UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

et al.,

plaintiffs,

plaintiffs,

priday, May 8, 2015

v.

10:45 a.m.

sysco corporation,

et al.,

Defendants.

Washington, D.C.

DAY 4 - 2nd MORNING SESSION

TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS

(EXCLUDING SEALED PORTION)

BEFORE THE HONORABLE AMIT P. MEHTA,

UNITED STATES DISTRICT COURT JUDGE

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MORNING SESSION, MAY 8, 2015

2 (10:47 a.m.)

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- THE COURT: Please be seated, everyone.
- 4 Please continue.
- 5 MR. MOHR: Thank you, Your Honor.
- 6 CONTINUED DIRECT EXAMINATION OF MARK ISRAEL

7 BY MR. MOHR:

- 8 Q. Dr. Israel, I'd like to move next to discussing how you
- 9 calculated welcome market shares in this matter.
- 10 A. Sure.
- 11 Q. Using the demonstrative on slide 16, can you walk us
- 12 through the specific methodology you used to calculate shares
- 13 for the sale of broadline distribution services to local
- 14 customers in a specific market?
- 15 A. Sure. So we did most of the hard work before, actually,
- 16 | so this is -- the -- as I said before, all of the competitors
- 17 | inside the light gray area, ultimately enter the calculation.
- 18 The only thing really to add is that, as you recall, each of
- 19 those competitors, each competitor that came in was pulled in by
- 20 being part of a circle around a given customer, so that
- 21 | basically for -- you can think about for each customer within
- 22 that circle I compute the share of sales made by the
- 23 distributors that are inside that customer circle. And then I
- 24 | just take away -- to group them together into the overall local
- 25 | area I take the weighted average across the customers based on

- 1 | the size of the customers. So that's all for the market shares.
- 2 | That's basically -- all the competitors in the light gray area
- 3 matter, they were rolled together based on which customer
- 4 circles they're in, and then they're rolled together into an
- 5 overall market share.
- 6 Q. And so, just to summarize here from the discussion
- before, any distributor located in the dark gray area, they're
- 8 accounted for in the market shares?
- 9 **A.** The dark gray areas, certainly, yes.
- 10 Q. And any competitor located in the light gray area you
- 11 take them into account in your market shares?
- 12 A. Yes. And to be clear, and maybe we'll talk more about
- 13 this, there are -- I do -- just like with the national shares, I
- 14 do a number of calculations to make sure the results are stable
- 15 across different assumptions. Some of those different versions
- 16 | are further expanding the circles, further expanding the light
- 17 gray area to bring in -- you know, to expand the local area out
- 18 a bit further to see if the results remain stable and they do.
- 19 Q. And so can you describe specifically some of the
- 20 different variations you did on local shares in terms of
- 21 | analyzing different distances?
- 22 A. Sure. In terms of distances, the picture that's drawn
- 23 here is the 75 percent draw area that what we talked about. I
- 24 did a version that used a 90 percent draw area, which pushes the
- 25 circles farther out. I also did a version, that's described in

detail in the report, I'll try to summarize it well here. It uses -- it goes all the way out to a 95 percent dry area, which is actually quite a large distance. But what I do in that case, just as another methodology, is I -- you can think about having rings as you're further away from the area in question, and I just scale those rings down so that farther away rings count less in the calculation. I basically figure out how much of the sales are made within each ring and adjust the weight put on each ring accordingly. But that would take you out substantially farther than this light gray area.

- Q. And why did you do calculations using different distances?
- A. I mean, again, what's clear to me is that, you know, we wanted to find a geographic market, a local is geographic market, so that defines the geographic area. We know that distance is characteristic of broadline distribution that matters. So just like with any product characteristic, we want to think about how big the distance should be, but I don't want my results to depend on one specific distance, so I want to try different distances to make sure -- and again, the result that ultimately matters is, are the shares and concentrations and changes above the presumption of harm in the merger guidelines. So I just want to make sure that my results are not sensitive to using a specific distance cutoff.
 - I mean, I should note that as I go to broader

distances -- I mentioned this earlier, but one thing that happens in many cities in lots of cases, is that you pull in more distributors, but a lot of those distributors are -- you pull in more distribution centers, a lot of those centers are the parties' centers. You're adding -- you're seeing they have a lot of nearby capacity and sales.

And so that, you know, drawing a specific area is not in any way cutting off the parties or others more than the other, it's just -- I just want to make sure that different distances lead me to stable results. And I found that across all the distances that I've done, my bottom-line conclusions are not changed at all.

THE COURT: And so maybe you'll get to this. Where do the revenue numbers come from that you associated with the geographic markets?

THE WITNESS: So that's a good question. It's -- I certainly don't have revenues on everyone. Again, the revenue numbers are from the CID responses where I have it. But in the case of the local markets, I did two other things to -- as other ways to measure market shares in this case, and --

BY MR. MOHR:

- 22 Q. Just be careful not to refer to the specific --
- 23 A. I can refer to the basis of the calculations.
- **Q.** Okay.
- 25 A. So the two other things that I did were -- the most basic

one was, instead of revenue as a measure of the size of each distributor to include in the share calculation, I used the square footage of its distribution center.

That's something that the parties had done in presentations to the FTC, was use square footage as a measure, sort of a proxy for the size of that distribution center.

I also used a number of sales reps where I had that distribution center as another way of measuring size. So instead of revenue, I used that as the share metric.

And then even when I come to revenue, in the cases where I don't observe the revenue, I use a common method in economics called imputation, which is I estimate the relationship between revenue and square footage basically, and where there's a distribution center where I don't know its revenue, I impute that value based on its size and that relationship between size and revenue.

So you can think about square footage being a nice measure because, I mean, the parties presented it, and in modern technology you can actually go to Google maps and see the outline of the distribution center in satellite view, and Google itself computes the square footage for you, so it's something you have on every distribution center. Where I had revenue I used that, and where I didn't I used this relationship between revenue and square footage.

Q. So just to make clear here, for some of the distributors

located on this map, you may have had their actual revenue
numbers, and for others you may have imputed their revenue based
on their square footage?

- A. That's correct. And to be clear, I do my shares three ways. One time I just used the square footage itself and compute basically squares of square footage. Another time I used sales reps where I have that -- if I'm missing the sales reps in that case, I impute it based on square footage. A third calculation is based on revenue, and if I'm missing the revenue I impute it based on square footage. So I do the calculations three ways, but in each calculation, if I'm missing the value I impute it based on square footage.
- Q. Can you describe how your calculations may have varied between revenue, square footage and sales force when you looked at the results?
- A. I mean, there were slight variations from city to city, but none of the conclusions on any given area changed as far as comparison to the presumption of merger harm.

One thing I show in the report is another way of looking at it, is -- you know, there's lots of local markets, so we need some way to summarize the results. Another way I do is look at things like the median increase in HHI across all local customers, or the 75th percentile increase in HHI, to summarize using these different metrics. And I find that across the different metrics those statistics are quite stable, certainly

- don't change in any way that would change any substantive conclusion.
- Q. And did you account for the divestiture at all in calculating your local shares?
- 5 A. I did. So I -- I computed shares --
- 6 Q. And if we can blackout the next slide, please.
- 7 I'm sorry, did you count for the divestiture in your 8 initial calculations?
- 9 A. I did. So first let me sort of explain that in general terms.
- 11 THE COURT: Aren't these numbers in your complaint?
- MR. MOHR: Your Honor, these are divestiture numbers.
- 13 These were not in the initial complaint.
- 14 THE COURT: Okay.

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THE WITNESS: So let me just describe in general terms the way that I accounted for the divestiture before turning to this.

The -- when you think about the divestiture for a local market, right, in some cases the -- the divestiture is distribution center specific, and so in some cases the divestiture caused that

distribution center to no longer be US Foods, to be PFG.

So that -- what that means -- if you remember the whole methodology was to define these overlap areas where Sysco and US Foods have overlapping distribution centers. Basically what the divestiture does when I compute it is make that not an overlap area for the merging parties anymore, right? And so the

most fundamental effect of the divestiture was just to take some of the former overlapping areas where there would be local harm and make those no longer overlapping areas.

Now, there are reasons to question -- and we'll talk about the divestiture -- whether the divestiture would fully solve the problem in a given local market, but for purposes of the calculation, what I did was just turn off the overlap where the divestiture occurred.

The effect that that had was in the -- it reduced -- so in the original calculations the percentage of local customers of the two parties who are in one of these overlapping areas, is over 60 percent. When I account for the divestiture it goes down, but it's still over 50 percent, so it reduces the number in overlapping areas but it's still substantial.

As far as the shares and concentration changes within any given overlap area, the divestiture doesn't really change that, right, because if it's an overlapping area and the divestiture didn't spin off that distribution center, we still got the same area on basically the same calculation. So the basic effect of a divestiture was just to reduce the percentage of customers in the overlap areas, but it's still over half.

What's shown on the screen are just some examples of CBSAs, which are, you know, large census definitions of cities where, even with the divestiture, the overall share rolling those CBSAs together remains quite high, and the change in HHI is far

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above the merchant quidelines presumption. So this is just specific examples of cities where there remains, clearly, a presumption of harm, even given the divestiture. MR. MOHR: And, Your Honor, I apologize. I think this slide can be shown, the --THE COURT: Okay. You can put that slide up. THE COURTROOM CLERK: It's delayed, Your Honor. THE COURT: Oh, it's delayed. Okay. BY MR. MOHR: Dr. Israel, for your local market share calculations did you consider any alternative methodologies? A. Um, I mean, I discussed some alternatives that I actually 13 pursued of using different distances, different metrics, et cetera. I mean, certainly, just overall in approaching the problem of computing local market shares, I mean, one question that I ask myself at the beginning of the process is: Would it be possible to just take that dark gray area that we were looking at and get comprehensive measures of sales into those areas from wherever they came from, say sort of ZIP code level data on sales. But I concluded there's no source that gives --

And in particular, the issue is that the -- you would need -- because we're doing local broadline customers, I would need sales in the ZIP codes that were not by systems

that has comprehensive data on sales, say by ZIP code.

distribution centers and that were made to local customers, so there's no source of data that I have.

We know that systems facilities distribute much farther than broadline facilities, and so if you can't separate those out you don't have the measure of broadline share.

All that that does is it -- the merger guidelines are quite clear. They're sort of two ways people compute local markets and local market shares: Define them by where the customers are; or define them by where the competitors are, because there's no comprehensive data on sales into each customer location. Everything we've been talking about is just this methodology of defining a relevant set of competitors and computing the shares across that set of competitors.

- Q. And to make that a little more concrete, if a specific distributor was able to provide ZIP code level sales into a local area, you know, why did you decide not to use that in your calculations?
- A. I mean, there's really two reasons: First is -- I mean, ultimately to compete market shares I need some way to get a denominator to get comprehensive numbers, so if I have it for some set of distributors I can't compute that. And in particular, I always have it for the merging parties, so anything that wasn't comprehensive for everyone else would tend to you -- you know, would only have the merging parties and not everyone else included, so I wouldn't want to compute shares

that way.

The other point that I raised is, you really would need a breakdown of sales to local broadline customers, and I just -- if I have sales from some other distributor I know that sales that travel a longer distance are often system sales. There's testimony from systems distributors indicating that they go much farther. And from firms that do both broadline and systems, indicating that their sales that go farther tend to be systems. So I wouldn't want to -- without that breakdown, I would have no reliable way to compute local broadline shares.

- Q. Based on your share calculations and concentration calculations for specific local areas, did you draw any overall conclusions about the likely effects of the proposed merger?
- A. I did. Maybe I could summarize everything that we've been talking about. I mean, on the national side I clearly found that shares -- the concentration changes in levels were far above the merger guidelines presumption of harm. The local level, I find that in many local areas the concentration levels and changes are far above the merger guidelines presumption of harm.

So based upon the analysis that we discussed to this point, I find that, given the markets that I've defined and the shares that I find, there's a, you know, clear presumption under the merger guidelines that the merger will harm competition and harm consumers.

Q. Did you end your analysis in the merger with a calculation of market shares?

A. No, definitely not. It's sort of a natural break point to think of the analysis that comes next. I mean, the way that merger guidelines and I approach this problem is, when you get through the shares and concentrations you've define markets and established that the changes in shares in concentrations are such that there's a presumption that the merger is harmful to competition. There's an increase in concentration at a level that the guidelines find leads to a presumption of harm. But certainly we're going to go on and ask whether there are factors that offset that, that would eliminate that.

And really there are three that I think we'll talk about.

One is: Is it true, the sort of competitive effects analysis that we've discussed? Does it turn out that the parties are actually distant enough from each other and not close competitors, such that even though the shares are high and the concentration changes are high, there wouldn't be a problem?

In my view, you'd really need to find, given these high shares, that they're quite distant competitors. As long as they're reasonable close or very close competitors, the shares indicate that there's a problem.

Second, I looked at any additional effects of the divestiture or entry over the longer term. And finally, at the -- whether efficiencies from the transaction could offset

- 1 harms.
- 2 Q. So let's turn to your --
- THE COURT: I'm sorry, was the second -- you consider
- 4 | barriers to entries? Is that what you said?
- 5 THE WITNESS: Yes. But as part of that I also consider,
- 6 although the calculations I've shown already incorporate the
- 7 effects of the divestiture, I consider whether there are
- 8 additional longer term effects. That's sort of an additional --
- 9 that's kind of another form of entry or expansion that I at least
- 10 consider as a possibility.
- 11 BY MR. MOHR:
- 12 Q. Sir, if we can move to your analysis of effects, first
- 13 | focusing on national customers. Did you perform any work to
- 14 | analyze whether the merger's likely to result in unilateral
- 15 | anticompetitive effects for national broadline customers?
- 16 **A.** I did.
- 17 Q. And can you describe what are unilateral effects, as you
- 18 analyze them?
- 19 A. I mean, the issue I'm analyzing here is this question
- 20 | that I discussed before, which is: Although the high shares and
- 21 | concentration levels give a strong reason and a presumption to
- 22 | think there would be harm, unilateral effects is asking how
- 23 close are these competitors to each other really, and are they
- 24 doing distant things from each other, such that there wouldn't
- 25 | actually be -- maybe there wouldn't be harm, despite those high

shares. And so the question is: How close are they to each other? How much do they compete with each other?

I think a useful way to think about this is -- I mean, ultimately -- and this is true in models I presented in my report and things. Ultimately, where competition is harmed the most is in cases where one merging party was the first choice for a customer, and the other merging party was the next best alternative; because the next best alternative is quite important in determining what terms the winner actually has to offer.

And so the question -- and shares give us a good indication. If the shares are high in both cases, they're likely competing with each other and causing problems. The question is -- or the loss of competition would cause problems.

The question is: Do we have some reason to think that when one of them is number one, the other one wasn't really number two, or vice versa. Shares tell us that probably happens a lot, but is there some reason that they're distant from each other in sort of what they do, such that they're not coming head to head that much.

What I find is, in fact, if anything, they're very similar to each other, and even beyond their shares, likely coming head to head with each other quite frequently. So, if anything, it goes the other direction. Certainly no reason to think that they are more distant from one another than the

- 1 | shares would imply.
- 2 Q. What specific information did you examine in your
- 3 unilateral effects analysis?
- 4 A. I mean, again, as -- my answer is in all of these things
- 5 | I looked at the objective characteristics of the firms, sort of
- 6 | what -- and are they similar to each other on important
- 7 dimensions or are they different? To guide those dimensions
- 8 | that I studied, which dimensions -- you know, there's lots of
- 9 ways you could look at a firm, what dimensions do I look at to
- 10 | see if they're close to each other or not. I looked at
- 11 | testimony and documents indicating what characteristics matter
- 12 to some or all national customers. And then, finally, I looked
- 13 at empirical data to see how often these firms are showing up as
- 14 competitors with one another.
- 15 Q. Based on your review of the record, what are the
- 16 objective characteristics that you observed about the merging
- 17 parties, as it relates to national broadline customers?
- 18 A. Yes. So in testimony for, you know, at least some, and
- 19 many cases many, national customers making up a lot of revenue,
- 20 I saw at least three dimensions on -- that matter to them in
- 21 choosing a distributor. I'm sure there are also others, but
- 22 three that came up a lot. One was just the geographic breadth
- 23 of the distributor, can the distributor cover a lot of my
- 24 | footprint? Second that came up a lot was, can the
- 25 distributor -- similar, but related -- can the distributor offer

me consistent products across my footprint? Can I get consistent products and services across my footprint? And a third was just breadth of products that I could be offered. Can I get a large number of different products? Can I get a large number of private label products?

As I mentioned for many national customers, the hospitality, healthcare, foodservice management customers that make up the bulk of the revenue, they indicate they have widespread menus and frequently changing menus, such that the ability to get a large number of different views and have those views be able to change from week to week is very important to many of those customers.

- Q. And you also mentioned that you've reviewed testimony for market participants. Did you review any testimony as it related to whether the merging parties are close or distant competitors for national customers?
- A. Yes. I've also ultimately did empirical analysis of that question, but I reviewed all the testimony that's been presented by both sides, and there certainly are a substantial number of customers making up a large amount of revenue who indicate directly that US Foods and Sysco have -- are close competitors, that they see them as the top two options, that they feel that they've benefited from the competition that arises from those two options competing with one another.
 - So, I mean, I -- you know, there are many, you know,

GPOs, foodservice management companies, healthcare 1 2 organizations, hospitality chains. I won't mention specific names here, but who indicate that they see the Sysco and 3 US Foods as top options and they benefit from such competition. 4 Collectively, the testimony I've seen that indicates that makes 5 up a substantial amount of the national revenue. 6 7 And if we could move on to the empirical analysis that 0. you described, and if we could please blackout the next screen. 8 9 Dr. Israel, if I can direct your attention to slide 19 of the demonstrative, which contains two figures, which are figures 10 11 12 and 14 taken from paragraph 175 of your report, PX 09350. Can you describe to the Court what's depicted in these figures 12 and the analysis you conducted? 13 So this goes back to the bidding RFP data we were 14 Sure. talking about before where I and my staff went through the --15 basically the specifications, 16 response of the parties, but 16 the information they provided in various forms indicating when 17 18 there had been an opportunity to bid or negotiate for a deal with a given national customer. Again, that's multi regional or 19 20 national. Sort of pour through all that information. 21 In this case, some of that was in the -- you asked a 22 question about length. Some of that here was in the form of 23 data the parties provided, some of that was in the form of documents going through that were describing competitions. 24

Poured through all of that data and came up with -- summarized

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on here, basically in the situations where there were these bidding opportunities -- this is from the Sysco side -- there was a separate analysis of US Foods. On the Sysco side, on the one hand, in those opportunities how frequently was any given competitor showing up, you know, as a competitor in the opportunity? How frequently were they mentioned as another firm competing for the opportunity?

On the right-hand side it is among the cases that Sysco lost, how frequently did these other competitors show up as the winner? I should note one thing that I intentionally -- is not here, and I intentionally did not do and don't do when I analyze data like this, is ask the question: In Sysco's data how frequently did Sysco win? Because we know they're going to have more records of their own wins in their data than they're going to have of other people's. That's what's going to be in their data. So the relevant question from a Sysco data is: Who else are they facing and who else are they losing to, and how does that compare across the forms?

I should also note that in these cases we -- this is broadline specific, so these are opportunities that were -- the customers were describing the need for broadline services, since we're now discussing the broadline product market.

Q. Okay. And if I direct your attention just to the next slide, slide 20, it's this -- is this the same analysis, just on the USF data set?

A. It is. I didn't really summarize the figures from the other one. I mean, they're on both pages. I mean, the bottom line conclusion, you can look at any of the four figures, is that whether you count it by number of times they participate or number of times they win, Sysco showed -- US Foods shows up more in the Sysco data than any other competitor, and, in fact, more than any other competitor combined. The same thing also true in either direction. All right.

So again, it's not a close call in terms of what's reflected in these records and their -- the bidding information in the records that were submitted. They show up as each other's competitors more often than everyone else combined. You can see, you know, others show up, DMA, PFG, other firms that we've talked about, but in every case Sysco shows up more for US Foods than everyone else combined. US Foods shows up more for Sysco than everyone else combined.

I mean, that's a -- that's certainly a higher standard than I would even need. I mean, this is quite clear that they are particularly close competitors for one another, and certainly no evidence that they're distance in space in any way that would offset the presumption in harm. If anything, they're showing up in each other's data at a very high rate.

- Q. Can you describe how you defined RFP for purposes of this analysis?
- A. I mean, really, a better term than RFP would be a bidding

situation. It was basically any time in the data when there was a record that a given national customer was looking for broadline service and was trying to weigh its options for that broadline service, so that could include, you know, any situation in which a customer was negotiating with a couple parties, was running a formal RFP. Basically we scoured the data for any situation in which a cust—— in which there was a record indicating that a customer wants to buy broadline services and is shopping around for those broadline services.

Not trying to, in any way, eliminate based on the form of that competition, but just there's a customer looking for broadline service, the parties' data indicates that we're part of a competition to get that business.

THE COURT: Does the bidding data come from a different data base than the links system? Do the companies keep a separate -- well, let me ask you: Is there a separate database for the RFP/bidding information?

THE WITNESS: I mean, it's separate, certainly, for me, yes. I mean, the -- the RFP data are something that I compiled by going through the parties' records and looking for any indication of when they had seen an opportunity to win national broadline business. LINKS plays a part in it, in the sense of when looking at the US Foods side data, you know, the process was effectively to go through weekly sales reports that the head of national sales at USF gets that indicates what are the current

opportunities. But then taking those sales reports, in order to
make sure I knew as much as possible about those opportunities, I
did cross reference it against LINK as a second source to figure
that out.

On the Sysco side, again, it was, you know, going through ordinary course documents they have that list current opportunities, checking it against the profitability model that they use to evaluate those opportunities. But to be clear, in each case this was a long process of going through everything that was submitted in response to specification 16 -- which was on this topic -- to look for situations in which the parties described there's an opportunity for business at this customer and to try to collect everything I could find in their records about who else was competing and who won or loss.

15 BY MR. MOHR:

- Q. Did you perform any analysis to test whether, you know,
 RFP observations that you collected, you know, were
 representative, accurate, against, you know, other sources of
 information?
 - A. I did. I mean, I describe at least two things. I mean, one is your explicit question, I also looked at investigational hearing transcripts, I looked at declarations and testimony from customers to try to cross reference to make sure that, where possible, that the information that was in the bidding data was reflected in what people were saying in the customer testimony

or in the investigational hearings.

I mean, obviously that's not a complete record, not everything is covered, but I cross-checked to make sure the same opportunities were generally showing up when possible.

The other thing that I would stress, just as an economist, that I find more -- probably more important is that -- it's what I said before: When you go through ordinary course records of the companies -- right, they are ordinary course records, they're credibly valuable -- they are imperfect, and you have to sort of figure out what you can from the information that's in them.

To me, the best -- what you need to do in those situations, and what I do in every case, is look at what you're getting from both sides, look at a couple different sources and make sure that you're getting basically the same picture. The Sysco data set and the USF data set were constructed separately from each other intentionally, such that I could see if I found that they were giving mutually reinforcing pictures of the parties being close competitors. That's what I found.

So ultimately, to me, my conclusion also heavily based upon the fact that either side is giving me the same story, and they're mutually showing very similar patterns as far as being each other's closest competitor.

Q. And, Dr. Israel, you referred to specification 16 of the second request a couple of times. Can you just explain a little

- bit, the second request and what specification 16, what type of
 information that was seeking?
 - A. So the second request, I mean, I'm not a lawyer here, so I won't get all the words exactly right. I think of it as a big CID or subpoena to the parties in the merger investigation process asking for a large variety of data and documents. I don't have the specifications memorized, but specification 16 was a specification asking for information on RFPs and bidding type situations.

And so in response to that specification, as I understand it, the parties submitted some summary spreadsheets that included a small number -- I think the top 20 or something -- bidding opportunities from each year. So that was certainly one input into what I used. But to go beyond just that list, I also used the other information in specification 16 just to search through it to find bidding opportunities and to find whatever information I could about who was on those and who won.

THE COURT: Will the CID requests be put into evidence?

MR. WEISSMAN: Yes, Your Honor.

THE COURT: Okay.

MR. MOHR: I think they have been, Your Honor.

THE COURT: The specific requests themselves? In other words, the actual request itself, so if I wanted to see what the wording was of CID number 16, that particular --

MR. WEISSMAN: Okay. I -- we know the answers have been.

1 I think within the answers some of the respondents actually
2 restated the questions.

THE COURT: Okay.

MR. WEISSMAN: So I think in that form, but if not, we certainly -- it's something that's easy for us to do. We will check that after the Court session today and offer it, if it's not already in there in some other form.

THE COURT: Okay. All right. Thank you.

BY MR. MOHR:

Q. Dr. Israel, you mentioned that you kind of created Sysco data set and the USF data set here.

Are you aware of any instances where Sysco and USF reported different RFP participants in the same RFP?

A. Yes. I mean, it's the sort of thing that happens when you put together these data sets, they're ordinary course records of who was perceived and who each party perceives as competing. I mean, one case in which it happens most frequently is if one of the parties was not one of the top one or two firms in the opportunity. They might just not have as good of records of that opportunity.

But there are other cases in which they report different competitors or different winners. The cases in which they actually report different winners were rare here. There weren't a lot of them. And there were actually even some where, I think, you know, one of the parties reported that someone else

had won, and it was actually the other party, and so that would
have actually increased my numbers.

But I -- what I -- I intentionally stick to what's in their ordinary course records, check to see that it's mutually reinforcing. And from my point of view, one way that I think about this exercise is that it's reflecting in this process who the parties are perceiving as their closest competitors on these opportunities. So if they perceive that each other is the participant and the winner in the vast majority of times, that, to me, is a very important measure of the competition that they're facing in the marketplace. So I intentionally don't try to redo what's in the records but just report what their records indicate about their perceptions of the competition that they're facing.

Q. And, Dr. Israel, as you said, this is analysis of -- as part of your national unilateral effects analysis.

Did you analyzes whether national broadline customers could attempt to defeat a price increasing from the merging parties by splitting up their purchases among multiple distributors, as opposed to contracting with a single distributor?

A. Yes. I mean, as I said from the start, my shares and my analyses here don't a priori exclude any particular competitor.

My shares compute anything that's gone to a combination of regionals. You know, the winners of any RFP are reported as who

they are, so it's -- I'm not excluding a possibility that that competitor could be a set of regionals.

I also, to the extent that someone has broken down on a bid, a national customer has broken down bids into separate regional opportunities, those would show up as, potentially, separate winners in my analysis. So if somebody's running six regional RFPs and six different firms win, that would be six different winners counted in my figures.

Q. Dr. Israel, if we could turn from -- focus on national customers to local customers here.

A part from calculating local market shares --

THE COURT: Mr. Mohr, I'm sorry, just before you move on, let me just make sure I'm clear. With respect to this analysis, the national customer definition, again, is the national customer definition that was given by the parties themselves?

THE WITNESS: Yes, although -- it's a good question. I mean, I will say that when you're going through the RFPs there are going to be cases where they're not the winner, and so they don't classify who the -- whether the customer would have been national or not. I mean, so it's not -- and there are just other cases where it's not clear from the documents. So it's not true that in every case I could define -- I could just go to their record.

THE COURT: All right.

THE WITNESS: I tried to use exactly the same methods,

which was see if they're asking for it in multiple regions.

One example of where I really tried to use the same method was on the US Foods side. I know that if the opportunity went to their director of national sales, I would consider that a national record. So I basically I was attempting to -- you know, use the same standards. But it's true that in the RFPs, as opposed to just the revenue data, you had to look at the actual observation and determine if it was asking for multi regional or if it was being treated as part of that division.

THE COURT: So when the data showed that they didn't win, you had to use some subjective assessment of how they would have treated the customer if they had one?

THE WITNESS: Yes. I mean, that's example, yeah. I mean, if you think about -- I mean, ultimately for the purposes of the RFPs, the net effect, if someone ends up on the other side of the line, it'd be one more or one less RFPs in my observation. I'm just doing the best to have the best sample of national RFPs that I can.

19 BY MR. MOHR:

- Q. All right. So, Dr. Israel, on the local side, apart from calculating local market shares, did you undertake any additional work to analyze whether there'd be any unilateral competitive effects on local broadline customers?
- 24 A. I did.
- 25 Q. And what were your conclusions regarding the likely

1 competitive effects of the merger for local broadline customers?

2 A. I mean, again, I did a variety of analyses to see whether

3 the parties, in terms of each other's data, show up as each

4 other's competitor frequently, and I found though they do,

again, much more frequently than anyone else. We'll talk about

6 that in more detail.

7 I also did some regression analysis or entry study to see

8 when the parties open a new distribution center near a

9 distribution center of the other party, if that affects prices.

10 And I found, indeed, it does to a significant amount. Again,

demonstrating directly the competitive effects that they place

on one another.

13 Q. So let's focus on the first one of these analyses, your

analysis of the LINK database which you discussed a little bit

15 earlier.

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16 First, can you just -- can you -- you described the LINK

database for the Court, but can you describe what analysis you

18 performed on the LINK database to analyze effects?

19 A. Sure. So we talked about the LINK database under

20 aggregate diversion, and there I was counting up the number of

times that US loses to another broadline firm. For purposes of

22 | the unilateral effects analysis, we're no longer talking about

23 | broadline in general, right, we're talking about Sysco in

particular for unilateral effects. And so I evaluated the

25 | number of times that Sysco -- in lost opportunities that Sysco

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was mentioned as a main competitor. I looked at Sysco in particular and for opportunities where US Foods lost the opportunity, how frequently was Sysco mentioned as the main competitor, a main competitor on that opportunity. So again, for where US Foods is not winning, where are they coming up against Sysco. What I found overall was that Sysco was showing up as a main -- I mean, a substantial number that's summarized in the report on the order of half the time that US Foods was losing, they were naming Sysco in particular as the main competitor. What's shown in the picture that's up right now is broken down -- because this is a local market analysis, broken down into certain CBSAs, where you see, based on number of opportunities or revenue at stake in the opportunity, Sysco's showing up as the main competitor on US Foods' losses in the majority or near majority of the opportunities that US Foods lost. So a simple summary is just when US Foods loses, Sysco shows up a lot as the main competitor. So can I ask: In the database itself, in the THE COURT: competitor field, does it permit the entry of more than one competitor?

THE WITNESS: It does. It does.

THE COURT: And ultimately, of course, it's up to the individual salesperson as to how many competitors they --

THE WITNESS: That's correct.

1 THE COURT: -- input? 2 THE WITNESS: That's correct. THE COURT: All right. 3 THE WITNESS: I don't remember the exact number as I sit 4 I think in many cases they list just one competitor, but 5 6 they can list more than one. And that's why it says on here -- I 7 believe what's up here is -- these are cases in which Sysco is listed in the competitor field, so I believe what's up here, 8 9 although I'd have to check the details that are in the report, I belive these are any cases in which Sysco was listed as one of 10 11 the competitors who were listed. 12 BY MR. MOHR: 13 Q. And for the record, this was from table 13, paragraph 326 of your report. Did you do any other similar types of analyses 14 15 on the LINK database in your report? Um, I mean, yes, I talked about them. I mean, there are 16 Α. sort of overall summary measures of how frequently Sysco shows 17 18 up and there are other analyses like these. I mean, the consistent finding was that in cases where US Foods loses, Sysco 19 20 shows up quite frequently. And I guess another good summary to 21 have is that where as I'm seeing Sysco showing up as a 22 competitor on the order of half the time, the next biggest firm 23 is below 10 percent, right, so no one else is showing up in 24 US Foods' data nearly as often as Sysco. 25 THE COURT: Is this in a particular area, or is this

aggregated across the locality?

THE WITNESS: The number I just gave you was aggregated across the locality. The table you're looking at here is -- you know, gives you the Sysco percentage in particular localities.

But overall, across the localities, Sysco shows up for more.

I mean, I -- I think -- the single thing I probably summarize it with is that the Sysco number is roughly half, right, so Sysco is showing up basically as much as everyone else combined.

BY MR. MOHR:

sets.

- Q. Dr. Israel, while conducting your analysis of the LINK data, did you discover any imperfections in the data set?
- A. I mean, yeah, we talked about some of this earlier.
- It's -- I mean, customer relationship management data sets are what salespeople enter. So they are -- from my review of the instructions that US Foods gives its salespeople and the frequently with which the fields in the data set are filled in, this is way above the norm of what I usually see from these data

But it is what salespeople -- it's intentionally the normal course record of what salespeople are seeing when they're competing in the field. So that means that there may be times when fields are not filled in, or there may be times when the salesperson's reporting what their perceiving and that changes.

Again, my own view of these situations is that if I'm trying to

study the competition that it's faced in the marketplace, the
record of what the salesperson is indicating is the key
competition in the marketplace is, to me, as good a variable as
I have, and so I don't try to change that. I take the
salesperson's indication of the competition they're facing as a
very good indicator of the competition that they're reacting to
in the marketplace.

Q. And you also mentioned that you reviewed requests for incentives used by Sysco's sales force. If I can direct your attention to slide 24 of the demonstrative, which contains table 15 taken from paragraph 240 of your report.

First, can you describe for the Court what are Sysco requests for incentives?

A. Sure. This is a program that Sysco had. I think it's been discontinued and there's other ways now that determine incentives, as I understand it. But they had it for several years where primarily local sales reps could come and say -- turn in a form and say I need to get a discount for this customer, and they would -- among the fields in that request would be a reason: Why do you need a discount?

And in the reason field they could list, I need to beat competition from X. That would be an answer for the reason.

And then this would go up to, I think, the VPs of sales who would have to sign them. But ultimately what I did here -- this is fewer observations than in LINK. This is not this

customer relationship management. This is when they turned in these requests for incentives.

Nevertheless, this is nice because it's an explicit place in which some Sysco sales rep is saying, I actually need to get a better price, who's putting that pressure on me?

And what you see on the picture is that in the vast majority of the times, well -- you know, over two-thirds of the time, basically, that a competitor was listed, it was US Foods who was listed, right? So and if you count it by US Foods being the only competitor who was listed, over 70 percent of the time, it counted -- the total mention's roughly the same number. So US Foods is being listed here far more than any other firm.

So again, this is -- those cases in which there was a request for incentive responding to a particular competitor, but as things go, you know, this is a reasonably large sample.

There's several hundred of these, and it's just very clear that there's this pattern that US Foods is the motivation for the incentive far more than any other firm.

Q. All right. And then, Dr. Israel, you also mentioned that you conducted a formal econometric study to test the price effect of two Sysco entry events.

First, can you just describe what an entry event study is?

A. Sure. The --

THE COURT: Do we need to take a break first?

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THE WITNESS: So, I mean, it's really pretty simple. I mean, the idea is just one of the firms opens a new distribution center, and you want to say, did that affect the prices of the other guy, and particularly, the other guy at a nearby distribution center.

It's -- you can think about it similar to that overlap methodology. This guy opens, and he's now suddenly in the draw area of the -- you know, if Sysco opens a facility, he's now in the draw area of a US Foods distribution center.

So the idea is to study what effect that has on prices.

The basic methodology that's standard here is something called "difference in differences," but the basic idea is to make sure you're isolating the effect of the entry, you look at the price of the US Foods distribution center that's near by, how it changes after the entry, but you use as a control group other US Foods distribution centers that are not right there, so that you -- to see how they change, right? So the question is: Does the distribution center that's affected by the entry, suppose its price drops, you want to make sure that wasn't just prices went down everywhere. So you compare it to a control group, which is the US Foods' prices at distribution centers more broadly. That's the idea. And then to the extent there is a difference in the effect on that local distribution center, that -- you conclude that that's, you know, the effect of the entry.

BY MR. MOHR:

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- Q. And what specific events did you identify in study?
- 3 A. It was the one issue that I quickly ran into in this
- 4 case, was that there just hadn't been very many entries to study
- 5 by Sysco or US Foods. I really wanted an event where there was
- a new Sysco or US Foods distribution center open, right? And
- 7 | really the only two events that I found that met that criteria
- 8 | were one in Long Island in, I think, in 2012, and one in
- 9 Riverside, California, I think, in 2013.
- The other issue, though, that came up almost immediately
 on this whole study was, those are new distribution centers, but
- in both cases they're actually not that far away from existing
- distribution centers, which means they're not really clean of
- events to study the effects of competition.
- In the case of Riverside, it was actually only, roughly,
- 16 30 miles away from an existing distribution center. In the case
- of Long Island, I think it's roughly double that. So in each of
- 18 those cases, to be frank, I consider this to be a lower amount.
- 19 This is not going to catch what would happen if a Sysco
- 20 distribution facility stepped in against US Foods where there
- 21 | hadn't been any Sysco competition before. This is going to
- 22 | measure the incremental effect of the Sysco competition.
- For that reason, I actually focused most of my attention
- 24 on the Long Island event because it was further away, and my
- 25 understanding is, ultimately served more new business than the

- Riverside event. But in either case, the main problem I have is
 these are underestimates of the true competitive effects. Long
 Island at least gets me somewhat closer to a good estimate
 because it's farther away from the existing distribution center.
 - Q. And what conclusions did you draw based on your entry study of these two events?

A. So I should also note just quickly that a couple other issues that come up in the entry study, one is that in the database in the transactions data, it's not perfect recording of all of the incentives and discounts that are ultimately given; sometimes there's, like, a year-end incentive. So to the extent that competition took the form of an incentive like that, I would miss that in the data.

So for those reasons, I really consider what I found here to be a lower bound on the true competitive effects. If you could measure a brand-new Sysco facility opening where there hadn't been one at all before, and you could get all the incentives and discounts and everything rolled in, you would have a cleaner measure, and both of those effects clearly would cause the effect to be bigger.

But what I find in my case is that -- what I found with what I can do is that the Long Island event in my -- in the base study, so that's just comparing right around the US Foods center to everywhere else that we talked about, prices at -- US Foods prices went down by 1.4 percent as a result of the Sysco entry.

And again, that's compared to the control group. That's the first row of this table.

What I wanted to do then, though, is go beyond that. I always like my econometrics to make sure the results make sense and they hold up and they're detecting a stable pattern. So I conducted some other cases on the event study where, for example, I looked at customers -- in row 1 here I looked at customers who are even closer to the facility to see if -- to see if -- if I'm measuring something where the effect should be bigger, and in effect it was. For customers within a 50 percent draw area, that effect went up to 2.6 percent.

I also looked at customers that are -- that most fit the category of needing broadline services, which I define as customers who buy more than 100 SKUs per week and use more than the average number of private label SKUs. As expected, the effect was bigger on them.

I looked at the effect on private level SKUs alone, which we know is an area where broadline is particularly important.

The effect was bigger for private label. And I looked at combinations of those cases.

So bottom line, I found that overall 1.4 percent effect, as this lower bound on the competitive effect of Sysco competition on US Foods. I found the effect was consistently bigger in the cases when the facts and theory of the case would indicate it should be bigger, which indicated to me that the

1 results are quite reliable.

- Q. And, Dr. Israel, you mentioned that when you studied the Sysco entry in Riverside, California, you found the smaller price effect. Does the smaller price effect in Riverside change your opinion about what you saw here from the Long Island entry
- 6 event?

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- A. No, not at all. I mean, the Riverside event was, again,
 as I said, even closer to an existing distribution facility.
 And as I understand, it was really -- that new Riverside
 facility was basically taking a lot of just -- folding out a lot
- of existing business, sort of creating new capacity for existing business. So for both of those reasons I think the Riverside event is just even more of a lower bound -- even more an understatement of the true competitive effects. So, in fact, I took the ranking of the Riverside and Long Island effects as one more piece of confirmation that I'm finding sensible numbers.

But because the basic econometric problem is that we don't have clean entry of a brand-new area, you know, I wanted to use the best measure I had that it would at least limit the extent of the understatement, and I consider that to be the Long Island event.

- Q. Dr. Israel, why did you study Sysco entry events rather than studying an exit event, for example?
- 24 A. Well, there's been some academic literature on this issue of studying entry or studying exit. I mean, one intuition some

people have is that an exit sounds more like a merger because something goes away instead of something getting added. I mean, obviously in my view, those are just flip sides of the same coin. So in theory you could study either to measure the effects of competition.

The trouble with exist events that this academic paper points to is that there's a reason why exits happen. In general, they happen because someone's not competing very effectively or a distribution center is not as important anymore or doesn't serve customers as well. So this paper finds that when studying exit events -- I think in the paper it's in grocery stores. But in studying exit events you very often find no effect from the exit because, as the paper says, the exit is usually happening because they're closing a store or a facility that wasn't succeeding, wasn't doing very well.

So the paper actually concludes that you shouldn't study exit events because they tend to find there's no effect because the exit happens for a reason and entry events are a more reliable measure.

- Q. Are you -- without referring to any specific distributor, are you familiar with the study by one of the defendants' experts about an entry event --
- A. Yes.

Q. -- in one of these areas?

Do the results of that study change your opinion that

- Sysco and USF are the closest competitors in many local markets?
- 2 A. No. I mean, describing in general terms, I mean,
- 3 Dr. Bresnahan, an expert for the defendants, did a study of an
- 4 entry by a smaller distributor in the Los Angeles area, and he
- found an effect that is statistically significant: Decrease in
- 6 prices, as I would expect if a new broadliner opens. But it's
- 7 | much smaller than the effect that I found for my Long Island
- 8 study, so I -- to me, it's consistent with the idea that
- 9 competition matters but that the smaller distributor had less of
- 10 an effect.

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- I would note that that smaller distributor had less --
- even in the case of the smaller district, this was the opening,
- as I recall, of a distribution facility in Los Angeles when the
- 14 | nearest one prior to that had been, I think, in Phoenix. So it
- 15 really was more of a clean entry into a new area, and yet
- 16 | nevertheless, it was -- he found a substantially smaller effect
- 17 | than I found for the Sysco Long Island event. So it's
- 18 | consist -- I'd expect there to be some effect from an entry, but
- 19 given that a smaller distributor has less effect on US Foods
- 20 than Sysco does, I'd expect it to be smaller, and that's exactly
- 21 what he found.
- 22 Q. Based on all of these analyses collectively, and your
- 23 review of the record here, what are your overall conclusions
- 24 | about effects on local broadline customers?
- 25 A. I mean, again, I would start from the market shares that

I computed and the changes in concentration and say those create 1 a presumption of harm in many local markets. But when I add to 2 that the frequency with which Sysco and US Foods show up as each 3 other's competitor, the mutually reinforcing nature of that 4 finding across the LINK data and the RFI data that I see it both 5 6 ways, it gives me a lot more confidence. And then the findings 7 from their regression analysis, I conclude that there's -- you know, it reinforces and bolsters my conclusion that the merger 8 9 is likely to the lead to substantial harm in many local markets. Dr. Israel, I'd like to move to your analysis to entry in 10 11 the divestiture. Did you perform, besides the market shares in the analysis, to form this opinion as to whether entry or 12 13 expansion is likely to counteract the competitive effects you 14 just described? I did. 15 Α. 16 What are your opinions? So I -- I mean, considered both the divestiture. 17 Α. Yeah. And as noted, I mean, my analyses shown thus far has all 18 incorporated the divestiture into my share and concentration 19 20 calculations, so I've already considered it in that sense. 21 But I also considered more generally whether the 22 divestiture would over time enable PFG to replace the

I also separately considered the likelihood and ability

competition that's lost as a result of the transaction, and I

concluded for a variety of reasons that it will not.

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of other entry or expansion by other distributors to offset the effects of the transaction. And again, I find that in the language of the guidelines that -- for entry to offset effects it needs to be timely, likely, and sufficient, likely to happen in a timely way, sufficient to offset the transaction's effects, and I find that those conditions are not met.

Q. Focusing first on the proposed divestiture to PFG, can you describe generally the work you did to analyze how it would impact the effects you estimate from the proposed transaction?

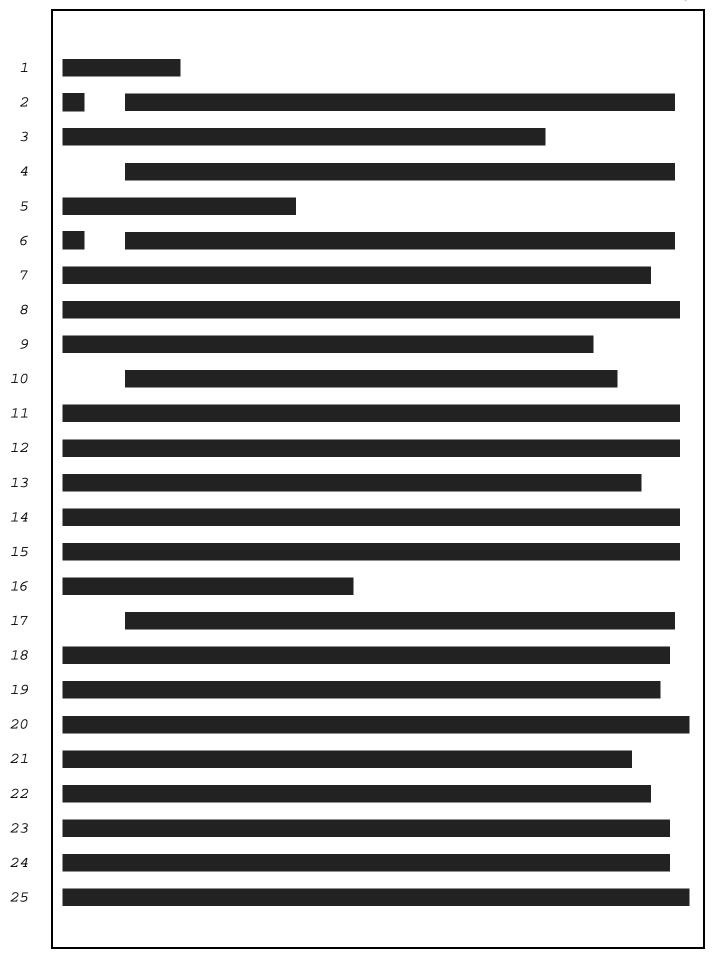
A. Sure. I mean, so as I said, my analysis of shares and concentrations and everything that I've done so far incorporates the divestiture already, so that was step one. I think that's probably the most basic.

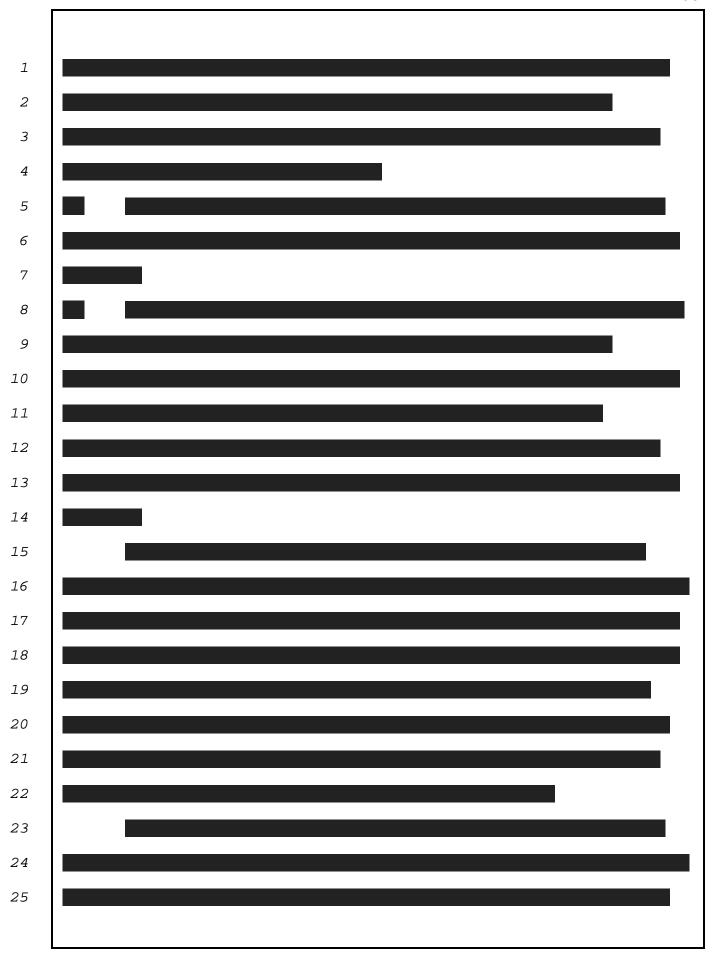
Step 2 was -- and you can just sort of see that in the basic -- you know, the size that PFG will have post-divestiture, which is just substantially smaller than the -- I think it's like -- it'll grow to be on the order of a total of 10 billion in revenue, whereas US Foods is over 20 and SYSCO's over 30, combined for them would be over 50; so substantially smaller than either an independent firm or the combined firm.

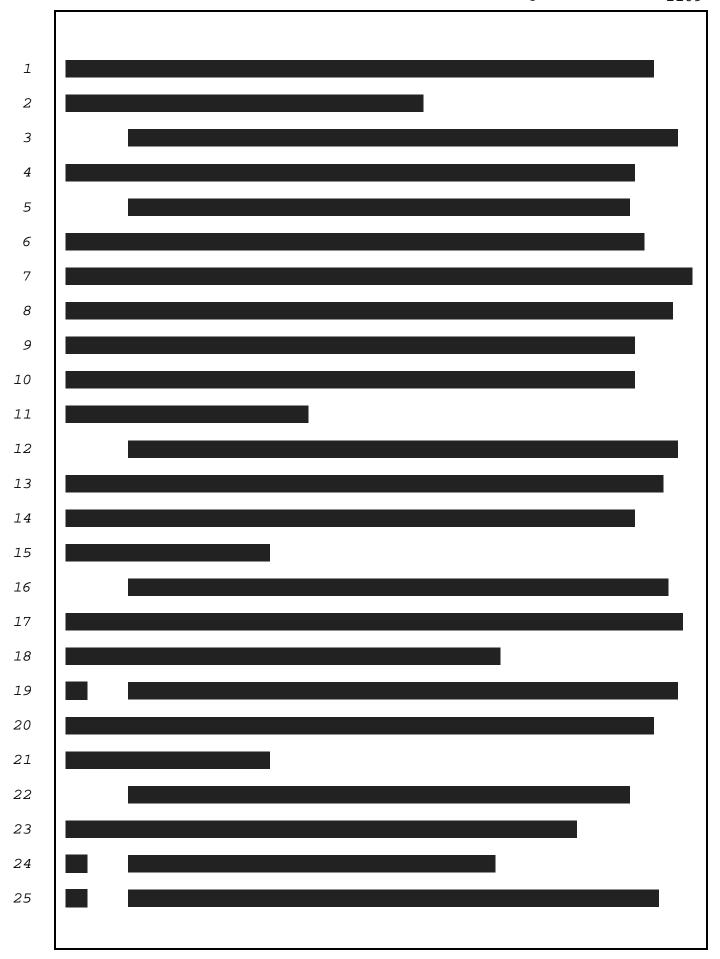
But I then went on to think about what about going forward? To me, as an economist, I mean, the best indication I have about going forward -- or one indication I have is, what the parties themselves -- or PFG itself is projecting about where it will get. That's at least one indication.

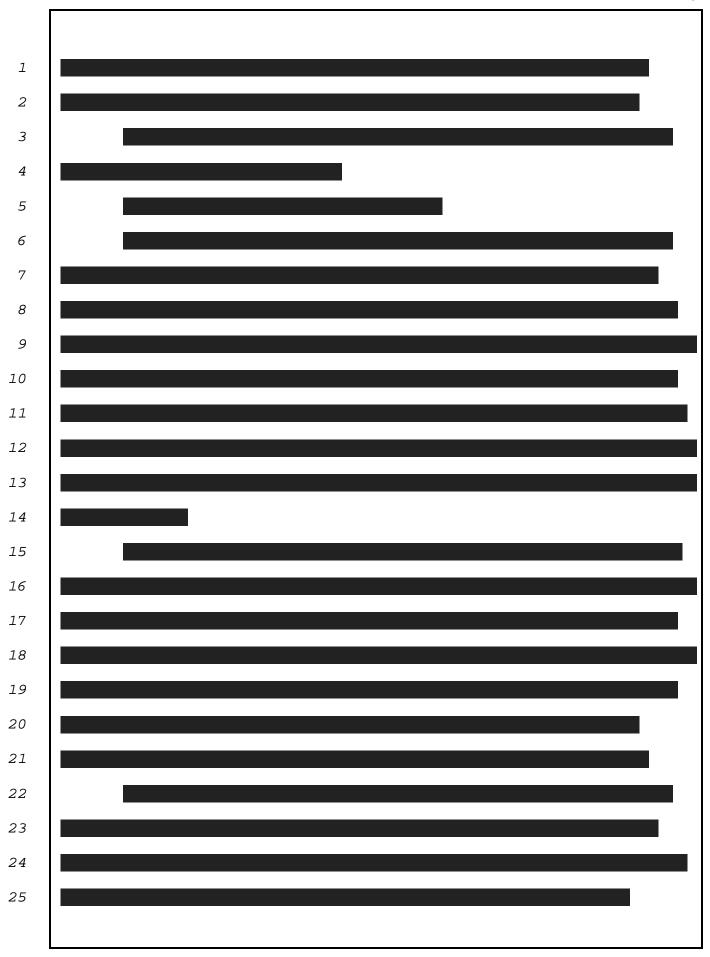
And I note that even in --1 2 MR. MOHR: If I could pause you here before you get into specifics. 3 Your Honor, we have about 20 minutes remaining but we're 4 starting to get into details about PFG divestiture and some of 5 6 the parties' efficiency claims, which may implicate confidential 7 material, so I'd ask -- I'm trying to reserve it all here until towards the end. If we could seal the courtroom at this time for 8 the remainder of Dr. Israel's direct? 9 THE COURT: Okay. How much longer do you think you'll be 10 11 on direct examination? 12 MR. MOHR: I think about 20 minutes, Your Honor. THE COURT: All right. Why don't I do the following: 13 don't we break for just about five minutes and let people file 14 Why don't you finish your direct examination. When you're 15 done we'll take our lunch break at that point, and then when the 16 cross-examination begins, we'll start with a public 17 18 cross-examination, which I assume will take a substantial amount 19 of time, or am I wrong about that? 20 MR. SIMMONS: The public will take maybe 20 minutes, and then I'll have to go into confidential session, Your Honor. 21 22 THE COURT: Okay. So it will probably make sense, then, 23 to start with the nonpublic -- I'm sorry, the --24 MR. SIMMONS: I prefer to start with the public. 25 THE COURT: Well, I just don't know if --

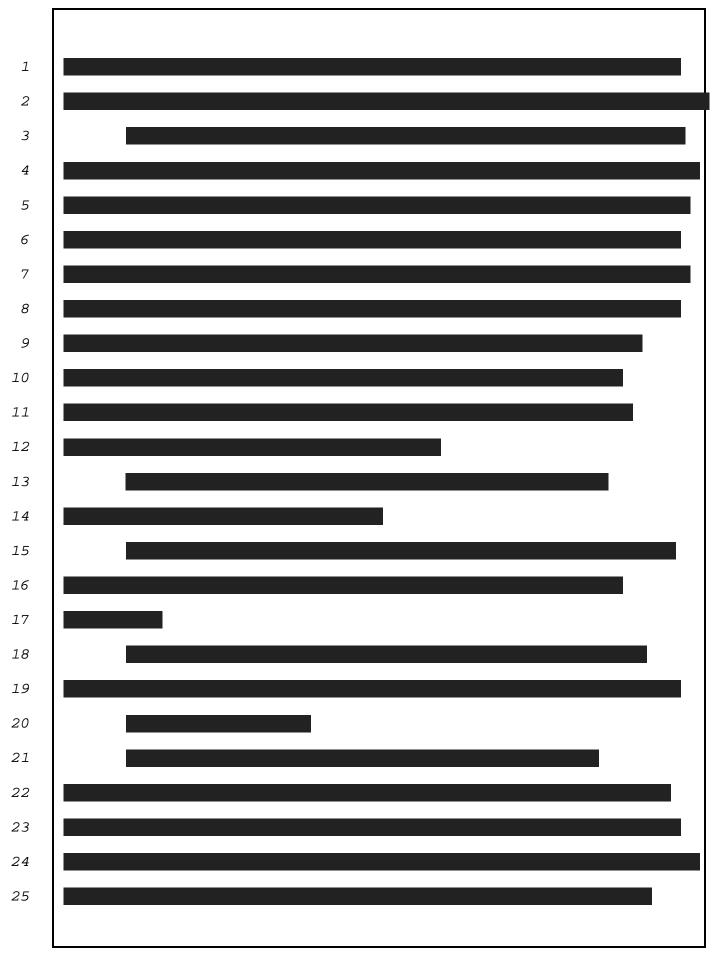
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MR. SIMMONS: I could start with the confidential, if
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     that's better.
            THE COURT: Why don't we start with the public and see how
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     long you can go before we have to close the courtroom. All
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     right. So let's take five minutes, and I'll ask everybody who's
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     here who is not affiliated with either the plaintiffs, the
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     defendants, the parties or -- not in this case -- in this case
     the witness, but you'll have to please be -- to stay outside the
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     courtroom for this portion of the proceedings.
            (Thereupon, a break was had from 11:47 a.m. until
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     11:55 a.m.)
            THE COURT: All right. Everyone, please be seated. Just
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     to confirm that everyone in the courtroom is someone who's
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     allowed to be in the courtroom?
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            All right. Great.
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            Ms. White, if you could lock the doors.
            THE COURTROOM CLERK: Yes, Your Honor.
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            Mr. Mohr, you can proceed.
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            MR. MOHR: Okay. Thank you, Your Honor.
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     BY MR. MOHR:
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            Dr. Israel, we were discussing your --
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            THE COURT: Oh, I'm sorry. And Mr. Wallace, this portion
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     will be under seal. Thank you.
            (Thereupon, the following further proceedings were sealed
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     by order of the court:)
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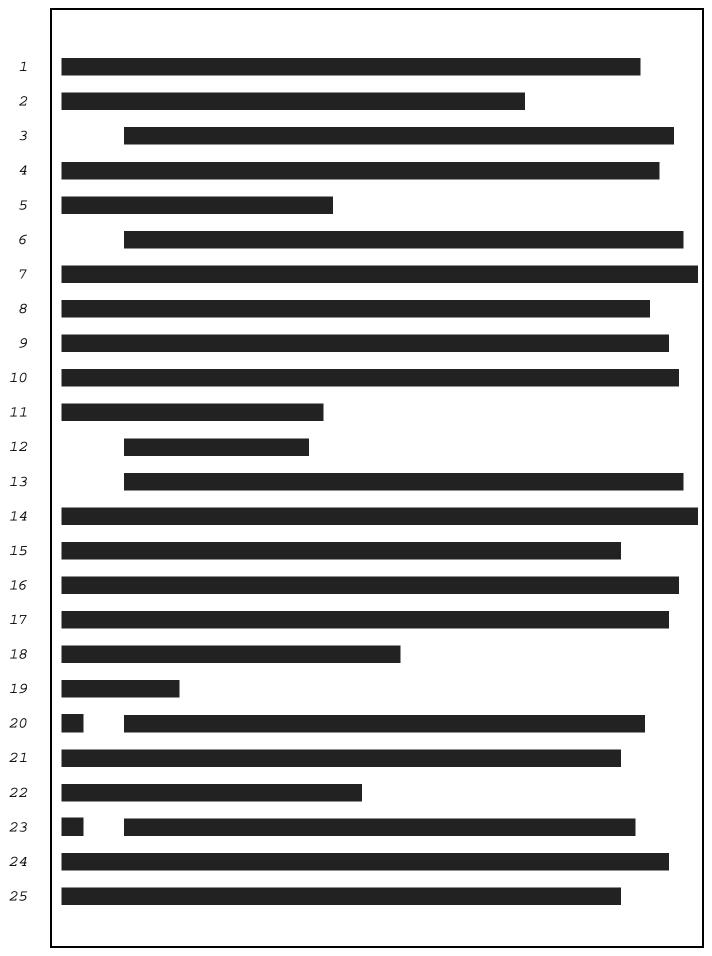


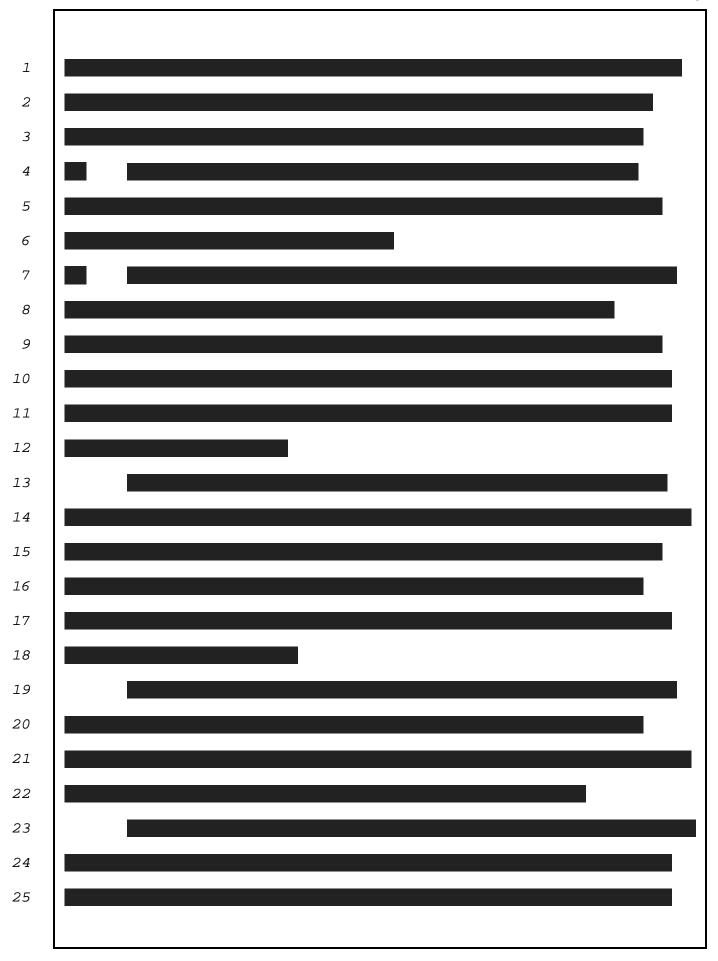


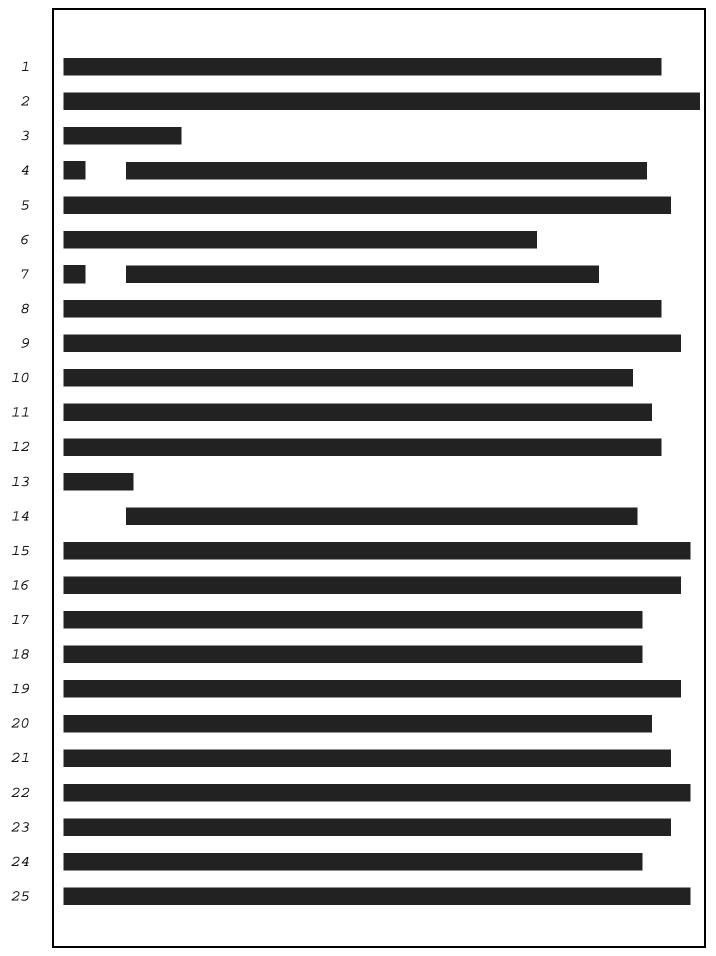


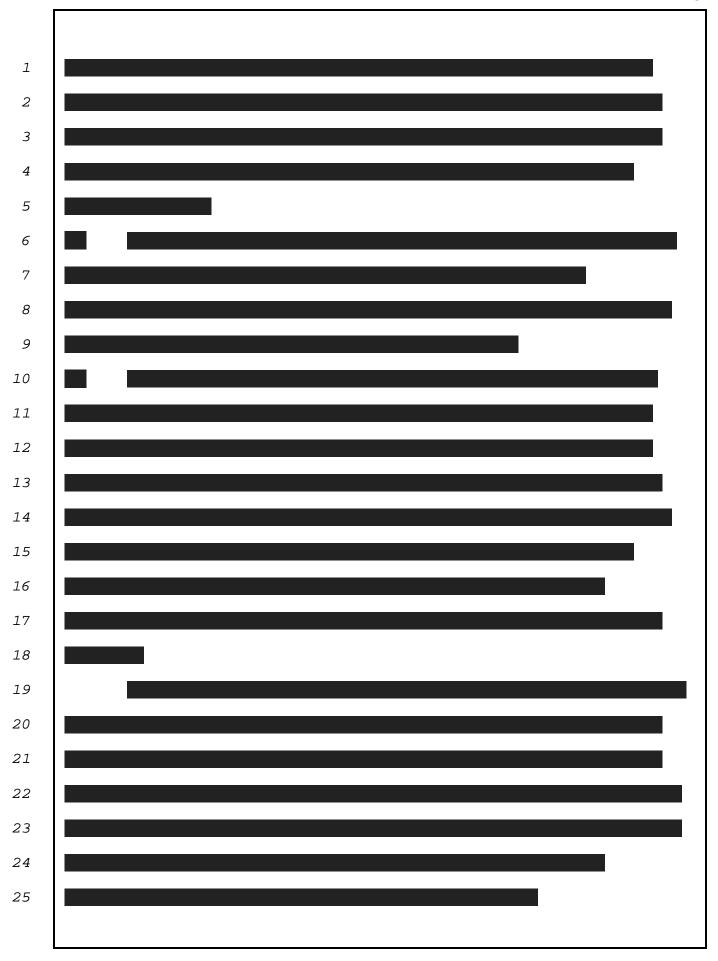


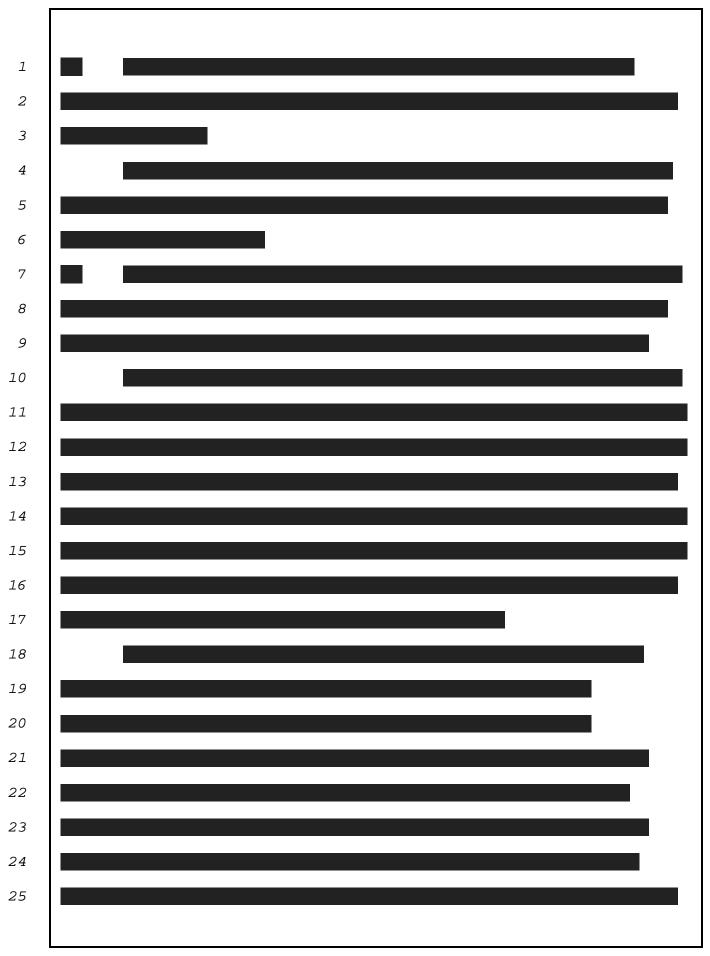


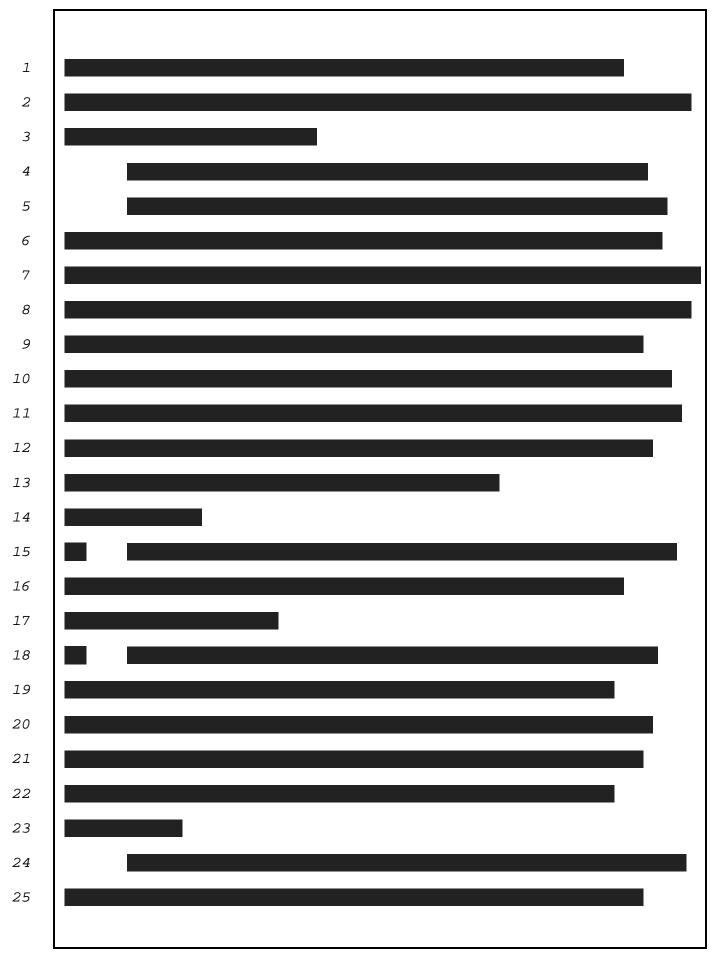


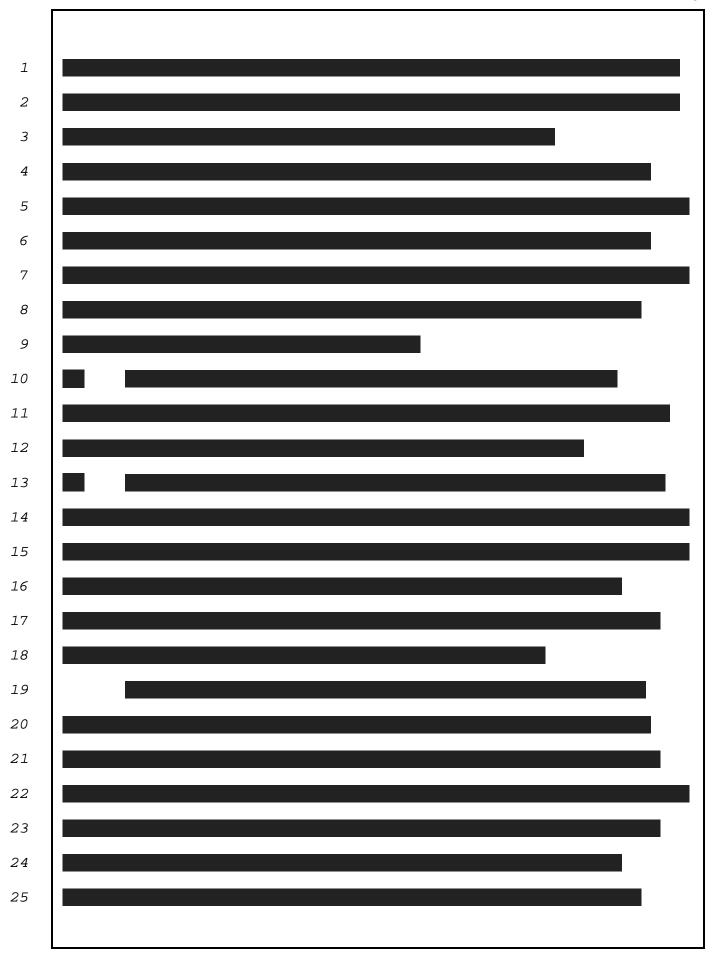


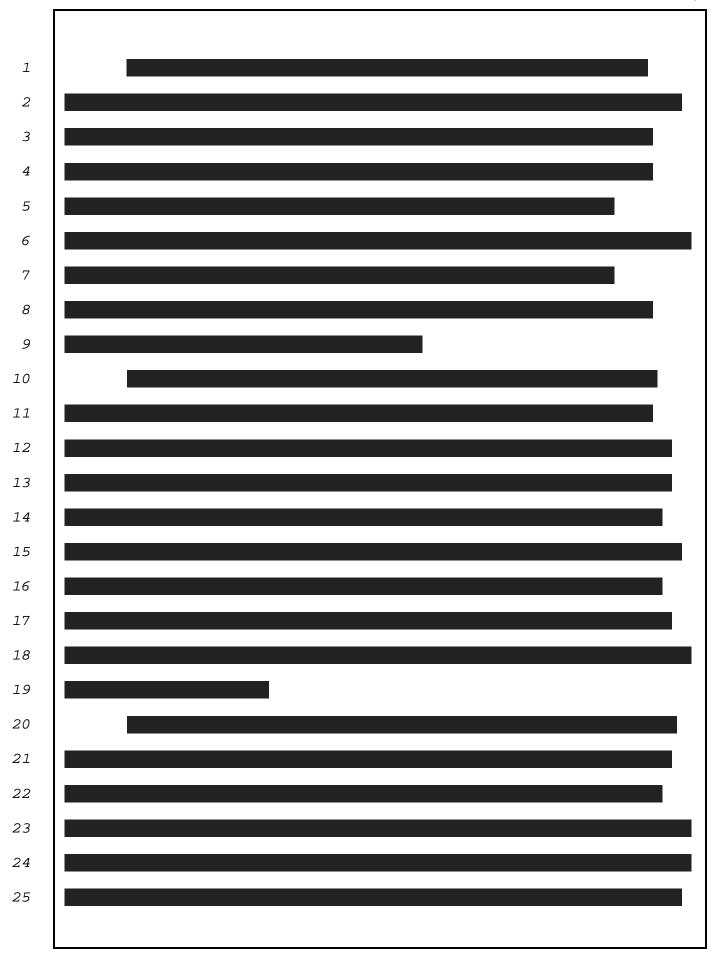


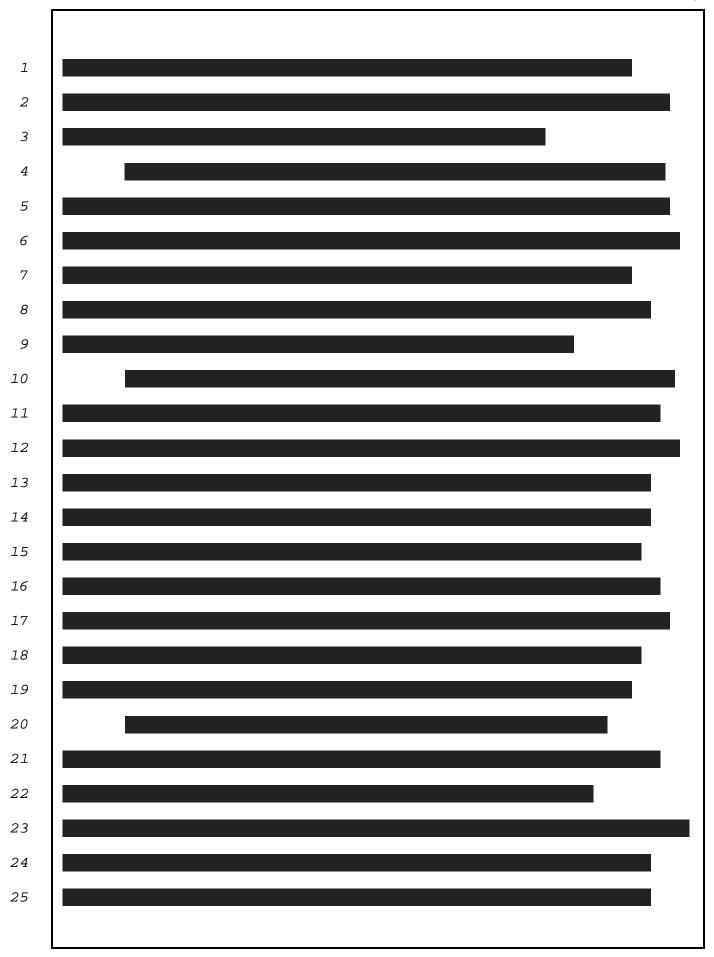


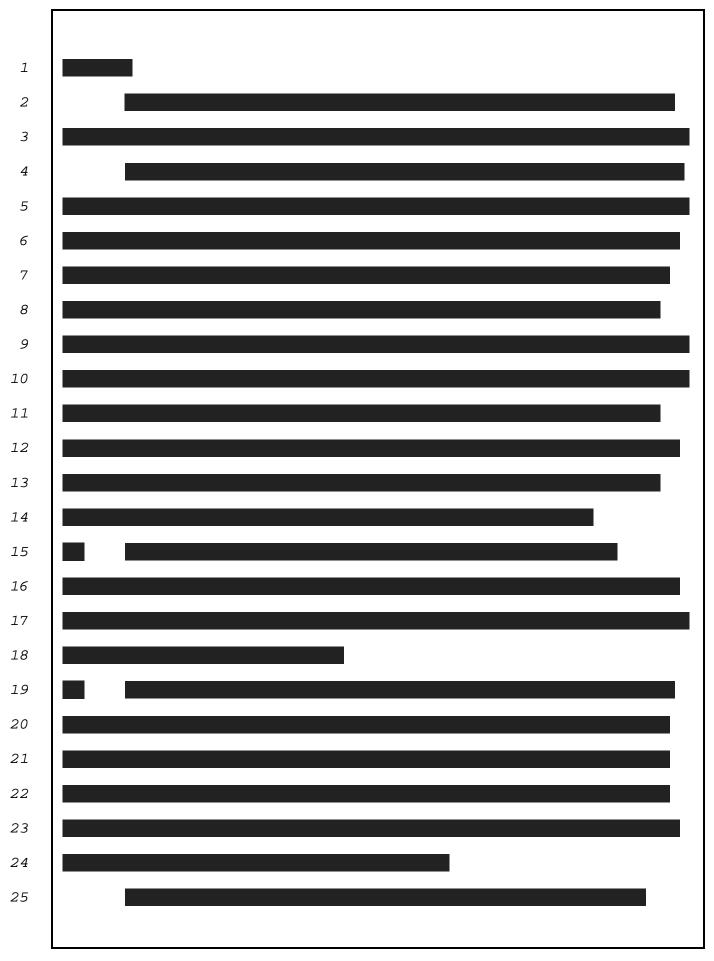


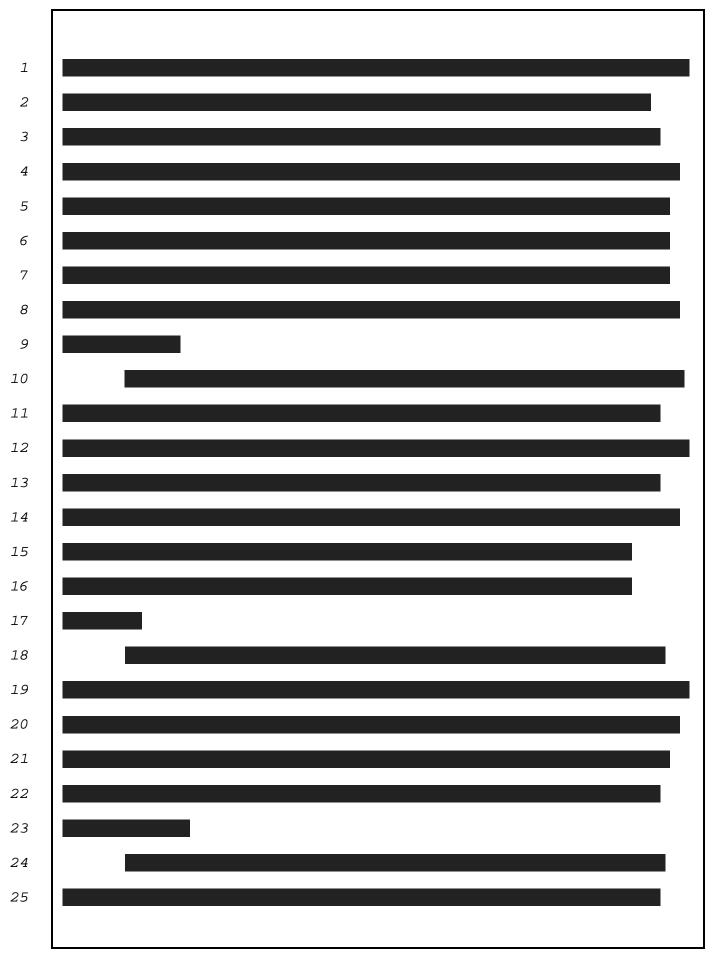


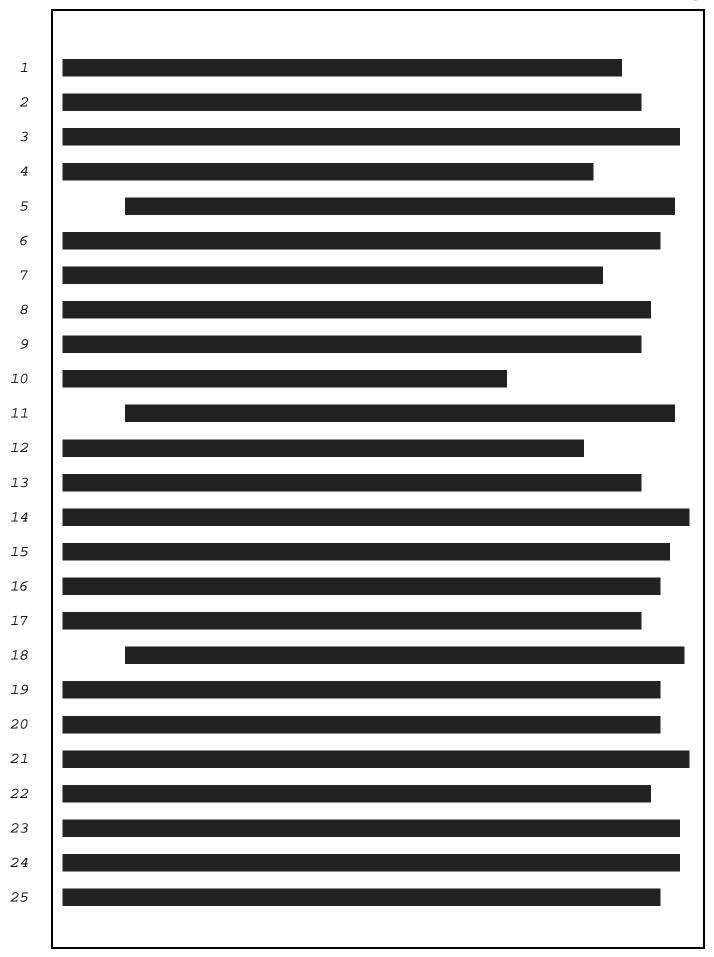


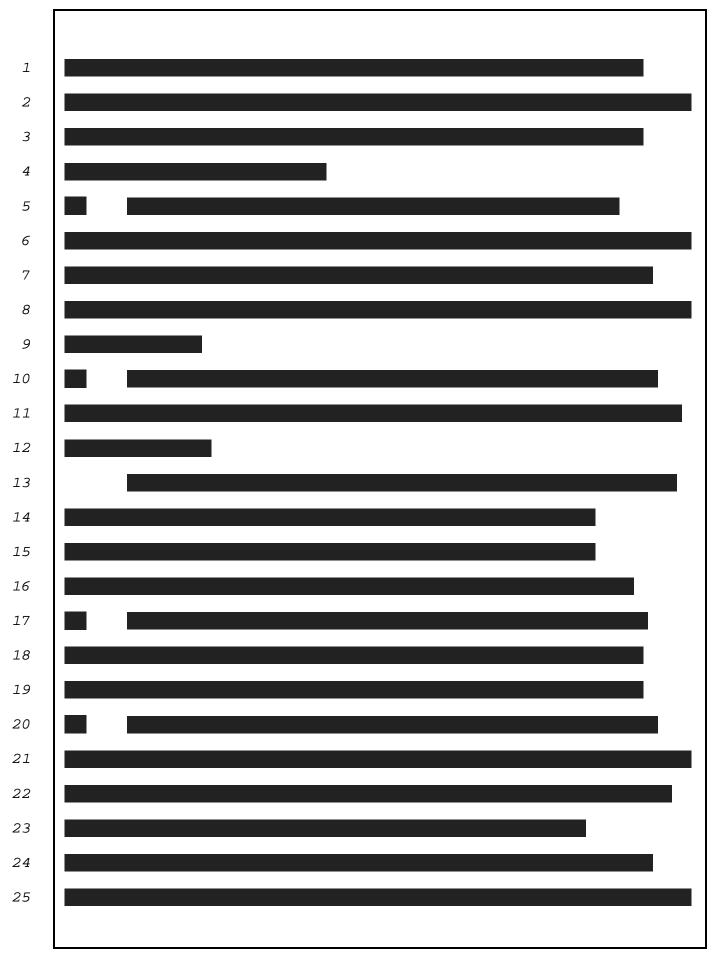


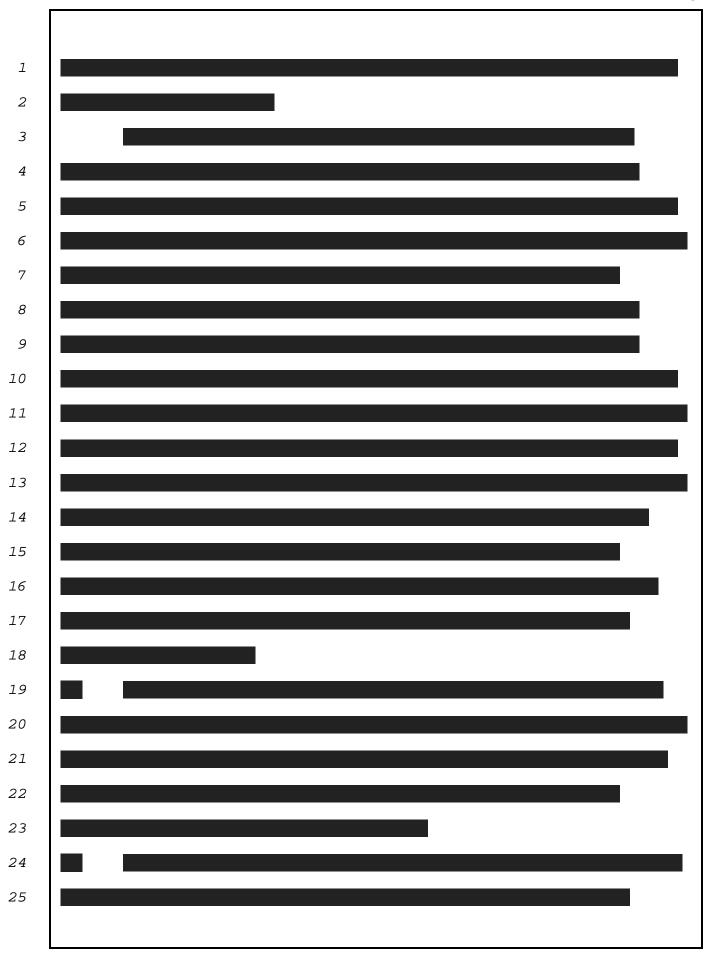


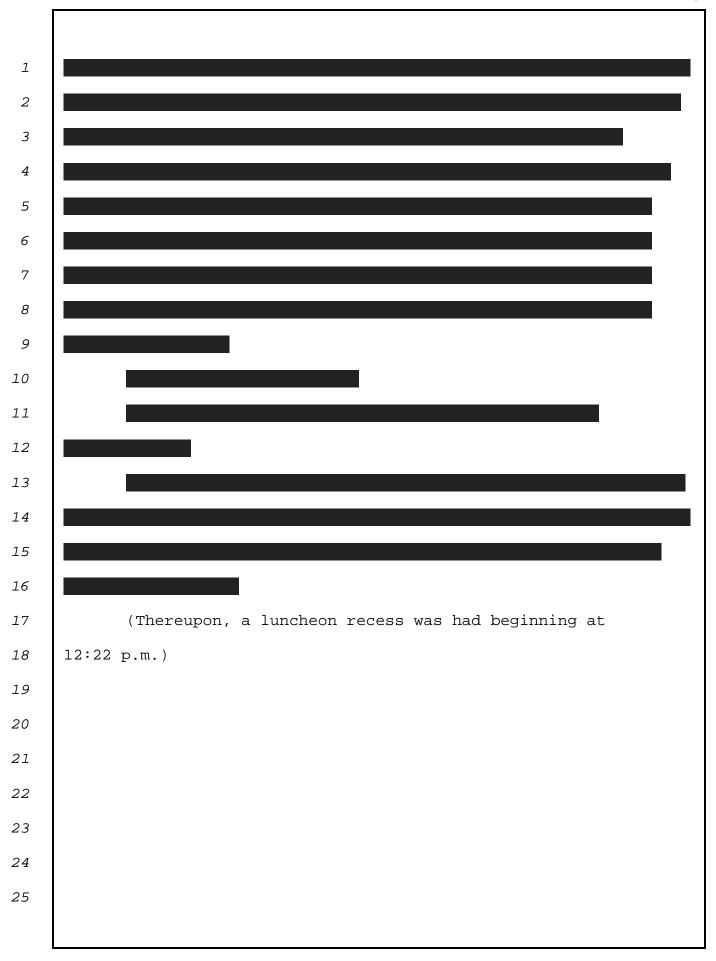












1	CERTIFICATE				
2					
3	I, Scott L. Wallace, RDR-CRR, certify th				
4	the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.				
5	/s/ Scott L. Wallace				
6					
7	Scott L. Wallace, RDR, CRR Date Official Court Reporter				
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