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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Milton G. Kimpson, Administrative Law Judge

Case No. 20-ALJ-17-0008-CC

Appellate Case No. 2024-001252

Mastercard International Incorporated, Appellant,

v.

South Carolina Department of Revenue, Respondent.

RECORD ON APPEAL - VOLUME II of XIV

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1 cardholder doesn't -- doesn't want that to take
2 place. But I ---

3 Q: And ---

4 A: But I think that the most important part to the
5 cardholder is that they're not financially
6 liable for the transaction.

7 Q: Flip over to page 302 of the authorization
8 manual. It's page P0001949.

9 **COURT REPORTER:** 19 what?

10 **MR. NEIL:** 49. I'm sorry.

11 **COURT REPORTER:** Thank you.

12 Q: Assurance IQ is what's discussed on that page.
13 That's one of the various Mastercard fraud
14 prevention services.

15 A: This -- this particular service, I'm not very
16 familiar with. I'm just reading about it for
17 the first time here.

18 Q: I'm not going to ask you a lot of detailed
19 questions about it. You -- you agree that this
20 is a -- this is a fraud prevention service,
21 among many, that Mastercard provides?

22 A: Yes, I believe so.

23 Q: Okay. There's a subheading there that says
24 about Assurance IQ, it's on that same page.
25 And the second sentence of the first paragraph



1 -- well, I'll just read the whole paragraph.
 2 With the growth of e-commerce, there's come an
 3 increase -- an increase in digital fraud.
 4 Although ways have been developed to combat
 5 this fraud, false positive declines are
 6 detrimental and costly. Consumers who
 7 experience a declined card can abandon or
 8 reduce their spending on the card or even
 9 consider changing cards or banks. This is why
 10 Mastercard needs consumers to have trust in
 11 their network, right? You don't want them to
 12 switch to other cards or banks?

13 A: Well, they -- they can change to another bank
 14 that's still a Mastercard.

15 Q: Okay.

16 A: So, consumers that experience a declined card
 17 can abandon or reduce their spending on the
 18 card. That's something that an issuer is not
 19 going to want, so, again, it's describing the
 20 benefits of the service. It's a -- it's --
 21 we're -- we're a B to B company, so the
 22 benefits are going to be to our customers'
 23 customers.

24 Q: All right. Let's keep going. Second
 25 paragraph, second sentence with that same



1 subheading on page 302. Assurance IQ
2 facilitates the exchange and normalization of
3 consumer account and device data provided by
4 participating merchants to give issuers a level
5 of assurance. The consumers are transacting
6 using attributes that are ty- -- typically
7 associated with them. Mastercard is
8 maintaining data on consumer accounts, right?

9 A: I don't know what data is being used to source
10 this service.

11 Q: Well, it's consumer account and device data,
12 right? That's what it says.

13 A: Yeah. Those are very general terms. I -- I
14 don't know specifically what those are
15 referring to. I'm sorry; do ---

16 Q: If you'll flip to the next page.

17 A: Would you mind if we take a quick break? Just
18 to ---

19 Q: I -- I've got about three more questions.

20 A: Okay. Sure.

21 Q: If you'll flip to the next page, page 304,
22 P0001951. You mentioned the benefits of this
23 proc- -- of -- of one of these fraud prevention
24 services earlier. Here's the benefits of
25 Assurance IQ, right? We're in the middle of



1 the page.

2 A: Benefits to issuers and merchants?

3 Q: Right.

4 A: Okay.

5 Q: So, the -- the first sort of subcategory there
6 is Assurance IQ helps issuers. And one of the
7 things, the second bullet point, is deepen and
8 retain valued customer relationships -- I'm
9 sorry -- consumer relationships with a more
10 consistent satisfying experience across
11 shopping choices. Again, Mastercard is doing
12 this to benefit the consumers' use of the
13 Mastercard card.

14 A: Directly above that, it says Assu- -- Assurance
15 IQ helps issuers.

16 Q: Right. But what is it helping issuers do?
17 It's helping them deepen and retain valued
18 consumer relationships, right?

19 A: Yeah. It's helping them keep their customers
20 happy.

21 Q: And they need to keep their customers happy
22 because their customers are using Mastercards.
23 I know you don't want to say it, but I'm right,
24 aren't I?

25 A: No. No. You're not. I mean, I -- I just feel



1 like you're asking the same question over and
2 over.

3 Q: I -- I am because you keep ---

4 A: It's -- my -- my answer is the same.

5 Q: Let's go down to the using Assurance IQ
6 merchants can. Do you see that? The very
7 first bullet point. Lower decline rates to
8 help preserve revenue and relationships with
9 their valued customers. Do you agree with
10 that? Do you agree with that statement?

11 A: I'm sorry. Which bullet point again?

12 Q: The very first one.

13 A: Lower decline rates. Preserve revenue and
14 relationships. So -- so, this is referring to
15 I think what we looked at before, which was the
16 fraud -- the fraud protection service that
17 mentioned merchants in its title and we
18 discussed before about how that is a benefit to
19 the -- it's a benefit to the acquirer because
20 the acquirer is going to use our service to
21 help keep their customers as happy as possible,
22 and we're describing the benefits for it.

23 Q: And having those customers as happy as possible
24 is important to Mastercard because when those
25 customers use their Mastercards, Mastercard



1 earns money, earns income?

2 A: No. Not necess- -- not necessarily. If -- if
3 -- if that -- if that customer, the -- the
4 customer is -- is concerned about what bank
5 they have their card with. If their account is
6 -- if their -- you know, if their transaction
7 is declined, they may not be happy with
8 Citibank. They may not be happy with Chase.
9 So, they may go to Bank of America. But it's
10 still a Mastercard.

11 Q: Thank you, Mr. Cavallo.

12 MR. NEIL: Judge, if he needs a break, I'm happy to
13 ---

14 MR. KERMAN: Your Honor -- I'm sorry. I didn't
15 meant to interrupt. We will have some re-
16 direct, but if we could take a break at this
17 time period, if you deem appropriate.

18 THE COURT: I think that would be great. It is
19 11:43. Do you just want to break for lunch now
20 and come back?

21 MR. KERMAN: I think I'll have a fairly short re-
22 direct of Mr. Cavallo. I think it might make
23 sense to finish before lunch.

24 THE COURT: I'm good with that.

25 MR. KERMAN: If we could just take a shorter, sort



1 of bathroom/water break now.

2 **THE COURT:** Let's try to ---

3 **MR. KERMAN:** If that's okay with ---

4 **THE COURT:** Let's try to get back at 12:00 then.

5 **MR. KERMAN:** Okay.

6 (Off the record from 11:46 a.m. until 12:07 p.m.)

7 **THE COURT:** Yes, sir.

8 **MR. KERMAN:** Is the court reporter ready?

9 **COURT REPORTER:** Yes. I'm sorry.

10 **MR. KERMAN:** Thank you.

11 **MR. CAVALLO - RE-DIRECT EXAMINATION BY MR. KERMAN:**

12 Q: All right. Mr. Cavallo, I'd like to look back
13 at Exhibit 12, page P0001670. I think we'll
14 have this up on the screen at any moment, but
15 feel free to look at it in your exhibit binder
16 if you'd like.

17 (Joint Exhibit Number 12 was referenced at this
18 time.)

19 A: Okay.

20 Q: I think during his cross examination, Mr. Neil,
21 directed you to the end of the first paragraph
22 and the term points of interaction, is that
23 correct?

24 A: Yes.

25 Q: Is there any physical connection between



1 Mastercard and a merchant's point of sale
2 machine?

3 A: No, there's not.

4 Q: What about any physical connection between
5 Mastercard and the merchant unrelated to the
6 point of sale machine?

7 A: With respect to transaction processing, no.

8 Q: Thank you for that clarification. As part of
9 transaction processing, does Mastercard
10 transmit any authorization data to a merchant?

11 A: It does not.

12 Q: I believe on your direct exam, you indicated
13 that Mastercard's last activity as part of its
14 role in the authorization process is delivering
15 the issuer's response to a MIP located at the
16 acquirer's processing facility, is that a fair
17 characterization of your testimony?

18 A: Yes, that's correct.

19 Q: After Mastercard performs that activity, does
20 Mastercard communicate at all with the merchant
21 to determine whether the merchant has acted in
22 accordance with the decision made by the
23 issuer?

24 A: No, it does not.

25 Q: All right. In this same Exhibit 12, I'd like



1 to turn page P0001910. And if you're looking
2 at the page of the PDF of the manual, I believe
3 that's page 263.

4 A: Okay.

5 Q: About, I don't know, two-thirds or three-
6 quarters of the way down the page, do you see
7 a heading titled e-commerce fraud alerts for
8 issuers?

9 A: Yes.

10 Q: And I believe Mr. Neil asked you some questions
11 about this -- this heading or this paragraph?

12 A: Yes, he did.

13 Q: Could you read the first sentence for the
14 record?

15 A: E-commerce fraud alerts for issuers require
16 acquirers to inform issuers when a merchant or
17 acquirer has decided not to complete an
18 approved card-not-present transaction because
19 of high fraud risk.

20 Q: I see the word requires in the first line
21 there. Do you see that?

22 A: Yes.

23 Q: Who is Mastercard requiring to do something in
24 this sentence?

25 A: The acquirer.



1 Q: Thank you. All right. If you'd turn to a few
2 pages later in that same Exhibit 12, P0001913,
3 which is PDF page -- in the manual itself,
4 labeled as page 266. Do you see that?

5 A: Yes.

6 Q: And I believe Mr. Neil asked you some questions
7 related to this heading at the very top titled
8 expert monitoring, real time fraud scoring
9 service for issuers.

10 A: Yes.

11 Q: And who would you say that this service is
12 provided to?

13 A: It is provided to the issuers.

14 Q: And then on the following page, P0001914, I
15 think we're already there.

16 A: Yes.

17 Q: You see a heading about two-thirds of the way
18 down that says expert monitoring, real time
19 fraud scoring service for merchants?

20 A: Yes.

21 Q: Could you read the sentence directly below that
22 heading for the record?

23 A: The expert monitoring solutions, EMS, real time
24 fraud scoring service for merchants provides
25 participating acquirers with a real time fraud



1 score based on U.S. issued dual message, card-
2 not-present, authorization transactions.

3 Q: Thank you. Who does it -- who does it say that
4 this service is provided for?

5 A: Participating acquirers.

6 Q: All right. If you could turn in the same
7 document, Exhibit 12, to page P0001949, which
8 is page 302 of the authorization manual.

9 A: Okay.

10 Q: Do you see a large heading that's about exactly
11 halfway down the page that says Mastercard
12 Assurance IQ?

13 A: Yes.

14 Q: And do you see a subheading a little bit
15 further down that says, About Assurance IQ?

16 A: Yes.

17 Q: In the second sentence in the second line of
18 the paragraph below that subheading about
19 Assurance IQ, do you see a reference to a term
20 false-positive declines?

21 A: Yes.

22 Q: Do you know what a false-positive decline
23 refers to?

24 A: A false-positive decline would be a transaction
25 that was declined by -- for fraud prevention



1 reasons when, in fact, it was a legitimate
2 transaction that was not fraudulent.

3 Q: I don't recall the exact question that Mr. Neil
4 asked you, but at some point during your cross
5 exam, you used the term -- I think you
6 described Mastercard as a B to -- B to B
7 service provider, is that an accurate
8 characterization of your testimony?

9 A: Yes.

10 Q: Could you just clarify for the record what you
11 meant by B to B?

12 A: Business to business.

13 Q: I think also in the context of that answer,
14 when you referred to Mastercard as a B to B
15 company, you mentioned something about benefits
16 would be received by Mastercard's customers'
17 customer. Do you recall that answer?

18 A: Yes.

19 Q: When you -- when you gave that answer, was it
20 -- was it your testimony that Mastercard sells
21 services to its customers who then provide
22 benefits in turn to their customers?

23 A: Yes. They use those services to provide
24 benefits to their customers.

25 Q: And then I believe in one of your last few



1 answers to Mr. Neil's questions on cross, you
2 referred to cardholders as customers. When you
3 used that term, did you mean customers of
4 Mastercard?

5 A: No. Customers of the issuers.

6 Q: Thank you. That's -- that's all I have.

7 **THE COURT:** Thank you. Any limited re-cross?

8 **MR. NEIL:** No questions, Your Honor.

9 **THE COURT:** Thank you. How would y'all like to
10 proceed now? Would you like to go to another --
11 thank you very much.

12 A: Thank you.

13 **THE COURT:** May he be excused?

14 **MR. KERMAN:** Yes.

15 **THE COURT:** All right.

16 **MR. KERMAN:** I know we just took a short break. I
17 think it makes sense given the time for us to
18 take a longer lunch break now, if that's okay
19 with the Court.

20 **THE COURT:** Okay. Thank you.

21 **MR. NEIL:** It's fine with the Department, Your
22 Honor. Whatever -- whatever your preference
23 is.

24 **THE COURT:** And yesterday, you were able, as I
25 recall, you were all able to get lunch and get



1 back within an hour.

2 **MR. KERMAN:** Yeah. I think we had -- we struggled
3 just a tiny bit. I think we were at about an
4 hour and eight minutes or so. If we could like
5 an hour and 15, I think that will avoid us
6 having to race back.

7 **THE COURT:** That's -- 1:30 sound good? I had a ---

8 **MR. KERMAN:** That would be perfect.

9 **THE COURT:** I had a group of lawyers in -- I don't
10 know -- almost two months ago. They preferred
11 almost two hours.

12 **MS. ROBINSON:** Oh, wow.

13 **THE COURT:** So, let's try today one- -- 1:30 and we
14 can play around with it from there. That
15 sounds good.

16 **MR. NEIL:** Thank you, Your Honor.

17 (Thank yous are heard.)

18 **THE COURT:** Okay. Thank you.

19 (Off the record from 12:20 p.m. until 1:36 p.m.)

20 **COURT REPORTER:** All rise.

21 **THE COURT:** Please be seated. All right. Let's
22 start.

23 **MR. KERMAN:** I forgot my glasses. Just give me one
24 second.

25 **THE COURT:** Well, I certainly understand that.



1 Please take your time.

2 **MR. KERMAN:** Your Honor, at this time, Petitioner
3 would like to call its next witness, Joseph
4 Buehler.

5 **THE COURT:** Mr. Buehler. Please come forward and be
6 sworn.

7 **COURT REPORTER:** State and spell your name, please.

8 **MR. BUEHLER:** My name is Joseph Buehler. J-O-S-E-P-
9 H, B, as in boy, U-E-H-L-E-R.

10 **COURT REPORTER:** B-U-E-H-L-E-R?

11 **MR. BUEHLER:** Yes, ma'am.

12 **COURT REPORTER:** Thank you. Raise your right hand
13 please. Do you solemnly swear that the
14 testimony you're about to give in this matter
15 is the truth, the whole truth, and nothing but
16 the truth, so help you God?

17 **MR. BUEHLER:** I do.

18 **COURT REPORTER:** Thank you.

19 **MR. BUEHLER - DIRECT EXAMINATION BY MR. KERMAN:**

20 Q: Good afternoon.

21 A: Good afternoon.

22 Q: Mr. Buehler, who are you employed by?

23 A: My current employer is Mastercard Technologies.

24 Q: What's your current position with the company?

25 A: My current position with the company is Senior



1 Vice President of Mastercard Technology Risk.

2 Q: How long have you been in that role?

3 A: I've been in my current role for approximately
4 a year and a half.

5 Q: Have you held any other positions with the
6 company?

7 A: I have. Several actually. I -- prior to this
8 role, I was actually the Vice President of
9 Settlement Operations. Looked after our global
10 operations process for settlement. As part of
11 that role, I also dealt with our clearing
12 process quite a bit. And then prior to that,
13 I was actually in our internal audit department
14 performing the technology audits and looking
15 after the audit operation function.

16 Q: Excuse me. And how long have you been employed
17 by Mastercard Technologies?

18 A: I've been employed by Mastercard Technologies
19 since 2009, so just over twelve and a half
20 years.

21 Q: Where did you work, if anywhere, before you
22 joined Mastercard Technologies in 2009, I
23 believe you said?

24 A: So -- so prior to coming to Mastercard, I
25 actually worked for Price Waterhouse Coopers.



1 As part of my job responsibilities at Price
2 Waterhouse Coopers, actually, Mastercard was
3 one of the companies that was one of our
4 clients and we did operational and assurance
5 attestation work for Mastercard.

6 Q: I'm sorry if I missed it. Did you say how long
7 you were in that role at PWC?

8 A: I was I the role at PWC for approximately six
9 and a half years.

10 Q: And what's your educational background?

11 A: I hold a Bachelor degree of Management
12 Information Systems from Saint Louis
13 University, which is in Saint Louis, Missouri.

14 Q: And where is your -- returning to your current
15 role, where is your office located?

16 A: Our office is located in Winghaven, Missouri,
17 a suburb outside of Saint Louis.

18 Q: Is Winghaven different than O'Fallon?

19 A: No. Winghaven is the actual location name.
20 It's in O'Fallon, Missouri, which also is where
21 it houses our operational center, as well as
22 our data center.

23 Q: Do you recall the tax years that are at issue
24 in this case?

25 A: Yes. My understanding is they were from the



1 year 2007 to the year 2016.

2 Q: And so, I -- I believe you said a few moments
3 ago that you joined the company in 2009?

4 A: That is correct.

5 Q: Unless I specify otherwise in my question, you
6 can assume that my question will pertain to the
7 company's activities during that 2007 to 2016
8 time frame. Is that okay?

9 A: That's okay.

10 Q: And we've heard some testimony in this case
11 about services Mastercard provides. Do you
12 have a technical understanding of any of those
13 services?

14 A: I do. As mentioned before, I looked after our
15 global settlement operations practice for
16 approximately seven years. So, very well
17 versed in our settlement processing. And then,
18 as part of that, we dealt heavily with our
19 clearing team. And so, therefore, I have a
20 knowledge related to that interaction
21 throughout that time period.

22 Q: All right. And I'd like to take those sort of
23 in the reverse order that you described them
24 and start with clearing. Can you describe what
25 you mean by that term, clearing?



1 A: Sure. So -- so clearing is the final
2 submission of transactional data by our
3 customers, the issuers and the acquirers. In
4 the clearing case, it's mainly the acquirers,
5 but in cases in which there might be charge
6 backs, the issuers would submit clearing batch
7 data. And then the -- the taking of that data
8 would then be performed, a series of edit
9 checks, from a value added services perspective
10 to come up with a net settlement for our
11 customer, across all other activity for a daily
12 period. And then, ultimately, that number when
13 then factor into our overall settlement
14 position between our customers.

15 Q: Thank you. There are a few terms you used in
16 there that I think we can walk through
17 throughout today. But I'd like to start by
18 looking at a diagram of the clearing process,
19 which is in Exhibit 11. And it's bates labeled
20 P0001646.

21 **(Joint Exhibit Number 11 was referenced at this**
22 **time.)**

23 A: Okay. I see it on the screen.

24 **MR. KERMAN:** I have a copy for the Court if you
25 would like one.



1 **THE COURT:** Yes, please. Thank you.

2 **MR. KERMAN:** Thank you, Your Honor. Adam, I assume
3 you're okay.

4 **MR. NEIL:** I'm good.

5 Q: Mr. Buehler, do you recognize this diagram?

6 A: I do recognize this diagram. Yes.

7 Q: Do you believe this to be an accurate depiction
8 of Mastercard's clearing process?

9 A: I do agree this is a good example of the
10 Mastercard clearing process. Yes.

11 Q: Could you identify the parties that are
12 involved in this clearing process?

13 A: Sure. So, the parties from clearing are really
14 just the acquiring bank, the issuing bank,
15 which are both of our customers, and then
16 Mastercard facilitating in the service.

17 Q: What about cardholders?

18 A: As you see on this screen, cardholder and
19 merchant are greyed out. So, unlike earlier
20 testimony, there is no involvement whatsoever
21 from a cardholder or merchant, even on the
22 ancillary sides of our customers' customers.

23 Q: I believe you identified Mastercard as a party
24 involved in the clearing process, is that
25 correct?



1 A: That is correct.

2 Q: Could you identify on this diagram where
3 Mastercard is located?

4 A: Sure. So, as you also saw in earlier
5 testimony, the color coding here helps to
6 articulate our customers in blue versus
7 Mastercard, which would be in the yellow shade.

8 Q: I think we've heard testimony throughout
9 yesterday and today about acquirers and
10 issuers, but could you just give us your
11 understanding of what those terms refer to?

12 A: Sure. So, in this case, the acquirer on the
13 top would be, as I mentioned earlier, the one
14 that mainly would be submitting in their final
15 transactional data. And then, at the bottom,
16 the issuer is going to be our customer in which
17 we would then presenting the information to
18 from a clearing perspective, so that they can
19 appropriately pass on to their customers to
20 provide billing statements, to post to
21 accounts, etcetera.

22 Q: You said twice already I think that the data is
23 submitted mainly by acquirers. Why do you --
24 why do you describe it that way?

25 A: The majority of the data is submitted by the



1 acquirers in clearing because we have to get
2 record of transactional data on file and that's
3 how they're submitted in through batches. And
4 so, that's why it generally comes from
5 acquirers. It does have the ability to come
6 from issuers. In the case where they may have
7 some sort of refute or what to charge back to
8 transaction, such as in -- in the form of a
9 return, so then it would have to come back
10 through the process that way to essentially
11 undo that first presentment of the clearing
12 data that the acquirer would present.

13 Q: You just referred to something called the first
14 presentment. Could you identify in this
15 diagram if -- if it exist what you are
16 referring to when you use that term?

17 A: So again, as I mentioned earlier, right, this
18 is a good example and -- and there's obviously
19 technicalities throughout the process that
20 would go off into there, such as technical
21 terms as first presentment. But essentially
22 what a first presentment is is that initial
23 receipt of transactional data that's final, so
24 that we can then begin processing it as part of
25 a clearing and then ultimately settlement



1 process between our customers.

2 Q: Would that be identified by the circle with the
3 1 between the acquirer bank -- with the arrow
4 coming down from the acquirer bank?

5 A: That is accurate. We would receive that
6 initial batch or that first presentment data in
7 that number 1.

8 Q: And you referred to, I believe you said that an
9 issuer bank could also provide data through
10 this process if there is something like
11 refuting a charge or a charge back, is that
12 correct?

13 A: That is correct.

14 Q: Is that identif- -- documented on this diagram
15 anywhere?

16 A: It -- it could be represented as the number 1
17 on the bottom coming back in because
18 essentially, that's still the start of the
19 clearing process for that batch of data. It's
20 just a second presentment is in that batch of
21 data versus the first presentment, which would
22 be coming from the acquirer bank in that top
23 number 1. So, they're both the entry points
24 into the clearing process.

25 Q: And so by the bottom number 1, you're referring



1 to the arrow going up from the issuer bank?

2 A: That is correct.

3 Q: And in both of those cases, is the acquirer or
4 the issuer submitting that data to Mastercard?

5 A: That is correct. The only way they can submit
6 it is to Mastercard.

7 Q: Why do banks submit this data to Mastercard?

8 A: Banks can -- can submit it for -- for a
9 multiple of reasons, but essentially it is
10 really making their lives easier by signing up
11 for the clearing service to utilize.
12 Theoretically, they could do it themselves, but
13 they would have to then take the mass amount of
14 transactions that they would have and then go
15 figure out who they're actually offsetting that
16 transaction with from an issuer side, and then
17 do that amongst themselves. This provides them
18 a much more seamless and scalable way for them
19 to understand what those net positions would be
20 across all of their transactional data.

21 Q: I think early on when you were describing --
22 when I first asked you to describe your
23 understanding of clearing, you used the term
24 batch data. Do you recall using that term?

25 A: I do.



1 Q: Could you elaborate or clarify as to what you
2 mean by batch data?

3 A: Sure. So -- so we have windows of opportunity
4 throughout they day by which they could submit
5 in their clearing data. And, essentially, what
6 the customers will do is batch that all into
7 one file and then submit that file in one of
8 those six windows that we have the opportunity
9 for them to submit through versus submitting
10 one at a time. Again, back to the practicality
11 of the matter, it would be much easier to
12 submit it all in one file versus in, you know,
13 potentially a million files for that clearing
14 cycle.

15 Q: In your answer just now you said, they could
16 submit data. Could you just clarify who you
17 mean by they?

18 A: Sure. They would be our customers, either the
19 acquirer or the issuer.

20 Q: I think you started to reference this in your
21 prior answer, but how often do banks submit
22 this data?

23 A: So, banks have the option to submit the data.
24 We have six clearing cycles a day and those six
25 clearing cycles really try to align with our



1 global processing, so it follows the same type
2 model. We have six opportunities to submit it.
3 There is a seventh opportunity that we do have,
4 but it's only for our Mexico customers for a
5 very specific regulatory purpose. So, all of
6 our general customers have six cycles
7 throughout the day to submit that in.

8 Q: Is it possible that a bank could submit data
9 more frequently than six times a day?

10 A: Sure. They could submit it as -- as often as
11 they would like. It would only get remitted
12 into the Mastercard systems within each one of
13 those six cutoff windows that I just
14 referenced.

15 Q: What is the method by which banks submit their
16 clearing data to Mastercard? Let me rephrase.
17 What's the method by which issuers and
18 acquirers -- I think those are the terms you've
19 been using -- what's the method by which
20 issuers and acquirers submit their clearing
21 data to Mastercard?

22 A: Sure. So, this example you see here, the MIP,
23 at each respective side, that is one of the
24 ways they could submit their data. They also
25 could submit their data through an interbased



1 -- internet based function that's referred to
2 as Mastercard File Express. And there's also
3 a connect direct option by which they could
4 submit it directly from their processing
5 facility into the Mastercard facility that
6 would have a direct end-to-end connection from
7 end points.

8 **COURT REPORTER:** From what? I'm sorry.

9 A: End points.

10 **COURT REPORTER:** Thank you.

11 A: Apology.

12 Q: When does the clearing process occur in
13 relation to when the authorization process
14 occurs?

15 A: So, the clearing process is actually very
16 separate from the authorization process and it
17 could be as close to as the same day that the
18 authorization process happens up to several
19 days later, all depending on when, again, the
20 issuer or the acquirer wants to submit in their
21 batch data. But in general, it's around
22 approximately a one to two-day difference
23 between the auth date and the clearing date.

24 Q: And by auth date, could you just ---

25 A: I apologize.



1 Q: --- clarify for the record?

2 A: I apologize. The date that they would have
3 authorized the transaction, what you heard,
4 too, earlier in testimony.

5 Q: Thank you.

6 **COURT REPORTER:** So, you're not saying off date?
7 You're saying A-U-T-H date?

8 A: A-U-T-H. Sorry, ma'am. Yes.

9 **COURT REPORTER:** Thank you.

10 A: Authorization.

11 **COURT REPORTER:** Thank you.

12 Q: Is auth how you typically refer to
13 authorization in your -- in your day-to-day
14 work?

15 A: In -- in common vernacular, yes. Auth is
16 authorization.

17 Q: Thank you. I'll try and keep my ears out for
18 that, if we need to clarify for the record. If
19 authorization has already -- if the
20 authorization process has already taken place,
21 why is it that issuers or acquirers need to
22 submit clearing data to Mastercard at all?

23 A: So, as you heard in earlier testimony,
24 authorization really is about safety and
25 security, and quickness, speed, to ensure we



1 get a message between our issuer and acquirers,
2 so that they can process their transaction.
3 Clearing then enriches that data. So, the --
4 the acquirer bank, which is our customer, or
5 issuer bank, which is our customer, will submit
6 in enriched data so that additional checks and
7 balances can be performed, right, as part of
8 our clearing process at -- at the Mastercard
9 facility. And then it also provides additional
10 information so that the issuer and acquirer can
11 properly post to their cardholder, in the
12 issuers case, and create billing statements for
13 their customers. And then allowing the
14 acquiring banks to then let their customers,
15 right, the merchants know, here's what and how
16 we expect to get the funds.

17 Q: Is every transaction that goes through the
18 authorization process -- does -- let me -- let
19 me rephrase that. Is it possible that a
20 transaction could go through the authorization
21 process and not reach the clearing process?

22 A: It is very possible that could happen. I
23 believe you heard in earlier testimony some
24 examples where there might be a hold put on the
25 account, such as at a hotel, right. You'll



1 have your initial authorization and until that
2 final transaction is actually declared, there
3 could be multiple attempts or multiple holds on
4 there. So, that's one example. Another
5 example, right, is several declines and then an
6 actual acceptance, and then ultimately they
7 would send through their final acceptance. But
8 it's really up to our customers to determine
9 what are those final transactions to then send
10 through so clearing can actually begin.

11 Q: All right. So, we talked about who submits
12 clearing data to Mastercard and how they submit
13 data to Mastercard. What -- what does
14 Mastercard do once it receives this data?

15 A: Sure. So -- so, once we receive the data,
16 that's really the beginning of the clearing
17 process. Once we receive it, the first thing
18 we would do is send an acknowledgment report
19 back. You'll see that referred to on the top
20 left in number 3, the IP 727 report. So, that
21 is actually the report that will get then sent
22 back to our customer to acknowledge, yes, we
23 got your data, and this is the clearing cycle
24 which we'll report it -- or process it in. And
25 then, once that's done, then you'll see in that



1 middle big box, it says MO facilities, right?
 2 That's really our Mastercard facilities and you
 3 heard earlier testimony refer to that as
 4 central site or data center. That's where
 5 we'll actually then perform the clearing
 6 process and various edit checks which you'll
 7 see in number 4 -- I'm sorry. You'll see the
 8 edit checks happen as part of the process and
 9 then output from those edit checks, which would
 10 be number 4, would be any error reports that
 11 would have to then go back to our customers to
 12 ensure that they would make the appropriate
 13 updates to the data that they provided in those
 14 earlier batches to ensure that they -- it can
 15 actually be processed. Else, it would not be
 16 processed.

17 Q: Could you just clarify what an acknowledgment
 18 report refers to?

19 A: Sure. So, an acknowledgment report is
 20 essentially letting them know we received their
 21 batch. It'll tell them the batch we received
 22 and it'll tell them then the cycle which will
 23 be clearing or processing that clearing data.

24 Q: And when you say, letting them know, who do you
 25 refer to there?



1 A: Letting our customer who sent in that
2 information. So, either the acquirer or the
3 issuer know that we're processing their data.

4 Q: I see several acronyms in the middle box that's
5 labeled Missouri facilities. Do you see those?

6 A: I do.

7 Q: Could you describe kind of at a high level what
8 the -- what each of those are?

9 A: Sure. So, in that first box, which you'll see
10 with the blue shading, that's MCBS. That
11 refers to our Mastercard Billing System. In
12 the second box, which is a purple shade, you'll
13 see GCMS. That is our Global Clearing
14 Management System. So, that does the bulk of
15 our clearing activities that we're talking
16 about here today in transactional clearing.
17 The third box is a greenish -- I can't see it
18 very well, but a greenish color. That is MDS,
19 which is our Mastercard Debit Switch. And then
20 the fourth box, which is very similar to our
21 third box is PTS, which is our Processing
22 Transaction Service or System, which also does
23 debit-like transaction processing.

24 Q: I believe you said GCMS stands for Global
25 Clearing ---



1 A: Management System.

2 Q: --- Management System.

3 A: Yes.

4 Q: Thank you for correcting me. And did you say
5 that system is primarily responsible for the
6 clearing process?

7 A: That is primarily responsible for our overall
8 clearing process. The MDS system, which is on
9 the -- the third box is primarily responsible
10 for our debit. So, that would be a subset of
11 the activity that we have and if you see there,
12 there are actually several lines where MDS
13 would actually feed into GCMS in many cases
14 because our customers ultimately like to
15 receive all of their clearing via one output.
16 So, we would actually do behind the scenes kind
17 of processing that is kind of unbeknownst --
18 sorry -- it is -- it's known to them, but it is
19 seamless for them so that they don't have to
20 have multiple reports coming back. So, that's
21 why you'll see -- while there's are our two cl-
22 -- main clearing systems, there are
23 interactions between the two.

24 Q: So, on the -- on the right side of the page, I
25 see some activities labeled with the numbers 5,



1 6, 7 and 8. Could you describe those in -- in
2 that order or if you prefer a different order?
3 A: Sure. No. I think that order sounds good.
4 So, number 5, you'll see is our TN-70 reports,
5 which is really the raw data that would come
6 out of our ulti- -- our -- our final clearing
7 processing for that cycle, and then for that
8 day. So, this allows the customers, our
9 customers, our acquirers and issuers, to
10 receive the data that they submitted in in a
11 raw format that's combined with all of the --
12 the receipt of data for that customer. Number
13 6 is our outbound T-112 files. And what this
14 actually does, this is actually the data that's
15 enriched. So, now it's a valuable added
16 service to the customer. Think of number 5 as
17 I'm just giving you back what you sent me, but
18 all in a kind of consolidated format. Number
19 6 now actually contains that enriched data that
20 they're going to need in order to provide
21 statements to their customers, right? So, this
22 is really one of the valuable pieces that they
23 have and that's why they're signing up for the
24 service. Number 7 is where we would have the
25 summary reports and then the notification



1 reports. So, what this does is as -- and we'll
2 talk about this more in settlement, but as we
3 get to the clearing summary reports and the
4 notification reports, this then gives the --
5 our -- our customers, the issuers and the
6 acquirers, the information that they need to
7 know, so that they can understand, here's how
8 much money I'm going to either owe or receive
9 at a very detailed level. And in settlement,
10 we actually give it to them at a very high
11 netted level. So, it's building up. And they
12 would utilize the multiple reports together to
13 understand their holistic position. And then
14 number 8 is as I just referenced, is the
15 settlement interface file that then will go off
16 to our settlement application, which is what's
17 pointing to on the right. And that's what
18 we'll actually utilize by cycle what their net
19 position is across all of their activity. And
20 their, I would mean -- I mean our customers,
21 our acquiring banks and issuing banks.

22 Q: Thank you. In describing item 6, you re- --
23 and it says here on the diagram itself, it
24 refers to enriched data. Could you maybe
25 clarify what that term means?



1 A: Sure. So, as I mentioned earlier, right, in
2 the authorization process and when they want to
3 just get a -- a decision made on how to
4 proceed, there's very limited data, just enough
5 to make that determination. When we get to
6 clearing, the data is now involved in there, so
7 they can understand how much each issuer and
8 acquirer will owe. It also provides additional
9 information on top of there that would be such
10 as interchange information, such as type of
11 transaction. It would have various forms of
12 other data that is going to really help them
13 ensure that they're providing their -- their
14 customers -- not our customers, their customers
15 and their meaning, again, our issuing and
16 acquiring banks. So, their customers, the
17 appropriate outcome, so that if they were to
18 ever inquire or want to know what this is, they
19 could then understand exactly what that
20 information would be.

21 Q: And I think when you described item 8 here, you
22 said that the data goes off to your settlement
23 application. Is -- is that a fair summary of
24 your testimony from a few minu- -- a few
25 minutes ago?



1 A: That is correct. Number 8, is the sift that
2 goes over to our settlement system, which is
3 SAM, S-A-M, or Settlement Application
4 Management System. And that's where we'll
5 actually create, again, their holistic
6 settlement position, that's either due to or
7 due from. And -- and that's going to be based
8 on all of their activity across the entire
9 processing day.

10 Q: When you referred to the settlement
11 application, I think you called it the S-A-M.
12 Is that -- is that something operat- -- is that
13 system operated by Mastercard?

14 A: That is correct. That is a system operated by
15 Mastercard.

16 Q: You also described, I think, multiple reports
17 or files when you were talking about steps
18 five, six, and seven. How does Mastercard
19 communicate those reports or files to its
20 issuer and acquirer customers?

21 A: Sure. So, the issuer or the acquirer customer
22 could actually elect how they want to receive
23 that. Many of them actually receive it by
24 going and pulling that information from our
25 Mastercard Connect application, which is a



1 Mastercard proprietary secure internet-based
2 solution by which they can go and download
3 those files. Its access based, so only certain
4 people can get to it and they have to actually
5 elect who gets to that data. They also could
6 receive it via the same method by which they
7 sent that information on the front end from a
8 batch perspective. But essentially, it's up to
9 our issuer and acquirer customers to -- to
10 elect on how they want to receive it.

11 Q: What would you describe as the beginning of the
12 clearing process, if you had to identify
13 specific activity?

14 A: So -- so the beginning of the clearing process
15 is essentially the number 1 circle on both of
16 these, which is when our customer would submit
17 in that batch data for us to process. That
18 would be the beginning of the cycle -- or the
19 beginning of the process.

20 Q: And when you say both of these, are you
21 referring to something on Exhibit 11, page
22 P0001646?

23 A: That is correct. Both of these referring to
24 the number 1 and the top, as well as the number
25 1 at the bottom.



1 Q: And if you were to identify an activity that
2 you see as the end result of clearing, what
3 activity would you identify?

4 A: So, in this case for clearing, there's
5 essentially a few end points. The ends point
6 would really be those outbound files, which you
7 see on the right, which would be the raw data
8 file, the enriched T-112 file, the summary
9 report and then, ultimately, the pass over into
10 our settlement system. So, end of clearing
11 would be the reports to the customers to give
12 them their overall position. And then it would
13 hand off as a -- a finalization stage to our
14 settlement process, so that we can actually
15 then move forward with the exchange of funds
16 between our customers.

17 Q: So, my understanding you -- and correct me if
18 I'm misunderstanding you, to say that items 5,
19 6, 7, and 8 on page P0001646 in your opinion
20 are all sort of outputs of the clearing
21 process?

22 A: That is correct. Those are each outputs of the
23 clearing process.

24 Q: We talked about what clearing service is, but
25 could you give us a sense of where this



1 clearing process occurs?

2 A: Sure. So, clearing occurs within our Winghaven
3 or O'Fallon location that we talked about
4 before, our Missouri processing facility. And
5 -- and that's where the -- the systemic process
6 occurs. And then the team that actually would
7 then look after that to ensure if there's any
8 errors or if there's an -- an anomaly is also
9 located within our O'Fallon Winghaven facility.

10 Q: What activities with respect to clearing does
11 Mastercard perform in South Carolina?

12 A: There are no activities performed in South
13 Carolina for clearing.

14 Q: Would you consider a cardholder's swipe of his
15 or her credit card to be part of the clearing
16 process?

17 A: I do not consider a swipe to be part of the
18 clearing process, no.

19 Q: Who -- who pays Mastercard for clearing
20 services?

21 A: So, our services are offered to our issuer and
22 acquirer banks who would then pay for those
23 services we performed.

24 Q: Do cardholders or merchants pay for those
25 service- -- for clearing services?



1 A: Cardholders and merchants are not even offered
2 the ability for that service. No, they do not
3 pay for them.

4 Q: You may have mentioned this earlier, but I --
5 I can't recall. Do you view clearing as a
6 distinct service from authorization?

7 A: I do consider clearing as a -- a very distinct
8 service from authorization.

9 Q: And why is that?

10 A: We don't interact with our authorization system
11 as part of clearing and we're reliant upon our
12 customers, our issuer and acquirer banks, to
13 submit that clearing data in to ensure that we
14 can begin the process.

15 Q: Could you turn to Exhibit 13 for a moment?

16 **(Joint Exhibit Number 13 was referenced at this**
17 **time.)**

18 A: I'm here.

19 Q: Do you recognize this document?

20 A: Yes. This is our GCMS reference manual.

21 Q: And you said that GCMS stands for Global
22 Clearing Management System? Did I get that
23 right this time?

24 A: That is correct. You did.

25 Q: Can you just describe what the purpose of this



1 GCMS reference manual is?

2 A: Sure. The purpose of this reference manual is
 3 for our customers, our issuers and acquirers,
 4 to really understand what they need to know in
 5 order to be able to facilitate clearing with
 6 Mastercard, so they'll participate in the
 7 service. This gives them background on what to
 8 expect in submitting the files, how they would
 9 expect us to process those files, and then what
 10 they would expect from an output perspective,
 11 and then the various technicalities within so
 12 that they can build their systems or build
 13 their processes to be able to interact with
 14 Mastercard.

15 Q: Is this manual intended for use by cardholders
 16 or merchants?

17 A: This manual is not intended for anyone outside
 18 of our customers, the issuers and acquirers.

19 Q: Thank you. You can close that exhibit if you'd
 20 like. All right. I believe when we started,
 21 the other service that you described having
 22 technical experience in is settlement, is that
 23 correct?

24 A: That is correct.

25 Q: Could you describe what you mean when you refer



1 to the term settlement?

2 A: Sure. The term settlement is really the
3 facilitation or exchange of funds between our
4 customers, the issuers and the acquirers.

5 Q: All right. I think we have another diagram
6 here.

7 **MR. KERMAN:** Your Honor, may I approach.

8 **THE COURT:** Yes, of course. Thank you.

9 **MR. KERMAN:** Thank you.

10 Q: And just for the record, this is Exhibit 11,
11 page P0001647. Mr. Buehler, do you recognize
12 this diagram?

13 **(Joint Exhibit Number 11 was referenced at this**
14 **time.)**

15 A: I do. I can only see half of it though.

16 Q: Oh.

17 A: So, yes. I do recognize this document.

18 Q: And do you think that this diagram accurately
19 reflects Mastercard's settlement process?

20 A: I do think this accurately represents the
21 process, yes.

22 Q: Could you identify the parties that are
23 involved in settlement?

24 A: Sure. So, the parties that are involved in
25 settlement are as we've talked about before,



1 our customers, our issuing and acquiring banks,
2 and then, also, settlement banks, which would
3 be then where we would actually settle the
4 funds between. And those are elected by our
5 customers, who they wish to have as their
6 settlement bank, as well as then Mastercard
7 utilizing a bank. Obviously, we're not a bank.
8 And we utilize a settlement bank in J.P. Morgan
9 Chase for our U.S. dollar settlements.

10 Q: Could you just clarify what you mean by the
11 term settlement bank?

12 A: Sure. So, settlement bank is the institu- --
13 the financial institution by which our
14 customers or Mastercard has their account held
15 at by which our customers direct their funds to
16 either be paid or taken from, as part of the
17 end-to-end settlement process.

18 Q: And then I -- I believe you said that
19 Mastercard has its own settlement bank?

20 A: That is correct. Because we're not a financial
21 institution, we utilize J.P. Morgan Chase and
22 our account with them for U.S. dollars during
23 this time is held in the New York -- their New
24 York location. Their being J.P. Morgan's New
25 York location.



1 Q: I'm sorry. If you could just remind me who you
2 said are the parties to settlement.

3 A: Sure. So, the parties are really between our
4 issuer and acquiring customers. And then
5 whoever they designate as their settlement
6 bank, which could be them as themselves or they
7 could have a third party bank like Mastercard
8 also has, in which their accounts held at for
9 certain purposes.

10 Q: And is Mastercard a party to the settlement
11 process?

12 A: Mastercard is a party to that, yes.

13 Q: What about cardholders, are they a part- --
14 parties to settlement?

15 A: As you can see in this diagram here, we
16 represented a lot of greyed out areas because,
17 for instance, in settlement, a lot of those
18 initial pieces of the equation that we talked
19 about earlier on have been removed. So, as you
20 can see here, cardholder, merchant and even the
21 MIPs from the facilitation of exchange of data
22 have all been removed. As now, it's a much
23 more direct process because we're down to the
24 exchange of funds, which is more of a financial
25 transaction.



1 Q: And so, is it fair to say that merchants are
2 not involved in the settlement process?

3 A: That is correct. Merchants are not involved in
4 the settlement process.

5 Q: You may have already said this, but who are
6 Mastercard's customers with respect to
7 settlement?

8 A: Mastercard's customers with respect to
9 settlement are the acquiring and issuing banks.

10 Q: I think when we looked at the last diagram on
11 page P0001646, that was describing a clearing
12 process, you said that step eight represented
13 sort of an output to Mastercard's settlement
14 system, is that correct?

15 A: That is correct. And if you'll see on this
16 diagram here, that step eight from the prior
17 diagram, is still color coded with these lines,
18 these arrows that are coming in from the right
19 side -- I'm sorry -- from the left side to the
20 right and that would be the continuation of
21 that last line from the prior diagram.

22 Q: So, in item 1 on the left here, there's a
23 reference to one multilateral net position per
24 bank per application cycle. Could you help me
25 break down what that means?



1 A: Sure. So, just like I mentioned earlier, GCMS,
2 our clearing process, has their six cycles.
3 And then, again, the seventh whenever it's
4 respect to Mexico specifically, which did not
5 impact our conversation today. Those cycles
6 will each send one file over to settlement.
7 When we get to our settlement day, so just like
8 clearing had the six cycles, settlement now has
9 multiple cycles a day for the various
10 currencies that we support across the globe.
11 For U.S. dollar purposes, we have one cycle per
12 day which runs at 8:00 a.m., central time. And
13 we will then compile all of those files that
14 you'll see here that we received in from
15 clearing and combine that into one multilateral
16 net position in which we'll then settle for all
17 of our customers that participate in the U.S.
18 dollar settlement service at 8:00 a.m. with one
19 position. It's either going to be they owe
20 funds or -- or they're owed funds based on all
21 of their transactions that were processed
22 during clearing for that prior day.

23 Q: Can you -- can you describe what the specific
24 -- I think it's an adjective -- term
25 multilateral means in that phrase?



1 A: Sure. So, multilateral actually has a couple
2 different definitions in this case. One, it's
3 across all of their positions that they have
4 had and interactions that they've had with other
5 issuer or acquiring banks. So, that's the
6 netting across. And then the multilateral
7 would also refer to if there were multiple
8 currencies across all of those equations, they
9 could elect to settle in just one currency.
10 And so, that's taking it across all
11 transactions from customers, all potential
12 currencies and then ending in one overall
13 multilateral net position.

14 Q: And I apologize if this will make you give a --
15 a repeat answer, but could you describe what
16 the term net means when it says one
17 multilateral net position?

18 A: Sure. So -- so as I mentioned earlier, right,
19 netting is across all of the various
20 interactions that they would have. So, think
21 of it -- as an example, right? An acquirer,
22 whenever they would per- -- receive acquired
23 information would get it from potentially many
24 different cards, right? Those cards go to many
25 different issuers. And then vice versa, one



1 issuer might have many interactions with many
2 different acquirers based on where their
3 cardholders are utilizing information. Again,
4 their, not our -- their -- our customers'
5 cardholders are transacting. And so,
6 therefore, the net is across all those
7 different interaction points and then
8 multilateral is again across all of those for
9 the entire day, potentially across multiple
10 currencies, coming out with one position. In
11 this case for a U.S. dollar. That's what the
12 term multilateral and net combined together
13 would mean.

14 Q: And could you clarify what the term position
15 means?

16 A: Sure. Position would be either -- it would be
17 the total amount that, again, they're either
18 due to or they're due from their reciprocate
19 customers. So, it's either due to them as a
20 credit position or due from them as a debit
21 position.

22 Q: And could you just again clarify what you mean
23 by them?

24 A: Sorry. Them meaning the customer, either the
25 issuer or the acquirer.



1 Q: So, is it fair to say that at the end of a
2 given day or at the end of a given settlement
3 cycle that an acquirer -- a single acquirer
4 might have one amount due to them or one amount
5 that they owe?

6 A: That is accurate. And that's actually the
7 ultimate goal of settlement is that they have
8 one amount at the end of the day that they're
9 either owing or owed.

10 Q: And is that true of an issuer bank, as well?

11 A: That is correct. An issuer bank would have
12 ultimately one position at the end of the day
13 as settlement was finished. And let me
14 clarify. One position per currency. So, as I
15 mentioned earlier, there are multiple
16 currencies that we actually settle in. You'll
17 have one position per day per currency.

18 Q: In this middle box on the page where it says
19 Missouri facilities, there's a -- the third
20 bullet says determine final debit or credit
21 amount. Is that -- does that mean something
22 different than what we've been talking about?

23 A: No. It actually means the same thing. And
24 apologies if I refer to it as different
25 terminology. So, it -- I didn't want to inter-



1 -- interfere debit and credit with debit or
2 credit cards. This is a due to, right, which
3 would be the credit, they're going to be
4 credited the funds or due from, which they'll
5 be debited the funds, for that overall position
6 for that day.

7 Q: So, once Mastercard has computed what each
8 issuer or acquirer's net settlement position
9 is, what happens next?

10 A: I can refer to the chart for that, I think it
11 changed.

12 **MS. ROBINSON:** Yes. Sorry. I was just trying to
13 get the mouse and it changed where it was.

14 A: Can you repeat your question? Apologies.

15 Q: I -- I think I said once -- once Mastercard has
16 determined each issuer and acquirer's net
17 settlement position, what -- what happens next?

18 A: Sure. So, there's a couple things that happen
19 once all the processing has been done, we've
20 received all the upstream information from our
21 clearing systems, And now we actually produced
22 that end settlement position, which we talked
23 about is either a debit or a credit, or due to
24 or a due from position. So, then two things
25 happen. One, we prepare advisements for our



1 customers for the issuers and the acquirers,
 2 which, again, is an elective report, which they
 3 can sign up for. And what the advisement does
 4 is it alerts them ahead of time, a few hours,
 5 on what their actual position is going to be
 6 for that day. They will have some indication
 7 from their clearing reports, which you saw back
 8 in number 5, 6, and 7 from the prior page, as
 9 to what that overarching position would be.
 10 Our advisement report makes it very clear for
 11 them on what those positions are and why they
 12 were created at a summary level. That is
 13 profor- -- provided to them so that they can
 14 prepare for either receiving funds or having to
 15 pay funds. And then we'll actually create what
 16 we call a transfer fund order. And that's the
 17 actual financial transaction message that's
 18 sent to our settlement bank, which is J.P.
 19 Morgan in this case, a third party. And then
 20 that is what is actually going to be utilized
 21 to move the funds from our issuers to our
 22 acquirers or vice versa based on what those
 23 positions are owed or owed to. So, the end
 24 result of settlement occurring is really the
 25 two reports, which is our advisement and our



1 transfer fund orders, and, ultimately, the
2 movement of funds between our customers to
3 ensure that both -- the parties are then whole,
4 that we have a net zero position at the end.

5 Q: I think you said there were two end results
6 there. Are you able to identify on this
7 diagram at P0001647 where those are located?

8 A: Sure. So, those are step three, you see in the
9 number three bubble, and then the number three
10 description on the right. That would be the
11 settlement advisements. And then number four
12 you'll see, which is our transfer fund order,
13 which that is our financial messaging that goes
14 to the settlement bank.

15 Q: Can you describe who the transfer funds order
16 is sent to?

17 A: Sure. As stated, it's going to, in this case,
18 our settlement bank, which is J.P. Morgan
19 Chase, in order for them to either pay those
20 customers, our issuers or acquirers, that are
21 due funds, or receive funds from those
22 customers, our issuers and acquirers, that owe
23 funds. And in this case, it is only sent to
24 J.P. Morgan Chase in the U.S. dollar example as
25 we pay or receive all through that singular



1 account.

2 Q: And where is J.P. Morgan Chase located?

3 A: J.P. Morgan Chase obviously has many locations.
4 Our account for settlement was held in their
5 New York location.

6 Q: And how does Mastercard communicate this
7 transfer funds order to J.P. Morgan Chase?

8 A: So, we have a direct host to host connection
9 with J.P. Morgan Chase in which we send those
10 financial transactions or financial messages.
11 They also have a back up method which we would
12 utilize every so often, which is internet
13 based, multi-factor authentication to get in.
14 That's how we would send the messages back and
15 forth.

16 Q: You may have mentioned it, but I can't recall.
17 Does Mastercard only notify J.P. Morgan Chase
18 of the net positions or do you notify each
19 issuer and acquirer, as well?

20 A: Yes. So, each issuer and acquirer, our
21 customers, are notified via the settlement
22 advisements, which is in number 3 down below.

23 Q: And how is that -- how is a settlement
24 advisement communicated to an issuer or
25 acquirer?



1 A: So, very similar to clearing, the customer
2 elects how they would like to receive that
3 information. And the majority of our
4 settlement customers actually would go pull
5 that information from our Mastercard Connect
6 Platform, which is the internet based platform
7 by which we provide them access to. And that's
8 how they can pull and download their reports.

9 Q: You described clearing earlier in your
10 testimony as being done on a -- a batch basis.
11 Is that a fair characterization of your
12 testimony?

13 A: That is correct.

14 Q: Is -- would you describe settlement as being
15 done on a batch basis too?

16 A: You can refer to it being done on a batch
17 basis. If we receive the information in on
18 those arrows you see from the left coming in
19 throughout the day, and they would all -- the
20 batch data would then be summarized into that
21 one singular position. So, yes. You could
22 refer to it. Although the batches are much
23 smaller when we get here then we would on the
24 front end.

25 Q: Who pays Mastercard for settlement services?



1 A: So, our customers, which are the issuer and
2 acquirers are the ones that actually pay for
3 those services, as they're the only ones that
4 the services are offered to.

5 Q: Do cardholders or merchants pay for settlement
6 services?

7 A: No. There's no interaction with merchants or
8 cardholders as part of settlement.

9 Q: Where does Mastercard perform its settlement
10 function?

11 A: So, as -- as we stated earlier, Mastercard
12 performs our settlement function within our
13 Missouri processing facility, which is shown in
14 that yellow box, which is our Winghaven or
15 O'Fallon location. And then there are some
16 subsequent business oversight that is out of
17 our New York location, as well.

18 Q: What settlement activities does Mastercard
19 perform in South Carolina?

20 A: There are no settlement activities performed in
21 South Carolina.

22 Q: Would you consider a cardholder's swipe of his
23 or her credit card to be part of the settlement
24 process?

25 A: I do not consider the swipe to be part of the



1 settlement process.

2 Q: Are any settlement activities of Mastercard's
3 triggered when a cardholder swipes his or her
4 card?

5 A: There are not processes triggered from a
6 cardholder swipe, no.

7 Q: Do you use settlement as a distinct service
8 from authorization?

9 A: I do. I definitely see settlement as a very
10 distinct service from authorization.

11 Q: I think earlier when we were talking about
12 clearing, you said that it's possible that
13 clearing could occur on the same day, but it
14 could also occur up to several days later. Is
15 that a fair summary of your testimony?

16 A: That is correct. Yes.

17 Q: And I believe you also said that the typical
18 time between the authorization process and the
19 clearing process is one to two days. Is that
20 a fair summary of your prior testimony?

21 A: That is correct.

22 Q: So, if a cardholder swiped his or her card on,
23 let's say, Monday, when would that transaction
24 typically be authorized?

25 A: Be authorized? It would be authorized at the



1 time they swipe the card.

2 Q: And then when would that transaction be
3 cleared?

4 A: Again, depending on when our customer, the
5 acquiring bank most likely in this case, when
6 they would submit that data. As we have the
7 six clearing cycles within a day, the earliest
8 would be, would be the following day, as we
9 have those six cycles. And then they finalize
10 to send settlement. When we actually go to
11 settle, which would be at 8:00 a.m. tomorrow.
12 So, it would be most likely in that case, a
13 day.

14 Q: So, let's -- just to clarify. You say if -- if
15 the transaction happened on Monday, the
16 earliest possible submission for clearing would
17 be on Tuesday?

18 A: They could submit it at any point in time that
19 they want. The earliest it would clear would
20 be on Tuesday.

21 Q: Okay. And when would be the earliest possible
22 settlement?

23 A: Again, it would be dependent on when our
24 customer would submit it in. If they submitted
25 it in right away, it could potentially also



1 settle on Tuesday. In most cases, it would
2 probably settle on Wednesday because they wait
3 until the end of their day to submit it in. But
4 again, that's clearly up to our customers on
5 how they want to actually submit in those batch
6 data files.

7 Q: You said that clearing could occur up to
8 several days after a swipe of a card. Under
9 what circumstances would several days go by
10 before clearing occurs?

11 A: Sure. So, again, that's really up to our
12 customers to determine when they want to submit
13 it in. And then the relationship that they
14 have with their customers. But in some cases,
15 if you have a small mom and pop shop, they may
16 have some sort of relationship with the
17 acquirer that they only submit them data on
18 let's say a weekly basis because it's most --
19 or most cost effective for them to do that.
20 But, again, Mastercard does not in- --
21 intervene with that. But we do have rules by
22 which they have to submit them in within a
23 certain time frame. That's what really
24 dictates. But in some cases, they may only
25 submit it on a weekly basis.



1 Q: And when you say they may only submit it on a
2 weekly basis ---

3 A: Apologies. Acquirers, our customers, would
4 submit it on a weekly basis.

5 Q: A moment ago, I gave an example of a cardholder
6 swiping his or her card on Monday and I asked
7 you when it would be authorized. Do you recall
8 that?

9 A: I do.

10 Q: And I think you answered that it -- the
11 authorization would be at the time the
12 cardholder swiped the card. When you gave that
13 answer, did you mean that authorization is
14 instantaneous with the swipe?

15 A: That is correct. There would be a
16 determination one way or another as part of
17 that swipe.

18 Q: So, it is fair to say that the authorization
19 would occur on the same day as the swipe?

20 A: And -- and as we talked earlier to just to
21 clarify, authorization is that end-to-end
22 exchange of a decision between our issuer and
23 acquirer customers. There could be multiple
24 authorizations that would have to happen for a
25 clearing file -- I'm sorry -- before that final



1 would come in a clearing file. So, that
2 initial question you asked, would that be an
3 instantaneous decision, the answer is yes. And
4 I believe we talked about that in earlier
5 testimony, as well, right? The goal is under
6 seven seconds to have a decision from the
7 issuer to the acquirer. But then again, the
8 clearing file, which you asked on the second
9 part of that question, could come in, again,
10 whenever they submit that batch file.

11 Q: If there were a situation where no cardholder
12 swiped their cards on a given day, is it
13 possible that Mastercard could still earn
14 settlement fees?

15 A: It is very possible. As we mentioned earlier,
16 right, there's many positions that are coming
17 into settlement as you can see in those lines
18 there on the left. And one of those boxes, if
19 you refer back to our prior diagram, was our
20 billing system. So, customers also elect to
21 have their revenues, right -- I -- I mean, the
22 -- their fees that are owed to Mastercard
23 collected via clearing, which then ultimately
24 would be indicated in their settlement position
25 on a day-to-day basis. So, that is where you



1 could potentially have no transactional data on
2 a day, but still have settlement occurring.

3 Q: Would you say that at the time a cardholder
4 swipes his or her card, that Mastercard has
5 earned any settlement fees?

6 A: There's no settlement fees tied to a swipe of
7 a card.

8 Q: I just want to clarify what you -- your
9 understanding of the term instantaneous. Mr.
10 Cavallo, I believe, testified that there were
11 several steps between a cardholder's swipe and
12 Mastercard's authorization. Is that consistent
13 with your understanding?

14 A: That is correct. That's what I understand.

15 Q: Thank you. That's all I have at this time.

16 **THE COURT:** Thank you. Cross examination?

17 **MR. NEIL:** Judge, would it be possible to take a
18 quick break before we start the cross-exam?

19 **THE COURT:** Of course. Let's try ten minutes.

20 **MR. NEIL:** That'll work. Thank you.

21 **(Off the record from 2:39 p.m. until 2:48 p.m.)**

22 **MS. WOOTEN:** Your Honor, I think we have a slight
23 housekeeping matter that we need to address
24 with opposing counsel.

25 **THE COURT:** Okay.



1 **MS. WOOTEN:** And I apologize, but we can have
2 another ten minutes to discuss that? It's ---

3 **THE COURT:** Yes.

4 **MS. WOOTEN:** --- going to -- it -- it relates to the
5 next witness that's going to be called.

6 **THE COURT:** That's quite all right.

7 **MS. WOOTEN:** Okay. Thank you.

8 **THE COURT:** It's never a problem.

9 **MS. WOOTEN:** We apologize for our -- for that
10 inconvenience.

11 (Off the record from 2:49 p.m. until 2:54 p.m.)

12 **THE COURT:** Looks like everybody's back.

13 **HOUSEKEEPING MATTERS:**

14 **MS. GEER:** Your Honor, we have two small
15 housekeeping matters. One is we filed
16 deposition designations, the Department filed
17 counter designations. We then filed counter
18 designations this morning. And we have now
19 marked up the actual transcript with the
20 designations. And so, I have a copy for the
21 Court to enter into the record if I may
22 approach.

23 **THE COURT:** Okay. Is there any objection to this?

24 **MR. NEIL:** No, sir, Your Honor. We've checked it
25 and everything she's put in is correct, but I



1 don't know if you want to explain the
2 highlighting ---

3 **MS. GEER:** Oh, yes. Sorry. For the record, let's
4 see -- the yellow highlights are Mastercard's
5 and the blue highlights are the Department's.

6 **THE COURT:** It sounds like you're in agreement, so
7 it's not a problem.

8 **MS. GEER:** Okay.

9 **MR. NEIL:** Okay. Great. Thank you.

10 **THE COURT:** Thank you very much. And you said ---

11 **MS. GEER:** And then one other housekeeping matter.
12 Mastercard had identified Orville Sharpe as a
13 witness, in our case. The Department intends
14 to call him in their case. And so, we have
15 reached an agreement with counsel that we will
16 combine our direct and our cross and do it
17 after they call him in their case.

18 **THE COURT:** That will be fine.

19 **MS. WOOTEN:** That's correct, Your Honor.

20 **THE COURT:** That's fine. It's never a problem when
21 people can agree. So, that's very good.

22 **MS. GEER:** So, those are the two housekeeping. Do
23 you want to close?

24 **MS. ROBINSON:** We -- that's the close of our
25 affirmative case sub- -- subject to the direct



1 against combined into the cross that ---

2 **THE COURT:** Of course.

3 **MS. ROBINSON:** --- as discussed. Thank you, Your
4 Honor.

5 **THE COURT:** And of course, you -- you'll always have
6 some times for rebuttal, also.

7 **MS. ROBINSON:** Thank you.

8 **THE COURT:** Yes, ma'am.

9 **MS. WOOTEN:** Thank you, Your Honor. One
10 housekeeping from the Department before we call
11 our first witness. Part of our discussion
12 outside was the time that we are going to go to
13 tonight. We have one witness that we think is
14 going to be rather lengthy. And I believe at
15 the beginning of the hearing, you stated that
16 the Court was amenable to us going late
17 tonight. Is that still a possibility or what
18 is -- what does the Court prefer, I guess ---

19 **THE COURT:** I think ---

20 **MS. WOOTEN:** --- for the end time today.

21 **THE COURT:** I think -- about how long after 5:00
22 would you like to go?

23 **MS. WOOTEN:** I'm not sure, Your Honor, to be honest.
24 We were thinking maybe 5:30. Is that -- or
25 would y'all like to go longer than that? What



1 -- the -- I think there's an issue with some
2 flights on Friday and so we're trying to get
3 the testimony in before those flights.

4 **THE COURT:** And that's fine with me. Let's check
5 with the Court staff out front.

6 **MR. GOLDMAN:** I'd definitely have to check with
7 Chris.

8 **THE COURT:** Yeah. And we'll go do that right now.
9 Jared, are you able to stay until 5:30?

10 **MR. THOMPSON:** Yeah.

11 **THE COURT:** I know you may need to leave.

12 **COURT REPORTER:** I'm good.

13 **MR. GOLDMAN:** Let me just go check with Chris.

14 **THE COURT:** We'll -- I think we can probably work on
15 that. We do need to run out for the staff. I
16 have resumed driving so that gives me a little
17 more flexibility. Give me just a second.

18 **(Off the record from 2:59 p.m. until 3:03 p.m.)**

19 **THE COURT:** I think 5:30 is going to work fine today
20 and if we -- so, Anthony is just kind of making
21 the final arrangement on that. My ceremony
22 tomorrow will not last very long. I've never
23 been to an Order of Palmetto ceremony, but I
24 can't imagine it lasting very long. And even
25 if it does, I'll just have to leave. It's



1 right over in the Governor's Office. So, it
2 starts at 11:30. So, as long as I'm there by
3 11:00 -- of course, now, I move a little slower
4 than I did at one time. But if I can leave
5 here at 11:15, I can easily be back. Having
6 said that, would you like to start early
7 tomorrow or just at the same time and kind of
8 march through? You probably ---

9 **MR. NEIL:** Your Honor, I think it make sense under
10 those circumstances with their desire to try
11 and finish tomorrow to start at 9:00, if that's
12 okay with the Court.

13 **THE COURT:** That's certainly fine with me. Now, you
14 actually believe we can finish the trial
15 tomorrow?

16 **MS. ROBINSON:** We -- we are hopeful. I mean, we're
17 done with our witnesses. We don't know how --
18 we have a sense of how long cross might take.
19 We don't know how long their direct is going to
20 take. We're keeping our fingers crossed. But
21 we're -- we'll be here as long as we need to be
22 here.

23 **THE COURT:** And I will be here all week, so.

24 **MS. ROBINSON:** But -- so, I think for tomorrow, we
25 could start at 9:00 and then we'll all just



1 break for lunch at 11:15.

2 **THE COURT:** That's good. Is that okay? All right.

3 Sounds good.

4 **MR. NEIL:** That works.

5 **THE COURT:** Thank you very much.

6 **MS. ROBINSON:** Sure. Do -- do you think we would be
7 doing about an hour lunch or hour and a half?

8 **THE COURT:** Probably about an hour. Let's say an
9 hour and a half just in case. Only because I
10 will just go over to the next building.

11 **MS. ROBINSON:** And we can't get started without you,
12 so we're -- so, okay. Thank you.

13 **THE COURT:** Thank you. Thank you. Department.

14 **RESPONDENT'S CASE IN CHIEF**

15 **MS. WOOTEN:** Thank you, Your Honor. The Department
16 calls Orville Sharpe.

17 **THE COURT:** Mr. Sharpe, how are you today? Come on
18 ---

19 **MR. SHARPE:** Hi.

20 **THE COURT:** --- up.

21 **MR. SHARPE:** Judge.

22 **COURT REPORTER:** O-R-V-I-L-L-E?

23 **MR. SHARPE:** Yes.

24 **COURT REPORTER:** Sharpe, S-H-A-R-P, or E?

25 **MR. SHARPE:** It's got an E on it.



1 **COURT REPORTER:** Thank you. Raise your right hand.
 2 Do you solemnly swear that the testimony you're
 3 about to give in this matter is the truth, the
 4 whole truth, and nothing but the truth, so help
 5 you God?

6 **MS. SHARPE:** Yes.

7 **COURT REPORTER:** Thank you.

8 **MR. SHARPE - DIRECT EXAMINATION BY MS. WOOTEN:**

9 Q: Mr. Sharpe, good morning -- or good afternoon.

10 A: Hi.

11 Q: Where are you currently employed?

12 A: South Carolina Department of Revenue.

13 Q: And how long have you been employed by the
 14 Department?

15 A: It'll be 44 years in April.

16 Q: In what area of the Department do you work?

17 A: Foreign income tax. Foreign corporate income
 18 tax.

19 Q: Can you explain what you mean by foreign income
 20 tax?

21 A: We audit multi-state corporations that conduct
 22 activity within and without South Carolina.
 23 So, it's -- it's the bigger companies.
 24 Mastercard is an example of your -- your
 25 Fortune 500 companies generally. The --



1 foreign means that their -- their generally,
2 their home office is commercially domiciled
3 outside of South Carolina.

4 Q: And what is your current title?

5 A: I'm one of the foreign audit corporate
6 supervisors.

7 Q: And what are your job duties and
8 responsibilities as a foreign audit supervisor?

9 A: I supervise six foreign auditors and I help
10 them select the audits through our audit
11 selection unit, and I supervise their work and
12 approve their audits.

13 Q: And what was your job prior to being a foreign
14 audit manager?

15 A: I was a foreign auditor. A foreign corporate
16 auditor.

17 Q: And can you describe your responsibilities and
18 duties in that position?

19 A: Well, you would first research a potential
20 audit and if you decided that you wanted to do
21 that audit, you'd have to get approval from
22 your supervisor to do the audit. And then
23 after you did that work, you would contact the
24 taxpayer to set up the audit and issue a -- an
25 initial informa- -- information document



1 request. And then, generally back then, you
2 would generally contact the taxpayers out of
3 state, wherever their records were located.
4 But, of course, since COVID, all our audits
5 have been electronic.

6 Q: And how long were you in that position?

7 A: Since I -- since I started at DOR. So, I think
8 I've been a supervisor for four years, so 40
9 years.

10 Q: You've been a foreign audit auditor -- or
11 foreign corporate auditor for 40 years?

12 A: For 40 years. I've been a supervisor about
13 four years.

14 Q: Are you familiar with the taxpayer in this
15 case?

16 A: Yes.

17 Q: Okay. And how are you familiar with the
18 taxpayer?

19 A: From -- from my audit with the team members of
20 Mastercard International.

21 Q: When was your first contact with the taxpayer?

22 A: I think I -- I called the tax manager on
23 7/19/2017.

24 Q: And what was the purpose of that call?

25 A: To set up the audit and get a -- a definite



1 field audit contact date.

2 Q: And what do you mean by field audit?

3 A: Meaning that the au- -- audit records in this
4 case were located in Purchase, New York, so we
5 -- we needed a date to contact them to review
6 the records in Purchase, New York.

7 Q: After you contacted the taxpayer via telephone,
8 did you have any other contact with the
9 taxpayer prior to conducting the audit?

10 A: Yes. I sent them an audit appointment letter
11 and initial IDR on 11/20/2017.

12 Q: And what kind of information is contained in
13 the audit appointment on the letter?

14 A: It lists the entities to be audited, the audit
15 periods and the initial document request, the
16 initial records that we wanted to -- to review.

17 Q: In what years did your audit appointment lever
18 -- letter cover?

19 A: 2007 -- well, I'm not sure. I think that the
20 -- the audit letter would have said date of
21 first activity through 2016. But the ultimate
22 audit period was 2007 through 2016.

23 Q: After you sent this audit appointment letter,
24 what was your next contact with the taxpayer?

25 A: I don't think we had any other contact with the



1 -- the taxpayer until we contacted them on
2 11/28/2017 to start the audit in Purchase, New
3 York.

4 Q: And when you say contacted the taxpayer on 28
5 -- 11/28/2017, where were you physically
6 located?

7 A: In Purchase, New York.

8 Q: Were you the only auditor present?

9 A: No. We -- we had -- I -- there were other --
10 two other auditors, Robin Goff and Joyce
11 Sprowl.

12 Q: Approximately how long did your audit take ---

13 A: We were there three days from 11/28 through
14 11/30/2017.

15 Q: And while you were there conducting the audit,
16 what was your role in that?

17 A: I was the lead auditor.

18 Q: And what does that mean?

19 A: The other two auditors, Robin and Joyce, were
20 new to the Department and I was training them.
21 So, they basically did whatever I asked them to
22 do.

23 Q: Such as?

24 A: Such as reviewing some inter-company contracts
25 they may have provided and when we were



1 inputting the audit schedules, they -- they put
2 in all the numbers in -- in the audit schedule
3 -- audit schedules and various other things.

4 Q: Do you recall the basis of this particular
5 audit?

6 A: We -- we asserted nexus on the taxpayer and
7 requi- -- required source of the receipts to
8 South Carolina.

9 Q: If you could, if you could flip to tab 27. I
10 believe it's in notebook 3.

11 **(Joint Exhibit Number 27 was referenced at this**
12 **time.)**

13 A: Okay.

14 Q: Do you recognize the first page of tab 27?

15 A: Yes. This is the proposed -- the final
16 proposed assessment we sent to the taxpayer on
17 March 26th, 2018.

18 Q: And did you draft or complete this document?

19 A: I think Robin or either Joyce would have
20 probably entered this information. This is
21 from our -- our -- our tax system called
22 DORWAY. So, they probably put the information
23 in DORWAY.

24 Q: Would other -- is there any other information
25 that would have accompanied this proposed



1 assessment that -- when you sent it to the
2 taxpayer? Would any other information have
3 accompanied the proposed assessment when ---

4 A: Yes.

5 Q: --- you sent it to the taxpayer?

6 A: It would have included the other DORWAY work
7 papers, which is our tax system. And the main
8 audit report is reflected in our Excel
9 worksheets, which included the -- the detail
10 schedule showing the computation of the -- the
11 South Carolina gross receipts apportionment and
12 the write up of why we felt we had nexus on
13 Mastercard International. And why we felt that
14 the -- that the method that we utilized to
15 source receipts to South Carolina was correct.

16 Q: And generally -- we'll get into the specifics
17 of the audit report later on in your -- your
18 testimony, but, generally, what were the
19 findings of your report?

20 A: That we had corporate and license through nexus
21 and they were required to source receipts to
22 South Carolina.

23 Q: What income tax returns did Mastercard file
24 during the audit period?

25 A: None.



1 Q: And what was the basis for the income tax
2 assessment in this particular matter?

3 A: They were doing business in South Carolina
4 pursuant to South Carolina Code of Laws 12-6-
5 530, which basically says that if you're
6 generating income or gain in South Carolina by
7 conducting business in South Carolina.

8 Q: And how did you determine Mastercard was doing
9 business in South Carolina?

10 A: Well, first of all, they -- they have employees
11 who are located in South Carolina and they're
12 also -- also licensing intangibles, the
13 Mastercard brand, for use in South Carolina.
14 And they're also issuing contracts and
15 controlling those contracts for businesses that
16 operate in South Carolina. And they're also
17 generating income in South Carolina on fees
18 based on the dollar val- -- value and on the
19 number of transactions initiated in South
20 Carolina.

21 Q: You stated that you determined Mastercard was
22 doing business in South Carolina. What did you
23 determine Mastercards's business was in South
24 Carolina?

25 A: The provision of a credit card network that



1 allowed consumers and merchants to consummate
2 credit purchases or card purchases in South
3 Carolina and elsewhere.

4 Q: What type of product did you determine
5 Mastercard was providing in South Carolina?

6 A: They're a service provider.

7 Q: And what is the standard statutory
8 apportionment method a service provider is
9 required to follow in South Carolina?

10 A: Gross receipts pursuant to South Carolina Code
11 of Laws 12-6-2290.

12 Q: And what apportionment method is Mastercard
13 required to use on its South Carolina income
14 tax returns?

15 A: Gross receipts.

16 Q: And why are they required to use gross
17 receipts?

18 A: Because they are -- they are a service
19 provider.

20 Q: And what apportionment formula did you apply to
21 Mastercard as part of your audit?

22 A: Gross receipts.

23 Q: Once you determine that a taxpayer is required
24 to use the gross receipts method under 2290,
25 how do you determine what items are included in



1 that ratio?

2 A: You can look to South Carolina Code of Laws 12-
3 6-2295, which lists the items included in the
4 South Carolina and everywhere receipts.

5 Q: And how does 22-6-22 -- or excuse me -- 12-6-
6 2295-A5 determine which receipts to include?

7 A: You have to determine where the location of the
8 income producing activity is in regard to South
9 Carolina receipts.

10 Q: You stated earlier that Mastercard's income is
11 apportioned based on gross receipts in South
12 Carolina. What is your understand of the
13 primary receipts for revenue streams of
14 Mastercard?

15 A: According to the 10-K for -- for Mastercard,
16 they have five major revenue streams and these
17 five major revenue streams are domestic
18 assessment fees, cross border volume fees,
19 transaction processing fees, other income and
20 rebates and incentives, which is a contra
21 revenue, meaning that it -- it's a negative
22 amount.

23 Q: Okay. And we'll -- we'll talk about those in
24 detail in just a few minutes. You stated that
25 you got that information from the -- from the



1 10-K, is that correct?

2 A: Correct.

3 Q: Okay. And is the 10-K public information?

4 A: Yes.

5 Q: All right. Let's go back and talk about those
6 five revenue streams. The first one, I believe
7 you mentioned was domestic assessments,
8 correct?

9 A: Correct.

10 Q: Okay. What is your understanding of the
11 domestic assessment fee?

12 A: It -- it's a fee that Mastercard charges, I
13 think -- from what I understand yesterday, it's
14 basically for their profit margin and other
15 expenses that they incur in performing their --
16 their business. But it's based on the dollar
17 amount of transactions that occur in South
18 Carolina and elsewhere.

19 Q: The transactions between which parties?

20 A: The transactions -- the transactions between --
21 it's the dollar -- it's -- it -- well, there --
22 from the -- the transactions between the --
23 it's based on the transactions that are
24 initiated in South Carolina and elsewhere.

25 Q: Mastercard's transactions?



1 A: Mastercard branded transactions that are
2 initiated in South Carolina and elsewhere. The
3 -- the acquirers and the issuing banks are --
4 are the ones that pay the domestic assessment
5 fees.

6 Q: All right. The next fee you testified to was
7 the cross border volume fee.

8 A: And it's really the same ---

9 Q: What is your -- hold on.

10 A: I'm sorry. I -- I know. I got to wait until
11 you finish.

12 Q: What is your ---

13 A: You told me that.

14 Q: What is your understanding of cross border
15 volume fees?

16 A: Basically the same thing as domestic assessment
17 fees, except the issuing bank and the merchant
18 are in different countries.

19 Q: And the third fee that you stated related to
20 transaction processing fees. What is your
21 understanding of a transaction processing fee?

22 A: These are fees that are charged to the issuers
23 and acquirers based on authorization, clearing
24 and settlement and the -- the charges are based
25 on the number of transactions.



1 Q: And, generally, what is your understanding of
2 the term authorization?

3 A: Authorization is where a Mastercard branded
4 transaction is routed over the Mastercard
5 credit card network to the issuer for approval
6 or denial of the transaction.

7 Q: And what is your understanding of the term
8 clearing?

9 A: Clearing is where the net positions is computed
10 for the acquirers and the issuers.

11 Q: And is it your understanding that settlement
12 would be the exchan- -- facilitating the
13 exchange of funds between parties?

14 A: Yes.

15 Q: All right. The fourth revenue stream that you
16 discussed was other revenue and income. What's
17 your understanding of that?

18 A: Other income is -- to me is -- it's the
19 smallest amount on the five revenue streams and
20 it's a -- a catchall basically. It includes
21 consulting fees that -- that they may charge to
22 the acquirers and the issuing banks. And --
23 and I learned yesterday or -- or today that
24 they also charge some of the -- some of the --
25 the merchants. That's -- I was trying to think



1 of the term. The merchants -- so -- certain
 2 fees. And it's also -- it can also include
 3 insurance that they provide -- that the
 4 acquiring -- or the issuing bank will --
 5 provides to the cardholder and other benefits
 6 that they provide to the cardholder. And Ruby
 7 indicated a lot more various categories of
 8 other income, which I don't remember. But it
 9 -- it's really just a -- a big box of -- of
 10 different types of income that fall under
 11 there.

12 Q: And I think the last category you mentioned was
 13 -- or revenue stream was rebates and
 14 incentives.

15 A: Uh-huh.

16 Q: Can you briefly describe your understanding of
 17 that?

18 A: Re- -- as I indicated before, rebates and
 19 incentives is a contra account, meaning it's a
 20 -- an offset to the revenue or a negative. And
 21 these are amounts that -- incentives that they
 22 -- that Mastercard provides to the acquirers
 23 and issuers based on their volume of business
 24 or amount of business that they provide to
 25 Mastercard.



1 Q: All right. And based on the information that
2 you got from the 10-K, what did you do next?

3 A: Based on the information that I got from the
4 10-K, I -- based on that information, I think
5 I determined that their income producing
6 activity, a portion would have been located in
7 South Carolina.

8 Q: I'm sorry. I didn't hear that last part.

9 A: I -- I -- I'm thinking that I -- I determined
10 that a portion of their income produc- --
11 producing activity was conducted in South
12 Carolina.

13 Q: Did you request additional information from
14 Mastercard regarding ---

15 A: Oh -- oh, yeah.

16 Q: --- those revenue streams?

17 A: Yes.

18 Q: Okay. What information did you request?

19 A: I -- well -- actually, we discussed with -- I
20 discussed with the tax manager what we thought
21 the income producing activity was in South
22 Carolina and she suggested these Mastercard
23 reports that they provided us to help us
24 determine what the gross receipts were in South
25 Carolina based on what we considered the income



1 pro- -- producing activity in South Carolina.

2 Q: And do you recall the -- the individual that
3 you spoke with or corresponded with, the tax
4 manager?

5 A: Let's see. I did remember her name, but I
6 can't remember it now.

7 Q: If you'll flip in that tab -- if you'll flip to
8 page 135, Bates stamp SCDOR 135.

9 A: Now, I think of it. Sally Chun.

10 Q: Thank you. What other information besides the
11 information you received from -- I believe you
12 -- I'm sorry. What did you say her name was?
13 Sally.

14 A: Sally Chun.

15 Q: What -- what other information did you receive
16 from Sally?

17 A: Well, we -- we requested the Mastercard federal
18 consolidated return. All this information
19 would have been listed in the initial IDR. We
20 requested the -- the U.S. 11-20 Pro Forma
21 returns for -- for Mastercard International.
22 We would have requested all inner-company
23 transactions between Mastercard International
24 and other affiliates. We would have requested
25 any inner-company agreements. We would have



1 requested the licensing agreements between the
2 issuers and the acquirers, and the various
3 other information we would have requested. But
4 it -- it would have in the -- the initial IDR
5 that we included with the audit appointment
6 letter that we sent to the taxpayer on
7 11/20/2017.

8 Q: And going back to the in- -- other information
9 you received from them ---

10 A: I'm sorry. That -- that -- the letter would
11 have been sent out on 7/20/2017, not
12 11/20/2017.

13 Q: All right. Thank you for that clarification.
14 Going back to the other information you
15 received from Mastercard, what specific
16 information did you receive related to their
17 gross receipts?

18 A: They were provided these reports that detailed
19 the total Mastercard branded transactions in
20 South Carolina and the U.S. for the -- the
21 various audit periods.

22 Q: If you can flip to -- in tab 27, Bates number
23 SCDOR 000677.

24 A: Yes. I've got it.

25 Q: Is this the information you just stated that



1 you received from Mastercard related to -- I'll
2 let you ... Is this the information you stated
3 that you received from Mastercard?

4 A: Right. The -- I think they provided their --
5 for each year, there were two pages and I think
6 one page was the normal Mastercard transactions
7 and the other page were -- were the -- the
8 debit transactions or the pin-based
9 transactions, I'm not sure which one, but there
10 were two pages. And then in addition to these
11 pages that they provided, they also provided
12 the -- a breakdown of -- of the U.S. Mastercard
13 generated revenue for the five revenue stream
14 -- streams we previously talked about.

15 Q: And this information you received, did you
16 receive it for every year of audit period?

17 A: Yes.

18 Q: Okay. And how did you use this information?

19 A: We used it to -- to -- to come up with the
20 amount of the gross receipts that should be
21 sourced to South Carolina based on what we
22 considered to be the -- the location of the
23 income producing activity in South Carolina.

24 Q: And we're going to walk through just an example
25 of each one.



1 **MS. WOOTEN:** Your Honor, may I approach the witness?

2 **THE COURT:** Of course.

3 **MS. WOOTEN:** May I approach the bench?

4 **THE COURT:** Yes, ma'am.

5 **MS. WOOTEN:** I've just handed this -- I'm going to
6 hand this exhibit or ---

7 **THE COURT:** Thank you.

8 **MS. WOOTEN:** --- document to Mr. Sharpe. It's on
9 the screen, as well.

10 **THE COURT:** Mastercard, do you have a copy?

11 **MS. ROBINSON:** I have a copy, yes.

12 Q: If you could flip to page number 2. If you
13 could walk us through how you determined the
14 ratio for domestic assessment fees.

15 A: Okay. I took the South Carolina dollar amount
16 of Mastercard branded transactions. I -- I
17 divided that by the U.S. dollar amount of
18 Mastercard branded transactions.

19 Q: Okay. And then what did you do once you came
20 up with that ratio?

21 A: After I did that, I multiplied that ratio by
22 the total U.S. domestic assessment fees to get
23 the total amount of South Carolina gross
24 receipts received from domestic assessment
25 fees.



1 Q: If you will flip to Bates -- stay in tab 27.
 2 And if you will go to Bates number SCDOR ---
 3 A: You said Tab 28?
 4 Q: 27.
 5 A: Uh-huh.
 6 Q: Bates number SCDOR 00695.
 7 A: Right.
 8 Q: And before I ask you specific questions about
 9 that ---
 10 **MS. ROBINSON:** I'm sorry, Nicki, can we just get a
 11 Bates page again?
 12 **MS. WOOTEN:** SCDOR 000695.
 13 **MS. ROBINSON:** Thank you.
 14 Q: Before I ask you about the specific numbers on
 15 that -- that page, let me go back and have you
 16 flip to the first page of the document that I
 17 handed you. What's the title of this document?
 18 A: Calculation of South Carolina receipts.
 19 Q: And generally, what -- are you familiar with
 20 this document?
 21 A: Yes.
 22 Q: Okay. And, generally, what does this document
 23 describe?
 24 A: This describes the method and the numbers that
 25 we used to calculate the South Carolina



1 receipts. All the information we used was
2 based on information provided by the taxpayer.

3 Q: All right. And it includes the five revenue
4 streams that we just discussed?

5 A: Right.

6 Q: Okay. And it's broken down by each revenue
7 stream?

8 A: Yes.

9 Q: Okay. And then there is a total for each
10 fiscal year of the audit period at the end, is
11 that correct?

12 A: Right.

13 Q: All right. So, let's go back to the first
14 revenue stream, domestic assessment fees. You
15 walked us through how you calculated the ratio.
16 Now, using Bates number SCDOR 000695 and
17 000696, please describe how you did the
18 mathematical calculation on page 2 of the
19 document titled Calculation of S.C. receipts.

20 A: Okay. In order to get to the total of the
21 South Carolina dollar amount of Mastercard
22 branded transactions, you have to add the
23 amount for -- on the first column for South
24 Carolina. So, that's 10 billion.
25 10,469,603,767. And you have to divide -- you



1 have to add that to the -- to 1.7 billion on
2 the -- the pin page. And that should come out
3 with 12,209,742,613 shown on page 2 of this
4 handout that you provided.

5 Q: All right. Now, that you've determined --
6 well, let me back up. What does -- you -- you
7 indicated you got figures from South Carolina
8 from these two pages, SCDOR 695 and SCDOR 696.
9 What information -- what is the category of
10 information on these two pages?

11 A: These are the amount of -- of U.S. branded
12 Mastercard transactions broken down by state.

13 Q: Now, what year do these pages relate to?

14 A: 2016.

15 Q: All right. Going back to your -- the handout,
16 the calculation handout, you showed us how --
17 you testified how you got the 12 billion dollar
18 number.

19 A: Right.

20 Q: Please continue with the rest of the formula.

21 A: Okay. 12 billion. And then -- then in order
22 to get the denominator, we have to add up the
23 total South Carol- -- I mean, total U.S.
24 Mastercard branded transactions. So, we go to
25 page 695 on the bottom and it has the grand



1 total. And I think that's one trillion. Is
2 that 1.07 trillion? Let's see. 859 -- yeah.
3 1.07 trillion. Then you go to the -- page 696,
4 and you add the -- 131 billion to come up with
5 the -- to the 1.201 trillion shown as the
6 denominator on page 2 of this handout that you
7 provided.

8 Q: Once you determined the gross receipts ratio,
9 what did you do next in this formula?

10 A: Then I multiplied that by the total U.S.
11 domestic assessment fees. And that was a- --
12 another document that the taxpayer provided to
13 us to get the South Carolina gross receipts for
14 domestic assessment fees.

15 Q: And what number represent -- on slide -- or
16 page 2 of this document, what number represents
17 the South Carolina receipts for domestic fees?

18 A: 2,355,786,170.

19 Q: Orville.

20 A: I'm sorry.

21 Q: Sorry. Mr. Sharpe, what number on page 2 ---

22 A: Oh, page 2.

23 Q: --- of this slide, the calculation of S.C.
24 receipts, represents South Carolina's receipts
25 that come from domestic assessment fees?



1 A: Oh, I'm sorry. 23,930,036.

2 Q: Thank you. Now, if you will -- did you

3 complete this calculation for each year of the

4 audit period for domestic assessment fees?

5 A: Correct.

6 Q: And you used the same formula and the same

7 process?

8 A: Right.

9 Q: Okay. All right. If you'll flip to slide 3.

10 **COURT REPORTER:** If you could watch your paper on

11 the microphone. Just push the microphone to

12 the side. Thanks.

13 Q: Page 3.

14 A: All right.

15 Q: Does this represent your calculations for

16 domestic assessment fees -- South Carolina

17 receipts from domestic assessment fees for the

18 entire audit period?

19 A: Yes.

20 Q: Okay. All right. If you'll flip to the next

21 slide, page 4.

22 A: Right.

23 Q: What is the title of -- of this page?

24 A: Cross border dollar volume fees.

25 Q: Okay. And did you perform a similar or the



1 same calculation for cross border dollar --
2 dollar volume fees that you did for domestic
3 assessment fees?

4 A: Yes. Because, again, the cross border dollar
5 volume fees are the same thing as domestic
6 assessment fees except the issuing bank and the
7 merchant are located in different countries.

8 Q: And the information you've received to compute
9 this calculation came from Mastercard?

10 A: Correct.

11 Q: All right. And if you'll flip to page 5. Did
12 you use the same process or formula to compute
13 the South Carolina receipts for cross border
14 dollar -- dollar volume fees for the audit
15 period?

16 A: Yes, I did.

17 Q: And is that represented on page 5?

18 A: Yes.

19 Q: All right. If you'll flip to page 6. What is
20 the title of this page?

21 A: Transaction processing fees.

22 Q: Did you compute or did you use the same formula
23 and computations for domestic assessment fees
24 and cross border volume fees that you did for
25 transaction processing fees?



1 A: No.

2 Q: Okay. Can you explain the difference?

3 A: The difference is that the transaction
4 processing fee -- fees are not based on the --
5 a dollar volume. They're -- they're based on
6 the number of transactions. So, in order to
7 computer the percentage of the -- that was
8 multiplied by the total amount of U.S.
9 transaction fees. We used the number of South
10 Carolina Mastercard branded card transactions
11 and divided by the total number of U.S.
12 Mastercard branded -- branded card
13 transactions.

14 Q: And that resulted in -- once you divided the
15 total number of Mastercard branded trans- --
16 card transactions over the total number of U.S.
17 Mastercard branded transactions, what did you
18 do with that information?

19 A: Then I multiplied that by the total amount of
20 U.S. transaction processing fees. And this was
21 also information provided to us by the
22 taxpayer.

23 Q: And did you use this calculation to determine
24 South Carolina receipts for transaction --
25 transaction processing fees during the audit



1 period?

2 A: Yes.

3 Q: And did you use that for every year of the
4 audit period?

5 A: Yes.

6 Q: Okay. If you'll flip to page 7. Does this
7 page represent your calculations of South
8 Carolina receipts from transaction processing
9 fees?

10 A: Yes, it does.

11 Q: And where did you obtain all of the information
12 for the calculations on this page?

13 A: All the information came from information
14 provided by the taxpayer.

15 Q: Okay. If you'll flip to page 8.

16 A: I'm there.

17 Q: What is the title of this page?

18 A: Other revenue.

19 Q: Okay. And does this page describe how you
20 calculated South Carolina receipts from
21 Mastercard's other revenue income stream?

22 A: Right. It does.

23 Q: Okay. Can you briefly walk us through how you
24 did that calculation for other revenue?

25 A: Yes. I took the sum of the -- the South



1 Carolina dollar amount of Mastercard assessment
2 fees, cross border dollar volume fees, and
3 transaction processing fees and divided this by
4 the sum of the U.S. dollar amount of Mastercard
5 assessment fees, cross border dollar volume
6 fees, and transaction processing fees to come
7 up with a percentage.

8 Q: And what did you do with that percentage?

9 A: This percentage was multiplied the total amount
10 of Mastercard's U.S. other revenue.

11 Q: Okay. And did you perform this same
12 calculation for every year of the audit period?

13 A: I did.

14 Q: Okay. If you'll flip to page 9. Does page 9
15 represent your calculations regarding South
16 Carolina receipts from other revenue for
17 Mastercard for ---

18 A: It does.

19 Q: --- for years 2007 through 2016?

20 A: Yes.

21 Q: Okay. And where did you get the information to
22 do the calculations on the page?

23 A: This information was came -- came from
24 information provided by the -- Mastercard.

25 Q: If you'll flip to page 10.



1 A: Page 10?

2 Q: Yes.

3 A: Okay.

4 Q: And can you describe the title of this page?

5 A: Rebates and incentives, contra receipts.

6 Q: All right. And can you describe how you

7 calculated the ratio in South Carolina receipts

8 regarding Mastercard's rebates and incentives?

9 A: Yes. I took the South Carolina dollar amount

10 of South Carolina Mastercard assessment fees,

11 cross border dol- -- dollar volumes fees and

12 transaction processing fees and divided this by

13 the U.S. dollar amount of Mastercard assessment

14 fees, cross border dollar volume fees and

15 transaction processing fees to get a

16 percentage.

17 Q: And what did you do with that percentage?

18 A: I multiplied this percentage by the total U.S.

19 Mastercard rebates and -- and incentives to

20 arrive at the amount of South Carolina gross

21 receipts for rebates and -- and incentives,

22 which is a negative amount.

23 Q: If you'll flip to page 11. Does page 11

24 describe your calculations of South Carolina

25 receipts using Mastercard's rebates and



1 incentive information?

2 A: Yes.

3 Q: And this is for the entire audit period?

4 A: Yes.

5 Q: All right. If you will flip to page 12. Can
6 you describe the information on page 12?

7 A: This shows the -- the total gross receipts
8 ratio for -- the South Carolina gross receipts
9 ratio for each audit year and the amount of
10 South Carolina income tax subject -- the amount
11 of South Carolina income subject -- subject to
12 tax, and the income tax due -- South Carolina
13 income tax due.

14 Q: In the first -- the second column, titled South
15 Carolina receipts ---

16 A: Right.

17 Q: --- the pages that you just discussed in this
18 exhibit or this document titled calculation of
19 South Carolina receipts, from pages 2 through
20 11, are those calculations represented in the
21 column titled South Carolina receipts?

22 A: Right. These are the -- the sum of the
23 category of computed South Carolina gross
24 receipts for each of the five revenue streams
25 that we previously discussed.



1 Q: And the third column is titled U.S. receipts.

2 A: Right. This is ---

3 Q: How -- how were U.S. receipts determined?

4 A: The taxpayer provided the total U.S. -- the
5 taxpayer provided the U.S. receipts for those
6 five previously discussed revenue streams and
7 this is the -- the total of the U.S. receipts
8 for those five Mastercard International revenue
9 streams.

10 Q: The title of the column is U.S. receipts, is
11 that correct?

12 A: Right.

13 Q: Did you use everywhere receipts for this column
14 in calculating your numbers?

15 A: Oh, I'm sorry. Yes. Yes. This is -- this
16 amount is a -- that's the total. That should
17 be total everywhere receipts per the Mastercard
18 U.S. 11-20 Pro Forma.

19 Q: Okay. And what is included in Mastercard's
20 everywhere receipts?

21 A: It includes basically everything on line --
22 lines -- every revenue or -- or receipts item
23 shown on lines -- lines 1 through 10 of the
24 U.S. 11-20 Pro Forma, excluding any negative
25 amounts, which are not considered receipts or



1 any foreign dividends that are not included in
2 the -- either the South Carolina everywhere
3 receipts because foreign dividends aren't
4 taxable in South Carolina.

5 Q: So, just to clarify, my understanding is the
6 title U.S. receipts was not your terminology.
7 Your terminology in the audit report is
8 everywhere receipts?

9 A: Right, this -- this is incorrect ---

10 Q: Okay.

11 A: --- on this document.

12 Q: Are the calculations, the numbers, correct?

13 A: The -- the calculations are in- -- are correct.
14 But the -- the title, U.S. receipts, that
15 should be everywhere receipts.

16 Q: Okay. When you calculated these ratios, did
17 you provided this information and calculations
18 to the taxpayer?

19 A: Yes, I did.

20 Q: Okay. And what objections did they have to
21 your ratio calculations?

22 A: No. They -- they told us we did a great job on
23 computing the gross receipts and that -- that
24 -- just that we did a great job. Not that they
25 -- they did agree with our sourcing



1 methodology. But they -- I think they agreed
2 with the numbers. At least she said that the
3 worksheets were great.

4 **OBJECTION:**

5 **MS. ROBINSON:** Your Honor, I -- I just want to --
6 this is getting a little bit close to a hearsay
7 line of questions. I have no concern with the
8 answer that was just given, I just -- we're
9 getting close ---

10 A: It's an email that I got from her that's
11 actually part of the discovery.

12 **THE COURT:** Wait. Just -- just one second.

13 A: Okay.

14 **MS. WOOTEN:** I'm not planning to go any further,
15 but, Your Honor, I don't believe it is a
16 hearsay. I -- I don't think it's hearsay.
17 Statements of a party opponent are not hearsay.
18 They're specifically excluded under the rules.
19 I don't plan to ask any further questions.

20 **THE COURT:** Okay.

21 **MS. WOOTEN:** But I don't believe that's hearsay.

22 **THE COURT:** Please renew your objection, if she goes
23 too far.

24 **MS. WOOTEN:** Thank you.

25 **THE COURT:** One second, please. Okay. Please



1 continue.

2 Q: Did the taxpayer offer any alternative
3 calculations?

4 A: No.

5 Q: All right. We spent a good bit of time talking
6 about ratios and calculations, but let's go
7 back to your audit, and it's contained within
8 tab 27.

9 **(Joint Exhibit Number 27 was referenced at this**
10 **time.)**

11 Q: Did you complete any draft or preliminary audit
12 report or work papers?

13 A: Yes. We forward the taxpayer a preliminary
14 draft. We normally send out a preliminary
15 draft before we issue the final proposed
16 assessment to give the taxpayer some -- some
17 time to review the schedules to see if there's
18 any corrections. And -- and we did provide a
19 preliminary draft to her, to -- to Sally, Ms.
20 Chun.

21 Q: Okay. And did you learn of any errors in the
22 preliminary audit report?

23 A: Yeah. There was some minor errors that we --
24 we corrected before we sent out the final audit
25 assessment.



1 Q: And what were those minor errors?

2 A: There were some modifications that we needed to
3 make to the federal taxable income and the
4 taxpayer also provided some completed RAR
5 reports that we included in the audit
6 schedules.

7 Q: And what is an RAR report?

8 A: That's the fellow audit a revenue agent report
9 that shows the -- any adjustments that the --
10 that the internal revenue auditor may have made
11 to the federal taxable income for a particular
12 audit year.

13 Q: And did you accept or make the adjustments the
14 taxpayer suggested to the preliminary work
15 papers?

16 A: Yes, we did. And we incorpor- -- incorporated
17 those adjustments requested by the taxpayer in
18 the final audit assessment.

19 Q: After you incorporated those adjustments, what
20 did you do next?

21 A: Then we submitted the final -- or the -- I
22 think we call it proposed assessment to -- to
23 my -- I'm not sure if I did it or -- or Robin
24 or Joyce. We would have sub- -- submitted to
25 our supervisor for approval who would have --



1 and then we would have sent out the assessment
2 after it was approved by our supervisor.

3 Q: So, after you sent it to the supervisor for
4 approval, you then send it to the taxpayer --
5 the final audit assessment to the taxpayer,
6 correct?

7 A: Correct.

8 Q: Okay. And what was the result of your final
9 audit report?

10 A: Corporate income and license fee assessment.

11 Q: And what was that assessment based upon?

12 A: It was based on our -- nexus being asserted on
13 Mastercard and sourcing of South Carolina gross
14 receipts to South Carolina.

15 Q: And how were those gross receipts sourced to
16 South Carolina?

17 A: Based on our interpretation of the location of
18 the income producing activity in South Carolina
19 pursuant to South Carolina Code of Laws 12-6-
20 2295(a)(5).

21 Q: And what is your determination of Mastercard's
22 South Carolina income producing activity during
23 the audit period?

24 A: Mastercard's -- my determination is their
25 income producing activity is the -- is -- is --



1 they bring together by -- could you rephrase
2 the question because I'm not -- what ---

3 Q: Sure. You stated that you source -- you source
4 Mastercard's gross receipts to South Carolina
5 based upon 12-6-2295(a)(5), correct?

6 A: Right.

7 Q: And (a)(5) refers to income producing activity.

8 A: Right.

9 Q: Okay. What is your determination of
10 Mastercard's income producing activity in South
11 Carolina during the audit period?

12 A: Mastercard's income producing activity is the
13 provision of a credit card network that allows
14 the merchant and the consumer or cardholder to
15 consummate purchases in South Carolina, and our
16 interpretation that -- that -- is that the
17 income is produced when the cardholder swipes
18 their card at the merchant's location in South
19 Carolina.

20 Q: What is your understanding of how a typical
21 Mastercard transaction works?

22 A: A customer will come into a merchant and will
23 present their card at a POS terminal and then
24 the transaction is routed via the internet or
25 Wi-fi to the credit card acquirer. And then



1 the transaction is routed to the Mastercard
2 network and then it's routed to the issuing
3 bank which approves or denies the -- the -- the
4 transaction and then it's routed back. The
5 approval or denial is routed back to the credit
6 card network, then -- then to the acquirer, and
7 then to the merchant. And if the transaction
8 is approved, the consumer or cardholder will
9 receive their purchase and get a receipt for
10 the transaction.

11 Q: Why is your determination that Mastercard -- or
12 that Mastercard's income producing activity
13 occurs in South Carolina? And I believe you
14 said it's the provision of a card network that
15 allows consumers and merchants to consummate
16 card purchases in South Carolina. Why is that
17 your determination that that's their income
18 producing activity?

19 A: Well, through the -- the utilization of
20 Mastercard brands and the credit -- the
21 Mastercard credit card network and the -- I
22 believe, the activity of the cardholder, the
23 issuers, the acquirers and the merchants, and
24 the -- the Mastercard credit card network,
25 transactions are able to happen in South



1 Carolina and a -- a consumer or cardholder is
2 able to make cash -- cashless purchases in
3 South Carolina and elsewhere.

4 Q: And based on your audit, what is your
5 determination of how Mastercard earns its
6 revenues and fees in South Carolina?

7 A: My -- I -- I believe the fees are earned and
8 the income is produced when the -- the
9 cardholder swipes their card at a merchant's
10 location in South Carolina.

11 Q: After the proposed assessment and work papers
12 were issued to the taxpayer, did you have any
13 other direct contact with the taxpayer or its
14 representative?

15 A: No, I didn't.

16 Q: After the final assessment was issued, what
17 information did you receive about Mastercard's
18 business after the audit was submitted?

19 A: I heard about their -- what they call the -- an
20 -- -- MIP or a Mastercard Interface Processor.

21 Q: And what is your understanding of what a -- of
22 that machine is?

23 A: This is a -- I think it's a computer and
24 software located at the -- at the issuer's and
25 the acquirer's processing center.



1 Q: After learning about the MIP machines, what
2 impact did that information have on your
3 analysis in the audit report?

4 A: None.

5 Q: Why not?

6 A: It doesn't -- to me, it doesn't impact the --
7 the location of the income producing activity.

8 Q: Were any penalties assessed against Mastercard
9 during the audit period?

10 A: Yes.

11 Q: And what were those penalties?

12 A: These were penalties that were statutorily
13 required to add, failure to file and failure to
14 pay.

15 Q: And was interest added to the assessment?

16 A: Yes.

17 Q: And why was that?

18 A: It was statutorily required to add interest.

19 Q: And are there any license fees included as part
20 of the Department's assessment?

21 A: Yes.

22 Q: And why is that?

23 A: Because in conjunction, if you have corporate
24 income tax nexus, you automatically have
25 corporate license fee nexus.



1 **MS. WOOTEN:** Your Honor, I beg the Court's
2 indulgence for a second.

3 **THE COURT:** Of course.

4 Q: Orville, if you could flip to tab 27, please.
5 The demonstrative that we were using earlier
6 when we were going through your calculations of
7 the South Carolina receipts, where did you pull
8 that information from, those figures?

9 A: The -- the South Carolina receipts?

10 Q: Uh-huh. The information that you used to
11 calculate the South Carolina receipts.

12 A: That information came from reports provided by
13 Mastercard.

14 Q: Okay. And when you calculated those receipts
15 or the ratios and the receipts, did you provide
16 that information to the taxpayer in there in
17 your audit papers or work papers?

18 A: Yes. It's -- it's in the audit work papers,
19 but it's not -- it's -- it's easy to follow.
20 It's the -- the information you've provided
21 today.

22 Q: If you'll flip to -- let's see, we'll start
23 with SCDOR 00005. And if you'll just glance
24 through same ex- -- or same tab, SCDOR 00015.
25 So, from pages 5 through 15, if you will glance



1 through those for us.

2 A: Yes.

3 Q: Are these pages an example of the work papers
4 you provided to the taxpayer using the numbers
5 that we discussed in that demonstrative?

6 A: Yes.

7 Q: Okay.

8 **MS. WOOTEN:** Your Honor, I have no further
9 questions.

10 **THE COURT:** Thank you.

11 **MS. ROBINSON:** And, Your Honor, we -- we would like
12 to cross. Can we take -- this is where it gets
13 awkward in timing. I'd -- I'd like to take a
14 15-minute break before crossing.

15 **THE COURT:** That's fine.

16 **MS. ROBINSON:** But we also could plan to end at 5:00
17 because I don't mind continuing -- starting the
18 cross and then continuing it tomorrow, if the
19 Court would rather end at 5:00 instead of 5:30.

20 **THE COURT:** Let's take ten minutes.

21 **MS. ROBINSON:** Okay.

22 **THE COURT:** If that's okay with everybody. We'll
23 just do the best we can.

24 **MS. ROBINSON:** Okay.

25 **MR. NEIL:** All right.



1 **MS. ROBINSON:** Actually, I -- I would like to
2 organize my thoughts a little bit more. May I
3 please have 15 minutes?

4 **THE COURT:** Of course.

5 **MS. ROBINSON:** Okay. Thank you.

6 (Off the record from 4:10 p.m. until 4:24 p.m.)

7 **COURT REPORTER:** All rise.

8 **THE COURT:** Please be seated. Please be seated.
9 Thank you. Would you all like to wait on Ms.
10 Wooten or just ...

11 **MR. NEIL:** No, sir. Ms. Wooten is gone for the day.

12 **THE COURT:** Oh, okay.

13 **MR. NEIL:** Thank you.

14 **THE COURT:** All right. All right. Very well timed
15 break.

16 **MR. SHARPE - CROSS EXAMINATION BY MS. ROBINSON:**

17 Q: Mr. Sharpe, it's good to see you in person.

18 A: Hi. How are you?

19 Q: I'm going to apologize in advance. My
20 questions are going to jump all over the place,
21 so my apologies. In direct, you were asked the
22 basis for your determination that Mastercard
23 was doing business in South Carolina and you
24 indicated five things. The -- the first of
25 those things was employees in the state. Do



1 you recall how many employees Mastercard had in
2 the state?

3 A: I think it was two to three. I don't recall
4 specifically.

5 Q: Is that two to three over the entire period or
6 during each year?

7 A: I'm not sure about the entire period because I
8 think they only had records back to a certain
9 period. But I think that the Mastercard's
10 employee -- employee withholding account had
11 been opened before we started the audit period.
12 So, that, to me, would indicate that they had
13 employees each and every year within the audit
14 period.

15 Q: Do you remember approximately how much the
16 employee withholding account showed as payroll
17 in South Carolina?

18 A: No, I don't.

19 Q: Okay. The third thing that you mentioned in
20 your list of five things was you said issuing
21 and controlling contracts for businesses in
22 South Carolina.

23 A: Right.

24 Q: What did you mean by that?

25 A: I meant the -- the contracts that they -- they



1 or the licensing agreements that they issue to
2 the -- to the acquirers and the issuers, and
3 those contracts refer to the Mastercard rules,
4 which I think Adam went through a lot of that
5 showing that the acquirer is required to do
6 certain things, the ---

7 Q: That's the rules?

8 A: Right.

9 Q: Right.

10 A: And the issuers -- is -- are required to do
11 certain things and the acquirer or the issuer
12 is required to make sure that the merchant
13 and/or the cardholder does certain things. So,
14 that's what I mean by controlling the contract
15 in South Carolina and elsewhere.

16 Q: Thank you. When you were asked to describe
17 domestic assessment and you indicated that part
18 of your answer was based on what you heard in
19 testimony yesterday. You said, from what I
20 understand, it includes pro- -- I'm sorry.
21 From -- from what I understood yesterday it
22 includes a profit margin.

23 A: Right.

24 Q: Were you a -- do -- what was your understanding
25 of domestic assessment during the audit?



1 A: That there were fees that basically that --
 2 they're just fees that Mastercard charges the
 3 acquirers and the issuers based on the dollar
 4 volume of the transactions and with regard to
 5 what specifically it's for, I'm not sure. I --
 6 my assumption would be that it's for expenses
 7 they incur in the performance of the services
 8 that they provide to the acquirers and the
 9 issuers.

10 Q: Thank you. When you were discussing -- when
 11 you were asked what cross border assessment
 12 means, you said the same as domestic
 13 assessment, but when the issuing bank and the
 14 merchant are in different countries.

15 A: Right.

16 Q: Is -- is that your understanding, it's when the
 17 issuing bank and the merchant are in ---

18 A: Right.

19 Q: --- different countries?

20 A: Yes.

21 Q: Okay. Did you hear a different description of
 22 cross border yesterday?

23 A: I don't think so, but I'd have to check my
 24 notes. But that's my -- it could have been the
 25 issuing bank and the -- and the merchant. Or



1 that's my understanding, they are -- are
2 located in -- in different countries.

3 Q: You spent a fair amount of time discussing
4 gross receipts during your direct testimony.

5 A: Right.

6 Q: And you -- it -- it kind of sounded to me like
7 you were implying that you asked Mastercard for
8 gross receipts data and the thing they sent you
9 was that swipe list. Is that the request you
10 made that ---

11 A: No. I -- I described to the -- the taxpayer
12 what our -- what I thought the income producing
13 activity was in South Carolina and Ms. Chun
14 suggested that I used these -- the Mastercard
15 records that they provided to maybe determine
16 what the South Carolina gross receipts would be
17 for the various categories.

18 Q: Was that after the audit started?

19 A: Yes.

20 Q: Okay. So, you -- you think it was her
21 suggestion to use that data?

22 A: Yes. It was definitely her suggestion after I
23 asked or indicated how -- what we thought the
24 income producing activity was in South
25 Carolina.



1 Q: Can -- I'd like to take a look at the initial
2 IDR. It's going to take me just a moment to
3 get a page number. I believe that it is South
4 Carolina DO- -- I'm sorry.

5 **MS. ROBINSON:** So, that would be tab 27?

6 Q: Tab 27. I believe ...

7 **MS. ROBINSON:** You know what, let me -- let me check
8 my page. I'm sorry. I really wish our PD- --
9 PDF pages and our Bates stamped pages matched.
10 That would make life a lot easier here. Okay.
11 Thank you.

12 Q: SCDOR 0- -- tab 27, DOR page 124, SCDOR_000124.
13 This is the first page of the document. Can
14 you just identify to the Court what this
15 document is?

16 **(Joint Exhibit Number 27 was referenced at this**
17 **time.)**

18 A: This is the initial I- -- I- -- IDR and
19 support, I believe. This is the initial IDR,
20 audit confirmation letter, and also I think
21 support for assert- -- asserting nexus,
22 Mastercard International and requiring sourcing
23 in South Carolina receipts.

24 Q: Is this the letter you referred to very early
25 in your testimony dated July 20th, 2017 that



1 was initiating the audit?

2 A: Correct.

3 Q: Okay. Can we go a couple of pages in until we
4 get to 000128, which is page 5 of the actual
5 document?

6 **THE COURT:** Are you able to bring that up on the ---

7 **MS. ROBINSON:** Can you bring this up on the screen?
8 My apologies.

9 **THE COURT:** That's fine. I'm sure I have it back
10 here somewhere.

11 **MS. ROBINSON:** In that giant stack. This was the
12 first page that Mr. Sharpe identified, but now
13 we're onto page 128.

14 **THE COURT:** Thank you.

15 **MS. ROBINSON:** SCDOR 000128.

16 Q: The -- the underlined heading there says
17 initial IDR. Is that correct?

18 A: Yes, ma'am.

19 Q: Can you actually go to the next page? And can
20 you read out loud IDR question number 9 that
21 was included in your audit initiation letter?

22 A: Number 9?

23 Q: Yes, please.

24 A: South Carolina receipts provide the amount of
25 domestic assessment fees and cross border



1 volume fees and transaction fees received from
2 transactions initiated in South Carolina by
3 Mastercard cardholders for each entity included
4 in the fe- -- federal consolidated return for
5 each audit year. Do you want me to go on?

6 Q: No.

7 A: Okay.

8 Q: I -- I think -- I think that's it. So, is that
9 a request for the swipe data?

10 A: Right. But it wasn't -- but -- but they did --
11 she didn't provide it until I discussed it in
12 more detail during the audit period. But, yes,
13 that is the request for the swipe dat- -- dat-
14 ---

15 Q: Okay. So ---

16 A: --- data.

17 Q: Okay. So ---

18 A: But it wasn't provided when we arrived there.
19 We had further discussions and she ultimately
20 suggested that we use the documents that we
21 previously discussed for determining the South
22 Carolina gross receipts.

23 Q: Okay. Understood. But the -- the idea of
24 asking for swipe data appears to have been your
25 idea -- did you write this IDR?



1 A: Yes.

2 Q: It appears to have been your idea in the audit
3 initiation letter.

4 A: Right.

5 Q: Okay. Were you provided other gross receipts
6 up -- were you provided gross -- sorry.

7 **MS. ROBINSON:** Can we actually switch over to that
8 swipe data? That's -- I believe it's 677 off
9 the top of my head because we've looked at this
10 page so many times. And let's actually go to
11 page 16. I think that's what Mr. Sharpe is --
12 I'm sorry.

13 Q: The year 2016. I think that's what you spent
14 some time discussing earlier. So, the year
15 2016 is SC -- is tab 27, SCDOR 6- -- 695. You
16 -- you were asked in direct about gross
17 receipts data and then you referenced this
18 document. Does this document provide
19 Mastercard's gross receipts?

20 A: No. Oh, which -- which one are you talking
21 about?

22 Q: Oh, I'm -- I'm sorry. Just -- it's the one up
23 on the display.

24 A: 695?

25 Q: Yes.



1 A: Not Mastercard's. It -- it provides the amount
2 of Mastercard branded transactions, but not the
3 amount that -- are you talking about gross
4 receipts of Mastercard branded transactions or
5 are you talking about the amount of gross
6 receipts generated by Mastercard?

7 Q: The latter. Gross receipts ---

8 A: No.

9 Q: --- generated by Mastercard.

10 A: This did not -- but there was another --
11 another form where they provided the U.S. gross
12 receipts generated by Mastercard. But this is
13 the Mastercard branded transactions.

14 Q: And -- and by that, you mean -- actually, never
15 mind. I think you said it earlier. I just
16 want to confirm that in your view this is not
17 Mastercard's receipts.

18 A: Well ---

19 Q: That it was used by you in computing the
20 apportionment number?

21 A: Along with the -- the -- the actual amount of
22 Mastercard receipts that they provided for the
23 U.S.

24 Q: Okay. Thank you. And I believe that other
25 document you just referenced is also in the



1 record here.

2 A: Right.

3 Q: The amount -- the gross receipts that
4 Mastercard provided. I just wanted to clarify
5 that this document was not Mastercard's gross
6 receipts.

7 A: Right. They were Mastercard branded receipts.

8 Q: Meaning the amount of transactions -- well,
9 actually, why don't you go ahead and say what
10 it is just ---

11 A: The Mastercard branded transactions are the
12 amount of the transaction -- transactions
13 generated in the U.S. by Mastercard cardholders
14 at merchants located in the U.S.

15 **MS. ROBINSON:** While we're on the topic of gross
16 receipt, I -- I -- just I'd -- I'd like to turn
17 to the -- the Department's demonstrative. I do
18 not have a copy I can put up on the screen.
19 It's not our demonstrative and, unfortunately,
20 I have so many notes on mine that I can't in
21 good faith put it on the ELMO. But I believe
22 you guys -- I -- I'm sorry. I believe Your
23 Honor has a copy.

24 **THE COURT:** Yes.

25 **MS. ROBINSON:** Okay.



1 **THE COURT:** Calculation of gross -- of South
2 Carolina receipts?

3 **MS. ROBINSON:** Okay. Could -- could you guys
4 possibly put the demonstrative back on the
5 screen or would that be inconvenient?

6 **MR. NEIL:** I think it may have been on Jason's
7 computer and he is now gone.

8 **MS. ROBINSON:** Okay. I'm ---

9 **THE COURT:** That's okay. If you could just ---

10 **MS. ROBINSON:** Okay. I think -- I think everybody
11 can see it.

12 **THE COURT:** Yeah.

13 **MS. ROBINSON:** Okay. I only have ---

14 A: I got a copy. You don't want my copy?

15 Q: No. I want you to have your copy.

16 A: All right.

17 Q: I -- I only have one or two questions about ---

18 A: Oh, okay.

19 Q: -- this document. So, we actually don't need
20 it for all that long. Did you -- did you write
21 this document? Did you create it?

22 A: I did one year and then Robin actually -- Robin
23 Goff, one of the auditors, she -- she pulled
24 the numbers from the audit schedules and we
25 provided those numbers to Nicki and she drafted



1 most of the -- the PowerPoint.

2 Q: Okay. And just to be clear by Nicki, you're
3 referring to the Department of Revenue
4 attorney?

5 A: Right.

6 Q: Okay. Thank you. Can you turn to page 3 of
7 the document? I'm going to ask a couple of
8 questions on page 3. My questions are actually
9 -- I would have the same question for each page
10 3, 5, 7, 9, 11, and I'm not going to repeat the
11 question for each page. I'm just going to ask
12 it once, but this is -- this is relevant for
13 all of them. Is all of the data that you need
14 to reach the South Carolina receipts number in
15 the far right column shown on this page?

16 A: I'm sorry. Can you repeat that question?

17 Q: Yeah. The -- the computation in that far right
18 column, that's just a matter of math, right?
19 Something times something times something times
20 something times something. Not -- that's not
21 the actual formula. I'm just saying. The
22 right hand -- the far most right column that
23 say South Caroli- -- S.C. receipts on the top.

24 A: Right.

25 Q: That's the result of just a mathematical



1 computation, correct?

2 A: Correct.

3 Q: Okay. Are all of the numbers that you would

4 add, subtract, multiply, divide in order to

5 reach that number, are they all shown on here?

6 Sorry. This isn't a trick question. I'm just

7 gonna ask it at this -- I'm -- I'm ---

8 A: I'm just -- I'm not -- I'm sorry.

9 Q: Let me just start with ---

10 A: I'm having a hard time following you.

11 Q: --- we have no problem with -- with the math in

12 here or the ---

13 A: Right.

14 Q: --- or the accuracy of the numbers. We don't

15 agree with the method.

16 A: Right.

17 Q: So, I'm not trying to trick you into something.

18 A: Okay.

19 Q: Let me just maybe be a little bit more blunt.

20 The first two numbers are used, South Carolina

21 transactions over what's labeled here U.S.

22 transactions as a ratio is what creates this --

23 using the 2007 number, point --0.7613 percent,

24 correct? Would you rather I use 2016 because

25 I think that's the year you did the math for?



1 A: What -- what year are you -- are you looking
2 at?

3 Q: I was looking at page 3 and I just went to the
4 top line. I'm happy to go to the ---

5 A: Well, you have to go back to the domestic
6 assessment fees to see how we calculated it
7 before you -- you ---

8 Q: Yeah. That's what I'm -- I'm sorry. I was
9 looking at page 3, which I thought was the
10 domestic assessment fees chart.

11 A: It is, but you have to go to the computation on
12 page 2.

13 Q: Okay. So, I see the computation of the ratio
14 ---

15 A: Right.

16 Q: --- is -- when I look at page 3, South Carolina
17 transactions over U.S. transactions. And
18 that's the 1.0158 percent.

19 A: Right.

20 Q: Okay. And then that is multiplied by -- by
21 what?

22 A: The -- the ratio is multiplied by the total
23 U.S. domestic assessment fees, was -- which was
24 the amount provided by the -- the taxpayer.

25 Q: Okay. And that's that 2355786170?



1 A: Yes. Yes.

2 Q: Okay. And the next column is the mathematical

3 result of that?

4 A: Correct.

5 Q: Okay. And then you add the mathematical

6 results in the far right for each year?

7 A: Right.

8 Q: And that -- if you then turn to page 12, that's

9 how you get the South Carolina receipts on page

10 12?

11 A: Correct.

12 Q: Okay. My question might make more sense on

13 this page. You then take the South Carolina

14 receipts and divide it by what's labeled here,

15 U.S. receipts, but you clarified should be

16 everywhere receipts?

17 A: Right.

18 Q: And that gives you a new re- -- ratio. If

19 we're sticking with 2016, that's 0.6033

20 percent?

21 A: Correct.

22 Q: Okay. What does -- what happens with that

23 number?

24 A: What -- with the -- okay. This percentage is

25 multiplied by the -- the modified federal



1 taxable income.

2 Q: Okay. Let me stop you there. I'll let you

3 keep going, but I just want to stop you there

4 for a second. Is that number on this page ---

5 A: Is that ---

6 Q: --- the page in front of you?

7 A: Oh, I'm sorry. Yes, it is. I'm sorry. It

8 should be South Carolina income subject to tax,

9 25,803,328. Should be the modified South

10 Carolina income.

11 Q: I -- I don't think that's right. I think that

12 the ratio is multiplied by what you described,

13 apportionable income to reach this number, to

14 reach the 25 million. Maybe if we look at your

15 work papers.

16 A: Okay. I'm with you now. We're missing a step.

17 Q: Okay. Thank you.

18 A: I see that.

19 Q: Okay.

20 A: We're missing a step.

21 Q: And I'm not saying the final number doesn't

22 take into account all the steps. I believe it

23 does.

24 A: Can we go back and look at the schedule?

25 Q: I just want to -- yeah. I just want to



1 understand what I'm looking at.

2 A: If we go back to the schedule, I can figure it
3 out.

4 Q: Yeah. The schedule is in your work papers.
5 I'm sorry. I'm looking at the Department's work
6 papers. If you turn to tab 27. I think the
7 Excel sheet work papers start at 00 -- SCDOR
8 00006. That's the start of the work papers.
9 I'll give you a minute to find the -- the page
10 that you want to find that number on.

11 **MR. NEIL:** Leah, can you tell -- what -- what year
12 are we looking at?

13 **MS. ROBINSON:** I think that the work papers show all
14 -- all the years.

15 **MR. NEIL:** Okay.

16 **MS. ROBINSON:** So, I'll leave it to Mr. Sharpe to
17 look at a year.

18 A: Okay. Any -- any year? Okay. If you look at
19 -- if we look at 1207, on -- see, I don't see
20 the -- it looks like it's on page -- I don't
21 know how to read these numbers on here. It's
22 SCDOR -- it looks like one, two, three, four,
23 five zeros and then a six.

24 Q: Okay.

25 A: Okay. Well, if we -- for example, if we look



1 at 2007, it looks like you -- you take the
2 federal taxable income. Well, I don't see
3 that. Federal taxable income of 935,372,852.
4 Then you have modifications to come up with the
5 apportionable income of 932,923,101. Then you
6 multiply that times the apportionment ratio,
7 .5723 percent, to get the -- the South Carolina
8 net income. So -- so, there were a couple of
9 steps left out of this computation, if that's
10 what your question was.

11 Q: I'm -- again, I'm not questioning the
12 computation. I just want to understand it a
13 little bit more. So, the apportionable income
14 for 2007, you just read that number as
15 932,923,101. I'm sorry. Not -- that was the
16 apportionable income to which the -- the ratio
17 was applied?

18 A: Apportionable income -- the South Carolina
19 apportionable income. So, then you'll -- you
20 multiply that times the apportionment ratio to
21 get the South Carolina proportion or net
22 income.

23 Q: Okay. Okay. So, then back to the
24 demonstrative page. So, that would give you for
25 -- well, we were looking at the demonstrative



1 at 2016 and you just read the number for 2017
2 -- I'm sorry.

3 A: For 2007.

4 Q: 2007. I'm going to do that again and again.
5 So, let's pick one year and stick with it. You
6 pick the year.

7 A: Okay. Let's go with 2007 since it's the first
8 one on here.

9 Q: 2007.

10 A: And I'm at that one.

11 Q: Okay. So, with the ---

12 **MS. ROBINSON:** Can you wiggle? You want -- oh, I
13 didn't realize you were unplugged. I thought
14 we could just -- I just want it back up on the
15 screen.

16 Q: Okay. So, I think we see almost all of these
17 numbers on there for 2007 and just to speed it
18 up, let me run it through and you tell me if I
19 get anything wrong here. Okay. So, for 2007,
20 and I'm looking both at the demonstrative, as
21 well as the -- well, the Department's
22 demonstrative from direct, as well as, I guess,
23 what's currently up there, 2007. So, if we
24 actually go pretty low on the page, we see the
25 same 14,253,564.



1 **THE COURT:** And might I ask, are you -- the
2 demonstrative, are you still on page 3 or are
3 you ---

4 **MS. ROBINSON:** I'm sorry. I am on page 12 of the
5 demonstrative where the ---

6 **THE COURT:** Thank you.

7 **MS. ROBINSON:** --- the totals for all the years, for
8 all the revenue streams are. I'm -- are you
9 standing to view better or do you have ---

10 **MR. NEIL:** I'm standing because I don't have -- I
11 forgot my reading glasses and I need to be far
12 away from the page. Can I be very ---

13 **MS. ROBINSON:** These -- these are 200 percent
14 cheaters if you want them.

15 **MR. NEIL:** I super appreciate it, but the turquoise
16 glasses don't match my tie.

17 **MS. ROBINSON:** I -- I wasn't sure if you were
18 standing to make an objection.

19 **MR. NEIL:** No. I -- I actually just need to be able
20 to see.

21 **MS. ROBINSON:** Okay. All good.

22 **Q:** So, under the explanation section, you can
23 actually see that 14 million 253 -- 14,253,564
24 number that's on the page for 2007 and right
25 below that is the same 2490. It gives you the



1 ratio. And I guess what -- what I'm going to
2 -- just for completeness, what we don't see on
3 the page 12 demonstrative is that number then
4 gets multiplied by the 932,923,101 up above to
5 reach the ---

6 **MS. ROBINSON:** Mike, can you make it a little bit
7 bigger just so that that 5 million 3 -- let me
8 just -- okay. There we go. Perfect.

9 Q: So, that's the same number here. Is there an
10 additional step to get to the income tax due?

11 A: The income -- yeah. You got to multiply ---

12 Q: Sorry. Yeah. Look -- looking at the
13 demonstrative to get from the 5 million to the
14 260 ---

15 A: Yeah. You got to multiply that by five
16 percent.

17 Q: And that five percent is?

18 A: The South Carolina corporate income tax rate.

19 Q: Okay. Thank you. So, what's not shown on this
20 document, but is included in the computations
21 shown in reaching the numbers on this document
22 is the apportion- -- the south -- what you
23 called the -- what you -- the schedule here
24 calls the apportionable income as adjusted,
25 that 932 million dollar number, as well as the



1 five percent tax rate?

2 A: Correct.

3 Q: Okay. And the numbers otherwise on the left.
4 Okay. Thank you. I just wanted to -- to
5 understand -- to understand that. Did you
6 request customer -- did you request the tax- --
7 well, let me start with something else. Was
8 the taxpayer cooperative during the audit?

9 A: Yes.

10 Q: Were there any pieces of information that you
11 asked the taxpayer for that they did not
12 provide?

13 A: Well, they were basically pretty cooperative.
14 We never got actual licensing agreements. We
15 got sample copies that were basically generic.
16 They had no information in them.

17 Q: Were you comfortable that the sample copy was
18 representative of what the actual agreements
19 looked like?

20 A: Yeah. Pretty much so, but I actually wanted to
21 see the actual copies, which we -- we never
22 recei- -- I never received them. But I think
23 they got them later in -- in -- I think y'all
24 forwarded it to -- copies later.

25 Q: Did the company refuse to give them to you?



1 A: We just requested them and they never provided
2 them. I don't remember if they -- or I would
3 say, we requested, and they gave us the blank
4 copies, but I don't know if they refused per
5 se, but they didn't provide them. And we ---

6 Q: Is it ---

7 A: --- requested them.

8 Q: Is it -- does -- is it typical in an audit that
9 lots of things are asked for and the items
10 being tendered by the company sort of trickle
11 in over time?

12 A: Right.

13 Q: Is it common for not every single item to be
14 provided?

15 A: Yes.

16 Q: Of the information that you did receive from
17 the company, was there any of it that you
18 didn't trust or that you were concerned as the
19 veracity of the information?

20 A: No.

21 Q: Okay. Did you ever request customer --
22 customer billing information?

23 A: No.

24 Q: You did not request it during the audit?

25 A: I did not request it.



1 Q: Okay. Do you know if -- have you ever reviewed
2 the customer billing information that was
3 provided in discovery in this matter?

4 A: I think I may have looked at it, but even if --
5 from what I understand is that they just
6 provided the companies that were domiciled in
7 South Carolina or that -- even if you're
8 including the -- the billing companies, you
9 have to include all the banks that actually
10 operate in South Carolina that are domiciled
11 outside of South Carolina, like Wells Fargo and
12 -- which are the big banks -- Bank of America.

13 Q: Which does cust- -- so, what does customer --
14 how -- how would you define a South Carolina
15 customer? You wouldn't use billing address?

16 A: I -- I would -- well, it depends on where the
17 customer is located. If they have branches in
18 South Carolina, I would think that would be a
19 part of their customers. Their -- their banks
20 were operating in South Carolina and have
21 customers who -- who have activity and -- and
22 probably get their credit cards from those
23 particular branches that are located in South
24 Carolina.

25 Q: So, when you -- do you ever in an audit ask a



1 company for data, it -- its receipts by
2 customer billing address?

3 A: Customer billing address. We -- it depends on
4 what type of company you're talking about. If
5 -- are you talking about a service provider or
6 are you talking about a company that sells
7 tangible personal property?

8 Q: Right now I'm just talking about the data, not
9 whether it's the right method to use, but just
10 the data. But have you ever requested ---

11 A: Yes.

12 Q: Okay. And when you've requested customer
13 billing addresses, has that been once or twice
14 or a bunch of times, a hundred times?

15 A: Well, I'm sorry. Excuse me. I probably would
16 never request billing address. I -- I
17 misspoke. I would probably request delivery
18 location, if it's -- if you're selling tangible
19 personal property. I can't remember when I
20 would request a billing address of a customer.

21 Q: Okay.

22 A: The delivery address is what we would normally
23 request.

24 Q: For tangible property or ---

25 A: For tangible.



1 Q: Okay. Other than tangible property, have you
2 ever requested that a company ---

3 A: I don't think so.

4 Q: You don't think so? Okay. Earlier when you
5 were talking about the work papers, you -- you
6 indicate -- your work papers, you indicated
7 that you gave an early set to Mastercard. You
8 said, Sally Chun. May- -- maybe did you mean
9 Sally Chu?

10 A: Oh, yes. I'd have to go back and look at the
11 email, but it could have been Sally Chu.

12 Q: Okay.

13 A: I -- I could have got that wrong.

14 Q: She's -- she's not with the company anymore, so
15 she'll never know.

16 A: She was very nice.

17 Q: She is very nice.

18 A: And she -- she actually took us to the
19 cafeteria, but we were required to use a
20 Mastercard card. We couldn't pay cash. And we
21 only had one person that had a Mastercard card
22 and so we had to get her to pay for all the
23 meals.

24 Q: And you still give her this great big
25 assessment? Just kidding.



1 A: No. She was really nice.

2 Q: Yeah. Along -- along the lines of her being

3 really nice, you said she said to you that the

4 work papers were really great.

5 A: Yes.

6 Q: Did -- was that in an email, did you say?

7 A: Yes.

8 Q: I don't remember seeing any emails in the audit

9 file.

10 A: In the audit file.

11 Q: Yeah. As part ---

12 A: It would've been provided in discovery, I'm

13 sure, because I -- I turned over everything in

14 discovery. I have it in -- in my email

15 cabinet.

16 Q: So, the audit file, which is in the record, we

17 could do a page flip, but it's like 840-

18 something -- I don't know, 600 pages. I don't

19 remember seeing any emails from Sally to you in

20 there saying the work papers are great.

21 A: I have it in my email cabinet.

22 Q: So, is it possible that there were documents

23 that were not included in the audit file?

24 A: I don't think so.

25 Q: Okay. How many IDRs were issued, do you



1 recall?

2 A: I think there was the initial IDR in there.
3 There were a few others, but I don't remember
4 how many others were issued.

5 Q: Would all of the ID- -- would all of the IDRs
6 that were issued be included in the audit file?

7 A: They should be.

8 Q: Okay.

9 **MS. ROBINSON:** So, Your Honor, it is 5:00 o'clock or
10 a minute or a two before. I actually still
11 have quite a bit to do. I'm sorry. Quite a
12 bit I'd like to ask. I do not think that I
13 would finish by 5:30. I'm happy to keep going
14 and pick up tomorrow, but if there was some
15 concern about trying to finish closer to 5:00
16 today.

17 **THE COURT:** Just give me an approximation of how
18 much longer do you think.

19 **MS. ROBINSON:** Probably an hour.

20 **THE COURT:** Okay. If we started in the morning at
21 9:00, you've got people flying in and out, so
22 I want to make sure that everybody who has
23 witnesses who are supposed to get on planes can
24 get on those planes, so.

25 **MS. ROBINSON:** We -- it's not a problem on -- on



1 Mastercard's end.

2 **THE COURT:** Okay. For the witnesses that you have
3 flying ...

4 **MR. NEIL:** So, we'll have one flyer in our group and
5 apparently his flight is Friday night. So, I
6 think we should be okay.

7 **THE COURT:** Does that mean he'll have to find
8 something to do in Columbia, South Carolina on
9 Thursday night? Excuse me.

10 **MR. HAWKINS:** I've been admiring the State House,
11 so. From afar, I've been admiring the State
12 House, so I'll go walk around.

13 **THE COURT:** Let's just start tomorrow.

14 **MR. NEIL:** We'll warn him about Five Points, Judge.

15 **THE COURT:** Yes.

16 **MS. ROBINSON:** So -- so, then we'll ---

17 **THE COURT:** Yes. Please do.

18 **MS. ROBINSON:** So, your ---

19 **THE COURT:** That's part our other jurisdiction, the
20 alcohol and beer things down there.

21 **MS. ROBINSON:** So, should we start up again tomorrow
22 at 9:00 a.m.?

23 **THE COURT:** Yes.

24 **MS. ROBINSON:** Okay. Thank you.

25 **THE COURT:** Thank you all.



1 **MR. NEIL:** Thank you, Your Honor.

2 **THE COURT:** We'll look to see everyone tomorrow
3 morning and thank you for also your
4 accommodation with my schedule tomorrow.

5 **(The hearing adjourned at 4:59 p.m. on Tuesday, March**
6 **9, 2022.)**

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DAY 3 - WEDNESDAY, MARCH 10, 2022

CALL TO ORDER

COURT REPORTER: All rise.

THE COURT: Thank you. Be seated. Good morning.
(Good mornings are heard.)

THE COURT: This is day 3 of Mastercard International versus the South Carolina Department of Revenue, Docket 20-ALJ-17-00008-CC. And we better get started. Let me begin, however, by saying thank you to everyone for kind of accommodating me this morning. I greatly appreciate that. And while we certainly will more than likely take a break before I have to leave the courthouse, I probably need to leave here by 11:15. Okay. Now, as I recall, Mastercard is back up, is that right?

MS. ROBINSON: Yes, sir. And we'd like to continue our cross-examination of Mr. Sharpe.

THE COURT: Yes. Mr. Sharpe, if you'll come back up and take the witness stand, and remember that you are still under oath.

MR. SHARPE - CROSS EXAMINATION CONTINUED BY MS.

ROBINSON:

A: Hi.



1 Q: Hello. Good morning. How are you this
2 morning?

3 A: Good.

4 Q: Good. As part of your responsibilities as an
5 auditor and now as a supervisor, are you
6 expected to be familiar with South Carolina tax
7 statutes, case law, regulations, and other
8 administrative guidance?

9 A: Yes.

10 Q: Why would you need to be familiar with those
11 things?

12 A: Because we're auditing taxpayers and we have to
13 -- have to make decision regarding their
14 liability -- potential liability.

15 Q: And how ---

16 **COURT REPORTER:** I'm sorry. Their what liability?

17 A: Their potential liability.

18 **COURT REPORTER:** Thank you.

19 Q: And how would those things be relevant for
20 determining a taxpayer's potential liability?

21 A: Well, if you're auditing a corporate taxpayer
22 you have to know certain adjustments you make
23 to the -- from the federal consolidated return
24 to the South Carolina return. You have to know
25 what items are included in the apportionment



1 factors. Just various sundry items.

2 Q: Okay. Thank you. Do you mind pulling the
3 microphone a little bit closer to you? I think
4 with the glass -- I -- I've heard everything
5 you said, but I'm afraid I might not hear you.

6 A: Okay.

7 Q: Oh, so much better.

8 A: I was told to move it earlier.

9 Q: I know.

10 A: I guess I'll have to move it when I start
11 looking through these binders.

12 Q: During yesterday's discussion, it might have
13 been implied that you thought Mastercard
14 through their former state tax manager, Sally
15 Chu, was in agreement with your work papers.
16 I want to clarify that. Were you suggesting
17 she agreed that the proposed assessment was
18 correct and Mastercard was likely to pay it or
19 did you mean something else?

20 A: I meant something else.

21 Q: And what did you mean?

22 A: I meant that she told us we did a -- a great
23 job on pulling the computation together from
24 the records that Mastercard provided for
25 determining the South Carolina and everywhere



1 gross receipts, but that she did not, and she
2 made that clear, agree with our sourcing
3 methodology.

4 Q: Okay. So, you thought she was comfortable with
5 the computations themselves under the
6 methodology -- methodology the Department was
7 asserting, but she wasn't agreeing with the
8 methodology?

9 A: Yeah. She said we did a great job on the -- on
10 pulling the work papers tog- -- together for
11 the computation of the South Carolina gross
12 receipts and everywhere gross receipts.

13 Q: Great. But you understood that Mastercard did
14 not agree that swipe was the correct method?

15 A: That -- they did not agree that our method was
16 the correct method.

17 Q: Okay. I'm going to mention a couple of
18 documents in the audit file as part of my
19 question. We can turn to each of them if what
20 I say doesn't refresh your recollection.

21 A: Okay.

22 Q: But I'm not asking you to turn to each of them
23 -- as -- as we go through them.

24 A: Okay.

25 Q: The audit initiation letter that we looked at



1 yesterday, which can be found at tab 27, SCDOR
2 P000124, advised Mastercard that your opinion
3 was that the income producing activity was
4 swipe. In the same letter, the Department
5 requested swipe data, that was the IDR Number
6 9 that you read out loud yesterday. Then the
7 proposed assessment issued at the very end of
8 the audit restated your opinion that the income
9 producing activity was the cardholder initiated
10 swipe. That's at tab 27, SCDOR P00017. Is all
11 of that correct?

12 **(Joint Exhibit Number 27 was referenced at this**
13 **time.)**

14 A: I don't remember saying swipe. Not -- not that
15 I -- I didn't, but I'd probably have to look at
16 the document to verify that I actually used the
17 term swipe.

18 Q: Okay. But was the method swipe? Even if you
19 didn't use the word swipe, was the ---

20 A: I think I said that the method was when a
21 Mastercard cardholder initiated a transaction
22 at a merchant's location in South Carolina.
23 That was the -- in my -- in the -- in that
24 part, I said my opinion, but in the
25 Department's opinion when the income produc- --



1 producing activity was produced.

2 Q: Okay. And -- and where the cardholder
3 initiates the transaction, that -- is that in
4 your view where a cardholder at a -- at a cash
5 register or the equivalent is either swiping
6 their card, tapping their card, inserting their
7 card or otherwise communicating their account
8 data to ---

9 A: Yeah. I think you could say that.

10 Q: Okay. So, can I call that swipe?

11 A: No. I don't like the term swipe.

12 Q: Okay.

13 A: But -- but just call it the initiation of the
14 transaction in South Carolina is what I ---

15 Q: Well, I'm definitely not going to call it that.
16 You -- you can call it that, but ---

17 A: All right.

18 Q: --- how about we just say the cardholder
19 activity at the cash register.

20 A: Right.

21 Q: Can I say that?

22 A: Okay.

23 Q: In- -- including also non-cash -- you know,
24 online or something. I just don't want every
25 time I refer to this to have to say a whole



1 paragraph.

2 A: Right.

3 Q: So, how about this. I'm going to call it
4 swipe. You can call it what you want to call
5 it, but I think we're in a agreement that we're
6 referring to the same action.

7 A: Yes.

8 Q: Okay. Great. So, with that in mind, is what
9 I said a moment ago accurate that in your audit
10 initiation letter, the Department expressed the
11 opinion that swipe was the correct method and
12 requested swipe data. And then, in the
13 proposed assessment issued at the very end of
14 the audit, it restated the opinion that swipe
15 was the correct method?

16 A: Yes. Other than -- well, I -- I don't think I
17 used the term swipe.

18 Q: Okay. Thank you. Yesterday you were asked
19 whether Mastercard provided you with any
20 alternative calculations and you said no. If
21 Mastercard had provided you with data showing
22 that its interpretation of DirecTV meant that
23 the location where it delivered the messages to
24 the banks was the income producing activity,
25 which would have resulted in zero



1 apportionment, would you have changed your
2 proposed assessment?

3 A: No.

4 Q: If they had provided you with data showing the
5 alternative reading of DirecTV that reaches
6 customer billing address, would you have
7 changed your proposed assessment?

8 A: No.

9 Q: Did you determine as part of your audit that
10 most of Mastercard's costs were incurred
11 outside of South Carolina?

12 A: Yes. I recognized that.

13 Q: Did you determine any costs were incurred
14 inside of South Carolina?

15 A: I didn't attempt to do that because we're not
16 a constant performance service. We're not a
17 constant performance state, so it's irrelevant
18 as to where the costs are performed.

19 Q: But you did determine as part of the audit and
20 include in your proposed assessment a statement
21 that recognizes that most of the costs
22 associated with the income producing activity
23 for the taxpayer occurs outside of South
24 Carolina?

25 A: Right. But I didn't attempt to determine what



1 amount, if any, of activities were performed in
2 South Carolina because we're not a constant
3 performance state.

4 Q: Okay. Are you -- as part of your audit, are
5 you aware of any costs that Mastercard incurred
6 in South Carolina?

7 A: I am aware -- well, they have employees in
8 South Carolina, so that would be a cost. They
9 have to bring -- maintain their brand, so I
10 would imagine advertising and things like that
11 would be a cost. And to the extent that they
12 advertise to a market in South Carolina, that
13 would be one of their costs.

14 Q: I'm sorry. I'm asking if you came across any
15 actual costs. So, you said payroll and in the
16 audit file, you reference a payroll number.

17 A: I'm sorry. I -- I didn't understand that ---

18 Q: Okay.

19 A: --- your question to mean that.

20 Q: Yeah.

21 A: Were there any actual costs?

22 Q: Yes.

23 A: Well, I think these are actual costs.

24 Q: But as part of your audit, did you see an
25 advertisement expense attributable to



1 advertising in South Carolina?

2 A: No. I didn't see but I would think that would
3 be one of the costs that were located in South
4 Carolina.

5 Q: Okay. Are you -- okay. As part of the audit,
6 did you conclude that Mastercard is a personal
7 service provider?

8 A: A personal? No. I just considered they were
9 a service provider.

10 Q: Did you conclude that Mastercard was a
11 professional service provider?

12 A: I just -- I just concluded I didn't go past
13 them being a service provider. I only
14 concluded that they were a service provider.
15 I didn't determine what type of -- I mean,
16 service provider they were. They're just a
17 service provider.

18 Q: Would -- would there have been any relevance to
19 them being a personal service provider as
20 compared to just a service provider?

21 A: Personal service provider. Maybe. It would
22 depend on what the personal service provider
23 was doing.

24 Q: Did you determine that Mastercard was a
25 technology company?



1 A: Did I deter- -- conclude that they were a
2 technology company? I -- that's part of their
3 business, but I -- I didn't con- -- conclude
4 that that was how they earned their receipts.

5 Q: Can we turn to tab 27, page 20, SCDOR 000020?

6 A: Tab 20?

7 Q: I'm sorry. Tab 27, but then page 20.

8 **COURT REPORTER:** Let me be clear about the
9 microphone. If you could -- your voice is a
10 little low this morning, so if you could use
11 the microphone, but just make sure that when
12 you're flipping pages, it doesn't rub up
13 against it.

14 A: Okay.

15 **COURT REPORTER:** That just prevents -- I don't use
16 that microphone.

17 A: Oh, okay.

18 **COURT REPORTER:** But the court does and that
19 prevents me from being able to hear you.

20 A: Okay. I'll try to talk louder too. I'm sorry.

21 **COURT REPORTER:** Thank you.

22 A: 27 you said? Section 20. My -- Section 27?

23 Q: Ta- ---

24 A: Section ---

25 Q: Yeah. Tab 27, SCDOR 0000020.



1 A: Okay.

2 Q: And -- and I'm sorry. We're having technical
3 issues, so we don't have it to put up on the
4 screen.

5 A: That's quite all right.

6 Q: But I'm going to read a sentence from sort of
7 the middle of the ---

8 **THE COURT:** Should be ---

9 Q: --- the first paragraph.

10 **MS. ROBINSON:** I -- I think the technical issue is
11 on our end, not connecting with the system
12 right now.

13 Q: It -- it says in short -- this is your audit --
14 is this your audit narrative?

15 A: Yes. And -- and you said it's page 20, right?

16 Q: Yeah. I think it's 20. Sorry. I thought it
17 was going to go up on the screen. Just double
18 checking I'm giving you the right page, but I'm
19 pretty sure it's 20.

20 **MR. NEIL:** You said the sentence starts in short,
21 correct?

22 **MS. ROBINSON:** Yes.

23 **MR. NEIL:** Okay. It's in the first paragraph.

24 Q: In the first paragraph, it looks like it's the
25 last sentence. In short, Mastercard is



1 effectively a technology company. Is that your
2 -- your -- your language there?

3 A: No. That's the language from one of
4 Mastercard's 10-K.

5 Q: That's from Mastercard's 10-K, but this is --
6 what document is this?

7 A: This is the audit report.

8 Q: So, did you take -- so, how did parts of the
9 10-K come to be in the audit report?

10 A: I -- I listed the -- the -- the types of
11 revenue streams that they reported per the 10-
12 K. Let's see, page 20?

13 Q: Yeah. So, I'm not sure this came from the 10-K
14 because let me read the whole sentence to you.
15 In short, Mastercard is effectively a
16 technology company that enables the issuers and
17 the acquirers, and ultimately, their customers
18 to complete payment card transactions. Do you
19 think that's from the 10-K?

20 A: Yes.

21 Q: Do you think all of this language is from the
22 10-K?

23 A: No.

24 Q: So, how do we know which parts -- well, let me
25 -- did -- did you adopt as your opinion the



1 language that you included in here?

2 A: No.

3 Q: I'm -- I don't mean opinion. I mean your ---

4 A: No.

5 Q: No? So, there's parts in the audit assessment
6 that you included ---

7 A: I'd have to go back and read this whole thing,
8 if you want to give me some time to read the
9 whole audit report, I can, but I can't say
10 which parts are related to my opinion and which
11 parts came from the 10-K, but a lot of the
12 information came from the 10-K. And I usually
13 indicated that it was from the 10-K, but if you
14 want to give me some time to read the context
15 of what I'm saying, I will do that and then
16 respond to your question.

17 Q: Yeah. We -- we are a little short on time.
18 So, I'm inclined to just ask you a question or
19 two.

20 A: Okay.

21 Q: If you included something from the 10-K -- and
22 by 10-K, you mean the annual report that
23 Mastercard Incorporated ---

24 A: Correct.

25 Q: --- would have filed with the Securities and



1 Exchange Administration?

2 A: Correct.

3 Q: Okay. Mastercard Incorporated being the
4 publicly traded parent entity?

5 A: Correct.

6 Q: If you had included language from the 10-K in
7 here that you agreed with, would you
8 specifically say we agree with the following
9 sentence?

10 A: I don't know. I'd have to read the report in
11 detail to -- to let you know.

12 Q: Okay. If you disagreed with something that you
13 included in -- if -- if there's something in
14 the 10-K that you decided to include in here,
15 but you didn't agree with it, would you have
16 said, here's a sentence from the 10-K we don't
17 agree with or would you have just included the
18 sentence?

19 A: I don't know. I'd have to re- -- read -- read
20 the whole report and ---

21 Q: Okay.

22 A: --- specifically respond to that question.

23 Q: Okay. I think we'll -- we'll just move -- move
24 on for the sake of time. When you drafted the
25 narrative that went along with the proposed



1 assessment, was your position that the income
2 producing activity was the cardholder activity
3 at the point of their purchase transaction?

4 A: Yes.

5 Q: What I'm calling swipe what you're ---

6 A: Yes.

7 Q: --- phrasing differently. In -- in fact, in
8 that same document, tab 27, SCDOR_000017, you
9 state ---

10 A: One -- 1-7?

11 Q: Uh-huh.

12 A: 1-7. Okay.

13 Q: You state -- and this is in bold in there, bold
14 font. In the auditor's opinion, the income
15 producing activity occurs from Mastercard
16 branded transactions within South Carolina when
17 the transaction is initiated by the Mastercard
18 cardholder in South Carolina. A line or two
19 down, you say, the income producing activity,
20 then you give a statute cite, occurs when the
21 Mastercard cardholder uses his card to make
22 purchases -- to make a purchase or access
23 funds. 100 percent of the receipts that accrue
24 to the taxpayer when it -- oh, I meant to stop
25 at funds. I'm sorry.



1 A: Uh-huh.

2 Q: That's from your audit report?

3 A: Yes.

4 Q: On page -- the same page, you also say, the

5 fees due the taxpayer from the card issuing

6 entities and acquirers occur at the time the

7 transaction is initiated by the South Carolina

8 cardholder. Is that what you said in that

9 proposed assessment?

10 A: I lost you somewhere.

11 Q: Sorry.

12 A: All right. Is that on the same page?

13 Q: It's on the same page. It says, the fees due

14 the taxpayer from card issuing entities and

15 acquirers occur at the time the transaction is

16 initiated by the South Carolina cardholder.

17 A: I don't see that. What paragraph on 17 is it

18 in?

19 Q: Oh, I'm sorry. On -- on ni- -- sorry. I may

20 have given you the wrong page number. Oh. No,

21 no, no. I gave you the right page number. On

22 -- on page 19. This is the paragraph where ---

23 A: 19?

24 Q: Yeah. Oh, I'm sorry. I had said 19. I think

25 I said 19.



1 A: 17 was where I was looking at.

2 Q: Oh. I'm sorry. The -- the last one I read was
3 17.

4 A: Okay.

5 Q: My apologies. So, in the paragraph where you
6 discussed DirecTV and indicate that you're
7 applying DirecTV, the Court of Appeals case in
8 DirecTV, about halfway -- the very last
9 sentence of the -- of that paragraph, the fees
10 due the taxpayer from the card issuing entities
11 and acquirers occur at the time the transaction
12 is initiated by the South Carolina cardholder.

13 A: Yes.

14 Q: Is that an accurate -- the -- the two
15 statements that I just read, is that an
16 accurate description of your -- your view of
17 the income producing activity when the audit
18 closed?

19 A: Yes.

20 Q: Yesterday you described the income producing
21 activity differently. Yesterday, you said --
22 and I tried to write down this word-for-word.
23 Provision of a credit card network that allows
24 merchant -- that -- you said that the IPA was
25 provision of a credit card network that allows



1 merchants and cardholders to consummate
2 purchases in South Carolina.

3 A: I think that's the -- the income producing
4 activity, but here I'm talking about the -- the
5 amount that actually produces the money is --
6 is when the transaction is initiated in -- in
7 South Carolina at a merchant's -- at a
8 Mastercard -- I mean, at a merchant's located
9 in South Carolina.

10 Q: That's not what the proposed assessment says
11 though. The proposed assessment doesn't say
12 it's a provision of a network. In fact,
13 doesn't mention provision of a network at all.
14 The proposed assessment in multiple places
15 refers to the taxpayer -- I'm sorry, the
16 cardholder swipe as the income producing
17 activity. The income producing activity occurs
18 for Mastercard branded transactions when the
19 transaction is initiated by the cardholder
20 that's made -- that's on 17. The income
21 producing activity, the statute cite, occurs
22 when the Mastercard cardholder uses his card to
23 make a purchase or access funds. Those are
24 both on 17.

25 **OBJECTION:**



1 **MS. WOOTEN:** I'm going to lodge an objection. I'm
2 not sure what the question is, but counsel has
3 been reading from the page. Is ---

4 **MS. ROBINSON:** Sure. I -- I can -- I can ---

5 **MS. WOOTEN:** Okay.

6 **MS. ROBINSON:** --- state a specific question.

7 **MS. WOOTEN:** Okay. Thank you.

8 Q: It seems that your opinion is -- that your view
9 of the income producing activity has changed
10 since the close of the audit to now. It seemed
11 to be a swipe before, and now it seems to be a
12 provision of the network.

13 A: I think it's both the same thing. The -- the
14 network allows the swipe to occur, so I -- I
15 think that -- that they're both really the same
16 thing.

17 Q: Do those two things exist in the same place?

18 A: I'm sorry.

19 Q: Do those exist in the same place?

20 A: Do the -- do -- do -- what? Can you -- what --
21 -

22 Q: Sure. You -- when you say network ---

23 A: Right.

24 Q: --- what do you mean?

25 A: The -- the Mastercard credit card network that



1 allows transactions to be consummated in South
2 Carolina and elsewhere.

3 Q: Can you be more specific? Are you referring to
4 the computer technology as the network? Are
5 you referring to ---

6 A: I could -- I could go -- con- -- con- -- I'm
7 really referring to everything. I'm referring
8 to the brands that -- that Mastercard uses in
9 South Carolina. I'm referring to the activity
10 of the cardholders and I'm referring to the
11 activity of the merchants. I'm referring --
12 referring to the activity of the issuers and
13 I'm referring to the activity of the Mastercard
14 credit card network. Everything. Everybody is
15 a player in the transaction. Everybody
16 contributes to -- to the allowing a credit card
17 -- the Mastercard credit card network to
18 operate in South Carolina.

19 Q: So, when I just asked you what the network was,
20 what your view of the network is to describe
21 the network, you just gave that explanation, is
22 that your view of the -- of the network?

23 A: Of -- of the Mastercard? Yes.

24 Q: Okay. When did you come to have that view?

25 A: I think I had that view from -- the -- the day



1 I started researching the audit that they all
 2 -- all the players involved and the brands that
 3 Mastercard has is -- is -- contributes to the
 4 -- allowing a credit card customer to swipe his
 5 card in South Carolina. I used the term swipe.
 6 In South Carolina, being able to make cashless
 7 purchases in -- in South Carolina. And I think
 8 I said that in -- in my letter that all the
 9 parties come together ---

10 Q: Right. Right now, I'm not -- I'm not asking
 11 you about like the ecosystem. I'm asking you
 12 to -- to describe what you mean by the word
 13 Mastercard network.

14 A: I'm saying that -- that the whole ecosystem,
 15 including the cardholder, including the -- the
 16 merchant, including the issuing bank, including
 17 the acquiring bank, and including the third
 18 party, including the Mastercard network, are
 19 all part of the ecosystem Mastercard network.

20 Q: Mastercard network. Okay. And then I asked
 21 when you came to have that understanding of the
 22 word network and you said that's been your
 23 understanding all along?

24 A: Yes.

25 Q: Were you deposed in this matter?



1 A: Yes.

2 Q: Were you deposed on September 23rd, 2021?

3 A: I don't ---

4 Q: Or thereabout?

5 A: Yes. I think so. I think that's the correct

6 date.

7 Q: Were you -- was the deposition taken under

8 oath?

9 A: Yes.

10 Q: Were you given a chance to review and correct

11 any errors in the transcript for that

12 deposition?

13 A: Yes.

14 Q: Did you sign the transcript?

15 A: Yes.

16 Q: Might you have given a different answer to the

17 question of describe the network at the

18 deposition?

19 A: I -- I don't know whether I did or didn't. I

20 don't remember.

21 **MS. ROBINSON:** May I open a sealed ---

22 **THE COURT:** Yes.

23 **MS. ROBINSON:** I -- I know I said we weren't using

24 sealed. This one we happened to have sealed.

25 **THE COURT:** That's fine.



1 **MS. ROBINSON:** I can't get this thing opened. May I
2 approach?

3 **THE COURT:** Yes. Of course.

4 Q: Can you turn to -- I just gave you the copy I
5 had. Is what I just handed you a copy of the
6 transcript that you reviewed and signed?

7 A: It appears to be.

8 **MS. ROBINSON:** Thank you.

9 Q: Can you turn to page 64, please? Are you at
10 64?

11 A: Right.

12 Q: I -- no. Not me. My colleague, Mr. Kerman,
13 asked you at line 6, can you describe the
14 network that you referred to? At line 8, you
15 answered, describe the network, no. I can't
16 describe the network. All I know is that --
17 all I know is that -- I'm sorry. I misread
18 that. Let me restart the answer there.
19 Describe the network, no. I can't describe the
20 network. All I know is that's the transaction
21 goes from the -- is routed from the merchant to
22 the acquirer to the network to the issuer and
23 then comes back the opposite way, but the
24 network is -- I don't know how to describe it.
25 No. I can't describe it. Next question at



1 line 15, do you know if the network is a
2 physical structure? Your answer at 17, I think
3 it's like computers, and I imagine signals
4 going back and forth. That's how I imagine the
5 network. Did I read that accurately?

6 A: Yes.

7 Q: Thank you. And that was your sworn testimony
8 on ---

9 A: Yes.

10 Q: --- I -- I forgot the date.

11 A: Yes.

12 Q: Do you believe any portion of Mastercard's
13 network exists in South Carolina? We're --
14 we're done with the transcript.

15 A: Okay. Do I -- I believe any portion of
16 Mastercard's network, yes, I do believe. I
17 think -- as I indicated, I think part of the
18 network is the -- the cardholders, the
19 acquiring -- acquiring banks, the issuing
20 banks, the merchants and all of those. I think
21 those are all part of the tran- -- are -- are
22 the -- the Mastercard network. I think the --
23 the flow of the transactions start in South
24 Carolina and they're all part of the Mastercard
25 network.



1 Q: When did you come to have the belief that part
2 of the Mastercard network is in South Carolina?

3 A: Day 1. When -- when I started researching
4 this.

5 Q: Can we return to that transcript? This is the
6 same transcript we looked at a minute ago.

7 A: Right.

8 Q: But I'm not going to go through the question
9 and answers on -- but this is the transcript.
10 Page -- are you at page 73? Oh, I'm sorry. I
11 may not have even said the page. Page 73,
12 please. Are you there?

13 A: Right.

14 Q: At line 9, my colleague asked you, did you
15 consider -- oh, nope. I'm sorry. At line 12,
16 my colleague asked you, is any portion of
17 Mastercard's network in South Carolina? Line
18 14, what was your answer?

19 A: I don't know.

20 Q: Could you turn to page 65, please? A moment
21 ago when describing the network, you included
22 the infrastructure as part of your description.
23 At line 13, you were asked -- I -- I'm sorry.
24 At line -- yep. At line 13, you were asked, so
25 I asked if you knew whether -- I'm sorry. Line



1 14, you were asked, are any of the computers or
2 software in South Carolina? What was your
3 answer at line 16?

4 A: I don't know.

5 Q: And both of those were your sworn testimony?

6 A: Yes.

7 Q: The proposed assessment refers to a number of
8 cases. We're done with the transcript.

9 A: Okay.

10 Q: Hopefully. The proposed assessment refers to
11 a number of court cases, a few Supreme Court
12 cases in the nexus section and South Carolina
13 cases in both the nexus section and the
14 sourcing section. Are the cases in the
15 proposed assessment the ones that you relied
16 upon in reaching your audit conclusions?

17 A: Yes. Some of them, yes. I -- I'm assuming all
18 of them or I wouldn't have listed them in
19 there.

20 Q: Meaning, if it's in there, you relied upon it?

21 A: Right.

22 Q: Okay. Did you rely on any cases that aren't
23 listed in there?

24 A: No. I don't -- not that I re- -- recall.

25 Q: Do -- do you happen to recall any of the



1 apportionment cases that were listed off the
2 top of your head?

3 A: Well, I think I probably -- I probably listed
4 Jeffery, Dish, Lockwood Greene, DirecTV.
5 Probably Tonya Pipe.

6 Q: Well, let me stop you. Maybe we should look at
7 the list because I'm not sure all of those are
8 actually ---

9 A: Okay.

10 Q: --- listed in there. Tab 27. The proposed
11 assessment starts at page 1 -- SCDOR 000001.
12 Yeah. The narrative portion of it starts at
13 16. So, I'm not sure the best way to do this
14 without you -- without taking up a lot of the
15 Court's time. But I can't find Lockwood Greene
16 in here.

17 **(Joint Exhibit Number 27 was referenced at this**
18 **time.)**

19 A: I -- it might have been in the initial audit
20 letter that I sent her. But it -- it might not
21 be. But -- but it -- it could've been. Can I
22 look to see or ---

23 Q: You -- you -- you can look?

24 A: Okay. What pages are I'm looking at?

25 Q: So, the audit narrative starts at -- at SCDOR



1 000016.

2 A: 16.

3 Q: Well, let me just ask the question a different
4 way. Did you rely on Lockwood Greene?

5 A: I think I -- I relied on all of our sourcing
6 cases. Lockwood Greene might not have -- I
7 think I -- I mean, because even if I relied on
8 Dish and DirecTV, they're -- they're both
9 contingent on the -- the Lockwood Greene cases.
10 So, if I relied on Dish and DirecTV, then --
11 then I automatically relied on Lockwood Greene
12 because both -- Lockwood Greene was discussed
13 in both those -- those cases.

14 Q: Did Lockwood Greene and Dish, and DirecTV reach
15 the same -- did the Courts use the same audit
16 methodology in those three cases?

17 A: No. But they -- they both said that if -- I
18 think that you're a service provider -- or all
19 three of them said, if you're a service
20 provider, each business is -- each service
21 provider is different and you have to determine
22 the income producing activity for that
23 particular business and there will be different
24 methods for different people. For example, in
25 Lockwood Greene, they say, banks always sourced



1 their receipts to the location of their
2 customers. Unlike Lockwood Greene, which
3 basically said that the receipts were sourced
4 to where the services were performed.

5 Q: So, if you relied on Lockwood Greene in -- in
6 your conclusions and assessment here, it
7 would've been for that statement you made a
8 moment ago, which is -- stands for the
9 proposition that every service company needs to
10 be -- you need to separately examine and
11 determine what its income producing activity
12 is?

13 A: Correct.

14 Q: Would you have relied on it for its methodology
15 or underlying conclusions besides the idea that
16 you just have to look at each business
17 individually?

18 A: No. Yeah. I mean, I -- I would have relied on
19 it for the -- the fact that each service
20 provider is different and you have to de- --
21 determine the income producing ac- -- activity
22 for that particular service provider, not the
23 methodology used in sourcing the receipts to
24 South Carolina in Lockwood Greene.

25 Q: Do you recall what the Court of Appeals



1 determined was the income producing activity in
2 DirecTV?

3 A: Well, the -- the -- DirecTV. Yes. But I'm
4 more fa- -- familiar with Dish because that was
5 my -- my case, but I'm ---

6 Q: Okay. That's fine. Let's switch over to Dish.

7 A: Okay.

8 Q: Do you recall ---

9 A: But they both were basically saying it -- it
10 said that access to the programming signal vi-
11 -- via the set top box and -- was the income
12 producing activity because it allowed the
13 subscriber to view the programing in -- in
14 South Carolina.

15 Q: If you -- so, in like a delivery approach?

16 A: Right. It was -- it was income produ- -- but
17 it was the activity that allowed them to access
18 the signal to view the programming that -- that
19 they purchased via the subscriber fees.

20 Q: If you applied the delivery approach here to
21 Mastercard's receipts, how much would you put
22 in the numerator each year?

23 A: How much would I put in the numerator each year
24 for delivery?

25 Q: Were -- were you here when the Mastercard



1 witnesses testified that ---

2 A: Yes.

3 Q: --- Mastercard delivers its message signals to
4 a device called the MIP at the acquirer's
5 processing center?

6 A: Yes.

7 Q: If you -- and did -- were -- were you here when
8 testimony was given that there were none of
9 those devices in South Carolina?

10 A: None of those devices. Right. Yes, ma'am.

11 Q: Is that your understanding that none of them --
12 none of the MIPs are in South Carolina?

13 A: Correct.

14 Q: So, if you were to apply a delivery approach
15 here, treating the delivery to that MIP as the
16 income producing activity, how much would you
17 put in the numerator of the apportionment
18 formula for each year?

19 A: I think the -- the delivery would be to the
20 merchant because tho- -- those are the -- the
21 people who are actually -- need the -- the --
22 the -- the approval and the settlement of the
23 transactions.

24 Q: Did DirecTV look to delivery to the paying
25 customer?



1 A: Did Dir- -- did ---
 2 Q: I'm sorry. Dish. I'm sorry. We were speaking
 3 about ---
 4 A: To Dish?
 5 Q: --- about Dish. Did Dish focus on ---
 6 A: Yes.
 7 Q: --- delivery to the paying customer?
 8 A: Yes.
 9 Q: So, in my hypothetical, if we focus on delivery
 10 to the paying customer, which would be the
 11 issuer or acquiring banks ---
 12 A: Right.
 13 Q: --- did any of that delivery occur in South
 14 Carolina in my hypothetical?
 15 A: Delivery occur in South Carolina. Okay. So,
 16 you're delivering it to the acquirer bank at
 17 the MIP location, which delivers it to the --
 18 I think so. I think maybe that the -- the --
 19 the acquiring banks delivering it to the
 20 merchant and that's -- yeah. That's part of
 21 what produces the income.
 22 Q: Sure. But in my example, I'm focusing on the
 23 delivery to the paying customer. Is the
 24 merchant paying Mastercard?
 25 A: Is the merchant paying Mastercard? No.



1 Q: So, who would the deliv- -- who would the
2 paying customer be?

3 A: The paying customers are the issuers and the
4 acquirers.

5 Q: Okay. So, was there any delivery to the paying
6 customers in South Carolina in my hypothetical?

7 A: Is there any delivery into the -- I don't think
8 so.

9 Q: The Court in DirecTV called many of the
10 taxpayer's activities income anticipatory and
11 distinguished the income anticipatory
12 activities from the income producing
13 activities. Did you attempt to determine
14 whether any of Mastercard's activities were
15 income anticipatory?

16 A: No.

17 Q: The Court in Dish called many of that
18 taxpayer's activities intermediate inputs and
19 distinguished those from the income producing
20 activities. Did you attempt to determine
21 whether any of Mastercard's activities were
22 intermediate inputs?

23 A: No.

24 Q: Is your understanding of Lockwood Greene that
25 the place of use standard in that case was



1 measured by the company's South Carolina
2 payroll?

3 A: The place of use -- yes.

4 Q: Were you present on Tuesday when Ms. Naskiewicz
5 testified?

6 A: Yes.

7 Q: Were you able to hear her testimony?

8 A: Yes.

9 Q: She testified and provided a definition of the
10 term brand, as ---

11 A: Right.

12 Q: --- as Mastercard uses that term. Did you hear
13 her -- her ---

14 A: Yes, I did.

15 Q: Okay. Did you think her description was
16 accurate?

17 A: Of the Mastercard brand? Yes.

18 Q: Yesterday, you were asked by the Department to
19 discuss a demonstrative the Department had
20 provided ---

21 A: Whoops.

22 Q: Actually, before I get into that question, I
23 was just told that I said place of use rather
24 than place of activity in my question about
25 Lockwood Greene. So, let me just re-ask that



1 question so that it's clear for the record. Is
2 it your understanding that Lockwood Greene used
3 place of activity standard and measured that
4 standard by using the South Carolina payroll?

5 A: Yes.

6 Q: Thank you. Yesterday, you were asked by the
7 Department to discuss a demonstrative. Do you
8 still have your copy?

9 A: Yes, I do.

10 Q: This demonstrative summarized data contained in
11 two or more doc- -- that was described as
12 summarizing data contained in two or more
13 documents already in the record, is that right?

14 A: Yes.

15 Q: And you were able to look at that document and
16 consider what was shown, and then you
17 recognized that two steps were missing. Not
18 that the calculations were wrong, but that the
19 illustration did not show two pieces of the
20 computation, is that correct?

21 A: Correct.

22 Q: So, you're familiar with how these numbers
23 should be computed?

24 A: Yes.

25 Q: Great. I'd like to do the same thing, but



1 using a different version of this document.

2 **MS. ROBINSON:** May I?

3 **THE COURT:** Yes, of course. Thank you.

4 **MS. ROBINSON:** Thank you.

5 Q: Like the document you saw yesterday, this is a
6 document that summarizes two or more records
7 that are already in the audit file ---

8 A: Uh-huh.

9 Q: --- and that was prepared by counsel for one of
10 the parties just like yesterday's document.

11 A: Right.

12 Q: Let me just quickly explain this demonstrative
13 to you. The green boxes are identical to what
14 was provided yesterday. So, the year, the
15 titles, and the U.S. receipts number. If you
16 want to just do a quick comparison to the other
17 document you have, you're -- you're welcome to
18 do that, but the green -- the green -- anything
19 green is copied from the other document. The
20 first box moving to the right, South Carolina
21 receipts by billing address, is taken from
22 Petitioner's Exhibit 1. The ratio is just
23 math. The income -- the apportionable income
24 as adjusted, I think that's the first number
25 that yest- -- the first column that yesterday



1 you said was missing from the computation
2 yesterday that was needed in order to reach the
3 tax due. Those numbers are taken from your
4 work papers in the audit file. The subject to
5 tax -- the South Carolina income subject to tax
6 is a formula. Yes.

7 A: When you say the U.S. receipts, are -- are they
8 actually the everywhere receipts?

9 Q: That is. We were copying ---

10 A: Okay.

11 Q: --- what was on yesterday's version. I
12 understand that you ---

13 A: Okay.

14 Q: --- testified yesterday that that ---

15 A: Okay.

16 Q: --- audit -- that that is better referred to as
17 everywhere. But the version of the
18 Department's document called it U.S. receipts.

19 A: Okay.

20 Q: But yes. That -- I -- that box as identical.
21 Okay. Continuing to the right, the South
22 Carolina income subject to tax is a matter of
23 math. The tax rate is the tax rate. That's
24 taken from your work papers in the audit file.
25 And the last column is the math. Does this



1 appear to capture all the steps that you walked
2 through as necessary what -- that you walked
3 through yesterday that were necessary to reach
4 the income tax due column?

5 A: Yes. Mathematically, it is correct, but we
6 don't agree with the methodology for sourcing
7 South Carolina receipts that you show there.

8 Q: Sure. What is the total tax due shown at the
9 bottom right for the years 2008 through 2016?

10 A: 308,107.

11 Q: Okay. And that was the only question I had
12 about that document. Over your 40 years of
13 auditing and four years of supervising, can you
14 estimate how many audits you were involved in
15 where taxpayers' apportionment methodology was
16 reviewed?

17 A: It's about 50 percent of the time because
18 about, I would say, service versus the sale of
19 tangible personal property is about 50 percent.
20 Some of them were combined. Their selling came
21 from personal property and the providing
22 services. So, the services are almost involved
23 in every audit, so to speak. So, it would
24 probably be every audit because there's sale of
25 tangible personal property and services. So,



1 if they're providing services, you have to
2 determine the -- the location of the income
3 producing activity. So, probably just about
4 every audit I ever conducted.

5 Q: And would that would be hundreds, thousands?

6 A: Thousands I would say.

7 Q: Thousands. Is South Carolina a market-based
8 sourcing state?

9 A: No.

10 Q: Is it your -- do -- would you agree that by
11 using swipe or pla- -- place of transact- -- I
12 don't remember exactly how you phrased it.

13 A: That's okay. We can use swipe. I concede
14 that.

15 Q: I appreciate that because it is -- it is a
16 tongue twister to try to get it out the other
17 way. Would -- would you concede that using
18 swipe is meant -- is looking to where
19 Mastercard's customers' customers' activity
20 occurs?

21 A: Yes.

22 Q: So, the sourcing method reflected in the
23 proposed work papers uses cust- -- Mastercard's
24 customers' customers' location?

25 A: Yes.



1 Q: Have you used that method in auditing any other
2 credit card processors for sourcing their
3 receipts?

4 A: Yes.

5 Q: Okay. I want to understand a -- a little bit
6 more about sourcing and I think you're the
7 expert here. On the first -- the first day, we
8 ---

9 **MS. ROBINSON:** Mike, can you put this up?

10 Q: On the first day we provided a copy of this
11 particular demonstrative. I can give you
12 another copy ---

13 **MS. ROBINSON:** Do you guys need ---

14 **MR. NEIL:** I would actually like one.

15 **MS. ROBINSON:** Okay.

16 **THE COURT:** I'm sure I can find mine.

17 **MS. ROBINSON:** If you don't -- if you don't have it
18 at your fingertips, I can ---

19 **MR. GOLDMAN:** All right. Which one is it?

20 **MS. ROBINSON:** It has the little -- the red star is
21 what makes it stand out from the others. I can
22 just hand you ---

23 **MR. GOLDMAN:** I have it.

24 **MS. ROBINSON:** Okay.

25 **MR. GOLDMAN:** Thank you.



1 **THE COURT:** Thank you.

2 Q: Were you present in the courtroom on Monday
3 when Ms. Nas- -- the -- when Ms. Naskiewicz
4 walked through this document?

5 A: Yes, but I ---

6 Q: I'm sorry. Tuesday.

7 A: Yes, but I couldn't really see it.

8 Q: You couldn't see it.

9 A: Now, it's still not really clear because it's
10 -- all this stuff is so white on here.

11 Q: Well, I'm actually not going to ask you
12 anything about the transaction processing.

13 A: Okay.

14 Q: Just the part that's -- that's lightened up.

15 A: Yeah.

16 Q: I really want to focus on the parties here and
17 how sourcing would work for each of the various
18 parties in this ---

19 A: Right.

20 Q: --- in this transaction. So, we understand the
21 Department's view on Mastercard.

22 A: Right.

23 Q: We don't agree with it, but we understand it.

24 A: Right.

25 Q: Can -- can we kind of -- I'm going to walk



1 through an example and I was thinking maybe the
 2 example would be like me buying a hundred
 3 dollar sweater. But then, I remembered that
 4 the Department mentioned something like 86
 5 trillion dollars of merchant sales happening
 6 during this audit period. So, let's pretend
 7 that I'm buying an 86 trillion dollar sweater.
 8 Okay. And so, I go to the merchant and I'm
 9 buying this 86 trillion dollar sweater. From
 10 a tax point of view, let's say that this
 11 merchant, it's the one shown on the picture
 12 here. I'm sorry. 84 billion. Sorry. I was
 13 just corrected. I guess an 84 billion dollar
 14 sweater is more realistic than trillion. Okay.

15 A: Excuse me. You were talking about everywhere,
 16 not just South Carolina, right? Or are you
 17 talking about South Carolina?

18 Q: No. I -- I think the number provided in the --
 19 in the opening statement was all of the sale --
 20 all of the merchant sales and debt card
 21 transactions for all ten years added up to 84
 22 billion.

23 A: Okay. Well, you said 86 trillion, I thought
 24 you were talking about everywhere.

25 Q: I ---



1 A: Of the -- the whole U.S.

2 Q: No. My mistake.

3 A: Okay.

4 Q: Let me start all over again.

5 A: Okay.

6 Q: I walk into the store to buy an 84 billion --

7 billion dollar sweater.

8 A: Uh-huh.

9 Q: And this store is in South Carolina. From a

10 tax point of view, let's start with -- do you

11 know anything about sales tax?

12 A: Yes. I -- I started out as a sales tax auditor

13 for a few years. Well, I guess maybe 15 years,

14 I guess. But I haven't kept up with it over

15 the years.

16 Q: Would -- would South Carolina get sales tax on

17 my 84 billion dollar -- I got to write that

18 down so I don't say it wrong -- sweater?

19 A: 84 billion dollar sweater.

20 Q: I'm not asking how much, just would -- would

21 South Carolina get sales tax on that when I buy

22 it?

23 A: In South Carolina? Yes.

24 Q: Okay.

25 A: Of course.



1 Q: All right. And now, the merchant for income
2 tax purposes, will the merchant source -- how
3 would the merchant source that sale?

4 A: I don't know. There's a thing in the South
5 Carolina Code of Laws that says ways of means
6 of communication. So, I would think that that
7 -- if they -- the merchant received all those
8 fees through these communication channels, I
9 think those would probably -- or -- or the
10 merchant ---

11 Q: The merchant. So, the merchant, I buy my
12 sweater and the merchant is going to include
13 that in its receipts ---

14 A: Right.

15 Q: --- and its tax base ---

16 A: Right.

17 Q: --- in South Carolina.

18 A: That's what your -- that was the question,
19 right?

20 Q: Right. So, would -- would that sweater --
21 would that 84 billion dollars be included in
22 the merchant's South Carolina tax base?

23 A: Yes.

24 Q: Okay. What about for the acquirer? The
25 acquirer here who's acquiring for that South



1 Carolina merchant?

2 A: The acquirer is acquiring for that South --
3 with the 84 billion purchase, that's all you're
4 talking about, right?

5 Q: Would -- would any fees related to that
6 purchase, right? Obviously, the acquirers is
7 not receiving that 84 billion dollars as
8 income, but it's receiving some fees off that
9 transaction. So, if the fees ---

10 A: I think that -- I think based on that ways of
11 communication, I think you could -- all those
12 fees that they receive when communicating these
13 -- that the interchange and -- and the other
14 things, I think that -- I don't know if they
15 do, but I think that the Department of Revenue
16 could source those -- that interchange and
17 those other fees that the -- that the merchant
18 collects -- that the acquirer collects from all
19 -- all the parties and bills to the merchant
20 would be taxable.

21 Q: And ---

22 A: Would be subject to sax -- sales tax in South
23 Carolina. Because we have a thing called ways
24 and means of communication, but I don't know
25 what ---



1 Q: And ---

2 A: --- the tech- -- technical ---

3 Q: Yeah. I'm sorry. We've gone -- I've gone back

4 to income tax for the acquirer. Would the

5 acquirer include its fees from this transaction

6 in its South Carolina gross receipts in the

7 numerator?

8 A: The acquirer. The fees. That -- yes. I think

9 that we would do that.

10 Q: Okay. With the Department's theory, Mastercard

11 would include its fees in South Carolina?

12 A: Yes.

13 Q: What about the issuer bank? Now, the -- and

14 let's focus on the issuer bank's fees ---

15 A: The interchange -- they basically receive ---

16 Q: The interchange. Thank you.

17 A: --- receive the interchange. Yes. We would

18 source those receipts to the -- the sites in

19 where the transaction occurred.

20 Q: South Carolina?

21 A: Yes.

22 Q: Okay. What about when it takes me more than

23 one payment to pay my credit card with an 84

24 billion dollar balance on it now, and I have to

25 pay over time, so now I'm paying my bank



1 interest. How would the bank source the
2 interest ---

3 A: They'd source the interest to the size of the
4 ---

5 Q: And -- and let me be clear. In this picture,
6 I'm a New Jersey resident.

7 A: Oh, you're a New Jersey resident. Okay. So,
8 South Carolina would source the -- the interest
9 to the site instead of the customer, so you
10 would -- you would have to be in South Carolina
11 for us to source the interest.

12 Q: So, because my card account would have a New
13 Jersey mailing address ---

14 A: Right.

15 Q: --- you -- you would not ---

16 A: Right.

17 Q: --- tax the -- you would not -- the issuer bank
18 would not include the interest in South
19 Carolina ---

20 A: It would include the interest where customers
21 are located.

22 Q: Okay. So, on the -- that 84 -- the -- the
23 giant purchase that I made, if I'm
24 understanding this correct, you indicated that
25 South Carolina would get sales tax on that



1 purchase?

2 A: Right.

3 Q: And that the merchant, the acquirer and, in
4 your view, Mastercard, would all include the
5 fees from that in South Carolina revenue --
6 receipts? Oh, I'm sorry. As well as the
7 issuer with respect to interchange?

8 A: Yes.

9 Q: Okay. Thank you. Is there any South Carolina
10 statute or case that addresses sourcing based
11 on customers' customer location?

12 A: Not that I'm aware of.

13 Q: Is there any Department of Revenue guidance
14 that addresses sourcing based on a customer's
15 customer location?

16 A: Not that I'm aware of.

17 Q: Is there any South Carolina guidance that
18 addresses credit card networks' sourcing,
19 specifically?

20 A: There is one court case that -- that addresses
21 inner -- securitization, but that's -- that's
22 totally different. So, I'd say no.

23 Q: Is there any South Carolina Department of
24 Revenue guidance regarding income producing
25 activity and how to determine what income



1 producing activities are?

2 A: No. It's -- it's basically just the court
3 cases that we have. I think Lockwood Greene,
4 Dish, and DirecTV and then there -- there was
5 another one that I -- I located. Mercury
6 Express was a sourcing court case too.

7 Q: Is there any Department of Revenue guidance
8 that helps the taxpayer know how to distinguish
9 between an income anticipatory activity and an
10 income producing activity?

11 A: Just the court cases that -- that -- Dish and
12 DirecTV, I -- I think they talked about those.

13 Q: Is there any Department of Revenue guidance
14 that helps the taxpayer distinguish between the
15 intermediate inputs, a term used in Dish, and
16 in income producing activity?

17 A: No.

18 Q: How's a taxpayer suppose to know that it should
19 be re- -- that it should be assigning receipts
20 based on the customer's customer location?

21 A: I -- they just need to know what their business
22 is and -- and what produces the -- the income
23 in South Carolina and elsewhere.

24 Q: And what if they have a different view of that
25 than the Department?



1 A: And that's why we're here. (Laughter)

2 Q: Does that mean their view is not -- does having
3 a different view of the Department mean that
4 the taxpayer's view is unreasonable?

5 A: Well, I think so in this case because
6 Mastercard, despite now saying that they have
7 nexus in South Carolina, never paid the --
8 South Carolina a dime.

9 Q: Well, the -- nexus isn't at issue here, but ---

10 A: I know, but it -- but -- but, obviously, it was
11 because Ruby said that they didn't think they
12 had nexus in South Carolina. That's why they
13 weren't filing.

14 Q: Sure. Let me ask another question then. If
15 Mastercard's interpretation of DirecTV, that
16 delivery means to MIP location, and there are
17 no MIPs in South Carolina, you said earlier
18 that would mean there would be zero receipts in
19 the numerator, what would their South Carolina
20 tax have been with zero receipts in their
21 numerator?

22 A: I don't think that their receipts would be
23 zero. I think they still had imbedded
24 royalties in the amount that they charged to
25 the acquirers and the issuers.



1 Q: Did you assign any of their income based on
2 intangibles rule?

3 A: No, we didn't. We didn't have to because
4 anything that we would have sourced to South
5 Carolina based on our sourcing methodology
6 would have already included that amount
7 imbedded ---

8 Q: The basic ---

9 A: --- in assessment fees that they charged to
10 their customers in South Carolina and
11 elsewhere.

12 Q: Based on Mastercard's reading of DirecTV, a
13 case for which you've acknowledged there's no
14 Department guidance, they would have had zero
15 in the numerator, which would mean their income
16 tax, pretty darn close to zero, correct?

17 A: I ---

18 Q: Under their -- their theory of the case.

19 A: Right. But I'm saying their theory would be
20 wrong because they -- they have royalties
21 imbedded in the -- the domestic fees that they
22 charge to the acquirers and -- and -- and
23 users.

24 Q: Did the Department have any type of
25 intellectual property expert or economist look



1 to determine whether or not there were imbedded
2 royalties?

3 A: No.

4 Q: Does the Department concede that there are no
5 payments for use of intangibles?

6 A: No.

7 Q: The Department doesn't concede that?

8 A: No.

9 Q: That wasn't in -- okay. You mentioned that you
10 audited at least one other credit card
11 processor and used customer's customer as a
12 sourcing method.

13 A: Yes.

14 Q: Was that how that credit card processor filed
15 its returns? Was that the method that the
16 taxpayer -- that that taxpayer used?

17 **MS. WOOTEN:** Obj- ---

18 **MS. ROBINSON:** I'm not asking him to identify the
19 taxpayer and I will not ask him to identify the
20 taxpayer.

21 **OBJECTION:**

22 **MS. WOOTEN:** I'm -- I'm going to lodge a -- an
23 objection under 12-54-240(b). As we discussed,
24 there are not many taxpayers in a similar
25 business as the taxpayer in this matter. So,



1 discussing any information to a similar
2 taxpayer could possibly reveal taxpayer
3 information for a taxpayer that's not in the
4 courtroom today.

5 **MS. ROBINSON:** It was discussed ---

6 **THE COURT:** You have a response?

7 **MS. ROBINSON:** It was discussed at the deposition.
8 I would have to check whether objections were
9 lodged at the deposition. But it was
10 discussed, I believe, as well, in the 30(b)(6)
11 deposition.

12 **THE COURT:** And how far are you planning to go with
13 this line of questioning?

14 **MS. ROBINSON:** I'm just going to ask if the other
15 taxpayer knew in advance whether to use
16 customer's customer or only knew customer's
17 customer was the Department's position via
18 being audited.

19 **MS. WOOTEN:** I -- I would respond briefly with that.
20 We don't -- the taxpayer's not here, so we
21 don't know what they intended or what they
22 thought or any response on their tax return.
23 They're not here to testify what they meant
24 when they did something on a tax return. So,
25 I would object it's hearsay.



1 **MS. ROBINSON:** The ---

2 **MS. WOOTEN:** And it calls for speculation. That
3 taxpayer is not here.

4 **MS. ROBINSON:** The -- the question is about his
5 adjustment. If his adjustment was to increase
6 their apportionment using customer's customer -
7 --

8 **THE COURT:** Uh-huh.

9 **MS. ROBINSON:** --- then it meant that they didn't
10 use customer's customer on the return as filed.

11 **THE COURT:** Can you ask him solely an objective
12 question. He -- he knows what you're talking
13 about. You all know. I don't want to know.
14 That didn't sound right.

15 **MS. ROBINSON:** I'm trying to establish that a credit
16 card processor ---

17 **THE COURT:** Uh-huh.

18 **MS. ROBINSON:** --- would have no way to know that
19 the Department's view is that it should be
20 sourcing to customer customer. That is
21 Mastercard's view.

22 **THE COURT:** If -- if you ---

23 **MS. ROBINSON:** Mr. Sharpe testified that he made a
24 customer's customer adjustment for another
25 credit card processor.



1 THE COURT: Uh-huh.

2 MS. ROBINSON: I think in his deposition he actually
3 referred to multiple ---

4 THE COURT: Uh-huh.

5 MS. ROBINSON: --- credit card processors.

6 THE COURT: If you will just ask him -- I don't want
7 to get too far afield. If you will ask him
8 about one of the taxpayers, but I can't have
9 any mention of that particular taxpayer in the
10 record.

11 MS. ROBINSON: Okay.

12 THE COURT: And so, I'm not asking you to identify
13 the taxpayer.

14 MS. ROBINSON: And I do not plan to. I actually
15 don't know who the taxpayer is.

16 THE COURT: And I'm sure you will object ---

17 MS. WOOTEN: I ---

18 THE COURT: --- if it goes too far.

19 MS. WOOTEN: Yeah. I understand -- I think we all
20 understand the question she's asking. The
21 Department just has to be mindful and careful
22 under 240 that no particulars of a taxpayer are
23 discussed in a trial in which the taxpayer is
24 not a part of. So, if -- if she can ask the
25 question and get the information without



1 touching on those, the Department doesn't have
2 an objection to the question. But, again, we
3 just have to be mindful of 12-54-240.

4 **THE COURT:** Okay. I understand. And thank you for
5 being -- being -- bringing it to my attention.

6 Q: I'm going to try to ask the question a
7 different way. Based on your familiarity with
8 all of the thousands of audits you've done,
9 some of which have involved other credit card
10 processors, would it be reasonable for a credit
11 card processor to not know in advance that the
12 Department's position for sourcing required it
13 to look through to its customer's customer?

14 A: I don't ---

15 Q: I'm not saying that the position is correct.
16 I'm just saying would it be reasonable.

17 A: I don't -- I don't think it would be
18 reasonable. I think they know their activity
19 and I think that the income activity is pro- --
20 produced through the act- -- through the
21 activity of -- of their cardholder, through
22 accessing the -- the -- making a credit card
23 purchase in South Carolina and elsewhere.

24 Q: And when you just said their cardholder, are
25 you suggesting that the cardholders are



1 Mastercard's customers?

2 A: Yes. I was, but I shouldn't. I -- I know that
3 that -- that the issuing banks are the ones who
4 issue the cards.

5 Q: So, it's your view ---

6 A: But they're Mastercard branded transactions.

7 Q: So, it's your view that credit card processors
8 should -- should know in advance that they
9 should assign receipts ---

10 A: They should know how to source their receipts
11 to South Carolina, yes, based on where the
12 income is produced.

13 Q: Okay. If you don't mind, just letting me
14 finish ---

15 A: Okay. I'm sorry.

16 Q: --- a specific question.

17 A: I thought you were through. I ---

18 Q: We're almo- -- I think this might be my last
19 question.

20 A: Oh, great. (Laughter)

21 Q: Yeah. If we get where I'm trying to go, it's
22 the last question. You know, there's
23 substantial penalties in- -- included here and
24 so, you know, I want to understand the
25 Department's -- the Department's view here.



1 And now I forgot what my question is.

2 A: I think he's referring a question to you.

3 Q: Oh, maybe he is. So, is it your view that a
4 credit card processor can read the Carolina --
5 the South Carolina statutes in DirecTV and Dish
6 and any other cases you mentioned, and know
7 with absolute certainty that it should be
8 assigning its receipts based on customer's
9 customer?

10 A: I just think it's absurd that they filed --
11 they didn't pay any tax, any source, anything
12 in South Carolina during these audit years.
13 And I think that they should know what their
14 income producing activity is in -- in South
15 Carolina and elsewhere.

16 Q: But you mentioned before that there's nothing
17 in any South Carolina statute, case law,
18 regulation or guidance that addresses use of
19 customer's customer.

20 A: No. Not that I'm aware of.

21 Q: And you still you think a taxpayer should know
22 that the Department wants them to use
23 customer's customer?

24 A: I think that if that's what produces their
25 income, they -- they have to know that that's



1 what produces their income.

2 Q: So, DirecTV ---

3 A: Our -- our section doesn't say that -- that it
4 -- the -- the income producing activity. It --
5 it's just where -- what produces the activity.
6 If the -- if the transaction initiate --
7 initiated in South Carolina is what produces
8 the income, that's what produces the income.

9 Q: So, Dish and DirecTV clearly require the
10 taxpayer to assign its receipts based on where
11 it delivered a signal to a paying customer.

12 A: Right.

13 Q: And that is a case that's out there for
14 taxpayers to read?

15 A: Yes.

16 Q: And yet you think it is more reasonable for a
17 taxpayer to disregard the delivery location as
18 defined by the Court of Appeals in DirecTV and
19 more reasonable for them to know they should
20 use customer's customer, which isn't included
21 anywhere in any South Carolina guidance?

22 A: Well, there's nothing that says that you don't
23 use that either.

24 Q: Thank you very much.

25 **MS. ROBINSON:** Thank you.



1 **THE COURT:** You're welcome. Thank you. Any re-
2 direct?

3 **MS. WOOTEN:** I do, Your Honor. And we've been going
4 for a little over an hour. Would it be
5 permissible to take a break -- to get a break
6 before we ---

7 **THE COURT:** Of course.

8 **MS. WOOTEN:** --- start back on re-direct. Thank
9 you, Your Honor.

10 **THE COURT:** Let's try to come back at 10:15.

11 **MS. WOOTEN:** Thank you.

12 **(Off the record from 10:09 a.m. until 10:23 a.m.)**

13 **COURT REPORTER:** All rise.

14 **THE COURT:** Thank you. Please be seated. All
15 right. Do we have everyone? It looks like it.
16 Yes, ma'am.

17 **MS. WOOTEN:** All right. Thank you, Your Honor.

18 **THE COURT:** Thank you all.

19 **MR. SHARPE - RE-DIRECT EXAMINATION BY MS. WOOTEN:**

20 Q: Mr. Sharpe, during your testimony yesterday, do
21 you recall discussing cross border volume fees?

22 A: Yes.

23 Q: Okay. And I believe your testimony was that it
24 was between an issuer and a merchant.

25 A: Yes.



1 Q: Is that correct? Okay. If you would, would
2 you please flip to tab 27.

3 (Joint Exhibit Number 27 was referenced at this
4 time.)

5 A: 27.

6 Q: And go to page -- Bates stamp SCDOR 000017.
7 It's page 15 of your audit work papers.

8 A: You said 107?

9 Q: 000017.

10 A: Oh, 1-7.

11 Q: 17. Page 17 of the Bates stamps numbers.

12 A: 17? Oh, okay. Yes. I'm on page 17.

13 Q: Okay. And it should be a portion of your audit
14 work papers?

15 A: Yes.

16 Q: Okay. If you would look down towards the
17 bottom half of the page, there is an indention
18 of three paragraphs and number 2 is cross
19 border volume fees. Do you see that?

20 A: Right.

21 Q: Okay. Can you read that first sentence for us?

22 A: Cross -- cross border volume fees. Cross
23 border volume fees are charged to issuers and
24 acquirers based on the dollar volume of
25 activity on cards and other devices that carry



1 out brands when a merchant country and the
2 issuer country are different.

3 Q: Thank you. As part of your work papers, Ms.
4 Robinson asked you a few questions about
5 whether Mastercard is a technology company.
6 And it was your testimony that those statements
7 came from the taxpayer's 10-K, is that correct?

8 A: Correct.

9 Q: Okay. If you would, if you'll flip to tab 23.
10 **(Joint Exhibit Number 23 was referenced at this**
11 **time.)**

12 A: Tab 23?

13 Q: Uh-huh.

14 A: Okay.

15 Q: And can you identify the document at tab 23?

16 A: A shared journey. Mastercard annual report
17 2014.

18 Q: Okay. If you will flip to page 4 of that
19 document. It's going to be labeled P0003711.

20 A: Correct. Okay.

21 Q: Can you read the first sentence under the
22 heading overview?

23 A: Mastercard is a technology company in the
24 global payments industry that connects
25 customers, financial institutions, merchants,



1 governments, and businesses wor- -- worldwide,
2 enabling them to use electronic forms of
3 payment instead of cash and checks.

4 Q: Thank you. Now, if you'll flip to tab 27. It
5 should be your audit work papers.

6 **(Joint Exhibit Number 27 was referenced at this**
7 **time.)**

8 A: Tab 27. Okay.

9 Q: If you will flip to SCDOR 000019. So, page 19.

10 A: Okay.

11 Q: Ms. Robinson asked you a few questions about
12 what the income -- what your determination of
13 the income producing activity was. And I
14 believe her questions related on whether or not
15 you included the network as part of the income
16 producing activity. Do you recall?

17 A: Do -- did I include the network as part of the
18 income producing ac- ---

19 Q: I'm just asking if you recall the questioning?

20 A: I think I do. Yes.

21 Q: Okay. And is it your testimony that -- that
22 part of the network is the income producing
23 activity in this matter?

24 A: Yes.

25 Q: Okay. And did you include that in your audit



1 report?

2 A: I don't re- -- remember.

3 Q: All right. Let's go to the first paragraph.

4 A: Okay.

5 Q: And we're going to go one, two, three, four,
6 five, six, seven, eight lines down.

7 A: Okay.

8 Q: And a few words in, it says, but 100 percent of
9 the income producing activity. If you will
10 read that -- the rest of that sentence.

11 A: But 100 percent of the income producing
12 activity occurs when a South Carolina
13 Mastercard cardholder uses a credit charge --
14 a credit/charge/debit card or other Mastercard
15 branded product to initiate processing of the
16 transact- -- processing of the transaction from
17 one of the merchants, card issuing bank,
18 merchant bank/ -- I mean, in parentheses,
19 acquirer and cardholder, over the Mastercard
20 network.

21 Q: Thank you. Ms. Robinson also asked you to read
22 excerpts of your deposition related to the
23 network. Specifically, she asked you -- do you
24 still have a copy of your transcript?

25 A: Yes.



1 Q: Okay. She read from page 24. Excuse me, 64.
2 And it was a question related to the network
3 and describing and referring to it, is that
4 correct?

5 A: Yes.

6 Q: Okay. Could you flip to page 29 of that same
7 deposition taken on October 4th, 2021?

8 A: 29. Okay. Got that.

9 Q: Are you at page 29?

10 A: Yes.

11 Q: All right. We're going to start at line 9.
12 Ms. Robinson asked you, what do you mean when
13 you say the, in quotes, network? Could you
14 read your answer to that question?

15 A: I'm talking about the Mastercard network. It
16 includes the issuer. It includes the acquirer.
17 It includes the merchants. It includes the
18 cardholder.

19 Q: Bear with me just a second. If you will -- if
20 you will refer to page 63.

21 A: Okay.

22 Q: And the question is on line 7. When a
23 cardholder swipes their card at a merchant
24 location, does Mastercard receive that
25 transaction information directly from that



1 merchant? And what is your answer?

2 A: Yeah. It's a process. It goes on the rails of
3 the Mastercard network. So, yes, the
4 transaction is not received directly from the
5 merchant, but it's part of the rails that --
6 that the transaction follows on up to the
7 Mastercard network. Yes.

8 Q: All right. If you will now flip to page 21.

9 A: All right. If you will go down to line 20.
10 The question reads, what do you mean when you
11 say that income is determined at that time or
12 -- I'm -- I apologize. Ms. Robinson asked the
13 question, what do you mean when you say that
14 income is determined at that time? And what
15 was your answer?

16 A: By the way, it wasn't Ms. Robinson.

17 Q: 21. I apologize.

18 A: It was ---

19 Q: Mr. Kerman? I apologize. Mr. Kerman was
20 asking the questions, not Ms. Robinson. Thank
21 you for that -- that correction. Mr. Kerman
22 asked you a question on Line -- beginning on
23 line 20 of page 21. Are you there?

24 A: Yes, I'm here.

25 Q: Okay. What do you mean when you say that



1 income is determined at that time? And what
2 was your answer beginning on line 22?

3 A: Well, based on the type of revenues that
4 Mastercard receives, they receive domestic
5 assessment fees, cross border volume fees, and
6 transaction processing fees. The amount of
7 those fees are determined in South Carolina and
8 el- -- elsewhere when a cardholder uses their
9 card in South Carolina or elsewhere to initiate
10 a Mastercard transaction over the Mastercard
11 credit card network.

12 Q: All right. And finally, if you will flip to
13 page 59.

14 A: 59. Okay. I'm there.

15 Q: The question reads, what do you mean --
16 beginning on line 7. What do you mean by
17 income tax producing activity? And what was
18 your response?

19 A: Income is produced. The taxpayer's income
20 producing activity is a provision of a network
21 via franchise, the acquirers and the issuers
22 who are able to operate the Mastercard credit
23 card in South Carolina and elsewhere. The
24 income produced over that network when the
25 cardholder uses his card to make a fund or



1 access funds in South Carolina.

2 Q: Okay. Thank you. I'm done with that
3 transcript. You can put that away. All right.
4 Do you have the two demonstratives with the
5 calculations on them?

6 A: The one ---

7 Q: Mastercard produced, a single page ---

8 A: Yes. I do.

9 Q: --- and then ---

10 A: And the one we produced. Yes. I have both of
11 them.

12 **MS. WOOTEN:** Okay. I spoke with counsel this
13 morning. We're going to substitute this
14 version. There were two errors in the -- the
15 packet yesterday from the Department. One, Mr.
16 Orville described on the stand. It -- there was
17 a column titled U.S. receipts and he said it
18 should've been titled everywhere receipts.

19 **THE COURT:** Uh-huh.

20 **MS. WOOTEN:** The other error was on one of the
21 example pages, the formula at the bottom had
22 the incorrect number.

23 **THE COURT:** Uh-huh.

24 **MS. WOOTEN:** I've changed that. The -- the numbers
25 in the chart are all the same. They're



1 directly tied to the documents in the audit
2 report. So, those were the two changes that I
3 made and I'm replacing this copy with that
4 copy. And I've given counsel a copy of that
5 already.

6 **THE COURT:** And that tracks?

7 **MS. ROBINSON:** She did give me a copy. I haven't
8 confirmed any numbers, but -- I -- I don't
9 doubt the numbers.

10 **MS. WOOTEN:** May I approach the witness and the
11 Bench, Your Honor?

12 **THE COURT:** Of course.

13 **MS. WOOTEN:** All right. I've denoted the new copy
14 with an R in the top corner.

15 **THE COURT:** Thank you. Uh-huh.

16 **MS. WOOTEN:** To replace the other.

17 **THE COURT:** Okay.

18 **MS. WOOTEN:** And I do not plan on asking any
19 questions on this line. We're just going to
20 talk -- we're going to talk about the last
21 page.

22 Q: If you will flip to the last page of the
23 Department's demonstrative.

24 **MS. WOOTEN:** Your Honor, can I place the document on
25 the ELMO?



1 **THE COURT:** Of course.

2 **MS. WOOTEN:** Anthony, do I need to do anything to
3 flip ---

4 **Q:** Do you recall Ms. Robinson discussing this
5 document in the other demonstrative provided by
6 Mastercard for the calculation of the income
7 tax due?

8 **A:** Yes, I do.

9 **Q:** Okay. And I believe her statement was the
10 green columns are exactly the same on this page
11 as they are on her demonstrative. Do you
12 recall that question or that statement?

13 **A:** Are you talking about the -- excluding the
14 numbers or -- or ---

15 **Q:** My understanding from Ms. Robinson's
16 questioning was that hers -- from her statement
17 was that they pulled the green columns on her
18 demonstrative straight from the green columns
19 on our demonstrative. Do you recall -- I --
20 I'm not asking you at this point to compare,
21 I'm just asking do you recall this ---

22 **A:** Yes.

23 **Q:** --- that conversation. Okay.

24 **A:** Okay.

25 **Q:** All right. Great. All right. If you will



1 look at ---

2 **THE COURT:** Just a second.

3 **(Off the record discussion.)**

4 Q: If you could look at the green column on
5 Mastercard's demonstrative, it's titled ratio.
6 Does the -- the numbers on the green column
7 titled ratio correspond to the green numbers or
8 the green box and numbers of the ratio column
9 on the Department's demonstrative?

10 A: No.

11 Q: Okay. Let's go to Mastercard's demonstrative.
12 It's S.C. income subject to tax, that column.
13 Do those numbers in that column correspond to
14 the numbers in the demo- -- Department's
15 demonstrative ---

16 **OBJECTION:**

17 **MS. ROBINSON:** Your -- Your Honor, if I may, I think
18 this line of questioning is mischaracterizing
19 my description of the document. I said the
20 green boxes were the same. Not everything
21 under the columns. So, for example, under
22 ratio, if you look at the other one, the title,
23 the green box at the top, is the same. All the
24 numbers are different, but they are not green.
25 So, I -- I think that this line of questioning



1 is mischaracterizing my description. I didn't
2 say the green columns. I said the green boxes.

3 **MS. ROBINSON:** Your Honor, I'm not intending to
4 mischaracterize counsel's statements. I just
5 want the record to be clear that the
6 information on the Department's columns is not
7 the same information that Mastercard used on
8 their columns. There's no intention that -- no
9 ill intention, I guess. I'm not trying to
10 infer that. I just want the record to be clear
11 that we're not using the same numbers.

12 **THE COURT:** I understand and -- and I'm not ---

13 **MS. ROBINSON:** Okay.

14 **THE COURT:** --- I'm not going to somehow take it
15 that you all are bickering. Ms. Wooten, I'm
16 going to allow this and then, Ms. Robinson, I'm
17 going to -- Robinson, I'm going to give you
18 some very limited cross if you need to clean
19 that up. But that's ---

20 **MS. ROBINSON:** Thank you, Your Honor.

21 **THE COURT:** That's -- of all the things that are
22 going on, this is not ---

23 **MS. WOOTEN:** And -- and I will stop at the second
24 column. I just wanted the record -- again, the
25 record to be clear that the data in those



1 columns is different. But I understand the
2 heading is the same, the data in the columns
3 are different.

4 **THE COURT:** I appreciate your attention to de- --
5 both of your attentions to detail. Please
6 continue.

7 Q: And if I could continue with that last
8 question. If you will look at the column
9 titled S.C. income subject to the tax on
10 Mastercard's demonstrative, do the numbers
11 listed in that column correspond to the same
12 heading on the Department's demonstrative?

13 A: No.

14 Q: Okay. Thank you. Ms. Robinson asked you if
15 South Carolina was a market-based sourcing
16 state and your response was no. Did you apply
17 market-based sourcing methodology in this
18 audit?

19 A: No.

20 Q: Ms. Robinson also asked you several questions
21 about how a taxpayer like Mastercard would know
22 how to source their income to South Carolina.
23 Do you recall those questions?

24 A: Yes.

25 Q: Okay. If a taxpayer like Mastercard did not



1 know how to source their income to South
2 Carolina, does the Department have a division
3 or section within their group that would answer
4 taxpayer questions?

5 A: Yes. They do.

6 Q: Who is that?

7 A: That's our policy department.

8 Q: And what would the Department's policy section
9 do if a taxpayer requested information or had
10 a question about their income tax return?

11 A: They could actually request a -- a formal
12 response to their question via a policy
13 document related issue to that particular
14 taxpayer.

15 Q: And are you aware if Mastercard ever requested
16 any guidance from the policy department at the
17 Department -- the policy department?

18 A: No.

19 **MS. WOOTEN:** That's all, Your Honor.

20 **THE COURT:** Would you like to follow up just to
21 clarify that last ---

22 **MS. ROBINSON:** Yes, please.

23 **THE COURT:** Okay. Of course.

24 **MR. SHARPE - RE-CROSS EXAMINATION BY MS. ROBINSON:**

25 Q: Just -- just a few questions and then we can --



1 we can be done. Regarding the document. And
2 you know what, I'm going to ---

3 **MS. ROBINSON:** May I put this on the ELMO?

4 **THE COURT:** Yes. Of course.

5 **THE COURT:** And Ms. Robinson, would you identify
6 only because I think I was writing when this --
7 you gave me that -- this demonstrative. Just
8 make sure to identify which one you produced
9 most recently for record.

10 **MS. ROBINSON:** Yeah. The Mastercard has produced
11 only one and that's the one that has orange on
12 it. The Department gave you a re- -- a revised
13 one, I believe it's marked with an R on the
14 front, which is the all green that is showing
15 is the Department's revised document. The
16 green and orange is Mastercard's.

17 **THE COURT:** Thank you.

18 **MS. ROBINSON:** Thank you.

19 Q: Earlier when we started looking at this -- at
20 the Mastercard version of this document, I
21 believe -- or at least I intended to indicate
22 that the green boxes were the same, although
23 now the Department has corrected the title in
24 their revised version of the third box, do you
25 recall in the Department's original version



1 what that third column top box said?

2 A: U.S. receipts.

3 Q: And is that what the third column top box of
4 the Mastercard document says?

5 A: Yes.

6 Q: But now that -- the Department has corrected
7 theirs to everywhere and the -- do the numbers
8 appear to be the same numbers? You can just
9 maybe spot check one or two.

10 A: Yes. They do.

11 Q: Okay. So, to -- to keep with the Department's
12 terminology, Mastercard's document should say
13 everywhere receipts there?

14 A: Yes.

15 Q: Okay. Do you believe these two documents
16 reflect the same formula in terms of numerator
17 over denominator equals a ratio; that ratio
18 times apportionable income equals South
19 Carolina income subject to tax, times the five
20 percent tax rate equals an income tax due?

21 A: The math -- mathematical calculations are --
22 are -- are correct, but the amounts inputted in
23 the numerator is -- is different.

24 Q: Right. These ref- -- these two documents
25 reflect two different positions, the green ---



1 A: Right.

2 Q: --- document reflects the Department's
3 position. The orange document reflects
4 Mastercard's position. Do you know, is it one
5 single figure that is different and then just
6 causes other numbers to change because of the
7 formula? In other words, is it just that the
8 numerator number, that first column that's
9 labeled South Carolina receipts. Is that
10 really the only difference in terms of data
11 input into the formulas and the rest is just
12 math?

13 A: Yes. I -- I think so. You know, the way you
14 come up with the South Carolina receipts are
15 different on the Department's version versus
16 Mastercard's version.

17 Q: But aside from a different method for the South
18 Carolina receipts, these are reflecting the
19 same computations?

20 A: The same computation, but your computation has
21 the apportionable income as adjusted, where
22 ours doesn't, right?

23 Q: In -- included as a visual, yes. So the ---

24 A: Well, okay.

25 Q: You're -- you're referring to if I count from



1 the left, one, two, three, four, five -- the
2 second yellow column ---

3 A: You've got two extra columns.

4 Q: Right.

5 A: Apportionable income as adjusted and tax rate.

6 Q: Those were the two columns when you discussed
7 the Department's document that you said those
8 numbers were used in computing the Department's
9 number, but those columns weren't shown?

10 A: Yeah. It -- I think it would show a better
11 flow of how the income tax due comes up with --
12 by including those two.

13 Q: So, which -- which one do you think shows the
14 better?

15 A: The one provided by Mastercard because you
16 included apportionable income as adjusted and
17 the -- the actual tax rate.

18 Q: Okay. And -- and to be clear, does
19 Mastercard's reflected its position that
20 delivery occurs at a MIP, and there are no MIPs
21 in South Carolina and, therefore, there would
22 be zero in the numerator? Does this reflect
23 that position or does this reflected a
24 different position in the numerator?

25 A: A different position.



1 Q: And -- and that's what's labeled here, customer
2 billing address?

3 A: Right.

4 Q: Do you happen to recall what in DirecTV the --
5 you might -- I'm sorry. I'm -- I'm supposed to
6 limit this just to the document. I will not go
7 into other -- other -- other questions.

8 **MS. ROBINSON:** I think I'd -- I'd like to propose
9 moving both into the record unless the
10 Department ---

11 **MS. WOOTEN:** I mean, no. I -- I would propose that
12 would be Respondent's 1, I believe, from the
13 Department's demonstrative.

14 **MS. ROBINSON:** I'm sorry. You are objecting to them
15 being moved in?

16 **MS. WOOTEN:** No.

17 **MS. ROBINSON:** Oh, okay. I -- I just misheard you.
18 So, how about I move mine in and then you
19 redirect to -- can we just move them both in
20 right now, one as Petitioner's Exhibit 2.

21 **THE COURT:** I don't have any problem with that.
22 What I would prefer is if the two of you can
23 agree what comes in and then if I have to -- if
24 there's some objection, I'll -- I'll entertain
25 that. I thought I actually heard Ms. Wooten



1 say she'd like hers in and I think I'm hearing
2 you're saying that you'd like yours in.

3 **MS. ROBINSON:** Yes.

4 **MS. WOOTEN:** Yes.

5 **THE COURT:** Is that ---

6 **MS. WOOTEN:** That's correct.

7 **THE COURT:** Any objection to the other?

8 **MS. WOOTEN:** No objection, Your Honor.

9 **THE COURT:** Okay.

10 **MS. ROBINSON:** No objection. I -- I believe we
11 would be marking -- and -- and I can hand a new
12 one. If you would -- __ -- we would ask that
13 the orange one be marked as Petitioner's
14 Exhibit 2, right?

15 **COURT REPORTER:** It would be Petitioner's 2.

16 **MS. ROBINSON:** It would Petitioner's Exhibit 2.

17 **THE COURT:** And Ms. Wooten, yours is?

18 **MS. WOOTEN:** Would be -- should be Respondent's
19 Exhibit 1. Can you just double check that this
20 is ---

21 **THE COURT:** Hearing no objection, I -- I will ---

22 **MS. WOOTEN:** This was my copy. I do you have a
23 copy if you need it.

24 **MS. ROBINSON:** Take -- take the one off the ELMO.

25 **MS. WOOTEN:** Yeah. Thank you. I can get it.



1 **THE COURT:** Thank you all for working this out.

2 **MS. ROBINSON:** Thank you.

3 **COURT REPORTER:** Thank you.

4 **MS. ROBINSON:** That's Number 2. Thank you.

5 (Petitioner's Exhibit Number 2 was marked for
6 identification purposes and admitted into evidence.)

7 (Respondent's Exhibit Number 1 was marked for
8 identification purposes and admitted into evidence.)

9 **THE COURT:** The exhibits are admitted as marked. I
10 guess I better say it for the record, so.

11 **COURT REPORTER:** I got it.

12 **THE COURT:** Okay. Thank you.

13 **MS. ROBINSON:** And just one last thing, I think I
14 was sort of interchangeably referring to these
15 colors as yellow and orange. I mean the same
16 thing. We don't have any further re-cross.

17 **THE COURT:** Let me commend you all for finishing
18 according to the -- what you told me. Let's go
19 off for a second.

20 **(Off the record from 10:50 a.m. until 1:01 p.m.)**

21 **COURT REPORTER:** Please rise.

22 **THE COURT:** Please be seated. Please be seated.
23 Looks like we've got everybody back. All
24 right. We're going to resume our trial. And
25 I think Department, you're ---



1 **MR. NEIL:** Yes, sir, Your Honor. Thank you. The
2 Department calls Professor Jim Hawkins to the
3 stand.

4 **THE COURT:** Professor Hawkins, please step forward.
5 How are you today?

6 **MR. HAWKINS:** Good. Thank you.

7 **COURT REPORTER:** I know this sounds simple, but it's
8 not always. J-I-M, H-A-W-K-I-N-S?

9 **MR. HAWKINS:** That's correct.

10 **COURT REPORTER:** Perfect. Raise your right hand,
11 please. Do you solemnly swear that the
12 testimony you're about to give in this matter
13 is the truth, the whole truth, and nothing but
14 the truth, so help you God?

15 **MR. HAWKINS:** Yes.

16 **COURT REPORTER:** Thank you.

17 **MR. HAWKINS - DIRECT EXAMINATION BY MR. NEIL:**

18 Q: Professor Hawkins, bear with me just one
19 second.

20 A: Sure.

21 Q: Professor Hawkins, what -- what do you do for
22 a living?

23 A: I'm a law professor.

24 Q: And where is that?

25 A: At the University of Houston Law Center.



1 Q: The Department of Revenue hired you to serve as
2 an expert witness in this dispute with
3 Mastercard, is that correct?

4 A: Yes.

5 Q: And what were you asked to do?

6 A: I was asked to help explain how the
7 transactions work and then also to form an
8 opinion about how -- about Mastercard's revenue
9 generating activities.

10 Q: In a minute, hopefully, you're going to have a
11 chance to tell the Court the opinions that
12 you've reached. But before we do that, we need
13 go through your qualifications. Okay.

14 A: Okay.

15 Q: Let's go all the way back to your undergraduate
16 training and we'll -- we'll move forward to the
17 present. Where did you go to college?

18 A: I went to Baylor University.

19 Q: And what did you study at Baylor?

20 A: I studied Philosophy.

21 Q: Did you go to law school immediately after
22 graduating from college?

23 A: No. I went and was an internal auditor at a
24 bank for a year, and then was a personal banker
25 at a bank for a year.



1 Q: Was that also in Texas?

2 A: Yes. Yes. Both of those were in Texas.

3 Q: And you went to law school where?

4 A: At the University of Texas.

5 Q: Okay. And what year did you start there?

6 A: 2003.

7 Q: And while you were in law school at the

8 University of Texas, did you write for any law

9 review -- write for the law review or any

10 journals there?

11 A: Yeah. I was the Chief Articles Editor on the

12 Texas Law Review.

13 Q: Did you publish any of your own articles while

14 you were at the University of Texas?

15 A: I published one article. Yes.

16 Q: Was that on any consumer credit issue?

17 A: It was not.

18 Q: Did you belong to any organizations that

19 touched on the relationship between the law and

20 business or the law and economics while you

21 were at Texas?

22 A: Yes. I was a Fellow at the Center for Law

23 Business and Economics.

24 Q: What does that mean?

25 A: It was a special center at the University of



1 Texas that two students a year were selected as
2 Fellows, and they then participated in a
3 workshop about law business and economics. And
4 I had the opportunity to write a paper with a
5 professor.

6 Q: So, was that a -- there was a competitive
7 selection process, I guess, for that?

8 A: There was.

9 Q: And -- and at that point, was that the
10 beginning of your sort of interest in law and
11 its relationship to business issues?

12 A: I -- I think even before that, just starting in
13 law school, I was interested in law and
14 business. But that was certainly a jumping off
15 point.

16 Q: I -- I can't remember if I asked you this. The
17 one article that you published, what was the
18 topic of that article?

19 A: It was about free speech in the early labor
20 movement. I also wrote a really bad note about
21 the confrontation clause, but thankfully, it
22 did not get published, so.

23 Q: After you graduated from law school, what did
24 you do professionally?

25 A: I clerked for the U.S. Court of Appeals for the



1 Fifth Circuit and then became an associate at
2 a major international law firm.

3 Q: Okay. And which -- which judge did you clerk
4 for?

5 A: For Jerry Smith.

6 Q: Okay. And how long did you stay in private
7 practice?

8 A: For less than a year.

9 Q: Okay. And what did you do while you were in
10 private practice?

11 A: I was a -- a litigation associate and so, it
12 was commercial litigation.

13 Q: When did you -- was -- was that less than a
14 year period, was it right after that that you
15 transitioned into academia?

16 A: That's right.

17 Q: Okay. And at which law schools have you
18 taught?

19 A: Just at the University of Houston.

20 Q: And what subjects have you taught since you've
21 been a law professor at the University of
22 Houston?

23 A: So, I've taught secured financing, which is all
24 about credit, especially with when there's
25 collateral. I've taught bankruptcy, contracts,



1 Texas consumer law. And I've taught a series
2 of seminars about consumer credit and credit
3 cards.

4 Q: Okay. Have you taught classes specifically
5 dealing with credit cards?

6 A: Yes.

7 Q: Okay. And just briefly, kind of run through
8 the subject matter of those classes dealing
9 with credit cards.

10 A: Sure. So, I have taught two seminars now that
11 deal with credit cards and we talk about you
12 know, issues that consumers face with credit
13 cards, but also networks. So, we -- I remember
14 we have a -- had a class on the history of
15 credit card networks, on the -- it's call the
16 platform effects, which is the effect of credit
17 card networks on a society. We had a class on
18 the interchange fees that credit cards -- that
19 credit card networks establish, about surcharge
20 rules that credit card networks establish,
21 about the Mastercard IPO. I'm trying to think
22 what other -- about how you define the market
23 for credit card networks.

24 Q: And you've taught that class for two semesters,
25 I think you said.



1 A: That's right.

2 Q: Okay. How about more generally? Have you
3 taught classes on consumer credit in general?

4 A: Yeah. And the other classes, it -- it comes
5 up. Like Texas consumer law. Obviously, it's
6 a -- a big issue with debt collection and where
7 people have their credit card bills that they
8 need to collect on. Secured finance, one of
9 the things that you can offer as collateral is
10 credit card receivables. So, I remember we
11 talked about that a couple of weeks ago. And
12 so, in other classes, it comes up just more
13 sporadically or periodically, I guess.

14 Q: So, I've not been a law professor. So, I'm not
15 exactly sure how to ask this question, but as
16 part of your ongoing teaching responsibilities,
17 do you keep up to date on research and -- and
18 trends and things that are going on in the
19 industries that you teach on?

20 A: I do.

21 Q: Okay. And does that include consumer credit
22 markets?

23 A: Yes.

24 Q: All right. Have you studied and researched
25 Mastercard specifically?



1 A: I have not. Un- -- unlike, like business law
2 -- or I'm sorry -- business professors who do
3 case studies on a specific company, for the
4 most part, law school professors look at
5 industries or products. And so, I haven't done
6 where I've studied one lender, I don't think in
7 any context. So, again, no I have not done a
8 specific article about Mastercard.

9 Q: You -- you talked about some of the other
10 credit topics that your course work touches.
11 Are there other areas of the credit industry
12 that you have studied besides credit cards?

13 A: Yeah. So, I've looked -- I mean, I have a
14 whole variety. There's a product called an
15 earned wage access product that I wrote a paper
16 about. I've written about pay day loans and
17 auto title loans. I've written about
18 involuntary debt, like where an employer
19 overpays an employee and then the employee is
20 in debt to their employer.

21 Q: You have been a law professor for how long?

22 A: It's 14 years, I think.

23 Q: Over that 14 years, is it -- is it fair to say
24 that you have studied credit markets,
25 specifically including credit cards, for the



1 entirety of that 14 years?

2 A: Yeah. I -- I think so. But I -- the one --
3 you know, some years, I'm more focused on
4 different credit products than just looking at
5 credit cards. And then, at other times, I've
6 been more focused on credit cards.

7 Q: What causes you to shift your focus one way or
8 the other in the -- within that industry?

9 A: Just the paper topics that -- we have a lot of
10 latitude about what we write about and so, I'm
11 interested in different topics and different
12 times or different things emerge in the market
13 that I think oh, nobody's written an article
14 about this. This would be a good thing to
15 write on.

16 Q: Why do you study the credit industry?

17 A: I -- to be honest, I just love it. I don't
18 know why. I -- I remember I told my class the
19 other day, I said, I probably know more about
20 credit cards than anyone you've ever met. And
21 I'm, like, I wish I knew more. And so, I just
22 -- I really like it. And I guess the other --
23 this is one thing and the other thing is I
24 think it really matters to people, you know,
25 the -- how the networks act, how the issuers



1 and acquirers act. All those things make a
2 difference in people's lives and so, to the
3 extent, the scholarship can make a positive
4 influence, that motivates me to want to do it.

5 Q: There are -- if I can rephrase it, there are
6 sort of practical ramifications to the academic
7 study of credit cards?

8 A: Yeah.

9 Q: Okay. So, what work product has resulted from
10 your study of credit cards in the credit
11 industry?

12 A: So, I've written five articles or book chapters
13 that relate -- that have a significant focus on
14 credit cards. I -- I just published an article
15 in the Emory Law Journal called Advertising
16 Injustices, Marketing Race and Credit in
17 America. I've published an article called the
18 Card Act on Campus in your alma mater, the
19 Washington and Lee Law Review. I published an
20 article called, Doctors as Bankers that talks
21 about credit cards in fertility markets.
22 Published a book chapter about credit cards in
23 self-pay medical markets. And then I've
24 published an article that has a big chunk
25 talking about bankruptcy -- credit cards



1 relationship to bankruptcy filings.

2 Q: Aside from your work with the University of
3 Houston and the publication that you do, do you
4 work for or through any other organizations or
5 groups that deal with credit or business or
6 economics?

7 A: I mean, I'm part of a variety of associations.
8 Like there's -- I've been on the leadership
9 board of -- a law professor group dealing with
10 credit and financial services. I can't
11 remember ---

12 Q: What's the name of that group.

13 A: I can't remember. It's -- I know it's on my
14 CV, but ---

15 Q: Hold on. Maybe I can tell you.

16 A: Okay. The American Association of Law Schools
17 Financial Services Group or something along
18 those lines.

19 Q: Is this -- is that the American Law and
20 Economics Review?

21 A: I ---

22 Q: Or is that something different?

23 A: Well, that's something different.

24 Q: Okay. Tell us about that one then.

25 A: About the American Law and Economics ---



1 Q: Review.

2 A: Yes. I've been asked to be a -- I peer
3 reviewed an article for the American Law and
4 Economics Review.

5 Q: What is the -- what is the stated purpose of
6 the American Law and Economics Review?

7 A: It's -- I don't know if this is -- well, I --
8 I understand generally, it's purpose is to
9 study how economics and law interact.

10 Q: Am I right that that's an organization that was
11 -- Professor Posner started?

12 A: It wouldn't surprise me if that was true, but
13 I'm actually not sure.

14 Q: I may have interrupted you. You -- I -- did
15 you go through all of the articles that you've
16 published on credit -- on credit cards?

17 A: Yes.

18 Q: All right. Have you published other articles
19 on just more broad -- credit more broadly,
20 consumer credit more broadly?

21 A: Yes.

22 Q: Tell me about those.

23 A: I -- so, I've published many articles, I guess,
24 over the last 14 or 15 years on those other
25 topics that we've talked about, you know,



1 payday lending, earned wage access, and other
2 markets like that. Also, published one article
3 that's particularly relevant to this litigation
4 called Consumers as Sellers in the Indiana Law
5 Journal because it talks about platforms and
6 because Mastercard is a platform that brings
7 cardholders and merchants together. And so,
8 this article ---

9 **MS. ROBINSON:** I'm sorry. Is this still part of the
10 qualifications.

11 **MR. NEIL:** I think so. Defining Mastercard as a
12 platform.

13 A: The only reason I'm giving it ---

14 **MR. NEIL:** He's describing the article that he
15 wrote.

16 **MS. ROBINSON:** Well, he described the article, but
17 does -- if the article doesn't discuss
18 Mastercard, then discussing Mastercard as a
19 platform seems to go beyond his qualifications
20 and into substance.

21 **MR. NEIL:** Okay.

22 Q: Did the article discuss Mastercard
23 specifically?

24 A: It did not discuss Mastercard specifically.

25 Q: Okay. So, let's -- let's refrain from talking



1 about what it is that Mastercard may do or not
2 do ---

3 A: Okay.

4 Q: --- at this point in -- in your testimony.
5 We're going to get there.

6 A: So, can ---

7 Q: Yeah, finish with that.

8 A: Can I explain? So, that article talks about
9 platforms that bring two sides of a market
10 together. And so, I believe that it's relevant
11 to this ---

12 Q: Okay.

13 A: --- testimony.

14 Q: Any other articles that you've published that
15 you believe are specifically related to the
16 opinions we expect you to offer in this case?

17 A: I -- I think that one and then, earlier
18 articles certainly talk about credit card
19 networks and so, like the -- one of the very
20 first articles I ever wrote about rent-to-own,
21 talks about the regressive cross subsidies that
22 credit card networks people say create. And so
23 that's certainly a network effect.

24 Q: I should have asked you this question earlier.
25 Do you currently have an active law license in



1 any state?

2 A: I do.

3 Q: Okay.

4 A: In -- in Texas.

5 Q: In Texas. And have you ever -- have you held

6 a law license in any state other than Texas?

7 A: No.

8 Q: Have you ever been subject to any discipline by

9 the Texas State Bar?

10 A: No.

11 Q: Have you been asked to provide expert witness

12 services in any other litigated matters?

13 A: Yes.

14 Q: Okay. And how many times?

15 A: Four times.

16 Q: Okay. And how many times have you actually

17 agreed to serve as an expert witness in a

18 litigated matter, all four or something else?

19 A: One time I did not. So, three times.

20 Q: One time you did not. Okay. Have you been

21 asked to testify as an expert in South Carolina

22 at any point in your career?

23 A: Yes.

24 Q: Okay. And is that case ongoing or is it over?

25 A: So, I have one case that is over that was in



1 South Carolina.

2 Q: And then this case?

3 A: Then this case and ---

4 Q: Are there other cases in South Carolina?

5 A: There's one other case ---

6 Q: Okay.

7 A: --- in South Carolina that's ongoing.

8 Q: Do -- well, what are you -- what were you asked

9 -- what opinions were you asked to offer in

10 those cases?

11 A: The case was about the -- the case that's

12 completed was about credit card mark- -- or

13 sorry -- credit markets specifically, auto

14 title lending. There's a dispute between two

15 lenders.

16 Q: And how did that case end? Was it settled or

17 did it go to trial?

18 A: It was settled.

19 Q: Okay. So, did you provide any testimony in

20 that case?

21 A: I was deposed.

22 Q: Okay. But -- but not -- you did not have to

23 testify in court.

24 A: I did not.

25 Q: Okay. You have another -- you have this matter



1 and then you have another ongoing matter in
2 South Carolina, is that right?

3 A: That's right.

4 Q: And have you testified in the ongoing matter?

5 A: No.

6 Q: Okay. What are you -- if you can tell us, I
7 don't know what the arrangement is, but if you
8 can tell us, what are you being asked to
9 testify about in -- in the ongoing case?

10 A: I've signed a confidentiality order in that
11 case, and so ...

12 Q: Fair enough. Have you ever -- has a court ever
13 refused to acknowledge your expertise or to
14 recognize you as an expert in any case?

15 A: No.

16 Q: Okay. What do you consider your area of
17 expertise as it is relevant to the Department
18 of Revenue's dispute with Mastercard?

19 A: Credit card or sorry -- consumer credit
20 markets.

21 Q: Okay. And does consumer credit markets include
22 the operation of credit card networks?

23 A: Yes. Yeah. Well, the name is credit card, so
24 that's one indication. But also in academic
25 circles, when people talk about credit markets,



1 that includes credit card networks because they
2 offer people a chance to pay and access credit
3 at the same time. And so, it's a unique sort
4 of product.

5 Q: Your CV. And I'm trying to look it up because
6 I'm not 99 percent sure I've wrote it down
7 wrong. All right. If you look in the notebook
8 number 3.

9 A: Okay.

10 Q: Your CV is Exhibit Number 36.

11 **(Joint Exhibit Number 36 was referenced at this**
12 **time.)**

13 A: Okay.

14 Q: Is that a current -- the current version of our
15 CV?

16 A: Yes.

17 Q: Is there anything that's on your current CV
18 that you believe is relevant to this case that
19 I may have missed in our discussion of your
20 qualifications?

21 A: I -- I don't -- the only thing I think that's
22 not been reflected is the many conferences and
23 workshops that I've attended over the years
24 that often involved credit card networks.

25 Q: So, those of us who are not law professors



1 sometimes go to what we call CLE, Continuing
2 Ed, seminars. Do you have that same obligation
3 as a law professor?

4 A: In Texas, we only have to do ethics. So, my
5 wife gets made every time she has to do her CLE
6 because I only have to do three hours of
7 ethics.

8 Q: But are these conferences that you're talking
9 about, they're -- they're akin to what those of
10 who aren't law professors would call CLE
11 conferences?

12 A: I think so, yeah. People present original
13 research and the ones I go to all are either
14 economics or credit related. And so, people
15 present research on their credit. Or
16 sometimes, there are roundtables like I went to
17 the U.S. Treasury, where there was a just
18 general roundtable about credit issues.

19 Q: So, that reminds me, I think one of the things
20 that you've done that maybe we haven't talked
21 on is that you have spoken at -- I probably
22 would call them symposiums. I don't know if
23 that's the technical term, but you've spoken at
24 these at various points in your career. Is
25 that true?



1 A: That's right.

2 Q: Okay. And did you talk in any of those forums
3 about either credit cards, credit card
4 industry, credit card networks or maybe
5 consumer credit, more generally?

6 A: Yes.

7 Q: Tell me about some of those that you've done
8 that you think might be relevant to our issues
9 that we're dealing with in this case.

10 A: So, several of them were related to credit
11 cards. So, the Card Act on Campus, I submitted
12 to the Conference on Empirical Legal Studies.
13 And there's a blind peer review process and so
14 I was selected for a present -- poster
15 presentation at Stanford Law School. And so,
16 I've presented that there. The paper that was
17 published with John Hopkins University Press
18 was selected by professors for a conference on
19 healthcare and economics at Harvard Law School.
20 And so -- and that certainly is -- is relevant
21 to credit cards. And there are others, but ...

22 Q: Right. Let me give you this caveat before we
23 go down this next road. You have not yet been
24 recognized by the Court as an expert, so I need
25 you to not actually give any of your opinions



1 when we go through the next couple of things
2 that we're going to talk about. But I want to
3 discuss the process that you used for -- for
4 formulation of the opinions that we believe
5 you're going to be able to give in this case.
6 You were retained by the Department and -- and
7 you were -- you -- you've already told us what
8 you were asked to do. Did anyone in the
9 Department of Revenue tell you what your
10 opinions should be?

11 A: No.

12 Q: Did anyone in the Department limit your ability
13 to research or analyze the matters that are at
14 issue in the case?

15 A: No.

16 Q: Were you provided any and all information that
17 you requested from the Department?

18 A: Yes.

19 Q: Did the Department withhold any information
20 from you to your knowledge?

21 A: No.

22 Q: Did you obtain all of the information from
23 Mastercard that was necessary for you to render
24 the opinions that you have in this case?

25 A: Yes. Through -- obviously, through the



1 discovery process.

2 Q: And did you do any of your own independent
3 research either related to Mastercard or
4 related to credit card networks more generally
5 that is reflected in the opinions you have in
6 this case?

7 A: Yes.

8 Q: Okay. And, again, did anybody limit your
9 ability to do that?

10 A: No.

11 Q: Would you consider yourself a -- a critic of
12 the consumer credit industry?

13 A: No. I don't. I think generally people would
14 think I am more on the apologist for the
15 industry side if -- although -- but I think,
16 you know, every article, you know, suggests
17 changes or points out things that could be
18 better, and so, just depends on the article, I
19 guess.

20 Q: All right. So, we may have covered this, but
21 I want -- I want to make sure it's clear. What
22 information did you rely on for the purpose of
23 formulating the opinions that you expect to
24 offer to today?

25 A: So, I relied on the things produced in the



1 litigation by Mastercard. And then I relied on
2 peer reviewed sources that I did research
3 about. I relied on Mastercard's websites and
4 then some other websites to find out
5 information that I -- yeah.

6 Q: Did you consider all of the information that
7 you reviewed to be reliable?

8 A: I -- I assumed that the things produced by
9 Mastercard and that were on Mastercard's
10 websites were reliable in terms of what
11 Mastercard is presenting about the world. And
12 peer reviewed sources, I considered -- I assume
13 they're reliable since they were reviewed by
14 peer sources. And then websites, I -- I've
15 looked at, you know, many websites over the
16 years, and so, I filtered some out. It was
17 clearly unreliable based on 15 years of knowing
18 about credit and some seemed reliable to me.

19 Q: You are aware, of course, that your -- your
20 qualifications to offer some of the testimony
21 that we expect you to offer today have been
22 questioned by Mastercard, right?

23 A: Right.

24 Q: As I understand their -- their concerns, the
25 first issue that they have raised is that you



1 are not an economist. Is that your
2 understanding of their ---

3 A: Yes.

4 Q: --- beef with -- with your testimony? Does the
5 issue of economics come up in your research on
6 credit markets?

7 A: It does.

8 Q: And -- and how?

9 A: I -- so, I would think because credit card
10 markets or credit markets involve money, almost
11 every article has some sort of economics bend
12 to it. There are some that don't that take a
13 different sociological approach or something,
14 but it's important in I would -- I would think
15 the vast majority of them.

16 Q: In your own scholarship, have you written on
17 economic issues?

18 A: I have. So, I -- I looked -- I pulled from
19 Westlaw, the 25 articles that are on Westlaw
20 and did control F and it turns out economics or
21 -- or some form of the word economics has come
22 up in almost 700 -- almost 700 times in what
23 I've written. Price has come up more than 600
24 times. Business has come up 500 times. Cost
25 has come up 1,000 times. Market has come up



1 1,300 times or something. And so, it's
2 definitely something I've spent the last 15
3 years writing about and talking about.

4 Q: Do you have any question in your own mind about
5 your competence to offer the opinions that we
6 expect you to offer in this case?

7 A: I do not.

8 Q: Okay. The second issue that's been raised in
9 opposition to your testimony as I understand it
10 is that you are not sufficiently informed about
11 credit card networks and -- and the Mastercard
12 network specifically. Is that also your
13 understanding?

14 A: Yes. I understand that's their objection.

15 Q: I -- I -- I've asked you this question in
16 another form, but I want to make sure that
17 we've -- we've got the answer clear for the
18 record. Before you were retained by the
19 Department in this case, had you studied and
20 written on credit card networks?

21 A: Yes. So, I -- starting in law school, I -- the
22 Center for Law and Business and Economics
23 workshop, talked about credit card networks.
24 The -- I did directed research with what I
25 think is generally known as the -- the



1 preeminent scholar on credit cards in the
 2 United States, Ronald Mann. And I remember
 3 from very early in my career, reading his book,
 4 Charging Ahead, that talks all about credit
 5 card networks among other articles that -- that
 6 show up in my scholarship from sort of the very
 7 start, like price list, which comes up in
 8 renting; good life, that talks about
 9 progressive cross subsidies caused by credit
 10 card networks. And so, it's been something
 11 that I've researched and thought about for the
 12 entire time.

13 Q: During the pendency of this litigation, have
 14 you continued to research credit card networks?

15 A: I have. Yeah. So, it's -- that's reflected in
 16 my teaching, those classes that I've taught and
 17 also, right now the next article that I'm going
 18 to write is about transparency in merchant
 19 services contracts where -- between the
 20 merchant and the acquirer. And so, that's
 21 obviously deeply informed by the network.

22 Q: Prior to what you were able to review in this
 23 litigation, have you read specific contracts
 24 between credit card companies like Mastercard
 25 and their issuers and acquirers?



1 A: You know, I -- I can't remember because I do
2 read a lot about credit cards. I don't think
3 I did and ---

4 Q: And why is that you don't think that you did?

5 A: Well, for -- so, for instance, that book,
6 Charging Ahead, by Ronald Mann, I remember it
7 says at the very start of the book, that credit
8 card contracts are really valuable, but they're
9 also proprietary. And I -- actually, two
10 mornings ago, I was reading a law review
11 article where they said these contracts are not
12 available to the general public. And so I
13 understand now some of the things are probably
14 available or especially if you're willing to
15 download it from a hacker or something like
16 that, you can get other contracts, but for a
17 lot of my career, I didn't think they were --
18 or I -- they weren't accessible to me.

19 Q: And just so we've got this all out on the
20 table. Are you being compensated for your work
21 in this case?

22 A: Yes.

23 Q: Okay. And what is your hourly rate?

24 A: \$450 an hour.

25 Q: Okay. Is that the usual rate that you have



1 charged to provide expert opinions and
2 testimony in litigated matters?

3 A: That's -- I've always had the same rate. Yes.

4 Q: Hang on just one second.

5 **MOTION TO ADMIT AS EXPERT:**

6 **MR. NEIL:** Your Honor, the Department moves at this
7 time that the Court recognize Professor Hawkins
8 as an expert witness in the area of consumer
9 credit markets.

10 **THE COURT:** Expert in area of consumer credit?

11 **MR. NEIL:** Markets.

12 **THE COURT:** Mastercard.

13 **MS. ROBINSON:** Your Honor, may I have the
14 opportunity to voir dire the witness?

15 **THE COURT:** Yes.

16 **MS. ROBINSON:** Thank you.

17 **MR. HAWKINS - VOIR DIRE BY MS. ROBINSON:**

18 Q: Good afternoon, Professor.

19 A: Good afternoon.

20 Q: I may jump around a little bit because I have
21 what I was planning on and then I have some new
22 stuff. But I do want to start with actually a
23 definitional item. In the last couple of
24 minutes, you were talking pretty extensively
25 about credit card networks.



1 A: Right.

2 Q: And I want to understand, are you using credit
3 card networks to mean Mastercard or to mean the
4 relationships that includes the issuer, the
5 acquirer, the cardholder, the merchant and
6 Mastercard?

7 A: I'm using it in the term -- in -- in the same
8 way Ms. Naskiewicz used it the first day of the
9 trial, which is both the technological network
10 and also the rules and human relationships that
11 ---

12 Q: So, you're ---

13 A: --- exists throughout the network.

14 Q: Okay. So you were not referring specifically
15 to Mastercard when you referred to credit card
16 network?

17 A: That's right.

18 Q: So, when you said that you've written
19 extensively on credit card networks, you were
20 not referring -- you were not indicating that
21 you have written extensively on Mastercard, but
22 rather you've written extensively with respect
23 to at least one or two of the parties within
24 that infrastructure?

25 A: No. So, I guess, I -- as Adam -- Mr. Neil,



1 asked, you know, have you written about
2 Mastercard, I said, no. Right? So, no. It's
3 not those -- I haven't written about Mastercard
4 at all. But I have studied -- I guess, I --
5 I believe ---

6 Q: Right. I -- I guess my question is he asked if
7 you had written about credit card networks and
8 I just want to know if the word network there
9 meant one of Visa, Mastercard, Discover,
10 American Express, or when you said you have
11 written a lot of about credit card networks,
12 did it mean relationships between issuers and
13 cardholders?

14 A: I may have misheard Mr. Neil. I thought he
15 asked have you researched and studied about
16 credit card networks. And so, if -- I -- that's
17 what I thought he had asked.

18 Q: Well, your answer was that you had written on
19 credit card networks. And so, I'm just trying
20 to understand if you meant that you had ---

21 A: If ---

22 Q: --- written on Mastercard.

23 A: Yeah. Sorry. If I said I have written
24 extensively on credit card network, then I
25 meant to say I have studied and researched



1 extensively about credit card networks. I'm
2 sorry. Yeah. I -- I apologize if I -- somehow
3 written came out of my mouth instead of
4 researched and studied.

5 Q: Mr. Neil asked you for a definition of consumer
6 credit markets. That what you're being offered
7 as an expert in, consumer credit markets. Can
8 -- can you just re- -- repeat or -- or renew
9 your definition of consumer credit markets?

10 A: I -- I don't remember him asking that. Maybe
11 I'm having ---

12 Q: He -- he did. You said it included the -- you
13 said, it's got credit card in the name. It
14 includes the operation of credit card markets.

15 A: Oh, I re- -- he asked do you think credit card
16 markets includes credit card networks like
17 Mastercard.

18 Q: Okay. Then he was ---

19 A: That -- and that I answered yes because credit
20 -- well, it involves credit card networks and
21 because in credit card networks, people or
22 businesses are offered both the chance to use
23 the network as payment method, and that same
24 act can be used as a way to access credit.

25 Q: Right. Are you being offered as an -- are you



1 representing yourself today as an expert on
2 consumer credit markets or on credit card
3 markets?

4 A: Consumer credit markets is what ---

5 Q: Consumer credit markets. Can -- can you give
6 us a definition on consumer credit markets?
7 What does that term mean?

8 A: Sure. So, consumer credit markets are markets
9 in which consumers access credit. And so, the
10 -- where people have the ability to access
11 credit and as I ---

12 Q: So, do -- do you understand Mastercard to
13 extend credit to cardholders?

14 A: They participate in a transaction in which ---

15 Q: But I'm sorry. I'm just asking, do you
16 understand them to extend credit?

17 **MR. NEIL:** Your Honor, I think he was answering the
18 question. I think he ought to be allowed to
19 complete his answer without being interpreted.

20 **MS. ROBINSON:** I think it's a yes or no question. I
21 ---

22 Q: Go -- go ahead. Go ahead and give -- give your
23 full answer.

24 **THE COURT:** Yeah. We'll -- let's -- let's let him.

25 A: Yeah. So, Mastercard itself does not make



1 loans. But they participate in the system in
2 which consumers access credit and businesses
3 access credit.

4 Q: Okay. I'm going to go through some of things
5 that were covered earlier. You had mentioned
6 that you worked for two different banks early
7 in your career. I believe you testified in the
8 deposition that those roles were not related to
9 those banks' credit card operations, is that
10 correct?

11 A: That's correct.

12 Q: Okay. Did I hear you right that you said you
13 have taught this credit card law and policy
14 class for two semesters?

15 A: Yeah. I guess, more exactly, I've taught for
16 one semester -- well, I guess one and a half
17 semesters. We're halfway through this
18 semester. But I just ---

19 Q: Okay.

20 A: --- meant we're in it now.

21 Q: Okay. So, when you said you have taught for
22 two semesters, you meant you have taught one
23 semester and you're currently teaching another
24 semester?

25 A: That's right.



1 Q: Do you happen to recall when you were
2 identified as an expert in this matter?

3 A: I don't recall off the top of my head. No.

4 Q: Would you -- would you believe me if I said it
5 was in 2020?

6 A: I would probably believe most of what you say,
7 so.

8 Q: When -- when was the ---

9 A: I believe it.

10 Q: When was the first time you taught that credit
11 card law and policy class?

12 A: Yeah. It was after I was -- I don't know if I
13 was -- had already been designated, but it was
14 after the time that I was working on this case.

15 Q: Okay. So, at the time that you were designated
16 as an expert here, you had not taught a class
17 that was specifically on credit card law and
18 policy?

19 A: No. I had taught consumer credit law and
20 policy, many, many times and I -- often
21 teaching that course, I thought, when you study
22 one pol- -- one product for two weeks, you kind
23 of just sort of get a very shallow glimpse of
24 it. And so, I -- I had thought we should do
25 one product for a whole semester.



1 Q: In fact, when you were deposed you said the
2 course that you've taught that is most focused
3 on credit card networks and the most relevant
4 here would be the credit card law and policy
5 one, not the consumer one, is that correct?

6 A: I think in my deposition I said writing
7 seminars about consumer credit. And so, I
8 believe it was the more general answer, but I'd
9 have to -- obviously, I don't -- we haven't
10 unsealed my deposition, yet. So, we'll have to
11 wait and do that then.

12 Q: So, how many of your articles discuss
13 Mastercard specifically?

14 A: I -- I -- none have a discussion of Mastercard
15 specifically.

16 Q: I -- you mentioned doing a word search of your
17 article and you said I think the word economics
18 appeared 700 times. I did a word search of
19 your articles, as you know ---

20 A: Right.

21 Q: --- it was the motion in limine, which I'm just
22 assuming that you've seen. The word Mastercard
23 came up -- is it correct that the word -- do
24 you have any reason to doubt that the word
25 Mastercard came up -- in 1,000 pages, so this



1 is all your articles right here. This is
2 actually double-sided. So, probably the stack
3 is twice as thick. So, very impressive amount
4 of writing. The word Mastercard appears twice
5 in all of that, both times in footnotes. Does
6 that sound about right?

7 A: I didn't -- I -- I should have done the search
8 when I did. I didn't do it, but I -- it
9 wouldn't -- I -- I trust what you're saying is
10 true.

11 Q: Did you know how many times Visa was mentioned?

12 A: I can't remember from your motion what ---

13 Q: Okay. Would you believe it's four times in text
14 -- in footnote. No. I'm sorry. In text.

15 A: I would believe that that's what y'all wrote
16 and I have no reason to doubt it.

17 Q: Would you believe that Discover was mentioned
18 one time?

19 A: I have no reason to doubt you.

20 Q: And that American Express also is -- was
21 mentioned one time? Although this one was
22 actually in the text. Not a footnote. But
23 with respect to their role as an issuer, not as
24 a processor. Does that sound right from your
25 recollection?



1 A: I have no reason to doubt what y'all have done.

2 Q: How -- how many of your articles have a
3 meaningful discussion of credit card networks
4 meaning the companies Mastercard, Visa,
5 American Express, Discover or their
6 competitors?

7 A: None directly talk about those four companies.
8 But ---

9 Q: Okay. What about your -- your presentations,
10 your CV includes a list of presentations. I'm
11 just going by the names. None of the names
12 jump out to me as dealing with any of the card
13 networks, Mastercard, Visa, American Express or
14 Discover. Does that sound right to you?

15 A: That's right.

16 Q: Did any of your government testimony relate to
17 those companies? You mentioned you testified
18 related to the Card Act.

19 A: I did not. I testified related to rent-to-own
20 and I know the underlying article that I
21 testified about included a discussion of cross
22 subsidies. And so, I can't remember if that
23 made it into the testimony before that
24 congressional subcommittee or not. And so I --
25 -



1 Q: Is ---

2 A: --- I just don't remember.

3 Q: Is that article in your CV?

4 A: It is.

5 Q: So, it would been a part of those word counts

6 where ---

7 A: Yep.

8 Q: --- Mastercard was mentioned twice throughout a

9 thousand pages?

10 A: Yep.

11 Q: Your CV lists your research and teaching

12 interests. It doesn't list credit card network

13 or credit card processing on your interests.

14 Is that right?

15 A: I think commonly. It'd be interesting to look

16 at other people who write extensively. I -- I

17 don't think I've ever seen credit card

18 processing listed as a -- an area of interest

19 for any professor that I've encountered.

20 Q: What about for a professor who walks around and

21 tells his students, quote, I probably know more

22 about credit cards than anyone you've ever met?

23 A: I -- I believe, yeah, I do not think those

24 professors would put as their teaching and

25 research interests credit card processing. I



1 don't -- I've -- it'd be interesting to know.
 2 I haven't done a search, but I would be shocked
 3 if any professor in America has that on their
 4 CV.

5 Q: So, as -- as to that comment that you mentioned
 6 earlier that you -- you said that you describe
 7 yourself as probably knowing more about credit
 8 cards than anyone you've ever met.

9 A: To my students, yes.

10 Q: To your students. So, do you think you know --
 11 when - when you say credit cards in that
 12 context, what do you mean?

13 A: There I was referring to the entire ecosystem,
 14 issuers, acquirers, the re- -- you know, how
 15 consumers interact. So, I was not talking about
 16 networks in that context.

17 Q: So, the entire -- earlier you said the way Ms.
 18 Naskiewicz defined it. So, both the technology
 19 and the relationships?

20 A: I think Ms. Naskiewicz's definition was the
 21 definition of the Mastercard network, as -- as
 22 I understood what her testimony was. So, I was
 23 using it in a broader sense, obviously than she
 24 was.

25 Q: Okay. Do -- do you think you know more about



1 credit cards in your sense than Mr. Cavallo who
2 testified yesterday?

3 A: Yes.

4 Q: Do you think you know more about credit cards
5 than Mr. Buehler, who testified yesterday?

6 A: Yes.

7 Q: And do you think you know more about credit
8 cards than Ms. Naskiewicz?

9 A: Yes.

10 Q: Okay. I'm not offering this into the -- I'm
11 just holding this up. This is your transcript
12 from the other day. These -- these green
13 stickies are everywhere that you said you
14 didn't know related to a fact that I asked you
15 about in your deposition. Do you remember when
16 you were deposed me asking you technical facts
17 about credit card processing and you answering
18 I don't know to any of them?

19 A: Yes.

20 Q: Do you have a sense of how many times you said
21 you don't know?

22 A: No.

23 Q: Was it like one or two, or more like ---

24 A: Oh, no. You asked a lot of questions like
25 about Mastercard specific systems. And I



1 couldn't remember the name of -- if Bank Net
2 was the authorization system. I said, I think
3 it's the authorization system, but I'm not
4 sure. And so, yeah. No. There were --
5 there's in -- as a credit card or a consumer
6 credit expert, I don't know every detail about
7 every player in the market. So, it doesn't
8 surprise me ---

9 Q: But you're being offer here to testify as to
10 Mastercard's operations. I think the notice of
11 disclosure specifically lists you as being
12 offered to testify as to Mastercard's
13 operations.

14 A: We could look, but I do not think it's ---

15 Q: Okay. Let's do that.

16 A: I don't think it's ---

17 **MS. ROBINSON:** Do you have the Notice of Disclosure.
18 Can you put it up on the screen? It is -- it's
19 Notice of Disclosure in tabs. They're going to
20 put it on the screen in just second. But I
21 believe it's near the end. 34. Tab 34. So,
22 we're referring here to -- this is the first
23 page of tab 34. I believe this actually
24 relates to both of the experts that the
25 Department indicated they would offer. So, we



1 have to go a few pages in. These are not Bates
2 stamped. Can you zoom in?

3 **(Joint Exhibit Number 34 was referenced at this**
4 **time.)**

5 Q: It looks like that says to me, Professor
6 Hawkins is expected to provide testimony
7 regarding the nature of Petitioner's business.

8 A: Yeah. I -- I think business is a much broader
9 term than operations. Operations relates to
10 the technical -- well, operation, right? The
11 technical, how things function ---

12 Q: Well, if it's broader, then it would include
13 operations.

14 A: Right. There's -- I mean, I -- I guess I -- I
15 also don't know where the water cooler is
16 located on the second floor of the Mastercard
17 building in purchasing. And so, I -- I
18 certainly do not know every detail.

19 Q: Right. But you just indicated that you know
20 more than Mr. Cavallo, Ms. Naskiewicz and Mr.
21 Buehler.

22 A: Yeah. You asked about generally -- I mean, I
23 -- I ---

24 Q: Oh, okay.

25 A: I would be shocked if they knew more generally



1 about credit cards than I do.

2 Q: Okay. Then let's focus on what you're offered
3 here. Do you know more about Petitioner's
4 business than the three Mastercard witnesses
5 who testified?

6 A: Yeah. I think about -- if -- if business means
7 the implication of their business, then yes.
8 If -- you know, if you mean ---

9 Q: Well, that just says business.

10 A: Right. Yeah. The nature of the business.
11 Yes. So, I've -- business is broad and nature
12 is even broader.

13 Q: It also says that you are going to be offered
14 as an -- as an expert on Petitioner's sources
15 of income. In -- in your 1026 pages, how --
16 how often do you write about a credit card
17 processor's sources of income?

18 A: I believe at least once, but it's -- yeah.
19 That's -- whatever it's worth, I think focusing
20 just on the writing is -- is a -- a weird
21 choice, but yeah.

22 Q: Well, at your -- at your deposition, we were --
23 you were asked sort of how you built your
24 expertise and you said ---

25 A: Right.



1 Q: --- research and writing is how you build your
2 expertise. So, we're focusing on your writing
3 because you indicated that that was a
4 reflection of your expertise.

5 A: But what you teach also reflects your research
6 -- I'm sorry -- teaching ---

7 Q: And at the time that you were disclosed as a --
8 as a potential expert witness here, you had not
9 taught a course dedicated to credit cards, is
10 that correct?

11 A: That's right. And so, yeah. If I was being
12 offered as an expert then, that seems relevant.
13 It seems less relevant now, but I certainly had
14 taught courses where whole classes were
15 dedicated to credit cards and to credit card
16 networks.

17 Q: Do -- do you think that your -- in terms of
18 your qualifications, is your level of knowledge
19 related to things that you expect to offer into
20 testimony if so allowed has changed between now
21 and when you were deposed?

22 A: I do think I have learned more because I've
23 studied the documents more.

24 Q: Have your opinions changed?

25 A: No.



1 Q: Does any of your writing with respect to payday
2 loans relate to Mastercard sources of income or
3 income streams?

4 A: No.

5 Q: What about the other fringe economy articles?

6 A: Do they relate to Mastercard's sources of
7 income or income streams? I don't think so.

8 Q: Oh, one last word search. Did you know the
9 word banana appears in your writing the same
10 number of times as Mastercard?

11 **OBJECTION:**

12 **MR. NEIL:** Objection, Your Honor. Relevance.

13 **MS. ROBINSON:** With -- withdrawn. Your -- Your
14 Honor, the -- Professor Hawkins defined
15 consumer credit markets to relate to lending.
16 To the extent his testimony relates to -- to
17 the extent he's being offered to provide
18 testimony related to issuer lending to
19 cardholders, we have no concerns regarding his
20 qualifications. To the extent he's being
21 offered to testify outside of how he defined
22 consumer credit markets, we do not believe that
23 his scholarship, that what he's discussed or
24 other things relate to the -- the credit card
25 processors in the credit card network, being



1 the companies like Mastercard, Visa, American
2 Express, and Discover, who he testified he has
3 not written about extensively. That's what we
4 have to examine, you know, to -- to consider
5 him. So, we -- do not object to him being
6 offered if his testimony is limited to consumer
7 credit markets as he defined it, but we would
8 object to him being offered beyond that limited
9 expertise.

10 **THE COURT:** So, you're okay with him testifying as
11 an expert in consumer disclosures ---

12 **MS. ROBINSON:** I -- I'm sorry.

13 **THE COURT:** --- or ---

14 **MS. ROBINSON:** I just didn't hear what you said.
15 Did you say consumer disclosures?

16 **THE COURT:** Excuse me. Consumer markets.

17 **MS. ROBINSON:** He -- he defined consumer credit
18 markets to mean businesses that extend credit
19 to consumers.

20 **THE COURT:** Uh-huh.

21 **MS. ROBINSON:** Within those parameters, he's written
22 quite a bit. We have no concerns. Outside of
23 those parameters, he indicated himself that
24 Mastercard has not been a significant part --
25 that he has not studied Mastercard specifically



1 prior to this. That he's written almost
 2 nothing on credit card processors. I would use
 3 the credit card net- -- word network that's
 4 been used for other -- other days, but I think
 5 the definition being used here is a little bit
 6 different. But in terms of Mastercard or a
 7 company like Mastercard, Visa, etcetera, he
 8 hasn't been -- written about them and he
 9 acknowledges that. He started teaching one
 10 course after becoming an expert here. He
 11 described it as having taught two courses and
 12 then he clarified that he taught one and is now
 13 teaching the other one. Probably not even
 14 halfway through the semester at this point.
 15 And went to writing seminars. I just -- I just
 16 don't see where the expertise is reflected in
 17 his scholarship for anything beyond consumer
 18 credit markets, meaning the lending to
 19 consumers.

20 **THE COURT:** Mr. Neil.

21 **MR. NEIL:** Sure, Your Honor. There's a lot there
 22 and with all due respect to Ms. Robinson, I
 23 think the first thing we need to address is her
 24 misrepresentation of his definition of consumer
 25 credit markets. And -- and we can read it



1 back. We can ask the court reporter to read it
 2 back if we need to. But he did not say that
 3 consumer credit markets was limited to lending.
 4 It's just -- it's just not what he said. That
 5 may be what her notes say, but it's not what
 6 came out of his mouth. So, I think that's the
 7 first issue that has to be addressed is his
 8 definition of consumer credit markets is much,
 9 much, much broader than has been characterized
 10 by Mastercard. He said it involves lending.
 11 He said it involves -- I forget exactly how he
 12 said it, but he was specifically asked did
 13 credit card companies come into that. And the
 14 answer was yes, because they are involved in
 15 the market that -- that generates consumer
 16 loans. And -- and that's true. Right? Like,
 17 that's objectively true according to this case.
 18 So, that part of the issue, I think, I -- I
 19 frankly take some umbrage in it because I just
 20 think it's -- it's just wrong. But ---

21 **MS. ROBINSON:** May I respond? Go ahead.

22 **MR. NEIL:** No. I got -- I got some more.

23 **THE COURT:** Wait a second. I -- I'm going to -- we
 24 are going to, I think, go back to the what the
 25 witness said on the issue. We'll -- we'll do



1 that after I hear, Mr. ---

2 **MR. NEIL:** Thank -- thank you, Your Honor. There --
 3 there are some -- there are a -- a variety of
 4 other things I think we need to unpack here.
 5 The first is that South Carolina law on when it
 6 is -- when an expert's testimony is relevant
 7 and admissible is very, very, very broad. The
 8 rule -- for some reason I decided to close by
 9 book. So, hang on tight just for a second
 10 while I pull it back up. But the rule about
 11 who is allowed to offer expert testimony or
 12 when expert testimony, may be a better way to
 13 say it. When expert testimony is allowed, is
 14 this, it's Rule 702. If scientific, technical,
 15 or other specialized knowledge will assist the
 16 trier of fact to understand the evidence or to
 17 determine a fact in issue, a witness qualified
 18 as an expert by knowledge, skill, experience,
 19 training, or education, may testify thereto in
 20 the form of an opinion or otherwise. So, let
 21 -- let's talk about each sort of component of
 22 this. Does Mr. -- Professor Hawkins have
 23 specialized knowledge? Yes, he does. He has
 24 been studying consumer finance topics for 15
 25 years. He has written, by their count, over a



1 thousand pages on that issue. Does that
2 include credit cards? He has testified from
3 the witness stand that it absolutely does. So,
4 he has the specialized knowledge. Will it
5 assist the trier of fact? With all due
6 respect, Judge, I think he -- you are the trier
7 of fact, and I think his testimony can assist
8 you. And there's a couple of reasons I think
9 it can assist you. First of all, we've got I
10 think something on the order of 4,500 pages of
11 exhibits. That's a lot of material. It's not
12 an easy transaction. I -- I dare say most of
13 the people that haven't set through this
14 courtroom and/or courtrooms dealing with
15 similar issues do not understand the
16 intricacies of what happens when they stick
17 their card in the slot at the Walmart. They
18 have no idea what goes on behind that. It is
19 -- it is -- it is not launching a rocket into
20 space. But it is not easy. It is -- it is a
21 complicated issue. And so, I don't mean to
22 demean the Court, but certainly I think he can
23 help you in understanding what's going on. I
24 think that Mastercard's own witnesses have
25 created the need for Professor Hawkins, to be



1 very frank. We sat through two witnesses over
2 days one and two of this trial who repeatedly
3 disclaimed the information provided in
4 Mastercard's own documents. Over and over and
5 over again. And so, the question that we've
6 got to have is -- that we've got to answer is,
7 well, who's right? Are the documents right or
8 are the witnesses right. And -- and Professor
9 Hawkins who has studied this stuff extensively,
10 I think has something to offer to the Court in
11 trying to -- to un- -- unring -- unwind that
12 knot, un- -- untie that knot of who is actually
13 right here. Which -- which -- which one of
14 these things are we going to -- are we going to
15 give more credibility to or more weight to. So
16 -- so, he certainly provides that in that he is
17 helpful to the Court to understand --
18 understand what's going on, understand what the
19 evidence is in the case.

20 The next thing we go to the in the Rule is a
21 wit- -- what -- how do you get qualified as an
22 expert. So, you can be qualified with one,
23 two, three, four, five -- five different
24 things; knowledge, skill, experience, training,
25 or education. Now, curiously enough, writing



1 is not one of those things. So, Ms. Robinson
 2 spent the vast majority of her argument talking
 3 about how Professor Hawkins has not written on
 4 Mastercard or Visa or American Express or
 5 Discover card. She didn't say anything about
 6 his experience, his training or his education.
 7 All of those things are things that he has
 8 spent a lot of time over the last 15 years, by
 9 his own testimony, dealing with. He has --
 10 he's -- he's a professor at a law school
 11 teaching these classes. Presumably, they don't
 12 let people who don't know what they're talking
 13 about teach. He's a tenured professor, by the
 14 way. I didn't ask him that question. I can
 15 ask him if I need to. But I don't think
 16 anybody is going to object. He has knowledge,
 17 skill, experience, training or education,
 18 regardless of whether he's written on it. I
 19 dare say that the vast majority of experts
 20 recognized for their expertise in South
 21 Carolina have not written to the level that he
 22 has written on any particular topic. So -- so,
 23 that's just in the Rule.

24 Then we get to the -- to the case law that
 25 deals with all this. All of this is in our --



1 the memo that we've already submitted, but I'll
 2 -- I'll hit the highlights very quickly. The
 3 Gooding case, a witness must have acquired by
 4 reason of study or experience, not writing, or
 5 both such knowledge and skill in a profession
 6 or science that he is better qualified than the
 7 jury, in this case, that's you, Your Honor, to
 8 form an opinion on the particular subject of
 9 the testimony. The O'Toole case, if the
 10 witness through his education and experience is
 11 able to draw inferences that could not be drawn
 12 by a layman, he should be qualified for the --
 13 he should be qualified as an expert. Again, I
 14 think that's particularly relevant in this
 15 case, where you're dealing with witnesses and
 16 documents that don't -- don't agree. The
 17 issue, of course, came up with respect to Dr.
 18 Harrison in the Dish case. And Mastercard
 19 spends quite a bit of a time talking about Dr.
 20 Harrison in the Dish case. Interestingly
 21 enough, Dr. Harrison was not a -- he was an
 22 economist. But at least as far as you can tell
 23 from his testimony in the case or from his CV,
 24 which we referenced in our -- in our pleadings
 25 with the Court, he has no experience on tax law



1 and he certainly has no experience on satellite
2 televisions. Professor Hawkins has more
3 experience in the credit industry, including
4 credit cards and the credit card networks, than
5 Dr. Harrison had on satellite television, at
6 least from what we can glean from the publicly
7 available information. There is nothing in
8 Dish or DirecTV that requires a witness who is
9 testifying on the tax implications of a
10 particular industry to be an economist. It's
11 just not there. Certainly, Dr. Harrison was an
12 economist. We don't dispute that. But the
13 Court doesn't say that that's necessary. The
14 Court qualified him as an expert, quite frankly
15 despite the fact that he recognized -- and
16 these are quotes from the opinion. He had --
17 that he admitted no economic publications
18 supported his testimony and that the -- the ALC
19 recognized him as an expert in the field of
20 general -- in the general field of applied
21 economics, and not in state income
22 apportionment or income producing activities.
23 Likewise, we're not offering Professor Harrison
24 as an expert in -- I'm sorry -- Professor
25 Hawkins as an expert in either of those things.



I've cited the Court to four different things that economists have been allowed to testify about in South Carolina. All of those, to use the phrase that I used in our pleading, involve number crunching. That is not what Professor Hawkins is here to do today. You do not need to be an economist to offer the testimony that he's going to offer. And you do not need to be an expert specific to Mastercard to be able to offer these opinions. And our courts again are clear, that if you have a general area of expertise, it is not necessary that you have specific expertise on a very specific topic. All of that goes to weight and not admissibility and, presumably, Ms. Robinson is going to cross examine him extensively about that stuff. And if she can convince Your Honor that he's not credible, we -- we will have to live with that. But his testimony is satisfactory or it satisfies the Rule 702 analysis. It -- it surpasses the requirements of any case law that I've been able to find in South Carolina. And we believe he should be allowed to testify.

THE COURT: Thank you. Yes, ma'am.



1 **MS. ROBINSON:** I -- I don't know if you wanted to
2 hear that -- how he defined consumer credit
3 markets earlier. I'm happy to read to you how
4 he defined in his deposition transcript.

5 **THE COURT:** Let -- let's hear. Madam Court
6 Reporter, do you have that piece of testimony
7 available now to read?

8 **COURT REPORTER:** I can go back and find it. It'll
9 take a little while because we've been going a
10 little bit.

11 **THE COURT:** Okay.

12 **COURT REPORTER:** So, I'm specifically looking of how
13 he defined consumer credit markets.

14 **THE COURT:** Is that ---

15 **MR. NEIL:** I think that is the term, Judge. I -- to
16 be honest, I wasn't taking notes that ---

17 **MS. ROBINSON:** Isn't that what you're offering him
18 as an expert in.

19 **MR. NEIL:** But that's certainly what his area of
20 expertise -- that's how he has defined his area
21 of expertise.

22 **THE COURT:** Do either of you object just to my
23 asking what he -- how he defines consumer
24 credit markets. He's being offered as an
25 expert in what?



1 **MR. NEIL:** He has been offered as an expert in
2 consumer credit markets.

3 **THE COURT:** Okay. Do either of you object to my
4 simply asking him what consumer credit markets
5 is?

6 **MR. NEIL:** No objection.

7 **MS. ROBINSON:** I mean, if -- if it's in the
8 transcript from how he defined it before, I'd
9 be happy to hear that because now he's heard
10 all of our concerns about the -- you know what,
11 we've got his deposition definition, so please
12 proceed.

13 **THE COURT:** Why -- why don't we do this, I -- I
14 think it better if we can find that testimony
15 if that's -- we can do this after she finishes
16 her argument and before I rule. Okay. Yes,
17 ma'am.

18 **MS. ROBINSON:** If -- if a -- okay. In his
19 deposition he defined the term as -- I'm sorry.
20 Should I get -- does anyone object to me just
21 reading from the deposition transcript right
22 now? I can certainly ask to continue to voir
23 dire him, hand it to him and ---

24 **MR. NEIL:** I -- I think at this point, Judge, we're
25 arguing the law. I -- not questioning



1 Professor Hawkins. So, I don't have any
2 objection to her reading it. It is -- it is
3 what it is.

4 **THE COURT:** I -- I want her to have her full
5 opportunity to continue to object.

6 **MR. NEIL:** Right.

7 **THE COURT:** And so, please.

8 **MS. ROBINSON:** At -- at the deposition taken on
9 January 7th, 2022, transcript was reviewed,
10 signed, etcetera. Question, what areas do you
11 consider yourself to be an expert in that are
12 relevant to these proceedings? Answer, I'm an
13 expert in consumer credit markets. Question,
14 and what does that mean? Answer, that means
15 markets where businesses extend credit or do
16 something like extend credit to people.
17 Question, are there any other areas of
18 expertise that you consider yourself an expert
19 in that are relevant to this proceeding? I
20 think that's such a broad term that it probably
21 encompasses other smaller items, like secured
22 financing and contracts, consumer contracts,
23 and consumer protection. But I think those are
24 all fairly captured in consumer credit markets.
25 Then he was asked how he developed that



1 expertise and the conversation goes on. His
 2 initial definition of consumer credit markets
 3 was businesses that extend credit or do
 4 something like extend credit. The thir- -- one
 5 of our designations, the 30(b)(6) witness
 6 testimony confirms the Department's view that
 7 Mastercard does not extend credit to
 8 cardholders. Several people have testified as
 9 to that. So, to the extent that his area of
 10 expertise is the extension of credit to people,
 11 so be it. We don't object to him testifying as
 12 to that issue. But that's not what Mastercard
 13 does. And that's already in the record and I
 14 don't believe there's been any dispute as to
 15 whether or not Mastercard extends credit. The
 16 other things he mentioned as smaller terms,
 17 secured financing, I don't think anybody would
 18 assert that Mastercard is involved in secured
 19 financing. Contracts, consumer contracts.
 20 Again, Mastercard does not contract with
 21 cardholders. That's been stated by, I think,
 22 every -- almost every witness. Or consumer
 23 protection. I don't see where the -- the
 24 business of Mastercard as he's described it,
 25 the income streams of Mastercard or where



1 Mastercard earns revenue falls within any of
2 the items that Professor Hawkins identified at
3 his deposition on January 7th.

4 There were a few other points that -- that
5 Mr. Neil made. He said I didn't discuss -- I
6 didn't specifically address Mr. Hawkins'
7 education. Nothing in his education
8 specifically addressed our issues here. He
9 indicated that he has not extensively studied
10 Mastercard, and that most of his information
11 has -- has come later. I suspect that if he's
12 allowed to testify, he will testify as to the
13 contractual relationships that Mastercard is
14 engaged in. He did not read those contracts or
15 was not aware of them. He testified to that.
16 But as we heard the other day, the contract is
17 the three-page document that then references
18 hundreds of other pages, the rules. Those
19 documents are available publicly. You can
20 Google them. So, this information has been out
21 there. The three-page contract, proprietary.
22 All of the other stuff, on the internet. And
23 Mr. Hawkins testified -- I believe he confirmed
24 today, testified at his deposition that he had
25 not read any of that for Mastercard. At his



1 deposition, he also indicated that he hadn't
2 read the rules for the other processors, as
3 well. We absolutely concede he is an expert
4 with respect to what he identified himself as,
5 businesses that extend credit to people, his
6 words. Beyond that, he didn't describe himself
7 as an expert in it. We have not seen it in his
8 writing. Those are the tangible things that we
9 can use to access his expertise. Mastercard
10 appears twice in 1026 pages of writing. Yet,
11 he's here testifying, claiming that he has a
12 better understanding of Mastercard's business
13 than the folks you heard from.

14 In his deposition, he said I don't know, all
15 these green times. I'm happy to read them or
16 offer his transcript.

17 **THE COURT:** You don't have to.

18 **MS. ROBINSON:** Again, we have no problem with him
19 testifying to what he described himself as an
20 expert. We have a problem beyond that.

21 **THE COURT:** I understand.

22 **MS. ROBINSON:** And our -- and our -- our objection
23 stands beyond that.

24 **THE COURT:** I understand. Madam Court Reporter, I
25 know it may take you a few minutes or so. But



1 to the extent you can find out, just read me
2 whatever the witness has said earlier about, he
3 was tendered as an expert in consumer credit
4 markets.

5 **COURT REPORTER:** Can we go off the record while I do
6 this?

7 **THE COURT:** Yes.

8 **COURT REPORTER:** Thank you.

9 **THE COURT:** If everybody would just be at ease or
10 if you need to go out into the hall, that's
11 fine. This should not take long.

12 **(Off the Record)**

13 **THE COURT:** All right. As I understand it,
14 Professor has been offered as an expert in
15 consumer credit markets, and we at least agree
16 on that.

17 **MS. ROBINSON:** Yes, Your Honor.

18 **MR. NEIL:** Yes, sir.

19 **THE COURT:** I've heard both of your objections and I
20 understand all of the objections. And I am not
21 as -- not as willing to say that South Carolina
22 law is as loose as Mr. Neil's characterization,
23 although I understand his point. What does
24 save this issue in terms of the Department's
25 case is that I am hearing the case as opposed



1 to twelve people. Not that you should have all
2 the confidence in the world in me, but what
3 will happen is that by the time I get through
4 -- and believe it or not, I do read these
5 transcripts -- will sort through anything that
6 is not -- and -- and I fur- -- will sort
7 through ev- -- anything that is not well-
8 founded. And I can tell -- and the
9 Department's lawyers know this, I pay great
10 attention to cross examination. So, I have
11 complete confidence that you will draw out any
12 inconsistencies, as well. So, with that, thank
13 you for kind of looking for the issue for me.
14 I'm going to allow the witness, but I do want
15 to hear and I also understand this may throw us
16 into tomorrow, I want you to have lots of time
17 and take the time necessary to try your
18 respective cases.

19 **MS. ROBINSON:** So, Your Honor, do you mind just --
20 it sounds to me like you're allowing him --
21 that you are qualifying him as expert. Could
22 -- just so it's clear, could you -- do you mind
23 stating what you are allowing him as an expert
24 in?

25 **THE COURT:** Yes. I think he was tendered as an



1 expert in -- and -- and Mr. Neil, please
2 correct me if I'm wrong, he's been tendered as
3 an expert in consumer credit markets. Is that
4 how you offered him?

5 **MR. NEIL:** Yes, sir.

6 **THE COURT:** So, I am qualifying him as an expert in
7 consumer credit markets. And, of course, as
8 you are pointing out, that means he can't go
9 beyond that. But I have full confidence if he
10 does, you will let me know.

11 **MS. ROBINSON:** Do you have an understanding of a
12 def- -- is there a definition we can work with
13 on that term or if I think he's going be- --
14 beyond it, I'll object and we'll deal with the
15 definition at that time?

16 **THE COURT:** I think you're going to have to do that.
17 Yes.

18 **RENEWED MOTION TO LIMIT TOPICS:**

19 **MS. ROBINSON:** All right. That -- that's fair. So,
20 just -- well, we just covered a lot of
21 material. I think techni- -- technically that
22 was all just related to the qualification. I
23 -- I would like to renew the Department's
24 motion in limine to limit him -- I'm sorry.
25 Did I say the Department's motion? I'm sorry.



1 I would like to renew Mastercard's motion in
2 limine to limit the topics to the areas with
3 being his expertise, which I think we have
4 addressed both in some of the discussion today,
5 as well as our briefs. I am doing that to
6 preserve it for the record. I am fine resting
7 on the submissions that were made as part of
8 the motion in limine and the discussion
9 earlier. Although if you would like to hear
10 argument on that issue, I'm happy to do it.

11 **THE COURT:** No need for additional argument. I
12 certainly understand your objection on that.

13 **MS. ROBINSON:** Thank you, Your Honor.

14 **THE COURT:** And -- and did I answer the question you
15 just asked?

16 **MS. ROBINSON:** I believe so. I just wanted to
17 preserve for the record or, you know, make it
18 clear in the record that we maintain -- that we
19 are renewing our motion in limine.

20 **THE COURT:** I understand that.

21 **MS. ROBINSON:** Which I do believe you responded to.

22 **THE COURT:** And of course, yes, we'll do that.

23 **MS. ROBINSON:** Thank you.

24 **THE COURT:** Thank you all. Thank you all.

25 **MR. NEIL:** Thank you, Your Honor.



1 MR. HAWKINS - DIRECT EXAMINATION CONTINUED BY MR.

2 NEIL:

3 Q: Professor Hawkins, I think at this point based
4 on what's just happened over the last hour and
5 a half, perhaps a good way to start with this
6 is for you to tell us the topics that you
7 believe fall within your area of expertise in
8 consumer credit markets, for which Judge
9 Kimpson has just authorized you to testify as
10 an expert in. Would you do that for us,
11 please?

12 A: Sure. As Ms. Robinson read from the
13 deposition, it's a broad term that includes the
14 most -- or that includes businesses lending to
15 people and related activities. And so, one
16 related activity, of course, is operation of
17 payment networks that facilitate businesses
18 lending to people.

19 Q: Okay. And -- and let's drill down on that just
20 a little bit. The -- in a -- this is a -- I
21 think somebody's testified to this already
22 perhaps, Ms. Naskiewicz, this is a four-party
23 system, is that right? Is that what it's
24 called?

25 A: Yes. It's got four-parties involved.



1 Q: And the four parties are the consumer
2 cardholder, the merchant, the issuer bank,
3 which is the bank that issues the card to the
4 cardholder, and the acquirer bank, which is the
5 bank that -- I don't know exactly how we
6 characterize it, but that processes credit card
7 payments for the merchant. Is that basically
8 correct?

9 A: Right.

10 Q: Okay. So, in that -- in that four-party
11 system, who is the borrower?

12 A: The borrower is -- well, I -- in a technical
13 legal sense, there's probably more than one
14 borrower. But what we mean colloquially is the
15 cardholder is the person who borrows. But
16 technically, obviously when -- when the -- if
17 the acquirer gives, you know -- or when the
18 merchant gives away goods and hasn't been paid,
19 they're expecting payment from the acquirer,
20 the mer- -- the issuer has promised the network
21 it would pay the network, the network is going
22 to pay the acquirer. And so there's borrowing
23 going in -- involved in those relationships for
24 sure. But what -- what we think about is the
25 cardholder is the one who is borrowing money.



1 Q: Okay. And who is the lender -- if -- if we --
2 understanding that there are other sort of
3 borrowers in the technical sense, when we're
4 talking about the -- the cardholder as the
5 borrower, who is the lender?

6 A: The issuer.

7 Q: Okay. And who is facilitating that -- who is
8 the facilitator of that -- of that transaction
9 of lending money from the issuer to the
10 cardholder?

11 A: Well, the network because the cardholder buys
12 it at a merchant and that's when the debt
13 obligation begins.

14 Q: And -- and in this dispute that we're talking
15 about here this week, who is the network?

16 A: Mastercard.

17 Q: Okay. So, what happens if I am a really
18 conscientious cardholder and I pay my credit
19 card off at the end of every month; I -- I
20 don't carry a balance, is that person still a
21 borrower?

22 A: They are.

23 Q: Tell -- tell us why that person is a borrower.

24 A: Because there's a time in between which they
25 get the goods and services, where they haven't



1 paid for it. So, they owe money. They're
2 borrowing money. They don't ever pay interest.
3 Like, that's how most of us or a lot of people
4 avoid paying interest on credit cards because
5 we pay it off at the end of the month. But we
6 owed it before then.

7 Q: So, if I can summarize, your definition of
8 consumer credit markets includes the -- the --
9 a credit card transaction because there is a
10 borrower, and a lender, and an entity that
11 facilitates that loan transaction?

12 A: That's right.

13 Q: And that happens ever time there is a credit
14 card transaction.

15 A: That's right.

16 Q: And specifically, is that the -- is that the --
17 the transaction that Mastercard is facilitating
18 on its network?

19 A: Yes.

20 Q: All right. Have you reached any opinions in
21 this matter?

22 A: I have.

23 Q: And let's just start with you telling the Court
24 what those opinions are.

25 A: Sure. So ---



1 Q: How many of them are there, first of all?

2 A: There's three opinions.

3 Q: Okay.

4 A: First two are related. The first one is that
 5 Mastercard generates revenue by providing a
 6 network for cardholders and merchants to
 7 transact and they provide that network by
 8 licensing logos, advertising to merchants and
 9 cardholders, by creating and enforcing rules
 10 that everyone -- that people in the system have
 11 to obey, and by transmitting information and
 12 funds to -- between parties. So, that's the
 13 first opinion. The second one is that
 14 Mastercard has solved the problem of multiple
 15 parties being in this market by creating that
 16 network. And so, they solved the problem of
 17 what's called a two-sided market by creating a
 18 network. And then the final opinion is that
 19 Mastercard generates revenue because a
 20 cardholder uses a card at a merchant.

21 Q: All right. And for each of those opinions, how
 22 do they relate specifically to the State of
 23 South Carolina?

24 A: Because that network that facilitates the
 25 transaction is in South Carolina.



1 Q: Okay. And how do we know that the network is
2 in South Carolina?

3 A: Because -- well, for one thing, there are
4 Mastercard logos everywhere that tell us that
5 its -- this is where -- and really, there's --
6 it's the place the transaction goes down. It's
7 the geographical location where the cardholder
8 and the merchant, for the ones we care about in
9 this case, occurs.

10 Q: Right. One -- one last issue before I get you
11 to offer us some explanation for the basis for
12 your opinions. An issue that has arisen as a
13 result of -- of the motions that we were just
14 discussing is your knowledge of Mastercard and
15 its contractual relationships and its rules and
16 -- and systems. You were retained, I think in
17 this case, in 2000- -- in 2020, right?

18 A: I think so.

19 Q: Okay. And it's now 2022.

20 A: Right.

21 Q: So, in the year and a half to two years since
22 you were retained by the Department as an
23 expert in this case, did you obtain additional
24 information on Mastercard and its business
25 model?



1 A: I did.

2 Q: And did that include reviewing Mastercard's
3 contracts with issuer and acquirer banks?

4 A: It did.

5 Q: And did it include review of the GCMS manual
6 and the authorization manual?

7 A: It did.

8 Q: And did it include review of the Mastercard
9 rules?

10 A: Yes.

11 Q: Did it include a review of the licensing
12 agreement that Mastercard has for its -- its
13 logos and marks?

14 A: Yes.

15 Q: Is there anything else about Mastercard that
16 you have been able to review in the last year
17 and a half to two years since you've been
18 retained in this case that bears on the
19 opinions that you have in this case?

20 A: I guess I've also looked at peer reviewed
21 literature that discusses credit card networks
22 and some of that discussion, at least, involves
23 Mastercard. I looked at the -- a lot of that
24 discussion involves. I also looked at
25 Mastercard's website and the commentary on



1 Mastercard.

2 Q: Let's -- let's start a little earlier. How did
3 credit card networks like Mastercard develop in
4 the United States?

5 A: It's -- so, it's -- it's hard for us to
6 imagine, because we just go to the store and
7 pay. But it's really pretty remarkable that
8 that works. Right? That I, a guy from Texas,
9 can go by a hundred dollar sweater at a store
10 in South Carolina. It's -- it's remarkable
11 that could happen because they don't know me.
12 Right? So, there's no reason for them to trust
13 me. Me giving them a plastic card with numbers
14 on it, isn't a reason for them to trust me.
15 And so, it's -- in -- in one sense, it's really
16 a remarkable thing Mastercard has done. And it
17 started -- I just like this story. Bank of
18 America in 1950 wanted to offer a credit card
19 just in Fresno, California. So, they got 300
20 merchants and they just mailed six- -- 60,000
21 cards out. Not card applications. Not to
22 people who applied. They just literally mailed
23 active cards out and they began having one bank
24 offer a credit card. And obviously it starts
25 before that. There's earlier iterations of



1 credit cards. But that was one sort of
2 watershed moment. And then, individual banks
3 throughout the United States were offering
4 them. So, they started joining together.
5 Because one problem is that they didn't want
6 just a mast- -- just a credit card that would
7 work in one city. You want to be able to go
8 across the country. So, you had to get a lot
9 of merchants and a lot of cardholders on board
10 for it to be a very valuable product. And the
11 way banks were able to do that is they joined
12 together, like the Inner Bank, which eventually
13 became Mastercard. They joined together and
14 they said, we're going to compete for
15 merchants' business. We're going to compete
16 for different cardholders' business. But we'll
17 agree to the same set of rules. And if
18 everyone in the whole system follows this same
19 set of rules, we'll know that it's okay that
20 somebody has a bank -- a credit card issued
21 from somewhere else and is using it here in
22 South Carolina. And so, they -- it's really
23 remarkable. That set of rules sort of allowed
24 the cooperation. Because when I go to the --
25 the store here in Columbia, they don't trust



1 me. Right? They have no idea who I am. But
 2 they'll take my card because they trust that
 3 the logo on it means Mastercard or whoever my
 4 card is with will pay the bill for them. It's
 5 a guarantee. And I can trust, right? I don't
 6 just give them access to my account. I can
 7 trust that they're not going to do a bunch of
 8 fraudulent charges because the network will
 9 protect me. So, that set of rules was really
 10 important in the development. The other key
 11 developmental piece was the development of the
 12 technological infrastructure where in the 70s
 13 cards got faster to use because Visa and
 14 Mastercard invested a bunch in developing
 15 computer systems to make things go quickly.

16 Q: Earlier, you referred to as Mastercard solving
 17 a problem in the market. I think you called it
 18 the problem of a two-sided network. Is that --
 19 is that what you called it?

20 A: Right.

21 Q: Tell -- tell us what that problem is and then
 22 how the Mastercard network solved it.

23 A: Yeah. Well, it's just -- part of it is just
 24 the basic problem of trust. You have different
 25 people and you have to figure out how to get



1 the cardholder and the merchant together. The
 2 other problem is getting enough people on board
 3 because you don't -- you don't -- you know, you
 4 don't want a Mastercard or a -- you don't want
 5 a credit card if there's one store in
 6 Greenville that will take it. You got to have
 7 a ton of stores and so, there's sort of --
 8 economists describe it as like a chicken and
 9 egg problem. You don't -- people don't want to
 10 join the market if no one else is there. But
 11 every time someone comes in, it makes the
 12 market more valuable, the network more
 13 valuable. And so, they're called network
 14 externalities.

15 Q: What is the most ---

16 **OBJECTION:**

17 **MS. ROBINSON:** I'm -- I'm sorry, Your Honor. I'm --
 18 I'm going to object that this seems to be going
 19 beyond the scope of consumer credit markets.
 20 He's speaking about network externalities,
 21 which is an economics term and concept.

22 **THE COURT:** Mr. Neil, any response and then as you -
 23 - if to the extent you have a response, as I
 24 understand it, he's giving background. How
 25 much more is background ---



1 **MR. NEIL:** Very, very little. Maybe -- maybe one
2 more question. But I -- I think what he is
3 testifying to is how consumer credit card
4 markets developed.

5 **THE COURT:** Uh-huh.

6 **MR. NEIL:** That's inherent -- at least in my
7 estimation, that's inherent to the topic that
8 he has been authorized to testify about. But
9 it is -- I'm basically done with the background
10 information for what that's worth.

11 **THE COURT:** I'm going to give him this opportunity
12 for this last question. So, to that extent,
13 your objection is overruled. And, Mr. Neil, I
14 -- I suspect that Ms. Robinson is going to hold
15 you to that. Or I'm going to hold you to it.
16 She's going to hold ---

17 **MR. NEIL:** Fair enough.

18 **THE COURT:** --- my attention.

19 Q: Professor Hawkins, what is the most important
20 role that Mastercard plays in the cardholder
21 merchant transaction?

22 A: I really believe those rules creating a network
23 with rules that everyone's going to follow is
24 what peer reviewed literature in this area says
25 is the most important function of that network



1 -- that credit card networks provide.

2 Q: Thank you. I want to ask you some background
3 questions and we have a PowerPoint that's a
4 demonstrative.

5 MR. NEIL: Your Honor, if I may approach, I'd be ---

6 THE COURT: Of course.

7 MR. NEIL: --- happy to hand that up.

8 THE COURT: Thank you.

9 MR. NEIL: You're very welcome.

10 Q: I want to go through with you just quickly how
11 that PowerPoint came to be and then we'll talk
12 about the specifics of it.

13 OBJECTION:

14 MS. ROBINSON: Your Honor, I'm -- I'm sorry. We
15 want to lodge an objection to this
16 demonstrative.

17 THE COURT: Uh-huh.

18 MS. ROBINSON: This was provided to us right as Mr.
19 Hawkins was taking the stand. So, we haven't
20 had much of an opportunity to review it. It's
21 26 pages long. But to -- to us, it -- it does
22 not appear to be limited just to diagrams that
23 visualize testimony. Rather it appears to
24 provide testimony or a guide to testimony. It's
25 -- it's essentially a set of answers. I -- I



1 mean, we don't know exactly how it's going to
2 be used. But it appears to include a
3 tremendous amount of narrative information.
4 Not so much the first page or two, but as we
5 continue, it's -- it -- it appears to be
6 filled, as well, with factual
7 mischaracterizations. Of course, I can address
8 those on cross. But, you know, we -- we
9 believe it's a prejudicial document because of
10 the amount of testimony contained in the
11 document. We -- we don't know the source of
12 this document other than it was handed to us,
13 but we are concerned about it.

14 **THE COURT:** I understand.

15 **MR. NEIL:** We're about to go through the source.
16 I'm sorry. I didn't meant to interrupt you.

17 **MS. ROBINSON:** But if -- if he's the expert that he
18 -- he claims to be, I'm not sure that he needs
19 all these notes in front of him to testify.

20 **THE COURT:** Well, I -- I'm inclined to allow him,
21 but I also don't believe in surprises either.
22 Mr. Neil, is it -- is there anything we can go
23 on to so that at our next break, Ms. Robinson
24 and her team can look at this?

25 **MR. NEIL:** Judge, I don't know that there is. The -



1 - the point of the -- of this demonstrative is
2 to pull out -- and -- and I'll represent to the
3 Court that every -- certainly, there is some
4 text in here. I -- I don't dispute that. But
5 every document that's in here is a document
6 that is in the record that Professor Hawkins
7 has used to -- to formulate his opinions and to
8 back them up as it relates to what Mastercard
9 is doing and how it's doing it and what the
10 practical effect of that is. So, this is -- I
11 don't believe that this is a surprise because
12 we're not producing anything new. It's all
13 stuff that's already in the record. It -- it
14 is stuff that was handed to them right now, but
15 if you recall this morning, they handed Ms.
16 Wooten a -- a demonstrative exhibit that they
17 prepared overnight right before Mr. Sharpe
18 retook the witness stand this morning. Ms.
19 Wooten provided them with the demonstrative
20 that she used in Mr. Sharpe's testimony right
21 before he took the stand. We got the
22 demonstrative for Ms. Naskiewicz's testimony,
23 right before she took the stand. So, I -- if
24 -- in a perfect world, would we have finished
25 this before last night and provided it to them



1 in advance? Sure. We -- we probably would
 2 have. But I -- I think providing it to them
 3 now is consistent with the way demonstratives
 4 have been treated. But I'm happy to take a
 5 short break and let them look through it. But
 6 I -- but I certainly will represent to the
 7 Court that all of the documents in here are
 8 documents that are in the record.

9 **MS. ROBINSON:** May I respond, Your Honor?

10 **THE COURT:** Of course.

11 **MS. ROBINSON:** In -- in terms of all the prior
 12 demonstratives, all of the prior demonstratives
 13 were either extracts from documents that have
 14 been in the record, in both parties' possession
 15 or the two -- what -- what got entered today as
 16 Petitioner's 1 -- Petitioner's 2/Respondent's
 17 1, are summaries of information already in the
 18 record. To the extent that this document is --
 19 has screenshots of documents in the record,
 20 those documents can be shown. That's not a
 21 problem. The problem is the full page of text
 22 that is testimony next to it. If -- if Mr. --
 23 if -- if Professor Hawkins is an expert, he
 24 shouldn't need this to guide his discussion.
 25 You know, I -- I think that the indepen- -- the



1 -- the diagrams themselves, they can go up.
 2 They can go up on the ELMO with the te- -- the
 3 -- the new text portions covered. The
 4 documents can go in the record. The -- you
 5 know, the -- the documents are in the record.
 6 They -- they can go up. I mean, I -- I'm
 7 looking at multiple full pages of new te- -- of
 8 text that, you know, I don't know the source.
 9 We -- we have had -- you know, while the
 10 language was being sought, you know, we have
 11 started to glance through it. We don't think
 12 some of the -- the information in here is
 13 correct. As I said, we can deal with that on
 14 cross. But I think it's more appropriate to
 15 come in as oral testimony ra- -- rather than,
 16 you know, the -- with talking points.

17 **THE COURT:** And is there anything more you want to
 18 say, Mr. Neil?

19 **MR. NEIL:** I -- I do, Your Honor. But I think the -
 20 - the cliché is what's good for the goose is
 21 good for the gander. And I have looked at and
 22 listened to Mastercard witnesses read off of
 23 pages that looked like this for the better part
 24 of three days. That's what they did. They
 25 read. What's the difference in this one?



1 Well, it's got a -- a bright red star around it
2 that says South Carolina. I've changed that
3 from New Jersey. That's what every witness
4 that they've had has done. And -- and so, I
5 don't think it's fair to say that this is some
6 prompt that is -- that is different than the
7 prompts that Mastercard has used with every
8 witness that they've put up.

9 **THE COURT:** I understand.

10 **MS. ROBINSON:** Your Honor, none of our witnesses
11 were reading off of those diagrams. And that
12 page has been in the Department's possession
13 for months.

14 **THE COURT:** And I ---

15 **MS. ROBINSON:** There's no surprise.

16 **THE COURT:** I understand. And -- and look, what has
17 occurred before on single sheets of paper or
18 one or two sheets, I'm going to allow use of
19 this document as a demonstrative.

20 **MR. NEIL:** Thank you, Your Honor.

21 **THE COURT:** I don't see any need -- and -- and well,
22 I'll --- but I'll listen to anything about
23 putting it into evidence itself. But
24 certainly, you can use it as a demonstrative at
25 this point. And Ms. Robinson, I am very



1 confident -- I realize it's a long document.
2 But I'm very confident that you can bring out
3 any inconsistencies on cross examination.

4 **MS. ROBINSON:** Thank you, Your Honor.

5 **THE COURT:** Yes, sir.

6 **MR. NEIL:** Thank you.

7 **THE COURT:** Please proceed.

8 **MR. NEIL:** Thank you, Your Honor.

9 Q: Professor Hawkins, we have a demonstrative
10 PowerPoint that's going to explain some of the
11 basis for your opinions in this case, is that
12 correct?

13 A: That's correct.

14 Q: And did you provide all of the information to
15 the Department about the documents and
16 materials that support your opinions in this
17 case?

18 A: I did.

19 Q: Specifically, what information did you give to
20 the Department for pur- -- pur- -- for purposes
21 of preparing this demonstrative exhibit?

22 A: I gave them the things, like the statements
23 that supported my opinions and then the Bates
24 labels or material that supported my opinions.

25 **MR. NEIL:** And -- and I may have misspoken. I want



1 to apologize to the Court. It's -- it's my
2 understanding that there may actually be one
3 thing in here that was not previously produced
4 in that -- in this case.

5 Q: Is that -- did you pull some stuff off the
6 Mastercard website?

7 A: Yes. Yeah. I think there are two like
8 screenshots from a Mastercard website. There's
9 one quote from an academic article that's
10 publicly available and I -- that's -- that's
11 all that I know of that's not a document
12 produced in this litigation.

13 Q: All right. And is it your understanding that
14 this PowerPoint was prepared using the
15 information that you provided?

16 A: Yes.

17 Q: Have you seen and reviewed the PowerPoint
18 already?

19 A: Yes.

20 Q: Does it correctly outline the basis for your
21 opinion?

22 A: It does.

23 **OBJECTION:**

24 **MS. ROBINSON:** Your -- Your Honor, I'd like to make
25 a new objection.



1 **THE COURT:** Yes.

2 **MS. ROBINSON:** It appears that this is an expert
3 report. We asked Mr. -- Professor Hawkins
4 during his deposition if he was planning to
5 produce a report. He said he had not been
6 asked to. Multiple times during his deposition
7 we said if new materials come up, please
8 provide them to your counsel to provide them to
9 us. There was an ongoing obligation to
10 supplement discovery. I have a rule number
11 here. Give me just a moment. This was just
12 described as an expert report.

13 **THE COURT:** I -- I don't need the rule, but I would
14 like a response from the Department. Thank
15 you.

16 **MR. NEIL:** Your Honor, I've never seen an expert
17 report that looks like this. It's a narrative.
18 It's a -- it's a report in the traditional
19 sense of -- of people writing things. This is
20 documents that were pulled out of the
21 discovery, again with one exception. And my
22 apologies to the Court. I just forgot about
23 the -- the thing from the Mastercard website.
24 Ms. Robinson and I had a very specific
25 discussion multiple times, at least three that



1 I can think of. And there are email follow-ups
2 that show it. That we were not going to
3 exchange demonstratives in advance of this
4 trial. It was an agreement that we had. And
5 she has fulfilled that agreement. She didn't
6 show me anything and she didn't show Ms. Wooten
7 anything or Mr. Luther or Mr. Ryan. As far as
8 I can tell, I'm following the agreement which
9 was we will not exchange demonstrative exhibits
10 prior to trial. This is not a report. This is
11 screenshots, pictures pulled out and
12 highlighted of documents that have been
13 produced in this litigation just like -- she
14 makes the point and she's not wrong, that this
15 document that was used multiple times was
16 produced months ago in the case. Every
17 document referenced in here, again with the one
18 exception of the screenshot from the website,
19 was produced in this case and Mastercard has
20 had them for months. In fact, in the vast
21 majority of the documents that were produced,
22 they are Mastercard's own documents that they
23 sent to us.

24 **MS. ROBINSON:** Your Honor, it may not be a
25 traditional report written in word with one



1 inch margins that -- you know, the report isn't
2 the form of the document. The report is the
3 content. There are screenshots in here of --
4 of documents in record. We have no concern
5 about those. Provide away. But this is not a
6 document in the record. This is Professor
7 Hawkins' opinions, page after page. He's
8 indicating here that creating network
9 externalities. He in his -- a few minutes ago
10 in his opinions discussed that one of his
11 opinions is that Mastercard solves the problem
12 of the multi-sided market and that addresses
13 network externalities. These are his opinions.
14 This is an expert report.

15 **THE COURT:** Objection overruled. I'm going to allow
16 the testimony to proceed using this document.
17 Mr. Neil, don't let the witness get too far a
18 flow.

19 **MR. NEIL:** We will not, Your Honor.

20 **THE COURT:** And you'll renew, I'm sure, objections
21 as they come up.

22 **MS. ROBINSON:** Thank you, Your Honor.

23 **THE COURT:** Yes, ma'am.

24 Q: Professor Hawkins, you've had a chance to
25 review and correct anything that the Department



1 put into this PowerPoint presentation, is that
2 right?

3 A: That's right.

4 Q: And in fact, you made some corrections to it,
5 didn't you?

6 A: That's right.

7 Q: is it fair to say that this is -- this is
8 reflective of the information -- the -- the
9 information that we're about to show is
10 reflective of the information that you used to
11 formulate your opinions, is that true?

12 A: Yes.

13 Q: Okay. Let's start with something I think we've
14 already talked about. And that is who are the
15 four participants in a credit card transaction?
16 I guess really there's five. Who are the five
17 participants in a credit card transaction?

18 A: Right. So, there's the cardholder, the
19 merchant, the acquiring bank, the network, and
20 the issuing bank.

21 Q: And help us understand what we're looking at
22 here. What relationship does Mastercard have
23 with merchants?

24 A: So, Mastercard has some direct contract- -- or
25 some -- some merchants have direct contractual



1 relationships with Mastercard and Mastercard
2 controls some of the terms in the merchant's
3 relationship with the acquirer. Mastercard has
4 programs that are designed specifically for the
5 merchant. And the merchant pays fees to
6 Mastercard indirectly through the acquirer.

7 Q: What relationship does Mastercard have with
8 cardholders?

9 A: So, Mastercard has programs that directly
10 benefit cardholders. And cardholders benefit
11 Mastercard by using their Mastercard branded
12 cards and generating fees through -- that the
13 issuer and acquirer pay Mastercard. And the
14 cardholder actually does pay extra for goods
15 and services. So, indirectly they pay some of
16 those fees.

17 Q: I think we've talked about this ad nauseam, so,
18 you can be as brief as you feel comfortable
19 with. What is Mastercard's relationship with
20 acquiring banks and issuing banks?

21 A: Mastercard has direct contractual relationships
22 with both.

23 Q: What is the triggering event that causes the
24 interaction among all five of these parties?

25 A: That's when the cardholder uses his or her card



1 or the business' card at a merchant location.
 2 And so, really Mastercard is -- is the -- a key
 3 player in every part of this transaction. And
 4 so, in some ways, the steps that y'all were
 5 just talking about that we've seen over the few
 6 days, I think is a -- it's misleading in terms
 7 of understanding what Mastercard does. It's
 8 not misleading with the -- if you're a computer
 9 programmer and you need to understand what's
 10 going on. But Mastercard is involved a lot
 11 earlier in the transaction. Right? People --
 12 cardholders, at least some, get their
 13 Mastercard because they see Mastercard
 14 commercials or they see advertising and so,
 15 they think they want to get a Mastercard.
 16 Merchants decide to take Mastercard because
 17 they know about the brand or have learned from
 18 advertising. And so, all of that happens
 19 before the steps that were on those diagrams.
 20 And Mastercard is actually involved in those
 21 earlier steps as well before we saw the color
 22 change in those diagrams. And so, they're
 23 involved in telling the merchant what it needs
 24 to get from the cardholder to validate the
 25 transaction. They're telling the merchant what



1 the merchant needs to do with the cardholder.
2 And so they're involved in every stage of this
3 process.

4 Q: I'm sorry. And -- and again, I think we've
5 touched on this a lot in this case, but can you
6 briefly tell the Court what happens in the
7 transaction that you just talked about?

8 A: Sure. So, a cardholder decides -- first
9 decides to get a Mastercard credit card. Then
10 goes to a merchant that accepts Mastercard
11 credit cards, either because it knows or sees
12 a logo. The merchant accepts it.

13 **OBJECTION:**

14 **MS. ROBINSON:** I -- I'm sorry. I'm going to lodge
15 an objection here as to this being beyond the
16 scope. Is -- is advertising and the influence
17 of advertising also a part of consumer credit
18 markets? It wasn't one of the described terms.
19 But we've now heard several references to
20 Mastercard's advertising and the advertising
21 convincing cardholders to do things.

22 **THE COURT:** Uh-huh.

23 **MS. ROBINSON:** I think it's outside of the scope of
24 the definition that was provided earlier.

25 **THE COURT:** What say you?



1 **MR. NEIL:** Again, Your Honor, a -- a market is not -
2 - and we -- I can deal with this with Professor
3 Hawkins if I need to. But I don't think a
4 market is as narrow as they want it to be. In
5 fact, I think this in some ways demonstrates
6 the -- the whole dispute in this case. And
7 that is -- they want this case to be about a
8 very isolated event that takes just a matter of
9 seconds where somebody purchases a good or a
10 service with a credit card. And that's not
11 what the case is about. Mastercard has set up
12 this big system. And it's a system that
13 involves lots of people and lots of players and
14 it does lots of things. And one of the things
15 that Mastercard does in its market, to try and
16 advance its market, is to try to bring new
17 people into the market. And we've established
18 through lots of testimony in this case that the
19 more people there are in the market, i.e., the
20 more consumers there are using Mastercards and
21 more merchants there are who accept
22 Mastercards, the more valuable the market is to
23 Mastercard and the more revenue they get. And
24 specifically, as it relates to South Carolina,
25 the more revenue they get here because of



1 transactions that occur here. So, the -- the
2 efforts that Mastercard undergoes to bring
3 people into that market for purposes of
4 furthering the market and growing the market,
5 are absolutely relevant to what is going on in
6 this case.

7 **THE COURT:** Anything further on this?

8 **MS. ROBINSON:** I think the Court of Appeals called
9 DirecTV's marketing an income anticipatory
10 activity that wasn't relevant to the income
11 producing activity, which was the technology,
12 the delivery at the end. That's not relevant
13 to the objection. That was just responsive to
14 his response. I mean, there -- there needs to
15 be some parameters around what consumer credit
16 markets means. I didn't understand advertising
17 to be one of the listed sub-components earlier.
18 That's the reason for me raising my objection.

19 **THE COURT:** I understand. I'm going to overrule.
20 However, Mr. Neil, we -- I think everybody in
21 this room has a credit card. So, let's ---

22 **MR. NEIL:** Fair enough, Judge.

23 **THE COURT:** --- proceed.

24 **MR. NEIL:** We'll -- we'll move on.

25 **Q:** Professor Hawkins, let's -- let's move forward



1 to discuss some specifics about the
2 relationship between Mastercard and the
3 acquirer. Skip a couple of steps. Do each of
4 these entities, Mastercard and the acquiring
5 bank, have obligations to each other?

6 A: Yes.

7 Q: And where -- where do those obligations arise?

8 A: From their direct contractual relationships.

9 Q: What does Mastercard provide to the acquiring
10 bank?

11 A: So, it authorizes -- it transmits the issuer's
12 authorization decision and sometimes, as we
13 heard, stands in for the issuer and issues the
14 -- I'm sorry -- authorizes the card and they
15 also provide clearing information, settlement
16 information, as we've learned throughout the
17 testimony in this case.

18 Q: And what does the acquiring bank do in return?

19 A: The acquiring bank pays fees primarily. And
20 so, I believe there's some documents here that
21 show the different fees that the acquiring bank
22 provides.

23 Q: So, what's going to be up on the screen first,
24 I think, is document, P0001433.

25 A: Right.



1 Q: And what specifically does -- well, where --
2 where does that come from first, if you know?

3 A: Right.

4 Q: And the second of all, what does it tell us?

5 A: This comes from, I believe it's call the cost
6 letter where the letter that Mastercard sends
7 its issuing and acquiring bank customers to
8 describe the fees. And so, this is a volume-
9 based fee that's based, for our purposes, on
10 the number -- sorry -- the amou- -- dollar
11 amount of transactions. And it's just one
12 example. There are a bunch of different fees
13 similar to this. But this is one example of a
14 volume-based fee.

15 Q: And in a volume-based fee, the -- the higher
16 the dollar value of the transactions, the
17 higher the fee that the acquiring bank owes to
18 Mastercard?

19 A: That's correct.

20 Q: Okay. And then let's move on to the second
21 document. I think it's -- I think it's the
22 second one. P0001443. I'm sorry. This is --
23 again, we're on 1433. It's just a different
24 part of the document. My apologies.

25 **MS. ROBINSON:** I'm sorry. This does not show up in



1 the copy we were given.

2 **MR. NEIL:** That's just sort of the nature of
3 PowerPoints. I -- I don't -- when -- when you
4 have documents that come in, they don't all
5 show up, but -- but ---

6 **MS. ROBINSON:** You could have printed each page
7 separate -- I mean, I -- I don't -- I don't
8 have a copy of this. And if I kind of look
9 ahead, it looks like this is going to happen
10 more -- more often and could -- I don't have a
11 copy of this.

12 **MR. NEIL:** Again, Your Honor, there are documents
13 that don't show up in the printer. I -- I can
14 fully concede that. I -- I don't know how to
15 make PowerPoint do it any differently.

16 **THE COURT:** And ---

17 **MR. NEIL:** If there's a way, I just don't know it.

18 **THE COURT:** And I don't know this Ms. Robinson is
19 taking -- she's not assigning blame per se, but
20 I think in all fairness, you've got provide her
21 a copy of this.

22 **MR. NEIL:** Well, Your Honor, I -- in some ways I
23 don't disagree, but in some ways I do, and with
24 all due respect to this, if we didn't have this
25 document and I walked up to Mr. -- to Professor



1 Hawkins and I said, look at this document and
2 tell me what it says. He would absolutely be
3 allowed to do that and she would not have any
4 objection to that at all. And she doesn't get
5 to create an objection because we're putting it
6 up on a screen. There -- there's no
7 requirement that I give her advanced notice of
8 the questions that I'm going to ask him or the
9 documents that I'm going to use. And, in fact,
10 to the extent that there may have been some
11 sort of good faith obligation to provide her
12 with demonstrative exhibits on the front end,
13 we specifically agreed we weren't going to do
14 it. And so, she's trying to create an
15 objection or she is creating an objection that
16 just doesn't exist. She doesn't get to know
17 what I'm going to ask him in advance. That's
18 -- that's how trial works.

19 **THE COURT:** I ---

20 **MS. ROBINSON:** Your Honor, I'm not objecting to the
21 document. I have not at all objected to the
22 documents appearing on the side. I've objected
23 to the content on -- on the other side ---

24 **MR. NEIL:** Actually, that's not what she just
25 objected to.



1 **MS. ROBINSON:** No. Well, I object that I don't have
2 a copy that -- I can't read this. I've been
3 struggling with my glasses. Everybody's seen
4 me do that for two days. I can't read what's
5 in front of me.

6 **THE COURT:** Is -- can you see my copy. I'll be
7 happy to ---

8 **MS. ROBINSON:** Your copy is exactly the same as my
9 copy. I'm -- I'm assuming.

10 A: I might be able to explain. The PowerPoint, I
11 believe the copy you have has all of the text
12 on the left and you're just not seeing the
13 documents as they pop up. But I think you have
14 my testimony in advance actually. Or whatever
15 is going to pop up. I think it's on there
16 already. But maybe I'm wrong.

17 **MS. ROBINSON:** You just called this your testimony.

18 A: Or the -- or the testimony, I guess, will be
19 the -- I don't know what the right legal word
20 is, but it's going to be the oral things that
21 I say. But you have the little markers to the
22 left.

23 **MS. ROBINSON:** You know, may -- maybe the solution
24 here is if we just slow down a little bit. I
25 can find that document in the binder, the



1 documents on the right are all in -- so far at
2 least, all in discovery. So, if I'm just given
3 a moment to pull it up, so I can see the same
4 thing.

5 **MR. NEIL:** Your Honor, I ---

6 **MS. ROBINSON:** You know, I'm glad ---

7 **MR. NEIL:** I'm trying to ---

8 **MS. ROBINSON:** Why don't you proceed.

9 **MR. NEIL:** I'm trying to help. I -- I -- I really --
10 - up until two hours ago, I felt like Ms.
11 Robinson and I have gotten along very well and
12 that has come to a crashing end. But if -- if
13 it is helpful, we can -- we can make a list.
14 We can give her a list of every document that
15 is referenced in this PowerPoint. We can take
16 a break and I -- I imagine we can do that in 15
17 minutes. I'd be happy to ---

18 **MS. ROBINSON:** I -- I think there's an easier
19 solution. If it's just the documents on the
20 right, if you could state the Bates number as
21 you're discussing it. To extent they're Bates
22 stamped, I can pull up the Bates numbers. We
23 have them all here.

24 **MR. NEIL:** Okay.

25 **THE COURT:** Is that okay?



1 **MR. NEIL:** Absolutely.

2 **THE COURT:** All right. Let's -- let's keep going.

3 Thank you all for working that out.

4 Q: Professor Hawkins, there are two documents that
5 are currently on the screen. It's actually --
6 the first document, I missed -- I miscalled the
7 number. The first document is P0001438. Is
8 that -- is that what you see up there?

9 A: That's right.

10 Q: And the second document was P0001433, is that
11 right?

12 A: That's right.

13 Q: And the third document that we're going to look
14 at in a minute, we haven't gotten there yet, is
15 going to be P0001443. All right. But now
16 we're on 1433. What does that document show?

17 A: So, this shows a fee that acquiring banks pay
18 for the number of merchants that are located in
19 our context in South Carolina.

20 Q: Okay. And why is that important to your
21 opinions concerning this case?

22 A: Because obviously those merchants are located
23 here in South Carolina and so, providing a
24 network in South Carolina allows Mastercard to
25 generate that revenue.



1 **MR. NEIL:** Your honor, here's what I'm going to try
 2 to do. We've got this PowerPoint on multiple
 3 screens. I'm going to -- before we pull up
 4 every slide, I'm going to give the documents
 5 that are going to be referenced on the slide.
 6 I think that should be helpful. I hope so.

7 **Q:** All right. Professor Hawkins, if we could move
 8 onto the relationship between Mastercard and
 9 the merchant.

10 **MR. NEIL:** I'm sorry. I've gotten a little bit
 11 flustered.

12 **Q:** 1433 we did not discuss.

13 **A:** 1443?

14 **Q:** 1443 we did not discuss.

15 **A:** Right.

16 **Q:** What does -- what does document P001443 show?

17 **A:** It's one example of fees that acquirers pay per
 18 transaction. Right. So, every transaction
 19 that occurs in South Carolina in our context,
 20 acquirers, this is one example of a fee they
 21 pay.

22 **Q:** So, if I understand this correctly, there are
 23 -- we've seen documents that demonstrate there
 24 are three types of fees that acquiring banks
 25 pay to Mastercard.



1 A: Right.

2 Q: And what are the -- what are the measurements

3 of the ---

4 A: So ---

5 Q: --- that get us to those three fees?

6 A: These are just three examples that show

7 acquirers pay fees to Mastercard. But two are

8 particularly relevant; number of transactions

9 in South Carolina, volume of transactions in

10 South Carolina.

11 Q: And then the third one was what?

12 A: It's the number of merchants in South Carolina.

13 Q: All right. Let's move on to the merchant and

14 Mastercard's relationship.

15 **MR. NEIL:** And, Your Honor, for purposes of

16 identifying documents, it's going to be

17 P0001705.

18 Q: Is there a contractual relationship between

19 Mastercard and a merchant that accepts

20 Mastercards?

21 A: Yes.

22 Q: What is it?

23 A: So, one contractual relationship relates to the

24 Mastercard logo that merchants have. And so,

25 in general, Mastercard doesn't let anyone it



1 wants use its logo. If you look at
 2 Mastercard.us, look at the terms of service, it
 3 says -- and not just -- anyone is not allowed.
 4 Right? Just looking at the website doesn't
 5 give you a right to use the Mastercard logo.
 6 And so, if you do though look at the Mastercard
 7 brand website, the frequently asked questions
 8 show that merchants who accept Mastercard are
 9 permitted. Mastercard's website also ex- --
 10 shows that merchants have to follow Mastercard
 11 rules when they use that logo. And so, that's
 12 one direct contractual relationship where
 13 Mastercard is allowing the merchant to use the
 14 logo. The merchants agree -- you know, is not
 15 violating Mastercard rules about how to use the
 16 logo.

17 Q: Is there a contract between the merchant and
 18 Mastercard that deals with how a merchant
 19 handles a transaction?

20 A: There's not a direct relationship.

21 Q: So, how does -- or -- or first of all, does
 22 Mastercard take steps to govern how a merchant
 23 handles a transaction?

24 A: Yes. Yeah. Mastercard forces the -- or --
 25 well, or contracts with the acquirer to make



1 the merchant ha- -- do certain things. And so,
2 there are -- we saw them earlier in the trial
3 some examples of how Mastercard does that and
4 requires the acquirer to do so.

5 Q: All right. So, let's move very quickly through
6 a list of things that Mastercard does for the
7 merchant in furtherance of that relationship.

8 A: Yes. So, this document, P0001705, is an
9 example of where the Mastercard rules require
10 that acquirers have Mastercard rules
11 essentially in their relation- -- in their
12 contracts with merchants.

13 Q: Does -- let's -- let's go through all of these
14 things. What -- what does Mastercard market --
15 how does Mastercard marketing directly affect
16 merchants?

17 A: Well, merchants accept cards because they're
18 convinced to with advertising. Right? That's
19 one reason. And Mastercard spends a lot of
20 money on advertising. It's because it
21 convinces -- in part, it's because it convinces
22 merchants to accept Mastercard.

23 Q: Does a -- what is the merchant discount fee?

24 A: That's a fee that the acquiring bank charges to
25 merchants to facilitate processing and to allow



1 merchants to participate in the network.

2 Q: Okay. If ---

3 **MR. NEIL:** Jason, advance the slide for me.

4 Q: How does Mastercard ---

5 **MR. NEIL:** And by the way, Your Honor, this
6 particular document is P0001686.

7 Q: Let's -- let's talk about this first. How --
8 what is -- what are network externalities? You
9 talked about those already.

10 A: So, that's just that the network itself makes
11 the relationship between merchants and
12 cardholders work because it brings them
13 together and it brings a lot of both of them
14 together and that benefits both sides by
15 getting a lot of people involved in the
16 transactions.

17 Q: What do we see in this document P0001686, about
18 the relationship between Mastercard and the
19 merchant?

20 A: So, this is just one example of where the
21 Mastercard rules tell the merchant how to act.
22 Right. Like it -- they -- it plainly says,
23 when the merchant gets the authorization
24 request back, they have to act in these
25 specific ways.



1 Q: And is -- and is that mandatory?

2 A: Yes.

3 Q: The next document that we're going to look at
4 is P0001844. What does this document show?

5 A: This tells merchants what they have to tell
6 customers when they do a pre-authorization,
7 like when -- when you go to a hotel or
8 something and get your card pre-authorized.

9 Q: And so, this is -- all of these documents, by
10 the way, are documents that are pulled from --
11 these pages are pulled from what document?

12 A: These are all from the Mastercard -- so far,
13 these are all from the Mastercard rules. Oh,
14 I'm sorry. This one -- sorry. I apologize.
15 The last two are both from the authorization
16 manual.

17 Q: Okay. And that is -- the authorization manual
18 is a document that we discussed quite a bit
19 yesterday. What does the authorization manual
20 ---

21 A: It's a ---

22 Q: --- show? Or what does it do?

23 A: It's a manual that tells acquirers what they're
24 supposed to do and what they're supposed to
25 make their merchants do.



1 Q: All right. And I think the next document we're
2 going to look at is P0001914. What does this
3 document show about the relationship between
4 Mastercard and the merchant?

5 A: I ---

6 Q: Hold on. I may have given you the wrong
7 number. 1364 is the number. My apologies.

8 A: I -- I think it may be P0000364.

9 Q: 364. Okay. My -- my apologies. What does
10 this document show about the relationship
11 between Mastercard and the merchant?

12 A: And so, this is a very famous Mastercard rule
13 that requires merchants to honor all
14 Mastercards.

15 Q: And, again, where does this document appear?

16 A: This one is in the Mastercard rules.

17 Q: Okay. If a merchant -- well, let's look at the
18 last one first. P0001914. What does this
19 document show as it relates to Mastercard's
20 relationship with the merchants?

21 A: So, ths is a service that Mastercard indirectly
22 offers the merchant.

23 Q: Okay. I think I gave you the wrong number. I
24 apologize. All right. 1844. 1844 is the pre-
25 authorization document that you've already



1 discussed.

2 A: 1826 is the one that I had discussed.

3 Q: All right. Let's -- let's talk about 1826.
4 What does 1826 show about the relationship
5 between Mastercard and the merchant?

6 A: So, it just shows one of many examples of where
7 the --Mastercard has created services
8 essentially for the merchant. Right. They're
9 indirect, but they're for the merchant.

10 Q: All right. And then 1914. Again, this comes
11 from the authorization manual. What does this
12 document show?

13 A: So, it shows that Mastercard is offering
14 something. You see at the end of the title,
15 for merchants. And it's indirectly through the
16 acquiring bank, obviously, but it's -- it's for
17 merchants based on just the plain language.

18 Q: And what is that they're offering? What does
19 this show on 1914 that Mastercard is providing?

20 A: Expert monitoring, real time fraud scoring
21 service.

22 Q: And why is that important for merchants?

23 A: Because they want to make sure that they don't
24 accept fraudulent transactions.

25 Q: All right. And then the last document that



1 we're going to look at here is P0003453. What
2 does that document show?

3 A: So, this is I believe from Mastercard's -- I
4 think it's 2011 annual report. And as you can
5 see from the language, it says, we enter into
6 arrangements with selected merchants under
7 which these merchants receive performance
8 incentives for the increased use of Mastercard
9 programs.

10 Q: And what is the significance of Mastercard
11 providing these incentives to merchants?

12 A: It just shows a direct contractual relationship
13 between merchants and -- between some merchants
14 and Mastercard.

15 Q: Does -- does a merchant have to follow the
16 rules set by Mastercard in order to remain a
17 part of the network?

18 A: Yes.

19 Q: And how do we know that?

20 A: Well, there's a -- because the documents we've
21 seen earlier in this trial say that the
22 acquirer will face compliance penalties if it
23 doesn't force it's merchant to obey. We also
24 know it, honestly, because merchants have spent
25 millions and millions of dollars, for instance,



1 trying to follow that -- to -- trying to not
2 have to follow the honor all cards rule. You
3 know, literally, since the 1990s have been
4 suing the networks to try to get out of that
5 rule.

6 Q: And what does the honor all cards rule do?

7 A: It ---

8 Q: Why would they want to get out of it?

9 A: They want to get out of it because it -- for a
10 long time, they didn't want to have to accept
11 one type of card like a Mastercard credit card.
12 But also have to accept the debit card. I
13 think it went the other way. Debit cards are
14 cheaper to accept. So, they wanted to be able
15 to accept Mastercard debit cards, but not have
16 to accept Mastercard credit cards that are more
17 expensive for the merchant. And then also,
18 nowadays, if you have a really awesome rewards
19 card, that costs you -- the merchant more money
20 to -- to accept and so, they didn't want to
21 have to accept the really expensive cards just
22 because they accept the more basic credit
23 cards.

24 Q: And -- and this last document that we're going
25 to look at is P0002004. What is Mastercard



1 providing through that document?

2 A: Here it just shows Mastercard's involvement in
3 the entire system because this is one example
4 of where Mastercard allocates the risks.
5 Right? Who's going to be owed if there's a
6 fraudulent transaction or something doesn't get
7 paid. And so, this document shows, you know,
8 liability doesn't shift from the merchant
9 unless certain things are performed or certain
10 things happen.

11 **MR. NEIL:** Your Honor, I want to be very up-front.
12 The next slide is the one slide that does not
13 show a document that has already been
14 introduced in the case. It deals with the
15 Mastercard website. I want to be very up-front
16 about that. And if the Court has some issue
17 with that, then we can move on, but that is --
18 I -- I feel like Mastercard's own website is
19 fair game.

20 **MS. ROBINSON:** I just have ---

21 **THE COURT:** Yes, ma'am.

22 **MS. ROBINSON:** I mean, I -- I don't have a problem
23 with the document. I mean this page.

24 **THE COURT:** Okay.

25 **MS. ROBINSON:** In this is -- this is what you're



1 referring to? It's not up there yet.

2 **MR. NEIL:** It is. It hadn't pulled up on purpose.

3 **MS. ROBINSON:** I know. I just want to make sure I'm
4 agreeing to the right document before -- I
5 don't want something else to pop up.

6 **MR. NEIL:** Sure.

7 A: I -- I believe ---

8 **MS. ROBINSON:** I -- I'm not raising an objection ---

9 A: The only ---

10 **MS. ROBINSON:** --- to that page.

11 **THE COURT:** Thank you. Thank you.

12 A: So, I -- I believe I've already te- -- okay.

13 Q: Hang on just one second.

14 A: Sure. Sure. Sorry.

15 Q: All right. I want to show you one last thing.
16 And -- and as I've already alluded to, it's the
17 -- it's -- it's a screenshot of the Mastercard
18 website. I'd like for you to tell us what this
19 document or what this does at -- at -- with
20 respect to the relationship between Mastercard
21 and the merchant?

22 **MS. ROBINSON:** Actually, I'm sorry. That is not
23 what I'm looking at. This -- this is ---

24 **MR. NEIL:** Well, it's the same problem ---

25 **MS. ROBINSON:** This is the page?



1 **MR. NEIL:** -- that we've already talked about. It's
2 just multiple pages from the web- -- multiple
3 screenshots from the page on the same slide.

4 **MS. ROBINSON:** Okay. May I just ask, when -- when I
5 have the opportunity to cross, I will not have
6 access to these pages in my version of the
7 document. But I guess what I'm asking in
8 advance is whether I will be able to use your
9 full demonstrative for my cross? Because some
10 of these pages just aren't in my set.

11 **MR. NEIL:** I -- use is a really broad term. But if
12 she -- if she's ---

13 **MS. ROBINSON:** How about -- have it up on the
14 screen, so that I can ask questions.

15 **MR. NEIL:** If she wants to have it up on the screen,
16 we can -- yes. I think we can make that ---

17 **THE COURT:** All right.

18 **MR. NEIL:** We -- we can figure out a way to make
19 that available.

20 **MS. ROBINSON:** And -- and actually, I'd like a few
21 minutes to review those, I guess, maybe just
22 these pages, which are the only ones so far
23 that aren't in the record before I begin cross.

24 **MR. NEIL:** Your Honor, I sus- --

25 **MS. ROBINSON:** I know. The timing, but.



1 **MR. NEIL:** We'll -- we'll figure out a way.

2 **THE COURT:** No. I'm not objecting to time at all.

3 And you all have accommodated me.

4 **MR. NEIL:** Nor am I.

5 **THE COURT:** We -- I think we can work all of that
6 out.

7 **MS. ROBINSON:** Yeah. I mean -- and let me just say
8 with these pages, I -- I don't see a website
9 address. I am trusting the -- the Department's
10 representation that these are from the website.

11 **THE COURT:** I am, as well.

12 Q: Professor Hawkins, do you know when you last
13 looked at the Mastercard website and located
14 the screenshot pages that we're about to show?

15 A: It was within the last two months for sure.
16 Probably more recent than that.

17 Q: Thank you. All right. So, what are -- what
18 are we looking at here on the screen right now?

19 A: So, this is the terms of use from the
20 Mastercard.us website. And so, this particular
21 section explains that not ev- -- that
22 Mastercard does not grant a license to use its
23 trademark to everyone in the world, to anyone
24 who wants to for instance.

25 Q: So, one of the things that we heard from



1 Mastercard's witnesses about these -- the logos
2 or the marks, is that anybody can go online and
3 download them and -- and do whatever they want
4 them. Is -- is that actually true?

5 A: I think that is not true because ---

6 Q: And we've got ---

7 A: --- if ---

8 Q: If we move forward to this frequently asked
9 questions, what does Mastercard say about who
10 can use and what is an authorized use of their
11 marks?

12 A: This is from Mastercard's brand use websites,
13 the frequently asked questions, and it says,
14 who's authorized to use a Mastercard brand art
15 -- artwork? Merchants who accept a Mastercard
16 payment brands -- brand or brands may display
17 Mastercard branding. And so, that's -- so,
18 yeah. So, it's limited to Mastercard
19 merchants.

20 Q: And why is it important for Mastercard to -- to
21 control the use of its branding and marks?

22 A: Because its important to facilitate
23 transactions between cardholders and merchants.
24 And because that logo has value.

25 Q: What does the logo demonstrate to shoppers who



1 are in the store or on the website where the --
2 where the Mastercard is accepted?

3 A: It demonstrates that the merchant or this
4 transaction will be governed by the Mastercard
5 rules and so, the -- the cardholder can trust
6 that they're not going to be charged a bunch of
7 fraudulent charges from the merchant.

8 Q: Okay. The next slide that we're going to, I'm
9 going to go ahead and give you the -- the
10 document numbers. P0000090, P000665, P000666.
11 So, let's start at the beginning. What does --
12 what -- what is -- you can see from the arrow
13 what we're talking about is what the merchant
14 then provides to Mastercard. What is it that
15 the merchant provides to Mastercard?

16 A: Right. Well, I have a bunch of things that it
17 provides. I don't know what order. And so,
18 this is what -- so, one thing is the merchant
19 has to follow certain rules that Mastercard has
20 laid out for use of its trademark.

21 Q: And what is the -- what do we see from document
22 P0000090?

23 A: So, this is what -- this is from the Mastercard
24 rules and it gives a specific instruction to
25 merchants. Right. A merchant is prohibited



1 from using the card face design to indicate
2 acceptance in merchant advertising or other
3 signage, other than signage for co-branded
4 programs. So, it's -- it's specific
5 prohibition from the merchant.

6 **THE COURT:** Yes, ma'am.

7 **OBJECTION:**

8 **MS. ROBINSON:** Your Honor, I'm sorry. I want to
9 object. Again, I think this outside of --
10 Professor Hawkins is offering testimony as to
11 intellectual property rights, which was not a
12 subcomponent he defined as part of consumer and
13 credit markets.

14 **THE COURT:** Mr. Neil.

15 **MR. NEIL:** Your Honor, I -- a couple of times now,
16 she has referred to some specific subcomponents
17 of consumer credit markets. And I think
18 somewhat -- somebody's going to get smart and
19 we're going to write this down, so we don't
20 have to keep going back and saying, we think
21 this is what it said, but I believe Professor
22 Hawkins defined the market to include the
23 relationships -- all of the relationships
24 between acquirers, issuers, cardholders and
25 merchants who -- who use and access the



1 Mastercard network. And so, those
2 relationships have lots of different components
3 to them. They have how do you use the card;
4 what transactions are approved; what
5 transactions aren't approved; what do you do
6 when you get certain messages. And among those
7 things are how do you use the logos and the
8 marks. That has been an -- an enormous issue
9 in this case. It's been talked about at ad
10 nauseam. And the reason is because it -- it
11 has a direct affect on what Mastercard does and
12 how it treats the other people in the group --
13 in -- in the network. And so, I don't know
14 exactly what Professor Hawkins said when he
15 defined the subcomponents as Ms. Robinson keeps
16 talking about, but what I don't think he did
17 was to limit himself to -- to some very
18 specific transactions. He's talking about the
19 relationship of -- of all of these participants
20 in this market and how they relate to each
21 other.

22 **MS. ROBINSON:** Your Honor, if I ---

23 **THE COURT:** Yes, sir.

24 **MS. ROBINSON:** If I may, I actually did write it
25 down when he said it in testimony. His



1 testimony definition in my opinion differed
2 from his deposition definition.

3 **THE COURT:** Uh-huh.

4 **MS. ROBINSON:** So, I'm making some of these
5 objections to preserve on appeal.

6 **THE COURT:** Uh-huh.

7 **MS. ROBINSON:** I won't get to address the difference
8 in definitions until I'm up to do my cross
9 examination. These statements will have
10 already been made. So, I'm make -- you know,
11 I -- I believe he has defined consumer credit
12 markets with a list of specific activities. I
13 can demonstrate that on cross. So, if you --
14 you know, I -- I want to at least preserve my
15 objection before the information is in the
16 record without an objection.

17 **THE COURT:** I understand. To that extent -- and I
18 kind of thought you were going there. So, for
19 -- for the record, the objection is overruled.
20 But I look forward to your pulling out any
21 inconsistencies.

22 **MS. ROBINSON:** And -- and if you prefer if I have
23 more of these objections, we can sort of
24 shorten them if it's going to be the same thing
25 each time.



1 **THE COURT:** I think ---

2 **MS. ROBINSON:** I -- I can just say, I making the
3 same objection again. You can overrule because
4 I really don't want to interrupt Mr. Neil's
5 flow, but I do want to preserve the objections.

6 **THE COURT:** You need to preserve objections, so
7 whether you use the shortened version, I'm
8 concerned about the record. So, I would -- I'm
9 going to leave that up to y'all.

10 **MS. ROBINSON:** Thank you, Your Honor.

11 **THE COURT:** Thank you. Yes, sir.

12 **MR. NEIL:** Thank you, Your Honor.

13 Q: Professor Hawkins, let's move forward to the
14 next document, P000665, which I believe comes
15 from the Mastercard rules. And it's Section
16 5.9, use of the marks. How does this provision
17 in the rules govern the relationship between
18 Mastercard and the merchant?

19 A: So, this is a contract document that binds the
20 issuer -- sorry, the network and the acquirer
21 and it also is telling the acquirer to bind the
22 merchant in a contractual relationship. And --
23 and specifies how a merchant is allowed to use
24 the marks. And I don't know that we have the
25 document up specifically, but you -- you heard



1 testimony yesterday that dealt with how the
2 acquirers are required to -- what the acquirers
3 are -- are mandated to put into the merchant
4 agreement.

5 A: Right.

6 Q: And does Mastercard mandate what the acquirers
7 are -- are mandated to put into the merchant
8 agreement?

9 A: Yes.

10 Q: The next document is the very following page,
11 P000666. What does that document show?

12 A: This shows that merchants have to display
13 acceptance marks at the point of interaction.

14 Q: All right. Do merchants pay fees directly to
15 Mastercard?

16 A: No.

17 Q: Do merchants -- are there indirect fees that
18 merchants have to pay to Mastercard?

19 A: Yes.

20 Q: And how do you know that?

21 A: I know that because one common payment that
22 merchants -- one common payment arrangement
23 between acquiring banks and merchants is called
24 interchange plus. And so, the acquiring bank
25 says to the merchant, we're going to charge you



1 everything Mastercard charges us plus our
2 margin. You know, plus the acquiring bank
3 wants to make money and so they add something
4 to it. And that's a very common payment method
5 in the industry.

6 Q: Have you reviewed Mastercard contracts that
7 have the interchange plus provision in them?
8 I'm sorry. Merchant agreements that have the
9 interchange plus provision in them?

10 A: Yes.

11 **MR. NEIL:** Just go to the next slide.

12 Q: All right. Let's go -- let's move on to
13 Mastercard and the issuer. Is there a direct
14 contractual relationship between Mastercard and
15 the issuer?

16 A: There is.

17 Q: What does Mastercard do for the issuer or
18 provide to the issuer?

19 A: It relays the authorization information to the
20 issuer and then accepts that information back
21 from the issuer. It sends them information
22 about their transactions and their settlement
23 position.

24 Q: What else does Mastercard do for the issuer?

25 A: It grants the issuer the right to use the



1 Mastercard mark on the credit cards that
2 issuers create. And it also establishes the
3 rate that issuers get as interchange to
4 participate in the transaction.

5 Q: What is the interchange rate?

6 A: It's essentially a fee that merchants pay to
7 acquirers who pay to Mastercard who pay -- or
8 transfers to the issuer to incentivize the
9 issuer to participate in the transa- -- in the
10 network.

11 Q: Let's look at document P0001831. What does
12 that document show?

13 A: So, it just is at -- the example show -- sorry.
14 Is an example at the top of how Mastercard
15 establishes the interchange rate. And so, it
16 refers to published Mastercard interchange rate
17 schedule.

18 Q: And, again, the interchange rate is not a fee
19 that's paid directly to Mastercard, right?

20 A: It's a fee that's at least transmitted through
21 Mastercard onto the issuer.

22 Q: So, it is a -- it is a fee that the issuer gets
23 from the acquirer?

24 A: Essentially, yes.

25 Q: Okay.



1 A: Yes.

2 Q: But Mastercard mandates that fee?

3 A: It sets the fee. Yes.

4 Q: Okay.

5 A: Yeah. Like the rate that the participants in

6 the transaction pay.

7 Q: All right. The last -- I'm sorry, not the

8 last. The next of the four relationships that

9 we want to talk about are the relationship

10 between Mastercard and the issuer, I think. Is

11 that right?

12 A: I guess. This -- we still need to talk about

13 what the issuer provides to Mastercard or what

14 it's relationship is.

15 Q: Okay. Right. What -- what is -- and that's

16 what I meant. I'm sorry.

17 A: It's okay.

18 Q: I didn't say that very well. What does the

19 issuer provide back to Mastercard?

20 A: So, it pays fees to Mastercard and those are

21 based on the same sort of volume and

22 transaction. And so, this document, P0001410,

23 talks about the issuer assessment, which is

24 based on number of transactions that occur in

25 South Carolina. This is another example,



1 P0001412, that talks about the number of
2 transactions, specifically for authorizations
3 for cardholders that are -- for transactions
4 occurring in South Carolina.

5 Q: So, is this the same kind of -- these are the
6 same kinds of fees that are charged to the
7 acquirer?

8 A: That's right.

9 Q: Okay. So, just to summarize, there are fees
10 related to the number of transactions and there
11 are fees related to the dollar volume of those
12 transactions, is that right?

13 A: That's right.

14 Q: And in either case, the more transactions or
15 the higher the dollar volume fee relates to a
16 higher -- I'm sorry -- the dollar volume
17 relates to a higher fee?

18 A: That's correct.

19 Q: What do we see in document P0001421?

20 A: So, this is another per tran- -- per
21 transaction fee.

22 Q: And these -- these fees relate to the use of
23 ATMs?

24 A: Right. I -- or point of sale debit cards and
25 so, that's similar. It's what -- in this



1 trial, at least, people have referred to as
2 something similar to credit card transactions.

3 Q: Okay. And the reason, issuers have these fees
4 but acquirers do not, is that right?

5 A: I'd have to look through because that -- so it
6 says here, point of sale switch fees are based
7 on a scale according to the number of billable
8 transactions for -- sorry -- billable
9 transactions for issuer transaction volume and
10 a fixed rate for acquirer transaction volume.

11 Q: So, as it ---

12 A: So ---

13 Q: --- relates to issuers, the fee is different,
14 I guess because they're the ones who issue the
15 cards?

16 A: Yeah. Well, so here, but both are paying fees.
17 And so, a lot of these fees, both issuers and
18 acquirers pay. But issuers for the transaction
19 process are paying a lot of the fees.

20 Q: I apologize, Professor Hawkins, I can't read
21 the Bates number on the next page. I'm trying
22 to do everything I can to make that -- I think
23 it is P000337.

24 A: I think it's 3337.

25 Q: 3337. And is this also a document that deals



1 with what the issuer provides back to
2 Mastercard?

3 A: Yes. So, this is annual report from
4 Mastercard. And it talks about how their -- it
5 says our net revenues increased 21.2 percent in
6 2001 primarily due to the increase dollar
7 volume of activity on cards carrying our brands
8 and increased transactions.

9 Q: So, I want to correct you real quick. I think
10 that says 2011, right?

11 A: Sorry. Is that not what I said? Yeah. 2011.
12 I apologize.

13 Q: And -- and what does this demonstrate about the
14 way the Mastercard fee structure works?

15 A: It shows that Mastercard generates revenue
16 through cardholders using cards at merchants'
17 locations.

18 Q: All right. The last relationship that I want
19 to talk with you about is the relationship
20 between Mastercard and the cardholder. Is
21 there a contract between Mastercard and a
22 cardholder?

23 A: No.

24 Q: So, what is the nature of the relationship
25 between Mastercard and a cardholder?



1 A: So, Mastercard provides some direct services to
2 the cardholder that these documents go through
3 in addition to we talked earlier about
4 advertising, but I'll go past that since ---

5 Q: Does -- does Mastercard's advertising -- let me
6 ask -- let me just ask this generically, what
7 is the -- what is the point of Mastercard
8 advertising to potential cardholders? Why does
9 that benefit Mastercard?

10 A: Because the more cardholders that use their
11 Mastercard branded credit card, the more money
12 Mastercard gets in revenue. So, more
13 transactions, more volume means more money for
14 Mastercard.

15 Q: And -- and that's what we've seen in the last
16 few slides related to the relationship between
17 Mastercard and the issuers, and then before
18 that, the relationship between Mastercard and
19 the acquirers?

20 A: Right.

21 Q: All right. Are there -- are there other
22 benefits that Mastercard provides directly to
23 cardholders?

24 A: There are.

25 Q: What are those?



1 A: So, there's a variety of benefits. One is --
 2 I don't know what order. So, they'll -- there
 3 are programs that Mastercard has designed that
 4 indirectly through the issuer go to credit --
 5 to cardholders. And so, there's one on the
 6 next -- this slide that's coming up, P0001970.
 7 It talks about a program where cardholders can
 8 control their spending through a service that
 9 Mastercard provides. And another service
 10 Mastercard provides is shown in this
 11 authorization manual, page P0001885, where they
 12 will send out emergency cards. And so, the
 13 next slide shows something similar where
 14 cardholders can receive emergency cash
 15 advances. This is on P0001425. And so, this
 16 enables Mastercard cardholders to get a cash
 17 advance.

18 Q: And these are benefits to -- provided directly
 19 by Mastercard to the cardholders?

20 A: Yeah. So, and if you look at this document,
 21 P0001953, Mastercard has created an ATM locator
 22 on its websites. It's on the Mastercard website
 23 that will locate a Mastercard ATM for
 24 cardholders to use.

25 Q: Does Mastercard have something called a



1 cardholder service fee?

2 A: Does Mastercard -- I ---

3 Q: Well ---

4 A: That ---

5 Q: --- I'll you what. Let's look at P0003343 on
6 the next page. So, what are -- first of all,
7 is there a cardholder service fee?

8 A: So, as this document shows, there are. This is
9 not a fee that's charged directly to the
10 cardholder. But this document does show that
11 Mastercard provides benefits to people carrying
12 Mastercard branded cards. And so, it shows the
13 relationship. And then that fee is charged to
14 the issuer or the acquiring bank.

15 Q: I got it. And does Mastercard ever communicate
16 directly to cardholders?

17 A: It -- I know that it controls the
18 communications that issuers make to cardholders
19 in some instances.

20 Q: How does it control that?

21 A: Through the rules or documents that govern
22 relationships with issuers.

23 Q: So, the next document that we're going to look
24 at is P0000120, which I believe is part of the
25 Mastercard rules. How does that document



1 control cardholder communications?

2 A: So, this is just an example telling issuers if
3 you're going to communicate with cardholders
4 about special issue programs, there are certain
5 way -- things you have to say and so, it's
6 controlling that issuer-cardholder
7 relationship, the communications between the
8 two parties.

9 Q: All right. The next document I want you to
10 look at is P0002599. And it talks about the
11 merchant data cleansing suite of services. Is
12 that something that benefits cardholders?

13 A: It does benefit cardholders.

14 Q: And how does that benefit cardholders?

15 A: Because that gives issuers better information,
16 which allows the issuers to put it on their
17 bill, the cardholders bills better.

18 Q: And so, what -- what benefit does that provide
19 to the cardholder?

20 A: Then when the cardholder -- when you see your
21 bill, if you can recognize, oh, yeah, I did go
22 to the Starbucks on North Main Street or
23 whatever in order to be able to know it's a
24 valid transaction as opposed to less clear data
25 that you don't know really if you did that



1 transaction or not. Also, it allows
2 cardholders to police fraud because if they can
3 see -- if I see a transaction was done in
4 Hawaii, never been there, then I would know
5 that -- that it wasn't mine. So, it --
6 Mastercard is benefitting cardholders there.

7 Q: The next slide is P0001975. What is the
8 Mastercard in control purchase controls?

9 A: It's a -- some -- another thing that benefits
10 cardholders. It says, provides cardholders the
11 ability to establish spend control rules. And
12 so, it's -- I believe we talked about this
13 earlier too. But it's a program that controls
14 spending ---

15 Q: How does that ---

16 A: --- for cardholders.

17 Q: How does that help cardholders?

18 A: Because if you have people in your business
19 that you don't want spending a lot of money on
20 their cards, you prevent them from spending
21 over certain limits.

22 Q: So, we've talked about things that Mastercard
23 provides the cardholder. Is there anything
24 that the cardholder provides back to
25 Mastercard?



1 A: Yes. So, obviously, we've talked already about
2 how every time the cardholder uses a Mastercard
3 branded card that's good for Mastercard because
4 it generates revenue. The other thing that the
5 cardholder does is indirectly pay fees to
6 Mastercard by paying more for goods and
7 services. And so, there's -- I -- I believe
8 it's the consensus view among academics that
9 merchants increase the cost of their services
10 because they accept credit cards and pass those
11 onto cardholders. So, obviously, this is
12 indirect, but the cardholder ends up paying for
13 part of Mastercard's fees.

14 Q: So, if the merchant doesn't have a direct
15 obligation to pay fees to Mastercard, what are
16 the fees that they are then passing on to the
17 cardholder?

18 A: They're the fees that the merchant has to pay
19 the acquirer, who has to pay Mastercard.

20 Q: All right. We can finish with the slide show.
21 All right. Is this -- is this PowerPoint
22 presentation or these slide shows, does this
23 give the -- the bases for the opinions that
24 you've provided earlier in this case?

25 A: It -- it reveals some of it, yes. Yeah.



1 Q: And -- so, let's talk about those for a minute.
2 Do you have an opinion about whether Mastercard
3 has a relationship with all four participants
4 in the Mastercard network?

5 A: Yes, I do.

6 Q: And what is that opinion?

7 A: That -- my opinion is that Mastercard does in
8 fact have a relationship with each of the four
9 other players in the four-party model.

10 Q: Is it fair to say that Mastercard's
11 relationship extends beyond the authorization
12 of any single transaction?

13 A: Absolutely. And that's ---

14 Q: And why is that?

15 A: That's because Mastercard is involved in every
16 part of it. And so, it's wrong -- I think one
17 really wrong way to think about Mastercard is
18 as a giant computer that just sort of crunches
19 numbers and sends numbers back. It's a system
20 that's been developed that lets merchants and
21 credit cards -- merchants and cardholders come
22 together to do transactions.

23 Q: And why is that important for purposes of
24 analyzing how Mastercard generates revenue?

25 A: Because it reveals what -- how Mastercard makes



1 its money. It makes its money by having all
2 four people operating in the network. If any
3 -- you know, if the merchant and cardholder
4 fall out of that transaction, Mastercard won't
5 make any money.

6 Q: And earlier, I think you talked about
7 Mastercard's efforts to create trust among the
8 four parties. How does that affect their
9 revenue generation activities?

10 A: It -- it's the trust that allows them to op- --
11 allows Mastercard to operate. The trust that
12 they created through rules that bind the
13 parties is why a cardholder goes into a
14 merchant and uses the card.

15 Q: Are those rules applicable in South Carolina?

16 A: They are.

17 Q: Are all of the fees that are owed by the
18 merchants and the -- I'm sorry -- by the
19 issuers and the acquirers, are they paid as a
20 result of transactions that happen in South
21 Carolina?

22 A: They are.

23 Q: Does the Mastercard network, as you've
24 described it, exist in South Carolina?

25 A: Yes.



1 Q: And your definition of the Mastercard network,
2 if I understood your testimony earlier, is the
3 same as Ms. Naskiewicz's?

4 A: I guess. Yeah.

5 Q: And ---

6 A: That's what she testified.

7 Q: And again, for the benefit of the Court, can
8 you tell us exactly what it is that comprises
9 the Mastercard network?

10 A: It's both. There's a technological network
11 that is providing and taking information and
12 funds, and there's human relationship and rules
13 network that Mastercard controls the whole
14 transaction by putting rules on everybody in
15 the transaction.

16 Q: Do you understand Mastercard's position about
17 where it generates revenue?

18 A: I think so.

19 Q: And -- and what do you understand Mastercard's
20 position on that issue to be?

21 A: That it generates revenue at the MIPs
22 locations.

23 Q: And what is your evaluation of that position?

24 A: That completely ignores the most valuable thing
25 that Mastercard offers, which is the network of



1 rules that allow a cardholder and a merchant to
2 get together and do a transaction.

3 **MR. NEIL:** Bear with me just moment. Your Honor, if
4 ---

5 **THE COURT:** Uh-huh.

6 **MR. NEIL:** If we could have a second.

7 Q: Professor Hawkins, I think those are all the
8 questions I have for you right now. I suspect
9 you're going to be cross-examined and please
10 answer whatever questions Ms. Robinson has.

11 **THE COURT:** Would you like a few minutes?

12 **MS. ROBINSON:** I -- I would like as many minutes as
13 you're willing to give me. I have -- I have a
14 lot of notes all over the place. I will say as
15 a -- at least as a housekeeping item, assuming
16 that the Department still plans to call an
17 additional witness, we are not finishing today.

18 **THE COURT:** That's okay.

19 **MS. ROBINSON:** Unless each side only maybe has one
20 question for that witness, which I doubt is the
21 case. So, I -- I had earlier represented --
22 you know, I -- I thought it would all come in.
23 And so, I -- I miscalculated that.

24 **THE COURT:** You did your best. So, don't worry
25 about that.



1 **MR. NEIL:** I'll defend her, Judge. I agreed with
2 her.

3 **MS. ROBINSON:** I -- I also don't think it's likely
4 that we will finish Mr. Hawk- -- Professor
5 Hawkins today, just -- just to get there. But
6 if I could have say 15 minutes or 20 minutes.
7 Let -- can I say 20 minutes?

8 **THE COURT:** 20 minutes sounds good. Now, I've got
9 to finish today at 5:30. Would it be better to
10 go to 5:30 and reconvene in the morning at --
11 I'd like to say 10:00, but I'll be here at 9:00
12 if you all need me to.

13 **MS. ROBINSON:** 10:00 is fine with -- with me.

14 **MR. NEIL:** That's fine, Your Honor.

15 **MS. ROBINSON:** I -- I think, if you -- if you would
16 rather not go all the way to 5:30, we could go
17 until 5:00 today and pick up tomorrow. I can
18 -- I can certainly -- there's a lot of
19 different sections to my cross, so I'm sure I
20 could finish one section by 5:00 and not sort
21 of be in the middle of something and we could
22 continue in the morning.

23 **THE COURT:** We can play that by ear, keeping in mind
24 we've got one more witness and you have the
25 ability for a rebuttal case. And one thing



1 that I -- you'll find with me, I want everybody
2 to have ample opportunity to try their cases.

3 **MS. ROBINSON:** Thank you, Your Honor.

4 **THE COURT:** So, let's -- let's try to get back at
5 4:20.

6 **MS. ROBINSON:** Thank you.

7 **THE COURT:** All right.

8 **(Off the record from 4:06 p.m. until 4:25 p.m.)**

9 **COURT REPORTER:** All rise.

10 **THE COURT:** Please be seated. Cross examination.

11 **MS. ROBINSON:** Thank you, Your Honor. I'm sorry.
12 Can I have a minute?

13 **MS. ROBINSON:** Thank you. Thank you.

14 **MR. HAWKINS - CROSS EXAMINATION BY MS. ROBINSON:**

15 Q: Is your definition of consumer credit markets
16 limited to markets where businesses extend
17 credit or do something like extend credit?

18 A: I -- I believe it -- it's a broad term and so,
19 to the extent that that includes other things,
20 like where lending is facilitated and other
21 things like it, I construe it as a broad term,
22 so, yeah. Especially with the later answer in
23 the deposition that it's a broad terms. Yes.

24 Q: You're referring to your testimony in the
25 deposition?



1 A: Right.

2 Q: So, I think earlier you defined consumer credit
3 market as ex- -- I really should switch
4 notebooks so I'm going from arguing the first
5 part to arguing the second part. Okay. Get it
6 all. During your testimony you defined
7 consumer credit markets as -- as -- as business
8 -- the lending business plus related activities
9 including the operation of networks, does that
10 sound correct?

11 A: I -- I think that fairly describes my -- my
12 understanding of that term.

13 Q: Was that your description of the term during
14 the deposition?

15 A: Yes.

16 Q: I think some of this goes without saying. You
17 -- you were deposed in this matter?

18 A: Yes.

19 Q: Were you deposed on December 20th?

20 A: Yes. Oh, no. Not December 20th.

21 Q: No. Oh, I'm sorry because that's Professor
22 Swain's deposition. I'm sorry. My apologies.

23 **COURT REPORTER:** Professor who? I'm sorry.
24 Professor?

25 **MS. ROBINSON:** Professor Swain.



1 **COURT REPORTER:** Thank you.

2 **MS. ROBINSON:** I think. Yeah. Sorry. My apologies
3 on that. Good thing I checked. It would have
4 been very awkward. I'm sorry, Your Honor.
5 Please just give us a minute.

6 **THE COURT:** It's okay. Take your time. With all
7 the paper you all have, you're doing an
8 excellent job keeping up with things.

9 **MS. ROBINSON:** As part of the housekeeping items at
10 the beginning of the trial, we agreed that a
11 copy of a transcript was accessed -- acceptable
12 rather than this sealed version.

13 **THE COURT:** That is correct.

14 **MS. ROBINSON:** Adam, did you want to flip through
15 this at all to be comfortable with us -- a copy
16 of the ---

17 **MR. NEIL:** No.

18 **MS. ROBINSON:** May I?

19 **THE COURT:** Yes.

20 Q: Does that appear to be a transcript from your
21 deposition?

22 A: Yes.

23 Q: And did you have the opportunity to review your
24 deposition transcript and make any corrections?

25 A: Yes.



1 Q: Did you make any corrections?

2 A: Yes.

3 Q: Can you turn to page 10?

4 A: Yes.

5 Q: I'm at line 4. I asked you the question, what
6 areas do you consider yourself to be an expert
7 in that are relevant to these proceedings, and
8 you answered, I'm an expert in consumer credit
9 markets, same as your answer today. At line 9,
10 I asked what does that term mean. You then
11 defined the term with the answer, that means
12 markets where businesses extend credit or do
13 something like extend credit to people.

14 A: Right.

15 Q: At line 13, I asked are there any other areas
16 of expertise that you can consider yourself an
17 expert in that are relevant to this proceeding?
18 Your answer was, I think that's such a broad
19 term that it probably encompasses other smaller
20 terms like secured financing and contracts,
21 consumer contracts, and consumer protection,
22 but I think all of those are fairly captured by
23 consumer credit markets. It -- did I read that
24 accurately?

25 A: Yes.



1 Q: If you want to glance at the following passages
2 to see if there's any other aspect around there
3 that's relevant to that definition, I'm happy
4 to give you a moment to, but I think it ends
5 right there.

6 A: Thank you. I -- I think I'm fine. Thank you.

7 Q: So, in that definition, you referred to bus- --
8 markets where businesses extend credit or do
9 something like extend credit to people. And
10 today, you're saying businesses that are
11 lending and related activities in the
12 operations of network. Are the related
13 activities in the operations of networks, do
14 they fall into the latter half of that where it
15 says, in the deposition transcript, something
16 like extend credit to people?

17 A: I believe they do. I also believe the list in
18 16 through 19 is a non-exclusive list. It
19 encompasses smaller terms like -- it doesn't
20 say like and limited to or something. So, I
21 believe that facilitating payment transactions,
22 especially where credit cards are involved, is
23 something like extending credit to people.

24 Q: So, the processing is like extending credit.
25 How -- how is that?



1 A: The processing is part -- is a small part of
2 what Mastercard does. And so, I -- I'm not
3 claiming to know more than Mr. Cavallo about
4 how they process authorizations. And so, I'm
5 certainly not going to testify that he said it
6 was the certain system that does it. No, it's
7 actually a different system that does it. But
8 certainly, the Mastercard rules and network
9 fall within this definition.

10 Q: Which -- which word in this definition?
11 Secured financing?

12 A: No. The -- as I just said or something like
13 extend credit ---

14 Q: Oh.

15 A: --- to people.

16 Q: Okay.

17 A: And I also don't think I have to list those
18 areas because it gives examples of smaller
19 terms that this broad term includes. It
20 doesn't give an exclusive list.

21 Q: When you were deposed, were you aware that you
22 were being deposed because you were off- --
23 being offered or going to be offered as a
24 witness in a matter involving Mastercard, a
25 payments processing network?



1 A: Yes.

2 Q: But it -- it didn't seem relevant to mention
3 payment processing network activities in your
4 areas of expertise?

5 A: No one -- so, the answer is I believe I did
6 answer by including payment card networks by
7 saying some things like extend credit or -- and
8 something -- sorry -- or do something like
9 extend credit to people. There's no one I know
10 who's an academic, who thinks that credit card
11 networks are unrelated to extending credit to
12 people. And I understand Mastercard, their
13 technical function is not to directly extend
14 credit to individuals, but the idea that
15 they're not -- that they're somehow outside --
16 that this cred- -- what everyone calls a credit
17 card company, has nothing to do with credit, it
18 -- to me, it's just an unrealistic view of what
19 these terms mean.

20 Q: Does Mastercard extend credit?

21 A: I'm hesitating because it depends when -- if --
22 how the settlement transactions work. So, as
23 they're described, if a settlement goes out and
24 the payment coming in hasn't come in, they're
25 extending credit until they're repaid. And so,



1 it depends how long those things process. But
2 I know in the documents, sometimes Mastercard
3 will hold accounts for people. And so, I --I
4 think in a minor way. They certainly don't do
5 it in the way that I've described. They
6 facilitate the parties in this credit card
7 business.

8 Q: I -- I want to return to what you just said
9 about them extending credit in the settlement
10 process. How -- how does that work?

11 A: You know, I thought there are times and I -- I
12 guess it -- it's probably safer to just say no.
13 They don't extend credit.

14 Q: Okay. So, they don't extend credit, but still
15 they're included in your mind in this
16 description that -- that says markets where
17 businesses extend credit or do something like
18 extend credit?

19 A: Right.

20 Q: So, what do they do that's like extend credit?

21 A: They -- they facilitate the issuers extending
22 credit to cardholders by providing a
23 transaction that is both a payment transaction
24 and an extension of credit.

25 Q: So, today you described it as related



1 activities, bu- -- the business of lending and
2 related activities, including operations of
3 networks. It seems maybe -- maybe closer -- I
4 think that's more ac- -- more of -- what --
5 what you're explaining, but at the time of your
6 deposition, when we were, you know, told that
7 you were being offered to testify as to
8 Mastercard's business, you gave this
9 definition, correct?

10 A: I believe I said the same thing both times.

11 Q: Okay. With -- within this list, can you let me
12 know which of these words covers advertising?

13 A: So -- yes. Oh, so ---

14 Q: Oh, I'm sorry. What -- what you believe ---

15 A: Oh, I -- I didn't know if you were going to say
16 some words. Okay. No. I ---

17 **MR. NEIL:** Which list are we talking about?

18 **MS. ROBINSON:** Sure. I -- I think Professor Hawkins
19 understands that I'm referring to the list of
20 activities between lines 10 and 21.

21 **MR. NEIL:** Oh, go ahead. I understand.

22 A: So, markets involve advertising. There are --
23 or at least credit markets all involve
24 advertising inherently. There are non-credit
25 markets where parties in those credit markets



1 don't need to advertise.

2 Q: So, for everybody in the credit market,
3 advertising is part of their business?

4 A: For -- for businesses that are selling
5 products, advertising is important.

6 Q: Okay. Is there anything special about
7 Mastercard's advertising?

8 A: I -- I mean, I think there a lot of things
9 special, like it's really persuasive.

10 Q: They probably think the same.

11 A: It's priceless. I mean, I -- we all know
12 exactly what it is. So, that -- I mean, I --
13 I -- I'm a fan. And so, I -- I think there's
14 a lot of things special about it.

15 Q: I -- I should have phrased that differently.
16 Is there -- you just said that all businesses
17 in the consumer credit markets industry
18 advertise. I think as part of your testimony
19 earlier you said that Mastercard's advertising
20 is one of its value drivers. I guess I'm
21 wondering, is it different? Is it a value
22 driver for -- is advertising a value driver for
23 Mastercard, but not for others in this field or
24 is it the same?

25 A: The only thing that seems a little bit



1 different here is Mastercard is saying that
2 cardholders aren't its customers and yet it
3 directs its advertising at cardholders. So,
4 that is a little different than issuers who try
5 to sign up cardholders and admit that the
6 cardholders are their customers. So, that --
7 that does seem unique about Mastercard's
8 advertising.

9 Q: Okay. And I think we'll come back to
10 advertising in -- in a little bit. I want to
11 sort of return to some of the objections I made
12 earlier. Do you see intellectual property as
13 an area of expertise included in this list of
14 activities between lines 10 and 21?

15 A: Intellectual property is not, but I don't think
16 I'm offering any testimony about intellectual
17 property. I was offering testimony about what
18 the contracts between the parties contain and
19 contracts, obviously, is on the list.

20 Q: You -- you didn't consider your testimony
21 earlier to be with respect to the -- the value
22 or influence of Mastercard's logo when used in
23 South Carolina or -- or presumably elsewhere?

24 A: Intellectual property relates to the rights and
25 obligations that parties have related to



1 copyright, trade- -- trademarks and things like
2 that. That's different than saying that a
3 company can generate value or revenue from
4 intellectual property. And so, I -- so, I do
5 think consumer credit markets involve
6 intellectual property and to the extent that
7 the intellectual property is used to generate
8 revenue in consumer credit markets, it's --
9 it's definitely part of consumer credit
10 markets.

11 Q: Is Mastercard's logo a trademark?

12 A: I believe so. I think that's what that
13 document that -- from Mastercard.us said.

14 Q: So, if Mastercard's logo is a trademark, and
15 you were talking about use of its logo in
16 increasing value and generating income, as --
17 and you said trademark is a part of
18 intellectual property, wouldn't that be
19 testimony regarding the use and implications of
20 intellectual property?

21 A: Well, so it would I guess as I just said, I --
22 it would be about how intellectual property is
23 being used in consumer credit markets. And so,
24 I -- I don't -- I'm not an expert about what
25 rights a trademark gives a company or how you



1 copyright something. But I am an expert in how
2 logos or other trademarks interact with
3 consumer credit.

4 Q: But that's -- and -- and that falls where in
5 this list?

6 A: Within the def- -- within consumer credit
7 markets, but that's -- that's part of what goes
8 in consumer credit markets is logos facilitate
9 trust or recognition.

10 Q: It's seeming like a broader word than -- than
11 the definition provided.

12 A: Well, I did say that's such a broad term. And
13 so, I -- I think reading it as a broad term is
14 consistent with my earlier testimony.

15 Q: Well, you said it's such a broad term that it
16 include -- that it includes other things like
17 this list.

18 A: Right.

19 Q: And then you said, that's fairly captured. You
20 -- you didn't discuss others. Is economics
21 included on this list?

22 A: No. That's -- but the idea of a market is an
23 economic concept. So, it's inherent within the
24 three words that make up consumer credit --
25 con- -- consumer credit markets.



1 Q: You've been represented as an expert with
2 respect to Mastercard's business since you were
3 disclosed as an expert to Mastercard, which
4 occurred in 2020, is that right?

5 A: Right.

6 Q: I'd like to go through the -- the transcript.
7 And there's a -- a number of passages. In your
8 mind, what -- if someone's an expert in
9 something, what -- what does that mean?

10 A: Are you asking under South Carolina law who
11 qualifies as an expert?

12 Q: No. I'm just asking your opinion of what --
13 what an expert ... If you're -- if you're not
14 comfortable answering -- I mean, if you don't
15 have answer that -- that's fine.

16 A: I -- I think it's someone who's acquired more
17 knowledge than most people spec- -- specific
18 knowledge about a field.

19 Q: And, in fact, you -- you said earlier that --
20 now I got rid of that page -- that you know
21 about credit cards than anyone else or
22 something like that.

23 A: I said I know more about the general credit
24 card business than the three Mastercard
25 employees who are -- who have testified in this



1 trial.

2 Q: Okay. Can you turn to page -- I guess 23. I
3 think the point is on 24. There had been some
4 discussion about your view and extension -- I
5 mean, whether or not Mastercard extends credit
6 and it sort of devolved, and jumping to line
7 18, I asked you what programs does Mastercard
8 -- you said Mastercard creates programs for
9 cardholders. What would be an example of a
10 program that Mastercard created for
11 cardholders? Your answer at 22, loyalty
12 programs. At 23, I said, such as? And 24, you
13 said, like the re- -- like the rewards programs
14 where -- your answer stops there. At 25, I
15 said can you be more specific? Your answer, I
16 mean, I don't know speci- -- the speci- -- I
17 don't know the specific rewards programs. I
18 just know that in the documents that Mastercard
19 has produced in litigation, it says we create
20 rewards programs for cardholders. Did I read
21 that correctly?

22 A: You did. And -- and I guess just to clarify,
23 obviously, I then went on to testify that I
24 knew about rewards programs from 15 years of
25 studying the market, but -- and -- so, I know



1 what that means that Mastercard offers reward
2 programs.

3 Q: But ---

4 A: What I interpreted you ---

5 Q: But you weren't able to identify a specific
6 one?

7 A: Yeah. I interpreted you to say do you know the
8 22 extra bonus points to go to Alaska if you
9 use your Mastercard by June 15th program.
10 Right? Which is ---

11 Q: You thought that's what I asked? Let me reread
12 ---

13 A: But yeah. Because you ---

14 Q: --- the question. Yeah. Let me reread ---

15 A: You said, I don't -- I said, I don't know the
16 specific rewards program. Right, like a
17 specific example of two for one points on
18 Tuesday.

19 Q: If we go up a few lines, we'll see that you
20 brought up rewards programs.

21 A: Right.

22 Q: Okay. Question, I think twice now you've said
23 that Mastercard has rules that would be
24 relevant in the decision to issue or extend
25 credit. What rules does Mastercard have



1 related to a bank's extension of credit? Your
 2 answer, Mastercard creates programs for
 3 cardholders. They provide services to
 4 cardholders. And so, when a bank makes the
 5 decision to extend credit, they do so against
 6 the backdrop of all those services and rules
 7 and systems that Mastercard has created. My
 8 question, and what programs does Mastercard --
 9 you said Mastercard creates programs for
 10 cardholders. What would be an example of a
 11 program that Mastercard created for
 12 cardholders? Your answer, loyalty programs.
 13 Questions, such as? Answer, like the rewards
 14 programs where -- you stopped speaking.
 15 Question, can you be more specific? Answer, I
 16 mean, I don't know the specific rewards
 17 programs. I just know that in the documents
 18 that Mastercard has produced for this
 19 litigation, it said, we create rewards programs
 20 for cardholders. So, you brought up rewards
 21 programs.

22 A: Right. Yeah. No. I ---

23 **OBJECTION:**

24 **MR. NEIL:** Your Honor, I -- we need to get moving
 25 and I understand that, but I -- I have -- this



1 is -- I think Ms. Robinson is using this for
2 impeachment. Professor Hawkins hasn't denied
3 any of this about rewards programs. And I --
4 I've -- I'm not sure what the impeachment --
5 what we're impeaching. And so, it -- it seems
6 like improper impeachment, and so, I -- I want
7 to lodge that objection because I just -- I
8 don't think we're impeaching anything. I think
9 at this point we're -- Ms. Robinson is just
10 reading his testimony into the record from his
11 deposition.

12 **THE COURT:** Yes, ma'am.

13 **MS. ROBINSON:** Your Honor, he -- he said he knows
14 about more about credit cards than anyone else.
15 I am examining that. I am -- you know, that
16 that is not how he was represented to us at the
17 deposition.

18 **MR. NEIL:** Your Honor, I -- I think -- I'm going to
19 object to that too because I think that's a
20 gross mischaracterization of what he said. I
21 think he's -- his testimony is he told his
22 class that he knows more about credit cards
23 than anybody else that they know. So, we're
24 talking about a law school class that he made
25 that comment to. I don't know if it's true or



1 not. He then said, I know more -- I think I
2 know more about general Mastercard business
3 than the three people that testified today.
4 Again, a very specific comment. What he did
5 not say is I know more about everybody else in
6 the world than about Mastercard or I know
7 everything there is to know about everything
8 Mastercard does. And I think that's where --
9 why this is improper. It -- he's never -- he's
10 saying today, I don't know specific rewards
11 programs, and he said then I don't know
12 specific rewards programs. So, there's nothing
13 to impeach.

14 **THE COURT:** I -- I understand. The -- both
15 objections are overruled. You're just at the
16 beginning of cross and you've got leeway when
17 it comes to cross examination. So, please
18 continue.

19 **MS. ROBINSON:** Okay.

20 **Q:** You spoke about the various parties including
21 -- did you speak about the relationship between
22 Mast- -- between acquirer banks and merchants?
23 Was that part of your direct testimony?

24 **A:** I think there was one question where -- well,
25 actually I don't think Adam asked any questions



1 there.

2 Q: There weren't any questions about acquirer
3 banks and merchants?

4 A: I -- not directly. Or not directly about that
5 relationship. But there were certainly things
6 that -- that come up about that relationship
7 and questions about Mastercard's relationship
8 with merchants.

9 Q: Did -- did you discuss as part of your
10 walkthrough of your PowerPoint anything related
11 to the relationships between acquirer banks and
12 merchants?

13 A: Yes.

14 Q: Do you know the standards that an acquirer bank
15 would use to decide whether or not to accept a
16 merchant?

17 A: I -- I do. I -- I know that in my deposition,
18 I said I'm not as familiar about that and
19 listed four things that are actually -- in
20 fact, now, I feel more confident are used by
21 merchants.

22 Q: So, in January you -- you didn't have a full
23 understanding and now you do today?

24 A: Well, no. I think the deposition reflects a
25 pretty full understanding. I just wasn't as



1 confident as I am today because obviously after
2 the deposition, I went and looked up to make
3 sure what I said was correct. Turns out it
4 was.

5 Q: Got it. As part of your presentation, did --
6 did you show a page from the annual report?

7 A: Yes.

8 Q: Okay. Do you know whose name is on the annual
9 report?

10 A: Mastercard, Inc.

11 Q: Did you know that name at all times relevant to
12 this matter?

13 A: I believe since I was very little, I've always
14 known the name Mastercard, but I did not in the
15 deposition know that Mastercard, Inc. was the
16 public company or the name of the public
17 company.

18 Q: Is there a difference between being a public
19 company and that being the name of a public
20 company?

21 A: I think so because it -- the name of the public
22 company is just who's filed to become a public
23 company. That's different than who's doing
24 business, what the annual report is talking
25 about. And so, that's why I think it's a



1 relevant distinction.

2 Q: I'm sorry. Did you relevant or irrelevant.

3 A: A -- sorry. A relevant distinction.

4 Q: A relevant distinction. Okay.

5 A: And I will say, I -- I -- I did know that
6 Mastercard, Inc. was the name of the public
7 company because I had taught a whole class on
8 it the year before. And so, even though I'm --
9 you know, like a whole individual class period.
10 Not a whole semester long class, but an
11 individual class period about the Mastercard
12 IPO. But I must have just forgotten that name
13 at the deposition. And if you need someone to
14 testify, my wife will testify I make a lot of
15 mistakes. And so, she could definitely testify
16 that even though I claim to be an expert on
17 consumer credit markets, I definitely make
18 mistakes, sometimes.

19 Q: Do you know when the IPO was?

20 A: 2006.

21 Q: Was Mastercard a for-profit or not-for-profit
22 before that?

23 A: I believe its status changed, I thought, in
24 2001 to become a -- to change from being a not-
25 for-profit to for-profit.



1 Q: 2000?

2 A: I thought around 2001 or -- yeah. Early 2000s.

3 Q: You -- you walked through a number of specific

4 fees during your direct testimony, is that

5 right?

6 A: That's correct.

7 Q: Probably all or at least most of them were on

8 the slides that you were referring to?

9 A: Right.

10 Q: If you had to just ballpark, how many different

11 specific fees do you think you might have

12 discussed during -- during your opening -- I --

13 I'm sorry -- during your direct exam?

14 A: I think six maybe. It would ---

15 Q: I -- I didn't count them. I'm just ---

16 A: Mr. Neil -- yeah. I'm thinking around six come

17 to mind.

18 Q: Do you recall me asking you about specific fees

19 during the deposition?

20 A: Yes. I do recall you asking.

21 Q: Do you recall what your answer was when I would

22 ask you generally what certain fees were for?

23 A: Yes. I remember of the 3,000 pages of

24 documents I read, I couldn't remember what the

25 specific fees were called at that time. I



1 would like to see ---

2 Q: I -- I'm sorry. That's not actually what I'm
3 -- not what I'm -- I'm referring to. I -- I
4 believe you told me that I was asking the wrong
5 question by asking you about fees. Does that
6 ring a bell?

7 A: I -- I said that the ways in which Mastercard
8 characterizes its fee are not outcome
9 determinative for what it's charging money for.

10 Q: So, in other words, Mastercard can name its
11 fees anything?

12 A: I -- I can't remember if I -- I -- I don't know
13 if said that or not.

14 Q: The -- I -- no. I'm -- I'm ----

15 A: So, I'd have to look.

16 Q: I'm sorry. I'm not trying to trip you up on
17 words. I'm actually trying to ask some
18 questions about the demonstrative that was used
19 today. I'm just wondering why during the
20 demonstrative today you focused on a number of
21 very specific fees.

22 A: Oh, that's -- that -- so, I did that just as
23 examples of how Mastercard charges for dollar
24 volume and number of transactions. And so,
25 they were just different examples of those fees



1 to show that that's -- and I -- I don't think
2 it's been in dispute. Obviously, it's in your
3 annual reports for, you know, an audit period.

4 Q: Was there a particular reason you picked the
5 particular fees that you showed?

6 A: I picked ones that issuers were required to pay
7 or acquirers were required to pay to show those
8 fees. And then I picked ones that were
9 examples of dollar volume and specific
10 transactions.

11 Q: And is -- is it your view that those fees --
12 that the way they were shown on the screen, the
13 name of the fee, a description of the fee, and
14 the particular charge per transaction or per
15 dollar volume, is it your view that that's an
16 accurate representation of what those fees are
17 for?

18 A: That -- like the -- that the name of the fee
19 captures everything that fee does for
20 Mastercard?

21 Q: Yes.

22 A: No. No. Because, obviously, if -- if that --
23 if every fee was allocated to a specific cost
24 Mastercard incurred, there's no we got to make
25 money for Mastercard fee, right? That there



1 would have to be a separate fee called our
2 profit. And I assume y'all don't want a -- or
3 Mastercard doesn't want to reveal to the world
4 precisely the way it makes profits.

5 Q: Well, it files an annual report, doesn't that
6 list it? Isn't it revealing to the world how it
7 makes profits in its annual report filed
8 presumably consistent with SEC rules and
9 audited by an accounting firm?

10 A: No. It's certainly true, that they tell the
11 world how much they make in profit. They just
12 don't structure their fees as the this is our
13 profit margin fee, this is the cost that we
14 have to pay the custodians for our building in
15 Missouri fee. You know, there are -- there are
16 different costs that are incurred that aren't
17 reflected in those fees. So, no. I don't
18 think they reflect every single expense or use
19 that Mastercard has for that money.

20 Q: You're a professor of contracts? One of -- one
21 of the courses ---

22 A: I -- I teach contracts, yes.

23 Q: Yeah. I -- I'm sorry. We were talking at the
24 same time. I'm just going to ask that question
25 again just for the record. You also teach one



1 or more courses in contracts?

2 A: Yes.

3 Q: So, thinking back to law school, 20 years ago,
4 so I may be off, I think of contract as a
5 meeting of the minds with bargain for
6 consideration. Am I close, Professor?

7 A: So, I tell my students, never say the word
8 meeting of the minds. But that's not what a
9 contract is. Don't ever say that a single
10 time. So, I -- so, for me personally, I would
11 -- I would not want to use that word, but I
12 understand -- I think I understand what it's a
13 short form.

14 Q: I'm not an expert in contracts. How would --
15 how would you correct my statement?

16 A: I'd say a contract is where an offer has been
17 accepted and there's consideration.

18 Q: Offer accepted and consideration.

19 A: And the consideration, the bargain for
20 exchange, that is -- I tell my students, always
21 say that word.

22 Q: I said that.

23 A: And so, that to me, I feel like that's like ---

24 Q: I said that.

25 A: --- the exact right thing to say.



1 Q: Bargain for consideration. Okay. So, with
2 that -- with that definition and -- and I'm --
3 I'm sure you're going to tell me in a minute
4 that consideration does not have to be dollars.
5 It can be something other?

6 A: Sure.

7 Q: So, using your definition, who enters into a
8 contract with Mastercard? Let -- let's -- I'm
9 sorry. Let's just go one by one. Okay. We've
10 seen a paper document, I believe you've
11 referred to it. It's in the record, the MLA.
12 Who enters into that written contract with
13 Mastercard?

14 A: Issuers and acquirers.

15 Q: And would you consider that document to be a
16 contract?

17 A: Yes.

18 Q: Is there a written document -- I'm sorry. Is
19 the MLA signed by both parties?

20 A: Yes.

21 Q: And what does the signature on that contract
22 represent?

23 A: It represents that the -- whoever assigned it
24 has adopted that writing.

25 Q: Is there a written agreement between -- for



1 processing services between Mastercard and
2 merchants?

3 A: No.

4 Q: Is there a written agreement between Mastercard
5 and cardholders?

6 A: No.

7 Q: In -- in the contract world, is there a concept
8 of a third party beneficiary?

9 A: Yes.

10 Q: What would that concept be?

11 A: So, I actually am not an expert in third party
12 beneficiary law. And so -- but I understand a
13 third party beneficiary is someone who's
14 directly contemplated in a contract that is
15 going to derive values from the con- -- derive
16 value from the contract.

17 Q: And do you know if that third party is bound by
18 the contract, does it control their behavior or
19 it just provides benefits to them?

20 A: I don't think in general just being a third
21 party beneficiary controls your actions or
22 controls the actions of the third party
23 beneficiary. Yeah. That alone does not.

24 Q: But benefits could still reach the third party
25 beneficiary through a contract?



1 A: Yes.

2 Q: What happens when a party breaks a contract,
3 are there -- gen- -- generally? I know this is
4 a general question, but you te- -- you're a
5 professor in contracts, so you can handle
6 general questions, I'm sure.

7 A: So, if a party breaks one of the promises
8 they've made, it's considered a breach of
9 contract.

10 Q: Okay. And is there usually an expectation
11 that when parties sign a contract that they
12 will respect the terms of the contract? Is
13 that sort of a ---

14 A: I ---

15 Q: --- an implied representation?

16 A: I do not think that is the way American
17 contract law views it. I think the way Justice
18 Holmes said is if you sign a contract, you
19 agree to abide by the contract or pay damages.
20 And so, I don't think there is -- I don't think
21 that's an accurate view of American contract
22 law.

23 Q: So, in other words, somebody, could disregard
24 the contract, but then there could be a
25 consequence if they ---



1 A: Right.

2 Q: --- disregard it?

3 **MS. ROBINSON:** Can we turn to the -- the

4 demonstrative, please?

5 Q: Do you still have your copy?

6 A: I actually never had a copy. I don't think.

7 Q: But you were able ---

8 A: Yeah.

9 Q: --- to see it on the screen?

10 A: Yeah.

11 **MS. ROBINSON:** I'm trying to think how -- how we do

12 the -- the clicking. I don't know how many

13 clicks it takes to get to this page.

14 **MR. NEIL:** Is that the second page?

15 **MS. ROBINSON:** It is. The pages aren't numbered.

16 It looks like it takes a bunch of clicks to get

17 there. Is that the last before? It's going go

18 -- can you just click one more? Oh, nope. I'm

19 sorry. You were right the first time. Can --

20 can you go back? Okay.

21 Q: This is the -- the second page after -- after

22 the cover page of this document. When you

23 testified earlier, you described the

24 relationship between the acquirer and

25 Mastercard as a direct contractual



1 relationship, is that right?

2 A: That's correct.

3 Q: And then you described the relationship between
4 the issuer and Mastercard as a direct
5 contractual relationship?

6 A: That's correct.

7 Q: And then you described the relationship, the
8 green arrow that looks like the -- the -- the
9 left leg of -- of that little guy there, as
10 between Mastercard and the cardholder. Well,
11 I guess it depends on which way Mastercard is
12 facing. I know that's the left leg and or the
13 right leg. I'm sorry. The -- the arrow
14 pointing towards the cardholder is the one I'm
15 focusing on.

16 A: Right.

17 Q: You described that as an indirect relationship,
18 I believe.

19 A: Right.

20 Q: And between Mastercard and the merchant as an
21 indirect relationship?

22 A: I said that there -- some merchants have direct
23 contractual relationships with Mastercard and
24 there are indirect, as well.

25 Q: Do you know what merchants would have a direct



1 relationship with Mastercard with respect to
2 transaction processing?

3 A: The ones that have contracted with Mastercard
4 to receive incentive payments.

5 Q: And can -- can you name one?

6 A: No. I'm sorry. I don't have Mastercard's
7 files and so, no, I cannot name the private
8 contracts they have. That they ---

9 Q: Do you know ---

10 A: --- have with merchants.

11 Q: Okay. Do you know if there are any in South
12 Carolina?

13 A: No. I do not.

14 Q: Okay. So, the -- the lines are the same like
15 it -- it's like a solid line where it's direct
16 and indirect, but you're describing it as --
17 the -- the bottom two as indirect, is that
18 correct? Like a dotted line or something.

19 A: Well, I -- I -- this line, I believe was used
20 to show the relationships between the parties
21 ---

22 Q: Uh-huh.

23 A: --- not the contractual relationships. But it
24 -- it is true that the cardholder and
25 Mastercard have an indirect relationship,



1 whereas the -- the merchant, I think, is solid
2 based on the -- or at least some merchants
3 would have a solid line in your demarcation and
4 some would have -- well, I think all would have
5 a solid line because all are bound by
6 Mastercard's logo rules.

7 Q: Right. I'm just trying to understand because
8 the slide is labeled Mastercard's business
9 model.

10 A: Right.

11 Q: But it -- how -- how do you visually
12 distinguish between the -- the direct and the
13 indirect relationships?

14 A: I believe that every single party on this
15 screen is essential to Mastercard's business
16 model. And so, the -- the point of the lines
17 was not to describe contractual relationships.
18 It was to describe significant relationships.
19 And so, that's why I think the green line is
20 sig- -- is -- is right.

21 Q: But didn't -- didn't Mr. Neil using the slide
22 discuss the direct and indirect relationships
23 with you using this slide?

24 A: I -- yes. But I -- I'm happy to say that what
25 I mean by these arrows is significant



1 relationships, not necessarily direct
2 contractual relationships.

3 Q: Okay. I think you said that like Mastercard
4 needs all of these parties in order for it to
5 what? I'm sorry. I don't want to put a word in
6 your mouth.

7 A: In order for it to generate revenue.

8 Q: Okay. What about the issuer? Does the issuer
9 need all of these parties here to generate
10 revenue from this activity?

11 A: From this activity with Mastercard, yes.

12 Q: Right. Like, of course, the bank could provide
13 mortgages and have revenue, but with respect to
14 the topic of the day.

15 A: Right. Or -- or if it was in a three-party --
16 well, no. That's right. They -- for ---

17 Q: Okay. What -- what about the acquirer? Does
18 the acquirer require everyone to be there for
19 it to generate revenue in -- in ---

20 A: From this type of transaction, yes.

21 Q: What about the merchant? Does it require all
22 of these parties to be there in order to
23 generate revenue?

24 A: So, I don't think so because there are other
25 credit card networks that operate without



1 acquirers and issuers and so, if American
2 Express replaced Mastercard there, you wouldn't
3 need an acquiring and an issuing bank.

4 Q: Okay.

5 A: So, I don't think the merchant needs all five.

6 Q: So, just for -- for clarity in the record, can
7 -- can you just quickly -- say four parties,
8 assuming three parties, assuming and what the
9 relevance would be on this chart?

10 A: Oh, sorry. So, your question does the merchant
11 in order -- I -- I interpreted your question to
12 be does the merchant need all five people, the
13 merchant, acquirer, Mastercard, issuer, and
14 cardholder, to generate revenue through a
15 credit card transaction model. And I said no
16 because in a three-part -- a three-party model,
17 the network would be -- would fill the role of
18 the issuer and the acquirer. And so, the
19 merchant could receive credit card payments
20 from the network or not involve an acquirer or
21 issuer.

22 Q: In other words, the network would be playing
23 the role of multiple parties at the same time?

24 A: Right.

25 Q: And that is what -- what would one call that --



1 that type of system?

2 A: A three-party model.

3 Q: A three-party model. And can you just -- just
4 -- just for background here, I know it was
5 discussed several days ago, but it would be
6 hard to find in the record, can you give one or
7 two examples of -- of companies that operate in
8 the three-party model?

9 A: American Express and Discover card both often
10 operate in this model.

11 Q: But within the four-party model.

12 A: Right.

13 Q: Which of these -- so four-party meaning
14 Mastercard plus four. So, we see five, is that
15 right?

16 A: Right.

17 Q: So, which of these parties isn't necessary?

18 A: For -- for the merchant, all of the parties are
19 necessary.

20 Q: Okay. And for the acquirer?

21 A: All of the parties are necessary.

22 Q: And for the issuer? Did we already say iss- --
23 I think. I'm sorry. Is there anybody on there
24 who doesn't need everybody else in your view?

25 A: No.



1 Q: Okay.

2 A: Not for this model.

3 Q: Not for this model. So, why is it particularly
4 relevant for Mastercard that you need the
5 cardholder if -- if -- if everybody here needs
6 everybody, is there anything unique about any
7 one party?

8 A: Well, yeah, because Mastercard's fees are
9 directly related to the relationship between
10 the cardholder and merchant. And that's what
11 happens in South Carolina and so, that's the
12 thing that triggers the generation of revenue.
13 So, that's why ---

14 Q: Which thing?

15 A: --- it matters. The -- sorry. The -- when the
16 cardholder and merchant engage in a Mastercard
17 branded transaction.

18 Q: Okay. So, can you walk me through from a
19 technical point of view, not -- I -- I'm sorry.
20 I don't mean a technical point of view. We've
21 heard plenty of that. Well, let me ask. Do --
22 do you have any reason to dispute -- were --
23 were you here for the testimony of Mr. Cavallo
24 on yesterday -- it seems much longer -- who
25 testified as to the authorization activities?



1 A: I was.

2 Q: Was -- was there any part of his description of
3 the computer systems and software, so the
4 hardware and the software, the flow of the
5 information, was there any part of that
6 testimony that you thought was inaccurate?

7 A: If you're asking specifically about exclusively
8 where information was sent, no. There -- I
9 don't have -- I didn't have anything. But
10 there were certainly things Mr. Cavallo said
11 that I don't think accurately represent what's
12 happening in the transaction.

13 Q: In -- in the physical transaction? That -- I'm
14 -- I'm just trying to focus right -- and I'm
15 just trying to find out if -- if you dispute
16 Mastercard's rendition of how a message moves
17 through the system and back, and what is
18 happening via computers and software while it's
19 moving.

20 A: Not -- not via computers and software.

21 Q: Okay. Were you here when Mr. Buehler testified
22 as to the clearing system?

23 A: I was.

24 Q: Do -- is there anything about his testimony
25 related to, again, the movement of information,



1 not various parties' rights or anything like
2 that, the movement of information from when it
3 enters the clear- -- when and how it enters the
4 clearing system, whatever the computers and the
5 software do to it to when it leaves the
6 clearing system?

7 A: I -- I was actually a little confused by some
8 of his testimony and -- or -- or had a
9 different understanding of how different
10 processes work or the way he characterized
11 them.

12 Q: Can you give me -- I mean, like what?

13 A: So, I -- and maybe I misunderstood. But I
14 thought he said authorization could happen on
15 day one and the clearing wouldn't happen until
16 the next day, and then the settlement would
17 happen the next day after that. And I may have
18 misunder- -- I -- I may have misunderstood what
19 he testified about. But I didn't understand
20 why, if an authorization happened at 9:00
21 o'clock on Monday morning, that a merchant
22 couldn't theoretically at least send it in the
23 next batch of transactions that the acquirers
24 were sent. And I -- I don't know if it's --
25 yeah. And so, I don't know if I misunderstood,



1 but that's the only reason ---

2 Q: No. I -- I -- I ---

3 A: --- I ---

4 Q: My understanding of how you just described his
5 testimony that these things might happen on --
6 on different days is -- is also how I heard him
7 to testify. Why don't -- why -- I'd like to
8 follow up with a question is -- is -- is that
9 just inconsistent with what you thought it
10 would be or do you have a specific reason to
11 doubt the accuracy of that?

12 A: I -- I didn't interpret him to say they might
13 happen on different days. I thought he said
14 they would happen on different days. But it --
15 and again, it was ---

16 Q: Okay.

17 A: It's a lot of testimony and that was the only
18 -- that was for related to clearing. That was
19 the only thing that I -- I didn't 100 percent
20 ---

21 Q: Sure.

22 A: I would want to depose him and just ask, so
23 what were you saying exactly?

24 Q: Sure. And let me ---

25 A: But ...



1 Q: And -- and let me just ask my question again.
2 Is it just you thought it worked differently or
3 do you have a reason to -- can you point to
4 something that says it works differently than
5 that?

6 A: I -- I believe that the industry describes the
7 clearing process with merchants differently
8 than how he was describing it.

9 Q: Okay. The industry -- the industry describes
10 it differently. Can you refer to a document,
11 a website, a conversation? Where -- where are
12 you picking up that ---

13 A: Just research I've done about merchant card
14 processing from the merchant to acquirer angle.
15 And so -- no. But I don't have a specific
16 document that I can pull out that says that.

17 Q: Are you -- are you sure you read that somewhere
18 or you think you read that somewhere?

19 A: No. I'm sure that some merchants -- he
20 testified that it could be a week before the
21 merchant gets the clearing information to the
22 acquirer, and I think that is far outside the
23 norm. I think most merchants get it there
24 every day unless ---

25 Q: But he said it could be that long. He didn't



1 say it typically is that long.

2 A: Yeah. But I -- I -- I think that mis- -- in my
3 mind, that misstates. But I -- I will say, I
4 don't ---

5 Q: Okay. But -- okay.

6 A: None of this is important to my opinion. And
7 so, if -- if the question is did I hear things
8 about clearing that affect my opinion in this
9 case, the answer is no.

10 Q: Okay. That actually isn't -- isn't my -- my
11 question. I mean, one -- one of the things you
12 were offered as an expert in -- on is
13 Mastercard's business. So, I'm, you know,
14 trying to determine whether you agree with the
15 descriptions you've heard related to cer- --
16 certain things or if you disagree with them.
17 So, related to your opinion from that point of
18 view. So, can -- can you identify -- did you
19 say you couldn't -- that you think you read
20 that somewhere or you know -- I'm sorry. You
21 said, you know you read that somewhere, but you
22 don't recall where you read it?

23 A: No. Yeah. No. I -- I've read hundreds of
24 documents about it. And so, no, I don't know
25 which of those hundreds of documents, from my



1 academic research, I read it. No.

2 Q: Okay. Aside from the timing of when clearing
3 begins, was there anything about the movement
4 of information through the system, again, with
5 the computers and the software, that Mr.
6 Buehler testified to that you did not think was
7 accurate?

8 A: No.

9 Q: Okay. Were you here when Mr. Buehler testified
10 as to the settlement processes?

11 A: Yes. I was.

12 Q: Was there anything about his description of how
13 settlement occurs from the information flow and
14 -- and I guess dollar flow point of view, from
15 the point of settlement starting, whatever
16 various computer and hardware processes occur,
17 to the point of settlement ending? Were there
18 any steps or apps- -- aspects of that that you
19 think are not accurate?

20 A: No.

21 **MS. ROBINSON:** I'm -- I'm assuming we got the green
22 light to go to 5:30 since nobody has -- has cut
23 me off. I guess that gives us about ---

24 **THE COURT:** Are you good with that?

25 **MS. ROBINSON:** Five or six more minutes.



1 THE COURT: Yes.

2 MS. ROBINSON: Okay.

3 THE COURT: Uh-huh.

4 Q: So, when you were testifying as to this
5 document, you said that -- that Mastercard's
6 steps, meaning -- referring to when the
7 Mastercard folks testified the prior days ---

8 A: Right.

9 Q: --- that their steps were misleading?

10 A: Right.

11 Q: Was it the -- the -- your different view on
12 that aspect of clearing that you were referring
13 to or were you referring to something else?

14 A: No. I was referring to something else.

15 Q: Something else. Okay. What were you referring
16 to?

17 A: So, I think those steps are misleading, I think
18 in three ways. One way is they start too late
19 in the process. Mastercard is involved in
20 convincing cardholders and merchants to use
21 Mastercard before those steps start. The
22 second way I think it's misleading is that the
23 coloring that shows Mastercard is only involved
24 in sort of the middle part of the transaction
25 is misleading because Mastercard is involved in



1 dictating the rules for every single part of
 2 the transaction. And the third thing that I
 3 think is misleading is by separating out, for
 4 instance, authorization into a bunch of
 5 different steps, and talking about it like, the
 6 issuer then makes a decision, is misleading
 7 because it makes it look like this is a long
 8 drawn out process when Mastercard's 2012 annual
 9 report says that it all occurs in 130
 10 milliseconds. That pr- -- transactions are
 11 processed on average in 130 milliseconds. And
 12 so obviously, there's not someone at the issuer
 13 hemming and hawing about whether or not to
 14 accept a card when the issuer decides this is
 15 all happening. It also creates the false
 16 impression that the system breaks down a bunch
 17 because that same annual report says, 99.9
 18 percent of the time, Mastercard's system was
 19 online for transactions. And so ---

20 Q: What -- what about the chart made it look like
 21 Mastercard's system broke down?

22 A: Because ---

23 Q: A bunch.

24 A: --- when it's talked about, you sort of say, so
 25 what happens here, and I guess maybe I'm



1 thinking from my deposition where you said what
2 would happen if everything stopped at step
3 three or something like that.

4 Q: Right.

5 A: And so that -- maybe it's a leftover from how
6 that chart's been treated or how those steps
7 have been discussed in the past.

8 Q: So, was there something about the description
9 you heard the other day that suggested the
10 system breaks down a bunch?

11 A: Maybe. Maybe not. Maybe it was my impression
12 from the deposition.

13 Q: Okay. Do you -- I don't -- I imagine that the
14 transcript won't show this, but I think when
15 you said the issuer makes a decision, you did
16 finger quotes around issuer make the decision.
17 So, it was like what part of your sentence, the
18 transaction flowing, and then the finger quote,
19 issuer, un-finger quote, makes the decision.
20 Why -- why -- why the air quote, finger quotes
21 ---

22 A: Oh ---

23 Q: --- bunny ears?

24 A: It shows you shouldn't use finger quotes
25 because I meant finger quotes, the issuer,



1 fingers quotes, makes a decision, un-finger
2 quotes because I was trying to say it's not
3 like the issuer is sitting there thinking real
4 hard, well, this guy is in Columbia, South
5 Carolina. There's a lot of crime there and
6 well, but he's from New York and we love New
7 Yorkers. Okay. We'll do it. Right? It's --
8 it's all instantaneous.

9 Q: But are you doubting that the issuer is making
10 a decision with respect to ---

11 A: No.

12 Q: --- every single transaction?

13 A: Well, in the colloquial use of that word, this
14 is what I think is misleading. In the
15 colloquial use of that word, makes a decision,
16 we think about a human deliberating about
17 choices. And really in that instance, it's a
18 computer program instantly executing orders.

19 Q: Would -- would you imagine that the computer
20 program was programmed by humans who set
21 parameters as to how to apply probably an
22 algorithm to ---

23 A: Yeah. No. Absolutely. That -- and
24 absolutely.

25 Q: And I'm just -- I can't tell if you're doubting



1 whether the issuer is the one primarily making
2 the decision or if you're just ---

3 A: No. I think the issuer is responsible for that
4 decision.

5 Q: Okay.

6 A: I just think describing it as a 12-step process
7 where the issuer makes a decision misleads us
8 to think this is somehow not happening at
9 lightning speed.

10 Q: What difference does the speed at which it
11 happens make?

12 A: I -- I think part of is it misleads us to think
13 that the processes are so separate or that the
14 cardholder and merchant's transaction is
15 somehow very different than what's going on at
16 the MIPs, when really it's all part of a
17 unified transaction.

18 Q: Well, doesn't the 12 steps show it all
19 literally connected with lines? I'm -- I'm not
20 sure where the misrepresentation is.

21 A: Well, I guess -- and I -- I shouldn't -- I
22 don't mean Mastercard is making a
23 misrepresentation. I'm just saying the effect
24 is misleading and so, I -- I don't -- I'm
25 definitely not saying it's like a lie or



1 something. I'm just saying, it -- it leaves
2 the wrong impression.

3 Q: I'm ---

4 A: The earlier things I do think are not -- not
5 lies from -- not -- from Mastercard, but like
6 do misrepresent like actually falsely represent
7 what's happening in the transaction. But this
8 -- the third thing just kind of leaves the
9 wrong impression.

10 Q: Meaning the color and starting too late in the
11 process?

12 A: Right.

13 **MS. ROBINSON:** Can we -- can we throw one of those
14 slides up, one of the circle ones? Oh, do we
15 -- do we want Anthony to actually put -- Your
16 Honor, we said we were going to stop at 5:30.
17 It's a few minutes before. I'm -- I'm happy to
18 pick up here in the morning.

19 **THE COURT:** I think that would be fine.

20 **MS. ROBINSON:** As long as that's all right with Mr.
21 Neil.

22 **MR. NEIL:** Absolutely.

23 **THE COURT:** Okay.

24 (The hearing adjourned at 5:28 p.m. on Thursday,
25 March 9, 2022.)



DAY 4 - FRIDAY, MARCH 11, 2022

COURT REPORTER: All rise.

THE COURT: Good morning. Looks like we've -- is Ms. Wooten over there?

MR. RYAN: She'll be here shortly, Your Honor.

THE COURT: Okay. Are we ready begin?

MS. ROBINSON: Yes, sir.

THE COURT: Let me announce the case and then let's kind of talk about some things.

CALL TO ORDER

THE COURT: This is day 4 of Mastercard International, Incorporated versus the South Carolina Department of Revenue, Docket 20-ALJ-170008-CC. It looks like everyone is back. I realized we have a lawyer that's coming in. But I understand we can get started. Any housekeeping matters that we need to discuss before we jump back into, I think, cross examination? Okay. Good morning.

MR. HAWKINS: Good morning.

THE COURT: How are you?

MR. HAWKINS: I'm doing well.

THE COURT: Well, let's get started, and, of course, as always, we can take breaks as needed. But you all have done a very good job of kind of



1 moving things through and -- so, I appreciate
2 that. Yes, ma'am.

3 **MS. ROBINSON:** Thank you.

4 **THE COURT:** Mastercard, you may begin.

5 **MS. ROBINSON:** We're actually not going to need your
6 slide yet.

7 **MR. NEIL:** Okay.

8 **MS. ROBINSON:** We scanned it.

9 **MR. NEIL:** Okay.

10 **MS. ROBINSON:** I'm sorry. I just had a little
11 sidebar there with opposing counsel.

12 **THE COURT:** That's quite all right.

13 **MR. HAWKINS - CROSS EXAMINATION CONTINUED BY MS.**

14 **ROBINSON:**

15 Q: Good morning, Professor Hawkins.

16 A: Good morning.

17 Q: Are you aware that the taxpayer filed a motion
18 in limine in this matter and the Department
19 filed a response?

20 A: Yes.

21 Q: Did you review the Department's response to
22 Petitioner's motion to limit expert testimony
23 of Jim Hawkins in this matter?

24 A: The Department's response? Yes. I read
25 through it.



1 Q: Did you read it before it was filed?

2 A: I did not as far as I -- no, I did not.

3 Q: It says in it, I'm going to quote, for the last
4 decade, Professor Hawkins has taught law school
5 classes entitled Consumer Law, Consumer Law and
6 Policy. That was listed as one item. And
7 Credit Cards Law and Policy on page 4.

8 A: Correct.

9 Q: That statement is incorrect, is it not?

10 A: So, for the last decade I have taught one of
11 those two classes. I have not taught both of
12 those classes for the last decade. I have ---

13 Q: So, that -- so, that statement ---

14 A: I think the statement is correct because it
15 doesn't say both. I think it's ---

16 Q: Well, let me read it again.

17 A: Okay.

18 Q: Okay. For the last decade, Professor Hawkins
19 has taught law school classes entitled Consumer
20 Law, Consumer Law and Policy, and Consumer
21 Credit Cards Law and Policy. It says and.

22 A: Right. I -- when I hear that sentence, I think
23 during the last decade he has taught those
24 classes. Not every year he has taught both
25 classes. And so, I -- I think it -- if I --



1 your -- if -- if what they meant was what you
2 said or what you're reading that I have taught
3 that credit card class for ten years, that's
4 not correct and think we've all acknowledged
5 that. If it means that I've taught one of
6 those two classes, I think that -- well, I
7 think that is correct, so.

8 Q: Okay. So, you have taught the Consumer Law
9 class for ten years?

10 A: I -- yeah. Some years, I taught -- I taught
11 Advanced Contract Law, but before -- you know,
12 over the last 14 years, if the question is have
13 you taught it ten times, one of those two
14 classes, I think that's accurate.

15 Q: I -- okay. Thank you. I asked you whether you
16 thought the description of the technical
17 activities provided by Mr. Buehler with respect
18 to clearing were accurate and you indicated
19 that you had a different understanding of the
20 time frame for first presentments, correct?

21 A: Right. That I -- I thought that it was
22 uncommon for merchants to wait seven days and
23 then you clarified and said, well, he just said
24 may. So, is it theoretically possible for them
25 to wait seven days, and I said, yes. That --



1 that's my recollection ---

2 Q: Okay.

3 A: --- of we talked about yesterday.

4 Q: And you -- you said that you recalled reading
5 somewhere in a non-Mastercard document that
6 first presentment happened on the same day as
7 the date of the authorized transaction?

8 A: I believe I said that merchants usually turn in
9 or that the information gets to the acquirer
10 that first day, yes.

11 Q: Okay. And -- and as a result of your opinion
12 of when first presentment happens and Mr.
13 Buehler's description of when he understands
14 first presentment to happen, you indicated that
15 there was an error in his description?

16 A: No. I don't think -- I don't think that's what
17 I said. I think I -- I said, I was -- I was
18 confused by what he said and maybe I didn't
19 hear him right. That -- well, yeah. To -- to
20 the extent that he was implying people usually
21 wait -- or that waiting seven days was common
22 for merchants, I do think that's wrong.

23 Q: You -- you understood his testimony to imply
24 that -- that customer -- that acquirers wait
25 seven days?



OBJECTION:

MR. NEIL: Your Honor, if I may. I -- I want to object here. This is pitting one witness against another, which is I think pretty clearly not allowed. She can ask him what he thinks. Mr. Buehler's testimony stands for what it stood for. But I don't think you can pit one witness against another and say is what he said correct. I'm pretty sure that we don't allow that. And I think that's what she's doing.

MS. ROBINSON: I -- I asked if -- Professor Hawkins has testified that he knows about Mastercard's business. He is here as an expert in Mastercard's business. He comment -- he has made several representations that are different than how Mastercard has represented things. So, I'm just trying on certain points to clarify.

MR. NEIL: And -- and she's -- I'm sorry.

THE COURT: No. Please.

MR. NEIL: She's allowed to do that. What she can't do is say, do you disagree with him.

THE COURT: Mr. Neil, I do agree that it is improper to pit witnesses against each other. This is



1 the beginning of her cross today, so I'm going
2 to allow a little bit more of this. I -- I'm
3 not sure where it's going yet. So, to the --
4 for right -- for right now, the objection is
5 overruled.

6 **MS. ROBINSON:** Okay. I'll ---

7 **THE COURT:** You may ---

8 **MS. ROBINSON:** I'll keep it short ---

9 **THE COURT:** Okay.

10 **MS. ROBINSON:** --- before -- okay.

11 **THE COURT:** Thank you.

12 **MR. NEIL:** Thank you, Your Honor.

13 **MS. ROBINSON:** We're going to display a document.

14 Q: Can you turn to -- you're -- you're welcome to
15 turn -- Mr. Kerman is going to put a document
16 up. If you'd like to look at it on paper
17 instead of the screen, you can. It is at tab
18 13 of the Joint binders. And it's -- once you
19 get to tab 13, we're looking at P0002244.

20 **(Joint Exhibit Number 13 was referenced at this**
21 **time.)**

22 A: Okay.

23 Q: This is a page from what has been identified as
24 Mastercard's clearing manual. The first
25 paragraph is titled, Timeframe for First



1 Presentments. Do you see that?

2 A: Yes.

3 Q: In the second paragraph, can you read the
4 sentence -- actually, I'll just read it because
5 I don't want to which -- I can't count the
6 sentences. It says, in the second -- it says,
7 an acquirer has a maximum of seven days to
8 present the transaction to the issuer for
9 electronically reported card information,
10 whether card read or key entered. Do you see
11 that?

12 A: Yes.

13 Q: Did I read that correctly?

14 A: You did.

15 Q: Do you -- do you have any concerns with this
16 statement in the manual?

17 A: I do not.

18 Q: Okay. Thank you. Okay.

19 **MS. ROBINSON:** Can we move to yesterday's
20 PowerPoint?

21 Q: Do you still have a -- the paper copy or --
22 we're going to look at the PowerPoint that you
23 were asked to walk through yesterday.

24 A: Okay.

25 Q: Do you need a paper copy?



1 A: I don't think so.

2 Q: Okay.

3 A: If it's on the -- I think I can use the screen.

4 Q: Turning to the fourth page of the document, at

5 least printed it was the fourth page. This

6 page is labeled merchant and cardholder and has

7 three bullets. The second bullet states,

8 cardholder uses credit card because merchant

9 displays Mastercard mark.

10 A: Right.

11 Q: Is that a statement of fact or is that a

12 statement of your opinion?

13 A: I think it's a general statement of fact, that

14 generally credit card or the -- I -- it's a

15 statement that reflects why people have

16 Mastercard marks on their door and at the point

17 of sale. They're there to indicate that a

18 cardholder can use their Mastercard branded

19 card there.

20 Q: So, it says that the cardholder uses the card

21 because the merchant displays the mark.

22 A: Right.

23 Q: So, I mean, I've walked into stores and seen a

24 mark and not used my Mastercard branded card.

25 I -- I guess I'm trying to understand the --



1 the cause and effect in this sentence.

2 A: Oh, it's -- it's not saying that the exclusive
3 reason a cardholder uses a Mastercard is
4 because of the logo. Like obviously, the
5 cardholder uses the card that they want
6 whatever is at that store. If they want to
7 pay, they want to use a credit card as opposed
8 to cash. So, there are certainly lots of
9 reasons. But the mark is important because it
10 indicates to the cardholder, this is a place
11 that accepts Mastercard.

12 Q: Okay. So, in other words, this bullet, in --
13 in your view is showing one reason why a
14 cardholder would use their card rather than
15 what is causing them to use the card?

16 A: Correct.

17 Q: Can we go to page 6, please? This page is
18 labeled Mastercard and Acquirer and has -- also
19 has three bullets. I see two bullets where the
20 transactions get authorized and then I see a
21 third bullet that's the later stage step of
22 settlement. Are -- are clearing activities
23 missing from this or are they intentionally
24 left off?

25 A: No. It's -- it's a non-exclusive list of the



1 sorts of things. Obviously, that -- as we've
2 seen the rules and related documents are
3 thousands of pages long. And so, I picked
4 several things that illustrate the relationship
5 between Mastercard and the acquirer.

6 Q: Okay. Why these and not other things, for
7 example, clearing?

8 A: I mean, there are three major functions. And
9 so, it's two of the three. But there's no
10 particular reason that clearing was not
11 included. It could certainly have included
12 Mastercard sends clearing information to the
13 acquirer.

14 Q: Okay. Is there anything on this bullet -- on
15 this page that indicates there are other
16 components that are left off, like an other --
17 like a bullet that says, and other things or --
18 -

19 A: As you can see, there is not.

20 Q: Can we go to page 12, please? This page is
21 titled, Mastercard and Merchant. The first
22 bullet says, markets in S.C. to convince
23 merchant to accept MC.

24 A: Right.

25 Q: Can -- can you just for clarity in- -- indicate



1 what you meant by the two initials there, the
2 two sets of initials?

3 A: So, it's saying that Mastercard markets in
4 South Carolina to convince merchants to accept
5 Mastercard.

6 Q: Okay. Thank you. I -- I assumed that's what
7 it meant. I just didn't want put words in your
8 mouth. Can you give an example of Mastercard
9 marketing in South Carolina to convince
10 merchants to accept cards?

11 A: Sure. If you go today to the Mastercard
12 website, there's a whole section about why
13 merchants should accept credit cards and the
14 reasons why it's good for the merchant, and so
15 ---

16 Q: And is that ---

17 A: --- it does ---

18 Q: Is that website available -- is -- is there
19 like a South Carolina specific page in the
20 website?

21 A: No. It's aimed at U.S. audiences and so, since
22 South Carolina as part of the United States,
23 it's aimed at -- you know, it's at South
24 Carolina.

25 Q: Okay. Are -- are you able to identify any



1 South Carolina specific marketing that
2 Mastercard does?

3 A: I believe in the documents produced in this
4 litigation, there were magazines that were --
5 oh -- oh, so that's exclusive. I think I
6 misunderstood. Sorry. You mean, are there any
7 ads that are exclusively for South Carolina, is
8 that what you're asking?

9 Q: Or aimed -- or aimed specifically to South
10 Carolina?

11 A: No. There -- there -- well, in the sense that
12 they're advertising to the entire United
13 States, and so they're advertising to South
14 Carolina as a subpart of the United States.
15 Not -- but not -- I -- I haven't seen anything
16 that's South Carolina merchants, pay attention,
17 sort of thing.

18 Q: Okay. So, here where it says markets in South
19 Carolina to convince the merchant, you just
20 mean ---

21 A: Right.

22 Q: --- that nationwide or potentially global
23 advertising campaigns on the website are
24 available here?

25 A: Right.



1 Q: Can be accessed here. Okay. Thank you. On
2 the same page, I want to focus on the -- the
3 last bullet for a minute. Your report
4 indicates that Mastercard, quote, provides
5 direct services like -- I'm sorry.

6 **OBJECTION:**

7 **MR. NEIL:** Your Honor, I would just like to object
8 to the characterization that this is a report.

9 **THE COURT:** Objection noted. Please continue.

10 **MS. ROBINSON:** I -- I do believe Professor Hawkins
11 called it a report yesterday. I -- I
12 understand it was not excluded as a (sic)
13 expert report. Sorry.

14 Q: I'm going to start that question again.
15 Looking at the last bullet, this indicates that
16 Mastercard provides direct services to
17 merchants, then lists three different things in
18 separate quotation marks. The first one listed
19 is account status in- -- inquiry service for
20 purchase transactions. The second listed is
21 expert monitoring solutions. And the third
22 listed is real time fraud scoring service for
23 merchants. What do you mean by direct here?

24 A: Here, I mean that they are designed for
25 merchants. Like the name on this slide



1 indicates expert monitoring, real time fraud
2 scoring services for merchants.

3 Q: When you say designed for merchants, do you
4 mean that what -- what do you -- I mean, do you
5 mean that they are provided directly to
6 merchants?

7 A: No. No. Just that merchants are the
8 recipients of these services.

9 Q: When you say recipients of the service, do you
10 mean that these services are delivered to the
11 merchants by Mastercard?

12 A: That -- I -- I understand it's often through
13 the acquirer, but they are designed for --
14 yeah. No. Not -- not -- this is not trying to
15 establish a direct contractual relationship
16 between Mastercard and the merchant.

17 Q: Okay. I think you just said they're often not
18 delivered direct to the acquire- -- to the
19 merchant. Are -- are they ever delivered
20 directly to the merchant by Mastercard?

21 A: I don't know if they're -- I know for
22 cardholders, they're delivered directly. But I
23 don't know ---

24 Q: Well, this -- this slide ---

25 A: --- of any examples about merchants directly.



1 Q: Yeah. This slide is a merchant slide.

2 A: Yeah. No. I -- I -- I'm not claiming they're

3 directly delivered.

4 Q: Are you acknowledging that they are not

5 directly delivered?

6 A: I -- I don't -- I haven't -- I don't remember

7 100 percent all of the rules, and so I -- I --

8 I think I'm just saying I can't say they are

9 directly delivered.

10 Q: Okay. But it says here, provides direct

11 services. So, can you maybe -- is that maybe

12 unclear or incorrect?

13 A: I mean, I -- based on the language of the

14 service in this authorization manual, it seems

15 like it's for merchants. But I -- I do

16 understand and acknowledge that they go through

17 the acquirer in this instance.

18 Q: Okay. And do you -- are you presenting these

19 here as three separate direct services?

20 A: Do ---

21 Q: I see three -- three sets of quotation marks.

22 A: So, these are just -- I guess the last one

23 doesn't have a closed ---

24 Q: What ---

25 A: --- quotation mark, but ---



1 Q: Well, we can forgive that as -- as editing.

2 A: But these are examples and the -- they're not
3 -- I'm not presenting as three distinct
4 examples. I'm just presenting them as ---

5 Q: So, as not three distinct examples, what do you
6 mean?

7 A: Like the -- to the extent expert monitoring
8 solutions and fraud scoring services are
9 similar, I'm not trying to make the claim that
10 they're different.

11 Q: Okay. But they're separated here. I'm mean,
12 that's what I'm trying to understand because I
13 look at this and I see it saying that
14 Mastercard is providing these directly to the
15 merchant. And it looks to be a list of three
16 separate activities, and I'm -- I'm just
17 wondering if that's an accurate presentation of
18 your understanding of these facts.

19 A: No. I'm just saying, these are things that
20 Mastercard describes as for the merchant. I --
21 I don't think the -- the slide does not say
22 three entirely distinct services that would ---

23 Q: So, what do the quotation marks and separation
24 by commas ---

25 A: I think those are the names of the different



1 services. Like I think it's quoting like you
2 see expert monitoring, real time fraud scoring
3 services for merchants. So, it's quoting the
4 authorization manual.

5 Q: Okay. Can we turn to -- this will be tab 12 in
6 the materials. And when you get to 12, it
7 would be page 0- -- P0001826.

8 **(Joint Exhibit Number 12 was referenced at this**
9 **time.)**

10 A: Okay.

11 Q: And I want to have the two side by side. So,
12 on your -- on the slide show it listed one as
13 Account Status Inquiry Service. Do you see
14 that on -- on this page, P0001826?

15 A: I do.

16 Q: Okay. And the very first line of that
17 description says account status inquiry service
18 allows acquirers to send account status
19 transactions to validate aspects of the
20 cardholder account. Did I read that correctly?

21 A: You did.

22 Q: Can you turn to the next page? This page
23 appears to walk through the steps in the
24 section titled, Account Status Inquiry
25 Transaction Process. Is that -- you're --



1 you're welcome to take the time to read it, but
2 does it appear to be the technical steps on how
3 that service is initiated, performed, and
4 delivered?

5 A: It does.

6 Q: If you want to take a moment to -- it -- to --
7 to read it, you are most welcome to. Did you
8 get a chance to review the steps?

9 A: I did.

10 Q: Okay.

11 A: Yes.

12 **MR. NEIL:** Real quickly. You -- you -- I didn't
13 write down the page number and it's not shown.
14 Can you just tell me what ---

15 **MS. ROBINSON:** It's the very next page.

16 **MR. NEIL:** 1827.

17 **MS. ROBINSON:** 128 -- 1827.

18 **MR. NEIL:** Okay. Thank you.

19 **MS. ROBINSON:** P0001827.

20 Q: So, if I'm reading that correctly, in step one,
21 it says the acquirer submits the request to
22 Mastercard as part of an authorization message.
23 And then at step two, the acquirer receives a
24 response. Where in here is there a direct
25 connection or direct service of Mastercard



1 providing the service to the merchant?

2 A: So, this service is meant to benefit the
3 merchant. If the merchant is not involved, I
4 can't imagine why the acquirer would want this
5 information. They don't just store it in their
6 acquirer facility or in the MIP. They provide
7 this information to the merchant to try to
8 authorize the transaction.

9 Q: Who provides it to the merchant?

10 A: The acquirer.

11 Q: The acquirer.

12 A: Yeah. No. Yeah. We said this is not ---

13 Q: So ---

14 A: --- a -- this is not something that omits the
15 acquirer. It's just -- its only function is to
16 benefit the merchant-cardholder transaction.
17 That's like the other functions that we've been
18 talking about for the last couple of days.

19 Q: Okay. Can we -- the second item on your -- on
20 your list in the PowerPoint was expert
21 monitoring solutions. Can we turn to tab 12 --
22 still in 12, page P0001914? I believe that
23 this is the page that was screenshot in your --
24 in the PowerPoint presentation from yesterday.
25 Does that ---



1 A: Right.

2 Q: I'm sorry. I spoke at the same time as you.

3 A: Sorry. Yes. This was in my -- the -- the

4 visual yesterday.

5 Q: Okay. And the title of this section is expert

6 monitoring, real time fraud scoring service for

7 merchants.

8 A: Yes.

9 Q: Is that ... Okay. In your report -- I'm -- I'm

10 sorry. In that PowerPoint -- I'll refer to it

11 as a PowerPoint. In that Power- -- PowerPoint,

12 expert monitoring solutions was listed

13 separately from real time fraud scoring service

14 for merchants. This title appears to combine

15 the two. So, what -- so, it -- what I'm

16 showing you right now doesn't exactly match

17 either of the titles on here, so I don't want

18 to represent this as matching the titles. But

19 this is what you were referring to for one or

20 both of those?

21 A: Yes.

22 Q: Okay. And this is what you were indicating as

23 what was phrased as a direct service to

24 merchants?

25 A: Right.



1 Q: Okay. Let's go back two pages in the document
2 to a page that wasn't -- I don't think was
3 included in your report, at least -- in the
4 PowerPoint it was not -- I -- I don't know if
5 it was included in the PowerPoint because the
6 printed copy I have didn't show the various
7 layers. But I do not believe that this -- this
8 page was included.

9 A: Okay.

10 Q: If -- if you think I'm wrong about that, please
11 let me know. As I mentioned, mine didn't have
12 every ---

13 A: Right.

14 Q: Okay. Do you see the heading at the bottom,
15 expert monitoring solutions hosted by
16 Mastercard?

17 A: I do.

18 Q: Okay. I'm -- I'm going to borrow from your
19 extensive publishing and writing experience for
20 a minute. And I just want to ask you a
21 question or two about the formatting of the
22 page.

23 A: Okay.

24 Q: Do you see how expert monitoring solutions
25 hosted by Mastercard is bold and all the way



1 over to the left most margin?

2 A: I do.

3 Q: And then if you look about an inch and a half
4 or two inches below that is a -- a different
5 service that is also bold, but is not
6 underlined?

7 A: I see that.

8 Q: Do you think it would be accurate to call the
9 top one like the -- a heading and the bottom
10 one a subheading?

11 A: I do think it's accurate, although I don't
12 think anything in my background qualifies me to
13 understand formatting particularly well. But
14 there's -- I -- that makes sense to me.

15 Q: I mean, you've published -- right. You --
16 you've read a lot, right? Voluminous amounts
17 of writing. I mean, is it fair to call the top
18 one a heading and the bottom one a subheading?

19 A: I don't know. I would need to look a little
20 bit more about how the rest of the document is
21 formulated. But there's nothing in my mind
22 that matters about this. And so, I'm happy to
23 continue on. But if it's super important, I
24 can look through the document more carefully to
25 -- to verify.



1 Q: Okay. Well, let me ask the next question and
2 if you aren't comfortable answering the next
3 question, then I may ask you to flip through
4 the document to verify. I look at this as a
5 heading and then a subheading and the heading
6 has some narrative text in it. Would -- do you
7 think it's fair to assume that the text under
8 the heading is general information that would
9 apply to each subheading that appears under it?

10 A: Yes.

11 Q: Okay. Okay. So, if we read the first sentence
12 of that narrative that we just -- that you just
13 indicated you agree would apply to each of the
14 subheadings below it, it says expert monitoring
15 -- monitoring solutions hosted by Mastercard
16 provide issuers with a comprehensive suite of
17 fraud solutions designed to detect and prevent
18 fraud transactions and to -- and pro- -- and
19 provide U.S. region acquirers with real time
20 fraud scoring solution for merchants on U.S.
21 issued dual message, card not present,
22 parentheses, CNP, end parentheses,
23 authorization transactions. Did -- did I read
24 that right?

25 A: Yes.



1 Q: Oth- -- other than maybe I stumbled over a
2 word. Okay. Does that sound like a service
3 provided directly to merchants?

4 A: I -- I -- just to clarify, I -- in my oral
5 testimony describing Mastercard's relationship
6 with merchants, I said there is a direct
7 contractual relationship with some merchants
8 and Mastercard because they -- Mastercard gives
9 some merchants incentives to offer Mastercards.
10 And then there's a bunch of indirect
11 relationships where Mastercard is controlling
12 the relationship between the acquirer and the
13 merchant or Mastercard is designing stuff for
14 the merchant. And so, this seems like
15 something that was designed solutions for
16 merchants. And so ---

17 Q: Provided to whom by Mastercard?

18 A: Oh, yes. Yeah. Of course, provided through
19 the acquirer, as we've been talking about all
20 morning.

21 Q: Okay. I -- I'm really getting to whether the
22 PowerPoint presentation is accurate or
23 misrepresenting information. And so, where it
24 says in the PowerPoint that Mastercard -- in
25 the section called Mastercard and merchant, and



1 has a heading that says, Provides Direct
2 Services, I -- I'm just trying to clarify that
3 your -- your testimony is that Mastercard is
4 not providing these services directly to
5 merchants.

6 A: That's correct. That these are designed for
7 merchants and provided to merchants through
8 their acquirers.

9 Q: Okay. Let -- let's actually read the next
10 paragraph. The last -- no -- I'm sorry.

11 **MS. ROBINSON:** Can you go back a page? To -- to
12 where we were.

13 Q: The last sentence of the second paragraph, this
14 enables issuers to improve profitability and
15 cardholder satisfaction while protecting the
16 integrity of Mastercard transactions. Does
17 that sound like a benefit to the issuer?

18 A: Yes. Yeah. No, I think it definitely benefits
19 the issuer. And also, on the page we were on
20 before, P0001914, it lists the specific
21 benefits, provides card -- CNP, card not
22 present merchants both real time behavior-based
23 fraud score. And so, I -- I do believe that
24 multiple parties benefit from Mastercard's
25 conduct.



1 Q: And those multiple parties that benefit from
2 Mastercard's conduct, in your opinion, include
3 the issuers and the acquirers?

4 A: Right.

5 Q: Okay. Thank you. Can you just maybe take a
6 second and flip from this heading, Expert
7 Monitoring Solutions, a page or two forward,
8 until you get to the next heading. And I'm
9 wondering if you can find in this section a
10 specific service called Expert Monitoring
11 Solutions as you listed on -- in your
12 PowerPoint.

13 A: Do you mean on 1916, the ---

14 Q: I mean anywhere in the document. Again, the
15 PowerPoint lists three distinct services and
16 I'm -- I'm asking if Expert Monitoring
17 Solutions is a distinct service from Expert
18 Monitoring Real Time Fraud Scoring.

19 A: In these four pages, I do not see a separate
20 one.

21 Q: Okay. Can we go back to the PowerPoint
22 presentation, please, to page 15? This -- I
23 believe that yesterday you -- so -- so this is
24 labeled at the top, Mastercard and Merchant,
25 and then has some screenshots. Can you just



1 confirm that -- that the words at the top in
2 green, Mastercard and Merchant, are not part of
3 what you screenshot or that someone screenshot
4 from ---

5 A: That's correct.

6 Q: That -- that's just a heading on the
7 PowerPoint?

8 A: That's correct.

9 Q: Okay. And can you -- can you just restate
10 where you found -- where you found these
11 document -- this -- this page? I can't read
12 the what's underlying it, this top one labeled
13 frequently asked questions.

14 A: So, this is on the Mastercard brand -- the
15 brand section of the Mastercard website.

16 Q: And that was accessed via the internet?

17 A: Yes.

18 Q: And it wasn't behind any pay walls or any like
19 -- you didn't have to enter a password or
20 anything?

21 A: No.

22 Q: So, just freely available to anybody who goes
23 to this website?

24 A: Yes.

25 Q: Okay. Can you read -- I don't know if you can



1 see because we scanned the document. But do
2 you recall the section that was highlighted or
3 can you still the highlighting that was
4 highlighted in your -- your PowerPoint
5 yesterday?

6 A: I think so.

7 Q: Or -- or do you know -- can you just read what
8 was highlighted because I don't know that it's
9 clear right now what was highlighted?

10 A: I believe the part that says, merchants who
11 accept a Mastercard payment brand or brands may
12 display Mastercard branding to promote
13 Mastercard product services and/or to indicate
14 acceptance of the brands. Only marks for the
15 brands accepted may be used on store signage,
16 receipts, websites, and apps.

17 Q: Okay. So, that says that merchants who accept
18 Mastercard may display the brands?

19 A: Right.

20 Q: Okay. Thank you.

21 **MS. ROBINSON:** Let's go to page 19 of this document.

22 Page 19. I think it might be ---

23 Q: In discussing one of the pages of the report,
24 you discussed the licensing of Mastercard's
25 logo. I'm actually not positive that your



1 discussion was on this page.

2 A: Okay.

3 Q: But this page looks to me like it shows the
4 Mastercard logo on the left most side, is that
5 accurate?

6 A: That is accurate.

7 Q: Okay. Where did you get that image from?

8 A: The images I did not add to the PowerPoint.

9 Q: Okay.

10 A: And so I'm not sure where the -- so, I didn't
11 add the cartoon figure of the cardholder and
12 cartoon figure of the bank. I -- as I
13 mentioned yesterday, I provided the statements
14 and the Bates numbers.

15 Q: Okay. Do you -- I think part of your testimony
16 was that there were limits on use of the logo?

17 A: Yes.

18 Q: Is that correct? Do you know if permission
19 would be needed to use the logo here in a
20 PowerPoint?

21 A: I -- before I -- yeah. I would think that you
22 should get permission before using -- I don't
23 know if there's -- this is intellectual
24 property. I don't know if there's a fair use,
25 that if you use a logo not for commercial



1 purposes, if you're allowed to use it. And so,
2 I think I -- I would want to explore that, but
3 I ---

4 Q: Would you think litigation over six million
5 dollars is not commercial purposes?

6 A: I don't think it's selling products, but -- but
7 again, I can't testify about the rules
8 regarding fair use.

9 Q: Okay. But -- but you can testify about the
10 rules regarding Mastercard's logo. I mean, I
11 think that's been part of what you ---

12 A: Well, I can testify about the contractual
13 relationships that are created. Right. That's
14 -- that's I'm meaning to testify. Right.
15 There's provisions in Mastercard's rules that
16 require merchants to use the logo. There's
17 provisions on their website that explicitly
18 give them permission. So, that's what I'm
19 testifying about. I'm not testifying about
20 fair use or copyright or ---

21 Q: So, I think you might have a little bit
22 yesterday. I mean, one of -- at least one of
23 Mastercard's witnesses said the logo can be
24 used broadly. You brought that up in your
25 direct, in your response to direct and said you



1 did not think that the logo could be used as
2 broadly as it had been described by Mastercard.

3 A: No. I was testifying about the Mastercard
4 terms of service on their website, which is a
5 contract or something like a contract sometimes
6 scholars think of it as a quasi contract of
7 some sort. And so, that's what I was
8 testifying about. And that's what -- what is
9 on the slide that was just up.

10 Q: Okay. So, is it your view that anyone can
11 download the Mastercard mark and use it without
12 -- use, but not abuse?

13 A: I do not have an opinion beyond the ones about
14 the contract that I've said.

15 Q: Okay. I think yesterday you may have del- --
16 dove into that area a little bit, but,
17 unfortunately, I don't remember exactly what
18 you -- what you said. So, I guess we'll just
19 have to go -- when we get the transcript, we'll
20 -- we'll see what was said at that point. Do
21 you know if Mastercard's permission was sought
22 to use the logo on this page?

23 A: I do not.

24 Q: Still on this page 19, which is titled
25 Mastercard and Issuer. And the second bullet



1 says, pay fees based on -- then there's three
2 sub-bullets, south -- S.C. consumer transaction
3 volume, number of authorization requests for
4 S.C. cardholders, number of transactions in
5 S.C. and I think ---

6 A: Right.

7 Q: --- on a prior slide, you said S.C. refers to
8 South Carolina.

9 A: Right.

10 Q: Okay. Are you suggesting through this slide
11 that an issuer would receive a bill or other
12 statement that reflects fees broken out by
13 state?

14 A: No.

15 Q: So, it -- when it says pays fees based on S.C.
16 consumer transaction volume, for example -- I'm
17 not going to go through all three -- are -- are
18 the fees that the issuer is paying to
19 Mastercard that you're referring to here, are
20 they designated in any way in the -- the
21 billing statements or in any other
22 documentation provided during clearing or
23 settlement as specifically related to South
24 Carolina?

25 A: No. It's saying that Mastercard is paid when



1 people in South Carolina engage in
2 transactions. And so, it's not saying anything
3 about how Mastercard sends its bills during
4 clearing.

5 Q: Or how issuers are paying?

6 A: No, it's saying that issuers are paying because
7 people in South Carolina are doing the
8 transactions.

9 Q: But the issuer is not like writing a check that
10 says in the memo line, this is for my South
11 Carolina transactions?

12 A: Correct.

13 Q: All right. Okay. I just wanted to understand
14 the bullets there a bit more. Do -- do you
15 have an understanding of how Mastercard
16 describes its assessment fee?

17 A: I do.

18 Q: And -- and by that, I mean what -- what the
19 banks receive in exchange for the assessment
20 fee?

21 A: I do.

22 Q: Okay. And can you share that understanding?

23 A: My understanding, I -- I'd want to refer to the
24 10-K to get the words exactly right.

25 Q: I'm not looking for the words to be exactly



1 right. I'm looking for your understanding.

2 A: I -- I understand it as a way that Mastercard
3 generates revenue and profit to run its
4 business.

5 Q: No. I -- I'm sorry. My question was do you
6 have an understanding of what Mastercard -- I
7 -- I think what you just said ---

8 A: Right.

9 Q: Was what you just said your understanding of
10 assessment or what you think Mastercard's
11 understand- -- understanding of assessment is?

12 A: I understand that in this litigation,
13 Mastercard has represented that it obtains its
14 fees for the volume-based fees to recoup costs.
15 So, I understand that. But from the annual
16 report, I believe Mastercard describes this as
17 one way to obtain revenue. That -- that it's
18 one of its revenue streams.

19 Q: Well, sure all of its revenue streams are its
20 revenue streams. Right? All of its fees go
21 into its revenue streams. I'm -- I'm asking if
22 you have a sense of -- of what Mastercard
23 describes its assessment fee as being revenue
24 in exchange for?

25 A: So, I -- in this cost letter, I do not think



1 Mastercard explains what its assessment fees
2 are revenue for.

3 Q: Okay.

4 A: In the cost letter that ---

5 Q: Oh, that -- that's just ---

6 A: This document.

7 Q: I'm sorry. That's just still up from the last
8 slide.

9 A: Right.

10 Q: I -- I'm sorry. My question is not related to
11 that slide.

12 A: And so, in the annual report, I understand that
13 -- or I -- I believe Mastercard largely
14 describes these fees just as a source or
15 revenue. In this litigation, I understand
16 Mastercard has represented the assessment fees
17 are -- are for something different than what
18 the cost letter and the annual report says.

19 Q: And -- and what would that be?

20 A: I believe it's purely to recoup costs that it
21 has incurred ---

22 Q: And do you -- do you ---

23 A: --- in operating the network.

24 Q: Do you know what costs?

25 A: Like the cost of operating the network. That



1 are -- that in the prior cooperation between
2 the banks were charged to the banks to -- just
3 to gener- -- not to generate profit, but just
4 to cover costs.

5 Q: Is -- is it your understanding that other
6 credit card networks have a fee similar to what
7 Mastercard labels as assessment? Even if it
8 has a different name. For example, Visa.

9 A: Yes.

10 Q: And how does Visa describe its -- its fee?

11 A: Well, I'm trying to think if I have read its
12 assessment description. I don't think I have
13 in recent memory that description. And so, it
14 would be hard for me to guess about what it
15 says.

16 Q: Well, just from your industry knowledge.

17 A: That I -- I believe that -- I believe that all
18 of the revenue streams are described as
19 generating revenue and profit for the different
20 networks that operate them.

21 Q: I mean, I think every business' revenue streams
22 are to generate revenue. I mean, I -- I guess
23 I'm trying to ---

24 A: Yeah.

25 Q: --- understand. Assessment is more than 50



1 percent of Mastercard's revenue. Visa, it's --
 2 it's a similar -- very substantial portion, I'm
 3 assuming. So -- so, how does Visa ---

4 A: They're -- both -- both are just different ways
 5 the companies designate fees to bring in money.
 6 I mean, they're -- it's not -- there's not a
 7 special this pays for the free Coke at the --
 8 you know, Mastercard facility, or this pays the
 9 custodian fee. These are just fees that cover
 10 the costs of doing business and then the margin
 11 for profit.

12 Q: We -- we can look at the fee breakout if -- if
 13 you'd like, but assessment represents hundreds
 14 of millions of dollars of revenue each year.

15 A: Right.

16 Q: Are -- are the banks just paying that because
 17 Mastercard wants to recover the costs of the
 18 custodian and the free Coke?

19 A: I -- I ---

20 Q: Using an example.

21 A: I think the banks ---

22 **OBJECTION:**

23 **MR. NEIL:** Objection, Your Honor. Calls for
 24 speculation.

25 **MS. ROBINSON:** He's -- but he's offered here as an



1 expert in how Mastercard generates its fees.
2 It's -- I'm asking for his opinion.

3 **THE COURT:** I understand that. Anything further?

4 **MR. NEIL:** He has not offered an opinion on
5 Mastercard's janitorial services or how they
6 pay for them. And it has no bearing whatsoever
7 on this lawsuit or this dispute. I don't think
8 it's -- I just don't think it's relevant and I
9 don't think he should be required to answer
10 that.

11 **MS. ROBINSON:** He brought up janitorial fees. When
12 I said what costs does this compensate them
13 for, he brought up free Coke and janitorial
14 fees. I agree they have nothing to do with
15 this, but I'm not the one who brought them up,
16 so I can rephrase my question.

17 **THE COURT:** If -- if you would, please.

18 **MS. ROBINSON:** Sure.

19 Q: Within the credit card industry, do other
20 networks -- do all of the networks in the four-
21 party system, have a fee similar to
22 Mastercard's assessment fee?

23 A: I -- I don't -- I haven't looked recently
24 enough at all of their annual reports to -- to
25 understand how they each describe their



1 different revenue generating activities.

2 Q: Okay. And in the -- the various research that
3 you've done over the years in this field of
4 credit card processing didn't reveal
5 information about the single largest revenue
6 item for credit card processors?

7 A: It's revealed -- it revealed that they all
8 charge based per transaction and per gross
9 dollar revenue. But in my mind, how those
10 underlying fees get desg- -- what they get
11 designated to pay for is, as we know, under-
12 inclusive. Right? There's -- there's not a --
13 for litigation in South Carolina's tax court's
14 fee. Right? There's no -- there's not specific
15 fees and so, those are all general fees that
16 are different ways to assess costs.

17 Q: There's not specific fees charged by the
18 company?

19 A: There are specific fees, but they're -- they're
20 under-inclusive is what I said.

21 Q: Okay. Okay. Can we turn to tab 10, P0001692?
22 This is a -- I'm sorry. 1629. I -- I'm going
23 to say that Bates again. Tab 10, P0001629. Do
24 you recognize this as having been a
25 demonstrative used multiple times over the last



1 few days?

2 **(Joint Exhibit Number 10 was referenced at this**
 3 **time.)**

4 A: I do.

5 Q: All right. And when I'm making that reference
 6 to the exhibit, the exhibit page is actually --
 7 also, has additional text on it that isn't
 8 represented up here. This is just the
 9 demonstrative portion of that page as it was on
 10 the other day.

11 A: Okay. Sorry. Can I flip it to then? I
 12 thought maybe I wouldn't have to ---

13 Q: Well, actually, no. We're just sticking to the
 14 demonstrative.

15 A: Okay. Well, I'll flip to it.

16 Q: I was just giving a page number, so the -- so
 17 the reference is there. You -- you mentioned
 18 earlier that -- yesterday, you mentioned that
 19 you did not agree with how Mastercard
 20 represents its involvement as shown on this
 21 slide, is that correct?

22 A: That's right.

23 Q: And I believe the concern you had -- or I think
 24 you stated three concerns, but the one that I
 25 want to focus on is that while this document



1 shows Mastercard getting involved at -- at the
2 receiving end of step three ---

3 A: Right.

4 Q: --- I believe you thought that that was too
5 late in -- in the process, that Mastercard
6 actually gets involved earlier. And I -- I
7 believe you even said prior to any of the steps
8 shown on here.

9 A: That's correct.

10 Q: What -- what -- what do you mean by that?

11 A: I mean that before a cardholder presents a
12 Mastercard branded card to a merchant,
13 Mastercard is involved by convincing merchants
14 to accept the card, convincing cold (sic) hard
15 -- cardholders to obtain a Mastercard, and then
16 the mer- -- before the cardholder presents it
17 to the merchant, the cardholder often sees that
18 Mastercard is accepted at that store. And as
19 that material we just read earlier, Mastercard
20 says that lets people know that Mastercard is
21 accepted there. And so, I believe Mastercard
22 is involved before step one.

23 Q: Okay. So, I think to sum up what you just
24 said, you - you believe that Mastercard is
25 involved in convincing the cardholder prior to



1 -- to do these things before step one as shown
2 on here. Is that accurate?

3 A: Well, and convincing the merchant to accept
4 cards and convincing the cardholder to use
5 Mastercard on this particular occasion. So, I
6 think three things, and so not just one.

7 Q: Okay. That's fair. And I think yesterday you
8 said that the advertising was a primary driver
9 of that and advertising was to get, quote, more
10 transactions, more volume, more money. Does --
11 does that sound like what you said yesterday?

12 A: Yes. That advertising facilitates that
13 transaction or encourages that transaction.
14 Yes.

15 Q: Okay. Is it true that if there are more
16 transactions occurring with Mastercard branded
17 cards that the issuer bank will make more
18 money?

19 A: Yes.

20 Q: Is it your view that the only reason a consumer
21 would contact an issuer is because of
22 Mastercard?

23 A: No.

24 Q: No. Oh, okay. I'm sorry, I thought that you
25 had said that yesterday.



1 A: No. I believe that I said at least some
2 cardholders contact issuers because of
3 Mastercard advertising.

4 Q: Okay. Do you know of -- do you have any ideas
5 of things that would cause a cardholder --
6 well, I'm sorry -- a pre-cardholder, a
7 consumer, to pick a particular issuer to apply
8 for a card?

9 A: So, one thing is if you go to the Mastercard
10 website and say -- and you can click on a thing
11 that says, get a credit card. And Mastercard
12 will direct you to a particular issuer that you
13 can get a Mastercard Mastercard with. So,
14 that's one way ---

15 Q: Okay. That sounds like a good benefit to the
16 issuers.

17 A: Well, yeah. As I mentioned, it -- it does
18 benefit the issuer and it benefits Mastercard
19 because one of Mastercard's main goals is to
20 have more cardholders using its cards more
21 frequently to make more money.

22 Q: Which also makes more money for the issuer
23 banks.

24 A: Certainly.

25 Q: And the acquirer banks.



1 A: Yes.

2 Q: Okay. Can you think of any, like, well known

3 ad campaigns run by issuer banks?

4 A: I cannot.

5 Q: You cannot. How about what's in your wallet?

6 A: That -- that phrase definitely. I've heard

7 that phrase before.

8 Q: Do you know whose campaign that is?

9 A: Capitol One?

10 Q: Are you asking me?

11 A: I'm -- I'm ask- -- I don't know which ---

12 Q: You ---

13 A: --- issuer that it. Yeah.

14 Q: Okay.

15 A: No, I don't know.

16 Q: Okay. I think you testified earlier that your

17 expertise includes advertising in this network,

18 in -- in this infrastructure, but you're not

19 sure if what's in your wallet is Capitol One's

20 advertising campaign?

21 A: Yeah. No. I -- I have. Emory Law Journal

22 just published an article that I wrote about

23 credit card advertising. But I do not, as I

24 mentioned -- law professors don't generally do

25 case studies where we study one particular



1 business in depth. And so, I -- yeah. No. I
2 -- I don't. I know how advertising works in
3 these markets, but when you ask random trivia
4 questions about specific instances, yeah, I --
5 I don't know. I think it's Capitol One, but --
6 -

7 Q: Okay. I mean, I wouldn't call that random
8 trivia questions. You've indicated that you
9 are an expert in advertising in this industry,
10 but we can -- we can let that go. Are you
11 familiar with the concept of affinity cards?

12 A: Yes.

13 Q: What is an affinity card or an affinity card
14 arrangement?

15 A: It's where an issuer teams up with -- or teams
16 up with some group to create a card that has
17 both the issuer, both the -- and the network
18 and then an organization as part of the card.

19 Q: Can you give an example?

20 A: The -- I didn't go to Harvard, but I wish I
21 did. And so, the Harvard Alumni card is a
22 Mastercard affinity card.

23 Q: Can you give another example?

24 A: Yeah. U of H, where I teach, has a U of H Visa
25 card.



1 Q: Okay. So, if somebody is like really big into
2 school spirit ---

3 A: Right.

4 Q: --- they might say, I want my alma mater's
5 card.

6 A: Sure.

7 Q: And then they would figure out who issues the
8 card -- that affinity card, is that ---

9 A: That's right.

10 Q: --- the step they would take? And if it
11 happened to be -- like if you were -- in your
12 examples, if you went to Harvard, you would
13 then get a Harvard card that's in the -- in the
14 Mastercard network, but you're U of H, so you'd
15 go get a Visa card in that example?

16 A: Right.

17 Q: Okay. So, it's the -- the affinity brand that
18 would cause you to select which card to get?

19 A: I guess within reason, right, like if U of H
20 had a relationship with Union Pay, I would not
21 get a Union Pay affinity card because it's a
22 Chinese bank. And so, I -- I'm not interested
23 in having a Union Pay card. But -- but I do
24 think you're absolutely right. Mastercard does
25 drive sales towards Mastercard by creating



1 affinity cards. I do think that's one
2 mechanism they use to try to get more
3 cardholder-merchant interactions.

4 Q: Okay. And I think you just said that
5 Mastercard creates affinity cards.

6 A: Or Mas- -- well, Mastercard participates in
7 affinity card programs in hopes that more
8 cardholders will join the Mastercard network.

9 Q: When you say Mastercard participates in
10 affinity card programs, what do you mean?

11 A: I mean, they create the structure that allows
12 issuers to team with organizations to offer
13 affinity cards.

14 Q: Is Mastercard entering into a contract with the
15 -- the -- what -- what would the name be for
16 the -- in -- in your example, it was the
17 university. What -- what's the name of that
18 party in this particular structure of an
19 affinity card?

20 A: I -- I would just call it the related
21 organization.

22 Q: Is that the -- is that the industry use name
23 for it?

24 A: I don't know what Mastercard's use name for it
25 is. But it's ---



1 Q: What about within the industry?

2 A: The affinity group is what it's called.

3 Q: The affinity group is what it's called ---

4 A: Right.

5 Q: --- within the industry?

6 A: I -- I'm trying to think. Every time I've --
7 yeah. I -- I don't know if there's another
8 special name that's slipping my mind right now.

9 Q: Okay.

10 **COURT REPORTER:** Are we saying affinity?

11 **MS. ROBINSON:** Affinity.

12 **COURT REPORTER:** Thank you.

13 **MS. ROBINSON:** A-F-F-I-N-I-T-Y.

14 **COURT REPORTER:** I just wanted to make sure. Thank
15 you.

16 **MS. ROBINSON:** Yeah. I think of it like I have an
17 affinity for my al -- you know my college or
18 whatever.

19 Q: Just -- just -- just for clarity of example,
20 would a -- like an airline miles program --
21 like a -- an airline have an affinity card
22 where I might get like miles for using the
23 card? I -- I just want for -- you know, as an
24 additional example of the type of affinity
25 card. We used college affiliations.



1 A: Yes. So, you could have like a Hyatt card or,
2 you know, a Delta card, I presume.

3 Q: So, if I'm somebody who often flies with a
4 particular airline and I want to maximize on my
5 miles, you just mentioned Delta, I might seek
6 out the Delta affinity card specifically
7 because it gives me extra miles when I travel?

8 A: Right.

9 Q: Okay. Thank you. So, still with this diagram,
10 I understand your disagreement with where
11 Mastercard represents itself entering the
12 picture here. Do you agree that Mastercard's
13 delivery of the authorization message is
14 complete at step ten?

15 A: That technically - yeah. Like not --
16 technically in the terms of technologically, I
17 guess maybe would be a better word. That's
18 where the information's delivered.

19 Q: Okay. Still on this slide, we have an issuer;
20 we have an acquirer. You -- you've spoken at
21 length about where Mastercard generates its
22 revenue and earns its revenue. Where does an
23 issuer, in your opinion, generate its revenue?

24 A: I haven't been asked in the litigation to form
25 an opinion about where issuers -- well, I --



1 and so I haven't formed an opinion.

2 Q: Do you have an opinion?

3 A: I do -- I'd have to think through it. But
4 yeah. So, I haven't formed an opinion.

5 Q: Okay.

6 A: I -- and so, because to me forming an opinion
7 is more a serious endeavor. If you're just
8 asking off the cuff without thinking much about
9 it, that's one thing. But before I said an
10 official opinion in this case, I would want to
11 think about it a lot.

12 Q: Okay. But you're familiar with issuers'
13 activities?

14 A: I am.

15 Q: Okay. So, where do -- where -- which of an
16 issuer bank's activities generate its income?

17 A: So, issuer banks generate some income through
18 the interchange fees that are generated by
19 these transactions in South Carolina. For our
20 example, where the merchant and the cardholder,
21 and then Mastercard -- I'm sorry -- then issuer
22 banks also generate income through charging
23 interest to cardholders, annual fees to
24 cardholders.

25 Q: And where -- where are the activities that



1 generate those fees?

2 A: As I just said, I -- I -- in terms of forming
3 opinion, I haven't been asked to do that. And
4 so, I haven't thought a ton about where issuers
5 do that. I remember Mr. Sharpe yesterday
6 testified that under South Carolina law, the
7 situs for lending would be the location of ---

8 Q: I'm not asking ---

9 A: --- the cardholder.

10 Q: Yeah. I'm not asking you to opine on South
11 Carolina law.

12 A: Yeah. So, but yeah. So, I haven't been asked
13 to form an opinion and I have not.

14 Q: Okay. You've kind of a few times throughout,
15 you've said sort of in a technical sense, in a
16 general sense, for -- for a number of things.
17 I -- I'm just wondering, do you have any
18 impression as to where issuers generate
19 revenue?

20 A: I think there are distinct income streams from
21 the issuers' activities because they both earn
22 revenue from credit card processing related
23 activities and then also lending related
24 activities. And so, I -- I don't think it's
25 easy to just say there's one place that they



1 generate revenue.

2 Q: Okay. All right. Let's switch over to the
3 acquirer bank. What would you say generates an
4 acquirer's revenue?

5 A: So, acquirers are paid by merchants. So, for
6 their involvement in the transaction.

7 Q: And where does that activity occur?

8 A: As I've mentioned, I wasn't retained in this
9 case to form an opinion about where acquirers
10 and that's not something that in credit card
11 scholarship -- it makes sense in this case,
12 it's super important for tax reasons, but
13 generally, that's not something credit card
14 scholars every talk about. And so, it's not
15 something I just sort of randomly have formed
16 an opinion about.

17 Q: Okay. This chart represents the acquirer
18 getting involved at step two when it receives
19 the message. Is that when you think an
20 acquirer gets involved in this process?

21 A: No. I think their involvement, like
22 Mastercard, is earlier.

23 Q: And -- and what is their involvement earlier?

24 A: They contract with the merchant to accept
25 specific cards.



1 Q: If a merchant didn't contract -- I'm sorry. If
2 the acquirer didn't contract with the merchant
3 to accept cards, could Mastercard make any
4 money?

5 A: Like if no acquirers contracted with any
6 merchants, would Mastercard make money? No.

7 Q: Are there any other activities of the acquirer
8 that you can identify that generate revenue?

9 A: I mean, most acquirer banks do a wide variety
10 of things like accept deposits and -- from
11 consumers, businesses.

12 Q: Sure. I'm sorry. I meant related to the
13 topics at hand here.

14 A: No. I believe, at least the primary way that
15 acquirers make money, is from merchants paying
16 fees for processing credit cards.

17 Q: All right. But in considering this matter, I
18 think you were retained in 2020.

19 A: Right.

20 Q: So, in the two years that you've been
21 considering this matter, you have not thought
22 about -- you've had no occasion to think about
23 where issuer banks generate revenue?

24 A: The -- I -- I only get paid when I do the
25 things that are related to this case. And so,



1 I -- I don't -- I don't feel like I can charge
2 the -- I guess indirectly the people of South
3 Carolina for me to form other opinions that are
4 unrelated to this litigation. And so, no, I
5 haven't -- I haven't sat around thinking as
6 part of this case about where issuers generate
7 revenue.

8 Q: So, are the only things you're comfortable
9 testifying to are the things that you learned
10 during the hours you were test- -- you were
11 being paid to think about the case?

12 A: Well, no. But I -- I -- as I mentioned, where
13 revenue gets generated generally isn't
14 important in commercial law. And so, I -- I
15 don't think people generally write articles
16 asking if an issuer makes money in New York or
17 Texas or South Carolina. And so, it's not
18 something outside of this litigation that it --
19 that I'm going to spend a lot of time thinking
20 about.

21 Q: I'm not going to disagree with you. I think
22 that was actually the basis of our motion in
23 limine. But -- so, in the last two years,
24 you've had no occasion with respect to this
25 matter or your research scholarship thinking,



1 your teaching, you've had no reason to think
2 about where one of these critical parties earns
3 its revenue ---

4 A: No. With ---

5 Q: --- the issuer?

6 A: With respect, Ms. Robinson, that's not what I
7 testified. I said, in order to form a formal
8 opinion, that's a -- a pretty big deal in a
9 case like this. And so, I have not taken the
10 time to form a formal opinion about an issue
11 that's not relevant in this case. And so, just
12 have I thought about it? Yes. I mean, like a
13 -- thought about a lot of things.

14 Q: I think the determination of relevancy is
15 actual up to His Honor and not -- not to you or
16 I.

17 **OBJECTION:**

18 **MR. NEIL:** Your Honor, I -- I think we've reached
19 the point of badgering the witness here about
20 something that he was never asked to offer an
21 opinion for and doesn't have any bearing on the
22 case. So, if she would like Your Honor to rule
23 on relevance, I would too.

24 **THE COURT:** I -- I'm going to stop short of
25 badgering. But please, Ms. Robinson, let's



1 continue.

2 **COURT REPORTER:** But please what? I'm sorry. Ms.
3 Robinson, continue?

4 **THE COURT:** Yes.

5 **COURT REPORTER:** Thank you.

6 **MS. ROBINSON:** Okay. I will shift gears.

7 **THE COURT:** Thank you.

8 Q: Let's just sort of look at the parties up here,
9 ignoring all the numbers for -- for a moment.

10 **MS. ROBINSON:** Actually, could you quickly put up
11 the parties? The one with just parties or is
12 that a hassle?

13 Q: I promise it's my last set of questions. We're
14 almost -- almost done here. Do you recognize
15 this as the demonstrative that was used on the
16 first day?

17 A: I do.

18 Q: And it lists the Mastercard plus four parties
19 that I think you agreed yesterday was the
20 appropriate group of parties in the four-party
21 system?

22 A: That's correct.

23 Q: Okay. With respect to the parties that are
24 listed, does this look accurate -- an accurate
25 representation of the parties in the system?



1 A: I guess with the addendum that was, I think,
2 discussed when you discussed this slide, that
3 there are third party processors ---
4 Q: Sure.
5 A: --- involved, but ---
6 Q: Okay.
7 A: --- other -- other than that, these are the
8 four -- five basic parties in the four-party
9 model.
10 Q: Okay. I think that yesterday you referred to
11 this in a different context, as a multi-sided
12 market?
13 A: That's right.
14 Q: Are multi-sided markets within your area of
15 expertise?
16 A: Yes.
17 Q: And this is a multi-sided market because there
18 are two distinct groups of customers? There is
19 some benefit connecting or coordinating the
20 groups and an intermediary can make the groups
21 better off?
22 A: That's right.
23 Q: Okay. I actually was reading that from a book
24 that is listed in your syllabus as one of your
25 texts.



1 A: Right.

2 Q: So, that's an accurate definition of a multi-

3 sided market?

4 A: Yes.

5 Q: Does the multi-sided market require -- sorry.

6 With the definition that I just gave, with

7 respect to Mastercard, who are the customers

8 that it's bringing together?

9 A: So, in an ultimate sense ---

10 Q: Uh-huh.

11 A: --- Mastercard brings together the cardholder

12 and merchants. That's -- in credit card

13 scholarship on multi-sided markets, those are

14 the two sides of the market. Mastercard, as

15 we've said many times, does that by bringing

16 acquirers and issuers together.

17 Q: So, the -- in -- in what I just read, the --

18 the two groups of customers would be the -- the

19 category of issuers as one group, the category

20 of acquirers as one group, and Mastercard is

21 the intermediary?

22 A: I do not think so. I think Mastercard brings

23 the cardholders and merchants together.

24 Q: And that's because?

25 A: Because ---



1 Q: Like -- well, actually, let me ask it
2 differently. Why isn't Mastercard bringing
3 together the issuer bank and the acquirer bank?

4 A: Because in a credit card transaction where a
5 cardholder purchases something from a merchant,
6 the two key parties that have to come together
7 to do that transaction are the cardholder and
8 the merchant, not the issuer and the acquirer.

9 Q: I thought yesterday you testified that all five
10 parties were critical and had to be there.

11 A: No. I -- I said -- well, so that's not
12 different than saying to do the transaction
13 between the cardholder and the merchant, the
14 two parties that are separated are the
15 cardholder and the merchant.

16 Q: Why aren't the issuer and the acquirer
17 separated?

18 A: Well, I guess in -- you're asking in the
19 context of multi-sided markets.

20 Q: Yes.

21 A: And in the context of credit card scholarship,
22 on multi-sided markets, it talks about
23 cardholders and merchants as the two parties
24 that the platform facilitates the transaction
25 between. And as I ---



1 Q: Is that scholarship that you've written?

2 A: No. I've written related scholarship.

3 Q: In- -- involving credit card market?

4 A: Involving platforms that bring two sides of a

5 market together.

6 Q: Okay. Let's -- what are some other just

7 examples of other multi-sided platforms?

8 A: Uber.

9 Q: Uber. What's another example?

10 A: Actually, I just saw yesterday, Outdoorsy.com.

11 It brings together people who own RVs, and who

12 want to rent RVs. And so, it acts as a

13 platform. AirBnB, eBay.

14 Q: Is television a multi-sided platform?

15 A: It -- yeah. It's a little bit more

16 complicated, but yes.

17 Q: And what ---

18 A: I think some people consider television.

19 Q: What would make television a multi-sided

20 platform? What -- what are the two -- what are

21 the two groups that are being brought -- two or

22 more groups -- I think -- two or more groups.

23 Who would the two groups being brought together

24 in a television multi-sided platform be?

25 A: Merchants who want to advertise on the



1 television and people who want to watch free
2 television.

3 Q: And then the -- who's the intermediary in that
4 case?

5 A: The television provider. Like the person who
6 -- like -- yeah. The network that presents
7 programming and advertising.

8 Q: Okay. So, I think I'm done. Thank you very
9 much.

10 **THE COURT:** Thank you.

11 **MR. NEIL:** Your Honor, I want to get done as much as
12 the next guy, but do you mind if we take five
13 minutes?

14 **THE COURT:** I think that's -- let's do ten minutes.

15 **MR. NEIL:** Be back at five minutes to 11:00?

16 **THE COURT:** Yes.

17 **MR. NEIL:** Thank you, Your Honor.

18 (Off the record from 10:45 a.m. until 11:00 a.m.)

19 **COURT REPORTER:** All rise.

20 **THE COURT:** Please be seated. Please be seated.
21 All right. Department.

22 **MR. NEIL:** Thank you, Your Honor.

23 **MR. HAWKINS - RE-DIRECT EXAMINATION BY MR. NEIL:**

24 Q: Professor Hawkins, I expect this to be fairly
25 brief.



1 **MR. NEIL:** Jason, could you get that 1629 up there?

2 **Q:** You were asked a couple of questions, actually

3 more than a couple, about the diagram on page

4 1629 Mastercard has referenced several times

5 in this trial. I'm about to ask you a question

6 about it if we can get it up on the screen.

7 There we go. I -- I think your testimony was

8 that ---

9 **MR. NEIL:** I don't think that's the right one,

10 Jason.

11 **MS. ROBINSON:** Do you want us to just throw that up?

12 **MR. NEIL:** No. We got it.

13 **MS. ROBINSON:** Okay.

14 **Q:** I think the question dealt with the message

15 that Mastercard delivers at the end of step

16 ten. Do you recall that question?

17 **A:** I do.

18 **Q:** Okay. And I believe specifically the question

19 was -- or your answer, I'm sorry, was that

20 technologically that was the end of the message

21 for Mastercard. Is that what you said?

22 **A:** That's right.

23 **Q:** Okay. Is that -- at the end of step ten --

24 well, first of all, what message are we talking

25 about?



1 A: The authorization approval or decline message
2 or some other related message along those
3 lines.

4 Q: Is that the message that comes from the issuer
5 bank?

6 A: Yes.

7 Q: And what is the purpose of that message?

8 A: That message -- the purpose is to allow the
9 merchant to accept the cardholder's card and
10 complete that transaction.

11 Q: So -- so what is the ultimate destination of
12 that message?

13 A: To the merchant and cardholder in the
14 merchant's location.

15 Q: Does Mastercard express any intent in the
16 materials that you've reviewed that are in
17 evidence in this case about where the message
18 is to be ultimately delivered?

19 A: Yes. Mastercard sends it in order for the
20 merchant to receive it.

21 Q: And the -- what is -- again, what is the point
22 of that message?

23 A: So that the merchant and cardholder can
24 consummate their transaction.

25 Q: Okay. All right. That's all I want to ask you



1 about that. You were also asked a series of
2 questions about a document which has the number
3 -- the Bates number, P0001827. It is part of
4 Exhibit Number 12. And I think that document
5 -- I'm having a hard time seeing it on the
6 screen. If you want to look at it on the
7 screen, that's fine.

8 **(Joint Exhibit Number 12 was referenced at this**
9 **time.)**

10 **MR. NEIL:** Sorry, I grabbed the wrong book. Yeah,
11 that's better.

12 Q: So, you were asked some questions about this
13 account status inquiry transaction process,
14 right?

15 A: Right.

16 Q: And do you have an understanding of what the
17 account status inquiry transaction process is
18 from your review of this document?

19 A: Yes.

20 Q: What is it?

21 A: It's a -- where a merchant is going to want
22 information about whether or not to approve the
23 card.

24 Q: So, paragraph 1 is what we're talking about.
25 The -- the acquirer submits an account status



1 inquiry transaction request in the
2 authorization request.

3 A: Right.

4 Q: And so, as I understand it, this is a series of
5 information that the acquirer is going to ask
6 for that is -- and they're asking for it from
7 the merchant?

8 A: So, I believe they're going to ask -- yeah.
9 For the merchant, right.

10 Q: Okay. So ---

11 A: For the benefit of the merchant.

12 Q: DE61 is one of the things that -- that they're
13 going to ask for. Do you see that down at the
14 bottom?

15 A: Right.

16 Q: What -- do you see what -- what is DE61 called?

17 A: Point of service data.

18 Q: Do you know what that is?

19 A: That's information coming from the merchants,
20 the point of service where the merchant and
21 cardholder are interacting.

22 Q: Okay. Do you know specifically what
23 information has to be provided a part of Code
24 DE61?

25 A: I don't know like the numbers that ---



1 Q: Okay.

2 A: --- you have to input in or ---

3 Q: Well, let's go to another document in Exhibit
4 12, another page, P0001728. And right there is
5 a description of what is contained within DE61.
6 What -- what information are we looking at that
7 DE61 is supposed to contain?

8 A: It's supposed to contain the postal code.

9 Q: And that's the postal code of what?

10 A: That's the postal code of the merchant.

11 Q: Okay. That -- and the merchant is the same
12 thing as the card acceptor?

13 A: Yes.

14 Q: Okay. Now, there's a reference in there that
15 says, DE61, the -- the postal code much match
16 between DE61, sub-field 14, and the
17 authorization message, and DE43, card acceptor
18 name/location, sub-field 4, card acceptor
19 postal zip code. Do you see that?

20 A: Yes.

21 Q: Okay. So, do you know what DE43 is?

22 A: That's the cardholder -- I'm sorry. The card
23 acceptor name and location field.

24 Q: Okay.

25 **MS. ROBINSON:** I -- I'm sorry. The quest- -- is he



1 asking him just to read what's on there or does
2 he know that?

3 **MR. NEIL:** I'm asking him if he knows.

4 **MS. ROBINSON:** Right. He didn't give a yes or a no
5 answer. He just read the answer off the page.

6 **MR. NEIL:** Okay.

7 A: Yes. I know.

8 Q: Okay. Do you know where DE43 -- the code DE43
9 is defined in -- in this document?

10 A: I do not know right off the top of my head.

11 Q: Okay. Let's look at page 0001707. I'm sorry.
12 My vision is terrible. All right. Yeah. Look
13 at the heading, Service Provider and Merchant
14 Information.

15 **THE COURT:** Your Honor, I'm sorry to be standing so
16 close. I just don't see well.

17 **THE COURT:** That's quite all right. I have to smile
18 at you squinting. It's not funny, but ...

19 Q: The -- you see that section, Service Provider
20 and Merchant Identification?

21 A: Right.

22 Q: Okay. That -- that gives a list of things that
23 the acquirer must identify. Is that right?

24 A: That's right.

25 Q: Okay. And if we scroll down to the next page,



1 1708. One of the things that they have to
2 submit is the following DE43 field
3 descriptions. You see that?

4 A: Yes.

5 Q: Okay. What -- do you see where DE43 field
6 descriptions are -- are identified there?

7 A: I see at the top of the page where it says,
8 card acceptor name and location.

9 Q: Okay. And then down below that there's some
10 bullet points. What has to be provided for the
11 DE43 code?

12 A: The card acceptor city, the card acceptor
13 state, province or region code.

14 Q: Okay. And then also the -- the name and
15 location of the card acceptor?

16 A: That's right.

17 Q: Okay. So, if I understand it right, the DE63
18 information and the DE -- I'm sorry -- the DE61
19 information and the DE43 information must
20 match. Is that what we saw on page 17 -- or
21 I'm sorry, page 1827?

22 A: Right.

23 Q: Okay. So, is it your understanding then from
24 all of this -- well, let me ask it a different
25 way. What is your under- -- where does



1 Mastercard get this information?

2 A: From the acquiring banks that report it to it.

3 Q: Okay. Thank you.

4 MR. NEIL: That's all I have, Judge.

5 THE COURT: Thank you. Any limited ---

6 MS. ROBINSON: You will be happy to hear I have no
7 further questions. Thank you very much.

8 THE COURT: No. Thank you. Thank you. Yes, sir.

9 MR. NEIL: Judge, the Department calls Professor
10 John Swain to the stand.

11 MS. ROBINSON: Your Honor, I -- I'm sorry. Could we
12 take a two-minute break. I believe some of our
13 witnesses are going to leave in about a half an
14 hour and I won't get a chance to say goodbye to
15 them. So, could we just go out in the hall and
16 say goodbye. They'll actually probably come
17 back in. Is -- is that all right? Because I
18 don't want to inter- -- interrupt his testimony
19 when they need to leave for the airport.

20 THE COURT: That -- that is not a problem
21 whatsoever. Let the -- let me take an
22 opportunity to say thank you for visiting.

23 (Responsive Thank you very much, Your Honor.)

24 (Off the record from 11:11 a.m. until 11:13 a.m.)

25 MR. NEIL: Thank you, Your Honor.



1 THE COURT: Yes, sir.

2 MR. NEIL: Professor Swain, I think needs to get in
3 the box, so to speak.

4 THE COURT: How are you, sir?

5 MR. SWAIN: Good. How are you?

6 THE COURT: I am good. Please have a seat.

7 COURT REPORTER: State and spell your name, please.

8 MR. SWAIN: Yes. It's John Swain, J-O-H-N, S-W-A-I-
9 N.

10 COURT REPORTER: Do -- do you solemnly swear the
11 testimony you're about to give in this matter
12 is the truth, the whole truth, and nothing but
13 the truth, so help you God?

14 MR. SWAIN: Yes, I do.

15 COURT REPORTER: Thank you.

16 **MR. SWAIN - DIRECT EXAMINATION BY MR. NEIL:**

17 Q: Professor Swain, I understand you're recently
18 retired, but before that, what did you do for
19 a living?

20 A: I was a law professor at the University of
21 Arizona.

22 Q: And the Department of Revenue in this case
23 hired you to serve as an expert witness in this
24 dispute with Mastercard, is that correct?

25 A: Correct.



1 Q: And what were you asked to do?

2 A: I was asked to evaluate the determination of
3 the Department from the perspective of state
4 and local tax policy.

5 Q: Okay. And at this point, I don't want you to
6 tell us your opinions, but have you prepared an
7 opinion about whether the Department's position
8 in this litigation is consistent or
9 inconsistent with good tax policy?

10 A: Yes.

11 Q: Okay. Let's quickly review your
12 qualifications. Where did you go to college?

13 A: Dartmouth College.

14 Q: And what did you study there?

15 A: Government.

16 Q: Did you go to law school immediately after
17 graduating from college?

18 A: No.

19 Q: What did you do?

20 A: I worked on a political campaign. I went to --
21 I was a researcher at Urban Institute in
22 Washington, D.C. Worked as a legislative aide
23 for a congressman in Washington, D.C. and then
24 went to law school.

25 Q: Okay. And where did you go to law school?



1 A: I went to Yale Law School.

2 Q: Did you write for the Law Review or any
3 journals while you were at Yale?

4 A: I did not write for any journals. I was an
5 editor on one.

6 Q: After you graduated from law school, what did
7 you do professionally?

8 A: I practiced law first in Albuquerque, New
9 Mexico, for two years and then Phoenix,
10 Arizona, for about 14 years.

11 Q: And in what areas did your private pract- --
12 well, let me ask it this way, did your private
13 practice have a particular focus?

14 A: Yes. Particularly, after the first two years,
15 when I went to the law firm -- Streich Lang Law
16 Firm in Phoenix now -- they merged with Quarles
17 and Brady law firm, I practiced exclusively in
18 the area of state and local taxation with the
19 occasional federal tax project.

20 Q: And I think you said that was for about 14
21 years?

22 A: Yes.

23 Q: And then after your -- I guess at that point,
24 your -- you've been in private practice for
25 about 16 years ---



1 A: Right.

2 Q: --- and then transitioned to academia?

3 A: That's correct.

4 Q: Okay. And did you go to the University of

5 Arizona immediately or was there some place

6 else?

7 A: Initially, I went to a start-up law school

8 called the Appalachian school- -- School of Law,

9 which is still in existence. And ---

10 Q: And where is that?

11 A: Grundy, Virginia.

12 Q: Okay. You were there for how long?

13 A: About two and a half years.

14 Q: What subjects did you teach at that law school?

15 A: There I taught federal income tax and estates

16 and trust.

17 Q: And from the Appalachian School of Law, did

18 then you then move to the University of

19 Arizona?

20 A: Yes.

21 Q: Okay. Have you taught at any other law

22 schools, for example, as say a visiting

23 professor while you've been at Arizona?

24 A: I've taught as an adjunct for the University of

25 Alabama. For about ten years I taught for them



1 in there LLM tax program. It was an online
2 program.

3 Q: And back at the University of Arizona, what
4 subjects did you teach?

5 A: State and local tax, federal tax, corporate
6 income tax, advanced corporate income tax,
7 international tax and state and gift tax.
8 Also, property, estates and trust, and
9 professional responsibility.

10 Q: How long prior to your -- you retired in
11 January, I guess, is that right?

12 A: January of -- 14 months ago -- of last year.

13 Q: How many years total were you at the University
14 of Arizona?

15 A: Well, from 2001 to 2021. Roughly 20 years.

16 Q: Do you currently maintain and active law
17 license in any state?

18 A: No. I'm -- I went inactive with my Arizona
19 license when I retired.

20 Q: Is -- you've been licenced, I guess, in Arizona
21 and New Mexico?

22 A: Correct.

23 Q: What is the status of your New Mexico license?

24 A: I just let that expire after a while.

25 Q: Have you ever been disciplined by either New



1 Mexico or Arizona Bar Associations?

2 A: No.

3 Q: Have you ever won any awards as a law
4 professor?

5 A: I won an in-house award for public service to
6 -- to the law school called the Bell Award. I
7 also -- I don't know if this qualifies as an
8 award, but State Tax Notes magazine, after the
9 end of the first decade of the 21st Century,
10 said that I was a member of the state and local
11 all tax team, the state law court with about
12 twelve other folks.

13 Q: How many articles have you published on state
14 and local tax law?

15 A: Roughly 50, in that neighborhood.

16 Q: And could you give us a few examples that might
17 be relevant to what we're going to talk about
18 today?

19 A: Yes. In 2008, I published an article in the --
20 in the Tulane Law Review called something like,
21 the attribution of service -- of receipts --
22 service receipts for corporate -- state
23 corporate income tax purposes. I wrote an
24 article on state income tax jurisdiction. I
25 think that was published in the William and



1 Mary Law Review. Those are two income tax
2 examples.

3 Q: Have you authored or co-authored any books on
4 taxation?

5 A: Yes. I co-au- -- -authored a case book on
6 state and local taxation with Walter
7 Hellerstein and Kirk -- Kirk Stark and Joan
8 Youngman. I also co-authored the Hellerstein
9 -- I don't know what they're calling it now.
10 The Hellerstein and Hellerstein and Swain state
11 taxation treatise, which I call the Hellerstein
12 Treatise. I stopped writing for the treatise
13 at the time I retired.

14 Q: This is not your first go around serving as an
15 expert witness, I don't think, is it?

16 A: I've been retained about a dozen times.

17 Q: And I think this is clear, but I'll just ask
18 anyway. All of those times have been in the
19 context of state and local taxation disputes?

20 A: Yes.

21 Q: How many times have you actually testified in
22 your capacity as an expert witness?

23 A: I think about -- I think five.

24 Q: Okay. And have you ever been -- has any court
25 ever refused to recognize you as an expert for



1 any reason?

2 A: No.

3 Q: How many times have you testified in South
4 Carolina as a tax expert?

5 A: Twice.

6 Q: And which cases were those?

7 A: DirecTV and Dish TV.

8 Q: Do you recall what your -- what your field of
9 expertise was in those cases?

10 A: State and local tax policy.

11 Q: Are you being compensated for your work?

12 A: Yes.

13 Q: What is your rate?

14 A: \$400 an hour.

15 Q: Is this a typical hourly rate for people who
16 provide the kinds of expertise that you do?

17 A: Maybe typical. It might be a little low.

18 Q: Is there anything about your -- the -- the fee
19 structure or the fee arrangement that you have
20 with the Department in this case that's
21 different from your typical fee arrangement or
22 fee structure?

23 A: No.

24 Q: What do you consider your area of expertise as
25 it is relevant to this dispute between the



1 Department of Revenue and Mastercard?

2 A: State and local tax policy.

3 Q: We've marked your CV. It's already in the
4 record as Exhibit 35. If you want to look at
5 the copy, I think it's in the third book, and
6 just make sure that it's current and accurate.
7 I do know that you've had sort of one major
8 life change I think since that was prepared.
9 You're now currently living where?

10 **(Joint Exhibit Number 35 was referenced at this**
11 **time.)**

12 A: Well, two things. I'm retired, so it should be
13 like parentheses emeritus, parentheses. I did
14 get emeritus status. And I'm now living in --
15 in Mount Pleasant, South Carolina.

16 Q: Okay. What is tax policy?

17 A: Well, very briefly, it's decisions by
18 government on how to tax and at what levels to
19 tax.

20 Q: Are there any principles that you looked to to
21 determine whether something is good tax policy?

22 A: Yes. And there are many articulations of what
23 tax policy is and principles of good tax
24 policy. I like to keep it very simple. The
25 first is sort of getting it theoretically



1 right. So, if you're going to have an income
2 tax, have rules that measure income. And the
3 other is sometimes getting it theoretically
4 right, if you're trying to be too accurate, you
5 run into administrative or compliance
6 difficulties. So, often sometimes there's a
7 tradeoff between administrability. And that's
8 the second thing I'd look at as a rule,
9 administrability. An example I like give
10 because it's sort of comical to me is I saw --
11 there was an article in the Harvard Law Review
12 that said that the federal graduated income tax
13 rate should be different depending on where you
14 live because the cost of living is different
15 from where you live. And since \$100,000 goes
16 further, I assume, in Charles- -- in Columbia,
17 South Carolina than Manhattan, people here
18 should start paying a graduated rate sooner on
19 their income than in New York because your
20 dollars go further. And I thought that was
21 probably not a very administrable rule and
22 maybe not politically acceptable either. The
23 third item is sort of contradictory in a sense.
24 It's -- so, I look non-tax policy goals.
25 Sometimes we do things in the tax law to



1 achieve a non-tax policy goal. For example,
 2 from time to time, we've allowed charitable
 3 contribution deductions. Those deductions
 4 aren't designed to get it right, to measure
 5 income properly. They're designed to encourage
 6 charitable giving. And there are other rules
 7 that. We use the tax code for non-tax policy
 8 reasons. And I look to see whether those rules
 9 are accomplishing those goals and how they
 10 might impact administrability.

11 Q: What analysis can a -- an expert in state and
 12 local tax policy provide that is relevant to
 13 this dispute between the Department and
 14 Mastercard?

15 A: Well, I can val- -- evaluate the -- the -- the
 16 determination from a tax policy point of view.
 17 I think that can be relevant because sometimes
 18 in interpreting the law, we look to what the
 19 policy effects are of interpretation A versus
 20 interpretation B and whether one is better from
 21 a public policy point of view.

22 **MOTION TO ADMIT AS EXPERT:**

23 **MR. NEIL:** Your Honor, at this time, the Department
 24 moves that the Court recognize Professor Swain
 25 as an expert in state and local tax policy.



1 **THE COURT:** Expert in state and local tax policy.

2 **MR. NEIL:** Yes, sir.

3 **MR. KERMAN:** Your Honor, we have no objection.

4 **THE COURT:** Thank you. That was going to be my next
5 question. The witness is qualified as tendered
6 in state and local tax policy.

7 **MR. NEIL:** Thank you, Your Honor.

8 **THE COURT:** You're welcome.

9 **Q:** Professor Swain, as part of your scholarship on
10 state and local tax policy, do you study trends
11 in state and local taxation?

12 **A:** Yes. I study or observe trends.

13 **Q:** How does a trend influence your opinion about
14 whether something may be good or bad from a tax
15 policy's perspective?

16 **A:** Well, I -- it's hard to say. I mean, a trend
17 can be good or bad. Part -- I think it's just
18 -- when I look at trends, again I -- I start
19 gathering data as a scholar and ask myself, why
20 is there that trend? What's driving that
21 trend? There may be some force or impulse
22 underlying it that I need to understand.

23 **Q:** Specifically, have you looked at trends
24 concerning how states are sourcing income of
25 multi-state businesses?



1 A: Yes.

2 Q: And what is the trend for sourcing income in
3 state corporate income taxation?

4 A: So, without getting too deep into the history,
5 or at least not yet, states -- the trend is to
6 go towards what we call single sales factor
7 apportionment and receipts attribution to that
8 sales factor based on where the market for
9 those receipts -- the market that generated
10 those receipts. And that's been the trend.
11 And it's been away from a formula that gave way
12 to where factors and production are like
13 property and payroll.

14 Q: So, maybe real quickly, just to get this out,
15 what is -- what is the single sales factor
16 apportionment, can you define it?

17 A: Well, as in this case, single sales factor or
18 gross receipt factor is -- a factor is a -- is
19 a ratio that's applied to a taxpayer's net
20 income to determine how much is -- is
21 apportionable to a given state. So, and we --
22 an enumerator of that factor goes to the in-
23 state receipts and the denominator goes
24 receipts everywhere. And that's a -- gives you
25 the percentage of income that is going to be



1 apportioned to a state. And one might measure
2 in-state receipts in many different ways, but
3 the -- the trend currently is to measure it
4 based on where the customer is, where the
5 person who purchased the -- the -- the product
6 is or -- when we're talking about services,
7 where the benefit of the service is received.

8 Q: You may have just answered this question, but
9 why is the single sales factor an appropriate
10 measurement for apportioning income among
11 states where a company earns income from
12 providing its goods or services?

13 A: Well, appropriate is an interesting word to
14 use. I guess, the way I'd put it is if I were
15 advising a state on what to adopt, and they --
16 I had -- they had to adopt an income tax, I
17 would say about the single sales factor
18 apportionment formula with market base source -
19 - sourcing or receipts attribution. Frankly,
20 I might suggest, you know, why don't you adopt
21 a gross receipts tax instead because that's
22 kind of what the corporate income tax is
23 becoming. When you're measuring income solely
24 based on where sales are occurring, where the
25 market is, it starts looking a lot like a gross



1 receipts tax. But -- and why would I recommend
2 that? Why would I, for example, which is what
3 has happened. We haven't gotten to the
4 history, yet, anyway. Why wouldn't I give
5 weight to where people's factories are or where
6 their employees are? And it's because states
7 and taxpayers have come to understand that to
8 do that would penalize new investment in the
9 state and actually discourage people in the
10 state from continuing to operate in your state
11 because they might go to another state where
12 they aren't, in effect, taxed on their payroll
13 and property. So, under a single sales factor
14 system or formula, if a taxpayer has \$100,000
15 of sales in your state, they could bring as
16 much investment into your state as they want,
17 but their -- their sales remain the same as the
18 -- their state income tax won't go up, so. And
19 because labor and capital are mobile, this is
20 something that happens and can happen, states
21 fear will happen and so, there's -- they've
22 sort of be compelled to adopt a single sales
23 factor apportionment.

24 Q: Let's -- let's -- let's talk about that history
25 some. You've brought it up a couple of times.



1 What the -- the three factors that you talked
2 about just a minute ago were payroll, property
3 value and sales. What is the -- well, I'll
4 just say it because I think we all agree, that
5 all came from a model statute called UDIPTA, is
6 that right?

7 A: Correct.

8 Q: What is UDIPTA?

9 A: UDIPTA.

10 Q: UDIPTA.

11 A: Uniform Division of Income for Tax Purposes Act
12 is a uniform law that was adopted in 1957 and
13 it provided a formula for apportioning business
14 income to states for corporate income tax
15 purposes. And the formula at the time relied
16 on a ratio, which was the average of three
17 factors; the property factor, the payroll
18 factor and the sales factor. The property
19 factor was a taxpayer's in-state property to
20 property everywhere. In-state payroll factor
21 was in-state payroll to payroll everywhere.
22 Sales factors was in-state sales over sales
23 everywhere. Those three ratios were averaged
24 and that -- the result was applied to net
25 income -- to net business income to arrive at



1 the taxable income. It was acknowledged that
2 the payroll and property give way to the
3 production of the good or service. And the
4 sales factor gave way to the contribution of
5 the market state to the taxpayer's income. And
6 that was considered something of a fair
7 compromise between produ- -- producing states
8 and market states.

9 Q: So, U- -- UDIPTA was put out as a model law of
10 -- if I understand it correctly, is that right?

11 A: Correct.

12 Q: And did South Carolina copy that model statute
13 for purposes of its apportionment law and
14 income tax?

15 A: No. I don't think they copied it. There are
16 a lot of similarities in the way -- in the
17 general way how South Carolina apportions
18 income.

19 Q: What is different about the way South Carolina
20 apportions income from the formula in UDIPTA?

21 A: Well, the structure is somewhat different, so
22 we have a separate sales factor for mercantile
23 business, the sales of tangible personal
24 property. We have a gross receipts factor
25 that's different. I mean, at least statutorily



1 it appears in a different place. With respect
2 to this dispute, UDIPTA relied on the catchall
3 for attributing to the numerator of the sales
4 factor receipts from other than sales of
5 tangible personal property. In other words,
6 receipts from services and intangibles. And
7 UDIPTA rules said that those receipts would be
8 attributed to the numerator of a sales factor
9 based on cost -- excuse me -- in- -- where the
10 income producing activity is and if the income
11 producing activity is in more than one state,
12 it would be to the -- to the state that -- I --
13 I can't remember the exact language, that had
14 the greater amount of income producing activity
15 based on cost performance. The South Carolina
16 rule says that receipts from services -- it's
17 not a catchall. There's a separate provision
18 for intangibles, which is a difference. But
19 that receipts from services will be attributed
20 to the numerator of the sales factor, or gross
21 receipts factor, based on where the income
22 producing activity occurs. And if the income
23 producing activity occurs in more than one
24 state, the receipts will be apportioned based
25 on the apportioned contribution of the

