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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 19, 2011
v. : Morning Session
 :
H&R BLOCK, INC., et al., : Washington, D.C.
 :
Defendants. :
..... :

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING - DAY 8
BEFORE THE HONORABLE BERYL A. HOWELL
UNITED STATES DISTRICT COURT JUDGE

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

1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3					
4	TONY G. BOWEN				
5	By Ms. Strimel		4		31
6	By Mr. Robertson			27	
7					
8	WILLIAM C. COBB				
9	By Mr. Robertson	33		90	
10	By Mr. Wayland		76		
11					
12	DR. MARK ZMIJEWSKI				
13	By Ms. Strimel	93			
14					
15					
16					
17					
18					
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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.

THE COURT: Good morning, Counsel. Are we ready to proceed or any administrative stuff to take care of before we begin?

MS. STRIMEL: Not from us, your Honor.

THE COURT: Okay. Is Mr. Bowen here?

Good morning, Mr. Bowen. I'd just remind you you remain under oath.

Ready to proceed?

MS. STRIMEL: Yes, I am, your Honor.

THE COURT: Please go forward.

CROSS-EXAMINATION (Continued)

BY MS. STRIMEL:

Q Good morning, Mr. Bowen.

A Good morning.

Q I'd like to start by asking you about a document that your counsel showed you during your questioning last week. You should see in front of you a document, Defendants' Exhibit 600, titled "Special Meeting of the Board of Directors."

Do you have that meeting in front of you?

A I do.

Q And these are materials that you presented to Block's board of directors in connection with its vote on the TaxACT

1 transaction, correct?

2 A Correct. Actually, Alan Bennett presented this material,
3 but I was present.

4 Q And you helped Mr. Bennett prepare the material?

5 A I did.

6 Q And counsel asked you some questions last week about what
7 was and wasn't found in this material.

8 Do you remember those questions?

9 A I believe so.

10 Q And in particular, you were asked some questions with
11 respect to what was stated in here or not stated in here
12 regarding Block's intents about price and competition and other
13 things.

14 Do you remember that, generally?

15 A Yes.

16 Q Now, at the time of this board meeting, you and others at
17 the table knew that this deal would be subject to antitrust
18 review, correct?

19 A Yes, we did.

20 Q And you know what the HSR process is, correct?

21 A At the time, I knew vaguely what it was.

22 Q And we call it the Hart-Scott-Ridino review, but you
23 understand that that's an antitrust review, correct?

24 A Yes, I do.

25 Q And part of the antitrust review that happens with the HSR

1 process is giving things like board documents to the antitrust
2 agencies to look at.

3 Are you aware of that?

4 A Meaning -- you're asking do I know that this document would
5 be given to the Department of Justice, for example?

6 Q Yes.

7 A Yes, we expected to.

8 Q Now, Block's antitrust counsel was also present at this
9 board meeting, correct?

10 A They were -- they participated via conference call.

11 Q You testified about the notes on the front page of this
12 DX 600 last week.

13 Did you testify that these are your notes?

14 A No, they are not.

15 Q Do you know whose notes they are?

16 A I believe they're Alan Bennett's, but I couldn't be for
17 sure.

18 Q If you wouldn't mind, if you could turn your attention to
19 the handwritten circle near the top of the page near the H&R
20 Block logo.

21 Do you see that circle or oval?

22 A On the right-hand side?

23 Q Yes.

24 A Yes, I do.

25 Q And the words in there appear to be "Ted Whitehead [sic] -

1 HSR."

2 Having been present at the meeting, do you have any
3 knowledge about what or who that is a reference to?

4 A I believe it's Ted Whitehouse, who is an attorney at Willkie
5 Farr.

6 Q And was the HSR process actually discussed during this
7 meeting?

8 A Yes. I believe we have a one-page summary of the process
9 that Mr. Whitehouse walked through during that conference call.

10 Q And that is at page 17 of DX 600?

11 A Yes, I believe it is.

12 Q Thank you.

13 You could put that exhibit aside, and at this time, we're
14 going to hand up another binder with some additional documents
15 that we'd like to ask you about.

16 A Okay.

17 Q If you could please turn to the last tab of the binder. And
18 just for the record, the binder is labeled "Cross Book, Volume 2
19 of 2," and the final Tab is Tab 29.

20 Tab 29 is Defense Exhibit No. 244. And I believe you also
21 testified about this document last week under questioning by
22 your counsel.

23 Do you remember that?

24 A Yes, I do.

25 Q And this was a deck that you presented to the H&R Block

1 management team, correct?

2 A Yes.

3 Q And members of the management team would have included the
4 CEO and the CFO of Block, among other people?

5 A Yes, it would have.

6 Q If you could please turn to Slide 7 of Exhibit 244 --
7 Defense Exhibit 244.

8 A Okay.

9 Q Now, you testified last week that this slide called
10 "Outcomes Reviewed" was a presentation of various strategic
11 options that Block had regarding whether or not to purchase
12 TaxACT, correct?

13 A Yes.

14 Q And this is a slide that you prepared?

15 A I was the ultimate author. I had other people input on this
16 slide, but I was the ultimate author.

17 Q One of the things that the slide does is to list the pros
18 and cons of various strategic options, correct?

19 A Yes. I think we're calling them benefits and downsides in
20 this slide.

21 Q And those are the two big columns in the middle, "Benefits"
22 and "Downsides"?

23 A Yes, they are.

24 Q And the question that I want to ask you has to do about the
25 bottom option, which is labeled "Don't Purchase TaxACT."

1 Do you see the bottom row of options?

2 A Yes, I do.

3 Q And "Don't Purchase TaxACT" is pretty self-explanatory,
4 right? This is the strategic implications of choosing not to
5 make the purchase?

6 A Yes.

7 Q Under the "Downsides" column, can you read the text that you
8 identified as Item 1 under downsides of not purchasing TaxACT.

9 A It says, "TaxACT continues to grow and HRB loses market
10 share."

11 Q So that's a downside that you presented in this written form
12 to the executive leadership on October 9?

13 A Yes. That was one of the things we had identified.

14 Q The second risk that you identified was, "Risk of competitor
15 purchasing TaxACT."

16 Is that another downside that you presented to your
17 management about what would happen if you didn't buy TaxACT?

18 A Yes, it was.

19 Q Now, if the competitor purchased TaxACT, it could improve
20 the features of the product, right? That's one of the things it
21 could do?

22 A I suppose so.

23 Q And it could launch even better pricing on the product than
24 exists today, couldn't it?

25 A I think the main competitor that we were concerned about

1 would have been TurboTax, so I'm not sure if I agree with that
2 statement.

3 Q You can put that exhibit aside.

4 I want to go back to some discussion of the projected
5 efficiencies from this transaction. And since we're in open
6 session, we won't talk about the exact numbers right now, but I
7 just want to ask you about some concepts.

8 A Okay.

9 Q For general, conceptually, what you did in preparing the
10 efficiencies claim was to compare Block's existing costs with a
11 measure of incremental cost that it would take TaxACT to do
12 certain tasks.

13 Is that basically how the comparison went?

14 A Yes. And that's the main cost efficiencies. On the revenue
15 efficiencies, we looked at the revenue that could be gained by
16 selling certain products to TaxACT clients.

17 Q And for the cost efficiencies, though, in particular, the
18 TaxACT cost estimates for what it would take them to do the
19 activity were an important input into the calculation,
20 correct?

21 A Yes.

22 Q And you provided TaxACT with guidance about what activities
23 to include in their incremental cost estimates, right?

24 A It was a conversation between both TaxACT and H&R Block on
25 what the integration activities would be and what the cost, and

1 then they came up with the estimates for those activities.

2 Q And there was a discussion between you and others at TaxACT
3 regarding that topic, right?

4 A Yes.

5 Q Have you heard of a product called "Best of Both"?

6 A Yes, I have.

7 Q And is Best of Both -- or is it or was it a hybrid type of
8 product?

9 A I believe so. I mean, I believe that's the definition of
10 it.

11 Q Now, you did not include any development effort by TaxACT or
12 you did not ask them to include any development effort regarding
13 Best of Both in their efficiencies cost estimate, did you?

14 A No. I do not believe they included Best of Both.

15 Q And in fact, the reason they didn't include Best of Both is
16 because the product wasn't very successful, correct?

17 A I think the product is not a significant part of H&R Block
18 today. And H&R Block is looking at other products that it may
19 be able to offer that are similar to Best of Both.

20 Q In fact, do you remember testifying at your August 9th
21 deposition that Best of Both -- regarding Best of both, "We
22 haven't seen a big number, a large number of clients who have
23 been utilizing the client"?

24 Did you say that?

25 A I don't recall saying that, but I generally agree with

1 that.

2 Q And if you had said it, it was true, right?

3 A I would hope so.

4 Q And you also testified on August 9th that H&R Block was
5 unsure if they were going to offer the product at all in the
6 future.

7 Was that true at the time that you said it?

8 A Yes, I believe it was.

9 Q Now, in terms of the efficiencies claims overall, a big
10 issue that arises -- a significant issue that arises has to do
11 with the consolidation of Block's online development platform
12 with its software development platform.

13 Is that an issue that arose in this context?

14 A It's one of the efficiencies -- benefits of that transaction
15 that we've identified.

16 Q And I believe you testified last week that you don't
17 consider yourself a technology expert or an IT expert,
18 correct?

19 A That's correct.

20 Q And so I take it that you're not here to give a particular
21 opinion technically on whether Block can or can't consolidate
22 those two platforms on its own, right?

23 A No.

24 Q And you'd rely on people from the IT department of Block for
25 a more clear assessment of that, correct?

1 A Yes.

2 MR. ROBERTSON: Your Honor, object to the extent that
3 we're getting into the specific efficiencies, all of which are
4 to be under seal. We don't really want our competitors to know
5 exactly how we're going to achieve the efficiencies in this
6 case.

7 THE COURT: I think that's understood. We're not
8 getting into numbers.

9 Anything that's been raised so far?

10 MR. ROBERTSON: The actual 11 things that we hope do
11 are all under seal. I think we just got into one of them. I
12 want to make sure we don't go down that road.

13 MS. STRIMEL: Well, we -- the next questions that I'm
14 going to be asking have to do with some deposition testimony
15 that the defendants have cleared so I'm going to go right there.
16 I won't go into numbers.

17 THE COURT: Thank you.

18 BY MS. STRIMEL:

19 Q At this time, sir, we'd like to hand you a binder labeled
20 Binder 2 of 2 -- I guess we've already done that. Why don't we
21 flip to the section of the binder that is Tab 25. I'm sorry; it
22 should be 24. This should have Government Exhibit 1466 in the
23 binder.

24 Do you see that?

25 A I do.

1 Q And I'm going to be reading some testimony of a man named
2 Richard Agar.

3 And I believe you testified last week that you know who that
4 is, correct?

5 A Yes, I do.

6 Q He's the chief information officer of Block, correct?

7 A Yes, he is.

8 Q If you could turn to the slide labeled 2. It's the second
9 page of the deck. And I'm going to read to you from page 35,
10 lines 12 through 15 of Mr. Agar's deposition.

11 And he says, "Like I've said, we looked at platform
12 opportunities pretty frequently so that yearly when we were
13 thinking about software and how to deliver it more effectively."

14 Do you see that testimony?

15 A I do.

16 Q And that's context for the next page. So if you could turn
17 forward to page 3, please. I'm going to read you something from
18 page 36, lines 6 through 22 of Mr. Agar's testimony.

19 "Question: When the evaluation was made in the spring of
20 2010, what specific platform choices were evaluated?

21 "Answer: Again, for clarification, this is specific to just
22 H&R Block?

23 "Question: Yes.

24 "Answer: We have a retail shrinkwrap piece of software that
25 we build, and we would look to consolidate that with the online

1 software builds."

2 Now, by the time you testified about your efficiencies
3 claims in this case in your deposition in August, had you talked
4 with Mr. Agar about the platform consolidation review that had
5 occurred?

6 A I don't recall a specific conversation where we talked
7 about -- it's making it sound like here that it's an annual
8 process. I'm not familiar with an annual process that's gone
9 through to look at consolidating those platforms so ...

10 Q And you also hadn't talked to him about a 2010 process for
11 evaluating that consolidation either, had you?

12 A No, I had not talked to him.

13 Q If you could turn to the next slide labeled No. 4. And I'm
14 reading you some testimony from page 39, line 17 of Mr. Agar's
15 deposition through line 43 -- page 43, line 9.

16 "Question: What was the amount that the evaluation
17 indicated was a savings opportunity from consolidating the
18 platforms?

19 "Answer: Again, for internal H&R Block, not related to this
20 transaction at all, the shrinkwrap product roughly costs us" --
21 and then he's got a number, which I won't read into the record.

22 MR. ROBERTSON: Take it off the screen.

23 MS. STRIMEL: My understanding is this has been cleared
24 but since it's a number, I want to be cautious.

25 BY MS. STRIMEL:

1 Q "And how much of that spend did the company indicate it
2 could save by converging those two platforms? More than 80
3 percent?"

4 "Answer: That would be in a range of what my expectation of
5 history would indicate.

6 "Question: Would H&R Block have to incur one time costs to
7 consolidate the shrinkwrap platform and the online platform on
8 its own?

9 "Answer: Potentially, but it wouldn't be material to the
10 savings."

11 Now, before coming to a final figure on the defendants'
12 claimed efficiencies, had you talked with Mr. Agar about the
13 nature of the savings he's describing here?

14 A Mr. Agar was involved in various discussions. I don't think
15 we -- as well as multiple team members of Mr. Agar's. I,
16 frankly, don't understand what he's claiming here. I would have
17 to ask him myself exactly what he's trying to infer.

18 Q Well, the next slide provides more information about that so
19 if you can turn to Slide No. 5. And this is from page 44 line 4
20 through 45, 17.

21 "Question: How could you do it without incurring additional
22 cost?"

23 MR. ROUSH: Objection, your Honor. The witness just
24 testified he hasn't talked to Mr. Agar about this. He would
25 have had to talk to Mr. Agar in order to understand any of this,

1 so I have an objection to her trying to clarify that through
2 Mr. Agar's continued testimony.

3 THE COURT: It's overruled.

4 BY MS. STRIMEL:

5 Q "Answer: We have technology people that would be dedicated
6 to the task.

7 "Question: And did you have confidence that you had the
8 right managers in place to evaluate whether H&R Block could
9 complete the project without impacting customers?

10 "Answer: Yes, I did. I personally did."

11 Did I read that correctly?

12 A You read what was on the page, yes.

13 Q And if you could turn to the slide labeled 7. It's two more
14 pages. And I don't need to read this, but for the record, it's
15 Mr. Agar's deposition page 48, line 19, through page 49, 4.

16 And the answer he gives is, "Again, I believe I stated
17 earlier that there would be no additional cost incurred to
18 execute that."

19 The final slide that I would like you to look at is Slide 8.

20 THE COURT: Is there a question associated with
21 Slide 7?

22 BY MS. STRIMEL:

23 Q I take it that -- does this -- did you consider this
24 information when you prepared your final efficiencies claim
25 figure?

1 A I have not had this conversation with Mr. Agar.

2 Q The final slide is Slide 8. And this is from page 33,
3 lines 22, to page 34, line 4.

4 And the answer here is, "In 2010, based on the pending
5 opportunity to acquire, we actually put on the shelf the idea
6 that we could actually consolidate platforms for digital until
7 we had an outcome from the pending transaction."

8 Now, you've testified last week under examination by your
9 counsel that you don't believe that platform integration
10 efficiencies are attainable without this merger.

11 Was that your testimony last week?

12 A Yes, it was.

13 Q And was part of your basis for saying that or having that
14 opinion that Block had tried unsuccessfully in the past to
15 consolidate platforms?

16 A Yes.

17 Q And when we asked you about those prior attempts in your
18 deposition, you gave two examples.

19 Do you remember what those were?

20 A From my deposition, no, I do not recall.

21 Q Do you remember talking to us about Tango and Silverlight in
22 saying that those were two examples of Block trying and failing
23 to improve its platform?

24 A Yes, I do.

25 Q What was Tango?

1 A Again, I was not involved at all, but it was supposedly a
2 redevelopment -- or a development of a new technology
3 platform.

4 Q It was a hybrid product, correct?

5 A I'm not familiar with all of the features of that particular
6 platform.

7 Q If you could turn to the next tab in the binder. It's
8 Tab 25. And if you could just turn to Slide 3.

9 Regarding Tango, the question was asked at page 184, line 8
10 of Mr. Agar's deposition, "Customers didn't want it?"

11 "Answer: They didn't use it so I guess you could infer that
12 they didn't want it."

13 Were you aware of that when you gave your testimony on
14 August 9th?

15 A Was I aware of what?

16 Q Of the belief by your CIO that Tango failed because
17 customers didn't want it?

18 THE COURT: Ms. Strimel, if I can just be clear. I'm
19 looking at a Tab -- oh, I see. 25. I'm in the wrong tab.
20 Sorry. I saw Silverlight rather than Tango.

21 I'm in the right place now.

22 MS. STRIMEL: But I should clarify that the piece that
23 I was reading from, the text is found on Government Exhibit
24 1467. And that's page 3.

25 You can put this aside.

1 THE COURT: I don't believe you got an answer to your
2 last question about the belief about your CIO that Tango failed
3 because customers didn't want it. I don't believe you got an
4 answer to that question because I interrupted.

5 So for clarification of the record, do you want to
6 repeat the question and make sure we get an answer.

7 MS. STRIMEL: Yes.

8 BY MS. STRIMEL:

9 Q When you provided your testimony that you believed that
10 Block had tried and failed in the past to improve its platform,
11 were you aware of Mr. Agar's assessment that Tango had actually
12 failed because customers didn't want it?

13 A No, I was not aware of that.

14 MS. STRIMEL: And at this time, the next line that I'm
15 going to go to does go to numbers, so we would request that the
16 courtroom be closed.

17 THE COURT: Will this be the end of your
18 cross-examination of the unsealed portion of the record?

19 MS. STRIMEL: Yes.

20 THE COURT: We will seal the courtroom. I'd ask that
21 spectators please depart the courtroom.

22 (The following portions, page 21-26, were designated as
23 confidential/attorneys' eyes only and sealed under a
24 separate transcript per order of the Court.)

25

1 MR. ROUSH: May I proceed, your Honor?

2 THE COURT: Yes, Mr. Roush.

3 REDIRECT EXAMINATION

4 BY MR. ROUSH:

5 Q Just a couple of questions, Mr. Bowen. If you could turn to
6 Tab 29 in Volume 2 of plaintiff's 2, "Cross Books."

7 I'll acknowledge that their version is a lot easier to read
8 so I'm going to use that one.

9 A Okay.

10 Q And turn to page 7 behind Tab 29.

11 A Okay.

12 Q You were asked about in the very last option that has an X
13 by it, "The TaxACT continues to grow and HRB loses market
14 share."

15 A Yes.

16 Q When you included that line, what did you mean?

17 A Well, at the time, H&R Block's digital business was
18 underperforming, and I think this assumption would be that
19 TaxACT had been successful and they would continue to grow, and
20 H&R Block would be just growing at their existing digital
21 business growth.

22 Q Did you mean to correlate a direct connection between TaxACT
23 growing and H&R Block losing market share?

24 A No, I did not.

25 Q Okay. You were asked a lot of questions about Mr. Agar's

1 testimony.

2 Was Mr. Agar involved in calculating the efficiencies in
3 this case?

4 A Mr. Agar was involved at various points. He wasn't
5 involved, as I said last week in my testimony, in every
6 discussion, but he was involved at various points.

7 Q And in the actual numbers that were provided, was he
8 involved in those numbers at all?

9 A No, he was not.

10 THE COURT: Mr. Roush, can I interrupt just one second
11 to go back to the other page?

12 MR. ROUSH: Of course, your Honor.

13 THE COURT: I believe during your cross-examination
14 about this statement on page 7 of GX 244, in response to
15 Ms. Strimel's question about your stated concern of the risk of
16 a competitor purchasing TaxACT, I think you said that you were
17 concerned mostly about TurboTax buying TaxACT, and you would not
18 agree with her statement that there would be -- about the effect
19 on TaxACT about such a purchase.

20 Can you just explain what you were talking about there,
21 if you remember.

22 THE WITNESS: I remember vaguely. I think she was
23 trying to state that there would be more functionality, more
24 features, and I think she said even possibly lower prices as a
25 result. And I was saying that I think we were mainly concerned

1 about TurboTax, and I don't know if that would be the outcome of
2 TurboTax acquiring TaxACT.

3 THE COURT: And why is that?

4 THE WITNESS: Well, I don't know if I have a good
5 answer for that. I think TurboTax would have a significant
6 number of clients at that point, and I just don't know what
7 their ultimate goal would be as a result of acquiring TaxACT.
8 And I just couldn't agree with the statements that if they
9 acquired them, that there would be additional features and
10 lower prices.

11 THE COURT: Okay.

12 BY MR. ROUSH:

13 Q Fair to say, Mr. Bowen, that you don't know what a
14 competitor would do if they acquired TaxACT?

15 A That's correct.

16 Q If you can turn -- are you aware that Mr. Agar testified
17 when asked why didn't the company take the steps towards
18 integration, that primary reason was because of confidence of
19 the ability to execute without impacting clients?

20 A No, I was not.

21 Q And that another reason was historical execution risk to
22 executing that?

23 A No.

24 MS. STRIMEL: Your Honor, we object. If the defense
25 wishes to admit testimony of Mr. Agar, they should have called

1 him. We can cross-examine on it, but they had the opportunity
2 to call him. He's not a party opponent.

3 THE COURT: Well, you on your cross-examination pointed
4 out areas where Mr. Bowen, despite his many conversations with
5 Mr. Agar in preparing his efficiency analysis, didn't touch on
6 certain areas in those conversations, so I think it's fair and
7 appropriate to complete that record of some of the other issues
8 that Mr. Bowen did not discuss with Mr. Agar in formulating his
9 final synergies analysis.

10 So the objection is overruled. Please continue.

11 MR. ROUSH: Thank you, your Honor.

12 Apologies, your Honor. I just have one more.

13 BY MR. ROUSH:

14 Q So as Mr. Agar's testimony was ending, he was asked -- I'll
15 skip the first paragraph.

16 "Just to close off on this shrinkwrap versus online
17 combination and the execution risk that you talked about in
18 counsel's questions, sir, the execution risk that people in
19 digital conveyed to you, do you know where they stand on that at
20 this time?"

21 MR. ROUSH: That is at Mr. Agar's testimony at
22 page 216, lines 12 through 22. And then we're about to pull up
23 page 217, the very beginning of that.

24 BY MR. ROUSH

25 Q And were aware that Mr. Agar then testified, "I would say

1 that Jason" -- is that Jason Houseworth?

2 A I assume it is.

3 Q -- "is still not entirety support it have of a consolidation
4 of platforms because of the potential loss of clients in year 2,
5 which I explained earlier."

6 Were you aware that that was his testimony?

7 A No, I was not.

8 MR. ROUSH: No further questions, your Honor, at this
9 time.

10 THE COURT: Ms. Strimel, any recross?

11 MS. STRIMEL: Just one question, your Honor.

12 RECCROSS-EXAMINATION

13 BY MS. STRIMEL:

14 Q And if we could pull up Mr. Agar's testimony, page 210,
15 lines 20 through 22, through page 211, lines 1 through 3.

16 And you see that Mr. Agar was asked -- and Mr. Agar was
17 asked, "In terms of moving the shrinkwrap software" --

18 MR. ROUSH: It has to be clear. Can he read it and
19 answer questions, as opposed to you reading it into the public
20 court?

21 MS. STRIMEL: There's no numbers.

22 THE COURT: So this deposition in its whole hasn't been
23 cleared?

24 MR. ROUSH: Not in its entirety. I think she cleared
25 the sections she planned to use. I'm happy to look at it if she

1 wants to point it out to me.

2 THE COURT: Why don't you do that. Just take a second
3 to do that.

4 (Brief pause.)

5 MR. ROUSH: We have no problem it, your Honor.

6 THE COURT: Please proceed.

7 BY MS. STRIMEL:

8 Q The question to Mr. Agar in terms of the risk of moving the
9 product was, "In terms of moving the shrinkwrapped software to
10 TaxACT's product, TaxACT's platform, if the merger were to go
11 through, does that same risk exist?

12 "Answer: It's a risk with any kind of migration of clients
13 to different platforms."

14 Are you aware of that testimony?

15 A I am not.

16 MS. STRIMEL: That's the conclusion. Thank you.

17 MR. ROUSH: No further questions at this time, your
18 Honor.

19 THE COURT: Mr. Bowen, you're excused.

20 THE WITNESS: Thank you, your Honor.

21 (Witness exits the courtroom.)

22 THE COURT: Would you like to call your next witness?

23 MR. ROUSH: He is probably out in the hall. Would this
24 be an appropriate time to take a ten-minute break?

25 THE COURT: We can take a ten-minute break and then

1 proceed with your witness after that.

2 MR. ROUSH: Thank you, your Honor.

3 (Recess was taken.)

4 THE COURT: Mr. Robertson.

5 MR. ROBERTSON: Good morning, your Honor.

6 THE COURT: Good morning. Are you ready to call your
7 next witness?

8 MR. ROBERTSON: Yes, your Honor. Your Honor,
9 defendants call Mr. William Cobb.

10 THE COURT: Good morning, Mr. Cobb. Just raise your
11 right hand.

12 (WHEREUPON, the witness was sworn.)

13 WILLIAM C. COBB,
14 called as a witness herein, having been first duly sworn, was
15 examined and testified as follows:

16 THE COURT: Please be seated.

17 THE WITNESS: Thank you.

18 MR. ROBERTSON: May I proceed, your Honor?

19 THE COURT: Yes, please.

20 DIRECT EXAMINATION

21 BY MR. ROBERTSON:

22 Q Sir, if you could state your full name, please.

23 A William C. Cobb.

24 Q And what is your current job, sir?

25 A I'm the president and chief executive officer of H&R Block,

1 Inc.

2 Q And how long have you held that title?

3 A Since May 16th, 2011.

4 Q And could you just tell the Court what your business
5 experience has been, briefly.

6 A Yes. I am a graduate of the University of Pennsylvania and
7 did my graduate work at Northwestern University graduating with
8 an MBA in June of 1979. I then had it is now over 30 years of
9 business experience. I started out in marketing with
10 Colgate-Palmolive. I then had a stint at a smaller company,
11 again in marketing, called Gino's, Inc.

12 Spent the bulk of my career, 13 years, at Pepsico. I worked
13 in all three divisions of what was then Pepsico. I started off
14 in the Fritolay division. I worked for four years there. I
15 worked for five years at the Pepi-Cola soft drink division and
16 then the last four-plus years was at the restaurant division,
17 which is now -- which was spun off by Pepsico and is now called
18 Yum! Brands.

19 During that time, I held a variety of marketing and sales
20 positions, most notable of which I was the head of marketing for
21 the Pepsi brands. I was the head of marketing for Pizza Hut. I
22 was also the international head of marketing for all of the
23 brands of what is now Yum!, which is Taco Bell, KFC and Pizza
24 Hut internationally.

25 In the year 2000, I followed a mentor of mine to eBay, Inc.,

1 where I initially was the global head of marketing. I then
2 became the head of international in -- I went there in 2000. I
3 became the head of international in 2002, and then the president
4 of eBay North America toward the end of 2004 where I served till
5 I think the first quarter of 2008. I worked for Meg Whittman,
6 who was the CEO at the time. And when she stepped down, I
7 decided to step down also.

8 Spent the next couple of years serving on a variety of
9 corporate boards, including H&R Block which I joined in August
10 of 2010 and then in May became the CEO. So that pretty much
11 brings you up to today.

12 Q And who did you relieve as CEO at H&R Block?

13 A Alan Bennett.

14 Q Now, sir, as you look at your company and how it markets its
15 products, tell the Court how you view that market.

16 A Okay. We are a company that is primarily focused on the tax
17 preparation industry. We serve clients in three countries;
18 Australia, Canada, and the United States. And the United States
19 is our primary country. We look at the market in all three
20 countries as the entire tax preparation industry so specific to
21 this case, the United States, we are looking to serve and grow
22 clients across the 130- to 140 million tax filers that are in
23 the U.S.

24 We also have a bank, and that is a business that is
25 primarily supportive of the tax event. So our bank has a

1 variety of financial products including a debit card called the
2 Emerald Card which serves people through the tax event. So we
3 are a highly seasonal business. We are a purchase that comes
4 once a year so we better be good when we are at that moment of
5 truth.

6 Q Just generally, what proportion of the business is the tax
7 stores versus the digital side?

8 A So last year, Counsel, we served approximately 14 million
9 customers through the -- what is referred to as the tax stores
10 or the tax offices and approximately 7 million clients or
11 customers through the various digital offerings that we have.

12 Q Now, you mention that your review of the market was all tax
13 preparation.

14 Is there some kind of wall between the two in terms of the
15 customers as you view them?

16 A I don't view it as such. I view the industry as one large
17 market. And I'll give you a couple of reasons why.

18 First of all, there's the obvious reasons that I think
19 people, since it is a one-time event every year because you have
20 to file your taxes, people have circumstances that change,
21 situations change, their time needs, so they make an individual
22 decision each year.

23 The other reason, and part of the reason I think I was
24 brought here, was I want to make sure that -- we were founded
25 55 years ago by Henry Block. Our primary business has been

1 through the tax offices, through our retail footprint of almost
2 11,000 stores. But there are some very recent examples that
3 show me if you view a market too narrowly -- and I'll cite
4 Blockbuster which is recently, you know, fallen on very hard
5 times, I believe they have filed for bankruptcy, but I know that
6 Borders has filed for bankruptcy and I think these were markets
7 or companies that might have looked at their market too
8 narrowly.

9 And that's something I don't want to do. I want to make
10 sure that our mission is to serve clients in the way they want
11 to be served, and we want to be the tax preparation service that
12 participates against the entire market.

13 Q And from your company's perspective, sir, whether it's
14 retail or digital or any other method, do you have a view as to
15 who your primary competitor is?

16 A Our primary competitor is the largest tax preparation
17 service, which is Intuit, which operates primarily under the
18 TurboTax brand.

19 Q And from the retail perspective, is that the same there
20 too?

21 A Yes, it is. Intuit has been increasingly, and as recently
22 as August, been very clear that their primary competitive focus
23 is what they call the tax stores, which is intended -- since
24 we're the largest retail tax preparation service, they are
25 talking about us.

1 So our primary focus for the corporation, because they are
2 the largest, is Intuit via TurboTax.

3 Q And have you seen any examples on the Web of this kind of
4 advertising by Intuit?

5 A Yes. They have advertised a couple of times basically
6 depicting our tax offices or tax stores, as they call it, as
7 being behind the times or having lazy people or not people of
8 particular expertise, which is quite counter to the way
9 consumers view us.

10 I think more importantly, sir, the reason why I'm so zeroed
11 in on them is not just that they may have a couple of ads and we
12 might -- you know, I come from a Coke and Pepsi background so
13 I'm well aware of competitive advertising. I'm also worried
14 about what offerings they are going to bring. And with them
15 being -- they are a technology company, they are well-stated as
16 a technology company, and what product offerings they're going
17 to bring is why I'm very keenly focused on them.

18 And obviously, I don't think it's just going to be an
19 advertising attempt to source business from us. I think they
20 will use their whole technology piece and come at us with
21 product offerings.

22 Q And who is the head of the retail side in terms of the
23 organizational structure at Block?

24 A Phil Mazzini is our president of what's called "retail tax,"
25 and he reports to me.

1 Q And since you've been there, when you talk with him, has
2 there been any discussion from your perspective of who the
3 competition is out there?

4 A Phil is very aware of Intuit. Phil runs a large network.
5 He is responsible for the franchise relationships. He is
6 responsible for the company stores. He is responsible for
7 bringing 90,000 seasonal workers on board this fall and having
8 them work through the tax season in off board. He is very aware
9 of who is trying to take share from him, who is trying to steal
10 clients from him. And he believes, as I do, that the number
11 one --

12 MR. WAYLAND: Objection, your Honor.

13 THE COURT: Sustained.

14 BY MR. ROBERTSON:

15 Q Just tell us from your perspective, sir, when you get this
16 information from your direct reports, how, if any, does that
17 affect your view of the market?

18 A Oh, I'm sorry. Their focus, their number one competitive
19 focus, is Intuit.

20 Q And how often does that affect the way you think of the
21 market, you as the CEO?

22 A We have this conversation on a virtually daily basis. So we
23 are preparing now for the tax season, and we are keenly focused
24 on how do we grow clients for what we call tax season 12.

25 Q And sir, do you know whether the company has been public at

1 all about the retail part of the business competing against
2 digital?

3 A I have been -- I think we've been very clear that we view
4 the market broadly. I think I've been very clear that our
5 number one goal is to grow the number of clients that H&R Block
6 serves.

7 So I believe the answer to your question is, yes, I feel we
8 have been clear.

9 Q And sir, do you have any view at all as to whether the
10 company is competing to get pen-and-paper users?

11 A Yes. We are competing. And anyone -- you know, if I look
12 at the U.S. market and 130- to 140 million filers, anyone who is
13 trying to reach that market, we do view as a competitor.

14 Q And let me just show you a couple of examples of what we've
15 already been discussing. I have a binder there in front of you,
16 sir.

17 A Oh, okay. Okay.

18 Q And look at Tab No. 1.

19 A Okay.

20 Q Are you familiar with Tab No. 1, sir?

21 A Yes.

22 Q And tell the Court what, if any, impact Tab No. 1 has on
23 your view of the market.

24 A Well, I believe it's from TurboTax's Web site, and it's
25 showing, you know, from their perspective, the advantages that

1 TurboTax offers versus what they are calling the leading tax
2 store, which means H&R Block.

3 Q And if we turn to Tab No. 4. Are you familiar with Tab
4 No. 4, sir?

5 A Yes, sir.

6 Q And just tell the Court what it is.

7 A It's the 2010 annual report for H&R Block.

8 Q And if you'd turn to page 10 of the report. Do you see --

9 A Page 10 of the form 10-K?

10 Q It's DX 358-26, which is page 10 of the report.

11 A Yes.

12 Q And do you see the paragraph that falls under the first bold
13 title there? Do you see that, sir?

14 A Where it says, "The retail tax services business is highly
15 competitive"?

16 Q Yes, sir. And the last sentence, do you see that? Last
17 sentence in that paragraph you just started with.

18 A Yes.

19 Q Where it says, "Our digital tax businesses also compete with
20 in-office tax preparation services and a number of online
21 software companies, primarily on the basis of price and
22 functionality."

23 And do you know whether you continued to tell the public
24 about the competition between digital and retail since you've
25 been the CEO?

1 A I believe this would be consistent with that, yes.

2 Q Now, sir, have you ever heard of the free offerings that
3 people make in the business you described?

4 A Yes.

5 Q And have you seen any of those up on the retail end of the
6 business?

7 A In terms of does retail offer any free offerings? Last year
8 we offered a couple of free products. We offered a free 1040 --
9 Form 1040EZ product. We also offered -- which enabled people to
10 come in and have their 1040EZ form filled out for no charge.

11 We also offered a free Second Look which enabled anyone who
12 wanted to -- who had done their taxes wherever they had done
13 them, to come in and we would check their return to see if there
14 were any errors, either that there was money left on the table
15 or whether there was, you know, something that was missed that
16 could subject them to an IRS audit.

17 Q Now, from your perspective, sir, why make these offerings at
18 the retail stores?

19 A It's part of our marketing efforts to attract clients.

20 Q And you're just trying to attract clients with those
21 offerings just in the retail side?

22 A No. Those -- well, the free 1040EZ was offered in the
23 digital -- with our digital offerings also.

24 Q And you know whether other competitors out there offer free
25 offerings?

1 A From time to time people will offer either, you know, some
2 sort of promotion or whatever. You also have competitors who
3 this is their business model. Everyday low pricing and free
4 becomes part of their overall business model. So throughout the
5 entire tax preparation industry, you will see this as a tool to
6 attract clients.

7 Q Now, the company is in the process of acquiring TaxACT?
8 You're aware of that, I assume?

9 A Yes, I am.

10 Q And from your perspective, does the company compete against
11 TaxACT?

12 A We compete against TaxACT in the sense that we compete
13 against anyone who is trying to grow clients. You know, every
14 year -- as I said, it's a once-a-year event. We're all
15 competing for 130- to 140 million tax filers.

16 So in that sense, we're competing with TaxACT.

17 Q And in terms of you mentioned Intuit being your number one
18 competitor, where do you put TaxACT in the scheme of that, if
19 anywhere?

20 A Well, again, we focus on TurboTax because they have a like
21 offering. We are a national company. We have national
22 marketing plans. We have an array of offering. Our mission is
23 to serve clients in the way that they want to be served.

24 TaxACT is a very specific company in the sense that they
25 compete against everyday low price. They have a set pricing

1 strategy. They have a set offering. But we wake up every day
2 in whatever part of the company thinking about TurboTax.

3 Q Now, sir, when did you first become aware of the potential
4 for the company to acquire TaxACT?

5 A When I joined the board in August of 2010.

6 Q And what was your understanding at the time as to the
7 reasons for acquiring TaxACT?

8 A At that time, my understanding was that this was a very
9 proven business model with an excellent management team. It was
10 a software company. It was a company that had had success.
11 They had a size of about 5- to 6 million customers.

12 They ran their business very efficiently. And it looked
13 like this was going to give us an ability to compete in a part
14 of the market where we cannot be effective because of our cost
15 structure.

16 Q Now, did there come a time, sir, when you received more
17 information about the potential acquisition?

18 A Yes. Over a period of weeks, I did learn more about it.

19 Q And were you involved in the board meeting in October of
20 2010?

21 A Yes, I participated in that meeting.

22 Q And tell us what you recall from that meeting, sir, just
23 generally. Not the whole meeting, but generally.

24 A Yeah. This was a common practice with boards having been on
25 other boards. We had the management team come to us. We knew

1 that they were looking at this particular acquisition so this
2 was a meeting to decide whether we wanted to proceed. The board
3 had to authorize it so we had to vote as individual board
4 members.

5 So this was the meeting to go through the strategic
6 rationale, how this was going to operate. Really the details as
7 a board would need to understand it to give us the information
8 we would need to vote either yes or no.

9 Q And did you receive a deck for that meeting or a deck or
10 decks for that meeting?

11 A Yes. Yes, sir.

12 Q And let me turn your attention in your binder to Tab No. 5.

13 A Okay.

14 Q And just ignoring the handwriting that's on this particular
15 copy, sir, do you recognize what Tab No. 5 is?

16 A Yes.

17 Q Just tell the Court what it is.

18 A This is a presentation that the management team -- it was a
19 telephonic meeting so we're all on the phone but the management
20 team presented to the board for their approval to proceed.

21 Q And if you'd turn to page -- it's 9 and 10 of the deck, but
22 it is DX 600 at 12 and 13.

23 A 9 and 10, sir?

24 Q Yeah. DX 600. It's in Tab 5.

25 A I have it.

1 Q And we have the "Strategic Rationale for the Transaction."
2 Was the "Strategic Rationale for the Transaction" briefed to the
3 board?

4 A I'm sorry. I was looking at the -- could you repeat the
5 question, please.

6 Q Yes, sir. I'm on page 9 of the slides, which is DX 600-12,
7 which is in the lower left-hand corner.

8 A Could I just take 20 seconds and look at it again? I'm
9 trying to pay attention to your question.

10 Q Okay. And I also have it on the screen here as well.
11 We on the same page?

12 A Yes. I'm just reading it to refamiliarize myself.

13 Q Okay.

14 A Go ahead, sir.

15 Q And sir, was the "Strategic Rationale for the Transaction"
16 briefed to the board?

17 A Yes.

18 Q And during the meeting, what was your understanding of what
19 the reasons were to buy TaxACT? Just tell us from your memory.

20 Tell the Court what you remember the reasons being. Put the
21 page down.

22 A Well, I believe that there were -- essentially, this was --
23 I'm trying to think of the numbers of reasons how I would
24 characterize it, but let me go through a few of them.

25 They ran an excellent business very efficiently. We would

1 be able to -- we, Block, would be able to move our offerings,
2 which are primarily to -- from a technology platform on to the
3 TaxACT platform which would enable us to realize great
4 efficiencies for our products.

5 It was a software company with a proven business model, a
6 proven management team, and be able to bring that expertise into
7 the company. It would add 5- to 6 million customers to our
8 overall H&R Block, Inc., portfolio which would enable us to have
9 TaxACT customers have access to the financial products offered
10 through our bank.

11 So there were a number of reasons that were positive. In
12 the end, for a board or a CEO or anyone, you want to look at the
13 price you pay. Is that going to be a good return for our
14 shareholders? And at the end, we deemed it would be.

15 Q And did you vote for the deal, sir?

16 A Yes, I did.

17 Q And sir, during this discussion with the board, was there
18 any discussion about taking away TaxACT's free offering?

19 A No.

20 Q And any discussion about raising prices?

21 A No.

22 Q Was there any discussion at all about what the model was
23 going to be going forward?

24 A At that time, which I assume you're -- that the business was
25 going to be run out of Cedar Rapids under the TaxACT CEO, Lance

1 Dunn. We were going to take the H&R Block digital offerings and
2 team and put them under Mr. Dunn, who would then operate the
3 combined business.

4 Q And in terms of what the offerings were, was there any plan
5 in terms of what the free offerings were going to be in the
6 future for TaxACT?

7 A My understanding was that TaxACT would continue to operate
8 its business the way it had been operating. That there would be
9 no change to their operating model.

10 Q Now, sir, if I told you that the Justice Department's
11 position here is that you're going to raise the price of TaxACT,
12 do you have any reaction to that?

13 MR. WAYLAND: Objection.

14 THE COURT: Overruled.

15 MR. ROBERTSON: I'll restate the question.

16 THE COURT: Go ahead.

17 BY MR. ROBERTSON:

18 Q Are you aware that the Justice Department has taken the
19 position in this case that you're going to raise the price of
20 TaxACT?

21 A Very well aware.

22 Q And how did you become aware?

23 A A variety of ways, but their press release blocking the
24 merger made it very clear that their belief was that we were
25 going to raise the prices, which is completely counter to what I

1 told the Justice Department on May 19th to the head of the
2 antitrust division when I pledged to not raise the prices for at
3 least three years on TaxACT.

4 Q And why did you do that? Why did you make that commitment,
5 sir?

6 A Because I wanted to make it very clear that we plan to
7 continue to run TaxACT the way it has been run. We are seeking
8 to purchase this company, merge with this company, because of
9 the way they do business. We think they have an expertise that
10 would be quite advantageous to our company and our shareholders.

11 So it would be -- there would be no business rationale,
12 there would be no financial rationale, around changing their
13 business model. They have been successful. That's why we want
14 to join up with them.

15 Q Now, sir, would embarking on any plan that would cause you
16 to lose a million customers, would that make any sense to you?

17 A That would make no sense, and it would be totally counter to
18 the goal that I've set for the company and been very clear about
19 that our number one goal is to increase the number of clients we
20 serve as H&R Block, Inc.

21 Q Now, when you found out about what the government's position
22 was, did you make any statements to the public about your view
23 of what the DOJ had said?

24 A Yes, sir. We issued a press release because I was very
25 disappointed that our government misstated our position, and I

1 wanted to make it very clear to everyone that we felt we were
2 correct, that we felt that our position was good for consumers
3 as well as for our shareholders, and that we would be very
4 aggressive in fighting this action. And that's what we've been
5 doing.

6 Q Now, just to make it clear what press release you're talking
7 about, if you'd turn to Tab No. 7, sir.

8 A That's the one.

9 Q Is this the press release, Tab No. 7, May 23rd, 2011?

10 A That is correct.

11 Q And there is a quote from you where it says, "We continue to
12 believe this merger makes sense, is procompetitive and will
13 greatly benefit consumers."

14 And if you'd just explain to the Court why you believe that
15 the merger would be procompetitive, and then we'll go to benefit
16 and consumers second.

17 A One of the underpinnings of the transaction, as I talked
18 about earlier, is the efficiencies we would realize by
19 putting -- by having one technology platform, the TaxACT
20 platform. Our goal is to take those efficiencies and turn that
21 into either increased features and functions on the product,
22 lower prices or increase marketing on the Block digital products
23 so that we would be able to have a better offering, a more
24 competitive offering, against TurboTax, which is, you know, the
25 largest by far competitor in the entire tax preparation

1 industry.

2 So by being more competitive against TurboTax, I think it
3 would give consumers many more options, and I think ultimately
4 for our company make us -- you know, be able to serve more
5 clients in the way that they want to be served.

6 Q And if you'd turn to Tab No. 2. And do you recognize Tab
7 No. 2 from June 24th, 2011, sir?

8 A I believe this is an article commenting on the -- our
9 earnings release of June 23rd. This is not our release. This
10 is, I believe -- I'm not sure who the reporter is, but -- Mark
11 Davis. So it's a reporter's account of our earnings release.

12 Q And in the middle of the page towards the bottom middle is
13 the statement, purportedly from you, "Consumers will be the
14 primary beneficiaries of the merger through innovation, enhanced
15 functionality, and low prices."

16 Is that something that you said, sir?

17 A I believe I just said it a couple of minutes also, sir, but
18 that is consistent with what was stated back on June 24th.

19 Actually, we said it on June 23rd. The reporter is
20 commenting on that on June 24th.

21 Q Now, you mentioned earlier, sir, that you and TurboTax were
22 in a particular space and you described what TaxACT was doing.

23 Was there any discussion at all back at this board meeting
24 about that distinction as to where the companies were actually
25 focused in terms of their marketing?

1 A Which companies?

2 Q TaxACT versus H&R Block.

3 A Oh, yes. I think the central point was that we were
4 uncompetitive in a part of the overall tax preparation market
5 where our cost structure would not enable us to compete
6 effectively.

7 So in the sense that we talked about, again, keeping TaxACT,
8 you know, going forward with their business model, their
9 approach, et cetera, that as H&R Block, Inc., this would give us
10 an ability to compete much more effectively in the everyday low
11 pricing segment because we don't have an offering there because
12 our cost structure prohibits that.

13 Q All right, sir. Now, you mentioned your commitment to the
14 DOJ, and we've seen what you've made in terms of commitment to
15 the public.

16 Now some time has gone by and you're here in court. Can you
17 tell the Court whether you still commit to what you promised in
18 terms of not raising TaxACT's prices or eliminating their free
19 offering?

20 A Yes, I still commit to that.

21 MR. WAYLAND: Objection.

22 THE COURT: And the objection is overruled.

23 BY THE WITNESS:

24 A Yes, I will still commit to that.

25 Q And why?

1 A Because I think it's important for us to be -- you know,
2 when you're the CEO of a public company, you have to be very
3 clear in what your belief is, what you're going to go forward.
4 Notwithstanding, we're in a legal proceeding. I have to do that
5 to satisfy investors and analysts.

6 So I wanted to be very clear that our merging, our
7 acquisition of TaxACT, that this is to bring another dimension
8 to our company, a software mindset, but that we believe that
9 this business model is a proven one, it's a profitable one, it's
10 one that grows. And we want to keep that going exactly the way
11 we did. So while it obviously has bearing on the legal case, I
12 also as CEO have to be very clear on what we're going to do with
13 this.

14 I think in addition to that, sir, I'd have to add that H&R
15 Block -- I'm the fifth CEO in five years. We have been -- we're
16 not proud of this, but we have been a company that has struggled
17 at the top. The board has given me a five-year employment
18 agreement, and I am here for the long term trying to build the
19 value of the company for the long term. And I wanted to be
20 clear not only to the Justice Department but to investors and
21 analysts of what we're going to do with TaxACT.

22 And I also wanted to be clear, if I may add, that the
23 efficiencies we would realize from the technology platform, that
24 we would be investing that back into the Block offerings which
25 ultimately, for purposes of this hearing, I believe will be very

1 procompetitive.

2 Q And what, if any, is your view, if you have any, about how
3 that would impact on consumers?

4 A I believe Block will have a much more competitive offering
5 in the form of either increased innovation features and
6 functions and/or lower prices.

7 Q And based on your experience, sir, that you described before
8 throughout your career, why do you believe that?

9 A Because I think we have -- our goal -- our business goal --
10 is to increase the number of clients. In order to increase the
11 number of clients, there are certain steps you have to take.
12 And I think, especially in today's economy and, again, the
13 nature of this industry with a once-a-year purchase decision, we
14 have to provide great value.

15 Now, value can be in the form of the expertise we believe we
16 provide when we assist people with their returns. It can be in
17 the form of the product offerings we have. It can be in the
18 form of lower prices.

19 We had a history in this company for some years back where
20 we raised prices and we continued to lose customers. That is
21 not a winning proposition, and that is not what I was brought
22 here to do.

23 MR. ROBERTSON: Your Honor, may I have a quick moment?

24 THE COURT: Yes.

25 (Brief pause.)

1 MR. ROBERTSON: I have one thing, your Honor, I have to
2 go through in closed session. It's very short, but I'm at the
3 end of the public part.

4 THE COURT: Okay. We will close the courtroom. I'd
5 ask the spectators to leave, please.

6 MR. ROBERTSON: This should take no more than five
7 minutes.

8 (The following portions, page 56-75, were designated as
9 confidential/attorneys' eyes only and sealed under a
10 separate transcript per order of the Court.)

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1 THE COURT: We are in open court. Please proceed.

2 MR. WAYLAND: Thank you, your Honor.

3 CROSS-EXAMINATION

4 BY MR. WAYLAND:

5 Q Mr. Cobb, when did you come to your view as to what the
6 market is?

7 A I think it is a combination of -- if I may, I think there
8 are a couple of aspects to it. One was as I went through a
9 series of reviews with the people and tried to understand the
10 market more directly, I also was very mindful of what was going
11 on in the broader area, and I think I referenced earlier
12 Blockbuster and Borders as two examples.

13 So it said to me that those were examples of companies that
14 might not have looked at the market as broadly as they should,
15 and so that has certainly had a bearing on my thinking.

16 Q All right. But you have a specific view today, right, that
17 the market that you compete in is all tax preparation?

18 A That is correct.

19 Q And it's your view that your digital business competes in
20 that market, right?

21 A Yes. It is one of the ways we offer our clients our
22 products.

23 Q And that's the only market it competes in, right, all tax
24 preparation market?

25 A I believe that everyone who is in the industry is trying to

1 grow clients against that 130- to 140 million base.

2 Q Did you change your mind in the last couple of weeks about
3 that, Mr. Cobb?

4 A Don't think so.

5 Q Did you have a view as of September 1 that you're competing
6 in the digital market, and Intuit is your most aggressive
7 competitor in that market?

8 Did you express that view publicly, sir?

9 A I think what I said, because we knew that Anthony from the
10 Justice Department was listening in, we wrote that remark
11 specifically for the Justice Department and described it the way
12 that you describe it.

13 Q Well, let's see what you said, sir.

14 A Okay.

15 Q All right. Let's look at Tab 3, sir.

16 A Okay.

17 Q This is a transcript of Investor Conference Call, correct?

18 A Yes, sir.

19 Q And this is a conference that was held on September 2nd,
20 2011, do you see that?

21 A I believe it's September 1st.

22 Q September 1st. I'm sorry.

23 And you, Mr. Cobb, on page 2, some remarks attributed to
24 you.

25 A Uh-huh. Yes.

1 Q And the third paragraph, two-thirds of the way through, you
2 say, "Combining H&R Block and TaxACT will do exactly what the
3 Justice Department wants; bring competition to a digital market
4 that's currently dominated by one player into it."

5 Do you see that?

6 A Yes.

7 Q And that's what your view was as of September 1st, right?

8 A Yes, sir.

9 Q Now, you arrived in May, correct, of 2011?

10 A Yes.

11 Q And let me show you what we've marked as Government
12 Exhibit 629. I'm just going to put it on the ELMO. This is
13 page 92.

14 A I'm sorry, sir. What is the ELMO?

15 Q Oh, it's the machine.

16 A Oh, I'm sorry.

17 Q Just look on the screen. It's our friend.

18 A Okay. ELMO is all our friend.

19 Q So this is the first page of what we've marked as Government
20 Exhibit 629. It's a submission that was made on behalf of the
21 parties in this case dated May 2nd, 2011, the same month that
22 you arrived as president.

23 And if we look at page 92 of the document --

24 A This preceded my arrival.

25 Q I understand. You were on the board, though, right?

1 A Yes, I was.

2 Q And page 92 of the document says, "After serving painful
3 years of confusion, indecision, apprehension, and false starts,
4 H&R Block has arrived finally at a coherent business strategy on
5 which to base its efforts to compete with Intuit. First point
6 is recognize that the digital tax preparation business serves
7 do-it-yourself customers and does not adversely affect its much
8 larger assisted tax preparation business."

9 Any reason to disagree with that statement that was made to
10 the Justice Department in May of 2011?

11 A I've come to a different point of view, but obviously this
12 was submitted at the time and that was probably the best
13 thinking at the time. I was not part of the group that put this
14 together.

15 Q All right. Now, you testified in closed session about
16 Mr. Houseworth, but why don't we just reorient ourselves.

17 Mr. Houseworth is the current head of the digital business,
18 right?

19 A That is correct.

20 Q And you've talked to Mr. Houseworth to inform yourself about
21 the business?

22 A Yes.

23 Q And you believe that Mr. Houseworth has a good understanding
24 of H&R Block's digital tax preparation business, right?

25 A Yes, sir.

1 Q All right. And if Mr. Houseworth does not believe that pen
2 and paper is a constraint on H&R Block in terms of the prices it
3 can charge, do you have any reason to disagree with him?

4 A I'm not sure the context, sir. I'm not sure. I've never
5 had that conversation with him.

6 Q Well, if Mr. Houseworth testified that H&R Block -- that pen
7 and paper does not constrain H&R Block in terms of the prices it
8 can charge, do you have any reason to disagree with him?

9 A Again, what was the context of the -- it sounds like this
10 is --

11 Q Let me ask you this: If that's his belief, do you have a
12 reason to disagree with it?

13 A Can you say it again. I was confused by the premise, but
14 let me just answer your question sir. I apologize.

15 Q All right. I'll ask it this way: If Mr. Houseworth has the
16 view that pen and paper does not constrain H&R Block's pricing
17 ability, do you have a reason to disagree with him?

18 A I think that, again, coming out of context, I don't know.
19 Pen and paper is obviously a free government offering and, you
20 know, we can't go charging thousands of dollars for our service
21 because there's a free opportunity.

22 So I'm not sure I'm doing an effective job of answering your
23 question, sir, but it doesn't -- given that it's free, I think
24 he might have been coming at it from it is what it is. It's
25 free. And it, you know -- we acknowledge that, and we price our

1 offerings to try to figure out the way that we deliver the best
2 value and grow the greatest number of clients.

3 That's the conversations I've had with him, but we've never
4 had a specific conversation to what you've referred to.

5 Q All right, sir. If Mr. -- if it's Mr. Houseworth's view
6 that your assisted business does not compete with the digital
7 business, do you have a different -- any reason to disagree
8 with him?

9 A When you say -- you mean, does H&R Block's assisted business
10 compete with its digital business?

11 Q Yeah.

12 A And he said it does not?

13 Q Right.

14 A Okay. Sorry.

15 I think what he's referring to, what I would imagine he was
16 referring to, is internally --

17 Q Before you tell me what he imagines, tell me whether you
18 would disagree or not with that statement.

19 A I would disagree with the statement.

20 Q All right. And why is that?

21 A Because when you look at from a client point of view,
22 clients look at all the offerings that anybody -- any provider,
23 any company, and they make their decision once a year. We, as I
24 stated, have as our mission to offer an array of offering.

25 So in the sense that someone would select an H&R Block

1 digital product versus coming into our office, in that sense it
2 is competitive. But we don't advertise against each other, and
3 from my chair, we certainly -- I want to keep as many clients
4 under H&R Block, Inc., as I can.

5 So I think -- I disagree with it in the sense that I think
6 that everyone is competing for that 130- to 140 million
7 clients.

8 Q So today you have a view as to whether H&R Block's
9 brick-and-mortar retail business compete with its digital
10 business, right, sir? Do you have a view on that today?

11 A Yes.

12 Q And you weren't able to have a view during your deposition.
13 Do you remember that? You weren't able to express a view on
14 that issue?

15 A I'm not sure I recall what you said. I'd also hasten to
16 add, I'm on a steep learning curve so I believe the deposition
17 was over a month ago.

18 And again, it's been very clear to me, the August 18th
19 Intuit call in a lot of ways changed everything.

20 Q Do you remember you were asked five times whether H&R
21 Block's digital business competed with its retail business and
22 you couldn't answer the question?

23 Do you remember that, sir?

24 A You'd have to read to me.

25 Q Why don't we show you that, sir, see if we can't refresh

1 your recollection.

2 A Okay. Great.

3 Q Let's show you page 54 of your deposition, line 8, through
4 59, line 6.

5 A Should I look here (indicating)? Okay.

6 Q All right.

7 "My question to you, Mr. Cobb, is simply: Do you understand
8 that H&R Block's digital do-it-yourself tax preparation business
9 does not affect its much larger assisted tax preparation
10 business?

11 "Can you read it again.

12 "Absolutely. Understood. Absolutely. This is the bullet:
13 'It has been recognized that the digital tax preparation
14 business serves do-it-yourself customers and does not adversely
15 affect its much larger assisted tax preparation business.'

16 "My question is whether you agree that H&R Block's digital
17 tax preparation business does not adversely affect its much
18 larger assisted tax preparation business?

19 "The -- our -- I want to -- I want to step back and talk
20 about what we try to do at H&R Block.

21 "Question: We're --

22 "Answer: And I -- I'd like to quote from -- from the annual
23 report because I think -- and I want to -- because I want to be
24 accurate with it.

25 "Question: Can I -- can I just."

1 Objection.

2 And then the next question, "Mr. Cobb, we do have a limited
3 amount of time here today. Mr. Robertson has a couple of hours
4 in which to question you --

5 "Answer: Okay.

6 "And by all means, when he questions you, you can feel free
7 to give whatever -- say whatever you want, but I would just ask
8 that we focus on my questions now --

9 "Answer: Okay.

10 "Question: So my question --"

11 Objection.

12 "Question: Yes.

13 "Answer: At H&R Block, Inc., we seek to serve our clients
14 in the manner in which they prefer. We are a client-based
15 company and we offer all forms of tax preparation service. We
16 offer assisted tax preparation and a variety of services using
17 online means. That is what we focus on. It's up to -- and any
18 great company focuses from the customer or the client in, not
19 their own business structure. And so we believe we have the
20 right approach, which is to focus on serving clients in the way
21 they wish to be served.

22 "Question: To your knowledge, does the digital tax
23 preparation business compete with the assisted tax preparation
24 business?

25 "Answer: To my knowledge, we, again, offer a variety of

1 offerings and we let our clients choose the way in which they
2 want to be served.

3 "Question: To your knowledge, does the digital tax
4 preparation business compete with the assisted tax preparation
5 business."

6 Objection; asked and answered. Response, "It's been asked."

7 "Answer: I --

8 "Mr. Robertson: Move to strike counsel's comment.

9 "Answer: I -- again, the way we approach the business is --
10 and we -- and we look at various ways and we stay very focused
11 on consumer trends and we try to offer a array of offering in
12 the -- offering in which the clients wish to be served in which
13 we can grow the most number of clients.

14 "Question: Respectively, Mr. Cobb, you are the chief
15 executive officer of H&R Block. Can you tell me whether H&R
16 Block's digital business competes with H&R Block's assisted
17 business.

18 "Answer: I can tell you, as the chief executive officer of
19 H&R Block, that we are a client-focused company and we seek to
20 serve clients in the way they want to be served, and that is
21 through -- and we are the only business that I'm aware of that
22 offers every form of tax preparation service, and that's what
23 the company was founded on and that's what we continue to
24 believe to this day.

25 "Question: Okay. This will be the last time I ask you.

1 Mr. Cobb, to your knowledge, do digital tax preparation
2 businesses and assisted tax preparation businesses compete with
3 one another?

4 "Answer: Again, as chief active officer of the company, we
5 are a client-focused company. We want to operate in a way in
6 which our clients are served in whatever form they want to do,
7 and that is what we accomplish at H&R Block."

8 And that was a month ago, right? You were asked five times
9 and you weren't able to answer the question. Today you are able
10 to tell us -- can you answer the question today?

11 A First of all, I don't think I said anything here that's any
12 different than what I said today.

13 Q I'm trying to get you to answer the question.

14 A I understand, sir, but I stand completely by what I said.

15 When you were asking me the question now, as I said to you,
16 when Intuit on August 18th made the statements that they made,
17 and I am on a steep learning curve, you have to adapt -- this is
18 a highly competitive business. They are coming after our tax
19 stores. So I have to make the assumption that their digital
20 business, which is all that they do, is coming after our tax
21 stores. And with all the switching that occurs in this
22 category, that we need to be mindful of the entire tax
23 preparation business.

24 So I apologize if you're not satisfied with that answer, but
25 I believe that this is a large market and there's lots of stuff

1 going on there. But I want to be highly aware of our business
2 goal, which is what I'm driving through the organization which
3 is to grow as many clients as we can in whatever form they want
4 to be served.

5 Q And you're in a steep learning curve. And Mr. Houseworth is
6 quite a bit ahead of you; don't you think?

7 A Well, he's been at the company for three years so ...

8 Q So when he's able to answer the question, do you think we
9 should rely on his answer instead of your inability to answer
10 it?

11 A I think you have to adapt to current market conditions and,
12 you know -- so that's what I would say, and I think
13 Mr. Houseworth does adapt too.

14 Q But he's not here to tell us how he adapted since he gave
15 his deposition testimony, is he?

16 A I don't believe he is here today.

17 Q Now, sir, your counsel showed you a statement -- a press
18 statement -- in which you said that the benefit of this
19 transaction would be innovation, low prices, and increased
20 functionality, right?

21 A Yes, sir.

22 Q All right. Have you looked into TaxACT at all since you
23 heard about the transaction?

24 A I'm not sure I understand. Looked into TaxACT?

25 Q Yeah. You voted to approve a transaction in which your

1 company is buying TaxACT, right?

2 A Yes, sir.

3 Q And you're a CEO about to try and execute on that
4 transaction, right?

5 A That is correct.

6 Q So can we assume that you know something about TaxACT?

7 A Yes, sir.

8 Q You know that they offer low prices?

9 A Yes.

10 Q You know that they have been innovative?

11 A Yes.

12 Q You that they have good functionality in their product?

13 A Yes.

14 Q So that already exists, the three things that you say this
15 transaction is going to bring.

16 A To the H&R Block brands. Because I think I've stated that
17 TaxACT will continue to operate with the proven business model
18 they have undertaken, and that what you just cited would then
19 apply to the Block brands.

20 Q And you have the ability to lower prices on your own, don't
21 you, sir?

22 A Of course we have the ability. Can we do it profitably?
23 The answer is no because our cost structure.

24 Q You're a seasoned executive. You know how to lower costs,
25 don't you, sir?

1 A Yes. That is something that any good business has to do.
2 So I would say as a general rule, yes, you do want to try to
3 lower costs.

4 MR. WAYLAND: I have no further questions, your Honor.

5 THE COURT: Mr. Robertson.

6 MR. WAYLAND: I do. I'm sorry. Reminded by my
7 colleagues.

8 BY MR. WAYLAND:

9 Q You talked about your three-year promise to freeze prices.
10 Why three years?

11 A I think in today's environment, I think three years is the
12 appropriate time frame. I think to go beyond that -- and while
13 I do have a five-year employment agreement -- I think, you know,
14 it's like I said earlier, this is going to be a tablet holiday
15 season.

16 I think innovation is happening so quickly that to go beyond
17 three years would not be -- it just isn't credible. I think the
18 days of five-year business plans are out. I think, frankly, the
19 longest time horizon a business executive or chief executive can
20 take is three years.

21 Q So if we're assessing the effect of a transaction, is what
22 you're telling us, three years is a reasonable time frame to
23 use, right?

24 A No, sir. I think what I'm saying is on that specific
25 dimension, the pledge that we made to the Justice Department, to

1 our investors, to analysts, and I believe I said at least three
2 years.

3 Q That's what you're willing to offer, three years, because
4 you really can't see too far beyond that, right?

5 A Sir, what I'm saying is I think it's very difficult for any
6 business in today's world to see beyond three years so that's
7 why I use that time frame.

8 MR. WAYLAND: Thank you, your Honor.

9 MR. ROBERTSON: May I proceed, your Honor?

10 THE COURT: Yes, please, Mr. Robertson.

11 REDIRECT EXAMINATION

12 BY MR. ROBERTSON:

13 Q Sir, as you sit here today, do you know of any reason why
14 you would change the TaxACT business model any time in the
15 foreseeable future?

16 A No, sir.

17 Q And counsel made some remark that you had made a statement
18 on September 1st.

19 Do you remember you had a deposition before September 1st,
20 nearly a month before that?

21 A That is correct.

22 Q And did you have a chance then to tell the Justice
23 Department your view of what the market was in the deposition?

24 A I don't believe we --

25 Q Let me -- just look at your tab that you had your

1 deposition.

2 MR. WAYLAND: Objection. It's improper for him to use
3 a deposition. He's got his witness on the stand. So the
4 deposition can be used for impeachment, not for any purpose on
5 direct.

6 THE COURT: Sustained.

7 BY MR. ROBERTSON:

8 Q Let me ask you this, sir: Back at the time of your
9 deposition, did you have the same belief that you've expressed
10 to the Court here in terms of what the market is?

11 A Oh, I was very clear on what I thought the market was back
12 then, I believe.

13 Q And you say you were very clear back then. Do you mean
14 during the deposition?

15 A Yes, sir.

16 Q Okay. When you said a couple times statements about what
17 the Justice Department wants, were you trying to express your
18 view of what the market was?

19 A No, sir.

20 Q You think it's fair for counsel to imply that you were?

21 MR. WAYLAND: Objection.

22 THE COURT: Overruled.

23 MR. ROBERTSON: I'll withdraw that.

24 I'm sorry, your Honor. I think we're done with that.

25 Your Honor, do you have any questions? I have no more

1 questions.

2 MR. WAYLAND: No more questions, your Honor.

3 THE COURT: You're excused, Mr. Cobb.

4 THE WITNESS: Thank you, your Honor.

5 (Witness exits the courtroom.)

6 MR. ROBERTSON: May I have a moment, your Honor?

7 THE COURT: Yes.

8 MR. ROBERTSON: Your Honor, we're still putting
9 together our joint submission on the documents and the hard
10 pieces of evidence, but in terms of the witnesses, the defense
11 rests.

12 THE COURT: Defense rests. Does the government have
13 any rebuttal witnesses?

14 MR. WAYLAND: We do, your Honor. We have two rebuttal
15 witnesses, both experts, and both examinations should be
16 relatively short. We should be able to complete the first one
17 today, including the cross, if we come back after lunch.

18 THE COURT: Can we start now?

19 MR. WAYLAND: Oh, he is here. We can start.

20 THE COURT: Please call your first rebuttal witness.

21 MR. WAYLAND: Ms. Strimel will call the next witness,
22 your Honor. I'll ask her to step forward, with your permission.

23 MS. STRIMEL: Plaintiff calls to the stand Mark
24 Zmijewski.

25 Just for the record, we're able to begin in open

1 session. We won't ask about numbers or the specific means of
2 achieving any synergies until we do closed court.

3 THE COURT: Please come forward and raise your right
4 hand.

5 (WHEREUPON, the witness was sworn.)

6 MARK ZMIJEWSKI,
7 called as a witness herein, having been first duly sworn, was
8 examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. STRIMEL:

11 Q Good morning, Dr. Zmijewski. Can you please introduce
12 yourself to the Court.

13 A My name is Mark Zmijewski.

14 Q And where do you work?

15 A I'm a professor of accounting at the University of Chicago,
16 Booth School of Business, and I'm also a managing director at
17 and a Navigant Economics.

18 Q Do you hold any positions at the Booth School of Business
19 other than your professorship?

20 A I'm also one of four academic deans.

21 Q And have you held any other positions at the university?

22 A I started at the university in 1984 as an assistant
23 professor and worked my way up through the ranks to full
24 professor. And also I've been the chair of the Ph.D. program,
25 the faculty chair of the Ph.D. program, and also the Director of

1 the Center for Research and Security Prices.

2 Q Can you please briefly describe your education.

3 A I hold three degrees all from the State University of New
4 York at Buffalo. A bachelor's degree -- Bachelor of Science, an
5 MBA and then a Ph.D. degree. And my Ph.D. has a major in
6 accounting and minors in economics and finance.

7 Q Can you please briefly describe the courses that you've
8 taught in accounting and finance.

9 A Over the years, I teach basic financial accounting, advanced
10 financial accounting. Advanced financial accounting covers
11 mergers and acquisitions as well as derivative securities.

12 I've also taught managerial accounting; how accountants
13 prepare reports internally within a company so that the company
14 can make decisions. On finance, I've taught corporate finance,
15 I've taught financial analysis and security analysis and, most
16 recently, I've been teaching financial strategy which is an
17 analysis of transactions; business acquisitions, asset sales,
18 asset purchases, mergers and acquisitions, leverage buyout
19 transactions, things like that.

20 Q Can you please describe to the Court what Navigant Economics
21 is and what is your role at that firm.

22 A Yes. I'm one of several managing directors. We have about
23 130 people total within that group. We're part of Navigant
24 Consulting, which is a larger consulting company. And this part
25 of the group, the economics group, looks at regulatory issues

1 and litigation issues and brings to bear accounting, economics,
2 and finance expertise.

3 Q What types of consulting do you do?

4 A Broadly speaking, my consulting focuses on two main areas;
5 issues related to business valuation like this one and then
6 issues related to security valuation.

7 So the issues related to business valuation would be valuing
8 entire businesses or valuing parts of businesses, valuing
9 synergies, things of that sort.

10 Q Have you testified in court before?

11 A Yes. I first testified in 1989 and have been testifying
12 regularly since then.

13 Q And in general, what types of clients have you had?

14 A Sometimes they're groups of clients, class action
15 plaintiffs; sometimes individuals, CEO, CFOs. Many times
16 companies, corporations hire me to do work. And then I've
17 worked for the Department of Justice before, the Securities and
18 Exchange Commission.

19 Q Have you been qualified as an expert by the Court in
20 previous matters?

21 A I have. My expertise is, just as my education and my
22 experience, it's in accounting, economics and finance, focused
23 on two areas -- business valuation and security valuation -- as
24 well as financial analysis. And broadly speaking, people
25 sometimes call that financial economics.

1 Q And does your curriculum vitae that's attached to your
2 report in the record in this matter accurately reflect your
3 qualifications and your academic and work experience?

4 A Yes, it does.

5 MS. STRIMEL: Your Honor, at this time, I submit
6 Professor Zmijewski as an expert in accounting, economics, and
7 finance, fairly summarized as financial economics.

8 THE COURT: Is there any objection?

9 MR. BREED: No objection.

10 THE COURT: The doctor will be allowed to opine and
11 give his opinion testimony.

12 THE WITNESS: Thank you, your Honor.

13 BY MS. STRIMEL:

14 Q Generally, can you describe what you were asked to do in
15 this matter, please.

16 A Yes. I was asked to examine the claimed efficiencies by the
17 defendants and analyze whether or not they were verifiable and
18 whether or not they were attainable only as a result of the
19 merger and could not be attained as a result of activities based
20 on a stand-alone basis.

21 Q Can you describe how your work on verifiability and merger
22 specificity fit into the structure of this case.

23 A I can. I have a notebook somewhere.

24 Q Yeah. We can bring the notebooks around at this time.

25 THE WITNESS: I prepared a few slides, your Honor, to

1 summarize some of my work. And the first slide -- second slide,
2 excuse me -- second slide is just some excerpts from the Merger
3 Guidelines, but to summarize what's in that.

4 THE COURT: Why don't you wait until counsel passes out
5 the notebooks and asks a question. She will make sure you don't
6 miss anything.

7 THE WITNESS: Thank you.

8 BY MS. STRIMEL:

9 Q I see that Slide 2 has some excerpts from the Horizontal
10 Merger Guidelines. There's no reason to read those here, but
11 can you describe the principles at stake in those.

12 A Yes. Some of the key principles are that for an efficiency
13 to be cognizable, it must be merger specific, in other words,
14 couldn't be achieved without the merger. It cannot result from
15 anticompetitive actions, and it must be verifiable so it's not
16 speculative.

17 Q And without looking for any particular formula here, but how
18 do you translate the principles from the Merger Guidelines into
19 an accounting perspective for the purpose of calculating
20 efficiencies or how would one do that?

21 A There's three steps. The three steps are fairly straight
22 forward.

23 The first question is what are the company's cost structures
24 on a stand-alone basis after making sure the companies achieve
25 all these efficiencies that they could achieve to know a

1 stand-alone basis so you don't have efficiencies that are not
2 merger specific in that calculation, in that assessment? That's
3 step one.

4 Step two is to assess what are the ongoing costs
5 post-merger? So I'll use the term "post-merger." And by that,
6 I mean, assuming the two companies combine, what's the ongoing
7 cost after the merger? I'll just use shorthand for that to say
8 postmerger cost.

9 And then the third component of that is what are the
10 up-front costs you have to incur to actually consummate the
11 merger and to integrate the merger so you can achieve those
12 ongoing costs? Those are the three components.

13 Q And do those three components get you to what the guidelines
14 refer to as "cognizable efficiencies"?

15 A I believe they do.

16 Q And are cognizable efficiencies the same thing as synergies
17 that executives would look at in evaluating whether or not to
18 make an acquisition?

19 A No. When I teach valuation courses and we look at merger
20 and acquisition transactions, we never use the term "cognizable
21 efficiencies." The term is always "synergies." And synergies
22 is a large group of performance enhancements that result from
23 the merger.

24 The cognizable efficiencies are a subset, so in efficiencies
25 it's all the different ways two companies can combine and

1 increase value, increase the performance of a postmerger
2 company.

3 Q Is that synergies?

4 A I'm sorry. I misspoke if I said efficiencies.

5 So synergies are when two companies combine, you think about
6 all the ways that performance can be enhanced. So that includes
7 revenue increases. You sell more. You sell different products
8 so you can sell more products. You might sell at higher prices.
9 Maybe it's anticompetitive, maybe it's not anticompetitive. All
10 of those would be considered that's on the revenue side.

11 On the expense side, you have different types of expense
12 reductions. Those are all part of synergies. But some of those
13 might not be merger specific. You'd still consider them if
14 you're analyzing efficiencies for the transaction.

15 Some of those might be the result of anticompetitive
16 behavior. Some of those just might be cost reductions that your
17 goal is that you're striving to attain, but you don't have
18 foundation for them.

19 So the last group would be merger specific synergy --
20 efficiencies cost reductions for which they're not the result of
21 anticompetitive behavior and can be verified. That's the group
22 of cognizable efficiencies.

23 So when you hear about synergies, it's a big group of
24 performance enhancements. Cognizable efficiencies is a small
25 group, a subset of all of that.

1 Q Now, you mentioned verifiability. What methodology do you
2 use to verify efficiencies claims?

3 A Well, I start with a number, a claimed efficiency, so it's a
4 number. And I analyze the calculation underpinning that number.
5 I understand the calculation and check the arithmetic is
6 correct. But I also check that the calculation is correct; for
7 example, it's not the result of anticompetitive behavior and
8 it's merger specific.

9 So if that's all correct, then you start digging into the
10 calculation itself. And the question is, well, what are the
11 inputs into the calculation? And you examine every input into
12 the calculation, and you then, essentially, have three broad
13 buckets. Is the input a fact? If it's a fact, you can go to
14 source documents and verify it. Is the input an analysis? And
15 if it's an analysis -- pardon me. If the input's an assumption,
16 then the question is, well, what analysis underpins that
17 assumption? There has to be some foundation, facts, analysis to
18 support an assumption.

19 And then the third type of input you might have is another
20 calculation. And if it's another calculation, then you go down
21 and dig in the layer below and go through that same process for
22 the next calculation. So the process is literally to just
23 follow through -- I can think of it sort of as a tree trunk and
24 a system of roots under it. You follow that entire system of
25 roots till you verify every input into all the different

1 calculations.

2 Q Do others use this type of methodology for verifying
3 financial accounting figures?

4 A Yes. This is reproducibility, essentially. So accountants
5 care about reliability. And the accounting profession cares
6 about that, the auditing profession cares about that. And even
7 the Securities and Exchange Commission in quality guidelines
8 outlines a similar reproducibility standard which is give a
9 third party all the facts; the third party will analyze those
10 facts, process the facts, and come up with roughly the same
11 answer.

12 Q Have you used this methodology before in a merger context?

13 A I have. I have testified two other times for the Department
14 of Justice in such litigation, as well as I've been hired by the
15 Department of Justice to do this work in matters that didn't
16 result in litigation.

17 And then I've also worked for merging parties, and the
18 merging parties have done the same work for merging parties and
19 presented to the agencies.

20 Q And do you use the standard in the same way every time?

21 A It's the same process.

22 Q Without going into the numbers or the specific nature of
23 particular efficiencies claims here, what's your overall opinion
24 concerning the defendants' claimed efficiencies?

25 A There are 11 efficiencies that are claimed. And I was able

1 to verify one of those 11 comfortably, and the other 10 I cannot
2 verify, for two major reasons. There's two consistent themes.

3 The first theme is in -- if you think about what I said
4 before, there's these first two components. Assessing the
5 current cost. In assessing the current cost, the defendants
6 pretty much ignored -- actually completely ignored -- any
7 efficiencies that could be achieved without the merger on a
8 stand-alone basis. So that was the first issue that really
9 affects most of these efficiency calculations.

10 The second theme that I saw consistently is although H&R
11 Block provided information that was verifiable -- actual
12 documents, Mr. Bowen testified and used
13 ordinary-course-of-business documents -- when we went to TaxACT,
14 TaxACT did not do that. TaxACT had key assumptions in the
15 ongoing cost. And those key assumptions in the ongoing cost
16 were not verifiable by a third party because there is no
17 analysis underpinning them. It's a complete dead end.

18 Those assumptions are based on conversations amongst people
19 without any analyses, without looking at the previous change in
20 volume and what incremental cost were looking back at history,
21 there wasn't any analysis of that. There wasn't any analysis of
22 previous projects and the cost of previous projects. So there
23 just wasn't any analysis underpinning those assumptions and,
24 therefore, a third party cannot verify those assumptions.

25 So those are the two major themes that pretty much affect

1 all of those 10 of the 11 efficiencies.

2 MS. STRIMEL: At this time, my questions are going to
3 get into some specifics about the claim so we would request that
4 the courtroom be closed.

5 THE COURT: Okay. We'll excuse the spectators while we
6 close the courtroom.

7 (The following portions, page 104-128, were designated as
8 confidential/attorneys' eyes only and sealed under a
9 separate transcript per order of the Court.)

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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.

SIGNATURE OF COURT REPORTER

DATE