

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
)	
et al.,)	Civil Action
)	No. 15-256
Plaintiffs,)	
)	Thursday, May 14, 2015
v.)	9:00 a.m.
)	
SYSCO CORPORATION,)	Washington, D.C.
)	
et al.,)	
)	
Defendants.)	

**DAY 8 - 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 14, 2015

(9:01 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 plaintiffs, Stephen Weissman, Mark Seidman, Melissa Davenport, Steve Mohr, and Krisha Cerilli. For the defense, Richard Parker, Ian Simmons, Edward Hassi, Katy Robson, Joseph Tringali, Peter Herrick and Philip Mirrer-Singer.

THE COURT: All right. Good morning, everyone. Here we are on our final day. Mr. Weissman.

MR. WEISSMAN: Good morning, Your Honor. We'll start our rebuttal case this morning. With your permission, we'd like to call Mr. Rajiv Gokhale to the stand, and my colleague Krisha Cerilli will handle the examination.

THE COURT: Very well. Good morning, Ms. Cerilli.

MS. CERILLI: Good morning. At this time, the FTC calls Mr. Rajiv Gokhale.

THE COURT: Mr. Gokhale, good morning and welcome.

THE WITNESS: Good morning, Your Honor.

MS. CERILLI: And, Your Honor, we have a slide dec that we'll be using for the examination which we can hand out now.

THE COURT: Okay. Thank you.

MS. CERILLI: And, Your Honor, I'd also like to, before we begin, bring to your attention the confidentiality issues with

1 the examination.

2 THE COURT: Okay.

3 MS. CERILLI: Defendants consider the specifics of their
4 estimates to be confidential, so what we've done is we've
5 arranged the examination so that Mr. Gokhale can describe his
6 conclusions at a high level with the public monitors still on,
7 but at a certain level of detail, we will -- we would ask if we
8 could turn the monitors off, and he'll continue his discussion
9 but without referencing certain specific numbers on the slides.

10 THE COURT: Okay. That's fine. Okay. Thank you,
11 Counsel.

12 (RAJIV GOKHALE, GOVERNMENTS' WITNESS, SWORN)

13 DIRECT EXAMINATION OF RAJIV GOKHALE

14 BY MS. CERILLI:

15 Q. Good morning, Mr. Gokhale.

16 A. Good morning, Ms. Cerilli.

17 Q. Would you please state and spell your name for the
18 record.

19 A. Rajiv B. Gokhale. It's spelled R-A-J-I-V, as in Victor,
20 middle initial B, as in Bombay, G-O-K-H-A-L-E.

21 Q. Okay. Mr. Gokhale, where do you work?

22 A. Compass Lexecon.

23 Q. And what is your current position at Compass Lexecon?

24 A. Executive vice president.

25 Q. Okay. And how long have you worked at Compass Lexecon?

1 A. Since '92, 1992 with a brief break in-between.

2 Q. Okay. And can you please describe your education?

3 A. Yes. I have a bachelor's in engineering from the
4 University of Bombay, at least that's what it was called then.
5 I have a master's in engineering from Vanderbilt University in
6 Nashville, Tennessee; and I have a business administration
7 degree from the University of Chicago's Graduate School of
8 Business, as it was called then. I believe it's called the
9 Booth School now.

10 Q. Okay. And what type of consulting work do you do at
11 Compass Lexecon?

12 A. A lot of that is related to regulatory issues and/or we
13 provide testimony and consulting related to matters in
14 litigation. It generally falls under the umbrella -- at least
15 my work falls under the umbrella of what I call financial
16 economics, which includes all sorts of financial analyses and
17 calculations related to damages, valuations, appraisals and also
18 includes things like what I'm doing here, which is trying to
19 understand merger-related or merger-specific cost efficiencies.

20 Q. Okay. And have you testified in court before?

21 A. I have.

22 Q. And how many times have you testified?

23 A. Twice in court, and I think a couple of times in
24 arbitrations.

25 Q. Okay. And in general, what did those testimonies relate

1 to?

2 **A.** Again, the broad area of financial economics, but the
3 testimonies in court specifically related to issues about
4 valuation of businesses.

5 **Q.** And you mentioned your consulting experience related to
6 merger efficiencies. Can you describe that experience?

7 **A.** I have over the years worked on matters related to
8 mergers and, again, different forms of financial analyses, but
9 specifically I can think of at least three times where I've done
10 something that's similar to what I'm doing here, which is to
11 understand, given the cost-savings estimates, what portion are
12 related to merger-specific cost efficiencies. And I have,
13 myself, filed a report once in a -- in also a related issue, but
14 I did not there do a similar analysis myself, that is, I didn't
15 look at the details and analyze merger-specific efficiencies
16 myself, but I responded to an expert at a higher broader level.

17 **Q.** Okay. And does the CV attached to the report that you
18 submitted in this matter accurately reflect your education,
19 qualifications and work experience?

20 **A.** It does.

21 MS. CERILLI: Your Honor, at this time I submit
22 Mr. Gokhale as an expert in financial economics.

23 MR. ROBSON: No objection.

24 THE COURT: It will be so admitted.

25 MS. CERILLI: Thank you.

1 BY MS. CERILLI:

2 Q. Mr. Gokhale, turning to your work in this matter, can you
3 please describe what you were asked to do?

4 A. Yes. As it shows on the slide, I was asked to review the
5 cost-savings claims as were put forth by the defendants, and in
6 particular, to look at how much or what portions of these claims
7 might be attributable to the merger, and unlikely to be achieved
8 by the defendants outside of the merger or through alternative
9 means.

10 I also was asked to look at whether the methodologies
11 were sound, reliable, and whether the underlying data and/or
12 information was substantiated.

13 And then I was also separately asked to review Professor
14 Hausman's report, in particular the portions of those reports
15 that related to the estimation of merger-specific cost
16 efficiencies.

17 Q. Okay. And what principles were you applying in
18 evaluating defendants' efficiencies claims?

19 A. As it shows on the next slide, the merger guidelines
20 describe a couple of the issues that I draw inspiration from.
21 The first paragraph, as it says, is what term "merger specific
22 efficiencies" under the guidelines. And while I'm not offering
23 a legal opinion on the interpretation of the guidelines, I'm
24 doing an analysis under, say, financial economic principles
25 about how I would interpret what would be merger-specific

1 efficiencies, and I described earlier, it would be those cost
2 savings that the defendants were likely to realize outside of a
3 merger control alternative means.

4 And the second part is what's called the verifiability,
5 and that's where the guidelines suggest, and my interpretation
6 was, whether the claims have been substantiated in a way that
7 one might be able to look at and verify the likelihood, the
8 magnitude of the claims, how they might be achieved and the
9 timing of such.

10 Q. Okay. And, Mr. Gokhale, what methodology did you apply
11 in attempting to assist the merger specificity of defendants'
12 claims?

13 A. I started really trying to understand the methodology in
14 a way where I could attempt to understand what was the source of
15 the claimed cost efficiencies or cost savings, and I tried to do
16 this by category of claim so that I could understand by category
17 of claim, A, whether the cost savings that were proposed by
18 defendants really resulted from initiatives that the defendants
19 had already undertaken prior to the merger; and if not, whether
20 they had offered any evidence as to why the two defendants
21 without a merger likely could not have attempted such
22 initiatives or extracted such cost savings.

23 Q. Okay. And what methodology did you apply to verify the
24 defendants' efficiencies claims?

25 A. What I also did, with understanding their methodologies,

1 where I could, I tried I follow through with the calculations.
2 In some cases the defendants have provided us actual, what I
3 call, spreadsheet models, and I attempted to understand the
4 calculations through the models; attempted to understand where
5 the key assumptions are, if I could identify them; and whether
6 there was a basis for the assumptions provided either in the
7 models, in other presentations or materials for review.

8 Q. And what information did you rely on in conducting your
9 assessment?

10 A. As I just said, since -- if I remember correctly I
11 started working on this around June of 2014, and we have
12 received over time a significant amount of information, in some
13 ways otherwise a steady extreme. But the information generally
14 contains internal correspondence, and by internal I mean either
15 between defendants or McKinsey, their consultant on this matter,
16 presentations that they made internally and are now available to
17 us, and these spreadsheets and some other information, but those
18 are the three broad categories.

19 Q. Okay. And have you used the methodology you just
20 described in prior matters?

21 A. Yes, I've used a similar approach.

22 Q. And without discussing specific numbers at this time,
23 what have you concluded concerning the merger specificity and
24 verifiability of defendants' claims?

25 A. I concluded, after understanding best I could their

1 methodologies and calculations, that defendants' methodology
2 really did not isolate what I would consider cost savings that
3 companies likely could have achieved on their own without the
4 merger -- sometimes I refer to these as stand-alone cost
5 savings -- to distinguish them from the savings that likely
6 would result because of a merger. So initiatives are things
7 that defendants now can do if they merge, that they liked likely
8 could not have done without a merger. So my study and analysis
9 of their methods tells me that they've commingled the two, and
10 when I tried to distinguish between the two, I find that a
11 significant portion of the cost savings they claim -- and I --
12 without stating numbers, that is that Mr. Wood said that the
13 cost savings they were carrying around was well north of a
14 billion dollars, but I find that a significant portion of those
15 are, in fact, cost savings that they could achieve outside of
16 the merger, based on initiatives that were already undertaken or
17 they likely could.

18 And what I then don't specifically subtract, I have put
19 in a column I called "Remaining Claims." And I call them
20 remaining claims because there are still a couple of issues
21 that, given the I have, I cannot fully resolve. And in
22 particular, I think a lot of the remaining claims also comingle
23 what I call stand-alone cost savings. They are still in several
24 remaining claims based on assumptions or inputs for which I
25 really haven't seen much evidence for or appropriate backup or

1 basis for.

2 And finally, the remaining claims also, to varying
3 degrees, are subject to what I call execution complexities,
4 contingencies -- that's a term that defendants have also used --
5 timing issues, and in many cases significant costs to achieve.
6 So these remaining claims by category, you know, are infused
7 with some or all of these three to varying degrees.

8 Q. Okay. And then did you also evaluate Professor Hausman's
9 report concerning efficiencies?

10 A. I did. What I found with Professor Hausman's analysis,
11 is that he seems to have accepted McKinsey's estimates at face
12 value. I did not see any discussion in his reports of what he
13 did to substantiate or independently verify the cost savings
14 that have been put forward by defendants. And I do find that,
15 even though he doesn't discuss it in his reports, that he has,
16 for lack of a better term, tagged certain cost categories as
17 either variable or merger specific. And again, there's no
18 explanation for it really. It's offered in the backup
19 spreadsheet. And I found that both his delineation of merger
20 specific and variable costs is overstated.

21 Q. And now turning to a more detailed review of your
22 opinions.

23 Can you describe for the Court what you've seen in the
24 evidentiary record concerning whether defendants' estimates
25 reflect merger-specific cost savings?

1 **A.** Yes. This next slide shows -- it's a part of Mr. Wood's
2 deposition. And Mr. Wood, if you look on the first page around
3 row 10, he explained that he didn't have an understanding of the
4 term "merger specificity," but more importantly, he explained
5 that the McKinsey teams who were tasked with estimating these
6 cost savings weren't were really given any instruction related
7 to merger specificity. And I find this explanation consistent
8 with my analysis and my conclusions that they have
9 co-commingled, therefore, significantly what I call stand-alone
10 savings with what would be merger-specific deficiencies.

11 MS. CERILLI: And as we move into that evidentiary record,
12 I'd ask if we can, at this point, turn the public monitors off.

13 BY MS. CERILLI:

14 **Q.** Can you please describe for the Court what additional
15 evidence you see in the record related to the merger specificity
16 of the claims?

17 **A.** I think the next two slides provide a good example, and
18 it's just in one category. This is in the -- what's called the
19 warehouse category, i.e., cost savings related to --
20 efficiencies related to warehouses. And if Your Honor could
21 look at the first line that's not highlighted, the number there
22 is about a third of what's attributed overall to this category,
23 but in the parties' manual response to the second request, they
24 themselves explain -- and you see some of this in the underlying
25 documents, too -- that part of the initiatives they would

1 undertake to extract these cost savings would be things like
2 installing triple pallet jacks. And my understanding is that's
3 a way where you can pick up three pallets at the same time, so
4 it makes the process more efficient.

5 And another example they gave is tightening the standards
6 at USF locations. And they explain this is like sharing best
7 practices, but if we switch to the next slide, this is a page
8 from a US Foods -- it's a budget planning update prepared in
9 August 2013 before the merger was announced.

10 And if I may draw Your Honor's attention to the few rows
11 that we've highlighted. The two rows on top talk about
12 standards, forklift standards, so there's some sense that the
13 standards and better standards or tighter standards, as
14 described in the earlier slide, are things that USF was already
15 thinking about and hoping to implement. And interestingly
16 enough, the last row we've highlighted that says "additional
17 triple pallet jacks," you know, that's the exact same thing. So
18 this is one example, and I have found many, where the parties
19 had already thought of and were considering or had already
20 started implementing some of these efficiencies -- I'm sorry,
21 some of these initiatives leading to cost savings that the
22 parties now call merger-specific efficiencies.

23 Q. And turning to the next slide, I believe this has your
24 conclusions with specific numbers. Can you describe for the
25 Court your specific conclusions here?

1 **A.** Yes. The number in the first row, that's really a
2 starting point that both Professor Hausman and I start with.
3 There's a very minor difference, I believe, but essentially the
4 same number. This is what you find in the underlying documents
5 as a full run rate.

6 And in the second row, are the amounts out of that
7 starting -- the gross starting point that I have concluded are
8 amounts that are not merger specific, leaving in the third row
9 what I described earlier as remaining claims, and those
10 remaining claims -- I mean, I can state that number -- I've
11 concluded is 481 million.

12 **Q.** Okay. And is it your conclusion that --

13 **THE COURT:** Sorry to interrupt. So former run rate amount
14 is what you define to be the maximum amount that McKinsey
15 identified as the annual cost savings from the merger?

16 **THE WITNESS:** That's right, Your Honor. And that or a
17 very similar number is what you would find in what they presented
18 to their board, I think in November of 2014, what they presented
19 to the commission as a starting point in January and February
20 of -- earlier this year.

21 **BY MS. CERILLI:**

22 **Q.** Okay. And what is the timeline for reaching full run
23 rate, for reaching the date -- the numbers that we're seeing on
24 this page, according to Sysco's schedule?

25 **A.** The best I understand it, it's beyond year five. So if

1 you look at a timeline, either by claim or in gross, you see
2 this building up to year four, year five, and then off to the
3 right is a column that's full run rate, which is generally
4 higher than the year four and year five numbers.

5 Q. Okay. And just as a percentage just to orient us, what
6 would the savings level be two years out from closing?

7 A. It depends by category, but I'll get to a couple of
8 categories later, for example, in what they call network -- it's
9 barely about 40 percent they hope to achieve at the end of year
10 two. And I think in IT it's similar, IT they leave -- comes to
11 fruition by year -- somewhere between years three and five.

12 Q. Okay. And you alluded to this earlier, but just to
13 briefly recap, is it your assessment that the remaining claims
14 are verified merger-specific efficiencies?

15 A. As I said earlier, I have still some reservations about
16 commingling and how these numbers are calculated and the timing
17 and contingency issues, which we'll get to in a minute. But I
18 should note that to the best of my understanding, Dr. Israel,
19 when he uses a number for merger-specific cost efficiencies --
20 one more thing I should add, before anyone includes both fixed
21 and variable costs, so when Dr. Israel borrows a number or uses
22 one from my report, I believe he takes the 481 minus the fixed
23 cost as a starting point. So despite my reservations, I have
24 not really suggested a lower number, and Dr. Israel, to the best
25 of my knowledge, doesn't use a lower number. He uses these as a

1 starting point.

2 Q. And you did conduct a fixed versus variable cost
3 assessment, correct?

4 A. I did, and I have a slide we'll get to later.

5 Q. Okay. Great. And this slide also mentions some
6 adjustments. Can you explain what the adjustments are?

7 A. Yes. And these adjustments -- the first one is related
8 to divestitures, and because of the proposed divestiture of some
9 distribution centers to PFG, we want to make sure that what we
10 call remaining claims is adjusted. And I presented both ways,
11 but in this I have adjusted it to discount it for the affect of
12 divestiture.

13 THE COURT: In other words, you backed out the cost
14 savings from the loss of those 11 facilities?

15 THE WITNESS: Yes, Your Honor.

16 And the second adjustment, which you can see, is about
17 \$100 million, is for what's called contingency. And
18 contingency's also a term you see in defendants' own
19 presentations. And they describe it, if I'm recalling correctly,
20 as something they discount for execution risk and so on. So what
21 they did is they had a contingency estimate in their presentation
22 to the board, in their presentation to the commission, but that
23 contingency estimate applied to the gross run rate. So what I've
24 done is I've allocated it proportionally to the \$481 million of
25 remaining claims. And when I make all those adjustments, the

1 remaining efficiency claims, after the divestiture adjustment and
2 after contingency, is down to about \$328 million.

3 BY MS. CERILLI:

4 Q. And let's turn to your assessment of some of the claims
5 you excluded on merger specificity grounds. We obviously won't
6 have time to discuss all of them, but are there a couple of
7 examples you'd like to describe for the Court here today?

8 A. Yes. And these -- I think we're discussing two: One is
9 category management or what's called CatMan for short,
10 sometimes; and the other is in the area of field sales.

11 Q. Okay. And are these claims where your conclusion differs
12 from Professor Hausman?

13 A. That's correct. That's why I picked them, is there's a
14 big areas of significant difference between me and Professor
15 Hausman.

16 Q. Okay. And I believe the Court has heard about category
17 management, but can you just briefly describe what category
18 management is, just to orient us?

19 A. It's -- the best I can paraphrase it, it's a way of
20 rationalizing your product mix or, you know, what are called
21 stock keeping units or SKUs for short. But sort of related to
22 that is if you have -- whether or not you have a perfect
23 assortment of product yet, so a related notion is to -- a
24 different way of engaging or interacting with the suppliers to
25 eke out cost savings.

1 Q. Okay. And again, just to orient us before we get into
2 the evidence, what is your basic collusion concerning the
3 category management claim put forth by defendants?

4 A. The -- that essentially this is a claim risk on
5 initiatives that both parties have already undertaken and expect
6 to put all of their categories through category management. So
7 the cost-savings estimate that defendants have proposed, in my
8 opinion, is something they are well on the way to achieve and
9 hope to achieve outside of the merger.

10 Q. Okay. And so you referenced the fact that they both have
11 category management programs. Can you just walk us through what
12 the record reflects concerning their -- both Sysco and US Foods
13 category management programs?

14 A. Yes. So what we're looking at now is a slide from a
15 presentation that Sysco had in March of 2014. And if you
16 notice, this says "Category Management Performance." It's laid
17 out in ways the expected timing, at least expected as of this
18 time. And my understanding from this and other documents is
19 that Sysco, A, has been working on category management for about
20 three years and fully expected to put all of its categories
21 through category management. This says by 2015, but I -- I now
22 understand that maybe by 2015 or currently they've put about
23 two-thirds of their categories through, but fully expect that
24 the remaining one-third will be put through if not in fiscal
25 year, I believe, around calendar year of 2015.

1 But what the chart shows you is that even if they
2 introduce their categories into category management, there is
3 some lag between starting the process and actually realizing
4 savings.

5 Q. Okay. And what do you see concerning US Foods category
6 management program?

7 A. This -- what we're looking at now is a slide from
8 US Foods' presentation, and there, too, you see -- I should
9 highlight under the first row, before I explain the rest of the
10 slide, under COGS or cost of goods sold, the term "SVM" is what
11 US Foods has called strategic vendor management. And this is
12 the part about the supplier engagement, but the best explanation
13 I can find of US Foods SVM is even without fully addressing the
14 SKU assortment, these are initiatives they can undertake to try
15 and reduce costs with suppliers.

16 And so the second part is generally called assortment
17 review, or I think kitchen tune up. There are various terms.
18 But what the slide does show you that even US Foods, as of this
19 time in 2013, was anticipating that they were already building
20 on a foundation for category management or undertaking some
21 initiatives, and that in 2014 and 2015 time frame expected what
22 they call to have in place a new phase of category management.

23 Q. And then what evidence do you see in the record that has
24 led you to question the merger specificity of the estimate put
25 forth by defendants here?

1 **A.** This -- and I'll get to the actual calculations later,
2 but this is a discussion from Mr. Todd's deposition testimony.
3 What Mr. Todd explained -- and Mr. Todd is an executive with, I
4 believe, Sysco's merchandising group, but he was on the synergy
5 teams for this purpose. So what Mr. Todd explains, in the top
6 half that's highlighted, is that if they were to look for
7 potential for savings, there -- if the category had already been
8 through category management once before, it matters because, as
9 he explains in the second part, that if you've already been
10 through a sourcing event, the savings will be greater the first
11 time you did it, but if you tried to do it again, then you would
12 expect lower savings.

13 **Q.** Okay. And from a perspective of assessing merger
14 specificity, what is the significance of Mr. Todd's testimony?

15 **A.** It's very important because if, in fact, Sysco and
16 US Foods were expecting to put all their categories through
17 category management, then in order to calculate the
18 merger-specific cost efficiencies, one should first correctly
19 model the savings that you would expect from your stand-alone
20 category management initiatives so that you don't double count
21 or put -- you don't count these stand-alone savings as
22 merger-specific savings.

23 **Q.** Okay. And then moving to the next slide, what have you
24 seen in the evidence concerning how Mr. Todd and the synergy
25 team treated US Foods category management program?

1 THE COURT: I'm sorry, can you specify what synergy team
2 is? Is that an internal term to Sysco, or is that something that
3 was formed in connection with the McKinsey analysis?

4 MS. CERILLI: Sure. So you heard from Mr. Wood that
5 McKinsey organized synergy teams by category, so what Mr. Todd
6 was on the synergy team for merchandising.

7 THE COURT: Okay.

8 MS. CERILLI: So it would have been Mr. Todd and McKinsey
9 person and a US Foods person.

10 THE COURT: Okay. I just wanted to clarify that. Thank
11 you.

12 MS. CERILLI: Yes.

13 THE WITNESS: So as Mr. Todd explains here, and without
14 reading that number, you can see the categories he says -- and
15 it's consistent with some information we'll see later -- that
16 US Foods had already put through what they call their, I think,
17 full assortment review. It's a small fraction of their total
18 categories with the rest yet to come. And he said that it didn't
19 matter to them that US Foods hadn't fully done it. All that
20 mattered to them was knowledge that US Foods put on hold its
21 efforts when the merger was announced. So in other words,
22 US Foods who was embarking on a category management project
23 stopped doing so when the merger was announced.

24 BY MS. CERILLI:

25 Q. Okay. And we can obviously see that the number that had

1 been through assortment review at US Foods -- and I won't state
2 it here -- but just for context, how many categories are we
3 referring to when the team is doing their analysis?

4 **A.** I think I have a summary on the next slide. No, I'm
5 sorry, I -- we'll come -- this is the slide I was thinking of,
6 and I'll -- no, I'll tell you which slide number the numbers are
7 on.

8 **Q.** And we can just use a general number as well.

9 **A.** Okay. Sorry. It's about 200 categories.

10 **Q.** Okay.

11 **A.** If we can go back a few slides, then, to Mr. Todd's
12 testimony. So the point is, given this discussion and given my
13 understanding, what I attempt to do is look for how they've
14 completed it in their calculations. And as we go, I'll explain
15 that my analysis tells me they've counted stand-alone cost
16 savings as merger-specific cost savings.

17 **Q.** Okay. And then what have you seen in the record
18 concerning how Mr. Todd and the merchandising synergy team
19 treated Sysco's program in making their calculations?

20 **A.** What they did was in their calculations of cost savings,
21 if a Sysco category had been through category management, they
22 started with initially a ratio, but they assigned a 75 percent
23 discount to the savings that they expected as a starting point.
24 So it tells me that they explicitly acknowledged and modeled in
25 some cases what Mr. Todd is describing here, that if you've

1 already done category management and you tried to do it again,
2 you're going to extract much lower savings than what you
3 initially did.

4 **Q.** And have you seen the document referencing the synergy
5 estimate being incremental to Sysco's fiscal year 2015 Naples
6 program?

7 **A.** I have. And Naples is -- I think it's sort of a
8 catch-all phrase, which also is described differently as a
9 business transformation initiative, but this is something the
10 parties had undertaken a few years back, and expected that as
11 part of Naples category management, would yield significant
12 savings.

13 But despite what this says, I just don't see it in the
14 underlying evidence and data that, in fact, what they've
15 calculated is incremental to Project Naples.

16 **Q.** Okay. But even if you took this statement at face value
17 that it's incremental to fiscal year 2015, would you conclude
18 that that means that the synergy estimate is merger specific?

19 **A.** No, because as we saw in the slide earlier, even if they
20 put through the remaining categories through management in 2015,
21 the savings won't actually be realized until some time later.
22 And you see that on the chart. So even if you took this at face
23 value that they're, in fact, taking fiscal year '15 numbers as a
24 baseline, which they don't, that still would not capture the
25 entire savings from their stand-alone efforts.

1 I'm sorry, if I may. In fact, I think as everybody's
2 testified, in the models you see that they use 2013 numbers as a
3 starting or baseline against which to compare.

4 **Q.** Now, in addition to the testimony and the documents that
5 we've just described, you mentioned that you have also looked at
6 the calculations, spreadsheets or model.

7 Can you explain for the Court what you see in the models
8 and why you believe the models do not reflect merger-specific
9 calculations?

10 **A.** Yes. So there's three things I'd like to explain about
11 the models. One is the overall set up of the model is --

12 **THE COURT:** I'm sorry, these are the McKinsey models
13 you're talking about?

14 **THE WITNESS:** These are the McKinsey models now. My
15 understanding is the synergy teams had input -- so it would also
16 include the -- whoever from Sysco or USF was on those teams.
17 So -- and like I said, I'm looking at spreadsheets. I call them
18 spreadsheets or models interchangeably.

19 But there are three things I'd like to explain. One is
20 that the overall calculation is one in which they take what they
21 call addressable spend. So they look at the cost of goods spend
22 by both parties, they decide what part of them is addressable.
23 To that, they're going to apply a rate, a savings rate, and the
24 multiplication gives as a starting point what they believe would
25 be the savings they're going to get from this particular

1 initiative. With that rate, they then subtract from that what
2 they call short-term levers, so things like -- you can
3 immediately talk to some suppliers, get better terms from
4 combining contracts, you can enhance some stuff, and maybe you
5 can consolidate some supplies. That, they say can happen even
6 without a full review of your SKUs. So they start with this
7 rate. They get a dollar amount. They subtract some of these
8 things, and what's left they call is the category management
9 savings, which is what we're discussing. So that's one aspect.

10 The second aspect is that in determining the rate, they
11 use what they call a two-step process. The first step is what's
12 generally described as a mathematical step, and that's the step
13 in which, as I said earlier, they start with some -- what I've
14 termed an unadjusted rate, the corrected rate discounted by
15 75 percent for the categories for Sysco that have been through
16 category management; similarly for the few categories that USF
17 that have been through category management, take a 75 percent
18 discount; and for some of the categories that USF that haven't
19 been through a full category management but have been through
20 this other process, SVM, they take a 50 percent discount.

21 And then that gives you another savings rate, an adjusted
22 savings rate at the end of the mathematical step, and then they
23 have something they call a business judgment step where they then
24 exercise their business judgment to further adjust the ratio.
25 That step is opaque. I can tell you or I haven't seen any

1 evidence they've presented on exactly how they go from a
2 particular rate at the end of the first step to second step.

3 And the third thing is that they have two iterations of
4 this, and that's what's on this slide. The iteration one had 204
5 categories on it. Iteration two, in which you can no longer see
6 the mathematical step, had 130 categories, but that's because
7 they combined some. And -- but if I compare the output -- or
8 inputs to version one and two, they're virtually similar, other
9 than the number of categories. The addressable spend is very
10 similar. The savings rate -- and this is at the end of step
11 two -- is very similar. The most recent savings -- this is
12 before you subtract all these amounts, and the important thing is
13 that the analyzed savings from CatMan are virtually identical.

14 BY MS. CERILLI:

15 Q. Okay. And moving to the next slide, is the key point
16 that you do not see them applying a discount for all of the
17 categories having been through category management?

18 A. This is what I said earlier, and the two rows that are
19 highlighted tell us how many out of the 200 categories for Sysco
20 that have not been adjusted in the mathematical step or
21 otherwise and for USF's how many, and there's a significant
22 number in each case.

23 So what I did was I tried to do a simple experiment --
24 and it's not perfect, but it illustrates the -- to what degree,
25 you know, they have significantly captured stand-alone savings.

1 What I did was I went back to the first iteration where I can
2 actually observe the mathematical step, and for these categories
3 where they did not take any discount, I said what happens if, by
4 their own reasoning, you apply 75 percent discount to the
5 initial savings rate -- you can see, Your Honor, here that that
6 itself causes a significant decrease, and that's in the last two
7 rows from the number they've placed on the category management 2
8 by doing nothing else but this one adjustment. And like I said,
9 I cannot completely follow-through because it gets opaque from
10 that point on.

11 Q. And are you aware of Mr. Wood's testimony concern- --
12 Mr. Wood -- pardon, McKinsey's testimony concerning the model?

13 A. I am. He described, the best I can understand it, is
14 that for the categories that had not been through category
15 management, somehow in this business judgment step, they've
16 accounted for it. I read his testimony, I tried to understand
17 it, and given the data I've been looking at since June, I just
18 don't see it in the underlying spreadsheets or data.

19 Q. Okay.

20 MS. CERILLI: We can move on to the next slide, and I say
21 you're --

22 THE COURT: I'm sorry to interrupt, but just so I
23 understand. So your point is the McKinsey discounted category
24 management savings for those categories that had, only for some
25 percentage of categories, that actually had been through the

1 category management process?

2 THE WITNESS: No, actually for all the categories that at
3 that point when they were creating these models had already been
4 through category management, they took a discount.

5 THE COURT: Okay.

6 THE WITNESS: Other categories they tagged as will be
7 through category management, for those two that take the
8 75 percent discount. But we know that the -- all the remaining
9 categories, those also they had decided went through category
10 management, just hadn't been actually started or planned at that
11 time. It's for those remaining categories they take no discount.

12 THE COURT: I see, okay.

13 THE WITNESS: So what this slide shows, it's a depiction
14 of the underlying data from the first iteration of McKinsey's.
15 And if we could look at the charts on the bottom, what it shows
16 for -- and in this case this is all of the categories, as you saw
17 in the earlier slide, for which they haven't taken a discount
18 because they hadn't been through category management at the time.
19 And if you see the height of the bars, they generally fall out
20 into .5, 2 percent, 4 percent, 8 percent, or 10. That's what I
21 call the unjustified savings rate, which as what I understand
22 they draw from their experience, collected judgment, et cetera.

23 The bars in the middle are what comes out of the
24 mathematical step. So it's clear that in the mathematical step
25 there is no discount because the bars are the exact same heights.

1 The third number on the right, you see some of the tall
2 bars on the very right got shorter, but some of the short bars on
3 the left got taller, and so the net effect is there's really not
4 much change, they still fall out into these levels. And you see
5 that in the table on top. If you look at the top panel, which is
6 the -- what I calculate is the average savings rate, weighted by
7 the addressable spend, so it sort of tells you what's applicable
8 across. If you see, Your Honor, the unadjusted mathematical step
9 and what comes out of the business judgment step is virtually
10 identical. So if the testimony is we somehow adjusted for this
11 category, I just don't see it in the underlying data. And if you
12 look at the medians, they're exactly identical.

13 And on the next slide I do a similar exercise for US Foods
14 with the same general output. The bars don't change much. You
15 can see there's a slight dip in the business judgment step when
16 they get to the weighted average, but the medians are exactly the
17 same.

18 BY MS. CERILLI:

19 Q. Okay. And, sir, just to conclude on the big picture, is
20 it their failure to apply a discount, their own discount, to all
21 categories that ultimately is what makes you question larger
22 specificity of this claim?

23 A. In that line it clearly demonstrates that what they
24 anticipate is they will put all their categories through, should
25 have taken a discount by their own reasoning, didn't do so, and

1 therefore significant amounts of what I would call cost
2 stand-alone savings are in, what they now term, merger-related
3 savings.

4 THE COURT: Did you see any evidence in the record as to
5 why they would not have applied the discount to all of the
6 categories?

7 THE WITNESS: I looked, Your Honor. I don't really see a
8 good reasoning, and that's why the one slide we had was
9 Mr. Wood's explanation, was that the best I can understand is
10 it's suggesting it's somehow taking into taken into account in
11 one of these steps, but I just don't see where.

12 BY MS. CERILLI:

13 Q. Okay. Thank you. I think we can now move onto another
14 example, thankfully, one related to field sales.

15 Is there one more example on merger specificity that
16 you'd like to describe where your opinion differs from Professor
17 Hausman?

18 A. Yes. This is related to the category that's called
19 "Field Sales," and if we switch to the next slide, one of the
20 ways in which the parties suggest the defendants and McKinsey
21 they can extract field savings, is by shifting some rows and
22 responsibilities. And what we've highlighted here, SC stands
23 for sales coordinators. So the goal is that they would hire
24 more people, and I believe Sysco has already had a pilot program
25 in this sense, but they would hire sales coordinators who would

1 be paid less than the sales associates themselves -- that's what
2 the MA is -- and, therefore, by relieving sales associates some
3 time, it would increase their productivity by freeing up their
4 time, and likewise by adding e-commerce or expanding e-commerce
5 capabilities.

6 As I said, if there was more evidence why either party
7 could not hire sales coordinator and do this shift as
8 stand-alone companies, but importantly, Mr. Wood also testified
9 that Sysco could have -- likely could have without the merger
10 also expanded the e-commerce capabilities. So it's just another
11 example of things the parties likely could have, or are already
12 contemplating in some sense, done without a merger where the
13 savings are being attributed to the merger.

14 **Q.** And then with respect to the remaining claims, we
15 obviously don't have time today to go through all of the
16 verifiability issues.

17 Do you have a couple of examples you can use just to
18 briefly describe the verifiability issues that you see with the
19 remaining claims?

20 **A.** Sure. I picked out a couple, and one is what they call
21 network savings. With network savings what they claim is the
22 amount that's listed in the top bullet, but I would note the
23 network savings, that both defendants had forward looking plans
24 for improving their own networks. So when they start with a
25 baseline of 2013, I don't see any evidence where they've taken

1 the 2013 baseline and adjusted it for the plans they themselves
2 had, and therefore the cost savings they would eke out as
3 stand-alone companies before comparing it to the cost of some
4 optimized network for the combined company.

5 And Mr. Wood actually somewhat stated that, you know, in
6 the optimized network for the combined company they take into
7 account growth and what it calls competitive dynamics. Well, if
8 growth and competitive dynamics are going to change over time, I
9 would like to see some evidence that even the 2013 baseline,
10 then, was adjusted to take into account so there's an
11 apples-to-apples comparison. I didn't see evidence of that.

12 And then there's a list below that says, as I discussed
13 earlier, only 40 percent of the savings come by the end of 2017.
14 And in their own presentations, McKinsey and Sysco, acknowledge
15 that the timing is important because often savings that are not
16 captured soon don't materialize at all.

17 Then the precise plan for which distribution's to close
18 is still, you know, being firmed up, are not certain. They
19 themselves in their risk identification discuss how, because of
20 customer restrictions, some SKU restrictions, about what you
21 have there, there may be some risk to actually implementing this
22 network plan.

23 And, finally, there is a dependency with category
24 management, because if you're going to change your assortment,
25 if you're going change your SKU mix dramatically over the next

1 few years, that likely would have of some implications of what
2 you do with network. And there are documents where they discuss
3 the relative timings and whether and how one might affect the
4 other.

5 Q. And then turning to the next slide, you have another
6 example just to highlight some of the verifiability issues?

7 A. Yes. IT is another example where, even what I've left in
8 remaining claims, if you -- if I go back to the underlying
9 spreadsheets, you see that in some cases it refers to things
10 like getting enough unneeded contracts or cancelling redundant
11 contracts. I've not seen a discussion of whether they are made
12 redundant by the merger or whether they were already redundant,
13 whether they're unnecessary or unneeded because of a merger or
14 they were already redundant.

15 But more importantly, when I try to follow through the
16 map and I see the dollar amounts they attribute to these claims,
17 it's just a dollar amount that's typed in. There's no real
18 discussion of why that dollar amount, how they estimated that
19 dollar amount, and so on. And when asked, Mr. Wood was unable
20 to explain in his deposition exactly how they did it, and more
21 importantly, the timing issue's the same. But this is -- and
22 the probability that I've discussed in the last bullet here, you
23 see for all claims, even in the more recent documents, they
24 themselves acknowledge for IT that the probability of actually
25 achieving that full run rate, Your Honor, for three of these

1 categories is somewhere from the 40, 50, 60 percent range. So
2 to me, that's an explicit acknowledgment of the risk of not
3 achieving these.

4 **Q.** And then just to reiterate, your understanding is that,
5 despite these verifiability issues, you understand that
6 Dr. Israel is using your remaining claim amount in total,
7 correct?

8 **A.** That's correct. All these issues prevent me from doing
9 is -- these issues prevent me from estimating myself what part
10 of the 481 is really what I would call merger specific, but
11 Dr. Israel starts with that high number.

12 **Q.** And then reference you did a fixed versus variable cost
13 assessment. Can you just show me your assessment here for us
14 and explain what it -- what your conclusions are?

15 **A.** That's what's on this next slide, the column on the
16 remaining claims, if you see, adds up to my 481, and I've broken
17 it out by the different categories. Amongst those, I've tried
18 to list, you know, whether they're variable, fixed or some
19 mixture of the two. And if you took the column on the right,
20 this is one I've not adjusted for divestiture but adjusted for
21 contingency. You see the 481 total drops to about 368, but
22 several of these categories are predominantly fixed, but if I
23 just simply subtract it from the 361, the categories that are
24 predominantly fixed, you get down to somewhere around 223
25 million as variable remaining claims.

1 Q. Okay. And by contrast, what has Professor Hausman
2 estimated as merger-specific variable cost savings, moving to
3 the next slide?

4 A. I think we have a slide on that, too. He -- and I've
5 used a number, and I believe he testified yesterday, that it was
6 about half a billion, but what you see here is a number from his
7 report. He actually now has a number slightly lower, about 20
8 million lower, that's in the footnote. And I think that's
9 because of a -- he had not correctly adjusted in his rebuttal
10 report, but he has here.

11 But the -- one of the main sources of difference between
12 his estimate and mine is that category management and a couple
13 of other things we discussed.

14 Q. Okay. And are you aware, Professor Hausman I believe
15 testified yesterday, and he mentioned that he believed your --
16 you had excluded too much on specificity grounds. He said your
17 exclusions did not make economic sense because Sysco and
18 US Foods should be doing these things already. What is your
19 response to that?

20 A. It's a red herring. But before I describe why it's a red
21 herring, I should note that in his rebuttal report, Professor
22 Hausman had plausible similar arguments, and like he did
23 yesterday -- I believe yesterday he testified that my 900
24 million, if accepted at face value, even after taxes would imply
25 that Sysco's share price would have gone up 45 percent, and his

1 point was it's irrational to expect a company would leave that
2 kind of value on the table.

3 I note that the calculation he -- that he presented
4 yesterday is very different from the one he had in his rebuttal
5 report. What he did in the rebuttal report is he applied
6 Sysco's price earning ratio to these pretax earnings. And I
7 noted in my deposition that you cannot apply price earnings
8 ratio which applies to after tax earnings to a pretax earnings
9 number. So I think in his deposition testimony he appears to
10 have corrected that one part, but many other errors remain. So
11 in order to fully understand why I think the 900 is a red
12 herring, it might help to look at his slide, the one I think he
13 used in his testimony yesterday.

14 MS. CERILLI: So what we're passing out is a slide from
15 Professor Hausman's presentation yesterday. It's DX 05028. And
16 we'll just use slide 37 where he reports his estimates.

17 THE WITNESS: So if I may orient us to what's on this
18 slide. The top part is Professor Hausman's conclusions as he
19 presented them. And when he discussed how the McKinsey has come
20 up a run rate, I think he called it approximately a billion
21 dollars, it's worth looking at the second bullet. The billion
22 dollars is really, I think, starts with what Mr. Wood described
23 as north of a billion, but it subtracts its divestiture, customer
24 loss and contingencies. Therefore, I think juxtapositioning this
25 900 million with any other number on this page is, itself, a

1 little misleading because the 900 doesn't take into account any
2 of these adjustments.

3 If you did -- and there's one other adjustment -- all the
4 other numbers presented on this page are really only referred --
5 the two columns on the right, to variable expenses, not fixed.
6 The 900 also contains fixed expenses that I've set aside as not
7 merger specific. So you adjust the 900 to make it an
8 apples-to-apples comparison, you would cut it in almost half.

9 So with that in mind, I would now like to draw attention
10 to the two numbers on the bottom, the one on the right --

11 BY MS. CERILLI:

12 Q. Okay. You don't have to mention them. I already
13 highlighted them, one in pink and one in yellow, if you want to
14 refer to them.

15 A. It's not highlighted on my copy. But if you notice the
16 two numbers totals is when Mr. -- Professor Hausman's comparing
17 the run rate of all variable cost synergies versus the run rate
18 of merger-specific variable costs. And the difference between
19 those two is about \$190 million. Professor Hausman never
20 explained -- sorry, that \$190 million comes from about three or
21 four categories that I also have called not merger specific. So
22 he concedes there are about 190, even in his own calculation of
23 variable costs, that are not merger specific. This is the way
24 he contradicts himself. He never explains why it's economically
25 irrational to leave \$190 million on the table, which by his own

1 logic, would still likely have a fairly significant share price
2 effect, but he finds the notion of leaving something higher
3 highly economically irrational. So that's one area.

4 But even that doesn't fully explain it because he's
5 missing probably the most important argument here, which is that
6 part of what I said set aside, as I discussed earlier, are
7 things like category management. That has nothing to do, as
8 Professor Hausman suggests, at leaving money on the table. I
9 set those values aside because the companies were already doing
10 that, not because they set it aside as -- or had never thought
11 of it. So this notion that the company would be irrational in
12 not undertaking some initiatives doesn't apply. They are out.

13 **Q.** Okay. And then turning back to the PowerPoint, there's
14 an appendix attached, which we obviously won't be going through,
15 but can you just describe what information you've left for us in
16 the appendix?

17 **A.** Yes. Those are by category, Your Honor, I've prepared,
18 for lack of a better term, a cheat sheet, so that by category
19 I've tried to capture from my report what the notes about each
20 category, and I tried to refer back to where in my report I
21 discuss those particular categories.

22 MS. CERILLI: Thank you, Mr. Gokhale. Thank you.

23 THE COURT: Thank you, Counsel.

24 MS. ROBSON: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MS. ROBSON: Katrina Robson for the defense.

2 CROSS-EXAMINATION OF RAJIV GOKHALE

3 BY MS. ROBSON:

4 Q. Good morning, Mr. Gokhale. It's good to see you again.

5 A. Good morning, Ms. Robson.

6 Q. Thank you for taking the time to talk to me one more
7 time.

8 MS. ROBSON: Your Honor, is it all right if we approach to
9 give you binders?

10 THE COURT: Yes.

11 BY MS. ROBSON:

12 Q. Are you ready, Mr. Gokhale?

13 A. I am.

14 Q. Great. Mr. Gokhale, you've analyzed merger efficiencies
15 in prior cases, right?

16 A. As I said in my direct, yes.

17 Q. And you consider yourself an expert on merger
18 efficiencies, right?

19 A. Under the broad umbrella of financial economics, yes.

20 Q. Okay. And as an expert on merger efficiencies you
21 wouldn't conduct an analysis based on insufficient information,
22 right?

23 A. That's a broad question. Without context that's
24 difficult to answer.

25 Q. Well, let me put it a different way: You would request

1 the information you needed for your merger efficiencies analysis
2 when you're conducting that analysis; is that right?

3 **A.** Are you asking if I were to -- a little different from
4 what I've done here, which is analyze the cost savings put
5 forth, if I myself were conducting analysis?

6 **Q.** That's correct.

7 **A.** I'd like to think I'd request information if it were
8 lacking.

9 **Q.** Okay. Now, during your deposition you testified that you
10 filed a report on merger efficiencies in one case, correct?

11 **A.** I think I discussed it quite a bit, and as I discussed
12 earlier it was in the context of a discussion on merger-specific
13 efficiencies. I did not, myself, do an analysis of
14 merger-specific cost efficiencies, as I've done one here or in
15 some other prior matters.

16 **Q.** And you've engaged a more full-blown analysis in
17 merger-related efficiencies on three other occasions?

18 **A.** Those are the ones I could remember and can remember.

19 **Q.** Okay. And to protect confidentiality, can we refer to
20 those four cases, as we did at your deposition, as the first
21 airlines merger, the second airlines merger, the oil industry
22 merger, and my favorite, the bath products merger?

23 **A.** Yes, with one point being one of those airline merger is
24 what I've just described. I filed a report in, the other three
25 I would say are examples we discussed where I did a fuller

1 merger-specificity analysis.

2 Q. And the report was filed in the second airlines merger,
3 can we refer to it that way?

4 A. Sure.

5 Q. Okay. In all four of those cases, the merging companies
6 calculated their own efficiencies estimates; is that right?

7 A. I'm sure they did, but I'm not sure I understand your
8 question.

9 Q. I mean, in each of those four cases, the merging
10 companies calculated their own efficiencies estimates?

11 A. I believe so. They had, at least as a starting point,
12 what they put forth as cost savings related to the merger.

13 Q. Okay. And in each of those cases you've -- or let me put
14 this a different way: In the three cases where you did the more
15 full-blown analysis, you started with an estimate of the company
16 cost savings, and then you tried as best as you could to go
17 through that to understand what would be something -- what would
18 be merger specific; is that right?

19 A. I did use, to the best of my recollection, those numbers
20 put forth as a starting point, and from there on we tried to
21 conduct some analysis of what we might consider merger specific.

22 Q. Okay. Great. Now, your demonstrative, let's turn to
23 that for just one moment. If you could turn back to, I believe
24 it is page 7 of your demonstrative.

25 MS. ROBSON: And to protect confidentiality, Your Honor, I

1 am going to write some numbers on a piece of paper here, rather
2 than read them into the record.

3 BY MS. ROBSON:

4 Q. Do you see what I'm looking at on page 7?

5 A. I do.

6 Q. Okay. The first thing that's listed there was the
7 installing triple pallet jacks in USF locations, right?

8 A. That's the first thing highlighted on that page.

9 MS. ROBSON: And are we off the screen? Great.

10 BY MS. ROBSON:

11 Q. Now, do you remember what the cost savings of the parties
12 calculated for merger-specific efficiencies were for installing
13 triple pallet jacks?

14 A. I don't off the top of my head.

15 Q. Okay. Well, let me write it down on this piece of paper
16 and you let me know if you remember. (Indicating.) Is that
17 right?

18 A. I'm sorry, could you move it down a little?

19 Q. Oh, sure, I'm sorry. There you go. Can you read it now?

20 A. I'd be happy to consult my report, if you'd like.

21 Q. Oh, I don't think you're going to see the specific number
22 in your report because this was a subset of the warehouse
23 deficiencies letter. Do you remember that?

24 A. Then it would be in one of the underlying spreadsheets.

25 Q. Okay. Yes. So that would be -- do you remember the

1 \$4 million number?

2 **A.** Like I said, I want to check.

3 MS. ROBSON: Oh, my apologies.

4 BY MS. ROBSON:

5 **Q.** Let me do it this way. Very quickly, did Dr. Hausman
6 include that particular cost deficiency in the cost deficiencies
7 that he considered variable and merger specific?

8 **A.** He didn't. This is one category where he concedes the
9 warehouse efficiency or the cost savings as estimated were not
10 merger specific, and there's a couple other categories where he
11 and I agree.

12 **Q.** So he looked at McKinsey's estimates and he determined
13 what were merger specific, and this is one of the categories
14 that he said was not?

15 **A.** I don't remember that part of his testimony, whether he
16 specifically referred to the warehouse efficiencies as something
17 he discussed with McKinsey.

18 **Q.** But he did not include it in his merger-specific variable
19 cost-savings estimate?

20 **A.** The best I can tell is if I look through the backup that
21 he provided to what I call table 4 in his report, which is where
22 he originally laid out these claims, that's correct. In there
23 he had a column for whether it was merger specific or not, and I
24 am pretty sure the warehouse efficiency did not have an entry
25 for MS.

1 Q. Okay. Let's look at the second -- or I guess this is
2 actually number 3 on the page, but it's the second highlighted
3 lever, where it says, "Tightening the standards at USF
4 locations."

5 Do you remember how much was calculated for that
6 particular efficiency?

7 A. Not off the top of my head. I'd have to look at it.

8 Q. Okay. Do you remember, does this number refresh your
9 recollection?

10 A. It's possible.

11 Q. Okay. And did Dr. Hausman include that in his
12 merger-specific variable cost savings?

13 A. As I said earlier, he'd been -- he did not include this
14 entire category, so if 7.3 is in that category, he would not
15 have included that either.

16 Q. You and I are going to have to work on making sure we're
17 a little bit more careful on confidentiality. We'll get through
18 it.

19 Now, in the -- let's go back to the --

20 A. I'm sorry. I apologize.

21 Q. That's okay. Let's go back to the cases where you have
22 done a merger-specific efficiencies analysis.

23 All right. In those four cases where the company did the
24 cost-savings analysis themselves, and you went through to try to
25 determine what was merger specific, you requested information

1 from the company in each of those cases; is that right?

2 **A.** Well, I think it's useful separating the three from the
3 one, the three where I did a fuller analysis or tried to offer
4 merger specificity. Because as I explained in that one case I
5 filed the report, I did not conduct such analysis myself.

6 **Q.** Um-hmm.

7 **A.** And I think you referred to four in your question.

8 **Q.** Well, then we'll refer to those three. In those three
9 cases, did you request information from the company to try to
10 determine what was merger specific and variable?

11 **A.** These were examples in which we did receive some
12 information. We did have conversations with companies. I
13 forget the exact titles. I'll call them managers as a
14 catch-all, but we did look through the information we had and
15 likely requested some and did have conversations with people.

16 **Q.** Okay. And in the first airline merger analysis that you
17 did, that was a series of phone calls with company employees; is
18 that right?

19 **A.** That's correct. I don't remember visiting an office or
20 facility for that.

21 **Q.** Okay. And for the oil industry merger, that included two
22 days of meetings with company employees?

23 **A.** To the best of my recollection, it was two days, and, as
24 I think I testified at my deposition, likely phone calls.

25 **Q.** Okay. In the bath products case, that included talking

1 to some people for an afternoon, right?

2 **A.** That's not how I would characterize it. I visited one of
3 the plants for an afternoon and I did talk to people at the
4 plants, but I believe we had conversations outside of that one
5 visit.

6 **Q.** Well, you know, what I've done is I've put your
7 deposition testimony in the back of that binder. If you don't
8 mind turning to it real quick, and we'll just refresh your
9 recollection as to what you told me at deposition. Okay?

10 **A.** What tab should I look at?

11 **Q.** You are looking at tab 16. It's the very last tab. And
12 you're going to go to line 9.

13 **A.** Line 9, so what page did you say?

14 **Q.** Page 60. And the first thing I asked you was: "Moving
15 on to the bath product case, how much data did you gather?

16 "And your answer was: Again, I'd have to look at our
17 files. I don't recall sitting here.

18 "And I asked you: Okay. How many people did you
19 interview?

20 "And your answer was: I don't recall. I do remember in
21 the case the company being acquired had a plant, may still, but
22 at the time had a plant in the western" --

23 **A.** I'm sorry, may I interrupt?

24 **Q.** Sure.

25 **A.** Page 16, I don't see a question.

1 Q. 60, six zero.

2 A. Six zero, okay.

3 Q. I'm sorry.

4 THE COURT: Yeah, and you'll need to look at the --
5 there's four pages on each page, so look at the page in the
6 upper-right quadrant of the corners.

7 BY MS. ROBSON:

8 Q. And just to go back just a little bit:

9 "I asked you: How many people did you interview?

10 "And your answer was: I don't" --

11 THE COURT: Let's make sure he's there.

12 MS. ROBSON: Oh, sure, I'm sorry.

13 BY MS. ROBSON:

14 Q. Mr. Gokhale, are you with me?

15 A. Yes. I'm look at 60 in the upper-right corner.

16 Q. Okay. And look at line -- I started at line 9, and I'm
17 at line 15 right now.

18 A. I'm with you now.

19 Q. Okay. "You said: I don't recall. I do remember in that
20 case the company being acquired had a plant, may still, but at
21 the time had a plant in the western suburbs of Chicago. I do
22 remember visiting there and talking to some of the people at the
23 plant."

24 Okay?

25 A. I read that.

1 Q. Great.

2 A. But just to go back to your earlier question, Ms. Robson,
3 your question suggests that that's all I did, that you
4 characterize as an afternoon of talking to somebody.

5 Q. Um-hmm.

6 A. I do say here I don't recall how many people I talked to.
7 This was just one example of what I did.

8 Q. Do you recall how many people you talked to now, sitting
9 here today?

10 A. I don't.

11 Q. Okay.

12 A. Should I close this?

13 Q. You can. In two of the mergers where you conducted a
14 more full-blown analysis you visited the companies, right?

15 A. I'm sorry, could you repeat the question?

16 Q. Sure. In two of the mergers, you visited the companies;
17 is that correct?

18 A. Well, as I said in the -- I guess, yes, in the oil and
19 gas we did meet in person, and in this merger I did visit a
20 plant.

21 Q. And in assessing the companies' cost-savings estimates
22 you reviewed some documents in some of those cases; is that
23 right?

24 A. I do remember reviewing material, but I don't recall
25 exactly what, but yes, I assume.

1 Q. For example, in the first airline merger analysis that
2 included the company's savings estimates and their
3 presentations; is that right?

4 A. That's correct.

5 Q. Okay. But you've never compared the merging companies'
6 contracts side-by-side in any of those cases to assess
7 cost-savings opportunities, correct?

8 A. I, myself, did not.

9 Q. Okay. And in all four of those mergers, you found
10 merger-specific efficiencies, right?

11 A. You keep saying four, and I would like to keep reminding
12 you it's three in which I did a merger-specific cost efficiency
13 analysis as I'm doing here, and --

14 Q. Let me take you back to your deposition one more time.
15 We're going to look at page 24 this time.

16 A. 24 you said?

17 Q. Let me make sure I'm at the right number. Yes, 24, it's
18 the upper right-hand corner. We're going to go to line 17.

19 "I asked you: Out of those four cases in how many cases
20 did you find merger-specific efficiencies?

21 "And you answered: You know, to varying degrees I think
22 in those cases we did find there were some. Like I said, we
23 started with what was presented to us as an estimate of cost
24 savings, and we tried as best we could to go through that to
25 understand what would be something we might classify as

1 merger-specific cost efficiency."

2 Did I read that correctly?

3 **A.** You are, but at several times in the deposition we also
4 did discuss -- and as I clarified today again as I did in the
5 deposition -- I did not do my own merger-specific cost
6 efficiency analysis in the report in which I file a report. I
7 did in the other three. And I'd be happy to look through the
8 deposition, but I know we discussed that several times.

9 **Q.** In this case you've concluded that you don't have enough
10 information to quantify merger-specific cost savings; is that
11 right?

12 **A.** In this case, out of the remaining claims of 481 million,
13 I do not have the information with which I would feel
14 comfortable placing an estimate on what portion of those 481 are
15 merger-specific cost efficiencies.

16 **Q.** Are you aware that Mr. Wood testified -- excuse me,
17 Tuesday that more than 100 McKinsey consultants worked on the
18 merger efficiencies analysis in this matter?

19 **A.** I wasn't present for his testimony, and I don't remember
20 reading that part of his testimony in court.

21 **Q.** Okay. Are you aware that Mr. Wood testified yesterday --
22 or excuse me, Tuesday that McKinsey consultants worked with 170
23 company employees on the merger efficiencies analysis?

24 **A.** Again, same answer, I don't recollect that testimony he
25 gave in court.

1 Q. Okay. And are you aware that Mr. Wood testified on
2 Tuesday that McKinsey consultants and the company employees
3 worked together for about eight months to finish their analysis?

4 A. I didn't hear the testimony, but this is consistent with
5 my understanding of the length and level of engagement McKinsey
6 had in this process.

7 Q. Okay. Are you aware that Mr. Wood testified that those
8 integration teams spent tens of thousands of hours working on
9 the integration analysis?

10 A. Again, I wasn't present for his testimony, but if that's
11 what he testified I'll accept your word for it.

12 Q. Okay. Could you turn to tab 1 in your binder now. And I
13 believe it should have a blue flag in it. Do you see that?

14 MS. ROBSON: For the record, this is DX 1358. It's the
15 report of Mr. Gokhale.

16 BY MS. ROBSON:

17 Q. And this is your materials considered list, right?

18 A. That's correct.

19 Q. Okay. And on your materials considered list is the sum
20 total of the documents that were in your files and considered in
21 some sense?

22 A. I believe that was the intent.

23 Q. Okay. Do you know how many documents are listed on your
24 appendix B of materials considered?

25 A. No, I haven't counted.

1 Q. Okay. Well, unfortunately, I made someone from my firm
2 count. And he did and came up with about 3,000. Does that
3 sound about right to you?

4 A. I'd be happy to count if you'd like me to, but I'll take
5 your word for it.

6 Q. Okay. Well, if we take 3,000 is about the right number?

7 A. I'll accept that for this discussion.

8 Q. Okay. Thank you. Do you know that McKinsey & Company,
9 that they're a party consultant that was hired to work on
10 efficiencies related to this merger produced over 100,000
11 documents to the FTC?

12 A. I don't know the exact number, but again, I'll accept
13 that.

14 Q. Okay. So if we do the math, if it's about 3,000 out of
15 100,000, you've looked at and considered about 4 percent of the
16 documents that McKinsey has produced in this matter related to
17 efficiencies?

18 A. Given the numbers you've stated, that math wouldn't be
19 wrong.

20 Q. Okay. And we agree that McKinsey's work generally is
21 held in high regard, right?

22 A. Again, as I explained in my deposition, they're a
23 well-regarded firm.

24 Q. I'm sorry?

25 A. I said they're a well-regarded firm, to the best of my

1 knowledge.

2 Q. Okay. And McKinsey's a reputable management consulting
3 firm, correct?

4 A. This may go back to my business school days, but again,
5 they were -- they were well-regarded.

6 Q. Excellent. Let's turn to page 18 of your demonstrative,
7 because I want to talk about that for a few minutes -- oh, I'm
8 sorry, it should be 19.

9 A. In this binder?

10 Q. You can see where -- it should be in here.

11 A. Okay.

12 Q. So can you turn to page 19 of your demonstrative?

13 A. 19?

14 Q. Um-hmm.

15 A. Yes.

16 Q. And on that demonstrative you have listed step 1,
17 mathematical step, right?

18 A. That's correct.

19 Q. And step 2, business judgment step, right?

20 A. That's correct.

21 Q. And are you aware that Mr. Wood testified yesterday that
22 the mathematical piece of this was a straw man? And I'm sorry,
23 that should be --

24 A. Did you say yesterday?

25 Q. Yes, it should be Tuesday, my apologies.

1 A. I don't think I read that part of his testimony.

2 Q. Okay. Are you aware that he testified that the straw man
3 was set up early in the process of the efficiencies analysis?

4 A. You know, if I go back to thinking of these iterations,
5 we received these two iterations once in August of 2014, and
6 then again more recently, I want to say, in about March of 2014.
7 I don't know, sitting here, whether I remember the date stamps
8 on when each iteration was actually created, but I do remember
9 testimony that suggests that the first iteration was created, it
10 was a mathematical step, and the second was, I believe, at a
11 later point in time. But as I also discussed earlier,
12 Mr. Day -- I'm sorry, Mr. Todd, who was on the synergy team, did
13 testify about this mathematical step, and I don't recollect him
14 calling it a straw man or a similar term.

15 Q. Are you aware that this mathematical step took place
16 before the two companies -- well, let me put it this way: Are
17 you aware that Mr. Wood testified that this mathematical -- what
18 you're calling mathematical step, was done before the two
19 companies were allowed to share the full body of knowledge that
20 they had?

21 A. I'm sorry, I'm searching for one thing.

22 Q. Um-hmm.

23 A. What I was trying to find that's actually in the previous
24 slide. Again, I wasn't in court for Mr. Wood's testimony. I
25 don't remember reading that part. What I do recollect reading

1 in his deposition, I don't remember him explaining then in his
2 first or second deposition that -- I don't recollect the word
3 "straw man." I'd be happy to look at it if you show me, but
4 what he's explaining here is that there were two steps in the
5 process: One, a mathematical step; and the second was a
6 business judgment step.

7 Q. And are you aware that Mr. Wood testified yesterday that
8 the business judgment step was the important step?

9 A. If you mean to his back, again, I wasn't in the court and
10 I haven't read that part of his testimony.

11 Q. Okay. So you haven't read that part of his testimony?

12 A. I have not.

13 Q. Okay. And were you aware that Mr. Wood testified on
14 Tuesday that during that business judgment step the collective
15 teams who source the products on a day-to-day basis met to
16 discuss market dynamics for each category?

17 A. I'm sorry, could you repeat that?

18 Q. Sure. Are you aware that Mr. Wood testified on Tuesday
19 that during that business judgment step the collective teams who
20 source the products on a day-to-day basis met to discuss market
21 dynamics for each category?

22 A. It's consistent with business judgment, I guess.

23 Q. Okay. And are you aware that Mr. Wood testified that
24 that information included information about the supply market?

25 A. Again, I didn't read that part of his testimony.

1 Q. Okay. And Mr. Wood testified on Tuesday -- or are you
2 aware that Mr. Wood testified on Tuesday that that that also
3 included insights about the individual suppliers?

4 A. I didn't read that part of his testimony.

5 Q. And the number of suppliers? Did you read that part of
6 his testimony?

7 A. I don't believe so.

8 Q. Okay. And the number of items, did you read that part of
9 his testimony?

10 A. I don't believe so, but I have the number of items on
11 these slides.

12 Q. Okay. The number you've provided in this top where you
13 have the mathematical step and business step under "Average
14 Savings Rate," that number you provide in that top box, is that
15 an average for the categories that -- or, excuse me, that is an
16 average for the categories that were marked as not yet completed
17 categories in the early mathematical step; is that right?

18 A. That's correct.

19 Q. Okay.

20 A. Although I would point out that if you went back to the
21 same spreadsheet models and you looked at the unadjusted average
22 for the categories that were tagged as "had been through" or
23 "will be through" category management for Sysco, the starting
24 point for the unadjusted number, as I've called it, would be
25 very similar, if not identical. And that's a calculation I did

1 look at.

2 And what was interesting is in the mathematical step for
3 the other categories that had been or will be through CatMan,
4 you do see that explicit recognition and discount which makes
5 the bars much shorter and you don't here.

6 Q. Well, let's run through that just a little bit further.

7 Your chart doesn't show how many categories had different
8 cost saving estimates if you compared the mathematical step to
9 the business judgment step, does it?

10 A. I didn't follow the question. Would you mind repeating
11 it?

12 Q. So if you were to look at this category by category and
13 try to determine whether there was a difference between the cost
14 savings estimated at the mathematical step versus the cost
15 savings estimated at the business judgment step, we can't tell
16 how many categories, from this chart, have different
17 cost-savings estimates between those two steps, can we?

18 A. Not from this chart, but I do remember looking at a
19 summary of that data.

20 Q. Okay. And this chart also doesn't show which categories
21 had cost-savings estimates that were different from the
22 mathematical step and the business -- which what you're calling
23 the business judgment step?

24 A. Again, I don't recollect off the top of my head which
25 categories did. What I do remember is that if you looked at the

1 categories -- and I'm thinking now of the categories that had
2 been or were tagged "will be through," you do see a steep
3 discount in the first step for some, and the ratio generally
4 went higher in the second step, and even in this case more
5 categories go up than down, I believe.

6 Q. Okay. Do you know how -- or, excuse me, your chart
7 doesn't actually show us, though, how many of those categories
8 go up versus how many of those categories go down, does it?

9 A. I agree, yes.

10 Q. Okay. Thank you.

11 A. This chart does not show that.

12 Q. And let's take a look at -- well, would you be surprised,
13 Mr. Gokhale, that the expected cost savings for 30 categories
14 that had not yet undergone category management decreased?

15 A. I'd have to look back at the data, but you if you look at
16 the bars, like I said, some of the bars on the right got
17 shorter.

18 Q. Okay. If we look at the bars at the bottom of your page
19 of that his histogram, are the categories in the step 1
20 histogram and the step 2 histogram in the same order or have
21 they been resorted from lowest to highest?

22 A. They have -- they are sorted in order of height of the
23 bars, so...

24 Q. Thank you. And the expected cost savings that increased
25 as a -- in terms of the differential between the math step and

1 the business judgment step, that was about 43 categories, right?

2 A. I don't recollect sitting here.

3 Q. Okay. So out of the 127 categories that had not yet been
4 through CatMan, the cost-savings estimates were different
5 between the math in the business judgment step for about 77 of
6 them, right?

7 A. Again, I don't recollect it.

8 Q. So approximately 60 percent of the time the integration
9 team shows a different cost-savings estimate than the math step
10 reached, right?

11 A. Again, I don't remember the exact numbers, but --

12 Q. Okay.

13 A. -- two interesting things about this histogram: One is
14 that they still mostly fall out in those levels of have 1, 2, or
15 4 or 8 percent, whatever the heights were; two, by their own
16 reasoning, categories that had not been through category
17 management were treated differently, but by their own reasoning
18 the categories that they thought had been through category
19 management, they thought, should -- deserves a 75 percent
20 discount. And how it is that McKinsey and the synergy team
21 exercised its business judgment? I don't see a discount
22 anywhere close to that, whether you think of some categories
23 going up, some categories going down, some categories just --
24 you know, some number of categories going down. It's surprising
25 that you don't see anywhere close to the level of discount they

1 themselves suggested, both in their testimony and in their
2 actual math.

3 Q. Okay.

4 A. Nor have I seen any evidence, nor did Mr. Wood explain,
5 why, if they started with a 75 percent discount, they then
6 decided that it was either too steep a discount, or in many
7 categories, the discount wasn't applicable at all. There's just
8 no discussion of that.

9 Q. Did you do a similar analysis for the 77 categories that
10 have been marked as having been or about to go through category
11 management of the mathematical step?

12 A. For -- hang on. Let me -- I'm sorry.

13 THE COURT: Similar? Similar to what?

14 MS. ROBSON: Similar to what is on page 19.

15 THE COURT: Okay.

16 THE WITNESS: I haven't presented it here, but I did look
17 at that data.

18 BY MS. ROBSON:

19 Q. Okay. Are you aware that for those categories
20 cost-savings estimates increased 57 times from the math step to
21 the business judgment step?

22 A. 57 times?

23 Q. 57 -- in 57 categories, D, cost-savings estimates changed
24 between the math step and the business judgment step. Are you
25 aware of that?

1 A. I don't remember that, but I -- what I do remember --

2 Q. In --

3 A. I'm sorry, would you like me to finish?

4 Q. Go right ahead.

5 A. What I do remember is if I compare either of the averages
6 or the median savings rate, there was a pretty substantial
7 increase for Sysco to the order of 75 percent when you went from
8 the unadjusted to the first step.

9 Q. And are you aware that --

10 A. I'm sorry, I'm not --

11 Q. Oh, go ahead.

12 A. And they went back up on the business judgment step, but
13 nowhere close to the levels of the unadjusted.

14 Q. And are you aware that for the categories that had gone
15 through -- or that were marked as having gone through category
16 management or about to go through category management, that they
17 decreased the cost savings eight times between the math step and
18 the business judgment step?

19 A. That was a long question. Could you rephrase or repeat
20 it?

21 Q. Sure. Were you aware that for those categories that had
22 been through category management, they -- the cost-savings
23 estimates were different, lower, in the business judgment step
24 than in the math step about eight times --

25 A. You mean --

1 Q. -- in eight categories?

2 A. -- eight different categories?

3 Q. Um-hmm.

4 A. As I said, I looked at the data, I don't remember the
5 specifics sitting here, but there were instances in which the
6 business judgment step savings rate was higher than at the end
7 of the mathematical step and in a few cases it was lower.

8 Q. So out of a total of 77 of the yes or will be categories,
9 the integration team chose a different cost-savings estimate
10 during the business judgment step than during the math -- than
11 what the math step revealed; is that right?

12 A. Did you ask if for all 77 there was a different number?

13 Q. So out of a total of the 77 of the yes or will be
14 categories, the integration team chose a different cost-savings
15 estimate during the business judgment step for more than
16 84 percent of the categories?

17 A. I don't remember the numbers, but I'll --

18 Q. Okay.

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

20 Q. So in total, then, of the 240 categories from Sysco, the
21 team chose a different cost-savings estimate at the business
22 judgment step for 138 of the categories?

23 A. You said 240. Do you mean 204?

24 Q. 204, I'm sorry.

25 A. Again, given the numbers you're stating, I don't know the

1 precise numbers. I'll accept your calculation.

2 Q. You didn't look at the market -- when you did your
3 analysis on page 19, you didn't look at the market dynamics
4 category by category to determine why the estimated savings
5 might have increased, did you?

6 A. Can you define what you mean by market dynamics?

7 Q. Sure. The things that Mr. Wood testified that the
8 integration team looked at when they reached the business
9 judgment step, so that would include, for instance, information
10 about the supply market, insights about individual suppliers,
11 the number of suppliers and the number of items.

12 A. As I discussed earlier, this step is really opaque.
13 There are some characterizations of what sorts of business
14 judgment were used, but there's very little -- and I'm thinking
15 as I talk about a presentation where there are five slides that
16 discuss -- and I believe bacon may be an example -- it's a list
17 generically of things they considered. But there is really no
18 discussion of consideration A causes us to now believe you
19 should not need a 75 percent, or consideration B causes us to
20 increase the ratio in this way. There's really nothing you can
21 follow, nor did Mr. Wood explain I think in his depositions, how
22 exactly the business judgment is exercised.

23 Q. Well, let's go through an example. Let's talk about dish
24 washing detergent. Dish washing detergent rolls up in the
25 cleaners and deterrents category, right? And if you don't know,

1 you can just say you don't know.

2 A. I don't know.

3 Q. And cleaners and detergents had not been through category
4 management at the time of the mathematical step, right? And
5 again, if you don't know you can just say you don't know.

6 A. I'd have to look.

7 Q. Okay. Do you know how many dish washing detergent
8 suppliers Sysco sources from for noncontract accounts, meaning
9 those accounts that make up addressable spend?

10 A. Not as it sit here, no.

11 Q. Okay. So you don't know that Sysco only sources from one
12 supplier for noncontract accounts?

13 A. I don't recollect that.

14 Q. Okay. Do you know who that supplier is?

15 A. I don't.

16 Q. So you don't know that Sysco suppliers is Ecolab?

17 A. I said I don't know who the supplier is.

18 Q. So Sysco, without putting that category through its
19 existing category management program, already had its
20 addressable spend purchasing volume aggregated in a single
21 supplier, right?

22 A. If what you're saying is correct, that would be right.

23 Q. Thank you. Do you know who US Foods purchases dish
24 washing detergent from?

25 A. I don't.

1 Q. So you don't know that they primarily purchase dish
2 washing detergent from Ecolab?

3 A. I don't.

4 Q. That means, doesn't it, that Sysco will be able to add
5 US Foods' purchasing volume for dishwashing detergent to its own
6 purchasing volume to achieve greater scale?

7 A. In your example that would be correct, but if may point
8 out, those are the categories -- this seems to be closer to what
9 US Foods described as strategic vendor management process where
10 you consolidate suppliers. But more specifically, as I
11 described earlier, there are three categories under this broad
12 umbrella that are called best terms, enhanced terms and supplier
13 consolidation. Those are, Your Honor, as I referred to are the
14 short-term levers, and those have been set aside. I have
15 included them in the remaining claims. My argument is with the
16 remaining category management issue.

17 So what you're describing, Ms. Robson, if it were simply
18 a matter of now jointly purchasing under one contract instead of
19 two, I suspect that would be included in something like the best
20 terms and enhanced terms or the supplier, or in this case,
21 already consolidated.

22 Q. Well, just one moment. You agree, don't you, that
23 increased scales can lead to cost savings, right?

24 A. It's generally -- it's not unreasonable to expect that if
25 you have higher scale you may be able to extract some better

1 cost profile.

2 Q. And as we just established, Sysco's going to be able to
3 add US Foods' purchasing volume for dishwashing detergent to its
4 own purchasing volume to achieve greater scale, right?

5 A. I agree. But what I'm trying to explain is if that's a
6 short-term lever, which is you simply get the better terms out
7 of one contract or you're able to enhance your terms by
8 combining this volume, that's a category that they've calculated
9 separately and that are left on the remaining claims that, in
10 that sense, it would not be something you would see in the ratio
11 that affects how number of category management savings you then
12 have left over and above those levers.

13 Q. Well, actually Mr. Wood testified yesterday that when
14 they did the category management -- or, excuse me, on Tuesday
15 when they did the category management savings they estimated the
16 total savings, and then they used those levers you're speaking
17 about right now, to pull some of those savings forward.

18 Did you read that portion of his testimony?

19 A. I did, but that's my understanding of the calculation,
20 and that's exactly what I'm describing now.

21 Q. Okay. So let's -- would it surprise you to learn that in
22 the dishwashing detergent category, that's one of the categories
23 where, in fact, the category management team in the business
24 judgment step determined that increased savings should be
25 accounted for?

1 A. Increased relative to what?

2 Q. Increased relative to what the math step showed.

3 A. It may have, but again, the explanation seems lacking.

4 Q. Okay. So let's move right along.

5 You testified that you think the merged companies'
6 category management savings include fiscal year 2016 savings
7 from Sysco's stand-alone category management initiative, right?

8 A. I'm sorry, could you read that back?

9 Q. Sure.

10 THE COURT: Ms. Robson, I'm going interrupt you. It's --
11 we've been going about an hour and a half. How much more do you
12 have in your examination?

13 MS. ROBSON: Oh, I've been going for an hour and a half?
14 I'm sorry.

15 THE COURT: No. No, not you specifically.

16 MS. ROBSON: I was, like, wow, that went fast.

17 THE COURT: Yeah.

18 MS. ROBSON: I would think maybe half an hour.

19 THE COURT: Okay. All right. Let's take a break. We'll
20 reconvene at quarter of.

21 (Thereupon, a break was had from 10:36 a.m. until
22 10:48 a.m.)

23 THE COURT: Please be seated, everyone. Ms. Robson,
24 before you continue.

25 MS. ROBSON: Yes, sir.

1 THE COURT: Can I just ask you to have the witness clarify
2 the two different steps and when they occurred and what their
3 purposes were, just so that I have that all properly framed and
4 understood?

5 MS. ROBSON: I'm sorry, you want me to clarify?

6 THE COURT: The two steps that we've been talking about,
7 the mathematical step and the business judgment step, and could
8 you ask the witness to clarify what roles those played in
9 Mr. Wood's analysis?

10 MS. ROBSON: Sure.

11 BY MS. ROBSON:

12 Q. Mr. Gokhale, could you clarify what roles those two steps
13 played in Mr. Wood's analysis?

14 THE COURT: I could have probably asked that question
15 myself.

16 THE WITNESS: So they are sequential, and the reason I can
17 tell they're sequential in what I call the first iteration of the
18 model, you see them starting with what I call unadjusted savings
19 rates; and I understand those unadjusted saving rates come from
20 past experience and so on. Just sticking to Sysco, if you look
21 at the categories that they have there in the columns identified
22 as already been through category management or will be through
23 category management, you see they literally in another column
24 over to the right take this unadjusted savings rate and decrease
25 it by 75 percent. And for all the other categories where they're

1 not tagged as either of those two, I haven't been through
2 category management at that time, nothing happens. They simply
3 copy over the unadjusted savings.

4 THE COURT: Okay. But Mr. Wood yesterday or two days ago
5 testified that there was an initial assessment done and presented
6 to the board prior to the merger announcement, and then there was
7 a subsequent assessment done involving the various teams and
8 further analysis.

9 Is that when these two adjustments -- are we talking about
10 two differently periods of time when these judgments were made?

11 MS. ROBSON: We are talking about two different periods of
12 time, Your Honor, but it's not those two periods of time.

13 THE COURT: Okay.

14 MS. ROBSON: So what Mr. Woods testified to the other day,
15 on Tuesday, was that very early in the process before they had
16 all of the information that they needed, they did a very early
17 mathematical, let's come up with a straw man that we can do, just
18 to try to figure out before we have the information.

19 THE COURT: Right. That's what I remember his testimony
20 as being.

21 MS. ROBSON: Yeah. And at that point the math stopped,
22 and then all of the experts got in the room, and they took into
23 consideration all of the dynamics regarding the market. And they
24 considered, with respect to all of those dynamics, where should
25 the number really be? And they used the straw man as kind of

1 where, you know, something to compare it against.

2 THE COURT: Okay. But that's your distinction between the
3 mathematical step and the --

4 MS. ROBSON: Exactly.

5 THE COURT: All right. So there is a -- all right. I get
6 it now. All right.

7 MS. ROBSON: Okay.

8 THE WITNESS: But if I may clarify, Your Honor, sorry. In
9 the model we see, they're almost sequential, so they take the
10 math out from the mathematical step. And then another column
11 over you see a, what I call, opaque adjustment, which is saving
12 rates that's different from what comes out of the mathematical
13 step. But from what I'm looking at, there is an acknowledgment
14 by Mr. Todd that if you've been through category management or
15 are going to go through it again, you would expect significantly
16 lower savings.

17 Now, 75 percent to me seems significantly lower. Whether
18 that's the accurate number or whether it's the starting point, I
19 can't tell. What I can tell is that when -- if Mr. Wood's
20 testimony is to be accepted that they only default to one
21 business judgment rate, which you cannot unpack anymore, I just
22 don't see anywhere close to the level of discounting. And it's
23 important to remember here, because if you believed there is a
24 significant discount one should apply for having gone through
25 category management, then if you compared the unadjusted column

1 to the adjusted column, however it is adjusted, one step, two
2 steps, I would expect to see a significant discount, as they
3 themselves said. And that's all I'm trying to show in these
4 histograms: I don't.

5 BY MS. ROBSON:

6 Q. Were you here for Mr. Wood's testimony the other day,
7 Mr. Gokhale?

8 A. This Tuesday, you mean?

9 Q. Yes, Tuesday, thank you. I'm sorry, I keep getting that
10 wrong.

11 A. I was not present in court.

12 Q. And you didn't read the entirety of it either, did you?

13 A. I did not.

14 Q. Okay. Let's move along.

15 You testified that you think the merged companies'
16 category management savings include fiscal year 2016 savings
17 from Sysco's existing category management initiative, right?

18 A. I don't believe I said that.

19 Q. Okay.

20 A. Can you refer me to what I was saying?

21 Q. Certainly. Let's go back to demonstrative, to your
22 demonstrative. And we're looking at page 10 -- I'm sorry, I
23 actually meant page 15. And at the top of that what was
24 highlighted was, "COGS savings are additional to fiscal year
25 2015 Naples benefit."

1 So you think that the savings estimates that we have with
2 respect to the merger include the fiscal year 2016 Naples
3 benefits?

4 **A.** No. That's not what I was testifying.

5 **Q.** Okay.

6 **A.** In fact, I was reacting to the statement, and I -- my
7 opinion is that -- I guess two separate things. One is in the
8 models and in their testimony elsewhere, they actually use 2013
9 as a baseline. While they say it's incremental to Naples, they
10 use 2013 as a baseline. And what I was referring to on the
11 earlier slide, that even if you accept that, that they were
12 using 2015 fiscal year as a baseline, you still have to note
13 that now about a third of the categories have not been through
14 category management, and as the chart showed, you would get
15 incremental savings in years beyond. So even if you accept it,
16 which I don't, but even if you accept it, that they use 2015 as
17 the baseline, you would still have counted some cost savings you
18 knew you were getting stand alone, in the merger-specific cost
19 efficiencies. That's what I testified.

20 **Q.** Okay. Let's -- if you could, now, turn to slide 10 of
21 your demonstrative -- and, I'm sorry, just very quickly.

22 This number up here, this is the total amount that the
23 parties have calculated for the cost savings resulting from the
24 merger, and it's on your screen. Do you see it?

25 **A.** I see you wrote it. It's a little fuzzy on the slide,

1 but the number you wrote is what the --

2 Q. Yes? Okay. Going back to slide 10, then.

3 A. Slide 10?

4 Q. Um-hmm. Or, excuse me, slide 11 where it has "Sysco's
5 existing CatMan program."

6 And you see at the bottom there it says --

7 THE COURT: The amount you wrote was just for category
8 management?

9 MS. ROBSON: That's just for category management.

10 THE COURT: Okay. That's what I thought. I know it was
11 lower than --

12 BY MS. ROBSON:

13 Q. Now, you see at the bottom of slide 11 there's a line
14 that says, "End-year net savings," and there's three numbers and
15 it shows what the increases between end of fiscal year 2015 and
16 end of fiscal year 2016. And I'm just going to write that
17 number up here so you can see it. Okay?

18 Is that (indicating) the difference between those two
19 numbers I just pointed to?

20 A. Yes.

21 Q. All right.

22 MS. ROBSON: And if I could approach, Your Honor, I'd like
23 to hand out one more document.

24 THE COURT: Sure. That's the difference between the 15
25 and 16? Is that the range you just identified?

1 MS. ROBSON: Yes.

2 THE WITNESS: That's correct, Your Honor.

3 THE COURT: Okay.

4 BY MS. ROBSON:

5 Q. You've seen this document before, right?

6 A. I believe I have.

7 Q. Yeah. In fact, you relied on this document in reaching
8 your conclusions, correct?

9 A. I'd have to look.

10 Q. Can you take my word for it? I can take you to your
11 materials if you'd like, but can you take my word for it you
12 relied on it, most of this?

13 A. Okay.

14 Q. And this is one of the integration teams presentations
15 given, among other things, merchandising, right?

16 A. It is what it says. It's a VC/OD review.

17 Q. Okay. Great.

18 MS. ROBSON: Now, for the record, this is PX 6156.

19 BY MS. ROBSON:

20 Q. I'm going to ask you to turn to page PX 6156-20. And
21 there's a bar chart on that page that's titled, "Timing of Value
22 Capture." And if you look over to the far right-hand side, you
23 see the number there for category management, and that's what we
24 put up on the screen. And then we have year 5, and that's
25 actually the same number. Year 4, same number.

1 Year 3, do you see that number? That's this number right
2 here (indicating), right?

3 **A.** It appears to be, yes.

4 **Q.** Year 2 is this number (indicating), right?

5 **A.** Yes.

6 **Q.** And year 1 or fiscal year 2016 is that number right there
7 (indicating), right?

8 **A.** Correct.

9 **Q.** And this is the timing of value capture for the category
10 management savings resulting from this merger?

11 **A.** It's black and white, but if I try to follow the same
12 shading, that's what it appears to be on this chart.

13 **Q.** Okay. Now, let's take a quick look at the next page. Do
14 you see the next page? It's PX 6156-21. And it reads,
15 "Potential areas -- potential opportunity areas to capture more
16 value."

17 And you see right there that first line that reads,
18 "Legacy USF kitchen tune-up," and the description is,
19 "year-over-year savings generated from USF sourcing events
20 completed prior to close of merger."

21 And the more value that they have yet to capture is
22 listed as TBD; is that right?

23 **A.** I read what you're saying.

24 **Q.** Okay. And the next line says, "Legacy SYF CatMan," and
25 next to it reads, "includes benefits that exceeds fiscal year

1 2015 Naples CatMan commitment for this launch through quarter 2
2 through quarter 4, fiscal year 2016."

3 And the potential additional capture value reads, "TBD,"
4 right?

5 **A.** I see that.

6 **Q.** Okay. I'm going to take you back to tab 7 in your
7 binder. That's PX 503, which is the investigational hearing
8 transcript of Chris Kreidler.

9 Chris Kreidler's the CFO of Sysco, right?

10 **A.** I know he was with Sysco. I don't remember his exact
11 title.

12 **Q.** And this investigational hearing transcript appears on
13 your materials considered list, right?

14 **A.** I believe so.

15 **Q.** Okay. And I'm going to take to you page 180, line 19.
16 That's the lower right-hand corner. It should be on the
17 left-hand sheet. Let me know when you're there.

18 **A.** I am.

19 **Q.** Okay. And the question there reads: "So when we're
20 looking at synergies in this board presentation from the deal,
21 what is the baseline that these are being projected against?"

22 "And Mr. Kreidler answered: So we were very clear with
23 the teams at this stage. We've been very clear with the teams
24 in the planning that these all exclude the synergies or the
25 business transformation initiatives that we were already going

1 after. So, for example, in category management the only
2 benefits we express here are the benefits that we would derive
3 from bringing -- from addressing the new volume, not what we
4 already have in our plan."

5 Did I read that correctly?

6 **A.** You did.

7 **Q.** Okay. Next I'm going to ask you to turn to tab 13.
8 That's the April 7th, 2015 deposition transcript of Carter Wood.
9 I'm going to direct you to line 91 -- or excuse me, page 91,
10 line 25. And the question that was asked: "What additional
11 category management review do you imagine the merged firm
12 conducting?"

13 "And he answered: Okay. So as part of this we created
14 what was the integrated category management plan that" --

15 **THE COURT:** Counsel, you're going to have to slow down.

16 **MS. ROBSON:** Oh, sorry. I'm sorry, Your Honor.

17 **THE COURT:** That's okay.

18 **BY MS. ROBSON:**

19 **Q.** "Okay. So as part of this we created what was the
20 integrated category management plan that took the best of the
21 both approaches and put them together, and what the team
22 imagines is that going forward they would deploy that plan
23 against the 130 to 200 categories, depending on how you want to
24 roll it up, and create \$280 million of incremental synergy
25 beyond which either firm independently would achieve on its

1 own."

2 Did I read that correctly?

3 **A.** You do, but again, I will note that what I'm asking is
4 that given this testimony, I contrasted with what Mr. Todd
5 described, you would expect a significant decrease when you're
6 trying to do it again. And I'm simply asking: Is that how they
7 implemented this calculation? And when I look at the underlying
8 data, it doesn't appear to me that they've actually done what
9 they suggest they're doing.

10 MS. ROBSON: And I apologize, Your Honor. My colleague
11 just handed me a note to remind me to give you the PX numbers for
12 those documents. The Kreidler deposition testimony was PX 503,
13 and the Carter Wood testimony was DX 262.

14 THE COURT: Thank you, Counsel.

15 MS. ROBSON: Okay.

16 BY MS. ROBSON:

17 **Q.** I'm going to go back now very quickly.

18 One of the indicia you've previously used to determine
19 that merging companies' efficiencies calculations were reliable
20 was whether industry analyst were analyzing the efficiencies
21 that would result from the merger, right?

22 **A.** Could you read that question back?

23 **Q.** Sure. Another one of the indicia that you've previously
24 used to determine that the merging companies' efficiencies
25 calculations were reliable was whether industry analysts were

1 analyzing the efficiencies that would result from the merger?

2 **A.** I think your question is stating it a little bit stronger
3 than I would explain it. What I have -- one of the tests or one
4 of the benchmarks, a better word than test, could be -- and
5 again, I should note that industry analysts would not be using
6 the term "merger-specific cost efficiencies" in quite the
7 context we are here. But to the extent, if a company may
8 suggest that they think a merger will lead to incremental or
9 additional cost savings, and to the extent you find some
10 evidence of third parties or others trying to analyze themselves
11 what might be also cost savings that accrue because of a merger,
12 it might be a benchmark that you use, but it's a benchmark.
13 It's not the -- you know, you can't use that benchmark to do
14 this type of category-by-category analysis unless the analyst
15 does it, but it could be a benchmark, too, so...

16 **Q.** Okay. Let's turn to tab 3 in your binder. This is a
17 Deutsche Bank markets research report regarding Sysco. It's
18 marked DX 5017. I'm going to ask you to take a look at page 3
19 underneath the title, "Additional Details on Deal Synergies."
20 And at the very bottom there's a bullet point that lists --
21 that's labeled, "Corporate G and A."

22 And it says, "15 to 25 percent (90 to 150 million)
23 consisting of driving organizational efficiency and eliminating
24 redundancy. Also included here is leverage and scale when
25 negotiating with third-party services. We believe this estimate

1 is very conservative, given the elimination of USF's overhead
2 will produce 450 to 500 million of savings alone, approximately
3 2 percent of sales."

4 You didn't consider this industry analyst report in
5 creating your conclusions about efficiencies, correct?

6 **A.** I did review analysts' reports, and there are other
7 analysts who don't have an optimistic view or agree with Sysco's
8 forecast. There are others who definitely do discuss how define
9 the number -- I forget the exact terms, but I want to suggest
10 very challenging.

11 **Q.** You don't list a single analyst report on your considered
12 materials list, do you, Mr. Gokhale?

13 **A.** I don't believe there are analyst reports, but I reviewed
14 them.

15 **Q.** Okay. Let's move to tab 4. It's listed, "Morning Star
16 Equity Research Document." And I'm going to ask you to turn to
17 page 6, bottom paragraph about the third line in reads,
18 "Management currently pegs synergies at around 600 million three
19 to four years after the close of the deal, which strikes us as
20 reasonable."

21 Did I read that correctly?

22 **A.** I'm sorry, I'm not with you. What page did you say?

23 **Q.** I'm sorry. It's page 6.

24 **A.** Okay. The bottom paragraph?

25 **Q.** Bottom paragraph, third sentence, "Management currently

1 pegs synergies at around 600 million three to four years after
2 the close of the deal, which strikes us as reasonable."

3 This doesn't appear on your materials considered list
4 either, does it?

5 **A.** So I'm still -- oh, I see it. It's management currently
6 pegs synergies at 600 million, which strikes us as reasonable?

7 **Q.** Um-hum.

8 **A.** Um, this report, I have looked at these, but it's not on
9 my materials reviewed list.

10 **Q.** Okay. Let's turn to tab 5. This is Susquehanna
11 Financial Group document, again, regarding Sysco. I'm going to
12 turn you to page 3, and the paragraph that's titled, "We
13 continue to believe the merger with US Foods will be approved."

14 I got that wrong. Go down to about the third sentence,
15 and it says, "We believe" -- you see where it says, "We
16 believe"?

17 **A.** I do.

18 **Q.** "We believe the combined company will possess meaningful
19 synergy opportunities an upside to the preliminary \$600 million
20 target remains likely."

21 This does not appear on your materials considered list
22 either, does it?

23 **A.** It does not, nor do other analyst reports who don't
24 believe these estimates.

25 **MR. WEISSMAN:** Excuse me, may I?

1 MS. ROBSON: The microphone actually fell.

2 THE COURT: Okay.

3 MS. ROBSON: It's down there. I can see it.

4 THE COURT: Way to go.

5 (Laughter.)

6 (Brief pause in proceedings.)

7 BY MS. ROBSON:

8 Q. I'm going to move now to some final questions, Mr. --

9 A. Actually, I'm sorry. We were done with this one?

10 Q. We are. Thank you.

11 A. I would like to point something else out, if it's okay?

12 THE COURT: You'll have an opportunity, Mr. Gokhale.

13 THE WITNESS: Okay.

14 THE COURT: Redirection examination is available to point
15 things out and clarify.

16 THE WITNESS: Thank you, Your Honor.

17 BY MS. ROBSON:

18 Q. Mr. Gokhale, you have two degrees in mechanical
19 engineering, right?

20 A. A bachelor's and a master's, yes.

21 Q. Okay. And you don't hold a bachelor's in finance?

22 A. No, I have only one bachelor's.

23 Q. Or a master's in finance?

24 A. Well, I think my MBA -- I forget the exact terms, what I
25 had, a concentration or something like that in finance.

1 Q. And you don't have a Ph.D. in finance?

2 A. I do not.

3 Q. And you don't hold a degree in economics, right?

4 A. I'd have to look back whether it qualifies, but my -- I
5 believe my MBA says concentration in finance.

6 Q. Okay. This is your first time testifying at trial about
7 merger-related efficiencies; is that right?

8 A. That's correct.

9 Q. And prior to this case you filed only one report
10 discussing merger-related efficiencies?

11 A. That's also correct.

12 Q. And you've never filed an expert report regarding
13 efficiencies in the food distribution industry; is that right?

14 A. What was the last part of your question?

15 Q. You've never filed an expert report regarding
16 efficiencies in the food distribution industry, correct?

17 A. I have not.

18 Q. Okay. And you've never filed a report regarding
19 efficiencies in the food industry more generally, right?

20 A. I have not.

21 Q. Okay.

22 MS. ROBSON: Thank you. No further questions, Your Honor.

23 THE COURT: Thank you very much.

24 All right. Ms. Cerilli, do you have redirect?

25 MS. CERILLI: Thank you, Your Honor. We have nothing

1 further.

2 THE COURT: Nothing further? Okay. Terrific.

3 All right. Mr. Gokhale, thank you very much for your time
4 this morning.

5 THE WITNESS: Thank you, Your Honor.

6 MS. CERILLI: Thank you.

7 THE WITNESS: Thank you.

8 THE COURT: All right, Mr. Weissman.

9 MR. WEISSMAN: Call our next witness?

10 THE COURT: Yes, please.

11 MR. WEISSMAN: Mr. Mohr is going to handle it.

12 MR. MOHR: Good morning, Your Honor, Stephen Mohr on
13 behalf of the Federal Trade Commission. The plaintiffs would
14 like to call Dr. Mark Israel as our next witness.

15 THE COURT: All right. Thank you.

16 Dr. Israel, welcome back.

17 THE WITNESS: Thank you.

18 THE COURT: I see you survived the birthday party?

19 THE WITNESS: I did.

20 (MARK ISRAEL, GOVERNMENTS' WITNESS, SWORN)

21 DIRECT EXAMINATION OF MARK ISRAEL

22 BY MR. MOHR:

23 Q. Good morning, Dr. Israel.

24 A. Good morning.

25 Q. Dr. Israel, were you present to listen to the testimony

1 of Dr. Hausman and Dr. Bresnahan yesterday?

2 **A.** I was.

3 **Q.** Did any of their testimony cause you to change any of the
4 conclusions you have testified to in this matter?

5 **A.** No. And to be clear, though, I've been working on this
6 case for a long time, and as you know, there's been a series of
7 reports that were filed in the case. My report's on April 14th
8 along with Dr. Hausman and Bresnahan, and then rebuttal reports.

9 So one thing I would say is that this back and forth on
10 some of these issues has been going on in those reports, and the
11 vast majority of what came up yesterday were things that had
12 been in their original report and that I responded to in my
13 rebuttal report. So as far as the vast majority of the details
14 of what they went through, I would say, you know, I would refer
15 to my rebuttal report as a good source. We've gone through
16 those issues. There really weren't any surprises that I saw,
17 and I think the vast majority of them are -- you know, I've
18 addressed fully in my rebuttal report.

19 There are a couple of issues that were new, either in
20 their rebuttal reports or yesterday that maybe we'll talk about
21 now, but I would say that, you know, more than 90 percent of the
22 issues were covered in my rebuttal report.

23 The other point I would make just quickly is -- I mean,
24 to me, what's important about my reports and what I really
25 stress in my work and with the team is that I come with the

1 analysis of the merger from a variety of points of view and make
2 sure that those -- that variety of points of view consistently
3 leads to the same conclusion. I see that as the way you test
4 the various pieces, and if two different ways of analyzing an
5 issue or two different ways of computing a number get you to the
6 same answer, then you know they weren't just random, unreliable
7 ways of doing it. You've gotten to the same place.

8 So the entire basis of my report really rests on, first,
9 looking at testimony and documents, as I said, and customers --
10 substantial customer testimony indicating that many customers
11 accounting for a large amount of revenue indicate they would be
12 harmed by the transaction and they rely on competition between
13 US Foods and Sysco. That sort of stands on the one hand.

14 And then through all the empirical work is another leg of
15 that, sort of supporting the basis for that and then coming at
16 it from another -- from another point of view and reaching the
17 same conclusion. Within the empirical work, you know, I would
18 stress that, say, for things like national market shares, I
19 compute them based on some RFP data, based on CID data. Totally
20 different methodologies get to the same, almost exactly the same
21 number. For the RFP data itself, constructed separate data sets
22 from Sysco and US Foods. Those processes were separate. They
23 get the same result that there's strong -- you know, that Sysco
24 is US's strongest competitor and vice verse.

25 For the local analysis with the LINK data and the request

1 for incentive data, again, the same thing, two separate data
2 sets. No reason they would have to give you the same answer,
3 but they do, and that gives me confidence that those conclusions
4 are reliable.

5 And what I -- in my experience, what you see when you
6 have unreliable methodology is different methods get to you
7 different answers, because if they're random, unreliable, the
8 sort of universe is possible of what you'd find, you don't get
9 to the same place. I mean, in my own view -- and I'll stop
10 here -- an example of that is -- I'm sure we'll talk more about
11 it -- Dr. Bresnahan presented some switching studies of
12 switching back and forth between Sysco and US Foods. What he
13 found was, in the case of switching from Sysco to US Foods,
14 nearly 60 percent of the switchers went -- who left Sysco went
15 to US Foods; but in the other direction he found a much smaller
16 number, say less than 20 percent, which would imply somehow
17 US Foods is a close competitor for Sysco but not the other way
18 around. That's the sort of asymmetry that I see when you don't
19 have reliable results, as opposed to my approach which leads to
20 the same answer from many points of view.

21 Q. Let's briefly discuss just some of the arguments that
22 were raised by Dr. Hausman and Dr. Bresnahan in their testimony
23 yesterday.

24 Starting off, there was some testimony regarding the
25 Katz/Shapiro formula and the calculation of aggregate diversion

1 ratios. And in your report you state that you apply the
2 Katz/Shapiro report, correct?

3 A. Yes.

4 Q. Are you aware that Dr. Hausman testified that you applied
5 an incorrect version of the test?

6 A. I am.

7 Q. Do you believe that you applied the correct formula in
8 this matter?

9 A. Yes, I do. So, to bear with me on a little Katz/Shapiro
10 economics again for a few minutes, but just -- I think it's
11 worth understanding the back and forth on that test. I mean,
12 the to sort of set the main points, in 2003 Michael Katz and
13 Carl Shapiro wrote the paper that set out this formula that
14 we've talked a lot about in here, which is this 10 over 10
15 plus M.

16 And the other end of that, in 2011 the Court in H&R Block
17 Tax Act applied that 10 over 10 plus M formula, the same one
18 that was originally in Katz and Shapiro. To an industry with
19 different products, and where one might argue there was some
20 asymmetry that Dr. Hausman talked about, but they reached the
21 same conclusion that I think the literature and I reached that
22 that's the correct test.

23 So just to understand what happened in the interim, in
24 roughly 2008, there's a paper by Daljord, et al that was
25 referenced that purported to show that the test used -- that the

1 test Katz and Shapiro had come up with was incorrect. It said
2 that the test should be not 10 over 10 plus M, but just 10
3 over M.

4 There's since that time, though, been multiple papers,
5 one by I think it's Ten Kate and Niels, another by Farrell and
6 Shapiro that was referenced. What those papers show is that
7 really what Daljord, et al had done was find a different test
8 that would be another way you might meet the Hypothetical
9 Monopolist Test in a different setting. What they said -- what
10 they actually said is the Daljord test would apply to a case
11 where you think what the monopolist would do would be simply
12 have a bunch of products, say, a bunch of different broadline
13 distributors, but you think for some reason one of them is low
14 price and the rest are not, and the monopolist would just raise
15 that one price. So it wouldn't raise all the prices; it would
16 just raise the one price. And what -- as the other papers show,
17 that's really another way you might meet the SSNIP test. That's
18 a different thing that a monopolist might do.

19 But if that's what you think the monopolist might do is
20 just raise the one price, so in this case it would mean, say,
21 merge all the broadliners together but just raise the Reinhart
22 price. If that's what you thought the monopolist would do, then
23 this 10 over M test is what you would apply. Basically you
24 wouldn't apply the ten and the denominator, basic math reason is
25 because only one price is going up.

1 But as these guys Farrell and Shapiro say, as, you know,
2 Ten Kate and Niels point out, as the Court adopted here, as
3 we're saying in this case, in a situation where you're saying
4 there's a bunch of broadliners, they're going to merge together,
5 and the question is: Is specialty, is cash-and-carry, is
6 systems enough to constrain the broadline price so that we're
7 talking about broadline prices going up across the broadline
8 products? Then the 10 over 10 plus M formula is the correct
9 formula to use.

10 So the analysis I've been discussing throughout is
11 generally: Do broadliners compete enough with each, such that
12 the broadline prices would go up? It's not would the Reinhart
13 price go up on it's own, it's would broadline prices go up. The
14 literature has shown that in that setting the correct test is
15 the one that I used. As I say, that's the one the Court adopted
16 in H&R Tax Act, even though in that case you might have said
17 maybe they'll just raise the price of Tax Act. That was
18 probably closer to that asymmetric case than we have here, but
19 even there the industry has said -- or the literature has said,
20 like, there was this one other paper that really points to an
21 alternative another way that you might meet the SSNIP test. But
22 if you're talking about generally broadline or a product versus
23 other products, you're talking about an all-over price increase,
24 then my test is the correct test.

25 Q. Now, Dr. Israel, are you aware that in applying this test

1 Dr. Hausman also testified that you used an incorrect margin?

2 **A.** Yes, I heard him say that.

3 **Q.** In your opinion, what is the proper methodology to
4 identify the correct margin to use in this test?

5 **A.** So what I would do is what the merger guidelines indicate
6 you should do, which is look to the parties, look to their
7 documents for the margins that they referred to. I particularly
8 think it makes sense to look at their financial documents, like,
9 when they report to the SEC, because they need to report how
10 they analyze their business, and to look at documents when they
11 talk about pricing pressures and pricing decisions.

12 So there are many documents, many submissions by Sysco,
13 for example, to the SEC where they consistently refer to the
14 gross margin, which is the price of the -- selling one more unit
15 minus the cost of that unit. That's a number we talked about
16 last time was in the high teens. They talk about that number.
17 They talk about if that number goes down they have to change
18 their pricing policies.

19 Just to give a little more background as to why I think
20 that's so important. If you did -- the margin -- we all agree,
21 as economists, the margin we're talking about is price minus
22 marginal cost, so it's -- and as Dr. Hausman described it well
23 in his report, that's price minus the marginal cost is the cost
24 of selling one more unit. That's the margin we're talking
25 about. That's easy to say. That can be hard for economists to

1 implement, what exactly is that cost.

2 As one example, Dr. Hausman and some of the costs that he
3 subtracts off to get to a lower margin, he includes things like
4 warehousing costs, selling costs, costs of labor. I mean, those
5 are things that, over a broad scope of business, someone might
6 say are variable to the overall broadline business, but if you
7 sell one more unit of food or ten more units of food, do your
8 warehousing costs actually go up? My own experience from
9 talking to the guys in the warehouses is that the answer is no,
10 they just move a box around to meet that so it wouldn't be a
11 marginal cost.

12 But my general point is, you know, economists shouldn't
13 be speculating on which piece is or is not a marginal cost or
14 what affects pricing decisions. We ought to go to the margins
15 that the companies report, say to the SEC when they're talking
16 about their pricing decisions, and use the numbers that they
17 report. And in the case of Sysco that number is consistently
18 throughout its filings its gross margin, which gives you a number
19 in the high teens.

20 **Q.** Ultimately, Dr. Israel, is your conclusion affected even
21 if you use the margin proposed by Dr. Hausman?

22 **A.** It's not. So just to be clear, if I use -- if you apply
23 the correct Katz/Shapiro test as the Court has applied, such
24 that the formula is $10 \text{ over } 10 \text{ plus } M$, then even if you use a
25 margin -- I think Dr. Hausman -- just to keep it confidential --

1 consistently referred to it, the one he used, as a little below
2 ten. If you use 10 over 10 plus M then you get a number that's,
3 like, 10 over 18 or so, 10 over 17. If you recall, to be
4 conservative I consistently used the margin of ten, which is
5 well below the growth margin. So under my method with the
6 margin of ten you would get a 50 percent as the aggregate
7 diversion that you would need to reach.

8 Under Dr. Hausman's margin you would get, instead of
9 50 percent, 55 to 60 percent. But all of the diversion numbers
10 in the analysis I presented indicate you would still be above
11 that level.

12 I should also point out that, you know, even if one used
13 the wrong version of the Katz/Shapiro test, just used 10 over M,
14 if you correctly used the gross margin, which is in the high
15 teens, you would again get an aggregate diversion of 50 percent
16 or a little bit that you would need to meet. So really the only
17 way that Dr. Hausman's criticism can question my empirical
18 approach to market definition, you would need to use the wrong
19 version of the test -- so it's just 10 over M -- and you would
20 need to use the wrong margin, not the gross margin. You would
21 need to make both of those mistakes. Either one of them alone
22 wouldn't be enough to do it; only by using the wrong test and
23 the wrong margin do you get to this other market definition.

24 Q. Dr. Israel, moving on to another critique presented by a
25 defendants' experts.

1 Do you recall that during their testimony yesterday
2 defendants' experts critiqued the various data sets used in your
3 analyses?

4 **A.** I do.

5 **Q.** Is your conclusion about the likely affects of the
6 proposed merger based on an analysis of just one of these data
7 sets?

8 **A.** No, definitely not. As I said before, my approach is to
9 use the ordinary course records of competition that the
10 companies keep so we can see who they're competing with. Those
11 are ordinary course records. We talked a lot about it in my
12 testimony about, you know, the strengths and weaknesses of each
13 data set. Each one, I think, does reflect the ordinary course
14 record of who the competitors are and what competition they
15 face, but it's important that, you know, again, for the share
16 calculations I do, I use the share calculation based on the CID
17 data and one based on RFP data that didn't rely on the CID data.
18 I get to the same place.

19 For the RFP data, I used RFP data from Sysco and from
20 US Foods, and again, that's really bidding data generally. They
21 have the same exact result that they're each other's competitor
22 more often than everyone else combined.

23 For the local analysis I used the LINK data and the
24 request for incentives data, mutually reinforcing results that
25 they're one another closest competitors.

1 And to be clear, that's not just the statement that there
2 are lots of data sets to use. The point is: If you use two
3 different data sets that are getting at the same question, and
4 they get the same answer, that's exceedingly unlikely to happen
5 by chance. That's a strong confirmation that there's a
6 substantive finding that you have there.

7 **Q.** Focusing just as an example of one of the types of data
8 sets you just mentioned, the RFP data sets, yesterday
9 Dr. Bresnahan testified that your RFP data sets omitted some
10 information submitted by third parties, specifically Sodexo; is
11 that correct?

12 **A.** I believe that's what he said, yes.

13 **Q.** Why didn't you include information from third parties in
14 your RFP data sets?

15 **A.** My RFP data sets were intentionally designed to be as
16 complete as I could put together records of the bidding records
17 and data from Sysco and from US Foods. So what I'm trying to
18 figure out is, from the Sysco point of view, in their data, who
19 do they compete with the most? Who do they lose to the most?

20 From the US Foods' point of view, in their data, who do
21 they compete with the most? Who do they lose to the most?

22 So the ones he put up like Sodexo, those actually came in
23 from third parties. I didn't have any sort of complete record
24 of all the bidding opportunities that some third parties might
25 put in. I didn't want to put in a sort of nonrandom sample of

1 just a few submissions by third parties. One, the intent was to
2 look at the Sysco data and the US Foods data, because my goal is
3 to measure who it is that they're competing with and losing to,
4 and I used -- I made those data sets as comprehensive as I
5 could.

6 THE COURT: I'm sorry, but the RFP data, again, we heard a
7 lot yesterday about where the RFP data came from, and it was put
8 together the other day, I should say, by the companies at the
9 request of the FTC. Is that the database that you're referring
10 to when you talk about the RFP data?

11 THE WITNESS: I mean, it is that data that we discussed.
12 I mean, I should say that, to be clear, it was submitted by the
13 parties. What I looked at were the things submitted by the
14 parties in response to the specification 16 of the second request
15 because I think it was going to be put in evidence.

16 Just to make sure we're clear, that submission included
17 multiple things. So one of them was a spreadsheet that the
18 parties put together that they indicated, I think, was their top
19 20 RFP opportunities in each year. That was one piece of the
20 submission. The other pieces of the submission, though, included
21 lots of other documents that they indicated were responsive to
22 their requests for information about bidding.

23 And I think it's -- well, since you asked, I think it's
24 worth -- I mean, I think it's been painted like that sort of just
25 snippets of e-mails and antidotes that were put together.

1 So just to give some examples of what I'm talking about.
2 On the US Foods side, there is a weekly sales report that's put
3 out through the -- Tom Lynch, the vice president of national
4 sales, a weekly sales report. That's the source that I added was
5 to go to that weekly sales report.

6 But it wasn't even just that. It was to go to that weekly
7 sales report and then cross check what was in that weekly sales
8 report against the LINK data, against anything else that we --
9 that, you know, were other documents that the parties submitted
10 as responsive, and against investigational hearing testimony,
11 against customer declarations. So it was sort of the parties'
12 spreadsheet, the Lynch won/loss reports or sales reports, I
13 should say, and then checking those against these other sources.

14 Same thing on the Sysco side. It was the parties'
15 reporting, plus two ordinary course documents in which they
16 indicated they track bidding opportunities, and then cross
17 checking of those bidding opportunities against the other
18 documents.

19 And all of that stuff came in together as part of spec 16
20 that was responsive to this request for information about bidding
21 situations.

22 THE COURT: Okay.

23 BY MR. MOHR:

24 Q. So just to be clear here for the record, the -- when you
25 refer to the RFP data sets that you analyzed, you're referring

1 to not only the Excel submission that the parties compiled that
2 came across to the FTC, but also these other documents that were
3 submitted in response to the second request?

4 **A.** Yeah, that's right in general. I should say that when we
5 talk about the aggregate diversion test that I did with the RFP
6 data, for the base version of that, just to make sure it relied
7 on what the parties had said, I did a version that just used
8 their spreadsheets, that just used what they submitted and got
9 to the same aggregate diversion result. So I did some analysis
10 where I just used their spreadsheets, but generally the RFP data
11 set was the spreadsheet supplemented with these other documents.
12 And like I said, those were ordinary course documents that were
13 tracking wins and losses and sales.

14 **Q.** And given that the parties compiled these won/loss
15 spreadsheets at the FTC's request while they were advocating
16 before the FTC that Sysco and USF were not close competitors, do
17 you have any reason to believe that it would have been compiled
18 in a way that would bias the results towards Sysco and USF?

19 **A.** No. I think as a general matter I would just say for all
20 of these data sets, I have no reason to believe that they would
21 be biased against a particular finding or biased -- so when I
22 see two separately constructed data sets showing on the US Foods
23 side Sysco is overwhelming the largest, most frequent
24 competitor, and then on the US Foods side, Sysco is the most
25 frequent competitor, same thing in the LINK and the request for

1 incentives data. I have no reason to believe that there's any
2 bias in that or that that sort of clear pattern of close
3 competition would be created by any bias in this data.

4 Q. Moving on to the switching analysis that Dr. Bresnahan
5 testified about yesterday. Dr. Bresnahan testified that he
6 performed the switching study for both national and local
7 customers that he claimed showed much smaller diversion between
8 Sysco and USF and you observed from other data sources; is that
9 right?

10 A. Yeah. I mean, at least in some directions I think it
11 showed smaller switching and in some directions, as I said,
12 like, from Sysco to US Foods it showed fairly large switching.

13 Q. In your report you stated that the switching analyses
14 suffered from systematic biases. Can you explain what you mean
15 in your rebuttal report by systematic biases?

16 A. Sure. And I really have three things in mind here. And
17 again, this is to contrast with data sets like the RFP data and
18 the LINK data that I use. I see no reason that -- there's a
19 bias in who those are reporting as the closest competitor.

20 That's very different from what Professor Bresnahan
21 switching analysis shows, and frankly, is the reason that I
22 didn't rely on the switching analysis like that. So the three
23 sources of systematic biases I have in mind, one made very clear
24 yesterday was that the analysis can only look at things that can
25 be matched to this AG data source. And as indicated, that AG

1 data source is only -- it's primarily restaurants and hotels,
2 right? I spent a fair amount of time in my direct testimony --
3 and I think Dr. Bresnahan agreed -- that restaurants and hotels
4 aren't really -- aren't representative of the overall set of
5 purchasers, right? So at most, it can only speak to that one
6 group. It doesn't tell you anything about whether healthcare
7 providers, GPOs, FSMs, have any harm.

8 Secondly, it's a group that, you know, is a small
9 percentage of total sales, and as we talked about, is not
10 representative of the overall group, may have some different
11 options.

12 I consistently chose to keep all of the national buyers
13 together, because when you look at them as a whole I clearly
14 find harm, but what this is, is one subset which we know is
15 distinct. So that's one -- and it is a small amount of data
16 that he has there, to make clear. I mean, in a given quarter --
17 and this is in my rebuttal report -- the switching he's talking
18 about is less than one half of 1 percent of the total volume of
19 sales. And that's just switchers. As I said, you know, in my
20 direct testimony, substitution and competition happens for the
21 upfront contract, for the overall sales. His is just a very
22 small, nonrandom sample of just switchers. So that's one point.

23 A second point is that unlike data sets like RFP and
24 LINK, which are directly about competition, who am I -- who are
25 these guys competing with for business? The switching analysis

1 is just about customers switching for any reason, whether it be
2 a competitive situation or not.

3 There's economic literature that indicates that if you
4 look at switching that isn't competitive, isn't price based,
5 isn't competitive switching, very often what you're going to
6 find is customers switching because they want something
7 different, not the closest substitute, but because they've
8 chosen they want a different alternative. They're not looking
9 for something that's a price substitute.

10 An example we've talked about would be one -- I won't
11 mention the name -- but one fast food chain who wanted sauce --
12 systems distribution as clearly something different and thought
13 that would be better, but waited until it had to be large enough
14 to qualify and then switched to systems because it was different
15 from broadline, not because it was a close substitute.

16 And then the third point, and perhaps the most important,
17 is that just the nature of the data exercise that Professor
18 Bresnahan had to do with the data he had, it's systematically
19 bias is what you're going to find. And the reason is -- my
20 rebuttal report goes through many examples, but I'll just give
21 the basics. The reason is we're trying to compare switches
22 between Sysco and US Foods to switches between Sysco and other,
23 right? Think about what we have to do to do that.

24 On the Sysco/US Foods side, you have to be able to find
25 the observation in Sysco, have it leave Sysco, and then find the

1 corresponding observation in US Foods. All right? And any time
2 there's a data match problem, which happens all the time in
3 these situations, you're not going to see it as a Sysco to
4 US Foods switch. In fact, you're going to see it as -- if it
5 doesn't match up across the data sets, when it leaves Sysco,
6 he's going to interpret that as a switch to other. All right.
7 So he has to -- he has to find the match in-between Sysco and
8 US Foods. Any time he doesn't find a match, that's
9 systematically not just going to lower the Sysco to US Foods
10 switching, but switch it over to the Sysco to -- or US Foods to
11 other. In my rebuttal report I show, you know, examples that
12 account for hundreds of such cases in which he fails to
13 correctly correct the data sets, hundreds of them.

14 On the other hand, what do we do between Sysco and
15 US Foods and other? There, if somebody leaves Sysco or
16 US Foods, as Professor Bresnahan said, we don't know what
17 happens to them, actually, right? So we just have to infer they
18 went to other. Any time that something else happened, we're
19 going to still infer other. If it's a mismatched data between
20 Sysco and US Foods, we're going to infer other. If it's that a
21 restaurant temporarily closed, we're going to infer other. If
22 it's the restaurant was, you know, being remodeled, we're going
23 to infer other.

24 And so the issue is that on the one hand you only get
25 them if it's a perfect match because we know the matches aren't

1 perfect, you're biasing down how many Sysco/US Foods matches you
2 find. On the other hand, because you're just inferring the
3 switch to other, any time you don't know what happened you're
4 going to necessarily bias up that number.

5 My rebuttal report goes through this in details, but as I
6 said, it shows literally hundreds in the mismatching and dozens
7 of other cases in which these problems arise in the data. And
8 this is not just a case, as I said, of just messy data. These
9 are, because of the nature of the algorithm for matching them,
10 they bias down Sysco to US Foods switches and bias up Sysco to
11 other switches. To me, that's why you see things like very
12 asymmetric results across the different sides because it's just
13 not a reliable method.

14 **Q.** And Dr. Bresnahan also testified that he performed
15 sensitivity analyses to address some of those criticisms. Have
16 you analyzed whether Dr. Bresnahan's sensitivity analyses
17 addressed the issues you raised in your rebuttal report?

18 **A.** I mean, as we discussed, you he described the sensitivity
19 analysis in his deposition, where he said instead of look at
20 quarter-to-quarter switches, he looked at just switches at the
21 beginning and the end and switches that way. I mean, I would
22 just say two things about that. One is that still requires you,
23 even if it's at the end, to match Sysco and US Foods. You still
24 have to do the match, and if the match doesn't work you still
25 miss it. And it still requires you, in the case where you see

1 it was Sysco and US Foods and it becomes something else, it
2 still requires you to figure out what that something else would
3 have been. You have to infer that in any case. So I don't
4 think it solves the fundamental problems with the approach,
5 which is on the one hand you need a match and on the other hand
6 you just have an inference.

7 But I'd also say that on our end when we're trying to
8 implement what he said in deposition, we've implemented sort of
9 such a change in his procedure, and we find that it doubles the
10 switching between Sysco and US Foods, he's finding in many
11 cases. So again, I think that just shows the results are
12 extremely sensitive because of these problems.

13 **Q.** Briefly moving on to two other criticisms raised by
14 defendants' experts. One defendants' expert testified that your
15 merger simulation model only applies to formal RFPs. Do you
16 agree that your model requires that an open outcry auction
17 occur, and that it does not account for situations in which
18 there may be negotiations between the bidder and the
19 distributor?

20 **A.** No. So let me explain. I mean, as I said in my direct
21 testimony, the model is a model that I applied to all bidding
22 situations. I mean, to be clear, I apply it not just to formal
23 RFPs, but to all bidding situations. The model says, as went
24 through in some detail, that the outcomes -- consistent with the
25 merger guidelines and much economics, the outcome of those

1 bidding situations in my model is that the best option will win,
2 and the way the surplus or the value will get split up is
3 that -- what the buyer will get will be determined by the second
4 best option, and the seller will get the gap between number 1
5 and number 2. All right. So that's not just applied to formal
6 RFPs, not just to open outcry auctions, that's what my model
7 does.

8 Now, there were -- and this was gone through in great
9 deal in the rebuttal report, so I'll try to be brief. There
10 were questions raised about that, particularly by Professor
11 Hausman. I would say they are -- they sort of fall into two
12 main buckets. All right? One is what's the informational
13 assumption you have in mind to say that the value's going to be
14 set at the number 2 level? In the economic literature, that's
15 the only place this open outcry assumption, this auction
16 assumption comes in at all, is that's one mechanism in the
17 economic literature where that information about what's the
18 second best option gets revealed. That could happen through
19 this Picasso auction that Professor Hausman talked about.

20 So I looked the open outcry model as a way of
21 implementing that and that informational assumption. But as I
22 talk about at length in the rebuttal report, that information
23 could, in fact, come from the fact that these firms have been in
24 the industry a long time and know the industry well, from the
25 competitive intelligence that they indicate in their testimony

1 and documents that they do, from the process of asking buyers
2 and suppliers what's available. It's really just an assumption
3 that the industry is well-modelled by suppliers who have good
4 information about who can serve who. The rebuttal report goes
5 through extensive testimony justifying that assumption.

6 The other thing I'd say on that informational assumption,
7 though, that was in my rebuttal report that professor Hausman
8 didn't address was that if you don't have perfect information,
9 as he said, you're in a world -- you could model that in a world
10 he described as the sealed bid auction. Sealed bid means I just
11 don't know everything.

12 There's a classic paper by Maskin and Riley that looks at
13 that situation, the sealed bid situation. And in its conclusion
14 it indicates that in the situation in which you have two close
15 competitors and they're going to merge together, it basically
16 says in a seal bid situation the problems likely could be worse.
17 And the intuition is simply, if I'm Sysco or US Foods and I
18 don't have perfect information today, then I sort of -- when I'm
19 bidding, I have to always be afraid the other one is there. So
20 that if I don't have perfect information, the other one is
21 always there as a threat. The merger takes away that threat.
22 So this paper that I talk about in the rebuttal report indicates
23 that with less than perfect information the problems could be
24 worse.

25 Let me briefly address the negotiations point, and

1 then -- so Professor Hausman also asked another question which
2 is: The way my model works, the buyer can use the outside
3 threat to get the second best alternative and the seller
4 captures the gap between number 1 and number 2. Effectively
5 what Professor Hausman says and does in some examples is say
6 maybe the buyer can get even more than that, maybe they can
7 actually go above the second best option and capture some of
8 that gap between number 1 and number 2.

9 And again, I don't want to get too deep into all this
10 now, but my rebuttal report indicates that under the theory of
11 negotiation, given that the buyer's outside threat is really the
12 number 2 option, given that the buyer doesn't know exactly what
13 the number 1 seller can do, and given that ultimately the buyer
14 needs to get food and its only threat is the number 2 option, I
15 explain in detail why the economics literature indicates that
16 the best way to model that is that the buyer's threat is
17 number 2 and the seller captures the difference. There's
18 negotiations literature that support that, even in the case of
19 negotiations.

20 But even there I'd say I went beyond that and I indicated
21 that even if you went to a negotiation model where the buyer and
22 seller split things 50/50, as long as my measure of harm is
23 bigger than the total efficiencies from the transaction, the
24 transaction is still harmful.

25 So in both cases what the rebuttal report does in detail

1 is say Professor Hausman rightly asked about an informational
2 assumption and a negotiation assumption. I justify why those
3 were relevant and correct assumptions, but I also show that even
4 if you were to relax those to the versions that he suggests
5 you'd get the same result.

6 **Q.** Moving on to your final criticism, at this hearing
7 executives from Sysco and US Foods have testified that they'll
8 not be able to go to a customer and say they're going to raise
9 their prices 5 to 10 percent after the merger because customers
10 would simply say they wouldn't accept that type of rate
11 increase.

12 Does this testimony change your opinion about whether the
13 merger will substantially lessen competition?

14 **A.** No, for several reasons. I mean, one is that when you
15 see these sorts of statements, I see them all the time, and I
16 often see them when I'm working, frankly, for the defendants who
17 say this price increase just couldn't happen, the customers
18 wouldn't accept it. What I always find -- and you have to keep
19 in mind that these firms are operating in a world in which Sysco
20 and US Foods compete, and that's why they see the customers
21 having that leverage. I mean, the entire sort of science and
22 business of antitrust analysis is to think about the world in
23 which Sysco and US Foods no longer compete. That's what we, as
24 economists, and the merger guidelines are helping us to do. So
25 I think the right way to analyze that is through the merger

1 guidelines, not through testimony that exists in a world in
2 which they do compete.

3 But even -- even -- you know, thinking about what their
4 testimony says, I would point out that it's important to
5 remember that the 5 percent price number that we hear a lot,
6 right, that's the price number that we use for a SSNIP, right?
7 So the 5 percent price number would say if you merge together
8 every firm in a market, that monopol- -- the standard for that
9 being a market is the monopolist could raise price by 5 percent.

10 I mean, obviously that means that the standard for merger
11 harm is not 5 percent, right, because as a whole market,
12 monopolists would raise the price by 5 percent. The question
13 then is: What would just two of those firms do? And the
14 guidelines say that if they're over, you know, 2,500 HHI,
15 et cetera there's a presumption of harm. That's not saying
16 they're the monopolist. So they don't have to raise prices by
17 5 percent. What they have to do, which is what I described, is
18 raise them enough that they would offset any benefits from the
19 transaction, and that's what I've computed.

20 And it's also just important to note that if there is a
21 price increase it doesn't necessarily take the form of just
22 going out and jacking up a list price. It can often take the
23 form of reducing incentives or not giving a price cut that
24 otherwise might have been given.

25 So bottom line, though, I think, and probably the most

1 important point there is, that if merger analysis lets you say
2 there will be harm, that's what the analysis does, that's the
3 way to think about it, and there's no basis that that harm has
4 to be a 5 or 10 percent number for there to be a problem. It
5 just has to be harmful or worse -- bigger than the benefits.

6 **Q.** So in closing, Dr. Israel, based on your expert opinion
7 and your review of the record in this case and the testimony at
8 this hearing, are you still confident that the proposed merger
9 is likely to cause competitive harm?

10 **A.** I am, absolutely. And let me sort of give an -- a couple
11 of ways to think about that. One is, as I said from the
12 beginning, by looking at the testimony and the customers who
13 indicate they'll be harmed, looking at all my empirical
14 analysis, I've been doing this a long time and I constantly have
15 to tell the team let's look at this from some other angle, and
16 those are in the report. I keep coming back to the same place,
17 which is that given the size and competitiveness of these two
18 firms, having them merge would be harmful to competition.

19 I actually, having been in the courtroom the entire day
20 yesterday, what struck me was that if you listen to the sort of
21 body of the testimony that Professor Hausman and Professor
22 Bresnahan gave, that was another example where if you put it all
23 together we get back to the same place. So let me explain what
24 I mean. Professor Bresnahan gave a number in his testimony
25 which was -- of those people who leave Sysco, 57 percent switch

1 to US Foods. And as I've indicated, I think that number is
2 biased downward and I don't -- based on the biases in that
3 switching number. But even if I take that 57 percent, that's a
4 lot of switching from Sysco to US Foods.

5 But we can go beyond that. If I think about what
6 Professor Hausman said yesterday, he said a couple of things,
7 many things, but a couple sort of affirmatively. One was that
8 he gave this margin number that was below 10 percent, right?
9 And I've indicated why I think that's the wrong margin. But
10 even if I take that 57 percent number and that margin that's
11 below 10 percent, that those were things they presented
12 affirmatively and I think about them, then Professor Hausman
13 also, for the first time he presented this yesterday, but he
14 also mentioned that he used merger simulation model, as you
15 mentioned. He went from the Section 6.1 of the merger
16 guidelines, and he said he used a model they have there to think
17 about merger harm. The model I used, by the way, is from
18 Section 6.2, which is on bargaining and auctions, which I think
19 is the right model here.

20 But the model that Professor Hausman used was from
21 Section 6.1, something called upward pricing pressure that we
22 all look at sometimes. It's well-known that when you look at --
23 when you use such a model, the basic measure of upward pricing
24 pressure -- and again, this is some math -- but the basic
25 measure of the guidelines give you an upward pricing pressure,

1 is that switching rate or that diversion rate times the margin.
2 That's the measure it gives you. And what that measure says is
3 if that measure is bigger than efficiencies from the
4 transaction, then you've got prices that are going to go up,
5 then the merger is bad.

6 So even if I take all of the stuff we heard yesterday,
7 all of it, and I take Professor Bresnahan's, you know, just
8 under 60 percent switching number, and I take Professor
9 Hausman's margin that's just less than 10 percent, and I
10 multiply them together, I get this upward pricing pressure index
11 that's 4 or 5 percent. It's on that basis. And remember, even
12 Professor Hausman's measure of efficiency's less than 1 percent,
13 right? That's what we talked about. It's less than 500
14 million, so it's less than 1 percent.

15 So even if I sort of grant everything they said and just
16 use Professor Bresnahan's switching number, Professor Hausman's
17 margin, you get back to the same place, which is that given the
18 amount of switching between these firms and given the small size
19 of the efficiencies, even that analysis leads you to the same
20 place, which is that the switching and the diversion and what
21 would happen as a result of the pricing incentives means that
22 the merger is harmful.

23 But let me just conclude one other thing sort of based on
24 my own analysis of how I would summarize based on my own
25 analysis. So you've heard me talk for a while. I mean, the way

1 I think about it is we went through sort of the key points in
2 the merger guidelines -- and I don't want to go back through all
3 of them. I'll just sort of hit the ones that to me stress the
4 most important stuff, right?

5 So one is, you know, there's been a lot of discussion.
6 I've presented a lot of information about this question of
7 broadline as a product market, right, aggregate diversion test,
8 et cetera as broadline as a product market. We won't go through
9 all of that analysis, I'm sure. I mean, to me I actually
10 thought Mr. Weissman yesterday had a good way to think about
11 this, just to sort of reality check it, which is the market
12 definition test is really saying if you merge together, not just
13 US Foods and Sysco, but PFG and DMA and Reinhart and Gordon and
14 everybody else we've been talking about, all of those
15 broadliners, do I think they could raise prices by 5 percent?
16 And I think if you look at the body of evidence that's been
17 coming from all sides here, including some from Professor
18 Hausman saying PFG might be a threat, whatever you have there,
19 you merge together all of those broadliners, I think the
20 evidence is clear they could raise prices by 5 percent. I mean,
21 there's just a lot of competition, especially between US Foods
22 and Sysco, but generally today that would be relaxed. So I
23 think it's clear that broadline is distinct, and that under
24 that -- under the Hypothetical Monopolist Test it's a product
25 market.

1 Point 2 is: What about the market shares? I presented
2 market shares, a variety of ways, competed with a variety of
3 metrics, various data sets. I consistently find national market
4 share is over 60 percent; many local market shares over
5 50 percent. But I'd also point out that even if you take the
6 numbers that the defendants' experts were talking about
7 yesterday, none of that is denying -- their own numbers say that
8 Sysco and US Foods combined would sell over \$50 billion in
9 broadline, roughly ten times as big as the next biggest
10 competitor.

11 Now, with a combined market share, even under their own
12 metrics, which is roughly 50 percent, I just don't think --
13 they're much, much larger than the next biggest competitor over
14 the market share, even under their own numbers, which is roughly
15 half.

16 And so the shares are quite high, which then the question
17 is, you know, are any of these mitigating factors going to
18 offset the problems that we would have? And I think, you know,
19 there you can simply say I think the evidence is clear that
20 they're more like each other than they are like other firms.
21 And the RFP data shows, and the LINK data and the RFI data, all
22 show substantial competition between them, as Professor Hausman,
23 I think, agreed with. So the notion that they're -- even though
24 the shares are high they're somehow so different from each other
25 that we shouldn't worry, I think flies in the face of the

1 evidence that we've seen.

2 And that leaves you with efficiencies, but under the most
3 aggressive numbers we've seen, efficiencies are less than
4 1 percent of revenues, so again, that doesn't offset any measure
5 of harm that I put forward, and it's quite small given
6 efficiencies I've seen in many cases.

7 And finally the divestiture. What I would say about the
8 divestiture is I went through several reasons why PFG will be
9 smaller, have greater distances, have higher COGS. To me, the
10 simplest number to remember about the divestiture is in PFG's
11 own projections, it would reach by 2019 a market share that is
12 roughly 60 percent of what US Foods has today. So, I mean, even
13 under their own projections the divestiture is not sufficient to
14 replace the competition.

15 MR. MOHR: No further questions.

16 THE COURT: All right. Thank you.

17 Mr. Simmons, how long do you think you'll have?

18 MR. SIMMONS: Hopefully just 30 minutes, Your Honor.

19 THE COURT: All right. Let's take a break until just
20 about noon and give our court reporter a rest and then we'll
21 finish up. Thank you.

22 (Thereupon, a break was had from 11:54 a.m. until
23 12:02 p.m.)

24 THE COURT: Please be seated, everyone. Thank you. All
25 right. Mr. Simmons.

1 MR. SIMMONS: Thank you, Your Honor.

2 CROSS-EXAMINATION OF MARK ISRAEL

3 BY MR. SIMMONS:

4 Q. I guess I'll say good afternoon. I think it's noon,
5 Dr. Israel. How are you?

6 A. I'm good, thanks.

7 Q. Dr. Israel, I want to first talk about your national
8 market share denominator. You didn't collect sales data for all
9 foodservice distributors in your alleged national broadline
10 market, did you?

11 A. I didn't collect data for all of them. I did have
12 sources of data that indicated the size of all of them.

13 Q. And you didn't -- but you didn't collect sales data for
14 all broadline distributors either, did you?

15 A. Again, I didn't collect data for all of them. I did have
16 data that indicated the size, the overall size of them.

17 Q. Now, you indicated in the trial here that your
18 denominator was extremely conservative, and that denominator is
19 just over \$34 billion, right, for national sales?

20 A. I mean, I -- I don't recall. It would depend which
21 number, whether it's 34 billion exactly. I did say my method 6
22 was conservative, yes.

23 Q. All right.

24 MR. SIMMONS: If I may approach, Your Honor? I don't want
25 to break the trend with the binder. We'll maintain our

1 tradition.

2 BY MR. SIMMONS:

3 Q. Now, you weren't here for the testimony of Mr. Lynch,
4 were you?

5 A. I was not.

6 Q. Did you read what Mr. Lynch said in this case?

7 A. I have not read all of his testimony.

8 Q. Did you read any of it?

9 A. Not his testimony in trial. I read his deposition
10 testimony.

11 Q. Okay. Well, in testimony at trial -- oh, yeah, it
12 shouldn't be in the back by the way, and it isn't.

13 Do you know who Mr. Lynch is, by the way?

14 A. I believe he's the vice president for national sales for
15 US Foods.

16 Q. In fact, he's the senior vice president of sales; is that
17 right?

18 A. I apologize, I didn't mean to demote him.

19 (Laughter.)

20 Q. Now, well, I'm just trying to make sure you're accurate,
21 because I know you care about accuracy.

22 Now, are you aware that Mr. Lynch testified that there
23 are well over 100 billion in national sales for which the USF
24 national sales division competes for?

25 A. As I said, I didn't read his testimony. I'll take your

1 word for it.

2 Q. Okay. Let's assume he did testify to that. Would you
3 agree with me that 100 billion is roughly three times the
4 34 billion denominator that you used in your extremely
5 conservative national broadline market share calculation?

6 A. Well, it certainly is larger. I mean, I suspect it
7 includes some as what I define as the systems market, but it
8 certainly is a large number, yes.

9 Q. Okay. So in constructing the CMU, the national customer
10 broadline market, you took the parties' two lists, okay -- and
11 so kind of construct an enumerator, but you have no reason to
12 dispute Mr. Lynch's statement that USF views itself as competing
13 in over \$100 billion worth of sales for what they consider to be
14 national customers; isn't that right?

15 A. I mean, as I said, I assume that includes some sales that
16 are systems, but I have no reason to dispute there's that
17 number.

18 Q. But that's a pure assumption on your part, isn't it,
19 Dr. Israel?

20 A. Well, no. I've studied the systems and broadline markets
21 closely -- we've talked about that -- and presented numbers on
22 the sides of each.

23 Q. Now, you haven't analyzed the number that Mr. Lynch put
24 forward because -- because you just testified to it this week,
25 and you didn't even read his testimony, did you?

1 A. I agree, I have not, but I do have numbers on the side of
2 broadline and on the side of systems, and a number like this
3 would be consistent if somebody included a lot of systems.

4 Q. USF has no systems, right?

5 A. I think USF, as we've said, competes for some restaurant
6 businesses that largely is in systems. It's a small percentage
7 of their total business, but they might say they compete for it.

8 Q. But they don't have a systems business, do they? They
9 meaning USF, isn't that a fact, sir?

10 A. No. I think they do make sales to customers who are
11 generally looking for systems business.

12 Q. All right. But let's talk about those sales, independent
13 restaurants, for example. You had no data on how many
14 independent restaurants were located in the local markets you
15 drew to use as your denominator. Isn't that a fact?

16 A. The number of independent restaurants?

17 Q. Yes.

18 A. I don't recall if I have data on that.

19 Q. All right. And you have no data on the purchases of all
20 independent restaurants in each of your local markets to use as
21 a denominator in your local market share calculations. Isn't
22 that a fact, sir?

23 A. I don't have -- my market share calculations are based on
24 the revenues of the broadliners that I included, as we've
25 discussed.

1 Q. Right.

2 A. They were not based on a number of the total independent
3 restaurant revenue that may or may not be in that market.

4 Q. So the answer to my question is: Yes, Dr. Israel? Can
5 you give the Court a clear answer?

6 A. Can you repeat the question?

7 Q. Yes. You had no data on the purchases of all independent
8 restaurants in each of your local markets to use as a
9 denominator in your local market share calculations. Isn't that
10 a fact?

11 A. No, I don't recall what all data I had at any point.
12 It's not the denominator of my market share calculations, that's
13 correct.

14 Q. And you didn't have data from all distributors in the US
15 who are classified as broadliners; isn't that fact?

16 A. I didn't independently have data on all broadliners. I
17 had data that permitted me to measure the size of all
18 broadliners.

19 Q. You didn't have data from all broadline distributors in
20 the United States showing who they sold to and how much they
21 sold to. Isn't that a fact?

22 A. I would agree that I didn't separate that data from all
23 of them. I did have data that let me measure the total size of
24 all them, which is what I need for the denominator.

25 Q. And you didn't even have data from the top 50 broadliners

1 and who they sold to and how much they sold to. Isn't that a
2 fact?

3 **A.** Again, I would agree that I didn't independently have
4 data from all of them. I had data that allowed me to measure
5 the size --

6 **Q.** Doctor, I didn't ask you about all of them.
7 My question was about the top 50.

8 **A.** I apologize.

9 **Q.** Just hold on a minute. You're trying to convey an
10 impression here for precision, right? You want the Court to
11 believe that you're precise and careful?

12 **A.** Yes.

13 **Q.** All right. So I'm going to ask you to be precise and
14 careful in response to my questions. Can you do that?

15 **A.** Yes.

16 **Q.** All right. My question was: Isn't it a fact you didn't
17 even have data from the top 50 broadliners, in terms of who they
18 sold to and how much they sold? Isn't that a fact?

19 **A.** I did not have data separately from all of the top 50.
20 As I said, I had data that let me measure the overall
21 denominator.

22 **Q.** And you have no data from specialty distributors selling
23 to independent restaurants. Isn't that a fact?

24 **A.** I don't know that I have no data. I may have data from
25 certain specialty distributors, but I didn't include it since

1 it's not part of my --

2 Q. And you have no -- I'm sorry.

3 A. I didn't include it since it's not part of my product
4 market.

5 Q. Right. And that's sort of an interesting statement, by
6 the way, about I heard you say to the Court, you know, it's
7 trying differently methods to test the hypotheses.

8 With all due respect, sir, what I'm hearing from you is,
9 I'm not including something because it's not in my product
10 market. So I would put to you that you're not trying different
11 methods to confirm a hypotheses. You're weeding things out
12 because they don't work with your APR hypotheses. Do you agree
13 with my statement?

14 A. Absolutely not. I mean, I think I was quite clear on the
15 methods I used to identify the produce market, which included
16 the RFP data, the LINK data, the RFI data, all of which I
17 intentionally included everything that was provided, systems,
18 specially, otherwise, to see if there was actually any
19 measurable diversion to those.

20 Q. And the data that you tendered has no data from any
21 cash-and-carry selling to independent restaurants. Isn't that a
22 fact?

23 A. I don't know what you mean by the data that I tendered.
24 I did analysis on my market shares where I, in fact, did include
25 cash-and-carry that offered delivery to show it didn't change my

1 results.

2 Q. You don't have data from cash-and-carry entities on who
3 they sold to and how much they sold to you; isn't that fact?

4 A. I think it's correct that I don't have it broken down by
5 who they sold to.

6 Q. And you have no data from club stores selling to
7 independent restaurants, who they sold to and how much, right?

8 A. Again, I'm not positive as I sit here what all data I
9 have. As we discussed, my market share methodology for local
10 markets we've described, and I did do versions of it that
11 included cash-and-carry.

12 Q. Doctor, do you deny that you have no data from club
13 stores selling to independent restaurants? Do you deny that,
14 sir?

15 A. I just don't recall every piece of data I've had. I
16 don't --

17 Q. That's not the question.

18 A. I don't have --

19 Q. I'm asking you whether you deny it?

20 A. I don't recall all the data that I have. I don't deny
21 that I didn't use such data in doing my market share
22 calculations.

23 Q. Let's turn now to this idea that you have, and the
24 impression you want to leave the Court with that you've tried
25 some methods to confirm a result, because I think you can tell

1 from the tender of my questions whether we see this as inductive
2 reasoning, reasoning from facts to a conclusion, or deductive
3 reasoning, reasoning downwards from a conclusion, and I think
4 you can tell where I come out on that.

5 I want to turn briefly to the CID that was issued, an
6 example of a CID that was issued in this case to construct a
7 denominator that we've asked the Court to struggle with. Please
8 turn to tab 13 in the binder you have in front of you, sir.

9 This is a CID issued to Reinhart Foodservices. Do you
10 see that?

11 **A.** Yes.

12 **Q.** All right. And it was issued June 2nd, 2014. Do you see
13 that on the first page?

14 **A.** Yes.

15 **Q.** And that is after you were retained in this matter,
16 right?

17 **A.** Yes.

18 **Q.** Okay. Did you have any input into this CID, sir, do you
19 recall?

20 **A.** I did not.

21 **Q.** Take a look at page 2. Hopefully your document is
22 flagged, page 2 of 10. Does your version have a flag on it?

23 **A.** No, but I can turn to page 10.

24 **Q.** I'll just put it on the ELMO. It's 2 of 10 of the
25 specification.

1 A. Um-hmm.

2 Q. This CID --

3 THE COURT: I'm not sure where you are. I thought you
4 said tab 13.

5 MR. SIMMONS: Yeah, I did, Your Honor, tab 13, and the
6 first several pages are the actual --

7 THE COURT: I don't see what the -- tab 13?

8 MR. SIMMONS: Yes. My copy has a couple of them in it.
9 It's DX 06111. Here, are these flagged? If you hand me your
10 binder I could find it for you, Your Honor. Let's just work with
11 what we have on the screen for a moment. Thank you.

12 Your Honor, I could hand you -- if I may approach the
13 witness, too?

14 BY MR. SIMMONS:

15 Q. Now, this is a subpoena CID to Reinhart Foodservice,
16 right?

17 A. Yes.

18 Q. And Reinhart is a distributor?

19 A. That's correct.

20 Q. This subpoena doesn't ask Reinhart to report sales to
21 local broadline customers, does it?

22 A. I haven't been through the whole thing. I don't see in
23 what you've highlighted.

24 Q. If you look at, for example, page 2 -- it's showing on
25 the screen here, J, it asks for "sales in dollars for business

1 segment by month, separately identifying sales pursuant to
2 contracts or agreements with or business obtained through
3 industry cooperatives."

4 Do you see that?

5 **A.** I do.

6 **Q.** Nowhere in the subpoena is Reinhart asked for sales to
7 specific customers and how much they sold to customers. Do you
8 dispute that?

9 **A.** Again, I haven't been through the whole thing, and I
10 wasn't involved in it, so I'd have to read the whole thing to be
11 sure.

12 **Q.** No, I don't have the time for that.

13 But do you have any reason to dispute my representation?

14 **A.** I mean, I just don't know, as I --

15 THE COURT: Counsel, the document speaks for itself.

16 MR. SIMMONS: Okay.

17 THE COURT: You don't need to elicit a response to what
18 the document does or doesn't contain. Move on.

19 BY MR. SIMMONS:

20 **Q.** Let's turn to the term -- if you can turn to the last
21 flag in tab 13. Do you see the phrase "business segment" is
22 used?

23 **A.** I do.

24 **Q.** Okay. Now, here the instructions say the term "business
25 segment" means, "and information shall be provided separately

1 for any company segment, division or department that provides
2 the relevant service, including but not limited to, one,
3 broadline distribution, including but not limited to independent
4 restaurants, healthcare organizations, hospitality
5 organizations, education institutions and government
6 organizations, whether or not they maintain a contract with the
7 company."

8 Do you see where I'm reading?

9 **A.** Yes.

10 **Q.** "2, systems/customized distribution, including but not
11 limited to national chain and quick service restaurants."

12 Do you see where I'm reading?

13 **A.** Yes.

14 **Q.** "3, specialty distributions."

15 Do you see where I'm reading?

16 **A.** Yes.

17 **Q.** "So the CID is instructing the distributor to classify
18 sales to national chains in quick service as systems."

19 Do you see that?

20 **A.** And again, the document speaks for itself. I think it's
21 saying to include any systems sales you have to such customers.
22 I'm not sure it tells you how to classify them.

23 **Q.** Well, on the face of the CID, quick service restaurant
24 sales are classified under systems and customized distribution
25 pursuant to the instructions of the CID, right?

1 **A.** I mean, again, I would read this to say including all
2 your systems and customized distribution, including sales to
3 those types of organizations. That's consistent with the
4 discussion I've had at systems, that it's a model built around
5 serving quick service and chain restaurants.

6 **Q.** But the CID is instructing the recipient to classify
7 sales to quick service as systems. Isn't that a fact?

8 MR. MOHR: Objection. It speaks for itself.

9 THE COURT: Counsel, let's -- let's use our remaining time
10 to not challenge what the document does or doesn't say. I can
11 read it, and if there's an argument to be made about what the FTC
12 requested from these distributors, you'll have an opportunity to
13 do that.

14 BY MR. SIMMONS:

15 **Q.** Let's turn to your harm model. Now, your table 3 in your
16 report quantifies your harm estimate; isn't that right?

17 **A.** That's a quantification. There are quantifications in
18 other places in the report, too.

19 **Q.** And that was the harm you quantified using your option
20 model; isn't that right?

21 **A.** As I said, I call it a bidding model, but that was one
22 place where I included the harm quantification from that model,
23 yes.

24 **Q.** And the bidding model that you used was based on two
25 inputs and two inputs only: Your estimates of national market

1 share, and your margins, right?

2 **A.** I'm just trying to think about -- I mean, it certainly is
3 not only the estimates of the national market share since, in
4 the table and in footnotes in various places, I compute a
5 variety of sensitivities that view the model in different ways.
6 But ultimately, it rests on some measure of the probability that
7 Sysco and US Foods are number 1 and number 2, which in my base I
8 draw from my market shares as well as the margins.

9 **Q.** Okay.

10 **A.** I'd say that's the same inputs in the model that
11 Professor Hausman espoused yesterday.

12 **Q.** In fact, in your deposition testimony, you acknowledged
13 that your auction model uses margins an input.

14 "Is that a fair statement?"

15 "You said: I wouldn't characterize it as an auction
16 model, while I'll accept that."

17 Well, that's what I'm talking about, margins as an input.
18 You agreed that margins are an input to your auction model,
19 right?

20 **A.** I agree entirely.

21 **Q.** All right. And then you were asked: "Does your -- what
22 in any way does your model rely on market shares?"

23 "And you said: Your model is calibrated to your
24 calculation of market shares, report and backup reflect all the
25 information."

1 So your model is calibrated to your calculation of
2 national broadline market shares, right?

3 **A.** I mean, if it -- it's gone now, but during all the
4 deposition testimony --

5 MR. MOHR: He still needs to see the testimony.

6 THE COURT: Put that back up, Counsel, so he can confirm
7 what he said.

8 THE WITNESS: I think this is what I said a minute ago,
9 which is that my base model uses the national broadline market
10 shares to calibrate the probability that the firms would be first
11 and second, yes.

12 BY MR. SIMMONS:

13 **Q.** Okay. Your model does not include customer-specific
14 factors like willingness to pay, right?

15 **A.** I disagree with that.

16 **Q.** Your model does not include customer-specific factors
17 like ability to switch distributor, right?

18 **A.** I disagree with that.

19 **Q.** Your model does not include customer-specific factors
20 such as delay crosses, right?

21 **A.** Again, I disagree with that. The model has an explicit
22 term for the quality of the service that it provided to a given
23 customer and how that matches with a given distributor.

24 **Q.** Your model doesn't include customer-specific variables
25 such as risk aversion, right?

1 A. Again, I disagree with saying the model does not include
2 those.

3 Q. Your model does not include customer-specific variables
4 such as driving distance, right?

5 A. Again, the model includes a specific factor that accounts
6 for the match between a customer and a given distributor.

7 Q. Your model does not include customer-specific variables
8 such as average drop size, right?

9 A. Again, same answer, as the model does include accounts
10 for those.

11 Q. Your model does not include the customer-specific
12 variables such as produce mix, right?

13 A. Same answer.

14 Q. Your model does not include customer-specific variables
15 such as geographic dispersion, right?

16 A. Same answer.

17 Q. Your model does not include customer-specific variables
18 such appearance the benefit of incumbency, right?

19 A. The same answer. It includes the term that accounts for
20 the quality of the match between a customer and a distributor.

21 Q. So not only does your model, in our view, not include
22 customer-specific variables, your model doesn't include
23 distributor-specific variables such as distribution costs, how
24 they may differ from one distributor to another, right?

25 A. Well, that's clearly false. The model, as I just said,

1 calibrated on market shares and the measure guidelines indicate
2 that the best overall measure of a distributor's capably is its
3 market share.

4 Q. Is it your -- are you telling the Court that you got cost
5 data from the distributors that were subpoenaed, that they
6 tendered their cost data?

7 A. I'm telling the Court what I used, market shares as area
8 measure of the competitive strength of each competitor in
9 estimating my model.

10 Q. The distributors that were subpoenaed in this matter did
11 not produce cost data and you didn't use it, correct?

12 A. I don't know, as I sit here, if they were subpoenaed for
13 cost data or not.

14 Q. And your model doesn't include distributor-specific
15 factors such as prospects in the near future, does it?

16 A. Again, my model is calibrated the market shares which
17 reflect competitive strength. There's also a version of my
18 model where I allow for correlation between bidding
19 opportunities that would account for things like future
20 prospects, and I show that the estimate of harm is bigger when I
21 do that.

22 Q. You don't -- your model doesn't include
23 distributor-specific factors such as delay costs, right?

24 A. Again, I use market shares as a known measure of the
25 competitive strength as the guidelines indicate is the best such

1 measure.

2 Q. The market share you calculated, right?

3 A. I used my baseline market shares and a variety of other
4 market shares and sensitivity rights.

5 Q. Your model doesn't use distributor-specific factors such
6 as risk aversion, right?

7 A. The same answer.

8 Q. Now, when I deposed you, I asked you: "And so, you
9 believe that everyone in the group" -- remember we had a
10 cross-examination where we talked about the list? And I asked
11 you: "So you believe every one in that group -- everyone in
12 that group will suffer harm. Is that your opinion?"

13 "And you answered me: My opinion is that that group of
14 customers will suffer harm as a whole.

15 "I asked you: Every single one of them?"

16 "And you answered: My opinion is that that group of
17 customers is well-defined and will suffer harm. As a matter of
18 economics, I have not listed every customer in that group. I
19 have defined a well-set of -- well-defined set of customers and
20 quantified the harm that that group of customers would face."

21 Do you recall saying that to me?

22 A. That sound correct, yes.

23 Q. You did not assess in any of your reports whether any
24 individual customers would suffer harm. Isn't that a fact?

25 A. I did not assess specific customers, nor have I in

1 basically any merger investigation I can think of.

2 Q. Now -- now, Mr. Mohr asked you some questions about
3 Professor Bresnahan's work, and you kept talking about this
4 57 percent, right? Do you remember that?

5 A. Yes.

6 Q. And Professor Bresnahan also showed that USF lost
7 business only when 15 percent that's reflected here? That's
8 what it says, right?

9 A. Yes.

10 Q. Mr. Mohr didn't ask you about that, did he?

11 A. I think we talked about the fact that the asymmetry
12 between 50 and 57 is a reason why I find the results unreliable.

13 Q. And -- and this reflects 15 percent, right?

14 A. Yes.

15 Q. This one is 39 percent (indicating), right?

16 A. Correct. As I've said throughout all of my testimony, I
17 think the numbers on revenue are the ones to rule out.

18 Q. And let's talk about it. You didn't mention asymmetries
19 about this chart, did you? This shows 15 percent, only
20 15 percent of switches, right? Do you see that?

21 A. I do.

22 Q. And Professor Bresnahan's chart shows 11 percent here.
23 Do you see that?

24 A. Yes.

25 Q. And this shows only 20 percent switches. Do you see

1 that, based on revenue?

2 **A.** I do.

3 **Q.** And this shows only 12 percent switches. Do you see
4 that, based on accounts?

5 **A.** Right. I agree I didn't separately talk about the local
6 analysis since it has all the same flaws that are revealed in
7 the national analysis.

8 **Q.** Something else you didn't talk about are the maps that
9 Dr. Bresnahan showed of regionalization. Sodexo has divided the
10 company into 70 regions, right?

11 **A.** I don't recall the number 70, as I sit here, but I know
12 they've regionalized the country and they use Sysco in the vast
13 majority of those locations.

14 **Q.** And Subway purchases on a regional basis, right?

15 **A.** I think we talked about this. It's regional, clearly,
16 yes.

17 **Q.** And you've done no analysis, no empirical analysis saying
18 regionalization will somehow be extinguished post-merger, have
19 you?

20 **A.** I don't expect it to be extinguished. I've included
21 regionalized purchases in all of my analysis.

22 **Q.** You've done no quantitative analysis for all the
23 customers on the CMU list. How much either by dollar volume or
24 by counts, you have no idea how many of them regionalize and on
25 what basis, do you? You can't quantify it for the Court, as you

1 is sit here; isn't that fact?

2 **A.** I can't quantify it customer by customer. I've included
3 regionalized purchases in all of my analysis, and for many
4 customers I can indicate they do regionalize and use Sysco and
5 US Foods for the bulk of their purchases anyway.

6 **Q.** Let's talk for a minute --

7 **MR. SIMMONS:** And I'm getting close to the end, Your
8 Honor. I understand there are time constraints, so I appreciate
9 it.

10 **BY MR. SIMMONS:**

11 **Q.** Let's talk again about you're auction model or bid model.
12 I'll you'll whatever term. You called it an English auction
13 outcry model in your first report, didn't you, sir? Isn't that
14 the term you used?

15 **A.** I don't recall. You can show me a page. I do -- as I
16 said today, I do implement the mathematics of the model in using
17 the English outcry model.

18 **Q.** Do you deny that in your declaration and in your first
19 report you used the term "English auction outcry model"?

20 **A.** I think we went through this in my deposition. I don't
21 deny that I used the term. There was also a long footnote
22 explaining why that was terminology, and, in fact, the results
23 were much more general.

24 **Q.** Now, your auction model assumes that a bidder will win
25 with probability equal to the bidders market share. Isn't that

1 a fact?

2 **A.** In the forms that you just -- the baseline model that
3 uses market share, then I assume the winning probability is the
4 market share, yes.

5 **Q.** So if Sysco has a 40 percent share, they will win a
6 bidding competition with a 40 percent chance. Isn't that a
7 fact?

8 **A.** These are revenue shares, so it's the amount of the
9 revenue that they will win. But they will win 40 percent of the
10 revenue, consistent with their 40 revenue share, yes.

11 **Q.** That is true in your auction model for all customers,
12 regardless of whether it is a Sysco customer or a customer that
13 Sysco is trying to win from another distributor, right?

14 **A.** Again, there are individual specific factors, so this
15 will vary from customer to customer. My model only says that on
16 average across the groups, Sysco's winning probability will be
17 40 percent of revenue consistent with their shares.

18 **Q.** Was that a yes or a no?

19 **A.** I think it was a no, because there are individual
20 specific factors. The only assumption is that the average
21 winning share is 40 percent.

22 **Q.** Now, you testified -- I'll come to that in a moment.
23 Pardon me, let me strike that.

24 Now, again, consistent with this idea that we don't want
25 to end up with self-fulfilling prophecies in terms of tests, you

1 said you have no reason to believe that the specification 16
2 data is biased; isn't that right?

3 A. Um...

4 Q. Didn't you say that?

5 A. Yeah. I believe what I said was I have no reason to
6 believe it's bias towards finding Sysco and USF as closest
7 competitors for one another than is true in reality.

8 Q. And you admitted that you did not want to use a random
9 sample from third parties, right?

10 A. I think I said I didn't want to use a nonrandom sample
11 from third parties.

12 Q. But in your specification 16 database you took the lists
13 that the parties gave you, that the parties were asked to
14 construct at the request of the FTC, and then you supplemented
15 that from the parties' documents, right?

16 A. Correct, I used all of the information the parties
17 submitted in spec 16 as a bidding opportunity.

18 Q. You didn't supplement it from documents of other entities
19 that responded to any FTC discovery, right?

20 A. Correct. Intentionally using -- each one is a separate
21 data set for the two parties as far as what they have as their
22 bidding opportunities.

23 Q. So your RFP data set is skewed towards including any bids
24 in which Sysco, USF or both parties participated in, right?

25 A. I mean, it's the data that they participated in,

1 therefore, I didn't use it to count their own wins. I used it
2 to count who they compete with, which is what you do with the
3 data they provide.

4 Q. And how you constructed the specification 16 database, by
5 definition, excludes bids in which neither party participated
6 in. Isn't that a fact?

7 A. If neither one is the top two choices, I'm not claiming
8 harm on any such commerce. So I look at who they compete with
9 and who they lose to as a measure of what the diversion is and
10 who they compete with.

11 Q. And your RFP database -- do you remember on
12 cross-examination, I took you through Sodexo, RFPs, some of
13 which is which mentioned Sysco, some of which is mentioned USF,
14 some of which mentioned neither, some of which mentioned only
15 one? Do you recall that?

16 A. I do.

17 Q. Okay. None of those RFPs which were produced to the FTC
18 in this matter, make it on your RFP backup. Isn't that a fact?

19 A. I mean, again, it's from third parties, and I didn't want
20 to take a nonrandom sample of third parties when the goal is to
21 see who the parties indicate they compete with.

22 Q. And isn't it a fact that your RFP backup, which is tab 1,
23 DX 01918, doesn't have any RFP's from Sodexo? Isn't that a
24 fact?

25 A. I don't know that, as I sit here.

1 Q. And your RFP backup doesn't include a bid to Hooters. Is
2 isn't that a fact?

3 A. Yeah, I don't have it memorized, as I sit here.

4 Q. I'm just -- I've got to go fast, so whatever you remember
5 you remember. You can say I don't remember.

6 And isn't it a fact that your RFP backup doesn't have Uno
7 Chicago Grill RFP? Isn't that a fact?

8 A. I consistently am not going to know what exactly is in
9 the data.

10 Q. Please turn to tab 8 of your binder, sir -- or I'm sorry,
11 yes, tab 8. This is a June 26th, 2014 letter from Mr. Larson of
12 Wachtell, Lipton. Do you see that?

13 A. I do.

14 Q. Had you seen this letter before today?

15 A. I don't recall.

16 Q. Well, let's turn to page 3 of this at tab -- I'm on
17 tab 8.

18 MR. SIMMONS: By the way, for the record, this is
19 DX 05031.

20 BY MR. SIMMONS:

21 Q. Mr. Larson writes the FTC and he says, "We share your
22 wish that there was a reliable database of bidding activity in
23 this industry, but unfortunately neither we, nor Sysco, can
24 simply fabricate one by wishing."

25 Do you see what he said?

1 A. Yes. I wish we could have fabricate it by wishing. We
2 had to spend months working to put it together.

3 Q. Mr. Larson also said --

4 THE WITNESS: Do you want me to repeat?

5 THE COURT: No.

6 BY MR. SIMMONS:

7 Q. -- "As stated during the call, the end result of all of
8 this would be an unreliable data set at best, given that Sysco
9 loses 20 to 25 percent sales force in any given year."

10 Do you see that?

11 THE COURT: Hang on, there's an objection.

12 MR. MOHR: Your Honor, I'm not sure if Dr. Israel's answer
13 was captured by the court reporter there.

14 THE WITNESS: Like I said, I just said I wish that we
15 could have fabricated it by wishing, too, but it took us months
16 of work to put it together.

17 And I see the statement you just read.

18 BY MR. SIMMONS:

19 Q. Now, I'm getting close to being done here, I believe.

20 You said the H&R Block case, and the economist there,
21 Warren-Boulton, used the Katz/Shapiro formula, right?

22 A. Yes, that's my recollection.

23 Q. And you said -- I wrote down in my notepad -- just a few
24 minutes ago, that that case involved -- I wrote down "different
25 products" in quotation marks.

1 Did you use words to that effect when Mr. Mohr put you
2 on?

3 **A.** I mean, it's possible. It certainly involved different
4 tax software, yes.

5 THE COURT: Counsel, I'm going to ask you not to
6 cross-examine him about what a case says. That's really an arm
7 of legal argument that can be made in pleadings of legal
8 argument.

9 BY MR. SIMMONS:

10 **Q.** Do you know whether the District Court --

11 MR. SIMMONS: I'm just doing it because he invoked the
12 case --

13 THE COURT: I understand.

14 MR. SIMMONS: -- and asked about the case, Your Honor.

15 THE COURT: I understand.

16 MR. SIMMONS: So I won't ask if you don't want me to.

17 THE COURT: All right. Look, if you-all disagree with
18 what he said about H&R Block, you'll have an opportunity in your
19 papers to --

20 MR. SIMMONS: Can I ask one?

21 THE COURT: Sure.

22 BY MR. SIMMONS:

23 **Q.** Do you know whether the District Court made an
24 observation that the products were basically the same, so not
25 different?

1 **A.** I don't know what the Court said.

2 MR. SIMMONS: All right. That's all I'll do with that,
3 Your Honor.

4 BY MR. SIMMONS:

5 **Q.** When I asked you in deposition: "Well, you've written
6 that you look to business documents in making judgments in this
7 casing, haven't you?"

8 "You answered: I look to business judgments -- I look to
9 business documents in making judgments when they are
10 informative. In general, I find business documents relatively
11 uninformative on the specifics of antitrust market definition
12 because they are almost never written with that in mind."

13 Is that -- is that your view today, sir?

14 **A.** My view is business documents are informative for the
15 business decisions that the companies make, and they're -- but
16 not -- generally not informative for doing antitrust specific
17 analysis based on those decisions.

18 **Q.** And you can't cite to the Court any document of the
19 millions that have been produced by the parties and the third
20 parties in this case that remotely suggest that the defendants
21 in this matter have anywhere near the market share that you are
22 putting to this Court. Isn't that a fact?

23 **A.** I don't have the documents memorized. There's certainly
24 substantial testimony, presentations made by PFG and others to
25 the FTC that indicate they have a substantial market share.

1 Q. Can you cite the Court one document, as you sit here now,
2 produced by any party or third party in this action which shows
3 the parties have a market share in the range that you're showing
4 in your table 1, sir?

5 A. Again, I don't remember each document and what it says.
6 I certainly know there are documents that indicate they have a
7 large share of broadline sales and substantial customer
8 testimony to that effect.

9 MR. SIMMONS: I have nothing further, Your Honor.

10 THE COURT: All right. Thank you.

11 Mr. Mohr, do you have any redirect?

12 MR. MOHR: No redirect, Your Honor.

13 THE COURT: Okay. Mr. Weissman, any further evidence in
14 your rebuttal case?

15 MR. WEISSMAN: No. I was going to inform the Court we are
16 at the end of our rebuttal case.

17 THE COURT: All right. Hang on a second. Dr. Israel,
18 thank you very much. You're free to go.

19 THE WITNESS: Thank you.

20 THE COURT: Okay. So no further evidence in your rebuttal
21 case?

22 MR. WEISSMAN: Subject to the exhibits.

23 THE COURT: Yes, understood. All right. Well, good. So
24 we've come to the conclusion of the live evidence portion of our
25 case. And let's talk about housekeeping and if there are any

1 outstanding evidentiary issues, documents and the like, disputes
2 that we can talk about now.

3 MR. WEISSMAN: Yeah. We -- to my knowledge, there are two
4 categories, and we're talking about three or four documents
5 total, for which the defense has objected to our exhibits: One
6 is -- one category's investigational hearings taken under oath by
7 the FTC during the investigation; and the second category is
8 something that was raised with our first witness, Ms. Szrom, the
9 declaration of Ms. Szrom.

10 THE COURT: Is it just hers or are there others in the
11 same category?

12 MR. WEISSMAN: No, just hers. And there's a supplemental
13 or an errata that just corrects some numbers, which I consider
14 that part of the same package.

15 THE COURT: All right. Well, let me address that one
16 first, because I actually thought about -- I will admit the Szrom
17 declaration. She was extensively cross-examined about the basis
18 of her information, or the basis of her knowledge for the
19 declaration, and I'll give it the weight that it deserves in lieu
20 of the cross-examination. Okay?

21 MR. SIMMONS: Understood.

22 MR. WEISSMAN: Okay. That's one category. The second
23 category are the sworn deposition type proceedings,
24 investigational hearings, and I'll give you the two exhibit
25 numbers: It's PX 513 and PX 514. And, obviously, associated

1 with those are designations that we've proffered to the Court.
2 And it's my understanding that the defense has objected to them,
3 and do you want them to state their objection, the basis for the
4 objection?

5 THE COURT: Well, let me and the following: Are they the
6 only investigational transcripts that you're seeking be admitted
7 into evidence?

8 MR. WEISSMAN: Yes.

9 THE COURT: Okay. So this is really the universe.

10 MR. SIMMONS: That's actually not correct, that we're not
11 objecting to it. There are a whole bunch of party
12 investigational hearings.

13 MR. HASSI: These are third party.

14 MR. SIMMONS: These are third party, which are different.

15 THE COURT: I see.

16 MR. SIMMONS: We understand the party statement under oath
17 can be used for any purpose.

18 THE COURT: Right.

19 MR. SIMMONS: The two -- the two third party ones.

20 THE COURT: I see. These are third-party investigational
21 depositions.

22 MR. SIMMONS: Yes, Your Honor. And our objection is
23 simply this: They're not taken pursuant to the federal rules,
24 the defendants were not permitted to be present when those were
25 taken, there were extensive depositions taken in this case,

1 including Mr. Grubenhoff, who's one of the two people of whom an
2 investigational hearing was taken. They took his deposition.
3 And we've got -- more depositions were taken in this case, I
4 think, than in any other FTC proceeding, merger proceeding
5 heretofore. We think the record should rest on those and not on
6 these investigational hearings which are out-of-court statements,
7 in particular the ones where there was an opportunity to depose
8 or a deposition, in fact, was taken. We think that should be the
9 record.

10 THE COURT: Well, I take it you had an opportunity to
11 depose those folks in the course of discovery here?

12 MR. HASSI: We did, Your Honor and we cross-examined
13 Mr. Grubenhoff at his deposition.

14 THE COURT: Okay.

15 MR. HASSI: We chose not to -- I'm trying to remember the
16 other -- Forum is the company, Benes [phonetic], I think was the
17 name, chose not to take that deposition, just as we chose with
18 respect to the declarations. We didn't have the opportunity,
19 given the discovery period here, to challenge all of those
20 declarations. Your Honor may recall we asked that those be
21 limited at the beginning of this case. There was a limited
22 period for discovery. We had to pick and choose our battles. We
23 chose people that were on their witness list and deposed those
24 folks.

25 THE COURT: Okay. I'm going to let them. The defendants

1 had an opportunity to depose these particular -- declarants is
2 not the right word -- witnesses, and in one case it sounds like
3 you, in fact, did have the opportunity and did, in fact, depose
4 the witness. It may not have happened with respect to the other
5 witness, but recognizing that the party may not have had the
6 opportunity to cross-examine at the investigational stage, I will
7 give those statements the weight that they deserve, in light of
8 the fact that there was no opportunity to cross-examine at the
9 investigative deposition. Okay?

10 MR. HASSI: Thank you, Your Honor.

11 THE COURT: All right. Any other evidentiary issues?

12 MR. WEISSMAN: I don't think that there's anything that's
13 ripe for today.

14 THE COURT: Okay.

15 MR. WEISSMAN: As you recall from yesterday, we're going
16 to meet and confer and submit something on Friday, and we may
17 need a conference or a call if there are any outstanding issues.

18 THE COURT: Okay. Well, you know where to find me. Okay.
19 Let's talk, then, about the findings of fact conclusions of law
20 which we discussed yesterday. I asked both of you to consult
21 with your teams and give us -- give me a sense of how many pages
22 we're talking about, and -- my -- I'm stealing myself, so why
23 don't you start, Mr. Parker.

24 MR. PARKER: Your Honor, we had a meeting last night and
25 discussed this, and tell us if we're going in the wrong direction

1 here, but we have a document that probably should be read more
2 like an encyclopedia than a novel; in other words, we have --
3 it's going to be about 300 pages -- easy -- but it's going to be
4 broken down, so if you want all the -- all of the evidence on the
5 market or all the evidence on PFG, you would be able to read it.
6 Now, if that's not useful to Your Honor, just -- we'll go in a
7 different -- but that's what we have.

8 I was also going to make one other suggestion. Steve and
9 I -- Mr. Weissman and I had a discussion. We have the hearing
10 set on the 28th. I think that his book is going to be as big as
11 mine. Now, all you have to do is read mine, Your Honor, but if
12 you want to go --

13 THE COURT: I suspect neither of these will make the *New*
14 *York Times* best seller list.

15 (Laughter.)

16 MR. PARKER: All you need to do is read mine. No,
17 seriously, but getting back to the point, Your Honor.

18 Steve and I, we are both available the following Monday
19 and Tuesday all day. I have my daughter's graduation on
20 Wednesday the 3rd, but other than that, we would be available if
21 Your Honor would need more time in view of the fact that -- of
22 the size of the papers that you're getting.

23 THE COURT: Well, I'll tell you my concerns are twofold.
24 One, I recognize -- the volume is an issue, but more importantly,
25 frankly, is I want to make sure both sides have an equal

1 opportunity to submit. I don't want one side thinking it's got
2 to be 150 pages side and the other side submitting 300.

3 So let me just ask you Mr. Weissman: Where are you in
4 terms of your ballpark page count?

5 MR. WEISSMAN: I think we're at 300 pages as well.

6 THE COURT: All right. Well, let's just do this. We'll
7 limit it to 300 pages. Ms. Itoh and I will get to through that
8 before the oral arguments. Frankly, I want to keep the oral
9 argument date where it is. We'll work to get through it because,
10 frankly, I think it's -- given the timing of when this decision
11 needs to be made, I want to have the oral argument sooner rather
12 than later, and I don't want to push you off any more than we
13 already have.

14 So I think we have the -- Ms. White, what did we set the
15 28th at?

16 THE COURTROOM CLERK: At 1:30, Your Honor.

17 THE COURT: At 1:30. Let's keep that. I think that's
18 probably going to be enough time to do this.

19 And in terms of format, I think you-all ought to expect
20 that I will have a lot of questions, but to the extent that you
21 want to have something prepared that looks like a closing, fill
22 free to do that, but you can expect that whatever you prepare
23 will have frequent interruptions. Obviously there's a lot of
24 material to digest, and I'll have a lot of questions to ask of
25 both sides.

1 I think the only outstanding issue was with respect to the
2 motions that the third parties have filed, and I asked you-all to
3 think overnight about whether you wish to have a date by which to
4 respond with objections to any confidentiality designations by
5 third parties. I know you have enough work to do as it is, but
6 is that a date that either side wishes to have set in order to
7 file objections?

8 MR. WEISSMAN: We're okay with -- we're not going to have
9 objections to the confidentiality.

10 THE COURT: Okay.

11 MR. PARKER: Same. I don't believe all this is
12 confidential, under the federal rules, but I think it worked. We
13 got it done during the hearing, and we don't intend to file any
14 further papers.

15 THE COURT: Okay. Well, we need to obviously deal with
16 this mechanically, because wherever it is that the third parties
17 have identified, we need to make sure is kept out of the public
18 record if I ultimately conclude that it is, in fact,
19 confidential. So that may take some effort, and I may call upon
20 you-all to help me with that.

21 Going back to the proposed findings, I would like those
22 hyperlinked. Again, if you can get that to me as close in time
23 to when the document is due, all I really care about is the hard
24 copy. I assume we'll need to file a version under seal to start,
25 but I'd like to have a redacted version filed on the public

1 record soon thereafter.

2 What do you think is a reasonable amount of time after
3 you-all file that document in order to file a redacted version?
4 Is that two days, I see? Are you holding your fingers up? Okay.

5 MR. WEISSMAN: How about seven days.

6 THE COURT: Let me just look at the calendar. I'd like to
7 have it put on the public record before we have the oral
8 argument.

9 MR. WEISSMAN: So they're due on the 20th, and the oral
10 arguments on the 28th.

11 THE COURT: How about -- can you do the 26th,
12 Mr. Weissman?

13 MR. WEISSMAN: Is that Memorial Day?

14 THE WITNESS: That's the Tuesday after Memorial Day.

15 MR. WEISSMAN: We can do that.

16 THE COURT: Okay. All right. So let's have the redacted
17 versions filed by the 26th so that they're all on the public
18 record for -- and if you can get them filed by 1:30 just so
19 they're on the public record for 48 hours before the oral
20 argument, I think that's enough time. All right.

21 Do we have anything else that we need to raise?

22 MR. HASSI: Your Honor, I just have one question on
23 clarification. You asked at the outset of the hearing for a form
24 of a witness summary.

25 THE COURT: Yes.

1 MR. HASSI: And what we propose to do -- and I just wanted
2 to make sure that we were meeting with what Your Honor's looking
3 for -- is to take the witnesses and give you, essentially, a
4 document that will have hyperlinks to it to have -- for each
5 witness, if there's a declaration, a hyperlink to the
6 declaration, if there's a counterdeclaration, same, deposition,
7 et cetera. We're not summarizing the witnesses' testimony so
8 much as just giving you access in one place to correspond with
9 the DA, we'll have a declaration for errata for trial.

10 THE COURT: Correct, correct. Basically I'm asking you to
11 help me with --

12 MR. HASSI: Organize.

13 THE COURT: Organize, yes.

14 MR. HASSI: So we're happy to do that.

15 THE COURT: Yes. Yeah, I'm not asking for summaries of
16 testimony or declarations.

17 And you did, just to reiterate, close of business on
18 Friday for your final exhibit list. I think we set that deadline
19 yesterday.

20 MR. WEISSMAN: We did. And those will have asterisks next
21 to them.

22 THE COURT: Yes. As I requested earlier, please, just
23 place them. I'm not putting a number -- a number limit, but
24 please identify with asterisks any key exhibits, sort of like the
25 numbers that are here, but perhaps not all of them have been.

1 MR. HASSI: Your Honor, one other question on the witness
2 summary. Is that something that we need to file or can we just
3 provide you with a copy?

4 THE COURT: You can just provide that directly to
5 chambers. And if you can do that -- can you do that also by the
6 26th?

7 MR. HASSI: I think we can do it by Friday.

8 THE COURT: Okay.

9 MS. ROBSON: Yes.

10 THE COURT: All right.

11 MS. ROBSON: We can do that.

12 THE COURT: All right. You can do that by Friday, all
13 right. Mr. Weissman, is that something you-all --

14 MR. WEISSMAN: I think -- and I just wanted to -- I
15 thought we were working on them jointly; is that right,
16 submitting something jointly with you?

17 MS. ROBSON: Well, what we've done is we put together a
18 witness sheet for you, and so the FTC doesn't have to do the same
19 work, it was provided to them, and if they have something that
20 needs to be supplemented, they'll provide it.

21 MR. WEISSMAN: Yeah.

22 THE COURT: All right. Well, why don't we just -- I'll
23 give you a little extra time on that. That's fine. Let's see if
24 you can -- if you could get that to me by next Wednesday, by the
25 20th, that would be great.

1 All right. Any other outstanding issues? All right.
2 Good. Look, let me just say that I think both sides have done a
3 terrific job. I'm grateful for the organization and the
4 professionalism that both sides have displayed throughout. I
5 think everybody was efficient with their presentation of
6 evidence. We got a lot done in a very concentrated period of
7 time, so you're allowed to at least take the afternoon off.

8 MR. WEISSMAN: Thank you, Your Honor, for the attention
9 you've paid.

10 THE COURT: You're welcome.

11 MR. PARKER: Thank you, Your Honor.

12 THE COURT: All right. We'll see you on the 28th.

13 Thanks, everybody.

14 (Proceedings adjourned at 12:51 p.m.)

15

16 C E R T I F I C A T E

17

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

21

22 /s/ Scott L. Wallace

23 5/14/15

24

25 -----
26 Scott L. Wallace, RDR, CRR
27 Official Court Reporter

Date

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I N D E XEXAMINATIONSPage

DIRECT EXAMINATION OF RAJIV GOKHALE BY MS. CERILLI	2252
CROSS-EXAMINATION OF RAJIV GOKHALE BY MS. ROBSON:	2287
DIRECT EXAMINATION OF MARK ISRAEL BY MR. MOHR:	2332
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