

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
)	
et al.,)	Civil Action
)	No. 15-256
Plaintiffs,)	
)	Wednesday, May 13, 2015
v.)	9:00 a.m.
)	
SYSCO CORPORATION,)	Washington, D.C.
)	
et al.,)	
)	
Defendants.)	

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

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MORNING SESSION, MAY 13, 2015

(9:02 a.m.)

THE COURT: Good morning, everyone. Please be seated.

THE COURTROOM CLERK: Civil Action 15-256, *Federal Trade Commission, et al. versus Sysco Corporation, et al.* For the plaintiff, Stephen Weissman, Alexis Gilman, Mark Seidman, Abiel Garcia, Melissa Davenport, Steve Mohr and Krisha Cerilli. For the defense, Richard Parker, Ian Simmons, Edward Hassi, Katy Robson, Joseph Tringali, Peter Herrick, Philip Mirrer-Singer, Ben Bradshaw and Christina Wachtell.

THE COURT: All right. Everybody, good morning. Should we take anything up before we begin or are we ready to start with your first witness, Mr. Parker?

MR. PARKER: I'm ready to go. Your Honor, defendants call Professor Jerry Hausman.

THE COURT: Dr. Hausman, good morning.

MR. PARKER: And surprise, surprise may we approach with our books?

THE COURT: Of course.

MR. PARKER: The way every day starts.

Your Honor, we're going to be going through a dec of slides which is DX 05028, and it's tab 1 in the notebook that I just passed up.

THE COURT: All right. Very good.

MR. PARKER: Thank you.

1 (JERRY HAUSMAN, DEFENDANTS' WITNESS, SWORN)

2 DIRECT EXAMINATION OF JERRY HAUSMAN

3 BY MR. PARKER:

4 Q. Professor Hausman, could you please introduce yourself to
5 the Judge, please?

6 A. Yes. Jerry Hausman, doctor and professor of economics,
7 Massachusetts Institute of Technology, Cambridge, Massachusetts.

8 Q. You're a professor?

9 A. Yes.

10 Q. And what is the class or classes you teach?

11 A. I teach currently applied microeconomics, which is a
12 study of how firms and consumers behave for. For many years I
13 taught a course in industrial organization, which is
14 competition. And I also teach courses in econometrics, which is
15 the application of statistics to economic data.

16 Q. How long have you been teaching at MIT, sir?

17 A. Over 40 years.

18 Q. And you have an undergraduate degree from Brown
19 University?

20 A. Yes.

21 Q. And your graduate degree is what, sir?

22 A. I have a D.Phil, which is equivalent to Ph.D., from
23 Oxford where I was a marshal scholar.

24 Q. And over the years have you been doing research and
25 writing in areas relevant to antitrust analysis of merger cases?

1 A. Yes.

2 Q. And can you please describe what some of that has been?

3 A. Yes. I was a coinventor of the first merger simulation
4 model, which has been discussed in the hearings, and I've done
5 academic research on price discrimination which has also been
6 discussed in the hearings.

7 Q. All right. And have you won any honors and awards as an
8 economist over the years, sir?

9 A. Yes. I've won a number, but the best-known is I won the
10 John Bates Clark award for the best economist under the age of
11 40 in the United States. Alas, that was a number of years ago.

12 Q. That was not last year, sir?

13 (Laughter.)

14 Have you submitted a report in this case, please?

15 A. Yes.

16 MR. PARKER: And that would be at tab 6, Your Honor.

17 DX 01355, and attached to that right after page 79 is Professor
18 Hausman's CV.

19 BY MR. PARKER:

20 Q. Is this CV an accurate statement of your background, sir?

21 A. Yes. I've written a couple more papers since then, but
22 it's essentially accurate.

23 Q. So the papers are listed on page 3 and go on for --
24 you've been a very busy man, sir -- go on for six or seven
25 pages, and you're saying you've even written a few more?

1 A. Yes.

2 Q. All right. Ever testified in an antitrust case before?

3 A. Yes. I've testified in about six antitrust cases before.

4 Q. And have you testified in other kinds of cases as well?

5 A. Yes. I -- I've testified in about three merger cases,
6 which of course are antitrust, and I also testified in damages
7 cases. I've also testified in merger and antitrust cases in
8 Australia, New Zealand, the UK and in Brussels for the EU.

9 Q. And the US antitrust cases would be what, sir?

10 A. I testified for Donnelley in *FTC versus Donnelley*, that
11 was about 1993. And then I testified for Staples in *FTC Versus*
12 *Staples*, that was about 1997. And then I testified on behalf of
13 Oracle in *US DOJ versus Oracle*, and that would have been about
14 2004.

15 Q. And you've been involved in this case since some time in
16 late -- late last year, sir?

17 A. Yes.

18 Q. And you've been reviewing transcripts, documents and
19 other testimony in this case?

20 A. Yes.

21 Q. All right.

22 MR. PARKER: Your Honor, I'd like to offer Professor
23 Hausman as an expert in the fields of microeconomics, industrial
24 organization and econometrics.

25 MR. WEISSMAN: No objection.

1 THE COURT: So admitted.

2 BY MR. PARKER:

3 Q. You mentioned that you've been involved in antitrust
4 cases in the past.

5 What role does economics play in merger analysis?

6 A. Well, my view is that economists should help the Court or
7 assist the Court in determining whether a merger can potentially
8 lead to an anticompetitive outcome. And the way I look at that
9 is -- there are many dimensions one can look at that, but you
10 usually focus on whether prices would be higher after a merger.

11 Q. All right. So we have a Court faced with all kinds of
12 testimony and documents, and you try to provide a framework in
13 which to view and analyze that evidence; is that fair?

14 A. Yes, an economic framework, yes.

15 Q. All right. And how do you go about doing that?

16 A. Well, typically there are three elements. The first is
17 market definition, so you try to define the contours of the
18 actors, you know, the firms and the customers. Then the next
19 you do is competitive effects. That's to see whether or not
20 there's a potential for prices to go up. And the last is
21 efficiencies, look at efficiencies, and that has the potential
22 to have prices come down, and you try to balance the two off.

23 Q. Let's start at step one. How does an economist look at
24 the analysis of relevant markets or the definition of relevant
25 markets, sir?

1 **A.** Typically the way it's done now is to use the
2 Hypothetical Monopolist Test, that has come up in proceedings,
3 and that is if there were hypothetical monopolists, would it be
4 able to raise prices 5 percent profitably.

5 THE COURT: Dr. Hausman, I'm sorry, I'm just going to ask
6 you just to move the microphone a little closer.

7 THE WITNESS: Oh, okay.

8 THE COURT: That may help.

9 THE WITNESS: Yeah, I can't seem to move the chair, but --

10 THE COURT: Oh, okay.

11 THE WITNESS: Thanks.

12 THE COURT: Thank you.

13 THE WITNESS: Sure.

14 MR. PARKER: Are we all set?

15 THE WITNESS: Yeah, I think so.

16 THE COURT: Yes.

17 BY MR. PARKER:

18 **Q.** All right. And what customers are relevant for
19 application of the SSNIP test, sir?

20 **A.** The customers are the customers in the market -- or
21 putative market that you're looking at. And so when prices go
22 up, some customers will switch, they're called the marginal
23 customers; and some customers won't switch, and they're called
24 the inframarginal customers. And the question is: Are there
25 sufficiently great number of marginal customers that will switch

1 when the price goes up so that it would be profitable?

2 Q. All right. How does one evaluate competitive effects?

3 A. Well, I think the best way to do it, since I'm an
4 inventor of the models, is when you can to use merger simulation
5 models. Sometimes you can't use them, but I think they're the
6 best way to do it. It's much better than using something like
7 market shares. I think that's been recognized by the antitrust
8 authorities in the merger guidelines for about 30 years now.

9 Q. All right. So let's just separate this.

10 The first step is to look at market and market
11 definition, and having done that, then you look at actual or
12 likely anticompetitive effects independent of the market; am I
13 right?

14 A. Well, within the market, yes.

15 Q. Within the market, excuse me.

16 A. Yes.

17 Q. Within the market, but independent of the market
18 structural factors; am I right?

19 A. Of the shares, yes.

20 Q. Yes. All right.

21 Are you familiar with Dr. Israel?

22 A. Yes, I am.

23 Q. Have you worked with him in the past?

24 A. Yes.

25 Q. Is he a well-regarded and competent economist?

1 A. Yes.

2 Q. Have you read his report and rebuttal report?

3 A. Yes.

4 Q. And did you also hear his testimony?

5 A. Yes.

6 Q. And you have some differences of opinion here that you
7 are prepared to present?

8 A. Yes.

9 Q. All right. Turn to slide 2, if you would, please. All
10 right.

11 THE COURT: Dr. Hausman, I'm sorry. Before you continue,
12 you mentioned marginal customers and then you contrasted those
13 with a different type of customer, and I missed --

14 THE WITNESS: Oh, it's inframarginal, I-N-F-R-A-marginal.

15 THE COURT: Inframarginal, okay.

16 THE WITNESS: Would you like me to explain it? I'll be
17 glad to. I have a great example.

18 THE COURT: Sure.

19 THE WITNESS: Okay. So my wife likes Budweiser beer --
20 this is an epophrical {phonetic} story -- and the question is,
21 you know, MIT salaries aren't bad, so if Budweiser raises the
22 price of a six-pack by 50 cents, my wife will continue to buy.
23 She's inframarginal. But why doesn't Bud just go and raise the
24 price for everybody by 50 cents? They'd make more money. Well,
25 there are sufficient marginal customers -- those are the

1 price-sensitive people -- who will switch to Coors and Miller.
2 So Budweiser, presumably, is charging the highest price they can,
3 even though my wife will continue to buy, there are sufficient
4 people who would switch and that's what stops them from raising
5 prices. The nonswitchers are inframarginal, and the switches are
6 marginal.

7 THE COURT: Thank you.

8 THE WITNESS: You're welcome.

9 BY MR. PARKER:

10 Q. All right. Is slide 2 a summary of the differences of
11 opinion you have with Dr. Israel with regard to his analysis
12 here?

13 A. Yes.

14 Q. All right. Let's start, why don't you start with the
15 margin. And I want to be -- we're going to get into some
16 confidential things, so I don't want this up on the screen here,
17 but we don't have to close the courtroom. We're going to be a
18 little careful with some of these numbers but let me go back.

19 Why did you start with the margin -- the margin analysis?

20 A. The margins are quite important. They demonstrate that
21 this is a very competitive industry, and the margins have been
22 declining over time. But also, there are critical inputs into
23 what Dr. Israel does, both for market definition and for his
24 auction model.

25 Q. All right. So let's turn now to slide 4 and make sure it

1 is -- that these series is not up on the general screen here,
2 please.

3 THE COURTROOM CLERK: It's not.

4 MR. PARKER: All right. Thank you.

5 BY MR. PARKER:

6 Q. All right. Dr. Israel testified that the relevant margin
7 for antitrust analysis is price minus marginal cost; am I
8 correct?

9 A. Yes, and I agree with that.

10 Q. Okay.

11 A. And I think most economists would agree.

12 Q. Has Dr. Israel, in fact, used this proper margin in this
13 matter?

14 A. No. He testified -- I actually used margin of
15 10 percent. And his calculations in his report, he had margins
16 which I won't say, but you can see on the screen. They were
17 significantly higher than the 10 percent that he used. The
18 10 percent, so far as I can see, is not based on any
19 calculations, he just picked a number out to be conservative.

20 Q. And he testified he thought it was conservative?

21 A. Yes.

22 Q. So let's go back over this quickly.

23 In his report you'll see at the bottom of the slide three
24 or four numbers that he used, and these come from his report,
25 correct?

1 A. Yes.

2 Q. And you believe those are incorrect?

3 A. Yes.

4 Q. All right. And then in his testimony he switched to
5 10 percent?

6 A. That's correct.

7 Q. Okay. And you believe that is incorrect as well?

8 A. Yes, too high.

9 Q. All right. And does the margins on the bottom, the three
10 or four numbers he's got down there, does that continue to
11 infect some of his analysis?

12 A. Yes. So far as I can see, he continues to use those
13 margins in his auction model, and that's going to lead to upward
14 bias calculation of potential harm.

15 Q. And for other testimony he uses the 10 percent?

16 A. I believe so, yes.

17 Q. All right. Turn, if you would, to page 5, which again,
18 is confidential -- I mean, excuse me, slide 5.

19 All right. Tell me what the margins you used in contrast
20 to what Dr. Israel used.

21 A. Okay. So what it says on the top is that his margins, he
22 testified in his deposition, did not include earned income, and
23 it does not include certain variable costs associated with
24 delivery, warehouse and selling. So what I'd like to do is
25 contrast his left-hand column. You can see that for Sysco he

1 starts off with 100 percent. He subtracts off cost and goods
2 sold, and he ends up with a margin, which is the same as the
3 margin on the previously slide.

4 Now, if you look at the correct margin, which are my
5 calculations, and again, you look at the left-most column, you
6 start off with Sysco. You see that I start off with 100
7 percent. I actually subtract off a smaller number than he does
8 because I add back in earned income. But then I subtract off
9 variable costs for delivery, warehouse and selling, and I end up
10 with a number which is about 50 percent lower than his number.

11 And in my view, you really have to include variable costs
12 for delivery, warehousing and selling because, after all, this
13 is a distribution business and it costs money to deliver, got to
14 hire those delivery people, people working in the warehouse and
15 the salespeople, and you can see that that has a significant
16 effect on the correct calculation of margins.

17 Then if you go to national broadline, again Dr. Israel
18 starts off with 100, subtracts off a number and ends up with a
19 somewhat smaller number than in the left-most column. So I'm in
20 his column number 3 now. And if you turn to column 3 from my
21 calculation, again, I subtract off a somewhat smaller number
22 than he does, but then I subtract off the delivery, warehouse
23 and selling, and I end up with a good deal lower margin, you
24 know, about 70 percent lower than his.

25 And this is important because incorrect margins will lead

1 to overly narrow market definitions, upward bias market shares,
2 and overstated harm to consumers. And you can see -- although I
3 don't want to say them out loud -- that the correct calculation
4 of numbers, for instance, in the right-hand side, are a good
5 deal lower than what he uses in his model, but also a good deal
6 lower than 10 percent.

7 Q. Professor, you say you added back in earned income?

8 A. Yes.

9 Q. And please explain that.

10 A. Yes. Earned income is when Sysco and US Foods sell to a
11 customer, they get what's called earned income from the food
12 supplier or manufacturer, and so that's money they're getting
13 back. And it's like a rebate, so I -- you know, I don't include
14 that as a cost.

15 Q. All right. So let's move now to --

16 THE COURT: I'm sorry.

17 MR. PARKER: Go ahead.

18 THE COURT: Dr. Hausman, the margins for delivery,
19 warehouse and selling, what are the sources of your information
20 for those margin calculations?

21 THE WITNESS: Your Honor, I hope your eyes are a little
22 better than mine, but you see the first thing says "Sysco/US
23 specification 5 P&L data."

24 THE COURT: Okay.

25 THE WITNESS: And then the second is "Sysco/US profitably

1 data." And it gives DX, and it's referred to in my reply report,
2 so those are the sources.

3 THE COURT: Okay. All right. Thank you.

4 THE WITNESS: You're welcome.

5 MR. PARKER: And his reply report is marked as an exhibit
6 here, Your Honor, and that would be DX 01353.

7 BY MR. PARKER:

8 Q. All right. Moving on to your next point here, sir. Move
9 on to slide 7, if you would, please.

10 All right. Here your view is that Dr. Israel's critical
11 loss model is incorrect. And let's just set the stage here.

12 How did he purport to use critical loss in his analysis,
13 sir?

14 A. Well, critical loss lines up with a SSNIP test, and I
15 just quote the merger guidelines here. I underlined at least
16 one product in the market should have its price raised by a
17 SSNIP, including one product sold by one of the merging firms.

18 And in his report he claimed to use what I have here as
19 model one, which is called Katz/Shapiro, you know, to economists
20 who are at UC Berkley.

21 Q. Okay. So he used a SSNIP test to help him determine his,
22 quote-unquote, broadline market; am I right?

23 A. Yes. So he used Katz/Shapiro, and as I say here, it's
24 the appropriate model in markets involving suppliers or
25 customers that are different. And so you have suppliers with

1 different costs, or you have a different mix of customers, you
2 know, the broadline customers, you have small independent
3 restaurants, you have GPOs, you have MIT, you know,
4 universities, so you have very different mix of customers and a
5 different mix of products. So in that case, which is called
6 asymmetric by economists, you should use Katz/Shapiro, and in
7 his report that's what he claimed he was using.

8 The second model is Farrell/Shapiro, that was a later
9 paper, and that's appropriate in markets involving suppliers or
10 customers that are similar, have similar costs, similar mix of
11 customers.

12 Now, I agree with Dr. Israel that Katz/Shapiro should be
13 used because I think that you do have different costs, different
14 mix of customers. And, in fact, he emphasized that you have
15 different types of suppliers and different types of customers,
16 you know, that they're quite heterogeneous, and I agree with
17 him.

18 Q. All right. So let's go back on this. Turn to the next
19 slide, please. There's really two ways to look at the critical
20 loss model here, correct, and the first is the Katz/Shapiro
21 approach, correct?

22 A. Yes, so here --

23 Q. All right. And that's what's being illustrated on
24 slide 8?

25 A. Yes. Here the hypothetical monopolist, HM, imposes a

1 SSNIP on only a single product sold by one of the merging firms.
2 And the reason for this is when you have different types of
3 customers and different types of firms, the hypothetical
4 monopolist might well find it profitable to raise prices on only
5 one product, but since the customers in all are different, it
6 might not find it profitable to raise prices on all products
7 because of the heterogeneity. So the question is: If Sysco or
8 a hypothetical monopolist were to impose a 5 percent SSNIP, what
9 percentage of sales loss, you know, by Sysco or the hypothetical
10 monopolist would be recaptured by other broadline distributors
11 versus nonbroadline distributors? And Dr. Israel described the
12 aggregate diversion ration, and, you know, he explained it quite
13 well, how it all works.

14 Q. All right. And so what's depicted here is you have Sysco
15 as a hypothetical monopolist on tab A; am I right?

16 A. Yes.

17 Q. Okay. And they're raising price, and the question is, is
18 whether -- how much business goes to the various other broadline
19 distributors that are depicted on this page; am I right?

20 A. Yes.

21 Q. And that's appropriate here because you have different
22 types of products?

23 A. Yes.

24 Q. Okay. Turn then, if you would, please, to tab 9, please.

25 And this would be the Farrell/Shapiro test, another pair of

1 Berkley professors; am I right?

2 A. Yes.

3 Q. All right. And here you have all of the firms in the
4 alleged market raising price at the same time; am I right?

5 A. Yes.

6 Q. Okay. And that would be for the sale of widgets or some
7 type of a commodity chemical or something?

8 A. Well, it doesn't have to be a commodity, it's just a
9 product that doesn't -- or set of products that are very
10 similar. They don't have to be exactly the same, but they
11 should be quite similar.

12 Q. All right. And under those circumstances, you'd use
13 Farrell/Shapiro; am I right?

14 A. Yes.

15 Q. And that's not appropriate here?

16 A. Not in my view, because of the heterogeneity of both
17 distributors and of the customers.

18 Q. Okay. And you said that, in fact, Dr. Israel --

19 THE COURT: Mr. Parker, I'm sorry to interrupt you.

20 MR. PARKER: Yes.

21 THE COURT: Ms. White, can I ask you to ask the female who
22 are standing at the door to stop staring in the courtroom. They
23 can either come in or move away from the door. It's quite
24 distracting.

25 Please continue, Mr. Parker.

1 MR. PARKER: I was wondering if I was doing something
2 wrong here.

3 THE COURT: No, no, no. People are sort of looking in and
4 it's distracting.

5 MR. PARKER: I kind of get going and you just never know
6 what's happening up here, you know.

7 THE COURT: I didn't mean to --

8 MR. PARKER: No, it's no problem.

9 BY MR. PARKER:

10 Q. All right. So you said -- I believe you said that
11 Dr. Israel selected the Katz/Shapiro approach; am I right?

12 A. That's what he said in his expert report, yes.

13 Q. So what'd he do wrong?

14 A. He used the wrong formula. He used the Farrell/Shapiro
15 formula rather than the correct Katz/Shapiro formula.

16 Q. So you're saying he thought he was doing Katz/Shapiro,
17 but in fact he was doing Farrell/Shapiro?

18 A. In terms of the formula, yes.

19 Q. All right. So turn, if you would, to slide 10, please.

20 A. Okay.

21 Q. Excuse me, turn, if you would, to slide 11, if you would,
22 please. I'm sorry. Do you see that, sir?

23 A. Yes.

24 Q. Okay. And this depicts the proper analysis?

25 A. Yes. So he uses, you know, the Katz/Shapiro. In the

1 previous slide it said that he was going to use the single
2 product SSNIP, but when he went about it, he used the
3 Farrell/Shapiro, so he used the top line. You know, just to
4 take a simple example, you have 10 percent in the numerator --
5 that's equivalent to a 5 percent SSNIP -- and then 10 percent
6 plus margin. He used 10 percent. So you'd have 10 percent over
7 20 percent, and that's equal to a half. And that would be --
8 you'd check whether the aggregate diversion ratio exceeded that
9 or was greater than or equal to that in terms of market
10 definition.

11 Q. All right.

12 A. The prep formula, though, for Katz/Shapiro, as was shown
13 in a subsequent paper of a journal I'm actually an editor of,
14 the *Journal of Competition Law in Economics*, is 10 percent over
15 the margin. So now you have 10 percent divided by 10 percent,
16 using his number, and you can see that the aggregate diversion,
17 rather than being greater than or equal to 0.5, has to be
18 greater than or equal to 1. So what you can see, then, is
19 employing the correct formula shows that a market for broadline
20 foodservice distribution, which was his product market, is too
21 narrow, because the aggregate diversion ratio can't be greater
22 than 1 by definition. You can't divert more than 100 percent.
23 That's just wrong. And it's not going to be equal to 100
24 percent either, because he testified that some of the business
25 goes to systems, some of the business goes to specialty. He

1 didn't think enough, but he certainly agrees that some goes
2 there.

3 Q. So what's it all mean for market definition, sir, bottom
4 line?

5 A. Well, using the Critical Loss Test, which he used in the
6 correct formula for Katz/Shapiro, the bottom line is his defined
7 market, product market, for broadline foodservice distribution
8 is too narrow. You need a wider market.

9 Q. And you need to include specialty and other types of
10 products?

11 A. You certainly need to include other things, and the most
12 obvious candidates are specialty, systems and so on.

13 Q. Turn, if you would, to tab 3, please.

14 A. Tab 3, okay.

15 THE COURT: Sorry, Doctor, Mr. Parker.

16 MR. PARKER: Yes.

17 THE COURT: Dr. Hausman, explain to me the connection
18 between the two. I'm not following.

19 THE WITNESS: Okay.

20 THE COURT: How do you get from Dr. Israel used the wrong
21 formula to his market definition should have included or
22 erroneously excluded, I should say, other modes of distribution
23 such as specialty and systems?

24 THE WITNESS: Okay. So Katz/Shapiro wrote this paper. I
25 think it's about 2003 or 2005.

1 MR. PARKER: Your Honor, it's at tab 3, it's marked as
2 a -- PX 09516.

3 THE WITNESS: So it's a 2003 paper. They said you should
4 look at a single price increase in the case where, you know,
5 things are asymmetric. That's a technical economic term.

6 THE COURT: For a single product?

7 THE WITNESS: Yes. And they actually got the wrong
8 formula. So along came -- I think it's a Norwegian economist,
9 and he published -- he and two coauthors published a paper and
10 said, well, Katz/Shapiro is okay except they got the wrong
11 formula, and the right formula is this one, the second formula on
12 this slide. And so when you do that, you get 10 percent over
13 10 percent. You can see it's too narrow. If you use the correct
14 margins, which I calculated, you know, it's even higher.

15 So then Farrell/Shapiro wrote a paper and said, okay, in
16 the case where things are very similar, is a symmetric case, you
17 can use this top formula. And Dr. Israel said I'm going to do
18 Katz/Shapiro, but I'm not sure he was aware -- maybe he was
19 aware, but he just used the wrong formula. And if he used the
20 right formula, which is the bottom formula, you get the diversion
21 ratio, even using his margin, conservative margin, has to be
22 greater than or equal to 100 percent, which means everything.

23 BY MR. PARKER:

24 Q. All right. And so the --

25 A. I'm sorry, I just want to make sure I answered your

1 question.

2 Q. Yeah, I'm sorry.

3 THE COURT: You did.

4 THE WITNESS: Yeah. Okay. Thank you.

5 BY MR. PARKER:

6 Q. And so the article that responded to Katz and Shapiro is
7 at tab 4, indeed, written by several Norwegians, and I'm not
8 going try to pronounce their names, but it's DX 00058?

9 A. Yes.

10 Q. And then if you turn to tab 5 for further reading
11 pleasure, you'll have Farrell/Shapiro, DX 02251; am I correct,
12 sir?

13 A. Yes. And actually since we're there, if you'll look at
14 footnote 17 in that Farrell/Shapiro paper, which is --

15 Q. It's page 5.

16 A. -- yes, page 5, they talk about symmetric products and
17 asymmetric products, and they refer to the Norwegian's paper and
18 say that, you know, they basically -- the Norwegians basically
19 got it right in the case of asymmetry. So they recognized -- I
20 mean, if you're an academic, you're willing to admit you make
21 mistakes.

22 Q. It happens all the time?

23 A. Well, that's what happens if you're an academic.

24 Q. Okay. All right. So let's move -- well, okay, so what
25 you're saying is he misapplied -- he used the wrong formula and

1 he ended up excluding things from the relevant markets that
2 shouldn't have been excluded. That's what we're saying here?

3 **A.** That's what I'm saying, yes.

4 **Q.** Yes, sir. All right. Let's move on.

5 Now, did he use a SSNIP Test to test his assumptions
6 regarding national customers or local customers or any other
7 aspect of his opinion?

8 **A.** No. He did it only for his product market for broadline
9 product market.

10 **Q.** Now, Mr. Weissman read a quote and they put it in their
11 brief about you talking about national markets here, sir. Can
12 you explain what you meant in your deposition about that, sir?

13 **A.** Yes. Well, my view is, is that if you look at separate
14 markets for national and local -- and I'll get into that more
15 today -- those are too narrow. So I think you need an overall
16 food distribution market. And when you do that, what I is said
17 in my deposition, I believe that's national. So that's my view,
18 that the FTC defined markets are too narrow. When you get the
19 right market, though, I see the geographic scope being national.

20 **Q.** And that's the market which has the thousands and
21 thousands of competitors that we've seen in various pieces of
22 evidence here, sir?

23 **A.** That's correct.

24 **Q.** Okay. Now, so he didn't do another SSNIP, but he did
25 come up with a price discrimination market concept; am I right?

1 A. Yes.

2 Q. All right. Turn, if you would, to number -- to slide 13,
3 please. All right. Professor Hausman, you have written a
4 seminal article on price discrimination and its proper role in
5 market analysis?

6 A. Well, it's your term seminal. I hope it is, but yes,
7 I've written an article, so...

8 Q. And that would be at tab 2. It appears to have been in
9 the *ABA Antitrust Law Journal* in 1996. Is that what we're
10 talking about, sir?

11 A. Yes.

12 Q. All right. And in there you talked about what the proper
13 elements were for price discrimination?

14 A. Yes.

15 Q. Okay. And please describe what those are.

16 A. Okay. Well, there are two elements. The first is no
17 arbitrage, and Dr. Israel and I agree that you're not going to
18 have arbitrage here.

19 But the first element which is important, and which is
20 fundamental, is you must be able to distinguish customers with
21 low price elasticity, you know, that is customers that are less
22 price sensitive. Because if you try to raise the price and
23 they're not price sensitive, they switch and you lose the
24 profit. So if they stay you get the 5 percent, but if they
25 switch you lose the whole margin. So you have to be able to

1 identify them somehow. And, of course, customers who are
2 smart -- which if you have large customers they typically are --
3 they're going to hide their preferences. You know,
4 Mr. Sonnemaker testified to that the other day. They're not
5 going to tell you, you know, I've got to go with you, they're
6 going to say, oh, I have all these other people out there. So
7 they're going to hide them, so you have to be able to figure it
8 out.

9 And in the paper there's a table, so this is tab 2, which
10 shows that with the margins that Dr. Israel uses -- it's table 1
11 on page 375 -- you'd have to be able to correctly guess or
12 correctly estimate 64.5 percent of the time, you have to be
13 correct that often if you're going to be able to successfully
14 price discriminate.

15 Q. All right. So the first element is that you have to find
16 the people against whom you can discriminate? You have to be
17 able to identify them?

18 A. Yes.

19 Q. You identify the people who won't or don't have enough
20 options or can't switch; am I right?

21 A. Or have very strong preferences.

22 Q. Or have very strong preferences.

23 Now, did Dr. Israel make a -- take any analysis to figure
24 out who those people were in this case?

25 A. No. I mean, in the past I've done econometric analysis

1 to do that, but all he did was to take the customer list -- you
2 know, he testified he took the customer list from Sysco and he
3 took the customer list from USF, and whatever they named
4 national customers, he said they could be price discriminated
5 against, and defined a price discrimination market based on
6 that.

7 Q. And did he do any analysis of what it was about the
8 people on Sysco's CMU list that made them vulnerable?

9 A. No.

10 Q. That said they didn't have choices?

11 A. No.

12 Q. That said they had some kind of a preference that they'd
13 pay more for Budweiser or -- as your family would?

14 A. No. He did no economic analysis at all, at least that
15 I'm aware of.

16 Q. And if you were really going to look at this and
17 determine price discrimination markets, what would you do, sir?

18 A. I'd do an econometric study. You'd look at the prices
19 people are paying, you'd look at their attributes and see if
20 they're if paying more. And I'll talk about that. I actually
21 did an econometric study later, and I'm going to talk about it.

22 Q. Okay. Have you ever -- you've done work on price
23 discrimination markets in the past, sir?

24 A. Many times, yes.

25 Q. And you've seen some real ones?

1 A. Oh, yes.

2 Q. All right.

3 A. In fact, my colleague from MIT, who's sitting here, wrote
4 an academic paper about it.

5 Q. I'm sorry?

6 A. Well, I've seen it before. I'm just saying I have a
7 colleague sitting in the room who's a chief economist at DOJ
8 now, and she wrote a paper and showed there was price
9 discrimination markets.

10 Q. All right. So you found some real ones?

11 A. They exist, yeah.

12 Q. All right. Are you aware of any real price
13 discrimination markets in which the targeted group of customers,
14 in fact, were paying lower margins than the ones who weren't
15 targeted?

16 A. No. That would be an all-time first, because you target
17 people to charge them more and not to charge them less.

18 If you look at the bottom panel here on my slide, it
19 can't be because of concentration, because according to
20 Dr. Israel the HHI for national customers is 3,153, and the HHIs
21 for local customers are generally lower. So it's not due to
22 concentration, because the higher HHI should lead to higher
23 margins, higher prices, all the other things equal.

24 But actually, it's been well-established, and it's in all
25 of the many depositions and much testimony, that national

1 customers have lower margins than local customers, so this is
2 exactly the opposite of what you would expect. And I think
3 that's due to a lot of different choices that people have, but
4 also, you have power of buyers. Many of the national customers
5 are power buyers, and they're going to be able to bargain for a
6 low price.

7 **Q.** Let's jump ahead quickly to slide 16, please. Is this
8 the analysis you were just talking about the margins?

9 **A.** Yes. So this is called -- oh, it just disappeared from
10 my screen. I can go there.

11 **MR. PARKER:** Your Honor, whenever I'm up here this thing
12 does not work. It absolutely dislikes me, I'm serious.

13 Yeah, I want it up on this screen but not out there,
14 please. Thank you.

15 **BY MR. PARKER:**

16 **Q.** All right. You're ready to go.

17 **A.** All right. So this is my econometric study. And so what
18 I did here, I used the customers from Sysco's SPM profitability
19 model. This is the most up-to-date data. And I did what's
20 called a nonparametric econometric analysis. So an econometric
21 model here, I control for a lot of different customer aspects,
22 how big they are, what they buy, do they buy a lot of meat, what
23 geographic area. So that's what econometrics does, it allows
24 you to control.

25 And then along the vertical axis, I have the margin per

1 case. That's profitability. And then along the horizontal axis
2 I have the number of OpCos used. And you can see it goes all
3 the way out to 71, which is -- or 70, which is -- that's the
4 number of OpCos that Sysco has.

5 So nonparametric is a red line, and this says how does
6 profitability vary with the number of OpCos used? And what you
7 can see is once you get to 5 it never increases. Actually, on a
8 statistical basis it never increases at all, but it's really
9 quite flat. You know, it always has its ups and downs. That's
10 what happens when you do statistics, but overall it's very flat.

11 If you get all the way out to 70 you can see it's
12 actually a little bit lower than around 25, which is where PFG
13 is. PFG has the lowest -- the highest number of OpCos or
14 distribution centers except for USF and Sysco. You can see that
15 from there on it never goes up, actually goes down just a tiny
16 bit, although it's not significant. So what I find here is that
17 national customers are not being price discriminated against,
18 because the people on the right-hand side, those are the people
19 that you would expect would end up paying higher because they'd
20 have fewer choices, they should be more price inelastic. And
21 Sysco and US Foods should recognize that and charge them higher
22 prices, or at least get higher margins. And my nonparametric
23 econometric shows definitively that does not happen.

24 Q. All right. Well, how do you know that the reason it gets
25 low out on the right is because it's because of Sysco and USF

1 pounding on each other for these customers, and that it's the
2 competition between these merged parties that cause the result?
3 How do you know that's not true, sir?

4 **A.** Well, that's inconsistent with the fact that they also
5 compete pretty much everywhere for local customers. But we know
6 for local customers the margins are over double, or
7 approximately double, what they are for national customers. So
8 if they were beating their brains out for national customers,
9 they should also be beating their brains out for local
10 customers, and we don't see that.

11 Furthermore, there's a lot of economic theory, including
12 a paper by a -- a Nobel Prize winner that discusses -- when you
13 only have two people competing, you expect higher prices because
14 they recognize that they only have one competitor and they don't
15 beat each other's brains out. I'm not saying it can never
16 happen, but the econometrics and the facts of the case, you
17 know, are just inconsistent with that.

18 THE COURT: Does the sophistication of the consumer matter
19 in this?

20 THE WITNESS: Yes.

21 THE COURT: How?

22 THE WITNESS: Very much so. So you have these
23 sophisticated buyers, and what they're saying is I can go to DMA,
24 I can do regional, like Subway does or Sonic does. I have all
25 these choices. You try to charge me a lot of money, goodbye.

1 And since they have a lot of business, you know, if some local
2 restaurant tries that, so what. But if one of these large buyers
3 does it, you know, you can lose hundreds of millions of dollars
4 of business. I think Five Guys recently left USF, and it's a
5 couple -- there was testimony to this, I believe -- and there's a
6 couple hundred million dollars of business lost. And so you
7 don't want to lose them, and when they threaten to go -- so long
8 as we have alternatives -- you know, if you make what's called an
9 incredible threat, you know, no one's going to believe you. But
10 you got to have real credible threat that you can go, and then
11 you're going to get lower prices because USF doesn't want to lose
12 you. That's the idea. So that's why power buyers, you know, are
13 very important in economics, and they're recognized in the merger
14 guidelines, and there's discussion.

15 BY MR. PARKER:

16 Q. All right. Sir, did you test whether there was a market
17 for, quote-unquote, national broadline customers, professor?

18 A. Yes, I did.

19 Q. Turn to page 15, please, and you used the proper
20 Katz/Shapiro formulation?

21 A. Yes.

22 Q. And please describe what you did and what were your
23 conclusions, sir. This would be tab 15.

24 A. Yes. So I took, again, 10 percent, which corresponds to
25 a 5 percent price increase. I divided by the margin, and you

1 see that I get a number substantially greater than 100 percent,
2 which, again, I won't say, but the version can't be greater than
3 100 percent. That's an impossibility. So this demonstrates
4 that the market must be broader than the national customer
5 market.

6 And again, we've heard testimony that there are other
7 products and producers, specialty, seafood, produce, meat,
8 that's all been talked about, and then you have systems and you
9 have other distributors as well.

10 Q. All right. Turn, if you would, to tab 17 and 18, and I
11 probably should have done that in --

12 THE COURT: Mr. Parker, I'm sorry to interrupt. You said
13 a 5 percent increase equates to 10 percent in the numerator?

14 THE WITNESS: Yeah. That's what Dr. Israel uses. It's
15 just the mathematics of -- for a 5 percent SSNIP it corresponds
16 to a 10 percent.

17 THE COURT: And you agree with that?

18 THE WITNESS: Oh, yeah, that's standard.

19 THE COURT: That's standard? All right.

20 THE WITNESS: It's a little bit of mathematics.

21 THE COURT: That's always dangerous to me.

22 THE WITNESS: Yes.

23 BY MR. PARKER:

24 Q. All right. Turn to page 17, sir, if you would, please.

25 A. Okay.

1 Q. And what is this chart?

2 A. So here I looked at the customers and Sysco's SPM model,
3 which is a large customers, and what I found was, for instance,
4 12 percent of the customers use only one OpCo, and many
5 customers use few OpCos. 37 percent use five or fewer OpCos,
6 and a lot of those are in one region in the country. And over
7 half, 55 percent, use ten or fewer OpCos. So this shows that
8 there are a large proportion of customers that certainly aren't
9 using very many OpCos.

10 Q. And then turn to the next page as well, please.

11 A. So this page I used the national customers of USF, and
12 the numbers are even higher, 13 percent use only one OpCo. Over
13 half, 51 percent, use five or fewer, and a lot of those are in
14 one region of the country, about half, and two-thirds use ten or
15 fewer OpCos. So again, I infer from this that these national
16 customers, you know, from the list at least, a lot of them
17 aren't using very many OpCos.

18 Q. And therefore?

19 A. Well, therefore, it seems to me the market definition,
20 which excludes, for instance, many regional and local
21 distributors, is incorrect because certainly if I am only using
22 one OpCo and I'm in Boston, I can use local people, I can use
23 regional people, I have a whole host of people I can use. You
24 know, I'm just in the Boston metro area, and just some trucks
25 that's all that's needed to serve me if I'm, you know, three or

1 four OpCos, but again, I'm just right around, you know, New
2 England, distances aren't very far, and again, I can be served
3 by other people.

4 Q. And --

5 THE COURT: And I'm sorry. This national -- the national
6 customer data that you relied on here, that's based on USF's
7 classification of what is national; in other words, these are the
8 accounts run out of their corporate headquarters?

9 THE WITNESS: Yes. It's -- if you look, Your Honor, it
10 says based on spec- --

11 THE COURT: I see, all right.

12 THE WITNESS: Yeah.

13 BY MR. PARKER:

14 Q. All right. And so the person in Boston really doesn't
15 care whether USF or anybody else does business in California or
16 Denver or Albuquerque or anywhere else?

17 A. That's correct.

18 Q. All right. Has Dr. Israel -- let's move now away from
19 the market definition and shares area and talk about competitive
20 effects.

21 A. Yes. I just want to make one point before we leave in
22 topic if I might.

23 Q. Yeah, sure. Go ahead.

24 A. And that is that Dr. Israel claimed that, of course, that
25 large amount of revenue is why people use a lot of OpCos, and

1 I'm not disagreeing with that, but this just shows in terms of
2 market definition you have a whole large percentage of customers
3 which you need to look at, just not the revenue, that can be
4 served by very few OpCos.

5 Q. All right. Did Dr. Israel come up with a conclusion on
6 whether there would be actual anticompetitive effects in his
7 broadline market for national customers?

8 A. Yes. He looked two ways. He did a qualitative analysis,
9 and then he used an auction model to try to quantify it.

10 Q. Let's talk about the -- that's the English auction model?

11 A. Yes.

12 Q. All right. If I had a picture in my office of the great
13 Brett Favre autographed and I was going auction it -- you can
14 see the excitement building -- and I was going to auction it to
15 the people out here, and they had raised their hands and bid,
16 and let's say I sold it for 25, and the other bid was 20 and the
17 bid before that was 15, would the English auction model analysis
18 apply to that transaction?

19 A. Yes, because there's only one unit and it's open
20 outcries, so everybody knows what everybody is bidding. There
21 are no secrets. And the highest bidder just has to bet the
22 second person by a dollar.

23 Q. And there the second bidder at 20 caused the other person
24 to go 25, and so the second bidder at 20 becomes of great
25 importance; am I right?

1 A. Although if I was I were bidding -- I'm not a Packers
2 fan -- I would have bid 21 rather than 25, but I'm an economist.

3 Q. That's a nice picture.

4 (Laughter.)

5 He's wearing his Packers uniform before he refed and ran
6 amuck, so it probably ought to go for more than that.

7 All right. Is that analysis appropriate here?

8 A. No, it's absolutely not.

9 Q. Why not?

10 A. Well, because it's -- in the middle of the slide, the
11 English auction model assumes each bidder observes the bids of
12 its competitors. That's not true here. There was testimony by
13 Mr. Holm and Mr. Sonnemaker and many other people, actually, in
14 the depositions, that it's much closer to a sealed bid auction.

15 The bidder, the customer is not going to tell you what
16 the competitor's bid is. In fact, he's always going imply,
17 depending on truthful he is, that the other bidders are offering
18 him a heck of a good price and you've got to beat it. I mean,
19 you know, that's how the world works.

20 Secondly, he's assuming, the English auction assumes that
21 there's a fix quantity. That Brett Favre thing, you're only
22 auctioning off one and it's one picture. The way I would like
23 to think about it is a plot of land, but, you know, we're in the
24 same place.

25 Here, again, there's testimony that most customers --

1 many customers don't put out any requirements at all. Those
2 that do are usually between 70 and 80 percent. So it's not a
3 fixed quantity because those customers can still go to specialty
4 people or other people to fulfill part of their requirements.

5 The third and fourth, which I think are the most
6 important, is there are no bilateral negotiations. So even if
7 there's an RFP -- there's been testimony by Mr. Holm and
8 Mr. Sonnemaker -- that they're always bilateral negotiations. I
9 also saw this in the Oracle case. When you have big companies,
10 you know, at the end they say, okay, well, you could well be the
11 winner, but it's time to sharpen your pencils. That just shows
12 how old I am about pencils, but it's time to sharpen your
13 Excel spreadsheet, and, you know, I expect a better price, and
14 that's how you close.

15 In an English auction once I bid \$21, unless you trump me
16 bidding 25, that's it, there's no negotiations.

17 **Q.** In my hypothetical -- and so the bilateral negotiations,
18 which are clear on the record, is another reason why the
19 auction -- English auction is not appropriate?

20 **A.** Yes, sir. And lastly, in the English auction there's no
21 incumbency advantage at all. So in other words, whoever bought
22 that picture -- again, you know, let's think of a Picasso -- it
23 doesn't matter -- the Picasso just got sold for \$150 million
24 yesterday. It doesn't matter who owned that Picasso before.
25 It's a one-shot deal, and it gets sold, the highest bidder wins.

1 But here, again, there's been a lot of testimony,
2 Mr. Holm and Mr. Sonnemaker, that incumbents have a large
3 advantage, and a lot of ones aren't even put out for bid, you
4 know, just make a new deal or they have evergreen contracts.
5 And in Dr. Israel's model, he never takes incumbency into
6 account.

7 So if you look at number one, number two, number three,
8 and number four, in my view, each of those assumptions is
9 incorrect, and also each of those assumptions leads his auction
10 model to lead to upward bias estimates of merger harm. So in
11 other words, by upward bias, Your Honor, I mean greater than it
12 would be if you had a correct model. That's economists talk
13 about bias.

14 Q. Dr. Israel testified at length about Sysco and USF are
15 number one and two. And what was that based on, sir?

16 A. I think that was essentially based on a database that was
17 put together by each of the two companies.

18 Q. All right. And did he -- and is there any way in that
19 database you can actually tell who's number one and number two?

20 A. Not in my view. The database has a lot of infirmities.
21 Dr. Bresnahan -- Professor Bresnahan will testify about that,
22 but I don't think you actually can do it correctly.

23 Q. And was he relying on market shares for his inference of
24 one and two, sir?

25 A. In his model, yes, he basis it on market shares.

1 Q. All right. You -- Dr. Israel also did an exit analysis
2 to assess anticompetitive effects?

3 A. Yes -- no, that's incorrect. He did an entry analysis --

4 Q. Excuse me entry analysis, I'm sorry.

5 A. -- for anticompetitive effects in local markets.

6 Q. And you did an exit analysis; am I right?

7 A. Yes, I did.

8 Q. All right. Turn to slide 26, please.

9 A. Okay. Before we get there, there was one point, again
10 I'm sorry -- I'd like to make. His model is based on RFPs,
11 and -- this is in my report -- 40 percent, only 40 percent of
12 contracts are signed with RFPs, the other 60 percent are signed
13 either through bilateral negotiations or just renewal. So his
14 model doesn't apply to over half of the contracts. And even
15 when there is an RFP there's always by lateral negotiations
16 afterwards, and his model doesn't take into account bilateral
17 negotiations. Sorry.

18 Q. All right. Let's talk -- you did an exit analysis and he
19 did an entry analysis; am I correct?

20 A. Yes.

21 Q. And you don't -- and you have a difference of opinion
22 with him about the entry analysis?

23 A. Yes.

24 Q. Please describe that, sir.

25 A. Okay. Well, if you go to the slide on the entry

1 analysis.

2 Q. That would be 27, please.

3 A. What he did was, he examined entry of Sysco in Riverside,
4 California and Long Island, and he fails two well-known
5 statistical tests. He combined Riverside and Long Island, and
6 he fails what's called the F-test named after RA Fisher. It's
7 been around for about 90 years. And it would -- what it says is
8 you can't combine them, it's incorrect to combine them. And so
9 when you split off Riverside, you can see that the effect is
10 only minus .06 percent. It's less than one-tenth of 1 percent,
11 and it's essentially zero.

12 Q. He also failed the Hausman test?

13 A. Yes. When you look at Long Island, and also Riverside
14 for that matter, he fails the Hausman test, which I invented
15 about 35 years ago. And with the Hausman test, there's a
16 fundamental assumption in any regression model -- so he said he
17 used differences, and differences, that's a regression model.
18 And that is, that the right-hand side variables, or the
19 explanatory variables as they're called, have to be uncorrelated
20 with the air term. If they're not, you get biased and
21 unreliable results. And the Hausman test allows you to test
22 that.

23 So in the paper he referred to, it says, you know, the
24 most difficult thing to do here is to get correct controls,
25 because if your controls in this type of thing are wrong -- the

1 controls is what you compare to -- the controls are correlated
2 with the air term, you get biased and unreliable results. And
3 the Hausman test tests that. And his model fails, with probably
4 99.9999 percent, which says his controls are invalid.

5 So he may come up on rebuttal and say, well, wait a
6 minute, but when you did the Hausman test the answer didn't
7 change that much, but that's the wrong way to look at it. What
8 the Hausman test is testing: Are his controls valid? And
9 they're invalid, and that means you can't make any inferences
10 from his differences in difference model at all which are
11 correct.

12 Q. All right. And so you would not make any inferences, as
13 a professional economist, about his entry analysis?

14 A. Well, even more so, is Hausman of the Hausman test, I
15 certainly wouldn't do it.

16 (Laughter.)

17 Q. All right. And you did an exit study, sir?

18 A. Yes, I looked at --

19 Q. Turn to slide 28 please.

20 A. -- Paducah, Kentucky.

21 Q. All right. And this was USF exiting Paducah in June of
22 2012?

23 A. Right. This was the only exit from broadline
24 distribution center during the data period.

25 Q. And according to Dr. Israel's definition of local

1 broadline customers, had USF entirely exited the Paducah market?

2 **A.** Yeah. So if you use his local market definition they
3 exited, because they started to serve customers from St. Louis
4 and Memphis and other places which are all outside of his market
5 definition.

6 **Q.** Please describe what you did and what conclusions you've
7 drawn from your study, sir.

8 **A.** Well, I did it two ways. Originally I did it at the date
9 of the announcement -- excuse me, I originally did it the date
10 that they exited and found there was no effect. And then he
11 criticized me in his report, so I did it also at the date of
12 announcement. And again, I found no effect.

13 So my conclusion is that if you look at the three
14 studies, in two of the three you find no effect, Paducah and
15 Riverside. In Long Island you can't make an inference because
16 it faces the Hausman test, but even if you used it, you could
17 see that it would be less than 0.5 percent.

18 Now, Dr. Israel testified the other day that he thinks,
19 based on an academic paper, that entry studies are better than
20 exit studies, but if you look at that paper, they're talking
21 about closing down supermarkets. Okay? So I have a house in a
22 town on the north shore of Boston, and they close down the
23 supermarkets -- a supermarket -- we only had one -- because it
24 wasn't selling enough. And I agree with him. You know,
25 oftentimes with a supermarket, when its closed it wasn't

1 succeeding. But it wasn't as if USF was pulling out of the
2 market here, you know, they were still going to deliver into
3 that market, just from other places. So that is very different.

4 So I think basing his view on what happens in the
5 supermarket industry, of which I've written a number of academic
6 papers over the years, especially on Wal-Mart, is incorrect.
7 Supermarkets are not the same as food distribution, so I think
8 using that basis is incorrect.

9 Q. All right. Just to summarize your opinion, sir, do you
10 think that USFX is a price constraint or a strong price
11 competitor on Sysco today?

12 A. Oh, yeah. They compete and they compete hard. I'd be
13 the first to agree.

14 Q. Did you hear Dr. Israel's testimony that Sysco and USF
15 are each other's closest competitor, in his opinion?

16 A. Yes.

17 Q. Okay. Assuming that's true, does that change any of your
18 conclusions in this matter, sir?

19 A. No, because what you have to look at, what are the other
20 alternatives people can turn to? And then also you have to see
21 how far away is number three, and that's going to differ by
22 customer. You can't use market shares. You know, for marginal
23 customers is number three close enough that they're going to
24 switch? You've got to segment the customers. You can't use
25 aggregate market shares, which is what he used. So I don't

1 think the way he went about the analysis really allows you to
2 draw an anticompetitive-effect, conclusion.

3 Q. All right. I want to change to another topic, please.

4 Sir, have you analyzed the impact of the PFG divestiture
5 package on the economic effects here, please, sir?

6 A. Yes, I did.

7 Q. All right. Turn, if you would, to page 31, slide 3-1.

8 THE WITNESS: 31, please, yes. I think we have the wrong
9 slide up.

10 MR. PARKER: All right. Yeah. All right. 31, that's
11 3-2.

12 BY MR. PARKER:

13 Q. All right. Is this your understanding of the -- what
14 makes up the PFG divestiture package?

15 A. Yes. Since Mr. Holm went through the details of this I'm
16 not going to do it again, but I talk about this in my report,
17 and this is the essential settlements of the divestiture which
18 is going to happen if the merger goes through. There's a signed
19 and sealed contract.

20 Q. All right. And you've read the relevant documents
21 regarding the divestiture package and heard Mr. Holm and other
22 testimony on this, sir?

23 A. Yes. And also, I looked at the presentation that PFG
24 made to the FTC and looked at their business plan.

25 Q. All right. Turn to 32, please. Thank you. All right.

1 Did Dr. Israel, in fact, examine the PFG divestiture?

2 A. Yes, he did.

3 Q. And what analysis has he done?

4 A. Well, what he did was he looked at market shares, as I
5 say in the middle. I think he has a market incorrect because
6 PFG has a different definition. But he claimed that they would
7 have 20 percent, I think, it's in 2019. But this excludes chain
8 restaurants. And also, if you look at their business plan, they
9 plan to grow pretty fast so that, you know, I understand what he
10 did, but I would disagree.

11 Q. All right.

12 A. And then he looked at market effects, but I think, again,
13 he has problems because he has the wrong margins again, and it's
14 also based, in my view, on incorrect shares.

15 Q. All right. For the reasons we've discussed above?

16 A. Yes.

17 Q. I mean, earlier?

18 A. Yes.

19 Q. Okay. All right. Turn, if you would, to page 33, let's
20 talk about a qualitative comparison.

21 How does -- in your judgment as an economist reading this
22 record and hearing the testimony, how does the number of
23 distribution centers affect a competitor's ability to compete?
24 And this has to be very confidential.

25 A. Yeah. Well, I think if you have them and they're in the

1 right location, you can compete very well. So it is true that
2 Sysco and USF have more distribution centers, but a lot of those
3 came with acquisitions over the years, so they -- you know, they
4 got a lot.

5 But if you look at this chart -- and I can't mention the
6 names -- you have two companies, and they made presentations to
7 the FTC. And the one in the middle said they can compete
8 nationally with fewer than with what PFG's going to have. And
9 then if you look at the one on the bottom, it's even fewer. And
10 the one at the bottom is growing much faster than USF or Sysco.
11 It's growing at about 10 to 15 percent per year, and it's been
12 very successful. And, in fact, they told the FTC that they
13 didn't even want Las Vegas in the divestiture package because
14 they thought they could do it better from Los Angeles, and Los
15 Angeles, last I knew is about 250 miles to Las Vegas, but they
16 were going use a shuttle strategy, which Mr. Schreiber talked
17 about, you know, it's a hub and spoke strategy, and it can also
18 lead to lower costs.

19 So here were sophisticated participants in the industry,
20 and they were saying, look, we can compete nationally -- and
21 they told the FTC this -- with even fewer the distribution
22 centers than PFG's going to have.

23 Q. So if three professional managed -- sets of managers
24 saying that 35, or some number slightly shorter of 35, is enough
25 to compete with the emerged entity?

1 **A.** Yes. And as we know, PFG -- this was said in court --
2 they're spending a billion-and-a-half dollars. And so, of
3 course, to an economist money talks loudest. And if you're
4 going to spend a billion-and-a-half dollars, you expect to be
5 able to succeed or you don't spend the money.

6 **Q.** Turning to the next slide, please. All right.

7 Have you looked at whether you think PFG will be at a
8 cost disadvantage in competition going forward?

9 **A.** Yes. Dr. Israel claimed there'd be a cost disadvantage
10 because they'd have fewer distribution centers and they'd have
11 to go farther, but he only looked at half the equation. He only
12 looked at outbound freight, and you have to look at inbound
13 freight. We've heard testimony that customers, large customers
14 especially, want to save on inbound freight, and they can do
15 that by using fewer distribution centers because they'll have
16 full loaded trucks. Mr. Holm testified to that.

17 But, furthermore, we know that currently PFG has about
18 the same COGS, cost of goods sold, price as USF, and they're
19 also a member of UniPro, which gives them even more purchasing
20 power. When they get bigger they'll be -- perhaps, be able to
21 get even lower COGS, but most importantly they have lower
22 operating costs today than USF has; so in other words, because
23 of the way that they're set up, they have lower operating costs
24 and that should continue in the future. That actually gives
25 them a competitive advantage compared to where USF is today.

1 Q. All right. And the next slide you have considered PFG's
2 current competitive capabilities, sir?

3 A. Yes.

4 Q. And what have you concluded?

5 A. Well, they're the third largest -- Mr. Holm, I think,
6 testified they're growing at about 14 percent. That's much
7 faster than USF or Sysco. It's over twice as fast, and maybe
8 even four times as fast. They've won a lot of business from
9 Sysco and USF. They're business plan has a lot of growth.
10 They're blacked by Blackstone, which is one of the most
11 successful and sophisticated investment firms. And as I said,
12 they're going to spend a billion-and-a-half dollars in capital.
13 And the old joke goes, "A billion dollars in Washington is real
14 money," so a billion-and-a-half is even more.

15 Q. And so you think that firms like PFG and Blackstone and
16 the others would be spending this kind of money if they didn't
17 think they could execute?

18 A. Yes. FTC did say to Mr. Holm, well, you'd make money
19 even if, you know, you don't do as well as predicted as the base
20 case, but I looked at that. You know, we teach our business
21 school students you have three cases: The downside case, the
22 base case, and the upside case.

23 And even in the downside case, which the FTC brought up,
24 they still do 76 percent of EBITDA, and then the upside case
25 they do 150 percent of base. And the probabilities they gave,

1 they only gave 10 to 15 percent for the downside case, but they
2 gave 35 percent for the upside case. And so, if anything, they
3 expect to do better than their base case. And yes, you know, a
4 billion-and-a-half dollars to an economist speaks loudly.

5 Q. All right. Final topic, sir.

6 There's been a lot of testimony here about cost savings
7 and synergies?

8 A. Yes.

9 Q. And have you made any analysis of that in an effort to
10 help the Court analyze that properly in an antitrust case?

11 A. Yes, I have.

12 Q. And what have you done?

13 A. Well, if you turn to that slide, please.

14 Q. Slide 37, please.

15 A. What you'll see is that I start off with the left-hand
16 column, and that's -- Mr. Wood talked about that yesterday. I
17 start off with McKinsey's estimates of run rate synergies.
18 That's on per year basis. So you can see that it's about a
19 billion dollars, give or take. And the present discounted value
20 of that, using Sysco's cost of capital, is over \$7 billion, so
21 that's a really big saving.

22 But then I subtracted off two elements. I used only
23 variable costs, so I got rid of the fixed cost savings, and
24 that's because economists typically concentrate on variable
25 costs in the short run, although, in the long run fixed costs

1 can also lead to lower prices, but in the short run, variable
2 cost synergies will lead to lower prices.

3 And then I looked at merger specificity, and I cut down
4 the savings of variable costs down to about half a billion
5 dollars. And that's based on things which are both variable
6 costs and merger-specific.

7 So I spent a lot of time working and talking with the
8 McKinsey people, determining what was merger specific, and then
9 the variable costs, fixed costs, I did based on my understanding
10 of how the distribution works and based on economics.

11 **Q.** Have you considered the amount of efficiencies -- and I
12 hope I don't mispronounce this gentleman's name -- Mr. Gokhale
13 has identified as merger specific?

14 **A.** Yeah. He ends up with a much lower number than here, and
15 what I think, as an economist, is that would mean they were
16 leaving a lot of money on the table. And, in fact, even if you
17 take taxes into account, the amount that they're leaving on the
18 table, according to Mr. Gokhale, since they're not merger
19 specific, which means they can do them without the merger -- and
20 they should do them -- the equity price would go up by
21 45 percent, and that would make their shareholders very happy.
22 And since most of them probably have some kind of bonus
23 arrangements or share arrangements, that would make them very
24 happy.

25 So economists don't usually think people leave large

1 amounts of money on the table. So if they could do it them now
2 without the merger, they should be doing them, maybe not every
3 last one, you know, sometimes you miss some, but you certainly
4 expect most of them, so I would disagree with Mr. Gokhale.

5 THE COURT: So, I'm sorry, what's your final
6 merger-specific numbers? Is that the number on the bottom right
7 corner?

8 THE WITNESS: That's it, Your Honor, yep.

9 MR. PARKER: Is that clear, Your Honor, the bottom right?

10 THE COURT: Yes, sir.

11 MR. PARKER: Okay. All right. Let's --

12 THE WITNESS: That's merger-specific variable cost, Your
13 Honor.

14 THE COURT: That's just your variable cost estimate?

15 THE WITNESS: Yes, Your Honor.

16 BY MR. PARKER:

17 Q. All right. Let's move to the issue of pass-through, and
18 that is whether customers or shareholders get the benefit of
19 this and which gets which.

20 Dr. Israel predicts very little pass-through; am I right?

21 A. That's what his auction model predicts, yes.

22 Q. And his analysis is based on what, sir -- or his
23 conclusion is based on what, sir?

24 A. Mainly his auction model.

25 Q. All right. And you do not believe for reasons stated

1 earlier that that really applies here; am I right?

2 **A.** That's correct.

3 **Q.** All right. And you -- what did you do to look at the
4 pass-through issue, sir?

5 **A.** Well, I looked at actual pass-throughs. So Sysco's had
6 this thing called Project Naples or it's sometimes called
7 CatMan. And what I found was that they had passed through just
8 about two-thirds, 64 percent; and similarly USF had a
9 cost-savings program, and they passed through 69 percent.

10 So this is what you expect in economics, that you expect
11 significant pass-through. It actually makes it better for the
12 firm -- I mean, lawyers I know often find this difficult to
13 understand, but when you lower prices you sell more.

14 Now, in Dr. Israel's model he has a zero elasticity in
15 his example because he's selling Picasso photos -- a Picasso
16 picture, so that's why he doesn't get it. But also, if you have
17 a sealed bid auction, you also pass-through some of your cost
18 savings. So the deal is, you keep some for yourself, but you
19 pass-through some of the customers, but you get that back, in
20 part, through increased business.

21 And, of course, you also have competition forcing you to
22 pass it through. And that's what I say here, that the margins
23 have been declining and Jacmar, which is a competitor of theirs,
24 you know, is just a quote from them, saying that they expect to
25 have more competition and lower prices.

1 Q. All right. So you looked at past efforts to save costs
2 and then figured out how much got passed through to customers;
3 am I right?

4 A. Yes.

5 Q. And that's what your conclusion is based on: What
6 competition has done in recent years; am I right?

7 A. Yes.

8 Q. All right. Turn to the conclusion, page 39, please.

9 Is this an accurate summary of what you've testified to
10 today?

11 A. Yes. We've been through all these topics.

12 Q. All right. And for the first time at trial, and I don't
13 believe it had been in his prior reports, Dr. Israel states
14 that -- or predicts that, "There will be a 4 to 5 percent price
15 increase as a result of the merger for his national customers."

16 Do you recall that testimony?

17 A. Yes, I do.

18 Q. And since you saw that and we're here in the courtroom,
19 what, if anything, have you done to respond to that?

20 A. Well, I looked at the merger guidelines, since he depends
21 on them, and if you look at Section 6.1 of the guidelines, they
22 have what's called the "Upward Pricing Pressure Test," which is
23 like a merger simulation model. So I used Dr. Israel's shares,
24 but I used my corrected margins and put it into that model, and
25 that model predicts less than a 1 percent price increase.

1 Now, as an inventor of merger simulation models, the
2 secret is those models always lead to a price increase, a
3 predicted price increase. And so in my experience, if the
4 predicted price increase is less than a percent or two, usually
5 the Department of Justice or whatever will say it's so small --
6 and those models always give an upward prediction -- it's
7 considered de minimis.

8 And furthermore, when you take into account that the
9 efficiencies -- and they're going to be passed through, at least
10 in part -- will forever lead to lower prices, it becomes
11 significantly less than 1 percent, and might even turn negative.
12 So if you base things on the guidelines model, which again, I
13 think is probably an overestimate because it doesn't take into
14 account that these people are power buyers and, you know,
15 bilateral negotiations and you have incumbency -- but even if
16 you use that model you get less than 1 percent, and with
17 efficiencies it's essentially zero or negative.

18 So if you -- I don't think that Dr. Israel's auction
19 model is correct. So if you want to turn to the guidelines,
20 you'll get a prediction of significantly less than 1 percent,
21 which in my view is de minimis.

22 **Q.** All right. Sir, I neglected one point.

23 You talked about your number for the variable cost
24 savings?

25 **A.** Yes.

1 Q. Okay. That's an annual?

2 A. That's annual, yes.

3 Q. So every year they achieve that amount, is what you're
4 saying?

5 A. Yeah. So the net present value of that would be
6 approximately \$4 billion.

7 Q. All right. In the opening arguments we had here, the
8 Court said to the parties, "Do you expect to present evidence
9 concerning pricing of national customer accounts in a
10 post-merger realm; in other words, will I hear modeling by your
11 experts about what we can expect prices to look like in the
12 aftermath of a merger if it were to go forward? And if so, if
13 not increased prices, what will the expert testify is the harm
14 and how is the harm quantified?"

15 How would you use Dr. Israel's analysis and your analysis
16 to answer the Court's question on opening day here?

17 THE COURT: Well, that's really not fair, Mr. Parker.

18 (Laughter.)

19 MR. PARKER: That's what? A whole new standard, Your
20 Honor. Go ahead.

21 THE WITNESS: Should I answer it, Your Honor?

22 THE COURT: Please.

23 THE WITNESS: Okay. So I don't think you can base things
24 on Dr. Israel's model because it's biased upwards, for all the
25 reasons I gave. And in my view, if you use the merger guidelines

1 approach, as I just testified, you basically have a de minimis
2 prediction, and when you take efficiencies into account, it could
3 well be procompetitive.

4 MR. PARKER: Thank you, Professor Hausman. I have no more
5 questions.

6 CROSS-EXAMINATION OF JERRY HAUSMAN

7 BY MR. WEISSMAN:

8 Q. Good morning, Dr. Hausman. How are you doing?

9 A. Pretty good. How about you?

10 Q. Good. Thank you. Let me just see if we can be clear
11 about one thing.

12 You didn't do an economic analysis of whether or not the
13 proposed Sysco/US Foods merger would be anticompetitive,
14 assuming there was no divestiture, correct?

15 A. That's correct. When I started the divestiture was
16 already in motion.

17 Q. So you can't -- assuming no divestiture, you can't tell
18 us whether the acquisition of US Foods by Sysco would be
19 anticompetitive, right?

20 A. That's correct.

21 Q. And you believe that for customers other than independent
22 restaurants, the relevant geographic market in this case is
23 national, correct?

24 A. Yes. I believe there's a food distribution market, not
25 separate for national or local customers, and the relevant

1 geographic market is national.

2 Q. But you didn't look at independent restaurants, correct?

3 A. No, I didn't.

4 Q. So your conclusion, as to national geographic market,
5 pertains only to the customers you looked at which were not
6 independent restaurants, correct?

7 A. Yeah, I looked at many other types but not independent
8 restaurants.

9 Q. Okay. So those are local customers, right?

10 A. Yes.

11 Q. Is your testimony that for local customers the market is
12 national?

13 A. No. What I'm saying is, is that many people who supply
14 local customers, like specialty people, can also supply national
15 customers. And so if you look at the proper market, you have to
16 look at where all the suppliers are, and that's national.

17 Q. Okay. So if the -- if Dr. Bresnahan testifies that the
18 local markets in this case are intensely local, would you agree
19 with that?

20 A. For the independent restaurants? Yes.

21 Q. Okay. But for the other customers, other than
22 independent restaurants, it's a national geographic market,
23 correct?

24 A. That's my view, that, you know, the specialty people can
25 serve these large customers, and they're located all over the

1 country.

2 Q. Okay. You haven't performed any market share
3 calculations in this case, correct?

4 A. That's correct.

5 Q. Okay. And let's talk a little bit about product market.
6 You talked a little bit about the Hypothetical Monopolist Test?

7 A. Yes.

8 Q. Are you familiar with the testimony of Mark Allen, the
9 president of the International Food Distributors Association?

10 A. No.

11 Q. Have you -- that was not something you considered as part
12 of your report?

13 A. I might have, but, you know, I've seen so many documents
14 I don't remember it.

15 Q. Okay. Let me see if I can refresh your recollection and
16 show you what -- well, you know what the IFDA is?

17 A. I think it's a trade group.

18 Q. Okay. And Mr. Allen lives and breathes in this industry,
19 correct?

20 A. I don't know, but if he's the president, I hope so.

21 Q. Okay.

22 MR. WEISSMAN: You can put this up on the screen.

23 BY MR. WEISSMAN:

24 Q. And at his -- and Mr. Allen was originally designated as
25 a defense witness in this case. Do you know that?

1 **A.** No, I don't.

2 **Q.** Okay. So he was asked at his deposition in this case:

3 "Would it be good for consumers, in your view, for all broadline
4 distributors in the United States to merge into one?"

5 "And his answer was: And you're talking Sysco, US,
6 everybody into one?"

7 "Question: All broadliners into one.

8 "Answer: I would presume that would not be good for the
9 consumer.

10 "Question: And why is that?"

11 "Answer: You've only got one choice.

12 "Question: And having only -- and having one choice
13 would probably allow that hypothetical monopolist, for lack of a
14 better word, to have some pricing power?"

15 "And his answer was: Sure.

16 "Question: Why would it allow the hypothetical
17 monopolist to have pricing power?"

18 "They would be the only distributor available in the
19 market to service the needs of those customers.

20 "And customers couldn't defeat that price increase, based
21 on you're experience?"

22 "His answer was: Probably not."

23 Does that -- did you see his testimony?"

24 **A.** No, I don't think I did.

25 **Q.** That's not testimony you asked to see as part of your

1 analysis?

2 **A.** Well, I might have, but -- of course, he doesn't know
3 what a hypothetical monopolist is, probably. But more
4 importantly, he doesn't -- I think, unless he's an economist --
5 understand the difference between inframarginal and marginal
6 customers that I've testified to.

7 **Q.** But he lives and breathes in this industry, correct?

8 **A.** I'm not disagreeing.

9 **Q.** Okay. So let's look a little bit about where your
10 Hypothetical Monopolist Test would take us.

11 So, in your opinion, based on the way you define the
12 market, all broadliners in the United States could merge
13 together into a single company, and that hypothetical monopolist
14 would have any ability to raise prices but a small but
15 significant amount, correct?

16 **A.** If it tried to it would lose enough business at the
17 margin to defeat it, and that's what the critical loss analysis
18 shows.

19 **Q.** So let's put a little finer point on this.

20 So Sysco merges with US Foods, and then next week --
21 let's sort of wield that wand -- Sysco then buys PFG, Reinhart,
22 Gordon, every other broadliner in the United States, and you're
23 saying you wouldn't have a problem with that, correct?

24 **A.** Well, the Critical Loss Test says that there are other
25 people that are constraining the margin. That's why we do

1 mathematics or economic analysis. And if you use a Critical
2 Loss Test it says there are other people in the market.

3 **Q.** So to use my hypothetical, we were here two months from
4 now, and you were presented with the merger that I just gave
5 you, US Foods, Sysco, PFG, Gordon, Reinhart, every single
6 broadliner in the United States, you'd be telling the Court
7 that's not a problem, correct?

8 **A.** No, I wouldn't be saying it's not a problem, but I would
9 be saying the market definition says the market's broader than
10 that, and that just follows from the Katz/Shapiro formula. It
11 could still create a problem for other reasons, so I'm not going
12 to say it don't create a problem, but we're just talking about
13 market definition now.

14 **Q.** Right, and I'm talking about market definition.

15 **A.** So am I.

16 **Q.** What would be the other reasons why it could create a
17 problem?

18 **A.** Well, you have to look at other things like certain
19 customers and the customers that differentiated. And if you
20 looked at them, maybe some could be price discriminated against.
21 There's no evidence of that. But if I was doing it, I would
22 have done some econometrics. You know, my econometrics show
23 there's none, but it's certainly conceivable. So that's what
24 you need to look at.

25 But if you want to do market definition, you know, the

1 critical loss is just straightforward mathematics and says the
2 market's broader.

3 Q. We could agree, sir, that based upon your review of Sysco
4 documents, Sysco views US Foods as an important competitor,
5 correct?

6 A. Yes, I testified to that.

7 Q. And we also can agree that, based upon your review of
8 US Foods' documents, it's clear that USF believes Sysco is an
9 important competitor to USF, correct?

10 A. Yes, as well as many other people, but yes.

11 Q. And, in fact, you just testified on direct that USF is a
12 strong price constraint on Sysco, right?

13 A. I absolutely believe that, yes.

14 Q. Okay. So --

15 A. But, of course, PFG will be also, but currently I believe
16 that USF is.

17 Q. Let's talk a little bit about the merger guidelines.
18 We talked before about power buyers, correct?

19 A. Yes.

20 MR. WEISSMAN: And if I could hand up the binders. Your
21 Honor, may we approach with binders?

22 THE COURT: Of course. Mr. Weissman, let's actually take
23 a brief recess and give our court reporter a rest.

24 MR. WEISSMAN: Sure.

25 THE COURT: This is a logical time to do it, it seems to

1 me.

2 MR. WEISSMAN: Sure.

3 THE COURT: Why don't we break for about -- why don't we
4 do ten minutes, and we'll all be back here at 10:35.

5 (Thereupon, a break was had from 10:25 a.m. until
6 10:38 a.m.)

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

8 All right. Mr. Weissman, Dr. Hausman.

9 BY MR. WEISSMAN:

10 Q. Okay. Welcome back, Dr. Hausman. There was some
11 discussion earlier with Mr. Parker about power buyers and buyer
12 power. Do you remember that?

13 A. Yes.

14 Q. And it's fair to say, isn't it, that large buyers in this
15 industry have buyer power, but only to the extent they have
16 attractive alternatives available to them, correct?

17 A. Yeah, that's what I testified to. I agree.

18 Q. Okay. And a big reason for the low margins for national
19 accounts, in your view, is because of the buyer power, correct?

20 A. Yes. They both have power and they're sophisticated,
21 both.

22 Q. Okay. And you're familiar with the merger guidelines,
23 obviously, correct?

24 A. Yes.

25 Q. Okay. Could you please open your binder to PX 6059,

1 and in particular, I'm going to ask you to turn to page 27 of
2 the merger guidelines.

3 A. Okay. What page did you say, sir?

4 Q. It's page 27.

5 A. Sure.

6 Q. It's PX 6059-030. Let me know when you're there.

7 A. Sure.

8 Q. Take your time.

9 A. I'm on 27, "Power Buyers," Section 8?

10 Q. Yeah, Section 8, correct?

11 A. Yes.

12 Q. You're familiar with this section of the guidelines,
13 correct?

14 A. Yes.

15 Q. Okay. Let me put up on the screen the part of the
16 guidelines.

17 Again, this is under "Power Buyers," correct?

18 A. Yes.

19 Q. And the merger guidelines, the last sentence before the
20 example says, "Normally, a merger that eliminates a supplier
21 whose presence contributed significantly to a buyer's
22 negotiating leverage will harm that buyer."

23 Do you see that?

24 A. Yes.

25 Q. And again, USF, in your view, is a strong price

1 constraint on Sysco, correct?

2 **A.** Yes, and PFG will replace USF. That's what I testified
3 to.

4 **Q.** And, in fact, sir, you believe that -- you believe that
5 in this case, PFG will be that new entrant to replace USF,
6 correct?

7 **A.** Yeah. There are other things that constrain Sysco, you
8 know, DMA, regional distributors and all, but to the extent that
9 USF has ruled, PFG will replace it, yes.

10 **Q.** Let's talk a little bit about RFPs and bidding. And do
11 you remember talking with Mr. Parker about RFPs and bidding?

12 **A.** Yes, I do.

13 **Q.** You didn't analyze USF's responses to any RFPs, did you?

14 **A.** No.

15 **Q.** And you didn't analyze Sysco's responses to any RFPs, did
16 you?

17 **A.** No. I read testimony, but I didn't analyze responses.

18 **Q.** And you recall Dr. Israel's report stated that he did
19 analyze Sysco's data on RFPs, correct?

20 **A.** Yeah. I think that's a defective sample, as I told you
21 in my deposition, but yes he did. It's a bias sample.

22 **Q.** And you heard -- you were in the courtroom when
23 Dr. Israel testified last week?

24 **A.** Yes.

25 **Q.** And you heard -- you testified on direct with Mr. Parker

1 that you believed he did not include bilateral negotiations in
2 his analysis, correct?

3 A. In his -- in his model he doesn't include by lateral
4 negotiations, yes.

5 Q. And -- but you heard Dr. Israel testify in court last
6 Friday that he didn't just analyze RFPs, but he also analyzed
7 situations in which either of the parties was bidding or
8 negotiating with a national customer for broadline service,
9 correct?

10 A. Yes, but typically you don't know who else is bidding and
11 competing.

12 Q. But he said he did that, correct?

13 A. Yes, he said he did that.

14 Q. And you didn't do that, correct?

15 A. No.

16 Q. And it's your understanding, sir, that as part of his
17 analysis of customer negotiations, Dr. Israel analyzed ordinary
18 course business documents, including e-mails, bid proposals and
19 profit models, correct?

20 A. Yes. And nowhere does it appear in his auction model. I
21 want to be quite clear, but he did testify he examined those
22 qualitatively.

23 Q. And you didn't do anything to determine whether
24 Dr. Israel's calculations of bidding wins by USF was incorrect?

25 A. No. But as I said, the sample is biased. It's what's

1 called a self-selected sample. And I've written papers on that,
2 and other people have. In fact, somebody at the University of
3 Chicago won a Nobel Prize based on that. So there was testimony
4 how a lot of that is just recollection of people, but it's not a
5 random sample. It's a biased sample, so I have severe doubts,
6 as an econometrician, what weight you should put on that. And
7 since you can't correct the sample, I decided that I wasn't
8 going to do it.

9 Q. So are you saying you can't -- as an economist, can't
10 rely on ordinary course business documents, including e-mails,
11 bid proposals and profit models for any analysis?

12 A. No. Profit models, if you look at all the customers,
13 then it's a good idea. But if you start looking at, for
14 instance, salespeople's recollection or what's in a database
15 like that, that typically will be a bias sample. I mean, we
16 know that, and people have testified to that. And when you
17 start doing analysis with a bias sample you get biased results,
18 unless you can correct for the bias, which he doesn't, of
19 course.

20 Q. Are you familiar with the testimony of Mr. Brawner who
21 appeared yesterday, a Sysco representative?

22 A. Yes.

23 Q. And did you hear or do you understand he testified that
24 the request for incentives that are filled out by the
25 salespeople, in his view, are reliable?

1 A. Yeah, although I thought that was mainly local. I wasn't
2 here for his testimony, but I think that was local, and what I'm
3 concentrating on, of course, are national.

4 Q. Right. But are you saying that for local they may be
5 reliable but for national they're not?

6 A. I haven't looked at local, but I've done many mergers,
7 probably 50 to 100 in my lifetime, and when you have these and
8 salesmen start saying this is what I remember, it's just not
9 objective. In fact, this is talked about all the time in
10 economics. Can you depend on survey, what people tell you in
11 responsive of surveys? I've written a multitude of papers on
12 this, and the answer is typically not, because they have
13 incorrect recollection, they often don't put the data in, and
14 you end up with a biased sample. There are sometimes ways to
15 correct for the bias, and I've developed techniques to do that,
16 but you can't do that here, or at least so far as I can see.

17 Q. And you also didn't do anything to determine whether
18 Dr. Israel's calculation of who the closest bidder in bidding
19 situations won by Sysco was, correct?

20 A. That's correct. That has the same infirmities, but yes.

21 Q. And your analysis revealed that about 40 percent of all
22 broadline distribution contracts start with a formal request for
23 proposal, correct?

24 A. Yeah. The majority do not, but about 40 percent do.

25 Q. So you referred to bilateral negotiations?

1 A. Yes.

2 Q. Let me see if the Court understands what you mean by
3 those. I'll show you some examples, and you can tell me if
4 these are what you would include. If you'd turn to PX 1451.

5 A. I'm there.

6 MR. WEISSMAN: This should not go up on the screen. Thank
7 you.

8 BY MR. WEISSMAN:

9 Q. So I'm not going to name the customer, but is it fair to
10 say this is one of Sysco's largest foodservice management
11 customers?

12 A. Yes.

13 Q. And it's dated -- this e-mail's dated August 7, 2013?

14 A. Yes -- the one I'm looking at, I may be in the wrong
15 place, is 2012, actually.

16 Q. Okay. I want to make sure we're on the same one. 1451.

17 A. Oh, I'm at 1455. That's my fault. Sorry about that.

18 Q. No problem.

19 A. Oh, yeah, so -- right, I'm there.

20 Q. Okay. And this is one of Sysco's largest foodservice
21 management customers?

22 A. Yes.

23 Q. And do you know -- do you know what percentage of
24 business that this customer does with Sysco, as opposed to every
25 other foodservice distributor?

1 A. No, I don't know. It varies a lot across customers.
2 That's one of the things that makes them heterogeneous. Some
3 are close to 100 percent; you know, some are less -- 10 percent
4 or less.

5 Q. All right. Would it surprise you that this is -- this
6 customer's closer to 100 percent?

7 A. No. There certainly are customers, and that's what I
8 would expect a lawyer to choose.

9 Q. Okay. And do you see that the customer's e-mailing Sysco
10 that is says, "We need to discuss this. As you're aware, we did
11 reach out to US Foods and asked for proposal for the business.
12 Our idea was that, if we didn't see any great benefit versus the
13 Sysco extension, then we would move forward. They've come back
14 with a proposal that would generate approximately X dollars in
15 additional yearly revenue, in addition to adding extra revenue
16 enhancements that do push that number over X million dollars."

17 A. Yes.

18 Q. Is this what you would consider a bilateral negotiation?

19 A. To some extent, although I would have grave doubts, if I
20 were Sysco, about the numbers that you didn't read into the
21 record. Because, in my experience, customers tend to exaggerate
22 other offers, so you always take it with a proverbial grain of
23 salt, unless they show you something on paper or something in a
24 spreadsheet. But yes, this would be -- I can get a better deal
25 elsewhere, so you better sharpen that pencil or I'm out of here.

1 Q. Right. And the elsewhere here, the leaver that this
2 customer of Sysco pulled was US Foods, correct?

3 A. That's correct.

4 Q. And, in fact, you're aware, sir, that this customer was
5 able to extract concessions, ultimately, from Sysco by using USF
6 as a leaver, correct?

7 A. Yeah. And they might have been available to do so with
8 DMA, but yeah, that's a bilateral negotiations: Give me a
9 better deal, please.

10 Q. Is there any evidence that you can point me to that this
11 customer cited DMA?

12 A. No. I'm looking at the e-mail, and I'm agreeing with
13 you. They cited US Foods, some customers will do that.

14 Q. And you didn't do any analysis of Sysco's national
15 account customers to determine who they used as a leaver point
16 in their bilateral negotiations with US Foods, did you?

17 A. No. I looked at the econometrics and looked at the
18 margins they were paying.

19 Q. So you haven't performed any analysis of which
20 distributor has been used as a point of leverage, most often in
21 bilateral negotiations between US Foods and its national
22 customers, correct?

23 A. That's correct.

24 Q. And you haven't performed any analysis of which
25 distributor has been used as a point of leverage most often in

1 bilateral negotiations between Sysco and its CMU or national
2 account customers, correct?

3 A. Maybe I heard that backwards, but I'll agree, but you
4 meant to say the two companies, and if you didn't, I'll agree
5 that Sysco and US Foods could be reversed in what you asked. I
6 may have just misheard you.

7 Q. Okay. Let me --

8 THE COURT: I think your question was US -- you said Sysco
9 and national, and then Sysco and CMU, and I think you meant to
10 say US Foods and national, Sysco and CMU.

11 MR. WEISSMAN: Yeah, CMU or national, however you want to
12 refer to it.

13 BY MR. WEISSMAN:

14 Q. So let me read it so we have a clear record. Okay?

15 A. Sure.

16 Q. You also haven't performed any analysis of which
17 distributor has been used as a point of leverage most often in
18 bilateral negotiations between Sysco and its CMU customers,
19 correct?

20 A. That's correct.

21 Q. Let me show you PX 3055.

22 A. Okay.

23 Q. Take a minute to look at that.

24 MR. WEISSMAN: And again, if I could ask Ms. White not to
25 put it on the screen.

1 BY MR. WEISSMAN:

2 Q. I'm not going to identify this customer, but is it fair
3 to say this is a --

4 A. Excuse me, I'm still reading it. Am allowed to do that?

5 Q. Oh, I'm sorry. Yeah, sure, go ahead.

6 A. Okay, I've looked it over.

7 Q. Okay. And this customer -- again, I won't name this
8 because we're in open court -- but this is a large customer GPO
9 of one or both of the merging parties, correct?

10 A. Yes. My memory is they used a number of distributors,
11 which I hope is correct, I could be wrong, but yeah, they use a
12 number of distributors, not just Sysco and US Foods.

13 Q. Do you remember who they used, if it's not US Foods and
14 Sysco?

15 A. No. I thought there were others, but I'm saying my
16 memory could be imperfect.

17 Q. Okay. And if you look at this document -- again, we're
18 talking about bilateral negotiations -- and this is from
19 February 2012, this is an internal US Foods' e-mail, correct?

20 A. Yes.

21 Q. And Mr. Lederer is the CEO of US Foods, correct?

22 A. I'll agree.

23 Q. And the author is Mr. Schuette, who's the COO of
24 US Foods, correct?

25 A. Yes.

1 Q. And Mr. Lynch is the national accounts head for US Foods,
2 correct?

3 A. Yeah. I think he testified yesterday.

4 Q. Yes. So do you see here where Mr. Schuette is reporting
5 on the -- some conversations with this customer?

6 A. Yes.

7 Q. And is it fair to say this would be considered a large
8 national account?

9 A. Yes.

10 Q. And do you see where it says, "This is a big decision for
11 them, with a lot of proposed change, so" --

12 A. Can you tell me where you are? I'm lost.

13 Q. Yeah, sure. If you look on the screen you can see where
14 I've highlighted.

15 A. Oh, I'm sorry, I thought you weren't going to put it on
16 the screen. Okay.

17 Q. I mean, whichever's easier for you I can --

18 A. Yeah. No, that makes it easier. Thank you.

19 Q. Okay. So, "This is a big decision for them with a lot of
20 proposed change. Sysco is knocking hard on the door wanting in,
21 no doubt, to slow us down. John..."

22 And he's talking about John Lederer, correct, CEO?

23 A. Yes.

24 Q. "... he assured that Tom and I will get with Sodexo --
25 will get Sodexo and ARA."

1 That's Aramark, correct?

2 A. Yes.

3 Q. "We have Compass on the calendar...."

4 Compass is another foodservice management company,
5 correct?

6 A. Very large, yes.

7 Q. "...set and make it known to Sysco that payback will
8 come."

9 Do you see that?

10 A. Yes.

11 Q. And is this another example of a bilateral negotiation
12 between the customer and US Foods?

13 A. It sounds like it. I mean, I can't tell whether they're
14 negotiating, but they're obviously saying we have alternatives
15 and we're going to go to the alternatives unless you give us a
16 good deal.

17 Q. Okay. And the alternative here identified, according to
18 the USF top management, was Sysco, correct?

19 A. It says, "Sysco is knocking hard on the door," yes.

20 Q. Okay. If you look -- continue to look down through the
21 e-mail here on PX 3055, do you see it says the first name of the
22 customer, and I'm not going to mention his first name. It
23 starts with a D. I'm under number one. It's not highlighted,
24 but I want to give it some context.

25 A. Yeah, okay.

1 Q. And D, "told me later this was for strategic purposes,
2 which apparently were customer-related in their founders, who
3 feel they should have a relationship with the largest
4 distributor who is perceived to be the gold standard in
5 foodservice."

6 Do you see that?

7 A. Yeah, I see it.

8 Q. And that's referring to Sysco, correct?

9 A. Yes, although DMA is mentioned in the next paragraph as
10 well, of course.

11 Q. Well, right, and I'm going to get to that. It says, "I
12 believe" -- well, on number two, it says, "Currently we sell
13 about X percent EB."

14 EB is private label or exclusive brands, correct?

15 A. Yes.

16 Q. "What incentive would they receive if that went to blank
17 percent? I believe this is coming from the Sysco dialogue as
18 DMA would not have a consistent approach to any brands
19 opportunities."

20 Do you see that?

21 A. Yes. So this was the point I was making before. He's
22 making an educated guess that it's from Sysco, but nobody knows,
23 it could be from DMA, and he's inferring he doesn't think they
24 have a consistent approach. But, of course, Sysco and USF don't
25 have a consistent approach across all their OpCos either.

1 But my point is, is that you just don't know when you're
2 bargaining. It could be DMA; it could be Sysco.

3 Q. Does this e-mail from the top executive suggest to you
4 that they believe their main competition is DMA, as opposed to
5 Sysco?

6 A. That's what this one person says, but he does acknowledge
7 that it could be DMA.

8 Q. Well, but this one person is the COO of the company and
9 he's copying Tom Lynch, correct?

10 A. Yeah. I'm not disagreeing.

11 Q. Okay.

12 A. But, you know, he doesn't know whether it's Sysco or
13 DMA's. He's making an inference here under uncertainty.

14 Q. Can we agree, sir, that Sysco and US Foods compete
15 vigorously with one another on nonprice competition as well?

16 A. Yes, although price turns out to be the most important,
17 by far, in my view, but they do compete, I agree.

18 Q. And if you look at the next sentence that I've
19 highlighted there, it says, "If you are a cynic like me" --
20 again, this is someone from US Foods talking -- "I would bet the
21 new products that we have come out with have been waved in their
22 face and look for them" -- it's referring to Sysco -- "to
23 respond with a new and unique Sysco product launch soon. Just
24 wait, they copy everything."

25 Do you see that?

1 A. Yeah. Again, that's an educated guess how Sysco's going
2 to respond, but he might be right.

3 Q. Do you know what -- do you know what US Foods' executive
4 meant when he says they copy everything?

5 A. Yeah, that -- well, no, I don't know, because I've never
6 talked to him. But I think what he's saying is if we come out
7 with something, they're going to try to compete with it. But,
8 of course, in terms of new brands and all, you have to remember
9 that Sysco has done the CatMan strategy, which was testified to
10 by the McKinsey person, Mr. Wood, and that's actually they've
11 reduced the number of SKUs and reduced the choice and they've
12 been able to offer their customers lower price. So to an
13 economist, you know, there's typically a tradeoff between choice
14 and price. I've written a lot of academic papers on this. And
15 so it's not just new products. You have to look at the price as
16 well.

17 Q. Right. And that, what you've described, occurred in a
18 world where Sysco was competing with USF, correct?

19 A. And with DMA and with local people, but yes, I agree.

20 Q. And if you please look at PX 277, I'm not going to go
21 through all of these, but I want to go through a couple more
22 with you. Okay?

23 A. Sure. 277, you said? Okay. I'm there.

24 Q. Take whatever time you need to look at this and let me
25 know when you're done.

1 A. Okay. Okay. I've read it.

2 Q. Okay. Are you a familiar with this document?

3 A. Yes, I've seen this before.

4 Q. And again, without talking specifics here because we're
5 in open court, is this -- is this an e-mail from someone at
6 US Foods to the USF board?

7 A. Yes.

8 Q. And it says, "We plan to make our best and final offer to
9 customer Y tomorrow."

10 And customer Y is one of the largest customers of
11 US Foods, correct?

12 A. Yes.

13 Q. You'd consider it a national account, correct?

14 A. Oh, yes.

15 Q. And it says, "Based on feedback we received from their
16 senior management, we plan to offer an X basis point reduction
17 from our current program margin for five to seven year sole
18 source award. The total analyzed investment would be X million
19 dollars at current sales levels. This is an aggressive bid that
20 we expect to be competitive. That said, we expect that Sysco
21 will present an even more aggressive offer that will require
22 this customer to choose between a greater margin reduction and
23 our proven execution and infrastructure investment."

24 Did I read that correctly?

25 A. Yes, you did.

1 Q. Is this another example of a bilateral negotiation?

2 A. So what this shows is a couple of things. You know, that
3 they're worried about Sysco, but they don't know what Sysco's
4 going to bid, so this is very different from an English auction
5 where you know the bids of everybody else. So that's one thing
6 I emphasize. They're just guessing. I mean, it's an educated
7 guess, of course, of what Sysco's going to do. So it's like a
8 sealed bid. It's not an open auction like Dr. Israel's model
9 is. And, you know, they're going to know they have to bid.
10 It's a bilateral negotiation. It's not an RFP.

11 But, also, you might note on the next page that they say
12 it might be a dual source award between us and Sysco as well, so
13 you know, that's something else they're considering.

14 Q. Right. It didn't say it'd be a dual source between USF
15 and DMA, for example?

16 A. That's correct.

17 Q. Okay. Let me show you another -- and do you know if
18 Dr. Israel factored this into his analysis?

19 A. I'm sure he looked at it, but it's nowhere in his auction
20 model, there is no -- he claimed that his auction model can take
21 care of bilateral negotiation and various other things in life,
22 but it is nowhere in his model. He has an English auction
23 model, but yes, I think he took this into account in thinking
24 about the case.

25 Q. But you didn't take it into account, correct?

1 A. No, I did.

2 Q. Go to 1061, please, PX 1061.

3 A. Let's see, 1061. 1064 -- um, can someone --

4 MR. WEISSMAN: Do you mind if I approach?

5 THE WITNESS: Yeah, because I have 1060 and 1068, but I
6 don't seem to have 61. I'm just -- I'm sure I'm just doing
7 something wrong.

8 MR. WEISSMAN: For the record, this is PX 1061, it's a
9 internal Sysco document.

10 THE WITNESS: I'm very familiar with this document.

11 BY MR. WEISSMAN:

12 Q. You've seen this document?

13 A. Yes, and I know what's in it. I don't need to read it.

14 Q. Okay. So again, we're going to talk elliptically about
15 this document. It's from -- just before the merger, correct,
16 was announced October 2013?

17 A. Again, I may be in the wrong spot. It says February
18 2014, so I --

19 Q. Are you on 1061?

20 A. Now let me go to 1061, and you said the date was October
21 2013, so I'm there. Thank you.

22 Q. That's just before the merger was announced, right?

23 A. That's my understanding, yes.

24 Q. Okay. And this customer is a hospitality customer,
25 correct?

1 A. Yes.

2 Q. Geographically disbursed throughout the United States,
3 correct?

4 A. That's my understanding.

5 Q. A number of locations, correct?

6 A. Yes.

7 Q. And purchases from a number of OpCos of Sysco or USF,
8 correct?

9 A. Yes.

10 Q. And do you see, sir, that -- and this is a document that
11 you considered?

12 A. I believe so, yes.

13 Q. Okay. And do you see where it says -- and this is an
14 internal e-mail. It says, "We are under significant competitive
15 pressure with USF on this business, since customer G brought in
16 a new director of purchasing and the private equity firm hired a
17 consultant."

18 And then skip down a line where I've highlighted, it
19 says, "Knowing USF is in the mix, we know signing bonus is a key
20 element, as well as low margins."

21 Do you see that?

22 A. Yes. So he says or she says, I guess it's a he, "Knowing
23 USF is in the mix," so I can't tell whether he believes there
24 are other companies that are out there as well or just USF. I
25 would infer that he thinks that there are other companies, but

1 I'm not sure.

2 Q. Does this individual reference anyone but USF in this
3 e-mail?

4 A. No. But he says that they're in the mix, and usually mix
5 you have to have more than one element, but I can't tell for
6 sure, I'll be the first to admit.

7 Q. Okay. Is this an example of a bilateral negotiation?

8 A. Yes. It looks like no RFP or anything.

9 Q. And let me show you one last one and then I'll move on.
10 Okay?

11 A. Sure.

12 Q. If you go to 1032, please, sir.

13 A. 1032. Okay.

14 Q. I believe this is a document that I showed you at your
15 deposition, but take whatever time you need.

16 A. No, this is the one I said I knew very well. I was there
17 before. It was my mistake.

18 Q. Okay. This is an internal -- this is PX 1032. This is
19 an internal e-mail within Sysco, February 2014, correct?

20 A. That's correct.

21 Q. And this is discussing or giving an executive summary of
22 the -- Sysco's relationship with one of its largest healthcare
23 customers, correct?

24 A. Yes.

25 Q. It says -- I'm not going to read this into the record for

1 confidentiality, but can you read that and just tell me if
2 you're familiar with that?

3 **A.** Yes. But I would like to point out that there are a
4 number of companies they were competing against. I think -- is
5 it okay, Your Honor, if I read it into the record? I don't --
6 you know, it's just who the competition is. It's -- or stop me
7 if you want, Mr. Weissman.

8 THE COURT: I think I -- it's not okay, Dr. Hausman.

9 THE WITNESS: Oh, okay.

10 THE COURT: There are a number of confidential documents.

11 THE WITNESS: Okay, sir.

12 THE COURT: It will be in the record, but it can't be read
13 in public.

14 THE WITNESS: Okay. I just point out there are number of
15 companies.

16 BY MR. WEISSMAN:

17 **Q.** Okay. Do you see the -- and I'll just skip down to the
18 second paragraph. And again, I won't read this, but is it fair
19 to say that Sysco decreased its margins and increased its
20 incentives to the customer in exchange for a certain term year
21 agreement and no USF?

22 **A.** No. There was testimony about that the other day. They
23 got a nice, long agreement and they got no USF, although they
24 still faced the other competitors, which you've highlighted in
25 the paragraph above, which I -- whom I won't name.

1 Q. Okay. And are you familiar, sir, with the testimony of
2 this customer in this case, and what he testified about the
3 negotiations?

4 A. No, but I do want to point out this was an RFP, again,
5 followed by bilateral negotiation, which I point out happens all
6 the time or almost all the time, so even if you do have an RFP,
7 you still have bilateral negotiations at the end.

8 Q. And you're aware, sir, that Dr. Israel factored in this
9 document into his analysis, correct?

10 A. Not into his model, but he did into his analysis, yes.

11 Q. Okay. And let me -- the customer, again, I won't name
12 the customer, but that customer was -- offered sworn testimony
13 in this case, correct?

14 A. I don't know, but I'm not going to disagree.

15 Q. Okay. Let me see if this refreshes your recollection.
16 We asked this customer about this particular negotiation, and
17 this customer's testimony, the question was: "Other than
18 US Foods, is there another distributor that customer could use
19 as that kind of leverage to improve their terms with Sysco?

20 "And his answer was: "No," correct?

21 A. Yes. He's a competitor of US Foods and Sysco, and that
22 was his testimony.

23 Q. You're saying because -- you think the customer is a
24 competitor?

25 A. A GPO, as I said in my report, are part customers and

1 part competitors of the distributors, yes.

2 Q. So you're saying his testimony's false?

3 A. No. I'm just saying it needs to be read in context that
4 he's a competitor as well as a customer.

5 Q. Okay. Let me move on.

6 It's fair to say, isn't it, sir, that in a number of
7 cases the customers you looked at use Sysco and US Foods as
8 lever points against each other to obtain better pricing in
9 bilateral negotiations?

10 A. That's correct.

11 Q. And at your deposition in this case, just two weeks ago,
12 right?

13 A. Yes.

14 Q. You couldn't identify for me a single example where a
15 customer used DMA, other than the document I just showed you
16 with that customer --

17 A. Yes.

18 Q. -- as a lever point in bilateral negotiations against
19 US Foods and Sysco, correct?

20 A. Yes. As I told you, my memory for names isn't great, so
21 I've had over 1,000 students. I do remember Ben Bernanke's
22 name. He was my teaching assistant, but I don't really have a
23 great memory for names anymore. I'm very sorry.

24 But, yeah, that document they showed DMA and there are
25 other documents, I'm sure, but they're not named Ben Bernanke.

1 Q. And there wasn't anything memorable enough for you to
2 identify for me two weeks ago, correct?

3 A. No, I just can't -- you lawyers are great at that. You
4 spend your life at it, but I just can't sit in a deposition and
5 remember names. I'm sorry.

6 Q. You spent close to 200 hours on this case, correct?

7 A. Yes.

8 Q. And you weren't able to identify for me a single name,
9 correct?

10 A. Well, DMA from that document, but owner than that, yes.

11 Q. Other than that document?

12 A. Yes.

13 Q. Okay. Now, you conclude in your report that a better
14 description of the process of negotiation is a multi stage
15 approach, correct?

16 A. Yeah, sealed bid, multi stage approach. But sealed bid
17 is very important, because what we've seen from all these
18 documents, Sysco or USF or whomever, doesn't know what the other
19 person's bidding, so it's not an open outcry auction, which an
20 English auction is, it's a sealed, multi stage auction, yes.

21 Q. But you didn't analyze the competitive effects of the
22 proposed merger under this multi stage approach model you
23 proposed, correct?

24 A. No. It's too complicated to do merger simulation on. I
25 wish I could, but it's just too complicated.

1 Q. In fact, you believe that no merger simulation model can
2 be applied to a multi stage approach, correct?

3 A. No existing one for sealed bids. I wish it could. I
4 wish I could invent one, but, you know, to the extent that I
5 know what's out there, there is not one.

6 Q. And you don't have a model for this particular merger,
7 correct?

8 A. No. That's why I turned to the merger guidelines and
9 used the model there.

10 Q. And when doing your efficiencies analysis, including what
11 you talked about with Mr. Parker, you didn't attempt -- you did
12 not attempt to analyze the offsetting consumer harm, correct?

13 A. That's correct, at the time of my deposition I had not.

14 Q. Okay. And it's fair to say, isn't it, that you didn't do
15 any analysis to determine how frequently when a bid or bilateral
16 negotiation comes down to two distributors, that those two
17 distributors were Sysco and US Foods, correct?

18 A. Yeah, but I don't think anybody knows that because it
19 could be others. It's just educated guesses.

20 Q. Now, Mr. Parker, during his opening, showed a slide from
21 a group called Cleveland Research. Are you familiar with
22 Cleveland Research?

23 A. Well, you show me that in the deposition, yeah.

24 Q. Okay. And he showed us this as a slide in support of the
25 opening. And if you could turn to PX 9332.

1 A. 9332. Could I have some help again, please?

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

3 THE COURT: Sure.

4 THE WITNESS: Yeah, I'm having a bad day.

5 MR. WEISSMAN: Let me help you. Yeah, I'm sorry, this is
6 the big one. This one does not. Does yours include it?

7 THE COURT: It does not.

8 MR. WEISSMAN: Okay. I apologize. We'll get it for you.

9 This is a public document so I can show it on the screen, and
10 I'll give you my copy, sir.

11 THE WITNESS: Okay. Thank you.

12 MR. WEISSMAN: Well, this may be our only copy her, so let
13 me show it on the screen, and I'm happy to give it to you.

14 THE WITNESS: Okay.

15 MR. WEISSMAN: Do you want to read it first?

16 THE WITNESS: No. You showed it to me in my deposition,
17 so we'll do the best we can.

18 MR. WEISSMAN: Okay. Thank you.

19 BY MR. WEISSMAN:

20 Q. So this is a public document, and this is a report from
21 Cleveland Research Company, the company that Mr. Parker used for
22 his opening on the slide, correct?

23 A. Yeah. They're a research company located in Cleveland,
24 not surprisingly.

25 Q. Okay. And one of their jobs is to study this industry,

1 correct?

2 A. Yes.

3 Q. They live this industry, correct?

4 A. Well, that I don't know, but they claim to have
5 expertise.

6 Q. Okay. And this report was done after the merger was
7 announced, correct?

8 A. Yes.

9 Q. I'm directing you, sir, to page 4 of this report, this
10 research report, and do you see where it says, and I've
11 highlighted, let me ask you about the first one, "Based on our
12 research, we believe both Sysco and US Foods have priced each
13 other down, competing for larger national/regional contract
14 accounts over the last several years."

15 Do you see that?

16 A. I see that.

17 Q. You agree with that, correct?

18 A. No. I think these guys actually get a failing grade, if
19 I may say so. Because I said in my testimony, they need to
20 explain why that didn't happen in local markets where they're
21 also competing with each other. So they're saying there's this
22 unique thing, and, you know, they've competed it down, but they
23 don't give a reason for why it hasn't been competed down with
24 the same two firms in local markets. So if they were going
25 to -- if this were a term payment for me, I'd say you gotta

1 explain that. That's the elephant in the room. But I might say
2 even if they're right, we're going to have PFG afterwards. But
3 I just don't think these people have done a full analysis of the
4 competitive dynamics of the industry.

5 Q. But you agree, as we discussed, US Foods is a strong
6 price constraint on Sysco, correct?

7 A. I agree.

8 Q. And that's consistent with what Cleveland Research is
9 saying, correct?

10 A. Yes, but what they're saying is that -- that was the main
11 reason that you have low margins, and they can't explain why the
12 margins are over twice as high in a similar situation, which is
13 even less concentrated in local markets.

14 Q. Well, let's talk a little bit for a second, digress a
15 little bit --

16 A. Sure.

17 Q. -- and talk about the margins for local customers.

18 Local customers buy the product usually directly from
19 Sysco and US Foods. They don't buy pursuant, for example, to a
20 GPO contract for their goods, correct?

21 A. That's correct.

22 Q. And that's one of the reasons that the margins are higher
23 for Sysco and US Foods on independent accounts, correct?

24 A. Well, it's that you have power buyers for national, and
25 that's important reason. But, you know, you have local

1 restaurants, you know, Legal Sea Foods in Boston, I met the
2 president, he's a very savvy guy, has become very rich, and why
3 doesn't he bargain them down, too? You know, if you've ever
4 been to Cambridge or Boston, which a lot of people in this room
5 have, I'm sure, you know, there are two dozen Legal Sea Foods --
6 probably more now -- you know, within 10 miles of downtown
7 Boston, and they could use somebody, they could bargain them
8 down, maybe they even have a contract. But I'm saying there are
9 a lot of restaurant chains like that who are run by very savvy,
10 sophisticated people, nevertheless, we see that the margins are
11 over double.

12 **Q.** Right. And Legal Sea Foods is a national chain customer
13 of one of the two merging parties, correct?

14 **A.** Sure, because they're also in Washington and all, but I'm
15 just using them for an example. I mean, they're in Washington
16 and Miami now.

17 But what I'm saying is, is that you get these localities,
18 and I would not think -- it would be incorrect to think that
19 independent restaurants are run by a lot of moms and pops. I'm
20 just saying there are a lot of MBAs who we've taught at MIT or
21 I've taught also at Harvard over the years that have set up
22 restaurants, and, you know, they're sophisticated.

23 Query, why don't they get very low prices?

24 **Q.** Is there volume as large as the large accounts?

25 **A.** No, but that's the point, that you have power buyers.

1 And, you know, what these people are saying is somehow Sysco and
2 US Foods is beating their brains out in national but not in
3 local markets. And what I'm saying is, no, in national markets
4 it's because you have power buyers and you don't in local
5 markets.

6 So we're actually sort of agreeing, but I'm just saying
7 Sysco and US Foods, you know, why would they beat the their
8 brains out in one market and not the other? It's because of
9 power buyers. They're not really beating their brains out.
10 It's the effect of power buyers.

11 Q. Right. And the effectiveness of power buyer, as we
12 discussed, depends on the attractiveness of the alternatives
13 available to them?

14 A. Yeah, that's fair enough.

15 Q. The attractiveness of alternatives available to them,
16 correct?

17 A. Yes. And all the alternatives are going to remain except
18 for US Foods, and PFG is entering with 35 distribution centers.

19 Q. Okay. We'll talk about PFG in a second.

20 A. Sure.

21 Q. Let me direct you to the second one. We believe -- this
22 is the research group, "We believe both Sysco and US Foods have
23 given aggressive terms and signing bonuses in order to win or
24 maintain larger accounts over the last few years."

25 Do you see that?

1 A. Yeah, that's correct.

2 Q. You agree with that?

3 A. Yeah, I agree with that.

4 Q. Okay. And if you turn to page 6, the same document, do
5 you see where it says, "Most national accounts have used Sysco
6 and US Foods as leverage points against each other to secure
7 more favorable contract terms"?

8 A. Yes.

9 Q. You agree with that, correct?

10 A. No. I'm saying that -- you know, it's what they mean by
11 most, and if they actually have any data or they're just
12 speaking ex cathedra here. But I certainly agree that Sysco and
13 US Foods are important competitors to each other, but whether
14 it's multi national accounts, I don't know, you know, if I knew
15 what they meant by most. But I am not arguing with you that --
16 or disagreeing with you that Sysco and US Foods are important
17 competitive constraints on each other.

18 Q. Okay. Thank you. Let's talk about PFG.

19 A. Okay.

20 Q. Okay. And Mr. Nannes is in the room, and I'm going to
21 ask him if I get into anything confidential you'll let me know?

22 MR. NANNES: Yes.

23 MR. WEISSMAN: Thank you.

24 BY MR. WEISSMAN:

25 Q. So you didn't speak with anyone at PFG in connection with

1 your analysis, correct?

2 A. Correct.

3 Q. And, in fact, you put significant weight on the business
4 plan PFG prepared in this case, correct?

5 A. Yes.

6 Q. And you mentioned relying on Reinhart's presentation to
7 the FTC. Do you remember that?

8 A. Yes. They said they could do with fewer than 35.

9 Q. Did you read the deposition testimony in this case of
10 Reinhart's chairman as to what Reinhart, in fact, told the FTC
11 staff about the adequacy of the divestiture package?

12 A. Yeah. I saw that, but I took that to me be -- you know,
13 again, he's telling the truth, but his spin on things is as a
14 disappointed bidder. They lost out. I've talked to the Sysco
15 people about it. You know, they were in the divestiture bidding
16 or negotiation, however you want to put it, and they lost out.
17 And they know as a competitor now, if this deal goes through --
18 he testified to this -- that Sysco and US Foods is going to be a
19 stronger competitor. So again, you've just got to put things in
20 context. He lost out, and he knows if the deal happens he's
21 going to face a stronger competitor.

22 Q. So did they drop out or did they just decline to bid?

23 A. They as much as dropped out, in my view.

24 Q. They declined to bid, correct?

25 A. Well, yeah, they couldn't get the deal they wanted.

1 Q. Okay. And so you raise a point: This was a competitive
2 process.

3 So Sysco, when it went out with the divestiture package,
4 told PFG and the other two bidders -- if there were other two,
5 and I'm sure there were -- that this was a competitive process,
6 so you better not get too greedy or you're out, correct?

7 A. Yeah, that's what competition does.

8 Q. Okay. So it's not like the divestiture buyer had the
9 ability to come in and say, here's what I really need without
10 risk of being tossed out, correct?

11 A. Well, no, but come on. These people are sophisticated.
12 They are going to ask for more than they want, and they know
13 negotiation is going to happen. So you ask for more than you
14 want, and you know there's going to be a compromise. But you
15 can't get too greedy. If you come in and ask for something
16 completely impossible, I agree with you, they're going to get
17 tossed, but everybody knows that. These are very sophisticated
18 business people.

19 Q. And you're familiar with the internal analysis that PFG
20 did internally before it was approached by Sysco, correct, as to
21 the number of distribution centers it needed for a national
22 footprint, correct?

23 A. Yeah, Mr. Holm testified to that the other day.

24 Q. And it's fair to say it was significantly more than 11,
25 correct?

1 A. Yes.

2 Q. Okay.

3 A. But they -- they're paying a billion and a half -- or
4 investing a billion-and-a-half dollars with the 11 online, and
5 as I testified earlier, I don't think sophisticated business
6 people spend a billion-and-a-half dollars unless they think
7 they're going to be successful competitors.

8 Q. Let's talk a little bit about that.

9 A. Okay.

10 Q. You've mentioned before the fact that Blackstone is
11 paying a significant amount of money is important to your
12 analysis, correct?

13 A. Yes.

14 Q. And you heard Mr. Holm's testimony the other day in court
15 where he said that, "Regardless of whether PFG replaces US Foods
16 as a national competitor, he still thinks it would be a very
17 good investment for Blackstone under any circumstances,"
18 correct?

19 A. Yeah. And I went back and looked at those business
20 documents after court, and they give that only a 10 to
21 15 percent chance. That's the downside I testified; but the
22 upside, they give 35 percent chance.

23 So, you know, you always do downside, medium, upside, but
24 if you take the average of the three or any type of probability
25 weighted average, their views are going to do better than

1 baseline, and there's some probability that they'll do worse,
2 but their expectation -- that's what the probabilities are all
3 about, that they use weights -- is they're going to do better
4 than baseline, which means they're going to be an even stronger
5 competitor than their business plan shows.

6 Q. Okay. I'm glad you raised that. Let's take a look at
7 what their baseline assumptions were for valuation purposes.
8 Please look at PX 9250.

9 MR. WEISSMAN: This should not be on the screen. Thank
10 you.

11 THE WITNESS: Hold it, please. 9250? I just want to make
12 sure I have it. Again, I'm having a problem.

13 MR. WEISSMAN: Okay.

14 THE WITNESS: It's just -- I have 9193. I don't see it.
15 Could you come and help me get that?

16 THE COURT: I don't know that this one's in the binder.

17 MR. WEISSMAN: Okay.

18 THE COURT: Do you need a break?

19 MR. WEISSMAN: We may do this on redirect. I'll make
20 sure -- why don't I just move on. I'm sorry about this.

21 THE COURT: Well, look, if you need two minutes to just
22 gather the document, we can do that. That's all right. Nobody
23 goes anywhere and just get the document. Or why don't you
24 continue, and can somebody on your team get the material before
25 the end of your examination?

1 MR. WEISSMAN: Do you have 9168, sir?

2 THE COURT: And by the way, we probably actually have a
3 copy of it in the back. All of your binders have not gone very
4 far.

5 (Laughter.)

6 MR. WEISSMAN: I do have 9168. I can --

7 THE WITNESS: Yeah, I have 9168.

8 BY MR. WEISSMAN:

9 Q. Okay. Take a look, sir at 9168.

10 A. Okay. So this is now -- I just to make sure I have the
11 right one. This is by a consulting company, Deloitte, yeah.

12 Q. Correct. And is it your understanding that PFG hired
13 Deloitte in connection with its sensitivity analysis?

14 A. Yes.

15 Q. Okay. And let's talk about the base case for valuation
16 purposes that the company used.

17 A. Okay.

18 Q. If you look at page 7.

19 A. Okay.

20 Q. You're familiar with this document, correct?

21 A. I've seen it before, yes.

22 Q. And page 7 describes the base case used for valuation,
23 correct?

24 A. Well, I'll certainly take your word for it, yep.

25 Q. Okay. And do you see the sales loss line put into the

1 base case? Revenue impact? Do you see that?

2 A. Yes.

3 Q. And I won't name the number, but is it fair to say that
4 through the end of 2017 the base case assumed a loss of revenue
5 for PFG with the divested assets --

6 A. Yes, I agree.

7 Q. -- of multiple millions -- of multiple hundreds of
8 millions of dollars?

9 A. Okay.

10 Q. Do you see that?

11 A. Yes.

12 Q. Do you see where my finger is on the screen?

13 A. Yeah. It's talking about revenue there, though, not
14 EBITDA.

15 Q. But EBITDA is profit, correct?

16 A. Yes.

17 Q. And is your testimony that this base case was the base
18 case they used for their business plan?

19 A. I don't remember, but I used what was in the business
20 plan. I'd have to check.

21 Q. Okay. So the base case used by Blackstone in this
22 document showed a sales loss -- a significant sales loss in the
23 first two years after the divestitures, correct?

24 A. Yes.

25 Q. And is it fair to say that Blackstone concluded that even

1 with that base case, which it pegged at 50 percent chance,
2 correct?

3 A. Yes.

4 Q. That the internal rate of return would be more attractive
5 to Blackstone than doing an IPO?

6 A. Yes, because they expect growth in the future and they're
7 going to open five more or seven more or nine more, I mean,
8 various estimates, let's use seven. They're going to open seven
9 new OpCos, and they're going to grow. They've been growing very
10 fast. Mr. Holm testified they've been growing about 14 percent
11 a year, much, much faster than Sysco or USF, and they expect to
12 grow. And it's often, you know, when you first buy something or
13 first invest you lose some money now but make it up in the
14 future, and that's what's going on.

15 Q. Well, look at the out years on this chart.

16 A. Okay.

17 Q. It shows a continued sales loss, correct?

18 A. Just for those OpCos for what they're buying, but
19 remember, they're going to expand and they're going to become
20 national and they're going to make money.

21 Q. Right, but the point is, sir, that even with this
22 sensitivity analysis that showed a continual decline in sales,
23 significant decline in sales at the OpCos that they were buying,
24 that Blackstone considered this investment more attractive than
25 an IPO, correct?

1 A. Yes.

2 Q. And, sir, if -- you would agree with me that PFG has
3 never done a fold-out expansion, correct?

4 A. Yeah. Mr. Holm testified to all of this. I have nothing
5 really to add besides what he testified to because I have no
6 knowledge of Mr. Holm.

7 Q. And you didn't talk to Blackstone either in connection
8 with your analysis, did you?

9 A. No, I didn't.

10 Q. So in the business plan -- and I'll show this -- if you
11 go to page 6 of 9060.

12 A. Do I have that in my binder?

13 Q. You do.

14 A. All right.

15 Q. I hope you do.

16 A. I'll find it. 9060.

17 MR. WEISSMAN: This is the business plan. Again, this is
18 confidential.

19 THE COURT: Okay.

20 THE WITNESS: Oh, yeah, I found it.

21 BY MR. WEISSMAN:

22 Q. Okay. Do you see the customers here that --

23 A. What page are you on? I'm sorry.

24 Q. It's page 6 of the business plan.

25 A. Okay.

1 Q. And if you look at the customers here --

2 A. Yes.

3 Q. -- every single one of the customers listed under
4 hospitality uses significantly more than 35 distribution
5 centers, correct?

6 A. Yes, some of them do a regional thing, as I said, I think
7 Avendra does, but yes.

8 Q. And when I said more than 30 or significantly more than
9 35, significantly more than 35 of one of the merging parties,
10 correct?

11 A. Yeah, but PFG's view is they can do it with 35, and there
12 are lower costs than USF and they'll be able to competitive or
13 they wouldn't do the deal.

14 Q. So if you take the second customer there. Do you see
15 that?

16 A. Yes.

17 Q. And I won't mention the number of distribution centers,
18 but let's say it's above 55.

19 A. Okay.

20 Q. In order to get that business away from Sysco, PFG would
21 need to convince that customer that using 35 is better than
22 using 55?

23 A. Nope.

24 Q. Why not?

25 A. What they need to do to get -- to keep that customer is

1 to say, I can get you a lower price. That customer doesn't care
2 whether it's 35, 50, 150, that customer cares about the price,
3 and if they -- if their distribution system with 35, in which
4 they have lower operating costs and, you know, has been
5 testified they can do shuttle services and all, it all comes
6 down to show me the money, if they can come in with a lower
7 price.

8 There are certain things if you have more distribution
9 centers I agree, but, you know, I -- in my analysis of this
10 industry, show me the money. So you get a better price, you
11 keep the business or you get the business. That's what it comes
12 down to.

13 Q. So did you --

14 A. It doesn't matter whether it's -- as I said, I'm not
15 going to repeat myself, 35 or 65.

16 Q. Did you hear the testimony of a Interstate executive in
17 the courtroom?

18 A. I read it.

19 Q. Okay. And did you hear his testimony that having a
20 proximate or close by distribution center is important for
21 service reasons?

22 A. Yes. But we know that three companies in my slide, all
23 of whom are sophisticated, you've already mentioned Reinhart so
24 I'm going to say their name, but the one that starts with G and
25 PFG, all of whom are growing much faster -- all of whom are

1 growing much faster than is USF or Sysco, and are sophisticated,
2 all said, we can be nationally competitive with 35 or less, so
3 you've got to discount. And these guys know -- they're running
4 the business -- Interstate is the customer.

5 Q. You have no reason to doubt Mr. Holm's sworn testimony
6 that it generally takes a fold-out broadliner approximately four
7 to five years to achieve sales per square foot similar to
8 established broadliners, correct?

9 A. Yes, but that's not what's at issue here. When you start
10 the fold-out, you start competing. He's saying it takes four to
11 five years, you know, to get your money back always it were.
12 But remember, they're planning to do seven or nine fold-outs.
13 They're sophisticated, Blackstone's behind them, so even if it
14 takes four to five years, that doesn't mean it takes them four
15 to five years to be competitive. They're competitive off the
16 bat, it just takes four to five years to become big enough.

17 Q. To become profitable?

18 A. To become profitable.

19 Q. Okay.

20 A. But these people are not babes in the woods. If they're
21 going to invest money in seven or nine new things, it's because
22 four to five years they're willing to wait and become
23 profitable. That's the idea.

24 Q. Right, but if they can invest a lot of money, not do as
25 well as USF, it'd still be a really good deal for Blackstone,

1 correct?

2 **A.** Well, I wouldn't say it's a really good deal, but they
3 make money, and I've testified to that, so I don't have anything
4 new to say.

5 **Q.** And according to Mr. Holm, PFG projects that if it
6 executes on its business plan, PFG by the end of 2019 will
7 achieve half of what USF's share is today for national business
8 at least within the three categories of customers we're talking
9 about on this slide, correct?

10 **A.** Yes, but I -- well, I thought he said he made a mistake
11 or whatever. But you just need to be very careful to make it an
12 apples-to-apples comparison. But, you know, what they're saying
13 is if we grow, we're not going to be as big as USF at the end of
14 four years. I'll agree with that.

15 **Q.** They'll be half as big, correct?

16 **A.** Well, I would disagree with half as big, but they're not
17 going to be as big.

18 **Q.** So you don't agree with Mr. Holm's deposition testimony?

19 **A.** No, I don't. And I think he said he made a mistake,
20 because he was comparing apples and oranges, two different
21 market definitions. He's taking all USF into account and only
22 certain categories for his company.

23 **Q.** So let me show you a slide that Mr. Parker used with you
24 when we were talking about PFG.

25 **A.** Okay.

1 Q. It is tab 1, slide 32.

2 A. Okay. Could someone put it on the screen, please?

3 Q. I will, yeah.

4 MR. WEISSMAN: And this could be public. Thank you.

5 BY MR. WEISSMAN:

6 Q. See under "Market Definition"?

7 THE COURT: What slide number again, Mr. Weissman?

8 MR. WEISSMAN: This is slide 32 of tab 1 of Mr. Parker's
9 binder from this morning.

10 THE WITNESS: Yes.

11 BY MR. WEISSMAN:

12 Q. Do you see where it says, "PFG has many specialty and
13 systems distribution centers which compete with Sysco and USF
14 for customers today"?

15 A. Yes.

16 Q. Do you see that?

17 You were in the courtroom for Mr. Holm's testimony,
18 correct?

19 A. Yes.

20 Q. And you heard him say that in his experience systems
21 distribution is not a substitute for those customers who need
22 broadline distribution, correct?

23 A. Yeah. I think he was talking for most customers, and
24 that's a lot of inframarginal customers. But we know, and
25 Dr. Israel testified, that customers switch to systems. So for

1 some customers, marginal customers, it is a substitute, but for
2 many it's not, I agree.

3 Q. And in this industry, there are individual negotiations,
4 correct?

5 A. Yes.

6 Q. Okay. And so you -- you don't doubt that, in his
7 experience, systems distribution is not a substitute for those
8 customers who need broadline, correct?

9 A. Well, that's what he testified to. But, again, I'm just
10 saying you need to look at marginal and inframarginal customers.

11 Q. And he also testified that the prices and services
12 offered by systems distributors do not affect the prices and
13 services offered by PFG's broadline division to broadline
14 customers?

15 A. That's what he testified to, yes.

16 Q. You thought he was telling the truth, correct?

17 A. Oh, yeah, absolutely.

18 Q. And you also heard him say that in his experience the
19 prices and services offered by specialty distributors do not
20 significantly affect the prices offered by PFG's broadline
21 division to broadline customers, correct?

22 A. Yeah. And I've seen documents that contradict that
23 saying specialty people are offering lower prices and higher
24 quality and we have to meet them or beat them or we're going to
25 not get the business, so I respectfully disagree with what he

1 said, because I've seen documents to the contrary, but he did
2 say that.

3 Q. Can you -- you can't name for me a single GPO that
4 purchases a systems distribution, can you?

5 A. No.

6 Q. And you can't name for me a single hospitality chain that
7 purchases systems distribution services either, can you?

8 A. No.

9 Q. And you can't identify for us a single foodservice
10 management company that purchases systems distribution, can you?

11 A. No.

12 Q. We can agree that for independent restaurants you don't
13 believe systems distribution would work, correct?

14 A. That's correct, for small independent restaurants, yeah.

15 Q. And it's fair to say, isn't it, that you have no opinion
16 as to whether cash-and-carry stores are substitutes for
17 broadline distribution?

18 A. Yeah, I'll let Professor Bresnahan talk to that.

19 Q. And you can't tell us whether cash-and-carry outlets are
20 in the same relevant market as broadline distribution?

21 A. No, I didn't study that. Again, Professor Bresnahan will
22 talk about that.

23 Q. So to be clear, you can't opine whether cash-and-carry
24 are in the same relevant market as broadline, correct?

25 A. That's correct.

1 Q. We'll talk for two or three minutes, about efficiencies
2 and then I'm done. Okay?

3 A. Yeah. You're running out of time.

4 THE COURT: Now the witnesses are keeping clocks.

5 (Laughter.)

6 BY MR. WEISSMAN:

7 Q. So you didn't do any independent analysis of the
8 estimates of the alleged efficiencies in this case?

9 A. No, as I testified, I depended on McKinsey. I did look
10 at a whole lot of boring documents, but I depended on McKinsey.

11 Q. And you took what they did at face value, correct?

12 A. Well, I talked to them and made sure it made sense. So
13 I'm not sure it's face value. I've done and, you know, had
14 hours of phone conversations with them, but what they seem to be
15 doing made sense, yes.

16 Q. You used those words in your report that you took what
17 they did at face value, correct?

18 A. Yeah. I'm agreeing, yes.

19 Q. Okay. So if you look at PX 6126.

20 MR. WEISSMAN: And this is a confidential document,
21 Ms. White.

22 THE WITNESS: Can I -- oh, I found it. Thank you.

23 BY MR. WEISSMAN:

24 Q. Take whatever time you need to read it, but this is one I
25 showed you at your deposition.

1 A. No, no, I'm familiar with this.

2 Q. And this is a document prepared by McKinsey, correct?

3 A. Yes.

4 Q. In March 2014 after the merger was announced?

5 A. Right.

6 Q. Okay. And if you start at the bottom of this e-mail

7 chain --

8 A. Are we on the first page?

9 Q. We're going to be on page -- I believe it's page 3,

10 PX 6126-003.

11 A. Okay. Yeah, I'm there, thank you.

12 Q. I'm sorry, go to page 2.

13 A. Okay. That's easy.

14 Q. Okay?

15 A. Yeah.

16 Q. This is an e-mail from someone working on the

17 efficiencies case at McKinsey, correct?

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

19 Q. Okay. And they're sending this e-mail to others on the

20 efficiencies team, correct?

21 A. Yes.

22 Q. Let me first read for you what he says here. He says,

23 "Very high risk of value leakage to customer. The vast majority

24 of customers are on cost plus pricing, so any savings to team

25 finds would flow through to the customer."

1 And there, you see, says, "This may delay the execution
2 of the network realignment until new contracts are signed that
3 protect the efforts of the combined company to lower its costs.
4 As McKinsey, we need to build a plan to help Sysco navigate this
5 situation."

6 **A.** That's real consultant speak if I've ever seen it. Yep,
7 we're looking for another job and maybe we can help them.

8 **Q.** And the job they were looking -- the job they were
9 looking for was to find ways that cost savings would not be
10 passed through to consumers, correct?

11 **A.** Yes, but hope springs eternal against economic reality.

12 **Q.** But they're spending a lot of Sysco's money running that
13 analysis, correct?

14 **A.** That's what consultants do, especially McKinsey.

15 **Q.** Okay. And Sysco, to your knowledge, didn't say stop
16 doing that, stop doing that, it's not worthwhile because we're
17 going to have to pass them through because of competition,
18 correct?

19 **A.** Not so far as I know.

20 **Q.** Okay. And, in fact, what you do know is that McKinsey
21 did, in fact, make recommendations to Sysco about ways that
22 Sysco wouldn't have to pass through some of the cost savings to
23 customers, correct?

24 **A.** Yeah, but they still expect cost savings to be passed
25 through, yeah, but I agree.

1 Q. Okay.

2 MR. WEISSMAN: That's all I have, Your Honor. Thank you.

3 THE COURT: Thank you, Mr. Weissman.

4 REDIRECT EXAMINATION OF JERRY HAUSMAN

5 BY MR. PARKER:

6 Q. All right. You were here for Mr. Holm's testimony?

7 A. Yes.

8 Q. All right. And he testified he thought the business plan
9 was conservative?

10 A. Yes.

11 Q. And he also testified that simply making the business
12 plan projections would not -- would not be a career-enhancing
13 move for him?

14 A. Yeah. I think in his depo he was even more strident and
15 said he'd be looking for a new job.

16 Q. All right. Are you aware, sir, that the parties produced
17 millions of pages of e-mails and other documents to the Federal
18 Trade Commission?

19 A. Yes.

20 Q. And Mr. Weissman just showed you a few of those, sir?

21 A. Yes, his favorites.

22 Q. Involving antidotes, negotiations and the like?

23 A. Yes. He did demonstrate very well that there are
24 bilateral negotiations for pretty much every contract he showed
25 me.

1 Q. As an econometrician, do those antidotes change any of
2 your conclusions about the infirmities associated with
3 Dr. Israel's report, which is based, in part -- or at least his
4 analysis is based, in part, on such anecdotal evidence?

5 A. No. In my view, you know, that's the problem with these.
6 These are highly biased data samples, and as an econometrician
7 we don't depend on those.

8 Q. All right. And when look at these antidotes, they tend
9 to be in negotiation with two sides going at each other trying
10 to come up with a deal, with the best possible deal?

11 A. Right, but neither side, or the distributor, doesn't know
12 what the competition is bidding. That's why it's not like an
13 English auction.

14 Q. Correct. And sometimes the customer's not telling the
15 truth as to who's out there?

16 A. In my experience in the business world I have seen that
17 many times.

18 Q. All right. And just because a customer says Sysco's
19 banging down the door and throwing money, right, that doesn't
20 mean it's necessary true, does it is?

21 A. I would say in my experience, no.

22 Q. And Sysco could also drop out of a competition at some
23 point; am I right?

24 A. That's happened. I've seen cases.

25 Q. And others come in. Well, let's -- we have a certain

1 customer --

2 MR. PARKER: This is confidential.

3 BY MR. PARKER:

4 Q. We had a certain customer we were talking about in
5 February about Sysco banging down the door and ripping and
6 snorting and everything else. Let's look at this a couple of
7 months later.

8 MR. PARKER: Could somebody just figure out how to -- I
9 just want to put one document up here, if somebody could do that
10 for me. All right. Thank you.

11 BY MR. PARKER:

12 Q. So let's revisit the scene here, and you will see a
13 couple months later, a continued discussion about this customer
14 and the last sentence reads what? "Sysco never came up in the
15 conversation, and no one at Avendra has mentioned Sysco in
16 weeks. Your read on DMA being the bigger threat seems right
17 on."

18 Does this surprise you as sort of the course of
19 negotiations in these kinds of things?

20 A. No. You don't know who the competition is, you don't
21 know what they're bidding, you're just making educated guesses.

22 Q. And it changes?

23 A. Yes.

24 Q. And you saw other antidotes with Mr. Sonnemaker yesterday
25 about losing business left and right to companies other than

1 US -- excuse me, Sysco losing the business left and right to
2 companies other than USF; am I right?

3 A. That was his testimony, yes.

4 Q. So there's -- and this would be the chart that he used,
5 DX 1088; am I right?

6 A. Yes.

7 Q. And what significance would you give that, sir?

8 A. That there's a lot of other competition out there. I
9 can't say I've been to many of these places -- my doctor won't
10 allow it -- but you can see that, you know, Gordon won, DMA won
11 and so on. This is, again, not a random sample, of course, but
12 he was trying to demonstrate that they often lost business to
13 other people.

14 Q. And you testified that a customer in New England -- I'm
15 sorry, I want to talk now about the markets here for a minute.

16 You testified that a customer in new New England doesn't
17 particularly care whether a distributor serves customers, for
18 example, in California?

19 A. That's correct.

20 Q. All right. Or a regional customer doesn't particularly
21 care if a distributor serves customers outside of its region?

22 A. That's correct.

23 Q. All right. And further, a multi regional customer making
24 a distributor choice for it's, say, New England footprint does
25 not necessarily care if a distributor also serves California,

1 Florida, Wyoming or Texas?

2 A. That's correct.

3 Q. All right. And it doesn't matter whether these customers
4 are restaurants, hospital chains, FSMs or whatever; am I right?

5 A. That's correct.

6 Q. All right.

7 MR. PARKER: I have no further questions. Thank you.

8 Oh, I'm sorry, the document I put up about the end of the
9 story or later in the story on the negotiation was DX 01088.

10 No more questions, Your Honor.

11 THE COURT: Thank you, Mr. Parker. Okay. Mr. Parker, I
12 take it that -- oh, sorry.

13 Dr. Hausman, thank you very much for your testimony.

14 THE WITNESS: You're welcome, Your Honor.

15 THE COURT: Mr. Parker, I take it Dr. Bresnahan is your
16 next witness?

17 MR. PARKER: Yes, he is.

18 THE COURT: All right. Why don't we take a second morning
19 break here, and let's reconvene at 5 of 12.

20 MR. PARKER: And we will call him at 5 of 12.

21 (Thereupon, a break was had from 11:47 a.m. until
22 11:56 a.m.)

23 THE COURT: Have a seat, everybody. Thank you. All
24 right, Mr. Parker.

25 MR. PARKER: You know, the Hausman test the F-test, all

1 this, this is a whole -- this is great, you know, a whole new
2 world; am I right?

3 (Laughter.)

4 We have more experts today, Your Honor. We call -- the
5 defendants call Mr. -- Professor Tim Bresnahan from Stanford
6 University, and Mr. Simmons from O'Melveny will be handling the
7 examination.

8 THE COURT: Thank you.

9 Have a seat Dr. Bresnahan, welcome.

10 THE WITNESS: Good morning.

11 MR. SIMMONS: Thank you.

12 (TIMOTHY BRESNAHAN, DEFENDANTS' WITNESS, SWORN)

13 DIRECT EXAMINATION OF TIMOTHY BRESNAHAN

14 BY MR. SIMMONS:

15 Q. Good morning, Professor Bresnahan. How are you?

16 A. Good morning, Mr. Simmons.

17 MR. SIMMONS: Your Honor, if I may, I will hand up to the
18 witness and the Court Professor Bresnahan's reports in this
19 matter, which are DX 01359 and DX 01354, as well as a binder. We
20 would -- we don't want to break that trend. And the binder has
21 five tabs, the first of which is a slide presentation, which is
22 marked DX 05029. So if I may, Your Honor, I'll approach the
23 Court and the witness?

24 THE COURT: Yes, please.

25 BY MR. SIMMONS:

1 Q. Would you please state your name for the record.

2 A. My name's Timothy Bresnahan.

3 Q. What is your current position?

4 A. I'm a professor of economics at Stanford University.

5 Q. Could you please briefly tell us about your professional
6 background that is relevant to this matter?

7 A. Yes. I've been a competition scholar since the 1970s.
8 Most of my papers are about competition in particular
9 industries, most of my students' papers. We call that the
10 industrial organization field. I've been not only active in
11 that field, but I've been in the leadership positions in that
12 field.

13 The National Bureau of Economic Research has an IO
14 program. NBER is the biggest collective effort by empirical
15 economists. I've been on the steering committee of the NBER
16 program from the time it was founded until I went on went on the
17 NBER board. I've been editor of the two big industrial
18 organization journals. I wrote the IO handbook chapter on
19 econometric methods for industries with market power. So I've
20 been doing a lot of leadership things in that field.

21 I've also got a data site. I, and my students, have
22 brought a lot of new data sets, particularly from business
23 sources, into economics. I've done a lot of work on -- actually
24 this is most of my work week, are the data we have reliable for
25 the economic inference we're trying to draw, and the data plus

1 the model we have reliable for the economic inferences we have
2 to draw.

3 That's spilled over into part of my public service.
4 The -- I worked briefly in the Federal Statistical System a long
5 time ago. I've come back to the Federal Statistical System as
6 an advisor on data collection and data appropriateness for
7 economic inferences. For example, the American Economic
8 Association has an Advisory Committee for the Census Bureau.
9 The Census Bureau does most of the data collection for the rest
10 of the Federal Statistical System. They have this Advisory
11 Committee, and I was on it for years. I chaired it for a while.
12 That was later replaced by a Federal Statistic -- a system-wide
13 committee called FESAC. I sat on that, too. So I've been a
14 data guy forever, and that's both in my work and in my public
15 service.

16 **Q.** Professor Bresnahan, could you tell -- tell us about your
17 public service, please?

18 **A.** Yes. My -- well, I just talked about some. My other
19 public service, I was in the antitrust division in '99 and 2000,
20 I was the chief economist, Deputy Assistant Attorney General.

21 **Q.** And what were your responsibilities as Deputy Assistant
22 Attorney General for economics?

23 **A.** As the chief economist, you're -- you're -- you know,
24 you're running the economics group. I think what's salient to
25 us here is about one merger a week gets the attention of the

1 front office. At that time the -- there were two economists in
2 the front office, and I'm the more senior of those. You know,
3 the chief economist recruits expert witnesses, if that's going
4 to be a litigation matter; oversees the support and preparation
5 of their testimony; but more important, in the -- you know,
6 mergers can be either good or bad for the consumer.

7 In the ongoing discussion in light of the law, in light
8 of the facts in the new industry you're thinking about, in light
9 of the merger guidelines, the chief economist is half of the
10 discussion of whether it's a good idea to try and block this
11 merger, whether that's in the interest of the American consumer.

12 Q. And you have served as chair of the Department of
13 Economics at Stanford University; is that right?

14 A. That's true.

15 Q. You are a member of the American Economics Association
16 Advisory Committee to the Bureau of Census?

17 A. I was, I was.

18 Q. You've been a member of the Federal Economic Statistic
19 Advisory Committee?

20 A. Yes.

21 Q. And you've been on the Economic Advisory Committee of the
22 ICPSR; is that right?

23 A. Yes. That's another big -- that's another big data
24 effort. That's an effort that collects and maintains databases.

25 Q. Would you briefly describe the types of analyses you've

1 done in this matter, sir?

2 **A.** I've done a lot of different things in this matter. I've
3 done some data analysis myself. I've reviewed a lot of
4 documents. I've read declaration -- there were a lot of
5 declarations. I read declarations and depositions. I've talked
6 to business people. I went to Houston to talk to Sysco
7 executives. I went to my local OpCo, so called San Francisco,
8 Sysco San Francisco, which is over in Fremont, to talk to those
9 folks. Talked to a couple USF guys on that. And there's
10 probably other activities. I've done a lot of work.

11 **Q.** Did you go out and get data that the Federal Trade
12 Commission did not have?

13 **A.** That's true, I did.

14 **Q.** And we'll discuss more of that a little later.

15 **MR. SIMMONS:** At this time, Your Honor, I would offer
16 Professor Bresnahan as an expert in competition economics in this
17 matter.

18 **MR. MOHR:** No objection, Your Honor.

19 **THE COURT:** So admitted.

20 **MR. SIMMONS:** All right. Thank you, Your Honor.

21 **BY MR. SIMMONS:**

22 **Q.** If we could put up, please, slide 2. Does -- you have
23 prepared a slide with your conclusions in this matter; is that
24 right, Professor Bresnahan?

25 **A.** Yes, that's the one on the screen.

1 Q. Could you just walk us through your conclusions as
2 depicted on slide 2?

3 A. Yes. We're going to have three big topics with me.
4 The -- you know, the first one is about the so-called national
5 broadline customers markets. I believe that there is no
6 reliable evidence that there's a harm to competition in that
7 market. And if you look at the reliable available economic
8 expert, it shows that there won't be a harm to the competitive
9 interests of those national broadline customers.

10 Second, local broadline customers -- and this is the next
11 32 markets, but they're very similar -- the same thing. I think
12 if you look at the reliable economic evidence about the
13 competitive circumstances serving the LBCs -- I'm going to
14 abbreviate these as NBCs and LBCs in the slide so as to keep
15 from repeating that -- that they won't be harmed by the merger.

16 And then finally we'll talk about market definition in
17 the broadline market without a national or local modifier.

18 Q. Thank you. If we could put up number 4, please. Now,
19 this slide -- slide 4, please.

20 This slide shows table 1 and table 3 from Dr. Israel's
21 report. Am I correct about that?

22 A. Yes.

23 Q. Why are you showing them here?

24 A. I want to put some -- I want to put some weight of our
25 attention on the very large shares of Sysco and USF in the

1 so-called national broadline market by saying that Dr. Israel
2 uses them twice. And I'm just going to capture that with his
3 table 1 and his table 3.

4 In table 1 he calculates these very large shares for
5 merger partners, and he uses that to draw an inference that
6 there'll be substantial harm to competition in that market. So
7 we're going to talk about those shares, whether they're
8 appropriate for that inference and whether they're well
9 measured.

10 In his auction model, Professor Hausman this morning
11 called it an auction model, but in his explicit quantitative
12 harm to competition model that's reported in table 3, Dr. Israel
13 reuses those shares. They're a crucial input into the harm to
14 competition model. Indeed, they're the main quantitative link
15 to the facts of this case, so I'm going want to talk about his
16 shares, both in his concentration and increase in concentration
17 analysis in table 1, and then come back to his use of the shares
18 in the -- in the quantification of the price raise in table 3.

19 **Q.** So the shares are a critical part or at the heart of the
20 FTC's case, in your view?

21 **A.** In the national broadline customers' case, absolutely.

22 **Q.** All right. If we could put up number 5, please. When
23 are market shares informative, in your view, Dr. Bresnahan?

24 **A.** Market shares and market share-based analysis are
25 informative when they -- when the shares you calculate offer

1 useful information about the competitive alternatives that
2 customers have, so --

3 Q. So why are --

4 A. I'm sorry. We do have -- a share analysis is if you have
5 two firms with big shares and they merge, those two firms
6 represent a lot of the competitive capacity available to
7 customers and it goes away, so that's how you use them.

8 Q. And why are national shares not informative for national
9 broadline customers, in your view?

10 A. As we'll see, and this is the first topic we'll take up,
11 what's been identified as the national broadline customers can
12 and do buy regionally, and so the national shares don't measure
13 the competitive alternatives available to them. So that won't
14 help assess whether there's any loss of competition relative to
15 them, the national broadline customers.

16 Q. And when you use the term "regionally" today, are you
17 using it both literally in terms of separate regions but also in
18 the sense of dividing up your demand how much --

19 A. I'm going use it both ways. Sometimes I'm going mean
20 regions like the, you know, nine census regions of the United
21 States or the Southeast or something like that, but more
22 frequently I'm going to mean there's a national broadline
23 customer that's been identified by Dr. Israel and they buy from
24 a lot of different customers at different locations.

25 Q. All right.

1 MR. SIMMONS: If we could pull it up, please, page 6, but
2 only this side of the courtroom, please. Thank you, Ms. White.

3 BY MR. SIMMONS:

4 Q. We see two circles here, Dr. Bresnahan. What can you
5 tell us what you -- what's the purpose of these two circles?
6 What are you trying to convey?

7 A. Sure. Well, first let me say what the map is. I'm going
8 to draw a lot of these maps. This is the map of the lower 48.
9 And I've used a data set I obtained -- the FTC didn't have it --
10 called the AG data, which is a data set that's sold -- I think
11 it's sold mostly to marketing people. And the data set -- the
12 AG data set helps you locate foodservice operators, in this
13 case, restaurants. And so I've marked all the locations of one
14 chain -- one of the ground rules here -- could I read --

15 Q. Just say the -- don't say the name, just say the entity
16 that you see there.

17 A. Okay. One chain -- you know, a chain that's in the red
18 circle to the right, its operations are in the red circle to the
19 right. It's in, you know, Indiana, Kentucky and Ohio, so it's a
20 regional chain in -- you know, in any sense of that word.

21 Q. All right. Now, you mentioned the AG data. How did
22 you -- did you just go out and get that?

23 A. Yeah, that's a publicly available data set.

24 Q. Does Dr. Israel use AG data?

25 A. No.

1 Q. All right. Now, I can see from the legend that the blue
2 means Sysco national sales.

3 How do you know that these locations are served by Sysco?

4 A. These are -- so I matched or merged the AG data set by
5 ZIP code location. I didn't try to use the exact addresses
6 here, that's harder. But I know all the ZIP codes that this
7 firm is operating in, and I matched that to here, Sysco's
8 transactions' database. I also matched it to USF, of course.

9 So I colored these blue because in the last quarter of
10 the transactions data, at least the one I used for these maps,
11 Sysco delivered to all of the locations of this firm. And you
12 can see from the legend I'm reserving other colors for other
13 purposes, whether it's USF or nobody or either of them, somebody
14 else.

15 Q. Now, we don't see any green boxes on the map. Does that
16 mean USF didn't service this customer?

17 A. Yeah, no green boxes, no USF, no orange or yellow boxes,
18 nobody else.

19 Q. So this is an example of a customer only served by Sysco,
20 right?

21 A. That's right.

22 Q. All right. Well, let's -- I took you off track a bit to
23 explain the data. You were talking about the two circles.

24 We're talking about a customer in the Midwest and yet you
25 circled California. What's your purpose in doing that?

1 **A.** So two things, first one, one of them's the one that
2 Professor Hausman said this morning. This firm, when choosing a
3 distributor, it's a matter of economics and shouldn't put any
4 economic weight, shouldn't put any weight, on distributors'
5 presence in California or Nevada. That's why I drew the circle
6 around California and Nevada. They just -- it just doesn't
7 matter to them. They're regional. That's the first thing.

8 Now, here's the second thing. When Dr. Israel calculates
9 his market shares, for Sysco and USF, he's counting their sales
10 in California and Nevada and everywhere else as part of this
11 firm's -- as part of their share. So for this firm he's
12 overcounting the competitive importance of Sysco and USF. Now,
13 if there's a regional that's, like, you know, right around that
14 part of the country, you know, they're just as an effective
15 competitor here, but their national share will be tiny.

16 **Q.** Now, there are some customers that have locations
17 nationwide, as we've seen throughout the course of this hearing.

18 Is this a problem for them, too, or is it only a problem
19 for customers with regional footprints?

20 **A.** No, let's look at the next customer.

21 **Q.** All right. Here we've heard a lot about Subway. Why
22 don't you walk us through these two points that you just --
23 touched on.

24 **A.** So this is a more complicated map because Subway is a
25 nationwide firm. But as you can see, here we use all the

1 colors. Subway's green in the Mid-Atlantic where I circled it
2 because they use USF there; and they're blue in some places like
3 New England because they use Sysco there; and they're purple in
4 Oklahoma, meaning both delivered. Now, that probably means
5 there was a transition -- and I'm using a whole quarter's
6 data -- so they probably switched from one of these firms to the
7 other. I mean, some other times it means that there are -- you
8 know, both firms are delivering at the same time in the same --
9 to the same ZIP code, but here I doubt it means that.

10 And then there's all this orange and yellow, and that's
11 neither Sysco nor USF, nor both. And -- but the, you know,
12 people are walking into those stores and buying sandwiches, so
13 it's somebody else that's supplying them there. So that's what
14 this map is, and I forgot what the question was.

15 Q. Well, that's all right. You remember the first small --
16 the midwestern entity we talked about and there were two
17 concepts there, one about --

18 A. Oh, same thing here. Look at those circled --

19 Q. Well, remind the Court what the two concepts are, number
20 one and number two.

21 A. They --

22 Q. The first concept?

23 A. The regionalized buy doesn't care about the available of
24 the distribution services in other places. So for that
25 Mid-Atlantic -- you know, competition to get that Mid-Atlantic

1 foodservice business here doesn't depend on foodservice
2 distributors' operations in California, Nevada, or -- you know,
3 or Texas or anywhere else. And so it just doesn't depend.
4 These -- this customer has chosen to regionalize its purchase
5 of, it's foodservice distribution services. It's substituted.
6 It's chosen to use USF in one region and not in others. It's
7 substituted for others. So the first principle is: This
8 customer doesn't care for that regional purchase about the
9 national footprint. It just -- once you've chosen to do that,
10 it doesn't matter. That's the first principle.

11 The second principle is: Again, if you look at market
12 shares, as Dr. Israel does, Sysco and USF have lots of capacity
13 across the whole country. They have capacity in California and
14 Nevada that don't buy for the -- that don't matter for this
15 purchase. They're not part of the competitive pressure that's
16 holding down prices at this purchase. So regionalizing a
17 customer like this is just like the regional customer we've seen
18 before in that regard. You're overcounting the importance of
19 Sysco and USF.

20 **Q.** And by overcounting you're referring to the so-called
21 national customer market share that Sysco --

22 **A.** Yes, absolutely.

23 **Q.** All right. And by overcounting, you're referring to the
24 national customer market share that Dr. Israel imputes to the
25 post-merger companies; is that right?

1 A. That's right.

2 Q. All right. Okay. And you have other examples of these
3 two principles we've been discussing; is that right?

4 A. I'm sure I do.

5 Q. All right.

6 A. I have lots. I've looked at a lot of these maps. Here's
7 another one.

8 Q. So what is Amerinet?

9 A. Amerinet's a big healthcare oriented GPO. And here it's
10 just the same two principles. Amerinet has regionalized its
11 purchases of -- it's chosen to regionalize its foodservice
12 distribution purposes. If you look at the upper Midwest, you
13 know, again, I keep circling California and Nevada because
14 that's where I live, but for that upper Midwest choice, the
15 competitive capacity of Sysco and USF in California and Nevada
16 is not relevant. It isn't part of the competitive forces that
17 were holding down prices for this firm in the upper Midwest.
18 And looking at the nationwide share of Sysco and USF overcounts
19 them, overemphasizes their competitive importance.

20 Q. Is it fair to say that if only national competition
21 mattered, Amerinet would not buy from multiple distributors?

22 A. That's right. I mean, they've chosen to -- they've
23 chosen to regionalize in this particular way. FTC has brought
24 forward a theory in which national customers -- it's drifted a
25 little bit at first -- require a national footprint, and now I

1 think it's drifted to there's a significant competitive
2 advantage for a national footprint. There's no significant
3 competitive advantage for a national footprint for the business
4 facing this customer.

5 Q. And again, as with the other slides we've shown, in your
6 view, Dr. Israel is overstating or overcounting the US/Sysco
7 market share in connection with an entity like Amerinet?

8 A. Yeah. As a competitive -- as a quantitative matter, yes.

9 Q. All right. Now, what do you conclude from the fact that
10 national market shares do not reflect the competitive
11 alternatives available to national broadline customers making
12 local or regional choices?

13 A. Well, that -- for those customers that have -- that make
14 local -- regional choices, either by regionalizing or just by
15 being regionalized, the national market shares aren't relevant
16 to their competitive -- to the competitive industry facing those
17 customers, and they're just not helpful for figuring out --
18 they're not relevant for figuring out whether they'll be harmed
19 by competition.

20 Q. All right. Let's talk for a minute here about the number
21 that appears on table 1 of Dr. Israel.

22 Even assuming national market shares were calculated
23 correctly, what, in your view, are the problems -- let's take
24 those numbers as a given.

25 What are the problems or the estimation errors that you

1 see in those numbers on table 1?

2 **A.** We were just talking about, I think, even given the
3 numbers, even given the numbers, he'd have this applicability
4 problem. They're not salient. Now, but I don't think it's
5 right to take those numbers as given. I think there's a lot of
6 trouble estimating those numbers.

7 **Q.** Can you walk us through the estimation problems that you
8 see?

9 **A.** Yes. I mean, it's -- you know, it's often true in a
10 merger case that people in the industry will have calculated
11 market shares in the relevant market because they think about
12 it. That's part of their thinking about -- big customers might
13 have done it or, you know, in this industry somebody like
14 Technomic might have done it.

15 For this national broadline customers' market, I don't
16 believe -- I haven't seen that any customer or competitor has
17 calculated those shares. There's no denominator that comes from
18 that. So another way that the -- another way you could
19 calculate those shares is you could ask all the buyers, who do
20 you buy from? You know, or you could ask all the sellers,
21 here's our definition of national broadline customers, how much
22 are you selling to them exactly? And you'd have to -- that
23 might be very difficult in this industry because that doesn't
24 seem to be a common term that they use, so if you couldn't do
25 that, you might say, well, our definition is how Sysco and USF

1 divide accounts according to what kind of salesperson they sold
2 by, and tried to communicate the content of that to everybody or
3 get all their sales data. But so, to get a denominator you
4 need -- you know, to get a denominator you need something that's
5 common across all buyers or all sellers.

6 Q. And did the Federal Trade Commission get all sales by all
7 sellers or all purchases by all buyers? Do you see that
8 anywhere?

9 A. No, not -- and not for -- and not for purchases in their
10 national broadline customers' market. They couldn't -- they
11 didn't gather that.

12 Q. Okay. But before -- so just to make sure we don't skip
13 over it: The numbers reflected in Dr. Israel's table 1, do you
14 agree or disagree with those numbers?

15 A. I disagree with those numbers.

16 Q. Okay. And do you see those numbers as reliable or
17 unreliable?

18 A. I think they're unreliable.

19 Q. Okay. Now, what kind of market share data would you
20 normally have in a merger case?

21 A. Well, I think that's just what we talked about,
22 Mr. Simmons. You know, normally somebody would have gathered in
23 the -- you know, in the ordinary course of business or there'd
24 be a consulting firm market research firm that does it.

25 Q. And you may recall Mr. Parker in his opening showed

1 documents and talking about the foodservice distribution
2 industry with various market shares?

3 A. Yes.

4 Q. Roughly, in your view, what share would the merging
5 parties have in the market?

6 A. Well, the ones I've seen that people have collected, that
7 the market researchers have calculated here, are not the FTC's
8 markets, they're sort of all foodservice distribution. And in
9 all foodservice distribution, I think of several different
10 participants in the market of calculated estimate of the total
11 size of that, the parties would have a share, oh, I don't know,
12 in the high 20s, 27 percent or something like that before the
13 divestiture, and about a quarter after the divestiture. The
14 quarter is me, it's not the ordinary course of business, but
15 lots of people have calculated the high 20s number.

16 Q. Now, if we could put up slide 11, we heard a lot about
17 Dr. Israel's RFP data. And given your experience and years of
18 economic work with databases and data-intensive problems, in
19 your view, are Dr. Israel's -- is Dr. Israel's RFP data reliable
20 or unreliable?

21 A. No, unreliable, sorry.

22 Q. That was an or.

23 A. Oh, I missed the "or." They're not reliable, I'm sorry.

24 Q. Why are they not reliable?

25 A. Dr. Israel treats them as if they were a won/loss

1 database that -- from each company, won/loss database that was
2 kept in the ordinary course of business, and he gets them only
3 from the parties. So the first problem he has is that they're
4 not a won/loss database that was maintained in the ordinary
5 course of business. He's constructed them from thousands of
6 different documents and had to -- you know, it's not some
7 manager's sense of, like, what are the -- what are the RFPs,
8 it's Dr. Israel's sense. So he's had to put a lot of his
9 judgment into it.

10 THE COURT: I'm sorry, what do you mean by won/loss
11 database?

12 THE WITNESS: In many industries that are actually bid --
13 run by auctions or bid data, customers will say we need a new
14 whatever it is, we need a new -- one of the ones I spent a lot of
15 time with is Enterprise Software. We need a new database
16 management system, please bid. And the sellers in such instances
17 will typically keep systematic records of which ones they bid on,
18 what they bid, what the other competitors bid, who they were, if
19 there's a organized process, who was qualified, who dropped out
20 at that stage, who dropped out before doing a bid, who lost the
21 bid, what the factors were that the buyer used to decide what
22 was -- and then they'd write down whether we won it or lost it in
23 an organized way. This is a common form of business records in
24 industries that are actually organized around auctions, unlike
25 this one, and the -- and they can be useful for assessing

1 competition. You know, you could learn -- if those records
2 existed, for example, you could learn when firm one is the top
3 bidder, who is frequently the second place bidder, and things
4 like that; but nothing like that exists in this industry.

5 BY MR. SIMMONS:

6 Q. And, indeed, Dr. Bresnahan, the Federal Trade Commission
7 told the parties to go out and try to create instances that they
8 could go to employees' recollections, and the parties tried to
9 recreate it at the FTC's request; isn't that right?

10 A. That's my understanding.

11 Q. And the parties, when they conveyed that information that
12 they were told by the FTC to go and create, because it didn't
13 otherwise exist, the parties were explicit with the Federal
14 Trade Commission that the parties deemed that evidence as
15 unreliable and incomplete; isn't that right?

16 A. Yeah. I've read some letters they wrote on both sides of
17 that exchange.

18 Q. So we're not talking about data at all, this RFP
19 database. So that none of us get the misimpression, this is not
20 a database that's kept in the ordinary course of business,
21 right?

22 A. That's absolutely right.

23 Q. All right. Let us move to the CID. We've heard in the
24 case so far that there was also CID data and that Dr. Israel
25 used some CID data. Please remind us what that is about as

1 distinct from the RFP database?

2 THE COURT: Mr. Simmons, I'm going to interrupt you. We
3 need to take our lunch break early. Let's reconvene at 1:30.

4 MR. SIMMONS: Certainly.

5 THE COURT: All right. Thank you.

6 (Thereupon, a luncheon recess was had beginning at
7 12:27 p.m.)

8

C E R T I F I C A T E

9

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

/s/ Scott L. Wallace

13

Scott L. Wallace, RDR, CRR
Official Court Reporter

Date

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