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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, ET AL.,

Plaintiffs,

vs.

SYSKO CORPORATION, ET AL.

Defendants.

CA No. 15-256
Washington, DC
May 13, 2015
1:35 P.M.

DAY 7, AFTERNOON SESSION
TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT COURT JUDGE

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I N D E X

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<u>For the Defendants:</u>	
TIMOTHY BRESNAHAN (Resumed)	
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P-R-O-C-E-E-D-I-N-G-S

MR. SIMMONS: Good afternoon, Your Honor. May I

proceed?

THE COURT: Please, Mr. Simmons.

MR. SIMMONS: Thank you, Your Honor.

DIRECT EXAMINATION (Cont'd)

BY MR. SIMMONS:

Q. Professor Bresnahan, I'd like to wrap up just a few more questions on Dr. Israel RFP database and then move to the issue of substitution.

A. Now, very good.

Q. Now, I think where we left off was the parties at the Federal Trade Commission's request went out and created -- memorialized instances that they could find of RFPs, and they told the FTC that they didn't deem that -- those lists as reliable; is that your understanding?

A. Yes.

Q. All right. And then Dr. Israel, I think we have slide 11 on the screen. Dr. Israel said that he then went out and supplemented from the parties' documents other instances of what he deemed to be RFPs; is that your understanding?

A. Yeah, that's right, he said he augmented.

Q. All right. So he went out and augmented what the parties gave him. And as he himself said it, he went through -- he exercised case-by-case judgment. Is that the

1 language reflected on slide 11?

2 A. Yes.

3 Q. All right. Everyone who received a binder should have
4 a tab two, and hopefully the first document in tab two is
5 flagged.

6 Is that the backup, the file produced with the Israel
7 report on April 14th in connection with his, Dr. Israel's RFP
8 data, sir?

9 A. I don't know about the production, but that is, I
10 believe, the backup to his dataset.

11 Q. And if you can turn to the first page of that, you see
12 there's a listing of customer estimated annual spend. Do you
13 see the various columns?

14 A. I do.

15 Q. All right. And you see there's a column, last full
16 column moving over from the right, called "winner," do you see
17 that?

18 A. Yes.

19 Q. All right. Now, there's no information on other
20 competitors listed in that column, is there, Dr. Bresnahan?

21 A. Not in the winner column.

22 Q. Right. And there's no information on the rankings of
23 competitors in connection with these RFPs in this backup, is
24 there?

25 A. Well, it's the -- sometimes the participants column

1 only mentions two, and if that were accurate, then you'd know
2 who the second was.

3 Q. All right. Based on who won the -- based on who won
4 it?

5 A. Right.

6 Q. All right. Now --

7 THE COURT: Just identify the exhibit number,
8 please.

9 MR. SIMMONS: Yes, Your Honor. It is DX 01918.

10 Thank you, Your Honor, I'm sorry.

11 BY MR. SIMMONS:

12 Q. Now, do you remember I examined Dr. Israel on this
13 dataset, do you recall that?

14 A. Yes.

15 Q. All right.

16 MR. SIMMONS: If we could move to slide 12, please.

17 BY MR. SIMMONS:

18 Q. Did you find instances of omissions from Dr. Israel's
19 backup and could you just briefly describe those for the
20 Court?

21 A. I did. I knew -- well, you brought these up when you
22 talked to Dr. Israel, that there was a -- that there were
23 Sodexo RFPs that they told the FTC about, I couldn't find
24 them. And I also knew similarly, I mean, I read some of it
25 too, but also from your conversation with Dr. Israel that

1 Gordon Foodservice had one business on six occasions from GPOs
2 and FSMs, so I could only find six -- no, on five, and I could
3 only find four of those five in this print-out.

4 Q. All right. Well, let me -- let me just ask to recoup
5 before we move to the next key issue of substitution, describe
6 for the Court again the interconnection, why do we talk so
7 much about this Dr. Israel database, this table one market
8 share, table that Dr. Israel -- and this table three effects,
9 what's the interconnection of these three things, RFP database
10 that Dr. Israel created, table one of Dr. Israel, table three
11 of Dr. Israel?

12 A. Dr. Israel doesn't have an appropriate denominator for
13 his table one market shares. He uses the RFP data in his
14 baseline imputation to try and create a denominator, and so
15 that's the background of his table one. And then he uses
16 those shares again in his quantification of harm in table
17 three. So this is at the foundation of all those.

18 Q. All right. And does this mean in your view that Dr.
19 Israel's estimates of national shares of unreliable and cannot
20 be used to draw an inference about competitive harm for the
21 reasons you've said?

22 A. Yes, both for this estimation reason and for the
23 conceptual reasons we were talking about earlier.

24 Q. All right. Let's move to slide 13, please. Now, a
25 central issue in this case, I think we would all agree is the

1 question of substitution. What are you saying on this slide
2 and briefly describe for the Court how you view the issue of
3 the substitution?

4 A. Substitution, and here in the NBC market, we're talking
5 being customer substitution, customer's ability to make
6 choices other than Sysco and USF for their foodservice
7 distribution services, that's central to the question of
8 whether there is harm to competition in the so called national
9 broadline customer market.

10 The FTC has defined this market in which we can't
11 calculate reliable market shares given the available
12 information. There isn't a denominator from ordinary source,
13 you can't collect the denominator from market participants,
14 and then -- and the effort to do it with RFP data has also
15 failed.

16 So I'm going to look at substitution using available
17 reliable data that's going to speak to the question of how
18 national broadline customers choose, and I'm going to see that
19 they choose away from Sysco and USF all the time.

20 Q. And unlike kind of reasoning on a substitution
21 conclusion from market shares, did you look at direct evidence
22 of substitution, Professor Bresnahan?

23 A. I did, it's very analogous to market shares, we're
24 going to be trying to figure out for these NBC customers what
25 are the important competitors supplying to them.

1 Q. All right. And does slide 14, which is -- should be on
2 your screen, can you briefly walk us through the sources of
3 data that you drew upon?

4 A. These are the data we're going to use, both merger
5 parties provided the FTC with very detailed transaction data
6 per customer, per location. This drives both their
7 operations, it's, you know, how they load the truck and where
8 the truck goes. It drives their accounting, it's how they
9 bill. They're very important databases, and they're extremely
10 detailed customer times location times delivery. That's the
11 first thing I'm going to use.

12 The second thing I'm going to use is -- actually I
13 don't think there's anything else which is systematic and
14 reliable that I've seen from inside the lawsuit. I'm going to
15 use the Ag Data, we've already been talking about it, I'm
16 going to use some Technomic reports, Technomics would be the
17 market and research company in this business, and some
18 Technomic reports that have been improved by Sysco to make a
19 restaurant report.

20 Q. Did Dr. Israel use Ag Data? I think we touched on that
21 before the lunch break.

22 A. No, I don't think he used any of these -- he may have
23 used the Technomics somewhere, but certainly not to examine
24 substitution in the way I have.

25 Q. All right.

1 MR. SIMMONS: Let's go to, if we could -- we can
2 skip to slide 15, please, if we could put that up.

3 BY MR. SIMMONS:

4 Q. Could you tell us your conclusion concerning
5 substitution and the connection, what does substitution have
6 to do with relevant market?

7 A. When customers can substitute away from the suppliers
8 that are inside the relevant market, that's not a relevant
9 market, you know, that's how you show that it's not a relevant
10 market.

11 Q. All right. And I think you said you examined direct
12 evidence, a substitution.

13 MR. SIMMONS: So let's put up number 16, please.
14 Just on this side of the courtroom. Thank you, Ms. White.

15 THE WITNESS: So the first kind of substitution is
16 going to be regional purchases. We looked at regional
17 purchases a little bit. I think we can go through this pretty
18 quickly. Here's a --

19 BY MR. SIMMONS:

20 Q. Please walk us through them.

21 A. Sure. Here's a buyer that has a nationwide footprint,
22 but buys pretty regionally. Can we see the next one?

23 MR. SIMMONS: Could you put up the next one,
24 please?

25

1 BY MR. SIMMONS:

2 Q. What kind of entity is this without saying its name?

3 A. The second one is a hospital chain, also with a
4 widespread footprint. It is a national customer of Sysco and
5 USF, you can see a little bit of the blue and green color out
6 in the west, but it also regionalizes. Most -- in most of
7 the -- in the rest of the country, other than in a few places
8 in the west, it buys from -- here's another one, a big firm in
9 the hospitality business that has a lot of chains.

10 This one regionalizes too, but maybe not as much. You
11 see a lot of blue dots on here. Sysco is an important
12 provider for these, for this firm, but then there's some other
13 ones. Let's look at the next one.

14 Here's a restaurant chain with extremely annoying
15 television ads, also regionalizes.

16 Q. All right. So, but help me out here, you know, so
17 we've got maps with different colored dots for a customer.

18 A. Right.

19 Q. What does that have to do with substitution? Why are
20 you drawing an inference of substitution?

21 A. If everyone was like the map we were looking at, to an
22 economist substitution is choice. It doesn't necessarily mean
23 pulling out firm A and putting firm two in later, it means
24 choice. This firm has chosen to use USF in some places, it's
25 a USF NBC, and it's chosen to use some supplier or suppliers

1 other than USF in -- or Sysco in other places. It's
2 substituting away from Sysco and USF.

3 Q. All right. If we could go to 20. Do all -- do all
4 customers regionalize, Professor Bresnahan?

5 A. Well, this one does, but let's go one more. So here's
6 one that doesn't, there and must be some of those. Here's a
7 customer that overwhelmingly buys distribution services from
8 USF, you know, and in the original definition of national
9 broadline customer, everyone would have to be like this
10 because it's a requirement.

11 So what I'm going to do, we've looked at these
12 different maps. I'm going to ask the systematic statistical
13 question about what does the typical NBC do within the data I
14 can gather, you know, rather than having the argument of the
15 anecdotes, you know, it's common that they look like this --
16 these guys, or it's common that they look like the guys we
17 were looking at a few minutes ago.

18 Rather than having the argument of the anecdotes, I'm
19 going to try and look at how much of these guys don't do this
20 substitution by location very much at all. We just looked at
21 some other guys that do lots of substitution by location.
22 Let's see what's -- let's see what's typical.

23 Q. All right.

24 MR. SIMMONS: Well, let's go to slide 22, please,
25 and this should also only be shown on this side of the

1 courtroom.

2 BY MR. SIMMONS:

3 Q. Now, this shows two types of customer groups; right?

4 A. Right, restaurants and hotels.

5 Q. And let's just -- everyone can see the, what the
6 different colors mean.

7 A. Right. So these are who's here? So first off, I've
8 got lists of restaurant firms and hotel firms from the Ag
9 Data, so I know where all their locations are, just like in
10 the maps we were doing.

11 And the second thing was I did -- I'm restricting
12 attention only to USF and Sysco national customers, so again
13 this pie chart, you have to be a national customer. And then
14 I look at all their locations, all the locations of all these
15 national customers.

16 THE COURT: When you say "national customers," do
17 you -- by the definition the parties themselves are using?
18 How do you define national?

19 THE WITNESS: I'm following Dr. Israel's definition
20 of national customers.

21 THE COURT: Okay.

22 THE WITNESS: We're working with that market
23 definition, so it's CMU on the Sysco side.

24 BY MR. SIMMONS:

25 Q. So are you testing, in answer to the Judge's question,

1 are you testing Dr. Israel's hypothesis on whether this --

2 A. Absolutely.

3 Q. All right. So you're testing that hypothesis.

4 A. So we can see what it is, the -- the -- among the
5 restaurants, we have all of those national customers of either
6 of the firms. They have all their locations. A little under
7 a third are served by one of the defendants, 32 percent. And
8 the rest are served by someone else. So if we had all the
9 maps in front of us we'd see 32 percent dots from the
10 defendants and 68 percent of the sort of orange, yellow dots
11 being served by everyone else.

12 So among the restaurants, they are substituting away,
13 these national customers are substituting away from the
14 defendants in a systematic way. So the typical map -- and now
15 I can reliably say the typical map is not like the last one we
16 were looking at where they just had one foodservice
17 distribution services supplier, the typical maps like the
18 other ones where they buy from everyone.

19 Similar story for -- oh, there's 208 restaurant firms
20 in here where I was able -- where they're both a national
21 customer, and I was able to map them to the Ag Data. There's
22 about 78 hotel firms in here where I was able to map them to
23 the Ag Data, and you get basically the same story. They're
24 national customers of Sysco and USF, you know, do they
25 typically buy mostly from those vendors? No, they buy the

1 majority, 58 percent here of their locations from other
2 foodservice distribution suppliers. At 58 percent of their
3 locations in the quarter we're using, there was never a
4 delivery from Sysco or USF.

5 Q. And in your opinion, Professor Bresnahan, is this
6 direct evidence of substitution at current prices, sir, this
7 meaning the data and entities reflected on slide 22?

8 A. Yes, this is the substitution by regionalization.
9 These customers could have chosen to buy the way the FTC
10 describes, to buy from one national vendor, and they did
11 choose, at least in some places, to buy from Sysco or USF.
12 Everywhere else they made another choice.

13 THE COURT: How do you know, what's the basis for
14 your determination of the non-Sysco, USF percentage, where is
15 that coming from?

16 THE WITNESS: That's the -- I have the list of
17 locations where they're an operator from Ag Data.

18 THE COURT: Okay. And does Ag Data tell you who's
19 servicing them as a distributor?

20 THE WITNESS: No, no. I've emerged and matched
21 that to, I've actually done a lot of these mergers and
22 matches. I've merged and matched that to the Sysco and USF
23 transaction data.

24 THE COURT: I see.

25 THE WITNESS: Using, and I need two things here. I

1 need to know who the buyer is, you know, is it, you know, I'll
2 use the name for that, the name of the restaurant chain or the
3 name of the hotel firm, that's the first thing I need to do
4 the match.

5 And the second thing I'm going to use is the zip
6 codes. So if I were to say what is the 58 percent extremely
7 precisely of the hotel firms that are buying from Sysco or USF
8 as national customers, in 58 percent of the zip codes where
9 they are operating a hotel, they didn't buy from either of
10 these firms.

11 THE COURT: Do you come to that number by
12 essentially, you've got the Ag Data, which, let's say shows
13 that there's ten restaurants in a particular area.

14 THE WITNESS: Yep.

15 THE COURT: But Sysco sales data only shows that
16 it's serving two of those restaurants.

17 THE WITNESS: That's right.

18 THE COURT: Is it then, do you get to the
19 80 percent through that, in other words, do you then assume
20 that the other eight are being served by other distributors?

21 THE WITNESS: Yes.

22 THE COURT: Okay.

23 THE WITNESS: Yes, you know, it's a restaurant, it
24 needs a foodservice, it needs something. It needs something.

25 THE COURT: So in other words, it's done by sort of

1 implication, if you will.

2 THE WITNESS: Exactly. No, exactly, it's -- it's,
3 you know, it's by process of elimination. They aren't served
4 by either of these guys.

5 THE COURT: Right.

6 THE WITNESS: They must be being served by someone
7 else, they're a hotel or they're a restaurant in a big chain,
8 they have someone.

9 THE COURT: Okay. And then you -- are you in a
10 position to break down that orange part of the pie among
11 broadline specialty systems distribution?

12 THE WITNESS: That's a terrific question, and no,
13 I'm not because all I know is other -- it's not Sysco or USF,
14 it could be a regional broadliner, it could be specialty, it
15 could be systems, but not SYGMA. I think I've included
16 Sysco's SYGMA here.

17 THE COURT: So SYGMA is included in your blue part
18 of the pie?

19 THE WITNESS: SYGMA is counted as served by Sysco
20 even though these are national broadline customers. And, of
21 course, USF doesn't draw the distinction between broadline and
22 systems, so all this is -- but it's by elimination. The
23 orange ones are the places these firms operate, you know,
24 operates a useful word here because they call them operators
25 in this business.

1 THE COURT: Right.

2 THE WITNESS: It places these customer firms
3 operate. I don't have the information to know by whom they
4 were served at those places. Here I just know it's other.

5 THE COURT: Okay. Thank you, I appreciate it.

6 THE WITNESS: Very good.

7 MR. SIMMONS: Thank you, Your Honor.

8 BY MR. SIMMONS:

9 Q. Now, you did this for restaurants and hotels because Ag
10 Data are available for hotels and restaurants?

11 A. That's right.

12 Q. All right. And just so we're clear, the percentages
13 depicted on slide 22 are not market shares, isn't that right,
14 that's not what you're --

15 A. No, they're -- they're -- well, they're like market
16 shares and they're not. I mean, the first way in which -- the
17 way in which they're like market shares is that they're share
18 of locations. And share of locations is a lot like a revenue
19 market share.

20 Q. Dr. Israel says we shouldn't be focusing on number of
21 customers, we should just be doing aggregate data, aggregate
22 revenues and so on. What's your response to that --

23 A. But this is within --

24 Q. -- you're looking at locations here.

25 A. This is within customer. This is within customer. And

1 I'm asking, you know, you've got a chain restaurant, it's
2 served 20 percent of the time by Sysco and 80 percent of the
3 time by someone else. That 20 percent, 80 percent, is not
4 radically different from revenues.

5 Q. So locations are in many ways closer to revenue than
6 counts?

7 A. That's right. Counts are like -- it's not number of
8 hamburgers or something.

9 Q. And did -- Dr. Israel didn't go up and get Ag Data, did
10 he?

11 A. No. I'm sorry, Mr. Simmons, I didn't fully answer.
12 That's the sense in which they're like shares. They're not
13 like shares because here these are only Sysco's and USF's NBC
14 customers. So it's not exactly like market share because
15 we're restricting attention to Sysco and USF customers. So
16 like the 32 percent is, you know, well, these are their
17 customers, so that's higher than what they --

18 THE COURT: In other words, a customer that wasn't
19 using either of them, that wouldn't be accounted for.

20 THE WITNESS: Exactly right.

21 BY MR. SIMMONS:

22 Q. Have you --

23 A. And we'll look at a little bit of that behavior in a
24 couple of slides.

25 Q. Have you done the kind of analysis that's on slide 22

1 for other customers aside from restaurants and hotels?

2 A. Two, well, two customers total where we did the maps,
3 the big GPO we looked at a couple of maps go.

4 Q. Amerinet? Amerinet?

5 A. Yes, yes. And the hospital chain we looked at a couple
6 of maps ago. Those are the only other two firms I've done
7 this for, and there's only two of them so I haven't added them
8 up in a statistical --

9 Q. I think I can say the name, not reviewing it, Kaiser
10 Permanente.

11 A. That's right, and those two firms are entirely
12 consistent with the story you would see here, they mostly buy
13 from other folks.

14 Q. All right. Did you do anything for GPOs and
15 foodservice management companies?

16 A. No, only Amerinet.

17 Q. All right.

18 A. And the data, you know, the data collected in
19 connection with this litigation doesn't include a list of all
20 their locations other than -- other -- Amerinet provided it, I
21 guess.

22 Q. Let's go to 23, Professor Bresnahan, walk us through
23 this slide, if you would, sir, please?

24 A. So here are -- so this is a different kind of evidence
25 of the same thing. So now I'm out of my systematic

1 statistical thing and back to --

2 Q. And if I could quickly interrupt, why don't you just
3 refer to upper left, lower left.

4 A. Oh, good, that's a useful notation.

5 Q. I wrote that on my notes.

6 A. And so here are four firms in the two categories you
7 just asked me about, GPS and FSMs. Upper left uses a lot of,
8 as you can see, uses a lot of distributors in a regional
9 approach and has 70 regions, uses some of the big so-called
10 regional broadline distributors, Gordon, Ben E. Keith. Upper
11 right primarily works with Sysco, but also uses other
12 broadliners.

13 Lower left has a large network of broadline and
14 specialty distribution centers and uses three broadliners,
15 including USF. Lower right, another GPO has recently moved
16 away from sole source agreement, and sole source agreement
17 really does correspond to the FTC's theory of how -- how these
18 folks buy, and they're starting to substitute, possibly even
19 threatened to substitute to regionalize.

20 Q. All right. Now, Dr. Israel's testified that even
21 though a customer might use multiple distributors, there's
22 this idea that I've got to have a primary distributor. If
23 they are using a primary distributor, do your opinions change
24 or your analysis?

25 A. No. I think Dr. Israel's making a mistake here. He's

1 confusing switching enough business to defeat a price increase
2 or threatening to switch enough business to negotiate away
3 from a price increase with switching a hundred percent of your
4 business. And, you know, these are mostly negotiated prices
5 with the big -- not the street prices, which are pretty close
6 to list prices, but the larger customers, it's mostly
7 negotiated prices, and, you know, the credible threat to
8 switch away some of the business will get the attention of the
9 foodservice distributor and you get better terms.

10 Q. All right. But Dr. Israel says, look, you know, using
11 multiple distributors is inefficient and, you know, it adds to
12 your cost. Have you seen any analysis from him on that
13 showing any kind of, as you add incremental distributors that
14 costs go up some quantum, has he done any quantification of
15 that that you've seen?

16 A. No, I think that a purely -- that was an assumption on
17 his part.

18 Q. It was pure assertion on his part, is that your view?

19 A. Well, assumption.

20 Q. All right. Now, in fact, have you seen the testimony
21 of Mr. Pazzanese of Sodexo on this matter?

22 A. Yes.

23 Q. What did he say about this notion that if you add
24 distributors, that's inefficient?

25 A. Didn't seem to think that that would add costs.

1 Q. All right. Now, just before we move off this concept
2 of substitution, which I think has a dimension of time, you
3 substitute over time and in space simultaneously I may be
4 using --

5 A. Well, so far we've been talking about substitution over
6 space.

7 Q. Right.

8 THE COURT: Can I interrupt? I'm sorry. Well, for
9 the layman it seems counterintuitive that more distributors
10 doesn't lead to increased costs. In other words, the person
11 that testified yesterday that, you know, I've got two
12 distributors, that means I've got to deal with two invoices,
13 I've got to deal with two sales representatives, I've got to
14 do twice as much as I have to do instead of when I have one
15 distributor.

16 Why is that not a logical assumption that more
17 distributors leads to increased cost? Again, it may be a cost
18 a customer's willing to take on because the cost that they're
19 saving by regionalizing makes that worthwhile, but why isn't
20 just the increase of distributors, number of distributors lead
21 to higher costs?

22 THE WITNESS: So I would expect the big cost here,
23 the administrator, on the administrative cost side, I think
24 narrowly we're talking about administrative cost.

25 THE COURT: Right.

1 THE WITNESS: Is when you first regionalize, so
2 we're just talking about a firm that has one big vender and a
3 second one, you know, once you've set up, you know, once
4 you've got somebody whose job it is to think about all those
5 different vendors, there's some functions you have to take
6 over, and I agree with you, those functions have -- might have
7 some cost, and you might have been relying on your sole source
8 vendor to do all that work for you, but once, sort of once you
9 cross the line, and I think Mr. Pazzanese has already crossed
10 that line, once you've crossed that line, then, you know,
11 you've got an order department, you've got, you know, you've
12 got accounts payable. It's plugged into your account payable
13 thing, the incremental costs of that in second, third, for it
14 would seem to me to be comparatively small.

15 So that's what I thought he was saying, you know,
16 you've got to have an administrative capacity in moving from a
17 sole source to a second, that might be a more serious business
18 decision, but third, fourth, fifth, I don't see it.

19 BY MR. SIMMONS:

20 Q. And just picking up on the Court's question, any
21 incremental cost, if we assume there are some, does that have
22 to be weighted against having options, choices?

23 A. Of course, you have more options, too, and you might
24 have more bargaining power, but I didn't think that was the
25 question, you know, you were recognizing, Your Honor, the

1 benefits you might have.

2 THE COURT: Right. Mr. Simmons, can I interrupt
3 you?

4 MR. SIMMONS: Absolutely.

5 THE COURT: Ms. White.

6 (Discussion off the record.)

7 THE COURT: Proceed.

8 MR. SIMMONS: Thank you, Your Honor.

9 BY MR. SIMMONS:

10 Q. I'm about to slightly shift gears a bit, but I just
11 want to make sure we're clear on this, Professor Bresnahan.
12 Can you briefly describe for us your thinking on whether
13 substitution requires a customer to move all of its purchases?
14 I've got a -- it's binary, I either you all or I use you
15 nothing?

16 A. No, of course not.

17 Q. All right. And just explain your reasoning for that,
18 if you would, please, sir?

19 A. The substitution that's relevant in an antitrust
20 inquiry is, you know, what would happen if they tried to raise
21 prices, and the seller -- the seller doesn't care whether, you
22 know, there's -- suppose all my customers move half their
23 business or half my customers move all their business, say if
24 I, you know, for the example all the customers are the same
25 size. That's an equally bad deterrent to raising the price,

1 you know, and so it doesn't have to be some of my customers
2 move all of their business, it could be many of my customers
3 move some of their business. So just to get to the -- just to
4 get, you know, for all the different things. For the
5 competitive effects, for the SSNIP, for everything, you know,
6 it doesn't -- substitution is substitution.

7 Q. All right. Now, we've seen that it's typical, I think
8 as we've gone through this presentation that it's typical for
9 a national broadline customer to buy from multiple
10 distributors. Do you have more evidence on substitution that
11 bears on the FTC's case about national broadline customers?

12 A. I do, I've looked at a couple of other dimensions.

13 MR. SIMMONS: If we could put up number 25, please,
14 on this side of the court.

15 THE COURT: Thank you, Ms. White.

16 BY MR. SIMMONS:

17 Q. So, what are your takeaways with slide 25, please?

18 A. These are restaurant chains, and they are in revenues
19 substituting away from Sysco and USF. So here I'm taking
20 advantage of another dataset which Sysco used Technomics data
21 to estimate the total foodservice purchases of each of the top
22 498 restaurant chains in the United States. That came from
23 Technomics, but then Sysco estimated what their purchases
24 were.

25 And so I ask in this chart for each -- for each of

1 these buckets, top 50 restaurant chains, second 50 and so on,
2 I ask how much of that total foodservice purchase by these
3 chains is supplied by Sysco and USF?

4 So down at the bottom, light blue is supplied by Sysco
5 and USF, and again, I get that from their transaction records.
6 And in -- the dark blue is supplied by somebody else. Again,
7 here again I'm trusting Sysco's estimate of the total buy by
8 these customers, but -- so that's their implicit estimate of.

9 Sysco can't calculate the light blue thing because they
10 don't know USF's purchases, but I can, but then I'm using
11 Sysco to figure out how much the top is. So this isn't -- so
12 here we see, you know, in the top 50 restaurants defendants
13 are selling, you know, high 20s, in the last 451 to 498
14 restaurant chains they're selling, between the two of them,
15 you know, 50, 60 percent, and the others are everywhere else.
16 So this is revenue share weighted of these top chains.

17 THE COURT: Did you use the restaurants are ranked
18 by what purchase, total purchases --

19 THE WITNESS: I believe Technomics ranked them by
20 total sales.

21 THE COURT: Okay.

22 THE WITNESS: You know, so you probably got
23 McDonald's right at the top.

24 BY MR. SIMMONS:

25 Q. So in other words, you use Technomic to put together

1 the top 500 restaurant list?

2 A. Yeah, which there are only 498.

3 Q. And you used the parties' transaction data to identify
4 actual sales?

5 A. That's right, and the Sysco report to figure out what
6 they thought sales by chain were -- I'm sorry, total purchases
7 by chain including that from them.

8 Q. And this is only for the parties' national customers
9 within these buckets; is that right?

10 A. Yes.

11 Q. All right.

12 A. This is like the ones we were just looking at, it's not
13 exactly market shares because it's, again, it's within their
14 national customers, so they're serving, oh, I don't know,
15 28 percent of the buy of their largest group of national
16 customers here and about 60 percent of the buy of their
17 smallest group of national customers here.

18 Q. All right.

19 THE COURT: What if neither of the defendant
20 companies served the customer?

21 THE WITNESS: So that's the next chart, let's take
22 a look at that.

23 THE COURT: Okay.

24 MR. SIMMONS: I'll hold my question, Your Honor.

25 THE COURT: Maybe I am getting better.

1 MR. SIMMONS: I don't want to interrupt the flow.

2 THE WITNESS: I don't think I'm going to do any
3 formulas, but --

4 MR. SIMMONS: Please answer the Judge's question.

5 THE WITNESS: So this is that chart. Again, it's
6 the large restaurant chains, and this is a count, this is a
7 count because there are 50 in each bucket except for the last
8 bucket, which has 48, and the light blue ones are served in at
9 least one location by one of defendants. And the dark blue
10 ones are served, not served in any location by one of
11 defendants. And so this is the answer to that.

12 Again, it's just for the restaurant chains because
13 there's where I've got a -- I'm using the Ag Data like a
14 denominator here. What are these folks buying.

15 Another way to do this, if we took the two charts
16 we've been looking at together, about 18 percent of the
17 aggregate foodservice purchases of these 498 chains comes from
18 one of defendants.

19 THE COURT: I'm sorry, say that again.

20 THE WITNESS: About 18 percent of the total
21 foodservice distribution purchases of these 498 restaurant
22 chains comes from one of defendants. And in these last two
23 charts, I've broken that up into two charts. Here we see how
24 many of them, defendants have as a customer, at least
25 somewhere, and in the previous chart we saw given it's their

1 customer, how much of the business do they get.

2 THE COURT: I'm sorry, 18 percent of the purchase
3 comes from one of -- at least one of the defendants?

4 THE WITNESS: That's in revenues. In revenues, if
5 we took the total purchases of these 498 firms, 18 percent of
6 that number comes from defendants, comes from the two
7 defendants.

8 THE COURT: From both defendants.

9 THE WITNESS: So that's -- that is like a market
10 share.

11 BY MR. SIMMONS:

12 Q. All right. But help me out, just on each slide we have
13 a big -- you have a big banner which says these different
14 bars, the light blue and the dark blue, but this is direct
15 evidence of substitution at current prices. Just connect the
16 dot for me, how is what's represented there, how does that
17 denote direct evidence of substitution at current prices?

18 A. Now two ways. Even the restaurant chains that are
19 choosing Sysco or USF are not choosing only Sysco and USF,
20 they are also choosing other vendors, so they are substituting
21 in space.

22 Here we see, you know, these are, I've bucketed them,
23 these are reasonably similarly situated firms. We've got top
24 50 restaurant chains, and we see that many of them who have
25 the opportunity to choose Sysco or USF are choosing somebody

1 else. So that's substitution, you know, it's a market, you
2 know, there's a market, you would think, and some of them are
3 substituting away from the defendants entirely. And others
4 are substituting away in part in space by regionalizing.

5 Q. All right. Well, Dr. Israel has argued that, you know,
6 restaurant chains are frequent quick service chains, and that
7 for some reason they may not be relevant to this market
8 definition even if they're on the CMU list because they can
9 more readily substitute to systems distribution, what's your
10 response to that?

11 A. Well, these -- so first off, there's just the factual
12 question. You know, when I heard Dr. Israel say that, I
13 looked at the websites to look at the menus of many of these
14 chains and, of course, some of them are the big quick service
15 chains, but many of them are also not. So this is mixed, so
16 I, you know, I don't see, you know, so, so what, is most of
17 my --

18 Q. All right. On this issue of substitution we've seen
19 direct evidence that national broadline customers of the
20 parties use other distributors and that you characterize that
21 as substitution. Have you also directly analyzed consumers
22 switching from Sysco to USF to another competitor?

23 A. I have.

24 Q. All right. Have you prepared a chart that explains how
25 you analyzed consumer switching?

1 A. Yes.

2 Q. Okay. Why don't you walk us through what this shows.

3 A. So this isn't about switching, this is going to be
4 about substitution in time.

5 Q. And also please explain your methodology here.

6 A. This is -- so, you know, much of the same problem we
7 were talking about earlier that we only have data from the
8 parties is going to be what's behind the idea here. So think
9 about a customer location, it's going to be zip code in one of
10 these changes. They stop buying from US Foods entirely, so
11 that's all -- all their business used to be US Foods, and US
12 Foods has lost this location as a customer.

13 Okay. Where can they go? First the easy one. They
14 could start buying later from Sysco, and I can see that in the
15 data because I've got the two parties data, and I've done my
16 merge. Okay, now we come to the tricky part. They might have
17 switched to another competitor, and what's I'm going to be
18 really interested, I want to figure out how much they've
19 switched to another competitor, but they might also have
20 closed that location, permanently closed that location.

21 So I'm going to look in the Ag Data later on and see if
22 it's still open. They're the ones that have been permanently
23 closed. And they might also have seasonally closed.

24 MR. MOHR: Your Honor, we're like to note for the
25 record that the analysis whether a business temporarily or

1 seasonally closed is not reflected in any of Dr. Bresnahan's
2 original report or rebuttal report so we would object to that
3 as not being properly disclosed under Rule 26, but we're
4 willing to withhold that objection so as long as Dr. Israel is
5 allowed to testify about that analysis on his rebuttal.

6 MR. SIMMONS: Well, and if I can respond, Your
7 Honor, I know you don't want argument, but we disagree with
8 this assertion.

9 THE COURT: Dr. Israel will have the opportunity to
10 testify about it, so go ahead and proceed.

11 THE WITNESS: Okay. So I think that was about the
12 right most box in the lower part.

13 THE COURT: Just to interrupt, but to take, just
14 to -- so the record is clear on this, I assume that this
15 particular slide deck was disclosed to the plaintiffs prior to
16 today.

17 MR. SIMMONS: Oh, absolutely, Your Honor, last
18 night, I think between 6:00 p.m. and 7:00 p.m. as per our
19 agreement.

20 THE COURT: I'm sorry?

21 MR. SIMMONS: Yesterday evening, we tendered this
22 deck.

23 THE COURT: Okay, so it was tendered then last
24 evening?

25 MR. SIMMONS: Oh, yes.

1 THE COURT: Okay. All right.

2 THE WITNESS: Okay. So let me do that again. US
3 Foods loses a location, it could go to Sysco, it could
4 permanently close, but I'm going to get rid them using the Ag
5 Data. It could temporarily close, for example, seasonally,
6 and I'm going to get rid of those by changing the season in
7 which my data ends. And that's how it -- it's quite analogous
8 to what we were talking about earlier. What's left over I'm
9 going to infer is a switch to another distributor at that
10 location. And -- okay, so let's --

11 BY MR. SIMMONS:

12 Q. And I just want to go back to kind of connect the dots
13 for everyone. Early this morning we talked about it before
14 lunch, we talked about there's two ways of constructing a
15 denominator. You can figure out who sells in the marketplace,
16 in the candidate market, and you can get all of their sales
17 data and who they sold to, or you can get everyone that
18 purchased in the market and get who they bought from and how
19 much and, you know, and so on.

20 A. Right.

21 Q. And those are the two -- FTC file here doesn't have
22 that in it, does it?

23 A. That's true. So that's why I'm doing this, and that's
24 why I have this category, which is other.

25 Q. All right, very good. Let us move forward to number

1 28, please, Dr. -- Professor Bresnahan. This is a slide that
2 presents the findings of your national broadline customer
3 switching analysis.

4 A. That's right.

5 Q. Will you describe your finding for the Court?

6 A. So on the left we have what corresponds exactly to what
7 we were just looking at. Within national customers, when a
8 location disappears from USF, it shows up in Sysco about
9 15 percent of the time, whether you do location counts or
10 revenue. So that's -- the left is just like the -- what we
11 were just looking at, and I'm inferring 85 percent to somebody
12 else.

13 Sysco symmetrically, when Sysco loses a location, it
14 goes, based on counts, to USF 39 percent of the time, and
15 based on revenue to USF 57 percent of the time. So this is
16 the results that come from the methodology that was described
17 on the previous slide.

18 Q. All right. And again, on the -- just back to this
19 denominator question.

20 A. Right.

21 Q. To your knowledge, the distributors that did produce
22 and did respond to this FTC CID in this matter, did those CIDs
23 asks for the distributor's customer names and their sales to
24 those customers?

25 A. I don't know what they asked for, Mr. Simmons. I know

1 we don't have it.

2 Q. Okay.

3 MR. SIMMONS: Now, I would just note for the
4 record, Your Honor, that as to slide 27 and its underlying
5 information, that was -- the slides were disclosed last night,
6 but the underlying material was disclosed at the end of April
7 and Professor Bresnahan was examined in his deposition.

8 THE COURT: I'm sorry to interrupt. The slide on
9 the -- or slide 28, the Sysco loss business numbers, so the
10 conclusion to draw from this is when Sysco has -- and this was
11 what, for what period of time? I think you said this was for
12 a quarter?

13 THE WITNESS: So, yes. I'm going to leave out an
14 interim quarter. You know, I don't want to assume that the
15 switch occurs on the first day of the calendar quarter, so if
16 it's USF in the winter, I'll look to see who it is in the
17 spring to avoid -- to avoid sort of the purple problem from
18 the maps.

19 THE COURT: I see.

20 THE WITNESS: Because I don't know the exact dates,
21 but it's sort of a -- it sounded like you had more --

22 THE COURT: Well, I was just curious, so the
23 57 percent of the switch is based on revenue from Sysco, that
24 57 percent of the switch was to USF; is that accurate?

25 THE WITNESS: That's true.

1 THE COURT: Okay.

2 BY MR. SIMMONS:

3 Q. If Sysco and USF were head-to-head, really head-to-head
4 competitors, would you expect to see a lot of more of their
5 business going from one to the other?

6 A. I would. I think to think about whether they're really
7 important head-to-head competitors for one another, you want
8 to average these two things, you know, average the 15 and the
9 57, average the 15 and the 39 because it's -- head-to-head
10 competitors is sort of a, you know, bilateral concept, back
11 and forth concept, and, you know, you're going to get a
12 number, you're going to get a number that's sort of like their
13 national shares of overall foodservice, even a quarter or
14 something.

15 THE COURT: Of course, it sounds like based on the
16 limitations and the data, or let me ask, does the data limit
17 your ability to define who, let's stay with the revenue, who
18 the other -- sorry, the other 43 percent are?

19 THE WITNESS: As before, I don't know who the other
20 85 percent are or the other 43 percent are because I don't
21 have -- this is a question Mr. Simmons just asked about.

22 THE COURT: Right.

23 THE WITNESS: Do I have -- you know, I don't know
24 if it's another, you know, big broadliner, I don't know if
25 it's a regional broadliner, and it's somebody else. And here

1 it's all of that location, you know, it's all of that
2 location, it's not just that some business disappears. So
3 somebody else is serving that location.

4 THE COURT: Okay.

5 THE WITNESS: But again, it's in -- it's staring
6 incognito, we've got data about these two firms, lots of data,
7 we have very limited data about any of their competitors to do
8 a competition analysis with, and I'm trying to work around
9 that.

10 MR. SIMMONS: All right. If we could put up 30,
11 we're about to slightly transition away.

12 BY MR. SIMMONS:

13 Q. Can you briefly summarize your conclusions thus far in
14 our talk?

15 A. So far, lately we've been talking about substitution.
16 I see a lot of substitution over time, that's what we were
17 just looking at. We see lots of business not served by Sysco
18 or USF. We saw lots of competition by space, most of the
19 locations are not being served, and for the restaurants most
20 of the revenue is not being served, you know, I think the idea
21 that this -- you see those great big shares in Dr. Israel's
22 table one and that would say most of the competition between
23 these firms is wrong. I'm using much more reliable data here
24 and I'm getting a very different picture of substitution. I'm
25 seeing a lot of substitution to third parties.

1 Q. And thus far, you're concluding that the FTC's theory
2 that this is a highly concentrated industry with competition
3 primarily between the two merging parties is wrong; is that
4 right?

5 A. That's exactly what I'm concluding.

6 Q. Let's move to kind of another issue. This issue of
7 price discrimination. So you heard Dr. Israel testify, and as
8 I understand his position and you correct me if you have a
9 different understanding. The customers on the CMU list can be
10 targeted for price discrimination. Explain to us what your
11 understanding of what -- what does price discrimination have
12 to do with relevant market, in your view, has Dr. Israel made
13 out any showing of price discrimination?

14 A. So an alternative way to define a relevant market to
15 the way we've been talking about is to group the customers
16 that sellers might price discriminate against. And, you know,
17 so who is that. That is in the language of economics, the
18 customers with inelastic demand. Or in the language of
19 business, that's the customers that can't substitute away.

20 And, you know, the -- Dr. Israel seeks to define such a
21 market by saying the merged firm could target everyone that's
22 on the CMU list or the national list today because they have
23 these characteristics, they can't -- they can't substitute
24 away. So that's what he's trying to do. He sort of
25 acknowledged this problem that -- he sort of acknowledged this

1 problem that they're in very different competitive
2 circumstances that I was talking about earlier, you know,
3 where they, you know, the regional ones, for example, aren't
4 buying nationally, you might want to define it particular
5 competitive footprint for each -- sort of acknowledge this
6 problem and has turned to this price discrimination market to
7 rescue it really.

8 Q. So you believe, it's your position that Dr. Israel's
9 invocation of price discrimination is an effort to rescue his
10 market definition theory, is that what you just said?

11 A. Yeah.

12 Q. Slide 32 references the Horizontal Merger Guidelines
13 language about observable characteristic. Am I correct that
14 the idea of price discrimination is that for the entity, the
15 company that wants to discriminate, it needs to be able to
16 identify the price elasticity of the customers that it can
17 discriminate against and those are usually reflected in some
18 observable characteristic that the -- is that the basic idea?

19 A. It has to be reflected in an observable characteristic
20 or they can't do the discrimination. You know, the -- if it's
21 true, I won't use my wife as the example here, I'll use
22 myself, you know, Coke, my local Coke bottling company could
23 raise the price of Diet Coke by a dollar a case, I'd continue
24 to buy it. But they don't know that about me, you know, they
25 don't -- I don't have an observable characteristic that says

1 I'm an infra-marginal buyer if the price went up, so they
2 couldn't price discriminate against me. You need an
3 observable characteristic to be able to price discriminate.

4 And yeah, and the Horizontal Merger Guidelines have
5 this wonderful example from cans, jars and bottles. Baby food
6 manufacturers have to buy glass containers. They can't
7 substitute away into metal or plastic for reasons of law.
8 But, so if you were selling glass jars to Beechnut, you would
9 have that observable characteristic. They can't -- they need
10 me, they can't get away from me. So that's a -- that's a
11 terrific example. There's an observable characteristic also,
12 now here let me say another thing.

13 That observable characteristic of the baby food
14 manufacturers is common to all baby food manufacturers. So
15 you could define with a common observable characteristic, you
16 could define in the large class of people that buy containers
17 for a living, you could define the baby food container buyers
18 as a relevant market because they're observably commonly in
19 elastic. So that's -- that's the idea of a -- creating a
20 market definition by price discrimination arguments.

21 Q. And this baby food example is in the Horizontal Merger
22 Guidelines, you used that as an example; isn't that right?

23 A. That's right, I have the cite to it here on the slide.

24 Q. Now, Dr. Israel says, well, wait a minute, if you're on
25 the parties CMU list, what more do I need, that's the

1 observable characteristic. What's your response to that?

2 A. That's -- so that's an observable characteristic, I
3 think, you know, Sysco knows if you're on their CMU list, but
4 you know it's not a trait like being a baby food manufacturer
5 it's sort -- you know, it's not a trait like being a baby food
6 manufacturer, that's the first thing.

7 And second, I mean, we've just seen, lots of customers
8 in the -- on those lists are regional or buy regionally, could
9 buy regionally. You know, the -- the -- being on that list
10 doesn't identify you as having the trait, you can't substitute
11 away from a price increase by the merged firm.

12 Q. Is it fair to say, therefore, that you reject the idea
13 that being on the CMU list is -- denotes some sort of
14 observable characteristic of pricing elasticity?

15 A. Right, and therefore, it can't be used to define a
16 market this way.

17 Q. All right. And you may remember I -- one of the first
18 things I did with Dr. Israel was I had three trucks with
19 different SKUs and different delivery dates. So different
20 products.

21 Doesn't price discrimination mean for the same product
22 on discriminating against my purchasers, isn't that the basic
23 idea, and I need an observable characteristic in order to know
24 who I can discriminate against from those I can't discriminate
25 against?

1 A. That's right. And, you know, in economics we have the
2 distinction between price differences or price disparity and
3 price discrimination. In this industry, well, certainly in
4 the national part of it that we're talking about, there's a
5 different product for every customer, you know, they have
6 different locations, they have different drop sizes, they have
7 different lists of things they're buying, that's where they
8 negotiate. They have to work all that out. When is the
9 trucks going to come, what's going to be on it, what's the
10 minimum drop size going to be. And so there are price
11 differences, price disparities, you know, sometimes --
12 sometimes the firms in this industry talk about delivered
13 price per case, but that's, you know, differences in that
14 aren't price discrimination, they're just price differences.
15 It's different products.

16 Q. Let's go to, I'm going to try to move this along here.
17 Let's go to slide 33, please, and tell us, just summarize what
18 you're seeing here.

19 A. I think this -- I think this summarizes what I just
20 said. The idea that the -- that the NBC are all commonly
21 vulnerable, just because they're on that list is one that I
22 have disproved.

23 Q. If we could go to 34, please.

24 Now, what about sole sourcing, what about customers you
25 buy from a single distributor today, can't they, you know,

1 aren't they particularly vulnerable?

2 A. No, and for two reasons. First, they'll buy from a
3 single distributor today at today's prices. At higher prices
4 they might themselves regionalize. But more important, there
5 are others that are regionalizing today or multi-sourcing in
6 other ways today.

7 So, you know, if I'm negotiating with my foodservice
8 distribution provider, and I am trying to buy from for my
9 whole footprint, I can say lots of people are dividing up
10 regionally and they're getting better prices, I'm thinking
11 about doing that, you know, and that's -- you know, you might
12 be an infra-marginal customer, that -- that -- the person that
13 wants to buy within a footprint might be -- might know that
14 they're an infra-marginal customer, but they don't -- they
15 shouldn't tell their counter-party in the negotiations that,
16 and their counter-party in the negotiations, they should say,
17 I'm just like all those other guys, I can divide it up, you
18 better give me some better terms.

19 Q. Does the CMU list say or has Dr. Israel shown or the
20 FTC said which customers can multisource and which customers
21 can't, is there --

22 A. No, that doesn't say that.

23 Q. All right. Let's go to number 35, if we could,
24 Professor, we're back again to Dr. Israel's table one and
25 table three. I think we're now going to go from -- we've gone

1 from data to substitution to now we're going to effects, just
2 to -- that's the --

3 A. Right, we've been talking about the top of this, and
4 now we're going to go to the bottom of this, the use of the
5 model to do competitive effects.

6 Q. And briefly remind us how do these market shares that
7 you believe were just wrong from the getgo, how do these
8 factor into this table three?

9 A. So table three is based on Dr. Israel's model. And the
10 market shares are a critical input into his calculations in
11 the model. And that's -- the reason for that is that he
12 doesn't have a real one lost database. He doesn't know who
13 really came in second. He doesn't have -- in the language of
14 his conversation with Mr. Simmons last week, he doesn't have
15 rankings. He may know who won, but he doesn't know who was
16 second and who was third.

17 So to replace that critical information to do an
18 auction kind of analysis, who was second, who was third, what
19 did they bid, doesn't have that information. He uses the
20 shares.

21 Q. All right. And you believe the shares are erroneous
22 and competitively irrelevant?

23 A. Right, for the national broadline market, you know,
24 we've been talking about that for awhile. I think they've got
25 mistakes in it, you know, and just as a matter of calculation,

1 and incomplete just as a matter of calculation, they don't hit
2 the regional guys very well because of the way they're
3 selected and, you know, they're conceptually wrong too.

4 Q. And --

5 A. And they're critical input, they replace the ranking
6 data and the auction model.

7 Q. Do you agree with Professor Hausman that Dr. Israel
8 failed to include distribution variable costs in calculating
9 margins?

10 A. Yes, that's another -- that's -- yes, I agree with
11 that. That's the other quantitative input into the harm to
12 competition model, it's the margins.

13 Q. Okay.

14 A. And Dr. Israel doesn't include distribution costs in
15 the --

16 Q. Okay, I'm sorry, Professor Bresnahan.

17 A. I'm sorry.

18 Q. No, I'm sorry. Slide 36 references a testable -- I'm
19 sorry, we're on slide 36, please. A testable prediction of
20 pass-through. What -- just tell us, connect that for us and
21 what we're talking about.

22 A. Dr. Israel has noted this prediction of his model, too.
23 His prediction is that if one firm's marginal costs go down,
24 the prices paid by its customers will not go down. And he
25 uses that prediction to talk about what will happen about the

1 merger. I use it to test the model in the present. What, you
2 know, and what didn't happen when Sysco's prices went down in,
3 for example, in the Catman program was that a lot of that was
4 passed through to their customers. So this implication of
5 Dr. Israel's theory, which can be tested in the present, is
6 false.

7 Q. Did -- is this basically the scientific method, taking
8 a hypothesis and testing it?

9 A. Of course.

10 Q. All right. If we could can go to -- I want to switch
11 now, we've -- I believe we are done with effects. But again,
12 just so we're clear before we leave the effects discussion.
13 In your view Dr. Israel is inferring effects from his
14 erroneous market shares; is that correct?

15 A. The market shares are critical to his inference of the
16 effects.

17 Q. He hasn't done any, you know, I've had the misfortune
18 of doing antitrust now for 24 years, but he hasn't poured into
19 some computer a bunch of price data and estimated some sort of
20 national market price effect, that's not what table three
21 shows, is it?

22 A. No. No, it's based on the margins, it's based on the
23 margins and the shares.

24 Q. All right. Let's move now to the -- to number 37 and
25 just have you recap because we're going to move to local

1 issues, and then we're close to being done.

2 THE COURT: Let me just ask how long you expect
3 your examination to be? I want to give the court reporter a
4 break. We've been going for about an hour.

5 MR. SIMMONS: Oh, sure, would you like to take --

6 THE COURT: How much longer do you think you have?

7 MR. SIMMONS: I hope maybe 25 minutes, Your Honor.

8 THE COURT: All right. Well, why don't you -- I
9 think you said you were going to summarize and then move to
10 local?

11 MR. SIMMONS: Yes.

12 THE COURT: All right. Why don't you summarize and
13 then move to local. After you summarize, we'll take a break.

14 MR. SIMMONS: Okay.

15 BY MR. SIMMONS:

16 Q. Let's summarize where we are so far.

17 A. We've been talking about the national broadline
18 customers market. I don't think it's -- I don't think it's
19 properly defined. I've drawn that conclusion by looking at
20 substitution out of it. I think the shares of Sysco and USF
21 in it are exaggerated relative to anything you want to use to
22 draw an inference about competition that would be lost with
23 the merger.

24 I think the model that shows a competitive effect in
25 it, first off, it's not separate from the shares. But it's

1 also not unreliable, it inherits the unreliability of the
2 shares and the margins. And I think the effort to rescue the
3 market definition by the price discrimination argument doesn't
4 work either.

5 THE COURT: All right. Why don't we take ten
6 minutes, and let's reconvene at ten of 3:00:

7 THE DEPUTY CLERK: All rise.

8 BRIEF RECESS AT 2:40 P.M.

9 AFTER RECESS

10 **THE COURT:** Counsel, let's talk real quick before
11 we continue the examination about timing here. And if
12 somebody would close the back door, please, thank you.

13 Realistically, what are we talking about the rest
14 of the afternoon, both in terms of you've got about another 20
15 minutes or so. Do you have a sense, Mr. Mohr, of how long
16 your cross will be?

17 MR. MOHR: Forty-five minutes, Your Honor.

18 THE COURT: Okay. And then how long would you
19 expect your rebuttal case to be?

20 MR. WEISSMAN: Our first rebuttal witness will be
21 half hour, 45 minutes.

22 THE COURT: Okay. But you've got two.

23 MR. WEISSMAN: Yes, Dr. Israel will be relatively
24 short, probably less than a half hour.

25 THE COURT: That's just your examination?

1 MR. WEISSMAN: Yes.

2 THE COURT: All right. So realistically we
3 probably won't finish today. That's okay. I expected this is
4 where we'd end up, that's all right. I just need to let the
5 court staff know so that they can make plans for tomorrow, and
6 then we can talk about timing for tomorrow. I don't know
7 whether people have flights to go home this evening, but I
8 just don't see how realistically we're going to finish even by
9 5:30 if we extend it to 5:30.

10 MR. WEISSMAN: Correct. And, Your Honor, I want to
11 be clear, when we started out we had a -- we wanted to
12 allocate time, I want to live up to that.

13 THE COURT: I understand that, and I'm not holding
14 this against either side, don't worry. I understand we've
15 worked -- everybody has worked very hard to try and finish
16 within the time that's been allocated. When we began this, I
17 figured we might need an extra day, which is fine. Do not
18 worry.

19 But let's, you know, again continue to try to be
20 efficient, we'll get through as much as we can today. And I
21 just -- it's 3:00 o'clock, I'd be stunned if we can finish
22 what we have to finish today by 5:00 or even 5:30, but I just
23 want the court staff to know that so that they can start
24 making plans for tomorrow. Okay?

25 MR. SIMMONS: May I proceed, Your Honor? Thank

1 you.

2 DIRECT EXAMINATION (Cont'd)

3 BY MR. SIMMONS:

4 Q. I want to move to local issues, but just ask two quick
5 questions, Professor Bresnahan, on slide 28. In connection
6 with the Sysco lost business side of that slide, if Dr.
7 Israel's national broadline customer market shares were
8 correct, would the substitution from Sysco to USF be even
9 higher than 57 percent in your view.

10 A. Yes, significantly higher. If they were closest
11 competitors.

12 Q. You take the other three calculations into effect; is
13 that right?

14 A. That's right.

15 Q. All right. Let's turn to local issues, we're going to
16 go through these as quickly as possible, Professor Bresnahan,
17 let's go to number 42.

18 Now, you did an analysis of Omaha; is that right?

19 A. Yes, that's right.

20 Q. All right. Why don't you just go straight to that
21 analysis and tell the Court what you need to tell in
22 connection with what Dr. Israel did. So why don't we quickly
23 cover the Omaha case study?

24 A. So Omaha is one of the local markets at issue.

25 THE COURT: Can you speak closer to the microphone,

1 please?

2 THE WITNESS: Omaha is one of the local markets at
3 issue. Dr. Israel has a methodology for assessing the market
4 share of competitors in each of these local markets. And that
5 leads him to estimate that Cash-Wa, our competitor, has a tiny
6 market share in Omaha.

7 Now, his -- again his methodology is not based on
8 there being sales data in Omaha. There is for the defendants.
9 What he's done for competitors is he's made an assumption
10 about how far they'll drive, and basically that's less -- no
11 further in his baseline than Sysco or USF drives 75 percent of
12 the time in that local area. I think that's an reliable
13 assumption.

14 If the -- you know, for local market definition,
15 you know, if the firms you're interested in are in town, how
16 far they drive is not a good indicator of whether folks will
17 drive in from out of town to compete. But anyway, that's what
18 he does.

19 What I've done is use the data on customer
20 locations provided by Cash-Wa to the FTC. I don't have full
21 information, all I know is where the customer is, I don't know
22 the customer's name. But I know whether they are in the local
23 market here. And I've used Dr. Israel's methods for
24 attributing Cash-Wa's sales to local versus national
25 customers. I'm not going to disagree with that, I'm just

1 going to disagree with the how far do they drive thing. And
2 when I do that, I don't know, can I read out these numbers, is
3 that okay?

4 BY MR. SIMMONS:

5 Q. Why don't you just --

6 A. You know, when I do that I --

7 Q. Just refer to them.

8 A. Let me just refer to them. When I do that I find that
9 in the local overlap area Cash-Wa had these sales that are
10 shown here, it's a lot more than this tiny percent, you know,
11 it's about a -- it's over a third of what Sysco and USF had,
12 and that's using information on where Cash-Wa actually saw zip
13 codes again.

14 Q. And for the record, you're referring to the numbers on
15 slide 42?

16 A. That's correct.

17 Q. The Cash-Wa sales as -- they're totaled, and then USF
18 sales are totaled?

19 A. Exactly. Similar for Reinhart, but here we're talking
20 about Cash-Wa.

21 Q. Okay.

22 A. So how do I do that? Let's look at the map on the next
23 page.

24 Q. Forty-three, please.

25 A. And this is a picture of the overlap areas, there's

1 Sysco and Lincoln and USF and Omaha, and the grayed in area is
2 their overlap area, and there's Cash-Wa in Kearney. Now
3 Cash-Wa used to be much closer, have a DC much closer and
4 serve a lot of customers in the overlap area, but then they
5 moved that business to Kearney.

6 What I'm going to do is I'm going to look at the
7 locations where Dr. Israel says Cash-Wa would have delivered
8 and then look at where they actually deliver on this map.

9 Q. Let's go there, number 44, please.

10 A. Yep. So here are -- it's the same area. Green is
11 areas he says they would have delivered. Zip codes again,
12 this is a zip code map. Red is red and they did -- red is
13 areas where his methodology says Cash-Wa would not have
14 delivered, but it did, in fact.

15 Q. And you use zip code data; is that right?

16 A. Yes.

17 Q. And then zip code data came from the FTC file?

18 A. That's my understanding.

19 Q. And Dr. Israel did not use zip code data in this local
20 draw area?

21 A. Not this zip code data, that's right. Yes, he must
22 have used some from the parties, but not --

23 Q. I'd like to move quickly off the local issue, but can
24 you give the Court your bottom line about this draw area and
25 circle drawing that Dr. Israel does, do you think that's a

1 defensible way of defining local relevant markets?

2 A. No, I mean, we can see here that the assumption that
3 the out of town competitors won't drive any further than the
4 folks in town is false. I mean, here it's sort of extremely
5 false.

6 Q. And you have other analyses of this kind of hypothesis
7 testing in your work, do you not?

8 A. Yeah, I do, I mean, there's sort of -- certainly to
9 other cities.

10 Q. All right. And we have an example of Chicago in the
11 deck, but we will move on.

12 A. Right.

13 Q. Now, you heard Professor Hausman criticize Dr. Israel's
14 entry concerning Long Island and Riverside, did you hear that?

15 A. I did.

16 Q. All right. Now, I want to move quickly so let's just
17 go to the bottom line. Do you agree with Dr. Hausman's
18 criticisms on what Dr. Israel did with Riverside and Long
19 Island?

20 A. Broadly.

21 Q. All right. Let's go -- but you did something else on
22 entry; did you not?

23 A. I did.

24 Q. And that's concerning Shamrock?

25 A. That's right.

1 Q. All right.

2 MR. SIMMONS: And we'll make this just on this side
3 of the courtroom, please, could we put up number 50, five
4 zero.

5 BY MR. SIMMONS:

6 Q. Tell us about what you did with Shamrock entry in Los
7 Angeles and why that rebuts what Dr. Israel, the conclusions
8 he's trying to draw?

9 A. So Dr. Israel looked at Sysco's entry into markets
10 where USF already was and said prices fall. I don't see the
11 antitrust salients of that. That establishes that Sysco and
12 USF are competitors, and I agree with that, everybody agrees
13 with that. So I looked at -- I did a comparative study. I
14 kept all of his health methods, everything from Dr. Israel,
15 and I kept his Sysco entry into greater Los Angeles, the
16 Riverside opening, and I found another one. The reason I kept
17 Sysco was I found another one. Shamrock, which was a big
18 regional that's been moving westward, entered in another place
19 in sort of eastern Los Angeles.

20 And so I just did another version of his entry methods
21 here for comparison purposes. I don't just look at Sysco, I
22 look at Shamrock, and I find if you just follow his methods,
23 Shamrock is a much more effective competitor against USF as
24 measured by the price impact of their entry, which is not a
25 crazy metric, than is Sysco, okay.

1 So, you know, if you actually did the right thing,
2 which was comparative, you'd reverse his conclusion. It's not
3 Sysco and USF are particularly close competitors, they're
4 actually not particularly close competitors in this locale.
5 I'm pretty sure this is the one place you can do this is Los
6 Angeles.

7 Q. All right. So you see your analysis on the Shamrock
8 entry as rebutting the inference?

9 A. Reversing the finding.

10 Q. I see. Let's turn to slide 52. Can you briefly tell
11 us about your work with respect to local broadline consumer
12 purchasing behavior and what that implies about what you
13 learned about substitution to competitors?

14 A. Which one are we looking at?

15 Q. Number 52, please.

16 A. So I did two kinds of local broadline things. Again
17 I'm going to be working within the four walls of the data that
18 I have, which are Sysco and USF data. I did a study of
19 unbundling, particularly I did a study of unbundling fresh
20 chicken.

21 Q. And when you mean unbundling, buying, taking something
22 out, about ten SKUs?

23 A. Rather than buying everything from Sysco, you buy fresh
24 chicken from somebody else some of the time. So I looked at a
25 bunch -- and I did this for other categories too.

1 Q. Okay.

2 A. I looked at the fresh chicken, and I looked at some
3 restaurants that promise freshness.

4 Q. And this work is described in your reports?

5 A. This work is described in my report. What I found was
6 customers that buy from Sysco all the time, many of them turn
7 off and on buying their fresh chicken from Sysco. They buy
8 something from Sysco, I chose ones that buy something from
9 Sysco all the time, so they're steadily Sysco customers, and I
10 see them, some of them pulse the fresh chicken buy off and on,
11 some of them buy fresh chicken steadily from Sysco.

12 And then I look at what they did when they weren't
13 buying fresh chicken from Sysco, and about 70 percent of the
14 time they're not buying anything from USF, all right, so I
15 infer, again, there's this -- I don't see the third party
16 seller, so I'm drawing an inference that they're buying fresh
17 chicken from somebody else, that seems like a pretty sound
18 inference.

19 They're not buying it from USF because I know they're
20 not buying anything from USF, and so -- but they're still
21 buying some stuff from Sysco, so to me that sounds like
22 unbundling like you want to do if you were moving some of your
23 business to a specialty provider, in this case sort of what
24 they call a protein specialty provider. So that's the
25 unbundling --

1 Q. Let's look at slide 53, and what does this have to do
2 with local switching?

3 A. So 53 is my other local analysis. It's similar to the
4 switching analysis we were looking at before on the NBC
5 locations. What are the important differences here. Here
6 Sysco has made an estimate of how frequently when they lose
7 business it's because the customer closed. USF hasn't. And
8 I'm going to use that customer closure rate to kind of do a
9 haircut on these numbers, that is to say, you know, they leave
10 Sysco, I don't see them in USF, I'm going to take that
11 ordinary closure rate out of it and I'm going to use the same
12 number symmetrically, okay, so again I'm drawing the inference
13 that they switched to a third party competitor.

14 So how does that work? USF lost business on the left
15 side, stop buying from USF. I look later, you know, about
16 15 percent of the time based on revenues, they're buying from
17 Sysco at that location, 85 percent of the time they're buying
18 from somebody else, a little bit smaller for Sysco based on
19 counts 11 and 89.

20 When Sysco loses business symmetrically I look to see
21 if it shows up in USF weighted by revenues about 20 percent of
22 the time it does, 80 percent to others, 12 percent based on
23 count. So the switching over time in these local markets is
24 not primarily between these two competitors, it's mostly the
25 third parties.

1 Q. All right. And what data did you use for this
2 analysis, sir?

3 A. This is based on the parties transaction data, the big
4 operational accounting database.

5 Q. And in your view, are the parties transaction data
6 reliable for the analysis that you did here?

7 A. Yes, my analysis is not inconsistent with the way they
8 use them in their business. They use them to figure out, you
9 know, who's buying what and when to send it to them and how
10 much to charge them for it.

11 Q. Did Dr. Israel use the transaction data for a
12 substitution analysis?

13 A. No, not for a substitution analysis, not for anything
14 like this.

15 Q. What did he use instead to study LBC substitution, was
16 it the link data?

17 A. He used, he -- I slowed down because you asked me to
18 study LBC substitution. I mean, he uses this link database
19 from USF. I don't think it's really a substitution, but he
20 certainly uses it to construct local competition statistics of
21 some kind.

22 Q. All right. Well, thank you for correcting my question.
23 In your view, whatever Dr. Israel did with the link database
24 you would not deem that a substitution analysis; is that
25 right?

1 A. That's right.

2 Q. All right. And why is that?

3 A. The link is another database, link is a tool and it
4 creates a database. And here's another database that Dr.
5 Israel is treating as a one loss database, this time for local
6 customers, but that's not what it is. Link is, I talked to
7 the -- to Mr. Horan [phonetic] at USF who's a senior executive
8 in their sales group. It's a prospecting database. When
9 sales reps are hoping to get an account, they have to enter it
10 into link. Its purpose isn't to assess the competitive
11 strength of competitors. And it has a main competition field,
12 it's one of the hundreds of fields in it. But sales reps
13 don't have to fill that out. Their most successful sales reps
14 measured by presence in this database don't fill it out at
15 all.

16 Q. So link, in other words, is -- am I correct to say that
17 links is a prospective, you know, I'm looking at prospects,
18 whereas transaction data that you used is what actually
19 happened?

20 A. Yeah, who am I actually selling to. The part that Dr.
21 Israel wants from here is who was the competitor, but that
22 part you can't even fill in. It's also got some -- it's also
23 got a projection of how much revenue there's going to be from
24 this account, those are a mess.

25 Q. Just projection, all right. Well --

1 A. And, you know, and, you know, USF didn't use this to
2 track competition, systematically has gotten rid of the who is
3 the competitor field, they've now replaced link with
4 Salesforce.com.

5 Q. And just to close this out, the transaction data that
6 you used for LBC substitution --

7 A. Yeah.

8 Q. -- was the parties transaction data; is that right?

9 A. Yes.

10 Q. And the FTC had that data; is that right?

11 A. That's true.

12 Q. And Dr. Israel had that data; is that right?

13 A. I hope so.

14 Q. And Dr. Israel didn't do any substitution analysis
15 based on that data; is that right?

16 A. No.

17 Q. Let's go to the punchline on page 55, just can you
18 quickly give us your punchlines on this local market issue,
19 please, Professor Bresnahan?

20 A. Yes, you know, I got three, these very concentrated
21 local market shares in the 32 markets, I don't think there's a
22 reliable foundation for that, that was the -- we looked at the
23 example of Omaha, we could at other examples. Because it
24 leaves out, you know, it doesn't use the reliable data, what
25 little reliable data there is on competitors, and that's where

1 they sold, they sold in these markets.

2 And then the analyses based on reliable data goes to
3 there being more competition, switching, unbundling, and the
4 entry thing emphasized the importance of third party
5 competitors in these local markets. Of course, the entry one
6 is just about Los Angeles, the other ones are systematic.

7 Q. And the data we're referring to here is competitor zip
8 code sales data; is that right?

9 A. Yes.

10 Q. Did Dr. -- Dr. Israel didn't use those, did he?

11 A. That's right.

12 Q. And the party transaction data?

13 A. Not for any analyses. Well, he used the party
14 transaction data in some places, but not to do a switching
15 analysis.

16 Q. I want to try to wrap up very soon because I'm mindful
17 of the time. Let's go to number 57, please?

18 A. Go ahead.

19 Q. Now we're on this broadline relevant issue. Give us
20 your views and your opinions concerning, Doctor, this
21 aggregate diversion test that Dr. Israel and others have
22 talked about?

23 A. Dr. Hausman talked about this this morning, and I'm not
24 going to talk about the wrong formula or the wrong margin,
25 but, you know, the idea of these aggregate diversion tests is

1 you come up with a reliable way to estimate how much sales
2 would be lost in or outside the supposed market by the -- in
3 response to a price increase. And Dr. Israel hasn't done
4 anything like that. He's used the link data and the RFP data
5 as if they were won/lost records, but they're not. And he
6 hasn't got anything that's about responses to price increases
7 here at all.

8 Q. So is it fair to say that calling whatever Dr. Israel
9 did a diversion analysis is a misnomer in your view?

10 A. Yeah, I don't think see where there's diversion in
11 there. I mean, he hasn't estimated diversion.

12 Q. All right. Let's quickly move to number 58 before we
13 go to our last slide. Give us your opinions that are
14 reflected there, sir, please?

15 A. I'm sorry, where are we.

16 Q. Number 58, the second to last line.

17 A. Yes. So now this is our last topic, shortest one.

18 Q. We have one last slide, quickly, after this.

19 A. The last topic, the last three big topics. The, you
20 know, the evidence brought forward that different channels,
21 broadline, systems, specialty, cash-and-carry, are special --
22 are different markets here is of two kinds.

23 One is an argument that some customers could not switch
24 across some boundaries between channels. There's some
25 customers that can't use systems, there's some customers who

1 can't move all of their demand to specialty, and then the --
2 and then there's an argument that the channels are different.

3 Those arguments aren't sufficient to establish that
4 those are separate markets, that the particular distribution
5 channel is a separate market, and Dr. Israel doesn't succeed
6 in establishing that broadline is a separate market using
7 those kind of arguments.

8 Q. And how slide 59, our final slide, which has a
9 photograph on it, how does that slide bear on this issue --

10 A. That's a --

11 (Court reporter interrupts.)

12 MR. SIMMONS: I'm sorry.

13 BY MR. SIMMONS:

14 Q. How does slide 59 bear on the question of whether a
15 distribution channel is its own antitrust market?

16 A. So the picture is a picture from the website of
17 Southwest Traders, which Dr. Israel has identified as a
18 specialty distributor. And Dr. Israel had this metaphor, and
19 I think the analogy to the metaphor is just wrong. You know,
20 he was talking about market definition in grocery stores, and
21 he said, I sometimes buy things from a peach stand, peach
22 stand is like specialty distribution, just because I sometimes
23 buy things from a peach stand doesn't mean they're a lot of
24 competition for a grocery store. So here's one he's
25 identified and, you know, what do they say? They say, we're

1 you're your one-stop-shop.

2 Now, they're not -- they are not of specialized, these
3 guys. They're working with quick serve restaurants and they
4 have -- they list a particular kind that they're there for,
5 but, you know, they go on. You have the convenience of one
6 stop and delivery service, you know, so that these guys are
7 not -- the analogy to a peach stand just doesn't work.

8 Q. All right. Three final questions quickly. Dr. Israel
9 has talked about a number of sensitivities to his analysis.
10 Do these sensitivities actually test his assumptions that
11 we've seen go from table one into table three?

12 A. No.

13 Q. And in your view is Dr. Israel's approach consistent
14 with the scientific method?

15 A. No, we've come to so many places where there are
16 comparatively reliable data you could use to check the
17 predictions, he hasn't. I have, the predictions have failed.

18 Q. Now, is Dr. Israel's approach consistent with the
19 Horizontal Merger Guidelines as you have seen them applied
20 when you were an Assistant Attorney General for economics at
21 the U.S. Department of Justice Antitrust Division?

22 A. No, I think he's misinterpreting the Horizontal Merger
23 Guidelines, he's treating them like they're a cook book, and
24 that's not what they are. The Horizontal Merger Guidelines
25 are a way to organize reliable economic analysis where the

1 appropriate analysis is economic on all the different topics
2 into a uniform frame, and so he's taken quotes from the
3 Horizontal Merger Guidelines, but at each of those junctures,
4 you need to do some reliable economic analysis, and I don't
5 think he's done that.

6 MR. SIMMONS: I have nothing further, Your Honor,
7 thank you.

8 Thank you, Professor Bresnahan.

9 THE COURT: Thank you, Mr. Simmons.

10 Mr. Mohr.

11 MR. MOHR: Good afternoon, Your Honor, Stephen Mohr
12 on behalf of the Federal Trade Commission.

13 Good afternoon, Dr. Bresnahan.

14 THE WITNESS: Good afternoon, Mr. Mohr, good to see
15 you again.

16 MR. MOHR: Your Honor, if we may approach and hand
17 out the exhibit binders, please.

18 THE COURT: Sure.

19 CROSS-EXAMINATION

20 BY MR. MOHR:

21 Q. Now, Dr. Bresnahan, there are a number of analyses
22 presented both in your slide deck from today and your reports.
23 But we don't have time to discuss all of them. Can we walk
24 through a few examples right now?

25 A. Sure.

1 Q. Great. One of the examples, if we can, was from slide
2 25 of your presentation and it was -- so slide 25 of your
3 presentation is titled large restaurant chain served by Sysco
4 or USF, its national customers also use other distributors.
5 Do you see that?

6 A. I do.

7 Q. And you just testified that you were performing this
8 analysis to test some of Dr. Israel's hypotheses; correct?

9 A. Yes, among other reasons.

10 Q. And it's fair to say that you don't view an analysis of
11 restaurant chains as representative of how other customers
12 purchase broadline distribution services; correct?

13 A. Or other distribution services, that's right. I think
14 there's a lot of heterogeneity in this industry, and that
15 different customers buy in different ways.

16 Q. And you didn't perform a similar analysis for
17 healthcare customers, correct?

18 A. Only for one. No, I'm sorry, this analysis, no. I
19 can't perform this analysis for any healthcare customers,
20 that's right.

21 Q. And you don't know how many of the top 20 customers
22 that Sysco sells broadline distribution services to or
23 restaurant chains; correct?

24 A. No, I haven't made that calculation.

25 Q. Now, another slide from your presentation this morning,

1 slide six, depicted a customer in the midwest, and you
2 testified that a regional entity doesn't care about a
3 distributor's presence in other regions of the country; is
4 that right?

5 A. Hang on, I missed a couple words in the middle of your
6 question.

7 Q. Sure. You testified that a regional entity such as the
8 customer depicted on slide six doesn't care about a broadline
9 distributor's presence in other regions of the country;
10 correct?

11 A. Yes, those other regions aren't relevant to the
12 competition serving this customer.

13 Q. But even the smallest customers may put weight on a
14 distributor's presence outside their footprint if they
15 anticipate expanding; right?

16 A. That's possible that they might. That wouldn't be
17 relevant to the -- the prices they got today and, of course,
18 it was -- it would only be relevant if they were considering
19 not regionalizing in the future so they might -- they might
20 put some weight on it, but, you know, they're doing business
21 where they are today.

22 Q. And, in fact, in declarations and deposition testimony
23 many customers have testified that they put weight on a
24 distributor's presence outside their current footprint because
25 of their expansion plans; correct?

1 A. I don't know about the many, I want to -- I know that
2 some distributors have said that.

3 I'm sorry, I completely misspoke. I don't know about
4 the many, I know that some customers have said that.

5 Q. And slide 27 of your presentation from today is titled
6 switching analysis business lost to competitors. Do you see
7 that?

8 A. I do.

9 Q. And you testified earlier today that this is direct
10 evidence of substitution; is that right?

11 A. Well, the analysis that follows from this is direct
12 evidence of substitution.

13 Q. All right. I'd like to ask just a few questions to
14 make sure I understand the methodology that you used for your
15 national switching analysis depicted here. Okay?

16 A. Okay.

17 MR. MOHR: And you can put these -- the next
18 demonstratives are not confidential.

19 BY MR. MOHR:

20 Q. For example, to make this concrete, let's say that you
21 observed Sysco selling to a national customer for the first
22 three quarters of 2013 in some zip code, but observed no sales
23 to Sysco at that location for that customer in the fourth
24 quarter of 2013, okay?

25 A. Okay. I'm with you.

1 Q. And if you observed US Foods sales in the fourth
2 quarter in that location -- at that location, you count that
3 as a switch from Sysco to USF; is that correct?

4 A. Yes.

5 Q. Every time that a particular buyer stops buying from
6 Sysco and you don't see sales to USF in the next quarter and
7 according to Ag Data that location isn't closed, you count
8 that as a switch to another competitor; is that right?

9 A. Yes, that's right in my main specification in table 20
10 of my report.

11 Q. Yeah. So on the demonstrative here, just focusing on
12 Sysco where a customer buys from Sysco in period one, two and
13 three, and you don't see sales by USF, you would count that as
14 a switch to a competitor; correct?

15 A. Yes.

16 Q. Now, you used the third party data source called Ag
17 Data to try to determine whether a specific customer is still
18 operating in a location and that Sysco did not lose business
19 because the location shut down; correct?

20 A. Yes, that's right.

21 Q. And if there was a mistake because the location is
22 actually closed, that would always bias in the direction of
23 showing a switch to a competitor when, in fact, there was not
24 a switch to a competitor; is that right?

25 A. I think in -- within this example, yes. The -- let me

1 say if it's true that the operator has only one location in
2 the zip code, then yes.

3 Q. For example, if the customer starts with Sysco, but
4 closes for seasonality in the fourth -- in period four as
5 depicted here, that would be counted as a switch to a third
6 party, correct?

7 A. In the tables that use only the Ag Data, data in which
8 use only a quarterly switching as we're talking about here,
9 yes.

10 Q. Okay. So just to be clear in this example here, as you
11 just testified, customer A buys from Sysco in period one, two,
12 three, in period four they're closed for the season. In your
13 switching analysis that would count as a switch to competitor;
14 is that right?

15 A. In that specific switching analysis, though not in the
16 others.

17 Q. And Dr. Israel pointed out examples of customers that
18 closed for seasonality in his rebuttal report, such as
19 Nathan's Famous Hot Dogs, which you counted as switches to a
20 competitor other than USF in your calculations?

21 A. That's right, in table 20.

22 Q. Similarly if a customer starts with Sysco, but closes
23 for remodeling, that would be counted as a switch to a third
24 party, correct?

25 A. Same response, in those particular -- hang on. Do you

1 want me to look at this one? In that particular table, yes.

2 Q. And just to be clear for the record, we're talking
3 about table 20 of your report and the table depicted in your
4 slide deck this morning?

5 A. That's right, that's right. Though there are other
6 tables which don't have this feature.

7 Q. And Dr. Israel in his rebuttal report pointed to the
8 example of a restaurant that closed in Knoxville, Tennessee to
9 be remodeled, but that you counted as a switch; correct?

10 A. I don't recall Knoxville, but I'm sure you're right.

11 Q. And finally here, customer C. if a customer phased out
12 Sysco and adds USF over two quarters, that would not be shown
13 as a switch to USF; isn't that right?

14 A. Again, in table 20, yes, in the other ones, no, I think
15 that's right. Let me look at this.

16 Yes, the -- this customer -- this customer is at risk
17 to be two switches because we have four periods for them in
18 table 20, but this particular one would not be counted as a
19 switch either time. Again, this is -- this would change in my
20 other tables.

21 Q. And Dr. Israel pointed to examples of locations that
22 phased out Sysco and added USF over two quarters and therefore
23 were not counted as switches in the table 20 analysis;
24 correct?

25 A. I think that's right.

1 Q. Now, you testified earlier, I believe, that in this
2 national switching analysis your analysis is limited to
3 customer locations for which there is an overlap between Ag
4 Data and Sysco's transactional database or USF's transactional
5 database; is that right?

6 A. Yes.

7 Q. And Exhibit 14 in your report lists all of the national
8 customer locations that you were able to match between Ag Data
9 and the company data; is that right?

10 A. I'm not sure, you know, the pointer doesn't help me.

11 MR. MOHR: Can we please black out the next slide?

12 BY MR. MOHR:

13 Q. Dr. Bresnahan, do you see here Exhibit 14 from page 53
14 of your initial report in this matter?

15 A. I do.

16 Q. And is this the correct table? Does this table
17 indicate which national customer locations you were able to
18 match between Ag Data and the Sysco and US Foods data?

19 A. The first two lines of it do, I think the other two
20 lines of it are not about Ag Data, but other than that, yes.

21 Q. And by first two lines, you mean the total customers
22 column and the total opportunities to serve column?

23 A. No, I mean the lines, not the columns, I mean the
24 restaurants -- the grow. I mean the rows, not the columns,
25 the restaurants grow and the hotels grow, those are based on

1 the Ag Data, I believe the other two are not.

2 Q. Okay. So according to table 14, you were able to match
3 208 restaurants, 72 hotels, one hospital chain, and one GPO;
4 is that right?

5 A. Right, well, not to the Ag Data, but overall.

6 Q. Overall for purposes of your national --

7 A. These are companies, not -- these aren't 208
8 restaurants, but they're that many companies.

9 Q. This is the list of the companies that you were able to
10 match?

11 A. No, that's what tripped me up before. There's a list
12 somewhere of these, it's in one of the appendices. But this
13 is a -- this isn't a list.

14 Q. This is the summary of the number of restaurants that
15 you could match?

16 A. That's correct.

17 Q. And the summary of the number of hotels that you would
18 match?

19 A. Companies, yes.

20 Q. It's fair to say that Ag Data mostly captures data on
21 chain restaurants and chain hotels, correct?

22 A. I think that's right.

23 Q. And Ag Data does not include any information on GPO
24 locations; right?

25 A. I believe that's right.

1 Q. So your switching analysis for national customers
2 doesn't capture any potential switches by GPOs because the Ag
3 Data doesn't include information on GPO member locations;
4 correct?

5 A. That's right.

6 Q. And your switching analysis for national customers
7 doesn't capture switches by foodservice management companies
8 because Ag Data doesn't include information on foodservice
9 management companies; correct?

10 A. That's right, for the foodservice management companies
11 like the GPOs, I don't have a way to solve the problem that
12 the site may have closed.

13 Q. And your switching analysis -- your national customer
14 switching analysis also doesn't capture switches by government
15 entities such as the VA because Ag Data doesn't include
16 information on government entities; correct?

17 A. Yes, that's right too.

18 Q. And you haven't calculated how much of Sysco's
19 broadline revenue is accounted for by the customers listed in
20 Exhibit 14, correct?

21 A. I think that's correct. I've calculated things like
22 the total purchases by restaurants and hotels, but not the
23 share of Sysco's revenue accounted for by these firms. I
24 think that's right.

25 Q. But it's fair to say that Dr. Israel's analysis of RFPs

1 does capture bidding situations by GPOs and foodservice
2 management companies and government entities; correct?

3 A. It includes some, it doesn't include them in a
4 systematic way, but there are some of those there.

5 Q. Your national customers switching analysis also doesn't
6 capture situations in which a customer renegotiates a contract
7 with Sysco and does not switch, but uses USF to get a better
8 deal; isn't that right?

9 A. I'm sorry again, Mr. Mohr. You're so soft-spoken I
10 lost a couple of words right at the beginning.

11 Q. Your switching analysis also doesn't capture situations
12 in which a customer renegotiates a contract with Sysco and
13 does not switch, but uses USF to get a better deal; is that
14 right?

15 A. That's right, it's just switches. Renegotiations using
16 a threat to switch to anybody else including USF aren't
17 captured there, it's just switches.

18 Q. Okay. And the national customer switching analysis
19 also does not take into account customers that might alternate
20 between Sysco and USF within the same quarter; is that right?

21 A. I'm not sure I follow the question. It's about
22 switching, but the -- maybe this will help. It's about
23 switching at sort of quarterly frequencies. If there -- I
24 think this is what you're asking, if they're switching back
25 and forth every week either between Sysco and USF or USF and

1 some third party or Sysco and some third party, I'm not going
2 to get that, I'm going to -- it's switching at quarterly
3 frequencies. I think that's responsive.

4 Q. So just to review your national switching analysis here
5 as reflected in table 20 of your report and the slide deck
6 from today, your analysis would credit as switches to
7 competitors locations that were instead closed for the season
8 or temporarily closed, but not count as switches to USF
9 instances where it was a slow switch added by USF over two
10 quarters, a switch by a GPO, or a switch by a foodservice
11 management company; is that fair?

12 A. I sort of -- I disagree pretty violently with the last
13 two lines. The -- the -- those aren't included either as a
14 switch or a non-switch, they're not a no switch.

15 Q. So in the numbers you report in table 20 and that you
16 show on your slide deck, those don't reflect any potential
17 switches that may have occurred by GPOs or foodservice
18 management companies; is that right?

19 A. Right, they don't -- they don't reflect them as either
20 opportunities to switches or switches or non-switches, that's
21 right.

22 Q. Now, earlier today you testified that the switching
23 data does not suggest strong head-to-head competition between
24 Sysco and US Foods; is that right?

25 A. Yes.

1 Q. This morning were you here to listen to Dr. Hausman's
2 testimony?

3 A. Yes.

4 Q. Do you agree with Dr. Hausman's testimony this morning
5 that US Foods is a strong price constraint on Sysco?

6 A. I think they're in competition with one another, I
7 think that that's one of the price constraints. I don't think
8 it's a particularity strong price constraint. So I'm not
9 sure, I'm not sure, it's a long answer, but it's because I'm
10 not exactly sure what he meant, and so I'm telling you exactly
11 what I mean.

12 Q. This afternoon you testified as it related to Dr.
13 Israel's model for national customers that you tested his
14 assumptions about pass-through; is that right?

15 A. I think it's an assumption, I think it's a prediction
16 of the model.

17 Q. Okay. So you tested his prediction of his model about
18 the amount of pass-through to national customers?

19 A. Yes.

20 Q. And --

21 A. No. So I tested it, my test uses local customers. It
22 doesn't use contract customers that have a, essentially a
23 price rider. Those are not necessarily the NBCs.

24 Q. So just to be clear on the pass-through analysis you
25 performed, you took out the Sysco CMU customers and studied

1 pass-through for the non-contracted customers; is that right?

2 A. Right, because of the mechanical pass through in the
3 short run that comes with the CMU contracts.

4 Q. But Dr. Israel's simulation model only applies to
5 national broadline customers; isn't that right?

6 A. That's right.

7 Q. And so your test to pass-through for local customers
8 cannot test Dr. Israel's model for pass-through because it
9 relates to national customers; isn't that right?

10 A. No, that's not right, you know, if there were some
11 serious argument that the market conditions were related to
12 pass-through were radically different in those two places, by
13 the way, any such argument would contradict the parallel
14 analyses that Dr. Israel has done of those two supposed
15 markets, then I'd entertain it, but absent that, I don't see
16 any reason to agree with you there.

17 Q. On slide 32 of your presentation you claim that there's
18 no observable characteristic as described in section three of
19 the Horizontal Merger Guidelines that makes national broadline
20 customers vulnerable to a price increase; is that correct?

21 A. Yes.

22 Q. And you point to example 11 of the Horizontal Merger
23 Guidelines from Section 4.14; is that right?

24 A. Yes.

25 Q. And you testified that for targeting price

1 discrimination there needs to be an observable characteristic;
2 is that right?

3 A. Yes.

4 Q. Section 3 of the Horizontal Merger Guidelines are about
5 targeted customers and price discrimination; correct?

6 A. Yes.

7 Q. And the example in Section 3 on targeted customers and
8 price discrimination reads: "Suppliers can distinguish large
9 buyers from small buyers. Large buyers are more likely than
10 small buyers to self-supply in response to a significant price
11 increase. The merger may lead to price discrimination against
12 small buyers, harming them, even if large buyers are not
13 harmed. Such discrimination can occur even if there's no
14 discreet gap in size between the classes of large and small
15 buyers." Did I read that correctly?

16 A. Yes, you did.

17 Q. Isn't it fair to say that Dr. Israel's national local
18 distinction is analogous to the large small distinction in
19 example three?

20 A. No.

21 Q. Slide 40 of your presentation today refers to Omaha, a
22 local market that Dr. Israel analyzed in his report; correct?

23 A. Yes, they were looking at slide 43.

24 Q. Yes, I'm sorry, 43. And you highlight Cash-Wa facility
25 that is located west of Omaha; correct?

1 A. Right.

2 Q. And although you note that the Cash-Wa zip code level
3 data showed sales into the Omaha area, you're aware that
4 Cash-Wa's data doesn't identify whether the sales are to local
5 or national customers; correct?

6 A. That's right.

7 Q. And although you note that the Cash-Wa zip code level
8 data shows sales into the Omaha area, you're also aware that
9 the data doesn't identify whether the sales are to broadline
10 or systems customers; correct?

11 A. That's also, right.

12 Q. And although you know that the Cash-Wa zip code level
13 data shows sales into the Omaha area, you're also aware that
14 the data doesn't identify whether the sales are food and food
15 related products or tobacco products; correct?

16 A. I know Cash-Wa sells tobacco, some of them may have
17 been limited to tobacco products, that's possible.

18 Q. So it's fair to say that you don't know how much, if
19 any, of Cash-Wa's zip code level sales from its facility into
20 Omaha are to local broadline customers; correct?

21 A. No more than Dr. Israel does in his overall calculation
22 here. You know, he has assignment methodology for Cash-Wa
23 where he assigns to each distribution center a split between
24 local and national customers, and I followed that.

25 The locations, I don't know whether there's accurate

1 for every location, that's right, but in terms of the overall,
2 when I get my number, that's what I'm using.

3 Q. Dr. Bresnahan, if I can turn your attention to slide 52
4 from your presentation today, in your report and in your
5 presentation today you used a similar switching methodology to
6 study switching among local customers; correct?

7 A. That's right, similar.

8 Q. Yeah. And slide 52 of your presentation is titled LBC
9 purchasing behavior shows that they substitute to competitors,
10 do you see that?

11 A. I do.

12 Q. In your local switching analyses a customer who buys
13 from both Sysco and US Foods during the same week and plays
14 them off against each other would not be counted as a switch;
15 correct?

16 A. Right, it's an analysis of switching, it's not an
17 analysis of playing off. So if the customer I see was using
18 any other competitor to get better terms, the other merger
19 party or anybody, it -- I wouldn't count that as a switch.

20 Q. Can I please direct your attention, Dr. Bresnahan, to
21 PX 07020 in your binder?

22 A. Okay. Hang on, where is that?

23 Q. I believe it's 10C.

24 A. Okay.

25 THE COURT: I'm sorry, what's the tab number?

1 THE WITNESS: 10C, I just heard.

2 THE COURT: Oh, 10C, okay.

3 MR. MOHR: Sorry, Your Honor, for the record, PX
4 07020 from tab 10C of the binder.

5 THE COURT: Okay, thank you.

6 BY MR. MOHR:

7 Q. And, Dr. Bresnahan, if I can just direct your attention
8 to paragraph four, I've highlighted a portion, and you can see
9 it on your screen there.

10 A. Okay, hang on, let me read paragraph four here.

11 Q. Sure.

12 A. (Reading document.)

13 Okay.

14 Q. And, so do you see this as a declaration from a
15 restaurant owner in Columbia, South Carolina?

16 A. I see that.

17 Q. And do you see in paragraph four the restaurant owner
18 states: "Each week I compare Sysco's prices on these products
19 to US Foods prices. If Sysco is more than a few cents per
20 pound cheaper on these items I will purchase them from Sysco.
21 Do you see that?

22 A. I do.

23 Q. But as you just testified, this competition between
24 Sysco and US Foods described in this declaration here wouldn't
25 be captured by your local switching analysis; isn't that

1 right?

2 A. No, this isn't a switch, this wouldn't be calculated by
3 a switching analysis.

4 Q. I'm sorry, it would or would not?

5 A. Let me say that again. This isn't a switch. So it
6 wouldn't be captured by a switching analysis, that's right.

7 Q. And you're aware that other local broadline customers
8 state in similar sworn affidavits that they also play Sysco
9 and US Foods off each other on a weekly basis; correct.

10 A. I think I've read that in other places too, yes.

11 Q. And it's fair to say that none of that competition
12 between Sysco and US Foods part, between Sysco and U.S. Foods
13 is reflected in your local switching analysis; isn't that
14 right?

15 A. No, I mean, even if they didn't tell the FTC about it,
16 they -- it's not a switch so it wouldn't be reflected in my
17 switching analysis.

18 Q. Additionally your local switching analysis doesn't
19 count switches between Sysco and US Foods if the customer
20 isn't flagged as local in both companies' datasets; correct.

21 A. I think I've done that both ways. I've done it in a
22 way where -- where one way is, as you say, they have to be
23 local in Dr. Israel's definition on both sides, and then
24 another one where I didn't impose that restriction.

25 Q. And also similar to your national switching analysis.

1 In your local switching analysis if the location is closed for
2 the season or temporarily closed, that gets counted as a
3 switch to a competitor; correct?

4 A. Again, that's right, in the main table, though not in
5 the -- not in the alternatives, that's right. And similarly,
6 in parallel, which was, I thought, the force of your question.

7 Q. So in the tables in your reports and in the numbers
8 presented today in your presentation, seasonal closures and
9 temporary closures get counted as switches to competitors;
10 correct?

11 A. Hang on, say that again? I just couldn't hear you.

12 Q. In the tables in your report and in your -- the numbers
13 in your presentation today based on those tables, if a
14 location is closed for the season or temporarily closed,
15 that's counted as a switch to a competitor; correct?

16 A. That's right, in those particular tables, that's right.

17 Q. Dr. Bresnahan, I'd like to direct your attention to
18 Exhibit 43 from page 143 of your initial report in this
19 matter, titled broadline specialty cash-and-carry competing in
20 San Diego, do you see that?

21 A. I do.

22 Q. And do you recognize that table?

23 A. Yes, I think it is the one you described.

24 Q. And in the first column in this table you list seven
25 distributors underneath the heading "broadline"; correct?

1 A. Yes.

2 Q. All right. I'll refer to them, but not directly, just
3 so we don't reveal any confidentiality.

4 A. I understand, I understand.

5 Q. Okay. So one of the firms, do you see the firm, the
6 second one on the list here?

7 A. Yes.

8 Q. Above my finger?

9 A. Yes.

10 Q. Now, it's fair to say that that distributor
11 self-identifies as a systems foodservice distributor?

12 A. I think that's right.

13 Q. Okay. And you're aware that that company's CEO stated
14 in a sworn affidavit that it does not service or solicit
15 broadline customers, correct?

16 A. I don't know that, but I'll take your word for it.

17 Q. And next I'll point to the fifth company here in this
18 table.

19 A. Which finger, sorry?

20 Q. Number five.

21 A. I see it.

22 Q. Now, you're aware, correct, that this company's
23 distribution center located in California is a systems
24 distribution center; correct?

25 A. That's my understanding.

1 Q. And you're aware that this company's CEO stated in a
2 sworn affidavit that the company's California distribution
3 center are wholly dedicated to systems distribution and do not
4 serve any broadline customers; correct?

5 A. No, again, I don't recall that, but I'm sure you're
6 right.

7 Q. And you're aware that this company CO also stated in
8 his affidavit that the company does not provide any broadline
9 distribution services in California; correct?

10 A. Same, I don't recall that, but I'm sure you're right.

11 Q. Then if we look -- I want to talk about the next
12 company on the list, number six.

13 A. Yeah.

14 Q. Do you see that? Are you aware that the chief
15 operating officer --

16 THE COURT: Sorry, could you point to that company
17 while I was looking down?

18 MR. MOHR: Sure. Number six on the list.

19 THE COURT: Okay.

20 BY MR. MOHR:

21 Q. Dr. Bresnahan, are you aware that the chief operating
22 officer of this distributor testified in his deposition that
23 the company has, quote, a very small customer base in San
24 Diego and called San Diego an insignificant part of its
25 market?

1 A. No, I'm not aware of that. I was basing their presence
2 for this one, it may be that we have a time difference here,
3 this is a company that had a -- that was advertising for a
4 delivery driver and a sales rep in San Diego County, among
5 other things, so that may be that it's a timing difference.
6 But I don't know whether he or she said that.

7 Q. Can I direct your attention to tab 7G.

8 A. 7B like boy?

9 Q. Sorry, 7G like girl. And if I can direct your
10 attention to page 158 of the deposition there, line 18?

11 A. Yeah.

12 Q. And do you see the witness says, "San Diego is -- we're
13 very small at this point and it's kind of an insignificant
14 part of our market right now so it's hard for me to say which
15 parts of San Diego. It's a small customer base at this point,
16 but we are in, we have customers in San Diego." Do you see
17 that?

18 A. I see that.

19 Q. Are you also aware that the chief operating officer of
20 this company testified that some of those customers that they
21 do have in San Diego are for national accounts and not local
22 business?

23 A. Yes.

24 Q. Going back to Exhibit 43, and move to the third firm
25 there?

1 A. Yes.

2 Q. And the firm listed there is PFG, and you're aware from
3 the testimony in this case, correct, that PFG location in
4 southern California is a facility for the companies' Roma
5 specialty division; correct?

6 A. That's my understanding:

7 Q. And if you look at the company right below PFG, do you
8 see that?

9 A. Yes.

10 Q. Now, are you aware that in response to specification
11 two of the CID issued in this case by the FTC this firm was
12 identified as a specialty distributor?

13 A. No.

14 Q. If I point to the last firm?

15 A. Okay.

16 Q. Here on this list, number seven, similarly are you
17 aware that in response to specification two of the CID issued
18 by the FTC in this matter this firm was identified as a
19 specialty distributor?

20 A. No, I didn't know that one either.

21 THE COURT: When you say identified as a specialty,
22 you mean self-identified?

23 MR. MOHR: It was a distributor, it was a CID to
24 another market participant.

25 THE COURT: Oh, I see, all right.

1 BY MR. MOHR:

2 Q. And so finally I think we've covered all of them except
3 the very first one at the top, do you see that firm, Dr.
4 Bresnahan?

5 A. I do.

6 Q. And are you aware that this company CEO stated in a
7 sworn affidavit that he characterized the company as
8 specializing in the sale of pizza and Italian items with
9 approximately 85 percent of its revenue made up of sales to
10 pizza and Italian restaurants?

11 A. I believe I read that.

12 Q. And you're also aware, right, that this company CEO
13 stated in the same affidavit that its core customers in
14 southern California are in Los Angeles, San Bernardino, and
15 Riverside; correct?

16 A. Sorry, couldn't hear you.

17 Q. And Riverside?

18 A. I don't recall that one.

19 Q. And, Dr. Israel [sic], isn't it fair to say that with
20 the exception of one firm that you've listed here which said
21 that its sales in San Diego were insignificant, none of the
22 firms you listed in table 43 are broadline distributors?

23 A. Dr. Israel is over there.

24 Q. I'm sorry, Dr. Bresnahan.

25 A. It's good to see him again too.

1 No, some of them are more general than that. The first
2 one on the list has some broadline features, I think.

3 Q. I'd like to move on to --

4 THE COURT: Mr. Mohr, I'm sorry, how much longer do
5 you think you have?

6 MR. MOHR: This is my last line of questioning.

7 THE COURT: Okay, all right.

8 BY MR. MOHR:

9 Q. Dr. Bresnahan, if I can direct your attention to
10 Exhibit 43 from page 114 of your report.

11 A. Mr. Mohr, I'm looking at Exhibit 36; am I right?

12 Q. Exhibit 36.

13 A. Okay, very good.

14 Q. From page 114 of your report. Is this table reflecting
15 the fresh chicken purchasing patterns that you testified to
16 earlier this afternoon?

17 A. That's right.

18 Q. And you testified earlier today that people, I think
19 you said pulse their fresh chicken purchases off and on?

20 A. Yes, those tend to be down towards the bottom of --
21 from Sysco, from Sysco. The ones that -- the ones up towards
22 the top tend to be consistent buyers of fresh chicken from
23 Sysco, they're all blue. Blue is you're buying from Sysco and
24 you're buying fresh chicken from Sysco in this four week
25 period, everybody is buying from Sysco. The other colors are

1 you're buying something from Sysco and it's not fresh chicken.
2 It doesn't include fresh chicken, I'm sorry, and all of these
3 are customers that bought fresh chicken sometime in these 13
4 four-week periods.

5 Q. So just to be clear, the vertical axis is different
6 customers; correct?

7 A. That's right, a row here is a customer.

8 Q. A row here is a customer. If a time period is blue,
9 that represents a period during which the customer made at
10 least one fresh chicken purchase from Sysco during the four
11 week period?

12 A. That's right, and in all -- they all bought something
13 from Sysco in every four-week period.

14 Q. And a green cell means they did not buy fresh chicken
15 from Sysco, but they bought something from USF in that period?

16 A. Actually let's slide it, let's slide it up and look at
17 the legend to make sure that's right. Yes.

18 Q. And the gray indicates no Sysco fresh chicken purchase
19 and no USF purchase during that period; correct?

20 A. Yes.

21 Q. Now, for -- in this fresh chicken analysis you look at
22 the purchasing patterns of approximately 98 local customers;
23 is that right?

24 A. Right, all in San Diego, I believe.

25 Q. And for purposes of your analysis you excluded 111

1 local customers that bought fresh chicken in every single
2 four-week period throughout the year; correct?

3 A. Right, they're not shown here.

4 Q. So it's fair to say that more than 50 percent of the
5 local customers in San Diego who bought fresh chicken sometime
6 during the year from Sysco bought it from Sysco in every
7 four-week period; is that right?

8 A. I think that's right.

9 Q. All right. And so Exhibit 36 is only presenting the
10 purchasing patterns for those customers, the minority who did
11 not purchase it during every four-week period; correct?

12 A. That's right, the ones who sometimes change.

13 Q. And it's fair to say that for the green and gray cells
14 in your exhibit you don't know whether the customer bought
15 fresh chicken during the period -- you don't know whether the
16 customer actually bought fresh chicken during that time
17 period; correct?

18 A. No, that's right, I don't. Well, I don't observe --
19 they're out of the reach of my database. I don't observe
20 whether they bought fresh chicken in that period.

21 Q. So as you testified in your deposition, while they
22 could be buying fresh chicken during those time periods, you
23 don't know what they're doing when they're stopping and
24 starting; correct?

25 A. I don't observe what they're doing when they're

1 stopping and starting in the data.

2 Q. For example, it's possible that the customer is
3 purchasing frozen chicken from Sysco during that period
4 instead; correct?

5 A. It's possible, it seems like a -- it seems like a funny
6 behavior to, you know, sometimes give your customers frozen
7 chicken and other times pay more money and give them fresh
8 chicken.

9 Q. It's also possible that the customer simply bought a
10 lot of fresh chicken in one period, put it in the freezer and
11 is using that during a gray or green period; correct?

12 A. That seems like a -- it seems like an unlikely
13 behavior, you would think you'd buy frozen chicken if you were
14 going to do that, it's cheaper.

15 Q. It's also possible that the customer just isn't
16 featuring fresh chicken on their menu during that four-week
17 period; correct?

18 A. That's possible, though the ones I looked at were
19 featuring fresh chicken. Sorry to speak over you.

20 Q. Go ahead.

21 A. I was done.

22 Q. And it's also possible that the restaurant is
23 temporarily closed during one of those gray periods; correct?

24 A. It's buying something from Sysco in every one of these
25 periods. That seems like that's significantly less likely.

1 Q. Even if the customer is purchasing fresh chicken from
2 someone other than Sysco during certain time period, you don't
3 know from whom the customer purchased fresh chicken; correct?

4 A. Unless it's Sysco, I don't know, that's right.

5 Q. So it's fair to say that Exhibit 36 does not provide
6 evidence of a single customer switching their fresh chicken
7 purchases from Sysco to a specialty distributor; correct?

8 A. No, I don't think that's fair -- I don't think that's
9 fair to say. There's this pulsing behavior, much of that must
10 be switching.

11 Q. Dr. Bresnahan, you recall you were deposed in this
12 matter by one of my colleagues?

13 A. Yes.

14 Q. And if I can direct your attention to page 113 of the
15 deposition?

16 A. I see it.

17 Q. Do you see, "Question: Exhibit 36,
18 is there any evidence that a single customer
19 here switched to a specialty distributor in
20 buying fresh chicken?

21 "Answer: Now I've lost it,
22 where is it?

23 "Question: But you don't know
24 if it was a specialty distributor?

25 "Answer: No, we don't know who

1 it was here."

2 A. That's true.

3 Q. So to review, is it fair to say that the only
4 conclusion you can draw from your fresh chicken analysis is
5 that the subset of customers that don't buy fresh chicken from
6 Sysco every four-week period don't purchase fresh chicken from
7 Sysco every four-week period?

8 A. No, I don't agree with that at all.

9 MR. MOHR: No further questions.

10 THE COURT: All right. Thank you, Mr. Mohr.

11 Mr. Simmons, how long do you think your redirect
12 will be?

13 MR. SIMMONS: I'll try to do it in 10 or 15.

14 THE COURT: Well, I've got to give the court
15 reporter a break here, we've been going for over an hour.
16 Let's reconvene in 10 minutes at 20 after 4:00. Thanks.

17 THE DEPUTY CLERK: All rise.

18 BRIEF RECESS AT 4:10 A.M.

19 AFTER RECESS

20 THE COURT: Please proceed.

21 MR. SIMMONS: Thank you, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. SIMMONS:

24 Q. Professor Bresnahan, you were asked several questions
25 about Saladino's, the distributor, Saladino's in connection

1 with San Diego. Do you recall that?

2 A. I do.

3 Q. Mr. Mohr asked you why we denoted Saladino's as a
4 broadliner. Do you recall that question?

5 A. Questions to that effect.

6 Q. Are you aware, Robert Baker of IPC was examined on
7 Defense Exhibit 01502, which I will distribute; was he not?

8 A. I remember Mr. Baker. Again, the pointer doesn't help
9 me.

10 MR. SIMMONS: May I approach the witness, Your
11 Honor?

12 THE COURT: Sure.

13 BY MR. SIMMONS:

14 Q. If I can direct your attention, please, Professor
15 Bresnahan, this is an IPC document, which is DX 01502.

16 A. I see that.

17 Q. If we'd turn to Page 20, 2-0.

18 A. Which --

19 THE COURT: I'm sorry. Which page? Hang on. I'm
20 not sure I have a 22-0.

21 THE WITNESS: It ends in 20 and it says "Current"
22 at the top.

23 MR. SIMMONS: Correct. I'm holding it up. So it's
24 Page 20.

25

1 BY MR. SIMMONS:

2 Q. Are you aware that Robert Baker of IPC, and I believe
3 this clip was shown yesterday. He identified all of the
4 distributors shown on Page 20, including Saladino's as
5 broadline distributors. Are you aware of that?

6 A. I remember seeing this before and it says that.

7 Q. All right. He said a few were not broadliners,
8 specifically Southeastern, Doerle, D-O-E-R-L-E, American and
9 Blue Line. All right?

10 A. I recall that as well.

11 Q. Now, are you aware that if you look at the Saladino's
12 website, if Mr. Mohr -- these boxes they like to put people
13 in. Are you aware that Saladino's, on it's website, lists
14 among the products available from it are beverages, cheese,
15 dairy, disposables, equipment, fresh produce, groceries,
16 janitorial, meat, miscellaneous, seafood and small wares.

17 Do you have any reason to dispute what is Saladino's
18 lists on its web page, Professor Bresnahan?

19 A. No, I don't believe I've read that web page, but I'm
20 sure you're right.

21 Q. Does that sound like a broadline or specialty
22 distributor?

23 A. It sounds pretty broad to me.

24 Q. Let's also go, still sticking with DX 01502, this IPC
25 document, please. Let us move to -- your copy hopefully has a

1 flag, Page 21.

2 A. I got it.

3 Q. All right. Do you see Saladino's as listed as the
4 fifth largest distributor to Subway. Do you see that?

5 A. Yes, I see that. This is a slightly hard to read
6 chart, but it looks like the distributors are sort of
7 associated with each bar and they are the one, two, three,
8 four, fifth from the right.

9 Q. And Subway purchases from Sysco broadline. Are you
10 aware of that?

11 A. Yes.

12 Q. And it purchases from PFG?

13 A. Yes.

14 Q. And it purchases from the other distributors listed
15 there. All right. Let's move to -- that's Saladino's. Let's
16 move to Shamrock, if I can find the document. I want to hand
17 out, please, MI 4001.

18 MR. SIMMONS: May I approach the witness and the
19 Court, Your Honor?

20 THE COURT: Yes.

21 MR. SIMMONS: Thank you.

22 THE COURT: I apologize for the noise from other
23 courtroom. There's an audio issue and we're not able to
24 resolve it. I am as frustrated as you are.

25 MR. SIMMONS: Ms. White, could you help me activate

1 this. Thank you. I like this old technology, it's much more
2 fail safe.

3 BY MR. SIMMONS:

4 Q. Here is a Shamrock web page. All right? And you heard
5 Mr. Mohr cast doubt on whether Shamrock sees itself as serving
6 San Diego. Do you recall Mr. Mohr's questions?

7 A. I do.

8 Q. All right. Well, this is Shamrock's web page, let's
9 see what it says. This says: In August, Shamrock Foods
10 opened a new foodservice distribution warehouse in Eastvale
11 officially expanding Shamrock Foods into southern California.
12 Do you see where I read, profession Bresnahan?

13 A. I do.

14 Q. Shamrock's website goes on to say: The distribution
15 center is intended to service California's inland empire and
16 south to San Diego. Is that's what Shamrock's website says
17 about its service?

18 A. Yes, you read that correctly.

19 Q. Let's move to chicken.

20 THE COURT: I thought I'd miss my opportunity --
21 (Laughter in the courtroom).

22 MR. SIMMONS: I remember that famous Henry Finley
23 opinion, "What is a chicken?"

24 BY MR. SIMMONS:

25 Q. Now, your fresh chicken analysis was about San Diego

1 local customers; right?

2 A. That's correct.

3 Q. And Dr. Israel maintains that defendants have
4 100-hundred percent of broadline in San Diego. Isn't that
5 what he shows in one of his charts?

6 A. Yes.

7 Q. So those customers not buying from Sysco or USF in San
8 Diego may be buying specialty or cash-and-carry fresh chicken?

9 A. Possibly.

10 Q. All right. Now, if you could refer -- let me -- if we
11 could go back, I want to cover price discrimination. You
12 answered one of his questions "No" about price discrimination
13 and I just want to go back to Example 3 of the merger
14 guidelines. Let me see if I can put it on the screen.

15 You answered "No" that you didn't agree with the
16 distinction Mr. Mohr was trying to draw, but he didn't ask you
17 why not; so I will.

18 Mr. Mohr asked you a set of questions, because this is
19 the guidelines talking about maybe small purchasers could be
20 discriminated against but big ones can't be. And he said, why
21 isn't that distinction in the guidelines? Why isn't that like
22 this CMU and local issue? You disagreed with that analogy,
23 could you please explain why?

24 A. Yes, for two reasons. One is the CMU customers are
25 very heterogeneous and some of them -- the boundary between

1 them and other forms of contract is administrative rather than
2 economic. So that's the first one.

3 Q. Could you please keep your voice up.

4 A. Yeah, I'll just yell. The other reason was that the --
5 I've looked -- this is the thing I testified to earlier today.
6 I've looked in some care -- with some care at the CMU
7 customers to see if they are, as a group, suitable for price
8 discrimination by a distributor with a big footprint, and
9 they're not. You know, many of them are regional, many of
10 them are regionalized. So that -- being on that list isn't a
11 good indicator of their demand elasticity for a large
12 distributor, you know, widespread distributors' services.

13 Q. And you recall the record shows that Dr. Israel just
14 took the CMU lists and he didn't do any kind of elasticity
15 check on them; did he?

16 A. That's right. He did not do any such check.

17 Q. All right. Now, Mr. Mohr asked you a lot of questions.
18 To me, it sounded like he's faulting you for making use of the
19 data that you had. That he faulted you for not doing what you
20 did maybe with restaurants and hotels, with what you did --
21 with, for example, GPOs? Did the FTC gather location data for
22 GPO members?

23 A. No.

24 Q. Is the location data of GPO members publicly available?

25 A. I've looked to see if it's publicly available. I think

1 I over spoke on the first one. I mean, I used the Amerinet
2 one. I think there was one other -- I spoke too fast. I
3 think there was one other where -- but I couldn't match it.
4 I had a terrible time matching it, so I didn't use it.

5 But, no, they got some. They got the Amerinet. So my
6 "No" was really a mistake. I apologize.

7 Q. But the FTC subpoenaed distributors other than the two
8 parties in this action; is that right?

9 A. I'm sure that's right.

10 Q. And in any of the materials that those distributors
11 turned over, did you see customer databases from competing
12 distributors with customer names and locations?

13 A. I don't think I saw one of those. No.

14 Q. Now, you were asked a series of questions about your
15 switching analyses; do you recall that by Mr. Mohr?

16 A. Yes.

17 Q. About whether a restaurant or whether something closed
18 for seasonality, whether there was something closed for
19 remodeling, whether, you know, various other contingencies.
20 There was some sort of long switch like a cycle issue. Even
21 accounting for all of these scenarios Mr. Mohr put to you, do
22 they change any of the results that you did on switching?

23 A. No. Those three were the drivers behind the
24 alternative analysis that I talked about so much in my
25 deposition. I think those three accounting for them changes

1 the numbers trivially.

2 Q. And if I could direct your attention, please, to Tab 5
3 of the binder that we handed out at the outset?

4 A. Is this the black binder or the white binder?

5 Q. The black one?

6 A. Okay.

7 Q. There should be several pages separated by a blue
8 divider and several pagers. Are these sensitivities analyses
9 that you connected with respect to your switching analyses,
10 Professor Bresnahan?

11 A. That's what is referred in here, I believe. Yes.

12 Q. DX 01610 and also DX 01611. Please briefly describe
13 for the Court what these sensitivity analyses have to do with
14 the issues that Mr. Mohr was raising?

15 THE COURT: I'm sorry. Where are we again?

16 MR. SIMMONS: This is Tab 5 of the Bresnahan
17 binder.

18 MR. MOHR: Your Honor, we're going to object to the
19 introduction of these analyses into evidence, they were not
20 disclosed with the initial report, the rebuttal report. The
21 first time the FTC learned about them was when Dr. Bresnahan
22 was deposed and he talked about the analyses in general. So
23 the first time we saw these actual figures here was when the
24 exhibits were exchanged last night.

25 MR. SIMMONS: Your Honor, these were produced

1 before the close of discovery before Professor Bresnahan's
2 deposition, and he was examined at length on these
3 sensitivities in his deposition.

4 THE COURT: Well, you all are saying two very
5 different things. I'm not sure how I make that decision.

6 MR. SIMMONS: I would suggest we let the
7 examination proceed and we can each write the Court a letter.

8 THE COURT: Why don't we proceed with the
9 examination. I'd like to see if there are -- if there's some
10 document or something else that demonstrates when these were
11 actually disclosed. I'd like to take a look at that. If
12 there are pages in the deposition that demonstrate examination
13 about this, I'd like to hear that as well. And then I can
14 make a final decision on both the exhibits and the testimony
15 that relates to the exhibits.

16 MR. SIMMONS: Thank you, Your Honor.

17 BY MR. SIMMONS:

18 Q. So the question, Dr. Bresnahan, is: Explain what these
19 sensitivity analyses have to do with the issues that Mr. Mohr
20 was raising?

21 A. Mr. Mohr asked about three issues -- I'm sorry. Mr.
22 Mohr asked about three issues. Seasonality, slow switches.
23 We had the example where the switch takes many quarters, and
24 temporary closures. And I agreed that those could, in
25 principle, be problems of my switching methodology as used in

1 my first report. So I did the sensitivities. And all three
2 of those things are addressed by the same change. They're
3 addressed by getting rid of the very short changes, just one,
4 two, three quarters, and taking a much longer difference.

5 The first time I see this site until the end of the
6 data, which is in one quarter. And then another one -- the
7 first time I see the site until two quarters before the end of
8 the data, which of course a different time of year. So the
9 ending at different times is to deal with the seasonality.
10 The long differences deal with the slow switches and the
11 temporary shut downs --

12 Q. All right. And Mr. Mohr asked you questions about
13 Omaha, which stretches from Slides 42 through 44. In your
14 view, do your criticisms of Dr. Israel's local draw area
15 methods stand, notwithstanding the issues Mr. Mohr is raising,
16 which is that the Cash-Wa sales you're identifying might have
17 been for cigarettes, we just don't know?

18 A. Yes.

19 Q. Do your criticisms of Dr. Israel still stand,
20 notwithstanding the issues Mr. Mohr is raising?

21 A. Yes.

22 Q. Why?

23 A. So, Cash-Wa does sell cigarettes, you know, they also
24 sell many other things that eating and drinking places buy.
25 They sell them throughout greater Omaha throughout the overlap

1 area.

2 Q. And we skipped over, given time issues, but do Pages 39
3 through 41 of your -- of the deck that we went through today,
4 give another example, namely Chicago?

5 A. They do.

6 Q. And, briefly, two sentences and I'm going to sit down.
7 Explain what you're doing with the Chicago example and why, in
8 your view, that invalidates --

9 A. Same problem with Dr. Israel's methodology. Different
10 outside competitor, Gordon this time, very similar picture
11 with the red and the green. A tiny little bit in the overlap
12 area. A tiny little bit in the overlap area -- a tiny little
13 bit of the overlap area that Dr. Israel thinks is supplied by
14 this third party competitor. They cover the whole overlap
15 area with red. Those guys don't sell any cigarettes.

16 Q. So the red on your Chicago maps is in Chicago, sales by
17 Gordon, and it's not captured by Dr. Israel; is that right?

18 A. That's right.

19 MR. SIMMONS: I have nothing further, Your Honor.
20 Thank you.

21 THE COURT: Thank you. Mr. Mohr, did you want to
22 examine on the Chicago issue since it wasn't raised during
23 the --

24 MR. MOHR: No, Your Honor.

25 THE COURT: All right. Thank you very much, sir.

1 I appreciate your time. Thank you for being here.

2 THE WITNESS: Thank you, sir.

3 THE COURT: Safe travels. All right. Well, let
4 me -- before you stand up. Mr. Parker, does that conclude
5 your case, sir?

6 MR. PARKER: Yes, sir. Doctor -- Professor
7 Bresnahan was our last witness. Yes, sir.

8 THE COURT: So do you want to formally rest and
9 we'll worry about --

10 MR. PARKER: And the defense rests.

11 THE COURT: All right. Okay. Mr. Weissman, how
12 would you like to proceed? It's 20 of 5:00.

13 MR. WEISSMAN: We can begin now, we can begin fresh
14 tomorrow. Whatever Your Honor's preference is.

15 THE COURT: Who do you prefer to -- who do you
16 intend to start with?

17 MR. WEISSMAN: We are going to start with
18 Mr. Rashev Gokhale (phonetic).

19 THE COURT: Okay.

20 MR. WEISSMAN: And we're prepared to start now. My
21 colleagues, Krisha Cerilli is going to handle the examination.

22 THE COURT: How long do you think he'll be?

23 MR. WEISSMAN: Less than an hour.

24 THE COURT: Why don't we -- let's not break it up
25 unnecessarily if he's got to come back tomorrow in any event.

1 We'll break a little early today. All right. So let's talk a
2 few minutes just to talk scheduling. It sounds like we've got
3 about two hours left; is that accurate? Between the direct
4 and the crosses.

5 MR. WEISSMAN: Just to be safe, I would think we,
6 the plaintiffs, have an hour and a half at most.

7 THE COURT: Okay.

8 MR. PARKER: My understanding is, Steve, you got
9 about an hour with the first witness and then a half hour with
10 doctor -- and we would intend to take a comparable time on
11 cross.

12 THE COURT: Okay. So it's basically the morning
13 then. Okay. Let's strive to get this done by our lunch break
14 tomorrow. So let's start again at 9:00 and take the morning
15 and we'll wrap up tomorrow.

16 MR. WEISSMAN: Thank you.

17 MR. PARKER: Thank you, Your Honor.

18 THE COURT: Can we talk scheduling and a couple of
19 others things just while we're here and have a few minutes.
20 We've gone an extra day, which again is no problem. But you
21 all are planning to file proposed findings of fact, conclusion
22 of law, when -- is that correct, the date?

23 THE WITNESS: Yes.

24 THE COURT: Is that still a reasonable data? I
25 assume those are already works in progress.

1 MR. PARKER: Those are works in progress. Yes,
2 sir.

3 THE COURT: Well, I would like to set an oral
4 arguments to follow that within a reasonable time period. I
5 don't want to wait too long. Let me ask before we set a date
6 on that. How long do you expect these to be -- your proposed
7 findings, and should I --

8 MR. WEISSMAN: Very long.

9 MR. PARKER: That box (indicating). That's a
10 draft. That's our first draft (indicating).

11 THE COURT: Realistic. Look, I understand that
12 they will be extensive, but --

13 MR. PARKER: Your Honor, could I check with our
14 team? I got a team working on this. Could I check with them
15 and maybe discuss this in the morning? I would think in a
16 case like this, and my experience in this case, it would be
17 extensive.

18 THE COURT: Okay. No, I expected as much. I'm
19 not -- I don't want to have thought about whether there ought
20 to be a page limit. But there ought to be a page limit that's
21 reasonable, but I understand the amount of evidence that's
22 here and the breadth of the arguments.

23 All right. So why don't we find out tomorrow
24 precisely how long that work in progress is and how long you
25 expect it to be. I want to have enough time to digest it

1 before I have you all back here so I can ask some questions
2 that are perhaps more intelligent than the ones I've been
3 asking so far. So let's at least have that conversation
4 tomorrow. Talk to your respective teams and perhaps talk to
5 each other about proposing a date.

6 Monday the 25th is the holiday, so we can't do it
7 that day. I'm actually pretty open the rest of the week,
8 except for Friday morning. So we could Wednesday or Thursday
9 of next week might -- of that following week might be a
10 reasonable day on which to do it.

11 MR. PARKER: And those dates are what?

12 THE COURT: The 27th or the 28th.

13 MR. PARKER: I'm not available on the 27th, so the
14 28th would be good.

15 THE COURT: Okay. All right. Why don't we
16 tentatively set the 28th. Consult with your respective teams
17 and make sure that works. We'll tentatively put down the 28th
18 right now --

19 MR. PARKER: Thank you.

20 THE COURT: -- for oral argument. And let's say
21 9:30 a.m. on the 28th. Does that work for -- you're looking
22 at me like that's a bad idea. We may need to do it in the
23 afternoon. Will that work?

24 MR. PARKER: That would be fine.

25 THE COURT: Let's tentatively put down 1:30 on the

1 28th. And I'm not going to put artificial time limits on any
2 of this, but let's start at 1:30 and we'll take the time we
3 need to get through --

4 MR. PARKER: Could I ask a question? We're doing
5 finding and conclusions, and that's what they are. We would
6 like to do a brief in support of that, but I didn't see that
7 your order contemplated that or not, so I wanted some guidance
8 on that.

9 THE COURT: Well, what do you anticipate a separate
10 brief would contain that the findings and --

11 MR. PARKER: To say that our findings and
12 conclusions are absolutely brilliant and should be --

13 THE COURT: You don't need a very long brief.
14 Look, the way I envision your proposed findings of fact and
15 conclusion of law would essentially integrate both findings
16 you'd like me to make, plus the legal analysis you'd like
17 those facts to reflect.

18 I don't see the need for a separate brief and, you
19 know, assuming that these will be quite lengthy and
20 comprehensive, I don't need any more paper than you've already
21 given to me.

22 MR. PARKER: That's fine.

23 THE COURT: So let's leave it at that. So that
24 will be -- that addresses the findings of fact/conclusion of
25 law. Tentatively we'll set the 28th at 1:30. The other thing

1 I wanted to raise with you all is all of these motions for
2 confidentiality that we have that are pending from various
3 third parties. I don't know whether either side has a strong
4 view as to this one way or another, but I'd like you to think
5 about that. Perhaps at the end of the day tomorrow we can
6 just discuss whether we ought to set some kind of timetable
7 for the parties to respond and lodge objections if you feel
8 like that's something you want to do. That's not something I
9 would expect that would be done until after the argument. I
10 don't want to take time away from you or your teams. That's a
11 secondary issue of lesser importance. But just something to
12 think about because I'd like to make sure our post-hearing
13 schedule is set by the time we leave here tomorrow. Just
14 something I want you to think about.

15 MR. PARKER: Your Honor, the issue there would be
16 what would be the status of these documents going forward,
17 whether they're under seal or not. I really feel like we
18 handled -- both sides handled that issue quite well.

19 THE COURT: No, I think did you too. My question
20 is simply -- I receive probably a dozen to a dozen and a half
21 motions from various parties requesting confidential treatment
22 of testimony and exhibits. You all may just say, look, we
23 don't have a dog in that fight, we're more than happy to
24 consent to those. If that's the case, fine. But I'd like to
25 know that. Or let me know whether you want a date set by

1 which you want to lodge objections to what's in those motions.

2 MR. WEISSMAN: We'll think about it overnight. But
3 to preview, I think that's where we're going to end up.

4 THE COURT: I just wanted to raise that. And then
5 final exhibit lists and when you would expect to be able to
6 provide those to Ms. White. I don't know whether that's
7 something that is likely to be available tomorrow or whether
8 you need a few days to compile your final lists.

9 MR. PARKER: Mr. Hassi has been handling that.

10 MR. WEISSMAN: What I would propose is -- because
11 there are some additions by both sides, given the testimony
12 and offering those, there are some things that we want to add
13 as well in order to be responsive to Your Honor's -- some of
14 Your Honor's questions.

15 What I would propose, if it's okay with Your Honor
16 and defense counsel, is that we set for introduction of the
17 new exhibit list or the supplemented exhibit list some time
18 later this week, and that will give us time to meet and confer
19 with the other side and narrow to the fullest extent possible.
20 Where there are objections, the goal will be hopefully no
21 objections.

22 THE COURT: All right. All right. So if there
23 were to be objections, I guess we could get on the phone and
24 handle those.

25 MR. WEISSMAN: Exactly.

1 MR. HASSI: That would be fine, Your Honor. I
2 think there's -- the vast majority of the exhibits there's no
3 issues. I think there's literally a handful of objections at
4 this stage. But as Mr. Weissman said, there have been
5 exhibits, some used today, that we want to make sure that the
6 record is complete.

7 THE COURT: So to the extent that there are ripe
8 objections about exhibits, let's deal with those tomorrow --

9 MR. WEISSMAN: Sure.

10 MR. HASSI: Fine.

11 THE COURT: -- after the testimony is concluded.
12 I'll leave the record open, obviously, to supplement exhibits
13 after the close of the testimony. But to the extent that
14 there are objections tomorrow or ripe objections about
15 exhibits, let's take that up after the testimony concluded.

16 MR. WEISSMAN: Thank you, Your Honor.

17 MR. HASSI: Thank you.

18 THE COURT: All right. Those were some of the
19 housekeeping things that I had.

20 MR. WEISSMAN: Do you want to set a deadline for
21 submission of the exhibit list so we know what we're shooting
22 at. We'll endeavor to use our best -- Friday morning?

23 THE COURT: That's fine. This is the supplemental
24 exhibit list you're referring to or final exhibit list?

25 MR. WEISSMAN: Can we just make it the final?

1 THE COURT: That's fine.

2 MR. PARKER: This is the comprehensive exhibit
3 list.

4 THE COURT: Look, it doesn't need to be Friday
5 morning, just Friday close of business is fine, and we'll look
6 for them then. All right. Is there anything else we ought to
7 take up in terms of housekeeping, scheduling, at this
8 juncture?

9 MR. PARKER: Nothing, Your Honor.

10 MR. WEISSMAN: Nothing.

11 THE COURT: Good. We'll see everybody tomorrow at
12 9:00 a.m. Please don't wait for me. Thank you.

13 COURT ADJOURNED AT 4:55 P.M.

14

15 C E R T I F I C A T E

16 I, Lisa M. Foradori, RPR, FCRR, certify that
17 the foregoing is a correct transcript from the record of
18 proceedings in the above-titled matter.

19

20

21

22 Date: _____

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Lisa M. Foradori, RPR, FCRR

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