

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
)	
et al.,)	Civil Action
)	No. 15-256
Plaintiffs,)	
)	Friday, May 8, 2015
v.)	1:30 p.m.
)	
SYSCO CORPORATION,)	Washington, D.C.
)	
et al.,)	
)	
Defendants.)	

DAY 4 - AFTERNOON SESSION
TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS
(EXCLUDING SEALED PORTION)
BEFORE THE HONORABLE AMIT P. MEHTA,
UNITED STATES DISTRICT COURT JUDGE

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AFTERNOON SESSION, MAY 8, 2015

2

(1:27 p.m.)

3

THE COURT: Please be seated, everyone. All right. So before we start, I have a question. We've been at this for about three and a half, four days. You've had three lunches in our cafeteria. Do the parties wish to take a position on the PFG delivered food? Our cafeteria prices are okay? All right.

8

A little dose of humor to start our last leg for the week. So, go ahead, Counsel.

10

MR. SIMMONS: Thank you, Your Honor. Ian Simmons of O'Melveny & Myers for Sysco, and welcome to antitrust.

12

CROSS-EXAMINATION OF MARK ISRAEL

13

BY MR. SIMMONS:

14

Q. Good afternoon, Dr. Israel.

15

A. Good afternoon.

16

Q. Dr. Israel, yesterday you said to the Court in connection with price discrimination that, "This goes back to the first step of the analysis, the targeted customer in question. I think it's easiest to start by thinking about it from the point of view, and that's really where the breakdown comes from. So the targeted customer question really, as I said, are the distinct customers who receive different prices and, therefore, could be affected differently by the merger when prices change."

24

Do you remember testifying to that effect?

25

A. That sounds familiar, yeah.

1 Q. All right. And you went on and you gave the Court a
2 metaphor. You said, "So I always think when we teach economics,
3 we think about a market for widgets, and the widgets cost \$5.
4 If you're evaluating a merger, you would say, what is the price
5 of widgets after the merger?"

6 Do you recall testifying to that effect --

7 A. Yes.

8 Q. -- yesterday?

9 MR. SIMMONS: May I approach, Your Honor?

10 THE COURT: Certainly.

11 BY MR. SIMMONS:

12 Q. Let's see if I can -- or we can put on the screen. Thank
13 you.

14 THE COURT: Counsel, do you want to give this a number for
15 the record?

16 MR. SIMMONS: Yes. I don't know. 6110, Your Honor.

17 MR. HASSI: 6110, Your Honor.

18 THE COURT: All right.

19 BY MR. SIMMONS:

20 Q. Now, this is -- depicts a simplified version of three
21 Sysco customers. Do you see the graphic you have in front of
22 you, Dr. Israel?

23 A. I do.

24 Q. All right. And the SKUs for customer A are fresh chicken
25 breast, lettuce and tomato, milk and goat cheese. Do you see

1 that?

2 A. I do.

3 Q. And the SKUs for customer B are canned soup, frozen
4 vegetables and frozen hot dogs. Do you see that?

5 A. Yes.

6 Q. The SKUs for customer A are not the same product of the
7 SKUs for customer B, are they?

8 A. The SKUs being sold to the customers are not the same.

9 Q. All right. And the SKUs for customer C are french fries.
10 Do you see that?

11 A. I do.

12 Q. Bulk beef patties, do you see that?

13 A. Yes.

14 Q. Shortening and oil, do you see that?

15 A. I do.

16 Q. The SKUs for customer C are not the same product as the
17 SKUS for customers A, are they?

18 A. The SKUs that customer C is purchasing here are different
19 from customer B.

20 Q. All right. Let's go down the left-hand column to average
21 distribution distance from distribution center. Do you see the
22 column?

23 A. I do.

24 Q. And three numbers appear separately for each customer.
25 Do you see that?

1 A. Um-hmm.

2 Q. The distance average from the distribution center for
3 customer A is 50. Do you see that?

4 A. Yes.

5 Q. The average distance from the distribution center for
6 customer B is 75 miles. Do you see that?

7 A. Yes.

8 Q. And the average distance from the distribution center for
9 customer C is 125 miles. Do you see that?

10 A. I do.

11 Q. The average distance from the distribution center
12 reflected on DX 6120 are not the same for all three customers,
13 are they?

14 A. I agree.

15 Q. Now let's turn to number of locations for the customer.
16 Customer A has 100 locations. Do you see that?

17 A. I do.

18 Q. Customer B has 400 locations. Do you see that?

19 A. I do.

20 Q. Customer C as 200 locations. Do you see that?

21 A. I do.

22 Q. The number of locations for each customer are not the
23 same, are they?

24 A. I agree.

25 Q. All right. Let's turn to delivery schedule. Customer A

1 gets delivery five times a week. Do you see that?

2 A. I do.

3 Q. Customer B gets delivery two times per week. Do you see
4 that?

5 A. I do.

6 Q. Customer C gets delivery schedule weekly. Do you see
7 that?

8 A. I do.

9 Q. The three customers do not have the same delivery
10 schedule, do they?

11 A. That's true.

12 Q. Let's turn to delivery windows. Customer A has a
13 delivery window of 6 to 9 a.m. Do you see that?

14 A. I do.

15 Q. Customer B has a delivery window of 2 to 7 p.m. Do you
16 see that?

17 A. I do.

18 Q. And customer C has a key drop delivery window. Do you
19 see that?

20 A. Yes.

21 Q. The delivery windows for the three customers are not the
22 same, are they?

23 A. They're not.

24 THE COURT: Counsel, can you define what key drop means?

25 MR. SIMMONS: I believe, Your Honor -- and I welcome

1 expertise on either side of the aisle to correct me. I believe
2 it refers to you have an ability to get in even after hours. I
3 think that counsel in this case both have access to the courtroom
4 24 hours, so I think that's --

5 THE COURT: Okay. I figured that's what it meant. I just
6 wanted to be clear.

7 BY MR. SIMMONS:

8 Q. Let's turn to the final characteristic of these customers
9 and their dealings with the distributor.

10 A. Um-hmm.

11 Q. We go to terms and -- we go to average drop size, I'm
12 sorry. Customer A has an average drop size of a quarter load.
13 Do you see that?

14 A. Yes.

15 Q. Customer B has an average drop size of a full load. Do
16 you see that?

17 A. Yes.

18 Q. Customer C has an average drop size of a full load. Do
19 you see that?

20 A. I do.

21 Q. B and C have the same average drop size, correct?

22 A. They do, as depicted, yes.

23 Q. But customer A has a different average drop size than B
24 and C, right?

25 A. That's what it shows, yes.

1 Q. All right. Terms in conditions, customer A has prompt
2 payment provision in its contract. Do you see that?

3 A. I do.

4 Q. Customer B has drop size discount schedule. Do you see
5 that?

6 A. I do.

7 Q. And customer C has an 80 percent purchases on covered
8 items provision in its contract. Do you see that?

9 A. I do.

10 Q. Even in the simplified version, the terms and conditions
11 that customer A, B and C have are different, correct?

12 A. I mean, I don't know where this sheet comes from, but the
13 customers on this sheet have different provisions, yes.

14 Q. All right. And you showed one of your slides to us
15 yesterday -- I'm sorry, I don't -- it's not appearing on the
16 screen. Do I have to do something?

17 Thank you. You can see where technology is not our
18 strong point here.

19 Here's from the guidelines, which is in your slide
20 plaintiffs' slide number 4, which you -- let me see if I can
21 make this go the right way. It says, "When examining targeted
22 customers and price discrimination," is the heading of this,
23 right?

24 A. It is, yes.

25 Q. All right. And you took this from the -- the Horizontal

1 Merger Guidelines?

2 A. Yes.

3 Q. All right. You quoted this as a quote from the
4 Horizontal Merger Guidelines, right?

5 A. It's from the merger guidelines, yes.

6 Q. It's a quote from the merger guidelines, right,
7 Dr. Israel?

8 A. Yes.

9 Q. And it says -- the quote from the Horizontal Merger
10 Guidelines says, "When examining possible adverse competitive
11 effects from a merger, the agencies consider whether those
12 effects vary significantly for different customers purchasing
13 the same or similar products?"

14 Did I read that sentence correctly?

15 A. You did.

16 Q. Now, Dr. Israel, do you remember I deposed you in this
17 matter?

18 A. Yes.

19 Q. And do you remember testifying to the effect that you
20 said, "Again, I've done a lot of analysis, so it's all reflected
21 in my reports. As I sit here, I don't recall a major focus on
22 analysis of customer switching, and the reason being is for that
23 to be informative at all, you need to know that it's price-based
24 switching, and I haven't seen any way to do that. I have done
25 all of the empirical analysis that I do in my reports, goes to

1 the substitution question with other message."

2 Do you remember testifying to that effect?

3 **A.** It sounds familiar, yes.

4 **Q.** And the Horizontal Merger Guidelines base diversion
5 analysis, they define it, I have it before you, it's one of your
6 exhibits, and I've underlined it. It says, "The diversion ratio
7 is the fraction of unit sales lost by the first product due to
8 an increase in its price that would be diverted to the second
9 product."

10 Did I read that sentence from the Horizontal Merger
11 Guidelines correctly?

12 **A.** Yeah, that's the technical definition of diversion ratio
13 in the merger guidelines, yes.

14 **Q.** Did I read the sentence correctly, Dr. Israel?

15 **A.** As I said, that's the technical definition in the merger
16 guidelines. Yes, you read it correctly.

17 **Q.** You also say in your deposition that, "I have studied
18 consumer substitution in the reports as I would define that as
19 an economist, but I have not explicitly studied consumer
20 switching because I don't believe that there's any price-based
21 switching evidence to study."

22 Do you remember testifying to that effect in deposition?

23 **A.** Consistent with how I studied things in matters like
24 this, I study win loss data when that's available to study
25 switching. I do recall testifying to that, yes.

1 Q. You also say in your deposition when you were asked
2 whether any of the 25 declarants that are on the national
3 customer list of the defendants, whether any of them said they
4 could not switch in the event of a price increase, do you
5 remember the colloquy you and I had on that in deposition, sir?

6 A. Not precisely.

7 Q. Okay. Do you recall saying -- does this refresh your
8 recollection? You were asked: "And do you know -- the yellow
9 text is referring to the 25 declarants of 778 CMU customers that
10 tendered declarations to the Federal Trade Commission in this
11 matter, I asked you in deposition, do you know how many of those
12 25 said they could not switch in the event of a pricing
13 increase?

14 "And you said: I mean, I don't know, nor would I have
15 looked at that because the standard, any standard of harm I've
16 measured, it's not could not switch, it's how much they would be
17 harmed based on the deterioration of the next best choice as a
18 result of the merger."

19 Was that your testimony in deposition, sir?

20 A. I mean, yes, that's my deposition testimony. That's
21 consistent with my understanding that what I'm studying is the
22 quality of the other options, not the -- not whether somebody
23 could switch in any circumstance.

24 Q. So you don't believe the standard is whether a consumer
25 could switch in the event of a price increases? Is that your

1 testimony?

2 **A.** My testimony is if someone's broadliner ceased to exist,
3 the customer would find food some other way. The question is
4 competitive harm, which is about the quality of the options and
5 the harm on the customers when they have to switch options.

6 **Q.** And you were asked about the defendants' national
7 customer list in this matter, weren't you?

8 **A.** Yes.

9 MR. SIMMONS: May I approach, Your Honor?

10 THE COURT: Yes, yes.

11 BY MR. SIMMONS:

12 **Q.** Now, in connection with this national broadline customer
13 market, you testified in deposition that you took the parties'
14 names, the names, and you didn't reduce it further; isn't that
15 right?

16 **A.** It would depend on the context of the analysis. I may
17 have said that in the context of certain analysis, yes.

18 **Q.** And you didn't do a SSNIP test, so -- you didn't take a
19 list of names, pour it into a computer that does a SSNIP, and
20 out comes something different, other than the names the
21 companies gave you; isn't that a fact?

22 **A.** I don't know what SSNIP test one would do on a list of
23 names.

24 **Q.** Okay. So you took the parties' names -- national
25 customer list as they were given to you by the parties; isn't

1 that a fact?

2 **A.** I took them for purposes of the grouping. I did for
3 section 3 of the guidelines before any SSNIP test was mentioned
4 in the guidelines.

5 **Q.** Is that a yes or a no?

6 **A.** That's a -- I took the list for purposes of my targeted
7 grouping, yes.

8 MR. SIMMONS: Now, let's, Your Honor, in the court I've
9 handed three items. There's a thin item we're going to go to
10 first, and then a thin binder, and then for the fat binders is
11 when we'll have to probably go into closed session.

12 THE COURT: All right.

13 BY MR. SIMMONS:

14 **Q.** Now, the -- Dr. Israel, if you'll just look for a minute
15 here at the podium, I'm going to turn to this item first.

16 **A.** Okay.

17 **Q.** Now, this is entitled, "Plaintiff Federal Trade
18 Commission's Objections and Responses to Defendants' Set of
19 Interrogatories?"

20 Do you have the document in front of you?

21 **A.** I do.

22 **Q.** All right. Now, if you could turn to -- everyone could
23 turn, we can do kind of do a dramatic reading together --
24 page 24. That's where I'm going to go first, page 24 of this.

25 The background of this, Dr. Israel, is that --

1 THE COURT: I'm sorry, I apologize for this, but just so
2 we've got a clean record, do you have an exhibit number on this,
3 or want to assign one?

4 MR. SIMMONS: 6111, Your Honor.

5 THE COURT: That's DX 6111?

6 MR. SIMMONS: Yes.

7 THE COURT: Okay.

8 MR. SIMMONS: DX 1367. Pardon? Yeah, sorry, Your Honor.

9 THE COURT: Yeah.

10 BY MR. SIMMONS:

11 Q. All right. So the background of this, you remember
12 Mr. Parker in his opening showed the pie chart to the Court,
13 that appears in the complaint, and it shows the defendants
14 having a 78 percent of the so-called national customer market?
15 The defendants served an interrogatory on the plaintiffs and
16 asked them, Can you give us the names, who's in the numerator
17 and who's in the denominator? That's the origins of this
18 interrogatory; isn't that right, Dr. Israel?

19 A. I'm not familiar with the origins of the interrogatories.

20 Q. Have you ever read this interrogatory before?

21 A. I believe it read it when you showed it to me in the
22 deposition.

23 Q. That was the first time you read it?

24 A. I believe that was the first time I read this, yes.

25 Q. Well, let's do some reading of it together. This is the

1 statement of the Federal Trade Commission.

2 They say, "National customers are a distinct set of
3 customers for broadline foodservice distribution service."

4 I'm reading from the second paragraph of page 24. Do you
5 see where I'm reading?

6 **A.** I do.

7 **Q.** All right. It goes on to say, "National customers
8 include, but are not limited to, GPOs consisting of nationally
9 disbursed members such as hospitals, nursing homes and other
10 institutions."

11 Do you see where I'm reading?

12 **A.** Yes.

13 **Q.** It says, "foodservice management companies that operate
14 cafeterias and other venues nationwide."

15 Do you see where I'm reading?

16 **A.** Yes.

17 **Q.** And, "hotel and restaurant chains with locations
18 disbursed throughout the United States."

19 Do you see that?

20 **A.** Yes.

21 **Q.** It goes on to say, "National customers centrally
22 negotiate their contracts with broadline foodservice
23 distributors, but they place orders from and require delivery to
24 multiple geographically disbursed locations."

25 Do you see that?

1 A. I do.

2 Q. It goes on to say, "Due to the geographic dispersion,
3 national customers typically contract with broadline foodservice
4 distributors that have distribution centers proximate to all or
5 virtually all their locations."

6 Do you see where I'm reading?

7 A. Yes.

8 Q. It goes on to say, "In addition, national customers
9 typically contract with a broadline distributor that can
10 provide, across all of their locations, product consistency and
11 availability, efficient contract management and administration,
12 e.g., centralized ordering and reporting, a single point of
13 contract, consistent pricing across all locations, volume
14 discounts and aggregated purchasing, and the ability to expand
15 geographically with the same broadline foodservice distributed."

16 Do you see where I read?

17 A. Yes.

18 Q. All right. And then the text continues with other
19 criteria of national broadline customers, right?

20 A. Yes.

21 Q. Okay.

22 A. Well, it continues with other statements. We can go
23 through them to see if some of them are criteria for national
24 customers.

25 Q. Okay. It goes on and says, "National broadline customers

1 also choose their broadline distributor based on various other
2 criteria."

3 Right? And it lists things?

4 A. I mean, some of them say typically some of the -- yes, it
5 lists many statements having to do with national customers.

6 Q. Okay. And if we flip over to, say, page 26, we begin to
7 see names that appear, Atria's Restaurant, right?

8 A. Yes.

9 Q. Charlie Brown's Steakhouse on page 28?

10 A. Yes.

11 Q. Cheese Cake Factory's on page 28; page 29 has Crust
12 Gourmet Factory. Do you see that?

13 A. I believe you. I don't find it on here right now. Oh,
14 there it is, yeah.

15 Q. Okay. Page 29 has Corner Bakery Cafe, right?

16 A. Yes.

17 Q. Okay. Let's go to our thin binder. I think we can do
18 this in public.

19 And you have said in your report that, "National
20 broadline customers are customers with multiple disbursed
21 locations, such that the footprint in which the customer
22 acquires distribution spans multiple regions for the entire
23 United States."

24 You said that in your report at paragraph 7B, page 2,
25 right?

1 A. I mean, that sounds right, as the definition I was going
2 for.

3 Q. Okay. And that actually appears at the -- in your
4 report.

5 Well, let's look at the first map in your book, if we
6 could turn the screen on, please. This is a national customer,
7 Atria's, it's on the list. This doesn't have a nationwide
8 footprint, does it, Dr. Israel?

9 A. I mean, the footprint that's depicted there is not
10 nationwide, looking at a name and a map I can't -- on a map, I
11 can't tell how Atria's actually purchases its food.

12 Q. Okay.

13 A. But what you have on the map is not nationwide.

14 Q. All right. Thank you. And this footprint of Atria's
15 does not span multiple regions, does it?

16 A. Again, the footprint you've drawn on the map does not
17 span multiple regions. But I can't tell by looking at the names
18 Atria's how Atria's purchases its food. Many of the names in
19 here are companies who have purchases their food a variety of
20 ways, including through national purchasing associations. So I
21 can't tell anything by just looking at a picture of one --
22 Atria's depiction on a map.

23 Q. Let's go to B&B Restaurant Ventures. B&B Restaurant
24 Ventures is on the list, the CMU list?

25 A. I don't know that this is the CMU list. My understanding

1 is this list includes names from multiple distributors, the
2 parties and others.

3 Q. Well, that's right. This list -- this list includes --
4 constitutes what the FTC sees as the denominator of the pie
5 chart, right?

6 A. I don't believe that's correct, based on my reading of
7 the document.

8 Q. Well, what do you believe this list denotes?

9 A. I mean, I believe -- I should look back at the document,
10 but I believe it says, "Based on information received by the FTC
11 to date, the following are among the customers whose purchases
12 are included in the share estimates."

13 Q. Right.

14 A. I don't believe that says that this is the denominator of
15 the shares.

16 Q. Okay. In other words, there may be other customers that
17 are not included in the denominator -- that are included in the
18 denominator but are not on the list, right?

19 A. I mean, the denominator -- I mean, the share calculations
20 come from work that I and my staff did. We went through in some
21 detail on how we did the share calculations, in order to look at
22 a variety of ways of getting the denominator to make sure the
23 results were robust.

24 Q. Well, let's turn to page 26 of the interrogatory.

25 A. Okay.

1 Q. Do you see B&B Restaurant Ventures, LLC, Fox Sports Grill
2 is on page 26?

3 A. I do.

4 Q. Okay. And we have their footprint on the map in front of
5 you. Do you see -- if you can look at my red pen, it may be
6 hard for the Court to see. It's down here in Southern
7 California. Do you see that?

8 A. Again, I see what you've shown on the map. This sort of
9 looking at a map and looking at them one by one and trying to
10 draw inferences is the reason that I rely on the parties'
11 definitions for national customers.

12 Q. Okay. And the footprint of B&B Restaurant Ventures is
13 not nationwide, is it, Dr. Israel?

14 A. Well, again, the footprint shown on the map is not
15 nationwide. But in my deposition you asked me repeatedly about
16 the El Paso International -- or the El Paso Airport. Since then
17 I've checked and they purchased through a foodservice management
18 company called HMSHost, so I cannot go through name by name and
19 figure out why the parties felt it was appropriate to include
20 these in a list of national customers, but it likely reflects
21 their buying decisions.

22 Q. And B&B Restaurant Ventures does not -- their footprint
23 doesn't span multiple regions, does it, Dr. Israel?

24 A. I mean, I don't know what their actual footprint or how
25 they purchase, as I sit here. What you've depicted on this map

1 spans the region that you've shown on the map.

2 Q. Dr. Israel, if this is accurate, would you say that the
3 footprint of B&B Restaurant Ventures spans multiple regions?

4 A. If this is accurate I would say that the footprint of the
5 restaurant, per se, does not span multiple regions, but their
6 purchasing of foodservice may be in a way that well does.

7 Q. Let's turn to our next map, and also let's refer to our
8 interrogatory answer. This map is Buona Advent- -- Buona
9 companies locations. Do you see that on the map?

10 A. I do.

11 Q. All right. And it's on page 27 of the interrogatory
12 answers. Do you see that?

13 A. I'll take your word for it.

14 Q. Okay. That'll move things along if we can have that
15 agreement.

16 THE COURT: Take it where you can get it, Counsel.

17 MR. SIMMONS: Thank you, Your Honor.

18 BY MR. SIMMONS:

19 Q. Again, do you see that this map says that, "Buona
20 companies spans five-digit ZIP codes"?

21 Do you see that at the front -- at the top of the map?

22 A. I mean, I see it is says "five-digit ZIP codes." I
23 assume that's a discussion of what's represented -- what's
24 represented on the map is the five-digit ZIP codes where the map
25 says Buona is located.

1 Q. Right. And the footprint of Buona companies isn't
2 nationwide, is it?

3 A. I mean, again, the footprint depicted on this map, if
4 accurate, is not nationwide.

5 Q. Okay. And the footprint of Buona companies doesn't span
6 multiple regions, does it?

7 A. The footprint -- I mean, it's hard for me to tell where
8 someone would cut off a region. The footprint is depicted on
9 the map. I think it's clear for people to see, right? Again, I
10 don't know, as I sit here looking at a list of names, whose list
11 this was on or why the designation was made, but I can tell you
12 I do know how the parties make the designations based on their
13 own documents, and that's my definition.

14 Q. Let's turn to the -- I won't ask whether that was a yes
15 or a no.

16 Let's turn to the next map. Here we have Charlie Brown's
17 Steakhouse. Do you see the map now on the screen?

18 A. I do.

19 Q. All right. And it's listed on page 28 of the
20 interrogatory grid, right?

21 A. Yes.

22 Q. You have to speak audibly.

23 And do you see the footprint that is depicted on the map,
24 sir?

25 A. I do.

1 Q. All right. And according to the map, Charlie Brown's
2 Steakhouse is a five-digit ZIP code. It spans five-digit ZIP
3 codes. Do you see that at the top?

4 A. I mean, again, I think that's saying this is a picture --

5 Q. Do you see it at the top, Dr. Israel?

6 A. Well, I don't agree with the interpretation of what you
7 said.

8 Q. I'm just asking if you see the language.

9 A. I see the language, five-digit ZIP codes, yes.

10 Q. The footprint of Charlie Brown's Steakhouse does not span
11 the nation, does it, Dr. Israel?

12 A. Subject to the caveats in my previous answers, I agree,
13 it does not the nation.

14 Q. And, indeed, the footprint of Charlie Brown's Steakhouse
15 doesn't span multiple regions, does it, Dr. Israel?

16 A. Again, subject to the caveats in my earlier answers, I
17 agree.

18 THE COURT: Can I just ask a clarifying question: When
19 you talk about five-digit ZIP codes, do you mean that there is
20 one of these restaurants within a five-digit ZIP code, and if
21 there's more than one within a digit ZIP code, there's only one
22 dot, regional?

23 THE WITNESS: Yes. Yes, Your Honor.

24 THE COURT: Okay.

25 BY MR. SIMMONS:

1 Q. Here is Crust Gourmet. Crust Gourmet appears on page 29
2 of the interrogatory answer, right?

3 A. Yes.

4 Q. All right. And you would agree with me that the
5 footprint of Crust Gourmet is not nationwide?

6 A. Again, subject to the caveats in my earlier answers, I
7 agree with what's depicted there.

8 Q. You would agree with me that the footprint of Crust
9 Gourmet does not span multiple regions?

10 A. Subject to the caveats in my earlier answers, I agree, it
11 spans what's listed on the map.

12 Q. Now, let's turn to Hard Rock Cafe, which I believe is
13 on -- also listed. In your view, is Hard Rock Cafe nationwide?
14 Does that span nationwide, as you use the term?

15 A. I mean, it certainly appears to be in multiple regions,
16 yes.

17 Q. Okay. Well, multiple regions or does it span -- I'm just
18 referencing the language in paragraph 7B, your report, sir,
19 where you say, "National broadline customers are customers with
20 multiple disbursed locations, such that the footprint in which
21 the customer requires distribution spans multiple regions for
22 the entire United States."

23 So I'm just asking: Is this entire United States, in
24 your view, or multiple regions?

25 A. I mean, it satisfies the definition that it spans

1 multiple regions.

2 Q. All right. And that's a national customer?

3 A. I mean, are they listed on the exhibit? I don't know if
4 you mentioned that.

5 Q. Oh, yes, I'm sorry, I suppose we -- we'll mark this whole
6 binder, if we haven't given it a number, I'm sorry, we'll give
7 this whole binder a number.

8 Let's turn to this one. This is Macaroni Grill. Do you
9 see that?

10 A. I do.

11 Q. It's on the screen for -- Macaroni Grill -- I'm now, by
12 the way, at tab 2 in the binder.

13 Macaroni Grill is not a national customer, right?

14 A. I don't know the answer to that, as I sit here.

15 Q. Well, do you want to take the time and look on the grid?

16 A. I mean, again, the grid was indicated to be a subset. It
17 contains -- so I'm not sure from the grid if I can tell.

18 Q. Now, the grid -- Dr. Israel, the qualification made on
19 the grid was that there might be some that needed to be added,
20 right?

21 A. I mean, the qualification I see is this is among the
22 customers, yes, so that would imply there could be others.

23 Q. To your knowledge, did the Federal Trade Commission ever
24 supplement this list, ever say here's 10, 20, 30 others that we
25 omitted? Did they ever do that?

1 A. I mean, I don't know one way or the other.

2 Q. You don't know. Okay. Let's assume they didn't, and
3 let's assume this is not a national customer. So can you have
4 those -- go with me on those assumptions for purposes of this
5 question?

6 A. I mean, again, I don't think I can assume this is not a
7 national customer based on what I've been shown.

8 Q. For purposes of my questions, can you make that
9 assumption, please?

10 A. I mean, it's going to depend on what the questions are.

11 Q. Well, my question is: The footprint you see at Macaroni
12 Grill, is that nationwide? Does that span the entire United
13 States, to use your words?

14 A. I mean, again, the footprint that's shown on here spans
15 multiple regions. Again, as always, from the footprint I can't
16 tell how purchasing is made by this company or any other facts,
17 but I would agree that the footprint on the map spans multiple
18 regions.

19 Q. And if the footprint on the map that spans multiple
20 regions, and those regions stretch from coast to coast, right,
21 as depicted on the map?

22 A. They certainly seem to be on the East Coast and the West
23 Coast, yes.

24 Q. And you're in the middle of the country, too, right?

25 A. Well, it's depicted on the map, yes.

1 Q. There's locations in Florida, right?

2 A. Yes.

3 Q. Locations in Texas, right?

4 A. Yes.

5 Q. Okay. And if this footprint that spans multiple regions
6 was a local customer, you would agree with me, ergo, that this
7 is a local customer, whose footprint spans multiple regions,
8 right?

9 A. Again, I don't know if this is a local customer, nor how
10 they buy their food that would lead to that decision, but if
11 that's the assumption, then yes.

12 Q. Let's turn, I believe this should be tab 3 of everyone's
13 skinny binder. Now, this is Bass Pro -- I think we did this
14 one -- Bass Pro, and they're on the list on page 26.

15 A. Yes, Bass Pro Shops, I've seen on the list of national
16 customers.

17 Q. Okay. Now, they span 67 ZIP codes, according to the top
18 of this map. Do you see that?

19 A. I do.

20 Q. Okay. And in your view, does the footprint of Bass Pro
21 Shops span multiple regions?

22 A. The footprint shown here spans multiple regions, yes.

23 Q. Does it span the entire United States?

24 A. I mean, it spans multiple regions or the entire United
25 States. That's my definition. It meets the definition.

1 Q. Actually, or is a conjunction. It's A or B. Is this --
2 I'm just trying to figure out your standards.

3 Is this multiple regions or is this the entire United
4 States?

5 A. I mean, I'm just staying that's not a distinction I had
6 to make. As long as it's multiple regions it meets the
7 definition.

8 Q. Okay. And this is a national customer, right?

9 A. Yes.

10 Q. Here is Sarku Japan. Do you have the map in front of
11 you?

12 A. I do.

13 Q. Okay. And according to this chart, Sarku Japan spans 209
14 ZIP codes. Do you see that at the top?

15 A. I do.

16 Q. And Sarku Japan is not on the list of national customers,
17 right?

18 A. I could look. I mean, again, I'll take your word for
19 that.

20 Q. Well, why don't you -- let me just see if you could find
21 it. I think it would be on page 40, if it was. Take a look and
22 tell me if you see it.

23 A. I don't.

24 Q. All right. Now, this is 209 ZIP codes, right?

25 A. That's what it says, yes.

1 Q. And in your view, does the footprint of Sarku Japan span
2 the entire United States?

3 A. I mean, again, it meets my definition, if this is -- if
4 I'm accepting that this is the footprint and accepting that they
5 buy their foodservice according to this entire footprint.

6 Q. Let's turn to another -- we'll wrap this part up in just
7 a moment. Let's turn to this map.

8 This is Palm Restaurant, which is on the list, the Palm?

9 A. Yeah, I've seen the Palm on the list of national
10 customers.

11 Q. All right. Okay. And it's 23 ZIP codes. Do you see
12 that at the top?

13 A. I do.

14 Q. Okay. Would you say the Palm spans the entire United
15 States?

16 A. Again, I would say it meets my definition.

17 Q. Okay. And it's 23 ZIP codes, according to the top of
18 this map, right?

19 A. That's what it says, yes.

20 Q. Pardon?

21 A. That's what it says, yes.

22 Q. Now let's go to Yogen Früz. Do you see that? Do you see
23 the map in front of you?

24 A. I do.

25 Q. Now, Yogen Früz is not on the list. Can you take my word

1 for it?

2 A. I will.

3 Q. All right. And it spans 64 ZIP codes, according to the
4 top of this map, right?

5 A. Yes, that's what the map says.

6 Q. Okay. Would you say Yogen Früz spans the entire United
7 States?

8 A. I mean, what's depicted on the map spans multiple
9 regions, yes.

10 Q. My question was: Would you say it spans the entire
11 United States?

12 A. I mean, again, I never really made a decision about
13 entire United States, what that means, because my definition is
14 multiple regions or the entire United States --

15 Q. Okay.

16 A. -- and this meets my definition.

17 MR. SIMMONS: Your Honor, regrettably, I think this is the
18 point at which I'm going to go through a series of third-party
19 case studies, and I just don't see a way of doing it without
20 going in-camera.

21 THE COURT: When you say "third-party case studies," you
22 mean?

23 MR. SIMMONS: Actual national customers we're going to
24 talk about, go through them and analyze them.

25 THE COURT: Okay. Will that take you to the end of your

1 examination?

2 MR. SIMMONS: Oh, no. No, Your Honor. No.

3 THE COURT: Can we save that until the end?

4 MR. SIMMONS: Okay. Well -- yes, I think we could do
5 that.

6 THE COURT: I'd prefer that we do that.

7 MR. SIMMONS: Okay. It's kind of the heart of it, but
8 so --

9 BY MR. SIMMONS:

10 Q. In classifying Sysco and USF customers as national, you
11 only relied on how they were classified by Sysco and USF, right?

12 A. Right. Following my normal practices as an economist, I
13 rely on the decisions on the firms in the question, yes.

14 Q. You didn't analyze the characteristics of the various
15 customers on the list?

16 A. I mean, I analyzed them insofar as I know the parties'
17 statements about how they classified customers, and I rely on
18 those because, in my judgment as an economist, it makes sense to
19 rely on the business decisions of the parties.

20 Q. You don't know whether the customers classified by Sysco
21 and USF as national customers have any of the characteristics
22 listed by the FTC that are typical of national customers, do
23 you?

24 A. Well, I certainly know some of them do because they made
25 declarations in this matter that indicated those

1 characteristics, and those declarations were from customers
2 accounting for a substantial part of the revenue of national
3 customers.

4 **Q.** But there's no quantification in either of your reports
5 mapping the customer population, the national customer
6 population, with the different attributes that we read about in
7 the interrogatory, the things that national customers'
8 supposedly want, you didn't engage in a quantification of
9 customers categorizing 30 want this, 40 -- you didn't do that,
10 did you?

11 **A.** I mean, I disagree that there's no quantification of it
12 in the sense that I know that they are on -- for the Sysco and
13 US Foods customers, which I would distinguish from many of the
14 customers we were talking about a minute ago which may be from
15 other firms. I know that they are on their list of national
16 customers, and I know the characteristics that they indicate
17 they used to populate that list.

18 **Q.** Yeah. My question -- pardon me if I wasn't specific.
19 You didn't take the list and do any empirical
20 quantification categorizing -- if there's 778 names on this
21 list, you didn't say 150 want -- fall into this bucket? You
22 didn't do that kind of quantification, did you, Dr. Israel? It
23 doesn't appear in either of your reports, does it?

24 **A.** I mean, I just don't agree with that, in the sense that I
25 know 100 percent of them are on the CMU list, and that list has

1 certain characteristics that are defined by the parties.

2 MR. SIMMONS: May I approach, Your Honor?

3 THE COURT: Of course.

4 BY MR. SIMMONS:

5 Q. Dr. Israel, the question was: You didn't take this list
6 and then divide the customers up, see where they meet the
7 various criteria set forth in the interrogatory answer, how many
8 want centralized purchasing, how many want consistent user
9 interface, you didn't engage -- you didn't do any empirical
10 classification or quantification of the customers on this list
11 in either report, did you?

12 A. I would agree with your statement that I didn't further
13 subdivide the list, that I relied on the national list as
14 provided by the parties.

15 MR. SIMMONS: I'm going to move to strike as
16 non-responsive.

17 BY MR. SIMMONS:

18 Q. My question was, it was a very clear question: The FTC's
19 interrogatory answer, which it says are a group that represent a
20 relevant market, have characteristics that those customers on
21 the list supposedly want, you didn't go through this list and
22 see which customers wanted the -- you didn't map the customers
23 up to the criteria, quantitatively in either report, did you?

24 THE COURT: Is there an objection, Counsel?

25 MR. HASSI: Yes. Objection, Your Honor, mischaracterizes

1 the interrogatory responses given by FTC, based on the grounds
2 counsel said it constituted the FTC list of who was included in
3 the product market. I believe it says that these are customers
4 on the list that are included in share estimates.

5 THE COURT: I understand the question, and I understand
6 the response. Let's move on. I understand that your point is
7 you didn't take the list and match it up with the descriptions.
8 I get it. We can move to the next set of questions.

9 MR. SIMMONS: I think now I do have to get --

10 THE COURT: All right. Folks, I hate to do this, but I'm
11 going to need people who are not affiliated with the parties or
12 their counsel to please leave the courtroom. This portion of the
13 examination will be under seal and in-camera. We'll try and get
14 the doors back open as soon as we can.

15 (Thereupon, the following proceedings were sealed by order
16 of the Court:)

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(Conclusion of sealed portion of proceedings.)

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(Thereupon, a break was had from 3:54 p.m. until
4:03 p.m.)

13

THE COURT: Please be seated, everyone. Thank you.

14

All right, Mr. Simmons, proceed.

15

MR. SIMMONS: Thank you, Your Honor. I'll go -- you just
cut me -- just do this, and I'll sit down.

16

BY MR. SIMMONS:

17

18

Q. Dr. Israel, I want to spend a few minutes on the local
market issue and then go to some method issues, and then I'll
stop when I'm told to stop. I'll stop in 45 minutes.

19

Now, Dr. Israel --

20

MR. SIMMONS: I'm sorry. Ma'am, could we have the screen
on, please. Thank you.

21

BY MR. SIMMONS:

22

Q. The complaint says -- and this is a hard copy to read --

1 says that the merger is -- "the parties' post-merger market
2 share of Los Ang- -- San Diego would be 100 percent."

3 Do you see that?

4 **A.** I do.

5 **Q.** And table 43 to your April 14th report also says, "The
6 parties will have 100 percent market share."

7 **MR. SIMMONS:** I think everyone should have a binder, a
8 local binder in front of them. This is at tab 1 of that binder.

9 **BY MR. SIMMONS:**

10 **Q.** You're getting barraged with binders. Do you see that?

11 **A.** I do.

12 **Q.** Your table 43 gives to the merging parties 100 percent
13 market share post-merger at San Diego?

14 **A.** Just to be clear, I gave it to them in the draw area
15 around --

16 **THE COURT:** Move that mic, please.

17 **THE WITNESS:** I can sit back. I apologize if I'm
18 deafening.

19 (Discussion had off the record.)

20 **THE WITNESS:** I mean, for the overlap customers in that
21 draw area that I define, I computed an open share -- a share of
22 100 percent, yes.

23 **BY MR. SIMMONS:**

24 **Q.** All right. And Shamrock is a broadline distributor,
25 right, Dr. Israel?

1 A. Shamrock has broadline distribution services, yes.

2 Q. And Shamrock gave -- tendered information to the FTC that
3 it makes sales in the San Diego area?

4 This is -- that should be at tab 1 of -- this is at tab 1
5 of your paper of your binder.

6 A. I see that, yes.

7 Q. So Shamrock is making sales in San Diego, but you're
8 saying the parties will have 100 percent post-merger market
9 share; is that right?

10 A. Um, my understanding from Shamrock's testimony is that
11 their business in San Diego is largely national chain business.
12 So, again, I can't separate that out. And they're even saying
13 it's largely a national chain business, then my methodology
14 computes the shares as we talked about earlier today.

15 I also would note that Shamrock's testimony describes
16 himself as struggling and barely present in San Diego.

17 Q. Well, when Shamrock on its Web page says -- and this is
18 on the screen hopefully -- in August --

19 MR. SIMMONS: This is at tab 2, Your Honor and Dr. Israel.

20 BY MR. SIMMONS:

21 Q. It says, "In August 2011, Shamrock Foods opened a
22 foodservice distribution warehouse in Eastvale, officially
23 expanding Shamrock Foods into Southern California. The
24 distribution center is intended to service California's inland
25 empire and south of San Diego."

1 Do you see that?

2 **A.** I do. It's well before testimony where they said they
3 had effectively very little business in San Diego.

4 **Q.** How much business do they have in San Diego?

5 **A.** You showed me some. They indicated they have some
6 national chain business in San Diego. That's what I know of, as
7 I sit here.

8 **Q.** Dr. Israel, none of your reports discussing the local --
9 the so-called broad -- the so-called "draw area method," none of
10 your reports use ZIP code data, right, none of your reports?

11 **A.** Um, I mean, I don't think that's true as a general
12 statement, but my methodology for the local draw area in the
13 local shares is just what I described this morning, which does
14 not rely on ZIP code data --

15 **Q.** Well, you testified in your deposition you didn't have
16 ZIP code data, and you didn't use it, right?

17 **A.** I don't think I said I didn't have ZIP code data. I said
18 I didn't have complete ZIP code data on all parties, and
19 certainly not complete ZIP code data that would break everything
20 down by local and national or by broadline and systems.

21 **Q.** And isn't it -- just so that we're all clear on this, you
22 didn't -- you had ZIP code data; is that right?

23 **A.** I mean, I certainly had ZIP code data from the parties.
24 I think there's some ZIP code data from other firms. At least
25 most cases of other firms, I don't believe it's broken down by

1 national or local or by systems and broadline.

2 Q. Well, Ben E. Keith produced ZIP code data, right?

3 A. I don't -- I'm not -- I don't recall specifically which
4 firms produced it, as I sit here.

5 Q. Cash-Wa produced ZIP code data, right?

6 A. Again, I don't recall which ones produced ZIP code data.

7 Q. Gordon Food Service produced ZIP code data, right?

8 A. I believe I've seen it from Gordon, but I don't recall,
9 as I sit here.

10 Q. Jacmar produced ZIP code data, right?

11 A. Again, Jacmar is the one I think I recall because I know
12 they're largely systems, and they've said they're largely
13 systems.

14 Q. Reinhart produced ZIP code data, right?

15 A. I don't recall, as I sit here. Another example of
16 someone who has a large systems business.

17 Q. FSA produced ZIP code data?

18 A. Same answer, I don't recall, but they certainly have a
19 large systems business.

20 Q. Shamrock produced ZIP code data, right?

21 A. Again, I don't recall specifically who did. But, again,
22 they've -- as I said, they indicate their San Diego business is
23 a national chain business, at least what I recall.

24 MR. SIMMONS: I've only got 45 -- I just -- if you just --

25 THE COURT: Counsel, it may be just easier to just list

1 them all.

2 MR. SIMMONS: Yeah.

3 BY MR. SIMMONS:

4 Q. And PFG produced ZIP code data, right?

5 A. Again, I don't recall, as I sit here.

6 Q. You didn't use any of the ZIP code data that these
7 parties produced; isn't that right?

8 A. I think I've answered this. I didn't have complete ZIP
9 code data with which to produce shares. And if I'm trying to
10 produce local broadline shares and I don't know if it's local or
11 broadline, I can't use it.

12 Q. And these parties that I've listed, eight of them,
13 produced ZIP code data. The other eight distributors that
14 produced material to the FTC didn't produce ZIP code data,
15 right?

16 A. I don't know the exact counts, as I sit here.

17 Q. And the Federal Trade Commission CID to the distributors
18 did not ask for ZIP code data, did it?

19 A. I don't know the answer to that, as I sit here.

20 Q. And Dr. Bresnahan did use ZIP code data in his analysis,
21 right?

22 A. You'd have to point me to some specific analysis.

23 Q. Do you know whether Dr. Bresnahan used the ZIP code data
24 that the FTC had in its possession?

25 A. I mean, again, I don't have Dr. Bresnahan's analyses

1 memorized, as I sit here. He might have used something in a
2 regression analysis. I don't -- I don't -- you'd have to point
3 me to a specific analysis.

4 **Q.** Do you remember Dr. Bresnahan using ZIP code data that
5 was in the possession of the FTC in connection with various draw
6 area analyses he did responding to your local market analysis?
7 Do you remember that?

8 **A.** Yeah, I do recall him, for example, in Omaha, indicating
9 that Cash-Wa sales should count. So now you reminded me Cash-Wa
10 had ZIP code data. I pointed out in my rebuttal report that
11 Cash-Wa sales were largely systems and heavily made up of things
12 like tobacco sales to convenience stores, which is why it
13 doesn't make sense to use data without knowing what the service
14 is.

15 **Q.** But Dr. Bresnahan used ZIP code data and you didn't,
16 right?

17 **A.** He used ZIP code data and arrived at an improper
18 conclusion about broadline sales.

19 **MR. SIMMONS:** Your Honor, may I approach the Court and the
20 witness?

21 **THE COURT:** Sure.

22 **BY MR. SIMMONS:**

23 **Q.** I'll hand you what's been marked as DX MI 4100.

24 This is -- this was produced in response to your back --
25 this is -- was produced as your -- part of your backup. I've

1 taken a single page of your backup in connection with your RFP
2 database, which is in connection with the specification 16
3 material. Do you see this? Does this document look familiar to
4 you?

5 **A.** Um, yeah. I mean, I'm not sure about this page, as I sit
6 here, but I've certainly seen pages like this that are summaries
7 of some of the information in that --

8 **Q.** All right. I understand. And the entire backup has been
9 marked as an exhibit in the case.

10 Now, this has various columns. The first column is
11 "Customer," and then there's a column "Estimated Annual Spend,"
12 there's a column that says "RFP Negotiation Date," there's a
13 column that says "Participants," and there's a column that says
14 "Winner." Do you see those columns?

15 **A.** I do.

16 **Q.** Okay. Nowhere in your backup do you list the rankings,
17 so USF came number one, Sysco came number two, PFG -- you
18 haven't produced any evidence to the defendants in this matter
19 as to what the rankings were in any RFP, much less all the RFPs,
20 you're relying upon. Isn't that a fact, sir?

21 **A.** Not as completely as you say it. I certainly indicated
22 who the winner is, which means I know who is ranked number 1.

23 **Q.** Dr. Israel, you've been telling the Court now for a long
24 time that your theory of the case is that if Sysco buys USF, it
25 will be removing the next best substitute.

1 Because my notebook's over there, and I'm running out of
2 time, I believe you said, "If the number two price gets absorbed
3 into the number one price, the bad number three price becomes
4 the new number two price," right?

5 **A.** That's what I said.

6 **Q.** Haven't you written about that and testified to that
7 effect, sir?

8 **A.** I have.

9 **Q.** Okay. And you produced to the defendants backup like
10 this, which doesn't say who's number one, who's number two,
11 who's number three, who's number four, et cetera. You don't
12 list it anywhere, do you?

13 **A.** It says who's number one, that's the winner.

14 **Q.** You don't list the rankings, do you?

15 **A.** I list who's number one, the winner. As I described
16 throughout my testimony this morning, you have to infer who was
17 number two, and sometimes you can tell because there's only one
18 other firm. Otherwise, it's based on things like market shares
19 that the merger guidelines indicate are the best indicator of
20 who's the next strongest competitor.

21 **Q.** Who is the number two bidder in the Blaze one that I've
22 highlighted, about a third of the way down? Can you tell us who
23 the number two was in that bid?

24 **A.** I mean, again, you can tell the participants. And as
25 I -- as is done in merger cases, every merger case I've worked

1 on, you infer the next best substitute based on shared data and
2 all the characteristics that I talked about this morning.

3 **Q.** With all due respect, Dr. Israel, you're making
4 inferences when you don't even know who came number two or
5 number three for any given auction. You can't say, can you?

6 **A.** I'm making inferences based on accepted methodology of
7 analyzing competition and mergers. The guidelines say share is
8 the best indicator of competitive strength. I start there. I
9 spent a long time this morning describing why it's even more
10 likely then implied by share that USF and Sysco are one and two
11 to each other.

12 **Q.** And is it an accepted methodology, to use your term, to
13 argue to a Court that if you remove the number two, the bad
14 number three price will become, you know, the next best price
15 post-merger when you don't even tell the parties? I mean, isn't
16 it rudimentary that people would ask?

17 So you've got this auction model, there's competitive
18 interactions and people are ranked. You never list -- you never
19 list the rankings in any auction, do you?

20 **A.** Again, it's fundamental economics that you would use the
21 available evidence to infer who would be number two, and that's
22 exactly the steps the merger guidelines step through. You think
23 about market shares as the best indicator of competitive
24 strength. That gives you a first indication. It's used all the
25 times in economics of who the likely number two is. And then

1 you move beyond that to see if it's more or less likely that the
2 parties would be one and two to each.

3 This is all described in the merger guidelines. The
4 section 6.2 on bargaining and auctions talks about exactly what
5 you just said, the harm would come from the new number three,
6 and also talks about inferring who the likely number two and
7 three are in the guidelines based on share.

8 **Q.** Dr. Israel, isn't it a fact you use the RFP data to
9 calculate the share?

10 **A.** I use the RFP data for one version of my share
11 calculations, which I confirmed with six other rows as we went
12 through this morning.

13 **Q.** But just so we have a clear record, the exemplar that's
14 been marked as DX MI 4100, which is from your backup on your RFP
15 model, based on the specification 16, this whole theory you have
16 that number two will be purchased by number one, and the number
17 three, which was distant and will become, you know, the next
18 best price post-merger, which is less favorable than the current
19 number two, nowhere in your backup do you list for anyone in
20 this room, if someone wanted to go and kick the tires on that to
21 figure out the rankings, you don't list the rankings, do you?

22 **A.** Again, I think I've answered this as well as I can. It's
23 not my theory. Fundamental analysis of mergers is that the harm
24 happens when you lose the next best alternative. The guidelines
25 indicate that share is the best indicator of that. That's why

1 there's a presumption of harm.

2 And then we move beyond share. And so what I've listed
3 throughout my report is the probability, the likelihood that
4 these firms are number one and number two.

5 Q. Let me get this straight, Dr. Israel. You're asking this
6 Court to go off and kind of assume, not know the rankings, but
7 kind of assume, take your word for it, that in some empirical
8 sense, majority, plurality, I have no concept, that in some
9 sense USF was the next closest -- was the number two -- that --
10 that was the number two in these auctions and is now being
11 brought up. You never list the rankings for us, right?

12 A. I'm not asking the Court to assume --

13 THE COURT: All right. Folks, let's -- let's move on.

14 BY MR. SIMMONS:

15 Q. I want to move, if you can move to -- you should have
16 a -- if the Judge thinks you are wrong on share, you would have
17 no evidence of close substitutes, right?

18 A. Well, that's certainly not the case. There's substantial
19 testimony. If a customer's indicating that they're a close
20 substitute, there's a comparison of the characteristics. This
21 is everything I went through this morning. There's RFP data,
22 there's link data, there's RFI data. That was the entirety of
23 my discussion of share and unilateral effects.

24 Q. I'd like to hand up a final --

25 MR. SIMMONS: I know my time in the hour glass is going,

1 and --

2 (Discussion had off the record.)

3 BY MR. SIMMONS:

4 Q. All right. Let's start out with market share now that
5 we're on it. All right.

6 This is a binder going to your various market share
7 statements. And if you look at tab 1, the first flag -- I'm
8 just going to do it this way. This was shown on the
9 government's -- I believe the government's opening statement.
10 It's your table 1, these market shares.

11 I want to spend a few minutes having a discussion about,
12 you know, what is in the denominator and what's not in the
13 denominator. So let's go as fast as we can here.

14 THE COURT: So this is PX 9350?

15 MR. SIMMONS: Yes, Your Honor. Pardon me.

16 THE COURT: Page 70? Okay.

17 MR. SIMMONS: Yes, Your Honor.

18 BY MR. SIMMONS:

19 Q. Now, your -- if you'll look at your table 1, Dr. Israel.

20 A. Yes.

21 Q. Your national list is 78 percent baseline that we -- that
22 has been discussed, that baseline is based on your RFP data that
23 you construct; is that right?

24 A. I mean, it incorporates some information from the RFP
25 data for purposes of deciding how big other sales are relative

1 to PMA sales, based largely --

2 Q. Well, you said in your deposition --

3 A. It's based largely on the parties' sales numbers, DMA's
4 sales numbers, and then the RFP data, to get a measure of how
5 big everyone else is relative to DMA.

6 Q. Well, I don't have the time to kind of put depositions'
7 excerpts in front of you, but on page 277 of your deposition,
8 which has been marked as an exhibit, line 6 through 9, you said,
9 "I consider the 78 percent to be a good number because it does
10 not -- it relies on RFP data, which I -- which I put forward and
11 which I, you know, have confidence in."

12 Did you say that, sir, in your deposition?

13 A. Yeah. It's consistent with what I just said, it uses RFP
14 data for one specific purpose.

15 Q. Fine, but I'm just trying to move things along.

16 Romanette 1 of table 1 is based on your RFP data, right?

17 A. No.

18 Q. All right. And the other estimates, romanette 2, are
19 based on CID data in the matter, right?

20 A. 1 through 6 are based CID data, yes.

21 Q. Okay. Now, let's take your fourth CID estimate, National
22 Plus Systems.

23 A. Okay.

24 Q. Aside from DMA and UniPro, you included the 13 regional
25 distributors in this estimate, right? You included 13 of them?

1 A. I don't know the count, as I sit here. I know what that
2 estimate did was include CID data and include the sales that
3 were labeled as "systems" as part of the --

4 Q. Okay. I'm just going to -- because I've only got -- I'm
5 going to get cut off, so I'm going to just go really -- I'm
6 trying to expedite.

7 Would you dispute my representation that your backup data
8 shows that you included 13 distributors -- and I could list
9 them, but I don't want to prolong the record -- 13 distributors,
10 Ben E. Keith's, Gordon Food Services, Jacmar, Labatt, Maines,
11 Reinhart, FSA, PFG, Merchants, Cash-Wa, Nicholas, and Pate
12 Dawson? Would you dispute that if that's what you included?

13 A. I mean, again, I don't know, as I sit here. There were,
14 I think, 17 sources in the CID data and the 13 of them also had
15 systems information, and that could be correct.

16 Q. All right. And I beg your pardon, everybody.

17 Tab 2 lists the entities that your backup data shows that
18 you included, and it lists the total as approximately
19 3.2 billion. Do you see that?

20 A. I do, yes.

21 Q. All right. Now, if we go to tab 3, this is Technomic,
22 which is a company that compiles data. If we go to tab 3, the
23 third page -- I'll put it on the screen.

24 The third page of Technomic shows that the systems, what
25 they call customized here, is 40 billion, right?

1 A. I see that.

2 Q. Okay. So you included 3 billion with the listing of
3 distributors that we discussed at tab 2, right?

4 A. Yeah. I mean, the intent of that row is to include sales
5 that were labeled as systems --

6 Q. Right.

7 A. -- by these broadline distributors --

8 Q. Right.

9 A. -- in order to add some extra for the broadline
10 distributors, not to include all systems' names.

11 Q. Right, no, I understand that. I just want to get the
12 numbers straight.

13 So we're talking about your sensitivity where it's
14 national and systems, number 4. And just so everyone can follow
15 the chain so far, right, number 4 -- because you said you're
16 being conservative, so you're adding in some systems, see what
17 that does to the denominator.

18 And you took data from the 13 entities that are at tab 2,
19 right, which leads to a total of about 3.2 billion that you
20 added. Is that a yes?

21 A. Yes.

22 Q. Okay. This Technomic sheet shows that total customized
23 is about 40 billion, right?

24 A. That's what it shows, yes.

25 Q. Okay. If we subtract the SYGMA, the Sysco -- let's just

1 call it 7 billion, because we're short on time. If we subtract
2 7 billion from 40 billion, that leaves us with 33 billion,
3 right?

4 **A.** I mean, in total customized, which has nothing to do with
5 my calculation, but yes.

6 **Q.** I'm just trying to get the numbers down. I understand
7 you believe you have the rationale, I've got that. I'm just
8 trying to get the numbers down.

9 If we take off the SYGMA, we're at 33 billion. And if we
10 subtract the 3.2 billion that you added from the 13
11 distributors, there's \$30 billion that -- I understand you think
12 you had a reason -- but that you didn't use. I just want that
13 clear on the record: You did not use \$30 billion of systems,
14 right?

15 **A.** Yeah. As we discussed, systems is not in my product
16 market, so I left out systems sales, other than as a sensitivity
17 to extra include some for the people who were listed as
18 broadliners.

19 **Q.** But so we're clear, you left off \$30 billion of your
20 romanette number 4, National Plus Systems. You left off 30
21 billion in sales, right?

22 **A.** As described in my report, that's a sensitivity that
23 brings in the systems sales made by these specific revenues.
24 Systems generally is not part of my product market, so it is
25 excluded.

1 Q. Now, let's go to -- let's go to your lowest estimate, the
2 romanette 4 -- just pardon me, number 6 in table 1.

3 THE COURT: I'm sorry. Am I to take from that, that there
4 are \$27 billion of sales and systems distributors, other than the
5 13 that are also broadliners?

6 MR. SIMMONS: That's correct.

7 THE WITNESS: There are certainly systems-only facilities,
8 like MBM, McLane, and others who make system sales into that
9 product market that are large.

10 THE COURT: Okay. And that number is not included in the
11 72 percent -- I'm sorry, the 69 percent calculation?

12 THE WITNESS: Everything here is an estimate of the
13 broadline.

14 THE COURT: Understood. Okay.

15 MR. SIMMONS: Now, let's turn -- and I'm getting close to
16 being at the end, Your Honor. And hopefully the court reporter
17 won't -- I'm going to wrap up, hopefully, very soon. But now, I
18 want to talk about the six and final sensitivity, and then I just
19 have one small topic to go into, and I'll sit down.

20 BY MR. SIMMONS:

21 Q. This sensitivity -- so romanette 6 on table 1 is the
22 parties' ratio of national. All right? Do you see that?

23 A. I do.

24 Q. Now, you've -- I think you said today and elsewhere that
25 you consider that to be a lower bound, right? Kind of a lower

1 estimate?

2 **A.** I mean, to be precise, I think applying the parties'
3 national proportion to the smaller distributors makes too much
4 of the smaller distributor sales look like they are national.

5 **Q.** Right. And if we turn to table 4, the sensitivity you
6 added, table -- or pardon me, tab 4, which is -- I don't know
7 what the DX is. Table 4 -- or tab 4 lists -- table 4 -- tab 4
8 lists 16 distributors whose sales amount to 28 billion, which
9 you included in this sensitivity, right?

10 **A.** That sounds correct, yes.

11 **Q.** Okay. And I won't read them. They're listed there on
12 tab 4.

13 So you -- this is including 28 billion of sales from the
14 entities listed at tab 4, right?

15 **A.** That sounds correct.

16 **Q.** Okay. And if we go to -- I'm just trying to find it.

17 If we go back to our Technomic tab 3 -- so now go back to
18 tab 3. So you've added 28 billion. Let's look at the Technomic
19 sheets.

20 **MR. SIMMONS:** Can we put it on the screen, please? We're
21 going to go through them. And the DX number is MI 0022.

22 **BY MR. SIMMONS:**

23 **Q.** All right. So the ones I've highlighted in yellow are
24 ones you have not included. Do you have any reason to dispute
25 that?

1 A. As far as the distributors that are listed there?

2 Q. Yes. And on the next page, if we can just -- if you and
3 the Court can flip your page -- two pages, you'll see there's
4 entities that are highlighted in yellow.

5 If I represent to you, you did not include sales of those
6 highlighted entities, do you have any reason to dispute that,
7 sir?

8 A. I mean, no. As mentioned this morning, there are a set
9 of distributors who make up roughly 10 percent of total
10 broadline sales that are not included in the CID.

11 Q. All right. And do you see the total broadline, if -- if
12 everyone in the room looks at the bottom there, the total number
13 is \$125 billion.

14 THE COURT: I'm sorry. Before you -- so the CID in its
15 scope request to multiple broadliners excluded about 10 percent
16 of the broadline market, as you understand it to be; is that
17 correct? In other words, they didn't send a CID to everybody?

18 THE WITNESS: They didn't send a CID to everyone.

19 THE COURT: And what's your sense of the percentage of
20 number of broadliners that did not receive a CID?

21 THE WITNESS: I know it better by revenue.

22 THE COURT: Okay. Then by revenue, what percentage of
23 overall revenue --

24 THE WITNESS: 10 percent.

25 THE COURT: So 10 percent?

1 THE WITNESS: And just to be clear, there's documents
2 submitted by multiple parties that indicate that the top ten
3 broadliners make up about 85 percent of sales. And then I have
4 sort of 5 percent on top of that.

5 So, remember, the calculation we're doing here is for
6 national broadliners. So those are the smallest guys. So
7 they -- I think they'd be less likely to be particularly
8 national.

9 But I also -- I didn't make this clear this morning, I
10 apologize. Even if you were to take that 10 percent and apply it
11 to my share calculations, it would change none of the HHI
12 presumptions. They would all still be far above in excess. And
13 I think the extreme case would be to assume that extra 10 percent
14 is all national and apply it. You'd still get the same HHI
15 presumption.

16 Again, I think more reasonable is that a lot of those
17 small guys are not particularly national, especially because I
18 have fully accounted for DMA and for MUG.

19 THE COURT: Okay. Sorry to interrupt you.

20 MR. SIMMONS: Oh, that's all right, Your Honor. We've
21 taken advantage of your generosity.

22 So tab 3 for purposes of your question, Your Honor, lists
23 the entities that responded in terms of a CID. But I just want
24 to go back to our strain of discussion so I can wrap up and sit
25 down before my hourglass is done.

1 BY MR. SIMMONS:

2 Q. The total broadline number reflected on Technomic is
3 \$125 billion. Do you see what's reflected on that third page?
4 I'm just asking if you see it.

5 A. I see the 125 billion.

6 Q. All right. And if we take -- start with that number, 125
7 billion. If we remove what USF and Sysco have -- and they're
8 represented -- if everyone just -- forget the technology.
9 They're represented at the top 2. 35 plus 23, let's just call
10 it 59.

11 If we take 125 billion minus 59 billion, that leaves
12 about 66 billion. Does that math sound right, Dr. Israel?

13 A. Um, yes.

14 Q. Okay. So 66 billion.

15 As we've discussed, tab 4 -- tab 4 of the binder --

16 THE COURT: Does the Technomic data, does it break -- does
17 it -- it's an aggregate number. It's not national -- it's not
18 what has been defined or considered national, correct? It's
19 national and local?

20 MR. SIMMONS: It's broadline, Your Honor. That's --

21 THE COURT: But it's all broadline.

22 MR. SIMMONS: That's right, and this is sort of our point
23 on where these lines are drawn.

24 THE COURT: Okay.

25 MR. SIMMONS: And, I mean, what's his basis to exclude it,

1 is sort of my subtext here.

2 BY MR. SIMMONS:

3 Q. So tab 4 lists the 28 billion that you added in, right,
4 on your sixth sensitivity?

5 A. That's the CID responses in my estimate in that
6 sensitivity for national sales.

7 Q. Okay. So just to recap on the math. 125 billion is
8 what's listed as the total from Technomic, minus 59 billion
9 which are the merging parties. The 66 billion left, if we
10 subtract from 66 billion the 28 billion that you used, that
11 leaves 38 billion, by my reckoning, unaccounted for. Does that
12 math sound right to you?

13 A. I don't think it's unaccounted for. As we just
14 discussed, a lot of it's local sales which are accounted for in
15 my local shares.

16 Q. It's 38 billion that you could not use in your
17 sensitivity; isn't that a fact, sir?

18 A. It's 38 billion that I did not include in my national
19 shares because I accounted for it in my local shares.

20 Q. And before I sit down, I just have a couple last
21 questions. You said, in response to a question I asked you in
22 your deposition -- why don't I go to the question I asked you.
23 You said to me, "Question: Well, you've written that you looked
24 to business documents in making judgments in this case, haven't
25 you?"

1 "And your answer was: I looked to business documents in
2 making judgments where they are informative. In general, I find
3 business documents relatively uninformative on the specifics of
4 antitrust market definition, because they are almost never
5 written with that in mind."

6 You said that in your deposition, didn't you, sir?

7 **A.** I believe I said and believe that business documents
8 generally aren't trying to do antitrust market --

9 **Q.** Yeah. And despite saying that, sir, you took
10 unequivocally what's been called the parties' CMU customer list
11 and you just took those lists and used them, didn't you, sir?

12 **A.** Well, not for market definition. I used it for my
13 analysis of targeted customers, which is an analysis of whether
14 the companies can price discriminate. I do think companies can
15 decide for themselves.

16 **MR. SIMMONS:** Thank you, Your Honor. Thank you to the
17 court staff. I have nothing further.

18 **THE COURT:** All right. Thank you, Mr. Simmons.

19 **Mr. Mohr,** are you prepared to proceed?

20 REDIRECT EXAMINATION OF MARK ISRAEL

21 BY MR. MOHR:

22 **Q.** Dr. Israel, Mr. Simmons was just asking you about your
23 use of the definition parties' for looking at different groups
24 of targeted customers.

25 Why, again, did you rely on the parties' definition of

1 national in looking at different targeted customers in this
2 matter?

3 **A.** I mean, again, as an economist, my logic is to rely on
4 what parties and what businesses do in the cases where they have
5 business rationales and an interest into their business
6 decisions. So in this case, as I was thinking about national
7 customers and local customers, there's these multiple documents
8 where the companies say we have basically two different service
9 models, two different pricing models. They call them local and
10 national. And they indicate what it is that makes a national
11 customer fit the national model, and they list things like a
12 single contract, coordination across markets, presence in
13 multiple regions. I don't remember all the factors, but things
14 like that, right? So the decision -- it's clear there's a split
15 between national and local.

16 The question is: Should I go through line by line myself
17 and try to decide what's national or local, or should I rely on
18 the parties who have this split? And their rationale for
19 national customers is their rationale that I'm using for the
20 split. So in a case like that, as an economist, I rely on the
21 parties' decision about why -- how their service models are
22 split into two groups.

23 **Q.** And I think you've testified to some extent that, you
24 know, different distributors might define or categorize a
25 customer's national slightly different.

1 Why aren't your results bias, given that distributors may
2 use different criteria to define a national customer?

3 **A.** I mean, that really goes into this whole discussion of
4 denominators that we've been having. The question is: How much
5 do you included in the denominator for national sales? And, you
6 know, that's why I do a range of estimates to get that number,
7 ranging from strictly using what the CID respondents call
8 national, to applying the parties' ratio to everyone, right? So
9 I consider that a range. Should I just take their word what the
10 CID respondent said or go all the way to the level of assuming
11 everyone is just as national as US and Sysco, even though I
12 think it's undisputed that US and Sysco are the most nationwide
13 of the distributors.

14 **Q.** And you were shown some maps which depicted footprints
15 for different customers. Just to recap, did you perform any
16 analyses to determine, you know, how common it is for one of the
17 customers flagged as national to have a national footprint?

18 **A.** Um, I mean, I certainly looked at, you know, the top
19 customers. And as I said, my analysis all thinks about revenue
20 as the relevant metric. So we talked about some analysis this
21 morning where I showed the majority of the revenue makes use of
22 35 or more distribution centers. And if you just take the top
23 15 or so national customers, they make up a large amount of the
24 revenue, and they tend to be GPOs and FSMs that we've been
25 talking about that aren't generally nationwide. So I certainly

1 look to see that a lot of the revenue is made up of GPOs, FSMs,
2 hotels, that have a broad footprint. With that said, my
3 definition of national is multi regional or national, and
4 everything I do in all of my shares and all of my calculations
5 and everything else I do incorporates both of those into the
6 estimates.

7 **Q.** And to address the -- if we can turn on the -- to address
8 this opening slide, which depicted a hypothetical in which there
9 were three different customers served by Sysco, just to be
10 clear, what is the product market -- what is the product that
11 you are considering in your analysis in this matter?

12 **A.** It's broadline foodservice distribution, which I would
13 define as purchasing a basket of products from a broadline
14 foodservice distributor. So again, analogies help. It's much
15 the same as a product market being office superstores, even
16 though people purchase different things from office superstores;
17 or a product market being -- you know, in the Cardinal case,
18 being drug wholesale distribution, even though people purchase
19 different things from their drug distributor. The fundamental
20 product is broadline distribution.

21 People purchase different baskets of goods from their
22 broadline distributor. That's part of the reason why you have
23 targeted customers in the analysis, because different people are
24 purchasing different things in different locations. But it's
25 standard and consistent with previous cases to define the

1 product as that basket of services and consider what would
2 happen to the prices of that broadline distribution service.

3 **Q.** So does it matter, to your analysis, that not all
4 customers by the exact same set of SKUs from their broadline
5 distributor?

6 **A.** No. I mean, my analysis is -- you know, think about it
7 national versus local. My analysis of national customers, the
8 model, everything else we talked about, first of all, the shares
9 are revenue shares to account for different customers who are of
10 different sizes in different ways. That might include what they
11 buy, how much they buy.

12 And then the modeling analysis itself incorporated the
13 fact that different customers are going to have different needs,
14 and they ranked different distributors with number one versus
15 number two. All of that is just saying, with that
16 heterogeneity you can still arrive at an estimate of the average
17 harm on that revenue base.

18 I actually would point out that it's pretty well accepted
19 in economics that when you have heterogeneity like that, and I
20 find this in my results, it tends to increase the merger harms
21 because, to the -- given that Sysco and US Foods are quite
22 similar, as I've shown, somebody who finds Sysco is their best
23 option, maybe they tend to be more national, they have certain
24 needs. It's very likely as I went through in my testimony that
25 they would find US Foods to be their next best choice. So

1 nothing about my analysis in any way depends on everyone being
2 the same or buying the same food.

3 On the local side, the regression analysis I talked
4 about, that looks at all SKUs. It puts every SKU in a bucket.
5 And what I'm computing is an average price increase that a draws
6 all SKUs. So it's explicitly, again, incorporating this idea
7 there's a basket of SKUs and I'm measuring an overall average
8 effect on price.

9 **Q.** And you walked through a number of examples of customers
10 who select a distributor on a region-by-region basis; is that
11 right?

12 **A.** Yes.

13 **Q.** Does the fact that some customers select distributors on
14 a regional basis impact any of your conclusions about this
15 matter?

16 **A.** I mean, only insofar as that they're all incorporated in
17 all of the analysis that I did. I mean, effectively I'm walking
18 through case studies of these different buyers who's looking at
19 snippets of the data that make up my overall data sets from
20 which I compute shares in which I use to do my analysis. So I
21 use an overall data set of RFPs, an overall data set of
22 revenues, that would include the sales of everyone that's listed
23 as a national customer, and includes who they buy from. The
24 fact that some of them are regional, you know, that's reflected
25 in who they're purchasing from and the decisions they're making.

1 Q. So just for example, for your national share
2 calculations, how did you account for the fact that some
3 customers may purchase on a regional basis with different
4 distributors?

5 A. I mean, again, it's all done by revenue, so if
6 somebody's -- if there's one customer and they split their
7 revenue up among ten distributors, they would all show up with
8 revenue in my share calculations.

9 And as I indicated, I also made sure to do a sensitivity
10 where I included anything that the individual respondents listed
11 as national or regional. And to go all the way to my row six,
12 as we've been calling it, where I attribute the parties'
13 national split to all the smaller distributors, many of their
14 sales are likely only regional, but I fully attribute them to
15 national in that case.

16 Q. So to make it concrete, for example, if PFG had some
17 sales to Subway, would you count PFG's to Subway in your
18 national sales calculation?

19 A. Yes.

20 Q. And if PFG had sales to Sodexo, would you count PFG sales
21 to Sodexo in your calculation?

22 A. Yes.

23 Q. And if PFG had sales to Navigator, are you accounting PFG
24 sales to Navigator in your calculations?

25 A. Yes.

1 Q. To the extent there are distributors that you did not
2 receive CID data from but who service national customers, their
3 conglomerate like MUG, are you accounting those sales in your
4 shares?

5 A. Yes. As I've indicated all, at least rows 1 through 6
6 where I used the CID data, they all include the parties, DMA and
7 MUG in every calculation. So the CID data is being used for
8 these other distributors to the extent they don't work for
9 national sales through these conglomerates designed to sell
10 nationally.

11 So everything that includes DMA or MUG is included, plus
12 all the CID respondents are included, as we saw from the list,
13 gives me the largest distributives who have the footprint,
14 potentially, to serve nationally, plus the conglomerations
15 through DMA and MUG.

16 Q. And when you were looking at your national share
17 calculations and the associated concentration levels, such as
18 HHIs, did you do anything to look and see whether those
19 concentration levels were consistent with the margins you saw
20 the companies earning on these customers?

21 A. Well, that's an interesting question and one I've thought
22 a lot about. I mean, it is true that, you know, the
23 concentration levels of quite high, and the margins on the
24 whole, you know, we talked about them being 15 to 20 percent.
25 My own report shows they're slightly lower on national

1 customers, and I know Dr. Hausman raised the issue that the
2 margins on national customers are slightly lower, but you raised
3 the question about why would that be if they really depend on
4 US Foods and Sysco.

5 It's actually a topic I've written on, as I think I
6 mentioned at the beginning of my testimony. And my findings
7 are, quite frequently, large buyers have -- when selling to
8 large buyers, distributors, sellers may have lower margins
9 because those buyers may have some buyer power, but very often
10 that buyer power results from the ability of that large buyer
11 explicitly to play the companies off against each other. So if
12 you think about the effect of a merger, a major effect -- and I
13 think that's true in the testimony throughout this case -- and
14 we just take that leverage away, so while large buyers may get
15 lower margins as a result of their size, they're very often more
16 affected by mergers than others because they lose the leverage
17 that was the source of their buyer.

18 So I find the sort of the concentration levels among
19 national buyers, and, you know, moderate margins to be quite
20 consistent with my general conclusion that those buyers today
21 can use competition between US and Sysco to maintain moderate
22 margins, and they would lose that ability post-merger and prices
23 would rise.

24 **Q.** Turning to the local shares estimates, there was some
25 questions about whether you did or do not include specific

1 distributors in those calculations.

2 If you didn't have CID data for a distributor for the
3 local shares, can you explain whether you attributed any shares
4 for them in those local calculations?

5 **A.** Sure. We talked about that a bit this morning. I'm sure
6 nobody remembers by now. But the -- for the local -- in a local
7 calculations, first of all, I was taking, you know, broad lists
8 of broadliners as provided, you know, by PFG, for example, and
9 others who provided a list of broadliners in the investigation.
10 Obviously that broad list of local broadliners is larger than
11 the number I had CID respondents on. Remember we I talked about
12 how if I didn't have revenue I used square footage or I used the
13 number of sales reps or I imputed revenue? So that was my way
14 of making sure that in the local calculations I tried to include
15 all of those.

16 **Q.** And do you recall any questions about -- a series of
17 questions about Sodexo selecting a distributor on a
18 region-by-region basis?

19 **A.** Yes.

20 **Q.** And do you recall Mr. Pazzanese from Sodexo submitted a
21 declaration in this matter?

22 **A.** Yes.

23 **Q.** If we can -- so I can show part of the declaration --
24 blackout the portion there.

25 Dr. Israel, approximately what percentage of Sodexo's

1 client sites use Sysco as their distributor?

2 **A.** According to the declaration here, approximately
3 80 percent of Sodexo's client sites receive service from Sysco.

4 **Q.** And approximately what percentage of -- and without
5 revealing a specific percentage, you know, how many of the
6 Integra, the GPOs sites, use Sysco as a foodservice distributor?

7 **A.** Well, I guess I did just reveal one number, so I'll just
8 say slightly less than the number that I just said.

9 **Q.** All right.

10 THE COURT: Would you actually put that back up for one
11 minute?

12 MR. MOHR: Sure.

13 THE COURT: All right. Thank you.

14 BY MR. MOHR:

15 **Q.** And similarly, Dr. Israel, do you remember a series of
16 questions about the Defense Logistics Agency, DLA?

17 **A.** I do, yes.

18 **Q.** Do you know what percentage of the DLA's business the
19 merging parties currently service?

20 **A.** That one I don't actually recall, as it sit here, no.

21 MR. MOHR: Would it -- can we please switch to the
22 computer, but keep it blacked out, please.

23 BY MR. MOHR:

24 **Q.** Would it refresh your recollection to see a document from
25 Sysco regarding the DLA business?

1 A. Right, so if --

2 Q. And, sir, again, without revealing the specific numbers,
3 just --

4 A. I mean, this indicates for contracts 1 from DLA in the
5 last two years. It's a -- I'd say, let's call it a clear
6 majority, substantial more than half of business has been won by
7 Sysco and US Foods, their combined share of those contracts.

8 THE COURT: Can I ask you to blow it up and just highlight
9 the number. I think I know what you're referring to, but let me
10 just make sure I know which number you're referring to on this
11 document.

12 MR. MOHR: Yes, Your Honor.

13 THE WITNESS: I'll just tell you, item number 1 there.

14 THE COURT: All right. I think I have it.

15 MR. MOHR: There we go (indicating).

16 THE COURT: All right.

17 MR. MOHR: Okay.

18 BY MR. MOHR:

19 Q. If a national customer regionalizes and selects a
20 distributor on a region-by-region basis but still ends up using
21 the merging parties for the majority of its business, do you
22 reach any conclusions from that behavior?

23 A. I mean, it would be reflected in the market shares that
24 I -- your showing that the merging parties win in that case, and
25 that would be reflected in the shares.

1 I think it would also be consistent with my understanding
2 as an economist that, you know, whether they regionalize and do
3 separate RFPs or separate auctions or whatever it is or whether
4 they do them jointly, the relevant question is: How successful
5 these firms are in winning that business? It's not so much the
6 institutional form of the sales. It's whether these firms that
7 we're talking about, and national distributors in general, are
8 more able to win that business than others. So I'd pay less
9 attention to the specific form of whether it's regional or
10 national and more to, you know, the revenue shares as the best
11 measure I have as an economist as how successful these firms are
12 in competing for that business.

13 Q. And moving on to your RFP analysis, do you recall some
14 questions about whether your RFP analysis purported to identify
15 who the number 2 bidder was in a given RFP?

16 A. I do.

17 Q. Can you just explain: What was the purpose of the RFP
18 analysis you were performing?

19 A. The RFP analysis itself was designed to, as we showed in
20 the charts earlier today, see how frequently Sysco and US Foods
21 lose to one another, and how frequently Sysco and US Foods face
22 competition from one another.

23 So in that sense, when Sysco loses an opportunity, the
24 data do tell me who they lost to, and as we saw, they
25 overwhelmingly lose to US Foods far more than anyone else. The

1 same in reverse. That tells me sort of -- it does give me a
2 measure in that case who the best alternative was. And when --
3 it also just tells me who they face in competition. So it was
4 really to look at unilateral affects and see how frequently they
5 face each other and lose to each other relative to other
6 competitors.

7 Q. Do you recall any line of questions about --

8 MR. MOHR: And, Your Honor, just for the record, the DLA
9 document that we put up on the screen was previously marked as
10 PX 01391.

11 THE COURT: Thank you.

12 BY MR. MOHR:

13 Q. Dr. Israel, do you recall some questions about Gordon
14 Food Services private label offerings?

15 A. I do.

16 Q. And did you perform any analysis of private label
17 offerings of various broadline distributors in your report?

18 A. My report does go through the extent of private label
19 SKUs that are available and showed that Sysco and US Foods have
20 the most extensive private label offerings.

21 Q. And if I could direct your attention --

22 MR. MOHR: And again, please, keep this blacked out from
23 the screens on the overhead. Thank you.

24 BY MR. MOHR:

25 Q. This is figure 11 from your report, paragraph 144. Can

1 you just describe, Dr. Israel, what's depicted here without
2 referring to any numbers?

3 **A.** Sure. So it's just the number of private label SKUs
4 offered by different broadline distributors. So it shows Sysco
5 as having by far the most private label SKUs; US Foods second;
6 and a drop to the rest; Gordon appears to rank 7th.

7 But in any case, it's just comparing and showing that
8 Sysco and US Foods have substantially more private label SKUs
9 that they offer than other broadliners.

10 THE COURT: What's the source of that data?

11 THE WITNESS: Actually, I don't remember this one. The
12 footnote should say.

13 MR. MOHR: Would it refresh your recollection to look at
14 appendix A?

15 THE WITNESS: Yeah, I think it would. What was the figure
16 number?

17 THE COURT: It's 11.

18 MR. MOHR: Figure 11.

19 THE WITNESS: Yeah. So it's listed here. It's -- you
20 know, we have the data listed for figure 11 in appendix A to my
21 report. So it's -- in the case of Sysco and US Foods, it's their
22 responses to the second request. And in the cases of the other
23 distributors, it's various base numbers. I don't know if those
24 are CID responses, but those are documents that are -- that give
25 that information are all listed here. So it would be in

1 appendix A of my report that lists all the Bates numbers that we
2 used to pull for each distributor.

3 BY MR. MOHR:

4 Q. And finally, Dr. Israel, do you recall any questions
5 about GFS as a competitor specifically for healthcare accounts?

6 A. Yeah. I believe there were some questions during the
7 discussion of various national accounts.

8 Q. Do you recall how Sysco perceives Gordon Food Service as
9 a competitor for healthcare GPO customers?

10 A. I actually don't recall Gordon specifically, and I know
11 they -- there's -- I've seen in many documents Sysco and
12 US Foods referring to themselves and one another as the closest
13 competitors for healthcare, but I don't recall specifically what
14 they said about Gordon.

15 Q. Would it refresh your recollection to see PX 01388?

16 A. Yes.

17 Q. If I could turn your attention to page 4 of that. Do you
18 see this document?

19 A. I do. I mean, so I do recall the statement here at the
20 top about US Foodservice being the strongest competitor for
21 healthcare GPO dollars. I didn't recall as I sat here that it
22 says followed by a distant Gordon Food Service, so it appears to
23 indicate that they see US Foodservice as the strongest
24 competitor, and they see Gordon Food Service as a distant
25 number 3.

1 MR. MOHR: No further questions, Your Honor.

2 THE COURT: All right. Thank you very much.

3 MR. SIMMONS: One. He's making me do it, Your Honor.

4 It's either he kills me or you kill me. He being, for the
5 record, Mr. Tringali.

6 RE-CROSS-EXAMINATION OF MARK ISRAEL

7 BY MR. SIMMONS:

8 Q. Dr. Israel, I know it's been a long day, and I believe
9 you testified to this effect in your deposition, so I hope not
10 to refer to it.

11 But if PFG is servicing a customer from both a broadline
12 facility and one of its custom or systems facility, you did not
13 include any of PFG's revenues for -- from the custom systems
14 facility, did you?

15 A. And again, my product market definition includes
16 broadline distribution centers. I talked earlier today about
17 how there are some customers who get some service from both of
18 those products markets, and that doesn't change my conclusions.
19 So it's correct that I don't count in any case the service from
20 explicitly systems business.

21 MR. SIMMONS: Thank you, Dr. Israel, and thank you to the
22 Court and the court staff.

23 THE COURT: Any redirect on that one question?

24 MR. MOHR: No, Your Honor.

25 THE COURT: All right. Dr. Israel, thank you. It's been

1 a long day. Thank you for your time and your testimony.

2 THE WITNESS: Thank you.

3 THE COURT: And enjoy your weekend.

4 (Discussion had off the record.)

5 THE COURT: All right. Mr. Weissman.

6 MR. WEISSMAN: Your Honor, would it -- we are prepared to
7 now rest in our case-in-chief. We do -- and I don't propose to
8 do this now, in the interest of time, unless you'd like to. We
9 do have a couple of exhibits that have been objected to by the
10 defendants, only a couple, that we would like to offer in, and if
11 Your Honor wants to take argument we can do it. Again, we're
12 prepared to reserve that until the end of the case, but we're
13 ready to close our case-in-chief.

14 THE COURT: No, let's reserve those evidentiary disputes
15 to the end. We don't need to abide by those formalities here.

16 So if you're ready to close your case, subject to the
17 additional exhibits, great. So that means we'll turn to you,
18 Mr. Parker, on Monday morning?

19 MR. PARKER: Yes.

20 THE COURT: All right. Where do you-all folks think we
21 are in terms of hitting our Wednesday deadline?

22 MR. WEISSMAN: I think we're in good shape. I can give
23 your Court an unaudited version -- we're going to audit it
24 tonight -- of the time of that one.

25 THE COURT: Unless you have something better to do.

1 MR. WEISSMAN: Yeah. Well, we, as of the end of the day,
2 by my calculation -- and again, we'll audit this -- plaintiffs
3 have taken 13 and a half hours, and the defendants have taken
4 9 and a half. Before today, we knew it was 1044 for plaintiffs
5 and 628 for defendants, and I'm just using my calculation today.

6 So we've got three days left on the schedule. That's 18
7 hours. I think we budgeted each for about 20 hours, so I think
8 we're on track, and if the way it breaks down -- again subject to
9 auditing -- the defendants would have 11 and a half, and we would
10 have 6 and a half, but --

11 THE COURT: Mr. Parker?

12 MR. PARKER: We may need to coordinate on this. I've got
13 them down for 14 and us for 9 minutes -- 9 hours, 13 minutes.

14 THE COURT: I'll charge you for that half hour.

15 MR. PARKER: It's been a long week, Your Honor, 9 hours,
16 13 minutes.

17 MR. WEISSMAN: We're not that far off, by the way.

18 MR. PARKER: We'll reconcile.

19 THE COURT: All right. Great. All right. Thank you,
20 everybody. I know it's been a tough slog the last four days, but
21 thank you for your professionalism.

22 MR. HASSI: Your Honor.

23 THE COURT: Mr. Hassi.

24 MR. HASSI: I have one thing. You asked a question about
25 Subway, if you wanted that answer in one minute now, I don't want

1 to try your patience.

2 THE COURT: Why don't you wait. You can tell me on
3 Monday.

4 MR. HASSI: Okay.

5 THE COURT: All right.

6 MR. WEISSMAN: What time on Monday?

7 THE COURT: Let's start at 9 a.m. on Monday. And a final
8 reminder, I need to remind everyone that Sunday's Mothers' Day.
9 You can't blame me if you forget to do that. So, all right.
10 Thank you, everybody. Have a great weekend.

11 (Proceedings adjourned at 5:01 p.m.)

12

C E R T I F I C A T E

13

14 I, Scott L. Wallace, RDR-CRR, certify that
15 the foregoing is a correct transcript from the record of
proceedings in the above-entitled matter.

16

/s/ Scott L. Wallace

5/8/15

17

Scott L. Wallace, RDR, CRR
Official Court Reporter

Date

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