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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

VERONICA GUTIERREZ, ERIN WALKER,)
and WILLIAM SMITH, as individuals)
and on behalf of all others)
similarly situated,)

Plaintiffs,)

vs.)

NO. C 07-05923-WHA

WELLS FARGO & COMPANY; WELLS)
FARGO BANK, N.A.; and DOES 1)
through 125,)

Defendants.)

San Francisco, California

Friday

May 7 , 2010

7:30 a.m.

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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1 Q Well, if you had to limit yourself to just the scenarios
2 that were run by Mr. Olsen, do you have an opinion about which
3 of those best measures the impact in this case?

4 A Yes, I do.

5 Q And what is that?

6 A I think I already testified that it was No. 3B.

7 Q And, can you remind us what 3B is?

8 A Yes, 3B is one of the scenarios that were requested by the
9 Court in its March order. That's the one where checks are
10 grouped first and sorted first; and then debit cards with no
11 time, sorted from high to low; and then debit cards with
12 timestamps are sorted chronologically.

13 MS. WINNER: I have no further questions.

14 THE COURT: Thank you.

15 Cross-examination.

16 MR. HIMMELSTEIN: Yes, Your Honor.

17 CROSS EXAMINATION

18 BY MR. HIMMELSTEIN:

19 Q Good morning, Dr. Cox.

20 A Good morning, Mr. Himmelstein.

21 Q In your resume attached to your report, you listed
22 31 cases since March 20th, 2006, in which you've provided
23 expert witness services.

24 Does that sound correct?

25 A Yes.

1 Q Do you do anything else for a living?

2 A I -- yes.

3 Q Is the bulk of your income derived from providing
4 expert-witness services?

5 A Yes.

6 Q How much are you being paid?

7 A How much am I being paid?

8 Q Yes.

9 A What do you mean, exactly?

10 Q How much an hour are you being paid for your services in
11 this case?

12 A NERA is billing for my time at, I think, 490 an hour.

13 Q And how much of that do you receive?

14 A I don't know.

15 Q How much have you billed so far?

16 A I don't know the answer to that.

17 Q Is it more than \$100,000?

18 A Yes, it is.

19 Q More than \$200,000?

20 A Yes, it is.

21 Q More than \$300,000?

22 A Yes.

23 Q More than \$400,000?

24 A I think it is.

25 Q Is it more than \$500,000?

1 **A** I don't know.

2 **Q** And, how much did you make last year?

3 **MS. WINNER:** Your Honor, I -- I object to this --

4 **MR. HIMMELSTEIN:** Goes to bias, Your Honor.

5 **THE COURT:** I -- I know that NERA rakes in many
6 millions, and that they are well paid. I don't think we need
7 to get into personal finances.

8 **MR. HIMMELSTEIN:** 'Nuff said.

9 **BY MR. HIMMELSTEIN:**

10 **Q** You do not consider yourself an expert on banking
11 practices, do you?

12 **A** I think what I testified in my deposition is, I don't
13 consider myself an expert in banking operations.

14 **MR. HIMMELSTEIN:** Your Honor, I would like to play
15 what we call Clip 6, which is from Dr. Cox's deposition,
16 February 5th of 2010, Page 35, Lines 15 through 19.

17 **THE COURT:** Does it contradict what he just said?

18 **MR. HIMMELSTEIN:** Directly.

19 **MS. WINNER:** Well --

20 **THE COURT:** You say --

21 **MS. WINNER:** I don't object to playing it.

22 **THE COURT:** He said here that he does not consider
23 himself an expert in banking operations.

24 **BY MR. HIMMELSTEIN:**

25 **Q** Do you consider yourself an expert in banking practices or

1 operations?

2 **A** No.

3 **Q** You worked with a number of people besides Mr. McGoveran
4 in doing your analysis. Is that correct?

5 **A** Sorry?

6 **Q** You worked with a number of people besides Mr. McGoveran
7 in doing your work in this case?

8 **A** Yes.

9 **Q** And, was there a team of people at Wells Fargo that you
10 worked with?

11 **A** Well, I was referring to the people in my staff, as well
12 as people at Wells Fargo. I did communicate with people at
13 Wells Fargo, as well as Mr. McGoveran.

14 **Q** When you say "communicate," do you mean you -- you sent
15 things back and forth? Or you attended regular meetings?

16 **A** I did have meetings with people at Wells Fargo, while I
17 was meeting with people, with Mr. McGoveran, as well.

18 **Q** And who were the people at Wells Fargo that you met with,
19 as best you can recall?

20 **A** Well, Mauro "Cardeneras" was one, that's the way I
21 remember his name as being pronounced. I did meet once
22 physically, and by telephone with -- at least -- sorry, I met
23 once physically and at least once by telephone with Ken
24 Zimmerman.

25 I met with Mr. Mark Lentz in a meeting. I met Noreen

1 Stitelman in some meetings. These would have been group
2 meetings in which all of these people were in attendance, or a
3 significant subset of them.

4 Mr. McGoveran, as I said, though -- I can't remember
5 whether your question referred just to Wells. There were some
6 other people whose names I can't remember right now.

7 **Q** You said you only attended one meeting at which Mr. Lentz
8 was present?

9 **A** No, I didn't say that.

10 **Q** One group meeting?

11 **A** There were several group meetings in which he was in
12 attendance, both physically and by telephone.

13 **Q** Are you aware of any analyses or calculations done by --
14 we'll call it "the team," if that's okay with you -- that are
15 not reflected in your report?

16 **A** No.

17 **Q** If there were any such analyses done by the team that were
18 not shared with you, is that something that would concern you?

19 **A** Well, I don't think there were any such analyses. But, I
20 would be interested, but I wouldn't necessarily be concerned.

21 **MR. HIMMELSTEIN:** Your Honor, I would like to read
22 in, as we said yesterday, some testimony from Mr. Lentz's
23 deposition, May 5th, 2010.

24 I would like to read in 44, Page 44, Line 14, through
25 Page 46, Line 17.

1 **THE COURT:** Any objection?

2 **MS. WINNER:** Yes.

3 **THE COURT:** What's the objection?

4 **MS. WINNER:** Line 14 -- this is mostly objections.

5 **MR. HIMMELSTEIN:** Your Honor, I think if we can put
6 it up, the relevance will become apparent. Basically, he
7 confirmed --

8 **MS. WINNER:** This is not impeachment of this witness.

9 **THE COURT:** Well, you don't have to --

10 **MR. HIMMELSTEIN:** Yes, it is --

11 **THE COURT:** Well, you can play a party deposition at
12 any time. It may be foundation for the next question that
13 counsel wants to ask.

14 So, if you were playing his deposition, the
15 witness's, yes, it would have to be for impeachment only.

16 **MR. HIMMELSTEIN:** It is foundation for the next
17 question, Your Honor.

18 **THE COURT:** All right. So, then, I'll -- all
19 right --

20 **MS. WINNER:** Your Honor, I do object to this. This
21 is -- this is not substantive testimony.

22 **THE COURT:** What is it?

23 **MS. WINNER:** This is -- he asked a question, there
24 was a privilege objection. And --

25 **MR. HIMMELSTEIN:** And then he answered the question,

1 anyway. Can --

2 **THE COURT:** All right. Now, to save time, I'm just
3 going to let Counsel do it. Let's go ahead.

4 (Document displayed)

5 **MR. HIMMELSTEIN:** All right (As read):

6 **"QUESTION:** Were there any analyses run by
7 the team"--

8 **THE WITNESS:** Sorry, where are you reading from?
9 Sorry.

10 **MR. HIMMELSTEIN:** I am reading from what's up on the
11 screen (As read):

12 **"QUESTION:** Were there any analyses run by
13 the team that were not shared with both
14 Mr. McGoveran and Dr. Cox?

15 **"MR. JOLLEY:** Objection, to the extent that you were running
16 analyses at the direction of counsel that weren't shared with
17 the experts testifying in this case, it's work product.

18 **"MR. HIMMELSTEIN:** I'm waiting for an oral answer.

19 **"MR. JOLLEY:** I instruct you not to answer, to the extent it
20 fits the description I just gave.

21 **"THE WITNESS:** It fits the description. **"MR. HIMMELSTEIN,**
22 **QUESTION:** So there were scenarios that the team ran that were
23 not shared with Mr. McGoveran and Dr. Cox.

24 **"MR. JOLLEY:** Objection, misstates testimony. I instruct the
25 witness not to answer, to the extent that there were analyses

1 performed at the direction of counsel that were not shared with
2 the experts testifying in this case. **"MR. HIMMELSTEIN,**

3 **QUESTION:** Let's go over the different employees that were on
4 the team. What were their names?

5 **"ANSWER:** Mauro Cardenas.

6 **"QUESTION:** And what is his position?

7 **"ANSWER:** He manages the modeling team under
8 my direction.

9 **"QUESTION:** What is the modeling team?

10 **"ANSWER:** He's got three teams currently
11 under him. One does statistical modeling,
12 one does financial modeling, and another one
13 provides support as to our transaction
14 strategies team.

15 **"QUESTION:** Who else was on the team?

16 **"ANSWER:** Joe Lange, Noreen Stitelman.

17 **"QUESTION:** What was Mr. Lange's position?

18 **"ANSWER:** Mr. Lange manages the financial
19 modeling team under Mauro Cardenas.

20 **"QUESTION:** And who else?

21 **"ANSWER:** Noreen Stitelman.

22 **"QUESTION:** And what was her position?

23 **"ANSWER:** She manages the statistical
24 modeling team under Mauro.

25 **"QUESTION:** What sort of level of seniority

1 is she within the company?

2 "ANSWER: Noreen?

3 "QUESTION: Yes.

4 "ANSWER: She doesn't have a title, she's not
5 a vice-president. She presently has one
6 staff member reporting to her.

7 "QUESTION: Who else was on the team?

8 "ANSWER: Kevin and Pradeep and Mauro,
9 Noreen, Joe, and myself. And then others
10 that would be there would be the experts.
11 From time to time, David would come also, but
12 not frequently."

13 **BY MR. HIMMELSTEIN:**

14 **Q** Calling attention to Mr. Lentz's testimony, that it fits
15 the description, are you now concerned that there were
16 scenarios run that were not shared with you?

17 **A** No, I'm not.

18 **MR. HIMMELSTEIN:** Can you put that testimony back up,
19 please.

20 (Document displayed)

21 **MR. HIMMELSTEIN:** And scroll to the top. Right
22 there.

23 **BY MR. HIMMELSTEIN:**

24 **Q** How else do you interpret Mr. Lentz's statement, "It fits
25 the description"?

1 **A** Well, how else, compared to what?

2 **Q** What possible meaning could that answer that Mr. Lentz
3 gave, "It fits the description," other than the fact that they
4 were run -- that the team was running analyses, at the
5 direction of counsel, that weren't shared with the experts
6 testifying in this case?

7 **A** Well, just that they were running analyses at the
8 direction of counsel.

9 **Q** That weren't shared with the experts testifying in this
10 case. Correct?

11 **A** As I explained in my testimony, the scenarios I described
12 were the ones that I developed. But there may have been other
13 discussions between counsel -- and apparently there were other
14 discussions between counsel and people at Wells Fargo.

15 But, that's not a concern to me.

16 **Q** Well, this doesn't talk about discussions; it talks about
17 analyses. That's not a concern to you, either?

18 **A** No.

19 **Q** Okay. Are you familiar with the Federal Judicial Center's
20 reference manual on scientific evidence and, in particular, the
21 reference guide on statistics?

22 **A** I am.

23 **MR. HIMMELSTEIN:** Can we put up Page 88 of that,
24 please?

25 **MS. WINNER:** Wait a minute. Do you have a copy of

1 that? Is that --

2 **MR. HIMMELSTEIN:** I do.

3 **MS. WINNER:** Is that one of the exhibits you
4 identified for this witness?

5 **MR. HIMMELSTEIN:** This was given to you by e-mail at
6 the appropriate time.

7 **MS. WINNER:** When was it given to us?

8 **MR. HIMMELSTEIN:** Three, two, three days ago.

9 (Mr. Himmelstein hands document to Ms. Winner)

10 **MR. HIMMELSTEIN:** I believe this is a --

11 **MS. WINNER:** Just a moment, please.

12 **MR. HIMMELSTEIN:** Okay.

13 **MS. WINNER:** This is not in evidence, so it shouldn't
14 be --

15 **MR. HIMMELSTEIN:** No, it's not in evidence yet.

16 **MR. HEIMANN:** (Inaudible)

17 **MR. HIMMELSTEIN:** It's an authority. It's Federal
18 Judicial Center.

19 **THE COURT:** Well, how were you planning to use this
20 with the witness?

21 **MR. HIMMELSTEIN:** I'm going to question the witness
22 about its content.

23 **THE COURT:** Well, why don't you show him the page
24 that you are interested in.

25 **MR. HIMMELSTEIN:** Yes.

1 (Document displayed)

2 **THE COURT:** And --

3 **MR. HIMMELSTEIN:** If I could approach the witness, it
4 might be easier for him to read a hard copy.

5 **THE COURT:** Yes.

6 (Document displayed)

7 (Witness examines document)

8 **BY MR. HIMMELSTEIN:**

9 **Q** Well, I call your attention to the Section 2, Disclosing
10 Other Analyses. Since I need you to read that and I need the
11 Court to hear it, would you mind doing the honors and reading
12 it aloud?

13 **MS. WINNER:** Your Honor, I object to this. I mean,
14 he's handing him one page out of a document --

15 **MR. HIMMELSTEIN:** This is the relevant portion of the
16 manual. We can probably get the whole manual upstairs.

17 **THE COURT:** Well, he said that he was familiar with
18 the manual. Ask him if he's familiar with this part of the
19 manual.

20 **MR. HIMMELSTEIN:** It's not really relevant to my
21 question, Your Honor, but I'll ask it, if you insist.

22 **THE COURT:** Well, what is the purpose of going down
23 this path?

24 **MR. HIMMELSTEIN:** If we could just read this, it will
25 be quite obvious.

1 **THE COURT:** All right. Go ahead.

2 **MR. HIMMELSTEIN:** Would the Court prefer that I read
3 it, or Dr. Cox?

4 **MS. WINNER:** Same objection, Your Honor.

5 **THE COURT:** Well, I think -- you go ahead and read.

6 **MR. HIMMELSTEIN:** All right (As read):
7 "Disclosing Other Analyses. Statisticians analyze data using a
8 variety of statistical models and methods. There is much to be
9 said for looking at the data in a variety of ways. To permit a
10 fair evaluation of the analysis that the statistician does
11 settle on, however, the testifying expert may explain the
12 history behind the development of the final statistical
13 approach. Indeed, some commentators have urged that counsel
14 who know of other data sets or analyses that do not support the
15 client's position should reveal this fact to the Court, rather
16 than attempt to mislead the Court by presenting only favorable
17 results."

18 And the citation to the commentator is to Judge
19 Schwarzer, whose courtroom is just down below us.

20 **BY MR. HIMMELSTEIN:**

21 **Q** Do you agree with the last sentence of that paragraph?

22 **A** I don't have an opinion, one way or another.

23 **Q** So, you don't have any opinion as to whether it would be
24 improper, for example, for a client to hire a testifying expert
25 and a consulting expert, have the consulting expert run all

1 sorts of scenarios, pick the one that they like that comes out
2 good for the client, and then feed that one to the expert as
3 the preferred method of analysis? Would that be improper?

4 **MS. WINNER:** Your Honor, I object to this. Lack of
5 foundation. This is argumentative; this is not proper
6 cross-examination.

7 **THE COURT:** Overruled. Please answer.

8 **THE WITNESS:** Well, I think that the -- you are
9 asking me a legal question as about what counsel should do in
10 respect to a court. In terms of what I think is appropriate, I
11 think it's appropriate to consider a wide set of scenarios and
12 possibilities. And that's what I did in presenting my results.

13 **BY MR. HIMMELSTEIN:**

14 **Q** Okay. If there were scenarios run that you were not aware
15 of, that came out more favorably for the bank than the
16 scenarios presented in your report, can you think of any reason
17 why the personnel who ran those scenarios would not share that
18 information with you?

19 **A** Well, sure. There might be things that I told the bank I
20 wasn't interested in. Or, scenarios that, for some reason,
21 didn't make sense. There are a lot of reasons why somebody
22 wouldn't share a scenario that was better in its results.

23 **Q** But aren't you the one supposed to be deciding whether a
24 scenario makes sense or not?

25 **A** Well, that's not the question you asked me. You asked me

1 whether I could think of any reason why they would do that. I
2 was telling the bank what I wanted to do, and I was telling
3 Mr. McGoveran what I wanted to do. And I did that, and I
4 presented those results.

5 **Q** And were you under the impression that you were in charge
6 of this entire operation?

7 **A** I was in charge of the operation.

8 **Q** If -- if the team ran analyses that came out less
9 favorably from the bank's perspective, can you think of any
10 other reasons that might not be shared with you?

11 **A** Any other reasons than the one I stated?

12 **Q** Yes.

13 **A** Well, no, I can't.

14 **Q** You -- it couldn't be possible, in your mind, that they
15 just didn't want to give you a less-favorable result to work
16 with?

17 **MS. WINNER:** Objection, Your Honor, this is -- this
18 is getting very argumentative at this point. And I know --

19 **THE COURT:** I understand the general problem.

20 **MR. HIMMELSTEIN:** All right.

21 **THE COURT:** And I think you are being argumentative.

22 **MR. HIMMELSTEIN:** Okay.

23 **BY MR. HIMMELSTEIN:**

24 **Q** Let's move to discussion of the alternative scenarios that
25 you ran. You testified that you're the person who came up with

1 those scenarios. Correct?

2 **A** That's correct.

3 **Q** But since you have no expertise in banking procedures,
4 what qualifies you to determine the correct processing order
5 for 10 million customers?

6 **A** Well, I think it's mischaracterizing my answer earlier, to
7 say that I have no expertise in banking practices. I do know a
8 lot about banking, and I've had a significant involvement in
9 banking before.

10 But, in addition to that, I did familiarize myself, as I
11 also testified earlier, with the operational issues that are
12 relevant to this case, and based my development of a scenario
13 after getting that information and increasing my learning.

14 **Q** Okay. And you double-checked those scenarios with Wells
15 Fargo?

16 **A** Well, the -- I guess I'm not sure what you mean by that.
17 I mean, I certainly double-checked the analysis once we did it.

18 **Q** Did they agree with you that this is the way to do it,
19 your alternatives?

20 **A** They -- they agreed that I could go ahead and do these.
21 I -- I told them that this was what I was going to do, and they
22 went ahead and did it.

23 **Q** Now, is it correct that all of your scenarios -- and you
24 presented results from two, but I know you ran four of them --
25 they all had checks and ACH processed before debit card

1 transactions?

2 **A** That's correct. In keeping with my effort to replicate a
3 chronological ordering.

4 **Q** And you said -- and I think this is a quote from your
5 direct testimony just a few minutes ago -- that you did that
6 because the transactions took place before the posting date,
7 with respect to checks and ACH. Is that correct?

8 **A** That's typically the case, is what I said.

9 **MR. HIMMELSTEIN:** Can we have Trial Exhibit 51 up on
10 the screen, please.

11 (Document displayed)

12 **MS. WINNER:** Wait just a moment, please.

13 **BY MR. HIMMELSTEIN:**

14 **Q** This was Exhibit 15 at your deposition, just for
15 reference.

16 **MR. HIMMELSTEIN:** Could we turn to the second page of
17 this document. And could you highlight in the middle, there's
18 a bullet point. It says "For checks, the transaction date,"
19 it's a little bit down from there, yeah.

20 Can you blow that up, please.

21 (Document displayed)

22 **BY MR. HIMMELSTEIN:**

23 **Q** This document -- you've seen this document before, yes?
24 It was shown to you at your deposition?

25 **A** I don't recall that, but I'll take your word for it.

1 Q Do you understand that this is a document that addresses
2 Wells Fargo's order of posting -- order of posting?

3 A It does discuss that, yes.

4 Q Well, Wells Fargo says for checks, the transaction date
5 will be the date the check is accepted and processed by the
6 bank.

7 But, your scenarios assume that it's the date the check is
8 written. Is that correct?

9 A That's the defined term, the way they define that term in
10 that document, yes.

11 Q So you define "transaction date" --

12 A But --

13 Q Sorry, go ahead.

14 A But I defined the transaction date sort of in the
15 English-language method, or by the English-language meaning,
16 which is the date that the check was written.

17 Q So, you, who are not an expert in banking practices or
18 procedures, define "transaction date" the opposite of the way
19 Wells Fargo defines it. And you based your alternative
20 scenarios on your definition. Correct?

21 A Well, there's several statements in there that are
22 arguable. One is that the bank defines "transaction date" this
23 way, outside of this document.

24 And, as I said, I was fairly straightforward in the way I
25 defined "transaction date," and I wanted to make the point or

1 assess the extent to which there's a time difference between
2 the date a check is written and the day a check actually posts.

3 **Q** Are you -- and your position with respect to ACH is that
4 the transaction date is what?

5 **A** Well, the transaction date is certainly before the date
6 that it actually posts. In almost all cases, an ACH would have
7 been arranged for before the -- the -- the date that the ACH
8 actually posts.

9 **Q** And ACH includes what laypeople call "bill-pay," correct?

10 **A** I'm not sure about the definition. I know what ACH is,
11 but it's basically "automatic clearing house," it's prearranged
12 deductions from your account.

13 **Q** And don't many people typically set up recurring payments
14 of bills, like their cable bill, their rent, whatever, months,
15 a year, or years in advance of when those payments actually are
16 supposed to happen?

17 **A** That's correct. But I wouldn't make that the date,
18 necessarily, of the -- the transaction date for an ACH that
19 takes place on a particular month.

20 **Q** Let me give you a hypothetical. I'll use myself as an
21 example. I set up in 19 -- I guess it was 2006, because I
22 moved -- a regular payment of my PG&E bill every month. I
23 haven't touched it since.

24 Would you say my transaction date for my April 2010
25 payment was in 2006?

1 **A** No, I wouldn't.

2 **Q** Would you say it was April 10th -- if it was due, say,
3 April 10th and paid April 10th, wouldn't that be the
4 transaction date?

5 **A** No, I wouldn't say that, either.

6 **Q** Well, what would it be?

7 **A** Well, it would be some date before the posting date. I
8 don't have to actually answer that question in order to be able
9 to do my analysis.

10 But, I think it's reasonable that when people make their
11 deductions from their checks, that they have in mind that they
12 have ACH transactions that they've already implemented at some
13 date before the actual posting date of that ACH transaction.

14 **Q** But, in terms -- determining a transaction date for the
15 ACH, you just -- you don't have one. There is no transaction
16 date for ACH, as far as you're concerned?

17 **A** Well, I didn't say that.

18 **Q** Well, what is it, then?

19 **A** Well, I didn't -- I said I didn't need to answer that
20 question, because I didn't have to come up with an exact date
21 relative to the posting date.

22 All I'm saying is, that it's reasonable to treat it as
23 something that posts -- something that -- a transaction that
24 took place before the actual posting date.

25 **Q** Is there any -- with respect to the hypothetical I gave

1 you, which is actually not a hypothetical, is there any date,
2 specific date that you could identify as the transaction date?

3 **A** I already answered that question. And the answer is, I
4 don't have a particular date.

5 **Q** Okay. Thank you.

6 Are you familiar with Wells Fargo's current posting order?

7 **A** Yes.

8 **Q** Can you just describe it briefly?

9 **A** Well, first of all, they deduct fees for things like
10 overdraft. Then they take into account all cash, cash --
11 cash -- sorry. Then they post all credits.

12 Then they take into account cash versus ATM deductions,
13 they deduct cash versus ATM. And then they deduct checks,
14 debit card transactions, ACH transactions, and bill-pay, from
15 high to low.

16 **Q** So, the current posting order commingles checks, debit
17 cards, and ACH transactions?

18 **A** That's correct.

19 **Q** It does not put checks or ACH transactions ahead of debit
20 cards, does it?

21 **A** That's correct.

22 **Q** In fact, isn't it true that, as far as I think anyone in
23 this courtroom knows, we've established, Wells Fargo has never,
24 ever posted either checks or ACH ahead of debit card
25 transactions?

1 **A** Well, I don't know the answer to that question.

2 **MR. HIMMELSTEIN:** Can we put up Exhibit 221, please.

3 (Document displayed)

4 **BY MR. HIMMELSTEIN:**

5 **Q** This is -- I don't know if you have seen this document
6 before. Have you?

7 **A** I -- I was told that you were going to be bringing it up
8 in my cross-examination, but that was the first time.

9 **Q** All right. Well, just for your context, I'll represent to
10 you, this is an exhibit filed by Wells Fargo that depicts its
11 previous posting orders, previous to the one that you just
12 described.

13 Looking at the pre-April 2001 posting order, do you see
14 there that cash withdrawals and debit cards are processed
15 before both checks and ACH?

16 (Witness examines displayed document)

17 **A** Well, I've not read the whole document, so I presume
18 that 1 and 2 refer to the order? The numbers in the circle
19 refer to the order.

20 And if that's the case, then it does appear that what is
21 said here is that debit cards are sorted before checks and ACH.

22 **Q** Looking at the bottom row, the April-to-November 2001
23 posting order, do you see there, as well, that debit cards are
24 processed ahead of both checks and ACH?

25 **A** Yeah, under the same interpretation, that's what that

1 document says.

2 **Q** And you -- I don't know if you understand that there's
3 some dispute about whether that is an accurate reflection of
4 the April-to-November 2001 posting order --

5 **MS. WINNER:** Your Honor, I object. This is beyond
6 the scope. This witness has offered no testimony about the
7 bank's historical posting order.

8 **MR. HIMMELSTEIN:** I'll withdraw that question, Your
9 Honor.

10 **BY MR. HIMMELSTEIN:**

11 **Q** Now, when the bank uses, say, authorization times or dates
12 that checks are received to -- to determine the transaction
13 date, or date and time, that's objectively verifiable
14 information, is it not? It comes from a neutral third-party
15 source.

16 **A** Did you ask about both checks and debit card transactions
17 or --

18 **Q** I'm sorry, let's stick with debit card transactions first.

19 **A** Okay. And your question is, that that's an objective
20 source? Sorry, may be a good idea --

21 **Q** I'll try and rephrase.

22 Do you have any doubt that when a bank shows that a check
23 was received by it, and posted on a particular day, assuming it
24 didn't mis-post, that it actually was received by the bank on
25 that day?

1 **A** I don't have any reason to believe it doesn't.

2 **Q** And do you have any reason to doubt that when a debit card
3 authorization comes through with a particular date and time,
4 that the date and time are correct?

5 **A** Generally, I would say that would be correct, yes.

6 **Q** Now, let's take checks. You based your analysis of
7 checks, did you not, not on anything objectively verifiable,
8 but on whatever date the writer of the check wrote on the
9 check, correct?

10 **A** That's correct.

11 **Q** And there's no way of knowing whether that's correct or
12 not, is it?

13 **A** There's no way of knowing whether it's correct or not for
14 a particular check. That's correct. People tend to write the
15 correct date, so, on average, my results hold up.

16 **Q** Do you ever, like, in a new year, continue to write the
17 old year on a check?

18 **A** Yes.

19 **Q** Do you ever, you know, write a check with the wrong date?

20 **A** Yes.

21 **Q** Okay. If the bank were to base its business process, the
22 posting order, not on objectively verifiable information, but
23 on something the customer could manipulate, like the date the
24 check was written, wouldn't that open up all sorts of
25 possibilities for fraud?

1 **A** I'm not sure that it would open up all sorts of
2 possibilities for fraud. It may be an argument for not sorting
3 checks chronologically, I suppose.

4 **Q** Do you have some understanding of why Wells Fargo would
5 post --

6 **MR. HIMMELSTEIN:** Could we have that exhibit up
7 again, please, the last one, 221.

8 (Document displayed)

9 **BY MR. HIMMELSTEIN:**

10 **Q** Do you have some understanding of why, in the pre-April
11 2001 and the April-to-November 2001 scenarios, why Wells Fargo
12 would post debit cards either the same as cash, in the first
13 one, or immediately after cash but before checks, in the second
14 one?

15 **A** I guess -- I guess I would rather you broke that down,
16 rather than have them either, in the question, unless -- unless
17 the question is linked --

18 **Q** For simplicity, let's take the April-to-November 2001
19 timeline. Cash withdrawals are first, they go ahead of
20 everything.

21 Do you have some notion of why that might be?

22 **A** In the April-to-November 2001?

23 **Q** Yes.

24 **A** No.

25 **Q** Would it be because cash is a non-recourse item that the

1 bank is going to be out of pocket on, whether there's enough
2 money in the customer's account or not?

3 **A** It might be, yes.

4 **Q** And, could that -- and are debit card transactions also
5 what we would call "non-recourse transactions," meaning -- or
6 "must-pay transactions," in the bank's parlance, meaning that
7 once the transaction is authorized, it must be paid?

8 **A** Yes, that's correct.

9 **Q** Do you see anything else up on that screen that falls into
10 that category?

11 **A** No.

12 **Q** All right. Well, if -- we're dealing, are we not, by
13 definition, with a situation where there is not enough money in
14 the account to cover all of the debits that are coming in.
15 Correct?

16 **A** That's correct.

17 **Q** So if there's not enough money in the account to cover
18 everything, why would the bank, under your posting scenarios,
19 and even under Wells Fargo's current posting scenario, why
20 would it want to risk getting stuck with what unpaid -- let me
21 rephrase.

22 Why would the bank not use whatever dollars are available
23 to pay first the things that it must pay?

24 **A** Well, for several reasons. One is, meeting the expressed
25 desires of its customers; for instance, the desire that

1 customers may want to have their checks cleared because they
2 prefer to have -- because their checks are often for important
3 items. And I think I cite -- I do cite in my report, for
4 instance, references by the Federal Reserve board on exactly
5 this point, making exactly that point.

6 **Q** Have you ever seen this so-called Norwest survey that
7 Wells Fargo -- well, that you referred to in your report as
8 something you were relying on?

9 **A** Well, that was not what I was just referring to, but I
10 was --

11 **Q** I know it wasn't, I'm asking about something else.

12 **A** -- but I have not seen the Norwest report, but I have seen
13 these other reports.

14 **Q** Did you ever ask to see it?

15 **A** I -- I don't recall whether -- whether I asked to see it.
16 But, at some point, I understood that it hasn't been found.

17 **Q** Well, you're telling me that this is a pretty important
18 thing for you, it's the reason why the bank might expose itself
19 to having to pay out all this money it couldn't get back, it's
20 customer preference.

21 And in your report, you cite this Norwest study as, you
22 know, a basis for the customer preference, but you didn't
23 think, as an aca- -- well, you're not an academic, but as a
24 professional economist -- that you should actually ask to see
25 that research?

1 **A** Well, as I said, I can't remember whether I asked to see
2 it or not. I did get corroborating evidence, since I wouldn't
3 have relied on one study anyway, from the Philadelphia Reserve
4 Bank and from the board of Governors of the Federal Reserve,
5 and I think I cited other examples in my report.

6 Collectively, that gave me, I think, some comfort that
7 that was a reasonable basis for the bank to clear checks in the
8 manner that they do.

9 **Q** Is another possible explanation for why the bank would
10 start putting recourse items ahead of non-recourse items, that
11 they calculated that, by changing the sort order, they would be
12 able to rake in more in overdraft fees from their customers
13 than they would lose in must-pay items that they couldn't
14 recover the money from their customers on?

15 **MS. WINNER:** Objection, Your Honor. This is entirely
16 beyond the scope of this Witness's testimony. He's not
17 offering -- he has not offered any testimony about what the
18 bank's reasons are for his posting order --

19 **THE COURT:** Isn't that correct? Aren't you just
20 arguing with someone who is not qualified to give those
21 answers?

22 **MR. HIMMELSTEIN:** Well, he said he's an economist,
23 and his report has all sorts of opinions that relate to this,
24 but I guess he has withdrawn those.

25 **THE COURT:** He didn't give those, he didn't give any

1 opinions on direct examination.

2 **MR. HIMMELSTEIN:** All right.

3 **BY MR. HIMMELSTEIN:**

4 **Q** So, but you agree that by changing in -- in your sort
5 order, all of your scenarios, as well as what the bank did in
6 its current sorting order when it changed from the
7 April-to-November one, the bank has now voluntarily exposed
8 itself to liability for non- -- must-pay items that the money
9 might not be recoverable from the customer?

10 **MS. WINNER:** Objection, Your Honor. Again, this is
11 beyond the scope of this witness's testimony.

12 **MR. HIMMELSTEIN:** Your Honor --

13 **MS. WINNER:** There's no -- and this witness has not
14 testified, nor has there been any foundation laid, as to his
15 knowledge of what the bank's previous posting order was.

16 That's just not the subject matter of this witness's
17 testimony.

18 **MR. HIMMELSTEIN:** Your Honor, I've asked him about
19 his sort orders, the consequences for the bank. He's
20 justifying his sort orders as being the best thing out there,
21 that's the way it should be done.

22 I think I'm entitled to explore the legitimacy of
23 that and the consequences to the parties of the sort orders
24 that he's putting forward.

25 **MS. WINNER:** Your Honor, his testimony was about how

1 you would measure the impact of a failure to measure -- to sort
2 chronologically. He has offered no testimony about what the
3 optimal sort order would be for the bank, given all
4 considerations.

5 That's not the subject -- the subject matter of his
6 testimony at all.

7 **MR. HIMMELSTEIN:** Your Honor, this is splitting hairs
8 so fine I can't even see it.

9 **THE COURT:** Well, this is a little different from the
10 other question. Since there are various scenarios on the
11 table, one of the scenarios that Mr. Himmelstein is trying to
12 roll up is to show that if the bank was really interested in
13 protecting its safety and soundness, it would always pay the
14 must-pays first, and then the optional things, like checks,
15 they would wait to see whether or not there was enough money to
16 cover them.

17 And if there was not enough money to cover them, then
18 they would have to make a decision whether or not to -- to
19 advance the money.

20 That's the point you're trying to make. Right?

21 **MR. HIMMELSTEIN:** Yes, Your Honor.

22 **THE COURT:** All right. Do you -- what comment do you
23 have to say on that point, Mr. Witness?

24 **THE WITNESS:** Well, it's certainly a consideration
25 for the bank, but the bank has other considerations, like its

1 customers' interests in getting checks cleared.

2 **THE COURT:** All right. These are things that the
3 witness is not an expert on, and it is not going to help me
4 very much to --

5 **MR. HIMMELSTEIN:** Okay.

6 **THE COURT:** -- argue over things like this. So --

7 **MR. HIMMELSTEIN:** I'll move on, Your Honor.

8 **THE COURT:** -- let's move on.

9 **THE WITNESS:** Can I ask a question?

10 **THE COURT:** I'm sorry, what?

11 **THE WITNESS:** I was just wondering when the next
12 break would be.

13 **THE COURT:** Well, if you need one, we'll take one
14 right now.

15 **THE WITNESS:** Well, if it's ten minutes, I can wait.

16 **THE COURT:** I would normally wait about 30 more
17 minutes, so, would this be a good time for you to take a break?

18 **THE WITNESS:** If you wouldn't mind, Your Honor.

19 **THE COURT:** Now, remember, you are on
20 cross-examination, so no talking with Counsel.

21 All right. We will take a 15-minute break.

22 **THE WITNESS:** Thank you, Your Honor.

23 (Recess taken from 10:48 a.m. to 11:03 a.m.)

24 **THE COURT:** All right. Back to work. Back to work.

25 Does that say 11:00?

1 **THE CLERK:** Yes.

2 **THE COURT:** Okay. All right. Is everyone ready now?

3 **MR. HIMMELSTEIN:** Yes, Your Honor.

4 **THE COURT:** Where are all your -- your teammates? I
5 guess they -- They're gone. Okay.

6 All right, let's go ahead.

7 **MR. HIMMELSTEIN:** Can you put this back up
8 (Indicating)?

9 (Document displayed)

10 **BY MR. HIMMELSTEIN:**

11 **Q** Dr. Cox, the -- is it true the -- one other change your
12 Scenario C and D makes, relative to the scenarios Mr. Olsen
13 ran, is that instead of crediting deposits before debits, you
14 have now put them after debit cards in the sort order?

15 Is that correct?

16 **A** I put them after checks.

17 **Q** Excuse me?

18 **A** I think your question was credits. And I put the credits
19 after checks.

20 **Q** Right. You put the credits after checks. Pardon me.

21 Has Wells Fargo ever, to your knowledge, done that?

22 **A** I don't know.

23 **Q** Didn't you think that would be something worth
24 investigating?

25 **A** Well, I didn't think it was relevant, no. I was trying to

1 sort -- think about how the bank would sort, if it was sorting
2 chronologically.

3 **Q** Did you consider the impact on customers and the bank, of
4 departing from its, as far as I can tell, historical consistent
5 procedure of processing credits before debits?

6 **A** I didn't consider that, no. I considered what would be
7 the chronological order.

8 **Q** So you considered the impact on class members of
9 collateral fees that merchants, et cetera, might have imposed
10 on them for bounced checks, but you didn't consider the impact
11 of failing to credit their deposits before their debits?

12 **A** Well, I did do that analysis about -- on the checks on
13 Mr. Olsen's scenarios.

14 But as I said, what I -- my sole objective in C and D was
15 to see what the scenarios would look like, or what the
16 sequencing would look like, if you attempted to do
17 chronological ordering.

18 **Q** Well, what is your justification for putting credits after
19 checks?

20 **A** Because my understanding is, and I think it's correct,
21 that those credits would generally have taken place the night
22 before or the day of the posting. These would be things like
23 cash deposits, check deposits, deposits made into people's
24 accounts.

25 And those would generally have taken place, in terms of

1 the order that the customer made them, after they wrote checks.

2 **Q** All right. So let me give you a hypothetical, using
3 myself again. I've got my PG&E payment scheduled for the first
4 of every month. I don't know how much it's going to be until I
5 get my PG&E bill.

6 So let's say, April 15th, I get a PG&E bill for \$300,
7 pursuant to the ACH I set up in, I think, 2006. That's going
8 to go out on May 1st.

9 If I were to go into the bank, 8:00 a.m. May 1st, deposit
10 \$300 in cash, you would bounce that -- you would not make that
11 payment, right? You would reject it because you would process
12 the credit after the checks -- after the ACH.

13 **A** That's correct. You would have known what your ACH bill
14 would have been for several days, and would have made the
15 credit to your account after the ACH was due.

16 **Q** And if I was reading the bank's bill-pay system, it would
17 tell me that the money is going out on a particular day, would
18 it not?

19 **A** That's correct.

20 **Q** So what obligation would I be under to deposit money
21 before -- back up for a second.

22 Do you understand that ACH transactions are
23 batch-processed at the end of the day, they don't get processed
24 during the business day?

25 **A** That's correct. That's what we're talking about here.

1 **Q** So, if I have a reasonable expectation that, at the end of
2 May 1st, I need to have \$300, at the end of the business day,
3 in my account to pay that PG&E bill I set up in 2006, and I go
4 in at 9:00 a.m., whenever the bank opens, deposit cash for that
5 amount, you think I've done something wrong and they should not
6 pay my PG&E bill.

7 Is that correct?

8 **A** Well, you have known that your PG&E bill was going to be
9 more than that the money that you had in the account for
10 several days. And basically, you're playing a float, by
11 waiting until you did.

12 **Q** Well, at what point -- take again this example I've given
13 you. At what point do I have to have that \$300 in the account
14 to satisfy you that I'm not playing the float?

15 **A** Well, you should have it in by the time that it comes due.

16 **Q** Which is when?

17 **A** But -- well, you should make an effort -- well, it comes
18 due on -- I forget the date that you said.

19 **Q** May 1st.

20 **A** -- on May 1st. And you, you know, waited until May 1st to
21 make that payment --

22 **Q** That's timely, isn't it? Sorry.

23 **A** -- but the fact of the matter is, if you were trying to
24 order things chronologically, if that was what you were really
25 trying to do, you would take into account the fact that you've

1 known for several days, you knew when you received your bill,
2 in fact, what your account was.

3 In fact, you've already benefited from consuming that
4 electricity for weeks and have known for several days what your
5 account would be. And you've waited until after the -- until
6 when you indicated for you to -- to pay the bill.

7 **Q** All right. So, in 2006, I set up an auto-pay for all my
8 PG&E bills. At that point in time, I don't know what the bills
9 are going to be. Right?

10 **A** That's correct, you don't.

11 **Q** So, it's not your position that I have to have, at that
12 time, money in the account to cover all my future bills, is it?

13 **A** No. I already said that, that was not --

14 **Q** All right. Now you said, for a bill that I know, by
15 reading what's on the bank's website, it's supposed to be paid
16 by the end of the business day, May 1st. It is not sufficient,
17 in your view, if we are doing things chronologically, for me to
18 make a deposit on the morning of that day.

19 When would be sufficient, in your view?

20 **A** Well, I'm not making the characterization of what the bank
21 should do. I'm just saying, if the bank should post items
22 chronologically, in the order that the customer made the
23 transaction, then you would do it in the way that I've
24 suggested in Scenarios C and D.

25 **Q** Under the bank's current posting order, do you understand

1 that they still process credits before debits, all kinds of
2 debits?

3 **A** Yes.

4 **Q** Do you have any notion or understanding of why banks do
5 that?

6 **A** Well, one is, is a benefit to their customers.

7 **Q** Isn't it because they would be sued right and left for not
8 paying things if the scenario I've just described with myself
9 were to materialize?

10 **A** I don't know whether they would be sued right and left,
11 and I don't know whether they think they would be.

12 **Q** Now you, in your damage calculations, you would exclude
13 what you call persons who overdraft repeatedly. Correct?

14 **A** I would certainly exclude damages to some set of people
15 who overdraft repeatedly, have multiple overdraft events
16 repeatedly.

17 **Q** And what is your cutoff point for who should be excluded
18 and who should not be excluded?

19 **A** Well, I don't personally have a cutoff point, I think that
20 should be up to the Court to decide. But I think a reasonable
21 number would be five, that if you have had it happen to you
22 five times over a several-year period, then by then, at least,
23 you are certainly on notice, and you certainly should have an
24 opportunity to amend your behavior so that your spending is
25 within your -- within your account, or make other arrangements

1 such as overdraft protection.

2 And certainly, I would say, by ten times, would be --
3 would be more than a reasonable cutoff.

4 **Q** Now, you are talking about five- or ten-time situations in
5 which you have a single overdrafts or multiple overdrafts?

6 **A** Multiple overdrafts. My calculations were only done on
7 multiple overdrafts.

8 **Q** Well, you were talking about people changing their
9 behavior, having enough money to cover their debits, right?
10 That's the behavior change you are looking for, and that you
11 are blaming them for not having.

12 **A** I'm not blaming anybody for anything. I'm just saying
13 that that would be one thing they could do, or make other
14 arrangements, such as arrange for overdraft protection or have
15 their accounts linked to credit cards.

16 **Q** But people who make a single overdraft should also know to
17 keep money in their accounts. Right?

18 Just like the same as people with multiple overdrafts.
19 Right?

20 **A** Yes.

21 **Q** And, and basically, don't you think everybody who opens a
22 bank account knows that if they exceed their balance, they're
23 going to get an overdraft or an NSF?

24 **A** Well, I think everybody knows that they -- that they're
25 going to get some sort of penalty and that they should keep

1 enough money in their account to pay for their transactions.

2 **Q** Now, are you aware that the damages calculated by
3 Mr. Olsen are damages resulting solely from the sort order that
4 Wells Fargo imposes, as opposed to just trying to recoup all
5 overdraft charges?

6 **A** I guess I don't understand the question.

7 **Q** Well, Mr. Olsen, did he not, calculate the difference
8 between the overdraft charges Wells Fargo actually imposed and
9 the overdraft charges that would be imposed under his
10 alternative processing scenarios?

11 **A** That's correct.

12 **Q** So that's a differential. He's not reporting as damages,
13 if you will, the entire amount of overdraft fees paid by those
14 people, just the differential. Right?

15 **A** That's correct.

16 **Q** And that differential is due to the different sort order
17 that Wells Fargo has versus what Mr. Olsen ran. Correct?

18 **A** Yes, that's correct.

19 **Q** So, how does the -- somebody overdrafting five times,
20 inform them about the sort order, so that they can change their
21 behavior and not suffer the damages that are due to the sort
22 order are, which is all that Plaintiffs are claiming?

23 **A** Can you say that again, please?

24 **Q** Yes. Well, I'll just have the court reporter read it
25 back, would be easier, I think.

1 (Pending question read back by the Reporter)

2 **THE WITNESS:** Well, I guess there would be two things
3 they could do. First of all, they could see that the
4 consequences of overdrafting is significant, and so that, by
5 itself, would inform them of the need, or reinforce them of the
6 need, the need to ensure that they don't overdraft their
7 accounts.

8 Or they might want to get more specific information,
9 and determine what the cause is, of the actual number of
10 overdrafts that they received.

11 **BY MR. HIMMELSTEIN:**

12 **Q** So you're not saying they would, simply by having five
13 instances of multiple overdrafts, know what Wells Fargo's sort
14 order was, are you?

15 **A** No. I'm just saying that that provides them with an
16 indicator that there is something that they should look into
17 or -- look into and address.

18 **Q** So, any of Wells Fargo's 10 million or so customers who
19 get multiple overdrafts, it is then incumbent on them to figure
20 out the bank's sort order and pursue that information.

21 Is that your testimony?

22 **A** Well, I'm not saying that they necessarily have to get an
23 exact understanding of every nuance of the sort order in every
24 circumstance. But I think that they should -- it should be a
25 signal to reinforce for them, to them, the need to amend

1 their -- the way they handle their accounts, either by limiting
2 their spending or by making other arrangements.

3 Sorry, I had another part to that answer, but --

4 **THE COURT:** Mr. Himmelstein, I need to ask you, how
5 much longer do you have?

6 **MR. HIMMELSTEIN:** Quite a bit, Your Honor. Maybe --

7 **THE COURT:** Well, you know, your side has run out of
8 time, so --

9 **MR. HIMMELSTEIN:** I'll move it along as fast as
10 possible. I have been dwelling on this.

11 I'll try to move quickly, but there are some critical
12 things that we need to --

13 **THE COURT:** I think you need to go to the critical
14 things --

15 **MR. HIMMELSTEIN:** There's a lot.

16 **THE COURT:** -- because the Plaintiffs have used up
17 all their time. You are in grace period, and you have been
18 arguing with the witness over things that are just
19 argumentative.

20 Stick to the main things.

21 **MR. HIMMELSTEIN:** I'll try and move through as
22 quickly as possible.

23 **BY MR. HIMMELSTEIN:**

24 **Q** Turning to one other complaint you had about Mr. Olsen's
25 scenario, which is, correct me if I'm wrong, that he processed

1 debit cards without timestamps first, instead of last, among
2 the debit card transactions, is that one of the issues?

3 **A** Well, I have pointed out that that created issues, yes.

4 **Q** But in both your C and D, you put cash and ATM debits
5 without timestamps at the beginning of the day, not the end.

6 They are all non-recourse transactions; why the
7 difference?

8 **A** Well, I'll not claiming that there isn't -- there's still
9 some issues about untimed transactions in my sequences. I'm
10 just making the best effort to sequence my transactions, as
11 much as possible, in chronological order.

12 **Q** Are you aware -- well, you must be, because you looked at
13 the scenarios -- that Mr. Olsen reran all of his calculations
14 that had debit cards without timestamps first; he reran them in
15 the alternative, processing them last?

16 **A** Debit card transactions.

17 **Q** Yes.

18 **A** In 3C and 2C, that's correct.

19 **Q** And did you make any comparison of the results, of, for
20 example -- well, the various pairs that have the debit cards
21 without timestamp sorted first versus last?

22 **A** Well, as I said in my Exhibit 714, or the -- the
23 Demonstrative 714, 2B and 2C were, in the aggregate, very
24 similar, and 3B and 3C were, in the aggregate, very similar
25 also.

1 Q Would it surprise you to learn that the greatest
2 differential between any of those pairs is 0.103 percent?

3 A No, it wouldn't. But that would not necessarily mean that
4 there aren't a significant number of people for whom damages
5 would have been different under those two scenarios.

6 Q But it wouldn't affect the aggregate number that Wells
7 Fargo would be liable for, if we prevail.

8 A That's correct.

9 Q Okay. Now, I want to talk about your extrapolation of the
10 ten days' worth of data that you analyzed to the entire class
11 period.

12 It's true, is it not, that unless a class member had all
13 of their multiple overdrafts on those ten days by sheer
14 coincidence, you did not calculate damages for any individual
15 class member?

16 A I testified to that earlier. That's correct.

17 Q And why didn't you just run all of the data? Why only ten
18 days?

19 A Well, it was because of a matter of time, and the
20 availability of resources.

21 Q Well, how is it that Mr. Olsen was able to compute -- make
22 all his computations for 1,435 days, whereas the bank, with all
23 of its resources and time, this case has been pending for
24 years, could only do 1/140th of that analysis?

25 A Well, as you recall, Mr. Olsen was given several months to

1 do his initial Scenarios 1, 2, and 3, and then asked for
2 extensions and was -- received extensions which, I think,
3 constituted months of extensions from the original due date of
4 his report.

5 So in fact, it indicated that, to me at least, that the --
6 the idea of taking a sample, which I thought was adequate, was
7 the appropriate way to go, in order to be able to ensure that
8 we would get -- that I would have enough time to run scenarios
9 and write up my results in a manner that was required by the
10 Court.

11 **Q** Your Scenarios C and D, you came up with those. They
12 don't really depend on anything Mr. Olsen did for you to
13 calculate those damages, do they?

14 **A** Well, that's correct. But --

15 **Q** So why didn't you make those --

16 **A** It --

17 **Q** Sorry.

18 **A** Well, at the time that I started this -- this work, I
19 thought I was working under a fairly limited amount of time,
20 and sampling clearly was the best way to undertake the analysis
21 that I needed to undertake for the purposes of reimbursement.

22 **Q** Before committing yourself to this particular method,
23 since you didn't have much time, I assume that you didn't think
24 you had time to try something and then, if it didn't work out,
25 try something else, is that correct?

1 **A** By not working out, you mean not having enough time to run
2 a computer program in order to write up a report for the Court?

3 **Q** I'll strike the question.

4 Before committing yourself to this particular method of
5 analysis, a 10-day sample plus an extrapolation, did you run
6 any statistical power calculations to determine the minimum
7 sample size you would need to achieve a 95 percent confidence
8 interval?

9 **A** Well, I think the technical question is whether or not I
10 ran a -- an initial analysis to figure out how many samples I
11 would need in order to have a 95 percent confidence interval
12 within a particular dollar amount.

13 And the answer to that is, no, I didn't.

14 **Q** Why not?

15 **A** Because I didn't -- I wasn't trying to prove that
16 something was statistically different from something else. I
17 was just trying to show what the analysis would -- what
18 different scenarios would look like.

19 **Q** So you didn't care whether your results would have
20 a 95 percent confidence interval or something less?

21 **A** Well, Mr. Himmelstein, you know that that is not correct
22 because I issued my 95 percent confidence intervals in my
23 report.

24 **Q** Right. So why did you not -- all right.

25 Who selected -- you said you selected the ten days that

1 were analyzed. That was your testimony earlier?

2 **A** No. My testimony was that I selected the technique that
3 was going to be used for selecting the days. And they were
4 selected under my direction and Mr. McGoveran's direction.

5 **Q** Do you recall that, at your deposition, you had no
6 recollection, and you -- you testified that there was no
7 written record, as far as you know, of the criteria used to
8 select those ten days?

9 **MS. WINNER:** Objection, Your Honor. This is not the
10 way the Court likes to have this --

11 **THE COURT:** You need to read the transcript.

12 **MR. HIMMELSTEIN:** All right. This would be Page 41,
13 Line 8, through Page 43, Line 21.

14 **MS. WINNER:** 41 -- 43, Line 8?

15 **MR. HIMMELSTEIN:** No. 41, Line 8, through 43,
16 Line 21.

17 **MS. WINNER:** Your Honor, I don't believe this is
18 inconsistent testimony, but I don't -- I don't want to waste a
19 lot of time arguing about it.

20 If he wants to go ahead and read it, that's fine with
21 me.

22 **MR. HIMMELSTEIN:** Play it.

23 **MS. WINNER:** I assume you are going to read the whole
24 thing.

25 **MR. HIMMELSTEIN:** We are playing. It's all there. I

1 apologize for that mistake yesterday.

2 **THE COURT:** All right.

3 (Deposition excerpt played in open court, not
4 transcribed)

5 **MR. HIMMELSTEIN:** That's it, Your Honor.

6 **BY MR. HIMMELSTEIN:**

7 **Q** Over what period of time were the ten days spread?

8 I'll -- if it will help you --

9 **A** Well, I can tell you.

10 **Q** Okay.

11 **A** From January, 2007, to June, 2008.

12 **Q** So, roughly 17 months?

13 **A** Yes, that would be right.

14 **Q** Could you turn, please, to Page 67 of your report.

15 **MR. HIMMELSTEIN:** And can we have that up on the
16 screen, please.

17 **MS. WINNER:** Just a moment. To 67 -- I'm sorry, what
18 page?

19 **MR. HIMMELSTEIN:** 67.

20 (Document displayed)

21 **BY MR. HIMMELSTEIN:**

22 **Q** Calling your attention to Subpart H, could you read that
23 aloud, please.

24 **A** (As read):

25 "Instead of using ratios from the FDIC report, Equation 7

1 indicates that Dr. Cowan's Method 3 is actually based on the
2 ratio of Wells Fargo's total overdraft fees for 2006,
3 \$479,981,603. The total for 2006 of the chosen call report
4 measure, e.g., demand deposits, transaction deposits,
5 et cetera. Therefore, Dr. Cowan's Method 3 assumes that data
6 from 2006 is applicable to the entire damages period
7 (2004-2008). There are a number of issues with using a ratio
8 from 2006 to model damages in earlier years (2004 and 2005) and
9 later years (2007 and 2008). According to Mark Lentz, a senior
10 vice-president at this Wells Fargo, there have been a number of
11 changes throughout the damages period that would make the use
12 of only one ratio measure at a point in time inappropriate."

13 **Q** Please continue.

14 **A** "Customers have shifted" --

15 **MS. WINNER:** This is not in evidence. I'm not sure
16 we -- is this being used for impeachment? Or why are --

17 **MR. HIMMELSTEIN:** Do you want me to cut to the chase,
18 Your Honor?

19 **THE COURT:** Yes.

20 **MR. HIMMELSTEIN:** These are criticisms of Mr. Lentz,
21 which were adopted and endorsed by both Dr. Cowan and Dr. Cox,
22 which Dr. Cox testified were equally applicable to his own
23 extrapolation at his deposition.

24 And that's what I intend to play next, if he doesn't
25 admit that.

1 **THE COURT:** Well, wait. Whose report have we been
2 reading?

3 **MR. HIMMELSTEIN:** This is Dr. Cox' report.

4 **MS. WINNER:** But it's -- it's not being used to
5 impeach his testimony.

6 **MR. HIMMELSTEIN:** Yeah. I'm showing his analysis, by
7 his own testimony at his deposition, is unreliable.

8 **THE COURT:** Do you did make those statements that we
9 just read off the screen in your report?

10 **THE WITNESS:** Yes, I did.

11 **THE COURT:** All right. So all right. He's admitted
12 that. So what's the point now?

13 **MR. HIMMELSTEIN:** Well, he made those statements.
14 And then at his deposition --

15 Well, I'll ask him.

16 **Q.** Aren't those criticisms equally applicable to your own
17 extrapolation that takes ten data points over a four-year
18 Class Period?

19 **A.** I agree that it is an issue, but I think that the results
20 stand for themselves; particularly the fact that my results
21 came out so close to Mr. Olsen's.

22 **Q.** Well, if it's an issue, did you try and quantify the
23 impact?

24 **A.** No, I didn't.

25 **Q.** Okay. I'd like to turn to your analysis of returned item

1 rates. That does not effect any charge imposed by Wells Fargo,
2 does it?

3 **A.** I guess I don't understand the question.

4 **Q.** Well, whether an item is returned or not the depositor
5 gets hit for the same \$34 fee. They call it an "NS fee" if
6 it's not paid, and an "overdraft fee" if it's paid; but the
7 fact that there are a higher or lower returned item rate under
8 the various scenarios does not affect any charge imposed on the
9 customer by Wells Fargo, correct?

10 **A.** No, that's not correct, because, just to cut to the chase,
11 if a check is not "made good," so to speak, relatively quickly,
12 there's a possibility that that check will be submitted again
13 by the merchant or the payee. And then the person has two NSF
14 fees, rather than one overdraft fee.

15 **Q.** Now, in terms of the higher returned item rates that you
16 put in -- let's see -- it's your Exhibit 4.1 to your report.

17 **MR. HIMMELSTEIN:** Can we have that up; the trial
18 exhibit number? 4.1A. Excuse me.

19 (Document displayed)

20 **MR. HIMMELSTEIN:** Now, I'm sorry. It was the
21 wrong --

22 **MS. WINNER:** Which exhibit?

23 **MR. HIMMELSTEIN:** I'm sorry. 2.4A.

24 Trial Exhibit 744.

25 **MS. WINNER:** 744?

1 **MR. HIMMELSTEIN:** Yes.

2 **Q.** These calculations that you made of percentages of items
3 that would be returned under Mr. Olsen's scenarios -- you did
4 not try to quantify any impact on the class of this, did you?

5 **A.** Just in an aggregate sense.

6 **Q.** I'm sorry?

7 **A.** Well, just I should think -- sorry. I was just trying to
8 think about what I did. No, I did not.

9 **Q.** And since you were -- you were talking about the
10 consequences of bouncing a check being a merchant might impose
11 a fee, something like that -- those penalties, because they're
12 imposed by third parties, there's no way to make that
13 calculation, is there?

14 **A.** You -- it would be hard to make it exactly. Further
15 research might allow you to make it approximately, but not with
16 particularity to every class member.

17 **Q.** And you didn't attempt to do that, did you?

18 **A.** That's correct. I did not.

19 **Q.** Okay. Now, we don't know the penalties imposed by payees,
20 but we do know the penalties imposed by law. And isn't it true
21 that by reordering transactions high to low, Wells Fargo
22 exposes its customers to up to three times the legal liability
23 they would face from a bounced check, as compared to a sort
24 order of low to high?

25 **A.** As I sit here, I don't know the answer to that question.

1 Q. Well, we went over this at your deposition, and you did.

2 So why don't we play the 13 page 87, line 13, through
3 page 94, line six? And then I've skipped some stuff that I
4 don't think adds anything. And we go then to 95 --

5 MS. WINNER: Wait a minute. Wait a minute. Wait a
6 minute.

7 MR. HIMMELSTEIN: -- 13, to 94:06.

8 MS. WINNER: Seven pages?

9 MR. HIMMELSTEIN: All right. I'll try and run it
10 through. I'll try and run it through quickly, your Honor.

11 THE COURT: No. Look.

12 BY MR. HIMMELSTEIN

13 Q. The bad-check statute, does it not provide for --

14 THE COURT: This is just argument. This is just
15 argument.

16 MR. HIMMELSTEIN: No, your Honor. No.

17 THE COURT: I mean, isn't it? I mean --

18 MR. HIMMELSTEIN: Okay. If I'll --

19 THE COURT: You're trying to make an analogy to what
20 a criminal statute says.

21 MR. HIMMELSTEIN: No, no. Mr. -- his report -- it
22 talked about, oh, if you bounce a mortgage check, you're going
23 to get hit with three times the charge. They produced as an
24 exhibit to his report the statute of that. He was relying on
25 that as the prime negative consequence of bouncing a check, as

1 the consequence of the bounced-check statute.

2 Now, we only talked about it in terms of a mortgage
3 check, but in fact, it applies to all checks. And what I got
4 him to admit at his deposition -- and we can play it, if you
5 want -- is that by changing the sort order from high to low, if
6 you had \$1,500 in an account, and four debits hit at once -- a
7 \$1,500 check, and three \$500 checks -- if you bounce the \$1,500
8 check, the person would be liable for statutory penalties of
9 only \$1,500. It's three times the amount of the check, up to
10 \$1,500.

11 But if you bounce, instead, arguing high to low, the
12 three \$500 checks, the consumer is liable for \$4,500: Three
13 times 500 for each of them.

14 So by doing this sort order low to high -- excuse
15 me -- high to low instead of low to high, instead of what he's
16 saying, that we're exposing people to consequences of bad
17 checks, the bank is legally exposing people to three times the
18 damages.

19 **THE COURT:** So this has got to be something you
20 develop in your findings of fact.

21 I think we -- we're very short on time today. I'm
22 going to give you five minutes.

23 **MR. HIMMELSTEIN:** All right, your Honor.

24 **THE COURT:** I'm going to give you five minutes to
25 finish your examination.

1 **MR. HIMMELSTEIN:** All right, your Honor.

2 **THE COURT:** So go to the most cogent and important
3 things.

4 **MR. HIMMELSTEIN:** Yes, your Honor.

5 Could we have Exhibit 74? Can you blow up that left
6 column there?

7 **MS. WINNER:** Oh, sure.

8 **MR. HIMMELSTEIN:** And in particular, the Pay Return
9 Ratio.

10 **Q.** Dr. Cox, to save time, I'll represent to you this is an
11 analysis performed by Wells Fargo on the percentage of -- the
12 Pay Return Ratio -- the amount of debits that are returned
13 before and after its 2001 processing change. So 2001,
14 Quarter 1, is where they're sorting low to high. And 2002,
15 Quarter 1, is where they're sorting high to low. And you see
16 that Pay Return Ratio has actually -- it's virtually unchanged.

17 Now, doesn't that undermine your contention that that
18 number is going to go way up under Mr. Olsen's scenarios?

19 **A.** Not necessarily. I mean, the -- first of all, I see here
20 a difference, so some other things may have changed; but also,
21 since the same number -- same number of checks -- same number
22 of checks are being returned, there could still be an increase
23 or a decrease in the -- there still could be an increase in the
24 number of bounced checks. I've never --

25 **Q.** No, but you said -- and it's in your report -- all

1 debit-card items are must-pay items.

2 And so if -- so this could not reflect -- could it? -- a
3 decrease in the amount of debit-card transactions they're
4 paying, offset by an increase in the amount of, you know,
5 checks they're not paying; the debit cards stay the same? So
6 how is this not just negligible impact on checks?

7 **A.** I guess you'll have to tell me what the -- what this is
8 again. This is a Pay Return Ratio on just debit cards, or
9 debits and checks?

10 **Q.** No. All debits.

11 **A.** All deductions?

12 **Q.** Correct. All debits, as far as we know.

13 **A.** Well, I don't -- I don't see what you can conclude from
14 this about the number of checks being cleared. In the first
15 column, they're sorting everything from low to high. And in
16 the second column, they're sorting everything from high to low.
17 And the number of items that are being cleared are the same.

18 **Q.** All right. Let me move on. Just turning quickly to
19 overdraft tolerance data, is it correct that you could not
20 determine which checks would go unpaid under -- under the
21 alternative scenarios of yourself or Mr. Olsen, without knowing
22 for each account and for each day the numerical overdraft
23 tolerance limit?

24 **A.** You would need to know the numerical overdraft tolerance
25 limit.

1 Q. And you -- you did not calculate that? You were given
2 that on request by Wells Fargo, correct?

3 A. Wells Fargo did the calculation for me, yes.

4 Q. And why didn't you do it?

5 A. Well, I just asked them to do it. And they had it
6 available. So I believed it was correct. And Mr. McGoveran
7 is -- it was Mr. McGoveran who also participated in making that
8 decision.

9 MR. HIMMELSTEIN: Can we put up 224, please?

10 MS. WINNER: Wait a minute, your Honor. I'm sorry.
11 This exhibit is under seal, your Honor.

12 MR. HIMMELSTEIN: This is a Champion/Challenger
13 exhibit, your Honor. I would like to ask the witness whether
14 Ms. Gutierrez would be under the Champion or the Challenger
15 formula, and the same for the other -- everyone else in the
16 class, because I don't think you can tell that from that
17 document.

18 MS. WINNER: I don't know that we've laid any
19 foundation that Mr. Cox worked with the document. I believe
20 the testimony yesterday was otherwise to that, but I mean --

21 THE COURT: Well, did you ever see that document? Do
22 you know what we're talking about?

23 THE WITNESS: I do know that document, only from the
24 fact that it was -- I was shown it when we were told that I was
25 going to be cross-examined on it.

