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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, : Civil Action  
: No. 1:11-cv-00948  
Plaintiff, :  
: September 13, 2011  
v. : Morning Session  
: Washington, D.C.  
H&R BLOCK, INC., et al., :  
Defendants. :  
.....:

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING - DAY 6  
BEFORE THE HONORABLE BERYL A. HOWELL  
UNITED STATES DISTRICT COURT JUDGE

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25 Proceedings reported by machine shorthand, transcript  
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P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action 11-948, United States of America v. H&R Block.

MR. WAYLAND: Good morning, your Honor. I do not believe there are any administrative matters, but Mr. Robertson, anything?

MR. ROBERTSON: No, your Honor. I think we're trying to get this accomplished this morning. And Dr. Meyer is in the courtroom so I think we can commence and keep this moving.

THE COURT: Good. Dr. Meyer, please come up to the bench.

Good morning. And I remind you you remain under oath.

THE WITNESS: Thank you.

CROSS-EXAMINATION

BY MR. WAYLAND:

Q Good morning, Dr. Meyer. I'm Joe Wayland, and I represent the government in this matter.

Diversion. It's a word I've written on the board over there (indicating). See it?

A I see it.

Q As I listened to your testimony yesterday, it seemed to be at the heart of your opinion, right?

A Diversion is an important concept in merger analysis, yes.

1 Q Well, I take it it must be because you're relying on  
2 diversion to support most of your opinion, correct?

3 A I have a lot of different pieces of evidence that support my  
4 opinion. But diversion is very important.

5 Q And you told us yesterday that diversion is critical to  
6 understanding the main issue in this case, which is what happens  
7 as a result if there's a price increase, correct?

8 A That is certainly one of the elements that you have to take  
9 into account when thinking about whether there's going to be a  
10 price increase. As I indicated, there are other elements as  
11 well.

12 Q All right. And you said that the government's market  
13 definition is wrong because we don't have the closest substitute  
14 in our market, right?

15 A Yes, I believe that's correct.

16 Q And the basis for that, as I got it, the quantitative basis  
17 for that is your calculation of diversion ratios, correct?

18 A That's the quantitative basis. There's also qualitative  
19 evidence that corroborates that.

20 Q You're an economist. You're here to tell us about the  
21 quantitative analysis that you've done, correct?

22 A I am here to tell you about the quantitative analysis, but  
23 qualitative analysis is also important.

24 Q Well, we're going to talk this morning about the  
25 quantitative analysis that you've done.

1           And the diversion quantitative analysis that you've done, as  
2 I understand it, a big part of it is the simulator, correct?

3           A    The simulator is important, yes.

4           Q    In fact, the simulator is where you get the quantitative  
5 evidence that supports your diversion analysis, correct?

6           A    Yes.

7           Q    All right. Let's go to the simulator.

8                   Now, the simulator was prepared on the basis of what you  
9 called in your report a "discrete choice survey," correct?

10          A    Correct.

11          Q    That's at Paragraph 44 of your report, right? It's on the  
12 screen.

13                   MR. WAYLAND: Your Honor, I think we have some binders.  
14 Do you have the binders that we -- Binders 1 and 2? Let me hand  
15 them up.

16          BY MR. WAYLAND:

17          Q    All right, Dr. Meyer. Paragraph 44 of your report says,  
18 "The simulator was prepared using a discrete choice survey of  
19 6,119 respondents," correct?

20          A    Yes.

21          Q    Now, you've written about discrete choice surveys, right?

22          A    Yes.

23          Q    You wrote an article called "Designing and Using Surveys to  
24 Define Relevant Markets," correct?

25          A    I believe that was the title, yes.

1 Q Yes. We've displayed it on the screen. It's at Tab 28.

2 And that's an article you wrote, correct?

3 A That's correct.

4 Q Okay. And where did the article appear?

5 A The article appeared in a book.

6 Q Do you remember the name of the book?

7 A It had to do with antitrust. I don't remember the name of  
8 the book.

9 Q And the article that we're looking at, "Designing and Using  
10 Surveys to Define Relevant Markets," that reflects your views of  
11 surveys and the proper use of surveys, correct?

12 A Yes.

13 Q All right. Let's see what you said about discrete choice  
14 surveys. Let's go to page 105.

15 And you say in your article that "discrete choice surveys  
16 refer to a form of stated preference survey in which respondents  
17 are offered choices under hypothetical conditions," correct?

18 A Correct.

19 Q All right. And that's your understanding of what a discrete  
20 choice survey should do, right?

21 A Correct.

22 Q And then you say, "In a discrete choice survey, respondents  
23 are presented with a set of alternative items with specified  
24 characteristics at randomly selected prices," correct?

25 A Correct.

1 Q And so a properly formulated discrete choice survey would  
2 satisfy this condition, correct, "presented with a set of  
3 alternative items with specified characteristics at randomly  
4 selected prices," correct?

5 A Correct.

6 Q All right. Now, let's -- I think you've said some more  
7 about it so let's keep going.

8 You give an example. "The respondent may be shown four  
9 product options." It could be more, right, it doesn't have to  
10 be four, correct?

11 A That's correct.

12 Q "Each option would be a product with a different combination  
13 of attributes and prices," correct?

14 A Correct.

15 Q That's what a discrete choice survey would be; a bunch of  
16 products, attributes, and prices, correct?

17 A Correct.

18 Q And makes sense. If you're trying to figure out what people  
19 would do in the real world, here's a list of products, here's  
20 the prices; we're going to change something about it, we'll  
21 change a price and see what happens, see how people react,  
22 right?

23 A That's correct.

24 Q And then later on you say, "The range of prices of different  
25 product options shown to the respondents might be randomly



1 selected from among a set of four or five hypothetical price  
2 points," correct?

3 A Correct.

4 Q So -- and I think as we see when we get into the simulator,  
5 that was supposed to happen, right? You change the price points  
6 and see how the respondents change their reaction, correct?

7 A Correct.

8 Q Okay. And the whole point of this, as you say in your  
9 article, is "an attempt to create a controlled market  
10 environment," correct?

11 A I think I say "a controlled market experiment."

12 Q "Experiment," all right. You're right. "A controlled  
13 market experiment."

14 Are you trying to get as close as you can to what consumers  
15 would do in the real world, right?

16 A You're trying to get information about how consumers respond  
17 to prices within a survey environment, yes.

18 Q Okay. Because you're trying to create a controlled market  
19 experiment, right; what happens in the market, you're trying to  
20 duplicate that, correct?

21 A Clearly, this is a survey so we have to recognize that. But  
22 you're trying to get as close as possible to understanding what  
23 consumers would do in the event of a price increase, that's  
24 correct.

25 Q All right. Let's go back to your report and see how you've

1 described what happened here.

2 Now, in your report you say, "The respondents were shown  
3 five pricing scenarios, and the options included online  
4 do-it-yourself options, software do-it-yourself options,  
5 assisted tax preparation options, and other do-it-yourself  
6 options, including pen and paper and friends and family."

7 Do you see that?

8 A Yes.

9 Q And that's, as far as you know, a correct explanation of  
10 what happened in the simulator, correct?

11 A Correct.

12 Q And then you say, "The pricing of the various options  
13 changed across scenarios."

14 And that, as far as you understand, is what happened as  
15 well, right?

16 A Correct.

17 Q And that's your understanding. Your understanding of the  
18 simulator is what's set forth that we've highlighted, correct?

19 A That's correct.

20 Q All right. Now, you looked at the results of the simulator,  
21 and you interpret them to show, as you report in Paragraph 45 of  
22 your report, that, "the largest diversion from HRB's TaxCut, in  
23 the event of a price increase, is to CPAs and accountants,"  
24 right?

25 That's the conclusion that you reported in your report that

1 you submitted in this case, correct?

2 A Correct.

3 Q And that's what your simulator told you, right?

4 A That's correct.

5 Q Okay. But before we talk about that conclusion, I just want  
6 to make sure I understand because, in my view, there's a little  
7 bit of uncertainty just in the sentence so let's talk about  
8 that.

9 First of all, CPAs and accountants, that's just a subset in  
10 the assistant market, right?

11 A That's correct.

12 Q All right. And by the way, when you say "HRB's TaxCut," you  
13 don't specify a particular product.

14 Do you mean to say that the largest diversion from any  
15 product of HRB in the digital market? Is that what you mean to  
16 say, or is there a specific TaxCut product you had in mind?

17 A This is not a specific TaxCut product. It's all of the  
18 TaxCut products in aggregate.

19 Q Okay. So all the TaxCut products in aggregate, all right,  
20 we've got that. Then you say, "in the event of a price  
21 increase." You don't say how big of a price increase.

22 Did you have a range in mind?

23 A This is a -- looks at what's known as the "cross-price" and  
24 "own-price elasticities." So these are deviations in the price  
25 around the base price. So it's --

1 Q It doesn't say that there.

2 So let me see if I understand this. Any HRB product, any  
3 price increase, biggest diversion CPAs and accountants. Is that  
4 your testimony?

5 A Well, what the pricing simulator is able to do, it looks --

6 Q I don't want to know what the pricing simulator is now. I  
7 want to know your conclusion with respect to the impact of a  
8 price increase on an HRB product.

9 And as I read this sentence, it says, any HRB product, any  
10 price increase, the result is most diversion goes to CPAs and  
11 accountants.

12 Is that your testimony?

13 A Yes. Well, it's not any price increase. These are small  
14 price increases around the starting point. That's the way that  
15 these calculations are done.

16 Q Okay. How small a price increase?

17 A Again, this is based on an own-price and a cross-price  
18 elasticity, which basically looks at, technically speaking, what  
19 we call the "slope," right around the starting point. So it's  
20 looking at -- you know, you think about it as sort of the  
21 smallest possible price increase, but it's looking at the  
22 direction of the price increase right around -- and the  
23 magnitude of the price increase right around the starting point.  
24 This doesn't depend on a particular 5 percent or 10 percent  
25 price increase.

1 Q What's the lowest priced HRB product?

2 A Pardon?

3 Q The lowest priced HRB product -- you could take the lowest  
4 price that was presented in the simulator.

5 What was the lowest price?

6 A The lowest price that I recall was 14.95 for a basic price  
7 in the simulator.

8 Q 14.95. What's 5 percent of that?

9 A Somewhere around 70 cents.

10 Q So 70 cents, HRB decides let's give them a buck. Let's  
11 raise the price of that product by a dollar.

12 What you're saying is that the reaction of the consumers to  
13 that price, the most diversion you'd see to raise the price from  
14 14.95 to 15.95, off we trot to the CPAs and the accountants.

15 Is that your testimony?

16 A My testimony is that what the pricing simulator does is  
17 obviously it did not include 15.95 as a price. It has  
18 particular prices embedded within it. But you can look at that,  
19 the prices that are within the simulator, and then you can take  
20 some inferences about where consumers go. You look at the  
21 pricing that was presented to consumers and you say, well, you  
22 know, on average -- again, this is a statistical analysis. This  
23 doesn't look at one particular respondent in the survey and say  
24 let's raise his price by 70 cents or a dollar and see where he  
25 goes.

1           What you do is you look at all of the data for all of the  
2 price changes, and you get -- as I said, it's not point-to-point  
3 changes. The way that you do this statistically is you look at  
4 what's known as "slopes," but that's the way you do that in this  
5 industry. That's how you analyze diversion generally; you look  
6 at elasticities and cross-price elasticities.

7           THE COURT: But could you answer the one question of  
8 what was the starting point? Was the starting point 14.95 or  
9 was it higher?

10          THE WITNESS: The starting point is at the base.

11          THE COURT: So that was 14.95?

12          THE WITNESS: The base is not in this simulator always  
13 the lowest priced product. I'd have to go back and check.

14          MR. WAYLAND: We're going to look at that, your Honor.  
15 I think it will become clear as we go forward.

16 BY MR. WAYLAND:

17 Q Well, when you looked at the simulator and you got this  
18 result, which you've reported which is the largest diversion  
19 from HRB's TaxCut, any product, in the event of any price  
20 increase, is to CPAs and accountants, did you stop and say,  
21 "That's kind of a bit of a weird result? You know, I'm an  
22 economist. I think about the real world. And a conclusion that  
23 suggests that somebody who is buying something at 14.95 sees a  
24 price increase is going to rush off to a CPA or an accountant,"  
25 did you stop to think, "Maybe I better try to figure out what's

1 going on?"

2 Did you try to do that?

3 A That's why I looked at the documents in this case, yes.

4 Q But in your conclusion, you don't have any explanation. Did  
5 you think people might want to understand, how do you explain  
6 this? What do you think is going on here that I come to a  
7 conclusion, which most of my testimony is based on, that CPAs  
8 and accountants are the closest substitute for any HRB product"?

9 Did it occur to you that that was kind of weird?

10 A No, not really in light of all of the other evidence that  
11 looks at how closely it appears that H&R Block and assisted tax  
12 preparation compete. They look at assisted tax preparation in a  
13 lot of their -- for example, in the pricing simulator, they  
14 chose to include assisted tax preparation. When they looked at  
15 market shares and looked at switching, they look at it to  
16 include assisted tax preparation. Mr. Smyth in his letter talks  
17 about competing so -- between retail and the assisted tax  
18 preparation.

19 So no, I mean, this didn't seem particularly odd to me. The  
20 datas say what the datas say.

21 Q Your testimony is, "I read all the documents" -- and you  
22 have 19 pages of cites of documents and other things that you  
23 looked at. "I read all this stuff. I sort of got a sense of  
24 what's going on so I looked at the simulator and, gee, that's  
25 not a surprise. The documents tell me -- I was ready for that

1 conclusion. The documents prepared me to believe reasonably  
2 that the highest level of diversion would be from a 14.95  
3 product to people trotting off to the CPAs and accountants.  
4 That's what the documents told me."

5 MR. ROBERTSON: Objection; form. Counsel is testifying  
6 about 19 pages. There's a heck of a lot more than just the  
7 19 pages. I think that that's misleading.

8 THE COURT: The objection's sustained. Could you ask a  
9 question.

10 MR. WAYLAND: Sure.

11 BY MR. WAYLAND:

12 Q Attached to your report is a 19-page appendix which  
13 describes the extent of the information you looked at,  
14 correct?

15 A I'd have to go back and check the page number. I think  
16 you're referring to my Appendix 2, which lists all the documents  
17 considered.

18 Q Yes. I didn't mean to belittle it. I meant to suggest that  
19 you did a lot of work, correct?

20 A Correct.

21 Q And the amount of documents that you read and the amount of  
22 data that you looked at and the amount of articles and others  
23 things that you considered, took 19 pages just to list those all  
24 out, correct?

25 A Again, I'd have to go back and check the page count.



1 Q We can look at it. I'll tell you it's 19 pages of, you  
2 know, sources for your opinion, correct?

3 A That sounds about right.

4 Q And your testimony today is having reviewed all that  
5 material, "I didn't think it was odd when my simulator told me  
6 that the greatest diversion was going to be to CPAs and  
7 accountants," correct?

8 A Yes. As I said, I looked at all the documents and I  
9 explained this yesterday. There are documents that look at the  
10 world in different ways. That wasn't surprising to me.

11 And so this quantitative analysis was able to distinguish  
12 between different views of the world and say which one is  
13 relevant for my analysis, which is to look at diversion based on  
14 price.

15 Q All right. Now, in your conclusion, I think CPAs and  
16 accountants were the largest and then retail stores were the  
17 fourth largest diversion, correct?

18 A That's my recollection.

19 Q Yeah, okay. And retail stores, they are part of the  
20 assisted, but they're lower priced generally, right?

21 A They are also another part of assisted, yes.

22 Q Okay. Let's look at some -- well, at Paragraph 33 of your  
23 report, you make some observations about the price of assisted,  
24 and you refer in a footnote to an HRB pricing survey in which  
25 there are a variety of prices for various forms of tax

1 preparation, okay.

2 And we have the page of your report up, and then the  
3 footnote is displayed, HRBDOJ00359542 at page 38.

4 Do you see that?

5 A I see what you have highlighted, but the footnote doesn't  
6 refer to the highlighted text so I'd have to go back.

7 Q It's redacted. If you want to look at your report to  
8 confirm that the footnote appears, we can do that, or you can  
9 just take my word that the footnote's in your report.

10 A Well, if I can just take a quick look to make sure what the  
11 footnote is referring to, I'd appreciate it.

12 Q Sure. It's at Paragraph 33.

13 A Yes, I see.

14 MR. WAYLAND: Okay. The next couple of slides we're  
15 going to look at, your Honor, one of them comes from the  
16 footnote reference. And then we have a summary that we  
17 prepared. And they have been marked confidential so we're going  
18 to show them to the Court and the witness, but we're not going  
19 to display them to the audience, if that's okay.

20 BY MR. WAYLAND:

21 Q All right. Let's look at the survey that you referred to.  
22 It's Tab 16. You see we've displayed the first page. It's at  
23 Tax Season '10, "Market Dynamics, Switching Pricing, Competitive  
24 Profiles."

25 Do you see that?

1 A I see that.

2 Q We're going to go to page 38, which is what you referenced  
3 in your report.

4 And again, as you answer my questions, please don't reveal  
5 any of the information. We're just going to describe it, and  
6 then I'll ask you some general questions about it, okay?

7 A Yes.

8 Q All right. So this is a chart that's entitled "Pricing  
9 Overview by Method." And that down the left margin in the  
10 chart, there are different kinds of tax preparation methods,  
11 accountants and tax prep firms, correct?

12 A Correct.

13 Q And then all the way on the right, there is a pricing range,  
14 Tax Season '10, that would be 2010, price range, and it lists  
15 the 25th to the 75th percentile pricing, correct?

16 A Correct.

17 Q And this page only lists assisted kinds of preparation,  
18 correct?

19 A With the exception that I had pointed out yesterday about  
20 paid family and friend, that's a little bit of an unclear  
21 category. But other than that, those are clearly in the  
22 assisted category.

23 Q Okay. This chart -- and this is the one you cited in your  
24 report, correct, on page 38?

25 A Yes.

1 Q Okay. This one has to do with the 25th to 75th percentile  
2 pricing of assisted products plus paid family and friend. Let's  
3 go to page 40. And you'll see this is a separate chart, and  
4 this has "Pricing Overview by Digital Method."

5 Do you see that?

6 A Yes, I do.

7 Q And this has various digital competitors and also lists  
8 their pricing for the 25th to 75th percentile, correct?

9 A Yes.

10 MR. WAYLAND: All right. Now, we prepared a chart that  
11 puts the numbers together from page 38 and page 40, and that is  
12 Trial Exhibit 14. We'll mark that as Trial Exhibit 14, your  
13 Honor. And it's displayed to you, Dr. Meyer, and to the Court,  
14 but not publicly.

15 (WHEREUPON, a certain document was marked Government Trial  
16 Exhibit 14 for identification as of September 13, 2011.)

17 BY MR. WAYLAND:

18 Q And it reflects the 25th to 75th percentile that we see  
19 reflected in the charts, including the 25th to 75 percentile  
20 numbers that you refer to in your report, okay.

21 We can't reveal the numbers, but would you agree with me,  
22 Dr. Meyer, that the CPAs are on the far left side, which is  
23 meaning they have the highest price for the 25th to 75th  
24 percentile, correct?

25 A Well, that's one category within CPAs is all the way on the

1 left. There are two other categories that are also within CPAs.

2 Q Right.

3 A And those don't exhibit the same characteristic as having  
4 the highest prices within assisted.

5 Q All right. And then -- but the blue, the digital, is to the  
6 right, correct, the digital is on the right substantially lower,  
7 correct?

8 A Blue is on the right.

9 Q Okay. All right. Now, you knew that, I mean, you knew  
10 this -- you cited this chart so you knew about this difference  
11 in percentile pricing between the 25th and the 75th percentile,  
12 right?

13 A I clearly didn't cite this chart, but I did cite the  
14 underlying document. And I understand this difference, yes.

15 Q Okay. And again, you didn't comment on it. You just -- in  
16 your report, you just said, "This is my result; largest  
17 diversion goes to CPAs and accountants," correct?

18 A No. I think I did actually speak at length about it, at  
19 least a page and a half, about the relevance of the price  
20 differential.

21 Q All right. Well, here in your report at paragraph 44, you  
22 said, "Here's what the simulator tells me," correct?

23 A I'd have to look and see whether it's Paragraph 44 that I  
24 talk about the simulator. I do talk about the simulator in  
25 paragraph 44, yes.

1 Q Okay. Let's go to the simulator itself and see if we can  
2 find an explanation for your conclusion that any price increase  
3 for any HRB product will lead to the largest diversion to CPAs  
4 and accountants. So if you would go to Defendants' Exhibit  
5 9231. That's Tab 47.

6 A I'm sorry; which tab?

7 Q Tab 47, yes.

8 MR. WAYLAND: You can turn the screen back on.

9 BY MR. WAYLAND:

10 Q Okay. So this is a PowerPoint of the pricing simulator.  
11 It's dated May 2009.

12 Do you see that?

13 A I see.

14 Q All right. Now, let's go to page 2. One more page.

15 It says, "The number of respondents in this survey was  
16 6,119," correct?

17 A Correct.

18 Q That was your understanding; that's how many people were  
19 surveyed. And let's go page 3.

20 And as I understand it, Dr. Meyer, these 6,119 people were  
21 divided into eight groups. And each of those eight groups  
22 viewed five different price scenarios, correct?

23 A That was the first task, yes.

24 Q And if you look at -- it says, "Respondents were randomly  
25 assigned to one of eight cells. Each cell viewed five different

1 price scenarios." If you drop down to page 4 for a minute,  
2 you'll see there's a list of the pricing scenarios that were  
3 tested by product, correct?

4 A Yes, that's correct.

5 Q Okay. Let's go back up on page 3. And it says that, in,  
6 the second bullet point, "Prices changed across the scenarios  
7 for three brands of tax preparation products -- TaxCut, TurboTax  
8 and TaxACT -- available in two forms, online and software.  
9 There were four predetermined price points for each brand or  
10 form."

11 Correct?

12 A Correct.

13 Q And that's your understanding of what happened in the  
14 simulator, correct?

15 A Well, I have to be a little -- clarify that a little bit.  
16 This is one part of the simulator. There was a second part as  
17 well. But this is what happened in this part of the  
18 simulator.

19 Q We'll look at the second part if we need to, but right now  
20 we're talking about what happened in this simulation, correct?

21 A In this task, yes.

22 Q Yeah, okay.

23 THE COURT: Which tab is this PowerPoint in?

24 MR. WAYLAND: This is at Tab 47, your Honor.

25 THE COURT: Thank you.

1 BY MR. WAYLAND:

2 Q Okay. And then what happened was for each scenario,  
3 "respondents selected which tax preparation method we were most  
4 likely to choose," correct?

5 A Correct.

6 Q And each task scenario that a respondent faced, included  
7 34 different product choices, correct?

8 A Yes.

9 Q Okay. 34. When each time you had to make a choice, your  
10 respondent -- 34 choices, your job is to choose one of them,  
11 right?

12 A Correct.

13 Q Okay. Let's count up and find out where those 34 choices  
14 came from, okay. Let's go to page 4.

15 And you see, Dr. Meyer, that there are three columns; TaxCut  
16 Online Scenarios, TurboTax Online Scenarios, and TaxACT Online  
17 Scenarios across the top of the page, correct?

18 A Correct.

19 Q And underneath each column, there are separately numbered  
20 boxes, correct, one, two, three, four?

21 A Correct.

22 Q Okay. Remember we said there were going to be four  
23 scenarios, correct? We can go back and look at that.

24 A There were four scenarios with regards to each of the  
25 products, yes.



1 Q Correct. Okay.

2 And each scenario we're going to see 34 products, correct,  
3 34 different choices?

4 A Correct.

5 Q Let's look at choice -- scenario one, so we're going to look  
6 at the 1 boxes and start counting.

7 TaxCut Online Scenarios, choice one on the upper left hand  
8 column. Start one, two, three, four, five choices in box one,  
9 correct?

10 A Correct.

11 Q And then in box one for TurboTax, so now we have five so  
12 far. And there's one, two, three, four, five.

13 Five more, right?

14 A Correct.

15 Q And then there are -- then in the TurboTax line, there are  
16 three, correct? TurboTax number one, there's three choices?

17 A Are you referring to the TaxACT?

18 Q Yeah, TaxACT. I'm sorry.

19 TaxACT, three, correct?

20 A There are three choices listed there, yes.

21 Q And then you also have to count in the software choices  
22 because you got online and software. If you go down below,  
23 you'll get TaxCut, there are four choices there.

24 A I see four choices there.

25 Q And then there are four choices in the TurboTax and there

1 are four choices in TaxACT in scenario number one software,  
2 correct?

3 A Yes.

4 Q All right. Now, if you add those all up, you get  
5 25 products so -- you get 25 product choices so we still need to  
6 find nine more, okay? Let's see where we can find those, all  
7 right, Dr. Meyer?

8 Are you still with me?

9 A I'm with you.

10 Q Okay. Let's look to the bottom of the page. And it says,  
11 "Base Case Scenario" -- "Scenario" is shaded -- "Other  
12 Non-Priced Choice Options."

13 Do you see that?

14 A I see that.

15 Q Let's count those up, and then we'll go back and look at  
16 them. Other online, other software, that's two. H&R Block,  
17 Jackson, Liberty, other retail office, that's six. CPA or  
18 accountant, friend or family, paper and pencil, that's nine.

19 That gives us our 34. And that makes sense, right? They  
20 got these choices that they saw from the TaxACT, TurboTax and --  
21 well, the Intuit, H&R Block, and TaxACT choices that we counted  
22 on the top, correct?

23 A Correct.

24 Q And as the simulator said, you're also going to see some  
25 other things, correct?

1 A In this task, yes.

2 Q Let's go back and look at what these options are.

3 Other online, there's no differentiation among the different  
4 possible vendors. Your choice was other online -- just other  
5 online, correct?

6 A Correct.

7 Q And your choice was other software, right?

8 A Correct.

9 Q And then you could choose from H&R Block retail office, et  
10 cetera, or you could choose CPA or accountant.

11 Do you see that on the right side?

12 A Yes, I do.

13 Q Okay. Now, they are actually grouped with products that are  
14 free or pretty cheap, right, friend or family or paper and  
15 pencil, right?

16 A I don't know whether friend or family would necessarily be  
17 cheap. Paper and pencil I would assume does not cost very much,  
18 yes.

19 Q And that's the thing that's wrong with the survey, isn't it,  
20 Dr. Meyer? It's a nonprice choice that the people had in front  
21 of them for those scenarios, those nine scenarios, right?

22 A I don't understand why you think that's wrong. That's not  
23 wrong. What you're looking at is when the prices of -- I mean,  
24 the question that's being asked here is when the price of TaxCut  
25 changes, what happens to the shares of the other options?

1           What the survey can't tell us -- I agree with that -- is  
2 what happens when the price of a CPA goes up because it doesn't  
3 vary the price of a CPA. But this was done in the ordinary  
4 course of business for H&R Block's online and software products  
5 to help them figure out how to price those products.

6           So this -- it's a setup that makes sense for the purpose  
7 that it was intended, and it is also relevant to, you know, the  
8 purpose that I'm looking at, which is what happens when the  
9 price of H&R Block's online and software products goes up.

10           THE COURT: Well, Dr. Meyer, you're clearly more of a  
11 survey expert than I am, certainly, but if you're given a choice  
12 with numbers next to a whole bunch of choices and then also  
13 given choices without numbers next to them, does that have an  
14 impact on how respondents might view that other option?

15           THE WITNESS: I don't think so in this case,  
16 particularly because CPA and accountant can mean different  
17 things to different people. I mean, it depends on, you know,  
18 what kind of tax return you have, how expensive that's going to  
19 be for you.

20           So it should be in the mind of each respondent the way  
21 that they think about that option and whether or not that's an  
22 option for them based on, you know, whatever their particular  
23 tax, you know -- their tax situation is.

24           THE COURT: Couldn't they also look at that and say,  
25 "Wow, if I were a millionaire and price wasn't even an issue,

1 I'd like to go to my own personal financial advisor, CPA"? So  
2 wouldn't this sort of lead respondents, as opposed to being  
3 practical and focusing on what the price might be, on what their  
4 wishful thinking might be if they didn't have to think about the  
5 price of those people if there was no price next to it?

6 THE WITNESS: In a survey, there is always the issue  
7 that people don't have to plunk down real money for any of these  
8 choices so we realize that. That is what a survey is. That's  
9 why I said yesterday in situations where --

10 THE COURT: Excuse me. But if you don't have a price  
11 next to it, would it help encourage that kind of wishful  
12 thinking?

13 THE WITNESS: I don't think any more so than any of the  
14 other products. I mean, what we're relying on is for people to  
15 be truthful in what they would do. It's their best estimation  
16 of what they would do given the choices. And I think, you know,  
17 putting down a particular price for a CPA or accountant when we  
18 don't know what kind of CPA or accountant that person would go  
19 to or what kind of, you know, tax return they have, you know, I  
20 don't think that's a bad way of going.

21 And I can tell you -- say the following: The firm that  
22 does this research does a lot of research for H&R Block, and  
23 they have thought very hard about how to do that.

24 THE COURT: Dr. Meyer, if you were doing this survey  
25 and you were designing this survey, would you want to have all

1 of the choices presented in basically a uniform manner? So if  
2 you're presenting choices with all the other choices, would it  
3 be your preference, if you were designing this survey and doing  
4 it, would you want to have some prices down to help avoid some  
5 of the wishful thinking that you've already said is part of the  
6 problem with surveys anyway?

7 THE WITNESS: I would have to think about that. I  
8 don't know sitting here whether it would be better to put in a  
9 price for the CPA and accountant and then perhaps have that be  
10 an irrelevant price for the respondent, or rather let the  
11 respondent have in their own mind what a CPA or accountant  
12 choice means for them. I don't know sitting here. I'd have to  
13 think about that some more.

14 BY MR. WAYLAND:

15 Q But we know in the real world what CPAs and accountants cost  
16 because you cited material in your page 38 of your -- page 38 of  
17 that survey, right? We know what those costs, right? It's not  
18 a mystery.

19 A Well, but there's a range of prices. I mean, a software  
20 product or an online product has a list price and perhaps -- and  
21 some discounting as well, but there's a specified price there.

22 My understanding of CPAs and accountants is that the price  
23 can vary depending on what you need them to do. How many  
24 schedules you have to fill out, you know, what type of tax form  
25 you have, and other factors like that. So I don't think there's

1 one particular price that's associated with the CPA or an  
2 accountant in the same way that you have, you know, a price  
3 associated with a particular software package, let's say.

4 Q Dr. Meyer, there are literally tens and tens of individual  
5 prices you've listed for software products ranging from, just on  
6 the first box on the top left, 14.95 to 19.95.

7 That's a pretty big range in percentage terms, isn't it?

8 A That's a pretty big range in percentage terms.

9 Q And you couldn't come up with some kind of price that  
10 represents CPA numbers? I mean, we looked at a footnote where  
11 you had the information.

12 A Well, look, I didn't do the survey.

13 Q That's exactly right. You didn't do the survey. The only  
14 piece of evidence that you're citing that you say is data that  
15 supports your diversion analysis, you didn't do it, and you  
16 can't explain why they didn't use pricing data for the number  
17 one diversion choice, right?

18 A Like I said, I did not do the survey. I do know that  
19 Directions that did the survey does a lot of work for H&R Block.  
20 It's done in the ordinary course of business. H&R Block thinks  
21 that it's valuable enough to be used in making pricing  
22 decisions. So to me that's valuable information.

23 Q And they're not here to testify, as far as -- right? They  
24 aren't here to explain what they did.

25 You're here to say that you don't know what they did or why

1 they did it, correct?

2 A I wouldn't agree with that at all. I know a lot of what  
3 they did and why they did it. That particular question of a  
4 price on the CPA or accountant, I don't recall having a  
5 discussion on that.

6 Q Don't you think, just as a matter of practicality, that if  
7 somebody was given a choice of a 19.95 product on the one box  
8 and an accountant that cost them 150 bucks, you'd want -- it  
9 would make a difference whether the accountant was free or  
10 5 bucks?

11 You think it would make a difference in determining what the  
12 diversion rate is to know how people would respond to the way  
13 the CPA was priced?

14 A Yes, but again, the point is that for each individual  
15 respondent, they'll have a different perception in their head,  
16 and as well they should, about what a CPA or accountant would  
17 cost for them. So in other words, if there is a respondent who  
18 has a very simple tax form and who -- perhaps, you know, the  
19 value of their time is very high such that really at the end of  
20 the day, a CPA or accountant is not all that much more expensive  
21 for them, then they should have a certain thought in their mind  
22 as they're answering the survey about what the price of CPA or  
23 accountant is.

24 The same thing with someone who has a very complex tax  
25 return. They'll have a different perception. They, I would



1 think, would be less likely to choose a CPA or accountant  
2 perhaps because it's more expensive. On the other hand, of  
3 course, it would take them longer to do the tax form themselves.

4 And that's why -- you know, all of those things are going on  
5 within a respondent's head, and that's fine, because we want to  
6 know, you know, for respondents what they're likely to do. We  
7 want them to have in their mind what their choices are.

8 Q Dr. Meyer, when you reached your conclusions about the  
9 diversion rate that you see in this pricing simulator, did you  
10 know that there was no price choice associated with the boxes on  
11 the bottom?

12 A Yes, I did.

13 Q All right. You did know that, okay. You knew it at the  
14 time, correct?

15 A Correct.

16 Q Let's go to your report and see what you said.

17 MR. WAYLAND: Can we blow up the sentence ahead of it.

18 BY MR. WAYLAND:

19 Q "The respondents were shown" --

20 MR. WAYLAND: Yeah, that's great.

21 BY MR. WAYLAND:

22 Q So this is what you said, "The respondents were shown five  
23 pricing scenarios, and the options included DIY options,  
24 software DIY options, assisted preparation options and other DIY  
25 options, including pen and paper and friends and family." Then

1 you said, "The pricing of the various options changed across  
2 scenarios."

3 Do you think that accurately describes the understanding of  
4 the survey that you've just given now?

5 A What that sentence was meant to convey was that the pricing  
6 of different options changed. Clearly, reading of that is --  
7 you know, it's clear to understand that the pricing, for  
8 example, of pen and paper doesn't change so perhaps, you know, I  
9 could have worded the sentence a little bit more -- in a  
10 different way, but it still conveys the general sense that the  
11 pricing of options changed. I was just explaining how the  
12 survey works.

13 Q All right. You didn't think it was necessary to give the  
14 kind of explanation you've given to the Court today about why it  
15 doesn't matter that CPA pricing wasn't listed when you described  
16 your conclusions that diversion to CPA was the largest  
17 diversion?

18 A Obviously, I included in my report what I included. This  
19 was sufficient to come to my conclusion. I had a broader  
20 understanding of the survey. I wasn't going to write down  
21 every, you know, last understanding of the survey. That would  
22 have taken pages and pages.

23 And I didn't think -- I don't think that's in any sense a  
24 fatal flaw of the survey such to render it not useful for my  
25 analysis.

1 Q And in your paper that you wrote that we looked at, your  
2 paper acknowledges the need for prices for all the products.  
3 That's what you said in your paper. We looked at it.

4 Otherwise, it makes no sense, right, Doctor?

5 A No. I mean, look, here it says, you know, "Each option is  
6 a product with different combinations of attributes and prices."  
7 If I have something like a pen and paper, which is a product  
8 whose price doesn't change, then it wouldn't make sense within  
9 the survey to change its price.

10 Q Okay. But accountants, they do have prices and they do  
11 change, right?

12 A Their price can change, but the price of every product  
13 doesn't have to change within the survey. It depends on what  
14 the purpose of the survey is.

15 Q Doesn't say that in your paper.

16 A I'm not sure whether it says that somewhere else in the  
17 paper or not, but that's -- it's true. I mean, each survey is  
18 designed based on what you're looking for. So if you're really  
19 focusing on a change in the price of the HRB product, then you  
20 don't have to have every other price changing in order to get  
21 some insights as to the change in that price.

22 One thing to keep in mind with surveys as well is that there  
23 is a tradeoff between adding more information to the survey and  
24 getting, you know, results, first of all, that respondents can  
25 understand and also that can be analyzed. You know, there are

1 time constraints and other sorts of constraints.

2 So there's a tradeoff. And you obviously look to change the  
3 prices of the things that matter in your inquiry. And the way  
4 in which H&R Block used the survey was to think about what price  
5 it should be charging for its products. And so --

6 Q But the way you're using it is to tell us what's going to  
7 happen as a result of a price change, right, that's what you're  
8 using it for?

9 A But I'm only using it with regards to a price change on the  
10 HRB products.

11 Q As your article says, the purpose of the discrete choice  
12 survey is to do a market experiment, right, simulator market  
13 experiment? We can look at the words. I think market  
14 experiment, right?

15 A I think this is a controlled market experiment, yes.

16 Q And in a real market, people know the different prices of  
17 the products that they're choosing among, right?

18 A Generally speaking, yes.

19 Q All right. If I want to buy one product at 5 bucks, a guy  
20 raises it the next day to 6 bucks, I reach my hand in blindly  
21 and say, "I'll take this one, whatever the price is," that  
22 doesn't happen in the real world, does it?

23 A No. But that wasn't happening in the survey either. The  
24 respondents have an idea in their mind of what it means to go to  
25 a CPA.

1 THE COURT: Dr. Meyer, you don't know what was really  
2 in the respondents mind. And for all you know, they might have  
3 been saying, "I know a CPA is really expensive so I'm going to  
4 calculate that in my mind." But they just have easily might  
5 have been saying, "Wow, so in this survey, I have a choice of --  
6 I didn't have to think about the price of a CPA or accountant  
7 because there's no price there. Would I like to go to that?  
8 Would I like the benefit of going to a personal person?"

9 As you sit here today, you don't know what was in the  
10 mind of the respondents; isn't that right?

11 THE WITNESS: I don't know what's in the mind of the  
12 respondent. That certainly is the case.

13 BY MR. WAYLAND:

14 Q All right, Dr. Meyer. Now, Tab 1 of your report -- at Tab 1  
15 of your book is your report and, as I said, there are 19 pages  
16 of citations. And you can look through them.

17 But as I understand it, you looked at a lot of documents,  
18 correct?

19 A I looked at a lot of documents, yes.

20 Q You looked at a lot of data, correct?

21 A I did.

22 Q You spoke to a number of people?

23 A I did.

24 Q You looked at depositions?

25 A That's correct.

1 Q And I think you did other things. You listened to testimony  
2 here, correct?

3 A I listened to testimony here, yes.

4 Q Now, in all of that, all of that wide range of evidence,  
5 only the pricing simulator in your mind provides a  
6 quantification of diversion, correct?

7 A That's the best direct test of a quantification of  
8 diversion. I think that the TaxACT survey sheds some light on  
9 diversion as well and the documents that I believe corroborate  
10 that quantitative evidence.

11 Q Okay. You said, "It's the pricing simulator that provides a  
12 quantification, and I haven't seen another document that  
13 provides the specific quantification of diversion."

14 You haven't changed your view about that, have you?

15 A No.

16 Q And if calculation of diversion based on a survey in which  
17 respondents didn't even know the price of the choices they had  
18 is flawed, then you don't have any quantification of diversion,  
19 do you?

20 A Well, your hypothetical is not what I think is true in this  
21 case. I think, first of all, the pricing simulator is not  
22 flawed, and I also think there are other pieces of evidence that  
23 shed some light on diversion, while not perhaps being a precise  
24 quantification of diversion, they shed some light on  
25 diversion.

1 Q When were you hired for this case?

2 A I was hired in June of this year.

3 Q Do you remember the date?

4 A I don't remember the date.

5 Q All right. When was your report -- when did you file your  
6 report?

7 A It was in July. I can look at the date.

8 Oh, I'm sorry. It was in August. August 12th.

9 Q August 12th. So you had just a couple months to come to  
10 your conclusions, right?

11 A That's correct.

12 Q Now, you haven't previously been qualified as an expert  
13 economist to testify in a relevant antitrust product market,  
14 correct?

15 A Correct.

16 Q And you have not previously been qualified as an expert  
17 economist on the competitive effects of a merger or acquisition,  
18 correct?

19 A Correct.

20 Q And you haven't been previously qualified as an expert  
21 economist on entry or expansion on relevant market, correct?

22 A Correct.

23 Q And you haven't been -- you've never submitted an expert  
24 report under your name regarding the competitive effects of a  
25 merger or acquisition except for the one in this case; is that

1 right?

2 A Correct.

3 Q And your doctoral dissertation was related to labor  
4 economics and not IO, correct?

5 A Correct.

6 Q And you've never written any peer-reviewed articles on any  
7 antitrust issue, correct?

8 A Correct.

9 Q Did you have tenure, Dr. Meyer?

10 A No.

11 Q In the DOJ matter that you mentioned, you weren't the lead  
12 economist. You were working for somebody else under his  
13 direction, correct?

14 A Correct.

15 Q Do you know who Dr. Dennis Carlton is?

16 A I've heard the name.

17 Q Do you know anything about his reputation in the business?

18 A Yes.

19 Q What is it?

20 A He has a good reputation in the business.

21 Q As what? As a leading economist?

22 A He's a well-known antitrust economist.

23 Q All right. You know whether Dr. Carlton has written in a  
24 number of peer-reviewed articles about antitrust matters?

25 A I don't know Dr. Carlton's CV.



1 Q Do you follow the economic literature -- the antitrust  
2 literature at all?

3 A I certainly do.

4 Q Ever come across Dr. Carlton's name?

5 A I have come across his name.

6 Q All right. Did you know that Dr. Carlton was hired as an  
7 expert for the defendants before you were?

8 A No.

9 Q Did you ask when you got hired in June, with only a couple  
10 months before trial, whether any other experts have been  
11 hired?

12 A No.

13 Q You didn't? You didn't ask?

14 A Whether there was another expert?

15 Q Whether anybody else had preceded you.

16 A Oh, I understand that someone else -- another firm assisted  
17 counsel in their analysis in front of the agencies.

18 Q Okay. Did you ever ask to speak to them?

19 A No. Let me clarify. My staff did speak with someone  
20 regarding some of the data that they sent -- some of the IRS  
21 data -- and so we clarified, you know, what the files were. But  
22 that's the extent of our conversations.

23 Q And you don't know why, one way or the other, you were asked  
24 to be the testifying expert in this case in June, correct?

25 A I don't have an understanding of that, no.

1 Q All right. Let's go back to the simulator for a few  
2 minutes.

3 You understand that Dr. Rick Warren-Boulton looked at the  
4 simulator, and one of the problems that he identified was the  
5 fact that when you increased price in one scenario, it actually  
6 predicted an increase in share and revenue. That's the anomaly  
7 that you described we talked about yesterday?

8 A Could you repeat your question. I just want to make sure  
9 that I heard right what you said.

10 Q That one of the problems that Dr. Rick Warren-Boulton  
11 identified was that when you looked at the scenarios -- you  
12 looked particularly at the 19.95 scenario -- it had a funny  
13 result because it seemed to suggest that there would be an  
14 increase in share and revenue as the price increased to 19.95.

15 Do you remember that, that's what he said?

16 A Yes.

17 Q Okay. And you don't have any reason to dispute that that  
18 version of the simulator actually shows that result, right?

19 A Well, because -- I had previously been using the term  
20 "simulator" in a slightly more expansive way so let me just, in  
21 light of the clarification that I gave yesterday, that anomaly  
22 is not in the simulator -- what I would call the simulator --  
23 which is the drop-down menu simulator. It's an Excel  
24 spreadsheet that was used to make the PowerPoint slides.

25 Q Okay. But wherever it is, you understood that there was a

1 problem. You acknowledged -- it showed some kind of problem,  
2 right?

3 A It showed some sort of anomaly, yes.

4 Q So Dr. Rick Warren-Boulton had correctly pointed out some  
5 kind of an anomaly, wherever it resided, correct?

6 A Correct.

7 Q All right. In response to that, you decided you needed to  
8 do a little bit more work, correct?

9 A Correct.

10 Q And one of the things that you did was to run a regression,  
11 correct?

12 A Correct.

13 Q And the regression is based on the same underlying data,  
14 right?

15 A Two of the regressions are based on that same underlying  
16 Excel spreadsheet. And as I explained yesterday, one regression  
17 was based on the drop-down menu simulator.

18 Q Okay. But the regression is based on the same responses to  
19 the same survey that we've been talking about, right?

20 A The regression is based on the simulator that was created by  
21 Directions Research that comes out of that survey.

22 Q Okay. But there's a lot of steps to get there, but we start  
23 with the survey, right?

24 A Yes. There are a lot of steps.

25 Q And your regression didn't change the questions in the

1 survey, right?

2 A Correct.

3 Q And it didn't change the respondents' answers looking at the  
4 choices, correct?

5 A Correct.

6 Q You just took the answers from that survey that didn't have  
7 price points for a number of options, and you ran a regression  
8 against it, right?

9 A Correct.

10 Q All right. Let's do one more thing with the simulator  
11 before we leave.

12 You said yesterday that you can get very different diversion  
13 rates depending on which scenario you look at, correct?

14 A I think I was talking about which slide you looked at.

15 Q Okay. Which slide. Depending on which slide.

16 The slides represent runs of the simulator, correct?

17 A No. The slides don't represent runs of the simulator. The  
18 slides represent subsets of that Excel spreadsheet which is the  
19 intermediate step, if you will, between the simulator and the  
20 PowerPoint presentation.

21 Q All right. Let's look at page 18 of DX 9231.

22 A Can you refresh my recollection on which tab.

23 Q 47. Are you with, Doctor?

24 A I'm just finding the page. It's easier for me to see it on  
25 the hard copy than on the screen.

1 Yes.

2 Q Okay. So this is titled "Case D: Who is Affected Most by  
3 Maximizing TaxCut Share."

4 Do you see that?

5 A Yes.

6 Q And you're familiar with this case, right?

7 A Yes.

8 Q This is the case that you used to calculate your diversion  
9 ratio, right?

10 A This was the case that was used to get my diversion ratio  
11 that was reported in my report. This doesn't reflect the  
12 subsequent work on the regressions that you mentioned previously  
13 and I testified to yesterday.

14 Q I understand that, Doctor. I'm just starting at the  
15 beginning of where you started with your work, okay?

16 A Yes.

17 Q So just so we have a clear record, Case D is your initial  
18 calculation of the diversion ratio, correct?

19 A Correct.

20 Q All right. And tell us what you did. How did you do  
21 that?

22 A Well, that comes from the changes in share that come from  
23 the bottom.

24 Q Maybe we can blow that up. Just down at the very bottom,  
25 the last line.

1 A Yes. The last two -- I think you'll need a little bit more.  
2 Right.

3 So you can see, for example, the change in share of TaxCut  
4 was 1.86. And the share -- the change in the share of the CPA  
5 accountant was negative 1.06. So if you take the -- so what  
6 that basically says is TaxCut's share went up by 1.86 percentage  
7 points, and CPA's share went down by 1.06 percentage points.

8 And so the diversion ratio from TaxCut to CPA is 1.06  
9 divided by 1.86.

10 Q All right. Now, let's go up to page 17. And that's a  
11 different case.

12 "What Prices Minimize TurboTax Share, Individual Pricing,"  
13 correct?

14 A Correct.

15 Q And at the bottom of the page, we don't have the same totals  
16 that you used, but we can do the same calculation because the  
17 information is set forth on the page, correct?

18 A Correct.

19 Q Let's see what happens when we do that. The average share  
20 percent for the top ten lines of data is 5.0, right, Doctor?  
21 We're not going to go through all the calculations, but we  
22 assume that we're correct. And if we check it later and it  
23 turns out we're wrong, we'll correct the record.

24 But for our purposes today, let's assume that we've done the  
25 calculations correctly, okay?

1 A I'll assume that you did the calculations correctly for the  
2 purpose of this question, yes.

3 Q Then the average share percent of TaxCut for the bottom ten  
4 lines of data is 5.06.

5 See that calculation, Doctor?

6 A I don't see a calculation.

7 Q You see the results?

8 A Likewise, I'll assume for the purpose of the question that  
9 it's true.

10 Q All right. Then we need also to get the average share  
11 percent correct in order to do a diversion calculation?

12 A Yes.

13 Q All right. Let's do that. The top ten lines for TaxACT,  
14 2.92.

15 Assume with me, Doctor, okay?

16 A Yes.

17 Q And the average percent -- the average share percent of  
18 TaxACT for the bottom ten lines is 3.06, correct, or assume with  
19 me?

20 A I'll assume with you.

21 Q All right. To calculate the diversion of TaxCut to TaxACT  
22 the way you did for slide 18, we need to first calculate the  
23 difference of the average percent share for the top ten rows  
24 versus the average percent share for the bottom ten rows, right?

25 That's what you did on page 18, right?

1 A Correct.

2 Q Okay. And the average difference is .44 because we've taken  
3 5.5, subtracted 5.06 to get .44, right?

4 A Correct.

5 Q For TaxACT, that would mean taking 2.92 and subtracting 3.06  
6 to get .14.

7 Does that look right to you, the calculation?

8 A The calculation looks right to me, yes.

9 Q Okay. Then a diversion ratio is simply .14 divided by .44,  
10 right?

11 A That's what comes out of the slide, yes.

12 Q All right. And so using Case C, we get a very, very  
13 different diversion ratio than using Case D, correct?

14 A I agree.

15 Q All right. 1.6 in the case that you used and 32 percent,  
16 correct?

17 A Correct.

18 Q All right. And so you would agree -- and I'm sure there are  
19 explanations -- but you would agree that you can get very  
20 different diversion ratios depending on what case you use in  
21 this simulator, right?

22 A I agree. And that's why I did further work, that's  
23 correct.

24 Q All right. Now, when you did your first set of work, my  
25 understanding is that you wound up at Case D because that's what



1 the research company told you you should look at, right?

2 A Not because they told me that's what I should look at.

3 That's because that was the case in which they chose to report  
4 diversion to HRB for the purpose of HRB thinking about prices to  
5 charge.

6 So I didn't ask Directions which case I should use. I  
7 looked at, in the ordinary course of business, which case they  
8 chose to report. I didn't have at that point in time the Excel  
9 spreadsheet that had all the data for all of the cases so I had  
10 to make a determination of which one to choose. And the one  
11 that made the most sense was the one that the firm who was  
12 reporting these results thought was relevant to HRB, who was  
13 thinking about pricing.

14 Q So in the first instance, you, the expert, didn't exercise  
15 your independent judgment to review all of the cases and make  
16 your own determination as to which case you should use,  
17 correct?

18 A No. I did make a judgment about which case I should use.  
19 And I just described that judgment.

20 Q As you described it, it's a judgment you relied on  
21 Diversion -- is that the name? What's the name of the firm?

22 A Directions Research.

23 Q Directions Research had made a choice, and you relied on  
24 their choice. You thought it was reasonable, but you relied on  
25 their choice, right, for your first run?

1 A It's reasonable to rely on choices that business people make  
2 in the ordinary course of business. You know, they were  
3 advising H&R Block on their pricing. And that's the scenario  
4 that they thought was most relevant in terms of reporting  
5 diversion to report to H&R Block.

6 Once I received the fuller set of data, I analyzed the  
7 fuller set of data.

8 Q I like the phrase "ordinary course of business" because  
9 we're going to turn to the 2011 survey right now. And you know  
10 what the 2011 TaxACT survey is, right?

11 A Yes.

12 Q That's another piece of paper or evidence that you rely on  
13 at least a little bit for diversion, right?

14 A Correct.

15 Q And that wasn't prepared in the ordinary course of business,  
16 was it?

17 A No.

18 Q It was prepared in the course of preparing for litigation,  
19 right?

20 A My understanding, it was prepared before litigation and as  
21 part of the discussions with the Department of Justice and its  
22 merger analysis.

23 Q Now, you just told us one of the reasons you relied on the  
24 survey firm for telling you what you should do with respect to  
25 the division ratio in the simulator was because they are doing

1 it in the ordinary course of business, right?

2 A Yes.

3 Q And now you're relying on a 2011 survey that wasn't prepared  
4 in the ordinary course of business, right?

5 A Correct.

6 Q All right. Let's talk about the details of that survey a  
7 little bit and see what it actually asks.

8 Now, yesterday the Judge asked you whether the survey was  
9 about price changes, and you said yes. And let's see exactly  
10 what the survey did.

11 Before we get there, let me ask you: Here's the -- page 68  
12 of the transcript. The Judge asked you, "And it's because the  
13 TaxACT survey specifically asked about price change. That's why  
14 you viewed that as more pertinent to your analysis?" And your  
15 answer to the Judge was, "Well said, yes," correct?

16 A Correct.

17 Q All right. Let's see whether it's really about price  
18 change. But before we get there, let's ask a couple of  
19 questions.

20 Your view is that simply looking at switching data between  
21 various tax preparation methods doesn't measure the degree of  
22 commission between firms, right?

23 A Correct.

24 Q So if we just know that people switched, but we don't know  
25 that it was in respect to a price change, you don't think that

1 tells us very much, right?

2 A It gives us information, but it doesn't give us information  
3 regarding diversion.

4 Q And you've been particularly critical of Dr. Warren-Boulton  
5 because you say he too much on switching data, which doesn't  
6 tell us very much about price changes, right?

7 A Yes. I believe that is an important reason why his analysis  
8 is incorrect, yes.

9 Q For example, if a customer switched to a different tax  
10 preparation method because of a change in his or her tax  
11 complexity, that wouldn't be because of a change in price,  
12 right?

13 A Correct.

14 Q Or if they changed because something happened in their life  
15 besides complexity, that wouldn't be because of price, right?

16 A Correct.

17 Q And if you are going to look at switching data, whatever it  
18 tells us, it's better to look at the IRS data than to look at a  
19 subset of some sample of people, isn't it?

20 A Yes.

21 Q Okay. Now, the survey didn't ask about a price change,  
22 did it?

23 A It did not specifically ask about a price change, no.

24 Q So when you said yes to the Judge yesterday, you weren't a  
25 hundred percent accurate, were you?

1 A That's correct.

2 Q Litigation survey. Let's look at the litigation survey.  
3 It's Tab 43. That's Defendants' Exhibit 9015, Tab 43, page 1.

4 A I'm sorry. Which tab?

5 Q 43. Okay. The questions are laid out for us, I think, so  
6 let's look at them.

7 "If you became" --

8 MR. WAYLAND: Can we pull up the question.

9 BY MR. WAYLAND:

10 Q This is Exhibit 9015, the 2011 TaxACT survey. The question  
11 that was asked, "If you became dissatisfied with TaxACT's price,  
12 functionality or quality, which of these products or services  
13 would you have considered using to prepare your federal taxes?  
14 Please select all that apply."

15 That's the question -- the fundamental question -- that was  
16 asked that you rely on, correct?

17 A Correct.

18 Q But you'd agree that a change in complexity could lead  
19 someone to be dissatisfied with their tax preparation method,  
20 correct?

21 A A change in complexity certainly could lead someone to look  
22 for a new tax preparation method. I don't see how that would be  
23 related to dissatisfaction regarding price, functionality, or  
24 quality. There particular is a modifier to the dissatisfaction  
25 that I think is important.

1 Q All right. That's your view of what the survey means,  
2 right?

3 A I think the survey means what the survey means. You know,  
4 you can see what the questions are.

5 Q Well, you would agree that the survey did not specifically  
6 ask the survey takers what tax preparation product they would  
7 choose in the event of a change in the price of a TaxACT  
8 product, correct? Didn't ask that question?

9 A Correct. That's not the way the question was worded.

10 Q In fact, there's no specific price change indicated anywhere  
11 in the survey, is there?

12 A There's not a specific price change indicated.

13 Q There is not a specific amount, correct?

14 A There's not a specific amount, no.

15 Q There's not a range, correct?

16 A There's not a range.

17 Q There's not even a percentage increase listed, right?

18 A Correct.

19 Q It doesn't even allow the respondents to distinguish in  
20 their response between dissatisfaction among price, quality, or  
21 functionality, correct?

22 A Correct.

23 Q Now, to answer your question that you think is at the heart  
24 of this case, wouldn't it have been better to ask, "If the price  
25 of a TaxACT product went up by this amount, what would you do"?

1           Isn't that a better way to get at what you're trying to get  
2 at?

3           A    You know, we can -- that may have been a better way.  I'd  
4 have to think about it some more.  But the question is, does  
5 this survey shed any light on the question at issue?

6           You know, I wasn't involved with this survey.  I saw it when  
7 I reviewed the evidence in the case.  And the question to me was  
8 not is this survey prepared perfectly or could I have prepared  
9 the survey better.  It was, you know, does this shed any light  
10 on the questions that I'm being asked to analyze?  And I thought  
11 it shed some light on it.

12          Q    Not much, though, right?

13          A    I wouldn't say not much.  You know, in connection with, for  
14 example, the TaxACT document that's looked at when TaxACT  
15 changed its -- was considering changing its state price, you  
16 know, what was it concerned about?  It was concerned about pen  
17 and paper.  And the fact that TaxACT's price hadn't changed very  
18 much so, you know, looking at historical evidence on price  
19 changes, wasn't going to yield much in terms of diversion from  
20 TaxACT.  This survey certainly sheds some light on the questions  
21 at issue.

22          Q    You never talked to the survey firm about this survey, did  
23 you?

24          A    I did not.

25          Q    Now, the article that we looked at earlier, "Designing and

1 Using Surveys to Define Relevant Markets," you have a section  
2 entitled "Distinguishing Good Surveys from Bad Surveys,"  
3 right?

4 A I don't recall the sections.

5 MR. WAYLAND: Tab 28. That's Government Exhibit 622,  
6 Your Honor.

7 BY MR. WAYLAND:

8 Q You have a section called "Distinguishing Good Surveys from  
9 Bad Surveys."

10 Do you see that?

11 A I see that.

12 Q And one of the problems that you identify in the bullet  
13 points is, "The survey should address nonresponse bias."

14 Do you see that?

15 A Yes.

16 Q Now, could you tell us what "nonresponse bias" is, just  
17 generally.

18 A Generally, nonresponse bias is when there is -- there are  
19 some respondents -- there are people to whom the survey is sent  
20 who respond, and there are people who don't respond to the  
21 survey. And if there's reason to believe that those groups are  
22 different, then you have to take that into account when you're  
23 analyzing the survey.

24 Q How many people responded to the survey?

25 A I don't recall the response rate.



1 Q Okay. Did you do anything to -- did you think it was a few  
2 hundred people that responded, a few thousand, 20,000?

3 A I know it's actually on that -- I think it was on the  
4 document that you just showed me before. I can refresh my  
5 recollection. I don't recall offhand.

6 I would say a relatively large number of respondents.

7 Q Like 1 -- less than 2 percent, right?

8 A Oh, before I thought you were talking about numbers of  
9 people versus percent. Yes, I think it was.

10 Q All right. Did you do anything to attempt to address any  
11 particular nonresponse bias with regard to the survey?

12 A No.

13 Q All right. Let's look at another survey, Dr. Meyer. Let's  
14 look at Tab 34, Government Exhibit 1351.

15 First page is displayed on your screen. It's entitled "H&R  
16 Block Market Research, Outline of Free File Alliance, Free  
17 Filing Brand Loyalty Study, Final Report." It's dated  
18 April 11th, 2008.

19 Do you see that?

20 A Yes.

21 Q Do you have any recollection of reviewing this among the  
22 many thousands of documents that you reviewed in the case?

23 A This looks familiar.

24 Q All right. Let's go to page 38. The title of the page is  
25 "Action If Brand Charged A Fee" and among those planning to file

1 online next year. And it says, "What would online filers do if  
2 their current brand charged a fee next year?"

3 Do you see that question?

4 A Yes.

5 Q The question is, if you get it free this year and we charge  
6 a fee next year, what would happen, right?

7 A Correct.

8 Q And then the results are listed below. And the first one is  
9 TurboTax free. What would you do? Switch to a free online  
10 program, pay to keep paying your current brand.

11 Total of that is -- they call it 70, 97 minus 2 -- it's  
12 95 percent of people would stick in the online world, right, in  
13 response --

14 A I'm not sure which line you're referring to.

15 Q Oh, I'm sorry. Right now we're just looking at the first  
16 line. Under the subheading, "What would you do if current brand  
17 were not free to you next year?" Meaning, this year it's free,  
18 next year you have to pay money.

19 So there's a price increase, right?

20 A Correct.

21 Q And they surveyed TurboTax, TaxCut, and TaxACT users and the  
22 answers are on -- and then they gave the answers. And the first  
23 line has the answers for people who are using TurboTax, and  
24 95 percent of the people would either keep their brand or stick  
25 in another -- stick to another online digital product.

1 That's what the survey seems to suggest, right?

2 A No, I understand what you're trying -- I just didn't  
3 understand which line you were referring to when you talked  
4 about a number just a moment ago.

5 Q Oh, I'm sorry. The first line I'm adding 68 and 97.

6 A I see.

7 Q Okay. Right?

8 A 68 plus 97.

9 Q 68 plus 27.

10 A Yes.

11 Q It's 95 I think. For TurboTax it's 89. For TaxCut -- I'm  
12 sorry; keep a clear record.

13 For TurboTax free it's 89. For TaxCut it's 92. And for  
14 TaxACT free it's 92. Would either switch to another free or  
15 keep their brand -- keep their current brand.

16 Do you see that?

17 A Yes.

18 Q Okay. And that -- a little bit different than the kind of  
19 survey results that you were testifying about, right?

20 A The results are from a different survey, they're different,  
21 yes.

22 Q And this survey you read and decided it's not the survey you  
23 wanted to rely on. You wanted to rely on the 2011 survey that  
24 was prepared in connection with the investigation, right?

25 A Well, this survey didn't give enough information to analyze

1 what would happen to customers, for example, of the TaxACT paid  
2 products.

3 Q I'm not saying that it did. I'm just saying it's a question  
4 that's pretty straight forward that says if you charged money,  
5 if you raise the price from zero to something, what's the  
6 reaction? It was a pretty straightforward question. Here's a  
7 price change, here's the effect, right?

8 A That's true. But this -- the way that this type of question  
9 is asked is something that I think I talked about yesterday in  
10 the type of way that you wouldn't want to ask a question in a  
11 survey like this.

12 You know, if you ask a respondent, so what would you do?  
13 You know, I know that you, for example, bought -- you know, like  
14 to drink Diet Coke, and the survey says, well, what would you do  
15 if the price of Diet Coke went up, you know, you think that what  
16 the company is doing is thinking about a price increase on Diet  
17 Coke and you certainly don't want that. So what respondents are  
18 likely to do is answer more than they actually would, that they  
19 would leave the product.

20 So you know, this is not the kind of question that I think  
21 is really the best way to ask a question related to pricing. I  
22 think I mentioned that yesterday as well.

23 MR. WAYLAND: All right. Your Honor, I'm about to  
24 change topics. It's 11 o'clock. Would this be an appropriate  
25 time for a morning break?

1 THE COURT: Yes.

2 MR. WAYLAND: Thank you, your Honor.

3 THE COURT: We'll break for ten minutes.

4 (Recess was taken.)

5 THE COURT: Mr. Wayland.

6 MR. WAYLAND: May I proceed?

7 THE COURT: Yes, please.

8 MR. WAYLAND: Thank you.

9 BY MR. WAYLAND:

10 Q Doctor, we're going to put away simulators and surveys for a  
11 little bit and talk about market definition.

12 As I understand your market definition, it's all forms of  
13 tax preparation, correct?

14 A Correct.

15 Q And you get there because your diversion data tells you that  
16 all those things are close substitutes for each other in some  
17 way or another, right?

18 A I wouldn't characterize it exactly in that way, but it's  
19 true that there are substitutes for each other. And the closest  
20 substitutes, assisted on the H&RB side, and pen and paper on the  
21 TaxACT side, that that comes from the survey, yes.

22 Q Okay. All right. So if your survey is wrong, maybe your  
23 market definition is wrong?

24 A I think I indicated this before. The survey of both the  
25 pricing simulator and the TaxACT survey are certainly the

1 pricing simulator, the best evidence, direct evidence, of  
2 diversion in response to a price increase. And I think the  
3 TaxACT survey sheds some light on it as well. But there are  
4 documents as well that deal with the general issue of  
5 substitutes and closeness of substitution.

6 Q I think you acknowledged yesterday, Dr. Meyer, that there  
7 are a number of documents in which the parties identify a  
8 separate market for digital and identify the big three as direct  
9 competitors, right?

10 A There are documents in which they talk about the big three.  
11 I don't think they ever define a relevant antitrust market for  
12 digital DIY and, of course, that's the question at hand.

13 THE COURT: Can I interrupt you just for a question  
14 because I want to go back to one question to make sure I  
15 understand the answer about it.

16 MR. WAYLAND: Okay, your Honor.

17 THE COURT: Dr. Meyer, in answer to the question about  
18 if the survey is wrong, then the market definition is wrong, if  
19 you took out the simulator -- the 2009 simulator -- would that  
20 change your definition of the market at all or would your  
21 reliance on the documents and the TaxACT survey, in your view,  
22 be sufficient for you to continue to have your view of the  
23 market?

24 THE WITNESS: It would still be sufficient.

25 THE COURT: Okay. That's what I wanted to be clear

1 about. Okay.

2 BY MR. WAYLAND:

3 Q And I think yesterday you said it was important to look at  
4 the context of the documents in order to understand why they  
5 might have identified a separate digital market, correct?

6 A Correct.

7 Q We're not going to look at many of those documents today,  
8 Dr. Meyer, but I did want to look at one. And that's  
9 Defendants' Exhibit 493 -- I mean, Government Exhibit 493,  
10 Tab 65.

11 MR. WAYLAND: This is sealed so it's off.

12 BY MR. WAYLAND:

13 Q Exhibit 493, "Project Island Overview." And you understood  
14 that Project Island is HRB's acquisition of TaxACT, right?

15 A Correct.

16 Q And this was a presentation -- there's been other testimony  
17 about it -- "Senior Level Executive Presentation." And they are  
18 discussing the transaction. And you can look at the first page.  
19 There is an executive summary of the reasons.

20 And let's go to the market share chart. And this page has  
21 market share for the digital market, correct?

22 A This looks like it is actually online. Let me just -- it  
23 looks like the pie chart has to do with online --

24 Q And the --

25 A -- which is a subset of digital.

1 Q Right. Subset of digital. And this is the only market  
2 share -- you can look through it. This is the market share data  
3 that's displayed for an analysis of the transaction, right?

4 A Within this document. I didn't see any additional market  
5 share information.

6 Q All right. So as I said, we could look at many, but at  
7 least when they are talking about the transaction, what its  
8 effect might be, they are looking at market share and digital,  
9 right?

10 A Well, I don't see this document as talking about what the  
11 antitrust and anticompetitive effect of the market  
12 transaction is.

13 Q All right. You can put that aside, Dr. Meyer. Let's go  
14 back to your market definition.

15 Let's start with pen and paper. It's literally not pens and  
16 reams of paper, correct?

17 A There are some individuals that fill it out with a pen or,  
18 obviously, could be a pencil. I'm not sure how specific we need  
19 to get. And specific pieces of paper, forms -- paper forms.  
20 They are also included in that what I call fillable forms.

21 Q Okay. But manufacturers of pens and paper are not  
22 competitors that you are counting in this market, correct?

23 A No. It's the method of tax preparation, not the sale of  
24 the pen.

25 Q Right. You're talking about an act that you've put into



1 your product market, correct, the act of filling out a form,  
2 right?

3 A It's a method of filling out a form.

4 Q And that, in your mind, is a product?

5 A It's a method of filling out the form that consumers can  
6 turn to. Again, the purpose of relevant market definition --  
7 market definition -- is to think about the alternatives that  
8 consumers can turn to.

9 And sometimes those alternatives include, you know, doing it  
10 completely yourself without having a particular, you know, piece  
11 of software, for example, as in this case.

12 Q If I have a cold and I can go to a doctor to get some  
13 assistance or I can go to the drug store and buy some cold  
14 remedies produced by a bunch of manufacturers of drugs or I can  
15 sit at home and drink chicken soup, is my sitting at home and  
16 drinking chicken soup part of the market for cold remedies?

17 A Look, in that situation -- you know, I'll start off by  
18 saying I haven't studied that market -- just because in some  
19 markets the possibility of, you know, sort of completely doing  
20 it yourself may or may not be an alternative. In other markets,  
21 it may be, and that's the question that we're really asking.

22 The question is if the price of cold medicines went up  
23 sufficiently, would people turn to chicken soup? I'm not saying  
24 that they would -- logically, they probably wouldn't -- but in  
25 some markets that is an important constraint, and in some it's

1 not. And so that's the question that we're asking here: Is  
2 this a market in which the choice of really doing it yourself --  
3 and here I'm distinguishing that from DIY software, I mean, just  
4 sort of really pen and paper, is it a constraint? That's the  
5 question. It's not either a constraint automatically or it's  
6 out of the market automatically. You have to ask the  
7 question.

8 Q Are there any competitors in the pen-and-paper segment of  
9 the market as you've described it?

10 A Those forms are provided by the Internal Revenue Service  
11 freely.

12 Q So is the Internal Revenue Service a competitor that we're  
13 adding in?

14 A No.

15 Q So there are no competitors in this segment of the market  
16 that you're including, the pen-and-paper segment, right?

17 A These are consumers who are choosing to do the work  
18 themselves. And it's an alternative that consumers have.

19 Q So all consumers, all people who on earth do dwell, are they  
20 part of the market?

21 A No. We're obviously talking about individuals who are  
22 filing their taxes.

23 Q So all individuals who are filing their taxes are  
24 competitors in the tax preparation market?

25 A That's not what I said at all. What I said is that the

1 option of going and using pen and paper is an option to which  
2 consumers -- it's an alternative or a substitute that consumers  
3 can turn to in the event of a price increase on the products at  
4 issue.

5 And that's exactly the question that we're asking. I mean,  
6 to -- that's at the heart of the question of market definition.  
7 That's what it's all about.

8 Q Section 4.1 of the Merger Guidelines say, "When a product  
9 sold by one merging firm competes against one or more products  
10 sold by the other merging firm, the agencies define a relevant  
11 product market around Product A to evaluate the importance of  
12 that competition. Such a relevant product market consists of a  
13 group of substitute products including a Product A. Multiple  
14 relevant product markets may thus be identified."

15 Pen and paper is not a product.

16 A It's not a product in the sense of a firm is putting out a  
17 software product, but it is relevant and it still fits into that  
18 same concept by saying it's a way of filling out your taxes. In  
19 the same way that digital software is a way of filling out your  
20 taxes and assisted tax preparation is a way of filling out your  
21 taxes.

22 It's a piece of paper -- it's several pieces of paper --  
23 provided by the IRS, and it's an alternative that consumers can  
24 turn to and it's a constrain on pricing.

25 Q And 4.1 talks about product markets. Now, markets are where

1 there is an exchange of economic activity, right, good for  
2 money, right, that's what a market is?

3 A That's one definition of the word "market."

4 Q And that's not what's happening with pen and paper.

5 Nobody's exchanging money. It's just somebody's choosing to do  
6 a task and not spending money, right?

7 A Well, the same is true for the free products that are sold  
8 by -- that are not sold, but that are provided by H&R Block or  
9 TaxACT or some of the other firms in this industry. I mean, not  
10 every element of this product market involves an exchange of  
11 money. For example, the free products -- the ones -- and I  
12 certainly have an understanding that some of the free products  
13 lead to monetization, but there are certainly consumers that --  
14 tax filers who use free products and never pay for anything.

15 Those are -- likewise, there's no exchange there, but that  
16 doesn't mean that they are not in the relevant market. Indeed,  
17 I think they are even in Dr. Warren-Boulton's relevant product  
18 market.

19 Q All right. We'll get back to the free in a little bit, but  
20 let's keep focusing on pen and paper.

21 You said you read depositions of various parties, right, as  
22 part of this?

23 A Correct.

24 Q And you see the answers where the executives said we don't  
25 think pen and paper, we don't compete with pen and paper? Did

1 you take that into account?

2 A I did take that into account.

3 Q Let's look at a couple of those. We'll put up Tab 55,  
4 Government Exhibit 293. This, again, can't be shown to the  
5 audience because it's an Intuit executive.

6 A What page?

7 Q Tab 55, Government Exhibit 293. Page 37, lines 20 to  
8 page 38, line 2. And we can't read it out loud, but you'll see  
9 that the Intuit executive was asked, "Did you compete with free  
10 fillable forms in seeking to attract tax preparation?" And  
11 you'll see his answer there.

12 Do you see that?

13 A I do. If I can just find it on my page to make sure that I  
14 see the context.

15 Q Okay. Let's look at Tab 56, Government Exhibit 296. This  
16 is Mr. Houseworth's testimony. He is an executive at H&R Block  
17 whose testimony you've cited in your report and declaration, I  
18 think, correct?

19 A I'd have to go back and check what I cited, but I certainly  
20 have reviewed his deposition.

21 Q Okay. And you agree that he's actually -- is he in charge  
22 of the digital business right now at H&R Block?

23 A Yes, that's my understanding.

24 Q All right. If you would look at his deposition. We're at  
25 page 89, line 2, to 90, line 1.

1 MR. WAYLAND: This isn't sealed, is it? I'm not sure  
2 it should be. Mr. Robertson, could you just --

3 MR. ROBERTSON: We can display it.

4 BY MR. WAYLAND:

5 Q So this is testimony of Mr. Houseworth on August 4th,  
6 page 89, line 2, to 91, 1.

7 "Question: Do you believe that pen and paper is a  
8 constraint on H&R Block's digital business?"

9 "What do you mean by 'constraint'? How could it be a  
10 constraint?"

11 "That's what I'm trying to understand." And then there's  
12 some colloquy.

13 Line 14, "Do you view -- do you believe that pen and paper  
14 is a constraint on H&R Block's digital business?"

15 "The Witness: Constraining how?"

16 "Question: Does it constrain H&R Block in terms of the  
17 prices it can charge?"

18 Answer from the head of the digital business, "I don't think  
19 so."

20 That was part of the deposition record that you considered,  
21 right?

22 A Yes.

23 Q You think that Mr. Houseworth knows more about his business  
24 than you do?

25 A Yes.

1 Q So if he testified that pen and paper doesn't constrain his  
2 business, don't you think we should listen to him?

3 A I think we should certainly take account of what he says but  
4 put it into its context of he is a business person who is  
5 thinking about constraints in a certain way. And I'm an  
6 economist who is thinking about things perhaps in a slightly  
7 different way than he is because I'm thinking about it in terms  
8 of an antitrust context.

9 As a starting point, we're talking about TurboTax, Intuit --  
10 I can say that much, right -- and H&R Block in these particular  
11 deposition excerpts. And indeed, in terms of the quantification  
12 of diversion or at least the closest thing that we have to a  
13 quantification of diverse, the place where the constraint seems  
14 to be most prevalent for pen and paper is with regards to  
15 TaxACT. And that's not surprising, because that's -- TaxACT'S  
16 products are at a lower price point. So it's reasonable to  
17 think that the constraint would be more so at that part of the  
18 marketplace.

19 But even so, I mean, when business people think about the  
20 primary constraints on their business, you know, they are  
21 usually thinking -- you know, a lot of times business people say  
22 what keeps you up at night? It's the primary things that are on  
23 their minds. But what I have to do is step back and look at,  
24 you know, all of the evidence and in terms of where customers  
25 would go.

1           So the analysis is a little bit different. I do believe  
2 that he knows his business, at least I have no reason to believe  
3 he doesn't, but it's a different question that he is sometimes  
4 thinking -- that a business person is sometimes thinking about  
5 than what an antitrust economist is thinking about.

6 Q And aren't you thinking about whether one product constrains  
7 the price of another? Isn't that your fundamental -- that's why  
8 you're here, right?

9 A Correct.

10 Q And Mr. Houseworth, the head of the business, is answering  
11 that question.

12 A Again, as I indicated, this is H&R Block, and I wouldn't  
13 expect that the effect of pen and paper is most prevalent on H&R  
14 Block. Indeed, I think it's more prevalent for TaxACT, as I  
15 stated before.

16 Q All right. You agree that the standard methodology for  
17 defining a relevant market is known as the hypothetical  
18 monopolist test, correct?

19 A The hypothetical monopolist test is an element in defining a  
20 relevant market, yes. There are some other principles, as I  
21 mentioned in my direct testimony, that are also important in  
22 defining relevant market.

23 Q Actually, Dr. Meyer, I was quoting your report at  
24 Paragraph 152 where you said, "The standard methodology for  
25 defining a relevant market is known as the hypothetical



1 monopolist test."

2 You haven't changed your view, have you, since you wrote  
3 your report?

4 A No. I was just clarifying that it's the standard  
5 methodology but in light of other factors as well. That's all  
6 I was clarifying.

7 Q And you did not yourself perform a hypothetical monopolist  
8 test on the digital do-it-yourself market that the government's  
9 alleged, correct?

10 A No. Because I don't think it's a proper relevant antitrust  
11 market.

12 Q So you just said, "Okay, I'm not going to run a test on that  
13 market," right?

14 A Well, it doesn't conform to the other principles of a  
15 relevant market so there was no point, in some sense, of running  
16 a SSNIP test on something that starts out fundamentally as not  
17 being a proper relevant antitrust market because it omits the  
18 important alternatives.

19 Q And you didn't perform any kind of calculation SSNIP test of  
20 your own market, right?

21 A As I said, there's not a particular calculation, but I  
22 explained in my direct testimony that it's clear that my market  
23 passes a SSNIP test.

24 Q I think at your deposition, you said the SSNIP test was  
25 "inherent" in what I did, right?

1 A I don't recall the exact language that I used.

2 Q All right. Let's look at your deposition to refresh your  
3 recollection as to what you said. And we're at page 38 of your  
4 deposition on August 22nd, 2011.

5 And at line 12, you were asked, "Which product set did you  
6 apply the hypothetical monopolist test in?" And your answer  
7 was, "Inherent in the opinions expressed in my report are  
8 hypothetical monopolist tests to the relevant market that I've  
9 determined all tax preparation methods," correct?

10 A Correct.

11 Q Does that refresh your recollection that you've described  
12 your test as being inherent in what you did?

13 A Yes.

14 Q All right.

15 THE COURT: What is the tab for Dr. Meyer's deposition?  
16 Is this in the notebook?

17 MR. WAYLAND: It's not in the book, your Honor. We can  
18 provide you with a copy.

19 THE COURT: It's okay.

20 MR. WAYLAND: It's Government Exhibit GX 666, your  
21 Honor.

22 THE COURT: Thank you.

23 BY MR. WAYLAND:

24 Q Now, let's talk about the SSNIP test a little bit. It's a  
25 small but significant nontransitory increase in price, right?

1 A That's what "SSNIP" stands for.

2 Q And we're generally talking about 5 or 10 percent. That's  
3 what economists, the government, that's how we talk when we're  
4 doing merger analysis generally, right?

5 A I believe that's in the Merger Guidelines, yes.

6 Q Now, in Section 4.11 of the Guidelines says that "groups of  
7 products" -- and we're going to display this, "may satisfy the  
8 hypothetical monopolist test without including the full range of  
9 substitutes from which consumers choose," correct?

10 A I actually see something that talks about not excluding a  
11 product that's a closer substitute for the first product than is  
12 the second product --

13 Q This is yours.

14 A -- which is the point that I've been making.

15 Q That's what you said, right. I'm sorry. Let's back up.

16 MR. WAYLAND: Let's display that again.

17 BY THE WITNESS:

18 A I'm glad this is coming up so many times because this is  
19 really important.

20 Q All right. This is the section of the Merger Guidelines  
21 that you quoted from yesterday, correct?

22 A Correct.

23 Q All right. Let's look at Section 4.1, see some more of it.

24 It says, "Groups of products may satisfy the hypothetical  
25 monopolist test without including a full range of substitutes

1 from which consumers choose," correct? That's a quote. Any  
2 disagreement?

3 A I don't know what the -- it doesn't look like the Horizontal  
4 Merger Guidelines to me so I don't know what that was.

5 Q This doesn't look like the Horizontal Merger Guidelines to  
6 you?

7 A This document --

8 Q It's not. If you want me to get the actual copy, we can do  
9 that, or you can accept that we've typed it out correctly.

10 Do you have any reason to believe that that doesn't --

11 A No. I thought that you were --

12 Q It's my script. We should have a copy for you. For some  
13 reason it's not here. So I'm just --

14 A I understand. I'm sorry. I was just confused. I thought  
15 that --

16 Q I understand. It's out fault for the confusion. We should  
17 have the text. It's not here for some reason. But in any  
18 event, we've typed it out.

19 And you don't disagree. You've read them, right?

20 MR. ROBERTSON: Objection. If we can just ask a  
21 question rather than have counsel show the witness his own  
22 outline.

23 MR. WAYLAND: We'll just put it aside.

24 THE COURT: Read from the Horizontal Guidelines as  
25 opposed to showing us all your work product, as much as we enjoy

1 looking at it.

2 MR. WAYLAND: I don't usually follow a script either.

3 BY MR. WAYLAND:

4 Q All right. We're going to put the Horizontal Merger  
5 Guidelines aside because they say what they say. Let's talk  
6 about applying a test here.

7 In your market, a market you've defined, the hypothetical  
8 monopolist monopolizes all forms of tax preparation, correct?

9 A Correct.

10 Q So I -- in order to do your taxes, you have to come to me.  
11 That's your hypothetical monopolist, right?

12 A Correct.

13 Q So the SSNIP test is sort of silly in that case because he  
14 can charge -- or she can charge -- an infinite price because  
15 everybody has to do their taxes, right?

16 A I don't know whether he could charge an infinite price  
17 because at some point in time, people don't have the income to  
18 pay that price. But, I mean, that's -- just to follow out your  
19 logic to its conclusion. But I agree, a hypothetical monopolist  
20 of that market could certainly increase the price and people can  
21 continue to pay their taxes, yes.

22 Q Right. And so that's why it didn't really make sense for  
23 you to do a SSNIP test because you're not going to get any  
24 result that tells you anything because the hypothetical  
25 monopolist can charge to infinity, essentially.

1 A It's true. That's why it passes the SSNIP test.

2 Q But the SSNIP test, you're supposed to be getting a yes or  
3 no. Either I raise the prices 5 or 10 percent and see a change,  
4 or maybe it's not enough and I have to try another test, right?  
5 You're trying to get a yes or no out of the SSNIP test.

6 Is it a relevant market or not, right?

7 A The SSNIP test is a yes-or-no type test, yes. In my market,  
8 it passes. I would say, yes, it is a relevant market. It  
9 passes the SSNIP test.

10 Q Because there can never be a no in your market because  
11 everyone has to pay and everyone has to pay whatever the  
12 monopolist demands.

13 A As I said yesterday, I mean, there are certainly times in  
14 which the proper relevant market is all of the alternatives to  
15 which people would practically turn. There's nothing wrong with  
16 that, and that happens to be the case in this matter.

17 Q But in the government's market, the one we've defined, you  
18 could reasonably say at some point some price that the digital  
19 monopolist monopolizes all digital prices is too high, people  
20 will go back to pen and paper, or they'll switch to assisted.

21 As an economist you'd say, yeah, that makes sense. At some  
22 point, somebody would switch to pen and paper or somebody would  
23 switch to assisted, right, and you could test that?

24 A You could test that.

25 Q All right. So that's a market you can actually apply the

1 SSNIP test to. Whether you agree that it's the right market, if  
2 it is, you can apply the SSNIP test and get a reasonable answer.

3 Some price people will switch out or switch up to assisted,  
4 right?

5 A Yeah, but that's not the SSNIP -- you can do the test that  
6 you outlined, but that's not the SSNIP test. The SSNIP test is  
7 not would it be a relevant market at a 5 percent price increase,  
8 but would it not be a relevant market if I applied a higher  
9 price increase. That's not the SSNIP test.

10 Q We talked about the pen-and-paper part of the market. Let's  
11 go to the other side of it which you include, and that's the  
12 assisted side. Let me show you Tab 29, Government Exhibit 629.  
13 This is a white paper that was submitted to the government on  
14 May 2nd, 2011. I think it was before you were retained as an  
15 economist. But submitted by counsel on behalf of both  
16 defendants. Let's look at page 92.

17 By the way, did you see this document among the things that  
18 you read in coming to your conclusion about the market?

19 A I have seen this document. This was not a document prepared  
20 in the ordinary course of business and so I didn't base my  
21 opinions on anything within this document. But I certainly have  
22 seen this document.

23 Q Well, it was prepared in the course of providing the  
24 government with the parties' positions. And I assume -- you've  
25 worked on white papers that go to the government, right?

1 A I have.

2 Q And when you prepared white papers that went to the  
3 government, you made your best effort to faithfully represent  
4 the truth to the government, right?

5 A That's correct.

6 Q All right. So that's the course in which it was prepared,  
7 right?

8 A That's my understanding.

9 Q All right. And on page 92, the paper says, "After several  
10 painful years of confusion, indecision, apprehension, and false  
11 starts, H&R Block has finally arrived at a coherent business  
12 strategy on which to base its efforts to compete with Intuit.  
13 It has recognized that the digital tax preparation business  
14 serves do-it-yourself customers and does not adversely affect  
15 its much larger tax preparation business."

16 You read the paper. You took that into account when you  
17 came to your opinion that assisted and digital were in the same  
18 market, right?

19 A I saw this, and I took this into account, yes.

20 Q Okay. Were you here for Mr. Bennett's testimony?

21 A I was not.

22 Q Did anybody tell you what Mr. Bennett said about assisted  
23 and digital?

24 A I read Mr. Bennett's testimony.

25 Q Okay. Do you recall that Mr. Bennett agreed that the



1 digital tax preparation business serves do-it-yourself customers  
2 and does not adversely affect its much larger assisted tax  
3 preparation business?

4 A I don't recall specifically what he said.

5 Q I think you also read the Intuit declaration that was  
6 submitted, right?

7 A Yes.

8 MR. WAYLAND: All right. Let's look at that and that  
9 cannot be displayed.

10 MR. ROBERTSON: Your Honor, I'll explain that documents  
11 were flashing on the screen that were under seal, and I wanted  
12 to make sure that he was aware of that.

13 MR. WAYLAND: We have the screen turned off.

14 BY MR. WAYLAND:

15 Q We're looking at Paragraph 25. This is Intuit's pricing.  
16 "Similarly, when setting prices, Intuit" --

17 A Which tab is this?

18 Q This is Tab 29. It's Government Exhibit -- it's Tab 8,  
19 Government Exhibit 29.

20 And in that -- do you have it, Dr. Meyer?

21 A Yes, I do.

22 Q All right. So in Government Exhibit 29, Paragraph 25,  
23 Intuit executive writes, "Similarly, when setting prices, Intuit  
24 relies primarily on its own consumer behavior studies and looks  
25 to the pricing of TaxACT and H&R Block."

1 Do you see that?

2 A Yes.

3 Q All right. Were you here for the trial testimony of  
4 Mr. Ernst?

5 A No, I was not in the courtroom when Mr. Ernst testified;  
6 however, I did review his testimony.

7 Q All right. And you understood that Mr. Ernst is a former  
8 CEO of H&R Block?

9 A Yes, I understand that.

10 Q And he was asked at line 33 --

11 MR. WAYLAND: Do we have that?

12 BY MR. WAYLAND:

13 Q The trial testimony of Mr. Ernst on September 7th, line  
14 33 -- at page 33, line 23.

15 "Did H&R Block view the digital market -- the digital method  
16 and the assisted method of tax preparation as competing with one  
17 another?"

18 "Not to any large degree, no."

19 And you read that, right?

20 A Yes.

21 Q Now, it's your view that if the prices of H&R Block's  
22 digital products went up, customers would switch in greater  
23 numbers to assisted tax preparation than they would switch to  
24 anywhere else, right?

25 A Correct.

1 Q And it's your view that, for example, if the price of basic  
2 went from 30- to \$35, people would -- biggest switch would be to  
3 assisted, right?

4 A This is looking at the prices generally of H&R Block  
5 products. I didn't do a specific analysis of one product or  
6 another product.

7 Q Well, can you shed any light as to what would happen if the  
8 price of the \$30 product went up to \$35?

9 A Again, what I looked at in terms of the statistical  
10 analysis -- I just want to be clear as to what I did -- was  
11 looking at the prices across the board of H&R Block products.

12 Q Okay. No matter what you did, I'm asking if it allows you  
13 to tell the Court anything at all about what would happen if the  
14 price of H&R Block's basic product went from 30- to \$35?

15 A That would increase the overall pricing of HRB's pricing  
16 portfolio, and that would -- the statistical analysis tells me  
17 that that would tend to lead to a diversion to assisted.

18 Q So how many people -- what percentage of people who bought  
19 the \$30 product would leave to go to assisted if the price went  
20 up to \$35?

21 A Again, this was -- I just want to be clear as to what the  
22 statistical analysis can tell us and what it can't tell us.

23 It can tell us that in general when HRB's prices go up, that  
24 the first place -- and this is in general across the board --  
25 that they go to assisted. It doesn't identify one particular

1 price from one particular product. That's not what the  
2 statistical analysis does. It's looking at across all of the  
3 prices in the portfolio.

4 Q Now, you are saying that it would just -- whatever happens,  
5 it's going to go from H&R Block to assisted, right? You defined  
6 assisted, right?

7 A Yes.

8 Q Okay. And you haven't -- you can't tell us where in the  
9 assisted group of various segments it would go, right?

10 A That's incorrect. The pricing simulator does break out  
11 different types of assisted tax preparation, and the most -- the  
12 highest diversion would go to CPA and accountants within even  
13 the assisted group.

14 Q Okay. And apart from what you learned from the simulator,  
15 is there any other basis to tell us where a customer who is  
16 buying the \$30 Block product is going to go when the price goes  
17 to \$35?

18 A There's not a specific pricing test that identified -- let  
19 me put it this way: There's not a particular analysis that  
20 looks just at the price of that one product and where people  
21 would go. I make -- I look at the data that's available on  
22 generally what happens when pricing goes up.

23 Q Okay. So if we put aside all the work that you've done with  
24 the simulator -- put that aside, pretend you didn't do it -- do  
25 you have any other basis to tell us what would happen if the

1 price of H&R Block's basic product went from 30- to \$35?

2 A I don't have a specific quantification. However, I have  
3 seen a lot of documents in which H&R Block talks about competing  
4 with assisted tax preparation which Mr. Smyth, for example,  
5 talks about the importance of digital competing with assisted  
6 and assisted competing with digital.

7 So there's a lot of qualitative evidence that indicates that  
8 they're competing. What you're asking about in terms of a  
9 specific quantification that, in the case of H&R Block, comes  
10 from the pricing simulator.

11 Q And your answer would be the same if I went through various  
12 price changes in, for example, the TaxACT products? If I asked  
13 you what would happen in response to a change in price from 9.95  
14 to 10.95, would you have a different answer?

15 A Generally speaking, as well, you know, there are a lot of  
16 documents that speak generally to the competition that TaxACT  
17 faces. There is certainly a document that contemplates a  
18 specific price increase on the TaxACT side of a state increase  
19 by a dollar and the thinking of management as to why they  
20 couldn't do that. And they are concerned that people would turn  
21 to pen and paper. That's perhaps a bit closer to asking the  
22 specific question of what would happen if the price went up by a  
23 particular amount of money.

24 Q I think we've had a lot of testimony about the 9.95 price at  
25 TaxACT has been constant for a long time. If it goes up 10

1 percent to 10.95, your testimony is that the result of that  
2 would be largest diversion would be people stopped doing  
3 their -- stopped using digital products?

4 A Well, I think it's important to realize that when we're  
5 talking about diversion, we're talking about the difference  
6 between what would happen at one price, the higher price versus  
7 the lower price. So you know, generally speaking, we know that  
8 there are each year, even on net, consumers coming from pen and  
9 paper and beginning to do their taxes digitally.

10 And so it could be that in response to a price increase,  
11 what would happen would be that a former TaxACT customer would  
12 switch back to pen and paper. That's one possibility. And  
13 that's what is specifically contemplated in the TaxACT survey.  
14 But its diversion would also refer to in a year -- if we compare  
15 how many new customers TaxACT got at the 10.95 price coming from  
16 pen and paper, that they would get fewer customers from pen and  
17 paper at the 10.95 price as they would from the 9.95 price. So  
18 in other words, that it slows down their growth of customers  
19 coming from pen and paper.

20 So I just want to be clear that diversion could be either  
21 one of those because it's comparing, you know, what would my  
22 world look like in a 10.95 price scenario versus a 9.95 price  
23 scenario? How many customers are using pen and paper and how  
24 many are using my product? It's a subtle distinction, but it is  
25 important in this case where TaxACT and, indeed, all of the

1 firms, are looking to get tax preparation customers from across  
2 the spectrum.

3 And so in order to keep that pipeline going of new  
4 customers, that's an important component of how they compete and  
5 what they care about. So I just hope that was -- didn't add  
6 more confusion, but I just wanted to be clear there.

7 Q All right. Just a couple more questions on this, Dr. Meyer.  
8 You testified in response to the Court's question that if the  
9 simulator were disregarded, there is sufficient basis for your  
10 relevant market opinion, right?

11 A Correct.

12 Q The TaxACT survey, that doesn't quantify diversion from  
13 H&R Block, right?

14 A Correct.

15 Q Okay. And it just addresses switching, right?

16 A Well, it is -- it's switching, but within a mind towards  
17 dissatisfaction with regards to price, features, or quality. So  
18 it's certainly closer to diversion than is pure switching  
19 data.

20 Q But in any event, it doesn't quantify diversion, right?

21 A It is not a specific direct test of diversion, but it sheds  
22 light on the question.

23 THE COURT: Can I just follow up on that one question  
24 because I know you asked about this, and I wasn't sure I  
25 followed it then so thank you for giving me another opportunity

1 to clarify this in my own mind.

2 MR. WAYLAND: Yes.

3 THE COURT: So the 2011 survey asks about price  
4 features and quality satisfaction. It doesn't ask about  
5 complexity. So you say that that's better than switching data  
6 for purposes of your analysis of the diversion ratio and  
7 diversion generally. And so as I see the only difference  
8 between the switching data and this survey is that the survey  
9 doesn't ask about complexity, but it does ask about three other  
10 different characteristics associated with the software.

11 Why is it that you don't think -- why is it  
12 specifically that you think that the switching data isn't better  
13 than that survey? I still don't understand. Since the only  
14 thing it seems to be not asking about -- let me put it to you  
15 this way: If that survey had said tell me about your -- if  
16 there was a difference in satisfaction in pricing, features,  
17 quality, and there was a change in the complexity of your tax  
18 situation, would it then, in your mind, be analogous to  
19 switching data?

20 THE WITNESS: No. You want a clarification.

21 THE COURT: Yes.

22 THE WITNESS: Because why are people switching in the  
23 switch data? Part of it could be because of price, features, or  
24 quality dissatisfaction. Part of it could be changes in  
25 complexity. But there are lots of other reasons why they could



1 be changing as well.

2 For example, we've heard about advertising. It could  
3 be that they saw some advertising, and that's why they switched.  
4 It could be that their friend told them about the product and  
5 they switched. It could be that they just wanted to try  
6 something different. They wanted to see if they got a higher  
7 return from a different product or method.

8 THE COURT: So the reason you prefer the survey is  
9 because unlike switching data where there's this whole panoply  
10 of reasons, at least it just refines the answers to those  
11 respondents who participated in the survey to those three  
12 different aspects that were asked about in the survey?

13 THE WITNESS: Correct.

14 THE COURT: Okay.

15 BY MR. WAYLAND:

16 Q Okay. Just finish up on this line, Dr. Meyer.

17 So if you disregard the pricing simulator, there's no  
18 quantitative basis to support your view that assisted is a  
19 closer substitute to H&R Block than other digital products,  
20 right?

21 A At that point, I would have to look to the qualitative data,  
22 yes.

23 Q Okay. Let's take a look at the slide again with the numbers  
24 on assisted and competing from digital that you used yesterday.  
25 This is your demonstrative.

1 MR. WAYLAND: Do you know what tab it was in her book?

2 BY MR. WAYLAND:

3 Q It's tab 52 in our book. I'm not sure what it was in your  
4 book.

5 If you recall, Dr. Meyer, after you testified about how the  
6 simulator provided your basis for diversion conclusions, you  
7 said, "Okay, well, I'll look at some other data too to see what  
8 it says." And here's what you presented to support your view  
9 that HRB's closest competitor is assisted. And you have the  
10 simulator data. And then you correct it after Dr. Rick  
11 Warren-Boulton pointed out the problem with the 19.95 and so you  
12 ran some other numbers, right?

13 A Correct.

14 Q Then you also lined up the IRS switching data. And you  
15 presented your results, right?

16 A I lined up the IRS switching data, yes. I don't think that  
17 that is diversion data.

18 Q I know. You think it's switching data, but you were just  
19 using it to show even with the switching data, I can support my  
20 position, right?

21 A Well, the switching data would have to include both this  
22 switching data and then the data with regards to TaxACT.

23 Q Okay. This is your chart. You presented it yesterday.

24 I'm not -- you had a purpose, right?

25 A Correct.

1 Q Okay. And do you know in statistics the basic problem of  
2 improper aggregation? Do you know anything about that?

3 A I have not heard of that particular term.

4 Q Well, do you understand just as a matter of logic that if  
5 you're comparing a group of something to individuals,  
6 individuals in another set, that that doesn't really work?

7 Do you understand that's a basic concept in statistical  
8 analysis?

9 A I'm not familiar with that concept.

10 Q Okay. Well, let's just look at what you did.

11 In getting your numbers, you have assisted listed as a  
12 single group, as if it's a thing, a one thing, right?

13 A Correct.

14 Q And then you've broken out TurboTax, TaxACT, other digital,  
15 right? They are separate.

16 You didn't group them together as digital, right?

17 A Correct.

18 Q Okay. And did you do that to see if you compared one  
19 segment to another segment if the numbers came out  
20 differently?

21 A No. As I said, I mean, you can also break out assisted  
22 into, for example, the CPA. And that still has the highest  
23 diversion from the pricing simulator.

24 Q What if you broke out assisted into Jackson Hewitt, CPA  
25 firm, Liberty Tax? What if you broke it out that way just as

1 you've broken out digital in some respects? Would it look  
2 different?

3 A Well, the CPA group still has the highest diversion.

4 Q We took your numbers and we did group to group, and we're  
5 going to show you what that is. So we've added together all the  
6 digital switching or diversion in your sense, switching on the  
7 IRS numbers, and we've added them together.

8 And if you compare group to group, again, just using your  
9 way of looking at it, it turns out that the closest competitor  
10 by group is digital, right?

11 A If you add up the numbers of digital, but the question here  
12 is a comparison between -- you know, the merger here is between  
13 HRB and TaxACT. And those are distinct entities, you know,  
14 within the digital space. And they are looked at separately by  
15 HRB.

16 On the other hand, assisted is looked at as a group by HRB.  
17 So I'm not sure what this shows. But I see the math that you're  
18 looking at.

19 Q It shows if you compare apples to apples you get a different  
20 result than if you sort of mix things up a bit, doesn't it?

21 A No, I don't think so.

22 Q All right.

23 THE COURT: I'm sorry. I don't understand why you  
24 don't think so.

25 THE WITNESS: Because when H&R Block looks at its

1 competition, when it talks about where its customers go, it  
2 considers TurboTax separately because, you know, that has a  
3 particular set of product features and has particular products.  
4 It looks at TaxACT separately and, of course, we have to look at  
5 them separately because that's the other party merging.

6 But then for assisted, it doesn't know where those  
7 customers are going to assisted. And when you see the way that  
8 it breaks things down in its ordinary-course-of-business  
9 documents, it looks at either assisted as a group or it looks at  
10 CPAs as a group versus tax stores at a group.

11 THE COURT: But that's not really right, isn't it,  
12 because in the simulator that you looked at yourself, I mean,  
13 they took assisted and they broke it down to a different  
14 groups -- friends and family, CPAs and accountants, retail  
15 stores -- and then you took all those and you put them together  
16 into assisted.

17 So just like you did that, why isn't a group of DDIY,  
18 why doesn't that include all the DDIY ways of performing your  
19 tax preparation in the way that this shows? You're saying it's  
20 not apples to apples, and I'm really having difficulty  
21 understanding why comparing assisted as a group, and all the  
22 different methods combined into assisted, why isn't that one  
23 group and all of DDIY digital tax preparation methods, why isn't  
24 that another group and why isn't that a better way of grouping  
25 these numbers?

1           THE WITNESS: Well, I would say the question is really,  
2 the way that I would think about it, is it correct to break down  
3 assisted into its individual components? Because if you do that  
4 and say, well, I'm going to start with all digital DIY and just  
5 put them together as a group, then you've done, in essence,  
6 exactly what Dr. Warren-Boulton has done, which is you assume  
7 your conclusion. You just say I assume that they're all  
8 together, I assume that they all compete, you know, with H&R  
9 Block, and then I'll just test to see whether they do. And as  
10 we can see, the diversion to TaxACT, for example, is relatively  
11 low.

12           On the other hand, the question of assisted, can you  
13 break it up? Yes, you can break it up. And sometimes the firms  
14 look at groups like CPAs and separately tax stores. And when  
15 you look at that, there's still very high diversion to CPAs. So  
16 even if I did it that way, there would still be very high  
17 diversion to CPAs.

18           So I don't think doing more aggregation is the answer.  
19 I think the question is, could there be less aggregation on the  
20 assisted side, and you can but the conclusions are still the  
21 same.

22           THE COURT: Well, I think the discussion about  
23 aggregation is -- not to get granular on exactly where people  
24 are being diverted -- but if you're going to put up a number for  
25 assisted of 41.8 percent or 38 percent, what is the comparable

1 number? And I think that that's the purpose.

2 So anyway, I'm sorry, Mr. Wayland; please continue.

3 MR. WAYLAND: That's fine, your Honor.

4 Just as a clear record, are we marking this? Do we  
5 have a separate exhibit number for this?

6 This will be Government Exhibit 15, your Honor, which  
7 just for the record --

8 THE COURT: This is a trial exhibit?

9 MR. WAYLAND: Yes, I'm sorry. Government Trial  
10 Exhibit 15 which is the calculation we've just displayed that  
11 aggregates the do-it-yourself market, your Honor.

12 THE COURT: Is that a tab in the notebooks?

13 MR. WAYLAND: It is, your Honor. Tab 52, your Honor.

14 (WHEREUPON, a certain document was marked Government Trial  
15 Exhibit 15 for identification as of September 13, 2011.)

16 BY MR. WAYLAND:

17 Q All right. We have another slide which deals with the same  
18 issue. This is another one of the slides that you presented  
19 yesterday. This is TaxACT's closest competitor is pen and  
20 paper.

21 And you have the assisted batch -- before I go any further,  
22 now, as I understand it, Doctor, the IRS switching data, you can  
23 look individually at every single -- you can get the data on  
24 every single preparer, right? You know that, right?

25 A I'm sorry. Say that again.

1 Q You can get switching data by individual preparer,  
2 correct?

3 A Sort of. You have to do a little bit of work. It doesn't  
4 actually tell you the preparer but the way in which it was  
5 prepared. But you can match up the way in which -- so in other  
6 words, it says that it was Jackson Hewitt software that was used  
7 and so you can bring that back and say, well, that was Jackson  
8 Hewitt that prepared the return.

9 Q All right. So you could have looked at the data and said  
10 preparer by preparer, where are people going to on the switching  
11 analysis, right?

12 A For the switching data, yes?

13 Q Okay. Let's just stick with the aggregation issue. And  
14 we've prepared another slide that does the same thing, adding up  
15 the digital shares.

16 And you'll see that if you calculate digital shares, it's  
17 actually higher than assisted or pen and paper by a substantial  
18 amount, right?

19 A I see the numbers that you're talking about, yes.

20 MR. WAYLAND: All right, your Honor. This will be  
21 Government Exhibit -- Trial Exhibit 16, Tab 51. And this again,  
22 for the record, is the aggregation of digital in the chart  
23 "TaxACT's Closest Competitor is Pen And Paper."

24 (WHEREUPON, a certain document was marked Government Trial  
25 Exhibit 16 for identification as of September 13, 2011.)



1 BY MR. WAYLAND:

2 Q Now, when you were thinking about whether assisted would be  
3 in the market, did you think about what Mr. Houseworth thought  
4 about that, the head of the digital business at H&R Block?

5 A Yes.

6 Q And what did he think about it?

7 A H&R Block, actually not all that different from TaxSlayer I  
8 believe that I -- Mr. Rhodes who was here -- has both a digital  
9 DIY product and an assisted product. And for both of those  
10 firms, there's obviously a consideration within the firm that  
11 they had these two products and a question of how hard that they  
12 want one product to compete against the other, you know, within  
13 that firm and taking sales.

14 And that's always been, I think, its attention and a  
15 constraining factor on firms that are set up in that way. They  
16 have to take into account all of the products in their  
17 portfolio. So -- you know, the retail business is a large part  
18 of H&R Block's business, and so there's certainly a hesitancy on  
19 the part of the management in certain documents to promote a  
20 whole lot of competition within the firm. They'd rather, you  
21 know, compete outside the firm.

22 But, you know, even Mr. Smyth, who was the CEO I believe in  
23 2010, has recognized that that's just not a feasible way to  
24 proceed. That digital does compete with the retail business,  
25 and retail does compete with their digital business, whether

1 that's something that they like to admit or not.

2 Q We talked about documents. I'm talking about sworn  
3 testimony which you said you read, right?

4 A Yes.

5 Q And when Mr. Houseworth said, "No, I don't view H&R Block's  
6 assisted business as competing with its digital business," did  
7 you have any reason to doubt that he knew what he was talking  
8 about?

9 A No.

10 MR. WAYLAND: All right. Your Honor, could I just  
11 inquire as to the schedule? I know that you're stopping early.  
12 Are we having lunch? Are we working through?

13 THE COURT: I'd like to go through to 1 o'clock if we  
14 can.

15 MR. WAYLAND: Okay. Thanks.

16 BY MR. WAYLAND:

17 Q Now, yesterday I think, Dr. Meyer, you testified that for  
18 diversion purposes, what you want to look at is increases in  
19 prices and see what happens, right?

20 A It's the responsiveness to a change in price, that's  
21 correct.

22 Q Okay. Now, in your report at page 29, you included a  
23 figure, Figure 1. And that's a chart that purports to show that  
24 the prices of certain products increased over a number of years,  
25 correct?

1 A If I can just look at my report so I can see it in color  
2 because it's --

3 Q I'm sorry, Doctor. Your report is at Tab 1, page 29. This  
4 is Government Exhibit 854.

5 A Oh, okay. I was hoping for a version in color. Let me just  
6 see if it's here.

7 Here's a version in color.

8 Q Okay. And for this chart, you picked a few products, and  
9 you laid out the price increase -- or the price change or lack  
10 of change over a period of time, right?

11 A Yes.

12 Q And this shows, would you agree, that -- and I think it was  
13 the point you put in your report for, that over the last four or  
14 five years or so, the prices of H&R Block's and TurboTax's  
15 products has increased, right?

16 A I think I was trying to show something slightly different  
17 with this chart.

18 Q Well, does the chart show that the prices of H&R Block and  
19 Intuit have increased over the last five years or so?

20 A It certainly shows that the price of the particular H&R  
21 Block product that I'm showing here has increased over time.

22 Q And during that period of time, there hasn't been much of a  
23 switch from H&R Block to assisted, right, or from Intuit  
24 either?

25 A I haven't looked at that specific question. Obviously,

1 controlling for all other factors.

2 Q Well, in one of the charts that you presented yesterday, the  
3 circle chart -- let me see if I can find it. Your binder,  
4 Tab -- I don't know what the tab number is, but it's in your  
5 binder, Doctor.

6 And net switching from assisted to digital DIY was  
7 1.3 million. So the testimony you presented yesterday was  
8 there's a movement from assisted to do-it-yourself, right?

9 A No. That's -- what I was showing here is that the net  
10 switching masked -- if you only looked at net switching, that  
11 masked a lot of switching in both directions between DIY and  
12 assisted. That was the purpose of this particular chart.

13 And as I realized as I was thinking about this yesterday, I  
14 may have mentioned that I thought this came from a HRB document.  
15 I thought about it, and I believe this comes from switching  
16 data, just to be clear.

17 Q You created it?

18 A Yes.

19 Q Let's go back to your chart, Figure 1, and see if we can  
20 learn anything about increases of prices and switching to  
21 digital.

22 Did you -- you presented some information showing that there  
23 was an increase in price for certain digital products,  
24 correct?

25 A Correct.

1 Q Did you do any investigation to see what the consequence of  
2 what that was, whether there was any switching to assisted as a  
3 result of these price increases?

4 A I did not do that particular analysis, no.

5 Q And that's what you're here to testify about, increased  
6 prices and switching, right?

7 A Diversion, yes.

8 Q All right. And here was some information you at least had  
9 part of the equation, and, you didn't try to solve the other  
10 side of the equation which was to see whether it resulted in any  
11 diversion, right?

12 A Well, the question is can you use this type of data to  
13 make -- to get information about diversion? I certainly asked  
14 myself that question because, as you said, it would be -- one  
15 might think that you could use this kind of data to get  
16 information about diversion. I certainly considered that as a  
17 possibility.

18 The problem is that, as you can see, that the prices only  
19 change, you know, once or maybe twice, maybe three times a year.  
20 That's not a whole lot of price variation, and so this is not  
21 the kind of data that you can use to get information about  
22 diversion. And the reason is this: You can't just look at what  
23 happens with one price, for example, HRB's price, and assisted  
24 tax preparation and say, "I just compared those two things. I  
25 look at what happened to HRB's price, I look at what happened to

1 the share of assisted, and I stop there," because you have to  
2 control for all the other factors. There are changes in  
3 TurboTax pricing. There are changes in pricing perhaps of other  
4 products. There's advertising that's happening. There may be  
5 new products that are introduced.

6 So it may appear at first glance -- and I certainly  
7 considered this possibility -- that you can use this type of  
8 data to come to diversion numbers and to come to an analysis of  
9 diversion rates, but when I looked at it more closely, I  
10 realized that you really can't because there's just not enough  
11 variation in these data. I mean, the typical type of data where  
12 you actually do use actual changes in prices and use them to  
13 estimate diversion data, I do that a lot in my work, but that is  
14 where prices change, for example, on a weekly basis.

15 I was describing for you earlier the supermarket scanner  
16 data. Prices there change on a weekly basis so you have a lot  
17 of observations about prices at different levels, and you can  
18 see -- and you can control for the prices of other products at  
19 different levels. You can control for advertising in all of the  
20 factors. So you can actually make a quantitative and  
21 statistical -- or show the relationship between a product's  
22 pricing and share controlling for other factors.

23 But just, you know, this data just doesn't have enough  
24 variation in it within to do it. And any comparison of one set  
25 of particular data points on here with a share of assisted --

1 and I pointed this out in my report because Dr. Warren-Boulton  
2 did that kind of analysis -- that just doesn't -- it just  
3 doesn't shed any light on the issue.

4 Q Well, let me see if I can understand why you used this  
5 chart.

6 If you look at the text, it says, "Figure 1 provides a clear  
7 picture of HRB's murky middle period. Before 2010, HRB's online  
8 premium product had been priced between TurboTax's online  
9 premiere and the value products. However, realizing that the  
10 old strategy was not successful, HRB has been focusing on  
11 positioning itself more clearly as a premium product. See since  
12 2010 as discussed above."

13 You're using this data to show that HRB has increased its  
14 prices which is enough for you, right? This tells you that HRB  
15 increased its prices?

16 A This shows that it increased its prices on the HRB premium  
17 product. This was really -- I mean, the chart was meant for a  
18 particular purpose which was to, as I said, describe what I had  
19 seen in the documents. It was a lot of discussion about this  
20 concept of the murky middle.

21 And so I was using this graph to try and come up for myself  
22 with a way of thinking about whether or not H&R Block had been  
23 in a murky middle, how to think about that concept that I had  
24 heard people talk about, and then think about the concept that  
25 H&RB saying that it was trying to get out of that murky middle.

1 So I asked myself what kind of data can I use to show or to  
2 indicate that trend. That's really all that this was doing.

3 Q And you understand that there are a lot of other products  
4 that HRB has -- had at the time, and some of those prices didn't  
5 go up, they actually came down, right?

6 A I think there may have been a product or two whose prices  
7 came down. I'd have to look at the data again to remember.

8 Q So looking at these individual provides points, I think what  
9 you're telling us is it's a little tricky, it doesn't really  
10 tell you a lot about what's happening in the market?

11 A Again, it's like data and statistics generally. You have to  
12 think about what you're using the data and statistics to show.  
13 This doesn't show that HRB's pricing on all products went up.

14 No, I'm not saying that it does. I use this for a  
15 particular purpose, and that's the purpose -- that's the reason  
16 why it was in my report.

17 Q You actually chose their highest priced product, right, HRB  
18 premium plus state?

19 A Yes.

20 Q Okay. Now, you didn't use average price, right?

21 A No. And I did that exactly because what I was showing was  
22 obviously if this is the highest priced products, all of the  
23 other products are below the highest priced product. And so  
24 what this shows is that, you know, in the middle part of this  
25 middle, the murky middle period, the products had a range, but



1 even the top end of the range was not at the level of TurboTax's  
2 price. By the end, the top end of the range approached -- or  
3 was at TurboTax's prices.

4 That's what I was showing. That's what the graph shows.

5 Q Now, you -- do you know whether the companies in this  
6 business track average price?

7 A I have seen mention and data about average price, yes.

8 Q And you were critical of Dr. Warren-Boulton for using  
9 average price as a way of measuring anything about this  
10 transaction, right?

11 A I wouldn't say you can't use average price for anything. I  
12 think, again, statistics are -- you have to understand what  
13 question you're asking and what pieces of data and what  
14 statistics are informative as to that question.

15 Q This is a business where a large percentage of the product  
16 is distributed for free, correct?

17 A There is a sizeable percentage distributed for free, yes.

18 Q And in fact, that percentage has been increasing in recent  
19 years, right?

20 A I'd have to look specifically -- I just don't recall the  
21 percentage for each company, whether it's been increasing or  
22 decreasing, but it's a sizeable percentage.

23 Q And for H&R Block it's been increasing, right? Isn't that  
24 part of them coming out of the murky middle and deciding to  
25 launch free in a more aggressive way?

1 A Again, I'd have to look at the data. I really can't  
2 remember every single data point.

3 Q And free has value to a company, right, free product? They  
4 are not giving it away because they are a charitable  
5 organization? They think there's a business purpose for giving  
6 away free, right?

7 A Certainly.

8 Q So a company would put value on free, right?

9 A Free is important to these firms, yes.

10 Q Okay. And customers are clearly getting some value by  
11 taking the product for free. They are satisfying their need,  
12 not paying any money, but there's clearly some economic value to  
13 them, right?

14 A Yes.

15 Q So when you're thinking about the company's business and  
16 you're trying to understand what's going on in the business,  
17 you'd want to put into your calculation what's happening with  
18 free, wouldn't you?

19 A Well, it depends what purpose, you know, what question  
20 you're asking. If you're asking a question about what happened  
21 to average pricing, then you look at free and you include free.  
22 But if you're asking a question did the firm change pricing, did  
23 the firms increase pricing, then looking at average pricing  
24 isn't correct because you're mixing -- there are two things that  
25 can change an average in this case. It could be changes of

1 individual prices or it could be that there's a change in the  
2 mix of prices.

3 And so, you know, again, it depends on what question you're  
4 asking. But if you're asking the question are firms behaving in  
5 such a way as to increase pricing, then looking at an average is  
6 not the right way to go. So it all depends on what question  
7 you're asking.

8 Q All right. And you agree, though, that H&RB, for example,  
9 keeps track of average pricing as part of its basic statistical  
10 analysis of its business, right?

11 A I have seen average pricing on HRB spreadsheets, yes.

12 Q Okay. And you've seen it on their documents that are  
13 described as the "Single Point of Truth" for understanding the  
14 company's financial position?

15 A I can't recall whether it was specifically on the "Single  
16 Point of Truth" document, but that was a spreadsheet that talked  
17 about financials. It may well have been on there.

18 Q All right. Let's look at Tab 24, Government Exhibit 296-7.  
19 And we have to turn off the screen for this. This is a document  
20 entitled "Digital Tax Solutions."

21 And you understood that Digital Tax Solutions, Dr. Meyer, is  
22 a separate business unit within H&R Block, right?

23 A Yes.

24 Q Their assisted and their digital are run by separate people  
25 and separate, right?

1 A That's my understanding, yes.

2 Q Okay. This is called "Fiscal Year 11, Actual Deep Dive."  
3 And it consists of a number of pages of information. And if you  
4 look at the "Single Point of Truth" page, which is the very  
5 first page, you see it says, "Single Point of Truth" at the top.

6 Do you see that?

7 A Yes.

8 Q All right. Then it has various categories of information.  
9 And underneath HRB four or five down, it says, "HRB Average  
10 Sales Price."

11 Do you see that?

12 A Can you point it out in the monitor.

13 Q On the monitor, we're just pointing it out to you.

14 A Thank you. Yes, I see that.

15 Q Okay. So on the "Single Point of Truth," HRB is tracking  
16 the average sales price, right?

17 A Yes.

18 Q And this is confidential so we're not going to reveal what  
19 it says, but you can see the trend on there, right, Doctor?

20 A Is there a particular line that you're referring to? There  
21 are trends in several of the lines.

22 Q Pick H&R Block online. And again, I don't want you to  
23 describe the trend. We just want to draw your attention to it,  
24 okay?

25 A Yes.

1 Q All right. Let's look at Government Exhibit 492.

2 A Is there a particular tab that you would like me to look at?

3 Q 64. And do you have Defendants' Exhibit -- Government  
4 Exhibit 492 in front of you, Doctor?

5 A Yes, I do.

6 Q And as you said yesterday, context matters when you look at  
7 documents. And so let's look at the front page, and we'll see  
8 that this is an HRB board presentation from June of 2010,  
9 correct?

10 A Correct.

11 Q And I think this is one of the documents you reviewed in the  
12 course of your work?

13 A This looks familiar, yes.

14 Q All right. So this is a board. This is information being  
15 presented to the board of H&R Block. Let's go to page 11.

16 And the information that was thought important to share with  
17 the board was the average sales price of H&R Block digital  
18 versus TaxACT and TurboTax.

19 Do you see that?

20 A I see that.

21 Q All right. And let's go to page 8 of the document. This  
22 doesn't deal directly with the average price issue, Doctor, but  
23 I just wanted to bring to your attention the fact that in this  
24 board presentation, the information is segmented -- market share  
25 information is segmented by assisted and digital, correct, two

1 separate market shares?

2 A Yes, I see that.

3 Q Okay. All right. Let's go to page 10.

4 A Of the same document?

5 Q Yes. And again, this the board presentation, and people are  
6 deciding what the board should know about competition. So  
7 they've listed out the assisted competitor analysis.

8 Do you see that?

9 A Yes.

10 Q All right. And then if you go to page 12, you'll see  
11 there's a separate breakout for the digital competitor analysis,  
12 correct?

13 A I see the title, yes.

14 Q Okay. And this is the way that the information was  
15 presented to the board, which you would expect as you were  
16 talking about context, that's a pretty important context; don't  
17 you think?

18 A This was one of many, many documents that I reviewed in the  
19 case.

20 Q We're not talking about that, Doctor. We're talking about  
21 context because you said that was important yesterday.

22 So we're now looking at a board document in which people are  
23 describing the competitive environment that HRB faces, and they  
24 have distinguished between assisted and digital markets,  
25 correct?

1 A I don't know if they distinguish between what they would  
2 call markets, and certainly they didn't distinguish between  
3 antitrust markets, but they looked at digital and assisted  
4 separately, yes.

5 Q All right. So your view as an economist, you -- well --  
6 All right. Now, you ran -- let me start over.

7 You didn't run a merger simulation on your own, correct?

8 A I ran a merger simulation, yes.

9 Q You ran Dr. Warren-Boulton's merger simulation, right?

10 A I ran -- I used the same approach to merger simulation, the  
11 same formulas that he used. I ran it myself.

12 Q Right. What happened is you got -- you didn't start when  
13 you got hired in June to run a merger simulation. You got  
14 Dr. Warren-Boulton's report, and you looked at his -- he had a  
15 merger simulation and you said, "Oh, okay, I'll take that and  
16 I'll put -- I'll do my own work with the same simulation,"  
17 right, same merger? I'm sorry; same merger model, right?

18 A Yes.

19 Q Okay. And you presented your results in one of your tabs  
20 yesterday, "Merger Simulation Predicts an Increase in Consumer  
21 Welfare." And I'm sorry; I don't have the plaintiff's exhibit  
22 number. It's our Tab 63 of your binder, and it's Defendants'  
23 Exhibit 9808.

24 And this is your result, right?

25 A Correct.

1 Q And the top one is running essentially Dr. Warren-Boulton's  
2 model, but you changed some inputs, right?

3 A I just included efficiencies.

4 Q Right. You changed an input. You added efficiencies,  
5 right?

6 A Yes, I accounted for efficiencies.

7 Q And the bottom one is using your diversion data, which was  
8 based on the simulator, right?

9 A Correct.

10 Q Okay. And using Dr. Warren-Boulton's model, even with your  
11 assumptions, shows consumer harm, right?

12 A Again, as I said, the model shows consumer harm, but of  
13 course that's not the end of the story with regards to  
14 unilateral effects. And I described that in detail yesterday.

15 Q I understand that, but just running Dr. Warren-Boulton's  
16 model with your numbers, your assumptions, you get consumer  
17 harm, right?

18 A No, that's not true at all.

19 Q What do you mean?

20 A Running Dr. Warren-Boulton's model with my numbers is the  
21 second set which actually shows an increase in consumer  
22 welfare.

23 Q All right. Running his models, but you're right. Running  
24 his model, but including efficiencies because that was one of  
25 your criticisms of his model; you show consumer harm, right?



1 A That was one -- of course, one of only several criticisms,  
2 but just looking at that -- just including efficiencies reduces  
3 the consumer harm substantially. But it does still come up with  
4 a negative number.

5 Q And a negative number means consumer harm?

6 A Correct.

7 Q And then underneath, you've got your numbers. You're using  
8 the same model, right, you didn't switch models? You took  
9 Dr. Warren-Boulton's model?

10 A Correct.

11 Q And then you put in this data that you got from the  
12 simulator. That's how you showed how it actually helped  
13 consumers, right?

14 A Yes, because of efficiencies. Efficiencies have a downward  
15 pressure on price, and that is beneficial for consumers. You  
16 know, that's why we think that a lot of mergers are beneficial  
17 because they lead to efficiencies which leads firms to be able  
18 to compete more effectively and indeed lower prices according to  
19 the model.

20 THE COURT: While you're thinking, Mr. Wayland, can I  
21 just ask -- if you're about to move on to a different area.

22 MR. WAYLAND: I'm moving to a new topic. It would be  
23 perfectly timed for you to ask follow-up on this one.

24 THE COURT: Okay. Do you feel that it's important to  
25 look at historical experiences that H&R Block has had with other

1 purchases of tax preparation software in your evaluation of  
2 efficiencies?

3 THE WITNESS: You know, I think it's important to look  
4 at everything that has happened in an industry. I wouldn't by  
5 itself, you know, throw away a piece of information one way or  
6 the other.

7 But again, the question is, does that shed light on  
8 what's going to happen here? I think that's really the  
9 question. And if a firm -- in this case, my understanding is  
10 that H&R Block had some difficulties achieving efficiencies  
11 perhaps in some of its previous acquisitions, but, you know,  
12 firms learn from their mistakes. That's what they do all the  
13 time.

14 And so, you know, whether -- the probative value that  
15 that has, I think here, as far as I can tell what my -- in  
16 discussing the efficiencies with the business people, is that  
17 they took that information from their previous acquisitions,  
18 learned from it, and they believe that their efficiencies  
19 estimates in this matter are conservative.

20 THE COURT: Did you look at specific documents related  
21 to H&R Block's purchase of TaxNet or RedGear?

22 THE WITNESS: I don't recall. There may have been some  
23 documents related to that. I don't recall a particular  
24 document. Nothing comes to mind.

25 THE COURT: Thank you, Mr. Wayland.

1 MR. WAYLAND: Thank you, your Honor.

2 BY MR. WAYLAND:

3 Q Dr. Meyer, you testified yesterday about a number of  
4 different products that you see as coming into the market and  
5 that H&R Block has been doing, its hybrid products and different  
6 kind of products you described.

7 You remember that yesterday?

8 A Yes.

9 Q All right. I mean, in general, none of these products have  
10 worked so far, right?

11 A My understanding is that they are selling a "Best of Both"  
12 product right now. The sales -- I can't recall the exact  
13 amount -- were perhaps in the order of a hundred thousand units.

14 When I spoke with Mr. Ciaramitaro at H&R Block, what he said  
15 was, you know, they think that it's an important concept, this  
16 idea of hybrid, the fact that consumers are looking for some  
17 elements of the assisted experience, if you will, and some  
18 elements of the DIY experience, but that they're still working  
19 to come up with a product that does that, you know, as optimally  
20 as they can. And they think that some of the new technology  
21 will really assist them in that.

22 Q Well, you testified yesterday with a lot of certainty, as I  
23 heard it, that there are all these products out there and they  
24 are going to change the world, and it turns out that they're not  
25 because they haven't been successful yet, right?

1 A I didn't say anything about changing the world. What I  
2 said -- I don't remember the exact words, but my -- the context  
3 that I put them in is that when we look out into the future,  
4 when we look at -- merger analysis is a phrase in the  
5 industry -- is a merger analysis is inherently a forward-looking  
6 emphasis, and so the question is, is leaving out -- you know,  
7 one of the questions is, is leaving out assisted from a relevant  
8 market appropriate considering the fact that merger analysis is  
9 a forward-looking exercise?

10 I don't think it is even based on the historical data. But  
11 I think looking forward, there's even more reason to believe  
12 that the competition between digital and assisted is going to  
13 intensify. It's not just the hybrid products. Indeed, it's --  
14 you know, for example, Thomson Reuters -- oh, this probably is  
15 sealed.

16 When firms are thinking in the future about what's  
17 competing, there are a number of different pieces of evidence  
18 that indicate that increasingly digital and assisted tax  
19 preparation is competing. I think in open court that's what I  
20 can say.

21 Q But when you have evidence as opposed to conjecture of what  
22 actually happened to a particular product, don't you think that  
23 should factor into the calculation of whether there's really  
24 going to be much change?

25 A I think I should take all factors into account, and I did.

1 Q Okay. And with respect to "Best of Both," how long has that  
2 product been out?

3 A I can't recall exactly when it was --

4 Q It's been out for a while?

5 A It's been out for a couple of years.

6 Q And the conclusion of H&R Block is, essentially, that it  
7 doesn't work, right?

8 A I don't recall H&R Block saying that in particular. I  
9 believe that there's no plan to discontinue the product, at  
10 least as far as I am aware. And as I said, when I spoke with  
11 Mr. Ciaramitaro of H&R Block, what he indicated to me was that  
12 they are involved in an ongoing process to figure out the best  
13 way to provide consumers with options that combined some  
14 elements of the assisted experience and some elements of the  
15 digital DIY experience, and that they're continuing to  
16 experiment with exactly which format and which approach is  
17 best.

18 Q If you would look at Tab 60 of your binder, Government  
19 Exhibit 2112.

20 A Which exhibit?

21 Q It's Tab 60, Government Exhibit 2112. These are H&R Block's  
22 second request interrogatory response. And we're just looking  
23 at it to establish a date.

24 A Okay. Is there a particular page that you wanted me to  
25 turn to?

1 Q Page 13. It says -- do you see the year? I don't think  
2 this is confidential. That's not being shown, right?

3 MR. WAYLAND: I won't say this in court if you think  
4 it's confidential, Mr. Robertson. It's on the screen. It has a  
5 date of when "Best of Both" introduced its product.

6 MR. ROBERTSON: Counsel, that's one block. I can't  
7 read the whole page.

8 MR. WAYLAND: The only thing I'm going to read into the  
9 record is that block that I pulled out.

10 MR. ROBERTSON: Counsel can read that particular line  
11 in.

12 MR. WAYLAND: Why don't we just take it down.

13 BY MR. WAYLAND:

14 Q It says, "In 2001, H&R Block introduced its integrated  
15 product now known as 'Best of Both.'"

16 Do you see that?

17 A Yes.

18 Q So it's been out for about ten years, right?

19 A Yes.

20 Q All right. You testified earlier as to the number of users,  
21 but actually I think that might be confidential as well so I'm  
22 not going to repeat it, but I think you've established what it  
23 is. It's in the record.

24 That's a hybrid product, right, as far as you understand?

25 A Yes. Hybrid being some elements of assisted and some

1 elements of DIY, yes.

2 Q For ten years Block's been trying to sell it without much of  
3 a success, right?

4 A Well, I know that they're continuing the product. I haven't  
5 seen any evidence at least that I know of that they are planning  
6 to discontinue the product. And they are looking for ways of  
7 using technology and other changes to continue to appeal to that  
8 and to address that perceived consumer demand for products that  
9 integrate both.

10 Q I apologize for making noise in the middle of your answer,  
11 Doctor. Just trying to get us moving along.

12 If you'd look at Tab 29, Government Exhibit 629.

13 MR. WAYLAND: And this may be -- this is sealed so we  
14 need to turn off -- it's off.

15 BY MR. WAYLAND:

16 Q If you would look at page 36.

17 A I'm sorry; which tab was it?

18 Q This is Tab 29. It's Government Exhibit 629. And I'd  
19 direct your attention to page 36. This is another submission  
20 made. This is the submission we looked at earlier submitted to  
21 the government in May 2011.

22 And looking at the last full paragraph, it says, "The view  
23 that prevailed for several years" -- and I'll skip ahead -- "was  
24 that H&RB needed to deploy advanced, state-of-the-art,  
25 best-in-class technology to support its digital products and

1 accomplish integration of HRB's digital and assisted tax  
2 preparation business to facilitate hybrid digital/assisted  
3 products and to promote customer migration from digital to  
4 retail. That view led to several expensive, failed efforts to  
5 develop new technology, including a failed product called  
6 'TANGO.'"

7 I think that was a product you mentioned yesterday, right?

8 A No. I don't recall mentioning that.

9 Q Oh, if you didn't, I'm sorry.

10 "And an abandoned effort to implement a technology called  
11 'Silver Light' into the existing online product," correct?

12 MR. ROBERTSON: May we have the document that's  
13 confidential. Just because we don't have it on the screen,  
14 doesn't mean that he can read it into the record.

15 MR. WAYLAND: He may be right.

16 THE COURT: Thank you, Mr. Robertson, for raising that.  
17 I thought he was reading a portion that has been cleared as  
18 releasable.

19 MR. WAYLAND: And I apologize. I shouldn't have read  
20 that. I should have just brought her attention to it. I don't  
21 think there's any mystery.

22 MR. ROBERTSON: It's a little late now.

23 MR. WAYLAND: Actually, I'm told by my side that this  
24 page was actually cleared in advance so we're okay.

25 THE COURT: Mr. Robertson, is that consistent with your



1 view?

2 MR. ROUSH: It's not consistent.

3 THE COURT: Okay. So there seems to be a dispute about  
4 whether it was cleared or not so we're not displaying it on the  
5 screen. You will stop reading from it.

6 MR. ROBERTSON: Thank you, your Honor.

7 MR. WAYLAND: Thank you, your Honor.

8 BY MR. WAYLAND:

9 Q Now, with respect to the "Best of Both," do you recall  
10 Mr. Bennett's -- did you look at Mr. Bennett's testimony from  
11 September 6th in the trial?

12 A I did.

13 Q And do you recall that he testified with respect to "Best of  
14 Both," that it had very high costs, even higher costs and had  
15 poor financial results?

16 Do you remember that?

17 A I don't recall that specific testimony.

18 Q All right. Another product I think you talked about  
19 yesterday was something called "Second Look"?

20 A Yes.

21 Q And this is a product that's aimed at attracting customers  
22 by promising to find errors made by other preparers, right?

23 A I'm not sure if it promises to find errors, and it's not  
24 limited to other preparers. I'm not sure if that's -- where  
25 that phrase comes from.

1 Q All right. And your understanding of -- that you think it  
2 was targeted at digital customers?

3 A I said it was targeted at all tax preparation customers  
4 because a tax filer -- a taxpayer -- could take either a  
5 pen-and-paper tax return into the HRB store, they could take a  
6 tax return done by another digital DIY software program in, they  
7 could take a tax return that was done by another preparer in and  
8 any of those could be -- you know, could go through the  
9 second-look process, if you will.

10 Q All right. Let's look at Tab 59. This is Government  
11 Exhibit 1357.

12 A Just to clarify, Tab 59?

13 Q Tab 59, yes.

14 A Okay.

15 Q And this begins, Dr. Meyer, with an e-mail, and then it has  
16 an attachment. And this is the ad for 2nd Story.

17 "We found errors in 2 out of 3 Jackson Hewitt tax returns."  
18 That seems to be -- what's Jackson Hewitt; do you know?

19 A Jackson Hewitt is a provider of assisted tax preparation  
20 services.

21 Q All right.

22 A They may also have a digital product. I can't recall at the  
23 moment.

24 MR. WAYLAND: Your Honor, I am about to move into a new  
25 area. It involves efficiencies, and then the next area would be

1 the entry and expansion which deals with confidential  
2 information from third parties. It's probably half hour or so,  
3 maybe a little bit longer, maybe 40 minutes at most, but it is  
4 new.

5 If we're going to stop at 1:00, we should probably  
6 finish up when we next meet and then we can do their redirect.

7 THE COURT: All right. So we are going to stop for the  
8 day and resume Thursday morning at 9:30.

9 MR. WAYLAND: Thank you very much, your Honor.

10 THE COURT: Thank you.

11 (Proceedings adjourned at 12:53 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Lisa S. Schwam, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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SIGNATURE OF COURT REPORTER

DATE