UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	Civil Action
	:	No. 1:11-cv-00948
Plaintiff,	:	
	:	October 3, 2011
v.	:	9:30 a.m.
	:	
H&R BLOCK, INC., et al.,	:	Washington, D.C.
	:	
Defendants.	:	
.....	:	

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING - DAY 9
BEFORE THE HONORABLE BERYL A. HOWELL
UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

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

THE COURT: Good morning, Counsel.

MR. WAYLAND: Good morning, your Honor.

MR. ROBERTSON: Good morning, your Honor.

THE COURT: Good morning, Mr. Robertson.

Mr. Wayland, are you ready to proceed?

MR. WAYLAND: I am, your Honor. May I introduce the people at our table this morning?

THE COURT: Yes, please.

MR. WAYLAND: I have James Gately, who has been here throughout the trial as you know, Mr. David Gringer, Mr. Tony Scicchitano, Mary Strimel, who examined some witnesses, and Mr. Larry Buterman. And I am Joseph Wayland for the United States.

THE COURT: Mr. Robertson, do you want to take the opportunity to introduce the people at your table as well?

MR. ROBERTSON: Thank you, your Honor. And I'm Robbie Robertson on behalf of the defendants. Also I have Corey Roush here, Derek Gamble from H&R Block, Logan Breed, and Stephanie Seymour here as well.

THE COURT: It's nice to see the faces of your talented minions who put together all this marvelous briefing material for me.

MR. ROBERTSON: Very talented, I should say, for the record.

MR. WAYLAND: This is the government, your Honor. They're colleagues, not minions. When I was at my law firm, they were minions. Now, they're colleagues.

THE COURT: Got it.

All right. As we proceed, I know that you all have your, you know, sort of closing arguments that you want to make, but just so you know --

MR. WAYLAND: You have questions.

THE COURT: Yes. So I will interrupt as we go on. But please proceed.

MR. WAYLAND: Thank you, your Honor. Good morning again. Your Honor, from the parties' opening statements through the last witness and the submission of our proposed findings of fact, our time with the Court has been focused essentially on telling a factual story. And certainly the Court is now intimately familiar with the large volume of evidence regarding the relevant market and the competitive effects of this transaction.

We believe, obviously, that the overwhelming weight of the evidence shows that the relevant market is digital do-it-yourself tax preparation, that a merger leaving two firms with a 90 percent share is presumptively anticompetitive, and that defendants have not come close to rebutting their burden.

But this morning, your Honor, I want to focus on the case law, and I want to view the evidence through the prism of the relevant authority, principally from this District and this circuit. Because when the case law is properly understood and applied, the relevant market is easily discerned, and the likely competitive harm is indisputable.

I think it's important today, your Honor, to focus on the law because in some ways the presentation of evidence at trial tends to obscure the legal analysis. During the trial, there is no formal order of proof that separates market definition evidence and testimony from competitive effects, no clear line between testimony concerning, for example, expansion or efficiencies, and we don't stop to see if burdens have been met or if they have shifted.

But post-trial, we have the benefit of a clear roadmap of how to review the evidence. It's laid out in this Court's decisions and the Court of Appeals' decisions.

Indeed, the issues before the Court today of market definition and competitive effect have been addressed repeatedly in this District. The applicable standards are well-settled, and those standards have been applied to facts similar to the facts here. Indeed, to accept the defendant's arguments in this case would require the Court to largely rewrite the standards long applied in this District. Let me give you just one example before I turn to the proof in a more systematic way.

Assuming, your Honor -- and I'm sure you'll have questions about this as we go forward -- that our product market definition is correct, as a result of this merger, two firms will have nearly 90 percent of the market. Using IRS data to calculate share, Intuit will have 62 percent of the market, and the merged H&R Block/TaxACT firm will have 28 percent. And HRB's internal calculations give the combined firm actually a higher share of 31 percent.

Defendants say in their papers that the combined firm's share, whether it's 28 percent or 31 percent, is simply too low as a matter of law to raise the prospect of competitive harm. This is wrong. The Court of Appeals and the District courts here have repeatedly reiterated the Supreme Court's direction in *Philadelphia National Bank* to focus on an undue percentage share of the relevant market and a significant increase in concentration. In that case, the Supreme Court said a 30 percent share was enough for an undue percentage.

In the *H.J. Heinz* baby food case, a merger where the merging parties had a 32 percent share and the dominant firm had a 65 percent share, the Court of Appeals said, "As far as we can determine, no court has ever approved a merger to duopoly under similar circumstances."

In the *Coca-Cola* case, Judge Gesell blocked a merger where a firm with a 37 percent share attempted to acquire a firm with a 4 1/2 percent market share, concluding in his very direct

way that, quote, "The acquisition totally lacks any redeeming feature."

In *Cardinal Health*, your Honor, Judge Sporkin recognized that 30 percent post-merger market share in *Philadelphia National Bank* and noted that subsequent case law had lowered the presumption to 25 percent or less.

And in *Swedish Match*, judge Hogan blocked a merger that would have led to duopoly where the two firms would have held 60 percent and 33 percent.

So, your Honor, the issue in these cases is not the specific share of the merged entity, but the resulting market structure. And the Courts are particularly concerned about mergers that leave two firms dominating a market.

As Judge Collyer explained recently in the *CCC* case, "It's easier for two firms to collude without being detected then for three, and with only two dominant firms left in the market, the incentive to preserve market share would be even greater and the cost of price cutting even riskier."

The defendants are simply wrong, your Honor, about the law and the threshold required to create a presumption of harm. The merger here falls squarely within the pattern of mergers that have been blocked by the courts of this District because defendants could not overcome the presumption of competitive harm arising from high market shares and market concentration.

Having jumped ahead a bit in the analytical framework,

your Honor, let me begin at the beginning. Let's start with the governing statute. Section 7 of the Clayton Act prohibits mergers where the effect may be to substantially lessen competition. As the Court of Appeals here said in *Heinz*, citing the Supreme Court's *Brown Shoe* decision, the emphasis on the word "may," it said, "Congress used the words 'may' be substantially to lessen competition to indicate its concerns with probabilities, not certainties." Thus we are not required to prove that the transaction will substantially lessen competition, but that it may do so.

Within that overarching standard, your Honor, let's turn to the relevant product market.

In their brief, defendants acknowledge that there are two related inquiries that courts conduct in determining the relevant product market. First, whether products are functionally interchangeable; that is, whether they are similar in character and use. And two, cross-elasticity of demand; that is, the responsiveness of the sales of one product to price changes of the other.

But defendants essentially ignore the second part of the analysis, and it's quite clear why they do that, your Honor. Because sales of assisted products are not responsive to price changes in digital products. That's a matter of common sense, real world observation, and confirmed by the parties' admissions. The prices of digital products are substantially

less than the prices of assisted products and a 5 or 10 percent change in the price of digital products simply will not result in any meaningful response to the much more expensive assisted products.

And there is absolutely no credible evidence in the record that suggests otherwise. If you look at defendant's brief and at the proposed findings of fact, you won't find any citation to any evidence that shows that a 5 or 10 percent increase in the price of digital will lead to any significant switching to assisted or vice versa.

There is something else missing from defendant's brief, your Honor, and this is very important. It's a reference to a fundamental principle applied in determining relevant product market, the smallest market principle, your Honor. That is, product market analysis begins with the smallest relevant market.

Again, from this District, *Arch Coal*, "Market definition begins by examining the most narrowly defined product or group of products sold by the merging firms to ascertain if the evidence and data support the conclusion that this product or group of products constitutes a relevant market." That's what economists do, and that's what the case law requires us to do.

And ignoring this fundamental principle, this smallest market principle, leads the defendants badly astray. They

mistakenly and repeatedly point to Dr. Warren-Boulton's statement that assisted and digital may be substitutes for one another as proof positive that they are in the same market. But under the smallest market principle, as Dr. Warren-Boulton explained and as the case law recognizes, not all substitutes are in the same market.

In *Staples* and *Swedish Match*, your Honor, in this District, the Court recognized that, "The mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." The Horizontal Merger Guidelines explain this principle in detail and explicitly recognize that not all substitutes are in the same relevant product market.

The Horizontal Merger Guidelines, "Market shares of different products and narrowly defined markets are more likely to capture the relative competitive significant of these price and often more accurately reflect competition between close substitutes. As a result, properly defining antitrust markets often exclude some substitutes to which some customers might turn in the face of price increases even if such substitutes provide alternatives for those products."

Bon-Ton Stores case, your Honor, same point: "If markets were defined solely based on the fact that two products compete for customers, it would be hard to conceive of any

merger or acquisition that would have an anticompetitive effect."

It's also what the FTC's chief economist said, Joe Farrell. I only mention him because the defendants cite him in a footnote in their brief to support their claim that digital and assisted should be in the same market. If you actually go to the article they cite, here's what Mr. Farrell said: "As has always been true under the hypothetical monopolist test, a market need not encompass the full range of substitutes including all substitutes would lead to absurdly broad markets that would, as the guidelines explain, make market shares misleading.

So as the guidelines and the case law recognize, your Honor, the critical issue is not, as defendant's claim, whether every possible substitute has been included in the relevant market, but what will happen if there is a price change in the candidate product market? That's what the Court said in *Cardinal Health* in this District. A product is construed to be a, quote, "reasonable substitute for another when the demand for it increases in response to an increase in the price of the other."

THE COURT: Well, can we just stop for a -- pause for a second on the market definition because the defendants have pointed out, both during the trial and in their briefs, that in the complaint, the government alleged a market definition that

includes the state returns. And that really no proof -- the defendants argued no proof has really been adduced about this part of the government's alleged market definition, which is do-it-yourself software for state returns.

MR. WAYLAND: Right.

THE COURT: And, you know, as I've looked through some of the trial testimony and through some of the exhibits, I really don't see much about the state returns, which are in the government's alleged market definition.

If state returns -- do-it-yourself software for state returns are not included in the market definition, would this affect your anticompetitive analysis in any way?

MR. WAYLAND: Absolutely not, your Honor, for a couple of reasons.

First of all --

THE COURT: So you could just as easily drop state returns from the market definition? Is that your position or what?

MR. WAYLAND: Our position, your Honor, is that, one, the Court and the government are entitled to rely on how the defendants analyze the market. If you go through all of the evidence, your Honor, you will see that that's how everyone analyzes this market using the IRS data, using federal returns.

So you will not find anywhere in the defendant's data any analysis that suggests there's any different way to look at

the markets either under -- using federal returns or state returns. They all use the federal numbers. And that makes sense because in the real world, mostly what happens is that people use the same company, and often the state tax is derivative of the federal tax so people don't go and buy generally a separate state product. They get the free product, and they buy the state product. They buy the state product, and they get the statement product. So in the real world, there isn't much difference, but most importantly --

THE COURT: Well, I know that's the government's position but, in fact, from what I've gleaned from the defendant's facts, they really suggest otherwise. You know, that -- I mean, I think that they assert that federal E-filings are not a reliable proxy to the state filings. And in Paragraph 144 of their facts, they talk about the fact that less than half of Block's DDIY federal customers in 2010 used state return products from HRB. Intuit reports a similarly less than half state attach rate.

So I know that the government is asserting that basically the market for state is correlative to the market for federal. And it wasn't really until I got the defendant's statement of facts that I actually saw some concrete numbers on the state attachment rate. And I was surprised. I expected it to be, you know, based on the government's assertion closer to, you know, certainly the majority rather than less than half of

both Intuit and H&R Block.

So I'm just wondering how the -- my job is to define what the relevant market is. You know, the government has said it's both federal and state return DDIY. And I don't understand what my factual basis is finding anything about the state DDIY.

MR. WAYLAND: Well, I think it's this, your Honor: I think, number one, as I said before, the only way that defendants have ever measured the market shares is to use the federal numbers. There is absolutely no evidence that if there were -- if you use the state numbers, you'd have any different share breakdown. I think that's the critical fact that's missing. If there was some evidence that it made a difference in the case, then maybe there would be a concern, but there's absolutely no evidence that it makes a difference in terms of market share.

It may be that some consumers use H&R Block for state and they use TaxACT for federal. I don't -- you know, there is some suggestion of that, but the idea that it matters --

THE COURT: The defendants are arguing that it's inflating their market share because you're including the state DDIY returns.

MR. WAYLAND: Your Honor, we're using the same numbers. We're using IRS data which is federal. It's federal numbers, your Honor. We're all using the same data. We're not inflating anything. We don't have separate state numbers. We have the

IRS numbers which are federal numbers. That's the one their expert uses to check our expert. Those are the numbers that they use to calculate their own market shares.

There is no evidence that the state market shares -- first of all, it's absolutely untrue that they inflate our numbers because we're just using the federal numbers. Secondly, even if there were some evidence that they were about the state numbers, there is no evidence that the market shares are any different in state versus federal even if somebody is using one for the other. Some people may be using state -- well, let me do it a different way.

Let's say that the market shares are 62 percent, 17 percent and 15 percent in federal. There's no evidence in the case that they're any different in state. It may be that some people use a different digital product, but there's no evidence that affects the shares at all.

And if this mattered, your Honor, if this mattered at all in how people look at the market, you would have seen it somewhere in the seven to ten years of evidence that we have. You don't see it. They track market share in the federal side. That's basically how it is, your Honor.

THE COURT: But why should I include -- I mean, you're right. I mean --

MR. WAYLAND: You can have --

THE COURT: But let's focus on the federal E-filing.

Why should I define this market if I adopt the government's position of DDIY? Why should I adopt it to include not just federal but also state returns?

MR. WAYLAND: Because that's how the defendants look at it, your Honor; that's why. And if you only had a federal, we still win because there's no evidence that there's a different breakdown in state. There's no evidence that the state numbers would somehow affect the anticompetitive affect that we see on the federal side.

I think that's the principal answer, your Honor. There's absolutely no evidence that even if there's a difference, you would see any difference.

THE COURT: All right.

MR. WAYLAND: You should ask Mr. Robertson what he makes of the state numbers. Do they suggest somehow that the shares are different?

THE COURT: I intend to.

MR. WAYLAND: Okay. Anyway, your Honor, to get at the issue of the reasonable substitute, responsiveness to price changes, the Horizontal Merger Guidelines and the courts applying these guidelines look to the hypothetical monopolist test: What would happen to the price of the candidate product if it's raised 5 or 10 percent.

Here's how the Court applied the test in *Swedish Match*: The Court said, "If a 5 percent increase in loose leaf prices

would induce a sufficient number of users to switch to the proposed substitute -- moist snuff tobacco -- then moist snuff would be included in the relevant product market. But if a sufficient number of consumers will not substitute moist snuff to make a 5 percent increase in loose leaf prices unprofitable, then moist snuff should be excluded."

You can apply the same analytics to this case, your Honor. Just switch out DDIY and assisted for moist and loose snuff and the analysis is the same. So applying the *Swedish Match* analytic, if a 5 percent increase in DDIY prices would induce a sufficient number of users to switch to the proposed substitute, assisted, then assisted should be included in the relevant product market.

The case law, your Honor, makes clear that not all substitutes must be in the relevant market. As the guidelines explain, "Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose. The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside of that group in response to a price increase."

And there is an example following this explanation, your Honor, which makes clear that, "This is true even though as much as two-thirds of the sales lost by one product when it raises its price are diverted to products outside the relevant

market."

So following these principles, the cases provide numerous examples of substitutes that are outside the relevant product market. *Swedish Match*, your Honor, the question was whether a product was just loose leaf tobacco or the market included moist snuff in a broader market for all smokeless tobacco.

In *Staples*, the issue is whether the product market was limited to office superstores or included all retailers and catalogs that sold consumable office supplies.

In *Visa*, the issue was whether the product market was limited to credit cards or was broader to include all forms of payment such as checks and cash.

And in *Heinz* in the district court opinion, the issue was whether manufactured baby food and homemade baby food were in the same market, just like pen and paper here and digital tax preparation.

The courts in all of these decisions recognized that there were larger markets, but defined smaller relevant markets for antitrust purposes. There were plenty of substitutes. If you need a package of printing paper, your Honor, Walmart is clearly a substitute. If you want smokeless tobacco, moist is a substitute for loose leaf. And the court recognized actually that some consumers use both.

These case law examples get at the core of market

definition. It's not enough that products are substitutes. It's not even enough that they compete to some degree. The real question is whether Product B would be a constraint on Product A. That's what the case law says, and that's what the economics shows.

Similarly here, your Honor, there may be a broad tax preparation market that everyone competes in to some extent, but the relevant market for antitrust purposes is not the broadest possible market but where you would expect to see price effects. So you need to start the analysis with the products of the merging parties, and that's digital do-it-yourself tax preparation.

As the case law and the guidelines make clear, it doesn't matter if even a large number of consumers move between assisted and digital. The issue is whether a monopolist of digital do-it-yourself products could expect to profitably raise prices by 5 or 10 percent. Applying this test, it's clear, as a matter of common sense, that assisted is not in the product market with digital do-it-yourself. And common sense is what the Court applied in *Swedish Match*. It said, "It does appear implausible that loose leaf users will substitute premium moist snuff in response to a 10 cent increase in the price of premium loose leaf because premium moist snuff would still be approximately $1.40 to $1.45 more expensive." It was only $1.40 cents, your Honor.

That's why the defendant's expert didn't apply a hypothetical monopolist test here. Because to satisfy the test, defendants would need to show that a 5 percent increase in digital product would be unprofitable because enough consumers would switch to assisted to make the price increase unprofitable.

Swedish Match found it implausible there would be a substitute over $1.40. Here the difference is more like a $140, your Honor. The average price of TurboTax, $55. Tax store, $200. H&R Block, it's $150. It's common sense, your Honor, that if the price of digital goes up 10 percent from, say, 44- to $48, there's not going to be -- it's not going to be unprofitable to do that because people are going out to tax stores which are at least a hundred dollars more.

You don't need an economist to tell you this. It's common sense. But we still did the economics. Our expert, Dr. Warren-Boulton, actually performed the hypothetical monopolist test. Their expert, Dr. Meyer, never did. She didn't do it because she wouldn't have found a result that she liked.

And if you look closely at what defendants are arguing, their market definition just doesn't make sense. Their argument depends on this Court finding that a 5 percent increase in the price of digital will be unprofitable because enough people will switch to assisted because of the price increase.

There is no evidence to suggest that's true. We know, as Mr. Smyth, H&R Block's former CEO, said that the choice between digital and assisted is not an economic one. As the parties' own documents make clear, the reason customers switch between digital and assisted is because of changes in complexity or changes in their lifestyle or life events that change a customer's need for certain tax products.

That's what Lance Dunn testified to. That's what H&R Block's president testified to. That's what they studied and found in all the studies they have done about why people switch. That's why Liberty Tax, which has both a digital and retail business, has said.

And it makes sense because, your Honor, if it was an economic choice -- think about this -- everyone would be doing digital because you can do it at home and it's much, much cheaper. Economics tells you that. But they're not. There are reasons why some people want digital, some people want assisted.

Which brings us to defendant's use of switching data in their proposed findings of fact. Now, the Merger Guidelines expressly say that switching data is a tool for implementing the hypothetical monopolist test. And when the defendants aren't criticizing the data, they are using it in the same flawed methodology that they used in the survey and simulator to try and obscure what the data reveal.

If you look at their use of IRS switching data at

Paragraph 50, page 12 of their proposed findings of fact, they first use an absolute number of taxpayers who switch between digital and assisted. I think that's 9 million people. This is inflated first by combining two tests of switching data. It's the two in the front. It's putting everyone together in the same place.

THE COURT: That math I could do.

MR. WAYLAND: Okay.

But even this combined total is less than 10 percent of total assisted and digital taxpayers. So there isn't -- even if you take their number at face value, there isn't that much switching between digital and assisted as a percentage of the actual users of the product.

Then after that figure, your Honor, they simply cite to a footnote. They say it's the IRS data, but what they do in the next several subparagraphs is they cite to a footnote in Dr. Meyer's report which compares shifts between individual digital products and all assisted products suffers from the same aggregation problem, which we've pointed out during her cross-examination. And as we showed at trial, there's actually much more shifting within the digital category than to the assisted category.

And critically, nowhere in any of their multi-page run of purported switching data which, by the way, comes from a number of sources, most of which are not the IRS, nowhere in

that do they suggest or cite any source that provides a basis to determine how much of the switching can be attributed to a response to price changes. And we know that a large part of the switching between these markets happens for reasons other than price.

Here are the facts. H&R Block and TaxACT experience more switching to TurboTax and each other than any individual assisted provider, with the single exception of H&R Block's retail stores. As the Court in *Swedish Match* pointed out, nothing could make a hypothetical monopolist happier than having diversion to another entity it owns. So that's if H&R Block is getting people to switch to their assisted store, they are happy about that. That's a good thing for them.

THE COURT: And I see on your chart, you're using, you know, a discounted and undiscounted rate. And when you say discounted, this is Dr. Warren-Boulton's discount?

MR. WAYLAND: Yes.

THE COURT: Which the defendants have contested as being -- I don't think they use the word, but my word -- arbitrary, for a number of reasons. And, you know, I've looked at Dr. Warren-Boulton's explanation for his discount, and I'd appreciate if you explain why he used a 50 percent discount.

The defendants say, you know, the actual data shows that it's a 25 percent -- if he's going to use a discount for people who switch to assisted due to complexity, it should be at

most 25 percent. But he uses 50 percent. And for the life of me, I've read his long report, I've read his short report, I cannot figure out where he got 50 percent.

Is it arbitrary?

MR. WAYLAND: No, your Honor. I think he cites to -- he cites to documents from the defendants in which they're estimating switching. He actually think it's conservative. He thinks that the documents -- and we'll go through some of these documents a little later, your Honor, in which the defendants themselves attribute most of the switching, most of the switching, to digital to non-price-related issues; in fact, much higher than 50 percent.

So Dr. Warren-Boulton actually thought his number was somewhat conservative because he said if you look at the documents, you could say 90 percent or more of it could be actually related to non-price reasons. And I think that's -- and we'll see some documents later, your Honor, where -- and we've seen the testimony of the -- in the documents and the CEOs and formers CEOs who said, as far as we can tell, all of our research says the switching has to do with something other than price.

So in some ways Dr. Warren-Boulton could have said, you know, "I'll discount the whole thing," but he said, "I'll be relatively conservative and take 50 percent." So that's where it comes from, your Honor.

THE COURT: Well, I know it's the government's position that it's a conservative discount and, you know, because of that may, in fact, underestimate switching. And, of course, you know, the defendants argue that it's overestimating the switching between TaxACT and H&R Block's digital material.

And I'm really trying to sort out where the 50 percent comes from, whether it should be 25 percent, and ultimately --

MR. WAYLAND: It doesn't matter that much actually. Even if you had a 25 percent discount versus 50 percent, it doesn't affect the actual harm calculated under the merger simulation by that much. Dr. Warren-Boulton says that in his report. He gives a range of harm. You still get a fairly high positive harm even if you had a 25 percent discount suggesting that there was less diversion.

But as I said, your Honor, I think the evidence is quite clear that the parties believe that virtually all of the switching is non-price related. And to give even half credit for that is pretty conservative by Dr. Warren-Boulton. There's no evidence actually that, as we've gone through already and as we'll go through as the morning proceeds, there's no evidence that any of the switching between digital and assisted is because of price differences. In fact, the evidence points completely the other way.

So to even suggest that half of the switching data is based on pricing is actually pretty favorable for the

defendants, your Honor.

THE COURT: And the reason that you're saying that is because putting aside what people and documents have said about how they are interpreting the IRS switching data, the IRS switching data basically is just comparing, you know, people who in one tax year had either a simple return and then it increased either in -- I think in Warren-Boulton he uses intermediate or more complex return the next year. So it's really an extrapolation from that about why they switched.

MR. WAYLAND: Exactly. Even the IRS categories are fairly blunderbuss. There's, like, three categories of complexity which, as Dr. Warren-Boulton explains in his report, don't get that granular about the reasons why.

But when we get to some of the price data, your Honor, I think this will become clearer by showing that as the price of digital went one way and the price of assisted went the other way, there was no significant share shifting which suggests again that Dr. Warren-Boulton is right and the defendants are right when they have concluded that most of the switching has nothing to do with price.

And price switching is what diversion is all about. That's why if you give a 50 percent discount, you're being pretty generous to the defendants.

THE COURT: Okay. Well, before we get into all that data, I mean, the defendants make, you know, an argument that

given the predictive nature of an antitrust analysis and what my job is in this case, I, you know, take to heart, which is that Dr. Warren-Boulton is basing his analysis in his 2007-2008 data in a very dynamic market with shrinking pen-and-paper pool and, you know, there are changes going on in this marketplace. And the defendant's argument is that Dr. Warren-Boulton is basing his whole analysis on outdated data.

So how -- you know, particularly with the emergence, you know, of hybrid products and so on. So how do you respond to that?

MR. WAYLAND: In several ways, your Honor.

First of all, as the defendants will have to admit, there hasn't been any significant change in market share breakdown between assisted and digital.

THE COURT: Even in 2010?

MR. WAYLAND: Even in 2010, your Honor, it's been -- the assisted's been flat.

Number two, as Dr. Warren-Boulton explained, there is a dynamic part of his analysis in the sense that it takes into account average prices that are coming down.

And just to go back to the first point, your Honor, there -- defendants would have to come forward and say -- with something else, some other analysis that says here's why he's wrong, your Honor, because look at 2010 and '11. It's gone crazy. You know, suddenly everyone is switching over to digital

or assisted or vice versa. Suddenly the prices are going crazy. Suddenly we're seeing some connection between digital pricing and changing in assisted. But there isn't any evidence of that your Honor. So that's one issue.

Second issue, this whole idea of -- which they have been trying to sell, your Honor, which is there is some kind of blurring going on between assisted and digital. Number one, let's talk about the relevant time frame, okay. Under the former Merger Guidelines, they actually specify two years -- economists still look at that -- and their own president got on the stand, your Honor, and said, "I can't promise you anything more than three years down the road because who knows what will happen in three years," all right.

So let's be generous and say it's somewhere between two to three years of prediction. What are the facts that we know about this, your Honor? We know that for the last nine or ten years, H&R Block's been trying to introduce some kind of product that blurs the two, and they have been completely unsuccessful. Completely unsuccessful.

We showed the documents, your Honor. It's not going anywhere. They've tried and they've tried and they've tried. And, your Honor, I think that is actually strong evidence that supports the view that these products are fundamentally different. Some people --

THE COURT: Yeah. But I think you sort of overstate

that a little bit, Mr. Wayland, I mean, because, you know, I think that the defendant's brief clarified that they haven't been trying to do this since 2001 when --

MR. WAYLAND: When Best of Both came in, your Honor, which they put a lot of weight on.

THE COURT: Well, actually, I think in a footnote in their brief they say that Best of Both actually just started in 2010.

MR. WAYLAND: That's not right, your Honor.

THE COURT: Well, I know I read that because I remember thinking, gosh, I thought that Best of Both had been tried for over a decade.

MR. WAYLAND: It's the same product under a different name, your Honor. They've been trying it for years. We have lots of cites, your Honor, going back where they have been trying this hybrid product for a very long time. And we cited your Honor to their conclusions that we've been trying this for a long time, and we can't get any traction. 100,000 customers.

THE COURT: So I think the footnote in the defendant's brief, which I can't put my finger on right now, basically said that you were relying on a document that had a typo which was one of the white papers I think that had been submitted to the government that Best of Both had been in existence since 2001; when, in fact, it was a typo, and Best of Both had only been in existence since 2010.

Your argument is if it was only called "Best of Both" -- the hybrid product was only called "Best of Both" in 2010, but they did have other products that went back to earlier?

MR. WAYLAND: Yes. Much earlier, your Honor. If you look at our cites in the record, your Honor, you'll see there are analytics of it. It's not talking about what happened in 2010. It's talking about what happened for a number of years and their inability to get any traction. That was the testimony of the witnesses as well, your Honor.

There simply is no evidence. There is plenty of evidence that it doesn't work. There's plenty of evidence that they want to keep trying. But if your Honor is talking about making predictions, I think you have to base it on the evidence that's before the Court. And there is no evidence that there's going to be any significant change between digital and assisted in the relevant time period, which is two to three years. None at all, your Honor.

While you're asking me about Dr. Warren-Boulton's report, I think it's -- let me talk to you about the report a little bit and then compare it to Dr. Meyer's because I think it's important for the Court to understand that.

Dr. Warren-Boulton acknowledged the limitations in what he was doing in his report. There are limitations in merger simulation. There are limitations in using the IRS diversion

data. It's not a direct measure of price-related diversion. He explained the basis for his 50 percent discount, recognized the limitations of it.

He's a careful economist. Here's the limitations of what we're doing. It's not perfect, but these are the tools that we, as economists, have to use. And you can always criticize. Well, he should have used a different number. He should have used that number. But he's a careful economist. He used the information, was honest about what he was doing.

And remember, Mr. Robertson during the last cross-examination focused on his V code issue. He said, "Well, you didn't account for 20 percent of the people." It's as if it was a surprise, like an "I gotcha" moment. It's in his report, your Honor. He said --

THE COURT: I know. I see.

MR. WAYLAND: He's got it.

And I think it's important because -- to compare with Dr. Meyer. She incorrectly claimed in her report that the price simulator included prices for all of the options. She had to admit on the stand that that wasn't true. She failed to reveal that there was a wide disparity in diversion ratios depending on what part of the simulator you used. And she had no recognition, no economist careful thinking, about her claim that the highest diversion ratio was from a digital product to the most expensive assisted product.

Where is the explanation? Where's like, "Oh, that's an interesting phenomenal. How do we explain it as an economist?" No attempt to apply economic tools. Just an unquestioning acceptance of a result which actually makes no sense.

So I think if you compare the two, you have a careful economist who admits the limitations of his work on the one hand, explains the reasons for doing it, versus an economist who doesn't apply any of the normal tools, who exaggerates, in a generous way, her findings in her report, and exercises no independent thought. So that's how I think you should look at the economist reports here, your Honor.

In any event, again, to talk about the diversion ratios, and here's -- when H&R Block actually did a study and did a survey and tried to come up with some answers about migration between H&R Block retail and digital, here's what they said: Most clients stick with their platform. Of those who return, 98 percent of retail clients return to retail, and 95 percent of digital clients return to digital.

Now, at some level, I think defendants seem to know that the price difference matters. But they can't seem to reconcile their conflicting views. Let me show you some of the conflict here, your Honor.

This is from their proposed findings of fact. Paragraph 106: "Competition between assisted tax preparation and digital do-it-yourself has dramatically intensified from

2009 to the present and will continue to intensify." Okay. That's competition between a relatively cheap product and a pretty expensive product.

Then at Paragraph 135, "Within the tax preparation market, premium products and value products largely appeal to divergent customer segments. The market is segmented by price, with high-priced solutions and low-priced solutions in different markets."

You can't have it both ways, your Honor. You can't have it both ways. You can't say that there's a market -- an active market -- between a high-priced tax preparation product, on the one hand, and a low-priced different, functional product on the other, and then say there's no competition within that market. It just makes no sense, your Honor. And I think this is enough right here, your Honor, to toss their case.

Now, it's also different from what they were saying in May, of course, when they said that H&R Block -- and we've shown this before, your Honor, but it's worth showing every time we're in front of you because this is what they said to the government, that H&R Block recognized that digital tax preparation serves do-it-yourself customers and does not adversely affect it's much larger assisted tax preparation business.

Again, your Honor, all of this evidence, you know, supports Dr. Warren-Boulton's use of 50 percent. They keep

saying it doesn't -- there's no connection between the two. Warren-Boulton gave them half credit for it.

Now, Jason Houseworth, their head of digital, who didn't testify --

THE COURT: I know you've criticized the defendants for not calling Mr. Houseworth as head of digital on relevant market definition. Is that really a fair criticism?

I mean, why couldn't the government have called them? I mean, you called a lot of their other people. You could have called them too.

MR. WAYLAND: We could have called them, your Honor, but, number one, I think we had -- didn't have the burden of rebutting our presumption so I don't think we had to call them.

Number two, they put on people who testified to market definition, which makes no sense, which is inconsistent with their documents, inconsistent with the testimony of Mr. Houseworth. And, you know, there's a reason for that; because Mr. Houseworth would have had to agree, as he did in his deposition, that he has a different view of the effect of assisted and digital.

All right. So we've been talking, your Honor, about price sensitivity, and price sensitivity is one of the *Brown Shoe* criteria to use, the practical indicia for market definition. As I said, there's no evidence in the record showing that the prices of digital or assisted are sensitive to

each other. No one's testified that they are, and the record is devoid of any documents that suggest that.

And I think even if there were some evidence of price-based switching, the *Swedish Match* court even acknowledged that if there were at least some customers that were willing to switch on the basis of price, that wouldn't be enough. There was even some price overlap between the two products there. But the Court found that the amount that is the difference in price would be -- the difference between them would be incapable of defeating a small price increase by loose leaf producers. That's the case here. So let's move on to the other *Brown Shoe* indicia.

The nature of the products, we've discussed at some length, your Honor. I'm not going to repeat it. They are fundamentally different products. They get produced differently. They get differed to clients differently. They are a fundamental different way of doing your tax work. I think we've established that. I'm not going to belabor it here.

Outlets they employ. That's a fact that we haven't really talked about, your Honor, but obviously the outlet for assisted preparation, as you walk into an office, it's brick and mortar, as they have always said. So outlets for assisted preparation are brick and mortar. You go and you sit down with somebody; that's how they deliver the product.

The outlet for digital, obviously, your Honor, it comes

over your line. You get on your computer. You can go to the store and buy it and stick it in your computer. So that's a *Brown Shoe* factor.

I think importantly, industry or public recognition courts look at how the merging parties and other industry participants describe their business and competitors. The Court has seen and has before it a substantial volume of documents in which the defendants identify a digital market and describe each other's competitors.

The defendants response is this: There are documents that refer to competition within a broader market and even reference Intuit's attempts to attract business from assisted stores, although apparently without much success. This is fundamentally wrong because it ignores the smallest market principle. And both the hypothetical monolopist test and the parties' admissions tell us the smallest relevant market is digital do-it-yourself.

This is not a case, your Honor, where the government is trying to tease out a smaller market on the basis of some abstract constructs or models or some just getting an economist to say that the market's not what the parties say it is. The defendant's words and conduct identify the market. I said at the opening, we didn't make this up. It's the parties' own words and a way of doing business that proves the market.

And I think it's very important, your Honor, to note

which party here is asking the Court to ignore what's in the documents. The defendants are asking the Court to accept that defendants didn't really mean it when they said over and over and over again in every form of ordinary course business documents that digital is a separate market, and that the big three are their closest competitors. They say forget about that. Remember Dr. Meyer got on the stand and said when they said that, they didn't really know what antitrust analysis means so you can't -- don't take their word for it when they said markets are digital.

And we're not asking the Court to ignore the documents that defendants offer that talk about a larger market. As the cases made clear, there may be larger markets, and there are substitutes out of the relevant product market, but the point is, the hypothetical monopolist test, common sense, the parties' own admissions, the way they look at it, establishes the relevant market. It's smaller than the broader tax market. As I said, which side is asking the Court to ignore what the documents say? It's the defendants.

Now, in the *Staples* case, your Honor, the Court made quite clear that the fact that the merging parties recognized that they face competition outside of the superstore market did not bring that competition into the relevant market for antitrust purposes. The Court in *Staples* looked to documents to see what is the competition defendants focused primarily on.

Let's do that here.

The Court in *Staples* -- I'm just substituting in the words here. H&R Block and TaxACT's documents show that both H&R Block and TaxACT focused primarily on competition from digital do-it-yourself. In document after document, the parties refer to, discuss, and make business decisions based upon the assumption that competition refers to other digital do-it-yourself. For example, H&R Block's 2011 strategy update refers to the big three. That was the same words that the defendants had used in *Staples*, and the Court picked up on that. And we've shown the documents before, your Honor.

Government Exhibit 492 at page 8, H&R Block is separately tracking digital and assisted share. Why aren't they together? Because they see them as different, separate markets. Government Exhibit 492 at page 10, they track their assisted competitors differently than they track their digital competitors. Government Exhibit 217, this is October 25th, 2010. That's what Mr. Houseworth is observing. When TaxACT is gone, there will be -- with TaxACT off the market, all players remaining make up less than 10 percent of the digital share. The market obviously there is digital market. He is not thinking about tax stores or CPAs. He is looking at TurboTax, TaxACT, and the other do-it-yourself firms.

And by the way, he is not analyzing the state market there either, your Honor. You'll see document after document,

there's no reference to the state filings. Nobody looks at the market that way.

And by the way *Visa*, your Honor, I think is a good case on this because *Visa* the court said, well, how should we look at the markets? Let's look at the way the defendants look at the markets. That's the way you start.

When we were thinking about the transaction, your Honor -- we saw this before in the opening I think -- Hart-Scott-Rodino, digital precedence for two and three merging, the parties understood what markets they were talking about.

Government Exhibit 8 -- that is Government Exhibit 8.

And by the way, I think this is a terrific example, your Honor, to a number of questions you've already asked, and that's the market share chart from Project Island.

So, your Honor, this is a document prepared for the analysis of this transaction. The senior executives are sitting around discussing the effect of the transaction. What do they have? Market share. What's the market? Digital. Is there any reference to tax? No. To state tax? No. Is there any reference to assisted? No. Any reference to pen and paper? No.

How do they calculate it? They calculate it by looking at digital. TaxACT is number three in the overall digital market and number two in the high-growth online segment. TaxACT is the same. We saw many documents, your Honor,

identified who their major direct competitors are. When TaxACT analyzed its threats, they had a whole analysis. We can't show this to the audience because it's been marked as confidential, but your Honor as it. A whole list of threats that they see. They are all digital, and it's either H&R Block or TurboTax.

Another factor that the Court looks at under *Brown Shoe* is distinct pricing. That's a little bit different than the price sensitivity issue, your Honor. The simple fact is that the prices of digital and assisted move independently of one another. We saw many competitive analyses, your Honor, during this case in which the parties are comparing prices. Virtually all of them are limited to comparisons of digital products, and they're limited to the big three. That's why defendants both track the prices of their competitors, and it's only the big three.

Now we're going to show -- and we're just flipping through them, your Honor, you've seen them before -- competitive price comparison. It's only the big three. Here is a document in which they are analyzing whether they should have a price increase. This is TaxACT. This is actually very insightful, your Honor.

"The price increases will net additional resources while still maintaining an advantage in cost relative to our main competitors, Intuit and H&R Block. We can still claim value leader." So here they are talking about a price increase.

What should we do? And what do they care about? They care about Intuit and H&R Block. They don't care about assisted. They don't care about pen and paper.

THE COURT: And remind me, is this document from H&R Block itself or is this from their outside consultant?

MR. WAYLAND: No, this is TaxACT's own internal analysis of whether to raise prices or not.

THE COURT: Okay.

MR. WAYLAND: Now we're going to go to two charts, your Honor. And these charts, one is HRB's average assisted price versus its average digital price.

And you'll see, your Honor, that the average digital price has been somewhat flat while there's been an increase in the average assisted price. It hasn't affected any movement in shares, right. There's nothing happening that they say should happen. If these prices go up, you should have seen a huge movement to digital if they are really price sensitive, okay.

In the next chart, your Honor, we've actually done a 10 percent increase in HRB's average digital price. So what we've done is we've raised the price -- the average price -- 10 percent, and you'll see that it just doesn't make any sense that raising the price is going to shift people from assisted to digital with this price gap and as the price of assisted went up.

In any event, your Honor, we -- you don't have to take

our word for it. The record is unanimous. Digital firms don't even consider assisted when setting the prices. We have in the book -- and I'm not going to go through it, your Honor -- it's --

THE COURT: Just so I understand what I'm looking at here, this HRB average assisted price versus 10 percent increase in HRB average digital price, is this --

MR. WAYLAND: You'll see at the bottom, your Honor, there are two lines. The first line, the bottom line, is gray.

THE COURT: Right.

MR. WAYLAND: That's from the prior chart which says -- that was the actual current prices. And what we've done is simply lifted the prices 10 percent as if they had increased their prices 10 percent just to suggest, your Honor, that --

THE COURT: What's generating this? Is this the --

MR. WAYLAND: No, these are actual prices.

THE COURT: Right.

MR. WAYLAND: These are actual prices at the bottom. We simply increased them by 10 percent and graphed them to show that if there had been a 10 percent increase, the idea that there would have been some change just doesn't make any sense because of the gap.

It's just a visual, your Honor. It's not a --

THE COURT: Okay. Well, this is pure speculation on your part.

MR. WAYLAND: No, no, not at all. It's real -- no, no, no, your Honor, it's not speculation at all. It's just simply illustrating the point, which we could do without even looking at this, that there is a gigantic gap in price between digital and assisted. And this just illustrates how big that gap is. If you increase the price by 10 percent, you don't get anywhere close to the price of assisted.

THE COURT: I see what you're doing.

MR. WAYLAND: Okay. That's all we're doing, your Honor.

THE COURT: I understand.

MR. WAYLAND: In any event, your Honor, we have collected in your book, but I'm not going to review it because you saw it at trial, you've seen it in all the evidence we presented, you heard it in the testimony, H&R Block, TurboTax, TaxHawk, Tax Slayer, Liberty, TaxACT, they all said they don't set their assisted price -- their digital price on the basis of assisted. That's critical, your Honor.

How can assisted be a constraint on digital when no digital firm even thinks about assisted products when setting their own prices?

Pen and paper is no different. I'm not going to spend much time on it. Defendants have a new name for it in their papers. It's called "self-supply." Last time it was "manual filing." I guess you supply your own pen and paper. And they

want to compare pen and paper to the corporations in *SunGard* that had vertically integrated with their own disaster backup computer systems. And so they say, "If consumers could turn to self-supply" -- just getting their own pen and paper -- "then it has to be in the market." But they misstate the case, your Honor.

Judge Huvelle in that case was careful to point out that its holding didn't extend to individual consumers, and that individual consumers can't vertically integrate.

Here's what the defendants claim: "If consumers would turn to self-supply" -- which in this case is manual tax preparation -- "then self-supply is to be included in the market." And they cite *SunGard* for that.

What did the Court say, Judge Huvelle? "Vertically integrated corporations should be included in product market but, by definition, individual consumers cannot vertically integrate by producing a product that they would otherwise have to purchase." The pen and paper is not a product. It can't be in the product market.

The Court in *Heinz* made clear that only real products belong in a product market. They make baby food. You can't say to a court don't worry about know an anticompetitive transaction; just make it at home. You want to make some squashed peas for your baby, it's not the same as buying it in the jar from Heinz.

In any event, the record is clear that pen and paper is not a constraint. As you know, we've gone through this evidence before, your Honor. I think this is a very telling chart. Government Exhibit 1155, it shows that the source of pen and paper is shrinking. There's absolutely no correlation between any change in price. Simply people are shifting --

THE COURT: But Mr. Wayland, I mean, can't you accept the proposition that pen and paper may be a constraint on pricing without necessarily saying it's part of the relevant market?

I mean, do you have to reach the conclusion that pen and paper is not a constraint on the market, as you just said, in order to also reach the conclusion that it's not part of the relevant market for antitrust --

MR. WAYLAND: Absolutely not, your Honor. At some point, obviously, and as Dr. Warren-Boulton I think explains, at some point if the price was too high, people are going to go and do something else. If it's $150 and people say, look, I can -- that's just too much, right, the relevant question is, though, would they switch back to pen and paper if the price goes up 5 or 10 percent? And there simply is no evidence that they would, your Honor. That's the relevant question.

THE COURT: I just wanted to make that clear because --

MR. WAYLAND: Yes. And we agree with that.

THE COURT: Okay. Because of your statement that it is

no constraint -- I don't think that's commonsensical either.

MR. WAYLAND: Yeah, it's no relevant constraint, your Honor.

THE COURT: Right.

MR. WAYLAND: All right. So we're showing Government Exhibit 1151. Again, this goes both to the pen and paper and the assisted issue. And again it goes back to the question you asked about Warren-Boulton's assumption about the 50 percent discount. This is H&R Block's own view of what's going on in the world, and it summarizes what the witnesses have said and what a number of other documents have said.

"Although online has been growing, that has not been at the expense of assisted. Instead, the growth has been at the expense of software and pen and paper. Online is not growing materially at the expense of assisted. There is simply a shift within do-it-yourself set of options."

So, again, it goes to the point that there's nothing happening that suggests that any price change is affecting market share between assisted and digital.

Okay. Now, there's another slide, "Digital Assessment," I think. This is, again, they are getting at the same issue. "Digital growth will continue to come primarily from pen and paper." And I think, your Honor, this actually goes to your question.

THE COURT: Could you just identify what this

document -- this is not the TS10 "Market Dynamics" document, right?

MR. WAYLAND: This is Government Exhibit 1151.

THE COURT: Okay. So I'm looking at GX128.

So what's the name of this document?

MR. WAYLAND: I don't know, your Honor, but we'll find that for you. We'll get it for you.

THE COURT: Okay. I can find it.

MR. WAYLAND: I think this also goes, your Honor, to the question you asked about how quickly things are going to change. And you'll see that they are projecting out to 2015, your Honor. And they say, "Digital growth will continue to come primarily from pen and paper." You'll see that there is no assumption that there's going to be any significant, dramatic shift in the industry all the way up through 2015.

Your Honor, I think it's -- I think the evidence between Dr. Warren-Boulton's hypothetical monopolist test and the factual evidence in the record shows that digital is the correct market here. I'm not going to spend much time on Dr. Meyer's answer to all of this because I think she was discredited in cross-examination. Her opinions rest almost exclusively on the 2011 litigation survey and the pricing simulator.

As we demonstrated in our papers and during cross-examination, neither provides any basis for her opinions.

She claimed that both provided a price basis to quantify a price-based diversion, but she admitted that the 2011 survey never asked about a change in price. And the pricing simulator survey didn't provide prices for a quarter of the choices.

Now, defendants tried to minimize the significance of the simulator's flaws, and they claim that Dr. Dhar said that the lack of a price wasn't a big deal. They say that in their papers. But Dr. Dhar wasn't even asked about the simulator at his deposition. His initial report was about the 2011 survey. And in his second report, what he said is, "I don't have enough information. I don't have the question. I don't understand what's going on to have an opinion about the 2009 simulator to form an opinion."

And by the way, here's the -- they have a cite. Here's what they actually cite as support for their proposition that Dr. Dhar's testimony somehow validates the simulator. Here was the question: "And you mentioned accountant is probably the least time intensive."

Answer, "That's why I said time and money. So, yes, it's the least, but it also costs the most perhaps and so they can afford it or not."

That's the quote, your Honor, that supposedly suggests that Dr. Dhar validated the pricing simulator, which he wasn't even asked about.

And Dr. Warren-Boulton didn't support the pricing

simulator either. His report -- his rebuttal report -- and his testimony in court could not have been clearer. He was highly critical of the simulator. In his own words, "The simulator produced results that violated basic economic principles." He is talking about the fact that as the price of H&R Block product went up, they actually sold more products.

And then Dr. Warren-Boulton took out the faulty data and using Dr. Meyer's methodology found that diversion between the parties was significantly higher than the 1.2 percent she found. He found it was 22 percent. A higher number than he used in his own analysis.

And what was his final conclusion? The simulator was an unreliable estimate of diversion ratios so suggest that he somehow supported the simulator is just not correct.

So there's a vast record here, your Honor, and it shows that digital is a relevant product market. There's the big three, and those big three are driving competition with one another. That's the competition everyone is focused on. H&R Block digital isn't competing with assisted. If it is, then it will surely have an incentive to get rid of TaxACT because TaxACT would be taking clients from assisted, and it's a much more profitable business. None of what defendants actually say make sense on that.

So let's turn to competitive effects. Well, before we go there, your Honor, one more thing. If you actually accept

what Dr. Meyer says and what the defendants are arguing here, here's what result you get: You get an all tax preparation market. And in that market, you could combine H&R Block, TurboTax, and TaxACT, and you would get an HHI of 1499. And under the guidelines, that transaction would be unlikely to have adverse competitive effects and ordinarily require no further analysis, your Honor. That's what they're suggesting here.

That can't be right, and that's why Dr. Meyer can only rely on a survey and simulator that are flawed. If they were right, they wouldn't produce the results that Dr. Meyer claims they do. Now on to competitive effects.

If our market definition is right, your Honor, post-acquisition the HHI is 4691. We would be combining two firms that will have 28 or 31 percent of the market, depending on how you calculate it. Increase of 400 in the HHI. At these levels, we get a presumption that the transaction is anticompetitive.

We've talked about the case law. Let's look at our chart that summarizes it. *Heinz*, 65 and 32 percent. *Swedish Match*, 60 and 30. *CCC Holdings*, 65 and 35. *Cardinal Health*, 40 and 37. And our case, 62 and 28. I didn't include *Coca-Cola*, which is about 38 and 4.2.

And what do the courts in this District say about that? *Heinz*, 65 and 32. "Creates by a wide margin a presumption that the merger will lessen composition."

Swedish Match, 60 and 30. "Because of the market share and concentration levels, the Courts find a presume under Philadelphia National Bank, the transaction is likely to substantially lessen competition."

CCC Holdings. "Because of the high market concentrations in HHI, a strong prima facie case that the merger would violate Section 7."

Cardinal Health, 40 and 37. "Court must presume that the proposed mergers pose a risk to competition."

The market share and market concentration facts of this transaction fit squarely within the bounds identified by these cases establishing a strong prima facie case and thus the burden of production shifted to plaintiffs to rebut that presumption.

Under the case law, the defendants were required to come forward with evidence showing that the high market share and concentration numbers are not an appropriate measure of anticompetitive effect. If defendants failed to make that showing, your Honor, the government was not required to do more; the transaction is presumptively anticompetitive.

Defendants ignore this clear authority at pages 13 and 15 of their post-trial brief. They suggest the government had the burden to, quote, "show that the transaction will lead to anticompetitive effect," and to prove that, quote, "defendants will not raise prices or reduce quality." At page 18 they claim that plaintiffs had to prove that there would be coordination.

Again, the defendants are wrong about the law. To rebut the presumption created by high market shares, defendants were required to prove, as the *Swedish Match* court said, "an increasing concentration will benefit consumers." This is a particularly heavy burden given the market share and concentration present here.

Here's what Judge Collyer explained in CCC: "Absent extraordinary circumstances, the ordinary presumption of coordinated effects holds and defendant has the burden to prove otherwise. Because the government has established a prima facie case, the burden is on defendants to demonstrate structural barriers unique to this industry that are sufficient to defeat the ordinary presumption of collusion that attaches to a merger in a highly concentrated industry."

As Judge Gesell explained in the *Coca-Cola* case, "In mergers involving high market concentration, the use of bare market statistics alone is presumptively justified" -- and by that he meant market share -- "and to rebut that presumption, evidence suggesting otherwise must be clear and specific."

As these cases make clear, the fundamental principle underlying the Clayton Act is that highly concentrated markets lead to tacit or explicit collusion. That's the starting premise as Judge Collyer explained. It's not something the government has to prove. It's a given.

After trying to shift the burden to the government,

defendants say that the transaction will not have anticompetitive effect for five reasons. The first two are essentially the same: H&R Block and Intuit will compete against each other, and the merger will make H&R Block a better competitor, and it will be more innovative.

This kind of answer was explicitly rejected by the courts in this District. In *Heinz*, the Court of Appeals considered the merger of the number two and number three firms with market shares very similar to what we have here. "In order to rebut the presumption, the defendants claimed just" -- as the defendants claim here -- "that the merger would allow for increased innovation and make the merged entity a much stronger competitor against a larger number one firm." We've heard it day after day after day here, your Honor. Exactly the same argument.

The *Heinz* court rejected that argument, just as the Court should here. What did the court say? "In the absence of reliable and significant evidence that the merger will permit innovation that otherwise could not be accomplished, the district court had no basis to conclude that the FTC's showing was rebutted by an innovation defense."

And we've juxtaposed that holding from the Court with Government Exhibit 101, which summarizes what we've said. H&R Block can do this on its own. There is nothing about this merger that's unique, that's going to change the market in any

way. We have lower prices from TaxACT. They are very aggressive in marketing. They are very efficient in the software development platform. There's nothing that's coming from this transaction that could not otherwise be accomplished without it.

"If we do not reach agreement with TaxACT" -- this is the president -- "I will operate our digital business as a separate business unit and move them to another part of our building and execute on our own plan, which is to improve our Web site, to convert more visits to customers, drive more costs out and more aggressively market our free product."

This is similar to the admissions of other former CEOs and the current CEO. These are things that TaxACT already does, and that H&R Block can do on its own. So *Heinz* says they haven't met their burden. In *Heinz*, in fact, your Honor, the Court reversed in part because "the district court failed to specify any structural market barriers to collusion that are unique to the baby food industry. Its conclusion that the ordinary presumption of collusion in a merger to duopoly is clearly erroneous."

Defendants here, your Honor, have not identified any credible structural barriers to collusion. To the contrary, all of the factors that courts in this District have recognized make coordination more likely. Again, there is a roadmap laid out in the case law.

Here are the factors that support likely coordinated effects that have been identified by the courts in this District: Price transparency, price leadership, product homogeneity, lack of sophisticated buyers, frequent, and very small transactions. All of those factors are present here, your Honor. Price transparency, you've seen -- you can go on the Web today, your Honor, and find out the prices of these prices. They compare their prices in charts they can produce in a moment's notice.

As we know, the products themselves are fairly transparent. Everybody knows what everybody else is doing. Product homogeneity, we know about that, your Honor, because the presidents of both companies got on the stand and said our products are pretty similar. We brand them differently, but underneath they are pretty much the same products.

Lack of sophisticated buyers. It's 140 million taxpayers, your Honor. Frequent, very small transactions. This is not the kind of case, your Honor, where courts have found structural barriers to collusion. Those kind of cases, your Honor, are where there are negotiated contracts between very sophisticated and small numbers of buyers.

With respect to price leadership, a point we haven't focused on too much, your Honor, in the case, but it's quite clear. Price leadership is when there is evidence in the industry that prices are traveling together between the leading

firms. This is a defendant's own exhibit, which they have used a number of times. It shows the tracking of prices between H&R Block and Intuit, the two firms that will be left after the merger happens. Clearly, there's price following. Remember Mr. Bennett testified that, hey, if they go up a dollar, I'll go up a dollar. So clear evidence of price leadership in the industry.

So, your Honor, under the case law, the plaintiffs can't -- the defendants can't come close to meeting their burden of showing that coordination is unlikely. Indeed, in their own documents, the defendants have recognized the benefits of coordination.

Before we get to look at that evidence, your Honor, let's again -- courts in this District, *CCC* -- I think this also is instructive. "With only two firms left in the market" -- this is Judge Collyer -- "the incentive to preserve market shares would be even greater, and the costs of price cutting even riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom." What is H&R Block thinking about? Exactly the same thing.

"The other possible strategic consideration is that Intuit and H&R Block together would have 84 percent of the digital market, and we both obviously have great incentive to keep this channel profitable."

Jump down ahead. They want to avoid a race to the

bottom, exactly what Judge Collyer identified as a potential problem when you have a two-firm duopoly.

It's exactly the kind of evidence worrying about how we can stop a race to the bottom, how we can avoid lowering our prices, how we can avoid the market moving in the wrong direction that Judge Sporkin was concerned about in *Cardinal Health* where the government presented evidence that the merging parties wanted to "ease pricing pressures and return prices to rational levels."

That's what Judge Sporkin was concerned about. It's exactly what's evidenced in the documents here. There is a concern that H&R Block and Intuit want to get this industry back to where they like it, where they can charge the higher prices for their branded product and not have to worry about the race to the bottom that's free and aggressive free has brought about. As Judge Sporkin said, this type of evidence supports the conclusion that a merger "would likely curb downward pricing pressures and adversely affect competition in the market."

Now, defendants say another reason why coordinated effects are unlikely is because TaxACT is not a maverick competitor. As an analytical matter, it doesn't appear that this issue has anything to do with the ability of firms to coordinate after the merger. There's no case law that suggests that showing that an acquired company is not a maverick meets the defendant's burden in showing that coordinated effects are

unlikely. It has more to do with the effect of removing an aggressive competitor from the market, and that effect could play out unilaterally or in a coordinated response from the remaining players.

In any event, again, turning in the case law: It's clear, as the Court said in *Staples*, "eliminating a particularly aggressive competitor in a highly concentrated market increases the risk of anticompetitive harm." And the Court, even though the plaintiffs say it's not -- and the defendants say it's not in the case law -- this is *Staples* -- enjoin the acquisition of what the Court described as a "low-priced aggressive maverick of the group."

There's no question that TaxACT has been a particularly aggressive competitor. We have used the term "maverick" to describe its behavior because that's how TaxACT described itself, and that's how the Court in *Staples* described an aggressive competitor. But the label doesn't particularly matter. Call it an aggressive competitor or call it a maverick; its elimination in this market is particularly problematic.

There's no doubt that TaxACT has long been a leader in product and marketing innovation and an aggressive competitor on price.

From an antitrust perspective, that's important for two reasons. First, it shows that TaxACT was a constraint in the market, just as the defendant's expert admitted, and helped to

keep prices down and introduce product innovation.

Second, antitrust law and economic theory predicts that when you eliminate an aggressive competitor, it makes coordination, whether tacit or express, easier.

Now, defendants get the standard right. To apply a maverick theory, one must show that one of the firms has behaved as a maverick and that's its incentives will change post-merger. And, in fact, the defendants in their various submissions to the Court have essentially admitted that TaxACT has been a maverick. They've described TaxACT's rise in popularity, aggressive marketing, sustained low prices, and its introduction of an entirely free product. And then they admit that TaxACT offered innovatively priced products in 2003 and 20005 and continues to be a price leader.

So they've acknowledged that TaxACT has been aggressive. Call it a maverick, call it an aggressive competitor. And the record shows that they continue to be an aggressive competitor, a maverick.

TaxACT sustained low prices. Defendants make it seem like you can only be a maverick with respect to prices the first time you offer low prices. That's not the case, your Honor.

THE COURT: If I can just stop you, pause for a second because, I mean, it was the government that was pushing TaxACT as a maverick at the outset of this litigation.

MR. WAYLAND: And we still are, your Honor.

THE COURT: And you still are.

And I know the Horizontal Merger Guidelines, you know, have this special, you know, reference to maverick in the 2010, you know, guidelines. And, you know, it has appeared to me through the course of this trial that many of the players in this market, including Block and including Intuit, are very aggressive competitors.

I mean, I don't think, you know -- if you look at, you know, the steps that TaxACT has taken for, you know, free for all on its Web site, free for all on the FFA, you know, yes, those are sort of innovative marketing strategies that it took were constrained on the market, but you can also look at a number of things that Block has done and Intuit has done that, you know, could also be considered maverick-like behavior.

You know, in fact, I think even the government talks about Block and Intuit being the first in the market to offer maximum refund guarantees, which is also, you know, sort of both a marketing strategy and a pricing -- you know, puts a constraint on the market that people have to respond to. In fact, in that case, TaxACT had to catch up to them as opposed to being the leader.

And I'm sort of trying to figure out when you have a market full of these very aggressive competitors, how am I supposed to evaluate the fact that one of -- you know, I don't feel like I have to put one of them on a pedestal as the

maverick or -- you know, because they are all aggressive competitors so, I mean --

MR. WAYLAND: Several responses.

THE COURT: -- is it really that important to your analysis to call TaxACT a maverick?

MR. WAYLAND: Call them a maverick, no, but I think it is relevant that they have been aggressive competitor because the case law recognizes that it's particularly problematic in a highly concentrated industry to lose an aggressive competitor, particularly an aggressive competitor that's number three right now.

So I think that is relevant, your Honor.

THE COURT: So is it really more the market share that TaxACT has --

MR. WAYLAND: It's a combination, yes.

THE COURT: -- in a market of a bunch of aggressive competitors, and that that's really one of the issues --

MR. WAYLAND: That's one of it, your Honor.

THE COURT: -- that you believe I should focus on?

MR. WAYLAND: Yes, your Honor. I think you should focus on the fact that in the market as it is now -- and it's a relatively mature market as we'll get into in a little bit -- the market shares have been pretty constant for a long time. That TaxACT has a significantly larger share than any of the other larger fringe competitors.

And as an aggressive competitor with that position, I think the case law is clear that it's more problematic to eliminate a competitor that's aggressive by merging them with a number -- by merging the number two and the number three.

So I think that -- yes, I think market share matters, I think the structure of the industry, but I think, your Honor, more importantly -- or just as importantly -- the evidence we think is pretty clear that, as you say, there are a number of aggressive competitors. If you look at the history of aggressiveness, particularly with respect to H&R Block and Intuit, their aggressiveness has been forced on them, your Honor. You can say, yes, they do the following things, but I think the evidence is pretty clear that they do the following things principally because TaxACT was the leader and forced them to do it. Document after document says -- remember at the beginning, they didn't like free, they didn't want to do free, they didn't want to do free as expansively as they've had to do it.

We've shown many documents, your Honor, where H&R Block says, oh, no, they're doing all this free, we better respond. And so, yes, then they become a free, aggressive competitor, but only because they're following TaxACT. TaxACT has been the leader.

And that's important, very important, your Honor, and I think we've described that. I'm going to describe a little bit

more of that in some of the more recent incidents of that and the following that occurs by Intuit and H&R Block.

I think we've -- up through, say, 2005, 2006, and 2007, I think it's pretty clear in our papers that TaxACT was the mover, H&R Block and Intuit were the followers. Let me speak about some more recent events.

In 2009, TaxACT made been an agreement with Mint, the personal finance cite. What was the response? TurboTax was concerned enough about that that they went out and bought Mint. And H&R Block was angry about the deal.

Now, our primary competitors either own or have direct links to personal finance software products. This is, it turns out, not a huge, you know, effect probably ultimately in the business but, again, it's TaxACT saying where can we look for new ways to compete? Leader, follower, angry third follower.

2010, TaxACT raised the bar with its free offering. Everyone could file their federal return for free with TaxACT. They couldn't do that on Turbo, H&R Block or TaxSlayer or TaxHawk.

This is a trend, your Honor. TaxACT does something like offer free for everyone. H&R Block and Turbo reluctantly follow. And then TaxACT does them one better. That's what an aggressive competitor is. That's what a maverick is. There is no example in the record of H&R Block or Turbo doing anything because of Slayer or Hawk or anyone other than TaxACT.

Government Exhibit 63 I think is redacted.

THE COURT: Well, we don't know what's going to happen with NASCAR. There are more cars than just one.

MR. WAYLAND: I'm sorry, your Honor?

THE COURT: Well, you just said you haven't seen anybody else following, you know, TaxSlayer's methodology, but I don't know.

MR. WAYLAND: Well, I would doubt if people are going to follow TaxSlayer, your Honor.

THE COURT: They could sponsor football games. We'll see. You know, maybe more tax preparation services are going to be advertising in places we've never seen them before.

MR. WAYLAND: Well, if we take their success in this sort of thing as an indication of whether you should follow them or not, I don't think you're going to see much following. They have spent 10-, 15-, $20 million on this marketing. Zero market share growth. So if you were an executive, you'd say, oh, what does that get you? Looks like it doesn't get you very much.

Government Exhibit 63, this is about the retail software. Defendants say it's not important, but H&R Block makes substantial revenue in this segment. And it really was a stable duopoly there, just TurboTax and Intuit. With all the digital -- and that's what all digital is going to be like if this goes through. And TaxACT came in, and what was their goal? To supplant H&R Block as the number two product line in hard

software.

What was H&R Block's response? Once they learned that TaxACT is going to be sold, they identified their sales are at risk. And TaxACT is a big risk because they are going to have free state filing with their software which H&R Block and Turbo charge $20 for. In fact, TaxACT sold 26,000 units, and H&R Block's sales dropped by more than 30,000 units. And next year, TaxACT is going to be in more places with its software.

So what's H&R Block doing? Again, the next slide is redacted, your Honor. This is -- it's from one of their executives. And you'll see, your Honor, that she -- they respond directly, and I probably can't say much more about publicly. But it's a direct response to what TaxACT is doing.

Similarly, Government Exhibit 608, why is H&R Block concerned? It's another survey which we -- the defendants didn't show you. And again, it's a -- we can't show it to the public, your Honor, but it shows H&R Block's concerned about losing share. TaxACT has -- gives you some specific numbers and expresses a very direct concern about a very recent competitive act by TaxACT.

So it's not a surprise that H&R Block is now considering not charging for its state filings. And consumers have TaxACT to thank for that. So we know that TaxACT was and is a maverick. The next question is whether incentives will change. I think the answer is clear that they will. I think we

got the testimony from Mr. Dunn and Mr. Bennett that they both have very different incentives right now. TaxACT's highest price is -- well, here's some of the testimony.

Remember this, your Honor? We asked Mr. Bennett, "After the transaction, will you have a strategy about branding H&R Block product and charging a higher price?"

"Higher than value, yes."

"And TaxACT doesn't have that motivation right now, do they, to raise prices?"

"No. They don't have a high-priced branded strategy, correct."

"So they don't have any conflict right now between a strategy, on the one hand, that has a high-priced brand and another that has the low-priced value fighter, right?"

"Correct."

And Mr. Dunn said the same thing. I won't read it, but essentially they have the same problem. Right now they have a motivation to charge low prices. They don't have to worry about cannibalization of a higher priced product. That's going to change after the transaction.

Finally, your Honor, plaintiffs say that coordinated effects are not likely because the fringe firms can expand and constrain any anticompetitive behavior that will happen by the big two after the merger.

Again, they have the burden on this, and the case law

is instructive. *Swedish Match*, the Court said, "The weight of the evidence offered by defendants must be sufficient to demonstrate that the remaining competitors will fill the competitive void."

In *CCC*, Judge Collyer, "The mere fact that fringe firms have an intent to compete does not necessarily mean that those firms are significant competitors capable of replacing lost competition." We juxtaposed that with some facts regarding the amount of spending that's occurring.

Cases make clear what factors matter in assessing this issue. First, of course, is the parties' own view of the market. In *CCC*, Judge Collyer said, "*CCC* and its private equity owner have repeatedly noted high barriers to enter in these markets." You recall, your Honor, we saw TaxACT and its private equity owner acknowledging that the company's extensive domain experience combined with high specialized tools provides a formal barrier in this industry. They said it twice in that document.

And, you know, very importantly, your Honor --

THE COURT: Mr. Wayland, before we leave barriers to entry, I mean, there's been some reference sporadically through the trial given the fact that we're in part talking about these software products -- about the stickiness of software products -- and how should the Court weigh that or should I even consider stickiness in part of the consideration of barriers to

entry?

MR. WAYLAND: I think stickiness is important, your Honor. Partly, it plays out in this case through the testimony about branding, your Honor. There seems to be a strong brand allegiance. I think people -- the evidence seems to be, and as Dr. Warren-Boultton talked about, and as a number of the witnesses talked about, seems to be an ability to extract higher value through your brand. Otherwise it's hard to explain why TaxACT and H&R Block can get so much more money for their product, which isn't that different.

THE COURT: But I do -- in my mind, stickiness because of the difficulty of consumers changing platforms for their tax preparation is somewhat different from the whole branding issue.

MR. WAYLAND: Well, actually, it's not that different, your Honor, for this reason: As it turns out -- I think there's been some testimony about this -- a lot of people get -- a lot of this is private data that goes across, you know, it's confidential information. They trust H&R Block or the Intuit name to, one, provide them with the expertise to actually do their taxes correctly and then, two, to provide them with the appropriate safeguards and whatever when they file their tax returns.

So there is a -- it isn't simply a question of downloading a piece of software and using it. There is a brand stickiness here based on the belief that the person that gives

you that thing has to know what they're doing about taxes and what kind of tax information needs. So that's why, you know, all of the witnesses testified about the millions and millions of dollars that they're spending to develop their brand, the difficulty of replicating that, and how many years it will take to do that. So I think branding actually has a correlation to stickiness in this case, your Honor.

And there's another part of it, too, which is the importation of data. Remember, you recall there was some testimony about that. So if you start out using, you know, TaxACT and you -- and let's say the market was completely transparent, and you say, oh, it's 5 cents less so I'm going to go next-door. It turns out you can only next-door easily if you can transport your data.

Now, that's one of the areas, for example, your Honor, you might expect that the merged firm would say why should we make that any easier at this point? You know, it's not in our benefit to get people to switch from a high-priced product so clearly another area where stickiness can play itself out as in the need to transport data and the ability of the firms to affect that in how they, you know, innovate. Again, it's not just about price; it's about product innovation as well.

Another important point here, your Honor, on expansion is the difference between increases in volume that matter and increases in market share. And we had a lot of testimony about

how much increase that -- I forget whether it was TaxHawk or TaxSlayer said they had recently. But what the cases focus on is the fringe competitor share of market and the ability to substantially increase market share is what matters, not the fact that you've doubled in size. In fact, in *CCC*, that's what Judge Collyer said. The defendant there said, well, I've doubled -- there's a firm out there that's doubled its growth, but the Judge said, yeah, great. They started pretty low and they are still pretty lower.

What matters is the fact that the fringe competitor still has a low market share. Doubling the number of customers does not by itself provide evidence that an existing fringe player provides sufficient competition. In *Swedish Match*, the Court noted that smaller competitors have much marginal success at obtaining market share.

That's exactly the case here, your Honor, and we went over this evidence somewhat during the trial. But the two -- the next two largest players that came in here and said they were ready to expand between 2006 and 2010, five years of tax time, their share increased by 1.4 percent collectively. That's with all this spending on NASCAR and all the innovation they're prepared to do. They simply have not been able to get any traction.

And market shares have been relatively stable for several years. And there's no evidence, your Honor, that there

are any significant changes in the industry that are going to suggest that those shares -- the stability of those shares is going to change.

In any event, as we've already suggested, there are significant barriers to expansion, including the importance of brand. The defendants suggest in a line in their papers that it doesn't matter. But, you know, their own executives testified at length about that. In *CCC*, Judge Collyer said, "Reputation can be a considerable barrier to entry where customers and suppliers emphasize the importance of reputation and expertise." Exactly what TaxACT even now and H&R Block and Intuit do.

Mr. Rhodes from TaxSlayer talked about that importance as well. Mr. Bennett talked about the millions and millions of dollars it would take, the time. Mr. Dunn talked about taking 11 years to duplicate what he's done. It's the parties' own discussions of the difficulties, your Honor.

There's also the shrinking market problem here, your Honor. The pool of pen and paper is shrinking, as we've seen from the charts, and courts recognize that this makes expansion less likely and coordination more likely, contrary to what plaintiffs [sic] actually say in their brief. And the reason for that is actually there are fewer people to choose from so you want to get together with your competitor and try and figure out a way to stop a race to the bottom. When it's expanding rapidly, everybody's out there trying to get share so it

actually, the way the market is going, is a factor in favor of collusion.

So the evidence, when viewed within the appropriate case law framework, does not satisfy the defendant's burden to rebut the presumption created by high market shares and concentration levels. And that should be the end of the case, your Honor. But even if defendants had met their burden of rebutting the presumption of the high market shares in concentration, there is substantial additional evidence of likely competitive harm.

Our expert, Dr. Warren-Boulton, applied the standard economist merger simulation model and reports that, as you know, there will be substantial consumer harm as a result of this case. He admitted there were limitations to the merger simulation, and that's why he used a number of different ways to get at the result and his results were consistent.

I think the criticisms that the defendants have laid at Dr. Warren-Boulton's feet have to be viewed in the light of two facts. The defendant's economist does not offer an alternative model, and she relies 100 percent on noneconometric studies created by others that, as I discussed, are seriously flawed. And second, when she actually used Dr. Warren-Boulton's model, even with all her assumptions she got competitive harm.

Now, Dr. Warren-Boulton provides an explanation, reasons for his methodology. He answered the criticisms during

the direct examination and during the cross-examination. Let me just deal with a couple of the critiques in the plaintiff's [sic] papers.

They criticize him discounting for switching to assisted from digital because of complexity but not for discounting for switching between; substantial evidence that much of switching occurs because of a change in life circumstances. We've been through this, your Honor. So we think he was reasonable in discounting for the switching.

And by the way, your Honor, it's clear that people that switch from digital to assisted are twice as likely to have an increase in complexity as people that stay within digital. So if you're staying within, you're less likely to have a complexity issue.

They say efficiencies aren't included. Well, Dr. Warren-Boulton doesn't include efficiencies in some runs because they are unproven and not merger specific. But he also did runs with efficiencies included, and the numbers are somewhat lower, but they also get positive consumer harm. And, again, I'm not going to talk about the efficiencies today, your Honor, because I don't think defendants came close to meeting their burden on efficiencies. But I think Dr. Warren-Boulton is right not to have given them any credit. But in any event, he did run a number of scenarios in which he did give some credit to them, and they still show substantial consumer harm.

They also say that TurboTax is a closer substitute than H&R Block, but that's not really the way the law works or the analysis works. This is the standard antitrust textbook. "Unilateral effects theories do not require that the output of the two merging firms be the closest possible substitutes for one another." Merger Guidelines, "You can get significant unilateral effects even though more sales are diverted to products sold by nonmerging firms than to products previously sold." So there's absolutely no case law or economic basis for the criticism that he somehow didn't compare TurboTax and H&R Block.

Now, that's Dr. Warren-Boulton, but contrary to plaintiff's [sic] view that there is no documentary or testimonial support for the notion that prices will increase -- they say that, they assert that -- there actually is substantial evidence of competitive harm. First of all, the transaction will remove a competitor with an incentive to compete with low prices. It's being acquired by a company with different incentives. They have admissions from their own expert and H&R Block and TaxACT executives that H&R Block has fought against expansion of free and is concerned about competing solely on price. It wants to maintain higher prices.

Remember what Dr. Meyer said? "The consistent theme found throughout H&R Block's marketing presentations and e-mail correspondence, namely, that in order to avoid brand dilution,

H&R Block does not want to compete primarily on price." I think that's an extraordinary admission by their own expert.

And when you combine that with the next admission, I think it really is the end of the case, your Honor. "Does the price that TaxACT has been maintaining over the last 11 years, the low prices that you testified about, in your view, does that have any impact or constraint on other competitors?" And her answer is yes because she testified to that before I even got her and she repeated it. She had a chance to take it back, but she said yes.

And so when you combine those two things together, your Honor, an admission that H&R Block doesn't want to compete on price and an admission by their expert that TaxACT is constraining prices, I think the prospect of harm here is obvious and admitted by their own expert. How do you fix this problem? You stop having TaxACT compete so aggressively on price.

Now, Mr. Bennett's testimony, you remember that. We did the little Xs with Mr. Bennett. We asked him, "It's your understanding, isn't it, that H&R Block's general strategy right now is to price below TurboTax?" And he said yes.

And then we showed him some documents and he said after the transaction, they want to raise H&R Block's taxes to the same price as TurboTax. So you get -- the price goes up. That's the consequence of that, trying to match TurboTax's

prices.

Now, I think again turning to *Heinz* --

THE COURT: So what you're suggesting is that I just shouldn't believe the defense assertion and in its papers that it's also not going to increase H&R Block's prices?

MR. WAYLAND: I think that as a matter of law is insufficient to rebut the presumption of harm. And I think that's exactly what Judge Sporkin said in *Cardinal Health* where the parties came in and said, oh, we promise, your Honor, this is the kind of industry where prices are going to go down for structural reasons. Don't worry about us. He said I can't accept those promises. That's not the way the law works. I look at the structure of the industry. I see that combining -- increasing concentration gives rise to likely competitive harm.

And similar things were going on there. He pointed to the high margins there and increasing prices over time. And remember we saw the chart showing the increasing prices and high margins. He said, come on, this can't be that competitive an industry to start out with if that's what's happening. And the idea that you're going to promise not to raise prices just doesn't do it for me.

And there is another important factor, your Honor. It's not just about raising prices as we've seen. A lot of it has to do with what kind of product innovation is happening. So, for example, if TaxACT in the merged entity decide, hey,

importing data is a bad thing for us, we're not going to do it, that's got nothing to do with, at least explicitly, with pricing. But it clearly would have an effect on the industry.

So it's not just pricing. And even if it were, the promise isn't enough. It's about innovation as well.

We have the *Cardinal Health* cite up, your Honor.

THE COURT: How much longer are you planning on --

MR. WAYLAND: About five minutes, your Honor. Two more pages.

Cardinal Health, the defendant's promised not to raise prices. Of course, the Court rejected this argument noting that the real issue is whether the merger would forcibly slow down the otherwise steady decline in prices. This is what's happening here, your Honor; a steady decline in average price because of the introduction in free.

Another point on this, your Honor. In *Heinz*, the Court looked at what the parties were thinking about before they did the transaction. And they analyzed, they said, well, they have considered a number of different ways to address competition in this industry. And the Court said, well, a couple of the measures were innovative, on your own, let's go out and do something, let's get better at what we're doing.

And the third was buying the competitor. And the Court said, you know, you chose the least procompetitive of the three possibilities.

Same thing here, your Honor. We've seen a lot of documents where there were a number of different ways when H&R Block could have competed here without buying its competitor, including creating its own free brand and doing other things as well.

Other evidence, your Honor, that suggests that the motivation may not be as benevolent as H&R Block has been suggesting. When you go outside of what we call the "4-C" documents, your Honor, and those are the documents that the parties have to produce to the government, they know they have to produce them when they make them, and they talk about all the great things, when you actually go into the e-mails and the documents of people, just under the top were thinking about the transaction and what might work, we see talk about the race to the bottom, we see talk about raising -- trying to push up TaxACT users up the price ladder. We see about not promoting H&R Block free as much as we used to. We see about trying to price HRB's prices equal to TurboTax.

And lastly, your Honor, on the case analysis. In *Swedish Match*, Judge Hogan was concerned because there were documents that suggested that the parties were concerned about the pressure that they were having to compete on price. And the Judge quoted a document, "where being forced to compete on price and to reinforce our brand imagery so that we can close the price gap between our brands and the competition that continue

to command a premium price."

That's exactly the kind of documents you see here, your Honor. Concern about price pressure, concern about dealing with free.

So, your Honor, in summary, finally, when you look at the facts through the prism of the applicable case law, digital do-it-yourself tax preparation is the relevant market. Defendants had the burden of rebutting the presumption of harm arising from the high market shares and levels of concentration. They haven't come close. Defendant's promises to be aggressive competitors in the post-merger world are contradicted by their own admissions and are irrelevant as a matter of law. And all the alleged procompetitive benefits of the proposed transaction already exist through TaxACT's independence or could easily be achieved by H&R Block on its own as its presidents have admitted.

To borrow Judge Gesell's cogent analysis of *Coca-Cola*, and this is his conclusion: "The stark unvarnished truth is that the Dr. Pepper brand has been a staunch effective competitor in the market that Coca-Cola Company has tried to stifle by developing its own pepper drink. And that has failed. It is now seeking to buy out its competitor. Once the Dr. Pepper brand joins the *Coca-Cola* line, much of this direct rivalry will probably cease. The acquisition totally lacks any apparent redeeming feature."

We think this is exactly the right analytic for this case, your Honor. The stark unvarnished truth is that TaxACT has been a staunch effective competitor that H&R Block has tried to stifle by developing its own free product and that has failed. It's now seeking to buy out TaxACT. And once the TaxACT brand joins the HRB line, much of this direct rivalry will probably cease. And this acquisition, your Honor, totally lacks any apparent redeeming feature. Thank you.

THE COURT: Thank you. We're going to take a ten-minute recess.

(Recess was taken.)

THE COURT: Mr. Robertson, are you ready to proceed?

MR. ROBERTSON: Yes, your Honor. I think we're all plugged in here. If I can just wait for the quiet.

THE COURT: I can hear you.

MR. ROBERTSON: Thank you, your Honor. My problem is I wear hearing aids, and I hear everything way in the back of the room instead of the things up here, which is where I need to be focused, so I'm trying to keep the din down in the back.

Your Honor, we started this case where the plaintiff made the allegation, and they're still doing it in Paragraph 24 of their complaint, that there are no reasonable product alternatives to digital DIY tax preparation products. That's what the allegation here is, and that's what we've been putting evidence on ever since.

It is the same allegation they made, by the way, in *SunGard* -- same type of allegation in *SunGard* -- no reasonable substitutes. Also the same allegation they made in *Oracle*, no reasonable substitutes. That's what the case is about, and we've been talking about that ever since. And we had a trial where we put on evidence. We did, they did not, and I want to talk about that.

We've shown them in the real world, the world where we all actually live, that millions of customers did switch back and forth. They do switch back and forth. They do switch back and forth between different methods of tax preparation. Very few actually switch back and forth because of a change in complexity, as the evidence will show.

Dr. Meyer actually showed that it was 25 percent. Counsel actually admitted that. It's not 50. It's 25 percent that have a change in complexity. Who knows why they switch? Is it because of price? Is it because they just wanted to switch? Nobody knows. We only know that 25 percent had a change in complexity.

And we know that these other products, whether it's in assisted preparation, pen and paper, or do-it-yourself on a computer, that they aren't all substitutes. Dr. Warren-Boulton admitted during cross-examination that they were substitutes. That's not disputed. They are substitutes. The question is whether they should be included in the same market. And I want

to go into that in some detail because it's very important, as counsel pointed out at the beginning of this case, to this case.

We also know that counsel in both their brief and today kept talking about my burden. I actually don't have any burden here. It's their burden. That's what the case law actually says. Both *General Dynamics* and *Brown Shoe*. *General Dynamics* is the last controlling case of the Supreme Court which they don't even cite.

Baker Hughes, which is the only controlling precedent in this circuit on a Department of Justice case. All the cases they cited were FTC cases. They don't even cite that case. And it is their burden. It's the burden throughout the entire case to prove a probable anticompetitive effect. That's way back in *Brown Shoe* at 370 U.S. at 323. Also in *General Dynamics*, the statistics are not conclusive evidence of anticompetitive effects. If the model is all you have and the model has flaws, as we'll talk about, that's not enough. And that's what *Baker Hughes* actually said as well. *Baker Hughes*, again, controlling precedent, they did not cite, didn't even talk about here today.

The evidence shows that H&R Block is buying TaxACT for two reasons, both of which are procompetitive. One is to lower their cost so they could be more competitive across the product markets -- the products that they have. The other reason is to compete at the low end of the market where they have never

successfully competed.

And TaxACT clearly is in that part of the market at 9.95. We'll talk about this price changes that they mentioned. There hasn't been a price change here at TaxACT for many, many, many years. And yet we've seen market share increases by both Block and TurboTax. Under counsel's definition with his chart that he made, they must not be in the same market if you follow his logic. We're not saying that. We're saying that all the methods of tax preparation should be included in the market because they affect each other, and it's the consumer's choice that matters.

Now, when you look at the intent, and we'll talk about that too, obviously the intent does matter. Your Honor pointed out that what counsel just said about *Cardinal* is not what the case actually said. It's also not what *Brown Shoe* said or *Whole Foods* or *Butterworth*, any of the cases that actually said that intent does matter.

And it's not only the intent, but why does the intent matter? Because the intent here makes sense. Why in the world would my client do what they claim, which is to gain about 2- to $3 million in profit and lose a million customers -- which Dr. Warren-Boulton finally admitted on the stand, that's what the effect of his model would be -- when the whole point here is to gain customers?

That is what Mr. Cobb testified to. That is what his

mission is, his mandate from his board. Why would he do that? And that whole model is premised on the fact that nobody else, whether it's the 30,000 other assisted preparers out there, or whether it's TaxSlayer or TaxHawk or anybody else, that nobody else is going to compete for that business. His model leaves all that out.

The only inputs to his model are TurboTax, TaxACT, and H&R Block. Nobody else is in there. No other data from any other competitor is in his model at all. And so it doesn't take into effect repositioning or the expansion by anybody else or anybody else competing hard for those same customers. We know that they do.

THE COURT: Can I just stop you. Dr. Warren-Boulton did include all the fringe players in DDIY, I thought, in his market analysis.

MR. ROBERTSON: Not in his model. In his model -- in his pricing, the model, the one where they claim there is a price increase, it's not in there.

THE COURT: In the merger simulation model?

MR. ROBERTSON: Yes, your Honor, it's not there.

Now, in terms of the legal standard, we do believe that *Baker Hughes* governs this case. It's the last word from this circuit on a Department of Justice case. The FTC cases, although there is some interesting analysis there which we've cited as well when it's pertinent, but the standard there is

very low. And I know because the cases they were citing, most of those are my cases. I actually argued them here in this building.

In *CCC*, for example, our whole argument, and the Court agreed, was that the merits of that case was going to be decided by the FTC and so the standard was very low. It was under the FTC Act 13(b). That's not this case. This case was a merits trial. Unlike the FTC getting to decide it, your Honor is deciding it right now. And so I think *Baker Hughes* is the controlling precedent. I don't know why they didn't cite it, but it is the case and it governs this case.

In terms of reasonable interchangeability or cross-elasticity of demand, which is the words of *Brown Shoe* at 325, you'd have to include all the substitutes that have the ability to take significant business from each other. That's what we're talking about here. That's also in the *Arch Coal* case.

Now, self-supply or outsource? Obviously, those are things that were considered by *SunGard* and *Oracle*, two cases they didn't cite in their brief either. Wonder why? They allege a narrow market in each of those cases. They lost. Same section of the Department of Justice, same group of people; they lost. And they lost because they were too narrow.

THE COURT: Excuse me, but how do you respond to the government's distinguishing of *SunGard* in terms of the vertical,

you know, self-supply that was at issue in that case versus the kind of consumer issue that we have here? And given the fact that it involves preparing your taxes, it's of enormous concern to Americans --

MR. ROBERTSON: Well, I did --

THE COURT: -- what happens here.

MR. ROBERTSON: -- I did make my own baby food for my kids, but that's not in case and let me explain why.

There are two aspect in *SunGard*. One was do-it-yourself and shipping it outside or going to an outside provider. That's what sending it out to a different site was all about. And what the allegation there was is that a substantial number of customers had no competitive alternatives. And the Court found that had not been proven.

Now, the Court did find that do-it-yourself for those customers was in the market. Now, what's the difference between carrots and peas and the jarred baby food in *Heinz* and what the Court was talking about in *SunGard*? Well, in baby food, there was no claim and there was no evidence put on that making it yourself actually was a competitive constraint. It didn't actually fulfill any of the requirements in *Brown Shoe* at all.

Here, what is the product? You don't draw the form. You get the form for free from the IRS, mostly -- these days, they don't mail them to you anymore -- off the Web site. The form is made by the IRS and it is for free. And they claim,

well, then you can't include it.

Well, most of the products in this case are free. TaxACT gives away the forms for free. So does H&R Block. So does TurboTax. So does, by the way, now tax stores. It's the form. That's the product that we're all competing for; to give the customer a form.

Now, when I give the customer a form, I can fill it out by hand or I can fill it out on the computer. And a lot of the people who were doing it themselves, we call it pen and paper, are actually typing it on the computer; entering the same data they would enter if they were doing it off of TaxACT or doing it off of H&R Block or doing it under TurboTax or going to a store and doing exactly the same thing. The difference there is someone is helping you fill out the form.

It's a form that is the product here. And about half the time -- a little bit less than half the time -- it is free. And also so are the instructions. So are the help. Both from the IRS, they give you the instructions for free. At TaxACT, they give you the instructions for free, and they pop up on the screen. So I think that it's different than saying peas and carrots that I buy at the store and I mix them up, that somehow that is now a competitive constraint on the price on the shelf at a grocery store.

We have evidence here, unlike what they had in *Heinz*, we have evident here that the price of free and the price of the

pen and paper actually does constrain the price of the digital products and also the products that are in the tax stores. We had Mr. Dunn, for example, in DX No. 13 where they made a decision not to raise the price, not by double, but by a dollar, because they were afraid people would shift back to pen and paper. That is a constraint on the price.

We have the tax stores deciding to offer 1040EZs for free. Why? Well, because they want to get some of these customers that look at the alternatives of doing the same thing for free. And they are doing that. So we believe that pen and paper is a product in that sense, but does it really matter? It matters. Your Honor made a careful distinction, which is do you include it in shares or is it a competitive constraint? They are different questions.

As a competitive constraint, clearly it is. We believe it's a product. If you take it out, put it in, does it change the case one bit? No, not at all. But it is important to understand that it is a competitive constraint. We believe it's a product. We believe it should be included.

But that's not the thing that's going to drive this case one way or the other. What matters is what's happening with the assisted preparation and the other methods of tax returns because they are about over 60 percent of the total tax returns that are done every year. And let me just go through just the basics of how one actually should be determining the

market because I think that it is important.

If you listen to what counsel just said that, well, as long as you do the SSNIP test, then you're done and you shouldn't include other substitutes that are actually closer than those that are in your proposed market. That is not what the Merger Guidelines actually says. And in fact, it explains that in Section 4 and in Section 4.1.

IN Section 4, it says that you have to define the market solely on demand substitution and the customer's willingness to substitute in response to a price increase. They didn't put on any evidence of that. We did.

Now, the question is, well, then how do you do it? And I need to walk through this. Your Honor can see this. We did this a couple times with the experts. What you start with -- and I have an example up here on the screen -- what you start with is the two products at issue here. And there are actually multiple products, but this is the way their expert said you should start doing it, and then the Merger Guidelines talks about this in Section 4.1.

And then you have to look and see if there's any other product that is a closer substitute than those that are in the proposed market. And you keep doing this over and over again until you have included all the substitutes that are closer than any of the ones that are inside the product market. So, for example, using the actual diversion data that we put on, first

you start with those that Dr. Warren-Boulton put in his proposed market; H&R Block, TurboTax, TaxACT, other online, and other software, do-it-yourself. And those are actually a total of 18 players. Now, it's 19 because there is a new entrant, 1040.com just a few weeks ago.

Now, what happens when you actually go out and look at the diversion data and see who are closer substitutes to those that are already in this market? Well, to H&R Block, we know CPAs are because that's what the data actually shows. We know their own stores -- people go more to their stores with a price increase than they would to TaxACT. More. Pen and paper. Friends and family. These are people who use who knows what method.

Jackson Hewitt and Liberty Tax are actually closer substitutes to H&R Block digital than all the other online digital including TaxSlayer, TaxHawk, and all the other 16 that are out there -- well, 15, I guess -- other ones out there besides them. And then finally the other stores that are out there, the ones that are not designated by the data.

Now, you could argue maybe we could break this down any further. Well, you can't break it down any further than Jackson Hewitt and Liberty Tax and H&R Block stores. The data doesn't do that. The data doesn't break it down any further than what we see here. It also doesn't break it down any further if you go to the switching data, which was used by Dr. Warren-Boulton.

Under the switching data, you get exactly the same kind of result, which is that all these other methods are closer substitutes to the players inside the box, inside Dr. Warren-Boulton's market, than they are to each other. H&R Block -- closest substitute H&R Block store than it is to TaxACT. CPAs and other assisted than it is to TaxACT. Jackson Hewitt and Liberty Tax are still within the bounds of the market where he thought there was some natural line off to the far right on this chart, there is some natural line there where all these other players are actually in there.

Well, you may think, based on what counsel said, and based upon their brief that, well, once you just find some grouping of these that meets the critical loss test, shouldn't you just stop? And the answer is no. And the Merger Guidelines and also Mr. Farrell's article that he mentioned, which is in 77 Antitrust Law Journal at 663, actually explains this. If you leave out these, you're going to have unconnected links in the chain.

THE COURT: Well, if I can just, you know, play this out a little bit because the plaintiff -- the government has argued that if your market definition is accepted of all tax preparation services, including pen and paper, self-supply, whatever you want to call it, that if there were a merger between the top three DDIY players -- HRB, TurboTax, and TaxACT -- that it would, under the guidance of the Horizontal

Merger Guidelines, be unlikely to have an adverse competitive effect.

And so they have tested your argument by saying this is what the bottom line effect is. That there could be a merger of Block and TurboTax with no anticompetitive fact. There could be a merger of Block, TurboTax, and TaxACT without any anticompetitive effect. You know, their Slide 62 that they showed.

MR. ROBERTSON: I believe that's what they put up there.

THE COURT: Is that the logical conclusion of your market definition?

MR. ROBERTSON: No, it's not. Number one --

THE COURT: Could you explain why not.

MR. ROBERTSON: A few things. And, of course, I didn't -- I should say I didn't write their rules. I guess I helped because I was at the government at the time. A year ago, the cutoff was a thousand. So 1431, which is I think what they came up with.

THE COURT: 1499.

MR. ROBERTSON: Would have qualified under the threshold.

But counsel actually explained why that's not correct. And that is that the market share is nearly 40 percent total. And he explained earlier that there was this threshold under the

case law of 30 percent. Well, obviously it's a lot higher than 30 percent so, under the case law, we don't know what that merger would look like. I doubt it could ever happen in my wildest dreams.

But I'm just saying we haven't analyzed that merger. But under the case law, could they bring a case? Counsel just said they could because it's a 30 percent cutoff.

Now, what is this? Even under their market definition in their complaint and in their expert report, the market share -- combined market share -- is less than 30 percent; it's 28. something percent. And so their, you know, slippery slope argument doesn't work.

It also doesn't work for a second reason, which is that there's no question that to TurboTax, its closest competitor is Block. No question. It happens to be Block retail tax stores, but it clearly is Block. And even if you look at their do-it-yourself, to Block, TurboTax is its closest competitor. If you start with TurboTax and go the other direction, it would be first the stores and then H&R Block do-it-yourself or digital.

Under the Merger Guidelines themselves, could they bring a case? I don't know how it would turn out, but the answer is yes. We are not closest competitors, TaxACT to Block, under any circumstances. And that's the only real relevance of this premium versus value thing that we talked about a little

bit during the trial is that we are not closest competitors. There are a lot of other competitors that come between Block and TaxACT, which means the unilateral effects argument doesn't work.

But if they had a case that they described, I could come out with a prima facie case based on the evidence that your Honor saw in this case. Obviously, we have both Block and we have -- I shouldn't shake my pen like that -- and we have TurboTax that are fighting head to head all over the place. Could that be a case? For them to say that under our theory it couldn't be, I don't agree with that. But let me just take it a step further.

Should you say we can find a way to do a critical loss or SSNIP test and then stop there and to throw the blue circles out -- and that's essentially what Dr. Warren-Boulton was saying. Should you do that? And the Merger Guidelines explains, no, you should not. And we also show that under his critical loss test, you could take any grouping and it would meet his test. Didn't matter which ones you picked. You could pick -- and we had the premium versus value. We had many different versions during that slow day when I was up at the board trying to walk through it. I walked through it a little bit faster with Dr. Meyer.

But the point is that his test, you could meet the critical loss test with any grouping. Shows it's not a very

good test based on the way he did it.

THE COURT: So is that your argument on the critical loss test because, I mean, we do in antitrust analysis, we do borrow a lot of from economic models because of their predictive value, to the extent they have it.

Is your argument, just so I make sure I understand it, is that I shouldn't even consider the critical loss test? I should give it less weight? What is your argument about the critical loss test? It is one of those tests that is -- you know, plays a role through all these antitrust decisions. And I'm having trouble sort of figuring out where you are on the critical loss test.

MR. ROBERTSON: Let me say two things, if I could. One is the way he did it was the same way he did it, we believe, in *Engelhard* and the Court rejected it so I don't think that the way he did it should have been accepted. Because if you have a statistical test and it gives you different results depending on what data you put in there or it gives you the same results depending on what data you put in there, then you have to question its validity, the way that he did it.

And the one reason why that's the case, why the way he did it ends up with the wrong result, is that the Merger Guidelines and Dr. Farrell actually explained that you have to do what I have up on the board here first before you do that test. And it explains in Example No. 6 in the Merger

Guidelines -- in the new Horizontal Merger Guidelines -- and it talks about seeing if another product is a closer substitute than those that are already in the box.

If another product is a closer substitute than the two, for example, that you already start off with, then Product C will normally be included in the relevant market -- this is a quote -- "even though Products A and B together satisfy the hypothetical monopolist test."

Just because you satisfy the SSNIP test or using a hypothetical monopolist test doesn't mean that you shouldn't have put in the competitors that should have been in the market in the first place into the market. If anybody is a closer competitor than those you already have in the market, they have to be included.

And that's a reflection of what the case law actually says.

THE COURT: But before you -- I mean, one of the issues is in figuring out what is the close substitute, and putting aside for a second the criticisms that have been leveled at some of the underlying data from which you have derived your colorful chart, you do have to look at the factors like, you know, from the case law about the functionality, the outlets, you know. There are a whole number of commonsense factors that you look at to see how comparable are the products that you're looking at?

I think, you know, during the course of the trial, you

know, Mr. Wayland asked Dr. Meyer, you know, if you're looking at a market for, you know, cold remedies, are you going to include chicken soup in that because it might be a substitute, you know. And I think, you know, her answer, was a little waffly.

But don't you have to look at other attributes of the substitutes in deciding whether or not they are in -- they are properly included in the relevant market? Isn't that also what the case law says?

MR. ROBERTSON: I think the key is whether changing the price of one will cause customers to switch to another. And I believe that that is what cross-elasticity of demand is all about. Do customers consider them to be substitutes and will they switch? It's not -- for the cold remedy, it's, well, maybe you have one cold remedy that is made for allergies, another one is made for the flu; will you substitute between the two of them with a change in price? And that's the kind of analysis that you would go through.

If you look at *SunGard*, there were a wide variety of prices between do-it-yourself and sending it out or sending it to another third party in terms of backup for digital. That's backup servers. Very big difference in price, very big difference in what the services that were offered. But the question was, would people -- would the customers actually choose one over the other if the merging parties tried to abuse

their position somehow? And what the Court found was that the government failed to put on any evidence on that point. They failed to put on any evidence on that point in this case too. And the same in *Oracle*.

And counsel here mentioned *Swedish Match* over and over again, which was an FTC case. And they actually put on econometric evidence to prove that point. And Judge Walker actually chastised this same section here because plaintiff's evidence was devoid of any thorough econometric analysis such as diversion ratios. They forgot to look at diversion ratios. And they told us that switching data wasn't diversion. They're right, but they didn't go out and try to find any of that evidence.

And the Court said both *Kraft General Foods* and *Swedish Match* Courts, the only other Courts to address unilateral effects, and it mentioned what *Swedish Match* did; relying on diversion ratios between two brands of loose leaf tobacco. It wasn't just common sense. Common sense might tell you that maybe I would switch from one kind of tobacco to another. I don't switch between any of them, but somebody could. But the question was will they divert because of price, and the FTC actually put on evidence that they did not.

Well, we didn't see any of that evidence from the government in this case. We put on evidence of people changing because of price. We actually did. And they can criticize the

pricing simulator --

THE COURT: So the answer to my question is sort of these commonsense factors can be trumped by this economic analysis data and whatever the actual diversion data, as close as you can get to it, shows?

Is that the answer to my question?

MR. ROBERTSON: There are two different ways of addressing the same thing. If you actually look at the *Brown Shoe* quote that everybody cites, it says reasonable interchangeability or elasticity of demand -- cross-elasticity of demand. The first -- the commonsense way to get at it is a proxy for doing it the other way, which is the actual econometric way if you don't have any proof of the other evidence.

And that's what the *Rothery* case which we cited actually said. It says it's an evidentiary proxy for direct proof of substitutability. That's 792 F.2d at 218. And the purpose is to augment the analysis of interchangeability and cross-elasticity statistician of demand. And that's in *CCC Holdings* at 605 F.Supp. 2d at 26.

Now, to go to *CCC*, first one has to understand -- and I tried that case too on the other side -- that one of the markets was already stipulated to so it's kind of hard to use that holding for much else. The other product market there wasn't any -- there wasn't like we have here all these other methods of

competition. There were three players, and the only other potential entrant was six guys in a garage. That was all there was. It didn't have any traction at all, nothing. They hadn't been in the market more than just a few months, certainly not what we see here over eight, nine years and 18 of them over seven, eight years. So that's not at all what we're talking about.

Now, when you look at what the burden of the government is to actually prove the market, they mention, oh, well, there's a significant disparity of price or the prices move in different directions. And I'd like to address that.

First, as a chart they pulled up -- in fact, it was one of our charts which was, oddly enough, so much different than theirs, you wonder why. They put up GX 629, which was the -- this particular chart (indicating). And they put up their chart, and they found a way to have the line on the bottom flat. Well, the only way they did that was including all the free products to pull that average down.

Well, once free products started coming up in the tax stores, you'll see that drop down too. If you look at actual paid prices, that's what we had on our chart. And what we also showed with Dr. Meyer is that the increase of price for paid products for H&R Block and TurboTax mimicked the increase of price for the tax stores, which were actually in the annual report of H&R Block. So that's a little bit misleading what the

government is doing with that data.

Now, the other thing is that they said, oh, well, people don't want really consider the price of the other. Well, without mentioning the person's name or the company, I'll just say it's one of the competitors out there -- DX 293 at page 93 -- where he considers in pricing all the methods, including assisted preparation. The pricing simulator obviously considers all the market.

And they mention Mr. Houseworth. Well, they could have called him, as your Honor pointed out. They could have called Mr. Maurer from Intuit. He was on their original witness list. But they didn't call them. Both were deposed; Mr. Houseworth three times. And what he actually said in GX 61 at 263 was that he included assisted preparation in the market.

That's what he actually testified to under oath. Didn't have to bring him here to say that. That's what he said. That's the unrebutted testimony. They could have brought him here and cross-examined. So did Mr. Bennett, which they mentioned at Volume 2 at pages 90 to 92. And your Honor has read our findings. It's in paragraph 7. There's a whole section on that.

There's also this issue of, well, switching may be -- in terms of the price, that the price is really over $200. That's what we saw in their post-trial brief for the first time. Actually, that's not really correct for assisted preparation.

There are some who pay more. But in DX 26, we do actually have what people were paying. And what we see is that 51 million assisted followers are paying less than $150 and 42 million digital DIY followers under $150.

And one can see that there are a lot of digital -- of assisted preparation filers who are paying a lot less than a hundred dollars. The light blue is assisted. And you see that under a hundred dollars, there are a lot of people who are paying less than a hundred dollars.

Well, where are the prices for Block and TurboTax? They are mostly in this 51- to $100 range for the paid products. That's where they are. And there's a lot of customers there that are paying about the same thing for assisted prep.

So now you know why TurboTax publicly has said over and over again how much they're focused on the assisted prep end of the business. Because that's where the customers are, that's where the fish are in the pond, especially as the pen and paper is shrinking.

Why do you think my client is petrified of them? It's not because they are taking away customers from online, because they're not. As your Honor mentioned the word, the stickiness issue, very few customers are actually switching out of an online product once they're there.

But there's a lot of other movement out there in the market, and what TurboTax knows is they have to go after the

stores. Well, where are the stores? Well, a lot of them are with my client, they are at Jackson Hewitt, they are at Liberty Tax. There are lots of CPAs.

THE COURT: Can I just ask you a question about the Block retail stores for a second because I haven't really been clear about this in this whole discussion.

And that is, does Block consider Intuit its biggest competitor or a bigger competitor to its retail stores than Liberty or Jackson Hewitt?

MR. ROBERTSON: Absolutely. Because they have more tax returns total for all methods than anybody else. H&R Block is second, including its stores and its online. It is number two to TurboTax. That's why they're more worried about TurboTax. TurboTax effectively -- I don't need to put it back up. That first chart I showed on diversion. More people were switching between TurboTax and back and forth and H&R Block retail stores than from Liberty Tax or Jackson Hewitt. They are further down the list.

The head-to-head competition is between TurboTax and H&R Block stores. That's where the battle is right now. And if you look at the documents that we cited from Intuit, from TurboTax, that is what you'll see. That's all they're talking about. They're not saying we need to do something to try to take away a few more online customers from Block. They are saying we need to go after the tax stores.

And what is Block doing in response to that? That's the Isis commercial that we showed your Honor. Don't need to play it again, but that's DX 6011 is. Isis Martinez where she's -- the whole purpose of the ad is to attack Intuit. Intuit is mentioned by name. This is a retail store advertisement.

So I do think that what the evidence shows -- and counsel just barely mentioned Intuit. And they are the biggest player out there. They do more tax returns than Block does total with all the stores and everything else, including all the franchisees. And even in their example of the market share, you can see that; that their total market share is much higher in the total tax prep market than anybody else.

There is -- clearly, the first test about whether the products are substitutes, we did have Dr. Warren-Boulton admit in Volume 12, 101 to 107, that, in fact, they are substitutes. The former CEO, Mr. Smyth, at DX 6122, told his own franchisees that they were going to compete against -- the online is going to compete against retail, and retail is going to have to compete against online. That's what's happening in the marketplace.

Even way back when Mr. Ernst was there, he said that TurboTax he saw was the most significant threat to all of its business. Not just online, but all of its business. That's in Volume 3 at 69.

We also see Intuit saying the same thing; that they are competing hard against the assisted preparation. That's in DX 406, for example. And that's in an earnings call. That's public. And we also lay this out in Paragraphs 49 and 65.

In the annual report at Block, they said under "Risks" that they're competing against -- the retail is competing against assisted -- assisted prep is competing against online and that's a risk. And they started doing that in 2009 and in 2010 and 2011; not something that was recent. It really started to hit in there.

And here's an example where they say that, well -- the CEOs are not saying that they compete against each other. Smyth, "We have many competitors; Intuit, TaxACT, Jackson Hewitt, and Liberty." Same document I cited. Ernst, "There's no question that some people shifted from both digital as well as professional back to paper and pencil."

And you heard Mr. Cobb's testimony; I don't need to repeat it all. But that is what he is worried about. And Mr. Bennett, "We view the marketplace often as a broad market." And Mr. Houseworth, "When I say the market, I'm thinking about actually assisted and do-it-yourself."

So to say that Mr. Houseworth didn't think that assisted was part of the market, this is what he actually said under oath. If they didn't agree with that, they could have brought him in here and said, well, what about this, what about

that? That's what the witnesses actually said. And I believe that your Honor should take that into account.

THE COURT: But can I just ask you about GX 128, which is the tax season '10 "Market Dynamics," H&R Block PowerPoint. And in terms of what, you know --

What?

MR. WAYLAND: We can put it on the screen.

THE COURT: That's okay. You don't have to do that.

-- where, you know, this talks about H&R Block's own analysis of the overall market and says that this suggests that online is not pulling incrementally from assisted. Online is stealing from other DIY options rather than creating a shift in DIY versus assisted. Which seems to indicate that by H&R Block's own analysis of where it's losing clients and why and gaining clients and why, in its own breakdown of assisted versus online, that it's not viewing online as its big competitor to its retail stores.

And there are other analyses throughout this document that suggest the same, which is why I was interested that, you know, in your view, H&R Block views its biggest competitor to its retail stores TurboTax, because -- that's not clear to me from H&R Block's own market analysis.

MR. ROBERTSON: What you have there -- and we went through, I don't know, dozens of these things where they would pull up one thing and we pulled out a different page that showed

something contrary, but let me just stay away from that now because I thought we got to the point of boredom when we were doing that during the trial.

But this issue, which Mr. Bennett testified about, he kept using the term "net-net," which was they were very concerned that they didn't have their own online products competing against their retail and taking products against retail. That's what they were concerned about.

And on a net basis -- I don't have to say "net-net" -- but on a net basis, it was fairly stable between the two.

THE COURT: And it was testing that concern that I think -- that is what underlies this market analysis.

MR. ROBERTSON: That's what they're focused on.

Now, to say that that's -- as counsel has, that that's proof that there's no competition from TurboTax against their tax stores, that's not what the company was saying. It's not what they said in their annual reports for three years now in a row. It's not what TurboTax says in their analysis. And a lot of them are secret and I can't go through them, but there are slews of documents that are in the record that I'm sure your Honor has seen that says that that's not true; that they actually are competing head to head with TurboTax store to online. So I think that that's what the evidence shows there; that there is a lot of competition.

Now, to say that there's no net-net change between H&R

Block online and its own retail stores, there is no change between online Block and TaxACT or online Block and TurboTax. They have been relatively stable for a long time. So if that's a determination of what you should include in the market or not, then we have to take TaxACT out of the market because we don't see any change. And we see a radical change in price that counsel put up there, which was true, the change on GX 629, when the prices are going up for these premium products and TaxACT's product is staying exactly at the same level.

Well, it happened that TurboTax, when increasing its price, was increasing its market share versus TaxACT. Well, under their analysis, maybe you shouldn't include TaxACT and TaxSlayer and all the folks in the bottom of the market as in the same market. Now, we haven't claimed that, but that follows from their analysis.

THE COURT: Well, while you still have your hand on that chart, I mean, maybe we can turn to the issue for which the government has proffered that chart, which is slightly different from what you're using it for. I mean, you're using it to say, see, they are different markets -- they are all in the same market, I guess. But they are using it for evidence of potential coordinated effects.

And by showing the tracking and the up-and-down lines between TurboTax and Block, is their analysis flawed in some way in using that chart as an example of coordinated effects?

MR. ROBERTSON: I think it is. For one thing, they never actually did that analysis. That was just counsel just making the argument. One could do that analysis. They haven't. But let's look at it. You'll see that the price is actually moving in different directions during different times even on the top end.

But where is the coordination with TaxACT products or TaxSlayer or any of these other players in the bottom? What the government is saying is that once we do a merger, that all of a sudden because H&R Block now owns TaxACT, that they'll be able to coordinate. Well, if he's right and they are coordinating on the top end, they don't need TaxACT to do that. What they need TaxACT to do is to stay in the bottom end and to stay charging at low, low prices, which Mr. Bowen had on his document to the board, to keep at low, low prices so they can continue to bring in more customer count. As Mr. Cobb testified, that is his mandate, that is what he's trying to do.

It doesn't make any sense that because we now own a 9.95 product, that's going to help us compete better with products that are 40-, 50-, $60, up to $140. That doesn't make any sense. You don't need to have TaxACT to do that. What they need TaxACT for, as the documents actually show, the ones they didn't want to show you that actually went to the board, that they want to continue to charge a low, low price.

The reason that TaxSlayer and TaxHawk haven't increased

that much market share is because TaxACT is charging a low, low price. They are the ones down in the bottom end of the market beating it out on the bottom end, the low, low price. Well, if they were to stop doing that, their market share would increase dramatically, the same way that TaxACT's did back in 2004, '05, and '06. They only increase their market share back when their own expert said they were given an opportunity to do so because TurboTax wasn't yet offering a free product.

Well, that's an opportunity -- well, if they raise prices the way that they claim, that's an opportunity for TaxSlayer and TaxHawk too. And let me just --

THE COURT: Well, Mr. Robertson, I have tried to understand the dual-brand strategy that Block has testified about in terms of post-merger. If this transaction is allowed to occur, that Block would then be offering two free products; Block At Home and TaxACT would continue. TaxACT would probably be bumped off the FFA and Block At Home would remain on the FFA.

How should I understand that in terms of any potential competitive effect or anticompetitive effect?

MR. ROBERTSON: It doesn't matter one bit, and here's why. For one thing, TaxACT doesn't do very much on the FFA. Once that event happened back in the 2005 tax season where the free for everyone is taken off of the FFA, that's why TaxACT went out to the Web. So they don't pay much attention to the FFA at this point. And there are 18 other players on the FFA

today. And so there's no claim that there is not enough competition on the FFA. That's not the issue. There are plenty of have competitors on the FFA that offer free product.

And TaxACT is not able now to offer the maverick offer -- whatever they want to call it back in 2003 -- they are not allowed to do that, and they haven't been allowed to do that since 2005. And so it doesn't change anything if TaxACT isn't on the FFA but continues to do what it's doing on the Web, which is to compete at a low, low price and compete for free, which Mr. Cobb has committed to this Court and to his shareholders, and Mr. Bennett actually said to his shareholders as well, that they would continue to do that.

This claim that they are going to change quality, that all of a sudden TaxACT is not going to do imports or something, there's no evidence that TaxACT would stop doing anything like that that it's currently doing at all. In fact, the reason that Block wants to buy TaxACT, one of the two main reasons, is that TaxACT does a very good job with the model that they have, which is a low price model.

And that's why they are letting Mr. Dunn out here (indicating) run the organization. He is the one that's going to be running it. And the way he's been successful for 11 years is by charging a low price and by offering free. And most of the people who come in to his system come in for free, and many of them stay free for a long time.

And the free issue --

THE COURT: Well, as I understand it, it might have been Mr. Ernst, it might have been Mr. Bennett, talked about how their intent with this purchase is that it will bring the TaxACT customers into the Block family in -- also in terms of upselling, which is how any of these companies who use this marketing strategy of using free to bring people in and upsell to them so that they can make revenue.

What it's -- the dots that I'm having trouble collecting using your yellow and blue dots is how, with the dual-brand strategy, TaxACT continuing as it is attracting customers who TaxACT hopes to upsell to its premium or deluxe TaxACT products, how any of that is going to be relevant to Block's -- bringing those same customers into the Block family.

MR. ROBERTSON: And what they mean by that is that they're buying a TaxACT product, and that Block can count that as a customer when they go to shareholders and Mr. Cobb says we have now 9 million customers. That's what he's being gauged by and so that does matter.

Now, you said, well, why would they go ahead and let Mr. Dunn do what he's doing? Mr. Dunn, in doing what he's doing, was making more profit per unit than Block was per unit in their business. He was doing better, more profitable, at these low prices because his costs are so low and because he's better at it.

And so that's something that's worth buying to get more customers and more profit at a low price at the prices that he is using. It's his model. And as Mr. Dunn testified, you break that model, and you say, oh, what the heck, now we own them, let's eliminate them, which, by the way, the document they cite in their brief, once again, we saw the diamond document again, which said it's an unsustainable strategy. Same page in what they're citing.

It's unsustainable. You break his model, do you think all those people are going to stay with him? Can you get new customers if you break the model? The answer is no. Is there any evidence that they intend on breaking the model? And the answer is no.

What the evidence is is that he is committed to this Court. They can go drag in Mr. Cobb if he decided to break his word to this Court or break his word to his shareholders. Bring him in next year. He is not going to do that. There is no reason for him to break his word to this Court or to his shareholders that he has no intention of changing his model.

Mr. Dunn is going to run this company. He is going to run it with a low price. That's what the evidence is. And Mr. Cobb saying that he believed that all the prices would actually come down because he could decrease the costs of operating his digital end of the business, there's no evidence contrary to that either. And this is a procompetitive merger on

that basis.

Now, in terms of market share -- before I get off of market share and move into some of the other areas, your Honor mentioned the state issue. Well, that does matter. If more than 50 percent or 50 percent -- we don't know what it is because there's no evidence put on of that -- of the state customers are not using the TaxACT or Block or whatever it is that they are doing the federal form on, where are they going? Where are they going? They don't have any evidence of that.

And they said, well, we should have put that in our documents or we should have made a presentation of that. We don't have the data; they do. They can go talk to Intuit and find out how many state tax people they have or find out where these people go. They could have done a survey. They could have done any number of things to find out the answer to that question. It's a lot of people.

Now, why does that matter? Because the way Warren-Boulton did all of his analysis is he wrapped all that state business into his analysis. His average price includes free, he included the upsells which are to state, and it includes all these other premium products in the case of Block and TurboTax. He's including all that in his analysis. He didn't pull them out. He included them in.

And we have no idea where they went, and counsel has done nothing to try to find out the answer to that. And if you

want to find out where customers divert to or where they divert to in case of a price change, which is what they actually did in *Swedish Match* or actually did in the cases that -- the *Oracle* case actually explains, how do you do that? Well, you could go get information from buyers, including surveys concerning how they would respond to price changes. I'm reading from the Merger Guidelines. That's what they could have and have done in other cases, failed to do here.

And that's what they got caught in when it came to *SunGard*. That's what they got caught up in when they did *Oracle* and when the Judge chastised them for not doing the analysis on diversion, and that's why the Court threw out the merger simulation that they had in that case, also because they used market shares as the proxy for diversion because they hadn't proved what the market was in the first place. And market shares are not a good proxy for diversion.

Counsel said, oh, they did it another way. Well, the other way they did it was switching data. Well, the switching data that was put in the model was just between the big three, as he called them. Wasn't anybody else. And so you don't know what the actual switching or diversion is except he just took 50 percent. We're going to take that off of assisted, and we'll assume that only 20 percent leave digital to go anywhere else. And he took that off of the Hoover model which, not to repeat what the witness said on why it was called the Hoover model,

that that number was picked up out of the air. There actually was no evidence that any of those numbers were real. He just assumed they were real and put them in the model.

I think that when you go back and look at the evidence, they had the burden to prove the market. They did not do that. These are substitutes, all of them. And if you look at *SunGard*, look at *Oracle*, two cases which they did not cite -- and happens to be the two closest cases to this one that were their last two cases in this kind of industry, and they could not prove the market for exactly the same reasons they didn't prove it here.

We didn't have to prove anything, but we decided to go further and actually come in and show evidence of diversion and to show that there were other methods like assisted preparation and to show evidence from Intuit, which they had this whole time over this last many, many months, they had that evidence, we did not. We got it after the complaint was filed.

They had that evidence from Intuit. Your Honor's read it. You've seen what it says. And to say that we should take a blind eye and just say, well, we can't include assisted preparation at all, because of what? Because there is no evidence that it is? Well, there is a lot of evidence that assisted preparation is a direct competitor to Block, and that TurboTax is competing directly against tax stores.

And in the survey that was done for TaxACT, which was done in reaction to what they asked us to do at the Department

of Justice, we did that survey and what it found was that most of the people who would switch from TurboTax were going to assisted preparation. They weren't going to H&R Block as the closest competitor. H&R Block was way down the list in that survey.

And so I think that to ignore the competitive effects and ignore the fact that assisted preparation is a substitute here under the case law -- and I'm sure your Honor has been very diligent in this case in looking at cases and the documents -- and you look at those cases and you have to say how can you take out this part of the market especially when you haven't actually proved it? What you've done is simply taken Dr. Warren-Boulton's word that there's some natural line beyond digital, and that's where we should stop.

He started with all 18, the same that were in the complaint, a month before he ever got hired. He started with that and he stayed with that, even though he admitted during his rebuttal that the switching data he relied upon actually showed that some of these other methods, including stores, were closer substitutes in terms of switching for diversion than other online software providers, including TaxACT. Well, then, they have to be in the same market. That's what the case law says, and there's really no exception to that.

Now, as in *SunGard*, if that's where we end this case, that does end the case. There's no reason to go any further.

We don't meet this 30 percent threshold that counsel is talking about. It's not 40 percent as it would in his hypothetical merger. We're not even close. And so there is no reason to go any further. The whole point of coordinated effects in terms of this assumption of coordinated effects, you get the assumption if you have the high concentration. Without the high concentration, you don't get the assumption.

Their whole argument in their brief that we somehow have a burden to prove the absence of all these things, our burden, if there is any, it's simply a burden of production, is not very high. And I suggest, with all respect, that your Honor just look at *Baker Hughes*. And what they cited is they have cited *Chicago Bridge*, another one of my cases, in the Fifth Circuit. And the Fifth Circuit distinguished *Baker Hughes* and said that *Baker Hughes* had a lack standard, and they refused to follow it. I thought it was great for me because I was down in Louisiana and not here. But this Court is here, and *Baker Hughes* is the governing law, and they just completely ignored it.

Now, turning to two of the elements and then get to expansion and keep within hopefully about the same time as counsel, if not a little bit shorter.

In terms of unilateral effects, number one, we believe it's contrary to what the actual evidence is, what Mr. Cobb said, and what the board documents actually said. The board

documents actually did not have a price increase in them. In fact, the board was told that the prices were likely going to go down. To say that contrary to what the business decision is on a $287 million deal, that somehow they missed it -- they missed the opportunity to raise prices, they didn't understand that -- I think is just fiction.

That's what the board made the decision on, that's what Mr. Cobb made the decision on; that prices were not going up. He testified both at his deposition and here at court, he thought they were going to go down. He wanted to be more competitive. He wanted to decrease his costs. He wanted to go and fight against Intuit because that's the battlefield and that's what he needed to do. So I think it is contrary to the evidence.

The intent, as *Brown Shoe* actually says, "It's a most important factor," quote. That's what it says. It doesn't say, well, it's not relevant. I think that's what -- or irrelevant was counsel's word. It's irrelevant in the case law he said. That's not what it says. Or *Cardinal* or *Whole Foods* or *Butterworth* or all these cases that your Honor knows quite well.

That our intent -- my client's intent -- does matter, and it makes sense. It's not something they just made up. It makes sense with the evidence that we presented. They don't have any need to do that to gain customers. Mr. Dunn's model works. Why change it? They like the way he does business,

Mr. Dunn testified, and also told his people at the time. He told investors at the time, I like the way TaxACT does business. Why would he change that?

And in terms of unilateral effects mimicking both *CCC*, which counsel wanted to talk about, and *Oracle*, that you need to have at least a 35 percent share in order to even have any power to do that. Now, in the last year, the new Merger Guidelines said, well, we don't agree with the 35 percent threshold anymore. So the agencies have now ipse dixit said -- I wanted to use a little Latin phrase there with all my eight years of Latin -- that, well, we just don't believe it's true anymore.

Well, courts haven't said that. Courts have said, yeah, you have to have a higher than 35 percent market share to even get there. And there's a lot of explanation for that in Judge walker's opinion in *Oracle*. And they're aware of that. Several of these folks were there. And so I think that the Court should consider that.

Also the exception under the commentary to the Merger Guidelines where they say, well, we shouldn't use the 35 percent anymore, it says it shouldn't apply where you have a substantial closeness of competition, where they're closest competitors. And in the closest competitor case, then you can try to make the argument that nobody else will reposition and nobody else will step into those shoes.

That's what *CCC* was analyzing. That's what Judge

Collyer looked at when she said, wait a minute, what about AutoText over here? Aren't they a substitute for the second player or are they some distant third? They are so far away that they can't give consumers a choice? And when faced with that, she rejected the unilateral effects model, the merger simulation. Same routine.

And also because every time you put the numbers in that my expert at the time put in there, it gave a price increase. We did that under cross-examination for hours and hours and hours until Judge Collyer looked over and said, okay, will you tell me, does it always give you a price increase? And my expert said yes. She said, well, I think we've heard enough of this. Well, she rejected using that model.

If you think about this not as an antitrust case but as any other case that your Honor hears day to day, and you have an expert who comes in and says I have a model and it always produces damages -- no matter what I do, it always produces damages, so I want you to accept it -- well, as we cited in our brief -- it's in Note 38, an article by Mr. Werden (phonetic) who actually created the logic model that Dr. Warren-Boulton used -- because there are many, many different ways to do this, your Honor; there's not one merger simulation, there are many different ways to do it -- he picked the one that his own article called the "Back of the Envelope" approach.

But that logic model, Mr. Werden actually wrote this

article saying you really shouldn't use it unless you can prove that it can make predictions in the past as well as the future. Because if you can't prove that it fixed the facts of the case, then it can be seriously misleading.

Well, I think that's what we have here, that's what we had in *CCC*, unfortunately for me, but the fact is that there we had no other choices in terms of competition, and so the Court had other things to rely on. And the standard going to an FTC hearing was very, very low, which I kept arguing is at my shins. That's not where we are here, and that's not what this Court is doing here. The Court is trying to find out what actually happened and whether it is probable that there are anticompetitive effects. Probable.

That's what *Brown Shoe* actually says. That's what *SunGard* actually says. We don't have that.

Other aspects of their unilateral effects. How does free affect it? You just use average prices.

THE COURT: Can I just pause here for just a second to talk about, you know, sort of probably some frustration on the part of economists about how courts and lawyers use their economic models and some concern on the part of judges, including, you know, Judge Collyer, about economic models that always produce one result. So, you know, I'm aware of this friction between the two professions on how they use each other's work.

And in looking at -- one of the things that Courts look at is sort of history, and does history repeat itself in analyzing potential anticompetitive harm, which is a predictive role, how much weight should I give to some of the history in this case having to do with Block's experience with RedGear, Block's experience with TaxNet, Mr. Dunn's own experience that he talked about when Intuit bought his prior employer -- and I think it was called TaxEdge, if I'm recalling that correctly, and after two years into it, stopped TaxEdge -- how should I look at that history in terms of putting aside the economic models, which you have very effectively criticized, and I've looked at some of the citations to some of the criticisms of those economic models, to put econometrics aside for a second and just look at history?

MR. ROBERTSON: Okay. Three things. And I don't know a lot about the Parsons TurboTax thing. It's now a long time ago.

THE COURT: I just have Mr. Dunn's testimony.

MR. ROBERTSON: Mr. Dunn mentioned it during his testimony. But what we do know is that that was reviewed by this same section, and they allowed that merger to happen provided that the company promise to license to another party, which they did.

And that's in the public record; it's not a secret. And they let that merger go through. There wasn't any -- all

these other competitors that we see today didn't exist. Talk about high HHIs or high market shares, it's way off the charts compared to what this case is. They allowed that merger through. They thought that that licensing to a third party, the way that TaxACT has licensed to Avanquest, that that was sufficient; that was a sufficient way to solve that problem.

Okay. So that's the first thing I would say there. Why that changed and why they actually did that, we don't really know. Mr. Dunn doesn't know either; otherwise, I could have asked him. We didn't ask -- have the documents on Intuit that far back.

THE COURT: No. I just have the cold fact. TaxEdge with Mr. Dunn there, bought by Intuit, gone in two years.

MR. ROBERTSON: He wasn't told so he didn't make the decision. Instead, as soon as he was told that he didn't need to do tax software for them, he left and founded his own company and did very well, as we see. Which the same thing could happen here.

But the second point is what about the two that are Block? Well, one of them, TaxNet, was very, very, very small. They didn't buy it for TaxNet; they bought it for the person that was trying to run it. And that person was then running all of Block's area. And RedGear as well. RedGear itself has been successful. It's not -- that is what you see of this other software that's in Boston that you see out -- they talk about

the box software and all of that. That's where a lot of this came from. It's not that the products weren't successful; it's that the efficiencies that they were trying to gain were not achieved in those cases.

TaxNet actually was successful as a product, but it was very small and didn't have very many sales at all at the time. I mean, they are much smaller than EasyTax that we see out there. They weren't even close to TaxSlayer or to TaxHawk. They were a very small company. What they were buying them for was to get their owner to come in and help run the company at Kansas City.

And that was the big thing that Mr. Bowen was talking about when he said, well, that didn't work. If you bring Mr. Dunn and say move to Kansas City and become an H&R Block green tie person -- I didn't wear a green tie today -- then you may fall under the same problems that Block has because you're part of the corporate culture. In the same way that the government often finds that if you bring somebody and say come on in and work at the government, that you're not as efficient as if hiring them and staying outside in their own culture. That's why the government outsources a lot of things.

And so when they made the decision in this case, he was asked, Mr. Bowen, to analyze that and say how should we do it differently because we want to be successful. Well, the obvious answer was don't bring them anywhere near Kansas City. Leave

them doing exactly the same thing they are doing now in their own culture, in their own company, in Cedar Rapids, and then we will expect them to do the same thing they're doing now.

And that was the big difference in terms of the way they looked at RedGear and the way they looked at this transaction. It wasn't a matter of just a success, it was also a matter of gaining the efficiencies. Because Mr. Dunn, part of how much he makes is based upon how well he does with these efficiencies. That is a target that he has to meet. And also keeping the customers. He has the same targets that Mr. Cobb has.

And so the company wanted to tell the board, if you're going to spend this much money -- and this was about 40 times the amount of money that we're talking about for RedGear -- you're going to spend this kind of money, then we have to make sure that we get what we paid for. And that's why you see these pro formas. The pro formas show -- and I don't want to go into the specifics of them -- show how much the company can make, if they don't raise prices but they do it the way he wants to do and continues to do it, how much more money they will make at the company.

Very important for them. They compared that to doing it themselves where over five years they would lose money, and they wouldn't gain anywhere near the number of customers. They thought that was not a good strategy. That's why they made the

decision, the board did, to go with Mr. Dunn. And Mr. Bowen explained that. It's in the documents -- it's in the board documents themselves, and that's at DX 347 at page 4, for example, it's explained. And that's why they made that decision.

So to answer your Honor's question -- and I hope I have -- Block was concerned about this too. We don't want to do a RedGear -- the RedGear product worked out fine, but we didn't make as much money as we thought we would. What was the problem? The problem was we brought the people to manage it in-house, and that did not work because then they did things the way that we always have done. And that wasn't working, and that's why we were trying to do this.

So that's why this is different. That's why they also are tired of having their own online software being run by their own people in Kansas City. They want Mr. Dunn to do it out in Cedar Rapids. He is very good at it.

So anyway, let me move on so I keep within the time.

THE COURT: Yes.

MR. ROBERTSON: I take it I have, what, about 12, 13 minutes?

THE COURT: Yes.

MR. ROBERTSON: I'll stop whenever your Honor wants me to, obviously, but I think that's what I counted.

THE COURT: No. I think for the court reporter, who

also may need a break, at 1 o'clock; is that okay?

THE REPORTER: Yes, your Honor.

MR. ROBERTSON: All right, your Honor. And she has have been very patient with all of us throughout this whole process.

In any case, so going back to unilateral effects, your Honor has read all the criticisms; I won't go through all of them again. I think it's pretty clear what our criticisms are.

But the main thing that just bugs me to no end is that when Mr. -- Dr. Warren-Boulton -- I'm used to Ph.D.s being called "Mr." and "Ms." rather than "doctor," but that's what we do here -- when he said they could gain 2- to $3 million and lose a million customers. That's what the effect of his model is because the way it works is that you can't increase price without losing output.

Well, is that logical based on the facts that your Honor heard at trial? And the answer is no. It's contrary to the facts. Well, if it's contrary to the facts, if this were not an antitrust case where people think these models are kind of interesting, then we wouldn't accept that. It's simply a theory, not empirical evidence, which is what we cited in our brief, what Commissioner Rush said when he accepted the new Merger Guidelines and said it's going to be different when the Courts get this because an expert's theory is just that; it's not empirical evidence.

And that's what he finished with with his concurrence on signing on to the Merger Guidelines. He was also the one that tried *Oracle* so he's been through this. And that's where -- he knew what actually happened there.

Now, also the other thing that I think we're missing here is what about everybody else? Is Intuit really going to play along with this, and are they going to see a price increase and just do nothing? I don't want to go into their documents, but you've seen their documents; that's not their plan. That is not their plan.

And also in terms of coordinated effects as it rolls into that as well, you have Intuit that is focused on assisted preparation as their target. That's what they're doing. Why in the world would they look over to Block and say let's implicitly agree to raise prices on the online product so we can keep our relative shares the same when that's not their focus? Their focus is to kill Block over in the tax stores, which is 95 percent of what Block does. That's 95 percent of Block's business in the tax stores, not this little online product.

So it wouldn't make any sense for Intuit that knows that its future is tied to going after assisted preparation, to make some implicit agreement with Block that we are going to go raise prices because you just bought TaxACT. That doesn't follow, and it doesn't follow either under coordinated effects or under unilateral effects because there are other players out

there too.

In terms of coordinated effects -- and I think we've done this well in our brief, I don't want to go into much detail on that -- but if you look at the Intuit documents and what they say they are going to do, it doesn't make any sense. That's not what they're strategy is. If they saw a price increase as a result of this merger, we know what they would do because it's in their documents, and we cited those in our findings and in our briefs so your Honor can see them. It's not what they're going to do.

Now, this business of TaxACT being a maverick, I think we beat that -- I hate to call it a dead horse because I think that's where the term came from, a horse, but what TaxACT did back in 2003 and then repeated it in 2005 doesn't make them a maverick when everybody is a maverick. The idea of a maverick is it's somehow unique. They're not unique at all.

In fact, as your Honor mentioned, Block and Intuit have been doing all kinds of "mavericky" things, if you want to call it, to beat each other up. And they are going to continue doing that because the battleground is for Intuit to take away the business from the stores. That's why the stores are advertising it's Intuit. They are offering free 1040EZ products at the stores.

So is Jackson Hewitt out there. You have Liberty Tax. We have Jackson Hewitt actually in their own documents talking

about this fight between the stores and the online products. Liberty, the same way. Those are in the documents. In Jackson Hewitt, it's DX 5057 where they actually say that they are concerned about the competition from online against their stores. So this isn't just an Intuit issue or a Block issue.

And the famous maverick document going back to January 2006, which we saw up on the screen here a few moments ago, one of the interesting parts about that is counsel was right; there was no mention of TaxSlayer, no mention of TaxHawk. There was also no mention of TurboTax or H&R Block. The only mention was pen and paper and assisted preparation. That's the only thing that document is focused on because that's what TaxACT was focused on.

I think the freemium --

THE COURT: If we could just stop for just one second about the whole maverick label that's been assigned to TaxACT. And putting aside, you know, that label, putting aside whether the maverick has to be unique in the marketplace, I mean, I think -- you know, you assert in your brief that no merger is going to join solely based on a maverick theory.

But I think you would accept that certainly in *Staples*, also in *FTC v. Libby*, the Courts did look at the fact that one of the parties to the transactions at issue were -- the word that they use is a "particularly" aggressive competitor in the market. And that if they didn't use the word "maverick," I

think TaxACT would qualify as one of the particularly aggressive competitors in this market, certainly by contrast to some of the other players who we heard from like TaxHawk who, for lifestyle reasons, you know, puts things on a time frame that they could do in one year, they extend it out for a few more.

So, I mean, you would agree that TaxACT's aggressive position, competitive position in the marketplace, is a relevant factor for the Court's consideration in analyzing this merger, wouldn't you?

MR. ROBERTSON: Let me -- I'll directly answer your question yes, and let me tell you why.

Because that's why H&R Block wants to buy them. Because they want them to be an aggressive competitor against Intuit and against everybody else out there. They are successful making money adding new customers. It's a great model. They don't want to break it. That model works.

We're not saying they are a failing firm at TaxACT. They do great at what they do. And the company wants them to continue doing exactly the same thing. So that's the first answer.

And in looking at *Staples*, *Staples* is an interesting case. I hate to say I'm involved in all these cases, but unfortunately I was on the wrong side of that one; didn't do very much on that one, thank goodness. But in the *Staples* case, those are the only two players they were talking about.

Now, the defense said, oh, you should consider everybody else. And, well, the reason why the FTC was able to win that case was because Staples actually did their econometric analysis saying that when Staples is not in the town, we can charge a whole lot higher prices.

THE COURT: Yes. They had very strong evidence in that case.

MR. ROBERTSON: Yes. And, you know, talk about being particularly aggressive, they were uniquely aggressive against Staples, uniquely aggressive against Staples. That was clearly the case. There weren't 18 other competitors. There weren't other competitors. And according to that analysis, that's the only two relevant competitors.

That was what the evidence actually showed. And the only thing that the defense tried to do to get around that was the efficiencies defense, which we'll talk about. But that's all that they really had. They couldn't say there was going to be entry or there were other people that could reposition. There was no evidence of any of that.

The evidence they had to deal with was this econometric evidence. The FTC then mimicked it with their own to show that it was correct. And that's all they did to prove direct competitive effects. The Court actually held that there was a market of really just those kind of stores, and really that was it for most of these markets; they were the only two. In some

cases, it was one or the other and nobody else. That's how they could do the econometric analysis.

So I think that in *Staples*, this kind of unilateral effects thing works pretty well. When there's only two and clearly one is a uniquely aggressive competitor and the company knows they can raise prices by a huge amount, by the, way based on that analysis, that then that is a different case than what we have here.

And, for example, they can, you know, say that TaxSlayer and TaxHawk aren't good competitors or -- on the one hand, they said that everybody was functionally the same, but yet TaxHawk and TaxSlayer are not. Well, your Honor, I'm sure, has looked at what these products are. It's the same in terms of the lower-end products. This is just the Gator Bowl and the NASCAR that TaxSlayer has that we have up on the screen just for those who are reading.

But the fact is -- and that both of these are examples of people who would love to get more customers if TaxACT were foolish enough to raise their prices. And they had to raise them by a lot. And the reason is that even under Dr. Warren-Boulton's model, because he includes free as an average, you have to take out free which means you have to raise the prices of other things a whole lot more.

And then to raise prices by -- and gain a profit of 2- to $3 million and lose a million customers, which are going to

go somewhere, maybe to the fellow with the NASCAR, then we had people that are there and not more than poised, they are already in the market, and been there for years.

Now, in briefing this -- and I think this is pretty important in terms of the law -- that counsel on the other side cited *Chicago Bridge* as a standard and for some reason forgot about *Baker Hughes*. *Baker Hughes* is the controlling precedent here, and that's what that case turned on. That case turned on entry, and there it was more potential entry from Canada. It wasn't even somebody who had been in the market or somebody who was there.

And the Court talked about what expansion was and talked about what it took and even said that just the mere threat of expansion could be enough. And interestingly, that standard, which other courts think is low, in the Ninth Circuit and also in *Chicago Bridge*, was rejected by them but is not rejected here. It is the standard here in this circuit.

If there were nothing else in this case, the fact that there are other people out there that are not distant thirds, they are functionally the same as counsel admitted, then what TaxACT has, if TaxACT were to act anticompetitively post-merger, then -- and that's where all these price increases come from, almost all of them are on TaxACT's product, not on the Block's product in Dr. Warren-Boulton's model -- then these people are not just poised to come in, they are ready.

And I think that the evidence is clear. I don't have to go through any of the actual documents. A lot of those are in secret. But I think that the fact that they are there, and the fact that they are capable, and the fact that they have capacity, all the things that one would look at to see whether they would tell my client at Block or at TaxACT, should we raise prices with the chance that we could get a 2- to $3 million gain and the chance that we're going to lose a million customers and hope that these other people do nothing and hope that TurboTax just says that's fine with us?

And by the way, proportionally, most of those are going to go to Intuit. We're going to help out our competitor by giving him a higher customer count which is what Mr. Cobb was saying he was worried about. Does that make sense based on the facts in this case? And we believe it does not.

And I think that in terms of what our burden is under *Baker Hughes*, we went far beyond saying there was somebody in Canada that might come in here. And at *CCC*, again, a much lower standard at the FTC, all they had is they went out and found this one fellow with five other folks that worked for him in his house and to say that that's good enough. And when the customer service people were over 20,000 at one of the companies versus the one person that could answer the phone call there, was quite different. There was no evidence put on that they could actually do anything. And I kept flashing up the picture of the

guy's house, and we had him in here down the hallway here.

But in any case, we have actual evidence that these competitors are there, and all the other ones that are out there too that we cited in our findings that were deposed many of them, they are there. It's far more proof than you can find in any of the other cases here, especially *Baker Hughes*. And the what did the government do to rebut it? They just don't like the folks. I mean, you heard what the arguments are. No contrary evidence. We don't have -- and I think the efficiency stuff, I don't want to go too much time on there but to say that the company made the decision. And one of the main reasons for the decision was to gain these efficiencies.

Counsel makes a big argument that, well, some of them are variable, not fixed, or they are fixed, not variable. And yet their own commentary, the Merger Guidelines, at 62-3, says that fixed costs can be relevant because consumers may benefit from them over the longer term even if not immediately. Well, what they will benefit here, as Mr. Dunn testified without any controversy at all, without any other evidence, that they'll have lower costs, they can compete more, but also he can lower prices on all these banking products which the banks are not letting him do right now, these third parties. He could do that with Block and charge the lower prices and consumers would benefit from that. And that would not be -- we would not be able to do that, your Honor, if this merger is enjoined.

Now, we believe -- and I'm a minute past. I deeply apologize to my court reporter. She is the only one moving. The rest of us are just standing here.

But, your Honor, I do believe that when you consider the case law in this case, consider *SunGard*, *Oracle*, for example, closest cases to this one, consider what *Baker Hughes* actually says and also *General Dynamics*, that the evidence that we put on more than rebuts their case. It actually shows their case is wrong. They have the burden throughout this case, as *Baker Hughes* says, the burden from beginning to end, to prove the market and to prove that it's probable that there would be anticompetitive effects. There was no evidence of that, just theory. Not empirical evidence, just theory.

And we rest our case, your Honor, and I thank your Honor for all the time you spent on this. It's very important to us and very important to my client. And we believe it's very important to consumers in this country that we be allowed to go forward with this deal and to show the Court that it will be a great benefit in competing against Intuit, against others, and to give consumers the benefits that we've actually shown to this Court. Thank you, your Honor.

THE COURT: Thank you, Mr. Robertson.

MR. ROBERTSON: Your Honor, do you have any more questions or am I done?

THE COURT: No, you're done.

MR. ROBERTSON: Thank you.

THE COURT: Mr. Wayland, do you have a rebuttal?

MR. WAYLAND: Yes, your Honor.

THE COURT: Why don't we resume at 2 o'clock.

(Lunch recess was taken.)

MR. WAYLAND: Good afternoon, your Honor.

THE COURT: Good afternoon. Are you ready to proceed, Mr. Wayland?

MR. WAYLAND: I am. I hope I won't take much of the Court's time, and I'll make my best effort to slow down for the reporter. She was my friend until today.

Just one quick cleanup, your Honor. You had asked the name of the document that had the reference to the large number of customers that stay with digital or assisted. And that is a June 2007 document entitled "Digital Tax Solutions Overview," H&R Block Government Exhibit 1151, your Honor.

THE COURT: Thank you.

MR. WAYLAND: A few points, your Honor. Let me start with *Baker Hughes* and Mr. Robertson's suggestion that we've somehow avoided *Baker Hughes* and therefore missed the relevant cases in the District and the circuit. It's a 1990 case, your Honor, which actually cites FTC cases so the idea that there is some difference in the substantive standard between the FTC cases and federal DOJ cases is just not right.

But since 1990, your Honor, we've cited cases, and I

think the most relevant case is the D.C. Circuit's opinion in *Heinz*, which is on all four squares with this case, your Honor. I discussed it this morning. It's got the same market share. Had the same excuses offered by the defendants about their intent and about the need to merge in order to compete more aggressively and to bring innovation. Those are rejected by the Court.

The other cases we cited, your Honor, come after *Baker Hughes* as well. The application of the standards regarding entry and expansion all are within the ambit of *Baker Hughes*, and so the idea that we somehow ignored it is just not correct.

Mr. Robertson began his substantive presentation with his concentric -- or a list of circles in a row. He said that the key point there was change in price. And he's right. The problem for Mr. Robertson is that those two exhibits don't shed any light on the issue of change in price.

So we had two sets of circles. The first set of circles purported to show what happens as a result of diversion. Those circles were based on data that Dr. Meyer generated. Remember, she says, well, I've done my simulation work and the simulator shows that the closest, quote, "diversion" was to CPAs and account answer, the most expensive.

THE COURT: You're talking about the blue and the gold circles?

MR. WAYLAND: Blue and gold circles, yes.

THE COURT: Right.

MR. WAYLAND: The blue and gold circle charts which we don't have a copy of, your Honor, but you do, I think.

THE COURT: Could I have a copy of that, Mr. Robertson? At some point if you can provide a copy.

MR. ROBERTSON: Yes, your Honor.

MR. WAYLAND: If I had my board, your Honor, I'd draw them for you, but I don't.

Anyway, he set up a set of circles, and he had Dr. Warren-Boulton's candidate market, which was digital products, and then he filled in other circles with other products. There are two charts. The first chart was, quote, the "diversion chart." But the basis for the diversion is simply Dr. Meyer's analysis, which we've dealt with and don't think it is the basis for anything.

THE COURT: Well, I'm glad you started with this because I'm actually more curious about the chart that's based on the IRS switching data.

MR. WAYLAND: I'm turning to that next, your Honor.

THE COURT: Okay.

MR. WAYLAND: The second chart was the IRS switching data chart. And let me say a few words about that.

One, again, it would be easier if I had it, but the next circle -- one of the large circles closer to TurboTax than TaxACT was an aggregation of CPAs. So, again, they have jumped

together all CPAs. If you actually disaggregate that, you'd see that the closest substitutes to H&R Block are TurboTax and TaxACT and H&R Block's retail stores. Those are individually the closest substitutes if you break them out that way.

And secondly --

THE COURT: Based on the IRS switching data?

MR. WAYLAND: Yes, exactly, your Honor.

THE COURT: Because it is one of those peculiar things in Dr. Meyer's report in Paragraph 156 where she does criticize, you know, the use of the IRS switching data by Dr. Warren-Boulton. And there's sort of, you know, interesting patterns that she picks up using this data that suggest that TaxACT customers, whether they had a change in their tax return complexity or not, had a higher switching rate to assisted than to H&R Block At Home or TurboTax, which for these value price conscious customers is, you know, sort of a little bit of --

MR. WAYLAND: Peculiar. It's actually explainable, your Honor, if you think about it and the reasons why people are switching. Let's put up a number of facts together, and I think it makes a little more sense.

First fact: I don't think there's any disagreement that the evidence seems to be that the defendants at least believe that most of the switching between digital and assisted can be explained for non-price reasons such as a change in circumstance, et cetera. Fact number one.

Fact number two, high loyalty rates generally among digital companies. There's a stickiness factor, okay, so a lot of people stick -- if they are going to stay in digital, they stay with their company. It's a fairly high stickiness factor.

Okay. So if you put those two facts together, you think, yes, people who are switching are switching for a non-price reason. They are switching because their situation changed. So you might expect to see -- again, I'm just taking all this data at face value if that's what's going on. It's as easily explainable by non-price reasons, which is what we're all about here, as by price reasons. In fact, it's probably more likely --

THE COURT: Does it have to be non-price reasons, I mean, because people who switch between TaxACT --

MR. WAYLAND: It's likely non-price reasons. That's my point, your Honor.

THE COURT: It's got to be a non-price reason because if you're switching to a more expensive --

MR. WAYLAND: That's the answer, your Honor, especially if you look at TaxACT which is so much lower priced than assisted. People are switching because -- for the reasons that the defendants say they switch; because they have had a change in circumstances that require them to have a more complex tax return or similar reasons.

So I think that's what we make of the switching data.

And they certainly don't tell us anything about a response to a price change. And that's, again, what's wrong with the circle chart. It says -- even if you didn't have a problem of aggregation, which it does, as we've just explained, if people are switching from H&R Block to assisted, that chart doesn't tell us why they're doing, okay, so it doesn't shed light on the question that Mr. Robertson posed when he started with the charts, which is does this tell us anything about what happens as a result of a price change? So it's correlation but not causal. That's the problem here.

There's a third problem, and that's this: Mr. Robertson said that Dr. Rick Warren-Boulton threw out the circles. I think it's the blue circles that come in. He said threw out the circles is what he said in the transcript. But it's not Dr. Warren-Boulton who throws those out; it's the defendant's own executive. When they analyze the market, they throw them out. When they say who are our direct competitors, they don't include those other yellow dots. When they make decisions about pricing, they don't include the yellow dots. They only include the blue dots.

So I think -- let's assume that you don't like either of the experts, your Honor. You may say, "A pox on both your houses."

THE COURT: I think you've both done very good jobs showing that these econometric models --

MR. WAYLAND: Are problematic sometimes, right. And I'll have to tell you, Dr. Warren-Boulton says that in his report. It's not like he says I've got a miracle cure here for telling you how to assess the probabilities of harm. We have limitations as economists. Here's the best we can do at this point.

But let's assume, your Honor, that you say, "A pox on both your houses. I don't like the expert testimony." And I'll tell you in a minute why you shouldn't do that with Warren-Boulton, but let's assume that you do.

Then we go to *Brown Shoe* and say what else should we look at it, right? And it's industry -- how the industry looks at itself. And when you get there, your Honor said the econometric evidence in *Staples* was, quote, "very strong." You said very strong. Here, the industry evidence is about as strong as you're ever going to get.

Now, I don't have Mr. Robertson's experience in trying all the cases that he's been describing to the Court over the course of the trial, but I've read the cases, your Honor, and the idea that you're going to find a more powerful admission of what the markets are, what the pricing is in these markets, is hard to imagine. Document after document after document, price decision after price decision made on the basis of a digital market.

Again, we're not the ones denying that; they are.

We're saying there might be a bigger market to think about in some way, but if you put *Brown Shoe* up because you don't believe the experts, you're left with how they describe the market and how they price their products. And that's about as powerful as you're ever going to get.

Let me just show you one or two things because Mr. Robertson said -- I don't know if there's any evidence in the record, but he said today that Intuit's -- H&R Block's biggest fear in the assisted market is Intuit. I think that's what he said. I think you asked him about that. Let's see what the documents actually say. We'll just look at one or two.

We showed this earlier, but this is -- what's the year on this? 2010. This is 2010. It was a board presentation, 2010. This is a board presentation, your Honor, 2010. So unless the board's changed its mind pretty recently -- we didn't have any evidence of this -- this is an assisted competitor analysis. This is the assisted business. They list the competitors; Liberty Tax, Jackson Hewitt, CPAs, mom-and-pops.

Next page, "Digital Competitor Analysis," TurboTax and TaxACT. I mean, you can get up here and say a lot about the market, but you need evidence. And here's the evidence; the June 2010 board presentation. So that goes to the idea that they are the biggest competitor, and it goes to the idea that when you look at the markets and who your competitors are, it's been consistent year after year.

And I promised that I'd try to convince you not to throw out Dr. Warren-Boulton. Let me just say a couple of points about his work.

Mr. Robertson pointed to *CCC*, for example, and said the Court there was critical of the expert's work. And she was. And the principal reason was the amount of data that she used. She said the underlying data that you're relying wasn't sufficient, like 18 data points in a survey.

That's the problem with their work here, your Honor; it's the 2011 survey. Dr. Warren-Boulton used the entire amount of evidence that you can get in this case. He used the IRS switching data. And as he admits, it's not a direct way to measure diversion so you have to do things with it. You have to discount it. You have to analyze it. You have to figure out what you can tell from it, okay.

And this isn't *Staples*. It's not *Staples* where we have SKUs, where they have all that data that's available to you, so you have to make due. And it's not the best. It's not as good as *Staples*, but it's what economists can do and they apply merger simulation models. And, yes, when you have high diversion and when you have high margins, you get a positive number for harm. That's what the model is supposed to do because that's how economics works.

If you have high margin, you can -- you don't have to shift a lot of share in order to get harm to consumers and

positive profits to yourself. So it's not surprising that models do that. And there's checks on those models. That's why you go to efficiencies. That's why you go to expansion. That's why you look at other evidence in the case.

We're not attempting to put the whole case on Dr. Warren-Boulton's shoulders because that would be hard to do given the limitations on this. But it's an indication. When you do your econometrics the way other economists do, here's what you come up with. It's not the cure all, but it's better than certainly what Dr. Meyer did, and it gives you an indication that the other evidence, the admissions about market share, the suggestions that the parties understand what the consequences of this could be when they are not writing their 4-c, it suggests that that's all moving in the right direction.

State issue, Mr. Robertson talked about that. Your Honor had some questions. This is the way I think about it, your Honor: The Department of Justice opened an investigation when the parties came in and said we'd like to do this transaction, as they always do. And the parties said, here's the way you need to think about the market: There is this big market out there, whether it's a digital market, whether it's all tax market, and here's how you measure shares in that market. You use IRS data, and you count up who is doing what. That's the way to measure shares.

Mr. Newkirk, Mr. Dunn, others in their testimony said

that's the way we calculate our share when we're doing our business. We don't break out state. We assume that it's all in the same market. When we measure revenue, we don't break out state revenue. It all comes together in the average pricing.

And so that's what the *Visa* case is. I think we cited it in our papers. It's 163 F.Supp. 2d at 338. That's what *Visa* says. It says when the parties come in and tell you something about the market, you're entitled to rely on that. And we don't have to go out and necessarily do additional research to figure out whether we should take their word. Of course we test it. But to suggest that there's some other way of counting, the burden shouldn't shift like that.

And let me say a few words about this data. Well, before I get there, there's no evidence -- so we start with the parties' view that this is how you look at it. And then we say, was any evidence presented to us or did we find any evidence as we looked at market share that suggested that using the federal data was not the right way to look at the markets? The parties never came to us and said, oh, you're getting it wrong if you don't break out state. They didn't do that.

And so there's no evidence to suggest that it's an improper way to look at a market; that saying that there's -- using the federal data to calculate shares for either a digital or all tax preparation market is somehow wrong or gets it wrong. There's no evidence that that's the case. In fact, the evidence

is to the contrary because the parties use that data to do it themselves.

There's also no evidence that any of the -- well, let me back up.

The data that they gave you says for some of the digital competitors, a number of people didn't buy their state product. So that's what your Honor was focused on. What that doesn't tell you --

THE COURT: Less than half.

MR. WAYLAND: In some cases for some people.

What that doesn't tell you is that they went somewhere else with -- to another actual competitor. And that could be for two reasons, your Honor. One would be a number of state don't have federal -- a state filing, so Texas, for example, a lot of people in Texas use all these products. They are not filing state products.

Secondly, a lot of states have free filing. So you have to buy the federal or use the federal and then you can just go on your own to the free state site. So that's why when you look at these numbers, there's no suggestion that anybody from H&R Block that doesn't use their state product is actually using somebody else's product. No evidence at all. And you can look at all their numbers and you'll see that. It just says, for a number of reasons, people aren't using that state tax.

And if you actually go on the Web, your Honor -- I

can't testify, and there hasn't been any evidence to the contrary, that it's very hard to actually get to the state. You have to go through the federal first. You don't just go and buy the state.

So for all those reasons, I think it's completely appropriate for the Court to conclude that the market shares data that the parties rely on and that we've relied on is adequate to calculate market shares here for an all digital or an all tax preparation market.

And the last case I'll cite, your Honor, which we do cite in our brief, is *PPG*. And that's a case where the Court said, look, you can't always be precise, and it's okay to estimate market shares. And I think for all of the facts that I've laid out, it would be okay to conclude that the state numbers follow the federal numbers, and there's no reason to suggest otherwise.

Mr. Robertson, I think he said it was like the point that aggrieved him the most in this case, which was that by his calculation, his clients aren't going to make much money if they raise prices, okay, our profits are going to be X. There's not a single case that looks at -- tries to -- would justify a merger because -- by looking at the profits that some merged party is going to make. You look at consumer harm, your Honor.

And the evidence here, whether you rely on Dr. Warren-Boulton's estimates or whether you look at the

parties' own evidence as to what they might do or the prospect of collusion, shows there's going to be consumer harm. And it doesn't -- you can't offset it by saying, oh, I'm only going to make a little bit of money from that harm to consumers. That's not a response, your Honor, under the law.

Finally, your Honor, Mr. Robertson talked about the principles at issue here and said his client, you know, should have the right to merge and help consumers. Well, one of the principles is, of course, the consistent enforcement of the antitrust laws which are intended, as Judge Collyer points out, to ensure that in a high -- where markets are concentrated, that transactions aren't allowed to proceed that threaten consumer harm.

And the law doesn't say we have to be certain about that because it's impossible to be certain. As your Honor has suggested today and throughout the trial, it's kind of hard to be certain about what's going to happen. But what the law says is that where you have these high concentrations of market share and concentration, there's a presumption. And that's because it is kind of hard sometimes to quantify that. That's why the presumption exists. Because the law recognizes that in general, if you allow that to happen, there's likely to be harm.

So that's why -- that's what's at stake here. And there's a line of cases in this District that say that these are the types of transactions that have to be blocked. And that's

what this Court needs to do; it needs to not deviate from that line of transactions. And it doesn't matter whether this is a relatively small transaction or whether it's going to be a relatively big transaction involving billions of dollars; it's the same principle.

And the principle in the case law needs to be applied here, and it needs to be applied equally. And that is that a transaction that threatens this harm because of the concentration without any justifying principles, because the parties could do exactly what they could do by not doing the transaction, needs to be stopped. Thank you.

THE COURT: Thank you.

MR. WAYLAND: Unless you have any questions, your Honor.

THE COURT: No.

I want to thank both sides for their very -- do you want to respond at all?

MR. ROBERTSON: We can talk all day, your Honor. Any questions your Honor has.

I think we have given a lot of information to the Court, but I'd be happy to answer any questions.

THE COURT: No. I'm out of questions. Well, that's not exactly true, but I think I need to look at all the documents.

Just for planning purposes, I expect to have a decision

in the case before the end of the month, which may not be as prompt as the parties would like, but it's -- I have a lot of material to look through, and following the bread crumbs from the briefs to the statement of facts and then to the original documents takes some time.

But I want to thank both sides for their very helpful arguments and briefing on the issues, and I'll come out with my opinion before the end of the month. I'm going to otherwise take it under advisement. So thank you.

(Proceedings adjourned at 2:25 p.m.)

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