

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, : Civil Action 96-1285
et al. :
Plaintiffs :
: Washington, D.C.
v. : Monday, October 22, 2007
: :
DIRK KEMPTHORNE, Secretary :
of the Interior, et al. :
: :
Defendants : AFTERNOON SESSION

TRANSCRIPT OF EVIDENTIARY HEARING
DAY 7
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

1 THE COURT: All right, sir.
2 MR. GINGOLD: Good afternoon, Your Honor.
3 THE COURT: Good afternoon.
4 (The witness resumed the stand.)
00:00:05 5 DIRECT EXAMINATION (Continued)
6
7 BY MR. GINGOLD:
8 Q. Good afternoon, Mr. Duncan.
9 A. Good afternoon.
00:00:08 10 Q. Mr. Duncan, this morning you testified with respect to two
11 of the problems you identified at the outset of your testimony:
12 The missing data problem and the sample selection problem; is
13 that correct?
14 A. Correct.
00:00:21 15 Q. There are three other problems which you identified which
16 you characterize as major. Is that a fair statement?
17 A. Yes.
18 Q. The next one is irrelevant sample design, correct?
19 A. Correct.
00:00:30 20 Q. What do you mean by an irrelevant sample design?
21 A. Here the notion that is captured in that concept is what
22 was the sample designed, what question was the sample designed
23 to answer. And what we're able to observe from looking at the
24 administrative record, and specifically the NORC reports in the
00:00:50 25 administrative record, is that the sample design was really --

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1 and the LSA, the sample that was drawn, was, as its name
2 implies, really a litigation support activity or an accounting,
3 as I believe this -- litigation support accounting.
4 But it was really designed to estimate the dollar exposure
00:01:08 5 consistent with the kinds of things that I would do in a damage
6 case, in preparation for a mediation or a settlement discussion,
7 trying to estimate the overall exposure. And it wasn't really
8 designed to answer specifically information about the accuracy
9 and completeness of the individual transaction listing and
00:01:27 10 account balances, and the information that was provided inside
11 of the LSA reports really went to those gross dollar questions,
12 not corrections that would potentially apply to individual
13 accounts.
14 Q. Now, you're making this statement based on your experience
00:01:42 15 with regard to damages issues, aren't you?
16 A. Yes, that's correct.
17 Q. And you've done that in the course of your career; you've
18 provided expertise in that regard, correct?
19 A. In hundreds and hundreds of cases.
00:01:52 20 Q. So what you've seen in the NORC sample is not materially
21 different from what you yourself have done in trying to estimate
22 liability, correct?
23 A. That's correct. When that's the question on the table,
24 this would be an appropriate activity to do.
00:02:04 25 Q. And that's a sound approach if you're a defendant, isn't

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00:02:19 1 it, in a case, correct? If you were defending yourself?

2 **A. To try to come up with some estimation, it's helpful in**

3 **trying to negotiate your way into, is there going to be a**

4 **mediation, it's helpful in trying to develop your trial**

5 **strategy, to have some idea of the rough magnitude.**

6 **Q.** And that is not your understanding, however, as to whether

7 or not it is an accounting that discharges a fiduciary duty,

8 correct?

9 **A. It would be inconsistent with that notion in my mind.**

00:02:33 10 **Q.** Now, could you give me some examples of transactions that

11 you're aware of where accounts are misstated? Do you have any

12 idea of any, or do you have any in mind?

13 **A. Of specific accounts that are misstated?**

14 **Q.** Yes. With respect to overpayment or underpayment.

00:02:56 15 **A. Well, the only specific information we've been provided as**

16 **part of the administrative record was for the Eastern Region.**

17 **Q.** And the Eastern Region tells you what based on your

18 recollection?

19 **A. Well, there are specific instances in the Eastern Region**

00:03:11 20 **analytical work done by Deloitte & Touche that show there are**

21 **dollar discrepancies, there are dollar differences between the**

22 **amount that is in the IRMS, in the electronic ledger era that**

23 **was sampled, and when they were reconciled back to whatever they**

24 **were reconciled against. There were dollar differences noted.**

00:03:30 25 **Q.** Let's talk about the historical accounting project itself.

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1 **identify, of the transactions that they reconciled, using the**

2 **different levels of reconciliation, of those that they**

3 **reconciled were there any differences that were observed.**

4 **And the other overlay here is it's not just any difference;**

00:05:22 5 **it has to be above their de minimis criteria. So there had to**

6 **be a difference in the transaction of at least a dollar. So**

7 **what they're saying here is actually there are no differences**

8 **observed that were below our de minimis threshold, for the ones**

9 **that were reconciled using the definition of reconciliation**

00:05:37 10 **inside the ASM.**

11 **Q.** And you're going to be discussing this later in your

12 testimony, but the de minimis, a dollar, is that so

13 insignificant it's not worth doing any work on?

14 **A. It matters for two major reasons. The first one is when**

00:05:55 15 **you're doing sampling, you're going to try to extrapolate those**

16 **results up to a much broader population, so you may be sampling**

17 **a small fraction of the transactions. So anything that you**

18 **discover is amplified many times over when it's extrapolated to**

19 **the population.**

00:06:11 20 **So how -- and remember the attribute sampling, the yes/no,**

21 **deciding what is yes and what is no, that makes a difference.**

22 **Even if it's only a dollar, it makes a difference because that**

23 **error rate, that yes/no error rate is going to be extrapolated**

24 **to the population, and it also affects how big a sample size you**

00:06:30 25 **pick and what assurance levels you can give. So it's important**

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1 I'll call up for purposes of our discussion Bates 33-3-14.

2 MR. GINGOLD: Your Honor, the historical --

3 THE COURT: Bates 33-3-14?

4 MR. GINGOLD: That's correct.

00:03:50 5 THE COURT: Okay.

6 MR. GINGOLD: That's part 2 of what is the historical

7 accounting project, and it has -- the historical accounting

8 project has two basic Bates stamp numbers 33-1, 33-2, and 33-3.

9 Part 2 is 33-3, and the page that I'd like to discuss with

00:04:13 10 Mr. Duncan is 33-3-14.

11 BY MR. GINGOLD:

12 **Q.** Mr. Duncan, you've read this before, haven't you?

13 **A. Yes, sir, I have.**

14 **Q.** That's right. And when we're dealing -- here we're dealing

00:04:33 15 with sample debit transactions and sample credit transactions,

16 correct?

17 **A. Correct.**

18 **Q.** And under sample debit transactions, the statement is

19 "There were no differences observed for debit transactions," and

00:04:44 20 then it goes on, "therefore, there were no underpayments or

21 overpayments."

22 What is your understanding of those two bullet points?

23 **A. This gets interwoven with a lot of the topics we've talked**

24 **about this morning, which is first of all what is an error. So**

00:05:01 25 **what they're saying here is as defined by the ASM, they did not**

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1 **from that standpoint.**

2 **It's also important because not only is the dollar**

3 **difference used in this notion of yes/no, which is the attribute**

4 **sampling, it also becomes a variable on the other side, which**

00:06:47 5 **it's called variable sampling, where you sum up those dollar**

6 **amounts. So there's really -- going all the way back to the**

7 **2003 Plan, it was always clear to me from the 2003 Plan and from**

8 **the 2007 Plan that the fundamental design was based on attribute**

9 **sampling, it's a yes/no question.**

00:07:07 10 **And back in the 2003 trial there was some discussion that**

11 **they may eventually do a variable type sample. They may gather**

12 **that information. In the course of this trial it's become clear**

13 **that they have done that activity. In Ms. Hinkins' rebuttal**

14 **report, she's made it very clear, and in the administrative**

00:07:23 15 **record you can see they have gathered that additional**

16 **information on how much the dollar difference is.**

17 **Well, really, the attribute sample piece, the yes and no,**

18 **there's no need to set some arbitrary level for yes or no when**

19 **you're going to collect that information on the dollar side. So**

00:07:40 20 **it's important here, if there is any difference, it should make**

21 **a difference in the attribute side, whatever the size of that**

22 **is, because that has ramifications on the rest of the sampling**

23 **exercise.**

24 **Q.** And does it make a particular difference, since the

00:07:54 25 statements that are being made are based on aggregate amounts as

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1 opposed to statements particularly to an individual Indian trust
 2 beneficiary's account?
 3 **A. Well, here the statements that are made in the aggregate**
 4 **are really driven off of both the yes/no question and off of the**
 00:08:12 **5 dollar size question, so it makes a difference in both**
 6 **instances.**
 7 **Q.** And therefore whether it's a dollar or 58 cents, it may be
 8 significant when you're extrapolating to the entire population,
 9 correct?
 00:08:23 **10 A. They need to be tracked down. As Dr. Scheuren correctly**
 11 **pointed out, a mistake of 58 cents, you need -- if it's not**
 12 **reconciled, you need to spend time tracking it down,**
 13 **particularly when you're sampling, because if that transaction**
 14 **should have been \$58 or \$58,000, that's going to make a big**
 00:08:43 **15 difference as to how you extrapolate the implications up to the**
 16 **population that you're able to extrapolate to.**
 17 **Q.** We've been discussing on this page the sample debit
 18 transactions. Does the same concern exist with regard to
 19 sampled credit transactions?
 00:08:57 **20 A. It does, but there's an additional layer to the flaw here**
 21 **in thinking. And that is, we read here there are 11**
 22 **underpayment differences totaling 341, and 25 overpayment**
 23 **differences totaling 853. And then the conclusion is the net**
 24 **overpayment was 512.**
 00:09:15 **25 And this is another difference that Dr. Hinkins and I have.**

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1 larger sample size?
 2 **A. No. All it would do is it would make the estimate of the**
 3 **underpayment or the overpayment, and if they go the next step of**
 4 **netting it, it would make each one of those a little more**
 00:11:07 **5 precise, but it's not going to solve the underlying problem of**
 6 **the inability to say something about the individual account**
 7 **balance.**
 8 **Q.** And would that information enable the defendants to confirm
 9 that individual transactions were accurate?
 00:11:21 **10 A. I'm not sure I follow that question.**
 11 **Q.** Okay. If you have a mean overpayment and mean underpayment
 12 associated with a posted transaction on two electronic systems
 13 and you expanded the sample size, you could not confirm based on
 14 that information that the individual transaction was accurate,
 00:11:43 **15 could you?**
 16 **A. You wouldn't have any basis.**
 17 **Q.** It provides nothing for you, does it?
 18 **A. Correct.**
 19 **Q.** I'd like to move on to problem No. 4, which you've
 00:11:53 **20 described as inappropriate sampling unit. Can you please**
 21 **explain what you mean by an inappropriate sampling unit?**
 22 **A. The issue that comes to bear here is we're trying to**
 23 **understand what happened in accounts. Inside of the accounts**
 24 **there are transactions.**
 00:12:14 **25 I think that DOI and certainly NORC recognized early on**

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1 **And this goes directly to my notion of sample design. It's**
 2 **irrelevant, the last part of that sentence is irrelevant to an**
 3 **individual account holder. It makes perfect sense in estimating**
 4 **exposure from -- liability in a litigation setting, but if I'm**
 00:09:33 **5 the individual that was underpaid \$341, just take this example,**
 6 **if someone else was overpaid \$853, that's irrelevant to me. You**
 7 **can't offset those transactions.**
 8 **And the sample design and what was reported in the sampling**
 9 **really gets this notion of the net. That's the way it's**
 00:09:52 **10 reported by the accountants, that's the way it's reported in the**
 11 **2007 Plan, and that netting is inappropriate in the context of**
 12 **trying to answer the question for individual account holders.**
 13 **Q.** Is it your understanding, then, that at the completion of
 14 the statistical sampling exercise, that the statement that would
 00:10:12 **15 be made to the account holder who is underpaid \$341 is that his**
 16 **stated balance is more likely than not accurate, and he would**
 17 **not be told he was underpaid \$341?**
 18 **A. It would have to bear itself out, how the HSAs were**
 19 **developed. But from what I've seen so far, it would be that**
 00:10:34 **20 your recorded transactions are probably right. They might be**
 21 **off by 1 percent, 4 percent, depending on credits or debits.**
 22 **But the individual that was underpaid the 341, from what I've**
 23 **seen so far, the only answer would be it's probably right within**
 24 **about 1 percent.**
 00:10:49 **25 Q.** Can this concern that you've discussed be cured with a

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1 **that sampling accounts would be problematic, because there's a**
 2 **likelihood, a reasonable likelihood that there would be an error**
 3 **in one of the transactions in the account. So as a matter of**
 4 **fact, early on in this process, when there were discussions**
 00:12:37 **5 about sampling accounts, sampling transactions, and they were**
 6 **weighing out the strengths and weaknesses, it was specifically**
 7 **articulated that even if you have very, very low error rates in**
 8 **the transactions, which is really contrary to what you would**
 9 **assume given all of the other reports from accountants and GAO,**
 00:12:56 **10 but if you assume it was going to be a very low transaction**
 11 **error rate, by the time you lumped all of those transactions**
 12 **into an account, what you're going to end up with was a high**
 13 **likelihood that you're going on have the account balance**
 14 **misstated.**
 00:13:09 **15 So looking at the transactions, let's say you assume**
 16 **there's only 1 percent error rate. Given the average size of**
 17 **these accounts, by the time you look at each account and say**
 18 **okay, there's a 1 percent chance that transaction's wrong, 1**
 19 **percent chance that transaction's wrong, by the time you get to**
 00:13:25 **20 the end of -- all the transactions in that account, even**
 21 **assuming a 1 percent error rate, you would say you can be 75**
 22 **percent sure that account balance is misstated.**
 23 **If the error rate goes up at all, to 2 percent or 3**
 24 **percent, effectively you're a hundred percent sure that every**
 00:13:42 **25 account balance is misstated. So it's the wrong unit to be**

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00:13:58 **1** looking at. You shouldn't be looking at transactions. Really

2 what should be done here, if you were going to go through this

3 sampling exercise, is it should be done on an account basis.

4 But the lack of information really tied their hands and they

00:14:18 **5** weren't able to do that.

6 Q. Let's take a look at an exhibit from the administrative

7 record, and it's identified as Bates No. 11501. Do you recall

8 reviewing this document?

9 A. Yes, I do.

00:14:37 **10** Q. As you can see, this is a November 24, 2002, document

11 that's identified as draft from the Office of Historical Trust

12 Accounting, and the headnote is "Statistical sampling strategy,"

13 and underneath that is "the scientific logic of using sampling

14 approaches." Is that correct?

00:14:59 **15** A. Yes.

16 Q. I'd like you to turn to what is Bates page No. 4 of this

17 document, and I'd like you to focus in on the second paragraph.

18 It's highlighted. What you've been discussing with regard to

19 the concern about error rate in an account versus error rate in

00:15:23 **20** the transaction, is the highlighted section one of the concerns

21 that you've had?

22 A. Yes. This articulates exactly what I was talking about.

23 It assumes a much, much -- a tenth of the error rate I was just

24 talking about. Here assuming that 0.1 percent of the

25 transactions are wrong, the account error rate would explode

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00:15:38 **1** upwards of 30 percent. The example I gave was if you assume it

2 was 1 percent error rate, it would balloon up to 75. So this is

3 exactly the issue that I was talking about, and it was

4 identified fairly early in the sampling exercise, as we see

5 here, by the Office of Trust Accounting document.

6 Q. So is it fair to say that if the goal was to substantiate a

7 near zero error rate, sampling accounts would not allow you to

8 reach that goal?

00:15:54 **9** A. You could establish a very small error rate for the

10 transactions, potentially, but it would not result in a high

11 likelihood that the account balances are correct.

12 Q. Now, is the determination of an error rate part of

13 Defendants' accounting efforts?

00:16:12 **14** A. It is. And we keep coming back to this notion because it

15 underpins everything. What is the error rate? And that is

16 defined by what is the error. So it's very important to

17 understand what that error rate is and what comprises that error

18 rate as part of conducting the sampling.

00:16:30 **19** Q. In that regard, I'd like you to turn your attention to an

20 exhibit, another exhibit from the administrative record. It's

21 Bates numbers 57-30-1. Have you reviewed this exhibit before?

22 A. Yes, I have.

23 Q. This is entitled "Managing historical accounting records."

24 It is undated. I'd like you to turn your attention to Bates

00:17:01 **25** No. -- page No. 3.

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1 THE COURT: It's also unidentified, isn't it?

2 MR. GINGOLD: Yes, it is. But it was in the

3 administrative record, Your Honor. It's identified with an HTA

4 Bates stamp number. We assume it's something that was either

00:17:14 **5** considered or relied on in making a decision because it was part

6 of the record.

7 THE COURT: All right. Go ahead.

8 BY MR. GINGOLD:

9 Q. In the middle of the page on Bates No. 3, we have

00:17:29 **10** highlighted a section. And you've discussed the problem of

11 missing records, correct?

12 A. Yes.

13 Q. And you've discussed the errors associated with that.

14 A. I have.

00:17:41 **15** Q. The highlighted section of this document specifically

16 states, "This warns us that we need to have a strategy that

17 resolves the missing record problem for disbursements in a way

18 that does not treat the failure to find the supporting

19 documentation as an error in the account."

00:18:01 **20** Now, what is your understanding of that statement?

21 A. Well, this goes to the notion of the sample size

22 determination and what really the exercise is trying to

23 accomplish. At this point in time, it's referencing this 1972

24 to '92 tribal reconciliation. This was the reconciliation I

00:18:19 **25** understand that was performed by Arthur Andersen.

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1 I've reviewed that tribal reconciliation. And the tribal

2 reconciliation found that even after making a whole series of

3 amendments to the standard by which they were, quote,

4 reconciling transactions, I believe they started out at GAAP and

00:18:37 **5** GAAS standards, and after a series of nearly a hundred

6 modifications to their work order, at the end of the day they

7 arrived with what the BIA instructed them was the standard to

8 which it should be reconciled.

9 Even after lowering that standard all the way down, they

00:18:51 **10** still had a substantial proportion of the documents that they

11 couldn't reconcile, that had missing supporting documentation.

12 If that was the case, and it was something in the 12 or 13

13 percent neighborhood that they could not reconcile, that would

14 be a huge implication on the sampling exercise, because if you

00:19:12 **15** assume a 13 percent error rate, if you treat all of those

16 unreconciled as errors, then the sample size grows -- well, not

17 even proportionally, it would grow even faster than that.

18 There's a large increase in the required sample size, and

19 there's potentially a decrease in the assurance rates that would

00:19:29 **20** be able to be provided.

21 So I think it's correctly identified here that if they're

22 going to treat these missing documents and unsupported documents

23 as errors, they're going to have -- it would have to be a

24 substantially different sampling exercise than what was

00:19:47 **25** conducted.

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00:19:56 1 Q. Is it fair to say they wouldn't be able to achieve a near
 2 zero error rate?
 3 A. **Correct. If you don't find a way to ignore those as**
 4 **errors, you're not going to get close to a zero error rate; your**
 5 **expectation going in would be something in the 12, 13 percent**
 6 **area.**
 7 Q. Is it your understanding that this particular concern on
 8 how to treat missing documents vis-a-vis error rate is something
 9 that was actually underscored by the Defendants in the
 00:20:11 10 administrative record?
 11 A. **Yes, it was.**
 12 THE COURT: If there's no objection to that question,
 13 I guess I'll let it stand, but this is the same document you
 14 showed to Dr. Scheuren and he couldn't identify it. So I'm not
 00:20:27 15 taking very much from this. Go ahead.
 16 BY MR. GINGOLD:
 17 Q. Let's go to Bates page 10 of the same document. And if we
 18 can turn to the second paragraph, which is the first highlighted
 19 paragraph on this page, you will note that that same warning
 00:20:54 20 with regard to treating missing documents is restated, isn't it?
 21 A. **Yes, it is.**
 22 Q. And you have reviewed this entire document, have you not,
 23 Mr. Duncan?
 24 A. **I have.**
 00:21:06 25 Q. Now, one of the things that you've pointed out is documents
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1 highlighted A, reconciled with directly relevant documents
 2 without discrepancy, and you'll see A, B, C, D, E,
 3 unsubstantiated. Is A consistent with your understanding of a
 4 1-rated reconciliation?
 00:22:54 5 A. **Well, accounting code 1 would be both A and B. There's**
 6 **sort of two steps to it. The first is the reconciliation. Can**
 7 **we tie it back to some document that substantiates it's either**
 8 **reconciled yes or no, and then the second question is is there a**
 9 **discrepancy in that reconciliation. Did we find a supporting**
 00:23:12 10 **document that's different or did we find supporting documents**
 11 **that support it. So accounting code 1 deals with A and B.**
 12 Q. So accounting code 1 even includes documentation which may
 13 be in conflict with the posted entry, correct?
 14 A. **From the standpoint of it being reconciled, yes or no, it**
 00:23:30 15 **is.**
 16 Q. And if we look at C and D on this page, "inferred
 17 reconciliation, strongly persuasive," and "inferred
 18 reconciliation, persuasive to some extent," do you have an
 19 understanding of what C and D mean?
 00:23:44 20 A. **Those map in some degree into accounting code 2 and**
 21 **possibly 1.**
 22 Q. But again, you don't have -- you haven't been able to
 23 review any detail which explains the accounting codes, have you?
 24 A. **Other than the ASM, but that does not tell me definitively,**
 00:24:04 25 **and the information about the results of the sampling don't tell**
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1 are resolved depending on coded numbers, correct, 1, 2, 3, and
 2 4 -- or reconciliations are resolved --
 3 A. **Correct. There were four codes for the reconciliation**
 4 **efforts.**
 00:21:20 5 Q. All right. And what is your recollection of code No. 1?
 6 A. **It changes modestly over time, but the consistent**
 7 **definition of an accounting code 1 is it has a directly**
 8 **supporting document, it has been recomputed using known**
 9 **Department of the Interior methods, or it has been substantiated**
 00:21:43 10 **with third-party documentation.**
 11 Q. And what about a code No. 2?
 12 A. **Code No. 2 is this term, alternative procedure. I've**
 13 **really, despite some extended efforts to try and find something**
 14 **as to what that means, I've not seen anything other than it's**
 00:22:01 15 **called an alternative procedure.**
 16 Q. As a matter of fact, you've reviewed portions of the
 17 administrative record, isn't it true?
 18 A. **The large majority of the administrative record I've**
 19 **reviewed personally.**
 00:22:12 20 Q. Did you find anything in your review of the administrative
 21 record which explained the alternative procedures in detail?
 22 A. **Not in any detail that I could decipher what exactly was**
 23 **the guidance to the individual accountant that's doing the**
 24 **reconciliation.**
 00:22:26 25 Q. If we can go to the middle of this page, you'll see a
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1 **you even whether or not, for accounting code 1, were they**
 2 **reconciled with a directly relevant document, or were they an**
 3 **inferred reconciliation. You can't tell in that bucket that's**
 4 **grouped as reconciled code 1 which of those happened.**
 00:24:20 5 Q. And in code 2 sound judgments are permitted, correct?
 6 A. **I believe code 1 and code 2, judgment is permitted.**
 7 Q. On the paragraph underneath the A, B, C, D, E descriptions,
 8 there seems to be an explanation of A through E. Did you review
 9 that before?
 00:24:40 10 A. **I did.**
 11 Q. What is your understanding of that explanation?
 12 MR. WARSHAWSKY: Objection. This document speaks for
 13 itself.
 14 THE COURT: Thank you. I'm going to sustain the
 00:24:48 15 objection. I tried to -- I mean, this is just a document that's
 16 found in the administrative record. Nobody quite knows what it
 17 is. I'm more interested in this witness's opinion than what he
 18 thinks of some other paper that's in the administrative record.
 19 BY MR. GINGOLD:
 00:25:04 20 Q. Do you believe reconciliation should be performed without
 21 direct source documents?
 22 MR. WARSHAWSKY: Objection. No foundation for the
 23 witness --
 24 THE COURT: I'll allow that question. I'll allow
 00:25:18 25 that.
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1 THE WITNESS: Ultimately that's what underpins all of
 2 the sampling exercise, is what is reconciled and what is not.
 3 And as a statistician, if it were tasked to me to try and
 4 perform this particular sampling exercise, it makes a huge
 00:25:32 5 difference whether or not something is reconciled with a
 6 directly supporting document, or whether or not it has been used
 7 through some judgment or recalculated or something like that.
 8 So I would not be comfortable preparing opinions or doing
 9 an extrapolation where you don't provide to the consumer of this
 00:25:53 10 information what the difference was, which ones were reconciled
 11 where there was actually back to a source document that says,
 12 and it matched. Which ones were recomputed? Because quite
 13 frankly, if I was looking at one that was recomputed, I'm not
 14 really sure that you would expect to find any error. Or one
 00:26:11 15 that is an alternative procedure. I don't know what an
 16 alternative procedure is, but I know what it's not. It's not
 17 linked back to a source document, directly tied to that source
 18 document. It's not a third party document. It's not inferred
 19 from the recomputation of the efforts.
 00:26:26 20 So everything in accounting code 2, what that means is it's
 21 something other than that, but I wouldn't really have any idea
 22 why you would expect to find an error under an alternative
 23 procedure.
 24 So when all of those get lumped together for the
 00:26:37 25 calculation of the error rate, in my mind that makes anything

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1 code. Do you have an understanding of what this is?
 2 **A. I do, and this document was very important in creating and**
 3 **drafting our opinions. This is the only information that was**
 4 **provided as part of the administrative record where we actually**
 00:28:58 5 **see what the accountants did in the process of doing the**
 6 **reconciliation.**
 7 **So what we have here is for the Eastern Region, this**
 8 **document goes down for the 289 transactions that were sampled in**
 9 **the Eastern Region, and what we see going across the line is**
 00:29:14 10 **there's an identifier, the 001, that just identifies the**
 11 **transaction, we can see that in the electronic ledger, this was**
 12 **a \$636.82 transaction. This was reconciled, if you go all the**
 13 **way to the right column, you can see this is an accounting code**
 14 **1. So that tells us that this was either directly reconciled,**
 00:29:36 15 **recomputed, or subject to third party documentation. It was one**
 16 **of those three things happened. And that reconciled to an**
 17 **amount of \$636.82 with no variance.**
 18 **So for this particular transaction, it's possible, although**
 19 **we can't tell, it's possible that this had an actual transaction**
 00:29:55 20 **that would show us exactly this is the right amount. It was a**
 21 **lease collection or check disbursement, depending on positive or**
 22 **negative, but there's this notion that you can see this is**
 23 **exactly how much came in. That's a possibility. It's also a**
 24 **possibility that it was just recomputed using some known**
 00:30:10 25 **Treasury method or Department of Interior method.**

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1 based on that error rate meaningless, because you just don't
 2 know how you got to this notion of there being a 1 percent error
 3 rate.
 4 BY MR. GINGOLD:
 00:26:49 5 **Q.** And specifically, is what you're saying that you as a
 6 reviewer of the information would not be able to make a decision
 7 as to what is an error in a particular transaction?
 8 **A. Correct. The entire sampling is based on this notion of**
 9 **the error rate, and if you don't have any understanding of what**
 00:27:08 10 **constituted the error, or have any confidence that an error has**
 11 **a meaning other than it could be any of these other procedures**
 12 **and not be an error, it would be nearly impossible to make any**
 13 **informed decision on that basis.**
 14 **Q.** I'd like to bring to your attention another document from
 00:27:26 15 the administrative record. It is identified as Bates No.
 16 60-12-1. This is a September 22, 2003, document entitled
 17 "Accountant's report on the reconciliation of the Eastern Region
 18 land-based non-interest individual Indian money transactions."
 19 Have you reviewed this document before, Mr. Duncan?
 00:27:57 20 **A. Yes, I have.**
 21 **Q.** I'd like you to turn your attention to Bates page 4, and
 22 I'd like you to look at this through page 10. And as you can
 23 see on Bates 4, you have categories which are identified as
 24 trans ID, transaction amount, throughput transaction amount,
 00:28:30 25 reconciled transaction amount, total variance, and accounting

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1 **Now, importantly, though -- maybe if I can just have you**
 2 **pan down.**
 3 **Q.** Drop to let's say trans ID 48.
 4 **A. Good. That's one example. So we can actually see here**
 00:30:25 5 **transaction 48, it's in the electronic ledger at \$162.23. It's**
 6 **also in accounting code 1. So what happened here is there must**
 7 **have -- however it worked in accounting code 1 -- we don't have**
 8 **the work papers. I can't see whether or not there is a check or**
 9 **there is a lease income. All we know, we have this piece of**
 00:30:46 10 **information. But it tells us that somehow they established that**
 11 **this particular account was off -- it's only off by a penny, but**
 12 **this transaction was off by one cent.**
 13 **Now, that, Your Honor, perhaps to put some context to what**
 14 **we were talking about before, but in answering a question in an**
 00:31:05 15 **attribute sample, my position would be that's an error, that's a**
 16 **mistake. It's only a penny, but that penny would be caught in**
 17 **the second part of this, which is the variable calculation. We**
 18 **can gather that up to quantify the magnitude, but it was**
 19 **recorded incorrectly.**
 00:31:19 20 **For purposes of the Eastern Region, though, that**
 21 **transaction was concluded that there was no error, because it**
 22 **fell below the de minimis rule. So this, I think, certainly**
 23 **helped us understand when we were looking at this, exactly what**
 24 **was happening at the individual reconciliation level.**
 00:31:37 25 **So in the Eastern Region, you'll recall, Your Honor, it was**

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00:31:56 **1 NORC's conclusion that there were no errors. There's a series**
2 of I believe 12 or 13 -- maybe 13 of these same kinds of
3 mistakes that are off by very small amounts, but at the end of
4 the day, NORC concluded there are no errors in this
5 reconciliation at all.
6 Q. And let's turn to Bates No. 5. And if we could focus in on
7 the top half of this so Mr. Duncan can read this.
8 You see there's additional variances of a penny and two
9 cents on this particular page, correct?
00:32:17 **10 A. Yes.**
11 Q. And again, you're unable to determine how that was
12 determined because you don't have the work papers, correct?
13 A. That's correct. We do know that these are accounting code
14 1. That tells us something about how it was reconciled, but
00:32:32 **15 nothing specific.**
16 Q. Let's drop to the bottom half of the page. Were there
17 additional variances identified, each of which is only a penny,
18 correct?
19 A. Correct.
00:32:42 **20 Q.** I'd like to turn to page 6. If you see on page 6 there are
21 additional transactions which are identified as a penny,
22 correct?
23 A. Correct. I believe on this page there's also some
24 negatives. There's positives and negatives.
00:33:00 **25 Q.** Does it make a difference if it's a positive or negative
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1 procedures; ergo I wouldn't expect to see an error.
2 Q. I'd like you to turn to Bates 10. And if you look at the
3 reconciliation columns above, what does that tell you?
4 A. Well, these are all accounting code 4, and I'm sure,
00:34:42 **5 Your Honor, you've seen -- the definitions are actually provided**
6 on the bottom. Transaction 4 is there's no evidence that can be
7 found, no alternative analyses, no alternative procedures.
8 These are simply ones that there was no way to reconcile.
9 Now, there's a little bit of a twist in the Eastern Region
00:34:57 **10 because it was done early as part of the LSA, and the**
11 transactions, the \$105 to the \$200, all of those transactions
12 are more than a hundred dollars. Here the certainty stratum
13 that was utilized was not a hundred thousand dollars and
14 greater, but it was a hundred dollars and greater. So there was
00:35:14 **15 an attempt to reconcile all of these as well.**
16 Ultimately it turns out these six transactions were not
17 able to be reconciled under anything, so they were lumped into
18 accounting code 4. And as you can see, there's no variance
19 associated with it, again, because you can't reconcile it, there
00:35:33 **20 would be no expectation of being able to calculate a variance.**
21 Q. And is it your understanding there's a zero error rate as
22 determined by NORC in the Eastern Region?
23 A. That's correct.
24 Q. Now, are you aware, other than -- you've discussed the fact
00:35:54 **25** you haven't seen work papers which help explain how the
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1 variance?
2 A. Well, this goes to the notion of the netting. At the end
3 of this report, you'll see that the net variance is provided,
4 and it does. It nets out the positives and negatives between
00:33:16 **5 these transactions.**
6 Q. What I'd like you to turn your attention to now is Bates
7 No. 9. And let's just focus on the top half of this first so
8 it's more easily readable. You note that these reconciliations
9 are done in accordance with accounting code 2?
00:33:35 **10 A. Correct. There are I believe 42 that were accounting code**
11 2 in this sample.
12 Q. But there's no variance?
13 A. I wouldn't expect there -- I don't know what the
14 alternative procedures are, but again, I know what they're not,
00:33:48 **15 so I wouldn't expect there to be a variance here under**
16 accounting code 2.
17 Q. And why wouldn't you expect a variance in accounting code
18 2?
19 A. Well, it's not linked to a directly supporting document,
00:34:00 **20 it's not recomputed, whatever the recomputation means, and it's**
21 not a third-party source; it's some alternative procedure. So
22 my guess is it's going to be highly unlikely under this
23 alternative procedure, whatever those methods ultimately turn
24 out to be, it's going to be highly unlikely that you're going to
00:34:16 **25 be able to contradict the dollar amount with the alternative**
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1 accounting codes have been employed, correct?
2 A. They would be very helpful in understanding what
3 constitutes these different codes.
4 Q. Is there any other evidence in the administrative record
00:36:09 **5** that you've reviewed that helps you understand what the error
6 rates are?
7 A. Well, there's the inclusion at the beginning of the Eastern
8 Region, there's a discussion as to what the error rates -- you
9 know, that there were no error rates -- there was a no error
00:36:31 **10 rate conclusion with respect to this particular project with the**
11 Eastern Region.
12 Q. And let's turn on this exhibit to Bates page No. 2. Is
13 this what you're referencing on the bottom of the page?
14 A. Yeah. This conclusion, I think it rolls to the next page,
00:36:52 **15 but this was the basis for what was then provided in some of the**
16 summary information about the national sample, as it related to
17 the Eastern Region.
18 So there were a total of 289 transactions. They said they
19 directly reconciled 241 of those, or they were able to directly
00:37:09 **20 reconcile it by using directly relevant documents. Again, what**
21 that means is, those were all accounting code 1, and it tells
22 you what the three different definitions of accounting code 1
23 are here that I've articulated for the Court.
24 Q. And then it goes on on the bottom of the page, carrying
00:37:23 **25** over to Bates 3, dealing with 42 transactions which were
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1 reconciled, correct?

2 **A. Correct.**

3 **Q.** Using alternative procedures, correct?

4 **A. Correct. It tells me nothing more than it was in fact an**

00:37:33 **5 alternative procedure. And this again links to what we saw at**

6 the bottom of that last table, which is the definition of the

7 accounting codes.

8 **Q.** And finally, at the end of this explanation by Deloitte &

9 Touche it talks about six transactions which Deloitte was unable

00:37:51 **10 to reconcile, correct?**

11 A. That's correct.

12 Q. What does this tell you?

13 A. Well, again, the error rate, if I were designing this as an

14 attribute sample and I was going to collect the information from

00:38:05 **15 the variable sample anyway, then I would think that any error**

16 should be counted as an error, because it's going to be

17 extrapolated up to a large population in the electronic ledger

18 era. And that information indicates, based on the number of

19 errors we saw there, it's going to be something in the 6-1/2

00:38:22 **20 percent range, would be the errors in that particular instance.**

21 But by defining an error as having to reach a certain

22 level, you're able to reach -- DOI is able to reach a lower

23 conclusion about the error rate, therefore draw a much smaller

24 sample size.

00:38:38 **25 Q.** And what is your understanding of what NORC actually stated

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1 **A. Again, there's nothing else in the administrative record**

2 **that allows us to do this level of detail, to actually look**

3 **behind the curtain. This is the only part of that study that**

4 **allowed us to do so.**

00:40:20 **5 Q.** And does it also discuss the approach that NORC has been

6 taking with regard to how it is reconciling posted transactions,

7 or not?

8 **A. Well, NORC's not doing any of the reconciliation work.**

9 **That's all done by the accounting firms. NORC designs the**

00:40:40 **10 sample, provides the sample list, and then the accounting firms**

11 go through the process of doing the reconciliation work.

12 Q. What about the plan itself, the historical accounting plan?

13 Let's go to Bates 33-2-14. Now, this itself, if you look at the

14 middle of the page, this deals with tribal reconciliation,

00:41:10 **15 correct?**

16 A. Correct.

17 Q. And you're talking about error rates generally with regard

18 to NORC's work, correct?

19 A. Correct.

00:41:19 **20 Q.** And tribal reconciliation work was used as a basis for

21 taking the approach that was done in the 2007 Plan, correct?

22 A. At least in part, yes.

23 Q. Now, you also discussed the fact earlier that the tribal

24 reconciliation report had an error rate that was significantly

00:41:35 **25 greater than 1 percent, didn't you?**

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1 with regard to the Eastern Region?

2 **A. My understanding is that they concluded that they**

3 **reconciled, of the 289, they're 98 plus percent certain that**

4 **there's a very low error rate based on the fact that they found**

00:38:59 **5 no errors.**

6 **Q.** Let's look at document 51-4 at 4. You've reviewed this

7 document, haven't you, Mr. Duncan?

8 **A. Yes, I have.**

9 **Q.** And this is a statistical evaluation of preliminary Eastern

00:39:22 **10 Region sample results, March 2004, by NORC, correct?**

11 A. Correct. This is a summary of the study that we just

12 looked at by Deloitte & Touche.

13 Q. Let's go to Bates 4. Let's focus in on the highlighted

14 portion of this page. What does this tell you, Mr. Duncan?

00:39:39 **15 A. Well, this is what we talked about this morning, is this**

16 notion that because of the way the error rate was defined, that

17 NORC can say that no errors were found. And on that basis they

18 can make the kinds of statements that you see ahead of that, at

19 the beginning of that sentence.

00:39:55 **20 Q.** And so no errors were found, basically, notwithstanding the

21 issues that you've just discussed for the last several minutes,

22 correct?

23 A. Correct.

24 Q. Now, this is only the Eastern Region, though. Why is this

00:40:07 **25 important?**

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1 **A. Well, the tribal reconciliation work had an unreconcilable**

2 **rate in the area of about 13 percent, and this is being**

3 **pulled -- I believe this comes out of the 2007 Plan directly.**

4 **And this goes to the notion of saying, well, doing the**

00:41:55 **5 historical accounting, we need to make an assumption. Before we**

6 start, we need to make an assumption about what's the error rate

7 going to be.

8 **And when they looked at things, like they said here we**

9 **looked at previous work like the tribal reconciliation project,**

00:42:09 **10 if you looked at that tribal reconciliation project and your**

11 thinking was if a transaction is unreconciled, I will treat it

12 as an error, then the assumption you would make about the

13 underlying error rate is it would be something in the 13 percent

14 area.

00:42:28 **15 But in fact, that's not the assumption that they made. The**

16 assumption that is made, and it's all throughout the

17 administrative record, the assumption that was made was it would

18 be a very low error rate. And in order to make that assumption

19 based on what they cited in the plan, you must have made the

00:42:45 **20 assumption that an unreconciled transaction is not an error. In**

21 other words, if there's no supporting document, it's okay.

22 That's the only way that you could cite that study as a premise

23 for a very low error rate. You have to assume that unreconciled

24 is not an error.

00:43:03 **25 Q.** Do you believe it's reasonable to assume a 1 percent error

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1 rate based on the information in the tribal trust reconciliation
 2 report?
 3 **A. Base on the tribal reconciliation report, based on the**
 4 **paragraph 19 work, based on the Rosenbaum work, based on**
 00:43:16 5 **everything that I have observed, I don't think it's reasonable**
 6 **to start -- if you're going to treat unreconciled as an error,**
 7 **it's not a reasonable basis to conclude that it's going to be a**
 8 **very low error rate. There's just too much missing information.**
 9 **Q. So how meaningful is the statement with regard to the**
 00:43:34 10 **probability that transactions are accurate and balances are**
 11 **correct if in fact the assumption is unreasonable?**
 12 **A. Well, if it's premised on the notion that in order to**
 13 **achieve an error it has to be not all the things that we talked**
 14 **about, it can't be accounting code 1, it can't be accounting**
 00:43:54 15 **code 2, in order for it to be an error it has to reach this**
 16 **notion of there being some contradictory underlying document, it**
 17 **really makes any of the implications to try and say something**
 18 **about the accuracy and completeness of the account transaction**
 19 **listing and the account balances, it really makes anything drawn**
 00:44:12 20 **from that meaningless.**
 21 **Q. You were also asked to rebut, Mr. Duncan, the expert**
 22 **reports of Drs. Lasater, Scheuren and Hinkins; is that correct?**
 23 **A. That's correct.**
 24 **Q. Let's start with Dr. Lasater. Based on your recollection,**
 00:44:30 25 **what were Dr. Lasater's opinions that he expressed to this**
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1 **Q. Did he reference any documents that supported that opinion?**
 2 **A. No.**
 3 **Q. If Dr. Lasater stated in his opinion to this Court that the**
 4 **proposed difference testing to evaluate statistically whether**
 00:46:02 5 **the paper ledger and electronic era transactions were processed**
 6 **by the same quality of bookkeeping is sound, would you agree**
 7 **with that opinion?**
 8 **A. I definitely would not agree with that, on several levels.**
 9 **The notion -- the hypothesis that Dr. Lasater's putting forth**
 00:46:23 10 **and that is vaguely described in the plan is that whatever was**
 11 **done over here in the electronic ledger era, what we're going to**
 12 **do is just go look in the paper ledger era, and if in fact**
 13 **there's no material difference between what we see in the paper**
 14 **ledger era versus the work that was done in the electronic**
 00:46:39 15 **ledger era, then we'll assume that those two populations are the**
 16 **same.**
 17 **Well, every bit of information I've reviewed in the**
 18 **administrative record indicates that that is not the case.**
 19 **There's not even a reasonable basis to start with that**
 00:46:53 20 **hypothesis.**
 21 **The only way that that hypothesis would potentially make**
 22 **sense is if the criteria upon which you compare the electronic**
 23 **ledger era to the paper ledger era is the same criteria, with**
 24 **this very, very high hurdle to create an error. Something where**
 00:47:10 25 **you would have almost no expectation of finding the error. You**
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1 Court?
 2 **A. Dr. Lasater's opinions really focused on the expectation**
 3 **for how the paper ledger era would be executed.**
 4 **Q. Just the paper ledger era?**
 00:44:48 5 **A. As it was expressed to the Court. In his written opinion**
 6 **he had some statements that were very similar to what**
 7 **Dr. Scheuren had been saying. So as I read it, the Judge only**
 8 **wanted to hear on the part that was not duplicative.**
 9 **Q. If Dr. Lasater stated that the proposed methodology for**
 00:45:07 10 **testing transactions in the paper ledger era is reasonable,**
 11 **would you agree with that?**
 12 **A. Absolutely not.**
 13 **Q. Why not?**
 14 **A. Well, first of all, I don't know what basis Dr. Lasater has**
 00:45:21 15 **for reaching that conclusion. I've reviewed the administrative**
 16 **record, I've reviewed the NORC reports. There is precious**
 17 **little information about what exactly is going to be done in the**
 18 **paper ledger era. So I don't think there's an adequate basis to**
 19 **reach the conclusion that it's reasonable. We don't know what**
 00:45:34 20 **it is yet.**
 21 **Q. Did Dr. Lasater provide the basis for his opinion in that**
 22 **regard?**
 23 **A. Dr. Lasater indicated that he had had some discussions with**
 24 **NORC about how they were going to do that, but nothing really**
 00:45:47 25 **materially beyond what we knew from the administrative record.**
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1 **might be able to reach the end conclusion that they're the same,**
 2 **but it's only because that which you are seeking to detect would**
 3 **not be detectable by the systems that you're using.**
 4 **Q. Does the FTI September 30, 2007, report provide the support**
 00:47:29 5 **for Dr. Lasater?**
 6 **A. No.**
 7 **Q. And why not?**
 8 **A. There's just not enough information in that report to**
 9 **determine that that's definitively the way that it's going to be**
 00:47:41 10 **done.**
 11 **Q. I'd like you to turn your attention to another exhibit from**
 12 **the administrative record. It is identified as 55-17-19. Have**
 13 **you reviewed this report?**
 14 **A. Yes, I have.**
 00:48:05 15 **Q. I'd like you to turn to page 37 of this report. And I'd**
 16 **like you to focus on the second bullet point, which is**
 17 **highlighted on this page. It states: "A review of the**
 18 **paragraph 19 search indicates that records recovery diminished**
 19 **from the 1930 to 1950 time frame and fell off before 1930."**
 00:48:29 20 **What is your understanding of that statement?**
 21 **A. Well, this is just one piece of information. When I said I**
 22 **reviewed the administrative record and it was clear to me that**
 23 **the expectation should be that the records in the paper ledger**
 24 **era are significantly worse than the electronic ledger era, this**
 00:48:48 25 **is simply something -- I believe this was presented by**
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1 **Mr. Edwards. This is simply documenting that fact, that the**
 2 **records get worse the further you go back in time, which is not**
 3 **a particularly controversial statement.**
 4 **Q.** So when Dr. Lasater made or offered his opinion, he didn't
 5 address the concern of the diminishing availability of records,
 6 did he, as you go further back in time?
 7 **A. He did not.**
 8 **Q.** Did Dr. Scheuren?
 9 **A. I don't believe that he made any specific comments or**
 10 **opinions about how they were going to deal with this particular**
 11 **issue.**
 12 **Q.** So if the observations were made by Dr. Scheuren and
 13 Dr. Lasater that the two eras, as they define paper and
 14 electronic, are substantially similar, you see no basis to
 15 support those opinions, do you?
 16 **A. I think the hypothesis itself is a waste of time to even**
 17 **bother to test. Everything would be contraindicated here. The**
 18 **hypothesis should be that they're fundamentally different based**
 19 **on everything that we've seen.**
 20 **Q.** And when you say everything, do you mean audit reports?
 21 **A. Audit reports, reconciliation reports, GAO reports, I mean**
 22 **reports to Congress, everything I've seen indicates that the**
 23 **records drop off substantially as you move back in time. And**
 24 **again, it's because there's missing documents. There's records**
 25 **that have been destroyed.**

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1 **Dr. Scheuren.**
 2 **Q.** And did either Dr. Lasater or Dr. Scheuren take into
 3 consideration in their opinion the fact that the target
 4 population is different from the sample population due to
 5 missing and omitted data?
 6 **A. I don't believe that either one them specifically addressed**
 7 **that. It was really addressed by Dr. Hinkins.**
 8 **Q.** Do you know whether or not anyone has been tasked with
 9 establishing the accuracy of account balances?
 10 **A. I don't know if anyone -- I don't know of anyone that has**
 11 **been. I do know that NORC specifically stated they were not**
 12 **tasked with designing a sample that would address that issue.**
 13 **Q.** And that was in Dr. Hinkins' rebuttal report, wasn't it?
 14 **A. That's correct.**
 15 **Q.** What effect, if any, does that have on your view of the
 16 adequacy of the statistical sampling plan?
 17 **A. Well, I think fundamentally Dr. Hinkins and I agree on**
 18 **several topics. This is one of them. My criticism, my concern**
 19 **during my time in 2003, and at my preparation for the trial here**
 20 **in 2007, has been that you can't take this kind of transaction**
 21 **sampling and apply it to accounts. And the rebuttal point on**
 22 **that issue from Dr. Hinkins was that NORC had never been asked**
 23 **to do a sample design that would address accounts.**
 24 **So I think fundamentally we're in agreement on that point.**
 25 **What has been done in the LSA sampling will not address**

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1 **Q.** Do you recall any discussion by Ms. Herman about how the
 2 record and bookkeeping systems among the various regions and
 3 agencies were different over time?
 4 **A. Yes. She testified that they varied over time and between**
 5 **agencies.**
 6 **Q.** So it would be very difficult in your opinion to reach the
 7 conclusion that the paper records era and the electronic records
 8 era are sufficiently similar to draw inferences from the
 9 electronic era to the paper era, correct?
 10 **A. I think that's a fair statement.**
 11 **Q.** Now, Dr. Scheuren indicated that -- didn't Dr. Scheuren
 12 indicate that no additional analysis or testing is necessary in
 13 that regard?
 14 **A. Dr. Scheuren indicated that there was no additional**
 15 **analysis done in the electronic era.**
 16 **Q.** Did he indicate whether or not additional analysis is
 17 necessary?
 18 **A. In the electronic era?**
 19 **Q.** Correct.
 20 **A. He indicated that it was not.**
 21 **Q.** Now, did Dr. Scheuren take into consideration that the LSA
 22 project was designed to estimate risk exposure, not transaction
 23 accuracy?
 24 **A. No. Again, the notion of the application of the faulty**
 25 **sample design was not addressed as a rebuttal to my opinion by**

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1 **accounts, account balances.**
 2 **Q.** But if the LSA sampling was designed for purposes of
 3 limiting liability or error, it could be used as a sound basis,
 4 could it not?
 5 **A. If it's limited to the electronic ledger era, and limited**
 6 **to the documents that were available for sampling, then yes.**
 7 **Q.** And similarly, couldn't NORC's LSA results for purposes of
 8 the litigation support accounting be considered as having an
 9 appropriate measure of error?
 10 **A. I'm sorry, I couldn't hear you over the coughing.**
 11 **Q.** With regard to NORC's LSA results, the litigation support
 12 accounting results, and its use of error in that regard, would
 13 it be inappropriate use of error in the LSA that it is using
 14 versus what we're talking about, the establishment of accurate
 15 account balances?
 16 **A. No. Again, I think the error rate is too narrowly defined**
 17 **to be useful even in that context.**
 18 **Q.** And does a qualitative meta-analysis report assist
 19 Dr. Scheuren in his opinions with regard to the appropriateness
 20 of drawing inferences from the electronic record era to the
 21 paper record era?
 22 **A. I don't believe it provides any reasonable basis for making**
 23 **that conclusion.**
 24 **Q.** Why is that?
 25 **A. Well, the meta-analysis, first of all, we obtained some**

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00:54:40 **1 information from the meta-analysis. There were many of the**
2 things that had been referenced in the meta-analysis that were
3 not provided to us. Of the documents that were provided to us,
4 many of them had missing pages, which from our review appeared
5 to be pages that were material, that would have potentially
6 influenced the way that that meta-analysis was reviewed.
7 But in any event, the documents that we were provided and
8 did look at, many of them were internally inconsistent with the
9 conclusions that had been reached in the meta-analysis. So I
00:54:55 **10 don't feel that the meta-analysis forms a reasonable foundation**
11 or basis upon which to make a conclusion that the paper ledger
12 era is the same from a bookkeeping standpoint as the electronic
13 ledger era.
00:55:13 **14 Q. Now, I'd like you to look at the fourth demonstrative you**
15 have on the original exhibit, where you actually identified as
16 you understood it the NORC solution in redefining the target
17 population. Do you recall preparing this demonstrative?
18 A. I do.
19 Q. Could you please explain it?
00:55:31 **20 A. Well, this is another area where I think Dr. Hinkins and I**
21 fundamentally are in agreement. I identified this issue prior
22 to Dr. Hinkins issuing her report, that the target population,
23 that there were things missing and omitted from the target
24 population. And Dr. Hinkins in her rebuttal clarified that in
00:55:49 **25 fact that was not what they were calling the target population.**

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1 that's sound statistical reasoning.
2 Q. Now, Dr. Hinkins also stated in her rebuttal that the
3 qualitative meta-analysis report is not central to the sample
4 design; is that correct?
00:57:25 **5 A. That's my recollection.**
6 Q. What is your opinion in that regard?
7 A. I think it's appropriately relegated to not being central.
8 It doesn't provide a reasonable basis, so that's the right spot
9 for it.
00:57:38 **10 Q. Is there any other basis for Dr. Scheuren coming to the**
11 conclusion that you've seen in the record that the paper ledger
12 era is similar to the electronic ledger era, other than a
13 meta-analysis?
00:58:00 **14 A. Well, a meta-analysis I don't think is a reasonable**
15 foundation to make that conclusion, and everything that I have
16 reviewed is to the contrary.
17 Q. With respect to your overall views of what is being
18 prepared here, and that is -- the error rate is one of the most
19 important issues, isn't it?
00:58:20 **20 A. It's absolutely fundamental to the entire discussion we're**
21 having.
22 Q. Do you recall reading in the transcript testimony the
23 testimony of Dr. Scheuren with respect to the error rate in the
24 LRIS tract history reports?
00:58:40 **25 A. If this is the DataCom issue, then I believe that's --**

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1 They, NORC, had said the target population is actually the
2 population from which we drew the sample.
3 And if that's the way you define the target population,
4 then my criticism falls away. You can actually draw an
00:56:06 **5 inference from the population from which you've sampled. So to**
6 the extent that NORC is now clearly delineating that the target
7 population is actually only that population from which the
8 sample was drawn, then I think everything's fine.
9 Q. It is fine, but it doesn't allow statements with regard to
00:56:25 **10 the accuracy of account balances, does it?**
11 A. Well, it's fine. It's just irrelevant. I mean it's
12 irrelevant to the real target population, which is all of the
13 account holders.
14 Q. And that's all the past and present individual Indian trust
00:56:37 **15 beneficiaries, is that your understanding?**
16 A. That's my understanding.
17 Q. Does the target population sample allow NORC or the
18 defendants to make a statement about the account balances for
19 its new target population?
00:56:52 **20 A. Not for the account balances. It's still going to be**
21 limited to account transactions.
22 Q. And so notwithstanding that, you don't have any
23 disagreement with what Dr. Hinkins stated, correct?
24 A. Not in this regard. If you correctly limit the
00:57:09 **25 extrapolation to the population from which you've sampled,**

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1 Q. Let me identify for purposes of this question a document
2 from the administrative record which has Bates No. 50-2-1. Now,
3 have you reviewed this document, Mr. Duncan?
4 A. Yes, I have.
00:59:07 **5 Q. I'd like you to turn to Bates No. 8. I'd like you to focus**
6 on the statement that is highlighted. It states, "We," which is
7 NORC, "particularly emphasize our positive results in view of a
8 report on the findings of the TIME project carried out by
9 DataCom in 2000. DataCom asserts an error rate of about 30
00:59:35 **10 percent in postings. NORC has found no evidence of such a**
11 figure."
12 Is this an example of the importance of a sound definition
13 of an error rate?
00:59:52 **14 A. Yes. This goes on to say that "such stark differences with**
15 our findings are not explained by statistical variance alone."
16 That's absolutely correct. This is definitional. If an
17 error -- if many of the things were defined as an error from the
18 standpoint of DataCom but not from the standpoint of NORC,
19 that's how you can get these kinds of stark contrasts.
01:00:13 **20 Q. And the contrasts as a result of a narrowly defined error**
21 rate provide meaningless results for a trust beneficiary,
22 correct?
23 A. It's my conclusion that the way these error rates have been
24 defined, it's so difficult to clear the hurdle of being an error
01:00:29 **25 that the error rate premise underlying all the statistical**

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01:00:51 **1 analysis is unfounded.**
2 Q. I would like to ask you if you agree on one final opinion
3 with something that Dr. Scheuren stated. And I'd like to pull
4 up for purposes of this question Bates 57-32-1. This is the
5 straw man pretest. Do you recall reviewing this document?
6 A. I do.
7 Q. First of all, do you have any understanding of what the
8 straw man pretest is about, based on your review of it?
9 A. My review of this document indicates to me that this is an
01:01:06 **10 attempt to -- the notion of a straw man is to put up an argument**
11 that can be fought. Generally speaking that argument is a
12 fallacy. It's meant to distract. But it's really just to put
13 something up that everyone can take shots at.
01:01:28 **14 Q.** And I'd like you to pay particular attention to page 2,
15 Bates No. 2. And the last sentence in the second paragraph.
16 Dr. Scheuren stated that he prepared this document, and it
17 states, "Clearly we are not talking about the standards used in
18 a court case."
19 Would it be your understanding that the standards that are
01:01:50 **20** being used with regard to the statistical sampling are not
21 standards that would allow a trust beneficiary to receive an
22 accurate statement of his account balances?
23 A. That is precisely my opinion.
24 Q. Would it be your opinion that the standards used --
01:02:09 **25** THE COURT: Let him give his opinion instead of you
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1 Your Honor, of cross-examination. I'm sorry. The direct
2 examination is completed. We'd like to move into evidence
3 Mr. Duncan's expert report and his expert rebuttal report.
4 THE COURT: All right. They'll be received.
5 (Plaintiff Exhibit Nos. PPX
6 4284, 4484 received into evidence.)
7 MR. GINGOLD: Your Honor, one more we would like to
8 try and move into evidence, which is the demonstrative
9 identified as PPX 4486, which is compiled based on the DCV
01:03:59 **10** information provided in the September 30, 2007, FTI DCV report
11 and testimony from Ms. Herman.
12 THE COURT: That will be received.
13 MR. GINGOLD: Thank you, Your Honor.
14 MR. WARSHAWSKY: For the record, we object. It's
01:04:17 **15** demonstrative. It's not substantive evidence.
16 THE COURT: It'll be received. It'll be part of the
17 record. It'll be received as demonstrative evidence. How does
18 that sound?
19 MR. WARSHAWSKY: Sounds perfect.
01:04:34 **20** (Plaintiff Exhibit No. PPX
21 4486 received into evidence.)
22 THE COURT: All right. Mr. Warshawsky, you may
23 cross-examine.
24 MR. GINGOLD: Your Honor, there's one more, I'm sorry.
01:04:46 **25** THE COURT: Somebody get the hook.
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1 stating it and asking him to say yes or no. I mean this is sort
2 of the ultimate question.
3 BY MR. GINGOLD:
4 Q. Explain your opinion.
01:02:19 **5** THE COURT: Thank you.
6 THE WITNESS: The fundamental premise is what is the
7 reconciliation, has something been reconciled or not, and is it
8 an error or is it not. And at the end of the day the statements
9 that are going to be able to be made from the statistical
01:02:32 **10** sampling that was done and from the reconciliation efforts that
11 were done will not provide results that really would have any
12 meaning to the individual account holder.
13 They don't have any understanding of whether or not their
14 balance is correctly stated. There's going to be some level of
01:02:46 **15** assurance that the transactions are probably correct, but at the
16 end of the day, as far as providing information to the
17 individual account holder on their account, I would contend, it
18 is my opinion, that the information that's being prepared as
19 part of the 2007 Plan would be meaningless.
01:03:07 **20** MR. GINGOLD: Your Honor, our cross-examination is
21 completed. I would like to move into evidence --
22 THE COURT: I don't think the cross-examination has
23 begun yet.
24 (Laughter)
01:03:17 **25** MR. GINGOLD: I'm sorry. We spent a week and a half,
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1 MR. GINGOLD: Oh, I'm sorry. Okay.
2 THE COURT: No, no. Go ahead. I'm just kidding.
3 Obviously, you smiled, though, Mr. Gingold. You have a nice
4 smile.
01:04:58 **5** MR. GINGOLD: Thank you, Your Honor. PPX 4468, which
6 is a document entitled "The Treasury Department's role in the
7 administration of tribal trust funds." It's a Morgan Angel
8 report dated April 16, 2004.
9 MR. WARSHAWSKY: Your Honor, we object again. This is
01:05:25 **10** a draft document. It was prepared for Treasury. It's not
11 probative or relevant to the issues.
12 MR. GINGOLD: Your Honor, all Morgan Angel -- Ed Angel
13 testified that they routinely prepare their documents in draft
14 until they're otherwise told by the Defendants to produce them.
01:05:42 **15** THE COURT: Do we know what this is? This is a draft.
16 Everybody agree this is a draft?
17 MR. GINGOLD: No, Your Honor. We do not. They
18 routinely dub their documents draft documents. The testimony
19 is, not only before this court in this current proceeding, but
01:05:55 **20** in the trial 1.5, Mr. Angel repeatedly responded to questions of
21 Mr. Harper that they routinely dub all their documents draft
22 documents.
23 MR. WARSHAWSKY: Your Honor, as you may recall, this
24 document was the subject of a motion that we filed. This was
01:06:11 **25** inadvertently disclosed in discovery, and most certainly is
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1 considered by Treasury and Morgan Angel to be a draft document.
 2 With regard to tribal --
 3 THE COURT: We had Dr. Angel up here and nobody asked
 4 him what this was.
 01:06:28 5 MR. WARSHAWSKY: It wasn't relevant to our
 6 presentation of Dr. Angel.
 7 MR. GINGOLD: Your Honor, it was identified in the
 8 opposition to -- in the motion to suppress this document, the
 9 government identified this as --
 01:06:40 10 THE COURT: It will be part of the record of this
 11 case, but it will be assumed to be a draft unless somebody has
 12 some other testimony establishing to the contrary.
 13 What about 4485, your demonstrative?
 14 MR. GINGOLD: We would like to move all the
 01:06:58 15 demonstratives in, Your Honor.
 16 THE COURT: All right. I'll receive 4485 as a
 17 demonstrative exhibit as well.
 18 MR. GINGOLD: Thank you, Your Honor.
 19 THE COURT: Thank you.
 01:07:12 20 (Plaintiff Exhibit Nos. 4468
 21 and 4485 received into
 22 evidence.)
 23 CROSS-EXAMINATION
 24 BY MR. WARSHAWSKY:
 01:07:16 25 Q. Good afternoon, Mr. Duncan.
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1 Q. And I counted it, it looked like there were about 32
 2 matters in which you've testified?
 3 A. Correct.
 4 Q. And of those 32, roughly 20 since you testified in the 2003
 01:08:59 5 Cobell case; is that correct?
 6 A. That's correct.
 7 Q. So, in other words, in the intervening 50 months since you
 8 testified in the Cobell case, you've testified as an expert in a
 9 different matter about every two and a half months; is that
 01:09:15 10 correct?
 11 A. Seems about right.
 12 Q. And would you identify, putting aside the Cobell matter,
 13 the matters on those two pages in which you've been admitted or
 14 accepted as an expert on statistics.
 01:09:32 15 A. The final piece there, Mirage Crossings, is a statistical
 16 sampling report as it relates to construction defect cases. The
 17 opposing expert on that case is a Ph.D. statistician out of
 18 Berkeley, I believe.
 19 Q. And you've been accepted by the Superior Court of Arizona
 01:09:49 20 in that case as a statistician.
 21 A. I'm sorry, I believe you asked me which ones I'd testified
 22 on. So this is a testimony in deposition only at this stage.
 23 Q. All right. Okay. Can you identify any where a court has
 24 accepted you to provide opinions as a statistician?
 01:10:05 25 A. If you can zoom out and we go up a little bit.
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1 A. Good afternoon, Mr. Warshawsky.
 2 Q. Mr. Duncan, you've testified about a wide variety of
 3 subjects this morning and this afternoon. Is that fair to say?
 4 A. I think they've all been pretty focused to the issue of the
 01:07:33 5 2007 Plan and the sampling associated with it.
 6 Q. I appreciate you saying that. Principally, you're here to
 7 talk about statistics, right?
 8 A. Well, statistics and also to address the issue of the DCV,
 9 which was provided to me in late September. It was not provided
 01:07:53 10 before we provided our expert opinions. But my understanding at
 11 the direction of counsel was that I was to analyze that and that
 12 the Court would listen to my opinions and my conclusions
 13 regarding the DCV.
 14 Q. And that's why you provided us with Plaintiffs' Exhibit
 01:08:11 15 4486 last night, correct?
 16 A. Correct.
 17 Q. All right. We'll get to that one. Let's talk about your
 18 background in statistics, please. Can you put up Plaintiffs'
 19 Exhibit 4284, please? This is your expert report. You remember
 01:08:23 20 this. And specifically go to pages 43 and 44 of 79.
 21 Mr. Duncan, do you recognize these two pages?
 22 A. I do.
 23 Q. And what is set forth on these two pages?
 24 A. This is my deposition and testimony history over the last
 01:08:46 25 10 years, I believe.
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1 Q. I know you brought some papers up there. Do you have a
 2 copy of your report up there by chance?
 3 A. I believe I may.
 4 Q. With the caveat that if there are notes in there I might
 01:10:24 5 want to look at them. If it would assist you to review those.
 6 A. This is a copy of my expert report and, given your caveat,
 7 I will tell you that there are no notes.
 8 Q. Okay. So feel free to refer to that if that would assist
 9 you.
 01:10:38 10 A. In the interest of trying to keep my carry-on baggage
 11 light, I have omitted my resume. I'm pretty familiar with it
 12 from the standpoint of needing to review it on the plane, so I
 13 don't make a copy of it.
 14 Q. My question was, though, whether you had been admitted as a
 01:10:57 15 statistician in any of these matters?
 16 A. Well, let me go back and look on the screen here. Go down,
 17 please. I'd have to go back and look at both -- what's called
 18 B&H Manufacturing, Inc., whether or not I was specifically
 19 tendered as a statistician in that context, but there was quite
 01:11:32 20 a bit of statistical testimony there. And in the Mitsubishi
 21 versus Hughes Electronics case. I'd have to look whether that
 22 was specifically -- I was tendered to the court in that role,
 23 but that was a very central part of both of those testimonies.
 24 Q. You don't remember that you were actually admitted as a
 01:11:48 25 statistician there?
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01:12:02 **1 A. I don't recall either way.**
2 Q. In your selected experience summary, pages 35 to 40 of your
3 expert report, you listed 16 separate areas of experience.
4 You're familiar with those 16 areas, of course.
5 A. Yes, I am.
6 Q. Have you listed being a statistician in any of those 16
7 areas?
8 A. A lot of those areas obviously contain statistical
9 analytical work, but I have not listed straight -- statistical
01:12:15 **10 analysis is a criteria permeates really all of the analytical**
11 work that I do.
12 Q. You know, I asked you that specifically in the 2003
13 hearing, and even after testifying in the 2003 hearing, you
14 didn't update your CV to list statistics now as being one of
01:12:32 **15** your professional experience areas, correct?
16 A. I didn't think the criticism was relevant then either.
17 Q. The answer to the question, though, is you did not update
18 your CV to say you're now a statistician.
19 A. That's correct. The statistical work that I do as embodied
01:12:48 **20 in some of these representative cases, I don't feel it necessary**
21 to clarify for the individuals that I provide my resume to,
22 beyond the fact that there's a significant component of
23 statistical work, I don't feel required to try and split that
24 out as a separate category. It permeates.
01:13:06 **25 Q.** Okay. Fair enough. Pages 40 and 41 of your expert report,
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1 you describe your teaching experience, and you list four areas
2 of economics. Do you remember that, sir?
3 A. Yes, I do.
4 Q. At the bottom of this page, continues on to the next page.
01:13:22 **5** And in none of those instances do you even refer to statistics
6 as being an area of your teaching, where you teach, correct?
7 A. Again, as part of the micro and macroeconomics, there is a
8 significant component which is -- and you asked me previously in
9 my deposition if there were statistics contained in those
01:13:38 **10 courses, and I informed you there was statistics, sampling,**
11 sample design construction. Those are part of those courses
12 that I was teaching.
13 Q. But it's not a subject that you actually teach, statistics?
14 A. Separate and apart from economics, I do not. It's part of
01:13:52 **15 the statistical analyses and survey work that I've done as an**
16 economist.
17 Q. Okay. And we've got up here on the screen page 41, the
18 publications that you've authored. Any of those have to do
19 strictly speaking with statistics?
01:14:06 **20 A. All of these would in some part have a statistical**
21 component to them. A lot of the economic blue chip forecast
22 work that we do is premised upon statistical analysis work that
23 I'm doing of trends, macroeconomic and microeconomic trends.
24 The notion of intellectual property and antitrust litigation. A
01:14:25 **25 lot of those underpinnings have statistical analytical work**
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1 involved in them as well.
2 Q. But for example, you haven't authored a publication in a
3 statistics -- a professional statistics journal.
4 A. I haven't authored a publication in an economics journal
5 either. As an economist, working as an expert witness, that is
6 not something I regularly engage in.
7 Q. That's your profession, by the way, isn't it, being an
8 expert witness?
9 A. I would say that's probably 80 plus percent of the work
01:14:40 **10 that I do.**
11 Q. Now, one of the things that you disclosed on your CV was
12 that you're a chartered financial analyst. What's a CFA?
13 A. It's a chartered financial analyst.
14 Q. Okay. And for those of us who aren't CFAs, can you tell us
01:15:08 **15** what that means?
16 A. It is -- a CPA is an application of an undergraduate degree
17 in accounting. Usually there's an accreditation occurred with
18 using those skills as an accountant. The CFA would be the
19 equivalent of that except it's an application of graduate level
01:15:28 **20 skills in economics, finance, statistics, real estate,**
21 securities markets and bond markets.
22 Q. Principally involved with investment management, investment
23 banking, financial analysis of stocks, bonds, correct?
24 A. No. That's a big part of it, but it's not principally
01:15:45 **25 that. There's also a significant valuation component built into**
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1 that. Valuing closely held businesses, things of that nature.
2 Q. It's not a title that one associates with a statistician,
3 right?
4 A. Several of my colleagues that are involved and hold the CFA
01:16:00 **5 charter are statisticians. They have graduate degrees in**
6 statistics and a lot of the analytical work they do as CFAs,
7 particularly underlying big bond portfolios and stock
8 portfolios, like pension funds, the work they do day to day is
9 as a statistician, but it's applied in the field of finance.
01:16:18 **10 Q.** You're talking about colleagues that have graduate degrees
11 in statistics, correct?
12 A. Correct.
13 Q. You don't have a graduate degree in statistics, do you?
14 A. That's correct.
01:16:26 **15 Q.** In fact, on page 42 of your expert report you describe your
16 educational background. Master's and a bachelor's degree in
17 economics, and your master's degree you list, what is it, five
18 areas of specialization?
19 A. Correct.
01:16:45 **20 Q.** And none of them are statistics, right?
21 A. No. As we've talked about in my deposition years ago,
22 econometrics is specifically the application of statistics and
23 statistical concepts in the field of economics. So I would say
24 that it is exactly that. It is statistics, just as economists
01:17:03 **25 use it.**
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1 Q. Well, just to cut through it, there are people who use
 2 statistical analysis in their work, and that's you, right?
 3 A. I certainly do.
 4 Q. And there are statisticians like Dr. Scheuren and
 01:17:16 5 Dr. Hinkins, right?
 6 A. I don't know that you make a distinction. I think they
 7 certainly use statistics in their work as well.
 8 Q. You consider yourself to be an equivalent statistician to
 9 Dr. Scheuren and Dr. Hinkins?
 01:17:29 10 A. I don't have a Ph.D. in statistics, but from the standpoint
 11 of using it on a day-to-day basis, I would say that we do very
 12 similar things.
 13 Q. By the way, I remember at the 2003 hearing, you joined the
 14 ASA, the American Statistical Association in the middle of the
 01:17:44 15 trial. Do you remember that, sir?
 16 A. Correct, I did.
 17 Q. How's that membership going?
 18 A. I've let that membership lapse. It really was not very
 19 beneficial.
 01:17:52 20 Q. So you didn't go to their meeting last year in Salt Lake
 21 City?
 22 A. I did not.
 23 Q. Now, let's talk a little bit about some of the stuff you
 24 have done as an expert witness. Obviously, today you testified
 01:18:09 25 about issues involving statistics. You've testified about a lot
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1 opinion there?
 2 A. This had to do with the quantification of damages to
 3 Ms. Power. She was a surgeon and she had actually had her
 4 finger severed in a boating accident, and it was an analysis of
 01:19:55 5 the statistical information on projected future earnings,
 6 projected for her practice, had to look at Bureau of Labor
 7 Statistics, what likely her profession would be and what
 8 progress, path she would make going down that road, and quantify
 9 her personal injury loss as a result of that accident.
 01:20:16 10 Q. And the opinions that you offered in that case actually
 11 extended to opinions about vocational rehabilitation and life
 12 care issues, right?
 13 A. On a very limited basis was I involved in the life care
 14 side of that. There were -- some of those inputs were required
 01:20:31 15 for quantifying her economic loss as a physician, as a surgeon.
 16 Q. In fact, your report was the subject of a motion in *limine*
 17 because you had offered opinions about vocational rehabilitation
 18 and life care issues, right?
 19 A. It certainly was.
 01:20:47 20 Q. And why don't you go ahead and pull that up, please. This
 21 is the first page of the motion. Do you recognize this, sir?
 22 A. Yeah. It's been some time since I've seen this, but yes.
 23 Q. Specifically I want to ask you about something. Would you
 24 go to page 30 of 69, and continue to the next page. Now, that
 01:21:24 25 looks familiar. Can you -- do you recognize what that document
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1 of other areas beyond just what a statistician does, or even
 2 economists, right? In 2003, for example, you offered opinions
 3 to Judge Lamberth about the legal application of Daubert in
 4 Kumho Tire, do you remember that?
 01:18:27 5 A. I provided testimony as it related to whether or not the
 6 expert work that was done by some of the other experts in the
 7 case was -- properly relied upon other experts, which I opined
 8 that it did, and the use of geographic information systems, as
 9 that was something that was typically relied upon by experts,
 01:18:45 10 and in my experience I provided an opinion to the court that it
 11 was in fact something that was used regularly by experts.
 12 Q. In fact, it was your opinion, though, for Judge Lamberth
 13 that the analysis of Mr. Fasold and the folks who worked for
 14 him, that that analysis satisfied the reliability and relevance
 01:19:05 15 standards of Daubert in Kumho Tire, correct?
 16 A. Correct.
 17 Q. And you're not an attorney, are you?
 18 A. I'm not.
 19 Q. That may not be a bad thing. But let me ask you, page 43
 01:19:19 20 of your expert report, you talk about a case that you worked on
 21 called Karron Power versus Delta Houseboat. Can you describe --
 22 that's in the U.S. District Court for the Eastern District of
 23 California, right?
 24 A. Correct.
 01:19:34 25 Q. What was your opinion -- the subject matter for your
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1 is? And actually, we can go through it if you would like.
 2 There's about 39 pages here. Why don't you flip through a few
 3 pages, see if Mr. Duncan recognizes it.
 4 A. I do.
 01:21:38 5 Q. What is this?
 6 A. This is my expert report in that case.
 7 Q. Would you go to pages 53 to 55 of the document, please.
 8 What's set forth in these three pages?
 9 A. These are a listing of, at that time, all cases where I had
 01:22:06 10 been retained as an expert witness, issued an expert report, and
 11 then in addition the deposition testimony and trial testimony
 12 columns that we saw previously in my expert report in this case.
 13 Q. And so if you want to flip back, you can see I've put some
 14 red arrows on the left-hand side. These were matters where I
 01:22:27 15 didn't see a corollary -- you know, a listing for those cases in
 16 your expert report in this case. I gather these are the matters
 17 where you didn't testify but where you had rendered an expert
 18 report; is that correct?
 19 A. Correct. It either settled or otherwise been resolved
 01:22:46 20 themselves before --
 21 Q. I beg your pardon?
 22 A. They had either settled or resolved themselves before I
 23 provided expert testimony.
 24 Q. And if I'm correct, I counted that you provided expert
 01:23:01 25 reports or testified in about 29 matters in the 50 months since
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1 you last testified in this case. Does that sound about right?

2 **A. I think that number is awfully low. This was all the way**

3 **back in 2005 and we're in 2007 now.**

4 **Q. Good point. So it's more than that?**

01:23:21 5 **A. Yeah. I would think it would be significantly more than**

6 **that.**

7 **Q. So basically you issue an expert report or testify in a**

8 **matter about every, what, month, month and a half?**

9 **A. Probably average. Maybe a little bit more than that, but**

01:23:34 10 **yeah.**

11 **Q. Why don't you refer to page 44. Let's go back to the**

12 **expert report in this case. So we're back to Plaintiffs'**

13 **Exhibit 4284. And you're going to have to blow this one up,**

14 **obviously, but I'm looking at the Carlos Huerta matter. This is**

01:24:10 15 **a matter in the District Court, Clark County, Nevada. Do you**

16 **see that?**

17 **A. Yes.**

18 **Q. What were you retained to provide opinions about in that**

19 **case?**

01:24:20 20 **A. There were a couple of different opinions in that case.**

21 **One was quantification of the damage that -- Mr. Huerta was a**

22 **real estate broke r and he claimed that -- well, he actually**

23 **bought the rights to this lawsuit from another person, but he**

24 **was a real estate broker and he was suing Horizon Ridge Medical**

01:24:41 25 **Plaza for alleged breach of contract associated with selling a**
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1 look familiar, sir, what's up here?

2 **A. Yes.**

3 **Q. What is this?**

4 **A. This is my second expert report, the one that dealt with**

01:26:20 5 **the fraudulent transfer issue.**

6 **Q. Okay. And this, you stated that you concluded "Defendants'**

7 **actions did not wear a significant number of the badges of fraud**

8 **to constitute an intentionally fraudulent transfer." Badges of**

9 **fraud, is that a legal concept?**

01:26:37 10 **A. It is. It's articulated in the Nevada revised statutes.**

11 **Q. And so you were rendering another legal opinion. Is that**

12 **correct?**

13 **A. That's not correct. That was specifically a topic of a**

14 **motion *in limine* to have this opinion excluded, which was also**

01:26:52 15 **unsuccessful. The judge deemed that it was appropriate for me**

16 **to opine to the financial component of those badges of fraud, as**

17 **it related to the claim that it was an intentionally fraudulent**

18 **transfer. Many of those badges turn on specific issues, like**

19 **how much net equity does the company still have after the**

01:27:12 20 **transfer, and those were squarely within my skill set as an**

21 **economist and a financial expert.**

22 **Q. You said this was the subject of a motion in *limine* that**

23 **was also not allowed; is that correct?**

24 **A. Correct.**

01:27:23 25 **Q. Was the motion in *limine* in Karron Power ruled on?**
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1 **property upon which they were going to build a medical office**

2 **building.**

3 **Q. Well, you also provided opinions about whether a**

4 **transaction was a fraudulent conveyance, right?**

01:24:54 5 **A. Correct. That was the second of the two opinions.**

6 **Q. Why don't you tell us about that opinion.**

7 **A. This was simply an analysis of whether or not Horizon Ridge**

8 **Medical Plaza -- the owners of Horizon Ridge Medical Plaza made**

9 **a distribution to the owners at one point in time, and there was**

01:25:09 10 **a claim brought in the course of the other litigation, there was**

11 **a claim brought that that transfer in fact made Horizon Ridge**

12 **Medical Plaza insolvent. So as a follow-up report I was asked**

13 **to analyze whether in fact that transfer was a fraudulent**

14 **transfer and whether it resulted in them being insolvent.**

01:25:25 15 **Q. And what kind of expertise did you apply in making that**

16 **determination?**

17 **A. Again, basic economic finance skills, as we were looking at**

18 **the financial statements. As a chartered financial analyst, I**

19 **frequently look at financial statements to try and understand --**

01:25:39 20 **I've testified in bankruptcy court before on the soundness of**

21 **plans presented to the bankruptcy judge. So here I specifically**

22 **was looking at whether or not that transaction rendered the**

23 **company insolvent.**

24 **Q. Can you pull up the expert opinion in that matter, please.**

01:26:03 25 **Mr. Duncan, I've had this put up on the screen now. Does this**
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1 **A. I don't recall that specifically, but as far as I'm aware,**

2 **I've never had a motion *in limine* to exclude my opinion accepted**

3 **by the court.**

4 **Q. Well, you didn't mean to suggest that the Karron Power**

01:27:38 5 **motion had been denied; is that correct?**

6 **A. I'm not aware one way or the other. I ultimately -- I**

7 **believe that case settled. I believe I testified at deposition**

8 **perhaps, and then the case settled.**

9 **Q. Let's go to page 44 of your expert report, please.**

01:27:51 10 **THE COURT: Mr. Warshawsky, are you going to bring**

11 **this man up on charges of unauthorized practice of law?**

12 **MR. WARSHAWSKY: No, I'm actually going to get to**

13 **the --**

14 **THE COURT: Then let's get on with the statistics part**

15 **of this.**

16 **MR. WARSHAWSKY: Okay. Very good. I do have to ask**

17 **Mr. Duncan about one matter he testified in very briefly,**

18 **because it does relate to some of the opinions he's offered**

19 **today.**

20 **BY MR. WARSHAWSKY:**

21 **Q. The Harbor Breeze matter. That was one before the**

22 **California Public Utilities Commission earlier this year?**

23 **A. Correct.**

24 **Q. And your opinions were rejected in that, right?**

01:28:25 25 **A. The application was rejected.**
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01:28:39 **1 Q.** Well, in fact, didn't the PUC find that your assumptions
2 were unrealistic?
3 A. **I testified in front of the Public Utility Commission. I**
4 did not review their findings at the end of the day. I
5 understand that they did allow this other party to come in and
6 begin to provide ferry service back and forth to Catalina
7 Island. But as far as what the basis of the specific
8 conclusions were, I'm not aware.
01:28:54 **9 Q.** Well, you had made an assumption that, what was it, five
10 trips a day or something like that in your analysis?
11 A. **My analysis went to an estimation of how would the existing**
12 ferry service -- very simple notion. The ferry service, they're
13 given a limited monopoly power to operate both during the summer
14 and the winter. They make lots of money during the summer.
01:29:14 **15 They don't make much money during the winter because there are**
16 not as many people going out to Catalina Island.
17 And my task was, in meeting with the chamber of commerce
18 and the mayor in the city of Catalina, to try to come up with an
19 estimate of, if someone else was allowed to come in and operate
01:29:35 **20 during the summer -- sorry, I was trying to speed up for the**
21 Judge.
22 THE COURT: You can't speed up fast enough for the
23 Judge.
24 BY MR. WARSHAWSKY:
01:29:42 **25 Q.** I'll take the cue there. Let's go straight to Plaintiffs'
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1 And then for those six regions where we didn't have any
2 information, we took an average of the months that we had for
3 the regions that we did have.
4 Q. In other words, if a region didn't have data in December
01:31:44 **5** 1984, you counted it as a missing month, right?
6 A. **Correct.**
7 Q. And meaning that it didn't have data for the IRMS system,
8 right?
9 A. **Correct.**
01:31:54 **10 Q.** You assumed, did you not, that every one of those regions
11 converted to IRMS as of October 1984?
12 A. **That was the implicit assumption in trying to estimate**
13 whether or not there were missing months for those regions.
14 Q. And so if in fact a region converted after October 1984,
01:32:15 **15** your assumption's erroneous, right?
16 A. **It would potentially change the calculations.**
17 Q. If, for example, Alaska converted around February of 1987,
18 you would have counted about, what, two and a half years of
19 missing data that wasn't really there, right?
01:32:31 **20 A.** **That would be correct.**
21 Q. And you don't know, for example, when the Western Region
22 converted, do you?
23 A. **I believe that information is in the DCV.**
24 Q. Well, if I told you between October 1985 and March 1987,
01:32:45 **25** does that sound consistent with what you recall?
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1 Exhibit 4486, then. Actually, you all have that. This is
2 Plaintiff's Exhibit 4486 that you testified about at length
3 today. Let me ask you, first of all, when you prepared -- when
4 did you prepare this chart, by the way?
01:30:16 **5 A.** **We finished last night.**
6 Q. When did you start working on it?
7 A. **Saturday morning.**
8 Q. And who worked on it? You worked on it, I gather?
9 A. **I did, as well as two of my staff.**
01:30:27 **10 Q.** Now, when you prepared the chart, did you study the entire
11 DCV report before reaching your conclusions there?
12 A. **I read the original DCV and the DCV that was presented**
13 September 30. I understand there were some additional documents
14 that were subsequent to that. I don't know that I've reviewed
01:30:47 **15 those.**
16 Q. Did you read the Alaska regional report in connection with
17 the DCV?
18 A. **I believe so.**
19 Q. Can you pull up DX 153A, 20. Actually, before we do that,
01:31:04 **20** let me ask you, go back to 4486. Sorry, we're kind of making
21 this up as we go, because we did just get this ourselves.
22 Your missing months, column 7, how did you compile the
23 numbers shown under column 7 for the months of missing data?
24 A. **There's a footnote there that explains that. We took the**
01:31:25 **25** **Tab 2 regional reports for months prior to the IRMS conversion.**
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1 A. **Roughly.**
2 Q. Okay. So to the extent your model assumed that the Western
3 Region converted in October 1984, you've overstated the number
4 of months of missing data there as well, right?
01:32:58 **5 A.** **That's correct.**
6 Q. And if I told you that the Pacific converted between March
7 of 1986 and November of 1986, again you've overstated the
8 Pacific.
9 A. **There might be 12, 15 months of data there where we don't**
01:33:14 **10 know whether or not they had converted, or if we did find out**
11 they had not yet converted, that would be included in this.
12 Q. By the way, back in the Western, if in fact Fort Yuma
13 didn't convert until 1996, you've assumed about 12 years of
14 missing data that really wouldn't be there because they weren't
01:33:31 **15** part of IRMS until 1996, right?
16 A. **That would potentially be correct.**
17 Q. Potentially be correct. How would it not be correct?
18 A. **You have to go back and look specifically to see whether or**
19 not any of these regions had been on essentially other previous
01:33:44 **20 electronic systems, or if this was their first conversion to**
21 IRMS. Because I know that many of these actually were on
22 electronic systems well before the time we are talking about the
23 conversion to IRMS. They were on the systems all the way back
24 to the 1970s. So depending on how that exactly is being
01:34:00 **25** **accounted for on the DCV, it may or may not overstate the number**
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1 of months of missing data.

2 Q. Why don't you pull up Exhibit 153A. Let's go to page 20.

3 Mr. Duncan, did you review this particular page when you were in

4 the process of preparing Plaintiffs' Exhibit 4486?

01:34:24 5 A. I believe that I have reviewed this.

6 Q. And would you read the fourth and fifth paragraphs? That's

7 actually the paragraph above the highlighting, and the

8 highlighted paragraph. You can just read that to yourself.

9 (Witness reviewing document.)

01:34:54 10 A. Okay.

11 Q. Did you consider that when you concluded that Alaska had 16

12 months of missing data?

13 A. I don't recall looking at that specifically as we were

14 trying to pull together what the flip side was of what

01:35:06 15 Ms. Herman had testified, how much they had gotten done, I don't

16 recall specifically looking at this and trying to calculate how

17 much was left to be done.

18 Q. Well, if you had looked at that, would that cause you to

19 reconsider your conclusion that there were 16 months of missing

01:35:21 20 data for Alaska?

21 A. Yeah. It may. Again I'd have to go back and look and see

22 if Alaska had converted to another electronic system prior to

23 this.

24 Q. Would you pull up page 33 from 153A. Did you look at this

01:35:37 25 page when you prepared Plaintiffs' Exhibit 4486?

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1 A. I don't recall looking at that specifically.

2 Q. Do you know what that means, by the way, when it says all

3 accounts in the region rolled forward?

4 A. This is what we talked about earlier today of their

01:35:50 5 accounts being out of balance. If one account from the ending

6 month doesn't match on the opening of the next month, then

7 you've got -- potentially have an issue that it hasn't been

8 rolled forward correctly.

9 Q. Was that an issue in this case?

01:36:03 10 A. It is not. It would surprise me if it was too big an issue

11 in Alaska, because they were fairly recent in coming on to some

12 of these systems.

13 Q. And had you reviewed this particular page, would that alter

14 your position about 16 months of missing data for Alaska?

01:36:22 15 A. Again, I think as I've already answered, I'd have to go

16 back and look and see, make sure there wasn't another system

17 they had transferred onto prior to this.

18 Q. Let's go back to 4486, please. Another assumption you

19 made, I believe -- I assume anyway in preparing this chart, is

01:36:44 20 that an agency or region would have transactions every single

21 month; is that correct?

22 A. Correct.

23 Q. And in fact, do you know if that's the case? Were there in

24 fact some agencies, agency offices that had months where they

01:37:04 25 didn't have transactions?

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1 A. It may be possible. To the extent that there were months

2 where agencies didn't have transactions, that should be

3 accounted for in the weighting, of going back and looking over

4 all the months we do have information. If there were instances

01:37:15 5 where there were not transactions, it would drag down the

6 average number of transactions per month or the average dollar

7 amount per transaction.

8 Q. But if an agency office, for example, didn't process

9 transactions in a month, you treated that as a missing month,

01:37:32 10 right?

11 A. That's correct. Well, let me back up. It is treated as a

12 missing month with respect to what's reported in the DCV, and

13 that was the basis upon which we did the calculation. The

14 missing month column.

01:37:40 15 Q. Did you read Ms. Herman's testimony in this matter?

16 A. Yes, I did.

17 Q. Do you remember reading the cross-examination when she was

18 asked about whether agencies -- whether there were any agency

19 offices that regularly processed transactions on a monthly

01:37:54 20 basis?

21 A. I recall there being uncertainty as to whether or not some

22 of those missing months were potentially due to them not

23 processing transactions, but that that had not yet been resolved

24 definitively.

01:38:06 25 Q. Well, if in fact your assumption in this chart is

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1 incorrect, that an agency office processed transactions every

2 month, if that's wrong, your chart again overstates the number

3 of missing months data, right?

4 A. You know, whether or not it had been processed during that

01:38:22 5 month, you'd have to know whether or not when, the month that it

6 did get transferred, did it -- were the transactions that were

7 processed in the missing month processed in another missing

8 month's transactions, because it may be that they lumped them

9 all the next month. If that month is missing, then the way that

01:38:37 10 we've done the calculation, it would average out across both

11 those months.

12 Q. Since you mentioned averaging, you used, what, average

13 dollar per transaction; is that right? I seem to remember that

14 somewhere in here. Is that right?

01:38:54 15 A. Yes.

16 Q. Which column was that?

17 A. 4. Average throughput per transaction.

18 Q. In fact, isn't it true that there were some transactions

19 that were very large in dollar amount?

01:39:10 20 A. Correct.

21 Q. And many, many small transactions?

22 A. Correct.

23 Q. Doesn't it overstate the impact in your chart to use an

24 average for the transactions?

01:39:24 25 A. I'd love to have the information available to me to be able

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1 to do the other calculation, but with the information we had, it
2 was limited to being able to do this analysis. So it depends on
3 how the weighting works out between the number of transactions.
4 It's not part of the DCV that we can tell.

01:39:39 **5 Q.** And one other thing, going back to the 1980s, do you know
6 were there in fact -- what was the practice in terms of -- do
7 you remember whether there was a practice in terms of paying
8 interest every six months or whether interest was posted on a
9 monthly basis?

01:39:58 **10 A. I may have known that at one point in this case, but I**
11 don't recall now.

12 Q. So if in fact early on, for purposes of your analysis,
13 interest was posted every six months instead of every month,
14 again your chart would overstate the impact of missing
15 transactions, right?

16 A. It may potentially. You'd have to go back and look and see
17 how they actually broke out between the months. Again, data we
18 don't have access to.

19 Q. Okay. All right. In your report, let's go to 4284,
20 please. Now, you used an expression numerous times in this
21 report, you talked about Interior's plan -- we can look at page
22 5, for example. It's in the first paragraph, the heading right
23 at the top. Just do the paragraph.

24 See right there in the first sentence you talked about --
25 used this expression about whether something, quote, "would

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1 This witness has testified in open court about his opinions
2 about irrelevant sample design, sample selection problem, et
3 cetera. He hasn't said anything until you raised the subject
4 about confusing and misleading the layperson, and I'm not going
5 to take that into account. You can cross-examine it if you'd
6 like, but what's written in his report means nothing to me.

7 MR. WARSHAWSKY: I would like to use, Your Honor, with
8 your indulgence, I would like to use the executive summary in
9 his report as a basis for talking, organizing the opinions that
10 he talked about today.

11 THE COURT: You can organize it any way you want to.
12 I just want to give you a heads-up that I don't care about
13 what's written in this report unless he's also testified to it
14 in open court.

15 MR. WARSHAWSKY: Very good, Your Honor.
16 BY MR. WARSHAWSKY:

17 Q. You testified quite a bit about sampling, but in fact, I
18 believe you actually frequently stated that you lack the
19 information necessary to evaluate the sampling plan that
20 Interior's put out, right?

21 A. I think I've testified that there's information about the
22 reconciliation activity that was clearly lacking. The
23 information that we had I thought formed a reasonable basis for
24 me reaching the conclusions about the sampling plan,
25 particularly then as I was able to read the information provided

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1 likely confuse and mislead the layperson."

2 A. Correct.

3 Q. What kind of -- what field were you using or what expertise
4 were you using in reaching those conclusions? Is that a
5 statistical judgment?

6 A. It is. As a statistician and certainly as an expert
7 witness, I think when you're providing testimony to a jury or to
8 the judge you need to take into account who that audience is.
9 And when you provide information, you need to present it in such
10 a way that it wouldn't mislead that consumer of the information.

11 Q. Okay. And are there any standards in statistics you apply
12 in reaching that conclusion?

13 A. No, but based on years of experience, you can have some
14 idea as to who your audience is and whether or not they will
15 correctly interpret and use the information you're providing, or
16 whether you need to be more clear and not use statistical
17 jargon, but you need to be clear and make sure that it doesn't
18 potentially mislead someone.

19 THE COURT: Mr. Warshawsky, for your information, and
20 I guess for the information of all counsel here, I've received
21 this witness's report in evidence, but as you may know, in jury
22 trials it is not usual to receive an expert report in evidence.
23 An expert report is handed over to the other side so they can
24 cross-examine it. But what counts is the opinions rendered in
25 open court.

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1 in the rebuttal reports. It was very clear to me what the
2 intentions and what the design was originally constructed to do.

3 Q. Okay. Let's look at the first bullet point here under the
4 executive summary. You talked about missing and destroyed data,
5 drawing from a target population not being possible. You
6 testified at length about that today, right, sir?

7 A. Correct.

8 Q. And isn't it true that the mere fact that some data is
9 missing or has been destroyed, that doesn't mean that there are
10 no other copies of that information available, right?

11 A. Doesn't necessarily mean that there are not other copies.
12 It doesn't mean that there are. It simply means there have been
13 data that are destroyed or missing.

14 Q. Have you reviewed any of the testimony in this case
15 discussing the redundancy of information within Interior's
16 system?

17 A. I recall that being in your opening comments. I don't
18 recall specifically other testimony that related to
19 redundancies. You may refresh my recollection.

20 Q. Well, did you read Dr. Scheuren's testimony?

21 A. I did.

22 Q. You don't remember him talking about redundancy?

23 A. It's not jumping off the page at me.

24 Q. Okay. Is it your opinion that it's impossible to take a
25 valid sample unless you can confirm that the sampling frame

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1 duplicates the target population?
 2 **A. We went around and around on this subject years ago in my**
 3 **deposition. But the notion -- you can take a sample from**
 4 **anything you want to take a sample from. The notion is what can**
 01:45:25 5 **you do with it when you're done. So you're asking me is it**
 6 **impossible to take a sample? No, you can take the sample. It**
 7 **simply limits what you can say with the information from that**
 8 **sample.**
 9 **Q.** Well, my question for you -- and Judge Robertson wasn't in
 01:45:39 10 our deposition years ago, and he wasn't at the 2003 hearing. My
 11 question for you is is it your opinion that the only way you can
 12 take a valid sample is if the sampling frame duplicates the
 13 target population?
 14 **A. You can take a valid sample from anything you want to take**
 01:45:57 15 **a sample from. The question is what can you do with that sample**
 16 **once you're done. Can you say anything about a part of that**
 17 **population that was not available to draw a sample from? It is**
 18 **my opinion that no, you cannot.**
 19 **Q.** Well, why don't you pull up the Reference Manual on
 01:46:16 20 Scientific Evidence, Second Edition 2000. Mr. Duncan, are you
 21 familiar with this document?
 22 **A. I am.**
 23 **Q.** Would you agree that it's a learned treatise with regard to
 24 the various subjects covered within that report?
 01:46:31 25 **A. I think generally speaking it is.**

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1 advance. As a result, compromises are sometimes required in
 2 developing the sampling frame." That's what we're talking about
 3 here, right?
 4 **A. Correct.**
 01:47:59 5 **Q.** So at least according to this treatise, you can go ahead
 6 and draw a sample even if there are inaccessible or missing data
 7 elements, right?
 8 **A. We agree on this point. You can draw the sample. The**
 9 **compromise that's talked about here is whether or not you're**
 01:48:14 10 **going to be able to make any sort of statement about something**
 11 **that was not available to be sampled from.**
 12 **Q.** Okay. And you're aware from your review -- and by the way,
 13 in your expert report -- I'll tell you, I didn't go through it.
 14 I think you indicated you reviewed just about everything in the
 01:48:36 15 administrative record, right?
 16 **A. When I prepare my expert report, to be the state court,**
 17 **federal court, or U.S. District Court, I prepare them in**
 18 **compliance with the federal rules of civil procedure, and that**
 19 **would require me to list every document that we have received,**
 01:48:49 20 **also called documents considered. I don't limit it to documents**
 21 **relied upon. So if we received a document, we listed them all,**
 22 **whether or not we reviewed them.**
 23 **Q.** Oh. So even though in your listing of documents you
 24 considered, you may not have actually reviewed documents that
 01:49:07 25 you listed as having been considered?

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1 **Q.** Okay. And if you go to page 91 of the document, please,
 2 this is the reference guide on statistics. Have you seen this
 3 before?
 4 **A. I have.**
 01:46:46 5 **Q.** Now, would you agree that this is a learned treatise on the
 6 application of statistics?
 7 **A. Again, I would say generally it is.**
 8 **Q.** Go to page 240, please. I'm sorry, it's actually not that
 9 page. It's page -- we're going to have to bump it forward.
 01:47:10 10 There we go. The one that has the highlighting. Are you
 11 familiar with this section?
 12 **A. I am.**
 13 **Q.** In fact, we talked about that four years ago, right?
 14 **A. Correct.**
 01:47:21 15 **Q.** What is the question being posed about the sampling frame
 16 approximating the population? What's your understanding as an
 17 expert?
 18 **A. It really goes right to this issue of have you constructed**
 19 **your sample, the sampling frame, which is how you're going to**
 01:47:35 20 **draw the sample, have you done it in such a way that you can**
 21 **approximate what the population is that you would like to make a**
 22 **statement about.**
 23 **Q.** And you see the last two sentences that I've highlighted
 24 there: "Frequently, however, the target population includes
 01:47:47 25 members who are inaccessible or who cannot be identified in

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1 **A. Correct. My understanding is that the federal rules**
 2 **require you to list everything that has been received, whether**
 3 **or not you reviewed it, or whether or not you've relied upon it.**
 4 **Q.** You obviously reviewed materials regarding efforts to
 01:49:22 5 restore transactions. The DCV, you've talked about that, right?
 6 **A. Correct.**
 7 **Q.** Aren't those the kinds of efforts that were being discussed
 8 in that treatise about attempting to take steps to fill those
 9 data gaps?
 01:49:37 10 **A. Certainly. That's one of the steps that would be**
 11 **anticipated when you have not been able to sample from a target**
 12 **population that you want to make an inference about, you can go**
 13 **back and see if there's some way to identify why those**
 14 **transactions in this instance were missing, and then you can**
 01:49:53 15 **draw subsamples of those to try to see whether or not they're**
 16 **different.**
 17 **Q.** You talked about this. Why don't we go ahead and pull up
 18 Plaintiff's Exhibit 4485. This is your demonstrative. Go to
 19 the third page. This is also, I believe, depicted in your
 01:50:12 20 expert report, right?
 21 **A. Correct.**
 22 **Q.** Now, in the second box there, it looks like the recorded
 23 transactions is roughly one fourth of the total population; is
 24 that correct?
 01:50:23 25 **A. Seems about right.**

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01:50:40 **1 Q.** Do you have any factual basis for telling Judge Robertson
2 that in fact the sampling frame in this case is about one fourth
3 of the target population?
4 A. **I don't think anybody knows how big that missing and**
5 omitted component is.
6 Q. Okay. So as far as you're aware, the sampled population
7 and the target population may actually be fairly close in size.
8 We know they're not identical, but close?
01:50:56 **9 A.** **I would have no basis, nor have I seen anything in the**
10 administrative record that indicates what the relative size of
11 those two boxes is.
12 Q. So Judge Robertson, when he looks at this diagram,
13 shouldn't draw any conclusions as to the size of the, relative
14 size of those two boxes; is that correct?
01:51:14 **15 A.** **No. I perhaps should put on the bottom "not necessarily to**
16 scale." We don't know.
17 Q. Okay. You indicated in your direct examination that you
18 reviewed the September 30, 2005, NORC report regarding the
19 reconciliation of the national sample and the high-dollar items.
01:51:35 **20** This was AR-438, Bates No. 40-00002. Let's try to find it maybe
21 in the administrative record. AR-438.
22 And in reaching your conclusions about missing or destroyed
23 data, the impossibility of doing the reconciliation work, you
24 considered pages 12 to 17 of the report.
01:52:29 **25** Why don't you show Mr. Duncan 12 through 17.
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1 Does this look familiar?
2 A. **Yes, it does.**
3 Q. And on page 13 of the report, table 4, how did you evaluate
4 the fact that the table indicates that all but nine out of 2,372
01:53:05 **5** transactions had been reconciled?
6 A. **This goes right back to the notion of the high, high hurdle**
7 to be considered unreconciled.
8 Q. I'm sorry?
9 A. **It goes back to the high, high hurdle to be considered**
01:53:18 **10 unreconciled. So here what it's saying is if it was accounting**
11 code 1 or 2, which comprises these alternative procedures, it
12 would be considered -- it would be listed in the reconciled
13 section. But because we don't know what those alternative
14 procedures are, and they may or may not be directly reconciled
01:53:36 **15 back to a supporting document but rather be subject to some**
16 judgment of the accountants, the notion of reconciled here, as
17 I've testified to, would be meaningless to an individual account
18 holder.
19 Q. Well, you're a CFA but you're not a CPA, right?
01:53:55 **20 A.** **That's correct.**
21 Q. And so you're not here today to offer opinions about what
22 would be adequate reconciliation procedures, right?
23 A. **That's correct. My understanding is Mr. Pallais will be**
24 doing that.
01:54:14 **25 Q.** You talked about not knowing what alternative procedures
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1 were, right?
2 A. **Correct.**
3 Q. So you don't know if that's an auditor's concept?
4 A. **I've reviewed the ASM to see whether or not it's something**
01:54:24 **5 they laid out in the ASM as an auditor's concept. I didn't see**
6 anything there that made it clear what this notion of the
7 alternative procedure was.
8 Q. Okay. But speaking more generally, you don't know whether
9 auditors routinely talk about utilizing alternative procedures
01:54:39 **10** in the course of doing audit work; is that correct?
11 A. **I've encountered the term before in working with**
12 PricewaterhouseCoopers.
13 Q. When you saw that term utilized in connection with the work
14 here, did it occur to you that "alternative procedures" was an
01:54:59 **15** auditor's term of art?
16 A. **I'm generally familiar with the term as it's been used by**
17 accountants when I did work in helping design statistical
18 sampling when I was at PricewaterhouseCoopers, so I've heard
19 "alternative procedures" used in different contexts among
01:55:14 **20 accountants.**
21 Q. So basically you rejected the conclusion in table 4 about
22 reconciling all but nine of the transactions because of your
23 understanding of how errors were determined; is that correct?
24 A. **Well, you're mixing two different concepts. You talked**
01:55:32 **25 about reconciled and you talked about errors. Reconciled is the**
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1 first step. The second step is whether or not there's an error.
2 Q. All right. You rejected the conclusion that all but nine
3 transactions had been reconciled because of your understanding
4 of the standard required to reconcile a transaction; is that
01:55:52 **5** correct?
6 A. **I don't know that I rejected or discounted the notion. It**
7 was reported here that it was reconciled. It was just my
8 opinion that given the hurdle associated with not being able to
9 be reconciled, that this doesn't hold any particular meaning to
01:56:08 **10 the individual account holder.**
11 Q. Okay. As a statistician, though, if it's reported to you
12 that all but nine out of almost 2,400 transactions was
13 reconciled, in your mind you would still consider there to be a
14 problem with missing data?
01:56:27 **15 A.** **Well, this goes to how the error rates and the**
16 reconciliation process is determined, and statisticians, as with
17 your clients, Dr. Scheuren and Dr. Hinkins, had input, they had
18 involvement in the discussion of what was reconciled and what
19 wasn't. So it matters because it then -- how one uses the
01:56:47 **20 result of that reconciliation activity is premised in part, in**
21 large part upon what the reconciliation means.
22 So as a statistician, I would view with great skepticism
23 the information that all but nine were reconciled. At a minimum
24 I would like to know how many were reconciled with a directly
01:57:07 **25 supported document, how many were reconciled by this**
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1 recomputation method, and how did that work. How many were
 2 reconciled by third-party documentation. How many of these were
 3 reconciled with the alternative procedures, and how was that
 4 alternative procedure actually done.
 01:57:21 5 Then I would be able to take this information and make some
 6 kind of meaningful extrapolation up to the rest of the
 7 population from which I drew the sample.
 8 Q. And in the course of your rendering your opinions rejecting
 9 these findings, you never reviewed any of the materials used by
 01:57:36 10 the accountants to reconcile transactions, did you?
 11 A. No, that's not correct. I've testified repeatedly I looked
 12 at the accounting standard manual, which is the -- all the
 13 different versions we were provided, there were at least two or
 14 three we looked at because it's changed over time, but we looked
 01:57:53 15 at the accounting standard manuals, and we looked at all the
 16 information we did have, which was the Eastern Region study, but
 17 we were not provided as part of the administrative record with
 18 any of the actual source documentation where you specifically
 19 tied one transaction back to another.
 01:58:06 20 Q. And that's what I meant by my question. You never looked
 21 at any of the stuff the auditors or the accountants actually
 22 looked at in concluding that a transaction was reconciled,
 23 right?
 24 A. I looked for it and I didn't find it.
 01:58:22 25 Q. Just to move it along -- oh, I'm getting a time-out sign.
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1 data?
 2 A. That's correct. Although here there are more differences
 3 noted, but the same concept applies.
 4 Q. In this case -- by the way, you remember what Dr. Scheuren,
 02:13:04 5 what NORC did for those instances where they couldn't find
 6 support for a transaction?
 7 A. Well, you have to be more specific. What do you mean? In
 8 which calculation?
 9 Q. I will. Why don't you go back -- let's jump back, I'm
 02:13:24 10 sorry, in the debit transactions. Okay. It's in the inferences
 11 for debit transactions. Do you remember reading this section,
 12 inferences for debit transactions?
 13 A. Yes.
 14 Q. Does that refresh your recollection as to how Dr. Scheuren
 02:13:59 15 and the NORC team treated the debit transactions where they
 16 weren't able to reconcile them?
 17 A. Again, there's still the same two questions: How was it
 18 treated from the attribute standpoint and how it was treated
 19 from the variable standpoint. From the attribute standpoint it
 02:14:16 20 was treated as an error, for the calculation of it being a
 21 yes/no, was it an error. But for purposes of calculating it for
 22 the variable, the dollar amount of the error, since it was
 23 unreconciled, there was no information available, and the NORC
 24 report assumed that that dollar difference was zero.
 02:14:32 25 So it's some of both. It's an assumption about what the
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1 THE COURT: We'll take a 10-minute break.
 2 (Recess from 3:42 p.m. to 3:56 p.m.)
 3 MR. WARSHAWSKY: Your Honor, just from a planning
 4 point of view, counsel were talking over the break. Does the
 02:11:42 5 Court have a 4:30 matter, or is that gone?
 6 THE COURT: We do but they're going to wait.
 7 MR. WARSHAWSKY: Excellent. Let's see if we can get
 8 through Mr. Duncan, then. Maybe you'll get your flight after
 9 all.
 02:11:57 10 THE WITNESS: I was just telling His Honor thank you.
 11 BY MR. WARSHAWSKY:
 12 Q. Just jumping back to one subject, you read Ms. Herman's
 13 testimony?
 14 A. I did.
 02:12:08 15 Q. You recall her testimony about the Plaintiffs being
 16 provided copies of the IRMS data in 1997?
 17 A. I do recall that.
 18 Q. In the course of your work, did you ever consider analyzing
 19 the data that was provided to the Plaintiffs?
 02:12:21 20 A. No, I have not.
 21 Q. Now, let's go back to AR-438. Page 16, table 7. Do you
 22 remember I was asking you before the break about the debit
 23 transactions. I guess to shortcut it, credit transactions I
 24 gather you would draw a comparable conclusion with regard to the
 02:12:48 25 ability to reconcile the items in the national sample, missing
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1 error rate is, it was treated like an error. For the dollar
 2 difference, it was not.
 3 Q. And what's the basis for your conclusion that that's how
 4 they treated it for the variable analysis?
 02:14:44 5 A. I'd have to go back and look at the documents. It's in
 6 some of the detailed NORC reports, where they say there's a
 7 couple of different ways we can deal with this when we don't
 8 have information on the reconciliation. We could treat it as
 9 the average dollar error for the reconciled transactions, where
 02:15:03 10 there was an error, we could take that average dollar amount, or
 11 we could treat it as a zero. And they've effectively treated it
 12 as a zero.
 13 Q. Are you talking about some of those draft documents and
 14 some of those documents prepared, say like in the 2002, 2003
 02:15:18 15 time frame?
 16 A. I'd have to go back and look specifically where that was
 17 at.
 18 Q. You don't sitting here today remember any analysis done in
 19 2005 that treated the unreconciled items as being not errors for
 02:15:34 20 purposes of the variable analysis, do you?
 21 A. Again, I'd have to go back and look at what date that
 22 document was.
 23 Q. And similarly, we can go to it -- by the way, Dr. Scheuren
 24 says that, in the final paragraph up here, that the error rates
 02:15:51 25 that he calculated, that those are based on a very conservative
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02:16:11 1 estimate, treating them as unreconciled, right?

2 **A. For purposes of the attribute piece, yes.**

3 **Q.** It's about as conservative as you could be, right?

4 **A. No. I think Dr. Scheuren or Dr. Hinkins appropriately**

5 **indicated it would be an unsound statistical practice to do**

6 **otherwise. In her rebuttal report she specifically opined that.**

7 **I wouldn't describe it as being conservative. It's the right**

8 **way to do it.**

02:16:29 9 **Q.** Thank you. I'll take that. Similarly for the credit

10 transactions, do you remember how the NORC team and Dr. Scheuren

11 treated unreconciled credit transactions?

12 **A. My recollection is that there weren't any unreconciled**

13 **credit transactions.**

02:16:40 14 **Q.** Why don't we jump ahead. Let's get to the inference for

15 credit transactions. This actually spills over to two pages.

16 There is this page right here, we're looking at this, what, 16,

17 the last paragraph on 16, where he sets out his percentages and

18 error rates and all that, and then spilling over to the next

19 page, go to the top of 17, you see the first full paragraph.

02:17:09 20 Does that refresh your recollection as to how the unreconciled

21 transactions were calculated?

22 **A. No. I'd have to go back and look at what component of this**

23 **is unreconciled. This is just dealing strictly with what the**

24 **error rate is, the 4 percent error rate. You'd have to go back**

02:17:24 25 **and look and see what proportion of those were unreconciled.**

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1 **These are errors.**

2 **Q.** I'm sorry, I'm looking at the next paragraph where he

3 actually quantified the \$86 million, the 42 million. Do you see

4 that?

02:17:35 5 **A. Yes, I do.**

6 **Q.** Does that refresh your recollection as to how the NORC

7 analysis treated unreconciled credit transactions?

8 **A. No, it doesn't tell you anything about what -- if there was**

9 **a difference, what that difference was. And on an unreconciled**

02:17:58 10 **transaction, it would be unclear to me what basis they would**

11 **have for what that difference was. It's not been reconciled.**

12 **Q.** Okay. Let's go back to your expert report, second bullet

13 point on page 5, please. Why don't you blow that up. This is

14 the one, do you see that, about the sampled population is

02:18:28 15 different from the target population?

16 **A. Yes.**

17 **Q.** And you say that the plan to sample the target population

18 is conjecture, not statistical inference. Does your analysis

19 also take into consideration the work that the plan describes to

02:18:45 20 be completed with regard to things such as the DCV, the

21 land-to-dollars work, posting tests?

22 **A. No, this specifically looks at the sampled population,**

23 **which was the subject of the sampling that was done, cannot be**

24 **inferred beyond the target population from which it was drawn.**

02:19:01 25 **Q.** So you're not telling Judge Robertson that if Interior then

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1 goes ahead and performs the remaining work with regard to

2 posting transactions, land to dollars, the DCV work, that it's

3 not possible to draw valid statistical inferences about the

4 entire population here, are you?

02:19:20 5 **A. Well, you would need to make sure that we don't have**

6 **missing and omitted transactions. And based on my review of the**

7 **documents, that is a hurdle that will not be cleared. As Arthur**

8 **Andersen opined, as the GAO opined, doing that kind of**

9 **reconciliation would not be possible given the paucity of**

10 **documents.**

02:19:40 11 **Q.** Well, I understand that's your assumption. That's what

12 you're working from. My question for you, sir, is if Interior

13 does go ahead and performs the remaining work to be done which

14 is described in the plan -- and this is in the administrative

02:19:54 15 record if you want to look at it, we could pull that up, at

16 pages 17, 18 AR5-66. Do you want us to do that?

17 **A. We certainly could, but what you would need to see is the**

18 **results of those, just as we've now, in 2007, have seen the**

19 **results of the sampling, you'd need to see the results of those**

02:20:13 20 **activities to opine whether or not it can be extrapolated to the**

21 **target population of all trust beneficiaries for all funds in**

22 **transactions and account balances.**

23 **Q.** And at this point in time you are just not in a position to

24 tell Judge Robertson anything about those results because they

02:20:27 25 haven't happened yet, right?

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1 **A. Well, I'm in a position to tell him that, in the first**

2 **instance, you're not going to be able to get to account**

3 **balances. It doesn't matter how much more sampling you do,**

4 **you're sampling transactions, so you're not going to be able to**

02:20:39 5 **get to -- when I read the 2007 Plan it's clear to me, it says**

6 **there would be accuracy and completeness with respect to the**

7 **account transaction listings and the account balances as of**

8 **12/31/2000. So any extrapolation out to that population at the**

9 **end of the day is not going to be supported by what I've read in**

02:20:57 10 **the 2007 Plan.**

11 **Q.** Okay. I think we're talking about a different point now,

12 and we'll get to the account balances and the transactions

13 issues that you testified about. But let's move to the third

14 bullet point here. You talked about estimating litigation

02:21:15 15 exposure, and I'm going to be real quick on this one. You've

16 read Dr. Hinkins' rebuttal to your opinion on that, right?

17 **A. I have.**

18 **Q.** And she says you're just flat out wrong, right?

19 **A. Well, she's of the opinion that it was estimated to do what**

02:21:33 20 **it did, which is to make an extrapolation to the sliver of the**

21 **electronic ledger from which they sampled. So we're obviously**

22 **in disagreement on this point as to what it was designed for,**

23 **but the notion of what the dollar exposure is was not only**

02:21:52 24 **testified to by Dr. Scheuren but was also specifically in the**

25 **NORC documentation of the LSA project. It's \$86 million in**

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02:22:13 **1 exposure on credits. \$8 million in exposure on debits. That's**
2 exactly the language, so --
3 Q. I think it was 4 on debits, right?
4 A. **4 million on debits. I stand corrected. So those issues,**
5 the concept is unchanged that there's this notion of what the
6 exposure is. The exercise that was done does identify the
7 exposure during the electronic ledger era in total, but it's not
8 going to give information to the account holders about their
9 account balances.
02:22:23 **10 Q.** Well, specifically, I'm talking about your analysis, and
11 it's in 4.3.3.1, which you reference in this bullet point. We
12 can go there if you need. But you talked about the netting of
13 transactions, netting of overpayments and underpayments, right?
14 A. **Correct. As one specific illustration of this being a**
02:22:45 **15 litigation exposure exercise, estimating the numbers in total,**
16 rather than an analysis, as I've said here, of the histories --
17 transaction histories and account balances.
18 Q. And in Dr. Hinkins' rebuttal to you she was pretty adamant
19 that was wrong, your assumption, right?
02:23:00 **20 A.** **You mean the concept of netting.**
21 Q. Right.
22 A. **She was adamant that NORC had not done netting, but as I**
23 read her opinion, she didn't say that the 2007 Plan had not done
24 netting.
02:23:12 **25 Q.** Okay. Well, if your assumption about the netting of
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1 result of a probate transaction, I mean that's a transaction
2 that creates the opening balance in the account, right?
3 A. **That would do that, yes.**
4 Q. Okay.
02:25:04 **5 A.** **Potentially. I guess if they didn't have another account,**
6 then yes, a probate transaction could create a separate account.
7 Q. Okay. So that's one way that you could be looking at the
8 accuracy of what the opening balance is, you look at the
9 transaction that establishes the opening balance, right?
02:25:20 **10 A.** **That would be one way.**
11 Q. Okay. Now, in your report, you stated, and you testified
12 about this earlier, that Interior was aware of the issue about
13 sampling accounts, and you referred to this November 24, 2002,
14 memorandum. Do you recall that?
02:25:38 **15 A.** **Is that the OHTA memorandum?**
16 Q. It is. Why don't we go ahead and pull that up. This is
17 administrative record 264, Bates numbers 11-5. And you
18 testified about this earlier today, right?
19 A. **Yes, I did.**
02:26:00 **20 Q.** And specifically, you were referring to page 4. Let's go
21 ahead to page 4, and blow up -- the second paragraph is what
22 you're talking about. Why don't we get both paragraphs, the one
23 above as well. There we go.
24 Specifically, you focused on this statement about the
02:26:28 **25** account error rate could explode up to 30 percent, right?
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1 overpayments and underpayments is incorrect, you'd agree with me
2 your third bullet point is also incorrect here, right?
3 A. **No, but that's only one piece of it. It's also what we've**
4 talked about, there not being an ability to talk about the
02:23:30 **5 account balance.**
6 Q. Now, the fourth bullet point, and you started talking about
7 this just a couple of answers ago, about the notion of sampling
8 transactions instead of sampling account balances. Let me ask
9 if, from a basic point of view, as a financial person, you
02:23:53 **10 understand of course that an account balance is the result of**
11 the transactions, right? I mean, the sum of transactions going
12 in, reductions for transactions going out, right?
13 A. **You can get there if you know the opening balance, yes.**
14 Then the transaction information will help you get to a closing
02:24:10 **15 balance.**
16 Q. Okay. And in fact, isn't it true -- maybe you don't know
17 this, I don't know, but from your dealings with accountants,
18 isn't it true that one of the things that auditors do is
19 assess -- is look at transactions to come to a conclusion about
02:24:27 **20 how reliable the business systems are that are used to generate**
21 reports such as account statements?
22 A. **Well, certainly when you're looking to assess the integrity**
23 of a system, one of the tools that you can use is to measure
24 transactions. That's certainly one tool.
02:24:43 **25 Q.** Okay. And if, for example, somebody's account opens as a
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1 A. **Correct.**
2 Q. And in your analysis, did you also consider the preceding
3 paragraph, where the author of this draft -- and by the way,
4 this was a draft document, wasn't it?
02:26:43 **5 A.** **I believe so.**
6 Q. -- was noting the cost of doing a full reconciliation of
7 accounts?
8 A. **Correct.**
9 Q. In fact -- and you've talked about the paragraph 19
02:26:57 **10** exercise a little bit, right?
11 A. **I did.**
12 Q. And you know that was an extremely expensive process.
13 A. **Correct.**
14 Q. To select an account and reconcile every single transaction
02:27:09 **15** in it, right?
16 A. **Correct.**
17 Q. Isn't that the context of the statement here, that it
18 wasn't a focus on the error rate caused by accounts, sampling,
19 it was the cost of doing account reconciliations, 100 percent
02:27:26 **20** verification?
21 A. **You're talking about two different concepts. You're**
22 talking about a hundred percent reconciliation on all accounts,
23 versus you're talking about taking a sample of an account and do
24 an analysis of every transaction in that account. The result
02:27:42 **25 that if -- because sampling transactions, even with a very low**
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1 error rate, will result in a relatively high error rate, as far
2 as an assurance standpoint on account balances, I think that is
3 portrayed here accurately, and as a separate issue from the
4 overall cost.

02:28:02 5 It's just another weakness they've issued, is if we do this
6 transaction-by-transaction sampling, everybody needs to be on
7 notice that we could only be able to say very limited things, or
8 I guess as it turns out nothing, about account balances.

9 THE COURT: Mr. Warshawsky, you yourself are the one
02:28:18 10 who has interposed a number of "speaks for itself" objections.
11 You also want to downplay this exhibit as only a draft. Why do
12 you need to quarrel with this witness about his interpretation
13 of somebody else's document that's only a draft and it speaks
14 for itself?

02:28:37 15 MR. WARSHAWSKY: Your Honor, I won't -- first of all,
16 I'm going to try not to quarrel with Mr. Duncan. Mr. Duncan has
17 focused on one specific statement in there and attributed a
18 motive to the Interior Department based on his reading of that
19 sentence, and I think it's simply important for the Court to
02:28:55 20 appreciate the full -- the context of that statement.

21 MR. GINGOLD: Objection, Your Honor. He did not
22 attribute a motive to --

23 THE COURT: I didn't hear him attribute motive either,
24 but go ahead, Mr. Warshawsky.

02:29:08 25 MR. WARSHAWSKY: Well, Your Honor, it actually was in
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1 his report, and I think he has -- but we can move on.

2 MR. GINGOLD: Your Honor, you instructed us to deal
3 with opinions as stated in this court. I object on any further
4 discussion --

02:29:22 5 THE COURT: It's gone over my head, counsel. Both of
6 you. Proceed, Mr. Warshawsky.

7 MR. WARSHAWSKY: Okay.
8 BY MR. WARSHAWSKY:

9 Q. The one thing I did want to ask you is the sentence that
02:29:35 10 follows what you referred to in your testimony, where the author
11 of this document wrote, "Clearly the numbers that should be
12 estimated is the amount of the dollars in error, not the
13 percentage of accounts with at least one error." Did you
14 consider that one as well in your analysis?

02:29:49 15 A. I did. That goes to the notion that what they're trying to
16 estimate is whether or not the transactions were correct,
17 whether or not the account histories as they were recorded, were
18 those correct. But it ignores the notion that, what my
19 understanding of what the Court has ordered, is the account
02:30:06 20 balances are required as part of that.

21 Q. If you simply look at the number of accounts that are in
22 error, or look at an account error rate, isn't that essentially
23 an attribute analysis?

24 A. It is.

02:30:17 25 Q. Okay. And you've criticized Interior because you believe
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1 they're employing attribute sampling in this, right?

2 A. I've only criticized to the extent that it won't accomplish
3 the end objective. What I'm opining here is you need get to the
4 dollar difference on the account balance. Not an attribute,
5 yes/no, is the account balance correct? What is the dollar
6 difference on the account balance. If I were an individual
7 account holder, that's what I would want to know, is my balance
8 right or not.

9 Q. So you'd advocate using a variable analysis, right?

02:30:34 10 A. I certainly think you could do both attribute and variable,
11 but in the end, as an account holder, I'm not really going to
12 appreciate it much if you just tell me your account balance is
13 wrong. I would like to know by how much.

14 Q. That's accomplished through a variable analysis, right?

02:30:45 15 A. It could in part. It could be accomplished by an attribute
16 analysis first and then a follow-up with a variable sample.

17 Q. Okay. Let's go back to your expert report. Again the
18 executive summary, page 5. Specifically, you criticized in
19 the -- what we have on the screen here now, it looks like it's

02:31:00 20 the fourth bullet point, but this is actually the fifth on the
21 page, the one about the statistical sampling plan -- I'm sorry,
22 the statistical sampling design employed attribute sampling.

23 A. Correct.

24 Q. In fact, having looked at things such as the September 30,
02:31:14 25 2005, NORC report that we've gone through just a few moments

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1 ago, isn't it true that Interior utilized both attribute and
2 variable sampling in this?

3 A. I didn't have the advantage of having Dr. Hinkins' opinions
4 before I drafted this report, but it's clear that they are
5 taking this the next step, which was hypothesized back in '03
6 that that might happen but not articulated how. It is now clear
7 that they are taking that next step of looking at the variable
8 portion as well.

9 Q. Okay. So that's been clarified to you.

02:31:58 10 A. Yes.

11 Q. Okay. Next bullet point you talked about, and you did
12 spend a lot of time talking about this in your direct. I want
13 to spend a few moments at least talking about it as well. The
14 definition of a deviation or an error. And for that, let's go
02:32:29 15 to page 24 of your report, please. Actually, why don't we move
16 ahead to page 27. And up at the top, you see up here -- let's
17 blow that up, please.

18 You went through on pages 27, 28 of your report your
19 analysis of the various types of transactions which you
20 concluded would not be considered errors; is that correct?

02:33:24 21 A. Correct. Based on my read of the administrative record.

22 Q. Well, now specifically your report seems to be citing the
23 definition of difference in error and the definition of
24 difference rate and error rate in the plan, and then you stated:

02:33:44 25 "Transactions not considered to be deviations according to the

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1 plan definitions." So you really considered more than just the
 2 definitions in reaching these conclusions?
 3 **A. You mean in reading the entire plan?**
 4 **Q.** In reaching your conclusions below about transactions which
 02:34:02 5 you said would not be considered deviations.
 6 **A. Well, what I'm saying here is that according to the 2007**
 7 **Plan, according to my read of the plan, these notions would not**
 8 **be considered as deviations.**
 9 **Q.** Okay. So your analysis was more than just definitions,
 02:34:16 10 right?
 11 **A. Correct.**
 12 **Q.** Okay. You reviewed the accounting standards manual?
 13 **A. Yes.**
 14 **Q.** Okay. Did you consider how the accounting standards manual
 02:34:27 15 described these types of errors in your analysis?
 16 **A. Generally, yes.**
 17 **Q.** Generally. I mean, you didn't think that that was the real
 18 authority to go to to determine whether or not an item would be
 19 considered an error?
 02:34:42 20 **A. Well, it first of all varies by different types of**
 21 **transactions, it varies by different types of credits, debits,**
 22 **whether or not they're oil and gas collections, whether or not**
 23 **they're check disbursements. So what I tried to do was distill**
 24 **down the essence of this notion of what's considered a deviation**
 02:34:59 25 **and what's not, and it interweaves both the notion of**

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1 **proportion of it exactly is only largely consistent with**
 2 **supporting documents.**
 3 **Q.** Okay. So to understand your opinion we need to know what
 4 you mean by the word "largely"?
 02:36:35 5 **A. Well, yeah. It either is consistent or is not consistent.**
 6 **But the 2007 Plan, if it's largely consistent -- in other words,**
 7 **if there is, by recomputing it or by looking at third-party**
 8 **documents we're able to say it looks right, that's not**
 9 **considered a deviation.**
 02:36:52 10 **Q.** Is the word "largely," is that your word or does that
 11 appear in something like the accounting standards manual?
 12 **A. I don't recall reading that specifically in the ASM.**
 13 **Q.** Okay. Next item you listed, a group of missing, erroneous
 14 or omitted transactions. With respect to the first two bullet
 02:37:13 15 points, those that were never entered into the transaction
 16 ledgers and those that were removed from the transaction
 17 ledgers, wouldn't those types of transactions be addressed
 18 through this work that we've been talking about, the DCV,
 19 land-to-dollars testing, posting work?
 02:37:32 20 **A. They could potentially be included in that universe.**
 21 **Q.** All right. Transactions that were intentionally altered,
 22 accidentally altered or erroneously entered. If that happened,
 23 wouldn't those types of transactions be inconsistent with
 24 supporting documentation?
 02:37:55 25 **A. Not necessarily. Again, I don't know what the alternative**

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1 **reconciliation activities, part of which are then included in**
 2 **the ASM manual, but also part of the extrapolation that's done**
 3 **by NORC, where for instance these de minimis rules are applied**
 4 **as to whether or not there's actually an error.**
 02:35:14 5 **The accounting would catch a lot of these. Like with the**
 6 **one we looked at, the only one we've been able to look at, the**
 7 **Deloitte & Touche study showed us where it was off. They**
 8 **captured that in the accounting. The de minimis rule was**
 9 **applied later on in the extrapolation process.**
 02:35:31 10 **Q.** Okay. You didn't talk about any of that in your report
 11 here, right?
 12 **A. That's correct. I testified to that content to the Judge.**
 13 **Q.** Well, let's see now. You say transactions not considered
 14 to be deviations, and the first item you said recorded
 02:35:44 15 transactions largely consistent with supporting documents that
 16 are found. Are you telling Judge Robertson that a transaction
 17 that's supported by -- that's largely consistent with supporting
 18 documentations, that should be considered a deviation?
 19 **A. Yeah. If it's inconsistent -- I mean there's this notion**
 02:36:01 20 **of, under accounting code 1, there's this notion of it could be**
 21 **directly supported by a document, but it could also just be kind**
 22 **of roughly consistent. And again, just for discussion purposes**
 23 **here, if it's not exactly tied to a source document, I think**
 24 **that's information, particularly as a statistician that's going**
 02:36:21 25 **to try and extrapolate from it, I would need to understand what**

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1 **procedure that would be used to substantiate it, whether or not**
 2 **that would detect something that was intentionally altered or**
 3 **not.**
 4 **Q.** What do you mean by an intentionally altered transaction?
 02:38:07 5 **A. Well, it could be something that was, as Ms. Redthunder was**
 6 **testifying to this morning, where a person was taking funds from**
 7 **a person that's disabled or otherwise that they're watching**
 8 **over, if they're inside of the BIA, they could go back and make**
 9 **a transfer and intentionally alter the documentation associated**
 02:38:27 10 **with that transfer.**
 11 **Q.** But ultimately if the accountant selected that transaction
 12 and reviewed supporting documentation, wouldn't that reveal
 13 whether that transaction had been altered?
 14 **A. May or may not. It depends again -- in my experience in**
 02:38:42 15 **dealing with trying to identify and detect fraud in**
 16 **organizations, those are exactly the kind of transactions where**
 17 **you would anticipate that the supporting documentation would**
 18 **both be altered, and so that it would support what had been**
 19 **done. Those are exactly the ones that are high risk.**
 02:38:56 20 **Q.** Okay. Cases of fraud are pretty unusual, though, aren't
 21 they?
 22 **A. Not in my experience.**
 23 **Q.** Okay. Well, let me ask you about the last bullet point.
 24 Transactions that never should have occurred. I'm sorry, I'm
 02:39:13 25 not sure what that means. What did you mean by that one?

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02:39:32 **1 A. Well, using an example that I used with Mr. Gingold this**
2 morning, if there was a collection that happened at Treasury,
3 there was a million dollars that was collected, if those funds
4 were posted over and it was a transaction, we should have never
5 received any money or we should have received money but didn't
6 get any, there could be a transaction that never should have
7 occurred the way that it did, that's not going to be captured
8 here as a deviation.
02:39:48 **9 Q. But if you reviewed supporting documentation, you wouldn't**
10 be able to tell whether it was a transaction that should not
11 have occurred?
12 A. First of all, you're assuming they are reviewing these
13 documents, and they're not. Under this example, they're not
14 going back over to Treasury to try and understand whether or not
02:39:59 **15 the allocation to the allottees occurred correctly. If you're**
16 asking if they were doing that step, should they detect it?
17 They probably would be able to detect something like that, which
18 is erroneous allocation.
19 Q. Okay. Last item, you talked about recorded transactions
02:40:15 **20 where no supporting documentation could be found. Aren't those**
21 the unreconciled transactions that NORC treated as errors in
22 their analysis?
23 A. No. There's lots of pieces of the reconciliation that
24 don't have supporting documents. I mean, category 1, the top
02:40:32 **25 tier reconciled transaction, part of that have directly**

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1 You're talking about, to cut through it, in that instance
2 you're really talking about issues like probate, direct pay, the
3 inclusion of accounts as of 10/25/1994; is that right?
4 A. Correct.
02:42:14 **5 Q. And these are all legal issues, right?**
6 A. Correct. I'm just informing the Court -- as a matter of
7 fact, that paragraph could be taken out of my report and put in
8 Dr. Hinkins' report. She has essentially the same opinion. You
9 can't extrapolate beyond the electronic ledger era from which
02:42:29 **10 the sample was drawn.**
11 Q. In other words, you're not saying there's a sampling issue
12 there; you're saying they haven't -- that the target population
13 doesn't include items that have been excluded because of legal
14 arguments.
02:42:41 **15 A. Correct. The consumer of this report, my understanding is**
16 it would be the Court, and I want to make it clear to the Court
17 that what was done will not go beyond those date restrictions.
18 Q. Okay. The final item on that is the famous meta-analysis,
19 and I gather now, based on what you've heard from -- what you've
02:43:03 **20 read I should say from Dr. Scheuren and Dr. Hinkins and what you**
21 said this morning, you recognize that meta-analysis is not a
22 central -- does not play a central role in the proposed plan for
23 the paper ledger era.
24 A. That's my understanding.
02:43:54 **25 Q. Your Honor, if I may have just a minute.**

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1 supporting documents, but part of it does not. It's recomputed,
2 it's third-party documents. So then when you drop down to
3 category 2, you know it's not something that has a directly
4 supporting document because it's already dropped all the way
02:40:50 **5 down to category 2.**
6 So these are the kinds of things that you would anticipate,
7 given it's not required to have a directly supporting document
8 in order to do the reconciliation.
9 Q. But you've already told us you don't know what's required
02:41:02 **10 for an item to be reconciled with category 2. Right?**
11 A. That's exactly what I testified to, but I know what it's
12 not, and it's not a directly supporting document or it would be
13 up in category 1.
14 Q. Okay. So what you're referring to, you're not really
02:41:16 **15 referring to no supporting documentation, you're talking about**
16 transactions that don't have what you call directly supporting
17 documentation; is that right?
18 A. Right. It's the notion of an alternative procedure. It's
19 not a supporting document. It's an alternative procedure.
02:41:29 **20 Q. Okay. Let's go back to page 5 of your report, please.**
21 Moving along. We're down to the seventh bullet point. And this
22 is the one that talks about the plan does not constitute a
23 sufficient basis for making extrapolations beyond the population
24 of recorded transactions in the electronic ledger era, subject
02:41:57 **25 to DOI date restrictions.**

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1 Let me ask one last thing. You did talk about your
2 criticism of the proposal to conduct a sample of the paper
3 ledger era to determine whether the populations were essentially
4 the same.
02:44:08 **5 A. Correct.**
6 Q. Okay. And you're familiar with the term initial hypothesis
7 testing?
8 A. Yes.
9 Q. And so you understand that that's simply a first step that
02:44:20 **10 Interior's proposing to do.**
11 A. That's my understanding.
12 Q. Based on your assumptions about the paper ledger era, it's
13 fair to say you expect that initial hypothesis test to be
14 rejected?
02:44:35 **15 A. Again, it goes back to the definition of the error. If**
16 what you're looking for is an error and you're unlikely to find
17 it, not finding it in the paper ledger era, and that happens to
18 be the same as the electronic ledger era, I would anticipate
19 that if you define the error high enough, you won't see it in
02:44:52 **20 either, and you could try to reach the conclusion that they're**
21 the same.
22 But it would be my expectation that if you were testing it
23 to talk about legitimately whether or not there's a difference
24 in the supporting documents, you would find a substantial
02:45:03 **25 difference between electronic and paper ledger eras.**

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02:45:23 1 Q. Okay. Well, let's step back from whether you believe
 2 Interior is acting legitimately, whether you believe they're
 3 setting the standards too high for an error. I ask you to
 4 assume that the way errors are being defined are proper and
 5 consistent with the standards that accountants would employ in
 6 this situation. Based on what you understand, your beliefs
 7 about the conditions of paper records, you expect the initial
 8 hypothesis to be rejected, right?
 9 A. I would.
 02:45:39 10 Q. Okay. And in that case, do you remember what Interior's
 11 proposed to do if the initial hypothesis is rejected?
 12 A. **Back to the drawing board and draw bigger samples.**
 13 Q. Thank you.
 14 MR. WARSHAWSKY: Your Honor, I have no more cross.
 02:45:52 15 Thank you, Mr. Duncan.
 16 THE WITNESS: You're welcome.
 17 MR. GINGOLD: A brief redirect, Your Honor.
 18 REDIRECT EXAMINATION
 19 BY MR. GINGOLD:
 02:46:03 20 Q. I'd like to call up Bates No. 152-4 at 17, which relates to
 21 Mr. Warshawsky's discussion of Plaintiffs' 4486, which is the
 22 estimated missing transactions throughput from October 1, 1984.
 23 As you can see, Mr. Duncan, this is the FTI report. And I'd
 24 like to go to 17. Have you seen this before?
 02:46:31 25 A. **Yes, I have.**
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02:48:20 1 A. **Yes.**
 2 Q. Now, you did not consider, for example, and let's take
 3 Rocky Mountain Region in the 4486. You didn't consider that if
 4 Rocky Mountain Region actually went on IRMS in 1976, you didn't
 5 consider the near decade of purged documents on a monthly basis,
 6 did you?
 7 A. **I did not. I simply started with what the DCV identified**
 8 **as the missing months.**
 9 Q. So when you're looking at this number, when you're looking
 02:48:35 10 at the total number of missing months data, you're dealing with
 11 it from still a narrow time period, correct?
 12 A. **Correct.**
 13 Q. You're not dealing with IRMS once it actually became
 14 implemented in the various agencies or regional offices,
 02:48:50 15 correct?
 16 A. **That's correct.**
 17 Q. So your estimate is what it is, for a period of time,
 18 excluding nearly a decade in some respect of missing data,
 19 correct?
 02:49:00 20 A. **At least in that one agency. It could be more or less in**
 21 **other agencies, but it's simply limited to the missing months**
 22 **identified by the DCV.**
 23 Q. And the DCV is not complete, is it?
 24 A. **No, it is not.**
 02:49:13 25 Q. And the land-to-dollar testing is not complete, is it?
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02:46:52 1 Q. Isn't this tab B-2 you're referring to in footnote 7 of
 2 Plaintiffs' Exhibit 4486?
 3 A. **Yes. This is the table.**
 4 Q. And if you can focus in a little bit, you're looking at --
 5 I'm not looking at that paragraph, excuse me. You're looking
 6 at -- if we can just have the upper part of this a little bit so
 7 we can have some clarity. I'm sorry.
 8 Okay. We're looking at control tests and we're looking at
 9 missing months, aren't we? Does this, part of it, provide that?
 02:47:16 10 A. **Yes.**
 11 Q. Okay. So you're dealing with missing months, correct?
 12 A. **Correct.**
 13 Q. And footnote 7 says some of -- footnote 7 in Plaintiff's
 14 Exhibit 4486 states the sum of tab B-2 regional reports for
 02:47:31 15 months prior to IRMS conversion and missing months after IRMS
 16 conversion, correct?
 17 A. **Correct.**
 18 Q. And you're stating this as an estimate, correct?
 19 A. **It is.**
 02:47:40 20 Q. Based on the missing months identified in the DCV, correct?
 21 A. **It is based on exactly that.**
 22 Q. And one of the questions that was asked by Mr. Warshawsky
 23 is whether or not you properly considered the missing months if
 24 all the agencies or regional offices didn't start as of your
 02:48:02 25 October 1, 1984 date. Do you recall that?
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02:49:24 1 A. **Not to my knowledge.**
 2 Q. And you were asked specifically questions about the
 3 Reference Manual For Scientific Evidence, weren't you?
 4 A. **Yes, I was.**
 5 Q. One of the -- I'm not going to put this up, but on page 90
 6 of the reference manual, there's a statement regarding when
 7 inferences can be made, correct?
 8 A. **I don't recall page 90 specifically. It's a large manual.**
 9 MR. WARSHAWSKY: Your Honor, we should pull it up.
 02:49:45 10 MR. GINGOLD: This should be a short question,
 11 Your Honor.
 12 BY MR. GINGOLD:
 13 Q. Is this a fair statement made in the manual: Inferences
 14 from part to the whole are justified only when the sample is
 02:49:53 15 representative?
 16 A. **That would be the kind of statement in the scientific**
 17 **manual, yes.**
 18 Q. And one of your concerns with regard to your opinion is
 19 that the sample is not representative of the target population,
 02:50:01 20 correct?
 21 A. **That's been my concern since I first started looking at**
 22 **this.**
 23 Q. Therefore, your opinion remains the same; if in fact the
 24 sample is taken for the purpose of establishing accurate account
 02:50:14 25 balances, for all past and present individual Indian trust
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1 beneficiaries, it is not representative, is it?

2 **A. The sample cannot be used to make a statement about that**

3 **population.**

4 **Q.** And Mr. Duncan, none of your opinions have changed as a

02:50:23 5 result of the cross-examination by Mr. Warshawsky, have they?

6 **A. No, they have not.**

7 MR. GINGOLD: Thank you.

8 THE COURT: I think you're excused, Mr. Duncan. Thank

9 you.

02:50:41 10 THE WITNESS: Thank you, Your Honor.

11 (The witness steps down.)

12 THE COURT: Do you have a 25-minute witness this

13 afternoon, or do you all want to go home?

14 MR. DORRIS: Our next witness is Mr. Homan. We can't

02:50:54 15 complete him in 25 minutes, but we can certainly start him if

16 that's what you'd prefer to do.

17 THE COURT: How long is Mr. Homan's direct?

18 MR. DORRIS: I would say it's about an hour and 45

19 minutes.

02:51:03 20 THE COURT: Let's get started.

21 MR. DORRIS: We call Paul Homan.

22 THE COURT: All right.

23 MR. DORRIS: Your Honor, we're going to cover several

24 areas with Mr. Homan. He was the first special trustee from

02:51:58 25 September of 1995 to January of 1999 pursuant to the 1994 Act,
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1 after he had been with the Office of the Comptroller of the

2 Currency and then in the private sector involved in five or six

3 turn-around situations with major financial institutions.

4 We'll be covering primarily five areas: the principal

02:52:30 5 reasons a complete historical accounting cannot be rendered, and

6 we'll be looking at some of the specific audits, some of which

7 were ordered by him while he was special trustee. We'll review

8 the advice from a financial institutional advisor to the

9 Department of Interior regarding what they would do in

02:52:50 10 situations where there are missing records.

11 The third area will be we will address the issue of cost

12 and appropriations and the government's sacrificing accuracy and

13 completeness as a result of them. Fourth, dealing with some key

14 definitional issues as to what the accounting statement or

02:53:14 15 accounting should include, and who is to be covered. And

16 finally, the application of certain fundamental trust principles

17 to this matter.

18 **PAUL HOMAN, WITNESS FOR THE PLAINTIFFS, SWORN**

19 **DIRECT EXAMINATION**

02:53:30 20 BY MR. DORRIS:

21 **Q.** Mr. Homan, have you provided an expert report that sets out

22 your qualifications and your background?

23 **A. Yes, I have. It's attached as one of the appendices in my**

24 **expert report, not only this time but in 2003, and it's also**

02:54:05 25 **briefed in a paragraph in the beginning of my expert report.**
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1 **Q.** If we could look on the screen at Plaintiffs' Exhibit 4210.

2 And this is then the cover page of your expert report?

3 **A. Yes.**

4 **Q.** And let's look over at the third page, please, sir. And if

02:54:40 5 you would blow up toward the bottom where it has Roman III,

6 qualifications. And is this then where you have set forth your

7 qualifications here?

8 **A. Yes.**

9 **Q.** And it briefly summarizes what I had told the Court about

02:55:01 10 your work in both the public service with the Office of the

11 Comptroller of the Currency, and also your work in the private

12 sector, if we can go over to the top of the next page. And the

13 top there -- pause for a moment for the Court to look -- and it

14 also then, the paragraph there talks about your work as a

02:55:32 15 special trustee for American Indians. And were you the first

16 such special trustee pursuant to the 1994 Act?

17 **A. Yes.**

18 **Q.** All right. And then at the end, it indicates that there

19 is -- you have a resume which is attached as Exhibit 3 to this

02:55:51 20 report. And let's look at that. If we go to page 390 of

21 Plaintiffs' Exhibit 4210. And if we'd look at the next page,

22 please. And is this a copy of your resume where you have --

23 that you prepared?

24 **A. Yes, I did.**

02:56:18 25 **Q.** And you list first, kind of going back in time, the work
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1 that you've done as an expert consultant, and then on the next

2 page, if we can blow that up, your work where you had turnaround

3 planning and experience, and then you go on and list three on

4 this page, including Riggs National Bank here in Washington,

02:56:45 5 D.C., and then three more on the next page where you were

6 involved in turnaround planning and experience.

7 **A. That is correct.**

8 **Q.** And then toward the bottom it indicates your work as a bank

9 regulator, experience with the Comptroller of the Currency, and

02:57:03 10 you were there -- this is one particular position that you had,

11 and if we look at the next page, you were with the Comptroller

12 of the Currency from 1966 to 1982, and that's summarized there

13 at the top of the page, correct?

14 **A. That is correct. That was my principal experience with the**

02:57:28 15 **government. I spent the last five years there as the senior**

16 **career bank official for the office of the Comptroller of the**

17 **Currency, which supervises the national banks and the largest**

18 **trust companies in the country.**

19 **Q.** And then it shows your work as a special trustee, and then

02:57:46 20 at the bottom of this page it shows your educational experience;

21 is that correct?

22 **A. Yes.**

23 MR. DORRIS: Your Honor, I would tender Mr. Homan as

24 an expert in trust management and trust standards and trust and

02:58:00 25 regulatory accounting.
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02:58:20 1 MR. QUINN: Your Honor, we have no objection to this
2 witness as an expert in general matters of trust administration.
3 I don't believe the witness has any training or certification
4 here in the accounting, and we would object to his certification
5 or being received as an expert on accounting matters, trust or
6 otherwise.

02:58:32 7 THE COURT: Well, let's hear what his opinions are,
8 and if you want to object to his opinions as he renders them on
9 the grounds that they're not qualified, I'll either consider
10 your objections or let you do *voir dire*. But let's proceed.

11 MR. QUINN: Thank you, Your Honor.

12 MR. DORRIS: Thank you, Your Honor.

13 BY MR. DORRIS:

02:58:44 14 Q. Let's look at Plaintiffs' Exhibit 4210, your expert report
15 again, on page 4. And if you will -- Your Honor, I would just
16 say, starting here at paragraph Roman numeral V, if you would
17 blow that up -- you will see his separate opinions are separated
18 with the capital letters A, and then it goes on through E, five
19 separate ones, which correlate to the five areas that I
02:59:10 20 indicated to you at the outset I would be covering. And I think
21 we can get started substantially on item A.

22 Mr. Homan, this is then in your report where you've tried
23 to set out your specific opinions; is that correct?

24 A. Yes.

02:59:25 25 Q. The first one, as the Court has an opportunity to look at
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1 not qualified to opine on accounting matters. It's not been
2 established he's an expert in the field of accounting. He's
3 testifying to application of standards, generally accepted
4 accounting principles and generally accepted auditing standards.
03:01:43 5 He's not qualified to opine in that regard.

6 THE COURT: Well, he's got a lot of experience,
7 counsel, a lot of experience in a lot of related areas. I'm
8 going to overrule the objection. You can make what you want of
9 it on cross-examination.

03:01:53 10 Proceed, Mr. Dorris.

11 MR. DORRIS: Thank you, Your Honor.

12 BY MR. DORRIS:

13 Q. Mr. Homan, let me try to break some of that down that you
14 just talked about, first of all. First of all, while I think
03:02:06 15 the Court is very familiar with it, you referred to GAAP, which
16 is G-A-A-P, general?

17 A. Accepted accounting principles. And GAAS, which is
18 generally accepted auditing standards.

19 Q. And that's GASS?

03:02:19 20 A. GAAS.

21 Q. And those are standards that you have worked with for many
22 years?

23 A. Yes. And they're also consistent with regulatory
24 accounting principles, which have been used since the '30s by
03:02:37 25 the Office of the Comptroller of the Currency and the other

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1 it, can you state and summarize what you were conveying there?
2 A. Yes. The standards of the Department of Interior in my
3 view, and I believe in the solicitor's view, as expressed to me
4 at least when I was in the Office of the Trustee, is that they
02:59:52 5 must meet the standards of an ordinary trustee. I was the bank
6 supervisor for many years of some of the largest trust companies
7 in the world. I'm aware that in connection with all national
8 bank trust companies, they have been required since the late
9 '70s, along with public trust companies, to keep their books in
03:00:14 10 accordance with GAAP, and to have an independent outside audit
11 conducted annually, using the generally accepted auditing
12 standards.

13 The Department of the Interior has neither. Therefore, I
14 believe that no beginning balance can be certified in any of the
03:00:38 15 accounts. I have reviewed extensively the auditing requirements
16 set forth by the only four audits ever done by the Bureau of
17 Indian Affairs, and later audits, but those were done by Arthur
18 Andersen in 1998.

19 They were all qualified, for the same reasons that the
03:01:00 20 current reports are qualified, and that is that a GAAP audit
21 could not be done because of missing records, lack of prior
22 audits, and accounting and -- trust accounting and trust
23 management systems that were unreliable for decades.

03:01:24 24 MR. QUINN: Your Honor, I object and move to strike.
25 The witness, as we've stated, our objection continuing, witness

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1 federal banking agencies. They're generally more conservative
2 accounting principles than used in GAAP, although they came
3 together in the late 1990s -- 1970s.

4 Q. So were you a commissioned or certified bank examiner? I
03:02:57 5 can't remember what --

6 A. I was a certified national bank examiner.

7 Q. Okay.

8 A. Which is the functional equivalent of a CPA, with the
9 additional distinction that bank examiners look not only by law

03:03:10 10 at history, which is what the accountants look at, but also rate
11 banks as to the competence and integrity of management and their
12 future prospects which, according to several financial criteria
13 in common use by the rating agencies in the private sector, and
14 in common use by the bank regulators since 1937.

03:03:36 15 Q. Okay. Let me just, in the first paragraph we have in the
16 screen, under item A, it says, "It was my opinion when I served
17 as Special Trustee for American Indians and it continues to be
18 my opinion today that an accurate and complete historical
03:03:58 19 accounting verified with documentation in conformity with
20 standards set forth in GAAS and GAAP or any other reasonable
21 standard, cannot be rendered." Do you see that?

22 A. That's correct.

23 Q. And you indicated in addition to GAAS and GAAP, you put in
24 there "any other reasonable standard." Why did you say that?

03:04:14 25 A. Well, first of all, there are private sector methods that

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03:04:42 **1** are consistent with GAAP that are specifically designed to deal
2 with missing records or unreliable trust accounting systems.
3 And they have been used extensively by the public sector in
4 the -- for example, over 2,000 times by the OCC and FDIC since
5 the bank resolutions -- or excuse me, the bank failures from the
6 1970s forward.
7 They've been used in every bank merger case that involves a
8 purchase and assumption transaction and the like. And they're
9 generally described, as I've said just below that, in the
03:04:57 **10** methodology proposed by the Bank of America as to how they would
11 handle situations where substantial missing records are missing
12 or where the trust systems, accounting systems, management
13 systems are unreliable.
14 Q. Okay. We'll get to the Bank of America part. You talk
03:05:20 **15** about that the opinion you've just given is one that was shared
16 by each of the independent certified public accounting firms
17 that have audited the individual Indian trusts. Give us a brief
18 overview of what audits are available to look at of the BIA or
19 the individual Indian trusts that you're referring to.
03:05:45 **20** A. All right. While I was there and subsequently there has
21 been four major categories that I would call attempts at a GAAS
22 or GAAP audit. The first four were conducted by Arthur Andersen
23 from 1988 through 1991. Those were the only audits conducted of
24 the entire Bureau of Indian Affairs' accounting and management
03:06:15 **25** systems, since the Office of Trust Fund Management did not exist

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1 that was done by KPMG?
2 A. Yes. I reviewed each one from 1995, the first one, through
3 the year 2006, although in some cases the management letters
4 that accompanied those, setting forth the specific material
03:08:09 **5** weaknesses, I didn't read. But I did read the one in 2006.
6 Q. And are those the four groups that you were referring to
7 earlier?
8 A. No. The fourth one was an audit that I ordered, which was
9 essentially a legal documentation check of some 790,000 OTFM
03:08:31 **10** accounts that was conducted in the late '90s while I was there.
11 And it involved bringing in all of the OTFM records, which were
12 the trust accounting records, not the Bureau's records, and we
13 did a legal doc check on each one of those files.
14 Q. And is that what you've referred to in your documentation
03:08:54 **15** as the file check?
16 A. That's right.
17 Q. All right. Let's look --
18 A. It wasn't an audit, per se.
19 Q. It was not an audit in terms of having a CPA come in and
03:09:09 **20** look at financial records; is that right?
21 A. Right.
22 Q. All right. Now, if we might pull up Plaintiffs' Exhibit
23 575. And if you would blow that up. This indicates it's the
24 Arthur Andersen tribal and individual Indian monies trust fund
03:09:33 **25** audit, financial statements as of September 30, 1989 and 1988.

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1 at that time. They were all qualified, for the reasons I
2 suggested earlier, and essentially for missing records. The
3 fact that the --
4 Q. I'm just looking for what -- we'll get into the particular
03:06:37 **5** ones.
6 A. All right. For the same reasons.
7 Q. You first got Arthur Andersen audits of BIA for four years
8 in the late 1980s.
9 A. That's correct. All right. The next one then was the
03:06:49 **10** tribal reconciliation project, also conducted by Arthur
11 Andersen, which attempted to do a GAAP/GAAS audit of the
12 transactions for the tribes in the 1971 to 1992 period.
13 Q. So that's kind of the second item. And you mentioned there
14 were four?
03:07:13 **15** A. I was the receiving official on those. The next one was a
16 selected audit by -- an independent outside audit that was
17 required by the Reform Act for the Office of Trust Fund
18 Management, and I received the first one, the second one, the
19 third one, and there has been one every year since.
03:07:36 **20** Q. And the first initial ones were done by Griffin as the --
21 A. That's correct.
22 Q. -- as the auditing company?
23 A. Right.
24 Q. And have you reviewed even the most recent one of those
03:07:49 **25** audits, which have continued since you left as Special Trustee,

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1 Is this one of the -- is this the first of the Arthur Andersen
2 audits of BIA that you referred to earlier?
3 A. Yes.
4 Q. All right. Let's look then at the next page -- well, let's
03:09:59 **5** go one more after that. And let's blow up -- first of all, the
6 date is May 11, 1990. And you can see that it's for the periods
7 that it said on the cover, and let's look down at the bottom two
8 paragraphs of this first page.
9 And in the next to last paragraph on this page, it talks
03:10:24 **10** about "The 1988 audit was the first known financial statement
11 audit by independent public accountants of the tribal and
12 individual Indian monies trust funds managed by the Bureau, and
13 the scope of our engagement was not sufficient with respect to
14 the financial statements for preceding periods, from inception
03:10:46 **15** through September 30, 1987, to enable us to determine the
16 propriety of trust fund balances resulting from prior activity,
17 and what portions of adjustments identified in our 1988 audit
18 related to prior periods." Do you see that?
19 A. Yes.
03:11:03 **20** Q. Now, was this an audit that you reviewed -- while it was
21 dated before you became special trustee, is this something you
22 became aware of and reviewed while you were special trustee?
23 A. Yes. We were interested in what they were -- I was
24 receiving the 1995 audit at the time from Arthur Andersen on the
03:11:28 **25** tribal reconciliation. I was interested in what they were able

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03:11:52 **1** to do in 1988 for essentially the same, covering the same
2 accounts, and -- the tribal accounts back to 1971. So I did
3 review that at that time, and also the notes, which I'm sure
4 you're going to show next.
5 Q. The notes are referred to in that next paragraph, that I
6 will not read aloud, but if you would look at them, it refers to
7 note 3, and then it notes a -- for several reasons, 1 and 2 on
8 that page, with 2 being major inadequacies in the accounting
9 records, and then it goes over to the next page.
03:12:14 **10** A. Yes. And what that means to me is that the accounting
11 balances cannot be confirmed. And that goes to the beginning
12 account balances not only of the general ledger but of each
13 subsidiary account, including the IIM subsidiary accounts.
14 Q. And it refers to the Bureau in here a number of times. And
03:12:32 **15** who is that?
16 A. The Bureau of Indian Affairs.
17 Q. Okay. So references to the Bureau here is --
18 A. "BIA," "Bureau of Indian Affairs" are used interchangeably.
19 Q. Let's look at -- you indicated the notes, and we do want to
03:12:47 **20** look at the notes. Let's look over -- I think it's page 10 of
21 this exhibit. It's going to be page 9, the one before that,
22 please. And the one before that. So it's page No. 8.
23 And would you highlight toward the bottom there. You
24 recall that, when we were just looking at reference note 3, and
03:13:31 **25** I'm now showing you what is note 3 in that financial statement.

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1 Do you see it, sir?
2 A. Yes.
3 Q. Okay. Now, would you take a moment and read that first
4 paragraph to yourself?
03:13:43 **5** (Witness reviewing document.)
6 A. Yes.
7 Q. And after that -- and we'll look at these pages in just a
8 minute -- there are 16 separate individual items listed there.
9 And I don't want us to look at each of those. But can you
03:14:09 **10** summarize what that says to you as someone with your background
11 as a bank examiner in looking at trust departments, what this
12 tells you about a trust?
13 A. These are basic governance and internal controls that were
14 never implemented correctly and appropriately by the Bureau of
03:14:31 **15** Indian Affairs. And they go to the weaknesses in staffing,
16 managerial and resource accounting appropriations, if you will,
17 lack of training, and inconsistent trust accounting systems, the
18 inability to do audits, any acceptable audits, GAAS or
19 otherwise.
03:14:59 **20** And the burden here is that these accumulate over decades.
21 I believe the Angel report, if I remember, the last testimony
22 documented these types of material weaknesses in accounting and
23 internal controls dating back to the 1930s that were isolated by
24 GAO and the like.
03:15:22 **25** I know for a fact, because I looked myself, that the trust

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1 accounting systems that were turned over to the Bureau in 1971
2 by the Treasury have been out of balance every year up to 1997,
3 with cumulative general ledger differences that I believe
4 exceeded 105 million, if I remember correctly.
03:15:43 **5** Q. And you've indicated this was the first audit by an
6 outside --
7 A. Well, it describes the first audit. The first audit was
8 done as of 1998.
9 MR. DORRIS: All right. And Your Honor, can we pick
03:15:54 **10** up here in the morning?
11 THE COURT: Yeah. That brings us right to 5:00.
12 Thank you, counsel. We will be adjourned until 9:30 tomorrow
13 morning.
14 MR. GINGOLD: Your Honor, I have a question.
03:16:04 **15** THE COURT: Yes, sir.
16 MR. GINGOLD: You indicated last week we may go to
17 Friday. If that's the case we'd like to be --
18 THE COURT: I thought I smiled when I said that.
19 (Laughter)
03:16:13 **20** MR. GINGOLD: One point, however. We brought in a lot
21 of witnesses to make sure there are no gaps, so it may mean we
22 may need to bleed over to Friday to finish off the last witness
23 on Thursday, if that's okay.
24 THE COURT: You're going to finish this case on
03:16:28 **25** Thursday?

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1 MR. GINGOLD: No, Your Honor. But we have a witness
2 that won't be able to come back.
3 THE COURT: Well, we'll talk about this in the
4 morning. I don't think we're going to sit on Friday, but we'll
03:16:38 **5** talk about it in the morning.
6 (Proceedings adjourned at 5:00 p.m.)
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7 EXHIBITS RECEIVED

8 Plaintiff Exhibit Nos. PPX 4284, 4484 1450
 Plaintiff Exhibit No. PPX 4486 1450
9 Plaintiff Exhibit Nos. PPX 4468, 4485 1452

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

BRYAN A. WAYNE