**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) To Relinquish Its Eligible Telecommunications Carrier Designation.	A.23-03-002 (Filed March 3, 2023)

PACIFIC BELL TELEPHONE COMPANY D/B/A AT&T CALIFORNIA'S (U 1001 C) COMMENTS ON THE ADMINISTRATIVE LAW JUDGE'S RULING TAKING OFFICIAL NOTICE

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Pursuant to the Administrative Law Judge's Ruling Taking Official Notice issued July 24, 2024 ("Ruling"), Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) hereby respectfully submits these comments.

AT&T California agrees that the Commission should enter into the record the documents cited in Section 1 of the Ruling.[1] These documents confirm that the Commission has robust procedures in place for collecting, processing, and validating the availability of fixed and mobile broadband services in California. Dr. Israel's testimony fully comports with these documents, which confirm (among other things) that the Commission vets mobile broadband data at the *census block* level and "remove[s] … *census blocks*" from its mobile Broadband Maps where it is "unable to validate" service.[2]

As to Section 2 of the Ruling, AT&T California opposes entering into the record *United States v. American Airlines Group and JetBlue Airways Corporation*.[3] No questioner asked Dr. Israel about this case at the evidentiary hearing, let alone sought its admission in the hearing, and for good reason: the case involved legal and factual issues that are wholly unrelated to the issues presented here. And the Commission would violate the Evidence Code and due process if it now belatedly considers the *American Airlines* case in assessing Dr. Israel's credibility. However, if

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[1] In particular, the 2020 California Broadband Data Processing and Validation document and the Communications Division's March 2024 data collection request are highly relevant to this proceeding. AT&T California does not object to the inclusion of the third document (D.16-12-025); but, as discussed below, that document does not add to the insights available from the other two documents.

[2] Cal. Pub. Utils. Comm'n, California Broadband Data Processing and Validation, Data as of December 31, 2020, at 5 (emphasis added), https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/communications-division/documents/broadband-mapping/california-broadband-data-processing-and-validation--2021-v22.pdf ("*Broadband Data Processing and Validation*"); *see also id.* at 12.

[3] *United States v. Am. Airlines Grp. Inc.*, 675 F. Supp. 3d 65 (D. Mass. 2023), *appeal argued*, No. 23-1802 (1st Cir. June 3, 2024).

the Commission nonetheless enters *American Airlines* into the record, it should also admit the attached decisions affirming Dr. Israel's credibility and relying on his expertise.

I. AT&T California Supports the Commission's Taking Official Notice of Its Robust Broadband Data Validation Process.

To determine where there is an alternative eligible telecommunications carrier ("ETC") entitling AT&T California to relinquish its designation, Dr. Israel relied on the Commission's Fixed and Mobile Broadband Maps because they provide reliable data about carrier service availability in AT&T California's service territory. In his testimony, Dr. Israel described his understanding of the Commission's extensive efforts to validate the service availability it reports in those maps, and he explained that those efforts gave him confidence in the data.

A. The Documents Identified in Section 1 of the Ruling Confirm That Dr. Israel Reasonably Relied on the Commission's Broadband Maps.

The Ruling takes official notice of three publicly available documents describing how the Commission collects and validates data regarding fixed and mobile broadband availability in California. The Ruling first seeks comment on whether these documents should be entered into the record.[4]

AT&T California agrees that the Commission should include in the record both the 2020 *Broadband Data Processing and Validation* document and the Communications Division's March 2024 data collection request.[5] AT&T California also respectfully suggests that prior data collection requests should be included in the record too.

[4] Ruling at 2.

[5] Letter from Selena Huang, Communications Division, Program Manager, Broadband – Video and Market Branch, to Cal. Broadband Providers & State Video Franchise Holders (Mar. 13, 2024) ("March 2024 Data Collection Request").

The Broadband Data Processing and Validation document. This document should be admitted into the record because it summarizes how the Commission's Broadband Mapping Program collects, processes, and validates broadband data, and is highly relevant to the issues in this proceeding.

As described in the *Broadband Data Processing and Validation* document, to produce the Fixed and Mobile Broadband Maps, the Commission begins by collecting reports from facilities-based carriers about the areas they *actually serve*, which for mobile providers includes shapefiles depicting the areas in which they provide service.[6] The Commission also collects carriers' subscriber data: fixed broadband carriers must submit at least census block level data, mobile broadband carriers have the option to submit subscriber data at the census tract level, and all carriers (fixed and mobile) may submit subscriber data at the more granular street address level.[7]

In turn, the Commission vets providers' reports of where they serve. The Commission has the Geographical Information Center at California State University at Chico geo-code, geo-match, and validate the geographic data.[8] Then, the Commission checks carrier-reported "broadband deployment data against broadband subscription and public feedback."[9] It validates fixed broadband providers' reports of serviceable addresses against subscription data by upstream and downstream speeds by census block and factors in any consumer "[r]eports of 'no service.'"[10]

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[6] *Broadband Data Processing and Validation* at 3–4.

[7] *Id.* at 3.

[8] *Id.* at 4.

[9] *Id.* at 5; *see also id.* at 6–12.

[10] *Id.* at 5 tbl. 1.

The Commission validates mobile broadband provider submissions in two ways. First, data concerning the "[n]umber of subscribers by upstream and downstream speeds by census tract [are] used to validate [the] availability and speed of corresponding mobile coverage area[s]."[11] Second, the Commission independently vets mobile broadband provider submissions against crowdsourced speed test data from the CalSPEED mobile application "to validate availability and speed" by census block.[12]

Based on its verification procedures, the Commission removes census blocks for which it cannot verify the provider's presence of service.[13] The provider is then given an opportunity to comment on the Commission's revisions to its coverage, "and the assigned analyst may also have recommendations for changes … to reflect [the provider's] coverage more accurately. Data is then revised based on recommendations for changes from the analyst before being considered final" to include in the Commission's Fixed and Mobile Broadband Maps, "determine eligibility for the CASF program, generate broadband adoption statistics, and perform analysis on broadband availability to Californians."[14] For these reasons, as Dr. Israel explained, the Commission's Fixed and Mobile Broadband Maps provide reliable data about carrier service availability in AT&T California's service territory.[15]

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[11] *Id.*

[12] *Id.* at 5 tbl. 1, 11–12.

[13] *Id.* at 5 ("Broadband deployment is removed in *census blocks* where the presence of service is unable to validate.") (emphasis added); *id*. at 12 (Mobile Validation Results: "**Red-zone** Records where the Highest Category field was coded as '0' (No Coverage) are 'Red-zones'. *A Red-zone is an area for which no subscriber census block could validate the providers claim to service the area, or a public feedback report indicates service in that block is not available. The deployment census block will be removed from the provider's final coverage*.") (emphasis added).

[14] *Id.* at 12.

[15] *See* Evidentiary Hr'g Tr. 835:15 (describing the maps as "the most accurate available"); *id.* at 922:4–5; *id.* at 846:2–13 ("[W]hat I rely on is the CPUC's maps indicating whether a service is available on a census block, which is very small. That's the best information we have … nothing about this statement would change my … reliance on the CPUC data is the best data that we have."). Although the FCC also

The March 2024 Data Collection Request. The Commission should admit this document into the record as well because it also provides information relevant to the proceeding. In particular, it makes clear that the Commission's data collection procedures require carriers to show where they are *actually* capable of providing service today. "Submissions shall reflect *actual service availability*. Specifically, locations where a provider has indicated they will not be able to provide service to a prospective customer—for reasons such as network limitations, construction barriers, line of site issues, etc.—shall not be represented as being served."[16] Providers "shall submit" data "accurately and timely."[17] Similar Communications Division letters from March 2022 and February 2023[18] also confirm that, when AT&T California filed its Application, mobile and fixed carriers had received instructions to report only areas where they actually provide service.

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publishes broadband maps that are very similar, Dr. Israel explained that he relied on the Commission's maps because this proceeding is before the Commission in California. *Id.* at 929:8–9.

[16] *See* March 2024 Data Collection Request.

[17] *See id*. ("Failure to submit data accurately and timely risks your coverage areas not being included on the California Interactive Broadband Map, which could potentially open those areas to CASF grants and potentially other infrastructure grants.").

[18] Letter from Selena Huang, Program Manager, Broadband – Video and Market Branch, to Cal. Broadband Providers (Feb. 1, 2023) ("Submissions shall reflect actual service availability. Specifically, locations where a provider has indicated they will not be able to provide service to a prospective customer—for reasons such as network limitations, construction barriers, line of site issues, etc.—shall not be represented as being served. Submissions shall reflect where consumers have successfully challenged availability (i.e., on the National Broadband Map). Submissions shall not include 'buffer zones' where networks can theoretically be extended, but shall reflect the ability to provide service within 10 business days of a request and service availability."); Letter from Selena Huang, Program Manager, Broadband – Video and Market Branch, to Cal. Broadband Providers & State Video Franchise Holders (Mar. 15, 2022). While the March 2022 request for 2021 data was less explicit, mobile broadband providers were directed to provide "shapefiles of the areas in which they *provide* service," and fixed broadband providers were instructed to identify "serviceable locations," which were "defined as locations where providers have actually built out their broadband network infrastructure and to which they either currently provide service or could perform a standard broadband installation." *Id.* (emphasis added). Copies of these letters are included as Attachments A and B.

Decision 16-12-025. AT&T California respectfully submits that Decision 16-12-025 is less relevant than the *Broadband Data Processing and Validation* document and the March 2024 Data Collection Request. In Decision 16-12-025, the Commission analyzed the telecommunications marketplace in 2016 and adopted procedures for the Communications Division to collect deployment and subscriber data from providers. As the Ruling states, Ordering Paragraph 1 directed communications providers to submit annual broadband subscriber and deployment data at the census block level and stated that mobile providers "*may* submit subscriber data at the census tract level."[19] The inclusion of Decision 16-12-025 in the record appears unnecessary for the proposition cited in the Ruling: the two other documents discussed above confirm that mobile providers may submit census tract level subscriber data—a proposition that does not seem to be in dispute. Nonetheless, D.16-12-025 does confirm that, for many years, the Commission has dedicated resources to ensuring the reliability of the broadband data it collects,[20] and AT&T California thus does not object to its inclusion in the record.

B. Dr. Israel's Testimony Is Fully Consistent with the Documents Cited in the Ruling.

The Ruling states that the Commission documents identified in Section 1 "call[] into question the accuracy of the statements made by both expert witnesses" about how the Commission validates mobile broadband data and directs that "[i]f parties have other information that supports the assertions their expert witnesses made while under oath, that the Commission validates mobile broadband data at the census block level, that supporting documentation must

[19] *Ord. Instituting Investigation into the State of Competition Among Telecomm. Providers in Cal., & To Consider & Resolve Questions Raised in the Ltd. Rehearing of Decision 08-09-042*, D.16-12-025, 2016 Cal. PUC LEXIS 683, at *305 (Dec. 1, 2016) (Ordering Paragraph 1) (emphasis added).

[20] *Id.* at *154 n.254 (describing Communications Division efforts since 2012 to collect data on mobile broadband service throughout California).

be included in comments."[21] For the reasons set forth below, Dr. Israel's testimony is fully consistent with the documents cited in the Ruling, in particular the *Broadband Data Processing and Validation* document upon which his testimony relied.

As an initial matter, Dr. Israel did not testify in this proceeding as an expert on the Commission's internal procedures for creating its Broadband Maps. Rather, Dr. Israel was "asked by counsel for AT&T to determine whether AT&T meets the standard for relinquishment of its ETC designation, and to consider and respond to: (i) the issues and questions posed by the CPUC in the Scoping Memo for this proceeding, (ii) claims made by Ms. Susan Baldwin in her testimony, and (iii) issues and questions that have been raised by The Utility Reform Network ('TURN') and Center for Accessible Technology ('CforAT')."[22] As he testified, Dr. Israel did rely on the Commission's Broadband Maps as a data source to provide his expert opinion on these issues.[23] However, during the evidentiary hearing, Dr. Israel explicitly stated that his testimony was based on his "understanding" regarding the Commission's Broadband Maps, and that he ultimately deferred to the Commission on how it creates and validates the maps.[24]

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[21] Ruling at 2. While the Ruling questions both experts' testimony on this point, AT&T California responds to this Ruling with respect to Dr. Israel's testimony and does not address Ms. Baldwin's testimony in these comments.

[22] Israel Rebuttal Testimony ¶ 13 (citations omitted).

[23] *Id.* ¶ 37; Evidentiary Hr'g Tr. 834:14–16 ("I'm quite confident on the quality of the CPUC maps and the checking that is done on those, which is what I relied on.").

[24] *See*, *e.g.*, Evidentiary Hr'g Tr. 862:21–863:12 (Dr. Israel) ("I spent a long time with the CPUC's procedures that, you know, you cross check those by where there are actually subscribers and by crowdsource data online speeds. I think they are a very good source of information that's very accurate … it's the [combination] of maps, plus the requirement to provide service, that makes me comfortable that we can rely on the maps to see where service really is."); *id*. 917:10 (explaining CPUC process "as I understand it"; *id.* at 918:7–21 (responding to questions regarding the CPUC mapping process "as I understand the CPUC maps," based on "my understanding," "the way I understand the CPUC maps"); *id*. 921:8–10 ("Q. Are you sure about that? A. I mean, I defer to the CPUC. But that's my—that's my understanding.").

More importantly, the documents cited in the Ruling support, rather than contradict, Dr. Israel's testimony.[25] In fact, Dr. Israel specifically relied on one of those documents, the *Broadband Data Processing and Validation* document, for his testimony.[26] Dr. Israel explained that "[t]he CPUC Broadband Maps data are a reliable source of broadband coverage: The CPUC conducts extensive testing and validation of both fixed and mobile coverage maps."[27] Then, citing the *Broadband Data Processing and Validation* document, Dr. Israel testified that "[t]he CPUC describes its validation approaches and data sources used to check and validate carrier-submitted data on its website."[28] This document states explicitly that the Commission validates mobile coverage at the *census block* level and that *census blocks* are removed if they fail validation. For example, page 5 of the document states, "Broadband deployment is removed *in census blocks where the presence of service is unable to validate*."[29] Page 12 of the document confirms this process for mobile validation: "A Red-zone is an area for which *no subscriber census block could validate the providers claim to service the area*, or a public feedback report indicates service in that block is not available. The deployment census block will be removed from the provider's final coverage."[30]

Thus, the *Broadband Data Processing and Validation* document provides the support requested by the Ruling, as it confirms that "the Commission validates mobile broadband data at

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[25] Ruling at 2 (inviting parties to submit information that "supports the assertions their expert witnesses made while under oath, that the Commission validates mobile broadband data at the census block level.").

[26] Israel Rebuttal Testimony attach. C-3 (listing the *Broadband Data Processing and Validation* in Attachment C: Materials Relied Upon).

[27] *Id.* ¶ 37.

[28] *Id.* ¶ 37 n.43.

[29] *Broadband Data Processing and Validation* at 5 (emphasis added).

[30] *Id.* at 12 (Mobile Validation Results: "**Red-zone** Records where the Highest Category field was coded as '0' (No Coverage) are 'Red-zones.'").

the census block level."[31] That observation also confirms the accuracy of Dr. Israel's stated understanding that the Commission validates mobile broadband deployment data at the census block level.[32]

In particular, Dr. Israel testified as follows:

> Q. So is this done for mobile even? The—the verification of a subscriber in a census block?
>
> A. Yes. It's done for mobile. It's slightly different for mobile and wireline. For both mobile and wireline, there's actually checking subscriber accounts. For wireline, I think there's a process of public comments about whether the service really is available at their area. For mobile, the extra—so the subscriber counts in both cases. But then, for mobile, it is this app on the phone, for people who have it, checking speeds. So, those two things.[33]

Dr. Israel's answer referred to both of the subscriber sources the Commission uses to validate the shapefiles mobile providers submit to depict their coverage areas: 1) the crowdsourced CalSPEED Mobile app; and 2) subscriber data submitted by mobile providers.[34] The crowdsourced CalSPEED Mobile app data are *always* "aggregated to the census block level and used to validate availability and speed."[35] Thus, when asked, "So is this done for mobile even? The—the verification of a subscriber in a census block?", Dr. Israel correctly responded in

[31] Ruling at 2.

[32] *Id*. at 1–2 ("At the April 9, 2024, evidentiary hearing, both expert witnesses testified that the Commission validates mobile broadband deployment data by comparing it with subscriber data at the census block level. In other words, if a mobile broadband provider submits broadband deployment data indicating that it offers service in a certain census block at speeds that meet a specific program's definition of 'served' speeds, and that same mobile broadband provider submits data indicating it has a subscriber in that same census block, the Commission considers the provider as serving that census block." The Ruling "call[s] into question the accuracy of the statements made by both expert witnesses" on this point.).

[33] Evidentiary Hr'g Tr. 917:12–22.

[34] *Broadband Data Processing and Validation* at 5 tbl. 1.

[35] *Id.* ("CalSPEED Mobile crowdsourced results. Speed test data from CalSPEED mobile app, recorded within 6 months of 12/31/2020, limited to LTE capable devices and WiFi results removed. *Speed test data is aggregated to census blocks and used to validate availability and speed*.") (emphasis added).

the affirmative,[36] referring to the crowdsourced CalSPEED mobile app data, which are (1) received directly from subscribers and (2) *always* aggregated to the census block. To be sure, the *other* verification source—the *carrier*-provided mobile broadband subscriber data—*may* be submitted at the census tract level,[37] but that fact does not change the reply's accuracy.

In any event, even if there were some question about whether "the Commission validates mobile broadband data at the census block level,"[38] or whether "the Commission validates mobile broadband deployment data by comparing it with subscriber data at the census block level,"[39] that would provide no basis for disregarding the analysis underlying AT&T California's Application under Section 214(e)(4). The Commission validates provider-submitted coverage data as described in the *Broadband Data Processing and Validation* document. That validation undergirds the reliability of both the Commission's Fixed and Mobile Broadband Maps and Dr. Israel's detailed testimony on the widespread availability of alternative ETCs based on those maps. Taking official notice of the *Broadband Data Processing and Validation* document and including it in the record should resolve any questions arising out of Dr. Israel's hearing testimony on the validation processes.

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[36] Evidentiary Hr'g Tr. 917:12–22.

[37] Mobile providers are allowed to submit those data either by census tract or at a more granular level. *Broadband Data Processing and Validation* at 3 ("Only Mobile providers *may* submit broadband subscriber data at the Census Tract level. *All* providers *may* fulfill the subscriber reporting requirement *by submitting subscriber data at the more granular street address level.*") (emphasis added); *see also* D.16-12-025, 2016 Cal. PUC LEXIS 683, at *305 ("Mobile providers *may* submit subscriber data at the census tract level.") (Ordering Paragraph 1) (emphasis added). The *Broadband Data Processing and Validation* document further indicates that, to the extent providers do, in fact, submit subscriber data at the street address level, the Commission aggregates those data to the census block level: "[i]n cases where the CPUC received street address level data from broadband providers, such addresses were geocoded and aggregated to census blocks." *Broadband Data Processing and Validation* at 4; *id*. at 5.

[38] Ruling at 2.

[39] *Id.* at 1.

II. It Is Not Appropriate To Enter Extrinsic Impeachment Evidence into the Record That Was Not Addressed at the Evidentiary Hearing.

AT&T California opposes admitting the *American Airlines* decision into evidence. As an initial matter, the decision is substantively irrelevant to this proceeding. *American Airlines* involved a challenge under the federal antitrust laws to the alliance between American Airlines and JetBlue to operate essentially as a single airline for most of their flights in and out of New York City and Boston.[40] The case involved legal concepts and factual issues that are completely unrelated to those in this proceeding. Indeed, the only possible reason that AT&T California can deduce for taking official notice of the *American Airlines* decision, which criticized Dr. Israel's testimony,[41] is to use it as a foundation for potential impeachment of Dr. Israel in this proceeding. That use would be improper under the Evidence Code and deny AT&T California due process—especially as the court's criticism of Dr. Israel's testimony is one of the bases of American Airlines's pending appeal of the decision.[42]

Intervenors and the assigned Administrative Law Judge had ample opportunity to assess Dr. Israel's credibility at the evidentiary hearing. They had the opportunity to question him about his qualifications, the subject matter of his testimony, the matters on which his expert opinion is based, and the reasons for his opinion. These are all matters within the scope of permissible cross-examination of an expert witness, and Intervenors and the assigned Administrative Law Judge fairly examined him on these grounds and had opportunity to cross-examine him using any

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[40] *See Am. Airlines*, 675 F. Supp. 3d at 73.

[41] To be clear, Dr. Israel's qualifications as an expert were not in dispute, and the district judge admitted Dr. Israel's testimony. The district judge simply did not agree with that testimony.

[42] *See* Brief of Defendant-Appellant at 43–44 n.12, *United States v. Am. Airlines Grp. Inc.*, No. 23-1802 (1st Cir. Dec. 6, 2023).

documents they wished.[43] No questioner asked Dr. Israel about *American Airlines* at the evidentiary hearing, nor sought to introduce the decision into evidence, even though the parties and the assigned Administrative Law Judge were aware of the case, which had been the subject of CforAT's motion filed on May 24, 2023 in A.23-03-003.[44]

Dr. Israel was therefore not given an opportunity to respond to any questions about if or how *American Airlines* should affect the Commission's assessment of his testimony at the evidentiary hearing. The Commission may assess the experts' credibility in this proceeding based on their testimony and demeanor at the hearing. But what it may not do is admit extrinsic evidence of specific instances of conduct as tending to prove that a witness is not credible in *this* proceeding.[45] Doing so would violate the rules of evidence and basic standards of relevance and due process.[46] Absent questioning Dr. Israel about the decision at the evidentiary hearing, using *American Airlines* to weigh Dr. Israel's testimony in this proceeding would be legal error.

Nonetheless, if it does admit *American Airlines* into the record, the Commission should also include in the record and consider the following additional officially noticeable information. Dr. Israel has testified in many high-profile matters and—despite the aberrational ruling in *American Airlines*—has distinguished himself as one of the nation's foremost testifying economic experts. Dr. Israel has worked on behalf of both government agencies and industry

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[43] *See* Cal. Evid. Code § 721; *Grimshaw v. Ford Motor Co.* 119 Cal. App. 3d 757, 796 (1981).

[44] *See* Ruling at 3.

[45] *See* Cal. Evid. Code § 787 (extrinsic evidence of specific instances of conduct inadmissible to attack or support a witness's credibility); *id.* § 721 (limiting evidence upon which an expert witness may be cross-examined and the admission of that evidence into the record).

[46] The Commission's proceedings are governed by its rules of practice and procedure, "and in the conduct thereof the technical rules of evidence need not be applied." Cal. Pub. Utils. Code § 1701(a); *see* Cal. Pub. Utils. Comm'n Rules of Prac. & Proc. Rule 13.6(a). Nonetheless, the Commission's rules and procedures are also subject to due process requirements. *Rittiman v. Pub. Utils. Comm'n*, 80 Cal. App. 5th 1018, 1031 (2022).

participants, and many courts, arbitrators, and regulators across this country and in Canada have adopted his opinions.[47] For instance, the Federal Trade Commission and a number of states (including California) chose Dr. Israel as their lead economic expert in opposing the Sysco/U.S. Foods merger in 2015, and the U.S. District Court for the District of Columbia depended heavily on Dr. Israel's testimony when enjoining that merger.[48] Similarly, the Canadian Competition Tribunal extensively relied on Dr. Israel's testimony as the principal expert witness on behalf of Rogers Communications Inc. in deciding in favor of Rogers's recent acquisition of Shaw Communications Inc.[49] The tribunal found Dr. Israel "to be knowledgeable, candid, and forthcoming" and added that his "evidence was generally well documented and presented."[50] Where Dr. Israel and the opposing expert disagreed, the panel found Dr. Israel's "testimony to be more robust and persuasive."[51]

Just last week, another federal district court rejected a defendant's request to exclude Dr. Israel's opinions and reports regarding class certification. That court explained that it "has ruled numerous times now, and has done so again today, that Dr. Israel's economic analyses related to antitrust injury are reliable."[52] On that basis, the court cited Dr. Israel's analysis multiple times in its decision to approve class certification.[53]

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[47] *See generally* Israel Rebuttal Testimony. attach. A. A full list of Dr. Israel's experience as an expert witness, including testimony before the Commission, is available in Attachment A of Dr. Israel's Rebuttal Testimony.

[48] *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 *passim* (D.D.C. 2015) (naming Dr. Israel 184 times).

[49] *Canada v. Rogers Commc'ns Inc.*, 2023 Comp Trib 1 *passim* (Can. Comp. Trib.) (referring or citing Dr. Israel's testimony favorably 48 times).

[50] *Id.* ¶ 77.

[51] *Id.*

[52] *Loop, LLC v. CDK Global, LLC* (In re *Dealer Mgmt. Sys. Antitrust Litig.*), No. 1:18-cv-00864, slip op. at 13–16, 29 (N.D. Ill. July 22, 2024).

[53] *Id. passim*.

In light of Dr. Israel's impressive record of testimony in many cases over many years, one judge's comments in one case involving distinct legal and factual questions should not cause the Commission to doubt Dr. Israel's well-supported testimony here. AT&T California believes that it would be inappropriate, for the reasons stated above, for the Commission to enter the *American Airlines* case into the record. However, if the Commission does so, AT&T California also respectfully requests that the Commission take official notice of, and enter into the record, the additional illustrative cases discussed above that involved Dr. Israel's expert testimony: *Federal Trade Commission v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015); *Canada v. Rogers Communications Inc.*, 2023 Comp Trib 1 (Can. Comp. Trib.); and *Loop, LLC v. CDK Global, LLC* (In re *Dealer Management Systems Antitrust Litigation*), No. 1:18-cv-00864 (N.D. Ill. July 22, 2024). These cases are attached hereto as Attachment C.

Dated: August 2, 2024

Respectfully submitted,

AT&T California

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ATTACHMENT A

Request for Broadband Deployment and Subscription Data as of Dec. 31, 2022

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA
505 VAN NESS AVENUE | SAN FRANCISCO, CALIFORNIA 94102
300 CAPITOL MALL | SACRAMENTO, CALIFORNIA 95814

February 1, 2023

To: California Broadband Providers

Subject: **Request for Broadband Deployment and Subscription Data as of Dec. 31, 2022**

Pursuant to legislation, including SB 156, SB 4, AB 41, SB 28, and AB 2752 codified in Public Utilities Code Sections 281(b)(4), 281.6 and 5895, the California Public Utilities Commission (CPUC or Commission) is authorized to collect information from broadband service providers. As such, all communications providers certificated and/or registered with the CPUC shall submit annually to the Communications Division by April 3, broadband subscriber and deployment data as of the end of the prior calendar year in a form designated by Communications Division Staff (see below).

Broadband data is to be submitted in the formats, and with the tools, available on the Broadband Mapping Program website.

1. Fixed Broadband Deployment Data:
   a. All Fixed Broadband providers must submit Deployment data by **ONE** of the following formats:
      i. KMZ/Shapefile(s) **containing Serviceable Locations (see below)** and **maximum advertised speeds per technology** in a .zip file

OR

      ii. .csv containing your **Serviceable Location addresses** and **maximum advertised speeds per technology**

OR

      iii. KMZ/Shapefile(s) **containing Serviceable Locations** in a .zip file and a matching .csv containing **maximum advertised speeds per technology**
2. Fixed Broadband Subscription Data:
   a. All Fixed Broadband Subscriber data must be submitted by **service address/location** in .csv format.
3. Pricing of Residential Service:
   a. All Providers of Residential Broadband service must submit non-promotional, unbundled pricing data at standard pricing for the tier of

broadband service closest to 25/3 (download/upload) and the pricing for the maximum bandwidth offered to customers by .xlsx in a .zip file.

4. Mobile Broadband Providers:
    a. Mobile Broadband Providers must submit broadband subscriber data by Census Tract, while providing shapefiles of the areas in which they provide service, using the Broadband Upload Tool. Please place the shapefiles in .zip files for upload.

All applicable Fixed Broadband data must be submitted using the Broadband Upload Tool.

The definition of "Serviceable Locations" in reference to the Broadband Data Collection is locations where providers have built out their broadband network infrastructure and to which they either currently provide service or could perform a standard broadband installation. A standard installation is defined in the Broadband DATA Act as "[t]he initiation by a provider of fixed broadband internet access service [within 10 business days of a request] in an area in which the provider has not previously offered that service, with no charges or delays attributable to the extension of the network of the provider."

Submissions shall reflect actual service availability. Specifically, locations where a provider has indicated they will not be able to provide service to a prospective customer – for reasons such as network limitations, construction barriers, line of site issues, etc. – shall not be represented as being served. Submissions shall reflect where consumers have successfully challenged availability (i.e., on the National Broadband Map). Submissions shall not include "buffer zones" where networks can theoretically be extended, but shall reflect the ability to provide service within 10 business days of a request and service availability.

Locations where broadband is not available at served speeds of at least 25 Mbps download and 3 Mbps upload may be eligible for a California Advanced Services Fund (CASF) grant to offset the costs of deploying network infrastructure. Failure to submit data accurately and timely risks your coverage areas not being included on the California Interactive Broadband Map, which could potentially open those areas to CASF grants.

Confidentiality of submitted data

If you seek confidential treatment of any information provided in response to this request, please comply with the provisions of the Commission's General Order 66 D with regard to procedures for submission of information to the California Public Utilities Commission with claims of confidentiality.

How to submit your data

Your fixed and mobile Broadband Data can **only** be submitted via the Broadband Data Upload Tool once you have logged in or created an account. **All Fixed Broadband data must be submitted in the aforementioned formats without exception.**

Please submit the requested data no later than **Monday, April 3, 2023**.

Send any questions or comments to broadbandmapping@cpuc.ca.gov

Thank you for your assistance and cooperation.

Sincerely,

/s/ Selena Huang
Program Manager
Broadband, Video and Market Branch
Communications Division

ATTACHMENT B

Request for Broadband Deployment and
Subscription Data as of Dec. 31, 2021

STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

March 15, 2022

To: California Broadband Providers and State Video Franchise Holders

Subject: **Request for Broadband Deployment and Subscription Data as of Dec. 31, 2021**

Pursuant to recent legislation, including SB 156, SB 4, AB 41, and SB 28, codified in Public Utilities Code Sections 281(b)(4), 281.6 and 5895, the California Public Utilities Commission (CPUC) is authorized to collect information from broadband service providers and State Video Franchise holders. As such, all communications providers certificated and/or registered with the CPUC shall submit annually to the Communications Division by June 1, broadband subscriber and deployment data as of the end of the prior calendar year in a form designated by Communications Division Staff (see below).

Broadband data is to be submitted in the formats, and with the tools, available on the Broadband Mapping Program website.

1. All Fixed Broadband providers must submit Deployment data by **ONE** of the following formats:
    a. KMZ/Shapefile(s) **containing Serviceable Locations (see below)** and **maximum advertised speeds per technology** in a .zip file

OR

    b. .CSV containing your **Serviceable Location addresses** and **maximum advertised speeds per technology**

OR

    c. KMZ/Shapefile(s) **containing Serviceable Locations** in a .zip file and a matching .CSV containing **maximum advertised speeds per technology**
2. All Fixed Broadband Subscriber data must be submitted by **service address/location** in .CSV format.
3. All applicable Fixed Broadband data must be submitted using the Broadband Upload Tool.
4. Mobile Broadband service providers may submit broadband subscriber data by Census Tract, while providing shapefiles of the areas in which they provide

service, using the Broadband Upload Tool. Please place the shapefiles in zip files for upload.

“Serviceable Locations” is defined as locations where providers have actually built out their broadband network infrastructure and to which they either currently provide service or could perform a standard broadband installation. A standard installation is defined in the Broadband DATA Act as “[t]he initiation by a provider of fixed broadband internet access service [within 10 business days of a request] in an area in which the provider has not previously offered that service, with no charges or delays attributable to the extension of the network of the provider.”

Serviceable Locations where broadband is not available at served speeds of at least 25 Mbps download and 3 Mbps upload may be eligible for a California Advanced Services Fund (CASF) grant to offset the costs of deploying network infrastructure. Failure to submit data appropriately and timely risks your coverage areas not being included on the California Interactive Broadband Map, which could potentially open those areas to CASF grants.

If you are a Residential Fixed Broadband provider, please submit non-promotional, non-bundled pricing data for the broadband services you provide. A template has been included on the Guidelines page of our website. Please state standard pricing for the tier of broadband service closest to 25/3 (download/upload) (or) and the pricing for the maximum bandwidth offered to customers. Pricing Data must also be submitted by June 1, using the Broadband Data Upload Tool in a .zip file.

ADDITIONAL DATA REQUIRED FROM STATE VIDEO FRANCHISE HOLDERS

Many broadband providers receiving this Data Request are also State Video Franchise holders. Pursuant to SB 28 (which amended the Digital Infrastructure and Video Competition Act (DIVCA) by replacing Public Utility Code Section 5960 with Section 5895), holders are now required to submit granular data on actual locations served rather than census tract-based information.

If your organization is a State Video Franchise holder, please check the Annual Reporting For Video Franchise Holders section of the CPUC’s Video Franchising web page for new instructions on how to report video data.

Confidentiality of submitted data

If you seek confidential treatment of any information provided in response to this request, please comply with the provisions of the Commission’s General Order 66 D with regard to procedures for submission of information to the California Public Utilities Commission with claims of confidentiality.

<u>How to submit your data</u>

Your fixed and mobile Broadband Data can **<u>only</u>** be submitted via the Broadband Data Upload Tool once you have logged in or created an account. **All Fixed Broadband data must be submitted in the aforementioned formats.**

Please submit the requested data no later than **Wednesday, June 1, 2022**.

Send any questions or comments to broadbandmapping@cpuc.ca.gov

Thank you for your assistance and cooperation.

Sincerely,

/s/ Selena Huang
Program Manager
Broadband, Video and Market Branch

ATTACHMENT C

F.T.C. v. Sysco Corp.
113 F. Supp. 3d 1 (D.D.C. 2015)

FEDERAL TRADE COMMISSION, et al., Plaintiffs,

v.

SYSCO CORPORATION, et al., Defendants.

Civil No. 1:15–cv–00256 (APM)

United States District Court, District of Columbia.

Signed June 23, 2015

Background: Federal Trade Commission (FTC) and several states brought action against two merging foodservice distributors, seeking injunctive relief to prevent proposed merger pending administrative hearing to determine if merger violated Clayton Act's anti-monopoly provision. FTC moved for preliminary injunction.

Holdings: The District Court, Amit P. Mehta, J., held that:

(1) broadline distribution was a relevant product market for evaluating proposed merger;

(2) broadline distribution to national customers was a relevant product market for evaluating merger;

(3) relevant geographic market for broadline foodservice to national customers was nationwide;

(4) relevant local geographic markets were areas of overlap resulting from FTC expert's 75-percent draw methodology;

(5) FTC created rebuttable presumption that merger would substantially lessen competition in nationwide and local markets;

(6) additional studies by FTC's expert indicated that merger would harm competition in nationwide and local markets;

(7) neither proposed divestiture of certain assets, nor existing regional competition, nor entry of new competitors and expansion by existing competition remedies anticompetitive effects of merger;

(8) estimated efficiencies of merged entity were not merger-specific costs savings substantial enough to overcome presumption that merger would substantially lessen competition; and

(9) equities favored preliminary injunction.

Motion granted.

1. Antitrust and Trade Regulation ⚷996

To satisfy the "public interest" standard for obtaining preliminary injunctive relief to block a proposed merger pending an administrative determination as to the merger's legality, the Federal Trade Commission (FTC) is not required to establish that the proposed merger would in fact violate the anti-monopoly section of the Clayton Act, but, to demonstrate the likelihood of success on the merits, the FTC must show that there is a reasonable probability that the challenged transaction will substantially impair competition. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

2. Antitrust and Trade Regulation ⚷996

Federal Trade Commission (FTC) shows that there is a reasonable probability that the challenged transaction will substantially impair competition, as required to obtain preliminary injunctive relief to block a proposed merger pending an administrative determination as to the merger's legality under the anti-monopoly provision of the Clayton Act, if it raises questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation, and determination by the FTC in the first instance, and ultimately by the Court of Appeals.

Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

3. Antitrust and Trade Regulation ⚷996

Though more relaxed than the traditional "equity" standard, the "public interest" standard for obtaining preliminary injunction to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision, nevertheless demands rigorous proof to block the proposed transaction. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

4. Antitrust and Trade Regulation ⚷996

Prior to a full trial on the merits, issuance of a preliminary injunction to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision, is an extraordinary and drastic remedy, because such issuance may prevent the transaction from ever being consummated. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

5. Antitrust and Trade Regulation ⚷996

Showing of a fair or tenable chance of success on the merits will not suffice for preliminary injunctive relief to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

6. Antitrust and Trade Regulation ⚷996

Under the burden-shifting framework set forth in *United States v. Baker Hughes, Inc.*, 908 F.2d 981, for the Federal Trade Commission (FTC) to establish its likelihood of success on the merits, as required to obtain a preliminary injunction to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision, the FTC bears the initial burden of showing that a proposed merger would lead to undue concentration in the market for a particular product in a particular geographic area, which establishes a presumption that the merger will substantially lessen competition. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

7. Antitrust and Trade Regulation ⚷976

Under the burden-shifting framework set forth in *United States v. Baker Hughes, Inc.*, 908 F.2d 981, for the Federal Trade Commission (FTC) to establish its likelihood of success on the merits, as required to obtain a preliminary injunction to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision, once the FTC shows that a proposed merger would lead to undue concentration in the market for a particular product in a particular geographic area, thus establishing a presumption that the merger will substantially lessen competition, the burden shifts to the defendant to rebut this presumption by offering proof that the market-share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

8. Antitrust and Trade Regulation ⚷976

Under the burden-shifting framework set forth in *United States v. Baker Hughes, Inc.*, 908 F.2d 981, for the Federal Trade Commission (FTC) to establish its likelihood of success on the merits, as required to obtain a preliminary injunction to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision, the more compelling the government's prima facie case, the more evidence the defendant must present to rebut successfully the presumption that the merger will substantially lessen competition. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

9. Antitrust and Trade Regulation ⚷976

Under the burden-shifting framework set forth in *United States v. Baker Hughes, Inc.*, 908 F.2d 981, for the Federal Trade Commission (FTC) to establish its likelihood of success on the merits, as required to obtain a preliminary injunction to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision, the defendant can make the required showing to rebut the presumption that the merger will substantially lessen competition by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

10. Antitrust and Trade Regulation ⚷976

Under the burden-shifting framework set forth in *United States v. Baker Hughes, Inc.*, 908 F.2d 981, for the Federal Trade Commission (FTC) to establish its likelihood of success on the merits, as required to obtain a preliminary injunction to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision, if the defendant successfully rebuts the presumption that the merger will substantially lessen competition, the burden of producing additional evidence of anticompetitive effect shifts to the government and merges with the ultimate burden of persuasion, which remains with the government at all times. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

11. Antitrust and Trade Regulation ⚷996

Under the burden-shifting framework set forth in *United States v. Baker Hughes, Inc.*, 908 F.2d 981, for the Federal Trade Commission (FTC) to establish its likelihood of success on the merits, as required to obtain a preliminary injunction to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision, a failure of proof by the government in any respect will mean the transaction should not be enjoined. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

12. Antitrust and Trade Regulation ⚷996

Under the burden-shifting framework set forth in *United States v. Baker*

Hughes, Inc., 908 F.2d 981, for the Federal Trade Commission (FTC) to establish its likelihood of success on the merits, as required to obtain a preliminary injunction to block a merger under the Federal Trade Commission Act (FTCA), pending an administrative determination as to the merger's legality under the Clayton Act's anti-monopoly provision, the court must also weigh the equities, but if the FTC is unable to demonstrate a likelihood of success, the equities alone cannot justify an injunction. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

13. Antitrust and Trade Regulation ⚷766, 767

Under the Clayton Act's anti-monopoly provision, a merger analysis starts with defining the "relevant market," which has two component parts: first, the "relevant product market" identifies the product and services with which the defendants' products compete, and second, the "relevant geographic market" identifies the geographic area in which the defendant competes in marketing its products or service. Clayton Act § 7, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

14. Antitrust and Trade Regulation ⚷765

Defining the relevant market is critical in an antitrust case under the Clayton Act's anti-monopoly provision because the legality of the proposed merger in question almost always depends upon the market power of the parties involved. Clayton Act § 7, 15 U.S.C.A. § 18.

15. Antitrust and Trade Regulation ⚷767

When defining the relevant market in a merger analysis under the Clayton Act's anti-monopoly provision, 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; in other words, a product market includes all goods that are reasonable substitutes, even though the products themselves are not entirely the same. Clayton Act § 7, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

16. Antitrust and Trade Regulation ⚷767

Whether goods are reasonable substitutes, such that the goods fall within product market in a merger analysis under the Clayton Act's anti-monopoly provision, depends on two factors: "functional interchangeability," which refers to whether buyers view similar products as substitute, and "cross-elasticity of demand," for which the question turns in part on price. Clayton Act § 7, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

17. Antitrust and Trade Regulation ⚷767

If consumers can substitute the use of one product for the other, then the products in question will be deemed functionally interchangeable, and courts will generally include functionally interchangeable products in the same product market in a merger analysis under the Clayton Act's anti-monopoly provision, unless factors other than use indicate that they are not actually part of the same market. Clayton Act § 7, 15 U.S.C.A. § 18.

18. Antitrust and Trade Regulation ⚷767

Price is not the only variable in determining the cross-elasticity of demand between products, as one factor in determining whether goods are reasonable substitutes, such that the goods fall within product market in a merger analysis under the Clayton Act's anti-monopoly provision, as cross-elasticity of demand also depends on the ease and speed with which customers can substitute the product and the desirability of doing so. Clayton Act § 7, 15 U.S.C.A. § 18.

19. Antitrust and Trade Regulation ⚷767

Substitution based on a reduction in price will not correlate to a high cross-elasticity of demand, as one factor in determining whether goods are reasonable substitutes, such that the goods fall within product market in a merger analysis under the Clayton Act's anti-monopoly provision, unless the switch can be accomplished without the consumer incurring undue expense or inconvenience. Clayton Act § 7, 15 U.S.C.A. § 18.

20. Antitrust and Trade Regulation ⚷767

In a merger analysis under the Clayton Act's anti-monopoly provision, the product that comprises the market need not be a discrete good for sale. Clayton Act § 7, 15 U.S.C.A. § 18.

21. Antitrust and Trade Regulation ⚷767

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 in a merger analysis under the Clayton Act's anti-monopoly provision, since the market definition hinges on whether consumers view the products as reasonable substitutes. Clayton Act § 7, 15 U.S.C.A. § 18.

22. Antitrust and Trade Regulation ⚷767

In a merger analysis under the Clayton Act's anti-monopoly provision, the market definition is guided by the "narrowest market principle," under which the relevant market cannot meaningfully encompass an infinite range of products, but instead must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn. Clayton Act § 7, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

23. Antitrust and Trade Regulation ⚷767

In a merger analysis under the Clayton Act's anti-monopoly provision, courts look to two main types of evidence in defining the relevant product market: the "practical indicia" set forth by the Supreme Court in *Brown Shoe Co. v. United States*, 82 S.Ct. 1502, and testimony from experts in the field of economics. Clayton Act § 7, 15 U.S.C.A. § 18.

24. Antitrust and Trade Regulation ⚷767

Under the Supreme Court's decision in *Brown Shoe Co. v. United States*, 82 S.Ct. 1502, the boundaries of a product market may be determined in a merger analysis under the Clayton Act's anti-monopoly provision by examining such practical indicia as industry or public recognition, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Clayton Act § 7, 15 U.S.C.A. § 18.

25. Antitrust and Trade Regulation ⚷782

Factors under Supreme Court's decision in *Brown Shoe Co. v. United States*, 82 S.Ct. 1502, supported Federal Trade Commission's (FTC) position that broadline foodservice distribution was relevant product market for evaluating proposed merger of two foodservice distributors under Clayton Act's anti-monopoly provision, where broadliners were characterized by having sufficient product breadth and diversity to serve wide variety of customers and to be "one-stop shop," maintaining large distribution centers with large sales forces, offering distribution in other channels but running those businesses separately from broadline businesses, as well as frequent and flexible delivery schedules, high degree of customer service and value-added service offerings, and distinct pricing, and industry and public recognized broadline as distinct mode of distribution. Clayton Act § 7, 15 U.S.C.A. § 18.

26. Antitrust and Trade Regulation ⚷767

In a merger analysis under the Clayton Act's anti-monopoly provision, one of the primary methods used by economists to determine a product market is called the "hypothetical monopolist test," which asks whether a hypothetical monopolist who has control over a set of substitutable products could profitably raise prices on those products; if so, the products may comprise the relevant product market. Clayton Act § 7, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

27. Antitrust and Trade Regulation ⚷977(4)

Evidence ⚷571(6)

Aggregate diversion analysis and conclusion by Federal Trade Commission's (FTC) expert was more consistent with business realities of food distribution market than that advanced by merging foodservice distributors' expert, thus favoring finding that broadline foodservice distribution was relevant product market for evaluating merger under Clayton Act's anti-monopoly provision, even though FTC expert's reliance on certain data was problematic, where distributor's expert concluded that actual aggregate diversion ratio was greater than 100 percent, which, contrary to testimony of several industry leaders, meant that hypothetical monopolist who had control over every broadline distributor in country could not profitably impose small but significant and non-transitory increase in price (SSNIP) because enough customers would switch to other channels of distribution. Clayton Act § 7, 15 U.S.C.A. § 18.

28. Antitrust and Trade Regulation ⚷757

Merger Guidelines promulgated by the Antitrust Division of the Department of Justice (DOJ) are not binding, but the Court of Appeals and other courts have looked to them for guidance in merger cases.

29. Antitrust and Trade Regulation ⚷782

Practical indicia under Supreme Court's decision in *Brown Shoe Co. v. United States*, 82 S.Ct. 1502, supported finding that broadline distribution to national customers was relevant product market for evaluating merger of two foodservice distributors under Clayton Act's anti-monopoly provision, where regional broadliners had formed cooperatives to compete for customers with geographically-dispersed footprint, industry analysts or experts had acknowledged that national customers formed market distinct from local buyers, distributors touted their strategic advantage as national distributors, national customers' needs differed from those of local customers, and distributors operated dedicated sales groups from their national headquarters. Clayton Act § 7, 15 U.S.C.A. § 18.

30. Antitrust and Trade Regulation ⚷782

Small but significant and non-transitory increase in price (SSNIP) test under

Merger Guidelines promulgated by Antitrust Division of Department of Justice (DOJ) supported finding that broadline distribution to national customers was relevant product market for evaluating merger of two foodservice distributors under Clayton Act's anti-monopoly provision, even though Federal Trade Commission (FTC) expert's reliance on certain data was problematic, where numerous national customers testified that other channels of distribution were not adequate substitutes for broadline distribution. Clayton Act § 7, 15 U.S.C.A. § 18.

31. Antitrust and Trade Regulation ⚷766

In a merger analysis under the Clayton Act's anti-monopoly provision, the "relevant geographic market" is the area in which the goods or services at issue are marketed to a significant degree by the acquired firm; as such, the proper question to be asked is where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. Clayton Act § 7, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

32. Antitrust and Trade Regulation ⚷766

In a merger analysis under the Clayton Act's anti-monopoly provision, the geographic market, like the product market, must correspond to the commercial realities of the industry and be economically significant. Clayton Act § 7, 15 U.S.C.A. § 18.

33. Antitrust and Trade Regulation ⚷766

In a merger analysis under the Clayton Act's anti-monopoly provision, the relevant geographical market need not, and indeed cannot, be defined with scientific precision, though such a market must be sufficiently defined so that the court understands in which part of the country competition is threatened. Clayton Act § 7, 15 U.S.C.A. § 18.

34. Antitrust and Trade Regulation ⚷782

In analysis of proposed merger of two foodservice distributors under Clayton Act's anti-monopoly provision, relevant geographic market for broadline foodservice distribution to national customers was nationwide, even though physical act of delivering food products occurred locally, where distributors competed within this market by touting their nationwide distribution capabilities to customers, bidding against other broadliners with multi-regional capabilities, coordinating marketing, negotiating, and managing of these customers through "national account" teams, and entering with customers into single contract whose terms, including pricing, applied across regions. Clayton Act § 7, 15 U.S.C.A. § 18.

35. Antitrust and Trade Regulation ⚷782

In analysis of proposed merger of two foodservice distributors under Clayton Act's anti-monopoly provision, relevant local geographic markets were areas of overlap resulting from Federal Trade Commission (FTC) expert's 75-percent draw methodology, under which, in absence of industry standard for defining local markets, expert drew circles around each distribution center operated by one of merging distributors, so as to capture 75% of each center's sales to local customers, identified those customers that fell within overlapping circles, and then identified broadline distributors who could compete for customers in overlap area and factored those broadline distributors into local market share computations. Clayton Act § 7, 15 U.S.C.A. § 18.

36. Antitrust and Trade Regulation ⚷976

In a merger analysis under the Clayton Act's anti-monopoly provision, a presumption that the merger will substantially lessen competition is created if the government shows that the merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market. Clayton Act § 7, 15 U.S.C.A. § 18.

37. Antitrust and Trade Regulation ⚷765

When determining the probable effects on competition in a merger analysis under the Clayton Act's anti-monopoly provision, "market concentration" is a function of the number of firms in a market and their respective market shares. Clayton Act § 7, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

38. Antitrust and Trade Regulation ⚷765, 976

When determining the probable effects on competition in a merger analysis under the Clayton Act's anti-monopoly provision, a common tool used to measure changes in market concentration is the Herfindahl–Hirschmann Index (HHI), which is calculated by summing the squares of the individual firms' market shares, thus giving proportionately greater weight to the larger market shares, and an increase in HHI by 510 points creates, by a wide margin, a presumption that the merger will lessen competition. Clayton Act § 7, 15 U.S.C.A. § 18.

39. Antitrust and Trade Regulation ⚷976

Federal Trade Commission (FTC) showed that proposed merger of two foodservice distributors would result in significant increase in market concentration in nationwide market for national broadline customers, thus creating rebuttable presumption that merger would substantially lessen competition in that market under Clayton Act's anti-monopoly provision, where expert identified distributors' individual sales to national broadline customers to use as numerator of market share, determined total sales by all broadliners to national customers to use as denominator, first by aggregating national sales of three principal competitors for national customers and second by aggregating national sales reported by largest 16 broadline distributors, and adjusted market shares to account for divestiture to largest regional broadliner. Clayton Act § 7, 15 U.S.C.A. § 18.

40. Antitrust and Trade Regulation ⚷976

Federal Trade Commission (FTC) showed that proposed merger of two foodservice distributors would result in significant increase in market concentration in local markets for broadline distribution, thus creating rebuttable presumption that merger would substantially lessen competition in that market under Clayton Act's anti-monopoly provision, where expert calculated overall local market shares by calculating market shares for each customer in relevant local market areas and then aggregating each of these customer-specific shares to local level, using weighted averages across all customers in those areas, applied three different metrics when calculating market shares so as to confirm his calculations, and calculated post-divestiture market concentrations and increases in Herfindahl–Hirschmann Index (HHI) used to measure changes in market concentration. Clayton Act § 7, 15 U.S.C.A. § 18.

41. Antitrust and Trade Regulation ⚷977(4)

Evidence ⚷571(6)

Federal Trade Commission (FTC) expert's requests for proposals (RFP) / bidding analysis was more persuasive than switching study by merging foodservice distributors' expert on FTC's unilateral effects theory to argue that merger would harm competition in national distribution markets, in violation of Clayton Act's anti-monopoly provision, even though both empirical studies were imperfect, where FTC expert's analysis better captured instances of actual competition across more representative cross-section of national customers over longer period of time, and his conclusions were corroborated by other evidence indicating that distributors were close competitors, particularly for large national customers, including ordinary course documents and testimony of industry actors indicating that distributors viewed each other as competitors. Clayton Act § 7, 15 U.S.C.A. § 18.

42. Antitrust and Trade Regulation ⚷757

When a merger eliminates head-to-head competition between close competitors, a merger is likely to have unilateral anticompetitive effect, in violation of the Clayton Act's anti-monopoly provision, if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms. Clayton Act § 7, 15 U.S.C.A. § 18.

43. Antitrust and Trade Regulation ⚷977(4)

Evidence ⚷571(6)

Federal Trade Commission (FTC) expert's merger simulation model strengthened FTC's prima facie case that merger of two foodservice distributors would substantially lessen competition in market for national customers, in violation of Clayton Act's anti-monopoly provision, where expert used "auction model" to estimate harm to national customers based on real-world observation that such customers used requests for proposals (RFP) processes that typically involved competitive bids and bilateral negotiations between distributors and foodservice operators to award business, and, to quantify likely harm to national customers, he performed calculations that used as inputs, inter alia, his estimates of distributors' national customer market shares and their price-cost margins. Clayton Act § 7, 15 U.S.C.A. § 18.

44. Antitrust and Trade Regulation ⚷977(4)

Evidence ⚷571(6)

Federal Trade Commission (FTC) showed that unilateral effects were likely to occur in many local markets because merger of two foodservice distributors would eliminate one of top competitors in those markets, thus strengthening FTC's prima facie case of merger harm under Clayton Act's anti-monopoly provision, where FTC expert looked at distributors' business records to determine how closely they competed in local markets, and, although certain data he used was problematic, such data overwhelmingly showed primary competition between distributors, distributors' ordinary course documents indicated that they were close competitors in local markets, and, although testimony of industry actors showed that other broadliners competed effectively in many local markets, such testimony also showed that distributors were strong competitors for local customers. Clayton Act § 7, 15 U.S.C.A. § 18.

45. Antitrust and Trade Regulation ⚷977(4)

Evidence ⚷571(6)

Federal Trade Commission (FTC) expert's entry event studies were not convincing evidence that merger of two foodservice distributors would harm local customers, in violation of Clayton Act's anti-monopoly provision, where two entry events on which expert relied were not as dissimilar as he testified, and yet they produced very different results, with one showing significant price decrease and other showing negligible one, and expert's explanation for these different results did not withstand scrutiny and no other evidence explained results. Clayton Act § 7, 15 U.S.C.A. § 18.

46. Antitrust and Trade Regulation ⚷976

Proposed divestiture to regional distributor of 11 of merging national foodservice distributor's distribution centers, even when coupled with regional distributor's "aggressive" national expansion, did not remedy anticompetitive effects on national market of proposed merger of two national distributors, and thus did not rebut presumption that merger would substantially lessen competition, in violation of Clayton Act's anti-monopoly provision, where regional distributor would not be nearly as competitive as merging distributor was pre-merger, based on sales and market share projections, questions as to whether post-merger regional distributor could meet national customers' needs, its own doubts that acquiring 11 centers was sufficient to compete nationally, competitive disadvantages in product acquisition costs, human resources, and ability to offer value-added services, and its continuing reliance on merged entity post-merger. Clayton Act § 7, 15 U.S.C.A. § 18.

47. Antitrust and Trade Regulation ⚷976

Existing regional competition did not remedy anticompetitive effects on national market of proposed merger of two national foodservice distributors, and thus did not rebut presumption that merger would substantially lessen competition, in violation of Clayton Act's anti-monopoly provision, where, pre-merger, national customers were in marketplace with two strong competitors capable of nationwide broadline distribution, but post-merger, these customers would be in marketplace with merged entity acting as single, undisputed heavyweight of national broadline distribution and collection of regional players, including transitioning regional distributor to which certain of merging distributor's assets would be divested and national distributor that operated primarily though its regional members, providing competitive constraints. Clayton Act § 7, 15 U.S.C.A. § 18.

48. Antitrust and Trade Regulation ⚷976

Absent substantial acquisition opportunity, entry of new competitors and expansion by existing regional distributors would not be timely, likely, and of sufficient magnitude to counteract anticompetitive effects on national market of proposed merger of two national foodservice distributors, and thus such entry and expansion did not rebut presumption that merger would substantially lessen competition, in violation of Clayton Act's anti-monopoly provision, where broadline foodservice distribution industry was very capital and labor intensive, and, even if regional distributor were to make substantial investment to start or expand its business, there was no guarantee that customers would follow because incumbency presented powerful force within industry. Clayton Act § 7, 15 U.S.C.A. § 18.

49. Antitrust and Trade Regulation ⚷757

In a merger analysis under the Clayton Act's anti-monopoly provision, the prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers. Clayton Act § 7, 15 U.S.C.A. § 18.

50. Antitrust and Trade Regulation ⚷977(4)

In some instances, efficiencies resulting from a proposed merger may be considered in rebutting the government's prima facie case that the merger would substantially lessen competition, in violation of the Clayton Act's anti-monopoly provision. Clayton Act § 7, 15 U.S.C.A. § 18.

51. Antitrust and Trade Regulation ⚷757

Even if evidence of efficiencies resulting from a proposed merger, alone, is insufficient to rebut the government's prima facie case that the merger would substantially lessen competition, in violation of the Clayton Act's anti-monopoly provision, such evidence may nevertheless be relevant to the competitive effects analysis of the market. Clayton Act § 7, 15 U.S.C.A. § 18.

52. Antitrust and Trade Regulation ⚷757

In a merger analysis under the Clayton Act's anti-monopoly provision, 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; specifically, the court must determine whether the efficiencies are "merger-specific," meaning they represent a type of cost saving that could not be achieved without the merger, and "verifiable," meaning the estimate of the predicted saving must be reasonably verifiable by an independent party. Clayton Act § 7, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

53. Antitrust and Trade Regulation ⚷757, 976

In a merger analysis under the Clayton Act's anti-monopoly provision, the merging entities bear the burden of demonstrating that claimed the efficiencies resulting from a proposed merger are specific to that merger, which requires a demonstration that the efficiencies cannot be achieved by either entity alone, and the entities must also demonstrate that their claimed efficiencies would benefit customers. Clayton Act § 7, 15 U.S.C.A. § 18.

54. Antitrust and Trade Regulation ⚷976

Even accepting accuracy of consulting firm's total annual cost savings estimate, merging national foodservice distributors did not show that this amount, or at least substantial portion of it, could not be achieved independently from proposed merger, and thus estimated efficiencies of merged entity were not merger-specific costs savings substantial enough to overcome presumption that merger of two national foodservice distributors would substantially lessen competition, in violation of Clayton Act's anti-monopoly provision, where distributors did not hired firm only to determine if merged entity could achieve enough cost savings to make merger worthwhile, not to conduct antitrust analysis, and distributors' expert did not conduct independent analysis of firm's findings, such that his reliance on firm's estimates likely overstated savings related to merger. Clayton Act § 7, 15 U.S.C.A. § 18.

55. Antitrust and Trade Regulation ⚷976

Even accepting total estimate of merger-specific efficiencies by merging national foodservice distributors' expert, projected savings from merger were insufficient to overcome evidence showing that possibly greater benefits public could achieve through existing, continued competition, and thus did not overcome presumption that merger of two national foodservice distributors would substantially lessen competition, in violation of Clayton Act's anti-monopoly provision; estimate would only amount to less than one percent of merged entity's annual revenue, and, even if merged entity passed on to customers all of this cost savings, such savings were unlikely to outweigh competitive harm to customers. Clayton Act § 7, 15 U.S.C.A. § 18.

56. Antitrust and Trade Regulation ⚷757

In a merger analysis under the Clayton Act's anti-monopoly provision, the critical question raised by the efficiencies defense is whether the projected savings from the merger are enough to overcome the evidence showing that possibly greater benefits can be achieved by the public through existing, continued competition. Clayton Act § 7, 15 U.S.C.A. § 18.

57. Antitrust and Trade Regulation ⚷996

Public interests outweighed private ones, such as significant amount of time, energy, and money that two foodservice distributors had devoted to proposed merger, as well as risk that distributors would abandon merger rather than proceed to trial, and thus equities favored preliminarily enjoining merger pending administrative determination of its legality under Clayton Act's anti-monopoly provision; public's interest in enforcing antitrust law plainly favored injunction, and public interest in preserving Federal Trade Commission's (FTC) ability to order effective relief after hearing also supported injunction, in that if merger were ultimately found to violate Clayton Act, it would be impossible to recreate pre-merger competition because distributors would have already combined operations and divested certain assets to regional broadline distributor. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

Stephen Weissman, Federal Trade Commission, Alexis Gilman, Catherine Sanchez, Christopher Abbott, David J. Laing, Jeanne Nichols, Krisha A. Cerilli, Kristian Sjoberg Rogers, Mark Seidman, Matthew McDonald, Melissa Davenport, Michael Derita, Ryan Quillian, Sophia Vandergrift, Stephen Mohr, Thomas H. Brock, Federal Trade Commission, Bureau of Competition, Nicholas Alan Bush, DC Office of the Attorney General, Washington, DC, Natalie S. Manzo, Office of the Attorney General, Los Angeles, CA, Robert W. Pratt, Illinois Office of the Attorney General, Antitrust, Chicago, IL, Layne M. Lindebak, Iowa Department of Justice, Special Litigation Division, Des Moines, IA, Gary Honick, Office of the Maryland Attorney General, Baltimore, MD, Benjamin Jack Velzen, James William Canaday, Office of the Minnesota Attorney General, St. Paul, MN, Kimberly Rae Parks, Office of the Ohio Attorney General, Columbus, OH, James A. Donahue, III, Office of the Attorney General, Antitrust Section, Jennifer Ann Thomson, Office of the Attorney General, Commonwealth of Pennsylvania, Harrisburg, PA, Victor J. Domen, Jr., Tennessee Attorney General's Office, Public Interest Division, Nashville, TN, Sarah Oxenham Allen, Office of the Attorney General, Consumer Protection Section, Stephen John Sovinsky, Office of the Attorney General of Virginia, Richmond, VA, Kip David Sturgis, North Carolina Department of Justice, Raleigh, NC, for Plaintiffs.

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MEMORANDUM OPINION

Amit P. Mehta, United States District Judge

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INTRODUCTION

Americans eat outside of their homes with incredible frequency. The U.S. Department of Commerce, for instance, recently reported, for the first time since it began tracking such data, that Americans spent more money per month at restaurants and bars than in grocery stores.[1] Of course, Americans eat out at many other places, too—sports arenas, school and workplace cafeterias, hotels and resorts, hospitals, and nursing homes, just to name a few. The foodservice distribution industry supplies food and related products to all of these locations. Foodservice distribution is big business. In 2013, the market grew to $231 billion. By some estimates, there are over 16,000 companies that compete in the foodservice distribution marketplace.

1. Michelle Jamrisko, *Americans' Spending on Dining Out Just Overtook Grocery Sales for the First Time Ever,* Bloomberg Business (Apr. 14, 2015), http://www.bloomberg.com/news/articles/2015–04–14/americans–spending–on–dining–out–just–overtook–grocery–sales–for–the–first–time–ever.

The two largest foodservice distribution companies in the country are Defendants Sysco Corporation ("Sysco") and U.S. Foods, Inc. ("USF"). Both are primarily "broadline" foodservice distributors. As the name implies, a broadline foodservice distributor sells and delivers a "broad" array of food and related products to just about anywhere food is consumed outside the home. In 2013, Sysco's broadline sales were over $[Redacted] billion and USF's were over $[Redacted] billion.

In December 2013, Sysco and USF announced that they had entered into an agreement to merge the companies. Fourteen months later, in February 2015, Sysco and USF announced that they intended to divest 11 USF distribution facilities to the third largest broadline foodservice distributor, Performance Food Group, Inc., if the merger received regulatory approval.

On February 20, 2015, the Federal Trade Commission ("FTC") and a group of states filed suit in this court seeking an injunction to prevent the proposed merger. Specifically, under Section 13(b) of the Federal Trade Commission Act, the FTC asked this court to halt the proposed merger until the FTC completes an administrative hearing—scheduled to begin on July 21, 2015—to determine whether the proposed combination would violate Section 7 of the Clayton Act.

The precise question presented by this case is whether the court should enjoin Sysco and USF from merging until the proposed combination is reviewed by an FTC Administrative Law Judge. The real-world impact of the case, however, is more consequential. Sysco and USF have announced that they will not proceed with the merger if the court grants the requested injunction.

The proceedings in this case have been extraordinary. The FTC investigated the proposed merger for more than a year before filing suit. Then, within a two-month period, the parties worked tirelessly to exchange millions of documents, depose dozens of witnesses, and secure over a hundred declarations. The court heard live testimony for eight days in early May 2015. Counsel for the parties have done all of this work while exhibiting the highest degree of skill and professionalism.

Congress passed the Clayton Act to enable the federal government to halt mergers in their incipiency that likely would result in high market concentrations. Congress was especially concerned with large combinations that would impact everyday consumers across the country. The court has considered all of the evidence in this case and has reached the following conclusion: The proposed merger of the country's first and second largest broadline foodservice distributors is likely to cause the type of industry concentration that Congress sought to curb at the outset before it harmed competition. The court finds that the FTC has met its burden under Section 13(b) of the Federal Trade Commission Act of showing that the requested injunction is in the public interest. The court, therefore, grants the FTC's motion for preliminary injunctive relief.

BACKGROUND

I. *THE FOODSERVICE DISTRIBUTION INDUSTRY*

A. Overview

Defendants operate in a $231 billion foodservice distribution industry, where over 16,000 companies battle daily to sell food and related products to restaurants, resorts, hotels, hospitals, schools, company cafeterias, and so on—everywhere food is served outside the home. Hr'g Tr. 1324; DX–00329 at 17. The types of customers served by the foodservice distribution industry come in all shapes and sizes. They range from independent restaurants, to well-known quick-service and casual dining chains (*e.g.,* Five Guys, Subway, and Applebee's), to hospitality procurement companies and hotel chains (*e.g.,* Avendra, Hilton Supply Management, and Starwood Hotels and Resorts), to government agencies (*e.g.,* the U.S. Department of Veterans Affairs), to foodservice management companies (*e.g.,* Aramark, Sodexo, and Compass Group), to healthcare group purchasing organizations (*e.g.,* Premier, Novation, and Navigator).

The industry recognizes four general categories of foodservice distribution companies: (i) broadline distributors, (ii) systems distributors, (iii) specialty distributors, and (iv) cash-and-carry and club stores. Customers commonly purchase from foodservice distributors in one or more of these different categories, or "channels," mixing and matching to suit their needs. For example, customers may purchase products directly from a broadline distributor; they may contract with a brand-named food manufacturer (*e.g.,* Tyson Foods for chicken or Kellogg's for cereal) and use a broadline or systems distributor for warehousing and delivery; they may use specialty distributors for select items such as produce or seafood; or they may make their purchases at a cash-and-carry or club store (*e.g.,* Restaurant Depot or Costco).

Understanding these different channels of distribution and the different customers they serve is central to the antitrust analysis that this case demands. The court, therefore, describes below the sellers and buyers of foodservice distribution in the United States.

B. Channels of Foodservice Distribution

1. *Broadline Distributors*

Broadline distribution is characterized by several key features, including: (i) product breadth and depth; (ii) availability of private-label products; (iii) frequent and flexible delivery, including next-day service; and (iv) "value-added" services, such as menu and nutrition planning.

Broadline distributors offer thousands of distinct items for sale—known as "stock keeping units" ("SKUs") for inventory management purposes—in a wide array of product categories, including canned and dry goods, dairy, meat, poultry, produce, seafood, frozen foods, beverages, and even janitorial supplies such as chemicals, cleaning equipment, and paper goods. Broadliners also sell "private label" goods, which are akin to "Trader Joe's" or "Safeway" brand products found in those grocery stores. "Private label" products are often comparable in quality to their name-brand counterparts, but are cheaper in price. Because they are able to offer such a diverse array of products, broadline distributors market themselves to customers as a "one-stop shop," by virtue of their ability to supply most—if not all—food and related products needed by their customers. Customers value the breadth of product offerings and the opportunity to aggregate a substantial portion of their purchases with one distributor, allowing them to save costs. They also appreciate broadliners' high level of customer service, which usually includes next-day and emergency deliveries. Focusing heavily on individualized customer service, broadline distributors employ much larger salesforces than the other channels.

Broadline distributors come in different sizes. The largest, by any measure, are Sysco and USF. In 2013, Sysco and USF made $[Redacted] billion and $[Redacted] billion in broadline sales, respectively. PX09350–236, Table 44. The next largest broadliner made less than $6 billion. *Id.*

Sysco and USF are also the only two broadliners with true nationwide service capability. Sysco and USF have 72 and 61 distribution centers, respectively—each with more than twice the number of distribution centers operated by the next-largest broadliners. Because of their nationwide footprint, Sysco and USF are often referred to as "national" broadliners. Combined, Defendants employ over 14,000 sales representatives. No other broadliner employs more than 1,600. Defendants together operate over 13,000 trucks. The next largest broadliners have just over 1,600.

The next tier of companies are "regional broadliners," so called because their distribution capabilities are concentrated in discrete regions of the United States. The largest regional broadliner, Performance Food Group ("PFG"), is the country's third-largest broadliner in terms of sales. PFG operates 24 broadline distribution facilities, mainly in the eastern and southern parts of the country and, in 2013, earned $6 billion in broadline revenue. The next five largest regional broadline distributors, in order of 2013 revenues, are: (i) Gordon Food Service, which has 10 distribution centers mainly in the Midwest, Florida, and Texas; (ii) Reinhart Foodservice, which has 24 distribution centers, primarily in the East and Midwest; (iii) Ben E. Keith Company, which has seven distribution centers in Texas and bordering states; (iv) Food Services of America, which has 10 distribution centers, concentrated in the Northwest; and (v) Shamrock Foods, which has four distribution centers in the Southwest and southern California. These regional broadliners had 2013 revenues ranging from approximately $[Redacted] billion to $[Redacted] billion.

The last tier of broadliners have five or fewer distribution centers and 2013 revenues of less than $1.1 billion. Many of these operate in a single locality or region, like Shetakis Wholesalers, which has one distribution center in Las Vegas, Nevada.

Regional broadline distributors have formed consortiums to compete for customers with multi-regional distribution needs. The largest consortium is Distribution Market Advantage ("DMA"). DMA is a supply chain sales and marketing cooperative owned by nine independent regional distributors, which are also its members, including Gordon Food Service, Ben E. Keith, and Reinhart Foodservice. DMA does not own any trucks or distribution facilities; rather, its purpose is to coordinate the bidding, contracting, and operational processes of its members to meet the needs of large customers that require a distributor with extensive geographic coverage. Another consortium is Multi–Unit Group ("MUG"), an alliance of 19 broadline distributors who are part of UniPro Foodservice, a larger consortium that includes distributors in different channels. As explained later, these regional consortia have had mixed results in competing for large, geographically dispersed customers.

2. Systems Distributors

Systems distributors, also referred to as "custom" or "customized" distributors, primarily serve fast food, quick service, fast casual, and casual chain restaurants (*e.g.,* Burger King, Wendy's, and Applebee's), which have fixed or limited menus. Unlike broadliners, systems distributors do not carry a large, diverse number of SKUs. Rather, their inventory profile is a small number of proprietary SKUs, which are manufactured specifically for the customer. For instance, the systems distributor for Wendy's carries and delivers the food products needed for Wendy's' menu and does not make those products available to others. As a result, systems distributors typically provide only warehousing and transport services. They do not offer private label products or value-added services such as menu planning, and they have very small salesforces, if any. Systems distributors make large, limited-SKU deliveries on a fixed, limited schedule, and typically do not offer next-day or emergency deliveries.

Some foodservice distribution companies operate both systems and broadline divisions. For instance, Sysco operates SYGMA, a systems distribution division. SYGMA is run by a different set of executives and, for the most part, operated out of separate distribution centers. PFG offers systems distribution through PFG Customized, which is run separately from its broadline division.

3. Specialty Distributors

Specialty distributors offer a limited and focused grouping of products within one or more product categories—typically fresh produce, meat, seafood, dairy or baked goods. Other specialty distributors focus on a specific type of cuisine, such as Italian fare. Many customers, especially independent restaurants, use specialty distributors to supplement their purchases from broadline distributors because the specialty distributor offers higher quality or fresher products than the broadline distributor or provides unique products that the broadline distributor does not carry, such as products from local farmers. Both in terms of number of SKUs and geographic coverage, specialty distributors are typically smaller than broadline distributors.

To compete with specialty distributors, some broadliners operate specialty divisions. Sysco, for instance, operates several specialty divisions separately from its broadline division. So, too, does PFG, which operates Roma, a specialty division for Italian food products.

4. Cash–and–Carry and Club Stores

Cash-and-carry stores offer a "self-service" model of food distribution, in which customers make purchases at the store and transport the purchased goods themselves. Club stores like Costco and Sam's Club also fall within this distribution channel. With limited exceptions, cash-and-carry stores do not deliver. They also offer fewer products than broadline distributors. For example, the largest cash-and-carry store, Restaurant Depot, only carries up to [Redacted] SKUs. Additionally, cash-and-carry stores do not have sales personnel dedicated to individual customers. Because of these features, the prices offered by cash-and-carry stores are significantly lower than those offered by broadliners. The typical cash-and-carry customer is an independent restaurant that either does not meet broadline distributors' minimum purchase requirements or needs to supplement its broadline deliveries.

C. Foodservice Distribution Customers

Foodservice distribution customers are a heterogeneous group. The largest customers, such as group purchasing organizations and foodservice management companies, buy hundreds of millions of dollars of product a year, whereas a single independent restaurant buys a small fraction of that amount. Some customers choose to buy from a single line of distribution; others mix distribution channels. Some customers demand fixed pricing, whereas others buy based on daily market rates. Generally speaking, however, customers can be grouped into several categories.

1. Group Purchasing Organizations

Group purchasing organizations, or GPOs, are entities that, through the collective buying power of their members, obtain lower prices for foodservice products.

GPOs negotiate direct contracts with food manufacturers and thereby secure lower prices than a member could individually.

GPOs do not have their own distribution capabilities. Rather, they contract with broadline distributors for warehousing, delivery, and operational services. When a member purchases a GPO-contracted good, the member pays the broadliner on a "cost-plus" basis: it pays for the "cost" of the product based on the GPO's contract with the manufacturer, "plus" the distributor's markup, which is negotiated between the GPO and distributor. GPOs also contract with broadliners to allow their members to purchase products from broadline distributors (rather than from manufacturers), in which case they pay the broadline distributor both the distribution margin (markup) and the cost for the product set by the distributor. GPO members also buy from specialty distributors.

GPOs are prominent in the healthcare and hospitality industries. The largest healthcare GPOs include Premier, Novation, and Navigator. One of the largest hospitality GPOs is Avendra. These companies annually spend hundreds of millions of dollars on broadline distribution.

2. Foodservice Management Companies

Foodservice management companies operate cafeterias or other dining facilities at educational institutions, sports venues, and workplaces. Like GPOs, foodservice management companies negotiate contracts with food manufacturers and rely on broadliners for storage and delivery; they also purchase directly from broadliners and specialty distributors. Sodexo, Compass Group, and Aramark are among the country's largest foodservice management companies. Those three companies each spend approximately $[Redacted] billion annually on broadline distribution.

3. Hospitality Chains

Hospitality chains are also large purchasers. Hilton Hotels, for example, uses a system similar to a GPO. It has a subsidiary, Hilton Supply Management LLC, which negotiates contracts on behalf of over 4,000 members to obtain food and related items at a discounted price. Other hospitality companies, such as Hyatt Hotels, purchase most of their foodservice products through Avendra, the largest hospitality GPO. Starwood Hotels and Interstate Hotels & Resorts, on the other hand, directly manage food procurement and distribution contracts for their properties. Regardless of the food purchasing model, hospitality chains also buy food directly from broadliners and rely on them for their storage and delivery needs. These companies spend hundreds of millions of dollars annually on broadline distribution. Individual hotels and resorts also buy directly from specialty distributors, as needed.

4. Restaurant Chains

Restaurant chains come in many sizes with a wide variety of characteristics. This customer category includes nationwide fast food or quick service restaurants such as Burger King and Subway, each with thousands of locations in all regions of the country. It also includes regional fast casual restaurant chains such as Culver's (primarily in the Midwest) and Zaxby's (primarily in the Southeast), as well as nationwide sit-down restaurant chains, such as Applebee's and Cheesecake Factory. The channel of distribution a chain restaurant uses depends, in part, on the number of locations and menu variety. The greater the number of locations and the fewer the menu items, the more amenable the chain restaurant is to systems distribution.

5 .Government Agencies

Some government agencies, notably the Defense Logistics Agency and the U.S. Department of Veterans Affairs, are large buyers of broadline distribution services. Those agencies, for instance, spend hundreds of millions of dollars each year on broadline foodservice.

6. "Street" Customers

Customers with only one location, or a handful of locations, are referred to in the industry as "street," "local," or "independent" customers. Examples of this type of customer include independent restaurants and resorts. Unlike the types of customers identified above, street customers usually do not have written contracts with broadliners; instead, they negotiate prices on a weekly or other short term basis. They also tend to diversify their purchases among multiple distribution channels. Indeed, according to a study conducted by an industry trade group, the International Foodservice Distributors Association, the typical independent customer uses up to twelve different supply sources. DX–00293 at 29.

I. *CASE HISTORY*

A. Sysco and USF

Defendant Sysco is a publicly-traded corporation headquartered in Houston, Texas. As the largest North American foodservice distributor, Sysco distributes food to approximately 425,000 customers in the United States, generating sales of about $46.5 billion in fiscal year 2014. Compl. for TRO and Prelim. Inj. Pursuant to Section 13(b) of the FTC Act, ECF No. 3 at ¶ 24 [hereinafter Compl.]. Sysco's business is divided into three divisions: (i) Broadline (81 percent of revenue); (ii) SYGMA, which provides systems distribution (13 percent of revenue); and (iii) "Other," which provides, among other things, specialty produce distribution (6 percent of revenue). *Id.* ¶ 25. Sysco's broadline division operates out of 72 distribution centers located across the United States. *Id.*

Defendant U.S. Foods, Inc., is a privately-held corporation based in Rosemont, Illinois, and is a wholly owned subsidiary of Defendant USF Holding Corp. USF is controlled by the investment funds of Clayton, Dubilier & Rice, Inc., and KKR & Co., L.P. The second-largest foodservice distributor in the United States, USF operates 61 broadline distribution centers across the country and serves over 200,000 customers nationwide. *Id.* ¶ 27. In fiscal year 2013, USF generated approximately $22 billion in revenue. *Id.*

B. History of the Merger

On December 8, 2013, Sysco and USF signed a definitive merger agreement, whereby Sysco agreed to acquire all shares of USF for $500 million in cash and $3 billion in newly issued Sysco equity. Sysco also agreed to assume $4.7 billion in USF's existing debt, for a total transaction value of $8.2 billion. The merger agreement expires on September 8, 2015.

After announcing the merger, Defendants filed a notification regarding the merger as required by the Hart–Scott–Rodino Antitrust Improvements Act, 15 U.S.C. § 18a. As a result of this filing, the FTC commenced an investigation to determine the effects of the proposed combination. The FTC is an administrative agency of the United States federal government that derives its authority from the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41 *et seq.* Among other duties, the FTC is vested with authority and responsibility for enforcing Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

During the FTC's investigation, and with the hope of gaining regulatory approval, on February 2, 2015, Sysco and USF announced an asset purchase agreement with regional broadline distributor Performance Food Group, Inc. ("PFG"), to sell 11 of USF's 61 distribution centers to PFG, contingent upon the successful completion of the merger. The 11 USF distribution centers—intended to increase PFG's geographic footprint—are, for the most part, located within the western half of the country, where PFG at present has only one distribution center. Currently, the 11 distribution centers account for approximately $4.5 billion in broadline sales. PX09250–011. The parties also executed a Transition Services Agreement. Under the two agreements, PFG would acquire all assets and employees at the 11 distribution centers, all customers under those contracts (assuming the customers consent), and the right to use USF private label products at those facilities for up to three years.

C. History of these Proceedings

On February 19, 2015, the Commissioners of the FTC voted 3–2 to authorize the filing of an administrative complaint in the FTC's Article I court to block the proposed merger, based on a finding that there was reason to believe that the merger would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. Trial before an Administrative Law Judge is scheduled to begin on July 21, 2015.

Also, on February 19, 2015, the Commission authorized the FTC staff to seek a preliminary injunction in federal court under Section 13(b) of the FTC Act in order to prevent Defendants from completing the merger. The FTC filed this action on February 20, 2015, seeking a temporary restraining order ("TRO") and preliminary injunction to maintain the status quo until the conclusion of the administrative trial. The FTC is joined in this action by the District of Columbia and the following states: California, Illinois, Iowa, Maryland, Minnesota, Nebraska, North Carolina, Ohio, Tennessee, Pennsylvania, and Virginia (collectively, the "Plaintiff States"). By and through their respective Attorneys General, the Plaintiff States have joined with the FTC in 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.

On February 24, 2015, Defendants stipulated to a TRO, agreeing not to merge until three calendar days after this court rules on the FTC's Motion for Preliminary Injunction. The court entered the stipulated TRO on February 27, 2015. Defendants have since represented that they will abandon the transaction if this court grants the preliminary injunction.

On March 4, 2015, the court scheduled a preliminary injunction hearing to start on May 5, 2015. The parties' counsel accomplished an extraordinary amount of work in the two months leading up to the evidentiary hearing. They exchanged approximately 14.8 million documents and took 72 depositions. Moreover, in addition to the more than 90 industry participant declarations that accompanied the FTC's motion for preliminary injunction, Defendants obtained 65 new declarations or counter declarations, while the FTC obtained an additional 25 new or counter declarations. During the eight-day evidentiary hearing, the court heard testimony from 20 witnesses, either live or via video deposition. The parties submitted a total of 185 declarations into evidence, as well as over 3,500 exhibits and excerpts of over 70 depositions. The court heard closing arguments on May 28, 2015.

LEGAL STANDARD

I. *SECTION 7 OF THE CLAYTON ACT*

Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." 15 U.S.C. § 18. When the FTC has "reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act," it may seek a preliminary injunction under Section 13(b) of the FTC Act to "prevent a merger pending the Commission's administrative adjudication of the merger's legality." *FTC v. Staples, Inc.,* 970 F.Supp. 1066, 1070 (D.D.C.1997) (citing 15 U.S.C. § 53(b)). "Section 13(b) provides for the grant of a preliminary injunction where 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." *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 714 (D.C.Cir.2001) (citing 15 U.S.C. § 53(b)).

II. *SECTION 13(B) STANDARD FOR PRELIMINARY INJUNCTIONS*

The Section 13(b) standard for preliminary injunctions differs from the familiar equity standard applied in other contexts. As the Court of Appeals explained in *Heinz*: "Congress intended this standard to depart from what it regarded as the then-traditional equity standard, which it characterized as requiring the plaintiff to show: (1) irreparable damage, (2) probability of success on the merits and (3) a balance of equities favoring the plaintiff." 246 F.3d at 714 (internal citation omitted). The court continued: "Congress determined that the traditional standard was not 'appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.' " *Id.* (quoting H.R.Rep. No. 93–624 at 31 (1971)); *see also FTC v. Exxon Corp.,* 636 F.2d 1336, 1343 (D.C.Cir.1980) ("In enacting [Section 13(b)], Congress further demonstrated its concern that injunctive relief be broadly available to the FTC by incorporating a unique 'public interest' standard in 15 U.S.C. [§] 53(b), rather than the more stringent, traditional 'equity' standard for injunctive relief.").

[1] Under Section 13(b)'s "public interest" standard, "[t]he FTC 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. Rather, to demonstrate the likelihood of success on the merits, "the government need only show that there is a reasonable probability that the challenged transaction will substantially impair competition." *Staples,* 970 F.Supp. at 1072 (citation omitted) (internal quotation marks omitted).

[2] A trial court evaluating a demand for injunctive relief therefore 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). The FTC satisfies this standard if it "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Id.*

at 714–15 (citations omitted) (internal quotation marks omitted). This standard reflects Congress' use of the words "*may* be substantially to lessen competition" in Section 7, as Congress' concern "was with probabilities, not certainties" of decreased competition. *Id.* at 713 (citing *Brown Shoe Co. v. United States,* 370 U.S. 294, 323, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)) (other citations omitted).

[3–5] Though more relaxed than the traditional equity injunction standard, Section 13(b)'s public interest standard nevertheless demands rigorous proof to block a proposed merger or acquisition. "[T]he issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy." *Exxon,* 636 F.2d at 1343 (citations omitted) (internal quotation marks omitted). That is because "the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated." *Id.* "Given the stakes, the FTC's burden is not insubstantial. . . ." *FTC v. Arch Coal,* 329 F.Supp.2d 109, 123 (D.D.C.2004), *case dismissed,* No. 04–5291, 2004 WL 2066879 (D.C.Cir. Sept. 15, 2004). "[A] showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief." *Id.* (citation omitted) (internal quotation marks omitted).

III. BAKER HUGHES BURDEN–SHIFTING FRAMEWORK

[6] In *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 982–83 (D.C.Cir.1990), the Court of Appeals established a burden-shifting framework for evaluating the FTC's likelihood of success on the merits. *See Heinz,* 246 F.3d at 715 (applying *Baker Hughes* "to the preliminary injunctive relief stage"). Under the *Baker Hughes* framework, the FTC bears the initial burden of showing that the merger would lead to "undue concentration in the market for a particular product in a particular geographic area." *Baker Hughes,* 908 F.2d at 982; *see also Heinz,* 246 F.3d at 715 (quoting *United States v. Phila. Nat'l Bank,* 374 U.S. 321, 363, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963)) ("[T]he government must show that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market." '). Such a showing establishes a "presumption" that the merger will substantially lessen competition. *Baker Hughes,* 908 F.2d at 982.

[7–9] The burden then shifts to the defendant to rebut the presumption by offering proof 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, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975)) (internal quotation marks omitted); *see also Baker Hughes,* 908 F.2d at 991 ("[A] defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition."). "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes,* 908 F.2d at 991. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.*

[10–12] "If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* at 983. "[A] failure of proof in any respect will mean the transaction should not be enjoined." *Arch Coal,* 329 F.Supp.2d at 116. The court must also weigh the equities, but if the FTC is unable to demonstrate a likelihood of success, the equities alone cannot justify an injunction. *Id.*

DISCUSSION

I. *THE RELEVANT MARKET*

[13, 14] Merger analysis starts with defining the relevant market. *United States v. Marine Bancorp.,* 418 U.S. 602, 618, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974) (Market definition is " 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (quoting *United States v. E.I. du Pont De Nemours & Co.,* 353 U.S. 586, 593, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957)); *see also FTC v. Swedish Match,* 131 F.Supp.2d 151, 156 (D.D.C. 2000). The relevant market has two component parts. "First, the 'relevant product market' identifies the product and services with which the defendants' products compete. Second, the 'relevant geographic market' identifies the geographic area in which the defendant competes in marketing its products or service." *Arch Coal, Inc.,* 329 F.Supp.2d at 119; *see also FTC v. CCC Holdings Inc.,* 605 F.Supp.2d 26, 37 (D.D.C.2009) (same). "Defining the relevant market is critical in an antitrust case because the legality of the proposed merger[ ] in question almost always depends upon the market power of the parties involved." *FTC v. Cardinal Health, Inc.,* 12 F.Supp.2d 34, 45 (D.D.C.1998).

Market definition has been the parties' primary battlefield in this case. According to the FTC, the relevant product market is broadline foodservice distribution. Compl. ¶ 40. Because broadline distribution is defined by a number of distinct attributes—such as a vast array of product offerings, private label offerings, next-day delivery, and value-added services—the FTC contends that the other modes of distribution are not reasonable substitutes for broadline distribution and thus must be excluded from the product market.

The FTC further contends that, within the product market for broadline distribution, there is another product market for foodservice distribution sold to "national" customers. *Id.* ¶ 44. These customers, the FTC asserts, are distinct from "local" or "street" customers in multiple respects. National customers have a nationwide or multi-regional footprint and, because of that footprint, typically contract with a broadliner that has geographically dispersed distribution centers; they usually make purchases under a single contract that offers price, product, and service consistency across all facilities; and they award contracts through a request for proposal or bilateral negotiations. National customers include, among others, GPOs, foodservice management companies, hospitality chains, and national chain restaurants. By contrast, the FTC says, the typical "local" or "street" customer is an independent restaurant, which does not require multiple, geographically dispersed distribution centers; purchases in smaller quantities; and ordinarily does not have a contract with its foodservice distributor(s) as it negotiates purchases on a weekly or other short-term basis. The FTC contends that for national customers the geographic market is nationwide. For local customers, it argues that the geographic market is localized near Defendants' distribution centers.

Defendants counter that the foodservice distribution market cannot be sliced and diced as advocated by the FTC. According to Defendants, the relevant market is the entire $231 billion foodservice distribution industry, consisting not only of broadline food distributors, but also specialty distributors, systems distributors, and cash-and-carry stores. All of these modes of distribution, Defendants argue, compete for foodservice distribution customer spending. Based on this market definition, Defendants assert that together, they make up approximately 25 percent of total foodservice distribution sales. They also dispute that there is a product market for "national customers," asserting that such a market has been created by the FTC out of whole cloth to artificially inflate Defendants' market shares. According to the FTC, Defendants combined have, at least, a 59 percent share of the national customer product market.

A. Broadline Distribution as a Relevant Product Market

1. *Legal Principles Affecting the Definition of the Relevant Product Market*

[15] The Supreme Court in *Brown Shoe* set forth the general rule for defining a product market: "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, 82 S.Ct. 1502. Stated another way, a product market includes all goods that are reasonable substitutes, even though the products themselves are not entirely the same. *Cardinal Health,* 12 F.Supp.2d at 46; *Staples, Inc.,* 970 F.Supp. at 1074 (stating the question as "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").

[16, 17] Whether goods are "reasonable substitutes" depends on two factors: functional interchangeability and cross-elasticity of demand. "Functional interchangeability" refers to whether buyers view similar products as substitutes. *See id.* ("Whether there are other products available to consumers which are similar in character or use to the products in question may be termed 'functional interchangeability.' ") "If consumers can substitute the use of one for the other, then the products in question will be deemed 'functionally interchangeable.' " *Arch Coal,* 329 F.Supp.2d at 119; *see also United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 393, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)) ("Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another."). "Courts will generally include functionally interchangeable products in the same product market unless factors *other than* use indicate that they are not actually part of the same market." *Arch Coal,* 329 F.Supp.2d at 119.

[18, 19] As for cross-elasticity of demand, there the question turns in part on price. *E.I. du Pont De Nemours,* 351 U.S. at 400, 76 S.Ct. 994 ("An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other."). If an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market. *See id.* ("If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication . . . that the products compete in the same market."); *Arch Coal,* 329 F.Supp.2d at 120. Price is not, however, the only variable in determining the cross-elasticity of demand between products. Cross-elasticity of demand also depends on the "ease and speed with which customers can substitute [the product] and the desirability of doing so." *FTC v. Whole Foods Market, Inc.,* 548 F.3d 1028, 1037 (D.C.Cir.2008) (Brown, J.). Thus, substitution based on a reduction in price will not correlate to a high cross-elasticity of demand unless the switch can be accomplished without the consumer incurring undue expense or inconvenience. *See Phila. Nat'l Bank,* 374 U.S. at 358, 83 S.Ct. 1715 (observing that "[t]he factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries").

[20] Three other established principles are critical to defining the relevant product market in this case. The first is that the "product" that comprises the market need not be a discrete good for sale. As the Supreme Court has made clear: "We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities." *United States v. Grinnell Corp.,* 384 U.S. 563, 572, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Phila. Nat'l Bank,* 374 U.S. at 356, 83 S.Ct. 1715 (citation omitted) (finding that "the cluster of products ... and services ... denoted by the term 'commercial banking'... composes a distinct line of commerce"). Thus, what is relevant for consideration here is not any particular food item sold or delivered by Defendants, but the full panoply of products and services offered by them that customers recognize as "broadline distribution."

[21] Second, "the 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." *Staples,* 970 F.Supp. at 1075; *Cardinal Health,* 12 F.Supp.2d at 47 (same). That is because market definition hinges on whether consumers view the products as "reasonable substitutes." *Cardinal Health,* 12 F.Supp.2d at 46. So, for example, fruit can be bought from both a grocery store and a fruit stand, but no one would reasonably assert that buying all of one's groceries from a fruit stand is a reasonable substitute for buying from a grocery store. *See Whole Foods,* 548 F.3d at 1040 (Brown, J.) ("The fact that a customer might buy a stick of gum at a supermarket or at a convenience store does not mean there is no definable groceries market."). Thus, as applicable here, the fact that buyers may cross-shop between modes of food distribution does not necessarily make them part of the same market for the purpose of merger analysis.

[22] Third, market definition is guided by the "narrowest market" principle. *Arch Coal,* 329 F.Supp.2d at 120. That is, "a relevant market cannot meaningfully encompass [an] infinite range [of products]. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times–Picayune Publ'g Co. v. United States,* 345 U.S. 594, 612 n. 31, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). Judge Bates in *Arch Coal* succinctly described the "narrowest market" principle in practice as follows:

> The analysis begins by examining the most narrowly-defined product or group of products sold by the merging firms to ascertain if the evidence and data support the conclusion that this product or group of products constitutes a relevant market. If not, the analysis shifts to the next broadest product grouping to test whether that is a relevant market. This process continues until a relevant market is identified.

Arch Coal, 329 F.Supp.2d at 120; *see also United States v. H & R Block, Inc.,* 833 F.Supp.2d 36, 58–60 (D.D.C.2011) (explaining "the principle that the relevant product market should ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test").

The critical question here, therefore, is whether broadline food distribution qualifies as the relevant product market, or whether the product market should be expanded to include other modes of distribution.

2. The Brown Shoe "Practical Indicia"

[23] Courts look to two main types of evidence in defining the relevant product market: the "practical indicia" set forth by the Supreme Court in *Brown Shoe* and testimony from experts in the field of economics. The court turns first to the *Brown Shoe* factors.

[24] According to *Brown Shoe,* "[t]he boundaries of [a product market] may be determined by examining such practical indicia as industry or public recognition . . ., the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502. "These indicia seem to be evidentiary proxies for direct proof of substitutability." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 (D.C.Cir.1986); *H & R Block,* 833 F.Supp.2d at 51. Courts have relied on the *Brown Shoe* factors in a number of cases to define the relevant product market.[2] *See, e.g., Staples,* 970 F.Supp. at 1075–80; *Cardinal Health,* 12 F.Supp.2d at 46–48; *Swedish Match,* 131 F.Supp.2d at 159–64; *CCC Holdings,* 605 F.Supp.2d at 39–44; *H & R Block,* 833 F.Supp.2d at 51–60.

[25] The court finds that the *Brown Shoe* factors support the FTC's position that broadline foodservice distribution is the relevant product market for evaluating the proposed merger. As discussed below, an analysis of those factors demonstrates that other modes of foodservice distribution are not functionally interchangeable with broadline foodservice distribution.

a. *Product breadth and diversity*

The most distinguishing feature of broadline distribution is its product breadth and diversity. Broadliners stock thousands of SKUs across every major food and food-related category in their distribution centers. *See Staples,* 970 F.Supp. at 1078 (comparing SKU selections among different sales outlets). The average Sysco or USF distribution center carries over [Redacted] SKUs. Regional broadliners carry fewer SKUs than Defendants, but still maintain between 6,000 to 19,000 SKUs in their distribution centers. PX093 50–215, Table 22. Broadliners also offer "private label" products, which are a broadliner's branded products. Sysco has over [Redacted] private-label SKUs, and USF has over[Redacted]. PX09350–219, Table 32. This product breadth and diversity enables broadliners to serve a wide variety of customers and to be a one-stop shop, if the customer wishes. As USF's Executive Vice President of Strategy David Schreibman testified at the FTC's Investigational Hearing: "[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." Investig'l Hr'g Tr., PX00590–006 at 24.

The other distribution channels pale in comparison to broadline in terms of prod-

2. The *Brown Shoe* practical indicia may indeed be "old school," as Sysco's counsel asserted at oral argument, Closing Arg. Hr'g Tr. 44, and its analytical framework relegated "to the jurisprudential sidelines," *see Whole Foods,* 548 F.3d at 1059 (Kavanaugh, J., dissenting). But Brown Shoe remains the law, and this court cannot ignore its dictates.

uct breadth and diversity. Systems distributors carry a limited number of SKUs—usually only a few thousand—in their distribution centers. PX09350–215, Table 22. These SKUs are ordinarily proprietary in nature and used only by the customers for which they were developed, meaning that systems products are not readily sellable to other customers. Specialty distributors also carry a limited number of SKUs, usually for niche products—such as fresh produce, meat, seafood, dairy, or bakery items—which tend to complement broadline offerings. As Sysco's CEO William DeLaney explained: "We own [specialty] to create great traction with our customers, . . . we felt we had some gaps in our [broadline] product offerings, whether it was special produce, special cut steaks. . . ." Investig'l Hr'g Tr., PX00580–010 at 38. Cash-and-carry stores likewise do not have the same breadth and diversity of products as broadline distributors. One of the largest cash-and-carry stores, Restaurant Depot, carries SKUs. USF's CHEF'STORE carries [Redacted] less than 4,000. PX09350–216, Table 26. A number of customer declarants stated that cash-and-carry store products tended to be less uniform and inferior in quality to products carried by broadliners.

b. *Distinct facilities and operations*

No one entering a systems, specialty, or cash-and-carry outlet would mistake it for a broadline distribution facility. *See Staples,* 970 F.Supp. at 1079 ("No one entering a Wal–Mart would mistake it for an office superstore. . . . You certainly know an office superstore when you see one."). Broadline distribution centers are massive. The average size of a Sysco distribution center is over 380,000 square feet; for USF, it is over 270,000 square feet. Some regional distributors also have distribution centers ranging from 200,000 to 400,000 square feet. PX09350–215, Table 25. Non-broadline facilities are generally smaller in size and cannot readily be converted into a broadline facility or accommodate broadline customers.

Broadline facilities also have large salesforces attached to them. Broadline facilities typically have dozens of sales representatives, while systems distributors have few sales representatives at their facilities. PX09350–215, Table 23. Cash-and-carry stores generally do not have dedicated account representatives at all. Because the model of distribution is self-service, cash-and-carry sales representatives do not learn the individualized needs of their customers in a systematic manner.

Additional proof that broadline foodservice distribution is a separate product market comes from the corporate structure of large foodservice distributors. Major foodservice distributors offer distribution in other channels besides broadline, but they run those businesses separately from their broadline businesses. *See, e.g., H & R Block,* 833 F.Supp.2d at 56 (observing that digital do-it-yourself tax preparation was a distinct product market from assisted tax preparation because H & R Block ran them as "separate business units"). Sysco runs its systems distribution business, SYGMA, as a separate division. So, too, does PFG, which runs a systems business known as PFG Customized. Sysco also runs separate specialty divisions, such as Fresh Point, a fresh produce supplier. So, too, does PFG, which has its own specialty division, Roma, which supplies Italian restaurants and pizza parlors. And USF runs a separate cash-and-carry operation, CHEF'STORE. This type of corporate structuring shows that those who run and manage foodservice companies view broadline as distinct from other modes of distribution.

c. *Delivery*

Timely and reliable delivery is critical in the food distribution industry. Unless customers can get the food they want when they need it, their businesses are at risk of losing clients and money. Broadliners have the capacity—due in large part to their extensive fleet of service vehicles, PX09350–217, Table 29—to offer frequent and flexible delivery schedules to meet customer needs, including next-day delivery. Ample evidence shows that, for a wide array of broadline customers—from large GPOs to individually-owned restaurants—next-day delivery is crucial to meeting their needs.

Neither systems distributors nor cash-and-carry stores offer the same degree of frequency and flexibility of delivery as broadliners.[3] Systems distributors tend to make large, limited-SKU deliveries on a fixed schedule. Also, systems fleets, on average, travel longer distances than broadline fleets to make deliveries. Carry-and-carry stores, for the most part, do not deliver. Rather, their primary model is self-service—that is, the customer transports the merchandise on her own. Some cash-and-carry outlets do offer delivery options. Costco, for example, offers limited-mileage delivery from some of its stores, and Restaurant Depot leases refrigerated trucks to its best customers. But those programs are quite limited and cannot substitute for the comprehensive and flexible delivery networks offered by broadliners to all of their customers.

d. *Customer service and value-added services*

Another distinguishing feature of broadline distributors is their high degree of customer service and value-added service offerings. For example, broadliners offer menu and nutritional-meal planning services to, among others, healthcare, hospitality, and restaurant customers. They also offer value-added services at their distribution facilities, such as food safety training and new product updates. Other modes of delivery do not generally offer comparable value-added services.

e. *Distinct customers*

Due in large part to the breadth of their product and service offerings, broadliners are capable of serving a wide range of customers, including classes of customers that the other channels cannot reach. Systems is a more efficient and cost-effective mode of distribution for fast food and quick service restaurants. Specialty distributors can provide higher quality and fresher products in certain categories, but have limited product offerings and charge higher prices than broadliners. Cash-and-carry stores are less expensive and more accessible for buyers such as independent restaurants, but their lack of delivery service makes them unsuitable for the large majority of foodservice customers.

These other channels, therefore, simply cannot and do not serve as wide an array of customers as broadliners do. The largest broadline customers, such as GPOs, foodservice management companies, and hospitality providers, cannot use systems or cash-and-carry for their needs. They purchase only modest quantities of product from specialty distributors. Even most independent restaurants cannot use cash-and-carry stores as a reasonable substitute

3. There was little evidence presented about the delivery capabilities of specialty distributors, aside from the fact that they have a limited geographic range of delivery. *See* PX00427–002 (Sodexo declarant indicating that specialty distributors covered a limited geographic range); PX00594–012 at 45 (MedAssets stating the same); PX00407–002 (Amerinet stating the same).

for their broadliner, even though such stores offer lower prices.

f. *Distinct pricing*

Broadliners generally compete only against other broadliners on pricing. PFG's President and CEO, George Holm, who has over 37 years of industry experience, testified that systems and specialty distributors do not significantly affect the pricing and services that PFG offers to its customers. Hr'g Tr. 575–76, 643. And, although broadliners recognize that cash-and-carry stores provide lower prices, the record does not show broadliners benchmarking their prices against cash-and-carry stores or lowering prices to compete with them. To the contrary, as USF's Executive Vice President of Strategy David Schreibman succinctly stated in an email comparing pricing between USF as a broadliner and its own cash-and-carry division, CHEF'STORE: "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.

g. *Industry or public recognition*

Overwhelmingly, the evidence shows that players in the foodservice distribution industry—both its suppliers and customers—recognize broadline, systems, specialty, and cash-and-carry to be distinct modes of distribution. *See Rothery Storage,* 792 F.2d at 219 n. 4 ("The 'industry or public recognition of the submarket as a separate economic' unit matters because we assume that economic actors usually have accurate perceptions of economic realities."). The court received both live and out-of-court sworn testimony from Defendants' executives; executives from other broadline distributors; officers of non-broadline companies; and customers, large and small. They uniformly observed that these modes of distribution are distinct in the variety of ways described above. In short, the industry widely recognizes that broadline distributors offer a unique cluster of products and services that is not functionally interchangeable with other modes of distribution.

h. *Defendants' response to Brown Shoe "practical indicia"*

Defendants do not, for the most part, contest the above-described distinctions between broadline and other channels of distribution. Instead, Defendants contend that defining the relevant market to include only broadliners "misunderstands consumer behavior." Memo of Defs. Sysco Corp., USF Holding Corp. and U.S. Foods, Inc., in Opp'n to Pls.' Mot. for A Prelim. Inj., ECF No. 130 at 19 [hereinafter Defs.' Opp'n Br.]. They argue "customers simultaneously can, and routinely do, choose to patronize competitors of all stripes offering fungible goods through different but overlapping distribution channels." *Id.* What matters, Defendants claim, is that nonbroadliners are able to constrain a broadliner's pricing by competing for customers who are able to move their entire purchasing, or portions of their purchasing, between channels. *Id.* at 19 ("Whether a substitute channel is a 'comprehensive' substitute is irrelevant to that question."). Defendants offer as one compelling example the burger chain Five Guys, which recently reallocated over $300 million in annual business from USF to a collection of regional broadliners and systems distributors.

Defendants are indisputably correct that customers buy across channels, especially independent restaurants. They are also unquestionably correct that some customers, particularly quick service and fast food restaurant chains, are capable of moving large segments of business from broadline to systems. But the fact that Defendants sometimes compete against other channels of distribution in the larger marketplace does not mean that those alternative channels belong in the relevant product market for purposes of merger analysis. *See Staples,* 970 F.Supp. at 1075 ("[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."); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 565b (4th ed. 2014) ("[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[.]").

Two key decisions from this jurisdiction, *Whole Foods* and *Staples,* support this conclusion. In *Whole Foods,* the question was whether there existed a product market for premium natural and organic supermarkets ("PNOS") separate from ordinary supermarkets. The Court of Appeals' ultimate decision was fractured—each judge issued a separate opinion, leaving no controlling opinion from the Court. Two judges, however, concluded that PNOS is a separate product market from ordinary supermarkets, even though there was evidence that customers "cross-shopp[ed]" between the two. 548 F.3d at 1040 (Brown, J.); *id.* ("But the fact that PNOS and ordinary supermarkets 'are direct competitors in some submarkets ... is not the end of the inquiry.' ") (quoting *United States v. Conn. Nat. Bank,* 418 U.S. 656, 664 n. 3, 94 S.Ct. 2788, 41 L.Ed.2d 1016 (1974)); *id.* at 1048 (Tatel, J.) ("That Whole Foods and Wild Oats have attracted many customers away from conventional grocery stores by offering extensive selections of natural and organic products thus tells us nothing about whether [they] should be treated as operating in the same market as conventional grocery stores."). Both judges agreed that just because customers were able to buy some categories of grocery products from both outlets—similar to how broadline customers are able to purchase some products from other modes of distribution—did not mean that PNOS was in the same product market as grocery stores. *See id.* at 1040 (Brown, J.) (citing testimony that "Whole Foods competes actively with conventional supermarkets for dry groceries sales, even though it ignores their prices for high-quality perishables"); *id.* at 1049 (Tatel, J.) ("As Judge Brown's opinion explains, this suggests that any competition between Whole Foods and conventional retailers may be limited to a narrow range of products that play a minor role in Whole Food's profitability.").

The court in *Staples* held much the same. There, the question was whether consumable office supplies sold by office superstores constituted a separate product market from office supplies sold elsewhere. *See Staples, Inc.,* 970 F.Supp. at 1073. The court acknowledged that no matter who sells them, office supply products—to some extent, like food products—are "undeniably the same." *Id.* at 1075. The court nevertheless held that the sale of office supplies through superstores constituted the relevant product market. "[T]he unique combination of size, selection, depth and breadth of inventory offered by the superstores distinguishes them from other retailers." *Id.* at 1079. Those words apply with equal force to broadline distributors relative to other food distribution channels. *See also Cardinal Health,* 12 F.Supp.2d at 47 (concluding that the wholesale drug industry "provide[s] customers with an efficient way to obtain prescription drugs through centralized warehousing, delivery, and billing services that enable the customers to avoid carry-ing large inventories, dealing with large number of vendors, and negotiating numerous transactions").

Defendants have not convincingly distinguished *Whole Foods* or *Staples.*[4] Instead, they urge the court to look to *United States v. Sungard Data Sys., Inc.,* 172 F.Supp.2d 172 (D.D.C.2001), as an analogous case. There, the question was whether different types of disaster recovery services for computer data comprised the same product market. *Id.* at 183. The court rejected the government's product market definition as limited only to shared hotsite services because "the government's market contains an extremely heterogeneous group of customers," *id.* at 182, who "are simply too varied and too dissimilar to support any generalizations," *id.* at 193. Here, it is unquestionably true that foodservice distribution customers are incredibly varied in their needs, buying habits, and price sensitivities. But *Sungard* differs in one critical respect. The court there observed that "the striking heterogeneity of the market, particularly as reflected by the *conflicting evidence relating to customer perceptions and practices,*" undercut the government's market definition. *Id.* at 182–83 (emphasis added). Here, that simply is not the case. Though the customers may be varied, the court has little doubt that the industry, from the perspective of both sellers and buyers, perceives broadline to be a separate mode of food distribution. Witnesses of all stripes had little trouble distinguishing among the different channels of distribution, and Defendants offered no evidence of any industry confusion among them. Those facts make this case fundamentally different from *Sungard. See id.* at 183 ("Customer responses were also often vague and confused" and product definitions were "consistently unclear.").

Defendants also argue that the FTC's definition of broadline as the relevant market improperly excludes other modes based on "a small number of customers' subjective preferences for broadline distribution." Defs.' Opp'n Br. at 17 (footnote omitted). But the evidence, as it relates to broadline versus other distribution channels, is hardly selective. Defendants' own executives acknowledged the fundamental differences between broadline and other modes of distribution.[5] So, too, did

4. In neither their opposition to the FTC's motion for preliminary injunction nor their proposed findings of fact and conclusions of law do Defendants attempt to distinguish *Whole Foods or Staples*. At oral argument, Defendants distinguished *Staples* based on the fact that in *Staples* the FTC had pricing data to show that prices were lower in markets where both merging firms were present. Closing Arg. Hr' g Tr. at 38–40. Defendants also sought to distinguish *Whole Foods* on the facts, arguing that in *Whole Foods* the defendants could not show that in the event of a price increase consumers of PNOS could go to a standard grocery store. *Id.* at 40–41. But the court finds these efforts to distinguish *Staples* and *Whole Foods* unconvincing. It is true that there was stronger pricing data in *Staples*, but pricing data alone did not lead to the court's conclusion. The factual similarities between this case and *Staples*, particularly the *Brown Shoe* practical indicia, are otherwise strong. As for *Whole Foods*, it is even more factually analogous to this case than is *Staples*. If anything, the proof that other channels of distribution are not reasonable substitutes for broadline is more compelling in this case than the evidence in *Whole Foods* that ordinary grocery stores are not a reasonable substitute for PNOS.

5. *See, e.g.,* DX–00319 at 32–36 (Sysco's CEO, William DeLaney, explained that systems is a "tailored, customized approach to certain types of customers" and the "model is not to serve GPO customers"); Hr' g Tr. 1369–70 (DeLaney stated that, compared to cash-and-carry, broadline is a "value package" that includes delivery services and menu consulting); Hr'g Tr. 1452 (David Schreibman of USF stated that "specialty distributors compete by having a broader array of products within their expertise" that "broadliner[s]

executives of regional broadliners, such as PFG,[6] Shamrock,[7] Reinhart Foodservice,[8] and Shetakis [9]; consortiums, such as UniPro [10]; systems distributors, such as Maines [11]; and cash-and-carry stores, such as Restaurant Depot.[12] Likewise, customers of every size recognized the differences between broadline and the other food distribution modes. In short, this is not the kind of case in which the testimonial evidence failed to demonstrate a consensus among the industry's players regarding the boundaries of the product market.

3. Expert Testimony

[26] Having concluded that the *Brown Shoe* "practical indicia" support a product market for broadline foodservice distribution, the court turns next to the second type of evidence that courts consider in product market definition: expert testimony in the field of economics. One of the primary methods used by economists to determine a product market is called the "hypothetical monopolist test." This test asks whether a hypothetical monopolist who has control over a set of substitutable products could profitably raise prices on those products. If so, the products may comprise the relevant product market. *See H & R Block,* 833 F.Supp.2d at 51–52. The theory behind the test is straightforward. If enough consumers are able to substitute away from the hypothetical monopolist's product to another product and thereby make a price increase unprofitable, then the relevant market cannot include only the monopolist's product and must also include the substitute goods. On the other hand, if the hypothetical monopolist could profitably raise price by a small amount, even with the loss of some customers, then economists consider the monopolist's product to constitute the relevant market.

The hypothetical monopolist test, which courts have applied, is set forth in the U.S. Department of Justice and FTC's Horizontal Merger Guidelines. *See* U.S. Dep't of Justice & FTC Horizontal Merger Guidelines § 4.1.1 (2010) [hereinafter Merger Guidelines]; *H & R Block,* 833 F.Supp.2d at 51–52; *CCC Holdings,* 605 F.Supp.2d at 40; *Arch Coal,* 329 F.Supp.2d at 120 & n. 7. As stated in the Merger Guidelines:

> [T]he test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products . . . likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.

may not have in [their] portfolio"); Investigat'l Hr'g Tr., PX00580–008–010 at 32-39 (DeLaney explained that broadline and specialty are "two different businesses," whereas broadline distribution includes "a full range of products"); Investigat'l Hr' g Tr., PX00584–060 at 239–40 (Louis Nasir, the Pacific Market President for Sysco, maintained that cash-and-carry stores "don't have the same selection" of products and "also don't have consistent inventory" compared with broadliners); Investigat'l Hr'g Tr., PX00590–011 at 42 (Schreibman stated that he was not aware of a cash-and-carry store that delivers).

6. *See* PX00429–002–007; Hr'g Tr. 571–73.

7. DX–00285 at 115–16, 164–66.

8. DX–00295 at 16–17, 22.

9. PX00414–001.

10. DX–00260 at 139.

11. DX–00264 at 64, 141; PX00424–001 (Maines is predominantly systems, but [Redacted] percent of 2013 revenues were from broadline sales).

12. DX–00314 at 146–47.

Merger Guidelines § 4.1.1. The SSNBP "is intended to represent a 'small but significant' increase in the prices charged by firms in the candidate market" and is typically assumed to be "five percent of the price paid by customers for the products or services to which the merging firms contribute value." Merger Guidelines § 4.1.2.

As applied to this case, the hypothetical monopolist test asks: If there was only one broadline food distributor, could it profitably raise price by five percent, or would that price increase result in a substantial number of customers moving enough of their spend to other modes of distribution—systems, specialty, or cash-and-carry—such that the price increase would be unprofitable? If the price increase would be profitable, then the relevant product market is broadline distribution; if unprofitable, it means that the relevant market must include at least one other channel of distribution. Each side presented expert testimony from economists who performed the hypothetical monopolist test but who came to different results.

a. *Dr. Mark Israel*

For its expert economic evidence, the FTC presented the testimony of Dr. Mark Israel, who received a doctorate in economics from Stanford University and now serves as Executive Vice President at Compass Lexecon, a consulting firm. Dr. Israel's testimony served two primary functions. First, he acted as a *de facto* summary witness, synthesizing the mass of testimonial and documentary evidence gathered by the FTC. Dr. Israel's summary of that evidence parallels the discussion in the above sub-sections, so the court does not revisit it here. Second, Dr. Israel conducted a SSNIP test, using what is known as an "aggregate diversion analysis." Its purpose is to determine the amount of sales that a hypothetical monopolist of broadline distribution could lose before a price increase becomes unprofitable. *See Swedish Match,* 131 F.Supp.2d at 160 (describing the related methodology of "critical loss analysis"); *H & R Block,* 833 F.Supp.2d at 63 (same). A detailed recitation of Dr. Israel's aggregate diversion analysis is necessary because Defendants challenge the basic elements of his work.

Aggregate diversion analysis has three basic steps. The first is to determine the threshold aggregate diversion ratio, which is the percentage of customers that would need to stay within the broadline market to make a price increase profitable. *See H & R Block,* 833 F.Supp.2d at 63. This is strictly a mathematical step, with the aggregate diversion ratio a function of the subject product's gross margin. The gross margin is defined as the price of selling one additional product minus the cost of selling the additional product.[13] The second step is to determine the *actual* aggregate diversion—that is, the actual percentage of customers of a single broadliner that would switch to another broadliner after a price increase. "Since these lost sales are recaptured within the proposed market, they are not lost to the hypothetical monopolist." *Id.* As will be seen, this step involved an analysis of Defendants' actual sales data. The final step is to compare the two: if the actual aggregate diversion is greater than the threshold ratio, then the hypothetical monopolist could profitably raise prices and the candidate market is the relevant product market. *See id.* In other words, as applied here, if the percentage of customers of a single broadliner who would switch to another broadliner (as opposed to another mode of

13. Gross margin is calculated as follows: (Revenue-Cost of Goods Sold)/Revenue.

distribution) in response to a price increase is greater than the percentage of customers needed to stay within the market to make a price increase profitable, then the relevant product market is properly defined as broadline distribution.

At step one of his aggregate diversion analysis, Dr. Israel assumed a gross margin of 10 percent, a figure lower than the gross margin contained in the parties' financial reporting.[14] A 10 percent gross margin, according to Dr. Israel, yields a 50 percent threshold aggregate diversion ratio based on a formula devised by two economists, Michael Katz and Carl Shapiro.[15]

Next, Dr. Israel calculated the actual aggregate diversion based on three different data sets. He constructed the first two data sets from national and regional requests for proposals ("RFPs") and "bidding" summary information and documents produced by each Defendant to the FTC. Based on this information, Dr. Israel built a database for each company that tracked, for each bidding opportunity, the incumbent distributor, the winning distributor, and the competing bidders. PX09350–104. Based on Sysco's RFP/bidding data, he found that, when Sysco lost a bid, [over 70%] of the time (based on potential revenue from sales opportunities) it was to another broadliner; the remaining losses were to another mode of distribution. PX09350–056. Based on USF's RFP/bidding data, the percentage was even higher—USF lost to other broadliners[over 70%] of the time. *Id.*

Dr. Israel constructed his third data set from USF's "Linc" database. Linc is a customer relations management tool that USF local sales representatives used until recently to track sales opportunities. The Linc database contains fields that sales representatives can complete to describe a sales opportunity, including a "main competition" field. Dr. Israel assumed that, if USF did not win an opportunity, it was won by the identified "main competitor." The Linc database contained hundreds of thousands of observations, about a third of which included information on the "main competitor." Based on this data, Dr. Israel concluded that [over 70%] of the local sales opportunities lost by USF (again, based on potential revenue of those sales opportunities) were lost to other broadliners. PX09350–056.

At the third step, Dr. Israel compared the aggregate diversion ratio of 50 percent to the actual diversion percentages derived from the three data sets. He concluded that, because each of the three actual diversion percentages was higher than the 50 percent threshold aggregate diversion ratio, broadline distribution was the relevant product market. In other words, Dr. Israel found that only 50 percent of broadline customers would need to remain within the broadline market to make a price increase profitable, while according to three different data sets, the actual percentage of customers who would remain within the broadline market (by switching to another broadliner) was greater than 50 percent. Therefore, Dr. Israel's calculations indicated that broadline distribution was the relevant product market.

14. Dr. Israel testified that the parties' reported gross margins are between 15 and 20 percent, but to be conservative he used a 10 percent margin. Hr'g Tr. 1004–05.

15. The Katz–Shapiro formula that Dr. Israel used is $L = X/(X + M)$, where L is the aggregate diversion ratio, or "critical loss," X is the price increase, and M is the margin. PX09350–055 at n.134. For his aggregate diversion analysis, Dr. Israel used a 10 percent price increase and a 10 percent margin, for a resulting critical loss of 50 percent, i.e., $.50 = .10/(.10 + .10)$. Hr'g Tr. 1004–07.

b. *Defendants' experts*

Defendants mounted an aggressive challenge to Dr. Israel's work through their own expert witnesses. Defendants first presented Dr. Jerry Hausman, a professor of economics at Massachusetts Institute of Technology. Dr. Hausman testified, in short, that Dr. Israel's aggregate diversion analysis was wrong because (i) he used the wrong gross margin and (ii) he used the wrong mathematical formula to calculate the threshold aggregate diversion ratio. According to Dr. Hausman, Dr. Israel excluded certain variable costs from his gross margin. The actual gross margin was not 10 percent, according to Dr. Hausman, but between [Redacted] percent and [Redacted] percent. Also, Dr. Hausman testified that the aggregate diversion formula Dr. Israel used was incorrect and led to an overly narrow market definition.[16] Using the proper margins and the correct formula, Dr. Hausman opined, the aggregate diversion ratio is not 50 percent, but rather over 100 percent, which is an impossibility (*i.e.*, more than 100 percent of customers cannot switch in response to a price increase). Thus, he concluded, the relevant product market is not broadline, but all channels of food distribution.

While Dr. Hausman challenged Dr. Israel's calculation of the threshold aggregate diversion ratio, Defendants' other expert, Dr. Timothy Bresnahan, a professor of economics at Stanford University, critiqued Dr. Israel's use of the RFP/bidding and Linc data sets to calculate the actual aggregate diversion. Regarding the RFP/bidding data, Dr. Bresnahan described the data as contrived and unreliable—a point that Defendants consistently articulated to the FTC during the investigation phase. Dr. Bresnahan explained that the companies do not keep comprehensive RFP or bidding data in the ordinary course of business and that the information Dr. Israel relied upon was pulled together at the insistence of the FTC, in part based on employees' unreliable notes and memories. As for the Linc data, it too was flawed, Dr. Bresnahan suggested, because it is a prospective sales database, not an actual transactions database in which USF sales personnel were accurately recording wins and losses. Moreover, neither the RFP/bidding data nor the Linc data describes whether Sysco or USF lost a customer for a price-based reason or some reason having nothing to do with price.

c. *The court's finding as to the expert testimony*

[27] Having weighed the competing expert testimonies and considered them in light of the evidentiary record as a whole, the court finds Dr. Israel's aggregate diversion analysis and conclusion to be more persuasive than that advanced by Defendants' expert, Dr. Hausman.[17] Dr. Israel's

16. According to Dr. Hausman, the correct formula is L = X/M, where L is the aggregate diversion ratio, or "critical loss," Xis the price increase, and Mis the margin. Dr. Hausman testified that this is the more appropriate formula in an asymmetric market, like food distribution, which involves suppliers and customers with different costs, different types of customers, and a different mix of products. Hr'g Tr. 1960–64; DFF at 285-86 (citing to DX–05028 at 11). The formula used by Dr. Israel, on the other hand, is more appropriate in a symmetric market, that is, a market marked by homogeneity among suppliers and customers. Hr'g Tr. 1960, 1965–66; DX–05028 at 10–11.

17. In finding Dr. Israel's conclusion more persuasive than that advanced by Defendants' expert, the court might be doing more than it is required to do. As Judge Tatel stated in *Whole Foods:* "Although courts certainly must evaluate the evidence in section 13(b) proceedings and may safely reject expert testimony they find unsupported, they trench on the FTC's role when they choose between plausireliance on the RFP/bidding and Linc data sets for calculating the aggregate diversion is problematic for the reasons Defendants have identified and, for those reasons, the court hesitates to rely on Dr. Israel's precise aggregate diversion percentages. But, when evaluated against the record as a whole, Dr. Israel's conclusions are more consistent with the business realities of the food distribution market than Dr. Hausman's. *See Cardinal Health,* 12 F.Supp.2d at 46 (stating that "the determination of the relevant market in the end is 'a matter of business reality—[ ] of how the market is perceived by those who strive for profit in it.'" (alteration in original) (quoting *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)); *Arch Coal,* 329 F.Supp.2d at 116 ("[A]ntitrust theory and speculation cannot trump facts[.]"); *H & R Block,* 833 F.Supp.2d at 65 (bearing in mind the shortcomings of the expert's analysis and treating the analysis as "another data point" in determining the relevant market, rather than as conclusive).

The court finds Dr. Hausman's conclusion—that the actual aggregate diversion ratio is greater than 100 percent—inconsistent with business reality. On cross-examination, Dr. Hausman admitted that his conclusion meant that a hypothetical monopolist who had control over *every single broadline distributor* in the country could *not* profitably impose a SSNIP on customers, because enough customers would switch to other channels of distribution. Hr'g Tr.2003–04. Yet many industry leaders testified either that other channels of distribution did not constrain the prices charged by broadliners or that other channels were not substitutes for broadline distribution. For instance, PFG's President and CEO, George Holm, testified that systems and specialty distributors do not significantly affect the pricing and services that PFG's broadline division offers to its customers. Hr'g Tr. 575–76. He also testified that systems and specialty distributors were not substitutes for broadliners. Hr'g Tr. 573. Such evidence from industry leaders,[18] which the court credits, contradicts Dr. Hausman's conclusion that a hypothetical monopolist of broadline services would not be able to impose a SSNIP because enough customers would switch to other channels of distribution.

4. Conclusion as to the Broadline Product Market

In conclusion, based on the vast record of evidence the parties have presented, the court finds that the FTC has carried its burden of demonstrating that broadline distribution is the relevant product market.

B. National Broadline Distribution as a Relevant Product Market

The FTC asserts that, within the broader product market for broadline distribution, there is a narrower but distinct product market for "broadline foodservice distribution services sold to National Customers." Compl. ¶ 44. According to the FTC, "[d]ue to [their] geographic dis-

ble, well-supported expert studies." *Whole Foods,* 548 F.3d at 1048 (Tatel, J.).

18. *See also* PX00429–004–007 (George Holm, President and CEO of PFG, explaining that systems, specialty, and cash-and-carry distributors are not substitutes for customers needing broadline distribution); DX–00285 at 125-26 (John Roussel, COO of Shamrock Foods, stating that it's "not possible" or "practical" for a broadline customer to use a systems distributor); DX–00260 at 139 (Bob Stewart, interim CEO of Unipro, explaining that a broadline customer cannot easily switch to a systems distributor and a broadline customer's needs are different than a systems customer's needs).

persion, National Customers typically contract with a broadline foodservice distributor that has distribution centers proximate to all (or virtually all) of their locations." *Id.* ¶ 42.

> National Customers typically contract with a broadliner that can provide—across all of their locations—product consistency and availability, efficient contract management and administration (e.g., centralized ordering and reporting, a single point of contact, and consistent pricing across all locations), volume discounts from aggregated purchasing, and the ability to expand geographically with the same broadline foodservice distributor.

Id. National customers include healthcare GPOs; foodservice management companies; and large hotel and restaurant chains. *Id.* ¶ 41. The FTC contends that Sysco and USF "are the only two single-firm broadline distributors with national geographic reach and, as such, are best positioned to serve National Customers." *Id.* ¶ 63.

Defendants vigorously dispute that there is such a thing as a "National Customer." They contend that a product market built around so-called national customers is "contrived," Defs.' Opp'n Br. at 16, and that the FTC's distinction between national and local customers is "factually and economically meaningless," *id.* at 13. They counter that the national-local distinction is not, as the FTC claims, built on differentiating customer characteristics, but is improperly based on an administrative distinction as to whether the customer prefers to be managed at the corporate level (making it a "national" customer) or at the local distribution center (making it a "local" customer). *Id.* at 12–15. The so-called national customer category, they also argue, is improperly based on a "few core customers who say they prefer the merging parties." *Id.* at 13. In addition, Defendants assert that Dr. Israel did not perform a SSNIP test to assess the existence of a national customer market. *Id.* at 12.

1. Legal Basis for Defining Relevant Product Market Based on Customer Type

Before turning to the evidence, the court first considers the legal basis for defining a product market based on a type of customer. Neither side comprehensively addressed this issue. Admittedly, defining a *product* market based on a type of *customer* seems incongruous. After all, one ordinarily thinks of a customer as purchasing a product in the market, and not as the product market itself. But, in this case, according to the FTC, the national customer and broadline product converge to define a market for broadline products sold to national customers. Broadline distributors must offer a particular kind of "product"—a cluster of goods and services that can be delivered across a broad geographic area—to compete for national customers. In that sense, the customer's requirements operate to define the product offering itself.

[28] The clearest articulation of this approach to product market definition comes from the Merger Guidelines. The Merger Guidelines are not binding, but the Court of Appeals and other courts have looked to them for guidance in previous merger cases. *See, e.g., Heinz,* 246 F.3d at 716 n. 9; *H & R Block,* 833 F.Supp.2d at 52 n. 10. Section 4.1.4 of the Merger Guidelines provides that "[i]f a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP." Merger Guidelines

§ 4.1.4. Markets to serve targeted customers are also known as "price discrimination markets" *Id.* Professors Areeda and Hovenkamp have endorsed market definition of this kind, as well: "Successful price discrimination means that the disfavored geographic or product class is insulated from the favored class and, if the discrimination is of sufficient magnitude, should be counted as a separate relevant market." 2B Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 534d (3d ed. 2007). The concern underlying price discrimination markets is that certain types of captured or dedicated customers could be targeted for monopolist pricing even if a price increase for all customers would not be profitable. *See* Merger Guidelines § 3; Areeda & Hovenkamp 3d ed., *supra,* ¶ 533d ("[S]ellers may be able to discriminate against buyers who have fewer alternatives or for whom the product performs a more valuable function[.]").

Defining a market around a targeted customer, as the FTC urges here, is not free from controversy, as the different opinions in *Whole Foods* demonstrate.[19] Relying on an earlier version of the Merger Guidelines that recognized price discrimination against "targeted buyers," Judge Brown explained that "core consumers"—in that case, those committed to premium and natural organic supermarkets—"can, in appropriate circumstances, be worthy of antitrust protection." *Whole Foods,* 548 F.3d at 1037 (Brown, J.) (citing DOJ and FTC, 1992 Horizontal Merger Guidelines § 1.12, 57 Fed.Reg. 41,552, 41,-555 (1992)). Judge Brown went on to say:

> In particular, when one or a few firms differentiate themselves by offering a particular package of goods or services, it is quite possible for there to be a central group of customers for whom "only [that package] will do." . . . Such customers may be captive to the sole supplier, which can then, by means of price discrimination, extract monopoly profits from them while competing for the business of marginal customers.

Whole Foods, 548 F.3d at 1038 (Brown, J.) (quoting *Grinnell,* 384 U.S. at 574, 86 S.Ct. 1698) (alteration in original).

Judge Kavanaugh, in dissent, rejected defining a market around a "core customer." *Whole Foods,* 548 F.3d at 1062 (Kavanaugh, J., dissenting). According to Judge Kavanaugh, "there is no support in the law for that singular focus on the core customer. Indeed, if that approach took root, it would have serious repercussions because virtually *every* merger involves some core customers who would stick with the company regardless of a significant price increase."[20] *Id.* The relevant question for market definition, according to Judge Kavanaugh, is not whether a die-

19. The FTC cites to the "distinct customers" factor in *Brown Shoe* as support for defining a market around a targeted customer. However, Brown Shoe only listed "distinct customers" as one of many factors for courts to consider in defining a market. *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502. It did not endorse defining a market around a group of targeted customers.

20. The Merger Guidelines do not, for instance, set forth how a court is to distinguish a "targeted" group of customers from customers in general. This gives rise to the question of what limiting principles or factors a court should apply in defining a price discrimination market. Absent limitations, price discrimination against a single customer might be used to justify blocking a merger. This is not a mere theoretical possibility. According to the Merger Guidelines, "[i]f prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers." Merger Guidelines § 4.1.4 (emphasis added).

hard group of core customers would be impacted by a substantial price increase, but whether the merged company "could increase prices by five percent or more without losing so many marginal customers as to make the price increase unprofitable." *Id.*

2. *Evidence Supporting a National Broadline Product Market*

[29] Ultimately, the court here need not resolve the *Whole Foods* disagreement over defining a market around a "core" customer. That is because the ordinary factors that courts consider in defining a market—the *Brown Shoe* practical indicia and the Merger Guidelines' SSNIP test—support a finding that broadline distribution to national customers is a relevant product market. *See, e.g,* Areeda & Hovenkamp 3d ed., *supra,* ¶ 533d ("If the defendant *can* profit by charging pharmacies a price significantly over its cost, then the pharmacy sales are a relevant market[.]").

a. *Industry and public recognition*

Among the most compelling evidence supporting a product market for national customers is the fact that regional broadliners have formed cooperatives, such as DMA and MUG, to compete for customers with a geographically dispersed footprint. Regional distributors, because of their limited footprints, do not have the capacity to serve customers with multi-regional needs across all of their locations. Only Sysco and USF have that capacity. These cooperatives were formed specifically to compete against Sysco and USF, by enabling regional competitors to combine to provide nationwide or multi-regional delivery and, importantly, to offer a single point of contact for the customer. Dan Cox, the President and CEO of DMA, explained that DMA was formed in 1988 as a competitive response to Sysco's merger with another company, Continental. *See* PX00565–051 at 202. He explained that "[w]hen that industry event took place, it was the first time that there was truly a national platform for foodservice distribution." *Id.* Put simply, business ventures like DMA would not exist if there were not a separate market for customers who have national or multi-regional distribution needs. *See Rothery Storage,* 792 F.2d at 218 n. 4 (stating that courts must "assume that economic actors usually have accurate perceptions of economic realities").

Equally compelling evidence of the national-local distinction comes from a report done by the management consulting firm, McKinsey & Co., whom Sysco hired to assist with merger integration. After closely analyzing the two companies' operations, McKinsey prepared a presentation in July 2014, titled "National, Intermediate, and Field Coverage Models." The presentation observed that "Sysco and U.S. Foods have different approaches to *grouping customers* and determining service models.... Both companies effectively operate two service models with distinct capabilities to serve *two types of customers.*" PX09010–002 (emphasis added). The presentation described "National Customers" as those who "use complex contracts with margin schedules, make online purchases of proprietary products, require auditing support, and coordinate across multiple markets." *Id.* By contrast, "Field Customers" were those who "make weekly purchases through in-person consultations, receive specialist support tailored to independent restaurants, require minimal auditing support, and operate in 1 or few markets." *Id.* McKinsey further observed that national customers' "requirements" included "[s]et margin schedule contract[s]"; "[e]fficient ordering across multiple locations"; "[l]arge number[s] of deviated, proprietary and close-coded products"; "[r]egulatory and audit support"; "[i]n-depth reporting"; and "[c]onsistency of service, pricing and products across multiple [m]arkets." PX09010–004. Field customers' "requirements," on the other hand, included the "[a]bility to make decisions each week along with consultation"; "[a]ccess to national, commodity, and some proprietary products"; "[f]ull business, culinary, and product support for independent businesses"; and "minimal" "[c]oordination across geographies." *Id.* McKinsey ultimately recommended that the companies recognize and build a new service model around a third kind of customer—an "Intermediate" customer—who would be identifiable based on five variables: (i) national contract/no contract; (ii) nature of industry; (iii) number of markets; (iv) number of regions; and (v) size of annual sales. PX09010–007. The McKinsey presentation identified as "conclusively" national those customers who operate in three or more markets or two or more regions. *Id.*

McKinsey is not the only industry analyst or expert to acknowledge that national customers form a market distinct from local buyers. Cleveland Research Company, an investment research firm, produced an analyst report on Sysco after the merger's announcement and recognized that Sysco and USF serve a distinct group of national customers. One of the report's conclusions was that "Sysco/USF will [be] able to keep most of their larger contracted and *national account customers* for the near- and medium-term due to national scale and existing contracts.... Based on our research, most national operators prefer to deal with one distributor because it is more efficient and less expensive than dealing with several regional players." PX09332–006 (emphasis added).

The industry's trade group, the International Food Distributors Association ("IFDA"), also recognizes a distinction between national and local customers. IFDA produces a Quarterly Operations survey that reports separate sales figures for "national" and "street" accounts. PX00570–004 at 78. IFDA's President, Mark Allen, explained that IFDA distinguishes between the two because "the dynamics between the two [types of] businesses might be a little bit different. The operating metrics might be a little bit different." *Id.* at 80.

Defendants' ordinary course documents also recognize the national-local distinction and tout their strategic advantage as to the former. *See H & R Block,* 833 F.Supp.2d at 52 ("When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents."). A Sysco "Investor Day" presentation from 2010 distinguishes the company's "Contract Sales (Broadline)" from "Street Sales," PX03101–010, and separates its "Key Competitors—National," from regional competitors, PX03101–020. Similarly, a presentation entitled "Board of Directors Strategy Sessions," dated July 2010, distinguishes between Sysco's market size for "corporate contracts"—defined to include "major foodservice management (FSM) sales, major group purchasing organization (GPO) sales, and major chain sales (non FSM or GPO)"—and "Street" business. PX01008–006.

USF has similar documents. An internal USF presentation, titled "Business Overview," describes "[USF's] Customers" as falling into three categories: (i) "Street: Independent restaurants or small local chains"; (ii) "National Accounts: Contracted customers located across the country," including acute and long-term healthcare facilities, hotels and the hospitality industry, schools, and U.S. military and government agencies; and (iii) "National Chain Restaurants: Fast food and quick-serve establishments." PX03122–004. *See also* PX03034–006 (similarly categorizing the company's customers). A USF "Investor Presentation" from November 2012 describes USF as the "2nd largest national broadline distributor," PX03000–006, and touts its "[a]bility to leverage our national scale to cost effectively service customers nationally," PX03000–014. Further, it distinguishes between "National Scale," where "US Foods is the second-largest broadline foodservice distributor in the U.S.," and "Local Scale," where "US Foods is estimated # 1 or # 2 position in [Redacted] of served markets," PX03000–014. *See also* PX03007–007 (internal document in which KKR & Co., one of USF's private equity owners, distinguishes between "Street and National Account customer segments").

Other key players in the industry also recognize that national customers are different. For instance, the President and CEO of PFG, George Holm, agreed that "Sysco and U.S. Foods are the only two distributors for broadline with the capability to serve national broadline customers with locations dispersed throughout the United States," including foodservice management companies, GPOs, large healthcare systems, and certain restaurant chains. Hr'g Tr. 596. Representatives of DMA and Reinhart likewise referred to national customers as those that are geographically dispersed and need a single point of contact. *See* PX00412–002–003; PX00415–004.

b. *Distinct customer needs*

There is ample record evidence that national customers' needs differ from those of local customers. The McKinsey analysis described above concisely summarized those distinctions. PX09010–004.

For starters, national customers, because of their dispersed geographic presence, often require a broadliner to meet their foodservice needs in more than one region. As a result, the number of distribution centers in a broadliner's network is often an important factor for such customers. In sharp contrast, according to Sysco, "all, or almost all," of its "local contract customers" are served by only one distribution center. PXO1400–001.

The Defendants' ordinary course documents highlighted their comprehensive distribution networks as a competitive advantage for serving national customers. *See, e.g.,* PX03000–014 (USF presentation touting its "[a]bility to leverage our national scale to cost effectively service customers nationally"); PX00247–001–002 (USF email communication to [Redacted] describing the "US Foods Value Proposition" as including "Privately held National Distribution footprint company"; "Single IT operating platform nationally"; and a "Single Point of Contact"); PX01062–005 (Sysco presentation to Aramark highlighting that Sysco's "national footprint, strong service approach and our breadth of product offerings is what differentiates us from our competition"). As USF's David Schreibman acknowledged during the evidentiary hearing, "US Foods['] leading national market position is due to U.S. Foods['] geographic presence that includes 62 distribution centers across the United States." Hr'g Tr. 1520–21. He also acknowledged that Sysco was the only company with greater scale than USF. *Id.* at 1522.

In addition to multi-regional distribution capabilities, national customers generally demand a set margin contract that applies across multiple locations. As PFG's George Holm testified, a single contract enables customers to simplify contract administration and to reduce administrative costs. *Id.* at 600–02. Additionally, national customers often use RFPs and/or bilateral negotiations to award broadline foodservice distribution contracts. *Id.* at 1595–97. In sharp contrast, pricing for local or "street" customers, according to Sysco, "[is] ultimately the result of individual negotiations between the customer and [broadliner]" and "can vary on a weekly and even daily basis." PX06057–032.

National customers also seek a single technology platform for handling their purchases. Consolidating purchasing through a single ordering platform creates efficiencies and cost savings, particularly as it relates to managing direct contracts with manufacturers and administering price changes. The importance of this feature is evidenced by DMA's development of a single ordering platform that enables customers to purchase from its members. Indeed, DMA promotes its technology platform as superior to Sysco's and USF's. PX00565–006 at 23–24. If national customers had not demanded such a feature, DMA would not have developed it.

Finally, product consistency is a factor for some national customers, particularly for those who wish to purchase private label products. *See* PX09010–004 (McKinsey report identifying as a "Customer requirement[ ]" for "National" customers "consistency of service, pricing, and products across multiple Markets"). Large customers can achieve a high degree of product consistency through direct contracting with product manufacturers or by purchasing proprietary brands stocked by Defendants. DX–01359 at 73 (Dr. Bresnahan report observing that "one way customers that value consistency achieve it is through direct negotiation with manufacturers to create propriety products" and that "[c]ustomers can also rely on national brands to ensure consistency"). However, because private label goods offer a strong value benefit, if a national customer wishes to purchase such goods and have them available across all of its locations, it can do so most efficiently through a broadliner with national geographic scope. *See* Hr'g Tr. 600 (George Holm of PFG stating that one reason national customers prefer to contract with Sysco or USF is that "[w]here they have a preference for a private brand, [ ] it is the same product [across] their system").

c. *Defendants' Operations*

Both Sysco and USF operate dedicated sales groups from their national headquarters that are responsible for negotiating and managing contracts with customers who use multiple distribution centers. *See Grinnell,* 384 U.S. at 572–74, 86 S.Ct. 1698 (holding that centralized station security services operated on a national level is a relevant product market). Sysco refers to these customers as "corporate multi-unit customers," or CMUs. USF refers to them as "national sales customers." According to USF's Senior Vice President for National Sales, Tom Lynch, each national customer in his group has a single USF representative who is responsible for that customer. The largest customers are assigned a full-time dedicated employee to manage the account. PX00517–014–015 at 56–58.

d. *SSNIP Test*

[30] Contrary to what Defendants contend, Dr. Israel did perform a SSNIP test to determine whether there is a separate product market for national customers. That SSNIP test was performed as an element of the SSNIP test that Dr. Israel used to assess whether broadline distribution was a relevant product market. As Dr. Israel testified, he applied to national customers the same 10 percent gross margin that he used to calculate the aggregate diversion ratio for all customers. Hr'g Tr. 1005 (stating that he used a 10 percent gross margin "to both local and national customers"). He derived the actual diversion for national customers based on the RFP/bidding data provided by the defendant companies. *Id.* at 1009 (describing the "RFP/bidding data" as "really national [customer] data"). Using the same methods discussed above, Dr. Israel calculated the actual diversion for Sysco's national customers to be [over 70%] and the actual diversion for USF's national customers to be [over 70%] In other words, over [70%] of the time (based on potential revenue from sales opportunities), when Sysco or USF lost a bid opportunity for a national customer, it was to another broadliner. Because these percentages were greater than the aggregate diversion ratio of 50 percent, Dr. Israel concluded that broadline service to national customers was a relevant market. In other words, Dr. Israel found that only 50 percent of national broadline customers would need to remain within the broadline market to make a price increase profitable, while the actual percentage of national customers who would remain within the broadline market (by switching to another broadliner) was greater than 50 percent. Dr. Israel's calculations, therefore, indicated that broadline distribution to national customers was the relevant product market.

The court already has expressed its reservations about relying on the RFP/bidding data to precisely calculate the aggregate diversion ratio. But, as before, the court finds that the ultimate conclusion of the SSNIP test—that broadline foodservice to national customers is a relevant product market—is supported by the weight of the evidence. Numerous national customer witnesses testified that other channels of distribution were not adequate substitutes for broadline distribution.[21] Although Defendants have shown that some national customers who were served by broadliners are now served by systems or systems-like distributors—most notably, Subway and Five Guys—those are the exceptions. Subway and Five Guys, because of their limited menus, are more amenable to substituting to a systems model. The same simply cannot be said of other large national customers, like GPOs, foodservice management companies, and hospitality chains, which rely heavily on broadliners.

e. *Defendants' arguments against a national customer market*

Asserting that there is no separate product market for national broadline customers, Defendants first argue that the national-local distinction is "arbitrary" because it is based on nothing more than customer preference about account management. Defendants' executives testified that Sysco's CMU customers and USF's national customers are so designated, not because of any particular characteristic or group of characteristics, but purely because the customer prefers to have its

21. *See* Hr'g Tr. 143–145 (Christine Szrom, fact witness for U.S. Department of Veteran Affairs, explaining that she is not familiar with systems distribution and could "absolutely not" use a cash-and-carry distributors); Hr' g Tr. 214–17 (James Thompson, Head of Procurement for Interstate Hotels and Resorts, stating that "it would be very difficult if not impossible" to operate Interstate's foodservice distribution without a broadliner and that specialty is not a substitute for broadline distribution); PX[Redacted]–002 (Joan Ralph, Group Vice President at Premier, Inc., saying that "[e]ven if we choose one day to contract with systems distributors, specialty distributors, or cash and carry stores, each would be as an additional, distinct service for our members who may need a quick, last-minute item or two; none could replace or serve as a substitute for broadline distribution services"); PX[Redacted]–002 ([Redacted], nothing that [Redacted] cannot contract with a systems distributor or use other forms of distribution.

account managed by the headquarters sales team, instead of by its local distribution center. The FTC's and Dr. Israel's reliance on the companies' administrative designation, Defendants argue, leads to arbitrary classifications. For example, some of Defendants' customers who use a small number of distribution centers are counted by the FTC as "national" customers. As Dr. Hausman demonstrated, 37 percent of Sysco's CMU customers use five or fewer distribution centers and 55 percent use ten or fewer. And, for USF, 51 percent of their national customers use five or fewer distribution centers and 67 percent use ten or fewer. Hr'g Tr.1976. Additionally, similarly situated customers—in terms of size, number of distribution centers, revenues, etc.—are sometimes treated differently. One customer may be identified as national and another as local, simply because one prefers to be managed from headquarters and the other from the local distribution center.

Defendants are correct that their "national" customer lists are over-inclusive—not every customer on those lists has multi-regional distribution needs. And they are also correct that the FTC could have more accurately defined a class of "national" customers by testing each candidate national customer against specific "national" criteria, such as the number of distribution centers used. But, ultimately, for the purpose of defining a product market, the court finds that the parties' "national" customer designation is a useful proxy for customers requiring geographically dispersed distribution and attendant services.

As the graphic below prepared by Dr. Israel shows, if the merger were to occur, a significant proportion of the combined company's national customer revenues would come from customers who use a large number of distribution centers. PX09375–077, Figure 3. National customers using more than 35 distribution centers would account for [Redacted] percent of a merged Sysco-USF's revenue; national customers using more than 24 distribution centers would account for [Redacted] percent of revenue; and national customers using at least 10 distribution centers would account for [Redacted] percent of revenue. Those figures demonstrate that Defendants' national-customer designations capture those key customers (based on revenues) who use a large number of distribution centers. The "national" designation includes, among others, the largest GPOs, like Premier, Novation, and MedAssets, each of whom uses over [Redacted] distribution centers; the largest foodservice management companies, like Sodexo, Aramark, and Compass, each of whom uses more than [Redacted] distribution centers; the largest hotel management company, Hilton, which uses [Redacted] distribution centers; and the second largest government customer, the U.S. Department of Veterans Affairs, which uses [Redacted] distribution centers (the largest is the U.S. Department of Defense, which uses [Redacted] distribution centers). PX09375–076, Table 5. Thus, for these customers, the label "national" is not merely administrative; it accurately reflects this high revenue-generating group's actual needs. The fact that some smaller customers are included among the Defendants' "national" designations does not mean that the designation lacks evidentiary value for defining a market for national customers.

Figure 3

Sysco and USF 2013 Revenues by Number of Distribution Centers Used

[Redacted]

Next, Defendants assert that defining a price discrimination market around national customers is untenable because the FTC failed to show that so-called national customers shared any objectively observable characteristics that would enable the combined company to price discriminate against that group. *See* Merger Guidelines § 3 (stating that "differential pricing" is an essential element of price discrimination, which "may involve" offering different pricing to different types of customers "based on observable characteristics"). In other words, they argue that this grouping of customers is so heterogeneous that there is no common, identifiable characteristic that could serve as a proxy for determining which customers in the broadline market have inelastic demand.

Defendants are undoubtedly correct that, even among their largest customers, there is great variety in the customers' servicing needs and requirements. But price discrimination can occur even when customers do not have common observable characteristics. As the Merger Guidelines state, markets for targeted customers may exist "when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product." Merger Guidelines § 4.1.4; *see also* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years,* 77 Antitrust L.J. 49, 93 (2010) (observing that, in markets for intermediate goods and services, "prices typically are negotiated and price discrimination is common").

Here, the evidence is clear that Defendants engage in individual negotiations with their national customers and possess substantial information about them. Indeed, the fact that Defendants employ substantially more sales representatives than other broadliners, PX09350–218, Table 30, and assign full-time dedicated employees to some of their largest customers is indicative of the "know-your-customer" philosophies of both firms. Defendants, therefore, already have substantial customer information that would allow them to predict which of their customers have inelastic demand and which do not. Price discrimination can occur in such a marketplace, even if the targeted customers do not share specific identifiable traits.

Finally, Defendants contend that a product market of targeted national customers does not comport with business realities. This argument has two main elements. First, they assert that, contrary to what the FTC contends, Compl. ¶¶ 5, 42, national customers do not require a broadline foodservice distributor that is national in scope. Rather, they argue, even at current prices, many large customers spread their distribution needs over multiple regional suppliers. For instance, Defendants cite GPOs, like [Redacted], [Redacted], Amerinet, and large government agencies, like the Defense Logistics Agency, as using a regional contracting approach. Defs.' Opp'n Br. at 15. They also refer to one of the largest foodservice management companies, Sodexo, which splits its distribution into [Redacted] regions. *Id.* And, then there is Subway and Five Guys, two large chain restaurants that have regionalized and purchase from multiple suppliers. *Id.* at 15–16. Because these types of customers can regionalize or credibly threaten to regionalize. Defendants argue, the merged company would not be able to discriminate against them on price.

But Defendants' argument founders when faced with the actual purchasing habits of the industry's largest customers. The evidence shows that the bulk of the broadline purchasing done by most geographically dispersed broadline customers is still done through Sysco and USF. Of Avendra's members' broadline spend, [Redacted] percent is with Sysco and USF. Pl.'s Collected Proposed Findings of Fact and Conclusions of Law, ECF No. 173 at 114 [hereinafter PFF]. Members of other GPOs similarly purchase a large percentage of their goods from Sysco and USF. The total broadline spend of Premier,[22] Novation, MedAssets, and HPSI members with Sysco and USF is, respectively, [Redacted] percent, [Redacted] percent, [Redacted] percent, and [Redacted] percent. *Id.* at 113–15; FTC Closing Arg. Slides at 35. Large foodservice management companies similarly make the bulk of their broadline purchases from Sysco and USF. Sodexo, Aramark, Compass, and Centerplate, respectively, spend [Redacted] percent, [Redacted] percent, [Redacted] percent, and [Redacted] percent of their broadline foodservice distribution dollars with Sysco and USF. PFF at 113–16; FTC Closing Arg. Slides at 35. The story is similar for large hospitality customers. Two of the largest, Hilton and Interstate, allocate [Redacted] percent and [Redacted] percent of their broadline spend, respectively, to the two companies. PFF at 114, 116; FTC Closing Arg. Slides at 35. Even the Defense Logistics Agency, which contracts regionally, dedicates [Redacted] percent of its broadline spend to Sysco and USF. PFF at 116; FTC Closing Arg. Slides at 35.

The court infers from this evidence that geographically dispersed customers view Sysco and USF as having significant comparative advantages over regional distributors, particularly because of their far-reaching distribution networks. Though some customers have spread their business over multiple broadliners, a significant portion (as measured by total revenues) have not. Indeed, PFG's George Holm observed that the "*clear trend* amongst national broadline customers is to move toward a single nationwide provider." Hr'g Tr. 598 (emphasis added); PX09081–002 (letter from PFG's counsel to FTC, dated November 14, 2014, stating the same). *See Brown Shoe,* 370 U.S. at 332, 82 S.Ct. 1502 (footnote omitted) ("Another important factor to consider is the trend toward concentration in the industry."). Mr. Holm further admitted that either Sysco or USF essentially wins every RFP issued by a national customer. Hr'g Tr. 598–99. And PFG acknowledged by letter to the FTC that, even as the country's third-largest broadliner, "PFG has difficulty competing for national broadline accounts because it does not have a nationwide footprint of broadline distribution centers." PX09081–001. Other large regional broadliners have said the same about their own businesses models.[23] Defendants' contention—that a product market defined around national customers does not comport with business reality because such customers have regionalized or can regionalize—is thus belied by the record evidence.

Second, Defendants argue that margin data shows that, as a merged entity, they would not be able to price discriminate against national customers. Dr. Hausman demonstrated that Defendants' margin on sales to customers who use fewer distribution centers is actually *higher* than their margin on sales to those who use more. DX–01355 at 58–61. Defendants contend

22. As to Premier, the person responsible for foodservice program, Joan Ralph, testified that [Redacted]. Hr'g Tr. 474; PX00475–001–002.

23. *See, e.g.,* PX00415–004 (Reinhart); PX00416–003 (Merchants); PX00434–003–004 (Labatt); PX00438–002–003 (Cash-Wa); PX00443–005 (Ben E. Keith); PX00449–003 (Jacmar); PX00451–005 (Services Group of America); PX00458–004 (Nicholas & Co.); PX00460–002–003 (Shamrock); PX00529–047–048 at 188–89 (Gordon).

that under the FTC's theory, they presently have a duopoly as to national customers, yet they do not earn duopoly profits on that customer class. Defendants thus maintain that, just as they cannot today price discriminate to earn duopoly profits, they would not be able to price discriminate after the merger to earn monopoly profits.

Defendants' argument, however, is unconvincing. Defendants' present inability to earn duopoly profits on national customers is probably because large customers can keep prices down by leveraging the defendant companies against one another. As the Cleveland Research Company observed: "Based on our research, **we believe both Sysco and U.S. Foods have priced each other down competing for larger national/regional contract accounts** over the last several years." PX09332–004. The ability of large buyers to keep prices down, functioning as what is known in antitrust literature as "power buyers," *see Cardinal Health,* 12 F.Supp.2d at 58–59; Merger Guidelines § 8, depends on the alternatives these large buyers have available to them, *see* Shapiro, *supra,* at 95; Areeda & Hovenkamp 3d ed., *supra,* ¶ 943a. If a merger reduces alternatives, the power buyers' ability to constrain price and avoid price discrimination can be correspondingly diminished. *See* Merger Guidelines § 8 ("Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer."). Thus, the fact that Defendants are currently unable to price discriminate against national customers does not mean that they would be unable to do so as a merged firm.

C. Product Market Summary

Having considered and weighed the parties' arguments and evidence, the court concludes that the FTC has carried its burden of showing that, for purposes of merger analysis, (i) broadline foodservice distribution is a relevant product market, and (ii) broadline foodservice distribution to national customers is also a relevant product market.

D. Relevant Geographic Market

[31–33] The court now turns to the second part of defining the relevant market, which involves determining the relevant geographic market. The Supreme Court has stated that, for Section 7 of the Clayton Act, the relevant geographic market is "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." *Marine Bancorp.,* 418 U.S. at 620–21, 94 S.Ct. 2856. Stated differently, "[t]he proper question to be asked . . . [is] where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Phila. Nat. Bank,* 374 U.S. at 357, 83 S.Ct. 1715; *see also Cardinal Health,* 12 F.Supp.2d at 49 (citation omitted) (internal quotation marks omitted) (stating that the relevant geographic market is "the area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition"). Like the product market, the geographic market must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe,* 370 U.S. at 336–37, 82 S.Ct. 1502 (footnote omitted) (internal quotation marks omitted). The Supreme Court has recognized that an "element of 'fuzziness would seem inherent in any attempt to delineate the relevant geographical market,' " and therefore "such markets need not—indeed cannot—be defined with scientific precision." *Conn. Nat. Bank,* 418 U.S. at 669, 94 S.Ct. 2788 (quoting *Phila. Nat'l Bank,* 374 U.S. at 360 n. 37, 83 S.Ct. 1715). That said, the relevant geographic market "must be sufficiently defined so that the [c]ourt understands in which part of the country competition is threatened." *Cardinal Health,* 12 F.Supp.2d at 49.

The FTC contends that there are two relevant geographic markets in this case. For national broadline customers, the relevant geographic market is nationwide. For local broadline customers, the relevant geographic markets are localized around Defendants' distribution centers.

With regard to national customers, for essentially the same reasons that the FTC asserts that there is a product market for broadline distribution to national customers, the FTC asserts that the geographic market for those customers is nationwide. The FTC relies on the fact that Defendants plan on a national level and have "national account" teams dedicated to national customers; their contractual pricing and service terms with national customers apply across regions; and their competition for national customers is largely other broadliners with nationwide coverage.

As for local customers, as discussed in more detail below, the FTC's local geographic markets were constructed by Dr. Israel and are premised on customers' proximity to Defendants' distribution centers. The basic idea is that, for local customers, distance to a distribution center is a key service factor and, for Defendants, distance traveled from a distribution center to make deliveries is a critical cost component. The FTC alleges that the merger threatens to harm competition in 32 local geographic markets where Sysco and USF together currently have dominant market shares. Compl. ¶ 60.

Defendants dispute that there is a nationwide geographic market for the same reasons that they contend that there is no national customer product market. As for the local geographic markets, Defendants aggressively challenge the methodology that Dr. Israel used in defining local markets. Their primary criticism is that the geographic areas are drawn so narrowly that they exclude actual competition from the relevant market. This results, they contend, in local market concentrations that artificially inflate Defendants' market shares.

1. National Market

[34] Although the physical act of delivering food products occurs locally, for national customers the relevant geographic area for competitive alternatives is nationwide, primarily because of their geographically dispersed footprint. Defendants compete within this market by touting their nationwide distribution capabilities to these customers; bidding against other broadliners with multi-regional capabilities (which is to say, against each other and the regional cooperatives); coordinating the marketing, negotiating, and managing of these customers through their "national account" teams; and entering with these customers into a single contract whose terms, including pricing, apply across regions. For these reasons, the court finds that the relevant geographic market for broadline foodservice to national customers is nationwide. *See Grinnell,* 384 U.S. at 575–76, 86 S.Ct. 1698 (finding a national geographic market where central station services "operated on a national level," and there was "national planning," a nationwide schedule of prices, and nationwide contracting for multi-state businesses); *Cardinal Health,* 12 F.Supp.2d at 50 (finding a national geographic market where evidence showed that "GPOs negotiate contracts with several wholesalers, making the same prices available throughout the country to all of their members—local, regional, or national").

2 .Local Markets

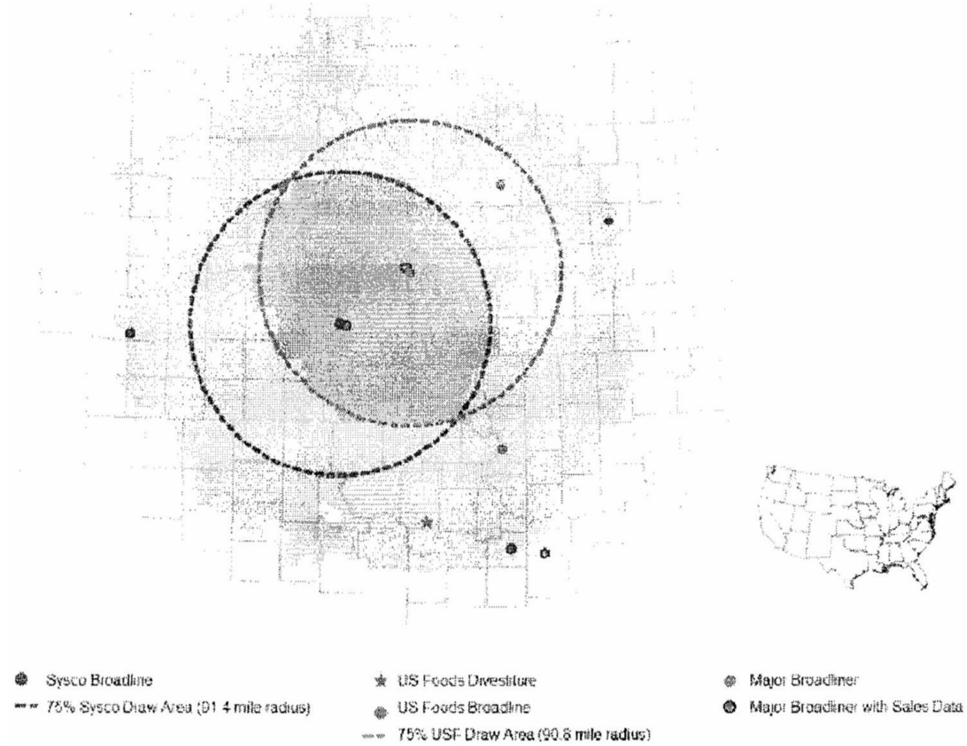
[35] Defining the local geographic market presents a far greater challenge. Not surprisingly, there is no industry standard for delineating the area that makes up a local geographic market for broadline distribution. Each local market has its own unique attributes. Customer composition and concentration differs across markets; so does the demand for products, with SKU variations reflecting local tastes and palettes. Average driving distances for foodservice distributors vary depending on the density of the area, with longer hauls more common in rural parts of the country and shorter trips more prevalent in urban areas. And, of course, the competitors vary from market to market.

The FTC tasked Dr. Israel with defining the local geographic markets. He constructed them as follows. In his first step, Dr. Israel drew circles around the location of each Sysco and USF distribution center. To determine the size of each circle, Dr. Israel used a radius, referred to as the "draw distance," that, on average, captured 75 percent of the distribution center's sales to local customers. The length of each distribution center's 75 percent draw radius differed. For example, the 75 percent draw distance around Sysco's Billings, Montana, facility was 262 miles, whereas the 75 percent draw distance around Sysco's Jersey City, New Jersey, facility was only 24 miles. PX09350–221–224, Table 38. What that means is Sysco drives over 200 miles further to capture 75 percent of its local sales in Billings than it does in Jersey City. That disparity makes sense, as more populated areas correspond to higher customer concentrations and shorter delivery distances.

In his second step, Dr. Israel identified each company's local customers that fell within an area of intersection between the draw circle around the Sysco distribution center and the draw circle around the USF distribution center. This area of intersection was termed the "overlap area." These "overlap customers," according to Dr. Israel, were the customers most likely to suffer harm from the merger, because these were the customers who would be left with one less alternative supplier after the merger. Exhibit 40 from Dr. Bresnahan's report, which is reproduced below, shows Dr. Israel's methodology in the Omaha, Nebraska, area. The blue-dotted circle corresponds to Sysco's 75 percent draw area, and the green-dotted circle corresponds to USF's. The dark gray area corresponds to the "overlap customers." DX–01359, Ex. 40.

EXHIBIT 40

DISTRIBUTION CENTERS LOCATED NEAR THE FTC'S CONTESTED LOCAL AREAS OMAHA, NE/COUNCIL BLUFFS, IA



In his third step, Dr. Israel identified the broadline distributors who could compete for the customers in the overlap area. To do this, Dr. Israel drew circles around each overlap customer using the 75 percent draw radius. This created a larger circle that moved the outer boundaries of the overlap area by the same radius as the 75 percent draw area, which is represented by the light gray area in Exhibit 40 above. According to Dr. Israel's analysis, the light gray area is the area to which customers can practically turn for alternative sources of broadline distribution. All of the competitors located within the light gray area were factored into Dr. Israel's local market share computations.

Defendants attack Dr. Israel's "circle drawing exercise" as "arbitrary" and not reflective of industry realities. Defs.' Opp'n Br. at 27. Specifically, they assert that Dr. Israel's methodology is flawed because it assumes that competitors will drive no greater distance than Sysco's or USF's 75 percent draw radius to serve customers. Defendants point to competitor declarations and testimony showing that in many of the 32 local markets in which the FTC claims Defendants have a dominant market share, competitors are willing to, and do, drive distances greater than the 75 percent draw radius to compete for and deliver to customers.

Notwithstanding this criticism, the court finds that there is nothing inherently "arbitrary" about Dr. Israel's methodology in defining the local markets. To the contrary, given the absence of an industry standard for defining a local market, Dr. Israel's methodology provides a practical approach and solution to an otherwise thorny problem. Dr. Israel's premise in defining these markets—that driving distance matters—is amply supported by the record and common sense. Customers who are farther away from a distribution center cost more to service. Longer distances correspond to, among other things, higher gas usage, more labor hours, and increased wear and tear on trucks. Given that the geographic market need not be defined by "metes and bounds," *Conn. Nat'l Bank,* 418 U.S. at 669, 94 S.Ct. 2788 (citation omitted) (internal quotation marks omitted), Dr. Israel's 75 percent draw methodology identifies "the area of competitive overlap, [where] the effect of the merger on competition will be direct and immediate," *Phila. Nat'l Bank,* 374 U.S. at 357, 83 S.Ct. 1715. *See also Conn. Nat'l Bank,* 418 U.S. at 670 n. 9, 94 S.Ct. 2788 (remanding to the district court to define the local market and observing that the "federal bank regulatory agencies define a bank's service area as the geographic area from which the bank derives 75% of its deposits"). The court therefore concludes that the relevant local geographic markets are the areas of overlap resulting from Dr. Israel's 75 percent draw methodology.

Ultimately, what really troubles Defendants about Dr. Israel's "circle drawing exercise" is not the resulting geographic areas, but what those areas mean for calculating Defendants' local market shares. The court considers those arguments in the next section.

II. *THE PROBABLE EFFECTS ON COMPETITION*

[36] Having concluded that the FTC has carried its burden of establishing a relevant market—both a nationwide market for broadline foodservice to national customers and various local markets for broadline foodservice to local customers—the court turns next to "the likely effects of the proposed [merger] on competition within [those] market[s]." *Swedish Match,* 131 F.Supp.2d at 166. As the Court of Appeals explained in *Heinz,* the government "must show that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market.' " 246 F.3d at 715 (quoting *Phila. Nat'l Bank,* 374 U.S. at 363, 83 S.Ct. 1715). "Such a showing establishes a 'presumption' that the merger will substantially lessen competition." *Id.* (citation omitted).

[37, 38] The Court of Appeals has held that the FTC can establish its *prima facie* case by showing that the merger will result in an increase in market concentration above certain levels. *Id.* "Market concentration is a function of the number of firms in a market and their respective market shares." *Arch Coal,* 329 F.Supp.2d at 123. A common tool used to measure changes in market concentration is the Herfindahl–Hirschmann Index (HHI). *Heinz,* 246 F.3d at 716; *see also* Merger Guidelines § 5.3. HHI figures are "calculated by summing the squares of the individual firms' market shares," a calculation that "gives proportionately greater weight to the larger market shares." Merger Guidelines § 5.3. "Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive." *Heinz,* 246 F.3d at 716. The Merger Guidelines, which provide "a useful illustration of the application of HHI," *FTC v. PPG Indus., Inc.,* 798 F.2d 1500, 1503 n. 4 (D.C.Cir. 1986), state that a market with an HHI above 2,500 is considered "highly concentrated"; a market with an HHI between 1,500 and 2,500 is considered "moderately concentrated"; and a market with an HHI below 1,500 is considered "unconcentrated," Merger Guidelines § 5.3. Furthermore, a merger that results in "highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id.* In *Heinz,* the Court of Appeals recognized that an increase in

HHI by 510 points "creates, by a wide margin, a presumption that the merger will lessen competition." 246 F.3d at 716.

A. Concentration in the National Broadline Customer Market

1. *Dr. Israel's National Broadline Customer Market Shares Calculations*

[39] In some cases the merging parties' market shares and post-merger HHIs are seemingly uncontroversial. *See, e.g., Staples,* 970 F.Supp. at 1081–82; *H & R Block,* 833 F.Supp.2d at 71–72. Not so here. Because there are no industry-recognized market shares for national broadline customers, the FTC tasked Dr. Israel with calculating the market shares and the HHIs. Not surprisingly, Defendants vigorously contested his methodology and conclusions.

Dr. Israel calculated Defendants' national customer shares as follows. As his first step, he identified Defendants' individual sales to national broadline customers, *i.e.,* the numerator for the market share calculation. Those sales figures came directly from the parties' "national" customer designations: for Sysco, its sales to CMU customers, and for USF, its sales to national customers.

Next, Dr. Israel determined the total sales by all broadline distributors to national customers, *i.e.,* the denominator for the national share calculation. Again, because there is no industry-recognized figure for such sales, Dr. Israel estimated them. He did so in two ways. First, he aggregated the national sales of the three principal competitors for national customers—Sysco, USF, and DMA—and added in another share equal to DMA's. This total comprised the denominator for his "baseline" shares calculation. PX09350–074. The addition of another DMA-sized share to the denominator was premised on his observation from the RFP/bidding data that the size of sales to national customers by all broadliners other than Sysco, USF, and DMA was about the same as DMA's.

Dr. Israel also used a second method to calculate the total sales to national customers. He aggregated the national sales reported by the largest 16 broadliners, including DMA and MUG, in response to the FTC's civil investigative demands. This data is referred to as CID data. Dr. Israel ran several "sensitivities" on this sum, adding in sales to account for variations in CID responses (*e.g.,* some distributors did not segregate "national" from total sales). Dr. Israel also aggregated the national sales of Sysco, USF, DMA, and MUG, plus an estimate of national sales for *all* other responding distributors based on the assumption that each distributor's national-local sales ratio was the same as Defendants' ratio. Dr. Israel's various approaches yielded a total national broadline sales estimate of $28 to $30 billion. Hr'g Tr. 1177–78; *see also* PX09060–006 (PFG business plan estimating the size of the national customer market to be approximately $20 billion).

As his last step, Dr. Israel adjusted his market shares to account for the divestiture to PFG. The chart below reflects Dr. Israel's post-merger, post-divestiture market share and HHI calculations. For his "baseline" calculation, Dr. Israel determined that the parties' post-merger national broadline customer market share would be 71 percent with an HHI increase of nearly 2,000 points. His CID data-based calculations, shown as (i) through (vi) in the chart, also yielded high post-merger shares and significantly increased HHIs. Dr. Israel's most conservative approach, in which he assumed that the top 16 broadliners had national to local sales ratios that were equal to Defendants' ratio of such shares—(iv) in the chart below—resulted in a post-merger market share of 59 percent and an HHI increase of 1,500 points. PX09350–186, Table 18.

Table 18

Shares of Sales to National Broadline Customers, After Accounting for the Proposed Divestiture

	Post-Divestiture Shares	Post-Divestiture HHI's	
	Combined Share	HHI	Δ HHI
Baseline	71%	5,119	1,966
(i) National	68%	4,935	1,953
(ii) National + Imputed National	65%	4,549	1,799
(iii) National + Regional	66%	4,614	1,822
(iv) National + Systems	62%	4,217	1,643
(v) National + Regional + Systems	61%	4,087	1,590
(vi) Parties' Ratio of National	59%	3,809	1,500

2. Defendants' Arguments

Defendants raise a host of objections to the reliability of Dr. Israel's methodology and calculations. They contend that his use of their "national" sales in the numerator was arbitrary because, as discussed above, not all of Defendants' "national" sales are to customers with a multi-regional footprint. The inclusion of those sales, they contend, overstated Defendants' national market share. They also argue that Dr. Israel's numerator included some sales to systems-like customers, such as to Five Guys, but his denominator excluded competitors' systems sales. This asymmetry, they assert, also resulted in an overstatement of Defendants' share. They further contend that the denominator used in Dr. Israel's "baseline" calculation is unreliable because it relies on the flawed RFP/bidding data set. And, finally, they argue that the denominator in the CID data calculation excludes over $30 billion in sales—though the source of this number is unclear.[24] They contend that these errors in developing the numerator resulted in biased market share calculations.

None of these arguments ultimately persuade the court that Dr. Israel's methodology or his market shares and HHI calculations are unreliable. The FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The "closest available approximation" often will do. *PPG,* 798 F.2d at 1505 (citation omitted); *see also H & R Block,* 833 F.Supp.2d at 72 (stating that a "reliable, reasonable, close approximation of relevant market share data is sufficient"). Indeed, in *PPG,* the FTC presented, and the Court of Appeals accepted, share calculations for "every market the evidence suggests is remotely possible," which "yield[ed] results of similar magnitudes in market concentration." 798 F.2d at 1506. Similarly, Dr. Israel ran multiple variants of his market shares and concentration analysis, using two different data sets and modifying one of these data sets, the CID data, in six different ways. Most convincing to the court was Dr. Israel's final method of calculating shares using the CID data, which assumed that all 16 of the top broadliners had the same national-local sales ratio as Defendants did. That approach yielded a

24. "Dr. Israel acknowledged that he left out $30 billion in systems distribution in the 'sensitivity analysis purporting to account for systems sales.' Defs." Proposed Findings of Fact and Conclusions of Law, ECF No. 171 at 263 (citing Hr'g Tr. 1259–60).

low-end market share of 59 percent and an HHI increase of 1,500 points—almost three times the 510 points that the Court of Appeals in *Heinz* found created a presumption of harm by a "wide margin." 246 F.3d at 716. This variation almost certainly *underestimated* Defendants' market shares, as smaller broadliners are unlikely to have a ratio of national-local sales comparable to Defendants' ratio.

Another reason Defendants' arguments do not sway the court is that other evidence in the record supports Dr. Israel's calculations. As discussed above, the largest customers for broadline distribution in the country—healthcare GPOs, foodservice management companies, hospitality companies, and large government agencies—make the vast majority of their broadline purchases from Defendants. These customers individually spend hundreds of millions of dollars (or more) on broadline distribution—totaling approximately half of the national broadline market (based on Dr. Israel's calculation of a total market of $28 to $30 billion). *See* FTC Closing Arg. Slides at 35. If the largest customers are presently spending between 60 to 100 percent of their total food budget with Defendants, *id.,* then Dr. Israel's low-bound, post-merger combined market share of 59 percent is consistent with market realities.

In addition, the only independent market share analysis of the broadline industry identified by the parties corroborates Dr. Israel's conclusions. The foodservice industry research firm Technomic collected 2014 sales data from the country's 43 largest broadliners. DX02016. Taken together, Technomic estimated total broadline sales to be $125 billion. Of that total, Sysco accounted for $35.7 billion and USF $23 billion, for a combined sum of $58.7 billion—nearly 47 percent of U.S. sales. *See id.*; *see also* PX09045–015 (PFG presentation to FTC stating that "[t]he two largest broadliners (Sysco and U.S. Foods) accounted for 51% of all broadline sales in 2010," based on a study by Hale Group, "Focus on Foodservice Distribution," dated April 11, 2013); PX09045–014 (PFG presentation to FTC highlighting a 2011 Technomic study showing that Sysco and USF had a combined market share of 58 percent among the top 10 broadline food distributors).

Technomic's 47 percent combined market share estimate for *total broadline* sales is consistent with Dr. Israel's low-end, post-divestiture estimate of 59 percent for *national broadline* sales. The Technomic data did not segregate national and local broadline customers. However, because the largest customers buy disproportionately from Sysco and USF, it stands to reason that the companies' combined market share for national customers would be greater than 47 percent, as Dr. Israel found. Even a combined market share of 47 percent (admittedly, a pre-divestiture number) can give rise to a presumption of harm. *See Phila. Nat'l Bank,* 374 U.S. at 364, 83 S.Ct. 1715 ("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.").

3. The Court's Finding as to National Broadline Customer Market Shares

The court thus finds that the FTC has shown, through Dr. Israel's testimony and other evidence, that a merger of Sysco and USF will result in a significant increase in market concentration in the market for national broadline customers. The FTC therefore has established a rebuttable presumption that the merger will substantially lessen competition in the market for national broadline distribution.

B. Concentration in the Local Markets

1. Dr. Israel's Local Broadline Customer Market Shares Calculations

[40] In addition to the market for national customers, the FTC also contends that the merged firm would create highly concentrated local markets for broadline foodservice distribution. To be precise, the FTC asserts that, in 32 different local markets, the merger between Sysco and USF would result in dramatic increases in HHIs, thereby substantially lessening the competition in those markets. Compl. ¶ 60, App. A. The FTC also maintains that the divestiture to PFG will not resolve Defendants' post-merger local market dominance.

As with the market for national customers, there is no industry study of local market shares. *See* PX09045–019 ("PFG is not aware of any systematic industry market share data."). The FTC again relied on Dr. Israel for those numbers. His starting point for calculating local share percentages was his 75 percent draw area methodology for defining the local geographic markets. *See* PX09350–058. As already discussed, Dr. Israel first identified the 75 percent overlap area in each local market and then identified the competitors that could serve those customers by drawing a circle with a radius equal to the 75 percent draw distance around each overlap customer. Next, to calculate the overall local market shares, Dr. Israel calculated a customer-specific market share. That is, for each customer in the overlap area, he calculated the market shares for the competitors who were located within the customer's 75 percent draw distance radius. Dr. Israel then aggregated each of these customer-specific shares to the local level, using weighted averages across all overlap customers. The consequence of this methodology was that, the greater the competitor's distance from the center of the overlap area, the less weight that competitor would receive in the overall local market share calculations. Stated differently, because these distant competitors' market shares would only come into the calculation due to customers on the borders of the overlap area, those competitors' shares would be smaller than the shares of competitors whose distribution centers were closer to the middle of the overlap area—namely, Sysco and USF.

When calculating market shares, Dr. Israel used three different metrics: (i) square footage of distribution centers; (ii) local broadline sales; and (iii) number of sales representatives. Dr. Israel used the first and third variables as proxies for revenues and as a way to confirm the market share calculations that were based on the second variable, sales revenues. To calculate shares based on revenues, Dr. Israel used the Defendants' sales data for the numerator. For the denominator, he used the sales numbers, where available, for local broadliners. For those local competitors for whom he did not have actual sales data, he estimated the sales revenue based on the size of the distribution center. PX09350–134 at n.410. Based on those metrics, in local markets with the 20 highest increases in pre-divestiture HHIs, Defendants' combined market shares ranged from 100 percent in San Diego, California, to over 65 percent in multiple markets. The HHI increases in each of top 20 markets were over 2,000 points. PX09350–135–137.

Dr. Israel also calculated post-divestiture market concentrations and HHI increases. According to the table below, in Memphis, Tennessee; Omaha, Nebraska; Sacramento, California; and Charleston, South Carolina, the post-divestiture combined markets shares remain above 80 percent with HHI increases in excess of 4,100, 1,400, 2,900, and 2,900 points, respectively. PX09350–213, Table 21. In seven other local markets, Dr. Israel calculated the post-divestiture combined market shares to be between 57 percent and 76 percent, with HHI increases in each case in excess of 1,500 points. *Id.*

Table 21

Examples of Areas with Large Change in HHI despite Divestitures

CBSA	Post-Merger Combined Share	Delta HHI
Omaha-Council Bluffs, NE-IA	90.3%	1,410
Sacramento--Roseville--Arden-Arcade, CA	88.6%	2,974
Durham-Chapel Hill, NC	75.4%	2,807
Charleston-North Charleston, SC	80.2%	2,947
Birmingham-Hoover, AL	57.5%	1,542
Jackson, MS	66.0%	2,155
Memphis, TN-MS-AR	93.8%	4,123
Columbia, SC	72.8%	2,315
Raleigh, NC	71.3%	2,188
Lynchburg, VA	63.3%	1,588
Rochester, NY	63.7%	1,574

2. Defendants' Arguments

Defendants attack Dr. Israel's local market share calculations in much the same way they did his national market share calculations—by contesting his methodology and inputs. Defendants assert that Dr. Israel's methodology was premised on the unreliable assumption that no competitor would drive a greater distance than Sysco or USF currently does to provide broadline services. In other words, they criticize Dr. Israel's use of the same draw radius to identify the relevant local competition as he did to identify the overlap area. As a result, they argue, Dr. Israel's local market share calculations excluded sales from broadliners who travel greater distances and thereby overstated Defendants' combined market shares.

To demonstrate this point, Dr. Bresnahan presented an analysis of the Omaha, Nebraska market. He testified that, according to Dr. Israel's analysis, Defendants had combined sales in Omaha of $95 million and a combined market share of 90 percent. According to Dr. Bresnahan, Dr. Israel's methodology did not factor in at least $[Redacted] million in sales by another local distributor, Cash–Wa, whose distribution facility is 129 miles west of Omaha—farther out than the 91–mile 75 percent draw radius that Dr. Israel had used for the area. Dr. Bresnahan based his conclusion on sales data per zip code produced by Cash–Wa, which Dr. Israel had not considered in his analysis. According to Dr. Bresnahan, the zip code data showed that in 2013, Cash–Wa made sales to customers in zip codes within the 75 percent overlap area—at least $[Redacted] million worth—which Dr. Israel did not account for because of his driving distance assumption. Had these Cash–Wa sales been taken into account, Defendants' combined market shares and increase in HHIs would have been lower. As illustrated by his Omaha study, Dr. Bresnahan concluded that Dr. Israel's local market share methodology produced unreliable results.

Dr. Bresnahan's Omaha study convincingly demonstrated that Dr. Israel's 75 percent draw area methodology resulted in underreported competitor sales in the

Omaha market. But what it did not show convincingly was by *how much.* Dr. Bresnahan's initial expert report stated that Cash–Wa's sales in the overlap area were over $[Redacted] million. DX01359–139. At the evidentiary hearing, however, he said that Cash–Wa's sales into that area were "at least $[Redacted] million," DX–05029 at 42, and he did not explain why that number differed from his report.[25] More fundamentally, Dr. Bresnahan's reliance on zip code data had its limits. As Dr. Bresnahan conceded, the zip code data did not differentiate between local and national customers or broadline and systems customers. Hr'g Tr. 2186. Dr. Israel explained that he did not use the zip code data for that very reason, as well as the additional reason that he did not have zip code data for all local market competitors. In addition, Cash–Wa does substantial business selling tobacco products; however, the zip code data does not segregate those sales. *Id.* As a result, although the court agrees with Defendants that Dr. Israel's methodology excluded some local broadline sales in Omaha, the court cannot reliably determine the extent of the underestimation. And, notably, even if Dr. Bresnahan's $[Redacted] million figure consisted entirely of local broadline sales, Defendants would still have a high combined local market share of [Redacted] percent ($95 million/($[Redacted] million + $95 million) = [Redacted] percent).

Ultimately, the court finds that Dr. Israel's specific local market calculations is informative, but not conclusive evidence, of the merger's potential harm to local broadline customers. As the Omaha study showed, because Dr. Israel's 75 percent draw methodology excluded some competitor sales and because each local market has nuances that cannot be captured by his methodology, the court cannot rely conclusively on Dr. Israel's precise local share calculations as a measure of competitive harm.

The court, however, finds variations on Dr. Israel's 75 percent draw methodology to provide persuasive evidence of the merger's impact on local markets. Dr. Israel did more than calculate local share percentages based on 75 percent draw areas. He also used a 90 percent draw area and a weighted 95 percent draw area. Those increased draw areas captured some of the competitor sales that the 75 percent draw area excluded.[26] Dr. Israel then aggregated the local market share figures across all overlap customers in all markets, using distribution center square footage, adjusted revenues, and number of sales representatives to estimate market share. PX09350–137–139. As shown in the table below,[27] these alternative approaches—

25. The court infers that the sales figure was reduced, in part, to estimate only Cash–Wa's *broadline* sales, as opposed to all sales. But that reason, if correct, was not made clear on the record. Additionally, in his report, Dr. Bresnahan reported over $[Redacted] million in sales by another broadliner, Reinhart. However, he made no mention of Reinhart's. However, he made no mention of Reinhart's sales in his testimony. That may be because Reinhart reported that [Redacted]. PX09034–019.

26. In a third variant, Dr. Israel went beyond the overlap areas and performed market calculations that took into account all local broadline customers, regardless of whether they fell into the overlap area. Dr. Israel also used a fourth variant—though not entirely clear from his report—in which he appears to have re-run his 75 percent draw methodology using all of Defendants' broadline customers in the overlap area, not just local broadline customers. PX09350–137–138

27. These figures are pre-divestiture share calculations. But the local market share percentages and HHI increases are so high that, even taking into account the divestiture, when aggregated across numerous markets, these figures are unlikely to decrease enough to designated as variations (i) and (ii)—demonstrate that for half of the customers in overlap areas, Defendants would have a post-merger combined local market share of more than 50 percent and the HHI would increase at least 1,300 points. PX09350–139, Table 7. A quarter of the overlap customers would face even greater market concentrations: Defendants post-merger would have at least 68 percent in combined local market share and the HHI would increase by at least 2,000 points. And, 10 percent of the overlap customers would face a combined market share north of 74 percent and an HHI increase of greater than 2,500 points. The picture that clearly emerges from these numbers is that, in many areas across the country, USF and Sysco already control a substantial share of the market for local broadline distribution. A merger between the two would lead to a significant increase in market concentration in many areas.

Table 7

Summary Statistics for Local Market Shares under Alternative Methodologies

	Combined Share			Δ HHI		
	Median	75th Pctile	90th Pctile	Median	75th Pctile	90th Pctile
Square footage shares						
Baseline	59.8%	71.8%	81.5%	1.763	2.375	3.169
(i) 90% distribution distance	58.3%	68.3%	75.3%	1.557	2.149	2.621
(ii) Continuous distribution distance	55.7%	68.3%	82.6%	1.369	2.013	2.765
(iii) All local CBSA customers	58.9%	70.4%	80.8%	1.603	2,364	3.081
(iv) All overlap CBSA customers*	60.9%	70.6%	78.3%	1,851	2,420	2,775
Adjusted revenue shares**						
Baseline	62.6%	74.7%	86.0%	1.574	2.778	3.094
(i) 90% distribution distance	57.2%	71.6%	79.2%	1.471	2.342	2,886
(ii) Continuous distribution distance	54.6%	70.6%	83.3%	1.208	1,849	3.000
(iii) All local CBSA customers	59.8%	74.6%	85.7%	1.327	2.614	2.974
(iv) All overlap CBSA customers*	66.7%	80.2%	86.1%	1,962	2,886	3.598
Sales representative shares						
Baseline	62.5%	70.8%	80.8%	1,854	2.406	3.152
(i) 90% distribution distance	58.0%	68.0%	74.8%	1,594	2,217	2.531
(ii) Continuous distribution distance	52.7%	70.5%	86.5%	1.345	2.039	2.655
(iii) All local CBSA customers	61.1%	70.4%	80.3%	1.595	2.308	3,099
(iv) All overlap CBSA customers*	61.6%	69.8%	79.4%	1.777	2.306	2.749

*Includes all customers.

**For variation (iv), unadjusted revenues are used.

Defendants' combined strength in local markets is corroborated by documents compiled during the Defendants' ordinary course of business. For example, in an Investor Presentation, dated November 2012, USF represented that it "estimated [having the] # 1 or # 2 position in [Redacted] of served markets." PX03000–014. Mr. Schreibman's investigational hearing testimony confirmed the present-day accuracy of that statement. Investigat'l Hr'g Tr., PX00515–017 at 65. He also confirmed that, in many of those markets, Sysco occupied the number one or two market position. *Id.*

Another USF document, a strategy document created in 2011, shows USF and Sysco with sizeable "market penetrations" in many local markets. PX03073–023–030. Mr. Schreibman testified that "market penetration" was different from "market share," as the former reflected the percentage of customers that purchased even $1 of product, whereas the latter reflected percentages of overall sales volumes. Hr'g Tr. 1508–09. But even if "market penetration" and "market share" have dif-

change the overall picture. *See* PX09375–103–104.

ferent definitions, both concepts are a measure of market strength, and the "market penetration" percentages show USF and Sysco to be first and second in numerous markets. Indeed, the very same strategy document lists 54 separate markets and identifies Sysco as a competitor in each of them. Of those 54 markets, USF estimated that Sysco had the number one position in [Redacted] markets and that, within those [Redacted] markets, USF was number two in [Redacted]. USF also estimated that it was number one in [Redacted] markets, with Sysco ranked number two in those same [Redacted] markets. And, in [Redacted] markets, USF viewed itself as tied for number one with Sysco. Thus, of the [Redacted] local markets, USF viewed Sysco or USF as the leading broadliner in [Redacted] and as the number two broadliner (or tied for first) in [Redacted]. This internal assessment clearly supports Dr. Israel's local market share calculations.

Defendants offer a different ordinary course document to rebut Dr. Israel's market share calculations. In 2013, relying on a sizeable third-party sales database of 335,000 independent restaurants, USF calculated its share of sales to independent restaurants in 53 local markets. That study showed USF with market shares much lower than that shown by Dr. Israel's calculations, ranging from a high of [Redacted] percent in Columbia, South Carolina, to a low of [Redacted] percent in the "Northwest." DX–00397–002.

But Defendants' reliance on the independent restaurant study as an indicator of local market shares is problematic for several reasons. First, there is no evidence that the underlying database differentiated between purchases from broadline distributors and purchases from other channels of distribution. The evidence has shown that, among foodservice customers, independent restaurants are among the most likely to buy from other channels, such as specialty and cash-and-carry. In other words, unless broadline sales are segregated from the rest—which the restaurant study appears not to have done—the resulting market share estimate will underestimate USF's actual share of only broadline purchases. A market share calculation that uses at its numerator purchases from *all channels* cannot be relied upon to determine USF's *broadline* market shares.

Second, no evidence was presented showing that the buying habits of independent restaurants is representative of other local broadline customers. Thus, by focusing only on independent restaurant purchasing, the data set does not provide an accurate picture of local market shares.

Third, the independent restaurant study's results conflict with other documents. For instance, USF's 2011 strategy document describes the company as having a "[s]olid #[Redacted]" position in "Reno/Sacramento," PX03073–019, but the restaurant study finds a less than 10 percent share in Reno, DX–00397–002. Similarly, the strategy document describes USF as having the "#[Redacted] position" in St. Louis, PX03073–018, but the restaurant study reported only a 13.3 percent share in the "Missouri Group," DX–00397–002.

Finally, Dr. Israel's conclusions are corroborated by PFG's analysis of the local markets. In January 2014, PFG made a presentation to the FTC in which it addressed the state of competition in various local markets. PFG, at the time, was represented by antitrust counsel, Kirkland & Ellis. Because there was no comprehensive industry data for local market shares, PFG "estimated local broadline market shares based upon [distribution center] square footage, which PFG uses to gauge competitor strength in the ordinary course of business"—one of the very methods that Dr. Israel used for calculating market shares. PX09045–019. PFG observed that, "[w]hile not perfect, we believe this approach produces *directionally correct results* and can be useful in flagging areas that merit closer consideration." *Id.* (emphasis added). PFG's analysis showed that in six major markets—New York, Philadelphia, Detroit, Denver, Las Vegas, and Los Angeles—a combined Sysco–USF, based on distribution center square footage, would control between 45 percent (New York City) to 80 percent (Las Vegas) of those local broadline markets. PX09045–020. PFG also calculated that a merger in those markets would result in HHI increases ranging from 1,000 points (New York City) to 3,100 points (Las Vegas). *Id.* Consistent with Dr. Israel's market shares and HHI calculations, PFG concluded that the "[p]reliminary findings indicate significant concentration in many local markets." *Id.*

3. The Court's Finding as to Local Broadline Customer Market Shares

The court thus finds, based on Dr. Israel's testimony and other evidence, that the FTC has shown that a merged Sysco–USF will significantly increase concentrations in local markets for broadline distribution. The FTC therefore has made its *prima facie* case and established a rebuttable presumption that the merger will lessen competition in the local markets.

C. Additional Evidence of Competitive Harm

The FTC did not rely solely on increased HHIs to establish that Defendants' proposed merger would cause competitive harm. *See Baker Hughes,* 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories."). It offered additional evidence to strengthen its *prima facie* case, to which the court now turns.

1. Unilateral Effects—National Customer Market

[41] The FTC advanced a "unilateral effects" theory to argue that the merger would harm competition in both the national and local broadline distribution markets. In this section, the court considers the evidence of unilateral effects in the national customer market and subsequently turns to the evidence regarding local customer markets.

[42] Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition. *See Heinz,* 246 F.3d at 717–19 (holding that elimination of competition between second- and third-largest jarred baby food manufacturers would weaken competition); *Swedish Match,* 131 F.Supp.2d at 169 (finding a likelihood of unilateral price increase where merger would eliminate one of Swedish Match's "primary direct competitors"); *Staples,* 970 F.Supp. at 1083 (finding anticompetitive effects where the "merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the . . . market."); *see also* Merger Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."). In such circumstances, 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." *H & R Block,* 833 F.Supp.2d at 81.

Unilateral anticompetitive effects can arise in a host of different settings. *See* *generally* Merger Guidelines § 6. Here, the FTC's case for unilateral effects rests on the fact that the broadline distribution industry is marked by negotiations between buyers and sellers. In such a market, "buyers commonly negotiate with more than one seller, and may play sellers off against one another." *Id.* § 6.2. If two competitors merge, buyers will be prevented from playing the sellers off one another in negotiations. *See id.* This elimination of competition "can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger." *Id.*

On the other hand, even if the merging parties had large market shares, if they were not particularly close competitors, then the market shares might overstate the extent to which the merger would harm competition. Although the merging parties need not be the top two firms to cause unilateral effects, *see, e.g., Heinz,* 246 F.3d at 717–19; *H & R Block,* 833 F.Supp.2d at 83–84, the FTC argues that the potential for unilateral effects here is magnified because Defendants are particularly close competitors and many national customers consider them the top two choices for broadline distribution. *See* Merger Guidelines § 6.2 ("Anticompetitive unilateral effects ... 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.").

The FTC offered various sources of evidence to show that the proposed merger will result in unilateral anticompetitive effects. The evidence includes empirical data collected and analyzed by Dr. Israel, Defendants' ordinary course documents, and testimonial evidence from other market actors.

a. *Dr. Israel's RFP/bidding study*

To show that Defendants were frequent head-to-head competitors—indeed, each other's closest rivals—Dr. Israel analyzed each company's bidding opportunities for national customers based on the RFP/bidding database that he compiled from the companies' records. The RFP/bidding records that Dr. Israel collected spanned a seven-year period, from 2007 to 2014. PX09375–088. He formed the database not only from the parties' reconstructed RFP data, but also from a host of ordinary course records reflecting bidding opportunities, PX09375–089–091. From this evidence, Dr. Israel concluded: "[I]n competitions for National Broadline Customer business, both USF and Sysco compete with and lose to one another much more than they compete with or lose to any other distributor and, indeed, more than all other distributors combined." PX09375–088. More specifically, based on Sysco's RFP/bidding records, Dr. Israel observed that USF appeared as a competitor for national broadline business twice as often as the next competitor and that, when Sysco lost, it lost to USF two and a half times more often than it lost to the next competitor. Similarly, based on USF's RFP/bidding records, Dr. Israel observed that Sysco appeared as a competitor for national broadline business four times as often as the next competitor and that, when USF lost, it lost to Sysco three and a half times more often than it lost to the next competitor. PX09350–105–109.

Defendants disputed the reliability of Dr. Israel's RFP/bidding data study in two primary ways. First, as already discussed, they forcefully challenged the underlying data set, arguing that neither company keeps ordinary course RFP and bidding records and that Dr. Israel's reliance on these artificially created data sets to calculate an empirical "win-loss" analysis is inherently flawed. As previously explained, the court has found that drawing precise conclusions based on the RFP/bidding data is problematic because of the data's limitations.

Second, to demonstrate that the merger would not create unilateral anticompetitive effects, Defendants offered a "switching study" conducted by Dr. Bresnahan. A switching study, as the name implies, analyzes customers' decision to "switch" their business to other competitors. For his study, Dr. Bresnahan acquired from a company called Aggdata the location information of tens of thousands of restaurant and hotel chain customers that are on either Sysco's or USF's "national customer" roster. He then analyzed Defendants' transaction records by quarter from the first quarter of 2011 to the third quarter of 2013 to determine if either company provided broadline distribution to a specific restaurant or hotel location. If either Defendant provided broadline distribution, he tracked the company's sales to the location and noted if it lost sales to the location during the period. If the company lost sales in a particular quarter, he checked the other defendant company's transaction records to see if it picked up the customer. If it did not, Dr. Bresnahan assumed that some other competitor did.

So, for example, if USF's records showed that a particular Sonic franchise did not purchase from USF in a particular quarter, he would turn to Sysco's records to see if Sysco had picked up the customer; if it did, he counted it as a switch to Sysco; if not, he assumed that the customer purchased from another distributor and counted it as a switch to a competitor other than Sysco. Based on this analysis, Dr. Bresnahan concluded that Sysco and USF are not uniquely close competitors. He found that USF lost business to Sysco 15 percent of the time based on both revenue and number of locations, and that Sysco lost business to USF 57 percent of the time based on revenue and 39 percent of the time based on number of locations. These percentages of switches, Dr. Bresnahan testified, were much lower than what one would have expected to see if Dr. Israel's national market shares were accurate.

For a variety of reasons, the court cannot agree with Dr. Bresnahan's ultimate conclusion—that USF and Sysco are not uniquely close competitors—based on his switching study. First, though the number of observations in Dr. Bresnahan's study were significant, they were limited almost exclusively to restaurant and hotel locations (including, it appears, restaurants served by Sysco's systems division, SYGMA).[28] The observations did not include other types of large national customers, such as GPOs, foodservice management companies, and large government agencies, which, as the evidence showed, spend large percentages of their foodservice distribution budget on Defendants. As Dr. Bresnahan admitted, he does not claim that his switching analysis reflects the buying habits of these national customers. Hr'g Tr. 2180–82.

Second, the time period of Dr. Bresnahan's study—two-and-a-half years—is shorter than the seven-year time period covered by Dr. Israel's RFP/bidding analysis. Significant switches that might have occurred between Defendants outside the two-and-a-half year period, therefore, were not counted.

28. The study did include one health care organization, Kaiser Permanente, and one GPO, Amerinet.

Third, the switching analysis does not capture the full extent of competition between Defendants (or between other competitors, for that matter), because it only tracks switches, not instances where a customer might have played one broadliner off the other to get better pricing. That kind of situation reflects actual competition at least as much as a switch, but such competition is not reflected in the data.

Fourth, unlike an RFP or bid situation, a switch does not necessarily equate to actual competition. A switch might have occurred for any number of reasons having nothing to do with pricing or service (*e.g.,* the customer's sister-in-law went to work for a competitor), but the study treats every switch as a loss for competitive reasons.

Fifth, Dr. Israel's rebuttal report pointed out a number of limitations in Dr. Bresnahan's switching analysis, including the exclusion of certain switches between Defendants and the treatment of actual switches, such as timed phase outs from one Defendant to the other, as non-switches. PX09375–081–084. Although Dr. Bresnahan testified that he corrected for these criticisms and that the adjustments did not materially alter his results or conclusion, the need for those adjustments reflects the limitations of drawing firm conclusions from such undifferentiated data.

Finally, Dr. Bresnahan's conclusion that USF and Sysco are not close competitors brings him into conflict with Defendants' other expert, Dr. Hausman. Dr. Bresnahan testified that, although he agrees that Sysco and USF are competitors, he did not think that one was a "particularly strong price constraint" on the other. Hr'g Tr. 2183. Dr. Hausman, on the other hand, unequivocally agreed that "USF is a strong price constraint on Sysco." *Id.* at 2005. He testified Sysco and USF "compete and they compete hard. I'd be the first to agree." *Id.* at 1986; *see id.* at 2037 ("I am not arguing with you that—or disagreeing with you that Sysco and U.S. Foods are important competitive constraints on each other."). Defendants do not explain how Dr. Bresnahan's switching study can be reconciled with Dr. Hausman's unqualified opinion that Defendants mutually constrain each other's prices, which can only mean that they are close competitors; if they were not, the pricing of one would not matter to the other.

In the end, the court finds that Dr. Israel's RFP/bidding analysis is more persuasive than Dr. Bresnahan's switching study. Both empirical studies are imperfect for the reasons already discussed. But Dr. Israel's analysis better captures instances of actual competition across a more representative cross-section of national customers over a longer period of time. Additionally, Dr. Israel's conclusions are corroborated by other evidence in the record, which, as discussed below, indicate that Sysco and USF are close competitors, particularly for large national customers.

b. *The parties' ordinary course documents*

The FTC presented ordinary course documents, from both Defendants and third parties, which support Dr. Israel's conclusion that Sysco and USF are particularly close competitors. For example, a 2012 USF presentation, titled "Strategy Refresh," explains that one reason for strategic rethinking is that "[c]ustomers perceive little difference between us and *our main competitor,*" identified as Sysco. PX03031–003 (emphasis added). The same presentation devotes a section to "Performance v. Sysco" and describes the companies as "[i]ndustry leaders." PX03031–010–011. Another USF document describes Sysco as USF's "major rival." PX03032–043.

Similarly, a Sysco presentation to its Board of Directors describes USF as its "next largest competitor" and puts forth "recent intelligence" about USF and two other competitors. PX01007–018; PX01007–023. Another Sysco strategy document focusing on the healthcare sector states that "US Foodservice is our strongest competitor for Healthcare GPO dollars." PX01388–004. In addition, there are many specific instances in the record demonstrating fierce competition between Sysco and USF for national customer accounts.[29] These documents indicate that Sysco and USF compete aggressively against one another on price; non-price incentives, such as signing bonuses; service; and other value-added offerings.

Industry analysts also have recognized the close competition between Defendants. For instance, the Cleveland Research Group's January 2014 market report on Sysco noted the Cleveland Research Group's assessment that "both Sysco and U.S. Foods have priced each other down competing for larger national/regional contract accounts over the last several years" and that "the acquisition removes a key price competitor (particularly with larger contract accounts)." PX09332–004.

c. *Testimonial evidence*

A number of industry actors testified that they view Sysco and USF to be close competitors for national customers. Particularly compelling testimony came from Mark Allen, the head of the foodservice distributors' trade group, IFDA. In his deposition, Mr. Allen agreed that Sysco and USF were "closest competitors" for national accounts, such as GPOs, hospitality, and foodservice management companies. PX00570–012; PX00570–014. He further described Sysco and USF as "powerful competitors" for independent customers, PX00570–113, and testified that, in his experience, GPOs, foodservice management companies, and hospitality chains use Sysco and USF to keep each other honest on price and service, PX00570–019. The testimony of the PFG's President and CEO, George Holm, was to the same effect. He testified that in his experience "foodservice management companies, GPOs[,] and certain restaurant groups" have "obtained lower prices by bidding Sysco and U.S. Foods against each other." Hr'g Tr. 651.

d. *Conclusion on unilateral effects in the national customer market*

The court's finding that Sysco and USF are close competitors in the national customer market is no surprise, given the uncontested facts of this case. Sysco and USF are the country's two largest broadliners by any measure. They have far more distribution centers, SKUs, private label products, sales representatives, and delivery trucks than any other broadline distributor. That they rely on these competitive advantages to compete, and compete aggressively against one another in the market for national customers, is amply born out on this record.

Based on all of the evidence presented, the court finds that, because the proposed merger would eliminate head-to-head competition between the number one and number two competitors in the market for national customers, the merger is likely to lead to unilateral anticompetitive effects in that market. Evidence of probable unilateral effects strengthens the FTC's *prima facie* case that the merger will lessen competition in the national customer market. *See Heinz,* 246 F.3d at 717 (footnote omitted) (finding that "the FTC's market con-

29. *See, e.g.,* PX01066–001–002; PX03064–001; PX01061–001–006.

centration statistics are bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties"); *Whole Foods,* 548 F.3d at 1043 (Tatel, J.) (citation omitted) (internal quotation marks omitted) (stating that "there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market").

2. Merger Simulation Model— National Customer Market

[43] To further show that the merger would harm national customers, Dr. Israel ran a merger simulation model to predict the merger's effect. Dr. Israel used an "auction model" to estimate the harm to national customers based on his real-world observation that national customers used RFP processes that "typically involve[d] competitive bids and bilateral negotiations between distributors and foodservice operators" to award business. PX09350–110. Under an auction model, the terms offered by the winning bidder are determined (or at least heavily influenced) by the second-best bidder, because the winning bidder will offer price and service terms that are just good enough to win the business. In theory, if the top two bidders merge, price and service terms will be determined (or at least heavily influenced) by the previously third-best bidder, who in a post-merger world would move into the number two spot. An auction model predicts harm to customers if, as here, the top two bidders merge and the next best bidder is a distant third. The magnitude of the harm is defined as the difference between the values offered by the companies that had been the pre-merger second- and third-place bidders. PX09350–113–114; *see CCC Holdings,* 605 F.Supp.2d at 69 (describing a similar auction model for predicting a price increase).

Practically speaking, the premise of Dr. Israel's auction model was that, in the pre-merger world, Sysco and USF are national customers' top two choices and, therefore, each company sets the other company's price. But, if they were to merge, the winning bidder's price would only be subject to competitive pressure by a pre-merger third-place bidder, such as PFG or some other distant competitor. If the next best bidder is not a major competitor, and therefore does not play a significant role in affecting prices, national customers will be harmed. An email dated December 12, 2013, summarizing a "USF Senior Teams" webcast addressing the proposed merger, perfectly captures this core premise of Dr. Israel's model. The email identified as one of the "key messages": "The 'distance' between the combined company and the next set of regional players *is huge.* Those regional players will have an even harder time trying to play catch up going forward because they simply won't have the resources that the combined company has to transform the industry." PX00103–002 (emphasis added). The "huge" distance between the merged entity and the rest of the field corresponds to the merger harm that Dr. Israel's model predicts.

To quantify the likely harm to national customers, Dr. Israel performed calculations that used as inputs, among others, his estimates of the parties' national customer market shares and their price-cost margins. PX09350–118. He concluded that, absent significant efficiencies and other mitigating factors, the merger would harm national customers on the order of more than $1.4 billion annually. PX09350–120; PX09350–220. Factoring in the divestiture to PFG and its increased market share, Dr. Israel calculated likely merger harm of more than $900 million annually. PX09350–189; PX09350–237.

Defendants assert that Dr. Israel's model is flawed for the same reason that they criticize his national market share calculations—both rely on the unreliable RFP/bidding data. Specifically, Defendants argue that, because the merger simulation model relies on the national market share calculations as a critical input, and because those market shares depend on the unreliable RFP/bidding data, Dr. Israel's estimate of likely merger harm is likewise unreliable. As discussed, the court agrees that the RFP/bidding data set is imperfect and its resulting market share calculations are imprecise to some degree. Dr. Israel's most conservative market share analysis, however, did not rely on the RFP/bidding data but rather on the CID data, and provided a reasonable approximation of the parties' share of the national customer market. Dr. Israel ran his merger simulation using that lower-bound market share estimate and still reached the conclusion that, absent significant efficiencies, the merger would likely cause significant harm. PX09350–121 n.363 ("Finally, I tested the robustness of my results to Sysco and USF having lower combined shares. I found that even when I use the lowest (and almost certainly too low) Sysco and USF shares presented in **Table 1,** the required efficiencies predicted by the model still far outweigh the efficiencies claimed by the parties."). The court, therefore, concludes that Dr. Israel's merger simulation model strengthens the FTC's *prima facie* case that the merger will substantially lessen competition in the market for national customers.

3. Unilateral Effects—Local Markets

[44] As it did for the national customer market, the FTC presented empirical, documentary, and testimonial evidence to demonstrate the potential for unilateral effects to harm local markets. That evidence, however, presented a more muddled picture of the potential for unilateral effects than did the evidence for the national customer market.

a. *Dr. Israel's empirical analysis*

As he did with the national customer market, Dr. Israel looked at Defendants' business records to determine how closely they compete in local markets. The data came from two sources—USF's Linc database and Sysco's request for incentives (RFI) records. The Linc database, as discussed earlier, is a customer relations management tool used by USF sales personnel to manage and store information on existing and prospective customer accounts. RFIs are internal Sysco records that sales personnel were required to submit to regional presidents to obtain approval to offer incentives to customers to either switch to Sysco or stay with the company.

Starting with the Linc database, Dr. Israel observed and analyzed nearly 100,000 business opportunities between January 2011 and June 2014 and divided them into two groups—USF wins and USF losses. When USF won the business, sales personnel identified Sysco as the main competitor 43 percent of the time (and 48 percent of the time measured by revenue); when USF lost the business, USF sales personnel identified Sysco as the main competitor 46 percent of the time (and 68 percent of the time measured by revenue). PX09350–143, Table 11. Whether USF won or lost, sales personnel identified Sysco as the main competitor eight times more frequently than the next most mentioned competitors (PFG and Gordon Food Service). Dr. Israel also segregated the Linc database's mentions of competitors in 20 local markets. That study showed that sales personnel in every market identified Sysco as USF's main competitor by a wide margin, especially when measured by revenues. PX09350–145, Table 14.

The RFI data painted a similar picture from the Sysco perspective. Dr. Israel reviewed 224 Sysco RFIs, covering a three-year period from 2011 to 2014, when Sysco discontinued the practice. In more than 66 percent of the RFIs, Sysco sales personnel identified USF as the reason for the incentive request. No other competitor appeared more than 10 percent of the time. PX09350–146–147.

Defendants attacked Dr. Israel's reliance on the Linc database, as they did when he used it in his aggregate diversion analysis. They asserted that Dr. Israel improperly relied on the Linc database as a win-loss record, when it was never intended as such. USF's Executive Vice President of Strategy, David Schreibman, testified that sales people did not use the database consistently and would sometimes enter competitor information simply to fill in the database; ultimately, USF did not rely on it to identify market competition. Hr'g Tr. 1505–06. Defendants also presented a local switching study performed by Dr. Bresnahan, which used the same switching methodology as described above but applied to local customers. According to Dr. Bresnahan, when local customers switch away from Sysco, they switch to USF only 11 percent of the time; and when they switch away from USF, they switch to Sysco only 15 percent of the time. Hr'g Tr. 2163. In other words, according to Dr. Bresnahan's switching analysis, when local customers switched away from Sysco it was typically to distributors other than USF.[30]

The court finds that the empirical evidence, on balance, shows that Sysco and USF are close competitors for local customers. As the court has already observed, relying on the Linc database to draw firm conclusions is problematic for the reasons raised by Defendants. That said, even recognizing the data's limitations, it so overwhelmingly demonstrated primary competition between Sysco and USF based on a sizeable number of observations (nearly 100,000 entries) that it cannot be wholly disregarded as evidence of close competition. Furthermore, the court found the RFI analysis especially compelling; indeed, Defendants did little to contest it. Although the number of observations was low, the RFI data overwhelmingly showed Sysco seeking incentives to attract or keep local customers in response to USF's efforts far more often than Sysco attempted to respond to any other competitor's efforts.

Dr. Bresnahan's switching study provided some counterweight to Dr. Israel's work. Like his national switching analysis, however, it did not account for competition when customers used Sysco and USF as leverage against each other, as many local customers said regularly occurred. The local switching study also relied heavily on chain restaurants and hotels and thus did not factor in the buying habits of other types of local customers, particularly independent restaurants. Therefore, notwithstanding the limits of the data sets relied on by Dr. Israel, the court finds that the empirical evidence supports the conclusion that Sysco and USF are close competitors in local markets.

30. Dr. Bresnahan also did another switching study to support his findings. He conducted a study of fresh chicken purchases by customers in San Diego, from which he concluded that customers "turn off and on buying fresh chicken from Sysco" and that most of the time when they "turn off" Sysco they buy from someone other than USF. Hr'g Tr. 2162. 93

b. *The parties' ordinary course documents*

Two notable ordinary course documents also support the conclusion that Sysco and USF are close competitors for local customers. The first is USF's November 2012 "Investor Presentation," which represented that "US Foods is estimated # 1 or # 2 position in [Redacted] of served markets." PX03000–014; *see also* PX03118–006. As previously noted, USF's David Schreibman confirmed both the present-day accuracy of that statement and the fact that, in many of those markets, Sysco occupied the number one or two position. DX–00272 at 62, 65. The second is the July 2011 USF acquisitions strategy document, which estimated USF's position in 54 separate markets, apparently based on market penetration rather than market share. USF estimated that either Sysco or USF was the leading broadliner in [Redacted] of those markets and was the number two broadliner (or tied for first) in [Redacted]. *See also* PX03002–009 (Clayton, Dubilier & Rice document, titled "Operating Review," acknowledging that one of Sysco's strengths is "[g]eographic coverage in all the key markets in the U.S.—# 1 or # 2 in virtually all the markets in which they operate"); PX03004–001 (Clayton, Dublier & Rice memo stating that USF is a "leader in both national and local markets" and that "Sysco [is the] closest competitor with similar business mix"). Sysco's and USF's leading positions in multiple local markets shows that they are close competitors in those markets.

c. *Testimonial evidence*

The testimonial evidence was more equivocal about the closeness of competition between Defendants. It demonstrated that Sysco and USF are strong competitors for local customers in several markets, but it also showed that other broadliners are competing effectively in many of those areas. The FTC's case featured four local markets: (i) Columbia/Charleston, South Carolina; (ii) Omaha, Nebraska; (iii) Raleigh/Durham, North Carolina; and (iv) Southwest Virginia. For each of those markets, the FTC presented testimonial evidence supporting Defendants' leading market positions. For instance, PFG's George Holm agreed that Sysco and USF were the largest and two most "competitively significant" broadline distributors in Columbia/Charleston, Raleigh/Durham, and Southwest Virginia. Hr'g Tr. 653–57; DX–00276 at 70–72. Mark Allen, IFDA President, agreed with those assessments, calling Defendants the "dominant" or "strongest" competitors in those three markets (and Las Vegas). DX–00294 at 170; *see also* Hr'g Tr. 1800 (testimony from Sysco Mid–Atlantic President Mike Brawner stating that USF is a "strong competitor" in Columbia, Raleigh/Durham). USF's ordinary course materials corroborate those observations, at least in terms of market penetration. PX03118–007–008 (showing USF as a "Strong # [Redacted]," based on market penetration, in Raleigh, Columbia, and Roanoke, with Sysco as number two in those areas, and showing Sysco as the number one broadliner in Omaha with USF a "Distant # [Redacted]").

Yet, when customer-level testimony is considered, the evidence of Defendants' leading market positions and their post-merger ability to increase prices becomes less clear. Both sides deposed and obtained numerous declarations from various customers in these local markets. The customer testimony obtained by the FTC invariably decried the merger's impact on local markets, whereas Defendants' customer witnesses emphasized alternatives in the marketplace and the ability to switch broadliners if the merged company attempted to impose a price increase.[31] Because of these conflicting local market assessments, the court cannot draw firm conclusions about the competitiveness of the local broadline markets from the testimonial evidence.[32]

d. Conclusion on unilateral effects in the local markets

In the final analysis, after considering all of the record evidence on local markets, the court finds that the FTC has shown that unilateral effects are likely to occur in many local markets because the merger will eliminate one of the top competitors in those markets. Though the court finds the evidence of unilateral effects in the local markets to be less convincing than in the national customer market, the evidence nevertheless strengthens the FTC's *prima facie* case of merger harm.

4. Local Event Studies

[45] To further show that the merger would adversely impact local customers, the FTC presented the results of an econometric event study conducted by Dr. Israel. Dr. Israel analyzed Sysco's opening of two distribution centers—one in Long Island, New York, in July 2012, and one in Riverside, California, in June 2013—to determine the impact those openings had on prices paid by USF customers served from a nearby competing facility. Known as an "entry study," Dr. Israel selected the Long Island and Riverside events because they were the only two recent instances in which Sysco had opened a new distribution center in the same market as a USF distribution center. From these event studies, the FTC hoped to show that prices fell

31. *Compare* PX07020–002 (Champ McGee, owner of Little Pigs Barbeque and FTC-sponsored declarant expressing "serious concerns" about merger's effect on business in the Columbia market), *and* Hr'g Tr. 344 (FTC witness, Gary Hoffman, Vice President and Corporate Executive Chef of Upstream Brewing Company from the Omaha market, expressing concern that the proposed merger would prevent him from playing Defendants off one another), *and* PX00487–005 (FTC-sponsored declarant Jason Smith of 18 Restaurant Group, from the Raleigh/Durham market, expressing concerning about the merger "because it eliminates one of our only two options for broadline distribution services" and rejects other competitors), *and* Hr'g Tr. 544–45 (FTC witness, Daniel Schablein, Controller at Wintergreen Resort from the southwestern Virginia market, stating that Sysco and USF were the only legitimate broadliners for his business), with DX–00227 at 2 (Justin Brooks, owner of Frayed Knot Restaurant and Defendants sponsored declarant, stating "I do not believe that Sysco could raise prices or reduce services on my business" in the Columbia market because of competition from PFG, Merchants, Reinhart, and Gordon Food Service), *and* DX–00191 at 2 (Defendants-sponsored declarant Anthony Fucinaro of Anthony's Steakhouse, from the Omaha market, stating, "If Sysco were to raise prices or lower service levels, I would move my contract to Reinhart, Martin Brothers, and/or Cash-Wa"), *and* DX–00232 at 2 (Defendants-sponsored declarant Patrick Cowden of Tobacco Road Sports Cafe, from the Raleigh/Durham market stating, "If Sysco tried to raise prices or decrease service quality following the merger, I could and would replace them with any of the other bidders in a heartbeat"), and DX-00209 at 1 (Defendants-sponsored declaration from George Huger of Southern Inn Restaurant, from the southwestern Virginia market, stating that he would have alternatives, including PFG and Staunton Foods, if he became dissatisfied with Sysco's prices or service after the merger).

32. The FTC did not present testimony or customer declarations about many of the markets that it claims will be highly concentrated after the merger. That is not, however, fatal to its case. *See Brown Shoe*, 370 U.S. at 339, 341, 82 S.Ct. 1502 (rejecting the argument that the government had not proven its case because it did not present evidence "in each line of commerce and each section of the country" and stating that "[t]here is no reason to protract already complex antitrust litigation by detailed analyses of peripheral economic facts, if the basic issues of the case may be determined through study of a fair sample").

when Sysco and USF directly competed and that the merger's elimination of USF as a competitor would have an upward effect on pricing.

Dr. Israel found that Sysco's entry in Long Island resulted in a 1.4 percent decline in USF's prices for customers in the 75 percent overlap area. PX09350–148. He also ran variations of his regression analysis on other groupings—customers within a 50 percent overlap area, customers purchasing more than 100 SKUs, and customers buying private label products—and found that the price decrease on these groupings was even greater. PX09350–148. By contrast, Dr. Israel found a less significant price impact in the Riverside entry study—a negligible price decline of only .06 percent.

Dr. Israel explained that neither of these events were clean entry studies because, in both cases, Sysco already had an existing distribution facility in the area, and thus already was competing against USF. In his opinion, the resulting price effects, therefore, were actually understated. Dr. Israel also found the results of the Long Island event more compelling than the Riverside event for two reasons. First, the Long Island facility was a greater distance away from Sysco's existing facility than the new Riverside facility was from its existing facility. Second, the Long Island facility served more new business than the Riverside facility. For those reasons, he concluded, the Long Island study better approximated a true entry event. Hr'g Tr. 1097–98. Dr. Israel ultimately concluded, based largely on the Long Island study, that the merger's elimination of USF as a competitor would have an upward pricing effect in local markets.

The court does not find Dr. Israel's entry studies to be convincing evidence that the merger will harm local customers. Dr. Israel's efforts to distinguish the Long Island and Riverside events simply do not hold up. Defendants' expert, Dr. Bresnahan, showed that the difference in distance between the Riverside facility and its nearby existing facility, on the one hand, and the Long Island facility and its nearby existing facility, on the other, was a mere 14 miles. He also showed that both new Sysco facilities served a similar fraction of existing Sysco customers. Thus, the two entry events were not as dissimilar as Dr. Israel testified, yet they produced very different results—one showing a significant price decrease, the other showing a negligible one. There may be location-specific reasons for the different results, but the reasons offered by Dr. Israel do not withstand scrutiny and no other evidence explained the difference. The court thus cannot conclude from these seemingly conflicting entry studies that the merger will harm local customers.

The court further notes that the pricing evidence here is far weaker than that found in other merger cases. In *Staples,* for instance, there was "compelling evidence" showing that prices were 13 percent higher in markets where Staples did not have competition from another office superstore. 970 F.Supp. at 1075–76 (pricing study). Similarly, in *Whole Foods,* an entry study showed that Whole Foods dropped its prices by five percent when another organic supermarket opened in the area. 548 F.3d at 1046–47 (Tatel, J.). In fairness, the FTC was unable to conduct pricing studies like those done in *Staples* and *Whole Foods* here because Defendants have competing facilities in nearly every local market. But the absence of convincing pricing effects evidence is the weakest aspect of the FTC's case.

5. Summary

In summary, the FTC has bolstered its *prima facie* case with additional proof that the merger would harm competition in both the national and local broadline markets. Although the FTC's case would have been strengthened with more convincing pricing effects evidence, the court nevertheless finds that the FTC has presented a compelling *prima facie* case of anticompetitive effects. *See Baker Hughes,* 908 F.2d at 991 ("The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully."). The court now turns to Defendants' rebuttal arguments.

III. *DEFENDANTS' REBUTTAL ARGUMENTS*

The FTC has established a presumption that the proposed merger will substantially lessen competition. Defendants, however, may rebut that presumption by showing that the traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects. *Heinz,* 246 F.3d at 715. The more "compelling the [FTC's] prima facie case, the more evidence the defendant must present to rebut [the presumption] successfully." *Baker Hughes,* 908 F.2d at 991. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.*

Defendants advance four arguments to support their claim that the food industry will remain competitive after the merger: (i) a post-divestiture PFG will be a strong competitor for customers seeking nationwide distribution; (ii) competition from other broadliners and other distribution channels will continue and grow; (iii) the entry of new competition and the repositioning of existing competitors will keep the industry competitive; and (iv) customers will benefit from efficiencies arising from the merger. The court addresses each of those arguments in turn and finds that, even taken collectively, Defendants cannot overcome the FTC's strong presumption of anticompetitive harm.

A. PFG Divestiture

Aside from the Supreme Court's guidance that "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition,'" *Ford Motor Co. v. United States,* 405 U.S. 562, 573, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972) (footnote omitted) (quoting *United States v. E.I. du Pont De Nemours & Co.,* 366 U.S. 316, 326, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961)), there is a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger. *Compare CCC Holdings,* 605 F.Supp.2d at 56–59 (applying the framework for market entry analysis in assessing the effectiveness of a licensing agreement that would enhance the competitiveness of an existing competitor) *with FTC v. Libbey, Inc.,* 211 F.Supp.2d 34, 47–48 (D.D.C.2002) (finding defendants' proposed "fix" inadequate—without going into market entry analysis—because competitor would face higher costs).

Here, both sides cite to the 2004 U.S. Department of Justice's "Policy Guide to Merger Remedies," which provides the following guidance: "Restoring competition requires replacing the *competitive intensity* lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels." Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 5 (Oct. 2004) [hereinafter 2004 Policy Guide] (emphasis added); *see also* Areeda & Hovenkamp 3d ed., *supra,* ¶ 990d (citing 2004 Policy Guide). A more recent U.S. Department of Justice Policy Guide provides: "The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market." Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (June 2011) [hereinafter 2011 Policy Guide] (footnote omitted). Both the 2004 Policy Guide and the 2011 Policy Guide add that an effective divestiture should address:

> [W]hatever obstacles (for example, lack of a distribution system or necessary know-how) lead to the conclusion that a competitor, absent the divestiture, would not be able to discipline a merger-generated increase in market power. That is, the divestiture assets must be substantial enough to enable the purchaser to *maintain the premerger level of competition,* and should be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them.

2004 Policy Guide at 9 (emphasis added) (footnotes omitted); *see also* 2011 Policy Guide at 8. With these principles in mind, the court analyzes the effect of the proposed divestiture.

1. Competitive Pressure Exerted by Post–Divestiture PFG

[46] Defendants argue that the divestiture of 11 "strategically located" USF distribution centers to PFG, coupled with PFG's "aggressive" expansion across the country, will "replace [any] competitive intensity lost as a result of the merger." Defs.' Proposed Findings of Fact and Conclusions of Law, ECF No. 171 at 156 [hereinafter DFF] (alteration in original) (quoting 2004 Merger Guidelines at 5). In addition to the 11 divested distribution centers, PFG's owner, The Blackstone Group, a leading private equity firm, has committed $490 million to develop seven more distribution centers (called "fold-outs") and to expand capacity in 16 existing facilities. Hr'g Tr. 724, 767–69; DFF at 155. Defendants also point to the industry acumen and experience of PFG's executives, particularly that of its President and CEO, George Holm, who has over 37 years of experience in the foodservice distribution industry. The court does not doubt Blackstone's financial commitment to PFG or Mr. Holm's leadership capabilities. However, based on the evidence presented, the court is not persuaded that post-merger PFG will be able to step into USF's shoes to maintain—certainly not in the near term—the pre-merger level of competition that characterizes the present marketplace.

PFG's five-year business plan shows that post-merger PFG will not be nearly as competitive as USF is today. In the lucrative market for national customers, the plan projects that PFG will have approximately $[Redacted] billion in national broadline sales by 2019—*less than half* of USF's 2013 national broadline sales of $[Redacted] billion. PX09350–074; PX09060–002; PX09060–004; PX09060–006; PX09253–023. Stated in terms of market share, PFG estimates that it will grow to 20 percent of the national broadline market over five years, with the merged Sysco–USF company having the "remaining share of the national broadline business." PFF at 220; Hr'g Tr. 719, 721–22. That percentage is smaller than USF's share of the national broadline customer market today. PX09350–187 (Dr. Israel's report stating "the best case scenario under the divestiture is the emergence of a significantly smaller competitor than USF even several years into the future"). Defendants are correct that the divestiture does not have to replicate pre-merger HHI levels. However, the fact that PFG only expects to achieve less than *half* of USF's current national customer sales in five years—assuming that its planned expansion efforts are successful—does not demonstrate that PFG will be sufficiently able to "discipline a merger-generated increase in market power." *See* 2011 Policy Guide at 8 (footnote omitted).

The court's concern about PFG's ability to compete effectively in the post-merger world is not limited to sales and market share projections. PFG's short-term effectiveness will depend in large part on its ability to incorporate the 11 formerly-USF-held distribution centers. Even assuming that PFG can do so seamlessly, the new PFG will have only 35 distribution centers—far fewer than the at least 100 distribution centers owned by the combined Sysco/USF. Having only one-third of the merged company's distribution centers will put PFG at a significant disadvantage in competing for national customers. Indeed, as Dr. Israel demonstrated, Defendants' largest national customers use more than 35 distribution centers. Those customers represent [Redacted] percent of Sysco's national broadline revenues, and [Redacted] percent of USF's national broadline revenues. PX09375–075–077, Figure 3. The court is not convinced that these large national customers will consider a post-merger PFG to be as capable of meeting their needs as USF is today.

Defendants counter that "PFG will be able to compete aggressively with its additional distribution centers because the fewer the distribution centers used for a particular customer, the greater the inbound efficiencies." DFF at 161–62. Because of higher volume per warehouse and lower freight costs, Defendants claim, many customers *prefer* to be served out of fewer distribution centers—so having a larger number of distribution centers is not necessarily a competitive advantage. *Id.* at 28, 161–62; Hr'g Tr. 1570–71, 1573–74; DX–00264 at 122–23. For example, to serve Zaxby's, a regional quick serve chain, PFG trucks drive past some of their own distribution centers because the longer drive "proves cheaper for the customer." DFF at 161; Hr'g Tr. 852. PFG can also take advantage of "shuttling," a technique of caravanning multiple trailers on a single truck, to increase efficiencies. DFF at 162; Hr'g Tr. 855–57. Mr. Holm even stated at his deposition that he believed that PFG would be able to serve [Redacted] out of 35 distribution centers more effectively than USF currently does out of [Redacted] DX–00276 at 96.

The court is skeptical of Defendants' claim that, even with far fewer distribution centers, PFG will be on equal competitive footing with the merged firm, especially for national customers. Defendants' own growth belies this fact. Both Sysco and USF have, over time, increased their number of distribution centers, demonstrating that Defendants view more distribution centers to be a competitive advantage. Indeed, when Defendants presently compete for national business, they highlight their nationwide geographic coverage to potential customers. *See, e.g.,* PX03000–014 (USF presentation touting its "[a]bility to leverage our national scale to cost effectively service customers nationally"); PX00247–001–002 (USF email communication to [Redacted] describing the "US Foods Value Proposition" as including a "Privately held National Distribution footprint company"); PX01062–005 (Sysco presentation to [Redacted] highlighting that Sysco's "national footprint, strong service approach and our breadth of product offerings is what differentiates us from our competition"); PX00279–001 (USF email to [Redacted] (a restaurant chain), mentioning "national footprint and scale" as a selling point); PX00281–006 (slide presentation to [Redacted] touting USF's "extensive" distribution network). USF's Executive Vice President of Strategy David Schreibman also testified that USF has the ability to leverage its national scale to cost-effectively service customers, and that USF views its national scale as a significant competitive advantage. Hr'g Tr. 1521–22; *see also* PX03010–001 (internal USF document stating that the "[o]nly 'true' options for both Premier and Novation is either Sysco or USF[;] [t]he regional players will bid, but not be seriously considered"). Furthermore, there was no evidence presented that Defendants have moved to consolidate their distribution facilities to take advantage of the supposed benefits of having fewer distribution centers.[33]

Notably, not even PFG has always considered the divestiture of only 11 distribution centers to be sufficient for it to compete on a national level. A PFG internal strategy document, dated April 3, 2014, sets forth two "final" proposals for additional distribution centers "necessary to establish a national broadline network." One proposal included options of 16 to 20 distribution centers, and the other included a list of 14 to 15. Hr'g Tr. 669–71 (discussing PX09193). Six months later, in October 2014, after PFG had started negotiations with Sysco about the divestiture, internal PFG communications re-affirmed the need for more than 11 distribution centers. Following Sysco's proposal to sell only seven distribution centers, a PFG board member wrote to George Holm:

> I would still find a way to tell the FTC that we think it takes 13 but that Sysco won't let us look at more than 7 *which will get us nowhere near a national solution.* We need the package size to be bigger to have any chance of winning *and to ever compete nationally*.... [We] should proactively educate the FTC why 13 opcos [another word for distribution center] is the *bare mimimum.*

PX09192–001 (emphasis added); *see also* PX00526–036; PX00526–141–142; PX09190. PFG did just that when it met with the FTC, making the case that it needed 13 distribution centers to "compete effectively for national business." PX00526–039 at 153; PX09070 (PFG's presentation to the FTC with a map of 13 USF distribution centers needed by PFG, which included the four metropolitan areas mentioned below). Ultimately, PFG was not able to negotiate the sale of more than 11 distribution centers, with Sysco having made the decision that it "would rather litigate w[ith] the FTC than sell more than 11." PFG felt that it was "prudent to engage on 11 for now to keep the momentum/dialogue going." PX09157–002; PX00526–041 at 163.

Having fewer distribution centers means that PFG will face coverage gaps in the geographic areas where it sought, but did not receive, a distribution center. Those areas include: Cincinnati, Ohio; Omaha, Nebraska; Oklahoma City, Oklahoma; and Los Angeles, California, where PFG received a different, smaller distribution center than it requested. PX00526–039 at 155–56; *see also* PX09070.

Defendants argue that PFG's requests to Sysco for a larger number of distribution centers than they actually received was part of a bargaining strategy. Closing Arg. Hr'g Tr. 115–16. However, PFG's recognition that it needed more than 11 distribution centers to compete

33. Defense counsel at oral argument represented that USF recently had closed two distribution centers, Closing Arg. Hr'g Tr. 113, but counsel for the FTC noted that USF also recently had opened a new distribution center, *id.* at 125–26.

nationally is reflected in internal documents that were created months before PFG began negotiating with Sysco. The court credits those internal projections over PFG's current position that an additional 11 distribution centers is enough to compete for national customers. *See* Amicus Br. of PFG, ECF No. 133 at 22–24 (arguing that PFG will be able to compete effectively with 35 distribution centers).

Defendants argue that, with the planned "foldouts," *i.e.*, new distribution facilities located in contiguous geographic markets, PFG will have more than the 13 distribution centers it was seeking, including one in Cincinnati. DX–01706 at 14. However, PFG has never done a foldout, and according to internal estimates, these facilities may not be operational until, at the earliest, several years following the merger.[34] Defendants assert that "PFG will be well-positioned to *bid* on Day One," because even after the bids are submitted, discussions between a customer and a distributor can take up to a year before a contract is finalized, and PFG can continue its foldout efforts in the meantime. DFF at 160 (emphasis added). According to Defendants, if the customer needs service sooner, PFG can provide service via shuttling until the foldout is complete. *Id.* at 161. However, there is substantial evidence showing that customers value having distribution centers close to their locations and that distribution costs increase with driving distance. Thus the court is not persuaded that—even with promises of foldouts and the use of shuttling—a sufficient number of national customers will view PFG as a viable alternative to the merged entity "on day one" to maintain the intensity that characterizes the present competition between Sysco and USF.

2. Additional Disadvantages Faced by Post–Merger PFG

In addition to its lack of nationwide geographic coverage, the court has other concerns about PFG's ability to compete against the merged entity. Because it will purchase in smaller product volumes than the merged Sysco entity, PFG could face higher product acquisition costs, or cost of goods sold ("COGS"), than its competitor. PX05051–003 (Blackstone Memorandum indicating that "due to its scale, USF has better procurement than PFG and the 11 [distribution centers] will likely spend more to acquire private label products and get less supplier rebate dollars"); PX09350–205 (Dr. Israel's opinion that, even with the divestiture, PFG is unlikely to make up the gap in COGS between itself and the parties today). PFG also will offer substantially fewer SKUs than the merged entity. PFG today sells less than half the total number of SKUs as USF and one third the number of private label SKUs. PX06055–004 (USF offers 350,000 SKUs, of which 30,000 are private label); PX09507–007; PX09507–013 (PFG offers 150,000 SKUs, of which [Redacted] are private label). PFG's fewer SKU offerings will be a competitive disadvantage.

PFG also will face disadvantages in terms of human resources. Defendants point out that, as part of the divestiture package, PFG would acquire over "4,400 USF personnel, including senior executives and personnel with healthcare expertise at the 11 distribution centers, and corporate regional leadership, national sales personnel, merchandising personnel, and others with national sales expertise; [and] a 12 month non-solicit of PFG employees at the 11 distribution centers." DFF at 155 (citing Hr'g Tr. 815–25; DX–06100 at 1).

34. PFG's Senior VP of Operations estimated that PFG's "priority" foldouts in Cincinnati, Ohio, Detroit, Michigan and Buffalo, New York, will not be operational until fiscal year 2018, and Montgomery, Alabama will not be operational until 2017. Hr'g Tr. 735–38.

However, even assuming that every USF employee at the 11 distribution centers becomes a PFG employee, PFG will still have fewer than half the sales representatives of either Sysco or USF today and less than one-quarter of the sales representatives of the combined firm. PX09350–181–184, Figure 18. And, PFG will only receive, at most, one-fifth of the national sales employees at USF dedicated to serving national customers. Hr'g Tr. 1528–31 (stating that only about 20 percent of USF's national account team will be made available for PFG to hire).

Moreover, PFG will be at a competitive disadvantage in its ability to offer value-added services. The lucrative healthcare segment is illustrative. George Holm conceded that PFG has had limited success with national healthcare customers. Hr'g Tr. 716–17. Some of that lack of success is due to PFG's limited footprint, but it is also attributable to PFG's lack of expertise in the healthcare segment and its inability to deliver value-added services to those customers. *See, e.g.,* PX00594–025 at 100 (PFG has a very small portion of [Redacted] members' business because PFG lacks acute care expertise); PX00474–001 ("PFG offers a more limited selection of healthcare-specific products than U.S. Foods."). Even if over time PFG can acquire health care expertise, in the short run it will be at a competitive disadvantage as compared to the merged entity.[35] For instance, Joan Ralph, Group Vice President of Premier testified that, even with the healthcare employees PFG acquires through the divestiture. PFG will have significantly less healthcare expertise than USF today. Hr'g Tr. 413: PX09350–211–212. And, as IFDA President Mark Allen testified. Sysco and USF have the best understanding of the healthcare class of trade. DX–00294 at 121. The merger would only enhance that strategic advantage.

3. Post–Merger PFG as an Independent Competitor

A final factor that cuts against the divestiture as a proposed fix is that PFG will be dependent on the merged entity' for years following the transaction, "In order to be accepted, curative divestitures must be made to ... a willing, *independent* competitor capable of effective production...." *CCC Holdings,* 605 F.Supp.2d at 59 (quoting *White Consol. Indus. v. Whirlpool Corp.,* 781 F.2d 1224, 1228 (6th Cir.1986)) (internal quotation marks omitted). As the court observed in *CCC Holdings,* it can be 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.* (internal quotation marks omitted). Under the Transition Services Agreement. PFG will have complete access to USF private label products for three years at its 11 new distribution centers, and therefore will be relying on the merged entity to license those products to PFG. *See* DX–06100 at 1; PX09060–005. PFG will also have the right to license USF's database for at least

35. PX[Redacted]–002 ([Redacted] stating that USF to offer "certain value-added services that are especially important to healthcare facilities"); PX[Redacted]–002 (Joan Ralph of Premier stating, "[i]t is critical to Premier that its members have access to foodservice representation with healthcare expertise who can provide nutritional guidance, menu-planning services, and [Redacted]."); PX[Redacted]–004 ([Redacted] discussing his concern that PFG "may lack the ability to provide the information technology services" like dynamic item ordering [Redacted] currently receives from USF); PX[Redacted]–009 ([Redacted] stating "I do not know whether PFG has the healthcare experience, which [Redacted] highly values.").

five years, with a continuing option for five more. PFG, therefore, will not be a truly independent competitor.

For the foregoing reasons, the court is not persuaded that the proposed divestiture will remedy the anticompetitive effects of the merger.

B. Existing Competition

1. Regionalization

[47] Defendants assert that existing competition can and will constrain potential price increases or other unilateral effects in the national customer market. Their primary argument is that the ability of national customers to switch or threaten to switch to a network of regional distributors will inhibit anticompetitive behavior by the merged company. *See* Defs.' Opp'n Br. at 40–41. Defendants point to many large national customers who multi-source their foodservice distribution needs, including using various regional broadliners to service individual locations. Defendants cite as examples Amerinet, Sodexo, the Defense Logistics Agency, [Redacted], Subway, and [Redacted], all of whom operate regionally under multiple contracts. *See id.* at 15.

But, for several reasons, the ability to regionalize is not likely to inoculate national customers from potential anticompetitive effects. The decision of many large customers to predominantly use one broadline distributor is not simply a preference, as Defendants would characterize it, but a rational business decision. As already discussed, for the most part, the largest national customers—particularly GPOs, foodservice management companies, and hospitality companies—predominantly rely on Sysco or USF for their broadline distribution needs. The largest customers, generally speaking, make from 61 percent to 100 percent of their broadline purchases from Sysco or USF. *See* FTC Closing Slide 35; PFF at 113–16. Even customers who contract regionally, such as [Redacted] and [Redacted], buy in very high quantities from Defendants. Regionalization is available today, as it will be after the merger. But market actors are not moving to that model. To the contrary, as PFG's George Holm testified, the "clear trend" among large customers is to move to a single nationwide provider. Hr'g Tr. 597–98. The court can only infer from this trend that regionalization is not a reasonable option for many national customers.

Regionalization likely has not taken hold for a variety of reasons. The record shows that when a customer increases its number of distributors, it incurs greater management and supply chain costs, making it far less desirable to switch to a multi-regional model. The court found the deposition testimony of Dan Cox, the President and CEO of DMA, particularly illuminating, given that the reason for DMA's existence is to consolidate the product and service offerings of multiple regional distributors and compete for national customers. Mr. Cox testified that using a sole source broadliner "forms the most efficient supply chain." DX00265 at 44. He explained that "[m]ore products at each delivery reduces our cost to service and therefore reduces their supply chain costs.... By aggregating [customers'] spend it makes the delivery system more efficient." *Id.* at 44–45.

A regional arrangement also brings with it the disadvantage of multiple points of contact. As Mr. Cox testified, a single point of contact simplifies communications, which DMA touts as an advantage over multi-sourcing broadline distribution. *Id.* at 14, 46, 68. He also added that a single information technology system is important to national customers, and DMA offers such a platform to attract them. As

Mr. Cox explained: "[I]f they come to DMA and deal with five different members, they wouldn't have to learn and understand five different order entry platforms. We have just one platform." *Id.* at 68. A multi-regional approach thus likely would require a customer to develop greater information technology capabilities to manage its foodservice distribution contracts.

Another downside of a multi-regional model is the difficulty in obtaining consistent products—particularly private label products—across a national customer's different locations. Mr. Cox offered the example of [Redacted], with which DMA does over $[Redacted] million in business. [Redacted] demands that DMA comply with its product specifications "at a level of 90 percent," *id.* at 74, indicating that even when a large customer uses multiple regional distributors, they impose rigorous demands with regard to product consistency. Product consistency, of course, can be achieved by purchasing from multiple distributors who carry the same brand-named products. But that approach would limit a customer's ability to purchase private label products, which typically offer a better value proposition than branded products.

PFG's George Holm concurred with Dan Cox's assessment of national customers' business needs and why they avoid regionalization. When asked why large national customers contract mainly with either Sysco or USF and why there is a clear trend toward those customers using a single broadliner, Holm offered numerous reasons: the "ability to get SKUs in quickly"; "one place to contact"; "[o]ne IT system"; "[o]ne sales contract"; "[o]ne person to deal with"; "the same product [across] their system"; writing "one check as opposed to several"; "simplified contract administration"; and easier "management of approved item lists and specifications." Hr'g Tr. 600–04. The court thus concludes that the possibility of regionalizing broadline foodservice is not likely to protect national customers from the merger's anticompetitive effects.

2. DMA

Today, the only other competitor with a nationwide footprint is DMA. Defendants claim that DMA is capable of effectively competing against the merged entity because it provides a single point of contact, a single contract with consistent terms across customer locations, and a single ordering platform. DFF at 165–66 (citing DX–00265 at 63–64, 66, 68). The court disagrees.

Defendants acknowledge that DMA is not a one-stop-shop for national customers as Sysco and USF are today. Indeed, Defendants recognize that "larger customers 'look to [DMA's] members regionally . . . rather than DMA as a national solution.'" *Id.* at 164–65 (quoting DX00265 at 86).

[Redacted] As Dan Cox, the President and CEO of DMA, explained:

[Redacted]

DX–00265 at 64–65. As a result, [Redacted] *Id.* at 65.

National customers who value private label products, such as GPOs or foodservice companies, [Redacted] *Id.* 79–80. [Redacted] *See id.* at 224–26

And, even if a national customer wanted to switch to DMA, [Redacted] As Mr. Cox explained, [Redacted] *Id.* at 99. [Redacted] *Id.* at 100, 157. For example, [Redacted] recently considered switching its business to DMA, but decided to stay with Sysco [Redacted] *Id.* at 227–29. [Redacted] the court does not view DMA as a viable competitor that can constrain a post-merger Sysco.

3. Conclusion as to Existing Competition

Based on the evidence presented, the court is convinced that national customers will be better off in a marketplace that has two strong competitors capable of nationwide broadline distribution than in a marketplace in which there is a single undisputed heavyweight of broadline distribution whose only competitive constraints is a transitioning PFG, DMA, and a collection of regional players.

C. Entry of New Firms and Expansion of Existing Competitors

[48, 49] Defendants argue that the entry of new competitors and the expansion of existing competitors will keep the industry competitive. If a court finds that "there exists ease of entry into the relevant product market," that finding "can be sufficient to offset the government's prima facie case of anti-competitiveness." *Cardinal Health,* 12 F.Supp.2d at 55. "The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers." Merger Guidelines § 9. Ease of entry must be "*timely, likely,* and *sufficient* in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *Id.* (emphasis added). As with their other rebuttal arguments, Defendants bear the burden of demonstrating the ability of other distributors to "fill the competitive void" that will result from the proposed merger. *See Swedish Match,* 131 F.Supp.2d at 169. Defendants assert that a lack of technological, legal, and regulatory barriers makes entry into the foodservice distribution industry relatively easy. Yet although all it may take is a "guy and a truck" to become a foodservice distributor, becoming a *broadline* foodservice distributor with the ability to compete for national customers is another thing altogether.

The broadline foodservice distribution industry is extraordinarily capital and labor intensive. It costs roughly $35 million to build a single distribution center. Hr'g Tr. 586. In addition, the distribution center must be stocked with goods. A fleet of expensive, refrigerated trucks is required to deliver the products. People—lots of them—are needed to sell the broadline service, maintain and stock the warehouse, and deliver the products. *See Swedish Match,* 131 F.Supp.2d at 171 (finding high barriers to entry where the evidence showed "substantial sunk costs in plant construction, product development, and marketing" required to compete). And, even if a newcomer were to make the substantial investment to start a broadline distribution company, there is no guarantee that customers will follow. Incumbency is a powerful force in the foodservice distribution industry. *See H & R Block,* 833 F.Supp.2d at 75 (finding that "importance of reputation and brand in driving consumer behavior" limited an existing competitor's ability to expand). Even if it were possible for a new entrant to overcome the incumbent's advantage, it would take years. These high barriers to entry will further entrench the merged company's market power. PX03003–005 (USF lender presentation describing broadline foodservice distribution as having "High barriers to entry for scale players").

Defendants also contend that existing firms have demonstrated the capacity to expand to compete against the merged firm. They highlight the fact that other broadline distributors—including Shamrock, Ben E. Keith, and Reinhart—started out as small businesses serving only limited items to local customers, but were able to grow to regional prominence. They describe examples of competitors that have recently opened new facilities or plan to do so.

But none of these examples overcome the fundamental problem with expansion as a constraint on the merged company—like new entry, successful expansion is extraordinarily capital intensive and demands a long time horizon. Based on their assessment that expansion would not be an economically viable strategy, regional distributors have said that they have no plans to expand or reposition in order to serve national customers. [Redacted], which has [Redacted] distribution centers mostly located in the [Redacted] has told the FTC that such a massive expansion would not be "viable" in the short term, given the "time and cost required." PX[Redacted]–006. Other regional distributors, including [Redacted] have similarly been dissuaded by the time, costs, or risks of expansion. PX[Redacted]–036 at 139–42; PX[Redacted]–004; PX[Redacted]–003; PX[Redacted]–005–006; PX[Redacted]–048–049.

Companies rarely enter new markets without an existing customer base because the costs and risks are prohibitive. There is a real "chicken-and-egg" problem with such expansion, known in the industry as "greenfield" expansion. Companies will not make the significant capital expenditure of building a new distribution center unless they already have customers to serve, but customers will not commit to a distributor unless it has demonstrated the ability to serve its needs. As a result, expansion in the industry is typically done through "foldouts"—building distribution centers in contiguous geographic areas—so that customers can be served from an existing facility until the new facility is built. But even foldouts take time to succeed. They can take from one to three years to complete, and it can take four to five years for a foldout facility to achieve sales per square foot similar to established broadline facilities. PX00529–042 at 166–68; Hr'g Tr. 837–39; *see also* PX00558–051 at 201–04. Although a foldout strategy may preserve competition in a particular local market, it cannot effectively be used to replace the competition benefitting national customers lost by the merger. The only way in which a regional player could expand sufficiently and quickly enough to compete with the merged company would be through a sizeable acquisition of multiple distribution centers.

In summary, the court finds that, absent a substantial acquisition opportunity, expansion by regional players will not be timely, likely, and of sufficient magnitude to counteract anticompetitive harm. *See Cardinal Health,* 12 F.Supp.2d at 58 ("Although the smaller wholesalers may adequately compete and expand to service both the primary and secondary needs of local customers, this Court finds that they would not sufficiently expand to compete with the nationals.").

D. Efficiencies

1. *Requirement for Merger–Specific and Verifiable Efficiencies*

[50, 51] Although the Supreme Court has never recognized the "efficiencies" defense in a Section 7 case, the Court of Appeals as well as the Horizontal Merger Guidelines recognize that, in some instances, efficiencies resulting from the merger may be considered in rebutting the government's *prima facie* case. *Heinz,* 246 F.3d at 720 (citations omitted). Where, as in this case, the court finds high market concentration levels, defendants must present "proof of extraordinary efficiencies" to rebut the government's *prima facie* case. *Id.* (citations omitted) (requiring "extraordinary" efficiencies to rebut an increase in HHI of 510 points); *see also*

Areeda & Hovenkamp 3d ed., *supra,* ¶ 971f (requiring "extraordinary" efficiencies where the "HHI is well above 1800 and the HHI increase is well above 100"). The court is not aware of any case, and Defendants have cited none, where the merging parties have successfully rebutted the government's *prima facie* case on the strength of the efficiencies. *See CCC Holdings,* 605 F.Supp.2d at 72 (stating that "courts have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies"). Yet even if evidence of efficiencies alone is insufficient to rebut the government's *prima facie* case, such evidence may nevertheless be "relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition." *Arch Coal,* 329 F.Supp.2d at 151 (citations omitted).

[52, 53] 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." *Heinz,* 246 F.3d at 721. Specifically, the court must determine whether the efficiencies are "merger specific"—meaning they represent "a type of cost saving that could not be achieved without the merger"—and "verifiable"—meaning "the estimate of the predicted saving must be reasonably verifiable by an independent party." *H & R Block,* 833 F.Supp.2d at 89 (internal quotation marks omitted) (citing Merger Guidelines § 10); *Cardinal Health,* 12 F.Supp.2d at 62 ("In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger."). Defendants bear the burden of demonstrating that their claimed efficiencies are merger specific, *H & R Block,* 833 F.Supp.2d at 90, which requires demonstrating that the efficiencies "cannot be achieved by either company alone," *Heinz,* 246 F.3d at 722. And, Defendants must also demonstrate that their claimed efficiencies would benefit customers. *CCC Holdings,* 605 F.Supp.2d at 74.

[54] Defendants claim that the merger will generate over one billion dollars in annual cost savings and operational synergies and, "[e]ven when discounted substantially for unforeseen integration complications, possible customer loss, and the divestiture, the merged company's efficiencies are expected to generate over $600 million in savings." DFF at 178. Defendants argue that the $600 million efficiencies estimate is "the product of meticulous analysis and planning," which occurred over the course of eight months and involved over 100 employees at McKinsey, an independent consulting firm, and over 170 Sysco and USF employees who are extremely familiar with the business. *Id.* at 179. As Defendants explained, "Sysco, USF, and McKinsey reviewed a back-breaking amount of information from the merging firms, analyzed historical integration data, modeled possible cost-savings opportunities, and built a new organizational structure around the companies' combined customer base, and designed detailed day 1, day 100, and year 1 plans for integration." *Id.* Of the $600 million cost savings identified by McKinsey, Defendants' expert Dr. Hausman identified more than $490 million as merger specific. To rebut Dr. Hausman's opinion on efficiencies, the FTC presented Mr. Rajiv Gokhale of Compass Lexecon as an expert in financial economics. He opined that at least 65 percent of Defendants' efficiencies were not merger specific. PX09351–007.

The court does not question the rigor and scale of the analysis conducted by

McKinsey. Nor does the court have any reason to question the accuracy of McKinsey's total annual cost savings estimate. But that is not the issue before the court. The issue is whether Defendants have shown that the projected "merger-specific" cost savings are substantial enough to overcome the presumption of harm arising from the increase in market concentration and other evidence of anticompetitive harm. As to that question, the court is unpersuaded that Defendants' combination would result in $490 million in merger-specific cost savings. Defendants have not shown that that amount, or at least a substantial portion of it, could not be achieved independently of the merger. Nor does it appear that Dr. Hausman conducted any independent analysis of the McKinsey estimate to determine which savings, if any, can be achieved without the merger.

Sysco did not hire McKinsey to identify merger-specific savings for antitrust purposes. Rather, it initially hired McKinsey in the fall of 2013 to determine whether a merged company could achieve enough cost savings to make the combination worthwhile. Hr'g Tr. 1862–63. After McKinsey concluded that the merger would generate sufficient cost savings and Sysco and USF announced the merger, McKinsey began a more in-depth analysis beginning in January 2014 to identify "particular synergies that would arise from the deal." *Id.* at 1864–65. Carter Wood, the McKinsey Director who led the effort, testified that his firm was hired "to estimate what is possible by combining these two companies such that, number one, they would have confidence or not to go ahead with the deal; and two, to create value for the newly integrated company." *Id.* at 1914. McKinsey was not given instructions on identifying merger-specific savings, and Mr. Wood testified that he was not familiar with the term "merger specific." *Id.* at 1904.

Dr. Hausman used McKinsey's projections as his baseline for identifying merger-specific savings. *Id.* at 2053. However, it is not clear what independent analysis Dr. Hausman did to reduce McKinsey's projected savings of $600 million annually to $[Redacted] million in merger-specific savings. In his report, Dr. Hausman explained:

> In my previous academic research I have emphasized the effect of cost saving efficiencies on marginal cost, which can be approximated by average variable cost. Thus I will take a conservative approach to the estimated efficiencies and focus on cost savings from changes in variable costs that arise from the merger and would not occur otherwise.

DX–01355 at 67 (footnote omitted). It is not apparent, however, how Dr. Hausman calculated merger-specific savings using this approach, as neither his testimony nor his report spell out precisely how he went about identifying the amount of variable cost savings to include in his merger-specific estimate.

Table 4a of Dr. Hausman's rebuttal report illustrates the difficulties with verifying his analysis. Dr. Hausman itemized the "run-rate of merger-specific variable cost synergies" into four

Table 4a: Estimated Cost Efficiencies[illegible]
Adjusted for Divestiture, Customer Loss, and Contingencies

Category	Run-Rate Synergies	Run-Rate of Variable Cost Synergies	Run-Rate of Merger Specific Variable Cost Synergies
Merchandising Total	[redacted]	[redacted]	[redacted]
Best cost and terms			[redacted]
Enhance terms			[redacted]
Consolidate suppliers			[redacted]
Full category management			[redacted]
Corporate billing			[redacted]
Operations Total	[redacted]	[redacted]	[redacted]
Network Optimization			[redacted]
Driver Efficiency[illegible]			[redacted]
Reduce average cost per mile for inbound freight[illegible]			[redacted]
Leverage network			[redacted]
Dis-synergy (LEI loss) from consolidation			[redacted]
Indirect Sourcing[illegible]			[redacted]
Sales Total	[redacted]	[redacted]	[redacted]
Sales associate headcount			[redacted]
DSM and RSM headcount			[redacted]
Reduce variable opex			[redacted]
Corporate Total	[redacted]	[redacted]	[redacted]
Combined Total:	[redacted]	[redacted]	[redacted]
[redacted]			

categories: (i) Merchandising, (ii) Operations, (iii) Sales, and (iv) Corporate. In each of those four categories, Dr. Hausman listed the component parts (in the first column) and the corresponding amounts (in the fourth column) that comprise the category cost savings estimate. Yet for each of these elements, Dr. Hausman relied exclusively on documents created by either McKinsey or Defendants. *See* DX–01353 at Ex. C, 2 n.i. He performed no independent analysis to verify these numbers. *Id.* ("All source material is either Sysco, U.S. Foods, or McKinsey material and I take those materials at face value.").

But even taking Dr. Hausman's variable cost savings numbers as presented, the court is not convinced that the full $490 million in projected savings is merger specific. For example, nearly half of the $[Redacted] million in merger-specific savings identified by Dr. Hausman come from the "Merchandising" category, also known as "category management." The $281 million that Dr. Hausman attributed to category management cost savings comes directly from McKinsey's calculations. Category management refers to a process of optimizing a distributor's product assortment by gaining insights into which SKUs its customers value and then optimizing the SKU inventory to match customers' demands and procure those products in the most cost-efficient manner. Hr'g. Tr. 1881. Both companies prior to the merger already were undertaking category management efforts. PX00592–035 at 137–40; PX00592–049 at 193–94.

Although McKinsey Director Mr. Wood testified that McKinsey made an effort to identify only incremental merchandising savings, that is, savings arising only because of the merger, he could not say whether the $281 million included some cost savings that Defendants might have been able to achieve separately. For instance, before the merger, Sysco was undergoing a category management program, called Project Naples, which was due to end in June 2015. However, Project Naples covered only two-thirds of Sysco's product categories; Sysco planned to complete the remaining categories at a later date. Mr. Wood testified that the $281 million figure was in addition to the Project Naples costs savings, but he could not say whether or not that number was in addition to the cost savings that Sysco could achieve through its continued cost savings efforts beyond June 2015.

USF, meanwhile, suspended its category management project after the merger's announcement. At the time the merger was announced, USF had only conducted category management on [Redacted] to [Redacted] categories out of 300. PX00592–035 at 139; PX00592–048–049 at 192–93. Mr. Wood could not say whether the $281 million was in addition to cost savings that USF might have achieved had it continued its category management program. Thus, Dr. Hausman's estimate of $281 million in "merger-specific" savings in Merchandising—a number that, again, relied exclusively on McKinsey's calculations—likely overstates the achievable merger-specific category management savings.

The FTC has pointed to, and Defendants have not rebutted, other ways in which Dr. Hausman's reliance on McKinsey's estimates likely overstated the savings arising from the merger. During the hearing, Mr. Wood acknowledged that part of the sales synergy estimate—which represents savings from combining the salesforces of the two companies—would be achieved by having customers place orders via an e-commerce platform. However, migration to electronic ordering can be achieved by either company independently of the merger. Hr'g Tr.1904–05. Another savings strategy identified by McKinsey, "maximizing backhaul," refers to having delivery trucks stop by suppliers to reload goods on their way back to the warehouse, in order to save an extra trip to those suppliers. Hr'g Tr. 1894–95. However, backhaul savings can also be achieved independently of the merger. *See* Hr'g Tr.1905–06.

2. *Insufficiency of Estimated Merger–Specific Savings*

[55, 56] Even if the court were to credit Dr. Hausman's total estimate of merger-specific efficiencies, the figure would only amount to less than one percent of the merged entity's annual revenue. PX09375–118 (Dr. Israel's rebuttal report stating that Dr. Hausman's original estimate of merger-specific, variable cost efficiencies of $[Redacted] million per year represents only one percent of Sysco and USF's combined annual broadline revenue).[36] Even assuming that 100 percent of the cost savings would be passed on to customers, the savings are unlikely to outweigh the competitive harm to customers. Since the savings are equal to a small percentage of the combined company's total revenue, even a modest increase in price could offset any cost savings generated by the efficiencies. At oral argument, Defendants' response to this concern was that the market would not allow even a slight price increase, as customers would exercise their other options, such as regionalizing. *See* Closing Arg. Hr'g Tr. 117–18. Having found that this merger will result in high national customer and local market concentration levels, the court does not share Defendants' confidence that the market would not tolerate such a price increase. As the court observed in *Cardinal Health,* "[t]he critical question raised by the efficiencies defense is whether the projected savings from the merger[ ] are enough to overcome the evidence [showing] that possibly greater benefits can be achieved by the public through existing, continued competition." 12 F.Supp.2d at 63. Here, Defendants have fallen short of making that showing.

E. Conclusion

Upon consideration of all of the evidence presented, the court concludes that Defendants' rebuttal evidence is not sufficient to overcome the presumption of anticompetitive harm that the FTC was able to establish through evidence of high post-merger market concentrations and other evidence of competitive harm. The court thus concludes that the FTC has met its burden of demonstrating a likelihood of success. That is, the FTC has raised "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Heinz,* 246 F.3d at 714–15 (citation omitted) (internal quotation marks omitted).

IV. *THE EQUITIES*

[57] Although the court has found that the FTC has shown a likelihood of success on the merits and thus created a presumption in favor of injunctive relief, *see Swedish Match,* 131 F.Supp.2d at 172, Section 13(b)'s "public interest" standard still requires the court to weigh the public and private equities of enjoining the merge, *Heinz,* 246 F.3d at 726. Here, the primary public interests to be considered include (i) the public interest in effectively enforcing antitrust laws and (ii) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial.

The public's interest in enforcing antitrust law plainly favors enjoining Defendants' proposed merger. *See id.* ("The principle public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws."); *Swedish Match,* 131 F.Supp.2d at 173 ("There is a strong public interest in effective enforcement of the antitrust laws that weighs heavily in favor of an injunction in this case.").

36. In 2013, Sysco and USF's combined broadline revenue was [over $50 B] PX09350–216, Table 27. One percent of that sum is greater than Dr. Hausman's merger-specific cost savings estimate of $[Redacted] million.

The second public interest factor—preserving the FTC's ability to order effective relief after the administrative hearing—also supports an injunction. As stated by the Court of Appeals, "if the merger were ultimately found to violate the Clayton Act, it would be impossible to recreate pre-merger competition" because the merging parties would have already combined their operations and they would be difficult to separate, even by a subsequent divestiture order. *Id.* ("Section 13(b) ... embodies Congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case."). That problem is amplified here because the proposed merger involves two transactions, not just one: (i) Sysco's merger with USF and (ii) PFG's purchase of USF's distribution centers and other assets. The parties have represented that, absent an injunction, Sysco and USF will merge their operations and divest 11 distribution centers and associated assets—including personnel, IT Systems, and USF private label products—to PFG, which will incorporate those assets into its own operations. As the FTC has pointed out, it would face an especially daunting and potentially impossible task of "unscrambling" the eggs (*i.e.,* returning the merging companies to their pre-merger state) if the ensuing administrative proceedings were to determine that the merger violates Section 7 of the Clayton Act. Additionally, it is difficult to conceive how a subsequent divestiture order—which would attempt to restore the parties to their pre-merger state—could be fulfilled without causing significant disruption to the foodservice distribution industry, its customers, and the ultimate consumers—Americans who eat outside the home.

Defendants contend that the public equities weigh against granting the preliminary injunction because the merger will generate substantial efficiencies that will be passed on to customers. They claim that, if the FTC obtains the injunction, Defendants and their customers will be harmed because "Sysco and U.S. Foods will abandon the merger and consumers will be deprived of its benefits." DFF at 186–87 (citing Hr'g Tr. 1516–17). But the court cannot conclude, on this record, that the merger's cost savings will outweigh the potential harm to customers from losing the country's second largest broadline distributor as a competitor for their business. Dr. Israel's merger simulation model predicted that, even taking into account the estimated cost savings, the merger would harm customers. PX09350–114–121, Table 3. Although the court has reservations about some of Dr. Israel's merger simulation model inputs, the court finds that the record as a whole—at the very least—raises substantial questions about whether the merger will harm consumers. Therefore, the public equities here favor granting the preliminary injunction.

The court recognizes the extraordinary amount of time, energy, and money that Sysco, USF, and PFG have devoted to the proposed merger. Their efforts, and the risk that the parties will abandon the merger rather than proceed to an administrative trial on the merits is, however, "at best, a private equity" which cannot overcome the significant public equities weighing in favor of a preliminary injunction. *See Heinz,* 246 F.3d at 727 (internal quotation marks omitted).

CONCLUSION

In the end, after considering the record in its entirety, the court returns to Judge Tatel's observation in *Whole Foods:* "[T]here can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market." *Whole Foods,* 548 F.3d at 1043 (Tatel, J.) (citation omitted) (internal quotation marks omitted). The court finds that the FTC has carried its burden of showing a "reasonable probability" that a merger of the country's two largest broadline foodservice distributors, Sysco and USF, would harm competition. Defendants' merger is likely to cause unduly high market concentrations in two relevant markets—broadline foodservice distribution to national customers and broadline foodservice distribution to local customers—and eliminate a key competitor in those markets, USF. The evidence offered by Defendants to rebut the FTC's showing of likely harm was unavailing. The equities also favor granting the requested preliminary injunction. The FTC, therefore, has established that it is likely to succeed in proving, after a full administrative hearing, that the effect of Sysco's proposed acquisition of USF "may be substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act.

The court thus grants the FTC's Motion for Preliminary Injunction. A separate order accompanies this Memorandum Opinion.

James H. TYLER, Plaintiff,

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY, Defendant.

Civil Action No. 14–0362 (JDB)

United States District Court, District of Columbia.

Signed June 29, 2015

Background: Applicant brought action alleging that District of Columbia agency's decision not to hire him was result of age discrimination, in violation of Age Discrimination in Employment Act (ADEA). Agency moved to dismiss.

Holdings: The District Court, John D. Bates, J., held that:

(1) dismissal for insufficient service of process was not warranted, and

(2) applicant stated plausible claim under ADEA.

Motion denied.

1. Federal Civil Procedure ⊶1751

Dismissal of applicant's age discrimination complaint against employer for insufficient service of process was not warranted, even though applicant did not effect service until more than 100 days after deadline, where applicant was proceeding pro se and in forma pauperis. Fed. R. Civ. P. 4(m).

2. Civil Rights ⊶1201

Successful claim under ADEA requires job applicant to demonstrate that he (1) is over 40 years of age; (2) was qualified for position for which he applied; (3) was not hired; and (4) was disadvantaged in favor of younger person. Age Discrimination in Employment Act of 1967 § 4, 29 U.S.C.A. § 623(a)(1).

3. Civil Rights ⊶1207

Applicant's allegations that he was 67 years old, that he submitted job application to District of Columbia agency, that agency declined to hire him as either police officer or special police officer on ground that he lacked high school diploma, and that he in fact had general educational development (G.E.D.) diploma and over 100 college credit hours, were sufficient to state plausible claim against agency under Age Discrimination in Employment Act (ADEA). Age Discrimination in Employ-

Canada (Commissioner of Competition) v. Rogers Communications Inc. and Shaw Communications Inc.
2023 Comp Trib 1

Public Version (Redactions in Original)

Competition Tribunal Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1
File No.: CT-2022-002
Registry Document No.: 832

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the Competition Act, RSC 1985, c C-34 as amended;

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
Shaw Communications Inc.
(respondents)

and

Videotron Ltd.
(intervenor)

Dates of hearing: November 7-10, 14-18, 21-25, 28-30, 2022; and December 1 and 13-14, 2022.
Before: P. Crampton C.J., W. Askanas and R. Samrout
Date of order: **December 31, 2022**

REASONS FOR ORDER AND ORDER

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I. INTRODUCTION

[1] A well-known adage in the competition law community holds that when competitors oppose a merger, it is often a good indication that the merger will be beneficial for competition. In this case, the opposition from the Respondents' two national competitors has been vigorous and far-reaching. Moreover, Rogers Communications Inc. ("**Rogers**") resisted discussing a potential transaction with Videotron Ltd. ("**Videotron**") until after the Commissioner of Competition (the "**Commissioner**") initiated this proceeding. Instead, Rogers attempted to address the Commissioner's concerns through a divestiture to a financial purchaser. Such purchasers are not typically known for aggressive price or non-price behaviour.

[2] The core issue in this proceeding is whether a proposed acquisition of Shaw Communications Inc. ("**Shaw**") by Rogers, as modified by a divestiture arrangement with Videotron, is likely to prevent or lessen competition substantially in the provision of wireless telecommunications services in Alberta and British Columbia. Pursuant to this three-way arrangement, Shaw would first transfer its subsidiary Freedom Mobile Inc. ("**Freedom**") to Videotron. Rogers would *only then* acquire the remainder of Shaw through an amalgamation arrangement.

[3] For the reasons that follow, the Tribunal finds that the proposed transactions and ancillary agreements comprising the arrangement (the "**Merger and Divestiture**") are not likely to prevent or lessen competition substantially. In other words, they are not likely to result in materially higher prices, relative to those that would likely prevail in the absence of the arrangement. The Merger and Divestiture are also unlikely to result in materially lower levels of non-price dimensions of competition, relative to those that would likely exist in the absence of the arrangement. Such non-price dimensions of competition include service, quality, variety, and innovation.

[4] In the course of making this finding, the Tribunal rejected various allegations made by the Commissioner in support of several propositions, including that: (i) Shaw's divestiture of Freedom to Videotron would result in Freedom being a less effective competitor than it was immediately prior to the announcement of the Merger; (ii) Rogers' acquisition of Shaw Mobile would likely give rise to anti-competitive unilateral effects; and (iii) the Merger and Divestiture would likely facilitate the exercise of collective market power by Rogers, BCE Inc. ("**Bell**"), and TELUS Communications Inc. ("**Telus**").

[5] Videotron is an experienced market disruptor that has achieved substantial success in Quebec. It has drawn upon that experience to develop very detailed and fully costed plans for its entry into and expansion within the relevant markets in Alberta and British Columbia, as well as in Ontario. Those plans were buttressed when Videotron acquired VMedia Inc. ("**VMedia**") earlier this year, with a view to accelerating its rollout of new bundled offerings. The Tribunal finds that the evidence establishes that the bundled offerings of Freedom and VMedia would likely be priced at a level that is at least as competitive as the level at which the bundled offerings of Shaw Mobile and Freedom likely would have been priced in the absence of the Merger. The Tribunal finds that the same is also likely to be true for the "wireless only" offerings of Freedom and Videotron's digital "Fizz" brand, relative to the corresponding offerings of Shaw Mobile and Freedom. In addition, the Tribunal finds that Videotron, which is in the process of rolling out 5G services in

Quebec, would likely do the same in Alberta and British Columbia, within a time frame that will ensure that competition is not substantially prevented or lessened.

[6] It bears underscoring that there will continue to be four strong competitors in the wireless markets in Alberta and British Columbia, namely, Bell, Telus, Rogers, and Videotron, just as there are today. Videotron's entry into those markets will likely ensure that competition and innovation remain robust. Among other things, Videotron has a proven record of aggressive pricing in Quebec and parts of Eastern Ontario. Its expansion into Alberta, British Columbia, and the rest of Ontario will be facilitated by very favourable arrangements that it has negotiated as part of the Divestiture. That expansion will also be facilitated by the national rollout of its successful, digital "Fizz" brand. Moreover, instead of the two firms (Telus and Shaw) that offer bundled wireless and wireline products in those markets today, there will be at least three (Telus, Rogers, and Videotron).

[7] The strengthening of Rogers' position in Alberta and British Columbia, combined with the very significant competitive initiatives that Telus and Bell have been pursuing since the Merger was announced, will also likely contribute to an increased intensity of competition in those markets.

[8] Alberta and British Columbia were the only two geographic markets at issue in this proceeding. The Commissioner confirmed on the opening day of the trial, that the Divestiture would ensure that competition is not likely to be prevented or lessened in Ontario, where approximately 72% of Freedom's customers are located. Rogers' post-merger market share in Alberta (approximately 26%) will be well below the 35% "safe harbour" threshold set forth in the Competition Bureau's *Merger Enforcement Guidelines* ("**MEGs**") in relation to unilateral market power. Rogers' share in British Columbia (approximately 40%) will only be moderately above that threshold. The Tribunal expects that those market shares, as well as the market shares of Telus and Bell, will erode as Videotron grows.

[9] Given the conclusions reached by the Tribunal, the Application by the Commissioner for an order directing Rogers and Shaw (together, the "**Respondents**") *not* to proceed with the Merger will be dismissed. The Commissioner's Application for alternative relief will also be dismissed. For greater certainty, the dismissal of this Application is premised on the Tribunal's understanding that, as a result of the manner in which the Divestiture has been structured, "Rogers will never own Freedom or its assets."

[10] These reasons do not address competition in wireline services, except to the extent that such services are relevant to competition in wireless services in Alberta and British Columbia. This is because the Commissioner did not allege that Rogers' acquisition of Shaw's wireline business would likely prevent or lessen competition substantially in any wireline markets. In essence, Rogers is simply stepping into Shaw's shoes in Alberta and British Columbia, where it currently does not compete in the wireline business.

II. THE PARTIES

[11] The Commissioner is appointed under section 7 of the *Competition Act*, RSC 1985, c C-34, as amended, (the "***Competition Act***") and is responsible for the enforcement and administration of the Act.

[12] Rogers is a facilities-based communications and media company headquartered in Toronto, Ontario. It provides wireline and wireless services, as well as certain media services.

[13] Rogers' wireline services include the supply of Internet access, television distribution, telephony, and smart home monitoring for customers and businesses in Ontario, New Brunswick, and Newfoundland. Its wireless services are provided across the country, under the brands Rogers, Fido, Chatr, and Cityfone: Exhibit CA-R-209, at para 27. Its media portfolio includes sports media and entertainment, television and radio broadcasting, and digital media. Rogers also supplies certain business telecommunications services.

[14] Shaw is a facilities-based communications company headquartered in Calgary, Alberta. It provides wireline and wireless services to both consumers and businesses.

[15] Shaw's wireline services include the supply of Internet access, television distribution, and telephony in Western Canada and Northern Ontario. In fiscal 2021, the wireline business generated approximately 83% of Shaw's revenues. Shaw's wireless services are supplied under the Freedom and Shaw Mobile brands. Approximately 72% of Freedom's subscribers are in Ontario, with the remainder being located in Alberta and British Columbia. Prior to 2016, Freedom operated as Wind Mobile. The rebranding took place shortly after Shaw entered the wireless business, through its acquisition of WIND Mobile Corp. ("**Wind Mobile**"). The Shaw Mobile brand was launched in mid-2020 and is sold in Alberta and British Columbia.

[16] Videotron is a facilities-based telecommunications company headquartered in Montreal, Quebec. It provides wireline, wireless, and entertainment services. It also operates as a reseller in Abitibi, Quebec, under the third-party Internet access ("**TPIA**") framework established by the Canadian Radio-television and Telecommunications Commission ("**CRTC**").

[17] Videotron's wireline services include the supply of Internet access, television distribution, and telephony in Quebec. In July 2022, Videotron acquired VMedia, another TPIA reseller, which operates in throughout Canada. Videotron sells its wireless services under the Videotron and Fizz brands in Quebec and the Greater Ottawa Area. As with Rogers and Shaw, Videotron also supplies certain business telecommunications services. Videotron's entertainment services consist of two subscription-based "over the top" services, known as Club illico and VRAI, which provide on-demand French-language content.

III. THE INITIALLY PROPOSED TRANSACTION

[18] Pursuant to an Arrangement Agreement between the Respondents, dated March 13, 2021 (the "**Arrangement Agreement**" or the "**Initially Proposed Transaction**"), Rogers agreed to purchase all of the issued and outstanding shares of Shaw for approximately $26 billion, inclusive of debt. Among other things, that agreement requires Rogers to pay a termination fee of $1.2 billion to Shaw in certain circumstances, including the issuance of a final order prohibiting the completion of the Merger under the *Competition Act*.

IV. PROCEDURAL HISTORY

[19] In the weeks following the execution of the Arrangement Agreement, the Respondents submitted a request to the Commissioner for an advance ruling certificate. This was followed by a pre-merger notification filing under the *Competition Act*. They also made requests for approvals required for the transfer of the licences held by Shaw under the *Broadcasting Act*, SC 1991, c 11 and the *Radiocommunication Act*, RSC, 1985, c R-2 ("***Radiocommunication Act***"), to the CTRC and the Minister of Innovation, Science and Industry (the "**Minister**"), respectively.

[20] In early February 2022, a representative of the Commissioner informed the Respondents that a remedy would be required in Alberta, British Columbia, and Ontario. The Respondents were further informed that, based on the information available at that time, a prohibition of the Initially Proposed Transaction would be sought, subject to the Respondents establishing the efficiencies defence set forth in section 96 of the *Competition Act*: Exhibit CA-A-173. After the Respondents continued with their efforts to find a suitable divestiture buyer, the Competition Bureau sent them another letter, dated February 25, 2022, expressing concern about the fact that a sale process was proceeding in the midst of "unresolved issues for the Commissioner": Transcript, at 2661.

[21] On March 24, 2022, the CRTC approved Rogers' acquisition of Shaw's broadcasting services, subject to a number of conditions and modifications.

[22] The following day, Rogers entered into a letter of intent ("**LOI**") and term sheet with [redacted], an investment firm, regarding the divestiture of Freedom: Exhibit P-A-0178. Approximately two weeks later, Rogers entered into a second LOI and term sheet with a group of other financial buyers led by [redacted] and [redacted]: P-A-0180. However, Rogers abandoned those potential divestiture transactions after the Commissioner expressed concerns in late April 2022 about the proposed purchasers and other elements of the transactions in question: Transcript, at 2668 and 2670.

[23] The Tribunal pauses to note that, until approximately that point in time, Videotron's efforts to participate in the divestiture process do not appear to have been successful: Transcript, at 2663 and 2670.

[24] On May 9, 2022, the Commissioner filed this Application under section 92 of the *Competition Act*. The principal relief sought in that Application is an order prohibiting the completion of the Initially Proposed Transaction. Contemporaneously, the Commissioner also filed an Application for an interim order pursuant to section 104 of the *Competition Act*. Later that month, the Commissioner and the Respondents filed a Consent Agreement with the Tribunal. Pursuant to that agreement, the Respondents agreed not to proceed with the closing of the Initially Proposed Transaction until the Tribunal disposed of the Commissioner's Application under section 92, unless the Commissioner otherwise agreed. That Consent Agreement has remained in place, pending the issuance of these reasons.

[25] On June 17, 2022, the Respondents, Videotron, and Quebecor Inc. ("**Quebecor**", Videotron's ultimate parent company) entered into an LOI and term sheet concerning the sale of Freedom to Videotron for $2 billion, plus $[redacted]

[redacted]. Later that month, Videotron submitted requests to the Commissioner for an advance ruling certificate, as well as to the Minister for the approval of the deemed transfer to Videotron of the spectrum licences held by Freedom: Exhibit CA-I-144, Exhibit 57.

[26] On August 11, 2022, the Respondents, Videotron, and Quebecor entered into a definitive agreement for the sale of Freedom to Videotron (the "**Divestiture Agreemen**t") on substantially the same terms as previously announced on June 17, 2022. Among other things, that Agreement states that the Outside Date for the completion of that transaction "shall be no later than January 31, 2023 without [Videotron's] written consent": Exhibit CA-I-144, Exhibit 64, at 1327. During the hearing, counsel to Rogers confirmed that Rogers will be required to make a payment of approximately "$265 million that will go to largely American bondholders" if the Merger and Divestiture Agreement are not completed prior to December 31, 2022: Transcript, at 4903. He also confirmed that there is a "very, very, very grave or substantial risk that the transaction will fall apart if it is not closed by January 31," 2023: Transcript, at 4903; see also Transcript of Case Management Conference, 28 October 2022, at 23.

[27] On October 25, 2022, the Minister issued a statement in which he officially denied the Respondents' request to permit the transfer of wireless spectrum licences from Shaw to Rogers. He added that "any new wireless licences acquired by Videotron would need to remain in its possession for at least 10 years" and that he "would expect to see prices for wireless services in Ontario and Western Canada comparable to what Videotron is currently offering in Quebec, which are today on average 20 per cent lower than in the rest of Canada": Exhibit P-R-0008.

[28] Within hours, Mr. Pierre Karl Péladeau, President and Chief Executive Officer of Quebecor and President of Videotron, issued a statement in which he stated that Videotron "intend[s] to accept the conditions stipulated by the Minister": Exhibit P-R-0009. During the hearing, Mr. Péladeau described Videotron's responses to the Minister's two conditions in terms of "obligations": Transcript, at 2517.

V. <u>THE DIVESTITURE AND ANCILLARY AGREEMENTS</u>

[29] Pursuant to the Merger and Divestiture, Shaw would first transfer all of the issued and outstanding shares of Freedom to Videotron. Rogers would *only then* acquire the remainder of Shaw through an amalgamation arrangement.

[30] As explained by Mr. Kent Thomson, Shaw's lead counsel in this proceeding, the Merger and Divestiture are "two transactions but conjoined. In other words, there is no world in which Shaw is going to be selling Freedom Mobile to Vidéotron at the price at issue here and on the terms at issue here, in the absence of the overall transaction proceeding": Transcript, Case Management Conference, 28 October 2022, at 16; see also paragraph 21 above.

[31] To this end, the press release issued jointly by Shaw, Rogers, and Quebecor upon the execution of the Divestiture Agreement on August 12, 2022, stated that the sale of Freedom is "conditional on, and would close substantially concurrently with, closing of the Rogers-Shaw Transaction"[1]: Exhibit CA-R-0209, Exhibit 34.

[1] The Tribunal notes that one of the conditions to the closing of the Divestiture Agreement is that "[a]ll conditions to the completion of the [Initially Proposed Transaction] as set forth in Article 6 of the Arrangement Agreement have

[32] In his Witness Statement, Mr. Paul McAleese, Shaw's President, explained that the Divestiture Agreement provides for (i) the acquisition by Videotron of all of the issued and outstanding shares of Freedom, including the transfer to Videotron of all assets necessary to continue operating Freedom's wireless and wireline businesses, on a standalone basis; (ii) the provision by Rogers and Shaw of transition services to ensure a seamless transfer of ownership of Freedom to Videotron, without any operational or service-related disruptions; and (iii) the provision by Rogers of ongoing ancillary network access services that will lower Freedom's cost base: Exhibit CA-R-0192, at para 349.

[33] At paragraphs 350-354 of his Witness Statement, Mr. McAleese elaborated that the assets Videotron will receive include:

(a) Subscribers: All of Freedom's approximately 1.7 million wireless subscribers, as well as its approximately [redacted] Freedom Home Internet (Gateway) subscribers (as of March 2022);

(b) Spectrum: All of Freedom's spectrum licences, subject to an agreement between Rogers and Freedom to swap certain equivalent blocks of spectrum in Toronto and rural British Columbia;

(c) Network Infrastructure: Freedom's wireless core network and related core network assets (primarily Nokia equipment), macro cell sites, small cells, and in-building systems, including an assumption of related leaseholds and all related obligations, and radio access network equipment (i.e., radios, basebands and related IP network apparatus);

(d) Backhaul Assets: All of Freedom's backhaul microwave systems and contracts for fibre backhaul services with third parties;

(e) Roaming Agreements: All of Freedom's domestic and international third-party roaming agreements;

(f) Brand: All Freedom-related intellectual property (including its websites) and goodwill;

(g) IT Systems: Operations support systems, business support systems, billing systems, customer care systems, call centre systems and HR systems, including hardware, software and related systems that are either dedicated to Freedom or separable from Shaw's other businesses and related to Freedom;

(h) OEM Inventory: All of the smartphone inventory of Freedom (store inventory or otherwise);

(i) Business Functions: Marketing, pricing, strategy, network, human resources (including

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been satisfied or waived (where permitted) by the party or parties to the Arrangement Agreement entitled to the benefit of such condition." In turn, one of the latter conditions is that "[n]o Law is in effect that makes the consummation of the Arrangement illegal or otherwise prohibits or enjoins [Shaw] or [Rogers] from consummating the Arrangement." This includes an order issued by the Tribunal.

contractors), customer care and other business teams that are either dedicated to Freedom or separable from Shaw's other businesses; and

(j) Leases and Retail Distribution: Freedom's real estate leases, sufficient to conduct Freedom's business in the ordinary course, including all of Freedom's retail operations (branded stores, contracts with Freedom dealers/franchisees and contracts with national retailers).

[34] Regarding transition services, the Divestiture Agreement requires Rogers and Shaw to provide Freedom with various transition services at no charge for up to two years, with the option to extend for a third year, at cost, if required.

[35] Insofar as network access services are concerned, Rogers will provide Freedom with:

(a) a significant volume of free roaming services, as well as a rate for incremental usage that is substantially lower than the tariffed rates established by the CRTC that Freedom currently pays to the three national facilities-based carriers for the vast majority of its roaming requirements;

(b) access to Shaw's Go WiFi public hotspots for all Freedom subscribers and all subscribers of any other wireless brand owned by Videotron at no charge, for as long as this service is also provided to Rogers/Shaw customers [redacted]; and

(c) the same fibre backhaul services that Shaw currently provides to Freedom, except that such backhaul services will be [redacted] instead of being charged at market rates. Videotron will have the right to purchase additional backhaul services from Rogers [redacted].

[36] In addition to the foregoing, Rogers will provide aggregated and disaggregated TPIA services using Rogers and Shaw wireline network infrastructure (wherever Rogers and Shaw provide home Internet services) to Videotron at rates that are further discounted from the CRTC tariffed wholesale rates.

[37] The Tribunal pauses to note that much of the foregoing is provided for in separate agreements or term sheets that are Schedules to the Divestiture Agreement. Pursuant to section 1.3 of the Divestiture Agreement, the Schedules thereto form an integral part of the Divestiture Agreement "for all purposes of it." The evidence before the Tribunal is that the term sheets "are complete, final and enforceable upon closing" the Divestiture Agreement: Exhibit P-I-0145, at para 156.

VI. REGULATORY BACKGROUND

[38] The telecommunications industry is subject to regulation in various ways that are relevant to the present proceeding. They will be briefly summarized below.

[39] By way of introduction, the Tribunal observes that section 7 of the *Telecommunications Act*, SC 1993, c 38 ("***Telcommunications Act***"), sets out the various objectives of Canadian telecommunications policy. The full text of section 7 is set forth in Appendix 1 to these reasons. For the present purposes, the Tribunal notes the following provisions:

7 It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives:	7 La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à:
(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;	b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;	c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;
(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;	f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

A. Wireline

[40] In *Telecom Regulatory Policy CRTC 2015-326* ("**CRTC 2015-326**"), the CRTC observed that its general approach towards wholesale services regulation has been to promote facilities-based competition wherever possible. The CRTC added that "facilities-based competition is best achieved by requiring incumbent carriers to make available facilities that are 'essential' for competition": Exhibit P-A-0029, Exhibit AA, at para 6. It appears that the CRTC continues to adopt this general approach today: Transcript, at 1006.

[41] To further this goal, one of the CRTC's core activities is to oversee the wholesale services regulatory TPIA framework that sets out the rates, terms, and conditions under which incumbent wireline telecommunications service providers are required to lease essential parts of their respective networks to their competitors. Mandated access to those facilities is designed to enable competitors to provide Internet, television/video, and local phone (landline) services to their retail end-customers, at competitive rates.

[42] In recent years, TPIA (also known as wholesale high-speed access ("**HSA**")) has been mandated on an "aggregated" basis. This has enabled competitors to lease a package of both (i) the "last mile" facilities they need to connect to customer locations, and (ii) the "transport" facilities that move large amounts of traffic over somewhat longer distances.

[43] Access on an aggregated basis also permits lessees to connect to an incumbent carrier's facilities from a limited number of interfaces (e.g., one interface per province): Exhibit P-A-0029, Exhibit AA, at para 56. However, such mandated access has been limited to the technologies that existed at the time of the CRTC's decision in *Telecom Regulatory Policy 2010-632*. Notably, this includes all digital subscriber line ("**DSL**") facilities owned by incumbent local exchange carriers ("**ILECs**") and data over cable service interface specification ("**DOCSIS**") owned by cable companies. However, there is no obligation for ILECs or cable companies to provide wholesale TPIA services over fibre-to-the-premises ("**FTTP**") facilities: Exhibit P-A-0029, Exhibit AA, at para 60.

[44] In CRTC 2015-326, the CRTC considered whether this "aggregated" access approach continued to be the appropriate manner in which to foster retail competition for broadband services and made the following determinations:

- Wholesale high-speed access services, which are used to support retail competition for services, such as local phone, television, and Internet access services, would continue to be mandated. However, the provision of aggregated services would no longer be mandated and would be phased out in conjunction with the implementation of a disaggregated service. Incumbent carriers were directed to begin implementing disaggregated wholesale high-speed access services, in phases, beginning in Ontario and Quebec.

- The requirement to implement disaggregated wholesale high-speed access services would eventually include making them available over fibre-access facilities.

[45] To date, mandated access to FTTP facilities on an aggregated basis continues to be unavailable, and disaggregated wholesale access has not been extended to Alberta and British Columbia: Exhibit P-A-0098; Transcript, at 1008-1010. One consequence of this is that competitors such as Distributel Communications Limited ("**Distributel**"), who rely on the access regime, are not able to obtain mandated access to the higher speeds available over FTTP facilities: Transcript, at 1009-1010.

[46] An important aspect of the shift from mandating access on an "aggregated" basis to a "disaggregated" basis is that access to longer-haul "transport" facilities would no longer be part of the regulated regime: Transcript, at 414. Put differently, the mandated access would primarily be to "last mile" facilities: Transcript, at 971.

[47] Although the CRTC oversees mandated access to "last mile" and "transport" facilities, it appears that it has forborne from regulating access to intercity and national "backbone" facilities pursuant to section 34 of the *Telecommunications Act*: Transcript, at 995. The Tribunal notes that where the CRTC finds that a telecommunications service provided by a Canadian carrier is or will be subject to sufficient competition to protect the interests of users, it is required to refrain – to the extent that it considers appropriate – from exercising certain of its regulatory powers, including in respect of the rates to be charged for that service.

[48] In *Telecom Order CRTC 2016-396* and *Telecom Order CRTC 2016-448*, the CRTC established revised interim rates for TPIA/HSA. Lower "final" rates were then established in *Telecom Order CRTC 2019-288* ("**CRTC 2019-288**"). However, the implementation of the latter order was stayed, such that those "final" rates did not come into effect. Ultimately, in Telecom Decision CRTC 2021-181, the CRTC determined that the interim rates set in its above-mentioned 2016 orders would prevail on a final basis: Exhibit P-A-0029, at para 23. Those rates were established pursuant to what is known as the CRTC's Phase II costing methodology, which is currently subject to review: Exhibit P-R-1958 (*Telecom Notice of Consultation CRTC 2020-131*)**;** Transcript, at 2300.

[49] Notwithstanding any mandated rates that may be established by the CRTC, market participants have the flexibility to enter into bilateral "off-tariff" agreements providing for rates, terms, or conditions that are different from those established by the CRTC: Transcript, at 981.

B. Wireless

[50] A mobile wireless network typically consists of (i) a radio access network ("**RAN**"), which includes equipment such as towers and antennas; (ii) a core network, which includes equipment such as switches and routers; (iii) backhaul, which connects the RAN and the core network; (iv) billing and operational support systems; (v) interconnections to other networks; and (vi) an interconnection to the Internet: Exhibit P-A-0029, Exhibit S, at para 40.

[51] Between approximately the mid-1990s and 2015, the CRTC largely forbore from regulating mobile wireless services. However, as discussed below, that began to change in 2014.

(1) Wholesale roaming

[52] Wholesale roaming enables the retail customers of a wireless carrier (i.e., the home network carrier) to automatically access voice, text, and data services by using a visited wireless carrier's RAN network (also referred to as "the host network"), when they travel outside their home carrier's network footprint: Exhibit P-A-0029, Exhibit S, at para 42.

[53] In 2014, section 27.1 of the *Telecommunications Act* introduced a cap on domestic wholesale roaming rates. At the same time, subsection 27.1(5) was added to provide that the amount established by the CRTC in relation to the rate charged by one Canadian carrier to another Canadian carrier for roaming services prevailed over the amount determined pursuant to subsections 27.1(1) to (3).

[54] The following year, the CRTC issued its *Telecom Regulatory Policy CRTC 2015-177* ("**CRTC 2015-177**"). In that policy, the CRTC stated, among other things, that it was necessary to regulate the rates that the three national wireless carriers charge to other Canadian wireless carriers for domestic Global System for Mobile ("**GSM**") communications-based wholesale roaming. The CRTC made this determination after it concluded that GSM-based wholesale roaming was neither subject to a sufficient level of competition, nor an essential service. The CRTC added that continued forbearance from the regulation of GSM-based wholesale roaming provided by the three national carriers to other Canadian carriers was not consistent with the policy objectives set out in section 7 of the *Telecommunications Act*. Given those findings, the CRTC established interim rates for wholesale roaming that prevailed over the caps set out in section 27.1, for the three national carriers. The CRTC also recommended the repeal of section 27.1, to allow for the return to market forces for the provision of all other wholesale roaming, as soon as possible: Exhibit P-A-0029, Exhibit S, at 1-2.

(2) Mobile virtual network operators (“MVNOs”)

[55] MVNOs are branded resellers that provide mobile wireless services at the retail level. Although some MVNOs self-supply some of the components of a mobile network, it appears that all MVNOs require access to the RAN of a wireless carrier: Exhibit P-A-0029, Exhibit S, at para 43.

[56] In CRTC 2015-177, the CRTC determined that MVNO access provided by the three national wireless carriers is essential. However, it refrained from mandating wholesale MVNO access at that time. This was in part because such action would significantly undermine investments that were being made by recent entrants, several of whom who have since been acquired by the three national wireless carriers.[2]

[57] In April 2021, the CRTC announced that it intended to mandate the provision of a wholesale facilities-based MVNO service that would enable eligible regional wireless carriers to use the wireless networks of the three national carriers, and of Sasktel, where these carriers exercise market power: Transcript, at 341-342; Exhibit P-R-1935 (*Telecom Regulatory Policy CRTC 2021-130* (*“***CRTC 2021-130***”*). This policy is intended to assist regional carriers to serve new areas while they build out their own networks over a mandated access period of seven years: Transcript, at 2512-13. It is expected to have a considerable depressing effect on the pricing that regional carriers, such as Videotron, pay to the national carriers to access to their networks: Transcript, at 2292. However, the CRTC has yet to finalize the terms and conditions of this new framework and the tariff rates for the service, which must be negotiated by the parties, subject to final offer arbitration by the CRTC if negotiations fail: Transcript, at 2321: Exhibit P-R-1935, at para 390.

[58] In October 2022, the CRTC issued its *Telecom Decision CRTC 2022-288* (“**CRTC-2022-288**”) as a further step towards implementing CRTC-2021-130. In that decision, the CRTC provided a number of directions about the details and tariffication of the wholesale MVNO access service, based on the submissions of concerned parties. The CRTC also clarified that wholesale MVNO access service will be available for use by regional wireless carriers that (i) are registered as such, (ii) have deployed a home public mobile network somewhere in Canada (including a RAN and a core network), and (iii) are actively offering mobile wireless services commercially to retail customers: CRTC 2022-288, at para 501. The decision directed the incumbents to file for approval revised tariff pages within 30 days.

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[2] In 2013, Telus acquired Public Mobile. In 2015, Rogers acquired Mobilicity. In 2016, Shaw acquired WIND Mobile Corp: Exhibit P-A-0029, at paras 11-13.

(3) Tower and site sharing

[59] In CRTC 2015-177, the CRTC determined that it was not in a position to make an assessment as to whether tower and site sharing were essential. Therefore, it refrained from mandating or requiring general wholesale tariffs for access to those facilities: CRTC 2015-177, at para 178.

(4) Spectrum

[60] Spectrum is regulated by the Minister of Innovation, Science and Industry under the *Radiocommunication Act.* In exercising his functions in this regard, he is supported by Innovation, Science and Economic Development Canada ("**ISED**").

[61] Pursuant to subparagraph 5(1)(a)(i.1) of that legislation, and subject to any regulations made under section 6, the Minister has broad discretion to issue spectrum licences in respect of the utilization of specified radio frequencies within a defined geographic area. This discretion extends to fixing the terms and conditions of such licences.

[62] ISED divides spectrum licences into geographic tiers.

[63] In 2011, Industry Canada, the predecessor to ISED, issued a *Framework for Spectrum Auctions in Canada*. Among other things, that framework states:

> Measures available to the government to promote a competitive post-auction marketplace include restricting the participation of certain entities in an auction and/or placing limits on the amount of spectrum that any one entity may hold by using spectrum set-asides or spectrum aggregation limits.
>
> *Exhibit P-A-0029, Exhibit P, at section 4.*

[64] Such spectrum set-asides were part of ISED's *Policy and Licensing Framework for Spectrum in the 3500 MHz Band* ("**ISED 3500 MHz Framework**"), which was issued in March 2020. That document described ISED's policy objectives for the 3500 MHz band as being to:

- foster innovation, investment and the evolution of wireless networks by enabling the development and adoption of 5G technologies

- support sustained competition, so that consumers and businesses benefit from greater choice

- facilitate the deployment and timely availability of services across the country, including in rural areas

ISED 3500 MHz Framework, at para 14.

VII. RELEVANT SECTIONS OF THE *COMPETITION ACT*

[65] Subsection 92(1) of the *Competition Act* provides the Tribunal with the authority to make an order in respect of a completed or proposed merger where it finds that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially. In the case of a proposed merger, and in the absence of the consent of the Commissioner and the merging parties, the Tribunal's powers are limited to ordering the merging parties not to proceed with all or part of their merger: *Competition Act*, para 92(1)(*f*).

[66] Section 93 sets forth a non-exhaustive list of factors to which the Tribunal may have regard in assessing whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

[67] Subsection 92(2) provides that the Tribunal shall not find that this statutory test is met, solely on the basis of evidence of market share or concentration.

[68] Pursuant to section 96, also known as the "efficiencies defence", the Tribunal is precluded from issuing an order under section 92 if it finds that the merger in question "has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger … and that the gains in efficiency would not likely be attained if the order were made."

[69] The full text of the above-mentioned provisions is set forth in Appendix 2 to these reasons.

VIII. ISSUES

[70] There are three principal issues in this proceeding. They are as follows:

a) What relevance does the Initially Proposed Transaction have for this proceeding?

b) Is the Merger, as modified by the Divestiture, likely to prevent or lessen competition substantially?

c) If so, have the Respondents established the requirements of the efficiencies defence?

IX. WITNESSES

A. Expert witnesses

[71] A total of 13 expert witnesses testified in this proceeding.

(1) The Commissioner's experts

[72] Five experts testified on behalf of the Commissioner. They were Dr. Nathan Miller, Mr. Michael Davies, Dr. Lars Osberg, Dr. Katherine Cuff, and Dr. Mark Zmijewski.

[73] Dr. Miller is a Professor at Georgetown University. His expertise is in the field of Industrial Organization and antitrust economics. He was the Commissioner's principal witness with respect to the likely effect that the Merger and Divestiture will have on competition. He was very knowledgeable and informed. However, the panel considered him to be less impartial than in the two other cases in which he recently appeared on behalf of the Commissioner. Among other things, Dr. Miller seemed to cherry-pick the facts that supported the Commissioner's case, he came across as being reluctant to answer certain questions on cross-examination, and he did not acknowledge the limitations of his analysis or other matters as readily as in his prior appearances before the Tribunal. The Tribunal was also surprised that he could not recall whether he requested the Competition Bureau to ask for additional data from Telus and Bell, within the last two weeks, the last two months, the last six months, or more. Ultimately, the Tribunal considered his testimony on key issues such as market shares and price effects to be less robust and persuasive than that of his counterpart, Dr. Israel, who testified on behalf of Rogers.

[74] Mr. Davies is the Founder and Chairman of Endeavour Partners, a consulting firm specializing in business strategy in the digital economy. That firm works with leading businesses throughout the high-tech, mobile, and telecom areas. Among other things, Mr. Davies has significant consulting and expert evidence experience with issues relating to the design, implementation, and management of wireless networks, competition in mobile services, and other digital technologies. Mr. Davies testified with respect to how wireless networks are constructed and operated, various aspects of the Merger and Divestiture, and the competitive strength of the Videotron/Freedom relative to that of Shaw/Freedom. As with Dr. Miller, Mr. Davies was very knowledgeable and informed. However, he was evasive and somewhat pedantic at times. He was also reluctant to acknowledge certain matters,[3] and he failed to consider the impact of the COVID-19 pandemic on Shaw's share of post-paid subscribers. Collectively, this undermined his credibility.

[75] Dr. Osberg, Dr. Cuff, and Dr. Zmijewski testified with respect to matters that are relevant to the efficiencies defence in section 96 of the *Competition Act*. Given the determination made in Part X below, it is unnecessary to address that defence or the testimony of these experts.

(2) Rogers' experts

[76] Five experts testified on behalf of Rogers. They were Dr. Mark Israel, Mr. Kenneth Martin, Mr. Andrew Harington, Dr. Roger Ware, and Dr. Michael Smart.

[77] Dr. Israel was Rogers' principal expert witness regarding the likely competitive effects of the Merger and Divestiture. He is a Senior Managing Director at Compass Lexicon, an economic consulting firm. He has a Ph.D. in economics from Stanford University. The panel found him to be knowledgeable, candid, and forthcoming. His evidence was generally well documented and presented. The panel found that Dr. Israel effectively set out a number of important shortcomings

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[3] These matters included that (i) the CRTC has expertise in the field of backhaul regulation; (ii) Videotron is now better placed than Shaw with respect to 3500 MHz spectrum; (iii) there would be little difference between a combined Videotron/Freedom and the current Shaw/Freedom in Ontario; (iv) the loss of Shaw Mobile's distribution network would not be significant to the combined Videotron/Freedom, because Freedom's distribution network accounts for nearly all of Freedom's sales; and (v) the impact of the COVID-19 pandemic.

in Dr. Miller's analysis, although he did not provide his own estimates in respect of some of those matters. Dr. Israel also made a number of appropriate concessions, including when he recognized that he should not have valued the 3500 MHz set-aside spectrum purchased by Videotron at a price paid by the three national carriers. However, there were a small number of occasions when he did not make an appropriate concession.[4] Nevertheless, his testimony generally held up. Where he and Dr. Miller disagreed, the panel found his testimony to be more robust and persuasive than that of Dr. Miller.

[78] Mr. Martin is a Director at Altman Solon, a strategic management consulting firm in the telecommunications industry. He testified with respect to the Commissioner's allegation that Freedom would be a less effective competitor under the ownership Videotron than it has been under the ownership of Shaw. The panel found his testimony to be forthright and candid. He readily conceded certain shortcomings in his report. On balance, his testimony was helpful, even though the panel was disappointed to learn that he was not only aware that he included certain charts in his presentation with information that was inconsistent with data provided in Mr. Lescadres' Reply Witness Statement, but that he also failed to alert the Tribunal of such inconsistencies.

[79] Mr. Harington, Dr. Ware, and Dr. Smart testified with respect to matters that are relevant to the efficiencies defence in section 96 of the *Competition Act*. Given the determination made in Part X below, it is unnecessary to address that defence or the testimony of these experts.

(3) Shaw's experts

[80] Three experts testified on behalf of Shaw. They were Dr. Paul Johnson, Dr. William Webb, and Dr. David Evans.

[81] Dr. Johnson is the owner of Rideau Economics, an Ottawa-based consulting firm, specializing in competition economics. From 2016-2019, he served as the T.D. MacDonald Chair in Industrial Economics at the Competition Bureau. He testified with respect to the alleged competitive impact of the July 2020 launch of Shaw Mobile. He had difficulty with the aggressive style of the Commissioner's cross-examination. He also avoided providing direct answers and acknowledging certain matters.[5] Ultimately, the panel found that his testimony was weak in a number of respects, including on the issue of the exclusion of Ontario from the control group, for the purposes of assessing the impact of Shaw Mobile's launch.

[82] Dr. Webb is an engineer who specializes in wireless communications. He testified about a number of technological matters, including (i) the primary components of wireless networks; (ii) the importance of spectrum and 5G; (iii) network reliability; (iv) and the potential impact of Freedom's lack of access to Shaw's WiFi hotspots under Videotron's ownership. Although Dr. Webb's experience in Canada is limited, he was knowledgeable on technical matters within his expertise and generally tried to be helpful. On a number of occasions, he did not hesitate to make

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[4] For example, he did not readily agree that Shaw was a well-known brand with "significant value;" that evidence as to whether transferred subscribers were, in fact, likely to revert after the divestiture was relevant to the analysis; and that the high port-out numbers reflected the fact that Shaw and Rogers were close competitors.

[5] For example, he resisted acknowledging that market participants such as Telus and Freedom drew a link between Shaw Mobile's launch and Ontario.

concessions. However, on other occasions his testimony was somewhat undermined by his reluctance to acknowledge certain matters.[6] Nevertheless, on balance, where he and Mr. Michael Davies[7] did not agree, the panel found his evidence to be more robust and persuasive than Mr. Davies' evidence.

[83] Dr. Evans testified with respect to matters that are relevant to the efficiencies defence in section 96 of the *Competition* Act. Given the determination made in Part X below, it is unnecessary to address that defence or his testimony.

B. Lay witnesses

[84] A total of 27 lay witnesses testified in this proceeding.

(1) The Commissioner's witnesses

[85] 17 lay witnesses testified on behalf of the Commissioner.

[86] The first six of those witnesses are subscribers of wireless services – four of them with Shaw in Alberta or British Columbia, one with Telus in British Columbia, and one with Koodo (Telus' flanker brand) in Ontario.[8] With the exception of the latter witness, they all switched to Shaw Mobile shortly after Shaw launched Shaw Mobile and bundled its Shaw Mobile wireless product with its Internet service at an incremental price of $0, in July 2020. One of those witnesses then switched back to Telus in April 2021 when Telus made a new offering, and after he had experienced inconsistent coverage with Shaw Mobile. All six of these witnesses were straightforward during their very brief cross-examinations. However, none of them was aware of the Divestiture at the time they prepared their Witness Statements. This reduced the usefulness of their testimony.

[87] The next four lay witnesses who testified on behalf of the Commissioner are employed by the Competition Bureau.[9] They were also only subjected to very limited cross-examination. In each case, the purpose of their testimony was to provide helpful background and other information through their Witness Statements. With the exception of Mr. Mathew McCarthy, who provided very helpful information with respect to the regulatory framework, the *viva voce* evidence of the other three witnesses from the Bureau was not particularly noteworthy, largely because they were not knowledgeable about some details of the Commissioner's review of the Merger.

[88] The next two witnesses who testified on behalf of the Commissioner are Freedom dealers. Mr. Sudeep Verma is the owner of 15 Freedom stores (previously 19) in Ontario. Mr. Sameer

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[6] For example, he was reluctant to acknowledge that cellphone users value WiFi, and that some people would be uncomfortable with accessing untrusted public hot spots.

[7] Mr. Michael Davies should not be confused with Mr. Rod Davies, discussed below.

[8] Messrs. Andre Bremault, Ryan Schumm, Mark Phaneuf, and David Bennett are Shaw customers. Mr. Shane Reimer switched to Shaw in April 2021 and then switched back to Telus in April 2021. Mr. Nimesh Chauhan is a Koodo customer in Ontario.

[9] They were Mr. Denis Albert (Acting Team Lead, Information Centre/Corporate Services), Ms. Stephanie Assad (Competition Law Officer), Ms. Jessica Fiset (Paralegal), and Mr. McCarthy (Competition Law Officer).

Dhamani is the owner of three Freedom stores (previously eight) in Alberta. They are both part of a Freedom dealers' trade association, known as the F-Branded Association, that was established shortly after the announcement of the Merger and that is currently suing Shaw: Transcript, at 460. Indeed, Mr. Verma is a member of the Board of Directors and the Executive Committee of that association. Mr. Verma's testimony focused on (i) Freedom's product offerings; (ii) how Freedom is positioned in the market; (iii) how it was built up by Shaw since it was rebranded from Wind Mobile; (iv) Freedom's planned launch of 5G services prior to the announcement of the Merger; (v) the changes in Freedom's competitiveness since that time; (vi) his lack of familiarity about the details of the Divestiture; and (vii) his "cautious optimism" about the Divestiture. Mr. Dhamani supplemented Mr. Verma's evidence, with which he agreed, with additional evidence pertaining to his experience in Alberta, before and after the announcement of the Merger. He seemed to be slightly more aware of the details of Divestiture than Mr. Verma. However, overall, both witnesses' lack of knowledge about the details pertaining to the Divestiture reduced the value of their testimony. Further, the panel observes in passing that an e-mail sent to Videotron's counsel on behalf of their association stated that [redacted]": Exhibit CA-R-0047, at 27.

[89] In addition to the foregoing witnesses, two senior executives at Telus testified on behalf of the Commissioner. The first was Mr. Charlie Casey, who holds the position of Vice President of Finance and Controller for Consumer Solutions. Mr. Casey testified with respect to (i) Telus' use of data from Comniscient Technologies LLC ("**Comlink**"); (ii) his perception that Shaw's competitive intensity has decreased materially since the announcement of the Merger; and (iii) records that Telus provided to the Commissioner in relation to the Merger, pursuant to an order issued by the Federal Court under section 11 of the *Competition Act*. The panel found Mr. Casey to be evasive and reluctant to answer several questions.[10] The panel also had concerns about his repeated inability to recall certain matters. In light of these shortcomings in his testimony, the panel had significant concerns about Mr. Casey's credibility. Those concerns were exacerbated by the evidence that revealed Telus' substantial efforts to "kill, slow and shape" the Merger and Divestiture: Exhibit CA-R-1940, at 5.

[90] The second witness from Telus was Mr. Nazim Benhadid, who is the Senior Vice President, Network Build & Operate. He testified with respect to (i) his view that wireline ownership is critical to wireless performance and reliability and (ii) the importance of competition based on network reliability and performance. As with Mr. Casey, the panel found Mr. Benhadid to be evasive and reluctant to answer a number of questions. This reluctance included his claimed unawareness of the fact that neither Rogers [redacted] has an extensive wireline network in Alberta or British Columbia. He also claimed to be unaware of other basic information about Rogers and Freedom, including where they own or lease fibre facilities in Alberta and British Columbia – both of which are Telus' home markets. Given his senior position at Telus, with responsibility for Telus' network, the panel considered that this testimony strained credulity. The panel also found that Mr.

[10] For example, Mr. Casey was evasive with respect to Project Fox and what it involved. On another occasion he initially could not recall an e-mail (Exhibit CA-R-0072), entitled [redacted], upon which he was copied, only to quickly reverse himself. There were also other e-mails that were sent to him which he did not recall receiving. In addition, he stated that he could not recall attending a wargaming session, the notes of which suggested he attended. He also claimed to be unaware of Project Peacock, even though several e-mails were sent to him about that project.

Benhadid overstated any shortcomings that may be associated with leasing facilities, relative to owning them. The panel's awareness of Telus' intense opposition to the Merger also adversely affected the weight the panel gave to Mr. Benhadid's testimony.

[91] Following the two witnesses from Telus, two senior executives from Bell proceeded to testify. The first was Mr. Blaik Kirby, who is Group President, Consumer and Small & Medium Business. In addition to addressing Bell's operations, he testified with respect to Bell's perceptions of (i) Shaw, Freedom, Shaw Mobile and their position/impact on the market; (ii) the change in Shaw's competitive behaviour since the announcement of the Merger; and (iii) Videotron's competitive strategy in Quebec. He also addressed information that Bell supplied to the Commissioner in response to an order issued by the Federal Court under section 11 of the *Competition Act*. He was knowledgeable and more forthcoming than were the two witnesses from Telus. He also readily conceded certain shortcomings in his Witness Statement. However, the panel's awareness of Bell's spirited opposition to the Merger adversely affected the overall weight that the panel gave to Mr. Kirby's testimony.

[92] The second Bell witness was Mr. Stephen Howe, who holds the position of Chief Technology and Information Officer. The panel found him to be knowledgeable and candid. However, he was reluctant to acknowledge certain things and claimed to be unaware of other matters that the panel considered he should have known.[11] This, together with the panel's awareness of Bell's opposition to the Merger, adversely affected the weight the panel gave to Mr. Howe's testimony.

[93] Another industry witness who testified on behalf of the Commissioner was Mr. Tom Nagel of Comcast Cable Communications LLC ("**Comcast**"), which is headquartered in Philadelphia, Pennsylvania. He testified with respect to Comcast's wireless offerings in the United States and the role of WiFi 'hotspots' in Comcast's network. The panel found Mr. Nagel to be straightforward, candid, and knowledgeable.

[94] The final lay witness who appeared on behalf of the Commissioner was Mr. Christopher Hickey, who holds the position of Director, Regulatory Affairs at Distributel. Distributel is a facilities-based telecommunications services provider of retail wireline and wireless services in various regions of Canada. To service its customers, it utilizes the facilities of other participants in the market, at both regulated and unregulated rates. Earlier this fall, Distributel entered into an agreement to be acquired by Bell. Among other things, Mr. Hickey testified with respect to (i) Distributel's operations, (ii) his perception of the importance of bundled offerings for Shaw, and (iii) the low/negative margins that Distributel would have if it priced at the same level as Shaw and if it did not have a favourable "off-tariff agreement." The panel found Mr. Hickey to be very knowledgeable, candid, and forthcoming.

[11] For example, he claimed to be unaware of an internal Bell announcement of a $1.5 billion equity offering that Telus launched shortly after the announcement of the Merger. He also could not recall important Bell network outages that occurred in November 2019 and in August 2020, although he then recalled the latter one after he was shown an internal Bell network engineering report.

(2) Rogers' witnesses

[95] Two lay witnesses testified on behalf of Rogers. The first was Mr. Dean Prevost, who is Rogers' President of Integration. He was the company's principal lay witness in this proceeding. His testimony covered a broad range of issues, including (i) Rogers' wireline and wireless networks; (ii) competition in wireless markets across Canada; (iii) the Merger and what Rogers hopes to achieve through it; (iv) the proposed Divestiture; (v) the predicted competitive reaction to the Merger and Divestiture; (vi) Rogers' integration plans with respect to Shaw; and (vi) Rogers' plans for Shaw Mobile. The panel found Mr. Prevost to be knowledgeable and candid, although he was reluctant to acknowledge certain things, such as the fact that consumers would be deprived of the benefits associated with the network that Rogers had planned to build in Alberta and British Columbia in the absence of the Merger.

[96] Rogers' second lay witness was Ms. Marisa Fabiano, who holds the position of Senior Vice President of Finance. She is also the Head of Shaw Integration for Rogers' Integration Management Office. In that capacity, she is responsible for reporting the quantification of potential synergies that Rogers expects to achieve through the Merger. Her testimony largely related to matters that are relevant to the efficiencies defence in section 96 of the *Competition Act*. Given the determination made in Part X below, it is unnecessary to address that defence or her testimony.

(3) Shaw's witnesses

[97] Five lay witnesses testified on behalf of Shaw. In each case, the panel found their testimony to be straightforward, candid, and forthcoming.

[98] Mr. Bradley Shaw is the Chief Executive Officer and Executive Chair of Shaw's Board of Directors. He testified with respect to (i) Shaw's history; (ii) the background to the Merger; (iii) the strategic review of Shaw's options that was conducted by TD Securities Inc. ("**TD Securities**"); (iv) the Merger and Divestiture; and (v) the impact of this proceeding on Shaw.

[99] As previously noted, Mr. McAleese is the President of Shaw. He testified with respect to a broad range of issues. These included (i) the Merger and the Divestiture; (ii) Shaw's business; (iii) how Shaw built Freedom's business after it was acquired in 2016; (iv) Shaw's efforts to prepare for 5G services; (v) the separation between Shaw's wireless and wireline networks; (vi) Shaw's efforts at bundling through Freedom and Shaw Mobile; and (vii) the future of Shaw.

[100] Mr. Trevor English is the Executive Vice President and Chief Financial and Corporate Development Officer of Shaw. He testified with respect to (i) Shaw's acquisition of Wind Mobile in 2016; (ii) Shaw's efforts to build-out wireless infrastructure; (iii) the extent of Shaw's investments in Freedom; (iv) the investments that Shaw considers are necessary on the wireline side of its business; (v) the Shaw family's decision to sell the business; (vi) the impact that the delay of consummating the Merger is having on Shaw's business; and (vii) Shaw's future if the Merger does not proceed.

[101] Mr. Donavan Annett holds the position of Principal Strategist of Strategy Architecture and Engineering at Shaw. Since the announcement of the Merger, he has worked with his peers at Rogers to identify underserved communities in Western Canada to which high-speed connectivity will be expanded pursuant to a commitment made by Rogers in connection with the Merger. He testified very briefly with respect to Rogers' plans to expand high-speed connectivity into various rural areas if the Merger is completed.

[102] Mr. Rod Davies is a Managing Director and Head of the Canadian Communications, Media and Technology, Investment Banking at TD Securities. He testified with respect to (i) the financial performance of Shaw relative to its peers; (ii) the benefits of scale in the telecommunications business; (iii) the advice TD Securities provided to the Shaw family with respect to Shaw's strategic options; and (iv) the process relating to the sale of Shaw.

(4) Videotron's witnesses

[103] Three lay witnesses testified on behalf of Videotron.

[104] As has been mentioned, Mr. Péladeau is the President and Chief Executive Officer of Quebecor and President of Videotron. He testified with respect to (i) Videotron's history; (ii) the development of its wireless network in Quebec and the greater Ottawa area; (iii) Videotron's interest in expanding its wireless services business across Canada; and (iv) its reaction to the Merger. Mr. Péladeau was candid and readily acknowledged when he did not know about certain details or documents. Given the nature of his overall responsibilities, this was not a significant concern for the panel.

[105] Mr. Jean-François Lescadres is the Vice President of Finance at Videotron. Among other things, he provided additional information with respect to (i) Videotron's business; (ii) its experience as an MVNO; (iii) its entry into the wireline business in Abitibi pursuant to the TPIA framework; (iv) its Fizz digital brand; (v) its plans to expand outside Quebec; (vi) its participation in the 3500 MHz auction, the events leading to the Divestiture; (vii) its negotiations with Rogers relating to the proposed Divestiture; (viii) its plans and projections for Freedom; and (ix) its plans if the Divestiture does not occur. The panel found Mr. Lescadres to be very knowledgeable about these topics. His testimony was straightforward, candid, and forthcoming.

[106] Mr. Mohamed Drif is the Senior Vice President and Chief Technology Officer of Videotron. He testified with respect to (i) the technical aspects of Videotron's wireline and wireless networks; (ii) Videotron's planned rollout of a wireless 5G network outside Quebec; (iii) Videotron's evaluation of Freedom; and (iv) Videotron's integration plans for Freedom. The panel found Mr. Drif's testimony to be straightforward, candid, and forthcoming.

X. <u>ANALYSIS</u>

A. What relevance does the Initially Proposed Transaction have for this proceeding?

[107] The Commissioner maintains that the Initially Proposed Transaction has two important implications for this proceeding. First, he asserts that it is the "merger" for the purposes of the Tribunal's assessment under section 92 of the *Competition Act*. Second, and as a consequence of this, he submits that the Respondents bear the burden of establishing that the Divestiture will ensure that the likely prevention and lessening of competition he alleges will result from that merger will no longer be "substantial".

[108] In support of the first of these positions, the Commissioner states that the Initially Proposed Merger is the "proposed merger" challenged in the present Application. In other words, he maintains that the Initially Proposed Transaction is the *proposed merger* that was the subject of this Application, as filed more than two months before the execution of the Divestiture Term Sheet and almost four months before the signing of the Divestiture Agreement. The Commissioner adds that the "proposed merger" as contemplated by section 92 is the "proposed merger in respect of which the Application is made," as set forth in section 96 of the *Competition Act*, which provides for the efficiencies defence. The Commissioner insists that there is no Application properly before the Tribunal about any other transaction in any other form. He adds that the Respondents have not resiled from or withdrawn from that proposed merger, which remains before the Tribunal in this Application. For greater certainty, the Commissioner states that the Divestiture is irrelevant and beyond the jurisdiction of the Tribunal when evaluating whether that proposed merger is likely to substantially lessen or prevent competition, under section 92.

[109] The Tribunal disagrees. The "proposed merger", as defined by the Commissioner, is *no longer being proposed*. It has been substantially modified, such that what Rogers proposes to acquire will no longer include the shares or assets of Freedom. In the words of Mr. McAleese, "Rogers will never own Freedom or operate Freedom": see Transcript, at 5327:15-16; Exhibit CA-R-0192, at para 359. Moreover, the Minister has publicly confirmed that he "would – under no circumstances – permit the wholesale transfer of wireless spectrum from Shaw to Rogers" and that this decision "formally closes that chapter of the original proposed transaction": Exhibit P-R-0008.

[110] To the extent that the future ownership of Freedom is a major focus of this proceeding, the Commissioner's insistence that the Tribunal spend scarce public resources assessing something that will never happen is divorced from reality. The Tribunal is not "obliged to pretend such an ignorance of realities": *Sask Govt Ins Office v Anderson*, [1967] MJ No 35, at para 5 (CA). Put differently, it "cannot ignore objective facts": *Sebastian v Vancouver Coastal Health Authority*, 2019 BCCA 241, at para 45. Nor should it be expected to do so. On the contrary, the Tribunal should be appropriately concerned with "the true state of affairs": *Commissioner v Canadian Waste Services Holdings Inc*, 2004 Comp Trib 10, at para 34.

[111] Given that intervening events occurring after the filing of an application can have a material impact on a proceeding before the Tribunal, they cannot be ignored. This would be inconsistent with the forward-looking analysis contemplated by section 92: *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, at paras 52-54 ("***Tervita SCC***"). Among other things, the Tribunal can only make an order under section 92 in respect of a proposed merger where it finds that the proposed merger "prevents or lessens, or <u>is likely</u> to prevent or lessen, competition substantially" (emphasis added). It is axiomatic that a previously proposed transaction that will never occur due to intervening developments cannot <u>be likely</u> to prevent or lessen competition substantially.

[112] This construction of section 92 is consistent with language in section 96, which contemplates the assessment of efficiencies that a proposed merger "<u>is</u> likely to bring about" and that "<u>will be</u> greater than and <u>will</u> offset, the effects of any prevention or lessening of competition that <u>will</u> result or <u>is</u> likely to result from the … proposed merger" (emphasis added). This contrasts with the conditional tense language ("would") that appears elsewhere in the merger provisions of the *Competition Act*, including in sections 94 ("would be"), 95 ("would result") and 100 ("would substantially impair" and "would be difficult to reverse").

[113] The Commissioner's position – that the intervening change to the nature of the proposed merger is irrelevant for the purposes of the initial stage of its assessment under section 92 – is also inconsistent with subsection 106(1) of the *Competition Act*. That provision explicitly recognizes the potential significance of changes to circumstances that existed at the time an application was made.

[114] The Commissioner submits that it would be unfair for the Tribunal to treat the Merger and Divestiture as the "proposed merger" for the purposes of the present Application because he only received a copy of the Divestiture Agreement on August 13, 2022. He adds that this was after the Scheduling Order had been issued, after the parties had exchanged documents, and only 10 days before the commencement of discoveries in this proceeding.

[115] The Tribunal disagrees. Videotron first informed the Commissioner of its interest in purchasing Shaw's wireless business on April 9, 2021. After several meetings with staff in the Competition Bureau, Videotron confirmed its interest in purchasing that business in a letter to the Commissioner dated December 17, 2021. After further exchanges and an additional meeting, Videotron reiterated that position in a letter to the Commissioner dated March 11, 2022. Videotron then informed the Commissioner on April 7, 2022, that it had made a proposal to Rogers to acquire the assets and shares relating to Shaw's wireless business. That was a full seven months prior to the commencement of the hearing of this Application. Approximately two months later, on June 17, 2022, Rogers informed the Commissioner that it had entered into a Letter Agreement and Term Sheet with Quebecor for the sale of Freedom. At the same time, Rogers provided copies of those documents to the Commissioner. The following week, Quebecor requested that the Commissioner issue an advance ruling certificate in respect of the Divestiture: Exhibit P-I-0145, at paras 84-96 and 139-140.

[116] Based on the above, the Tribunal considers that it would not be unfair to the Commissioner to treat the Merger and Divestiture as the proposed merger for the purposes of the present Application.

[117] Considering all of the foregoing, the Tribunal finds that the "proposed merger" for the purposes of the present Application is the only merger that is currently being *proposed* between Rogers and Shaw, namely, their three-way, two-step, arrangement involving Videotron.

[118] The Tribunal notes that this finding is consistent with a U.S. authority directly on point. In *Federal Trade Commission v Arch Coal, Inc*, No 1:04-cv-00534, ECF No 67 (DDC July 7, 2004), the Commission made a motion to exclude, for the purposes of a preliminary injunction proceeding, all evidence and argument on the issue of a divestiture of one of two mines to be purchased by Arch Coal, Inc. ("**Arch**"). In its decision, the Court observed, "In effect, the FTC asks this Court to assess the proposed merger as if Arch would retain both the North Rochelle and Buckskin mines" owned by the acquiree, Triton Coal Co. ("**Triton**"). On that issue, the Defendants argued that ignoring the divestiture "would be tantamount to the Court assessing 'a purely hypothetical transaction of the Commission's making – that none of the parties are proposing'." Ultimately, the Court agreed and stated that it was "unwilling simply to ignore the fact of the divestiture of Buckskin to Kiewit". The Court concluded that "the challenged transaction [consists] of both the acquisition of Triton by Arch and the divestiture of the Buckskin mine to Kiewit."

[119] The Tribunal's similar finding in the present proceeding has two important consequences. First, the Commissioner's submissions with respect to the impact of Rogers' acquisition of Freedom are not particularly relevant, as that aspect of the Initially Proposed Transaction is never going to happen. They will therefore not be further addressed below.

[120] Second, the Tribunal's finding has an important bearing on the issue of who bears the burden under section 92. The Commissioner recognizes that he bears the burden with respect to the Merger. However, he insists that the Respondents bear the burden of demonstrating that the Divestiture will restore competition to the point at which the alleged prevention and lessening of competition that would likely have been brought about by the Initially Proposed Transaction would no longer be substantial.

[121] In support of this argument, the Commissioner relies on *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at paras 85 and 89 ("***Southam***"). There, the Court found that the parties to the merger bore the burden of demonstrating the effectiveness of their proposed remedy. This finding was rooted in the fact that it was they who asserted that the remedy would eliminate the substantial lessening of competition that the Tribunal found *had* resulted from the merger: *Southam*, at paras 14, 20, and 82. In that context, the relevant issue was whether the remedy proposed by the merging parties would *restore* competition to the required degree. The Commissioner had already discharged his burden of demonstrating that the merger had substantially lessened competition.

[122] The present situation can be distinguished from the facts in *Southam*. There is no completed merger from which to carve out a remedy that may or may not restore competition to the point at which an established lessening or prevention of competition can no longer be said to be substantial. There is only a proposed, two-step merger that *the Commissioner asserts* will likely prevent and lessen competition substantially. He makes that assertion *both* because Videotron will acquire Freedom and because Rogers will then acquire what remains of Shaw – i.e. the Shaw Mobile brand and its associated customer contracts.

[123] In these circumstances, the burden appropriately falls on the Commissioner to prove his allegations.

[124] Ultimately, nothing turns on this finding, as the Tribunal has determined that even if the burden was upon the merging parties, that burden would be satisfied.

B. Is the Merger likely to prevent or lessen competition substantially?

(1) Applicable legal principles

[125] Pursuant to subsection 92(1) of the *Competition Act*, the Tribunal may make an order where it finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

[126] The "prevent" and "lessen" branches of subsection 92(1) are distinct. However, the ultimate test under each branch is essentially the same. That test is whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger: *Tervita SCC, above,* at para 54. This involves comparing the state of competition if the merger proceeds with the state of competition that is likely to prevail "but for" the merger: *Tervita SCC*, above, at paras 50-51; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18, at paras 464-465 ("***P&H***"); *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14, at para 369 ("***Tervita CT***").

[127] Often, the state of competition that is likely to prevail in the counterfactual "but for" world is that which exists immediately prior to the merger. However, where the evidence demonstrates that the market is likely to change, the relevant comparison is between the likely future with the merger, and the likely future without the merger. It bears underscoring that this analysis is *forward-looking* in nature: *Tervita SCC*, above, at paras 52-53.

[128] Market power is the ability to profitably influence price or non-price dimensions of competition for an economically meaningful period of time: *Tervita*, above, at para 44; *Tervita CT*, above, at para 371

[129] Accordingly, the assessment of whether competition is likely to be prevented or lessened generally involves an evaluation of whether the merged entity will likely have the ability to increase prices, or to reduce meaningful dimensions of non-price competition, relative to levels that would likely prevail "but for" the merger: *Tervita SCC*, above, at para 51; *Tervita CT*, above, at para 373. Without such effects, section 92 will not generally be engaged: *Tervita SCC*, above, at para 44.

[130] The non-price dimensions typically assessed include service, quality, variety, and innovation: *Tervita SCC*, above, at para 44.

[131] In assessing whether competition is likely to be *prevented*, the focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that likely would have otherwise taken place if the merger did not occur: *Tervita SCC*, above, at para 55. Common examples of such prevention of future competition in the merger context include:

> [374] […] (i) the acquisition of a potential or recent entrant that was likely to expand or to become a meaningful competitor in the relevant market, (ii) an acquisition of an incumbent firm by a potential entrant that otherwise likely would have entered the relevant market *de novo*, and (iii) an acquisition that prevents what otherwise would have been the likely emergence of an important source of competition from an existing or future rival.
>
> *Tervita CT*, above, at para 374

[132] For greater certainty, where the Tribunal concludes that one or more other firms likely would enter or expand on a scale similar to what was prevented or forestalled by a merger, and within the requisite time frame described below, it is unlikely to conclude that the merger is likely to prevent competition substantially: *Tervita SCC*, above, at para 68; *Tervita CT*, above, at para 385.

[133] In assessing whether competition is likely to be *lessened*, the focus of the assessment is upon whether the merger in question is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals: *Tervita SCC,* above, at para 55.

[134] In determining whether a merger is likely to lessen competition *substantially*, the Tribunal's focus is upon whether the merged entity, acting alone or interdependently with one or more other firms, is likely to be able to exercise *materially* greater market power than in the absence of the merger: *Tervita SCC*, above, at para 54; *P&H*, above, at para 464.

[135] This involves an evaluation of the likely magnitude, scope, and duration of any adverse effects on prices or on non-price dimensions of competition that may be likely to result from the merger: *Tervita SCC*, above, at para 45; *Tervita CT*, above, at para 375; *P&H*, above, at para 467. In conducting that evaluation, the Tribunal may sometimes employ the term "price" as shorthand for all dimensions of competition: *Tervita SCC*, above, at para 44.

[136] With respect to magnitude, or degree, the Tribunal generally assesses the likely effect of a merger on both price and non-price dimensions of competition. It also considers the overall economic impact of the merger in the relevant market. Insofar as prices are concerned, the Tribunal focuses upon whether they are likely to be materially higher than in the absence of the merger. In conducting its assessment, the Tribunal has not found it useful to apply rigid numerical criteria, such as a 5% difference in prices. Instead, the magnitude required to establish a material price increase will depend on the facts of each case. Insofar as non-price dimensions of competition are concerned, the Tribunal's focus will be upon whether levels of service, quality, variety, innovation, etc., are likely to be materially lower than in the absence of the merger: *Tervita SCC*, above, at paras 54 and 80-81; *Tervita CT*, above, at paras 376-377; *P&H*, above, at paras 468-470.

[137] Regarding scope, the Tribunal typically considers whether the merged entity would likely have the ability to impose such effects in a material part of the relevant market, or in respect of a material volume of sales.

[138] Turning to duration, the Tribunal will ordinarily evaluate whether the merged entity would likely have the ability to sustain a material price increase, or a material reduction in non-price benefits of competition, for approximately two years or more, relative to the "but for" scenario: *Tervita CT*, above, at para 379.

[139] If the requisite magnitude, scope, and duration are not demonstrated to be *likely*, the Tribunal will generally conclude that the "substantiality" requirement is not met, even if there is likely to be *some* non-substantial prevention or lessening of competition: *P&H*, above, at para 458.

[140] It bears underscoring that what matters is the *ability* of the merged entity – unilaterally or interdependently with one or more of its rivals – to exercise a materially greater degree of market power than "but for" the merger. It is not necessary for the Tribunal to find that such market power is, in fact, likely to be exercised in relation to price or non-price dimensions of competition: *Tervita SCC*, above, at paras 44, 51, and 80-81; *P&H*, above, at para 473.

[141] The burden of establishing that a merger is likely to prevent or lessen competition substantially falls on the Commissioner: *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28, at paras 107-108 ("***Tervita FCA***"). To satisfy that burden, the Commissioner must establish this likely effect of the merger, as well as the "but for" counterfactual, on a balance of probabilities, and with clear and convincing evidence: *P&H*, above, at para 476. For the purposes of section 92, the Commissioner is not required to go further and quantify the overall "deadweight loss" to the Canadian economy: *Tervita SCC*, above, at para 166.[12]

[142] Pursuant to subsection 92(2) of the *Competition Ac*t, the Tribunal is not permitted to find that a merger lessens, or is likely to lessen, competition substantially solely on the basis of evidence of concentration or market share.

[143] Consequently, it is necessary to consider qualitative assessment factors. As previously noted, a non-exhaustive list of factors that the Tribunal may consider is set forth in section 93 of the *Competition Act*. For the present purposes, the relevant section 93 factors are discussed in Parts X.B.(8)-(12) below.

(2) Summary of the Commissioner's allegations

[144] The Commissioner alleges that the Merger and Divestiture are likely to prevent and lessen competition substantially.

[145] Regarding the alleged substantial *prevention* of competition, the Commissioner maintains that Shaw (i) has a track record as a maverick disruptor and innovator; (ii) was on a growth trajectory until the Merger announcement; (iii) had plans to purchase 3500 MHz spectrum and begin offering 5G services; (iv) had network expansion plans; and (v) was poised to enter into other markets, such as business services. The Commissioner states that the Merger would prevent this future competition, such that competition would likely be substantially prevented.

[146] With respect to the alleged substantial *lessening* of competition, the Commissioner asserts that this is likely to result from the elimination of close competition between Shaw and Rogers, as well as from the removal of Shaw as a disruptor of price coordination in the relevant markets.

(3) The relevant markets

(a) Product market

[147] In his Application, the Commissioner defined two relevant markets for the purposes of this proceeding, namely, the provision of wireless services to (i) consumers; and (ii) business customers. However, at paragraph 9 of his Written Opening Statement, the Commissioner stated that he was no longer alleging a substantial prevention or lessening of competition in the latter market. The Commissioner confirmed this position at paragraph 10 of his Final Written Argument.

[12] This contrasts with the Commissioner's burden in relation to the efficiencies defence under section 96 of the *Competition Act*.

[148] For the purposes of this proceeding, the Respondents do not contest that the sole relevant product market is the provision of wireless services to *consumers*. Nevertheless, they maintain that there are important aspects of differentiated competition, such as bundled offerings, which impact competition for wireless services to non-business consumers. The Tribunal agrees. This will be further discussed later in these reasons.

[149] It appears to be common ground between the parties that the term "wireless services" has the meaning described at paragraph 3 of the Commissioner's Application, namely, "those services provided over a radio network permitting both voice and data communication (including text messaging, internet and mobile application services) without being tethered to a fixed location." This will be the meaning ascribed to the term "wireless services" in the analysis below.

[150] In summary, the sole relevant product market for the purposes of the present analysis is the provision of wireless services to consumers.

(b) Geographic markets

[151] In his Application, the Commissioner defined three relevant geographic markets, namely, the provinces of British Columbia, Alberta, and Ontario. However, at the outset of the hearing of the Application, he conceded that the Divestiture would ensure that competition is not likely to be prevented or lessened *substantially* in Ontario. The trial then proceeded on the basis of that understanding.

[152] For the purposes of this proceeding, the Respondents do not contest the Commissioner's approach to defining relevant markets at the provincial level. However, they note that there are important aspects of competition that transcend provincial boundaries. These include (i) the reduced dependency on roaming that Freedom and Videotron will enjoy as a result of the Divestiture; (ii) the marginal cost savings that will be realized by Videotron, and (iii) the introduction of new bundled competition by Videotron. The Tribunal agrees with the first two of these points and does not understand the third. This will be further discussed later in this decision.

[153] In summary, the two relevant geographic markets for the purposes of the present assessment are the provinces of British Columbia and Alberta, respectively.

(4) The relevant "but for" counterfactual

(a) The general framework

[154] As discussed at paragraphs 126-129 above, the assessment of whether a proposed merger is likely to prevent or lessen competition involves comparing the state of competition if the merger proceeds with the state of competition that is likely to prevail "but for" the merger. Given the forward-looking nature of this assessment, it is important to consider any evidence relating to the future trajectory of the market and its participants. This is required to enable the Tribunal to assess whether the merged entity will likely have the ability to increase prices, or to reduce meaningful dimensions of non-price competition, relative to levels that would likely prevail "but for" the merger.

[155] The Commissioner maintains that the relevant date for the commencement of the forward-looking "but for" analysis is the date upon which Rogers and Shaw executed their Arrangement Agreement, namely, March 13, 2021. The Commissioner asserts that to hold otherwise would incentivize actions designed to wear down or diminish competitors before adjudication is possible.

[156] The Respondents disagree. They characterize the approach suggested by the Commissioner as amounting to a legally untenable "backward-looking" approach. They submit that such an approach would preclude the Tribunal from fully assessing all relevant factors, including what has happened since March 13, 2021. In this latter regard, they note that the signing of the Arrangement Agreement precluded Shaw from participating in the 3500 MHz spectrum auction and that Freedom's business has steadily weakened.

[157] The Tribunal agrees with the Commissioner's position on this issue. Where the execution or announcement of a merger agreement leads to changes in the behaviour of the merging parties, or to a weakening of the party to be acquired, for example, as a result of the departure of customers or employees, the appropriate date *for the commencement of* the forward-looking "but for" analysis is the date of the execution or announcement of the merger agreement. The same is true where the execution of the merger agreement has another important impact on competition. In this case, such an impact was Shaw's ineligibility to participate in the auction for the 3500 MHz set-aside spectrum.

[158] Shaw knew full well that its execution of the merger agreement would have this effect. Accordingly, this was analogous to a "self-inflicted wound." For the purposes of the "but for" analysis, Shaw cannot have the benefit of this. Nor can it have the benefit of any weakening of Freedom or Shaw Mobile that resulted from the departure of employees, customers, suppliers, etc., *due to* the proposed merger.

[159] In these circumstances, the proper approach to the assessment of the likely state of affairs in the counterfactual "but for" world is to determine the *likely trajectory* of Shaw Mobile and Freedom if the Respondents had not signed their Arrangement Agreement. In assessing that likely trajectory, the Tribunal will consider any evidence of likely changes to prices or non-price behaviour that has been adduced in this proceeding.

[160] Ultimately, the burden is on the Commissioner to establish the relevant parameters of the "but for" counterfactual, including the prices or the approximate range of prices that likely would have been offered by Shaw Mobile and Freedom "but for" the execution of the Arrangement Agreement between Shaw and Rogers: *Tervita CT*, above, at paras 59 and 125.

[161] Once a determination of the relevant parameters of the "but for" counterfactual has been made, the Tribunal will then assess whether prices will likely be materially higher than those in that counterfactual if the Merger and the Divestiture proceed. The Tribunal will also assess whether the benefits of non-price competition will likely be materially lower than they would likely be in the "but for" counterfactual, if the Merger and the Divestiture proceed.

(b) Assessment

(i) Prices

[162] During the hearing, the focus of the parties' submissions regarding prices in the "but for" counterfactual world was upon Shaw Mobile's prices. The Commissioner maintained that Shaw Mobile's prices would not likely have increased "but for" the execution of the Arrangement Agreement between Rogers and Shaw on March 13, 2021. Dr. Miller supported this position.

[163] For the reasons set forth below, the Tribunal has concluded that the Commissioner has not met his burden of establishing the relevant "but for" price with respect to Shaw Mobile's offerings. Stated differently, he has not demonstrated that Shaw Mobile's prices would likely have remained the same between March 13, 2021 and the present time. Indeed, Shaw has demonstrated, on a balance of probabilities and with clear and convincing evidence that the prices of Shaw Mobile's various offerings on March 13, 2021 were introductory in nature and likely would have increased prior to now.

[164] Shaw Mobile was launched on July 30, 2020, just prior to the busy "back to school" season and the annual launch of Apple's latest iPhone. At that time, Shaw Mobile had three offerings: (i) $0 for talk and text only, with the option to pay $10 per GB of data (which could be rolled over from month to month until that limit was reached); (ii) $45 for "unlimited" calling in Canada and 25GB of data; and (iii) $55 for "unlimited" calling in Canada, the U.S., and Mexico. The latter two plans included 2GB of nationwide roaming.

[165] Mr. McAleese testified that this pricing was always intended to be introductory in nature: Transcript, at 2880; Exhibit CA-R-0192, at para 253; Exhibit CA-R-0195, at para 94. This is corroborated by a document prepared for a conference call with market analysts in connection with Shaw Mobile's July 30, 2020 launch: Exhibit CA-R-192, Exhibit 95, Among other things, that document characterized the pricing of Shaw Mobile's offerings as being "intro pricing" that would be available "for a limited time." The document reiterated that message in the following statement: "Shaw Mobile pricing is 'introductory' for an undetermined period as we see how competitors react". The document then proceeded to state, "Post intro period, segmentation will inform wireless offers depending on the level of wireline services subscribed to." Part of the uncertainty in this regard was attributable to the COVID-19 pandemic, which had resulted in reduced "store traffic/activity levels."

[166] The link with the wireline side of Shaw's business was reinforced through messaging that underscored that "pricing is anchored in the wireline bundle" and that one of the key objectives was to "reduce broadband churn." Shaw's messaging explained that it aspired to protect its "50/50" split of broadband Internet subscribers with Telus, by "get[ting] 50% of net new broadband adds." Pricing for standalone wireless services was at "market rates", also referred to as "rack rate pricing", namely, $15 for talk and text, $85 for "unlimited", and $95 for "unlimited U.S. and Mexico": Exhibit CA-R-0192, Exhibit 95. A number of analyst reports issued on Shaw Mobile's launch date reflect that Shaw's messaging regarding the "introductory" nature of Shaw Mobile's offerings was in fact delivered.

[167] In late October 2020, Shaw launched an additional offering, while maintaining the prices of its existing plans. That new offering consisted of unlimited roaming within Canada and 25GB of data for $25. This offering was exclusively for customers who subscribed to Shaw's fastest and most expensive wireline Internet plan at the time, known as "Fibre + Gig." At that time, Shaw Mobile also launched what it called 9-box pricing, reflected in the nine boxes in the table below:

October 2020 Shaw Mobile Pricing				
Plan	Mobile Only	Internet Subscriber	Fibre+ Gig Subscriber	
By The Gig	$15	$0	$0	
25 GB Canada	$85	$45	$25	
25 GB U.S./Mexico	$95	$55	$35	

[168] The pricing in the table immediately above did not change until November 16, 2021, when Shaw Mobile introduced its "Fibre + Gig 1.5" mobile-only plan at $0. At the same time, Shaw Mobile implemented what amounted to a price increase for (i) the two bundled offerings in the first row of the table above, and (ii) the "Fibre + Gig" option in the second row.[13] However, those price increases appear to have been designed to incentivize customers to purchase the new "Fibre + Gig 1.5" product, in order to be eligible for the wireless offer of $0 in the "By the Gig Plan" and $25 in the "Unlimited $25GB Canada" plan. To the extent that this initiative was an extension of the strategy previously adopted, it appears that Shaw Mobile implemented its "price increase" in the ordinary course of business.

[169] The Commissioner maintains that this price increase resulted from a change in strategy, from "growth" to "steady state," pending the completion of the Merger. In support of this position, the Commissioner relies on internal Shaw documents that refer to that shift, both in those terms and in a diagram depicting a shift from the passing lane to the middle lane on a highway. Some of those documents refer to an internal expectation that "continued consumer softness" would be associated with this change in strategy.

[170] However, one of those internal documents, which was delivered to Shaw's Board of Directors on October 28, 2021, stated that one of Shaw's strategic objectives for fiscal 2022 was to "deliver a healthy business" to Rogers. It also explained that an objective of the "middle lane" strategy was to "balance growth and profit." An internal e-mail to Mr. McAleese from Ms. Sara Murray, Vice President of Commercial Finance, dated July 29, 2021, also identified this objective: Exhibit CA-R-0195, Exhibit 32. The purpose of that e-mail was to identify a number of options for improving Shaw's contribution margin. One of those options was to increase Shaw Mobile pricing. The e-mail indicated that this would increase the contribution margin by [redacted], after taking account of reduced sales. On cross-examination, Dr. Miller conceded that if Shaw's decision to increase prices was profit-maximizing, that decision would have been made regardless of whether the Merger was happening: Transcript, at 1656-1657.

[13] The price increases were for the two internet plans in the first row, and the "Fibre + Gig" column in the middle row. The prices in the "Mobile Only" column of those two rows were left unchanged. It is not clear if any changes were made to the "U.S./Mexico" offerings in the third row.

[171] Mr. McAleese maintained that Shaw began discussing plans to increase the prices of its Shaw Mobile offerings well before the Merger was contemplated. In support of this position, he attached to his Reply Witness Statement an internal Shaw e-mail, dated October 9, 2020, which discussed two options, namely: (i) introducing 12-box pricing with a price increase on select customers (namely, those paying less than $100/month); and (ii) introducing simpler 9-box pricing with a discount for one group of customers and no change in pricing for others: Exhibit CA-R-0195, Exhibit 22. He also attached a slide deck entitled "Shaw Mobile 9/12 Box Introduction," dated October 13, 2020, which included a chart for future 12-box pricing that contained the letters "TBA" in five of the boxes. That indicated that the prices remained to be announced: Exhibit CA-R-0192, Exhibit 121. No further evidence was adduced to corroborate Mr. McAleese's position that price increases were planned well before the Merger. Mr. McAleese acknowledged on cross-examination that he was not aware of any other evidence in support of his position: Transcript, at 3014-3015.

[172] Mr. McAleese explained that "there was little point in discussing the specifics" of price increases until Shaw's IT department found a way to integrate Shaw's wireless pricing into the eligible wireline rate plan for the purposes of Shaw's billing system: Transcript, at 3006 and 3015. The ongoing work in that regard was corroborated in one of the documents attached to his Reply Witness Statement: Exhibit CA-R-0195, Exhibit 26, at 2.

[173] Mr. McAleese attached another document to his Witness Statement, entitled "Virtual SLT Retreat, Pre-Read Materials," dated November 4, 2020, which reported that approximately [redacted]% of Shaw Mobile's customers had opted for the "By the Gig" plan, meaning that they were on $0 plans: Exhibit CA-R-0192, Exhibit 104, at 22. Mr. McAleese noted that this did not translate into long-term business success for Shaw.

[174] Parenthetically, the document discussed immediately above also described Shaw Mobile's initial pricing as being "introductory": Exhibit CA-R-0195, Exhibit 104, at 20. Mr. Rod Davies of TD Securities also testified that his team understood from Shaw's management that Shaw Mobile's pricing was introductory and could not be sustained indefinitely: Exhibit CA-R-190, at para 37.

[175] Notwithstanding Mr. McAleese's statement regarding the longer-term implications of Shaw Mobile's pricing, the Commissioner maintained that Shaw Mobile's introductory pricing was profitable. In this regard, he referred to an internal Shaw document that described how [redacted] Customer Lifetime Value ("**CLV**") [redacted]: Exhibit CA-A-0594, at 53. That same document forecasted "[redacted],"[14] but noted that the [redacted]": Exhibit CA-A-0594, at 38 and 44. It also indicated that [redacted]: CA-A-0594, at 38 and 44.

[176] In response to the Commissioner's emphasis on the document described above, Mr. McAleese explained that the CLV and churn data in question were not realistic, because they

[14] ARPU is an acronym for average revenue per user.

reflected the fact that most people were working from home (due to COVID-19) and so were signing up for enhanced wireline packages and unwilling to take the risk of a multi-day disruption that might be associated with changing wireless providers: Transcript, at 3119-3120. The Tribunal considers this explanation to be persuasive.

[177] In addition to the foregoing, the Commissioner referred to a [redacted]: Exhibit CA-R-0190, Exhibit 1, at 124.[15]

[178] In another document sent to TD Securities during its review, Shaw projected that Shaw Mobile would continue to grow its subscriber base [redacted]: Transcript, at 2987.

[179] Despite the foregoing, Mr. Davies of TD Securities testified that [redacted]: Transcript, at 2838-2839. Mr. Davies added, “[redacted]”: Transcript, at 2849.

[180] Considering all of the foregoing, the Tribunal finds that the Commissioner has not met his burden of establishing, on a balance of probabilities with clear and convincing evidence, that “but for” the execution of the Arrangement Agreement, the prices of Shaw Mobile’s offerings would likely have remained essentially unchanged from those that existed on March 13, 2021. In particular, he has not established that the November 2021 increase of some of Shaw Mobile’s prices was attributable to the execution of the Arrangement Agreement.

[181] The Tribunal finds that Shaw has demonstrated that the price increases it implemented in November 2021 occurred in the ordinary course of business. The Tribunal accepts that Shaw implemented these price increases both as part of Shaw Mobile’s original plan to enter the market with a lower “introductory” price that would eventually be increased, and as part of a subsequent plan to increase Shaw Mobile’s profitability.

[182] The Tribunal notes that during the trial, the Commissioner’s counsel pressed one of Videotron’s witnesses to concede that “[redacted]: Transcript, at 2244, (emphasis added). Counsel added, “[redacted] Transcript, at 2251 (emphasis added). After the Tribunal pointed this out during final submissions, the Commissioner suggested that the exchange in question related to wireline pricing. However, it is clear from the context reflected on page 2244 of the Transcript that the exchange in question pertained to Shaw Mobile. More generally, the Tribunal notes that raising

[15] ABPU is an acronym for average billing per user.

prices that are offered during the entry period is a very common practice, especially when such pricing is explicitly characterized as being "introductory" in nature.

[183] Insofar as Freedom is concerned, and in the absence of any material submissions regarding the likely evolution of its prices "but for" the merger, the Tribunal is prepared to treat the prices that prevailed immediately prior to the execution of the Arrangement Agreement as the appropriate counterfactual benchmark for the purposes of this proceeding.

(ii) Non-price competition

[184] In the Commissioner's Application, it is alleged that "but for" the Merger, Shaw likely would have continued growing in competitive significance, including by expanding and upgrading its network to 5G. In this latter regard, the Commissioner alleged that Shaw planned to participate in the 3500MHz spectrum auction and to launch 5G in key markets, such as [redacted].

[185] The Tribunal agrees that "but for" the Merger, Shaw likely would have participated in the 3500 MHz auction. Based on Mr. McAleese's statements that Shaw expected to be able to acquire 3500 MHZ spectrum in that auction and that Shaw was confident in that regard, the Tribunal accepts that "but for" the execution of the Arrangement Agreement, it is more probable than not that Shaw would have been successful in that auction, at least to a significant extent.[16] In reaching this finding, the Tribunal also considered that [redacted]: Exhibit CA-R-190, at Exhibit 1, at 6. Success in that auction would have enabled Shaw Mobile to eventually launch full 5G service. In the meantime, Shaw would likely have proceeded with its plans to launch 5G "lite" service, pending the auction and the various steps it would have had to take to launch a "full" 5G service with 3500 MHz spectrum.

[186] As it turned out, Shaw's plans to pursue the launch of its 5G "lite" service, using its existing 600 MHz spectrum, "changed with the execution of the Arrangement Agreement." Mr. McAleese explained that this was because Shaw would no longer be eligible to bid for 3500 MHz spectrum that was "set aside" for regional competitors. Without the ability to obtain such spectrum, Shaw made a decision not to launch its 5G "lite" service because it did not want its customers to "buy a product that was never going to step up the way our peers' experience was going to do": Transcript, at 2876-2877.

[187] Given this finding, an important aspect of the Tribunal's assessment of the Divestiture will be upon whether Videotron would likely launch "full" 5G service within approximately two years of when Shaw Mobile would likely have done so, in essentially the same areas. The Tribunal will also assess the extent to which Videotron likely would launch an intermediate 5G "lite" product in the relevant time frame.

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[16] The Tribunal recognizes that the results of spectrum auctions are inherently difficult to predict. While Shaw was optimistic and well positioned financially, it may well have failed to obtain all of the spectrum it sought in the auction.

[188] For greater certainty, in comparing the "but for" counterfactual world in which Shaw planned to participate in the 3500MHz auction with what is likely to occur if the Merger and Divestiture proceed, the issue of whether Shaw is likely to obtain 3500 MHz or 3800 MHz spectrum if the Merger and Divestiture do not proceed is not relevant. This is because Shaw was well aware, at the time it entered into the Arrangement Agreement with Rogers, that one of the consequences would be that it would not be able to participate in the "set-aside" auction for 3500 MHz spectrum: see para 186, above.[17]

[189] The Tribunal pauses to observe that despite Shaw's inability to benefit from this adverse consequence in the Tribunal's assessment of the "but for" counterfactual, the Tribunal will consider the fact that Videotron obtained the 3500 MHz spectrum that Shaw had hoped to obtain, in its assessment of the likely effect of the Merger and Divestiture. The Tribunal will also consider the very significant competitive initiatives that Bell and Telus have undertaken in the wake of the announcement of the Merger and Divestiture.

[190] With respect to other aspects of Shaw's expansion in the relevant "but for" world, the Commissioner's Final Written Argument referred to evidence which demonstrates that Shaw had plans to expand its wireless footprint into [redacted].

[191] Once again, the Tribunal will assess Videotron's plans against this evidence in coming to its determination. However, in considering the weight to give to that evidence, the Tribunal will bear in mind that the Commissioner did not cross-examine any of Shaw's witnesses regarding that evidence. Instead, the Commissioner simply asked Mr. McAleese to confirm that Shaw "had plans on the drawing board to continue [its] geographic expansion": Transcript, at 2907. Mr. McAleese responded in the affirmative.

[192] The Tribunal will also take into account Rogers' plan to expand high-speed connectivity to several areas in Western Canada, as part of a $1 billion commitment it has made to expand rural service if the Merger and Divestiture proceed: Exhibit CB-R-0207, at paras 12-13 and 21.

[193] In addition, the Tribunal will consider the extent to which Shaw likely would have continued to commit the very large investments it has been making since 2016, to grow and expand its wireless business.

(5) Market shares and concentration

(a) Introduction

[17] In any event, given the importance of 5G, [redacted], the Tribunal considers that it is more probable than not that Shaw would use the proceeds of the "break fee" that is provided for in the Arrangement Agreement, to obtain 3500 MHz spectrum on the secondary market, or to obtain 3800 MHz spectrum in the upcoming auction.

[194] Market shares and the level of concentration in a relevant market can be helpful indicators of the likely impact of a merger. The same is true with respect to changes in market shares and the level of concentration. However, as previously noted, subsection 92(2) of the *Competition Act* provides that the Tribunal shall not find that a merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of market share or concentration. Such evidence is therefore generally only the starting point in the post-market definition stage of the Tribunal's assessment of a merger or proposed merger.

[195] The MEGs state that "[i]n the absence of high post-merger market share and concentration, effective competition in the relevant market is generally likely to constrain the creation, maintenance or enhancement of market power by reason of the merger": MEGs, at para 5.8. The Tribunal agrees with this statement.

[196] Having regard to the foregoing, the MEGs articulate what are colloquially known as "safe harbour" thresholds "to identify and distinguish mergers that are unlikely to have anti-competitive consequences from those that require a more detailed analysis": MEGs, at para 5.9. Those thresholds are (i) a 35% market share in relation to potential concerns related to the unilateral exercise of market power, and (ii) a four-firm concentration ratio ("**CR4**") of 65% in relation to potential concerns regarding the interdependent or coordinated exercise of market power – provided however, that a CR4 in excess of this threshold will generally not be challenged if the post-merger market share of the merged firm would be less than 10 %: MEGs, at para 5.9.

[197] The foregoing thresholds have remained unchanged for over 30 years: Director of Investigation and Research, *Merger Enforcement Guidelines* (March 1991), at para 4.2.1. To the extent that they have stood the test of time and provided helpful guidance to the Canadian public, the Tribunal considers that it is appropriate to embrace them to distinguish between mergers that are unlikely to prevent or lessen competition substantially and mergers that require additional analysis: see also *P&H*, above, at paras 567-569.

[198] These thresholds can be helpful in the present proceeding.

(b) Assessment

[199] In his Application, the Commissioner provided market share and concentration data based on shares of subscribers ("**SOS**"). However, in his Written Opening Statement, he adopted a different measure, namely, share of gross additions ("**SOGA**") during a defined period of time. In support of that position, he noted that the MEGs state as follows:

> When a regulated or historical incumbent firm is facing deregulation or enhanced competition, shares based on new customer acquisitions may be a better indicator of competitive vigor than are shares based on existing customers.
>
> MEGs, above, at para 5.4

[200] Dr. Miller supported this approach, observing:

> The best approximation of "new customer acquisitions" that is available to me is the same measure that mobile wireless carriers often use to assess their

competitive success, their share of "gross adds." Gross adds are the new customers that a wireless carrier gains during a particular period of time.

Exhibit CA-A-0122, at para 61.

[201] Dr. Miller defended the SOGA approach on the basis that only a fraction of current subscribers update their wireless plans or switch carriers in any given month. Stated differently, a significant portion of a wireless carrier's installed customer base is not actively shopping in any given month. Consequently, Dr. Miller maintained that the SOGA during a particular period of time provides a better indicator of competitive vigor and future competitive significance of market participants than the SOS. He suggested that this would be particularly true for a new entrant such as Shaw Mobile, which has a small installed base, but a high SOGA. In his view, the SOGA is a good approximation of the choices made by customers that are actively shopping among the available competitive options in the market. He added that the Respondents themselves use data on gross additions ("**Gross Adds**") to measure their performance in the ordinary course of business: Exhibit CA-A-0122, at footnote 113.

[202] The Commissioner argued that a further reason why SOGA is superior to SOS as a measure of market share is that, to the extent that SOS implicitly includes customer decisions that were made far in the past, SOS is a poor reflection of customers' current choices and current competitive conditions, including new products.

[203] Having regard to the foregoing, Dr. Miller calculated the following market shares based on SOGA:[18]

Table 1 – Market Shares based on Gross Adds between January and April 2021					
Province	**Rogers**	**Shaw Mobile**	**Freedom**	**Bell**	**Telus**
Alberta	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
British Columbia	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Ontario	[redacted]		[redacted]	[redacted]	[redacted]

Source: Exhibit CA-A-0122, Exhibits 2 and 18.

[18] This data is reproduced from Exhibit 2 and Exhibit 18 to Dr. Miller's initial report, which also included SOGA data for Rogers and Shaw Mobile/Freedom combined, as well as more detailed brand-level data. Dr. Miller excluded new subscriptions to non-phone mobile service (e.g., connectivity for tablets), to allow for the possibility that adding a device to an existing consumer account may not reflect the same competitive situation as a new phone subscription for a consumer. He also excluded new subscriptions for business accounts that are distinguished from consumer accounts.

[204] Dr. Miller chose the period between January and April 2021 because it was the most recent period in respect of which the data he used to conduct his merger simulation was consistently available for all of the above-noted carriers.

[205] When Dr. Miller calculated diversion ratios based on the SOGA figures in Table 1 above, he found that they [redacted]: Exhibit CA-A-0122, at para 359 and Exhibit 34 at 171.

[206] As further discussed in the next section below, Dr. Miller's market share estimates based on the SOGA data reflected in Table 1 above played a crucial role in his merger simulations, which he relied on to estimate the price and welfare effects of the Merger and the Divestiture.

[207] Dr. Israel criticized the SOGA approach to calculating market shares on several grounds: Exhibit CA-R-1851, at paras 55-67. Generally speaking, he maintained that the use of SOGA data so soon after Shaw Mobile's launch inflates Shaw Mobile's current and ongoing competitive significance in Alberta and British Columbia. This is because a new product can be expected to get a burst of new subscribers who would have already purchased this product earlier had it been available. This is particularly so for a product that is significantly differentiated from existing products. In this context, using the new product's SOGA assumes that it will always maintain its "newness." In addition, a new product is often offered for a low introductory price that is not representative of its longer-term steady state price.

[208] Beyond the foregoing, Dr. Israel pointed out that SOGA does not capture the choices of all shoppers. Instead, it only captures the choices of shoppers who ultimately make a decision to switch brands. This fails to account for the many active shoppers who choose to stay with their existing brands. During cross-examination, Mr. Kirby stated the following, which suggests that the number of active shoppers who ultimately decide to stay with their carrier is approximately [redacted] times greater than the number who switch:

> [redacted]
>
> Transcript, at 954-955.

[209] This testimony corroborates Dr. Israel's position that using SOGA does not provide a reliable measure of the share of active shoppers, let alone all subscribers.

[210] Regarding the [redacted] between SOGA and the data concerning port-ins and port-outs between Rogers and Shaw, Dr. Israel explained that this should be no surprise because porting data captures the same thing as SOGA: short-term switching behaviour prompted by short specific competitive initiatives, such as Shaw Mobile's entry and Rogers' response.

[211] Using actual wireless subscriber data from the same period used by Dr. Miller to calculate his SOGA estimates, Dr. Israel calculated Shaw Mobile's "share of active shoppers" in Alberta and British Columbia under three alternate assumptions, namely (i) that all wireless subscribers shop every 12 months, (ii) that they shop every 24 months, and (iii) that they shop every 36 months. His results are set forth in Table 2 below:

Table 2: Illustration of Shaw Mobile Share of Shoppers Under Alternative Assumptions for Frequency of Subscriber Shopping

Frequency of Shopping by Existing Subscribers	Shaw Mobile Share of Active Shoppers	
	AB	BC
[redacted]		

Source: Prof. Miller's backup materials.

[212] In addition to the criticisms set forth above, Dr. Israel prepared the following three charts, based on more comprehensive data, to convey the shortcomings of Dr. Miller's SOGA estimates:

Figure 1: Shaw and Rogers gross adds in AB and BC, August 2020 – April 2022

[redacted]

Figure 2: Shaw Mobile's monthly market share growth, percentage points, July 2020 – March 2022

[redacted]

Figure 3: Shaw Mobile share of subscribers in AB and BC, July 2020 – April 2022

[redacted]

[213] Regarding Figure 3 immediately above, Dr. Israel maintained that there is no plausible scenario in which Shaw Mobile could bridge the gap between the solid lines at the bottom and the dotted lines at the top, in order to achieve the [redacted]%+ "market shares" reflected in SOGA data for the period July 2020 to April 2022. The Tribunal agrees.

[214] In reply, Dr. Miller noted that he agreed with Dr. Israel that it would not make sense to measure competitive significance shortly after a one-off event. He explained that this is why he excluded the first few months after Shaw Mobile's launch in July 2020. He maintained that his selection of the period between January and April 2021 best reflected Shaw's ongoing competitive significance after the initial months of particularly high subscriber additions. With respect to the longer period (July 2020 – April 2022) used by Dr. Israel, Dr. Miller asserted that this included price increases that were implemented in November 2021, after the Merger was announced, and therefore could not be interpreted as representing the competitive strength of Shaw Mobile before that announcement.

[215] Dr. Miller also acknowledged that an important shortcoming of the SOGA approach was the inability to observe how often active shoppers decide to remain with their existing carrier. Despite this, Dr. Miller continued to assert that although neither SOS, nor SOGA are perfect measures of market share, the likely errors associated with the latter are much more limited than that which is associated with SOS. As it turned out, Mr. Kirby's above-mentioned testimony on cross-examination significantly undermined Dr. Miller's position. To some extent, the same is true of Dr. Miller's own acknowledgement on cross-examination that the churn rate and the rate at which people shop are not the same thing: Transcript, at 1598.

[216] Elsewhere in his Reply Report, Dr. Miller noted that data regarding Rogers' post-paid subscribers in 2021 indicates that [redacted] Exhibit CA-A-0122, at footnote 15. This data shows that the percentage of Rogers' customers who are free to actively shop around for a better deal – and may well be doing so – [redacted]%). The absence of similar data for other carriers prevents the Tribunal from making a more general observation in this regard.

[217] In Reply to Dr. Miller, Dr. Israel maintained his position that market shares based on SOS provide a better reflection than SOGA of the "ongoing competitive significance" of Shaw Mobile and its competitors. As to the November 2021 price changes,[19] he asserted that Shaw's SOGA was on a downward path even before that time, and indeed before the announcement of the Merger. The sole exception was a short spike that other carriers also enjoyed in connection with the "back to school" season. This is reflected in Figures 1 and 2 of Dr. Israel's report above. It is also reflected in the following chart from Dr. Israel's presentation during the hearing, which simply made some additions to a similar slide contained in Dr. Miller's presentation.[20]

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[19] Dr. Israel also maintained that the November 2021 price increases implemented by Shaw Mobile were consistent with profit maximization on Shaw's part. That price increase is discussed at paragraphs 168-181 above.

[20] The adjustments consisted of the addition of the blue line, an extension of the horizontal dotted line beyond April 2021, and the reference to seasonal demand.

[redacted]

[218] Considering all of the foregoing, the panel finds that market shares based on SOS provide a better reflection than market shares based on SOGA, of the ongoing competitive significance of Shaw Mobile and the other market participants in the relevant markets. The panel reaches this finding essentially for the reasons given by Dr. Israel. Nonetheless, the panel accepts that market shares based on SOS somewhat understate Shaw Mobile's competitive significance, though nowhere near to the extent suggested by Dr. Miller.

[219] The Tribunal pauses to observe that Dr. Miller appears to have recognized that data extending beyond the January – April 2021 period that he used for his SOGA calculations would have been helpful. To this end, he made a request for additional Bell and Telus data extending beyond that period. The Tribunal found it very surprising that, on cross-examination, he could not recall who he asked or when he made his request, and he did not know why he did not ultimately receive that data: Transcript, at 1548.

[220] Although the evidence reveals that market participants often use SOGA, it equally establishes that SOS is more frequently used when discussing market shares. SOGA appears to be more commonly used to track the impact of specific promotions or other initiatives, or to track what is happening on a very short-term basis. In this regard, the Tribunal accepts Dr. Israel's testimony that "Gross Adds along with churn … can be looked at together in certain contexts to see how things are changing, but it is not a correct measure of market share": Transcript, at 4527.

[221] The Tribunal notes that the CRTC also reports market shares based on SOS: see for example, Exhibit P-A-0241.

[222] Having regard to its conclusion that SOS is the appropriate basis upon which to calculate market shares, the Tribunal accepts the following shares calculated by Dr. Israel:

Table 3 – Market Shares based on March 2022 Share of Post-paid Subscribers					
Province	**Rogers**	**Shaw Mobile**	**Freedom**	**Bell**	**Telus**
Alberta	19.4%	6.8%	7.0%	19.7%	47.1%
British Columbia	33.6%	6.5%	6.7%	15.0%	38.2%
Ontario	42.5%		12.4%	26.1%	19.1%

Source: Exhibit CA-R-1851, at Table 3.

[223] The total market shares for Alberta, British Columbia, and Ontario (in each row) sum up to 100 because Dr. Miller and Dr. Israel excluded smaller competitors, who collectively account for a tiny market share. The Tribunal considers that the exclusion of those smaller competitors does not have a material impact on its assessment of the likely impact of the Merger and Divestiture.

[224] Based on the foregoing market shares, the post-Merger CR4 would be 100% in each of the above-noted provinces. The post-Merger CR3 for Rogers, Telus, and Bell (the "**National Carriers**) combined would be 93% in Alberta, 93.3% in British Columbia, and 87.6% in Ontario.

[225] Unfortunately, Dr. Israel did not include pre-paid subscribers in his market share estimates. This was because he focused on Dr. Miller's eight-brand simulation, which was confined to the post-paid brands of the above-noted market participants,[21] and which Dr. Miller considered to be superior to his 11-brand simulation (that included the pre-paid brands of Bell, Rogers and Telus):[22] Exhibit CA-R-1854, at para 48; Exhibit CA-A-0122, at para 177; Transcript, at 4668.

[226] The exclusion of pre-paid subscribers from the market share estimates provided above is not likely to have a material impact on the Tribunal's analysis. This is because Shaw Mobile does not have pre-paid subscribers, and Freedom only has a modest number of pre-paid subscribers in Alberta and British Columbia.[23] Accordingly, the shares attributed to Shaw Mobile in Table 3 above are *higher* than they would be if pre-paid subscribers had been included, while the shares attributed to Freedom are, at most, marginally lower. Given that Videotron has no subscribers in Alberta and British Columbia, the combined market share of Videotron and Freedom would in any

[21] The eight brands comprise two brands for each of Rogers (Rogers Wireless & Fido), Bell (Bell Wireless & Virgin Mobile), Telus (Telus Wireless & Koodo) and Shaw (Shaw Mobile and Freedom).

[22] The three additional pre-paid brands included in Dr. Miller's 11-brand model are Chatr (Rogers), Public Mobile (Telus) and Lucky (Bell).

[23] The total number of Freedom pre-paid subscribers as of May 31, 2022 was only [redacted] in Alberta and [redacted] in British Columbia. The corresponding figure for Ontario is [redacted]: Exhibit CA-R-0192, at Exhibit 72. According to Mr. Verma, Freedom has a higher percentage of pre-paid subscribers, relative to its competitors: Transcript, at 429. The Tribunal understood this statement as applying to Ontario, where Mr. Verma owns 15 Freedom stores. Accordingly, the exclusion of pre-paid subscribers from Table 3 above likely has the effect of understating Freedom's market share in that province.

event fall well below the 35% threshold that distinguishes mergers that are unlikely to prevent or lessen competition substantially from those that require further analysis.

(6) Predicted price effects

[227] Dr. Miller estimated that the Merger and Divestiture are likely to result in weighted average price increases in the range of 0.8% to 3.4% in Alberta and 2.5% to 5% in British Columbia. In each case, the lower bound of the range represents the weighted average price increase for the eight post-paid brands mentioned above, whereas the upper bound represents the weighted average price increase for all 11 post-paid and pre-paid brands combined. As noted above, Dr. Miller considered his estimates in relation to the eight post-paid brands to be superior to his estimates in relation to all 11 brands: Exhibit CA-A-0122, at para 177.

[228] Dr. Miller considered his estimated weighted average price increases to be conservative. Among other things, he believed that he adopted a generous approach to the classification of variable costs, which reduced the level of the margins that would otherwise have been inputted into the model: Transcript, at 1727. He also believed his model understated the extent of diversion between Rogers and Shaw: Transcript, at 1751.

[229] In running his eight and 11 brand simulations, Dr. Miller used a unilateral effects model with two parts: the logit demand system, which describes the behaviour of consumers, and the Nash-Bertrand market equilibrium, which describes the behaviour of firms. The four key inputs into that model were market shares (calculated in terms of SOGA), markups (obtained from Rogers and Shaw), prices (as measured by ARPU), and market elasticities (obtained from mainly primarily academic literature): Exhibit CA-A-0122, paras 152-167 and 251.

[230] Dr. Israel maintained that Dr. Miller's estimates of price increases (and corresponding welfare effects) were substantially overstated for several reasons, and therefore unreliable. But before addressing those reasons during the hearing, he observed that models, such as the one Dr. Miller used for his analysis, will always predict a price increase. In his experience, and given the low level of weighted average price increases reported by Dr. Miller, Dr. Israel opined that Dr. Miller's model is "finding very little": Transcript, at 4449-4450. He added that the model's prediction of price increases for Bell and Telus was not consistent with the evidence, indicating that those carriers "seem to be reacting to the transaction as though they need to compete more aggressively … [rather than]… pull[ing] back with a price increase": Transcript, at 4450.

[231] Turning to Dr. Israel's more specific critiques of Dr. Miller's estimated price effects, he maintained that Dr. Miller ought to have used SOS data, rather than SOGA data, to calibrate his model. To the extent that Dr. Miller's SOGA estimates were more than [redacted] higher than Shaw Mobile's actual SOS-based market shares ([redacted]% versus 6.8% in Alberta and [redacted]% versus 6.5% in British Columbia)[24], this had the effect of "overstat[ing] by a large amount any prediction of harm": Transcript, at 4451. This is because the model assumes that diversion is proportionate to market share: Exhibit CA-R-1851, at para 52. Therefore, increased market shares produce increased diversion ratios.

[24] See Tables 1 and 3 above.

[232] As noted at paragraph 210 above, Dr. Israel was not surprised that the SOGA [redacted] the port-in and port-out data that he had available because the latter data [redacted] as SOGA data: short-term switching behaviour prompted by short, specific competitive initiatives. However, he underscored that port-in and port-out data cannot be used to validate diversion ratio estimates. This is because "diversion ratios measure the degree to which buyers would substitute to other products <u>in response to a price or quality change</u>" (emphasis added), whereas "switching rates capture all consumer movements between products, including those that have nothing to do with price or quality changes": Exhibit CA-R-1851, at footnote 38; Transcript, at 4463-4464. Dr. Israel added that, in some situations, porting data can reflect "pull" factors such as Shaw Mobile's entry with its new bundled product, whereas diversion ratios measure the "push" factor associated with a price increase that causes customers to switch to another service provider: Transcript, at 4465-4466.

[233] In Reply, Dr. Miller maintained, as he did with respect to his use of SOGA data to calculate market shares, that this data was superior to SOS data. As with the explanation he provided in that context, the Tribunal once again finds his position to be unpersuasive.

[234] Dr. Israel's second principal critique of Dr. Miller's estimated price effects is that it ignored the fact that some customers appear to prefer to bundle wireless services with their purchases of wireline services. Dr. Israel observed that the failure to recognize such preferences, and indeed other preferences (such as for premium or non-premium products), is a well-known limitation of the flat logit model used by Dr. Miller. To the extent that Dr. Miller's model assumes that all products are equally close to each other, such that market shares determine diversion ratios, it overestimates diversion from Shaw Mobile's bundled customers to Rogers. This is because there are only two providers of bundled products in Alberta and British Columbia. Given this, people who prefer a bundle are more likely to switch between those two providers (Shaw Mobile and Telus). The panel considers that the fact that almost all of Shaw Mobile's wireless customers purchase their wireless services as part of a bundle would strongly suggest that this would be the case. Notwithstanding the emphasis that Dr. Miller placed on Shaw's bundling strategy in his report, and his recognition that the launch of Shaw Mobile would permit Shaw to compete more directly with Telus (including on bundled offerings), he omitted to adjust his model to account for consumer preferences for bundles.

[235] Dr. Israel suggested that the significance of Dr. Miller's failure to address such preferences was amplified by the fact that he did not account for the bundled product that Videotron plans to introduce either: Transcript, at 4471.

[236] Dr. Israel added that Dr. Miller ought to have adapted his flat logit model to better reflect the more realistic assumption that a consumer who has a bundled product is, all things being equal, more likely to switch to another bundled product than to a standalone wireless product. In this regard, he noted that Dr. Miller could have used a "nested" logit model, consisting of a nest for bundled products and a second nest for standalone products. Although Dr. Israel did not have a good empirical estimate of the proper value to use for the nest parameter, he demonstrated that even a moderate value, such as 0.25 (which implies only mild preferences for products in the two nests) has a large positive effect on the results produced by the model: Exhibit CA-R-1854, at paras 38-46.

[237] In Reply, Dr. Miller stated that Dr. Israel did not demonstrate that grouping products into predefined "nests" would significantly affect the results of the simulations he performed. During the hearing, Dr. Miller added that the inclusion of the two nests suggested by Dr. Israel would have artificially increased the diversion between Shaw Mobile and Telus, and artificially reduced the diversions between Shaw Mobile and Rogers. The Tribunal disagrees and accepts Dr. Israel's position that adapting Dr. Miller's model to account for bundling and indeed other consumer preferences (such as for premium or non-premium brands) would have better reflected market dynamics and would have produced more reliable results. The Tribunal accepts Dr. Israel's view that accounting for bundling would reduce the upward pricing pressure predicted by Dr. Miller's model. The Tribunal also accepts Dr. Israel's estimate of the significant impact that this would have had on Dr. Miller's estimates, using even the moderate 0.25 parameter that he relied on.

[238] The Tribunal pauses to add that, during the hearing, Dr. Miller appeared to suggest that he did not adapt his model to account for bundling on the demand-side because he sees the role of bundling as a supply-side consideration since it reduces churn: Transcript, at 1486. The panel considers that omitting to account for the demand-side role of bundling in this context was a significant shortcoming in Dr. Miller's model. It was also inconsistent with the inclusion of data that was intimately linked to the demand-side of bundling.

[239] Dr. Israel's third principal critique of Dr. Miller's estimates of price effects is that Dr. Miller failed to take into account the marginal cost savings that Freedom and Videotron will achieve pursuant to the Divestiture. Dr. Israel explained that, as a general principle, if the cost of providing a wireless service decreases, this will put downward pressure on prices and upward pressure on output. Yet, Dr. Miller ignored these effects in his merger simulations.

[240] Specifically, Dr. Israel noted that Dr. Miller did not account for the lower costs for Freedom subscribers to roam (i) in Quebec (where Videotron is based), (ii) elsewhere in Canada (where Freedom subscribers will benefit from the [redacted]% lower rate that Videotron has negotiated with Rogers), and (iii) internationally (in countries where Quebecor has negotiated rates that are lower than those currently paid by Freedom subscribers). In addition, Dr. Miller did not account for the fact that [redacted]. Indeed, he considered the [redacted] to be unrelated to the marginal costs associated with providing customers with wireless service.

[241] In Reply, Dr. Miller stated that when he incorporated into his model the predicted marginal cost savings "that have some foundation and relevance," he found that they did not materially change his conclusions: Exhibit CA-A-0125, at para 60. Unfortunately, he did not explain which marginal cost savings satisfied that test. Ultimately, the Tribunal accepts Dr. Israel's estimates of the impact of those cost savings on Dr. Miller's estimates of price effects.

[242] In addition to his three principal criticisms of Dr. Miller's estimates, Dr. Israel maintained that Dr. Miller's model generates unreasonable margins and marginal costs. In this regard, he noted that Freedom's accounting marginal cost in Alberta is $[redacted], yet Dr. Miller's model implies a marginal cost of $[redacted]. Dr. Israel stated that the mismatch between the cost used for calibration and the costs implied by the model means that the model does not remotely fit the data. He also pointed to figures with respect to Shaw Mobile's margins and implied marginal costs that he characterized as being "even more striking": Exhibit CA-R-1851, at para 77.

[243] In Reply, Dr. Miller asserted that by allowing for a calibration of relatively low marginal costs for Shaw's wireless products in Alberta and British Columbia, his model incorporated the bundling strategy adopted by Shaw, the revenue Shaw earns on its wireline products, and Shaw incentives. He added that he designed his model's "calibration routine to match the empirical markups of Rogers, Fido, and Freedom correctly *on average* in each of the relevant provinces": Exhibit CA-A-0125, at para 53. Once again, the Tribunal did not find these explanations to be persuasive. Among other things, more accurate margins and marginal costs would have improved Dr. Miller's estimates. The Tribunal considers that Dr. Miller's reliance on SOGA, rather than SOS, contributed to the calibration of unreasonably low marginal costs for Shaw and Freedom.

[244] In summary, the Tribunal finds that, after adapting Dr. Miller's model to address the shortcomings discussed above, Dr. Israel persuasively demonstrated that the model would not have predicted a material price increase in Alberta or British Columbia. In other words, the Tribunal finds that the Commissioner's quantitative evidence of predicted price effects of the Merger and Divestiture are not reliable and substantially overstated. The Tribunal agrees with Dr. Israel that Dr. Miller's predicted post-Merger price increases are highly doubtful, for the reasons set forth above. Overall, the Commissioner has not met his burden of establishing such effects. Nonetheless, the Tribunal will proceed to consider the qualitative factors under section 93 of the *Competition Act* that are relevant in this proceeding.

[245] The Tribunal observes that despite predicting a weighted average price increase of 0.8% in Alberta and 2.5% in British Columbia, Dr. Miller's model predicted that Freedom's prices in those provinces would be *reduced* by 17.3% and 15.1%, respectively.[25] His predicted weighted average price increase across all Bell and Telus brands in those provinces was only 0.2% and 0.3%, respectively. This is well below the "materiality" threshold.

[246] It bears underscoring that the only "material" predicted price increases were for Shaw Mobile (5.5% and 11.8% in Alberta and in British Columbia, respectively), Rogers (12.1% and 9.6%, respectively), and Fido (14.3% and 12.8%, respectively). The Tribunal is satisfied that once Dr. Miller's model is adjusted to address the shortcomings identified by Dr. Israel – which have a substantial impact on the diversion ratios between Rogers/Fido and Shaw Mobile – those predicted price increases also diminish below the materiality threshold.

(7) Closeness of competition between Rogers and Shaw

[247] The Commissioner alleges that Rogers and Shaw are each other's closest competitor and that the elimination of competition between them is likely to substantially lessen competition.

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[25] These predicted price increases were for Dr. Miller's 8-brand model, which focused on premium and flanker brands. Dr. Miller stated that he considered that model to be superior to his 11-brand model, which also included the pre-paid brands of Rogers (Chatr), Bell (Lucky) and Telus (Public Mobile). This was because the 8-brand model "appear[ed] to better match the data inputs as it is not required to reconcile the prices, market shares, and markups for an additional group of brands … that is somewhat differentiated from the other two groups … Accordingly, the 8-brand model is likely to deliver more informative predictions about the merger of Roger with a competitor that does not operate a prepaid brand": Exhibit CA-A-0122, at para 177. The weighted average price increases predicted in Dr. Miller's 11-brand model were only slightly higher than in his 8-brand model, namely, 3.4% for Alberta and 5.0% for British Columbia.

[248] In support of this allegation, the Commissioner maintains that industry porting data reflects a higher level of switching between Rogers and Shaw, compared to levels of switching between other firms.

[249] To the extent that some of the porting data relates to port-outs to Freedom, this evidence is favourable to Videotron, subject to the Tribunal's consideration of Videotron's ability to replace Shaw to the requisite degree. That will be discussed in the next section below. The Tribunal will adopt the same approach to the other evidence adduced by the Commissioner with respect to competition between Rogers and Freedom. In this section, the Tribunal will focus on the Commissioner's allegations of closeness between Rogers and Shaw Mobile.

[250] In Exhibit 4 to his initial report, Dr. Miller provides porting data that reflects a [redacted] of customer switching from Rogers to Shaw, and vice versa, in the period January – April 2021. More specifically, this data reflects that approximately [redacted]% of consumers in Alberta and British Columbia who ported out of Rogers chose to switch to Shaw; and that the port-outs from Shaw to Rogers were approximately [redacted]% for Alberta and [redacted]% for British Columbia. However, that data includes port-ins to Freedom and port-outs from Freedom. Data for Shaw Mobile alone was not provided.

[251] In Exhibit 33 to that report, Dr. Miller presented a chart showing that port-outs from Rogers to Shaw (i) spiked from close to [redacted], after the launch of Shaw Mobile, and (ii) remained higher than prior to that launch, albeit on a declining trend from the initial spike in August 2020 for the ensuing 16 month period, particularly after Shaw Mobile's price increase in November 2021.

[252] Dr. Israel testified that when a new product is launched, port-outs to that product tend to come from customers who are looking for something different. He added that the fact that Rogers does not have a bundle would help to explain why customers who are interested in a bundle would switch to Shaw Mobile. In his view, "That's not at all the same thing as closeness of substitution going forward or diversion": Transcript, at 4547-4548.

[253] The Tribunal agrees. Other evidence demonstrates that 97% of Shaw Mobile's customers also have Shaw Internet: Exhibit CA-R-0192, at para 292. Mr. Kirby added that, according to surveys conducted by Bell [redacted]. These statistics support the view that customers who port-in to Shaw are primarily persons who already have Shaw's internet service and are interested in a bundled offering.

[254] The Commissioner also referred to evidence that [redacted], in the month or so following Shaw Mobile's launch: see e.g., Exhibit CA-A-0474. With respect to Telus, this can be explained by the fact that Telus already had a bundled offering, so its mobile customers who were interested in such an offering did not have to switch carriers to avail themselves of the benefits of bundling. The explanation for the [redacted] is less apparent. In any event, this data was for a very short period of time, so it does not demonstrate long-term closeness between Rogers and Shaw Mobile, relative to Bell and Telus.

[255] The fact that Shaw Mobile accounts for a high percentage of Rogers' port-outs likely also reflects that Rogers has a disproportionate share of Shaw's wireline customers. The Commissioner recognized this fact, as well: Transcript, at 5002. Mr. Kirby also noted that approximately 60% of Rogers' wireless customers in the West are Shaw wireline households: Transcript, at 738.

[256] The [redacted] of Rogers' port-outs to Shaw also likely reflects that Rogers does not offer a bundled product in Alberta and British Columbia. Consequently, when Shaw Mobile began to offer a bundled product at an attractive price, those who were interested in a bundled offering and were not committed under a contract switched. Others then followed suit, perhaps as their contracts expired. The declining trend in such port-outs is not consistent with the Commissioner's theory of a longer-term relationship of particular closeness between Rogers and Shaw Mobile.

[257] Shaw's uncontested evidence is that Shaw Mobile has always been a wireline retention tool, designed to halt the steady loss of wireline customers to *Telus*. Shaw's internal documentation clearly reflects that it is Telus, rather than Rogers, that is Shaw's closest competitor, including for bundled offerings: see for example, Exhibit CA-R-0198, Exhibits 2 and 3; Exhibit CA-R-0190, at paras 32-36, 43, and Exhibit 1; Exhibit CA-R-0192, at paras 9 and 35-37; Exhibit CA-R-0165, at paras 101-111.

[258] The Commissioner also asserts that Rogers and Shaw have frequently targeted their marketing activities at one another. However, the evidence he cites in support of this statement simply demonstrates that Rogers was responding to new market initiatives, such as the launch of Shaw Mobile, as competitors often do: see, for example, Mr. Prevost's explanation of a particular document cited by the Commissioner, Transcript, at 3371. The evidence with respect to Shaw's targeting of Rogers largely relates to Freedom and does not establish any particular closeness between Rogers and Shaw Mobile to any sustained degree.

[259] In addition to the foregoing, the Commissioner alleges that [redacted]. However, the evidence he adduced in support of this allegation falls well short of establishing any particular closeness between Rogers and Shaw Mobile. One of the two documents relied upon by the Commissioner is an internal Rogers document that simply addresses [redacted] Exhibit CA-R-0212, Exhibit 38, at 18. The other document discusses initiatives directed towards both Shaw Mobile and Telus: Exhibit CA-R-0209, Exhibit 20, at 8.

[260] The Commissioner also alleges that, since the announcement of the Merger, Shaw has lost customers to Rogers. However, the evidence in this proceeding demonstrates that competitors regularly lose customers to each other. In the absence of something more, this is not evidence of sustained and particular closeness between Rogers and Shaw Mobile. The Tribunal pauses to observe that insofar as any diminishment of Shaw since the announcement of the Merger is relevant in the assessment of the Divestiture, it will be addressed later in these reasons.

[261] Finally, the Commissioner alleges that the closeness of competition between Rogers and Shaw is reflected [redacted]: CA-A-0864, at 8. This is not evidence of *closeness* of competition between Rogers and Shaw Mobile. It is simply evidence of [redacted].

(8) Barriers to entry (s. 93(d))

[262] In his Application, the Commissioner maintained that barriers to entry faced by a prospective provider of wireless services are high. He then identified several reasons why he believes this to be so.

[263] The Respondents do not agree that the factors identified by the Commissioner constitute high barriers to entry, particularly given the CRTC's MVNO regime. Nevertheless, for the purposes of this proceeding, the Respondents conceded that new entry on a scale sufficient to meet the test established in the Tribunal's jurisprudence is unlikely to occur within a two-year period following the Merger and Divestiture. In other words, the Respondents conceded that future entry is unlikely to occur on a scale sufficient to ensure that any material adverse price or non-price effects potentially resulting from the Merger and Divestiture could not be sustained for the period of time that would typically be considered to constitute a substantial prevention or lessening of competition: *Tervita CT*, above, at paras 122-125 and 377-379; see also *Tervita SCC*, above, at para 78.

(9) Availability of acceptable substitutes and effectiveness of remaining competition (ss. 93(c) and (e))

(a) Freedom

[264] The Commissioner asserts that the divestiture of Freedom to Videotron would result in Freedom being a less effective competitor than it was immediately prior to the announcement of the Merger. Stated differently, the Commissioner asserts that the Divestiture would not likely restore the level of competition remaining in the relevant markets to the point at which the prevention and lessening of competition he has alleged would no longer be substantial. The Tribunal disagrees.

[265] The Commissioner bases his assertion on several grounds. In summary, he states the following:

a) The reduction in the scale of Freedom's operations, relative to the combined scale of Freedom and Shaw Mobile, will reduce its ability to invest in and expand its network, increase Freedom's capital requirements as a standalone entity, and result in slower deployment of 5G.

b) The separation of Freedom from Shaw's network infrastructure will reduce its ability to offer bundled services by cross-subsidizing and cross-marketing between its product lines with promotions and discounts.

c) Freedom will have a degree of dependency on Rogers that will hamper its incentive and ability to compete and that will provide avenues for Rogers to undermine Freedom's competitiveness. This will further limit Freedom's ability to offer discounted bundled wireless plans, attract new customers, and keep any bundled customers that it may obtain. This will also likely lead to higher customer churn and lower customer lifetime value for Freedom, which will undermine Freedom's ability to invest in its network in the future.

d) Freedom will lose access to Shaw's in-home WiFi "hotspots".

e) Freedom will lose access to Shaw's corporate retail locations.

[266] The Tribunal will assess each of these allegations below:

(i) Freedom's reduced scale and ability to invest in and expand its network, including 5G, as well as its alleged increased costs.

[267] The Commissioner asserts that if Freedom is separated from Shaw, it will have a reduced scale and ability to carry out Shaw's growth and expansion plans, as well as increased capital or operating costs. The Commissioner adds that, prior to the announcement of the Merger, Shaw had planned to make 5G investments, enter new markets and expand into the business services market. He maintains that, under Videotron's ownership, those 5G investments and other plans will be reduced and delayed.

[268] Regarding Freedom's scale, the evidence demonstrates that Freedom would not in fact have a smaller scale under Videotron's ownership than it would have if it remained with Shaw. Among other things, Videotron will have more revenue, more wireless subscribers across the country, and more spectrum: Exhibit CA-I-0146, at para 49; Transcript, at 3678.[26] In addition, Videotron's national presence will give it the ability to offer new incentives to businesses that operate nationally: Transcript, at 2159; Exhibit CA-I-0144 at para 179.

[269] With respect to Freedom's ability to invest in and expand its network, as well as its allegedly increased costs, the Tribunal notes that the $2.85 billion price Videotron has negotiated for Freedom is substantially less than the more than $4.5 billion investment Shaw has made in Freedom since 2016: Transcript, at 2608, 2609, and 2612. This will effectively give Freedom a much more advantageous cost-base from which to compete, relative to that which is currently the case for Shaw: Exhibit CA-R-0232, Exhibit B, at 4 and paras 38, 44 and 56-57. Freedom will further benefit from reduced costs with respect to roaming [redacted]: see paragraphs 235-236 above and Transcript, at 2158-2159, 2162, and 2173; and Exhibit CA-I-0144, at paras 136, 179, and 217-220. The Tribunal expects that to the extent that Videotron is able to realize any of the considerable additional cost savings it expects to achieve through the Divestiture, this will further improve Videotron's cost position: Exhibit CA-I-0144, at paras 201-220.

[270] The Tribunal pauses to note that Telus opposed Videotron's participation in the 3500MHz "set aside" auction on the basis that such participation would permit Videotron to purchase such

[26] As of May 31, 2022, Shaw Mobile and Freedom combined had approximately [redacted] subscribers: approximately [redacted] for Shaw Mobile and approximately [redacted] million for Freedom: Exhibit CA-I-0192, Exhibit 73. By comparison, Videotron currently has approximately [redacted] wireless subscribers, to which it would be adding Freedom's [redacted] subscribers. Videotron also has approximately [redacted] wireline subscribers, in comparison to [redacted] for Shaw: Exhibit CA-I-0146, at para 49; Exhibit CA-R-195, at para 14.

spectrum at a significantly lower cost than what the National Carriers would have to pay, thereby enabling Videotron to gain a significant cost advantage: Exhibit CA-R-0232, Exhibit B, at para 32. During cross-examination on an affidavit in a judicial review proceeding before the Federal Court, Mr. Eric Edora, Telus' Director of Regulatory Affairs, testified that "when there's market entry it does create disruption. I think Videotron is certainly a little bit different than other competitors that might enter […] Videotron would be a more formidable competitor …": Exhibit CA-I-0144, Exhibit 21, at 32-33.

[271] Bell's similar view in this regard is reflected in two internal e-mails. The first was sent by [redacted]: Exhibit CA-R-0085

[272] Insofar as 5G is concerned, Videotron obtained an extensive portfolio of 3500MHz spectrum licences in the recent "set aside" auction. Its 5G rollout plan provides for [redacted].

[273] In the first phase, it intends to begin by rolling out the plan that Freedom had in place, based on 600 MHz, when Shaw entered into the Arrangement Agreement with Rogers. The Tribunal understands that this will be essentially the same "5G "lite" service that Freedom/Shaw had been planning to introduce to approximately 700 sites across Canada in April 2021, or soon thereafter. Messrs. Drif and Lescadres both testified that this service will be launched within three or four months of Videotron's acquisition of Freedom: Transcript, at 2495 and 2192; Exhibit CA-I-144, at para 193; Exhibit CA-I-0152, at para 83(a). In other words, it will be launched approximately within the two-year time frame used for assessing whether a prevention or lessening of competition is "substantial": see para 138 above. [redacted].

[274] [redacted]: Exhibit CA-R-0192, at para 72. [redacted]: Exhibit CA-R-1092, Exhibit 46, at 9-11, 17.

[275] [redacted]: Exhibit CA-I-0152, at para 83(b); Transcript, at 2381.

[276] [redacted]: CA-I-0152, at para 83(c); Transcript, at 2381.

[277] The Tribunal considers it important to note that Videotron is already operating and building a 5G network in Quebec. This experience will provide Videotron with an advantage relative to Shaw, in terms of its rollout of that network in Alberta, British Columbia, and Ontario. Videotron also has a detailed [redacted] investment plan that contemplates expenditures totalling nearly $[redacted], to roll out a 5G network across Freedom's footprint to better compete against the National Carriers' 5G networks: Exhibit CA-I-0146, at para 36.

[278] Based on the foregoing, as well as the fact that Videotron appears to have obtained essentially the same spectrum that Shaw had been planning to seek in the auction, the Tribunal finds that consumers are not likely to be materially worse off with respect to 5G services, as a result of the Merger and Divestiture. Although Videotron's rollout of 5G "lite" and then full 5G services might ultimately take slightly longer than what likely would have occurred "but for" Shaw's execution of the Arrangement Agreement, the evidentiary record is very thin regarding the timing of (i) Shaw's full 5G rollout, (ii) the nature of the additional services that would be made available to consumers, and (iii) how they would value those services. Consequently, the Tribunal does not consider that any delays that might be associated with Videotron's rollout of full 5G services, relative to Shaw's corresponding deployment, warrant substantial weight in the assessment of whether competition is likely to be prevented or lessened substantially.

[279] For the reasons set forth at paragraphs 268-269 above, the Tribunal also finds that Freedom, under Videotron's ownership, would not have a reduced scale or ability to invest in and expand its network. Moreover, Freedom will have a very favourable cost position, relative to Shaw.

(ii) The separation of Freedom from Shaw's network infrastructure

[280] The Commissioner alleges that there is a significant degree of integration of Freedom within Shaw's organizational structure. The Commissioner further maintains that Freedom benefits from Shaw's related businesses and operations, including Shaw's network infrastructure and backhaul. He submits that Freedom's separation from Shaw will reduce its ability to compete, including by bundling or cross-selling multiple services.

[281] Freedom was a standalone business when it was acquired by Shaw in 2016: Transcript, at 2606. According to Mr. English's testimony, which the Tribunal accepts, Freedom has not been integrated into Shaw's business to any material degree since that time: Transcript, at 2609-2610. Although Shaw explored the extent to which it might be able to achieve integration synergies, the synergies that it has been able to obtain have been "fairly small": Transcript, at 2610. On the "[redacted]": Transcript, at 2767.

[282] The Tribunal's understanding of the Divestiture Agreement is that Videotron would acquire Freedom's entire business, except for (i) certain assets relating to Shaw Mobile's business, Shaw's Go Wi-Fi sites and various other assets that are not significant for the present purposes, (ii) Freedom's lease at [redacted], and (iii) other assets that are leased, licensed or made available to Freedom or its affiliate Freedom Mobile Distribution Inc.: Exhibit CA-R-0192, at Exhibit 165 (including, Articles 2.1 and 18, and Schedule F thereto, at Articles 2.1 and 2.2). This understanding was confirmed during the hearing: Transcript, at 76, 2777, and 5240. See also paragraph 32 above.

[283] With respect to Shaw's network infrastructure and backhaul, Videotron has negotiated very favourable arrangements with Rogers. This includes [redacted] and the right to purchase additional backhaul services from Rogers for [redacted] of (i) current rates, or (ii) the market rates that prevail at the time the services would be purchased: see para 35(c) above, and the discussion below with respect to roaming services and access to Shaw's Go-Wifi public hotspots. The Tribunal notes that when Videotron scrutinized Freedom's current backhaul arrangements with various suppliers across the country, it determined that the rates Freedom currently obtains from Shaw are "[redacted]" than what it pays to its other backhaul providers: Exhibit CA-A-0230; Transcript, at 3925-3926. Pursuant to its agreement with Rogers, Freedom would continue to have the benefit of these preferential rates.

[284] Backhaul accounts for approximately [redacted]% of overall operating expense costs for Freedom: CA-R-0232, at para 77. The majority of Freedom's backhaul is provided by microwave systems, which the evidence suggests is technologically equivalent to fibre backhaul: Transcript at 1112 and 5468. Those microwave systems are, and will continue to be, owned by Freedom: Exhibit CA-R-0232, at para 76. As to the balance, approximately [redacted]% of Freedom's backhaul requirements is procured [redacted] from third parties: Transcript, at 2612; Exhibit CA-R-0232, at paras 77-79.[27] With respect to TPIA, Rogers has contractually committed to providing Videotron/Freedom with aggregated and disaggregated TPIA services (wherever Rogers and Shaw currently provide home Internet services) [redacted]. Mr. Lescadres testified that Videotron currently projects that it will reach that benchmark in approximately two to three years, and that "10 years from now, we're going to be at [redacted] customers": Transcript, at 2271-2272.

[285] Based on Videotron's detailed financial modelling and business plan (see Exhibit CA-I-0144, Exhibit 66), the Tribunal is satisfied that it will likely be able to achieve its goal of attaining the [redacted] subscriber threshold within approximately the timeframe that it has estimated.

[286] The Tribunal's understanding is that Videotron/Freedom would remain free to opt out of its favourable arrangements with Rogers for the supply of TPIA and backhaul, at any time: Transcript, at 2423, 2441, 2325, and 2373. It would also have the flexibility to expand the capacity it obtains from Rogers to accommodate its growth: Transcript, at 2329, 2370 and 2373.

[287] With respect to bundling, the Commissioner pressed Mr. Lescadres during cross-examination regarding Videotron's ability to bundle profitably. Based on Mr. Lescadres' responses, as supported in particular by his Reply Witness Statement, the Tribunal is satisfied that Videotron will be able to profitably bundle wireless and wireline (Internet, television and landline home phone) services at prices materially below what Shaw is offering today: see e.g., Transcript, at 2268-2276; and Exhibit CA-I-0146, at paras 5-26. The Tribunal's finding in this regard is reinforced by the fact that Videotron took a conservative approach to its modelling, in various respects: see e.g., Transcript, at 2166 and 2169; Exhibit CA-I-0144, at paras 63, 113, 116, 168, 177, 178, 186, and 215.

[288] The Tribunal notes that Mr. Lescadres explained that Videotron's approach to the pricing of its bundled offerings would be essentially the opposite of Shaw's approach. Whereas Shaw

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[27] Other evidence suggests that Shaw only supplies [redacted]% of Freedom's wireline backhaul across the country: Transcript, at 3036 and 5468.

Mobile combines relatively expensive wireline services with very low-priced wireless services – indeed as low as $0 – [redacted]: Transcript, at 2323. Videotron considers that this strategy would assist it to achieve the twin objectives of reducing customer churn and attracting customers to its bundled offers. The Tribunal understands that Videotron would be able to do this because, in contrast to Shaw, it does not have to incur the risk of having to re-price an installed base of Internet subscribers in Alberta and British Columbia.

[289] The Tribunal notes that Videotron's recent acquisition of VMedia will assist it to expedite the rollout of its bundled offerings. V-Media is a TPIA-based reseller of Internet services in Quebec, Ontario, Alberta, and British Columbia. It was acquired to provide Videotron with TPIA experience outside Quebec and to assist Videotron to have an impact with its bundled offerings more quickly: Transcript, at 2278 and 2338. This is because it has advanced technology, including billing and servicing systems, as well as established TPIA connections with Rogers: Transcript, at 2337-2339. The Tribunal further notes that, in an internal document, Bell corroborated Videotron's expectation when it observed, "[redacted]": Exhibit CA-R-0080, at 18.

[290] The Tribunal acknowledges that Dr. Miller opined that Videotron's favourable TPIA arrangement would not enable Videotron/Freedom to price its bundled offerings at rates that are similar to what Shaw Mobile currently provides. In advancing that position, Dr. Miller relied upon Mr. Hickey's statement that it would not be feasible for Distributel to offer competitive bundles based on a TPIA arrangement with Shaw at the wholesale rate mandated by the CRTC: CA-A-0122, at paras 241-242. However, on cross-examination, Mr. Hickey qualified his position by stating that Distributel would need an off-tariff arrangement with Shaw in order to be able to compete with Shaw Mobile's pricing: Transcript, at 1206. He proceeded to confirm that if Distributel had been able to acquire Shaw's wireless business and continue with a discounted TPIA arrangement, it could be potentially successful in competing with other carriers in Western Canada: Transcript, at 1207. He then added that the favourable TPIA arrangement that Videotron has negotiated with Rogers is such an off-tariff arrangement and that he was unaware of it when he prepared his Witness Statement: Transcript, at 1218-1219.

[291] The Tribunal also notes that, in preparing his expert report, Dr. Miller did not engage with Videotron's detailed business plan and could not recall that it contained detailed cash flow projections and operating expenses, as well as other information: Transcript, at 1615-1616.

[292] Regarding Freedom's ongoing access to towers, telephone/utility poles, light standards, and cell sites, the Tribunal notes that, in opposing the Initially Proposed Transaction, Telus told the Bureau that Rogers did not need to acquire Shaw. It explained, "Rogers has access, as of right, under CRTC rules, to all ILEC poles across the country and existing ISED/CRTC protections enable Rogers' access to support structures (e.g., towers, telephone/utility poles, light standards)": Exhibit CB-R-1936, at 43.

[293] The Commissioner also maintains that Freedom's challenges under Videotron's ownership would be heightened by a loss of access to Shaw's support for small cells.

[294] However, the Tribunal notes that Videotron has entered into a Binding Term Sheet for Small Cell Licensing Agreement that requires [redacted]: Exhibit CA-I-0144, at Exhibit 64. During cross-examination, Mr. Drif maintained that this type of agreement is common in the telecommunications industry and that it would not affect Videotron's ability to be competitive: Transcript, at 2472-2475. In his Witness Statement, Mr. Drif added that Videotron intends to roll out small cells, just like it has done in Quebec: Exhibit CA-I-0152, at para 87.

[295] Based on all of the foregoing, the Tribunal has concluded that Freedom's separation from Shaw and its purchase by Videotron would not materially reduce its ability to compete, including in the manner the Commissioner has alleged.

(iii) Freedom's alleged "dependency" on Rogers, and its ability to offer competitive bundles

[296] The Commissioner alleges that Freedom will have a degree of dependency on Rogers as a result of the numerous contractual arrangements that form part of its Divestiture arrangement with Rogers. The Commissioner asserts that this will include being reliant on Rogers for critical assets and services for an indeterminate and potentially unlimited period of time. The Commissioner maintains that this will adversely impact Freedom's ability and incentive to compete, and will further provide Rogers with avenues to undermine Freedom's competitiveness.

[297] In advancing these positions, the Commissioner places particular emphasis on the advantages of owning, relative to leasing, backhaul, and other infrastructure.

[298] However, it is significant to note that the CRTC has forborne from the regulation of backhaul: Transcript, at 995. According to Mr. Martin, there is a robust, competitive market for backhaul, with multiple providers available in most areas: Transcript, at 3677; Exhibit CA-R-0232, at paras 80-81. This was corroborated by Dr. Webb: Transcript, at 3928-3929. This is also confirmed by the widespread use of leased facilities in the wireless business in Canada: see, for example, Exhibit CA-R-0102. Indeed, in cross-examination, one of the Commissioner's witnesses conceded that leasing was "done all the time" and represented "business as usual" for the industry: Transcript, at para 1139. The Transcript is replete with examples of industry players leasing fibre outside of their own wireline footprints: see for example, Transcript, at 1120 (Mr. Benhadid on both Bell and Telus); Transcript, at 995, 997 (Mr. Hickey on Distributel).

[299] Some of the more noteworthy examples of market participants competing successfully without owned backhaul or other wireline infrastructure include Telus in Eastern Canada and Saskatchewan, Bell in Western Canada, Rogers in Western Canada, Freedom in most of Ontario, Freedom in Western Canada, and Videotron in Abitibi, Quebec: See Exhibit CA-R-0232, at paras 67-74; Transcript, at 3730, 3733, 3741; Exhibit P-A-0241 (for CRTC market share data).

[300] Despite this competitive market for backhaul, Mr. Benhadid stated that wireline ownership is critical to wireless network performance and reliability: Exhibit CA-A-0100, at para 4. He explained that when one leases backhaul, one has less control over the reliability and performance of the traffic one carries; a reduced ability to contain disruptions from outages; an [redacted]; and a reduced ability to adapt to sudden spikes in demand and performance anomalies; Transcript, at 1064-1065. Similarly, Mr. Howe of Bell highlighted four advantages to deploying a wireless network within one's wireline network footprint, including (i) the possibility to leverage a single construction process to build infrastructure for both the wireline and wireless networks; (ii) the ability to take advantage of strong relationships with the local municipality based on an established history of operating a wireline network; (iii) the provision of lower costs, improved support, and the ability to create a more resilient overall network architecture; and (iv) the creation of additional opportunities for innovation: Exhibit CA-A-0111, at paras 8, 10-14.

[301] [redacted]

[redacted]

[redacted]

[302] [redacted]

[303] [redacted]

[304] [redacted]

[305] [redacted]

[306] Having regard to the foregoing, the Tribunal considers the more recent, contradictory, evidence provided by Telus and Bell witnesses not to be credible. The Tribunal finds that the other evidence referenced in the immediately preceding paragraphs above, as well as at paragraphs 282-291, establishes that Freedom's loss of access to Shaw's wireline facilities would not materially weaken its ability to compete, relative to its current ability as part of Shaw: see Transcript, at 2610-2612 and 2867-2868; Exhibit CA-R-0232, at paras 60, 67-68, and 72. See also Exhibit CA-R-1818, at para 20.

[307] The Tribunal considers that this conclusion is broadly supported by a 2019 Competition Bureau study to assess the performance of Canada's wholesale access regime. Among other things, that study found that "the wholesale access regime appears to be fulfilling its promise to bring about greater consumer choice and increased levels of competition": Exhibit CA-I-0144, Exhibit 8, at 7. It also found, "Wholesale-based competitors typically price cheaper than facilities-based competitors" and that "wholesale-based competitors have been able to obtain market shares in the order of 15-20% across the areas where they focus their marketing efforts": Exhibit CA-I-0144, Exhibit 8, at 17 and 21.

[308] The Tribunal notes that Videotron actively explored purchasing fibre assets from Rogers. However, it ultimately determined that a long-term agreement that included "necessary protections and favourable pricing" would meet its needs, and avoid "[redacted]": Exhibit CA-I-0144, at para 120; Transcript, at 2331-2332.

[309] The Tribunal further notes that there are important trade-offs between owning and leasing. While owning provides an additional degree of control and more flexibility, relative to leasing, it also requires a large up-front capital investment. With that in mind, Videotron considered it to be preferable to enter and expand into Western Canada by leasing backhaul and TPIA, as it did in Abitibi, [redacted]: Transcript, at 2496 and 2591-2594: Exhibit CA-I-0144, at paras 187-190.

[310] With respect to the Commissioner's allegation regarding the avenues that would be available to Rogers to undermine Freedom's competitiveness, the Commissioner put evidence to Mr. Lescadres on cross-examination regarding Rogers' past discrimination of third party traffic. [redacted]: Exhibit CA-I-0144, at 1326. [redacted] Armed with this information, Mr. Lescadres explained that Videotron negotiated for contractual protections to protect itself in this regard. These included [redacted]: Transcript, at 2277-2280 and 2324-2325.

[311] Mr. Lescadres also testified that Videotron and Rogers have a long history of contractual relationships. He noted that although Videotron was at one time entirely dependent on Rogers when Videotron operated as an MVNO, he is not aware of any steps Rogers took to use its network ownership position to disadvantage Videotron. He added that although Videotron has continued to be highly dependent on Rogers as a result of some of their ongoing arrangements, this has not prevented Videotron from continuing to successfully compete against Rogers. In this regard, he stated that over the ten-year period between December 2011 and December 2021, Videotron estimates that approximately [redacted] of Videotron's total gains in wireless market share have come at the expense of Rogers and its flanker brands: Exhibit CA-I-0146, at paras 64-72.

[312] The Commissioner also alleges that Freedom will have a reduced ability to bundle and that this will increase its churn rate and lower the CLV of Freedom's customers. Based on the evidence discussed at paragraphs 287-291 above, the Tribunal does not accept these allegations.

[313] The Commissioner further alleges that the Merger and Divestiture would likely result in Videotron/Freedom being dependent upon a less reliable network, namely, Rogers' network. In support of this allegation, the Commissioner pointed to three network disruptions in the past three years. The first occurred for approximately 11 hours on July 7, 2019, when Freedom customers experienced intermittent issues placing or receiving voice calls to Rogers' customers nationally. 3G voice calls, VoLTE calls, and WiFi calling were impacted, but data services were not. 911 calling across the country was also intermittently impacted. The second incident occurred on April 19, 2021, when Rogers experienced nationwide network issues for approximately 16 hours. It appears that this primarily impacted Freedom customers attempting to connect with Rogers customers. The third incident occurred on July 8, 2022, when Rogers experienced a major service outage affecting more than 12 million users.

[314] In the wake of the latter outage, Rogers committed to the following network resiliency measures:

a) [redacted];

b) [redacted]; and

c) A Memorandum of Understanding between telecommunications carriers that will allow them to more effectively work together in the event of an emergency, including to ensure that the 9-1-1 system is not vulnerable to an outage or other network disruption. This Memorandum of Understanding was finalized and delivered to ISED on September 7, 2022. Rogers, Videotron, Shaw, Bell and Telus are among the twelve signatories.

[315] Based on the foregoing, and the degree of public attention that the most recent outage received, the Tribunal is satisfied that the resiliency of Rogers' network is likely to improve, and that the adverse consequences of potential future outages on consumers are likely to be reduced.

[316] The evidence in this proceeding also establishes that other carriers also experience outages. For example, Bell experienced an important one in November 2019 and another in August 2020, although neither was as significant as Rogers' most recent outage: Transcript, at 1368-1374.

[317] The evidence further establishes that Freedom's wireless service has had a history of dropped calls and non-seamless handoff, when its customers have left Freedom's service area: see for example, Transcript at 2172; Exhibit P-A-017, at para 10.

[318] In addition, the evidence demonstrates that carriers compete on the basis of network reliability. However, it is far from clear how periodic network outages impact the intensity of competition.

[319] Beyond the foregoing, Mr. McKenzie's unchallenged evidence is that the CRTC has the authority and responsibility for ensuring that carriers have reliable networks: Transcript, at 3450.

[320] Considering all of the foregoing, the Tribunal finds that it has not been established that Rogers' network is likely to be materially less reliable or resilient than Shaw's network. It has also not been established that any difference between the two networks in this regard would likely have a material impact on the future competitiveness of Videotron/Freedom, or more generally on competition in the relevant markets.

(iv) Freedom's loss of access to Shaw's in-home WiFi "hotspots"

[321] The Commissioner alleges that Freedom currently derives a significant benefit from access to Shaw's Wi-Fi hotspots, which improve network coverage and reduce network costs, including by reducing network traffic. The Commissioner adds that Freedom's customers obtain significant value from these hotspots, which have been a central feature of Shaw's marketing materials and strategy. The Commissioner further notes that Shaw had planned to expand its WiFi hotspot network, and viewed WiFi and small-cell deployment as complementary.

[322] Shaw has two types of WiFi hotspots, namely, public hotspots and home hotspots.

[323] Pursuant to a Binding Term Sheet for Go WiFi Services, Videotron/Freedom would continue to have access to over 100,000 public hotspots, located in malls, restaurants and other locations for no charge for [redacted]: Exhibit CA-I-0144, Exhibit 64; Exhibit CA-R-0192, at paras 191, 353(b) and 387.

[324] However, Videotron/Freedom will lose access to over 900,000 home hotspots that Shaw has deployed across Western Canada. The Tribunal understands that the principal value of these home hotspots for customers of Shaw Mobile and Freedom is that they allow for data downloading in any home where such hotspots are present, without having to manually authenticate their mobile device. Mr. Prevost described this as a "small feature" because without such hotspots, the customer would simply have to manually authenticate with their password, or the password of their host: Transcript, at 3401-3402. Mr. Martin added that mobile phones, with the WiFi radio turned on, will prioritize more frequently used WiFi networks first. For most mobile users, the most frequently used WiFi network is their home WiFi, rather than a Go WiFi hotspot: Exhibit CA-R-232, at paras 92-93

[325] Mr. McAleese testified that Shaw's network of hotspots is based on 10-year-old technology that was developed before the rollout of "large bucket" and unlimited data plans and low band spectrum that permits multi-residential WiFi coverage to pass through concrete walls. It was also developed before LTE, which provides a considerably higher download speed, relative to that of the Go-Wifi network: Transcript, at 2887. Mr. McAleese added that Freedom does not rely in any way on home hotspots to operate its wireless network: Transcript, at 2887-2889.

[326] Mr. Lescadres stated that Videotron does not consider access to Go WiFi, whether public or within the home, to be necessary or valuable but does not see any harm in that service being available to its customers: Exhibit CA-I-0144, at para 157(d).

[327] In cross-examination, Mr. Drif explained that Shaw's home hotspots were of little interest to Videotron because Videotron plans to launch 5G service relatively soon after acquiring Freedom, and that such service would obviate any need for those hotspots. This is because of the greater speed and capacity of 5G service: Transcript, at 2455-2456. [redacted]: Exhibit CA-I-0152, at paras 139-140. [redacted]: Transcript, at 2458, 2461, and 2462.

[328] [redacted]: Transcript, at 2460-2461.

[329] Having regard to the foregoing, the Tribunal finds that Freedom's loss of access to Shaw's home-hotspots would not materially impact its ability to compete post-Merger and Divestiture. The Tribunal makes the same finding with respect to the fact that Freedom would no longer own the public hotspots to which it will nevertheless have access for [redacted].

(v) Freedom's loss of access to Shaw's corporate retail locations

[330] The Commissioner alleges that Freedom would be weakened as a result of its loss of access to Shaw's retail locations and distribution network.

[331] However, the uncontested evidence is that no Freedom products or services have ever been sold through Shaw branded stores or online. Transcript, at 2882.

[332] The Tribunal also notes that Videotron executives have met with representatives of the F-Branded Association to express support for the dealer channel, should Videotron acquire Freedom: CA-I-0146, at para 58. An e-mail sent to Videotron's counsel on behalf of that association stated that its [redacted]": Exhibit CA-R-0047, at 27. This was broadly corroborated by Mr. Verma, who testified that "on a personal level and at the association also for Freedom dealers, we are cautiously optimistic … about the proposed divestiture of Freedom to Videotron.": Transcript, at 443.

(vi) Separation from Shaw Mobile

[333] The Commissioner maintains that Freedom will be a less effective competitor due to its separation from Shaw Mobile. However, subsequent to Shaw Mobile's launch, [redacted]: Exhibit CA-R- 0132, at 21.

[334] Moreover, while Shaw Mobile's current subscriber base adds approximately [redacted] subscribers to the combined scale of Shaw Mobile and Freedom, the loss of that subscriber base will be more than offset by the addition of Videotron's 1,661,000 subscribers in Quebec and Eastern Ontario.

[335] Consequently, Freedom's separation from Shaw Mobile is not likely to adversely impact its scale or effectiveness as a competitor.

[336] The Tribunal finds Mr. Lescadres' explanation for why Videotron did not acquire Shaw Mobile to be compelling. After initially being interested in acquiring Shaw Mobile together with Freedom, Videotron discovered that Shaw Mobile's customers were "low ARPU customers" who were being "heavily subsidized" by very high Internet prices, relative to what Videotron charges in Quebec. Videotron then decided that it would be more consistent with its business plan to compete for those customers with a lower overall bundled price, than to purchase them as "wireless only" customers: Transcript, at 2156-2157.

[337] The Tribunal notes that representatives of [redacted] were also of the view that it would not be necessary for the purchaser of Freedom to also purchase Shaw Mobile. [redacted]: Exhibit CA-A-1948.

(vii) [redacted]

[338] The Commissioner alleges that competition is likely to be prevented and lessened as a result of the [redacted]. In support of this allegation, the Commissioner drew the Tribunal's attention to internal Rogers documentation which suggested that [redacted]: Exhibit CA-R-0212, Exhibit 38, at 18.

[339] The Tribunal acknowledges that the Shaw Mobile brand provides additional variety and choice in the relevant markets. However, to the extent that the vast majority of Shaw Mobile customers also purchase Shaw's Internet services, it would appear that the value of the Shaw Mobile brand is overwhelmingly limited to the bundling segment of the market, where there currently are only two providers: Telus and Shaw. If the Merger and Divestiture proceed, there will be at least three such providers – Telus, Rogers and Videotron/Freedom/VMedia. In essence, Freedom, which does not currently have a significant presence in the market segment for bundled offerings, will move into that segment, together with VMedia, thereby ensuring that the number of brands in that market segment does not diminish.

[340] Indeed, to the extent that Videotron intends to roll out its successful Fizz brand across Ontario and Western Canada, this will add to the number of brands available to consumers in those areas: Exhibit CA-I-0144, at paras 173-174. The Tribunal notes that the Fizz brand has achieved a market share of 5% in Quebec since it was launched in 2018: Transcript, at 2267.

[341] Moreover, while Freedom currently is marketed as [redacted], Videotron intends to reposition it as a [redacted]

[redacted]: Transcript, at 2871: Exhibit CA-I-0144, at paras 173 and 192.

(viii) Expansion into new areas

[342] As noted at paragraph 190 above, the Commissioner alleges that "but for" the Merger, Shaw likely would have geographically expanded its wireless footprint. In this regard, he referred to evidence reflecting that [redacted].

[343] The Tribunal notes that the Commissioner did not cross-examine any of Shaw's witnesses regarding that evidence. Instead, the Commissioner simply asked Mr. McAleese to confirm that Shaw "had plans on the drawing board to continue [its] geographic expansion": Transcript, at 2907. Mr. McAleese responded in the affirmative. As a result, the specifics of those plans were not subjected to the important testing function of cross-examination. This reduces the weight to which it might otherwise have merited.

[344] The Commissioner also did not provide any information whatsoever regarding competitive conditions in the areas mentioned above. As a result, it is not possible to assess the likely competitive impact of Shaw not expanding into those areas.

[345] In any event, Mr. Péladeau testified that Videotron plans to use the new MVNO policy framework to expand beyond Freedom's current footprint, and then to eventually expand its own network into those areas within the seven year time-frame required by that policy framework: Transcript, 2512-2513. Mr. Lescadres added that Videotron is already negotiating with third parties who would be providing such service, although it is not clear whether that is for service in Western Canada or elsewhere: Transcript, 2321. The Tribunal observes that Videotron will have a strong incentive to pursue geographic expansion, so that it can reach the [redacted] threshold at which it will qualify for the [redacted]% discount that it has negotiated with Rogers: see paragraph 284 above.

[346] In addition, Rogers has committed to establishing a new $1 billion Rogers Rural and Indigenous Connectivity Fund dedicated to connecting rural, remote and Indigenous communities across Western Canada to high-speed Internet and closing critical connectivity gaps faster for underserved areas: Exhibit P-R-0208, at para 12. Mr. Annett testified that based on analysis that has been conducted to date, five areas in Western Canada have been selected as areas to which high speed connectivity will be extended. Those areas are: [redacted].

[347] Having regard to the foregoing, the Tribunal considers that the evidence does not establish that any prevention of future competition that might be associated with Shaw not entering into the areas identified at paragraph 335 above is likely to be substantial, particularly having regard to the geographic expansion plans of Videotron and Rogers.

(ix) Summary (Freedom)

[348] In summary, for the reasons set forth above, the Tribunal does not accept the Commissioner's various allegations in support of his proposition that the divestiture of Freedom to Videotron would result in Freedom being a less effective competitor than it was immediately prior to the announcement of the Merger.

[349] Videotron would be acquiring Freedom's entire business, except for certain assets that relate to Shaw Mobile's business or that would not be material to Freedom's ability to continue providing essentially the same degree of vigorous and effective competition that Freedom and Shaw Mobile together would likely have provided "but for" the Merger.

[350] Indeed, to the extent that Videotron is much more committed than Shaw to be a long-term participant in the relevant markets, the Tribunal expects that Videotron would be a more aggressive and effective competitor than Freedom and Shaw Mobile likely would have been in the absence of the Merger.

[351] Videotron is an experienced market disrupter that has achieved substantial success in Quebec. It has drawn upon that experience to develop very detailed and fully costed plans for its entry into and expansion within Alberta and British Columbia. Those plans were buttressed when Videotron acquired VMedia earlier this year, with a view to accelerating the rollout of new bundled offerings. The Tribunal is persuaded that the bundled offerings of Freedom and VMedia will be priced at a level that is at least as competitive as the offerings of Shaw Mobile and Freedom likely would have been in the absence of the Merger. That is to say, the Tribunal finds that Freedom's and VMedia's overall bundled prices for Internet and wireless services combined will be at least as favourable as the bundled offerings of Shaw Mobile and Freedom likely would have been "but for" the Merger. The Tribunal finds that the same is also likely to be true for the "wireless only" offerings of Freedom and Fizz, relative to the corresponding offerings of Shaw Mobile and Freedom.

[352] The Tribunal's conclusion in this regard is reinforced by several additional considerations. These include the fact that Freedom only has a trivial presence in the bundled segment of the relevant markets,[28] while the same is true for Shaw Mobile in the "wireless only" segment of the market.[29] In addition, as discussed at paragraph 385 below, Shaw was likely going to have to redirect its limited investment funds away from its wireless business towards its wireline business, and increase the free cash flow generated by its wireless business. The Tribunal finds that this likely would have adversely impacted the competitiveness of Shaw's wireless business. Moreover, Videotron has committed to offering "prices for wireless services in Ontario and Western Canada comparable to what Videotron is currently offering in Quebec, which are today on average 20 per cent lower than in the rest of Canada": Exhibit P-R-0008; Transcript, at 2517 and 2336-2337.

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[28] According to Mr. McAleese, bundled customers make up less than [redacted]% of Freedom's total subscriber base: Exhibit CA-R-0192, at para 386.

[29] Approximately [redacted]% of Shaw Mobile's wireless customers also purchase Internet services from Shaw. Transcript, at 365-366; Exhibit CA-R-0192, at para 292.

[353] Although price commitments typically are irrelevant to the Tribunal's analysis of the likely effects of a Merger, the nature of Videotron's commitments is distinguishable from what merging parties sometimes propose. This is because, to the extent that merging parties are found to have a greater *ability* to increase prices materially, relative to the counterfactual "but for" scenario, the test for a likely substantial prevention or lessening of competition would be met, regardless of any commitment that might be made not to exercise that market power. By comparison, the Commissioner has not alleged, nor could he reasonably maintain, that the Divestiture would likely result in Videotron being able to exercise any market power in the relevant markets. Moreover, the Tribunal understands that the Minister will retain leverage over Videotron. The Tribunal considers that this will increase the likelihood that Videotron will meet its pricing commitment.

[354] The Tribunal pauses to observe that while Videotron plans to offer prices at least [redacted]% below existing prices for Freedom branded wireless and wireline services offered on a standalone basis, it plans to offer bundled prices that are [redacted]% below existing levels. It also plans to offer prices for Fizz that are [redacted]% lower than prices offered by the current flanker brands in the market, and [redacted]% lower for other services: Exhibit CA-I-0144, at para 175.

[355] A further consideration that is relevant in assessing Videotron's likely competitiveness is that Telus and Bell have both been taking steps to increase their competitiveness as a result of the Merger and Divestiture. This will be discussed in the next section below. For the present purposes, the Tribunal will simply observe that whereas only two firms (Telus and Shaw) currently have bundled offerings in Alberta and British Columbia, there would be at least three (Telus, Rogers and Videotron) if the Merger and Divestiture proceed. Indeed, the Tribunal expects that [redacted], there will be four firms providing bundled offerings: Exhibit CA-R-0080, at 21; Transcript, at 801-804.

(b) Telus

[356] [redacted]: Exhibit CA-R-0067.

[357] The following week, Telus announced the closing of a $1.3 billion equity offering. Telus explained this initiative as follows:

> Proceeds of the Offering will be used to further strengthen the Company's balance sheet and, principally, to capitalize on a unique strategic opportunity to accelerate its broadband capital investment program, including the substantial advancement of the build-out of TELUS PureFibre infrastructure in Alberta, British Columbia and Eastern Quebec, as well as an accelerated roll-out of the Company's national 5G network.
>
> Exhibit P-R-0071.

[358] [redacted]

[redacted]: Exhibit CA-R-1912.

[359] The Tribunal considers that these initiatives will help to increase the competitive intensity in the relevant markets and make an important contribution to undermining the emergence of any conditions that might otherwise be conducive to coordinated behaviour.

(c) Bell

[360] On May 31, 2021, Bell announced its "biggest-ever network acceleration plan", which involved an additional $1.7 billion investment, relative to the plans announced earlier in the year, after the Shaw sale process had commenced.

[361] Bell explained this initiative as follows:

> [redacted]
>
> Exhibit CA-R-209, Exhibit 43.

[362] In anticipation of the Merger, Bell prepared an extensive plan detailing numerous competitive initiatives that it is already pursuing or is planning to pursue: CA-R-0080; Transcript, at 801. After the announcement of the Divestiture, those plans were updated on the assumption that Videotron would begin bundling Internet with wireless services: Exhibit CA-R-0080, at 2. Among other things, those plans describe a [redacted]: Exhibit CA-R-0080.

[363] More recently, Bell announced that it had acquired Distributel. In its press release, it explained its rationale as follows:

> With Bell's investment, Distributel will benefit from expanded resources and access to technology required to support the next stage in its business growth

> and to continue to enhance the services it already successfully delivers to customers.
>
> Exhibit CA-R-209, Exhibit 44.

[364] Once again, the Tribunal considers that these initiatives will help to increase the competitive intensity in the relevant markets and make an important contribution to undermining the emergence of any conditions that might otherwise be conducive to coordinated behaviour.

(d) Overall summary (effectiveness of remaining competition)

[365] For the reasons set forth in parts X.B.(9)(a)-(c) above, the Tribunal finds that the level of competition that would likely remain subsequent to the Merger and Divestiture would be sufficient to ensure that competition is not prevented or lessened substantially. In other words, the Tribunal finds that remaining competition would likely be sufficiently effective to ensure that prices would not likely be materially greater than they would be "but for" the Merger and Divestiture. It would also likely be sufficiently effective to ensure that non-price benefits of competition, including 5G services, would not likely be materially less than they would be "but for" the Merger.

(10) Removal of a vigorous and effective competitor (s. 93(f))

[366] The Commissioner alleges that the Merger is likely to eliminate Shaw as a vigorous and effective competitor that was disrupting wireless services markets to the benefit of consumers.

[367] In this regard, the Commissioner maintains that Shaw has been a growing competitive force, more than doubling its subscriber base since acquiring Wind Mobile in 2016. The Commissioner asserts that Shaw has achieved this success by introducing a number of innovations, including being the first carrier to eliminate overage fees, as well as the first carrier to offer devices for free on term contracts, Wi-Fi offloading (access to numerous locations for free Wi-Fi by its customers), and $0 phone plans with internet bundles. In addition, Shaw has introduced other innovations to Canada, such as WiFi hotspots. The Commissioner further notes that Shaw has made significant long-term investments to transform the Freedom network from a 3G network into a competitive LTE-Advanced network and a 5G capable network between 2016 and 2020.

[368] The Commissioner adds that Shaw's competitive initiatives have forced its rivals to respond by offering enhanced wireless plans and promotions and by targeting customers lost to Shaw.

[369] The evidence supports these positions advanced by the Commissioner. The Tribunal accepts that Shaw has been a vigorous and effective competitor, including by forcing Rogers, Bell, and Telus to respond with offerings that they likely would not otherwise have offered.

[370] However, the evidence also demonstrates that prior to pursuing a potential sale of its business, Shaw seriously assessed whether it could continue to justify committing the very large investments that it had been making in pursuit of its growth.

[371] After receiving an unsolicited expression of interest from the former CEO of Rogers in July 2020, Shaw's Board of Directors discussed the company's 3-year strategic plan as well as other developments and trends in the telecommunications industry, at its regularly scheduled meeting in October 2020. The following month, Messrs. Shaw, and English requested TD Securities to prepare an overview of key telecommunications sector trends and potential strategic alternatives for Shaw in light of key sector trends and developments. TD Securities was also requested to address future wireline and wireless network strategies and capital requirements, as well as the particular strengths and challenges of the company's business and operations: Exhibit CA-R-0198, at Exhibit 1, at 36.

[372] Mr. Rod Davies was one of the individuals who led the TD Securities team that prepared this assessment. He explained his understanding of the broader context underlying his mandate as follows:

> [redacted]
>
> Exhibit CA-R-190, at para 19.

[373] Mr. Davies and one of his colleagues at TD Securities presented the results of their team's analysis and strategic review to the members of the Shaw Family and to the Shaw Family Living Trust ("**SFLT**") on February 1 and 5, 2021.

[374] The Tribunal pauses to observe that, in the meantime, Shaw received a second unsolicited expression of interest from another potential strategic purchaser.

[375] The highlights of the extensive TD Securities analysis are as follows:

[redacted]

[redacted]

30 [redacted]

See Exhibit CA-R 190, at paras 19, 29, 30, 32, 34, 35, 39, 40, 42, 43 and Exhibit 1, at 25, 27 and 40.

[376] In the intervening period, Shaw's wireline business has continued to account for effectively all of Shaw's Free Cash Flow: Exhibit CA-R-192, at para 59(c); Transcript, at 2683.

[377] That wireline business also accounts for approximately 83% of Shaw's "services revenues" and approximately 84% of its "Adjusted EBITDA": Exhibit CA-R-192, at para 59(a) and (b).

[378] However, as a result of increased competition from Telus and Shaw's under-investment in its wireline business, [redacted]: Exhibit CA-R-195, at para 14.

[379] In this context, Mr. McAleese stated that "[redacted]": Exhibit CA-R-0195, at para 12. He added, "[redacted]."

[380] By way of further context, Mr. English explained that after having invested roughly $5 billion in its wireless business since purchasing Wind Mobile in 2016, that business is "still net negative by about $3.3 billion."[31]: Transcript, at 2612.

[381] In cross-examination, Mr. English was pressed as to why Shaw would not be able to reduce its dividend to free up funds for investment. Mr. English replied that this "would have significant implications on our share price" and that Shaw has to keep in mind that it is "competing for capital as well in this business." When further pressed, he stated that reducing the dividend would be very detrimental to Shaw's share price, which had "underperformed for the better part of 10 years." He added that "[Shaw has been]… under a lot of pressure from our shareholders about additional return of capital initiatives and the outlook for our company": Transcript, at 2688-2689.

[382] [redacted]: Transcript, at 2700. [redacted]: Transcript, at 2721. When asked by the panel about the possibility of issuing more equity, Mr. English repeated that, as with the possibility of issuing more debt, Shaw would need to show that there would be a long-term sustainable return for investors. He added that any incremental investments that might be made would need to make a significant difference in assisting Shaw to meet the challenges it has been facing over the last decade: Transcript, at 2783-2784.

[31] Other evidence tendered by Shaw suggests that its total investment in the wireless side of its business may have been closer to $4.5 billion. See for example, Exhibit CA-R-0165, at para 156.

[383] In addition, Mr. English was pressed about an internal document dated April 9, 2020, that included a reference to Shaw's "strong balance sheet and liquidity position to support [Shaw's] operations through this uncertain [COVID-19] environment": Transcript, at 2689. Mr. English explained that this was true for the uncertain "near term," in part due to the sale of two businesses: Transcript, 2696 and 2699. Those businesses were (i) Shaw Media, which was sold for $2.65 billion in 2016 to fund Shaw's acquisition of Wind Mobile, and (ii) Shaw's U.S. data centre business called ViaWest, which was sold for US$1.7 billion in 2017: Transcript, at 2608-2609. Mr. English returned to this at the end of his testimony, when questioned by a member of the panel about Shaw's ability to generate financing from capital markets. He explained that Shaw does "not have significant non-core assets to fund the required investments over the long term to create network parity with Telus, or frankly, to invest in a 5G world over the long term…": Transcript, at 2782. Mr. Shaw made the same point when he observed:

> "[redacted]."
>
> Transcript, at 3138.

[384] Mr. Shaw also noted that while Shaw is currently in "fine" shape, Shaw's management does not believe it has the scale and size to make the required investments over the next several years, to compete and keep pace with Telus: Transcript, at 3132; see also Transcript, at 2623.

[385] In summary, the Tribunal accepts the Commissioner's submission that Shaw has been a vigorous and effective competitor, including by forcing the National Carriers to respond with offerings that they likely would not otherwise have offered. However, the evidence also demonstrates that Shaw is facing serious challenges in maintaining the capital intensity that it has allocated to the wireless side of its business. The Tribunal accepts Shaw's position that going forward, Shaw will likely have to recalibrate the balance between its investment in its wireline business and its investment in its wireless business, if the Merger and Divestiture do not proceed. The Tribunal also accepts that Shaw would likely have had to make that shift, "but for" the Merger. The evidence demonstrates that this recalibration will likely involve diverting the limited funds that Shaw has available for future investments from its wireless business to its wireline business, which generates substantially all of Shaw's Free Cash Flow, but has declined in recent years as Shaw focused on its wireless business. The same likely would have been the case "but for" the Merger.

[386] The Tribunal considers it to be reasonable to infer from this that the competitiveness of Shaw Mobile and Freedom likely will decline if the Merger does not proceed, and likely would have declined in the absence of the Merger.

(11) Nature and extent of change and innovation (s. 93(g))

[387] The nature and extent of change and innovation in a market can have a significant bearing on the Tribunal's assessment of the likely effect of a merger on competition. Broadly speaking, the greater the level of actual or likely change and innovation in a market, the less likely it will be that a merger will prevent or lessen competition substantially, at least when there are a number of strong competitors competing in a highly dynamic environment.

[388] Based on the evidence considered in the preceding sections of these reasons, the Tribunal considers that the markets for the supply of wireless services in British Columbia and Alberta are in a highly dynamic state that is likely to persist for the foreseeable future. Among other things, the National Carriers and Videotron/Freedom are rapidly positioning themselves for, and heavily investing in, 5G, which will represent a "new industrial frontier" and a "true game-changer": Transcript, at 2874 and 98.

[389] In addition, the Merger will result in Rogers injecting a new and substantial source of competition into Telus' home markets. In anticipation of that, Bell and Telus are pursuing major competitive initiatives. Adding to all of this will be the entry of Videotron, a proven market disruptor.

[390] The Tribunal finds that the foregoing considerations will reduce the potential for the Merger and the Divestiture to prevent or lessen competition substantially.

(12) Any other factor that is relevant to competition in a market that is or would be affected by the Merger (s. 93(h)

[391] The regulated nature of the telecommunications industry in Canada is a factor that is relevant to an assessment of the likely impact of the Merger and Divestiture on competition.

[392] As discussed in Part VI of these reasons, a number of aspects of the wireline and wireless services businesses are regulated by the CRTC, which appears to be committed to encouraging greater competition in those businesses.

[393] At least two ongoing and pending regulatory initiatives can reasonably be expected to stimulate increased competition in the relevant markets and elsewhere in Canada. These include (i) the upcoming transition to a disaggregated model of wholesale high-speed access, to help increase competition and give smaller competitors greater control over the services they offer to Canadians: and (ii) the pending regime of mandated wholesale MVNO access, upon which Videotron has stated it intends to rely: see paragraph 345 above.

[394] In addition, as discussed at paragraph 319 above, the CRTC has authority and responsibility for ensuring network reliability.

[395] Apart from the CTRC's oversight role, the Minister has broad discretion, under the *Radiocommunication Act* and regulations, to issue spectrum licences and to set the terms and conditions of such licences. The Minister imposes conditions on spectrum licences, and has the power to suspend or revoke spectrum licences if the licence holder contravenes the terms and conditions of the licence: Transcript, at 324-325.

[396] As previously mentioned, the Minister must approve the proposed spectrum transfer from Shaw to Videotron. In this regard, he has made "very clear the lens through which [he] will consider this proposed spectrum transfer." First, he stated that any new wireless licenses acquired by Videotron would need to remain in its possession for at least 10 years. Second, he has expressed an expectation "to see prices for wireless services in Ontario and Western Canada comparable to what Vidéotron is currently offering in Quebec, which are today on average 20 per cent lower than in the rest of Canada": Exhibit P-R-0008. Although this does not appear to be a legally enforceable condition, it is also not something that the Tribunal expects would be taken lightly by Videotron, especially given that it will have to deal with the Minister in the future. The Tribunal expects that Videotron will endeavour to honour what Mr. Péladeau describes as its "obligation", and what Mr. Lescadres describes as its "commitment", in this regard: Transcript, at 2517 and 2335-2336.

[397] More generally, the Minister committed earlier this year to "push aggressively to generate innovation, improve coverage and reduce the costs of telecommunications services using every tool we have": Exhibit P-R-0046. This followed a statement he made in March 2020 to "take action with other regulatory tools to further increase competition and help reduce prices": Exhibit P-R-0045.

(13) Coordinated effects

(a) The Commissioner's allegations

[398] The Commissioner maintains that the Merger is likely to facilitate increased coordination between the National Carriers, notwithstanding the Divestiture.

[399] In support of this allegation, the Commissioner states the following:

a) Pricing behaviour is very transparent, the National Carriers actively monitor each other's plans, prices, and promotions;

b) The National Carriers can and do signal their future pricing intentions by using tactics such as promotional pricing with pre-specified end dates or by publicly announcing their future pricing.

c) The National Carriers sometimes interpret price movements as signals about competitor intentions and react with their own price signals meant to communicate their intention to accede to a price increase or to punish a competitor for lowering its price.

d) The National Carriers often refer to the need to maintain "price discipline" and to avoid "irrational pricing".

e) There is a history of parallel or coordinated behaviour in this industry.

f) The threat of retaliation is a significant factor in pricing decisions by the National Carriers. Among other things, they recognize that they each compete across many product and geographic markets. This leads them to weigh the risk of retaliation not only in the same areas in which a promotion may be offered, but also in other areas.

g) The National Carriers recognize that competitive initiatives may carry a risk of having to re-price their existing customer base. This discourages both the likelihood and scale of competitive initiatives and responses.

[400] In addition to the foregoing, the Commissioner states that the following market characteristics substantially increase the likelihood of successful coordination among the National Carriers post-Merger:

a) Consumers of Wireless Services lack buyer-side market power.

b) There are high barriers to entry and expansion;

c) The Merger would result in a substantial increase in concentration.

d) There will be an increase in cost symmetry among the National Carriers.

e) The underlying service costs of competitors are generally well-known to the National Carriers.

f) The Merger will eliminate Shaw as a maverick competitor.

(b) Assessment

[401] The lynchpin of the Commissioner's position with respect to coordinated effects is that the Merger "is likely to lead to enhanced anticompetitive coordination by removing [Shaw, which is] a highly disruptive player from the market". In this regard, the Commissioner describes Shaw as being "a disrputor of coordination, driving down prices and fostering service enhancements such as higher limit plans": Application, at para 89.

[402] However, Videotron also has a long history of being a highly disruptive, innovative competitor. This is how it has managed to gain a market share of approximately 22% of wireless subscribers in Quebec: Exhibit CA-I-0144, at para 5. The competitive dynamic that it has stimulated has led to much lower prices in Quebec, relative to other provinces: Exhibit CA-R-0232, at para 24. Indeed, the Minister estimates that prices in Quebec "are today on average 20 per cent lower than in the rest of Canada": Exhibit P-R-0008.

[403] Considering the foregoing, and for the additional reasons provided in part X.B.(9) – (12) above, the Tribunal finds that the Merger and the Divestiture are not likely to give rise to an increased likelihood of coordinated behaviour, as the Commissioner has alleged.

(14) Conclusion

[404] For all of the reasons set forth in Parts X.B.(1)-(13) above, the Tribunal has determined that the Merger and Divestiture are not likely to prevent or lessen competition substantially in the markets for wireless services in Alberta and British Columbia. In other words, the Merger and Divestiture are not likely to result in materially higher prices for those services, relative to those that would likely prevail in the absence of the arrangement. The Merger and Divestiture are also unlikely to result in materially lower levels of non-price dimensions of competition, relative to those that would likely exist in the absence of the arrangement.

[405] In the course of making this determination, the Tribunal rejected various allegations made by the Commissioner in support of several propositions, including that: (i) Shaw's divestiture of

Freedom to Videotron would result in Freedom being a less effective competitor than it was immediately prior to the announcement of the Merger; (ii) Rogers' acquisition of Shaw Mobile would likely give rise to anti-competitive unilateral effects; and (iii) the Merger and Divestiture would likely facilitate the exercise of collective market power by the National Carriers.

[406] To the extent that Videotron is much more committed than Shaw to be a long-term participant in the relevant markets, the Tribunal expects that Videotron would be a more aggressive and effective competitor than Freedom and Shaw Mobile likely would have been in the absence of the Merger. For much the same reason that determined, upstart boxers often do better than incumbents who are already casting their eyes towards retirement, the Tribunal expects the same would be true for Videotron/Freedom, relative to Freedom/Shaw Mobile and their trajectory under Shaw's ownership, at the time the Merger was announced.

[407] Videotron is an experienced market disruptor that has achieved substantial success in Quebec, where it has grown to having a 22% share of wireless subscribers. It has drawn upon its experience to develop very detailed and fully costed plans for its entry into and expansion within the relevant markets in Alberta and British Columbia, as well as in Ontario. Those plans were buttressed when Videotron acquired VMedia earlier this year, with a view to accelerating its rollout of new bundled offerings. The Tribunal has concluded that the evidence establishes that the bundled offerings of Freedom and VMedia will likely be priced at a level that is at least as competitive as the level at which the bundled offerings of Shaw Mobile and Freedom likely would have been priced in the absence of the Merger. The Tribunal has determined that the same is also likely to be true for the "wireless only" offerings of Freedom under Videotron and Videotron's digital "Fizz" brand, relative to the corresponding offerings of Shaw Mobile and Freedom under Shaw's control. In addition, the Tribunal has found that Videotron, which is in the process of rolling out 5G services in Quebec, is likely to do the same in Alberta and British Columbia within a time-frame that will ensure that competition is not substantially prevented or lessened.

[408] It bears underscoring that there will continue to be four strong competitors in the wireless markets in Alberta and British Columbia, namely, Bell, Telus, Rogers and Videotron, just as there are today. Videotron's entry into those markets will likely ensure that competition and innovation remain robust. Among other things, Videotron has a proven record of aggressive pricing and innovation in Quebec and parts of Eastern Ontario. Its expansion into Alberta, British Columbia and the rest of Ontario will be facilitated by the very favourable arrangements that it has negotiated as part of the Divestiture. That expansion will also be facilitated by the national rollout of Videotron's "Fizz" brand. Moreover, instead of the two firms (Telus and Shaw) that offer bundled wireless and wireline products in those markets today, there will be at least three (Telus, Rogers, and Videotron).

[409] The Tribunal has also determined that the strengthening of Rogers' position in Alberta and British Columbia, combined with the very significant competitive initiatives that Telus and Bell have been pursuing since the Merger was announced, will also likely contribute to an increased intensity of competition in those markets.

C. The efficiencies defence

[410] Given the Tribunal's conclusion that the Merger and Divestiture are unlikely to prevent or lessen competition substantially, it is unnecessary to consider whether the Respondents have satisfied the requirements of the efficiencies defence in section 96 of the *Competition Act*.

XI. DISPOSITION

[411] For the reasons set forth in Part X.B. above, and summarized in Part X.B.(14), the Commissioner's application will be dismissed.

[412] The Tribunal will address the issue of costs in a subsequent decision.

XII. ORDER

[413] The Application brought by the Commissioner is dismissed.

DATED this 30th day of December, 2022

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Paul Crampton C.J. (Presiding Member)
(s) Wiktor Askanas
(s) Ramaz Samrout

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APPENDIX 1 – Section 7 of the *Telecommunications Act*

Canadian Telecommunications Policy	Politique canadienne de télécommunication
Objectives	**Politique**
7 It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada’s identity and sovereignty and that the Canadian telecommunications policy has as its objectives	**7** La présente loi affirme le caractère essentiel des télécommunications pour l’identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :
(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;	**a)** favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;
(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;	**b)** permettre l’accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;	**c)** accroître l’efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;
(d) to promote the ownership and control of Canadian carriers by Canadians;	**d)** promouvoir l’accession à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

e) promouvoir l’utilisation d’installations de transmission canadiennes pour les télécommunications à l’intérieur du Canada et à destination ou en provenance de l’étranger;

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l’efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

g) stimuler la recherche et le développement au Canada dans le domaine des télécommunications ainsi que l’innovation en ce qui touche la fourniture de services dans ce domaine;

(h) to respond to the economic and social requirements of users of telecommunications services; and

h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

(i) to contribute to the protection of the privacy of persons.

i) contribuer à la protection de la vie privée des personnes.

APPENDIX 2 – Relevant provisions of the *Competition Act*

Mergers	Fusionnements
[…]	[…]
Order	**Ordonnance en cas de diminution de la concurrence**
92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially	**92 (1)** Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :
(a) in a trade, industry or profession,	**a)** dans un commerce, une industrie ou une profession;
(b) among the sources from which a trade, industry or profession obtains a product,	**b)** entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;
(c) among the outlets through which a trade, industry or profession disposes of a product, or	**c)** entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;
(d) otherwise than as described in paragraphs (a) to (c),	**d)** autrement que selon ce qui est prévu aux alinéas a) à c),
the Tribunal may, subject to sections 94 to 96,	le Tribunal peut, sous réserve des articles 94 à 96 :
(e) in the case of a completed merger, order any party to the merger or any other person	**e)** dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci

	soit partie au fusionnement ou non :
(i) to dissolve the merger in such manner as the Tribunal directs,	**(i)** de le dissoudre, conformément à ses directives,
(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or	**(ii)** de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,
(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or	**(iii)** en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;
(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person	**f)** dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :
(i) ordering the person against whom the order is directed not to proceed with the merger,	**(i)** à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,
(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or	**(ii)** à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,
(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both	**(iii)** en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :
(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the	**(A)** à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire

prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux of the parties to the merger or proposed merger;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(d) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(f) any likelihood that the merger or proposed merger will or would result in the

entreprises des parties au fusionnement réalisé ou proposé;

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l'accès à un marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market;

(g.1) network effects within the market;

(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

[…]

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result

concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

g.1) les effets de réseau dans le marché;

g.2) le fait que le fusionnement réalisé ou propose contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

[…]

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l’ordonnance prévue à l’article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l’objet de la demande a eu pour effet ou aura vraisemblablement pour effet d’entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l’empêchement ou de la diminution de la from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l’ordonnance était rendue.

Factors to be considered

Facteurs pris en considération

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(2) Dans l’étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

(a) a significant increase in the real value of exports; or

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

(b) a significant substitution of domestic products for imported products.

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

(3) Pour l’application du présent article, le Tribunal ne conclut pas, en raison seulement d’une redistribution de revenu entre plusieurs personnes, qu’un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

Loop, LLC v. CDK Global, LLC
No. 1:18-cv-00864 (N.D. Ill. July 22, 2024)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION,	)	
LOOP, LLC, d/b/a AUTOLOOP	)	**MDL 2817**
	)	**Case No. 18-cv-2521**
Plaintiff,	)	
	)	**Judge Rebecca R. Pallmeyer**
v.	)	
CDK GLOBAL, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This antitrust multidistrict litigation revolves around the back-end software essential for managing operations at our nation's car dealerships. At the center of the case are Defendants CDK Global, LLC ("CDK") and The Reynolds and Reynolds Company ("Reynolds"), leading providers of this automotive software, who stand accused of conspiring to violate antitrust laws by restricting competitor access to their data systems—which allegedly has resulted in increased prices for a subset of their services. Plaintiff Loop, LLC ("AutoLoop") has sued CDK on behalf of hundreds of automotive software application vendors that are direct purchasers of the services at issue in this case. Having survived various challenges throughout this litigation, including a pleadings challenge, *Daubert* briefing, and a summary judgment motion, AutoLoop now seeks certification of a class of software vendors (the "Vendor Class") under § 1 of the Sherman Act allegedly harmed by the conspiracy. In support of its bid for class treatment, AutoLoop has submitted the report of its expert, Dr. Mark Israel. Defendant CDK opposes class certification and has moved to exclude portions of Dr. Israel's report. For the reasons detailed below, the court overrules CDK's challenges and certifies the Vendor Class.

BACKGROUND

I. Pre-Suit Factual Background

The court assumes familiarity with the facts of this case, which have been set out in greater detail in several prior opinions.[1] To recap: Defendants CDK and Reynolds[2] are technology companies that operate in the automotive software space and sell "dealer management systems" ("DMS") to retail automobile dealerships. In simple terms, a DMS is a software platform that enables car dealers to use the data they generate to manage the day-to-day functions of their business, including sales, financing, and service operations. CDK and Reynolds control roughly 70% of the United States franchise dealership market for these systems. Within a DMS, dealers use software applications ("apps") that supplement the DMS's functionality and offer add-on tools to deal with tasks such as inventory management, customer relationship management, warranty services, repair orders, and electronic vehicle registration and titling. Most of these apps are sold by third-party developers, referred to here as "vendors," although DMS providers like CDK and Reynolds also create and market apps to dealers.

To make their apps commercially viable, vendors require access to dealers' (their clients') data, which is stored on the dealers' DMS. However, this data is kept on the DMS in a raw and unprocessed form that is generally unusable by vendors. So, vendors enlist data integration companies to "clean" and consolidate the data, making it functional for the vendor's needs—a process generally known as data syndication and referred to here as data integration services ("DIS"). CDK and Reynolds both

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[1] *See, e.g.*, *In re Dealer Mgmt. Sys. Antitrust Litig.* ("Summ. J. Op."), 680 F. Supp. 3d 919, 933 (N.D. Ill. 2023) [1381]; *In re Dealer Mgmt. Sys. Antitrust Litig.* ("*Daubert* Op."), 581 F. Supp. 3d 1029 (N.D. Ill. 2022) [1321]; *In re Dealer Mgmt. Sys. Antitrust Litig.* ("Dealers MTD Op."), 362 F. Supp. 3d 510 (N.D. Ill. 2019) [507]; *In re Dealer Mgmt. Sys. Antitrust Litig.* ("AutoLoop MTD Op."), 362 F. Supp. 3d 477 (N.D. Ill. 2019) [504]; *In re Dealer Mgmt. Sys. Antitrust Litig.* ("Authenticom MTD Op."), 313 F. Supp. 3d 931 (N.D. Ill. 2018) [176].

[2] AutoLoop brought its case against CDK only, with the understanding that CDK is jointly and severally liable for all harm caused by Reynolds in furtherance of the alleged conspiracy. *See In re Uranium Antitrust Litig.*, 552 F. Supp. 518, 522 (N.D. Ill. 1982) ("[A]n antitrust defendant is jointly and severally liable for the acts of its co-conspirators.").

sell "certified" DIS (called 3PA and RCI, respectively) within their own DMS platforms, but vendors can also purchase DIS from third-party data integrators. Notably, CDK has two subsidiary companies, DMI and IntegraLink, that sell DIS on the open market.

This antitrust case centers around the evolution of CDK's and Reynolds's policies regarding third-party access to dealers' DMS data. Initially, both companies had relatively "open" policies that allowed independent DIS providers to directly access dealers' DMS data. This meant vendors working with a dealer that used either of Defendants' DMSs had the option to use Defendants' certified DIS services or contract with an independent DIS provider. Beginning in 2006, however, Reynolds began preventing independent DIS providers from accessing its DMS, whereas CDK kept its DMS "open" to other DIS providers, and promoted this feature to dealers as a reason dealers should use CDK's system. In other words, for a period of time CDK and Reynolds competed in part on the "openness" of their DMSs. Then, around September 2013, CDK suddenly stopped marketing its DMS as open. Plaintiffs claim this about-face was the result of an oral agreement between senior executives at CDK and Reynolds to squeeze independent DIS providers out of the market. According to Plaintiffs, they achieved this by, among other things, coordinating a message that "data security" concerns required them to block independent DIS providers from accessing their respective DMSs. Consistent with oral agreement, CDK would begin to restrict access to its DMS, while Reynolds orally agreed that for a limited time DMI and IntegraLink would retain access to Reynolds's DMS—what Plaintiffs characterize as a form of quid pro quo.

In February 2015, following these alleged oral agreements, CDK and Reynolds entered into three written agreements. In one of these agreements, called the "Wind Down Agreement," they effectively memorialized the alleged quid pro quo arrangement: CDK formally agreed that within approximately five years, DMI and IntegraLink would stop servicing dealers who had a Reynolds DMS. In return, Reynolds agreed to give DMI and IntegraLink access to its DMS during the wind-down period. Reynolds and CDK also agreed that neither would any other independent DIS provider that attempted to access the other's DMS. Concurrent with the Wind Down Agreement, CDK and

Reynolds also entered into the "3PA Agreement" and the "RCI Agreement." These agreements provided Defendants with reciprocal access to each other's certified integration programs.

Thus, AutoLoop's theory of the case is that CDK and Reynolds conspired to eliminate competition from independent DIS providers, thereby forcing vendors to purchase DIS from CDK and Reynolds at an inflated price.

II. Initial Pretrial Proceedings

Dozens of auto dealerships, vendors, and independent data integrators sued CDK and Reynolds under the Sherman Act and various state antitrust and consumer protection laws. On February 1, 2018, the Judicial Panel on Multidistrict Litigation ("JPML") consolidated the cases in this MDL. The parties filed various claims and counterclaims under federal and state antitrust laws, many of which were resolved early in the litigation via dismissal[3] or settlement.[4] The court's May 2018 scheduling order [166] laid out a merits discovery period for all plaintiffs through February 2019 (later extended to April 2019), followed by an initial round of *Daubert* and summary judgment motion practice, and then by motions for class certification plus a second round of *Daubert* briefing specifically directed towards the requirements of Rule 23. After fact discovery closed, the court ruled on the parties' initial *Daubert* motions in January 2022 and on their motions for summary judgment in June 2023. In its 2022 *Daubert* opinion, the court found AutoLoop's expert's merits report admissible in its entirety. (*See generally Daubert* Op. [1321].) Then, in 2023 the court ruled that AutoLoop's Sherman Act § 1 conspiracy claim and its parallel state law claim survived summary judgment, and that those claims will be subject to the rule-of-reason analysis at trial. (*See generally* Summ. J. Op. [1381].)

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[3] (*See* [176], [425], [504], [505], [506], [507], [749], [857].)

[4] (*See* [502], [778], [1199], [1351].)

III. Post-Discovery Factual Developments

Given the long procedural history of this case, the facts underlying AutoLoop's substantive claims continue to evolve in tandem with the litigation. For example, CDK now highlights for the court's consideration several changes that have taken place in the DMS and DIS markets that were not presented at summary judgment. For one, CDK alleges that it now faces increased competition from other DMS providers, such as the firms Auto/Mate, Dealertrack, and Tekion, challenging its' and Reynolds's historic dominance over the DMS market. In addition, CDK pushed out a few new initiatives that it claims were intended to win over customers in the face of increased competition. These include a "Customer Rewards Program" (introduced in 2018 and discontinued a year later) that offered various benefits in the form of discounts on upfront costs and ongoing fees, including waivers of the DIS fees charged to participating dealers' vendors for use of their 3PA data. (Decl. of Leigh Ann Conver [1460-11] (hereinafter "Conver Decl.") ¶¶ 18–21.) CDK also announced in 2022 that it would "sunset 3PA [CDK's DIS] by the end of 2024" in favor of a new product, "Fortellis," which provides a centralized "app store" for dealers to purchase CDK and third-party apps as well as a more modern framework for vendors to integrate with dealers' DMS data. (*Id.* ¶¶ 37–39.) CDK launched Fortellis in early 2019. (*Id.* ¶ 37.) Finally, CDK created a new free service in September 2022 called "Data Your Way," which allows dealers to export their own DMS data and share it with vendors directly without paying any DIS fees to CDK. (*Id.* ¶¶ 48–52.)

IV. Class Certification

Before the court now is AutoLoop's motion for class certification. AutoLoop seeks certification of one damages class (the "Vendor Class") under Federal Rule of Civil Procedure 23(b)(3), comprised of:

> All automotive software vendors (i.e., persons or entities engaged in the sale of software solutions to automotive dealerships) located in the United States that, at any time since October 1, 2013, have purchased data integration services from CDK or Reynolds. Excluded from the class are (1) CDK, Reynolds, and any of their officers, directors, employees, subsidiaries, and affiliates; (2) Cox Automotive, Inc. and its subsidiaries and affiliates; and (3) automotive software vendors that first purchased data integration services from CDK after June 5, 2018.

(AutoLoop Class Certification Reply [1472] at 6.)[5] The Vendors bring a single Sherman Act § 1 conspiracy claim against CDK.[6] AutoLoop requests that it be appointed as the class representative for the Vendor Class and that Kellogg Hansen and Professor Samuel Issacharoff be appointed class counsel.

The following discussion is divided into two sections. In the first section, the court addresses CDK's challenges to certain opinions of AutoLoop's expert, Dr. Mark Israel. Then, the court rules on AutoLoop's class certification motion.

***DAUBERT* MOTION**

Federal Rule of Evidence 702 governs the admissibility of expert witness testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588 (1993). Before admitting expert testimony, a district court must determine that (1) the expert is proposing to testify to valid scientific, technical, or other specialized knowledge, and (2) the testimony will assist the trier of fact. *See Robinson v. Davol Inc.*, 913 F.3d 690, 695 (7th Cir. 2019). When an expert's testimony is "critical" to class certification, a district court must resolve any challenge to that expert's qualifications or submissions before it rules on class certification. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012) (citing *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010)). In the context of this motion, expert testimony is critical if it is "important to an issue decisive for . . . a class certification

[5] AutoLoop modified its proposed class definition in its reply brief to exclude from the class any vendors that "first purchased data integration services from CDK after June 5, 2018." This was done in response to CDK's argument that vendors who first contracted with CDK after June 5, 2018 signed agreements that included class-waiver provisions. Courts ordinarily allow plaintiffs to modify their proposed class definition in response to an argument made by the defendant. *See Simpson v. Dart*, No. 18 C 553, 2021 WL 2254969, at *1 (N.D. Ill. June 3, 2021) (allowing plaintiff to modify class definition in reply brief); *see also Schorsch v. Hewlett–Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) (noting that "litigants and judges regularly modify class definitions"). The court will do so in this case and addresses AutoLoop's recent proposed class definition, narrowed in light of the class action waiver.

[6] As noted, AutoLoop's Florida-law claim also survived summary judgment; however, AutoLoop does not assert this claim on a classwide basis. (*See* AutoLoop Mem. in Supp. of Mot. for Class Certification [1422-1] at 2 n.2.)

decision." *Id.* at 812. The party seeking to offer an expert's testimony bears the burden of establishing its admissibility under *Daubert* by a preponderance of the evidence. *City of Rockford v. Mallinckrodt ARD, Inc.*, No. 3:17-CV-50107, 2024 WL 1363544, at *5 (N.D. Ill. Mar. 29, 2024) (citing *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 782 (7th Cir. 2017)).

As alluded to above, the court has ruled on numerous challenges CDK has made against Dr. Israel's expert reports. (*See generally Daubert* Op. and Summ. J. Op.) These prior rulings are law of the case and will not be reconsidered here "absent exceptional circumstances such as a change in the law, new evidence, or compelling circumstances." *Zhang v. Gonzales*, 434 F.3d 993, 998 (7th Cir. 2006). For this reason, the current review of Dr. Israel's reports can be more narrowly focused on whether he offers a reliable method to try the Vendors' case on a classwide basis. The court's analysis below homes in on this narrower question, and declines CDK's invitation to revisit past issues.

I. Dr. Mark Israel

Dr. Israel has submitted several expert reports in this case. In a nutshell, the central theory of his reports on the merits of the Vendors' claims is that

> CDK's and Reynolds' actions have harmed competitors, competition, and consumers in DIS markets and App markets and have harmed competition and consumers in the DMS market. . . . [T]he mechanism of this harm was the joint blocking of independent DIS providers from accessing the CDK and Reynolds DMSs, which effectively monopolized CDK's and Reynolds' respective DIS markets, thus leading to higher DIS prices and higher DIS costs to App vendors, thereby also harming competition in App markets.

(Israel Initial Rep. [889-1] ¶ 10; *see also* Israel Initial Reply Rep. [889-2] ¶ 5.) To quantify how much the conspiracy increased DIS prices, he used a "difference-in-differences" ("DID") model, which compared changes in prices for CDK's and Reynolds's integration services (3PA and RCI, respectively) against benchmark prices from an independent data integrator (in this case, Authenticom[7]) that were not altered by the alleged conspiracy. (*See* Israel Initial Rep. ¶¶ 193–99.) Dr.

[7] Authenticom is an independent data integrator. It was previously a party to this MDL but settled its claims against Defendant CDK in October 2020 [1199] and against Defendant Reynolds in May 2022 [1351].

Israel checked the robustness of his DID results with a separate regression model, called a "before-during" ("B&D") model, which compared 3PA and RCI prices before and during the alleged conspiracy period. (*Id.* ¶¶ 203–04.) Both models supported Dr. Israel's economic conclusion that CDK and Reynolds conspired to eliminate competition in their DIS markets, and that vendors incurred price overcharges as a result. (*See id.* ¶¶ 200–02, 204.) CDK vigorously challenged the admissibility of Dr. Israel's merits opinions on multiple grounds, but the court rejected those arguments in two separate opinions, ruling generally that the disputes amounted to a battle of the experts that must be left for the factfinder to resolve. (*See Daubert* Op. at 16–29; Summ. J. Op. at 68–72.)

Dr. Israel has submitted additional reports in support of AutoLoop's class certification motion, although these are more properly understood as addenda to his initial merits reports. (*See* Israel Suppl. Rep. [1422-2], Israel Suppl. Reply [1474-1], Israel Suppl. Sur-Reply [1513-1].) In these newer reports, Dr. Israel asserts that his initial merits analysis "was entirely done on a common basis, evaluating the alleged conduct as a whole and its impact on a market-wide basis, without the need to evaluate issues particular to individual class members" and thus "appl[ies] equally to all class members, and do[es] not require inquiry into issues particular to any class member." (Israel Suppl. Rep. ¶ 13.) In other words, Dr. Israel opines, "there are common, class-wide economic methods to evaluate" market definition, market power, liability, and antitrust injury. (*Id.* ¶ 45; *see id.* ¶¶ 20, 24, 28, 34.) Further, he states that the models he used in his initial report provide a "common method to quantify damages" for the class as a whole and for each member of the class. (*Id.* ¶ 45; *see id.* ¶¶ 35, 38.) In this most recent round of reports, Dr. Israel reruns his regression models with updated data through September 2023. (Israel Suppl. Reply ¶¶ 43–44, 96–97.) With this updated data, his DID model estimates $395.46 million in classwide damages and his B&D model estimates $406.94 million in classwide damages. (*Id.* at 49 tbl.1, 56 tbl.2.)

At class certification, CDK moves to exclude testimony of Dr. Israel that relates to "(1) any opinion that the fact of 'monopolization' establishes class-wide antitrust impact; (2) all damages Dr. Israel computes using his before-during model; (3) all post-2019 damages computed using Dr. Israel's difference-in-differences model; and (4) any opinion that damages are continuing." (CDK's Mot. to Exclude Ops. of Dr. Israel [1459] at 1.) CDK's motion rests in key part on the report of its own expert, Dr. Laila Haider, an economist and vice president at consulting firm Charles River Associates, whose opinions the court has not previously addressed in this case [1460-1]. The court deals with each of CDK's arguments in turn, ultimately rejecting CDK's motion to exclude any portion of Dr. Israel's class certification opinions.

A. Monopolization and Antitrust Injury

CDK first argues that the court should exclude "new" opinion testimony from Dr. Israel that, in CDK's view, conflates unreasonable restraint (i.e. closure of CDK's and Reynolds's DMS markets to independent data integrators) with antitrust injury (also referred to by some courts as "antitrust impact"). (CDK's Mem. in Supp. of Mot. to Exclude Ops. of Dr. Israel [1459-1] at 1.) Specifically, CDK notes that Dr. Israel testified in his deposition that the "fact of monopolization establishes injury." (Jan. 19, 2014 Israel Dep. [1460-12] 73:10–11.) This means, CDK contends, that "according to Israel, the DMS closure automatically establishes injury to all vendors, regardless of any effect on price." (CDK's Mem. in Supp. of Mot. to Exclude Ops. of Dr. Israel at 6.) CDK calls this view "legally flawed" because "proof of [an antitrust] violation and of antitrust injury are *distinct* matters that must be shown independently." (*Id.* at 5–6 (emphasis in CDK's brief) (first quoting *Meds. Co. v. Mylan Inc.*, No. 11-CV-1285, 2014 WL 1227214, at *5 (N.D. Ill. Mar. 25, 2014), and then quoting *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 343–44 (1990).)

The court reads Dr. Israel's testimony less broadly; it does not appear to the court that he has assumed that antitrust injury and liability necessarily rise and fall together. Instead, as he makes clear in his report, "[his] opinion is not that all monopolization cases in which [d]efendants are found liable necessarily have common antitrust injury; it is that the facts of this case demonstrate such common injury." (Israel Suppl. Reply ¶ 40.) He explains that in other monopolization cases there may be debate as to whether buyers in the relevant market retain sufficient alternative options to avoid harm, "[b]ut based on the evidence in the present case, I see no room for debate on this question: The options for independent automated DIS services were eliminated, leaving a monopoly in each DIS market" that resulted in an increase in the price of CDK's and Reynolds's DIS, among other harms. (*Id.* ¶¶ 37–38; *see also* Israel Suppl. Rep. ¶ 33.) The quote from Dr. Israel's deposition that CDK points to is taken out of context; a more honest reading of his testimony shows that Dr. Israel was being asked a question about the evidence in this case, not being asked to opine on the general legal theory of antitrust injury. (*See* Jan. 19, 2014 Israel Dep. 72:18–74:11.)

Beyond this, CDK overstates the legal proposition that "proof of [an antitrust] violation and of antitrust injury are *distinct* matters that must be shown *independently*." (CDK's Mem. in Supp. of Mot. to Exclude Ops. of Dr. Israel at 6 (emphasis in CDK's brief).) As an initial matter, each of the cases it cites for this proposition dealt with whether a competitor—as opposed to a customer, like each of the vendors is here—suffered an antitrust injury. *See Atl. Richfield Co.*, 495 U.S. at 345 (holding competitor did not suffer antitrust injury); *O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc.*, 36 F.3d 565, 573 (7th Cir. 1994) (same); *Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989) (discussing antitrust injury in the context of harm to a competitor). The Supreme Court has explained that the distinction between consumer and competitor antitrust claims is relevant because "a competitor will be injured and hence motivated to sue only when [an antitrust violation] has a *procompetitive* impact on the market. Therefore, providing the competitor a cause of action would not protect the rights of . . . consumers under the antitrust laws." *Atl. Richfield Co.*, 495 U.S. at 345–46 (emphasis in original). More to the point, none of these cited cases stand for the legal proposition that customers in a monopolized market cannot make out a prima facie case of antitrust injury based on evidence that a monopolist used its market power to increase prices. *See Bradburn Parent/Tchr.*

Stores, Inc. v. 3M, No. CIV.A.02-7676, 2004 WL 1842987, at *13 (E.D. Pa. Aug. 18, 2004) ("[W]hen a monopolist unlawfully maintains its monopoly power . . . it is logical, at least as a general rule, to presume that all class members have suffered injury as a result of the conduct, in the form of supra-competitive prices."). CDK's challenge has even less purchase here because Dr. Israel takes the next step and opines that his regression analysis provides a sound econometric method to discern the existence of antitrust injury on each class member in the form of supracompetitive DIS prices. Accordingly, to the extent that Dr. Israel is testifying that the alleged monopolization of CDK's and Reynolds's case resulted in antitrust injury to the vendors based on the evidence in this case, the court finds no basis to exclude his testimony.

B. Damages Related to Dr. Israel's B&D Model

Next, CDK argues that Dr. Israel's B&D model (which is his "secondary model" that he uses as a robustness check on his primary DID model) is unreliable because it (1) relies on pooled data—i.e., uses aggregated data for all vendors, rather than running the regression separately for each vendor—and (2) extrapolates from an allegedly unrepresentative sample. (*See* CDK's Mem. in Supp. of Mot. to Exclude Ops. of Dr. Israel at 7–10.) CDK concedes that "it is not unusual for economists to use pooled data to estimate aggregate damages in antitrust cases" but claims that it is necessary to first test the assumption that each customer was affected in the same way by the alleged conspiracy, specifically by using a "Chow test."[8] (*Id.* at 8.) CDK claims that when Dr. Haider performed a Chow test on Dr. Israel's B&D model, she found that the results "strongly reject[] the restrictive assumption that the price effects of the alleged conduct are the same for all vendors buying from a given Defendant in an alleged conduct period," suggesting "that it is inappropriate to pool data for all vendors into a single regression model." (Haider Rep. [1460-1] ¶¶ 241, 187.) In arguing that the secondary model

[8] A Chow test is a testing principle that uses a mathematical formula to determine whether the independent variables have drastically different effects on two or more subsets of the data. (*See* Haider Rep. [1460-1] at 91 nn.340 & 341.)

uses an unrepresentative sample, CDK reasons that the vendors who purchased both before and during the alleged conspiracy (i.e., the subset of vendors that were used in the B&D model) are unrepresentative of the vendors as a whole because they "tended to buy more DIS, and more *expensive* DIS." (CDK's Mem. in Supp. of Mot. to Exclude Ops. of Dr. Israel at 10 (emphasis in original).) Additionally, CDK takes issue with the model's inclusion of data from affiliates of Cox Automotive, Inc. as those vendors have settled their claims against CDK and are not part of the putative class. (*Id.*)

AutoLoop and Dr. Israel respond to these challenges to the B&D model in their opposition papers and supplemental reply report. First, Dr. Israel defends his decision to rely on pooled data, contending that it was reasonable given the evidence of the alleged conspiracy's market-wide effects. He adds that pooling is particularly useful here because it generates results with greater "statistical significance,"[9] whereas Dr. Haider's method of running separate regressions for each vendor produced many results that were not statistically significant. (Israel Suppl. Reply ¶¶ 112, 123, 127.) As for Dr. Haider's critique that Dr. Israel should have run a Chow test on his B&D model, AutoLoop denies that running a Chow test is a prerequisite to using pooled data and cites to several courts that have rejected similar arguments. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F. 4th 651, 675–76 (9th Cir.) (en banc) (ruling that district court did not abuse discretion in concluding that "the failure of the Chow test did not require the court to reject the model" where "there was a rational basis for [expert's] use of the pooled regression model to demonstrate class-wide impact"), *cert. denied sub nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, 143 S. Ct. 424 (2022); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB), 2022 WL 14862098, at *13 (E.D.N.Y. Oct. 8, 2022) ("[T]he case law does not support the contention that passing the Chow test is an absolute prerequisite." (citation omitted)).

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[9] Statistical significance is a measure used in research to determine if the results of a study are likely to be meaningful rather than occurring by chance. It helps researchers assess whether an observed effect or relationship between variables is likely to reflect a real pattern or if it could have happened randomly. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 n.6 (2011) (citing Federal Judicial Center, *Reference Manual on Scientific Evidence* at 122–24, 354 (2d ed. 2000).)

Nonetheless, in response to Dr. Haider's critique, Dr. Israel concedes that he should have applied the Chow test to his B&D models that use producer price indices for the software industry ("software PPI") or software PPI and auto sales as controls. Dr. Israel further admits that when he does apply the Chow test to these models, it rejects his assumption that the coefficients on the control variables are consistent across vendors. (Israel Suppl. Reply ¶ 110.) He contends, however, that the "appropriate reaction" to this result is "not to throw the model out, but rather to use a version that lets those coefficients vary by vendor . . . ." (*Id.*) In his reply report, Dr. Israel makes this adjustment and shows that—even when he allows the coefficients to vary by vendor—the estimated overcharges are similar to those in his original B&D model, and still higher than what his DID model estimates. (*Id.* at 55 tbl.2.) In other words, whether or not he accounts for the implications of the Chow test, his B&D model shows higher total overcharges than his DID model.

AutoLoop also dismisses CDK's argument that Dr. Israel's secondary model uses a nonrepresentative sample. As AutoLoop notes, the court has already addressed this issue, and has accepted Dr. Israel's conclusion that the alleged conspiracy affected all vendors in the same way. And, in any event, the group of vendors used in the B&D model represents a substantial portion of the putative class's transactions: roughly 70% of the Defendants' DIS sales volumes. (AutoLoop Opp'n to CDK's Mot. to Exclude Ops. of Dr. Israel [1470] at 11–12.) Finally, AutoLoop states that it would make "no economic sense" for Dr. Israel to remove Cox Automotive from the regression model just because it settled its case, since its transactions were still affected by the conspiracy. (*Id.* at 13.)

The court need not referee the experts' battle on this issue for two reasons. First, CDK has effectively waived any challenge to Dr. Israel's secondary model. Dr. Israel produced the same basic model in 2019 during the merits phase of this litigation; CDK had an opportunity to challenge the B&D model then and chose not to. The court considered the reliability of Dr. Israel's DID and B&D models in two separate opinions and ruled that both were admissible. (*See Daubert* Op. at 25 ("Israel also considered other methods of testing collusion's impact, including one that substituted CDK's and

Reynolds' own pre-conduct prices as the relevant baseline and one that used industry control variables."); Summ. J. Op. at 68 ("Israel conducted robustness checks using pre-conspiracy 3PA and RCI prices as an alternative benchmark and reached a similar calculation under that approach.").) CDK has not shown any "exceptional circumstances such as a change in the law, new evidence, or compelling circumstances" that compel this court to reexamine its previous determination. *Zhang*, 434 F.3d at 998. Second, and more to the point, CDK has not clearly articulated how its challenges to Dr. Israel's secondary model bear on class certification, which is the present concern of this court. The only case CDK cites on the purported Chow test issue, *Reed Construction Data Inc. v. McGraw-Hill Cos., Inc.*, was decided at summary judgment, not under Rule 23 (and, notably, involved an expert who could not provide any rational basis for his decision beyond his own common-sense judgment). 49 F. Supp. 3d 385, 405–06 (S.D.N.Y. 2014), *aff'd*, 638 F. App'x 43 (2d Cir. 2016). As to Dr. Israel's alleged use of an unrepresentative sample, the relevance of any potential variation between the sampled and unsampled vendors is itself a common question that may, if needed, be resolved at trial via classwide evidence. (*See* Israel Suppl. Reply ¶¶ 125, 131, 135 (noting that distinctions such as simple versus complex DIS services can be adjusted for using a common, classwide methodology).) Accordingly, the court rejects CDK's request to revisit the reliability of Dr. Israel's B&D model at this stage.

C. Post-2019 Damages Related to Dr. Israel's DID Model

CDK's third challenge relates to Dr. Israel's updated damages calculations from his DID model—but this deserves little discussion. CDK argues that Dr. Israel improperly "projects" damages through 2023 by applying the overcharge figure he calculated in 2019 during the merits phase to the intervening five years of DIS transactions. (CDK's Mem. in Supp. of Mot. to Exclude Ops. of Dr. Israel at 11.) CDK contends that this type of projection is inappropriate because "there is no basis for Israel's assumption of a constant overcharge from February 2015 to the present day." (*Id.* at 12.) Dr. Israel explained in his opening report that he could not update his DID model at the time his opening brief was due because he did not yet have updated Authenticom data.[10] He has since obtained updated Authenticom data and re-run his DID model with those figures in his most recent report. (*See* Israel Suppl. Reply ¶¶ 94–97.) Thus, this issue is moot.

D. Continuing Damages

Finally, CDK asks the court to exclude any opinion that damages from the alleged conspiracy are continuing because Dr. Israel "reaches that conclusion by ignoring four years of market facts . . . [that] undermine[] any link to the alleged conduct." (CDK's Mem. in Supp. of Mot. to Exclude Ops. of Dr. Israel at 13.) CDK lists several new programs, products, and events that it claims Dr. Israel did not consider based on his deposition testimony, such as the increased market share of new DMS providers like Tekion and the introduction of allegedly procompetitive programs like "Data Your Way." (*Id.* at 14.) AutoLoop counters by first noting that CDK's challenge here does not get at whether post-2019 damages can be adjudicated on a classwide basis, but instead raises a common defense that CDK can levy against the vendors at trial. Nevertheless, AutoLoop also argues that "the economic evidence" supports Dr. Israel's conclusion that damages are ongoing because "the competition that was eliminated by the conspiracy has not been restored" and CDK and Reynolds continue to charge higher prices than they would have but for the conspiracy. (AutoLoop Opp'n to CDK's Mot. to Exclude Ops. of Dr. Israel at 14–15.) It also argues that Dr. Israel's overcharge analysis already accounts for several of the "new" market facts that CDK claims he overlooks, such as CDK's fee waiver program. (*Id.* at 15.)

The court agrees with AutoLoop that this challenge to Dr. Israel's testimony has little to no bearing on class certification. CDK's cherry-picking of Dr. Israel's deposition testimony does not in any way establish that Dr. Israel's updated damages calculations ignore post-2019 developments wholesale in a way that renders them fundamentally unreliable; indeed, Dr. Israel does appear to have

[10] Recall that Dr. Israel's DID model calculates damages by measuring how much 3PA and RCI prices increased as compared to the benchmark prices of Authenticom.

accounted for many of the developments in this latter period, if not every single one that CDK identifies. In any event, the experts—each relying on economic principles and data from this case—have offered competing theories for when the appropriate cutoff date is for damages calculations. The difference in opinion here is not a basis to exclude Dr. Israel's testimony; rather, it represents one of the many battles over which the experts will confront each other during trial. *See In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2023 WL 7220170, at *5 (N.D. Ill. Nov. 2, 2023) ("Just because there is an alternative explanation that is contrary to that proffered by [plaintiffs' expert] does not mean that [plaintiffs' expert's] opinion should be excluded.").

In conclusion, the court denies CDK's *Daubert* challenges and finds that the entirety of Dr. Israel's class certification reports are admissible.

CLASS CERTIFICATION MOTION

The court now reaches AutoLoop's class certification motion. To certify a damages class, a plaintiff must satisfy the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—plus Rule 23(b)(3)'s predominance and superiority requirements. *See Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 923 (7th Cir. 2016); *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511, 513 (7th Cir. 2009). Rule 23 "does not set forth a mere pleading standard," and the plaintiffs bear the burden of "satisfy[ing] through evidentiary proof" each of its elements. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation marks and citation omitted). Accordingly, the court is tasked with conducting a "rigorous analysis" to determine whether the plaintiffs have satisfied the Rule's requirements. *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011); *see also Am. Honda Motor Co.*, 600 F.3d at 815 ("[B]efore deciding whether a class should be certified, [the court must] . . . make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied."). However, the Seventh Circuit has warned against elevating class certification proceedings "into a dress rehearsal for the trial on the merits," and has instructed district courts to simply consider the parties' evidence and determine whether the plaintiffs have proven each of Rule 23's elements by a preponderance of the evidence. *Messner*, 669 F.3d at 811 (citations omitted).

Aside from the textual requirements provided for in Rule 23, the Seventh Circuit also requires plaintiffs to prove that the proposed class is ascertainable. *See Mullins v. Direct Digit., LLC*, 795 F.3d 654, 659 (7th Cir. 2015). The "ascertainability" standard is satisfied if the class definitions are precise, defined by objective criteria, and not dependent on success on the merits. *Id.* at 659–60. The court's analysis here addresses each of Rule 23's requirements for class certification, though CDK only genuinely challenges class certification on predominance grounds.

A. Rule 23(a) Requirements

1. Numerosity and Ascertainability

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). CDK does not contest that Plaintiff can satisfy this requirement. Indeed, but courts have found "a forty-member class . . . sufficient to meet the numerosity requirement." *Anderson v. Weinert Enters., Inc.*, 986 F.3d 773, 777 (7th Cir. 2021) (citing *Orr v. Shicker*, 953 F.3d 490, 498 (7th Cir. 2020)). The putative Vendor Class is made up of 244 class members. (*See* Israel Suppl. Reply ¶ 97 & n.156.) Joinder of these hundreds of vendors scattered across the country would be impractical and, as AutoLoop has identified each of the 244 class members based on CDK's and Reynolds's own objective data, its proposed class definition also easily satisfies the Seventh Circuit's ascertainability requirement. (*See* Israel Suppl. Reply at 88–92 tbl.9.)

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). For purposes of the commonality requirement, "even a single common question will do." *Moehrl v. Nat'l Ass'n of Realtors*, No. 19 C 1610, 2023 WL 2683199, at *11 (N.D. Ill. Mar. 29, 2023) (quoting *Wal-Mart*, 564 U.S. at 359). For this reason, "[a] common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2) and is typically manifest where the defendants have engaged in standardized conduct towards members of the proposed class." *Am. Council of the Blind of Metro. Chi. v. City of Chicago*, 589 F. Supp. 3d 904, 908 (N.D. Ill. 2022) (cleaned up) (citing *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998)). Moreover, courts within the Seventh Circuit have repeatedly held that "the question of the existence of a conspiracy in restraint of trade is one that is common to all potential plaintiffs." *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 167 (S.D. Ind. 2009) (quoting *Sebo v. Rubenstein*, 188 F.R.D. 310, 313 (N.D. Ill. 1999)). In light of this caselaw, AutoLoop argues that whether CDK and Reynolds conspired to coordinate their data access policies and block independent data integrators from their respective DMSs is a common question (among others) that warrants satisfaction of the commonality requirement. CDK does not contest that AutoLoop has satisfied the commonality requirement on this basis, and the court agrees that it is met here.

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). The inquiry here is whether AutoLoop's claims "arise from the same events or course of conduct that gives rise to the putative class members' claims." *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1026 (7th Cir. 2018). This requirement "is meant to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large," under the logic that "a class representative will adequately pursue her own claims, and if those claims are typical of those of the rest of the class, then her pursuit of her own interest will necessarily benefit the class as well." *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587, 605 (7th Cir. 2021) (internal quotation marks and citations omitted). "The issue of typicality is closely related to commonality and should be liberally construed." *In re Steel Antitrust Litig.*, No. 08 C 5214, 2015 WL 5304629, at *3 (N.D. Ill. Sept. 9, 2015) (quoting *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 475 (N.D. Ill. 2009), *aff'd*, 606 F.3d 391 (7th Cir. 2010)).

CDK does not challenge the typicality requirement, and the court finds is satisfied here. AutoLoop's claims arise from Defendants' alleged conspiracy to eliminate competition in the data integration market; such claims can be pursued by every member of the putative class, each of whom also purchased DIS from Defendants. AutoLoop also notes that it prevailed at summary judgment on CDK's counterclaims [1383], meaning that any potential trial would only involve its affirmative antitrust claims against CDK, which are typical of the class.

4. Adequacy of Representation

Finally, the fourth of 23(a)'s class certification prerequisites requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). To be an adequate representative, "the named plaintiff must 'be part of the class and possess the same interest and suffer the same injury as the class members.' " *Conrad v. Boiron, Inc.*, 869 F.3d 536, 539 (7th Cir. 2017) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997)). In a similar vein, "the court must be satisfied that the plaintiff will keep the interests of the entire class at the forefront." *Id.* Alternatively, a named plaintiff will not be able to adequately represent a class "if, for example, the proposed representative is subject to a defense to which other class members are not, or if the representative cannot prove the elements of the class's claim for reasons unique to the representative." *Ploss v. Kraft Foods Grp., Inc.*, 431 F. Supp. 3d 1003, 1011 (N.D. Ill. 2020) (citing *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724–25 (7th Cir. 2011)).

It is undisputed that AutoLoop and its counsel have adequately represented the class.[11] AutoLoop's antitrust claims mirror those of the class, suggesting that its interest in "maximizing class-

[11] CDK did raise an adequacy challenge in its opposition brief to class certification; however, its challenge was narrowly related to the fact that the AutoLoop's initially proposed class definition included some class members that had signed enforceable class waivers with CDK. (CDK Opp'n to Class Certification [1456] at 12–16.) As noted, AutoLoop mooted this challenge by voluntarily narrowing the scope of its class definition to effectively exclude vendors that could have entered into enforceable class waiver agreements with CDK. (*See* AutoLoop Class Certification Reply at 6.)

wide damages" is aligned with the class's general interest. *Steel*, 2015 WL 5304629, at *4. Additionally, with roughly $15 million in purported damages stemming from the conspiracy, AutoLoop holds a substantial stake in the successful outcome of the case. (*See* Israel Suppl. Reply at 88 tbl.9.) Furthermore, it has demonstrated its interest in the action by intensely litigating its antitrust claims through the discovery, *Daubert*, and summary judgment stages, all while its counsel have served as co-lead counsel in this MDL since 2018. In other words, adequacy is met here because AutoLoop's claims align with those of the class, it has a significant interest in the outcome of the case, and its lawyers have proven to be competent.

The court concludes that AutoLoop has met Rule 23(a)'s preliminary class certification requirements, as well as the Seventh Circuit's ascertainability requirement. Accordingly, the court now turns to the heart of the parties' dispute—Rule 23(b)(3).

B. Rule 23(b)(3) Requirements

To certify a class under Rule 23(b)(3), AutoLoop must demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 603 (7th Cir. 2020) (quoting FED. R. CIV. P. 23(b)(3)). Courts have isolated two distinct but related requirements embedded in Rule 23(b)(3)'s text: the "predominance" and "superiority" requirements. *See id.* The court deals with each of these in turn.

1. Predominance

The predominance inquiry tasks district courts with scrutinizing the balance between common and individual questions in the case. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). Individual questions are those where "members of a proposed class will need to present evidence that varies from member to member," whereas common questions are those where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Id.* (alteration in *Tyson Foods, Inc.*) (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50 (5th ed. 2012)). When evaluating whether common issues predominate, "a qualitative assessment" is necessary. *Steel*, 2015 WL 5304629, at *5 (citing *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014)). This approach goes beyond merely tallying the number of common versus individual issues, and instead centers on the relative significance of the issues. *Id.* For this reason, "[i]ndividual questions need not be absent" to certify a class and "[t]he text of Rule 23(b)(3) itself contemplates that such individual questions will be present." *Messner*, 669 F.3d at 815. Further, "the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc.*, 577 U.S. at 454 (quoting 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1778 (3d ed. 2011)). Thus, above all, the question the court must answer is whether individual issues will "overwhelm the questions common to the class." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013). While the Supreme Court has underscored that the predominance inquiry is "demanding," it has also noted that "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem*, 521 U.S. at 623, 625; *see also Messner*, 669 F.3d at 814 (noting that antitrust cases "will frequently lead to [class] certification" even under Rule 23(b)(3)'s "rigorous[] appli[cation]").

The court begins its predominance analysis "with the elements of the underlying cause of action." *Messner*, 669 F.3d at 815 (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011)). In the antitrust context, plaintiffs must prove (1) that the defendant violated federal antitrust law; and (2) that the antitrust violation caused them some injury. *Kleen Prods. LLC*, 831 F.3d at 925. Plaintiffs must also show damages, but "it is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)." *Id.* (quoting *Messner*, 669 F.3d at 815.) Proceeding as an individual plaintiff at summary judgment, AutoLoop has already shown that the record evidence is sufficient to create a triable issue for each of the elements of its

Sherman Act § 1 claim. (Summ. J. Op. at 48–74.) Now, at the class certification stage, the question becomes whether AutoLoop can show that this evidence is common to the class, or in other words, that "common evidence and a single, reliable methodology will prove [these] elements on a simultaneous, class-wide basis." *Steel*, 2015 WL 5304629, at *5 (citing *Parko*, 739 F.3d at 1085–86, and *Butler v. Sears*, 727 F.3d 796 (7th Cir. 2013)).

AutoLoop argues that predominance is "clearly satisfied" in this case because it survived at summary judgment based entirely on classwide evidence. (AutoLoop Mem. in Supp. of Mot. for Class Certification [1422-1] at 10.) In other words, AutoLoop contends that any vendor in the class could use the exact same record that it used at summary judgment to establish all the elements of its claim in an individual trial. Regarding the first element, it is undisputed that whether Defendants conspired to align their data access policies to drive independent DIS providers from the market is a question common to each class member. Indeed, the answer to this question is "central" to the class's claim and the trial "will focus overwhelmingly on common proof of conspiracy—witness testimony, documents, email and phone records, economic evidence, and other evidence relating to Defendants' conduct." *Steel*, 2015 WL 5304629, at *6. AutoLoop's summary judgment evidence on this score included: background information on the relevant DMS and DIS markets; internal emails and communications between CDK and Reynolds evidencing a sudden collaborative relationship; notes from a CDK executive describing an apparent agreement between defendants to lock down their respective DMSs; testimony from Authenticom's CEO about conversations he had with Defendants' executives in 2015 and 2016 where they suggested that they had an agreement in place to remove independent DIS providers from their DMSs; and Dr. Israel's opinions that the economic evidence supported the existence of an unlawful conspiracy that had anticompetitive effects in the relevant DIS markets. (*See* Summ. J. Op. at 15–64.) Dr. Israel explains that each vendor in the putative class could rely on the exact same evidence to prove the first two elements of their claim, which concern several interrelated common questions, such as market definition, market power, whether there was an agreement between Defendants, and whether that agreement had anticompetitive effects in the relevant antitrust markets for DIS. (Israel Suppl. Rep. at 5–12.)

Given the importance of the conspiracy element to an antitrust action, courts and commentators regularly accept that common questions here will predominate over individual questions. *See, e.g.*, *Kleen Prods. LLC*, 831 F.3d at 928–29 (finding conspiracy issues common to class predominated over individual issues in direct purchasers' Sherman Act claim where plaintiffs offered common evidence showing a conspiracy and expert report showing that relevant market was amenable to collusion, and expert offered a reliable method of measuring aggregate classwide damages); *Ready-Mixed Concrete*, 261 F.R.D. at 169 (holding that common questions predominated with respect to conspiracy element and remarking, "[a]lthough Defendants contend that the question of impact is too individualized to warrant class certification, the common question of the existence of a horizontal price-fixing conspiracy usually satisfies Rule 23(b)(3)"); *see also* 7AA Wright, Miller & Kane, *supra*, § 1778 ("[W]hether a conspiracy exists is a common question that is thought to predominate over the other issues in the case and has the effect of satisfying the first prerequisite in Rule 23(b)(3)."). Accordingly, AutoLoop contends that based on these common questions alone it has satisfied predominance in full. (AutoLoop Mem. in Supp. of Mot. for Class Certification at 10.) CDK does not address AutoLoop's arguments here; instead, it focuses exclusively on arguing that individual issues related to the antitrust injury element predominate over common questions in this case.

The predominance inquiry with respect to antitrust injury asks whether the plaintiffs can "show that it [is] possible to use common evidence to prove that [Defendant's antitrust violation] injured the members of the proposed class." *Messner*, 669 F.3d at 816. Antitrust injuries are "the type [of injuries] the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation." *Tri-Gen Inc. v. Int'l Union of Operating Eng'rs, Local 150*, 433 F.3d 1024, 1031 (7th Cir. 2006) (internal quotation marks omitted) (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977)). At the class certification stage, "a plaintiff is not required to actually *prove* this element" and instead "'need only demonstrate that the element of antitrust impact is *capable of proof* at trial through evidence that is common to the class rather than individual to its members.' " *Ploss*, 431 F. Supp. 3d at 1018 (emphasis in *Ploss*) (citing *Messner*, 669 F.3d at 818); *see also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014) ("If the [district] court thought that no class can be certified until proof exists that every member has been harmed, it was wrong.")

Dr. Israel opines that the source of antitrust injury took many forms in this case, including: increased prices for DIS services at CDK and Reynolds; costs associated with forced switching to CDK and Reynolds and away from preferred DIS providers; the elimination of the option to switch away from CDK and Reynolds to a preferred DIS option; removal of the upward quality pressure on CDK's and Reynolds's DIS offerings that is generated by market competition; and the exclusion of outside options to use in negotiations with CDK and Reynolds. (Israel Suppl. Reply ¶ 16.) He supports his opinion that monopolization of the DIS markets in this case caused the above injuries with economic analysis (*see* Israel Initial Rep. § VI) and empirical evidence of injury (*see id.* § VII.A). The economic analysis spans dozens of pages in his initial report and details the mechanisms Defendants used to stretch their *DMS* market power into *DIS* market power; how competition between CDK and Reynolds initially prevented each of them from independently blocking DIS providers, thus limiting their ability to fully leverage their market power; and how collusion, facilitated through communication between their executives and formal agreements, allowed them to fully leverage joint market power. (*See* Israel Initial Rep. § VI.) The empirical analysis measures the anticompetitive effects of the alleged conspiracy, largely in the form of graphs evidencing that the alleged conspiracy lowered the extent of independent DIS provided at Defendants' dealers; raised DIS prices for apps sold to Defendants' dealers and correspondingly raised Defendants' DIS revenues and profits; did not result in lower prices for Defendants' DMS (which is what, according to Dr. Israel, would be expected to happen if DIS prices increased absent collusion); and ultimately led to pass-through of the DIS price increase into app prices. (*See* Israel Initial Rep. § VII.A.) All this evidence suggesting antitrust injury, according to Dr. Israel, is common to the class and can be analyzed on a classwide basis. (*See* Israel Suppl. Reply at 5–14.)

Having provided an economic basis for the antitrust injury allegedly suffered by the Vendors, Dr. Israel then goes on to quantify the injury suffered, i.e., damages, through two regression models. (*See* Israel Suppl. Reply §§ IV, V.) As explained in the court's *Daubert* section above, Dr. Israel's primary model is his DID regression, which quantifies damages for two of the categories of injury he identified in his economic analysis: (1) increased prices for DIS services at CDK and Reynolds and (2) costs associated with forced switching[12] to CDK and Reynolds and away from preferred DIS providers. (*Id.* at 49 tbl.1.) The DID model estimates $395.46 million in total classwide damages related to price elevation and $409.56 million in damages when his model also considers costs associated with forced switching. (*Id.*) He also breaks down the damages for each class member by multiplying the overcharge percentage from his DID model by the volume of commerce data from CDK and Reynolds. (*Id.* at 88–92 tbl.9.) In addition, Dr. Israel produced a secondary model, his B&D model, that also quantities damages on a classwide and individualized basis. (*See id.* at 56 tbl.2, 94 tbl.10.) This model estimates $406.94 million in classwide damages. (*Id.* at 94 tbl.10.) In short,

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[12] Dr. Israel describes the basis for the "forced switching" harm as follows:

> Buyers who preferred to purchase DIS from Authenticom, or any other independent DIS provider, were forced to switch after CDK and Reynolds closed their DMSs. This forced switching directly harmed these buyers due to the loss of their preferred choices. One source of this harm—but not all of it—occurred if the buyer had to pay a higher price to Reynolds or CDK for DIS than it did to its preferred vendor, as most did. But even if a buyer did not have to pay a higher price post-switch (which would be an unusual case), that buyer was still harmed by being forced to switch away from its preferred supplier. I provided a conservative quantification of the higher price portion of the harm via my estimate of forced switching overcharge.

(Israel Suppl. Reply ¶ 48; *see also* Israel Initial Rep. ¶¶ 217–19.)

Dr. Israel contends that his regression models offer a method of determining the amount of classwide damages related to price overcharges and can also be used by each vendor to make a prima facie showing of injury and damages related to price overcharge.

To the contrary, CDK insists that the Vendor Class should not be certified because antitrust injury cannot be shown through common proof. (CDK Opp'n to Class Certification [1456] at 16–17.) The crux of its argument is that some vendors in the class were uninjured, which CDK claims dooms a finding of predominance. It reaches this conclusion in two parts. First, CDK argues that, as a matter of law, the Vendors' antitrust injury cannot take any form other than being charged an above-market price. (*Id.* at 17–18.) In other words, CDK posits that to show antitrust injury, the Vendors must present evidence that they suffered a price overcharge. (*Id.* at 17 (citing *O.K. Sand & Gravel, Inc.*, 36 F.3d at 573).) This would mean that the Vendors may not rely on economic evidence of reduced quality of DIS or loss of choice to show antitrust injury. From here, CDK, through its expert Dr. Haider, claims that the Vendors also cannot rely on Dr. Israel's regression model to show injury in the form of overcharges because his analysis obscures relevant market factors, such as vendor size (in terms of quantity of DIS product purchased) (*see* Haider Rep. ¶¶ 141–46); differences between "complex and simple" DIS (*see id.* ¶¶ 147–52); and changes to CDK's DIS program that began in July 2019, such as its fee waiver program and introduction of the Fortellis and Data Your Way programs (*see id.* ¶¶ 182–90). For example, Dr. Haider argues that when she modifies Israel's B&D model to account for the differences between large and small vendors,[13] the average overcharge for small vendors buying from CDK is slight (0.2%) and not statistically significant in the initial conspiracy period, and negative (-4.5%) and not statistically significant in the post-February 2015 period. (*Id.* ¶¶ 142–43 & tbl.14.) CDK claims that this shows that "a great many" vendors were uninjured, thus

[13] Dr. Haider defined small vendors as the "vendors whose total fees paid during the proposed class period are in the bottom 80 percent for each defendant" and large vendors as "vendors whose total fees paid during the proposed class period are in the top 20 percent for each defendant." (*See* Haider Rep. at 83 tbl.14, nn. 2, 3.)

precluding class certification. (CDK Opp'n to Class Certification at 18.) Finally, in a related argument, CDK maintains that Dr. Israel's models also cannot be used to measure damages because they fail to "account for material differences in . . . vendors' damages." (*Id.* at 20 n.8.)

AutoLoop disputes each of these points. At a high level, AutoLoop asserts that CDK "improperly conflates the question whether a vendor incurred a measurable overcharge (damages) with the question whether the vendor suffered an antitrust injury." (AutoLoop Class Certification Reply at 12.) AutoLoop urges that antitrust injury is not limited to price overcharges, and it cites to various other courts that have suggested as much. *See, e.g.*, *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 475 (7th Cir. 2020) ("The [antitrust] harms that typically flow from a competitive market shifting to total control by a monopolist include potentially higher prices, lower output, and reduced innovation."); *Lucasys Inc. v. PowerPlan, Inc.*, 576 F. Supp. 3d 1331, 1350–51 (N.D. Ga. 2021) (collecting cases) (finding plaintiff sufficiently alleged antitrust injury where defendant's "anticompetitive conduct harmed competition by depriving customers of choice, and thereby prevented them from accessing lower-cost, higher-quality options"); *Nilavar v. Mercy Health Sys.*, 142 F. Supp. 2d 859, 874 (S.D. Ohio 2000) (noting that "higher prices, lower quality services, and less choice for consumers" are "the kind of injuries that the antitrust laws were enacted to prevent"). Accordingly, AutoLoop asserts that CDK cannot disprove antitrust injury by jiggering with Dr. Israel's regression models because they quantify only the damages related to one form of antitrust injury that occurred in this case: price overcharges. Put differently, AutoLoop claims that even if a regression analysis were to show that a vendor did not incur an overcharge during the conspiracy period, that vendor still suffered an antitrust harm, based on Israel's economic analyses in this matter, because they were forced to purchase in a market where the Defendants had less incentive to innovate or improve the quality of their DIS. (*See* Israel Suppl. Reply ¶¶ 42–49.) Moreover, Dr. Israel explains that regression analyses simply show *correlation* between relevant variables (the variables here being, overcharges and the alleged conspiracy)—they cannot prove *causation* (injury), which requires a separate theoretical economic analysis. (*See* AutoLoop Sur-Resp. at 2–3.)[14] In other words, he argues that Dr. Haider's attempt to show a lack of antitrust injury for some vendors by performing separate regression analyses was deficient because her regressions were untethered from an underlying economic analysis that explains why some vendors and not others were uninjured. (*Id.* at 3 n.2.)

In this vein, AutoLoop contends that even if the court were to focus exclusively on price overcharges for antitrust injury generally, Dr. Israel's economic analysis and damages models show a price overcharge for virtually every vendor. (*See* Israel Suppl. Reply at 88 tbl.9 (DID model showing 241 out of 244 vendors experiencing an average price overcharge); *id.* at 94 tbl.10 (B&D model showing all vendors experiencing an average price overcharge).) Dr. Israel also addresses Dr. Haider's challenges to the methodological decisions Dr. Israel made in his regression analyses. He defends his decision to not divide the sample into different subgroups, explaining that the economic evidence in this case shows that the impact of the conspiracy was market-wide; thus, the most appropriate way to estimate overcharges for the class members is to calculate the average overcharge in Defendants' DIS markets. (S*ee id.* ¶¶ 116–34.) He adds that the modifications Dr. Haider has made to his regression model, which she claims shows many vendors were uninjured, do not establish that any vendors were in fact not overcharged because by her own admission they lack statistical significance. (*Id.* ¶¶ 131–32.) Dr. Israel further points out that her results can be read as showing positive overcharges even for the small vendors.[15] (*Id.*) He also opines that CDK's actions since April 2019, i.e. granting fee waivers from some DIS fees and introducing the Fortellis and Data Your Way programs, do not undermine

[14] Citing ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 131 (3d ed. 2017), and *EEOC v. Sears*, 839 F.2d 302, 360 (7th Cir. 1988) (Cudahy, J., concurring in part and dissenting in part) ("Regression statistics by themselves only demonstrate correlations between variables; to move from correlation to causation, there must be some independent theory about the causal relationships of the variables.")

[15] Dr. Israel explains that "Dr. Haider finds a -4.5% overcharge with an 11.9% standard error for her bottom 80% of CDK vendors, and thus the top end of the 90% confidence interval is 15.1% (-4.5% plus product of the critical value of 1.645 multiplied by 11.9%)." (Israel Suppl. Reply ¶ 132 n.205.)

his conclusion that antitrust injury is common to the class because his regression model takes into account the fee waivers and because CDK's DIS platform remains monopolized. (*Id.* ¶¶ 57–63, 137–42.) Finally, AutoLoop stresses that Dr. Haider's attacks on Dr. Israel's regression models are unrelated to the question of class certification; indeed, neither Dr. Haider's nor Dr. Israel's regression models necessitate individualized inquiries into specific class members' circumstances—both use classwide statistical methods to estimate damages for all class members. (*Id.* ¶ 24.)

Notwithstanding the extensive briefing the parties devote to this issue, the court is not concerned that any potential individualized issues related to antitrust injury will "overwhelm" the bevy of questions common to the Vendors. Their sparring on antitrust injury largely ignores the relatively narrow inquiry the court must decide: is it possible for the Vendors to prove injury with evidence that is common to the class? The Vendors have proven that they can. The court has ruled numerous times now, and has done so again today, that Dr. Israel's economic analyses related to antitrust injury are reliable. His opinions on antitrust injury in this case (*see* Israel Initial Rep. §§ VI, VII.A) are undoubtedly common to the class, and each vendor can rely on them to make out their prima facie showing of injury. Indeed, one vendor, AutoLoop, has already relied on Dr. Israel's opinions to defeat a motion for summary judgment and has given the court a sneak peek at what trial might look like. Tellingly, of the challenges CDK raised against AutoLoop at summary judgment, virtually none were individual to AutoLoop's specific claim and instead all concerned issues that would be common to each vendor. (*See* Summ. J. Op. at 48–74.) CDK has not shown why any other class member could not make out their case with the same evidence.

The debate between the parties about whether antitrust injury is confined to price overcharges or instead includes more abstract effects (decreases in quality or loss of choice) is largely academic because Dr. Israel provides economic evidence of classwide price overcharges and quantifies this injury with his regression analyses. (*Id.*; Israel Suppl. Reply §§ IV, V.) And, Dr. Haider's attempt to undermine Dr. Israel's antitrust injury conclusions related to overcharge by attacking his damages model is misplaced. As AutoLoop and Dr. Israel explain, while regression models can provide strong evidence of antitrust injury by demonstrating that a plaintiff incurred net positive damages, their inability to account for mitigation measures taken by either party means that the absence of damages does not automatically imply the absence of injury in the form of an overcharge at some point in the class period. *See In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88–89 (D. Conn. 2009) ("Proving damages proves injury because damages necessarily indicate that the plaintiff has been impacted or injured by the antitrust violation; the converse, however, is not necessarily true . . . . [I]t is possible for a plaintiff to suffer antitrust injury-in-fact and yet have no damages because it has taken steps to mitigate the actual price paid through rebates, discounts, and other non-price factors such as lowered shipping costs, technical services, or any other type of purchase incentive.")

Notably, Dr. Haider does not even challenge the ability of Dr. Israel's DID model to assess classwide damages; instead, she quibbles about the precision at which it can allocate individual damages. However, the Seventh Circuit has counseled that "[t]he determination of the aggregate classwide damages is something that can be handled most efficiently as a class action, and the allocation of that total sum among the class members can be managed individually, should the case ever reach that point." *Kleen Prods LLC*, 831 F.3d at 929. It has also squarely rejected the notion that plaintiffs must *prove* each class member was injured to certify a class, which is essentially the burden CDK asks the court to impose on the Vendors. *Id.* at 927 ("While we have no quarrel with the proposition that each and every class member would need to make such a showing in order ultimately to recover, we have not insisted on this level of proof at the class certification stage."). To be sure, predominance issues do arise when a proposed class includes members "who *could not* have been harmed," as opposed to a class that includes members "who *were not* harmed." *Messner*, 669 F.3d at 825 (emphasis in original). But CDK does not argue that any vendor *could not* have been harmed, and nothing in the record suggests that any of the class members were immune from harm—each class member purchased DIS from Defendants during the alleged conspiracy period where prices were inflated. The fact remains that courts handling antitrust class actions routinely endorse the practice of using regression models to estimate an average overcharge that can establish injury and measure damages on a classwide basis, so long as the regression analysis is based on a rigorous application of economic theory. *See, e.g.*, *In re NorthShore Univ. HealthSystem Antitrust Litig.*, 657 F. Supp. 3d 1077, 1090–92 (N.D. Ill. 2023); *Broiler Chicken*, 2022 WL 1720468, at *20; *In re Pork Antitrust Litig.*, 665 F. Supp. 3d 967, 1005–06 (D. Minn. 2023); *Bumble Bee Foods LLC*, 31 F.4th at 677–78; *In re Disposable Contact Lens Antitrust*, 329 F.R.D. 336, 389 (M.D. Fla. 2018).

Acknowledging that *Messner* and *Kleen* counsel in favor of certifying the Vendor Class, CDK asks this district court to reexamine the holdings in those cases in light of the Supreme Court's ruling in *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). (CDK Sur-Reply in Opp. to Class Certification [1510] at 3.) According to CDK, "*TransUnion* and Rule 23 require a practical analysis: Every class member must have Article III standing and thus concrete injury, so predominance is only met if common evidence can sort out members who in fact suffered no injury." (*Id.* (cleaned up).) The court need not devote much time to this challenge for two reasons. First, this court is bound by Seventh Circuit precedent and lacks authority to overturn its rulings unless it is "almost certain that the higher court would repudiate the doctrine if given the chance to do so." *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986). This is not one of those instances. CDK's contention that *TransUnion* altered the class certification analysis is wrong—the Supreme Court expressly declined addressing whether every class member must show standing before certification—thereby leaving intact the holdings of *Messner* and *Kleen*. *TransUnion LLC*, 594 U.S. at 431 n.4. ("We do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class.") (emphasis in original). The Vendors have provided evidence capable of establishing concrete injury (price overcharges) on a classwide basis; this "is sufficient to show an injury-in-fact traceable to the defendants and redressable by a favorable ruling," which is all that is required for the Vendors to show Article III standing at the class certification stage. *Bumble Bee Foods LLC*, 31 F.4th at 682 (rejecting similar standing argument raised by antitrust defendant); *see also Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 155 (3d Cir. 2023) ("*TransUnion* suggests that the need for unnamed class members to demonstrate Article III standing depends on the stage of litigation[,] . . . at certification . . . it is not necessary for each member to prove his or her standing for the class action to be justiciable."); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (explaining that standing must be shown "with the manner and degree of evidence required at the successive stages of the litigation"). Second, even under CDK's fantasized conception of standing, the Vendor Class withstands scrutiny. As the court understands it, CDK argues that *TransUnion* requires AutoLoop to establish, at class certification, not only that every vendor has suffered concrete injury, but also that common evidence can filter out uninjured class members. Dr. Israel's regression models do exactly that. His DID and B&D models rely on common evidence to establish damages related to price overcharges and can filter out uninjured class members. (*See* Israel Suppl. Reply at 88 tbl.9; *id.* 94 tbl.10.) At bottom, CDK's standing challenge is a Hail Mary attempt that falls way short.

The court is satisfied that the Vendors have provided common evidence that, if believed by a jury, can prove each element of their § 1 Sherman Act claim, and that any individualized inquiries will not overwhelm the questions of law and fact that are common to the class.

2. Superiority

When a court finds that common questions predominate, they generally also find that superiority is also met. *See Moehrl*, 2023 WL 2683199, at *22. "Superiority will be found 'when a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' " *Id.* at 21 (quoting *Wilkins v. Just Energy Grp., Inc.*, 308 F.R.D. 170, 190 (N.D. Ill. 2015). AutoLoop argues that a class action is superior here because the alternative would require every plaintiff to pursue a separate trial with "needless repetition of the same evidence on all of the common issues addressed by the [c]ourt at summary judgment: the existence of Defendants' conspiracy, its impact on competition and DIS prices, CDK's alleged procompetitive justifications, and Dr. Israel's damages model." (AutoLoop Mem. in Supp. of Mot. for Class Certification at 14.) It also argues that class treatment is preferrable because forcing vendors to pursue their claims individually would be cost-prohibitive for those with low damages, especially given the expense of litigating an antitrust case. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (noting that class actions were designed for situations "in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate"). Finally, it notes that absent class members have had years to file their own cases but only one other vendor has done so (Cox Automotive), suggesting that a class action is a superior means to obtain relief for the class.

CDK does not squarely address AutoLoop's superiority argument, effectively waiving any challenge to class certification on this basis. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver."). Either way, the court is confident that certifying the Vendor Class is the superior option here given the forgoing discussion.

C. Class Period

Finally, CDK argues that even if the Vendors' Class is ultimately certified, the court should shorten their proposed class period. Autoloop proposes a class period covering all DIS sales from October 1, 2013 to the present. (*See* AutoLoop Class Certification Reply at 6.) In CDK's view, Plaintiffs have not shown that they are entitled to class treatment for the latter half of this period. Notably, Reynolds—one of the two accused coconspirators—settled with the indirect purchaser plaintiffs (a group of retail car dealerships, referred to in this MDL as "Dealers") in late 2018, which should, according to CDK, be enough to end the class period on its own. Moreover, CDK identifies purportedly significant changes in the market that have taken place since this settlement and the close of fact discovery in mid-2019, including the rise of third-party DMS competitors and its own introduction of "new and pro-competitive initiatives" in response to this shift, such as the fee waiver promotion and the Fortellis and Data Your Way programs. These shifts, it argues, render AutoLoop's expert analyses—first completed in 2019, based solely on data from merits discovery—outdated for assessing whether common questions of injury and damages predominate among the proposed Vendor Class over the past five years. Accordingly, CDK proposes two alternatives for an earlier end date to the class period: (1) October 2018, the month of the Reynolds settlement; or (2) December 2019, the month when Plaintiffs submitted their initial merits expert reports.

The court rejects CDK's claim that the Reynolds settlement is by itself sufficient to end the class period. As an initial matter, AutoLoop correctly points out that the length of Defendants' conspiracy is both a merits issue and a common question that affects the class as a whole. *See Kaplan v. IA.C. Cap. Advisors, L.P*, 146 F. Supp. 3d 588, 589 (S.D.N.Y. 2015). This does not mean that it is per se inappropriate to consider on class certification: "[c]ourts have long recognized that they 'must evaluate some aspects of the merits of plaintiffs' proposed class period to determine the appropriate endpoints.' " *W. Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc.*, 325 F.R.D. 280, 293 (D. Minn. 2018) (quoting *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 143 (D.N.J. 1984)). But in this case, the parties have already thoroughly litigated the merits at summary judgment, and if CDK wanted to raise the Reynolds settlement as a potential cutoff date for the underlying conspiracy, it should have done so then.

Even if the court were to reopen the summary judgment analysis for a "peek" at CDK's argument on this front, *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010), the mere fact that Reynolds settled with the Dealers says nothing about whether it ceased conspiring with CDK—or whether its actions have continued to affect the market to this day. To withdraw from a conspiracy, a defendant must show "[a]ffirmative acts inconsistent with the object of the conspiracy," such as alerting authorities or resuming procompetitive behavior. *Drug Mart Pharm. Corp. v. Am. Home Prods. Corp.*, 288 F. Supp. 2d 325, 329 (E.D.N.Y. 2003) (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464 (1978)). A settlement agreement may, in some cases, constitute such an "affirmative act" if it requires the defendant to cease their accused anticompetitive conduct. *See id.* at 330–33 (finding settlement agreement with term controlling defendant's future pricing practices sufficient to end conspiracy). But the Dealers' October 2018 settlement with Reynolds contains no injunctive provisions requiring Reynolds to do anything of the sort.[16] And even supposing Reynolds *had* successfully withdrawn, if the "effect of the conspiracy lingers beyond the end of the formal collusion . . . [t]his also taints the post-conspiracy prices and may give rise to extended damages." Areeda & Hovenkamp, *supra*, ¶ 395b2; *see In re Rail Freight Fuel Surcharge Antitrust Litig. (No. II)*, No. 1:19-CV-03379 (BAH), 2020 WL 5016922, at *24 (D.D.C. Aug. 25, 2020) ("[L]ingering effects of a completed conspiracy after a class period may be remediated upon successful proof of the underlying anticompetitive conduct."); *In re Polyurethane Foam Antitrust Litig.*, 314 F.R.D. 226, 268–69 (N.D. Ohio 2014).

Nor is the end of fact discovery a sufficient basis to justify cutting off AutoLoop's proposed class period. CDK is correct that trimming the class period may be appropriate where the evidence supports Rule 23's requirements for some, but not all, years. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 303 (N.D. Cal. 2010) (shortening proposed class period from eleven to seven years on typicality and predominance grounds where class representatives made no purchases in the first several years of the proposed period and evidence largely post-dated these years), *abrogated on other grounds by In re ATM Fee Antitrust Litig.*, 686 F.3d 741 (9th Cir. 2012). Here, however, AutoLoop has met its burden of justifying, by a preponderance of the evidence, a class period covering the full eleven years (and counting) since the onset of the alleged conspiracy in 2013. As discussed in the *Daubert* section above, Dr. Israel has updated his model through 2023 using new Authenticom data, and his renewed analysis shows continued overcharges over the latter five years of the proposed class period—notwithstanding the various changes in the market that CDK identifies. CDK will be

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[16] (*See* Ex. 1 to Decl. of Peggy Wedgworth [427-2] at 10, 12–19 (detailing $29.5 million payment to Dealership Class in exchange for release of claims, but no injunctive provisions).)

free to make its best case at trial for why these market changes defeat the Vendors' claims for ongoing antitrust harms up to the present day.[17]

CONCLUSION

CDK's motion to exclude certain opinions of Dr. Mark Israel [1459] is denied and AutoLoop's motion for class certification [1422] is granted. The following Vendor Class is certified under Rule 23(b)(3):

> All automotive software vendors (i.e., persons or entities engaged in the sale of software solutions to automotive dealerships) located in the United States that, at any time since October 1, 2013, have purchased data integration services from CDK or Reynolds. Excluded from the class are (1) CDK, Reynolds, and any of their officers, directors, employees, subsidiaries, and affiliates; (2) Cox Automotive, Inc. and its subsidiaries and affiliates; and (3) automotive software vendors that first purchased data integration services from CDK after June 5, 2018; (4) any federal, state governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

Having completed all pretrial matters, the court recommends that the JPML remand this case for trial to the Western District of Wisconsin pursuant to § 1407. (*See* Mem. Op. and Order [18] in 18-cv-2521.)

ENTERED:

Dated: July 22, 2024

REBECCA R. PALLMEYER
United States District Judge

[17] The Vendors present various arguments to the contrary. As Dr. Israel notes in his supplemental reply, the fact that competition may have increased in the *DMS* market says nothing about whether Defendants' practices regarding their *DIS* systems—from which they continue to exclude third-party integrators—remain anticompetitive. (Israel Suppl. Rep. ¶ 58.)