24 you're presuming it would be NYCE because that has less of the
25 market in the PIN debit business then the Department of Justice

1 would be satisfied.

2 MR. CONRATH: Would be satisfied.

3 THE COURT: Would be.

4 MR. CONRATH: Yes.

5 THE COURT: And so it's approaching the analysis from

6 that point of view that Dr. Zmijewski, I'm getting worse

7 instead of better.

8 Looked at this to try to determine which part of the

9 efficiencies really went to the merger by theorizing that NYCE

10 would be spun off.

11 THE WITNESS: Your Honor, that's not why. I didn't

12 do it with that theory in mind. I did it because I was asked

13 to accomplish a certain task. That might have been the

14 motivation why I was asked, but you're pulling me a little out

15 of my domain.

16 THE COURT: Okay, I don't want to pull you out of

17 your domain, but for purposes of allocating savings or

18 efficiencies to the merger and not to the merger your approach

19 to that was to determine what the company would look like if it

20 didn't have NYCE?

21 THE WITNESS: What they could accomplish if they

22 didn't, if what, what they could accomplish if they didn't have

23 NYCE in the merger, yes, my analysis is consistent with that.

24 THE COURT: So and by merger here you're talking,

25 therefore, just about the merger of the two PIN debit entities,

1 the two PIN debit businesses and not Concord and First Data?
2 THE WITNESS: That's correct Your Honor.
3 THE COURT: So the
4
5 are from efficiencies related to merging First
6 Data and Concord and not merging NYCE and STAR?
7 THE WITNESS: They're not related to the NYCE
8 operations or STAR operations that's correct.
9 MR. HOCKETT: Your Honor, if I could be heard briefly
10 on this please?
11 THE COURT: Yes.
12 MR. HOCKETT: There's been a lot of legal argument
13 and I just feel like I need to respond to it.
14 MR. CONRATH: If I might just finish up on this
15 thought to be clear about why we asked that question to Dr.
16 Zmijewski?
17 THE COURT: All right. You do me unhonoured, go
18 ahead.
19 MR. CONRATH: All right, I lived in Poland for two
20 years, Your Honor, so I got a little practice.
21 THE COURT: Well now I know.
22 MR. CONRATH: All right, there's a legal question
23 that caused us to ask Dr. Zmijewski to perform this analysis
24 and it is, are the alleged efficiencies merger specific and the
25 way to think of that is this, first the question of

1 efficiencies comes up if there's anticompetitive harm and the
2 affirmative defense of efficiencies is, well, even if there's
3 harm it will be overcome by these efficiencies.
4 And then the logic says, well, should we endure this and
5 anticompetitive harm in order to get these efficiencies and the
6 principal is well, only if you need the anticompetitive harm in
7 order to get the efficiencies.
8 THE COURT: Okay.
9 MR. CONRATH: So we asked, could you get the
10 efficiencies without the harmful part and the harmful part of
11 this merger is combining STAR and NYCE. If they were just
12 combining the merchant processing operations, we wouldn't be
13 here.
14 So the way -- and that's usually described in the
15 efficiencies law and literature as merger specificity. And the
16 question is, do you need the anticompetitive harm to get the
17 efficiencies?
18 And so we asked Dr. Zmijewski to look at that so that we
19 could say, okay, some of this you could get without imposing
20 the harm.
21 So the merger guidelines for example direct us to look
22 and say, well, could you get the efficiency by for example the
23 divestiture, that's why we're here.
24 THE COURT: And I appreciate that. I understood the
25 concept of the merger specific efficiencies, but I didn't

1 understand the backwards getting into it but now I do.
2 MR. HOCKETT: Your Honor, with respect we don't agree
3 obviously with Dr. Zmijewski's conclusions on either front nor
4 that the question should be framed as it was to him to do his
5 work.
6 The transaction that the Government is trying to block is
7 the merger of Concord and First Data, not of NYCE and STAR.
8 This isn't an action to try to force the divestiture of NYCE or
9 STAR. It's an action that would stop the merger and,
10 therefore, stop the realization of the overall efficiencies
11 whether they stem from a combination of the assets of NYCE and
12 STAR or from some other assets that the Government is not
13 worried about in this deal.
14 So it is part of the efficiencies analysis to consider
15 all of the efficiencies from whatever part of the transaction.
16 THE COURT: Well I think there's some validity to
17 what you say, but there's also validity to the Government's
18 point. It as I understand it reviewed this potential merger
19 from a number of perspectives, not just the merger of the PIN
20 debit networks and probably even looked at the merchant
21 processing part of it and came to the conclusion that as to
22 other aspects of the businesses that are being merged, it
23 didn't have an antitrust concern, but that it does when it
24 comes to the PIN debit part of it.
25 And while its position is that the merger shouldn't occur,

1 its position that the merger shouldn't occur is because its in
2 this Court anyway worried about the PIN debit businesses.
3 So that we now know from the Government now through
4 Mr. Conrath that if you didn't merge the PIN debit businesses
5 they wouldn't care if First Data and Concord merged.
6 Presumably First Data and Concord aren't interested in that
7 approach and so therefore here we are.
8 But since that's the Government's position it seems to
9 me that it is certainly legitimate to try to break out such
10 efficiencies as would exist only from the merger of those two
11 businesses. And to the extent that your experts haven't quite
12 looked at it that way yet, they may want to do that before we
13 actually get to trial.
14 MR. HOCKETT: Yes, I appreciate that Your Honor. We
15 do, we intend to contest both the facts and the law on this
16 because I don't believe the law is as clear as the Government
17 contends it is on that point.
18 We do not have an expert witness here to testify in
19 opposition to either Dr. Zmijewski's audit, if you will, of the
20 paper trail of the efficiences.
21 I seriously question whether that has any bearing on the
22 issues before the Court even if accepted, but we don't have
23 anybody here that's going to address that aspect of it, but we
24 will have testimony if we get to us.
25 THE COURT: Yeah, we're going get to you right now.

1 This is the second of the Government's two witnesses to be
2 presented right, excuse me, I didn't mean to act as if you
3 weren't a person, you know.
4 THE WITNESS: Thank you, Your Honor.
5 THE COURT: Thank you for coming.
6 But I think what we should do now and I do understand that
7 you want to argue about on this point. I really don't want to
8 hear the legal arguments today on whether or not Dr.
9 Zmijewski's testimony is, you know, to be taken as gospel or
10 not. We can argue about that another day.
11 I just needed to know where he was coming from and what
12 his conclusions were and for right now I got it. I understand
13 it. You actually spoke in English and it was very much
14 appreciated.
15 THE WITNESS: Thank you.
16 THE COURT: Thank you.
17 So what we're going to do is take about a seven minute
18 break so that everybody can go to other places if they choose
19 to do so and I can get a fresh cup of coffee and we'll come
20 back and reconvene at 3:32.
21 MS. ALEXIS: Could I just add one point Your Honor.
22 My partner amply argued this, but our trial brief will address
23 the issue of why this is a very artificial way to approach
24 efficiencies and you should not break out this so-called PIN
25 debit issue separately.

1 THE COURT: Okay.
2 MS. ALEXIS: Okay, Your Honor, thank you.
3 THE COURT: I understand that. I'm going to be much
4 more educated by the time we get to the trial, but I'm feeling
5 fairly educated by the experts to far.
6 Thank you, we'll be back in about five minutes.
7 (Recess.)
8 MR. CONRATH: May I raise this afternoon at 4 o'clock
9 we were suppose to file weekend reading, Your Honor, in the
10 form of transcripts, and I'm informed that unexpectedly perhaps
11 weather related, the Clerk's office closed at three. So I have
12 here --
13 THE COURT: Our Clerk's office?
14 MR. CONRATH: I'm only repeating what I was told.
15 THE COURT: Oh, no, it closed for the Christmas
16 party.
17 MR. CONRATH: Ah hah!
18 THE COURT: It's much more important than the
19 weather.
20 MR. CONRATH: I understand.
21 THE COURT: The Courthouse Christmas party is going
22 on and I want you to know that we are not in attendance.
23 MR. CONRATH: We are --
24 THE COURT: That is really sad; isn't it, but you're
25 all welcome. It's in the jury lounge, it goes until 6 o'clock

1 so we're going to be done by five.

2 MR. CONRATH: We'll do our best, but we are prepared

3 to give you hand delivery if you like.

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

5 Monday?

6 THE COURT: Save the CD and give me the hard copies.

7 That's what I need. Thank you, sir.

8 MR. CONRATH: You are welcome.

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

10 Go right ahead, sir.

11 MR. HOCKETT: Your Honor, for purposes of time

12 management, we started at 1:20 and I'm just wondering are we

13 going to go past five or will be ending right at five?

14 THE COURT: I would like to end right at five if we

15 could possibly do that. Since the Government bears the burden,

16 I figured that --

17 MR. HOCKETT: They get all of the breaks.

18 MR. CONRATH: Except for the overall schedule.

19 THE COURT: And I think --

20 MR. HOCKETT: Thank you, Mr. Conrath.

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

22 those things.

23 MR. HOCKETT: Then we'll proceed forthwith and have

24 Dr. Katz take the stand, please.

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

1 please.

2 Dr. Hausman, are you with us?

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

4 though.

5 THE COURT: Oh, I'm sorry, but it's probably not

6 Christmas either.

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

8 Cairo.

9 THE COURT: Can I ask a question? Excuse me for

10 doing this.

11 Should we ask Dr. Hausman to testify first so that he

12 doesn't have to hang on the phone?

13 MR. HOCKETT: Actually, we intended for him to hang

14 on the phone so that he could go last and listen to all of

15 this.

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

17 DR. HAUSMAN: Thank you, Your Honor.

18 (DEFENDANT WITNESS, MICHAEL KATZ, SWORN.)

19 MR. HOCKETT: Your Honor, we would like to proceed in

20 the following fashion. Although we had prepared a free

21 standing presentation, we really want in the interest of time

22 to address head on the issues that have been brought to the

23 floor by Dr. Ordover.

24 So we thought the most expedient way to do that would be

25 for Dr. Katz to go over selected slides from Dr. Ordover's

1 presentation and explain what is wrong with his analysis and
2 why we think that the Government has not met their burden of
3 proof and are not going to.
4 So without further ado, I will turn it over to Dr. Katz
5 to give a little bit of a framework to you, and then we'll see
6 some of the individual slides and, of course, respond to the
7 Court's question.
8 THE COURT: Okay.
9 THE WITNESS: If I could I thought I would just jump
10 around a bit since you have heard the presentation, and
11 certainly expect that you will ask questions.
12 So I thought maybe a good place to start would be with
13 Professor Ordover's fourth slide which is the diagram of the
14 industry. If I could, I would like to just make a couple of
15 points with, with this slide because I think in some ways, it
16 identifies what really is a critical difference in how the two
17 sides are thinking about this two-sided market.
18 What I think is missing here is if you look at the
19 cardholder diagram, it shows the purchasers and the
20 cardholder's relationship with the merchant. The one thing
21 that is missing is the cardholder's relationship with the
22 issuer.
23 That's a sense in which Professor Ordover I think has
24 really failed to fully take into account that this is a
25 two-sided market, you know, all around because what he is

1 leaving out when he forgets that relationship is that we, you
2 know, we have talked a lot about Interchange and how it goes
3 from the merchant through to the issuer, and Professor Ordover
4 has talked about how that would, an increase in the Interchange
5 fee could be passed through to consumers in their role as
6 customers or merchants.
7 But what he didn't talk about is that the increased
8 Interchange goes to issuers which is then passed back to
9 consumers in their role as bank customers and that they see
10 that, you know, most directly in things like the rewards
11 programs for some debit cards, but also they see it in overall
12 fees or the lack of use fees or in account features to the
13 extent that the bank used this as integrated with their overall
14 checking account services that they are providing.
15 And I think that's really important because if you are
16 going to look at the effects of this transaction on consumers
17 and if you are going to allege that it's going to change the
18 Interchange fee, and clearly that's something that is the
19 subject of dispute here, but you are going to have to take into
20 account the full effects of consumers. And from what I have
21 seen, it looks as if Mr. Professor Ordover has not done that.
22 Another important thing that I think that comes out of
23 the diagram is the following. And that what we are hearing is
24 that much of the alleged harm is about an increase in
25 Interchange. And that's looked at by focusing on the effects

1 of the merchant.

2 But again, although Professor Ordover does recognize

3 issuer at times, it is not fully -- issuers are not fully

4 integrated into his analysis, and let me just give an example

5 or analogy to show why.

6 Suppose the Government had found that their best

7 prediction is they think that the merger is going to drive

8 Interchange down.

9 They could have come in here with the sorts of theories

10 they are doing today and said, well, you know, that's really

11 anti-competitive because think what that is going to do to

12 issuers. Issuers are not getting the money that they were

13 getting and as a result of this merger, Interchange is going to

14 be driven down, that's going to harm issuers, and it's going to

15 harm their customers.

16 So what you are left with is the position that

17 Interchange rates go down, you are criticized for one side of

18 the market, and if they go up, you are criticized for the

19 other. And the way out of this apparent dilemma is, of course,

20 you have got to look at both sides at once.

21 So I think that a fundamental disagreement you are

22 hearing between the economist is that what we have all have

23 said, it's a two-sided market I conclude, and I believe

24 Professor Hausman agrees with me, that Professor Ordover really

25 hasn't looked at both sides of the market and integrated it

1 into his analysis.

2 THE COURT: I'm not quite sure that I follow you.

3 Are you saying that the anti-competitive consequence or harm

4 that the Government sees here is an increase in Interchange

5 fees?

6 THE WITNESS: Certainly it's my impression. I have

7 some difficulty sometimes telling which things they are worried

8 about with the anti-competitive harm, but I believe that that

9 is an important part of what Professor Ordover has talked

10 about.

11 He has talked about, you know, the total fees to

12 merchants. He cited to, to the various declarations and those

13 were about Interchange fees, not about Switch fees.

14 THE COURT: Well, I thought that he in terms of the

15 concern if there were a merger, I thought he had two points.

16 One was that it would be harder for merchants to extract

17 themselves, that is at page 16, and the second is that it would

18 reduce the least cost routing option.

19 THE WITNESS: That's right, but the question on both

20 of those is how does that show up? And I thought he was saying

21 it would increase the charges that the merchants would face

22 without asking what's happening on the other side.

23 Maybe -- I think where it's come up, not as a

24 theoretical matter, but that is an imperical one of looking at

25 the facts because one of the things that he pointed to was the

1 2002 round of increases.

2 Those increases were about Interchange rates. Those

3 weren't increases in Switch fees. Another thing that has been

4 brought up in this case at various points is people said well,

5 merchants are complaining because they have seen concentration

6 go up and they have seen a higher Interchange. Switch fees

7 have not been increasing.

8 THE COURT: No, I got that from your materials. And

9 I understood from your materials that the, one of the arguments

10 made by the defendants is that the Government's case does

11 confuse the difference between Interchange and the Switch fees.

12 That's part of the reason I was questioning Professor Ordover

13 earlier about it.

14 But in terms of what he says in this presentation and so

15 therefore basically what he testified to about today, I thought

16 that the cost to the merchant of dropping a network was the

17 cost of substituting one network for another because STAR and

18 NYCE together would have so much of the market.

19 THE WITNESS: Yes, but those costs would depend on

20 the all end costs to the merchant. So if you are talking about

21 cost from going from one to the other, it wouldn't be just the

22 Switch fees. It would be the Switch fees, plus the

23 Interchange.

24 THE COURT: If a -- maybe you know the answer to

25 this. Does Interlink charge or get a Switch fee?

1 THE WITNESS: Interlink yes, they do and you maybe
2 asked this earlier about what happens with Visa's signature.
3 THE COURT: Right.
4 THE WITNESS: I believe that they do have some sorts
5 of network charges that they put on in addition to the
6 Interchange.
7 THE COURT: Okay. Okay. But I understand your point
8 about the difference between Interchange and Switch fees.
9 THE WITNESS: Okay. One of the points that I could
10 make about --
11 THE COURT: If I could just ask one other question.
12 The network in the middle here doesn't really have much
13 to do with Interchange fees, does it?
14 THE WITNESS: Well, I would say the answer is yes and
15 no. I mean, the network does pick the Interchange fee as a
16 dimension of competition, but ultimately that Interchange fee
17 is driven by competition to attract the issuers, to attract
18 merchants, and again, as you have read, that's one of our
19 points that the increases in Interchange fees that we have been
20 seeing is a result not of the exercise of market power, but it
21 is the result of competition as PIN networks have tried to keep
22 issuer customers.
23 THE COURT: Right.
24 THE WITNESS: I'll stop there.
25 THE COURT: Okay.

1 THE WITNESS: I say one other thing from the diagram
2 which comes back later, and it has to do with some of the good
3 points that Professor Ordover has raised at least, I guess he
4 get didn't to the slides, but that is the processor is shown
5 here between the merchant and the network.
6 I think that an important point here to remember is that
7 the processor is hired by the merchant and I think that matters
8 because Professor Ordover has talked about processors doing
9 various things to favor the networks, but I think it's critical
10 to remember that a merchant can pick the processor it wants as
11 we have talked about earlier today, the Government is not
12 alleging some sort of competitive harm in the process or market
13 and that that is a central fact then that the processors can be
14 expected to serve merchant interests.
15 THE COURT: Hum. And STAR, is STAR a processor?
16 THE WITNESS: STAR is not. Concord is a processor.
17 They have a processing operation that then again competes with
18 other processing operations.
19 THE COURT: Okay.
20 THE WITNESS: Okay. As I said, I'll jump around a
21 bit in the interest of speed.
22 I would like to touch on one thing and that is talking
23 about the product market definition, and the issue that came
24 up. This is on I guess his slide seven.
25 About saying how where the merger guidelines to the

1 analysis begins with the SSNIP test.

2 I think the correct statement about where economic

3 analysis begins, I think Professor Ordover would agree with

4 this, is you have got to ask the question, why are you doing

5 market definition or what is the point.

6 And, you know, it's not to do the SSNIP test. It is to

7 assess the dimensions of competition. What economist I think

8 all agree on is the way you do that is to think about

9 substitution.

10 And as again, that was something that was mentioned in

11 the plaintiff's reports, something that I said earlier, that

12 there are different degrees of substitution. The question is

13 how close a substitute does something have to be to be a

14 competitor.

15 The properly applied and in the right situations the

16 SSNIP test can be a way to get at that and in fact, it's a

17 standard way and it is frequently used, but it's by no means

18 the only way.

19 And as you saw in my report, I looked at a variety of

20 other considerations. I did the same thing when I looked at --

21 I was the Government's expert witness in the credit card case,

22 U.S. v Visa, the same sorts of factors, other economists look

23 at those factors as well.

24 So I think that the one thing there is a consensus on

25 economist is the key of substitution, but then there are a

1 number of ways to go about looking at that, and I certainly can
2 go into more detail if you wish, but I just wanted to make that
3 one essential point.
4 THE COURT: I am interested in the issue of whether
5 or not the merger guidelines are the only way to think about
6 this, and the hypothetical monopolist because and you can
7 correct me if I've mischaracterized your expert opinion or Dr.
8 Hausman, of course, can correct me too, but it seemed to me
9 that in the defendant's articulation of the market one of the
10 critical points was that Visa's growth spurt has kind of warped
11 the market and is not accounted for by the Government's
12 hypothetical monopolist approach.
13 Is that -- am I misunderstanding your point?
14 THE WITNESS: I wouldn't say you are misunderstanding
15 it. I guess I would say there's some different points in there
16 in that I think a lot of what we're seeing with Visa is the
17 intensity of the competition and the fact that the competition
18 cuts across signature and PIN, and in that way I think it does
19 show that the mechanical application of the SSNIP test in this
20 particular market as leading to incorrect conclusions.
21 But I guess it's more the facts contradict the
22 conclusion that is reached from the SSNIP test as opposed to it
23 directly affecting the SSNIP test.
24 I think that there's another problem that does directly
25 affect the SSNIP test and that is the use of Interchange in the

1 SSNIP. I think is conceptually incorrect.

2 THE COURT: Say that, explain yourself, I didn't

3 understand what you said.

4 THE WITNESS: So this will take a little bit of time.

5 But if you think about what happens in ordinary markets, lets

6 take tofu because that was Professor Ordover's example, and I

7 have had tofu, to be honest, at his house and it has a certain

8 linkage here in the grand scheme of things.

9 If you think about what happens with tofu, suppose you

10 were to ask does somebody have market power. You say okay,

11 what happens when they raise their price? Well, what you

12 figure happens if you charge more, you are going to lose some

13 sales. So what you have to do is you balance out. Will I get

14 a higher price for what I keep selling, but then I lose sales,

15 okay. Well, which effect is bigger, and we say that if the

16 price increase is profitable over some range, you could talk

17 about having market power.

18 Now think about Interchange. When you -- what you are

19 doing as we have heard and you have read a lot, the network

20 doesn't keep the Interchange, okay. The network is just

21 flowing it through, so why does the network care about

22 Interchange?

23 They care about it for one reason. They want to

24 maximize the number of transactions on the network because

25 that's how they are going to make their money, collecting

1 Switch fees.

2 What that means is when you -- you may have incentives

3 to raise Interchange to drive up your volume, and in particular

4 in this market, what happens you are raising Interchange to get

5 issuers. So if you think about that, the tofu market you raise

6 your price because you are exercising market power. In this

7 market you may be raising your price precisely because you are

8 competing.

9 Now there's one more step in this argument. So let's go

10 back to the SSNIP test. The SSNIP test says is it profitable

11 to raise your price?

12 Well, now in the tofu market, the only way it's

13 profitable if you have market power, and so, you know, the

14 SSNIP is one way to do it, but at least conceptually can make

15 some sense. But here you may be raising your price precisely

16 because you face competition, so to then interpret the SSNIP

17 test as proof of market power is just completely backwards.

18 So it's not that it's, you know, it is not that the

19 SSNIP is always wrong, I'm not saying that, but I'm saying that

20 the application of this hypothetical monopolist test in the

21 SSNIP in using the Interchange is just potentially at least

22 backwards.

23 You can interpret competitive behavior as evidence that

24 you had the, the hypothetical monopolist in action and

25 therefore, it's just invalid and I, you know, I think it's just

1 a mistake I think when Professor Ordover says in his rebuttal
2 report that those price increases that we saw in 2002, the
3 Interchange I think the line is something like that was the
4 SSNIP test seven times over because the Interchange went up 70
5 percent, and I think that's not true at all.
6 I think precisely the fact that those 2002 price
7 increases were competitive price increases shows how wrong this
8 methodology is when applied the way it's been applied in this
9 case.
10 MR. HOCKETT: So perhaps you could talk about some
11 other ways, some other factors of, that are appropriate to use
12 in connection with delineating market boundaries.
13 THE WITNESS: One of the things I went through was
14 and actually, Professor Ordover mentions it on his slide eight
15 is looking at the, you know, functional interchangeability of
16 the products.
17 Now Professional Ordover says in his slide that's not
18 the only way to define a relevant market, and I certainly agree
19 with that, and I didn't just do it that way, but I think that
20 it is important in this case that what PIN debit and signature
21 debit are both doing is they are providing a particular card
22 base form of access to people's checking accounts.
23 This is a footnote, I'm sorry, I can't resist. There's
24 also some savings accounts and money markets, but roughly
25 speaking, it's providing card base access to people's checking

1 accounts.

2 And you know, he makes his point that in earlier

3 testimony in another matter I talked about wire line and

4 wireless telephones, but I don't think that they do have the

5 same functionality but because the whole point, the key selling

6 point of wireless phones is they're mobile in a way that

7 obviously a corded telephone isn't. So I think that's an inapt

8 comparison.

9 So I think that the fact that they're really doing the

10 same thing is important here. I also think -- that he

11 mentions, you know, to try and counter that, he talks about

12 Staples and Office Depot, and I will just stay away from any of

13 the legal aspects of it, but I think his point misses the

14 economics point which is sure, you must be right that you

15 shouldn't do functional interchangeability in Staples and

16 Office Depot by saying well, is the typing paper the same.

17 Just the way here, I wouldn't say you shouldn't do

18 functional interchangeability by asking is the gasoline you buy

19 with PIN debit the same as what you buy with signature.

20 Obviously, it's the same gasoline, but that's not the issue.

21 It's the service is actually being provided by PIN and

22 signature debit are the same, that you can use them

23 differently.

24 THE COURT: Is there any support for the notion that

25 the ultimate consumer, the purchaser, someone like me cares

1 whether it's signature or PIN debit?

2 THE WITNESS: I would have to say that the evidence

3 is mixed on that, there's different opinions in the industry.

4 I think what is clear is there are people who prefer PIN

5 and there are people who prefer signature, and there are a lot

6 of people who either don't care or don't, they don't even know

7 the difference and a lot of people who go back and forth

8 between the two which is why we see this battle we see going on

9 in the debit industry where you have got issuers by and large

10 not always pushing to get consumers to use signature because

11 they think you can persuade the consumer, and then you have got

12 the merchants trying to push them towards PIN. Not in all

13 cases.

14 It is one of the things that certainly we'll be hearing

15 later in the trial, but

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18

19

20 But by and large, because the pre-WAL MART history of

21 the industry, we don't have the full convergence yet, you have

22 got this tug of war with merchants and issuers because they

23 know they can move consumers back and forth.

24 MR. HOCKETT: Can explain just for a minute why a

25 merchant might want to steer towards signature?

1 THE WITNESS: Well, the particular merchant what they
2 are talking about is the fact is that where given the pricing
3 schedules we see today for some merchants and I think we'll see
4 increasingly, for them signature is cheaper than PIN, and
5 that's what they indicated in that, and as I said, I expect to
6 see more of that as we continue seeing the conversions.
7 THE COURT: But the only signature debit is really
8 Interlink and Mistro, right or MasterCard?
9 THE WITNESS: No, it's MasterCard and Visa, the
10 brands, yes, that's right.
11 In fact, that's one of the -- this may be too detailed
12 to get into, but that's one of my points I actually make saying
13 that if it were right that signature was a separate market and
14 PIN were a separate market, the WAL MART litigation would not
15 have made any sense because how would you be claiming that
16 debit is a competitive market if there's only two people in it,
17 but that's right, there are only those two in the United
18 States.
19 THE COURT: And is your understanding of Professor
20 Ordover's opinion that signature debit is a stand alone market?
21 THE WITNESS: I'm, my only understanding on that is
22 that he wants to exclude it from his analysis of the
23 competitive facts and doesn't see it as a restraint.
24 I don't know if he sees other products in it. I would
25 be surprised if he could because if you thought that signature,

1 say if you thought signature and ACH based debit cards
2 competed, I don't see how you could think that ACH didn't also
3 compete with PIN debit.
4 And my understanding of his position, and I may be wrong
5 about this when I say that he takes the view that ACH is not an
6 irrelevant market.
7 THE COURT: And you would put signature debit in the
8 same market because of the, what you think to be the
9 interchangeability of them?
10 THE WITNESS: That's the fundamental.
11 THE COURT: Substitution.
12 THE WITNESS: That would be the fundamental driving
13 force is the substitution. Now there are other pieces of
14 evidence that support that in addition to surveys of consumer
15 behavior or industry views on that. It's also the behavior of
16 the industry participants, as again, we have already talked
17 about other people talked with you about earlier today with
18 Visa being concerned with what happened to signature.
19 Certainly I think when you read the document, various
20 industry documents where people are talking about the history
21 of PIN debit, it's been seen as taking business from signature
22 that there's been a shift that has been going on and, you know,
23 that's a fundamental part of --
24 THE COURT: Isn't it really debit cards taking
25 business from credit cards?

1 THE WITNESS: Well, the largest thing -- I have to go
2 back in my memory because some of this is actually from the
3 previous case rather than this one. I did look at the credit
4 card case.
5 The trend data seems to say what is happening is that
6 debit cards are taking away from cashing checks, and certainly
7 if you ask Visa and MasterCard who have the broadest credit
8 lines, since they are in credit too, certainly what I testified
9 to in the previous matter, they have targeted their debit
10 products, financing or taking away business from cash and
11 checks.
12 Credit is on the other side; in fact, it's the way I
13 have thought about payment industry and a lot of people have,
14 but it's the five years I have been doing this, there's a
15 critical distinction in what you pay now or pay later, and the
16 credit is on one side along with charge cards they give you a
17 month to pay, and then cash and checks and both kind of
18 signature are on the other side of that because defacto that
19 you are paying right away.
20 I mean, you have heard some thing about signature.
21 MR. HOCKETT: You said both kinds of signature.
22 THE WITNESS: I mean both kinds of debit, I misspoke.
23 We have heard some things, and we have read them that
24 signature, you know, clears more slowly, but my understanding
25 is that what large issuers do is even if they don't actually

1 take the money out of your account for a while, if you go out
2 and make a signature purchase, they will put a hold on that
3 amount of money right away, and that most signature
4 transactions actually clear, the vast majority of them at least
5 on Visa, clear within a day and in fact, PIN debits sometimes
6 does clear within seconds as you heard Professor Ordover say,
7 but my understanding is also that, I don't know if it's the
8 processor's decision, but somebody in that complicated link
9 makes the decision that they actually clear a PIN at the end of
10 the business day or the end of the banking day. So those
11 things are really very close.
12 The one that is a little different obviously, the check,
13 you get more of a float.
14 THE COURT: You kind of suggested in your opinion I
15 think that or your report that checks could also be considered
16 part of this market and checks do seem to me to be a different
17 breed of cat.
18 THE WITNESS: Here is the thing and why you are
19 correct if you read my -- when I say look, signature is in
20 there, and what I also say is excluding checks from the
21 analysis I believe is a mistake as a matter of economics.
22 Now where I certainly I guess it would seem to a critic
23 is that I am waffling. Okay, did I say checks are in the
24 market or not. It actually could come down both ways because
25 the market definition is not the key economic issue. The key

1 economic issue is what does competition look like, and I think
2 that checks absolutely have to be understood to understand the
3 overall competition in this market.
4 If somebody wanted to say though okay, the market is PIN
5 and signature and ACH and checks are outside of the market but
6 will take them into account, I could live with that. If you
7 want to say no, no, anything outside of the market we just
8 don't count at all, then I think I would put checks in, but I
9 would agree with you and wouldn't contradict that, the checks
10 are not as close a substitute as the other things, but I think
11 that they clearly have a competitive influence, but they are
12 also clearly not as close a substitute.
13 THE COURT: Hum. Okay. Were there other things in
14 Professor Ordover's --
15 MR. HOCKETT: You want to talk about steering or --
16 THE WITNESS: Well, actually if I could make just a
17 couple more points. One, some apologies for jumping around,
18 but some data points, but I do want to make one that comes up I
19 guess on 13 which is the fundamental conceptual point, and I
20 think a fundamental conceptual difference.
21 And that is this whole point about would merchants today
22 have PIN pads and engage in PIN prompting, would they stop
23 doing it? And I would disagree that that's the central
24 question because what we know as a fact is that the majority of
25 merchant locations in the United States don't have PIN pads.

1 Okay, we know that there are many more merchants that have just
2 signature than there are that have either just signature or
3 signature and PIN.
4 And so I think it's a mistake to forget that the issue
5 is not necessarily getting people who have PIN to stop, people
6 have already made the investment in PIN pads to stop, although
7 that can happen, and I am told that it is happening as people
8 have to upgrade PIN pads, some merchants reconsider whether
9 they want to keep them.
10 But I think the big part of the issue here is with
11 merchants have not bought PIN pads, and that's a majority of
12 them, they have to ask themselves is it worth doing, and so
13 when they do that, they are going to have to compare signature
14 Interchange rates and PIN rates and it's a question of going
15 forward.
16 And I don't agree that this is what is going to happen
17 because I think people may actually may move both ways, but for
18 the sake of argument, but suppose it were true somehow that we
19 knew that what is going to happen over the next ten years is no
20 one is ever going to go from PIN to signature, it's only the
21 other way. Suppose that's what we knew, and again, I don't
22 agree with that.
23 There's still a critical issue to the businesses and
24 then to competition and then to consumers how quickly that will
25 happen. I mean, nobody thinks that I know of any way that even

1 the people who are most pessimistic about signature think it's
2 going to be around for a while.
3 So the critical issue is how quickly if you think this
4 is going to happen, how quickly do you move from signature to
5 PIN and that is influenced by the PIN Interchange rate and the
6 signature Interchange rate and the cost of PIN pads and
7 training employees and things like that and that's a dimension
8 of competition. Because I mean, that's you know, that's one
9 view of what signature is all about.
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15 THE COURT: What do you think is the role that Visa
16 plays in the current competition in the PIN debit market?
17 THE WITNESS: Well, they certainly Interlink
18 participates directly in the PIN debit market.
19 THE COURT: Right. But it only has 10 percent or
20 something like that, not much.
21 THE WITNESS: It's actually doing up dramatically, I
22 mean, given that STAR is losing and Interlink is gaining, and I
23 mean certainly, I don't have the numbers at the tip of my
24 fingers but we are talking about STAR, just looking at PIN is
25 the biggest network

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2
3 MR. HOCKETT: Your Honor, there's a graph that shows
4 the banks that are leaning up on the screen and the reduction
5 in the share of PIN debit.
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12 THE WITNESS: I believe also there's some questions
13 -- I mean, the reason we have this graft, the important point
14 again you have read me saying it several times already is about
15 STAR losing the business. It appears and I believe people in
16 the industry expect most of that business to go to Interlink,
17 but it's not certain that that is what is going to happen, and
18 I believe as part of the WAL MART settlement, Visa is not
19 suppose to have exclusive contracts to guarantee these things.
20 THE COURT: Well, what are the chances that this
21 business because I don't quite understand the double bugging
22 issue when it comes to this, that these businesses would retain
23 a STAR bug?
24 THE WITNESS: My understanding of it, and when we get
25 done, I'll go check it is that these are banks that said to

1 STAR we are leaving, you know. I mean, particularly if --
2 THE COURT: So they are not going to have a STAR bug
3 at all?
4 THE WITNESS: That's my understanding.
5 Now if I could touch on another issue that has come up
6 related to this.
7 THE COURT: Let me back up, I'm sorry.
8 How much of this loss is associated with competition
9 from Visa?
10 THE WITNESS: I believe that all of these banks have
11 said that they are leaving STAR and announced that they are
12 going to Visa's Interlink, but I believe some of them may also
13 be having other bugs on their cards. So that's why I can't be
14 sure that this is all going to Interlink, but certainly what I
15 have read says the industry expectation is that the bulk of
16 this is going to Interlink.
17 THE COURT: Okay.
18 THE WITNESS: Let me if I could say on this I believe
19 the point has been made by or the assertion has been made by
20 the plaintiffs is that well, okay, STAR has lost a lot, but how
21 do we know that they won't gain a lot in the future.
22 I say two things to that. First, if you can lose
23 something like a of your business, get a back, lose
24 a if it's really going around that much, that suggests
25 that it's pretty easy for people to Switch and there's a lot of

1 competition.

2 The other thing is that I don't think that there's a

3 reason to think that STAR is going to bounce back up because

4 these are long term contracts that were entered by and large

5 when Concord bought up a network and it was part of getting the

6 issuer owners to commit to staying around. It was what I say

7 is a one enough event. Those contracts are now expiring and

8 STAR is losing the people so I think this is a one time thing.

9 The other is certainly I think going forward STAR, you

10 know, will get some more issuers, but they also may lose some

11 more, and I don't think that there's any reason to think that

12 going forward they are likely to gain more than that. You can

13 isolate this as a special event.

14 THE COURT: These are kind of large banks to lose.

15 Who is bigger than Wachovia?

16 THE WITNESS: I think Bank of America, they have

17 already lost them to Interlink.

18 THE COURT: So they are gone.

19 What about Wells Fargo, is Wells Fargo bigger than

20 Wachovia?

21 MR. HOCKETT: They are I think comparatively sized.

22 MR. PATTON: They have lost

23 in just the last several

24 months. I think Wells Fargo is the second largest issuer of

25 debit cards in the United States after Bank of America and

1 Wachovia is third. Bank One may be third or fourth, but those
2 are the top four as I understand it. Bank of America --
3 THE COURT: For what period of time are these
4 contracts when they're moving over to, are these long term
5 contracts as well that one would be signing up with Interlink?
6 MR. HOCKETT: Yes, Your Honor.
7 MR. PATTON: I think.
8 THE COURT: I mean, I think it's hard to replace them
9 then. There isn't another bank like Wachovia or Wells Fargo to
10 substitute. You would have to go get a lot of little ones.
11 THE WITNESS: That's right.
12 THE COURT: All right.
13 But let me back you up a minute. Because it's very
14 difficult for me to determine which of you, or how to untie
15 this knot.
16 Do you say that we shouldn't use the guidelines
17 hypothetical monopolist concept in order to define the market?
18 Do you disagree with the way that Professor Ordover performed
19 that analysis and you say yes, you can use the hypothetical
20 monopolist, but that analysis doesn't, doesn't work because of
21 some other reason or do you say that, that that's fine, he
22 applied it properly, but the real word is actually somewhere
23 else? What is the source of the disagreement?
24 THE WITNESS: It's a combination of things I guess.
25 First, I would say that even conceptually that it's incorrect

1 applied to using Interchange as the price you're changing with
2 the SSNIP. It's not even the right idea in theory, okay.
3 THE COURT: Okay. Because that's, because it would
4 be the right idea in theory if it were the switching fee?
5 THE WITNESS: Conceptually if you were thinking just
6 about Switch fee -- actually, I think there is a problem. The
7 Switch fee is not the merchant price, the merchant pays the
8 whole thing. There is a different conception.
9 THE COURT: No.
10 THE WITNESS: Different conceptual problem if you use
11 the Switch fee because the merchant's price is the Interchange.
12 Interchange plus the Switch fee, so they have to pay both of
13 those. So I think that runs into a different difficulty
14 applying the test.
15 THE COURT: But the problem with applying the
16 Interchange fee is that that doesn't actually go to the persons
17 accused of being monopolists. It's a funny way to monopolize.
18 THE WITNESS: That's correct.
19 THE COURT: To make money for somebody else.
20 THE WITNESS: That's why I say conceptually I think
21 here it gets you in trouble is the wrong thing because you are
22 competing to get those people. By getting more money for them,
23 it's a form of competition, it's not an exercise of the market
24 power, so I think that's one problem.
25 There's always, I am not sure the right word is problem.

1 One always has to be careful of applying the hypothetical
2 monopolist test though to make sure that the results you get
3 out of it makes sense because it is a particular, you know,
4 mechanical way to do things, and it's a point I make that what
5 it says is, okay, if you have properly applied it, so let's go
6 with tofu and suppose we have done it and we really find out
7 that we are sure that the tofu monopolist could raise price by
8 five or 10 percent, okay.
9 Even if you knew that, it doesn't tell you what the
10 merger of two tofu firms is going to do because they are not
11 merging to monopoly, and that's why I talk about you have to
12 worry about expansion and what rivals will do, what Interlink
13 would do because you are not getting the hypothetical monopoly
14 when you actually merge so you have got to -- and this is
15 always the case, you have got to --
16 THE COURT: But, but the point is that it has or I
17 thought the point was that it would have an anti-competitive
18 effect not that you would end up with a hundred percent
19 monopolist, but that by operation of the hypothetical
20 monopolist construct, you can demonstrate that it would have an
21 anti-competitive effect and therefore should be avoided.
22 THE WITNESS: Okay, and I would say that it, except
23 that it never does that by itself. That applying the
24 hypothetical monopolist test would tell you -- I mean, by
25 construction it says if you have all of the firms selling this

1 product together in a perfect cartel, this is what they could
2 do.
3 Now I think I haven't heard anybody say here today, they
4 say we're getting all of the PIN debit firms together in a
5 perfect cartel. So the idea of it from an economist point of
6 view is not that it's competitive effects analysis, but it's
7 they are trying to draw some boundaries to do it, but once you
8 have got the boundaries, once you have got the boundaries, you
9 have got, you want to check with the real world or the facts.
10 These boundaries of the test really make sense to understand
11 competition.
12 THE COURT: Well, we have lost everybody.
13 THE WITNESS: I think we might -- we are still on the
14 line.
15 (Noise from phones.)
16 THE COURT: Is anybody there?
17 DR. HAUSMAN: This is Terry Hausman.
18 MS. ALEXIS: Hello.
19 THE COURT: We need you.
20 Are you still there, Dr. Hausman? Hello.
21 Why don't you hang up.
22 (Pause.)
23 Why don't you go ahead.
24 THE WITNESS: So as I was saying, I mean, and the
25 merger guidelines would lay this out too, that it would be a

1 first step for drawing the boundaries, but by itself it can't
2 tell you what the competitive effects are, and I'm sure that
3 Your Honor would agree with that.
4 But it's just one step and then a step typically put in
5 the merger guidelines with the guidelines then say to calculate
6 market shares and now I guess I am getting into some of the
7 legal stuff about whether that creates some sort of presumption
8 or not.
9 Which I gather it is not Professor Ordover's approach
10 here so in that sense I think even he is agreeing that you
11 don't follow the merger guidelines, you know, mechanically and
12 everything, because at least in these slides he has not tried
13 to do what the merger guidelines would identify I think as the
14 third step which would be calculating market shares, you know,
15 and I think he's correct in that.
16 I have said that I don't think that market shares are a
17 very good indicator here, but I think that it does illustrate
18 that economist recognize that the merger guidelines are not the
19 only way to do things.
20 THE COURT: I am sorry, I didn't hear that.
21 THE WITNESS: Oh, the merger guidelines are not the
22 only way to do things, and I think that there's generally
23 consensus among economist as well, that if do you follow the
24 guidelines you have, you always want to check it against the
25 facts and other pieces of evidence as well and there are other

1 ways to go about it.

2 THE COURT: Did you get anybody on the phone?

3 (Pause.)

4 THE DEPUTY CLERK: Are people still on the phone?

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

6 THE COURT: Is that Dr. Hausman?

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

8 Blake-Thomas.

9 THE COURT: Washington D.C. can talk to Washington

10 good. Is there anyone else on the phone?

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

12 State Attorney General's office.

13 MS. HACKER: Janice Hacker in Texas.

14 MR. BETSKO: Joseph Betsko and Ben Cox from

15 Pennsylvania.

16 THE COURT: So did we lose you and you all stayed on

17 the phone; is that the idea?

18 MS. ALEXIS: Yes, this is San Francisco, and the

19 conference operator just called the people. There is some

20 problem with Dr. Hausman and they are going to try to reconnect

21 him.

22 THE COURT: Thank you. I'm sorry. I was just trying

23 to figure out who is attending and who is not.

24 THE WITNESS: The person from Bloomberg still has not

25 figured out how to tap the line or at least knows enough to be

1 quiet when you ask.

2 All right. If I could and also in the interest of time

3 before we get Professor Hausman back, just jump to two of the

4 tables Professor Ordover presented; one of them being I guess

5 his page 19. My set didn't come with numbers, so I hope I

6 numbered them correctly, but --

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

8 THE WITNESS: Yes, the single-bugged and multi-bugged

9 transactions. And you and Professor Ordover did have a

10 discussion about what to make of the different columns and as

11 he I think correctly pointed out, one has to look at the first

12 column with some caution because he said, and if he hadn't I

13 would have, you know, that MasterCard has something like

14 of its transactions, you know, you put the

15 MasterCard number in there, something like for the

16 first column.

17 So and I don't believe anyone is saying that, you know,

18 that MasterCard's debit program is anything approaching a

19 monopoly, so Professor Ordover pointed you, you know, to focus

20 on the second column. So in between two columns he and I are

21 in agreement that the second one would be the one to look at if

22 you are going to do this because of the things like the

23

24 Now a couple of things though about this column, he and

25 I have different calculations of what that number that appears

1 on his table as , and they are different for two reasons.
2 One, which I think is the smaller source of the
3 difference, is that I believe that he only considered certain
4 networks in his data set and I think there were some
5 transactions that involve other networks, but that adjustment
6 is quite small.
7 And then the other thing in my report you see a number I
8 think just under percent was projecting out the loss of STAR
9 issuers, the ones you saw identified in the previous graft so
10 that the number is percent.
11 And I would like to make a couple of points, maybe three
12 points about this.
13 THE OPERATOR: Pardon the interruption, Jerry Hausman
14 now joins your conference.
15 THE COURT: Thank you.
16 THE WITNESS: And that is and you have heard about
17 this in a different context for when particularly Professor
18 Hausman and I thought that Professor Ordover was using market
19 share as his predictor of competitive harm and we said well, if
20 that were true you would see STAR charging higher prices.
21 Well, I would make the same point here that you observed
22 that STAR is at percent and that NYCE is at percent. Yet
23 I think there's agreement and there's disagreement on how to
24 interpret the data, but I believe there's agreement that the
25

1 MR. HOCKETT: Would you like me to show that graft?
2 THE WITNESS: It's up to Her Honor. She may have
3 seen that enough times.
4 THE COURT: I think that given the way that everybody
5 -- I don't think that's actually been challenged.
6 THE WITNESS: Yes. As I say, I believe the
7 disagreement is on the interpretation, so I think it would be
8 useful to go back to the other -- okay, so clearly there's
9 disagreement on the interpretation, but I believe there's
10 agreement on facts that the
11 , if anything it's the other way around.
12 So what I would point to here is that going from
13 doesn't show up on the data as having an effect and
14 again, Professor Ordover has his reasons for thinking why it
15 shouldn't, but then he is saying if you use the number
16 projecting out for STAR that somehow going from say
17 would have a significant effect and would harm
18 consumers.
19 My point would be that I don't think that the data show
20 in effect going from at least anyone has been
21 able to discern and I don't see any that he's offered evidence
22 and I'm not aware of any that going that same amount upward
23 from would have an effect.
24 So that's the first point I would like to make about the
25 numbers.

1 A second one is I'm not quite sure what to make of
2 combining these things and sometimes these things STAR and NYCE
3 don't compete on these things that are uniquely bugged anyway,
4 but maybe that is more of a throw away point.
5 I think the more important of the other points for this
6 is this, that the degree of single bugging and multiple bugging
7 is a choice made by issuers. Okay, it's not that STAR and NYCE
8 are getting to pick what happens here. The issuer is making
9 the choice.
10 So for example, if the issuers have reasons they want to
11 have bugs for multiple networks and the issuers see STAR and
12 NYCE merge and suppose they do combine the networks into one.
13 It will be the issuer's decision whether then to put the bug of
14 another network on those cards as well. So I think that's
15 important to remember that these numbers, they're not set in
16 stone and in particular they are not set by these two networks.
17 THE COURT: Well, in that sense isn't that what part
18 of the in essence the WAL MART litigation was about? It's a
19 different, it's a different concept, but as I understand it
20 that Visa and MasterCard had an obligation that it was imposing
21 that if you took their credit cards, you had to take their
22 debit cards, right?
23 THE WITNESS: That's correct.
24 THE COURT: And it's the -- I mean, I don't quite
25 understand how the issuer is ruled then by the network. The

1 network like Visa goes and says we'll pay you a lot of money.
2 Are those your facts or Dr. Hausman's facts, the ones
3 about -- about how much --
4 THE WITNESS: He has talked about that, but the
5 networks can try to influence the issuer decision to the extent
6 they can create financial incentives to try to run more of the
7 transactions over their particular network.
8 And in particular, you know, in the end and if a
9 network -- and that's the way the competition can work is the
10 network offers a good enough deal to the issuer, the issuer may
11 put only that network's bug on it, but that in a sense is, in a
12 sense it is the outcome of competition by networks to attract
13 issuers.
14 THE COURT: What about the concern that Dr. Ordover
15 testified to using his ,
16 that the percentage here putting STAR and NYCE together would
17 make it difficult for a merchant to get out of the market
18 because that one network would control so much of the debit PIN
19 market?
20 THE WITNESS: Okay, I think there a few things here
21 are relevant here. One, there's a question of whether the
22 merchants in fact look at these numbers, and I believe that's
23 an issue Professor Ordover himself raised in his report do the
24 merchants actually even know these numbers, so that would be
25 one point, but I think that the other important point, and this

1 is where I guess market definition would come into this or the
2 question of substitution comes in.
3 You know, the question of where would the people go,
4 okay. What he's saying is these people couldn't go to another
5 PIN debit network but they could go to cash or signature debit
6 or checks or in some cases, people would go to credit cards.
7 In some cases they go to ACH.
8 So that's why I think we see another part of the
9 difference and what you are hearing from the economist saying
10 that there's enough substitution, that's one of the factors
11 that goes into it, that the merchants can expect to get the
12 business on a different payment instrument. I see that's an
13 important part.
14 THE COURT: So would you not anticipate a loss of
15 business? There's a question, it's mentioned in one of these
16 slides, about what happens if the customer comes in and the
17 merchant doesn't accept his card. Does the customer actually
18 walk away or does the customer just pay by an alternative
19 means?
20 Is there any fact to support that or is it, is this a
21 hypothesis of the economist?
22 THE WITNESS: No, I think there are facts that
23 suggest in fact that the merchant won't lose very many sales.
24 I mean, I guess you could question whether it's a fact if it
25 was made in their pleadings, but as I said, in the WAL MART

1 litigation certainly the merchant plaintiffs took the position
2 that if they didn't accept signature, and that's right, it's
3 starting with signature, they said if they didn't accept
4 signature they wouldn't lose any sales because people would go
5 somewhere else.
6 I would submit from that that if there, if they are
7 going to go to PIN or cash or checks, the same thing is going
8 to be true by and large for people with PIN debit that they
9 could go somewhere else.
10 I think that one of the things I think in fact you heard
11 earlier today and in the graft again is that people's debit
12 cards tend to have a signature mark on them and also, you know,
13 one or more PIN marks. So most people when they give the
14 merchant their card have the, the person, consumer walking in
15 could be switched over from one to the other and, you know,
16 again all of this stuff we have heard about trying to -- the
17 fact that merchants can steer, you see things like
18 suddenly steering, you know, this big percentage of people away
19 from signature in the PIN. They were using signature before
20 they started doing it, so it's all the indications that they
21 could steer them back.
22 I think when you do see people going back and forth
23 there's data that
24
25

1 All of that suggests that in fact people will just move
2 to another payment instrument rather than go out, you know,
3 leave the store.
4 THE COURT: And not make the purchase at all?
5 THE WITNESS: That's right. I think particularly
6 when you think about what goes on with debit and particularly I
7 guess PIN debit is a significant percentage of those
8 transactions are things like groceries.
9 So I mean, you know, someone goes in, they do their
10 weekly grocery, now it's true you could try to go to another
11 store, but I think it is important that groceries are so
12 important here because it also suggests you tend to buy your
13 grocery, at least most people buy their groceries in the same
14 store, you can do things like your checks, you know,
15 preapproved or various forms of verifications, and things like
16 that, you have a relationship say with your supermarket.
17 I mean, it may not be a close one but you do have a
18 commercial relationship with them in a way that say you
19 wouldn't, certainly going to a hotel and that then makes other
20 payment mechanisms a better substitute than you might otherwise
21 think. That's why checks are used a lot at supermarkets.
22 THE COURT: Supermarkets don't do much steering
23 though do they between debit and credit cards?
24 THE WITNESS: Certainly between, actually between
25 debit and credit or between --

1 THE COURT: Between one kind of debit and another?
2 THE WITNESS: Between one kind of debit and the other
3 kind they do.
4 THE COURT: They do?
5 THE WITNESS: They do do that. They will have ones
6 like I believe that's right. I may be misremembering which
7 ones, some of the large chains in fact will have things like,
8 they will have PIN prompts that when you swipe your card, if it
9 sees that the card can do either PIN or signature, it will ask
10 you to put your PIN in. You know, some of them may try, they
11 may also train their clerks to do it, that supermarkets are
12 pretty savvy about that.
13 The other thing is that we have things like Safeway that
14 has been a leader -- actually and I guess I think it's Publics
15 as well having their own debit having their own debit network,
16 and then Safeway having their ACH based debit card for a
17 variety of reasons they would like people to use. The
18 supermarkets, these big chains have been quite sophisticated in
19 looking for other mechanisms or for moving people around in
20 ways favorable to the merchants.
21 MR. HOCKETT: I do want to make sure that we leave
22 enough time for Dr. Hausman. I don't know whether there were a
23 couple of additional points that Dr. Katz wanted to --
24 THE WITNESS: I would like to make one additional
25 point which I will make today and I'm sure you will be hearing

1 about in the future, but if I just could turn to slide 23 and
2 just explain something that Professor Ordover in fact was
3 careful to explain in his report, but I would like to highlight
4 it here and then report some additional work that people under
5 my direction have done in the last say 48 hours.
6 And that is and you went through this with him before
7 but he reports the top of the first two columns the conflicts
8 between STAR and NYCE. I guess because of the data he had
9 available, at least that's my understanding of why this was
10 done, he used the routing instructions that Concord has when he
11 looked at the EMS data my understanding is that he didn't have
12 the FDMS data, because my understanding is that he didn't have
13 the FDMS routing instructions.
14 So the total FDMS and which things are conflicts is his
15 estimation based on applying one company's process to another
16 company. We were able to obtain, people under my direction,
17 were able to obtain information in the last couple of days
18 about what the routing instructions were or are for, for FDMS.
19 MR. CONRATH: This is material we sought, Your Honor,
20 and were told was not available.
21 MR. HOCKETT: I don't think that's true.
22 MS. ALEXIS: It's been produced, it was produced
23 months ago. You have routing instructions that were produced
24 months ago.
25 MR. CONRATH: Not in this file.

1 THE COURT: Well, why don't you -- we'll let that one
2 go.
3 THE WITNESS: I have no idea about that.
4 THE COURT: No, no, that's a different argument.
5 THE WITNESS: Anyway, the numbers that people under
6 my direction calculated that -- I think I have got this right,
7 it's a dramatic difference. Instead of
8
9 THE COURT: Under the FDMS column?
10 THE WITNESS: Yes, for the percent of total priority
11 in conflict and the big change is that there just were many
12 fewer dual bug cards, not just dual bugged, they just had many
13 fewer transactions that had both an instruction to go to STAR
14 first and an instruction at the same time to go to NYCE first.
15 THE COURT: Okay.
16 THE WITNESS: Again, this one where they would also,
17 and then I'll stop, make the point again though that to the
18 extent what we see and I believe this is what I believe we do
19 see is networks competing for issuers. It's in the network's
20 interest to figure out ways to end various routing conflicts
21 and that's true whether or not the networks merge because
22 otherwise, what you have happening is almost a default, you are
23 letting the merchant choose and clearly, that's not what the
24 issuers want.
25 So the competitive forces of networks trying to attract

1 issuers is at work here, and in fact, if I wrote it down
2 correctly, Professor Ordover talked about something about
3 arbitrage, you know, merchants arbitraging against the
4 networks, and then that's what we saw going on here.
5 But of course, the way to think about it with
6 Interchange is they are arbitraging against the issuers. It's
7 obviously both, they are looking at Switch fees and
8 Interchange, but the bigger component is Interchange and so
9 when the merchant is trying to find the least cost routing, a
10 lot of what they are doing is trying to avoid paying the issuer
11 the money which tells us that the issuers have economic
12 incentives to, you know, to get the networks to stop doing
13 these things, and so to the extent that these do turn out to be
14 significant effects, there are these economic incentives to
15 stop that happening, and I guess I should say there are also
16 economic incentives to stop me from talking any more so that
17 Jerry can, unless you have any questions.
18 THE COURT: Okay. No, no, I think we need to hear
19 from Dr. Hausman, and it is getting late.
20 MR. HOCKETT: Before we let Dr. Katz go, can we just
21 make sure that Dr. Hausman is still present?
22 THE COURT: Dr. Hausman, are you still there?
23 DR. HAUSMAN: Yes, I am, Your Honor. I have been the
24 whole time.
25 MR. HOCKETT: Very good. Let me just give the Court

1 a copy of the slides that we have already supplied to the
2 Government.
3 THE COURT: All right. And could you also inform the
4 Government as quickly as possible about the Bates number or
5 whatever it is of the routing instructions for First Data?
6 MR. CONRATH: Your Honor, if I can address this very
7 briefly. What we do not have is First Data's bin tables that
8 identify the conflicts and can't do the routing instructions
9 without that. We have been asking for that.
10 If I might, Your Honor, I know we have come to, to be
11 amused by my repeated references to the same points, but it's a
12 very serious point. The Government is seriously injured by
13 this and this is a classic example of the kind of, you know,
14 non-disclosure, we have to fight. If we are on a regular
15 schedule, I'm familiar with those kind of litigation games, I
16 know how to get information.
17 We don't have time to do it here and therefore, we are
18 gravely prejudiced.
19 MS. ALEXIS: Your Honor, and I don't want to take
20 the time from Professor Hausman, I think it's very late where
21 he is, but I might add as I said from sitting back there that
22 there are routing instructions at First Data, those were
23 produced --
24 THE COURT: Yes, but what about the bin tables?
25 MS. ALEXIS -- months ago.

1 With respect to the bin tables, I don't think that and I
2 will go back and check that issue, but they know if they looked
3 at the documents just exactly how the transaction should be
4 routed. Under the First Data algorithim it's a computer
5 algorithim that says first you look at if it's an issuer
6 selection has there been an issuer routing, if not, then you
7 default to least-cost routing.
8 There's nothing to do with looking at STAR next, and
9 that's been clear from the documents. They have had witnesses
10 galore that they could have asked for clarification on that
11 point, and for whatever reason haven't done that.
12 THE COURT: But the issue according to Mr. Conrath is
13 bin tables.
14 MS. ALEXIS: Your Honor, I don't think that bin
15 tables are not necessarily what tells you how we do the
16 routing. The routing instruction is an algorithim that says
17 first you look at this, then you move to that.
18 Could we reserve this argument for when Professor
19 Hausman is no longer --
20 THE COURT: We'll reserve this because we have really
21 imposed on Professor Hausman's ears. Go ahead.
22 MS. ALEXIS: Thank you.
23 Professor Hausman, can you hear me okay?
24 PROFESSOR HAUSMAN: Yes, I can. I'm trying to figure
25 out based on the number of questions that have been asked today

1 what's left for you to address.

2 THE COURT: We need to swear the witness.

3 MS. ALEXIS: Oh, I am sorry, okay. I apologize, Your

4 Honor.

5 (DEFENDANT WITNESS, JERRY HAUSMAN, SWORN.)

6 THE WITNESS: Yes. And would you ask Miss Alexis to

7 speak directly into the microphone, she's breaking up.

8 MS. ALEXIS: I am, but you tell me if you can't hear

9 me, okay.

10 THE WITNESS: I can hear you now.

11 MS. ALEXIS: I was trying to figure out what are the

12 issues that are left that we could assist the Court with and,

13 of course, I'm sure Judge Collyer will also pipe up and ask

14 questions throughout.

15 But there are three that I thought -- actually four that

16 I thought where we could be useful in the half hour or so

17 that's left. One is to briefly touch on, you know, your view

18 of the merger guidelines and how even if, even if Interchange

19 were used in there in a kind of SSNIP test under the merger

20 guidelines and looking only at the merchants whether they, the

21 Justice Department or Professor Ordover has approached this

22 properly in the way that they have applied their own

23 guidelines.

24 Second --

25 THE COURT: Why don't we just do that one, let's

1 start with that.

2 MS. ALEXIS: Okay, let's start with that one.

3 THE WITNESS: Okay. That's good, Your Honor, because

4 I can remember that one.

5 I do not think that the merger guidelines really can be

6 applied here. I am not saying that but --

7 (he's breaking up.)

8 Under selling tofu or you can be selling many different

9 products, but the whole thing here is, is that it's a two-sided

10 market and --

11 (lost sound.)

12 THE COURT: Dr. Hausman, we can't hear you, you are

13 breaking up, so we can't get your testimony into the record.

14 Can you slow down just a little bit and maybe if you

15 speak a little more specifically it will come through.

16 THE WITNESS: Okay. I will try again, Your Honor.

17 What I was saying is that I do not believe that the

18 merger guidelines adequately can take into account the dual

19 status or the dual roles that Interchange and Switch fees take

20 into account.

21 (Connection breaking up.)

22 THE WITNESS: Network by close merchants and issuers.

23 And the Switches, Interchange has to do both and this -- you

24 are now confusing competition for getting banks with what looks

25 like what a monopolist might otherwise be of --

1 THE COURT: You can only take down what you can --
2 Jerry, it seems to be breaking up, and I don't know if
3 -- we're not going to get any record on this.
4 Maybe would it be worthwhile to try to call in again and
5 get a clearer connection?
6 THE WITNESS: Yeah, what I do is, there's a number
7 and I can call in and I'll do that right now.
8 THE COURT: Thank you.
9 THE WITNESS: I will hang up and call back.
10 MS. ALEXIS: I apologize, Your Honor.
11 (Pause.)
12 THE COURT: He's in Egypt.
13 MR. CONRATH: I suppose, Your Honor, that this should
14 just remind us that defendant's proposed schedule when they
15 knew their expert would be out of the country.
16 (Pause.)
17 THE COURT: That's true.
18 We cannot go into a conference and sit there listening
19 to a busy signal.
20 MS. ALEXIS: I understand that, Your Honor, and I
21 apologize. I think there were a couple of key points that he
22 did want to address with you. And I don't know what the, what
23 the answer is besides the merger guidelines which I think have
24 been addressed to some extent.
25 There he merely wanted to explain to you why Visa, why

1 you have to and I think you already picked up on a lot of that
2 based on his earlier report, on the importance of Visa and how
3 it views the two markets as very integrated; i.e. signature and
4 PIN.
5 THE COURT: Although I don't think that you can
6 testify for him.
7 MS. ALEXIS: I know that and I am not trying to. I
8 am just saying that was the key issue that he wanted to be able
9 to address with you and answer your questions.
10 THE COURT: Well, I think that we cannot hear from
11 the Professor this afternoon which is unfortunate, but more
12 unfortunate because the defendants are going to have to figure
13 out how much of his testimony they want to put into the trial
14 record and --
15 MS. ALEXIS: From today?
16 THE COURT: No, not from today. We don't have any
17 testimony from him today. I mean live testimony and --
18 MS. ALEXIS: He will be here.
19 THE COURT: Oh, I understand but you have to
20 understand that you are going to be running against a clock,
21 and the longer that you have to take for his testimony, the
22 less time you are going to have for something else, that's all
23 I'm saying.
24 MS. ALEXIS: Oh, I see, Your Honor, yes.
25 THE COURT: I mean, luckily I have heard from the

1 other experts and so a fair amount of their testimony can be
2 sculpted for purposes of trial in a way that everybody can know
3 that I have already heard a lot of what they have to say.
4 And so hopefully, we can have their testimony without
5 having to kick everybody out of the courtroom, without having
6 to seal the record, and they can give their opinions and the
7 basis for their opinions and you are going to have to figure
8 out a way to get the testimony from Professor Hausman in
9 without that advantage. That's all I'm saying because we can't
10 reach him.
11 MS. ALEXIS: Again, I apologize. I thought that the
12 telecommunications was better than it was, at least it was
13 working this morning.
14 THE COURT: Well, he could hear us on and off, but I
15 don't think that he could participate very effectively.
16 Let's talk about bin tables.
17 Mr. Conrath, would you tell me what bin tables are?
18 MR. CONRATH: Perhaps we could seek someone who is a
19 little more expert than I am.
20 THE COURT: All right, whomever it is that knows what
21 bin tables are.
22 Oh, we'll really getting -- now we're getting to the
23 real expert.
24 MR. SOVEN: Exactly. Your Honor, I'm working -- my
25 name is Joshua Soven, and I'm from the United States and I'm

1 working off some incomplete information.

2 Bin files are bank identification numbers and it's our

3 understanding the way the process works that what a network

4 will do will send lists of bin files which refer to debit cards

5 to merchant processors, and those bin files contain

6 instructions as to whether or not that network is the priority

7 network for the particular network at issue.

8 So STAR on a weekly basis will send lists of files to

9 the various merchant processor flagging certain ranges of cards

10 as its cards, and it's my understanding that we do not have

11 master routing tables from First Data which is what we thought

12 Mr. Katz, Dr. Katz was testifying about.

13 And if I have got it wrong, I have got it wrong.

14 MS. ALEXIS: Let me partner Frank Hinman who is more

15 familiar with that.

16 MR. SOVEN: Sure.

17 MR. HINMAN: Good afternoon, Your Honor, Frank

18 Hinman.

19 Let me start by saying that as to the specific analysis

20 that Dr. Katz' associate has done in the last 48 hours I don't

21 know what it was based on, and so I can't tell you that.

22 I have been involved over the course of these

23 negotiations in trying to determine what we have and can

24 provide and what we don't have and can't provide.

25 That being said, there have been others in my office who

1 are right on the front lines of that issue.
2 All I guess I can say is that I will work with counsel
3 immediately. I doubt seriously whether there actually is
4 something that we have now decided to use at the eleventh hour
5 and withheld from the Government. I mean, I think that would
6 either be --
7 THE COURT: Whether you have withheld it and you're
8 using it or whether you are not using it but they haven't got
9 it and you do and they think that they need it --
10 MR. HINMAN: Oh, of course, Your Honor.
11 THE COURT: -- do you know what bin tables are?
12 MR. HINMAN: Do I know what bin tables are? I have a
13 conceptual idea.
14 THE COURT: Is there anyone on the phone who would
15 from the defendants who would -- oh, we are not on the phone
16 any more.
17 MR. PATTON: Your Honor, I could take a stab at --
18 and Mr. Hinman feel free. As I understand bin tables --
19 THE COURT: I don't want an explanation about what
20 they are, the Government has given me one.
21 I want to know whether they exist for First Data, and
22 then I want to know why if the Government has asked for them,
23 it doesn't have them?
24 MR. HOCKETT: Your Honor, I have asked Dr. Katz to
25 step outside and to verify with his associate what exactly it

1 was that she used to run the calculations.

2 THE COURT: That's fine, and that would be helpful.

3 What I want to know is does First Data have bin tables,

4 and if so, why doesn't the Government have them?

5 MR. HINMAN: Your Honor, to my knowledge, there is

6 nothing that we have that they don't have. I mean, that's all

7 I can tell you.

8 To the extent that I'm mistaken about that, which I

9 don't think that I am, if I am, all we can do is remedy that

10 immediately and that's what we will do. But I have no basis to

11 think that's the case.

12 THE COURT: Okay. So as far as you are familiar and

13 unfortunately, you happen to be very familiar, as far as you

14 know, everything that you have, all of the documentation that

15 you from First Data they have?

16 MR. HINMAN: Absolutely.

17 THE COURT: Okay. I'm not sure that answers

18 Mr. Conrath's question but it certainly means that the lawyers

19 have produced what they have. Yes, sir.

20 MR. SOVEN: Yes, Your Honor, I just have one point of

21 clarification.

22 It's our understanding that we do have bin files. We

23 asked for the data in a way that would identify the conflicts,

24 and we were told that the data did not exist.

25 If the Court would like a more precise explanation I can

1 offer Scott Thompson who is an economist in our office who can
2 explain it more fully.
3 MR. THOMPSON: Your Honor --
4 THE COURT: Wait, wait. Do I understand that you got
5 something in a fashion or information from Concord that you did
6 not get from First Data? That was the suggestion.
7 MR. HINMAN: There are differences in what the two --
8 what the companies.
9 THE COURT: I'm sure there are.
10 MR. HINMAN: So yes.
11 MR. SOVEN: That's correct.
12 THE COURT: As to this issue?
13 MR. SOVEN: Yes.
14 THE COURT: It's your opinion in the Department of
15 Justice that the information that you think that you need from
16 First Data must exist and you can't find it?
17 MR. SOVEN: No, Your Honor what we are -- Dr. Katz
18 said several things in his testimony which suggested he had
19 information from First Data which could identify the conflicts
20 between network routing rules. That's the information we had
21 sought from First Data and it was our understanding from them
22 that that data did not exist.
23 THE COURT: Okay. Now I understand. So it's not
24 exactly bin tables?
25 EURBGS: No, it's data which indicates the conflict

1 between the routing instructions of the various networks.
2 MS. ALEXIS: If I could interject, Your Honor, and
3 we'll double check on this point, but I think it's exactly what
4 I said before, it's the routing instructions, there is an
5 algorithim, it's all done by computer as to what happens when
6 you get a notification as to whether an issuer has designated a
7 particular network as for its primary routing.
8 And First Data adopted this back in the late '90s and it
9 follows it, and those instructions have been given and so they
10 don't, as far as I know, there is no variance, it's a computer
11 algorithim and that's what is followed and I believe that's
12 what Dr. Katz is relying on, but we will confirm that.
13 THE COURT: Is there any -- As I understand it, NYCE
14 is willing to use any network at all?
15 MS. ALEXIS: First Data will use -- what First Data
16 does with its routing and as I said, they adopted this in the
17 late '90s is they will look to see and this is by computer,
18 they will look to see whether an issuer has designated a
19 particular network as its primary network when they get a
20 transaction through that might have several bugs on it.
21 If there is no issuer designation then --
22 THE COURT: Sorry, I am interrupting you. I have a
23 note that says every one is back on the main conference line.
24 MS. ALEXIS: Okay, sorry.
25 THE COURT: Hold on.

1 (Pause.)

2 THE COURT: In the meantime, the expert is checking

3 with his associates to find out?

4 MS. ALEXIS: Yes, he is.

5 THE COURT: Is every one there?

6 THE WITNESS: Yes, I'm here, this is Jerry Hausman.

7 THE COURT: My goodness.

8 MS. ALEXIS: He actually sounds clear.

9 THE WITNESS: Yes, we got a fiberoptic cable this

10 time, Your Honor. I teach telecommunications so I can tell

11 what happened.

12 THE COURT: We were deep into talking about bin

13 tables and things, and maybe we'll slow down that conversation

14 and give you a few minutes.

15 Dr. Hausman, you were just saying when we were so rudely

16 interrupted as I say that, that the analysis used by the

17 Government confuses competition with market --

18 THE WITNESS: Market power.

19 THE COURT: Market power, thank you, thank you.

20 Why don't you finish your thought.

21 THE WITNESS: Yes. Well, what I was saying is that

22 in a one-sided market if done correctly, the SSNIP test usually

23 is okay. But in a two-sided market where you have both

24 Interchange and Switch and you have to satisfy two parties, the

25 merchants and the banks -- I am going to call the issuers the

1 banks, Your Honor.

2 THE COURT: I tried that and got corrected.

3 THE WITNESS: Okay, well I will not do so.

4 The problem is that what is actually competition which

5 is trying to get issuers by raising the Interchange. If you

6 only look at the other side of the market, looks like you are

7 exercising market power, and so that's why that SSNIP test

8 which, you know, is designed to look at only one side of the

9 market in my view is not designed to look at two-sided markets

10 such as we are talking about here.

11 THE COURT: Okay. I got that. What was the second

12 point? Second question that you had?

13 MS. ALEXIS: Well, the second question I had under

14 the merger guidelines is that Professor Ordover says that he is

15 looking at the current price. Even if you include interchange

16 fees and just look at the merchant side of the market, he says

17 that he is looking at the current price of signature debit

18 versus PIN debit and says that it's so much more expensive.

19 Under the merger guideline approach if you were to

20 follow that should you be looking at the current price given

21 the situation that, you know, that's or the conditions under

22 which signature debit has been sold over the last many years?

23 THE WITNESS: No, because what happened before was

24 that Visa and MasterCard tied their credit card to signature

25 debit so all economic theory would say that would lead to

1 decreased credit card rates and increase signature debit rates.
2 And with the WAL MART settlement said you are not
3 allowed to do that any more, economic theory would then say
4 that the credit card rates are going to go up which they have
5 already started to, MasterCard has announced they are going to
6 raise their rates, and that signature debit is going to come
7 down and we have already seen that happen as well.
8 Now the merger guidelines are very careful to make two
9 points. The first is that you are suppose to look to the
10 future when the merger will happen. I don't think that
11 Professor Ordover has done that, but secondly, there's
12 something called the cellophane fallacy which is known to
13 antitrust economists and judges, Judge Closner talked about
14 this a long time ago and that is that if the prices in the
15 market are artificially distorted and are not competitive
16 prices, the Government is suppose to come in and use
17 competitive prices. It says that right in the merger
18 guidelines, I don't have the section handy, Your Honor, but if
19 someone can point you to that.
20 So we know that the prices have not been competitive
21 prices, they have been distorted by this tie which is no longer
22 going to exist and the competitive prices is as Professor
23 Ordover I think has argued is, is that signature doesn't really
24 have very many advantages over debit, so we expect that --
25 over PIN debits -- so we expect the prices under competitive

1 conditions to come closer together.

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13 report and most particularly, I think I got it from your

14 rebuttal report, which if I misunderstood you, I need your

15 correction.

16 Which was that Visa because of its strength in the

17 signature end of credit and debit was able through Interlink to

18 force an increase in the Interchange fees to the benefit of its

19 member banks and thereby an increase to the cost of the

20 merchants through good old fashioned competition with the

21 networks including the two defendants here, and that was the

22 result of competition from Visa and not the result of any,

23 anything else and really these parties ought to be able to

24 merge because you need somebody with a little weight as against

25 Visa.

1 THE WITNESS: Okay. I'm totally with you; however,
2 there is an argument which I heard one of the Government
3 lawyers make, I think it was probably Craig Conrath, saying
4 that the question is whether prices will go up and it's not
5 just whether you, you know, create another gorilla to contend
6 with Visa.
7 So I'm completely with you and I don't think that
8 there's really any argument that Visa has led to an increase in
9 Interchange rates for PIN debit and has forced the networks
10 through competition to raise their Interchange rates, and of
11 course, that helps Visa.
12 But I would like to make an additional point which I
13 don't think that has come out in the hearing. Now as you know,
14 I didn't hear the whole hearing, but I don't think that anyone
15 said this.
16 We know that there's the graph that was shown to you
17 that STAR is going to go from its current approximately
18 51 percent down to my latest calculation is that
19 was in my rebuttal report.
20 We know also that Interlink is going to go up by quite a
21 amount -- quite a bit. I think there is a
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25 But what hasn't come out in this hearing is that under

1 the WAL MART settlement, Interlink is allowed -- or Visa is
2 allowed to create a new tie and the new tie is that if you take
3 Interlink you have to take their signature debit. That has
4 been agreed to in the WAL MART. So in other words, if you take
5 one debit instrument which is Interlink, you are going to have
6 to take both.
7 Once Visa gets up to, and I'm going use a number here
8 which is just approximate, of _ , that's going to mean,
9 according to Professor Ordover's argument, that it's very
10 difficult for a merchant not to take Interlink because they're
11 going to be on a lot of cards and again, Professor Ordover
12 testified, I heard him say that Interlink usually goes for
13 either a single bug or an exclusive.
14 Now of course, under the settlement they are not allowed
15 to do an exclusive for I think it's two years, but you can
16 certainly fix it up from an economic point of view that it will
17 be in the issuer's best interest to have only a single bug in
18 many cases. And I can explain that at trial, of course.
19 But once Interlink gets up to a large share which they
20 are going to have, and there is going to be a single bug or an
21 exclusive on a card, then it's going to be difficult for
22 merchants not to take them.
23 Once merchants take them and they are also making
24 special deals with a lot of large merchants like WAL MART -- it
25 was in the paper this week -- then you are also going to have

1 to take Visa signature debit so this whole 800-pound gorilla
2 thing is going to be re-enforced by Interlink growing and
3 therefore requiring merchants to take signature debit as well,
4 and it will be in Visa's best interest then to continue to
5 increase the Interchange on Interlink, force up the networks
6 and drive the merchant fees even closer together in the future.
7 THE COURT: Now do you -- I think I even follow that.
8 Do you understand that there really isn't a switching fee in
9 the Visa arrangements because it runs its own network or it's
10 already --
11 THE WITNESS: That's not correct, Your Honor. I
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18 So there's no separate Switch fee for merchants but they
19 do charge the issuers a Switch fee. That's how they make their
20 money and they do other charges as well.
21 And the person's name is a
22 THE COURT: That's for signature debit, right?
23 THE WITNESS: Yes. I thought that was your question,
24 Your Honor.
25 THE COURT: No, I was really thinking about

1 Interlink.

2 THE WITNESS: Oh, Interlink. Interlink has a --

3 excuse me -- has a merchant Switch fee which they charge and

4 then they have Interchange as well.

5 THE COURT: So is it, as I understood your expert

6 report, you believe that as a practical matter, putting aside

7 for a moment the, how the guidelines might work, as a practical

8 matter it's impossible to look at the debit PIN -- the PIN

9 debit market without taking into account the aggressive growth

10 that Visa is engaged in to enlarge its position in the PIN

11 debit market but also to contract PIN and signature debit?

12 THE WITNESS: That's absolutely correct, Your Honor.

13 Would you like me to explain or --

14 THE COURT: Yeah.

15 THE WITNESS: You certainly understood it.

16 Yes. What's going on there is what, if you don't put in

17 signature debit you are missing the competitive dynamic of the

18 market. Because remember, the Government has argued that STAR

19 has market power now from the mergers that have taken place in

20 the past, that's right in their complaint.

21 So if we look at STAR and that's a form of market power,

22 they are acting in an economically irrational manner because

23 what they are doing is they are raising the Interchange which

24 they don't get to keep at all, and that means that there's

25 going to be less demand for PIN debit because demand curve

1 slopes downward, but at the same time, the total Switch fees
2 which they do get to keep are going down in real terms.
3 So they are just, you know, shooting themselves in the
4 foot or harming themselves and since STAR is certainly a profit
5 maximizing enterprise, that doesn't make economic sense. And
6 so the only way to understand that is to bring in signature
7 debit and say what Visa is up to is trying to protect its
8 signature debit franchise and then it's undertaking the
9 strategy that you and I were just discussing here.
10 THE COURT: Okay.
11 THE WITNESS: Because otherwise, you just don't have
12 an economic explanation for what is going on. I mean, it's
13 unheard of for a firm with market power to be harming itself
14 and lowering its price, you know, which is here the combination
15 of the Switch fees, yet that is what the Government is arguing.
16 THE COURT: Okay. Thank you.
17 Did you have another question for the Professor? It's
18 five after five. I know that I said 5 o'clock, but we did run
19 into technical problems.
20 MS. ALEXIS: Well, there are two other issues and I
21 will let Jerry decide for himself whether he wants to follow
22 it.
23 One is whether you wanted to address the competitive
24 affects, the two issues that Professor Ordover addressed that
25 he had on his slides.

1 And then the last was efficiencies in your view of how
2 efficiencies should be addressed.
3 THE COURT: Why don't you go to the efficiencies
4 point rather than the competitive effects.
5 THE WITNESS: Okay. Sure. The efficiencies and I am
6 going to call them Professor Z if I might, because I don't have
7 his business card in front of me. If that's okay with the
8 Court?
9 THE COURT: Of course.
10 THE WITNESS: What Professor Z said was that he
11 thinks that, and this is just under instructions from the
12 Justice Department lawyers, that you should only look at
13 effects that come directly from the merger. This is when they
14 are talking, Your Honor, about what would happen if they -- and
15 this is incorrect.
16 And I actually talked about this in the paper I
17 published in 1999 at the conference which was partly held by
18 the Department of Justice.
19 I mean, what do we do mergers for -- you said this
20 exactly right, we look at the effect of prices on consumers.
21 Now I told First Data and they did this, I said, you
22 know, there may be efficiencies for things like Western Union
23 but most merchants don't sell or buy Western Union so you
24 shouldn't take that into account and they did not.
25 But what he wants to do is to get rid of processor

1 efficiencies. Remember you were talking about FDMS or FDC,
2 First Data Corp. and Concord. But who pays those processing
3 fees and who will benefit from the efficiencies?
4 Well, it's the same mergers -- the same merchants --
5 excuse me -- who use the PIN debit networks because you can't
6 use a PIN debit network unless you can process and so it seems
7 to me that if it's going to be, if they're going to argue that
8 prices might go up to merchants from the merger, we want to
9 take into account both direct and indirect effects that are
10 going to cause prices to go down to merchants because at the
11 end of the day we want to know are merchants going to pay more
12 or less for PIN debit. So I think --
13 THE COURT: If I can interrupt.
14 THE WITNESS: Sure.
15 THE COURT: If we took into effect the efficiencies
16 at the processor level that I think that Dr. Zmijewski --
17 MS. ALEXIS: Sounds right.
18 THE COURT: Yes, I really apologize to the doctor for
19 slaughtering his name.
20 But anyway, if we take into effect the
21 that he attributes to processor efficiencies
22 are you saying that that would reduce the cost of processing
23 and so therefore, you could increase your Switch fees and the
24 merchants wouldn't mind?
25 THE WITNESS: No. The merchants would like to have

1 the prices go down period, they don't want you to increase the
2 Switch fees either.
3 And I don't think that Switch fees will go up, you know,
4 for all of the reasons that STAR --
5 But no, my point is --
6 THE COURT: Seems to me you are going too fast, we
7 need to change the paper for the court reporter. That's where
8 you dropped off.
9 THE WITNESS: Sure. Just tell me when to start
10 again.
11 THE COURT: Yeah, but you are absolutely resorting to
12 your fast talking too.
13 THE WITNESS: Oh, I apologize, Your Honor.
14 THE COURT: No, I don't mind, but the court reporter
15 can't get it.
16 Did you just hang up?
17 THE WITNESS: No, I am here, Your Honor.
18 THE COURT: Good. If you could just read the last
19 sentence for him.
20 (Last sentence read by the court reporter.)
21 THE COURT: That's where you dropped.
22 THE WITNESS: Why don't I just start that sentence
23 again.
24 THE COURT: All right.
25 THE WITNESS: Okay. So what I'm saying is that I do

1 not believe that the merchant fees for the network will go up
2 for the reason that we know now that
3 , so I don't think that this merger is going to
4 allow that to happen, but I think that lawyers, you know, talk
5 about arguing in the alternative.
6 So let me alternatively assume that the Government is
7 correct and that the, that the merchant fees could go up, you
8 know, that the combination of Switch plus Interchange could go
9 up.
10 What I'm saying is that merchants would then pay higher
11 fees but the efficiencies in processing which will lead to
12 lower processing fees are an offset to that because the
13 merchants have to pay for processing and so that will be a
14 negative number which would offset the positive number that the
15 Government is claiming that merchants would have to pay.
16 THE COURT: Okay, I understand that. I mean, I
17 understand the argument that you are making and now I can let
18 the lawyers just argue about whether or not I should even take
19 that kind of offset into account, but I understand where you
20 are coming from.
21 All right. It's 10 after five and you have been about
22 the most patient witness that I have ever met or not met as the
23 case my be.
24 I think that you should hang up the telephone and go
25 talk to your wife.

1 THE WITNESS: Okay. Could I just ask if I have done
2 that fine, I just want -- Ms. Alexis had one other area, but --
3 MS. ALEXIS: No, I think we in fact are done.
4 THE COURT: I think we have run out of time, we have
5 run out of time for the day.
6 MS. ALEXIS: Thank you, Jerry. What time is it in
7 Cairo?
8 THE WITNESS: It's 12 past 12, so I think it is time
9 for bed.
10 THE COURT: I would say a drink but all right. Have
11 a nice evening. Thank you very much.
12 MS. ALEXIS: Good night.
13 THE WITNESS: Okay, bye.
14 THE COURT: Is everybody else still on the phone?
15 MR. COX: Pennsylvania is still on.
16 MS. HACKER: Texas is still on.
17 THE COURT: More patient people. All right, let's
18 get back to the question of bin numbers.
19 Did we have any response from the expert?
20 MR. HOCKETT: Your Honor, we couldn't get any
21 definitive information in this interval, so we'll just have to
22 follow up. I don't think that anything is amiss, but we'll
23 just have to double check to make sure.
24 MR. CONRATH: Your Honor, I reacted simply to the
25 fact that Dr. Katz criticized Dr. Ordover for making, using an

1 assumption --

2 THE COURT: No, no I understand.

3 MR. CONRATH: -- for something that we had been

4 asking and asking for. So if it exists and we didn't get it,

5 that's a real problem.

6 THE COURT: Okay. Well, let's figure that out.

7 What he was relying on and how he reached his

8 calculation and then we can determine whether that's actually

9 already in the Government's hands and they didn't read it the

10 same way or whatever. Okay.

11 MR. HOCKETT: Very good, Your Honor. we'll do that.

12 THE COURT: All right. Now are there any other

13 matters that we needed to address? I think there is an issue

14 of the late blooming expert but the Government was going to

15 file something?

16 MR. CONRATH: Yes, I didn't think that we need to

17 address that now, Your Honor.

18 THE COURT: Okay.

19 MR. HOCKETT: That's fine with us, Your Honor.

20 THE COURT: Okay. Is there anything else we need to

21 address?

22 MR. CONRATH: I don't think so. I take it from what

23 you said and I think we have been taking it this way but maybe

24 we should clarify that the testimony of these people is

25 basically included as if it were given at trial ultimately and

1 so it can be cited and whatnot?

2 THE COURT: Yes.

3 MR. CONRATH: Is that what you intended?

4 THE COURT: Yes, I think that's right, and I think

5 that it's for that reason that we will need to come up with a

6 public and private version or sealed version of the transcript.

7 It is probable that there are large portions of

8 transcripts that will not need to be sealed as it turns out.

9 My greatest interest was for purposes of what might be

10 confidential information was the Visa competition argument

11 that's advanced most particularly by Dr. Hausman who turns out

12 to be in Egypt and very briefly on the telephone.

13 So if you could review the transcript for that purpose,

14 that purpose as quickly as possible, you would serve all of our

15 interests since I did seal the hearing.

16 MR. HOCKETT: We'll do that, Your Honor.

17 THE COURT: All right. And but I agree with the

18 point that you just made, Mr. Conrath, that it will not be

19 necessary for any of these witnesses to specifically repeat the

20 testimony that they gave here today, and certainly not to take

21 any time to give me their backgrounds and their expertise and

22 all of that.

23 I really accept them all as clearly the experts that

24 they are and the fact that they don't agree doesn't do anything

25 but perhaps help me, so.

1 MR. CONRATH: Very well, Your Honor.
2 THE COURT: Okay, good. I really want to thank
3 everybody for making the effort given the schedule and I note
4 the difficulty of this schedule for everybody and most
5 particularly, for the Government trying hard to put this case
6 together. But I do want to thank you very much for taking the
7 time to put this hearing together because it has been of
8 material assistance to me and just understanding some of the
9 issues that we're dealing with, and I will now take some things
10 home with me over the weekend and have something to work on.
11 MR. CONRATH: We thank you for the time to make these
12 presentations, Your Honor.
13 MR. HOCKETT: Defendants thank you as well.
14 THE COURT: Very, very valuable. Thank you all a
15 lot. I hope you have a good weekend, travel safely. And I
16 think we're done for the day.
17 The party is actually open if anyone would like to
18 attend.
19 (Recess at 5:25 p.m.)
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1 Certificate

2 I certify that the foregoing is a true and correct
3 transcript, to the best of my ability, of the above pages, of
4 the stenographic notes provided to me by the United States
5 District Court, of the proceedings taken on the date and time
6 previously stated in the above matter.

7 I further certify that I am neither counsel for,
8 related to, nor employed by any of the parties to the action in
9 wich this hearing was taken, and further that I am not
10 financially nor otherwise interested in the outcome of the
11 action.

12

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15 Crystal M. Pilgrim, RPR 10/8/03

16 Date

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