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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, ET AL.,

Plaintiffs,

vs.

SYSCO CORPORATION, ET AL.

Defendants.

CA No. 15-256
Washington, DC
May 28, 2015
1:30 P.M.

DAY 9 CLOSING ARGUMENTS
TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action 15-256, Federal Trade Commission, et al., versus Sysco Corporation, et al.

For the plaintiffs, Stephen Weissman, Alexis Gilman, Mark Seidman, Melissa Davenport, Steve Mohr, and Krisha Cerilli.

For the defense, Richard Parker, Ian Simmons, Edward Hassi, Joseph Tringali, Peter Herrick, and Haidee Schwartz.

THE COURT: All right, everybody, good afternoon, and welcome back. Mr. Parker, your observation at the start of this is even more apt today about this being Washington.

All right. We're here on the -- for the oral arguments on the FTC and the plaintiffs' motion for preliminary injunction. Earlier this week the parties and the Court had a telephone conversation just to discuss the structure of this, of today's hearing.

We are going to go until about 5:00 o'clock. Total argument time will be three hours, an hour and a half for each side. Each side will have five minutes of openings during which I promise counsel I will not interrupt you during those five minutes. I can't say that for the rest of the time. We'll then spend 35 minutes on market definition, 30 minutes on anti-competitive effects, and then the final 20 minutes

1 we'll discuss sort of the pro-competitor effects arguments,
2 including the proposed divestiture.

3 So with that, Mr. Weissman, would you like to
4 proceed?

5 Oh, and one other thing, Counsel. I've asked
6 Ms. White to just -- we'll do our best to keep track of time.
7 We're obviously not an appellate court so we don't have lights
8 that will go off, but I'll both ask both sides to keep track
9 of time, but I've also asked Ms. White to just give you a
10 five-minute warning when you're -- when your time is up.

11 And obviously, Mr. Weissman, if you want to reserve
12 any time for rebuttal, please let us know.

13 MR. WEISSMAN: Okay. Thank you. Good afternoon,
14 Your Honor. May it please the Court.

15 The Court obviously has a massive record before it.
16 The FTC and the States respectfully submit that when that
17 record is viewed through the lens of Section 13(b) of the FTC
18 Act and the relevant case law, that there are very, very
19 strong reasons for a preliminary injunction in this case.

20 Just starting with basics about 13(b) of the FTC
21 Act. There's been a lot of discussion and focus at the
22 evidentiary hearing on the likelihood of success prong, but
23 Section 13(b), as the Court knows, has two prongs. And both
24 prongs need to be factored into the determination about
25 whether to issue a preliminary injunction in this case.

1 Application of the public interest standard
2 involves evaluation of the equities and likelihood of success
3 on the merits. And these factors are balanced under a sliding
4 scale, meaning that the strength of showing on one of the
5 prongs affects the strength of showing are needed on the other
6 prong. In this case plaintiffs had made a strong case on both
7 prongs of the public interest test.

8 Let me first deal with the equities prong. There's
9 been not so much discussion, including during the evidentiary
10 hearing, about that prong, but that prong, as the law states,
11 is very important. The courts have repeatedly recognized the
12 two most important public equities are the strong public
13 interest and enforcement of the antitrust laws and the equally
14 strong interest ensuring that effective relief is available to
15 the commission if, after the merits hearing, there is a
16 successful showing by the FTC.

17 In this case, that scrambling of the eggs problem
18 would be particularly acute because here, as Your Honor knows,
19 we have two concurrent transactions that would be taking
20 place. One would be Sysco's acquisition of US Foods, and then
21 concurrently what the parties are proposing to do in the
22 absence of an injunction is to immediately divest 11
23 distribution centers and related assets, including employees,
24 to PFG.

25 So here the Commission would need to basically

1 unscramble two eggs, and that, I think further militates a
2 showing for the FTC on the strength of the equities in this
3 case.

4 Now, defendants have made much on the equities
5 prong of their claim that if an injunction issues the
6 transaction will be terminated. But the courts have
7 consistently held, including in *Heinz*, including in *Whole*
8 *Foods*, Court of Appeals, that that is really a private equity.
9 And as we know from the law, private equities are subordinate
10 to public equities under the public interest test.

11 The plaintiffs also have a very strong showing on
12 the likelihood of success prong, and the evidence, we believe,
13 and we respectfully submit show that throughout the hearing as
14 well as throughout the submissions that were made after the
15 trial.

16 To summarize our case in a nutshell, this merger
17 between Sysco and US Foods would combine by far the two
18 largest broadliners in the United States leading to extremely
19 high market shares and concentration levels in both a national
20 broadline market and multiple local markets as well. On every
21 conceivable competitive metric Sysco would be many times the
22 size of the next largest broadliner, even accounting for the
23 divestiture to PFG.

24 Equally, if not more important, is the fact that
25 the merger would eliminate an intense rivalry between closest

1 competitors that has yielded substantial benefits, tangible
2 benefits for customers across the broadline spectrum.

3 Now, these tangible benefits, they don't just
4 manifest themselves in price decreases, there are a myriad of
5 ways that the benefits of this competition between these two
6 companies manifest themselves. It could be a signing bonus.
7 There were a lot of testimony about signing bonuses. It could
8 be relaxing of a fuel surcharge or waiving a fuel surcharge,
9 it could be lowering minimums for order drops.

10 It could be better service, it could be more
11 product offerings, it could be better incentives. So there
12 are a myriad of ways in which the two companies here that are
13 attempting to merge have competed with each other and that has
14 yielded benefits to consumers, and those benefits would be
15 lost in this transaction.

16 Now, defendants have failed to demonstrate that
17 expansion by regional competitors, including PFG, or entry by
18 new competitors would prevent or counteract the likely
19 competitive effects of this transaction. And the efficiencies
20 defense has never justified an otherwise anti-competitive
21 acquisition, and it shouldn't do so here.

22 So before I turn it over to Mr. Parker, let me just
23 put this slide up. And Mr. Parker told me this is not
24 confidential. You're going to hear a lot about the evidence,
25 you've heard a lot about the evidence already. And this

1 slide, which is a Sysco slide about research it did to analyze
2 who its primary competitors were, a cross segment, really
3 captures a lot of what the evidence shows.

4 If you look across segments here, and as the title
5 of this slide clearly shows, Sysco and US Foods are
6 consistently cited as the most common primary distributor
7 across segments. And that is particularly so if you look at
8 the middle rows in healthcare and travel and leisure, which is
9 really hospitality, and that has been among the focal points
10 of our case and that will be something that we talk a little
11 bit more in the rest of the closing argument.

12 Thank you, Your Honor.

13 THE COURT: Thank you, Mr. Weissman.

14 Mr. Parker.

15 MR. PARKER: Yes, sir. Good afternoon, Your Honor.

16 THE COURT: Good afternoon, Mr. Parker.

17 MR. PARKER: The evidence in this case reveals a
18 market, reveals a food distribution market that is exactly the
19 way Mr. Tringali and I described it in our opening statements
20 three weeks ago, intensely competitive. Working, getting
21 \$250 billion worth of food in the right place at the right
22 time at a good price.

23 It is also relentlessly demanding, Your Honor.
24 Demanding on the firms in this industry to reduce prices.
25 The -- to reduce costs and to reduce prices.

1 Your Honor, the evidence in this case shows
2 declining margins, shows a competition has centered on
3 squeezing out costs. That marketplace imperative, Your Honor,
4 is what bred this merger, it's what causes this merger because
5 Sysco and US Foods are combining to achieve some \$600 million
6 a year in price -- in cost savings that were identified by a
7 team of company experts and outside experts from McKinsey.
8 That's what the documents indicate, and cases that have been
9 tried by many people in this room throughout this --
10 throughout this -- the courthouse have been turned on company
11 documents that say -- that predict all kind of
12 anti-competitive effects, and that's not what you have here.
13 That is not what you have.

14 You have documents talking about cost savings and
15 benefits from customers. You have Sysco documents talking
16 about achieving efficiencies. You are not going to find
17 documents talking about taking out Sysco in some kind of a
18 scheme or move to target our best customers for price
19 increases. And you're certainly not going to find documents
20 that suggest that this entity is going to have 75 percent of
21 anything, let lone a mythical market for sale of broadline
22 services to national customers. This is a merger that is
23 pro-competitive in its intent, and we intend to execute on
24 that.

25 Now, you don't have -- the second point I want to

1 make here, you don't have to take our word for it, you don't
2 have to trust our good intentions. Because there is a market
3 out there, there is a functioning market that rewards
4 pro-competitive activity, that rewards cost decreases and
5 severely punishes anti-competitive activity.

6 Let's put up my favorite slides. I have many
7 favorite slides, Your Honor, but this is one of them. We'll
8 talk about catfish later, sir, but right now this is the one.

9 This is the way we look at the industry, the way
10 customers look at the industry, the way competitors alike, and
11 what you see here, Your Honor, is Sysco and US Foods being
12 big -- yeah, we're big -- but we're not the only game in town.
13 Competition in this industry is not driven by just Sysco
14 versus US Foods. You will also note that if we have -- if
15 this combination occurs, we're going to have a 24, 25 percent
16 market share, and that has never been an antitrust problem in
17 any case I'm ever aware of.

18 Now, let's look at this from a customer point of
19 view. This is a case about food. What this is from a
20 customer point of view is a menu, it's a menu of choices.
21 This is a continuum of diverse companies with diverse business
22 models who are providing these services and customers today,
23 today, right now, at a time when this market is really -- the
24 people at this table and this table both agree this is a
25 competitive market, and customers are all over the place

1 making choices, to diversify their option, to exercise their
2 options to use different kinds of suppliers. They're doing it
3 and they're doing it today. And the record is replete with
4 that.

5 Now, Your Honor, this exercise is to predict the
6 future. That's, Your Honor, in deciding this case, that's
7 your job. To make inferences from current reality to what
8 it's likely to be when this merger closed. And what is the
9 inference that can be made when customers are exercising
10 options now at current prices. The answer is, if somebody had
11 the temerity to propose a price increase to eliminate a fuel
12 surcharge and do some of the other evil things that Steve just
13 mentioned, they'll exercise their options earlier, more often,
14 and with greater intensity. This is a merger intended to be
15 pro-competitive and a marketplace to make sure that it is.

16 Thank you.

17 THE COURT: All right, thank you, Mr. Parker.

18 All right, Mr. Weissman, I'll hear from you on the
19 relevant market.

20 MR. WEISSMAN: Thank you, Your Honor.

21 The standards for market definition in this circuit
22 are well settled. We start with *Brown Shoe* and the reasonable
23 interchangeability test. And in evaluating what constitutes
24 reasonable interchangeability and in defining a market, we're
25 guided principally by two evidentiary sources according to

1 cases in this circuit.

2 The first one are the *Brown Shoe* factors, the *Brown*
3 *Shoe* indicia that the courts have consistently relied upon in
4 defining markets in cases like this.

5 The second is the hypothetical monopolist test
6 embodied in the DOJ and FTC horizontal merger guidelines which
7 the courts, including *H&R Block*, Judge Howell recently
8 endorsed. And both evidentiary sources point in the same
9 direction in this case.

10 We also have the benefit of very instructive
11 precedent from courts, include in this circuit, analogous
12 cases. But we start with the Supreme Court case, and these
13 cases have been cited by the D.C. Circuit in merger cases.
14 And we're talking about Philadelphia National Bank, we're
15 talking about Philipsburg Bank, we're talking about
16 Connecticut National Bank. And in all of those cases the
17 court there refused to slice the market by individual services
18 and recognized cluster markets consisting in those cases of
19 commercial banking services.

20 Importantly, and Connecticut National Bank being
21 the most recent one --

22 THE COURT: Let me ask a question.

23 MR. WEISSMAN: Sure.

24 THE COURT: Mr. Parker just said moments ago that
25 you're not going to find in this evidentiary record any

1 evidence that looks at the broadline market just as a
2 broadline market and then allocates market shares among the
3 broadliners. Is he right about that?

4 MR. WEISSMAN: No, he is not.

5 THE COURT: I'm not talking about Dr. Israel's
6 analysis.

7 MR. WEISSMAN: No.

8 THE COURT: Any independent third party that's
9 looked at the market and said this is the broadline market and
10 this is the shares that each of these companies in the
11 broad -- that particular broadliners have.

12 MR. WEISSMAN: I don't know about independent third
13 party. I can tell you that the parties in their own
14 documents, for example, show -- both show really high market
15 shares, for example, in healthcare. Forty percent,
16 50 percent, we're talking about 90 percent.

17 THE COURT: What about the market in its entirety?
18 In other words, there is -- I think I've seen the number
19 \$120 billion for the broadline market, among all broadliners.
20 Is there a study that's not sponsored by the FTC for purposes
21 of litigation that I can look to that says US Foods has
22 X-percent of the broadline market, Sysco has Y-percent of the
23 broadline market, and everybody else has the difference?

24 MR. WEISSMAN: I believe the Technomic study that's
25 been cited breaks down broadliners. I think it looked at the

1 top broadliners and then gives the rest.

2 THE COURT: Okay.

3 MR. WEISSMAN: And within that, they certainly
4 recognize that broadliners compete with one another. But in
5 terms of what --

6 THE COURT: And what's the percentage? We've
7 talked about national versus local, let's leave that to the
8 side for a moment. What is, based on the Technomic study, the
9 combined market share in the broadline category of these two
10 companies?

11 MR. WEISSMAN: I don't know.

12 THE COURT: You can ask somebody to get it and give
13 me an answer later.

14 MR. WEISSMAN: Yes. Can we try to track that down?
15 Yeah.

16 THE COURT: Okay.

17 MR. WEISSMAN: And we have the benefit not only of
18 the Supreme Court cases, but we also have two more recent
19 cases that talk about the form of distribution being a
20 separate market here. After applying the *Brown Shoe* test and
21 the SSNIP test, and those cases as I listed here are *Staples*,
22 *FTC v. Staples*, and *Cardinal Health*, and then more recently
23 the Court of Appeals in *Whole Foods* talked about the
24 segmenting or the possibility of defining market separately
25 for premium, natural and organic grocery stores separate from

1 grocery supermarkets.

2 And so in *Staples*, those cases are very, very
3 analogous to the type of case we have here. In this case
4 we're a talking about broadline distribution to a number of
5 customers. In *Staples* it was talking about sale of office
6 supplies through the Office Super Store channel. And the
7 court there recognized and noted and emphasized that what made
8 Office Super Stores unique, and their own market in that case
9 was the unique combination of size, selection, depth and
10 breadth of inventory which distinguishes them from other
11 retailers. We have exactly that here.

12 Then we look at *Cardinal Health*. That was decided
13 a year later.

14 THE COURT: What do we do about the -- there's
15 plenty of evidence both at the national and the local level
16 that buyers of foodservices, with some exceptions, use a mix
17 of distribution chains. In some cases they rely on specialty.
18 In some of the very large, even the large GPOs permit up to
19 20 percent, for example, for specialty and other purchases.
20 Isn't that -- and they've made the argument you don't have to
21 have entire substitutability. Dr. Bresnahan said you don't
22 have to have complete substitutability, all you need to have
23 is essentially a credible threat from other modes in order to
24 constrain price. Why is that wrong?

25 MR. WEISSMAN: Well, first of all, the facts show

1 is they're not -- not different than what was the case in drug
2 wholesalers. You had buyers there that were also buying from
3 alternative channels. And the real question there is whether
4 a hypothetical monopolist of broadline services could
5 profitably implement a price increase, and that's what
6 Dr. Israel did in this case. And what he showed after
7 performing an aggregate diversion analysis was that, sure,
8 there might be some diversion to specialty, there might be
9 some diversion to systems, particularly for national
10 customers. But the vast amount of diversion would be to other
11 broadliners in this case, and he applied the Katz Shapiro test
12 that's been widely recognized and applied by --

13 THE COURT: So let's talk about it because that has
14 been a subject of a great deal of contention, Dr. Israel's
15 aggregate diversion analysis. Because that's his SSNIP test
16 for purposes of broadline and everything else.

17 There was a fundamental disagreement about two
18 things. One: Did he apply the right margin? And, two: Did
19 he apply the correct Katz Shapiro formula?

20 Two questions. A: Do I have to resolve that?
21 Well, I guess maybe the first question is: Was Dr. Israel
22 right? And why is he right? And, two: Is that something I
23 have to resolve to rule in your favor?

24 MR. WEISSMAN: He was right. And you don't need to
25 resolve it in any event because the *Brown Shoe* factors

1 conclusively show broadline --

2 THE COURT: So you're telling me that the case law
3 would support, if I were to conclude that Dr. Israel is not
4 credible, I'm not saying I'm concluding that, but I say:
5 Look, I can't rely on his expert analysis for a whole host of
6 reasons. Your position is still that the *Brown Shoe* factors
7 would permit me -- in fact, you would say compel me to
8 conclude the broadline is the relevant product market here.

9 MR. WEISSMAN: I think they would permit you, and I
10 think under the facts of this case and how strong the showing
11 we've made under the *Brown Shoe* factors, I would respectfully
12 submit that it compels the conclusion that broadline is a
13 market here.

14 But I think, and I think the evidence showed
15 Dr. Israel got it right. And I think as he testified that
16 even if he used the wrong margin, he's still right. The only
17 way he got it wrong is if he used the wrong margin and if he
18 used the wrong test. And in this case he used the right
19 margin, the gross profit margin, which again, *H&R Block* makes
20 it clear you look at the gross profit margin. He explained
21 why he used the gross profit margin in this case, because it's
22 what the parties used, it's what they go to investors with,
23 it's how they report, it's how they determine when to change
24 pricing and so forth.

25 And he also testified he used the right Katz

1 Shapiro model. He used -- he used the same -- this is --
2 we're talking about customers here that are -- I'm sorry,
3 suppliers here that are largely a homogeneous group of
4 broadliners. There may be some differentiation because Sysco
5 and US Foods are large and differentiated from others, but as
6 a total matter he's used the right formula and he used the
7 right margins, so I think he got it right.

8 THE COURT: So that gives us the diversion
9 threshold. I'm calling it the diversion threshold.

10 MR. WEISSMAN: Yes.

11 THE COURT: But then you still have to compare that
12 against how many consumers were to actually switch, and you
13 got to make that analysis. And the defendants have said:
14 Look, his analysis is inherently incredible because the data
15 he's relied upon is incredible. One, the RFP bidding data,
16 RFP and the bidding data that's been pulled together, the
17 parties repeatedly have said from the beginning to the FTC,
18 this is not credible data, we have put this together at your
19 request. How can I as a court rely on data that the parties
20 themselves don't rely upon on a day-to-day basis ordinarily to
21 determine where they are competitively and have told the
22 Government you can't rely on this.

23 MR. WEISSMAN: That was for the national customers.

24 THE COURT: That's for the national, and I'll get
25 to the local folks in a --

1 MR. WEISSMAN: Okay. Let me deal with the national
2 customers. He did rely on the RFP bidding for his diversion
3 analysis, and what his testimony revealed, notwithstanding the
4 characterizations, is that when we talk about RFPs we're
5 talking about a real robust analysis that he did. He didn't
6 just rely on the spreadsheets that they pointed out they tried
7 to disclaim when they submitted them. He looked at documents.
8 He looked at declarations. He looked at deposition testimony.
9 It was not just taking at face value the spreadsheets. He
10 probed and probed and probed. It took a long time to do his
11 analysis. So his analysis of the, quote/unquote, RFP database
12 was quite credible, quite credible, and that shows that --

13 THE COURT: It's only as credible -- look, I don't
14 fault him for the amount of work that he's done. Nobody's up
15 here to say that Dr. Israel didn't spend hours and hours and
16 months and months putting this database together, but if the
17 data itself is not complete, if the data itself, you know,
18 they've said, look, our salespeople, this is the Linc
19 database, particularly, even with the RFPs, we had to go back
20 and construct this information.

21 Now, I understand he did additional legwork on the
22 bidding opportunities, but on the RFPs, they don't have a
23 readymade reliable set of information to just hand over and
24 say you can rely on this to determine who the other
25 competitors were for a particular RFP.

1 MR. WEISSMAN: It's the best available information,
2 and it's pretty good. It's very consistent with all the other
3 evidence in this case. It's consistent with the documents,
4 it's consistent with all the documents we showed you who was
5 head to head in lowering prices against one other. It's
6 consistent with the customer testimony. We had five or six
7 customer witnesses come in here, even the witness they
8 proffered used Sysco and US Foods in over 40 different states
9 and over 65 percent of their volume.

10 So when you talk about whether the RFP, is it
11 anomalous, does it look like there's something wrong here?
12 No, it's completely consistent with all the other evidence
13 that was presented to this Court about who the top two players
14 were. And the chart I showed you, I think, bears out even
15 more. They are the top -- there's no doubt these are the top
16 two choices for a whole slew of customers, and the RFP data
17 confirms that.

18 Now, is the RFP data fully complete and accurate?
19 You're never going to get a full database that is, it's as
20 good as you're going to get, and it's pretty darn good.

21 THE COURT: Okay. What about the Linc database? I
22 mean, he says that the aggregate diversion number is
23 98 percent.

24 MR. WEISSMAN: Right.

25 THE COURT: That is not consistent with what we've

1 heard. We have heard repeatedly from customers, your own
2 declarants, that some portion, certainly more than
3 two percent, are purchased from other channels. So if I can't
4 rely on that number or that number doesn't match up with the
5 rest of the evidence, how can I rely on the Linc database to
6 begin with?

7 MR. WEISSMAN: Well, the Linc database when we talk
8 about the SSNIP test, we talk about price base substitution.
9 Certainly there are people who use specialty. There are
10 people who use systems. And they use them, as Your Honor
11 said, to a limited extent, 20 percent or so. But the question
12 is, under the SSNIP test, is that price base substitution?
13 And what the Linc database, as well as the request for
14 incentive database of Sysco shows is that when they are
15 actually pricing their product they are pricing their product
16 against other broadline distributors.

17 THE COURT: But the Linc database doesn't tell us
18 why a particular customer left. In other words, it could just
19 be because I didn't like my salesperson. I mean, you're
20 reading far too much into the Linc database to say that those
21 switches or those identified changes in broadline suppliers is
22 because of price. We don't know that, the Linc database
23 doesn't tell us that.

24 MR. WEISSMAN: But what -- let me -- the Linc
25 database, by the way, is reliable. And there's actually been

1 a lawsuit where they've gone and alleged in a lawsuit, I've
2 shown you the screen here, this is about a year ago, filed a
3 lawsuit against a competing broadliner that had hired someone,
4 and here's what they allege, very different from what they've
5 claimed in this case about the Linc database.

6 They say it's a critical tool, a critical
7 information needed by US Foods to service customers. Without
8 this information US Foods cannot service its customers
9 properly. So that, I think ought to believe or it does believe
10 the claim here that there's some inherent reliability --
11 inherent unreliability to the Linc database.

12 The other thing about the Linc database is, is that
13 there's evidence in the record, PX 3256, that shows that it is
14 price-based, the substitution. TM's, territory managers,
15 territory managers with five or more opportunities entered
16 into Linc are performing better than the group with less than
17 five opportunities by 70 basis points on batting average and
18 99 basis point on lines dropped. It has a -- the same
19 document talks about a quantitative impact. Ability to go
20 compete with your competitors on price.

21 So it is -- it is reliable. And again, we're
22 talking about 98 percent. Even assuming, even if you discount
23 some of that, discount some of that, that's -- maybe
24 20 percent wasn't price-based substitution. You're still
25 talking about in excess of 70 percent. And as Dr. Israel

1 testified, the critical loss that you needed was 40 percent.
2 So it clears it by a wide margin even if you discount for some
3 unreliability because it may not be price-based.

4 THE COURT: Let me move you, if I can, in your
5 remaining time to the national market, and then I want to talk
6 about the local geographic market.

7 MR. WEISSMAN: Okay.

8 THE COURT: I asked you in opening whether national
9 customers are a product submarket. You then write in your
10 proposed conclusions of law, which is paragraph 44, quote:
11 Whether one views the issue through the lens of product market
12 or geographic market, the sale of broadline distribution
13 services to national customers is a distinct market under both
14 *Brown Shoe* and the merger guidelines. So what is it? Is it
15 product market or is it a geographic market?

16 MR. WEISSMAN: We believe it's a product market,
17 but courts have looked at the issue and said it could be a
18 geographic market as well.

19 THE COURT: So explain to me how we get there. I
20 mean, I've looked at the merger guidelines, I've read a lot of
21 these cases, and the cases say you start with defining the
22 market. Merger guidelines, Section 4 say start with defining
23 the -- or has to do with defining the market. But in
24 Section 3, and this is what Dr. Israel did, he did this
25 step-by-step. They talk about specific customers. And

1 explain to me why we start first with the customers. And
2 what's the case law that supports the fact or your contention
3 that you can build a market around specific customers? That
4 seems to me to be backwards.

5 In other words, you identify the customer first,
6 then figure out whether a market works around the customer as
7 opposed to the other way around, which is figure out what the
8 market is first and then decide whether it impacts customers.

9 MR. WEISSMAN: And that's what he did and that's
10 what we did. He identified broadline distribution services as
11 the relevant market. And then what we did is we looked at,
12 consistent with the guidelines and the *Brown Shoe* factors,
13 whether there were particular customers that need to be
14 differentiated, so-to-speak, and so that you could look at
15 them and analyze them differently.

16 And under both *Brown Shoe* and Section 3 of the
17 guidelines, as Your Honor points out, you look at customers,
18 you see, is there -- are these customers subject to individual
19 negotiation? Here national customers certainly are. I think
20 that's undisputed in this case.

21 The second is, is there sufficient information that
22 the suppliers have about these customers? Those are the
23 factors.

24 Section 3 and Section 4.14 as well.

25 THE COURT: It seems to me this case lands me

1 squarely in the middle of a debate that happens in *Whole*
2 *Foods*; right? Judge Brown's talking about core customers.
3 Judge Kavanaugh, who dissents, talks about marginal customers
4 and that's what we need to look to and the impact of a price
5 increase. Judge Tatel doesn't take a position. What's Judge
6 Mehta supposed to do with those three different views on this?

7 MR. WEISSMAN: Yes.

8 THE COURT: And even the guidelines do talk about a
9 particular type of customer and price discrimination. I
10 understand that, but where is the law on this, Mr. Weissman,
11 and what am I supposed to -- what case am I supposed to look
12 to that allows me to look at a market based upon the impact on
13 a particular type of customer?

14 MR. WEISSMAN: There's a lot of case law, and we
15 cite those cases in our conclusions and I can find them.
16 Certainly you look at, in this case this is -- Judge Mehta
17 ought to decide that this is a market where you can segregate
18 customers because there's ability to price discriminate,
19 there's individual negotiations. In cases where you can't
20 segregate the customers, where there's the marginal customers,
21 it's where there's a post-it price, for example.

22 THE COURT: So is that the answer to their
23 response, which is, look, this is a heterogeneous market.
24 This is a market in which each customer has particular needs,
25 and they argue, look, you can't possibly have any identifying

1 characteristics come from such a heterogeneous market. Is the
2 answer that you can price discriminate nevertheless is because
3 of the individual negotiation?

4 MR. WEISSMAN: Absolutely. And more than that.
5 It's not just the individual negotiations, it's the long
6 history that both of these companies have had in dealing with
7 these customers. They've dealt with the healthcare GPOs, they
8 know what the needs are, they know where their locations are,
9 they know where their memberships are dispersed. They know
10 what their demand is, they know why, these customers in
11 particular, but other customers as well, as the testimony
12 shows, won't turn to specialty or cash-and-carry to constrain
13 a price increase. It's the individual negotiations, it's
14 being able to identify characteristics, for example,
15 geographic dispersion, knowing what they've done in the past
16 and their preferences. It's all those things together. It's
17 their preference for a bundle of products, large SKUs, varying
18 menus, all those types of things, this is not blind to the
19 suppliers in this case.

20 THE COURT: So that permits, in your view, price
21 discrimination. But Dr. Israel -- and I understand your
22 point, there's sort of two buckets of evidence, there's the
23 *Brown Shoe* factors and then there's the economic evidence --

24 But Dr. Israel, as far as I can tell on this
25 record, did not perform a SSNIP test on the national market.

1 In other words, he did not do a similar aggregate diversion
2 analysis in the way that he did between broadline and
3 everybody else for national and regionalization, because as I
4 see it, those are the only two options if you were to do a
5 SSNIP test. You'd take all of the broadliners that could
6 actually serve a geographically dispersed group of customers
7 and then figure out if you raise price on that group of
8 customers, whether they'd switch to some other mode of
9 distribution. Am I wrong that that's how a SSNIP test should
10 be performed for national customers?

11 MR. WEISSMAN: I think that the SSNIP test is not
12 readily suited to the analysis you're talking about. What
13 Dr. Israel did is he performed a SSNIP test, he performed the
14 SSNIP test for local customers, and then he did it for
15 national customers.

16 THE COURT: Right.

17 MR. WEISSMAN: He determined, based on that SSNIP
18 test, that there wouldn't be -- there'd be more -- a lot of
19 diversion to other broadliners. He, therefore, concluded that
20 broadline was a distinct market. And then in terms of
21 identifying national customers he looked at the guidelines.
22 He said, is there evidence here, economic and otherwise, that
23 shows me that these customers here are different. And he
24 looked at --

25 THE COURT: He didn't perform the same kind of test

1 with respect to national customers. In other words, the
2 defendants are saying he didn't perform a test, and I don't
3 see that he did either, you know, in the same way that he
4 looked at broadline versus other channels. And he did his
5 aggregate diversion analysis. He didn't do a similar
6 aggregate diversion analysis just for the national customers,
7 did he?

8 MR. WEISSMAN: He did. He did an aggregate
9 diversion. That's where he used the RFP data to conclude that
10 broadline is a distinct market. If you're talking about did
11 he do an aggregate diversion analysis to see whether a SSNIP
12 would lead national customers to all of a sudden become local
13 customers?

14 THE COURT: No, to become served by regionalized
15 broadliners.

16 MR. WEISSMAN: He included that in the market. He
17 included all the regional -- the folks who regionalized.
18 He -- that's why you don't have a hundred percent market
19 share. He included, and that's been sort of a misconception
20 of our case from the beginning. Maybe we haven't made this
21 clear enough. We have included in our national customer
22 broadline market those customers and those competitors that
23 are involved in regionalization. The fact of the matter is,
24 is that even those customers that regionalized, and we have a
25 chart on this that I'll show you, even those that regionalize

1 overwhelmingly use the defendants as their principal source.
2 This is Number 35. And I think this should be confidential,
3 if we can keep this off the main screen.

4 THE COURT: Sure.

5 MR. WEISSMAN: This is Slide 34 of our
6 presentation, and I should have handed you a copy. May I
7 approach?

8 THE COURT: Sure, of course. It's up on the
9 screen, Mr. Weissman, you can --

10 MR. WEISSMAN: So we have included the
11 regionalization. Dr. Israel included customers, national
12 customers who regionalize. And some of these -- these are the
13 largest customers by class because those are the ones we had
14 the best information for. And here, a lot of these customers
15 are customers the defendants have identified as those that
16 have regionalized. For example, MedAssets, but look at how
17 much they buy from Sysco and US Foods.

18 The same with HPSI, a witness in this case. You
19 saw the map. In 49 different states they're using Sysco. In
20 44 they're using US Foods. Navigator is another one they've
21 pointed to, then go to Foodservice Management Company. Sodexo
22 has been like the poster child of their regionalization case.
23 Here's what the facts show. Same with all the other customers
24 we're talking about here.

25 THE COURT: So why can't these customers defeat a

1 price increase from the hypothetical monopolist by
2 regionalizing? In other words, if this merger were to go
3 through and the merged company would raise price, why couldn't
4 they defeat that price increase by going to a regionalized
5 model?

6 MR. WEISSMAN: There are two different issues. One
7 is market definition and one is price increase. And any price
8 increase, it could be one percent, is anti-competitive once
9 you've got a relevant market.

10 If you're talking about can they move to
11 regionalization, but we're including that in the market right
12 now, and what I'm saying is that if that was a viable option
13 for them, you'd see them doing it a lot more than they are
14 today, and you wouldn't have all the testimony we talked about
15 the strong -- the strong revealed preference for using one of
16 these two at least to service their members across the nation.

17 So it's not as easy, and they'd have to add --
18 they'd have to add resources. It's not -- it would be costly.
19 You heard, for example, the gentleman from Culver's who
20 testified by video talking about it's just not efficient to
21 keep adding, that's a cost to me. So I'm going to incur the
22 cost if I do move to regionalization, that's going to be a
23 cost to me, even if ultimately I get the same price.

24 So the bottom line is you'd see it a lot more if
25 that was a true viable option, and we do include it in the

1 market here, and the revealed preferences manifest themselves
2 in the overwhelming market shares in this case.

3 THE COURT: Let me, in your remaining time, move
4 you to the local market definition, the geographic definition.
5 I don't know how much time you have left, but I don't want to
6 miss out on this.

7 Help me understand what Dr. Israel did in terms of
8 drawing his geographic markets. I understood what he did to
9 be the following. One, he identified -- he did a 75 percent
10 draw area around the distribution centers of both defendants.

11 MR. WEISSMAN: Correct.

12 THE COURT: He then drew an additional radius
13 around each of the customers within that draw -- that draw
14 area.

15 MR. WEISSMAN: Correct.

16 THE COURT: That gave us a geographic area in which
17 to identify the other competitors.

18 MR. WEISSMAN: Correct.

19 THE COURT: Now, for each of those other
20 competitors that fall within the draw area, the larger draw
21 area, did he include all of the revenue of that competitor in
22 his local market share analysis?

23 MR. WEISSMAN: Yes.

24 THE COURT: He did?

25 MR. WEISSMAN: Yes.

1 THE COURT: So if PFG is within that area, he
2 included the entirety of PFG's revenue and not just the
3 percentage of it that was commensurate with the draw distance.

4 MR. WEISSMAN: Yes.

5 THE COURT: Because the defendants have said, at
6 least as I understand it --

7 MR. WEISSMAN: I'm sorry, I'm corrected, it's the
8 percentage with the draw, the draw area.

9 THE COURT: Okay. So it's not the full revenue,
10 it's the revenues amount that's commensurate with the draw
11 distance.

12 MR. WEISSMAN: Seventy-five percent.

13 THE COURT: And why did he do that? Why didn't he
14 put the entire amount in that?

15 MR. WEISSMAN: Because that's how he determined the
16 merging parties' shares as well, I believe.

17 THE COURT: Well, and maybe this is an issue really
18 for market concentration, but what I've -- there's a strong
19 critique from Dr. Bresnahan who says, look, the competitors
20 within the market, within the local market, you've
21 under-included their total revenue. And the reason you've
22 under-included their total revenue is you haven't demonstrated
23 or you haven't taken into account that they'll drive further
24 than US Foods' or Sysco's 75 percent draw area. And if you
25 exclude those, that revenue, you're actually artificially

1 inflating US Foods' and Sysco's local market concentrations.

2 MR. WEISSMAN: And what Dr. Israel testified is,

3 and the records show, is distance is very relevant here.

4 Distance is very relevant to local broadline customers for

5 service reasons, for next-day delivery, for same-day delivery,

6 for ability to get all sorts of services. That is a very

7 important component, and we have that in our findings of fact

8 as well. And the defendants' own executives admitted, they

9 admit that their proximity to customers gives them a

10 competitive advantage. And so it's on this basis that you

11 need to understand really what the true picture is like when

12 you start calculating market shares.

13 And I would add, too, that the Supreme Court of

14 Philadelphia National Bank, I believe it's Footnote 35 or 36,

15 used a similar draw area type of methodology in trying to

16 figure out what are the customers here that will be most

17 directly immediately affected by the merger. And the Court --

18 the Supreme Court in *Philadelphia National Bank* and in

19 *Connecticut National Bank* said you're never going to have --

20 it's tough to draw the exact perimeter.

21 What you've got to do is come up with a good

22 solution about markets where the effect will be most direct

23 and immediate, and that's what Dr. Israel did here. And he

24 went beyond that. He used three different methodologies. He

25 used a 90 percent. He pressure checked what he did on the

1 75 percent draw area. He used a 90 percent draw area, and
2 then a 95 percent draw area as well. And the results were
3 very consistent, and as he testified that's what he wants to
4 see. If he starts seeing anomalies, then he thinks
5 something's wrong.

6 And I would add, the defendants haven't even
7 offered their own definition here. I'm not saying it's their
8 burden.

9 THE COURT: It's not their burden.

10 MR. WEISSMAN: No, it's not their burden. But it's
11 not like they've got some panacea here where clearly he should
12 have done it this way. This is the way that economists draw
13 markets in these types of cases. It's consistent with
14 *Philadelphia National Bank*, and it's extremely conservative
15 and reliable in this case.

16 THE COURT: Did you want to save any of your time
17 for rebuttal?

18 MR. WEISSMAN: I do.

19 THE COURT: Okay. I'll give you a couple minutes
20 for rebuttal on this segment.

21 MR. WEISSMAN: Okay. Thank you.

22 THE COURT: Thank you, Mr. Weissman.

23 MR. WEISSMAN: Thank you.

24 MR. PARKER: Your Honor, I've been doing this for a
25 long time, and you've been handed a case, the likes of which I

1 haven't seen for some of the reasons you just mentioned.

2 Your Honor, I was going to review the evidence that
3 we have that there is a competitive interaction between
4 broadline and specialty and cash-and-carry. You heard it day
5 after day after day, and I could do that, and we're losing the
6 catfish to -- in the southeast. What we got -- losing
7 \$33 million of produce to Pro Act. There is an economic
8 interaction here. And you've got Restaurant Depot selling
9 \$6 or \$8 billion dollars worth of stuff to different people.
10 And so I don't think there is an economic.

11 Now, Dr. Israel gets -- asks you to ignore this
12 clear economic activity by doing his SSNIP test. And if you'd
13 please turn to Slide 50, and I'll just get right to that
14 instead of -- instead of --

15 THE COURT: Well, before we start talking SSNIPs,
16 which I'm fond of doing. Let's talk about what the case law
17 says, and Mr. Weissman pointed out some of the cases in this
18 circuit, *Staples*, for instance. Judge Hogan, and I'm going to
19 paraphrase, and he says, look, just because you compete in the
20 real world doesn't make that competition for purposes of an
21 antitrust market. Recently in *Whole Foods* we didn't get three
22 judges all agreeing on the rationale, but two of them at a
23 minimum agreed that there was a market, a specialty market for
24 organic and other type of food.

25 And as Mr. Weissman says, the Supreme Court has

1 recognized that the certain bundling of products, it's largely
2 in the bank context. Bundling of products can constitute a
3 separate market. Why don't those cases control the outcome in
4 this matter?

5 MR. PARKER: I think the reason is that they're
6 factually distinct.

7 THE COURT: How?

8 MR. PARKER: I believe that *Staples*, in my opinion,
9 I was an FTC person at the time, was correctly decided. But
10 this case is really more like *SunGard's*, this is more like
11 Judge Huvelle's opinion in *SunGard*. Of course, there can be a
12 cluster market that people have to have, a broadline service
13 that could conceivably be. But on facts where people can
14 discipline a price increase by turning to something else, then
15 that becomes part of the market. And what *Staples* found is --
16 I'm sorry.

17 THE COURT: No, but wasn't that the case in
18 *Staples*? I mean, I read *Staples* yesterday again, and it
19 wasn't just a market for all office supplies, it's even more
20 narrow than that.

21 MR. PARKER: Correct.

22 THE COURT: It's a product for pencils and pens and
23 things that are renewable and disposable.

24 MR. PARKER: Right.

25 THE COURT: And the Court says, yeah, sure, even

1 though Wal-Mart sells them and Safeway sells those things,
2 this is a very specific market. And what we have here, very
3 similarly, is we've got specialty folks, we've got
4 cash-and-carry, and yes, there's some competition among them
5 and broadliners, but why isn't broadline unique in the same
6 way that Staples and Office Depot, I think it was, sell those
7 unique products?

8 MR. PARKER: What the defense contended in that
9 case, as I recall it, and I read it recently, but not
10 yesterday, was that all you've got to do is go to Wal-Mart.
11 I'm contending -- I'm contending here that if broadline prices
12 go up you can defeat them with using specialty or
13 cash-and-carry at other points.

14 The defense there said, well, go to Wal-Mart or go
15 to some other -- go to Best Buy or somebody else that carries
16 this. The problem is, is that the facts didn't support that.
17 The parties themselves, and I talked about documents in my
18 opening. The parties themselves called areas, the Staples
19 guys where Office Depot wasn't present, that was called a no
20 competition zone, whether Wal-Mart was there or not.

21 And what the FTC did and did an excellent job on it
22 was that they found that where these two were present, prices
23 were lower. Where these two -- where only one or them was
24 there, prices were higher despite, despite Wal-Mart being
25 there, despite these other -- despite these other sources.

1 So it's a factual question, Your Honor.

2 THE COURT: Well, what about *Whole Foods*? I mean,
3 I'm not sure there could be a more analogous case, both
4 involve food, to start. But you've got the same kind of
5 factual situation. You've got a large specialty grocer, which
6 is a lot like what *broadline* does, but there's a broader
7 market out there in the world for groceries.

8 We've got larger generalized grocery stores like
9 Safeway, you've got peach stands, you've got a whole array of
10 different ways to buy food as a consumer. And *Whole Foods*,
11 the Court of Appeals, two out of three judges say, you know
12 what, an organic supermarket is a market, that is a specific
13 product market. And if that is, why isn't *broadline*?

14 I mean, we've heard from -- and I'll say that, you
15 know, what I -- your findings of fact were terrific, both
16 sides were. But what was noticeably absent from them was an
17 analysis of the *Brown Shoe* factors, and, you know, those *Brown*
18 *Shoe* factors suggest unique product, you know, as in *Staples*.
19 Number of SKUs here is quite different for *broadline* than it
20 is for other modes. Larger warehouses, as was the case in
21 *Staples*. Why isn't this case squarely within those two cases,
22 *Whole Foods* and *Staples*?

23 MR. PARKER: Because in *Whole Foods*, in *Whole*
24 *Foods*, Your Honor the Government could not -- I'm sorry, the
25 defense could not make the case that in the case of a price

1 increase people would go to Safeway; that it was a real
2 alternative. And I believe here there is a strong evidence of
3 economic interaction here. I don't know what the evidence in
4 the case was. I mean, did they call customers who said, well,
5 if it goes up at Whole Foods I'm going to go to Safeway. We
6 have customers, we have competitors that everybody says, I can
7 go to this particular -- I can go this route, I can take away
8 the catfish business, I can take away the produce business,
9 and that will do it, it's a factual issue.

10 THE COURT: Those are -- I agree, of course.

11 MR. PARKER: It's a factual issue.

12 THE COURT: Of course. But then you have Mr. Holm
13 get up on the stand and testify, and say to the Court, at
14 least he said at a point in time, and you ultimately had to
15 agree with him. You can't substitute systems for broadline.
16 You can't substitute specialty for broadline. And he's not
17 the only one. Mr. Allen -- I've read his deposition testimony
18 similarly. And he's the head of the trade group. If anybody
19 knows it, he would. If nobody knows it, Mr. Holm would.

20 MR. PARKER: Right.

21 THE COURT: That you can't substitute these other
22 modes for broadline. Broadline is just too unique.

23 MR. PARKER: Let me go to Slide 12. And that was
24 Mr. Holm's opinion, that was the opinion he gave at the time
25 of cooperation with the FTC. It's his judgment. Okay.

1 THE COURT: You're saying he's wrong?

2 MR. PARKER: I'm saying he's incorrect.

3 THE COURT: Okay.

4 MR. PARKER: I'm saying he's incorrect. I'm not
5 talking about he did something wrong here. I'm saying that
6 his opinion --

7 THE COURT: No. No. You're entitled to disagree
8 with him. I just want to know if --

9 MR. PARKER: He's incorrect. He is a very strong
10 executive. He is a very strong executive, incredibly
11 aggressive, and saw an opportunity to work with the FTC and
12 achieve divestitures. And a month before he had any
13 divestitures on the table he signed an affidavit. And what we
14 know from those affidavits is they're not written by him,
15 they're written by the FTC. But, in any event, Your Honor,
16 it's an opinion, okay?

17 Let's look at the facts. Turn to slide -- well,
18 right here. Applebee's, right there, some broadline, some
19 systems. Zaxby's, that's a Chick-fil-A type outfit, some of
20 each. Shake Shack, one of my favorites, you'd think that
21 would be systems. You'd definitely think that would be
22 systems, but it's sure not. And you go down and look at the
23 others.

24 Please turn to Slide 13, if you would. Thank you.

25 THE COURT: The larger folks don't. In other

1 words, look, I understand that some of the restaurant chains
2 have greater flexibility in terms of systems versus --

3 MR. PARKER: They do.

4 THE COURT: -- that makes sense to me, but the big
5 GPOs, the big foodservice management companies, there's no
6 evidence that they have been able to switch in whole or even
7 in part to systems. Maybe a little bit of specialty, but by
8 and large they're buying broadline.

9 MR. PARKER: Your Honor, we do not contend that
10 systems is a particularly appropriate for hospital GPOs, or
11 for healthcare GPOs, but I do contend that at least in the
12 restaurant segment this is a real option, and look at Five
13 Guys who from day one was a USF broadline customer until --
14 for 20-25 years, and then all of a sudden abruptly shift to be
15 50 percent broadline, 50 percent systems with other
16 distributors and reduced the number of OpCos or the number of
17 distribution centers they use from 34 down to 12 -- or, excuse
18 me, 34 down to 17. So there is an economic.

19 What I'm saying is, is not every option, I mean,
20 it's undeny -- I don't want to deny the undeny -- I mean, the
21 GPOs are not going to do systems, that's fine. But there's
22 options out here, and not every option works for everybody,
23 but there is an option for everybody is what I'm suggesting.
24 And the FTC is asking you to ignore clear evidence of economic
25 interaction on the basis of a SSNIP test, and I can go through

1 that, in which the wrong margin, the wrong formula was used,
2 and you are absolutely right. Our RFP data is not what you do
3 with a SSNIP test. I mean, in the guidelines, the guidelines
4 talk about what -- the kinds of data you're supposed to have,
5 something that indicates if the price of broadline goes up,
6 then some people will --

7 THE COURT: Mr. Weissman said if I were to even
8 conclude that Dr. Israel's SSNIP test in his analysis is not
9 credible that they still win. Do you agree with that?

10 MR. PARKER: No, I don't.

11 THE COURT: You don't think they win on *Brown Shoe*
12 factors?

13 MR. PARKER: No, sir. No, sir, I don't. And *Brown*
14 *Shoe*, by the way, is old time antitrust. You're supposed to
15 do SSNIP test and things like that right now. And I will tell
16 you, this is what it is. Okay? Do you want to do old school
17 or do you want to do the new school?

18 THE COURT: Well, I told Congress I wouldn't do any
19 of those, Mr. Parker.

20 MR. PARKER: Okay. You're the only one here
21 confirmed by the Senate, I think.

22 Your Honor, but what I'm saying is, is I don't
23 think the *Brown Shoe* factors necessarily support him either.
24 I mean, okay, you know, we do systems business separately from
25 others, but Gordon combines it, USF combines it. I don't

1 think there's some obvious recog -- the systems -- the whole
2 *Brown Shoe* factors are very amorphous, which is why
3 Dr. Israel, by the way, who's a fine economist and somebody we
4 all -- we all know each other very well. He was given an
5 impossible task and could not deliver on the impossible.
6 That's all I'm saying here. I'm not criticizing him. But he
7 used the wrong formula and the wrong margin and got the wrong
8 answer.

9 But let me move to the issue where I think the real
10 issue is. Because this -- what makes this an odd case is that
11 the complaint clearly says broadline sales to national
12 customers is a product market. To do that, as Your Honor
13 said, under the guidelines, you have to do a SSNIP test. He
14 never did a SSNIP test. He avoided a SSNIP test, and he moved
15 to a special rule under Section 3.

16 THE COURT: What would the SSNIP test be? I tried
17 to describe it to Mr. Weissman, and he said I didn't do a good
18 job. So what would the SSNIP test be? Again, because I don't
19 see him doing one either, okay.

20 MR. PARKER: Right.

21 THE COURT: But what would the SSNIP test look like
22 if I wanted to know whether national customers were a product
23 market?

24 MR. PARKER: You have to have a group of truly
25 national customers.

1 THE COURT: However that's defined.

2 MR. PARKER: However that's defined. And, you
3 know, that's something that's very ambiguous on this record
4 and very hard to do, and you'd have to have some evidence of
5 switching. Something that you could apply the diversion ratio
6 to.

7 THE COURT: And switch to what?

8 MR. PARKER: Whether national customers would
9 switch to other forms of distribution.

10 THE COURT: Which would be?

11 MR. PARKER: Whether national -- okay, you get --
12 assume you have five national customers.

13 THE COURT: Right.

14 MR. PARKER: You do a SSNIP to find whether
15 customer one, two, three, four, five would make the switch.

16 THE COURT: The switch --

17 MR. PARKER: I don't think --

18 THE COURT: The switch to other modes of
19 distribution or the switch to a regionalized approach to
20 broadline services?

21 MR. PARKER: Well, if you're looking for a
22 broadline sales to national customers, you'd first look at the
23 issue of switching to -- to some other mode of distribution.

24 THE COURT: Right.

25 MR. PARKER: But what he's done is he's avoided

1 that and he's gotten down, he goes to a special rule, which is
2 Section 3 of the guidelines, a special rule for price
3 discrimination markets to avoid that problem. All right.

4 So let's look at now -- and there are cases out
5 here. Price discrimination is a perfectly valid theory where
6 it applies. And turn, if you would, to Page 16, please. And
7 there is a case out, there's a commission case out, the *R.R.*
8 *Donnelley* case, and it involves some obscure kind of printing
9 equipment, and it lays out a test, and you can see that on my
10 slide.

11 The hypothetical monopolist can identify switch --
12 switch out gravure and put in food distribution customers with
13 sufficiently inelastic demand for this product. And, two, the
14 hypothetical can selectively and profitably increase prices to
15 those customers.

16 So what you have to do is you have a set of
17 vulnerable customers. You can't just dump into the market a
18 bunch of customers. I don't see -- what the theory of price
19 discrimination is, is you find the people who can get nailed
20 for a price increase, put them into the market, and go from
21 there. Please turn to the next slide. I was trying to think
22 of a real practice --

23 THE COURT: Wouldn't you concede, Mr. Parker, would
24 you concede that there are some customers who are uniquely
25 national, that is --

1 MR. PARKER: Yes, sir.

2 THE COURT: -- they have multi-regional needs.

3 MR. PARKER: Yes, sir. Yes, sir.

4 THE COURT: I understand what Dr. Israel did in
5 relying on the parties' definition of national or CMU is a
6 little blurry, there are customers and --

7 MR. PARKER: I would say really blurry.

8 THE COURT: Really blurry.

9 MR. PARKER: Yes, sir.

10 THE COURT: But there are some number of customers
11 and they're big money customers --

12 MR. PARKER: Absolutely.

13 THE COURT: -- who use 24 plus distribution
14 centers.

15 MR. PARKER: Correct.

16 THE COURT: Why don't they at a minimum constitute
17 a national customer group?

18 MR. PARKER: All right. Let's turn here to -- and
19 the theory is price discrimination here. And turn, if you
20 would, to slide 20.

21 All right. So the question is under their theory
22 of the case can the executives at our company pick out one of
23 these companies and raise price to them because they're
24 national, and they clearly are -- all right, so let's look at
25 Novation.

1 Is it the case that Novation, because they are sole
2 source, is uniquely vulnerable to a price increase? And on
3 this record the answer is no. Why? Because of the next three
4 or four slides to the right. Everybody knows that these other
5 people who look an awful lot like Novation regionalize.
6 Regionalize. So my -- so Bill DeLaney sits there and says,
7 well, let's go -- let's go do Novation. And what he's going
8 to discover is how can I possibly do that --

9 THE COURT: Isn't the --

10 MR. PARKER: -- when anybody can regionalize.

11 THE COURT: Isn't the response that, from the other
12 side, is the reason one -- one, regionalizing is not a fair
13 alternative. All right. You can't -- it is fair to ask these
14 large companies to, as an alternative, to regionalize, which
15 is unquestionably going to increase their cost in order to
16 accommodate a merger. And that's essentially what I hear you
17 arguing that, look, because these folks can regionalize, this
18 merger should go forward. But why should that group of
19 customers have to incur the cost in order to regionalize when
20 right now, Mr. Weissman showed a slide, that even the
21 customers you've identified here by and large use these two
22 companies for the vast majority of their food purchasing?

23 MR. PARKER: And under the case law, under the case
24 law --

25 THE COURT: And what case tells me that I should

1 consider regionalizing?

2 MR. PARKER: Under the case law a preference for a
3 sole source is not good enough. The question is what you
4 could do, and there isn't any evidence from the other side as
5 to why it would be infeasible for Novation to do what Premier
6 did.

7 THE COURT: But why is it -- you all have used the
8 word "preference," and I understand it. But if we assume that
9 the customers in this marketplace are sophisticated actors,
10 and they surely are --

11 MR. PARKER: Yeah.

12 THE COURT: -- there has not been a trend toward
13 regionalizing among the largest customers. There just hasn't,
14 and I understand there are some examples like Subway, but by
15 and large the big food folks, food management companies, the
16 GPOs, the large chains have not regionalized. And I take from
17 that is that there is a reason for them to sole source, and
18 they would rather have two sole source distributors than one.
19 Why is that wrong?

20 MR. PARKER: All right. Your Honor, the question
21 is, is whether we can select these people out for price
22 increases. And the idea that we could go and target Novation
23 with a billion dollars or whatever they have of business,
24 knowing that people just like them regionalize, makes no
25 sense, and the threat of regionalization is sufficient.

1 Let's look at Premier. Premier six months ago
2 would have been in the sole source bucket. We don't have a
3 merger here yet. Ms. Ralph --

4 THE COURT: She went kicking and screaming, from
5 what I could tell.

6 MR. PARKER: Ms. Ralph, let me tell you what she --
7 and she's very effective, and she's kicked and screamed her
8 way into a very effective solution. One, she signed a
9 contract with an MFN, which guarantees her the best price for
10 the X-number of years. And, Number 2, she took a shot over
11 USF's bow by taking 11 or 12 states and up to \$200 million and
12 regionalized. And we don't even have a merger yet.

13 What I'm suggesting, Your Honor, what I'm
14 suggesting, Your Honor, is that when you see people exercising
15 choices at current competitive prices, the inference is, as in
16 the *Oracle* case, is that they can do it in the future.

17 THE COURT: So, Mr. Parker, and I know this is a
18 big deal so I want to stay on it for a moment.

19 MR. PARKER: Sure.

20 THE COURT: If there is one case out there that
21 stands for the proposition that you just articulated, and
22 let's even make it a fact specific proposition, which is if
23 buyers of this particular product, or any product, can
24 regionalize or change their mode in which they receive the
25 product, that that is a factor that ought to be considered in

1 defeating a price increase, what case can I look to that says
2 that?

3 MR. PARKER: Turn to Page 26 -- give me Slide 26.
4 Commission opinion in the *Donnelley* case, which is widely
5 cited in the price discrimination area, where you say:
6 "Third, given this existing substitution at current
7 presumptively competitive prices," that's what we have today
8 Your Honor, "a significant, non-transpiratory increase in,
9 fill-in-the-blank, for our product, prices for high volume
10 printing would likely expand use of what the other product.
11 They switch to another offset printing."

12 And, Your Honor, if they wanted to come in, I mean,
13 it's their burden to come in and say there's no way that these
14 people can possibly regionalize because it costs a gazillion
15 dollars to do that.

16 Applebee's, for example, Your Honor, regionalized,
17 they got 3400 stores, they use 11 distribution companies, and
18 they have three people doing it. Now, that's what's in the
19 record. What I haven't seen -- what I haven't seen --

20 But here's what I -- here's what I think. Go back
21 to some of these, Aramark, Novation, the other point, and
22 let's get away from, for a minute, from SSNIPs and the Hausman
23 test and the F-test and all these other things we've been
24 talking about, and just think practically. Practically, in
25 the world in which we live, is our company really going to go

1 to these people with billion dollars at stake knowing that
2 everybody who looks like them regionalizes, and said, you know
3 something, in two years when the RFP happens, I'm going to
4 raise your price by X-percent. And knowing, when they've
5 already been out there telling them that we've got
6 \$600 million in cost savings that we're going to share with
7 you. Is that in the world in which we live? Is that
8 practical? Is that something that you would expect to happen?
9 And I suggest, Your Honor, it's not. I suggest it's not.

10 Because they've --

11 You know, we don't know whether Novation, it cost
12 them a gazillion dollars to regionalize. We don't know
13 whether Aramark does, but we do know that we had better not
14 have trucks driving around half empty. We do know that. And
15 we do know that they don't even have to regionalize
16 completely, they can take some of the business.

17 And, by the way, I'm a billion dollar customer, and
18 I ask you why you're going to raise price. Well, the answer
19 is: We merged and now we. Can, that's a good start. And the
20 second point is, is -- all right, fine, you just lost the East
21 Coast. That's fine. You just lost the East Coast. I'm going
22 with somebody else on the East Coast, that's all it takes.
23 And what I'm suggesting, you have a clear case here, Your
24 Honor. You could rule for the other side on the broadline
25 market, I don't think you should, but you could. But still

1 there's no -- they lose the case because their market is a
2 price discrimination market, and there is no reason, there's
3 no observable facts to price discriminate.

4 THE COURT: Get back to the question I asked
5 before, which is for purposes of making the analysis that you
6 all asked me to do, why should I take into account or look at
7 a world in the future in which the large companies are told
8 you have now two options. Either you can single source with
9 US/Sysco merged company or you can break apart the way you've
10 been doing business for years, which is largely buying from
11 one of two national competitors. And that's what you're
12 asking me to conclude.

13 MR. PARKER: Yes, sir. And I think that the very
14 threat of doing that or the very threat of doing that a little
15 bit is enough to keep the prices competitive, that's the
16 point.

17 THE COURT: So what's a better threat? Is it a
18 better threat to have two national companies that can do that
19 or is it a better threat to have one national company that can
20 do it with the threat of regionalization?

21 MR. PARKER: I believe it's better to have one
22 company performing at an all time low cost point and an all
23 time low price point, and the option to regionalize than
24 having two companies who are having trouble competing at
25 current prices. It's better. This is better. It's better

1 because of the cost savings. It's better because of the
2 future. Excuse me. It's better because of the cost savings
3 and it's better because of the options they have.

4 I'm now at a low price point. I've got
5 \$600 million of savings to share with you, I'm going to raise
6 your price? No, you're not. I'm going to do the same thing
7 everybody else in this industry does. I don't think it's
8 plausible, Your Honor.

9 THE COURT: We've heard evidence that the smaller
10 broadliners are disadvantaged, a whole host of reasons, but
11 one of them is their inability to secure the same discounts,
12 if you will, for manufacturers, because a big company has
13 volume buying ability. All right.

14 MR. PARKER: Right.

15 THE COURT: So if the choices are combine US
16 Foods/Sysco and the regional players, how are the regional
17 players ever going to compete on price if they can't have the
18 same volume buying power of the combined company and be a
19 credible threat.

20 MR. PARKER: Okay. They can because -- they can
21 sure compete because the customers themselves can go to the
22 manufacturers. The customers can go to a GPO.

23 THE COURT: Well, the GPOs can do that.

24 MR. PARKER: The GPOs can do that. It doesn't
25 matter. If I'm mad at Sysco, merged Sysco, and I want to take

1 business from them and a small regional says I can't get you
2 the same price on corn flakes and catfish. I'll say, well, I
3 can get that through the GPO or I can call up Kellogg's myself
4 and do that. So it really doesn't matter. It really doesn't
5 matter. Because all they're buying at that point is drayage.
6 That's all they're buying.

7 THE COURT: Okay.

8 MR. PARKER: Your Honor, can I address the local
9 markets?

10 THE COURT: Certainly, of course.

11 MR. PARKER: Yeah. I was going to say the first
12 problem with the local market, I want to say the first problem
13 with the local markets -- turn to Slide 31, please, yeah, I'm
14 sorry.

15 And here we have Restaurant -- testimony from the
16 Restaurant Depot people, the Restaurant Depot people saying
17 that these local independent restaurants are our bread and
18 butter. No question -- broadline is really not an imperative
19 at the local level, okay. Here Jackalope Jacks, one of my
20 favorite places, of course, says that Sysco lowered its price
21 by 20 percent because of cash-and-carry. So you can't look at
22 these local markets simply on a broadline basis.

23 THE COURT: It's not your burden, I get that.

24 MR. PARKER: Right.

25 THE COURT: It's not your burden. But let me ask

1 you, how would you propose to draw a local geographic
2 market --

3 MR. PARKER: I would --

4 THE COURT: -- and given how you would do it,
5 what's wrong with the way Dr. Israel did it?

6 MR. PARKER: I would do it using the zip code data
7 that they probably could have got hold of. And Dr. Bresnahan
8 has a long discussion to that in his testimony in his report.
9 And if you turn to slide -- I think the zip code data is the
10 way to do it.

11 I would also look at economic reality here. Turn,
12 if you would, to Slide 32. And this is Dr. Israel's handiwork
13 with his slide, and you'll see this is D.C., this is where we
14 are right now. We are in the relevant market -- excuse me,
15 Slide 37. You will see where Sysco D.C. is, and then you saw
16 the -- the circle, and that's his circle.

17 Now, it turns out that PFG has a place in Windsor,
18 Maryland, which I think is up by Baltimore, I know is up by
19 Baltimore. And turn to the next slide, and you will see that
20 Dr. Israel assumes that nobody drives any further than Sysco
21 and US Food does, which is 27.8 miles, which means that PFG
22 Maryland only competes in the green part. But we happen to
23 know, and Dr. Holm -- and Mr. Holm testified to it, that PFG
24 competes in downtown Washington, which is the red zone, which
25 he's not supposed to be. They don't count. So the economic

1 activity occurring with the ham and cheese sandwich I ate
2 seven days in a row is not included in the market. And that's
3 an absurd result. That's an absurd result.

4 THE COURT: It certainly has an impact on the
5 market, local market concentration figures that Dr. Israel and
6 the FTC are sponsoring.

7 MR. PARKER: Yes, sir.

8 THE COURT: No question. And it biases the market
9 shares in favor of the defendants. In other words, they would
10 have a higher market concentration --

11 MR. PARKER: Yes.

12 THE COURT: -- because you're excluding relevant
13 competition and relevant revenues from --

14 MR. PARKER: Correct.

15 THE COURT: -- other competitors who can serve the
16 same area. I understand.

17 MR. PARKER: Yes, sir. Yes, sir. And this is
18 *res ipso loquitur*, to use the Latin, as to the problem with
19 his market definition. It leads to an absurd result that the
20 sandwich I had down there really didn't come from PFG or it
21 doesn't count, and we all know that it did.

22 I believe I'm out of time.

23 THE COURT: All right.

24 MR. PARKER: Thank you, Your Honor.

25 THE COURT: Thank you. I'll give you two minutes,

1 Mr. Weissman, and then we'll take our first break of the
2 afternoon.

3 MR. WEISSMAN: Thank you, Your Honor.

4 On the last point there -- sorry.

5 So quickly on the last point, the PFG sales were
6 actually included in the gray area. You remember he had a
7 gray area.

8 THE COURT: In their entirety or just for the
9 percentage of PFG sales that are within that draw radius?

10 MR. WEISSMAN: Yes, only the latter. And the
11 reason is, is because you wouldn't impute the entirety of that
12 distribution center, that distribution center is probably
13 serving other regions as well, so why would you impute the
14 entirety of the sales into that gray area.

15 THE COURT: I guess that makes sense, you know, for
16 instance, use the map that Dr. -- that was just shown, sure,
17 you might not impute the sales to the northwest of that
18 distribution center, but certainly to the southeast. If
19 you're looking at the D.C. market, wouldn't you extend PFG
20 more than the same number of miles that you've used as your
21 draw area?

22 MR. WEISSMAN: They were included in -- in the draw
23 area. Again, you know, it's -- if you get out too far, too,
24 remember Dr. Israel showed, if you extend the radius and the
25 circle is too far, you start to draw in other US Foods and

1 Sysco distribution centers, which would make the market shares
2 even higher. So he had to come up with a sensible approach, a
3 practical approach, and that's exactly what he did here in
4 drawing the relevant markets.

5 And I would say the documents that the -- the
6 defendants' documents that talk about their local shares or
7 local penetration, whatever, very consistent with what we're
8 talking about here that Dr. -- this is not something that is
9 at odds with the documents or what the customers are saying
10 about who their principal choice is, it's very, very
11 consistent. We're not just relying on simply his shares, it's
12 the totality of the evidence.

13 THE COURT: What's your response to, I'm taking
14 your time, but what's your response to Mr. Parker that
15 regionalization is the silver bullet here? I mean, why
16 shouldn't I say, look, there's evidence here that these folks
17 are already regionalizing or at least using multiple
18 broadliners in different regions, and that would be enough to
19 constrain price.

20 MR. WEISSMAN: Because I think you hit the nail
21 right on the head, Your Honor. You'd be seeing a lot more of
22 it today if it was a credible threat and customers simply
23 don't want to do it. You heard Mr. Thompson from Interstate
24 saying, boy, I really, really don't want to do that. So you
25 heard Culver say, adding, adding more, more and more, it's

1 impractical. So you're darned if you do, you're darned if you
2 don't. And I think that was Your Honor's point. You'd be
3 seeing it a lot more today being done if it was a credible
4 threat. And the bottom line is even for those that
5 regionalize, you're seeing a really, really high percentage
6 that use the merging entity, and that -- merging parties, and
7 that, I think, speaks volumes about why regionalization is not
8 the answer.

9 And, again, we included all that in our market
10 definition and market shares. And what the revealed
11 preference derived from those shares shows is it's really not
12 a good solution. The whole existence of DMA, I think, makes
13 the point that this -- you need specialized vendors to serve
14 national customers. MUG is the same.

15 And that sort of reinforces the point here that
16 regionalizing, not going, you know, splitting it up in eight
17 different ways, it's just not a viable constraint on the
18 merging parties, and it wouldn't defeat the myriad of ways
19 that they could implement anti-competitive behavior here.

20 THE COURT: Okay.

21 MR. WEISSMAN: If I could address a couple things
22 that Mr. Parker said.

23 THE COURT: Thirty seconds.

24 MR. WEISSMAN: One is *Whole Foods*, that *Brown Shoe*
25 old school. Well, look at *Whole Foods*, look at *Staples*, look

1 at *Cardinal*, all those cases rely heavily on the *Brown Shoe*
2 factors. In fact, *Staples* didn't even mention the SSNIP test.
3 *Cardinal* didn't even mention the SSNIP test, and *Whole Foods*
4 relied secondarily on the SSNIP test that the FTC's economist
5 did.

6 THE COURT: Let's talk about that in the next
7 section because it was there in those cases that I think is
8 problematic here is there is a lot of pricing evidence in that
9 case. In those two cases, there was a lot of pricing evidence
10 that supported the ultimate conclusion, which, at least as I
11 see this record, and you'll correct me if I'm wrong, there's
12 not very much of it here.

13 MR. WEISSMAN: Well, can I hit that point right now
14 or do you want to take a break?

15 THE COURT: Let's take a break.

16 MR. WEISSMAN: Okay.

17 THE COURT: Let's take a break.

18 MR. WEISSMAN: Thank you, Your Honor.

19 THE COURT: All right. Let's -- why don't we
20 reconvene at five after 3:00. Thank you, everyone.

21 THE DEPUTY CLERK: All rise. This Honorable Court
22 stands in a brief recess.

23 BRIEF RECESS AT 2:55 P.M.

24 AFTER RECESS

25 THE COURT: All right, Mr. Weissman. So this

1 portion of the 30 minutes per side, do you want to -- would
2 you like to reserve some time for rebuttal?

3 MR. WEISSMAN: Yes, Your Honor, thank you.

4 THE COURT: And how much time do you want to
5 reserve?

6 MR. WEISSMAN: Five minutes.

7 THE COURT: Okay, all right.

8 MR. WEISSMAN: Thank you, Your Honor.

9 If we could put up -- I want to turn to distinct
10 pricing because --

11 THE COURT: Hang on one second.

12 Okay, all right, go ahead.

13 MR. WEISSMAN: And if we could turn off the monitor
14 to the public for Slide 9, that would be great. Thank you.

15 So Your Honor raised before the break the issue of
16 pricing evidence. And pricing evidence goes to both relevant
17 market and it also goes to competitive effects. And here we
18 have very strong pricing evidence. This is not a case like
19 *Staples* where you have areas of the country where there was
20 only one present and the other not present where you could
21 analyze the pricing. Here, the two companies are basically
22 present everywhere. So you couldn't do an effective
23 cross-sectional analysis here. What Dr. Israel did instead
24 was an event study, which I'll talk about, an entry event
25 study, which I'll talk about in a minute.

1 And in *Swedish Match* as well. The Court in *Swedish*
2 *Match* observed, I think it was Judge Hogan observed that there
3 wasn't the type of pricing evidence you had in *Staples* because
4 it wasn't available, but that -- that hardly is determinative
5 here, particularly when you look at the *Brown Shoe* factors.

6 So one of the *Brown Shoe* factors, indeed, is
7 distinct pricing. And here's what the evidence shows. So
8 this is Paragraph 9. Who do broadliners price against? And
9 this is an e-mail from Mr. Schreiberman, who testified at trial,
10 right before the announcement of the merger, and here's what
11 he says internally.

12 He says, "On the truck we will be competitive with
13 broadline distributors on a similar cost model." He doesn't
14 say on the truck we'll be competitive with specialty and
15 cash-and-carry and systems, he specifically identifies
16 broadline. And that's very consistent with what you see the
17 other direct evidence, direct pricing evidence that the Court
18 has in front of it in this record.

19 We have cited, and there was a lot of testimony, we
20 showed a lot of documents to witnesses here about who is it
21 that drives the pricing in RFPs or bilateral negotiations or
22 even at the local level. It's the competition between
23 broadliners, and in particular competition between these two
24 companies. Here is another -- this is a confidential
25 document, this is a large hospitality customer, this is

1 unambiguous as to what is driving the pricing here for these
2 customers here.

3 THE COURT: I understand why you are presenting
4 these kinds of facts because if you didn't I'd ask you where
5 they were. But one of the real key questions in my mind is,
6 what do I do with this kind of, particularly the subjective
7 testimony of certain declarants? Courts have struggled with
8 this. How much weight do you give to a particular declarant
9 unless you, the FTC, as the proponent of this -- of seeking to
10 block this merger, can demonstrate that these particular
11 declarants and other witnesses are representative of the
12 customer base as a whole. Have you done that here?

13 MR. WEISSMAN: We have. And Dr. Israel testified
14 that the witnesses he relied upon for his conclusion, among
15 the other facts for his conclusion, that national broadline
16 customers were at risk here, was the testimony of 27 different
17 national customers that collectively accounted for almost
18 \$20 billion in sales to a national broadline sales. And I'll
19 give you the finding of fact specifically where we cite that
20 testimony.

21 I will find that, I don't want to take time, but I
22 will certainly get you that because that shows we're not just
23 talking about, as in *SunGard*, eight declarants or affiants
24 here where you had very different facts. We're talking about
25 here a massive amount of customers. But we're not just

1 relying on the customers for this pricing evidence. It's the
2 documents, including the internal documents of the parties.
3 All of it points in the same -- to the same direction.

4 We're looking also at testimony from others in the
5 marketplace, not just customers. Here's what Mr. Holm said.
6 Mr. Holm made it clear that there was no significant price
7 effect on broadline, on his broadline business of others. And
8 he principally competes on a regional basis, so if there was a
9 price effect, that's where you would see it, if anything.

10 And here's testimony from a party, Mr. Schreibman.
11 This is not subjective testimony, this is objective testimony.
12 He can't point to a single example in an RFP where US Foods
13 lowered its pricing to compete with a cash-and-carry outlet.

14 Then we look -- let's look at the empirical data,
15 the pricing evidence, you asked about pricing evidence, so
16 there's direct evidence of pricing, there's customer testimony
17 about pricing. And there's also empirical evidence about
18 pricing.

19 Here on Slide 13 we're showing you the analysis
20 that Dr. Israel performed of the Sysco Requests For
21 incentives. Recall that Mr. Brawner from Sysco said that
22 those were reliable when he testified about the RFIs. Here's
23 what they show, they show overwhelmingly when there is a price
24 incentive given, it's given, first of all, more often by far
25 to match or beat USF, but certainly other broadliners as well.

1 THE COURT: I also recall that there was testimony
2 to the effect that this was phased out by Sysco, this
3 particular process. I guess the question is A: Is that true
4 to your knowledge? And, B: What is the timeframe?
5 Dr. Israel has a count in one case of 193, the other count is
6 224. Do you know over what time period he collected this,
7 these --

8 MR. WEISSMAN: I'll find out, but on your first
9 question, I believe, and Mr. Parker can correct me if I'm
10 wrong, that the testimony was that the Linc database was --
11 that the USF database was phased out.

12 THE COURT: Okay.

13 MR. WEISSMAN: I don't believe there was testimony
14 that the Sysco RFI database, in fact, Mr. Brawner was talking
15 about how reliable it is, so I'm not sure why -- why they
16 would phase out. And in terms of the timeframe, in terms of
17 the timeframe from this RFI information, this is -- I'm sorry,
18 I just got a note saying it was phased out after the merger,
19 2014.

20 THE COURT: Okay. I thought that's what I
21 recalled.

22 MR. WEISSMAN: And that in terms of the timeframe
23 for the RFI database, we'll get you the exact, it's recent,
24 it's relatively recent. This is not going back to 2007
25 or 2008.

1 And in terms of the finding of fact where I cited
2 to you Dr. Israel relied on the views in the testimony of a
3 whole range of national customers that comprised close to
4 \$20 billion, that's Plaintiff Finding of Fact 468.

5 THE COURT: Okay.

6 MR. WEISSMAN: And the RFI database, I just got the
7 answer. These guys are good. 2012 to early 2014. And,
8 again, they phased it out, only after the merger was
9 announced.

10 THE COURT: Okay.

11 MR. WEISSMAN: So other pricing evidence. We also
12 have the entry event study that Dr. Israel performed, and he
13 testified -- and this was very conservative for a number of
14 reasons -- that when Sysco entered in Long Island that the
15 prices dropped a significant amount, and then he used that to
16 help quantify --

17 THE COURT: Is 1.4 percent significant?

18 MR. WEISSMAN: It is. 1.4 multiplied by the amount
19 of local broadline sales, that's a lot of money every year in
20 harm, yeah.

21 THE COURT: Okay.

22 MR. WEISSMAN: And that is statistically
23 significant. So that's another thing that Dr. Israel did.

24 THE COURT: Let's talk about the Long Island a
25 second because I've actually looked at this, I wanted to try

1 and understand it. And Dr. Bresnahan -- here's what my
2 problem is with the reliability of this study. One,
3 Dr. Israel himself says, look, this isn't really a true entry
4 study in the sense of -- because it's not a clean entry.
5 There was already a pre-existing distribution center, it's not
6 a clean entry. That's one.

7 Two, he sort of ignores Long Island -- not Long
8 Island, the one in California. He sort of says, look, I'm not
9 going to rely on that one because it was closer, I believe, in
10 distance from an existing Sysco distribution center.

11 MR. WEISSMAN: Uh-huh.

12 THE COURT: But Dr. Bresnahan says they're not --
13 they're only actually 15 miles apart. In other words, the new
14 distribution centers on both the East Coast and the West Coast
15 were only 15 miles apart from where the original distribution
16 centers were. And the price differential is dramatic, it's
17 almost negligible on the West Coast, but, you know,
18 1.4 percent are robust in the Long Island study.

19 How am I supposed to take anything from that?
20 You've got two studies with relatively comparable
21 circumstances that point in different directions.

22 MR. WEISSMAN: There are differences for sure. So
23 Long Island, a very dense area. Fifteen miles in Long Island
24 is different than 15 miles in Riverside. So that's one
25 factor.

1 The second factor Your Honor pointed out, it's not
2 a clean event study. Well, that -- the reason it wasn't clean
3 is because you already had some degree of competition there.
4 Had you eliminated that and made it a clean study, the result
5 would have been higher in both areas so the fact that it's not
6 a clean study because you already had nearby DCs, actually it
7 minimizes the effect of the entry instead of, and if you took
8 that away, it would increase the share. That's one of the
9 reasons Dr. Israel testified that his analysis was very
10 conservative.

11 THE COURT: And what about the entry study that
12 Dr. Bresnahan did of the other competitor. Why isn't that
13 also demonstrative or why doesn't that demonstrate that there
14 isn't much of a price effect when a new competitor arrives on
15 the scene? I guess one of the questions, it wasn't clear to
16 me from the record, is how large that new distribution center
17 was and how much it was in a position to actually compete to
18 lower price at the time the study was done.

19 MR. WEISSMAN: Dr. Bresnahan actually found a price
20 effect.

21 THE COURT: But it was small.

22 MR. WEISSMAN: It was small. It was small. But it
23 was still there. That distribution center, too, was further
24 inland than where Sysco and US Foods have their distribution
25 centers. And the bottom line is there was an impact there, it

1 was the Shamrock entry into that area.

2 THE COURT: Right.

3 MR. WEISSMAN: And Shamrock, I mean, I'm not going
4 to get into confidential details, but they've struggled, they
5 haven't been as competitive as you would see, for example,
6 US Foods and Sysco looking. So if you look at the entry of a
7 smaller local player, you're inclined to see less of a price
8 impact than you would see, for example, in what happened in
9 Long Island.

10 The other thing, I just got passed a note, that the
11 distances are greater than 15 miles, it's not as the crow
12 flies, it's greater in Long Island.

13 THE COURT: Because the traffic is worse in Long
14 Island than southern California?

15 MR. WEISSMAN: It's mileage, driving mileage plus
16 that.

17 THE COURT: Okay.

18 MR. WEISSMAN: So a difference. But again, I'm
19 listing the totality of the pricing evidence. We're not just
20 relying on one single source, it all points in the same
21 direction. The SSNIP test, now Mr. -- you asked Mr. Parker
22 how would I perform a SSNIP test for national customers. And
23 the way he described it, that's exactly what Dr. Israel did.
24 Dr. Israel looked at whether a SSNIP in broadline would lead
25 national customers to other forms of distribution. And, sure,

1 he relied on the RFP database, which we talked about, and
2 that's a separate issue, but he did perform exactly the type
3 of SSNIP analysis for national customers that Mr. Parker says
4 that's what he should have done.

5 THE COURT: Can I ask you in your time to move to
6 the market concentration issues?

7 MR. WEISSMAN: Sure.

8 THE COURT: At least as I understand the law, once
9 we define what the relevant market is, we need to figure out
10 what the concentration is in the relevant market. And I
11 assume that you would like the Court to find that in light of
12 what the concentrations are, that there is a presumption of
13 harm; correct?

14 MR. WEISSMAN: Correct.

15 THE COURT: And if I were to conclude, based upon
16 how Dr. Israel came up with the market concentrations, that
17 they're not reliable. There would be no presumption; correct?

18 MR. WEISSMAN: There would be no presumption, but
19 there are other ways. We obviously could get a preliminary
20 injunction under *Whole Foods*.

21 THE COURT: Okay. But that would not be the
22 preferred way, I take it.

23 MR. WEISSMAN: We'd prefer to have both.

24 THE COURT: All right. So let's talk about the
25 market concentrations. Dr. Israel's -- starts with what

1 defendants have said is, this is my word, not theirs, an
2 arbitrary numerator. He says, look, I'm going to start with
3 the revenue from the national customers from -- I'll get this
4 backwards -- from USF and the CMU customers from Sysco.

5 Why is that the right place to start when we've
6 seen, multiple examples, of the national customers service
7 being dependent upon what the customer wants, not any
8 particular group or single set of characteristics of the
9 customer itself?

10 MR. WEISSMAN: Because it is a reasonable
11 approximation, and more than that under the case law. That's
12 what *PPG* says. That's what *H&R Block* says. You come up with
13 a close reasonable approximation of what the market shares are
14 to calculate market concentrations. And it wasn't arbitrary.
15 He used the same designations that the parties used and that,
16 by the way, McKinsey uses to define the market.

17 I'm going to show you the slide from McKinsey where
18 they say it was arbitrary for Dr. Israel to use national
19 accounts and CMU and group them and categorize them national
20 customers for purposes of market shares. This is how McKinsey
21 analyzed the issue.

22 THE COURT: Isn't the issue sort of slightly
23 different in the sense that the national versus local makes
24 sense for product market definition. In other words, if the
25 world recognizes that there's some national customers and

1 there's some local customers, that I understand, that's a
2 factor to consider in deciding whether there's a national
3 market -- excuse me, a product market for a national
4 broadline.

5 But in terms of calculating what that share is, is
6 it fair to start at the same place that McKinsey does? Aren't
7 we really -- don't we really need to know who the national
8 product customers are and that they're defined in a consistent
9 way?

10 MR. WEISSMAN: And we've done that. We have
11 defined the national customers in a way that are customers
12 that are geographically dispersed. Now --

13 THE COURT: But they're not, they're not.
14 Dr. Hausman's study, he does an analysis of the national
15 customers, says half of them, 55 percent, I think this is for
16 Sysco, used 10 or fewer OpCos, that's not -- that's not
17 national.

18 MR. WEISSMAN: No, but that's -- again, national,
19 both our definition, McKinsey's definition and the parties'
20 definition, you don't need to be -- have locations in all
21 48 states. What we mean and we've been very consistent about
22 defining this, is a national customer is a customer with
23 geographically dispersed locations that need foodservice
24 distribution in those -- and using at least 10 OpCos, you're
25 going to be spanning across multiple regions.

1 THE COURT: Yeah, 10 or fewer. This is Hausman's
2 numbers. 55 percent of Sysco's national customers use 10 or
3 fewer OpCos. This is from the national dataset for Sysco.
4 Two-thirds use 10 or fewer. Doesn't that tell us, tell me
5 that the -- that if one of -- one of the objective factors, it
6 seems to me, as to whether a customer is national is number of
7 distribution centers? And that's the one thing you can't --
8 you know, if you're using more distribution centers, the
9 greater you're dispersed throughout the country.

10 MR. WEISSMAN: Right.

11 THE COURT: But if you're using fewer distribution
12 centers, doesn't that tell you that you're not, in fact,
13 national, that you're a regional customer who cannot only look
14 to Sysco or US Foods, but look to somebody who's got a smaller
15 footprint?

16 MR. WEISSMAN: It very much depends on the regions.
17 Dr. Hausman's same chart showed that a smaller fraction of
18 those customers that he's talked about are confined to a
19 single region. So if you have customers that are spread
20 across different regions, and you may not be, quote/unquote,
21 national in the literal sense, but you're national for
22 purposes of how we're defining and how the parties define it
23 because they cut across --

24 THE COURT: But if you're concentrated in a region,
25 isn't it by definition different than what you're putting

1 forward as national? That is, a customer that needs
2 multi-regional dispersed service of broadline. In other
3 words, if I happen to be national and there's a good number
4 who are using less than 10 distribution centers, and I'm
5 concentrated in a particular area, that doesn't make me
6 national under the FTC's definition of what constitutes a
7 national customer.

8 MR. WEISSMAN: Right. And what we do, what we do,
9 Your Honor, is we count the regional sales in those. So we
10 give full faith and credit to the extent those customers --

11 THE COURT: But that's in -- in the denominator,
12 not in the numerator.

13 MR. WEISSMAN: Right, but you're including them
14 both in the numerator and the denominator. That's the fair
15 way to do it. To the extent that there are customers -- and
16 we got CID data, and he ran these numbers seven different ways
17 giving every benefit of the doubt to what constitutes a
18 national sale by a regional competitor, and these were
19 90 percent of the broadline sales. This is not some
20 incomplete dataset. He included all that in the sales base,
21 and that's what they still show. The market shares are
22 extremely, extremely high.

23 The other thing I would point out, Your Honor, is
24 that, and this is Slide 61. In terms of the revenue we're
25 talking about -- this is from Dr. Israel's report -- in terms

1 of the revenue we're talking about, the parties' CMU and
2 national account customers accounted for close to 90 percent
3 of the revenue of those customers. So when we're talking
4 about revenues, and we'll talk a little bit later about PFG.
5 But look at the number with regard to customers that use more
6 than 35 distribution centers, well more than half.

7 So we're talking -- if we look at revenues instead
8 of one off here or there national customer, we're trying to
9 get at a very good reasonable approximation, which is what the
10 law requires as to the market shares here, and that's exactly
11 what Dr. Israel did, and these numbers bear that out.

12 THE COURT: Is there any industry analysis in the
13 record of the share of broadline for national customers? In
14 other words, for the bigger customers, is there any industry
15 study that shows Sysco has got X-percent, USF has Y-percent?

16 MR. WEISSMAN: An industry study, I'm not aware of
17 one. You asked before about Technomic data, and I don't want
18 to interrupt your question.

19 THE COURT: No, no.

20 MR. WEISSMAN: But I certainly will point you to
21 PX 9035, and it's Page 14. And that is a Technomic, an
22 extract from a Technomic --

23 THE COURT: Do you mind turning that around,
24 because I -- okay.

25 MR. PARKER: Do you have an extra copy of that?

1 MR. WEISSMAN: I don't, but we can get you one at a
2 break.

3 MR. PARKER: Thanks.

4 THE COURT: Okay.

5 MR. WEISSMAN: Let me give this to you now.

6 MR. PARKER: Thanks.

7 MR. WEISSMAN: But to answer your question, what we
8 have are internal documents that talk about shares in these
9 particular segments, we're talking about combined 90 percent
10 in healthcare.

11 THE COURT: Let me ask you about the -- for
12 national customers, ask you about the denominator. I always
13 get the numerator -- the denominator. I believe Dr. Israel's
14 denominator for the national concentration was between \$28 to
15 \$34 billion; is that correct?

16 MR. WEISSMAN: Correct.

17 THE COURT: The defendants have said that that
18 excludes, I think, on the magnitude of \$32 billion.

19 MR. WEISSMAN: Okay.

20 THE COURT: Is that accurate?

21 MR. WEISSMAN: No.

22 THE COURT: Where are they getting that number
23 from? Maybe I should ask them. What does that number entail
24 and where is it coming from?

25 MR. WEISSMAN: I think I recall that point trying

1 to be made with Dr. Israel and what he -- he didn't recognize
2 the document, I'll let them explain what that document shows.
3 But I think Dr. Israel said it wouldn't surprise him if there
4 were a lot of chain, quick-serve restaurants that use systems
5 that weren't captured by his headline because that's not
6 who -- he doesn't include systems sales.

7 THE COURT: What about Mr. Lynch's testimony? I
8 think the defendants have cited this in their Findings of
9 Fact/Conclusions of Law. He says, look -- and he's the
10 national VP, if I remember correctly, he's the VP for national
11 sales for Sysco, I think, if I remember correctly. He says,
12 look, I compete for \$100 billion dollars worth of contracts.
13 Is he wrong?

14 MR. WEISSMAN: If he's saying he's going out there
15 and competing for systems and quick-serves and McDonald's and
16 Burger Kings and all the systems, I don't know if he's wrong
17 or not, but that's not the way we're defining the market. And
18 I would point you to the analysis that PFG did, and I'll put
19 this up on the screen.

20 THE COURT: This is when they made the presentation
21 to the FTC?

22 MR. WEISSMAN: Yes. Slide 29, yeah, this should
23 not be up on the screen. They estimated, again not including
24 all, and I'll supplement it with the testimony in a second,
25 but not including all segments of national headline

1 customers, they estimated that the total market size was
2 approximately \$20 billion.

3 What it did not include were the certain restaurant
4 chains that also would need to be added, that Dr. Israel added
5 to get his 28 to 34. And if you look at Dr. Israel's report,
6 the way he segregated it, it basically breaks down exactly the
7 way PFG did it. So this is someone who lives and breathes in
8 the market who's calculating the market size for national
9 broadline customers in a consistent way with what our expert
10 did. And that -- he's not saying it's \$100 million dollars
11 like Mr. Lynch testified.

12 The other thing I would emphasize about
13 concentration levels, too, is Dr. Israel, he road-tested this.
14 He pressure checked this seven different ways. And this is on
15 Page 34 of the slide. He talked about all the different ways,
16 and this is after the proposed divestiture. He looked at it,
17 and it's all directionally the same. It may be different by a
18 couple percentages here and there, but it all points in the
19 same direction, that there are extremely high HHIs, extremely
20 high market shares, and even accounting for the divestiture,
21 this blows by the presumptions on the merger guidelines and
22 the case law.

23 THE COURT: All right. I think you have three or
24 so minutes for rebuttal.

25 MR. WEISSMAN: Thank you, Your Honor.

1 THE COURT: Good afternoon, Mr. Tringali.

2 MR. TRINGALI: Thank you, Your Honor. Good
3 afternoon.

4 Let me start, Your Honor, with market shares,
5 Tab 40.

6 THE COURT: Can I start somewhere else?

7 MR. TRINGALI: Okay.

8 THE COURT: I apologize. Here's my question to
9 you. Assume with me for a moment that I find, if I were to
10 find that there's a national market for broadline customers,
11 the following statement was written by Judge Tatel in *Whole*
12 *Foods*, and, in fact, he's quoting Judge Friedman, quote:
13 There can be little doubt that the acquisition of the second
14 largest firm in the market by the largest firm in the market
15 will tend to harm competition in that market.

16 Do you agree with that statement that that would be
17 applicable here, if I were to find that there is a national
18 broadline market?

19 MR. TRINGALI: No, Your Honor, because one of the
20 things I'll get to is Dr. Israel's analysis of harm, which is
21 based on market shares, based on his RFP data, based on margin
22 and based on his auction theory, all of which fall.

23 THE COURT: So let's leave that aside for a moment.

24 MR. TRINGALI: Okay.

25 THE COURT: But I read *Whole Foods* or I hear what

1 Judge Tatel is saying is if you're number one and you're
2 number two in the particular market, that will tend to harm
3 competition. Do you disagree that, again, I'm going to ask
4 you to assume there's a national broadline market. Do you
5 agree that Sysco and US Foods are number one and number two in
6 that market?

7 MR. TRINGALI: I will agree that they are likely
8 the largest in terms of number of customers just because they
9 have the largest number of locations, but I will not agree
10 that it would harm customers. And the reason will be is that
11 if you look at the customer options and what customers are
12 doing, what customers said that they will do, what they
13 already are doing, you don't have that harm. So one and two
14 combining could, of course, cause harm, but it's when one and
15 two combine and there's a problem in terms of three, four,
16 five and six.

17 That's not the case here. And we can go through
18 this in various ways. The RFP database being one, customer
19 preference issues being another, and my favorite, elephant in
20 the room chart that shows you various customers in every
21 product category -- every customer category who are already
22 using multiple distributors.

23 And once you're using multiple distributors, Your
24 Honor, once you're not using sole source national
25 distribution, which no one needs to use, then it seems to me

1 your question is answered because then the customer has every
2 option available to them. They are not beholding to one and
3 two.

4 So the whole premise of this case, and we really
5 should start with where I was going to end, which is the
6 complaint in this case, Paragraph 5, which is really how they
7 deal with the national customers. They say, "National
8 customers," this is quoting from the complaint, Paragraph 5.
9 "National customers require or typically contract with the
10 broadline distributor that offers consistency of pricing,
11 service, ordering and products across all of their geographic
12 locations as well as efficient ordering and contracting
13 processes. Defendants are the only two single firm broadline
14 distributors that meet these requirements."

15 If that were true, Your Honor, then the answer to
16 your question would be yes, there would be harm. The problem
17 is, that is not true.

18 And you started getting to this in terms of asking
19 Mr. Weissman about national market shares, how do you put --
20 you know, where do you get this numerator, where do you get
21 this denominator if no one can really define what a national
22 market -- what a national customer is. And that's the
23 fundamental problem.

24 There are some customers who today are nationwide
25 and sole source because that is their preference. But that is

1 not the numerator that the FTC is using. Mr. Weissman tells
2 you that that's what their case is about. That's not what
3 their shares are about. That's not what their complaint is
4 about. He today walks away from restaurants. Restaurants are
5 in their case, and every single dollar of sales by USF and by
6 Sysco to national chain restaurants, including restaurants
7 served by systems distributors is in the numerator, but then
8 when you get to the denominator, they exclude all the systems
9 distributors who are also servicing those restaurants.

10 THE COURT: I thought the SYGMA, for example, the
11 SYGMA systems customers would be excluded from Dr. Israel's
12 numerator.

13 MR. TRINGALI: The SYGMA is excluded, Your Honor,
14 but in the case of SYGMA -- sorry. In the case of Sysco and
15 USF, USF doesn't have a SYGMA-type division.

16 THE COURT: Right.

17 MR. TRINGALI: All of our sales to restaurants,
18 whether they are systems-type restaurants served by other
19 systems distributors and include -- as well as broadline are
20 included in the numerator. So when Sysco sells -- Sysco
21 doesn't uniquely sell to national chain restaurants that could
22 be served by SYGMA through SYGMA, sometimes they serve them
23 through Sysco. USF serves them exclusively through USF. And
24 every cent, Five Guys, \$300 million, that's all in the
25 numerator. But when they now -- when Five Guys now moves from

1 us, our largest single loss, and splits its business between
2 broadliners and systems distributors, the FTC will tell you
3 don't ignore that, ignore the fact that customers are
4 switching between the two because that's restaurants, which
5 suddenly is -- suddenly we're going to ignore, even though
6 it's part of the market, that -- every dollar that is being
7 given from Five Guys to the systems distributors will be
8 excluded from the denominator.

9 THE COURT: Right.

10 MR. TRINGALI: So if you turn to national market
11 shares, and this is Tab 42, you'll see that he used around
12 \$30 billion, and Mr. Weissman just -- you know, I will tell
13 Your Honor that there is not a single document from Sysco,
14 from USF or from any customer or competitor that has anything
15 about a national broadline market of -- a national broadline
16 market of \$30 billion. The document they showed you from PFG,
17 which was done by Kirkland & Ellis, a law firm going to the
18 FTC, first of all, talks about specific group of national
19 customers because you remember, there's this definitional
20 problem about a national customer. And Mr. Holm services many
21 national account customers today. Many of the customers who
22 are national customers are serviced by Mr. Holm today and PFG.

23 The issue is there are some customers who, in Mr.
24 Holm's view, are only seeking a sole source national
25 distributor, and he's estimating that at about \$20 billion.

1 What he is not including, and Mr. Weissman tried on his
2 examination to get him to say that if you add back restaurant
3 that will be about \$10 billion, and Mr. Holm didn't go there.
4 Because if you look at Mr. Lynch's estimate, which is Tab 43,
5 when they talk about national chains, it's \$76 billion.

6 So even if you were to agree with the \$20 billion
7 in PFG's document, that only goes to a few categories of
8 customers who require nationwide distribution in Mr. Holm's
9 view. And then you add the national chains, you're back at
10 \$100 billion dollars.

11 THE COURT: So is that -- is that what your
12 contention is as to why the denominator doesn't have an
13 additional \$32 billion? What's that \$32 billion that you
14 claim is missing from the denominator?

15 MR. TRINGALI: That's because he didn't collect
16 data from various people.

17 THE COURT: Okay.

18 MR. TRINGALI: So the denominator is --

19 THE COURT: You think that's \$32 billion of other
20 broadline sales?

21 MR. TRINGALI: Your Honor, the problem is that we
22 can collect -- first of all, they collected only -- even
23 though they've been doing this investigation for 14 months,
24 they only collected from, I think, something like 13
25 distributors; that's number one.

1 Number two, they asked the distributors in
2 responding to the CID not to include sales to chain
3 restaurants as national sales, to include them as systems
4 sales. So they made that distinction. But when they're
5 calculating our numerator, they're not making that
6 distinction. So you can't have apples and oranges here, okay.
7 If they're going to --

8 THE COURT: I recognize there's imperfections, I
9 mean, there's no --

10 MR. TRINGALI: There's more than imperfections.

11 THE COURT: I know that's what your position is.
12 But look, and let's just get to the issue of that numerator --
13 excuse me, the denominator for a second that Dr. Israel used,
14 particularly from the CID data. This is what I understand him
15 to have done. There were 16 broadliners from which CID data
16 was obtained; is that accurate?

17 MR. TRINGALI: Yes.

18 THE COURT: And he took all of those 16 revenue
19 figures, and that's his numerator -- excuse me, his
20 denominator. Hang on. My further understanding is that the
21 10 largest broadliners, according, it's in the record, 10
22 largest broadliners account for 84 percent of all broadline
23 sales. And that of that total broadline sales, Sysco and US
24 Food account for about 50-51 percent. Do you agree with those
25 numbers?

1 MR. TRINGALI: I don't agree with those numbers.
2 And part of the problem, Your Honor, is that in terms of
3 trying to define, first of all, we have an issue with DMA in
4 terms of how their sales are accounted for. And what he's
5 also done, the DMA, Dr. Israel, is he backed out anything that
6 was chain again artificial, you know --

7 THE COURT: Well, it's artificial in some sense,
8 Mr. Tringali. I mean, look, there's been witness after
9 witness after witness that have said systems is different.
10 One of the ways systems is different is that they've got
11 proprietary products that they distribute. McDonald's has
12 special containers, special beef patties, I suspect. Same
13 with Wendy's. And so if those aren't in broadline, and I
14 understand that there are some customers that have switched,
15 but by and large there seems to be industry recognition that
16 things like chain, fast food chain restaurants, those are
17 largely systems customers. Do you disagree with that?

18 MR. TRINGALI: I do disagree with that, Your Honor
19 because they're mixed, and that's the fundamental problem with
20 the FTC --

21 THE COURT: Well, other than Five Guys, who else
22 would you --

23 MR. TRINGALI: Oh, there are numerous examples,
24 Your Honor, IHOPs, Applebee's, there are numerous examples
25 where they are using hybrid, where they're using both systems,

1 and they're using specialty. Sorry, systems and broadliners.
2 That is a consistent phenomenon. It is also a consistent
3 phenomenon -- you heard Mr. Lynch testify about Crystal, which
4 is moving to a systems distributor from us. Five Guys is the
5 other example, obviously, but there are numerous examples of
6 restaurants who have split their business.

7 And, Your Honor, if they were not being included in
8 the market, in the national broadline customer market, these
9 chain restaurants, then you're absolutely correct, we should
10 think of systems as different, but the fact is that they're
11 being counted in our share, every single dollar is being
12 included in the numerator. So you can't have this
13 distinction, Your Honor, and say, well, systems distributors
14 are primarily servicing chain restaurants so we're going to
15 put them to the side, but then say chain restaurants are in
16 the market.

17 THE COURT: Well, let's move away from restaurants
18 because I hear you and I agree that restaurants are on a
19 spectrum, if you will. There are certainly restaurants that
20 can -- that are on the border between systems and broadline,
21 and the math is probably not as accurate as it ought to be on
22 them. But look, there are a number of other types of
23 customers for whom broadline is the primary, if not exclusive,
24 method of delivery, okay. And this is some of the numbers
25 Mr. Weissman put up earlier.

1 The largest healthcare GPOs, the smallest of them,
2 two-thirds buy from Sysco, US Foods. Hospitality GPO, over
3 60 percent. Hotel management companies, over 60 percent.
4 Food management services companies, over 80 percent. Large
5 government buyers, over 75 percent.

6 I understand that you dispute Dr. Israel's
7 methodology, but don't those percentages suggest that these
8 two defendants have at least 60 percent of the national
9 customer market of those who need true national distribution?

10 MR. TRINGALI: But, Your Honor, that's the problem
11 here. That is not the market that's being defined by the FTC.
12 The market is not --

13 THE COURT: It's a portion of their market.

14 MR. TRINGALI: It's a portion of their market, but
15 that's not the market. They could have alleged and brought
16 before you a case of that -- the market you have just
17 described, but the market that they have brought before you is
18 national broadline customers, which Dr. Israel and the FTC
19 means any customer that is classified as national or CMU by
20 Sysco, that means in our case we had 50 -- 25 percent of those
21 customers are serviced by one or two distribution centers.

22 THE COURT: So what if I agree with you that that
23 is ill-conceived, it's ill-defined. But for the numbers I
24 just mentioned, that's pretty well-defined. I mean, these are
25 substantial companies. We all can agree that they're

1 companies that probably use upwards of 24 distribution centers
2 and their numbers are all north of 60 percent. Why isn't that
3 a fair estimate of the national customer market, or at least
4 an estimate that corroborates Dr. Israel's numbers, because
5 his low end is 60 percent.

6 MR. TRINGALI: Because, Your Honor, that is not the
7 market. And that is a fundamental flaw in this case for the
8 FTC. You can't -- you cannot, if they wanted to bring a
9 market that is that market, then that would have been what
10 they could have alleged, that's what the market would have
11 been that the expert would have testified to, our experts
12 would have testified to, and we'd be before you. They cannot
13 now segregate out a piece of the market for the first time
14 at -- in closing or in their findings of the facts, and now
15 say to you that's the market, this is the portion of the
16 market and these are the customers we want you to concentrate
17 on. They chose to include all the national CMU customers.

18 THE COURT: Again, and I agree with you, they can't
19 now ask me to find a different market or a submarket as to any
20 particular segment here. But doesn't this -- don't those
21 numbers corroborate, again, Dr. Israel, whatever you think of
22 what he did, the bottom number is around 60 percent. These
23 companies are a substantial percentage of your -- the two
24 defendants' national customers. Why don't those numbers
25 corroborate the 60 percent number that Dr. Israel has come up

1 with?

2 MR. TRINGALI: Because it's left out everything
3 else. If you're talking about --

4 THE COURT: So is everything else -- the shares are
5 so much lower that they would bring it under 60 percent?

6 MR. TRINGALI: Yes, Your Honor. Because the
7 national restaurants, for example, is something where I'm
8 going to show you a win/loss chart for DMA, and you're going
9 to see how much business DMA has taken. I will show you
10 documents, you know, you saw selected documents, around nine
11 million documents, showing competition between Sysco and USF.

12 I will show you examples of competition with PFG,
13 with Gordon, with DMA, with Reinhart. We are losing business
14 to these people. You heard of the recent losses for both USF
15 and Sysco, it wasn't to each other.

16 And I think if you turn to the -- let me just, you
17 know, the final comment on the size of the national market is,
18 it really -- Mr. Lynch went through each category, Your Honor,
19 so it wasn't just -- and the market is much larger than that,
20 and Dr. Israel presumably did not listen -- didn't read
21 Dr. Lynch's -- Mr. Lynch's testimony, he had no response to it
22 whatsoever. Nor did he have any response on the local side,
23 which -- and we can get to that later because I do want to
24 address the local market shares.

25 But I think it's important, if you turn to the RFP

1 database, and this is page -- I'm not sure what page, but it's
2 the first of the RFP. This is where you're going to see the
3 problem in terms of market shares, which is that he is very
4 clear that he left out, he excluded systems customers and
5 regional customers.

6 The problem is -- so he excludes that from his RFP
7 database, okay, that's the basis for which he concludes what
8 the shares are. But systems customers, and he defines, by the
9 way, in the next page, he defines systems customers in his
10 definition where the incumbent was a systems provider or where
11 the RFP proposal included either an all systems option or a
12 hybrid systems broadliner option.

13 So he excludes that, both systems, someone who was
14 using some systems or could be using some systems, even if
15 USF, for example, is competing for that business. Okay. So
16 that is going to automatically increase the share. You
17 mentioned that on the local side, it's definitely doing this
18 on the national side. You automatically increase the share
19 for USF and Sysco if you exclude all the times we've lost or
20 are losing business or bidding against systems distributors,
21 and then he excludes regional distributors.

22 But you've already seen, Your Honor, that we
23 don't -- we have national customers that are not even
24 regional, they're in one state or one distribution center, so
25 why does he exclude them? You can't have a national customer

1 base that you know nothing about. And he's very clear, Your
2 Honor asked him that question, and he said: I just took the
3 list, I have no idea what the characteristics are. And then
4 say: But now when I do my RFP database, I'm going to exclude
5 regional, I'm going to exclude anybody who could use systems.
6 That makes absolutely no sense, Your Honor.

7 And then also from, in terms of market share, I
8 mean, argues in the RFP database, as it means for market
9 share, he excludes any time anybody else is bidding. He's
10 only looking at when USF and Sysco bid against each other.

11 THE COURT: What about -- I mean, one of the things
12 he does, and I -- the other thing he does, as he would say, to
13 verify the numbers he came up with involve, in which he had to
14 use the RFP numbers, in which he used the RFP numbers, is to
15 rely on the CID data. He got broadline numbers from the top
16 16 broadline distributors, and he included that, that was his
17 denominator; right?

18 And based on that he still comes up with, again, I
19 think his most conservative number was 60 percent. So what's
20 the problem with that? I understand he didn't include every
21 broadliner, but he used the top 16, which is probably around
22 85 to 88 percent of the total broadline sales revenue in the
23 country.

24 MR. TRINGALI: The problem with that, Your Honor,
25 is how do they define national sales?

1 THE COURT: Well, they didn't. But he accounts for
2 that; right? The last thing he did, he said, is, look, my
3 most conservative number, the 60 percent number, assumes that
4 each of the other 14 broadliners have a ratio of national to
5 local sales as the defendants. And that's probably not right,
6 given that those who are much further down the list don't have
7 the same ratio as US Foods and Sysco. But given -- but leave
8 that aside for a moment, that's what he did. That's how he
9 came up with that 60 percent number.

10 MR. TRINGALI: But what he does, Your Honor, is the
11 definition of a national sales customer, even giving him the
12 benefit of what he did, you have no idea how those other
13 entities are classifying their customers; number one. And,
14 number two, you have what no -- what he could have done, what
15 the FTC could have done is gone out to customers and try to
16 construct the denominator, they didn't do that.

17 The other way the FTC could have done it is to try
18 to get all data in terms of who the customers were and
19 determine whether those types of customers -- from the
20 distributors. And find out whether those customers are
21 customers who had multiple locations, for example. None of
22 that was done. So he didn't have customer data, and he -- so
23 all they had was the aggregate number. He did not have the
24 customer breakdown from the customers.

25 The other thing -- so that's number one in terms of

1 what he didn't have.

2 The other thing, though, is when you look at his
3 RFP database, which is the basis for the market shares and
4 then becomes the basis for his harm and the basis for his
5 SSNIP test, he excludes, not just bids where neither of us
6 participant, but look at the DMA, and this is confidential,
7 the DMA win/loss chart.

8 On the top half of this page are bids, RFPs, where
9 DMA bid and won. You'll see numerous examples where Sysco or
10 USF was the incumbent. Every one that is highlighted was not
11 included in Dr. Israel's RFP database.

12 On the bottom half are RFPs, again, where DMA bid,
13 Sysco and USF are sometimes the incumbent, and it stays with
14 the incumbent. None of -- every one that's highlighted was
15 not included.

16 Then you've heard so much about Spec 16, and you've
17 heard all the reasons why Spec 16 is unreliable. But I think
18 one of the things you probably have not heard yet is how much
19 of the Spec 16 RFP responses are not included in Dr. Israel's
20 RFP database. In the case of USF, he excluded 60 percent of
21 the bids that we put in our RFP database. And that's DX 1882,
22 Your Honor.

23 In the case of Sysco, he excludes nearly
24 50 percent, and that's DX 1945.

25 THE COURT: And what's the reason for that? Is

1 that because he assumed these are systems bids or because --

2 MR. TRINGALI: I think mostly because -- they're
3 not systems bids, but I think other systems people are bidding
4 as well. So when he has other bidders, when we list other
5 bidders, we mention a systems person, even though they're
6 other broadliners, so that's why he excludes it, even though
7 it's all included in his numerator.

8 THE COURT: Mr. Tringali, I think your time is
9 drawing near, I'm not exactly sure where we are, but I know
10 you wanted to talk about local numbers.

11 MR. TRINGALI: Yes, let's go -- yep, the local
12 market shares, Your Honor, I want to make something -- first
13 of all --

14 THE COURT: Before we go, let me just ask you the
15 question, the same question I asked of Mr. Weissman, and that
16 is: How it is or what number you contend Dr. Israel put in
17 his denominator for the local numbers for the local market
18 shares. It wasn't clear to me whether he included the
19 entire -- maybe Mr. Weissman can clear this up -- whether he
20 included all of the competitor revenue that fell within the
21 draw area or just the competitor revenue. The percentage of
22 it that would correlate with the particular radius that the
23 75 percent draw area corresponded to. Does that make sense?

24 MR. TRINGALI: It makes sense, Your Honor. I think
25 Mr. Weissman did not clear it up for you because the

1 fundamental problem with Dr. Israel, what he did was he
2 excluded the revenue. Let's go to the Omaha map. He excluded
3 all sales he had available to him, which is what Dr. Bresnahan
4 used. Zip code information from various broadline
5 distributors. So in Omaha, for example, he had zip code
6 information for Cash-Wa. So he knew exactly where Cash-Wa was
7 making sales, he had that available to him. He didn't use it,
8 but he had it available to him.

9 But instead what he did was draw his little
10 circles, okay, and because Cash-Wa's facility is outside of
11 where his circles overlap, he then, if you go to the next
12 slide, only includes the green revenue of Cash-Wa and excludes
13 all the orange revenue of Cash-Wa in Omaha. That is not just
14 us saying something is theoretical, that's based on actual zip
15 code sales of Cash-Wa in Omaha. And you'll remember
16 Dr. Israel -- I'm sorry, Dr. Bresnahan made the point that
17 that's something like \$38 million worth of sales.

18 The FTC's response to Dr. Israel on --
19 Dr. Bresnahan on cross-examination was: But doesn't Cash-Wa
20 also sell cigarettes? First of all, I'd submit that's an
21 awful lot of cigarettes to be selling in Omaha. But more
22 importantly, Your Honor, you will see lots of evidence that we
23 have here for you, both from Israel that Cash-Wa is a
24 broadliner, as well as from three customers in Omaha.

25 THE COURT: So let me ask you the following,

1 Mr. Tringali. Well, would you agree there is, I think, a
2 US Foods document, maybe it's a Sysco document -- it's a
3 US Foods slide deck, that does an analysis, this is PX 3118,
4 that does an analysis of where US Foods thinks it is in a
5 whole host of different local markets. That slide deck, for a
6 number of markets that are at issue here, identifies US Foods
7 and Sysco as one and two, particularly in the four key markets
8 that have been the focus of the FTC's case.

9 Why doesn't a slide deck like that, an ordinary
10 slide deck kept in the ordinary course, while the numbers may
11 be off for Dr. Israel for the very reasons that you've talked
12 about -- in fact, the idea that, for example, in San Diego
13 these two companies have a hundred percent is sort of hard to
14 fathom. But why doesn't that kind of ordinary course
15 document, at a minimum, tell us that Dr. Israel is at least
16 right in terms of his market concentration showing that these
17 two companies are one and two in those local markets?

18 MR. TRINGALI: Because you also have an ordinary
19 course document that we showed with Mr. Schreiberman where the
20 company is trying to compute its actual market share in every
21 market. And the market -- those are -- that is computing
22 actual market shares, and those market shares are
23 dramatically, dramatically lower, Your Honor.

24 THE COURT: Which document is that? You can ask
25 somebody to pass up the note. You don't need to answer it

1 right now.

2 MR. TRINGALI: Okay. But that's the point, is that
3 we had that the -- that's when Mr. Schreibman did the
4 difference between the market penetration numbers --

5 THE COURT: Yes.

6 MR. TRINGALI: -- that he had used versus what the
7 actual market share estimates were, and we had that document
8 that, rather than looking at 300 restaurants on a sample size,
9 looked at 7,000 restaurants, for example, in Columbia, South
10 Carolina. So the --

11 THE COURT: But was that just based on restaurants
12 or did it include all --

13 MR. TRINGALI: That was independent restaurants,
14 Your Honor, just to get local market shares.

15 THE COURT: Okay. So that would exclude
16 non-restaurants that are served locally, and then, of course,
17 Dr. Israel would have excluded the national sales from the
18 local share revenues anyway.

19 MR. TRINGALI: Right. Exactly. Exactly, Your
20 Honor.

21 THE COURT: Okay.

22 MR. TRINGALI: And let me just conclude, Your
23 Honor, with my favorite -- we'll go to the last slide, because
24 I think this gets to your issue about regionalization.
25 Regionalization --

1 THE COURT: It's not my issue.

2 MR. TRINGALI: Sorry?

3 THE COURT: It's not my issue.

4 MR. TRINGALI: Your question. Your question, Your
5 Honor. Regionalization does occur, is occurring, and is --
6 and is not a hypothetical in response to a price increase. If
7 you look at -- let's go to the last slide.

8 If you look at restaurants, and you can add several
9 restaurants here, if you look at hospitality, and you could
10 add Best Western and Choice. If you look at healthcare GPOs,
11 which has been so much of the focus, you could add in addition
12 to MedAssets, you have HPSI, you have Amerinet, you have
13 Navigator. All of -- and the DLA, Sodexo, you could add
14 Compass. All of those do not meet these requirements of this
15 national market that you're talking about and the FTC is now
16 talking about that had these unique customer requirements.

17 And that, Your Honor, I continue to say is the
18 fundamental issue in this case, and that's the reason why
19 there's not harm to customers because customers have options.
20 Options that they are already using. You saw what Premier is
21 already doing. And you remember from Mr. Lynch's testimony
22 that Premier extended that strategy of carving out only
23 intrastate customers, it would be 40 to 50 percent of
24 Premier's business. That should tell you what can be done by
25 a customer. It doesn't have to be, as Your Honor already

1 noted, everything in terms of specialty, everything in terms
2 of systems, it can be just enough to cause a price increase to
3 be defeated.

4 Thank you.

5 THE COURT: Thank you, Mr. Tringali.

6 Mr. Weissman?

7 MR. WEISSMAN: Thank you, Your Honor. Let me start
8 where Mr. Tringali ended with his chart here. And let -- we
9 prepared our own chart that looks very similar, but adds a
10 row. And this is Slide 78 of our -- I think we should
11 probably turn this off to the public.

12 And the fundamental issue that Mr. Tringali and the
13 defendants cannot get around is there is something about these
14 two companies, it's a combination of things that gives rise to
15 those sales levels even for those customers that he's able to
16 identify that do some regionalization. It could be that for
17 80 percent of the business the company in the middle really
18 likes a single broadliner contact. It could be that they like
19 having single pricing for their nationwide members throughout
20 the U.S. Or if you look at DLA's number here, second to the
21 right, another customer.

22 Sysco and US Foods dominate that business. Sodexo,
23 again, their poster child for regionalization. They put in a
24 declaration that complained about the deal. You have their
25 deposition. They explained why these two companies are too

1 close competitors. Look at the percentage that they are
2 buying from these two companies, so that's a fundamental
3 point, even if you adopt this regionalization option as a
4 notion, this is a fundamental fact that the defendants cannot
5 get around.

6 Now, let me -- and I know you want to probably take
7 a break, so let me just address two or three points. Mr.
8 Tringali put up a slide of RFPs that weren't included in
9 Dr. Israel's analysis. Those were RFPs where there hadn't
10 been a winner yet. So there wasn't the ability to identify
11 the winner in part of those analyses, so it wouldn't be right
12 to do that.

13 The other thing is and, Your Honor, Mr. Tringali
14 talked about --

15 THE COURT: What do you make of his argument,
16 Mr. Weissman, that there's not a fair comparison here, at
17 least as it relates to restaurant customers.

18 MR. WEISSMAN: Uh-huh.

19 THE COURT: You know, I assume that at the time the
20 shared calculations were done a restaurant like Five Guys was
21 included in the numerator. But all systems distributors are
22 excluded from the denominator. And so you're including
23 certain out of market numbers in the numerator, but out of the
24 denominator and that unfairly biases the market concentration
25 numbers against the defendants.

1 MR. WEISSMAN: And that's why Dr. Israel pressure
2 tested this in two ways. One is the one Your Honor pointed
3 out. He assigned ratios that included, I think this -- I'm
4 not sure which methodology it was.

5 THE COURT: This is at Roman X-6, I think, where --

6 MR. WEISSMAN: Yeah, where he actually controlled
7 for that. The other thing that Dr. Israel did is in order to
8 pressure check his numbers he actually did a number, and this
9 is Footnote 197 of Dr. Israel's report, when he removed quick
10 service restaurants from the national market, and you even get
11 a higher market share there. I think it's upward of 70
12 percent, even with the divestiture.

13 So he controlled for that in a number of ways, and
14 what he's calculating here are broadline sales to national
15 customers. If that sale to a systems customer came out of a
16 broadline, that was included in the market because that's a
17 broadline sale. And that's the way you do it under the merger
18 guidelines and under the case law.

19 Thank you.

20 THE COURT: All right. Thank you.

21 All right, it's -- let's see, why don't we
22 reconvene at 20 after and we'll do the final leg of our
23 argument this afternoon. Thank you everyone.

24 THE DEPUTY CLERK: All rise.

25 BRIEF RECESS AT 4:07 P.M.

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AFTER RECESS

THE COURT: Mr. Parker, I understand you want to lead off here.

MR. PARKER: I'm always ready to lead off.

And I'll reserve three minutes at the end.

Your Honor, I want to talk about a couple of points that I think are important here. Entry, I want to talk about PFG, and I want to talk about the cost savings.

Please turn, if you would, to Slide 1389 in the booklet that we provided, please.

Your Honor, these markets are not static. They are dynamic. And you'll see in -- since 2012, the number of new distribution centers and new entrants into various markets that have been added. And what happens in this industry is that, we aren't making this up, that somebody in Minnesota decides they want to go to Iowa so they put a salesperson in Des Moines, Iowa, get a little business going, get sufficient business going, and then build from there. That's the way they do it. And you've heard Mr. Holm say his biggest salesperson out of the Denver office is in Albuquerque.

Turn to the next slide, if you would, please. Late breaking news, Reinhart is building a new distribution center in -- down by Manassas in Prince William County to serve presumably the District of Columbia and beyond, which is a problem market for them.

1 Another problem market is southern California, and
2 we have another new distribution center being built there by a
3 company called Jacmar, which is a southern California -- which
4 is a southern California company. So these markets do not
5 stay static, they move. People move around. There's business
6 out there and these customers go out -- excuse me, these
7 competitors go after it.

8 Finally, I don't -- there's all kinds of ways to
9 grow. I have it in slide 142. Maines, for example, was
10 selling candy to grocers, ended up being broadline. Shamrock
11 started a dairy distributor. You heard the story about my
12 favorite duck delivery in Oregon as well. Fold-out, that's
13 what I said, where they put a salesperson somewhere, get a
14 little momentum going, and then build a center. Gordon is
15 doing that in four distribution centers in the last several
16 years.

17 And, finally, there's growth by acquisition where
18 you see a company like Gordon making an acquisition in Texas
19 in order to reserve the Culver business. So I'm simply saying
20 that these markets are dynamic and they change.

21 THE COURT: Let me ask, Mr. Parker, would you agree
22 that if, starting with the assumption that there's a national
23 customer market, if there is such a thing, would you agree
24 that the barriers to entry would be greater for that
25 particular market segment than they would be for broadline in

1 general?

2 MR. PARKER: I would say if somebody wanted to do
3 what PFG is now doing, which is what I'm about to talk about,
4 and develop a nationwide footprint, that would take -- that
5 would take some time or would take an incredible opportunity
6 like what happened here. But since it's our view and my
7 opinion that anybody can participate and serve national
8 customers, the answer to the question is no.

9 But if you got two distribution centers and you
10 need 20, it's going to take longer. But what I'm suggesting
11 is, what I'm suggesting is, however, that if you got two
12 distribution centers or three, that doesn't mean you're not
13 somebody who can be used by a national customer.

14 THE COURT: All right.

15 MR. PARKER: All right. I think it's very
16 important, Your Honor, we have -- Mr. Weissman talked about
17 all those percentages of business that we have, and I suggest
18 that we have it because we're very good. I'm very proud of my
19 clients, that's a good company, and we have that now. But
20 these customers are carving out a little bit, 20 percent or
21 whatever it is, I don't have Steve's chart in front of me.
22 And they've already developed the infrastructure to
23 regionalize. They already have -- they have it.

24 And so in the event that we have the temerity to do
25 something we shouldn't do post-merger, I think it's pretty

1 easy for them to regionalize more. They already started.
2 They use us for 70 or all those big numbers because we're
3 good, we're very good, and we intend to get better, but
4 they've got something in reserve. They're holding it back,
5 and they're ready to go, and that's what we're saying.

6 All right. PFG. We were talking the other time,
7 you were asking questions about wouldn't they rather have two
8 nationals than just us. You recall that exchange. And I did
9 not mention PFG because I'm going to mention it now. And, of
10 course, we have to keep in mind that PFG will be present.
11 That this transaction -- that there will be no Sysco/US Foods
12 combination without the divestiture of the assets, it's all
13 tied together contractually.

14 So let's look at PFG on Slide 143. And you will
15 see a substantial company, but you also have to realize that
16 the testimony is that they are growing at 14 percent a year
17 with this footprint, and the industry isn't doing nearly as
18 well. Mr. Holm, I don't disagree -- I disagree with his views
19 of the market, but I'm in awe of the work that he's doing. We
20 picked a very, very good company to -- as a divestiture
21 partner here because they are very good, they're astonishingly
22 competitive.

23 Behind them, of course, is Blackstone, which is --
24 what do you say about Blackstone, they're one of the biggest
25 private equity companies in the world. And you will see the

1 result of them putting \$895 million on the table. You will
2 see where they're going to be right after the closure, and
3 this all of a sudden becomes a much bigger company. And to
4 the extent that somebody wants a sole source, these people are
5 credible.

6 THE COURT: Let me, if I may, Mr. Parker, ask
7 you -- raise a few issues which you think are the FTC's
8 primary points here.

9 MR. PARKER: Sure.

10 THE COURT: One is, even under PFG's own
11 projections, and I won't mention the number.

12 MR. PARKER: Yeah.

13 THE COURT: But even under their own projections,
14 in five years they will have still a smaller national market
15 share, or a market share. I don't remember whether it's
16 national or for all broadline, that is a fraction of what US
17 Foods is today. Why is that not demonstrative of the fact
18 that US Foods -- excuse me, that PFG can't simply slide into
19 the number two slot even if everything goes right?

20 MR. PARKER: Your Honor, they can slide in because
21 they can bid on the first day, and what they really need to do
22 is provide a competitive bid, and they can do that. If the
23 merger closes next Monday, they can bid for any contract on
24 Tuesday. And putting in a bid maintains the competitive
25 intensity. Maintains the competitive intensity. And they --

1 that business plan, the testimony was that's a conservative
2 business plan, and I believe that -- I know the testimony is
3 Mr. Holm will be typing a résumé, if that's all that he does.
4 He intends to do a lot better than that, and he's properly
5 incentivized, I'm sure, to do exactly that.

6 THE COURT: In fairness to Mr. Holm and his
7 company, I have no reason to dispute that they could bid on
8 day one. I think the question, though, is could they
9 competitively bid on day one. And the FTC has identified
10 certain disadvantages, what they would say are competitive
11 disadvantages. I'm curious to hear your response.

12 Fewer distribution centers, fewer SKUs, their
13 private label products, I believe are fewer than US Foods or
14 the combined company would be. They would be in part
15 dependent upon the merged entity for a substantial or a
16 substantial portion of its business in the new distribution
17 centers.

18 Why do those combination of factors -- and one
19 other that Dr. Israel mentioned is longer driving distance.
20 He claims that's a competitive disadvantage. Why is that
21 going to enable them to be competitively bidding on day one?

22 MR. PARKER: Well, let's turn to Slide 1. And this
23 is private, by the way. This is definitely private.
24 Slide 145. And that is we have a market test of what it takes
25 to competitively bid on day one. And you'll see the

1 distribution centers that PFG is going to have on day one, and
2 you'll see the other two bids who say they can bid with the
3 numbers of distribution centers there. That is a market test
4 as to what it takes to be able to bid and to bid seriously on
5 day one right there. It's a market test.

6 Number two, on driving -- well, let's look at this.
7 Slide 146. After the fold-outs you'll see -- after the other
8 \$500 million that -- half a billion dollars that Blackstone's
9 also put up, they will have that many distribution centers set
10 forth on 146. That is quite a better -- quite a good
11 footprint.

12 And then, finally, I want to turn to an -- I think
13 what's a very good point here is on 149. I think there's a
14 trend in the United States that customers prefer fewer DCs. I
15 talked about an hour ago about Five Guys going from 34 to 17.
16 And here we have a client, a customer of PFG's, Zaxby's, which
17 is a Chick-fil-A type restaurant down south. And you will see
18 here that because of inbound efficiencies, because they can be
19 so more efficient because they're bringing in more product,
20 they're able to drive from south Georgia, Cairo, Georgia, all
21 the way down to Florida bypassing other points.

22 So I don't think, I don't think that the distances
23 are anything like what Mr. Weissman is talking about in terms
24 of imperiling their ability to compete.

25 THE COURT: So, Mr. Parker, let me ask you the

1 following. If there has been a trend in the industry of
2 customers seeking fewer distribution centers to service them,
3 has US Foods or Sysco sought to sell any of its distribution
4 centers?

5 MR. PARKER: I'm sorry.

6 THE COURT: Has US Foods or Sysco sought to sell
7 any of its distribution centers or close them in order to
8 become more efficient and service from fewer distribution
9 centers.

10 MR. PARKER: Not that I'm aware of. I'm not aware
11 of them closing, because I believe we're operating those
12 distribution centers today in a general sense efficiently.
13 Somebody here will tell me if I'm wrong, but I don't
14 believe --

15 THE COURT: I guess the question then is, look, I'm
16 not a businessman, I'm a judge who's trying to make a decision
17 here. Shouldn't I infer from the fact that US Foods and Sysco
18 have not, prior to this merger, closed distribution centers
19 infer that having more distribution centers still matters in
20 this industry?

21 MR. PARKER: You know, it does matter in this
22 industry, but it matters for -- it matters for revenue. It
23 doesn't matter, it doesn't matter for national coverage at
24 all. And let me make that point. Safeway, I just shopped at
25 Safeway out in Maryland, and Safeway has 422 stores in

1 California, not because they need that footprint to get my
2 business, but because they get more revenues that way. And
3 that's what Mr. DeLaney said. He is buying a business here.
4 He's buying revenues. He's buying customers. He's buying
5 profits. He's buying the ability to -- to reduce costs. He
6 is not buying distributions centers.

7 And the question here is, is whether -- we have
8 more distribution centers than we have hot and cold running
9 distribution centers, there's no question after this merger,
10 no question. But that's -- that doesn't mean that all those
11 are necessary to bid, and that doesn't mean that we're buying
12 these in order to be able to bid on contracts we can't -- now,
13 we already can bid on any contract. We're buying a business.
14 We're not buying more distribution centers, Your Honor, so I
15 don't think you can raise that inference at all.

16 I was about to blurt it out.

17 THE COURT: Either that or what you already said
18 was what you --

19 MR. PARKER: All right. It turns out that USF has
20 closed Oklahoma and Lakeland, Florida so apparently there has
21 been some -- some diminution.

22 THE COURT: Okay.

23 MR. PARKER: So I think this Zaxby thing is very
24 important. And then in terms of the aggressiveness of this
25 company. Turn, if you would, to 148, and let's not put this

1 on the public record here. You know, George Holm got his task
2 force together to do this expansion before he even had an
3 offer on the table for the -- for these acquisition -- I mean,
4 for these centers. He spent a lot of time talking to
5 customers, saying, if I get these distribution centers, this
6 is what I want to do. And he has no commitments, I'm not
7 suggesting that. But he's already been out schmoozing these
8 customers, and he has at least expressions of interest.

9 This is a very, very aggressive person. And so I
10 think when your question is: Wouldn't they prefer two rather
11 than regionalizing? I don't think it's that difficult for
12 them to regionalize, and they certainly haven't made the case
13 that it is. But, more importantly, Your Honor, we went the
14 extra mile, we tried to settle this case. We tried to settle
15 this case. We went the extra mile, and we're doing a big
16 divestiture, \$895 million worth of assets, and there is going
17 to be another, quote/unquote, nationwide footprint out there.

18 THE COURT: Two questions: What am I supposed to
19 take from the fact that PFG's internal projections sought more
20 distribution centers than they received? That's question one.

21 Question two is, as I understand it, a number of
22 these large customers, in fact, the largest of the customers
23 have contracts that require them to consent to a new
24 distributor. If they don't consent or if they consent
25 initially and are dissatisfied, what are their competitive

1 options at that point?

2 MR. PARKER: All right. In answer to your first
3 question, in answer to your first question, the -- well, let's
4 talk about the consent. I believe that Mr. Holm believes,
5 based on his early, early -- early returns that he is going to
6 get the consents. But if they don't get the consents, then
7 their options would be like anybody else's options would be,
8 would be to get a bid from Sysco and to get a bid on a
9 regional basis. That would be their options.

10 THE COURT: Okay.

11 MR. PARKER: That would be their option.

12 Now, let's go back to the question. Your Honor, if
13 you want, you know, these people, it is well-known in the
14 world that when there is a divestiture it is a fire sale. An
15 antitrust divestiture equals fire sale. And the prices that
16 Mr. Holm was able to negotiate are very, very good. And he's
17 got 11, and he started at 19, of course, you start at 19.
18 Would we rather have 19 than 11. Absolutely. Would you
19 rather have 13 than 11? Absolutely. But what does he need?
20 And I'm suggesting he has what he needs. He's going to have
21 35 distribution centers, and he's going to build out four
22 more. He's going to end up with 42. You've got a billion and
23 a half dollars on there, there's no question where the money
24 is coming from, and there's no question about the pressure to
25 succeed here. You don't last long with Blackstone if you

1 don't succeed, and Mr. Holm is very confident he can succeed.

2 And so we have, we -- if Your Honor has any
3 discomfort of this merger at all, I don't think you should.

4 There has been a failure of proof on the elements of this
5 offense or the elements of this -- this law violation, a
6 failure of proof. If you have any doubt on anything, if you
7 think that anybody is going to get hurt, PFG is out there.

8 It's out there as a backstop. We don't think it's necessary,
9 but it's out there as a backstop.

10 A couple of minutes on -- a couple minutes on cost,
11 cost savings. I've been doing this for a long time, and I
12 have never seen somebody -- I'm sorry, turn to Slide 150.

13 There you will see this was the first document that the folks
14 at USF gave us. And this is not something where we say, let's
15 go take out a -- that's what I was saying earlier. They came
16 to us, and what did show us? Right here, significant
17 synergies appear to exist. And so that's the start of the
18 story.

19 This is the outgrowth of competitive pressure to
20 reduce cost. What happened next is that we put together an
21 internal task force and came up with a board of presentation
22 in November, which is the next slide. And it talks about --

23 THE COURT: I'm going to interrupt you, Mr. Parker.
24 I don't know -- and I'll ask Mr. Weissman this question, but I
25 don't believe there's any evidence to demonstrate that

1 McKinsey's estimation of annual synergies is incorrect. The
2 question really is: Are they merger specific?

3 MR. PARKER: Right.

4 THE COURT: And what Dr. Israel says is, look, even
5 if you take the full McKinsey efficiencies, and I don't know
6 whether I can say the number or not, but it's --

7 MR. PARKER: Go ahead.

8 THE COURT: -- seven figures. That is still only
9 one percent of the total revenues of the new company. And if
10 the company were to even raise the price by, say, 1.1 percent,
11 that would outstrip the efficiencies. What's your response to
12 that critique?

13 MR. PARKER: I'm sorry, Dr. Israel said -- I'm
14 sorry, Your Honor.

15 THE COURT: Maybe I'm getting it wrong. My
16 understanding of what he said was, look, the efficiencies even
17 estimated by McKinsey are only one percent of the revenue of
18 the combined company.

19 MR. PARKER: I think that's correct.

20 THE COURT: And so even if price were to go up by
21 say one and a half percent or 1.1 percent because the
22 efficiencies, even if they were all passed through to the
23 customers, that's only a percent savings because of the
24 merger. And that's assuming all of it is merger specific.
25 All it would take is a 1.1 percent price increase to offset

1 the efficiencies. What's the response to that?

2 MR. PARKER: The response to that is is that the
3 market won't allow it. The market won't allow a 1.1 percent
4 or any price increase. This is all about -- this is all about
5 taking cost out and bringing prices down. We not only have
6 calculated the synergy, we've been selling them to our
7 customers. So turn, if you would, to Page 153, and you'll see
8 what Subway's response is. Yeah, Mr. DeLaney and others have
9 been to see me, they've been to see me, and they told me about
10 it, and I expect to share in it. That is not consistent with
11 a 1.1 percent or any other percent price increase. I don't
12 believe the market will allow any price increase here when
13 what it will demand is further price decrease.

14 THE COURT: Dr. Hausman's final merger specific
15 number was slightly south of half a billion dollars.

16 MR. PARKER: Yes, it was.

17 THE COURT: What did he do to get to that number?

18 MR. PARKER: He looked at -- he looked at --

19 THE COURT: In other words -- I'm sorry. Did he do
20 anything independent of what McKinsey did?

21 MR. PARKER: In terms of -- no, no, he took the
22 McKinsey numbers as a given, McKinsey, we had a task force
23 that spent months and months.

24 THE COURT: Right. No, I know. And that's an
25 impressive group that came up with these numbers.

1 MR. PARKER: Very impressive. He took that, and he
2 looked at it from an economic point of view as to what are
3 likely to be variable costs that going to be passed through
4 and what are likely to be merger specific, and that's how he
5 came up with, he did not tinker with the number, didn't look
6 at it at all. He was looking at it the way a Ph.D economist
7 looks at it to determine passthrough, to determine merger
8 specificity and to determine what's variable and what's --

9 THE COURT: So what did he do to make that
10 determination? I understand he took McKinsey's numbers, but
11 if you've got merger specific, non-merger specific, what did
12 he do to put some numbers in this box and some numbers in the
13 other box?

14 MR. PARKER: He looked at each category and he
15 looked at what could be achieved with the merger and without
16 the merger and came up with those assumptions. He made an
17 independent evaluation of the numbers, he didn't recalculate
18 the numbers. And I think he made a conservative approach.

19 I think he also said that the -- under a half a
20 billion or merger specific were variable costs, but he has a
21 higher number that are fixed costs and over time will be
22 passed along, substantially passed along to customers.

23 THE COURT: All right. Mr. Parker, I'm going to
24 give you a few minutes for rebuttal. And, Mr. Weissman, I
25 turn the lecturn to you.

1 MR. WEISSMAN: Thank you, Your Honor.

2 I want to come back to PFG and efficiencies, but
3 before I go to entry, which is where Mr. Parker started, I do
4 want to note that the record is clear that the fact that
5 Blackstone is investing doesn't say anything about the ability
6 of PFG to become a national competitor that replaces the
7 competition lost from the loss of US Foods.

8 The testimony was clear, even Dr. Hausman admitted
9 that the sensitivity analysis run showed that this was a
10 really good investment for Blackstone under any circumstance,
11 even if the sales continued to decline. It had an ROI return
12 on investment that was higher than going into an I.P.O., which
13 is what Mr. Holm testified they were going to do. So -- and
14 Mr. Parker said they got this at a really, really good fire
15 sale price. That's true. And that more than makes the point
16 that the fact that Blackstone invested in this doesn't say
17 anything about the ability to replace competition lost by
18 US Foods, and that's really the key question here, that the --
19 and it's their burden to meet, they need to show it's timely,
20 likely, and sufficient to offset the competitive harm here.

21 THE COURT: Does that burden shift to them only if
22 you get the presumption or does the case law say they carry
23 that burden regardless of whether the presumption -- you get
24 the presumption or not?

25 MR. WEISSMAN: If we show -- if we have a

1 presumption, concentration presumption, it definitely shifts.

2 THE COURT: Right.

3 MR. WEISSMAN: If you find we have a presumption
4 based upon something other than shares, as the Court in *Whole*
5 *Foods* --

6 THE COURT: Well, say I find no presumption, does
7 the burden still rest on them? The ultimate burden of
8 persuasion is on you.

9 MR. WEISSMAN: I don't -- I'm not sure there's been
10 a case that has addressed that issue.

11 THE COURT: Okay.

12 MR. WEISSMAN: Our position would be it would
13 because we can still -- it would shift to the defendants
14 because we would shift the burden by virtue of showing the
15 intense competition, the unilateral effects independent of
16 what you consider the market shares to be.

17 THE COURT: And so, you know, look PFG is a
18 company, and what I found interesting about the record is that
19 a number of the smaller regional competitors all seem to have
20 growth rates that are much higher than the two defendants
21 here. Why is that not an indicia that if PFG, which is
22 presently growing in double figures, would seem to reflect it
23 has the capable leadership to grow at that kind of rate. Why
24 should I doubt their ability to step into the shoes of
25 US Foods, which hasn't been growing at that kind of rate over

1 the last few years?

2 MR. WEISSMAN: A couple responses to that. First
3 is the rate of growth. Remember, these regional companies are
4 mainly growing with independent regional -- independent
5 restaurant business and local customers. The margins on those
6 customers are higher because it's --

7 THE COURT: I assume that beating US Foods and
8 Sysco, who you say are the largest folks even in the local
9 markets.

10 MR. WEISSMAN: If you look at the shares, you don't
11 see that. Sysco and US Foods are still number one and two in
12 all the local markets that we're complaining about here.
13 Certainly PFG is growing, and part of their growth has put
14 them at a real capacity issue, which is one of the reasons,
15 one of the multiple reasons that would constrain their ability
16 and why they even acknowledge that in order to make this work,
17 even within five years, they've got to do 26 different
18 expansion projects, and all of those have to go well. They're
19 all going to go in parallel. And even if they accomplish
20 those and accomplish them on the timeframe they want, they're
21 still, as Your Honor noted, still at half, half the market
22 share for national customers that US Foods is today.

23 So I'm going to come back to PFG, but certainly
24 they're growing, there's no doubt about that, but they're
25 growing again because they're mainly competing for local

1 business where the margins are higher because that's where
2 broadliners sell the product directly, you don't have as many
3 direct contracts with manufacturers.

4 Let me talk a little bit about ease of entry. The
5 legal standard here is they need to show, the defendants need
6 to show timely, likely and sufficient in its magnitude and
7 scope to deter or counteract the competitive effects of
8 concern. They have failed to show that, they've pointed to
9 examples, but the record is very clear. And Mr. Holm was up
10 there testifying about all the problems about expanding in the
11 different markets. They've never done a fold-out.

12 PFG has never done a fold-out acquisition in the
13 history of the company. What they do is they try to buy
14 companies. And what -- what we see here and what Mr. Holm
15 testified, and there's a legion of testimony from other
16 distributors that supports this, is that there are a lot of
17 things that deter and prevent entry. You need to find a
18 location for a distribution center. In some areas that's
19 easier than others. In California, for example, really,
20 really difficult because of zoning. You need to spend a lot
21 of money. We heard about upward of \$30 million just to build
22 a distribution center.

23 You also need to fill it with products, much of
24 which are perishable. It's the chicken and egg problem that
25 Mr. Holm referred to. You need to have the products available

1 to support customers, but you're not going to invest in those
2 products until you have those customers. It's a chicken and
3 egg problem.

4 THE COURT: If regionalization is an option, and
5 the record shows that some of these companies are
6 regionalizing, you don't need to, as a regional -- current
7 regional competitor, add that many more distribution centers,
8 say, for example, to be competitive with the merged company,
9 do you? I mean, their point is, look, if the issue here is
10 price constraint, a company like -- I believe it was Reinhart,
11 I can't remember who it was that's opening in Northern
12 Virginia, they don't need to open 20 new distribution centers,
13 they just need to open one or two, or maybe a few more to
14 become competitive and at least pose the threat of preventing
15 these large national customers from regionalizing.

16 MR. WEISSMAN: Third party distributors, we're not
17 saying they need to be national, per se, I think it's fair to
18 say -- and here's a slide right from US Foods -- that this is
19 high barriers to entry for scale players. So to come in on a
20 national level is impossible, even by the defendants.

21 But to answer your question about building out.
22 There's plenty of testimony in the record from these regional
23 distributors who would need to expand two, three, that they
24 wouldn't do it even in the face of the price increase, it's
25 too risky. There are too many things they need to do. You've

1 got to go find salespeople. Salespeople are subject to
2 non-competes in these markets for a year. And as Mr. Holm
3 testified, after that year expires they often lose the book of
4 business because it's been replaced by someone else.

5 There's also clear and undisputed testimony in the
6 record, and we cite this in our findings that right now this
7 industry is going through an acute driver shortage. That, and
8 then the testimony from Mr. Allen from IFDA made it clear that
9 that is an impediment to anyone looking to build even one and
10 expand into a different region.

11 Then you deal with reputation among customers for
12 quality and consistency. We have, and I'm going to go to the
13 next slide, I think we should not put this up. Okay, it's not
14 up. This shows all of the -- and the defendants cite these
15 examples as examples of entry, but here's what the testimony
16 shows about what actually happened. Shamrock, big problems.
17 Merchants, the new entrant they cite for South Carolina, it's
18 been in the market for seven years, minimal share.

19 Reinhart talking about what it's going to do. And
20 Ben E. Keith in the southwest. That's how long it took for
21 them to get a point where they could build a broadline DC in
22 Houston. So entry is, it's not quick, it's certainly
23 expensive, and it's certainly not an answer to the
24 anti-competitive effects that we're talking about here.

25 Now, one of the things you asked Mr. Parker is why

1 aren't the defendants closing distribution centers, and I
2 think he cited to you, after Mr. Tringali gave him a note,
3 they closed two, one in Lakeland, Florida and one somewhere
4 else. But what they don't mention is last week they just
5 opened up a new distribution center in New Hampshire, it's all
6 over the press. So they may be dropping a couple, but they're
7 also building new ones, too.

8 Goes to your point, if it was really an issue that
9 customers are demanding fewer DCs, then why do they still have
10 the same networks that they've had for years, for years. And
11 it's not only the geographic dispersion having that nationwide
12 presence that's important to these companies, particularly
13 when you're talking about the large customers, but it's also
14 the location.

15 US Foods goes out and when it markets its product
16 and its services, it talks about how its distribution centers
17 are strategically located, so it's not just number of
18 distribution centers, it's where they're located, and the more
19 you have and the more dispersed they are, the more likely it
20 is you're going to be able to serve a customer on a cost
21 effective basis.

22 THE COURT: Well, what do you make of the testimony
23 and the evidence that we heard from a number of people about
24 fewer distribution centers equaling fewer inbound costs, and
25 that being an important factor, particularly in PFG's ability

1 to actually serve on a national level and do it in a cost
2 effective way?

3 MR. WEISSMAN: There's no doubt there are some
4 customers who want to consolidate the inbound freight. There
5 are also customers, and there's plenty of testimony, who want
6 more distribution centers. So there's no trend, clear trend
7 here, and certainly not one that would allow PFG to compete
8 much less on day one.

9 I'm going to show you a chart of -- I'm going to go
10 to PFG now -- of all the large customers, and this should not
11 go on the screen either. This should be -- and I went through
12 this document with Mr. Holm, this was under seal. And if
13 you -- and he confirmed for me this -- these are the customers
14 he needs to go after to replace US Foods. Virtually every
15 single customer on this list uses far more, far more than 35
16 distribution centers today. Some use more than 50.

17 So even with his rosiest plans for expansion --
18 and, again, Mr. Holm is a good guy, they're a good company,
19 we're not disparaging them all, but the question is whether
20 they're going to replace the competitive vigor that US Foods
21 has today. He would need, PFG would need to convince these
22 customers or a good fraction of these customers that that
23 inbound savings is so important to them that they ought to
24 move from 50 or 45 down to 35. That's just not realistic,
25 frankly, it's not realistic, and the risk here is on

1 consumers. And if it's their burden, that risk should not be
2 borne by consumers.

3 The other thing, if you look at this document, too,
4 they confirm that they're looking in five years at growing
5 their share to 20 percent. Unambiguous. And, again, this
6 is -- if everything goes well, they've never done a fold-out
7 expansion. Never -- and everything goes well.

8 Now, to Your Honor's question before about what do
9 we make or what should the Court make of internal projections
10 about how many distribution centers PFG needed. And let me
11 show you a couple documents. Again, these should not go up.
12 These are internal, this is not negotiation with Sysco where
13 they're saying here's what we want, and then they're starting
14 at a high level. This is internal documents, and this
15 document, there are multiple ones of this, this document,
16 PX 9197, is unambiguous.

17 It says, "Refine list of the additional OpCos
18 required to become a national broadline distributor." This
19 same list of 19 distribution centers was presented to the
20 board in June of that year. And then you'll recall this
21 e-mail exchange after the negotiations began. And when Sysco
22 said: You guys are falling behind. You're falling behind the
23 others here. We're not selling you any more than 11. You
24 better get down to 11. Here's what Blackstone, the e-mail
25 exchange with Blackstone was with PFG and Mr. Holm. He talks

1 about we need -- the fact is we need 13 OpCos to be national.
2 And then he says we should proactively educate the FTC why 13
3 OpCos is the bare minimum. And what do they do? They came
4 down to the FTC, and they gave us the maps that we showed Your
5 Honor, and they said this is what we need. This is what we
6 need to be a national competitor. And it's undisputed, they
7 didn't get anything close to that, and they didn't get the
8 larger facility in Los Angeles either.

9 So there are a whole host of problems, and there is
10 great weight, I think, to be put on the internal dialogue.
11 You may have placed less weight on the negotiations, but this
12 is internal ordinary course business documents as to what they
13 need.

14 THE COURT: Let me ask you, you've got a few
15 minutes left, but let's talk about the efficiencies
16 calculations and what's merger specific and what isn't. Let
17 me ask you the first, the macro question, which is: Do you
18 take issue with the McKinsey annual number? Leave aside
19 whether it's merger specific or not. Do you take -- does the
20 FTC say that's not the right number for efficiencies total?

21 MR. WEISSMAN: The answer is yes in part because it
22 doesn't account for the divestiture to PFG. So you've got 11
23 distribution centers, there's going to be some synergies that
24 weren't captured.

25 The other thing is, again, this is not our burden,

1 we were unable to verify. You heard Mr. Gokhale testify that
2 he looked long and hard for information to verify those
3 numbers. So I can't tell you that they're wrong, but I can't
4 tell you that they're right either. They're not verifiable
5 and, therefore, under the law they should not be counted.

6 THE COURT: Look, I mean, it's not as if, you know,
7 these folks did a back of the napkin calculation. I mean,
8 they spent tens of millions of dollars to bring McKinsey in to
9 come up with these efficiency numbers, and perhaps their
10 marching orders were put merger specific in one box and
11 non-merger specific in another.

12 But, you know, for Mr. Gokhale to say that he
13 couldn't get behind the numbers, you know, I'm not so sure
14 that whether he could or not, I don't have a lot of dispute, I
15 don't have a lot of doubt that they tried to come up with the
16 best numbers they could come up with. And if he can't verify
17 them, there may be an issue of the documentation or what have
18 you, but it's hard for me to believe that the McKinsey numbers
19 wouldn't be pretty darn accurate.

20 MR. WEISSMAN: But the point is they're not
21 verifiable. And under the law, H&R Block merger guidelines,
22 they need to be -- in addition to merger specific, they need
23 to be verifiable and you need to show passthrough. And here
24 you have serious problems on all three of those elements. I'm
25 not doubting you that they came up with a number, they worked

1 hard, they spent a lot of time and money, and they even spent
2 time in making recommendations about how to prevent
3 passthrough from happening. They did a lot of work on this.

4 THE COURT: When I think about passthrough, do I
5 have to think about that as a percentage of merger specific
6 savings or total savings?

7 MR. WEISSMAN: I think you have to think about the
8 passthrough of the merger specific savings.

9 THE COURT: Okay. All right. And there was
10 evidence, I think, that in the past Sysco, I believe, has
11 passed through 60 percent of its savings. Why shouldn't that
12 percentage be a fair benchmark for the passthrough here?

13 MR. WEISSMAN: Because there's going to be a key
14 ingredient missing from the marketplace that helped force that
15 passthrough, which is intense competition with US Foods. The
16 documentation, the record is clear that a lot of the -- you
17 know, the discounting, the allowances, the RFP bidding. You
18 saw all the documents, we cited it all in our findings of
19 fact. Dr. Israel did an analysis. The passthrough that may
20 have occurred in the past was a good percentage because of US
21 foods. And that dynamic goes away, and even if some get
22 passed through, it certainly, it's going to be dwarfed, as
23 Your Honor noted, by the harm here, even if it's one percent
24 harm.

25 THE COURT: Okay. Anything further, Mr. Weissman?

1 MR. WEISSMAN: No, unless you have more questions.

2 THE COURT: I have nothing further. Thank you.

3 MR. WEISSMAN: Thank you, Your Honor.

4 THE COURT: Mr. Parker.

5 MR. PARKER: A couple of quick points. Your Honor
6 is very correct, and it's very hard to get behind the fact
7 that Blackstone is investing 895 at the outside and a billion
8 and a half overall. If Blackstone bought a bar of gold at \$2
9 and bought another one at \$2,000, they -- a company like that
10 is going to maximize the value no matter how much they paid.
11 And you have to assume, we all have to assume that when
12 serious people put that kind of money on the table, something
13 very aggressive is about to happen.

14 We didn't just sell these to the little kid down
15 the street. We sold them to probably the best competitor, you
16 know, we didn't -- we sold them to the -- I was going to say
17 the New England Patriots, but they've got a little bit of
18 trouble. We sold them to LeBron James, that's what we did.
19 We didn't sell them to the Lakers. Okay. That's what I'm
20 saying.

21 The other point I want to make is that PFG really,
22 in order to be a factor here, only has to make a credible
23 threat. A credible threat. I think they can bid on any
24 contract. I think when Holm says he can bid on any contract,
25 he can. And, by the way, the number of distribution centers

1 is going to be 42 at least, not 35.

2 And in terms of credible -- well, let's just think
3 what it -- people are credible threats right now. Just look
4 at what their favorite witness Ms. Ralph did. She did a
5 credible threat by stringing through some regional
6 distributors and taking away 11 distribution centers. We got
7 PFG that's a lot bigger, and day one -- that any of the -- any
8 of the companies that she went to, that's a credible threat.

9 THE COURT: Is the analysis on that issue the issue
10 of the divestiture? Is it, to the extent there's a
11 difference, is it enough to show that they're a credible
12 threat or they actually have to demonstrate that they can
13 slide into being the number two?

14 MR. PARKER: It's a credible threat, Your Honor,
15 it's a credible threat. The question is, is whether to the
16 extent you find a diminution in competitive intensity, and I
17 don't think you can. But to the extent you do, the question
18 is whether they are a reasonable -- reasonably able to replace
19 that competitive intensity. You don't have to look the same,
20 you don't have to do exactly the same, you have to inject
21 yourself into the market and be a credible threat.

22 And my final point here is, is to go back, the
23 elements of the offense, there is a failure of proof on
24 product market. There's a failure of proof on market share,
25 there is no presumption. A failure of proof on actual

1 competitive effects, and if you have any doubt on that, you
2 got PFG. And if you have any -- the fundamental fact here is,
3 is that at current prices people are exercising options, and
4 the Court ought to have a lot of confidence that if prices go
5 up, those options will be exercised, as I said earlier, more
6 often and more intense, and there will be no competitive
7 injury, and this injunction ought to be denied.

8 THE COURT: All right. Thank you, Mr. Parker.

9 MR. PARKER: Thank you.

10 THE COURT: All right, everyone. That brings us to
11 the conclusion of these proceedings. Let me say the
12 following, and that is, first I want to say thank you. This
13 has been really an extraordinary set of proceedings,
14 particularly for a new judge.

15 I think what both sides have done in terms of
16 demonstrating professionalism working with the court staff,
17 working with the Court, is highly commendable, and it's
18 something I wish we could replicate over and over again. So
19 thank you all.

20 Your written work has been tremendous, your oral
21 advocacy has been tremendous, and you all have frankly done
22 all the hard work so far. And so you've passed the baton on
23 to me, so let me say thank you. And you'll hear from us as
24 soon we can get a decision to you. Thank you.

25 MR. WEISSMAN: Thank you, Your Honor.

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MR. PARKER: Thank you, Your Honor.

MR. TRINGALI: Thank you.

THE DEPUTY CLERK: All right.

COURT ADJOURNED AT 5:05 P.M.

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C E R T I F I C A T E

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

Date: _____

Lisa M. Foradori, RPR, FCRR

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<p>9 Case 1:15-cv-00256-APM 90 percent [5] 2442/16 2462/25 2463/1 2503/19 2504/2 9035 [1] 2504/21 9197 [1] 2555/16 95 percent [1] 2463/2 98 percent [2] 2449/23 2451/22 99 [1] 2451/18</p>	<p>admitted [2] 2462/8 2547/8 adopt [1] 2530/3 advantage [1] 2462/10 advocacy [1] 2561/21 affected [1] 2462/17 affects [1] 2434/5 affiants [1] 2492/23 affidavit [1] 2469/13 affidavits [1] 2469/14 after [24] 2434/15 2435/14 2443/20 2445/6 2464/5 2464/5 2489/20 2489/24 2494/18 2495/8 2507/16 2515/8 2515/9 2531/22 2532/1 2533/7 2536/2 2538/7 2538/7 2540/9 2552/3 2553/2 2554/14 2555/21 afternoon [8] 2432/11 2433/13 2437/15 2437/16 2486/2 2508/1 2508/3 2531/23 again [23] 2446/19 2451/21 2465/18 2472/18 2486/23 2488/9 2495/8 2498/18 2501/18 2506/23 2509/3 2515/6 2518/18 2518/21 2521/18 2523/12 2529/23 2549/25 2554/18 2555/5 2555/11 2556/25 2561/18 against [8] 2447/12 2449/5 2450/16 2451/3 2491/8 2520/20 2521/10 2530/25 aggregate [9] 2445/7 2445/15 2449/22 2456/1 2457/5 2457/6 2457/8 2457/11 2522/23 aggressiveness [3] 2469/11 2541/9 2559/13 aggressiveness [1] 2540/24 Agilman [1] 2428/24 ago [5] 2437/20 2441/24 2451/2 2478/1 2538/15 agree [18] 2439/24 2468/10 2468/15 2471/9 2508/16 2509/5 2509/7 2509/9 2513/6 2514/24 2515/1 2516/18 2517/22 2517/25 2518/18 2526/1 2533/21 2533/23 agreed [1] 2464/23 agreeing [1] 2464/22 ahead [2] 2490/12 2544/7 aided [1] 2430/24 al [4] 2428/4 2428/8 2432/4 2432/4 Albuquerque [1] 2532/20 ALEXIS [2] 2428/22 2432/5 alike [1] 2439/10 all [142] allege [1] 2451/4 alleged [3] 2451/1 2517/15 2518/10 Allen [2] 2468/17 2552/8 allocates [1] 2442/2 allow [4] 2545/3 2545/3 2545/12 2554/7 allowances [1] 2558/17 allows [1] 2454/12 almost [2] 2492/17 2496/17 along [2] 2546/22 2546/22 already [18] 2436/25 2480/5 2487/17 2496/5 2497/3 2497/6 2509/13 2509/21 2520/22 2528/20 2528/21 2528/25 2534/22 2534/23 2535/1 2540/13 2540/17 2541/7 also [30] 2433/9 2435/11 2437/23 2439/14 2441/10 2443/18 2445/2 2446/25 2484/11 2490/17 2493/4 2493/17 2494/1 2495/11 2497/13 2507/4 2511/9 2515/5 2516/2 2521/7 2525/20 2526/18 2535/15 2538/9 2546/19 2550/23 2552/5 2553/7 2553/13 2554/5 alternative [4] 2445/3 2468/2 2476/13 2476/14 always [2] 2505/12 2532/4 am [5] 2454/11 2454/11 2456/9 2496/19</p>	<p>2541/18 ambiguous [1] 2473/3 Amerinet [1] 2528/12 AMIT [1] 2428/14 among [7] 2437/9 2442/2 2442/19 2466/4 2477/13 2492/14 2552/11 amorphous [1] 2472/2 amount [7] 2445/10 2448/14 2461/10 2461/14 2492/25 2495/15 2495/18 analogous [3] 2441/11 2444/3 2467/3 analyses [1] 2530/11 analysis [33] 2442/6 2445/7 2445/15 2446/5 2447/13 2447/14 2448/3 2448/5 2448/11 2448/11 2456/2 2456/12 2457/5 2457/6 2457/11 2460/22 2467/17 2471/8 2481/5 2490/23 2493/19 2497/9 2499/3 2501/14 2504/12 2506/18 2508/20 2526/3 2526/4 2530/9 2547/9 2558/19 2560/9 analyze [3] 2437/1 2453/15 2490/21 analyzed [1] 2500/21 Angeles [1] 2556/8 announced [1] 2495/9 announcement [1] 2491/10 annual [2] 2544/1 2556/18 anomalies [1] 2463/4 anomalous [1] 2449/11 another [12] 2443/4 2458/20 2479/11 2491/24 2495/23 2509/19 2529/21 2533/1 2533/2 2541/17 2557/11 2559/9 answer [18] 2440/10 2443/13 2454/22 2455/2 2472/8 2476/3 2480/18 2488/8 2495/7 2505/7 2510/15 2526/25 2534/8 2542/2 2542/3 2551/21 2552/23 2556/21 answered [1] 2510/1 anti [7] 2432/25 2436/20 2438/12 2439/5 2459/8 2488/19 2552/24 anti-competitive [7] 2432/25 2436/20 2438/12 2439/5 2459/8 2488/19 2552/24 antitrust [5] 2434/13 2439/16 2464/21 2471/14 2542/15 any [40] 2433/12 2439/17 2441/25 2442/8 2445/25 2454/25 2459/7 2463/16 2469/12 2469/15 2471/18 2477/4 2478/23 2484/20 2500/7 2504/12 2504/14 2512/14 2517/19 2518/19 2519/22 2521/9 2536/23 2539/3 2539/7 2540/13 2543/2 2543/6 2543/25 2545/4 2545/11 2545/12 2547/10 2555/23 2559/23 2559/24 2560/7 2560/7 2561/1 2561/2 anybody [7] 2468/18 2476/10 2521/5 2521/9 2534/7 2542/7 2543/7 anyone [1] 2552/9 anything [12] 2438/21 2493/9 2496/19 2512/14 2515/5 2538/23 2543/6 2545/20 2547/5 2547/17 2556/7 2558/25 anyway [1] 2527/18 apart [3] 2481/9 2496/13 2496/15 apologize [1] 2508/8 apparently [1] 2540/20 Appeals [3] 2435/8 2443/23 2467/11 appear [1] 2543/17 APPEARANCES [1] 2428/17 appellate [1] 2433/7 Applebee's [3] 2469/18 2479/16 2515/24 apples [1] 2514/6 applicable [1] 2508/17 Application [1] 2434/1 applied [2] 2445/11 2445/12</p>
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