IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, *et. al.*, Plaintiffs, v. **SYSCO CORPORATION**, **USF HOLDING CORP.**, and **US FOODS, INC.** Defendants.	Civil Action No. 15-cv-00256 (APM) **PUBLIC VERSION**

PLAINTIFFS' CORRECTED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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PROPOSED FINDINGS OF FACT

PROPOSED CONCLUSIONS OF LAW

LIST OF ACRONYMS / ABBREVIATIONS AND CITATION LEGEND FOR HEARING TRANSCRIPTS

List of Commonly Used Acronyms and Abbreviations

Acronym	Full Term
BEK	Ben E. Keith
Decl.	Declaration
Dep.	Deposition
DMA	Distribution Market Advantage
FSM	Food Service Management
GFS	Gordon Food Service
GPO	Group Purchasing Organization
Hrg.	Hearing
IFDA	International Food Distributors' Association
IH	Investigational Hearing
MUG	UniPro's Multi-Unit Group
PFG	Performance Food Group
PFS	Performance Food Service, the broadline division of PFG
RFI	Request for Information
RFP	Request for Proposal
USF	US Foods
VA	United States Department of Veterans Affairs

Legend for Citations to Hearing Transcripts

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PLAINTIFFS' PROPOSED FINDINGS OF FACT

I. BACKGROUND

A. The Transaction

1. Pursuant to a definitive merger agreement dated December 8, 2013, Sysco Corporation ("Sysco") proposes to acquire all shares of US Foods for $500 million in cash and $3 billion in newly issued Sysco equity. Sysco would also assume $4.7 billion of US Foods' existing debt, for a total transaction value of $8.2 billion. *See* Complaint ¶ 28; Defendant Sysco Corporation's Answer to the Complaint ¶ 28 [hereinafter "Sysco Answer"]; Answer of Defendants USF Holding Corp. and US Foods, Inc. ¶ 28 [hereinafter "US Foods Answer"].

2. On February 19, 2015, the Commission authorized commencement of this action under Section 13(b) of the FTC Act, which was filed on February 20, 2015, to seek a temporary restraining order (TRO) and preliminary injunction preventing the consummation of the proposed merger during the pendency of the administrative proceedings. Complaint ¶ 30; Sysco Answer ¶ 30; US Foods Answer ¶ 30. On February 24, 2015, Defendants stipulated to a TRO until three calendar days after the Court rules on the FTC's Motion for Preliminary Injunction, which stipulation was signed by the Court on February 27, 2015.

3. The administrative trial on the merits is scheduled to begin on July 21, 2015. Complaint ¶ 30; Sysco Answer ¶ 30; US Foods Answer ¶ 30. The ongoing administrative proceeding provides a forum for all parties to conduct discovery, followed by a merits trial with up to 210 hours of live testimony. *See* 16 C.F.R. § 3.41 (2014). The decision of the Administrative Law Judge is subject to appeal to the full Commission, which, in turn, is subject to judicial review by a United States Court of Appeals. Complaint ¶ 30; Sysco Answer ¶ 30; US Foods Answer ¶ 30.

B. <u>The Parties</u>

4. Plaintiff Federal Trade Commission ("FTC" or "Commission") is an administrative agency of the United States Government established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq*., with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. Complaint ¶ 22; Sysco Answer ¶ 22; US Foods Answer ¶ 22.

5. The Plaintiff States include the District of Columbia; the States of California, Illinois, Iowa, Maryland, Minnesota, Nebraska, North Carolina, Ohio, and Tennessee; and the Commonwealths of Pennsylvania and Virginia. The Plaintiff States, by and through their respective Attorneys General, bring this action pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, in their sovereign or quasi-sovereign capacities as *parens patriae* on behalf of the citizens, general welfare, and economy of each of their states. Complaint ¶ 23; Sysco Answer ¶ 23; US Foods Answer ¶ 23.

6. Defendant Sysco is a publicly traded corporation organized under the laws of Delaware with headquarters in Houston, Texas. Sysco is the largest North American distributor of food and related products primarily to the foodservice industry. Sysco distributes food and related products and provides services to approximately 425,000 customers across the United States, including independent restaurants, healthcare and educational facilities, lodging establishments, and other foodservice customers. In its fiscal year 2014, Sysco generated sales of $46.5 billion. Complaint ¶ 24; Sysco Answer ¶ 24; US Foods Answer ¶ 24.

7. Defendant Sysco operates through three business divisions: Broadline; SYGMA, which provides "systems" (also known as "custom") foodservice distribution services; and "Other," which is a division that provides, among other things, specialty produce distribution.

Sysco's Broadline division includes 72 distribution centers in the United States that distribute a full line of food and related products to foodservices operators. SYGMA distributes a more limited set of food and related products to certain large chains, primarily quick-service restaurants. In fiscal year 2014, the breakdown of total Sysco sales by division was approximately 81% Broadline, 13% SYGMA, and 6% Other. Complaint ¶ 25; Sysco Answer ¶ 25; US Foods Answer ¶ 25.

8. Defendant US Foods, Inc. (together with USF Holding Corp., "US Foods") is a privately held corporation based in Rosemont, Illinois, and incorporated under the laws of Delaware. US Foods, Inc. is a wholly owned subsidiary of Defendant USF Holding Corp., which is owned and controlled by investment funds associated with or managed by Clayton, Dubilier & Rice, Inc., and KKR & Co., L.P. Complaint ¶ 26; Sysco Answer ¶ 26; US Foods Answer ¶ 26.

9. Defendant USF Holding Corp. is the second-largest distributor of food and food-related products in the United States. USF Holding Corp. operates 61 distribution centers from which it provides broadline distribution services throughout the United States. In its fiscal year 2013, USF Holding Corp. generated approximately $22 billion in sales to more than 200,000 customers nationwide. Complaint ¶ 27; Sysco Answer ¶ 27; US Foods Answer ¶ 27.

10. Defendants Sysco Corporation, USF Holding Corp., and US Foods, Inc. are all engaged in "commerce" within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12. Complaint ¶ 20; Sysco Answer ¶ 20; US Foods Answer ¶ 20.

II. BROADLINE FOODSERVICE DISTRIBUTION IS A RELEVANT MARKET

11. Broadline foodservice distribution ("broadline distribution") is a relevant product market in which to assess the competitive effects of the proposed merger. In response to

customer demand, broadline distributors offers foodservice operators a distinct combination, or cluster, of goods and services: flexible, next-day delivery of a wide range of branded and private label products, along with value-added services.

12. Broadline distribution is not "reasonably interchangeable" with other foodservice channels. Broadline distribution has a distinct set of characteristics and uses, distinct facilities, distinct customers, and distinct pricing. The industry recognizes broadline distribution as a distinct line of commerce.

13. One of Defendants' own witnesses, [redacted] testified that the breadth of products and services that broadline distributors provide distinguishes them from other forms of distribution. PX00570 ([redacted] Dep. at 129:19-130:16). As a result, a hypothetical monopolist of all broadline distributors would be able to exercise pricing power because "[t]hey would be the only distributor . . . in the market to service the needs of those customers" and customers could not defeat a price increase. PX00570 ([redacted] Dep. at 131:14-132:5).

14. Plaintiffs' economic expert, Dr. Mark Israel, after analyzing product market definition using the analytical framework in the U.S. Department of Justice & Federal Trade Commission *Horizontal Merger Guidelines* (2010) ("*Merger Guidelines*"), concluded that broadline distribution is a relevant product market. PX09350 (Israel Report) ¶¶ 35-40.

A. <u>Broadline Distribution Has a Distinct Set of Characteristics and Uses</u>

15. David Schreibman of US Foods agrees that "broadline distribution offers customers a broad line of products and value-added distribution services focused on meeting the unique needs of street and national account customers." PX00515 (Schreibman (US Foods) Dep. at 75:22-76:2).

16. "Broadline operating companies distribute a full line of food products and a wide

variety of non-food products to their customers," as Sysco's most recent Form 10-K describes it. PX06054-003. Sysco's broadline operating companies "also provide ancillary services relating to foodservice distribution, such as providing customers with product usage reports and other data, menu-planning advice, food safety training and assistance in inventory control, as well as access to various third party services designed to add value to our customers' businesses." PX06054-004-005. Sysco markets the concept that customers can get all or the majority of the products they need from Sysco. Brawner (Sysco) Hrg. Vol. 14 at 122:7-10.

17. Customers view broadline distributors as an efficient and cost-effective source for a wide range of food and related products; offering frequent and flexible delivery; and providing a number of important value-added services that other types of distributors do not. Ralph (Premier) Hrg. Vol. 3 at 62:16-64:2; Szrom (VA) Hrg. Vol. 2 at 20:25-22:7; Thompson (Interstate) Hrg. Vol. 2 at 92:1-17; Hoffman (Upstream) Hrg. Vol. 3 at 9:7-20; Schablein (Wintergreen) Hrg. Vol. 4 at 13:22-14:2; PX00572 ([redacted] Dep. at 141:21-142:1); PX00560 ([redacted] Dep. at 44:14-21); PX00552 ([redacted] Dep. at 88:21-89:15); PX00487 ([redacted] Decl.) ¶ 13.

18. Other distributors confirm that broadline distribution comprises a distinct set of characteristics. PX00563 ([redacted] Dep. at 101:16-103:14); PX00564 ([redacted] Dep. at 11:3-6); *see also* Holm (PFG) Hrg Vol. 4 at 57:6-58:22.

19. Dr. Israel's analysis of the industry leads him to conclude that broadline distributors are distinguished by many features of their operations. PX09350 (Israel Report) ¶ 25; *see also* Israel Hrg. Vol. 11 at 128:7-129:2.

20. Broadline distribution differs significantly from other foodservice channels, as even Defendants' expert agrees. DX01360 (Bresnahan Report at 19-20); *see also* PX00571

([redacted] Dep. at 143:14-144:11); PX00570 ([redacted] Dep. at 129:19-130:16).

1. **Broadline Distributors Provide a Wide Range of Products**

21. Broadline distributors offer a wide variety of products and choices. This includes dry grocery, frozen grocery and products, refrigerated products, center of the plate, dairy, ice cream, and produce. A broadliner offers a broad spectrum of products within each of those categories. Ralph (Premier) Hrg. Vol. 3 at 62:16-23.

22. US Foods executives agree that "part of being a broadline distributor is a broad product breadth." PX00591 (Schuette (US Foods) IH at 126:12-16). Tom Kimball, US Foods' Vice President of National Accounts, confirmed that broadline customers are "purchasing a far wider array of product. And so [their] needs are different as a customer." PX00587 (Kimball (US Foods) IH at 82:2-10). Customers select a broadline distributor in part based on the broadliner's ability to offer most, if not all, of their food and related product needs. PX00590 (Schreibman (US Foods) IH at 24:19-25:8) ("[W]e have such a broad selection of SKUs because that is a key consideration of our customer base, you have to have what they want").

23. Broadline distributors confirm that a key characteristic of broadline distribution is that the distributor carries many thousands of SKUs, including products in all major food and food-related categories. PX00531 ([redacted] Dep. at 21:20-23:13); Holm (PFG) Hrg. Vol. 4 at 57:6-11; PX00413 ([redacted] Decl.) ¶¶ 2, 4 (approximately [redacted] SKUs); PX00414 ([redacted] Decl.) ¶ 2 (around [redacted] SKUs); PX00417 ([redacted] Decl.) ¶ 4 (roughly [redacted] SKUs); PX00424 ([redacted] Decl.) ¶ 3 (approximately [redacted] SKUs); PX00434 ([redacted] Decl.) ¶ 2 (between [redacted] SKUs); PX00443 ([redacted] Decl.) ¶ 2 (offering more than [redacted] SKUs).

24. The wide breadth of products offered by broadline distributors is important to customers. Schreibman (US Foods) Hrg. Vol. 13 at 35:8-10 (testifying that a wide array of product choices is important to customers). For example, many healthcare group purchasing

organizations (GPOs) have a broad membership and operate facilities with a wide variety of different levels of [redacted] Some members create meals from scratch, meaning they need more raw ingredients, whereas other members use more frozen and convenience products. The needs of healthcare organizations are extremely diverse, and they therefore need a broad spectrum of SKUs to fulfill their foodservice needs. Ralph (Premier) Hrg. Vol. 3 at 64:3-17; PX00594 ([redacted] IH at 67:6-13); *see also* PX00405 ([redacted] Decl.) ¶ 3; PX00437 ([redacted] Decl.) ¶ 4; PX00450 ([redacted] Decl.) ¶ 3; PX00463 ([redacted] Decl.) ¶ 3; PX00472 ([redacted] ¶ 2; PX00489 ([redacted] Decl.) ¶ 4.

25. Customers typically rely on a broadline distributor to provide a substantial portion of their foodservice needs. Szrom (VA) Hrg. Vol. 1 at 99:20-100:9; Thompson (Interstate) Hrg. Vol. 2 at 96:12-20; PX00557 ([redacted] Dep. at 24:5-15); PX00538 ([redacted] Dep. at 105:6-19); *id.* at 226:13-227:4; PX00547 ([redacted] Dep. at 41:10-18); PX00550 ([redacted] Dep. at 105:14-106:21); PX00523 ([redacted] Dep. at 178:23-181:15); PX00404 ([redacted] Decl.) ¶ 7; PX00421 ([redacted] Decl.) ¶ 3; PX00425 ([redacted] Decl.) ¶ 3; PX00432 ([redacted] Decl.) ¶ 3; PX00437 ([redacted] Decl.) ¶ 4; PX00447 ([redacted] Decl.) ¶ 7; PX00439 ([redacted] Decl.) ¶ 4; PX00445 ([redacted] Decl.) ¶ 2; PX00455 ([redacted] Decl.) ¶ 2; PX00457 ([redacted] Decl.) ¶ 3; PX00462 ([redacted] Decl.) ¶4; PX00468 ([redacted] Decl.) ¶ 3; PX00489 ([redacted] Decl.) ¶ 3; PX00498 ([redacted] Decl.) ¶ 3.

26. The product variety offered by broadliners allows them to accommodate complex and diverse customer needs, as well as fluctuating order volume and mix. Szrom (VA) Hrg. Vol. 2 at 9:3-13:23, 20:25-22:7; PX00552 ([redacted] Dep. at 68:14-69:22); PX00567 ([redacted] Dep. at 126:12-132:20; PX00466 ([redacted] Decl.) ¶ 6; PX00426 ([redacted] Decl.) ¶¶ 4, 6; PX00459 ([redacted] Decl.) ¶ 3; PX00497 ([redacted] Decl.) ¶ 3; PX00464

([redacted] Decl.) ¶ 4; PX00461 ([redacted] Decl.) ¶ 5; PX00479 ([redacted] Decl.) ¶ 3.

27. Customers require access to a wide range of food products to prepare variable and unique menus. Hoffman (Upstream) Hrg. Vol. 3 at 9:2-20; PX00487 ([redacted] Decl.) ¶ 3; PX00403 ([redacted] Decl.) ¶ 5; PX00404 ([redacted] Decl.) ¶ 6; PX00405 ([redacted] Decl.) ¶ 5; PX00419 ([redacted] Decl.) ¶ 3; PX00421 ([redacted] Decl.) ¶ 3; PX00429 ([redacted] Decl.) ¶ 4; PX00441 ([redacted] Decl.) ¶ 4; PX00446 ([redacted] Decl.) ¶ 4; PX00462 ([redacted] Decl.) ¶¶ 3-4; PX00491 ([redacted] Decl.) ¶¶ 4, 6; PX09341-007.

28. Broadline distributors give customers an opportunity to aggregate most of their spending with one distributor, allowing them to save costs. PX00550 ([redacted] Dep. at 105:14-25, 113:7-114:18); Thompson (Interstate) Hrg. Vol. 2 at 96:17-20; PX00576 ([redacted] Dep. at :7-100:13); PX00556 ([redacted] Dep. at 72:11-21); PX00465 ([redacted] Decl.) ¶ 3.

29. Defendants' executives have testified that broadline distributors carry a "far wider array of products" than other distribution channels. PX00587 (Kimball (US Foods) IH at 82:2-10); PX00589 (Lynch (US Foods) IH at 63:17-65:5); PX00584 (Nasir (Sysco) IH at 22:3-10); *see also* PX00525 ([redacted] Dep. at 193:2-10).

30. The breadth of products offered by broadliners distinguishes broadline from systems and specialty distributors. Unlike systems or specialty distributors, broadliners offer a broad line of thousands of food and non-food products that span many categories. Holm (PFG) Hrg. Vol. 4 at 57:6-11. Broadline customers enjoy the ability to shop from a broadliner's extensive available product lines. Holm (PFG) Hrg. Vol. 4 at 58:6-9; *see also* PX00462 ([redacted] Decl.) ¶ 3; PX00594 ([redacted] IH at 44:14-21).

31. Broadline distributors also carry a wide range of private-label (i.e., distributor

branded) products. Schreibman (US Foods) Hrg. Vol. 13 at 35:5-7; PX00528 ([redacted] Dep. at 119:4-12); PX00567 ([redacted] Dep. at 126:12-15); PX00401 ([redacted] Decl.) ¶ 4; PX00407 ([redacted] Decl.) ¶ 4; PX00427 ([redacted] Decl.) ¶ 3; PX00429 ([redacted] Decl.) ¶ 8; PX00441 ([redacted] Decl.) ¶ 4; PX00443 ([redacted] Decl.) ¶ 2.

32. Private label products are attractive to many broadline customers because they may provide customers with a value proposition of either lower costs or higher quality. Holm (PFG) Hrg. Vol. 4 at 58:17-22; *see also* PX00443 ([redacted] Decl.) ¶ 2; PX00444 ([redacted] Decl.) ¶ 10; PX00449 ([redacted] Decl.) ¶ 9; PX00543 ([redacted] Dep. at 114:3-9).

33. Customers often rely on private label products to save costs because distributors typically price these products below comparable national branded products. Szrom (VA) Hrg. Vol. 1 at 97:15-99:9; PX00545 ([redacted] Dep. at 48:17-50:2); PX00538 ([redacted] Dep. at 236:16-237:22); PX00528 ([redacted] Dep. at 120:14-121:2); PX00560 ([redacted] Dep. at 36:17-40:13); PX00401 ([redacted] Decl.) ¶ 4; PX00404 ([redacted] Decl.) ¶ 7; PX00405 ([redacted] Decl.) ¶ 6; PX00407 ([redacted] Decl.) ¶ 4; PX00419 ([redacted] Decl.) ¶ 3; PX00426 ([redacted] Decl.) ¶ 6; PX00448 ([redacted] Decl.) ¶ 4; PX00452 ([redacted] Decl.) ¶ 3; PX00457 ([redacted] Decl.) ¶ 3; PX00459 ([redacted] Decl.) ¶ 3; PX00461 ([redacted] Decl.) ¶ 3; PX00463 ([redacted] Decl.) ¶ 3; PX00464 ([redacted] Decl.) ¶ 4; PX00465 ([redacted] Decl.) ¶ 3; PX00466 ([redacted] Decl.) ¶ 4; PX00467 ([redacted] Decl.) ¶ 4; PX00472 ([redacted] Decl.) ¶ 3; PX00476 ([redacted] Decl.) ¶ 6; PX00479 ([redacted] Decl.) ¶ 3; PX00483 ([redacted] Decl.) ¶ 7; PX00497 ([redacted] Decl.) ¶ 3; PX00594 ([redacted] IH at 67:20-68:1, 93:11-95:21).

34. In his expert opinion, Dr. Israel concluded that broadline distributors "stock,

warehouse, sell, and distribute a broad array (generally thousands of stock keeping units SKUs) of food and food-related products across all the food and food-related categories generally required to prepare a meal." Further, he determined that broadline distributors' "offerings generally include both branded and private label (i.e., distributor-brand) products, giving customers access to products at a range of price points and quality levels." PX09350 (Israel Report) ¶ 25.

2. Broadliners Provide More Frequent and Flexible Delivery Options

35. Broadline distributors generally provide next-day delivery. Holm (PFG) Hrg. Vol. 4 at 58:3-5; *see also* PX00560 ([redacted] Dep. at 40:14-24); PX00580 (DeLaney (Sysco) IH at 37:12-22); PX00402 ([redacted] Decl.) ¶ 5; PX00437 ([redacted] Decl.) ¶ 4; PX00448 ([redacted] Decl.) ¶ 4.

36. Broadline distributors are able to meet customers' requirements for frequent and flexible delivery schedules, including same- and next-day delivery, which are important to customers. Schablein (Wintergreen) Hrg. Vol. 4 at 43:3-11; PX00560 ([redacted] Dep. at 40:14-42:24) [redacted] PX00480 ([redacted] Supp. Decl.) ¶¶ 5-6; PX00520 ([redacted] Dep. at 75:15-24, 120:8-20); PX00557 ([redacted] Dep. at 40:16-41:23); PX00538 ([redacted] Dep. at 227:8-230:14); PX00528 ([redacted] Dep. at 122:3-123:15); PX00551 ([redacted] Dep. at 97:4-99:12); PX00552 ([redacted] Dep. at 43:22-46:9); PX00548 ([redacted] Dep. at 117:1-118:6); PX00567 ([redacted] Dep. at 133:25-134:19); PX00553 ([redacted] Dep. at 97:5-101:20, 104:4-106:25); PX00556 ([redacted] Dep. at 25:24-26:16); PX00401 ([redacted] Decl.) ¶ 4; PX00407 ([redacted] Decl.) ¶ 4; PX00427 ([redacted] Decl.) ¶ 3; PX00429 ([redacted] Decl.) ¶ 5; PX00447 ([redacted] Decl.) ¶ 7; PX00448 ([redacted] Decl.)

¶ 4; PX00471 ([redacted] Decl.) ¶ 4; PX00493 ([redacted] Supp. Decl.) ¶ 9.

37. Many broadline customers require frequent next-day delivery because they lack storage capacity to maintain multiple days' worth of foodservice products on site at any one time. Hoffman (Upstream) Hrg. Vol. 3 at 15:13-16:1; PX00520 ([redacted] Dep. at 83:4-16); PX00557 ([redacted] Dep. at 40:24-42:3); PX00551 ([redacted] Dep. at 103:6-17); PX00542 ([redacted] Dep. at 42:19-43:6); PX00553 ([redacted] Dep. at 97:25-98:23, 104:8-25); PX00529 ([redacted] Dep. at 150:17-22); PX00425 ([redacted] Decl.) ¶ 3; PX00455 ([redacted] Decl.) ¶ 13; PX00461 ([redacted] Decl.) ¶ 3; PX00466 ([redacted] Decl.) ¶ 5; PX00471 ([redacted] Decl.) ¶ 4; PX00480 ([redacted] Supp. Decl.) ¶ 6; PX00564 ([redacted] Dep. at 44:6-45:21).

38. For example, [redacted] a national healthcare GPO, explained that next-day delivery is a "critical service attribute" for many of [redacted]. PX00466 ([redacted] Decl.) ¶ 5. Next-day delivery allows [redacted] to "[redacted]" PX00466 ([redacted] Decl.) ¶ 5. Next-day delivery is particularly important for [redacted] who lack the storage capacity to maintain several days' worth of inventory. PX00466 ([redacted] Decl.) ¶ 5. [redacted] also testified that if [redacted] is unable to contract with a distributor that provides next-day delivery, [redacted] would likely lose [redacted] in that area. PX00574 ([redacted] Dep. at 177:6-178:9).

39. Many broadline customers also require next-day delivery because it is more difficult to predict well in advance a location's specific food needs. PX00485 ([redacted] Decl.) ¶ 5; PX00480 ([redacted] Supp. Decl.) ¶ 6; PX00467 ([redacted] Decl.) ¶ 3 ("[redacted]").

3. Broadline Distributors Provide Higher Levels of Customer Service

40. Broadline distributors offer higher levels of customer service than other foodservice channels. PX00590 (Schreibman (US Foods) IH at 38:11-19). As a result, broadline distributors employ more salespeople than other foodservice channels. PX00590 (Schreibman (US Foods) IH at 38:11-39:1); *see also* PX00443 ([redacted] Decl.) ¶¶ 3- 10.

41. Broadline customers often rely significantly on the customer service provided by broadliner sales representatives. PX00520 ([redacted] Dep. at 87:7-90:16); PX00538 ([redacted] Dep. at 230:15-232:3); PX00528 ([redacted] Dep. at 115:17-117:19); PX00553 ([redacted] Dep. at 112:13-113:6); PX00409 ([redacted] Decl.) ¶ 6; PX00463 ([redacted] Decl.) ¶ 6; PX00471 ([redacted] Decl.) ¶ 5; PX00472 ([redacted] ¶ 4; PX00487 ([redacted] Decl.) ¶ 5; PX00489 ([redacted] Decl.) ¶ 6; *see also* PX00584 (Nasir (Sysco) IH at 96:24-99:4).

42. Broadline distributors typically offer "recovery" service, which involves quickly fixing incorrect or damaged orders and/or deliveries. Thompson (Interstate) Hrg. Vol. 2 at 122:18-123:16; PX00520 ([redacted] Dep. at 89:12-90:3); PX00528 ([redacted] Dep. at 65:21-66:5); PX00553 ([redacted] Dep. at 108:15-109:19); PX00487 ([redacted] Decl.) ¶ 5; PX00489 ([redacted] Decl.) ¶ 6; PX00480 ([redacted] Supp. Decl.) ¶¶ 5, 7.

43. Broadline distributors also offer "will-call" pickup at their distribution centers for emergency purchases, which is important to broadline customers. PX00528 ([redacted] Dep. at 66:6-16, 115:17-116:8); PX00426 ([redacted] Decl.) ¶ 6.

44. Broadline distributors also provide other forms of customer service, such as making product recommendations, providing free product samples, and lending customers trucks for cold storage. Schablein (Wintergreen) Hrg. Vol. 4 at 43:3-44:6; PX00528 ([redacted]

[redacted]) Dep. at 115:3-15); PX00552 ([redacted] Dep. at 47:17-48:12); PX00535 ([redacted] Dep. at 158:22-159:21); PX00420 ([redacted] Decl.) ¶ 9.

4. Broadline Distributors Provide Additional Value-Added Services

45. Broadliners typically provide many services in addition to distribution, which are referred to in the industry as "value-added services." These value-added services complement and enhance the distribution of food and food-related products. Sonnemaker (Sysco) Hrg. Vol. 13 at 132:18-20; Holm (PFG) Hrg. Vol. 4 at 57:6-58:20; PX00570 ([redacted] Dep. at 130:7-130:16); PX00567 ([redacted] Dep. at 126:27-127:15); PX00466 ([redacted] Decl.) ¶ 7; PX00409 ([redacted] Decl.) ¶ 6; PX00447 ([redacted] Decl.) ¶ 8; PX00455 ([redacted] Decl.) ¶ 10; PX00461 ([redacted] Decl.) ¶ 8; PX00491 ([redacted] Decl.) ¶ 5; PX00581 (Green (Sysco) IH at 80:14-82:7); PX00584 (Nasir (Sysco) IH at 11:20-13:6).

46. Sysco offers substantial value-added services to its broadline customers, as evidenced by its response to a Request for Proposal (RFP) issued by [redacted] Specifically, Sysco submitted [redacted] PX01460-028-032. Sysco also offers value-added services to its customers at its broadline distribution centers, including food safety training, showing new products to customers, updating customers on market trends, and performing menu analysis. PX00598 (Brawner (Sysco) Dep. at 94:19-95:12).

47. Similarly, according US Foods' Executive VP for Strategy, US Foods is able to offer broadline customers "a broad selection of products and [value-added] services [redacted] PX00515 (Schreibman (US Foods) Dep. at 65:19-65:23). US Foods' ability to "[redacted]

[redacted].” PX00515 (Schreibman (US Foods) Dep. at 65:24-66:3).

48. Other distributors state that a feature of their broadline distribution operation is to offer value-added services. *See*, *e.g.*, PX00564 ([redacted] Dep. at 57:1-58:19); PX00529 ([redacted] Dep. at 155:9-156:10). [redacted] agrees. PX00570 ([redacted] Dep. at 130:7-130:16).

49. The value-added services provided by broadline distributors include assistance with menu planning, delivery planning to ensure a continuous supply of food to fulfill the menu requirements, and assistance with analyzing the nutritional value of prepared meals. These value-added services are valuable to customers. Schablein (Wintergreen) Hrg. Vol. 4 at 43:3-44:15; PX00598 (Brawner (Sysco) Dep. at 94:19-95:12); PX00520 ([redacted] Dep. at 85:10-88:12); PX00559 ([redacted] Dep. at 98:21-99:7); PX00574 ([redacted] Dep. at 198:8-200:3); PX00455 ([redacted] Decl.) ¶ 10; PX00466 ([redacted] Decl.) ¶ 7; PX00472 ([redacted] ¶ 4; PX00475 ([redacted] Supp. Decl.) ¶ 6; PX00491 ([redacted] Decl.) ¶ 5.

50. Broadline distribution includes additional services and capabilities that are of special importance to healthcare customers. PX00515 (Schreibman (US Foods) Dep. at 85:6-86:4) (US Foods’ value-added services include [redacted]). Distribution in healthcare foodservice is not just about moving boxes from one location to another, but also consists of value-added services such as healthcare expertise. Specifically, healthcare organizations need their distributor to offer expertise when it comes to medical foods, enteral products, menu requirements, and the cost challenges that they face as a healthcare provider. Ralph (Premier) Hrg. Vol. 3 at 63:1-14; *see also* PX00466 ([redacted] Decl.) ¶ 7.

B. <u>Broadline Distributors Have Distinct Facilities</u>

51. Broadline distributors typically maintain separate broadline facilities, which are

distinct from systems-only or specialty distribution centers. Holm (PFG) Hrg. Vol. 4 at 58:23-59:4; PX00451 ([redacted] Decl.) ¶ 4. Systems distributors service customers from unique facilities that cannot be converted to serve broadline customers. PX00526 ([redacted] Dep. at 166:8-15); PX00562 ([redacted] Dep. at 140:15-141:17); PX00579 ([redacted] Dep. at 12:9-18. Sysco's Senior Vice President of Sales, Scott Sonnemaker, testified that systems distribution centers are distinct from broadline distribution centers in their staffing and layout. PX00585 (Sonnemaker (Sysco) IH at 198:24-199:14); PX00429 ([redacted] Decl.) ¶ 11; *see also* PX00558 (DeLaney (Sysco) Dep. at 19:25-21:7); PX00544 ([redacted] Dep. at 77:9-78:24); PX00415 ([redacted] Decl.) ¶ 6; PX00424 ([redacted] Decl.) ¶ 5.

52. Likewise, specialty distribution centers are distinct from broadline distribution centers, run under different operating divisions, and cannot be readily used or converted to service broadline customers. Brawner (Sysco) Hrg. Vol. 14 at 120:22-121:20 (Sysco's Mid-Atlantic Market President for broadline distribution is not responsible for Sysco's specialty divisions—FreshPoint and Buckhead Beef—within his geographic area of responsibility); PX00526 ([redacted] Dep. at 166:8-15); PX09059-007-010.

C. <u>Broadline Distributors Have Distinct Customers</u>

53. Broadline distributors principally sell to and target known broadline customers. *See* PX00415 ([redacted] Decl.) ¶ 8; PX00417 ([redacted] Decl.) ¶ 4; PX00429 ([redacted] Decl.) ¶ 4; PX00443 ([redacted] Decl.) ¶ 2; PX00444 ([redacted] Decl.) ¶ 6; PX00451 ([redacted] Decl.) ¶ 9. Certain categories of customers are most likely to require broadline distribution services, including healthcare organizations and GPOs, hospitality companies, and foodservice management companies, as well as independent restaurants and many chain restaurants. Thompson (Interstate) Hrg. Vol. 2 at 93:14-17; PX00585 (Sonnemaker (Sysco) IH at 99:1-7); Holm (PFG) Hrg. Vol. 4 at 62:7-63:17; Hausman Hrg. Vol. 16 at 112:3-14 (unable to name any GPOs,

hospitality chains, foodservice management companies, or independent restaurants that purchases systems distribution); PX00405 ([redacted] Decl.) ¶ 5; PX00404 ([redacted] Decl.) ¶ 7; PX00437 ([redacted] Decl.) ¶ 4 (same); PX00523 ([redacted] Dep. at 178:23-181:15) (same); PX00486 ([redacted] Decl.) ¶ 10 (same).

54. Broadline customers, especially non-chain restaurants, typically seek bids only from broadline distributors, to the exclusion of all other forms of distribution. Schablein (Wintergreen) Hrg. Vol. 4 at 21:14-22:14, 25:16-24; Schreibman (US Foods) Hrg. Vol. 13 at 44:23-46:3; Thompson (Interstate) Hrg. Vol. 2 at 107:12-22; Szrom (VA) Hrg. Vol. 2 at 20:6-22:21; PX00560 ([redacted] Dep. at 20:18-20, 24:11-25:8); PX00402 ([redacted] Decl.) ¶ 8; PX00418 ([redacted] Decl.) ¶¶ 13, 15; PX00421 ([redacted] Decl.) ¶ 9; PX00432 ([redacted] Decl.) ¶ 13; PX00436 ([redacted] Decl.) ¶¶ 4, 11; PX00445 ([redacted] Decl.) ¶ 14; PX07019 ([redacted] Decl.) ¶ 14 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ 2(f)).

D. <u>Broadline Distributors Have Distinct Pricing from Other Channels</u>

55. Broadline distributors focus primarily on competition with other broadliners, and price and service terms are not significantly affected by the prices and services offered by other distribution channels. Holm (PFG) Hrg. Vol. 4 at 61:1-25; Holm (PFG) Hrg. Vol. 6 at 5:25-6:4 ("[P]rices and services offered by specialty distributors do not significantly affect the prices and services offered by PFG's broadline division to broadline customers"); PX00429 ([redacted] Decl.) ¶ 12; *see also* PX00415 ([redacted] Decl.) ¶ 13; PX00451 ([redacted] Decl.) ¶¶ 19-21.

56. The record is replete with evidence that broadliners determine their pricing for broadline services based on competition from other broadline distributors. Schreibman (US Foods) Hrg. Vol. 13 at 45:2-24; PX00515 (Schreibman (US Foods) Dep. at 104:1-4); PX00064-001; PX00277-001; PX00286-002; PX00300-001-002; PX00305-001-002; PX00325-001; PX00415 ([redacted] Decl.) ¶ 16; PX00429 ([redacted] Decl.) ¶ 12; PX00466 ([redacted] Decl.) ¶ 7;

PX00631-002-003; PX01022-001; PX01032-001-002; PX01033-001; PX01056-001; PX01060-003-004; PX01061-001-005; PX01066-001-002; PX01067-001; PX01425-001-002; PX01459-001-002; PX01461-001-002; PX01462-001; PX01464-001-002; PX01465-002; PX01472-001-002; PX03010-001-002; PX03035-003; PX03042-001-002; PX03055-001; PX03057-001; PX03062-003; PX03068-002; PX03074-001; PX03084; PX03086-002; PX03212-001; PX03275-001; PX09004-002; *see also* PX09350 (Israel Report) ¶¶ 91-92. For example, a US Foods executive emailed others in the company in the ordinary course of business a few weeks before the public announcement of the Sysco merger, stating: "In the store, we will be competitive with [redacted] on a similar cost model. *On the truck, we will be competitive with broadline distributors on a similar cost model.*" PX03114-003 (emphasis added).[1]

57. In fact, Defendants' expert, Dr. Hausman, readily acknowledged at the hearing that US Foods is a "strong price constraint" on Sysco and that "Sysco and US Foods are important competitive constraints on each other." Hausman Hrg. Vol. 16 at 65:11-13, 94:5-7, 97:4-17. He also agreed that "in a number of cases," customers "use Sysco and US Foods as leaver [sic] points against each other to obtain better pricing" in negotiations. Hausman Hrg. Vol. 16 at 89:6-10.

E. <u>Other Forms of Foodservice Distribution Are Not Viable Substitutes</u>

58. Customers would not defeat a price increase by substituting away from the services of a hypothetical monopolist of broadline distribution in the event of "a small but significant and nontransitory increase in price" (SSNIP). *See* PX00570 ([redacted] Dep. at 130:17-132:5). [redacted]

[1] At the preliminary injunction hearing, the author of the email, David Schreibman, explained that "on the truck" refers to US Foods' broadline operation. Schreibman (US Foods) Hrg. Vol. 13 at 47:13-48:6 (discussing PX03114).

[redacted] PX00570 ([redacted] Dep. at 131:14-25).

59. For many customers, no other foodservice channel—systems distribution, specialty distribution, nor cash-and-carry stores—"could replace or serve as a substitute for broadline distribution services." PX00436 ([redacted] Decl.) ¶ 5; *see also* Thompson (Interstate) Hrg. Vol. 2 at 94:13-15, 96:9-11, 98:16-18. Other witnesses, including many of Defendants' own witnesses, confirm this fact. PX00518 ([redacted] Dep. at 8:4-23, 105:16-106:16, 111:6-112:9, 117:9-20, 132:7-133:13); PX00539 ([redacted] Dep. at 154:3-155:19); PX00574 ([redacted] Dep. at 220:22-223:19); PX00548 ([redacted] Dep. at 121:22-122:15, 124:9-21); PX00522 ([redacted] Dep. at 136:9-137:8, 140:14-142:1); PX00525 ([redacted] Dep. at 192:16-194:12); PX00401 ([redacted] Decl.) ¶¶ 4-5, 12, 16; PX00404 ([redacted] Decl.) ¶¶ 4-8; PX00455 ([redacted] Decl.) ¶¶ 3, 5-6; PX00537 ([redacted] Dep. at 146:11-147:22, 150:4-151:10); PX00521 ([redacted] Dep. at 167:18-170:15); PX00566 ([redacted] Dep. at 121:11-122:15); PX00573 ([redacted] Dep. at 93:14-96:12); PX00553 ([redacted] Dep. at 181:17-183:19); PX07000 ([redacted] Supp. Decl.) ¶¶ 5-6; PX07001 ([redacted] Supp. Decl.) ¶¶ 12-13; PX07004 ([redacted] Supp. Decl.) ¶¶ 5-6; PX07009 ([redacted] Supp. Decl.) ¶¶ 8-9; PX07010 ([redacted] Supp. Decl.) ¶¶ 5-6; PX07012 ([redacted] Supp. Decl.) ¶¶ 5, 7; PX07015 ([redacted] Supp. Decl.) ¶¶ 4-5; PX07016 ([redacted] Supp. Decl.) ¶¶ 6-7.

60. Specifically, broadline customers would not switch their business—in meaningful part, much less in totality—to another foodservice channel to defeat an anticompetitive price increase. *See* Szrom (VA) Hrg. Vol. 2 at 20:25-22:7, 23:9-16, 23:24-24:21; Thompson (Interstate) Hrg. Vol. 2 at 94:13-15, 96:9-11, 98:16-19; PX00570 ([redacted] Dep. at 130:17-132:5); PX00520 ([redacted] Dep. at 93:6-94:2, 94:16-95:8, 99:23-100:24, 103:24-

104:9); PX00532 ([redacted] Dep. at 160:8-24, 162:9-12); PX00574 ([redacted] Dep. at 218:13-223:19); PX00528 ([redacted] Dep. at 128:23-129:9, 129:16-19, 130:10-131:2); PX00533 ([redacted] Dep. at 80:25-81:8, 81:16-82:2, 83:11-84:1); PX00572 ([redacted] Dep. at 138:18-25); PX00550 ([redacted] Dep. at 114:15-23, 115:16-117:14); PX00523 ([redacted] Dep. at 191:9-192:6); PX00518 ([redacted] Dep. at 105:16-106:16, 117:9-20); PX00401 ([redacted] Decl.) ¶¶ 4-5, 16; PX00402 ([redacted] Decl.) ¶¶ 11-13; PX00403 ([redacted] Decl.) ¶¶ 5-7; PX00404 ([redacted] Decl.) ¶¶ 4, 14; PX00405 ([redacted] Decl.) ¶¶ 5, 7-8; PX00407 ([redacted] Decl.) ¶¶ 4-5; PX00411 ([redacted] Decl.) ¶¶ 8, 10; PX00418 ([redacted] Decl.) ¶¶ 17-18; PX00419 ([redacted] Decl.) ¶¶ 3-4; PX00423 ([redacted] Decl.) ¶¶ 8-9; PX00427 ([redacted] Decl.) ¶¶ 3-4, 12; PX00431 ([redacted] Decl.) ¶¶ 6, 13; PX00436 ([redacted] Decl.) ¶¶ 4-5; PX00437 ([redacted] Decl.) ¶¶ 5-6; PX00445 ([redacted] Decl.) ¶¶ 7-8; PX00446 ([redacted] Decl.) ¶¶ 4-5, 11; PX00448 ([redacted] Decl.) ¶¶ 4-6, 11-12; PX00455 ([redacted] Decl.) ¶¶ 3, 5-6; PX00457 ([redacted] Decl.) ¶¶ 8-10; PX00461 ([redacted] Decl.) ¶ 12-13; PX00467 ([redacted] Decl.) ¶¶ 6-7; PX00479 ([redacted] Decl.) ¶¶ 10-11; PX00496 ([redacted] Decl.) ¶¶ 7-8.

1. <u>Systems Distribution Is Not a Substitute for Broadline Distribution</u>

61. Systems distribution is not a substitute for those customers that need broadline distribution. Holm (PFG) Hrg. Vol. 4 at 59:13-16; *see also id.* at 67:5-8; Thompson (Interstate) Hrg. Vol. 2 at 94:13-15.

62. Numerous market participants confirm that systems distribution is not a substitute for broadline distribution. PX00563 ([redacted] Dep. at 164:18-166:10); PX00554 ([redacted] Dep. at 138:5-139:14); PX00415 ([redacted] Decl.) ¶ 5; PX00429 ([redacted] Decl.) ¶ 7; PX00491 ([redacted] Decl.) ¶ 4; *see also* PX00562 ([redacted] Dep. at 64:17-65:5)

("The nature of the service that's provided to each is distinctly different").

63. "Systems business is distinct from broadline in a number of ways." PX00414 ([redacted] Decl.) ¶ 3; *see also* PX00427 ([redacted] Decl.) ¶ 3.

(a) <u>Systems Distribution Has Distinct Characteristics and Uses</u>

64. Systems distribution is distinct from broadline distribution. PX00580 (DeLaney (Sysco) Dep. at 32:19-39:13) (explaining that Sysco runs SYGMA separately due to the special needs of its customers, including low touch, low costs, mostly proprietary items).

65. Sysco operates its broadline and systems distribution divisions as separate business units, run by separate executives and operating largely from separate facilities. DeLaney (Sysco) Hrg. Vol. 12 at 54:20-55:8; PX00558 (DeLaney (Sysco) Dep. at 32:12-36:23); PX00023-032-035; PX00580 (DeLaney (Sysco) IH at 37:9-40:4); *see also* Brawner (Sysco) Hrg. Vol. 14 at 120:9-21; PX00584 (Nasir (Sysco) IH at 22:14-19) (same).

66. PFG, like Sysco, has separate divisions for its broadline and systems distribution services. Holm (PFG) Hrg. Vol. 4 at 59:2-10. These divisions have distinct operations, procurement, management organizations, and infrastructure. PX00429 ([redacted] Decl.) ¶ 7.

67. Systems distributors make large, limited-SKU deliveries on a fixed schedule and generally do not provide the value-added services demanded by many broadline customers. PX00544 ([redacted] Dep. at 70:2-73:23); PX00283-008; PX00405 ([redacted] Decl.) ¶ 5; PX00412 ([redacted] Decl.) ¶ 3; PX00415 ([redacted] Decl.) ¶ 4; PX00418 ([redacted] Decl.) ¶ 17; PX00419 ([redacted] Decl.) ¶ 3; PX00427 ([redacted] Decl.) ¶ 3; PX00441 ([redacted] Decl.) ¶ 4; PX00445 ([redacted] Decl.) ¶ 7; PX00446 ([redacted] Decl.) ¶ 4; PX00491 ([redacted] Decl.) ¶ 5; PX00580 (DeLaney (Sysco) IH at 39:3-13); PX07024 ([redacted] Supp. Decl.) ¶¶ 2-3.

68. Systems distributors offer a limited number of mostly customer-proprietary products that customers have negotiated to purchase directly with food manufacturers. Holm

(PFG) Hrg. Vol. 4 at 65:8-22; PX00580 (DeLaney (Sysco) IH at 39:3-13); PX00584 (Nasir (Sysco) IH at 23:5-24:13); PX00590 (Schreibman (US Foods) IH at 33:5-34:5); PX00591 (Schuette (US Foods) IH at 103:16-104:16); PX00577 ([redacted] Dep. at 28:6-31:17); PX00562 ([redacted] Dep. at 110:3-111:9, 250:10-251:13); PX00567 ([redacted] Dep. at 123:4-24, 127:7-128:7); PX00563 ([redacted] Dep. at 164:18-165:20); PX00569 (Sonnemaker (Sysco) Dep. at 47:18-48:1); PX00405 ([redacted] Decl.) ¶ 5; PX00414 ([redacted] Decl.) ¶ 3; PX00415 ([redacted] Decl.) ¶ 4; PX00418 ([redacted] Decl.) ¶ 18; PX00419 ([redacted] Decl.) ¶ 3; PX00424 ([redacted] Decl.) ¶¶ 2, 4; PX00429 ([redacted] Decl.) ¶¶ 6-7; PX00442 ([redacted] Decl.) ¶ 12; PX00443 ([redacted] Decl.) ¶ 8; PX00448 ([redacted] Decl.) ¶ 5; PX00451 ([redacted] Decl.) ¶ 8; PX00491 ([redacted] Decl.) ¶¶ 2-4; *see also* PX00418 ([redacted] Decl.) ¶¶ 17-18; PX00421 ([redacted] Decl.) ¶ 12; PX00455 ([redacted] Decl.) ¶ 5.

69. For example, [redacted] a systems distributor, carries [redacted] SKUs per customer, while broadline distribution centers carry [redacted] or more SKUs. PX00491 ([redacted] Decl.) ¶ 4; *see also* PX00455 ([redacted] Decl.) ¶ 5.

70. Systems distributors do not offer private label products. PX00567 ([redacted] Dep. at 126:3-7); PX00516 ([redacted] Dep. at 155:15-156:5); PX00407 ([redacted] Decl.) ¶ 4; PX00427 ([redacted] Decl.) ¶ 3.

71. Systems customers typically contract directly with food manufacturers to develop product specifications and negotiate prices for each product to be used in their restaurants. Schreibman (US Foods) Hrg. Vol. 12 at 136:19-137:15); PX00598 (Brawner (Sysco) Dep. at 76:21-78:10); PX00562 ([redacted] Dep. at 110:3-111:4, 212:19-213:13); PX00415 ([redacted] Decl.) ¶ 4; PX00418 ([redacted] Decl.) ¶ 18; PX00424 ([redacted] Decl.) ¶ 2; PX00445 ([redacted] Decl.) ¶ 10; PX00455 ([redacted] Decl.) ¶ 5; PX00491 ([redacted] Decl.) ¶¶ 2-4.

72. Systems distributors typically do not offer next-day delivery or the ability to provide additional or substitute products to an order on short notice. Holm (PFG) Hrg. Vol. 4 at 64:14-65:2; PX00429 ([redacted] Decl.) ¶ 6.

73. Systems distributors utilize a very limited—if any—salesforce. PX00531 ([redacted] Dep. at 93:21-94:5); PX00577 ([redacted] Dep. at 30:15-31:17); PX00567 ([redacted] Dep. at 122:22-123:13); PX00543 ([redacted] Dep. at 39:8-17); PX00416 ([redacted] Decl.) ¶ 4; PX00443 ([redacted] Decl.) ¶¶ 3-10; PX00455 ([redacted] Decl.) ¶ 5; PX00491 ([redacted] Decl.) ¶ 5; *see also* PX00405 ([redacted] Decl.) ¶ 5; PX00590 (Schreibman (US Foods) IH at 37:1-38:19).

74. Systems distributors do not offer value added services, such as menu planning. DeLaney (Sysco) Hrg. Vol. 12 at 54:3-11; PX00524 ([redacted] Dep. at 174:21-175:16); PX00567 ([redacted] Dep. at 126:24-127:15); PX00466 ([redacted] Decl.) ¶ 7.

75. Systems distributors serve a more limited set of customers compared to broadline distributors. Holm (PFG) Hrg. Vol. 4 at 62:1-12; PX00516 ([redacted] Dep. at 155:15-156:5); PX00531 ([redacted] Dep. at 93:18-20); PX00569 (Sonnemaker (Sysco) Dep. at 46:12-25); PX00443 ([redacted] Decl.) ¶ 8.

76. Systems customers take larger deliveries than broadline customers in part because they have a relatively predictable demand for consistent and specified menu items. Holm (PFG) Hrg. Vol. 4 at 65:3-7; *cf.* PX00437 ([redacted] Decl.) ¶ 4.

77. Systems distributors tend to travel more miles from fewer distribution centers than broadline distributors. DeLaney (Sysco) Hrg. Vol. 12 at 55:9-11); PX00524 ([redacted] Dep. at 189:17-190:5); PX00562 ([redacted] Dep. at 252:9-253:4); PX00518 ([redacted] Dep. at 8:4-15); PX00529 ([redacted] Dep. at 57:24-58:21, 66:11-14);

PX00443 ([redacted] Decl.) ¶ 11; PX00590 (Schreibman (US Foods) IH at 34:16-24); PX00591 (Schuette (US Foods) IH at 108:19-109:2, 120:19-23).

(b) Systems Distribution Typically Has Distinct Facilities

78. Systems distributors typically service customers from distinct facilities that do not serve broadline customers. PX00562 ([redacted] Dep. at 52:13-53:9) ([redacted]); *id*. at 140:15-141:17; *see also* DeLaney (Sysco) Hrg. Vol. 12 at 54:22-55:11; PX00585 (Sonnemaker (Sysco) IH at 198:24-200:4); PX00558 (DeLaney (Sysco) Dep. at 19:25-21:7); PX00415 ([redacted] Decl.) ¶ 6; PX00424 ([redacted] Decl.) ¶ 5; PX00429 ([redacted] Decl.) ¶ 11.

79. While systems customers, or customers with the attributes of systems customers, may be served out of broadline distribution centers, broadline customers cannot generally be served out of a systems distribution center. Holm (PFG) Hrg. Vol. 4 at 59:20-23 (agreeing that "[I]t's much easier for systems distribution customers to use broadline than the reverse"); PX00524 ([redacted] Dep. at 176:11-12); PX00565 ([redacted] Dep. at 38:11-14); PX00563 ([redacted] Dep. at 125:14-126:22); PX00544 ([redacted] Dep. at 77:25-78:24); PX00491 ([redacted] Decl.) ¶ 4; *see also* PX00427 ([redacted] Decl.) ¶ 3.

(c) Systems Distributors Cannot Serve Many Categories of Broadline Customers

80. Systems distributors typically refuse to serve customers that require too many SKUs, do not have sufficiently dense and numerous locations, require frequent delivery, or do not purchase sufficiently large product volumes. [redacted]

[redacted] PX00544 ([redacted] Dep. at 77:9-16); *see also* PX00558 (DeLaney (Sysco) Dep. at 44:5-13); PX00569 (Sonnemaker (Sysco) Dep. at 50:9-51:7, 58:12-14, 60:17-20); PX00517(Lynch (US Foods) Dep. at 90:24-91:12, 131:4-132:2); PX00586 (Humphreys (US Foods) IH at 118:7-14); PX00491 ([redacted] Decl.) ¶ 4; PX00565 ([redacted] Dep. at 38:12-14); *id*. at 207:23-209:14); PX00526 ([redacted] Dep. at 11:13-12:13); PX00534 ([redacted] Dep. at 107:21-109:25); PX00525 ([redacted] Dep. at 192:22-194:12); PX00524 ([redacted] Dep. at 169:23-170:9, 175:12-176:12); PX00567 ([redacted] Dep. at 123:25-125:15, 132:16-135:3).

81. Tom Lynch, US Foods' Senior Vice President for National Sales, testified that "a very significant portion of our current customer base, both national and local" is not able to contract directly with manufacturers. PX00517 (Lynch (US Foods) Dep. at 107:3-108:22). For these customers, systems distribution is not a viable option. PX00517 (Lynch (US Foods) Dep. at 115:23-116:13). Mr. Lynch admitted that there are broadline customers with foodservice needs that "make it difficult for them to use and consider custom [or systems] distribution." Lynch (US Foods) Hrg. Vol. 14 at 65:16-21. [redacted] PX00517 (Lynch (US Foods) Dep. at 106:2-22).

82. Systems distributors acknowledge that they do not serve certain categories of foodservice operators. PFG's CEO, George Holm, testified that PFG's systems business, known as PFG Customized, could not serve broadline customers such as healthcare GPOs, hospitality chains, or independent restaurants because systems distribution centers serve "very large casual dining restaurants" and could not carry the SKUs necessary for broadline customers. Holm (PFG) Hrg. Vol. 4 at 62:7-63:20; PX00526 ([redacted] Dep. at 11:13-12:13). [redacted]

[redacted] PX00491 ([redacted] Decl.) ¶ 6; *see also* PX00565 ([redacted] Dep. at 38:8-14); PX00558 (DeLaney (Sysco) Dep. at 35:20-36:23); PX00595 (Hausman Dep. at 97:25-98:15); PX00515 (Schreibman (US Foods) Dep. at 46:2-16, 70:16-71:9); PX00544 ([redacted] Dep. at 77:25-78:24); PX00554 ([redacted] Dep. at 138:5-16, 139:2-5); PX00446 ([redacted] Decl.) ¶ 4; PX00585 (Sonnemaker (Sysco) IH at 201:7-202:2); PX00590 (Schreibman (US Foods) IH at 32:2-12); *see also* PX00516 ([redacted] Dep. at 155:15-24).

83. Healthcare GPOs cannot use systems distribution. Most products in systems distribution facilities are proprietary, which would not work for a healthcare GPO's membership. Such healthcare organization members need their distributor to carry a broad selection of products, and a systems distributor does not have that capability. Systems distributors have not been asked to bid on the business of healthcare GPOs. Systems distribution is not a substitute for broadline distribution for such customers. Ralph (Premier) Hrg. Vol. 3 at 64:18-66:3; Holm (PFG) Hrg. Vol. 4 at 62:7-9; *see also* Lindahl (HPSI) Hrg. Vol. 12 at 119:5-16; Schreibman (US Foods) Hrg. Vol. 13 at 45:2-16; PX00517 (Lynch (US Foods) Dep. at 140:2-22); PX00407 ([redacted] Decl.) ¶ 4; PX00446 ([redacted] Decl.) ¶ 4; PX00491 ([redacted] Decl.) ¶ 6.

84. Foodservice management companies cannot use systems distribution. PX00525 ([redacted] Dep. at 193:8-10); PX00401 ([redacted] Decl.) ¶ 4; PX00419 ([redacted] Decl.) ¶ 3; PX00427 ([redacted] Decl.) ¶ 3; *see also* PX00415 ([redacted] Decl.) ¶ 5; PX00585 (Sonnemaker (Sysco) IH at 99:1-4); PX00558 (DeLaney (Sysco) Dep. at 36:16-23).

85. Hospitality chains cannot use systems distribution. *See* Thompson (Interstate) Hrg. Vol. 2 at 94:10-15; PX00431 ([redacted] Decl.) ¶ 13; PX00403 ([redacted] Decl.) ¶ 5;

PX00404 ([redacted] Decl.) ¶ 6; PX00585 (Sonnemaker (Sysco) IH at 99:5-7); *see also* PX00421 ([redacted] Decl.) ¶ 12; PX00491 ([redacted] Decl.) ¶ 6.

86. Certain restaurant chains cannot use systems distribution. *See, e.g.*, PX00437 ([redacted] Decl.) ¶ 4; PX00432 ([redacted] Decl.) ¶¶ 15-16; PX00418 ([redacted] Decl.) ¶¶ 17-18; PX00445 ([redacted] Decl.) ¶ 7; PX00455 ([redacted] Decl.) ¶ 5; *see also* PX00491 ([redacted] Decl.) ¶ 6. Even among quick-service chain restaurants, a customer must meet certain volume thresholds in order to be able to utilize systems distribution. [redacted] PX00567 ([redacted] Dep. at 135:4-137:10). [redacted] PX00567 ([redacted] Dep. at 102:22-103:3, 139:5-140:6).

87. Independent restaurants cannot use systems distribution. PX00524 ([redacted] Dep. at 176:18-20, 173:12-174:10, 174:21-175:16, 178:5-22); PX00598 (Brawner (Sysco) Dep. at 85:17-22); PX00576 ([redacted] Dep. at 102:1-14); PX00464 ([redacted] Decl.) ¶ 14; *see also* PX00491 ([redacted] Decl.) ¶ 6.

88. Systems distributors generally serve large, quick-service chain restaurants with different foodservice needs than broadline customers. Tom Lynch, US Foods' Senior Vice President for National Sales, explained that many large national restaurant chains have attributes that "make them a candidate for a custom [or systems] distribution opportunity," such as a high level of proprietary products, consistency in purchasing patterns, and location density. PX00517 (Lynch (US Foods) Dep. at 87:9-88:5, 89:19-91:24); *see also* PX00524 ([redacted] Dep. at 175:17-176:12); PX00404 ([redacted] Decl.) ¶ 6; PX00414 ([redacted] Decl.) ¶ 3; PX00415 ([redacted] Decl.) ¶ 6; PX00441 ([redacted] Decl.) ¶ 4; PX00491 ([redacted] Decl.) ¶¶ 2, 6; PX00589

(Lynch (US Foods) IH at 60:19-61:14); PX00590 (Schreibman (US Foods) IH at 32:2-33:22); PX00582 (Jarosh (US Foods) IH at 45:1-25:15, 96:24-97:11).

89. Examples of systems customers include:

Applebee's	PX00515 (Schreibman (US Foods) Dep. at 57:10-13); PX00424 ([redacted] Decl.) ¶ 2; Ralph (Premier) Hrg. Vol. 3 at 64:18-65:9.
Burger King	PX00515 (Schreibman (US Foods) Dep. at 58:1-2); PX00543 ([redacted] Dep. at 66:10-18); PX00415 ([redacted] Decl.) ¶ 6; PX00424 ([redacted] Decl.) ¶ 2; *see also* PX00524 ([redacted] Dep. at 173:12-22).
Chili's	Holm (PFG) Hrg. Vol. 7 at 29:3-11; PX09045-011.
Cracker Barrel	Holm (PFG) Hrg. Vol. 7 at 29:3-11; PX09045-011.
Dairy Queen	PX00414 ([redacted] Decl.) ¶ 3; PX00587 (Kimball (US Foods) IH at 88:5-9).
[redacted]	PX00567 ([redacted] Dep. at 102:22-103:3, 139:5-140:6); Schreibman (US Foods) Hrg. Vol. 13 at 31:4-6; PX00515 (Schreibman (US Foods) Dep. at 56:21-23, 58:5-16); PX00587 (Kimball (US Foods) IH at 86:20-87:4).
Kentucky Fried Chicken	Holm (PFG) Hrg. Vol. 7 at 30:10-12; PX00515 (Schreibman (US Foods) Dep. at 80:10-17); PX00591 (Schuette (US Foods) IH at 97:2-12); PX00414 ([redacted] Decl.) ¶ 3; PX00416 ([redacted] Decl.) ¶ 4.
McDonalds	PX00524 ([redacted] Dep. at 172:24-173:3); PX00515 (Schreibman (US Foods) Dep. at 58:3-4); PX00590 (Schreibman (US Foods) IH at 33:5-22); PX09045-011.
Outback Steakhouse	Holm (PFG) Hrg. Vol. 7 at 29:22-25; PX00543 ([redacted] Dep. at 64:6-16).
Ruby Tuesday's	Holm (PFG) Hrg. Vol. 7 at 29:3-25.
Sonic	PX00515 (Schreibman (US Foods) Dep. at 46:20-22); PX00590 (Schreibman (US Foods) IH at 33:5-22); PX00587 (Kimball (US Foods) IH at 214:6-17); *see also* PX00524 ([redacted] Dep. at 173:12-22).
[redacted]	Schreibman (US Foods) Hrg. Vol. 13 at 31:4-12; PX00524 ([redacted] Dep. at 36:4-13, 38:2-18); *id.* at 170:9-22) ([redacted]); *id.* at 120:19-25 ([redacted]); *id.* at 173:4-175:11 [redacted]; PX00587 (Kimball (US Foods) IH at 85:12-15); PX00515 (Schreibman (US Foods) Dep. at 46:17-19); PX00543 ([redacted] Dep. at 64:6-16; PX00590 (Schreibman (US Foods) IH at 33:5-22); PX00591 (Schuette

	(US Foods) IH at 97:2-12); PX00415 ([redacted] Decl.) ¶ 6; PX00424 ([redacted] Decl.) ¶ 2.
TGI Friday's	Holm (PFG) Hrg. Vol. 7 at 29.
Waffle House	PX00515 (Schreibman (US Foods) Dep. at 57:19-25); PX00587 (Kimball (US Foods) IH at 86:20-87:6); *see also* PX00524 ([redacted] Dep. at 173:12-22).
Wendy's	PX00543 ([redacted] Dep. at 39:8-12, 64:6-16); PX00424 ([redacted] Decl.) ¶ 2.
Zaxby's	Holm (PFG) Hrg. Vol. 7 at 30:13-14.

(d) <u>Systems Distributors Use a Different Pricing Mechanism</u>

90. Pricing for systems distribution is different from the pricing mechanism for broadline distribution. PX00563 ([redacted] Dep. at 167:24-170:20); *see also* PX00518 ([redacted] Dep. at 111:6-112:9).

91. According to George Holm of PFG, the prices and services offered by systems distributors do not affect the prices and services offered by PFG's broadline division to broadline customers. Holm (PFG) Hrg. Vol. 4 at 61:21-25.

92. Systems distributors focus primarily on competition with other systems distributors. PX00562 ([redacted] Dep. at 111:11-19); *see also* PX00407 ([redacted] Decl.) ¶ 4.

93. Broadline customers do not threaten to switch to systems distribution as leverage to constrain broadline distributors' pricing. PX00549 ([redacted] Dep. at 236:23-237:11).

94. Systems distributors operate under a distinct business model from broadline distributors. PX00580 (DeLaney (Sysco) IH at 37:9-38:3). [redacted] PX00515 (Schreibman (US Foods) Dep. at

45:7-18). Systems customers, such as [redacted], have significantly smaller drop sizes and use common inventory. PX00515 (Schreibman (US Foods) Dep. at 45:19-46:22).

(e) Dr. Israel's Analysis Confirms That Systems Distribution Is Not in the Relevant Product Market

95. Dr. Israel concludes that "systems is a distan[t] enough substitute, and in particular, a substitute that is not available to a substantial portion of customers who purchase broadline services that a SSNIP on broadline services would not lead to significant diversion to systems, such that systems does not need to be included in the market." Israel Hrg. Vol. 7 at 87:24-88:4.

96. Dr. Israel finds that systems distributors customize their operations to their systems customers. The bulk of systems distributors' capacity is dedicated to the products that their systems customers require, the layout of their warehouse is optimized to serve those customers, and their delivery operations are optimized to serve those customers. Together, these elements render systems distributors poor substitutes for broadline customers. PX09350 (Israel Report) ¶ 54.

97. Because systems distributors customize the SKUs they carry (many of which are proprietary) to their customers, they typically do not stock their distribution centers with products other than those their customers have specifically requested. Systems distributors are generally only equipped to deliver a fixed set of SKUs that have been set in advance and, therefore, are unable to offer customers ordering flexibility. As a result, a customer generally cannot buy un-contracted products "off the shelf" from a systems distributor, meaning that systems distributors could not meet the product needs of most broadline customers, as they would not have the products those customers require. PX09350 (Israel Report) ¶ 55; *see also* Israel Hrg. Vol. 9 at 9:2-10:5 ("The systems facilities, as I mentioned yesterday, are really

tailored to serve these chain restaurants, so they have entirely or almost entirely proprietary or exclusive products that go to the chain restaurants. That tends to be fewer products, they tend to all be exclusive to the chain restaurants.").

98. In Figure 1 of his report, Dr. Israel uses data the Defendants submitted in response to the Second Request and data third parties submitted in response to Civil Investigative Demands to show that the broadline distribution centers (warehouses) of Sysco and other distributors carry a substantially higher average number of SKUs than their systems distribution centers. PX09350 (Israel Report) ¶ 57, Figure 1; *see also* Israel Hrg. Vol. 9 at 11:4-12:7 (explaining Figure 1, and noting that "probably even a more important point is that those SKUs are almost entirely or entirely exclusive to a chain with which that facility has a contract. So if a broadline customer were to come or somebody who wanted broadline services were to come to the systems facility and ask to get products, the system facility effectively literally wouldn't have anything to sell them because it has stuff that's exclusive to its chain customers.").

99. In Figure 2 of his report, Dr. Israel uses data the Defendants submitted in response to the Second Request, together with data third parties submitted in response to Civil Investigative Demands, to show that broadline distribution centers on average employ substantially more sales representatives than systems distribution centers. PX09350 (Israel Report) ¶ 59, Figure 2; *see also* Israel Hrg. Vol. 9 at 10:6-8 ("In addition, the systems facilities generally don't have sales reps, they're just in the business of providing the service for these chain contracts they already have."); Israel Hrg. Vol. 9 at 12:15-13:3 (explaining Figure 2 and noting "this is pretty directly relevant to the question of a SSNIP [if] the broadliner were to raise its price, the question is where would the sales go, and the systems facilities don't even have sales rep out completing for those sales").

100. In response to a small price increase, it is unlikely that a broadline customer would decide to switch to a distributor that does not have a sales force competing for local business. Put differently, without sales representatives competing for business, systems distributors are unlikely to steal enough business away from broadline distributors to defeat a SSNIP, meaning that a hypothetical monopolist over broadline distribution—but not systems distribution—would be able to profitably impose a SSNIP, making broadline distribution a relevant product market. PX09350 (Israel Report) ¶ 61.

101. Systems distributors impose high volume requirements on their customers, both in terms of the density of a customer's outlets and the volume of deliveries per unit. Generally, systems distributors employ minimum drop sizes, below which customers will receive heavy financial penalties on top of the cost of a delivery. Similarly, systems distributors require customers to turn a minimum number of cases per warehouse. Systems distributors impose these requirements because systems customers typically purchase and stock a high proportion of proprietary products and thus distributors cannot sell proprietary products to customers other than the one that holds the ownership rights. For all of these reasons, turning to a systems distributor in response to a small price increase is not likely to be a realistic option for many broadline customers. PX09350 (Israel Report) ¶ 62.

102. Dr. Israel notes that "Sysco operates its systems distribution business, SYGMA, as a separate business unit run by separate executives. This is also consistent with systems distribution facing a distinct set of competitive conditions, including competing against certain systems-only distributors, such as [redacted] that do not provide broadline distribution services." PX09350 (Israel Report) ¶ 64.

103. Dr. Israel finds that [redacted] of all Sysco broadline customers located in Core Based

Statistical Areas (CBSAs)[2] that have SYGMA distribution centers actually have a SYGMA systems distribution center closer to their location than the broadline distribution center that serves them. Looking only at Sysco's National Customers, the results are similar, as [redacted] have a SYGMA systems distribution center closer to their location than the broadline distribution center that serves them. Hence, even though many of Sysco's broadline customers have a systems distribution center closer to their location, they chose not to source product from those facilities. PX09350 (Israel Report) ¶ 65; Israel Hrg. Vol. 9 at 13:4-16:11.

104. Dr. Israel testified that systems distributors "tend to have much larger distribution areas because they're not doing this sort of regular next day delivery, but instead they're doing sort of more frequent -- easier to schedule, but less frequent deliveries to these chain restaurants; those are some of the features." Israel Hrg. Vol. 9 at 9:21-10:13; *see also id.* at 16:14-17:4 ("There's testimony from many systems distributors indicating that the business model of systems just tends to have larger geographic footprints. I mean, in that business model there's just a broader range of distribution. . . . Whereas the broadline model is generally a much tighter area in order to be able to make next day deliveries and things of that nature.").

105. Dr. Israel also finds that a "[redacted]. Across all SYGMA customers, Sysco's weighted average margin was [redacted] in 2013, whereas its weighted average margin on all of its broadline customers was [redacted] (the margin on all of its National Broadline Customers was [redacted])." PX09350 (Israel Report) ¶ 66.

106. Defendants' expert Dr. Hausman agreed that systems distribution is not a substitute for "many" customers. Hausman Hrg. Vol. 16 at 110:20-111:2. Dr. Hausman also

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[2] A Core Based Statistical Area (CBSA) is a grouping of adjacent metropolitan areas drawn according to commuting patterns. PX09350 (Israel Report) ¶ 221, n.406.

agreed that systems distribution would not work for "small independent restaurants." Hausman Hrg. Vol. 16 at 112:12-14.

2. Specialty Distribution Is Not a Substitute for Broadline Distribution

107. Specialty distribution is separate and distinct from broadline distribution. Holm (PFG) Hrg. Vol. 4 at 67:5-8, 69:1-18; Thompson (Interstate) Hrg. Vol. 2 at 96:9-11.

108. According PFG's CEO, the prices and services offered by specialty distributors do not significantly affect the prices and services offered by PFG's broadline division to broadline customers. Holm (PFG) Hrg. Vol. 6 at 5:25-6:4. PFG's Vistar division, which is a specialty distributor that distributes vending products such as candy, snacks, and beverages, very rarely competes with broadline distribution. Holm (PFG) Hrg. Vol. 4 at 52:11-19.

(a) Specialty Distribution Has Distinct Characteristics and Uses

109. Unlike broadliners, specialty distributors carry specialized offerings usually limited to only one or a few specific categories. Holm (PFG) Hrg. Vol. 4 at 67:15-23; Thompson (Interstate) Hrg. Vol. 2 at 94:16-25. By definition, specialty distributors have limited product breadth because they focus on a single product category or a small set of products (e.g., produce). Hoffman (Upstream) Hrg. Vol. 3 at 10:7-10; Schablein (Wintergreen) Hrg. Vol. 4 at 16:18-17:4; PX00520 ([redacted] Dep. at 91:14-92:4); PX00557 ([redacted] Dep. at 39:18-40:7); PX00543 ([redacted] Dep. at 58:16-59:2).

110. Specialty distributors are smaller than broadline distributors in terms of both volume and geographic coverage. PX00427 ([redacted] Decl.) ¶ 4 (specialty distributors "offer a limited geographic range"); PX00594 ([redacted] IH at 44:22-45:7); PX00407 ([redacted] Decl.) ¶ 5.

111. Specialty distributors do not offer the same high level of customer service as broadline distributors. Schablein (Wintergreen) Hrg. Vol. 4 at 17; PX00525 ([redacted]

([redacted] Dep. at 195:18-197:7); PX00535 ([redacted] Dep. at 150:16-22); PX00487 ([redacted] Decl.) ¶ 13.

(b) Specialty Distributors Typically Have Unique Facilities

112. Specialty distributors typically have distinct facilities that cannot readily accommodate or be converted to broadline distribution. PX00416 ([redacted] Decl.) ¶ 5; PX00415 ([redacted] Decl.) ¶ 20; PX00526 ([redacted] Dep. at 166:8-15) ([redacted]); PX00443 ([redacted] Decl.) ¶ 13; PX00544 ([redacted] Dep. at 19:10-20:15).

113. Sysco operates its own specialty divisions separate from its broadline division. Sysco's CEO testified that it positions its own specialty distribution business as a way to fill in gaps in broadline offerings. PX00580 (DeLaney (Sysco) IH at 38:4-39:13) ("[redacted]); PX00558 (DeLaney (Sysco) Dep. at 46:10-23); *see also* PX00543 ([redacted] Dep. at 59:3-20); Brawner (Sysco) Hrg. Vol. 14 at 121:4-20.

114. [redacted] PX09297-005; PX00549 ([redacted] Dep. at 213:7-214:10).

115. Customers view Sysco's specialty divisions as distinct and separate from its broadline division. PX00487 ([redacted] Decl.) ¶ 12; PX00523 ([redacted] Dep. at 190:19-22); PX00594 ([redacted] IH at 48:17-22).

116. [redacted]

[redacted] at 39:18-40:14.

(c) <u>Specialty Distributors Lack the Full Range of Product Offerings of Broadline Distributors</u>

117. While certain customers may use specialty distributors in addition to a broadliner, many customers still require broadline distribution for the bulk of their needs because specialty distributors lack the full range of product offerings. *See*, *e.g.*, Holm (PFG) Hrg. Vol. 4 at 67:24-68:6; Hoffman (Upstream) Hrg. Vol. 3 at 12:11-17; Schablein (Wintergreen) Hrg. Vol. 4 at 16:18-17:12; PX00594 ([redacted] IH at 50:21-51:9); PX00520 ([redacted] Dep. at 94:16-95:8); PX00539 ([redacted] Dep. at 154:3-155:19); PX00553 ([redacted] Dep. at 19:20-20:18, 182:4-183:5); PX00498 ([redacted] Decl.) ¶ 7; PX00402 ([redacted] Decl.) ¶ 11; PX00410 ([redacted] Decl.) ¶ 12; PX00411 ([redacted] Decl.) ¶ 10; PX00419 ([redacted] Decl.) ¶ 4; PX00423 ([redacted] Decl.) ¶ 8; PX00425 ([redacted] Decl.) ¶ 10; PX00426 ([redacted] Decl.) ¶ 8; PX00432 ([redacted] Decl.) ¶ 5; PX00442 ([redacted] Decl.) ¶¶ 13, 14; PX00446 ([redacted] Decl.) ¶ 5; PX00461 ([redacted] Decl.) ¶ 12; PX00462 ([redacted] Decl.) ¶ 3; PX00443 ([redacted] Decl.) ¶ 13..

118. Although some broadline customers purchase some products from specialty distributors, broadline customers cannot replace broadline distribution with specialty distributors. Hoffman (Upstream) Hrg. Vol. 3 at 12:1-13:3; Schablein (Wintergreen) Hrg. Vol. 4 at 45:19-22; Thompson (Interstate) Hrg. Vol. 2 at 96:9-11; PX00537 ([redacted] Dep. at 146:17-147:22); PX00538 ([redacted] Dep. at 175:20-177:1); PX00532 ([redacted] Dep. at 160:8-161:2); PX00560 ([redacted] Dep. at 31:25-32:18); PX00553 ([redacted] Dep. at 138:16-139:25, 182:4-183:5); PX00405 ([redacted] Decl.) ¶ 7; PX00411 ([redacted] Decl.) ¶ 10; PX00434 ([redacted] Decl.) ¶ 9; PX00452 ([redacted]

Decl.) ¶ 8; PX00457 ([redacted] Decl.) ¶ 8; PX00459 ([redacted] Decl.) ¶ 8; PX00461 ([redacted] Decl.) ¶ 12; PX00464 ([redacted] Decl.) ¶ 12; PX00479 ([redacted] Decl.) ¶ 10; PX00483 ([redacted] Decl.) ¶ 11; PX00497 ([redacted] Decl.) ¶ 8.

119. Broadline customers that use specialty distributors typically do so as a supplement to—not a substitute for—broadline distribution. Thompson (Interstate) Hrg. Vol. 2 at 95:7-22; PX00520 ([redacted] Dep. at 95:5-8); P00557 ([redacted] Dep. at 21:3-24, 53:10-57:21); PX00538 ([redacted] Dep. at 175:20-177:1); PX00528 ([redacted] Dep. at 126:15-18); PX00525 ([redacted] Dep. at 198:22-199:3); PX00553 ([redacted] Dep. at 182:4-183:5); PX00550 ([redacted] Dep. at 114:15-23); PX00405 ([redacted] Decl.) ¶ 7; PX00418 ([redacted] Decl.) ¶¶ 3-4; PX00421 ([redacted] Decl.) ¶ 3; PX00427 ([redacted] Decl.) ¶ 4; PX00446 ([redacted] Decl.) ¶ 5; PX00445 ([redacted] Decl.) ¶ 3; PX00455 ([redacted] Decl.) ¶ 3; PX00461 ([redacted] Decl.) ¶ 4; PX00462 ([redacted] Decl.) ¶ 3; PX00463 ([redacted] Decl.) ¶ 4; PX00468 ([redacted] Decl.) ¶ 4; PX00479 ([redacted] Decl.) ¶ 4; PX00498 ([redacted] ¶ 7; PX00594 ([redacted] IH at 49:11-19); PX07019 ([redacted] Decl.) ¶ 3; *see also* PX00558 (DeLaney (Sysco) Dep. at 49:9-50:8); PX07024 ([redacted] Supp. Decl.) ¶ 11; PX00563([redacted] Dep. at 101:16-103:14).

(d) <u>Customers Use Specialty Distributors as Supplements to Their Broadline Distributor</u>

120. Broadline customers generally use specialty distributors to supply unique or higher quality items not offered by their broadliner. Thompson (Interstate) Hrg. Vol. 2 at 95:7-95:22; PX00402 ([redacted] Decl.) ¶ 11; PX00404 ([redacted] Decl.) ¶ 8; PX00409 ([redacted] Decl.) ¶ 3; PX00441 ([redacted] Decl.) ¶ 5; PX00442 ([redacted] Decl.) ¶ 13; PX00445 ([redacted] Decl.) ¶ 3; PX00450 ([redacted] Decl.) ¶ 7; PX00448 ([redacted] Decl.)

¶ 6; PX07018 ([redacted] Supp. Decl.) ¶ 8; PX07016 ([redacted] Supp. Decl.) ¶¶ 5-6; PX07011 ([redacted] Supp. Decl.) ¶ 4; PX00487 ([redacted] Decl.) ¶ 12; PX00411 ([redacted] Decl.) ¶ 9; PX00461 ([redacted] Decl.) ¶ 4; PX00479 ([redacted] Decl.) ¶ 4; PX00552 ([redacted] Dep. at 49:17-50:22); PX00445 ([redacted] Decl.) ¶ 3; PX00462 ([redacted] Decl.) ¶ 3; PX07019 ([redacted] Decl.) ¶ 3; PX00421 ([redacted] Decl.) ¶ 3; PX00549 ([redacted] Dep. at 167:19-168:20); PX00410 ([redacted] Decl.) ¶ 5; *see also* PX00429 ([redacted] Decl.) ¶ 9; PX00554 ([redacted] Dep. at 141:3-19).

121. Customers supplement their broadline purchases with purchases from specialty distributors for a variety of reasons, including because specialty distributors provide:

a. **Superior product quality compared to broadliners.** Thompson (Interstate) Hrg. Vol. 2 at 95; PX00520 ([redacted] Dep. at 20:14-21:6, 92:5-15); PX00557 ([redacted] Dep. at 53:10-25); PX00538 ([redacted] Dep. at 40:15-18, 46:3-20, 49:17-50:4, 106:6-107:23, 110:2-111:25); PX00540/DX00270 ([redacted] Dep. at 69:4-70:1, 71:22-72:16); PX00553 ([redacted] Dep. at 34:15-35:18); PX00556 [redacted] Dep. at 51:11-24); PX00546 ([redacted] Dep. at 104:13-108:22); PX00521 ([redacted] Dep. at 54:9-55:10); PX00552 ([redacted] Dep. at 49:17-51:17); PX00594 ([redacted] IH at 39:5-20); PX00560 ([redacted] Dep. at 23:14-24:8); PX00464 ([redacted] Decl.) ¶ 5; PX00471 ([redacted] Decl.) ¶ 11; PX00418 ([redacted] Decl.) ¶ 4; PX00455 ([redacted] Decl.) ¶ 3.

b. **Fresher products compared to broadliners.** Schablein (Wintergreen) Hrg. Vol. 4 at 15:11-16:8; Thompson (Interstate) Hrg. Vol. 2 at 95:1-22; PX00557 ([redacted] Dep. at 53:10-25; PX00538/DX00278 ([redacted] Dep. at 29:6-22, 38:16-39:19, 59:5-18, 106:8-107:23); PX00527 ([redacted] Dep. at 65:5-66:2); PX00457 ([redacted] Decl.) ¶ 4; PX00471 ([redacted] Decl.) ¶ 11; PX00405 ([redacted] Decl.) ¶ 7; PX00452 ([redacted] Decl.) ¶ 7.

c. **Unique products that are not available from broadliners, including items from local farmers/manufacturers.** Ralph (Premier) Hrg. Vol. 3 at 118:3-19:21; Schablein (Wintergreen) Hrg. Vol. 4 at 15:11-16:8; Schreibman (US Foods) Hrg. Vol. 12 at 145:2-16; Szrom (VA) Hrg. Vol. 1 at 99:25-100:9; Thompson (Interstate) Hrg. Vol. 2 at 95:7-22; PX00553 ([redacted] Dep. at 113:1-114:3); PX00520 ([redacted] Dep. at 17:19-18:6, 20:14-21:6); PX00538 ([redacted] Dep. at 28:23-29:22, 49:17-50:4, 106:6-107:23, 121:15-123:12); PX00532 ([redacted] Dep. at 121:24-122:14);

PX00528 ([redacted] Dep. at 69:7-22); PX00560 ([redacted] Dep. at 23:14-24:8); PX00553 ([redacted] Dep. at 21:8-22:23, 35:9-18); PX00405 ([redacted] Decl.) ¶ 7; PX00434 ([redacted] Decl.) ¶ 9; PX00464 ([redacted] Decl.) ¶ 5.

d. **More product depth within the specialty category than broadliners provide.** Schreibman (US Foods) Hrg. Vol. 12 at 145:5-16; PX00538 ([redacted] Dep. at 46:3-20, 106:6-107:23, 110:2-111:25); PX00464 ([redacted] Decl.) ¶ 5; PX00455 ([redacted] Decl.) ¶ 3; PX00462 ([redacted] Decl.) ¶ 3.

122. Because many categories of food and related products are not offered by any specialty distributor, a customer would still need to purchase from a broadliner to fulfill many of its product requirements. Hoffman (Upstream) Hrg. Vol. 3 at 12-13; Holm (PFG) Hrg. Vol. 4 at 68:3-6; PX00419 ([redacted] Decl.) ¶ 4; PX00520 ([redacted] Dep. at 93-94; PX00425 ([redacted] Decl.) ¶ 10; PX00443 ([redacted] Decl.) ¶ 13; PX00450 ([redacted] Decl.) ¶ 10; PX00452 ([redacted] Decl.) ¶ 8; PX00459 ([redacted] Decl.) ¶ 8; PX00464 ([redacted] Decl.) ¶ 12; PX00472 ([redacted] Decl.) ¶ 11; PX00487 ([redacted] Decl.) ¶ 12; PX00498 ([redacted] Decl.) ¶ 7; PX00593 ([redacted] IH at 25-26); PX07015 ([redacted] Supp. Decl.) ¶ 4; PX07021 ([redacted] Supp. Decl.) ¶ 7; *see also* PX00401 ([redacted] Decl.) ¶ 5; PX07024 ([redacted] Supp. Decl.) ¶ 11.

123. Customers would likely face product shortages if they relied solely on specialty distributors because specialty distributors do not sell their products in the volume that customers need year-round. PX00497 ([redacted] Decl.) ¶ 8.

(e) Specialty Pricing Is Distinct from Broadline Pricing

124. Specialty pricing is different from broadline pricing as a result of its distinct characteristics. PX00594 ([redacted] IH at 45:8-17) ([redacted]

[redacted]) (emphasis added).

125. The prices and services offered by specialty distributors do not significantly affect the prices and services offered by PFG's broadline division to broadline customers. Holm (PFG) Hrg. Vol. 6 at 5:25-6:4.

126. Broadline distributors do not change their price or quality in response to competition from specialty distributors. *See*, *e.g.*, PX00521 ([redacted] Dep. at 56:23-25, 57:6-13); PX00552 ([redacted] Dep. at 60:7-10); PX00535 ([redacted] Dep. at 142:6-146:15).

127. Broadline customers could not economically use a network of specialty distributors to replace or price-constrain their broadliner. Hoffman (Upstream) Hrg. Vol. 3 at 12:1-10; PX00520 ([redacted] Dep. at 94:16-95:8); PX00521 ([redacted] Dep. at 155:19-156:8); PX00528 ([redacted] Dep. at 125:2-126:9); PX00541 ([redacted] Dep. at 166:25-168:19); PX00550 ([redacted] Dep. at 111:23-114:23); PX00401 ([redacted] Decl.) ¶ 5; PX00411 ([redacted] Decl.) ¶ 10; PX00419 ([redacted] Decl.) ¶ 4; PX00423 ([redacted] Decl.) ¶ 8; PX00425 ([redacted] Decl.) ¶ 10; PX00427 ([redacted] Decl.) ¶ 4; PX00435 ([redacted] ¶ 9; PX00437 ([redacted] Decl.) ¶ 5; PX00457 ([redacted] Decl.) ¶ 8; PX00461 ([redacted] Decl.) ¶ 12; PX00463 ([redacted] Decl.) ¶ 12; PX00464 ([redacted] Decl.) ¶ 12; PX00465 ([redacted] Decl.) ¶ 9; PX00467 ([redacted] Decl.) ¶ 6; PX00468 ([redacted] Decl.) ¶ 9; PX00479 ([redacted] Decl.) ¶ 10; PX00487 ([redacted] Decl.) ¶ 13; PX00489 ([redacted] Decl.) ¶ 10; PX00496 ([redacted] Decl.) ¶ 7; PX00498 ([redacted] Decl.) ¶ 7; PX00497 ([redacted] Decl.) ¶ 8; PX00593 ([redacted] IH at 25:16-26:9); PX07011 ([redacted] Supp. Decl.) ¶ 5; *see also* PX00415 ([redacted] Decl.) ¶ 14; PX07024 ([redacted] Supp. Decl.) ¶ 11;

PX00554 ([redacted] Dep. at 142:12-43:2).

128. Managing a network of specialty distributors would be logistically difficult, imposing significant additional labor and managerial costs. Lindahl (HPSI) Hrg. Vol. 12 at 119:17-120:8; PX00516 ([redacted] Dep. at 86:12-23); PX00524 ([redacted] Dep. at 165:7-167:5, 182:4-183:1); PX00537 ([redacted] Dep. at 127:24-128:16); PX00539 ([redacted] Dep. at 139:7-12); PX00532 ([redacted] Dep. at 141:2-142:15, 157:13-158:13); PX00574 ([redacted] Dep. at 220:22-221:21); PX00527 ([redacted] Dep. at 48:17-49:1); PX00521 ([redacted] Dep. at 153:17-155:18); PX00528 ([redacted] Dep. at 125:2-126:9); PX00560 ([redacted] Dep. at 32:7-33:7); PX00568 ([redacted] Dep. at 209:23-210:7); PX00548 ([redacted] Dep. at 120:19-122:15); PX00522 ([redacted] Dep. at 136:12-137:8); PX00572 ([redacted] Dep. at 138:18-139:23); PX00523 ([redacted] Dep. at 186:4-187:25); PX00518 ([redacted] Dep. at 115:8-22); PX00556 ([redacted] Dep. at 71:18-72:21 [redacted]; PX00403 ([redacted] Decl.) ¶ 6); PX00405 ([redacted] Decl.) ¶ 7; PX00407 ([redacted] Decl.) ¶ 5; PX00410 ([redacted] Decl.) ¶ 12; PX00411 ([redacted] Decl.) ¶ 10; PX00422 ([redacted] Decl.) ¶ 11; PX00423 ([redacted] Decl.) ¶ 8; PX00425 ([redacted] Decl.) ¶ 10; PX00426 ([redacted] Decl.) ¶ 8; PX00435 ([redacted] ¶ 9; PX00437 ([redacted] Decl.) ¶ 5; PX00452 ([redacted] Decl.) ¶ 8; PX00457 ([redacted] Decl.) ¶ 8; PX00459 ([redacted] Decl.) ¶ 8; PX00463 ([redacted] Decl.) ¶ 12; PX00464 ([redacted] Decl.) ¶ 12; PX00472 ([redacted] Decl.) ¶ 11; PX00483 ([redacted] Decl.) ¶ 11; PX00489 ([redacted] Decl.) ¶ 10; PX00498 ([redacted] Decl.) ¶ 7; *see also* PX00543 ([redacted] Dep. at 123:22-124:5); PX00529 ([redacted] Dep. at 158:24-159:11).

129. Many of Defendants' witnesses agree about the difficulty of switching to a network of specialty distributors. PX07000 ([redacted] Supp. Decl.) ¶ 5; PX07005 ([redacted] Supp. Decl.) ¶ 6; PX07007 ([redacted] Supp. Decl.) ¶ 6; PX07010 ([redacted] Supp. Decl.) ¶ 5; PX07011 ([redacted] Supp. Decl.) ¶ 5; PX07015 ([redacted] Supp. Decl.) ¶ 4; PX07018 ([redacted] Supp. Decl.) ¶ 8.

130. Using a network of specialty distributors would be more expensive than using a broadline distributor because specialty distributors often charge high prices for products and distribution. PX00524 ([redacted] Dep. at 181:7-183:1); PX00537 ([redacted] Dep. at 146:17-147:22); PX00576 ([redacted] Dep. at 173:16-174:10); PX00532 ([redacted] Dep. at 159:24-161:3, 168:1-25); PX00528 ([redacted] Dep. at 124:22-126:18); PX00547 ([redacted] Dep. at 112:5-114:3); PX00552 ([redacted] Dep. at 49:17-51:17); PX00568 ([redacted] Dep. at 109:9-22, 208:22-210:2, 229:2-8); PX00541 ([redacted] Dep. at 164:21-168:19, 202:11-203:3); PX00525 ([redacted] Dep. at 198:7-21); PX00550 ([redacted] Dep. at 112:25-113:8); PX00556 ([redacted] Dep. at 63:14-64:8); PX00401 ([redacted] Decl.) ¶ 5; PX00410 ([redacted] Decl.) ¶ 12; PX00420 ([redacted] Decl.) ¶ 12; PX00425 ([redacted] Decl.) ¶ 10; PX00426 ([redacted] Decl.) ¶ 8; PX00435 ([redacted] ¶ 9; PX00437 ([redacted] Decl.) ¶ 5; PX00442 ([redacted] Decl.) ¶13; PX00452 ([redacted] Decl.) ¶ 8; PX00457 ([redacted] Decl.) ¶ 8; PX00459 ([redacted] Decl.) ¶ 8; PX00461 ([redacted] Decl.) ¶ 12; PX00463 ([redacted] Decl.) ¶ 12; PX00464 ([redacted] Decl.) ¶¶ 5, 12; PX00471 ([redacted] Decl.) ¶¶ 11-12; PX00472 ([redacted] Decl.) ¶ 11; PX00483 ([redacted] Decl.) ¶ 11; PX00487 ([redacted] Decl.) ¶ 13; PX00489 ([redacted] Decl.) ¶ 10; PX00496 ([redacted] Decl.) ¶ 7; PX00497 ([redacted] Decl.) ¶ 8;

PX00498 ([redacted] Decl.) ¶ 7; PX07002 ([redacted] Supp. Decl.) ¶ 5; PX07004 ([redacted] Supp. Decl.) ¶ 5; PX07011 ([redacted] Supp. Decl.) ¶ 5; *see also* PX00543 ([redacted] Dep. at 122:21-23:12).

131. Among the benefits that customers would lose if they switched to a network of specialty distributors are the volume rebates and discounts they receive from broadline distributors. PX00533 ([redacted] Dep. at 84:16-24); PX00568 ([redacted] Dep. at 214:21-215:4); PX00541 ([redacted] Dep. at 165:16-25); PX00535 ([redacted] Dep. at 147:23-148:10); PX00573 ([redacted] Dep. at 63:5-10); PX00550 ([redacted] Dep. at 113:17-114:14); PX00523 ([redacted] Dep. at 189:3-4); PX00422 ([redacted] Decl.) ¶ 11; PX00463 ([redacted] Decl.) ¶ 12; PX00466 ([redacted] Decl.) ¶ 6; PX00471 ([redacted] Decl.) ¶ 12; PX00483 ([redacted] Decl.) ¶ 11; PX00487 ([redacted] Decl.) ¶ 13; *see also* PX00524 ([redacted] Dep. at 181:7-183:1); PX00439 ([redacted] Decl.) ¶ 12.

132. For large broadline customers with multiple, geographically dispersed units, using specialty distributors as an alternative to broadline distribution would be a logistical challenge, as specialty distributors typically lack a national footprint. PX00560 ([redacted] Dep. at 24:18-25:8); PX00548 ([redacted] Dep. at 120:16-121:12); PX00446 ([redacted] Decl.) ¶ 5; PX00448 ([redacted] Decl.) ¶¶ 6, 14; *see also* PX00517 (Lynch (US Foods) Dep. at 180:6-13).

133. Such large broadline customers generally do not invite specialty distributors to bid on the broadline portion of their business. Tom Lynch, US Foods' Senior Vice President for National Sales, admitted that US Foods has never lost an RFP for a broadline customer to a specialty distributor. Lynch (US Foods) Hrg. Vol. 14 at 65:22-66:3; PX00517 (Lynch (US

Foods) Dep. at 135:1-12); *see also* [redacted] at 24:1-8; PX00594 ([redacted] IH at 49); PX00560 ([redacted] Dep. at 24:11-25:8).

134. Specialty distribution, which usually offers a very limited and focused product category, is not a substitute for broadline distribution for a healthcare GPO. Ralph (Premier) Hrg. Vol. 3 at 67:22-24. Specialty distributors could not meet all of the needs that a healthcare organization would have, as they fulfill a niche role and do not meet such an organization's broad product needs. Ralph (Premier) Hrg. Vol. 3 at 66:4-67:2. Even cumulatively, a collection of specialty distributors would be unlikely to be able to meet a healthcare organization's entire food needs. Ralph (Premier) Hrg. Vol. 3 at 67:3-18. Moreover, specialty distributors' products are often more expensive, which makes them a less attractive option for budget-conscious healthcare organizations. Ralph (Premier) Hrg. Vol. 3 at 66:16-67:2. Adding distributors adds costs—it is more complex for a member to have to deal with more trucks, more invoices to process, more ordering processes, and the like. Ralph (Premier) Hrg. Vol. 3 at 67:3-18.

135. Broadline customers state that they could not and would not substitute specialty distribution for broadline distribution to obtain better pricing. *See*, *e.g.*, PX00553 ([redacted] Dep. at 182:4-183:5) [redacted]); PX00520 ([redacted] Dep. at 94:16-95:4); PX00538 ([redacted] Dep. at 201:7-22); PX00474 ([redacted] Dep. at 218:13-219:10); PX00528 ([redacted] Dep. at 125:2-18); PX00533 ([redacted] Dep. at 80:25-81:8); PX00548 ([redacted] Dep. at 120:16-122:15); PX00549 ([redacted] Dep. at 167:19-168:20); PX00567 ([redacted] Dep. at 157:13-158:11); PX00550 ([redacted] Dep. at 114:4-23); PX00487 ([redacted] Dep. at 186:4-187:24, 192:3-6); PX00518 ([redacted] Dep. at 115:8-22,

117:9-20); PX07002 ([redacted] Supp. Decl.) ¶ 5; PX07004 ([redacted] Supp. Decl.) ¶ 5; PX07007 ([redacted] Supp. Decl.) ¶ 6; PX07011 ([redacted] Supp. Decl.) ¶¶ 4-5; PX07012 ([redacted] Supp. Decl.) ¶ 7; PX07013 ([redacted] Supp. Decl.) ¶ 8; PX07014 ([redacted] Supp. Decl.) ¶ 8; PX07015 ([redacted] Supp. Decl.) ¶ 4; PX07016 ([redacted] Supp. Decl.) ¶¶ 5-6; PX07018 ([redacted] Supp. Decl.) ¶ 8; PX07020 ([redacted] Supp. Decl.) ¶ 5; *see also* PX00509 (Lynch (US Foods) Dep. at 184:24-185:20).

136. PFG generally does not encounter independent restaurant customers threatening to switch, much less actually switching, a portion of their purchases away from broadline to specialty distributors in response to price changes. Holm (PFG) Hrg. Vol. 6 at 5:5-24.

137. Customers testified that they have never threatened to switch even a portion of their business to a specialty distributor in order to get lower prices from a broadline distributor. PX00560 ([redacted] Dep. at 25:9-23, 31:15-24); PX00408 ([redacted] Decl.) ¶ 10; PX00476 ([redacted] Decl.) ¶ 9; PX00479 ([redacted] Decl.) ¶ 10; PX00483 ([redacted] Decl.) ¶ 11; PX00486 ([redacted] Decl.) ¶ 10; PX07004 ([redacted] Decl.) ¶ 5; *see also* PX00427 ([redacted] Decl.) ¶ 12. They likewise testified that they have never used the prices offered by specialty distributors in order to get better prices from a broadline distributor. PX00560 ([redacted] Dep. at 25:9-27:21); PX00521 ([redacted] Dep. at 102:15-18); PX00552 ([redacted] Dep. at 60:7-10); PX00576 ([redacted] Dep. at 59:19-24); *see also* PX00548 ([redacted] Dep. at 120:16-121:12).

138. Increasing the amount of purchases made through specialty distributors would also reduce or eliminate the benefit to customers of aggregating purchases with a broadline distributor to obtain lower prices, which increases the customer's overall costs. Schablein

(Wintergreen) Hrg. Vol. 4 at 16:18-17:4; Thompson (Interstate) Hrg. Vol. 2 at 96:12-20; PX00568 ([redacted] Dep. at 208:7-210:2); PX00403 ([redacted] Decl.) ¶ 6; PX00404 ([redacted] Decl.) ¶ 8; PX00409 ([redacted] Decl.) ¶ 8; PX00422 ([redacted] Decl.) ¶ 11; PX00425 ([redacted] Decl.) ¶ 10; PX00457 ([redacted] Decl.) ¶ 8; PX00463 ([redacted] Decl.) ¶ 12; PX00464 ([redacted] Decl.) ¶ 12; PX00466 ([redacted] Decl.) ¶ 6; PX00483 ([redacted] Decl.) ¶ 11; PX00487 ([redacted] Decl.) ¶ 13; PX00593 ([redacted] IH) at 26:5-9); PX07001 ([redacted] Supp. Decl.) ¶ 12; PX07006 ([redacted] Supp. Decl.) ¶ 8; PX07016 ([redacted] Supp. Decl.) ¶ 6; PX07017 ([redacted] Supp. Decl.) ¶ 7; PX07018 ([redacted] Supp. Decl.) ¶ 8; PX07021 ([redacted] Supp. Decl.) ¶ 7; *see also* PX00524 ([redacted] Dep. at 181:15-183:1); PX00521 ([redacted] Dep. at 156:9-157:14).

(f) <u>Dr. Israel's Analysis Confirms That Specialty Distribution Is Not in the Relevant Product Market</u>

139. Dr. Israel "concluded that a specialty distribution is quite distinct, offers a different service from broadline distribution. Serves quite distinct needs in customers. And therefore that the substitution from broadline to specialty in response to a SSNIP would be limited such that it doesn't change my conclusion that broadline itself is the relevant product market." Israel Hrg. Vol. 9 at 20:18-24.

140. Dr. Israel's review of the industry allowed him to determine that specialty distributors intentionally limit their focus to a specific food category, typically carrying a narrower, specialized set of products associated with that type of food. PX09350 (Israel Report) ¶ 33; *see also* Israel Hrg. Vol. 9 at 23:24-24:3.

141. Dr. Israel found it is unlikely that a customer would be able to use multiple different specialty distributors to purchase all the products they purchase from broadline

distributors, at least not in a cost-effective manner, and thus it is unlikely that a customer would do so in response to a small price increase at its broadline distributor, rather than switching to another broadline option. PX09350 (Israel Report) ¶ 69.

142. Review of data submitted by industry participants allowed Dr. Israel to show the specialty distribution centers operated by many firms carry significantly fewer SKUs than broadline distributors' warehouses. PX09350 (Israel Report) ¶ 70, Figure 3; *see also* Israel Hrg. Vol. 9 at 25:2-17 (explaining Figure 3).

143. Review of data submitted by industry participants allowed Dr. Israel to show that the average size of a specialty distribution center is generally significantly smaller than the average size of a broadline distribution center, implying that even if specialty distributors wanted to supply a broader range of SKUs, they could not do so without making significant additional investments in capacity. PX09350 (Israel Report) ¶ 71, Figure 4.

144. Dr. Israel found that, "[i]n general, broadline distributors and specialty distributors serve separate customer needs, rather than compete for the same set of customers' needs. Because they serve a distinct set of needs, specialty distributors are not likely alternatives for customers responding to a small price increase at their broadline distributor by seeking out an alternative way to satisfy the needs that a broadline distributor had been fulfilling." PX09350 (Israel Report) ¶ 72; *see also* Israel Hrg. Vol. 9 at 25:3-29:10.

145. Dr. Israel determined that "Even a combination of specialty distributors may not cover all of the product categories a customer needs, and the products that specialty distributors supply are often more expensive than those provided by broadline distributors. Moreover, the increased transaction costs from dealing with several specialty distributors in place of a single broadline distributor mean that substituting specialty distribution in response to a small price

increase in broadline services is generally a poor option." PX09350 (Israel Report) ¶ 73.

3. Cash-and-Carry Is Not a Substitute for Broadline Distribution

146. At the hearing, industry witnesses (other than Defendants' own executives) uniformly testified that cash-and-carry stores are not a substitute for broadline distribution. *See*, *e.g.*, Holm (PFG) Hrg. Vol. 4 at 70:3-6; Thompson (Interstate) Hrg. Vol. 2 at 98:16-98:18; Schablein (Wintergreen) Hrg. Vol. 4 at 19:3-20; Szrom (VA) Hrg. Vol. 2 at 23:24-24:24.

147. According to US Foods' ordinary course documents, broadline distributors compete primarily with other broadline distributors and cash-and-carry stores compete primarily with other cash-and-carry stores: "In the store, we will be competitive with [redacted] on a similar cost model. On the truck, we will be competitive with broadline distributors on a similar cost model." PX03114-003.

148. [redacted] believes that, post-merger, [redacted] because, [redacted] PX00571 ([redacted] Dep. at 139:20-140:12)). In the event of a price increase, [redacted] expects that broadline customers would be more likely to keep using broadline distribution than switch to cash-and-carry. PX00571 ([redacted] Dep. at 132:24-133:14).

(a) Cash-and-Carry Stores Have Distinct Characteristics and Uses

149. Cash-and-carry stores have distinct characteristics that distinguish them from broadline distributors. Cash-and-carry stores are warehouse stores that sell food, equipment, and supplies to members. Examples of cash-and-carry stores are Restaurant Depot, Smart & Final, Gordon Foodservice's Marketplace, and US Foods' CHEF'STORE. Schreibman (US Foods)

Hrg. Vol. 12 at 147:24-148:4. This distribution channel may also include grocery stores, other retail outlets, and club stores (e.g., [redacted]) that sell certain foodservice items, but do not deliver to customers. PX00543 ([redacted] Dep. at 56:2-11).

150. Factors such as delivery, product breadth, and value-added services distinguish broadline from cash-and-carry. PX00563 ([redacted] Dep. at 114:9-117:14).

151. Unlike broadline distributors, cash-and-carry stores do not deliver products to their customers but rather require a foodservice operator to self-distribute. PX00400 ([redacted] Decl.) ¶¶ 5, 10; PX00453 ([redacted] Decl.) ¶ 4; PX00428 ([redacted] Decl.) ¶ 7 ([redacted]); PX00531 ([redacted] Dep. at 89:17-90:7); PX00558 (DeLaney (Sysco) Dep. at 52:7-9); PX00438 ([redacted] Decl.) ¶ 10; PX00590 (Schreibman (US Foods) IH at 42:11-15); PX00591 (Schuette (US Foods) IH at 190:6-8).

152. Cash-and-carry stores lack the full breadth of products that broadline customers require. Schablein (Wintergreen) Hrg. Vol. 4 at 19:3-15; Szrom (VA) Hrg. Vol. 2 at 24:11-16; PX00520 ([redacted] Dep. at 97:15-98:5); PX00528 ([redacted] Dep. at 126:19-127:10); PX00553 ([redacted] Dep. at 143:3-144:7); PX00405 ([redacted] Decl.) ¶ 8; PX00410 ([redacted] Decl.) ¶ 13; PX00411 ([redacted] Decl.) ¶ 8; PX00420 ([redacted] Decl.) ¶ 13; PX00422 ([redacted] Decl.) ¶ 10; PX00423 ([redacted] Decl.) ¶ 9; PX00426 ([redacted] Decl.) ¶ 10; PX00435 ([redacted] ¶ 10; PX00440 ([redacted] Decl.) ¶ 8; PX00446 ([redacted] Decl.) ¶ 11; PX00447 ([redacted] Decl.) ¶ 11; PX00448 ([redacted] Decl.) ¶ 11; PX00452 ([redacted] Decl.) ¶¶ 9-10; PX00457 ([redacted] Decl.) ¶ 9; PX00459 ([redacted] Decl.) ¶ 9; PX00463 ([redacted]

[redacted] Decl.) ¶ 13; PX00465 ([redacted] Decl.) ¶ 10; PX00467 ([redacted] Decl.) ¶ 7; PX00468 ([redacted] Decl.) ¶ 10; PX00471 ([redacted] Decl.) ¶ 13; PX00479 ([redacted] Decl.) ¶ 11; PX00482 ([redacted] Decl.) ¶ 12; PX00483 ([redacted] Decl.) ¶ 12; PX00485 ([redacted] Decl.) ¶ 11; PX00487 ([redacted] Decl.) ¶ 14; PX00489 ([redacted] Decl.) ¶ 11; PX00496 ([redacted] Decl.) ¶ 8; PX00497 ([redacted] Decl.) ¶ 9; PX00498 ([redacted] Decl.) ¶ 8; PX07020 ([redacted] Supp. Decl.) ¶ 6; *see also* PX00428 ([redacted] Decl.) ¶ 6.

153. Owners and operators of cash-and-carry stores recognize that they do not carry the same breadth of products as broadline distributors. "[redacted]" PX00428 ([redacted] Decl.) ¶ 6; *see also* PX00453 ([redacted] Decl.) ¶ 2. [redacted] a cash-and-carry store that caters to foodservice customers, [redacted] PX00400 ([redacted] Decl.) ¶ 3; *see also* PX00444 ([redacted] Decl.) ¶ 20 (explaining [redacted]).

154. [redacted] PX00571 ([redacted] Dep. at 134:9-35:2).

155. Certain cash-and-carry stores mainly offer products [redacted]. PX00400

([redacted] Decl.) ¶ 9; PX00428 ([redacted] Decl.) ¶ 8; PX00433 ([redacted] Decl.) ¶ 8; *see also* PX00521 ([redacted] Dep. at 169:17-170:8); PX00543 ([redacted] Dep. at 57:3-7) ([redacted]).

156. Cash-and-carry stores do not carry the same quality of products as broadline distributors. PX00532 ([redacted] Dep. at 162:23-25); PX00521 ([redacted] Dep. at 170:16-171:5); PX00553 ([redacted] Dep. at 143:10-11) ("The quality is inferior."); PX00411 ([redacted] Decl.) ¶ 8; PX00430 (Jackalope Jacks Decl.) ¶ 11; PX00447 ([redacted] Decl.) ¶ 11; PX00459 ([redacted] Decl.) ¶ 9; PX00452 ([redacted] Decl.) ¶ 9; PX00463 ([redacted] Decl.) ¶ 13; PX00468 ([redacted] Decl.) ¶ 10; PX00471 ([redacted] Decl.) ¶ 13; PX00476 ([redacted] Decl.) ¶ 10; PX00479 ([redacted] Decl.) ¶ 11; PX00482 ([redacted] Decl.) ¶ 12; PX00483 ([redacted] Decl.) ¶ 12; PX00485 ([redacted] Decl.) ¶ 11; PX00487 ([redacted] Decl.) ¶ 14.

157. Cash-and-carry stores also do not provide consistent products across all of their stores, which is an important service for many broadline customers. PX00403 ([redacted] Decl.) ¶ 7; PX00405 ([redacted] Decl.) ¶ 8; PX00436 ([redacted] Decl.) ¶ 5; PX00445 ([redacted] Decl.) ¶ 8; PX00450 ([redacted] Decl.) ¶ 11; PX00431 ([redacted] Decl.) ¶ 6; PX00468 ([redacted] Decl.) ¶ 10; PX00418 ([redacted] Decl.) ¶ 5; PX00445 ([redacted] Decl.) ¶ 8.

158. Cash-and-carry stores do not provide the same products on a consistent basis, even in the same store. PX00584 (Nasir (Sysco) IH at 239:21-240:25).

159. Cash-and-carry stores do not offer the volume of products needed by broadline customers. PX00463 ([redacted] Decl.) ¶ 13; PX00464 ([redacted] Decl.) ¶ 13; PX00471 ([redacted] Decl.) ¶ 13; PX00483 ([redacted] Decl.) ¶ 12; PX00487 ([redacted] Decl.) ¶ 14.

160. Unlike broadline distributors, cash-and-carry stores do not have dedicated account sales representatives. PX00520 ([redacted] Dep. at 99:20-22); PX00528 ([redacted] Dep. at 127:17-128:2); PX00487 ([redacted] Decl.) ¶ 14.

161. Unlike broadline distributors, cash-and-carry stores do not provide value-added services, such as contracted and centralized purchasing. *See* DeLaney (Sysco) Hrg. Vol. 12 at 62:5-63:4; PX00575 ([redacted] Dep. at 101:23-102:13); PX00573 ([redacted] Dep. at 79:13-80:12); PX00435 ([redacted] ¶ 10; PX00447 ([redacted] Decl.) ¶ 11; PX07001 ([redacted] Supp. Decl.) ¶ 13.

162. Unlike broadline distributors, cash-and-carry stores do not provide credit to their customers, but rather require payments be made by cash or credit cards. PX00571 ([redacted] Dep. at 70:3-17); PX00470 ([redacted] Decl.) ¶ 6.

163. Unlike broadline distributors, cash-and-carry stores are "relatively low service orientated" because they do not provide credit, have a salesforce, or offer delivery. PX00571 ([redacted] Dep. at 70:3-17).

(b) <u>Cash-and-Carry Stores Compete with Other Cash-and-Carry Stores to Serve a Niche Market</u>

164. Cash-and-carry stores serve a "niche market" of customers that have the ability to, or prefer to, shop at a cash-and-carry store. PX00400 ([redacted] Decl.) ¶ 11.

165. Customers that might purchase food from cash-and-carry outlets are either very small or those retail outlets mainly act as an emergency back-up for a select range of products. Holm (PFG) Hrg. Vol. 4 at 70:7-20. The primary users of cash-and-carry are independent operators currently using broadline delivery that are looking to fill-in their regular delivered drops or other independent restaurants that do not meet the minimum requirements for broadline delivery. Schablein (Wintergreen) Hrg. Vol. 4 at 18:20-19:20; DX01540 at 34-35; PX00538

([redacted] Dep. at 31:8-14, 52:9-14, 53:7-54:15); PX00563 ([redacted] Dep. at 118:10-119:5); PX00251 at 011; PX00415 ([redacted] Decl.) ¶ 15; PX00427 ([redacted] Decl.) ¶ 12; PX00428 ([redacted] Decl.) ¶ 5; PX00429 ([redacted] Decl.) ¶ 13; PX00438 ([redacted] Decl.) ¶ 10; PX00529 ([redacted] Dep. at 17:25-18:11); PX00553 ([redacted] Dep. at 143:3-144:7); PX00518 ([redacted] Dep. at 9:22-10:13).

166. While customers that use broadline may also use cash-and-carry, they typically use it as a supplement—not an alternative—to their broadline distributor. *See* PX00320-030 ([redacted]) (emphasis added). Many of Defendants' declarants who use cash-and-carry admit that they only use cash-and-carry stores for particular items, or when they have no other choice. For example:

a. "In my Initial Declaration, . . . [redacted] PX07009 ([redacted] Supp. Decl.) ¶ 8 (emphasis added).

b. "In my Initial Declaration, [redacted] PX07003 ([redacted] Supp. Decl.) ¶ 9 (emphasis added).

c. "[redacted]." PX07007 ([redacted] Supp. Decl.) ¶ 7 (emphasis added).

d. [redacted] PX07002 ([redacted] Supp. Decl.) ¶ 6 (emphasis added).

e. [redacted]

[redacted] PX07017 ([redacted] Supp. Decl.) ¶ 8 (emphasis added).

f. [redacted] PX07004 ([redacted] Supp. Decl.) ¶ 6 (emphasis added).

g. [redacted] PX07005 ([redacted] Supp. Decl.) ¶ 7 (emphasis added).

h. [redacted] PX07010 ([redacted] Supp. Decl.) ¶ 6 (emphasis added).

167. Cash-and-carry stores do not compete at all for many categories of broadline customers. According to [redacted] cash-and-carry stores do not compete for "[redacted]" PX00571 ([redacted] Dep. at 124:15-125:23). Most broadline customers, including hospitals, hotel chains, schools, universities, and contract feeders, "[redacted]," that cannot be fulfilled by a cash-and-carry store. PX00563 ([redacted] Dep. at 116:9-117:14).

168. [redacted] PX00590 (Schreibman (US Foods) IH at 56:11-60:13). [redacted] PX00252 at 001. [redacted] PX00590 (Schreibman (US Foods)

IH at 57:22-58:16).

169. Cash-and-carry stores do not compete with broadline distributors for customers with multi-regional or geographically dispersed facilities. PX00453 ([redacted] Decl.) ¶ 7 ([redacted]); PX00428 ([redacted] Decl.) ¶ 7.

170. Cash-and-carry stores generally do not participate in the RFPs for broadline customers. [redacted] PX00580 (DeLaney (Sysco) IH at 110:17-111:6); *see also* PX00584 (Nasir (Sysco) IH at 241:1-242:12). Likewise, David Schreibman, US Foods Executive Vice President for Strategy was unable to identify any instances in which a cash-and-carry store (a) lowered its pricing in response to a bid by a cash-and-carry outlet, or (b) was invited to participate in an RFP issued by a healthcare GPO or a foodservice management company. Schreibman (US Foods) Hrg. Vol. 13 at 45:17-47:3; PX00515 (Schreibman (US Foods) Dep. at 102:21-104:4); *see also* PX00591 (Schuette (US Foods) IH at 190:15-19); Ralph (Premier) Hrg. Vol. 3 at 69:19-20; PX00589 (Lynch (US Foods) Dep. at 186:1-11); PX00587 (Kimball (US Foods) IH at 182:12-183:12, 217:20-218:6).

171. Cash-and-carry stores are not a substitute for broadline distribution for healthcare GPO members. Ralph (Premier) Hrg. Vol. 3 at 69:20-22. Healthcare organizations cannot use cash-and-carry stores as a primary foodservice procurement method because they are ordering and receiving large quantities of food and related products at one time, and it would not be feasible for each organization to own a truck, go to the store, and manually pick up the

voluminous product they are currently having delivered. Ralph (Premier) Hrg. Vol. 3 at 68:6-15. In addition, healthcare organizations must maintain the food at the proper temperature in order to ensure food safety, and procuring food from a cash-and-carry outlet, without a refrigerated truck, would compromise that. Ralph (Premier) Hrg. Vol. 3 at 68:16-24. A healthcare GPO's members also find the lack of consistency of products to be an obstacle to using cash-and-carry stores. Such stores do not carry the same product day in and day out, and it is particularly important for healthcare and educational organizations to have consistent products that meet all of the regulations and nutritional requirements. Ralph (Premier) Hrg. Vol. 3 at 68:25-69:16; *see also* PX00594 ([redacted] IH at 50:18-20) (cash-and-carry stores do not compete for [redacted] broadline business).

172. Similarly, cash-and-carry stores are not a substitute for broadline distribution for hotels or other hospitality venue customers. *See*, *e.g.*, Thompson (Interstate) Hrg. Vol. 2 at 97:10-98:9; Schablein (Wintergreen) Hrg. Vol. 4 at 19:3-20; PX00549 ([redacted] Dep. at 236:13-22); PX00403 ([redacted] Decl.) ¶ 7.

(c) <u>Cash-and-Carry Pricing Is Distinct from Broadline Pricing</u>

173. Cash-and-carry stores offer a distinct pricing model that differs from broadline distributors. US Foods' executives have not identified any RFPs in which US Foods lowered its pricing to compete with a cash-and-carry store. Schreibman (US Foods) Hrg. Vol. 13 at 46:25-47:3; PX00515 (Schreibman (US Foods) Dep. at 102:21-104:4); *see also* PX03114 at 003-004.

174. Cash-and-carry stores and broadline distribution businesses are subject to different pricing models. [redacted] PX00591 (Schuette (US Foods) IH at 190:15-191:10).

175. Customers confirm that broadliners do not reduce their prices in response to being

shown lower prices offered by cash-and-carry stores. For example, [redacted]. PX00551 ([redacted] Dep. at 113:12-24). In addition, when [redacted] an independent restaurant in Raleigh, [redacted] PX00521 ([redacted] Dep. at 103:13-104:7).

176. Customers do not use the threat of switching to cash-and-carry stores as leverage to constrain broadline distributors' pricing. PX00549 ([redacted] Dep. at 236:12-22). Customers do not threaten to switch to cash-and-carry stores or actually do so in order to constrain pricing from broadline distributors. PX00524 ([redacted] Dep. at 185:9-14).

177. Cash-and-carry stores tend to offer lower prices than broadline distributors, yet very few customers use cash-and-carry to fulfill the majority of their foodservice needs. PX00400 ([redacted] Decl.) ¶¶ 9, 11; PX00571 ([redacted] Dep. at 125:14-127:5).

178. Local customers are willing to pay higher prices for products delivered by broadline distributors in order to avoid the time and expense of shopping at a cash-and-carry store. PX00520 [redacted] Dep. at 98:23-99:16); PX00553 ([redacted] Dep. at 181:17-183:5); PX00523 ([redacted] Dep. at 135:12-36:15); PX00457 ([redacted] Decl.) ¶ 9; PX07008 ([redacted] Supp. Decl.) ¶ 10; PX07022 ([redacted] Supp. Decl.) ¶ 6.

179. [redacted]

[redacted] PX00571 ([redacted] Dep. at 10:6-10).

180. Cash-and-carry operations compete with other cash-and-carry stores, not broadline distribution. PX00438 ([redacted] Decl.) ¶ 10; PX03114-003 ("[redacted]"). [redacted] PX00571 ([redacted] Dep. at 136:21-24). [redacted] PX00571 ([redacted] Dep. at 135:11-136:20). Similarly, [redacted] testified that cash-and-carry stores like [redacted] compete primarily with [redacted] cash-and-carry business, not [redacted] broadline distribution business. PX00563 ([redacted] Dep. at 114:9-117:14); *see also* PX00562 ([redacted] Dep. at 91:10-92:8) ([redacted]). And [redacted] explained that [redacted] primarily competes against [redacted] PX00529 ([redacted] Dep. at 163:4-20). [redacted] further testified that [redacted] do not serve as an alternative to broadline distributors because [redacted] does not deliver [redacted], and delivery is an important service component for broadline customers. PX00529 ([redacted] Dep. at 163:21-164:7); *see also* PX00453 ([redacted] Decl.) ¶ 6 (stating that "[redacted]" and that "[redacted]

[redacted]"); PX00428 ([redacted] Decl.) ¶ 6 (stating that [redacted]").

181. Customers would not substitute self-procurement at cash-and-carry stores even in the event of a price increase for broadline distribution. Schablein (Wintergreen) Hrg. Vol. 4 at 19:3-20; PX00520 ([redacted] Dep. at 99:23-100:6); PX00574 ([redacted] Dep. at 222:2-23:19); PX00548 ([redacted] Dep. at 124:9-21); PX00522 ([redacted] Dep. at 141:8-142:1); PX00525 ([redacted] Dep. at 219:8-220:11); PX00553 ([redacted] Dep. at 181:17-24) [redacted]); PX00518 ([redacted] Dep. at 105:16-106:6) ("[redacted]."); *id.* at 133:9-13 ("[redacted]); PX00400 ([redacted] Decl.) ¶ 11; PX00426 ([redacted] Decl.) ¶ 10; PX00457 ([redacted] Decl.) ¶ 9; PX00459 ([redacted] Decl.) ¶ 9; PX00464 ([redacted] Decl.) ¶ 13; PX00487 ([redacted] Decl.) ¶ 14; PX00496 ([redacted] Decl.) ¶ 8; PX00498 ([redacted] Decl.) ¶ 8; PX07002 ([redacted] Supp. Decl.) ¶ 6; PX07005 ([redacted] Supp. Decl.) ¶ 7; PX07006 ([redacted] Supp. Decl.) ¶ 9; PX07007 ([redacted] Supp. Decl.) ¶ 7; PX07015 ([redacted] Supp. Decl.) ¶ 5.

(d) <u>Cash-and-Carry Is Not a Viable Substitute for Broadline</u>

182. Cash-and-carry stores are not a viable substitute for broadline distribution. Schablein (Wintergreen) Hrg. Vol. 4 at 19:3-20; Szrom (VA) Hrg. Vol. 2 at 23:9-24:21; Thompson (Interstate) Hrg. Vol. 2 at 97:10-98:9, 98:16-18; PX00520 ([redacted]

Dep. at 100:15-19); PX00538 ([redacted] Dep. at 187:11-188:18); PX00531 ([redacted] Dep. at 126:9-17); PX00532 ([redacted] Dep. at 169:5-170:10); PX00571 ([redacted] Dep. at 84:25-85:13, 146:19-147:8); PX00528 ([redacted] Dep. at 126:19-128:11, 129:16-19, 130:10-17); PX00572 ([redacted] Dep. at 114:5-24, 117:20-118:1); PX00567 ([redacted] Dep. at 156:13-23); PX00535 ([redacted] Dep. at 133:22-135:7); PX00553 ([redacted] Dep. at 181:17-182:3) [redacted]); PX00518 ([redacted] Dep. at 132:12-133:13); PX00405 ([redacted] Decl.) ¶ 8; PX00411 ([redacted] Decl.) ¶ 8; PX00419 ([redacted] Decl.) ¶ 4; PX00423 ([redacted] Decl.) ¶ 9; PX00425 ([redacted] Decl.) ¶ 11; PX00426 ([redacted] Decl.) ¶ 10; PX00432 ([redacted] Decl.) ¶ 6; PX00437 ([redacted] Decl.) ¶ 6; PX00446 ([redacted] Decl.) ¶ 11; PX00447 ([redacted] Decl.) ¶ 11; PX00457 ([redacted] Decl.) ¶ 9; PX00459 ([redacted] Decl.) ¶ 9; PX00461 ([redacted] Decl.) ¶ 13; PX00463 ([redacted] Decl.) ¶ 13; PX00464 ([redacted] Decl.) ¶ 13; PX00467 ([redacted] Decl.) ¶ 7; PX00471 ([redacted] Decl.) ¶ 13; PX00479 ([redacted] Decl.) ¶ 11; PX00483 ([redacted] Decl.) ¶ 12; PX00487 ([redacted] Decl.) ¶ 14; PX00497 ([redacted] Decl.) ¶ 9; PX00591 (Schuette (US Foods) IH at 192:8-14); PX07011 ([redacted] Supp. Decl.) ¶ 6; PX07017 ([redacted] Supp. Decl.) ¶ 9; PX07018 ([redacted] Supp. Decl.) ¶ 9; PX07021 ([redacted] Supp. Decl.) ¶ 8; *see also* Lindahl (HPSI) Hrg. Vol. 12 at 120:12-14.

183. Even local customers that sometimes shop at cash-and-carry stores today, including many of Defendants' customer-declarants, emphasize that they could not switch a significant portion of their business to cash-and-carry stores. PX00520 ([redacted]

Dep. at 100:7-14); PX00568 ([redacted] Dep. at 170:16-171:10, 210:9-212:13); PX00553 ([redacted] Dep. at 181:17-182:3); PX00550 ([redacted] Dep. at 115:9-117:14); PX00411 ([redacted] Decl.) ¶ 8; PX00435 ([redacted] Decl.) ¶ 10; PX00472 ([redacted] Decl.) ¶ 12; PX00479 ([redacted] Decl.) ¶ 11; PX07002 ([redacted] Supp. Decl.) ¶ 6; PX07005 ([redacted] Supp. Decl.) ¶ 7; PX07006 ([redacted] Supp. Decl.) ¶ 9; PX07007 ([redacted] Supp. Decl.) ¶ 5; PX07008 ([redacted] Supp. Decl.) ¶¶ 10-11; PX07010 ([redacted] Supp. Decl.) ¶ 6; PX07012 ([redacted] Supp. Decl.) ¶ 5; PX07014 ([redacted] Supp. Decl.) ¶ 6.

184. Distributors other than Defendants confirm that broadline customers cannot substitute a cash-and-carry store for a broadline distributor. Holm (PFG) Hrg. Vol. 4 at 70:3-20; PX00531 ([redacted] Dep. at 126:9-17); PX00562 ([redacted] Dep. at 91:24-92:8, 207:3-12); PX00543 ([redacted] Dep. at 57:8-25); PX00554 ([redacted] Dep. at 144:22-145:6); PX00429 ([redacted] Decl.) ¶ 13; *see also* PX07024 ([redacted] Decl.) ¶ 11.

185. To utilize cash-and-carry stores as an alternative to broadline distribution, customers must hire additional staff, or allocate existing staff, to travel to these stores to purchase the products, and they must have or acquire refrigerated trucks to transport the items, both of which increase their overall food costs. Szrom (VA) Hrg. Vol. 2 at 23:8-16, 24:8-21 (using cash and carry would be a "logistical nightmare."); Hoffman (Upstream) Hrg. Vol. 3 at 13:25-14:12; Thompson (Interstate) Hrg. Vol. 2 at 97:10-98:9; PX00537 ([redacted] Dep. at 150:4-24); PX00520 ([redacted] Dep. at 97:15-98:17); PX00538 ([redacted] Dep. at 187:11-188:18); PX00532 ([redacted] Dep. at 169:5-170:10); PX00521 ([redacted] Dep. at 200:2-201:3); PX00528 ([redacted] Dep. at 126:19-128:11); PX00552 ([redacted] Dep. at 64:19-65:3) ([redacted]

[redacted]); PX00573 ([redacted] Dep. at 82:10-83:4); PX00553 ([redacted] Dep. at 143:3-144:7); PX00550 ([redacted] Dep. at 115:9-116:15); PX00523 ([redacted] Dep. at 133:4-134:19, 135:12-136:15, 140:12-22); PX00400 ([redacted] Decl.) ¶ 7; PX00403 ([redacted] Decl.) ¶ 7; PX00405 ([redacted] Decl.) ¶ 8; PX00408 ([redacted] Decl.) ¶ 11; PX00410 ([redacted] Decl.) ¶ 13; PX00411 ([redacted] Decl.) ¶ 8; PX00419 ([redacted] Decl.) ¶ 4; PX00423 ([redacted] Decl.) ¶ 9; PX00425 ([redacted] Decl.) ¶ 11; PX00426 ([redacted] Decl.) ¶ 10; PX00435 ([redacted] Decl.) ¶ 10; PX00437 ([redacted] Decl.) ¶ 6; PX00445 ([redacted] Decl.) ¶ 8; PX00447 ([redacted] Decl.) ¶ 11; PX00448 ([redacted] Decl.) ¶ 11; PX00451 ([redacted] Decl.) ¶ 21; PX00452 ([redacted] Decl.) ¶ 10; PX00454 ([redacted] Decl.) ¶ 7; PX00457 ([redacted] Decl.) ¶ 9; PX00459 ([redacted] Decl.) ¶ 9; PX00464 ([redacted] Decl.) ¶ 13; PX00467 ([redacted] Decl.) ¶ 7; PX00479 ([redacted] Decl.) ¶ 11; PX00487 ([redacted] Decl.) ¶ 14; PX00496 ([redacted] Decl.) ¶ 8; PX00498 ([redacted] Decl.) ¶ 8; PX00588 (Lederer (US Foods) IH at 202:5-17, 203:8-20); PX07003 ([redacted] Supp. Decl.) ¶ 9; PX07014 ([redacted] Supp. Decl.) ¶ 6; PX07015 ([redacted] Supp. Decl.) ¶ 5; PX07016 ([redacted] Supp. Decl.) ¶ 7; PX07022 ([redacted] Supp. Decl.) ¶ 6.

186. Because cash-and-carry stores do not provide delivery services, customers can only use cash-and-carry if a store is within a short driving distance of their restaurants. PX00429 ([redacted] Decl.) ¶ 13; PX00452 ([redacted] Decl.) ¶¶ 9-10; PX07018 ([redacted] Supp. Decl.) ¶ 9; *see also* PX00321-034; Schreibman (US Foods) Hrg. Vol. 13 at 53:10-54:4 (agreeing that PX00321-034 shows that US Foods' broadline sales increased to customers located 20 or more miles away from the newly opened Restaurant Depot in [redacted]).

187. [redacted] claims that [redacted] draws

customers from about [redacted]. PX00400 ([redacted] Decl.) ¶ 4. As such, [redacted] PX00571 ([redacted] Dep. at 130:16-131:8). Similarly, [redacted] estimates that most customers of [redacted] are located within [redacted] of the store. PX00529 ([redacted] Dep. at 162:2-18).

188. Defendants' executives testified [redacted] PX00580 (Delaney (Sysco) IH at 67:14-68:6) ([redacted]); PX00588 (Lederer (US Foods) IH at 203:8-20) ([redacted]).

189. [redacted] PX03114-004. Similarly, according to the hearing testimony of David Schreibman, Executive Vice President for Strategy at US Foods, "the [food] manufacturing community . . . treat[s] Restaurant Depot as a different channel for purposes of product costs . . . ." Schreibman (US Foods) Hrg. Vol. 12 at 152:10-18.

(e) <u>Dr. Israel's Analysis Confirms That Cash-and-Carry Is Not in the Relevant Product Market</u>

190. Dr. Israel determined that "[a]lthough cash and carry stores sell food and food-related products, for many reasons it is unlikely that a broadline customer would respond to a small broadline price increase by shifting substantial sales to cash and carry stores, rather than shifting purchases from one broadliner to another." PX09350 (Israel Report) ¶ 75; *see also* Israel Hrg. Vol. 9 at 29:25-30:11.

191. Dr. Israel's review of the evidence caused him to find that "[c]ash and carry stores also do not allow customers to purchase in a centralized manner or to buy pursuant to their own direct manufacturer contracts." PX09350 (Israel Report) ¶ 34. "Centralized purchasing is important to customers with multiple locations because having one point of contact for purchasing and invoicing generally reduces costs relative to dealing with multiple points of contact. Consistent product offerings across facilities are also important to customers that have multiple locations and seek to offer the same food products at all of their locations." PX09350 (Israel Report) ¶ 79; *see also* Israel Hrg. Vol. 9 at 30:19-32:7.

192. Based on data provided by industry participants, Dr. Israel found that, "generally, the average number of SKUs carried at several large broadline distributors' distribution centers is significantly higher than the average number of SKUs carried at several large cash and carry companies' stores." PX09350 (Israel Report) ¶ 78, Figure 5; *see also* Israel Hrg. Vol. 9 at 30:19-32:7 ("As I often see in many industries, when you compare a true distributor versus a retail store, one problem the retail store has is it just – can't have as much stuff, right, it just has to lay stuff out in a way that a customer can get to it as opposed to a distributor can stack boxes up high and pick those boxes. You see cash-and-carry just doesn't deliver and it just has many fewer SKUs.").

193. Dr. Israel concluded that because they employ a "different format and business model, cash and carry stores target a different customer base from broadline distributors, which implies that they are not close substitutes and that cash and carry would be unlikely to steal customers away from broadline distribution in response to a small price increase." PX09350 (Israel Report) ¶ 82; *see also* Israel Hrg. Vol. 9 at 34:13-35:10 ("I know there is some testimony in the record that talks about the split of cash-and-carry and the different types of customers. . . .

[I]t says roughly 50 percent of what cash-and-carry sells is to households . . . . It says about 30 percent of that remaining 50 percent is businesses so small that they don't really qualify or they can't really make use of a broadline distributor. And then 20 percent, sort of the remaining 20 percent, one-fifth of that relatively small cash-and-carry segment is this group we were talking about that uses both cash-and-carry and broadline. But again, as I indicated, my review of the testimony is that in general people are describing using that for a distinct need that supplement what their broadliner does as opposed to replacing it.").

194. Dr. Israel finds that an additional "distinction between cash and carry stores and broadline distribution is that broadline distributors generally negotiate prices with each customer independently and can therefore price discriminate across customers, whereas cash and carry stores offer the same prices to all customers. Indeed, for most large customers, cash and carry stores are not attractive because they do not allow those customers to establish stable, centralized prices, and do not allow them to access the favorable pricing and volume discounts they obtain when they consolidate their volume with a broadline distributor or product manufacturer or both, under a long-term contract. This makes those customers highly unlikely to switch to cash and carry in response to a small price increase by their broadline distributor." PX09350 (Israel Report) ¶ 84; *see also* Israel Hrg. Vol. 9 at 32:8-33:5 (testifying that national customers would be unable to replicate "the uniformity and contracting" available from broadline distribution with cash-and-carry).

195. "Consistent with the different customer needs served by cash and carry stores relative to broadline distributors, as well as the lack of strong customer substitution from broadline distributors to cash and carry stores, broadline distributors' behavior indicates that they are not particularly concerned about cannibalization of distribution revenues by cash and carry

operations." PX09350 (Israel Report) ¶ 85.

F. <u>Dr. Israel's Analysis Confirms That Broadline Distribution Services Is the Relevant Product Market</u>

196. Dr. Israel finds that the service needs filled by broadline distributors are distinct from those that can be filled by other foodservice channels, meaning that customers would be much more likely to turn to another broadline distributor in the face of a price increase than to another type of distributor. Accordingly, Dr. Israel determines that a hypothetical monopolist, freed of the pricing pressure from other broadline distributors, would almost certainly find it profitable to impose a SSNIP, making broadline foodservice a relevant product market. PX09350 (Israel Report) ¶ 40.

197. Dr. Israel determines that in response to a price increase at their broadline distributor, customers would be much more likely to switch to another broadline distributor than to one of these alternative types of distributors, supporting the conclusion that broadline distribution passes the hypothetical monopolist test to be a relevant product market. PX09350 (Israel Report) ¶¶ 48-49.

198. The fact that broadline customers may also use specialty distributors, or cash-and-carry stores, for some of their needs, and thus broadline distributors may lose some sales to these distribution modes following a price increase, does not mean that these other modes of distribution would capture a sufficient portion of the substitution from a broadline distributor to defeat that price increase. PX09350 (Israel Report) ¶ 69; PX09375 (Israel Rebuttal Report) ¶¶ 87-89; Israel Hrg. Vol. 9 at 20:25-23:6. Defendants' expert Dr. Bresnahan agreed that his analysis of purchasing patterns of chain restaurants it not representative of how other customers purchase broadline distribution services. Bresnahan Hrg. Vol. 17 at 69:10-15.

199. Dr. Israel implemented standard economic methodology in finding that broadline

customers are unlikely to switch to alternatives that cannot effectively meet their distinct needs in response to a SSNIP. PX09350 (Israel Report) ¶¶ 87-92 ("The economic literature has established—and the courts have accepted and explicitly relied on—a method for determining what percentage of those leaving a given product in response to a small price increase would need to switch to another product inside the candidate product market—as opposed to a product outside the candidate market—for the market to be sufficiently broad so as to constitute a relevant antitrust market."). Dr. Israel implements this method, known as the *Katz-Shapiro* aggregate diversion analysis, and finds that it confirms that broadline distribution is a relevant product market. PX09350 (Israel Report) ¶ 87-88, 91; *see also* Israel Hrg. Vol. 7 at 81:9-83:2; Israel Hrg. Vol. 9 at 35:11-37:15.

200. Using aggregate diversion analysis, Dr. Israel concludes that "[b]ased on Sysco's and USF's weighted-average margins of approximately [redacted], I calculate the critical loss associated with a 10 percent price increase to be approximately [redacted]. The implication of a [redacted] critical loss is that, as long as [redacted] of those customers leaving the single broadline distributor imposing a 10 percent price increase would choose another broadline option, broadline distribution services are a relevant product market." PX09350 (Israel Report) ¶ 90.

201. The specific formula that Dr. Israel applied in performing the aggregate diversion analysis is the original *Katz-Shapiro* formula. The original *Katz-Shapiro* formula (10% / (10% +M)) applies in situations where the hypothetical monopolist would apply a symmetric price increase (i.e., a hypothetical monopolist of all broadline distributors would impose a symmetric price increase across all such distributors). Israel Hrg. Vol. 9 at 50:1-52:1; Israel Hrg. Vol. 18 at 89:7-91:24. The formula pointed to by Defendants' experts only applies in a situation where the

hypothetical monopolist would impose an asymmetric price increase. Israel Hrg. Vol. 9 at 50:20-51:17; Israel Hrg. Vol. 18 at 90:10-16 ("[T]he Daljord test would apply to a case where you think what the monopolist would do would be simply have a bunch of products, say, a bunch of different broadline distributors, but you think for some reason one of them is low price and the rest are not, and the monopolist would just raise that one price."). The *Katz-Shapiro* formula is the correct formula to use in this case because the appropriate question is: "Do broadliners compete enough with each, such that the broadline prices would go up" under the hypothetical monopolist test. Israel Hrg. Vol. 18 at 91:10-24.

202. "[T]he margin [Sysco] and [US Foods] refer to consistently, both in talking about profitability, but also in talking about how they would have to adjust their prices, is there a gross margin, which is basically the price of selling one more unit of food minus the cost of goods sold associated with that unit. And they report that, I won't give the exact number, but they report that gross margin that they talk about consistently as their metric in the 15 to 20 percent range." Israel Hrg. Vol. 9 at 38:10-17; *see also* Israel Hrg. Vol. 18 at 92:12-18 ("So there are many documents, many submissions by Sysco, for example, to the SEC where they consistently refer to the gross margin, which is the price of the – selling one more unit minus the cost of that unit. . . . They talk about if that number goes down they have to change their pricing policies."); Israel Hrg. Vol. 18 at 93:17-19 ("And in the case of Sysco that number is consistently given throughout it[s] filings its gross margin, which gives you a number in the high teens."). Dr. Israel applied a "clearly conservative" margin of ten percent for his aggregate diversion calculation, which is lower than Defendants' reported gross margins, and "applies to both local and national customers." Israel Hrg. Vol. 9 at 39:12-18.

203. Dr. Israel proffers multiple sources of empirical evidence that confirm sufficient

diversion would occur to other broadline distributors to render broadline distribution a relevant product market. For example, he finds that "USF's Linc data, [redacted], shows that [redacted] of the sales opportunities (based on the potential revenue of those sales opportunities) were lost to other distributors who provide broadline service. Furthermore, my analysis of RFP data shows that of the RFPs Sysco and USF lost, [redacted] and [redacted], respectively, were lost to a distributor that provides broadline services." PX09350 (Israel Report) ¶ 92; *see also* Israel Hrg. Vol. 9 at 44:8-45:12 (testifying that in the Sysco RFP dataset, "well over 70 percent of the losses they had were to other broadline firms"; in the USF RFP dataset "that was even a higher percentage . . . going to other broadliners"; and in the Linc data "north of 90 percent of the losses in the lin[c] data are reported as being losses to other broadline firms.").

204. Dr. Israel performed this test using data from national customers and local customers. Specifically, he used the RFP data to estimate aggregate diversion for national customers, and Linc data to estimate aggregate diversion for local customers. Israel Hrg. Vol. 9 at 42:17-44:7. Dr. Israel concludes that sufficient diversion would occur to other broadline distributors to render broadline distribution a relevant product market even if (1) the incorrect margin identified by Dr. Hausman is used in the correct *Katz-Shapiro* test, and (2) the incorrect formula identified by Defendants' expert is used for the aggregate diversion test if the correct margin is used. Israel Hrg. Vol. 18 at 93:20-94:23.

205. Defendants' own expert finds that over half of Sysco's broadline customers would switch to another broadline distributor (in fact US Foods) in response to a price increase. PX09375 (Israel Rebuttal Report) ¶ 71 (citing DX01360 (Bresnahan Report §§ E(2)(a), F(1)(a))).

G. Defendants' Expert Economist Fails to Show That Other Foodservice Channels Should Be Included in the Relevant Product Market

206. Dr. Bresnahan's national switching analysis is flawed in several ways that lead to severe downward biases in estimated rates of switching between the merging parties. PX09375 (Israel Rebuttal Report) ¶¶ 121-131, Tables 6, 7, 8, 9, 10. For example, every time that a particular buyer stops buying from Sysco or USF, and Dr. Bresnahan fails to identify either new sales occurring at the other merging party or a closure of a location through Aggdata, he interprets it as a switch to another competitor rather than a potential limitation in the data. PX09375 (Israel Rebuttal Report) ¶¶ 121-131, Tables 6, 7, 8, 9, 10*; see also* Bresnahan Hrg. Vol. 17 at 72:1-74:25; PX00701 (Bresnahan Dep. at 172:13-23). Additionally, Dr. Bresnahan's methodology is flawed in that he systematically excludes substitutions between Defendants if both Sysco and USF deliver to the same location for more than a single quarter. *See* Bresnahan Hrg. Vol. 17 at 72:1-74:25; PX00701 (Bresnahan Dep. 128:3-10). Further, Dr. Bresnahan's analysis erroneously counts as switches to competitors every location that temporarily closed (e.g., to remodel) or was seasonally closed. Bresnahan Hrg. Vol. 17 at 72:1-74:25. Finally, his analysis is heavily biased towards a specific type of customer: chain restaurants, which are not representative of broadline customers as a group. *See* Bresnahan Hrg. Vol. 17 at 77:1-79:17 (national customer switching analysis does not capture switches by GPOs, foodservice management companies, or government entities). Dr. Bresnahan's switching analysis also does not capture situations in which a customer renegotiates a contract with Sysco and does not switch, but uses US Foods to get a better deal. Bresnahan Hrg. Vol. 17 at 78:5-17.

207. Dr. Bresnahan's local switching study yields no reliable conclusions about competition between USF and Sysco for local broadline customers because it suffers from flaws that bias downwards the diversion between Defendants. Specifically, the study (i) derives from

an unrepresentative sample of fairly few switches; (ii) improperly assumes that customers that did not make purchases from Sysco and USF for a given time period must have purchased from a competitor; and (iii) applies an asymmetric algorithm for defining switches that systematically inflates switches to competitors at the expense of switches between Defendants. PX09375 (Israel Rebuttal Report) ¶ 186; *see also* Bresnahan Hrg. Vol. 17 at 87:1-16 (in local switching analysis seasonal closures and temporary closures are counted as switches to competitors). Finally, the local switching analysis fails to capture the competitive effect of customers switching between Sysco and USF within a week, or playing them off each other to obtain better prices. *See* Bresnahan Hrg. Vol. 17 at 84:12-19.

208. Dr. Bresnahan's fresh chicken study, which purports to show that local broadline customers frequently switch single product lines away from Sysco to distributors other than USF, actually demonstrates no such switching. PX09375 (Israel Rebuttal Report) ¶¶ 189-92. First, the study assumes what it seeks to prove, by taking a group of 209 local customers and excluding the 111 who purchased fresh chicken from Sysco in every four-week period throughout the year. *See* Bresnahan Hrg. Vol. 17 at 94:25-95:3. Having isolated the 98 customers that did not purchase fresh chicken from Sysco in every period, Dr. Bresnahan then assumes that in four-week periods in which customers did not buy fresh chicken from Sysco and also did not make any purchases from US Foods, they purchased fresh chicken from other suppliers. What this assumption is based on is unclear—as Dr. Bresnahan acknowledged, there are numerous reasons why a customer may not have purchased fresh chicken in a certain period. *See generally* Bresnahan Hrg. Vol. 17 at 95:13-97:4; *see*, *e.g.*, *id*. at 95:15-20 ("[Q] you don't know whether the customer actually bought fresh chicken during the time period; correct? A. No, that's right, I don't. . . . I don't observe whether the bought fresh chicken in that period."); *see also* PX00701

(Bresnahan Dep. at 106: 19-20) ("[W]e don't know what [the Sysco customers studied are] doing when they're stopping and starting"). Even if a customer is purchasing fresh chicken from someone other than Sysco during a certain time period, Dr. Bresnahan testified that he does not know from whom the customer purchased fresh chicken. Bresnahan Hrg. Vol. 17 at 97:1-4; *see also* PX00701 (Bresnahan Dep. at 114:8-10) ("[Q.] But you don't know if it was a specialty distributor? [A] No. We don't know who it was here.").

III. THE MERGER WOULD HARM DISTINCT TYPES OF CUSTOMERS

209. Defendants work closely with their customers and prospective customers, and are aware of the characteristics that affect the types of distribution options that are available to them, as well as what their past purchasing practices have been. PX00569 (Sonnemaker (Sysco) Dep. at 12:23-13:9, 15:10-17:11, 24:12-25:9; 78:3-81:24); PX00517 (Lynch (US Foods) Dep. at 147:11-148:6).

210. That knowledge allows Defendants to identify categories of foodservice customers with different requirements.

A. <u>National Customers</u>

211. It is appropriate to analyze the merger separately for sales of broadline services to customers with locations dispersed nationwide or across multiple regions ("National Customers"). PX09350 (Israel Report) ¶ 7; *see also* PX09010-002-007; PX03122-004.

212. National Customers frequently use requests for proposals (RFPs) to procure broadline foodservice distribution services. Schreibman (US Foods) Hrg. Vol. 13 at 39:5-40:25.

213. National Customers include: (1) hospitality chains and GPOs; (2) healthcare GPOs; (3) foodservice management companies (sometimes referred to as "contract feeders"); and (4) restaurant chains. *See* PX00320-038; PX01064-001; PX03122-004; Holm (PFG) Hrg. Vol. 4 at 82:5-21; [redacted].

1. Defendants Recognize that National Customers Have Different Foodservice Distribution Needs

214. Defendants recognize the competitive distinction between National Customers and local customers. Israel Hrg. Vol. 7 at 70:15-24 ("So the parties themselves break customers down into national and local. I think US Foods explicitly uses those words. I think at Sysco they talk about CMU or corporate multiunit customers as opposed to local customers. The parties' consultant, McKinsey, in analyzing the business models, I believe, refer to these the companies effectively having two service models -- two distinct service models to serve two distinct sets of customers, is really a fundamental split between national and local customers in terms of how they were served.").

215. Both companies maintain distinct divisions within their organizations dedicated to serving customers with multiple locations. US Foods operates a National Sales group to handle customers that use multiple US Foods distribution centers. PX00517 (Lynch (US Foods) Dep. at 8:21-9:6); PX00320-038. Similarly, Sysco operates a separate division for its "corporate multi-unit" customers. PX00584 (Nasir (Sysco) IH at 23:5-12); PX01400-001.

216. Sysco's CEO testified that [redacted] PX00558 (DeLaney (Sysco) Dep. at 6:13-19); *see also* DeLaney (Sysco) Hrg. Vol. 12 at 71:18-21.

217. US Foods' COO testified that [redacted] PX00591 (Schuette (US Foods) IH at 121:12-122:9, 125:2-126:22).

218. [redacted]

[redacted] PX03122-004; *see also* PX03034-006.

219. [redacted] PX03122-004.

220. [redacted] PX03000-014; *see also* PX03034-006; PX03003-006; PX03025-002.

221. Thomas Lynch, US Foods' Senior VP for National Sales, explained that, [redacted] PX00589 (Lynch (US Foods) IH at 44:9-46:8). He testified that [redacted] PX00589 (Lynch (US Foods) IH at 45:18-20).

222. Mr. Lynch admitted that in business development presentations, US Foods has pitched to prospective competitors that it is a "national player with the ability to cover national business." Lynch (US Foods) Hrg. Vol. 14 at 66:23-67:2; *see also* PX00589 (Lynch (US Foods) IH at 188:13-190:18).

223. US Foods serves National Customers out of its national sales organization located in Rosemont, Illinois. Lynch (US Foods) Hrg. Vol. 14 at 66:17-22; PX00517 (Lynch (US Foods) Dep. at 10:10-24). [redacted] PX00517 (Lynch (US Foods) Dep. at 55:8-19). [redacted]

[redacted] PX00517 (Lynch (US Foods) Dep. at 57:5-58:18).

224. [redacted] (PX01054-005) [redacted] (PX03101-020); *see also* PX09249-003 (Sysco presentation to [redacted] stating that Sysco is a "[s]trong national broadline distributor w/ local market capabilities.").

225. In a 2013 presentation for [redacted], Sysco highlighted its competitive advantages over other distributors, stating that its [redacted] PX01062-005.

226. One of US Foods' private equity owners, Clayton, Dubilier & Rice, observed in a 2013 valuation analysis that [redacted] PX03004-001. [redacted] PX03004-001. At the preliminary injunction hearing, David Schreibman of US Foods agreed that US Foods and Sysco have "leading *national market* position[s]." Schreibman (US Foods) Hrg. Vol. 13 at 31:13-15, 33:25-34:7 (emphasis added).

227. Defendants market themselves differently to National Customers, emphasizing their broad geographic coverage, single point of contact, nationally consistent service, product consistency throughout their network, and centralized administration and reporting, among other qualities. Schreibman (US Foods) Hrg. Vol. 13 at 37:8-13; PX00515 (Schreibman (US Foods) Dep. at 245:15-22); PX00247-001-002 ([redacted]

[redacted]); PX00288; PX00587 (Kimball (US Foods) IH at 226:10-227:23); PX00588 (Lederer (US Foods) IH at 217:21-220:12); PX00589 (Lynch (US Foods) IH) at 46:18-48:1); PX01053-004; PX01054-005; PX01062-005; PX01460-001 [redacted]); PX03025-002 [redacted]); PX03211 ([redacted]); PX03220-008-011; PX03017; PX05049-020; PX00281-011; *see also* PX00232-034; PX09249-021.

228. The majority of sales from Defendants' respective National Sales and CMU divisions are to customers that use more than 35 distribution centers. PX09375 (Israel Rebuttal Report) ¶ 115, Figure 3; Israel Hrg. Vol. 9 at 56:3-20; Israel Hrg. Vol. 11 at 127:14-128:6.

229. [redacted] PX00515 (Schreibman (US Foods) Dep. at 75).

230. [redacted] PX00515 (Schreibman (US Foods) Dep. at 69:3-8). [redacted] PX00515 (Schreibman (US Foods) Dep. at 71:16-72:23).

231. [redacted]

[redacted] PX00515 (Schreibman (US Foods) Dep. at 69:17-20).

232. [redacted] PX09010-002; *see also* PX09010-004 ([redacted]). [redacted] PX09010-004. [redacted] PX09010-004; *see also* PX00591 (Schuette (US Foods) IH at 49:19-50:11).

233. [redacted] PX09010-007.

234. [redacted] PX06170-002.

2. Other Market Participants Recognize Distinctions Between National and Local Broadline Customers

235. Other broadline distributors refer to Sysco and US Foods as "national distributors." PX00412 ([redacted] Decl.) ¶¶ 6-7; PX00415 ([redacted] Decl.) ¶¶ 10, 16; PX00416 ([redacted] Decl.) ¶ 12; PX00429 ([redacted] Decl.) ¶¶ 3, 19, 23; PX00434 ([redacted] Decl.) ¶ 11.

236. Other broadline distributors also refer to geographically dispersed customers as "national." Holm (PFG) Hrg. Vol. 4 at 82:5-21; [redacted]; PX00412 ([redacted] Decl.) ¶¶ 7, 9, 11-12; PX00415 ([redacted] Decl.) ¶ 12; PX00416 ([redacted] Decl.) ¶ 9; PX00424 ([redacted] Decl.) ¶ 9; PX00429 ([redacted] Decl.) ¶¶ 15, 17, 19, 23; PX00434 ([redacted] Decl.) ¶ 12.

237. Regional distributors confirm their ability to compete for sales to National Customers is limited because, among other things, they cannot offer national coverage. *See*, *e.g.*, PX00564 ([redacted] Dep. at 53:11-15, 107:5-12); PX00434 ([redacted] Decl.) ¶ 12; PX00443 ([redacted] Decl.) ¶ 16. In fact, there are two consortia of regional distributors, Distribution Market Advantage ("DMA") and UniPro's Multi-Unit Group ("MUG"), whose purpose is to allow independent distributors to compete for the business of National Customers.

238. DMA was created in an effort to help regional distributors to serve National Customers because the individual members are generally not capable of serving all of a National Customer's business on their own. PX00412 ([redacted] Decl.) ¶ 3; PX00531([redacted] Dep. at 37:21-38:2) [redacted]); PX00517 (Lynch (US Foods) Dep. at 219:17-23); PX00534 ([redacted] Dep. at 31:3-17); PX00543 ([redacted] Dep. at 67:15-68:12); PX00415 ([redacted] Decl.) ¶ 10; PX00429 ([redacted] Decl.) ¶ 19; PX00449 ([redacted] Decl.) ¶ 8; *see also* PX00558 (DeLaney (Sysco) Dep. at 133:18-134:19). Individual members of DMA cannot service national accounts independent of DMA. PX00531 ([redacted] Dep. at 42:4-14, 125:20-126:8); PX00449 ([redacted] Decl.) ¶ 8.

239. UniPro was formed to create an alliance, similar to DMA, to allow a group of independent distributors to come together and go out after national business. PX00543 ([redacted]

([redacted] Dep. at 109:14-110:5). UniPro is also supposed to blend the independent distributors' buying power together to be able to compete with Sysco and US Foods' buying power. PX00543 ([redacted] Dep. at 109:20-110:5).

240. The CEO of PFG testified about the distinct class of "national broadline customers," including their differences in needs compared to local customers. Holm (PFG) Hrg. Vol. 4 at 84:6-90:18; PX00429 ([redacted] Decl.) ¶¶ 15-16, 19, 23. [redacted] PX09060-013.

241. [redacted] testified that [redacted] distinguishes between "national accounts" and "street" customers in the ordinary course of business, with national accounts usually "requir[ing] service from [a] foodservice distributor in multiple areas of the country." PX00570 ([redacted] Dep. at 79:6-81:14). [redacted] also testified that most National Customers prefer to deal with one distributor because it is more efficient and less expensive than dealing with several regional players. PX00570 ([redacted] Dep. at 125:7-18).

3. <u>National Customers Have Distinct Distribution Needs</u>

242. National Customers have locations that are geographically dispersed in different regions or nationally. PX00531 ([redacted] Dep. at 45:13-18, 47:16-18; PX00570 ([redacted] Dep. at 80:6-80:8); PX00560 ([redacted] Dep. at 47:12-48:18); PX00549 ([redacted] Dep. at 227:6-17); PX00437 ([redacted] Decl.) ¶ 2; PX00404 ([redacted] Decl.) ¶ 2; PX00594 ([redacted] IH at 26:22-27:11, 55:2-8).

243. National Customers often take a national approach to procuring foodservice distribution services. Thompson (Interstate) Hrg. Vol. 2 at 100 ("[W]e're looking for a company that can support our whole operation [across the United States] as it relates to food distribution");

PX00560 ([redacted] Dep. at 12:4-9); PX00405 ([redacted] Decl.) ¶ 12; PX00407 ([redacted] Decl.) ¶ 7.

244. National Customers choose broadline distributors, at least in part, based on the ability of those distributors to provide broad geographic coverage. PX03273; PX09299; PX09341-008 ([redacted]); PX00567 ([redacted] Dep. at 145:13-147:15); PX00437 ([redacted] Decl.) ¶ 11; PX00480 ([redacted] Supp. Decl.) ¶ 5; PX00407 ([redacted] Decl.) ¶ 7; PX00439 ([redacted] Decl.) ¶ 6; *see also* PX09350 (Israel Report) ¶¶ 173-178; Szrom (VA) Hrg. Vol. 2 at 9:3-18, 11:11-25, 20:3-22:7.

245. In selecting which broadline distributors to include in an RFP, National Customers consider a distributors' geographic footprint. Many National Customers limit RFPs to distributors with national coverage. Szrom (VA) Hrg. Vol. 2 at 9:3-18, 11:11-25, 20:3-22:7; Holm (PFG) Hrg. Vol. 6 at 6:21-7:4 (testifying that PFG sometimes is not invited to bid for business of National Customers); PX09036-001; PX09037-001; PX09038-002; PX00432 ([redacted] Decl.) ¶ 13; PX00436 ([redacted] Decl.) ¶¶ 10-11; PX00418 ([redacted] Decl.) ¶¶ 13, 15; PX00445 ([redacted] Decl.) ¶ 14; PX07019 ([redacted] Decl.) ¶ 11; PX00421 ([redacted] Decl.) ¶ 9.

246. As the hearing testimony showed, there are National Customers that require a broadline distributor with a national geographic footprint. For example, Premier requires a national broadline distribution contract to service its members. Ralph (Premier) Hrg. Vol. 3 at 71:13-15. A large part of Premier's membership is either national or multi-regional, and these members need a single distributor to service their foodservice distribution needs. Ralph (Premier) Hrg. Vol. 3 at 71:13-25. Similarly, Interstate Hotels looks to contract with one distributor that can provide broadline distribution to its properties nationwide. Thompson

(Interstate) Hrg. Vol. 2 at 88:11-89:3. One of the technical evaluation factors used by the United States Department of Veterans Affairs (VA) in selecting a broadline distributor is the "capability to perform nationwide." PX09342-065; PX09338-002; Szrom (VA) Hrg. Vol. 2 at 9.

247. For National Customers, the more geographic coverage a broadline distributor can provide, the better. PX00594 ([redacted] IH at 81:21-82:11); PX00560 ([redacted] Dep. at 65:16-66:20, 141:2-8).

248. Defendants recognize the benefits of broad geographic coverage, which allows them "[redacted]," which, in turn, [redacted] PX00591 (Schuette (US Foods) IH at 83:10-84:11, 134:9-17); *see also* PX00558 (DeLaney (Sysco) Dep. at 273:5-11) ([redacted]); PX01062-005 ([redacted]).

249. Defendants use their national scale to cost-effectively serve customers across the country. Schreibman (US Foods) Hrg. Vol. 13 at 35:11-14. As a result, Defendants' scale is a significant competitive advantage. Schreibman (US Foods) Hrg. Vol. 13 at 35:11-17. Sysco and US Foods each has more scale than any other participant in the industry. Schreibman (US Foods) Hrg. Vol. 13 at 35:11-20.

250. Even for National Customers that may seek to use fewer distribution centers, Defendants still benefit from their ability to provide an optimal network to those customers based on a larger and denser geographic footprint. PX00569 (Sonnemaker (Sysco) Dep. at 134:3-23).

251. National broadline distribution allows National Customers to more easily and efficiently: acquire items that meet a particular set of specifications or that are sourced from a particular manufacturer; ensure consistent distributor service, execution, and product quality;

manage broadline distribution contracts; obtain lower distribution prices by consolidating their purchase volume; and easily procure food for new locations when expanding to new geographic areas. Szrom (VA) Hrg. Vol. 2 at 15:19-18:13, 20:25-22:7; Thompson (Interstate) Hrg. Vol. 2 at 100:7-103:22; Holm (PFG) Hrg. Vol. 4 at 84:6-90:18; PX00565 ([redacted] Dep. at 14:2-13); PX00567 ([redacted] Dep. at 175:19-176:24); PX00404 ([redacted] Decl.) ¶ 4; PX00418 ([redacted] Decl.) ¶ 8; PX00419 ([redacted] Decl.) ¶ 8; PX00421 ([redacted] Decl.) ¶¶ 6-7, 14; PX00437 ([redacted] Decl.) ¶¶ 8, 11; PX00441 ([redacted] Decl.) ¶ 6; PX00442 ([redacted] Decl.) ¶ 11; PX00445 ([redacted] Decl.) ¶¶ 9-12; PX00455 ([redacted] Decl.) ¶¶ 7-9; PX00493 ([redacted] Supp. Decl.) ¶ 2; PX07019 ([redacted] Decl.) ¶¶ 4-8.

252. Even if National Customers do not use a single broadliner as a sole source supplier, they typically demand the ability to contract centrally with a broadline distributor with national distribution capabilities, for reasons of efficiency, product and service consistency, and cost. Szrom (VA) Hrg. Vol. 2 at 15:14-18:13, 20:3-22:7; Holm (PFG) Hrg. Vol. 4 at 84:6-90:18; PX00401 ([redacted] Decl.) ¶ 12; PX00402 ([redacted] Decl.) ¶ 6; PX00404 ([redacted] Decl.) ¶ 9; PX00405 ([redacted] Decl.) ¶ 12; PX00418 ([redacted] Decl.) ¶ 8; PX00419 ([redacted] Decl.) ¶ 8; PX00421 ([redacted] Decl.) ¶¶ 6-7, 14; PX00432 ([redacted] Decl.) ¶ 10; PX00436 ([redacted] Decl.) ¶¶ 9-10; PX00439 ([redacted] Decl.) ¶¶ 6-7; PX00441 ([redacted] Decl.) ¶ 8; PX00442 ([redacted] Decl.) ¶ 11; PX00445 ([redacted] Decl.) ¶¶ 9-11; PX00455 ([redacted] Decl.) ¶¶ 7-9; PX00493 ([redacted] Supp. Decl.) ¶ 2; PX07019 ([redacted] Decl.) ¶¶ 4-8.

253. National Customers frequently negotiate contracts, including with Defendants, that require broadliners to apply the same price schedules and other terms to their locations or members throughout the country. Thompson (Interstate) Hrg. Vol. 2 at 87:21-88:10 (observing that the margins in Interstate's contract with US Foods apply across the country); Schreibman

(US Foods) Hrg. Vol. 13 at 42:10-15; PX00567 ([redacted] Dep. at 73:17-74:4, 147:16-21); PX00405 ([redacted] Decl.) ¶ 12 [redacted]); PX00418 ([redacted] Decl.) ¶ 14; PX00421 ([redacted] Decl.) ¶ 4; PX00442 ([redacted] Decl.) ¶ 11; PX00445 ([redacted] Decl.) ¶ 4; PX00455 ([redacted] Decl.) ¶ 4; PX00589 (Lynch (US Foods) IH at 117:14-118:10); PX09010-004; PX09297-010-013, 019.

254. A broadliner with national distribution coverage offers National Customers simple contract administration and consistent SKU availability. Holm (PFG) Hrg. Vol. 4 at 84:6-90:8; PX00429 ([redacted] Decl.) ¶ 16; PX00405 ([redacted] Decl.) ¶ 12.

255. [redacted] PX00569 (Sonnemaker (Sysco) Dep. at 40:15-42:4).

256. Many National Customers consider purchasing broadline distribution services, at least principally, from distributors with national coverage and view Sysco and US Foods as the only two truly national broadline distributors. Holm (PFG) Hrg. Vol. 4 at 84:6-85:18; Thompson (Interstate) Hrg. Vol. 2 at 100:7-14; PX00403 ([redacted] Decl.) ¶ 14; PX00404 ([redacted] Decl.) ¶ 11; PX00405 ([redacted] Decl.) ¶ 13; PX00407 ([redacted] Decl.) ¶¶ 7, 10; PX00418 ([redacted] Decl.) ¶¶ 15-16; PX00419 ([redacted] Decl.) ¶ ¶ 7, 9; PX00421 ([redacted] Decl.) ¶¶ 10-11, 17; PX00432 ([redacted] Decl.) ¶ 14; PX00436 ([redacted] Decl.) ¶¶ 11, 16; PX00439 ([redacted] Decl.) ¶ 9; PX00441 ([redacted] Decl.) ¶ 9; PX00445 ([redacted] Decl.) ¶¶ 15-16; PX00455 ([redacted] Decl.) ¶¶ 12-13; PX00493 ([redacted] Supp. Decl.) ¶ 4; PX07019 ([redacted] Decl.) ¶¶ 20-21 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ 2(a)); *see also* Szrom (VA) Hrg. Vol. 2 at 9:3-22, 11:11-25, 20:3-22:7.

257. Using multiple distributors adds cost and complexity to foodservice operations.

[redacted] at 30:18-31:17; Thompson (Interstate) Hrg. Vol. 2 at 93:11-17, 100:7-103:22; *see also* PX00549 ([redacted] Dep. at 198:1-23, 250:4-251:4). For example, using multiple distributors requires a National Customer to face different product numbering systems, different ordering platforms, different products, and different points of contact. Holm (PFG) Hrg. Vol. 4 at 84:6-90:18.

(a) <u>Competition for National Customers Often Occurs Through Formal or Informal Bidding Processes</u>

258. National Customers typically conduct formal bids or informal negotiations which culminate in a multiple-year contract between the customer and their broadline distributor which memorializes the prices and service terms that will govern the relationship. Schreibman (US Foods) Hrg. Vol. 13 at 39:5-40:4. Pursuant to such contracts, customers pay the distributor a distribution mark-up fee that the distributor and the customer have negotiated. PX09350 (Israel Report) ¶ 29.

259. These are individualized negotiations. Hausman Hrg. Vol. 16 at 111:3-5. Distributors in this context tailor their proposals to the competitive circumstances faced by individual customers. PX00569 (Sonnemaker (Sysco) Dep. at 133:1-9, 80:5-81:24); PX00565 ([redacted] Dep. at 10:13-15); PX00517 (Lynch (US Foods) Dep. at 123:23-125:14).

260. [redacted] PX00585 (Sonnemaker (Sysco) IH at 144:10-24); PX00401 ([redacted] Decl.) ¶¶ 6, 8; PX00404 ([redacted] Decl.) ¶ 3; PX00405 ([redacted] Decl.) ¶ 6; PX00418 ([redacted] Decl.) ¶¶ 3, 13; PX00421 ([redacted] Decl.) ¶ 4; PX00445 ([redacted] Decl.) ¶ 4; PX00446 ([redacted] Decl.) ¶ 6; PX00455 ([redacted] Decl.) ¶ 4.

261. National Customers also evaluate the distributor's prices for the items they intend

to purchase through the distributor. PX00401 ([redacted] Decl.) ¶ 6; *see* PX00402 ([redacted] Decl.) ¶¶ 5, 9; PX00421 ([redacted] Decl.) ¶ 9.

262. National Customers negotiate over other monetary incentives such as upfront payments designed to induce customers to switch distributors or renew their contracts. Schablein (Wintergreen) Hrg. Vol. 4 at 23:25-24:9.

(b) <u>National Customers Have Distinct Pricing</u>

263. Broadline distributors typically use a distinct pricing model for National Customers compared to local customers. PX09350 (Israel Report) ¶ 29; *see also* Israel Hrg. Vol. 7 at 67:8-25; PX06194-029 [redacted] PX06057-031-032 [redacted]). Whereas National Customers generally require a "[redacted]," most local customers negotiate prices on a weekly basis from a price list. *See* PX09010-004; *see also* Schreibman (US Foods) Hrg. Vol. 12 at 136:6-137:15; *cf.* PX00584 (Nasir (Sysco) IH at 133:14-134:3) ([redacted]); *with id.* at 157:24-160:19 ([redacted]). Some local customers have contracts, but the competitive dynamics in that customer's local area still drive the pricing of those contracts. *See* PX00425 ([redacted] Decl.) ¶¶ 6-7; PX00423 ([redacted] Decl.) ¶¶ 4-5.

264. There are also different margins for local customers and National Customers. *See, e.g.*, PX09507-008 ([redacted]); *id.* at 013 ("[redacted]); PX09007-012-013, 016; PX03103-002.

(c) <u>Product Consistency Is Important to Many National Customers</u>

265. Defendants recognize that "consistency of . . . products" is important to many National Customers. PX09010-004.

266. Specifically, it is important to many National Customers that their locations have access to a consistent set of products, including national brand and distributor private label items. Szrom (VA) Hrg. Vol. 2 at 17:13-18:5; Holm (PFG) Hrg. Vol. 4 at 86:12-21; PX00402 ([redacted] Decl.) ¶ 6; PX00404 ([redacted] Decl.) ¶ 9; PX00418 ([redacted] Decl.) ¶ 9; PX00431 ([redacted] Decl.) ¶ 10; PX00432 ([redacted] Decl.) ¶¶ 8, 10; PX00439 ([redacted] Decl.) ¶ 6; PX00445 ([redacted] Decl.) ¶ 10; PX00448 ([redacted] Decl.) ¶ 9; PX00560 ([redacted] Dep. at 21:4-23:13); PX00567 ([redacted] Dep. at 175:19-177:6); PX00448 ([redacted] Decl.) ¶ 9; PX07019 ([redacted] Decl.) ¶¶ 6-7.

267. National Customers value product consistency because it helps them ensure that their customers' experience is consistent across multiple locations. PX00549 ([redacted] Dep. at 205:12-24); PX00403 ([redacted] Decl.) ¶ 9; PX00418 ([redacted] Decl.) ¶ 9; PX00431 ([redacted] Decl.) ¶ 10; PX00432 ([redacted] Decl.) ¶ 10; PX00439 ([redacted] Decl.) ¶ 6; *see also* PX00441 ([redacted] Decl.) ¶ 12; PX00445 ([redacted] Decl.) ¶ 10; PX00455 ([redacted] Decl.) ¶ 7; PX00431 ([redacted] Decl.) ¶ 10; PX09241-001.

268. National Customers can more easily achieve product consistency with a national distributor than a network of regional distributors. Holm (PFG) Hrg. Vol. 4 at 86:12-86:21;

PX00567 ([redacted] Dep. at 175:19-177:6); PX00401 ([redacted] Decl.) ¶ 12; PX00402 ([redacted] Decl.) ¶ 6; PX00403 ([redacted] Decl.) ¶ 9; PX00404 ([redacted] Decl.) ¶ 4; PX00405 ([redacted] Decl.) ¶ 10; PX00407 ([redacted] Decl.) ¶ 7; PX00418 ([redacted] Decl.) ¶ 9; PX00419 ([redacted] Decl.) ¶ 8; PX00421 ([redacted] Decl.) ¶ 14; PX00431 ([redacted] Decl.) ¶ 10; PX00432 ([redacted] Decl.) ¶ 10; PX00439 ([redacted] Decl.) ¶ 6; PX00442 ([redacted] Decl.) ¶ 11; PX00445 ([redacted] Decl.) ¶ 10; PX00448 ([redacted] Decl.) ¶ 9; PX00445 ([redacted] Decl.) ¶ 10; PX00455 ([redacted] Decl.) ¶ 7; PX00462 ([redacted] Decl.) ¶ 7; PX07019 ([redacted] Decl.) ¶¶ 6-7.

(d) <u>National Broadliners Facilitate Efficient Management and Administration</u>

269. It is generally more efficient and more cost-effective for National Customers to purchase food and related products through a national broadline distributor. By using a national broadline distributor, a National Customer need only deal with one point of contact to discuss service changes or resolve issues. Szrom (VA) Hrg. Vol. 2 at 17:12-23; Thompson (Interstate) Hrg. Vol. 2 at 110:11-23; Holm (PFG) Hrg. Vol. 4 at 86:12-87:3; PX00404 ([redacted] Decl.) ¶ 9; PX00405 ([redacted] Decl.) ¶ 12; PX00418 ([redacted] Decl.) ¶ 11; PX00421 ([redacted] Decl.) ¶ 6; PX00431 ([redacted] Decl.) ¶ 10; PX00432 ([redacted] Decl.) ¶ 12; PX00445 ([redacted] Decl.) ¶ 10; PX00455 ([redacted] Decl.) ¶ 8; PX00593 ([redacted] IH at 26:10-27:5); PX07019 ([redacted] Decl.) ¶ 8; PX09432-027.

270. A healthcare GPO's members that are national or multi-regional want a single distributor servicing their facilities in part because they want one entity to contact when they have a problem or to make changes that affect all of their facilities. These members find it efficient to have a single distributor to handle issues. Ralph (Premier) Hrg. Vol. 3 at 71:13-72:23.

271. Likewise, the Senior VP of Procurement of Interstate, a national hospitality management company, testified that Interstate "look[s] for one distributor that can handle all of [its] hotels . . . it just makes it much easier . . . to manage [its] properties, manage the efficiency of [its] properties." Thompson (Interstate) Hrg. Vol. 2 at 88:20-89:3.

272. Contracting with multiple regional distributors—or with the a consortium composed of numerous distributors—require customers to coordinate with contacts at each company, increasing the difficulty of managing its broadline distribution relationships and likely requiring additional procurement staff and company resources. PX00401 ([redacted] Decl.) ¶¶ 11-12; PX00403 ([redacted] Decl.) ¶ 8; PX00405 ([redacted] Decl.) ¶ 12; PX00418 ([redacted] Decl.) ¶ 11; PX00421 ([redacted] Decl.) ¶¶ 6, 14, 16; PX00427 ([redacted] Decl.) ¶ 8; PX00431 ([redacted] Decl.) ¶¶ 10, 12; PX00432 ([redacted] Decl.) ¶¶ 12, 14; *see also* PX00549 ([redacted] Dep. at 196:4-198:23, 250:4-251:4); PX00567 ([redacted] Dep. at 73:17-74:4); PX00436 ([redacted] Decl.) ¶¶ 10, 16; PX00442 ([redacted] Decl.) ¶¶ 11, 15; PX00445 ([redacted] Decl.) ¶ 10; PX00455 ([redacted] Decl.) ¶ 14; PX07019 ([redacted] Decl.) ¶ 8.

273. National Customers often require customized catalogs and electronic ordering systems, technology interfaces between their procurement software and the distributor's processing and fulfillment systems, and regular reporting from the distributor about purchasing patterns and spend. PX00548 ([redacted] Dep. at 134:7-139:24); PX00432 ([redacted] Decl.) ¶ 10; PX00455 ([redacted] Decl.) ¶ 10; PX07019 ([redacted] Decl.) ¶ 16; PX00421 ([redacted] Decl.) ¶ 14.

274. National broadline distributors provide customers with consistent billing formats, electronic ordering systems, product numbers, and auditing systems for each of their warehouses. PX00288; PX00589 (Lynch (US Foods) IH at 48:2-49:12); *see also* PX00418 ([redacted] Decl.)

¶ 11; PX00442 ([redacted] Decl.) ¶ 11; PX00455 ([redacted] Decl.) ¶ 8; PX07019 ([redacted] Decl.) ¶ 8; PX00421 ([redacted] Decl.) ¶ 14; PX00405 ([redacted] Decl.) ¶ 12.

275. A healthcare GPO's national and multi-regional members require the consistency of product numbering that a single distributor can provide. Each distributor has its own product numbering system, which adds complexity when ordering products through different distributors. Healthcare organizations that span multiple regions value having the ability to execute their operations in a consistent manner across the United States by using a single distributor that has a common numbering platform. Ralph (Premier) Hrg. Vol. 3 at 71:13-72:20.

276. Working with a single distributor allows a large healthcare GPO to ensure that its members are receiving the prices that the GPO has negotiated with manufacturers on products. With a single national distributor, a GPO has single-price loading and a central capacity in the U.S. that is automatically fed out into all of its distributor's distribution centers across the country. This provides the most efficient way for a GPO to ensure that the price it has negotiated is the price that its end-user members are charged. Ralph (Premier) Hrg. Vol. 3 at 71:13-72:20.

277. A national hospitality customer derives similar efficiencies by working with a single broadline distributor for its properties nationwide. Thompson (Interstate) Hrg. Vol. 2 at 101:6-103:22.

278. Uniform billing systems enable National Customers to manage more efficiently their procurement across multiple, geographically disperse locations. Using different systems from multiple regional distributors would add significant time and costs to these procurement functions for National Customers. Holm (PFG) Hrg. Vol. 4 at 89:18-90:8; PX00401 ([redacted] Decl.) ¶ 12; PX00402 ([redacted] Decl.) ¶ 6; PX00403 ([redacted] Decl.) ¶ 8; PX00404 ([redacted] Decl.) ¶ 11; PX00405 ([redacted] Decl.) ¶ 12;

PX00407 ([redacted] Decl.) ¶ 11; PX00418 ([redacted] Decl.) ¶ 11; PX00421 ([redacted] Decl.) ¶ 14; PX00439 ([redacted] Decl.) ¶ 9; PX00442 ([redacted] Decl.) ¶ 11; PX00455 ([redacted] Decl.) ¶ 8; PX00462 ([redacted] Decl.) ¶ 7; PX00593 ([redacted] IH at 72:20-73:7); PX07019 ([redacted] Decl.) ¶ 8.

(e) <u>National Broadliners Allow Customers to Obtain Volume Discounts</u>

279. Using a national broadline distributor allows National Customers to obtain lower prices for broadline distribution by enabling them to obtain volume discounts through aggregation of most or all their broadline distribution spend with a single broadline distributor. Szrom (VA) Hrg. Vol. 2 at 17:13-18:13; Thompson (Interstate) Hrg. Vol. 2 at 96:12-20; PX00402 ([redacted] Decl.) ¶ 6; PX00404 ([redacted] Decl.) ¶ 10; PX00407 ([redacted] Decl.) ¶ 7; PX00418 ([redacted] Decl.) ¶ 10; PX00419 ([redacted] Decl.) ¶ 8; PX00421 ([redacted] Decl.) ¶ 7; PX00432 ([redacted] Decl.) ¶ 11; PX00436 ([redacted] Decl.) ¶ 6; PX00439 ([redacted] Decl.) ¶ 10; PX00441 ([redacted] Decl.) ¶ 5; PX00445 ([redacted] Decl.) ¶ 11; PX00446 ([redacted] Decl.) ¶ 3; PX00454 ([redacted] Decl.) ¶ 10; PX00455 ([redacted] Decl.) ¶ 9; PX00462 ([redacted] Decl.) ¶ 8; PX00431 ([redacted] Decl.) ¶¶ 3, 11; PX00462 ([redacted] Decl.) ¶ 8; PX07019 ([redacted] Decl.) ¶ 5.

280. For example, [redacted] PX00517 (Lynch (US Foods) Dep. at 118:8-119:22).

281. Using a network of regional distributors would require customers to split their spend among numerous distributors, reducing their ability to take advantage of volume discounts, resulting in higher distribution prices and, ultimately, higher prices to consumers. Szrom (VA) Hrg. Vol. 2 at 17-18:13-18:13; PX00574 ([redacted] Dep. at 207:1-14); PX00466 ([redacted] Decl.) ¶ 8; PX00402 ([redacted] Decl.) ¶ 6; PX00418 ([redacted]

Decl.) ¶ 10; PX00421 ([redacted] Decl.) ¶¶ 7, 15-16; *see also* PX00404 ([redacted] Decl.) ¶ 10; PX00419 ([redacted] Decl.) ¶ 8; PX00432 ([redacted] Decl.) ¶ 11; PX00455 ([redacted] Decl.) ¶¶ 9, 14; PX00462 ([redacted] Decl.) ¶ 8; PX07019 ([redacted] Decl.) ¶ 5.

(f) <u>National Coverage Facilitates Customer Expansion to New Areas</u>

282. By using a broadline distributor with nationwide coverage, a customer seeking to expand its operations into multiple states or regions does not need to issue an RFP or locate and evaluate a new broadline distributor each time it expands to a new area. *See* PX00418 ([redacted] Decl.) ¶ 12; PX00427 ([redacted] Decl.) ¶ 9; PX00445 ([redacted] Decl.) ¶ 12; PX00448 ([redacted] Decl.) ¶ 9; PX00567 ([redacted] Dep. at 146:15-147:19); *see also* PX00437 ([redacted] Decl.) ¶ 11.

283. Chain restaurant customers often start in one area of the country and rapidly expand to new areas that may not be contiguous to their existing locations. [redacted] has locations on both United States coasts, with a few restaurants in central states. *See* PX00418 ([redacted] Decl.) ¶¶ 2, 12.

284. [redacted] PX00548 ([redacted] Dep. at 148:18-149:4).

285. GPOs want a distributor that can serve potential new members. PX00560 ([redacted] Dep. at 45:9-25).

286. Dr. Israel found that "[a]nother benefit from working with a single broadline distributor is that customers are able to expand into new areas of the country more easily, quickly, and efficiently, because the customer does not need to issue an RFP or evaluate a new

broadline distributor each time it expands to a new area." PX09350 (Israel Report) ¶ 104; *see also* Israel Hrg. Vol. 9 at 53:7-12 ("[P]art of what a national distributor does is help companies that are growing be able to grow into new areas, so again I wouldn't want to limit the footprint to just a certain area for some sub-set of customers."); Bresnahan Hrg. Vol. 17 at 70:13-16 ("Q. But even the smallest customers may put weight on a distributor's presence outside their footprint if they anticipate expanding, right? A. That's possible that they might.").

(g) National Distributors Offer a Single Contract with Centralized Administration

287. National distribution coverage, such as that provided only by Sysco and US Foods, offers customers the ability to arrange for simplified contract administration, which simplifies management of pricing rules. Holm (PFG) Hrg. Vol. 4 at 87. Bids can be complex, with different pricing across different product categories. Sometimes an individual SKU base will have special pricing from the manufacturer. It is efficient to have a relationship with a single distributor to manage that process. Holm (PFG) Hrg. Vol. 4 at 87. Other aspects of contract administration are also more efficient with a single national broadline distributor, including managing price change dates (which involves loading in the contracts from the manufacturers into the broadliner's system), and managing approved item lists and specifications. Holm (PFG) Hrg. Vol. 4 at 88.

288. Another reason for the clear trend toward use of a single national broadliner for National Customers is that national distribution coverage allows geographically dispersed customers the ability to arrange for SKU availability nationwide. Holm (PFG) Hrg. Vol. 4 at 89.

289. National Customers generally have a single contract with pricing terms that do not vary by geography. Schreibman (US Foods) Hrg. Vol. 13 at 42:10-15; PX09010-004.

290. For example, Premier, a national GPO customer, has a single master distribution

agreement with Sysco or US Foods for the distribution services they provide, which covers all of that GPO's members using its food program for distribution services, regardless of where they are located. Ralph (Premier) Hrg. Vol. 3 at 73:1-8. The pricing terms in the contract do not vary by geography. Ralph (Premier) Hrg. Vol. 3 at 73:20-22.

291. Similarly, Interstate Hotels, a national hospitality customer, has a distribution agreement for with US Foods for the distribution services they provide, which covers all of that customer's properties that are using its food program for distribution services, regardless of where they are located. Thompson (Interstate) Hrg. Vol 2 at 87:3-89:3.

292. Sysco enters into master distribution agreements with the company's multi-unit customers. These contracts are negotiated by Sysco corporate. PX00569 (Sonnemaker (Sysco) Dep. at 81:25-82:12).

293. [redacted] PX00569 (Sonnemaker (Sysco) Dep. at 86:13-87:5).

294. [redacted] PX00569 (Sonnemaker (Sysco) Dep. at 90:25-91:3).

B. <u>Local Broadline Customers</u>

295. Local broadline customers include restaurants, schools, caterers, resorts, and other entities that serve food away from home. Local broadline customers have either a single location or multiple locations that can generally be served from a single broadline distribution center. PX09350 (Israel Report) ¶ 96. Although in some cases large local customers may select a broadline distributor and negotiate a contract through a formal or informal RFP process similar to National Customers, the vast majority of local customers do not enter into a contract, and instead work with local sales representatives to compare the prices of broadline distributors, negotiate prices, and place orders, generally on a weekly basis. PX09350 (Israel Report) ¶ 30;

PX09010-004 ([redacted]).

296. The term "street customer" typically refers to local foodservice operators, such as independent restaurants, that purchase from distributors on an order-by-order basis through sales associates, without a formal bid process and generally without a formal contract. Schreibman (US Foods) Hrg. Vol. 12 at 136:2-18; PX00447 ([redacted] Decl.) ¶ 7; PX00486 ([redacted] Decl.) ¶ 6; *see also* PX00414 ([redacted] Decl.) ¶ 2.

297. According to US Foods' COO, Stuart Schuette, [redacted] PX00591 (Schuette (US Foods) IH at 19:9-18.

298. Street customers typically do not have contracts with food manufacturers; rather, they purchase from broadline distributors, which, in turn, have agreements with manufacturers. Schreibman (US Foods) Hrg. Vol. 12 at 136:6-13. As a result, customers tend to pay a single price for the product and distribution. Schreibman (US Foods) Hrg. Vol. 12 at 136:14-18.

299. [redacted] PX00584 (Nasir (Sysco) IH at 133:14-137:1).

300. Dr. Israel concluded that the size and strength of a broadline distributor's local sales force is one important competitive factor in the competition for the business of street customers. PX09350 (Israel Report) ¶ 31.

301. Local customers receive order guides or price sheets from sales representatives and make purchasing decisions based on the prices offered for particular products and brands that week. PX09350 (Israel Report) ¶ 30. As explained by Sysco, [redacted]

[redacted] PX06057-032.

302. Local customers recognize that broadliners compete with each other on price in order to get their business. PX00496 ([redacted] Decl.) ¶ 5; PX00498 ([redacted] Decl.) ¶ 5.

303. Local customers frequently play broadline distributors against each other via negotiations with local sales representatives, making the regular interactions between broadline distribution sales representatives an important aspect of competition for local broadline customers. PX09350 (Israel Report) ¶ 30.

IV. RELEVANT GEOGRAPHIC MARKETS

304. Broadline distributors deliver to customers. As a result, geographic market definition is based on an area that relates to customer location. PX09350 (Israel Report) ¶ 94.

A. For National Customers, the Relevant Geographic Market Is National

305. For sales to National Customers, the United States is a relevant geographic market for purposes of evaluating the effects of the Sysco/US Foods merger on National Customers.

306. Defendants' regular business practices corroborate a national broadline distribution market under the factors laid out by the Supreme Court in *U.S. v. Grinnell Corp.*, 384 U.S. 563, 575-76 (1966).

a. **Defendants plan on a national level, including maintaining "national account" teams dedicated to servicing National Customers, which are separate from their local sales organization.** Schreibman (US Foods) Hrg. Vol. 13 at 37:11-18; PX00569 (Sonnemaker (Sysco) Dep. at 40:15-42:4, 81:6-84:17); PX00517 (Lynch (US Foods) Dep. at 234:25-236:18); PX00515 (Schreibman (US Foods) Dep. at 76:10-79:13); PX00587 (Kimball (US Foods) IH at 226:14-227:23); PX00591 (Schuette (US Foods) IH at 20:18-21:19); PX00591 (Schuette (US Foods) IH at 50:5-11); *see also* PX09010-004; PX01064-001; PX00589 (Lynch (US Foods) IH) at 46:18-47:12); PX03238; PX03243-22.

b. **Defendants deal with multistate businesses on the basis of nationwide contracts that cover activities in many states.** Lindahl (HPSI) Hrg. Vol. 12 at 121:3-10; PX00569 (Sonnemaker (Sysco) Dep. at 86:23-87:5, 90:25-91:3); PX00515 (Schreibman (US Foods) Dep. at 90:6-91:22); PX00517 (Lynch (US Foods) Dep. at 9:20-10:15, 44:18-45:2); PX00567 ([redacted] Dep.

at 146:15-47:21); PX00560 ([redacted] Dep. at 19:11-20:6); PX00436 ([redacted] Decl.) ¶¶ 3, 6; PX00437 ([redacted] Decl.) ¶¶ 2, 7-9; PX00073-001-002 ([redacted]); PX00287-005 [redacted]); *see also* PX09299 ([redacted]").

c. **The pricing, service, and other terms contained in those contracts apply across regions regardless of where the customer facility is located (though such terms may vary to meet local conditions).** Lindahl (HPSI) Hrg. Vol. 12 at 121:3-10 (noting that prices may vary to meet local conditions, namely the cost of distribution); Thompson (Interstate) Hrg. Vol. 2 at 87:21-88:10; Lynch (US Foods) Hrg. Vol. 14 at 86:11-88:18; Schreibman (US Foods) Hrg. Vol. 13 at 42:10-15; PX00517 (Lynch (US Foods) Dep. at 43:24-45:2); PX00515 (Schreibman (US Foods) Dep. at 90:10-91:22); PX00589 (Lynch (US Foods) IH at 117:24-18:10); PX00567 ([redacted] Dep. at 147:16-21); PX00560 ([redacted] Dep. at 19:11-20:6); PX00570 ([redacted] Dep. at 104:2-9); PX00436 ([redacted] Decl.) ¶ 6; PX00445 ([redacted] Decl.) ¶ 4; PX00073-001, 007-008, 027-030 ([redacted]); PX00287-005, 008-009, 030 ([redacted] PX01084-032; PX01086-037 ([redacted]); PX01107-015 [redacted] *see also* PX09299; PX01084.

d. **Defendants offer incentives at a national level.** PX09297-016 ([redacted]); PX01086-040 ([redacted]

307. Defendants recognize that there is a "national market." *See, e.g.*, PX03004-001 (noting that [redacted]"); Schreibman (US Foods) Hrg. Vol. 13 at 31:13-15, 34:5-7.

308. Premier, a large National Customer healthcare GPO, invited only distributors with purportedly national coverage—Sysco, US Foods, DMA, and UniPro—to participate in its most recent national request for information ("RFI"), in 2009. Ralph (Premier) Hrg. Vol. 3 at 74:18-20. Following the RFI, only Sysco and US Foods submitted bids in response to Premier's RFP. Neither DMA nor UniPro submitted a bid for Premier's business in 2009 because both of them

felt that they had gaps in the country where they would not be able to service 100% of the Premier program members. Ralph (Premier) Hrg. Vol. 3 at 75:1-11.

309. Other industry participants confirm the existence of a national market. PX00539 ([redacted] Dep. at 90:9-91:8); PX00565([redacted] Dep. at 201:24-202:23); PX00559 ([redacted] Dep. at 48:21-49:5); PX00574 ([redacted] Dep. at 202:5-24, 205:18-206:1); PX00560 ([redacted] Dep. at 12:4-24, 19:11-20:6, 33:22-34:3); PX00526 ([redacted] Dep. at 49:11-16, 60:6-61:3, 64:7-66:5, 74:6-19, 77:4-78:23, 80:10-25); PX00563 ([redacted] Dep. at 133:25-36:3, 183:7-191:23); PX00529 ([redacted] Dep. at 175:21-176:11, 189:14-190:17); PX00429 ([redacted] Decl.) ¶ 3; PX00442 ([redacted] Decl.) ¶ 11; *see also* PX03273-001.

310. The existence of specialized vendors like DMA confirms that the United States is a relevant geographic market. DMA was created to bring together regional distributors to bid on National Customer business. PX00412 ([redacted] Decl.) ¶ 3; PX00531 ([redacted] Dep. at 37:21-38:2); PX00517 (Lynch (US Foods) Dep. at 219:6-23); PX00534 ([redacted] Dep. at 31:3-17); PX00415 ([redacted] Decl.) ¶ 10; PX00429 ([redacted] Decl.) ¶ 19; PX00443 ([redacted] Decl.) ¶ 17; PX00449 ([redacted] Decl.) ¶ 8; PX00594 ([redacted] IH at 59:13-23); *see also* PX00558 (DeLaney (Sysco) Dep. at 133:18-134:19).

311. Defendants' economic expert, Dr. Hausman, admits that the relevant geographic market for customers besides local customers is the United States. Hausman Hrg. Vol. 16 at 59:21-60:20; PX00595 (Hausman Dep. at 133:10-15).

312. Dr. Israel concludes the relevant geographic market is national for National Customers. PX09350 (Israel Report) ¶ 112; Israel Hrg. Vol. 9 at 52:6-10.

313. "[G]iven the important 'transactional complementarity' between a customer's

purchases—meaning the factors that cause customers to consolidate their distribution services for different regions with one distributor (or a small number of distributors)," Dr. Israel concludes that the purchases of national broadline customers could not "meaningfully be split into a set of separate purchases within each local area [ ] in which they operate." Thus, "National Broadline Customer purchase decisions should be considered jointly." PX09350 (Israel Report) ¶ 100; *see also* Hausman Hrg. Vol. 16 at 59:21-60:1.

314. Dr. Israel finds that, for National Customers, many facts—including, among others, the frequent use of a single contract for many or all locations, the frequent use of a single RFP for many or all locations, uniform pricing across locations, the existence of a dedicated national sales force/account team at each Defendant and other distributors, strategic and marketing materials sponsored by Defendants that describe the value of joint purchasing/service across locations, and the existence of explicit conglomerates (such as DMA) through which regional distributors come together to service national accounts—indicate that many buyers evaluate jointly the overall set of locations for which they are purchasing and choose to use a single primary distributor (or a small number of distributors) if possible. PX09350 (Israel Report) ¶ 101.

315. Thus, Dr. Israel concludes that "matching this purchase process, the economic analysis of the purchase decision should be conducted jointly, across all the locations." PX09350 (Israel Report) ¶ 101; *see also* Israel Hrg. Vol. 9 at 54:17-55:6 ("[Y]ou consistently see things like the issuance of an RFP that covers large regions or the entire country looking for contracts that cover the entire country or their entire footprint. One thing you see consistently is a common price across all of their locations. You see these customers by the definition I'm using being served by the national sales force generally instead of the local sales force. . . . And as an

economist the fact that these regional competitors feel the need to organize themselves into this conglomerate [DMA] suggests they feel the need to offer a nationwide service.”).

316. “[A] very high percentage of the combined firm’s national customer revenue, well over half, comes from customers who use, say more than 35 distribution centers.” Israel Hrg. Vol. 9 at 56:3-12; *see also* PX09375 (Israel Rebuttal Report) ¶ 115, Figure 3; Israel Hrg. Vol. 11 at 127:14-22.

317. Sysco’s and US Foods’ number of distribution centers is an advantage even for customers that use fewer distribution centers. Dr. Israel explained that “[w]hen a broadline company has more distribution centers, it’s going to better fit the footprints of more companies. . . . So even if [the customer] only use[s] three or four, that broad base mean they’re probably closer to me, and they have more different ways to find the capacity to serve what I need, so that variety is valuable, I think, in any case if someone is multi-regional.” Israel Hrg. Vol. 9 at 56:21-58:2.

318. Dr. Israel’s analysis of the industry yielded evidence that many National Customers select a broadline distributor through a formal or informal RFP/negotiation process (or at least one covering many of their locations at one time), which often results in a single contract specifying terms and prices of the distribution arrangement (often two to five years in length) across the customer’s locations. PX09350 (Israel Report) ¶ 105.

319. Dr. Israel found that National Customers’ distribution contracts also typically require the customer to commit a specified percentage of their total volume—often 80 to 90 percent of their total purchases—to the distributor, limiting customers’ ability to split purchases across multiple distributors. PX09350 (Israel Report) ¶ 106; *see also* PX00594 ([redacted] IH at 38:10-39:15).

320. Dr. Israel concluded that the way in which Defendants organize and conduct their business indicates that a National Customer's purchasing decisions should be considered jointly. Defendants and other broadline distributors recognize the distinct needs of National Customers versus local customers. In particular, Sysco and US Foods each [redacted]. PX09350 (Israel Report) ¶ 107.

321. Additionally, Dr. Israel found that Defendants, [redacted] PX09350 (Israel Report) ¶ 108.

322. Dr. Israel also relied on the analysis done by Defendants' integration consultant, McKinsey & Company, which observed [redacted] PX09350 (Israel Report) ¶ 109; PX09010.

323. Dr. Israel found that "the very existence of DMA implies that there are transactional complementarities for customers that suppliers need to meet to be effective in winning business from National Broadline Customers. If markets were only local, there would be no role for DMA, which links together distribution across markets." PX09350 (Israel Report) ¶ 110.

324. Dr. Israel notes that "some customers are only regional (e.g., [redacted]), but in those cases, using a national geographic market has the effect of including all broadline competitors nationwide, even those that cannot effectively serve a given buyer's footprint, with this inclusion of additional competitors a conservative assumption

(meaning one that understates the parties' actual significance)." PX09350 (Israel Report) ¶ 112.

B. For Local Customers, Local Areas Are Relevant Geographic Markets

325. Broadline distributors compete at a local level for customers whose distribution needs are limited to a local or regional area. Appropriate geographic markets in which to analyze the transaction are local markets for sales of broadline distribution services to customers with single or tightly clustered locations (local broadline customers). PX09350 (Israel Report) ¶ 7.

326. The proximity of a distribution center to a customer's location(s) is a key determinant as to whether a particular broadline distributor is a viable option for that customer. PX00576 ([redacted] Dep. at 157:9-158:24); PX00527 ([redacted] Dep. at 22:2-23:4, 23:8-20); PX00521 ([redacted] Dep. at 140:18-141:7); PX00560 ([redacted] Dep. at 40:14-41:2, 64:8-16); PX00558 ([redacted] Dep. at 107:3-17); PX00573 ([redacted] Dep. at 48:21-50:19; 51:20-53:17); PX00556 ([redacted] Dep. at 35:7-35:24); PX00457 ([redacted] Decl.) ¶ 3; PX00461 ([redacted] Decl.) ¶ 5; PX00464 ([redacted] Decl.) ¶ 10; PX00495 ([redacted] Decl.) ¶¶ 2-4; PX07003 ([redacted] Supp. Decl.) ¶ 8; PX07009 ([redacted] Supp. Decl.) ¶ 6; PX07014 ([redacted] Supp. Decl.) ¶ 7; PX07020 ([redacted] Supp. Decl.) ¶ 3; *see also* PX00558 (DeLaney (Sysco) Dep. at 14:14-15:6).

327. The cost to serve a broadline customer, including labor costs, fuel costs, and maintenance costs, increases as the distance increases. PX00598 (Brawner (Sysco) Dep. at 56:18-60:14, 93:5-94:1); PX00531 ([redacted] Dep. at 127:10-13); PX00558 (DeLaney (Sysco) Dep. at 14:14-15:6); PX00517 (Lynch (US Foods) Dep. at 155:1-12); PX00534 ([redacted] Dep. at 125:7-126:6); PX00543 ([redacted] Dep. at 29:5-15, 120:3-9); PX00569 (Sonnemaker (Sysco) Dep. at 129:25-131:11); PX00529 ([redacted] Dep. at 169:13-170:11); PX00495 ([redacted] Supp. Decl.) ¶¶ 2-3; PX00586

(Humphreys (US Foods) IH at 20:19-21:2); PX07024 ([redacted] Supp. Decl.) ¶ 9; *see also* PX00524 ([redacted] Dep. at 190:6-192:17).

328. The proximity of a distribution center to a customer's location(s) is also a key determinant of the distributor's ability to provide good service. PX00529 ([redacted] Dep. at 150:23-151:11); PX00443 ([redacted] Decl.) ¶ 11; PX00449 ([redacted] Decl.) ¶ 5; *see also* PX00524 ([redacted] Dep. at 192:25-193:21).

329. Sysco's Mid-Atlantic Market President, Mike Brawner, testified that Sysco opened a distribution center in Columbia, SC, in large part to provide better service to restaurant owners in the Columbia area. Brawner (Sysco) Hrg. Vol. 14 at 127:6-9. Having a distribution center in Columbia helped Sysco provide better food safety, higher product quality, and more engagement with restaurant owners in the market. Brawner (Sysco) Hrg. Vol. 14 at 127:17.

330. Mr. Brawner testified that Sysco also has "tons of interaction" with its customers at its broadline distribution centers. These interactions include food safety training, showing new products to customers, keeping customers updated on market trends, and performing menu analysis. For these types of value-added services, it helps to have a distribution center closer to customer locations. PX00598 (Brawner (Sysco) Dep. at 94:13-95:15).

331. According to US Foods' COO, Stuart Schuette, when a distributor has to travel longer distances "it's hard to compete" because "[i]t costs a lot of money" and "the service risks are higher because things happen along the way." PX00591 (Schuette (US Foods) IH at 33:5-34:19). Distributors are "at a competitive disadvantage in a situation like that . . . ." PX00591 (Schuette (US Foods) IH at 34, at 33:17-34:11, 83:10-84:11).

332. Because customers value next-day delivery, they require relatively close proximity between their locations and the distribution centers that serve them. PX00470

([redacted] Decl.) ¶ 7; PX00476 ([redacted] Decl.) ¶ 5; PX00486 ([redacted] Decl.) ¶ 4; PX00487 ([redacted] Decl.) ¶ 4. Local broadline customers generally require their broadline distributor to fulfill emergency orders, either by having a sales representative personally deliver the emergency item or by making available a "will-call" window at the distribution center where the customer can pick up the item. PX00476 ([redacted] Decl.) ¶ 5. Local customers also value frequent and flexible delivery schedules because many have limited on-site storage space for large amounts of food and related products. Hoffman (Upstream) Hrg. Vol. 3 at 15:9-21; PX00542 ([redacted] Dep. at 42:12-43:6); PX00457 ([redacted] Decl.) ¶ 3. Next-day delivery allows local foodservice providers to serve fresh food to their customers. PX00466 ([redacted] Decl.) ¶ 5; PX00470 ([redacted] Decl.) ¶ 7.

333. Serving broadline customers from further distances increases the risk of delayed delivery or other service interruptions, as well as the risk that the product will become damaged or lose freshness. PX00460 ([redacted] Dep. at177:20-178:17); PX00529 ([redacted] Dep. at 150:23-151:11); PX00416 ([redacted] Decl.) ¶ 8; *see also* PX00524 ([redacted] Dep. at 192:25-193:21); PX00548 ([redacted] Dep. at 154:17-155:19); PX00518 ([redacted] Dep. at 22:20-23:12); PX00593 ([redacted] IH at 63:4-8).

334. Local customers generally turn to broadline distributors located within approximately 150 miles of their foodservice location (for local customers in dense metropolitan areas, that distance is often smaller). PX00422 ([redacted] Decl.) ¶ 8; PX00425 ([redacted] Decl.) ¶ 12; PX00457 ([redacted] Decl.) ¶¶ 3, 5; PX00458 ([redacted] Decl.) ¶ 14; PX00461 ([redacted] Decl.) ¶ 5; PX00463 ([redacted] Decl.) ¶ 5; PX00464 ([redacted] Decl.) ¶ 10; PX00470 ([redacted] Decl.) ¶ 7; PX00476 ([redacted] Decl.) ¶¶ 5, 8; PX00487 ([redacted] Decl.) ¶¶ 4, 10; *see also* DeLaney (Sysco) Hrg. Vol. 12 at 71:22-72:6;

PX00517 (Lynch (US Foods) Dep. at 152:2-153:21); PX00543 ([redacted] Dep. at 27:10-16); PX00460 ([redacted] Dep. at 66:7-67:4); PX00413 ([redacted] Decl.) ¶ 6; PX00414 ([redacted] Decl.) ¶ 5; PX00417 ([redacted] Decl.) ¶ 3; PX00460 ([redacted] Decl.) ¶ 4.

335. Sysco's CEO explained that "stretch distribution," defined as servicing customers beyond the geographic boundaries of a distribution center's street business, is more costly because it incurs higher labor and fuel costs. PX00558 (DeLaney (Sysco) Dep. at 266:10-19, 269:15-270:2). An additional disadvantage of stretch distribution is that it negatively affects a distributor's ability to provide adequate service. PX00558 (DeLaney (Sysco) Dep. at 270:3-8).

336. For purposes of analyzing the proposed merger, the overlapping trade areas of Defendants' distribution centers are relevant geographic markets. The overlapping trade areas represent the areas of effective competition between Defendants.

337. Dr. Mark Israel used accepted (and conservative) methods to define local geographic markets pursuant to the *Merger Guidelines*. Israel Hrg. Vol. 9 at 58:10-64:3. Following the *Merger Guidelines*, Dr. Israel defines local markets by grouping customers together by "type of customer" for purposes of analysis, including the computation of market shares. Dr. Israel "buil[t] up the candidate market starting from each party's locations, then adding the areas in which a customer could find an alternative supplier until [he] reach[ed] a geographic market over which a hypothetical broadline monopolist could impose a SSNIP." PX09350 (Israel Report) ¶¶ 97, 99. Specifically, Dr. Israel calculates the 75% draw area for Sysco and US Foods in each locality (i.e., the area in which Sysco and US Foods make 75% of their local broadline sales) and then calculates the overlap of those two draw areas because this is the area in which there are customers "for whom there's potentially some loss of competition . . . [as] they won't have those two competitors that are overlapping for them so they could be

harmed by the loss of competition." Israel Hrg. Vol. 9 at 59:9-61:8; *see also* PX09350 (Israel Report) ¶¶ 99, 220 (describing alternative local market definition using overlapping draw areas instead of CBSAs).

338. To identify the relevant competitors associated with each local geographic market, Dr. Israel identifies the distribution centers that are within a distance circle around every customer within the overlapping draw area. To determine the size of the circles to draw around customers, Dr. Israel initially used the radius that on average would capture 75% of the sales across all of Defendants' broadline distribution centers serving local broadline customers in the areas. Every competitor that is captured within a circle around any customer is included as a competitor in that specific local market. Israel Hrg. Vol. 9 at 62:1-64:3 PX09350 (Israel Report) ¶¶ 98, 221. To test that the results are stable and robust, Dr. Israel confirms that his conclusions hold using alternative calculations, including the use of 90 percent draw areas and a method in which, rather than simply cap the draw areas at 75 or 90 percent, he includes all distribution centers up to 95 percent, but scales down the weight placed on more distant distribution centers. PX09350 (Israel Report) ¶¶ 98, 222, 225, Table 7.

339. Dr. Israel concluded that proximity to a distribution center matters to local broadline customers "as far as being able to provide next day delivery and as far as the cost of service." Israel Hrg. Vol. 9 at 63:1-64:3; *see also* PX09350 (Israel Report) ¶ 215.

340. Dr. Israel concluded that the Defendants' overlapping trade areas in the following localities constitute relevant geographic markets for local customers: Reno, NV-Sacramento, CA; Memphis, TN; Las Vegas, NV; San Diego, CA; Kansas City, MO-KS; Swedesboro, NJ-Philadelphia, PA; Chicago, IL; Bloomington, IL; Baltimore, MD-Washington, DC; Minneapolis-St. Paul, MN; Los Angeles, CA; Atlanta, GA; San Francisco, CA; Raleigh, NC; Altoona-

Harrisburg, PA; Columbia-Charleston, SC; Tampa-St. Petersburg, FL; Lakeland-Orlando, FL; Grand Forks, ND; Montgomery-Birmingham, AL; Jackson, MS; Harrisonburg-Roanoke, VA; St. Louis, MO; Salt Lake City, UT; Pittsburgh, PA; Charlotte, NC; Cleveland, OH; Buffalo-Rochester-Syracuse, NY; Oklahoma City, OK; Denver, CO; Omaha-NE-Council Bluffs, IA; Lubbock, TX; New York, NY; Albany, NY; Milwaukee, WI; and Seattle, WA. PX09350 (Israel Report) App. A, Table 43.

341. Defendants' expert Dr. Hausman agrees that the relevant geographic markets are "intensely local" for independent restaurants. Hausman Hrg. Vol. 16 at 60:17-20.

V. THE MERGER IS PRESUMPTIVELY ILLEGAL IN THE RELEVANT

342. Under the *Merger Guidelines*, a merger is presumptively anticompetitive if it increases the HHI by more than 200 points and results in a post-merger HHI exceeding 2,500. PX06059 (*Merger Guidelines*) § 5.3.

343. The calculation and the examination of market share and concentration is an important tool for performing merger analysis, as it provides relevant information regarding the current competitive conditions in a market. Israel Hrg. Vol. 9 at 64:8-65:15; PX09350 (Israel Report) ¶ 120.

344. In accordance with Section 4.1.4 of the *Merger Guidelines*, Dr. Israel groups all National Customers together into a nationwide market and groups local broadline customers together within each locality in order to calculate meaningful shares and perform other relevant analyses. PX09350 (Israel Report) ¶ 95.

A. Market Structure

1. National Distributors

345. Sysco and US Foods are the only two broadline foodservice distributors with a truly nationwide presence. PX09350 (Israel Report) ¶ 135; PX00518 ([redacted]

Dep. at 125:18-126:1); PX00405 ([redacted] Decl.) ¶13; PX00439 ([redacted] Decl.) ¶ 9. Competing broadline distributors operate far fewer distribution centers and cannot provide a comparable level of national distribution coverage. Sysco's and US Foods' next-largest broadline competitors in terms of distribution center count, [redacted], operate only [redacted] broadline distribution centers, respectively. PX09350 (Israel Report) ¶ 135.

346. Sysco and US Foods are the largest and second-largest broadline distributors, respectively, in the United States. Complaint ¶¶ 24-27; Sysco Answer ¶¶ 24-27; US Foods's Answer ¶¶ 24-27. Based on data submitted by industry participants, Dr. Israel shows that Sysco and US Foods are the largest broadline distributors in the United States in terms of:

a. Broadline distribution revenue. PX09350 (Israel Report) ¶ 118, Figure 6.

b. Number of distribution centers. PX09350 (Israel Report) ¶ 119, Figure 7.

c. Size of delivery fleet. PX09350 (Israel Report) ¶ 119, Figure 8.

d. Size of salesforce. PX09350 (Israel Report) ¶ 119, Figure 9.

347. The alternatives to Sysco and USF for most National Customers are either to use multiple regional broadline distributors, or to use a conglomerate of regional broadline distributors such as DMA. PX09350 (Israel Report) ¶ 133.

2. <u>Regional Consortiums</u>

348. DMA is a supply chain sales and marketing cooperative owned by nine independent regional foodservice distributor members. PX00449 ([redacted] Decl.) ¶ 8 ([redacted]). Each member is a separate entity, owning its distribution centers and having ultimate decision-making power over how to run its own business, including [redacted]. PX00443 ([redacted] Decl.) ¶ 17. [redacted]. PX00412 ([redacted] Decl.) ¶¶ 4-5.

349. DMA's broadline distribution business is primarily focused on chain restaurant business. PX00412 ([redacted] Decl.) ¶ 5; Holm (PFG) Hrg. Vol. 6 at 11:1-14. DMA's members have had little success in winning business from customers in the healthcare, hospitality and foodservice management segments. PX00412 ([redacted] Decl.) ¶ 12; Holm (PFG) Hrg. Vol. 6 at 11:11-14. According to PFG's CEO, "the majority" of National Customers "have found DMA not to be a viable alternative to Sysco and US Foods." Holm (PFG) Hrg. Vol. 6 at 11:20-23.

350. Multi-Unit Group ("MUG"), a subsidiary of UniPro Foodservice, is a regional consortium comprised of 18 members. [redacted] PX09064-003.

351. Dr. Israel observes that [redacted] PX09350 (Israel Report) ¶ 139.

352. Dr. Israel determined that [redacted] PX09350 (Israel Report) ¶ 140.

353. Dr. Israel also found [redacted]

[redacted] PX09350 (Israel Report) ¶ 141, Table 2.

354. [redacted] PX09350 (Israel Report) ¶ 146.

3. **Regional Distributors**

355. The next three largest broadliners after Sysco and US Foods—[redacted] are regional broadline distributors, with distribution networks that fall far short of Sysco's and US Foods' nationwide networks. In particular, each of these regional distributors is concentrated in the eastern United States and lacks coverage in substantial portions of the country, including the western United States. PX09350 (Israel Report) ¶ 136. Dr. Israel found that [redacted] PX09350 (Israel Report) ¶ 138.

356. The largest regional distributor is [redacted] PX00429 ([redacted] Decl.) ¶¶ 2-3. [redacted] PX00429 ([redacted] Decl.) ¶¶ 14, 17. [redacted]. PX00429 ([redacted] Decl.) ¶ 19. [redacted] PX00429 ([redacted] Decl.) ¶ 3. [redacted]

357. The next largest regional distributor is [redacted] PX09034. [redacted]

[redacted] PX00415 ([redacted] Decl.) ¶ 3. [redacted] PX00415 ([redacted] Decl.) ¶ 12; PX00543 ([redacted] Dep. at 61:11-23); [redacted] Dep. at 235:1-36:6) [redacted]").

358. [redacted] is the third largest regional broadliner [redacted] PX00444 ([redacted] Decl.) ¶ 4. [redacted] PX00529 ([redacted] Dep. at 13:18-22); PX09110. [redacted] PX00543 ([redacted] Dep. at 61:11-23); PX00525 ([redacted] Dep. at 2351:12).

359. [redacted] PX00451 ([redacted] Decl.) ¶¶ 3, 5. [redacted] PX00451 ([redacted] Decl.) ¶ 18. [redacted] PX00451 ([redacted] Decl.) ¶¶ 2, 4.

360. [redacted] PX00443 ([redacted] Decl.) ¶ 2.

361. [redacted] PX00434 ([redacted] Decl.) ¶¶ 2-7.

362. [redacted] PX00460 ([redacted] Decl.) ¶ 3. [redacted] PX00460 ([redacted] Decl.) ¶ 6; PX00543 [redacted] Dep. at 61:11-23).

363. [redacted] PX00416 ([redacted] Decl.) ¶ 2.

364. [redacted] PX00458 ([redacted] Decl.) ¶ 4. [redacted] PX00543 ([redacted] Dep. at 61:11-23).

365. [redacted] PX00564 ([redacted] Dep. at 123:13-23).

366. [redacted]. PX00414 ([redacted] Decl.) ¶ 2. [redacted] PX00414 ([redacted] Decl.) ¶ 5.

367. [redacted] PX00417 ([redacted] Decl.) ¶ 2-3.

368. [redacted]

[redacted] PX00413 ([redacted] Decl.) ¶ 2-3. [redacted] PX00413 ([redacted] Decl.) ¶ 3.

B. <u>The Proposed Merger Is Presumptively Illegal in the National Market</u>

369. The merger will combine the two largest broadline distributors in the country, which together account for approximately 75% of the sales to National Customers. Plaintiffs' national market shares include all sales made by broadline distributors to National Customers regardless of contracting model (e.g., sole or multi-source). Thus, even accounting for National Customers that bid their business regionally or contract with multiple distributors, National Customers still use Defendants for most of their broadline distribution services.

370. The Commission's market share calculations for sales to National Customers are presented in an expert report prepared by Dr. Mark Israel. PX09350 (Israel Report) ¶ 122, Table 1; *see also* PX09350 (Israel Report) ¶ 318, Table 18. Dr. Israel calculated market shares using broadline distribution sales data submitted by Defendants in response to the Commission's requests for additional information issued pursuant to the Hart-Scott-Rodino ("HSR") Act, and data submitted by third parties voluntarily and pursuant to compulsory process.

371. Dr. Israel also calculated shares of sales to various subsets, or classes, of National Customers. For example, Dr. Israel estimated that Sysco and US Foods have a combined share of sales to healthcare customers of 81-86 percent. Dr. Israel also estimated that Sysco and US Foods have a 76% to 77% share of sales to National Customers excluding quick-service restaurants. PX09350 (Israel Report) ¶ 122, n.197.

372. Dr. Israel concludes that shares and concentration levels for the sale of broadline distribution services to National Customers are "far above the merger guidelines presumption of harm." Israel Hrg. Vol. 10 at 14:11-20.

373. Under the *Merger Guidelines*, a merger is presumed likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points. Dr. Israel's baseline national market share calculation (described below) shows the combined firm with a 78% post-merger share and the post-merger HHI and delta HHI are 6,146 and 2,993, respectively. Thus, the merger is presumptively illegal.

374. Dr. Israel's baseline share estimate is computed using data on sales to National Customers for the three principal competitors for such accounts—Sysco, US Foods, and DMA—along with the RFP data used here to size all other options, relative to DMA, based on the performance of DMA versus all other (non-Defendant) options in the RFP data. PX09350 (Israel Report) ¶ 121, Table 1; *see also* Israel Hrg. Vol. 9 at 66:22-68:12.

375. Defendants' extremely high market shares are confirmed by the various iterations of market share that Dr. Israel calculates as a robustness check. PX09350 (Israel Report) ¶ 122, n.197. In addition to his baseline approach, Dr. Israel calculates national market shares using CID responses and other data for regional providers six different ways (variations i-vi). In particular, to calculate market shares in variations (i)-(vi), Dr. Israel uses those sales identified as being to National Customers by Sysco, US Foods, [redacted], plus estimates of relevant other third-party distributor sales to National Customers from CID responses and other third-party distributor data. These methodologies yield post-merger combined shares ranging from 75% to 65% in the most conservative case. PX09350 (Israel Report) ¶ 122, Table 1. Dr. Israel calculated the shares a number of different ways "to make sure that my results are not in any way sensitive towards the specific way of defining what it means for them to sell [to] national customers." Israel Hrg. Vol. 9 at 66:9-16, 68:7-71:19.

376. Defendants' high market shares among the largest customers is consistent with their high shares in the national broadline market, as shown in the following table.

LARGEST CUSTOMER FOODSERVICE DISTRIBUTION SPEND

Customer	Total BL Spend	BL Spend with Sysco	% Sysco	BL Spend with USF	% USF	Total Sysco/ USF BL	Other BL	Total No. of BLers
[redacted]								

[redacted]

Customer	Total BL Spend	BL Spend with Sysco	% Sysco	BL Spend with USF	% USF	Total Sysco/ USF BL	Other BL	Total No. of BLers
[redacted]								

[redacted]

Customer	Total BL Spend	BL Spend with Sysco	% Sysco	BL Spend with USF	% USF	Total Sysco/ USF BL	Other BL	Total No. of BLers
[redacted]								

[redacted]

Customer	Total BL Spend	BL Spend with Sysco	% Sysco	BL Spend with USF	% USF	Total Sysco/ USF BL	Other BL	Total No. of BLers
[redacted]								

377. Dr. Israel concludes that, regardless of the variation in methodology, the estimates of combined shares and delta HHIs are high—combined shares of 65 percent or greater (over 75

[redacted]

percent the baseline estimate) with a delta HHI of more than 2,100 (nearly 3,000 in the baseline estimate), meaning that the finding of a high combined share for Defendants, and thus a reasonable presumption of merger harm, is robust across sources. PX09350 (Israel Report) ¶ 123; *see also* Israel Hrg. Vol. 9 at 71:11-19.

378. Dr. Israel explains that "data on shares provide strong evidence of the gap between Sysco and USF and all potential post-merger second-place options for National Broadline Customers and thus of the likely competitive harm from the proposed merger. Fundamental antitrust principles, as reflected in the [*Merger Guidelines*], make it clear that—whatever speculation one could engage in about other 'possible' options for food distribution—revenue shares are the best, most objective, 'all in' indicator of competitive significance . . . ." PX09350 (Israel Report) ¶ 120.

379. Dr. Israel determined that the sales captured in his national market share estimates accounted for the "vast majority" of sales to National Customers. Specifically, Dr. Israel used data accounting for approximately 90 percent of all broadline distributor sales, as well as [redacted] Israel Hrg. Vol. 11 at 121:19-122:18; *see also* Israel Hrg. Vol. 9 at 73:21-74:19. Further, Dr. Israel's baseline national market share calculation "doesn't depend on the CID data at all," but its consistency with the CID-based share estimate "is another indication that the CID data, anything that's omitted is not causing any problems in the estimates." Israel Hrg. Vol. 9 at 74:15-19.

380. Defendants' ordinary course documents also corroborate high market shares for sales to National Customers, especially healthcare customers. PX00042-003 [redacted]); PX01080-001 ([redacted]);

PX03103-002 (US Foods: [redacted]); PX01008-031, 033-035. Dr. Israel finds that "evidence from RFPs, documents, and customer testimony indicate that Sysco and USF are much closer substitutes for one another—in terms of the characteristics most valued by National Broadline Customers—than are *any* of the other broadline distributors included in the share calculations. As such . . . Sysco's and USF's shares, large as they are, likely substantially *understate* their competitive significance to one another and thus the harm to competition and consumers if they were to merge." PX09350 (Israel Report) ¶ 125.

381. Dr. Israel calculates national market shares accounting for the divestiture to PFG. In his baseline share calculation, Dr. Israel estimates Defendants' combined share of sales to National Customer accounts will be approximately 71% post-divestiture, with a post-merger HHI of 5,119, and a merger induced change in HHI of 1,966. He also repeats his six national market share variations accounting for the divestiture and finds that, regardless of the precise method used, the estimates of combined shares and delta HHI remain far above the standards outlined in the *Merger Guidelines* for concentration that is likely to enhance market power. PX09350 (Israel Report) ¶¶ 318-319, Table 18; *see also* Israel Hrg. Vol. 9 at 65:9-15.

382. All of Dr. Israel's share estimates include sales by distributors to customers that split up their broadline distribution purchases among multiple distributors. Dr. Israel testified "if a national customer splits up its sales one way, two ways, five ways, the revenues are associated to the firm that has those revenues." Israel Hrg. Vol. 9 at 74:20-75:3; *see also id.* at 74:20-23 ("Q. What if a national broadline customer splits up its business between, say, US Foods and PFG, would you count PFG sales in that instance? A. Absolutely."); Israel Hrg. Vol. 10 at

28:15-29:8 ("My shares compute anything that's gone to a combination of regionals."); Israel Hrg. Vol. 11 at 131:6-8 ("[I]f there's one customer and they split their revenue up among ten distributors, they would all show up with revenue in my share calculations.").

383. The share and concentration levels that Dr. Israel calculated for National Customers are consistent with the margins that Sysco and US Foods earn from these customers. Israel Hrg. Vol. 11 at 132:16-133:23. Dr. Israel explains that "quite frequently, large buyers have – when selling to large buyers, distributors may have lower margins because those buyers may have some buyer power, but very often that buyer power results from the ability of that large buyer explicitly to play the companies off against each other. . . . so while large buyers may get lower margins as a result of their size, they're very often more affected by mergers than others because they lose the leverage that was the source of their buyer [power]." Israel Hrg. Vol. 11 at 133:7-17.

384. Indeed, Defendants' expert, Dr. Hausman, readily conceded that "Sysco and US Foods are important competitive constraints on each other," including "strong price constraint[s]". Hausman Hrg. Vol. 16 at 94:5-7, 97:9-17.

C. The Proposed Merger Is Presumptively Illegal in Numerous Local Markets

385. Even with the proposed divestiture to PFG, Defendants' combined share and HHI are "far above the [merger] guidelines presumption" in a number of local markets including Raleigh / Durham, North Carolina; Omaha, Nebraska; Columbia / Charleston, South Carolina; and Southwest Virginia. Israel Hrg. Vol. 10:3-12:3; PX09350 (Israel Report) ¶ 370, Table 21.

386. Dr. Israel computes three sets of local broadline market shares based on three different metrics to measure the size of each competitor in the market: (i) square footage, (ii) "adjusted revenues" (adjusted to exclude, to the extent possible, sales to systems and National Customers), and (iii) number of sales representatives. Dr. Israel aggregates each of these

customer-specific share calculations to overlapping draw areas, or alternatively, CBSAs, using a revenue-weighted average across all overlap customers to do the aggregation. To evaluate the robustness of these results, he then performs those calculations using several variations in the methodology. The result shows high shares and HHI deltas across all three metrics. PX09350 (Israel Report) ¶ 222, Tables 4, 5, 6, 7; PX09350 (Israel Report) ¶ 224-225, Table 7; PX09350 (Israel Report) ¶ 331, Table 21; *see also* Israel Hrg. Vol. 10 at 4:11-10:2.

387. In a specific local market, Dr. Israel counted sales by any distributor that was within "a circle of a given customer." Israel Hrg. Vol. 10 at 4:11-5:5. Thus, Dr. Israel counted sales by distributors located outside of the overlapping draw area, or alternatively, CBSA. Israel Hrg. Vol. 10 at 4:11-5:5. Dr. Israel tested larger sized circles to analyze whether his share estimates changed with variations on the specific distance. He found that "across all the distances [he's] done, [his] bottom-line conclusions are not changed at all" because while widening a circle "pull[s] in more distribution centers, a lot of those centers are [Sysco's and US Foods'] centers. You're adding – you're seeing that they have a lot of nearby capacity and sales." Israel Hrg. Vol. 10 at 6:11-7:12.

388. The following statements about particular relevant local markets are based on Dr. Israel's market share and concentration analyses (PX09350 (Israel Report) App. A, Table 43):

a. In Columbia / Charleston, South Carolina, Defendants have a combined market share of 73%. PX09350 (Israel Report) App. A, Table 43.

b. The Columbia / Charleston market for broadline distribution is highly concentrated, as defined by the *Merger Guidelines*. The HHI for the Columbia / Charleston market for broadline distribution is approximately 3,506 pre-merger. PX09350 (Israel Report) App. A, Table 43.

c. The Columbia / Charleston market for broadline distribution will be highly concentrated as a result of the merger, with the HHI increasing 2,337 to reach 5,843. PX09350 (Israel Report) App. A, Table 43.

d. Defendants' documents corroborate the high market shares in the

Columbia / Charleston market. PX03073-025; PX09350 (Israel Report) ¶¶ 262-263 [redacted]).

e. In Omaha/Council Bluffs, Nebraska/Iowa ("Omaha") Defendants have a combined market share of 90%. PX09350 (Israel Report) App. A, Table 43.

f. The Omaha market for broadline distribution is highly concentrated, as defined by the *Merger Guidelines*. The HHI for the Omaha market for broadline distribution is approximately 6,755 pre-merger. PX09350 (Israel Report) App. A, Table 43.

g. The Omaha market for broadline distribution will be highly concentrated as a result of the merger, with the HHI increasing 1,463 to reach 8,218. PX09350 (Israel Report) App. A, Table 43.

h. Defendants' documents corroborate the high market shares in the Omaha market. *See* Section VI.B.2.

i. In Raleigh / Durham, North Carolina, Defendants have a combined market share of 74%. PX09350 (Israel Report) App. A, Table 43.

j. The Raleigh / Durham market for broadline distribution is highly concentrated, as defined by the *Merger Guidelines*. The HHI for the Raleigh / Durham market for broadline distribution is approximately 3,054 pre-merger. PX09350 (Israel Report) App. A, Table 43.

k. The Raleigh / Durham market for broadline distribution will be highly concentrated as a result of the merger, with the HHI increasing 2,561 to reach 5,615. PX09350 (Israel Report) App. A, Table 43.

l. Defendants' documents corroborate the high market shares in the Raleigh / Durham market. *See* Section VI.B.3.

m. In Harrisonburg / Roanoke, VA ("Southwest Virginia"), Defendants have a combined market share of 63%. PX09350 (Israel Report) App. A, Table 43.

n. The Southwest Virginia market for broadline distribution is moderately concentrated, as defined by the *Merger Guidelines*. The HHI for the Southwest Virginia market for broadline distribution is approximately 2,338 pre-merger. PX09350 (Israel Report) App. A, Table 43.

o. The Southwest Virginia market for broadline distribution will be highly concentrated as a result of the merger, with the HHI increasing 1,990 to reach 4,328. PX09350 (Israel Report) App. A, Table 43.

p. Defendants' documents corroborate the high market shares in the Southwest Virginia market. *See* Section VI.B.4.

389. Each of the local markets identified in Appendix A of Plaintiffs' Complaint will be highly concentrated as a result of the merger. PX09350 (Israel Report) App. A, Table 43 (listing local overlap shares and HHIs). (As discussed below, eight of the 32 local markets listed in Appendix A are markets in which PFG would acquire a US Foods' distribution center.)

390. Dr. Israel also calculates share-based diversion ratios between Sysco and US Foods. He finds that the diversion ratios are substantial: "They exceed 50 percent for a quarter (weighted by revenue) of local overlap customers, and they exceed 66 percent for ten percent of these customers." Dr. Israel finds this to be "another strong indication that many Local Broadline Customers are likely to experience particularly large price effects." PX09350 (Israel Report) ¶ 227, Table 8. Similarly, Dr. Israel finds that "diversion ratios from Sysco to USF, computed using data compiled from Sysco's ordinary course Business Reviews by Sysco's economists, show very high share-based diversion ratios in several markets . . . ." PX09350 (Israel Report) ¶ 229, Table 10.

391. For example, Dr. Israel determines that in the Columbia CBSA, the combined market share of Sysco and US Foods is between 67.3% and 78.6%, and the change in HHI is between 2,068 and 2,686, depending on the metric used for measuring the size of the distribution centers. In the Charleston CBSA, the combined market share is between 74.7% and 83.7%, and the change in HHI is between 2,737 and 3,132. PX09350 (Israel Report) ¶ 261.

392. In the Omaha – Council Bluffs CBSA, Dr. Israel estimates that the combined market share of Sysco and US Foods is between 80.8% and 90.3%, and the change in HHI is between 1,410 and 3,414, depending on the metric used for measuring the size of the distribution centers. In this market, the merger would increase the HHI by 1,475 points to 8,224. PX09350

(Israel Report) ¶ 265.

393. As shown below, Dr. Israel calculated local share estimates accounting for the proposed divestiture to PFG. Israel Hrg. Vol. 10 at 10:3-12:3; PX09350 (Israel Report) ¶ 370, Table 21. Those calculations show that in Columbia / Charleston, SC; Omaha, NE; Raleigh / Durham, NC; Southwest Virginia; and other locations, the merger is presumptively illegal. PX09350 (Israel Report) ¶ 370, Table 21.

394. Defendants' ordinary course documents corroborate high market shares in numerous local markets. PX03073-025 ([redacted]); PX03123-063-064 ([redacted]; PX08002-007 ([redacted]); PX08003-006 ([redacted]); *see also* PX09350 (Israel Report) ¶ 229, Table 10 (diversion ratios computed using data compiled from ordinary course Business Reviews by Sysco's economists show high share-based diversions).

395. Defendants acknowledge that they are the top two distributors in nearly every local market. PX00588 (Lederer (US Foods) IH at 226:23-227:20); PX00515 (Schreibman (US Foods) Dep. at 62:11-15, 65:8-13; PX03118-006.

396. Third parties also recognize that Sysco and US Foods are the two "dominant" and "most competitively significant" distributors in Columbia, South Carolina; Raleigh / Durham, North Carolina, and Southwest Virginia, among other markets. PX00570 ([redacted] Dep. at 169:24-170:13); PX00526 ([redacted] Dep. at 71:12-72:9).

397. If one were to accept Defendants' argument that there is no separate market for National Customers, the market share and concentration levels in the local markets at issue would be even higher than if National Customers and local customers were analyzed separately.

PX09350 (Israel Report) ¶¶ 225-26, Table 7. This is because, in calculating local market shares, Dr. Israel removed Defendants' and other broadliners' sales to National Customers, which are weighted toward Defendants, as the only two national broadliners.

VI. THE MERGER WOULD SUBSTANTIALLY LESSEN COMPETITION

398. The merger will substantially lessen competition for (a) National Customers in the national market, and (b) local customers in numerous geographic markets.

399. For many broadline customers, Defendants are the top two—and for some, the only two—viable options for broadline distribution. Hoffman (Upstream) Hrg. Vol. 3 at 16:18-21; Schablein (Wintergreen) Hrg. Vol. 4 at 30:6-20; Thompson (Interstate) Hrg. Vol. 2 at 100:7-16; PX00570 ([redacted] Dep. at 124:10-125:1, 169:24-170:13 ([redacted]);; PX00520 ([redacted] Dep. at 118:4-7, 119:2-6); PX00532 ([redacted] Dep. at 175:5-14); PX00533 ([redacted] Dep. at 52:4-17); PX00561 ([redacted] Dep. at 108:10-19, 109:13-110:12); PX00572 ([redacted] Dep. at 142:13-20); PX00566 ([redacted] Dep. at 127:2-11); PX00541 ([redacted] Dep. at 222:17-23); PX00523 ([redacted] Dep. at 195:6-14, 210:12-24); PX00410 ([redacted] Decl.) ¶ 8; PX00420 ([redacted] Decl.) ¶ 15; PX00423 ([redacted] Decl.) ¶¶ 7, 10; PX00435 ([redacted] Decl.) ¶¶ 8, 11; PX00437 ([redacted] Decl.) ¶ 12; PX00448 ([redacted] Decl.) ¶ 13; PX00461 ([redacted] Decl.) ¶ 14; PX00479 ([redacted] Decl.) ¶ 12; PX00482 ([redacted] Decl.) ¶¶ 8, 13; PX03034-006, PX03100-004.

400. [redacted] PX03004-001; Schreibman (US Foods) Hrg. Vol. 13 at 32:12-33:24 (discussing PX03004). Defendants' expert, Dr. Hausman, acknowledged that "Sysco and US Foods are

important competitive constraints on each other," including "strong price constraint[s]." Hausman Hrg. Vol. 16 at 94:5-7, 97:9-17.

401. According to Sysco's CEO, William DeLaney, broadline competition between Sysco and US Foods is "highly competitive" throughout the vast majority of the United States, thereby benefiting customers. PX00558 (DeLaney (Sysco) Dep. at 96:1-98:25). Sysco and US Foods compete across all dimensions: price, service, quality, product breadth (including private label product breadth), product innovation, and technology support. PX00558 (DeLaney (Sysco) Dep. at 96:11-98:8). Mr. Schreibman of US Foods agreed that Sysco is both an "important" and "principal" competitor of US Foods. Schreibman (US Foods) Hrg. Vol. 13 at 33:18-22.

402. The competition between Sysco and US Foods results in lower prices, signing incentives, and other benefits for National Customers and local customers. Schablein (Wintergreen) Hrg. Vol. 4 at 20:21-25:24, 27:24-28:24; PX00557 ([redacted] Dep. at 49:3-50:20); PX00558 (DeLaney (Sysco) Dep. at 98:8-99:10, 128:6-130:4); PX00574 ([redacted] Dep. at 213:3-215:23); PX00528 ([redacted] Dep. at 131:7-23); PX00567 ([redacted] Dep. at 142:15-143:13, 190:5-192:18); PX00569 (Sonnemaker (Sysco) Dep. at 174:23-177:8); PX00060-001; PX00285-002; PX00423 ([redacted] Decl.) ¶¶ 4-5; PX00410 ([redacted] Decl.) ¶ 9, 14; PX00435 ([redacted] Decl.) ¶ 11; PX00457 ([redacted] Decl.) ¶¶ 6, 10; PX00482 ([redacted] Decl.) ¶¶ 7, 13; PX00498 ([redacted] Decl.) ¶ 5; PX00594 ([redacted] IH at 140:5-9, 169:19-171:22); PX07019 ([redacted] Decl.) ¶ 21; PX01446-001; PX01447-003; PX01449-001; PX03057-001; PX03058-001; PX03211-001; PX03212-001; PX03266-001; PX03267-002; PX03270-002; PX03275; PX03276; *see also* PX03222; PX00515 (Schreibman (US Foods) Dep. at 182:5-13) (discussing PX03222); PX00439 ([redacted] Decl.) ¶ 11.

403. Defendants internally admit that the merger will eliminate this competition. [redacted] PX01002-003. [redacted] PX00311-002. Similarly, Stuart Schuette, US Foods' COO, wrote after the merger was announced, [redacted] PX00312-002.

404. Dr. Israel determines that "Sysco and USF are very similar to one another—and quite distinct from all other broadline distributors—on multiple dimensions. This implies both that the merging parties likely serve as the next-best alternative for the other party's customers and that the constraint provided by the next-best alternatives is much weaker. These are the classic economic conditions for substantial merger harms." PX09350 (Israel Report) ¶ 114; *see also* Israel Hrg. Vol. 10 at 16:17-18:1.

A. The Merger Would Substantially Lessen Competition in the National Market

405. Sysco and US Foods are the only two truly national broadline distributors. Thompson (Interstate) Hrg. Vol. 2 at 100:7-16; PX00570 ([redacted] Dep. at 111:16-21); PX00405 ([redacted] Decl.) ¶ 13; PX00429 ([redacted] Decl.) ¶ 15; PX00437 ([redacted] Decl.) ¶ 11; PX00439 ([redacted] Decl.) ¶ 9; PX00448 ([redacted] Decl.) ¶¶ 8-9.

406. According to US Foods' Mr. Schreibman, Sysco and US Foods each has a "leading national market position." Schreibman (US Foods) Hrg. Vol. 13 at 31:13-15, 33:25-34:7. US Foods' leading national market position is due to its geographic coverage that includes 61 distribution centers across the U.S. Schreibman (US Foods) Hrg. Vol. 13 at 33:25-34:4.

407. After the proposed merger's announcement, one of Sysco's largest National Customers, [redacted] PX00389; PX00392-001;

PX00594 ([redacted] IH at 250:3-20, 252:14-253:23); *see also id*. at 255:5-19 (discussing PX00392).

408. Another of Sysco's largest customers, [redacted] PX00373-001.

409. Compared to other broadline distributors, Defendants are best positioned to serve the broadline needs of National Customers because of their geographic footprints, large distribution fleets, and broad product offerings. PX00560 ([redacted] Dep. at 80:11-83:13; PX00567 ([redacted] Dep. at 146:7-148:4); PX07019 ([redacted] Decl.) ¶ 19; *see also* PX09249-003.

410. Sysco and US Foods compete head-to-head for National Customers. PX00405 ([redacted] Decl.) ¶13; PX00300-001 ([redacted]; PX00588 (Lederer (US Foods) IH at 155:3:25); PX03037-001.

411. National Customers testified that Sysco and US Foods are an implicit competitive threat in contract negotiations. Thompson (Interstate) Hrg. Vol. 2 at 118:19-119:16; PX00539 ([redacted] Dep. at 164:2-18); PX00574 ([redacted] Dep. at 213:3-11, 213:16-15:23); PX07019 ([redacted] Decl.) ¶21; PX00407 ([redacted] Decl.) ¶ 8 ("[redacted]."); PX00427 ([redacted] Decl.) ¶ 10 ("[redacted]

[redacted]

412. As a result of competition between Sysco and US Foods, National Customers get better prices and/or value-added services. In RFPs, bids, and contract negotiations with National Customers, Defendants frequently discount prices, offer incentives, and improve service terms to keep and take business from each other. PX00574 ([redacted] Dep. at 213:3-215:23); PX00567 ([redacted] Dep. at 140:7-141:4, 142:15-144:5, 167:2-169:19, 190:5-192:18); PX00419 ([redacted] Decl.) ¶ 10 ("[redacted] PX00402 ([redacted] Decl.) ¶ 13; PX00403 ([redacted] Decl.) ¶ 14; PX00404 ([redacted] Decl.) ¶ 5; PX00418 ([redacted] Decl.) ¶ 19; PX00421 ([redacted] Decl.) ¶ 17; PX00431 ([redacted] Decl.) ¶ 14; PX00432 ([redacted] Decl.) ¶ 18; PX00436 ([redacted] Decl.) ¶ 15; PX00437 ([redacted] Decl.) ¶ 12; PX00439 ([redacted] Decl.) ¶ 11; PX00441 ([redacted] Decl.) ¶ 10; PX00445 ([redacted] Decl.) ¶ 16; PX07019 ([redacted] Decl.) ¶ 17; PX00246-001; PX00277-001; PX01139-001-002; PX01451-001; PX09338-002.

413. Customers use prices from RFP responses received from Sysco and US Foods to determine fair and reasonable prices, even if, in the end, no actual negotiation over price takes place. Szrom (VA) Hrg. Vol. 2 at 13:17-14:6, 32:3-33:6, 36:6-21, 64:22-65:15.

414. Concessions on price and other terms by one Defendant frequently are the result of competition from the other Defendant. PX00589 (Lynch (US Foods) IH at 184:23-185:9); PX03266-001; PX03270-002; PX01446-001; PX01447-003; PX03267-002; PX03212-001; PX00060-001; PX00285-002; PX03057-001; PX03058-001; PX03020-001; PX03040-002.

415. Numerous of Defendants' National Customers have expressed concerns that the

proposed merger would result in anticompetitive effects, including higher prices and reduced levels of customer service. Szrom (VA) Hrg. Vol. 2 at 26:17-23; Thompson (Interstate) Hrg. Vol. 2 at 125:23-26:7; PX00518 ([redacted] Dep. at 125:23-26:7; PX00437 ([redacted] Decl.) ¶¶ 12-14; PX00478 ([redacted] Supp. Decl.) ¶ 2; PX00436 ([redacted] Decl.) ¶ 17; PX00402 ([redacted] Decl.) ¶ 14; PX00403 ([redacted] Decl.) ¶ 14; PX00407 ([redacted] Decl.) ¶ 13; PX00402 ([redacted] Decl.) ¶¶ 14-15; PX00404 ([redacted] Decl.) ¶¶ 12-15; PX00455 ([redacted] Decl.) ¶ 13; PX00445 ([redacted] Decl.) ¶¶ 16-17; PX07019 ([redacted] Decl.) ¶¶ 21-22; PX00421 ([redacted] Decl.) ¶¶ 17-18; *see also*, PX09299-019 [redacted]

416. [redacted] at 13:4-17.

1. **Defendants Compete Head-to-Head on Price**

417. Sysco and US Foods compete intensely on price for National Customer business.

418. Defendants routinely lower their prices to National Customers in response to competition from the other. *See, e.g.*, PX00277-001-002; PX01032-001-002; PX01451-001; PX03212-001; PX03266-001; PX03268 ("Sysco is our strongest competitor and they have offered an estimated [redacted] in savings [to [redacted] . . . I do recommend we offer some concessions to minimize our risk."); PX09356-037 (showing that Sysco dropped its bid price to [redacted] to beat out the bid from US Foods).

419. In its most recent national RFP, which was awarded to US Foods in 2010, Premier used competition from Sysco to extract favorable terms from US Foods. Premier has been able to use the potential of switching distributors as an advantage to continue to get the best program and the best price for its membership. Ralph (Premier) Hrg. Vol. 3 at 79:7-24.

420. As another example, Sysco submitted its bid to [redacted] most recent RFP, [redacted] PX00594 ([redacted] IH at 162:2-21) (discussing PX00601-008); PX00594 ([redacted] IH at 216:13-217:6) (discussing PX00399-002). [redacted] PX00594 ([redacted] IH at 165:6-16); *see also* PX00594 ([redacted] IH at 167:20-171:22) (discussing PX00386). [redacted] leveraged US Foods' presence in the RFP to get better pricing and terms from Sysco. PX01032-001. According to [redacted] PX00594 ([redacted] IH at 213:13-214:25) (discussing PX00385-001 ("[redacted])). As a result of the leverage provided by competition from US Foods, Sysco improved its financial offer to [redacted] PX00594 ([redacted] IH at 213:13-214:25). According to [redacted] no other distributor could give [redacted] that kind of leverage. PX00594 ([redacted] IH at 222:2-5). An ordinary course internal Sysco email regarding the [redacted] RFP notes that Sysco "[redacted]" PX01032-001.

421. Tom Lynch, US Foods' Senior Vice President for National Sales, admitted that US Foods has offered incentive payments or cut margins to customers in order to win business from Sysco. Lynch (US Foods) Hrg. Vol. 14 at 75:3-10. Defendants' expert, Dr. Hausman, agrees that "both Sysco and US Foods have given aggressive terms and signing bonuses in order

to win or maintain larger accounts over the last few years." Hausman Hrg. Vol. 16 at 96:21-97:3.

422. Scott Sonnemaker, Sysco's Senior Vice President for Sales, acknowledged that Sysco has improved its pricing or offered incentives to retain or win business from US Foods. For example, [redacted] PX01451-001. Mr. Sonnemaker testified that "I don't have any doubt that this obviously was a really aggressive proposal. As I mentioned earlier, we compete with US [Foods] all the time . . . ." Sonnemaker (Sysco) Hrg. Vol. 13 at 152:12-14.

423. Customer testimony further confirms that Sysco and US Foods reduce their prices in response to competition from each other. PX00404 ([redacted] Decl.) ¶ 5; PX00402 ([redacted] Decl.) ¶ 9; PX00418 ([redacted] Decl.) ¶ 13; PX00445 ([redacted] Decl.) ¶ 14.

424. For example, Defendants have offered and provided upfront incentive payments to National Customers to win or keep business from the other. *See*, *e.g.*, PX01066-001-002; PX03064-001; PX01067-001; PX00060-001; PX01056-001-002; PX03039-002; PX03064-001; PX03076-001; PX00245-001; PX03056-001; PX03057-001; PX03077-001-002; PX00285-002; PX00286-002; PX01425-001. A Sysco executive, after learning that Sysco kept [redacted] business despite being offered to [redacted] and a [redacted] signing bonus offer from US Foods, lamented: "Sure sounds like US [Foods] will do anything at this point to gain new business." PX00104-001.

425. Competition between Defendants to win the business of large GPOs, hospitality chains, and foodservice management companies is particularly intense. *See*, *e.g.*, PX03010-001; PX01061-001 ([redacted]

[redacted]"); PX03055-001-002.

426. These National Customers use Sysco and US Foods as leverage against each other to get better prices and terms. PX00589 (Lynch (US Foods) IH at 184:23-185:9); PX01451-001; PX00277-001-002; Holm (PFG) Hrg. Vol. 6 at 14:22-25; PX00594 ([redacted] IH at 140:5-14, 211:11-212:6) (discussing PX00398-001).

427. [redacted] a national healthcare GPO, explained that "competition between Sysco and US Foods" resulted in "significantly better pricing for [redacted]." PX00466 ([redacted] Decl.) ¶ 10. [redacted] testified that the competition between Sysco and US Foods allowed [redacted] to go "back to US Foods and back to Sysco for better pricing structures." PX00574 ([redacted] Dep. at 40:24-42:3); *see also* PX00574 ([redacted] Dep. at 149:14-150:4, 214:1-215:23).

428. Customer testimony demonstrates that National Customers rely on competition between Defendants in bidding and other negotiations, and that, post-merger, the combined firm would be a "must have" for many of these customers. PX00404 ([redacted] Decl.) ¶ 5; PX00436 ([redacted] Decl.) ¶ 17; PX00441 ([redacted] Decl.) ¶ 11.

429. Dr. Israel testified that a post-merger price increase "doesn't necessarily take the form of just going out and jacking up a list price. It can often take the form of reducing incentives or not giving a price cut that otherwise might have been given." Israel Hrg. Vol. 18 at 110:21-25; *see also id.* at 109:6-111:5.

2. <u>Defendants Compete Head-to-Head on Service Offerings and Other Dimensions of Competition</u>

430. Defendants compete to win customers with their value-added services and other services offerings. PX00515 (Schreibman (US Foods) Dep. at 178:12-16, 181:25-182:13). Defendants compete in "[redacted]," (PX03103-003) or on non-price factors, such as

ordering platforms and other customer-facing technology, timeliness of deliveries, fill rates (i.e., "product compliance"), value-added services such as menu planning applications, and more. *See*, *e.g.*, PX01010-007, 021-022; PX00281-012.

431. In particular, Defendants' documents demonstrate vigorous competition on service between Sysco and US Foods, including to provide value-added services. PX00042-003 ([redacted]); PX01003-001 [redacted]); PX01007-023 ([redacted]); PX01045-001 ([redacted]); PX03071-005 ([redacted]).

432. Defendants compete on the terms of service, such as delivery frequency and drop sizes. PX00589 (Lynch (US Foods) IH at 103:23-104:5); PX00455 ([redacted] Decl.) ¶ 13. Relatedly, Defendants compete on the geographic footprint they can offer to serve National Customers. PX01450.

433. Defendants also compete on quality of service and service levels. PX00524 ([redacted] Dep. at 224:11-19); PX00432 (Decl. [redacted] ¶ 7. Indeed, competition between

Defendants drives both companies to improve operational efficiency to provide better service to customers more cost-effectively. PX00402 ([redacted] Decl.) ¶ 13; PX00419 ([redacted] Decl.) ¶ 11.

434. Further, Defendants compete on information technology offering. DeLaney (Sysco) Hrg. Vol. 12 at 80:12-81:5; PX00524 ([redacted] Dep. at 225:16-21); PX00567 ([redacted] Dep. at 190:5-192:18); PX00401 ([redacted] Decl.) ¶ 10; PX00436 ([redacted] Decl.) ¶ 16; PX00493 ([redacted] Supp. Decl.) ¶ 12; PX01007-023; PX01032-001; PX03080-001; PX01010-013.

435. Indeed, Defendants' expert, Dr. Hausman, agrees that "Sysco and US Foods compete vigorously with one another on nonprice competition," in addition to competing on price. Hausman Hrg. Vol. 16 at 80:14-17.

436. Consequently, National Customers are concerned that the merger will reduce Sysco and US Foods' incentive to compete, not only on price, but also on service offerings and quality. PX00402 ([redacted] Decl.) ¶ 14; PX00421 ([redacted] Decl.) ¶ 17; PX00436 ([redacted] Decl.) ¶ 17; PX00437 ([redacted] Decl.) ¶ 12; PX00441 ([redacted] Decl.) ¶ 10; PX00442 ([redacted] Decl.) ¶ 16; PX00454 ([redacted] Decl.) ¶ 11; PX00466 ([redacted] Decl.) ¶ 11.

3. <u>Defendants Compete To Best Each Other on Product Assortment</u>

437. Defendants also compete in terms of their product breadth. PX00515 (Schreibman (US Foods) Dep. at 148:21-149:6, 214:22-219:2).

438. Sysco and US Foods distinguish themselves from other, smaller distributors with their more extensive and greater variety of products overall (SKUs). For example, Sysco and US Foods carry an average of approximately [redacted] and [redacted] SKUs, respectively, in their broadline distribution centers. Other broadline distributors typically carry far fewer SKUs: The next three largest broadline distributors—[redacted] carry an

average of approximately [redacted] SKUs, respectively. PX09350 (Israel Report) ¶¶ 142-43, Figure 10.

439. Dr. Israel observes that Sysco's and US Foods' extensive SKU coverages are of particular benefit in competing for broadline customers that have large and diverse needs, including GPOs and foodservice management companies among others. PX09350 (Israel Report) ¶ 143.

440. Sysco and US Foods also specifically compete with each other on their private label product selections. PX03055-001 ([redacted]).

441. Sysco and US Foods also distinguish themselves from other, smaller distributors with their more extensive and greater variety of private label products. PX00448 ([redacted] Decl.) ¶ 7.

442. Using data submitted by industry participants, Dr. Israel shows that Sysco and US Foods have an enormous private label advantage over other broadline distributors. For example, the private label SKU offerings of Sysco and US Foods are approximately [redacted]. PX09350 (Israel Report) ¶ 144, Figure 11; Israel Hrg. Vol. 11 at 138:16-139:9.

443. Company-wide, Sysco offers approximately [redacted] private label SKUs, and US Foods offers approximately [redacted] private label SKUs. Other broadline distributors offer significantly fewer private label SKUs. For example, [redacted] offers approximately [redacted] private label SKUs, [redacted] offers approximately [redacted] private label SKUs, and [redacted] offers approximately [redacted] private label SKUs. PX09350 (Israel Report) ¶ 145.

444. As such, National Customers are concerned that the merger will reduce Sysco and

US Foods' incentive to compete on product offerings. *See*, *e.g.*, PX00454 ([redacted] Decl.) ¶ 11.

4. Defendants Are Each Other's Closest Competitor

445. Sysco and US Foods are each other's closest competitors for National Customers.

446. The evidence shows that Sysco and US Foods surpass—and distinguish themselves—from all other broadline distributors on the most competitively significant metrics. *See*, *e.g.*, PX00443 ([redacted] Decl.) ¶ 16; PX00462 ([redacted] Decl.) ¶ 9.

447. Sysco and US Foods are the only single-firm broadline distributors with nationwide reach and the ability to offer consistent products and uniform pricing throughout the United States. PX03032-042 [redacted]); PX01047-026; PX00594 ([redacted] IH at 55:20-59:5); *see also* [redacted] at 13:1-23 (explaining that [redacted]).

448. Sysco and US Foods have far more distribution centers than any other broadline distributor in the United States. PX09350 (Israel Report) ¶ 119, Figure 7; *id.* ¶ 135; Holm (PFG) Hrg. Vol. 4 at 55:14-24.

449. Sysco and US Foods earn far more in revenue than any other broadline distributor in the United States. PX09350 (Israel Report) ¶ 118, Figure 6; *id.* ¶ 121; Holm (PFG) Hrg. Vol. 4 at 55:14-21.

450. Sysco and US Foods have by far the largest broadline salesforces of any broadline distributor in the United States. PX09350 (Israel Report) at 64, ¶ 119, Figure 9; *id.* ¶ 315, Figure 18; Holm (PFG) Hrg. Vol. 4 at 55:14-56:2.

451. Sysco and US Foods have by far the largest delivery fleet of any broadline distributor in the United States. PX09350 (Israel Report) ¶ 119, Figure 8; *id.* ¶ 315, Figure 19;

Holm (PFG) Hrg. Vol. 4 at 55:14-56:4.

452. Sysco and US Foods have by far the broadest selection of products of any broadline distributor in the United States. PX09350 (Israel Report) ¶¶ 142-143, Figure 10; *see also* PX00462 ([redacted] Decl.) ¶ 9; PX00402 ([redacted] Decl.) ¶ 10; PX00455 ([redacted] Decl.) ¶ 12; PX00490 ([redacted] Supp. Decl.) ¶ 5-6; PX00466 ([redacted] Decl.) ¶ 9.

453. Sysco and US Foods have by far the broadest selection of private label products of any broadline distributor in the United States. PX09350 (Israel Report) ¶¶ 144-145, Figure 11; Israel Hrg. Vol. 11 at 138:16-139:9; *see also* PX00441 ([redacted] Decl.) ¶ 7; PX00404 ([redacted] Decl.) ¶ 4.

454. US Foods' CEO, John Lederer, testified that Sysco is distinguished from other broadline distributors based on its size, its scale, its cost of goods, and the volume of goods that flow through its warehouses. PX00588 (Lederer (US Foods) IH at 162:22-164:6).

455. Independent industry analysts have concluded that the closeness of competition between Sysco and US Foods has caused the companies to reduce prices charged for food distribution services offered to National Customers. PX09332-004 ("[redacted]"); *see also* PX00570 ([redacted] Dep. at 123:5-13 ([redacted]

(a) <u>Evidence from Defendants Confirms That Sysco and US Foods Are Each Other's Closest Competitor for National Customers</u>

456. Defendants' internal business documents indicate that Sysco and US Foods see each other as their primary competitors for National Customers. PX03031-003 ([redacted]

[redacted]); PX00105-001 [redacted]); PX03004-001 [redacted]) (emphasis added).

457. In the ordinary course of business, Sysco recognizes that US Foods is Sysco's "[redacted]." PX01388-004.

458. Defendants' business records also show that Sysco and US Foods are overwhelmingly the top two choices for National Customers. [redacted] *See* PX09350 (Israel Report) ¶¶ 177, 178.

459. A survey commissioned by Sysco, asking customers [redacted] PX01006-005. This survey also reported that [redacted] PX01006-011.

(b) <u>Evidence from National Customers Confirms That Sysco and US Foods Are Each Other's Closest Competitor</u>

460. National Customers testify that Sysco and US Foods are each other's largest and

closest competitors. Szrom (VA) Hrg. Vol. 2 at 25:22-26:9; Thompson (Interstate) Hrg. Vol. 2 at 107:12-22; Holm (PFG) Hrg. Vol. 6 at 15:1-10; PX00570 ([redacted] Dep. at 124:11-125:1); PX00567 ([redacted] Dep. at 143:14-145:7); PX00594 ([redacted] IH at 56:8-10, 63:25-64:8, 205:19-22); PX00560 ([redacted] Dep. at 80:4-81:12, 112:4-13); PX00405 ([redacted] Decl.) ¶ 13; PX00437 ([redacted] Decl.) ¶ 12; PX00462 ([redacted] Decl.) ¶ 9; PX00478 ([redacted] Supp. Decl.) ¶ 2; PX00480 ([redacted] Supp. Decl.) ¶ 2; *see also* PX00570 ([redacted] Dep. at 112:13-18, 123:4-125:1, 137:17-139:4); PX00402 ([redacted] Decl.) ¶ 13; PX00418 ([redacted] Decl.) ¶ 19; PX00419 ([redacted] Decl.) ¶ 7; PX00421 ([redacted] Decl.) ¶ 18; PX00445 ([redacted] Decl.) ¶¶ 14, 16; PX00454 ([redacted] Decl.) ¶ 11; PX00455 ([redacted] Decl.) ¶ 12; PX00462 ([redacted] Decl.) ¶ 9; PX07019 ([redacted] Decl.) ¶¶ 19-20 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ (2)(a)).

461. Many National Customers identify Sysco and US Foods as the only two truly national broadline distributors. Thompson (Interstate) Hrg. Vol. 2 at 89:4-9; PX00560 ([redacted] Dep. at 81:17-82:15); PX00401 ([redacted] Decl.) ¶ 11; PX00402 ([redacted] Decl.) ¶ 13; PX00405 ([redacted] Decl.) ¶13; PX00407 ([redacted] Decl.) ¶ 7; PX00418 ([redacted] Decl.) ¶ 15; PX00421 ([redacted] Decl.) ¶ 17; PX00431 ([redacted] Decl.) ¶ 12; PX00439 ([redacted] Decl.) ¶ 11; PX00445 ([redacted] Decl.) ¶ 16; PX00455 ([redacted] Decl.) ¶ 12; PX00594 ([redacted] IH at 278:22-279:11); PX07019 ([redacted] Decl.) ¶ 21; *see also* PX00569 (Sonnemaker (Sysco) Dep. at 173:1-23).

462. Premier views Sysco as its next best option after US Foods today. Sysco is the only other national player, and if a customer needs a national broadline distributor, its only two choices are Sysco or US Foods. Ralph (Premier) Hrg. Vol. 3 at 79:25-80:13.

463. Interstate views Sysco and US Foods as the only distributors that could provide

broadline foodservice distribution to all of Interstate's properties across the United States. Thompson (Interstate) Hrg. Vol. 2 at 89:4-9, 120:2-14. James Thompson, Senior Vice President of Interstate Hotels, testified that when Interstate started down the road of an RFP in or around 2011, though never completed, he only considered including Sysco and US Foods because those were the only two companies that fit Interstate's requirements. Thompson (Interstate) Hrg. Vol. 2 at 106:23-107:22. Mr. Thompson also testified that, absent the merger, in Interstate's next RFP is to invite only Sysco and US Foods because those are "the two viable [distribution] companies for Interstate Hotels." Thompson (Interstate) Hrg. Vol.2 at 119:20-120:14.

464. In response to [redacted] most recent RFP, Sysco [redacted] PX00594 ([redacted] IH at 177:9-16). In fact, Sysco "[redacted]" rather, Sysco viewed US Foods as Sysco's most direct competitor. PX00594 ([redacted] IH at 170:25-171:22). From [redacted] perspective, there is not a third alternative after Sysco and US Foods. PX00594 ([redacted] IH at 279:3-11). Not contracting with Sysco or US Foods would be tantamount to telling [redacted] PX00594 ([redacted] IH at 278:11-21). [redacted] PX00594 ([redacted] IH at 190:7-191:10) (discussing PX00602-029). As a result, US Foods is [redacted] next-best option to Sysco. PX00560 ([redacted] Dep. at 82:10-83:13).

465. [redacted] a national healthcare GPO, testified that Sysco and US Foods "[redacted]" as the "[redacted] PX00574 ([redacted] Dep. at 93:25-95:3). [redacted] also

explained that, while [redacted] may "[redacted]" to find alternative distributors, "[redacted]." PX00574 ([redacted] Dep. at 127:9-128:11).

466. Because there are no other viable alternatives, [redacted] expects that prices for [redacted] will "[redacted] after the merged Sysco/US Foods [redacted]." PX00574 ([redacted] Dep. at 127:9-128:11). Specifically, he expects that prices will increase by approximately [redacted]. PX00574 ([redacted] Dep. at 232:1-7).

467. If the merger were to go forward, [redacted] explained that [redacted] would also lose the [redacted] PX00574 ([redacted] Dep. at 213:3-22); *see also* PX00466 ([redacted] Decl.) ¶ 10.

468. Dr. Israel gathered evidence from 25 National Customers, with combined annual purchases exceeding [redacted], as well as deposition testimony from two others, which indicates that Sysco and US Foods are the top two choices for many National Customers. PX09350 (Israel Report) ¶ 155.

(c) <u>Evidence from Other Distributors Confirms That Sysco and US Foods Are Each Other's Closest Competitor</u>

469. It is not only PFG, but other regional distributors as well that recognize that Sysco and US Foods are each other's closest competitors, with distinct competitive advantages in their ability to serve National Customers. For example, the [redacted] testified that: [redacted] PX00412 ([redacted] Decl.) ¶ 7 (emphasis added). [redacted]

[redacted] PX00412 ([redacted] Decl.) ¶ 11; *see also* PX00416 ([redacted] Decl.) ¶ 9; PX00434 ([redacted] Decl.) ¶ 11; PX00443 ([redacted] Decl.) ¶ 16.

470. [redacted] stated that, in "[redacted]." PX00415 ([redacted] Decl.) ¶ 16. As a result, he expects that, after the merger, "[redacted]" particularly "[redacted]." PX00415 ([redacted] Decl.) ¶ 17.

471. [redacted] stated that [redacted] PX00444 ([redacted] Decl.) ¶ 18. [redacted] explained that [redacted] PX00529 ([redacted] Dep. at 201:3-10). [redacted] PX00529 ([redacted] Dep. at 201:23-202:24). [redacted] PX00529 ([redacted] Dep. at 202:14-203:12).

5. <u>The Merger Would Substantially Lessen Competition for Each Major Segment of National Customers</u>

472. National Customers such as foodservice management firms, GPOs, large

healthcare systems, and certain restaurant chains have moved increasingly to use national suppliers, and now overwhelmingly contract with either Sysco or US Foods for broadline foodservice needs. Holm (PFG) Hrg. Vol. 4 at 81:25-84:9.

473. Based on his experience, Mr. Holm of PFG believes that there is a "clear trend" among National Customers is to move toward a single nationwide provider. Holm (PFG) Hrg. Vol. 4 at 84:6-9. Either Sysco or US Foods wins essentially every RFP for these National Customers. Holm (PFG) Hrg. Vol. 4 at 84:21-23.

474. National Customers like [redacted] contract the vast majority of their broadline foodservice distribution business with Sysco. PX00427 ([redacted] Decl.) ¶ 5; PX00401 ([redacted] Decl.) ¶ 7; PX00462 ([redacted] Decl.) ¶ 4; *see also* PX09007-010. Other National Customers, such as many of the large GPOs, hold large contracts with US Foods on behalf of their members and clients. Holm (PFG) Hrg. Vol. 4 at 85:7-86:7. Several factors explain why National Customers contract with either Sysco or US Foods, including the ability to get SKUs stocked quickly, one point of contact, a single IT system, and consistency of private brands across the system. Holm (PFG) Hrg. Vol. 4 at 86:8-91:11.

475. [redacted] went even further, testifying that, for National Customers such as larger GPOs, hospitality chains, and foodservice management companies, it is Sysco that keeps US Foods "[redacted]," and vice versa. PX00570 ([redacted] Dep. at 138:7-139:4).

476. Likewise, PFG's CEO testified that foodservice management companies, GPOs, and certain restaurant groups would be particularly vulnerable to price increases after the merger of Sysco and US Foods. Holm (PFG) Hrg. Vol. 6 at 14:12-16. These National Customers have obtained lower prices by bidding Sysco and US Foods against each other. Holm (PFG) Hrg. Vol. 6 at 14:22-25. For foodservice management companies, GPOs, and certain national chain

restaurants, a Sysco-US Foods merger would combine the only two viable distributors that have the geographic scope to service them. Holm (PFG) Hrg. Vol. 6 at 15:1-7.

(a) <u>Healthcare</u>

477. David Schreibman, Executive Vice President for Strategy at US Foods, testified at the preliminary injunction hearing that US Foods has a leading market share position among healthcare customers, narrowly leading Sysco. Schreibman (US Foods) Hrg. Vol. 13 at 38:2-10. According to Mr. Schreibman, US Foods controls about 48% of food distribution sales to acute care hospitals, virtually all of which purchase through national GPOs. Schreibman (US Foods) Hrg. Vol. 13 at 38:11-22.

478. Scott Sonnemaker, Sysco's Senior Vice President of Sales, acknowledged that US Foods is Sysco's strongest competitor for healthcare GPO dollars. Sonnemaker (Sysco) Hrg. Vol. 13 at 139:9-12; *see also* PX01008-033 ([redacted]). Sysco estimated that it controlled a nearly 50% share of the major healthcare GPO's business. Sonnemaker (Sysco) Hrg. Vol. 13 at 139:16-23. Sysco compares itself to US Foods when competing for healthcare business, noting that it has as much healthcare business as US Foods, and that customers who are moving from US Foods to Sysco are doing so because of a superior value-added service offering. Sonnemaker (Sysco) Hrg. Vol. 13 at 143:9-144:19.

479. National healthcare GPOs have expressed concerns about the merger. PX00436 ([redacted] Decl.) ¶¶ 17-18; PX00594 ([redacted] IH at 223:1-224:3) [redacted]; *id*. at 228:9-229:7 (discussing PX00395); *id*. at 238:10-18 [redacted]; *id*. at 243:4-23 [redacted]; PX00593 ([redacted] IH at 135:1-22); PX00376-001.

480. Consistent with the concerns of these national healthcare GPOs, a 2010 Sysco Board presentation notes that [redacted] PX01008-033. [redacted] PX01008-033.

481. Sysco competes for the business of [redacted] Sonnemaker (Sysco) Hrg. Vol. 13 at 146:5-47:19.

482. An internal US Foods document analyzing the most recent national RFPs issued by [redacted] and [redacted] predicted that [redacted] PX03010-001. This analysis further concluded that [redacted] PX03010-001; *see also* Lynch (US Foods) Hrg. Vol. 14 at 77:8-79:1.

483. Tom Lynch, US Foods' Senior Vice President for National Sales, testified that US Foods offered price reductions to [redacted] in response to competition from Sysco. Lynch (US Foods) Hrg. Vol. 14 at 75:3-77:25.

484. Other market participants expect the merger to reduce competition for national healthcare GPOs. PX00405 ([redacted] Decl.) ¶ 13; PX00415 ([redacted] Decl.) ¶ 17 ([redacted]).

(b) Hospitality

485. National hospitality chains likewise have expressed concerns that the merger will reduce competition between the only two national broadline distributors. Thompson (Interstate) Hrg. Vol. 2 at 100:7-16, 125:4-26:25; PX00404 ([redacted] Decl.) ¶ 12; PX00480 ([redacted] Supp. Decl.) ¶ 2; PX00431 ([redacted] Decl.) ¶¶ 14-16; PX00454 ([redacted] Decl.) ¶ 11.

486. Mr. Thompson of Interstate testified that he uses Sysco's presence in the market to obtain better pricing from US Foods, and provided a very recent example. Interstate recently took over several hotels that Sysco serviced. Interstate transitioned the hotels to US Foods, and the hotels complained that US Foods' prices were higher than Sysco's prices. Mr. Thompson used information about Sysco's prices to benchmark Sysco against US Foods. Thompson (Interstate) Hrg. Vol. 2 at 113:4-114:4.

487. [redacted] provided a vivid example of how it directly benefits from head-to-head competition between US Foods and Sysco. When [redacted] most recent contract with US Foods was set to expire [redacted] gave US Foods a choice: improve the terms of the existing contract or compete head-to-head with Sysco in a formal RFP. Rather than risk losing to Sysco, US Foods provided [redacted] PX00404 ([redacted] Decl.) ¶ 5.

488. Sysco executives asked [redacted] multiple times to write a letter or submit a declaration to the FTC in support the merger that touted the merger's benefits and said there would be multiple competitive options post-merger. PX09240; PX09239; PX09238; PX09236. After discussing the issue [redacted] declined because [redacted]." PX09242-001-002.

(c) <u>Foodservice Management</u>

489. Foodservice management groups also would face a significant reduction in competition if the merger occurs. PX00427 ([redacted] Decl.) ¶ 10; Holm (PFG) Hrg. Vol. 6 at

14:12-16.

490. [redacted] a large foodservice management company, believes that, after the merger, the combined Sysco / US Foods "[redacted]" PX00427 ([redacted] Decl.) ¶ 11.

491. Another large foodservice management company, [redacted] recently leveraged US Foods' aggressive pricing proposal to gain lower pricing from Sysco. *See* PX01450; PX01451-001.

492. [redacted] a large foodservice management group, testified that Sysco and US Foods are the only two broadline distributors that offer nationwide coverage, and the only two that offer the level of service that [redacted] requires nationally. PX00401 ([redacted] Decl.) ¶ 9-10. [redacted] has used "[redacted]," including service terms. PX00401 ([redacted] Decl.) ¶ 9.

493. Other market participants also expect that the merger will reduce competition for national foodservice management companies. PX00415 ([redacted] Decl.) ¶ 17.

6. <u>National Customers that Regionalize Overwhelmingly Use Defendants for Broadline Foodservice Distribution</u>

494. Even National Customers that split their purchases among multiple distributors use Defendants for the majority of the broadline foodservice distribution needs. Israel Hrg. Vol. 11 at 134:23-135:3 (testifying that approximately [redacted] of [redacted] locations are served by Sysco); Israel Hrg. Vol. 11 at 135:15-136:7 (testifying that [redacted] of [redacted] business has been won by Sysco and US Foods); PX01391 (showing Sysco and US Foods have won [redacted], and are the incumbents in [redacted]); PX00594 ([redacted] IH at 92:10-18) (testifying that about [redacted]

[redacted] of [redacted] total spend is with Sysco).

495. Even Defendants' only customer witness at the hearing uses Sysco and US Foods for the majority of its members foodservice needs. Specifically, HPSI determines "who are the best, you know, distributors in those geographic areas," and the majority of HPSI's spend is with Defendants. Lindahl (HPSI) Hrg. Vol. 12 at 97:22-98:2; *id*. at 130:18-131:8 (testifying that approximately 65% of all HPSI's members' spend is with Defendants); *see also* Lindahl (HPSI) Hrg. Vol. 12 at 123:24-124:21 (discussing DX01454 and testifying that Sysco serves HPSI in every state except Hawaii and US Foods serves HPSI in 42 states).

7. <u>Dr. Israel's Analysis Confirms That the Merger Would Substantially Lessen Competition in the National Broadline Market</u>

496. As Dr. Israel explained in his report, "[t]he specific structure of competition in the foodservice distribution industry, including use of RFPs or similar negotiation processes, helps to clarify the specific mechanism for harm in this case. In an RFP situation (much like an auction), economics teaches that the terms offered by the winning bidder are determined (or at least heavily influenced) by the capabilities of the second-best option for a given buyer (i.e., the bidder that the winning bidder must beat to win the RFP), as the winning broadline distributor will seek to offer price and service terms that are just sufficient to win the contract." PX09350 (Israel Report) ¶ 129.

497. Dr. Israel explains that "a merger harms a buyer when sellers that would otherwise be the top two bidders for that buyer's business merge—particularly when the third-place option is a distant third—because after the merger the price and service terms offered to the customer are now determined (or at least heavily influenced) by the previously third-best bidder that moves into the number two position." PX09350 (Israel Report) ¶ 129; *see also* Israel Hrg. Vol. 10 at 16:17-18:1; Israel Hrg. Vol. 18 at 105:13-109:5.

498. Dr. Israel observes that "voluminous evidence . . . indicates that Sysco and USF are the top two broadline distributors for a large proportion of National Broadline Customers, and that the various options that may serve as the third-choice distributor for different buyers are substantially weaker options. Practically speaking, this means that in a large percentage of National Broadline Customer RFPs, Sysco or USF is the firm determining the other's (i.e., the winning bidder's) price, and if the proposed merger is allowed to proceed, the winning bidder's price will be determined by a third, more distant substitute broadline distributor, resulting in significant merger harm to many National Broadline Customers." PX09350 (Israel Report) at ¶ 130.

499. Using data on shares of National Customer revenues and estimates of national broadline distributors' price-cost margins on National Customer accounts as inputs, Dr. Israel generates an economic model that predicts that the merger will yield significant harm to National Customers. Dr. Israel's model also predicts that efficiencies will be passed through to customers only to a limited degree, thus implying substantial net harm to National Customers from the transaction. PX09350 (Israel Report) ¶ 132; [redacted] at 62:15-65:16.

500. [redacted] at 62:15-65:16; Israel Hrg. Vol. 18 at 105:13-109:5; *see also* PX09375 (Israel Rebuttal Report) ¶¶ 220-225. Further, if the model suggested by Defendants' expert Dr. Hausman (upward pricing pressure) were used instead, that model would also predict that the merger would result in significant harm to national customers that outweighs the efficiencies. Israel Hrg. Vol. 18 at 111:6-116:14.

501. Dr. Israel concludes that many National Customers actively encourage competition between Sysco and US Foods in RFPs (or less formal negotiations) and achieve price and non-price concessions from such competition, which is a source of customer-benefitting price reductions and quality enhancements that would be lost following the proposed transaction. PX09350 (Israel Report) ¶ 155.

502. Dr. Israel analyzed RFPs and similar types of negotiations for national broadline accounts collected from Defendants' ordinary course documents and Second Request submissions. His analysis of these materials shows substantial direct competition between Sysco and US Foods for National Customers, with each competing with and losing to the other at a level that dwarfs all other distributors, thus further demonstrating the closeness of substitution and intense competition between Sysco and US Foods. PX09350 (Israel Report) ¶ 173; Israel Hrg. Vol. 11 at 137:17-138:6. Dr. Israel did not use RFP data submitted by third-parties because his analysis focused on, "from the Sysco point of view, in their data, who do they compete with the most?" Israel Hrg. Vol. 18 at 96:13-97:5 (explaining that "[f]rom the US Foods' point of view, in their data, who do they compete with the most? Who do they lose to the most?").

503. By contrast, Defendants' expert Dr. Hausman testified that he did not analyze any of US Foods' or Sysco's responses to any RFPs. Hausman Hrg. Vol. 16 at 68:13-17. Dr. Hausman also testified that he did not analyze which distributor has been used as a point of leverage most often in bilateral negotiations between US Foods and its National Customers; he conceded, however, that "in a number of cases", National Customers "use Sysco and US Foods as lever points against each other to obtain better pricing in bilateral negotiations." Hausman Hrg. Vol. 16 at 74:1-13, 89:6-10.

504. Dr. Israel's RFP database was compiled from bid record spreadsheets Defendants

submitted to the FTC during its investigation, as well as many ordinary course bid records (including emails, bid proposals, and profit models) that Defendants produced to the FTC as the best available source of data on historical RFPs (and similar negotiations). Israel Hrg. Vol. 10 at 22:23-26:17; *see also* PX00701 (Bresnahan Dep. at 150:1-151:19) (agreeing that the type of ordinary course bidding records used by Dr. Israel in his RFP database are informative as to whether Sysco and US Foods are closest competitors). The database encompasses information about RFPs for customers that Defendants self-identified as national accounts, as well as many other non-party customers with geographically dispersed locations. Israel Hrg. Vol. 10 at 29:12-30:18. Dr. Israel defines RFPs to include both formal and informal RFPs and negotiation processes. Israel Hrg. Vol. 10 at 22:23-23:13; Israel Hrg. Vol. 11 at 137:17-138:6. Understanding that each party may overstate its own participation and wins, Dr. Israel controls for this issue in the data by focusing on each Defendants' reporting of participation and wins by *other* broadline distributors, including the other Defendant (i.e., in the Sysco database, Dr. Israel excludes Sysco wins, and in the US Foods database, Dr. Israel excludes US Foods wins). PX09350 (Israel Report) ¶ 173 n.328. Dr. Israel's bidding analysis accounts for customers that split up bids into multiple regions or among multiple distributors. Israel Hrg. Vol. 10 at 28:15-29:8.

505. Dr. Israel's analysis shows that, in Sysco's data on RFPs, [redacted] Additionally, Dr. Israel's analysis shows that [redacted] PX09350 (Israel Report) ¶ 175, Figure 12; *id.* ¶ 177, Figure 14; *see also*

Israel Hrg. Vol. 10 at 20:7-21:22.

506. Dr. Israel's analysis shows that, in US Foods' data on RFPs, [redacted] Additionally, US Foods' data on RFP wins [redacted] PX09350 (Israel Report) ¶ 176, Figure 13; *id.* ¶ 178, Figure 15; *see also* Israel Hrg. Vol. 10 at 21:23-22:22.

507. Dr. Israel finds that GPOs and foodservice management companies may be particularly effective at pitting Sysco and US Foods against one another in RFPs to obtain low prices. This is a strategy that GPOs and foodservice management companies indicate is at the heart of their procurement strategy, and an ability that would be lost post-transaction. Thus, the loss of this power through the proposed merger is likely to be particularly harmful to them. PX09350 (Israel Report) ¶ 207; Israel Hrg. Vol. 7 at 59: 1-15; *see also* Hausman Hrg. Vol. 16 at 66:14-17.

508. Dr. Israel finds that, to the extent GPOs and foodservice management companies can bring alternative options into the mix to discipline Sysco or US Foods, they have every incentive to do so today. Yet, data and Defendants' own estimates indicate that Sysco and US Foods service the vast majority of GPO business today, indicating that GPOs consider Sysco and US Foods their top two options, with other options well behind. PX09350 (Israel Report) at ¶ 208.

B. <u>The Merger Would Substantially Lessen Competition in Numerous Local Markets</u>

509. Sysco and US Foods are the largest and most significant broadline distributors in

a large number of local markets.

510. David Schreibman of US Foods testified that [redacted]" PX00515 (Schreibman Dep. at 62:11-15); *see also* PX00591 (Schuette (US Foods) IH at 139:11-140:4); PX00588 (Lederer (US Foods) IH at 226:22-227:20, 228:21-229:7). Mr. Schreibman further acknowledged that, [redacted] PX00515 (Schreibman (US Foods) Dep. at 65:8-13).

511. The merger would substantially lessen competition in a large number of local markets. Dr. Israel concludes that even with the proposed divestiture to PFG, Defendants' combined share and HHI is "far above the merger guidelines presumption" in a number of local markets including Raleigh / Durham, NC; Omaha, NE; Columbia / Charleston, SC; and Southwest Virginia. Israel Hrg. Vol. 10 at 10:6-12:3, 14:11-25; PX09350 (Israel Report) ¶ 370, Table 21.

512. In addition to their large, leading market shares in a number of local markets, Sysco and US Foods enjoy several competitive advantages over local distributors. [redacted] PX00515 (Schreibman (US Foods) Dep. at 65:14-18).

513. [redacted] PX00515 (Schreibman (US Foods) Dep. at 65:19-23).

514. [redacted] PX00515 (Schreibman (US Foods) Dep. at 65:24-66:3).

515. [redacted] PX00591 (Schuette (US Foods) IH at 136:5-18).

516. Local customers testify that Sysco and US Foods are each other's largest and closest competitors. PX00520 ([redacted] Dep. at 111:19-112:5); PX00532 ([redacted] Dep. at 167:13-20); PX00528 ([redacted] Dep. at 131:18-23); PX00550 ([redacted] Dep. at 122:21-123:25); PX00523 ([redacted] Dep. at 195:6-14, 201:19-25); PX00556 ([redacted] Dep. at 68:24-70:9); PX00423 ([redacted] Decl.) ¶ 10; PX00435 ([redacted] Decl.) ¶ 8; PX00461 ([redacted] Decl.) ¶ 8; PX00482 ([redacted] Decl.) ¶ 8; PX00496 ([redacted] Decl.) ¶ 10; PX07000 ([redacted] Supp. Decl.) ¶ 4; PX07001 ([redacted] Supp. Decl.) ¶ 7.

517. Local customers testify that Sysco and US Foods are the implicit threat in negotiations. PX00520 ([redacted] Dep. at 111:19-24); PX00521 ([redacted] Dep. at 174:20-175:7); PX00528 ([redacted] Dep. at 131:7-17); PX00547 ([redacted] Dep. at 81:8-83:20); PX00568 ([redacted] Dep. at 217:3-219:10); PX00550 ([redacted] Dep. at 121:24-122:20); PX00523 ([redacted] Dep. at 193:15-194:14); PX00482 ([redacted] Decl.) ¶¶ 7, 13 [redacted].

518. [redacted] testified that there are areas of the country where Sysco and US Foods "[redacted]" and are "[redacted]." PX00570 ([redacted] Dep. at 113:7-14).

519. Dr. Israel explains that for many customers that are proximate to both Sysco and

US Foods distribution centers, Sysco and US Foods account for a very high share of sales and capacity within the effective distribution distance surrounding the customer's location. These shares are very high regardless of whether they are calculated only for local broadline customers or for all customers combined. PX09350 (Israel Report) ¶ 217.

520. Dr. Israel examines US Foods' ordinary course sales representative reporting tool, the Linc database, to consider the extent to which US Foods' local sales representatives perceive various distributors as its main competitor. US Foods characterizes Linc as "a customer relations management tool" that "allows Territory Managers [that is, local sales representatives] to manage and store information regarding existing US Foods' customer accounts, as well as prospective US Foods' customer accounts or business opportunities." PX09510 (*US Foods v. Melidona*, No. 14-cv-5554 (N.D. Ill. filed July 21, 2014) (Compl. ¶ 47)). US Foods notes that the Linc database "contain[s] critical information needed by US Foods to service its customers" and that "[w]ithout this information, US Foods cannot service its customers properly." PX09510 (*Melidona*) ¶ 48. US Foods further notes that [redacted] PX03158-002. The Linc database contains hundreds of thousands of observations, providing "a large sample of observations to look at . . . [and tells me who US Foods'] salespeople say that they are facing and who they're facing in competition." Israel Hrg. Vol. 9 at 46:16-48:15.

521. The Linc database shows that US Foods overwhelmingly views Sysco as US Foods' largest competitor across local areas, [redacted]

[redacted] PX09350 (Israel Report) ¶¶ 234-236, Tables 11, 12, 13, 14; *see also* Israel Hrg. Vol. 10 at 31:13-33:24.

522. Requests for incentives are internal Sysco requests for authorization to offer financial incentives to current or potential broadline customers. Sysco's Mr. Brawner confirmed that these written requests provide reliable information about the competition Sysco faces. Brawner (Sysco) Hrg. Vol. 14 at 139:22-140:10. Dr. Israel examined Sysco's local requests for incentives to see the frequency with which Sysco listed various competitors as the reason for an incentive request. [redacted] PX09350 (Israel Report) ¶¶ 239, Table 15; *see also* Israel Hrg. Vol. 10 at 35:8-36:18.

523. Dr. Israel also conducted an econometric event study, the results of which show that the entry of Sysco distribution centers had a meaningful impact on the prices that US Foods charged customers. From this study, Dr. Israel concludes that elimination of competition between Defendants due to the proposed merger will likely lead to increased prices for local customers in overlap markets. PX09350 (Israel Report) ¶ 241.

524. Based on his econometric event study, Dr. Israel finds a price effect from the Long Island event of at least 1.4 percent—that is, Sysco's entry resulted in a 1.4 percent decline (and potentially much more) in US Foods' price for customers in the overlap area. Dr. Israel found larger price effects for customers and products that are more likely to be affected by the merger, thus confirming the reliability of the results and identifying customers most likely to be targeted with price increases post-merger. PX09350 (Israel Report) ¶¶ 243-245, Table 16; *see also* Israel Hrg. Vol. 10 at 39:5-41:1. Dr. Israel focused on the Long Island event because

factors limiting estimated effects were more severe in the case of the Sysco Riverside entry. Israel Hrg. Vol. 10 at 41:2-21. However, Dr. Israel describes both events as lower bounds on the likely price effects the merger will cause because these two events measured only the incremental effect on competition of adding additional capacity in areas where Sysco was already competitively constraining US Foods to some extent, whereas the merger would fully eliminate US Foods as a competitive constraint on Sysco. PX09350 (Israel Report) ¶ 252; *see also* Israel Hrg. Vol. 10 at 38:2-39:4.

525. By contrast, Defendants' expert, Dr. Hausman, fails to show that the merger is unlikely to result in harm to local broadline customers based on an exit study regarding the closing of a US Foods facility in Paducah, Kentucky. Dr. Israel explained that, in studies of exit events, "you very often find no effect from the exit because, as [the relevant academic research] says, the exit is usually happening because they're closing a store or a facility that wasn't succeeding, wasn't doing very well." Israel Hrg. Vol. 10 at 41:22-42:19.

1. <u>Columbia / Charleston, South Carolina</u>

526. US Foods acknowledges that it has "a strong number one position" in Columbia, South Carolina. Schreibman (US Foods) Hrg. Vol. 13 at 58:22-59:1; PX00515 (Schreibman (US Foods) Dep. at 111:17-23); PX03118-007 ([redacted]). [redacted]. PX03118-007.

527. George Holm, CEO of PFG, testified that [redacted]. PX00526 ([redacted] Dep. at 71:12-71:20). He testified that US Foods is the largest broadline distributor in Columbia and that Sysco is number two. Holm (PFG) Hrg. Vol. 6 at 16:14-18. Information sent in an October 2014 email to Mr. Holm from an executive of a company in the Carolinas acquired by US Foods stated that, together, US Foods and Sysco control 70% of sales

in the Columbia area. Holm (PFG) Hrg. Vol. 6 at 19:8-22.

528. Sysco's Mid-Atlantic Market President Michael Brawner testified that US Foods is a "strong competitor" in the Columbia area. Brawner (Sysco) Hrg. Vol. 14 at 113:6-10.

529. Sysco and US Foods offer transition and retention bonuses to customers in Columbia / Charleston in order to win or keep business from the other. PX00426 ([redacted] Decl.) ¶ 7; PX00483 ([redacted] Decl.) ¶ 8; PX00541 ([redacted] Dep. at 189:3-20); *see also* PX01033-001 ("[redacted]"); PX01462-001; PX03275-001.

530. For example, in April 2014, Sysco "[redacted]" to customers in Columbia, South Carolina. PX01464-002. Sysco was "[redacted]," but noted that it "[redacted]." PX01464-002. The Vice President of Finance/CFO for Sysco's Columbia distribution center noted that he has seen "[redacted] PX01464-002. Sysco's Mid-Atlantic Market President responded that [redacted]" PX01464-001.

531. In competition for another customer in Columbia, South Carolina, after Sysco made an introductory offer, "[redacted] . . . ." PX01459-001. After receiving an email describing US Foods' counteroffer, the President of Sysco's Columbia distribution center wrote to Sysco's Mid-Atlantic Market President to say "[redacted]" PX01459-001 (emphasis added).

532. Customers in Columbia / Charleston pit Sysco and US Foods against each other in order to get lower prices. PX00426 ([redacted] Decl.) ¶¶ 7, 11; PX00483 ([redacted]

Decl.) ¶ 8; PX00532 ([redacted] Dep. at 78:15-79:32) [redacted]); PX00452 ([redacted] Decl.) ¶ 5 [redacted].

533. Sysco and US Foods reduce their prices and improve their terms in response to competition from each other in Columbia / Charleston. PX00541 ([redacted] Dep. at 221:6-222:11); PX00471 ([redacted] Decl.) ¶ 8; PX00532 ([redacted] Dep. at 172:18-174:5, 177:2-178:9); PX00452 ([redacted] Decl.) ¶ 5.

534. The competition between Sysco and US Foods in Columbia / Charleston results in lower prices for customers. PX00537 ([redacted] Dep. at 151:12-152:24); PX00532 ([redacted] Dep. at 175:5-10, 203:20-25); PX00541 ([redacted] Dep. at 229:12-230:3); PX00452 ([redacted] Decl.) ¶ 3; PX00471 ([redacted] Decl.) ¶ 9; PX00483 ([redacted] Decl.) ¶ 9; PX00497 ([redacted] Decl.) ¶¶ 5-6, 10; PX07001 ([redacted] Supp. Decl.) ¶¶ 7-8; PX07020 ([redacted] Supp. Decl.) ¶ 4.

535. Customers in Columbia and Charleston, South Carolina, recognize that Sysco and US Foods are each other's closest and most important competitors. PX00532 ([redacted] Dep. at 167:13-20, 175:11-14); PX00423 ([redacted] Decl.) ¶¶ 5-7, 10; PX00426 ([redacted] Decl.) ¶ 11; PX00452 ([redacted] Decl.) ¶ 5; PX00471 ([redacted] Decl.) ¶ 9; PX00482 ([redacted] Decl.) ¶ 8; PX00497 ([redacted] Decl.) ¶ 6; PX07000 ([redacted] Supp. Decl.) ¶ 4; PX07001 ([redacted] Supp. Decl.) ¶¶ 7-8; PX07018 ([redacted] Supp. Decl.) ¶¶ 5-6.

536. Next to Sysco, US Foods is many customers' next best option for broadline foodservice distribution services in Columbia / Charleston, and vice versa. PX00497 ([redacted] Decl.) ¶ 6; PX00537 ([redacted] Dep. at 154:8-21); PX00452 ([redacted] Decl.) ¶ 5.

537. Other distributors purportedly serving customers in Columbia / Charleston, such as [redacted] have not made a meaningful effort to win business in Columbia / Charleston. PX00546 ([redacted] Dep. at 132:7-133:9); PX00452 ([redacted] Decl.) ¶ 6.

538. For customers in Columbia / Charleston, [redacted] is not a viable alternative to Sysco and US Foods. PX00497 ([redacted] Decl.) ¶ 7.

539. [redacted] is higher priced compared to Sysco and US Foods in Columbia / Charleston. PX00497 ([redacted] Decl.) ¶ 7; PX00537 ([redacted] Dep. at 70:13-17); PX00471 ([redacted] Decl.) ¶ 9; PX00532 ([redacted] Dep. at 72:6-13, 116:18-117:10); PX00452 ([redacted] Decl.) ¶ 6.

540. [redacted] has a narrower product selection that Sysco or US Foods in Columbia / Charleston. PX00497 ([redacted] Decl.) ¶ 7; PX00537 ([redacted] Dep. at 70:7-24, 81:18-25, 82:18-25, 155:-9-156:8); PX00471 ([redacted] Decl.) ¶ 7; PX00532 ([redacted] Dep. at 74:8-75:23, 88:10-22, 170:18-171:21); PX00452 ([redacted] Decl.) ¶ 6 [redacted].

541. After the merger, [redacted] would not be as strong a competitor to the merged company as US Foods is to Sysco today in Columbia / Charleston. PX00497 ([redacted] Decl.) ¶ 7.

542. For customers in Columbia / Charleston, [redacted] is not a viable option to Sysco and US Foods. PX00452 ([redacted] Decl.) ¶ 6.

543. [redacted] has a narrower product selection that Sysco or US Foods in Columbia / Charleston. PX00452 ([redacted] Decl.) ¶ 6.

544. Indeed, [redacted] itself confirms [redacted]

[redacted] PX00416 ([redacted] Decl.) ¶ 12. [redacted] PX00416 ([redacted] Decl.) ¶ 12. For these reasons, [redacted] PX00416 ([redacted] Decl.) ¶ 12.

545. [redacted] PX00416 ([redacted] Decl.) ¶ 13.

546. For customers in Columbia / Charleston, [redacted] is not a viable option to Sysco and US Foods. PX00471 ([redacted] Decl.) ¶ 10.

547. According to one local customer, [redacted] PX00452 ([redacted] Decl.) ¶ 6.

548. Broadline customers in Columbia and Charleston, South Carolina, have expressed serious concerns that the merger will reduce competition, leading to higher prices and reduced levels of customer service. PX00497 ([redacted] Decl.) ¶ 10; PX00537 ([redacted] Dep. at 153:7-154:21); PX00482 ([redacted] Decl.) ¶ 13; PX00483 ([redacted] Decl.) ¶¶ 13-14; PX00541 ([redacted] Dep. at 229:12-230:12); PX00471 ([redacted] Decl.) ¶ 14; PX00532 ([redacted] Dep. at 181:25-183:1); PX00452 ([redacted] Decl.) ¶¶ 11-13.

549. For example, [redacted] in Columbia testified that he has [redacted]

[redacted] PX07020 ([redacted] Supp. Decl.) ¶ 7; *see also id.* ¶ 4.

550. Similarly, [redacted] in Columbia testified: [redacted] PX00423 ([redacted] Decl.) ¶ 10.

551. Customers in Columbia / Charleston would likely pay a price increase imposed by the combined company because they would not have a comparable alternative source for the products they need to run their businesses. PX00452 ([redacted] Decl.) ¶ 11.

552. The Market President for the Mid-Atlantic at Sysco, Mike Brawner, expressed agitation at the intense competition with US Foods, which had offered a customer an additional financial incentive to switch its business: "[redacted]" PX03275-001.

553. [redacted], testified that Sysco and US Foods are the "[redacted]" in Columbia, South Carolina. PX00570 ([redacted] Dep. at 170:3-6).

554. According to US Foods' Linc database, in the Columbia CBSA, [redacted] In the Charleston CBSA, [redacted] PX09350 (Israel Report) ¶ 262.

2. <u>Omaha, Nebraska</u>

555. US Foods' internal documents show that [redacted] PX03118-008.

556. Some customers in Omaha, Nebraska, recognize Sysco and US Foods to be each other's closest and most important competitors. Hoffman (Upstream) Hrg. Vol. 3 at 16:18-21; PX00468 ([redacted] Decl.) ¶ 6; PX00486 ([redacted] Decl.) ¶¶ 6-7; PX00472 ([redacted] Decl.) ¶ 10; PX00473 ([redacted] Decl.) ¶ 7; PX07009 ([redacted] Supp. Decl.) ¶¶ 4-6; PX07012 ([redacted] Supp. Decl.) ¶ 6; PX07013 ([redacted] Supp. Decl.) ¶ 5; PX07014 ([redacted] Supp. Decl.) ¶ 7; PX07021 ([redacted] Supp. Decl.) ¶¶ 3-6; *see also* PX00535 ([redacted] Dep. at 140:23-142:2).

557. Customers in Omaha consider Sysco and US Foods to be the only viable options for broadline distribution. PX00472 ([redacted] Decl.) ¶ 7.

558. Sysco and US Foods regularly reduce their prices and improve their terms in response to competition from each other in Omaha. PX00535 ([redacted] Dep. at 136:20-138:6); PX00472 ([redacted] Decl.) ¶ 7.

559. Competition between Sysco and US Foods has yielded better prices and service for customers in Omaha. Hoffman (Upstream) Hrg. Vol. 3 at 26:2-8; PX00547 ([redacted] Dep. at 81:8-83:20, 96); PX00535 ([redacted] Dep. at 131:12-32:24, 139:16-40:4); PX00486 ([redacted] Decl.) ¶ 6.

560. Gary Hoffman of Upstream Brewing Company testified that he "always ha[s] the ability to use [Sysco] as a baseball bat to keep [US Foods] inline [sic]. [US Foods] knew that there was competition out there, and I checked their product line and their pricing, just to see." Hoffman (Upstream) Hrg. Vol. 3 at 23:9-15.

561. Local broadline customers in Omaha have testified that [redacted] are not meaningful alternatives to Sysco or US Foods. Hoffman (Upstream) Hrg. Vol. 3 at 17:8-18:20; PX00486 ([redacted] Decl.) ¶ 9.

562. [redacted] notes that [redacted] PX00495 ([redacted] Supp. Decl.) ¶ 11.

563. Sysco and US Foods [redacted] so "[redacted]." PX00495 ([redacted] Supp. Decl.) ¶ 11; *see also* Hoffman (Upstream) Hrg. Vol. 3 at 17:23-18:1, 24:24-25:5; PX00468 ([redacted] Decl.) ¶ 8; PX00547 ([redacted] Dep. at 31:12-16); PX00486 ([redacted] Decl.) ¶ 8.

564. For broadline distribution services, [redacted]. PX00472 ([redacted] Decl.) ¶ 8. As a result, customers cannot use [redacted]. PX00472 ([redacted] Decl.) ¶ 8.

565. [redacted] PX00472 ([redacted] Decl.) ¶ 8.

566. Broadline customers in Omaha, Nebraska, have expressed serious concerns that the merger will reduce competition, leading to higher prices. Hoffman (Upstream) Hrg. Vol. 3 at 26:2-8; PX00547 ([redacted] Dep. at 96:11-17); PX00486 ([redacted] Decl.) ¶ 12; PX00472 ([redacted] Decl.) ¶¶ 13-14; PX00486 ([redacted] Decl.) ¶ 12.

567. One of Defendants' witnesses from Omaha testified [redacted] PX07012 ([redacted] Supp. Decl.) ¶ 8.

568. [redacted] PX00526 ([redacted] Dep.) at 155:22-156:1).

3. Raleigh / Durham, North Carolina

569. David Schreibman of US Foods testified that US Foods holds a "strong number one position" in Raleigh, North Carolina. Schreibman (US Foods) Hrg. Vol. 13 at 58-025. [redacted] PX03118-007.

570. [redacted] PX03073-025; *see also* PX03118-007 ([redacted]).

571. According to the CEO of PFG, the two most competitively significant broadline distributors in the Raleigh, North Carolina, market are US Foods and Sysco. Holm (PFG) Hrg. Vol. 6 at 18:16-19:2.

572. [redacted] testified that Sysco and US Foods are the "[redacted]" in Raleigh, North Carolina. PX00570 ([redacted] Dep. at 170:7-10).

573. Sysco's Mid-Atlantic Market President Michael Brawner testified that US Foods is a "strong competitor" in Raleigh / Durham. Brawner (Sysco) Hrg. Vol. 14 at 113:11-15.

574. Customers recognize Sysco and US Foods are each other's closest and most important competitors in the Raleigh / Durham, North Carolina market. PX00521 ([redacted] Dep. at 157:25-158:6); PX00561 ([redacted] Dep. at 109:23-110:12); PX00523 ([redacted] Dep. at 195:6-14, 201:19-25); PX00440 ([redacted] Decl.) ¶ 8; PX00457 ([redacted] Decl.) ¶ 7; PX00461 ([redacted] Decl.) ¶ 8; PX00487 ([redacted] Decl.) ¶ 11; PX07004 ([redacted] Supp. Decl.) ¶ 3; PX07016 ([redacted] Supp. Decl.) ¶ 4; PX07017 ([redacted] Supp. Decl.) ¶¶ 4-5.

575. Broadline customers in Raleigh / Durham benefit from the competition between

Sysco and US Foods. PX00521 ([redacted] Dep. at 101:18-102:10, 174-175); PX00552 ([redacted] Dep. at 91:12-92:6); PX00457 ([redacted] Decl.) ¶ 6, 10; PX00461 ([redacted] Decl.) ¶ 6; PX00479 ([redacted] Decl.) ¶ 8, 12; PX00487 ([redacted] Decl.) ¶¶ 7-9, 15.

576. Customers in Raleigh / Durham compare US Foods' prices to Sysco's prices, and vice versa, to make sure they are getting the best deals. PX00487 ([redacted] Decl.) ¶ 7; PX00523 ([redacted] Dep. at 193:15-194:14); PX00479 ([redacted] Decl.) ¶ 8; PX00521 ([redacted] Dep. at 101:18-102:10, 174:20-175:7).

577. Sysco and US Foods reduce their prices in response to competition from each other. PX00521 ([redacted] Dep. at 174:20-175:7); PX00551 ([redacted] Dep. at 37:22-39:4); PX00523 ([redacted] Dep. at 193:15-194:14); PX00457 ([redacted] Decl.) ¶ 6, 10; PX00479 ([redacted] Decl.) ¶ 8; PX00487 ([redacted] Decl.) ¶¶ 7-8; PX01461-001; PX01469-001.

578. Customers in Raleigh / Durham obtain lower prices from Sysco and US Foods due to the head-to-head competition between them. PX00487 ([redacted] Decl.) ¶¶ 7-8, 15; PX00523 ([redacted] Dep. at 209:19-23); PX00479 ([redacted] Decl.) ¶¶ 8, 12; PX00521 ([redacted] Dep. at 174:20-175:75); PX00551 ([redacted] Dep. at 37:22-38:12, 38:25-39:4; PX00552 ([redacted] Dep. at 91:12-92:6).

579. Other broadline distributors serving Raleigh / Durham are not competitively significant compared to Sysco and US Foods. PX00487 ([redacted] Decl.) ¶¶ 9-10; PX00523 ([redacted] Dep. at 195:19-22); PX00461 ([redacted] Decl.) ¶¶ 8-10.

580. Distributors in Charlotte, North Carolina, are too far away to provide emergency, same day service to customers in Raleigh / Durham. PX00521 ([redacted] Dep. at

142:8-20); PX00552 ([redacted] Dep. at 107:3-22).

581. [redacted] is higher priced compared to Sysco and US Foods. PX00487 ([redacted] Decl.) ¶ 9; PX00523 ([redacted] Dep. at 52:12-54:5, 64:15-65:4, 199:24-201:4).

582. [redacted] does not have the experienced customer service personnel that Defendants have. PX00487 ([redacted] Decl.) ¶ 9; PX00523 ([redacted] Dep. at 47:4-48:21, 80:25-82:11); PX00552 ([redacted] Dep. at 100:5-101:7).

583. Unlike Sysco and US Foods, [redacted] does not attempt to gain business in Raleigh / Durham by sending sales people to potential customer's restaurants. PX00521 ([redacted] Dep. at 107:305, 158:25-159:12).

584. [redacted] does not offer the same product variety that Sysco and US Foods offer. PX00487 ([redacted] Decl.) ¶ 9; PX00523 ([redacted] Dep. at 73:16-74:10, 202:20-203:20). For example, [redacted] determined that [redacted] "[redacted]" after it discovered that [redacted] did not carry the [redacted] products that [redacted] requires. PX00552 ([redacted] Dep. at 74:7-77:9); PX09285.

585. [redacted] does not offer the same level of technology that Sysco and US Foods offer. PX00523 ([redacted] Dep. at 47:4-48:21).

586. [redacted] is not a meaningful alternative to Sysco and US Foods. PX00523 ([redacted] Dep. at 200:25-203:20); PX00552 ([redacted] Dep. at 74:7-77:18, 102:4-24).

587. [redacted] does not have the experienced customer service personnel that Sysco and US Foods have. PX00487 ([redacted] Decl.) ¶ 10; PX00523 ([redacted] Dep. at 90:11-94:19).

588. [redacted] are too far away from Raleigh / Durham to provide the customer service that customers need, such as the ability to fix incorrect orders or deliveries on a same-day basis. PX00487 ([redacted] Decl.) ¶ 10; PX00523 ([redacted] Dep. at 86:24-88:5); PX00461 ([redacted] Decl.) ¶ 11; PX00552 ([redacted] Dep. at 90:3-23).

589. [redacted] does not provide the same product quality as Sysco and US Foods. PX00551 ([redacted] Dep. at 109:11-110:11).

590. [redacted] does not provide the same level of service and delivery or product variety as Sysco and US Foods. PX00551 ([redacted] Dep. at 47:13-49-22).

591. [redacted] does not have the capacity to act as a primary broadliner for customers in the Raleigh / Durham area. PX00551 ([redacted] Dep. at 47:22-48:8, 105:17-106:15).

592. Broadline customers in Raleigh / Durham testified that broadline distributors other than US Foods and Sysco rarely, if ever, even attempt to solicit their business. PX00566 ([redacted] Dep. at 34:6-35:18); PX00521 ([redacted] Dep. at 160:19-22).

593. Broadline customers in Raleigh / Durham have expressed serious concerns that the merger will reduce competition, leading to higher costs, reduced product breadth, and diminished customer service. PX00551 ([redacted] Dep. at 117:13-24; PX00552 ([redacted] Dep. at 87:5-89:15, 91:4-92:6); PX00523 ([redacted] Dep. at 148:2-149:18, 154:1-156:15, 207:24-210:24); PX00440 ([redacted] Decl.) ¶ 8; PX00457 ([redacted] Decl.) ¶ 10; PX00479 ([redacted] Decl.) ¶ 12; *see also* PX09287; PX09288; PX09289; PX09290; PX09292; PX09293.

594. The owner of [redacted] in Raleigh testified that he would accept a price

increase of [redacted] from US Foods before he would look to other distribution options. PX00521 ([redacted] Dep. at 163:18-165:19).

4. Southwest Virginia

595. Mr. Schreibman of US Foods testified that US Foods holds a "strong number one position" in Southwest Virginia. Schreibman (US Foods) Hrg. Vol. 13 at 59:5-10. [redacted] PX03118-006-07.

596. [redacted] PX03073-025.

597. [redacted] testified that Sysco and US Foods are the dominant distributors in Southwest Virginia. PX00570 ([redacted] Dep. at 168:6-170:13).

598. Sysco's Mid-Atlantic Market President, Michael Brawner, testified that US Foods is a "strong competitor" in Virginia. Brawner (Sysco) Hrg. Vol. 14 at 113:11-15.

599. According to the CEO of PFG, US Foods and Sysco are the two largest distributors in Southwest Virginia. Holm (PFG) Hrg. Vol. 6 at 20:4-7.

600. Sysco and US Foods compete head-to-head to win the business of customers in Southwest Virginia. Schablein (Wintergreen) Hrg. Vol. 4 at 20:21-25:18, 28:9-24; PX00538 ([redacted] Dep. at 222:15-224:24); PX01061-001.

601. Customers in Southwest Virginia recognize that Sysco and US Foods are each other's closest competitors. PX00520 ([redacted] Dep. at 111:25-112:5); PX00538 ([redacted] Dep. at 247:24-249:13); PX00528 ([redacted] Dep. at 131:18-23); PX00553 ([redacted] Dep. at 122:19-123:2); PX00550 ([redacted] Dep. at 122:21-123:25); PX07003 ([redacted] Supp. Decl.) ¶ 7.

602. Broadline customers in Southwest Virginia benefit from the competition between

Sysco and US Foods. PX00538 ([redacted] Dep. at 222:15-24, 242-46); PX00528 ([redacted] Dep. at 33:25-34:12); PX00553 ([redacted] Dep. at 173:10-24); PX00409 ([redacted] Decl.) ¶ 10; PX00520 ([redacted] Dep. at 111:15-24).

603. For example, Daniel Schablein, the Controller at Wintergreen Resort in Wintergreen, Virginia, testified that in the last bidding competition for Wintergreen's broadline foodservice business in 2011, the only bidders were Sysco and US Foods. Schablein (Wintergreen) Hrg. Vol. 4 at 25:6-18. At that time, Wintergreen was using US Foods for its broadline distribution needs. Schablein (Wintergreen) Hrg. Vol. 4 at 25:13-15. The result of the bidding competition was that Wintergreen switched from US Foods and signed a contract with Sysco. Schablein (Wintergreen) Hrg. Vol. 4 at 24:13-15. Sysco's proposal included pricing that was three to five percent better than what Wintergreen would get from US Foods, as well as a $50,000 signing bonus. Schablein (Wintergreen) Hrg. Vol. 4 at 24:3-12; *see also* PX01390; PX00550 ([redacted] Dep. at 122:14-20).

604. Next to Sysco, US Foods is customers' next best option for broadline foodservice distribution services in Southwest Virginia, and vice versa. PX00520 ([redacted] Dep. at 118:4-119:6); PX00528 ([redacted] Dep. at 134:21-135:4); PX00550 ([redacted] Dep. at 127:24-128:4).

605. Customers in Southwest Virginia consider Sysco and US Foods to be the only viable options for broadline distribution. Schablein (Wintergreen) Hrg. Vol. 4 at 25:25-27:13, 30:13-31:7; PX00538 ([redacted] Dep. at 136:14-23, 152:2-23); PX00528 ([redacted] Dep. at 34:23-35:10, 82:12-25, 88:11-14, 110:2-16); PX09132; *see also* PX00520 ([redacted] Dep. at 112:11-113:7).

606. Other distributors, such as [redacted] have not made a meaningful effort to win business in Southwest Virginia. Schablein (Wintergreen) Hrg. Vol. 4 at 26:22-27, 45:13; PX00520 ([redacted] Dep. at 109:25-110:14); PX00538 ([redacted] Dep. at 141:16-143:9, 164:7-169:21); PX00528 ([redacted] Dep. at 73:14-75:15, 82:12-25); PX00553 ([redacted] Dep. at 69:18-70:5, 96:2-10).

607. For customers in Southwest Virginia, [redacted] is not a viable alternative to Sysco and US Foods. PX00538 ([redacted] Dep. at 151:3-152:1, 191:3-13); PX00553 ([redacted] Dep. at 183:6-184:2); PX00550 ([redacted] Dep. at 125:3-22).

608. [redacted] is higher priced compared to Sysco and US Foods in Southwest Virginia. PX00538 ([redacted] Dep. at 44:2-45:21; 150:8-7, 152:24-153:5); PX00528 ([redacted] Dep. at 95:10-17, 141:18-20).

609. [redacted] has a narrower product selection than Sysco or US Foods for Southwest Virginia customers. PX00538 ([redacted] Dep. at 145:12-146:8, 149:24-150:7); PX00528 ([redacted] Dep. at 88:11-90:21, 96, 111:7-112:9).

610. [redacted] does not provide the same level of service, including delivery, as Sysco and US Foods. PX00538 ([redacted] Dep. at 44:2-23, 149:24-150:7); PX00528 ([redacted] Dep. at 92:13-93:2, 94:14-16); PX00553 ([redacted] Dep. at 57:9-16, 58:5-11, 114:12-115:3).

611. The owner of [redacted] testified that [redacted]." PX00528 ([redacted] Dep. at 133:2-15); *see also* PX00409 ([redacted] Decl.) ¶ 7.

612. [redacted] of [redacted] explained that, based on [redacted]

[redacted] PX07003 ([redacted] Supp. Decl.) ¶¶ 7, 12.

613. [redacted], testified that [redacted] has benefited from the competition between Sysco and US Foods, which are each other's primary competitors in terms of product variety, pricing, and quality. PX00520 ([redacted] Dep. at 111:15-112:5); *see also id.* at 118:22-119:7.

614. [redacted], testified that the competition between Sysco and US Foods "[redacted]." PX00553 ([redacted] Dep. at 173:10-174:18). Although [redacted] has made some purchases from [redacted] testified that Sysco and US Foods are each other's closest competitors. PX00553 ([redacted] Dep. at 122:19-123:2).

615. [redacted], testified that Sysco and US Foods are each other's closest competitor, and that competition from Sysco keeps US Foods [redacted] PX00528 ([redacted] Dep. at 131:7-17).

616. [redacted] the owner of [redacted], testified that if Sysco or US Foods were to raise their prices on canned or dry food, [redacted]. PX00538 ([redacted] Dep. at 43:20-45:21).

617. Broadline customers in Southwest Virginia have expressed serious concerns about the merger. PX00520 ([redacted] Dep. at 112:11-113:8, 113:20-117:24, 124:20-125:20); PX00538 ([redacted] Dep. at 193:20-195:5, 241:17-22); PX00528 ([redacted] Dep. at 34:2-12); PX00553 ([redacted] Dep. at 175:16-

176:19; 188-190); PX07003 ([redacted] Decl.) ¶ 12.

618. For example, Daniel Schablein of Wintergreen Resorts in Wintergreen, Virginia, testified that the possibility of the proposed merger "[a]bsolutely" gives him concern. Schablein (Wintergreen) Hrg. Vol. 4 at 30:21-31:7. Mr. Schablein explained that, "quite frankly, when we first heard of the proposed merger, our first reaction was, oops, this cannot be good for us. We certainly believe competition is what makes the business world go around, and because we felt they were the only two companies that could legitimately compete against each other for our business, we were concerned that that would give that one company an advantage in terms of maybe not providing as good a deal as they otherwise might." Schablein (Wintergreen) Hrg. Vol. 4 at 30:21-31:7.

619. [redacted] described the proposed merger as [redacted] PX00538 ([redacted] Dep. at 239:19-240:22). "[redacted]" PX00538 ([redacted] Dep. at 240:7-10); *see also id.* at 153:25-154:11, 189:15-190:12, 224:10-24.

620. [redacted] was so concerned at the news of the merger [redacted] PX09132; *see also* PX00528 ([redacted] Dep. at 33:25-34:12); PX00409 ([redacted] Decl.) ¶ 10.

5. <u>Other Local Markets</u>

621. The merger is likely to cause anticompetitive harm in a number of additional local markets. PX09350 (Israel Report) App. A, Table 43. Even after the divestiture, the merger remains likely to cause competitive harm in many local markets. PX09350 (Israel Report) ¶ 370, Table 21.

622. In other local markets, Sysco and US Foods compete with each other to offer lower prices and signing bonuses to keep or take business from each other. PX00420 ([redacted] Decl.) ¶ 6 (Salisbury, Maryland); PX00422 ([redacted] Decl.) ¶¶ 5, 12 (Las Vegas, Nevada); PX00485 ([redacted] Decl.) ¶¶ 8, 12 (San Francisco Bay Area, California); PX00465 ([redacted] Decl.) ¶ 7 (Novato, California); PX00470 ([redacted] Decl.) ¶ 4 (Reno, Nevada); PX00425 ([redacted] Decl.) ¶¶ 6-7 (Los Angeles, California); PX00430 ([redacted] Decl.) ¶ 4 (Charlotte, North Carolina); PX00450 ([redacted] Decl.) ¶ 4 (Los Angeles, California); PX00459 ([redacted] Decl.) ¶ 6 (San Diego, California); PX00464 ([redacted] Decl.) ¶ 9 (San Diego, California); PX00496 ([redacted] Decl.) ¶ 5 (Pensacola, Florida); PX00498 ([redacted] Decl.) ¶¶ 5, 9 (Santa Rosa, Florida); *see also* PX00463 ([redacted] Decl.) ¶ 8 (San Diego, California).

623. In other local markets, Sysco and US Foods compete with each other to offer better service, higher-quality products, and greater product breadth. PX00420 ([redacted] Decl.) ¶¶ 7-9 (Salisbury, Maryland); PX00422 ([redacted] Decl.) ¶ 5 (Las Vegas, Nevada); PX00430 ([redacted] Decl.) ¶ 9 (Charlotte, North Carolina); PX00450 ([redacted] Decl.) ¶ 4 (Los Angeles, California); PX00496 ([redacted] Decl.) ¶ 5 (Pensacola, Florida).

624. For many customers in other local markets, Sysco and US Foods are each other's closest competitors, and often the only viable options for broadline distribution services. PX00422 ([redacted] Decl.) ¶ 7 (Las Vegas, Nevada); PX00430 ([redacted] Decl.) ¶ 9 (Charlotte, North Carolina); PX00465 ([redacted] Decl.) ¶ 8 (Novato, California); PX00470 ([redacted] Decl.) ¶ 4 (Reno, Nevada); PX00572 ([redacted] Dep. at 39:17-40:20) (Los Angeles, California); PX00425 ([redacted] Decl.) ¶ 5 (Los Angeles, California); PX00459 ([redacted] Decl.) ¶ 7 (San Diego, California); PX00463 ([redacted]

Decl.) ¶ 10 (San Diego, California); PX00464 ([redacted] Decl.) ¶ 9 (San Diego, California); PX00496 ([redacted] Decl.) ¶ 6 (Pensacola, Florida); PX00498 ([redacted] Decl.) ¶ 6 (Santa Rosa, Florida).

625. In other local markets, other broadline distributors are less competitively significant than Sysco or US Foods because of their inferior product breadth, inferior service levels, and higher prices. PX00420 ([redacted] Decl.) ¶ 11 (Salisbury, Maryland); PX00422 ([redacted] Decl.) ¶ 7 (Las Vegas, Nevada); PX00576 ([redacted] Dep. at 52:19-53:3, 54:17-55:2, 208:24-209:21, 217:12-24, 218:18-220:6) (San Francisco Bay Area, California); PX00572 ([redacted] Dep. at 59:12-60:16) (Los Angeles, California); PX00465 ([redacted] Decl.) ¶ 8 (Novato, California); PX00425 ([redacted] Decl.) ¶ 9 (Los Angeles, California); PX00449 ([redacted] Decl.) ¶ 10 (Los Angeles Area, California); PX00459 ([redacted] Decl.) ¶ 7 (San Diego, California); PX00464 ([redacted] Decl.) ¶ 10 (San Diego, California); PX00496 ([redacted] Decl.) ¶ 6 (Pensacola, Florida); PX00498 ([redacted] Decl.) ¶ 6 (Santa Rosa, Florida).

626. In other local markets, customers are concerned that the merger of Sysco and US foods will reduce competition, leading to higher prices, reduced product selection, and worse service. PX00420 ([redacted] Decl.) ¶ 15 (Salisbury, Maryland); PX00430 ([redacted] Decl.) ¶ 12 (Charlotte, North Carolina); PX00425 ([redacted] Decl.) ¶ 13 (Los Angeles, California); PX00450 ([redacted] Decl.) ¶ 12 (Los Angeles, California); PX00496 ([redacted] Decl.) ¶¶ 9-10 (Pensacola, Florida); PX00498 ([redacted] Decl.) ¶ 9 (Santa Rosa, Florida).

VII. REGIONAL BROADLINE DISTRIBUTORS WILL NOT PREVENT THE MERGER'S LIKELY HARM

A. <u>Regional Distributors Do Not Compete for National Customers Today</u>

627. Regional broadline distributors do not have the geographic footprint to compete

with Sysco and US Foods for National Customer business today. Holm (PFG) Hrg. Vol. 6 at 6:15-18; PX00415 ([redacted] Decl.) ¶ 12; PX00416 ([redacted] Decl.) ¶ 9; PX00424 ([redacted] Decl.) ¶ 9; PX00434 ([redacted] Decl.) ¶ 11-12; PX00438 ([redacted] Decl.) ¶ 7; PX00443 ([redacted] Decl.) ¶ 16-17; PX00449 ([redacted] Decl.) ¶ 8; PX00451 ([redacted] Decl.) ¶ 18; PX00458 ([redacted] Decl.) ¶ 12; PX00460 ([redacted] Decl.) ¶ 6; *see also* PX00529 ([redacted] Dep. at 188:2-189:23. To the extent that regional broadline distributors do compete for National Customer business, their competitive significance is reflected in Plaintiffs' market share and bid data. *See* PX09375 (Israel Rebuttal Report) ¶ 36.

628. For National Customers, Dr. Israel's share calculations include all sales by all distributors, including those made by explicit conglomerates of regional distributors (e.g., DMA) or one or more regional distributors. PX09375 (Israel Rebuttal Report) ¶ 36. Dr. Israel testified, "if a national customer splits up its sales one way, two ways, five ways, the revenues are associated to the firm that has those revenues." Israel Hrg. Vol. 9 at 74:20-75:3; *see also* Israel Hrg. Vol. 10 at 28:17-29:8 ("My shares compute anything that's gone to a combination of regionals."); Israel Hrg. Vol. 11 at 131:1-15 ("[I]f there's one customer and they split their revenue up among ten distributors, they would all show up with revenue in my share calculations."). Similarly, Dr. Israel's auction model allows for sales made by DMA or "other" players, which can include pieced together collections of regional distributors. PX09375 (Israel Rebuttal Report) ¶ 36.

629. Dr. Israel explains that "data on shares provide strong evidence of the gap between Sysco and USF and all potential post-merger second-place options for National Broadline Customers and thus of the likely competitive harm from the proposed merger. Fundamental antitrust principles, as reflected in the [*Merger Guidelines*], make it clear that—

whatever speculation one could engage in about other "possible" options for food distribution—revenue shares are the best, most objective, 'all in' indicator of competitive significance . . . ." PX09350 (Israel Report) ¶ 120.

630. Regional and local broadline distributors, including consortia thereof, have approximately a 25% share of the sales to National Customers. Even under the most conservative methodology in favor of Defendants, these distributors do not exceed a 35% share of the sales to National Customers. The largest broadline distributor after the merged firm would be DMA, which would hold approximately one-seventh the market share of the combined Sysco/US Foods, or 11%. PX09350 (Israel Report) at 075-076, ¶ 121-122, Table 1.

B. <u>Regional and Local Distributors Cannot Constrain Sysco Post-Merger in the National Market for Broadline Services</u>

631. Regional and local broadline distributors have competitive disadvantages that make them an inadequate substitute for Sysco and US Foods today.

632. Many National Customers look for broadline distributors that can service all, or most, of their needs geographically. *See*, *e.g.*, Thompson (Interstate) Hrg. Vol. 2 at 100:7-16; Ralph (Premier) Hrg. Vol. 3 at 71:13-25; PX00404 ([redacted] Decl.) ¶¶ 4, 9; Szrom (VA) Hrg. Vol. 2 at 9:3-13; PX00418 ([redacted] Decl.) ¶ 8 [redacted]); PX00455 ([redacted] Decl.) ¶ 9; PX00445 ([redacted] Decl.) ¶ 9.

633. For National Customers, regional and local broadline distributors lack sufficient geographic coverage. PX00555 ([redacted] Dep. at 140:15-141:8); PX00560 ([redacted] Dep. at 88:14-89:9, 94:24-96:13, 99:2-100:1); PX00574 ([redacted] Dep. at 203:8-15); PX00539 ([redacted] Dep. at 90:9-91:8, 150:15-151:24, 174:12-22); PX00549 ([redacted] Dep. at 196:4-197:25); PX07019 ([redacted] Decl.) ¶¶ 19, 25 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ (2)(a)); PX00436 ([redacted] Decl.) ¶ 18.

634. Regional distributors' lack of geographic coverage has limited their ability to obtain business from National Customers. Holm (PFG) Hrg. Vol. 6 at 9:13-10:24; PX00564 ([redacted] Dep. at 135:3-13); PX00429 ([redacted] Decl.) ¶¶ 17, 18; PX00434 ([redacted] Decl.) ¶ 12.

635. PFG's CEO George Holm testified that PFG does not currently have the footprint to serve National Customers, such as foodservice management companies, that seek national distribution. Holm (PFG) Hrg. Vol. 6 at 6:21-7:22. For example, at the hearing, Mr. Holm explained that, even though Hilton and PFG are both owned by Blackstone, Hilton has not awarded PFG a significant amount of its business because PFG does not have sufficient geographic coverage. Holm (PFG) Hrg. Vol. 6 at 7:25-8:16.

636. Mr. Holm acknowledged that regional broadline distributors would be unable to constrain a merged Sysco / US Foods. Holm (PFG) Hrg. Vol. 6 at 15:1-15. (The inadequacy of the proposed divestiture to PFG is discussed in detail below in Section VIII).

637. Regional and local broadline distributors have significantly fewer distribution centers than Defendants and, as such, a far smaller geographic footprint than Defendants. PX09350 (Israel Report) ¶ 119, Figure 7; *see also* PX00449 ([redacted] Decl.) ¶ 2 ([redacted]); PX00414 ([redacted] Decl.) ¶ 2 ([redacted]); [redacted] at 120:19-23.

638. Additionally, regional and local broadline distributors lack sufficient product breadth, including private label product breadth, to constrain Sysco and US Foods. PX00560 ([redacted] Dep. at 83:25-85:10); PX00549 ([redacted] Dep. at 271:21-272:7); PX07019 ([redacted] Decl.) ¶¶ 20, 26 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ (2)(a)).

639. Regional and local broadline distributors have fewer SKUs than Defendants. For example, Sysco and US Foods carry an average of about [redacted] SKUs, respectively

in their broadline distribution centers. PX09350 (Israel Report) ¶ 143. In contrast, the next three largest broadline distributors—[redacted] carry an average of approximately [redacted] SKUs respectively. PX09350 (Israel Report) ¶ 143; *see also* PX00531 ([redacted] Dep. at 25:4-7); PX00414 ([redacted] Decl.) ¶ 2.

640. Company-wide, Sysco offers approximately [redacted] private label SKUs, and US Foods offers approximately [redacted] private label SKUs. Other broadline distributors offer significantly fewer private label SKUs. For example, [redacted] offers approximately [redacted] private label SKUs, [redacted] offers approximately [redacted] private label SKUs, and [redacted] offers approximately [redacted] private label SKUs. PX09350 (Israel Report) ¶145; *see also* PX00414 ([redacted] Decl.) ¶ 4; PX00449 ([redacted] Decl.) ¶ 9.

641. Carrying few or no private label products is a competitive disadvantage because such products can be sold at a lower price compared to national brands, which is attractive to many customers, but they still yield higher profit margins. PX00449 ([redacted] Decl.) ¶ 9; PX00531 ([redacted] Dep. at 130:2-7).

642. Additionally, regional and local broadline distributors have smaller delivery fleets compared to Sysco and US Foods. PX00414 ([redacted] Decl.) ¶ 5 ([redacted]). Based on data submitted by industry participants, Dr. Israel shows that Sysco and US Foods are the largest broadline distributors in the United States by size of delivery fleets, and the combined company would dwarf the competition on this metric. PX09350 (Israel Report) App. A, Table 29 (Sysco and USF would have a combined delivery fleet of [redacted]); *see also* PX09350 (Israel Report) ¶ 119, Figure 8.

643. Regional and local broadline distributors also employ fewer people, including salespeople, than Sysco and US Foods. PX00414 ([redacted] Decl.) ¶¶ 2, 8. Based on data

submitted by industry participants, Dr. Israel shows that Sysco and US Foods are the largest broadline distributors in the United States by size of salesforce, and the combined company would dwarf the competition on this metric. PX09350 (Israel Report) App. A, Table 30; *see also* PX09350 (Israel Report) ¶ 119, Figure 9.

644. Regional distributors also do not offer other important competitive features. PX00555 ([redacted] Dep. at 170:4-19); PX00407 ([redacted] Decl.) ¶ 7; PX00427 ([redacted] Decl.) ¶ 9; PX00436 ([redacted] Decl.) ¶¶ 13-14; PX07019 ([redacted] Decl.) ¶¶ 19, 26 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ (2)(a)).

645. Defendants recognize that regional distributors would be at a competitive disadvantage compared to merged firm. After the announcement of the merger, a US Foods' executive remarked that [redacted] PX00103-002.

646. According to David Schreibman of US Foods, [redacted] PX00250-001. He testified that [redacted] PX00515 (Schreibman (US Foods) Dep. at 72:12-18).

647. According to [redacted], even the larger regional distributors, such as [redacted] have been "shut out" of servicing large GPOs, who prefer the "big distributors," Sysco and US Foods, because they offer one point of contact and an easier business relationship. PX00570 ([redacted] Dep. at 109:22-112:12).

648. A recent industry study published by [redacted]

[redacted] concluded that "[redacted]" PX09335-042. [redacted] PX00570 ([redacted] Dep. at 97:13-98:4, 103:3-14, 105:2-21).

649. For the same reasons that regional broadline distributors do not constrain Sysco and US Foods today, they would not constrain a post-merger Sysco.

C. <u>DMA and Other Consortia of Regional Distributors Will Not Prevent Sysco from Exercising Market Power</u>

650. DMA and other regional consortia cannot constrain Sysco and US Foods post-merger. Dr. Hausman, Defendants' expert, was unable to identify more than one example where he believes a customer used DMA as a lever point in bilateral negotiations with Sysco or US Foods. Hausman Hrg. Vol. 16 at 89:14-25.

651. DMA is not a broadline distributor itself but rather a consortium of nine regional broadline distributors: [redacted] PX00565 ([redacted] Dep. at 7:5-12, 8:13-17); PX00412 ([redacted] Decl.) ¶ 2. [redacted] PX00412 ([redacted] Decl.) ¶ 5; Holm (PFG) Hrg. Vol. 6 at 11:11-14; PX00449 ([redacted] Decl.) ¶ 8; *cf*. PX00562 ([redacted] Dep. at 88:5-7, 12-14) ([redacted]).

652. PFG's CEO agrees that "the majority" of National Customers "have found DMA not to be a viable alternative to Sysco or US Foods." Holm (PFG) Hrg. Vol. 6 at 11:20-23.

653. Indeed, DMA, which exists solely to serve National Customers and chain

restaurants, has had difficulty gaining broadline business from National Customers. PX00565 ([redacted] Dep. at 265:8-267:4); PX00563 ([redacted] Dep. at 183:7-191:23); PX00539 ([redacted] Dep. at 150:15-22); *see also* PX00558 (DeLaney (Sysco) Dep. at 133:18-137:9); PX07019 ([redacted] Decl.) ¶ 10.

654. UniPro is a purchasing cooperative for independent distributors. PX00449 ([redacted] Decl.) ¶ 9. Some of UniPro's member distributors also belong to a regional consortium known as the Multi-Unit Group (MUG) to collectively bid for foodservice distribution business that they could not bid on independently. PX00554 ([redacted] Dep. at 134:20-136:7).

655. [redacted] PX00429 ([redacted] Decl.) ¶ 19.

656. Dr. Israel finds that "[m]any National Broadline Customers indicate that [redacted]." PX09350 (Israel Report) ¶ 150.

1. <u>DMA Faces Several Competitive Disadvantages</u>

657. [redacted] PX00558 (DeLaney (Sysco) Dep. at 134:20-137:9) [redacted] PX00558 (DeLaney (Sysco) Dep. at 134:20-137:9); *see also* PX00419 ([redacted] Decl.) ¶ 9; PX00429 ([redacted] Decl.) ¶ 19.

658. DMA coordinates the bidding, contracting, and operational processes on behalf of its member-distributors, in an attempt to enable them to serve multi-unit customers throughout the United States. PX00449 ([redacted] Decl.) ¶ 8. But its structure has drawbacks.

659. For example, [redacted] PX00412 ([redacted] Decl.) ¶ 8; PX00443 ([redacted] Decl.) ¶ 17; PX00449 ([redacted] Decl.) ¶ 8. [redacted] PX00449 ([redacted] Decl.) ¶ 8.

660. DMA's member distributors [redacted]

661. [redacted]" PX00415 ([redacted] Decl.) ¶ 10.

662. [redacted] explained that [redacted]. PX00563 ([redacted] Dep. at 190:25-191:23); *see also id.* at 183:7-190:24 ([redacted]), 195:2-7 ([redacted]); PX00460 ([redacted] Decl.) ¶ 6.

(a) <u>DMA's Network Has Geographic Coverage Gaps</u>

663. [redacted]

[redacted] PX00558 (DeLaney (Sysco) Dep. at 134:20-135:13).

664. DMA's broadline distribution network does not cover the entire United States. PX00460 ([redacted] Decl.) ¶ 6; *see also* PX00421 ([redacted] Decl.) ¶ 18; PX00427 ([redacted] Decl.) ¶ 7; PX00437 ([redacted] Decl.) ¶ 11; PX00462 ([redacted] Decl.) ¶ 9. [redacted] PX00412 ([redacted] Decl.) ¶ 4; PX00282-002 ([redacted]). [redacted] PX00437 ([redacted] Decl.) ¶ 11.

665. [redacted] PX00594 ([redacted] IH at 59:19-60:13, 193:13-23); *id*. at 149:11-24 (discussing PX00383-011).

666. Consequently, DMA does not bid on some National Customer business because it has gaps where it would not be able to service 100% of that customer's business. Ralph (Premier) Hrg. Vol. 3 at 75:4-11.

(b) <u>DMA Cannot Provide Consistent National Service Across Its Members</u>

667. DMA customers are serviced by a different DMA member depending on where the individual customer site is located. PX00531 ([redacted] Dep. at 48:22-49:9).

668. In other words, DMA's regional-distributor members maintain their own identity and their own manufacturer relationships. Ralph (Premier) Hrg. Vol. 3 at 75:12-76:13; PX00565 ([redacted] Dep. at 226:10-227:14).

669. As a result, [redacted] PX00421 ([redacted] Decl.) ¶ 14; PX00439 ([redacted] Decl.) ¶ 9.

670. [redacted] PX00565 ([redacted] Dep. at 265:8-267:4); PX00401 ([redacted]

[redacted] Decl.) ¶ 11; PX00421 ([redacted] Decl.) ¶ 14; PX00436 ([redacted] Decl.) ¶ 16; PX00437 ([redacted] Decl.) ¶ 11. [redacted] PX00591 (Schuette (US Foods) IH at 178:7-179:20).

671. [redacted] PX00402 ([redacted] Decl.) ¶ 10; PX00405 ([redacted] Decl.) ¶¶ 6, 12; PX00421 ([redacted] Decl.) ¶ 14.

672. [redacted] PX00421 ([redacted] Decl.) ¶ 14. [redacted] PX00401 ([redacted] Decl.) ¶ 10.

673. [redacted]. PX00401 ([redacted] Decl.) ¶ 12.

674. [redacted] PX00442 ([redacted] Decl.) ¶ 15; *see also* PX00589 (Lynch (US Foods) IH at 204:1-23).

675. [redacted]. PX00412 ([redacted] Decl.) ¶ 8.

676. [redacted] PX00594 ([redacted] IH at 98:13-24).

677. [redacted]

[redacted] PX00565 ([redacted] Dep. at 64:20-65:12); PX00401 ([redacted] Decl.) ¶ 11; PX00403 ([redacted] Decl.) ¶ 12; PX00437 ([redacted] Decl.) ¶ 11; PX00421 ([redacted] Decl.) ¶ 14.

678. [redacted] PX00565 ([redacted] Dep. at 18:10-23:13).

679. [redacted] PX00437 ([redacted] Decl.) ¶ 11.

(c) <u>DMA Cannot Provide Product Consistency Across Its Members</u>

680. [redacted] PX00565 ([redacted] Dep. at 245:15-23); PX00407 ([redacted] Decl.) ¶ 10; PX00439 ([redacted] Decl.) ¶ 9; PX00444 ([redacted] Decl.) ¶ 11; PX09326-002-003.

681. [redacted] PX00415 ([redacted] Decl.) ¶ 11.

682. [redacted] PX00412 ([redacted] Decl.) ¶ 7; PX00401 ([redacted] Decl.) ¶ 12; *see also* PX00549 ([redacted] Dep. at 175:2-17, 245:13-19, 245:22-25, 246:1-19, 246:22-25).

683. [redacted] PX00412 ([redacted] Decl.) ¶ 7, 11; PX00415 ([redacted]

Decl.) ¶ 11; PX00585 (Sonnemaker (Sysco) IH at 166:3-8); PX00401 ([redacted] Decl.) ¶ 11-12; PX00421 ([redacted] Decl.) ¶ 14; PX00432 ([redacted] Decl.) ¶ 14; PX00407 ([redacted] Decl.) ¶ 10.

684. Indeed, [redacted]." PX00412 ([redacted] Decl.) ¶ 7; *see also id.* ¶ 11 ([redacted]); PX00565 ([redacted] Dep. at 246:7-247:7).

685. [redacted] PX00412 ([redacted] Decl.) ¶ 12.

686. Defendants' documents indicate that [redacted] PX00282-002; PX00314-001-002.

687. [redacted] PX00589 (Lynch (US Foods) IH at 206:11-20); PX00591 (Schuette (US Foods) IH at 125:2-17); *see also* PX00558 (DeLaney (Sysco) Dep. at 137:4-15).

(d) <u>Working with DMA Involves Higher Costs for Customers</u>

688. Each DMA member is responsible for its own product procurement. PX00412

([redacted] Decl.) ¶ 11. As such, DMA members [redacted]. PX00421 ([redacted] Decl.) ¶ 15; *see also* PX00558 (DeLaney (Sysco) Dep. at 150:11-151:11).

689. [redacted] PX00415 ([redacted] Decl.) ¶ 10; *see also* PX00558 (DeLaney (Sysco) Dep. at 148:7-150:10).

690. Overall, [redacted] PX00439 ([redacted] Decl.) ¶ 9 [redacted]); PX00442 ([redacted] Decl.) ¶ 15; PX00448 ([redacted] Decl.) ¶ 9.

691. For example, [redacted]" PX00602-029 ([redacted]); PX00594 ([redacted] IH at 194:15-195:4); *see also id*. at 192:3-24.

692. Likewise, [redacted] PX00445 ([redacted] Decl.) ¶ 14.

2. <u>DMA Is an Inadequate Alternative Today and Post-Merger</u>

693. PFG CEO George Holm testified that the majority of National Customers do not find DMA to be a viable alternative to Sysco or US Foods. Holm (PFG) Hrg. Vol. 6 at 11.

694. Many National Customers do not view DMA or other consortia as a close substitute for a national broadline distributor. PX00401 ([redacted] Decl.) ¶¶ 12, 15; PX00402 ([redacted] Decl.) ¶ 10; PX00403 ([redacted] Decl.) ¶ 14; PX00405 ([redacted] Decl.) ¶ 10; PX00407 ([redacted] Decl.) ¶ 10; PX00418 ([redacted] Decl.)

¶¶ 16, 20; PX00419 ([redacted] Decl.) ¶ 9; PX00431 ([redacted] Decl.) ¶ 15; PX00432 ([redacted] Decl.) ¶ 14; PX00442 ([redacted] Decl.) ¶ 15; PX00445 ([redacted] Decl.) ¶ 16; PX00439 ([redacted] Decl.) ¶ 9; PX00455 ([redacted] Decl.) ¶ 11; PX00462 ([redacted] Decl.) ¶; PX07019 ([redacted] Decl.) ¶ 10; PX00421 ([redacted] Decl.) ¶ 18; PX00493 ([redacted] Supp. Decl.) ¶ 4.

695. The unrebutted testimony of [redacted] a large hospitality chain, confirms the inadequacy of DMA to serve National Customers: "[redacted]." PX00404 ([redacted] Decl.) ¶ 11.

696. As such, many National Customers do not believe DMA would be a viable alternative to the merged Sysco/US Foods. PX00405 ([redacted] Decl.) ¶ 10; PX00442 ([redacted] Decl.) ¶15; PX00462 ([redacted] Decl.) ¶ 9; PX00594 ([redacted] IH at 244:18-245:4).

697. According to Joan Ralph of Premier, DMA is not an attractive alternative to a single-firm distributor because DMA can only deliver as well as its weakest individual regional distributor can deliver. Ralph (Premier) Hrg. Vol. 3 at 75:12-76:13.

698. [redacted] testified that DMA is the next-closest option after Sysco and US Foods, but DMA "[redacted]" be able to support [redacted] "[redacted]" and contracting with DMA "[redacted]." PX00594 ([redacted] IH at 280:8-16).

3. <u>Other Regional Consortia Face Similar Competitive Disadvantages</u>

699. As with DMA, UniPro's MUG faces competitive disadvantages relative to Sysco

and US Foods. PX00407 ([redacted] Decl.) ¶ 10.

700. [redacted] described MUG as [redacted] which puts MUG at a competitive disadvantage relative to "[redacted]" Sysco and US Foods. PX00554 ([redacted] Dep. at 164:3-23).

701. MUG focuses on [redacted]. PX00554 ([redacted] Dep. at 136:8-25).

D. <u>An Ad-Hoc Network of Regional Distributors Is Not a Viable Alternative</u>

702. An ad-hoc network of regional distributors could not discipline the merged firm's pricing and services to National Customers.

703. Regional distributors lack the product offerings and service levels of both Sysco and US Foods. PX00448 ([redacted] Decl.) ¶ 10; PX00449 ([redacted] Decl.) ¶ 2; PX00431 ([redacted] Decl.) ¶ 12.

704. Regional distributors also lack geographic coverage in certain areas. *See supra* Section V(A)(3) (describing regional distributors and their geographic footprints).

705. As such, National Customers could not rely on regional distributors as leverage to constrain prices from a combined Sysco/US Foods. PX00448 ([redacted] Decl.) ¶ 10; PX00431 ([redacted] Decl.) ¶ 15.

1. <u>Switching to Regional Distributors Would Be Costly and Logistically Difficult for Many National Customers</u>

706. Managing multiple distributors is more complex than managing a single distributor. PX00549 ([redacted] Dep. at 198:1-23); PX09341-005. In particular, there

are several drawbacks to using an ad hoc network of regional distributors.

707. Using a network of regional distributors is inefficient and costly because it requires managing multiple RFPs, contract negotiations, contracts, and distributor relationships. PX00445 ([redacted] Decl.) ¶ 17; PX00418 ([redacted] Decl.) ¶ 20; PX00431 ([redacted] Decl.) ¶ 15; PX00405 ([redacted] Decl.) ¶ 13; PX03106-002; *see also* PX00548 ([redacted] Dep. at 41:4-16); PX00442 ([redacted] Decl.) ¶ 17; PX00445 ([redacted] Decl.) ¶ 17; PX00448 ([redacted] Decl.) ¶ 14.

708. Using a network of regional distributors would require additional personnel and resources to manage. PX00518 ([redacted] Dep. at 118:5-25); PX00437 ([redacted] Decl.) ¶ 8; PX00418 ([redacted] Decl.) ¶¶ 11, 20; PX00432 ([redacted] Decl.) ¶ 12; PX00441 ([redacted] Decl.) ¶ 12; PX00404 ([redacted] Decl.) ¶ 14; PX07019 ([redacted] Decl.) ¶ 8; PX00421 ([redacted] Decl.) ¶ 16.

709. As Jim Thompson of Interstate Hotels explained at the preliminary injunction hearing, using a network of regional distributors would require increasing the size of his staff and "a lot more oversight from my group." Thompson (Interstate) Hrg. Vol. 2 at 126:23-127:4. Mr. Thompson, in the time he has been in charge of procurement, has never considered regionalizing Interstate's distribution. Thompson (Interstate) Hrg. Vol. 2 at 101:6-17.

710. Customers would need to make a costly investment in an infrastructure and resources to manage a network of regional distributors. PX00518 ([redacted] Dep. at 118; PX00402 ([redacted] Decl.) ¶ 6; PX00407 ([redacted] Decl.) ¶ 11; PX00439 ([redacted] Decl.) ¶ 9; PX00588 (Lederer (US Foods) IH at 251; PX00421 ([redacted] Decl.) ¶ 16; PX00437 ([redacted] Decl.) ¶ 8.

711. For example, [redacted]

[redacted] requires an annual budget of [redacted] to manage regionalized foodservice procurement and distribution for [redacted] PX00516 ([redacted] Dep. at 127:13-128:12).

712. The process of building the infrastructure needed to implement a regionalized distribution strategy would likely [redacted] and would be [redacted] PX00404 ([redacted] Decl.) ¶ 14; *see also* PX00441 ([redacted] Decl.) ¶ 12; PX00437 ([redacted] Decl.) ¶ 13; PX00412 ([redacted] Decl.) ¶ 6.

713. Using a network of regional distributors also makes it difficult or impossible for customers to have consistent national brand and private label products. PX00441 ([redacted] Decl.) ¶ 12; PX00407 ([redacted] Decl.) ¶ 11; PX00439 ([redacted] Decl.) ¶ 10; PX00462 ([redacted] Decl.) ¶ 7.

714. Regionalized networks likely still would have geographic gaps. Therefore, National Customers that use regional distributors for a portion of their business still consider Defendants a "must have." *See* PX00436 ([redacted] Decl.) ¶ 19; PX00437 ([redacted] Decl.) ¶ 8.

715. Regionalizing procurement would result in higher inbound freight costs. PX00407 ([redacted] Decl.) ¶ 11; PX00437 ([redacted] Decl.) ¶ 13; PX00462 ([redacted] Decl.) ¶ 7.

716. There are also switching costs to utilizing a network of regional distributors. PX00594 ([redacted] IH at 157:25-158:22) ([redacted]); *id*. at 192:10-193:6 ([redacted]). To switch to multiple distributors from a single distributor would require multiplying the work required to transition distributors by the number of distributors. Ralph (Premier) Hrg. Vol. 4 at 8:9-24.

717. An ad hoc network would result in National Customers paying higher prices.

PX00594 ([redacted] IH at 155:5-156:17, 281:2-21; PX00560 ([redacted] Dep. at 52:7-53:6, 57:4-20, 60:15-63:6); PX00437 ([redacted] Decl.) ¶ 13.

718. The rebates and discounts that National Customers receive from national broadline distributors would be reduced or eliminated by switching to a regional procurement strategy. PX00419 ([redacted] Decl.) ¶ 8; PX00462 ([redacted] Decl.) ¶ 8; PX00549 ([redacted] Dep. at 198:1-23); PX00518 ([redacted] Dep. at 119:1-11); PX00574 ([redacted] Dep. at 207:1-14); PX09341-005.

719. In sum, as [redacted] of [redacted] explained:

[redacted]

PX00402 ([redacted] Decl.) ¶ 6.

720. Accordingly, many National Customers do not view a network of regional distributors as a viable alternative. PX00574 ([redacted] Dep. at 202:5-24); PX00421 ([redacted] Decl.) ¶ 16; PX00455 ([redacted] Decl.) ¶ 14; PX00401 ([redacted] ¶ 12; PX00407 ([redacted] Decl.) ¶ 10.

721. Interstate manages food distribution for between 275 and 320 hotel properties located in over 40 states. Thompson (Interstate) Hrg. Vol. 2 at 79:5-12, 88:3-19. Jim Thompson

of Interstate Hotels explained that regionalizing distribution "doesn't make sense for our organization" and that Interstate "would prefer to work with one distributor" because of the efficiencies. Thompson (Interstate) Hrg. Vol. 2 at 101:6-17. Mr. Thompson stated that he "couldn't imagine trying to do it with two to three or four distributors." Thompson (Interstate) Hrg. Vol. 2 at 100:17-101:15.

722. Consequently, National Customers would absorb a price increase before switching to a regional model. PX00445 ([redacted] Decl.) ¶ 17 [redacted] *see also* PX00560 ([redacted] Dep. at 56:9-23.

2. <u>Isolated Examples Do Not Show that Other National Customers Could Easily Switch to Regional Distributors</u>

723. The challenges of regionalizing even a small portion of a customer's spend can be seen in how dependent National Customers are on Sysco and US Foods today for the majority of their broadline distribution spend.

724. Moreover, the vast majority of customers that Defendants point to as having a regionalized distribution network are large national chain restaurants—i.e., systems customers. *See* PX00515 (Schreibman (US Foods) Dep. at 45:19-46:22, 57:21-58:2, 80:10-17) ([redacted]).

725. Even among the National Customers that use multiple broadline distributors, however, Sysco, US Foods, or the two combined represent that majority or vast majority of these customers' broadline distribution spend. PX00421 ([redacted] Decl.) ¶ 3; PX00427 ([redacted] Decl.) ¶ 5; PX01391-001. *See also* PX09358-002.

726. Some National Customers, such as [redacted] have been consolidating their spend with Defendants or are in the process of doing so. PX00462 ([redacted] Decl.) ¶ 5; *see also* PX00549 ([redacted] Dep. at 185:6-19); PX09247-004; PX09249-017-018.

727. Consolidating spend with one or few broadline distributors has advantages that are generally lost with a regional procurement strategy. PX07019 ([redacted] Decl.) ¶ 13 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ (2)(b)-(e)); PX00462 ([redacted] Decl.) ¶¶ 5-9.

728. In sum, even if they wanted to, National Customers could not easily replace a national broadline distributor with an ad-hoc regional network. PX00488 ([redacted] Supp. Decl.) ¶ 10; PX00421 ([redacted] Decl.) ¶ 16; PX00462 ([redacted] Decl.) ¶¶ 5, 9; PX00445 ([redacted] Decl.) ¶ 17; PX00455 ([redacted] Decl.) ¶ 14; *see also* PX00518 ([redacted] Dep. at 118:23-119:14).

E. <u>Other Distributors Cannot Constrain Sysco Post-Merger in the Local Relevant Markets</u>

729. Local customers also would not have similarly competitive options post-merger.

730. Other broadline distributors charge higher prices. PX00538 ([redacted] Dep. at 149:24-150:7, 152-53); PX00576 ([redacted] Dep. at 54:17-55:2); PX00528 ([redacted] Dep. at 95:10-24); PX00561 ([redacted] Dep. at 71:3-72:6, 117:17-22); PX00575 ([redacted] Dep. at 62:1-9); PX00523 ([redacted] Dep. at 33:16-35:15, 56:10-58:6, 199:24-200:24); PX00556 ([redacted] Dep. at 46:24-48:22, 70:10-13); PX07003 ([redacted] Supp. Decl.) ¶ 7; PX07014 ([redacted] Supp. Decl.) ¶ 7.

731. They also do not offer adequate product breadth. PX00545 ([redacted] Dep. at 125:10-22, 187:2-12); PX00538 ([redacted] Dep. at 145:7-146:15, 149:24-150:7); PX00528 ([redacted] Dep. at 30:10-31:5); PX00547 ([redacted]

Dep. at 111:1-21, 118:5-18); PX00553 ([redacted] Dep. at 44:21-45:16); PX00515 (Schreibman (US Foods) Dep. at 65:8-66:3); PX00523 ([redacted] Dep. at 73:16-74:10, 202:20-203:20); PX00423 ([redacted] Decl.) ¶ 7; PX00461 ([redacted] Decl.) ¶ 11; PX07009 ([redacted] Supp. Decl.) ¶ 5; PX07014 ([redacted] Supp. Decl.) ¶ 7; PX07021 ([redacted] Supp. Decl.) ¶ 6; *see also* PX00449 ([redacted] Decl.) ¶ 2.

732. In addition, other broadline distributors do not have a track record of being able to consistently handle high-volume orders. PX00423 ([redacted] Decl.) ¶ 7.

733. Further, other broadline distributors do not offer the same level of customer service as Sysco and US Foods. PX00552 ([redacted] Dep. at 100:5-102:24); PX00573 ([redacted] Dep. at 48:20-53:19); PX00535 ([redacted] Dep. at 132:11-133:11); PX00553 ([redacted] Dep. at 51:12-25, 56:7-57:23); PX00523 ([redacted] Dep. at 72:10-73:1, 74:21-78:2, 80:25-82:11, 90:11-93:2); PX00556 ([redacted] Dep. at 47:24-48:22, 86:19-87:3); PX07010 ([redacted] Supp. Decl.) ¶¶ 8-9). Defendants' larger salesforces allow them to spend more time with customers. PX00580 (DeLaney (Sysco) IH at 83:19-85:2).

734. Finally, other broadline distributors lack the ability to make regular on-time deliveries. PX00557 ([redacted] Dep. at 43:21-44:10); PX00538 ([redacted] Dep. at 146:24-147:12, 149:24-150:7); PX00528 ([redacted] Dep. at 92:19-93:2, 94:14-16); PX00568 ([redacted] Dep. at 177:13-20); PX00542 ([redacted] Dep. at 34:12-35:19); PX07013 ([redacted] Supp. Decl.) ¶ 7.

F. <u>Carving Out a Particular Geography or Product Line Would Not Discipline a Post-Merger Price Increase</u>

735. The challenges of carving out a particular geographic area or product line show that such efforts will not constrain Sysco post-merger.

736. After the Sysco-US Foods merger was announced, [redacted] at 37.

737. [redacted] at 44:1-12. Today, [redacted] spends a total of [redacted] with US Foods. PX00517 (Lynch (US Foods) Dep. at 200:20-201:10).

738. Premier awarded local business within six states to one distributor, and awarded a pilot program to a second distributor in a seventh state. Ralph (Premier) Hrg. Vol. 3 at 90:6-12.

739. The regional carve out showed Premier that it had underestimated the complexity involved in the product conversions and the matching of items. This process has taken more time than expected. Premier's members have also raised many questions about switching from US Foods to a regional distributor. Ralph (Premier) Hrg. Vol. 3 at 87:6-88:6, 89:9-21.

740. If Premier tried to regionalize more broadly (i.e., to include national and multi-regional members), Premier would expect even greater complexity because its national and multi-regional members would be dealing with multiple product numbers, multiple companies, and a greater time commitment and cost. Ralph (Premier) Hrg. Vol. 3 at 89:22-90:5.

741. [redacted] stated that "[redacted] PX00480 ([redacted] Supp. Decl.) ¶ 11.

742. "[redacted]

[redacted].” PX00480 ([redacted] Supp. Decl.) ¶ 11.

743. “[redacted].” PX00480 ([redacted] Supp. Decl.) ¶ 11.

744. Therefore, the remaining regional broadline distributors—alone, through a consortium, or through an ad hoc network—would not constrain Sysco post-merger, even if customers threatened to carve out geographies or product categories.

745. Dr. Israel explains that “if carving off portions of national account business to regional distributors was an effective way to get better prices from Sysco and USF, it would be more commonly observed in the marketplace. Yet, Sysco’s and USF’s high shares of national broadline business belie any claim that regional providers are an effective alternative to USF and Sysco. Further, to the extent that National Broadline Customers could discipline pricing by taking away, or threatening to take away, relatively profitable sales from the parties, again, they would be doing so today.” PX09350 (Israel Report) ¶ 153.

VIII. THE PROPOSED EXPANSION OF PFG DOES NOT ADDRESS THE MERGER’S COMPETITIVE HARM

746. On February 2, 2015, Defendants entered into an agreement with PFG to divest the following 11 US Foods’ distribution centers to PFG (“proposed divestiture”): (1) Cleveland, OH; (2) Corona, CA; (3) Denver, CO; (4) Kansas City, KS; (5) Las Vegas, NV; (6) Minneapolis,

MN; (7) Phoenix, AZ; (8) Salt Lake City, UT; (9) San Diego, CA; (10) San Francisco, CA; and (11) Seattle, WA. PX01444-003.

747. Even with the divested distribution centers and related assets, PFG would be at a substantial competitive disadvantage relative to US Foods today and to the combined Sysco / US Foods post-merger. [redacted] PX09350 (Israel Report) ¶ 315, Figure 16; *see also* [redacted] at 48:2-49:4.

748. Dr. Israel concludes that the proposed divestiture to PFG will not replace the competition that would be lost as a result of the merger. Israel Hrg. Vol. 10 at 44:10-45:6.

A. <u>PFG Would Have Significant Competitive Disadvantages</u>

1. <u>PFG Is Not Competitive for National Customer Business Today</u>

749. PFG does not have the geographic footprint to compete with Sysco and US Foods for National Customers today. Thompson (Interstate) Hrg. Vol. 2 at 84:6-85:3 (but for a request from Blackstone—one of Interstate's largest customers—Interstate would not use PFG today); PX00594 ([redacted] IH at 193:7-12) [redacted]); PX00560 ([redacted] Dep. at 88:14-23, 89:1-9, 89:11); PX00437 ([redacted] Decl.) ¶ 10.

750. PFG has either bid for and lost, or has not been invited to bid for, RFPs issued by National Customers requiring distribution across the United States. Holm (PFG) Hrg. Vol. 6 at 6:21-24. National Customers may occasionally invite PFG to respond to a national RFP, but PFG is not able to win national broadline business because, among other things, it lacks a national geographic footprint. Holm (PFG) Hrg. Vol. 6 at 6:25-7:4.

751. [redacted] at 80:3-20; Thompson (Interstate) Hrg. Vol. 2 at 103:24-

104:21 (Interstate and PFG decided together that PFG "did not have enough scale to handle" Interstate's business). For example, Hilton, a National Customer, does not use PFG even in areas where PFG has geographic coverage because PFG does not have national coverage. Holm (PFG) Hrg. Vol. 6 at 8:5-20. This is true even though PFG and Hilton are both owned by Blackstone. Holm (PFG) Hrg. Vol. 6 at 7:25-8:4.

752. [redacted] at 79:19-25.

753. [redacted] at 81:11-17.

754. [redacted] PX00478 ([redacted] Supp. Decl.) ¶ 4. For example, [redacted] PX00602 at 029.

755. [redacted] PX00594 ([redacted] IH at 257:13-58:2).

756. [redacted] According to [redacted] PFG informed [redacted] that "[redacted]" PX00478 ([redacted] Supp. Decl.) ¶ 6. "[redacted]"

PX00478 ([redacted] Supp. Decl.) ¶ 6.

757. According to Stuart Schuette, US Foods' COO, [redacted] PX00297-001. Mr. Schuette also wrote, [redacted] PX00298-001.

758. According to David Schreibman of US Foods, [redacted] PX00260-001 ([redacted]); *see also* PX00588 (Lederer (US Foods) IH at 188:17-89:10) (testifying that [redacted]).

759. The divestiture of 11 distribution centers and related assets to PFG fails to transform PFG into a national broadline distributor capable of replacing the competition eliminated by the merger. In particular, the divestiture package is inadequate and PFG will still have several deficiencies, especially compared to the vigorous threat that the current US Foods presents to Sysco. *See*, *e.g.*, PX00525 ([redacted] Dep. at 227:24-228:1, 228:3, 228:5, 228:11-229:9); PX00490 ([redacted] Supp. Decl.) ¶ 3; PX00493 ([redacted] Supp. Decl.) ¶ 7.

2. <u>PFG Received Fewer Distribution Centers Than It Sought and Needs</u>

760. Eleven distribution centers falls far short of the number of distribution centers needed for PFG to provide national broadline distribution services, and it is far fewer than PFG believed it needed to provide broadline distribution to National Customers.

761. [redacted]

762. [redacted] PX09152; PX09153; PX09174; PX09185-008; PX09193-002; PX09194-006-008; PX09197; *see also* PX00558 (DeLaney (Sysco) Dep. at 277:6-19).

763. [redacted]

764. [redacted] at 32:20-34:18 (discussing PX09193). [redacted] at 37:8-38:6 (discussing PX09197).

765. Before signing the divestiture agreement, [redacted] PX09194-001.

766. [redacted] PX09174-001; *see also* [redacted] at 27:16-30:3 (discussing PX09174).

767. [redacted] (PX09194-

006) [redacted] (PX09194-002, 008); *see also* PX09257.

768. Consistent with these internal analyses and presentations to the FTC, in its negotiations with Defendants, PFG requested more than 11 distribution centers. DeLaney (Sysco) Hrg. Vol. 12 at 90:23-91:19 (PFG initially wanted 16 DCs, including Cincinnati, in the divestiture); PX00515 (Schreibman (US Foods) Dep. at 230:3-11, 239:21-240:8).

769. [redacted] at 50:12-51:20. [redacted] at 52:4-6, 58:3-5.

770. [redacted]; PX00526 ([redacted] Dep. at 153:18-23); PX09070. [redacted] PX00526 ([redacted] Dep. at 111:25-113:19 (discussing PX09257).

771. [redacted] at 54:7-12.

772. [redacted] PX00526 ([redacted] Dep. at 139:7-140:17, 144:8-145:20, 153:18-23; PX09190; PX09192-001-002. [redacted]

[redacted].” PX9192-001 (emphasis added).

773. [redacted] PX09157-002; [redacted] at 60:23-61:2.

774. [redacted] at 61:3-11; PX09377-001; PX09192-001.

775. [redacted]. PX00526 ([redacted] Dep. at 155:16-56:10); *see also* PX09070 ([redacted]).

776. [redacted] PX00526 ([redacted] Dep. at 111:12-19). [redacted] PX00526 ([redacted] Dep.) at 114:2-115:25). [redacted]

PX00526 ([redacted] Dep.) at 114:17-115:1).

777. [redacted] at 120:13-23 ([redacted]); PX00583 (Kreidler (Sysco) Dep. at 14:9-15) (Sysco has 71 broadline operating companies in the United States).

778. [redacted]. PX01400-003. [redacted] DX-07005.

779. [redacted] PX09375 (Israel Rebuttal Report) ¶ 115, Figure 3. [redacted] PX09375 (Israel Rebuttal Report) ¶ 115, Figure 3; *see also* Lynch (US Foods) Hrg. Vol. 14 at 64:6-13.

780. [redacted] PX09375 (Israel Rebuttal Report) ¶ 115.

781. [redacted] PX09350 (Israel Report) ¶ 315, Figure 17. [redacted]

[redacted] PX09350 (Israel Report) ¶ 333 n.591; PX09375 (Israel Rebuttal Report) ¶ 115, Figure 3; [redacted] at 49:5-20.

3. PFG Would Face Geographic Gaps

782. Even with the proposed divestiture, PFG would lack distribution center coverage in several geographic areas.

783. Under Defendants' proposed divestiture package:

a. [redacted] at 39:7-41:22, 59:12-23; 68:10-72:2.

b. [redacted] at 38:7-25.

c. [redacted] at 58:25-59:11.

784. [redacted] PX09157-002; [redacted] at 61:3-11.

785. National Customers also believe that PFG will have significant geographic gaps. PX00493 ([redacted] Supp. Decl.) ¶ 9; PX00594 ([redacted] IH at 260:1-262:4); PX00560 ([redacted] Dep. at 94:24-95:8, 106:8-107:13); PX07019 ([redacted] Decl.) ¶ 25 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ (2)(a)); PX00478 ([redacted] Supp. Decl.) ¶ 6;

PX00492 ([redacted] Supp. Decl.) ¶ 9 ([redacted]).

786. At the preliminary injunction hearing, Interstate identified several regions where PFG would have challenges servicing Interstate's properties because it will lack coverage in areas that US Foods covers today. Those regions include western and central Pennsylvania, western New York, and New Mexico. Thompson (Interstate) Hrg. Vol. 2 at 122:10-14.

787. These gaps are important because more geographic coverage is better for National Customers. PX00560 ([redacted] Dep. at 98:22-99:7, 111:20-22); PX00401 ([redacted] Decl.) ¶¶ 11, 13; PX00404 ([redacted] Decl.) ¶ 11. Likewise, less geographic coverage is worse for National Customers. PX00560 ([redacted] Dep. at 99:8-12); PX00405 ([redacted] Decl.) ¶¶ 12-13.

788. Many National Customers are serviced out of numerous distribution centers that are close to their locations. US Foods currently services Premier's members from 60 distribution centers. Ralph (Premier) Hrg. Vol. 3 at 91:19-22. Premier utilizes this many distribution centers because there are advantages to having distribution centers in close proximity to its members and disadvantages to using more distant distribution centers. Premier does not view PFG, which would have [redacted] after the divestiture, to be as capable of serving Premier's members, or able to do so cost competitively. Ralph (Premier) Hrg. Vol. 3 at 93:20-94:25.

789. US Foods currently serves Interstate from 42 distribution centers. Thompson (Interstate) Hrg. Vol. 2 at 88:11-13. Interstate prefers to have distribution centers within 100 miles of its properties because using more distant distribution centers can have a negative impact on service levels. Thompson (Interstate) Hrg. Vol. 2 at 89:10-90:1. Greater distances can make it difficult for a distributor to recover or provide last minute deliveries. Thompson (Interstate) Hrg. Vol. 2 89:10-90:1. Delivery issues "could be devastating to a hotel" and having a

distribution center relatively close by makes it easier for a distributor to recover if there is a product shortage or if a hotel needs a special delivery for a catered function at the hotel. Thompson (Interstate) Hrg. Vol. 2 at 122:18-124:24.

790. [redacted] PX00560 ([redacted] Dep. at 111:6-22); *see also* PX00480 ([redacted] Supp. Decl.) ¶ 8.

791. Notably, [redacted] PX09060-013-015. In other words, [redacted]

792. Dr. Israel's finding that, post-divestiture, [redacted]. PX09350 (Israel Report) ¶ 330; *see also* [redacted] at 51:6-52:14.

793. Further, PFG cannot fill its geographic coverage gaps by distributing from its Roma or Vistar distribution centers because:

a. [redacted] PX00594 ([redacted] IH at 54:20-23, 256:19-257:1).

b. Vistar has a limited product offering compared to what broadline distributors like Sysco or US Foods offer. PX00549 ([redacted] Dep. at 189:22-190:21); Thompson (Interstate) Hrg. Vol. 2 at 156:21-157:17. [redacted] PX00549 ([redacted] Dep. at 190:10-21).

c. [redacted]

[redacted] PX00526 ([redacted] Dep. at 166:8-15). [redacted] PX09059-006. [redacted] PX09059-007. [redacted] PX09059-010.

4. **PFG Would Face Cost Disadvantages**

794. Even with the proposed divestiture, PFG will face competitively significant [redacted] disadvantages relative to US Foods today and the merged firm.

795. [redacted] PX09350 (Israel Report) ¶¶ 333-335.

796. [redacted] PX00558 (DeLaney (Sysco) Dep. at 14:6-15:6); PX00517 (Lynch (US Foods) Dep. at 155:1-12); PX00569 (Sonnemaker (Sysco) Dep. at 130:14-131:11); PX00529 ([redacted] Dep. at 169:13-170:19); PX00495 ([redacted] Supp. Decl.) ¶ 3; PX00586 (Humphreys (US Foods) IH at 20-21); Ralph (Premier) Hrg. Vol. 3 at 92:1-8; PX00524 ([redacted] Dep. at 190:6-191:15); *cf.* PX00534 ([redacted] Dep. at 125:7-23).

797. [redacted] PX00526 ([redacted] Dep. at 240:4-11); PX07024 ([redacted] Supp. Decl.) ¶ 9.

798. [redacted]

[redacted]

799. [redacted] PX09350 (Israel Report) ¶¶ 339-344. For example, [redacted]. PX00526 ([redacted] Dep. at 246:3-11).

800. [redacted] PX09350 (Israel Report) ¶¶ 339-340, Table 20.

801. Customers view distant distributors as less (or not) viable options. Thompson (Interstate) Hrg. Vol. 2 at 89:4-9; PX00518 ([redacted] Dep. at 22:20-23:12); PX00539 ([redacted] Dep. at 115:15-116:17).

802. According to US Foods' COO, Stuart Schuette, [redacted] PX00591 (Schuette (US Foods) IH at 33:5-34:19); *see also* PX00586 (Humphreys (US Foods) IH at 19-20). [redacted] PX00591 (Schuette (US Foods) IH at 34).

803. [redacted] DX01355 (Hausman Report at 68-89). [redacted]. *See* PX09351 (Gokhale Report) ¶ 91. [redacted] *See* PX09351 (Gokhale Report) ¶ 100; PX09350 (Israel Report) App. A, Table 28. [redacted]

804. [redacted] PX09252 [redacted].

805. Although receiving inbound product shipments at fewer distribution centers can

reduce costs, there are countervailing outbound delivery costs. DeLaney (Sysco) Hrg. Vol. 12 at 73:6-11; PX00569 (Sonnemaker (Sysco) Dep. at 124:8-125:3). [redacted] at 124:25-125:4.

806. [redacted]

807. Dr. Israel finds that "[redacted]" PX09350 (Israel Report) ¶ 354.

808. [redacted] PX05051-003.

809. [redacted] PX05051-006; PX09182-001 ([redacted]).

810. [redacted]

[redacted] PX09350 (Israel Report) ¶¶ 339-344; *see also* PX00526 ([redacted] Dep. at 240:22-241:7).

811. Indeed, National Customers are concerned that PFG would not be cost-competitive with Sysco post-merger. *See, e.g.*, PX00493 ([redacted] Supp. Decl.) ¶¶ 9,13; PX00474 ([redacted] Supp. Decl.) ¶ 3; PX00480 ([redacted] Supp. Decl.) ¶ 10.

5. PFG Would Face Capacity Constraints

812. PFG will also be competitively hindered by capacity constraints [redacted]

813. [redacted] at 102:8-22; PX00526 ([redacted] Dep. at 218:20-224:9); PX09170-044-050. [redacted] at 103:19-104:3; 106:12-107:12. [redacted] at 104:15-106:9.

814. [redacted] at 107:13-16. [redacted] *See* PX09061; PX09350 (Israel Report) ¶¶ 345, 347.

815. [redacted] PX00526 ([redacted] Dep. at 221:18-223:9). [redacted] PX00526 ([redacted] Dep. at 223:10-224:9).

816. [redacted] PX05050-001.

817. [redacted] PX09060-002; PX09015-026; PX00526 ([redacted] Dep. at 207:11-208:8, 218:10-224:9). [redacted] PX00526 ([redacted] Dep. at 15:20-22).

818. [redacted] PX00529 ([redacted] Dep. at 173:18-174:23). [redacted] PX00529 ([redacted] Dep. at 175:5-15).

819. National Customers are concerned that PFG will not have the capacity to serve them effectively. Thompson (Interstate) Hrg. Vol. 2 at 125:4-18; PX00493 ([redacted] Supp. Decl.) ¶ 11; PX00475 ([redacted] Supp. Decl.) ¶ 10; PX00488 ([redacted] Supp. Decl.) ¶ 11.

820. [redacted] PX09350 (Israel Report) ¶¶ 330, 345-346, Figure 20. [redacted]

at 54:4-18. [redacted] PX09350 (Israel Report) ¶ 330.

6. <u>PFG Would Face Product and Service Disadvantages</u>

821. PFG will be at a product-offering disadvantage compared to US Foods today and the merged firm.

822. The breadth and depth of PFG's product offerings are not comparable to US Foods. Thompson (Interstate) Hrg. Vol. 2 at 104:5-21 ("US Foods was far and away, they had much more product available to our hotels"); PX00560 ([redacted] Dep. at 84:11-85:10); PX00475 ([redacted] Supp. Decl.) ¶¶ 10, 12. US Foods offers [redacted] SKUs across its network ([redacted] of which are private label SKUs), while PFG offers only [redacted] SKUs (and only [redacted] private label SKUs). PX06055-004; PX09507-007, 013.

823. Customers are concerned that PFG's lack of product breadth will increase costs, management difficulties, and product shortages. PX00490 ([redacted] Supp. Decl.) ¶ 5.

824. Dr. Israel's review of the evidence leads him to conclude that, in addition to overall product mix, broadline distributors compete on breadth, depth, and quality of private label product offerings, in particular, a feature that National Customers particularly value. Dr. Israel notes that both Sysco and US Foods have superior private label portfolios to any other broadline distributor, and specifically compete on this factor today. PFG lags far behind both Sysco and US Foods in terms of private label SKU offerings—Sysco and US Foods offer approximately [redacted] and [redacted] private label SKUs, respectively, whereas PFG offers only

[redacted] private label SKUs. PX09350 (Israel Report) ¶ 357.

825. [redacted] at 55:4-56:5.

826. PFG will also be at a disadvantage compared to US Foods today and the merged firm in terms of customer service and the value-added services offered to National Customers.

827. Dr. Israel calculates that PFG will have fewer than [redacted] of the sales representatives of either Sysco or US Foods premerger—it will have less than [redacted] of sales representatives of the combined firm. PX09350 (Israel Report) ¶ 315, Figure 18.

828. PFG will have approximately [redacted] of the delivery fleet of Sysco and less than [redacted] of the delivery fleet of US Foods pre-merger—it will have less than [redacted] of the fleet of the combined firm. PX09350 (Israel Report) ¶ 315, Figure 19.

829. PFG's value-added services are not comparable to those offered by US Foods to National Customers. Specifically, National Customers in the healthcare segment rely on sophisticated menu planning, nutritional analytics, and financial reporting tools, and distributor representatives with healthcare expertise available to offer guidance. PX00466 ([redacted] Decl.) ¶ 5; PX00594 ([redacted] IH at 100:2-12); PX00474 ([redacted] Supp. Decl.) ¶ 4; PX00475 ([redacted] Supp. Decl.) ¶ 6; PX00493 ([redacted] Supp. Decl.) ¶ 12; PX07019 ([redacted] Decl.) ¶ 26. PFG's current value-added services are more limited and the proposed divestiture would not likely enable PFG to develop comparable services. PX09350 (Israel Report) ¶¶ 362-366.

830. PFG will be at a disadvantage compared to US Foods today and the merged firm in terms of service levels it provides to customers.

831. Many customers are concerned that PFG's more limited network of distribution

centers would reduce service quality for National Customers. PX00480 ([redacted] Supp. Decl.) at ¶ 8; PX00493 ([redacted] Supp. Decl.) ¶ 9; PX00560 ([redacted] Dep. at 104:12-105:12); PX00490 ([redacted] Supp. Decl.) ¶ 4; PX07019 ([redacted] Decl.) ¶ 25 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ (2)(a)); PX00480 ([redacted] Supp. Decl.) ¶ 9.

832. For example, [redacted] PX00517 (Lynch (US Foods) Dep. at 254:7-257:19); PX00589 (Lynch (US Foods) IH at 179:4-23). Mr. Lynch testified that National Customers expressed concerns about the proposed divestiture to PFG. PX00517 (Lynch (US Foods) Dep. at 262:24-266:9).

833. PFG will receive only a fraction of the national sales employees that US Foods uses to solicit and serve National Customers. Only about [redacted] of US Foods' national account team will be made available for PFG to hire. Schreibman (US Foods) Hrg. Vol. 13 at 42:16-44:2; *see also* PX00515 (Schreibman (US Foods) Dep. at 9:15-10:10).

834. The US Foods national account team generally has the contracting relationship with National Customers, and that relationship is an "important element of serving customers, for sure." Schreibman (US Foods) Hrg. Vol. 13 at 43:9-20. PFG has not even interviewed the people on US Foods' national account team who PFG hopes to hire. Schreibman (US Foods) Hrg. Vol. 13 at 44:19-22; *see also* PX00515 (Schreibman (US Foods) Dep. at 9:15-10:10).

835. Further, because of its smaller distribution-center network, PFG will need to drive farther to serve customers. Driving greater delivery distances would adversely affect PFG's ability to provide service levels comparable to US Foods. PX00490 ([redacted] Supp. Decl.) ¶ 4; PX00493 ([redacted] Supp. Decl.) ¶ 9; PX07019 ([redacted] Decl.) ¶ 25 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ (2)(a)); *see also* PX00549 ([redacted] Dep. at 228:6-229:2).

836. For example, driving greater distances increases the risk of delivery delays due to bad weather, unexpected traffic, and road construction, which can impact the distributor's ability to hit a specific time window for delivery. PX00526 ([redacted] Dep. at 241:9-242:5).

837. Driving greater distances also makes it more difficult for a broadline distributor to provide recovery service in cases where food products are missing, damaged, or short of the quantity ordered. PX00529 ([redacted] Dep. at 150:23-151:11).

838. These service issues—on-time next-day delivery and fast recovery—are critical to many broadline customers. PX00474 ([redacted] Supp. Decl.) ¶ 3; PX00475 ([redacted] Supp. Decl.) ¶¶ 8-9; PX00480 ([redacted] Supp. Decl.) ¶¶ 5-8; PX00490 ([redacted] Supp. Decl.) ¶ 4; PX00493 ([redacted] Supp. Decl.) ¶ 9.

839. Hitting delivery windows on time and recovery are particularly important for healthcare providers and educational institutions because they cannot easily substitute items. Ralph (Premier) Hrg. Vol. 3 at 91:23-92:24.

840. [redacted]

7. PFG Lacks Experience with Healthcare Customers

841. PFG will also be at a disadvantage relative to US Foods today and the merged firm for healthcare customers in particular.

842. Healthcare customers have very demanding foodservice needs because patients have very specific nutritional requirements, nutritional requirements are heavily regulated, and the consequences of food shortages are serious. PX00405 ([redacted] Decl.) ¶¶ 3, 5, 8; PX00436 ([redacted] Decl.) ¶ 4; PX07019 ([redacted] Decl.) ¶ 7.

843. PFG is not focused on the healthcare segment. PFG is generally better in restaurants, especially street business, while healthcare is new to PFG. Ralph (Premier) Hrg. Vol. 3 at 90:24-91:18. Premier is concerned that PFG, even with the healthcare employees it acquires through the divestiture, will have significantly less healthcare expertise than US Foods does today. US Foods has healthcare expertise extending throughout the organization, from the CEO on down. Ralph (Premier) Hrg. Vol. 3 at 95:1-20.

844. PFG is a contracted broadline distributor for [redacted] but has a very small portion of [redacted] business because PFG lacks acute care expertise. PX00594 ([redacted] IH at 100:2-12). [redacted]. PX00594 ([redacted] IH at 101:19-25).

845. According to [redacted], PFG does not [redacted]. PX00594 ([redacted] IH at 201:5-16).

846. As a result of PFG's limited healthcare experience, it does not currently carry the full range of specialized healthcare products. PX00474 ([redacted] Supp. Decl.) ¶ 4 ("[redacted]").

847. PFG is only entitled to hire a fraction of US Foods' corporate headquarters-based national healthcare employees. *See* Schreibman (US Foods) Hrg. Vol. 13 at 43:21-44:18. In contrast, [redacted] PX00599 ([redacted] Dep. at 62:20-22).

B. <u>The Proposed Divestiture Will Not Restore the Lost Competition</u>

1. <u>Even Under PFG's Projections, Competition Will Not Be Restored</u>

848. The deficiencies of the divestiture package that will prevent PFG from replacing

US Foods as an effective national broadline distributor competitor to PFG [redacted]

849. [redacted] PX00526 ([redacted] Dep. at 197:8-199:5); PX09060-006; [redacted] at 48:17-19.

850. [redacted] PX09060-002, 004, 006. [redacted] PX09350 (Israel Report) ¶ 121; *see also id*. ¶¶ 315, 320.

851. [redacted] PX00526 ([redacted] Dep. at 197:14-19); PX09060-006. [redacted] PX00526 ([redacted] Dep. at 198:14-199:5).

852. [redacted] PX09350 (Israel Report) ¶ 320; PX09060-006, 014. [redacted] PX09350 (Israel Report) ¶ 320.

853. Defendants' expert Dr. Hausman agreed that through the end of 2017, PFG's base

case projections assumed a loss of revenue for PFG with the divested assets. Hausman Hrg. Vol. 16 at 103:3-11; *see also id.* at 103:21-24 (agreeing that the base case used by Blackstone also showed a "significant sales loss in the first two years after the divestitures").

2. National Customers Do Not Believe PFG's Expansion Will Replace the Loss of Competition Caused by the Merger

854. Many National Customers do not believe that PFG will be an effective competitor even with the divested assets. PX00539 ([redacted] Dep. at 90:9-91:8); PX00560 ([redacted] Dep. at 111:6-9, 111:11-22, 112: 4-16, 112:18); PX00594 ([redacted] IH at 261:4-263:2); PX00525 ([redacted] Dep. at 227:24-228:1,3,5,9-25-229:9); PX00490 ([redacted] Supp. Decl.) ¶¶ 3, 6; PX00493 ([redacted] Supp. Decl.) ¶¶ 7-13; PX07019 ([redacted] Decl.) ¶ 25 (as amended by PX07025 ([redacted] Supp. Decl.) ¶ (2)(a)); PX00480 ([redacted] Supp. Decl.) ¶¶ 9-10.

855. National Customer concern about PFG as an effective replacement for US Foods as a national competitor include the following:

a. "[redacted]" PX00478 ([redacted] Supp. Decl.) ¶ 3.

b. "[redacted] PX00480 ([redacted] Supp. Decl.) ¶ 3.

856. [redacted] a large healthcare GPO that was on Defendants' witness list, has several concerns about PFG even with the proposed divestiture. PX00560 ([redacted] Dep. at 109:10-12, 16-24-111:6-9, 11-22); *id.* at 114:14-17 ("[redacted]

[redacted]); PX00594 ([redacted] IH at 262:19-262:18) ("[redacted]").

857. [redacted] testified that he does not believe PFG would be a viable option following the divestiture, that customers would instead choose post-merger Sysco, and that "[redacted]" PX00574 ([redacted] Dep. at 115:3-22).

858. Even with the PFG expansion, National Customers expect the combined company would still be able to raise prices. PX00480 ([redacted] Supp. Decl.) ¶¶ 3, ¶ 10; *see also* PX00478 ([redacted] Supp. Decl.) ¶ 6 ("[redacted]").

3. PFG Faces Significant Execution Risk

859. PFG's business plan depends on the successful execution of several highly complex projects stemming from and related to the proposed divestiture. If PFG cannot execute, its ability to compete for National Customers and replace the competition eliminate by the merger will be handicapped.

860. The acquisition and integration of 11 distribution centers into PFG's existing business alone carries significant execution risk.

861. [redacted], described the proposed divestiture as a [redacted] 13-25. [redacted]—wrote that [redacted] at 119:17-22.

862. In one email written while PFG was negotiating with Defendants, [redacted]

[redacted] admits to [redacted] that [redacted] PX09169-001.

863. PFG has never acquired more than two distribution centers at once. Holm (PFG) Hrg. Vol. 4 at 54:2-11. And that acquisition did not go well according to customers. PX00594 ([redacted] IH at 262:8-263:2, 268:11-269:4, 270:16-271:5).

864. [redacted] at 34:19-20, 35:23-25. [redacted] at 38:7.

865. Customers do not believe that PFG would be able to integrate the 11 US Foods distribution centers well into the PFG network. PX00560 ([redacted] Dep. at 114:14-17) ("[redacted]"); PX00525 ([redacted] Dep. at 228:16-229:9).

866. [redacted]

867. [redacted] *See* PX09060-013-015.

868. [redacted] at 87:9-17; PX09060-013 ([redacted]).

869. [redacted] at 93:21-23. [redacted] at 94:14-17.

870. [redacted] PX00526 ([redacted] Dep. at165:5-10).

871. [redacted] at 98:22-101:5.

872. [redacted] PX00429 ([redacted] Decl.) ¶ 27.

873. PFG has never done a fold-out expansion of a broadline facility. Holm (PFG) Hrg. Vol. 4 at 54:14-16.

874. [redacted] PX00526 ([redacted] Dep. at 207:20-208:8). [redacted] at 92:24-93:23, 94:11-17, 95:2-23, 96:25-97:10.

875. [redacted]

[redacted] PX01362-004. [redacted] PX09060-005.

876. PFG also faces the risk that it may lose the business of large National Customers that US Foods currently serves. [redacted] at 90:6-91:16. [redacted] PX09258-002 [redacted] PX00475 ([redacted] Supp. Decl.) ¶ 12.

877. Premier views moving its business from US Foods to PFG in the 11 divested distribution centers as unattractive, given that it would force Premier's multi-regional members to split their business among multiple distributors. Ralph (Premier) Hrg. Vol. 3 at 90:24-91:18. This would require those members to deal with two numbering schemes, two systems, and a disparity in tools available to the member's facilities. Premier's healthcare members cannot afford to add costs to their structure. Ralph (Premier) Hrg. Vol. 3 at 96:17-97:17.

878. [redacted] at 17:11-14.

879. [redacted]

[redacted]

880. [redacted]

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

f. [redacted]

g. [redacted]

881. [redacted] PX00474 ([redacted] Supp. Decl.) ¶ 5; PX00480 ([redacted] Supp. Decl.) ¶ 12; PX00488 ([redacted] Supp. Decl.) ¶ 11.

882. [redacted]

[redacted] at 46:21-47:6. [redacted] at 47:7-11. [redacted] at 49:3-8.

883. There are two risks if PFG loses significant business from National Customers. The first risk is that the loss of significant National Customer business makes PFG unprofitable.

884. If customers choose not to stay with PFG, PFG would be at risk of not being able to cover the fixed expenses associated with operating the distribution centers. Ralph (Premier) Hrg. Vol. 3 at 94:4-25.

885. [redacted] at 110:21-111:21. [redacted] at 112:9-12. [redacted] at 112:114-20. [redacted] at 116:16-20.

886. Paradoxically, the second risk is that [redacted]

[redacted]

887. [redacted] at 109:8-22. [redacted]

4. <u>The Proposed Divestiture Does Not Address Multiple Local Markets</u>

888. Plaintiffs' Complaint alleges harm in 32 local markets. The proposed divestiture does not address the merger's likely anticompetitive effects in many local markets.

889. Most prominently, the proposed divestitures do not address significant competitive harm in Omaha, NE; Raleigh / Durham, NC; Columbia / Charleston, SC; and Southwest Virginia—all areas where broadline customers testify that Sysco and US Foods are by far each other's most significant competitor today. PX09350 (Israel Report) ¶ 314.

890. Additionally, [redacted] at 58:25-59:11.

891. At the preliminary injunction hearing, [redacted] at 67:4-72:2.

IX. NEW ENTRY OR EXPANSION WOULD NOT BE TIMELY, LIKELY, OR SUFFICIENT

892. Entry into the broadline distribution market is financially risky, expensive, time-consuming, and logistically challenging. Holm (PFG) Hrg. Vol. 4 at 70:21-71:17; Schreibman (US Foods) Dep. at 75:13-21; Schreibman (US Foods) Hrg. Vol. 13 at 36:25-37:2 (agreeing that "there are high barriers to entry for scale players in this industry").

893. As such, entry or expansion sufficient to counteract the anticompetitive effects of the merger—either in the national market or local geographic markets—is unlikely and, even if likely, would not be timely or sufficient.

A. *De Novo* Entry or Expansion in the National Broadline Distribution Market Would Not Be Timely, Likely or Sufficient

894. *De novo* entry by a firm into the national broadline distribution market is unlikely and, in any event, would be untimely and insufficient to deter or counter the proposed merger's adverse effects on competition.

895. Greenfield expansion refers to building a new distribution center in a new, non-adjacent area not served by the broadline distributor. True greenfield entry is rare and difficult. Holm (PFG) Hrg. Vol. 4 at 71:15-72:3.

896. Fold-out expansion refers to a strategy in which a distributor "seeds" a target area with sales by hiring sales representatives in the target area (or transferring them from adjacent areas) and using stretch distribution or shuttle sites originating from existing distribution centers to establish a customer base in the target area. PX00558 (DeLaney (Sysco) Dep. at 196:9-197:7); PX00415 ([redacted] Decl.) ¶ 18; PX00434 ([redacted] Decl.) ¶ 10. Expansion by fold-out is incremental and local at best. Holm (PFG) Hrg. Vol. 4 at 80:24-81:4.

897. In particular, there are high barriers to entry and expansion into the national broadline distribution services market. Schreibman (US Foods) Hrg. Vol. 13 at 36:25-37:2;

PX03003-005; PX03016-034; PX03007-005.

898. These barriers include the significant time and cost of building a national distribution network strategically located throughout the country and the need to build a reputation as a national distributor capable of meeting the needs of National Customers. *See* Holm (PFG) Hrg. Vol. 4 at 72:8-12; PX00443 ([redacted] Decl.) ¶ 18; PX00449 ([redacted] Decl.) ¶¶ 4, 6; PX00460 ([redacted] Decl.) ¶¶ 7-9.

899. Expansion by the largest regional broadliners into a national competitor would require the addition of numerous distribution centers, which is highly unlikely to occur in a timely manner.

900. [redacted] has the third-most broadline distribution centers ([redacted]) behind Sysco and US Foods, with [redacted] distribution centers [redacted]. PX09350 (Israel Report) App. A, Table 28. [redacted] however, has no plans to expand nationally: "[redacted]." PX00415 ([redacted] Decl.) ¶ 18. Neither do other regional distributors. PX00564 ([redacted] Dep. at 139:7-11); PX00434 ([redacted] Decl.) ¶ 13; PX00438 ([redacted] Decl.) ¶ 8; PX00443 ([redacted] Decl.) ¶ 18; PX00564 ([redacted] Dep. at 144:9-19; PX00529 ([redacted] Dep. at 188:10-189:2, 192:20-193:2) (stating that [redacted]

901. Regional broadline distributors have stated that they do not view opening a new distribution center without an existing base of customers—let alone a national distribution

network—to be an economically viable strategy. PX00564 ([redacted] Dep. at 141:12-142:1); PX00415 ([redacted] Decl.) ¶ 18; PX00434 ([redacted] Decl.) ¶ 13; *see also* PX00543 [redacted] Dep. at 124:10-18).

902. Indeed, customers do not believe that it is likely or feasible for a regional broadline distributor to expand organically its geographic coverage quickly enough to constrain anticompetitive conduct by the merged entity. *See*, *e.g.*, PX00404 ([redacted] Decl.) ¶ 14.

903. Therefore, *de novo* entry or expansion by regional distributors is unlikely to occur in a manner that would be sufficient to constrain the merged firm from charging higher prices than they would be able to absent the merger.

B. <u>Local Entry or Expansion Would Not Be Timely, Likely, or Sufficient</u>

904. Local entry or expansion is also highly unlikely to occur, much less in a timely or sufficient manner to check the merged entity. *See* PX00544 ([redacted] Dep. at 87:14-88:19) (explaining that entry and expansion are financially risky, expensive, and time-consuming).

905. Greenfield expansion into local markets is rare to non-existent. Holm (PFG) Hrg. Vol. 4 at 71:15-25; PX00415 ([redacted] Decl.) ¶ 19; PX00434 ([redacted] Decl.) ¶ 10; PX00451 ([redacted] Decl.) ¶ 22. Greenfield expansion is a complex and costly endeavor. PX00529 ([redacted] Dep. at 183:12-184:9). Greenfield expansion is complex because it requires the distributor to determine what products it needs to stock in the market and to set up a supply chain to ensure it has the right products in the distribution center. PX00529 ([redacted] Dep. at 183:12-184:9). Greenfield expansion is costly because it requires the distributor to incur fixed costs to build a distribution center, while having no customers. PX00529 ([redacted] Dep. at 183:12-184:9).

906. In Mr. Holm's experience, it costs about $35 million to establish a new distribution center. Holm (PFG) Hrg. Vol. 4 at 72:4-12. Greenfield entry typically requires a

large broadline distribution center, with the requisite space and temperature zones to handle the full range and volume of stock keeping units provided by broadliners. Holm (PFG) Hrg. Vol. 4 at 72:13-17. A distributor entering on a greenfield basis would also need a sufficient customer base to support its investment in inventory, much of which is perishable. Holm (PFG) Hrg. Vol. 4 at 72:18-25. A broadliner risks significant losses if it stocks a new distribution center with products but does not have the customer base to sell those products before they expire, which creates a serious "chicken and egg" problem. Holm (PFG) Hrg. Vol. 4 at 73:1-18.

907. A broadliner distributor needs a knowledgeable local sales force in order to facilitate its entry into a new or adjacent region. Holm (PFG) Hrg. Vol. 4 at 74:4-12. The broadline industry is characterized by non-compete clauses in employment contracts, which frequently limit the ability of employees to solicit their former employer's customers on behalf of their new employer, typically for a year. Holm (PFG) Hrg. Vol. 4 at 76:4-19.

908. The current environment for expanding into new regions is especially challenging given the acute and growing shortage of truck drivers available to the foodservice industry. [redacted], explained that the driver shortage is "an impediment to expansion" and that "distributors are struggling as a result of it." PX00570 ([redacted] Dep. at 143:1-143:25, 144:1-20; PX00567 ([redacted] Dep. at 203:9-204:17).

909. Fold-out expansions are difficult, costly, risky and time consuming for other reasons as well. [redacted] testified that fold-out expansion is a "lengthy process" that can take from one to three years to complete, starting from approval of the fold-out by the board of directors. PX00529 ([redacted] Dep. at 166:10-167:14); *see also* PX00558 (DeLaney (Sysco) Dep. at 202:2-6); PX00414 ([redacted] Decl.) ¶ 7.

910. Other hurdles to overcome include finding suitable locations that are low cost and

ensure adequate freeway access, establishing a base of independent broadline business to generate enough product variety and purchasing power to be competitive with other distributors in the market, and hiring local sales representatives, the supply of which is limited due to restrictive covenants enforced by other distributors. PX00444 ([redacted] Decl.) ¶ 14; *see also* PX00415 ([redacted] Decl.) ¶ 20; PX00417 ([redacted] Decl.) ¶¶ 11-12; PX00429 ([redacted] Decl.) ¶ 25; PX00443 ([redacted] Decl.) ¶ 15.

911. With either greenfield or fold-out entry, a key challenge is ensuring that there is a sufficient customer base in place to "cover the cost of investment in that building and putting together that management team." PX00558 (DeLaney (Sysco) Dep. at 203:25-204:20); PX00434 ([redacted] Decl.) ¶ 10.

912. Another barrier to entry that any new entrant would have to surmount is the lack of an established reputation. PX00449 ([redacted] Decl.) ¶ 4; *see also* PX00531 ([redacted] Dep. at 131:25-133:11).

913. Even after building the distribution center, it takes time to win business from street customers. PX00420 ([redacted] Decl.) ¶ 14; PX00451 ([redacted] Decl.) ¶ 24.

914. According to PFG, it takes a fold-out facility approximately four to five years "to achieve sales per square foot similar to established broadliners." Holm (PFG) Hrg. Vol. 4 at 78:14-18; *see also* PX00543 ([redacted] Dep. at 41:25-42:13).

915. Local entry or expansion in California is particularly challenging. [redacted] at 95:13-17; PX00449 ([redacted] Decl.) ¶ 6.

916. Regional distributors have declared that they do not have plans to expand significantly, even if the merged entity were to raise prices. PX00531 ([redacted] Dep. at 30:21-23); PX00543 ([redacted] Dep. at 76:10-17); PX00413 ([redacted] Decl.) ¶ 3;

PX00414 ([redacted] Decl.) ¶ 5; PX00415 ([redacted] Decl.) ¶ 18; PX00417 ([redacted] Decl.) ¶ 13; PX00424 ([redacted] Decl.) ¶ 8; PX00434 ([redacted] Decl.) ¶ 13; PX00449 ([redacted] Decl.) ¶ 11; PX07024 ([redacted] Supp. Decl.) ¶ 8; *see also* PX00412 ([redacted] Decl.) ¶ 12.

C. Examples of Attempted Entry and Expansion Illustrate These Barriers

917. Several recent experiences by broadliners highlight that entry and expansion is challenging, risky, and often unsuccessful.

918. Sysco's recent experience [redacted] PX00584 (Nasir (Sysco) IH at 115:7-8). [redacted] PX00584 (Nasir (Sysco) IH at 228:18-230:15).

919. [redacted] PX00584 (Nasir (Sysco) IH at 230:9-11). [redacted] PX00584 (Nasir (Sysco) IH at 223:17-224:6). [redacted] PX00584 (Nasir (Sysco) IH at 114:24-115:25).

920. Regional distributors utilizing fold-out strategy have also experienced challenges in expanding to new geographies.

921. [redacted]

[redacted] PX00434 ([redacted] Decl.) ¶ 10.

922. Nicholas & Co., a distributor based in Salt Lake City, Utah, recently completed a fold-out expansion into Las Vegas, Nevada. From the time Nicholas made the decision to open a distribution center in Las Vegas, [redacted] PX00534 ([redacted] Dep. at 129:21-130:24). This expansion will cost Nicholas approximately [redacted]. PX00534 ([redacted] Dep. at 131:2-9). Even when the Nicholas expansion is completed, customers will be unwilling to use Nicholas until it builds its inventory and can offer pricing and service terms similar to those offered by Sysco and US Foods. PX00422 ([redacted] Decl.) ¶ 9.

923. [redacted] PX00534 ([redacted] Dep. at 132:22-135:8). [redacted] PX00534 ([redacted] Dep. at 134:22-136:11.

924. [redacted] PX00544 ([redacted] Dep. at 94:11-96:15). [redacted] PX00544 ([redacted] Dep. at 94:11-96:15).

925. [redacted]

[redacted] PX00460 ([redacted] Decl.) ¶ 7.

926. Several years later, [redacted] PX00563 ([redacted] Dep. at 200:6-203:19). [redacted] ([redacted] Dep. at 203:10-13). [redacted] PX00460 ([redacted] Decl.) ¶ 8; *see also*; PX03054-003; PX03096-001.

927. [redacted] PX00416 ([redacted] Decl.) ¶ 12. [redacted] PX00416 ([redacted] Decl.) ¶ 13.

928. [redacted]. PX00495 ([redacted] Supp. Decl.) ¶ 7. In 2009, [redacted]

[redacted] PX00495 ([redacted] Supp. Decl.) ¶ 7.

929. [redacted] PX00543 ([redacted] Dep. at 32:12-14); PX09350 (Israel Report), App. A, Table 43 (showing Sysco and US Foods, combined, have a market share of [redacted]). [redacted] PX00543 ([redacted] Dep. at 120:10-17); PX00414 ([redacted] Decl.) ¶ 5. [redacted] PX00543 ([redacted] Dep. at 107:22-108:6).

930. [redacted] PX00449 ([redacted] Decl.) ¶ 6. [redacted] PX00449 ([redacted] Decl.) ¶ 6. [redacted] PX00449 ([redacted] Decl.) ¶ 6. [redacted] PX00449 ([redacted] Decl.) ¶ 6. [redacted] PX00449 ([redacted] Decl.) ¶ 6.

931. [redacted]

[redacted]. PX00443 ([redacted] Decl.) ¶ 14. [redacted] *Id.*

D. Other Channels Could Not Reposition to Replace Lost Competition

1. Systems Distributors Could Not Reposition

932. Systems distributors would have to expand their distribution capabilities to reposition as broadline distributors. David Schreibman of US Foods admitted in an email that it would be [redacted] PX00267.

933. Systems distributor seeking to reposition would need to expand its facilities significantly to house additional inventory or build separate, larger distribution facilities to carry the number of SKUs that broadline customers demand. PX00415 ([redacted] Decl.) ¶ 6; *see also* PX00544 ([redacted] Dep. at 103:4-104:14) (not "financially viable"); PX00562 ([redacted] Dep. at 140:15-141:17).

934. Systems warehouses are smaller and configured differently, the warehouse may lack the full array of temperature zones required for a broadline inventory, and the distributor likely cannot displace existing systems-customer inventory due to contractual obligations. PX00585 (Sonnemaker (Sysco) IH at 198:24-200:4); PX00424 ([redacted] Decl.) ¶ 8.

935. A PFG customized distribution facility cannot simply be converted into a broadline facility. Such a conversion would be akin to a greenfield expansion. Holm (PFG) Hrg. Vol. 4 at 77:2-21.

936. Systems distributors would also need to negotiate contracts with food manufacturers to add to the breadth and depth of their inventory. PX09350 (Israel Report) ¶ 55; *see also* PX00515 (Schreibman (US Foods) Dep. at 147:2-149:6, 214:22-19:2). A systems distributor would have to create a robust private label inventory in order to compete with other broadline distributors. PX09350 (Israel Report) ¶¶ 143-144 (large private label offering is

competitive advantage); PX00448 ([redacted] Decl.) ¶ 7.

937. Further, a systems distributor would need to employ a significant number of sales representatives to call on broadline customers. PX00510 (Schreibman (US Foods) IH at 38:15-39:1); PX00443 ([redacted] Decl.) ¶¶ 3-10. Non-solicitation agreements would also likely hinder repositioning by systems distributors. *See* Holm (PFG) Hrg. Vol. 4 at 76:4-19.

938. Thus, repositioning by systems distributors is unlikely to ameliorate the anticompetitive harm resulting from the merger.

2. <u>Specialty Distributors Could Not Reposition</u>

939. Specialty distributors focus on a single category or very limited set of products, operate smaller warehouses, and operate smaller trucks than broadline distributors. PX00443 ([redacted] Decl.) ¶ 13. As such, "specialty distributors cannot easily reposition themselves to become broadline distributors because they would need to significantly expand their distribution centers, truck fleet, sales force, product assortment, and customer base, among other things." PX00443 ([redacted] Decl.) ¶ 13.

940. Historically, specialty distributors have not attempted to sell product lines outside of their specialty. PX00521 ([redacted] Dep. at 65:22-66:2); PX00551 ([redacted] Dep. at 67:18-68:5).

941. To reposition as a broadline distributor, the specialty distributor would need to significantly renovate or expand its existing distribution centers to accommodate a broader array of products, including creating multiple refrigerated zones to store food at varied temperatures.

942. For example, PFG could not simply convert a Roma specialty facility into a broadline facility. Such a conversion would be akin to a greenfield expansion. Holm (PFG) Hrg. Vol. 4 at 77:2-21.

943. [redacted]

[redacted] at 62. And a Roma facility cannot simply be converted in its existing footprint into a broadline facility. Holm (PFG) Hrg. Vol. 4 at 62:1-63:20.

944. Additionally specialty distributor would need to invest in a fleet of larger tractor-trailers and recruit sales personnel. PX00443 ([redacted] Decl.) ¶ 13.

945. Thus, repositioning by specialty distributors is unlikely to ameliorate the anticompetitive harm resulting from the merger.

3. Cash-and-Carry Stores Could Not Reposition

946. Cash-and-carry stores generally do not deliver, so their reposition would require a more extensive investment and conversion that even systems and specialty distributors. Cash-and-carry stores' efforts to serve customers has been very limited.

947. Only [redacted] deliver products to customers, and only to customers within [redacted]. PX00428 ([redacted] Decl.) ¶¶ 1, 4. Therefore, repositioning by [redacted] would involve a massive investment in distribution assets.

948. Approximately [redacted] have enrolled in [redacted] program where [redacted] PX00571 ([redacted] Dep. at 13:6-16:22, 20:5-13).

949. Moreover, [redacted] has no plans [redacted] PX00571 ([redacted] Dep. at 128:14-129:12).

950. Thus, repositioning by cash-and-carry stores is unlikely to ameliorate the anticompetitive harm resulting from the merger.

X. OTHER PURPORTED CONSTRAINTS ON DEFENDANTS' COMPETITIVE CONDUCT ARE MISLEADING

A. Large Buyers Cannot Constrain the Exercise of Market Power

951. Large customers cannot constrain Sysco or US Foods today and would not be able to do so post-merger. PX00404 ([redacted] Decl.) ¶ 13 ("[redacted].").

952. Customers currently have less leverage when negotiating with Sysco and US Foods compared to other distributors or consortia thereof. PX00594 ([redacted] IH at 38-39).

953. Many of Defendants' largest consumers are concerned that the merger will lead to higher prices and lower service quality than would be the case but for the merger. Szrom (VA) Hrg. Vol. 2 at 26:13-23; PX00403 ([redacted] Decl.) ¶ 14; PX00404 ([redacted] Decl.) ¶¶ 12-14; PX00407 ([redacted] Decl.) ¶ 12; PX00419 ([redacted] Decl.) ¶¶ 10-11; PX00436 ([redacted] Decl.) ¶ 17; PX00439 ([redacted] Decl.) ¶ 11; PX00441 ([redacted] Decl.) ¶¶ 10-11; PX00466 ([redacted] Decl.) ¶ 11; PX00493 ([redacted] Supp. Decl.) ¶ 2.

954. Dr. Israel testified that "in many cases powerful buyers often get that power by the ability to play firms off of each by the ability to negotiate with multiple parties." Israel Hrg. Vol. 7 at 59: 1-12; *see also* Hausman Hrg. Vol. 16 at 66:14-17. This is a strategy that GPOs and foodservice management companies, two types of large broadline customers, indicate is at the heart of their procurement strategy, and an ability that would be lost post-transaction. Thus, the loss of this power through the proposed merger is likely to be particularly harmful to them. PX09350 (Israel Report) ¶ 207.

B. GPOs Do Not Compete with Broadline Distributors

955. A GPO is an organization of individual members that pool their purchases to leverage buying power. Schreibman (US Foods) Hrg. Vol. 12 at 137:16-38:2; PX00405 ([redacted] Decl.) ¶ 4; *see also* PX00531 ([redacted] Dep. at 92:9-14); PX09350 (Israel Report) ¶¶ 198-199.

956. GPOs compete with other GPOs. Lindahl (HPSI) Hrg. Vol. 12 at 106:9-19; Sonnemaker (Sysco) Hrg. Vol. 13 at 144:23-45:3; PX00594 ([redacted] IH at 42:13-21, 148:2-6); PX00560 ([redacted] Dep. at 122:3-17, 123:11-24:1).

957. GPOs do not compete with broadline distributors. Ralph (Premier) Hrg. Vol. 3 at 59:13-23; Sonnemaker (Sysco) Hrg. Vol. 13 at 144:23-45:3; PX00531 ([redacted] Dep. at 92:18-25); PX00549 ([redacted] Dep. at 183:6-18).

958. GPOs are customers of broadline distributors. PX00405 ([redacted] Decl.) ¶ 4; PX00407 ([redacted] Decl.) ¶ 6; PX00590 (Schreibman (US Foods) IH at 66:6-22); *see also* Schreibman (US Foods) Hrg. Vol. 12 at 138:6-14; PX09350 (Israel Report) ¶ 200.

959. GPOs cannot provide foodservice distribution services. Ralph (Premier) Hrg. Vol. 3 at 59:13-23, 112:8-16; Thompson (Interstate) Hrg. Vol. 2 at 80:5-6; PX00549 ([redacted] Dep. at 183:6-18); PX00594 ([redacted] IH at 53:2-8); PX00407 ([redacted] Decl.) ¶ 6; *see also* Schreibman (US Foods) Hrg. Vol. 12 at 138:6-24 (describing how foodservice distributors deliver products to GPO members); PX09350 (Israel Report) ¶ 200.

960. When competing for business against a distributor, a GPO's foodservice distribution partner provides the distribution component of the bid. Ralph (Premier) Hrg. Vol. 3 at 112:8-16; PX00594 ([redacted] IH at 51:17-52:17).

961. GPOs members would benefit from reduced costs on products purchased by their members. If a distributor can give a GPO's members a better price than they can achieve

through the GPO's contracts with manufacturers, this is beneficial to the GPO's members and to the GPO. Ralph (Premier) Hrg. Vol. 3 at 59:24-60:10; PX09375 (Israel Rebuttal Report) ¶ 53.

962. Dr. Israel explains that, as purchasers of broadline distribution services, GPOs will be harmed if the prices of broadline distribution services go up. Even if one were to accept that GPOs are *also* competitors of broadline distributors in the negotiation of direct contracts with food suppliers, Dr. Israel notes this would provide no basis to determine that their concerns about the deal arise from their role as a competitor concerned about efficiencies rather than their role as customers concerned about competitive harm. PX09375 (Israel Rebuttal Report) ¶ 51. He further observes that the GPOs' sworn declarations describe the concern in terms of harm to competition once the ability to play Sysco and US Foods against each other is eliminated, a concern consistent with the larger body of evidence. PX09375 (Israel Rebuttal Report) ¶ 51.

XI. THE ASSERTED EFFICIENCIES DO NOT REBUT THE PRESUMPTION OF COMPETITIVE HARM

963. Defendants have failed to establish that their claimed efficiencies are merger-specific and verifiable. Furthermore, even assuming Defendants' claims were merger-specific and verifiable, Defendants have failed to establish that customers would benefit from the claimed efficiencies. In any event, Defendants' purported merger-specific efficiencies would not outweigh the anticompetitive harm resulting from the acquisition.

A. Defendants Have Failed to Establish Verifiable, Merger-Specific Efficiencies

964. Defendants claim [redacted] in annual efficiencies after five years. PX09351 (Gokhale Report) ¶ 12; Wood (McKinsey) Hrg. Vol. 15 at 17:9-13. Defendants' efficiencies estimates were developed by synergy teams made up of personnel from Sysco, US Foods, and McKinsey & Company ("McKinsey"). Wood (McKinsey) Hrg. Vol. 15 at 12:22-13:24.

965. Mr. Rajiv Gokhale of Compass Lexecon, an expert in financial economics,

reviewed and assessed Defendants' efficiencies claims and evidence. Mr. Gokhale's assessment included the review of investigational hearing and deposition transcripts, and thousands of documents produced by Defendants and McKinsey. Mr. Gokhale's review in particular included: (i) all documents cited by Defendants' expert, Dr. Hausman; (ii) all documents cited by Mr. Carter Wood of McKinsey in his Statement of Facts Tendered in Connection with the Expert Report of Professor Jerry Hausman (excluded from the evidentiary record); and (iii) all information and documents cited by Sysco in responding to the Commission's request for information concerning Defendants' efficiencies claims. PX09351 (Gokhale Report) at App. B; PX09376 (Gokhale Rebuttal) at App. B-1; *see also* Gokhale Hrg. Vol. 18 at 9:10-10:18.

966. Mr. Gokhale's analysis concluded that a significant portion—at least [redacted]—of Defendants' claimed efficiencies total is not merger-specific, because Defendants are claiming savings from initiatives that both companies could pursue, and in many cases are pursuing, independently. Gokhale Hrg. Vol. 18 at 10:22-12:7; PX09351 (Gokhale Report) ¶ 13(c).

967. Moreover, Defendants have failed to provide the substantiation necessary for independent verification of their remaining claims. Mr. Gokhale's analysis reveals that even Defendants' remaining claims likely include savings that Sysco or US Foods could achieve without the merger, and thus that Defendants' estimates are not a reliable estimate of merger-specific savings. Defendants' remaining claims are also subject to numerous execution complexities and contingencies, timing issues, and significant costs to achieve, and in a number of instances depend on assumptions or calculations for which Defendants have not provided documentation. Gokhale Hrg. Vol. 18 at 10:22-12:7; PX09351 (Gokhale Report) ¶¶ 13(d)-(e).

1. <u>McKinsey's Materials Do Not Substantiate Merger-Specificity</u>

968. Materials generated by the synergy teams working with McKinsey do not substantiate merger-specific efficiencies, because the synergy teams developed their estimates

without regard for whether Sysco and US Foods could achieve the claimed cost savings without the merger. Gokhale Hrg. Vol. 18 at 10:22-12:7, 12:21-14:25, 19:1-9; 31:15-32:13; PX09351 (Gokhale Report) ¶¶ 13(a), 44-52, 75-77, 107-10, 119-22, 125, 128-29, 132-34, 140-45, 156-65.

969. Mr. Wood of McKinsey, whom Defendants designated to testify on their behalf concerning the work of the synergy teams, indicated that he did not have an understanding of the term "merger-specificity." He also acknowledged that the synergy teams did not receive instructions related to merger-specificity. Wood (McKinsey) Hrg. Vol. 15 at 52:8-20; PX00530 (Wood (McKinsey) Dep. at 40:10-12, 41:19-22).

970. Consistent with this, the record reflects that the synergy teams have counted within their claimed efficiencies estimates savings from initiatives that are already in progress at one or both of the companies. Gokhale Hrg. Vol. 18 at 13:14-14:22, 19:1-9; PX09351 (Gokhale Report) ¶¶ 44-50 (category management), ¶¶ 76-77 (distribution productivity initiatives), ¶ 142 (sales productivity initiatives), ¶ 158 (centralization of corporate functions).

971. Mr. Wood also lacked specific knowledge of the methodology the synergy teams used to generate many of Defendants' estimates, and was unable to answer numerous questions relevant to assessing the merger-specificity and foundation of Defendants' estimates. Wood (McKinsey) Hrg. Vol. 15 at 55:13-23, 58:1-9; PX00530 (Wood (McKinsey) Dep. at 58:8-25, 59:14-65:23, 73:5-74:9, 77:2-79:4, 86:12-88:20, 95:16-98:12, 103:16-105:8, 108:16-109:21, 111:5-115:22, 121:8-122:11, 126:7-16, 132:6-134:4, 167:18-168:25, 170:19-172:4, 184:4-185:2); PX00700 (Wood (McKinsey) Dep. at 284:24-285:2, 342:17-344:1).

972. Additionally, McKinsey has a financial stake in the outcome of the litigation, because it expects to serve as Sysco's integration consultant in the event the merger closes. PX00530 (Wood (McKinsey) Dep. at 44:1-10, 45:11-20). McKinsey therefore is not an

independent party for the purposes of assessing Defendants' efficiencies claims.

2. Dr. Hausman Does Not Substantiate Merger-Specific Efficiencies

973. Dr. Hausman did not attempt to verify Defendants' and McKinsey's efficiencies estimates; instead, he accepted those estimates at face value. Hausman Hrg. Vol. 16 at 113:7-18. Dr. Hausman's opinions, therefore, do not serve as independent verification of Defendants' estimates, and provide no additional substantiation in support of Defendants' claims.

974. While not attempting to verify Defendants' and McKinsey's work, Dr. Hausman nevertheless concedes that significant portions of the synergy teams' estimates are not merger-specific. Specifically, Dr. Hausman opines that only [redacted] of Defendants' claims reflect verifiable, merger-specific savings. DX01207 (Errata Sheet to Hausman Reply) at Ex. C; DX05028 (Hausman Demonstratives) at 37.

975. Dr. Hausman fails to explain the basis for his merger-specificity conclusions, instead simply designating certain claims as merger-specific in a backup spreadsheet to his report. Gokhale Hrg. Vol. 18 at 12:8-20; PX09376 (Gokhale Rebuttal Report) ¶¶ 13-16.

976. The evidence reveals that Dr. Hausman's conclusions significantly overstate merger-specific benefits. The following sections demonstrate the point.

(a) Category Management

977. Dr. Hausman classifies Defendants' category management claim as merger-specific. DX01355 (Hausman Reply Report at 31-32). But Defendants have failed to provide substantiation establishing merger-specific category management savings.

978. Both Sysco and US Foods have independent category management programs that are ongoing and not yet completed. Gokhale Hrg. Vol. 18 at 19:10-20:4; Wood (McKinsey) Hrg. Vol. 15 at 57:8-14, 59:20-61:2; PX09351 (Gokhale Report) ¶¶ 37-38.

979. The evidence indicates that Defendants' category management synergy claim is

driven by savings that Sysco and US Foods could achieve by completing category management independently. Gokhale Hrg. Vol. 18 at 27:15-31:3; PX09351 (Gokhale Report) ¶¶ 44-50.

980. Dr. Hausman's contrary conclusion hinges on an assertion by Mr. Wood of McKinsey that the synergy team responsible for generating the category management estimate had "discussions" in which the team members exercised "business judgment" and made their estimates "incremental" to what Sysco and US Foods would achieve independently. Wood (McKinsey) Hrg. Vol. 15 at 33:17-36:2, 57:18-22; PX00700 (Wood (McKinsey) Dep. at 305:4-306:1); DX01353 (Hausman Reply Report at 31-32).

981. Defendants, however, have failed to point to any documentation demonstrating that this synergy team's estimate only reflects savings available through the merger. Indeed, the "business judgment" step in the synergy team's calculation process is opaque, undocumented, and unverifiable. Gokhale Hrg. Vol. 18 at 25:4-27:13, 28:11-18, 64:2-64:22, 69:1-72:4; PX09351 (Gokhale Report) ¶ 43.

982. Additionally, Mr. Wood's assertion of "incremental" savings is contradicted by the evidence. Mr. Wood was not personally involved in generating the category management estimate. Wood (McKinsey) Hrg. Vol. 15 at 57:15-58:6. By contrast, Mr. Brian Todd of Sysco, who was personally involved in generating this estimate (*see* Wood (McKinsey) Hrg. Vol. 15 at 15:20-16:9; PX00592 (Day & Todd (Sysco) IH at 17:7-19:7)), testified that the category management synergy team did not discount its projected savings for US Foods' plans to conduct category management independently going forward. According to Mr. Todd, US Foods had only completed an assortment review on [redacted] by the time of the proposed merger, and put its work on hold when the merger was announced in December 2013. PX00592 (Day & Todd (Sysco) IH at 138:23-139:12, 193:18-194:1). Thus,

Mr. Todd said, US Foods' future plans to conduct category management did not matter to the synergy team, and the synergy team instead used a 2013 cost baseline. PX00592 (Day & Todd (Sysco) IH at 193:6-194:7); *see also* PX09351 (Gokhale Report) ¶ 45. Dr. Hausman does not cite or acknowledge Mr. Todd's testimony.

983. With respect to Sysco's category management program, in support of Mr. Wood's assertion, Defendants have only been able to point to a document saying that the synergy estimate is "additional to [Sysco's] FY2015 Naples benefit." *See* PX00596 (Gokhale Dep. at 292:13-296:10) (referencing PX06156-019); *see also* Gokhale Hrg. Vol. 18 at 77:6:78:6 (referencing PX00503 (Kreidler (Sysco) IH at 180:19-182:3). The assertion that the synergy estimate is "additional to" Sysco's FY2015 Project Naples benefit is not verifiable in the calculation spreadsheets (or models) produced by McKinsey. Gokhale Hrg. Vol. 18 at 24:4-15. But even if accepted at face value, this assertion does not mean that the synergy estimate accounts for the savings Sysco could achieve independently. Gokhale Hrg. Vol. 18 at 24:16-25:3. Sysco's cost savings initiative called Project Naples (or Business Transformation) ends in FY2015 (*see* Wood (McKinsey) Hrg. Vol. 15 at 59:16-19; PX00583 (Kreidler (Sysco) IH at 109:2-12)), but Sysco's category management program does not. Indeed, Mr. Wood testified that Sysco has not yet completed category management on one-third of its product categories, and would not be done with those categories until after Sysco's FY 2015 ends in June 2015. Wood (McKinsey) Hrg. Vol. 15 at 59:20-61:2; *see also* Gokhale Hrg. Vol. 18 at 19:10-20:4, 24:16-25:3 (referencing PX00359-004).

984. Finally, the spreadsheets produced by McKinsey do not indicate that the synergy team reduced its savings estimates at the "business judgment" step in the calculation process for categories that have not yet been through category management at Sysco or US Foods. Gokhale

Hrg. Vol. 18 at 27:15-31:11, 71:2-72:4; PX08022 (Gokhale Demonstratives) at 17, 19-20.

(b) Field Sales Associate Headcount

985. Dr. Hausman classifies Defendants' entire field sales associate headcount claim as merger specific, albeit without explanation. DX01355 (Hausman Report at 69). But a substantial portion of Defendants' field sales savings estimate is associated with initiatives that can be pursued without the merger. Gokhale Hrg. Vol. 18 at 31:15-32:13; PX09351 (Gokhale Report) ¶¶ 141-142; PX09376 (Gokhale Rebuttal Report) ¶ 20. For instance, Defendants' estimate includes savings associated with implementing an e-commerce platform, but Mr. Wood acknowledges that Sysco could develop an e-commerce platform without the merger. Wood (McKinsey) Hrg. Vol. 15 at 53:2-12.

(c) Supply Chain

986. Again without explanation of his methodology, Dr. Hausman deems most of Defendants' supply chain efficiencies as merger-specific. DX01355 (Hausman Report at 68-69). But a substantial portion of Defendants' supply chain savings estimate is associated with initiatives that can be pursued without the merger. PX09351 (Gokhale Report) ¶¶ 104-110. For instance, Defendants' estimate includes savings from a cultural shift at Sysco towards increased use of backhaul. US Foods, however, already makes greater use of backhaul today, without the merger. Wood (McKinsey) Hrg. Vol. 15 at 53:16-54:10; PX09351 (Gokhale Report) ¶ 108. In addition, Defendants' estimate includes savings associated with implementing advanced RFP techniques for purchasing inbound freight services. PX09351 (Gokhale Report) ¶ 107. But these savings appear driven by RFP process improvements not associated with the merger, and indeed, McKinsey documentation explicitly states that savings may be available to Sysco from utilizing advanced techniques before the merger closes. PX09351 (Gokhale Report) ¶ 107.

3. Defendants' Remaining Claims are Unsubstantiated and Overstated

987. After setting aside claims that do not appear merger-specific, Mr. Gokhale finds that Defendants' remaining claims total only $328 million annually after five years (applying Defendants' contingency and divestiture adjustments). PX09351 (Gokhale Report) ¶¶ 13(f)-(g).

988. Defendants have failed to provide the substantiation necessary for independent verification of these remaining claims, and even these remaining claims are likely overstated. Gokhale Hrg. Vol. 18 at 11:21-12:7, 15:22-18:2; PX09351 (Gokhale Report) ¶¶ 13(d)-(e).

989. The verifiability issues with the remaining claims include the following.

a. **Network Optimization**: Defendants claim savings associated with optimizing the distribution costs of the combined firm, by realigning business between adjacent distribution centers and in some cases consolidating adjacent distribution centers. PX09351 (Gokhale Report) ¶ 91. The synergy team that estimated this claim, however, used 2013 costs as a baseline, even though Defendants had forward-looking plans to improve their distribution costs. Gokhale Hrg. Vol. 18 at 32:14-34:4; PX09351 (Gokhale Report) ¶ 97. The use of historical costs without consideration of additional cost savings Defendants would achieve in the future as standalone companies is not a reliable method of estimating merger-specific efficiencies. Additionally, under Sysco's own schedule, less than 40% of the network optimization savings will be realized within two years of closing. Gokhale Hrg. Vol. 18 at 32:14-34:4; PX09351 (Gokhale Report) ¶ 101(a). However, as Defendants and McKinsey themselves recognize, savings not achieved shortly after closing are often not realized at all. Gokhale Hrg. Vol. 18 at 32:14-34:4; PX09351 (Gokhale Report) ¶ 101(a); *see also* PX09520-006 ("We have found some evidence to suggest that synergies that are not captured within, say, the first full budget year after consolidation may never be captured, overtaken as they are by subsequent events."). Finally, while the synergy team's estimate [redacted] PX00558 (DeLaney (Sysco) Dep. at 239:24-242:6); PX00530 (Wood (McKinsey) Dep. at 108:16-21, 121:17-122:6); *see also* PX09351 (Gokhale Report) ¶ 100. These contingencies and timing issues leave questions about the likelihood of Sysco realizing the projected network optimization savings in full or in a timely fashion. Gokhale Hrg. Vol. 18 at 32:14-34:4; PX09351 (Gokhale Report) ¶¶ 101-102.

b. **Information Technology**: Defendants' remaining IT claims include projected savings associated with consolidating IT infrastructures and applications, and enhanced scale in IT purchasing. PX09351 (Gokhale Report) ¶¶ 170-173. However, Mr. Wood could not explain what information supported

Defendants' estimates of these claims or how they were calculated. PX00530 (Wood (McKinsey) Dep. at 63:8-65:23). Most of the savings materialize only [redacted] years after closing, and documents assign only [redacted] probabilities of achievement to these claims. Gokhale Hrg. Vol. 18 at 34:7-35:3; PX09351 (Gokhale Report) ¶¶ 170-173.

c. **Marketing**: Defendants' remaining marketing claims are based on unexplained, high-level assumptions. PX09351 (Gokhale Report) ¶ 66.

d. **"Interim" Merchandising Levers**: Defendants' remaining merchandising claims include product cost savings associated with "interim" levers, which include obtaining enhanced terms from suppliers. DX05026 (Wood Demonstratives) at 3. These remaining claims are based on assumed savings rates that Mr. Wood could not explain and for which Defendants have not provided supporting documentation. PX09351 (Gokhale Report) ¶¶ 53-58; PX00530 (Wood (McKinsey) Dep. at 95:16-98:12).

4. Dr. Hausman's Critique of Mr. Gokhale's Analysis Is Unsupported

990. Dr. Hausman contends that Mr. Gokhale's analysis finding significant standalone savings in Defendants' estimates implies that Sysco and US Foods are "leaving a lot of money on the table," which Dr. Hausman contends does not make economic sense. Hausman Hrg. Vol. 16 at 53:11-54:4; DX01353 (Hausman Reply Report at 29-30). Further, Dr. Hausman says that Mr. Gokhale "provides no reason why the parties are not employing these practices today." DX05028 (Hausman Demonstratives) at 37.

991. Dr. Hausman's critique of Mr. Gokhale's merger-specificity analysis is unsupported for several reasons. First, Dr. Hausman's critique misconstrues the legal standard for an efficiencies defense. It is Defendants' burden to establish merger-specificity, not Plaintiffs' burden to establish that Defendants' claims are not merger-specific.

992. Second, Dr. Hausman concludes that [redacted] of, what he classifies as, variable cost savings are not merger-specific (a total that would be even larger if calculated prior to contingency and divestiture adjustments). *See* DX05028 (Hausman Demonstratives) at 37 [redacted] minus [redacted]). Dr. Hausman does not explain why (in his terms) Sysco and US Foods are "leaving money on the table" for the claims he sets aside on merger-specificity

grounds, and Dr. Hausman thus fails to satisfy his own standard for making merger-specificity classifications. Gokhale Hrg. Vol. 18 at 38:12-39:12.

993. Third, as discussed above, the evidence indicates that the synergy teams included in their estimates savings from initiatives already in progress at one or both of the companies. Mr. Gokhale's exclusion of these claims on merger-specificity grounds does not imply that Defendants are leaving money on the table; rather, Defendants' synergy estimates overstate merger benefits by including existing initiatives that can be, and are being, pursued without the merger. Gokhale Hrg. Vol. 18 at 38:12-39:12; PX09376 (Gokhale Rebuttal Report) ¶ 18.

994. Finally, the implication of Dr. Hausman's position—an initiative not currently being pursued by either company must be merger-specific—is not supported by logic or the evidentiary record. If one applied Dr. Hausman's reasoning in 2010, one would have concluded at that time that Defendants needed a merger to order to undertake category management. But that was not the case, because both Sysco and US Foods have since then successfully pursued category management initiatives independently. PX09376 (Gokhale Rebuttal Report) ¶ 19.

5. Defendants Plan to Continue to Reduce Costs Independently

995. Defendants' senior executives admit that Defendants have strong standalone cost savings capabilities, which they could pursue without the merger.

996. When first considering a merger with US Foods, Sysco CEO Bill DeLaney wrote that [redacted] at Sysco. PX00094-001. Mr. DeLaney agreed that Sysco could transform itself without merging with US Foods. PX00580 (DeLaney (Sysco) IH at 288:4-8).

997. Mr. DeLaney also acknowledged that Sysco is undertaking various cost-saving initiatives on its own. For example, Mr. DeLaney testified that Sysco has achieved approximately $300 million in annual cost savings from its independent category management

program, that this program is ongoing, and that Sysco does not need the US Foods merger to undertake category management. DeLaney (Sysco) Hrg. Vol. 12 at 83:16-84:25. Sysco has also undertaken other cost-saving initiatives, like route optimization and fleet management savings, without the US Foods merger, *see* DeLaney (Sysco) Hrg. Vol. 12 at 86:14-21, and expects to continue to do so without the merger. PX00558 (DeLaney (Sysco) Dep. at 204:21-207:5).

998. David Schreibman of US Foods, agreed that "as an independent company US Foods has been taking steps to become more efficient and reduce its costs," and explained that the company has achieved savings related to "cost of product, cost of goods, distribution center costs, route optimization, labor and wage and benefits, pension costs." PX00515 (Schreibman (US Foods) Dep. at 135:4-137:17); *see also* PX00589 (Lynch (US Foods) IH at 235:12-236:12); PX00591 (Schuette (US Foods) IH at 60:7-62:5, 63:3-70:22).

999. Mr. Schreibman further agreed that US Foods could continue to reduce each of these categories of costs as a standalone company. Schreibman (US Foods) Hrg. Vol. 13 at 55:21-57:1; PX00515 (Schreibman (US Foods) Dep. at 135:4-137:17). In fact, Mr. Schreibman agreed that US Foods "used Sysco's cost-cutting successes as a call-to-arms to help reduce [US Foods'] own costs," and that one of the ways that US Foods competes with Sysco is by trying to cut costs when Sysco is doing the same. Schreibman (US Foods) Hrg. Vol. 13 at 55:21-56:4; PX00515 (Schreibman (US Foods) Dep. at 184:1-185:10) (discussing PX03218-001); *see also* PX00515 (Schreibman (US Foods) Dep. at 117:9-118:17.

1000. Moreover, McKinsey has experience working with companies to implement changes and achieve costs savings without a merger, *see* Wood (McKinsey) Hrg. Vol. 15 at 51:18-52:7, PX00700 (Wood (McKinsey) Dep. at 236:21-237:13), and thus McKinsey and other consultants serve as an additional resource for implementing cost savings initiatives independent of this transaction. *See* PX00583 (Kreidler (Sysco) IH at 70:12-72:4).

B. <u>Defendants Failed to Show The Claimed Efficiencies Will Benefit Customers</u>

1001. Even if Defendants' efficiencies claims were cognizable, Defendants have failed to establish that the claimed savings will benefit customers.

1002. To the contrary, McKinsey documents indicate that McKinsey is actively formulating plans for Sysco to minimize passing the claimed cost savings to customers. One document notes the [redacted] due to cost-plus contracts currently in place with customers. McKinsey posits that Sysco [redacted] and further indicates that [redacted] PX06126-001-002. In another document, a McKinsey partner notes that there are [redacted] and suggests a discussion on [redacted] PX06127-001.

1003. Dr. Hausman acknowledges that McKinsey has made recommendations to Sysco about ways that Sysco could avoid passing some of the claimed cost savings to customers. Hausman Hrg. Vol. 16 at 114:22-115:25.

1004. Further, according to standard economic logic, Defendants have no incentive to pass through merger efficiencies to the customers that currently consider either Sysco or US Foods their number one choice for broadline distribution, because those customers would already choose Sysco or US Foods at current prices. PX09350 (Israel Report) ¶ 182.

C. <u>Claimed Merger-Specific Efficiencies Do Not Outweigh the Anticompetitive Harm Resulting From the Acquisition</u>

1005. Even assuming Defendants' efficiencies claims had been substantiated, and even assuming Defendants had established that the savings would be passed through to customers, Defendants' purported merger-specific efficiencies do not outweigh the anticompetitive harm resulting from the merger.

1006. Both Dr. Hausman and Dr. Bresnahan agree that variable cost savings should be the focus of an assessment of whether cost savings are likely to offset competitive harm, because fixed cost savings are unlikely to impact pricing in the short run. Hausman Hrg. Vol. 16 at 52:5-53:10; DX01359 (Bresnahan Report at 156).

1007. After setting aside claims that are not merger-specific, Mr. Gokhale finds that the variable cost portion of Defendants' remaining claims totals no more than about $223 million annually after five years, without even reducing the total to account for the divestitures. Gokhale Hrg. Vol. 18 at 35:4-25; PX09351 (Gokhale Report) at App. G. Even giving Defendants credit for these claims (which as noted above are unsubstantiated and overstated), Dr. Israel finds that the competitive harm exceeds this amount. Israel Hrg. Vol. 10 at 57:1-58:13; *see also* Israel Hrg. Vol. 18 at 116:2-6; PX09350 (Israel Report) ¶ 196; PX09375 (Israel Rebuttal Report) ¶ 198.

1008. Dr. Israel also finds that the competitive harm readily exceeds even Dr. Hausman's greater measure of [redacted] in merger-specific, variable costs. Israel Hrg. Vol. 10 at 57:1-58:13, 65:5-16; PX09375 (Israel Rebuttal Report) ¶ 198.

1009. As Dr. Israel explained, [redacted] Israel Hrg. Vol. 10 at 57:1-58:13.

1010. Dr. Israel explains further that, [redacted] Israel Hrg. Vol. 10 at 62:15-65:4; *see also* PX09350 (Israel Report) ¶ 326, Table 19. Stated differently, [redacted] Israel Hrg. Vol. 10 at 62:15-65:4.

1011. Thus, even if one assumes (counter to the evidence) that Dr. Hausman's efficiencies estimate is correct *and* that all those efficiencies were passed through, [redacted] Israel Hrg. Vol. 10 at 65:5-16. Further, even if the model suggested by Dr. Hausman (upward pricing pressure) were used instead of Dr. Israel's model, that model also predicts that the merger would result in significant harm to National Customers that outweighs the efficiencies. Israel Hrg. Vol. 18 at 112:5-113:22.

XII. PRELIMINARY INJUNCTIVE RELIEF IS NECESSARY

1012. The strong public interest in effective enforcement of the antitrust laws weighs heavily in favor of a preliminary injunction here. Without an injunction, purchasers of broadline foodservice distribution services would immediately be at risk of significant anticompetitive harm. If the Court permits Defendants to consummate the merger, the Commission cannot be assured of meaningful relief at the end of the administrative hearing, which begins July 21, 2015. Defendants can claim only private harm from delaying consummation of the merger, which is subordinate to the public interest in preserving competition.

A. <u>Strong Equities Weigh in Favor of an Injunction</u>

1013. The public's interest in the effective enforcement of antitrust laws weighs decidedly in favor of a preliminary injunction. That interest would be compromised if the parties are permitted to consummate the proposed merger. Furthermore, absent a preliminary injunction, the FTC cannot be assured of meaningful relief in its ability to restore the competitive landscape if the merger is found unlawful following the full administrative trial on the merits.

> a. If allowed to consummate the merger, Defendants will simultaneously divest 11 US Foods distribution centers along with related personnel and assets to PFG, which will immediately begin operating and integrating them pursuant to the Transition Services Agreement. PX01144; PX01442.

b. Sysco would have the ability and right to begin integrating US Foods' customers, personnel, and operations into Sysco's operations upon consummating the merger. It also would immediately gain access to the competitively sensitive business information of its head-to-head rival. Once Defendants begin to comingle assets and personnel, it will be exceedingly difficult, if not impossible, to separate the two companies in a way that restores their pre-merger competition.

1014. Therefore, if the merger is consummated, it would likely be impossible to undo the transaction and fully restore the lost competition.

B. Any Countervailing Equities Do Not Outweigh the Public's Interest in Effective Antitrust Enforcement

1015. Defendants are both financially sound. Preliminary injunction would not threaten the operations of either Defendant during the administrative hearing. As US Foods' Mr. Schreibman testified, US Foods will "be a very formidable competitor" with a "very promising future" if the merger does not close. Schreibman (US Foods) Hrg. Vol. 13 at 30:17-25.

1016. Administrative proceedings are well under way, with the hearing set to begin on July 21, 2015. Under the Commission's rules, the Administrative Law Judge must issue an initial decision within 85 days of the close of the hearing, and if an appeal is taken by either party, the Commission must issue its decision within 45 days of the completion of briefing and oral argument. 16 C.F.R. § 3.51(a), 3.52(a)(1) (2010); *see also* 74 Fed. Reg. 1805 (Jan. 13, 2009) (rules adopted "tighter time limits during the adjudicatory process").

PROPOSED CONCLUSIONS OF LAW

I. THE COURT HAS JURISDICTION OVER THIS ACTION

1. This Court has subject matter jurisdiction over this action, which seeks preliminary relief pending administrative adjudication of the underlying merits of whether the proposed merger violates Clayton Act § 7, 15 U.S.C. § 18, and Federal Trade Commission Act ("FTC Act") § 5, 15 U.S.C. § 45. *See* FTC Act §13(b), 15 U.S.C. §53(b).

2. Defendants are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section l of the Clayton Act, 15 U.S.C. § 12. Defendants also are, and at all relevant times have been, engaged in commerce in each of the Plaintiff States.

3. Defendants transact substantial business in the District of Columbia and are subject to personal jurisdiction therein. Venue, therefore, is proper in this district under 28 U.S.C, § 1391(b) and (c) and 15 U.S.C. § 53(b).

II. THE STANDARD FOR A PRELIMINARY INJUNCTION IS MET HERE

4. "'Whenever the Commission has reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act [and/or Section 5 of the FTC Act], the FTC may seek a preliminary injunction to prevent a merger pending the Commission's administrative adjudication of the merger's legality.'" *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1070 (D.D.C. 1997)); *see* 15 U.S.C. § 53(b).

5. A preliminary injunction should issue when "such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *Heinz*, 246 F.3d at 714; *see also* 15 U.S.C. § 53(b); *FTC v.*

Whole Foods Market, Inc., 548 F.3d 1028, 1034-35 (D.C. Cir. 2008). The "district court must balance the likelihood of the FTC's success against the equities, under a sliding scale." *Id.* at 1035, 1041 ("To obtain a preliminary injunction under § 53(b), the FTC need only show a likelihood of success sufficient, using the sliding scale, to balance any equities that might weigh against the injunction.") (citations omitted).

6. To evaluate the "likelihood of success on the merits" under Section 13(b), this Court must "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger '*may be* substantially to lessen competition, or to tend to create a monopoly' in violation of section 7 of the Clayton Act." *Heinz*, 246 F.3d at 714 (quoting 15 U.S.C. § 18) (emphasis added).

7. To establish likelihood of success on the merits at this preliminary injunction stage, the Commission "is not required to *establish* that the proposed merger would in fact violate Section 7 of the Clayton Act." *Heinz*, 246 F.3d at 714 (emphasis in original) (citations omitted). Nor is it "the district court's task . . . 'to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *FTC v. CCC Holdings, Inc.,* 605 F. Supp. 2d 26, 67 (D.D.C. 2009) (quoting *Whole Foods*, 548 F.3d at 1042 (Tatel, J., concurring)); *accord Staples*, 970 F. Supp. at 1071.

8. "The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws." *Heinz*, 246 F.3d at 726 (citing *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991)).

9. As described below, the equities weigh strongly in favor of a preliminary injunction here. Likewise, Plaintiffs have demonstrated a strong likelihood of success on the merits to support relief under Section 13(b).

III. CLAYTON ACT SECTION 7 AND FTC ACT SECTION 5 STANDARDS

10. Plaintiffs' underlying antitrust claims in the administrative trial on the merits are based on Section 7 of the Clayton Act and Section 5 of the FTC Act. The former prohibits mergers "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce . . . in any section of the country." 15 U.S.C. § 18. The latter statute proscribes "[u]nfair methods of competition in or affecting commerce . . . ." 15 U.S.C. § 45(a)(1). An acquisition that violates the Clayton Act, by definition, is a violation of Section 5 of the FTC Act. *See, e.g., FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

11. Section 7 of the Clayton Act was intended to arrest anticompetitive mergers "in their incipiency" and, accordingly, requires a prediction of the merger's likely impact on future competition. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (internal quotation marks omitted). "Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties"—even on the ultimate merits. *Heinz*, 246 F.3d at 713 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (emphasis in original)).

12. For the government to prevail in a Section 7 case, even at the merits stage, "certainty, even a high probability, need not be shown," and "[d]oubts are to be resolved against the transaction." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989); *Brown Shoe*, 370 U.S. at 323.

13. Courts typically assess whether a merger violates Section 7 by determining: (1) the "line of commerce," or relevant product market; (2) the "section of the country," or relevant geographic market; and (3) the merger's probable effect on competition in the relevant product and geographic markets. *United States v. Marine Bancorp. Inc.*, 418 U.S. 602, 618-23 (1974);

Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 422-23 (5th Cir. 2008). However, this "analytical structure does not exhaust the possible ways . . . to demonstrate a likelihood of success on the merits in a preliminary proceeding." *Whole Foods*, 548 F.3d at 1036.

14. Under Section 7 of the Clayton Act, "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Phila. Nat'l Bank*, 374 U.S. at 363; *see FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 52 (D.D.C. 1998) (quoting *Phila. Nat'l Bank*).

15. "By showing that the proposed transaction . . . will lead to undue concentration [for a particular product or service in a particular geography], the Commission establishes a presumption that the transaction will substantially lessen competition." *Staples*, 970 F. Supp. at 1083; *see Heinz*, 246 F.3d at 715.

16. Once the presumption is established, the burden of rebutting the *prima facie* case shifts to Defendants. *See Marine Bancorp.*, 418 U.S. at 631; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 167 (D.D.C. 2000). The "more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725 (citation omitted); *see also United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011).

17. Only if Defendants come forward with evidence sufficient to rebut the presumption does "the burden of producing additional evidence of anticompetitive effect shift[] to the government," which retains the burden of persuasion at all times. *H&R Block,* 833 F. Supp. 2d at 50.

18. "The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened throughout the country, or on the other hand it may prove that competition may be substantially lessened only in one or more sections of the country. In either event a violation of [Section] 7 would be proved." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966).

A. RELEVANT MARKETS TO ANALYZE THE PROPOSED MERGER ARE BROADLINE DISTRIBUTION TO NATIONAL & LOCAL CUSTOMERS

19. In defining relevant markets, courts are guided by the Supreme Court's leading decision in *Brown Shoe*, 370 U.S. 294. Courts also look to the "hypothetical monopolist test" in the *U.S. Department of Justice & Federal Trade Commission's Horizontal Merger Guidelines* (2010) (*Merger Guidelines*) as an analytical method for defining relevant markets. *See H&R Block*, 833 F. Supp. 2d at 51-52.[1]

20. "As the United States Supreme Court observed in [*Brown Shoe*], 'The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').'" *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 595-96 (6th Cir. 1970) (quoting *Brown Shoe*, 370 U.S. at 324). In this case, the areas of effective competition are broadline distribution services to National Customers in a national geographic market and broadline distribution services to local customers in numerous local geographic markets.

B. BROADLINE DISTRIBUTION IS A RELEVANT PRODUCT MARKET

21. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325.

[1] Although not binding, courts often rely on the *Merger Guidelines* as persuasive authority in antitrust cases. *See, e.g., H&R Block*, 833 F. Supp. 2d at 52 n.10; *Staples*, 970 F. Supp. at 1082.

22. Reasonable interchangeability is assessed by "look[ing] at 'whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.'" *H&R Block*, 833 F. Supp. 2d at 51 (quoting *Staples*, 970 F.Supp. at 1074). "Whether one product is reasonably interchangeable for another" depends significantly "on the ease and speed with which customers can substitute it and *the desirability of doing so*." *See Whole Foods*, 548 F.3d at 1037 (emphasis added) (citing *U.S. v. Microsoft, Corp.*, 253 F.3d 34, 53-54 (D.C. Cir. 2001)). "After all, market definition focuses on what products are *reasonably* substitutable; what is reasonable must ultimately be determined by 'settled consumer preference.'" *Whole Foods,* 548 F. 3d at 1039 (emphasis in original) (quoting *Phila. Nat'l Bank*, 374 U.S. at 357).

23. The relevant product market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, *only a limited number of buyers will turn* . . . ." *See Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953) (emphasis added). Functional interchangeability, *i.e.* the fact that some products may superficially (or even under careful examination) appear to be similar in use, does not alone warrant inclusion in the relevant product market. *Staples*, 970 F. Supp. at 1074; *see also H&R Block*, 833 F. Supp. 2d at 54.

24. "A broad market may also contain relevant submarkets, which themselves 'constitute product markets for antitrust purposes.'" *Whole Foods*, 548 F.3d at 1037 (quoting *Brown Shoe*, 370 U.S. at 325); *see also H&R Block*, 833 F. Supp. 2d at 51; *Cardinal Health*, 12 F. Supp. 2d at 47 (quoting *Staples*, 970 F. Supp. at 1075-76).

25. The Supreme Court in *Brown Shoe* set forth a number of "practical indicia" as guides for defining relevant product markets. 384 U.S. at 325. Courts in this Circuit consistently apply

these "practical indicia" in determining relevant antitrust markets. *See, e.g.*, *H&R Block*, 833 F. Supp. 2d at 51; *CCC Holdings*, 605 F. Supp. 2d at 38; *Whole Foods*, 548 F.3d at 1037-38; *Swedish Match*, 131 F. Supp. 2d at 159-60; *Cardinal Health,* 12 F. Supp. 2d at 46-47; *Staples,* 970 F. Supp. at 1075-76.

26. These indicia include "the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices," the existence of special classes of customers who desire particular products and services, "industry or public recognition" of a separate market, "specialized vendors," and how the defendants' own materials portray the "business reality" of the market. *Brown Shoe*, 370 U.S. at 325; *see also United States v. Grinnell Corp.,* 384 U.S. 563, 572 (1966); *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 n.4 (D.C. Cir. 1986).

27. "Practical indicia" serve as "evidentiary proxies for proof of substitutability and cross-elasticities of supply and demand." *H&R Block,* 833 F. Supp. 2d at 51 (citing *Rothery Storage & Van,* 792 F.2d at 218).

28. The Supreme Court has made clear that a cluster of products or services may constitute a relevant market for purposes of Section 7 of the Clayton Act. *See United States v. Conn. Nat'l Bank*, 418 U.S. 656, 664 (1974); *Phila. Nat'l Bank*, 374 U.S. at 356. For example, in *Connecticut National Bank*, the Court held that the cluster of products and services provided by commercial banks constituted a distinct relevant market. 418 U.S. at 664. Notably, the Court rejected an argument that, because savings banks provided some of the same products and services offered by commercial banks, savings banks should be included in the same relevant market as commercial banks. The Court stated:

> *Philadelphia Bank* emphasized that it is the *cluster* of products and services that full-service banks offer that as a matter of trade reality makes commercial banking a distinct line of commerce. Commercial banks are the only financial institutions in which a wide variety of financial products and services – some unique to commercial banking and others not – are gathered together in one place. The clustering of financial products and services in banks facilitates convenient access to them for all banking customers . . . . [C]ommercial banks in Connecticut offer a 'cluster of products and services' that their savings bank counterparts do not. *Id.* at 664 (quotations omitted) (emphasis in original).

29. A form of distribution is a cluster of products and services that may constitute a relevant product market. *See, e.g., Cardinal Health*, 12 F. Supp. 2d at 45, 47 ("wholesale distribution of prescription drugs"); *Staples*, 970 F. Supp. at 1080 ("sale of consumable office supplies through office supply superstores"); *accord Whole Foods*, 548 F.3d at 1041 (premium natural organic supermarkets).

30. "'[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.'" *Cardinal Health*, 12 F. Supp. 2d at 47 (quoting *Staples*, 970 F. Supp. at 1075-76); *see also Whole Foods*, 548 F.3d at 1040 ("But the fact that PNOS and ordinary supermarkets 'are direct competitors in some submarkets . . . is not the end of the inquiry[.]'") (citation omitted); *Swedish Match*, 131 F. Supp. 2d at 164-65 (finding that while moist snuff competed with the product at issue – loose leaf snuff – it was not in the relevant product market because it was "incapable of inducing substitution sufficient enough to render loose leaf price increases unprofitable[.]"). Nor is the fact that customers may occasionally substitute one product or service for another sufficient to justify grouping those products or services in the same relevant market. *See* Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 565b (3rd and 4th Ed. CCH Incorporated 2010-2014) [hereinafter, *Antitrust Law*] ("[I]t would be improper to group complementary goods into the same relevant market just because they occasionally substitute for one another. Substitution must be effective to hold the

primary good to a price near its costs[.]").

31. In *Cardinal Health*, the Court blocked two mergers between the only four national drug wholesalers after rejecting the defendant-wholesalers' argument that the product market should be defined broadly to include all possible forms of prescription-drug distribution, including those already used to some extent by customers. While recognizing "[a]ll the forms of distribution must, at some level, compete with each other[,]" the Court found that drug wholesaling services were not interchangeable with other forms of distribution and thus constituted a relevant product market. *Cardinal Health,*12 F. Supp. 2d at 47. Even though customers might use alternative channels for some percentage of their drug purchases, drug wholesaling services represented a distinct bundle of goods and services that was not reasonably interchangeable with those alternative channels. *See id*. at 47-49.

32. Much like broadline distribution services here do with respect to food, the distribution services in *Cardinal Health* "provide[d] customers with an efficient way to obtain prescription drugs[,]" including "centralized warehousing, delivery, and billing services" that enabled customers to avoid "dealing with a large number of vendors, and negotiating numerous transactions[,]" as well as additional value-added services that other distribution channels did not provide. *Id*. at 47.

33. Likewise, in *Staples,* this Court observed that, while the office supply products sold by the merging parties were "undeniably the same no matter who sells them, and no one denies that many different types of retailers sell these products[,]" the office supply superstores channel nevertheless comprised a distinct relevant market because the "unique combination of size, selection, depth and breadth of inventory . . . distinguishes them from other retailers." 970 F. Supp. at 1075, 1079. Here, broadliners' "unique combination of size, selection, depth and

breadth of inventory . . . distinguishes" them from other foodservice distributors. PFF II(A)

34. Broadline foodservice distribution constitutes a distinct relevant product market in which to assess the competitive effects of the proposed merger. Broadline distribution offers customers a distinct cluster of products and services: flexible, next-day delivery of a wide range of branded and private label products, along with value-added services such as menu planning, nutritional analysis, and order tracking. PFF II(A)(1)-(A)(4). The fact that each customer may purchase a different basket of goods and services does not require defining separate markets for each product and service, particularly where such "distinctions would be 'impractical' and 'unwarranted.'" *See Brown Shoe*, 370 U.S. at 327-28 (finding relevant product market included men's, women's and children's shoes even if they are not interchangeable); *see also FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281 at *9 (N.D. Ohio 2011) ("[general acute care services] are a broad 'cluster market' of inpatient surgical, medical, and supporting services provided in a hospital setting to commercially-insured patients").

35. The substantial evidence showing that broadline distributors, including Defendants, determine their pricing for broadline services based on competition from other broadliners, *see* PFF II(D), further bolsters the conclusion that broadline distribution is a separate product market. *H&R Block*, 833 F. Supp. 2d at 53 (development of "pricing and business strategy with [a particular] market and those competitors in mind" is "strong evidence" of the relevant product market); *see also Swedish Match*, 131 F. Supp. 2d at 165 ("The Commission amassed evidence showing that loose leaf pricing is determined upon the basis of competition with other loose leaf products . . . .").

36. Systems distribution is not reasonably interchangeable with broadline distribution. Among other distinctions, systems distributors carry significantly fewer SKUs (typically limited

to restaurant-proprietary products), provide significantly fewer value-added services and sales support, have less flexible and frequent delivery schedules, have larger drop sizes, longer average delivery distances, and serve a more limited set of customers (principally fast-food and quick-serve restaurants) than broadline distributors. PFF II(E)(1); *see Staples*, 970 F. Supp. at 1078 (treating differences in suppliers' SKU counts and customer bases as evidence they are not in the same product market). Sysco, like PFG, maintains both a broadline and systems distribution business, but operates each through a "separate business unit," further supporting the conclusion that systems and broadline distribution are two products in separate relevant markets. PFF ¶¶ 65-66; *see H&R Block*, 833 F. Supp. 2d at 56 ("HRB's DDIY and assisted businesses are run as separate business units.").

37. Likewise, specialty distribution is not reasonably interchangeable with broadline distribution. PFF II(E)(2). Unlike broadline distributors, specialty distributors do not carry a full-line of products, but instead focus on one or a few specific product categories, such as seafood or produce. PFF II(E)(2)(c); *see Conn. Nat'l Bank*, 418 U.S. at 664 (rejecting argument that, because savings banks provided some of the same products and services offered by commercial banks, they are in same market: "commercial banks in Connecticut offer a cluster of products and services that their savings bank counterparts do not") (quotations omitted); *accord Whole Foods*, 548 F.3d at 1040 (noting that, even if PNOS and ordinary supermarkets "'are direct competitors in some submarkets,'" this does not mean they are in the same product market) (quoting *Conn. Nat'l Bank*, 418 U.S. at 664 n.3).

38. Nor are "cash-and-carry" retailers and "club" stores functionally interchangeable, much less reasonably substitutable, with broadline distribution. PFF II(E)(3). Cash-and-carry and club stores are a self-supply option that shifts the critical task of distribution to the customer.

PFF ¶ 151. "[C]ourts in antitrust cases frequently exclude similar 'self-supply' substitutes from relevant product markets." *H&R Block*, 833 F. Supp. 2d at 57-58; *accord CCC Holdings*, 605 F. Supp. 2d at 41-42. The overwhelming weight of evidence in the record shows that most, if not virtually all, customers of broadline distribution do not view cash-and-carry or club stores as a viable alternative to the services they receive from broadliners. *See* PFF II(E)(3)(d).

39. Application of the *Merger Guidelines* yields the same conclusion of a distinct broadline market. The *Merger Guidelines* explain that relevant product market definition focuses on "demand substitution factors, *i.e.*, on *customers'* ability and *willingness* to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service." *Merger Guidelines* §4 (emphasis added).

40. The *Merger Guidelines*' market definition test asks whether a hypothetical monopolist could profitably impose "a small but significant and nontransitory increase in price" (SSNIP), typically five percent, over particular products or services (if so, that is a relevant market), or whether customers switching to alternative products or services would make such a price increase unprofitable (meaning the purported market is too narrow). *See Merger Guidelines* §§ 4.1.1-4.1.3; s*ee also H&R Block*, 833 F. Supp. 2d at 55 ("The key question for the Court is whether DDIY and assisted products are sufficiently close substitutes *to constrain any anticompetitive DDIY pricing* after the proposed merger.") (emphasis added). The relevant inquiry when determining whether a product is properly included in the relevant product market is not whether customers could in theory switch to another product in the face of a price increase but rather whether enough customers ***would*** switch away from the product at issue in response to a SSNIP. *H&R Block*, 833 F. Supp. 2d at 52.

41. As Dr. Israel testified at the hearing, broadline distribution is a relevant product market because it is a cluster of products and services over which a hypothetical broadline distributor monopolist could profitably impose at least a SSNIP. PFF II(F). Customers of broadline distribution – whether National Customers or local customers – would be unlikely to substitute alternatives to such an extent that a SSNIP would be unprofitable. PFF ¶ 196-97; *see also* PFF ¶ 14.

42. Defendants' attempt to include all possible alternatives "in the relevant product market. . .violates the principle that the relevant product market should ordinarily be defined as the *smallest* product market that will satisfy the hypothetical monopolist test." *See H&R Block*, 833 F. Supp. 2d. at 59 (citing *Merger Guidelines* §4.1.1) (emphasis added).

C. BROADLINE DISTRIBUTION TO CERTAIN CLASSES OF CUSTOMERS ARE RELEVANT MARKETS

43. *Brown Shoe* and its progeny recognize that it is often appropriate to define separate markets by customer class. *See* 370 U.S. at 325 ("distinct customers"); *Whole Foods*, 548 F.3d at 1037 (defining PNOS market based on "core customers" of PNOS); *L.G. Balfour, Inc. v. FTC*, 442 F.2d 1, 9 (7th Cir. 1971) (defining relevant market as "national college fraternity insignia-bearing goods"); *Cardinal Health*, 12 F. Supp. 2d at 48 (analyzing mergers' impact on hospitals, independent pharmacies, and retail chains); *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 933-35 (6th Cir. 2005) (holding that "a reasonable trier of fact could find that leisure or price-sensitive passengers represent a separate and distinct market" in the overall air passenger travel market); *Ansell Inc. v. Schmid Labs., Inc.*, 757 F. Supp. 467, 471-75 (D.N.J.) (finding "economically significant submarket" of "branded latex condoms [sold] to retail distributors," based on analysis of *Brown Shoe* factors showing significant differences between retailers and other purchasers), *aff'd*, 941 F.2d 1200 (3d Cir. 1991).

44. Here, it is appropriate to analyze the proposed merger's effects on National Customers separately from its effects on local customers. Whether one views the issue through the lens of product market or geographic market, the sale of broadline distribution services to National Customers is a distinct market under both *Brown Shoe* and the *Merger Guidelines,* separate from the market for the sale of broadline distribution services to local customers. Defendants' expert, Dr. Hausman, readily acknowledged that there is a ***national*** relevant geographic market for customers other than local customers, for which he agrees with Dr. Bresnahan that the geographic markets are local. PFF ¶ 311. By Defendants' expert's own logic, therefore, the competitive conditions and options for local customers differ from National Customers.

45. Industry participants, including Defendants themselves, widely recognize National Customers as distinct from local, or "street," customers. *See* PFF III(A)(1). *See Brown Shoe*, 370 U.S. at 325; *L.G. Balfour*, 442 F.2d at 9 (affirming finding that "national college fraternity insignia-bearing goods" constituted a relevant market where, among other things, industry participants testified that they considered national college fraternity jewelry as a separate and distinct sales market). Sysco, US Foods, and PFG all have dedicated sales forces at their corporate headquarters whose specific function is to call on National Customers, with separate sales forces dedicated to local customers. *See* PFF ¶ 215. Defendants market themselves externally, and refer to themselves internally, as national broadline distributors. *See* PFF III(A)(1).

46. The formation of specialized vendors like DMA, MUG, and smaller consortia of regional broadliners, whose express purpose is to compete for and service geographically dispersed customers, *see* PFF ¶¶ 237-39, highlights the reality that National Customers are

distinct from local customers, especially in their need for efficient broadline distribution services nationally or across multiple regions. *See Brown Shoe*, 370 U.S. at 325 ("specialized vendors" for particular customers support distinct relevant markets); *Balfour*, 442 F.2d at 9 (the existence of several firms devoted solely to the sale of insignia to national college fraternities supported separate national market).

47. National Customers also have distinct pricing compared to local broadline customers, including in terms of how prices are negotiated (*i.e.,* centrally negotiated multi-year contracts for National Customers versus weekly pricing, typically non-contracted and through a local sales representative, for local customers). *See* PFF III(A)(3)(b); *Brown Shoe*, 370 U.S. at 325 ("distinct prices" are an indicia of separate markets); *Whole Foods*, 548 F.3d at 1039 (same).

48. Application of the *Merger Guidelines* further demonstrates that the effects of the proposed merger should be analyzed separately for National Customers. The *Merger Guidelines* provide that, where, as here, suppliers can readily identify and target a subset of customers that differ in their likelihood of switching to alternatives in response to a SSNIP, *i.e.,* price discriminate, it may be appropriate for the relevant market to be "defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP." *Merger Guidelines* §4.1.4.[2]

49. A hypothetical monopolist of broadline distribution could price-discriminate based on observable customer characteristics—in this case, type of customer (*e.g.*, healthcare GPO), customer location, the geographic dispersion of those locations, and customer purchasing requirements. *See* PFF ¶¶ 209-10, 263, 482. Indeed, Defendants are familiar with customers'

[2] Price discrimination is typically feasible when, as is the case here, firms are able to impose "differential pricing" on customers and where "limited arbitrage" is present. *Merger Guidelines* §3; *see also* Areeda & Hovenkamp Antitrust Law ¶ 533d ("Sellers may be able to discriminate against buyers who have fewer alternatives or for whom the product performs a more valuable function.").

purchasing requirements from years of providing service or competing for their business (and in some cases explicit RFP requirements for national coverage). PFF ¶¶ 209-10, 482. Where price discrimination is feasible, the relevant inquiry is whether it would be profitable for that hypothetical monopolist to raise prices by a SSNIP to a group of customers, rather than all customers. *Merger Guidelines* § 4.1.4. The *Merger Guidelines*, therefore, bolster the conclusion under the *Brown Shoe* factors that it is appropriate to analyze the competitive effects of the proposed merger separately for National Customers and local customers of broadline distribution services. *See id.*[3]

D. THE RELEVANT GEOGRAPHIC MARKETS

50. "The 'relevant geographic market' identifies the geographic area in which the defendants compete in marketing their products or services." *H&R Block*, 833 F. Supp. 2d at 50 n.7 (quoting *CCC Holdings*, 605 F. Supp. 2d at 37); *see also Cardinal Health*, 12 F. Supp. 2d at 49; *Merger Guidelines* § 4.2.

51. The relevant geographic market must "correspond to the commercial realities of the industry" as determined by a "pragmatic, factual approach." *Brown Shoe*, 370 U.S. at 336 (internal quotation marks omitted).

52. Relevant geographic markets "need not . . . be defined with scientific precision," *Conn. Nat'l Bank*, 418 U.S. at 669, or by precise "metes and bounds," *Pabst Brewing*, 384 U.S. at 549; *see also Phila. Nat'l Bank*, 374 U.S. at 361 (difficulty in defining local markets at times requires "workable compromise"). The court, however, must understand "in which part of the country competition is threatened." *Cardinal Health*, 12 F. Supp. 2d at 49; *see also Conn. Nat'l*

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[3] Although courts often use the term "submarket," which has caused some confusion, ultimately, "the relevant concern [is whether] a significant group of customers exist[] who would rather pay a higher price than substitute with alternatives, all of which they f[i]nd less satisfactory for one reason or another." Areeda & Hovenkamp, *Antitrust Law* ¶ 913.

Bank, 418 U.S. at 669-70 ("the Government's role [is] to come forward with evidence delineating the rough approximation of localized banking markets").

1. The Relevant Geographic Market for National Customers Is National

53. For National Customers, the relevant geographic market is national. Defendants' expert, Dr. Hausman, effectively admitted as much at the hearing, testifying that, for customers other than local customers, the relevant geographic market is national. PFF ¶ 311.

54. In *United States v. Grinnell*, 384 U.S. 563, 575 (1966), the Court found a national geographic market for a cluster market comprised of protective products and services offered by central stations.

55. The factors that led the Supreme Court to find a national geographic market in *Grinnell* are present in this case. As in *Grinnell*, Defendants' individual distribution centers may be "in a sense local," 384 U.S. at 575, in that they typically serve areas which are within a radius of about 100 to 150 miles, but the presence of other factors knits these local units together to constitute a national market for antitrust purposes. The record evidence amply demonstrates that, as in *Grinnell*, Defendants plan on a national level, including by maintaining "national account" teams dedicated to serving National Customers, PFF ¶215, 306(a); they deal with multistate businesses on the basis of nationwide contracts, PFF ¶ 306(b); their contracts with customers, like those of other broadliners that may service part of a National Customer's business, cover activities in many states, PFF ¶ 306(b); and the pricing, service, and other terms contained in those contracts apply across regions, though, as in *Grinnell*, such terms may be varied to meet local conditions, PFF ¶ 306(c). *See id*. at 575-76; s*ee also Cardinal Health*, 12 F. Supp. 2d at 50 (finding a national market where "many GPOs negotiate contracts with several

wholesalers, making the same prices available throughout the country to all of their members—local, regional, or national") (citing *Grinnell*, 384 U.S. at 575).

56. A national geographic market for National Customers also "reflect[s] the reality of the way" in which Defendants, as well as DMA and similar consortia, "built and conduct their business." *See Grinnell*, 384 U.S. at 576; *see also In re Pool Prods. Distrib. Antitrust Litig.*, 940 F. Supp. 2d 367, 381-82 (E.D. La. 2013) (denying motion to dismiss where plaintiffs had sufficiently claimed a national market based on the *Grinnell* factors).

57. The Defendants and other industry participants recognize the existence of a "national market." PFF III(A)(2), ¶ 307. *See Brown Shoe*, 370 U.S. at 325 (industry recognition is a "practical indicia").

2. Numerous Local Areas Are Relevant Geographic Markets

58. For local customers purchasing broadline distribution services, the relevant geographic markets are local.

59. The Supreme Court has described the relevant geographic market as "the region 'in which the seller operates, and to which the purchaser can practicably turn for supplies.'" *Cardinal Health,* 12 F. Supp. 2d at 49 (quoting *Tampa Elec. Co. v. Nashville Coal Co*., 365 U.S. 320, 327 (1961)); *see also U.S. Steel Corp.*, 426 F.2d at 596.

60. "A common method to determine the relevant geographic market . . . is to find whether a hypothetical monopolist could impose a 'small but significant non-transitory increase in price' ('SSNIP') in the proposed market." *St. Alphonsus Med. Ctr. v. St Luke's Health Sys., Ltd.* 778 F.3d 775, 784 (9th Cir. 2015) (quoting *Theme Promotions v. News Am. Mktg. FSI*, 546 F.3d 991, 1002 (9th Cir. 2008)). "If enough customers would respond to a SSNIP by purchasing the product from outside the proposed geographic market, making the SSNIP unprofitable, the proposed market definition is too narrow." *Id.* (citing *Theme Promotions,* 546 F.3d at 1002); *see*

also In re Se. Milk Antitrust Litig., 739 F.3d 262, 277-78 (6th Cir. 2014) (describing relevant geographic market as one where "buyers . . . respond to a SSNIP by purchasing regardless of the increase"); *Merger Guidelines* § 4.2.2 (explaining that a "region forms a relevant geographic market if [a] price increase would not be defeated by substitution away from the relevant product or by arbitrage, e.g., customers in the region travelling outside it to purchase the relevant product").

61. Here, Dr. Israel "buil[t] up the candidate market starting from each party's locations, then adding the areas in which a customer could find an alternative supplier until [he] reach[ed] a geographic market over which a hypothetical broadline monopolist could impose a SSNIP." PX09350 (Israel Report) ¶ 97. The resulting geographic markets are the overlapping draw areas of Sysco and US Foods in each locality (*i.e.*, the distance within which the distribution center makes 75% of its shipments to local broadline customers, weighted by revenue). PFF ¶¶ 337-340; PX09350 (Israel Report) ¶ 221. These overlapping draw areas are the "geographic area[s] in which the defendants compete in marketing their products and services," *H&R Block*, 833 F. Supp. 2d at 50 n.7, and "in which part of the country competition is threatened." *Cardinal Health*, 12 F. Supp. 2d at 49.

62. Customers demand and receive broadline distribution services from proximate distribution centers because more distant distribution is generally more costly and lower quality than distribution from a closer facility. PFF ¶ 326-28. Consequently, distance appropriately identifies the set of distributors to whom a local broadline customer could "practically turn" in response to a price increase. *See, e.g.*, *Cardinal Health,* 12 F. Supp. 2d at 49 (quoting *Tampa Elec.*, 365 U.S. at 327); *see also St. Luke's Health Sys.*, 778 F.3d at 784 (finding that a

hypothetical primary-care-physician monopolist in the local area could profitably impose a SSNIP on insurers because residents "strongly prefer access to local PCPs").

63. Dr. Israel's local geographic markets, and the market share he estimates for those markets, properly account for competitors that may be located *outside* the local market boundaries by *including* all broadline distributors who are alternatives for customers within the market (*i.e.*, all the broadline distributors that are within a circle around the customer, with radius equal to the CBSA-specific 75% draw area). PFF ¶ 338. *Compare Cardinal Health*, 12 F. Supp. 2d at 51 (suggesting that the local market share estimates were "not entirely accurate" because they did not account for "sales made from distribution centers outside a region to customers located within that region"), *with Merger Guidelines* § 4.2.2 ("Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market.").

64. The existence of some local customers that may use even more distant distribution centers (*e.g.*, systems customers receiving systems distribution service) does not suggest that local customers would turn to such distant distributors in response to a SSNIP and that the geographic markets should be broader. For example, in *St. Luke's Health System*, the fact that one-third of the residents in the relevant local market traveled outside the local market to obtain the relevant service did not prove that a significant number of residents would do so in response to a SSNIP—there were specific reasons why those residents obtained the relevant service outside the geographic market, and therefore, "the [district] court reasonably found this statistic not determinative [of a broader geographic market]." 778 F.3d at 785; s*ee also Cardinal Health*, 12 F. Supp. 2d at 51 (concluding that "[d]espite the statistical inaccuracies [including failing to account for sales made from distribution centers outside a region to customers located with that

region] . . . certain regional markets are distinct enough to realize the lack of competition that will result should these mergers be approved”).

65. The local geographic markets defined by Plaintiffs are also generally consistent with how industry participants, including Defendants, view local geographic markets in the ordinary course of business, and are consistent with the areas in which local distribution centers draw the majority of revenue from customers. PFF ¶¶ 326-28.

66. Defendants have not offered an alternative method to define local geographic markets.

67. In sum, Dr. Israel explained that the customers located within these overlapping draw areas are the customers “for which both Sysco and USF distribution centers are among the competitive alternatives, [and which] can be easily identified and targeted post-merger.” PX09350 (Israel Report) ¶ 219. Thus, consistent with *Philadelphia National Bank*, the local geographic markets in this case constitute the locations “where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.” 374 U.S. at 357 (citation omitted).

E. THE ACQUISITION IS PRESUMPTIVELY UNLAWFUL BASED ON MARKET SHARES AND MARKET CONCENTRATION THRESHOLDS

68. A merger that significantly increases market shares and concentration to high levels creates a presumption that the merger is illegal under Section 7 of the Clayton Act. *Phila. Nat’l Bank*, 374 U.S. at 363; *Heinz*, 246 F.3d at 715. In *Philadelphia National Bank*, the Supreme Court enjoined a merger resulting in a combined share of “at least 30%.” *Phila. Nat’l Bank*, 374 U.S. at 364 (“Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.”).

69. Plaintiffs may rely on "the closest available approximation" of market shares when calculating concentration levels. *See FTC v. PPG Industries*, 798 F. 2d 1500, 1505 (D.C. Cir. 1986) (affirming finding of a highly concentrated market based on market shares in a related market where shares were unavailable and noting that "the fact that there appear[ed] to be the only three fully capable firms in that market indicates" the market is highly concentrated); *see also H&R Block*, 833 F. Supp. 2d at 72 (a "reliable, reasonable, close approximation of relevant market share data is sufficient"); *FTC v. PPG Indus., Inc.*, 628 F. Supp. 881, 884 n.6 (D.D.C. 1986) ("In the compilation of [market share] statistics 'precision in detail is less important than the accuracy of the broad picture presented.'") (quoting *Brown Shoe*, 370 U.S. at 342 n.69), *rev'd in part on other grounds*, 798 F.2d 1500 (D.C. Cir. 1986); *accord United States v. Cont'l Can Co.*, 378 U.S. 441, 459 n.10 (1964); *United States v. Bazaarvoice, Inc.*, No. 13-cv-133, 2014 U.S. Dist. LEXIS 3284, at *237 (N.D. Cal. Jan. 8, 2014) ("The Court recognizes that the above measures do not perfectly capture the combined entity's share of the R&R market. Nonetheless, each of the measures reveals the same basic market structure: that Bazaarvoice and PowerReviews are the two dominant providers of R&R and they have a combined market share in excess of 50 percent.").

70. Courts employ a statistical measure called the Herfindahl-Hirschman Index (HHI) to measure market concentration. *Heinz,* 246 F.3d at 716; *H&R Block*, 833 F. Supp. 2d at 71. This index calculates market concentration by summing the squares of the individual market share of each market participant. *See Cardinal Health,* 12 F. Supp. 2d at 53.

71. Under the *Merger Guidelines*, a merger is presumptively anticompetitive if it increases the HHI by more than 200 points and results in a post-merger HHI exceeding 2,500. *Merger Guidelines* § 5.3; *H&R Block*, 833 F. Supp. 2d at 71-72; *see Heinz*, 246 F.3d at 716-719

(finding presumption where post-merger HHI was 5285 and HHI increase was 510); *Staples, Inc.*, 970 F. Supp. 1066 (heavy reliance on *Merger Guidelines*' presumption).

72. In the national market, Sysco's acquisition of US Foods, even accounting for the proposed divestiture to PFG, exceeds these thresholds by a wide margin. PFF ¶ 381. The post-merger HHI would be 5,119, representing an increase of 1,966 points from the already highly concentrated pre-merger levels. PFF ¶ 381. To ensure that his market share and HHI calculations were robust, Dr. Israel used at least seven different methodologies to calculate market shares and HHIs for the national market, and each yielded shares and concentration levels that far surpass those required for a presumption of harm under *Philadelphia National Bank* and the *Merger Guidelines*. PFF ¶¶ 375, 381.

73. Likewise, in each of the 32 local markets identified in Appendix A to the Complaint, the proposed merger would substantially exceed the thresholds necessary to establish a presumption of harm in these markets. PFF ¶ 389. Even assuming the divestiture of US Foods' distribution centers to PFG in eight of these local markets results in no change in market share or concentration in those eight markets, Defendants' proposed merger is still presumptively unlawful in 24 separate local markets. PFF VIII(B)(4).

74. Notably, if one were to accept Defendants' argument that there is no separate market for National Customers, the market share and concentration levels in the local markets at issue would be even higher than if National Customers and local customers were analyzed separately. PFF ¶ 397. This is because, in calculating local market shares, Dr. Israel subtracted out the parties' and other broadliners' sales to National Customers. Therefore, regardless of how the relevant markets are defined, the merger is presumptively unlawful.

F. THE ACQUISITION WOULD SUBSTANTIALLY LESSEN COMPETITION BY ELIMINATING SIGNIFICANT HEAD-TO-HEAD COMPETITION BETWEEN SYSCO AND US FOODS

75. Once market shares have established a presumption of illegality, the burden shifts to Defendants to rebut the presumption by "produc[ing] evidence that 'shows that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)). The "ultimate burden of persuasion . . . remains with the [plaintiff] at all times." *Heinz*, 246 F.3d at 715.

76. The government also may demonstrate a likelihood of success on the merits by producing evidence, in addition to or apart from market concentration, to show that a proposed acquisition would likely result in a substantial lessening of competition. *See Whole Foods*, 548 F.3d at 1036 (establishing a presumption of illegality based on undue concentration "does not exhaust the possible ways to prove a § 7 violation on the merits").

77. Here, Plaintiffs have demonstrated that the proposed merger likely would reduce competition for both National Customers and local customers by eliminating important and intense head-to-head competition between the merging parties that has directly benefitted customers through lower prices and better service.

78. "The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition." *Merger Guidelines* § 6. This type of anticompetitive effect is referred to as a "unilateral effect," as it does not depend on a coordinated response by other firms in the market. *See H&R Block*, 833 F. Supp. 2d at 81 (citing *Swedish Match*, 131 F. Supp. 2d at 169) ("A merger is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms.").

79. Evaluating "[t]he extent of direct competition between the products sold by the merging parties is central" to the unilateral effects analysis. *H&R Block*, 833 F. Supp. 2d at 81 (quoting *Merger Guidelines* § 6.1); *Staples*, 970 F. Supp. at 1083 (finding that "the elimination of a particularly aggressive competitor in a highly concentrated market . . . is certainly an important consideration when analyzing possible anti-competitive effects").

80. The merging parties' ordinary course documents are particularly informative in assessing the significance of direct, head-to-head competition between the merging parties. *See, e.g.*, *H&R Block*, 833 F. Supp. 2d at 81-82 (relying on defendants' ordinary course documents to conclude merging parties are head-to-head competitors).

81. Courts in this Circuit repeatedly have held that transactions that would eliminate significant head-to-head competition are likely to result in anticompetitive unilateral effects. *See*, *e.g.*, *Swedish Match*, 131 F. Supp. 2d at 169 ("[A] unilateral price increase . . . is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors."); *H&R Block*, 833 F. Supp. 2d at 88-89 (finding unilateral effects likely in merger between second and third largest firms in the relevant market); *Staples*, 970 F. Supp. at 1083 (finding unilateral anticompetitive effects when the transaction "would eliminate significant head-to-head competition" between the merging parties).

82. "A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations." *Merger Guidelines* § 6.2. The elimination of this competition "alone can significantly enhance the ability and incentive of the merged entity to obtain a more favorable result to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger." *Id*.

83. The risk of anticompetitive effects is magnified when the merging firms, as is the case with Sysco and US Foods, are particularly close competitors. *See id.* ("[Anticompetitive unilateral] effects are likely to be greater, the greater the advantage the runner-up merging firm has over other suppliers in meeting customers' needs."). Indeed, unilateral effects are more likely to result when the products or services of the two merging parties "are relatively similar to one another" and "more different from the products [or services] . . . [offered] by most other firms in the market," and when other firms in the market "are unable readily to . . . make [their products or services] more nearly like" those of the merging parties. Areeda & Hovenkamp, *Antitrust Law* ¶ 914f.

84. "Anticompetitive unilateral effects in [bargaining or auction] settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business." *Merger Guidelines* §6.2. As Dr. Israel's analysis of the Defendants' RFP data shows, Sysco and US Foods are each the runner-up when the other wins the business with significantly more frequency than with any other competitor. PFF VI(A)(7).

85. Even though they are here, merging parties need not be each other's *closest* competitors for a merger to result in significant unilateral anticompetitive effects. *H&R Block*, 833 F. Supp. 2d at 83-84 (finding unilateral effects where the merging firms were "each other's *second* closest rivals" and the closest competitor to both firms remained independent) (emphasis added). There only needs to be substantial head-to-head competition or diversion for unilateral effects to result. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 914a (explaining that "unilateral effects theories do not require that . . . the two merging firms be the closest possible substitutes

for one another," just that they "be regarded by *customers* as reasonably close substitutes") (emphasis added).

86. A firm's ability to target particular customers for price increases is also relevant to the unilateral effects analysis. *See Merger Guidelines* § 6.2. "[W]hen the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers; when sellers are less well informed, such effects are more apt to be spread over a broader class of buyers." *Id*. Here, Defendants are familiar with customers' purchasing requirements from years of providing service or competing for their business (and sometimes from explicit RFP requirements for national coverage), positioning them to home in on such customers and negotiate customer-specific prices (that is, price discriminate) accordingly. *See* PFF ¶ 209-10.

87. Demonstrating a likelihood of unilateral effects does not require a showing that the defendants would enjoy any threshold level of market share. *See H&R Block*, 833 F. Supp. at 84-85 (finding unilateral effects while "declin[ing] the defendants' invitation, in reliance on *Oracle*, to impose a market share threshold for proving a unilateral effects claim"). Indeed, "[a]s a matter of applied economics, evaluation of unilateral effects does not require a market definition in the traditional sense at all." *H&R Block*, 833 F. Supp. 2d at 84 n.35 (quoting Areeda & Hovenkamp, *Antitrust Law* ¶ 913a); *Whole Foods*, 548 F.3d at 1036 n.1 (explaining that in cases involving unilateral effects "it might not be necessary to understand the market definition to conclude a preliminary injunction should issue").

88. The existence of alternatives to the merging parties does not undermine the likelihood of unilateral anticompetitive effects. *See H&R Block*, 833 F. Supp. 2d at 72 (finding likely anticompetitive unilateral effects where combined firm would have 28.4% market share); *FTC v.*

OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1083 (N.D. Ill. 2012) (holding that the FTC is not "required to show that all competition will be eliminated as the result of a merger in order to obtain an injunction . . . .").

89. The likely anticompetitive effects do not need to affect *all* customers for a transaction to violate Section 7 of the Clayton Act. *See Whole Foods*, 548 F. 3d at 1041. This is particularly true in cases such as this where pricing and terms are negotiated with each customer on an individual basis. *See Merger Guidelines* §6.2.

90. Where a merger "eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage," the merger is likely to cause competitive harm. *Merger Guidelines* § 8.

91. As this Court explained in *Staples* and *Cardinal Health*, anticompetitive effects are present where, as Plaintiffs have alleged and shown here, *see* Pls. Mem. In Support at 1, prices would be "higher after the merger than they would be absent the merger." *See Staples*, 970 F. Supp. at 1082 n.14 ("This does not necessarily mean that prices would rise from the levels they are now. Instead, according to the Commission, prices would simply not decrease as much as they would have on their own absent the merger."); *Cardinal Health*, 12 F. Supp. 2d at 52 n.11 ("The real anti-competitive concern before this Court is whether the mergers would forcibly slow down the otherwise steady decline in prices.").

92. Likewise, anticompetitive effects manifest in a number of ways other than higher prices compared to prices without the merger. *See Merger Guidelines* §1. The merged entity would possess a number of levers to harm customers without changing its distribution fee, or markup, such as by eliminating discounts, rebates, incentives, and "signing bonuses." *See* PFF VI(A)(1), ¶ 523.

93. Anticompetitive effects can also include "non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation." *Merger Guidelines* § 1. In particular, unilateral anticompetitive effects can arise from reductions in product variety due to loss of competitive incentives. *Merger Guidelines* § 6.4 ("If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product."). Such non-price competitive harm is likely here.

1. The Merger Likely Would Substantially Lessen Competition in the Market for National Customers

94. Evidence from a variety of sources—documents, customers, other distributors, and empirical data—demonstrates that Sysco and US Foods engage in significant head-to-head competition for National Customers. PFF VI(A). Indeed, Defendants' own expert, Dr. Hausman, acknowledged at the hearing that US Foods serves as a "strong price constraint on Sysco," and that Sysco and US Foods are "important competitive constraints on one another." PFF ¶ 57. The elimination of the significant and intense head-to-head competition between Sysco and US Foods for National Customers is likely to lessen competition substantially.

2. The Merger Likely Would Substantially Lessen Competition in Numerous Local Markets

95. The merger also would eliminate important, direct competition to local customers in at least the 24 local markets identified above. The evidence demonstrates that Sysco and US Foods engage in fierce head-to-head competition for local customers on a daily basis. PFF V(I)(b). This head-to-head competition between the largest and most competitively significant broadliners has yielded substantial benefits to local customers in the form of lower prices,

signing bonuses, and better services. The merger would eliminate or significantly reduce these benefits because the merger is likely to lessen competition substantially.

G. DEFENDANTS CANNOT REBUT THE STRONG PRESUMPTION OF ILLEGALITY OR PLAINTIFFS' SHOWING OF LIKELY COMPETITIVE HARM

96. Defendants have not produced evidence sufficient to rebut the presumption of harm likely to result from the proposed merger.

97. Defendants bear a heavy burden to rebut the presumption here, given the strength of Plaintiffs' *prima facie* case. *See H&R Block*, 833 F. Supp. 2d at 72 (the stronger the *prima facie* case, the more evidence defendants must present to rebut the established presumption).

98. While evidence of anticompetitive intent may be probative of the likely competitive effects of a merger, the absence of anticompetitive intent is not a defense to an otherwise anticompetitive merger and cannot rebut a *prima facie* case. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 964a ("evidence of neutral or procompetitive intent cannot be taken to rebut a prima facie case based on market shares"). Indeed, even where a merger is motivated by "reasons other than contemplated anticompetitive effect," evidence of such motives is "quite irrelevant." *Id.* ¶ 964b.

1. Remaining Competitors Cannot Constrain the Merged Firm

99. To evaluate Defendants' contention that the remaining firms would effectively constrain a merged Sysco/US Foods, the relevant inquiry is not whether remaining competitors would be able to replace "*some* of the competition provided by [an acquisition target], which will be vitiated" post-acquisition, but rather whether "such competition will defeat a likely anticompetitive price increase in a post-acquisition . . . market." *See Swedish Match*, 131 F. Supp. 2d at 170 (emphasis added). As this Court made clear in *H&R Block*, harm occurs even if

other competitors are present in the marketplace. 833 F. Supp. 2d at 81-89 (blocking the merger even though a competitor with more than 60% market share still existed).

100. The remaining competitors would be unable to "fill the competitive void" left after the merger in the market for broadline distribution to National Customers and thus cannot serve as a basis for rebutting the presumption of competitive harm. *See Swedish Match*, 131 F. Supp. 2d at 169. Neither a regional consortium, such as DMA, nor an ad hoc network of regional distributors could discipline the merged firm's pricing and services to National Customers. PFF VII(C). While the remaining firms conceivably might replace "some of the competition" US Foods provides today, because those competitors lack sufficient geographic coverage, product breadth, or other important competitive offerings that National Customers demand, such competition would be insufficient to defeat post-merger anticompetitive effects. PFF VIII(B), VIII(C); s*ee H&R Block*, 833 F. Supp. 2d at 73-74 (competition from an existing competitor was insufficient because expansion was unlikely to allow it to "compete 'on the same playing field' as the merged company") (quoting *Chi. Bridge & Iron*, 534 F. 3d at 430). Defendants have a distinct competitive advantage over the remaining competitors with respect to National Customers in particular based on years of providing service or competing for their business (including, at times, explicit RFP requirements for national coverage), enabling the merged firm to target post-merger anticompetitive effects at those customers who view the remaining competitors as distant alternatives. *See Merger Guidelines*, § 6.2.

101. Likewise, the remaining competitors would not constrain the combined Sysco/US Foods in the relevant local markets. Other broadline distributors cannot replicate the competitive pressure US Foods places on Sysco today because the remaining competitors often charge higher prices, and they do not offer adequate product breadth, product quality, the level of sales support

or other customer service, or the ability to make regular on-time deliveries. PFF VII(E). *See Swedish Match*, 131 F. Supp. 2d at 170.

102. Defendants attempt to conflate the *Merger Guidelines*' relevant market test, which asks whether a 5% SSNIP would induce substitution to another product, with the question of whether the remaining firms in the relevant market, *i.e.*, other broadline distributors, could constrain a post-merger price increase, including a price increase less than 5%. Whether a SSNIP of 5% would induce customers to switch to another broadline distributor is not relevant to the determination of whether the merger will result in competitive harm. As Dr. Israel explained, a price increase well below a SSNIP would be sufficient for this merger to result in competitive harm. Israel Hrg. Vol 18 109:6-111:5.

2. Defendants Cannot Demonstrate That Entry or Expansion by Other Firms Will Counteract the Competitive Effects Arising From the Transaction

103. Defendants bear the burden of proving that "'entry into the . . . market[s] would likely avert [the proposed transaction's] anticompetitive effects.'" *Staples*, 970 F. Supp. at 1086 (quoting *United States v. Baker Hughes Inc.*, 908 F.2d 981, 989 (D.C. Cir. 1990)); *see Swedish Match*, 131 F. Supp. 2d at 170; *Cardinal Health*, 12 F. Supp. 2d at 55.

104. Entry must be "'timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.'" *H&R Block*, 833 F. Supp. 2d at 74 (quoting *Merger Guidelines* § 9); *see also CCC Holdings*, 605 F. Supp.2d at 47. "Determining whether there is ease of entry hinges upon an analysis of barriers to new firms entering the market or existing firms expanding into new regions of the market." *CCC Holdings*, 606 F. Supp. 2d at 47 (quoting *Cardinal Health*, 12 F. Supp. 2d at 55); *Swedish Match*, 131 F. Supp. 2d at 170 (noting the importance of barriers to entry in determining whether entry would likely avert anticompetitive harm).

105. To meet their burden, Defendants must show at least a "reasonable probability" of sufficient entry. *Chi. Bridge & Iron*, 534 F.3d at 430 n.10. It is not sufficient merely to identify other competitors that might possibly expand. *See H&R Block*, 833 F. Supp. 2d at 73-76.

106. "In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect." *Merger Guidelines* §9.1. Thus, to consider entry timely, it must "be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry." *Id.*

107. A key determinant of the likelihood of entry is whether it would be profitable to enter the market after considering the expense and risk associated with entry. *Merger Guidelines* § 9.2 ("Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits."); *see Swedish Match*, F. Supp. 2d at 171 (finding entry unlikely where it required "substantial sunk costs in plant construction, product development, and marketing" and there was "little hope of gaining market share").

108. The absence of significant entry is indicative of high barriers to entry. *Merger Guidelines* § 9 ("The Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence."). "The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future." *CCC Holdings*, 605 F. Supp. 2d at 47-48 (quoting *Cardinal Health*, 12 F. Supp. 2d at 56).

109. "Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern." *Merger Guidelines* § 9.3. Where an entrant or existing firm

will operate at a smaller scale than either merging party, such entry would not be sufficient if the entrant will be "at a significant competitive disadvantage." *Merger Guidelines* § 9.3.

110. Entry or expansion by existing firms must be on a large enough scale that it can replace the competition lost because of the merger. *See Cardinal Health*, 12 F. Supp. 2d at 58 (finding that "the absence of another national wholesaler" was "too great a competitive loss" and that regional wholesalers could not replace the lost competition); *Chi. Bridge & Iron*, 534 F.3d at 430 (concluding that entry "would be unable to constrain the likely anti-competitive effects" because "potential entrants would not be of a sufficient scale to compete on the same playing field" as the merged entity). In the absence of substantial growth, smaller competitors would not be a meaningful constraint on prices. *See CCC Holdings*, 605 F. Supp. 2d at 58 (size of competitors is relevant when analyzing expansion of existing competitors).

111. When considering sufficiency of entry or expansion, it is also relevant to assess whether "the products offered by entrants are [] close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable." *Merger Guidelines* §9.3. Entry would be insufficient where the entrants' products are not close enough substitutes to the merged firm's products. *Id.*

112. Regional broadline distributors are unlikely to expand, much less in a manner that is timely or sufficient to counteract the anticompetitive effects in the national market resulting from the transaction. PFF IX(A). Expansion and entry in local markets is also unlikely and, in any event would be untimely and insufficient given the financial risk, expense, time, and logistical challenges associated with entry into a local geographic market. PFF IX(B).

3. *Defendants' Proposed Expansion of PFG through Divestiture Does Not Address the Merger's Anticompetitive Harm*

113. With a *prima facie* case established, defendants bear the burden of producing evidence that shows the proposed expansion of PFG through divestiture will counteract the likely anticompetitive effects of the merger. *See H&R Block*, 833 F. Supp. 2d at 73 ("defendants carry the burden to show that ease of expansion is sufficient 'to fill the competitive void that will result if [defendants are] permitted to purchase' their acquisition target") (quoting *Swedish Match*, 131 F. Supp. 2d at 169).

114. The proposed expansion of PFG through divestiture is insufficient to replace the competition between Sysco and US Foods lost through the proposed merger.

115. To rebut the *prima facie* case based on expansion of an existing firm in the relevant market, which Defendants attempt to do for the national broadline market through the proposed divestiture to PFG, Defendants must show that such expansion would be sufficient to offset the anticompetitive effects resulting from the loss in competition. *See H&R Block*, 833 F. Supp. 2d at 74 (analysis of competitor expansion "will focus on whether … competitors are poised to expand in a way that is 'timely, likely, and sufficient in its magnitude, character and scope to deter or counteract' any potential anticompetitive effects from the merger"); *Cardinal Health*, 12 F. Supp. 2d at 58 (to be sufficient to offset anticompetitive effects, expansion must replace the "competitive loss" resulting from the merger); *Swedish Match*, 131 F. Supp. 2d at 170 (even where competitors may replace some competition, defendants must proffer sufficient evidence to show that "such competition will defeat a likely anticompetitive price increase"). To address the merger's anticompetitive harm, expansion through divestiture must "replac[e] the competitive intensity lost as a result of the merger . . . ." *See* Def.'s Opp. at 38 (quoting Antitrust Division, U.S. Dep't of Justice, *Policy Guide to Merger Remedies* at 5 (Oct. 2004)).

116. In *CCC Holdings*, this court granted a preliminary injunction after rejecting a proposed "fix"—a licensing agreement—that defendants' contended would alleviate competitive concerns by enabling another firm to "expand its business to new heights." 605 F. Supp. 2d at 57. While recognizing "[t]he ability and willingness of current competitors to expand their foothold in the market . . . greatly reduces the anticompetitive effects of a merger," the court concluded that the proposed "fix" was insufficient to constrain post-merger anticompetitive effects based on the licensee's size (in terms of revenue and personnel) relative to the merged firm, length of time needed for effective expansion, and the risks associated with the licensee's ongoing entanglements with the merged firm. *See id.* at 58-59.

117. Similar to the proposed licensee in *CCC Holdings,* PFG would be significantly smaller compared to US Foods and even more so compared to the merged Sysco/US Foods. *Id*. PFG will have far fewer distribution centers, geographic-coverage gaps, significant capacity constraints, and reputational and operational challenges compared to the current US Foods. PFF VIII(A). Additionally, PFG's expansion would not be timely because "[t]he growth curve to take" it "from where it is now to where it would need to be to compete with the [combined firm] seriously enough to cause price competition is extraordinarily steep and inevitably long." *See CCC Holdings*, 605 F. Supp. 2d at 58. By PFG's own account, even if it were to execute on an extremely aggressive expansion strategy that includes 26 capital projects—7 foldouts and 19 building expansions—within the next five years, it still would achieve only approximately half of US Foods' current share of sales to national healthcare GPOs, hospitality customers, and foodservice management companies. PFF VIII(B)(1). Moreover, as in *CCC Holdings,* it is "simply unknown how many" National Customers will find PFG "to be up to par, or at what pace." 605 F.2d at 59; *see* PFF VIII(C)(2).

118. The court must also evaluate whether PFG can be "considered a truly independent competitor" when assessing the divestiture's ability to cure competitive harm. *See CCC Holdings*, 605 F. Supp. 2d at 59 ("In order to be accepted, 'curative divestitures' must be made to a new competitor that is 'in fact . . . a willing, *independent* competitor capable of effective production in the … market'") (citations omitted) (emphasis in original). The court in *CCC Holdings* recognized "that it is a 'problem' to allow 'continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior." *Id.* (citation omitted). Here, the proposed divestiture would require ongoing contractual entanglements between competitors—PFG and the combined Sysco/US Foods. For example, although US Foods "will relinquish financial interests," in the distribution centers upon consummation of the merger, PFG will be heavily dependent on US Foods for several years through various license and transition agreements. PFF VIII(B)(3).

4. Large Buyers Cannot Protect Themselves in the Absence of Meaningful Alternatives

119. "[C]ourts have not yet found that power buyers alone enable a defendant to overcome the government's presumption of anti-competitiveness . . . ." *Chi. Bridge & Iron*, 534 F.3d at 440 (quoting *Cardinal Health*, 12 F. Supp. 2d at 58). Indeed, "the economic argument for even *partially* rebutting a presumptive case because a market is dominated by large buyers, is weak." *Id.* (emphasis added) (citations omitted).

120. "Even buyers that can negotiate favorable terms may be harmed by an increase in market power." *Merger Guidelines* § 8. Where a merger "eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage," the merger is likely to cause competitive harm. *Chi. Bridge & Iron*, 534 F.3d at 440; *In re ProMedica Health Sys., Inc.,* Docket No. 9346, Comm'n Op. at 36-37 (finding that "an increase in the hospital provider's

bargaining leverage translates to an increase in its reimbursement rates"). Combining the two largest and closest broadline foodservice distributors would eliminate even the most powerful buyers' ability to "swing back and forth between competitors post-acquisition." *Chi. Bridge & Iron*, 534 F.3d at 440. Thus, while large customers such as GPOs and contract feeders may have negotiating power today, the increase in Sysco's leverage that results from eliminating its closest alternative, *i.e.*, US Foods, will enable Sysco to extract more favorable pricing than it would have been able to absent the merger. *See In re ProMedica Health Sys., Inc.*, Docket No. 9346, Comm'n Op. at 53-54 (finding that, even though managed care organizations had leverage of their own in negotiations with hospitals, they would find it harder to resist the merged hospital's price demands post-merger).

5. Defendants' Efficiencies Claims Do Not Rebut the Presumption of Illegality

121. "High market concentration levels require 'proof of extraordinary efficiencies'" to rebut the presumption of likely anticompetitive effects, and "courts 'generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case.'" *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz*, 246 F.3d at 720). Indeed, no court has ever relied on efficiencies to rescue an otherwise unlawful transaction. *See ProMedica Health Sys.*, 2011 WL 1219281, at *57; *CCC Holdings*, 605 F. Supp. 2d at 72.

122. The court "must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz*, 246 F.3d at 721).

123. Claimed efficiencies are not cognizable unless they are (1) "merger-specific," and (2) "reasonably verifiable by an independent party." *Id*. Defendants bear the burden of establishing both elements. *See id.; ProMedica Health Sys.*, 2011 WL 1219281, at *57; *see also Merger*

Guidelines § 10 (stating that it is "incumbent upon the merging firms to substantiate efficiency claims" so that the FTC can verify by reasonable means the "likelihood and magnitude of each asserted efficiency" and "why each would be merger-specific").

124. To be merger-specific, a claimed efficiency "must represent a type of cost saving that could not be achieved without the merger." *Id.* "If a company could achieve certain cost savings without any merger at all, then those stand-alone cost savings cannot be credited as merger-specific efficiencies." *Id.* at 90; *see also Heinz*, 246 F.3d at 721-72; *Merger Guidelines* § 10.

125. To be verifiable, claimed efficiencies must be based on more than assertions concerning "managers['] experiential judgment about likely costs." *Id.* at 91. "While reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders [efficiencies claims] not cognizable by the Court." *Id.* "If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise." *Id.*; *see also Staples*, 970 F. Supp. at 1089 (finding defendants had "failed to produce the necessary documentation for verification" of their estimates); Areeda & Hovenkamp, *Antitrust Law* ¶ 964b (efficiencies "must be demonstrated by objective evidence of merger-specific economies, not merely by the intent to achieve them").

126. Efficiencies estimates are not an accurate measure of merger-specific benefits when they are based on the merging parties' past costs "without considering the additional cost savings that [the merging parties] would have received in the future as [] stand-alone compan[ies]." *See Staples*, 970 F. Supp. at 1090.

127. Efficiencies claims are insufficient to rebut a presumption of anticompetitive effects when there are contingencies and uncertainties concerning "whether, and to what extent" they will be executed. *See OSF Healthcare Sys.*, 852 F. Supp. 2d at 1089-90.

128. "[D]elayed benefits" are also "less proximate and more difficult to predict," and thus are entitled to less weight. *CCC Holdings*, 605 F. Supp. 2d at 73 (internal citations omitted); *Merger Guidelines* § 10 n.15.

129. In addition to establishing the merger-specificity and verifiability of their claims, to succeed on an efficiencies defense, merging parties must also demonstrate that their claimed efficiencies would benefit customers. *See St. Luke's Health Sys.*, 778 F.3d at 791-92; *University Health, Inc.*, 938 F.2d at 1223; *CCC Holdings*, 605 F. Supp. 2d at 74.

130. Defendants here have failed to establish that their efficiencies claims are cognizable, because they have failed to provide substantiation that would allow for independent verification of their claims and because they could achieve substantial portions of the alleged efficiencies independently, without the merger. PFF XI(A).

131. Defendants' efficiencies defense also fails because they have not established that the merged firm would pass the claimed savings on to customers. PFF XI(B).

IV. THE EQUITIES ALSO FAVOR A PRELIMINARY INJUNCTION

132. Plaintiffs have shown in this proceeding that the Commission is likely to succeed on the ultimate merits at the upcoming administrative trial. "No court has denied relief to the FTC in a [Section] 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *ProMedica Health System*, 2011 WL 1219281 at *60; *see also PPG*, 798 F.2d at 1508 (establishment of a likelihood of success "weighs heavily in favor of a preliminary injunction . . . .") (quoting *Weyerhaeuser*, 665 F.2d at 1085).

133. Nevertheless, under Section 13(b), the Court also must "weigh the equities" to determine whether a preliminary injunction is in the public interest. *Heinz*, 246 F.3d at 726. "The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws." *Id.*; *see also Whole Foods*, 548 F.3d at 1035 ("The equities will often weigh in favor of the FTC, since 'the public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting [§ 13(b)].").

134. An equally important public equity favoring preliminary relief here is preservation of the Commission's ability to order effective relief if the FTC Complaint Counsel succeed at the merits trial, as the difficulty of "unscrambl[ing] merged assets" would preclude "an effective order of divestiture." *Id.* at 1034 (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n.5 (1966)); *see also FTC v. Libbey, Inc.,* 211 F. Supp. 2d 34, 54 (D.D.C. 2002) ("Preserving the status quo so that meaningful relief will be available to the FTC, is another equity that weighs in favor of issuing the preliminary injunction. 'Unscrambling the eggs' after the fact may not be a realistic option in [the] case.") (citations omitted). The inherent difficulties of divesting integrated assets after a merger are well known. *See Whole Foods*, 548 F.3d at 1034 (Brown, J.) (*citing Dean Foods*, 384 U.S. at 607 n.5 (1966)).

135. Here, without a preliminary injunction, Defendants can "scramble the eggs"—that is, merge their operations and make it extremely difficult, if not impossible, for competition to be restored to its previous state if the merger is subsequently found to be illegal. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085-86 n.31 (D.C. Cir. 1981).

136. The task of "unscrambling the eggs" would be further complicated in this case because, absent a preliminary injunction, Sysco would, concurrent with its closing of the US

Foods transaction, immediately transfer 11 US Foods distribution centers along with associated assets to PFG pursuant to the proposed divestiture agreements. PFG immediately would take control of these assets and be free to integrate any or all of them, including but not limited to the distribution centers, transferred US Foods personnel, and competitively sensitive information, with PFG's existing assets. Moreover, there is a risk of interim harm to competition and consumers if the merger is allowed to proceed before the administrative trial on the merits concludes and a merits opinion issues.

137. Private equities are "subordinate to public interests and cannot alone support the denial of preliminary relief." *FTC v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131, 1146 (N.D. Ill. 1988) (citing *Weyerhaeuser*, 665 F.2d at 1083). Indeed, "[o]nly 'public equities' that benefit consumers" can trump the Commission's showing of likely success on the merits. *CCC Holdings*, 605 F. Supp. 2d at 75-76 (citing *Whole Foods*, 548 F.3d at 1041 (Brown, J.)).

138. The "'risk that the transaction will not occur at all,' by itself, is a private consideration that cannot alone defeat the preliminary injunction." *Whole Foods*, 548 F.3d at 1041 (citing *Heinz*, 246 F.3d at 726). An assertion that the merging parties will abandon the merger and not proceed with the administrative trial on the merits if a preliminary injunction issues does not elevate the Commission's burden under Section 13(b). *See Heinz*, 246 F.3d at 727 ("[T]hat is at best a 'private' equity which does not affect our analysis . . . .").

* * * * * * *

139. In conclusion, after weighing the relevant equities and considering the Commission's likelihood of ultimate success, it is in the public interest that the Court enter a preliminary injunction enjoining the proposed merger between Sysco and US Foods pending completion of the Commission's administrative proceeding.

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Respectfully Submitted,

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