**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

SYSCO CORPORATION,

and

USF HOLDING CORP.,

and

US FOODS, INC.,

Defendants.

Civil Action No. 1:15-cv-00256-APM

**FILED UNDER SEAL**
(PUBLIC VERSION)

# MEMORANDUM OF DEFENDANTS SYSCO CORPORATION, USF HOLDING CORP., AND US FOODS, INC., IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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## I. INTRODUCTION

Food distribution in the United States is an intensely competitive industry. More than 16,000 companies—including broadline distributors, systems distributors, specialty distributors, and cash-and-carry stores—battle daily to sell and distribute food and related products to hundreds of thousands of customers: restaurants of all types, hotel franchises, residence facilities, hospitals, educational institutions, and company cafeterias. Customers demand and receive food distribution service individualized to their diverse needs.

There is no one-size-fits-all distribution model. Some customers may contract with distributors for both the purchase and distribution of their supplies. Chains and larger customers often contract directly with suppliers for the purchase of products and shipment to distribution facilities, using distributors only for warehousing and delivery. Some join Group Purchasing Organization (GPOs), which use immense, aggregated buying power to negotiate favorable contracts with suppliers and, similarly, use distributors only to store and deliver their products. Most mix and match these options: buying directly from the supplier for some products, using GPO membership for certain supplies, and purchasing yet others from distributors. Buyers continually adjust their buying strategies in pursuit of the best prices, quality, and service.

The food distribution business is fragmented, diffuse, and highly competitive. Data supplied by Technomic, an independent industry data repository, show that Sysco and US Foods (USF), combined, will have a market share of 27% after the merger, dropping to 25% after divestiture. But in an effort to obtain the presumption of illegality that comes from a large market share held by the merged entity, the FTC attempts to impose on this multifaceted industry a segmented order that does not exist in reality. The FTC alleges that the distribution industry is sharply divided among broadline distributors, specialty distributors, systems distributors, and cash-and-carry firms, and that these distribution channels do not compete or constrain each other.

From that mistaken premise the FTC conjures up two antitrust product markets, consisting of (1) broadline distribution services sold to so-called "National Customers" and (2) broadline distribution services sold to so-called "Local Customers." The FTC's economist, Dr. Israel, [redacted]. Only with these tortured, conflicting market analyses did the FTC purport to reduce the food distribution industry to a tenth of its true size and claim that the parties will garner a huge market share. No wonder two of five FTC Commissioners found no reason to believe this merger violates antitrust laws.

Modern antitrust law requires economic analyses that the FTC fails to provide. Dr. Israel's report lacks any rigorous analysis of customer demand and buying patterns. What empirical analysis the FTC can muster artificially excludes competitors and rests on assumptions so flawed as to yield local markets in which Sysco and USF allegedly would have 100% market share, in contradiction to real world facts. The FTC and its economist also ignored data proving actual substitution among channels. Antitrust analysis must be grounded in competitive reality, and the FTC's case is pure fiction.

The FTC's failure to establish relevant product and geographic markets precludes both the presumption of illegality it seeks and any structural inference of anticompetitive effects. In fact, the totality of the evidence reveals a vital marketplace. Customers' diverse and plentiful buying options will more than constrain the behavior of the merged entity. But there is more: the efficiencies that flow from this merger will push costs down, allowing for greater price competition than exists today, a result further enhanced by the divestiture of significant assets to

Performance Food Group (PFG). Finally, the equities in this case favor Sysco and USF because the merger is squarely in the best interests of foodservice businesses and end consumers.

Competition is the bedrock of our economy and preserving competition is the central objective of the antitrust laws. This merger enhances, not lessens, competition in the food distribution industry. The preliminary injunction should be denied.

## II. <u>STATEMENT OF FACTS</u>

Foodservice distribution is a $231 billion industry.[1] More than 16,000 companies provide food and food-related products to businesses that sell food to consumers outside the home.[2] Some foodservice distribution customers are familiar—local eateries, national and regional restaurant chains, franchised restaurants, government agencies, hospitals, and nursing homes. Some are less so—such as [redacted], a foodservice management company that itself contracts to supply food services to hospitals, airports, cafeterias, and large office buildings [redacted].[3] Customers come in all shapes and sizes, each with its own business model, differentiated menu, and target consumer.

Customer buying strategies are just as diverse. Some negotiate directly with manufacturers [redacted] to obtain favorable pricing, which also can include the pricing for shipping the product from the supplier location to a distribution center.[4] Under those arrangements, distributors such as Sysco and USF only provide drayage, warehousing product and trucking it to the customer. Some customers join GPOs, which negotiate contracts on behalf of their members, including agreements with one or more competing foodservice distributors to

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[1] [redacted] (Ex. 1).
[redacted] 127:2-13 (Ex. 2).
[3] Bresnahan Rpt. at 20 (Ex. 3).
[4] *Id.* at 73 (Ex. 3); [redacted] Dep. 124:15-125:4 (Ex. 4); [redacted] Dep. 20:12-21 (Ex. 5).

deliver products purchased at GPO-negotiated prices. Some customers purchase products from distributors such as Sysco or USF under a contract;[5] others negotiate prices weekly or daily on an item-by-item basis with local sales representatives.[6] Most customers combine strategies, contracting directly with a supplier for some products, buying some from a cash and carry like Restaurant Depot or a club store like Sam's Club, purchasing others from a distributor, and, for still others, taking advantage of GPO pricing. Customers vary their procurement strategies—and the products purchased under each—based on what best serves their own business interests.[7] Nothing in this industry is static: customers' procurement strategies frequently change as they modify menus, adjust business models, switch chefs, and find new and better deals for food supplies and delivery.[8] And competitors in the food distribution industry evolve and shift to meet customer demands, adjusting the number and variety of individual products (also called stock keeping units, or "SKUs") they offer, the quality of their products, their product focus, delivery options, geographic reach, and marketing support.

Depending on where the competitor falls along the spectra for these many characteristics, it may be labeled a broadline distributor,[9] a systems distributor,[10] a specialty distributor,[11] or a

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[5] [redacted] Dep. 83:13-21 (Ex. 8).
[7] *See, e.g.*, [redacted] Dep. 44:25-45:19 (Ex. 9); [redacted] Dep. 40:13-21 (Ex. 6).
[8] *See, e.g.*, [redacted] Dep. 87:2-21, 162:7-163:9 (Ex. 8) (compares broadline and specialty prices weekly).
[9] Broadline distributors "specialize in the sales and delivery of a wide range of products to foodservice companies." Bresnahan Rpt. at 19 (Ex. 3).
[10] Systems distributors "primarily sell and deliver to higher volume customers, frequently those with a large number of proprietary products." *Id.*
[11] Specialty distributors "generally offer fewer product categories than a broadline distributor, but may offer a broader assortment than broadline distributors within their specialty categories." *Id.* at 19-20.

cash-and-carry store.[12] These distinctions blur in practice. Even when customers purchase directly from distributors, they regularly use different combinations of options, often dividing their business regionally and by product type.[13] Indeed, the typical independent customer uses *twelve* different supply sources.[14] For example, a customer might negotiate directly with Kraft Foods for pasta, use a specialty distributor for meat, a cash-and-carry distributor like Restaurant Depot for cleaning supplies, and a broadline distributor for canned goods. Demand is also geographically divisible. Some of the largest customers have a nationwide footprint but divide their business regionally, some going so far as to enter into individual contracts with each supplier distribution center.[15]

GPOs have become formidable low cost competitors to foodservice distribution companies. When Sysco or USF sells both food products and delivery services to its customers, an opportunity exists to capture profit (as GPOs do) on the sale of the products. One of the benefits of the merger is to provide the merged entity greater buying power to negotiate lower food prices and pass those prices along to customers, increasing competition with GPOs.

The pressure from thousands of other foodservice distributors and wholesalers across the country has forced Sysco and USF to lower their operating costs in order to offer competitive prices. And the foodservice distribution industry, along with restaurants generally, has seen a

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[12] Cash-and-carry stores include warehouse stores like Restaurant Depot and club stores like Costco and Sam's Club. *Id.* at 20.

[13] *See, e.g.*, [redacted] Dep. 17:18-19:15, 110:6-8 (Ex. 4); [redacted] Dep. 23:24-24:08 (Ex. 5) [redacted]. [redacted] Dep. 29:4-30:1 (Ex. 6).

[15] *See* [redacted] (Ex. 10) [redacted]. For a graphical demonstration of the scale on which these individual contracts can operate, *see id.* [redacted] (Ex. 11) [redacted].

[redacted] customers and competitors to reduce prices.[17] The merger offers the combined company more purchasing volume, increased scale, and efficient routes, all of which will drive the costs of distribution and food purchases lower than either company could on its own.[18] Those lower costs will translate directly into lower prices for customers.[19]

At bottom, there is no one-size-fits all distribution model in the foodservice distribution industry. Customers create their own distribution mix using multiple providers. Pre-merger, Sysco has an industry revenue share of 17%. USF has about 10%. This share will shrink after the PFG divestiture of 11 strategically located USF distribution centers [redacted], and the combined Sysco-USF entity ultimately will account for about [redacted] of foodservice distribution sales.[20] There is no market power, no pre-merger duopoly, no post-merger monopoly, and, certainly, no basis for blocking this pro-competitive merger.

## III. <u>THE FTC BEARS THE BURDEN OF SHOWING THAT THE MERGER SHOULD BE ENJOINED</u>

When the FTC seeks to enjoin a merger, "[t]he issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy," because it "may prevent the transaction from ever being consummated." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (quotation marks omitted); *see also Mo. Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir. 1974) (injunction likely "spell[s] the doom of an agreed merger").

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[16] [redacted] (Ex. 12); [redacted] (Ex. 13).
[redacted] (Ex. 13).
[18] Hausman Rpt. ¶¶ 149-170 (Ex. 14); *see also id*. Tbl. 4 [redacted]; [redacted] Dep. 58:12-18, 89:2-15, 91:25-92:11, 105:24-108:15, 156:1-23, 162:3-16 (Ex. 15).
Hausman Rpt. ¶¶ 162-63 (Ex. 14).
[20] [redacted] projects that the combined entity will [redacted] *See* PX09125-002 (Ex. 16).

Indeed, no unconsummated merger has survived the issuance of a preliminary injunction and the Commission's lengthy review process. The FTC has acknowledged just how important a federal court injunction is—its recently-revised rules of practice make it likely that the FTC will end administrative proceedings if a federal court denies a preliminary injunction. FTC, Commission Approves Revisions to Its Rules of Practice (Mar. 13, 2015).[21] "Given the stakes," the FTC bears a heavy burden when it requests preliminary injunctive relief. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2007). This merger will not survive a lengthy administrative trial. This Court will decide the merger's fate.

The Court must determine that an injunction is "in the public interest," after "weighing the equities and considering the Commission's likelihood of ultimate success." 15 U.S.C. § 53(b). The FTC's likelihood of ultimate success is paramount: "absent a likelihood of success on the merits, equities alone will not justify an injunction." *Arch Coal*, 329 F. Supp. 2d at 116. To warrant an injunction, the FTC "must show a reasonable probability that the proposed transaction would substantially lessen competition in the future." *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998) (internal quotation omitted).[22] In other words, the FTC must establish that the probable effect of the merger will be substantially to lessen competition in the relevant antitrust markets. *See, e.g., Arch Coal*, 329 F. Supp. 2d at 117. And in assessing the FTC's evidence, the Court must "'exercise independent judgment'"—it cannot simply defer to

[21] Forthcoming in the Federal Register.

[22] Although the FTC correctly observes that Section 7 of the Clayton Act proscribes mergers whose effect "may be substantially to lessen competition," Mem. at 8 (quoting 15 U.S.C. § 18), the Supreme Court has explained that to satisfy this standard the FTC must show that "there is a reasonable probability that the merger will substantially lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000) ("the Commission must show that there is a 'reasonable probability' that the challenged acquisition will substantially lessen competition"); *FTC v. Staples*, 970 F. Supp. 1066, 1072 (D.D.C. 1997) (same). Even the Director of the FTC's Bureau of Competition acknowledges that "it is well settled that the FTC 'must show a reasonable probability that the proposed transaction would substantially lessen competition in the future.'" Harry Phillips, *An Interview with Deborah Feinstein*, Global Competition Review, Feb. 11, 2015.

the FTC. *FTC v. Weyerhaueser Co.*, 665 F.2d 1072, 1082 (D.C. Cir 1981) (quoting H. Rep. No. 624 at 31); *accord FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1051 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("The law does not allow the FTC to just snap its fingers and temporarily block a merger.").[23]

## IV. THE FTC CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

To establish a likelihood of ultimate success on the merits, the FTC must demonstrate: (1) a relevant product market; (2) a relevant geographic market; and (3) probable anticompetitive effects in these markets. *See United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 49-50 (D.D.C. 2011). Only if the FTC establishes its relevant markets and demonstrates undue concentration is it entitled to a presumption that the merger is illegal. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). Where the FTC is not entitled to this presumption, it must establish likely anticompetitive effects from the merger. *See, e.g.*, *H&R Block*, 833 F. Supp. 2d at 49-50. "[A] failure of proof in any respect will mean the transaction should not be enjoined." *Arch Coal*, 329 F. Supp. 2d at 116.

Defendants can rebut any showing of anticompetitive effects the FTC might make, since "a broad analysis of the market to determine any effects on competition is required." *Id.*; *see also United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974). Defendants can make this

[23] Some courts have characterized the FTC's burden under § 13(b) of the FTC Act as being lower than the traditional preliminary injunction standard, but that is only because the FTC is not required to show irreparable harm. *See Weyerhaueser*, 665 F.2d at 1082; *see also* Areeda et al., Antitrust Law § 325b ("When the FTC brings suit, it is sometimes said that irreparable harm is presumed, but probable success on the merits must still be proven.") (footnotes omitted). There is no warrant for diluting the likelihood of success standard, as two judges did in separate, non-precedential opinions in *Whole Foods*. That judgment "sets no precedent beyond the precise facts of the case." *Whole Foods*, No. 07-5276 (D.C. Cir. Nov. 21, 2008) (Ginsburg, J., concurring in denial of rehearing en banc) (quotations omitted). In any event, the FTC does not argue for a lower standard, and adopting that approach would undermine the statutory text, Congress's intent in enacting § 13(b), and the Supreme Court's decision in *Munaf v. Geren*, 553 U.S. 674 (2008). *See Whole Foods*, 548 F.3d at 1059-60 (Kavanaugh, J., dissenting); *see also Weyerhaueser*, 665 F.2d at 1082 ("Section 13(b) was not designed to innovate.").

showing in a number of ways. *See, e.g.*, *Arch Coal*, 329 F. Supp. 2d at 158 (unilateral price increase unlikely); *cf. United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001) (divestiture); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (entry and repositioning of competitors); *id.* at 98 (sophisticated customers); *Heinz*, 246 F.3d at 720 (procompetitive efficiencies). Injunctive relief is also improper when the equities weigh in favor of allowing the merger to proceed. *See Weyerhaueser*, 665 F.2d at 1081.

### A. THE FTC FAILS TO ESTABLISH A RELEVANT PRODUCT MARKET

A relevant product market is essential to the FTC's claim. *United States v. Marine Bancorp. Inc.*, 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is a necessary predicate to deciding whether a merger contravenes the Clayton Act.") (quotation marks omitted); *Cardinal Health*, 12 F. Supp. 2d at 45. A relevant product market "is necessary to identify that area of trade within which a defendant allegedly has acquired or will acquire an illegal monopolistic or oligopolistic position." *Arch Coal*, 329 F. Supp. 2d at 119. Without it, "an examination of a transaction's competitive effects is without context or meaning." *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995); *see also FTC v. Lab. Corp. of Am.*, No. CAVC 10-1873, 2011 WL 3100372, at *17 (C.D. Cal. Feb. 22, 2011) ("The failure to properly define a relevant market may lead to the dismissal of a Section 7 claim.").

A product market includes all functionally similar products to which customers could turn if defendants attempted to, post-merger, impose a small but significant price increase. *See, e.g.*, *Arch Coal*, 329 F. Supp. 2d at 119. A product market is determined through a rigorous exploration of demand, *i.e.*, "the reasonable interchangeability of use" of and the "cross-elasticity of demand" between defendants' product and competing products. *Brown Shoe*, 370 U.S. at 325 (1962). The key question is whether a hypothetical monopolist in the alleged market profitably could impose a small but significant and non-transitory increase in price (a SSNIP). *See, e.g.*, *Arch Coal*, 329 F. Supp. 2d at 120; *accord* U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines ("HMG") (2010) § 4.1.1.

The FTC alleges that broadline foodservice distribution services sold to "National Customers" is a relevant product market, Compl. ¶ 44; Mem. at 14, and that broadline foodservice distribution in local markets—*i.e.*, to "Local Customers"—is another, Compl. ¶¶ 40, 50; Mem. at 12-13, 22-23. In effect, the FTC isolates one distribution mode (broadline) from many competing options, and then further divides *that* alleged product market based on a distinction between sales to "National" and "Local" customers.[24]

This does not reflect marketplace dynamics and is gerrymandering, pure and simple. The effects are profound. By artificially isolating broadline distribution and then cleaving "National Customers" from the market, the FTC shrinks a roughly $230 billion industry to a tenth of its size and triples the companies' combined share, from a modest 27% to an astounding 78%.[25] So too for "Local Customers": only by defining the market so narrowly as to include only certain broadline distribution, excluding all other competition, can the FTC derive shares as high as 100%.[26] These contrived product markets must be rejected. The FTC's analysis violates several fundamental tenets of product market definition and contravenes basic principles of antitrust economics. As a result, the alleged markets are inconsistent with the facts. *See, e.g.*, *PepsiCo, Inc. v. Coca-Cola Co.*, 114 F. Supp. 2d 243, 249 (S.D.N.Y. 2000) (rejecting PepsiCo's

[24] That these alleged *product* markets refer to so-called "National" and "Local Customers," should not be confused with the FTC's contention that the corresponding *geographic* markets are the United States and various locales. The FTC uses the terms "National" and "Local" to describe the market for services in which defendants compete. *See* Mem. at 19 (alleging the "merger would harm competition for two types of customers"); *see also, e.g.*, Mem. at 22 (distinguishing between "local customers" (*i.e.*, product market) and "local areas" (*i.e.*, geographic market)).

[25] *See* Israel Rpt. ¶ 121 (Ex. 17) ([redacted]).

[26] *See id*. App. A Tbl. 43 (calculating market shares for broadline services sold to local customers).

contention that a bundle of product (fountain syrup) and services (system distribution) utilized by certain classes of customers constitutes a relevant market).

#### 1. The Distinction Between "National" And "Local" Customers Fails

##### a. No Economic Analysis Means No Market

The first flaw in the FTC's market analysis is fundamental. Because the law requires application of economics to market facts, expert analysis is required to define a product market. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1246 (11th Cir. 2002) ("Construction of the relevant market . . . must be based on expert testimony."); *Water Craft Mgmt. LLC v. Mercury Maine*, 361 F. Supp. 2d 518, 542-45 (M.D. La. 2004) (collecting cases).[27] Though Dr. Israel does purport to define a product market, his definition is at odds with the FTC's: what the Complaint calls relevant product markets Dr. Israel calls relevant geographic markets. Specifically, the Complaint asserts two discrete product markets: "broadline foodservice distribution services sold to 'National Customers,'" Compl. ¶ 44; Mem. at 14, and, separately, broadline distribution services sold to local customers, Compl. ¶ 50; Mem. at 12-13, 22-23. The phrases "National Customers" and "Local Customers" are elements of the alleged *product* markets. *See, e.g.*, *PepsiCo*, 114 F. Supp. 2d at 248 (*product* markets "may be narrowed by the type of consumer"); HMG § 4.1.4 (*product* markets can be defined around a "subset of customers").[28]

[27] Even if this failure does not foreclose the FTC's claim as a matter of law, it is still dispositive "as a practical matter" because the FTC cannot rebut Dr. Bresnahan's or Dr. Hausman's compelling analysis, *e.g.*, *Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 108 F. Supp. 2d 549, 576 n.16 (W.D. Va. 2000) ("[A]s a practical matter . . . the plaintiffs' lack of any witness to testify about antitrust economics, or to rebut the defendants' economists, proves fatal."), and because it is virtually "impossible to prove such a complex economic question without the assistance of a qualified expert, *viz.*, an economist," *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 223 F. Supp. 2d 718, 727 n.3 (D. Md. 2002) . As explained below, the FTC's non-expert evidence cannot compensate for this glaring gap in proof. *Drs. Steuer and Latham, P.A. v. Nat'l Med. Enters., Inc.*, 672 F. Supp. 1489, 1512 n.25 (D. S.C. 1987), *aff'd* 846 F.2d 70 (4th Cir. 1988) ("Failure to adduce expert testimony on competitive issues such as market definition augurs strongly in favor of granting summary judgment against an antitrust plaintiff.").

[28] *See also* Bresnahan Rpt. at 27 (Ex. 3) ("[T]he term 'national' is used by the FTC as a modifier in its *product market* definition.").

Dr. Israel calculates Defendants' shares for these alleged markets. *See* Israel Rpt. ¶ 121 Tbl. 1 (Ex. 17). [redacted].[29] This strongly suggests that, far from applying the "intellectual rigor that characterizes" antitrust economics, he worked backward from his desired outcome. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (unreliable expert testimony must be excluded). In short, the FTC's product markets hinge on a distinction between "National" and "Local" customers with zero economic analysis of any kind, much less the required SSNIP test.

Because the FTC has offered no expert analysis of the two product markets that form the foundation of its case, its claim fails entirely. *See, e.g.*, *Surgical Care Ctr. of Hammon, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 840 (5th Cir. 2002) (plaintiff failed to establish the relevant market where expert testimony was inadequate).

**b. A Product Market Premised On The Distinction Between "National" And "Local" Customers Is Legally And Factually Untenable**

The FTC divorces "National" from "Local" customers by arguing that "National Customers" prize various attributes that allegedly distinguish broadline distribution and favor a sole distributor with national capabilities, and thus have especially strong (inelastic) demand for

[29] *Compare* Israel Decl. ¶ 101 (Ex. 18) ([redacted]), *with* Israel Rpt. ¶ 121 (Ex. 17) ([redacted]).

that distribution channel. *See* Mem. at 19-21. But basic antitrust economics reject contrived product markets based on perceived "requirements" of alleged "core" customers:

> It is an economic truism that buyers do not have homogeneous preferences or demand elasticities for a given product within a relevant market, and there may often be some conceptual means of identifying classes of customers that appear to have inelastic demand for the product. The potential for this approach to swallow up the market definition principles established by the federal courts and the Commission is substantial.

*In re R.R. Donnelley & Sons Co.*, 120 FTC 36, 78 & n.65 (1995). Moreover, the industry does not recognize the FTC's classifications. As one broadline distributor said, [redacted][30]

That some customers favor broadline distribution services does not answer the question of whether a hypothetical monopolist profitably could impose a SSNIP. *See, e.g.*, *United States v. Sungard Data Sys.*, 172 F. Supp. 2d 172, 192 (D.D.C. 2001) (although the evidence showed that some customers could not switch to a substitute product, the government failed "to show whether this captive group is substantial enough that a hypothetical monopolist would find it profitable to impose such an increase in price").[31] In short, the FTC improperly attempts to conjure a market premised upon a few core customers who say they prefer the merging parties.[32]

The FTC's distinction between "National Customers" and "Local Customers" is factually and economically meaningless as well. *See, e.g.*, *Brown Shoe*, 370 U.S. at 336-37 (a credible market must "correspond to the commercial realities of the industry and be economically

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[30] [redacted] Dep. 77:12-15 (Ex. 19); *see also* [redacted] Dep. 44:8-24 (Ex. 5) [redacted]

[31] The D.C. Circuit's fractured opinion in *Whole Foods* is not to the contrary. Not only is *Whole Foods* not entitled to precedential weight, only Judge Brown's opinion adopted a core-customer approach to market definition. *See* 548 F.3d at 1041-49 (opinion of Tatel, J.); *id*. at 1062-63 (opinion of Kavanaugh, J.) (expressly rejecting "Judge Brown's emphasis on core customers").

[32] It would further run afoul of the above principle if the FTC were to attempt to isolate one the four "classes of National Customers" identified in its brief. *See* Mem. at 19.

significant") (quotation marks and footnote omitted); *Cardinal Health*, 12 F. Supp. 2d at 46 (same). [redacted][34] Indeed, if this distinction were economically meaningful, similarly situated customers would be similarly classified—but they are not.[35] For example, [redacted]. [redacted][37] By the FTC's logic, these customers *switch product markets* without changing the actual product (distribution services) they buy. Especially in a case like this, where the market's "contours are difficult to define," expert

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[33] Bresnahan Rpt. at 36 (Ex. 3) [redacted] Hausman Rpt. ¶ 31 (Ex. 14) [redacted] (Ex. 20).
[35] *See* Bresnahan Rpt. at 42-44, Exs. 8-9 (Ex. 3) [redacted].
[36] *Id.*
[37] *See, e.g.*, SYY003-000212 [redacted] (Ex. 21); Bresnahan Rpt. at 42 (Ex. 3).

analysis is critical. *Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905, 2008 WL 73689, at *10 n.13 (N.D. Cal. Jan. 5, 2008). But, on this issue, Dr. Israel offers none.

Also, "National Customers" are *not*, as the FTC posits, confined to using only the largest distributors. The FTC asserts that "National" broadline customers "typically" require: [redacted][38]

But that is not how customers included in the FTC's "National" market actually behave. For instance [redacted],[39] [redacted],[40] [redacted],[41] and [redacted][42] all operate regionally under multiple contracts, to name just a few.[43] [redacted][44] [redacted][45]

[38] [redacted] *see, e.g.*, [redacted] Dep. 78:16-79:19 (Ex. 22) [redacted] *see* [redacted] Dep. 160:24-167:16 (Ex. 23).
[39] Bresnahan Rpt. at 51, Ex. 12 (Ex. 3) [redacted].
[40] DLA, for example, breaks the nation into four large regions (West, South, East, Navy), which it further subdivides. *See* Defense Logistics Agency, CONUS Regions, available at https://www.troopsupport.dla.mil/subs/pv/regions/conus.asp (Ex. 24).
[41] *See* [redacted] SYS16299860, pp. 7, 10 (Ex. 25).
[42] [redacted] USF-10044399-401 at USF-10044399 [redacted] (Ex. 26).
[43] Indeed, the existence and success of DMA, a conglomeration of regional distributors, confirms that many so-called "National Customers" do business regionally.
[44] *See* [redacted], p. 20 (Ex. 10); Bresnahan Rpt. at 49, Ex. 11 (Ex. 3) [redacted]; [redacted] Dep. 95:4-23 (Ex. 4).
[45] [redacted] Dep. 31:20-32:6 (Ex. 23) [redacted]; *see also id.* at 84:12-18 [redacted]; SYY003-000036 (Ex. 27) [redacted].

Nor is it true that so-called "National Customers" require "a broadline distributor with national distribution capabilities." Mem. at 20. Many "National Customers" [redacted] as one customer told the FTC.[46] And even those who do not contract regionally do not *require* a foodservice distributor with numerous distribution centers nationwide.[47] Many "National Customers" prefer *fewer* distribution centers, since fewer distribution centers means higher volume per warehouse and thus lower freight costs from manufacturer to warehouse.[48] [redacted][49]

The FTC's motivation to divorce "National Customers" from "Local Customers" is obvious: Defendants' combined "market share" nearly triples, to 78%, in the FTC's contrived market. In reality, foodservice distribution is far more complex and dynamic than the FTC contends. Proposed product markets are deemed "economically meaningless" where the distinguishing features are merely "a spectrum of consumer choices." *W. Parcel Exp. v. United Parcel Serv. of Am., Inc.*, 65 F. Supp. 2d 1052, 1059-60 (N.D. Cal. 1998) (quotation marks omitted), *aff'd*, 190 F.3d 974 (9th Cir. 1999).[50] The "National Customer" with monolithic demand for national service from a sole provider is a creature entirely of the FTC's own making.

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[46] [redacted] Dep. 93:8-11, 19:5-9 (Ex. 28).
[47] Bresnahan Rpt. at 60 (Ex. 3).
[48] *See, e.g.*, [redacted] Dep. 55:22-56:1 (Ex. 29); [redacted] Dep. 172:25-173:7 (Ex. 30); *accord* Bresnahan Rpt. at 63-64 (Ex. 3) [redacted].
[49] *See, e.g.*, [redacted] (Ex. 31); [redacted] Dep. 94:8-104:20 (Ex. 22); *id.* at 113:4-10.
[50] *See also, e.g.*, *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (rejecting proposed product market of "premium ice creams" because "all grades of ice creams compete with one another for customer preference" and "the relevant market is ice cream generally").

### 2. The FTC Further Errs In Isolating Broadline Distribution From Other Channels

The FTC's attempt to subdivide a diverse and sprawling industry by severing broadline from the rest of the market suffers from two fatal flaws: (a) the FTC's evidence is grounded in an unrepresentative sample of subjective customer preferences for broadline distribution, and (b) the FTC fails to account for customers' demonstrable ability to spread their purchases freely across multiple distribution channels simultaneously.

#### a. The FTC Cannot Establish A Product Market Based On Customer Preferences

The FTC relies primarily on a small number of customers' subjective preferences[51] for broadline distribution. *See* Mem. at 12-13, 20-21 (citing cherry-picked customer testimony); Israel Rpt. ¶¶ 35-86 (Ex. 17) (same), ¶ 90 ([redacted]). Because customer *preferences* shed little light on customers' *ability* to substitute in response to a post-merger price increase, the vast majority of the FTC's proof is "largely unhelpful." *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1130-31 (N.D. Cal. 2004) ("[T]he issue is not what [products] the customers would *like* or *prefer* . . .; the issue is what they *could* do in the event of an anticompetitive price increase."); *Arch Coal*, 329 F. Supp. 2d at 122.[52]

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[51] *E.g.*, PX00485 ¶ 10 (Ex. 32); PX00419 ¶ 3 (Ex. 33); PX00435 ¶ 3 (Ex. 34); PX00407 ¶ 6 (Ex. 35); PX00442 ¶ 11 (Ex. 36); PX00405 ¶ 12 (Ex. 37); PX00439 ¶ 9 (Ex. 38).

[52] *See also Global Discount Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705 (S.D.N.Y. 1997) (Sotomayor J.) ("The plaintiff's argument is analogous to a contention that a consumer is 'locked into' Pepsi because she prefers the taste, or NBC because she prefers 'Friends,' 'Seinfeld,' and 'E.R.' A consumer might choose to purchase a certain product because the manufacturer has spent time and energy differentiating his or her creation from the panoply of products in the market, but at base, Pepsi is one of many sodas, and NBC is just another television network.").

The FTC also fails to establish that its customer witnesses accurately represent either of its proposed product markets.[53] *See, e.g.*, *Oracle*, 331 F. Supp. 2d at 1167 ("Drawing generalized conclusions about an extremely heterogeneous customer market based upon testimony from a small sample is not only unreliable, it is nearly impossible."); *Sungard*, 172 F. Supp. 2d at 182. The hundreds of thousands of customers purchasing foodservice distribution services are "an extremely heterogeneous group." *Id*. While a few cherry-picked customers may *prefer* not to switch distribution channels, the FTC has not shown that so few *could* make such a change that a monopolist's price increase would be profitable. *Id*. To the contrary: customers in both of the FTC's alleged markets testified to the abundance of competitive options.[54]

Indeed, while Dr. Israel purports to define a broadline distribution product market (utterly ignoring his unsupported distinction between "National" and "Local" customers) he applies little analysis to support his definition, and instead relies primarily on the same unrepresentative customer testimony. [redacted].[55] Instead, [redacted], he boldly asserts that

[53] In fact, the FTC's own submissions demonstrate that its evidence is non-representative. [redacted], Israel Rpt. ¶ 30 (Ex. 17), [redacted]. *See, e.g.*, [redacted] Dep. 94:4-13 (Ex. 30) [redacted]; [redacted] Supp. Decl. ¶ 4 (Ex. 39) [redacted] Decl. ¶¶ 3-6 (Ex. 40) [redacted]. In economic terms, [redacted] which must be true for a SSNIP to be profitable.

it is "[redacted]" whether broadline distribution is a relevant product market. *See, e.g.*, Israel Rpt. ¶¶ 35-92 (Ex. 17). This is speculation, not analysis.

### b. Customers Utilize Multiple Distribution Channels Simultaneously

Moreover, the FTC misunderstands customer behavior. *See PepsiCo*, 114 F. Supp. 2d at 251 ("In order to define the relevant market, courts should be guided by the commercial realities facing the [relevant customers], not only by the method of product distribution."). The FTC argues that various distribution channels are not in the relevant market because customers cannot satisfy *all* their foodservice distribution needs through that channel. *See generally* Mem. at 15-18. But that argument ignores the reality that customers simultaneously can, and routinely do, choose to patronize competitors of all stripes offering fungible goods through different but overlapping distribution channels.[56] *See Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1221 (10th Cir. 1986).[57] Thus, the relevant question under the antitrust laws is whether customers could divert enough of their demand to competitors in other channels that a SSNIP would be unprofitable. Whether a substitute distribution channel is a "comprehensive" substitute is irrelevant to that question.[58] Mem. at 16. *See* Bresnahan Rpt. at 121 (Ex. 3) ("If a customer

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[56] *See, e.g.*, [redacted] Dep. 187:8-11 (Ex. 41) [redacted]; [redacted] Dep. 97:8-11 (Ex. 42).

[57] *Westman* is strikingly similar to this case. There, the plaintiff's Sherman Act claim turned in part on its allegation that Hobart, a manufacturer of kitchen equipment, operated in an antitrust market defined as "one-stop shopping"—that is, "a method of marketing in which a distributor carries multiple lines of the same product as well as lines of complementary products, so as to provide all the needs of a food service operation." 796 F.2d at 1220. The Tenth Circuit rejected the plaintiff's narrowly-drawn market on the ground that, even if one-stop distribution was an effective or superior way to compete, the market could not exclude distributors with less extensive offerings where consumers satisfied a portion of their total demand from "non-one-stop-shopping' distributors." *Id.* at 1220-22. The *Westman* court held as a matter of law "that the relevant product market at a minimum consisted of the products sold by restaurant equipment dealers, whether or not those dealers carried a wide enough range of products and brands to be classed as 'one-stop shopping' distributors." *Id.* at 1221.

[58] *Compare, e.g.*, [redacted] Decl. ¶ 5 (Ex. 44) [redacted] *with* [redacted] Supp. Decl. ¶¶ 6-7 (Ex. 45) [redacted]

switches some of its purchases from, for example, a broadline distributor to a specialty distributor in response to a price increase at the broadline distributor, that loss of sales will certainly make the price increase less profitable and could make the price increase unprofitable."); *accord United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) ("We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities."). Customers in this industry are more than capable of using alternate channels to protect themselves from a price increase.

The FTC asks the Court to compare broadline distribution to other channels separately and individually. Mem. at 14-15 (systems); 16-17 (specialty); 17-18 (cash and carry). But in a market where customers simultaneously allocate demand among many distribution channels in widely varying degrees, the FTC's approach makes little sense. The proper analysis focuses on how much demand would be switched to all alternate distribution channels *from* broadline. *See Staples*, 970 F. Supp. at 1077-81 (comparing sales of office supply superstores with all "other sellers of office supplies").[59] And, as shown below, the record is clear that in both of the FTC's alleged markets, an increase in the price of broadline distribution services would be unprofitable.

### 3. The Merged Entity Could Not Raise Prices To The FTC's "National" Broadline Customers

Actual evidence of substitution across distribution channels demonstrates that a SSNIP in the FTC's "national broadline" market would not be profitable. Specifically, many "National

[redacted] *and* [redacted] Decl. ¶ 5 (Ex. 46) *with* [redacted] Supp. Decl. ¶¶ 5-6 (Ex. 47).

[59] *See also* HMG § 4.1.3 (Ex. 43) ("The hypothetical monopolist's incentive to raise prices depends . . . on the extent to which customers would likely substitute *away from* the products in the candidate market in response to" a SSNIP) (emphasis added); *see also id.* § 4.1.3 ("A price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute *away from* products in the candidate market.") (emphasis added); Bresnahan Rpt. at 9 (Ex. 3) ("If enough buyers included within a proposed relevant market can substitute *out* of it by buying from suppliers who are outside the defined market, the relevant market is defined too narrowly."); Hausman Rpt. ¶ 26 (Ex. 14) ("When the hypothetical monopolist increases its price, its profits increase on customers who continue to purchase its product, but it loses the previous profits on customers who discontinue their purchases.").

Customers" use broadline distribution to satisfy demand that they could easily reallocate to specialty distributors, which compete vigorously with broadliners.[60] [redacted] Speculation that using specialty distributors is impractical is contradicted by the many customers who effectively use a network of specialty distributors to satisfy a material portion of their overall demand.[63] *See* Bresnahan Rpt. at 87 (Ex. 3) ("From a competitive standpoint, 'national' customers with the ability to switch *some* of their purchases to specialty distributors can use that threat to discipline their broadline distributors.").

The same holds true for systems distribution. [redacted][65] Indeed, customer buying patterns make even the distinction between broadline and systems tenuous.[66] *See Oracle*, 331 F. Supp. 2d at 1120-21 ("[T]o the extent clear

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[60] *See, e.g.*, [redacted] Dep. 139:9-140:17 (Ex. 29) [redacted] Dep. 87:1-90:10, 180:20-181:11 (Ex. 23); *see also* Bresnahan Rpt. at 86-87, 90 (Ex. 3).

[61] [redacted] (Ex. 48).

[62] [redacted] (Ex. 49); *see also* [redacted] (Ex. 50) [redacted]; [redacted] SYS16322960 (Nov. 18, 2014) (Ex. 51) [redacted]

*See, e.g.*, Bresnahan Rpt. at 88, Ex. 24 and surrounding text (Ex. 3) [redacted]; *id*. at 88-89 [redacted]; [redacted] Ex. 52) [redacted] Dep. 36:24-37:7 (Ex. 29). [redacted] Dep. 18:7-14 (Ex. 28).

[65] [redacted] Dep. 37:14-20 (Ex. 4) [redacted].

[66] As Dr. Bresnahan demonstrates, the wide variance in how customers allocate their purchases between the two channels combined with the non-overlap of broadline and systems shipping locations prove false the FTC's assertion that "National" customers cannot substitute between them. Bresnahan Rpt. at 82-86, Exs. 21-23 (Ex. 3); *see also*,

breaks are difficult to identify, attempts to create defensible market boundaries are likely to be based on relatively vague product characteristics . . . [which] do not meet section 7's requirement that the relevant market be well-defined.") (quotation marks omitted). Thus, [redacted][67]

In sum, the FTC has not shown that a SSNIP in its "national broadline" market would be profitable. This approach yields a product market that is "defined too narrowly." HMG § 4.1.1.

#### 4. Broadline Distribution Services Sold To "Local Customers" Is Not A Product Market

The FTC does not take into account whether "Local Customers" could divert demand to competitor products, rendering a SSNIP unprofitable. *See Oracle*, 331 F. Supp. 2d at 1131.[68] Instead, the FTC presents a list of attributes that distinguish broadline distribution from each substitute, and on that basis argues that broadline distribution services sold to "Local Customers" is a market all its own. But the features that allegedly distinguish broadline distribution from its substitutes are virtually meaningless to "Local Customers," *see Westman*, 796 F.2d at 1220 ("Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful.") (quotation marks omitted),[69] and the record is clear that "Local Customers" substitute freely across distribution channels.[70]

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*e.g.*, [redacted] Dep. 48:24-49:5 (Ex. 29) [redacted]; [redacted] Dep. 66:10-18 (Ex. 9).

Bresnahan Rpt. at 84, Ex. 22 (Ex. 3).

[68] Bresnahan Rpt. at 114 (Ex. 3) (noting "'local' customers—like "national" customers—do not need to move their entire business away from Sysco and USF to an alternative distributor to take advantage of competition").

[69] Bresnahan Rpt. at 120 (Ex. 3) ("What matters for assessing competition between channels is not the characteristics of the channels, but rather how customers value those characteristics and how customers therefore substitute among channels."); *Cardinal Health*, 12 F. Supp. 2d at 46 ("when one product is a reasonable substitute

The FTC claims that specialty distribution is not a "comprehensive" substitute, Mem. at 16, because customers could "not economically use a network of specialty distributors." Mem. at 17. But the FTC misses the fact that [redacted][71] As one broadline distributor explained: [redacted][72] *See Westman*, 796 F.2d at 1220 (error to "focus[ ] on the system of product distribution").

So too for cash and carry. The FTC excludes them because "[t]hey lack the full breadth of items that many customers need, contracted and centralized purchasing, and consistent products across all facilities." Mem. at 17. But whether cash-and-carry stores provide the "full breadth" of needed items is irrelevant, as explained above. Moreover, not only is the FTC inaccurate in its assertion that cash-and-carry stores do not deliver,[73] self-distribution *is* a meaningful option for many "Local Customers."[74] In reality, [redacted]

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for the other, it is to be included in the same relevant product market even though the products themselves are not the same").

[70] *See* Bresnahan Rpt. at 114 (Ex. 3) ("Many 'local' customers purchase distribution services by considering prices from multiple broadline and specialty distributors as well as cash-and-carry stores across their portfolio of purchases *on a weekly if not daily basis*, frequently purchasing different items from whichever distributor and distribution channel offers the best pricing.").

[71] [redacted] Dep. 49:13-50:12 (Ex. 5); [redacted] Dep. 83:15-21 (Ex. 8) [redacted]; [redacted] Dep. 41:11-14 [redacted] (Ex. 54); [redacted] Decl. ¶¶ 3-5 (Ex. 55) [redacted]); *accord* [redacted]) Dep. 75:24-76:3 [redacted] (Ex. 58).

[redacted] Dep. 61:9-10 (Ex. 9).

[73] [redacted] USF-00510387 at USF-00510390 (Apr. 1, 2013) (Ex. 56) [redacted] Dep. 89:5-7 (Ex. 57).

*See, e.g.*, [redacted] Dep. 80:21-24 (Ex. 58) [redacted]; [redacted] Dep. 39:6-9 (Ex. 59).

[redacted][76] Indeed, substitution exists [redacted][77] That is, cash and carry competes head on with broadline for local customers, and often wins.[78] At bottom, competition for local customers is [redacted][79] [redacted][80]

### B. THE FTC ALSO FAILS TO ESTABLISH RELEVANT GEOGRAPHIC MARKETS

Relevant geographic markets are determined by available supply. To establish a relevant geographic market, "the FTC must present evidence on the critical question of *where* consumers [in the product market] could practicably turn for alternative services should the merger be consummated and prices become anticompetitive." *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999) (emphasis added). The FTC fails to do so in alleging a nationwide geographic market for its "National Customers" and 32 tightly-drawn small locales for "Local Customers." Compl. ¶¶ 45-55, Appx. A; Mem at 18-23. In defining both markets, the FTC fails

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[75] *See* [redacted] (Ex. 60) [redacted] (Ex. 61) [redacted].

Schreibman (USF) Dep. 106:19-20 (Ex. 42). [redacted] (Ex. 62).

[redacted] 119:24-120:1 (Ex. 42); *id.* at 116:7-9.

[78] *See, e.g.*, [redacted] Dep. 105:6-8 (Ex. 42) [redacted]; [redacted] (Ex. 63) [redacted] Dep. 110:6-21 (Ex. 9).

[80] *Id*.

to account for the inherently local nature of foodservice distribution: it overlooks the many options available to "National Customers" in regional and local markets, and fails to draw its "local markets" broadly enough to include all goods that "compete on substantial parity" with the goods that will allegedly become anticompetitive owing to the merger. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1026-27 (10th Cir. 2002) (citations and internal quotations omitted).

### 1. There Is No Relevant Nationwide Geographic Market

The FTC's nationwide geographic market fails for similar reasons that its "National Customer" product market fails. "National Customers" contract regionally or even locally for foodservices, and prices vary across regional and local geographic markets in response to *regional* and *local* competition and customer demands,[81] which bars the finding of a nationwide geographic market, *see Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, No. H-05-3394, 2008 WL 7356272, at *10 (S.D. Tex. Nov. 25, 2008) (plaintiffs failed to allege a nationwide geographic market for casket sales where "[t]he evidence clearly demonstrates that casket prices vary across geographic markets and even within the same funeral chain"), and underscores the FTC's use of an economically meaningless *administrative* label applied to heterogeneous customers, *see E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 442-43 (4th Cir. 2011) (geographic market must be defined in relation to "commercial realities," specifically, "factors bearing upon where customers might realistically look to buy the product").

Tellingly, no evidence supports the FTC's assertion that, in a market for "National" foodservice customers, "prices within different parts of the continental United States[] tend towards uniformity" or that "changes in the price of the product in one area will affect prices in

81 [redacted] Bresnahan Rpt. at 56 (Ex. 3).

another area"—evidence that would be available were the foodservice industry for so-called "National Customers" a true nationwide geographic market. *See Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315, 321-22 (N.D. Ohio 1981); *cf. Grinnell*, 384 U.S. at 575 (finding a nationwide market for security systems where prices and rates were set centrally).

**2. The FTC Fails To Establish Relevant Local Geographic Markets**

The Complaint lists 32 geographic areas in which Sysco and USF allegedly have large shares. Compl. ¶ 50. These "markets," defined as "the overlapping trade areas of the Defendants' distribution centers (i.e., the locations of the local customers that could be served by both Defendants distribution centers)," [redacted]. This arbitrary methodology, which for most markets in question is the *only* evidence the FTC has presented to support its allegations of local market anticompetitive harm, conflicts with the market realities and with the FTC's own Merger Guidelines.[83] Dr. Israel also ignores [redacted]. In the four markets for which the FTC has presented *any* evidence beyond Dr. Israel's flawed market share calculations (Raleigh/Durham,

[82] More precisely, Dr. Israel identifies a "draw area" around each Sysco and USF broadline distribution center—*i.e.*, the smallest circle centered on the distribution center that contains a certain percent of the sales made by that center. *See* Bresnahan Rpt. at 130 (Ex. 3).

[83] Section 4.2.2 of the Merger Guidelines ("Geographic Markets Based on the Locations of Customers") is absolutely clear: "When the geographic market is defined based on customer locations, sales made to those customers are counted, *regardless of the location of the supplier making those sales*." HMG § 4.2.2 (Ex. 43) (emphasis added). Dr. Israel, by contrast, excludes all suppliers outside his overlapping circles, precisely *because of* the location of the supplier making those sales. This direct contradiction with the Merger Guidelines, which he allegedly applies, is likely explained by the fact that he uses the *wrong section* of those Guidelines. *See, e.g.*, Israel Rpt. ¶¶ 95, 99 (Ex. 17) (citing HMG § 4.1.4 ("*Product Market* Definition with Targeted Customers")) (emphasis added).

Columbia/Charleston, Omaha, and Southwest Virginia) there is overwhelming evidence of robust competition.

a. **Dr. Israel's Arbitrary "Draw Area" Methodology**

The FTC "fail[s] to address a critical legal question: where could consumers of the product . . . *practically turn for alternative sources of the product.*" *Bathke v. Casey's Gen. Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995) (internal quotation and citation omitted).[84] The FTC's circle drawing exercise does not denote any functional limitation on competitors' abilities to enter and compete, or any restrictions on customers' abilities to shop around for alternate vendors. Instead, it "appears to assume that no competitor would drive farther to serve a Sysco or USF customer than Sysco or USF currently drives to serve that customer." Bresnahan Rpt. at 131 (Ex. 3). But "[t]his is an ad hoc and demonstrably incorrect assumption. . . . Sysco and USF competitors are currently driving farther to serve customers in the Sysco-USF overlap areas." *Id.*

Take San Diego. The FTC alleges that Defendants command the *entire* foodservice distribution industry in San Diego. Not so. Putting aside the obvious point that many local customers can and do satisfy their needs from sources other than broadliners, the FTC overlooks the fact that other broadline suppliers operate in San Diego. [redacted][85] [redacted]

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[84] This is conceptually the same as the SSNIP test, which provides that "[i]f enough consumers would respond to a SSNIP by purchasing the product from outside the proposed geographic market, making the SSNIP unprofitable, the proposed [geographic] market definition is too narrow." *St. Alphonsus Med. Ctr. Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015).

[85] [redacted] (Ex. 62).

[redacted][86]

[redacted][89] In other words, customers in San Diego can and do turn to distributors in Los Angeles for competitive pricing. *See Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1017 (6th Cir. 1999) ("[W]hen the evidence indicates that a large proportion of consumers within the proposed area in fact turn to alternative sources of supply outside the proposed area, the market boundaries posited by the plaintiff must be rejected.").

Additionally, Dr. Israel errs in counting solely "[redacted]," though merger law is inherently forward looking. *Freeman Hosp.*, 69 F.3d at 270 (rejecting geographic market definition that failed to consider where consumers would seek medical care after the merger). In truth, "[e]very local area has some distributors who would drive a few miles farther than they do today and offer sales in those areas if the return to doing so were higher." Bresnahan Rpt. at 132. And for customers, [redacted][90] [redacted]

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[86] *Id.* at [redacted].

[87] [redacted] (Ex. 64).

[88] [redacted] (Ex. 65).

[89] [redacted] (Ex. 66).

[90] [redacted] Dep. 132:11-23 (Ex. 67); [redacted] Dep. 11:20-12:8 (Ex. 68).

[91] *Cf.* [redacted] Dep. 128:6-10 (Ex. 68).

Perhaps the clearest evidence that distributors from outside the FTC's circles can and do "compete on substantial parity" comes from a macroscopic look at where "Local Customers" turn when they switch away from Sysco and USF. *See Lantec*, 306 F.3d at 1027. [redacted] Bresnahan Rpt. at 109 (Ex. 3).

The FTC incorrectly asserts that "local customers turn only to broadline distributors located within approximately 150 miles of their foodservice location, and sometimes much closer in dense metropolitan areas." Mem. at 22. The FTC's overlapping circles merely indicate a portion of the areas currently served by both Defendants. So what? Competitors, including Sysco and USF, already travel far beyond the purported "trade areas" to compete for customers.[93] *See Bathke*, 64 F.3d at 346 ("trade area" is the distance a customer will travel for a particular vendor, whereas "relevant market" is the area customers look for alternatives).

b. **Dr. Israel Does Not Account For The PFG Divestiture**

Distribution centers are being divested in seven of the FTC's alleged local markets—San Diego, Las Vegas, Kansas City, Minneapolis, San Francisco, Cleveland, and Salt Lake City. Accordingly, an increase in concentration or market share cannot occur in these markets. [redacted][94]

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[92] [redacted] Dep. 132:11-23 (Ex. 67). Travel distances are far greater than the FTC assumes. *See, e.g.*, [redacted] Dep. 66:15-20 (Ex. 53) [redacted].

[93] *See* Bresnahan Rpt. at 131-40 (Ex. 3).

[94] *See* [redacted] Supp. Decl. ¶¶ 2-4 (Ex. 69); [redacted] Supp. Decl. ¶¶ 2-6 (Ex. 70); [redacted] Supp. Decl. ¶¶ 2-5 (Ex. 71).

### c. Evidence From Specific Local Markets Demonstrates Robust Competition

The FTC offered specific evidence in only four markets. Competition is varied and robust in each.

#### (1) Columbia/Charleston, South Carolina

Columbia/Charleston is a hotbed of competition. Broadliners like PFG, [redacted][95] [redacted],[96] [redacted],[97] [redacted],[98] and [redacted],[99] cash-and-carry stores like [redacted] and a group of vibrant local specialty food distributors[101] compete with Sysco and USF on a product-by-product basis. [redacted][102]

[redacted] Seeking to expand its foothold, PFG acquired Institution Food House (IFH), "the largest independently owned broad-line food service distributor based in the

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[95] [redacted] Decl. ¶ 3 (Ex. 72).
[96] [redacted] Decl. ¶¶ 6, 8 (Ex. 73).
[97] *Id.*
[98] [redacted] Dep. 59:7-14 (Ex. 74).
[99] Pate Dawson has strengthened its position in South Carolina with the recent acquisition of Southern Foods. *See* "Pate Dawson Acquires Southern Foods Assets," Triad Business Journal (Jul. 2, 2010) (*available at* http://www.bizjournals.com/triad/stories/2010/06/28/daily57.html (Ex. 75).
[100] [redacted] Decl. ¶ 6 (Ex. 72).
[101] [redacted] Dep.135:13-19, 151:6-21 (Ex. 78); *see also* [redacted] Dep. 67:25-69:3 (Ex. 76) [redacted]
*See, e.g.*, [redacted] Dep. 88:8-91:6 (Ex. 76) [redacted]; [redacted] Dep. 101:7-105:12 (Ex. 77).

Carolinas" in 2012,[103] [redacted] Competition will intensify when Gordon opens a new distribution center outside of Charlotte this fall.[107] Customers are confident that they could [redacted] should Sysco or USF raise theirs.[108]

(2) <u>Raleigh/Durham, North Carolina</u>

[redacted]

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[103] "Performance Food Group to Acquire Institution Food House, Inc.," BusinessWire (May 30, 2012, 4:00 p.m.) http://www.businesswire.com/news/home/20120530006440/en/Performance-Food-Group-Acquire-Institution-Food-House#.VQntM47F8R0 (Ex. 79).

[104] [redacted] Ex. 80).

[redacted] (Ex. 81) [redacted] .

[redacted] (Ex. 83).

[107] Press Release, "Gordon Food Service Announces Expansion Into North Carolina" (Oct. 27, 2014), available at https://www.gfs.com/en/about-us/news-and-store-events/gordon-food-service-announces-expansion-into-north-carolina (Ex. 85).

[108] [redacted] Decl. ¶¶ 6, 8 (Ex. 73).

[109] *See, e.g.*, [redacted] Dep. 116:1-25 (Ex. 86) [redacted] ; 123:16-124:20 [redacted] ; [redacted] Dep. 49:24-50:23; 95:5-96:19 (Ex. 87).

[redacted] Dep. 29:14-32:9 (Ex. 88).

[111] *Id.* at 28:7-11, 119:9-12.

[112] *Id.* at 31:25-32:9, 67:2-11.

In addition, broadline distributors other than Sysco and USF (including [redacted]) compete in this market.[113] Broadline competition in the area is *increasing*: for example, Gordon recently announced the opening of a distribution center in nearby Charlotte [redacted] The same holds true for specialty distribution and cash and carry: indeed, much like Gordon, [redacted].[115] Many customers—including several of the FTC's declarants—believe the merger may lower prices and improve service, as the merged entity takes advantage of a streamlined distribution network and increased purchasing power with manufacturers.[116] And they agree that if they become dissatisfied with the merged entity's prices or services, they can readily move all or part of their business to other options.[117]

(3) Omaha, Nebraska/Council Bluffs, Iowa

[redacted] the FTC argues that customers lack alternative broadline distribution options in Omaha and Council Bluffs. [redacted]

[113] *See, e.g.*, *id.* at 30:16-22.
[114] *See* [redacted] Dep. 83:3-9 (Ex. 89). [redacted] *See Oracle*, 331 F. Supp. 2d at 1131 (holding "unsubstantiated customer apprehensions do not substitute for hard evidence" and finding inadequate customer preferences speculation that "was not backed up by serious analysis that they had themselves performed or evidence they presented. . . . [E]ach testified, with a kind of rote, that they would have no choice but to accept a ten percent price increase by a merged Oracle/PeopleSoft. But none gave testimony about the cost of alternatives to the hypothetical price increase. . . .").
[115] *See* [redacted] Dep. 93:20-94:17 (Ex. 86); [redacted] Decl. ¶ 6 (Ex. 72); [redacted] Decl. ¶¶ 5-6 (Ex. 90); [redacted] Dep. 89:11-90:14 (Ex. 89).
*See* [redacted] Dep. 97:3-98:9 (Ex. 91); [redacted] Decl. ¶ 6 (Ex. 44); [redacted] Decl. ¶ 5 (Ex. 92); [redacted] Decl. ¶ 6 (Ex. 93); [redacted] Decl. ¶ 8 (Ex. 72).
[117] *See* [redacted] Dep. 133:22-135:15 (Ex. 86); [redacted] Decl. ¶¶ 2-3 (Ex. 92); [redacted] Decl. ¶¶ 3-4 (Ex. 44); [redacted] Decl. ¶ 7 (Ex. 72).
[118] [redacted] Decl. ¶ 6 (Ex. 55).

[redacted] Customers in Omaha/Council Bluffs have a deep stable of competitive options, including a recent influx of broadliners.[125] [redacted][126]

(4) Southwest Virginia

Southwest Virginia is the same story. Sysco and USF compete vigorously with an array of large and small broadliners, including [redacted],

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[119] *See, e.g.,* [redacted] Dep. 46:1-23, 47:19-48:4 (Ex. 95); [redacted] Dep. 25:24-26:16 (Ex. 96).

[120] *See, e.g.,* [redacted] Dep. 25:24-26:16 (Ex. 96) [redacted].

[121] *See* [redacted] Dep. 65:25-67:11, 72:10-20 (Ex. 97); *see also id.* 160:20-161:6 [redacted] Dep. 54:20-25 (Ex. 59) [redacted].

[redacted] *See e.g.,* [redacted] Dep. 24:23-25:4, 26:8-27:23 (Ex. 59) [redacted] Dep. 89:20-90:4, 114:5-115:5 (Ex. 97).

[124] *See* Bresnahan Rpt. at 139 Ex. 41 (Ex. 3) [redacted] *See id.* at 137-140.

[redacted] *See* [redacted] Decl. ¶¶ 2, 5 (Ex. 55); [redacted] Decl. ¶¶ 5, 10 (Ex. 98); [redacted] Decl. ¶ 10 (Ex. 99).

[redacted] *See* [redacted] Supp. Decl. ¶ 6 (Ex. 100) [redacted] Dep. 18:19-19:13 (Ex. 59).

[redacted].[127] [redacted] Scores of specialty players[130] and cash-and-carry firms[131] compete as well, exerting significant downward pressures on prices. As one local restaurateur put it, [redacted][132]

[redacted]

[127] *See, e.g.*, [redacted] Dep.70:15-25 (Ex. 102); [redacted] Dep. 72:20-24 (Ex. 103); [redacted] Decl. ¶5 (Ex. 104); [redacted] Decl. ¶¶ 2-5 (Ex. 105); [redacted] Decl. ¶¶ 7-9 (Ex. 106); [redacted] Decl. ¶ 5 (Ex. 107).

[128] [redacted] (Ex. 109) [redacted] (Ex. 110) [redacted].

*See, e.g.*, [redacted] Decl. ¶ 7 (Ex. 106); [redacted] Decl. ¶ 5 (Ex. 107); [redacted] Decl. ¶ 5 (Ex. 111); [redacted] Decl. ¶ 5 (Ex. 112); [redacted] Dep. 13:10-23, 17:19-18:6, 20:21-21:6, 23:24-24:10, 25:19-24, 40:19-41:14 (Ex. 54); [redacted] Dep. 40:15-43:1, 55:25-56:13, 107:14-107:23 (Ex. 67); [redacted] Dep. 60:7-67:24, 84:1-86:2 (Ex. 113).

[131] *See* [redacted] Decl. ¶ 5 (Ex. 114); [redacted] (Ex. 115). [redacted] Decl. ¶ 9 (Ex. 112); *see also id.* at ¶¶ 8-10; [redacted] Decl. ¶ 5 (Ex. 108); [redacted] Decl. ¶¶ 9-10 (Ex. 116); [redacted] Decl. ¶ 5 (Ex. 107).

[133] *See* [redacted] Dep. 51:12-52:23, 57:17-23, 86:22-87:7, 101:25-102:4, 127:25-129:18, 148:5-149:16 (Ex. 117).

[134] *See* [redacted] Dep. 57:20:23, 58:10-16, 126:9-13, 127:22-128:5 (Ex. 54).

[redacted][135] *Oracle*, 331 F. Supp. 2d at 1167 ("the court cannot take the self-interested testimony of five companies which chose to eliminate SAP from consideration, and from that sample draw the general conclusion that SAP does not present a competitive alternative to Oracle and PeopleSoft"). [redacted] The resounding message from this region is that customers presently utilize many specialty distributors that compete with Sysco and USF,[137] and that cash and carry is a viable competitive option.[138]

### C. THE FTC FAILS TO ESTABLISH ACTUAL ANTICOMPETITIVE EFFECTS

Try as it may, the FTC cannot grab its brass ring: a structural presumption of illegality. The FTC's HHI calculations, which the FTC cites for this presumption, are based on shares in markets that do not exist. *Heinz*, 246 F.3d at 716-17 & n.10. This is a huge problem for the FTC: no court has ***ever*** enjoined a merger where the government could not establish its prima facie case. Without a structural presumption, the FTC must show actual anticompetitive effects on a forward-looking basis. The FTC fails to do so. The FTC relies on (1) the elimination of head to head competition between the two firms and (2) [redacted] Both allegations fail.

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[135] [redacted] Dep. 156:10-16, 158:7-161:19 (Ex. 67); [redacted] Dep. 140:11-140:22 (Ex. 58); [redacted] Dep. 88:17-90:14 (Ex. 113).

[136] *See* [redacted] Dep. 100:15-19 (Ex. 58); [redacted] Dep. 108:13-17 (Ex. 54); [redacted] Dep. 155:23-156:1 (Ex. 67).

*See* [redacted] Dep. 13:15-19, 15:10-20, 17:19-23, 20:21-21:6, 24:310, 25:19-24, 40:19-41:14, 47:19-49:7 (Ex. 54); [redacted] Dep. 40:15-43:1, 55:25-56:13, 107:15-111:25 (Ex. 67); [redacted] Dep. 67:20-24 (Ex. 113); [redacted] Dep. 75:16-76:3 (Ex. 58).

[138] *See* [redacted] Dep. 10:9-14, 15:3-6, 40:14-18, 61:17-25 (Ex. 54); [redacted] Dep. 27:4-19, 62:11-13, 99:20-100:1, 140:24-141:3 (Ex. 67); [redacted] Dep.76:14-19, 80:14-81:22, 129:20-130:9, 133:16-22 (Ex. 58).

By definition, the current competition between Sysco and USF will end, but that does not make the FTC's case. *See Malaney v. UAL Corp.*, No 3:10-cv-02858, 2010 WL 3790296, at *7 n.11 (N.D. Cal. Sep. 27, 2010) ("[T]here is no support for the notion that, merely by removing one competitor, any horizontal merger . . . will be anticompetitive and thereby violate Section 7[.]"). The evidence not only will show that the merger will not reduce competition, it will make the merged entity more competitive, and the divestiture to PFG will enhance competition.

### 1. The FTC's Unilateral Effects Theory Fails

The FTC appears to rely on a so-called unilateral effects theory, in which Sysco and USF allegedly are closest substitutes for many customers and, for these customers, the merger will reduce competition substantially. *See* HMG § 6.1. As a matter of law, three conditions are necessary to establish a unilateral effects claim: the defendants compete in a differentiated market; the defendants' products are customers' top two choices; and it is unlikely that other firms (existing or new) will reposition themselves to offer close substitutes. *See Oracle*, 331 F. Supp. 2d at 1117-18. None of those conditions applies.

First, foodservice customers are not a homogenous group, and the FTC has failed to demonstrate that any particular distributor's characteristics make it unique, much less that all other distributors are such distant substitutes that the merged company could raise its prices without losing sufficient customers to make a price increase unprofitable.[139] The majority of the FTC's "National Customers" rely on distributors simply to provide a drayage function. They procure foodservice products by negotiating directly with their suppliers and rely on distributors

[139] *See* Bresnahan Rpt. at 66 (Ex. 3) (demonstrating that Sysco and USF are not uniquely close substitutes); *see also id.* at 109.

to warehouse and deliver those products to their locations.[140] But a truck is a truck and a warehouse is a warehouse, and the industry offers both in droves, making this merger "unlikely to generate substantial unilateral price increases." HMG § 6.1. And the merged entity's size is not a competitive advantage, because [redacted]. When it comes to "Local Customers," Sysco's and USF's size attributes are irrelevant: Sysco having distribution centers in other states is of no import to a local restauranteur. Thus, in local markets, the FTC's theory of harm would require it to show that local restaurants will have no real options post-merger. The facts do not permit such a showing.

Second, the FTC cannot show that Sysco and USF are customers' top two choices.[141] [redacted] the conclusions that are premised on this model are inapplicable. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997) (a court properly rejects expert opinion where "there is simply too great an analytical gap between the data and the opinion proffered").

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[140] [redacted] Dep. 128:3-128:7 (Ex. 22); [redacted] Dep. 83:20-84:6 (Ex. 118); [redacted] Dep. 155:20-156:3 (Ex. 4); [redacted] Dep. 35:12-16 (Ex. 29).
[141] [redacted]
[142] *Id.* ¶¶ 75-78 and underlying evidence.
[143] *Id.*
[144] *Id.* ¶ 74.

Third, there is ample evidence that other competitors will reposition themselves to compete. *See* pp. 39-41, *infra*. Ultimately, the FTC's case "give[s] an inaccurate prediction of the proposed acquisition's probable effect on competition." *Staples*, 970 F. Supp. at 1083. For all the reasons below, the merger will be procompetitive.

2. **The PFG Divestiture Enhances Competition**

The proposed merger's effect on competition must be analyzed with reference to the divestitures to PFG. A divestiture's effectiveness is guided by whether the transaction "replace[s] the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger [market share] levels." Antitrust Division, U.S. Dep't of Justice, Policy Guide to Merger Remedies at 5 (Oct. 2004). The FTC ignores these considerations.

PFG will acquire 11 USF distribution centers [redacted][145] In practical terms, this expansion will allow PFG, already the third largest distributor and a formidable competitor in the east, the majority of USF's distribution centers west of the Mississippi. This will allow PFG to expand its [redacted] *See* Bresnahan Rpt. at 95, Ex. 26 (Ex. 3).

The FTC argues PFG will still have too few distribution centers, Mem. at 34, but the effectiveness of a supplier is not correlated to the number of distribution centers it operates. The success of a broadline distributor actually hinges on operational *efficiency*, not size. *See, e.g.*,

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[145] [redacted] (Ex. 109). *Id.*

*United States v. Syufy Enters.*, 903 F.2d 659, 670-71 (9th Cir. 1990) ("[W]hile size no doubt provides significant business advantages, it can also have very substantial drawbacks, such as increased management costs and other diseconomies of scale."). A distribution company can reduce its overall cost by maximizing the use of full truckloads, even if the truck ultimately drives more miles to deliver the products to the customer. [redacted]. And it is this operational efficiency that will make it a potent competitor to the merged entity. *See United States v. Gillette Co*., 828 F. Supp. 78, 85 n.11 (D.D.C. 1993) (divestiture serves as a check on the merged entity's ability to raise prices).

### 3. **Competition Will Constrain Post-Merger Pricing**

Where "non-merging firms [are] able to reposition their products to offer close substitutes for the products offered by the merging firms," anticompetitive effects are less likely. HMG § 6.1; *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1232 (8th Cir. 1987) (the number of current competitors "indicates lack of market power."). Here, "[t]he record strongly suggests that there [is] significant interbrand competition," *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1005 (5th Cir. 1981), and significant inter-channel competition.

First, it is clear that other distributors that currently compete with Sysco and USF will continue to compete for all customers. For example, [redacted] all currently compete head-to-head with Sysco and USF to serve large customers.[147] PFG already serves customers of all sizes,[148] and the divestiture will only strengthen PFG's competitive posture. Likewise, Gordon has a strong presence in the Midwest, Florida, and Southern New England, recently

147 [redacted]
148 [redacted]

opened a facility in Kannapolis, North Carolina,[149] and is [redacted][151] Reinhart, too, [redacted] and its capabilities [redacted] in effectively constraining Sysco and USF.[152] [redacted][153] Of course, since many "national" companies bid regionally, regional distributors currently pose a competitive threat as well: [redacted][154]

Second, as detailed above, inter-channel competition will constrain post-merger pricing. *See Tenet Health Care*, 186 F.3d at 1055. Customers choose whatever *combination* of distributors provide goods most cheaply and efficiently to meet their needs, and inter-channel competition is among the distinguishing characteristics of the industry. Specialty, systems, and cash and carry successfully compete with broadline distributors and can discipline broadline pricing. *See Westman*, 796 F.2d at 1220. Moreover, [redacted]

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149 https://www.gfs.com/en/about-us/news-and-store-events/gordon-food-service-announces-expansion-into-north-carolina (Ex. 85).
150 Bresnahan Rpt. at 95-98 (Ex. 3). [redacted] Ex. 119).
[redacted] (Ex. 120).
[redacted] (Ex. 121).
[redacted] 26:22-27:6 (Ex. 103).
154 [redacted] 116:19-117:2 (Ex. 9); [redacted] 104:1-106:22 (Ex. 57).

[redacted].[155]

### 4. New Entrants Can Constrain Post-Merger Pricing

Low barriers to entry trump high market shares in a Section 7 case. *Baker Hughes*, 908 F.2d at 984. Barriers to entry are low in the foodservice industry.[156] The market here consists of trucks delivering food from a warehouse. There is no "technological", "legal[,] or regulatory barrier" that would preclude competitors from entering the market, *Gillette*, 828 F. Supp. at 84, nor is "business dependent on a scarce commodity, control over which might give the incumbent a substantial structural advantage." *Syufy Enters.*, 903 F.2d at 667. Many successful competitors, such as Gordon (originally a butter and egg delivery service),[157] BiRite (started as a "one-man operation")[158] and Greenleaf (originally a distributor of local produce)[159] are testaments to the fact that even small, scrappy competitors can grow and thrive in this industry.

Evidence of new entry is ample. For example, [redacted][160] [redacted][161] Likewise, in Las Vegas, [redacted]

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[155] Bresnahan Rpt. at 102-05, 162-65 (Ex. 3).
[156] *See* [redacted] Gordon Food Service, About Us, History, http://www.gfs.com/en/about-us/history.page (Ex. 123).
[158] BiRite, About Us, The Company, http://birite.com/about-us/the-company/ (Ex. 124).
[159] Greenleaf, About Greenleaf, http://www.greenleafsf.com/about (Ex. 125).
[160] [redacted] (Ex. 126) [redacted] 68:13-74:9 (Ex. 127).

[redacted] in a market supposedly dominated by Sysco and USF.[162]

### 5. Sophisticated Foodservice Customers Promote Competition

The sophistication of foodservices customers also ensures that the merger will not have anticompetitive effects. *See Baker Hughes*, 908 F.2d at 986; *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 679 (D. Minn. 1990) ("The most persuasive argument proffered by defendants to rebut the presumption of violation of Section 7 is the power of the buyers. . . ."). The evidence shows that "National Customers" "closely examine available options" and scrutinize offers, *id.*, including by pursuing a strategy of regional sourcing and negotiating with multiple vendors across different foodservice distribution channels.[163] "This sophistication [is] likely to promote competition even in a highly concentrated market." *Id.* Sophisticated, high-volume customers can and will turn to other purchasing options should the merged entity impose a SSNIP.[164] *See* Hausman Rpt. ¶ 133 (Ex. 14) ([redacted]).

### 6. Customers Will Benefit Substantially From Merger-Specific Efficiencies

Defendants estimate that the merger will generate [redacted] cost savings and operational synergies.[165] Even when discounted [redacted] Defendants' efficiencies are expected to generate [redacted] annual savings. [redacted]

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162 [redacted] 32:6-22 (Ex. 9).

163 *Id.* at 111:16-18 [redacted]; [redacted] 72:20-73:25 (Ex. 30) [redacted] *See, e.g.*, [redacted] Dep. 111:25-112:3 (Ex. 9) [redacted] (Exs. 128-145). *See generally* Hausman Rpt. ¶¶ 66-123 (Ex. 14).

[redacted] months before this litigation began—and employees and managers are now responsible for delivering.[166] [redacted].[167]

[redacted] The calculation includes [redacted] variable, merger-specific cost savings[170]—[redacted] that could not practically be achieved absent the merger.[171]

The merger will reduce the costs incurred by the merged company when it purchases and distributes food, which will in turn reduce the prices customers pay for those products and services.[172] Expert analysis[173] confirms that the combined entity's cost reductions will pass through to customers at high rates, [redacted]—[redacted]

166 [redacted] Ex. 146).
[redacted] 219:20-24 (Ex. 15).
[redacted]
Hausman Rpt. ¶ 149, Tbl. 4 (Ex. 14). [redacted]. Gokhale Rpt. ¶ 177 (Ex. 147).
Hausman Rpt. ¶ 149, Tbl. 4 (Ex. 14).
172 *See* [redacted] 89:2-15 (Ex. 15); Bresnahan Rpt. at 156-61 (Ex. 3).
173 [redacted] Bresnahan Rpt. at 158 (Ex. 3).

[redacted][174] These past practices indicate that similar savings will pass through to customers as a result of this merger.[175]

Such price reductions also increase competition between the merged entity and others, including broadline distributors, systems distributors, GPOs,[176] cash and carry, and specialty distributors.[177] The merged company's ability to offer lower prices will force its competitors to improve their pricing.[178] Defendants' competitors have conceded as much.[179] Taken together, these cost savings will benefit competition. *See Arch Coal*, 329 F. Supp. 2d at 123.

## V. THE EQUITIES WEIGH IN FAVOR OF ALLOWING THE PROPOSED MERGER TO PROCEED

Because the FTC has failed to show a likelihood of success, the equities are immaterial: "Absent a likelihood of success on the merits . . . equities alone will not justify an injunction." *Arch Coal*, 329 F. Supp. 2d at 159; *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 52 (D.D.C. 1988), *vacated as moot* 850 F.2d 694 (D.C. Cir. 1988). But here, the equities cut *against* the FTC. As described above, the merger will generate substantial efficiencies for the benefit of consumers throughout the country. Denying injunctive relief will ensure that those efficiencies can be realized quickly, given the FTC's likely suspension of any further administrative

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[174] *See* Bresnahan Rpt. at 159-60 (Ex. 3). Dr. Israel maintains that [redacted] Israel Rpt. ¶ 14(g) (Ex. 17). [redacted] *See* Bresnahan Rpt. at 160 (Ex. 3) ("A model that is an extraordinarily bad fit for how the industry works is particularly unhelpful"); Hausman Rpt. ¶ 56 (Ex. 14) [redacted]

*See* Hausman Rpt. ¶ 162-63 (Ex. 14); *see also* HMG §10 (Ex. 43) ("efficiency claims substantiated by analogous past experience are those most likely to be credited").

[176] Bresnahan Rpt. at 162 (Ex. 3).

[177] *See* Hausman Rpt. ¶ 159 (Ex. 14); *see also* [redacted] (Ex. 148) [redacted]

Hausman Rpt. ¶ 164 (Ex. 14).

[179] *Id*.

litigation. By contrast, granting an injunction would doom the merger, ensuring that its benefits are never realized. Substantial mergers simply cannot weather the "glacial pace of an FTC administrative proceeding." *Lab. Corp*, 2011 WL 3100372, at *22 (quotation omitted). Again, *none ever has*, despite the FTC's institution of so-called "fast-track" proceedings in 2009. *Id.*

Issuing an injunction would permanently deprive consumers of the considerable benefits of the merger, whereas denying an injunction would enhance competition in multiple significant respects. The equities therefore require denying the FTC's request for injunctive relief.

## VI. CONCLUSION

The FTC has failed to show a reasonable probability that the merger will substantially lessen competition. The preliminary injunction should be denied.

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Respectfully submitted,

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